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Index #: E2019008544

Date: 07/15/2021

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Return To:
Cynthia Roth
200 Elizabeth St
Utica, NY 13501

KIMBER, KELLY A

A.O. SMITH WATER PRODUCTS CO
AIR & LIQUID SYSTEMS CORPORATION, as successor-by-
merger to BUFFALO PUMPS, INC
AMCHEM PRODUCTS, INC., n/k/a RHONE POULENC AG
COMPANY, n/k/a BAYER CROPSCIENCE INC
BURNHAM, LLC, Individually, and as successor to

Total Fees Paid: \$0.00

Employee: CW

State of New York

MONROE COUNTY CLERK'S OFFICE
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JAMIE ROMEO

MONROE COUNTY CLERK



**SUPREME COURT OF THE STATE OF NEW YORK
7JDAL – COUNTY OF MONROE**

ORDER

KELLY A. KIMBER,

Index No.: E2019008544

Plaintiffs,

-against-

Hon. Erin P. Gall, J.S.C.

A.O. SMITH WATER PRODUCTS, INC., et. al.,

Defendants.

Plaintiff Kelly A. Kimber (“Plaintiff”), by and through her attorneys, Weitz & Luxenberg, P.C., having moved before this Court for a Protective Order Granting Partial Relief from Subpoenas *Duces Tecum* served on non-party bankruptcy trusts, seeking redaction of information regarding settlement amounts, non-party affiant personal information, highly sensitive and personal medical issues, and claim specific identification information generated by the trusts, and Defendant Cleaver Brooks Inc., by and through its attorneys, Mackenzie Hughes LLP, and Zurn Industries LLC, by and through its attorneys, McGivney, Kluger, Clark and Intoccia, having opposed said motion;

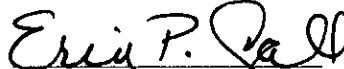
NOW, upon reading the Affirmation of Thomas P. Comerford dated January 11, 2021, and the attached exhibits, in support of the motion; the Affirmation of Christopher A. Powers, Esq., dated January 26, 2021, in opposition to the motion; the Affirmation of Meagan E. Dean dated June 1, 2021, and the attached exhibits, in opposition to the motion; and oral argument having been heard by the Court on June 2, 2021, a true and accurate transcript of which is attached hereto; and due deliberation having been had thereon; and upon the bench decision of the court dated June 2, 2021, as included in the attached transcript, it is hereby

ORDERED that Plaintiff’s motion for a protective order is **GRANTED** only to the extent that information related to settlement amounts, Social Security numbers and highly sensitive medical information related to claimant’s drug and/or alcohol abuse and HIV status specifically, shall be redacted, and Plaintiff’s motion for a protective order is otherwise **DENIED** in all other respects.

The foregoing constitutes the Order of this Court.

Dated: July 15, 2021

ENTERED,


Hon. Erin P. Gall, J.S.C.

STATE OF NEW YORK FIFTH JUDICIAL DISTRICT
SUPREME COURT COUNTY OF MONROE/MADISON

KELLY A. KIMBER,
Plaintiff,
Index No.: E2019008544
- against -

A.O. SMITH WATER PRODUCTS, INC., et al.,
Defendants.

SCOTT M. TUCKER, as Executor for the Estate of RICHARD B. TUCKER,
Plaintiff,
Index No.: EF2019-1858
- against -

AMCHEM PRODUCTS, INC., et al.,
Defendants.

DECISION
Via Microsoft Teams
June 2, 2021

HELD BEFORE:
THE HONORABLE ERIN P. GALL,
SUPREME COURT JUSTICE

APPEARANCES:
WEITZ & LUXENBERG, PC
700 Broadway
New York, New York 10003
BY: ADAM DREKSLER, ESQ.

MCGIVNEY, KLUGER, CLARK & INTOCCIA, PC
100 Madison Street - Suite 1640
Syracuse, New York 13202
BY: MEAGAN DEAN, ESQ.

DARGER, ERRANTE, YAVITZ & BLAU, LLP
116 East 27th Street - 12th Floor
New York, New York 10016
BY: SANDRA STEINMAN, ESQ.

MACKENZIE HUGHES, LLP
400 South Warren Street - Suite 400
Syracuse, New York 13202
BY: CHRISTOPHER POWERS, ESQ.

Also Present: Evan Naylor, Esq.
Colin Fitzgerald, Esq.

Regina A. Dewhurst
Senior Court Reporter

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1 THE COURT: I am going to allow you to put your
2 arguments on the record. I've read your papers. The
3 only thing I would ask more than ever is to please be
4 brief and only elaborate on what you need.

5 (Whereupon, a discussion was held off the
6 record.)

7 MR. DREKSLER: Your Honor, obviously the
8 defendants are going to go first because it's their
9 papers, but I just wanted to let you know -- like I let
10 Meagan and some of the defense counselors know
11 beforehand -- in *Kimber* there were seven total filed
12 bankruptcy claims. So seven proof of claims were served
13 as listed in our papers. I've since with the bankruptcy
14 paralegal who filed them went through them and we have
15 since withdrawn six of them. We're going to re-serve our
16 updated POCs that include the withdrawal for six of those
17 claims. The reason we're withdrawing it is there's no
18 actual identification and the bankruptcy paralegal made a
19 mistake with the cite. She put it down as bank and it
20 was a plaza, whatever. We're withdrawing those six and
21 those six involved -- some of them -- the nonparty
22 affiant affidavit. The one for Garlock is direct
23 identification through the plaintiff's father when he was
24 deposed and that has since been turned over, along with
25 our POCs, but we will do another production for those

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1 documents. I mean, as Meagan pointed out, the arguments
2 are very similar, and since we have limited time, I'll
3 let the defendants go, but for this case I'm not really
4 talking about *Kimber* because we've turned over everything,
5 and I don't believe there are any redactions other than
6 the social security number and settlement value, but
7 actually there's no settlement value, so it doesn't
8 matter because we just submitted the claim. So there's
9 nothing really to discuss in *Kimber* but obviously there
10 is for *Richard Tucker*. So that might --

11 THE COURT: Okay.

12 MR. DREKSLER: -- solve some time. Chris
13 Powers filed something. Meagan filed something last
14 night in *Kimber*. Meagan's also in *Tucker*. I'm done for
15 now. I'll let everyone else go but that's where we're at.

16 MR. POWERS: Yeah, Judge. I guess given that,
17 I'll let the *Tucker* folks go first. The arguments are
18 the same pretty much. I mean, we're going to be fighting
19 the same battle regardless. So I'll let the *Tucker* folks
20 go first on that.

21 MS. DEAN: Judge, if I could make a suggestion?
22 I think -- yes, Sandy filed the underlying briefing in
23 *Tucker*. So if it's fine with you, your Honor, and Sandy,
24 I would just maybe suggest that she lead us off. I have
25 a defendant in both of these cases, so I'm happy to

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1 follow up on very briefly with hers and then maybe if
2 Chris could follow up with that, that would make sense.

3 THE COURT: Okay, great.

4 MR. DREKSLER: Make sure I'll get some time.

5 MS. DEAN: Adam already spoke --

6 MR. DREKSLER: Five minutes, maybe four, if you
7 want me to talk fast, but for the Court reporter's health
8 and safety I will go slow.

9 THE COURT: You're lucky we've got Gina but go
10 ahead. Sandy, I'll let you go first.

11 MS. STEINMAN: Sure. I'll try to keep this
12 short and sweet but Union Carbide just simply wants the
13 discovery that it's been entitled to, has been seeking
14 since January of this year. We made valid subpoenas
15 requesting the POCs and the reliance materials that are
16 part of these POCs. This issue really comes down to
17 whether or not nonparty affiant information and claim
18 identification information can be withheld from defendants
19 and they can't for three reasons.

20 One is that they're discoverable and they're
21 not subject to privilege; and, two, there's nothing that
22 would result in prejudice to plaintiff if they were
23 disclosed to defendant; and, three, in-camera review is
24 not necessary since the materials are neither privileged
25 or would result in prejudice to plaintiff. And in the

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1 past we've agreed to do simultaneous production of POC
2 materials, which indicates that in-camera review is not
3 necessarily needed, and it is a complete waste of
4 judicial resources that are already stretched too thin.

5 New York Law has made clear that POC-supporting
6 materials, such as the affidavit and transcripts, are
7 discoverable and not subject to privilege. Affidavits of
8 nonparties supporting these trust submissions have been
9 specifically recognized by New York Courts as not only
10 discoverable but is highly relevant, probative and
11 essential to the defense at trial. The identity of these
12 individuals and their knowledge of decedent's exposure to
13 asbestos is one of the only possible means by which Union
14 Carbide can investigate the extent of Mr. Tucker's
15 exposure to other products and locations, which bears
16 directly on the share of fault. And if you may recall,
17 Judge, this case is about a dye moulding case, but it
18 also has years and years of naval exposure and that's
19 what a lot of these POCs reference, and so we are entitled
20 to get witness information.

21 Witnesses should not be kept secret. If
22 they're -- and Justice Chimes in the Eighth Judicial
23 District agreed with us. She rejected these exact same
24 arguments that plaintiff's counsel are making now and is,
25 therefore, directly on point on this issue. In *Bauer*

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1 *versus AO Smith Water Products* she held that defendant
2 Ford was entitled to receive all documents filed by or on
3 behalf of the plaintiff with bankruptcy trust as for its
4 proposed subpoena. Now, these documents are the same
5 documents that Union Carbide seeks here; again, the
6 affiant materials -- the nonparty affiant materials that
7 discuss different exposures, specifically in the Navy.

8 The plaintiff in that case requested redactions
9 of nonparty personal information and in-camera inspection,
10 and Justice Chimes determined that plaintiff's request
11 for redaction should not be granted related to nonparty
12 affiant information or claims-specific information, and
13 because these materials are not privileged materials,
14 that there really didn't need to be an in-camera
15 inspection.

16 Second, there's no prejudice to plaintiff if
17 these materials are turned over to defendants. They have
18 yet to make any factual showing that this would be
19 prejudicial to them in any way. If the disclosure is
20 sought, it is irrelevant material and does not come under
21 the immunities of CPLR 3101. It is the rare case in
22 which CPLR 3103 is applied to deny disclosures and that's
23 from the Third Department, *Willis v. Cassia*, 255 AD2d 800,
24 and the -- you know, the party seeking protective order
25 or to prevent disclosure has a very heavy burden,

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1 especially where the materials here are relevant, and in
2 this case they are relevant. It goes directly to the
3 Article 16 shares and the actual exposure issues of
4 plaintiff.

5 Again, plaintiff has not demonstrated any
6 prejudice to him whatsoever, and instead they make
7 reference to red herrings related to purported NI-Cal
8 protocols which doesn't exist.

9 All of the cases that they cite in their brief,
10 which I won't go through, are agreements between certain
11 parties that were later memorialized in orders, and the
12 one case they do cite to is the *Matter of New York City*
13 *Asbestos Litigation*, which their reliance is also
14 misplaced to show protocol. Fact is there is no protocol
15 in NI-Cal. It's done by agreement and that case
16 basically reiterated some of the compromises that were
17 made, just like a CMO in any jurisdiction. Even if this
18 was a protocol in NI-Cal, none of the upstate courts have
19 followed this purported protocol, and there have been
20 three cases that plaintiff himself cites in his own
21 papers related to the unredacted affidavits and
22 transcripts which were granted. For example, *James*
23 *Wright versus Air Liquid Systems*, Justice Aulisi granted
24 defendant's request for unredacted affidavits and
25 transcripts. He did it again in the *John Farrenkopf* case

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1 in 2017, again, after the Heitler decision, and again
2 Justice Chimes did the same in *Bauer* in 2016. Again,
3 after the Heitler decision, there's no such protocol and
4 certainly has not been followed in Upstate New York.

5 Lastly, there's no camera review required or
6 needed. Typically an in-camera review is reserved for
7 privileged materials. Again, as we noted before, there
8 is no privilege. There's no prejudice even to plaintiffs,
9 and if any privilege would have attached, that privilege
10 went away as soon as plaintiffs attached those affidavits
11 and transcripts to a third-party trust. There is no
12 longer that privilege, no longer attaches. So, therefore,
13 they waived that privilege, if there was any, and again
14 this is a total waste of judicial resources.

15 If this Court has to review every POC in every
16 case that are ordered, it would take -- take your Honor
17 and your staff a very long time to conduct each review.
18 Thank you, Judge.

19 THE COURT: Thanks. Anything further?

20 MR. DREKSLER: This is a lot for me to do and
21 then give it to Meagan (inaudible) --

22 THE COURT: Hold on one second. Meagan, I'll
23 let the defense finish arguments and then I'll let Adam
24 speak. Meagan?

25 MS. DEAN: Yes, Judge, thank you. I think that

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1 might be helpful. So this is Meagan Dean from the law
2 firm of McGivney, Cluger, Clark & Intoccia. I represent
3 defendant Rogers Corporation in the *Richard Tucker* matter
4 and defendant Zurn Industries, LLC in the *Kelly Kimber*
5 matter.

6 As indicated in my motion papers, Judge, the
7 issues that are the subject of the instant motion are
8 really very similar between the two cases, which is the
9 reason they're being heard together today.

10 In the -- and I will note, I guess, at the
11 outset that Rogers Corporation fully joins in the
12 briefing of Union Carbide Corporation in the *Richard*
13 *Tucker* matter that separately filed an affirmation in
14 opposition to plaintiff's motion for protective order in
15 the *Kelly Kimber* matter.

16 Judge, as Ms. Steinman indicated, I could not
17 think of a more discoverable piece of evidence in the
18 asbestos litigation than proof of claims submissions
19 submitted by plaintiffs. Claimants in the asbestos
20 litigation are asserting that they have suffered a
21 personal injury related to prior asbestos exposure. The
22 proof of claims that are submitted to asbestos personal
23 injury bankruptcy trusts include information and
24 affidavits and are essentially sworn statements concerning
25 the injured claimant's prior exposure to asbestos.

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1 As Ms. Steinman indicated, New York Courts have
2 ruled pretty consistently across the board this kind of
3 information, including the proof of claims submissions
4 and all information underlying the proofs are discoverable
5 as they are admissions. Further, pretty much all of the
6 courts in Upstate New York that have dealt with this
7 exact issue, including in the *Wright, Farrenkopf* and
8 *Bauer* matters, have held that these proof of claim
9 materials are clearly relevant for disclosure purposes
10 because they contain information concerning product
11 identification, the claimant's work history and exposure
12 to asbestos and directly relate to causation and
13 apportionment fault. That's actually a direct quote from
14 Justice Lane's prior holding in the *Drabczyk* matter in
15 the Eighth Judicial District in which this issue was also
16 decided. Notably, the *Drabczyk* matter was a Belluck and
17 Fox case. The *Farrenkopf, Wright* and *Bauer* matters were
18 all Weitz and Luxenberg matters and also matters of which
19 I'm fully familiar with the facts and circumstances, as I
20 represented other unrelated defendants in those cases.

21 This, as Ms. -- this case, the *Tucker* matter as
22 well as the *Kimber* matter, Judge, as Ms. Steinman
23 indicated, are very similar. Plaintiff's counsel
24 essentially seeks redactions of information that are
25 highly probative and relevant to our defense of these

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1 actions. The names of the affiant's and related
2 information are entirely discoverable. We are entitled
3 to pursue additional witnesses and certainly would object
4 to any redactions of this information.

5 As I noted in my moving papers, Judge, my
6 clients do consent to the redaction of any settlement
7 amounts. That's not at issue in our motion papers; we
8 concede that. Such information is subject to disclosure
9 pursuant to the Court at a later juncture, but we do not
10 request that information remain unredacted in disclosure
11 of the proof of claims, and insofar as medical information
12 is concerned, we will note, Judge, in Justice Chimes'
13 holding in *Bauer* she did advise that information
14 concerning the clients -- excuse me -- the claimant's HIV
15 status or drug and/or alcohol abuse specifically could be
16 redacted.

17 I would note, your Honor, I believe any and all
18 medical information is highly relevant to a claim
19 involving personal injury. I don't think that any of
20 that should be subject to redaction but would, of course,
21 you know, defer to your Honor if such information is to
22 be potentially redacted. Under that very limited
23 circumstance, I would suggest that's the only occasion
24 where in-camera review would be appropriate. Other than
25 that limited circumstance, Judge, as Ms. Steinman also

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1 reiterated already, in-camera review is otherwise a waste
2 of judicial resources, and it cannot possibly be the case
3 that in every single one of these asbestos litigation
4 matters that proof of claims submissions need to be
5 reviewed by the Court before disclosure or any redactions.

6 So with that being said, Judge, I join in
7 Ms. Steinman's application, and our arguments are more
8 fully outlined in our briefings and we'll rely on those.

9 THE COURT: Great. Thanks, Meagan. Chris, do
10 you have anything that you want?

11 MR. POWERS: Just a couple things. I'll keep
12 it very short. I do not have a client in the *Tucker*
13 matter, so this will be related to the *Kimber* matter only.

14 I would basically echo everything Meagan just
15 said and Ms. Steinman just said. Particularly, I was
16 going to add about the medical history but Meagan just
17 covered that regarding the claimant's medical history.
18 We think that's relevant and should be -- it should be
19 subject to any sort of blanket redaction rule. I would
20 echo what Meagan just said on that.

21 Another thing that we mentioned in our papers,
22 the plaintiff sought to redact claims-specific identifying
23 information. I don't -- we just aren't sure what that
24 means. We don't object to it necessarily. Just I wasn't
25 sure what that meant. To the extent it contains a social

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1 number or any sort of identifying information, that's
2 fine. We just didn't want to agree to something we
3 weren't entirely sure what that meant. So I guess
4 whatever order the Court comes up with, we would probably
5 be okay with that. I just want to make that clear.

6 Regarding the affiant names, I think one of the
7 things we mentioned in our papers was just dates of birth.
8 To the extent that it's -- again, we're not necessarily
9 opposed to a redaction of dates of birth, but if there's
10 some other way to -- if the person's name -- if we don't
11 know their name -- if the name is John Smith, we might
12 need some other sort of identification -- even year of
13 birth or something like that that would help us find that
14 person, we would be okay with redacting everything but
15 the year or something like that; that was kind of the
16 point we were making in our papers about the day of birth
17 being included but, again, we would defer to the Court
18 for something. That's the only reason we were bringing
19 that up. Just because we don't know their name, we might
20 need some sort of other identifying information to find
21 that person.

22 THE COURT: Understood.

23 MR. POWERS: And the only thing I'll mention, I
24 know that Adam represented that he's going to be
25 withdrawing the claims in the *Kimber* matter all except

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1 for one. I would have to go back to my clients and trial
2 counsel and house counsel especially just to see if we
3 still want any information, but I don't know that
4 necessarily makes what's already been presented irrelevant.
5 So we just want to reserve our rights to be able to
6 pursue these subpoenas if we choose to.

7 THE COURT: Yes. Adam, anything to add?

8 MR. DREKSLER: Your Honor, I'll try to make
9 this quick but there's unfortunately a lot to unpack.
10 This is Adam Dreksler, for the record, on behalf of Weitz
11 and Luxenberg for the case of *Kelly Kimber* as well as the
12 *Estate of Mr. Tucker*.

13 First off, your Honor, like I represented off
14 the record, there were seven claims filed in the *Kelly*
15 *Kimber* matter. Six of those claims have since be
16 withdrawn other than the Garlock claim. The Garlock
17 claim, the evidence we're using to submit that claim is
18 the deposition testimony provided by plaintiff's father
19 and not plaintiff herself; that is being submitted and
20 that was already turned over in the *Kimber* matter on
21 February 10th, 2020. By the end of this week we will
22 serve in response to what Chris just said -- Mr. Powers
23 just said -- by the end of this week hopefully, if not
24 sooner, we will serve copies of those updated POCs that
25 reference the withdrawal. Therefore, there's only one

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1 bankruptcy claim being filed in the *Kelly Kimber* matter
2 and really the motions filed by Cleaver Brooks and
3 yesterday on behalf of Zurn Industries are moot.

4 However, for the purposes of this argument,
5 with regard to *Kimber* and *Tucker*, we concede that they
6 are really the same arguments. So I'm going to argue --

7 THE COURT: The jurors are coming back now.

8 MR. DREKSLER: I could go faster. I probably
9 have five minutes or so.

10 THE COURT: That's okay.

11 MR. DREKSLER: Just in response to some of the
12 statements that Ms. Steinman said already, we're not
13 arguing discoverability or privilege issue. We're not
14 arguing that there's no prejudice that a party suffers.
15 It's a privacy issue -- and I'm going to get into that in
16 a second -- but it's strictly a privacy issue.

17 Further, regarding the protocol in NI-Cal, that
18 is actually the protocol in NI-Cal. It was set up in
19 2012 and it's been followed since by Judge Heitler all
20 the way to Judge Mendez, for a little bit with Judge
21 Billings and now with Judge Silvera. Shelley Rossoff,
22 special master, actually handles the in-camera review and
23 we've done that many, many times before.

24 With regard to the no in-camera reviews being
25 conducted and why it's not needed and the defendants

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1 claiming that it's an unnecessary account of waste of
2 judicial resources, that's really an overreach
3 considering that, your Honor, we provided the materials --
4 for all the materials in the proof of claims with these
5 redactions. We timely provided them in accordance with
6 the discovery schedule and the defendants -- mainly Union
7 Carbide -- has now subpoenaed those trusts to get those
8 very same documents we already provided. So that seems
9 like it's a little more of judicial resources in that
10 situation, trust resources, which are really confined to
11 whatever is in that trust that's used to compensate
12 people for their harm suffered. So this is really a red
13 herring of that argument, and aside from that, this has
14 been done with cases assigned to Judge Aulisi beforehand
15 where my colleague, Mike Fanelli, and other colleagues in
16 my office have sat with defense counsel and reviewed with
17 Mr. Canary (phonetic), along with the defendants, what's
18 inside these POCs and the information included and that's
19 already been done.

20 The other thing I want to bring up before the
21 main argument is the *Bauer* decision. I just reread the
22 decision and it mentions nothing at all regarding the
23 identity of the nonparty affiant. I read it. I couldn't
24 find it. I read it twice. I couldn't find it again.
25 And I discussed with other people in the office, please

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1 reread it yourself. But, your Honor, as you know, we're
2 not here to discuss the discoverability of the proof of
3 claims in their entirety. All documents in *Tucker* were
4 served on December 3rd, 2019 and *Kimber*, February 10th,
5 2020. Again, we're going to re-serve those updated POCs
6 for *Kimber* later this week.

7 Your Honor, as you know, the sole reason we're
8 here is defendant disagrees with our redactions of the
9 nonparty affiant personal information listed in the POCs,
10 despite us doing so in strict accordance with what
11 Ms. Steinman discussed in Judge Heitler's November 2012
12 non-case specific NI-Cal as a whole and protocol decision
13 and that has been followed for years since that time frame.

14 What's important to note and I'm sure when you
15 read the papers -- and in our April 13th paper we tried
16 to summarize this issue in less than four pages -- I
17 believe it was two and a half -- that really explains
18 everything, but just to reiterate, Judge Heitler's
19 decision was not case specific. It was based on New York
20 Law in its entirety and the policy and it was used to
21 create the protocol. Therefore, although it's not
22 binding, it's extraordinarily persuasive, especially
23 considering it's directly on point on this very decision
24 and waived the defendant's interest in obtaining the
25 factual information regarding plaintiff's exposures

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1 versus the confidentiality of a nonparty affiant, and as
2 you could already tell, the main takeaway from this
3 decision is that this decision draws a distinction
4 between -- which really Union Carbide papers and the
5 other papers filed by defendants attempts and with their
6 arguments today to blur those lines, there is a
7 distinction between the factual information contained in
8 the nonparty affidavits -- i.e., asbestos exposure
9 info -- and the nonparty or verse the nonparty affiant's
10 personal information we're discussing today.

11 Judge Heitler ruled -- and you'll see it on
12 papers -- that the Court is sensitive, not regarding
13 privilege, not regarding prejudice but to the privacy
14 issues concerning the nonparty affiant and does not want
15 to drag those individuals into the tort system without a
16 compelling reason, holding defendants are entitled only
17 to that factual information in the nonparty affidavits,
18 the exposure, to investigate alternative exposures and
19 not the affiant's personal information; that's exactly
20 what we have been doing ever since that date and that was
21 heavily litigated by my colleague -- Jerry Kristal, and I
22 believe Mr. Powers -- not their office but the office
23 down in the city -- Barry, McTiernan and Moore -- also
24 for Cleaver Brooks was Suzie Halbardier.

25 Just as a quick historical background, as you

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1 know, Weitz and Luxenberg represented thousands of people
2 before, all with the same injuries or all with similar
3 injuries. Many of those clients and their cases
4 identified exposure at specific locations when proving
5 their (inaudible) -- just like happened here. Our
6 clients that came thereafter are then able to use that
7 identification in the trust system without providing much
8 of what's needed or really anything that's needed in the
9 tort system, as is a very different and much lower
10 standard of proof in the trust system. The trust, unlike
11 the tort system, allow for the submission of these
12 nonparty affidavits despite the plaintiff here -- like
13 Ms. *Kimber* or Mr. *Tucker* -- ever knowing that third-party
14 affiant, ever working with that person or even working
15 during the same time frame at the same location as that
16 nonparty affiant. So, therefore, the nonparty's affiant
17 identification used for the trust submission is not an
18 admission in the tort system since we do not necessarily
19 need to prove exposure to even that very product
20 dependent on the specific bankruptcy trust standard. In
21 fact, since plaintiffs do not know nor worked with the
22 nonparty affiant, as is here in both cases, it's really
23 inadmissible hearsay and wouldn't even get into trial.
24 So even if the defendant, let's say, further was able to
25 provide that it's -- this info, they cannot even prove

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1 actual exposure at trial to an identified bankruptcy
2 product regarding the different standards set up, like
3 frequency or even failure to establish, failure to warn.
4 So, therefore, it's not going to be even provable at trial.

5 So given the trust system's lower standard,
6 when compared to the tort system, the defendants here are
7 requesting the identity of the nonparty affiant despite
8 that this information cannot reasonably calculate to
9 admissible evidence as there's no legally-sustainable
10 connection in the tort system. And alternatively, in our
11 position, allowing us to continue to redact the nonparty
12 affiant's identity, consistent with Judge Heitler's
13 decision and what has been done before in this Court and
14 other upstate courts, this does not prevent -- most
15 important, it does not prevent the defendant from
16 investigating plaintiff's exposures to other products at
17 alternative locations since they were already provided
18 this information in the affidavit themselves. So it
19 really amounts to a fishing expedition and attempt to
20 harass people who don't even know the witness.

21 It's not like we're hiding coworkers here. The
22 defendants know the exact protocol and follow this exact
23 protocol. It's really clear that their real intention is
24 seeking a second crack at something that has long been
25 settled. And, your Honor, just in sum, without a

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1 compelling reason, this Court should deny defendants'
2 request that this additional information is, again, not
3 reasonably likely to lead to admissible evidence as our
4 clients here have no connection to the nonparty affiant
5 other than working at the same location versus,
6 alternatively, the defendants can continue to investigate
7 that additional exposure by reviewing affidavits which
8 are provided -- nothing is redacted -- regarding the
9 exposure there. So the defendants actually suffered no
10 prejudice, and we turned over everything timely.

11 Again, in the *Kimber* matter, should be moot.
12 For the *Tucker* matter, that's really our argument there.
13 Thank you very much, your Honor, for your time.

14 THE COURT: Thank you. I'm going to actually
15 put my decision on the record because I've got the jury
16 literally knocking at the door of the courtroom to come
17 in. Are you comfortable with that?

18 MS. DEAN: Judge, if I may just note very
19 briefly just to clarify one thing because there was a
20 representation that some proof of claims are going to be
21 withdrawn in the *Kimber* matter. Much like the testimony
22 of a plaintiff, once a sworn affidavit is submitted to
23 another entity, regardless of whether it's withdrawn or
24 not, we're entitled to that information, especially
25 because of the fact that plaintiff's counsel were both to

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1 subsequently submit proof of claims admissions to that
2 trust again. So I just wanted -- I would just like to
3 clarify one point as to the *Kimber* matter, that we are
4 seeking disclosure of all proof of claims submissions
5 regardless of whether or not plaintiff's counsel is
6 representing that they're withdraw at this point.

7 MR. DREKSLER: That's fine, your Honor. As I
8 indicated, they were already turned over and turned over
9 again regarding the withdrawal and again won't be
10 admissible in trial, so it's really moot also. But, your
11 Honor, we're ready for your decision. Thank you.

12 THE COURT: Thank you. For the record, Gina,
13 if I go too quickly, I'll be able to clarify this for you
14 after, okay. So typically when seeking an in-camera
15 review, the movant needs to establish that the material
16 sought to be protected is privileged. The plaintiffs
17 have no claim of privilege in this case. Material may be
18 confidential but not subject to any claim of privilege.
19 To require the Court to examine all requested discovery
20 material is impractical and an unnecessary burden. New
21 York Courts have routinely held that materials associated
22 with bankruptcy trust POCs are broadly discoverable and
23 not subject to privilege. Court citing *Ritzel versus AO*
24 *Smith*, Index Number 190269/2010. In the recent case
25 directly on point, *Bauer versus AO Smith*, Index Number

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1 813738/2016, Justice Chimes held that defendant Ford was
2 entitled to receive all documents filed by or on behalf
3 of plaintiff with the bankruptcy trusts as per its
4 proposed subpoena duces tecum including, but not limited
5 to, forms and materials, supporting documentation,
6 request forms, signature pages, releases, correspondence
7 and communications, checks, affidavits, wire transfers,
8 agreements, electronic filer agreements and notices of
9 withdrawal but that information related to settlement
10 amounts, social security numbers and highly-sensitive
11 medical information shall be redacted.

12 This Court orders that as the plaintiffs have
13 failed to establish prejudice and as the Court finds the
14 material such to be relevant, the Court will grant the
15 plaintiff's motion for protective order only to the
16 extent that information related to settlement amounts,
17 social security numbers and highly-sensitive medical
18 information shall be redacted. All other subpoenaed
19 information shall be disclosed. Okay.

20 MS. DEAN: Judge, if I could seek clarification
21 on one point of your ruling -- and thank you very much.
22 For the highly-sensitive medical information, just to
23 make sure that that's not subject to interpretation.

24 THE COURT: Yes.

25 MS. DEAN: Justice Chimes in the *Bauer* matter

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24

1 noted that when she held that such highly-confidential
2 medical and highly-sensitive medical information was to
3 be redacted that that included information about the
4 plaintiff's -- claimant's drug and/or alcohol abuse and
5 HIV status specifically, to define that. Is that the
6 same ruling that your Honor has, that that's the limited
7 extent of the highly-sensitive medical information?

8 THE COURT: Yes.

9 MS. DEAN: Okay. Thank you, Judge.

10 THE COURT: Thank you.

11 MR. DREKSLER: Thank you, Judge.

12 MS. STEINMAN: Very quickly. The Court is in
13 possession of some of the claims in the *Tucker* matter and
14 we would like to obtain that from the Court.

15 MR. DREKSLER: You already have the stuff --
16 turned it over.

17 THE COURT: If I have it, I don't have -- I'm
18 in Albany, so I have to see what we have in the court.
19 So can you do me a favor? Can you send -- (Teams cut
20 out) -- and then we'll address that when I'm back in the
21 courthouse.

22 MS. STEINMAN: Judge, you cut out, so I'm not
23 exactly sure what you said.

24 THE COURT: The service is terrible here. If
25 you can send an e-mail to Colleen and copy everyone on it

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with your request and then we'll take a look at it when
I'm back in the courthouse?

MS. KEANE: Hi, this is Colleen. I can follow
up with you guys.

THE COURT: Thank you.

MR. DREKSLER: Thank you, Judge.

(Whereupon, the proceedings were concluded.)

* * *

Certified to be a true and accurate transcript

Regina A. Dewhurst
Regina A. Dewhurst, Senior Court Reporter