

**UNITED STATES BANKRUPTCY COURT  
WESTERN DISTRICT OF NORTH CAROLINA  
CHARLOTTE DIVISION**

	:	Chapter 11
In re	:	
	:	Case No. 20-30080 (JCW)
DBMP LLC, <sup>1</sup>	:	
	:	
Debtor.	:	
	:	

**DEBTOR’S REPLY TO INFORMATIONAL BRIEF OF OFFICIAL  
COMMITTEE OF ASBESTOS PERSONAL INJURY CLAIMANTS**

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<sup>1</sup> The last four digits of the Debtor’s taxpayer identification number are 8817. The Debtor’s address is 20 Moores Road, Malvern, Pennsylvania 19355.

**TABLE OF CONTENTS**

	<b>Page</b>
Preliminary Statement.....	1
I. The Committee’s Discussion of Fiber Type and Asbestos Disease Causation Omits Any Discussion of the Crucial Issue of Dose.....	3
II. Work with Old CT’s Asbestos Products Resulted in Very Low Doses of Asbestos Exposure if Appropriate Work Practices Were Followed. ....	10
A. Asphalt Roofing Products .....	11
B. AC Pipe.....	13
III. The Committee’s Discussion of Old CT’s Knowledge and Actions Fails to Consider Dose or Distinctions Between Products. ....	18
IV. The Committee Misrepresents Old CT’s Comprehensive Warnings Program.....	25
V. The 2000-2001 Bankruptcy Wave Accounts For the Post-2000 Spike in Mesothelioma Claims Against Old CT.....	33
A. Old CT Was Unmistakably Swept Up in the Bankruptcy Wave. ....	33
B. Old CT’s Post-2000 Settlement and Defense Costs Were Compounded By Plaintiffs’ Litigation Tactics. ....	40
Conclusion .....	41

## TABLE OF AUTHORITIES

### Page(s)

### CASES

<i>Anderson v. Ford Motor Co.</i> , 950 F. Supp. 2d 1217, 1222-25 (D. Utah 2013) .....	9
<i>Barabin v. Scapa Dryer Fabrics, Inc.</i> , No. C07-1454, 2018 WL 840147, at *11-13 (W.D. Wash. Feb. 12, 2018).....	9
<i>Bartel v. John Crane, Inc.</i> , 316 F. Supp. 2d 603, 604, 611(N.D. Ohio 2004), <i>aff'd sub nom.</i> , <i>Lindstrom v. A-C Prod. Liab. Trust</i> , 424 F.3d 488, 493 (6th Cir. 2005) .....	9
<i>Bell v. Foster Wheeler Energy Corp.</i> , No. 15-6394, 2016 WL 5847124, at *3-4 (E.D. La. Oct. 6, 2017) .....	9
<i>Bostic v. Georgia-Pacific Corp.</i> , 439 S.W.3d 332, 338-42 (Tex. 2014) .....	9
<i>Comardelle v. Pennsylvania Gen. Ins. Co.</i> , 76 F. Supp. 3d 628, 630-35 (E.D. La. 2015) .....	9
Dec. 1977 EEH Study at 14-15 .....	24
<i>Ford Motor Co. v. Boomer</i> , 285 Va. 141, 159-60 (2013).....	9
<i>Haskins v. 3-M Co.</i> , No. 2:15-CV-02086, 2017 WL 3118017, at *5-9 (D.S.C. July 21, 2017) .....	9
<i>In re Garlock Sealing Tech., LLC</i> , 504 B.R. 71, 82 (Bankr. W.D.N.C. 2014) .....	8
<i>In re NYC Asb. Litig. (Juni)</i> , 148 A.D.3d 233, 36-40 (2017), <i>aff'd</i> , 32 N.Y.3d 1116 (2018) .....	9
<i>In re W.R. Grace &amp; Co.</i> , 355 B.R. 462, 469 (Bankr. D. Del. 2006) .....	8
<i>Krik v. Exxon Mobil Corp.</i> , 870 F.3d 669, 673-78 (7th Cir. 2017).....	9
<i>Martin v. Cincinnati Gas &amp; Elec. Co.</i> , 561 F.3d 439, 443 (6th Cir. 2009).....	9
<i>McGonnell v. Kaiser Gypsum Co.</i> , 98 Cal. App. 4th 1098, 1104 (2002) .....	36
<i>McIndoe v. Huntington Ingalls, Inc.</i> , 817 F.3d 1170, 1177-78 (9th Cir. 2016) .....	9
<i>Moeller v. Garlock Sealing Tech., LLC</i> , 660 F.3d 950, 954-55 (6th Cir. 2011) .....	9
<i>R. T. Vanderbilt v. Occupational Safety &amp; Health Review Comm'n</i> , 608 F.2d 570, 572 (11th Cir. 1983) .....	24
<i>R. T. Vanderbilt v. Occupational Safety &amp; Health Review Comm'n</i> , 628 F.2d 815, 818 (6th Cir. 1984) .....	24
<i>Ripa v. Owens-Corning Fiberglas Corp.</i> , 282 N.J. Super. 373, 405 (App. Div. 1995) .....	18
<i>Scapa Dryer Fabrics, Inc. v. Knight</i> , 299 Ga. 286, 290 (2016) .....	9
<i>Schwartz v. Honeywell Int'l, Inc.</i> , 153 Ohio St. 3d 175, 176, 179-81 (2018).....	9
<i>Sclafani v. Air &amp; Liquid Sys. Corp.</i> , No. 2:12-CV-3013, 2013 WL 2477077, at *4-5 (C.D. Cal. May 9, 2013).....	9
<i>Smith v. Ford Motor Co.</i> , No. 2:08-CV-630, 2013 WL 214378, at *1-5 (D. Utah Jan. 18, 2013).....	9
<i>Suoja v. Owens-Illinois, Inc.</i> , 211 F. Supp. 3d 1196, 1207-09 (W.D. Wis. 2016).....	9
<i>United States v. Johns-Manville Corp.</i> , 237 F. Supp. 885, 891 (E.D. Pa. 1964).....	18
<i>Verdos v. Northrup Grumman Shipbuilding, Inc.</i> , 119 F. Supp. 3d 556, 562-64 (E.D. La. 2015) .....	9
<i>Wannall v. Honeywell Int'l, Inc.</i> , 292 F.R.D. 26, 38-43 (D.D.C. 2013), <i>aff'd</i> , 775 F.3d 425 (D.C. Cir. 2014) .....	9
<i>Yates v. Ford Motor Co.</i> , 113 F. Supp. 3d 841, 846-49 (E.D.N.C. 2015) .....	9

### REGULATIONS

25 Fed. Reg. 1543, 1562-63 (Feb. 20, 1960).....	19
29 C.F.R. § 1910.1001(c) .....	4
29 C.F.R. § 1926.1101(a)(8) & (g)(8)(ii) .....	12
36 Fed. Reg. 10466, 10506 (May 29, 1971).....	21
37 Fed. Reg. 11318, 11321 (June 7, 1972) .....	24
40 C.F.R. § 763.90(i)(5) .....	6
48 Fed. Reg. 53280 (Nov. 25, 1983) .....	24
51 Fed. Reg. 22612, 22663 (June 20, 1986).....	14
55 Fed. Reg. 48406, 48408 (Nov. 20, 1990) .....	12

### TREATISES

Restatement (Second) of Torts, § 431.....	8
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Alessandro Marinaccio et al., <i>Analysis of Latency Time and its Determinants in Asbestos Related Malignant Mesothelioma Cases of The Italian Register</i> , 43 Eur. J. Cancer 2722, 2725 (2007).....	38
American Water Works Association, <i>Buried No Longer: Confronting America's Water Infrastructure Challenge</i> , at 8 (Figure 5) (2012).....	17
<i>Asbestos in Drinking-water</i> , at 3 (WHO 2003).....	22
Barry I. Castleman, <i>Asbestos: Medical and Legal Aspects</i> (1st ed. 1984).....	38
CONSAD Research Corp., <i>Economic Analysis of the Proposed Revisions to the OSHA Asbestos Standards for Construction and General Industry</i> , § 2.2.2 at 2.7 & Table 2.3 (July 1990; prepared for OSHA) .....	16
CONSAD Research Corp., <i>Economic and Technological Profile Related to OSHA's Revised Permanent Asbestos Standard for the Construction Industry and Asbestos Removal; and Routine Maintenance Projects in General Industry</i> , at 4.8 (Dec. 31, 1985; prepared for OSHA).....	15
<i>Consumer Group Lists Asbestos as Top Hazard</i> , Seattle Times, June 4, 1977, at A4 .....	29
Dennis J. Paustenbach et al., <i>Occupational Exposure to Airborne Asbestos from Coatings, Mastics and Adhesives</i> , 14 J. of Expo. Sci. and Env't Epidemiol. 234 (2004) .....	11
Draft Final Report, Research Triangle Institute, <i>Phase II Regulatory Analysis of the Proposed OSHA Standards on Asbestos</i> , at II-41 (Aug. 1980; prepared for OSHA) .....	16
Ellen Skammeritz et al., <i>Asbestos Exposure and Survival in Malignant Mesothelioma: A Description of 122 Consecutive Cases at an Occupational Clinic</i> , 2 Int'l J. Occup. Env't Med. 224 (2011) .....	7
Equitable Environmental Health, <i>Dust Exposures During the Cutting and Machining of Asbestos/Cement Pipe Additional Studies</i> , at Tables 2, 4 (Dec. 15, 1977).....	13
Fionna M. Mowat et al., <i>Simulation Tests to Assess Occupational Exposure to Airborne Asbestos from Asphalt-Based Roofing Products</i> , 51 Ann. Occup. Hyg. 451 (2007) .....	11
GCA Corp., <i>Life Cycle of Asbestos in Commercial and Industrial Use Including Estimates of Releases to Air, Water and Land</i> , at 128 (Feb. 1982; prepared for EPA) .....	16
Gillian Frost, <i>The Latency Period of Mesothelioma Among a Cohort of British Asbestos Workers (1978-2005)</i> , 109 Brit. J. Cancer 1965 (2013) .....	38
<i>Hazard Alert: Asbestos</i> , UA Journal, Nov. 1977.....	30
Irving J. Selikoff et al., <i>Asbestos Exposure and Neoplasia</i> , 252 J. Am. Med. Ass'n 91 (1964).....	22
Irving J. Selikoff et al., <i>Relation Between Exposure to Asbestos and Mesothelioma</i> , 272 New Eng. J. Med. 560 (1965).....	22
Irving J. Selikoff, et al., <i>The Occurrence of Asbestosis Among Insulation Workers in the United States</i> , 132 Ann. N.Y. Acad. Sci. 139 (1965).....	22
Irving J. Selikoff, <i>Partnership for Prevention – The Insulation Industry Hygiene Research Program</i> , 39 Indus. Med. 21, 23 (April 1970).....	23
J. H. Lange et al., <i>Area and Personal Airborne Exposure During Abatement of Asbestos-Containing Roofing Material</i> , 64 Bull. Env't Contam. Toxicol. 673 (2000) .....	11
Jane Brody, <i>Cancer Found in Asbestos Workers' Kin</i> , N.Y. Times, Sept. 19, 1974, at 1 .....	29
Jennifer S. Pierce et al., <i>An Evaluation of Reported No-Effect Chrysotile Exposures for Lung Cancer and Mesothelioma</i> , 38 Crit. Rev. Toxicol. 191 (2008) .....	4
Jennifer S. Pierce et al., <i>An Updated Evaluation of Reported No-observed Adverse Effect Levels for Chrysotile Asbestos for Lung Cancer and Mesothelioma</i> , 46 Crit. Rev. Toxicol. 561 (2016).....	4
Judicial Council of California Civil Jury Instructions, No. 1203 (2021) .....	36
Judicial Council of California Civil Jury Instructions, No. 435 (2021) .....	36
Larry Pryor, <i>Asbestos in California Water: How Much, How Dangerous?</i> , L.A. Times, June 23, 1974, at I-3 .....	29
<i>Loose asbestos fiber seen as cancer threat to men in building trades</i> , Eng'g News-Rec., Apr. 2, 1970, at 11-12 ....	23
P.G. Harries, <i>Asbestos Hazards in Naval Dockyards</i> , 11 Ann. Occup. Hyg. 135, 139 (1968).....	21
Patrick Sheenan et al., <i>Simulation Tests To Assess Occupational Exposure to Airborne Asbestos from Artificially Weathered Asphalt-Based Roofing Products</i> , 54 Ann. Occup. Hyg. 880 (2010).....	11
Richard L. Attanoos et al., <i>Malignant Mesothelioma and Its Non-Asbestos Causes</i> , 142 Arch. Pathol. Lab. Med. 753 (2018).....	6
U.S. EPA, <i>Asbestos Fact Sheet</i> (2016) .....	4
Wesley M. Noble et al., <i>Equitable Environmental Health, Asbestos Exposure During the Cutting and Machining of Asbestos Cement Pipe</i> , at Table 2 (March 16, 1977).....	13



On the petition date of this case—January 23, 2020—DBMP LLC (“DBMP” or the “Debtor”) submitted its *Informational Brief* [Dkt. 22] (“DBMP Info. Br.”) describing the asbestos products and 45-year experience in the tort system of DBMP and the former CertainTeed Corporation (“Old CT”). Nineteen months later, on August 23, 2021, the Official Committee of Asbestos Personal Injury Claimants (the “Committee”) submitted a responsive *Informational Brief* [Dkt. 1003] (the “ACC Brief” or “ACC Br.”). DBMP submits this Reply to address the issues raised by the ACC Brief, including numerous misstatements therein.

### **Preliminary Statement**

The Committee spends several of the opening pages of its Informational Brief repeating its complaints about DBMP’s prepetition restructuring and bankruptcy filing. DBMP has answered these complaints multiple times in briefing and in argument and will not waste the Court’s time by repeating those points once again in this brief. Instead, DBMP answers below the flawed and often false assertions that the Committee has made concerning Old CT’s asbestos products and experiences in the tort system. In brief:

- The Committee spends many pages arguing that chrysotile fiber is capable of causing mesothelioma and that crocidolite fiber is more toxic than chrysotile. But the Committee does not even mention the issue of **dose**, which is critical to the causation of mesothelioma or any other asbestos-related disease. The science shows that exposures to any fiber type must reach a certain threshold dose to cause injury; the Committee’s assertion that any exposure to asbestos—no matter how small—is hazardous is not supported by scientific data and has been rejected by numerous state and federal courts.
- The Committee asserts that exposures to asbestos from Old CT asbestos-containing products—primarily asphalt roofing products and asbestos cement (“AC”) pipe—were “massive” and “staggering,” involving “hundreds of thousands” of people. These statements are overblown, unsupported rhetoric contradicted by the facts. Numerous government reports and industrial hygiene studies show that the few Old CT asphalt roofing products that even contained asbestos released low or non-detectable levels of asbestos due to the asphalt binder in the products. AC pipe released asbestos fiber only when cut, and, again, government reports and industrial hygiene studies show that the pipe could be cut and machined with very low fiber release provided that appropriate tools (no power saws) and work practices were used. The Committee’s claim (ACC Br.

at 4) that Old CT is “the last” of the “big dusties”—companies that made and sold friable, dusty asbestos insulation with massive exposures—is simply false.

- The Committee’s statement that Old CT knew or should have known of hazards in its products decades or even a century ago (long before it even began manufacturing AC pipe in June 1962) is similarly a gross mischaracterization of the factual record. Instead, the facts show that Old CT paid attention to the evolving science and medicine concerning the causation of asbestos-related disease, took many steps to protect workers in its plants beginning in the 1960s (since those in-plant exposures were of concern to the medical and scientific community at that time), and that, once work practices changed and power saws began to be commonly used to cut AC pipe in the 1970s, tested those work practices and immediately warned workers and their employers not to use power saws to cut the pipe.
- Contrary to the Committee’s claims, the factual record also shows that Old CT’s warning program involved multiple efforts to advise workers and their employers to use manual tools, not power saws, to cut pipe. Beginning in the summer of 1977, these efforts included telephone calls, letters, and personal visits to AC pipe distributors, utilities, and contractors; multiple warning booklets, both from manufacturers (Old CT shipped one with every load of pipe for several years), and from a trade group, the American Water Works Association (“AWWA”); revised specifications and installation guides; presentations at trade group meetings; and an audiovisual warning package (slide show and script) for employers to use with workers in the field. Further, starting in 1979, Old CT placed a warning label on every stick of pipe that the company sold (which was the first warning label placed by any manufacturer on AC pipe). In 1983, Old CT began distribution of Material Safety Data Sheets (“MSDS” or a “Safety Sheet”) (two years before the federal requirement) with every load of pipe and with every invoice, again warning not to cut pipe with a power saw; and, in the rest of the 1980s and early 1990s, continued preparing and distributing updated warning booklets, Safety Sheets, and warning labels. Many of these efforts were joined in by the other manufacturers of AC pipe. The factual record thus shows that Old CT engaged in a comprehensive effort to warn workers and their employers not to use power saws to cut AC pipe and to explain how to work with the pipe safely, culminating in the development of a system in 1986 for installing AC pipe with no cutting at all. The factual record also shows that, contrary to the Committee’s speculation, these warnings were heard and understood by workers, unions, and employers.
- The record of Old CT’s experience in the tort system shows without question that Old CT became a litigation target due to the bankruptcy wave in the early 2000s, with the number of mesothelioma claims filed against the company increasing by almost 200% between 2000 and 2002, and continuing at an elevated rate until the DBMP bankruptcy filing. The Committee’s explanations for this increase—Old CT’s membership in the Center for Claims Resolution (“CCR”), new evidence of Old CT’s alleged misdeeds, or the latency period for development of mesothelioma—simply do not hold up under scrutiny.

- Finally, the Committee, once again, fails to offer **any** justification for the obvious and prejudicial product mis-identification and non-disclosure that Old CT illustrated in the exemplar cases discussed in its Informational Brief.<sup>2</sup> According to the Committee, the exemplar cases show that the “tort system worked,” but that argument ignores how often “the tort system did not work”—the extraordinary defense costs expended in the exemplar and numerous other cases, and the never-discovered non-disclosures that had a material adverse effect on Old CT’s settlement history. This is the very point of Old CT’s Trust Motion—to find out the extent to which Old CT was subject to non-disclosures of critical alternate exposure evidence. If the Committee’s assertions were correct—that these non-disclosures either did not occur or were immaterial—the discovery sought by the Trust Motion would show this. If the Committee believes this, it is difficult to understand why it opposes DBMP’s Trust Motion so vigorously.

**I. The Committee’s Discussion of Fiber Type and Asbestos Disease Causation Omits Any Discussion of the Crucial Issue of Dose.**

The Committee spends nine pages of its brief arguing that chrysotile asbestos is capable of causing mesothelioma. ACC Br. at 9-18. This is a strawman argument. DBMP did not assert in its Informational Brief that chrysotile exposures could not cause mesothelioma under any circumstances. Instead, DBMP/Old CT has always maintained that, for any fiber type, the **dose** of the exposure is the crucial issue. For example, in one of the last cases Old CT tried to a defense verdict prior to its bankruptcy petition—the *Ronald Smith* case tried in Los Angeles in 2019—Old CT presented the expert testimony of Jennifer Pierce, M.S., Ph.D., an expert in toxicology and industrial hygiene.<sup>3</sup> She explained that her research shows that there is a “no observed adverse effect level” or “NOAEL” for very high cumulative exposures to chrysotile asbestos—some **46 to 100 times** the cumulative exposures allowed under the **current**

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<sup>2</sup> Three of these cases were also discussed more extensively in DBMP’s later-filed briefs concerning trust discovery. See Debtor’s Motion for Bankruptcy Rule 2004 Examination of Asbestos Trusts [Dkt. 416] (the “Trust Motion”) and Reply in Support of Debtor’s Motion for Bankruptcy Rule 2004 Examination of Asbestos Trusts [Dkt. 949] (the “Trust Motion Reply”).

<sup>3</sup> Dr. Pierce has done extensive research in the area of asbestos exposure and risk of mesothelioma, and has published multiple peer-reviewed papers on this topic. Tr. Trans. of Jennifer Pierce, Ph.D., *Smith v. Amcord, Inc.*, 7205:14-17 (Cal. Super. Ct. Aug. 19, 2019) (“Pierce Smith Tr. Trans.”) (Ex. 1). She has a Masters in Science degree in Toxicology, and a Ph.D. in Industrial Hygiene, with emphases in Epidemiology and Air Quality. *Id.* at 7203:25-7204:18.



permissible exposure limit (“PEL”) for asbestos established by the Occupational Safety and Health Administration of the U.S. Department of Labor (“OSHA”). Pierce *Smith* Tr. Trans. at 7246:2-13.<sup>4</sup> A NOAEL is “the highest cumulative exposure at which no observed risk is being demonstrated.” *Id.* at 7245:13-18. In other words, Dr. Pierce’s work has shown that, while chrysotile asbestos may cause mesothelioma, this occurs only at doses that are far higher than those experienced by U.S. workers in the post-OSHA era. And Dr. Pierce’s calculations are not based on some theoretical or non-real world construct, but instead on an evaluation of numerous epidemiological studies concerning asbestos-exposed workers with actual data concerning exposure levels and the occurrence of mesothelioma. *Id.* at 7257:9-15.<sup>5</sup>

So too, DBMP and Old CT have never disputed that exposure to crocidolite asbestos is more hazardous than exposure to chrysotile asbestos, but, again, dose matters. During the *Smith* trial, Dr. Pierce testified that the NOAEL for exposure to crocidolite asbestos is far lower than the NOAEL she calculates for chrysotile asbestos. *Id.* at 7246:28-7247:13. Similar to the chrysotile NOAEL, this crocidolite NOAEL level is supported by real world data. For example, in a study of workers at the Wittenoom crocidolite mine in Australia—involving only crocidolite exposures—there were no mesotheliomas among workers whose tenure was less than three months, demonstrating that there is a threshold dose for crocidolite fiber to cause mesothelioma.

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<sup>4</sup> OSHA’s PEL for asbestos of 0.1 fibers per cubic centimeter of air (“f/cc”) is expressed as an “8-hour time-weighted average.” 29 C.F.R. § 1910.1001(c)(1). It is “the concentration of [asbestos] to which most workers can be exposed without adverse effect averaged over a normal 8-h workday or a 40-h work week.” U.S. EPA, *Asbestos Fact Sheet* (2016), available at <https://www.epa.gov/sites/production/files/2016-10/documents/asbestos.pdf>. The OSHA regulations also include an “excursion” limit, which is 1.0 f/cc averaged over 30 minutes. 29 C.F.R. § 1910.1001(c)(2).

<sup>5</sup> See Jennifer S. Pierce *et al.*, *An Evaluation of Reported No-Effect Chrysotile Exposures for Lung Cancer and Mesothelioma*, 38 Crit. Rev. Toxicol. 191 (2008); Jennifer S. Pierce *et al.*, *An Updated Evaluation of Reported No-observed Adverse Effect Levels for Chrysotile Asbestos for Lung Cancer and Mesothelioma*, 46 Crit. Rev. Toxicol. 561 (2016).

Tr. Trans. of Dr. Michael Holland, *Smith v. Amcord, Inc.*, 9095:2-9 (Cal. Super. Ct. Aug. 22, 2019) (“Holland Smith Tr. Trans.”) (Ex. 2).<sup>6</sup>

Curiously, the Committee makes contradictory statements about fiber type in its brief. Thus, at page 10: ““because it is the most widely used, **chrysotile accounts for the majority of cases of mesothelioma and asbestos diseases including pleural mesothelioma;**”” but at page 11: **crocidolite asbestos** is ““so hazardous”” that ““**it may be responsible for more illnesses and deaths than any other type of asbestos.**”” (Citations omitted; emphasis added.) The obvious inconsistency may result from the Committee having lifted large parts of its Informational Brief from the Informational Brief filed by the Bestwall Committee in the *Bestwall* chapter 11 proceeding. *See Informational Brief of the Official Committee of Asbestos Claimants of Bestwall LLC [with Previously Redacted Sections]*, Dkt. 1318, No. 17-31795 (LTB) (Bankr. W.D.N.C. Sept. 4, 2020), at 34-46 (the “Bestwall Informational Brief”). In *Bestwall*, the Committee’s goal is to indict chrysotile fiber whereas, in this case, the Committee’s goal is to indict both chrysotile and crocidolite fiber. But litigation strategy should not trump science.

In any event, the pages that the Committee devotes to arguing that chrysotile asbestos may cause mesothelioma in some circumstances and that crocidolite fiber is a more potent carcinogen than chrysotile asbestos are moot: DBMP does not and has not disputed these points.

Dr. Pierce’s expert testimony highlights, however, the crucial issue of **dose** in asbestos disease causation—an issue that the Committee wholly ignores. Asbestos dose is a combination of frequency, duration, and intensity of exposure—how often, how long, and what level of exposure there was. All experts agree that asbestos-related diseases are dose-responsive; this

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<sup>6</sup> Dr. Holland is a physician who is Board-Certified in five specialties: Emergency Medicine, Medical Toxicology, Occupational Medicine, Undersea and Hyperbaric Medicine, and Addiction Medicine. Holland *Smith* Tr. Trans. at 9003:11-14.

means that the higher the dose (to a certain level), the more disease. Holland *Smith* Tr. Trans. at 9024:7-9025:4. Further, asbestos, like any harmful substance (including carcinogens like radiation and tobacco smoke) requires some level of overall dose to produce disease, as shown by Dr. Pierce's (and others') research regarding asbestos NOAELs. The human body has many defense mechanisms that protect each of us from the harmful effects of a wide variety of substances, including carcinogens. These mechanisms work up to some **threshold**—beyond the threshold, harmful substances can produce disease because they overwhelm the body's defenses. Even poisons like arsenic are either harmless or beneficial at doses below the relevant threshold. *Id.* at 9025:5-9028:27; 9029:3-9032:25.

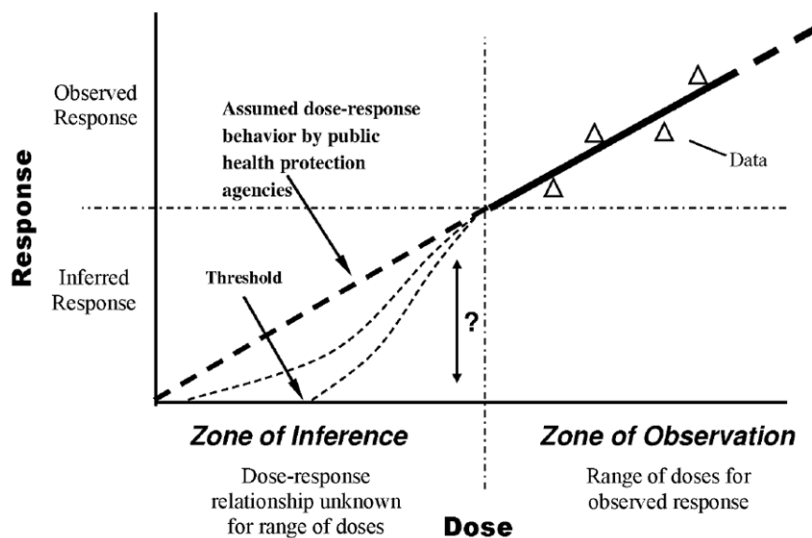
Asbestos is no different from other harmful substances: the dose principle holds true. Asbestos fibers are ubiquitous in the world's environment and so every human experiences some level of "background" asbestos exposure. These "background" exposures have never been shown to cause mesothelioma.<sup>7</sup> In addition, millions of workers have received minor or low level asbestos exposures without harm. Indeed, OSHA's asbestos PEL today is not zero—it is 0.1 f/cc for eight hours per day, 250 days per year, for a 45-year work life. 29 C.F.R. § 1910.1001(c). So too, the U.S. Environmental Protection Agency ("EPA") allows school children back into an asbestos-remediated school if measured levels are below 0.01 f/cc. *See* 40 C.F.R. § 763.90(i)(5).

The Committee includes an argument in its brief captioned "There Is No Safe Level of Asbestos Exposure." ACC Br. at 14. In fact, however, most of the statements the Committee quotes, such as from Professor Markowitz (ACC Br. at 15), say instead that no safe level of

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<sup>7</sup> Other known causes of mesothelioma include therapeutic radiation, exposure to erionite, and certain genetic mutations. Richard L. Attanoos *et al.*, *Malignant Mesothelioma and Its Non-Asbestos Causes*, 142 Arch. Pathol. Lab. Med. 753 (2018).

exposure to asbestos “has been identified.”<sup>8</sup> In other words, scientists and doctors do not know precisely where that safe threshold of exposure is. This is because mesotheliomas are so rare in populations with low-level exposures—occurring at a rate that is essentially indistinguishable from the background rate—that no reliable studies have been able to establish an association between such low-level exposure and disease. Thus, as a matter of regulatory precaution, government regulators **assume** that there is a risk at low levels of exposure, despite the lack of data supporting that conclusion. Explained graphically, there are studies describing an increased incidence of disease in individuals that experienced high levels of exposure, and the regulators simply extend the line fitting that data down to lower levels, thus assuming that there is a theoretical disease risk at any exposure level above zero, despite the lack of studies showing any disease at lower levels.<sup>9</sup>



<sup>8</sup> Although the statement from OSHA’s website quoted in the ACC Brief (at 14) does not have this qualifier, the article the statement cites does. See Ellen Skammeritz *et al.*, *Asbestos Exposure and Survival in Malignant Mesothelioma: A Description of 122 Consecutive Cases at an Occupational Clinic*, 2 Int’l J. Occup. Env’t Med. 224 (2011) (“It has never been possible to establish a lower threshold for cumulative asbestos exposure in relation to the development of [malignant mesothelioma], despite the fact that a dose-response relationship has been determined.”).

<sup>9</sup> The chart reproduced in text is from the February 8, 2013 expert report of Elizabeth Anderson, Ph.D., in *Garlock*. See discussion of Dr. Anderson’s expert testimony in *Garlock* in footnote 10 below.

This “linear no threshold” model of disease causation may make sense to regulators as a matter of public policy, but it is not competent evidence that there is risk at lower levels of exposure or that there is no safe threshold level of exposure. As Dr. Pierce explains, the “linear no threshold” model shows a “theoretical risk” at low exposure levels, but not “true risk” or “real risk” at those levels. *See Pierce Smith Tr. Trans.* at 7258:12-24. Instead, the model, which government regulators have followed for **every** carcinogen—not just asbestos—since at least the early 1980s, simply assumes that it is appropriate to regulate in the area of the graph that shows only “inferred” or “theoretical” risk with no supporting data.<sup>10</sup> As Judge Hodges concluded in *Garlock*, however, “[r]egulatory authorities use ‘precautionary principles’ to carry out their mandates and use linear projections into a zone of inference of theoretical risk that are not appropriate for judicial determinations, including causation.” *In re Garlock Sealing Tech., LLC*, 504 B.R. 71, 82 (Bankr. W.D.N.C. 2014). In other words, while it may make sense to regulate exposures where there is only theoretical risk, it is not proper to find that such exposures meet the tort law requirements for establishing causation, such as establishing that these exposures are a “substantial factor” in bringing about the harm. *See* Restatement (Second) of Torts, § 431.<sup>11</sup>

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<sup>10</sup> This was explained at the *Garlock* estimation trial by expert Elizabeth Anderson, Ph.D. Dr. Anderson worked at the EPA from 1971-85, developed the first guidelines for EPA risk assessments, led EPA’s Carcinogen Assessment Group, and directed EPA’s risk assessments for asbestos in the 1980s. *Tr. Trans. of Elizabeth Anderson, Ph.D., In re Garlock Sealing Tech. LLC*, 4375:14-4376:11 (Bankr. W.D.N.C. Aug. 12, 2013) (Ex. 3). Dr. Anderson testified that EPA and all other U.S. public health agencies use a “linear no-threshold” model for **all** carcinogens, not just asbestos. *Id.* at 4389:6-7. This means that agencies “extrapolate from the incidence [of disease] that we know about at certain exposure levels” down to “an inferred risk” or the “theoretical risk zone” at lower exposure levels even though “the real risk might be considerably less.” *Id.* at 4389:2-4, 14-15. Public health agencies regulate in this area of “inferred risk” “in the interest of public health protection.” *Id.* at 4389:11-14.

<sup>11</sup> *See also In re W.R. Grace & Co.*, 355 B.R. 462, 469 (Bankr. D. Del. 2006):

“‘The distinction between avoidance of risk through regulation and compensation for injuries after the fact is a fundamental one. In the former, risk assessment may lead to control of a toxic substance even though the possibility of harm to any individual is small and the studies necessary to assess the risks are incomplete; society as a whole is willing to pay the price as a matter of policy. In the latter, a far higher probability (greater than 50%) is required since the law believes it unfair to require an individual to pay for another’s tragedy unless it is shown that it is more likely or not that he caused it.’” (Citation omitted.)

Of the courts that have considered the Committee's position that every exposure to asbestos is hazardous or elevates the risk, most have rejected it. Courts rejecting this theory include appellate courts in Georgia, New York, Ohio, Texas, and Virginia,<sup>12</sup> the Sixth, Seventh, and Ninth Circuits,<sup>13</sup> and numerous federal district and bankruptcy courts.<sup>14</sup>

Why have so many courts rejected the every exposure theory? As the opinions cited above explain, any exposure testimony (1) is illogical because it ignores the fact that background exposures to asbestos from the ambient air also accumulate in the lungs but these are not causative (if they were, many more people would have mesothelioma); (2) assumes improperly that disease caused at high levels of exposure also would occur at much lower doses with no evidence that it does; (3) has no epidemiological support (not one study) showing that the lower exposures are causative; and (4) undercuts the "substantial factor" or similar causation standards, in effect, shifting the burden of proof to the defendant to show a non-causative dose.

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<sup>12</sup> See *Scapa Dryer Fabrics, Inc. v. Knight*, 299 Ga. 286, 290-94 (2016); *In re NYC Asb. Litig. (Juni)*, 148 A.D.3d 233, 236-40 (2017), *aff'd*, 32 N.Y.3d 1116 (2018); *Schwartz v. Honeywell Int'l, Inc.*, 153 Ohio St. 3d 175, 176, 179-81 (2018); *Bostic v. Georgia-Pacific Corp.*, 439 S.W.3d 332, 338-42 (Tex. 2014); *Ford Motor Co. v. Boomer*, 285 Va. 141, 159-60 (2013); *Wannall v. Honeywell Int'l, Inc.*, 292 F.R.D. 26, 38-43 (D.D.C. 2013) (applying *Boomer*), *aff'd*, 775 F.3d 425 (D.C. Cir. 2014).

<sup>13</sup> See *Bartel v. John Crane, Inc.*, 316 F. Supp. 2d 603, 604, 611 (N.D. Ohio 2004), *aff'd sub nom.*, *Lindstrom v. A-C Prod. Liab. Trust*, 424 F.3d 488, 493 (6th Cir. 2005); *Moeller v. Garlock Sealing Tech., LLC*, 660 F.3d 950, 954-55 (6th Cir. 2011); *Martin v. Cincinnati Gas & Elec. Co.*, 561 F.3d 439, 443 (6th Cir. 2009); *Krik v. Exxon Mobil Corp.*, 870 F.3d 669, 673-78 (7th Cir. 2017); *McIndoe v. Huntington Ingalls, Inc.*, 817 F.3d 1170, 1177-78 (9th Cir. 2016).

<sup>14</sup> E.g., *In re W.R. Grace & Co.*, 355 B.R. at 476; *Smith v. Ford Motor Co.*, No. 2:08-CV-630, 2013 WL 214378, at \*1-5 (D. Utah Jan. 18, 2013); *Anderson v. Ford Motor Co.*, 950 F. Supp. 2d 1217, 1222-25 (D. Utah 2013); *Sclafani v. Air & Liquid Sys. Corp.*, No. 2:12-CV-3013, 2013 WL 2477077, at \*4-5 (C.D. Cal. May 9, 2013); *Comardelle v. Pennsylvania Gen. Ins. Co.*, 76 F. Supp. 3d 628, 630-35 (E.D. La. 2015); *Yates v. Ford Motor Co.*, 113 F. Supp. 3d 841, 846-49 (E.D.N.C. 2015); *Verdos v. Northrup Grumman Shipbuilding, Inc.*, 119 F. Supp. 3d 556, 562-65 (E.D. La. 2015); *Suoja v. Owens-Illinois, Inc.*, 211 F. Supp. 3d 1196, 1207-09 (W.D. Wis. 2016); *Bell v. Foster Wheeler Energy Corp.*, No. 15-6394, 2016 WL 5847124, at \*3-4 (E.D. La. Oct. 6, 2016); *Haskins v. 3-M Co.*, No. 2:15-CV-02086, 2017 WL 3118017, at \*5-9 (D.S.C. July 21, 2017); *Barabin v. Scapa Dryer Fabrics, Inc.*, No. C07-1454, 2018 WL 840147, at \*11-13 (W.D. Wash. Feb. 12, 2018).

To sum up, DBMP does not and has not taken the position that exposure to chrysotile fiber cannot cause mesothelioma under any circumstances, and it does not dispute that crocidolite fiber is more carcinogenic than chrysotile fiber. But DBMP aligns itself with the consensus of scientific opinion and legal precedent that **dose** is critical in asbestos disease causation—whatever the fiber type—and that there is no credible scientific support for the notion that any exposure to asbestos—no matter how small—can cause disease, let alone that it is sufficient proof of tort law causation.

**II. Work with Old CT’s Asbestos Products Resulted in Very Low Doses of Asbestos Exposure if Appropriate Work Practices Were Followed.**

The Committee baldly asserts that “CertainTeed’s products and conduct exposed hundreds of thousands of individuals to asbestos,” and that these exposures were “massive” and “staggering.” *Id.* at 4, 9, 18. These assertions are identical to the assertions the Bestwall Asbestos Claimants’ Committee made in its Informational Brief concerning Bestwall joint compound, except that there the claim was that “millions of individuals” rather than “hundreds of thousands” were exposed.<sup>15</sup> In any event, these statements with respect to Old CT are gross, unsupported exaggerations. They ignore completely the types of asbestos-containing products Old CT made or sold, the sort of workers who used them, and the frequency, duration, and levels of asbestos exposure generated from work with Old CT’s products (*i.e.*, dose). A careful examination of these factors shows that Old CT’s products generated low doses of asbestos fiber if appropriate work practices were followed, and were generally used only by a defined and limited group of workers. To claim, as the Committee does (ACC Br. at 4), that Old CT is “the

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<sup>15</sup> *Bestwall* Informational Brief at 10, 46.

last” of the “big dusties”— the ten or so companies that manufactured and sold friable asbestos insulation for decades, with massive exposures—is completely unfounded.<sup>16</sup>

As outlined in DBMP’s Informational Brief, the two primary types of asbestos-containing products that Old CT made or sold were asphalt roofing products and AC pipe.<sup>17</sup>

**A. Asphalt Roofing Products**

As outlined in DBMP’s Informational Brief, although Old CT began in the roofing business in 1904—over 115 years ago—for the vast majority of its history, none of its roofing products contained any asbestos. And even in the 1950s through the early 1980s, when a few roofing products—specifically, some rolled roofing, a few types of shingles, and some cements and coatings—contained some asbestos, the vast majority of the asphalt roofing products that Old CT made and sold contained no asbestos whatsoever. Further, to the extent that these products contained any asbestos, the fiber was all chrysotile and, even more important, bound up in the asphalt matrix of the products making any fiber release minimal at best.

The lack of significant fiber release from asphalt roofing products has been documented in government reports and industrial hygiene studies over and over again during the past 40 years. *See* DBMP Info. Br. at 13-14 & nn. 26-27, 29.<sup>18</sup> Indeed, the current OSHA regulations

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<sup>16</sup> The “big dusties” is generally used to refer to the major manufacturers of asbestos pipe covering and block insulation, including Johns-Manville, UNR, Celotex, Eagle-Picher, Keene, Owens-Illinois, Owens-Corning, Fibreboard, Pittsburgh-Corning, and Armstrong. *See In re Garlock Sealing Tech., LLC*, 504 B.R. at 83.

<sup>17</sup> Although Old CT did manufacture asbestos-containing joint compound until June 30, 1956, due to the passage of time, the number of workers who still can credibly claim exposure to that product is very small. Old CT also sold some rebranded asbestos cement shingles and flat sheets manufactured by other companies, but the volume of those sales by Old CT was small compared to the product manufacturers. Finally, Old CT sold (through its merger with Gustin-Bacon Manufacturing Company in 1966) some specialty railroad products composed of fiberglass insulation with an asbestos paper or cloth backing, but, again, the volume of such sales was small and had ended by 1970. Hence, for purposes of this chapter 11 proceeding, the asphalt roofing products and AC pipe are the primary products at issue.

<sup>18</sup> For additional studies showing extremely low fiber release from work with asphalt roofing products, *see* Patrick Sheenan *et al.*, *Simulation Tests to Assess Occupational Exposure to Airborne Asbestos from Artificially Weathered Asphalt-Based Roofing Products*, 54 Ann. Occup. Hyg. 880 (2010); Fionna M. Mowat *et al.*, *Simulation Tests to Assess Occupational Exposure to Airborne Asbestos from Asphalt-Based Roofing Products*, 51 Ann. Occup. Hyg.



do not have any rules with respect to roof coatings and cements, and only minimal work practice rules for other asphalt roofing products. *See* F.R. § 1926.1101(a)(8) & (g)(8)(ii).

The Committee offers little in response. It states that “CertainTeed manufactured felts and ply roofing sheets that contained asbestos for over 20 years” and that it sold one type of asphalt shingle that contained asbestos (manufactured by Philip-Carey) “*for six years.*” ACC Br. at 21-22 (emphasis in original).<sup>19</sup> But the length of time Old CT sold these products is not significant, given that, as report after report and study after study documents, any fiber release from asphalt roofing products was insignificant.

The Committee’s only other response to the lack of material fiber release from asphalt roofing products is that it “ignores the practical reality \* \* \* that weather events regularly damage roofs, spreading their dust and debris and exposing vast numbers of people to their contents.” ACC Br. at 22. But the Committee cites no evidence whatsoever to support the contention that deteriorating roofs “expose[] vast numbers of people” to asbestos. That is not surprising since the evidence is to the contrary. In fact, in 1990, when EPA revised its National Emissions Standards for Hazardous Air Pollutants, *i.e.*, NESHAP, regulations concerning building demolition, removal and waste disposal, it stated that “asphalt roofing products would rarely, if ever, need to be removed” from a building before demolition. This is because, EPA reasoned, even when such roofing products are “broken or damaged,” “they would not release significant amounts of asbestos fibers.” 55 Fed. Reg. 48406, 48408 (Nov. 20, 1990); *see also id.* at 48409 (noting that EPA evaluated data on fiber release from roofing products (and other

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451 (2007); Dennis J. Paustenbach *et al.*, *Occupational Exposure to Airborne Asbestos from Coatings, Mastics and Adhesives*, 14 J. of Expo. Sci. and Env’t Epidemiol. 234 (2004); J. H. Lange *et al.*, *Area and Personal Airborne Exposure During Abatement of Asbestos-Containing Roofing Material*, 64 Bull. Env’t Contam. Toxicol. 673 (2000).

<sup>19</sup> The twenty-year statement is accurate only for two plants on the west coast; in the rest of the country, Old CT sold asbestos-containing rolled roofing for, at most, ten years.

products) damaged during demolition and found that “the potential for fiber release appeared minimal”). Indeed, to the best of its knowledge, Old CT was **never** sued for claimed exposure to in-place weathered roofing.

In short, the Committee has offered nothing to refute the overwhelming evidence that Old CT’s asphalt roofing products—to the extent they contained asbestos at all—were not and, if still in place, are not hazardous. These products certainly have never exposed “hundreds of thousands” of individuals to asbestos.

## **B. AC Pipe**

With respect to AC pipe, the Committee discusses fiber release only when the pipe is cut with a gas-powered abrasive disc saw, ignores all other methods of cutting and fabricating AC pipe utilized over the years that yield far lower levels of asbestos, and also ignores that AC pipe installation involves very little cutting or fabricating. ACC Br. at 19-20. As discussed in the DBMP Informational Brief (at 8), through the early to mid-1970s, the predominant methods used to cut and fabricate AC pipe were manual cutting tools, such as the carbide tip and snap cutter, or hand or power lathes used to machine the end of AC pipes when the pipes were cut on the rough barrel.<sup>20</sup> All of these tools, along with the gas-powered abrasive disc saw—which had only recently come into use for AC pipe—were tested by Equitable Environmental Health (“EEH”) in two 1977 studies, and the results showed that only cutting AC pipe with the abrasive disc saw resulted in fiber release that exceeded the then-applicable OSHA PELs.<sup>21</sup> It is therefore not

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<sup>20</sup> CertainTeed also sold shorter pieces of pipe called “FMs” or “fully-machined” pieces that did not need to be machined on the end when cut because the entire length of pipe was already machined.

<sup>21</sup> Wesley M. Noble *et al.*, Equitable Environmental Health, *Asbestos Exposures During the Cutting and Machining of Asbestos Cement Pipe*, at Table 2 (March 16, 1977) (“March 1977 EEH Study”) (Ex. 4); Equitable Environmental Health, *Dust Exposures During the Cutting and Machining of Asbestos/Cement Pipe Additional Studies*, at Tables 2, 4 (Dec. 15, 1977) (“Dec. 1977 EEH Study”) (Ex. 5).

surprising that the EEH studies concluded that AC pipe “can be cut, machined, and installed without exceeding current and proposed OSHA standards, but that use of proper tools and adherence to recommended work practices are essential.”<sup>22</sup> OSHA reached the same conclusion in its 1986 rulemaking. 51 Fed. Reg. 22612, 22663 (June 20, 1986).

To be sure, the EEH studies showed that cutting AC pipe with a gas-powered abrasive disc saw resulted in asbestos levels above the OSHA PEL for a 15-minute sample; DBMP/Old CT has never disputed this fact. Instead, immediately after receiving the first EEH study results in 1977, Old CT took multiple steps to warn pipe contractors, utility owners, and installers not to cut AC pipe with a power saw, but instead only to use manual methods to cut pipe. *See* Part IV below. If appropriate work practices were used, and AC pipe was not cut with a gas-powered abrasive disc saw, the pipe could be cut and machined in the field with minimal fiber release. Further, by 1986, Old CT had developed a “coupling closure” system which allowed AC pipe to be installed without any cutting whatsoever.<sup>23</sup>

As the Committee points out, most of the AC pipe manufactured by Old CT, and every other U.S. manufacturer of AC pipe, contained some crocidolite fiber—ranging in amount to up to 24% of the asbestos content of the pipe (which was, in total, approximately 2-3% of the pipe by weight).<sup>24</sup> But, as Dr. Pierce explained in her testimony in the *Smith* case discussed above, if

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<sup>22</sup> Dec. 1977 EEH Study at 15.

<sup>23</sup> CertainTeed, “How to Install A/C Pipe Using Closure Couplings & Closure Lengths” (1986) (Ex. 6). Old CT was the first AC pipe manufacturer to develop this system, which it shared with the industry. Tr. Trans. of Lloyd Ambler, *Herrera v. CertainTeed Corp.*, 32:14-18; 33:7-36:24 (Ariz. Super. Ct. Jan. 22, 2018 (A.M. session)) (“*Ambler Herrera Tr. Trans.*”) (Ex. 7). Mr. Ambler, who worked for the Old CT pipe group starting in 1967, including as President of the group from 1989 until his retirement in 2001, testified as Old CT’s corporate representative for AC pipe. *Id.* at 4:4-23.

<sup>24</sup> The Committee wrongfully accuses Old CT of being “evasive” about the content of asbestos fiber in its AC pipe because Old CT’s standard interrogatory responses state that the asbestos content varied “anywhere from 0 to 24% crocidolite (blue) fiber by weight” with the remaining fiber being chrysotile. ACC Br. at 10 n.26. That response included all types of AC pipe that Old CT manufactured over 31 years. As Mr. Ambler testified repeatedly, and as DBMP explained in its Informational Brief (at 5 n.8), Old CT manufactured AC sewer pipe for a short time at a

the asbestos in the AC pipe was, for example, 85% chrysotile and 15% crocidolite, it makes sense to assume that a worker's exposure to asbestos from the pipe was in these same ratios. Pierce *Smith* Tr. Trans. at 7233:13-7234:2. Given the low levels of fiber release when AC pipe was cut or machined by the manual tools discussed above, it would require a very long duration of work with AC pipe to approach a dose of exposure to crocidolite fiber exceeding the NOAEL for crocidolite fiber that Dr. Pierce's work demonstrates. Standard AC pipe installation methods, however, did not lead to such long duration exposures.

For example, the Committee quotes a study prepared for OSHA stating that, during a typical AC pipe installation job, a worker "could be *exposed for a total of 7.5 hours.*" ACC Br. at 20 (emphasis in original). But the Committee omits the rest of the passage, which states that, in a study of AC pipe installation in seven major metropolitan areas, "only 1.1 percent of the total job time was spent cutting," and that these cutting operations "accounted for only 7.5 person-hours per job or 5.3 person-minutes per work day."<sup>25</sup> In other words, the 7.5 hours of cutting was divided among all workers on the **entire** multi-week job.<sup>26</sup> Indeed, using these numbers and assuming use of manual tools to cut the pipe, just to get to the NOAEL level for crocidolite asbestos fiber would require over 1,300 AC pipe installation jobs; at an average of 22 days per job, that many jobs would take over 114 work years involving nothing other than AC

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plant in Buffalo, New York, using an extrusion process; that pipe contained only chrysotile fiber and was a "complete failure." Ambler *Herrera* Tr. Trans. at 29:23-30:9 (Jan. 22, 2018 (A.M. session)); *id.* at 21:19-23 (Jan. 23, 2018 (P.M. session)). Further, while all the AC pipe that Old CT manufactured at its five other plants contained crocidolite fiber, the percentages of crocidolite in the asbestos mix varied from 10-24% depending on the type of pipe and other conditions during manufacturing. *Id.* at 36:9-37:20 (Jan. 23, 2018 (A.M. session)).

<sup>25</sup> CONSAD Research Corp., *Economic and Technological Profile Related to OSHA's Revised Permanent Asbestos Standard for the Construction Industry and Asbestos Removal and Routine Maintenance Projects in General Industry*, § 4.3.1.1 at 4.8 (Dec. 31, 1985; prepared for OSHA) ("CONSAD 1985 Report") (Ex. 8).

<sup>26</sup> CONSAD estimated an average standard AC pipe installation crew size of 3.83 persons, and an average of 675 person-hours per job. CONSAD 1985 Report, § 4.3.1.1 at 4.8; § 5.1.1 at 5.6. That translates to around 22 days per job (675 person-hours ÷ (3.83 persons \* 8 hours/day)).

pipe installation. This illustrates that, if appropriate tools and work practices were used—as Old CT’s warning materials stated—work with AC pipe resulted in very low asbestos exposures, including to crocidolite fiber.

The Committee also grossly exaggerates the number of workers potentially exposed to asbestos from AC pipe. As noted above, they state that “hundreds of thousands” of workers were exposed to asbestos from Old CT’s asbestos products. Given that the vast majority of Old CT’s roofing products did not contain asbestos, and the few roofing products that did yielded little if any asbestos exposure, the Committee’s statement about “hundreds of thousands” of exposed individuals must refer primarily to AC pipe workers. But AC pipe was not a “do-it-yourself” product used by homeowners; instead, installation of AC pipe or other types of water or sewer pipe was a specialized trade involving experienced workers who needed expensive heavy equipment to perform their jobs, such as excavators and backhoes.<sup>27</sup> DBMP’s Informational Brief (at 8) cited the CONSAD 1985 Report (prepared for OSHA) that estimated the maximum number of workers who at least occasionally worked with AC pipe in the mid-1980s to be approximately 17,650.<sup>28</sup> An earlier report prepared for OSHA estimated the number of AC pipe workers in the second half of the 1970s to be in the range of 7,020 to 49,140.<sup>29</sup>

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<sup>27</sup> See GCA Corp., *Life Cycle of Asbestos in Commercial and Industrial Use Including Estimates of Releases to Air, Water and Land*, at 128 (Feb. 1982; prepared for EPA) (“GCA 1982 Report”) (AC pipe “is not a consumer product. Installation is almost always by professional workers, who should be familiar with installation procedures.”) (Ex. 9).

<sup>28</sup> CONSAD 1985 Report, § 5.1.1 at 5.6-5.7 & Table 5.1. At the 17,650 maximum number of occasionally-exposed AC pipe workers, the effective 8-hour time-weighted average exposure for each worker would be 0.01 f/cc—one tenth of the current OSHA PEL. *Id.*, § 5.1.1 at 5.7.

<sup>29</sup> Draft Final Report, Research Triangle Institute, *Phase II Regulatory Analysis of the Proposed OSHA Standards on Asbestos*, at II-41 (Aug. 1980; prepared for OSHA) (“RTI 1980 Report”) (Ex. 10). By 1990, the estimate of the number of AC pipe workers had decreased to a range of 224 to 2,100. CONSAD Research Corp., *Economic Analysis of the Proposed Revisions to the OSHA Asbestos Standards for Construction and General Industry*, § 2.2.2 at 2.7 & Table 2.3 (July 1990; prepared for OSHA) (“CONSAD 1990 Report”) (Ex. 11).

Unlike the Committee's, these numbers were not pulled out of thin air, but, instead, were based on a detailed assessment of typical crew size and the actual feet of AC pipe laid per year.<sup>30</sup> Even adding some workers to those numbers for earlier years when AC pipe use was potentially more widespread, the notion that "hundreds of thousands" of workers were exposed to asbestos from AC pipe is plainly an extraordinary overstatement.<sup>31</sup>

The Committee also argues that AC pipe is a hazard because it deteriorates over time. ACC Br. at 18-19. In fact, AC pipe is buried underground, with a service life of 65 to 105 years.<sup>32</sup> Pipe that is buried underground is obviously not an inhalation hazard. And, similar to installation, in-place AC pipe may be repaired or replaced without generating asbestos levels above the current OSHA PELs provided that manual tools and appropriate work practices are used. Affidavit of Lloyd Ambler, *McIntyre v. Metropolitan Life Ins. Co.*, ¶ 22 (Mass. Super. Ct. Feb. 1, 2018) ("Ambler McIntyre Aff.") (Ex. 12); GCA 1982 Report at 130 (even if AC pipe is removed during replacement, "there should be minimal asbestos fiber mobilization from the old pipe").

In short, neither Old CT's asphalt roofing products nor its AC pipe were significant sources of asbestos exposure if appropriate work practices were followed. Both were low dose asbestos products. And neither product exposed "hundreds of thousands" of people to asbestos.

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<sup>30</sup> CONSAD 1985 Report, § 5.1.1 at 5.6-5.7; RTI 1980 Report at II-45; CONSAD 1990 Report, § 2.2.2 at 2.7.

<sup>31</sup> The Committee also states (ACC Br. at 20) that the five Old CT AC pipe plants "employed thousands of workers," which again is an unsupported overstatement. Further, exposures experienced by most Old CT plant workers are not relevant to this proceeding, since most of these claims are handled exclusively through workers' compensation, and those liabilities were allocated to CertainTeed LLC and not to DBMP in the Corporate Restructuring. See *Declaration of Robert J. Panaro in Support of First Day Pleadings* [Dkt. 24], at ¶ 10.

<sup>32</sup> See AWWA, *Buried No Longer: Confronting America's Water Infrastructure Challenge*, at 8 (Figure 5) (2012), available at <https://www.awwa.org/Portals/0/AWWA/Government/BuriedNoLonger.pdf?ver=2013-03-29-125906-653> ("2012 AWWA Report"); see also GCA 1982 Report at 130 ("once in the ground, A/C pipe lasts forever.").

### **III. The Committee's Discussion of Old CT's Knowledge and Actions Fails to Consider Dose or Distinctions Between Products.**

The Committee's recitation about what Old CT knew about the hazards of asbestos and how it acted in response blurs all distinctions between levels of asbestos exposure, types of asbestos products, and types of asbestos-related disease. Indeed, the Committee argues that even a "cursory" review of the medical and scientific literature as far back as 1897 would have alerted Old CT to the dangers of asbestos. ACC Br. at 22-23. The Committee's arguments on this issue are overly simplistic, and would require a level of foresight on Old CT's part that no physician or scientist in the world has ever possessed.

Prior to June 1962, when Old CT purchased the AC pipe assets of Keasbey & Mattison ("K&M"), Old CT had little involvement with asbestos.<sup>33</sup> It had sold its gypsum business in 1956 and hence did not make or sell asbestos-containing joint compound after June 30, 1956. Very few roofing products contained asbestos, and Old CT's only other asbestos products were some specialty railroad products (with Old CT's liability for these products the result of a 1966 merger with Gustin-Bacon Manufacturing Company), and a few rebranded products—asbestos cement roofing and siding shingles and flat sheets manufactured by National Gypsum. By June

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<sup>33</sup> The Committee includes in a footnote references to Ambler, Pennsylvania, where one of Old CT's AC pipe plants was located, as an "asbestos company town," but neglects to point out that the cited article primarily concerns asbestos operations in Ambler when K&M owned the AC pipe and several other asbestos products manufacturing plants in Ambler. ACC Br. at 6 n.14. Old CT bought only the AC pipe plants from K&M in 1962; the other asbestos manufacturing plants owned by K&M in Ambler and elsewhere were sold to other companies.

The Committee also tries to lump Old CT together with Turner & Newall ("T&N"), an English company that owned K&M. *Id.* at 6 n.15 and 23. T&N became a shareholder in Old CT in 1962 as a result of the sale of the K&M AC pipe assets to Old CT, but a federal court found no indication that "T&N has dominated or influenced Certain-teed in the operation of its asbestos-cement pipe business" in the early 1960s or "will dominate" CertainTeed "in the future." *United States v. Johns-Manville Corp.*, 237 F. Supp. 885, 891 (E.D. Pa. 1964). One or two of T&N's officers were members of the Old CT Board from time to time, but that is not a basis for holding T&N's actions or knowledge attributable to Old CT. *Ripa v. Owens-Corning Fiberglas Corp.*, 282 N.J. Super. 373, 405 (App. Div. 1995) ("general rule" that when officer or agent of corporation acts on behalf of another corporation, officer or agent's "personal knowledge is not imputed to the second entity").

1962, when it began to operate four AC pipe plants, Old CT was aware of the disease asbestosis. It understood that asbestosis could result only from the inhalation of substantial amounts of asbestos fiber over long periods of time, such as could occur in a mine or in an asbestos products manufacturing plant without adequate dust control.<sup>34</sup> At that time, there was a national “threshold limit value” (“TLV”) standard for asbestos exposure, adopted by the American Conference of Government Industrial Hygienists (“ACGIH”) and by the federal government and in many states, of 5 million particles per cubic foot of air (“mppcf”); both the ACGIH and the government stated that the 5 mppcf TLV “represent[ed] conditions under which it is believed that nearly all workers may be repeatedly exposed, day after day, without adverse effect.”<sup>35</sup> Because of its knowledge and understanding that uncontrolled asbestos levels could lead to asbestosis, Old CT employed, from the first day in June 1962 that it operated the AC pipe plants, an industrial hygienist/dust control engineer, Leon Horowitz, whose job was to engineer and maintain dust collectors and to take dust counts in Old CT’s plants to ensure that the dust levels were below the 5 mppcf TLV “national standard.”<sup>36</sup>

In the years following its June 1962 AC pipe asset purchase, Old CT learned of the association between high levels of asbestos exposure and lung cancer, primarily in cigarette smokers, and a rare form of cancer called mesothelioma.<sup>37</sup> Again, Old CT understood that if the

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<sup>34</sup> Tr. Trans of Lloyd Ambler, *Espinosa v. CertainTeed Corp.*, 63:10-66:23 (Cal. Super. Ct. Jan. 23, 2017) (“Ambler Espinosa Tr. Trans.”) (Ex. 13).

<sup>35</sup> *E.g.*, 25 Fed. Reg. 1543, 1562-63 (Feb. 20, 1960) (adopting 5 mppcf as TLV for asbestos exposure under Longshoremen’s and Harbor Workers’ Compensation Act).

<sup>36</sup> Dep. Trans. of Leon Horowitz, *Weisberg v. Bell Asbestos Mines, Ltd.*, 33:13-35:20 (Pa. Ct. Comm. Pleas Feb. 1, 1982) (Ex. 14).

<sup>37</sup> Mr. Horowitz explained, when he was deposed in the early 1980s, that, although he heard and saw some reports concerning a possible link between asbestos and cancer in the early 1960s, he and the rest of the industrial hygiene community did not immediately accept such a link, but he became more convinced after attending the Selikoff conference in 1964, as described below. *Id.* at 161:17-162:5; 167:25-168:7; 194:17-196:15.



dust levels in its plants were kept below the 5 mppcf TLV, these diseases would not result.<sup>38</sup> Old CT sent Mr. Horowitz and another representative to medical and scientific conferences, including the world famous “Selikoff conference” in New York City in October 1964, to keep up to date on developments in science and medicine concerning asbestos-related diseases.<sup>39</sup> Following his attendance at the Selikoff conference, Mr. Horowitz drafted a memo to Old CT management that concluded with a list of measures that Old CT should take to keep its plants safe.<sup>40</sup> Old CT implemented all of those measures, including adopting a policy of trying to achieve one-half the 5 mppcf TLV limits in its plants due to the discussions at the Selikoff conference suggesting that the 5 mppcf TLV might be too high.<sup>41</sup>

In the first half of the 1960s, Old CT also invested large sums in modernizing the AC pipe plants it acquired and improving the dust collection and other safety systems at the plants. For example, in the three years after the 1962 acquisition, Old CT invested \$17 to \$20 million (in 1960s dollars) in its AC pipe plants, and that money was spent on, among other things, funding

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<sup>38</sup> This belief was not unique to Old CT. Dr. Herbert Stokinger, who, from 1951-77, was Chief Toxicologist with the U.S. Public Health Service and then NIOSH and also a member and then Chair of the TLV Committee of the ACGIH, stated in an Affidavit that “it was believed by the TLV Committee at the time that cancer was considered (1964), that it did not occur without the presence of asbestosis, and therefore, the established threshold limit value [of 5 mppcf] adequately protected against cancer.” Aff. of Herbert E. Stokinger, Ph.D., ¶ 11 (Dec. 27, 1980) (Ex. 15).

<sup>39</sup> Both experts retained by plaintiffs and defendants in the asbestos litigation agree concerning the importance of this 1964 conference that Dr. Irving Selikoff organized, which spanned three days and involved discussions of dozens of scientific papers by experts from all over the world. *E.g.*, Tr. Trans. of Gerald Markowitz, Ph.D., *Smith v. Amcord, Inc.*, 5451:28-5452:5 (Cal. Super. Ct. Aug. 14, 2019) (Ex. 16) (plaintiffs’ expert; Selikoff conference was “landscape-changing,” “[e]specially in terms of mesothelioma”); Tr. Trans. of Morton Corn, Ph.D., *Espinosa v. CertainTeed Corp.*, 64:10-19 (Cal. Super. Ct. Feb. 15, 2017) (defense expert; 1964 Selikoff conference “was a turning point in the way the professional health community...viewed asbestos”).

<sup>40</sup> November 10, 1964 Memorandum from L.D. Horowitz to M.S. Davis, Jr. (Ex. 18). This list of items was at the end of Mr. Horowitz’s memo concerning the Selikoff conference under the caption: “What can Certain-teed Products Corporation do to meet this problem?”

<sup>41</sup> Ambler *Espinosa* Tr. Trans. at 56:14-57:4 (Jan. 26, 2017). Thus, the Committee is flatly incorrect when it asserts (ACC Br. at 25) that, after the 1964 Selikoff conference, Old CT did not take any steps to protect its employees in the plants.

substantial improvements in dust collection equipment.<sup>42</sup> In the mid to late 1960s, Old CT invited the U.S. Public Health Service (“USPHS”) to inspect its pipe plants and to take dust measurements as part of a larger exposure and epidemiological study that the USPHS was conducting to understand better what asbestos exposure levels led to disease. The USPHS reports on the Old CT plants were generally favorable and raised no concern about the dust levels or about any risks to end-users of the products Old CT was manufacturing.<sup>43</sup>

Most significantly, at no time in the 1960s or early 1970s, in any of Old CT’s internal memos, in reports of various medical and scientific conferences that Old CT employees attended, or in the correspondence/reports between Old CT and the USPHS or Old CT’s workers’ compensation insurer was **any** concern raised about any dangers to workers who installed AC pipe in the field or who worked with Old CT’s roofing products. Instead, the concern understood at that time, within Old CT and throughout the industry, was with asbestos mines and product manufacturing plants—where tons of raw fiber were used—and individuals who worked with dusty, friable asbestos-containing thermal insulation with high levels of exposure.<sup>44</sup> Indeed,

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<sup>42</sup> Tr. Trans. of Dr. Patrick Gaughan, *Wecker v. Air Liquid Systems Corp.*, 60:20-62:24 (Cal. Super. Ct. April 16, 2019) (Ex. 19); *see also* Travelers Survey of St. Louis Plant, at 2 (May 26, 1965) (“Travelers St. Louis Plant Survey”) (Ex. 20).

<sup>43</sup> Ambler *Herrera* Tr. Trans. at 66:13-21; 69:1-10 (Jan. 23, 2018 (P.M. session)). Similarly, inspections by Old CT’s workers’ compensation insurer of the AC pipe plants in the 1960s and 1970s praised the cleanliness and safety features of those plants and raised no concerns about asbestos hazards. *E.g.*, Travelers St. Louis Plant Survey; Travelers Survey of Santa Clara Plant (June 18, 1965) (Ex. 21).

The Committee cites a NIOSH survey of the Old CT Santa Clara plant in June 1971 and falsely states that the survey found “that 49 samples exceeded the 1970 threshold limit value for asbestos of 5.0 f/cc. ACC Br. at 28, citing Ex. A-36. In fact, that survey found that “**three** of the 49 samples,” not 49, exceeded 5 f/cc. *See id.* at Ex. A-36 (A-000245). Further, although NIOSH recommended a TLV of 5 f/cc in June 1971, the OSHA standard at that time was 12 f/cc, which only one out of 49 samples exceeded. *Id.*; 36 Fed. Reg. 10466, 10506 (May 29, 1971).

<sup>44</sup> For example, a study concerning removal of asbestos spray and pipe insulation aboard ships published in 1968 recorded levels of asbestos exposure in the hundreds or thousands of f/cc, orders of magnitude greater than the peak levels recorded by EEH when AC pipe was cut with a gas-powered abrasive disc saw. *E.g.*, P.G. Harries, *Asbestos Hazards in Naval Dockyards*, 11 Ann. Occup. Hyg. 135, 139 (1968).

asbestos insulators were the very group that Dr. Selikoff studied and reported on at his 1964 conference.<sup>45</sup>

The Committee misleadingly cites some documents from the second half of the 1960s which they state “spelled out concerns of AC Pipe use leading to cancer.” ACC Br. at 26. But the documents the Committee cites discuss concerns over **ingestion** of asbestos fibers in drinking water that had flowed through AC pipe, not concerns over **inhalation** of asbestos fiber while AC pipe was being installed.<sup>46</sup> The Committee discusses this drinking water controversy in the late 1960s a couple of paragraphs later in their brief (at 27), but they never acknowledge the obvious points that (1) concerns over ingestion were very different from concerns over inhalation of asbestos fibers; and (2) science debunked the false premise that there was a potential health risk from drinking water that flowed through AC pipe.<sup>47</sup> Indeed, today, hundreds of miles of AC pipe carry drinking water all over the U.S. with no legitimate concerns about ingestion risks.<sup>48</sup>

Probably the best evidence that there was no concern about working with asbestos-containing roofing products or AC pipe throughout the 1960s and into the early 1970s are statements by Dr. Selikoff at that time. Dr. Selikoff, who the Committee describes (ACC Br. at

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<sup>45</sup> Irving J. Selikoff *et al.*, *Asbestos Exposure and Neoplasia*, 252 J. Am. Med. Ass’n 91 (1964); Irving J. Selikoff *et al.*, *Relation Between Exposure to Asbestos and Mesothelioma*, 272 New Eng. J. Med. 560 (1965); Irving J. Selikoff *et al.*, *The Occurrence of Asbestosis Among Insulation Workers in the United States*, 132 Ann. N.Y. Acad. Sci. 139 (1965). EPA banned new installation of asbestos insulation in 1975. See 40 Fed. Reg. 48292, 48301 (Oct. 14, 1975) (amending 40 C.F.R. § 61.22(h)(3)(i)). AC pipe and asbestos roofing products, by contrast, were never banned.

<sup>46</sup> See ACC Br. at 26 nn.102-03, Exs. A-28 & A-29, including, in A-29, letter from Dr. Selikoff at A-000210 (“[T]here is no evidence at this time that the presumably very low-level exposures by ingestion which might occur by intake of water through asbestos-cement pipes has resulted in a recognized health hazard.”).

<sup>47</sup> *E.g.*, *Asbestos in Drinking-water*, at 3 (WHO 2003) (Ex. 22) (“Available epidemiological studies do not support the hypothesis that an increased cancer risk is associated with the ingestion of asbestos in drinking water.”).

<sup>48</sup> Among the documents from the second half of the 1960s cited by the Committee is a 1968 memo from Turner & Newell entitled “Putting the Case for Asbestos.” The Committee admits that this memo was used by T&N when speaking with T&N customers in England (ACC Br. at 26), but they ignore the testimony of Mr. Ambler, an employee of Old CT involved in AC pipe sales in the late 1960s, that Old CT **never** used the approach outlined in that T&N memo. Ambler *Espinosa* Tr. Trans. at 100:22-101:20 (Jan. 26, 2017).

24) as the “seminal medical researcher” in the asbestos area, was the first to raise the alarm in the 1960s concerning asbestos exposures and asbestos disease, including cancer, among heavily-exposed asbestos insulators. By contrast, in an article published in April 1970, Dr. Selikoff stated: “It is fortunate that the greatest part of [the asbestos in construction materials] has been in products in which the asbestos is ‘locked in’—that is, it is bound with cement or plastics or other binder so that there is no release, certainly no significant release, of asbestos fiber in either working areas or general air.”<sup>49</sup> He then went on to give some example of these “locked in” asbestos products: “floor tiles, **roofing felts, asbestos cement products**, siding material...”<sup>50</sup> In that same month, Dr. Selikoff is quoted in another article as stating that “products in which asbestos has been bonded into the material, such as floor and ceiling tiles, **roofing**, siding and **pipe, are not considered a cause of cancer.**”<sup>51</sup> If Dr. Selikoff, one of the foremost asbestos disease researchers in the 1960s and 1970s, believed in the early 1970s that working with asbestos-containing roofing products and AC pipe did not result in a “significant release” of asbestos fiber and “[is] not considered a cause of cancer,” it is difficult to see how Old CT should have had the superior knowledge that the Committee claims it had (or should have had).

In 1970, the U.S. Congress adopted the Occupational Health & Safety Act; that Act, which created OSHA, regulated employers and was intended to promote safety in the workplace. One of the first substances OSHA regulated was asbestos. The 1972 OSHA regulations

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<sup>49</sup> Irving J. Selikoff, *Partnership for Prevention – The Insulation Industry Hygiene Research Program*, 39 *Indus. Med.* 21, 23 (April 1970) (Ex. 23).

<sup>50</sup> *Id.* (emphasis added).

<sup>51</sup> *Loose asbestos fiber seen as cancer threat to men in building trades*, Eng’g News-Rec., Apr. 2, 1970, at 11-12 (emphasis added) (Ex. 24). Dr. Selikoff is also cited in a report by an OSHA contractor in 1980 as stating “there is no significant hazard from asbestos for roofers,” citing an epidemiological study of that occupation. RTI 1980 Report at II-45.

recognized the “locked in” characteristic of certain asbestos-containing products, including roofing and asbestos cement products, a concept that Dr. Selikoff endorsed.<sup>52</sup> Thus, the regulations provided that employers did not need to put the OSHA hazard warning required on other asbestos products in their facilities “where asbestos fibers have been modified by a bonding agent, coating, binder or other material” so that “during any reasonably foreseeable use” asbestos levels in excess of the OSHA PELs would not be generated.<sup>53</sup>

As explained in Part II above, through the early to mid-1970s, the predominant way to cut AC pipe in the field continued to be the manual methods such as the carbide tip cutter and the snap cutter, and the predominant way to machine pipe was to use a hand or power lathe. These were the cutting methods recommended in Old CT’s installation guides, and, when tested by EEH in 1977, all generated levels of asbestos far below the then applicable OSHA PELs (as well as the lower OSHA PELs proposed at that time).<sup>54</sup> But in the early to mid-1970s, contractors began installing ductile iron pipe on some job sites and that product could only be cut during installation with gas-powered abrasive disc saws. When some contractors began to use those

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<sup>52</sup> NIOSH also recognized the concept of “locked in” asbestos products: “floor tiles, asbestos cements, and roofing felts and shingles.” NIOSH, *Criteria for a Recommended Standard, Occupational Exposure to Asbestos*, at III-1 (1972) (Ex. 25).

<sup>53</sup> 37 Fed. Reg. 11318, 11321 (June 7, 1972) (§ 1910.93a(g)(2)).

Moreover, throughout the 1970s, the OSHA asbestos regulations applied only to employers and not to manufacturers, such as Old CT, with respect to the sale or shipment of asbestos-containing products. *See R. T. Vanderbilt v. Occupational Safety & Health Review Comm’n*, 608 F.2d 570, 574-78 (11th Cir. 1983); *R. T. Vanderbilt v. Occupational Safety & Health Review Comm’n*, 628 F.2d 815, 818 (6th Cir. 1984) (both holding talc supplier not covered by 1972 OSHA asbestos regulations, only employer). Old CT, of course, had to follow the OSHA asbestos regulations in its AC pipe plants and other company facilities where asbestos fiber or asbestos-containing products were used. But the first time that OSHA required any warnings from asbestos-containing product suppliers was in 1985, when the Hazard Communications standard required manufacturers to include Safety Sheets with products that it sold (which Old CT had already begun doing in 1983, as discussed below). 48 Fed. Reg. 53280 (Nov. 25, 1983); *id.* at 53346 (announcing standard’s effective date for manufacturers of Nov. 25, 1985) (§ 1910.1200 (j)(1)).

<sup>54</sup> March 1977 EEH Study at 15; Dec. 1977 EEH Study at 14-15.

same saws to cut AC pipe in the field, this new work practice caused Old CT and other manufacturers of AC pipe concern because of the possibility of generating significant levels of asbestos fiber.<sup>55</sup> Due to these concerns, Old CT, through the Asbestos Cement Pipe Producers Association (“ACPPA”) arranged for EEH to test asbestos fiber levels generated when AC pipe was cut with power saws, along with other work practices. Upon receiving the results in 1977, Old CT immediately took multiple steps to warn workers and their employers not to cut AC pipe with power saws, but instead to cut and fabricate the pipe with manual tools, which yielded much lower asbestos levels far below the OSHA standards.

As outlined in Part IV, Old CT continuously enhanced and strengthened its warning program from the late 1970s until it shut down its last AC pipe plant in 1992. By 1986, it had developed a method for installing AC pipe that involved no cutting whatsoever. As the quality of PVC pipe improved, AC pipe was eventually replaced by PVC pipe and by pipes of other compositions. But through the time it last sold AC pipe in the first quarter of 1993, Old CT’s AC pipe could be manufactured, installed, and repaired safely so long as proper work practices and precautions were followed.

#### **IV. The Committee Misrepresents Old CT’s Comprehensive Warnings Program.**

The Committee attacks Old CT for not placing a warning label on its AC pipe until 1979 and further argues that, notwithstanding that label, Old CT did not adequately warn of the potential hazards of asbestos exposure. ACC Br. at 30-31. But the Committee bases its arguments on a truncated and inaccurate description of Old CT’s warnings program, which encompassed much more than just a warning label. Further, with respect to timing, the

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<sup>55</sup> Under the 1972 OSHA regulations, employers whose workers used power tools, such as saws, that had the potential to generate asbestos levels over the OSHA limits were required to equip those saws with “local exhaust ventilation systems.” 37 Fed. Reg. at 11320 (§ 1910.93a(c)(1)(iii)). But the saws that contractors began using to cut AC pipe in the mid-1970s generally did not have those ventilation systems.

Committee completely ignores the medical and scientific state of the art with respect to the hazards of asbestos exposure that are discussed above in Part II.<sup>56</sup> And, with respect to adequacy, the Committee speculates, 40 years after the fact, about how pipe installers “might” have understood Old CT’s warning label, but—in addition to ignoring all of the other warning materials provided by Old CT—offers no supporting evidence.

As discussed above, prior to the mid-1970s, the predominant work practices used with AC pipe—manual cutting tools and hand and power lathes—generated levels of exposure far below the OSHA PELs or other applicable standards. Old CT accordingly believed during this period that the levels of asbestos exposure potentially experienced during AC pipe installation did not result in any risk to installation workers.<sup>57</sup> Old CT’s understanding was informed by the above-quoted statements of Dr. Selikoff that there was no significant release of asbestos fiber from AC pipe or other “locked-in” products, as well as by the TLVs and PELs for asbestos exposure adopted by the ACGIH and then OSHA.<sup>58</sup> Hence, contrary to the Committee’s assertions (at 31-32), Old CT’s decisions on these matters were motivated by the science, not financial concerns.<sup>59</sup>

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<sup>56</sup> The Committee argues that Old CT ignored the advice of Clifford Sheckler of Johns-Manville in 1971 that warning labels should be placed on asbestos-containing products. ACC Br. at 28. He made that statement, however, at a meeting of the Asbestos Textile Institute (“ATI”), a trade group to which Old CT did not belong and at a meeting that Old CT did not attend. *Id.*, Ex. A-35, at A-000241. Further, ATI members manufactured asbestos textile materials, which, in 1971, were considerably dustier and more of a concern than asphalt roofing products or asbestos cement products. Indeed, Mr. Sheckler’s employer, Johns-Manville, did not put a warning label on its AC pipe until 1980—which is after Old CT first placed a warning label on Old CT AC pipe. *See* Affidavit of Margaret J. Baumgardner attaching Johns-Manville Interrogatory Answers, at MT-CORR-000013-14 (Feb. 24, 2004) (Ex. 26).

<sup>57</sup> Tr. Trans. of Lloyd Ambler, *Burch v. CertainTeed Corp.*, 8748:23-8750:1, 8753:25-8754:19 (Cal. Super. Ct. Feb. 7-8, 2017) (“Ambler Burch Tr. Trans.”) (Ex. 27).

<sup>58</sup> *See, e.g.*, Ambler Burch Tr. Trans. at 9368:16-9369:17, 9370:6-9374:6 (testifying that Old CT received copies of Dr. Selikoff’s 1970 paper cited above, as well as heard him speak at trade association meetings company representatives attended in the 1970s).

<sup>59</sup> Tellingly, although the Committee asserts (at 31-32) that in the 1970s, Old CT “was making high profit margins” on AC pipe and “maintained a pattern of coordinated concealment aimed at keeping the company’s revenue stream

Old CT's understanding of potential risks associated with AC pipe installation began to change in the mid-1970s, as contractors began increasingly to use gas-powered abrasive disc saws to cut AC pipe and there were proposals to lower the OSHA PELs.<sup>60</sup> As described above, it was at this time that EEH was hired to test various AC pipe work practices. And Old CT learned from EEH's work that cutting pipe with a gas-powered abrasive disc saw was the only AC pipe work practice that had the potential to generate asbestos exposures in excess of the existing or any proposed OSHA PELs.

After receiving the first EEH report in 1977, Old CT immediately took steps to warn customers not to use an abrasive disc saw to cut AC pipe, including by having its sales force and field service technicians deliver oral warnings to the AC pipe distributors and contractors with whom they dealt. *Ambler McIntyre Aff.* ¶ 7.<sup>61</sup> Old CT also helped draft a "Recommended Work Practices for A/C Pipe" booklet that expressly warned pipe installers not to cut AC pipe with an

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intact," it cites no evidence to support this accusation of malfeasance. Instead, the Committee cites (at 31-32 & n. 127) long-standing plaintiff expert Barry Castleman's selective quotation from testimony submitted by Old CT in connection with the 1972 OSHA rulemaking, as well as one appellate court's interpretation of that testimony. Putting aside that this was public testimony before a federal agency, and so hardly concealed, the discussion of warning labels in the 1972 OSHA testimony related to the contemporaneous but disproven concern about **ingestion** of asbestos—as discussed above, the risk of cancer from drinking water that flowed through AC pipe. At that time, Old CT was not aware of any doctor or scientist suggesting there was a risk of disease among workers installing AC pipe, and so had no reason to contemplate—much less comment to OSHA upon—a label warning of such risk. *Ambler Burch Tr. Trans.* at 9375:13-23, 9376:18-9380:5.

<sup>60</sup> For testimony regarding the increasing use of gas-powered saws on AC pipe in the 1970s, as ductile iron pipe (which could only be cut with that tool) became more prevalent, *see* Tr. Trans. of Gary Santon, *Herrera v. CertainTeed Corp.*, 8:19-9:2, 11:5-12:1, 21:14-20 (Ariz. Super. Ct. Jan. 24, 2018) ("Santon Tr. Trans.") (Ex. 28) (Mr. Santon was a pipe salesman for Old CT in the Phoenix area from 1975 through 1990. *Id.* at 4:20-25.); Tr. Trans. of William Passmore, *Herrera v. CertainTeed Corp.*, 16:22-17:2 (AM), 25:23-26:8 (AM) (Ariz. Super. Ct. Jan. 10, 2018) ("Passmore Tr. Trans.") (Ex. 29) (From 1970 to 1985, Mr. Passmore worked for a Phoenix area contractor that installed AC and other types of utility pipe. *Id.* at 7:23-8:3 (AM).); Tr. Trans. of Kevin Krausgrill, *O'Bryan v. A.H. Voss Co.*, 1917:23-1920:10 (Cal. Super. Ct. Apr. 30, 2014) (Ex. 30) (Mr. Krausgrill was a long-time employee of a Northern California distributor of Old CT AC pipe, eventually becoming President and CEO of the company. *Id.* at 1896:6-1901:14, 1913:2-11.).

<sup>61</sup> *See also* Santon Tr. Trans. at 9:3-10:7; Dep. Trans. of Robert Rice, *Gaines v. Georgia-Pacific, LLC*, 49:3-20, 50:16-52:7, 52:16-54:1 (Tex. Dist. Ct. Nov. 18, 2009) ("Rice Dep. Trans.") (Ex. 31) (Mr. Rice worked in Louisiana and Texas as a sales engineer for Old CT from 1976 until 1987 or 1988. *Id.* at 22:12-13, 23:11-24:16.).



abrasive disc saw because that tool “produce[s] concentrations of airborne asbestos dust which exceed OSHA permissible levels.” *Id.* ¶ 8 & Att. B at 19.<sup>62</sup> The booklet instead recommended that workers use the manual pipe cutting and machining methods shown by the EEH study not to result in asbestos exposures in excess of the OSHA PEL. *Id.* Att. B at 7-17.

Starting in the summer of 1977, Old CT distributed this booklet widely to engineers, contractors, and other users of AC pipe, as did other AC pipe manufacturers; among other things, Old CT included a copy of the booklet with each load of pipe shipped from its plants. *Id.* ¶¶ 9-10, 12.<sup>63</sup> Some 80,000 booklets were handed out soon after its 1977 publication. *Id.* ¶ 10. The recommendation against using an abrasive saw to cut AC pipe became so well-known that it started appearing in municipal job specifications.<sup>64</sup>

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<sup>62</sup> The Committee (at 30-31) argues that a worker “might never make the connection” between this warning and “the danger of releasing asbestos fibers,” and instead might believe that an abrasive saw “might cause cracks in the pipe or cause shards to come off and cut the user.” That, of course, ignores the reference to the OSHA permissible levels, which had nothing to do with cracks or pipe shards. *See also* Passmore Tr. Trans. at 20:24-21:19 (PM) (understandable from Recommended Work Practices that “if you use an abrasive disk saw, you could exceed the OSHA permissible levels”).

<sup>63</sup> *See* Memo from L.C. Ambler to W.A. Krivsky *et al.* re Field Construction Practices – A/C Pipe (Aug. 31, 1977) (Ex. 32); Memo from J.F. Baker to All District Managers *et al.* re Recommended Work Practices for A/C Pipe (Sept. 14, 1977) (Ex. 33); Santon Tr. Trans. at 17:6-19:11; Rice Dep. Trans. at 61:14-62:14; Dep. Trans. of Hicks Blackburn, *Genereaux v. Advance Auto Parts, Inc.*, 110:20-114:13 (Utah Dist. Ct. June 19, 2019) (Ex. 34) (Mr. Blackburn was a pipe salesman for Old CT in Utah from 1970 to 1986. *Id.* at 18:10-15, 24:3-25.); Tr. Trans. of Robert Guzzetta, *O’Kelley v. Asbestos Defendants*, 213:3-215:19 (Cal. Super. Ct. Dec. 11, 2014) (“Guzzetta Tr. Trans.”) (Ex. 35) (From 1977 through 2014, Mr. Guzzetta worked as an engineer for California Water Service Company, a retail water provider in California that specified AC pipe. *Id.* at 202:18-203:19, 204:21-205:15.); Tr. Trans. of Dewey Long, *O’Kelley v. Asbestos Defendants*, 53:11-54:10 (Cal. Super. Ct. Dec. 2, 2014) (Ex. 36) (From 1977 through 2002, Mr. Long was the safety director and risk manager for West Valley Construction, a California contractor that installed AC pipe. *Id.* at 47:14-48:4.); Dep. Trans. of Steven Schebler, *Tarazon v. CertainTeed Corp.*, 60:7-61:14 (Az. Super. Ct. June 12, 2014) (“Schebler Dep. Trans.”) (Ex. 37) (From 1978 through 1981, Mr. Schebler worked for Del Webb as an engineer and field superintendent overseeing installation of AC pipe in new Arizona subdivisions. *Id.* at 56:2-57:4, 59:2-5, 61:16-20.); Dep. Trans. of Orville Spears, *Pound v. Amcord, Inc.*, 11:24-12:16, 13:15-14:5, 76:19-77:11 (Cal. Super. Ct. Dec. 17, 2009) (Ex. 38) (Mr. Spears was the long-time President of Inland Water Works, a company that distributed Old CT AC pipe in Southern California. *Id.* at 10:1-22, 12:21-25.); Dep. Trans. of Richard Cronk, *Wold v. APH Stores, Inc.*, 73:13-74:18 (Minn. Dist. Ct. Feb. 21, 2018) (Ex. 39) (Mr. Cronk worked for decades in various sales-related positions for the pipe division of Johns-Manville and then J-M Manufacturing. *Id.* at 8:10-9:6, 9:17-22, 11:1-2, 16:25-17:20, 19:4-15, 22:5-24.).

<sup>64</sup> *See, e.g.*, Specifications included in Cambria Community Services District, Contract Documents and Construction Plans for Cambria Water Distribution Facilities, Unit 1, at § 144 (April 1978) (“Pipe may be cut by means of saws

The Recommended Work Practices booklet also summarized the OSHA asbestos regulations, and explained that if the recommended work practices were followed “it is improbable that field personnel would be exposed” to asbestos at levels in excess of the OSHA PELs. *Id.* ¶ 8 & Att. B at 4. It further included a section on asbestos and health stating that “[a]s you are aware, airborne asbestos fiber has been identified as a possible health hazard,” and that “minimizing exposure to airborne asbestos dust is the only effective method of preventing asbestos-related disease.” *Id.* Att. B at 3. As the booklet thus recognized, by this time, the potential health hazards associated with asbestos exposure were the subject of widespread reporting in the popular press.<sup>65</sup> But the company’s sales force and field service personnel nonetheless made sure Old CT’s customers understood the possible consequences of airborne asbestos exposure so that they could pass that information along to pipe installers.<sup>66</sup>

The AC pipe industry also distributed the Recommended Work Practices booklet to unions whose members made up a large part of the workforce involved in AC pipe installation.<sup>67</sup> And the industry sponsored seminars at which proper work practices were demonstrated to union

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or pipe cutters which will produce a square cut. No wedge-type roller cutters or power-drive abrasive wheels will be permitted.”) (Ex. 40).

<sup>65</sup> See, e.g., Larry Pryor, *Asbestos in California Water: How Much, How Dangerous?*, L.A. Times, June 23, 1974, at I-3 (Ex. 41); Jane Brody, *Cancer Found in Asbestos Workers’ Kin*, N.Y. Times, Sept. 19, 1974, at 1 (Ex. 42); *Consumer Group Lists Asbestos as Top Hazard*, Seattle Times, June 4, 1977, at A4 (Ex. 43). Indeed, individuals involved with AC pipe installation during the 1970s confirmed such knowledge at trials and depositions. See, e.g., Schebler Dep. Trans. at 59:6-60:3 (“[w]e all knew [asbestos] could cause cancer”); Passmore Tr. Trans. at 10:18-14:4 (PM) (heard by the mid-1970s that asbestos could cause cancer); Dep. Trans. of Charles Freund, *Herrera v. CertainTeed Corp.*, 76:2-13 (Ariz. Super. Ct. Feb. 22, 2017) (describing “big to-do” on TV and other media in the early 1970s concerning asbestos hazards) (“Freund Dep. Trans.”) (Ex. 44). From 1978 through 1986, Mr. Freund worked as a heavy equipment operator for a Phoenix-area contractor that installed AC pipe. *Id.* at 13:3-9, 14:4-13.

<sup>66</sup> See, e.g., Stanton Tr. Trans. at 19:12-20:7, 28:4-13, 39:19-40:4; Rice Dep. Trans. at 65:15-66:8; Guzzetta Tr. Trans. at 214:18-215:19, 217:12-18; 219:17-220:9.

<sup>67</sup> See Letter from John Bogart to Bob Duffy re Cal-OSHA—Use and handling of Asbestos Cement Pipe (A/C) (August 31, 1977) (Ex. 45); Dep. Trans. of Arvid Levy, *Carmichael v. Michelin North America, Inc.*, 77:4-79:9, 82:22-83:18 (Cal. Super. Ct. Apr. 30, 2019) (“Levy Dep. Trans.”) (Ex. 46). Mr. Levy was a long-time member of the plumbers and pipefitters union (known as the United Association or UA) and, in the late 1970s and early 1980s, an elected union officer in California. *Id.* at 10:21-11:10, 12:7-22, 25:9-20, 34:9-21.

members and others.<sup>68</sup> Contemporaneous documents establish that the unions received and understood the information provided to them by the AC pipe industry, and made an effort to widely circulate such information to their members.<sup>69</sup>

Soon after publication of the Recommended Work Practices, Old CT began incorporating the booklet into its AC pipe installation guides. Ambler *McIntyre* Aff. ¶ 9. In addition, it added to those guides the following warning: “CAUTION – Asbestos-cement pipe contains asbestos fibers. Do not cut or machine without protection. Breathing asbestos dust may cause serious bodily harm.” *Id.* ¶ 13.<sup>70</sup>

Also in the late 1970s, Old CT started to distribute a second ACPPA booklet—“A/C Pipe and Health”—that contained additional details regarding the health risks associated with heavy asbestos exposure and that stressed using recommended work practices. *Id.* ¶ 11. Moreover, during this time, the two primary national pipe industry standard setting organizations—the AWWA (for water pipe) and the American Society of Testing and Materials (“ASTM”) (for sewer pipe)—adopted and incorporated the recommended work practices into their AC pipe standards and specifications. *Id.* ¶ 12. The AWWA prepared its own Recommended Work Practices book, which was almost a verbatim copy of the ACPPA Recommended Work

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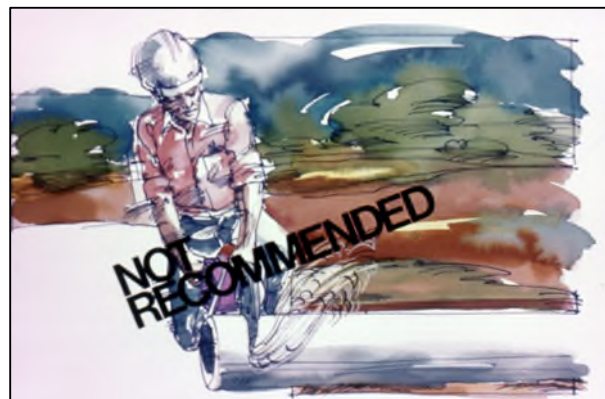
<sup>68</sup> Levy Dep. Trans. at 83:19-84:14; Memo from J.K. Bogart to F.A. Rice *et al.* re A/C Pipe Customers Education (Oct. 18, 1977) (Ex. 47).

<sup>69</sup> The November 1977 edition of the monthly magazine sent to all members of the United Association of Plumbers & Pipefitters contained an article that described the potential health risks of asbestos exposure, including mesothelioma and lung cancer. *Hazard Alert: Asbestos*, UA Journal, Nov. 1977, at 12, 13 (Ex. 48); Levy Dep. Trans. at 68:25-70:8, 74:1-23. The article explained that “[i]f asbestos cement pipe is cut with a high-speed carbide saw, asbestos fibers above the maximum allowable limit may be released to the air and enter the body.” *Hazard Alert: Asbestos*, *supra*, at 13.

<sup>70</sup> See also Installation Guide, Asbestos-Cement Fluid-Tite Non-Pressure Sewer Pipe at 4 (“Sewer Pipe Guide”) (Ex. 49); Installation Guide, Fluid-Tite Pressure Pipe at 2 (“Pressure Pipe Guide”) (Ex. 50). Hence, contrary to the Committee’s assertions (at 21, 30), Old CT informed customers that asbestos was an ingredient in AC pipe. Of course, that fact was no secret—the word “asbestos” was part of the name of the product. See, e.g., Sewer Pipe Guide at cover, 144-46; Pressure Pipe Guide at 11, 16.

Practices, and the AWWA booklet was also widely distributed. *Id.* The AWWA and the ASTM had enormous influence with the municipalities and engineers who specified, and the contractors who installed, AC pipe. *Id.*

The ACPPA prepared an audiovisual presentation—Risk & Responsibility—for contractors to use at safety meetings with their workers. *Id.* ¶ 10 & Att. D.<sup>71</sup> The presentation stressed that using an abrasive saw to cut or machine AC pipe was “too risky” and instead that manual methods should be used.<sup>72</sup> The slides bolstered this message, for example the following:



Over time, Old CT took additional steps to get out the word regarding proper work practices and the consequences of failing to follow such practices. Thus, in 1979, Old CT became the first AC pipe manufacturer to place a warning label on every piece of AC pipe it

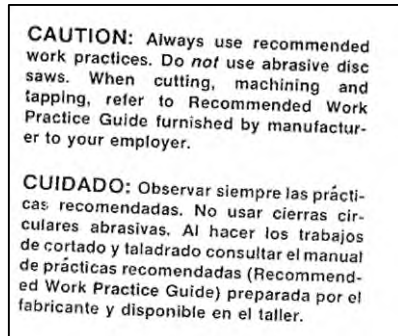
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<sup>71</sup> Old CT played this presentation for contractors, distributors, and other customers during tours of its AC pipe plants. Stanton Tr. Trans. at 34:16-35:3; 60:22-61:19. A second audio-visual presentation—A/C Pipe & Health—focusing primarily on the ingestion issue (that is, the debunked concern that drinking water that flowed through AC pipe was hazardous), also was prepared by the ACPPA. It is that second presentation to which the California Court of Appeals referred in the passage cited by the Committee. ACC Br. at 32. In contrast to the inhalation risk, which it affirmatively discussed with customers and others in the industry in an effort to encourage use of safe and proper work practices, Old CT did not proactively raise the ingestion issue because, as discussed above, it was a false concern.

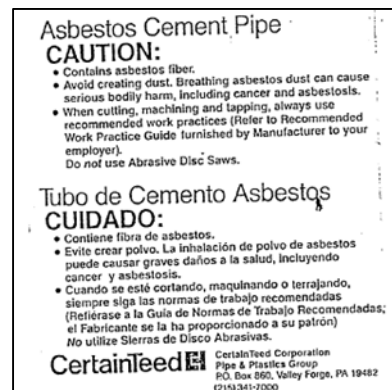
<sup>72</sup> The audio stated that “I know you’ve all heard or read that asbestos can hurt you. Well, it can . . . especially if you breathe a lot of dust containing asbestos or breathe it for a long time . . . you increase your risk of getting lung disease . . . or even cancer”. Ambler *McIntyre* Aff. Att. D at 6. It explained that “the way to stay below dangerous dust levels is to follow recommended work practices,” that is using manual tools to cut or machine the pipe. *Id.* at 7-8. It stressed, however, that use of an abrasive disc saw “produces a hell of a lot of asbestos dust,” and so should never be used because “that’s too risky.” *Id.* at 9.

sold, and it updated the warning in 1985. *Id.* ¶ 14. The warnings, written in both English and Spanish, were placed at or near the end the pipe—which is the part of the pipe a worker would handle when making connections—and are reprinted immediately below:

**1979:**



**1985:**



*Id.* ¶¶ 14-15. Testimony from workers confirms that—contrary to the Committee’s speculation—they saw and understood Old CT’s warning labels. *See, e.g.,* Freund Dep. Trans. at 66:6-15, 75:4-76:1.

Starting in 1983, Old CT began including a Safety Sheet with every load of AC pipe shipped from its plants, and with every invoice sent to pipe purchasers. *Ambler McIntyre Aff.* ¶ 16 & Att. F. Old CT’s 1983 Safety Sheet was updated several times over the subsequent decade. *Id.* ¶¶ 17-18 & Atts. G-H. All versions of Old CT’s Safety Sheets advised customers of the OSHA PELs for asbestos, warned of the potential to develop mesothelioma and other diseases as a result of excessive exposure to asbestos, and reinforced the need to follow recommended work practices. *Id.* Atts. F-H.

In sum, contrary to the Committee’s conjecture, Old CT undertook an extensive and multi-pronged approach to providing warnings when it became apparent that workers were using AC pipe installation methods potentially exposing them to harmful levels of asbestos. The company’s warnings program: (a) told workers what work practices not to use, (b) explained

how to install AC pipe in a manner that reduced asbestos exposures to levels well below the then-applicable—and even the present (2021)—OSHA standards, and (c) described the potential health risks associated with not following such recommended work practices.

**V. The 2000-2001 Bankruptcy Wave Accounts For the Post-2000 Spike in Mesothelioma Claims Against Old CT.**

**A. Old CT Was Unmistakably Swept Up in the Bankruptcy Wave.**

In its Informational Brief (at 16-18), DBMP showed that mesothelioma claims against Old CT increased dramatically immediately after the most frequently-sued defendants, primarily those whose products included friable asbestos-containing insulation, filed for bankruptcy during 2000 and 2001—the so-called “Bankruptcy Wave.” The numbers are stark and undisputed by the Committee: In 2000, Old CT was sued in fewer than 550 mesothelioma cases, and in just over 20,000 total asbestos cases. One year later, the number of mesothelioma claims doubled to about 1,100, and the overall number of claims increased to almost 56,000. By 2002, mesothelioma claims had risen to about 1,500, and total claims to about 82,500; compared to 2000 filings, this represented an almost 200 percent increase in mesothelioma claims and an over 300 percent increase in overall asbestos claims against Old CT.<sup>73</sup>

In an effort to downplay the relevance of the Bankruptcy Wave to Old CT’s claims’ experience, the Committee offers several competing but ultimately flawed explanations for this dramatic and sudden increase: (1) the early 2001 dissolution of the CCR, of which Old CT was a member; (2) “dogged investigation by plaintiff attorneys” that, after 2000, “revealed problematic facts” about Old CT; and (3) the supposed median latency period for mesothelioma of 45 years

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<sup>73</sup> DBMP’s Informational Brief contains slightly different 2002 figures. The difference is attributable to data reconciliation work performed by DBMP’s expert, Bates White, on DBMP’s original data maintained in its “PACE claims database.” The case statistics herein are derived from the Bates White reconciled claim database, while the figures cited in the Informational Brief were derived from the original PACE claims database. The Debtor produced both databases to the Committee early on in these proceedings.

combined with Old CT's 1960s entry into the asbestos-containing products market. ACC Br. at 32-38. The Debtor refutes each of these explanations in turn below.

1. The Committee baldly asserts (ACC Br. at 36) that during the years of Old CT's CCR membership, "despite its culpability" Old CT was not aggressively pursued because of the CCR's sharing formula, and specifically the policy that all CCR members contributed to settlements of the cases in which they had been sued. Missing from the Committee's presentation is any evidence that, during the CCR years, thousands of mesothelioma plaintiffs opted not to sue Old CT "despite its culpability" because they had sued other CCR members. Thus, as reflected in the CCR database produced to the Committee, between 1990 and 2000 (the last full year of the CCR's operation), Old CT was sued on average in fewer than 300 mesothelioma cases a year. That was a fraction of the number of mesothelioma lawsuits faced by other CCR members.<sup>74</sup> This sharp difference in the number of lawsuits was mirrored in the companies' relative contributions to the CCR's overall indemnity payments in mesothelioma cases. So, while Old CT's share of such indemnity payments during 1990 to 2000 was less than three percent, other CCR members who were much more frequently sued paid a considerably larger share.<sup>75</sup> Given this not surprising relationship between the number of filings and the amount paid in indemnity, it defies logic to argue, as the Committee does here, that the CCR sharing formula led plaintiffs regularly to refrain from suing Old CT in cases in which it was

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<sup>74</sup> See, e.g., Mark A. Peterson, Armstrong World Industries, Inc. Projected Liabilities for Asbestos Personal Injury Claims as of December 2000 (Nov. 6, 2003), at 12 ("Peterson Armstrong Report") (Ex. 51) (chart reporting on the number of mesothelioma claims against former CCR member Armstrong World Industries; those filings ranged from a low of 678 to a high of 1,939 during the period 1990 to 2000, with an average of over 1,100 mesothelioma claims annually); Mark A. Peterson, USG Corporation Projected Liabilities for Asbestos Personal Injury Claims as of June 2001 (May 2006), at 27 ("Peterson USG Report") (Ex. 52) (chart reporting on the number of mesothelioma claims against former CCR member USG; those filings ranged from a low of 452 to a high of 1,617 during the period 1990 to 2000, with an average of almost 900 mesothelioma claims annually).

<sup>75</sup> For example, as shown by the CCR database, Armstrong contributed over 21% to the CCR's mesothelioma indemnity payments during that period, and USG contributed over 11%.

“culpable.” Had that been the case, the more frequently sued CCR members who bore most of the indemnity burden would surely have pushed for an alternative sharing arrangement.

In pointing to the CCR’s dissolution as the cause of the steep rise in mesothelioma claims against Old CT, the Committee also conveniently forgets that the bankruptcies that made up the Bankruptcy Wave included the four largest CCR members that together funded the bulk of the CCR settlements.<sup>76</sup> The Committee makes no effort to disentangle the impact of these four bankruptcies from the essentially contemporaneous dissolution of the CCR, instead attributing the increase in claims against Old CT largely if not solely to the end of the CCR. Curiously, however, the Committee’s own expert, Dr. Peterson, has opined in cases involving other CCR members that the end of the CCR should have led to a *reduction* in the number of lawsuits filed against CCR members.<sup>77</sup>

2. The Committee next theorizes (ACC Br. at 36-37) that the number of claims against Old CT increased after 2000 because plaintiff attorneys learned of “problematic facts demonstrating how profit was placed above safety as the lives of unwitting consumers, employees, and bystanders were placed in danger.” DBMP disagrees strenuously with this hyperbolic characterization of Old CT’s conduct, but that is beside the point. Liability in an asbestos case does not require proof of immoral conduct. To the contrary, in most jurisdictions a plaintiff can establish a defendant’s liability by proving exposure to asbestos from an asbestos-

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<sup>76</sup> As shown by the CCR database produced to the Committee, during 1990 to 2000, these four companies—Armstrong, USG, Federal-Mogul, and GAF—paid over 60% of the CCR’s overall indemnity and almost 67% of the CCR’s mesothelioma settlements.

<sup>77</sup> See Peterson Armstrong Report at 2 (Following dissolution of the CCR, “Armstrong probably would have received and paid fewer claims as an asbestos defendant handling its cases independently compared to the number of claims it would have continued to receive as a CCR member. To the extent that Armstrong had been named as a defendant in some complaints in the past simply because it was a CCR member, that practice would likely have ended with the CCR’s dissolution.”); Peterson USG Report at 4 (“To the extent that USG had been named as a defendant and paid some claims in the past simply because it was a named CCR member, it is likely that USG would compensate a somewhat lower number of claims outside CCR than it had as a member of CCR.”).



containing product sold by the company and that such exposure was a substantial factor contributing to the cause of plaintiff's disease.<sup>78</sup> Evidence of exposure, moreover, is largely controlled by the plaintiff, who is "one of the best persons, if not the best person, to identify the various products and substances to which he had been exposed." *McGonnell v. Kaiser Gypsum Co.*, 98 Cal. App. 4th 1098, 1104 (2002). And plaintiffs who actually worked with the product should have been well aware that AC pipe sold by Old CT contained asbestos, given that the word "asbestos" was prominently featured in the name. Likewise, Old CT used the product name to inform customers of the asbestos content of other asbestos-containing products it sold, *e.g.*, asbestos cement siding shingles, asbestos roofing felt. Nor was Old CT's identity as a supplier of these products kept hidden, given that the company name was featured on the product itself and/or the product label.

Further, on average close to 300 mesothelioma plaintiffs a year sued Old CT during the 1990s, as did many thousands more non-malignant, other cancer, and lung cancer plaintiffs, a fact which also undercuts the Committee's belief that Old CT was somehow unknown in the asbestos litigation before 2001. Once again, their own expert, Dr. Peterson, believes otherwise, testifying that he disagrees with the notion that "as time has gone on," and in particular following the Bankruptcy Wave, "plaintiffs have successfully identified new tiers of defendants." Instead, he agrees with DBMP, explaining that as some defendants left the litigation because of bankruptcy, plaintiffs' counsel have pursued more aggressively others that were already known to them:

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<sup>78</sup> See, *e.g.*, Judicial Council of California Civil Jury Instructions, No. 1203 (2021) ("Strict Liability—Design Defect—Consumer Expectation—Essential Factual Elements"), available at <https://www.courts.ca.gov/partners/317.htm>; Judicial Council of California Civil Jury Instructions, No. 435 (2021) ("Causation for Asbestos-Related Cancer Claims").

It's not so much that they've identified new defendants, they always knew about them. They've turned to them now and they're demanding and receiving bigger settlements from them. So it's not a discovery of a defendant that the plaintiffs [sic] lawyers didn't know about, it's that now those defendants have stepped up, they've moved from the fourth level to the third or the second or the first, it's the role these companies play not the fact that they're known or unknown.<sup>79</sup>

That, of course, is precisely what happened to Old CT in the aftermath of the Bankruptcy Wave, with plaintiffs' counsel and their clients more and more "turn[ing] to" Old CT in cases in which the company would not have been sued prior to 2001.

The exhibits attached to the Committee's Informational Brief themselves demonstrate that Old CT was well known to plaintiffs' counsel long before the early 2000s. Exhibit A-20, for example, is an excerpt from a February 1982 deposition of Old CT's former industrial hygienist, Mr. Horowitz, that related largely to Old CT's AC pipe manufacturing operations, which the Committee cites (ACC Br. at 22 & n. 82) in support of the proposition that Old CT was aware of the hazards of asbestos in 1962. Exhibit A-21 is the 1964 memorandum prepared by Mr. Horowitz following the Selikoff conference, which was attached as an exhibit to his 1982 deposition, and on which the Committee also relies (ACC Br. at 22 & n. 83) to argue that Old CT had extensive knowledge of asbestos hazards "at all relevant times." Exhibits A-11 and A-12 are excerpts from Old CT's discovery responses during the 1990s in which it described the asbestos-containing products sold by the company. Exhibit A-4 contains excerpts from the fifth edition of a book by long-time plaintiff's corporate knowledge expert Barry Castleman; the portions of the book the Committee attaches relate at least in part to Old CT's purported knowledge of asbestos hazards. While this fifth edition was published in 2005, earlier editions of Dr. Castleman's

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<sup>79</sup> Transcript of Hearing, *In re Federal Mogul Global et al.*, No. 01-10578 (D. Del. June 20, 2005), at 740-41 ("Peterson Federal-Mogul Testimony") (Ex. 53).

book—including the first edition published in 1984—also contained information about Old CT.<sup>80</sup> In short, long before 2001, plaintiffs’ attorneys had information regarding, among other things, the asbestos-containing products sold by Old CT and the knowledge possessed by the company relating to the hazards of asbestos. Nonetheless, prior to 2001, Old CT was sued in only a relatively small number of mesothelioma cases each year.

3. The Committee has no better luck with its effort (ACC Br. at 37) to blame the increase in filings post 2000 on a median 45-year latency period for mesothelioma combined with Old CT’s “late” entry into the asbestos-containing products market. To begin, this contention wrongly assumes that plaintiffs who sued Old CT had no exposure to asbestos prior to their purported work with Old CT asbestos-containing products. Plaintiffs, however, regularly asserted other, earlier asbestos exposures, which means that for them the latency period began prior to their first alleged exposure to an Old CT asbestos-containing product. Moreover, while the Committee points to Old CT’s 1962 entry into the AC pipe market, it ignores that prior to 1962, the company sold other asbestos-containing products, including joint compound through June 1956. *See* DBMP Informational Br. at 11-15.

Further, as the paper relied upon by the Committee reports, the latency period for mesothelioma has “a great range of variability,” with a normal (or Gaussian, as described in the paper) distribution curve around the mean.<sup>81</sup> In other words, the reported median latency period

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<sup>80</sup> *See* Excerpts from Barry I. Castleman, *Asbestos: Medical and Legal Aspects* (1st ed. 1984) (Ex. 54).

<sup>81</sup> Alessandro Marinaccio *et al.*, *Analysis of Latency Time and its Determinants in Asbestos Related Malignant Mesothelioma Cases of The Italian Register*, 43 *Eur. J. Cancer* 2722, 2725 (2007) (“Marinaccio 2007”) (ACC Br., Ex. A-39). This paper examined the latency period for diagnoses from 1993-2001, and observed that the latency period was longer in more recently diagnosed cases. *Id.* at 2723, 2725 (“Latency increased constantly during the observed period with respect to the year of diagnosis.”). Consistent with this finding, other papers that have analyzed earlier mesothelioma diagnoses have reported shorter latency periods. *See, e.g.*, Gillian Frost, *The Latency Period of Mesothelioma Among a Cohort of British Asbestos Workers (1978-2005)*, 109 *Brit. J. Cancer* 1965 (2013) (reporting 22.8 year median latency of 614 individuals who died of mesothelioma between 1978 and 2005; excluding 24 cases diagnosed within 10 years of first exposure, the median latency was 30.2 years).

does not describe a minimum number of years after first exposure that must lapse before mesothelioma will occur. Rather, it describes the midpoint of observed latency periods, with an equal number of individuals experiencing both shorter latency periods and longer latency periods. For the over 2,000 men with malignant pleural mesothelioma considered in the Marinaccio 2007 paper, the latency period ranged from a low of 6 to a high of 84 years, with 90 percent of cases having a latency period of 26 to 64 years.<sup>82</sup> This, in turn, means that even focusing just on Old CT's AC pipe, which was first sold by the company in 1962, and even assuming that no plaintiff experienced any asbestos exposure prior to his or her work with that pipe, Old CT should have experienced a steady increase in mesothelioma claims over time starting sometime in the late 1980s (26 years after it first sold AC pipe). As described above, what Old CT experienced instead was an abrupt surge in mesothelioma lawsuits starting in 2001.<sup>83</sup>

In short, the intense growth in mesothelioma claims experienced by Old CT starting in 2001 did not result from any of the factors described by the Committee, but rather was a direct consequence of the contemporaneous bankruptcy filings of other, much more frequently sued defendants. The Committee's own expert, Dr. Peterson, has on multiple occasions acknowledged that the Bankruptcy Wave led other defendants to experience an increase in claims. In the W.R. Grace case, for example, he stated "because all the other big payers had

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<sup>82</sup> Marinaccio 2007 at Table 2.

<sup>83</sup> The Committee's suggestions (at 37) that the extraordinary number of claims faced by Old CT starting in 2001 is the result of exposures during pipe removal or because of the impact of "wear and tear" on water pipe are just silly. As to the former, claims against Old CT relating to pipe removal were few and far between, which is not surprising given that the average service life for AC pipe is between 65 and 105 years. *See* 2012 AWWA Report at 8 (Figure 5). And as to the latter, as discussed above, there is no link between mesothelioma or any other disease and ingestion of asbestos, as might theoretically occur by drinking water that flowed through AC pipe that had experienced "wear and tear."

gone into bankruptcy” the number of claims Grace would have faced had it not filed for bankruptcy in 2001 “would have increased greatly.”<sup>84</sup> And, in the A.P.I. case, Dr. Peterson made a similar observation regarding a much less frequently sued defendant, which he believed “became a focus of asbestos litigation” after the Bankruptcy Wave caused “the most significant source of payments to asbestos claimants [to] evaporate[.]”<sup>85</sup> Indeed, consistent with Dr. Peterson’s opinions, and as the Committee acknowledges (at 33 n.131), multiple other companies aside from Old CT experienced the same tsunami of lawsuits in the aftermath of the Bankruptcy Wave, a fact that sharply undercuts the Committee’s contention that factors unique to Old CT—as opposed to the inventiveness of the plaintiffs’ bar—were the cause.<sup>86</sup>

**B. Old CT’s Post-2000 Settlement and Defense Costs Were Compounded By Plaintiffs’ Litigation Tactics.**

DBMP explained in its Informational Brief (at 18-20) how Old CT’s defense costs were adversely impacted by plaintiffs’ faulty and potentially fabricated recollections of work with Old CT products, which recollections the company had to spend significant amounts of time and money to investigate and disprove. DBMP offered as an example a Florida case that—after incurring over \$2 million in defense costs—it tried to a defense verdict, but there were numerous other cases where such misidentification occurred. The Committee’s only response to the

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<sup>84</sup> Mark A. Peterson, W.R. Grace Projected Liabilities for Asbestos Personal Injury Claims as of April 2001 (Rev. January 2009), at 25-26 (Ex. 55). In 2000, over 1,150 mesothelioma claims were asserted against W.R. Grace, more than double the number asserted against Old CT. *Id.* at 67. *See also* Peterson Federal-Mogul Testimony at 737 (“the bankruptcies of eight other prominent defendants in 2000, 2001 would have exacerbated the situation for [other defendants], they would have expected to receive more claims”); Peterson USG Report at 4, 13 (making similar observations about USG).

<sup>85</sup> Declaration of Dr. Mark A. Peterson, Expert for Court-Appointed Legal Representative of Future Asbestos Claimants, *In re A.P.I. Inc.*, No. 05-30073 (Bankr. D. Minn. Dec. 2, 2005), at 10 (Ex. 56).

<sup>86</sup> The Committee’s offhand comment (at 37) that increased public knowledge of asbestos disease led to an overall increase in the number of asbestos-related lawsuits is belied by the claims experience of the companies that made up the Bankruptcy Wave. As noted above, for example, in just one year during the 1990s, Armstrong received as many as 1,939 mesothelioma claims.

Florida exemplar is the cavalier statement “that the tort system works” because Old CT eventually achieved a defense verdict in the case. ACC Br. at 39. But the fact that the Florida plaintiffs’ recalcitrance to engage in reasonable settlement discussions forced Old CT, at great cost, to try the case to a defense verdict fails to address that Old CT regularly settled other cases primarily to avoid incurring the prohibitive costs associated with proving similar misidentification. And, of course, it ignores the larger point that Old CT never should have been sued by this plaintiff—or many others—in the first place, as well as the significant financial burden placed on Old CT to defend unwarranted lawsuits.

DBMP’s Informational Brief also described (at 20-24) three cases where plaintiffs withheld from Old CT evidence of alternative asbestos exposure that they had asserted in claims made to the Veterans Administration or to trusts established by other bankrupt entities. The Committee’s assertions regarding those cases were addressed in DBMP’s submissions in connection with its Trust Motion, and so are not repeated here.<sup>87</sup>

### **Conclusion**

Chapter 11 remains the only means for a debtor to permanently, fairly and efficiently resolve its current and future asbestos liabilities. In stark contrast to the tort system, an ability to reach a consensual resolution through section 524(g) of the Bankruptcy Code is beneficial to all interested parties, including present and future asbestos claimants. DBMP remains committed to that goal in this proceeding.

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<sup>87</sup> See Debtor’s Trust Motion, ¶¶ 21-23; Trust Motion Reply, Ex. C at 2 to 14. DBMP addressed in its Trust Motion Reply (at ¶¶ 30-36 & Ex. C) the various assertions made in Part IV of the Committee’s Informational Brief, and so does not repeat that discussion here either.

Dated: November 5, 2021  
Charlotte, North Carolina

Respectfully submitted,

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