

STATE OF NEW YORK  
SUPREME COURT

COUNTY OF ONONDAGA

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**SHIRLEY I. BEAULIEU**, Executor of the State of  
**MARC BEAULIEU**, Deceased,

*Plaintiff,*

*-against-*

Index No.: 2015EF4176

**ALCOA, INC.**, *et al.*,

*Defendants.*

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**MEMORANDUM OF LAW IN SUPPORT OF  
DEFENDANT LINDBERG/MPH'S  
MOTION FOR AN ORDER COMPELLING DISCLOSURE  
AND ADMISSION OF PLAINTIFF'S PROOF OF CLAIMS**

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## PRELIMINARY STATEMENT

Defendant Lindberg/MPH (“Lindberg”) respectfully submits this Memorandum of Law in support of its motion for an order from this Court requiring Plaintiff to complete and disclose all bankruptcy trust claims before trial commences. This is the only way to insure that Plaintiff discloses all exposure facts and evidence in their control associated with the alleged causation of Plaintiff Marc Beaulieu’s mesothelioma to the Defendants. Such filings and subsequent disclosures must be made before trial begins or Lindberg (and any other remaining defendants) will suffer incurable prejudice. This includes not only the loss of evidence of other asbestos exposures, but also the irreparable injury of the loss of potentially responsible entities on the verdict sheet.

Following disclosure, Lindberg also seeks an Order admitting Plaintiff’s proof of claim forms and any documents filed in support into evidence as party admissions as well as under the doctrine of judicial estoppel, following established case law of this State. Proof of Claim forms cannot and should not be separated from the evidence submitted along with such form because the form along with the supporting evidence is the “Proof” of Claim, and should be evaluated by a jury in assessing the liability for Plaintiff’s alleged asbestos exposure.

## FACTUAL BACKGROUND

Generally, this action is for personal injuries allegedly sustained by plaintiff’s decedent, Marc Beaulieu, arising from claimed exposure to asbestos fibers through various sources and from various asbestos-containing products. Mr. Beaulieu’s alleged exposure to asbestos arises from his work at a General Motors plant located in Massena, New York as well as from work he personally performed on his residences (Ex. A, Interrogatory Responses, Chart A).

As it relates to Lindberg, Plaintiff has alleged exposure from Marc Beaulieu being in the presence of other workers repairing furnaces manufactured Lindberg located at the General Motors foundry (Ex. B, Plaintiff's Dep., pp. 94, 114, 168). There is no dispute that Marc Beaulieu worked in the vicinity of other trades at General Motors, including those who worked on pipe insulation (Ex. B, Plaintiff's Dep., pp. 164-165). Plaintiff further testified he worked with Gold Bond joint compound, manufactured by National Gypsum who is a bankrupt entity (Ex. B, Plaintiff's Dep., pp. 263). Despite multiple requests and Plaintiff's obligation in discovery, however, Plaintiff has not disclosed Proof of Claim forms filed with asbestos bankruptcy trusts as of the date of this motion (Ex. C, Requests for Disclosure).

## ARGUMENT

### POINT I

#### **THE COURT SHOULD ISSUE AN ORDER COMPELLING PLAINTIFF TO PRODUCE ALL BANKRUPTCY FILINGS AND SUPPORTING DOCUMENTS PRIOR TO TRIAL**

##### **A. Asbestos Bankruptcy Trusts and Abuse.**

Asbestos bankruptcy trusts were designed to adjudicate vast liabilities carried by "first-wave" asbestos defendants. These are defendants who, among other things, mined asbestos and manufactured friable asbestos products. Beginning in 1982, these first-wave defendants filed for bankruptcy to settle present and future asbestos liability. A second wave followed in the 1990s, and a third from 2000 to 2005. All told, asbestos litigation has forced nearly one hundred companies into bankruptcy to date (*See* Mark A. Behrens & Cary Silverman, *Punitive Damages in Asbestos Personal Injury Litigation: The Basis for Deferral Remains Sound*, 8 RUTGERS J.L. & PUB. POL'Y 50, 64 [2011]).

The United States Congress specifically amended the bankruptcy code to deal with post-bankruptcy asbestos trusts (*See* 11 U.S.C. § 524[g]). As part of the debtor's reorganization, a trust is established on behalf of future claimants (*Id.*). The bankruptcy court enters an injunction against suit, which operates in the same manner as a release or covenant of nonsuit (*Id.*). The trust pays any claimant who falls into the class of persons for whom the trust was created. A bankruptcy trust under this procedure is the same as a settled party (*See* Michael D. Green, *Second Thoughts About Apportionment in Asbestos Litigation*, 37 SW. U. L. REV. 531, 540 & n.46 [2008]). With the entities responsible for the most damaging exposures to asbestos in bankruptcy, plaintiffs sought new solvent defendants "to shoulder a larger share of the value of asbestos claims and to widen their search for other corporations that might be held liable" (*O'Neil v. Crane Co.*, 53 Cal. 4th 335, 354 & n.9 [Cal 2012]). The "remaining defendants are 'downstream' users or distributors of asbestos-containing products, or manufacturers of products in which asbestos was jacketed or encapsulated" (*Tancredi v. AC&S*, 194 Misc. 2d 214, 219 [Sup. Ct. N.Y. Co. 2002]).

Solvent defendants absorb litigation costs and bankrupt entities' liability for little reason other than their solvency. Over thirteen (13) years ago, *Tancredi* captured the injustice as follows:

In asbestos litigation, the bankrupt tortfeasors' shares of liability, which the Plaintiff claim the solvent defendants must absorb, can comprise much or most of a large verdict. For example: In August 1993, multimillion dollar verdicts were returned in four consolidated cases, in which the plaintiffs were exposed to asbestos-containing pipe covering, cement, spray and tile in the 1940's and 1950's. Fault percentages were apportioned among the tortfeasors. If the four cases were decided today, the percentage attributable to now-bankrupt defendants would be 45% (of

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