No. 11-1310

IN THE

Supreme Court of the United States

CONTINENTAL INSURANCE COMPANY,

Petitioner,

v.

THORPE INSULATION COMPANY, *et al.*,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether, under *Shearson/American Express, Inc. v. McMahon*, 482 U.S. 220 (1987), a bankruptcy court may deny arbitration of a core proceeding based on a claim that the chapter 11 mass-asbestos debtor breached a pre-bankruptcy agreement with the claimant by invoking for itself and third parties the protections of 11 U.S.C. §524(g). App. 19a-20a.

CORPORATE DISCLOSURE STATEMENT

Respondent Thorpe Insulation Company has no parent corporation and no publicly-held corporation holds 10% or more of its stock.[1] The other respondents, the Official Committee of Unsecured Creditors of Thorpe Insulation Company and Pacific Insulation Company, and the Honorable Charles B. Renfrew (Ret.), the court-appointed Futures Representative, are not business organizations, and do not have issued and outstanding stock, or any stockholders of any kind.

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[1] Thorpe Insulation Company, a California corporation, the chapter 11 debtor in this case, merged with its chapter 11 affiliate, Pacific Insulation Company, a California corporation, on October 22, 2010, the effective date of Thorpe's 524(g) plan of reorganization. Thorpe Insulation Company was the surviving California corporation in the merger, and was renamed Pacific Insulation Company. The *certiorari* petition and all the opinions below adopt the convention of referring to the reorganized and merged firm interchangeably with the pre-bankruptcy debtor as "Thorpe" or "Thorpe Insulation Company." This Brief in Opposition also adopts this convention.

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INTRODUCTION

This matter arises out of the mass-asbestos chapter 11 reorganization case of Respondent Thorpe Insulation Company ("Thorpe"). In that case, Thorpe, its related parties, representatives of both its present and future asbestos claimants,[2] and the great majority of its historical liability insurers, are seeking to resolve thousands of present and future Thorpe-related asbestos claims through a chapter 11 plan confirmed under the unique statutory scheme established by Congress solely for mass-asbestos settlements and codified at 11 U.S.C. §524(g). App. 4a-6a.

Petitioner Continental Insurance Company ("Continental") is one of a handful of Thorpe's historical liability insurers that chose not to resolve its Thorpe-related asbestos liability through Thorpe's 524(g) plan. App. 5a-6a. In conjunction with opposing confirmation of Thorpe's 524(g) plan, Continental filed a proof of claim in the bankruptcy court asserting that Thorpe's pursuit of 524(g) relief through the plan and the creation and funding of a statutory mass-asbestos trust violated a pre-bankruptcy contract between Thorpe and Continental. App. 7a, 18a. This was the "state-law breach-of-contract action arising from a pre-

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[2] Thorpe's present and future asbestos claimants are represented in this case by the Official Committee of Unsecured Creditors (the "Committee"), and the Hon. Charles B. Renfrew, Ret., the court-appointed futures claims representative (the "Futures Representative"), respectively.

bankruptcy agreement" that Continental wished to arbitrate. Pet. 10.

Expressly and faithfully applying this Court's decision in *Shearson/American Express, Inc. v. McMahon*, 482 U.S. 220 (1987), the court of appeals held that, given the peculiar nature of Continental's claim, both arbitration and allowance of Continental's claim would conflict with the federal bankruptcy policy forbidding a prospective mass-asbestos debtor's pre-bankruptcy waiver of its core 524(g) rights. App. 18a-20a, 26a-29a. In so concluding, the Ninth Circuit did not depart from, but rather *joined*, its sister circuits, expressly relying on, *inter alia*, the decisions of the Fifth and Third Circuits, *In re National Gypsum Co.*, 118 F.3d 1056 (5th Cir. 1997), and *In re Mintze*, 434 F.3d 222 (3d Cir. 2006), that Continental erroneously asserts conflict with the decision below. Pet. 3-4, 19-22; App. 15a-17a.

In fact, every circuit decision, and even the commentators that the Petition relies on, would, consistent with *McMahon*, resolve a claim for damages based on a pre-bankruptcy waiver of core bankruptcy rights in a contract otherwise subject to arbitration just the way the *Thorpe* court did. No doubt there are difficult cases in which the arbitrability of a claim that arises in bankruptcy is open to debate and over which courts might differ; but *Thorpe* is not such a case. Rather, it lies squarely within both the *McMahon* exception and the application of that exception in bankruptcy cases in all the circuits that have addressed the question.

The Petition should be denied. Any difference in the circuit courts of appeals' application of *McMahon* in bankruptcy cases is irrelevant here because this case would be decided the same way under each of those court's articulated standard. This case, moreover, arises on such idiosyncratic facts – a claim based on the propriety of a purported waiver of bankruptcy rights – and in such a narrow context – involving a plan under §524(g), a section of the Bankruptcy Code that is arcane even for bankruptcy specialists – that it does not fairly or meaningfully present any general question regarding when bankruptcy courts should adjudicate a matter that is subject to an arbitration clause.

ADDITIONAL STATUTORY PROVISION

Continental lists the Federal Arbitration Act ("FAA"), 9 U.S.C. §2, as a relevant statute, but omits the Bankruptcy Code section, 11 U.S.C. §524(g), with which the courts below held arbitration of Continental's claim would inherently conflict. App. 18a-20a, 33a, 53a-55a, 78a-79a, 94a-95a.

Section 524(g) establishes a unique and complex scheme to resolve mass-asbestos cases through the creation of a statutory trust and the entry of channeling injunctions protecting debtors, their related parties, and settling insurers from present and future asbestos liability, with the express consent of 75% of present asbestos claimants, subject to numerous conditions and findings. App. 5a.

Section 524(g) is reproduced in Respondents' Appendix for the convenience of the Court.

STATEMENT OF THE CASE

1. Thorpe distributed and installed asbestos insulation products for commercial and industrial uses between 1948 and 1972 and, for some years thereafter, it performed asbestos abatement services. App. 2a. Beginning in the 1970s, some 12,000 claims were brought by individuals alleging injury caused by exposure to Thorpe-installed or distributed asbestos. *Id*.

Thorpe purchased primary and excess general liability insurance from 1948-1980 from two dozen separate carriers. Although, historically, Thorpe's insurers defended Thorpe from asbestos-related claims and indemnified it for losses, in 1998, Continental claimed exhaustion of its policies and ceased indemnifying Thorpe. App. 2a-3a. By 2005, all of Thorpe's insurers had followed suit. App. 4a.

Thorpe disputed its insurers' claims of exhaustion. Its dispute with Continental was arbitrated, and state-court coverage litigation ensued between Thorpe and its other carriers. App. 2a-5a. Thorpe also began settlement discussions with insurers and asbestos claimants with a view to globally and consensually resolving its asbestos liability and insurance disputes through §524(g). App. 5a-6a.

Congress enacted §524(g) in 1994 in response to the crushing social and legal problems posed by asbestos. From the 1920s through approximately 1980, millions of Americans were exposed to asbestos. Those exposed may not manifest injury for

decades, but, when they do, they often suffer painful, crippling and fatal respiratory illnesses and cancers. This long latency period has made it impractical for businesses and insurers to comprehensively resolve their asbestos liabilities outside of bankruptcy. Attempts to comprehensively resolve these liabilities through class action settlements have proved unworkable. *See, e.g.*, *Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 821 (1999); *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 628-29 (1997). The alternative to bankruptcy, even for companies and insurers that would prefer a comprehensive settlement, is thousands of individual jury trials. Such a process is grossly inefficient and expensive, effectively prevents insurers from globally resolving their asbestos exposure through settlement, impedes businesses with asbestos liabilities from accessing capital, and is unfair to claimants who manifest injury late in the latency period when sources of payment have been exhausted by earlier claims.

Section 524(g), applicable only in mass-asbestos chapter 11 cases, adopts the basic framework for global resolution developed in the 1980s in the landmark reorganization of the Johns-Manville Corporation: Debtors, their related parties, and settling insurers may, in exchange for contributing to a trust dedicated to the payment of asbestos claims, comprehensively resolve all of their present and future asbestos-related liability. §524(g)(4)(A)(ii); 4 COLLIER ON BANKRUPTCY ¶ 524.07 (16th ed. 2012); *Travelers Indem. Co. v. Bailey*, 557 U.S. 137, 140-42 (2009). Those parties benefit from a "channeling injunction" that routes present and future asbestos

claims to the trust. That injunction also protects contributing insurers from present and future claims, direct actions, and the indirect contribution claims of non-settling insurers.

Section 524(g) places numerous conditions on this relief (in addition to the usual bankruptcy plan confirmation requirements) for the protection of asbestos claimants. In contrast to a conventional plan of reorganization which may, under certain circumstances, be "crammed down" on a class of creditors that rejects the plan (§1129(b)), a 524(g) plan may be confirmed only with the affirmative consent of 75% of the asbestos claimants who vote on the plan. §524(g)(2)(B)(ii)(IV)(bb). The statute also requires appointment of a legal representative to protect the interests of future claimants (defined as holders of "demands"). §524(g)(4)(B)(i), (g)(5). Finally, the bankruptcy court must find that the 524(g) trust's payment mechanisms provide reasonable assurance that present and future claims will be treated in substantially the same manner, and the 524(g) plan is fair and equitable to future claimants in light of the contributions made by the beneficiaries of the channeling injunction. §524(g)(2)(B)(ii)(V), (g)(4)(B).

Before bankruptcy, Thorpe reached four settlements with insurers who agreed to pay over $40 million to comprehensively settle their Thorpe-related asbestos liability. App. 5a-6a. In exchange, Thorpe agreed to seek to confirm a 524(g) plan that protected those insurers from that liability, and that established a trust funded by, *inter alia*, insurer settlements and remaining insurance rights against

non-settling insurers to pay Thorpe-related asbestos claims. *Id.*

Thorpe filed its chapter 11 case in October 2007 to implement its pre-bankruptcy insurer settlements, and to make the 524(g) settlement option available to other insurers willing to fund the 524(g) trust in exchange for comprehensive resolution of their Thorpe-related asbestos liability. *Id.*

The bankruptcy filing resulted in the appointment of the Committee and the Futures Representative. Thereafter, Thorpe, with the participation and support of the Committee and the Futures Representative, settled with 13 additional insurers, generating over $550 million more in settlement proceeds, for a total of 17 settling insurers and gross settlement proceeds of over $600 million to fund the 524(g) trust. Continental opted not to resolve its Thorpe-related asbestos liability through the 524(g) process, choosing instead to stand on its rights under its policies in post-confirmation litigation.

2. Continental issued primary liability insurance to Thorpe from 1971-1979. Pet. 6 n.1. In 1985, Thorpe entered into a "Wellington Agreement" with Continental that provided for arbitration of asbestos-related insurance coverage disputes. App. 2a. When Continental claimed exhaustion of its policies, the parties arbitrated the scope of remaining coverage. App. 2a-3a. The arbitrator found for Continental, and Thorpe appealed. App. 3a. Thereafter, Continental and Thorpe entered into an agreement – the "Settlement

Agreement" – resolving Thorpe's appeal. *Id.;* Resp. App. 14a.

The Settlement Agreement waived and released Thorpe's claims for additional coverage for asbestos claims under its liability insurance policies with Continental. *Id*. The Settlement Agreement, however, still left Continental exposed to Thorpe-related asbestos liability on two fronts. App. 4a. First, the Settlement Agreement did not bind individual asbestos claimants who have an independent right under California law to collect insurance proceeds (a "direct-action" right). *Id*; CAL. INS. CODE §11580. Second, the Settlement Agreement did not bind Thorpe's other insurers, who held potential contribution claims against Continental based on payments under their policies that cover the same liabilities as Continental's policies (the "Contribution Claims"). App. 4a.

The Settlement Agreement included a standard provision to ensure that the parties owned, and would not assign, the claims being released (the "Assignment Warranty"). App. 3a-4a. It also contained a standard mutual covenant that Thorpe and Continental would not voluntarily assist others in asserting claims that Thorpe and Continental released (the "Establishment Warranty"). App. 4a.

3. Continental got wind that Thorpe was exploring insurer settlements to fund a 524(g) plan and began to complain about Thorpe's bankruptcy preparations. Resp. App. 59a-61a. On September 28, 2007, Continental demanded that Thorpe confirm in writing that Thorpe, "in conjunction with a

contemplated bankruptcy filing[,]" had not and would not "take any action to assist any party in asserting claims" against Continental, "acquire, assign or assert any alleged rights" against Continental, or "take any action … designed in substance to pursue or assist with an insurance recovery" from Continental. Resp. App. 60a.

When Continental did not receive the assurances it wanted, it wrote to Abraham Sofaer, who had presided over the arbitration, to convene a new arbitration regarding Thorpe's bankruptcy preparations. App. 6a & n.2; Resp. App. 73a-90a.

Continental's purpose in requesting arbitration was to limit Thorpe's actions in chapter 11. The principal complaints were (i) that "Thorpe may well be attempting to affect [Continental's] rights via a soon-to-be-filed bankruptcy proceeding[;]" and (ii) that "Thorpe may be negotiating a bankruptcy with its adversaries, the asbestos claimants and their lawyers" that "may well be intended to resurrect rights against Continental … that were expressly released in the Settlement Agreement." App. 6a n.2; Resp. App. 88a-89a. Continental requested that the arbitrator act "as expeditiously as possible" because "a bankruptcy filing and/or any actions related thereto pertinent to the [Continental] policies may irreparably harm [Continental's] rights under the Settlement Agreement…." App. 6a n.2; Resp. App. 90a. No arbitration was ever convened, however, as Thorpe's chapter 11 filing two weeks later automatically stayed any arbitration. App. 6a-7a; 11 U.S.C. §362(a)(1).

4. In Thorpe's bankruptcy, Continental filed a proof of claim against Thorpe (as amended, the "Claim") setting forth the same claim asserted in its pre-bankruptcy letter, and further specifying that Thorpe's invocation of 524(g) relief violated the Settlement Agreement. App. 7a; Resp. App. 20a-27a. Continental asserted that Thorpe breached the Assignment Warranty and the Establishment Warranty (i) by proposing a 524(g) plan, with the support of the Committee and the Futures Representative, that preserved asbestos claimants' direct-action rights against Continental, and (ii) by acquiring from the settling insurers the Contribution Claims and proposing to vest those claims in the 524(g) trust. *Id.* With one exception, the charging allegations stem from Thorpe's pre- and post-bankruptcy activities in planning and pursuing relief under §524(g). *Id.*

The only part of the Claim arguably not tied to Thorpe's bankruptcy alleged that Thorpe "encouraged, facilitated, and voluntarily assisted" asbestos claimants in filing three direct-action complaints against Continental (the "Direct Actions") in late 2007. App. 7a, 32a n.1; Resp. App. 22a. Thorpe's bankruptcy case stayed the Direct Actions three weeks after their filing. App. 43a-44a.[3]

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[3] Although the issue was mooted by the bankruptcy court's post-remand ruling on the merits disallowing what then remained of the Claim on grounds of waiver and bankruptcy policy, App. 12a-14a, 32a-33a, 65a-70a, Thorpe denied ever encouraging the Direct Actions, or otherwise violating the

footnote continued on next page…

When Thorpe objected to the Claim, Continental cross-moved to compel arbitration. App. 7a. The bankruptcy court set the motion to compel and Thorpe's claim objection for hearing the same day and indicated it would resolve legal issues relating to the Claim in the event that the court declined to compel arbitration. *Id*. Thorpe contended that the Settlement Agreement, fairly construed, did not bar it from pursuing a 524(g) plan with its asbestos claimants but that, even if the Settlement Agreement could be so interpreted, those provisions would constitute an unenforceable waiver of bankruptcy rights. App. 112a-116a.

On October 16, 2008, the bankruptcy court denied Continental's motion to compel arbitration of its Claim. App. 8a. The bankruptcy court first determined that the proceeding (to allow or disallow a claim against the estate) was within its core jurisdiction. *Id*; 28 U.S.C. §157(b)(2)(B). The

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Establishment Warranty in any respect, and there is no record evidence to support Continental's contrary factual allegations. App. 68a; Pet. 8. Its assertions that Thorpe in fact breached the Settlement Agreement by "working with asbestos claimants to assist them in bringing direct actions against Continental," was denied under oath by both the Thorpe and asbestos claimants' representatives involved. *Id*. Thorpe also denied that any of its acts violated the Assignment Warranty and the bankruptcy and district courts agreed, finding that the Assignment Warranty did not prevent the acquisition and vesting of Contribution Claims in a 524(g) trust. App. 82a, 113a. The Ninth Circuit, because of its waiver ruling, did not address the question, but "doubt[ed]" that Continental's contrary reading "is correct." App. 28a n.15.

bankruptcy court recognized that arbitration of a core matter did not of itself necessarily conflict with bankruptcy policy, but reasoned that this particular core matter should be heard by the bankruptcy court because Continental had raised claims that directly implicated the underlying purposes of the Bankruptcy Code and the administration of the 524(g) case before the bankruptcy court. App. 8a-9a.

The bankruptcy court then sustained Thorpe's Claim objection as a matter of law. App. 9a-11a. Continental's interpretation of the Settlement Agreement as prohibiting Thorpe from (i) acquiring the Contribution Claims, and (ii) formulating and prosecuting a 524(g) plan was unsupportable; in any event, any contractual provision prohibiting this conduct would be an unenforceable waiver of core bankruptcy rights. *Id.*

The district court affirmed the bankruptcy court, with a limited exception. App. 11a-12a, 73a-84a. Agreeing that the claim objection was a core matter, and applying "the strictest standard enunciated by an appeals court," App. 78a n.3, the district court determined that arbitration of this matter would inherently conflict with the purposes of the Bankruptcy Code. App. 11a, 78a-79a. The Claim "raised difficult questions that went to the heart of the management of the bankruptcy estate," App. 78a, in particular, whether a pre-bankruptcy contract could effectively override the 524(g) scheme. App. 11a, 78a-79a.

The district court also affirmed the bankruptcy court's determination that the Assignment and

Establishment Warranties did not preclude Thorpe from negotiating with asbestos claimants to propose and confirm a 524(g) plan that (i) sought to acquire Contribution Claims and vest them in a 524(g) trust, and (ii) preserved asbestos claimants' existing direct-action rights against Continental, as "Thorpe's actions are part-and-parcel of its attempt to establish a trust to pay asbestos claims and to avail itself and certain third parties of the protections of 11 U.S.C. §524(g)." App. 11a, 80a-83a. The district court observed that, through the Claim, Continental sought the benefit of a 524(g) channeling injunction – protection from direct actions and Contribution Claims – without providing any value to the 524(g) trust:

> Section 524(g) would not function properly if [Continental's] view of the Settlement Agreement were followed. [Continental's] reading of the Settlement Agreement would require Thorpe essentially to destroy valuable contribution rights held pre-petition by the other settling insurers and not Thorpe in order to effectuate a §524(g) injunction. For §524(g) to function properly in this context, the Thorpe asbestos liability of the settling insurers is shifted to the asbestos trust and along with that liability comes the corresponding contribution claim assets. [Continental's] argument that §524(g) does not have to work this way – that the contribution claims can merely be discarded – is self-serving, to say the least, and misses the

> further point that any destruction of valuable assets can act as a barrier to the successful confirmation of a reorganization plan.

App. 82a-83a (emphasis omitted).

The district court, however, reversed the bankruptcy court's disallowance of the Claim solely "as it relates to the alleged pre-petition encouragement of direct actions by asbestos claimants against [Continental] and remand[ed] the matter for further findings." App. 11a-12a, 74a.

On remand, Thorpe moved for summary judgment on what remained of the Claim. App. 12a. Continental, in contrast, sought to expand the scope of the remand to relitigate whether Thorpe's conduct in negotiating and proposing a 524(g) plan violated the Establishment Warranty. *Id.*; App. 32a-33a; 65a-69a. Continental requested expansive discovery related to Thorpe's planning for a 524(g) bankruptcy case, and argued that Thorpe and asbestos claimants' counsel had jointly pursued a 524(g) plan as a part of a "game plan" for dealing with Thorpe's asbestos liabilities and coverage disputes that violated Continental's contractual rights. *Id.*

Before ruling on Thorpe's motion for summary judgment, the bankruptcy court repeatedly offered Continental an opportunity for discovery and an evidentiary hearing limited to the question of whether Thorpe encouraged the filing of the Direct Actions. App. 13a, 68-69a. In spite of this proposal,

Continental refused to limit its Claim on remand. *Id.*

Based on Continental's description of its Claim in its pleadings and refusal to narrow the remand to the encouragement of the Direct Actions, the bankruptcy court determined that its earlier ruling, which had been affirmed by the district court, applied equally on remand. App. 12a-13a, 32a-33a, 53a-57a, 69a-70a. Accordingly, the bankruptcy court denied Continental's renewed motion to compel arbitration and granted Thorpe's motion for summary judgment. App. 35a-36a, 59a-60a.

Continental appealed again to the district court. App. 13a-14a, 31a-33a. The district court affirmed, finding that "Continental repeatedly refused to limit the scope of its claim to matters that were within the scope of the remand…." *Id.* Arbitration of the Claim under these circumstances would inappropriately "require the arbitrator to decide important matters of bankruptcy policy involving §524(g)." *Id.*

5. In the court of appeals, Continental argued that its Claim was a "non-core" matter with respect to which the bankruptcy court had no discretion to deny arbitration. App. 14a. Continental further argued that even if the Claim were a core matter, the courts below erred in denying arbitration because arbitrating the Claim would not "inherently conflict" with the Bankruptcy Code. *Id.*

The court of appeals affirmed the Claim disallowance and core matter determination, rulings

that Continental does not challenge in the Petition, and also affirmed the denial of arbitration. App. 2a.

Regarding the denial of arbitration, the court of appeals observed that the core/non-core distinction, although relevant, "is not alone dispositive." App. 17a. Expressly joining its sister circuits, the court of appeals held that "even in a core proceeding, the *McMahon* standard must be met – that is, a bankruptcy court has discretion to decline to enforce an otherwise applicable arbitration provision only if arbitration would conflict with the underlying purposes of the Bankruptcy Code." *Id.* (again citing, *inter alia*, *National Gypsum* and *Mintze*).

Based on its careful review of the charging allegations in the Claim, App. 7a; Resp. App. 11a-32a, and Continental's letter requesting intervention by the arbitrator, App. 6a & n.2, 18a; Resp. App. 73a-90a, the court of appeals affirmed the determinations below that the specific nature of Continental's Claim that Thorpe had breached the Settlement Agreement by cooperating with asbestos claimants in negotiating and proposing its 524(g) plan of reorganization and seeking to establish and fund a 524(g) trust caused "an inherent conflict between arbitration and the statute's [*i.e.*, §524(g)'s] underlying purposes." *McMahon*, 482 U.S. at 227; App. 18a-23a.

REASONS FOR DENYING THE PETITION

A. Arbitration of the Claim Was Properly Denied Under *McMahon* in Accordance with All Applicable Circuit Court Decisions.

1. *At Continental's Urging, and Without Objection from Thorpe, the Court of Appeals Adopted and Applied the* McMahon/ National Gypsum *Standard.*

Thorpe, Continental, and, at least since this Court's 1987 *McMahon* decision, all the lower federal courts, agree that pre-bankruptcy arbitration rights are generally preserved in bankruptcy, even with respect to core bankruptcy matters, unless arbitration of the particular matter would inherently conflict with the purposes or policy of the Bankruptcy Code. *McMahon*, 482 U.S. at 226-27.

Continental, nevertheless, mischaracterizes the Ninth Circuit's decision in this case as conflicting with *In re National Gypsum Co.*, 118 F.3d 1056 (5th Cir. 1997), and *In re Mintze*, 434 F.3d 222 (3d Cir. 2006). Pet. 3-4, 19-22.

This supposed conflict is made up of whole cloth.

As had the district court and the bankruptcy court, App. 77a-78a & n.3 (applying the *Mintze* standard "because it is the strictest standard enunciated by an appeals court"), App. 8a-9a, the Ninth Circuit expressly "join[ed]" its "sister circuits" by adopting and applying the *National Gypsum* and

Mintze standards in deciding this case. App. 17a (citing, *inter alia*, *Mintze* and *National Gypsum* as establishing applicable standard).

Indeed, Continental itself, in arguing this case below, contended that ***consensus*** rather than conflict existed with respect to the applicable standard:

> The vast majority of Circuit Courts that have considered this issue, as well as a Bankruptcy Appellate Panel of this Circuit, *In re Gurga*, 176 B.R. 196 (B.A.P 9th Cir. 1994), and district courts within this Circuit, have held that the "inherent conflict" test enunciated in *In re National Gypsum Company*, *In re Mintze*, and *In re Electric Machinery Enterprises, Inc.*, among others (AOB at 26), is the appropriate standard. *See, e.g., In re Cooley*, 362 B.R. 514, 519-20 (N.D. Ala. 2007) ("***[M]ost courts*** have concluded a bankruptcy court has ***no discretion*** to refuse to enforce an arbitration agreement unless arbitration would seriously jeopardize the objectives of the Bankruptcy Code. The Second, Third, Fourth and Fifth Circuit Courts of Appeal, and the Ninth Circuit Bankruptcy Appellate Panel have all refused to apply a simple core versus non-core test in their search for a *McMahon* exception to the FAA's mandate.")

Appellant's Reply Br. at 13, *Continental Ins. Co. v. Thorpe Insulation Co. (In re Thorpe Insulation Co.)*, 671 F.3d 1011 (9th Cir. 2012) (No. 10-55744, Dkt. No. 20, filed Dec. 15, 2010) (emphasis supplied by Continental).

Thorpe, for its part, argued below that, under any of the existing formulations of the applicable standard, expressly including that of *National Gypsum,* Continental's Claim was not arbitrable:

> This Court need not choose among these formulations of the scope of discretion because arbitration was properly denied here under any of them. … Even under *National Gypsum*, … the bankruptcy court properly denied arbitration because the Claim directly implicated issues at the heart of the 524(g) process and the Congressional policy in favor of consensual and global resolution of mass-asbestos liabilities that it embodies.

Br. of Appellees Thorpe Insulation Co., et al. at 31, *Thorpe*, 671 F.3d 1011 (9th Cir. 2012) (No. 10-55744, Dkt. No. 13, filed Nov. 17, 2010).

In light of the parties' apparent agreement on the point, it is unsurprising that the Ninth Circuit adopted and applied the *National Gypsum* standard in this case. App. 16a-17a (citing *National Gypsum* approvingly four times); App. 20a-21a (citing *National Gypsum* three more times).

Given the specific nature of the Claim, the *National Gypsum* court surely would have found, just as *Thorpe* did, that the bankruptcy court properly denied arbitration. *National Gypsum*, like *Thorpe,* involved a non-settling insurer attacking a 524(g) reorganization by asserting contribution claims and invoking arbitration rights under a Wellington agreement. 118 F.3d at 1059-61. The 524(g) trust in that case defended the claim by invoking the federal bankruptcy discharge under the confirmed plan. *Id.*; 11 U.S.C. §§524(a), 1141. The Fifth Circuit found that the bankruptcy court properly denied arbitration of the issue whether the discharge precluded the insurer from asserting these rights under the Wellington agreement:

> We think that, at least where the cause of action at issue is not derivative of the pre-petition legal or equitable rights possessed by a debtor but rather is derived entirely from the federal rights conferred by the Bankruptcy Code, a bankruptcy court retains significant discretion to assess whether arbitration would be consistent with the purpose of the Code, including the goal of centralized resolution of purely bankruptcy issues, the need to protect creditors and reorganizing debtors from piecemeal litigation, and the undisputed power of a bankruptcy court to enforce its own orders.

118 F.3d at 1069.

The *Thorpe* court was faced with a similar question under similar circumstances. Continental claimed that the Settlement Agreement precluded Thorpe from cooperating with its asbestos claimants in prosecuting a 524(g) plan of reorganization that preserved direct-action rights and Contribution Claims against Continental. App. 7a. Thorpe's Claim objection asserted that the Bankruptcy Code barred the Claim because §524(g) expressly contemplated and conditioned relief on such cooperation. App. 10a-11a; §524(g)(2)(B)(ii)(IV)(bb) (conditioning confirmation of 524(g) plan on acceptance of 75% of voting asbestos claimants). The decisive issue raised and litigated below (which Continental does not challenge in this Court) was the scope of the preclusive effect of federal bankruptcy law with respect to a claim relating to Thorpe's prosecution of the 524(g) plan then before the bankruptcy court. App. 26a-29a. Just as the *National Gypsum* court before it determined that a mass-asbestos debtor's 524(a) discharge defense to a non-settling insurer's contribution claim was non-arbitrable, the Ninth Circuit, agreeing with the district court that "Continental's claim raised questions 'go[ing] to the heart of §524(g) and the management of an asbestos-related bankruptcy estate,'" App. 19a, found that:

> The purpose of §524(g) is to consolidate a debtor's asbestos-related assets and liabilities into a single trust for the benefit of asbestos claimants. *See* H.R. Rep. 103-835, at 46-48. Congress intended that the trust/injunction mechanism be "available

> for use by any asbestos company facing … overwhelming liability." *See id.* at 48. Congress tasked bankruptcy courts with ensuring that §524(g)'s "high standards" are met and gave them authority to implement and supervise this unique procedure. *See id.* at 47. A claim based on a debtor's efforts to seek for itself and third parties the protections of §524(g) implicates and tests the efficacy of the provision's underlying policies. Because Congress intended that the bankruptcy court oversee all aspects of a §524(g) reorganization, only the bankruptcy court should decide whether the debtor's conduct in the bankruptcy gives rise to a claim for breach of contract. Arbitration in this case would conflict with congressional intent.

App. 19a-20a. For these reasons, Continental's claim of conflict with *National Gypsum* and *Mintze* is spurious.

2. *The Ninth Circuit did not Adopt Centralization of Disputes as a Sufficient Condition for Denying Arbitration in Bankruptcy Matters.*

Continental reserves special scorn for the Ninth Circuit's reliance on the deeply-rooted bankruptcy policy favoring centralization of disputes, claiming that the Ninth Circuit's holding accords "bankruptcy courts … broad discretion to override agreements to arbitrate whenever the bankruptcy policy of 'centralization' is implicated—that is, in every claim

by a creditor against a debtor" and that this supposed holding is inconsistent with *National Gypsum* and its progeny. Pet 15, 22.

But *National Gypsum* itself, as noted above, expressly relied on just that policy in denying arbitration of the matter before it. 118 F.3d at 1069 (noting "goal of centralized resolution of purely bankruptcy issues [and] the need to protect creditors and reorganizing debtors from piecemeal litigation"). And, of course, bankruptcy is a collective federal procedure the basic premise of which, from time immemorial, has been that centralization of dispute resolution is essential to the preservation of value and equal treatment of creditors of an insolvent estate. *United States Fid. & Guar. Co. v. Bray*, 225 U.S. 205, 217 (1912) ("[T]he jurisdiction of the bankruptcy courts in all 'proceedings in bankruptcy' is intended to be exclusive of all other courts, and that such proceedings include, among others, all matters of administration, such as the allowance, rejection and reconsideration of claims, the reduction of the estates to money and its distribution, the determination of the preferences and priorities to be accorded to claims presented for allowance and payment in regular course, and the supervision and control of the trustees and others who are employed to assist them.").

Indeed, for these reasons, the Framers expressly assigned to Congress the authority to make "uniform Laws on the subject of Bankruptcies throughout the United States," U.S. CONST. art. I, §8, cl. 4, even though debtor-creditor law otherwise, then as now, has been a matter of state law. *See also* THE

FEDERALIST NO. 42, at 271 (C. Rossiter ed., 1961) ("The power of establishing uniform laws of bankruptcy is so intimately connected with the regulation of commerce, and will prevent so many frauds where the parties or their property may lie or be removed into different States, that the expediency of it seems not likely to be drawn into question.").

In this respect, reconciling the FAA and the Bankruptcy Code differs slightly from reconciling the FAA with other competing federal statutes that are primarily substantive in nature. When the federal policy is substantive, ordinarily there is little reason to think that arbitration is incapable of securing the federal right at issue. *See Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983). But some federal bankruptcy policy is at its heart procedural; it is a procedure that requires centralization, and individual arbitrations may therefore more often lead to an inherent conflict with federal bankruptcy policy. *See Celotex Corp. v. Edwards*, 514 U.S. 300, 308 (1995) ("'Congress intended to grant comprehensive jurisdiction to the bankruptcy courts so that they might deal efficiently and expeditiously with all matters connected with the bankruptcy estate.'") (quoting *Pacor, Inc. v. Higgins*, 743 F.2d 984, 994 (3d Cir. 1984)). Indeed, in chapter 11 cases, where complex, interdependent, comprehensive plans are negotiated and confirmed under the close supervision of the bankruptcy court, the need for centralized, bankruptcy court, resolution of plan issues may be particularly compelling. It is difficult to imagine, for example, how a reorganization plan could ever be successfully

confirmed in a complex case if the resolution of the legal and factual issues relating to the treatment of individual creditors under that plan were under the separate and uncoordinated control of various private arbitrators rather than the bankruptcy court simply because the credit agreements, notes and contracts underlying those creditors' claims had arbitration clauses.

For these reasons, courts have permissibly used centralization of issues and disputes as one of the factors in applying the *McMahon* exception.

But no circuit court of appeals, and certainly not *Thorpe* or *National Gypsum,* has held that the general policy of centralization of disputes would prevent arbitration of ***any*** claim filed in a bankruptcy. In *Thorpe,* the Ninth Circuit was clear that "centralizing the dispute in this case had heightened importance because the bankruptcy court found a need to expedite resolution of Continental's claim … and to coordinate resolution of the claim with the plan confirmation process." App. 21a-22a. The Ninth Circuit made it absolutely clear that the bankruptcy policy of centralization would not preclude arbitration of core matters that were not integral to the chapter 11 reorganization itself. App. 21a-22a n.10 (expressly noting that the putative "standalone" claim that Continental had abandoned relating to the encouragement of the Direct Actions would have been subject to arbitration had Continental opted to assert it).

Finally, Continental singles out the Second Circuit decision *In re United States Lines, Inc.*, 197

F.3d 631 (2d Cir. 1999), mischaracterizes it as the primary authority supporting *Thorpe*, and then engages in an extended critique of that case. Pet. 3-4, 22-25. *United States Lines*, of course, on its face adopts and relies on the *National Gypsum* standard and, like *National Gypsum,* notes that not all core matters are non-arbitrable. 197 F.3d at 640. Unlike *Thorpe* and *National Gypsum*, however, *United States Lines* involved a claim ***by*** the debtor's estate rather than a claim ***against*** that estate; that is, in *United States Lines* the mass-asbestos trust was asserting a claim for contract breach against its non-settling insurers rather than the other way around. *Id.* at 634. Accordingly, a serious issue existed in that case whether the matter was core or non-core. After this Court's decision in *Stern v. Marshall*, 131 S. Ct. 2594 (2011), it is unclear whether the Second Circuit's ruling on the core/non-core issue can be sustained. Although Continental suggests that *United States Lines* was "influential," Pet. 22, it really does not say how, as the later circuit court decisions barely mention it. *In re White Mtn. Mining Co.*, 403 F.3d 164, 168, 169 (4th Cir. 2005) (noting only that *United States Lines* denied arbitration of an international arbitration agreement and held that a bankruptcy court may not deny arbitration just because it involves a core proceeding); *In re Mintze*, 434 F.3d 222, 231 (3d Cir. 2006) (noting only *United States Lines'* holding that the *McMahon* standard must be independently satisfied as to core matters); *In re Elec. Mach. Enters., Inc.*, 479 F.3d 791, 798-89 (11th Cir. 2007) (not referring to *United States Lines* at all in affirming, under *McMahon,* district court's reversal of a bankruptcy court order denying

arbitration of a turnover action whether the matter was core or non-core); *In re Crysen/Montenay Energy Co.*, 226 F.3d 160, 165-66 (2d Cir. 2000) (affirming, following *United States Lines,* lower court's stay of a bankruptcy court adversary proceeding in favor of arbitration in a non-core matter). Be that as it may, the question in this case is not whether *United States Lines* correctly applied the *National Gypsum* standard to a contract claim by the debtor's estate that may well have been non-core, as Continental suggests, but whether *Thorpe*, following *National Gypsum* on closely analogous facts in a very similar context, did so in respect of a clearly core claim against the estate rendered unenforceable by the Bankruptcy Code.

3. *Continental's Claim Raised Issues of Federal Bankruptcy Law on its Face.*

Continental persists in this Court, in the face of the charging allegations of its own Claim, App. 7a; Resp. App. 11a-32a, in asserting that that Claim did not expressly and directly implicate federal bankruptcy policy. Pet. 28 ("Continental's claim alleges a breach of its pre-bankruptcy Agreement with Thorpe. The claim did not arise under §524(g) or any provision of the Bankruptcy Code."). The Ninth Circuit, after fully analyzing the Claim and its charging allegations, however, rejected Continental's attempt to mischaracterize it in this way. App. 18a ("[W]e note that Continental's claim is not, as Continental contends on appeal, 'independent of Thorpe's bankruptcy.'"). Even a cursory review of the Claim makes it apparent that the damages Continental sought were based entirely on Thorpe's

actions invoking the protections of §524(g) with the support of its asbestos claimants in order to confirm a 524(g) plan, create a 524(g) trust for its asbestos claimants, and protect itself and other settling parties (but not Continental, which did not qualify for such relief) with a 524(g) channeling injunction.[4] Indeed, concurrently with asserting the Claim and seeking to compel its arbitration, Continental, in opposing Thorpe's 524(g) plan, asserted that the same allegations as underlay the Claim also served as a basis to deny plan confirmation. *See* Supp. Excerpts of Record at Tab 107, *Thorpe,* 671 F.3d 1011 (9th Cir. 2012) (No. 10-55744, Dkt. No. 16, filed Nov. 17, 2010) (Continental's objection to confirmation of Thorpe's 524(g) plan); App. 52a ("The Insurers have stated that the Remaining Claims and their objections to the Plan involve common issues of fact."); *see also* App. 46a-57a.

Thus, although it is true that the Claim relied on state law, not §524(g), as the legal basis for damages, that damage claim was predicated squarely on Thorpe's pursuit of 524(g) relief and, as the courts below all found, was barred by §524(g). App. 7a-14a, 26a-29a. By invoking Thorpe's assertion of 524(g) rights as the predicate for its damage claim, Continental raised critical issues of

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[4] The finding by all three courts below, amply supported by the record, App. 12a-14a, 21a-22a & n.10, that Continental abandoned and waived its factually-unsupported "standalone" claim for damages based on Thorpe's alleged pre-bankruptcy encouragement of the Direct Actions, *supra* at 14-15 & n.3, is obviously a fact-bound determination unworthy of review.

bankruptcy policy regarding access to §524(g) and the proper scope of 524(g) protection for mass-asbestos debtors.

Continental claims that *National Gypsum* and its progeny "have concluded that bankruptcy courts may refuse to enforce arbitration clauses only in proceedings to vindicate rights created by the Bankruptcy Code itself – rights that often exist to protect creditors as a group." Pet. 4. In *Thorpe,* the Ninth Circuit, indeed all three courts below, adopted and applied that very proposition in deciding this case. App. 7a-14a, 18a-23a. Each of those courts noted that, as a matter of law, and on the face of the Claim, Continental sought damages based on Thorpe's invocation of the collective 524(g) right for itself, its asbestos claimants and its settling insurers. *Id.* Continental put Thorpe's 524(g) rights in issue in this case. *Id.* Thus, it fell within the discretion of the bankruptcy court to adjudicate the scope of the bar to the damage claim created by §524(g) rather than remit the issue to arbitration.

In contending that its Claim did not implicate a right that arose under the Bankruptcy Code, while conceding that Thorpe's defense to that Claim implicated §524(g), Pet. 28, Continental appears to conflate *National Gypsum*'s standard for reconciling the FAA and the Bankruptcy Code with the term of art "arising under," which appears in 28 U.S.C. §1331 and marks the scope of the federal question jurisdiction of the lower federal courts.

Whether the Claim "arises under" the Bankruptcy Code for purposes of determining federal

question jurisdiction under 28 U.S.C. §1331 is irrelevant. *National Gypsum* states that whether a core matter is arbitrable turns not on the statutory basis for jurisdiction, but rather "on the underlying nature of the proceeding," namely whether "arbitration of the proceeding would conflict with the purposes of the Code." 118 F.3d at 1067.

Proper reconciliation of competing policies in the FAA and the Bankruptcy Code under *McMahon* has nothing to do with the scope of the federal question jurisdiction or the elaborate and technical caselaw developed thereunder. There is no doubt that the bankruptcy court had jurisdiction over the Claim, 28 U.S.C. §1334, and that it constituted a core matter, 28 U.S.C. §157(b)(2)(B), without regard to what law the Claim "arose under." Under the *National Gypsum* test adopted by *Thorpe,* the question before the Ninth Circuit was not the basis for jurisdiction, but whether arbitration of that core matter would conflict with and jeopardize the objectives of the Bankruptcy Code under the circumstances of the case. App. 17a. As set forth above, the Ninth Circuit properly determined that it would. App. 18a-23a.

B. The Specific Issues Raised by this Case Are Unlikely to Recur.

The specific conflict between the Bankruptcy Code and federal arbitration policy at issue in this case is highly unlikely to recur and does not have broad systemic implications going forward. Mass-asbestos bankruptcies are a unique subspecialty within the world of chapter 11 bankruptcy governed

by a statute, §524(g), directed solely at this particular legacy liability. Asbestos has not been in wide use in this Nation since the early 1970s and, as is typical of these cases, the asbestos liabilities and the insurance assets that form the foundation of the *Thorpe* chapter 11 reorganization date from asbestos exposure that occurred in the period 1948-1980. Only 70 chapter 11 cases implicating the Bankruptcy Code's mass-asbestos provisions have been filed since the adoption of §524(g) in 1994, as against some 23 ***million*** bankruptcy cases generally.[5]

Even within the arcane subworld of 524(g) reorganizations, the issue raised in this case is idiosyncratic. In no other 524(g) case has a non-settling insurer argued that it was entitled to arbitrate a claim for monetary damages based upon its insured's invocation of §524(g). Non-settling insurer claims of "conflict of interest" and "bad faith" arising out of the negotiations over a 524(g) plan between the debtor and asbestos claimants are bandied about in these cases commonly (and are commonly rejected), but they are uniformly ***adjudicated***, not arbitrated. Proper application of the *McMahon*/*National Gypsum* standard to the

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[5] *Compare History of Asbestos Bankruptcies* (chronological order) maintained by Crowell & Moring, http://www.crowell.com/Practices/Bankruptcy/History-of-Asbestos-Bankruptcies (last visited June 20, 2012) *with Bankruptcy Statistics* maintained by Administrative Office of the U.S. Courts on behalf of the Federal Judiciary, http://www.uscourts.gov/Statistics/BankruptcyStatistics.aspx, (last visited June 20, 2012).

Claim is important to Continental, Thorpe and Thorpe's asbestos claimants, but is not a matter of broad systemic importance.

C. The Court of Appeals Appropriately Reconciled Competing Federal Policies.

If this Court were to grant *certiorari*, it would find that the decision below fully comports with a proper and comprehensive review of the relevant policies and appropriately applied the *McMahon* standard to the peculiar problem posed by the assertion of a claim in bankruptcy predicated on the breach of a pre-bankruptcy contract, when the alleged breach was accessing 524(g) relief.

1. *The Policy Against Bankruptcy Waivers.*

Pre-petition bankruptcy waivers are invalid, as they defeat the Bankruptcy Code's goal of allowing a "fresh start" to "the honest but unfortunate debtor." *Grogan v. Garner*, 498 U.S. 279, 286-87 (1991) (citation omitted). The courts below properly found that, to the extent the Establishment Warranty were read to prohibit Thorpe from proceeding with its 524(g) plan, that covenant would be unenforceable as an invalid pre-petition waiver of fundamental protections of the Bankruptcy Code. App. 26a-29a; *In re Huang*, 275 F.3d 1173, 1177 (9th Cir. 2002) ("It is against public policy for a debtor to waive the prepetition protection of the Bankruptcy Code.... [T]his prohibition of prepetition waiver has to be the law; otherwise, astute creditors would routinely require their debtors to waive."). In so holding, the Ninth Circuit echoes a deeply-rooted and long-

established principle of law. *See, e.g.*, *In re Cole*, 226 B.R. 647, 651-54 & nn.6-7 (B.A.P. 9th Cir. 1998) (citing sixteen cases for the proposition that "prepetition waivers of the bankruptcy discharge … [and] other bankruptcy benefits … are … unenforceable").

Thorpe, through the Settlement Agreement, could not have contractually disabled itself from pursuing 524(g) relief with the support of its asbestos claimants and settling insurers. Because §524(g) requires the consent of 75% of the asbestos claimants who vote on the 524(g) plan, §524(g)(2)(B)(ii)(IV)(bb), it would be impossible to confirm such a plan without cooperating with representatives of asbestos claimants to craft a 524(g) plan that they would support. Prohibiting such cooperation would effectively waive fundamental rights that Thorpe held not only for its own benefit, but for the benefit of all of its asbestos claimants and the settling insurers that stood to benefit from their invocation.

Similarly, the Bankruptcy Code renders unenforceable restrictions on assignment of claims that would result in forfeiture of pre-bankruptcy rights. *See* §541(c)(1)(A) ("an interest of the debtor in property becomes property of the estate … notwithstanding any provision in an agreement, transfer instrument, or applicable nonbankruptcy law … that restricts or conditions transfer of such interest by the debtor"). Sections 541, 524(g) and 1123 override contractual anti-assignment provisions that would otherwise prevent Thorpe's rights from vesting in the Thorpe bankruptcy estate and 524(g)

trust. *See, e.g.*, *In re Combustion Eng'g, Inc.*, 391 F.3d 190, 219 & n.27 (3d Cir. 2004).

Moreover, many approved plans of reorganization vest otherwise non-assignable claims in trusts under §1123(b)(3)(B). In *Holywell Corp. v. Smith*, 503 U.S. 47 (1992), this Court recognized that a plan may designate a trust to serve as the estate's representative to liquidate assets and distribute the proceeds to the estates' creditors pursuant to §1123(b)(3)(B). *Id.* at 50-51; s*ee also In re Mann Farms, Inc.*, 917 F.2d 1210, 1214 (9th Cir. 1990). So long as the claims are pursued for the benefit of creditors, bankruptcy law overrides any contractual or state-law statutory prohibition on assignment of the claims. *See, e.g.*, *Metro. Creditors' Trust v. PricewaterhouseCoopers, LLP*, 463 F. Supp. 2d 1193, 1198-99 (E.D. Wash. 2006) (malpractice actions vested in litigation trust pursuant to §1123(b)(3)(B) despite contractual prohibitions on assignment); *In re Avado Brands, Inc.*, 358 B.R. 868, 883 (Bankr. N.D. Tex. 2006) (tort actions vested in litigation trust pursuant to §1123(b)(3)(B) despite state-law statutory prohibition on assignment).

In short, if the Settlement Agreement barred Thorpe from negotiating with its asbestos claimants and jointly prosecuting a 524(g) plan that vested Contribution Claims in a 524(g) trust and preserved asbestos claimants' pre-existing state-law direct-action rights against Continental, then, to that extent, enforcement of the Settlement Agreement and arbitration of a claim for breach would violate fundamental bankruptcy policies under §§541(c)(1), 524(g) and 1123.

McMahon should not be read to require the FAA to become a device for objecting parties in a chapter 11 case to undermine the bankruptcy court's control and decision-making authority over the critical aspects of the administration of a mass-asbestos case and the 524(g) process that Congress envisioned would serve to globally resolve such matters. Bankruptcy law barred Continental's Claim; the scope of that bar was for the bankruptcy court to determine in light of the nature of that Claim and its centrality to Thorpe's reorganization.

2. *Third Party Interests.*

The courts below recognized that the Claim went "to the heart of §524(g) and the management of an asbestos-related bankruptcy estate." App. 19a, 78a. Section 524(g), at its heart, is a collective proceeding and a collective right. By seeking to privately arbitrate whether the proposed 524(g) plan and 524(g) trust improperly preserved direct-action rights and Contribution Claims, Continental essentially sought 524(g) relief for itself (a complete release of third-party present and future direct and indirect asbestos liability) without satisfying §524(g). App. 82a-83a. In particular, Continental was uninterested in making a "fair and equitable" contribution to the 524(g) trust sufficient to gain the consent of 75% of Thorpe's asbestos claimants. §524(g)(2)(B)(ii)(IV). In seeking to arbitrate its claim that the 524(g) plan breached the Settlement Agreement, Continental attempted to remove central issues in the chapter 11 case from the bankruptcy court, in which all parties were represented, to

Continental's preferred arbitration forum. Third-party settling insurers and asbestos claimants, those most affected by these issues, never consented to, and would have had no standing absent Continental's consent to participate in, that arbitration. The existence of these powerful third-party interests, whose protection is integral to the 524(g) scheme, underscore the need to resolve all 524(g) plan-related issues in the bankruptcy case itself and make clear the conflict between arbitration and the fundamental purposes of §524(g).

D. Continental's Unsupported Hyperbole Regarding the Scope and Effect of the Ruling Below Should Be Disregarded.

Continental loudly proclaims that the courts of appeals, in reconciling bankruptcy policy with the FAA, are systematically undermining *McMahon* and the federal policy favoring arbitration. Continental's rhetoric and imagery are grossly exaggerated and its claims that "[b]ankruptcy and arbitration are … on a collision course," Pet. 34, that "[a] cloud … hangs over every arbitration clause," Pet. 33, and that the courts of appeals "have succeeded only in sinking ever deeper into a morass of confusion," Pet. 34, are extravagant overstatements.

In fact, the courts of appeals have uniformly applied *McMahon* in the bankruptcy context and compelled arbitration unless a specific inherent conflict with bankruptcy policy can be demonstrated. Post-*McMahon*, an overwhelming number of both core and non-core bankruptcy disputes otherwise subject to arbitration are in fact resolved in

arbitration, notwithstanding one of the parties' intervening bankruptcy filing. Michael D. Sousa, *A Morass of Federal Policy: Enforcing Arbitration Agreements in Bankruptcy Proceedings*, 15 NORTON J. BANKR. L. & PRAC. 259, 263-64 (2006).

The overwhelming consensus in the commentary is that the courts of appeals, in the wake of *McMahon,* have given *too much* rather than too little deference to the FAA in reconciling bankruptcy policy with the FAA. Note, *Jurisdiction in Bankruptcy Proceedings: A Test Case for Implied Repeal of the Federal Arbitration Act*, 117 HARV. L. REV. 2296, 2297-99 (2004); Fred Neufeld, *Enforcement of Contractual Arbitration Agreements Under the Bankruptcy Code*, 65 AM. BANKR. L. J. 525, 557-58 (1991); Mette Kurth, Comment, *An Unstoppable Mandate and an Immovable Policy*, 43 UCLA L. REV. 999, 1034 (1996); Alan N. Resnick, *The Enforceability of Arbitration Clauses in Bankruptcy*, 15 AM. BANKR. INST. L. REV. 183, 212-13, 221 (2007).

Nevertheless, even while bending over backwards to protect arbitration rights, the courts of appeals have recognized that certain core issues arising in bankruptcy cases that are inextricably intertwined with the fundamental purpose and objectives of the bankruptcy case are not arbitrable.[6]

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[6] Even Continental's own favored commentator, Paul F. Kirgis, *Arbitration, Bankruptcy and Public Policy: A Contractarian Analysis*, 17 AM. BANKR. INST. L. REV. 503 (2007), agrees that there is "[a] general consensus [] that bankruptcy

footnote continued on next page…

Thorpe is entirely within this tradition: Congress created §524(g) as the sole avenue for global settlement of crushing mass-asbestos liabilities, a national legal, social and economic problem of substantial magnitude. Thorpe, its asbestos claimants and its settling insurers, desired to invoke this mechanism. Continental, a holdout non-settling insurer, desired to attack the 524(g) plan. Continental could object to that plan and the process by which it was formulated in the bankruptcy court; but it was not entitled to remove the question of the propriety of Thorpe's pursuit of 524(g) relief and Continental's treatment under the 524(g) plan out of the bankruptcy court and into an arbitration forum.

Although review by this Court is unwarranted in any event, such review certainly should not be prompted by hyperbolic and false claims about a non-existent crisis involving a lack of enforcement of arbitration clauses in bankruptcy cases.

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law is a system of mandatory rules" and that elements of bankruptcy law that "are integral to the functioning of the bankruptcy scheme … [cannot] be overridden by private parties through pre-petition contracts." *Id.* at 538. Kirgis observes that "an arbitral award that produces a result contrary to the result that bankruptcy law would produce under the same circumstances is in violation of public policy." *Id.* Thus, even Kirgis, it seems, would not enforce an arbitral award based on a pre-petition contract that limits access to 524(g) relief or precludes a legitimate 524(g) debtor from negotiating and jointly proposing a 524(g) plan with its asbestos claimants.

CONCLUSION

For the foregoing reasons, the Court should deny Continental's petition for a writ of *certiorari*.

Respectfully submitted,

July 2, 2012

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APPENDIX

APPENDIX A —RELEVANT STATUTE: 11 USC § 524(g)

11 USC § 524(g)

(g)(1)(A) After notice and hearing, a court that enters an order confirming a plan of reorganization under chapter 11 may issue, in connection with such order, an injunction in accordance with this subsection to supplement the injunctive effect of a discharge under this section.

(B) An injunction may be issued under subparagraph (A) to enjoin entities from taking legal action for the purpose of directly or indirectly collecting, recovering, or receiving payment or recovery with respect to any claim or demand that, under a plan of reorganization, is to be paid in whole or in part by a trust described in paragraph (2)(B)(i), except such legal actions as are expressly allowed by the injunction, the confirmation order, or the plan of reorganization.

(2)(A) Subject to subsection (h), if the requirements of subparagraph (B) are met at the time an injunction described in paragraph (1) is entered, then after entry of such injunction, any proceeding that involves the validity, application, construction, or modification of such injunction, or of this subsection with respect to such injunction, may be commenced only in the district court in which such injunction was entered, and such court shall have exclusive jurisdiction over any such proceeding without regard to the amount in controversy.

(B) The requirements of this subparagraph are that—

(i) the injunction is to be implemented in connection with a trust that, pursuant to the plan of reorganization—

(I) is to assume the liabilities of a debtor which at the time of entry of the order for relief has been named as a defendant in personal injury, wrongful death, or property-damage actions seeking recovery for damages allegedly caused by the presence of, or exposure to, asbestos or asbestos-containing products;

(II) is to be funded in whole or in part by the securities of 1 or more debtors involved in such plan and by the obligation of such debtor or debtors to make future payments, including dividends;

(III) is to own, or by the exercise of rights granted under such plan would be entitled to own if specified contingencies occur, a majority of the voting shares of—

(aa) each such debtor;

(bb) the parent corporation of each such debtor; or

(cc) a subsidiary of each such debtor that is also a debtor; and

(IV) is to use its assets or income to pay claims

and demands; and

(ii) subject to subsection (h), the court determines that—

(I) the debtor is likely to be subject to substantial future demands for payment arising out of the same or similar conduct or events that gave rise to the claims that are addressed by the injunction;

(II) the actual amounts, numbers, and timing of such future demands cannot be determined;

(III) pursuit of such demands outside the procedures prescribed by such plan is likely to threaten the plan's purpose to deal equitably with claims and future demands;

(IV) as part of the process of seeking confirmation of such plan—

(aa) the terms of the injunction proposed to be issued under paragraph (1)(A), including any provisions barring actions against third parties pursuant to paragraph (4)(A), are set out in such plan and in any disclosure statement supporting the plan; and

(bb) a separate class or classes of the claimants whose claims are to

be addressed by a trust described in clause (i) is established and votes, by at least 75 percent of those voting, in favor of the plan; and

(V) subject to subsection (h), pursuant to court orders or otherwise, the trust will operate through mechanisms such as structured, periodic, or supplemental payments, pro rata distributions, matrices, or periodic review of estimates of the numbers and values of present claims and future demands, or other comparable mechanisms, that provide reasonable assurance that the trust will value, and be in a financial position to pay, present claims and future demands that involve similar claims in substantially the same manner.

(3)(A) If the requirements of paragraph (2)(B) are met and the order confirming the plan of reorganization was issued or affirmed by the district court that has jurisdiction over the reorganization case, then after the time for appeal of the order that issues or affirms the plan—

(i) the injunction shall be valid and enforceable and may not be revoked or modified by any court except through appeal in accordance with paragraph (6);

(ii) no entity that pursuant to such plan or thereafter becomes a direct or indirect transferee of, or successor to any assets of, a debtor or trust that is the subject of the injunction shall be liable

with respect to any claim or demand made against such entity by reason of its becoming such a transferee or successor; and

(iii) no entity that pursuant to such plan or thereafter makes a loan to such a debtor or trust or to such a successor or transferee shall, by reason of making the loan, be liable with respect to any claim or demand made against such entity, nor shall any pledge of assets made in connection with such a loan be upset or impaired for that reason;

(B) Subparagraph (A) shall not be construed to—

(i) imply that an entity described in subparagraph (A)(ii) or (iii) would, if this paragraph were not applicable, necessarily be liable to any entity by reason of any of the acts described in subparagraph (A);

(ii) relieve any such entity of the duty to comply with, or of liability under, any Federal or State law regarding the making of a fraudulent conveyance in a transaction described in subparagraph (A)(ii) or (iii); or

(iii) relieve a debtor of the debtor's obligation to comply with the terms of the plan of reorganization, or affect the power of the court to exercise its authority under sections 1141 and 1142 to compel the debtor to do so.

(4)(A)(i) Subject to subparagraph (B), an injunction described in paragraph (1) shall be valid and enforceable against all entities that it addresses.

(ii) Notwithstanding the provisions of section 524(e), such an injunction may bar any action directed against a third party who is identifiable from the terms of such injunction (by name or as part of an identifiable group) and is alleged to be directly or indirectly liable for the conduct of, claims against, or demands on the debtor to the extent such alleged liability of such third party arises by reason of—

(I) the third party's ownership of a financial interest in the debtor, a past or present affiliate of the debtor, or a predecessor in interest of the debtor;

(II) the third party's involvement in the management of the debtor or a predecessor in interest of the debtor, or service as an officer, director or employee of the debtor or a related party;

(III) the third party's provision of insurance to the debtor or a related party; or

(IV) the third party's involvement in a transaction changing the corporate structure, or in a loan or other financial transaction affecting the financial condition, of the debtor

or a related party, including but not limited to—

(aa) involvement in providing financing (debt or equity), or advice to an entity involved in such a transaction; or

(bb) acquiring or selling a financial interest in an entity as part of such a transaction.

(iii) As used in this subparagraph, the term "related party" means—

(I) a past or present affiliate of the debtor;

(II) a predecessor in interest of the debtor; or

(III) any entity that owned a financial interest in—

(aa) the debtor;

(bb) a past or present affiliate of the debtor; or

(cc) a predecessor in interest of the debtor.

(B) Subject to subsection (h), if, under a plan of reorganization, a kind of demand described in such plan is to be paid in whole or in part by a trust described in paragraph (2)(B)(i) in connection with which an injunction

described in paragraph (1) is to be implemented, then such injunction shall be valid and enforceable with respect to a demand of such kind made, after such plan is confirmed, against the debtor or debtors involved, or against a third party described in subparagraph (A)(ii), if—

(i) as part of the proceedings leading to issuance of such injunction, the court appoints a legal representative for the purpose of protecting the rights of persons that might subsequently assert demands of such kind, and

(ii) the court determines, before entering the order confirming such plan, that identifying such debtor or debtors, or such third party (by name or as part of an identifiable group), in such injunction with respect to such demands for purposes of this subparagraph is fair and equitable with respect to the persons that might subsequently assert such demands, in light of the benefits provided, or to be provided, to such trust on behalf of such debtor or debtors or such third party.

(5) In this subsection, the term "demand" means a demand for payment, present or future, that—

(A) was not a claim during the proceedings leading to the confirmation of a plan of reorganization;

(B) arises out of the same or similar conduct or events that gave rise to the claims addressed by the injunction issued under paragraph (1); and

(C) pursuant to the plan, is to be paid by a trust described in paragraph (2)(B)(i).

(6) Paragraph (3)(A)(i) does not bar an action taken by or at the direction of an appellate court on appeal of an injunction issued under paragraph (1) or of the order of confirmation that relates to the injunction.

(7) This subsection does not affect the operation of section 1144 or the power of the district court to refer a proceeding under section 157 of title 28 or any reference of a proceeding made prior to the date of the enactment of this subsection.

APPENDIX B — AMENDED PROOF OF CLAIM AND ATTACHMENT TO AMENDED PROOF OF CLAIM, FILED SEPTEMBER 22, 2008

B10 (Official Form 10 (12/07))

UNITED STATES BANKRUPTCY COURT Central District of California	AMENDED PROOF OF
Name of Debtor: **Thorpe Insulation Company**	Case Number: **2:07-bk-19271**

NOTE: *This form should not be used to make a claim for an administrative expense arising after the commencement of the case. A request payment of an administrative expense may be filed pursuant to 11 U.S.C. § 503.*

Name of Creditor (the person or other entity to whom the debtor owes money or property): **Continental Insurance Company, as successor in interest to Harbor Insurance Company**	X Check this box to indicate that t amends a previously filed claim
Name and address where notices should be sent: **David C. Christian II** **Seyfarth Shaw LLP** **131 S. Dearborn St., Suite 2400** **Chicago, Illinois 60603** **Telephone number: (312) 460-5000**	**Court Claim Number 30** *(If known)* Filed on: **February 11, 2008**
Name and address where payment should be sent (if different from above): Telephone number:	G Check this box if you are aware anyone else had filed a proof of relating to your claim. Attach c statement giving particulars. G Check this box if you are the de trustee in this case.
1. Amount of Claim. Not less than $360,890.10, plus additional damages and other amounts potentially totaling many millions of dollars. See attached Addendum. If all or part of your claim is secured, complete item 4 below; however, if all of your claim is unsecured, do not complete item 4. If all or part of your claim is entitled to priority, complete item 5. G Check this box if claim includes interest or other charges in addition to the principal amount of claim. Attach itemized statement of interest or charges.	**5. Amount of Claim Entitled to P Under 11 U.S.C. §507(a). If ar portion of your claim falls in the following categories, che box and state the amount.** Specify the priority of the claim. G Domestic support obligations u U.S.C. §507(a)(1)(A) or (a)(1)(B
2. Basis for claim: See attached Addendum (See instruction #2 on reverse side.)	G Wages, salaries, or commissior $10,950*) earned within 180 da before filing of the bankruptcy p cessation of the debtor's busine whichever is earlier – 11 U.S.C (a)(4).
3. Last four digits of any number by which creditor identifies debtor: _____ **3a. Debtor may have scheduled account as:** _____ (See instruction #3a on reverse side.)	G Contributions to an employee b plan – 11 U.S.C. §507 (a)(5)
4. **Secured Claim** (See instruction #4 on reverse side.) Check the appropriate box if your claim is secured by a lien on property or a right of setoff and provide the requested information. **Nature of property or right of setoff:** G Real Estate G Motor Vehicle **XX** Other **Describe:** Potential right of setoff. **See attached Addendum.** **Value of Property: $_____ Annual Interest Rate _____%** **Amount of arrearage and other charges as of time case filed included in secured claim, if any: $_____ Basis for perfection: _____** **Amount of Secured Claim: Undetermined Amount Unsecured: Undetermined**	G Up to $2,425* of deposits towar purchase, lease, or rental of pro services for personal, family, or household use – 11 U.S.C. §50 (a)(7).
6. **Credits**: The amount of all payments on this claim has been credited for the purpose of making this proof of claim. 7. **Documents**: Attach redacted copies of any documents that support the claim, such as promissory notes, purchase orders, invoices, itemized statements or running accounts, contracts, judgments, mortgages, and security agreements. You may also attach a summary. Attach redacted copies of documents providing evidence of perfection of a security interest. You may also attach a summary. (*See definition of "redacted" on reverse side.*) See attached Addendum. Other voluminous documents in support of the claim can be made available upon request and/or are in the possession of the Debtor. DO NOT SEND ORIGINAL DOCUMENTS. ATTACHED DOCUMENTS MAY BE DESTROYED AFTER SCANNING. If the documents are not available, please explain:	G Taxes or penalties owed to governmental units – 11 U.S.C. (a)(8) G Other – Specify applicable para 11 U.S.C. §507 (a)(___). **Amount entitled to priorit** $_____ **Amounts are subject to adjustmer 4/1/10 and every 3 years thereafte respect to cases commenced on o the date of adjustment.*

Date:	**Signature**: The person filing this claim must sign it. Sign and print name and title, if any, of the creditor or other person authorized to file this claim and state address and telephone number if different from the notice address above. Attach copy of power of attorney, if any.	FOR COURT USE ONL
9-22-08	Kirk Elyakin, Claims Consultant	

Penalty for presenting fraudulent claim: Fine of up to $500,000 or imprisonment for up to 5 years, or both. 18 U.S.C. §§ 152 and 3571.

Appendix B

ATTACHMENT TO AMENDED PROOF OF CLAIM

1. This document is part of, and is incorporated by reference into, the foregoing Amended Proof of Claim ("Proof of Claim") filed by Continental Insurance Company ("Continental") as successor in interest to certain policies issued by Harbor Insurance Company ("Harbor"). This Proof of Claim is filed in connection with and as an amendment to the proof of claim the Court instructed Continental to file on February 11, 2008 (the "original proof of claim") in response to Continental's request for stay relief to resume an arbitration proceeding commenced under the "Wellington Agreement" (as described below) before the Petition Date.

2. Continental files this amendment to describe additional facts and circumstances supporting its claim that have occurred and/or come to light since its original proof of claim. The facts and circumstances supporting Continental's claim are described below and, for the reasons set forth in the Motion to Compel Arbitration filed by Continental and Fireman's Fund Insurance Company ("Fireman's Fund") on September 22, 2008, should be litigated in the pre-petition arbitration proceeding pending before the Honorable Abraham Sofaer. Accordingly, this Proof of Claim neither constitutes nor should be construed in any way as consent by Continental to the jurisdiction of the Court with respect to any proceedings commenced in this case, *see* ¶ 49, *infra*.

Appendix B

BACKGROUND

A. The Wellington Agreement, The Wellington Arbitration, And The Subsequent 2003 Settlement Agreement.

3. Harbor issued four primary liability policies to Thorpe covering the years 1971-1979. Harbor and Thorpe are signatories to the Wellington Agreement, an omnibus insurance coverage and claims handling agreement executed in 1985 by approximately 35 asbestos producers and certain of their insurers. The Wellington Agreement provided for binding arbitration as the exclusive procedure for resolving disputes between the signatories.

4. Fireman's Fund issued or allegedly issued 17 primary policies to Thorpe covering the years 1952-1971. Fireman's Fund is also a signatory to the Wellington Agreement under the same terms as Harbor.

5. As part of the Wellington Agreement, Thorpe, Harbor and Fireman's Fund agreed that the coverage available for asbestos-related claims under the Harbor and Fireman's Fund policies was limited to the policies' aggregate limits ofliability. Accordingly, between 1978 and 1998, Thorpe sought, and both Harbor and Fireman's Fund paid, a combined $23.5 million in coverage pursuant to the parties' agreement that the asbestos claims against Thorpe were "products" and/or "completed operations" claims subject to the policies' aggregate limits. The aggregate limits of the Harbor policies exhausted in April, 1998. Fireman's Fund's limits exhausted in September, 1998.

6. Upon exhaustion of both the Harbor and Fireman's Fund policies and its other primary coverage, Thorpe began tendering claims to, and accepting coverage from, its excess carriers, who were obligated to pay such claims only if the underlying Fireman's Fund and Harbor policies were in fact exhausted. At the same time, however, Thorpe demanded that Harbor and Fireman's Fund provide additional, alleged "non-products" coverage that, contrary to its agreement, Thorpe claimed was not subject to aggregate limits. Harbor and Fireman's Fund responded to Thorpe's demand by initiating arbitration under the Wellington Agreement to obtain a declaration that their primary policies were exhausted, and that Thorpe was not entitled to additional "non-products" coverage thereunder.

7. The arbitration was conducted by the Honorable Abraham Sofaer, a former United States District Judge for the Southern District of New York. After an evidentiary hearing, Judge Sofaer issued preliminary findings of fact and conclusions of law in which he rejected Thorpe's claim for additional coverage and ruled that, pursuant to their policies and the Wellington Agreement, neither Fireman's Fund nor Continental had any further obligations to provide coverage to Thorpe with respect to asbestos bodily injury claims, whether alleged "non- products" coverage or otherwise. Judge Sofaer subsequently issued an opinion which finalized his preliminary findings of fact and conclusions of law and ordered Thorpe, as the losing party, to pay Harbor's and Fireman's Fund's attorneys' fees.

8. The parties thereafter commenced discussions about resolving, by consent, both (a) Judge Sofaer's award in favor of Harbor and Fireman's Fund and (b) Thorpe's appeal therefrom to a panel of three arbitrators as permitted under the procedures established by the Wellington Agreement. On April 17, 2003, the parties entered into a Settlement Agreement and Release resolving Thorpe's claim. (*See* Exhibit A (the "2003 Settlement Agreement").) Parties to the 2003 Settlement Agreement included "Thorpe Insulation Company, and each of its predecessors, parents, subsidiaries, affiliated companies, assigns and/or ***successors in interest*** ...." (*Id.* at 1) (emphasis added). "Successors-in-interest" plainly includes the putative Trust that Thorpe seeks to establish under its Amended Joint Plan of Reorganization (the "Plan").

9. Among other things, in the 2003 Settlement Agreement Thorpe released Continental and Fireman's Fund "from any claims for coverage of any kind under or related to the Policies ..." (*id.* at 6, ¶ 5) "known and unknown" claims, "future" claims (*id.* at 7-8, ¶ 9), and "unanticipated claims of any kind" "including those which do not yet exist and which could not be foreseen" (*id.* at 11, ¶ 18). Specifically, the 2003 Settlement Agreement provided:

> Thorpe releases [Continental and Fireman's Fund] from ***any claims for coverage of any kind*** under or related to the Policies, including, ***but not limited to,*** those under the Wellington Agreement, the Harbor Policies, the Fireman's

Fund Policies, and the CHSA, and release[] Insurers from any kind of contractual liability or extra contractual liability, including, but not limited to, any alleged in the Complaints, and under the 5/25/99 ADR (*id.* at 6, ¶ 5) (emphasis added).

[Fireman's Fund's] and [Continental's] agreements herein constitute ***a full accord and satisfaction*** of ***any and all claims*** they have ***or may ever have*** for ***any*** claim of ***any*** kind under the Policies, ***whether described above or otherwise***. [Thorpe] fully releases and forever discharges the Insurers ... of and from ***any and all claims***, actions, causes of action, rights liabilities, ***obligations*** and ***demands*** of ***every*** kind and nature, ***known and unknown***, suspected or unsuspected past, present and ***future***, ***arising out of, related to***, or ***in any way connected with***, in whole or in part, ***any claim of any kind*** under the Policies or relating to the 5/25/99 ADR or the Complaints, which release specifically includes, but is not limited to, damages, punitive damages, attorneys' fees or costs of any kind, or ***equitable relief of any kind*** for any alleged acts or omissions, if any, by, on the part of, or on behalf of Insurers constituting any breach of any duty or any tort or other wrong or unfair defense or settlement practices, insurance or other statutory code violations, bad faith, breach of fiduciary duty, fraud, malice or oppression arising from any

> claim of any kind ..." (*Id* at 7-8, ¶ 9.) (Emphasis added.)

10. Thorpe expressly acknowledged that its release of future and unknown claims on its behalf and on behalf of its successors was a valid waiver under Section 1542 of the California Civil Code:

> Thorpe understands and acknowledges that the significance and consequence of this waiver of Section 1542 ofthe Civil Code is that even ifThorpe should eventually suffer additional damages arising out of any claim of any kind as to the Thorpe Released Matters, it will not be permitted to make any claim for those damages to or against Fireman's Fund or CIC ... Furthermore, Thorpe acknowledges that it intends these consequences even as to any claim of any kind that may exist as of the date of this release but which Thorpe does not know exist, and which, if known, would materially affect Thorpe's decision to execute this release, regardless of whether Thorpe's lack of knowledge is the result of ignorance, oversight, error, negligence, or any other cause. (*Id.* at 10-11 ¶ 17; *see also id.* at 10-11, ¶¶ 15-18.)

11. Indeed, Thorpe made the following acknowledgement:

> Thorpe acknowledges that it intends the consequences of its waiver of Civil Code Section 1542 even as ***to unanticipated claims of any***

> ***kind*** relating to the Thorpe Released Matters, except under the Chicago Policies or the Transcontinental Excess Policies, **including those which do not yet exist and which could not be foreseen**. (*Id.* at 11, ¶ 18.)(Emphasis added.)

12. In addition, the parties made the following warranties:

> The parties to this Agreement each represent and warrant that they have not and ***will not in any manner assign, transfer, convey or sell, or purport to assign, transfer, convey or sell*** to any entity or person any cause of action, chose in action, or part thereof, ***arising out of or connected with the matters released herein***, and that they are the only person or entities entitled to recover for damages under such claims, causes of action, actions, and rights. The parties to this Agreement each further represent and warrant that they ***will not in any way voluntarily assist any other person or entity in the establishment of any claim, cause of action, action, or right*** against the other party to this Agreement arising out of, resulting from ***or in any way*** relating to the matters released. (*Id.* at 12-13, ¶ 24.) (Emphasis added.)

13. The 2003 Settlement Agreement provided the following remedies for breach of these warranties:

> Each party to this Agreement expressly agrees to indemnify the other for all expenses, reasonable fees, including reasonable attorneys' fees, and other consequences, of any breach by the indemnifying Party of a warranty expressly stated in this Agreement, provided that neither this provision nor any provision other than paragraph 27 limits the rights, obligations or duties of the parties hereto under the Wellington Agreement.

Id. at 15-16, ¶ 31.

14. Contemporaneous documents exchanged at the time of negotiation reflect that all parties, including Thorpe, understood the language of the 2003 Settlement Agreement accomplished "peace" between the parties. (*See* Exhibit B (email from Thorpe attorney K. Pasich to P. Logan, dated April 7, 2003).)

15. Finally, the parties agreed "to the continuing jurisdiction of Trial Judge Abraham D. Sofaer to enforce this Agreement and its terms." (*See* Exhibit A at 10, ¶ 14.)

B. This Proof Of Claim Concerns Thorpe's Breaches Only, Not Resolution Of The Non-Products Issue Or The Merits Of Third-Party Direct Actions.

16. Following the 2003 Settlement Agreement, Thorpe continued to submit and accept payment from its excess carriers for claims as products claims subject to its excess limits. In late 2005, as the remainder of these limits

were exhausting, Thorpe asserted for the first time that it was entitled to alleged "non-products" coverage from its non-Wellington carriers. To resolve this issue, Thorpe and two of its excess insurers filed competing declaratory judgment actions in California Superior Court. The actions were consolidated as coordinated proceedings before the Honorable Carolyn Kuhl in the Superior Court of California, County of Los Angeles ("Coverage Action"). Neither Continental nor Fireman's Fund are parties to the Coverage Action.

17. The Coverage Action was litigated for almost two years before Thorpe commenced its Chapter 11 bankruptcy case on October 15, 2007 (the "Petition Date"). By order dated December 28, 2007, this Court remanded the Coverage Action to Judge Kuhl. The "non-products" issue thus is not before the Court, and this Proof of Claim does not raise the issue. The Wellington Agreement, Judge Sofaer's decision, and the subsequent 2003 Settlement Agreement all conclusively resolved the non-products issue as to Fireman's Fund, Continental, and Thorpe and/or any successor in interest to Thorpe.

18. Nor does this Proof of Claim implicate, or seek any adjudication relating to, whether any third-party has any right to file or litigate the merits of direct action claims against Continental or Fireman's Fund pursuant to Cal. Ins. Code § 11580. Any such claims filed post-petition will be resolved as a matter of California state law in a non-bankruptcy court venue. Accordingly, this Proof of Claim relates only to Thorpe's breaches of its settlement obligations.

C. Thorpe Acquires Settled Carriers' Contribution Rights And Colludes With Asbestos Claimants To Facilitate Direct Actions Against Continental And Fireman's Fund.

19. The circumstances giving rise to Continental's and Fireman's Fund's claims are the culmination of repeated attempts by Thorpe to circumvent its contractually agreed-upon limits for the Harbor and Fireman's Fund policies, which Thorpe first acknowledged more than 20 years ago in the Wellington Agreement, then reaffirmed in even more expansive language in the 2003 Settlement Agreement following its unsuccessful attempt to avoid those limits in arbitration. Having failed at a frontal assault before Judge Sofaer, Thorpe now seeks to renege on (and thereby breach) the 2003 Settlement Agreement by (i) facilitating "direct actions" brought by asbestos claimants, with whom Thorpe has openly aligned itself for purposes of maximizing its insurance coverage, against Fireman's Fund and Continental, and (ii) assigning to its putative Trust contribution rights against Fireman's Fund and Continental obtained from settled insurers. Fatal to Thorpe's strategy, however, is that both actions are prohibited by, and a material breach of, the 2003 Settlement Agreement.

Thorpe's Acquisition And Assignment Of Contribution Rights.

20. Thorpe began implementing this strategy as early as August, 2006 with its settlement agreement with Pacific Indemnity, through which it acquired

Appendix B

Pacific Indemnity's potential contribution rights against other Thorpe carriers, including Continental and Fireman's Fund. Thorpe subsequently settled with four other insurers before the Petition Date, including Great American, Republic, Associated International, American Centennial, and one insurer, General Insurance, post-petition. Each of these settlements includes an assignment, by the settling insurers to Thorpe, of the settling insurers' contribution, indemnity, and subrogation rights (collectively, "contribution rights") against other insurers. In some instances, the settlement agreements provide that Thorpe may convey such acquired rights to the contemplated Trust (which, as of the date of filing this Proof of Claim, is not yet constituted). In any event, as is detailed below, Thorpe's proposed Plan specifically assigns these contribution rights from Thorpe to the Trust.

21. On information and belief, the Trust intends to assert the settled carriers' alleged contribution rights against Continental and Fireman's Fund. This attempt by Thorpe to acquire such contribution rights, then assign them to the Trust so the Trust can assert them against Continental and Fireman's Fund, violates the terms of the 2003 Settlement Agreement.

Thorpe Cooperates With The Asbestos Claimants In Filing Direct Actions Against Continental And Fireman's Fund.

22. Having twice agreed (first in the Wellington Agreement, and later in the 2003 Settlement Agreement) and once been ordered (by Judge Sofaer) that it has no

right to alleged "non-products" coverage, Thorpe is now pursuing yet a further scheme designed to try and coerce such coverage from Continental and Fireman's Fund. By seeking to maximize these insurers' potential exposure to direct action lawsuits by asbestos claimants, Thorpe now hopes to pressure them into paying large settlements for coverage to which Thorpe knows it is not entitled. This is not only a breach of the 2003 Settlement Agreement, but utmost bad faith in light of Thorpe's multiple past unsuccessful attempts to achieve such coverage.

23. In late 2006, the plaintiffs' firm Brayton Purcell filed on behalf of certain of its clients several "direct actions" seeking coverage from the insurers who are parties to the Coverage Action. None of these actions named Continental or Fireman's Fund as parties. Thorpe's counsel then met with Brayton Purcell on at least one occasion in mid- September 2007. Thorpe may well have had other meetings or communications with relevant actors, but neither Fireman's Fund nor Continental thus far has been permitted to take deposition or document discovery of Thorpe or third-parties relating to the claims asserted herein.

24. In late September, 2007, Brayton Purcell then filed additional direct action lawsuits against Thorpe's insurers, this time naming both Continental and Fireman's Fund as defendants. On information and belief, Thorpe encouraged, facilitated, and voluntarily assisted this filing. Facts and evidence to be obtained in discovery from the relevant parties, all of which is currently outside Continental's or Fireman's Fund's possession and control,

will establish the details of Thorpe's scheme, including who communicated with whom, in what form, on how many occasions, and what was said in those communications.

25. To encourage, facilitate, and voluntarily assist the filing of direct actions against Continental and Fireman's Fund in the future, Thorpe has now proposed a Plan that, as discussed in more detail below, specifically targets Continental and Fireman's Fund alone to be defendants in direct actions by expressly excluding them from the "Asbestos Insurer Injunction" barring post-confirmation direct action lawsuits against all other Thorpe insurers, whether settled or not. Facts and evidence to be obtained in discovery of the Plan Proponents, all of which is currently outside Continental's and Fireman's Fund's possession and control, will establish the details of this scheme. Thorpe's cooperation and participation as a "Plan Proponent" in drafting, proposing, and seeking confirmation of a Plan designed to assist asbestos claimants in bringing direct action claims against Continental and Fireman's Fund violates the terms of the 2003 Settlement Agreement.

D. Continental And Fireman's Fund Initiate Arbitration Pre-Petition To Enforce The Settlement Agreement.

26. In mid-2007, Continental and Fireman's Fund had reason to believe that Thorpe may not have been fulfilling its obligations under the 2003 Settlement Agreement. On September 28, 2007, Continental wrote Thorpe to remind it of Thorpe's obligations under the 2003 Settlement Agreement, asking that Thorpe confirm it was not: (i)

taking any action to assist any party in asserting claims against Continental; (ii) acquiring, assigning or asserting any alleged rights against Continental; or (iii) taking any action to pursue or assist with an insurance recovery from Continental. (*See* Exhibit C (Letter from T. Jacobs to C. Malaret dated Sept. 28, 2007).) Fireman's Fund sent a similar letter. (*See* Exhibit D (Letter from P. Logan to C. Malaret dated September 28, 2007).)

27. Thorpe did not respond to Continental's or Fireman's Fund's inquiries and, as a result, the insurers initiated arbitration proceedings with Judge Sofaer to enforce the terms of the 2003 Settlement Agreement. Thorpe responded by disputing Judge Sofaer's jurisdiction and opposing Continental's and Fireman's Fund's claims. (*See* Exhibit E.) (*See also* Exhibit F, letter from A. Jacobus to J. Sofaer dated October 2, 2007.) Judge Sofaer agreed to exercise his exclusive jurisdiction over the dispute, and scheduled a hearing for October 16, 2007.

28. Before the hearing, counsel for Continental and Fireman's Fund again asked Thorpe's counsel if Thorpe was acquiring contribution rights from settling carriers or in any way assisting with the filing of direct actions against Continental and Fireman's Fund. Thorpe's counsel refused to address the issue. On October 15, 2007, the day before the parties' scheduled hearing with Judge Sofaer, Thorpe filed its bankruptcy petition staying the arbitration (and avoiding an imminent acknowledgement of its conduct in connection with assignment of contribution rights and claimants pursuing direct actions). On information and belief, the timing of Thorpe's bankruptcy filing was motivated at least in part by its desire to escape

its contractual commitment to arbitrate before Judge Sofaer.

E. The Pre-Petition Breach Continues And Is Exacerbated Post-Petition: Thorpe's Proposed Plan Targets Continental And Fireman's Fund For Direct Actions By The Asbestos Claimants And Assigns The Contribution Rights To The Trust.

29. On July 24, 2008, Thorpe filed its Plan which, *inter alia,* purports to assign to a putative Trust any and all contribution rights against Fireman's Fund and Continental which Thorpe has acquired or will acquire from settled insurers. *(See* Plan at p. 6, § 1.16, p. 38, § 5.4.1.)

30. In addition, the Plan, which Thorpe is a co-proponent of, singles out and targets Continental and Fireman's Fund for post-confirmation direct action lawsuits by enjoining all such lawsuits against all Thorpe insurers, whether they have settled or not, *except* for Continental and Fireman's Fund. Specifically, the "Asbestos Insurer Injunction" Thorpe proposes provides that:

> All entities ... which have held or asserted, which hold or assert, or which may in the future hold or assert any Asbestos Related Claim shall be, and hereby are, permanently stayed, restrained and enjoined from taking any legal action for the purpose of directly or indirectly collecting, recovering or receiving payment or recovery with respect to any such claim from or against

> any Asbestos Insurer (***except Continental and Fireman's Fund***) ... The provisions of this Asbestos Insurer Injunction ***shall not apply to protect either Continental or Fireman's Fund***.

(*See* Plan, Exh. C.) (Emphasis added.)

31. Further, while discovery will be necessary to flesh out the particulars of its scheme, it appears that Thorpe, acting as a co-proponent of the Plan, has also agreed that a post-confirmation entity known as "RTI Company" will be established so that claimants may more easily obtain judgments against Thorpe in the tort system that will later become the subject of direct actions against Continental and Fireman's Fund only. (*See* Plan at p. 36-37, § 5.1.6.) As Thorpe well knows, acquisition of a "judgment" in the tort system is a necessary prerequisite for the later filing of direct actions against Continental and Fireman's Fund under Cal. Ins. Code § 11580. Simultaneously, Thorpe has agreed to, and proposes, Trust Distribution Procedures ("TDPs") which allow the Trust to waive defenses for suits in the tort system so that "judgments" may be more easily obtained. (*See* Plan, Exh. I, TDP §§ 7.3 ("[T]he Trust may waive any defense and/or concede any issue of fact or law"); *see also id.*, § 5.11 (allowing the Trustees, in conjunction with the TAC and Futures Representative, unfettered discretion to adopt "alternative" claims handling procedures).) The upshot of all of this is that Thorpe, acting as a co-proponent of the Plan, is "voluntarily assisting" and facilitating the establishment of direct actions against Continental and Fireman's Fund in numerous ways. Continental and

Fireman's Fund are the only insurers so targeted. This turns Thorpe's obligations to Continental and Fireman's Fund on their head, in that such actions are expressly prohibited by the 2003 Settlement Agreement.

32. It is important to state here what this Proof of Claim does not involve. It does not concern any rights that claimants may (or may not) have, independent of actions taken by Thorpe, to assert or litigate the merits of direct action claims. While Continental and Fireman's Fund believe that any direct actions filed against them ultimately will be found to lack merit in the state court system, those claims are not being adjudicated in this Court and, indeed, could not be because no such claims exist. Rather, this Proof of Claim deals with Thorpe's actions and conduct—both pre-petition and as a co-proponent of the Plan—in wrongfully facilitating the filing of such claims.

CONTINENTAL'S CLAIMS

A. Thorpe's Collusion With Asbestos Claimants To Bring Direct Actions Against Continental Is In Breach Of The Settlement Agreement.

33. Pre-petition, Thorpe assisted, facilitated, and cooperated with asbestos claimants who filed direct actions against Continental.

34. As outlined above, this scheme has continued post-petition as evidenced by, *inter alia,* the terms of the Plan which Thorpe has proposed.

35. Thorpe's actions violate the express terms of the 2003 Settlement Agreement, which prohibits Thorpe from, *inter alia,* "in any way voluntarily assist[ing] any other person or entity in the establishment of any claim, cause of action, or right against the other party to [the 2003 Settlement Agreement] arising out of, resulting from or in any way relating to the matters released."

36. Continental has been injured by these breaches, and Thorpe is liable to Continental for all damages Continental suffers as a result. The amount of such damages will be determined in the arbitration. Continental disputes that it has or ultimately will have any direct action liability to asbestos claimants - which will be resolved in the state court system - but Thorpe has stated that it believes Continental's potential damages as a result of direct action filings could total "hundreds of millions of dollars." (*See* Objection to Continental's original proof of claim, at 16.)

B. Thorpe Has Breached The 2003 Settlement Agreement By Acquiring Contribution Rights From Settled Carriers.

37. Thorpe has acquired contribution rights from one or more of the settling insurers and seeks to assign those rights to the putative Trust for purposes of the Trust asserting against them against Continental.

38. Such acquisition of contribution rights against Continental from settling insurers and assignment of such rights to the putative Trust, violates, *inter alia,* Thorpe's warranty in the 2003 Settlement Agreement that it will

not "assign, transfer, convey or sell, or purport to assign, transfer, convey or sell to any entity or person any cause of action ... arising out of or connected with the matters released [in the Settlement Agreement]...." Acquisition and assignment of any such claim also violates Thorpe's commitment, on both its own behalf and that of any successor-in-interest, including the putative Trust, that it had released all claims of any kind, whether "known or unknown," including all "future" and "unanticipated" claims. Thorpe specifically warranted that its release of any and all future or unknown claims, no matter how denominated, is enforceable against it under Section 1542 of the California Civil Code.

39. Continental has been injured by these breaches, and Thorpe is liable to Continental for all damages Continental suffers as a result. The amount of such damages will be determined in the arbitration. Continental disputes that it has or will have any liability for contribution claims, but the potential dollar value of such claims assigned by the settled carriers to Thorpe and then to the Trust to date equals at least $65 million.

C. Continental's Claim For Attorneys' Fees.

40. The 2003 Settlement Agreement provides that each party is entitled to "all expenses, reasonable fees, including reasonable attorneys' fees" for any breach of a warranty provided in the Agreement.

41. As described above, Thorpe has breached the warranties set forth in the 2003 Settlement Agreement.

42. Accordingly, Thorpe is liable to Continental for all expenses, reasonable fees and attorneys fees Continental expends defending itself against Thorpe's breaches. Such fees through August 31, 2008 equal at least $360,890.

STATEMENT REGARDING ARBITRATION AND DISCOVERY

43. This matter must be arbitrated pursuant to the Wellington Agreement and the 2003 Settlement Agreement. The fact that Thorpe has continued and exacerbated its pre-petition breaches post-petition, by proposing the Plan, cannot change this result. Indeed, Thorpe's attempt to game the bankruptcy process is a reason to enforce the 2003 Settlement Agreement, not disregard it.

44. Continental requires discovery—written, oral and document-based—to fully establish the facts underlying its claims. Virtually all of the relevant facts and evidence concerning Continental's claims are in the possession of Thorpe, third-parties, and co-proponents of the Plan. This discovery should take place before Judge Sofaer in arbitration, as the parties agreed.

CONCLUSION

45. Some or all of the foregoing claims may constitute general unsecured claims against Thorpe and its bankruptcy estate arising prior to the Petition Date and/or be secured claims subject to a right of setoff against any obligations owing by Continental.

46. Therefore, and without prejudice to its other rights and remedies, Continental hereby demands allowance and payment of its claims, in an amount not less than $360,890, plus damages as set forth above, as well as other amounts to which it may be or may become entitled, from Thorpe and its bankruptcy estate.

RESERVATION OF RIGHTS

47. In addition to the foregoing, Continental expressly reserves all other rights, remedies, interests, priorities, protections, claims, counterclaims, defenses, setoffs, and recoupments, including, without limitation, claims against Thorpe under sections 503, 507, 510, 544, 545, 547, 548, 549, 550, and 553 of the Bankruptcy Code.

48. Continental specifically reserves the right to amend, modify, or withdraw this proof of claim at any time, and the right to assert any other legal theory in support of its recovery from Thorpe, its successors, or any subsequent trust established as a result of this Chapter 11 proceeding.

49. This proof of claim is being filed so that the merits of Continental's claims can be arbitrated before Judge Sofaer as the parties agreed and the law requires. By preparing, signing, and/or filing this proof of claim, or taking any action in connection therewith, Continental is not (a) in any manner whatsoever waiving or relinquishing any rights it may have against any other entity liable for all or any parts of the matters set forth herein, (b) waiving its contractual right to arbitrate or consenting

to the jurisdiction of the Bankruptcy Court with respect to any proceedings commenced in this case, (c) waiving the right to withdraw the reference with respect to objections, cases, or proceedings, (d) electing any remedy which waives or otherwise affects any other remedy, (e) acknowledging or admitting any liability to any entity, (f) limiting its claims to the amounts or theories set forth herein, or (g) estopped or prevented from taking any other action or position.

50. Continental reserves the right to amend and supplement this proof of claim and to file additional claims against Thorpe for any reason.

APPENDIX C — EXHIBIT A TO ADDENDUM FOR AMENDED PROOF OF CLAIM: 2003 SETTLEMENT AGREEMENT

SETTLEMENT AGREEMENT AND RELEASE

This Settlement Agreement And Release (hereinafter referred to as the "Agreement") is entered into by and between Fireman's Fund Insurance Company, and each of its predecessors, parents, subsidiaries, affiliated companies, successors in interest, and/or their shareholders, directors, and officers (hereinafter collectively referred to as "Fireman's Fund"), Continental Insurance Company (as successor in interest to certain policies of Harbor Insurance Company) and each of its predecessors, parents, subsidiaries, affiliated companies, successors in interest, and/or their shareholders, directors, and officers (hereinafter collectively referred to as "CIC") on the one hand (collectively "Insurers"); and Thorpe Insulation Company, and each of its predecessors, parents, subsidiaries, affiliated companies, assigns and/or successors in interest and/or its shareholders, directors, and officers (hereinafter collectively referred to as "Thorpe"), on the other hand, as of the date of the execution of this Agreement by all parties hereto (the "Effective Date"), and in accordance with the terms and conditions set forth below.

WHEREAS, the following four liability policies were issued to Thorpe Insulation Company (collectively, the "Harbor Policies"):

- Harbor Insurance Company policy 110256 (policy period February 1, 1971 to February 1, 1974);

- Harbor Insurance Company policy 116239 (policy period February 1, 1974 to February 1, 1977);

- Harbor Insurance Company policy 122720 (policy period February 1, 1977 to February 1, 1978);

- Harbor policy 133921 (policy period February 1, 1978 to February 1, 1979); and

WHEREAS, Fireman's Fund agreed that it issued the following seventeen liability policies (collectively, the "Fireman's Fund Policies") to Thorpe Insulation Company:

- Fireman's Fund policy XAC146704 (policy period October 1, 1952 to October 1, 1953);

- Fireman's Fund policy XAC154209 (policy period October 1, 1953 to October 1, 1954);

- Fireman's Fund policy XAC164700 (policy period October 1, 1954 to October 1, 1955);

- Fireman's Fund policy PC9260213 (policy period October 1, 1955 to October 1, 1956);

- Fireman's Fund policy PC9264664 (policy period October 1, 1956 to October 1, 1957);

- Fireman's Fund policy PC9270501 (policy period October 1, 1957 to October 1, 1958);

- Fireman's Fund policy PC1203000 (policy period October 1, 1958 to October l, 1959);

- Fireman's Fund policy PC1233290 (policy period October 1, 1959 to October 1, 1960);

- Fireman's Fund policy PC1246755 (policy period October 1, 1960 to October 1, 1961);

- Fireman's Fund policy PC1264410 (policy period October 1, 1961 to October 1, 1962);

- Fireman's Fund policy PC1278921 (policy period October 1, 1962 to October 1, 1963);

- Fireman's Fund policy PC1289502 (policy period October 1, 1963 to October 1, 1964);

- Fireman's Fund policy PC1311311 (policy period October 1, 1964 to October 1, 1965);

- Fireman's Fund policy PC1330000 (policy period October 1, 1965 to October 1, 1966);

- Fireman's Fund policy PC1346060 (policy period October 1, 1966 to October 1, 1967);

- Fireman's Fund policy L1383012L (policy period October 1, 1967 to October 1, 1968);

- Fireman's Fund policy L1407905L (policy period October 1, 1968 to October 1, 1971);

(the Fireman's Fund Policies and the Harbor Policies collectively "the Policies"); and

WHEREAS, Insurers and Thorpe Insulation Company are both signatories to that certain document titled Agreement Concerning Asbestos-Related Claims, dated June 19, 1985 ("the Wellington Agreement"); and

WHEREAS, Insurers and Thorpe Insulation Company are both signatories to that certain document titled Claim Handling And Settlement Agreement signed by Thorpe Insulation Company on February 13, 1985 ("CHSA"); and

WHEREAS, numerous Asbestos-Related Claims (the "Asbestos-Related Claims"), as defined in Wellington Agreement, § XXIII.2., have been and continue to be asserted against Thorpe Insulation Company; and

WHEREAS, CIC has, through various payments on Thorpe Insulation Company's behalf, exhausted the products/completed operations limits of the Harbor Policies; and

WHEREAS, Fireman's Fund has, through various payments on Thorpe Insulation Company's behalf, exhausted the products/completed operations limits of the Fireman's Fund Policies; and

WHEREAS, Fireman's Fund did on May 25, 1999 initiate, and Thorp Insulation Company is a party to, an ADR pursuant to the Wellington Agreement ("the 5/25/99 ADR"); and

WHEREAS, CIC joined the 5/25/99 ADR; and

WHEREAS, the Trial Judge in the 5/25/99 ADR issued a Draft Findings And Conclusions dated June 4, 2002, and later issued an opinion dated October 28, 2002 and titled Findings Of Fact And Conclusions Of Law (the "ADR Decision") which concluded, *inter alia,* that an award of attorneys' fees and costs in favor of the Insurers and against Thorpe Insulation Company was appropriate; and

WHEREAS, Thorpe Insulation Company noticed its Appeal under the Wellington Agreement of the ADR Decision; and

WHEREAS, Insurers and Thorpe Insulation Company are currently involved in Los Angeles County Superior Court lawsuits bearing the case numbers: BC 217 096; BS 058 813, BS 060 397, and BS 060 398 ("the Complaints"); and

WHEREAS, Thorpe and Insurers now desire to compromise, settle and adjust fully and finally all disputes which exist between them on the terms hereinafter set forth,

NOW, THEREFORE, in consideration of the foregoing and the mutual promises and covenants set forth below, intending to be legally bound hereby, Thorpe Insulation Company and Insurers mutually contract and agree, as follows:

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1. Insurers agree to waive all costs and fees claimed in the ADR and the "carve outs" (those portions of the 5/25/99 ADR first removed from, then reintroduced into the ADR by agreement of the parties) and incurred in or in connection with the Complaints.

2. Insurers agree to pay to Thorpe Insulation Company the total amount of $300,000 as follows: CIC will pay to Thorpe Insulation Company exactly $111,990, and Fireman's Fund will pay to Thorpe Insulation Company exactly $188,010. Insurers will make every effort to pay these amounts by April 15, 2003, and will in no event make them later than fifteen (15) days after Thorpe Insulation Company's execution and delivery to the Insurers of a counterpart of this Agreement, including execution of the attached letter to Judge Sofaer, incorporated by reference herein as Appendix A.

3. As of the Effective Date of the Agreement, and no later than five (5) days after execution of the Agreement, Thorpe Insulation Company, CIC, and Fireman's Fund will request that Trial Judge Abraham D. Sofaer file the October 28, 2002 Findings Of Fact And Conclusions Of Law with the Center for Public Resolution, Inc., in accordance with the Wellington Agreement, Appendix C, § 100.7, by forwarding the executed letter at Appendix A to Judge Sofaer.

4. As of the Effective Date, CIC and Fireman's Fund will dismiss with prejudice all claims for attorneys' fees and costs arising from the Wellington Agreement arbitration and the Complaints.

5. Thorpe releases Insurers from any claims for coverage of any kind under or related to the Policies, including, but not limited to, those under the Wellington Agreement, the Harbor Policies, the Fireman's Fund Policies, and the CHSA, and releases Insurers from any kind of contractual liability or extra contractual liability, including, but not limited to, any alleged in the Complaints, and under the 5/25/99 ADR.

6. This Agreement does not apply to the following policies:

> Transcontinental Insurance Company RDX 1773041, policy period October 1, 1979 to October 1, 1980;
>
> Transcontinental Insurance Company RDX 2820299, policy period October 1, 1980 to October 1, 1981;
>
> (the "Transcontinental Excess Policies");
>
> Chicago Insurance Company 28315760, policy period June 30, 1981 to October 1, 1981;
>
> Chicago Insurance Company 55C0020082, policy period October 1, 1981 to October 1, 1982;
>
> Chicago Insurance Company 55C0031057, policy period October 1, 1982 to November 23, 1982;
>
> (the "Chicago Policies").

7. Thorpe Insulation Company will dismiss the Complaints, including all which it filed, and all counterclaims and/or cross-complaints within the actions encompassed by the Complaints, with prejudice, within ten (10) days from the date it signs this Agreement. Within ten (10) days after the date Thorpe Insulation Company signs this Agreement, Fireman's Fund will dismiss, with prejudice, the Complaints, including all which it filed, and all counterclaims and/or cross-complaints within the actions encompassed by the Complaints. Within ten (10) days after it signs this Agreement, Thorpe Insulation Company will dismiss, drop, abandon, and take all procedural steps necessary to end its appeal of the Trial Judge's Decision in the 5/25/99 ADR. At the request of either FFIC or CIC, in writing, Thorpe Insulation Company will fully, completely, and unreservedly cooperate in having the Trial Judge's Decision in the 5/25/99 ADR finalized and reduced to a judgment in any appropriate courts. The Insurer making the written request will pay all reasonable fees (including reasonable attorneys' fees), costs, and expenses which Thorpe Insulation Company incurs in so cooperating.

8. Insurers expressly acknowledge that the provisions above constitute a full and complete accord and satisfaction of any and all obligations which now or may exist on the part of Thorpe to reimburse Insurers for payment of the costs or fees associated with the 5/25/99 ADR and the Complaints.

9. Thorpe expressly acknowledges and agrees that Fireman's Fund's and CIC's agreements herein constitute a full and complete accord and satisfaction of

any and all obligations they have or may ever have for any claim of any kind under the Policies, whether described above or otherwise. Thorpe Insulation Company fully releases and forever discharges the Insurers, their parents, subsidiaries, affiliated companies, predecessor companies, successors-in-interest, and all of their past and present officers, directors, employees, shareholders, representatives, and attorneys, of and from any and all claims, actions, causes of action, rights, liabilities, obligations and demands of every kind and nature, known and unknown, suspected or unsuspected past, present, and future, arising out of, related to, or in any way connected with, in whole or in part, any claim of any kind under the Policies or relating to the 5/25/99 ADR or the Complaints, which release specifically includes, but is not limited to, damages, punitive damages, attorneys' fees or costs of any kind, or equitable relief of any kind for any alleged acts or omissions, if any, by, on the part of, or on behalf of Insurers constituting or allegedly constituting any breach of any duty or any tort or other wrong or unfair defense or settlement practices, insurance or other statutory code violations, bad faith, breach of fiduciary duty, fraud, malice or oppression arising from any claim of any kind (hereafter the "Thorpe Released Matters").

10. Insurers each expressly acknowledge and agree that Thorpe's agreements herein constitute a full and complete accord and satisfactions of any and all obligations it has or may ever have for any claim or duty of any kind under the Policies, whether described above or otherwise. Insurers each fully release and forever discharge Thorpe, its parents, subsidiaries, affiliated companies, predecessor

companies, successors-in-interest, and all of its past and present officers, directors, employees, shareholders, representatives, and attorneys, of and from any and all claims, actions, causes of action, rights, liabilities, obligations and demands of every kind and nature, known and unknown, suspected or unsuspected, past, present, and future, arising out of, related to, or in any way connected with, in whole or in part, any claim of any kind under the Policies or relating to the 5/25/99 ADR or the Complaints, which release specifically includes, but is not limited to, damages, punitive damages, equitable relief, attorneys' fees and costs of any kind for any alleged acts or omissions, if any, by, on the part of, or on behalf of Thorpe, including those constituting or allegedly constituting any breach of any duty or any tort or other wrong (hereafter the "Insurers Released Matters").

11. Nothing contained herein shall be construed to be an admission of any kind by any signatory hereto.

12. This Agreement is the result of a compromise accord, and is the product of arms'-length negotiations. This Agreement is restricted and limited to the matters addressed herein, and shall not be used by either Insurers or Thorpe in any court or dispute resolution proceeding to infer or to create coverage or the lack thereof under any insurance policy issued to Thorpe by Insurers.

13. In consideration of Insurers' performance of their obligations set forth in this Agreement, Thorpe and Insurers contract and agree not to appeal or attack the judgments to be entered according to this Agreement in the California Superior Court Actions, in any fashion

whatsoever, including, but not limited to, appeal, writ, motion to set aside a judgment, or otherwise, and Thorpe contracts and agrees that, in addition to dismissing its appeal of the 5/25/99 ADR as set forth above, it will not institute or pursue any further or related appeal of the 5/25/99 ADR or any issue therein, as described in the Wellington Agreement, Appendix C, § 11.00, *et seq.*

14. Thorpe and Insurers agree to the continuing jurisdiction of Trial Judge Abraham D. Sofaer to enforce this Agreement and its terms. If Trial Judge Abraham D. Sofaer is not available to enforce this Agreement or its terms upon application by any party to this Agreement, the parties to this Agreement agree that any other Trial Judge that the Center for Public Resources, Inc. or its successors or assigns shall designate to enforce the Agreement or its terms shall have the power and jurisdiction to enforce this Agreement or its terms. Nothing in this Agreement shall be read or construed to preclude any party to this Agreement from enforcing or attempting to enforce this Agreement or its terms pursuant to this paragraph.

15. Thorpe certifies that it has read and waives as to the Thorpe Released Matters the application of Section 1542 of the Civil Code, set out below:

> A general release does not extend to claims which the creditor does not know or suspect to exist in his favor at the time of executing the release, which if known by him must have materially affected his settlement with the debtor.

16. Thorpe hereby waives, as to the Thorpe Released Matters, application of Section 1542 of the Civil Code.

17. Thorpe understands and acknowledges that the significance and consequence of this waiver of Section 1542 of the Civil Code is that even if Thorpe should eventually suffer additional damages arising out of any claim of any kind as to the Thorpe Released Matters, it will not be permitted to make any claim for those damages to or against Fireman's Fund or CIC, except under the Chicago Policies or the Transcontinental Excess Policies. Furthermore, Thorpe acknowledges that it intends these consequences even as to any claim of any kind that may exist as of the date of this release but which Thorpe does not know exist, and which, if known, would materially affect Thorpe's decision to execute this release, regardless of whether Thorpe's lack of knowledge is the result of ignorance, oversight, error, negligence, or any other cause.

18. Thorpe acknowledges that it intends the consequences of its waiver of Civil Code Section 1542 even as to unanticipated claims of any kind relating to the Thorpe Released Matters, except under the Chicago Policies or the Transcontinental Excess Policies, including those which do not yet exist and which could not be foreseen.

19. Insurers certify that they have read and waive as to the Insurers Released Matters the application of Section 1542 of the Civil Code, set out below:

> A general release does not extend to claims which the creditor does not know or suspect

> to exist in his favor at the time of executing the release, which if known by him must have materially affected his settlement with the debtor.

20. Insurers hereby waive as to the Insurers Released Matters application of Section 1542 of the Civil Code.

21. Insurers understand and acknowledge that the significance and consequence of this waiver of Section 1542 of the Civil Code is that even if Insurers should eventually suffer additional damages arising out of any claim of any kind as to the Insurer Released Matters, they will not be permitted to make any claim for those damages to or against Thorpe, except under the Chicago Policies or the Transcontinental Excess Policies. Furthermore, Insurers acknowledge that they intend these consequences even as to any claim of any kind as to the Insurers Released Matters that may exist as of the date of this release but which Insurers do not know exist, and which, if known, would materially affect Insurers' decision to execute this release, regardless of whether Insurers' lack of knowledge is the result of ignorance, oversight, error, negligence, or any other cause.

22. Insurers acknowledge that they intend the consequences of their waiver of Civil Code Section 1542 even as to unanticipated claims of any kind relating to the Insurers Released Matters, except under the Chicago Policies or the Transcontinental Excess Policies, including those which do not yet exist and which could not be foreseen.

23. The parties to this Agreement each warrant and represent that in executing this Agreement, it has relied on legal advice from the attorney(s) of its choice, that the terms of this Agreement and its consequences have been completely read and have been explained to it by that attorney(s), and that it fully understands the terms of this Agreement.

24. The parties to this Agreement each represent and warrant that they have not and will not in any manner assign, transfer, convey or sell, or purport to assign, transfer, convey or sell to any entity or person any cause of action, chose in action, or part thereof, arising out of or connected with the matters released herein, and that they are the only persons or entities entitled to recover for damages under such claims, causes of action, actions, and rights. The parties to this Agreement each also represent and warrant that no subrogation of any such causes of action, chose in action, or part thereof, has taken place. The parties to this Agreement each further represent and warrant that they will not in any way voluntarily assist any other person or entity in the establishment of any claim, cause of action, action, or right against the other party to this Agreement arising out of, resulting from or in any way relating to the matters released.

25. Each party to the Agreement shall take such steps and shall execute such documents as may be reasonably necessary or proper to effectuate the purpose and intent of this Agreement.

26. This Agreement prevails over prior communications regarding the matters contained herein

between the signatories hereto or their representatives. This Agreement has been reviewed by counsel for the signatories hereto. No party shall be deemed the drafter of this Agreement or any particular provision in it. This agreement is not an insurance policy and shall not be subject to the rules of construction of insurance policies. This Agreement shall not be construed against either party on the basis that Party's identity as a drafter or as an insurance company, and each party expressly waives the doctrine of *contra proferentem.*

27. The parties expressly agree and stipulate that the ADR Decision and also such final version of it as is prepared by Judge Sofaer pursuant to this Agreement, if such there be, will *not* be confidential, and any judgment(s) or order(s) pursuant to paragraph 7 or otherwise called for by this Agreement will likewise not be confidential.

28. This Agreement is an integrated Agreement and contains the entire Agreement regarding the matters herein between the signatories hereto, and no representations, warranties, or promises have been made or relied on by any signatory hereto other than as set forth herein, and no modification to this Agreement has been made, or can be effective unless in writing and signed by the party to be charged. The failure or invalidation of any provision of this Agreement shall not in any way affect the validity of, or performance of any party pursuant to, any other provision of the Agreement.

29. This Agreement is intended to confer rights and benefits only on the signatories hereto as described in this Agreement, and is not intended to confer any right

or benefit upon any other person or entity. No person or entity other than the signatories hereto shall have any legally enforceable right under this Agreement. All rights of action for any breach of this Agreement are hereby reserved to the signatories herein.

30. Each party represents and warrants:

a. That it is a corporation duly organized and validly existing in good standing under the laws of one of the States of the United States;

b. That it has taken all necessary corporate and legal actions to duly approve the making and performance of this Agreement and that no further corporate or other approval is necessary;

c. That the making and performance of this Agreement will not violate any provision of law or of its Articles of Incorporation or Bylaws;

d. That it has read this Agreement and knows the contents hereof, that the terms hereof are contractual and not by way of recital, and that it has signed this Agreement of its own free act;

e. That in making this Agreement, it has obtained the advice of legal counsel;

f. Each signatory to this Agreement warrants that he or she has full authority to sign in the capacity designated for that individual in this Agreement and each signatory warrants that he or she has full authority to bind the party on whose behalf the signatory signs; and

g. That the individual who signs this Agreement has authorization to do so on its behalf.

31. Each party to this Agreement expressly agrees to indemnify the other for all expenses, reasonable fees, including reasonable attorneys' fees, and other consequences, of any breach by the indemnifying Party of a warranty expressly stated in this Agreement, provided that neither this provision nor any provision other than paragraph 27 limits the rights, obligations or duties of the parties hereto under the Wellington Agreement.

32. Each of the terms of this Agreement is binding upon each signatory hereto, and their respective predecessors, successors, parents, subsidiaries, affiliated companies, transferees, assigns, representatives, principals, agents, officers, directors, and employees.

33. The parties to this Agreement hereby agree that this Agreement may be executed in counterparts, and that all such counterparts shall constitute one instrument binding on the signatories in accordance therewith, notwithstanding that all signatories are not signatories to the original or the same counterpart. This

Agreement shall be effective on the date when it has been signed by all the parties hereto. One original Agreement is to be delivered to Thorpe Insulation Company, one original Agreement is to be delivered to CIC, and one original Agreement is to be delivered to Fireman's Fund. Facsimile copies of signatures shall constitute original signatures for the purpose of this paragraph; however, any party providing a facsimile copy of a signature shall immediately forward to the other parties, by first-class mail, postage prepaid, a counterpart of this Agreement bearing an original signature.

34. Any and all statements, communications, or notices to be provided pursuant to this Agreement shall be in writing and sent by facsimile or by first-class mail, postage prepaid. Such communications or notices shall be sent to the individuals noted below, or to such other individuals as such party may designate in writing from time to time:

Thorpe Insulation Company
c/o Robert W. Fults
324 West El Segundo Boulevard
El Segundo, California 90245

and

Kirk A. Pasich, Esq.
Howrey Simon Arnold & White, LLP
1925 Century Park East, Suite 2100
Los Angeles, California 90067

Appendix C

Continental Insurance Company
Donald F. Corke
CNA - Environmental & Mass Tort Claims
1100 Cornwall Road
Post Office Box 906
Monmouth Junction, New Jersey 08852-0906

and

Rodney L. Eshelman, Esq.
Carroll, Burdick & McDonough LLP
44 Montgomery Street, Suite 400
San Francisco, California 94104

Fireman's Fund Insurance Company
William Frank
Fireman's Fund Insurance Company
777 San Marin Drive, SM3/C87
Novato, California 94998-3400

and

Peter J. Logan, Esq.
Kaufman & Logan, LLP
111 Pine Street, Suite 1300
San Francisco, California 94111

35. Thorpe, CIC, and Fireman's Fund agree that this Agreement is being entered into to resolve their disputes over various coverage issues, and neither any portion of this Agreement nor the existence of the Agreement may be used or construed as an admission or concession of any position whatsoever.

36. Thorpe, CIC, and Fireman's Fund each agree that each has given and received good, sufficient, and valuable consideration for the obligations that each party to this Agreement has contracted to perform according to this Agreement.

37. Each party to this Agreement shall take such steps and shall execute such documents as may be reasonably necessary or proper to effectuate the purpose and intent of this Agreement.

IN WITNESS WHEREOF, this Agreement, consisting of nineteen (19) pages, has been read and signed by the duly authorized representatives of Thorpe on the date set forth below.

THORPE INSULATION COMPANY
By: /s/
Date: 4/17/03
Name: R.W. Fults
Title: Chairman

IN WITNESS WHEREOF, this Agreement, consisting of nineteen (19) pages, has been read and signed by the duly authorized representatives of CIC Insurance Company, on the date set forth below.

CONTINENTAL INSURANCE COMPANY
By: /s/
Date: 4/14/03
Name: Donald F. Corke
Title: Claims Counsel

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IN WITNESS WHEREOF, this Agreement, consisting of nineteen (19) pages, has been read and signed by the duly authorized representatives of Fireman's Fund on the date set forth below.

FIREMAN'S FUND INSURANCE COMPANY
By: /s/_____
Date: 17 April 2003
Name: William F. Frank
Title: Sr. Litigation Analyst

APPENDIX D — EXHIBIT A TO ADDENDUM FOR AMENDED PROOF OF CLAIM: 2003 SETTLEMENT AGREEMENT'S APPENDIX, APRIL 11, 2003 LETTER FROM R. GRINER TO A. SOFAER

[LETTERHEAD OF CARROLL, BURDICK & MCDONOUGH LLP]

April 11, 2003

The Honorable Abraham D. Sofaer
Stanford University
Herbert Hoover Memorial Building, Room 234
434 Galvez Mall
Stanford, California 94305-6010

Re: ***Fireman's Fund, et al. v. Thorpe***
CPR File No. W-00-19
File No. 24802

Dear Judge Sofaer:

The parties have reached agreement settling all outstanding issues in the Thorpe Insulation ADR, and have agreed to the following:

- Thorpe will dismiss its appeal with prejudice;
- The Insurers waive their right to receive attorneys' fees and costs, as set forth in the Findings Of Fact And Conclusions Of Law;

- Thorpe will stipulate to join the Insurers in moving the appropriate court(s) for an order confirming the Findings Of Fact And Conclusions Of Law and/or incorporating them into a judgment(s); and

- The Findings of Fact and Conclusions of Law shall not be subject to the confidentiality provisions of the Wellington Agreement, and may be disclosed to third parties.

We understand that the Findings Of Fact And Conclusions Of Law should include a statement that the decision is final and binding, and that the decision may be confirmed by any court having jurisdiction pursuant to section 9 of the U.S. Arbitration Act (U.S.C.A. § 9), and section 18 of the Procedure Manual referred to in Appendix C of the Wellington Agreement. Therefore, we request that you include such language at the end of the Findings Of Fact And Conclusions Of Law, as well as a statement that the decision is not confidential, and that you issue a Statement Of Relief Granted that includes the agreements set forth above, and forward both documents to the CPR. We would like to finalize this agreement as soon as possible so if you disagree with anything herein, please let us know at your earliest convenience.

Very truly yours,

CARROLL, BURDICK & McDONOUGH LLP

/s/
Reggie Griner

RG:lm
cc: Kirk A. Pasich, Esq.
Karin E. Freeman, Esq.
Peter J. Logan, Esq.
Keith Denny, Esq.

Thorpe Insulation hereby joins in Fireman's Fund's and Continental Insurance Company's requests as set forth in this letter. Thorpe Insulation stipulates that the Findings Of Fact And Conclusions Of Law should be confirmed as a judgment by a court of appropriate jurisdiction and will not oppose such a motion.

Thorpe Insulation Company

By /s/
Date: 4/17/03
Name: R.W. Fults
Title: Chairman

APPENDIX E — EXHIBIT B TO ADDENDUM FOR AMENDED PROOF OF CLAIM: APRIL 7, 2003 EMAIL FROM K. PASICH TO P. LOGAN

From: PasichK@howrey.com
[SMTP:PASICHK@HOWREY.COM]

Sent: Monday, April 07, 2003 4:55:08 PM

To: Griner, Reggie; plogan@kllaw.com

Cc: AdamsK@Howrey.com

Subject: Thorpe--Draft Settlement Agreement

Thorpe has had an opportunity to consider your most recent draft. Here are Thorpe's replies:

1. In our original revisions, we changed the definition of Thorpe to Thorpe Insulation Company ("TIC") in various places where it was appropriate to refer to TIC individually as opposed to Thorpe, including predecessors, parents, subsidiaries, affiliated companies, successors, shareholders, directors, and officers. For example, you did not initiate the Wellington proceeding against any entity or individual other than TIC. Likewise, only TIC is getting the payment. Therefore, it is not appropriate to use the broader reference in all circumstances. Please see our original comments to determine which is appropriate where.

2. Thorpe believes that the discussions between Mr. Fults and Mr. Frank contemplated resolution of all

outstanding issues and claims between the parties. This would be in accord with earlier discussions that I had with Peter about getting "peace" between the parties. Given that FFIC has claims (e.g., for fees) against Thorpe, Thorpe believes a mutual release was fairly contemplated and understood. Please reinsert language to make the releases mutual. Please also modify paragraph 1 to state: "Insurers agree to waive all costs and fees claimed in the ADR and the 'carve outs' (those portions of the 5/25/99 ADR first removed from, then reintroduced into the ADR by agreement of the parties) and incurred in or in connection with the Complaints."

3. Thorpe will agree to the changes in paragraph 2 regarding the timing of payment, so long as the agreement is finalized and delivered to Thorpe for execution by Thursday, April 10.

APPENDIX F — EXHIBIT C TO ADDENDUM FOR AMENDED PROOF OF CLAIM: SEPTEMBER 28, 2007 LETTER FROM T. JACOBS TO C. MALARET

[LETTERHEAD OF GRIPPO & ELDEN LLC]

September 28, 2007

Via E-Mail and Overnight Mail

Charles J. Malaret, Esq.
Morgan, Lewis & Bockius LLP
300 South Grand Avenue
22nd floor
Los Angeles, California 90071-3132

Re: *Thorpe Insulation Company ("Thorpe")*

Dear Charlie:

We write on behalf of Continental Insurance Company ("Continental"), as successor in interest to Harbor Insurance Company ("Harbor").

Thorpe has not provided any meaningful response to our letters of October 5, 2006, August 9, 2007, August 22, 2007, or September 13, 2007, all requesting information regarding a potential Thorpe bankruptcy. In light of Thorpe's silence, we have become increasingly concerned that Thorpe, alone or in conjunction with others, may be taking steps to prejudice Continental/Harbor's rights under the April 2003 "Settlement Agreement and Release" ("Settlement Agreement") entered into between Thorpe,

Continental/Harbor and Fireman's Fund Insurance Company ("Fireman's Fund").

We remind Thorpe that the Settlement Agreement expressly extinguishes any and all coverage rights against Continental/Harbor and prohibits Thorpe from: (1) "voluntarily assist[ing] any other person or entity in the establishment of any claim, cause of action, action or right against [Harbor] (¶ 24); (2) making any assignments (¶ 24); (3) applies to successors and assigns of Thorpe (¶ 32); and (4) applies to and releases all claims that Thorpe (or its successors or assigns) had or ever may have against Harbor, no matter how constituted or acquired (¶¶ 5, 9, 15-18). These provisions prevent Thorpe from assisting any claimant (or any other person or entity) in pursuing a claim against Harbor. They also prevent Thorpe from in any manner acquiring, assigning or asserting any alleged right against Harbor (*i.e.*, alleged insurer contribution rights).

In light of our many unanswered letters and questions regarding a potential Thorpe bankruptcy, we demand that Thorpe confirm in writing by 5:00 p.m. PDT on Monday, October 1, 2007, that it is not and will not, in conjunction with a contemplated bankruptcy filing or otherwise: (1) take any action to assist any party in asserting claims against Continental/Harbor; (2) acquire, assign or assert any alleged rights against Harbor; or (3) take any action, in whatever form, designed in substance to pursue or assist with an insurance recovery from Continental/Harbor.

Appendix F

If we do not receive a timely and unequivocal assurance of Thorpe's compliance as outlined above, we will take appropriate steps to protect Continental/Harbor's rights under the Settlement Agreement. We are copying counsel for Fireman's Fund.

Very truly yours,

/s/_____
Todd C. Jacobs

/ks

cc: Sarah M. Shields
Alan P. Jacobus
Peter J. Logan
Ted E. Sullivan

APPENDIX G — EXHIBIT D TO ADDENDUM FOR AMENDED PROOF OF CLAIM: SEPTEMBER 28, 2007 LETTER FROM P. LOGAN TO C. MALARET

[LETTERHEAD OF KAUFMAN & LOGAN LLP]

September 28, 2007

VIA E-MAIL ONLY

Charles J. Malaret, Esq.
Morgan, Lewis & Bockius, LLP
22nd Floor, 300 South Grand Avenue
Los Angeles, California 90071-3132

RE: Thorpe Insulation Consolidated Cases
K&L File No. 1355.141

Dear Mr. Malaret:

I received today an e-mail copy of a letter sent to you by Todd Jacobs on behalf of Continental Insurance Company as successor in interest to Harbor Insurance Company ("Continental"). My co-counsel, Ted Sullivan, on behalf of Chicago Insurance Company ("Chicago"), has also written letters to your office regarding a potential Thorpe bankruptcy on April 10, 2007, May 31, 2007 and July 26, 2007. Chicago has not received any meaningful reply to the letters. Like Continental, Chicago has become increasingly concerned about whether Thorpe is taking steps that may prejudice Chicago's rights under its policies.

Further, as you know, I represent Fireman's Fund Insurance Company ("FFIC") in connection with the April, 2003 Settlement Agreement and Release ("Settlement Agreement") entered into between Thorpe, FFIC and Continental.

FFIC refers Thorpe to the same provisions of the Settlement Agreement outlined in Continental's letter and, like Continental, asserts that these provisions prevent Thorpe from assisting any claimant (or any other person or entity) in pursuing a claim against FFIC.

Like Continental, FFIC must insist that Thorpe confirm in writing by 5:00 p.m. PDT on Monday, October 1, 2007, that, in connection with a contemplated bankruptcy filing, or otherwise:

1) It will not take, and has not taken, any action to assist any party in asserting claims against FFIC;

2) It will not acquire, assign or assert, and has not acquired, assigned, or asserted, any alleged rights against FFIC; and

3) It will not take, and has not taken, any action, in whatever form, designed in substance to pursue or assist with an insurance recovery from FFIC.

Appendix G

Very truly yours,

/s/
Peter Logan

cc (via email): Ted Sullivan
Todd Jacobs
Susan Shields

APPENDIX H — EXHIBIT E TO ADDENDUM FOR AMENDED PROOF OF CLAIM: OCTOBER 12, 2007 LETTER FROM C. MALARET TO A. SOFAER

[LETTERHEAD OF MORGAN,
LEWIS & BOCKIUS LLP]

October 12, 2007

Via E-Mail and Federal Express

The Honorable Abraham D. Sofaer
Stanford University
Herbert Hoover Memorial Building
Room 234
434 Galvez Mall
Stanford, California 94305-6010

Re: Fireman's Fund Ins. Co. v. Thorpe Insulation Co. - Wellington Agreement

Dear Judge Sofaer:

We write on behalf of Thorpe Insulation Company ("Thorpe") and in response to the letter, dated October 2, 2007, sent to Your Honor on behalf of Continental Insurance Company, as successor in interest to certain policies issued by Harbor Insurance Company ("Harbor"), in which Fireman's Fund Insurance Company ("Fireman's Fund") joined.

Appendix H

I. INTRODUCTION

Harbor and Fireman's Fund seek to invoke Your Honor's continuing jurisdiction to enforce an April 17, 2003 Settlement Agreement and Release between Thorpe and these insurers (the "Settlement Agreement") that arose from the "Wellington Arbitration" on the alleged ground that they have "reason to believe" or "suspect" that Thorpe "may be" breaching this agreement. *See* Oct. 2 Letter at p. 2. Based on their suspicions, these insurers request that Your Honor: (1) convene a meeting to frame proceedings to enforce the Settlement Agreement; (2) "order Thorpe to provide discovery on its preparations for bankruptcy;" and (3) "schedule a hearing on the merits to make findings of fact and conclusions of law as to Thorpe's [alleged] breach of the Settlement Agreement." Oct. 2 Letter at p. 10.

As explained below, however, Harbor's and Fireman's Fund's invocation of Your Honor's jurisdiction and request for relief is nothing more than a subterfuge to obtain documents and information in this forum for their respective related entities -- Transcontinental Insurance Company ("Transcontinental") and Chicago Insurance Company ("Chicago") -- which such related entities cannot obtain in the coordinated proceedings currently pending before the Honorable Carolyn Kuhl in the Los Angeles Superior Court, captioned *In re: Thorpe Insulation Asbestos Coverage Cases,* Judicial Counsel Coordination Proceeding No. 4458 (the "Pending Coverage Action").

Appendix H

II. THE PENDING COVERAGE ACTION AND INSURERS' ATTEMPTS TO OBTAIN IRRELEVANT DOCUMENTS AND INFORMATION

By the Pending Coverage Action, Thorpe seeks, among other things, a declaration of its rights under numerous comprehensive general liability insurance policies issued by various insurance carriers. Neither Harbor nor Fireman's Fund is a party to that action, and Thorpe has not otherwise taken any action against these parties. On the other hand, Transcontinental (an entity related to Harbor)[1] and Chicago (an entity related to Fireman's Fund)[2] are parties to the Pending Coverage Action.

The Pending Coverage Action is in Phase I. That phase relates to policy interpretation issues only. In turn, Judge Kuhl has limited discovery and trial during Phase I strictly to matters of policy interpretation.[3] Notwithstanding this limitation, the insurance carriers in the Pending Coverage Action, including Transcontinental and Chicago, have sought discovery relating to matters beyond the scope of Phase I. Most significantly, insurers have served Thorpe with formal discovery requests seeking, among other things, documents and information

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1. *See* Oct. 2 Letter at pp. 1, 5 (". . . Transcontinental Insurance Company[] is a CNA service mark company, as is Continental [successor in interest to certain Harbor policies]").

2. *"See* Oct. 2 Letter at p. 5, n.5 ("Chicago ... has a corporate relationship with primary insurer Fireman's Fund.").

3. The Phase I fact discovery cut-off currently is December 15, 2007. The Phase I trial currently is set for May 28, 2008.

relating to bankruptcy-related matters and Thorpe's settlement agreements with insurance carriers. Such documents and information have no relevance to Phase I policy interpretation issues. Indeed, Thorpe has objected to these requests on relevance (and other grounds) and has refused to produce the requested documents and information.

III. THORPE IS NOT IN BREACH OF THE SETTLEMENT AGREEMENT

Recognizing the Phase I limitations and their inability to obtain such documents and information in the Pending Coverage Action, Transcontinental and Chicago -- through their affiliated entities Harbor and Fireman's Fund, respectively -- have now concocted a theory in the hopes of obtaining the documents and information in this "Wellington" forum. Your Honor should shut down this attempt.

In their October 2 letter, these insurers contend that Thorpe breached the following provisions of the Settlement Agreement: (1) the restriction from ""assign[ing], transfer[ring], convey[ing] or sell[ing], or purport[ing] to assign, transfer, convey or sell to any entity or person any cause of action, chose in action, or part thereof, arising out of or connected with the matters released herein;" and (2) the restriction from "voluntarily assist[ing] any other person or entity in the establishment of any claim, cause of action, action, or right against the other party to this Agreement arising out of, resulting from or in any way relating to the matters released." Oct. 2 Letter at pp.

2, 4, 9-10. Thorpe has not breached these (or any other) provisions of the Settlement Agreement.

As an initial matter, Harbor and Fireman's Fund admit they have no hard facts for their breach of agreement claims. Indeed, they admit that they merely "believe" or "suspect" that Thorpe "may be" violating the foregoing provisions. *See* Oct. 2 Letter at pp. 2, 9-10.

In any event, the actions that Harbor and Fireman's Fund aver Thorpe is taking, even if true, causes no damage to them or otherwise alter their existing rights under the Settlement Agreement. The Insurers fail to recognize that the rights or claims Thorpe is purportedly assigning or "voluntarily assisting" other parties in establishing exists against Harbor and Fireman's Fund already exists irrespective of any action taken by Thorpe (whether consistent with or in violation of the Settlement Agreement). In discussions between the parties' respective counsel, Harbor's and Fireman's Fund's lawyers explained that they are particularly concerned that, in connection with a potential bankruptcy filing, Harbor and Fireman's Fund may be subjected to such claims. The Insurers' concern is unreasonable because it ignores well-settled California law that both claimants and insurers have ***direct actions*** and ***contribution rights*** against both Harbor and Fireman's Fund irrespective of any bankruptcy action taken by Thorpe and the Wellington agreement does not preclude Thorpe from seeking bankruptcy protection.

First, it cannot be disputed that asbestos claimants may have direct action against Thorpe's insurers during

or after Thorpe's bankruptcy. Thorpe cannot prevent claimants from seeking direct actions against Harbor and Fireman's Fund like the recent action filed by some asbestos plaintiffs. The Wellington agreement also does not protect the Insurers from such actions.

Second, Thorpe cannot prevent contribution actions filed by other insurers. For example, in *Employers Insurance Company of Wausau v. Travelers Indemnity Company,* 141 Cal. App. 4th 398 (2006), plaintiff-insurer Wausau succeeded in obtaining a declaratory judgment that required the defendant insurers to contribute to the cost of defending claims after the defendant insurers already entered comprehensive settlements with the mutual insured. *See id.* at 401. The defendant insurers appealed. They argued that their settlement agreements with the insured barred Wausau's contribution claims. By those settlement agreements, the insured "released the defendant insurers from any obligation to defend or indemnify it against past, present and future environmental actions and agreed to indemnify the settling carriers against any claims under their policies, including other insurers' claims for contribution." *Id.* The Court of Appeal rejected this argument out of hand:

> "This right of equitable contribution belongs to each insurer individually. It is not based on any right of subrogation to the rights of the insured, and is not equivalent to "'standing in the shoes'" of the insured. . . . [t]he right to equitable contribution exists ***independently*** of the rights of the insured. . . ." Thus, the well-settled rule

> is that an insurer's obligation to contribute to another insurer's defense or indemnification of a common insured ***arises independently and is separate from any contractual obligation owed to their insured.***

Id. at 404 (emphasis supplied in part) (citations omitted). Again, the Wellington agreement does not protect Harbor or Fireman's Fund from such claims.

Put simply, regardless of any action Thorpe takes, asbestos claimants, other insurers or bankruptcy trust may nevertheless hold and assert claims against Harbor and Fireman's Fund.

IV. CONCLUSION

Thorpe is not in breach of its Settlement Agreement with Harbor and Fireman's Fund. These insurers are well aware that Thorpe cannot prevent third parties from asserting rights or claims, nor does the Wellington agreement prevent such claims. In the event Thorpe files bankruptcy, Harbor, Fireman's Fund and any other insurer will have and may assert whatever rights afforded to them under the Bankruptcy Code or other applicable bankruptcy law in the Bankruptcy Court.

Further, Harbor's and Fireman's Fund's attempts to "reopen" this Wellington matter, nevertheless, is nothing more than a stealth attempt to obtain documents and information which their related companies are unable to obtain in the Pending Coverage Action as a result of

Appendix H

Judge Kuhl's limitations on the scope of discovery during Phase I of that action. Your Honor should not permit these insurers to circumvent Judge Kuhl's Phase I limitations.

Accordingly, Harbor's and Fireman's Fund's requests for relief should be denied.

Respectfully submitted,

/s/_____
Charles J. Malaret

APPENDIX I — EXHIBIT F TO ADDENDUM FOR AMENDED PROOF OF CLAIM: OCTOBER 2, 2007 LETTER FROM A. JACOBUS TO A. SOFAER

[LETTERHEAD OF CARROLL, BURDICK & MCDONOUGH LLP]

October 2, 2007

By Federal Express, First Class Mail, and Electronic Mail (PDF)

The Honorable Abraham D. Sofaer
Stanford University
Herbert Hoover Memorial Building
Room 234
434 Galvez Mall
Stanford, California 94305-6010

Re: Enforcement Of Settlement Agreement And Release In The *Fireman's Fund Ins. Co. v. Thorpe Insulation Co.* Wellington Agreement Arbitration

Dear Judge Sofaer:

We write on behalf of Continental Insurance Company, as successor in interest to certain policies issued by Harbor Insurance Company ("Continental" or "Harbor"), to request that Your Honor enforce an April 17, 2003 Settlement Agreement and Release[1] over which Your Honor has continuing jurisdiction. Fireman's Fund

1. A copy of the Settlement Agreement and Release is attached as **Exhibit 1** to this letter.

Insurance Company ("Fireman's Fund") also joins in this letter and the relief requested herein, and requests that any communications relating to this letter be copied on its coverage counsel, Peter J. Logan.

The Settlement Agreement ended the Wellington Agreement[2] arbitration proceedings between Continental and Firemen's Fund, on the one hand, and Thorpe Insulation Company ("Thorpe"), on the other hand, over which Your Honor presided as Trial Judge in 2001, and in which Your Honor issued Findings of Fact and Conclusions of Law after a hearing on the merits.[3] Generally speaking, and as discussed in more detail below, Your Honor determined that Thorpe was not entitled to the so-called "non-products" coverage it was seeking under the Harbor and Fireman's Fund policies for the asbestos bodily injury claims asserted against Thorpe.

As outlined in this letter, under the Settlement Agreement, Thorpe (including its successors and assigns) released all claims it had or ever may have (essentially all rights to coverage under the policies) against Continental and Fireman's Fund, no matter how constituted or acquired. (Settlement Agreement at 6, 7-8, 10-11, ¶¶ 5, 9, 15-18.) Second, Thorpe is prohibited from voluntarily assisting others in the establishment of any claim, cause of action, action, or right against Continental and Fireman's

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2. The formal name of the agreement is the Agreement Concerning Asbestos-Related Claims, dated June 19, 1985. A copy of the Wellington Agreement is attached as **Exhibit 2** to this letter.

3. Your Honor's Findings of Fact, Conclusions of Law and Final and Binding Order are attached as **Exhibit 3** to this letter.

Fund with respect to the matters released in the Settlement Agreement. *Id.* at 12-13, ¶ 24. Third, Thorpe is prohibited from assigning, transferring, conveying, or selling, or purporting to assign, transfer, convey, or sell, any cause of action, chose in action, or part thereof, arising out of or connected with the matters released in the Settlement Agreement. *Id.* at 12-13, ¶ 24.

From 2003 until sometime in 2006, Harbor and Fireman's Fund had no reason to think Thorpe was breaching or even might breach the Settlement Agreement. Unfortunately, the situation appears to have changed during the past year. Continental and Fireman's Fund have reason to believe (and Thorpe has not denied despite Continental and Fireman's Fund's/Chicago's repeated requests for information from Thorpe) that Thorpe is now preparing for bankruptcy and that, in so doing, Thorpe may be endeavoring to acquire, assert, or assign alleged rights against Continental and Fireman's Fund that were released in the Settlement Agreement, for example, contribution rights acquired from other carriers in settlements. In addition, Continental and Fireman's Fund also have reason to believe (and Thorpe has not denied despite Continental's and Fireman's Fund's/Chicago's repeated request for information from Thorpe) that Thorpe may be voluntarily assisting others, including asbestos claimants and their lawyers, in the establishment of claims, causes of action, actions, or rights against Continental and Fireman's Fund with respect to matters released in the Settlement Agreement. These are breaches of the agreement (*id.* at 6, 7-8, 9-11, 12-13, ¶¶ 5, 9, 12-13, 15-18, 24), which give rise to indemnity and other rights in Continental and Fireman's Fund's favor (*id.* at 10, 15-16,

¶¶ 15-16, 31). As recently as last week, Continental and Fireman's Fund asked Thorpe to confirm that it was not taking any such actions. (Letter from Jacobs to Malaret (Sept. 28, 2007); Letter from Logan to Malaret (Sept. 28, 2007).)[4] Thorpe did not respond.

Since Your Honor has continuing jurisdiction to enforce the Settlement Agreement (*id.* at 10, ¶ 14), Continental and Fireman's Fund request that Your Honor:

(1) convene a meeting of counsel for Continental, Fireman's Fund, and Thorpe within 10 days of this letter to frame proceedings to enforce the Settlement Agreement;

(2) order Thorpe to provide discovery on its preparations for bankruptcy, and its communications with asbestos plaintiffs' attorneys and other insurers, especially as to how those preparations affect the Harbor and Fireman's Fund policies; and

(3) schedule a hearing on the merits to make findings of fact and conclusions of law as to Thorpe's breach of the Settlement Agreement and as to the damages, attorneys fees, and other relief to which Continental and Fireman's Fund may be entitled.

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4. The September 28, 2007 Jacobs letter is attached as **Exhibit 4** to this letter; the September 28, 2007 Logan letter is attached as **Exhibit 5** to this letter.

Thorpe could quickly put an end to our suspicions and this proceeding by submitting sworn declarations that (1) it is not violating the Settlement Agreement in the above ways (or in any related manner), (2) that it will not do so in the future, and (3) by providing any and all bankruptcy-related or other pertinent documents and communications with asbestos claimants and their lawyers or other insurers relating to the Harbor or Fireman's Fund policies.

I. Background: The 2002 Wellington Agreement Arbitration And Subsequent Events.

From 1948 to 1972, Thorpe distributed and installed insulation that contained asbestos. (Findings of Fact and Conclusions of Law at 1.) Since 1978, claimants sued Thorpe for allegedly causing asbestos bodily injuries. *Id.* Until 1999, Thorpe sought coverage for these claims from Continental and Fireman's Fund based on "products" coverage. *Id.* Continental and Fireman's Fund began proceedings under the Wellington Agreement when the insurers learned that Thorpe would, for the first time, seek "non-products" coverage. *Id.* at 1-2.

A. In The Wellington Agreement Arbitration Your Honor Concluded That Thorpe Was Not Entitled To Additional Coverage For Asbestos Bodily Injury Claims.

As Your Honor may recall, the 2001 Wellington Agreement arbitration focused on whether Thorpe was entitled to so-called "non-products" coverage after Thorpe

had exhausted the limits applicable to the products or completed operations hazards in the Harbor and Fireman's Fund policies. (Findings of Fact and Conclusions of Law at 1-4.) Your Honor found that Thorpe was not entitled to "non-products" coverage for the asbestos bodily injury claims asserted against Thorpe. *Id.*

Pursuant to the Wellington Agreement, Your Honor ordered Thorpe, as the losing party, to pay Continental and Fireman's Fund's attorneys' fees. *See id.* at 43-47. The Los Angeles superior court (which had referred the matter to arbitration) entered Your Honor's decision as a judgment.

B. Continental, Fireman's Fund, And Thorpe Settled The Coverage Claims After The Wellington Agreement Arbitration.

After Your Honor issued the preliminary Findings of Fact and Conclusions of Law on June 4, 2002, the parties began to negotiate resolution of the coverage matters at issue in the Wellington Agreement arbitration. On April 17, 2003, all three parties entered into the Settlement Agreement and Release. In exchange for a cash payment from Continental and Fireman's Fund and a waiver of the substantial fees and costs to which the insurers were entitled (Settlement Agreement at 5, ¶¶ 1-2), "Thorpe release[d] Insurers from any claims for coverage of any kind under or related to the Policies . . ." (*id.* at 6, ¶ 5), including "known and unknown" claims, "future" claims (*id.* at 7-8, ¶ 9), and claims "which do not yet exist and which could not be foreseen" (*id.* at 11, ¶ 18), thereby giving up its planned appeal of Your Honor's decision.

As part of the consideration for the agreement, the parties made certain warranties.

> The parties to this Agreement each represent and warrant that they have not and will not in any manner assign, transfer, convey or sell, or purport to assign, transfer, convey or sell to any entity or person any cause of action, chose in action, or part thereof, arising out of or connected with the matters released herein, and that they are the only person or entities entitled to recover for damages under such claims, causes of action, actions, and rights. [. . .] The parties to this Agreement each further represent and warrant that they will not in any way voluntarily assist any other person or entity in the establishment of any claim, cause of action, action, or right against the other party to this Agreement arising out of, resulting from or in any way relating to the matters released.

Id. at 12-13, ¶ 24. The Settlement Agreement specifically provided remedies for breaches of the warranties:

> Each party to this Agreement expressly agrees to indemnify the other for all expenses, reasonable fees, including reasonable attorneys' fees, and other consequences, of any breach by the indemnifying Party of a warranty expressly stated in this Agreement, provided that neither this provision nor any provision other than paragraph 27 limits the rights,

> obligations or duties of the parties hereto under the Wellington Agreement.

Id. at 15-16, ¶ 31.

The parties also agreed "to the continuing jurisdiction of Trial Judge Abraham D. Sofaer to enforce this Agreement and its terms." *Id.* at 10, ¶ 14.

C. After The Wellington Agreement Arbitration, Thorpe Continued To Seek "Products" Coverage From Other Insurers.

In addition to the policies Harbor and Fireman's Fund issued to Thorpe, various other primary and excess insurers issued other policies to Thorpe. One of those excess insurers, Transcontinental Insurance Company, is a CNA service mark company, as is Continental. Thorpe continued to exhaust the products coverage of its excess insurers until late 2005 when its products coverage began to run out.

In late 2005, Thorpe claimed for the first time that it was entitled to so-called "non-products" coverage from its primary carriers other than Harbor and Fireman's Fund and from its excess insurers. In November 2005, two of Thorpe's excess insurers, Chicago Insurance Company[5] and Motor Vehicle Casualty Company, filed a declaratory judgment action in California superior court over Thorpe's

5. Chicago Insurance Company is one of Thorpe's excess insurers. It has a corporate relationship with primary insurer Fireman's Fund. The Chicago policies were not released by the 2003 Settlement Agreement.

claimed entitlement to "non-products" coverage. Thorpe also filed suit in California superior court. Those actions, plus additional actions, are now pending as coordinated proceedings before The Honorable Carolyn Kuhl of the Superior Court of California, County of Los Angeles, in an action known as *In re: Thorpe Insulation Asbestos Coverage Cases,* Judicial Council Coordination Proceeding No. 4458 (La. Super. Ct. Los Angeles County).

D. Thorpe Has Not Been Forthright About Its Bankruptcy Plans.

For almost a year now, Transcontinental (a defendant in the Coordination Proceeding and a CNA service mark company like Continental/Harbor) acting for itself and Continental has sought information from Thorpe concerning its bankruptcy plans. On October 5, 2006, Transcontinental, after seeing a Term Sheet relating to settlement of certain asbestos bodily injury claims against Thorpe that mentioned a Thorpe bankruptcy, sought information from Thorpe about its bankruptcy plans. (Letter from Venetis to Malaret (Oct. 5, 2006) at 1, 2-3.)[6] That same day, Thorpe's current coverage counsel, Morgan, Lewis & Bockius ("Morgan, Lewis"), responded to the inquiry by denying that any bankruptcy-related documents existed, with the exception of a "likely out-of-date" report. (Letter from Raskin to Venetis (Oct. 5, 2006) at 2.[7])

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6. The October 5, 2006 Venetis letter is attached as **Exhibit 6** to this letter.

7. The October 5, 2006 Raskin letter is attached as **Exhibit 7** to this letter.

Appendix I

On August 9, 2007, Todd Jacobs, co-counsel for Continental and Transcontinental, again inquired of Thorpe about its bankruptcy plans, given the passage of a year. (Letter from Jacobs to Malaret and Raskin (Aug. 9, 2007).[8])[9] When Thorpe did not respond, Mr. Jacobs followed-up by letter on August 22, 2007. (Letter from Jacobs to Malaret and Raskin (Aug. 22, 2007).[10]) That same day, Mr. Jacobs sent Thorpe's lawyers a letter requesting that Thorpe "give immediate electronic notice of [commencement of a bankruptcy case] . . ." to him and others. (Letter from Jacobs to Malaret, Raskin, *et al.* (Aug. 22, 2007) at 1.[11]) Mr. Jacobs also requested that Thorpe "please advise me immediately if you do not agree to honor our request for immediate notice as set forth above." *Id.* at 2.

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8. The August 9, 2007 Jacobs letter is attached as **Exhibit 8** to this letter.

9. Like Continental, Chicago Insurance Company (also a defendant in the coordinated proceedings and a Fireman's Fund related corporation) has been seeking information from Thorpe concerning Thorpe's bankruptcy plans. Chicago has sent letters to Thorpe Insulation as early as April 10, 2007. To date Chicago Insurance Company has not received any meaningful response from Thorpe.

10. The August 22, 2007 Jacobs letter is attached as **Exhibit 9** to this letter.

11. The second August 22, 2007 Jacobs letter is attached as **Exhibit 10** to this letter.

Thorpe responded on September 7, 2007. (Letter from Malaret to Jacobs (Sept. 7, 2007) at 1.[12]) The "response" was opaque. In its entirety, Thorpe's letter reads:

> This responds to your correspondence of August 9, 2007 and August 22, 2007. As CNA is aware, Thorpe Insulation ("Thorpe") presently faces thousands of lawsuits alleging bodily injury, almost $6 million in judgments that are enforceable today against Thorpe and millions of dollars in settlements agreed to by Thorpe's insurers, including CNA, that remain unfunded. In light of Thorpe's financial issues relating to the asbestos lawsuits, judgments and settlements, Thorpe is obligated to consider the interests of its creditors and is analyzing its options for moving forward, including a possible bankruptcy. To the extent that Thorpe seeks bankruptcy protection in the future, it will abide by applicable bankruptcy laws and orders of the Court.

Id. at 1. To be perfectly clear, Transcontinental and Continental deny all of the allegations of Thorpe's letter as it pertains to them. The point, though, is that Thorpe provided none of the bankruptcy information that Continental and Transcontinental have been requesting for almost a year, while Thorpe is implicitly threatening bankruptcy.

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12. The September 7, 2007 Malaret letter is attached as **Exhibit 11** to this letter.

Mr. Jacobs responded on September 13, 2007 to point out that Thorpe had not responded to the questions or provided the information Continental and Transcontinental were seeking from Thorpe. (Letter from Jacobs to Malaret (Sept. 13, 2007) at 1-2.[13]) Although Thorpe has not, to date, responded to that letter, on September 21, 2007, Brayton, Purcell, a law firm that represents claimants with asbestos bodily injury claims against Thorpe, demanded that several insurers, including Harbor and Fireman's Fund, pay claims against Thorpe. (Letter from Brayton, Purcell to Insurer [sic] (Sept. 21, 2007).[14])

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13. The September 13, 2007 Jacobs letter is attached as **Exhibit 12** to this letter.

14. One of Brayton, Purcell's September 21, 2007 demand letters is attached as **Exhibit 13** to this letter. Transcontinental's response is attached as **Exhibit 14** to this letter. We do not know where the Brayton, Purcell firm obtained its current list of carriers, including *Harbor and Fireman's Fund,* but a troubling possibility is that Thorpe provided it. The complete list of insurers Brayton, Purcell sent demand letters to is: Ambassador Insurance Company; American Centennial Insurance Company; Argonaut Insurance Company; Associated International Insurance Company; California Union Insurance Company; Central National Insurance Company; Chicago Insurance Company; Employers Reinsurance Corporation; ***Fireman's Fund Insurance Company;*** General Accident Insurance Company of America; Granite State Insurance Company; Great American Insurance Company; ***Harbor Insurance Company;*** Marine Bonding and Casualty Company; Manhattan Insurance Group; Middlesex Insurance Company; Mission American Insurance Company; Motor Vehicle Casualty Company; National Union Fire Insurance Company of Pittsburgh, PA; Northbrook Property and Casualty Insurance Company; Pacific Indemnity Company; Puritan Insurance Incorporated;

Moreover, on September 25, 2007, the Brayton, Purcell firm filed at least four actions against Harbor, Fireman's Fund and other insurers, including Transcontinental, in San Francisco superior court, alleging that Harbor, Fireman's Fund, and the other insurers owe damages to certain of that firm's asbestos bodily injury claimants.[15] While the Brayton, Purcell firm has previously sought to name certain of Thorpe's insurers as parties to underlying asbestos actions, it had not until last week sought coverage from Harbor or Fireman's Fund.

Having for over a year received no bankruptcy-related information from Thorpe, and having now seen the demand letter from Brayton, Purcell and four lawsuits from Brayton, Purcell identifying Harbor and Fireman's Fund as Thorpe carriers, Continental and Fireman's Fund on September 28, 2007 specifically requested that Thorpe identify what actions (if any) Thorpe was taking with respect to the Harbor and Fireman's Fund policies in any potential bankruptcy or otherwise. (Letter from Jacobs to Malaret (Sept. 28, 2007).[16]) The letter specifically reminded Thorpe of its obligations under the parties' Settlement Agreement and demanded that Thorpe confirm that it was not: (1) taking any action to assist any

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Republic Indemnity Company of America; Transcontinental Insurance Company; Transport Insurance Company; and Westport Insurance Company.

15. As far as we are aware, no carrier has as yet been served with these complaints.

16. The September 28, 2007 Jacobs letter is attached as **Exhibit 4** to this letter.

party in asserting claims against Continental/Harbor; (2) acquiring, assigning or asserting any alleged rights against Harbor; or (3) taking any action, in whatever form, designed in substance to pursue or assist with an insurance recovery from Continental/Harbor.

As of the date of this letter, Thorpe has not responded to Harbor's September 28, 2007 demand. This circumstance alone causes Harbor grave concern that its rights under the Settlement Agreement are being violated.

II. Another Cause For Concern: *Fuller-Austin Insulation Co. v. Highlands Ins. Co.*

It has regrettably become commonplace for certain policyholders to attempt to vitiate insurer rights through bankruptcy proceedings. This circumstance, coupled with Thorpe's non-responses to Harbor's repeated requests for information, outlined above, provide Harbor great concern. The *Fuller-Austin* matter is an example of a policyholder's attempt to strip insurers of their rights through bankruptcy proceedings.

In *Fuller-Austin Insulation Co. v. Highlands Ins. Co.,* 135 Cal. App. 4th 958, 965, 38 Cal. Rptr. 3d 716, 721 (2006),[17] Thorpe's current coverage counsel, Morgan Lewis, represented a policyholder that attempted to deny insurers due process with respect to their coverage defenses. Fuller-Austin was an installer of asbestos-

17. *Fuller-Austin Insulation Co. v. Highlands Ins. Co.*, 135 Cal. App. 4th 958, 38 Cal. Rptr. 3d 716 (2006) is attached as **Exhibit 15** to this letter.

containing materials. *Fuller-Austin,* 135 Cal. App. 4th at 966-967, 38 Cal. Rptr. 3d at 721. Morgan, Lewis and Fuller-Austin negotiated a bankruptcy plan with their adversaries, the lawyers for the claimants who had asserted asbestos claims against Fuller-Austin, while denying its insurers any meaningful opportunity to participate in those negotiations. *Fuller-Austin,* 135 Cal. App. 4th at 968-969, 38 Cal. Rptr. 3d at 723. Fuller-Austin further opposed the insurers' participation in its bankruptcy, but all the while represented to the bankruptcy court and the insurers that the insurers' coverage defenses would be heard on the merits in insurance coverage litigation that was pending in California superior court. *Fuller-Austin,* 135 Cal. App. 4th at 969-971, 38 Cal. Rptr. 3d at 723-725.

After the bankruptcy proceedings concluded and the California insurance coverage litigation resumed, Fuller-Austin had a "new position" with respect to the insurers' coverage defenses. *Fuller-Austin,* 135 Cal. App. 4th at 972, 38 Cal. Rptr. 3d at 726.

> [In the California superior court] Fuller-Austin adopted a position it did not take in the bankruptcy proceedings; it asserted that its confirmed [bankruptcy] Plan was a final adjudication that established its liability to asbestos claimants and therefore obligated [the insurers] to pay the full . . . value [negotiated between Fuller-Austin and the asbestos claimants without the participation of the insurers] established by the bankruptcy court with respect to each asbestos claim.

Id. Thus, during the bankruptcy proceedings, Fuller-Austin took the position that the insurers' coverage defenses would be heard in the California coverage action, but after the bankruptcy proceedings Fuller-Austin contended that the bankruptcy proceedings had adjudicated the insurers' coverage defenses against them. Generally speaking, the superior court agreed with Fuller-Austin. *Fuller-Austin,* 135 Cal. App. 4th at 971-975, 38 Cal. Rptr. 3d at 725-728.

The Court of Appeal reversed "significant portions of both the trial court's statement of decision and the special verdict . . ." and held that it could not "conclude that the [bankruptcy statutes were] intended to eradicate [the insurers'] rights under their insurance policies." *Fuller-Austin,* 135 Cal. App. 4th at 966, 38 Cal. Rptr. 3d at 721. Despite this rejection of the tactics employed in *Fuller-Austin,* Thorpe may well be attempting to affect Harbor and Fireman's Fund's rights via a soon-to-be-filed bankruptcy proceeding. Even though the appellate court reversed the superior court's decision in *Fuller-Austin,* Continental and Fireman's Fund here wish to head off a potentially protracted and expensive battle in bankruptcy court if they can.

III. Continental And Fireman's Fund Have Reason To Suspect That Thorpe May Be Breaching The Settlement Agreement.

As discussed above, Continental and Fireman's Fund believe that Thorpe may be negotiating a bankruptcy with its adversaries, the asbestos claimants and their lawyers, and to the exclusion of its insurers. Such negotiations and

actions may well be intended to resurrect rights against Continental and Fireman's Fund that were expressly released in the Settlement Agreement.

As indicated in the introduction of this letter (*supra,* at 3), Thorpe could quickly put an end to these proceedings by providing sworn assurances that it is not doing anything to circumvent the Settlement Agreement.

IV. Continental Requests That Your Honor Enforce The Settlement Agreement.

Unless Thorpe provides acceptable, sworn assurances that it has not breached and will not breach the Settlement Agreement, Continental and Fireman's Fund request that Your Honor begin proceedings to enforce the Settlement Agreement. Specifically, Continental and Fireman's Fund request the following relief:

(1) convene a meeting of counsel for Continental, Fireman's Fund, and Thorpe within 10 days of this letter to frame proceedings to enforce the Settlement Agreement;

(2) order Thorpe to provide discovery on its preparations for bankruptcy, especially as to how those preparations affect the Harbor and Fireman's Fund policies; and

(3) schedule a hearing on the merits to make findings of fact and conclusions of law as to Thorpe's breach of the Settlement Agreement and as to the damages and other relief to which Continental may be entitled.

Appendix I

Since a bankruptcy filing and/or any actions related thereto pertinent to the Harbor and Fireman's Fund policies may irreparably harm Continental and Fireman's Fund's rights under the Settlement Agreement, Continental and Fireman's Fund respectfully request that enforcement of the Settlement Agreement proceed as expeditiously as possible.

We look forward to discussing the issues raised in this letter with Your Honor and counsel for Fireman's Fund and Thorpe as soon as reasonably possible.

Sincerely yours,

CARROLL, BURDICK & McDONOUGH LLP

/s/_____
Alan P. Jacobus

cc: Thorpe Insulation Company c/o Robert Fults
Kirk A. Pasich (listed on Settlement Agreement as coverage counsel for Thorpe)
Charles J. Malaret (current coverage counsel for Thorpe)
Peter J. Logan (current coverage counsel for Fireman's Fund and Chicago)
Ted E. Sullivan (current coverage counsel for Chicago)
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