IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE

In re: BOY SCOUTS OF AMERICA AND DELAWARE BSA, LLC,[1] Debtors.	Chapter 11 Case No. 20-10343 (LSS) (Jointly Administered) **Ref. D.I. 8190 & 8210**

DEBTORS' RESPONSE TO THE OFFICIAL COMMITTEE OF TORT CLAIMANTS' STATUS REPORT RE: SECOND MODIFIED FIFTH AMENDED PLAN OF REORGANIZATION FOR BOY SCOUTS OF AMERICA AND DELAWARE BSA, LLC

1. The Debtors file this response (the "Response") to the "status report" [D.I. 8190] (the "TCC Status Report") filed by the Official Committee of Tort Claimants (the "TCC") with respect to the *Second Modified Fifth Amended Plan of Reorganization for Boy Scouts of America and Delaware BSA, LLC* [D.I. 7832] (as may be amended, modified, or supplemented from time to time, the "Plan") and the joinder filed by the Zalkin Law Firm, P.C. and Pfau Cochran Vertetis Amala PLLC [D.I. 8210] ("PCVA").[2]

I. Individual Voting Survivors Overwhelmingly Support the Plan. Plaintiffs' Firms, Using Master Ballots, Account for the Majority of Rejections.

2. The TCC Status Report is not, as the name suggests, an attempt to update this Court and parties in interest on the status of these chapter 11 cases. Rather, it is once again an advocacy piece by the TCC intended to further poison the well in these cases and destroy the results of the Coalition, Future Claimants' Representative, Debtors, and Ad Hoc Committee's hard-fought efforts. If the TCC is successful, survivors will receive virtually no recovery in these chapter 11

[1] The Debtors in these chapter 11 cases, together with the last four digits of each Debtor's federal tax identification number, are as follows: Boy Scouts of America (6300); and Delaware BSA, LLC (4311). The Debtors' mailing address is 1325 West Walnut Hill Lane, Irving, Texas 75038.

[2] Capitalized terms used but not defined herein shall have the meanings ascribed to them in the Plan.

cases and the only "winners" will be the TCC's professionals and those state court lawyers that believe public destruction of the Debtors' Plan will yield more for them in individual negotiations pertaining to their cases. Let's get the facts straight. While the TCC notes in the TCC Status Report that the "[s]urvivors have spoken," it wholly disregards the wishes of the vast majority of survivors and proceeds to act against them. The survivors have voted to accept the Plan. *See* 11 U.S.C. 1126(c) ("A class of claims has accepted a plan if such plan has been accepted by creditors . . . that hold at least two-thirds in amount and more than one-half in number of the allowed claims of such class held by creditors . . . ."). Moreover, the *preliminary* voting results[3] demonstrate that 85% of individual abuse survivors who voted via direct Ballot (rather than by Master Ballot) voted in favor of the Plan. In contrast, more than 59% of the votes to reject the Plan were cast by Master Ballots. Of these, vocal opponents aligned with the TCC accounted for at least 79%. These preliminary results demonstrate that individual abuse survivors heavily support the Plan, while certain plaintiffs' firms—largely those aligned with the TCC—that voted their clients' claims via Master Ballot oppose the Plan.

II. The TCC, as a Fiduciary for All Survivors, Must Support the Plan.

3. The TCC is an official committee that owes a fiduciary duty to the class of creditors that it represents, and its members are required to place the interests of its constituent class above their own personal stake in the bankruptcy case. *See, e.g.*, *In re Res. Cap., LLC*, 480 B.R. 550, 559 (Bankr. S.D.N.Y. 2012) (citing *In re Dana Corp.*, 344 B.R. 35, 38 (Bankr. S.D.N.Y. 2006)); *see also* TCC 30(b)(6) Dep. Hr'g Tr. at 112:2-3 (testifying that the TCC "represents" and "acts as

[3] *See Declaration of Catherine Nownes-Whitaker of Omni Agent Solutions Regarding the Solicitation of Votes and Preliminary Tabulation of Ballots Cast on the Second Modified Fifth Amended Chapter 11 Plan of Reorganization for Boy Scouts of America and Delaware BSA, LLC* [D.I. 8141] (the "Preliminary Voting Report").

a fiduciary for all survivors of sexual abuse").[4] Indeed, the TCC has acknowledged that an abuse survivor's vote in favor of the Plan is a "definitive expression that that survivor believes it is in his interest that the plan be confirmed." *See* TCC 30(b)(6) Dep. Hr'g Tr. at 68:25-69:7.

4. Having seen the Preliminary Voting Report, the TCC now knows what the class it represents wants. Seventy-three percent of the survivors to whom the TCC owes duties voted in favor of the Plan. The TCC simply disregards its fiduciary duty in advocating against the interests of the overwhelming majority of the class it represents in favor of certain minority plaintiff attorneys representing, at best, only 27% of the class. And without discovery into the Master Ballot process, the Debtors and the Court have no idea if these minority claims' votes were informed and valid. When the TCC and its members were not trying to destroy the Debtors, they argued that Master Ballots should be subject to rigorous levels of protection for abuse survivors. Now the TCC relies on Master Ballots to favor members of the class it represents that are outnumbered by approximately 300%. The TCC has no legitimate basis to act against the interests of some 73% of the class it represents.

5. All of this is even more significant given the TCC's use of estate funds to engage in a massive negative campaign against the Plan during solicitation, including numerous town halls, video productions, and the inappropriate authoring and dissemination of the TCC/Kosnoff Communications. The Debtors believe these actions resulted in 27% of abuse survivors voting against the Plan, the majority of which were voted by Master Ballot. The Debtors are in disbelief that this statutory committee continues to act against the interests of the majority of the voted interests of the class it is supposed to represent. The Debtors question how the collective interests

[4] Relevant excerpts of the deposition transcript are attached hereto as **Exhibit B**.

of survivors in a Plan proposing a Settlement Trust with over $2.69 billion[5] in cash and notes, plus valuable insurance rights, are served by a committee that seeks not to safeguard this value, but to eschew it.

III. The TCC's Third Party Release Arguments Are Premature, Misplaced, and a Transparent Attempt to Poison the Well.

6. The TCC weaponizes the preliminary voting results to make inappropriate confirmation arguments regarding third party releases, which are not properly before the Court, and based upon voting results that are subject to change, as clearly set forth in the Preliminary Voting Report. Regardless, preliminary results demonstrate that Class 8 (Direct Abuse Claims) has voted in favor of the Plan by a preliminary tally of 73.12%. This vote meets the statutory requirements of section 1126(c) of the Bankruptcy Code. Moreover, the TCC's chart of cases is a disingenuous presentation of the law regarding nonconsensual third party releases. In fact, the Pachulski firm—the TCC's counsel here including many of the same lawyers—represented the tort claimants' committee, a plan proponent, in *In re TK Holdings*, No. 17-11375 (BLS) (Bankr. D. Del.), a mass tort case in this District where nonconsensual third party releases were approved with 74-78.18% of affected voting creditors accepting the Plan, but remarkably excluded that case from its chart. There can be no legitimate reason to exclude that adverse exemplar other than to disingenuously suggest to this Court and the interested public that the Debtors' Plan is not confirmable.[6]

IV. Survivors of Abuse Will Be Paid in Full Under the Debtors' Plan.

7. Unfortunately for survivors, the TCC has failed to inform them of the real facts underlying this Plan, including the fact that Class 8 will likely be paid in full. In particular, in the

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[5] *See Notice of Tenth Mediator's Report Regarding Clarendon Term Sheet* [D.I. 8102], Ex. A (Jan. 3, 2022).

[6] *TK Holdings* was a much more recent case than most of the cases listed on the TCC's chart, and as such, appears to be deliberately omitted rather than a product of the case being out of date.

Bates White rebuttal report served last Wednesday, a copy of which is attached hereto as **Exhibit A** (the "Bates Rebuttal Report"), the Debtors' expert, Dr. Charles E. Bates, states that "based on my review of the 29 verdicts, further review of the settlement history, and further analysis of the economics of sexual abuse claim filings, I now believe that the value of the Abuse Claims is most likely in the lowest quartile of the range I originally estimated, that is, most likely between $2.4 and $3.6 billion." *See* Bates Rebuttal Report at 3 (emphasis added). In light of Dr. Bates's opinion that (i) the value of the Direct Abuse Claims has a midpoint of $3.0 billion, (ii) the size of the contributions already being made to the Settlement Trust (over $2.69 billion), and (iii) the expected value of non-settling insurance rights and non-settling chartered organization claims, the Debtors anticipate *payment in full* to holders of allowed claims in Class 8 in accordance with the Trust Distribution Procedures. It belies common sense that the TCC is continuing to attack a Plan with a preliminary accepting vote of 73% in a class that will be paid in full.

V. Ballots Are Still Being Reconciled and Voting Discovery Is Ongoing.

8. It is important for the Court to be aware that Ballots are still being reconciled and remain subject to further review and audit, including more than 1,200 Class 9 Ballots that were not included in the preliminary voting results. Updated preliminary reporting from Omni Agent Solutions ("Omni") as a result of this review indicates that Class 9 is now an accepting class in favor of the Plan.

9. Additionally, Master Ballots are being reviewed for compliance with the Disclosure Statement Order (*i.e.*, review of whether (i) proper powers of attorney were returned for certain clients, (ii) detailed logs related to attorney/client communications were returned for certain clients, and (iii) Bankruptcy Rule 2019 statements were filed for all attorneys submitting Master Ballots). The TCC again advocates against the class it represents by questioning the Debtors' work in investigating the Master Ballots. The TCC has explicitly recognized the potential

infirmities associated with Master Ballots: *see, e.g.*, Sept. 23, 2021 Hr'g Tr. at 32:5–9 [D.I. 6391] (MR. STANG: "This is about survivors. And we need to be sure that whoever is submitting a master ballot using a process that does not bear that client's signature on the ballot has every level of protection that their voice is being accurately heard."); *see also id.* at 43:14-44:5 (MR. SMOLA: "So those yes votes, that consent, and the integrity of that consent is absolutely crucial. So I would endorse every possible mechanism this Court seeks to employ to ensure the integrity of the vote."). Yet the TCC has no interest in assessing the validity of the Master Ballot votes of the minority interests it is representing against the overwhelming majority of the class. Indeed, the TCC has served written discovery and deposition notices, but only on the Debtors, the Debtors' voting agent, and Plan proponents. This is not surprising, as the TCC has aligned with rogue plaintiffs' counsel in providing contrary advice to survivors represented by other counsel and survivors represented by multiple counsel.

10. Additionally, as the TCC can see, discovery as to the Master Ballots is appropriate for anyone interested in a valid count. As demonstrated by the voting percentages discussed above, the Master Ballot vote results are strikingly different from the direct Ballot results. For example, the preliminary voting results demonstrate the following percentages of TCC-aligned firms voting against the Plan by Master Ballot:

Law Firm	Total Votes on Master Ballot to Accept or Reject Plan (Not Superseded by Direct Ballot)	Percent Rejecting the Plan
Hurley McKenna & Mertz PC	2,904	89.98%
Zuckerman Spaeder LLP / Abused in Scouting	1,314	93.38%
Pfau Cochran Vertetis Amala PLLC	905	98.90%
Crew Janci LLP	342	99.71%
Horowitz Law	208	98.56%
Herman Law	165	98.79%

While the Debtors' review of the Master Ballots and related materials remains ongoing, the Debtors have already identified several significant concerns regarding the validity and integrity of the votes cast by Master Ballot, including from several of the firms listed above:

(a) certain of the documents purportedly evidencing a survivor's vote are not signed or have the signature crossed out;

(b) certain firms submitted Master Ballots that included purported clients not identified on the client lists provided to Omni;

(c) certain of the "power of attorney" documents allegedly authorizing survivor voting fail to comply with the laws of the states in which they were executed;

(d) certain of the signatures do not match the name of the survivor who is purportedly casting the vote; and

(e) certain of the votes appear to have been counted twice by the law firm submitting them.

11. Although discovery into Master Ballots will not yet be complete, the final voting report will be filed on January 17, 2022, in accordance with the scheduling order entered by the Court [D.I. 7996]. If action is needed with respect to Master Ballots, it will occur after full and fair discovery has concluded.

VI. The Debtors Continue to Investigate and, Simultaneously, Mediate.

12. As the Court is aware, the Debtors are continuing to investigate the impact of the Pachulski firm's improper drafting and endorsement of Mr. Kosnoff's communications to thousands of survivors, many of whom were not clients of Mr. Kosnoff, from the TCC's official email address. In that regard, the TCC recently produced additional discovery—which was withheld until after the Pachulski witnesses were deposed—that further demonstrates: (1) Mr. Lucas wrote significant portions of the TCC/Kosnoff Letter, including portions that clearly circumvent the Court's Disclosure Statement Order, and, despite representations to the contrary,

the TCC and its advisors were aware of this fact;[7] (2) Mr. Stang and Mr. Lucas were on notice that the TCC/Kosnoff Communications were being disseminated to non-Kosnoff clients, and discussed and strategically decided to ignore the Debtors' and Coalition's inquiries;[8] and (3) so unusual was the TCC's transmission of the TCC/Kosnoff Letter that some survivors thought Mr. Kosnoff was communicating directly to them from the BSA Survivors email address.[9]

13. As a result of ongoing mediation efforts, the size of the Settlement Trust now stands at more than $2.69 billion. The Debtors and other parties in interest are continuing to mediate on a daily basis, with additional in-person mediation scheduled for this week to reach settlements with parties preliminarily voting against the Plan and to continue to grow the size of the Settlement Trust. The TCC and certain of its aligned state court counsel will attend, and the Debtors sincerely hope they will pivot from blindly attacking the Plan to a constructive dialogue that supports all survivors.[10]

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[7] *Compare* **Exhibit C**, Nov. 10 Hr'g Tr. at 17:25-18:9 (MR. STANG: "This motion concerns one email that was written by Mr. Kosnoff. We had no participation in the writing of it."), *with* **Exhibit D**, KOSNOFF000183 (October 18, 2021 emails between Mr. Kennedy and Mr. Kosnoff with the subject line "Great letter!", in which Mr. Kennedy states, "I hope it gets some traction and your clients read it" and Mr. Kosnoff responds, "I'm happy with how the letter turned out. Lucas made some great edits and added details I had not known"); *see also* **Exhibit E**, TCC-PlanConf-064136 (Oct. 17, 2021 email from Mr. Lucas to Mr. Kosnoff, copying TCC co-chairman Doug Kennedy, attaching a mark-up of the TCC/Kosnoff Letter).

[8] *See* **Exhibit F**, TCC-PlanConf-123770 (Nov. 6, 2021 text message from J. Lucas to J. Stang stating "Molton's email has grown on me and I like it more now. My initial reaction to things like that is dread because I want to avoid problems. However, now that it is sunk in a bit and I thought about it, what is he going to do? Tell him to file an adversary proceeding and we will see him next month after we file our answer. No need to respond."); **Exhibit G**, TCC-PlanConf-123793 (Nov. 7, 2021 email from Mr. Stang to Mr. Lucas forwarding a letter from Ms. Lauria and stating "I see no reason to reply to Jessica's letter," to which Mr. Lucas responds "And the follow up from Molton and Eisenberg.").

[9] *See* **Exhibit H**, Golden Dep. Tr. at 47:18-48:5 ("I asked Mr. Lucas what should be done with respect to these email replies that were being received by the BSASurvivors email inbox; and in light of the fact that I – I noticed that there were, you know, some that started with the words 'Dear Tim.'); *see also* **Exhibit I**, TCC-PlanConf-123786 (Nov. 6, 2021 email from Mr. Golden to Mr. Lucas stating "I now see that we sent this out, presumably on his behalf. In the future, please give me a heads up about all mass mailings because I am getting replies I was not expecting coming in mass and am not sure how to reply (because they all think I am Tim Kosnoff and I am not)").

[10] As the Debtors have previously noted, aside from voting-related issues, the costs to the estate in connection with the TCC's drafting and dissemination of the TCC/Kosnoff Communications have been significant. The Debtors

14. As always, the Debtors welcome any guidance the Court wishes to provide to the parties in this case. The Debtors believe the Plan is confirmable, and intend to continue to work at reaching further settlements and increasing support for the Plan, in accordance with their duty to the estates, survivors and all parties in interest.

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have recently received information from the TCC and other estate fiduciaries regarding these associated fees and costs, and plan to share information and meet-and-confer as part of the mediation.

Dated: January 11, 2022
Wilmington, Delaware

MORRIS, NICHOLS, ARSHT & TUNNELL LLP

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ATTORNEYS FOR THE DEBTORS AND
DEBTORS IN POSSESSION

Exhibit A

Bates Rebuttal Report

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE

In re: BOY SCOUTS OF AMERICA AND DELAWARE BSA, LLC, Debtors.[1]	Chapter 11 Case No. 20-10343 (LSS) (Jointly Administered)

REBUTTAL EXPERT REPORT OF CHARLES E. BATES

January 5, 2021

[1] The Debtors in these Chapter 11 Cases, together with the last four digits of each Debtor's federal tax identification number, are as follows: Boy Scouts of America (6300) and Delaware BSA, LLC (4311). The Debtors' mailing address is 1325 West Walnut Hill Lane, Irving, Texas 75038.

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I. Introduction

(1) I submitted a report in this proceeding on December 5, 2021 ("Affirmative Report"). In that Affirmative Report, I provided an estimate of the total value of the Abuse Proofs of Claim asserted against the Debtors (the "Abuse Claims") as of the Petition Date at tort values. Based on the POC[2] data and historical settlement data available early in the spring of 2021, I estimated the aggregate value of the Abuse Claims as of the Petition Date was between $2.4 billion and $7.1 billion against the BSA and other BSA-related parties. In my affirmative report, I also provide opinions about the Base Matrix Values contained in the Trust Distribution Procedures ("TDP") and the portion of claims and loss potentially attributable to The Church of Jesus Christ of Latter-day Saints (the "TCJC").

(2) On December 5, 2021, experts retained by the Official Tort Claimants Committee ("TCC"), certain remaining insurers, the Roman Catholic Ad Hoc Committee, and the United Methodist Ad Hoc Committee submitted reports on a range of topics. Many of those reports dealt with issues related to estimation and topics addressed in my Affirmative Report. Counsel to the Debtors has asked me to review these expert reports and the analyses and opinions contained therein and respond to those that relate to the analyses and/or opinions included in my December 5, 2021 expert report.

I.A. Qualifications

(3) I am Chairman of Bates White, which is an economic consulting firm with its primary office located in Washington, DC. I specialize in the application of statistics and computer modeling to economic and financial issues, and I have extensive experience working on mass-tort claims and liability valuation issues. I have 30 years of experience in a wide range of litigation and commercial consulting areas.

(4) I received my PhD and MA in Economics from the University of Rochester and my BA in Economics and Mathematics, with high honors, from the University of California, San Diego. I have taught courses on economic analysis, the theory of value, advanced statistical and econometric analysis, and trade theory. I was an instructor at the Rochester Institute of Technology, the University of California, San Diego, and was on the faculty of Johns Hopkins University for seven years. I have published papers on advanced topics in estimation theory in peer-reviewed journals.

[2] Throughout this report I use the terms "Proof of Claim" and "POC" to refer solely to the Proof of Claim forms submitted by or behalf of Abuse Claims and not Proof of Claim forms for other creditor classes.

(5) A more complete description of my qualifications and experience is provided in Section I.A of the Affirmative Report and a complete copy of my Curriculum Vitae is attached to that report as Appendix A.

I.B. Scope of charge

(6) Counsel to the Debtors has asked me to review certain reports submitted at the request of the Official Tort Claimants Committee ("TCC"), certain remaining insurers, the Roman Catholic Ad Hoc Committee, and the United Methodist Ad Hoc Committee and respond to those that relate to the analyses and/or opinions included in my December 5, 2021, expert report. In this report I respond to the certain opinions presented in the following reports exchanged in this matter:

a. The December 5, 2021, Expert Report of Katheryn R. McNally of the Claro Group LLC (the "Claro Report")

b. The December 5, 2021, Affirmative Expert Report of Marc C Scarcella, M.A. (the "Scarcella Report")

c. The December 5, 2021, Expert Report of Dr. Jon R. Conte

d. The December 5, 2021, Expert Report of David H. Judd & Matthew K. Babcock of Berkley Research Group (the "BRG Report")

(7) Bates White's work on this matter is ongoing. My work here is based on the information available to me as of the date of this report. Unless otherwise noted, in this report, as in my affirmative report "Expert Report of Charles E. Bates" dated December 5, 2021, "BSA" refers to the BSA inclusive of other BSA-related parties such as the Local Councils and Chartered Organizations and all BSA-related entities.

I.C. Confidentiality

(8) Bates White has read and agreed to abide by the Stipulated Confidential and Protective Order issued by this Court on June 8, 2020 [Docket 799; related Docket 613].

(9) Much of the information on which this report is based is Confidential subject to the terms of the Stipulated Confidential and Protective Order. More specifically, the information on which this report is based relates to allegations made by (sexual) Abuse Claims who have submitted claim forms in the current Bankruptcy litigation as well related historical claims.[3] This information is sensitive in nature

[3] Capitalized terms not otherwise defined have the meaning as defined in the Fifth Amended Plan and Amended

and should be treated with care in addition to being subject to the protective restrictions from the Stipulated Confidential and Protective Order.

I.D. Summary of opinions

(10) There are three opinions in the Claro Report that relate to my opinions, analyses, and expertise in this matter. They are:

> Claro Opinion 1: The low end of a reasonable range of claim value for all BSA Sexual Abuse Claims in the aggregate is estimated to be between $24.76 billion and $30.41 billion.
>
> Claro Opinion 2: The Bates White Disclosure Statement Valuation of $2.4 billion - $7.1 billion is inconsistent with settlement amounts agreed to by BSA prior to commencement of its chapter 11 cases and is not supported by disclosed methodology.
>
> Claro Opinion 3: The valuation methodology proposed in the TDP is fundamentally flawed and is not a reasonable basis on which to value the BSA Sexual Abuse Claims for purposes of the Plan.

(11) I disagree with all three of these Claro Opinions. All are fatally flawed by the same fundamental error: Claro ignores the large selection bias inherent in using values from a highly selected group of 29 plaintiff verdicts and 517 settlements to draw inference on the value of 82,209 Abuse Claims, which were filed under different conditions and represent a broader and more diverse claim pool. Further, Claro repeatedly claims to be valuing the claims "conservatively" when they in fact do the opposite.

(12) Moreover, based on my review of the 29 verdicts, further review of the settlement history, and further analysis of the economics of sexual abuse claim filings, I now believe that the value of the Abuse Claims is most likely in the lowest quartile of the of the range I originally estimated, that is, most likely between $2.4 and $3.6 billion.

(13) The 29 exemplar plaintiff verdicts of the Claro study group highlight the stark differences between the fact profiles of tried sexual abuse claims in contrast to the historical settled BSA-related claims on the one hand, and the even starker differences with the current Abuse Claims on the other hand.

(14) The tried cases where the plaintiff was successful are characterized by a clear and obvious institutional failure, the abuse being uncovered and reported to the police soon after it occurred, and with most survivors initiating litigation within a few years of the abuse.

Disclosure Statement.

a. Of the 29 plaintiff verdicts, at least 21 involved a paid employee of the institution whereas the Abuse Claims involved abusers who overwhelmingly consisted of unpaid volunteers. For 22 of the cases, the abuse was uncovered shortly after the abuse occurred and 75% initiated litigation within a few years of when the abuse ended. In contrast, less than 13% of the BSA settled cases were litigated with 10 years after the abuse ended and, even more starkly, less than 1% of Abuse Claims filed a POC within 10 years of the abuse.

b. Seventeen of the plaintiff verdicts involved survivors 18 years old or less at the time litigation commenced, with the average age at time of litigation for all 29 verdicts being 21. In contrast, the average age at litigation of the BSA settled claims is 48, with none over 72. For the Abuse Claims, the average age at filing a POC was 55, with 10% at least 70 years old.

c. Most strikingly different from litigated claims where over 90 percent of claims involved repeat abusers, less than 15 percent of Abuse Claims involve repeat abusers.[4] Moreover, 85 percent of Abuse Claim Survivors never reported their abuse to the police or to Scouting.

(15) Having observed these stark differences between Claro's exemplar verdicts, the BSA settled claims, and the Abuse Claims, I re-examined the historical settlements for abusers identified as having abused only a single survivor ("Single Survivor Cases") to ascertain what distinguished high six- and seven-figure settlements for once identified abusers from the lower valued ones. In doing this work I discovered that 38 of the cases I reported in my affirmative report as Single Survivor Cases in fact involved a repeat abuser. These newly-identified repeat abuser cases included all but one of the claims that were settled for over $375,000. This one exception was a former employee of the New Hampshire council, a case that fits the profile of the plaintiff verdicts. The remaining 16 Single Survivor Cases in the 262 historical settlements report on Table 5 of my affirmative report have a resolution average of $150,000. In contrast, the 38 cases I now know to be repeat abuser cases have a resolution average of $335,000.

(16) This update to the historical settlement data is important as it points to a more significant value distinction between the Single Survivor Cases and those involving repeat abusers. This is illustrated in Figure 1 below which is an update to Figure 7 of my affirmative report.[5] It now shows a three-fold difference between these categories within the 262 historical BSA settlements resolved by the BSA defense counsel Ogletree. The difference is slightly larger if I use the full ten-year BSA settlement

[4] Out of 344 historical settlement of the Claro historical settlement study group with a known abuser name, 318 are associated with repeat abusers.

[5] A table listing the claims in the historical resolution data that were revealed to be repeat abuser cases on the basis of additional analysis is included as Appendix A to this report.

history that Claro used in its study. There, the difference between Single Survivor Cases and repeat abuser cases is greater than three-fold, with the Single Survivor Cases' settlement average being $140,000 whereas the "Other repeat abusers" settlement average being $460,000. The median settlement amount of the Single Survivor cases is $100,000.

Figure 1: Updated Average settlement amount and count of claims by abuser and allegation categories[6]

Abuser category	Penetration	Other sex acts	Groping/touching	Allegation not recorded[7]	Overall
One time abuser					
Average settlement	$212,500	$177,000	$25,000	$37,500	$150,219
Count of claims	4	8	1	3	16
David Bruce Smith					
Average settlement	$1,750,000				$1,750,000
Count of claims	1				1
Louis Brouillard					
Average settlement	$69,900	$78,864	$25,625	$43,636	$57,630
Count of claims	10	22	4	33	69
Other repeat abusers					
Average settlement	$668,674	$454,919	$382,937	$137,614	$462,054
Count of claims	40	66	37	15	158
Thomas Hacker					
Average settlement	$8,025,000	$4,863,636	$3,500,000		$5,568,750
Count of claims	4	11	1		16
Abuser not recorded					
Average settlement			$75,000	$0	$37,500
Count of claims			1	1	2
Overall average settlement	**$1,053,322**	**$810,053**	**$406,163**	**$69,552**	**$650,036**
Total count of claims	**59**	**107**	**44**	**52**	**262**

(17) There are clear distinctions and similarities between the Abuse Claims, the BSA historical settlements, and the Claro study group of plaintiff verdicts. The similarities are that all involve various allegations of sexual abuse by non-family member adults on minors, with rare exceptions.[8] As tort claims, all are claims for pain and suffering, and the effects the abusers' actions had on the survivors' lives, as well as for punitive damages if possible. All assert an institution, here the BSA, had some oversight duty that makes it responsible for at least some share of the harm caused by the abusers' actions. That is where the distinctions arise. For the same harm to a survivor, in one circumstance the BSA may have little if any responsibility for the harm done by an unknown sexual abuser (i.e., a volunteer or one-time abuser)—having done all it could reasonably have done to protect

6 Note that this is an update of figure 7 from my Affirmative Report.

7 Includes one settled claim of zero dollars noted as "Multiple various abuse claims."

8 Three percent of Abuse Claims are for minor-on-minor abuse.

the survivor while carrying on its charitable mission with a volunteer organization—while in another circumstance the BSA may have significant responsibility for the harm done because the abuser was, or could have been, known as such by the organization, but failed to identify its need to act.

(18) The cases of the Claro plaintiff verdict study group are primarily of the latter type, with the average institutional liability share being two thirds of the compensatory awards to the survivors. However, the three cases in Claro's study in which the BSA was a defendant show results at the opposite sides of the institutional responsibility spectrum. In one case, the BSA was held 100 percent liable for a $7,000,000 verdict for its failure to remove a scout leader for several years after the survivor's parents wrote a letter to accusing the abuser of pedophilia. In contrast, at the lower end of the responsibility scale, the BSA was held 5 percent liable and required to pay $25,000 to each of three survivors, for its failure to enforce its rules not allowing adults to be alone with a minor, with the jury assessing 75 percent of liability to the perpetrator, another 8 percent to the spouse of the abuser, and the final 12 percent of liability to the parents of the survivors. In the third case, the BSA was held 60 percent liable for its failure to not prevent a repeat abuser from abusing several children, with the local council being assigned 15 percent liability share and the Mormon Church Entities being assigned a 25 percent liability share. Further, the BSA was assessed a large punitive damage verdict for failure to act to prevent the abuse to the survivor. Though there is no clear difference in the sexual abuse or harm done by the abusers in these three cases, the value of the cases against the BSA, and BSA-related parties, was very different based on each jury's assessment of the BSA's responsibility to prevent the abuse.

(19) The BSA historical settlements also cover a wide range of possibilities between these two extremes of institutional responsibility. Figure 2 shows the wide range of amounts paid by the BSA to resolve the 573 resolved cases in the Claro study group of historical BSA litigated claims (note that the Claro report refers to this group as 517 as it sets aside the 54 zero payment resolutions). The differences have less to do with the types of abuse and harm done than the portion of responsibility attributed to the BSA – the full range of allegations occur in all payment size categories. The BSA settlements to survivors of two notorious repeat abusers Hacker and Brouillard illustrate the opposite sides of the institutional responsibility spectrum within this data. At the one extreme, Hacker was identified as a potential abuser by the BSA in the 1960s yet was able to manipulate his way around the BSA youth protection programs over the subsequent two decades to gain access to and abuse dozens of boys. The BSA faced the prospect of a sequence of trials, each with the prospect of punitive damages, all with multiple survivors each validating the testimony of the other about the abuse they suffered at the hands of Hacker. Hacker himself asserted the BSA should have stopped him. The BSA faced the prospect of being assessed by juries a large portion of the responsibility for multiple multimillion dollar verdicts. The seven-figure settlements paid to 16 survivors of abuse by Hacker account for over 50 percent of the money the BSA paid to only six percent of litigating survivors since 2016.

Figure 2: Claro study group of historical BSA resolved claims by size of payment to claimants

Payment size	Claims resolved	Total amount paid	Mean amount paid
Dismissed without payment	54	$0	$0
Four and five figure payments	219	$8,700,249	$39,727
Six figure payments	235	$75,741,500	$322,304
Seven figure payments	65	$181,765,000	$2,796,385
Grand total	**573**	**$266,206,749**	**$464,584**
Median			**$100,000**

(20) In contrast, the BSA settlements to 69 survivors abused by Brouillard were comprised of mostly mid-five-figure payments, reflective of the BSA facing the prospect of being assessed by juries a small portion of the responsibility for multiple verdicts. The age and profile of abuse allegations against Brouillard are not materially distinguishable from those against Hacker. Both repeatedly abused dozens of children. What was different from Hacker was the prospect of the jury-assigned responsibility share. Survivors of abuse by Brouillard account for one fourth of all resolutions with litigating survivors since 2016, but only 2 percent of the money the BSA to survivors since then.

(21) I conclude from these differences that it is not statistically reliable to value the Abuse Claims with simple average values from the study groups without accounting for how the compositional difference affect the value of claims. This is the well-known statistical estimation problem called "selection bias." This is seen here in the significance of the differences in the composition of survivor characteristics between the study group of the Claro verdicts, the study group of the BSA historical resolutions, and the Abuse Claims on the one hand, as well as the large differences in the claim values within and between the study groups of the Claro verdicts and the BSA historical resolutions on the other hand. Each of the characteristics identified in paragraph (14) clearly affects the ability of a litigating survivor to establish the responsibility share of the BSA and the differences associated with these characteristics must be considered to value the Abuse Claims.

(22) Selection bias occurs when individuals or groups in a study differ systematically from the population of interest leading to a systematic error in an association or outcome. Here, the verdicts Claro uses as a study group, which total just 29 claims, are purposely selected to be successfully tried cases against institutions held responsible for some acts committed by abusers. Claro demonstrates an awareness that verdict amounts were subject to selection bias, though it is never given that name. This is obvious because of the way Claro adjusts the 29 verdict amounts to value Abuse Claims, rather than using the verdict amounts directly to value Abuse Claims. But Claro's adjustment does not sufficiently account for the selection bias of the verdicts. Claro only adjusts the verdicts so that they are equivalent to BSA historical settlement averages. What Claro fails to address is that the BSA settlements are also a highly selected group, and their average value also suffers from selection bias. The BSA settlements are the small fraction of sexual abuse occurrences that resulted in lawsuits. Notably, they are dominated by cases involving repeat abusers. That fact alone introduces a significant selection bias

akin to using verdicts in place of settlements. In contrast to the high fraction of settlements involving claims with repeat abusers, only 13 percent of Abuse Claims involve identifiable repeat abusers. The Abuse Claims are mostly Single Survivor Cases involving survivors who never reported their abuse to Scouting or the police and told no one of their abuse for years. As shown above, the BSA settlements for such cases are lower than the repeat abuser claims. This means the chance of a liability finding against the BSA or the liability share of BSA must be lower for single victim cases. Accordingly, the value associated with such cases would be lower.

(23) Claro Opinion 1 is wrong because the Claro analysis overstates the total value of BSA's Abuse Claims manyfold. Accounting for the selection bias of the verdicts and historical settlements leads to the proper conclusion that the value of the Abuse Claims is between $2.4 billion and $7.1 billion, and for the reason I articulate in this report, most likely less than $3.6 billion.

(24) Second, Claro Opinion 2 is wrong because the Bates White Disclosure Statement Valuation of $2.4 billion - $7.1 billion is consistent with settlement amounts agreed to by BSA prior to commencement of its chapter 11 cases. Claro errs in ignoring the large selection bias of valuing claims that were never pursued in the tort system prior to bankruptcy. To be consistent with the historical settlements, the valuation of Abuse Claims must consider how the Abuse Claims differ from the settled claims, not blindly apply the historical average settlement as Claro does. The scenario-based methodology described in the Disclosure Statement provides a reasonable basis for that evaluation and how the differences between the Abuse Claims and the settlements affect the valuation of the Abuse Claims. Claro is wrong to say the disclosed methodology does not support the disclosed valuation range. For reference, the Amended Disclosure statement says:

> *To arrive at the valuation range, Bates White considered multiple scenarios… all of the scenarios are based on a frequency and severity valuation model where the number of current Abuse Claims (frequency) alleging a particular Abuse (severity) is measured against the attributes described above, which, when combined with historical data regarding resolution of Abuse Claims, allows Bates White to project the value of the Claims*.[9]

The use of scenarios constructed by frequency-severity modeling is a well-established, commonly-employed method among actuaries and other analysts for purposes of insurance loss forecasting and estimating litigation claims.

(25) Note, moreover, this is the same the methodology employed by Claro for its study, albeit, as indicated above, that Claro does not consider all the necessary factors to account for the difference between the verdict study group and the Abuse Claims. Though Claro never references it by name, the Claro study uses a frequency-severity model with plus and minus factors identified, and, where noted, implemented to adjust the selected severity benchmark. Claro begins with a benchmark population of

[9] *See* Amended Disclosure statement [Docket 6214] at page 91.

claims to value (frequency = 46,916) and a benchmark value for each claim from a verdict average (severity = $4.3 million) and multiplies the two to obtain a benchmark value of $88 billion. Claro then identifies a series of "minus factors" (downward adjustments) and "plus factors" (identified whenever the Claro report refers to as assumption as "conservative".) Claro then reduces the verdicts-based severity benchmarks downward by the application of a series of minus factors until the reduced benchmarks result in an average valuation approximately equal to the simple average of the BSA historical settlements. The Claro study ends with an implicit, though crucial, assumption that the benchmark frequency population of 46,916 Abuse Claims have the same valuation characteristics of the BSA historical settlements. This mistake leads Claro to conclude the value of the Abuse Claims is over $25 billion (= 46,916 Abuse Claims × BSA Settlement average of $513,000). Had Claro critically evaluated the implicit assumption of the applicability of the simple historical settlement average to the Abuse Claims as I did, Claro would have found that there remained significant selection bias in the average BSA settlement and that further significant downward adjustments of the severity benchmarks were required to properly value the Abuse Claims.

(26) Contrary to Claro's third opinion, the TDP provides a reasonable basis on which to value the BSA Sexual Abuse Claims for purposes of the Plan. Claro assert the TDP are unreasonable based on four supporting conclusions that are incorrect and without merit, each of which I address in the body of this report. The appropriate evaluation of the reasonableness of the Settlement Trust is whether the Settlement Trust pays Abuse Claims, fairly and equitably, reasonable amounts relative to the harm to the survivor, the responsibility of the BSA, accounting for state laws apropos of each Abuse Claim. Overall, the TDP are reasonable because they set values consistent with the aggregate BSA Abuse Claim valuation range of $2.4 billion to $7.1 billion.

(27) It is not possible to know the value of each Abuse Claim until after its evaluation by the Settlement Trustee. Though many of the aggravating factors and SOL mitigating factors are known for many of the Abuse Claims as documented in their POCs, other aggravating and mitigating factors are not ascertainable from the face of the POCs, and the mitigating scalars related to BSA's responsibility share are virtually unknown at this time. We can, however, calculate how alternative hypothetical average values for the unknown scalars affect the value assigned to Abuse Claims by Settlement Trust. This provides a test of the reasonableness of the Settlement Trust; if scalar amounts that appear reasonable considering what we know about the Abuse Claims result in TDP values consistent with the aggregate BSA Abuse Claim valuation range of $2.4 billion to $7.1 billion, then the Settlement Trust and TDP are also reasonable.

(28) To test the effect of different aggravating and mitigating scalars on the face value of Abuse Claims run through the Settlement Trust, I created a BSA Trust simulation model that uses the rules of the TDP to assign values to each Abuse Claim based on what is known about each Abuse Claim and a hypothetical set of aggravating and mitigating scalars to account for unknown Abuse Claim attributes. To assist in the reasonableness assessment of the hypothetical scalars I also created a tort system

simulation to model the economics of claim filing in litigation and its implications for the pattern of claim filings against the BSA. The tort system simulation is useful because it informs me about the effect of certain Abuse Claim characteristics important for the determination of the TDP scalars, notably the BSA potential responsibility share mentioned above, on the number and value of BSA settlements. For this purpose, I calibrated the tort system simulation to match the number of Abuse Claims and the number and average value of historical settlements. I then set mitigating and aggravating scalars of the Trust simulation to test what average values of those scalars would be needed to have the Trust make payments consistent with the tort system simulation. The Trust simulation modelling exercise indicates that if the average level of the BSA responsibility share scalars of the Trust is about 10 percent for Abuse Claims for Single Survivor Cases and the net of aggravating and mitigating scalars for repeat abuser Abuse Claim is 125 percent, then the Trust will spend about $3.4 billion paying claims at values consistent with simulated BSA-entities responsibility shares needed to match the historical filing and settlement pattern.

(29) These levels for the Trust mitigating and aggravating scalars are reasonable and appropriate for the Trust to properly account for the tort system values of the Abuse Claims. As described in the body of this report, the tort system simulation shows that the Abuse Claims represent a wider – and overall lower – range of valuation than the BSA historical settlements. The fact that such a high proportion of the Abuse Claims were never recruited to file tort claims, yet so many have come forward in this bankruptcy proceeding, means there must be a tort system valuation threshold below which plaintiff law firms will not invest the time nor money to recruit the Abuse Claims in the same manner they recruit so many other torts. This bankruptcy proceeding with the prospect of a settlement trust has drastically reduced the costs to plaintiff law firms to prosecute the Abuse Claims against the BSA. It made recruiting of survivors a profitable enterprise to launch and invest.

(30) Significantly higher scalars do not reconcile with the historical filing and settlement pattern. At higher valuations, I believe recovery attorneys would have been working hard to recruit these claims for years and there would have been many more historical BSA settlements. I believe this because of my work in other mass torts. For example, by way of comparison, I know from my work on *Garlock*, mesothelioma claimants receive on average less than $600,000 in tort system recoveries.[10] Yet recovery attorneys advertise daily on television and other media advertisements to recruit a couple thousand mesothelioma claims every year. If the case economics of the typical Abuse Claims supported tort system recoveries of that level, I believe many thousands of Abuse Claims would have already been filed as tort claims. To wit: there are over 27,000 Abuse Claims unrestricted by statute of limitations that could have filed a lawsuit but did not. These survivors are typically high school graduates in their mid-fifties, half of whom are unemployed or retired. Several hundred thousand dollars would make a difference in their lives. Yet no wide scale effort was made by recovery

[10] *See* Exhibit 28 of Expert Report of Charles E. Bates, PhD from *Garlock.* Trial exhibit GST-0996, *In re Garlock Sealing Technologies LLC, et al.*, No. 10-31607 (Bankr. W.D.N.C. Feb. 15, 2013).

attorneys to recruit these Abuse Claims until this bankruptcy matter. For these reasons, I believe that the average BSA responsibility share for Abuse Claims is more likely less than 10% than greater than 10%.

(31) The simulations not only show that the TDP are clearly reasonable in their valuation of Abuse Claims, they demonstrate that the vast majority of Abuse Claims would receive no compensation for their abuse but for a trust set up as part of this bankruptcy proceeding, consistent with the fact that so many of the Abuse Claims were never pursued through litigation.[11] More generally, as I and others have opined in other settings,[12] the tort system is neither as fair nor as equitable to mass tort claimants as a well-designed bankruptcy settlement trust. The tort system is more akin to a lottery than a fair compensation system, paying widely varying amounts to similarly situated claimants with comparable claims against a defendant. In contrast, a well-designed trust like the Settlement Trust, properly accounts consistently and equitably for claim attributes that should affect claim value. Notably, and particularly critical here, the Settlement Trust can properly compensate the tens of thousands of Abuse Claims whose value is below that of the filing threshold and who would never be compensated in the tort and will not receive any compensation should a Settlement Trust not be set up for that purpose. Abuse Claims with a once-identified abuser will be associated with low percentage mitigating scalars in large part, due to the lack of institutional responsibility by BSA. That determines a reasonable payment reflective of the BSA's appropriate responsibility those Abuse Claims, an amount however, that is below the threshold required to warrant the investment of plaintiff law firms to recruit and represent such Abuse Claims in the tort system.

(32) As the Claro verdict study group reveals, the institutional share of responsibility is a critical factor determining the value of a sexual abuse claim against an institution. As I discussed in paragraph (18) above, the three BSA related verdicts show how the BSA's responsibility share is a central component in determining if the BSA has any liability for a sexual abuse claim and, if so, how much, from a four- or five-figure value up to a seven-figure value. The tort system simulation illustrates the how there could be so many Abuse Claims and, relative to the number of Abuse Claims, so few tort filings and settlements. Given, as Claro has shown in its verdict study, the potential for at least a seven-figure return for a credible sexual abuse lawsuit if high institutional responsibility can be established by the plaintiff, it must be the case that the average liability responsibility share of the BSA is low. The BSA settlement data also supports this conclusion. Note that for cases that were filed against the BSA, 50 percent of lawsuits were resolved for a payment of $100,000 or less, at an average payment of $32,000. That amount is less than 2% of the adult-on-minor sexual abuse verdict benchmark of $1.88 million used by Claro. As described above, filed cases were a selected group

[11] This does not mean that the claims are necessarily meritless, but rather that their individual tort system value is below the value required for an individual retention to be profitable for a plaintiff's attorney. For more on this see the discussion starting at paragraph 54.

[12] See the Declaration of Charles E. Bates, PhD, adversarial proceeding docket #238 *In re DBMP LLC* Adv. Pro. No. 20-03004 (JCW) (Bankr. W.D.N.C. Feb. 23, 2021).

with sufficiently high expected outcomes. As the historical results show, establishing a high enough institutional responsibility for the BSA by a plaintiff is difficult and only occurs in rare cases. In summary, considering all these factors, the verdicts of the Claro study group, the historical BSA settlements, and the results of the simulation modeling, it is more likely that the average BSA responsibility share of claims for which it holds any responsibility is less than 10 percent than more than 10 percent, much less if considering the entire population of Abuse Claims. Following from the tort simulation model, which has an average 9% BSA responsibility to all the claims for which Claro attaches value, the valuation of the Abuse Claims is more likely below $3.5 billion than above it, meaning the value of Abuse Claims is more likely in the lower quartile of my original valuation range than in the higher portion of the range.

(33) Claro offers an opinion as to the portion of Abuse Claim value attributable to TCJC Abuse Claims. In formulating that opinion, Claro fails to consider that only a portion of the valuation of claims potentially involving TCJC would be attributable to TCJC. That is, TCJC would not be responsible for 100% of the value of Abuse Claims that implicated it. Some of that responsibility would fall to the BSA and Local Councils, a fact that Claro acknowledges and uses in other sections of its report. Claro further fails to consider that some portion of the amounts attributable to the TCJC may also be subject to coverage under BSA's insurance policies. Any reasonable treatment of those considerations would bring the top end figure assigned to TCJC below $250 million.

(34) Moving on to the other reports, first, the Scarcella Report misidentifies the source of uncertainty and conflates issues related to fixed value TDP with discretionary TDP. His misunderstanding of how the Settlement Trust is to be administered leads him to a false comparison between the proposed Settlement Trust and certain asbestos trusts. Those asbestos trusts have had to lower their payment rates because they did not have the discretion nor mandate to pay lower value claims lower amounts. In contrast, the Settlement Trust is designed to use aggravating and mitigating scalars to account for Abuse Claim attributes that affect their value. Properly interpreted, his critique highlights the importance of having claims evaluated on their merits and not simply paid scheduled amounts. I agree that appropriate evaluation of individual claims is necessary to ensure that the TDPs fairly compensate claimants in full.

(35) Second, though the BRG Report largely addresses issues that I am not opining upon in this case, it does include a section on the "Value of Survivor Claims" that purports to produce a valuation range for Abuse Claims of roughly $7.6 billion - $9.3 billion "for purposes of [their] Adjusted Local Council Liquidation Analysis."[13] This figure is produced by valuing 41,750 claims that identify a Local Council on their POCs.[14] The BRG analysis purports to evaluate those 41,750 claims by applying the TDP Base Matrix Values and some of the TDP scalars, but not others. It clearly

[13] BRG Report, pp. 33–34.

[14] BRG Report, p. 33.

overvalues claims manyfold making essentially the same error as Claro by ignoring the selection bias in valuing Abuse Claims with settlements. This is a flawed approach that is inconsistent with how the TDP will eventually be applied, inconsistent with the Claro Report—which was also submitted on behalf of the TCC—and inconsistent with my estimate of the value of Abuse Claims.

(36) The following report provides the support for these and the remainder of my rebuttal opinions. I turn first to the Claro report.

I.E. Materials relied upon

(37) This report is based on data and information I considered as part of my Affirmative Report and the materials listed in Appendix B.

II. Claro's analysis overstates the total value of BSA's Abuse Claims manyfold

(38) There are three opinions in the Claro Report that relate to my opinions, analysis, and expertise in this matter. They are:

> Claro Opinion 1: The low end of a reasonable range of claim value for all BSA Sexual Abuse Claims in the aggregate is estimated to be between $24.76 billion and $30.41 billion.
>
> Claro Opinion 2: The Bates White Disclosure Statement Valuation of $2.4 billion - $7.1 billion is inconsistent with settlement amounts agreed to by BSA prior to commencement of its chapter 11 cases and is not supported by disclosed methodology.
>
> Claro Opinion 3: The valuation methodology proposed in the TDP is fundamentally flawed and is not a reasonable basis on which to value the BSA Sexual Abuse Claims for purposes of the Plan.

(39) I disagree with all three of these opinions in the Claro Report. All three are fatally flawed by the same fundamental error: Claro ignores the large selection bias inherent in using simple average values from a highly selected group of 517 settlements in an attempt to draw inference on the value of 82,209 Abuse Claims, which were filed under different conditions and represent a broader claim pool. In this section, I address selection bias and how Claro and BRG come to incorrect conclusions about Abuse Claim valuation by not accounting for the selection bias of settled claims.

(40) Selection bias occurs when individuals or groups in a study differ systematically from the population of interest leading to a systematic error in an association or outcome. Here, the verdicts Claro uses as a study group, which total just 29 claims, are purposely selected to be successfully tried cases against institutions held responsible for the acts committed by abusers. They are cases where the institutional share of assigned loss will be atypically high. They are cases where the survivor reported their abuse, the abuser was caught, and primarily cases where litigation commenced relatively soon after the abuse was discovered. The abuser was often an employee of the institution sued. The link between the abuser and the institutional responsibility was clear to the jury in these cases. In contrast, only a small portion of Abuse Claims was anyone involved with Scouting or the police told of the abuse. The abusers identified in the Abuse Claim were, except in rare circumstances, volunteers who did not work for the BSA and were rarely caught. The link between the abuser and the institutional responsibility is tenuous for most Abuse Claims.

(41) The fact that verdicts generally are not a random sample of claims and the selection bias in verdicts have been well documented in the Law and Economics literature (*see*, e.g., Priest and Klein 1984 and

Wittman 1995, 1988).[15] Selection bias must be properly addressed in deriving statistical inferences.[16] Only a small fraction of claims end up in trial. It is difficult and risky to draw statistical inferences about general claims from verdicts, because they only account for a small percentage of the population and are not selected randomly.[17] Particularly, cases with potentially large awards are more likely to end in trial.[18] Thus, simply taking the average of the verdict amounts, without accounting for the selection bias, is likely to overestimate the average compensation for general claims.

(42) The point regarding selection bias in verdicts, and in lead cases in mass torts in general, is not merely an academic one. The economics facing plaintiffs' attorneys mean that it makes the most sense to focus their early efforts in a mass tort on cases with the highest expected damages. There are numerous examples of mass torts for which the verdicts associated with the marquee cases that were first pursued by plaintiffs and the plaintiffs' bar were orders of magnitude higher in value than the per claim value associated with the subsequent group resolution of those tort claims. Consider the example of Roundup (glyphosate), which is a common herbicide. There were three high-profile plaintiff tort verdicts against its manufacturer, Bayer-Monsanto. Just the compensatory component of those verdicts, post-appeal, averaged over $10 million each.[19] In 2021 a global settlement in principle was reached which would pay approximately 100,000 pending cases $100,000 each.[20] This would be over 100 times less than the headline verdict values post-appeal (over 200 times less than headline verdict values pre-appeal) and post removal of punitive awards. Vioxx (rofecoxib), a drug used to treat patients with arthritis and other conditions causing chronic or acute pain, is another example.

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15 George L. Priest and Benjamin Klein, "The Selection of Disputes for Litigation," *Journal of Legal Studies* 13, no. 1 (1984): 1–55.

Donald Wittman, "Is the Selection of Cases for Trial Biased?," *Journal of Legal Studies* 14, no. 1(1985): 185–214.

Donald Wittman, "Dispute Resolution, Bargaining, and the Selection of Cases for Trial: A Study of the Generation of Biased and Unbiased Data," *Journal of Legal Studies* 17, no. 2 (1988): 313–352.

16 National Research Council, "Reference Manual on Scientific Evidence: Third Edition," 2011, Washington, DC: The National Academies.

James J. Heckman, "Micro Data, Heterogeneity, and the Evaluation of Public Policy: Nobel Lecture," *Journal of Political Economy* 109, no. 4 (2001): 673–748.

17 George L. Priest and Benjamin Klein, "The Selection of Disputes for Litigation," *Journal of Legal Studies* 13, no. 1 (1984): 2.

Theodore Eisenberg, "Testing the Selection Effect: A New Theoretical Framework with Empirical Tests," *Journal of Legal Studies* 19, no. 2 (1990): 337.

18 Donald Wittman, "Dispute Resolution, Bargaining, and the Selection of Cases for Trial: A Study of the Generation of Biased and Unbiased Data," *Journal of Legal Studies* 17, no. 2 (1988)" 313–352.

19 Notably, the pre-appeal compensatory figures averaged more than twice as much. *See*:

Dewayne Johnson v. Monsanto Co., No. CGC-16-550128 (Cal. Ct. App. July 20. 2020);

Pretrial Order No. 164: Amended Judgment, *In re Roundup Products Liability Litigation*, No. 16-md-2741-VC (N.D. Cal. July 17, 2019);

Order (1) Denying Motions of Defendant for JNOV and (2) Conditionally Granting Motions of Defendant for New Trial, *Alva and Alberta Pilliod v. Monsanto Co. et al.*, No. RG17-862702 (Cal. Alameda County Ct. July 19, 2019).

20 *See* Bayer, "Bayer Announces Agreements to Resolve Major Legacy Monsanto Litigation," press release, June 24, 2020, https://media.bayer.com/baynews/baynews.nsf/id/Bayer-announces-agreements-to-resolve-major-legacy-Monsanto-litigation.

The first verdict against its manufacturer, Merck and Co., awarded the plaintiff $24.5 million in compensatory damages.[21] The second verdict against Merck was for $4.5 million in compensatory damages.[22] Several months before Merck's global settlement, a jury returned another verdict, for $20 million in compensatory damages.[23] Notwithstanding the average verdict amount of more than $16 million across the three identified headline verdicts, the global settlement that involved about 60,000 claims paid, on average, $81,000 per claim.[24] This is about 200 times less than the average headline verdict.[25]

(43) As an initial matter, the verdicts proposed for inclusion as reviewed by Dr. Conte do not appear to be analogous to the Abuse Claims. Dr. Conte opined that cases were properly included because they often involve "an adult offender who is an employee" of an institution and the institution allegedly "failed to adequately screen the adult or to supervise and monitor." This points to a high degree of selection bias, as the selection criteria assumed that the appropriate claims were those involving a higher degree of institutional responsibility. Indeed, Dr. Conte opined that abuse claims were properly excluded "because there is no institutional share of compensatory damages." The selection bias built into this process is not surprising given that Dr. Conte admittedly did no analysis to categorize potential comparable verdicts himself, rather, he simply adopted the proposed comparable verdicts provided to him by counsel to the TCC.

(44) The extent of the selection bias across the 29 verdicts contained in the Claro study group relative to the BSA historical resolutions, and particularly the current Abuse Claims reflected in the proofs of claim, is stark. The 29 exemplar plaintiff verdicts of the Claro study group are selected to be ones where the plaintiff won at trial. These are cases where the plaintiff and their attorney elected to go through that process and then had a successful outcome. I reviewed the information Claro provided associated with these outcomes and performed additional research on these cases. My review showed that most of the Claro study group cases were ones characterized by a clear and obvious institutional failure. Most of those cases involved claims against employees, which, all else equal, are related to the institution having a higher degree of control or at least responsibility for the actions of the abuser. Most of the Claro study group cases also involved the abuse being uncovered, reported or discovered

[21] The punitive damages were $229 million, although they were later reduced because Texas tort laws impose caps on punitive damages. *See* "Ernst v. Merck Vioxx Trial: Massive Verdict for Plaintiff; Knock-Out Punch for Merck?" *Drug Injury Watch*, August 20, 2005, https://www.drug-injury.com/druginjurycom/2005/08/ernst_v_merck_v.html.

[22] The punitive damages were $9 million. *See* "Vioxx Plaintiff Gets $13.5 Million in Damages," NBC News, April 12, 2006, https://www.nbcnews.com/health/health-news/vioxx-plaintiff-gets-13-5-million-damages-flna1c9468817.

[23] The punitive damages were $27.5 million. *See* "Jury Awards $20 Million to Idaho Man in Latest Merck Vioxx Trial," CNBC, March 12, 2007, https://www.cnbc.com/2007/03/12/jury-awards-20-million-to-idaho-man-in-latest-merck-vioxx-trial.html.

[24] *See* Lewis Krauskopf, "Merck Agrees to Pay $4.85 Billion in Vioxx Settlement," Reuters, November 9, 2007, https://www.reuters.com/article/us-merck-vioxx-settlement/merck-agrees-to-pay-4-85-billion-in-vioxx-settlement-idUSL0929726620071109.

[25] Although the first two verdicts were eventually reversed on appeal, the reversal occurred only *after* the global settlement was reached. *See* "Merck Wins Appeals in Three Vioxx Cases," CNBC, May 29, 2008, https://www.cnbc.com/id/24875089.

soon after it occurred and survivors initiating litigation within a few years of the abuse. In fact, seventeen of the plaintiff verdicts involved survivors 18 years old or less at the time litigation commenced, with the average age at time of litigation for all 29 verdicts being 21. In contrast, the average age at litigation of the BSA settled claims is 48, with none over 72. For the Abuse Claims, the average age at filing a POC was 55, with 10% at least 70 years old. Most strikingly different from litigated claims, 85 percent of Abuse Claims involve abusers who are only identified once in either the POCs or the BSA historical settlements and 85 percent of Abuse Claim Survivors never reported their abuse to the police or to Scouting. In addition, over 79 percent of verdicts in the Claro verdict study group are from states with the potential for highest verdict awards and only 7 percent from states with the lowest award potential.[26] Figure 3 below highlights some of the key characteristics associated with the strong claims that comprise the 29 verdicts in the Claro study group.

[26] For my work in *Garlock*, I classified states into three groups based on the size of observed wrongful death awards in every state. I use that classification here. I provide a tabulation of the state classifications in the appendix to this report. See paragraph 130 of my Affirmative report in *Garlock.*

Figure 3: Characteristics of claims in the Claro study group

Claro reference number	Abuser institutional relationship	Knowledge of abuse	Garlock state category	Years from abuse end to litigation	Plaintiff age at time of litigation
17	Employee	Reported or discovered	High	0	16
18	Employee	Reported or discovered	High	2	11
20	Employee	Reported or discovered	High	7	23
22	Employee	Not reported, not discovered	High	8	23
24	Volunteer	Unclear	High	2	9 and 14
26	Employee	Reported or discovered	High	3	18
28	Volunteer	Reported or discovered	High	1	15
29	Volunteer	Not reported, not discovered	Low	35	49
30	Employee	Reported or discovered	High	1	15
31	Unclear	Reported or discovered	High	27	36
32	Volunteer	Reported or discovered	High	4	16 to 23
33	Employee	Reported or discovered	High	1	15
34	Employee	Reported or discovered	Low	46	61
35	Employee	Reported or discovered	High	0	10
36	Employee	Reported or discovered	High	4	11 and 15
38	Employee	Reported or discovered	High	2	18
39	Employee	Reported or discovered	High	3	14 to 16
40	Employee	Reported or discovered	Medium	39	53
58	Employee	Unclear	Medium	6	Less than 21
64	Volunteer	Not reported, not discovered	Medium	23	38
70	Employee	Reported or discovered	High	0	5
71	Employee	Unclear	Medium	9	19
75	Employee	Reported or discovered	High	2	18
77	Volunteer	Not reported, not discovered	High	16	26
78	Another user of the facility	Reported or discovered	High	2	13
80	Employee	Reported or discovered	High	1	20
81	Employee	Reported or discovered	High	3	9 and 11
89	Employee	Reported or discovered	High	1	10
92	Employee	Reported or discovered	High	1	5 to 8

(45) Consider, for example, the second case in the above figure, no. 18—Nevaeh Thompson v. New York City Department of Education, and Antonio K'Tori. This case involves the largest verdict amount against an institution among the 29 verdicts in the Claro study group. The jury awarded the survivor $16 million for personal injury and past pain and suffering, 85% of which (i.e., $13.6 million) was

assigned to the New York City Department of Education and K'Tori, who was the principal at the survivor's public school. The survivor alleged that she was sexually assaulted and/or molested by one of her teachers, Mr. Watts, more than 100 times during the 2007–08 and 2008–09 school years. She sued in June 2011, alleging that the defendants were negligent in their retention and supervision of Watts. Watts had faced similar allegations of sexual assault while serving as assistant principal at another New York public school, and was demoted to teacher and transferred to the survivor's school.

(46) As another example, consider case no. 70—Jane Doe v. Bright Horizons Family Solution. A 5-year old survivor, whose identity appear to have been kept confidential, disclosed to her mother that she was sexually abused by a music teacher employed at her preschool center. Her parents sued the center within a few months of the disclosure, alleging that the center failed to ensure the survivor's safety when it allowed other teachers to routinely leave the classroom for significant periods of time, rendering the perpetrator the only adult in the room with children. The jury ruled that the center was vicariously liable for the wrongful acts committed by its employee and awarded the survivor $3 million in compensatory damages.

(47) Claro acknowledges that verdict amounts were subject to selection bias, though selection bias is never explicitly discussed. This is obvious because of the way Claro adjusts the 29 verdict amounts to value Abuse Claims. The report proceeds to first calculate that the average amount attributed to the institutional defendants in these 29 verdicts was $4.3 million. To account for the unrepresentativeness of verdicts, Claro makes a series of adjustments to the verdict averages to conclude that the average value of Abuse Claims is $525,000 to $650,000, about the same as the historical settlement average. That is, Claro estimates that the selection bias of using the 29 verdicts to value the Abuse Claims is 7 to 8 times that which one would have obtained by using the historical settlement average. Finding comfort in the similarity between the adjusted verdict averages[27] and having determined there are 46,916 valuable Abuse Claims, Claro estimates the total value of the Abuse Claims as $25 billion (= $525,000 × 46,916) to $30 billion (=$650,000 × 46,915).

(48) Notably, the first step in the Claro adjustment to account for the selection bias in verdicts involves reducing the verdict values using the TDP Aggravating Scalar Factors. These scalars are three criteria with values set to one for Single Survivor Cases with typical severity and impact of abuse: a maximum of up to 1.5 for severity of abuse, a maximum of up to 1.5 for the impacts of abuse, and a maximum of up to 2.0 for a repeat abuser. Claro adjust the verdicts downward as though the original verdicts were at the maximum value for all three scalars, the product of which is 4.5, rescaling them as though the typical Abuse Claim would have combined average aggravating scalar of 2.75. Claro

[27] On page 32 of Claro's report, Claro states: "In order to assess the overall reasonableness of the Claro Valuation, results were compared to amounts paid by BSA for similar claims using data provided by BSA. Overall, the Claro Valuation is consistent with the Historical BSA Settlements." If that is Claro's standard to judge the reasonableness of "Claro Valuation", I am puzzled why Claro spent 16 pages of Claro's report making a series of adjustments and calculations to ostensibly account for the differences between verdicts and settlements. Why not skip the verdict selection and step-by-step adjustments and go straight to using the settlement average? The result is the same.

chose this value because it was halfway between the starting value of the product of the aggravating scalars, which is 1.0, and the maximum of 4.5. This choice is not an intermediate, balanced choice because it is in the middle of the range from minimum to maximum. Rather, it forces all Abuse Claims to be assigned values of repeat abuser claims; under the TDP, the maximum possible value of the aggravating scalars for a Single Survivor Case is 2.25 (=1.5 × 1.5.) A value of 2.75 requires the abuser to have been identified at least twice as an alleged abuser. Further, it forces all repeat abuser Abuse Claims to be valued as though they had some atypical additional impact from either or both the severity of impact of abuse factors. (2.75 = 2.0 × 1.375)

(49) What Claro fails to recognize is that the BSA settlements are also a highly selected group dominated by cases involving repeat abusers and therefore reliance on the BSA settlements must also account for this selection bias. The BSA settlements are subject to a selection bias as significant as would occur in using verdicts in place of settlements. The reason the BSA settlements are a highly selected group derives from the economics of sexual abuse cases. A sexual abuse claim rarely has any institutional tort value unless there is a deep-pocketed or well-insured institution that can be held liable for the harm of the abuser. Such claims also require a credible basis to establish the institution knew, or should have known, and should have done something it did not do to prevent the abuse. That is why most of the prepetition settlements against the BSA involved repeat abusers. This factor establishes credibility to the assertion that the BSA should have known. It also adds credence to the allegations of the survivor, sometimes made many years after they were abused, providing a corroborating account of another survivor who was abused by the same abuser.

(50) Having observed these stark differences between Claro's exemplar verdicts, the BSA settled claims, and the Abuse Claims, I re-examined the historical settlements for the cases listed as Single Survivor Cases to ascertain what distinguished high six- and seven-figure settlements for these cases from the lower valued ones. In doing so, I incorporated updates pertaining to abuser frequency information, as described in the Murray Rebuttal Report, as to whether the abusers associated with claims that were marked as Single Survivor Cases in the available 517 positive value settlements comprising the BSA historical resolution data relied upon by Claro, to determine if they were truly Single Survivor Cases or were associated with repeat abusers. By incorporating this work, I was able to identify abuser names in the BSA settled claims that also appear in the current Proof of Claim data, indicating a pattern of repeat abuse. In addition to the updated information from the Murray Rebuttal Report, I also conducted searches for reports or press releases associated with the remaining Single Survivor Cases to see if they contained references to additional survivors associated with the abuser.[28]

(51) In performing this work, I discovered that 38 of the cases I reported in my affirmative report as Single Survivor Cases in fact involved a repeat abuser. Because my report considered the resolution over the

[28] This additional research involved internet searches of the identified abuser names. During my review of the search results, I also considered the location and timing information for the settled claim to help validate my findings.

last five years while the Claro report considered the resolutions over the last ten years, the count impact on the Claro study group of resolved BSA claims is even higher. In total, 61 of the claims Claro considers that are marked as Single Survivor Cases turn out to involve repeat abusers. Of that total 45 of the Single Survivor Cases are related to abusers who appear in the POCs, 15 are ones that were identified as repeat abusers based on additional research, and 1 is related to an abuser who appears twice in the set of 573 claims as well as in the POC data (though only once in the 262 resolutions from the last five years which formed the basis of my analysis in my Affirmative Report). Figure 4 provides a summary of these results. Appendix A provides a list of the of the cases initially marked as Single Survivor Cases that in fact involved a repeat abuser.

Figure 4: Apparent Single Survivor Cases that further research revealed involved a repeat abuser

Update Category	Count of Claims (including $0 settlements)	Average Resolution Amount (including $0 settlements)	Count of Claims (excluding $0 settlements)	Average Resolution Amount (excluding $0 settlements)
Abuser name found in POC data	45	$365,000	41	$400,000
Abuser name appears twice in the set of 573 claims	1	$140,000	1	$140,000
Additional research indicates repeat abuser	15	$240,000	13	$275,000
Total	**61**	**$330,000**	**55**	**$365,000**

(52) These newly-identified repeat abuser cases included all but one of the previously categorized as Single Survivor claims that were settled for over $375,000. This one exception was a former employee of the New Hampshire council, a case that fits the profile of the plaintiff verdicts. The remaining 16 Single Survivor Cases in the 262 historical settlements report on Table 5 of my affirmative report have a resolution average of $150,000. In contrast, the 38 cases I now know to be repeat abuser cases have a resolution average of $335,000 (30 cases with an average of $400,000 excluding no payment resolutions.)

(53) In contrast to the high fraction of settlements involving claims with repeat abusers, only 13% of Abuse Claims involve identifiable repeat abusers. The Abuse Claims mostly involve abusers who are identified only once and most told no one of their abuse for years and never told Scouting or the police. As shown in my Affirmative Report, the BSA settlements for such cases are lower than the repeat abuser claims. This means the chance of a liability finding against the BSA or the liability share of BSA would also be lower for single victim cases.

(54) The selection bias in settlement data and the fact that the settlements involve more high value cases follows from the economics of litigation. Not all potential claims resulted in a lawsuit. Only a small fraction of them did. Which claimants choose to litigate is a selection process that is not random, because the decision to sue is the result of characteristics of certain claims that other potential claims

do not share.[29] Such characteristics could be both monetary and non-monetary, such as the expected compensation from the lawsuits, pecuniary costs of litigation, risk preference of the claimant, and emotional responses in litigation.[30] Generalizing all factors into expected benefit and expected cost, a claimant will sue if the expected benefit exceeds the expected cost of the suit.[31] This means the settlements, from claimants who decided to litigate, will typically have a higher expected value compared to other potential claims.

(55) Another party in the suit-selection process is the plaintiff attorney, who needs to decide whether to accept retention of a potential case. The plaintiff attorney chooses cases that have a positive expected return, which is the expected benefit minus the expected cost.[32] That is because plaintiff attorneys are paid on a contingency fee basis, i.e., plaintiffs pay a percentage of the settlement/verdict amount to their attorneys. Thus, the plaintiff attorney's expected benefit is a direct derivative of the settlement/verdict amount, which depends on the potential award and the chances of getting a settlement or winning in trial. Correspondingly, plaintiff attorneys pursue the cases with higher potential awards and better chances of winning among all potential claims.

(56) The differences between the Abuse Claims and Claro's study groups, (the 29 verdicts, and the 517 historical settlements,) are so significant that 98% of the Abuse Claims never filed a lawsuit. The study groups consist entirely of tort claims that were successful at obtaining a payment from an institutional defendant. Claro's exclusion of zero payment resolutions increases the selection bias from another unobservable feature of the different claim populations. The verdicts are preselected to have only plaintiff trial victories. The historical resolutions have 51 of 573 cases resolved without payment from the BSA. Claro excludes these zero payment resolutions, presumably to bring the historical resolutions data more in line with the selected verdicts data; including the zero-dollar settlements reduces the average value of historical resolutions to $465,000, below the adjusted verdict average. However, the basic claim attributes of those 51 claims appear no different than the paid claims. Further, there is no apparent difference between them and the 46,916 Abuse Claims that Claro values. That means that it is likely that the 46,916 also have zero value claims as well, and for the reasons discussed below, likely in higher proportion than in the historical resolution since over 45,000 of these Abuse Claims never filed a lawsuit. Though Claro purportedly accounts for several claim attributes that would affect the size of settlements relative to its verdict study group, it never addresses the selection bias created by using lawsuit average verdicts or settlements as a basis for

[29] Theodore Eisenberg and Henry S. Farber, "The litigious plaintiff hypothesis: case selection and resolution," *RAND Journal of Economics* 28, no. 0 (1997): S92–S112.

[30] Theodore Eisenberg and Henry S. Farber, "The litigious plaintiff hypothesis: case selection and resolution," *RAND Journal of Economics* 28, no. 0 (1997): S92–S112.

Peter H. Huang and Ho-Mou Wu, "Emotional Responses in Litigation," International Review of Law and Economics 12, no. 1 (1992): 31–44.

[31] Louis Kaplow and Steven Shavell, "Economic analysis of law," In *Handbook of public economics* 3, ed. Alan J. Auerbach and Martin Feldstein (Elsevier, 2002), 1661–1784.

[32] Jean Tirole, *The Theory of Industrial Organization* (Cambridge, Mass: MIT Press, 1988).

valuing claims that could have filed lawsuits but choose not to. This is the Minus Factor Four that I discussed in my Affirmative Report.

(57) Here is a simple numerical example that illustrates how selection bias can lead to a false valuation conclusion based on study group averages:

(58) Assume plaintiff law firm K requires an expected minimum recovery of $80,000 on a sexual abuse case to cover its costs. It charges for its work a contingency fee of 40 percent of any recovery. Presented with the opportunity of a case with damages of $200,000 that is within the statute of limitations, K takes the case. If instead the case is outside of the statute of limitations in a Gray 1 state where K expects only a 50/50 chance of getting a favorable statute of limitations ruling on the case, the expected value of the case would be 50% × $200,000 = $100,000, and K's expected recovery would be only $40,000. Because this is below K's minimum recovery of $80,000, K would not accept retention of this case. Assume a second case comes along in the Gray 1 state with damages of $400,000. K can settle the case for a 50% discount and meet the return threshold: the expected settlement is 50% × 400,000=$200,000, which gives K a contingency fee of $80,000, meeting the minimum recovery threshold, so K accepts the case retention. For a Gray 3 state, assuming a 75% discount for a case presumptively barred by the state's statute of limitations, K would accept neither of the prior two cases unless not presumptively barred but would accept a presumptively barred case if that case would have been worth $800,000 if not barred. This case's settlement value in a Gray 3 state is $200,000 (= 25% of $800,000), sufficient to cover K's minimum recovery threshold, so K accepts this case. The Gray states may have many cases like the lower value case of Open status, but they would never get accepted for representation by K and would never result in a lawsuit.

(59) Note, however, that even if the retention threshold was the same for all law firms and Survivors at $200,000, the observed settlements would sometimes be below $200,000. That is because the retention decision is made based on expectations about the eventual resolution of an uncertain outcome. To use a familiar gambling game to illustrate, the expected value of a spin of a roulette wheel is 18, whereas the outcomes vary anywhere from 0 to 36. A fair-odd's bet that a spin of the roulette wheel yields a number bigger than 10 is typically a winner, though not always. In the example above K takes the retention so long as the expectation is that the case will resolve for at least $200,000. In a particular case, there are chances that the resolution will be above or below that amount. The actual BSA settlements are more highly skewed than portrayed in this example and in the discussion of the filing threshold below due to the higher variance of outcomes relative to expectations.

(60) This illustration demonstrates that the cases that would be litigated, either to verdict or settlement, are only those with sufficiently high expected value to meet the expected recovery threshold for the plaintiff's attorney even accounting for potential defenses to liability. Thus, the sample set of either verdicts or settlements excludes lower value claims entirely. Applying the selection principle

illustrated here generally, lawsuit settlement averages will overstate the population average value inclusive of cases that were never filed because there is an expected valuation threshold that must be exceeded for cases to be filed as lawsuits. For populations where values are highly skewed, with many below the acceptable cost threshold, many claims will not be filed and the settlement average of the ones that are filed are biased above the population mean; the more highly skewed, the greater the bias.

(61) This applies to the Abuse Claims. As I discussed in my Affirmative Report, even the limited sample of the BSA historical settlements is highly skewed. In addition to the inherent uncertainty of litigation, as is clear from both my report and the Claro Report, this is due to numerous claim attributes that can affect the value of a claim. Some affect the size of damages, some affect the likelihood that the plaintiff would prevail at trial, some affect the likelihood of a case passing legal thresholds required to make it to trial, and some affect the liability share that would be assigned to the BSA in that eventuality. Given the data limitations here, it is not possible to measure each effect separately or parse the contribution of each attribute to the outcomes represented in the BSA historical settlements. We know, however, that their combined effect creates a selection bias that is large, and we know the direction of the bias, meaning the settlement average overstates the average Abuse Claim value. We know this because 80,000 Abuse Claims could have been tort claims. An entrepreneurial plaintiff's bar that publicizes tort opportunities and recruits large numbers of claims across a variety of torts, had been unwilling to invest in recruiting sexual abuse claims against the BSA until the bankruptcy filing changed the case economics. With that change, the recruiting investment can pay off and was pursued vigorously resulting in vastly more bankruptcy claims than lawsuits filed in the 10 years prior to the petition date.

(62) To illustrate the potential for the filing selection bias illustrated above to have a large impact on claim valuation and the difference between the number of tort claims filed and the number of Abuse Claims, I have created a simulation extending the selection bias example above to 47,000 hypothetical, sufficiently documented Abuse Claims.[33] For the simulation, I select $1.8 million[34] as the average potential verdict amount for a typical cross-section of 47,000 claims with various abuse allegations and other severity attributes. For this simulation, I bifurcate the valuation factors into two categories that would affect the settlement values of these claims: the expected share of relative liability that would be assigned to the BSA for open SOL status Abuse Claims and the expected discount of settlements based on the Abuse Claims' statute of limitations status. The liability shares are assumed to cover the spectrum of possibilities from 1% to 100%, Category A claims cover the upper portion of the range, scaling down from 100%, and are assumed to have an average BSA share that is 2/3rds the full institutional verdict share. This results in an average value of $1.2 million in Open states for

[33] A copy of the simulation model is included in my backup material.

[34] For reference note that on Table 6 of the Claro report, the average Mid Base Value verdict from the mix of allegations in their selected group of 46,916 claims to be valued is $1.88 million. I use $1.8 million in this example for ease of presentation.

category A claims. Category B claims are assumed to have an average BSA share that is half that of the category A claims ($600,000), Category C half that again ($300,000), and Category D half of Category C ($150,000). The hypothetical Abuse Claims are also assigned into five statute of limitations status categories as used in the TDP, with relative values assigned to No statute of limitations limitation (Open at 100%), Grey 1 (50%), Gray 2 (30%), Gray 3 (10%) and Closed (1%). The following table provides the hypothetical settlement values of the 20 combinations of Categories A through D and the statute of limitations categories.

Figure 5: Illustration of potential filing selection bias

		Hypothetical BSA average share of $1.8 million by category			
SOL status	Settlement discount	D – 1/12 value	C – 1/6 value	B – 1/3 value	A – 2/3 value
		$150,000	$300,000	$600,000	$1,200,000
Open	100%	$150,000	$300,000	$600,000	$1,200,000
Gray 1	50%	$75,000	$150,000	$300,000	$600,000
Gray 2	30%	$45,000	$90,000	$180,000	$360,000
Gray 3	10%	$15,000	$30,000	$60,000	$120,000
Closed	1%	$1,500	$3,000	$6,000	$12,000

(63) Adopting the filing threshold assumption of the example above, I assume for this simulation that claims with a value below $200,000 would not have been filed. This is to capture the economic reality that for survivors and law firms, there is a threshold below which the payoff is not worth the emotional and financial cost to the survivor and the financial cost to the plaintiff law firm. That threshold may not be $200,000, and it is likely not the same for everyone, but there is some threshold. In the table above I have highlighted in orange the value combinations that are below the assumed threshold.

(64) Continuing the simulation, in the table below I have reverse engineered a distribution of 47,433 hypothetical Abuse Claims by allocating them among the 20 attribute categories to obtain 517 claims that would have been brought and resulted in lawsuits and settlements. The 47,433 claims used in the simulation is the sum of the 46,916 Abuse Claims that Claro values and the 517 positive value historical resolutions included in the historical BSA resolutions that Claro considers (the claims from Survivors who litigated and settled with BSA prior to the BSA bankruptcy filing). The allocation of the 47,433 claims across the 20 category combinations was designed to satisfy two conditions:

- First, the proportion of claims for each statute of limitations status category had to be consistent with the proportions in the POC data.

- Second, the number of claims above the filing value threshold of $200,000 had to equal 517 and the average settlement had to be approximately $510,000.[35] To achieve this second objective, I posited a proportion of claims within each of the categories A through D.

(65) The upper panel of Figure 6 presents the resulting allocation. It shows the count of each type of claims, defined by the combination of the statute of limitations status and the categories of A through D. As before, the cells highlighted in orange indicate claims that would not have been filed because their expected value is below the assumed threshold. The lower panel of Figure 6 provides the relevant summary statistics. Statistics pertaining to claim counts are based on the upper panel of the figure; statistics pertaining to dollar valuations are results of both the counts, listed in the upper panel of Figure 6, and the corresponding values, listed in Figure 5. By design, the simulation produces 517 settlements, totaling $262.2 million, which translates into an average of $510,000 per settled claim.

Figure 6: Hypothetical Abuse Claim filing threshold simulation

		Category percentage and number of claims				
Claims %	SOL status	D – 1/12 value	C – 1/6 value	B – 1/3 value	A – 2/3 value	Total
		97.5%	1.3%	0.8%	0.4%	100%
35%	Open	16,251	217	130	65	16,662
15%	Gray 1	6,764	90	54	27	6,935
13%	Gray 2	6,113	81	49	24	6,267
27%	Gray 3	12,635	168	101	51	12,955
10%	Closed	4,499	60	36	18	4,613
Total count		46,262	616	370	185	47,433
Count below threshold		46,262	400	186	68	46,916
Count of lawsuits		0	217	184	116	517
Total settlements		$-	$65,000,000	$94,200,000	$103,000,000	$262,200,000
Average settlement		$-	$300,000	$510,000	$880,000	$510,000
Abuse Claim total value		$3,416,200,000	$26,000,000	$15,100,000	$6,300,000	$3,463,600,000
Abuse Claim average value		$74,000	$65,000	$81,000	$92,000	$74,000

(66) The bankruptcy filing of the BSA greatly diminishes the filing threshold. Costly claim-by-claim litigation is to be replaced with a much less costly administrative trust where claims can be resolved confidentially. Mass recruiting of Abuse Claims becomes a profitable enterprise with depositions, legal battles, and negotiations replaced by claim forms and values set by TDP. In the simulation, all the additional 46,916 hypothetical Abuse Claims that were not brought as tort claims in the example above will submit POCs to be evaluated by the Settlement Trust. Valued on the same basis as the lawsuits, the hypothetical 46,916 Abuse Claims have a simulated value of $3.46 billion. In contrast,

[35] The values specified here are not unique as there are three amounts to be specified, namely the percentage of claims from each category A to C, and two constraints: (1) the total number of claims with positive settlements is 517 and (2) the settlement average is $510,000. The different combinations of values that satisfy these constraints produce nearly identical simulation results.

the simulated value of the tort settlements is $262,200,000. If we were to ignore (as Claro did) the selection bias created by the filing threshold, and directly applied the settlement average of $510,000 to 46,916 Abuse Claims, we would erroneously conclude that their value was $25 billion. At its core, this is what Claro did, overvaluing the actual Abuse Claims manyfold.

(67) This is a simulation. We do not actually know the number of Abuse Claims that fall within each of categories A through D and the corresponding BSA responsibility shares. We do not know the actual discounts associated with statute of limitations status, though the values used in the simulation are within the range of values set forth in the TDPs as discounts to use for the TD for various jurisdictions.[36] Moreover, we do not have the data required to replace the values I used in this simulation with statistical estimates based on data. The historical data are too sparse and clearly are not representative of the vast majority of Abuse Claims for the reasons discussed above.

(68) We are, however, not without guidance regarding the value of the Abuse Claims. When calibrated to the BSA historical settlements and filings, the simulation model is reasonable representation of the economics incentives and their consequences for the decision of Abuse Claim Survivors and their counsels to file lawsuits. We know that several hundred lawsuits were filed and settled with a wide variety of settlement amounts. As shown in Figure 2, about 10 percent were zero-dollar resolutions, another 10 percent were seven figure settlements, 40 percent with an average resolution of $40,000, and the remaining 40 percent were resolved for just over $300,000. We also know that over 80,000 Abuse Claims were filed in the instant matter, which could have been filed as tort claims in the past. This means there must be a very large selection bias caused by a filing threshold. When presented with an avenue for recoveries at greatly reduced cost relative to litigation, entrepreneurial lawyers were willing to invest and recruit 80,000+ Survivors, who, for their part, saw an avenue for compensation without the same litigation burden as was present prepetition. My understanding based on the Declaration of Catherine Nownes-Whitaker of Omni Agent Solutions Regarding the Solicitation of Votes and Preliminary Tabulation of Ballots Cast on the Second Modified Fifth Amended Chapter 11 Plan of Reorganization for Boy Scouts of America and Delaware BSA, LLC is that preliminary indications are that 7,919 Direct Abuse Claims indicated they would take the $3,500 expedited distribution. This represents slightly less than 15% of the claims that returned ballots and slightly less than 10% of the 82,209 unique and timely claims. Given that this Declaration was filed within the last 24 hours and is still preliminary, Bates White's analysis of this information is ongoing. While we do not yet have enough information to draw conclusions about the characteristics of these claims, this election shows immediately that a meaningful set of claims are willing to take a low value. Further, the Whitaker declaration shows that only 53,888 of the 82,209 unique and timely

[36] In litigation the statute of limitations discount is likely to be different case-by-case and may depend in part on the expected liability share levels. This is because a case with a high liability share in conjunction with a particularly egregious pattern of abuse is a case where judges have been more likely to decline to apply the statute of limitations at the outset of the case or, as in the highest-value cases faced by the BSA, left for the jury to decide. (Kerry Lewis, Thomas Hacker)

claims submitted valid votes for or against the Plan. While Whitaker's declaration suggests that some number of the uncounted votes were untimely or incorrectly submitted, up to 28,321 claimants did not take the time to vote at all. This is despite an extensive noticing and solicitation process conducted by Debtors and plaintiffs' attorneys alike, both directly and indirectly through high profile public forums.[37]

(69) Moreover, we know there are large differences between the historically litigated claims and the Abuse Claims, most notably, the high proportion of repeat abusers in the historical claims in contrast to the high proportion of apparent single victim abusers in the Abuse Claims. This difference points to a potential source of the filing threshold: establishing that the BSA is liable for the actions of an abuser is more difficult and less valuable if the plaintiff cannot establish the abuser also abused other Survivors. Sufficiently so that the likely value of litigating a claim against the BSA was not worth the effort to most Survivors in the tort system.

(70) We also have evidence of the selection bias and a change filing threshold for plaintiff law firms, i.e. a change in behavior as to what claims they were willing to represent pre- and post-petition in this specific tort and as it relates to claims filed against BSA. This is supported by statements and actions taken by some of the plaintiff law firms themselves in this case. Kosnoff Law, PLLC filed a Verified Statement Pursuant To Rule Of Bankruptcy Procedure 2019 ("Kosnoff 2019").[38] Kosnoff Law, along with two other firms AVA Law Group and Eisenberg Rothweiler, under the auspices of a group called Abused in Scouting or AIS is the most prolific representative of Abuse Claims in this matter. The Kosnoff 2019 identifies over 16,000 Abuse Claims that Kosnoff Law says it represents. That same Kosnoff 2019, while discussing the process of recruiting claims for the bankruptcy states that "While that advertising effort slowly developed, Mr. Kosnoff reached out to men who had contacted Kosnoff Law years earlier seeking representation, but whose cases the firm had declined due to statute of limitations issues."[39] This is a clear indication that Mr. Kosnoff was more selective pre-petition in terms of which individuals he was willing to represent. It is notable that of the 16,000 current Abuse Claims that Kosnoff Law says it represents, roughly 70% are now presumptively barred based on the statute of limitations analysis (i.e. would fall in either a closed or Grey state and be beyond the age since majority at which claims are allowed in those jurisdictions) and thus had reduced prospects of recovery in the tort system. The example engagement agreement provided in connection with the Kosnoff 2019 provides further evidence that Kosnoff Law, AVA Law Group, and Eisenberg Rothweiler differentiated between potential representation in this bankruptcy case and more generally. That agreement states that the firms are "committing to represent you **only** in connection with the February 18, 2020 bankruptcy filing, or a related global resolution of sex abuse

[37] *Declaration of Shannon R. Wheatman, Ph.D in Support of Procedures for Providing Direct Notice and Supplemental Notice Plan to Provide Notice of Bar Date to Abuse Survivors* [Docket 556]; Supplemental Notice Plan [Docket 557-1]; *Affidavit of Service* [Docket 7999].

[38] Docket 5924.

[39] Docket 5924, p. 4.

claims against BSA."[40] Clearly, the filing threshold for which claims Kosnoff Law is willing to represent has moved.

(71) This point regarding Kosnoff Law is significant. The Claro valuation assigns at least $3.75 billion, 15% of its total valuation, to Abuse Claims readily identifiable on the Kosnoff 2019. Notably, over 10,000 of the claims that go into making up that total are presumptively barred according to the Claro analysis. The economics of case filing for other law firms are not materially different than those faced by Kosnoff Law.

(72) Confronted with these facts, I chose the valuation approach described in my Affirmative Report and summarized in the Disclosure Statement. I identified a core set of claims that were not statute of limitations barred and appeared to have all the requisite attributes to have been litigated claims, but for the costs of litigation. I assigned them a benchmark value derived from the historical settlements and then evaluated the appropriateness of using those values considering alternative claim attributes that would affect the number or value (frequency or severity, using the terms of my Affirmative Report) of valuable claims. I considered the potential for more valuable claims, most notably the relaxing of statute of limitations or further identification of abusers (Plus Factors.) I also considered factors that would affect the value of claims, most notably the valuation bias created by the filing threshold discussed above (Minus Factor 4.) On that basis I concluded that the value of Abuse Claims was in the wide range of $2.4 to $7.1 billion, wide because of the inherent uncertainty of valuing 82,209 claims from a highly selected study group of several hundred BSA historical settlements. This is a reasonable approach, appropriate for the available data and information regarding historical settlements and the Abuse Claims. What I have seen of the other experts and additional historical settlement, as well as the additional analyses I performed since I issued that report and discuss here leads me to the conclusion that the value of the Abuse claims is likely in the lower quartile of the $2.4 to $7.1 billion range I estimated previously. Claro's opinion 2 is incorrect.

(73) Confronted with the same information, Claro took a different approach, looking outside the scope of the BSA's litigation history to sexual abuse verdicts including other institutions. As it turned out, this approach was not helpful for understanding the value of the Abuse Claims. With the assistance of lawyers of the TCC and Dr. Jon Conte, as referred to above, Claro selected the 29 verdicts of Claro's study group with which to value the Abuse Claims. This is an even more highly selected and unrepresentative group than the 517 historical BSA settlements Claro also evaluated. Recognizing that verdicts were not representative of settlements, Claro adjusts the verdicts until the valuation average matches the mid-six-figure settlement average. Multiply that by the 46,916 Abuse Claims

[40] *See* Exhibit B to the Kosnoff 2019, which is a copy of the "Professional Employment Agreement" for clients retained under the moniker Abused in Scouting by Kosnoff Law, AVA Law Group, and Eisenberg Rothweiler.
"II. Scope of Representation: By signing this Engagement Agreement, you understand and agree that AIS Counsel is committing to represent you **only** in connection with the February 18, 2020 bankruptcy filing, or a related global resolution of sex abuse claims against BSA. You have the right to terminate the representation at any time, subject to our right to recoup fees and expenses as provided by law." (Emphasis original).

Claro assigns value gives $25 billion. Claro never addresses the selection bias and its implication for valuation incumbent in the facts that 80,000+ Abuse Claims only filed claims after the costs to the Survivors and their attorneys of filing were greatly reduced relative to the tort system. As a result, Claro overvalues the Abuse Claims manyfold. Claro's estimates are unreliable and Claro's opinion 1 is incorrect.

(74) The new information provided by the Claro verdict study group, the updated repeat abuser status of many of the high value BSA historical settlements, and the simulation model analysis has shed additional light on the likely impact of the plus and minus factors associated with my affirmative report Abuse Claim valuation. For reference, the following is a reprint of Figure 34 of my affirmative report that summarizes the valuation uncertainty factors I considered.

Figure 7: Summary of valuation uncertainty factors (Figure 34 of Bates affirmative report)

Factor	Reference	Valuation component	Impact potential	Comment
Plus Factor 1	SOL enforcement or revivals	Frequency	Small	Little time remaining before confirmation
Plus Factor 2	Unidentified abuser update	Frequency	Large	Partially realized since Tranche IV
Plus Factor 3	Multiple abuse occurrences	Severity	Small	Relates to hundreds of Abuse Claims
Plus Factor 4	Abuse reported	Severity	Small	Likely incorporated in benchmark value
Plus Factor 5	Young abuse survivors	Severity	Small	Ambiguous
Plus Factor 6	Bar Date minors	Frequency	Small	Relates to hundreds of Abuse Claims
Plus Factor 7	Repressed memory Abuse Claims	Frequency	Small	Relates to hundreds of Abuse Claims
Minus Factor 1	Age of survivors	Severity	Large	Relates to thousands of Abuse Claims
Minus Factor 2	Youth on youth abuse	Severity	Small	Relates to hundreds of Abuse Claims
Minus Factor 3	Identifying missing relationships	Severity	Small	Relates to hundreds of Abuse Claims
Minus Factor 4	Unobserved hesitancy attributes	Severity	Large	Relates to nearly all Abuse Claims

(75) Readdressing first the plus factors, nothing in the Claro or other affirmative expert reports provides any new information that affects my consideration of the plus factors. The only change of which I am aware is that the North Carolina Supreme Court has invalidated the state's revival law, reinstituting statute of limitations for sexual abuse claims. This reduces the SOL status of approximately 2,000 Abuse Claims from North Carolina. The most significant plus factor for consideration of its impact on the simulation model results is Plus Factor 2, the potential for Abuse Claims that currently have not identified their abuser to do so in the future. If Claro's assumption that 25 percent of Abuse Claims that currently only provide a description of their abuser will later properly identify an abuser, this would add an additional $200 million to the Abuse Claim value, which would not materially impact my benchmark valuation.

(76) Turning now to the minus factors, Minus Factor 1 would have a significant impact on the Abuse Claim value as described in my affirmative report. The additional relevance for this report is that it increases the likelihood that the BSA responsibility share is below 10 percent. Over 35 percent of the

Abuse Claims were for Survivors first abused by 1970 and 10 percent by 1960. That amount passage of time from abuse to litigation is unprecedented in the Claro Study group and rare in the BSA historical settlements. It clearly raises obstacles to any Survivor who attempts to prosecute a claim asserting BSA responsibility for the abuse they suffered.

(77) I have identified an additional minus factor since my affirmative report, Minus Factor 5. Its potential impact is large. Over 79 percent of verdicts in the Claro verdict study group are from states with the potential for highest verdict awards and only 7 percent states with the lowest potential.[41] In contrast, only 50% of Abuse Claims are from states with the highest potential verdicts and 25 percent are from the states with the lowest potential verdicts. What drives the difference in wrongful death verdicts for the various states is each states potential for non-economic damages, particularly relevant for sexual abuse lawsuits. The prevalence of high verdict states in the Claro verdict study group is another consequence of litigation economics. Claro failed to account for this selection bias in its calculation of the benchmark verdicts. It would lower those benchmarks. The implication is that the value of Abuse Claims below the filing threshold is likely lower than indicated by the simulation model. For example, if the average verdict potential in the simulation illustrated in Figure 6 is $1,200,000 instead of $1,800,000, the simulated value of Abuse Claims is reduced to $2.5 billion.

(78) Minus Factor 4 is the subject of much of this report. My work in understanding the selection bias of the Claro verdict study group and further analysis of the historical BSA settlements has revealed the economic forces that explain the pattern of the BSA tort claims for sexual abuse and bankruptcy filings of Abuse Claims. That work led me to create the simulation described above to model the effect of the economic filing threshold phenomenon and how it affects the number of tort claims filed. Notably, it reveals the importance of the size of the average BSA responsibility share in determining the observed filing pattern.

(79) As the Claro verdict study group reveals, the institutional share of responsibility is a critical factor determining the value of a sexual abuse claim against an institution. As I discussed in paragraph (18) above, the three BSA related verdicts show how the BSA's responsibility share is a central component in determining if the BSA has any liability for a sexual abuse claim and, if so, how much, from a four- or five-figure value up to a seven-figure value. The tort system simulation above illustrates the how there could be so many Abuse Claims and, relative to the number of Abuse Claims, so few tort filings and settlements. Given, as Claro has shown in its verdict study, the potential for at least a seven-figure return for a credible sexual abuse lawsuit if high institutional responsibility can be established by the plaintiff, it must be the case that the average liability responsibility share of the BSA is low. The BSA settlement data also supports this conclusion. Note that for cases that were filed against the BSA, 50 percent of lawsuits were resolved for a payment of

[41] For my work in *Garlock*, I classified states into three groups based on the size of observed wrongful death awards in every state. I use that classification here. I provide a tabulation of the state classifications in the appendix to this report. See paragraph 130 of my Affirmative report in *Garlock.*

$100,000 or less, at an average payment of $32,000. That amount is less than 2% of the adult-on-minor sexual abuse verdict benchmark of $1.88 million used by Claro. As described above, filed cases were a selected group with sufficiently high expected outcomes. As the historical results show, establishing a high enough institutional responsibility for the BSA by a plaintiff is difficult and only occurs in rare cases. In summary, considering all these factors, the verdicts of the Claro study group, the historical BSA settlements, and the results of the simulation modeling, it is more likely that the average BSA responsibility share of claims for which it holds any responsibility is less than 10 percent, than more than 10 percent, much less if considering the entire population of Abuse Claims. Following from the tort simulation model above, which has an average 9% BSA responsibility to all the claims for which Claro attaches value, the valuation of the Abuse Claims is more likely below $3.5 billion than above it, meaning the value of Abuse Claims is more likely in the lower quartile of my original valuation range than in the higher portion of the range.

II.A. Claro's claims about the Bates White's valuation methodology are incorrect and unfounded

(80) Claro's opinion 2 is also incorrect in stating that methodology for Bates White's forecasting, including relevant inputs and assumptions, was not disclosed.[42] Notwithstanding the fact that Claro was yet to receive my Affirmative Report at the time the Claro Report was prepared, the Amended Disclosure statement already identified Bates White's methodology as one based on scenario analysis and using a frequency and severity valuation model. Specifically, the Amended Disclosure statement says:

> *To arrive at the valuation range, Bates White considered multiple scenarios… all of the scenarios are based on a frequency and severity valuation model where the number of current Abuse Claims (frequency) alleging a particular Abuse (severity) is measured against the attributes described above, which, when combined with historical data regarding resolution of Abuse Claims, allows Bates White to project the value of the Claims*.[43]

(81) Frequency-severity modeling is a commonly employed method among actuaries for purposes of insurance loss forecasting and in the context of estimating future litigation claims.[44] In my experience,

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42 Claro Report, pp. 34–35.

The Tranche IV valuation model was produced in late October in response to a subpoena filed by the TCC. The produced valuation model contained the relevant Bates White Valuation Factors, along with the detailed application of those factors to the unique and timely set of Sexual Abuse Claims identified in the Tranche IV data.

43 *See* Amended Disclosure statement [Docket 6214] at page 91.

44 *See, e.g.*, Edward W. Frees, Richard A. Derrig and Glenn Meyers. *Predictive Modeling Applications in Actuarial Science*; Volume 1: Predictive Modeling Techniques. Cambridge University Press: 2014 at 138 ("Many insurance datasets feature information about frequency, how often claims arise, in addition to severity, the claim size. … Frequency-severity modeling is important in insurance applications because of features of contracts, policyholder behavior, databases that insurers maintain, and regulatory requirements."); Erik Bolviken. *Computation and Modelling*

some form of frequency-severity modeling is the most used form of estimation in mass tort bankruptcies. I have used a form of this modeling in numerous bankruptcy cases including *In re Kaiser Gypsum Company* and *In re Garlock Sealing Technologies* and in my work testifying before the Senate Judiciary Committee on the economic viability of the Trust Fund proposed under S.852, the Fairness in Asbestos Injury Resolution (FAIR) Act. Further, Claro itself employs a version of frequency-severity modeling to arrive at its estimate.

(82) Scenario analysis, also referred to as scenario modeling, scenario prediction, or scenario planning, is a well-established method for evaluating potential outcomes in the face of uncertainty.[45] I regularly use scenario modeling in conjunction with a frequency-severity approach when evaluating potential contingencies when advising companies as part of their financial disclosure requirements under GAAP and IFRS. It is a recognized approach to quantifying the effects of "epistemic" uncertainty; i.e., uncertainty arising from "known unknowns" that cannot be described adequately in statistical terms. For example, an academic article that provides a systematic treatment of uncertainty and has been cited more than 2,000 times notes that "[a] much-used analytical tool to deal with the deep uncertainties of the unknown (and unknowable) future is to use scenarios as plausible descriptions of how the system and its driving forces may develop."[46] Similarly, recognizing that "[u]ncertainties arise due to insufficient knowledge about the constituents and the boundary conditions of the problem or system at hand," a publication devoted to analysis of environmental problems explains that "[s]cenarios offer a convenient form to tally knowns and unknowns and to organize the latter into a suitable form for systematic study."[47]

(83) Claro also claims that "[i]t is unclear in the Amended Disclosure Statement the extent to which Bates White valued any claims other than 16,600 claims that it 'focused its valuation on.'"[48] As noted above, the Bates White valuation model produced in this matter contains the inputs and assumptions related to how these claims have been valued. Further, both the Disclosure Statement and my Affirmative Report make it clear that I considered alternative scenarios around the benchmark modeling, some affecting the average values ("severity") and some affecting the number of valuable

in Insurance and Finance. Cambridge University Press: 2014 at 279 ("Actuarial modelling in general insurance is usually broken down on claim size (next chapter) and claim frequency (treated here).")

45 Underscoring the general acceptance of this method is the fact that review articles now exist that summarize the scholarly research in this area. *See, e.g.*, Chermack, Thomas J., Susan A. Lynham, and Wendy E. A. Ruona. "A Review of Scenario Planning Literature." *Futures Research Quarterly* 72 (2001): 7–32; Amer, Muhammad, Tugrul U.Daim, Antonie Jetter. "A review of scenario planning." *Futures* 46 (February 2013): 23–40; Tourki, Yousra, Jeffrey Keisler, and Igor Linkov. "Scenario analysis: a review of methods and applications for engineering and environmental systems." *Environment Systems & Decisions* 33 (2013): 3–20.

46 W.E. Walker, P. Harremoës, J. Rotmans, J.P. van der Sluijs, M.B.A. van Asselt, P. Janssen & M.P. Krayer von Krauss. "Defining Uncertainty: A Conceptual Basis for Uncertainty Management in Model-Based Decision Support." *Integrated Assessment* 4, No. 1 (2003): 5–17.

47 Ferenc L. Toth. "Dealing with Surprises in Environmental Scenarios" in Joseph Alcamo (ed.). *Environmental Futures: The Practice of Environmental Scenario Analysis*. Elsevier: 2008 at 170.

48 Claro Report, p. 35.

claims ("frequency")[49]. Both make explicit reference to factors that could drive the value up or down and both refer to a potential 50% increase or decrease in the valuation. Note from Figure 7 that four of the plus factors identified in my affirmative report are factors that would increase the number of valuable claims above the core 16,113 Abuse Claims used to construct the initial benchmark aggregate value. These are the plus factors identified in Figure 7 where the column labeled "Valuation component" has the entry "Frequency." In the discussion of each of these four plus factors in my affirmative report, I clearly state that each would represent an increase in the number of Abuse Claims that would meet the criteria to be valued. It is a misrepresentation to assert that my valuation analysis only includes the value of 16,113 claims; that was merely an intermediate step in the valuation study to ascertain the valuation range of all 82,209 Abuse Claims. My valuation study correctly identifies those Abuse Claims that appear facially meet the criteria as potential tort claims. It then addresses, though my analysis of plus and minus factors how the number and average value of valuable claims could be different than the benchmark of Abuse Claims that appear facially meet the criteria as potential tort claims.

(84) Claro's comment is particularly disingenuous as Claro misapplies the distinction between whether a plus or minus factor should be applied as a frequency or a severity adjustment. As referenced in paragraph (25) of the summary above, though Claro never references it by name, the Claro study uses, as I did in my study, a frequency-severity model with plus and minus factors identified, and, where noted, implemented to adjust the selected severity benchmark, albeit Claro does not consider all the necessary factors to account for the difference between the verdict study group and the Abuse Claims. Apropos the current discussion, Claro treats the two minus factors of (1) lack of abuser identification and (2) failure to be within the state's statute of limitations laws as though they were only severity factor discounts. From the standpoint of tort system valuation and decision for a plaintiff's attorney to accept a sexual abuse case for retention, these should be characterized as minus factors that reduce the frequency of valuable tort claims. It is reasonable to assume that once retained and pursued as litigated claims, they would require discounts to settle, However, as follows from the discussion of the filing threshold above, claims with expected settlement discount below the filing threshold will not be retained and filed. This means that by in large, these two minus factors identified by Claro as severity reductions are frequency reductions. Where Claro reduces its valuation to account for this factor, it should be reducing the number of claims. Had Claro properly accounted for these two minus factors as downward frequency adjustments, it too would have identified less than 17,000 Abuse Claims as facially meeting the criteria for consideration as tort claims.

(85) Lastly, Claro claims that "the Bates White Disclosure Statement Valuation produces results that are lower than the amounts historically paid by BSA to resolve sexual abuse claims, even if every single BSA Sexual Abuse Claim except for the 16,600 'focused on' by Bates White are valued at $0."[50]

[49] *See* Figure 34 of my Affirmative Report.

[50] Claro Report, p. 35.

Correct, and that is what Claro would also have determined had it properly accounted for the selection bias of valuing Abuse Claims with either verdicts or historical settlement. From a valuation perspective, what Claro has done is not different than applying the average price of homes in a select zip code, say 90210, which is Beverly Hills where the average home prices is over $4 million, to all the homes in the United States. That mistakes would lead to the conclusion that the value of the 139 million homes in the United States was $556 trillion. In fact, the actual number is less than a one tenth of that. Given that the number of Abuse Claims that did not file a lawsuit is so much larger than the number that did, it should not be surprising that their average value is much lower than litigated claims that settled or successfully went to verdict.

II.B. The TDP provide a reasonable basis on which to value the BSA Sexual Abuse Claims for purposes of the Plan.

(86) Claro's third opinion is that "the valuation methodology proposed in the TDP is fundamentally flawed and is not a reasonable basis on which to value the BSA Sexual Abuse Claims for purposes of the Plan."[51] This opinion is without merit and incorrect. Claro cites four conclusions to support Opinion 3. All four conclusions are meritless and either incorrect or irrelevant. They are:

3.1 The TDP Base Matrix Value and Maximum Matrix Value are less than the Historical BSA Settlements.

3.2 The application of discounts for legal defenses is inappropriate when using settlement figures as Base Matrix Values.

3.3 It inconsistently applies discounts for BSA Sexual Abuse Claims alleging abuse by a minor.

3.4 The discounts applied related to the statute of limitations are not supported by Historical BSA Settlements.

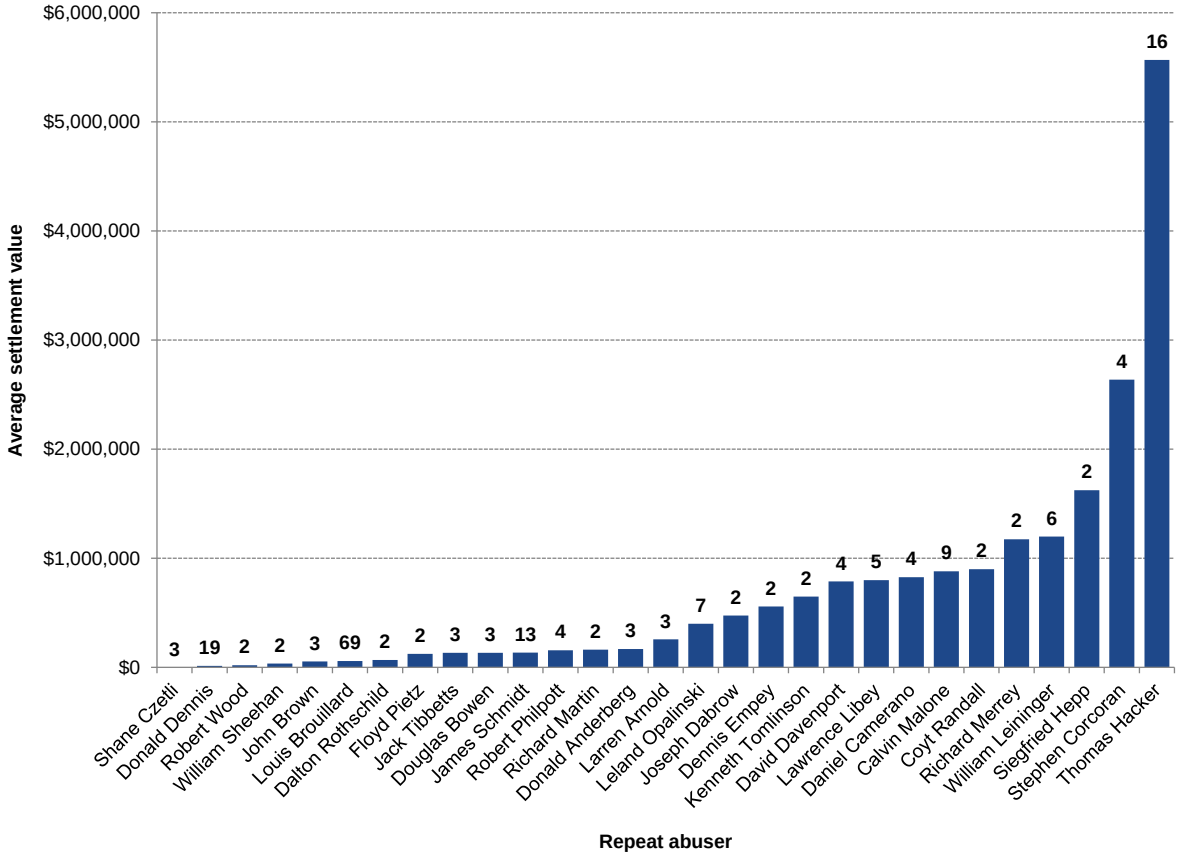
I will address each in turn.

(87) Claro's supporting conclusion 3.1 is both incorrect and irrelevant. There are many settlements that are less than the Base Matrix Values. For example, 3/4ths of historical resolutions for identifiable penetration allegations are for less than $600,000, which is the TDP Base Matrix Value for penetration allegation Abuse Claims. While it is true that there are a handful of settlements above the Maximum Matrix Value, nearly all are associated with a single settlement of the numerous Survivors of the notorious abuser Thomas Hacker. These cases were resolved in the face of the unique circumstance of a series of trials all with the prospect of significant punitive damages. As shown in Figure 6 of my affirmative report, nearly all other cases, even those involving other notorious repeat

[51] Claro Report, p. 2.

abusers, settled for well below the Maximum Matrix Value. This figure is replicated below for reference.

Figure 8: Graph of average historical resolution value and count of claims by abuser



(88) Whether true or not, Claro's supporting conclusion 3.1 is irrelevant. The differences in the settlements of cases involving the most egregious abusers are reflective of the lottery-like aspect of the tort system that a settlement trust TDP is designed to correct. A goal of the TDP is to bring fairness and equal compensation to similarly situated claims. Paying all claims according to the worst legal circumstances for the defendant is clearly not fair. The Settlement Trust is designed to pay all similarly situated claims from the perspective of harm to the survivor and responsibility of the BSA, while accounting for state tort laws, the same amount. Relative to the tort system, some of the similarly situated claims will be paid more and some will be paid less by the Settlement Trust. The fairness and equality goals of the Settlement Trust require this.

(89) Claro's supporting conclusion 3.1 is also irrelevant because the Settlement Trust is designed to compensate all qualifying Survivors, including the vast number of Survivors whose claim values were below their filing threshold, as explained above. Settlements for claims with these characteristics are not observed in the historical settlement data as such claims were never filed as tort claims. As

discussed above, the selection bias caused by the filing threshold resulted in the historical settlement average being well above the typical value of Survivors claims whose values were below the filing threshold. The average BSA trust settlement should be significantly less than the average historical settlement and Base Matrix Value by allegation category and hence the TDP benchmark values if the trust is properly administered according to the TDP.

(90) Claro's supporting conclusion 3.2 is irrelevant because Claro mischaracterizes the TDP. The Base Matrix Values are not an average amount reflective of a particular mix of settlements incorporating discounts for legal defenses. The Base Matrix Values do not account for the effect of any attributes of a claim more than once. As explained in paragraph 115 of my affirmative report, "[t]hese values are not designed to necessarily be the average assigned to a given tier of Abuse Claim, but rather provide a jumping-off or reference point, based on the historical resolutions, from which the current and future Abuse Claims can be valued." Notably, the Base Matrix Values incorporate the high level of institutional responsibility associated with the BSA historical settlements around $600,000. This is a level of BSA responsibility that is well above the level required to exceed the filing threshold for claims to be filed as lawsuits against the BSA. Clearly the BSA responsibility share for the vast majority of Abuse Claims must be lower. As illustrated by the simulation summarized in Figure 5 and in the filing threshold example of paragraphs (58) and (62), the same value can be associated with alternative fact patterns, some of them with discounts for legal defenses and others without. There is a tradeoff between alternative attributes, some of which increase the claim value relative to a benchmark settlement and others that decrease it. In the examples above, alternative combinations of SOL status and relative liability share result in the same settlement amount, including claims without any discount for legal defenses. A higher BSA liability share for an Abuse Claim subject to an SOL discount can result in the same settlement amount of an Abuse Claims with a lower BSA liability share, but no SOL discount. Clearly, the proper application of the TDP to the valuation of a particular Abuse Claim needs to consider the Base Matrix Values as being associated with a benchmark case that meets the SOL requirements for the state of that Abuse Claim. A tradeoff between the BSA's relative responsibility incorporated in the other mitigating scales and the SOL status scale can result in the same payment. Claro has not properly characterized the administration of the Settlement Trust and, hence, Claro's supporting conclusion 3.2 is irrelevant.

(91) Claro's supporting conclusion 3.3 is incorrect and irrelevant. Contrary to Claro's assertion, the TDP consistently applies discounts for BSA Sexual Abuse Claims alleging abuse by a minor. The Abuse Types are consistently assigned one valuation tier less for allegations involving a minor abuser than an adult abuser. Claro asserts that this is inconsistent because the percentage drop in valuation from one tier to the next lower is not the same for each abuse tier. I am not aware of any principle of fairness or equity that would require the percentage drop from one tier to the next to be the same. Claro's evaluation criteria are spurious and irrelevant.

(92) Claro's supporting conclusion 3.4 that the discounts applied related to the statute of limitations are not supported by Historical BSA Settlements is without merit and not supported by the analysis Claro cites. Claro advances a comparison of the settlement averages of Open, Gray 1, Gray2, and Gray 3 SOL status settlements as a test of the impact of SOL Status on settlement value. But since Claro ignores, or is ignorant of, the selection bias created by the filing threshold, Claro is unaware that the observed settlement averages of filed claims cannot be informative on their own of the impact of SOL Status on settlement value. The simple filing threshold example of paragraph (58) illustrates why. Note that for all three cases considered in the example, the observed settlements are for $200,000. Unobserved are the attributes of these three cases that indicate the difference in case quality. The comparison of the settlements alone tells us nothing about the statute of limitations discount.

(93) There is insufficient data regarding the BSA settlements to have any hope of reliably detecting the settlement discount associated with the Gray states. Claro removes claims whose SOL status were not Open at the time of settlement to obtain the result of any discount for Gray status claims. There is no reasonable justification for that exclusion. Claro calls this "conservative" as it lowers Claro's number and appears to validate Claro's analysis. It is neither conservative nor validating. It shows that something else, something unobserved, is a bigger factor in determining the settlement averages. The principle of a settlement discount for a claim without Open SOL status is sound. Claro's test is not.

(94) As shown here, Claro's four supporting conclusions are incorrect and do not support Claro's opinion that the valuation methodology proposed in the TDP is fundamentally flawed and is not a reasonable basis on which to value the BSA Sexual Abuse Claims for purposes of the Plan. The appropriate evaluation of the reasonableness of the Settlement Trust is whether the Settlement Trust pays Abuse Claims, fairly and equitably, reasonable amounts relative to the harm to the Survivor, the responsibility of the BSA, accounting for state laws apropos of each Abuse Claim. Overall, the application of the TDP should set values consistent with the aggregate BSA Abuse Claim valuation range of $2.4 billion to $7.1 billion, assuming the Abuse Claims are what the POCs represent them to be.

(95) It is not possible to know what the valuation of each Abuse Claim will be until after its evaluation by the Settlement Trustee. Though many of the aggravating factors and SOL mitigating factor are known for many of the Abuse Claims as documented in their POCs, the mitigating scalars related to the BSA's responsibility share are virtually unknown. Moreover, the application of many of the aggravating and mitigating factors will depend on the Settlement Trustee's assessment of additional evidence. Hence, we cannot know at this time the value the Settlement Trust will assign the Abuse claims. We can, however, test what must occur as the net effect of the unknown scalars for the Settlement Trust to fall within the valuation range. If those amounts are reasonable considering what we know about the Abuse Claims, then the Settlement Trust and TDP are also reasonable.

(96) To test the effect of different aggravating and mitigating scalars on the face value of Abuse Claims run through the Settlement Trust, I created a BSA Trust simulation model that uses the rules of the TDP to assign value to each Abuse Claim based on what is known about each Abuse Claim and a hypothetical set of aggravating and mitigating scalars to account for unknown Abuse Claim attributes. The model values the 82,209 Abuse Claims based on known claim attributes set forth in the POCs. I modeled the SOL mitigating factors based on the SOL status of each Abuse Claim based on the age and abuse state of each survivor when known. After creating a set of standardized abuser names, I assigned to each Survivor the appropriate Abuse Profile category based on the number of times each abuser appeared in total between the historical resolutions data and the Abuse Claims. To account for particularly egregious behavior and to achieve the highest value for each Abuse Claim accounting for its other attributes, I assigned to each Abuse Claim whose abuser was in the historical resolutions data a premium of 50 percent, in addition to the Abuser Profile and Abuse Occurrences aggregating factors. I then created two summary average scalars to simulate the net effect of the BSA mitigating responsibility scalars and aggravating scalars, one for abusers with no other known accusations of abuse and one for those that were accused more than once. I assigned every Abuse Claim that did not qualify for payment for lack of required information the Expedited Value of $3,500. Finally, I also assigned the Expedited Value of $3,500 to any Abuse Claim whose Allowed Abuse Claim Calculus resulted in an amount less than $3,500.

(97) I then set mitigating and aggravating scalars of the Trust simulation to the average values those scalars would need to be to have the Trust make payments consistent with the tort system simulation described above. I set a mitigating scalar for all Single Abuser Cases to 10%, reflective of BSA's likely low average responsibility for these Abuse Claims. I set the mitigating and aggravating scalars for the repeat abuser claims so that the average adjustment for repeat abuser Abuse Claims increased their Settlement Trust payment to 125 percent of the Base Matrix Value. The results are tabulated below in Figure 9. It shows that at these settings the Settlement Trust would pay Abuse Claims $3.5 billion. It also shows the wide variety of payment sizes that will be made by the Settlement Trust. Hundreds of the worst abuse cases will receive seven figure payments, and thousand of others will receive six payments, both consistent with a higher level of BSA responsibility than would be typical for the Abuse Claims. This is consistent with the observed filing pattern and historical settlements. To that point, Figure 10 shows the same results bifurcated between claims with BSA Settlement Payments above the assumed tort system filing threshold of the trust simulation model of $200,000. This simulation produces results consistent with just over 4,000 Abuse Claims that would otherwise be filed as tort claims with a settlement average of $540,000, consistent with the historical average. Also consistent with the historical filing pattern, over 78,000 Abuse Claims are valued at less than the assumed filing threshold. These are the claims for which the Settlement Trust is their only foreseeable path to compensation.

Figure 9: TDP simulation results for Abuse Claims grouped by TDP payment size

Payment size	Claims resolved	Total amount paid	Mean amount paid
Expedited claim payment	34,378	$120,000,000	$3,500
Four and five-figure payments	41,889	$810,000,000	$19,000
Six figure payments	5,555	$2,030,000,000	$365,000
Seven figure payments	387	$500,000,000	$1,286,000
Grand Total	**82,209**	**$3,450,000,000**	**$42,000**

Figure 10: TDP simulation results for Abuse Claims grouped by TDP payment size

Payments exceeding $200,000 filing threshold	Payment size	Claims resolved	Total amount paid	Mean amount paid
NO	Expedited claim payment	34,378	$120,000,000	$3,500
NO	Four and five-figure payments	41,889	$810,000,000	$19,000
NO	Six figure payments	1,772	$270,000,000	$154,000
NO	**Subtotal**	**78,039**	**$1,200,000,000**	**$15,000**
YES	$200,000 and above	4,170	$2,250,000,000	$540,000
	Grand Total	**82,209**	**$3,450,000,000**	**$42,000**

(98) These levels for the Trust mitigating and aggravating scalars are reasonable and appropriate for the Trust to properly account for the tort system values of the Abuse Claims. As described above, the tort system simulation shows that the Abuse Claims represent a wider – and overall lower – range of valuation than the BSA historical settlements. The fact that such a high proportion of the Abuse Claims were never recruited to file tort claims, yet so many have come forward in this bankruptcy proceeding, means there must be a tort system valuation threshold below which plaintiff law firms will not invest the time nor money to recruit the Abuse Claims in the same manner they recruit so many other torts. This bankruptcy proceeding with the prospect of a settlement trust has drastically reduced the costs to plaintiff law firms to prosecute the Abuse Claims against the BSA. It made recruiting of Survivors a profitable enterprise to launch and invest.

III. Portion of valuation attributable to TCJC Abuse Claims in Claro Report

(99) According to the Claro Report "Claro was provided with a list of 2,402 BSA Sexual Abuse Claims associated with the TCJC."[52] Claro uses that list to identify the subset of the 82,209 claims that are TCJC claims, states the portion of those that were amongst its set of valued claims (1,554), and goes on to note that those claims "represent $691.63 million - $784.88 million of the total Claro Valuation."[53] Notwithstanding the other issues identified in this report related to the total Claro Valuation—which are significant and cause it to be inflated manyfold—Claro's TCJC figure fails to consider that only some share of its own total valuation as to all BSA-related parties would be attributable to TCJC. Claro further fails to consider that some portion of the amounts attributable to the TCJC may also be subject to coverage under BSA's insurance policies.

(100) The failure of Claro to acknowledge that the TCJC would bear financial responsibility for only some share of the valuation for TCJC claims is striking and contradictory to other opinions in Claro's report. Section IV of the Claro Report provides both an allocation of the Claro Valuation to BSA insurance and, as part of that work, an apportionment of the valuation among BSA-related entities. In Section IV, the Claro Report provides three potential apportionment scenarios which assign 0%, 16.67%, and 33.33% to the Charter Organizations collectively, a group that would include the TCJC.[54] While Claro describes those scenarios as "illustrative" it is notable that the highest share any of them contemplates a Charter Organization bearing is 1/3 of the total.[55] If one were to apply that same 1/3 share—the highest Claro deemed necessary for illustrating the value of insurance—it would result in the portion of the total Claro Valuation being assigned to TCJC being $228.24 million - $259.01 million. Figure 11 provides a table that summarizes the calculations involved with applying Claro's "Apportionment Scenario" Charter Organization shares to Claro's total valuation for the TCJC claims.

Figure 11: Applying Claro Apportionment Scenarios to Claro Report's Valuation total for TCJC claims

Valuation scenario	Reported Claro Valuation total for TCJC claims	Claro Valuation Apportionment Scenario 3	Claro Valuation Apportionment Scenario 2	Claro Valuation Apportionment Scenario 1
Percent assigned to Chartered Organizations	N/A	33.33%	16.67%	0.00%
Claro high range figure	$691.63	$230.54	$115.27	$0.00
Claro low range figure	$784.88	$261.63	$130.81	$0.00

[52] Claro, p. 34.

[53] *Ibid*.

[54] Claro, p. 43.

[55] *Ibid*.

(101) Clearly any further reduction of the apportionment shares below the highest share from "Apportionment Scenario 3" of the Claro Report, and consistent with the other scenarios presented, would bring the top end figure below $250 million. Similarly, any reduction in the total Claro Valuation presented in the Claro Report of 3.5% or more would push the figures in Apportionment Scenario 3 below $250 million. Finally, any allocation to insurance that assigned at least 3.5% of the total Claro Valuation that would otherwise go to the TCJC share of this subset of claims to BSA insurance or indemnities, would bring the top end figure assigned to TCJC below $250 million.

IV. Scarcella Report misidentifies the source of uncertainty and conflates issues related to fixed value TDP with discretionary TDP

(102) The Scarcella Report is subject to a fundamental error in that it misidentifies the source of uncertainty in the valuation of the current Abuse Claims both in the aggregate and individually. The report states that "The TDP creates a significant level of uncertainty surrounding the quantum of post-confirmation claim liability…."[56] This statement fails to recognize the fact that there is uncertainty about the value of the Abuse Claims now. This is the reason why I provide such a broad valuation range—$2.4 billion to $7.1 billion—in my Affirmative Report.

(103) It is not that the TDP are creating uncertainty, rather there is currently uncertainty around the valuation of the Abuse Claims, in the aggregate, and even more so, at an individual level. The determination of value for any one specific Abuse Claim requires a more thorough evaluation of each case on its own merits This uncertainty is the very reason the TDP calls for gathering additional information, vetting, and the use of discretion in the determination of future individual claim values and they do not simply purport to fix a single value to each claim based on some already known observable characteristic. The Scarcella Report is asking for the TDP to provide certainty to the Remaining Insurers (as defined in the Scarcella Report) when no such certainty exists for any other party in the case at this time. The Remaining Insurers do face uncertainty, but so did the insurers and other parties who settled. And to a degree so do individual Abuse Claims who cannot know for sure how their claim will compare to the others submitted nor how much will eventually be recovered from parties yet to contribute including the Remaining Insurers. The TDP do not eliminate this uncertainty, but they do provide a systematic framework for resolving it.

(104) The Scarcella Report notes that "it is common for administrative settlement trusts to receive a higher rate of less meritorious claim submissions as compared to the tort system."[57] As discussed earlier in this report, we have already seen through the application of the POC process, a multi-fold increase in the number of claims brought forward as compared to the pre-petition tort system.[58] In such a circumstance, simply applying fixed historical average values to all the Abuse Claims would result in an overvaluation of the claiming pool. This is why the TDP in this case are structured as they are and call for the appropriate application of scalars to account for aggravating and mitigating factors.

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[56] Scarcella Repot, p. 8.

[57] Scarcella Report, p. 7.

[58] In paragraphs 31 and 32 the Scarcella Report suggests that the Settlement Trust will incentivize increased claiming relative to what would have happened in the tort system, but this again misplaces the source of risk. Given the bankruptcy and POC process, increased claiming has already occurred. The BSA and all its insurers, whether settling or not, already face more claims than they did. Scarcella Report, p. 15-16.

(105) The Amended Plan and the TDP have several mechanisms to address the differences in the strength of the current Abuse Claims relative to the prior historical settlements. Notably, the Amended Plan allows for Abuse Claims to vote for an Expedited Distribution of $3,500. My understanding based on the Declaration of Catherine Nownes-Whitaker of Omni Agent Solutions Regarding the Solicitation of Votes and Preliminary Tabulation of Ballots Cast on the Second Modified Fifth Amended Chapter 11 Plan of Reorganization for Boy Scouts of America and Delaware BSA, LLC is that preliminary indications are that 7,919 Direct Abuse Claims indicated they would take the $3,500 expedited distribution. This represents slightly less than 15% of the claims that returned ballots and slightly less than 10% of the 82,209 unique and timely claims. Given that this Declaration was filed within the last 24 hours and is still preliminary, Bates White's analysis of this information is ongoing.

(106) The TDP also provide for a screening mechanism, the Initial Evaluation Criteria, that are designed to filter out non-meritorious claims. The Allowed Abuse Claims remaining after these processes will then be subject to the application of both Aggravating Scaling Factors and Mitigating Scaling Factors to those claims which are valued. As discussed elsewhere in this report, it is my expectation that—given the strong selection bias in the historical resolutions as compared to the current set of POC claims—the average combined Aggravating Scaling Factor and Mitigating Scalar Factor will be significantly less than one.[59] Thus, the very "discretionary interpretation" that the Scarcella Report at times criticizes is one of the solutions to the potential problems the Scarcella Report warns against that can result in the overvaluation of claims.[6061] The range of values allowed within the TDP is a feature. Within each tier within the Matrix, between the Base Values and the combined Mitigating Scaling Factors and Aggravating Scaling Factors, the Settlement Trustee has latitude to adjust any current Abuse Claim value to accurately reflect its value relative to the historical resolutions used as a benchmark. That discretion will need to be appropriately applied, but it allows for the TDP to produce appropriate claim-specific values.

(107) The Scarcella Report identifies a supposed "moral hazard" stating that "the Settlement Trust does not bear any downside risk of overvaluing claims."[62] I disagree. The Settlement Trustee who is charged with administering the TDP has no incentive to overvalue claims. He has a fiduciary obligation to all valid Abuse Claimants. Misapplication of the Settlement Trustee's discretion in applying the Aggravating Scaling Factors and Mitigating Scaling Factors would result in a redistribution of value among the Abuse Claims that would disadvantage certain Abuse Claims to the detriment of others. This would be inconsistent with the Settlement Trustee's fiduciary obligation to Abuse Claimants, as

[59] In essence I agree with the theme of the Scarcella Report's point that "values…from the administrative settlement trust should be lower than what would otherwise be paid to an inherently smaller set of more credible claims." But critically I think this is true in the aggregate and not necessarily on an individual basis, as that full passage states, as some high value claims are likely to still exist. Scarcella Report, p. 7.

[60] Scarcella Report, p. 8.

[61] Note that accounting for the variation in value we expect to see with the broader group of Abuse Claims is in conflict with the Scarcella Report.

[62] Scarcella Report, p. 15.

overseen by the Settlement Trust Advisory Committee. Thus, the Settlement Trustee would not be "willing to make decisions without concern for downside risk or cost."

(108) In relation to its point on moral hazard the Scarcella Report also states that "since claim valuations will likely be tendered to Remaining Insurers for payment, the Settlement Trust has an economic incentive to overvalue claims to maximize insurance recoveries." Again, the Settlement Trustee charged with administering the TDP has no such incentive. While some Abuse Claims will likely be tendered to Remaining Insurers, as the Scarcella Report itself also notes, some insurers have already settled. For Abuse Claims that would be covered by such settling insurers, the Settlement Trustee is in effect spending money from a fixed pool of assets. Increasing the value of those Abuse Claims will not increase the value of the assets available to pay them. Moreover, because the TDP cap the value of the most valuable Abuse Claims, if the Settlement Trustee were to simply scale up the value of all Abuse Claims, he would be disadvantaging the most meritorious Abuse Claims. Any attempt by the Settlement Trustee to inflate values by misuse of their discretion in applying the Aggravating Scaling Factors and Mitigating Scaling Factors, or any overvaluation of Abuse Claims, would result in a redistribution of value among the Abuse Claims inconsistent with the Settlement Trustee's fiduciary obligations. Thus, the risk of the moral hazard the Scarcella Report purports to identify would be born not just by the Remaining Insurers and other Non-Protected Parties it identifies, but also by the most meritorious Abuse Claims whose counsel will be participating in the process via the Settlement Trust Advisory Committee and who are charges of the Settlement Trustee.

(109) The Scarcella Report incorrectly suggests that the application of factors under Bates White's aggregate valuation approach are inconsistent with the TDP.[63] As an initial matter, the benchmark valuation and TDP are consistent; both are informed by the BSA's prepetition approach to assessing and settling claims. This suggestion also misunderstands the Bates White benchmark valuation approach which yields the aggregate estimate in my Affirmative Report. That valuation approach necessarily differs from the simple application of the TDP to all the current Abuse Claims as the correct application of the TDP requires a claim-by-claim valuation and application of the criteria which calls for additional information that is not available to any party at this time. Rather than trying to assign the correct value to each Abuse Claim, as described in more detail in my Affirmative Report, my valuation range was generated with reference to a smaller subset of the current Abuse Claims that, taking their current POC submissions at face value, look the most like more selective historical resolutions and applying values that are consistent with those more selective cases to those apparently stronger cases. I then considered potential plus and minus factors around that base benchmark model. Those factors, namely two of the plus factors, explicitly include an accounting for the potential in changes in the number of claims that can identify an abuser and the idea that not all apparently statue barred claims will receive $0 compensation. Critically, that range also considers the

[63] See Scarcella Report paragraphs 34 and 35, e.g. "the Bates White approach may differ from the TDP in ways that could result in the BW Estimates being lower than other TDP-based estimates." Scarcella Report, p. 17.

main minus factor, which is that with further information the average value assigned to current Abuse Claims could be closer to, or below, the median value for the historical resolutions. [64]

(110) Finally, the Scarcella Report is incorrect in suggesting that Trusts inherently overpay. While it is true that there are a significant number of trusts that have over time reduced their payment percentages, indicating that they paid more claims than originally estimated, this is largely a feature of long-tailed trusts like those in asbestos with two features: i.) significant future claims; and ii.) fixed payment valuations. Here, with the POC process, the number of future Abuse Claims is likely to be small. Further, as noted in the Scarcella Report itself, the value of Abuse Claims is not fixed for each claim tier, but rather will be subject to scaling relative to historical resolutions. Even asbestos trusts with significant future claims that feature more variation in claim valuation, such as the Western Trusts and the Garlock Trust, have generally raised their payment percentages rather than lowered them.

[64] For more on this see the discussion of selection bias throughout Section II.

V. BRG Report uses an arbitrary valuation figure

(111) The BRG Report largely addresses issues that I am not opining upon in this case. The BRG Report does, however, include a section on the "Value of Survivor Claims" that purports to produce a valuation range for Abuse Claims of roughly $7.6 billion - $9.3 billion "for purposes of [their] Adjusted Local Council Liquidation Analysis."[65] This figure is produced by valuing 41,750 claims that identify a Local Council on their POCs.[66] The BRG analysis purports to evaluate those 41,750 claims by applying the TDP Base Matrix Values and some of the TDP scalars, but not others. This is a flawed approach that is inconsistent with how the TDP will eventually be applied, inconsistent with the Claro Report—which was also submitted on behalf of the TCC—and inconsistent with my estimate of the value of Abuse Claims.

(112) No party has the information needed to fully apply the TDP scalars at this time. By applying some scalars and not others, the BRG Report has assumed an aggregate value of 1.0 for the scalars it does not directly consider. The BRG Report provides no support for making this assumption. Moreover, this assumption is flawed. As discussed earlier in this report, the selection bias inherent in the BSA-related pre-petition historical resolutions, relative to the current set of Abuse Claims represented by the POCs, means that we should expect that the average combined Aggravating Scaling Factor and Mitigating Scalar Factor will be significantly less than one. While multiplying the Abuse Claims by the Base Values and certain select scalars, but not others, arithmetically produces a number, that number does not represent a reliable estimate of what the tort value of these claims would be nor what they will eventually receive under the TDP. The correct application of the TDP requires a claim-by-claim valuation and application of the relevant criteria and requires additional information that is not available to any party at this time. Further, as discussed elsewhere in this report, those TDP values will only be applied to claims that do not opt for an Expedited Distribution as part of their vote under the Amended Plan and to claims that pass the Initial Evaluation Criteria and are determined to be Allowed Abuse Claims.

(113) A valuation of only the claims that directly identify a Local Council on their POCs does not make sense and is inconsistent with the valuation approach taken in the Claro Report and my own estimate.

(114) The "Value of Survivor Claims" presented in the BRG Report also fails to recognize that the Local Councils would bear only some share of the loss for their claims and a portion of the loss attributable to the Local Councils for such claims may also be subject to coverage under BSA's insurance policies. The TDP is designed to produce a value as to all BSA-related parties and TDP Base Matrix Values that the BRG Report uses were derived with reference to settlements on behalf of all BSA-related parties. This means that only some share of the total valuation as to all BSA-related parties

[65] BRG Report, pp. 33–34.

[66] BRG Report, p. 33.

would be attributable to the Local Councils. This failure is striking in that Section IV of the Claro Report provides both an apportionment of the valuation among BSA-related entities, including Local Councils, and an allocation to insurance. Notably, as discussed in Section III of this report, the highest share of the total loss Claro contemplates assigning to the Local Council's collectively in any of its Apportionment Scenarios is 1/3.

(115) The Value of Survivor Claims presented in the BRG Report does not represent a valid estimate of the value of the Abuse Claims in any context.

Charles E. Bates

January 5, 2022

Date

Appendix A. Updates to abuser frequency category in BSA-PLAN_01635877

Figure 12: Updated abuser frequency category by settlement claim number

Claim Number	Abuser(s) Full Name	Settlement Confirmation	Original Abuser Frequency Category	Updated Abuser Frequency Category	Reason for Update
8	Donald Leonard Keys	$400,000	0-1	2-4	Abuser name found in POC data
9	Richard Fred Swendiman	$250,000	0-1	2-4	Additional research indicates repeat abuser
10	Richard Demers	$25,000	0-1	2-4	Abuser name found in POC data
15	Jerold Mackinnon	$10,000	0-1	2-4	Additional research indicates repeat abuser
16	Garrett (Gary) Hatfield	$1,970,000	0-1	5-9	Abuser name found in POC data
28	Dustin Hedrick; C Dunbar	$1,750,000	0-1	2-4	Additional research indicates repeat abuser
31	Wallace Schrade	$112,000	0-1	2-4	Abuser name found in POC data
33	Paul Longway	$125,000	0-1	10+	Abuser name found in POC data
34	Earl Belke	$425,000	0-1	2-4	Additional research indicates repeat abuser
36	Ray Gillespie	$115,000	0-1	2-4	Abuser name found in POC data
49	Gary Blackwell	$25,000	0-1	5-9	Abuser name found in POC data
53	Mike Dean; Tom Carron; Quentin Thompson	$0	0-1	2-4	Abuser name found in POC data
60	Donald McShannock	$5,000	0-1	2-4	Abuser name found in POC data
63	Robert Spencer	$300,000	0-1	5-9	Abuser name found in POC data
64	Kirby Blanchard	$75,000	0-1	2-4	Abuser name found in POC data
68	Joseph Mackey	$100,000	0-1	2-4	Abuser name found in POC data
70	Jerome Kubic; Ron Smith	$475,000	0-1	5-9	Abuser name found in POC data
71	Randall Shafer	$175,000	0-1	2-4	Abuser name found in POC data
72	Dale Astleford	$500,000	0-1	2-4	Abuser name found in POC data
74	Andrew Momont	$262,500	0-1	2-4	Additional research indicates repeat abuser

80	Charles Lawrence Shattuck	$280,000	0-1	2-4	Additional research indicates repeat abuser
81	Gary Lee Gephart	$75,000	0-1	5-9	Abuser name found in POC data
83	Michael Stachowski	$0	0-1	2-4	Additional research indicates repeat abuser
91	John George	$20,000	0-1	5-9	Abuser name found in POC data
94	Fred Swank	$0	0-1	2-4	Abuser name found in POC data
95	Chris Hernandez; Ed Avila; Andrea Ponce; Manuel Ponce; Johnny Barajas; Kyle Kaye	$0	0-1	2-4	Abuser name found in POC data
97	Gary Monroe	$2,150,000	0-1	2-4	Abuser name found in POC data
106	James Hale; Thomas Seifert	$1,000,000	0-1	2-4	Abuser name found in POC data
111	Bruce DeSandre	$0	0-1	2-4	Abuser name found in POC data
112	Garrett Piland	$0	0-1	2-4	Additional research indicates repeat abuser
114	Ron "Argie" Guinto	$150,000	0-1	2-4	Additional research indicates repeat abuser
128	Thomas Erickson	$385,000	0-1	2-4	Abuser name found in POC data
161	Fleming Royal Weaver	$1,200,000	0-1	5-9	Abuser name found in POC data
223	Gilbert Gauthe	$275,000	0-1	2-4	Abuser name found in POC data
256	Arthur Patrick Lewis	$20,000	0-1	2-4	Abuser name found in POC data
258	Larry Stevens	$22,500	0-1	5-9	Abuser name found in POC data
259	Charles "Charlie" Riley	$22,500	0-1	2-4	Abuser name found in POC data
261	Thomas Hampton	$22,500	0-1	2-4	Abuser name found in POC data
298	Alan Delay & Steven Hill	$140,000	1	10+	Abuser name found in POC data/Appears multiple times in BSA-PLAN_01635877
310	Arnold Codispoti	$950,000	1	10+	Abuser name found in POC data
312	Peter Stibal	$550,000	1	2-4	Abuser name found in POC data
357	Leon Lestage	$62,500	1	2-4	Abuser name found in POC data
362	Ronald Becker	$8,000	1	5-9	Abuser name found in POC data
374	Michael Connelly; James E. Pacitto	$175,000	1	2-4	Abuser name found in POC data
383	Peter Poorman	$30,000	1	2-4	Additional research indicates repeat abuser

398	Larry Van Dyke	$97,500	1	2-4	Additional research indicates repeat abuser
412	Gregory Ritter	$500,000	1	2-4	Abuser name found in POC data
435	Delbert Shaw	$50,000	1	2-4	Abuser name found in POC data
440	Jim Moore	$275,000	1	5-9	Abuser name found in POC data
451	Donald Sanschagrin	$25,000	1	2-4	Abuser name found in POC data
452	Merlin Nagler	$50,000	1	2-4	Additional research indicates repeat abuser
483	Alton Parady	$750,000	1	2-4	Abuser name found in POC data
506	Joseph Laurita	$50,000	1	2-4	Additional research indicates repeat abuser
513	Chase Panem	$375,000	0-1	2-4	Abuser name found in POC data
514	Al S. Stein	$2,300,000	1	2-4	Abuser name found in POC data
541	Floyd David Slusher	$300,000	1	5-9	Abuser name found in POC data
548	Eugene Thorne	$60,000	1	2-4	Abuser name found in POC data
552	Drake Harkness	$95,000	1	2-4	Abuser name found in POC data
571	Gregory A. Benson	$350,000	1	2-4	Abuser name found in POC data
572	Norman Leach	$70,000	1	2-4	Additional research indicates repeat abuser
577	Vincent Ariaz	$155,000	1	2-4	Additional research indicates repeat abuser
Average Settlement Confirmation		**$330,164**			

Appendix B. Materials relied upon

Below is a list of materials I relied upon in reaching in my opinions. Should I identify any additional materials that were omitted from this list, I will supplement accordingly:

- **Expert Report of Makeda S. Murray, MBA (December 5, 2021), inclusive of the reliance materials listed therein**
- **Rebuttal Expert Report of Makeda S. Murray, MBA (January 5, 2022), inclusive of the reliance materials listed therein**
- **Expert Report of Charles E. Bates (December 5, 2021), inclusive of the reliance materials listed therein**
- **Opposing expert reports and materials**
  - Expert Report of Katheryn R. McNally of the Claro Group LLC (December 5, 2021), inclusive of the reliance materials listed therein: BSA_Claro_Report 20211205 (executed).pdf
  - Affirmative Expert Report of Marc C Scarcella, M.A. (December 5, 2021), inclusive of the reliance materials listed therein: 2021.12.05 Affirmative Report of Marc Scarcella – BSA.pdf
  - Expert Report of Jon R. Conte, Ph.D. (December 5, 2021), inclusive of the reliance materials listed therein: 12-5-21 BSA - TCC's expert report – Conte.pdf
  - Expert Report of David H. Judd & Matthew K. Babcock of Berkley Research Group (December 5, 2021), inclusive of the reliance materials listed therein: BRG Expert Report.pdf
- **Referenced filings from the BSA docket**
  - [5919] BSA - UNREDACTED Kosnoff Law 2019 Statement.pdf
  - Subpoena filed by the TCC requesting production of documents related to the valuation model
  - Amended disclosure statement
- **Bates White-generated valuation models**
  - Trust simulation model (Tranche VI): Bates White BSA trust simulation model (Tranche VI) -- confidential -- for production.xlsx
- **Sources providing information on repeat abusers in the BSA historical settlements data**
  - (INSTANCES_OF_CHILD_SEXUAL_ABUSE_ALLEGEDLY_PERPETRATED_BY_MEMBERS_OF_THE_CHURCH_OF_JESUS_CHRIST_OF_LATTER-DAY_SAINTS-2017-06.pdf (mormonleaks.io))

- Richard-Fred-Swendiman.pdf (andersonadvocates.com)
- Lowell Man Sentenced for Indecent Assault of Child at Chelmsford Camp | Chelmsford, MA Patch
- Oregon Man Files $5 Million Suit Against Boy Scouts For Sexual Abuse | Jefferson Public Radio (ijpr.org)
- Ex-Boy Scout sues BSA, says Scoutmaster molested him - Albuquerque Journal (abqjournal.com)
- Former police explorer reaches $500,000 settlement with Rohnert Park in lewd texts case (pressdemocrat.com)
- Ronald Guinto - Boy Scouts Sex Abuse Lawsuit (childmolestationattorneys.com)
- New York Sexual Abuse | Adam Horowitz Sexual Abuse Blog (adamhorowitzlaw.com)
- Man sentenced for sodomy of child at Boy Scout day camp in Trussville | The Trussville Tribune
- Ex-Cub Scouts 'den mom' charged with kiddie porn after grooming boy (nypost.com)
- Washington lawsuit accuses 13 of Boy Scouts abuses (mynorthwest.com)
- Inside the 'perversion files': Larry Van Dyke - Documents - Los Angeles Times (latimes.com)
- New Wash. lawsuit accuses 13 of Boy Scout abuses (usatoday.com)
- South Florida Man Sues Boy Scouts Claiming He Was Sexually Abused – NBC 6 South Florida (nbcmiami.com)
- Boy Scouts' opposition to background checks let pedophiles in - Los Angeles Times (latimes.com)
- Dozens of Teenage Boy Scout Explorers Have Been Sexually Abused by Cops; Should Scouts Share the Blame? | News | Phoenix | Phoenix New Times | The Leading Independent News Source in Phoenix, Arizona
- 405 Mass. 618 (1989), Commonwealth v. Dockham - Massachusetts - Case Law - VLEX 616599678
- SN&R • Scouts' dishonor: Boy Scouts of America blame the victim in cringeworthy legal defense against Sacramento sexual abuse lawsuit (newsreview.com)

- **Additional documentation for 29 Claro Benchmark verdicts (provided in Production)**
- **Records from other litigation**
  - Report of Charles E. Bates, PhD: Trial exhibit GST-0996, *In re Garlock Sealing Technologies LLC, et al.*, No. 10-31607 (Bankr. W.D.N.C. Feb. 15, 2013)

- Dewayne Johnson v. Monsanto Co., No. CGC-16-550128 (Cal. Ct. App. July 20. 2020)
- Pretrial Order No. 164: Amended Judgment, In re Roundup Products Liability Litigation, No. 16-md-2741-VC (N.D. Cal. July 17, 2019)
- Order (1) Denying Motions of Defendant for JNOV and (2) Conditionally Granting Motions of Defendant for New Trial, *Alva and Alberta Pilliod v. Monsanto Co. et al.*, No. RG17-862702 (Cal. Alameda County Ct. July 19, 2019)
- Bayer, "Bayer Announces Agreements to Resolve Major Legacy Monsanto Litigation," press release, June 24, 2020, https://media.bayer.com/baynews/baynews.nsf/id/Bayer-announces-agreements-to-resolve-major-legacy-Monsanto-litigation
- "Ernst v. Merck Vioxx Trial: Massive Verdict for Plaintiff; Knock-Out Punch for Merck?" *Drug Injury Watch*, August 20, 2005, https://www.drug-injury.com/druginjurycom/2005/08/ernst_v_merck_v.html
- "Jury Awards $20 Million to Idaho Man in Latest Merck Vioxx Trial," CNBC, March 12, 2007, https://www.cnbc.com/2007/03/12/jury-awards-20-million-to-idaho-man-in-latest-merck-vioxx-trial.html
- "Merck Agrees to Pay $4.85 Billion in Vioxx Settlement," Reuters, November 9, 2007, https://www.reuters.com/article/us-merck-vioxx-settlement/merck-agrees-to-pay-4-85-billion-in-vioxx-settlement-idUSL0929726620071109
- "Merck Wins Appeals in Three Vioxx Cases," CNBC, May 29, 2008, https://www.cnbc.com/id/24875089
- "Vioxx Plaintiff Gets $13.5 Million in Damages," NBC News, April 12, 2006, https://www.nbcnews.com/health/health-news/vioxx-plaintiff-gets-13-5-million-damages-flna1c9468817

- **Academic literature**
  - Amer, Muhammad, Tugrul U.Daim, Antonie Jetter. "A review of scenario planning." *Futures* 46 (February 2013): 23–40.
  - Bølviken, Erik. *Computation and Modelling in Insurance and Finance*. Cambridge University Press: 2014.
  - Chermack, Thomas J., Susan A. Lynham, and Wendy E. A. Ruona. "A Review of Scenario Planning Literature." *Futures Research Quarterly* 72 (2001): 7–32.
  - Eisenberg, Theodore, "Testing the Selection Effect: A New Theoretical Framework with Empirical Tests," *Journal of Legal Studies* 19, no. 2 (1990): 337.
  - Theodore Eisenberg and Henry S. Farber, "The litigious plaintiff hypothesis: case selection and resolution," *RAND Journal of Economics* 28, no. 0 (1997): S92-S112.

- Edward W. Frees, Richard A. Derrig and Glenn Meyers. *Predictive Modeling Applications in Actuarial Science*; Volume 1: Predictive Modeling Techniques. Cambridge University Press: 2014.
- James J. Heckman, "Micro Data, Heterogeneity, and the Evaluation of Public Policy: Nobel Lecture," *Journal of Political Economy* 109, no. 4 (2000): 673-748.
- Peter H. Huang and Ho-Mou Wu, "Emotional Responses in Litigation," International Review of Law and Economics 12, no. 1 (1992): 31-44.
- Louis Kaplow and Steven Shavell, "Economic analysis of law," In *Handbook of public economics* 3, ed. Alan J. Auerbach and Martin Feldstein (Elsevier, 2002), 1661-1784.
- George L. Priest and Benjamin Klein, "The Selection of Disputes for Litigation," Journal of Legal Studies 13, no. 1 (1984): 1-55.
- National Research Council, "Reference Manual on Scientific Evidence: Third Edition," 2011, Washington, DC: The National Academies.
- Tirole, Jean, *The Theory of Industrial Organization* (Cambridge, Mass: MIT Press, 1988).
- Toth, Ferenc L. "Dealing with Surprises in Environmental Scenarios" in Joseph Alcamo (ed.). *Environmental Futures: The Practice of Environmental Scenario Analysis*. Elsevier: 2008.
- Yousra Tourki, Jeffrey Keisler, and Igor Linkov. "Scenario analysis: a review of methods and applications for engineering and environmental systems." *Environment Systems & Decisions* 33 (2013): 3–20.
- W.E. Walker, P. Harremoës, J. Rotmans, J.P. van der Sluijs, M.B.A. van Asselt, P. Janssen & M.P. Krayer von Krauss. "Defining Uncertainty: A Conceptual Basis for Uncertainty Management in Model-Based Decision Support." *Integrated Assessment* 4, No. 1 (2003): 5–17.
- Donald Wittman, "Is the Selection of Cases for Trial Biased?," *Journal of Legal Studies* 14, no. 1(1985): 185-214.
- Donald Wittman, "Dispute Resolution, Bargaining, and the Selection of Cases for Trial: A Study of the Generation of Biased and Unbiased Data," *Journal of Legal Studies* 17, no. 2 (1988): 313-352.

All other documents cited throughout the report, inclusive of the footnotes.

Exhibit B

Excerpt of TCC 30(b)(6) Deposition Transcript

Transcript of the Testimony of

DOUGLAS KENNEDY

December 29, 2021

IN RE BOY SCOUTS AND DELAWARE BSA

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UNITED STATES BANKRUPTCY COURT

FOR THE DISTRICT OF DELAWARE

\- - -

IN RE:	:	CHAPTER 11
BOY SCOUTS OF AMERICA AND	:	CASE NO.
DELAWARE BSA, LLC,	:	20-10343 (LSS)
Debtors.	:	(Jointly Administered)

\- - -

Remote videotaped deposition of DOUGLAS KENNEDY, on behalf of the Official Committee of held via videoconference on Wednesday, December 29, 2021, beginning at approximately 11:09 a.m. Eastern Standard Time, the proceedings being recorded stenographically by Gail Inghram Verbano, Registered Diplomate Reporter, Certified Realtime Reporter, Certified Shorthand Reporter-CA (No. 8635), and transcribed under her direction.

Page 66

what a privilege log is. And a privilege log lists documents that are withheld for production. We do not log conversations we have with our clients.

MR. HERSHEY: Well, if you have email conversations you certainly could. So should I ask if he's had email conversations with his attorneys regarding the subject?

MR. KORNFELD: If you asked about whether there were emails about conversations with his attorneys, we have provided you a privilege log, you have provided us with a privilege log; the privilege logs are there. I'm not going to let you get into what was discussed with attorneys so I suggest you ask your next question.

MR. HERSHEY: Okay. We'll reserve our rights.

MR. KORNFELD: I understand you reserve. You don't have to say you reserve every time. Whenever we have a dispute, all parties reserve all of their rights. So we reserve, you reserve, we

Page 67

don't have to say it. You haven't waived anything by not saying that.

MR. HERSHEY: I appreciate that, Alan. As you know, it's a force of habit with me to reserve rights. So I may find myself accidentally saying it anyway, but I'll try to remember.

MR. KORNFELD: Yeah. But I get -- I get nervous when you do that and then I have to reserve rights too and you'll tell me, well, what have you waived. And let's just get by that too if we can.

MR. HERSHEY: Okay.

Q. I want to turn to your testimony, Mr. Kennedy, that you will consider the vote as a factor when it comes in.

Do you remember testifying to that effect?

A. Yes.

Q. Okay. So from your perspective, how a survivor votes on the plan is just one indication of that survivor's interest; is that right?

MR. KORNFELD: Objection as to

Page 68

form.

A. The TCC will consider it, yes.

Q. Okay. But is it possible that a survivor might vote in favor of the plan but the TCC will still determine that it is not in that survivor's interest to support the plan?

MR. KORNFELD: Objection as to form.

A. It is, of course, possible that survivors will vote in both ways on the plan, yes.

Q. That's not my question. My question is: If a survivor votes yes on the plan, will that, to you, be a definitive expression that that survivor believes it is in his interest that the plan be confirmed?

MR. KORNFELD: Objection as to form.

A. I'm sorry. Sam, I -- I lost you for a second. Can you -- or Mr. Hershey, I'm sorry. Can you --

Q. Okay.

A. Can you restate that question.

Q. Absolutely.

If a survivor votes yes on the

Page 69

plan, will the TCC view that as a definitive statement that that survivor believes that the plan is in his best interests?

MR. KORNFELD: Objection as to form.

A. Given that survivor's understanding of the plan, yes.

Q. Okay. What percentage of survivors would need to vote in favor of the plan for the TCC to support the plan?

MR. KORNFELD: Objection as to form.

And I would caution you again if this is getting into an area that has been discussed with counsel -- an area that has had its strategy examined by the committee in the presence of counsel, I would instruct you not to answer.

If you can answer the question without getting into discussions that have been in the presence of TCC counsel, you may do so. If you cannot, please don't.

A. I can't answer that question, because those discussions amongst the TCC have occurred with counsel present.

Page 110

are in the TDP that I'm looking at that we signed and no longer supported, then, yes.

Q. And also the document we previously discussed, the RSA term sheet, also contained terms that were to be included in a plan of reorganization; correct?

A. At that time, yes.

Q. Okay. And are you -- are you aware that under a plan of reorganization, creditors vote in different classes depending on the nature of their claims?

MR. KORNFELD: Objection as to form.

A. Yes.

Q. And are you aware that under the plan that was proposed for these TDPs, there was a class of claimants comprised of abuse claimants?

A. Yes.

Q. And are you aware whether abuse claimants who selected -- excuse me. I'll rephrase.

Are you aware whether abuse claimants who elected an expedited distribution voted in the same class as other abuse claimants

Page 111

who did not elect an expedited distribution?

MR. KORNFELD: Objection as to form.

A. We're talking about in this TDP?

Q. In the plan proposed in connection with this TDP; correct?

A. With this one, then, yes.

Q. Okay. Sorry. When you say "yes," you -- you understand they're in the same class.

A. Yes.

MR. HERSHEY: I realize we're coming up on our agreed time for lunch, and I'm actually almost done with this section, so I'll just take five more minutes if that's okay and then we can break for lunch?

THE WITNESS: Sure.

MR. KORNFELD: Sure. Go ahead.

Q. Now, survivors who elect an expedited distribution, the TCC represents those survivors as well; correct?

A. Yes.

Q. They're -- they're not carved out from the survivors represented by the TCC; right?

MR. KORNFELD: Objection as to

Page 112

form.

A. The TCC represents all survivors of sexual abuse while in the Boy Scouts.

Q. And the TCC acts as a fiduciary for all survivors of sexual abuse while in the Boy Scouts, correct?

A. Yes.

Q. Including survivors [inaudible] --

(Clarification by reporter.)

Q. -- who elect an expedited distribution?

A. Yes.

Q. Does the TCC recognize that there are legitimate reasons why a survivor might elect to receive an expedited distribution?

A. The TCC recognizes that survivors will have their own reasons.

Q. Does the TCC recognize that there are survivors who believe it is in their interest to elect an expedited distribution?

A. The TCC has no way of knowing what an individual survivor's intention is. We recognize their right to take that election if they so choose.

Q. Well, presumably the TCC

Page 113

negotiated an agreement containing an expedited distribution on the understanding that some survivors would view it as in their interest to elect that distribution; correct?

A. Yes.

Q. Okay.

MR. HERSHEY: Okay. Last thing before lunch. Let's turn to page 96.

MR. KORNFELD: Sam -- Sam, just one -- one friendly suggestion. When you turn your head to the right, we lose your sound. When you look straight on, we hear you clearly or at least I hear you clearly.

MR. HERSHEY: I appreciate that. I'll try -- my outline has been to the right but I'll try to not speak while I'm looking at it.

Q. So this is page 96 of 118 that I think we're turning to.

Excuse me, I'm sorry. I'm sorry. This is actually in a different document. I apologize.

MR. HERSHEY: All right. Why don't we do this then. Let's take our

Exhibit C

Excerpt of November 10, 2021 Hearing Transcript

UNITED STATES BANKRUPTCY COURT
DISTRICT OF DELAWARE

IN RE:	Chapter 11
	Case No. 20-10343 (LSS)
BOY SCOUTS OF AMERICA AND DELAWARE BSA, LLC,	(Jointly Administered)
Debtors.	
BOY SCOUTS OF AMERICA,	Adversary Proceeding No. 20-50527 (LSS)
Plaintiff,	
v.	
A.A., *et al.*,	Courtroom 2
	824 Market Street
Defendants.	Wilmington, Delaware 19801
	Wednesday, November 10, 2021
	10:05 a.m.

TRANSCRIPT OF ZOOM HEARING
BEFORE THE HONORABLE LAURIE SELBER SILVERSTEIN
CHIEF UNITED STATES BANKRUPTCY JUDGE

Electronically
Recorded By: Brandon J. McCarthy, ECRO

Transcription Service: Reliable
1007 N. Orange Street
Wilmington, Delaware 19801
Telephone: (302) 654-8080
E-Mail: gmatthews@reliable-co.com

Proceedings recorded by electronic sound recording:
transcript produced by transcription service.

and we intend to answer the discovery. Ms. Lauria, in one of her letters, set a deadline for answering, at the time, unspecified discovery, but it consists of interrogatories and requests for production of documents. And because this deals with, at least some of it deals with a fairly circumscribed period of time, essentially this past weekend, we have every intention of responding as quickly as possible. And I mean as quickly as possible.

So we will be open about what happened and our explanation, if it's not satisfactory in the form of a letter, will be answered in interrogatories and, frankly, ongoing communications with the debtor.

As the parties have noted, this -- we have an unprecedented solicitation campaign going on between the tort claimants committee and those who oppose the plan, and the coalition, and those who support the plan. This backdrop includes, in my experience, fairly sophisticated websites, we have one, the coalition has one; weekly town hall meetings previously to the last maybe month we were doing them monthly. Those town hall meetings were announced in using our list serve. The coalition has now weekly town hall meetings, at least I believe they are weekly. They are certainly periodic. And it has even gotten to the point of having, in effect, dueling YouTube videos.

This motion concerns one email that was written by

Mr. Kosnoff. We had no participation in the writing of it. It was signed by Mr. Kosnoff, though it's probably the digital type signature, but we did transmit it. It was transmitted to a subset of the constituency. It was sent to a client list that Mr. Kosnoff had provided to us. He provided it to us some time ago, I think it was just after -- I'm not sure of the exact timing, but we had used it to send out announcements of our town halls. Then it was also sent to, what I refer to as, the TCC list.

By the way, Mr. Kosnoff gave us written authority to use the, what I will call, Kosnoff list which consists of what he represented to be his clients where he was co-counsel with other parties, but we have expressed written authority from him to use it.

As to what I call the TCC list, it consists of, obviously, coalition lawyers, because Mr. Molton said that he received it, and has always had them on it for some substantial period of time parties who are unrepresented which we gartered from the proof of claim forms. And also individuals who over the last almost two years have contacted us saying they want to be kept apprised of what was going on in the case. These are generalities, Your Honor. I don't know if we're going to get into discovery that explains each and every person on what I call the TCC list, but those are generally how the two lists fall out.

CERTIFICATION

I certify that the foregoing is a correct transcript from the electronic sound recording of the proceedings in the above-entitled matter to the best of my knowledge and ability.

/s/ William J. Garling November 10, 2021

William J. Garling, CET**D-543

Certified Court Transcriptionist

For Reliable

Exhibit D

KOSNOFF000183

Timothy Kosnoff <tim@kosnoff.com>

Great letter!

6 messages

Doug Kennedy <emailfromdk@gmail.com> Mon, Oct 18, 2021 at 2:01 PM
To: Timothy Kosnoff <tim@kosnoff.com>

I hope it gets some traction and your clients read it. I bet a lot will pay attention to it.

Best,
Doug

Timothy Kosnoff <tim@kosnoff.com> Mon, Oct 18, 2021 at 2:09 PM
To: Doug Kennedy <emailfromdk@gmail.com>
Bcc: Tim@kosnoff.com

Thanks. And thank you for all your efforts.

Sent from my iPhone

> On Oct 18, 2021, at 2:01 PM, Doug Kennedy <emailfromdk@gmail.com> wrote:
>
>
[Quoted text hidden]

Doug Kennedy <emailfromdk@gmail.com> Mon, Oct 18, 2021 at 2:51 PM
To: Timothy Kosnoff <tim@kosnoff.com>

Thanks Tim. It's a group effort and I hope we can all keep moving this in the right direction. Guessing tomorrow's hearing will be a lot of lawyering. I'll peek in for a bit.

Doug
[Quoted text hidden]

Timothy Kosnoff <tim@kosnoff.com> Mon, Oct 18, 2021 at 3:52 PM
To: Doug Kennedy <emailfromdk@gmail.com>
Bcc: Tim@kosnoff.com

I'm holding out some hope she stops these stupid discovery wars.

Sent from my iPhone

On Oct 18, 2021, at 2:51 PM, Doug Kennedy <emailfromdk@gmail.com> wrote:

[Quoted text hidden]

Doug Kennedy <emailfromdk@gmail.com> Mon, Oct 18, 2021 at 3:54 PM
To: Timothy Kosnoff <tim@kosnoff.com>

Agreed.

DK
[Quoted text hidden]

Timothy Kosnoff <tim@kosnoff.com> Mon, Oct 18, 2021 at 5:07 PM
To: Doug Kennedy <emailfromdk@gmail.com>
Bcc: Tim@kosnoff.com

I'm happy with how the letter turned out. Lucas made some great edits and added details I had not known.

David Wilks my lawyer also made it crisper in places.

Both left in my style and relentless attack on the Coalition and ER. Tough statements but fail comment.

I'm getting positive feedback from my Twitter echo chamber and from non-clients who follow me. Andrew said he'd get it out from the AIS website tomorrow. He's not sending out ballots until the 26th so we're fine but I'm anxious to get it out to the rest of our clients.

Sent from my iPhone

> On Oct 18, 2021, at 2:51 PM, Doug Kennedy <emailfromdk@gmail.com> wrote:
>
> [Quoted text hidden]

Exhibit E

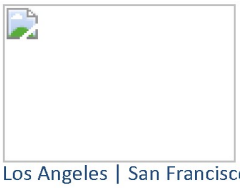
TCC-PlanConf-064136

From: "John W. Lucas" <jlucas@pszjlaw.com>
To: "Tim Kosnoff" <tim@kosnoff.com>
Cc: "Douglas Kennedy" <emailfromdk@gmail.com>
Subject: RE: Kosnoff Letter to AIS Clients
Date: Sun, 17 Oct 2021 23:31:44 +0000
Importance: Normal
Attachments: DOCS_LA-_340286-v2-BSA_-_TK_Letter.docx; Redline_-_BSA_-_TK_Letter-340286-v1_and_BSA_-_TK_Letter-340286-v2.pdf

---

My comments attached. Clean and blackline.

John W. Lucas
Pachulski Stang Ziehl & Jones LLP
Direct Dial: 415.217.5108
Tel: 415.263.7000 | Cell: 415.306.3576 | Fax: 415.263.7010
jlucas@pszjlaw.com
vCard | Bio | LinkedIn



Los Angeles | San Francisco | Wilmington, DE | New York | Houston

---

From: Timothy Kosnoff [mailto:tim@kosnoff.com]
Sent: Sunday, October 17, 2021 11:28 AM
To: John W. Lucas <jlucas@pszjlaw.com>
Cc: Douglas Kennedy <emailfromdk@gmail.com>
Subject: Fwd: Kosnoff Letter to AIS Clients

Please review and comment. I'd like to get it out asap.

Sent from my iPhone

Begin forwarded message:

From: Timothy Kosnoff <Tim@kosnoff.com>
Date: October 17, 2021 at 11:14:58 AM PDT
To: David Wilks <dwilks@wilks.law>
Subject: Kosnoff Letter to AIS Clients

David,

I'm sorry to foist this on you on a Sunday but I'm getting pressure to get this out the door ASAP.

Would you edit this and make it better?

Thanks.

Tim

TIMOTHY D. KOSNOFF
Licensed Attorney

U.S. Mailing address:

1321 Upland Drive
PMB 4685
Houston, TX 77043
USA

Direct: 425-837-9690
Main: 206-257-3590
Fax: 206-837-9690
Toll free: 855-LAW4CSA

tim@kosnoff.com

www.kosnoff.com (sexual abuse in focus website)
If you'd like to connect with me on Twitter my feed is:
http ://twitter.com/SexAbuseAttys

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Mail Forwarding Service: 1321 Upland Drive, PMB 4685, Houston, TX 77043

Timothy D. Kosnoff
Direct: 425-830-8201

E-mail: tim@kosnoff.com

KOSNOFF LAW RECOMMENDS THAT ABUSED IN SCOUTING CLIENTS VOTE TO REJECT THE BOY SCOUT PLAN

Dear Clients,

I am the founder of a movement known informally as Abused in Scouting. I have been representing child abuse survivors in civil litigation since 1996. I have successfully litigated in state courts on behalf of men abused as scouts in courts throughout the country. In my career, I have tried seven child sexual abuse civil jury trials, five to verdict.

My firm recruited Eisenberg Rothweiler law firm and AVA law firm in 2019 to join me in an effort to reach out to men abused as boys in the Boy Scouts of America when I learned that the BSA intended to permanently extinguish the legal rights of men abused in scouting for over a century. We are co-counsel for all of you.

I am giving you the **opposite** recommendation you received from the Eisenberg Rothweiler law firm. **I urge you to VOTE NO**. Let me explain why I violently disagree with my co-counsel and the Coalition, which is nothing more than a group of six law firms that supports the Boy Scout's plan.

A U.S. Senator once said, "You are entitled to your own opinions but you are not entitled to your own facts." The supporters of the BSA Plan are telling you their opinions, which are not supported by the facts or the truth.

- **The Plan will not compensate survivors fairly**. While $1.854 billion is an enormous amount of money, the number of sexual abuse claims filed in the Boy

Scout's case sadly makes $1.854 billion a very small amount of money. The settlement trust expenses (which must be paid first) could be as high as 10%, which reduces the average payment per survivor to approximately $17,000. If some survivors are paid more, that means most of the other survivors will receive much less or nothing at all. Under your engagement letter with AIS, your payment will be reduced by __% to pay for the attorneys' share of the payment.

- **Why are the numbers so low**?

  There are law firms that do not specialize in this type of work who borrowed millions of dollars from Wall Street hedge funds to run TV ad campaigns and finance the cost of their collection of claims from survivors. These are the same firms you see running ads for other injury cases like asbestos, opioids, vaginal mesh, baby powder talc, etc. Those law firms came into the Boy Scout's bankruptcy case and have treated survivors like "inventories" for the sole purpose of collecting their contingency fee. While you and other survivors might not receive large or meaningful payments, the "mass tort" lawyers will because they will take a piece of your payment which under the current $1.854 billion settlement fund will total more than $425 million.

  The Boy Scouts, Local Councils, and Hartford negotiated with the "mass tort" lawyers instead of the Official Tort Claimants' Committee (TCC) because the "nass tort" lawyers were willing to accept much less.

- **Why was the Hartford Insurance settlement a cheap deal?**

  The Hartford Insurance Company (Hartford), the only settling insurer to date, is paying a tiny fraction of the coverage it is contractually obligated to pay. For example, in 1972 alone, if you only look at the "in-statute" penetration claims for that year they have a face value of more than $800 million. That does not take into account the thousands of other claims in the same year and the many other thousands in 1971, 1973, 1974, 1975, and all of the other years Hartford provided insurance coverage. In addition, the $787 million dollar settlement is not being dedicated to the specific survivor claims that trigger Hartford's policies. Instead, the $787 million will be used to pay all survivors even if their claim did not trigger a Hartford policy. After all is said and done, the Hartford

settlement will yield approximately $8,500 per survivor after accounting for trust expenses and overhead.

- **The Plan cuts a cheap deal with the BSA local councils which are legally separate entities in exchange for complete legal immunity from separate claims you have against the local council in which you were abused.**

  Eisenberg Rothweiler and the Coalition offered to settle with the Local Councils before undertaking any review of the claims or financial analysis of the Local Councils. In short, the Coalition blinding offered to settle for $600 million when the TCC demonstrated to the Coalition that the Local Councils had the ability to pay more than three times that amount without endangering their Scouting mission.

- **The Chartered Organizations founded and ran your troop which included various churches, schools, civic organizations, YMCA, etc are getting a release for free for all claims after 1975 for not objecting to the Plan.**

  Under the terms of BSA's Plan, Chartered Organizations do not pay a cent for broad releases for more that 40 years of sexual abuse claims (1976-2020). Instead, Chartered Organizations receive a release of their sexual abuse liability in exchange for a transfer of their interests in insurance policies purchased by the BSA and Local Councils.

- **BSA's Plan includes a $250 million settlement with the Mormon Church (TCJC) which had a one hundred years direct involvement in every aspect of the Scouting program. The $250 million settlement is tiny in comparison to the Church's legal exposure and its available assets which are in the billions of dollars.**

  The $250 million is not only far below the level of its culpability for abuse in TCJC wards but it will only be distributed to survivors who have claims against the Mormon Church.

- **Rejection of the Plan does not mean many more years of waiting. It means the BSA and the other entities will quickly come back to the negotiating table and finally be serious about fairly compensating survivors. A YES vote would likely mean years of appeals and probable rejection of the Plan by a higher court.**

The Boy Scout's "melting ice cube" defense is a hoax. The Boy Scouts holds hundreds of millions in cash and other assets that it designates as "restricted" and not available to pay you. It is hard to understand how that money is not available to pay you when the money was made available to provide the framework that led to your sexual abuse. In the end, the Boy Scouts are ready and willing to cut any deal because they will be protected by a bankruptcy discharge while your claims will be left to the "mass tort" lawyers to take their share then leave you with crumbs.

There are grave **legal** problems with the Plan even assuming it received 2/3rds voting support from the survivors that vote. **That is why it is critical that each and every one of you vote and you vote NO**.

Under the Plan, the Boy Scouts and the Coalition are trying to remove the contractual rights of the insurance companies. It is unclear if their motives will be successful but it is sure to delay payments to survivors because the Plan will be wrapped up in appeals and many years of litigation over the rights of the insurance companies and their obligation to provide any coverage.

Another huge legal problem with the Plan is the issue of insurance coverage. For example, the insurance companies will dispute they have to provide coverage to sexual abuse claims. The bankruptcy judge has acknowledged that she will not determine insurance coverage issues. Under the Plan, the Trust Distribution Procedures provides for the appointment of a Settlement Trustee who would evaluate all the survivor claims and make awards that would be legally binding on the insurance companies to pay. There is absolutely no legal support that would permit this and **ample law that says it cannot be done.** The insurance companies will appeal this to the end of time.

- The TCC is made up of 9 survivors of scout leader abuse, just like you. They have served tirelessly for 20 months. They are not paid for their service. They have a fiduciary duty to all the survivors to advocate for your best interests. The TCC urges survivors to **REJECT** the BSA Plan. There is nothing in it for them except the pride that comes from doing their best for you.
- **The TCC was shut out of the backrooms where these cheap, fool-hearty deals were cut by the Coalition and Eisenberg Rothweiler.**

The TCC has its own Plan. For many months, it has been forbidden by the court to file its own Plan or to even talk about it until now. The TCC has the legal right to file its own bankruptcy plan starting next week. I don't know what it contains or if I will eventually support it but I want to see it, because the BSA Plan is a disaster for all survivors. We can only go up from here. But first survivors have send a resounding message to all the players that the BSA Plan is a big fat **NO!**

KOSNOFF PLLC.
A PROFESSIONAL SERVICE CORPORATION
7001 Seaview Ave N.W.
SEATTLE, WASHINGTON 98117
TELEPHONE: (425) 837-9690

Mail Forwarding Service: 1321 Upland Drive, PMB 4685, Houston, TX 77043

Timothy D. Kosnoff
Direct: 425-830-8201

E-mail: tim@kosnoff.com

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Dear Clients,

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My firm recruited Eisenberg Rothweiler law firm and AVA law firm in 2019 to join me in an effort to reach out to men abused as boys in the Boy Scouts of America when I learned that the BSA intended to permanently extinguish the legal rights ~~of millions~~ of men abused in scouting for over a century. We are co-counsel for all of you.

I am giving you the **opposite** recommendation you received from the Eisenberg Rothweiler law firm. **I urge you to VOTE NO**. Let me explain why I violently disagree with my co-counsel and ~~their cohorts on the entity known as~~ the Coalition, which ~~also~~is nothing more than a group of six law firms that supports the Boy Scout's plan.

A U.S. Senator once said, "You are entitled to your own opinions but you are not entitled to your own facts." The supporters of the BSA Plan are telling you their opinions, which are not supported by the facts~~, which are not~~ or the truth.

- **The Plan ~~does~~will not compensate survivors fairly**. ~~The payments to survivors under the Plan are historically low for this type of case. There are over~~

~~82,000 survivor~~While $1.854 billion is an enormous amount of money, the number of sexual abuse claims filed in the Boy Scout's case~~. While $1.7B sounds like a lot of money, after payment of all the bankruptcy lawyers fees and costs, I estimate that the amount that goes to the survivors is pennies on the dollar, before payment of their attorneys fees. For example, if you were abused in Maryland, you would receive as little as $59.00 dollars. If you suffered the worst imaginable abuse in Maryland, the most you would~~ sadly makes $1.854 billion a very small amount of money. The settlement trust expenses (which must be paid first) could be as high as 10%, which reduces the average payment per survivor to approximately $17,000. If some survivors are paid more, that means most of the other survivors will receive ~~is $10,000 dollars. In New York, depending where you were abused and what happened~~much less or nothing at all. Under your engagement letter with AIS, your payment will be reduced by __% to ~~you,~~pay for the ~~numbers range from about $337.00 dollars to $57,000 dollars~~attorneys' share of the payment.

- **Why are the numbers so low**?

  There are law firms that ~~don't~~ do not specialize in this type of work who borrowed millions of dollars from Wall Street hedge funds to run TV ad campaigns and finance the cost of their collection of claims from survivors. These are the same firms you see running ads for other injury cases like asbestos, opioids, vaginal mesh, baby powder talc, etc.~~, whatever the mass tort du jour happens to be on the menu. They don't have any relevant experience in those types of cases either but they can come in to Ch. 11 bankruptcies with huge inventories of clients from tv ads and~~ Those law firms came into the Boy Scout's bankruptcy case and have treated survivors like "inventories" for the sole purpose of collecting their contingency fee. While you and other survivors might not receive large or meaningful payments, the "mass tort" lawyers will because they will take ~~control~~a piece of ~~the bankruptcy cases, settle cheap, and take huge fees for knowing nothing and doing nothing. That's what happened here. Of course the BSA and the Hartford Insurance Company dealt only with them and not the official committee representing your interests – because they knew they would sell out their clients on the cheap~~your payment which under the current $1.854 billion settlement fund will total more than $425 million.

The Boy Scouts, Local Councils, and Hartford negotiated with the "mass tort" lawyers instead of the Official Tort Claimants' Committee (TCC) because the "nass tort" lawyers were willing to accept much less.

- **Why was the Hartford Insurance settlement a cheap deal?**

  The Hartford Insurance Company (Hartford), the only settling insurer to date, is paying a tiny fraction of the coverage it is contractually obligated to pay. ~~The payment is low partially because Hartford is paying less than 7% of what it owes. The~~For example, in 1972 alone, if you only look at the "in-statute" penetration claims for that year they have a face value of more than $800 million. That does not take into account the thousands of other claims in the same year and the many other thousands in 1971, 1973, 1974, 1975, and all of the other years Hartford provided insurance coverage. In addition, the $787 million dollar settlement is not being dedicated to the specific survivor claims that trigger Hartford's policies. ~~The~~Instead, the $787~~M~~ million will be used to pay all survivors even if their claim did not trigger a Hartford policy. After all is said and done, the Hartford settlement will yield approximately $8,500 per survivor after accounting for trust expenses and overhead.

- **The Plan cuts a cheap deal with the BSA local councils which are legally separate entities in exchange for complete legal immunity from separate claims you have against the local council in which you were abused.**

  ~~The BSA Plan supported by~~

  Eisenberg Rothweiler and the Coalition ~~includes settlements~~offered to settle with the ~~local councils that leaves them with over a billion dollars of cash and property in excess of what their current need to fulfill the mission of~~Local Councils before undertaking any review of the claims or financial analysis of the Local Councils. In short, the Coalition blinding offered to settle for $600 million when the TCC demonstrated to the Coalition that the Local Councils had the ability to pay more than three times that amount without endangering their Scouting mission.

- **The ~~Charter organization which~~Chartered Organizations founded and ran your troop which ~~could have been a church, a school~~included various**

churches, schools, ~~a~~ civic ~~organization~~organizations, YMCA, etc ~~is~~are getting ~~off scot-free~~a release for free for all claims after 1975 for not objecting to the Plan.

Under the terms of BSA's Plan, Chartered Organizations do not pay a cent for broad releases for more that 40 years of sexual abuse claims (1976-2020). Instead, Chartered Organizations receive a release of their sexual abuse liability in exchange for a transfer of their interests in insurance policies purchased by the BSA and Local Councils.

- **BSA's Plan includes a $250 million settlement with the Mormon Church (TCJC) which had a one hundred years direct involvement in every aspect of the Scouting program. The $250 million settlement is tiny in comparison to the Church's legal exposure and its available assets which are in the ~~hundreds of~~ billions of dollars.**

  The $250 million is not only far below the level of its culpability for abuse in ~~LDS~~TCJC wards but it will only be distributed to survivors who have claims against the Mormon Church ~~which would result in the distribution of that pot of money only to them~~.

- **Rejection of the Plan does not mean many more years of waiting. It means the BSA and the other entities will quickly come back to the negotiating table and finally be serious about fairly compensating survivors. A YES vote would likely mean years of appeals and probable rejection of the Plan by a higher court.**

The ~~BSA currently is a melted ice cube. It has a few months of cash in the bank. It is desperate. That is why it allowed the Coalition lawyers to hijack the case~~Boy Scout's "melting ice cube" defense is a hoax. The Boy Scouts holds hundreds of millions in cash and other assets that it designates as "restricted" and not available to pay you. It is hard to understand how that money is not available to pay you when the money was made available to provide the framework that led to your sexual abuse. In the end, the Boy Scouts are ready and willing to cut any deal because they will be protected by a bankruptcy discharge while your claims will be left to the "mass tort" lawyers to take their share then leave you with crumbs.

There are grave **legal** problems with the Plan even assuming it received 2/3rds voting support from the survivors that vote. **That is why it is critical that each and every one of you vote and you vote NO**.

~~The insurance companies have legal contract rights of which the bankruptcy judge cannot strip them. One example is the "anti-assignment" clauses which are standard in these policies. That means that if BSA assigns its rights in the insurance policies to a Settlement Trust as set forth in the Plan, the insurance is voided and the carriers are off the hook. The insurance companies would appeal this issue to the highest court possible. That would take years.~~

Under the Plan, the Boy Scouts and the Coalition are trying to remove the contractual rights of the insurance companies. It is unclear if their motives will be successful but it is sure to delay payments to survivors because the Plan will be wrapped up in appeals and many years of litigation over the rights of the insurance companies and their obligation to provide any coverage.

Another huge legal problem with the Plan is the issue of insurance coverage. For example, ~~meaning how much insurance coverage do~~ the insurance companies ~~owe, if any~~will dispute they have to provide coverage to sexual abuse claims. The bankruptcy judge has acknowledged that she ~~cannot and~~ will not determine insurance coverage issues. ~~But~~Under the Plan, the Trust Distribution ~~Protocol~~Procedures provides for the appointment of a Settlement Trustee who would evaluate all the survivor claims and make awards ~~which~~that would be legally binding on the insurance companies to pay. There is absolutely no legal support that would permit this and **ample law that says it cannot be done.** The insurance companies ~~would~~will appeal this to the end of time.

- The ~~Tort Claim Committee (~~TCC~~)~~ is made up of 9 survivors of scout leader abuse, just like you. They have served tirelessly for 20 months. They are not paid for their service. They have a fiduciary duty to all the survivors to advocate for your best interests. The TCC urges survivors to **REJECT** the BSA Plan. There is nothing in it for them except the pride that comes from doing their best for you.
- **The TCC was shut out of the backrooms where these cheap, fool-hearty deals were cut by the Coalition and Eisenberg Rothweiler.**

The TCC has its own Plan. For many months, it has been forbidden by the court to file its own Plan or to even talk about it until now. The TCC has the legal right to file its own bankruptcy plan starting next week. I don't know what it contains or if I will eventually support it but I want to see it, because the BSA Plan is a disaster for all survivors. We can only go up from here. But first survivors have send a resounding message to all the players that the BSA Plan is a big fat **NO!**

Document comparison by Workshare Compare on Sunday, October 17, 2021 4:30:02 PM

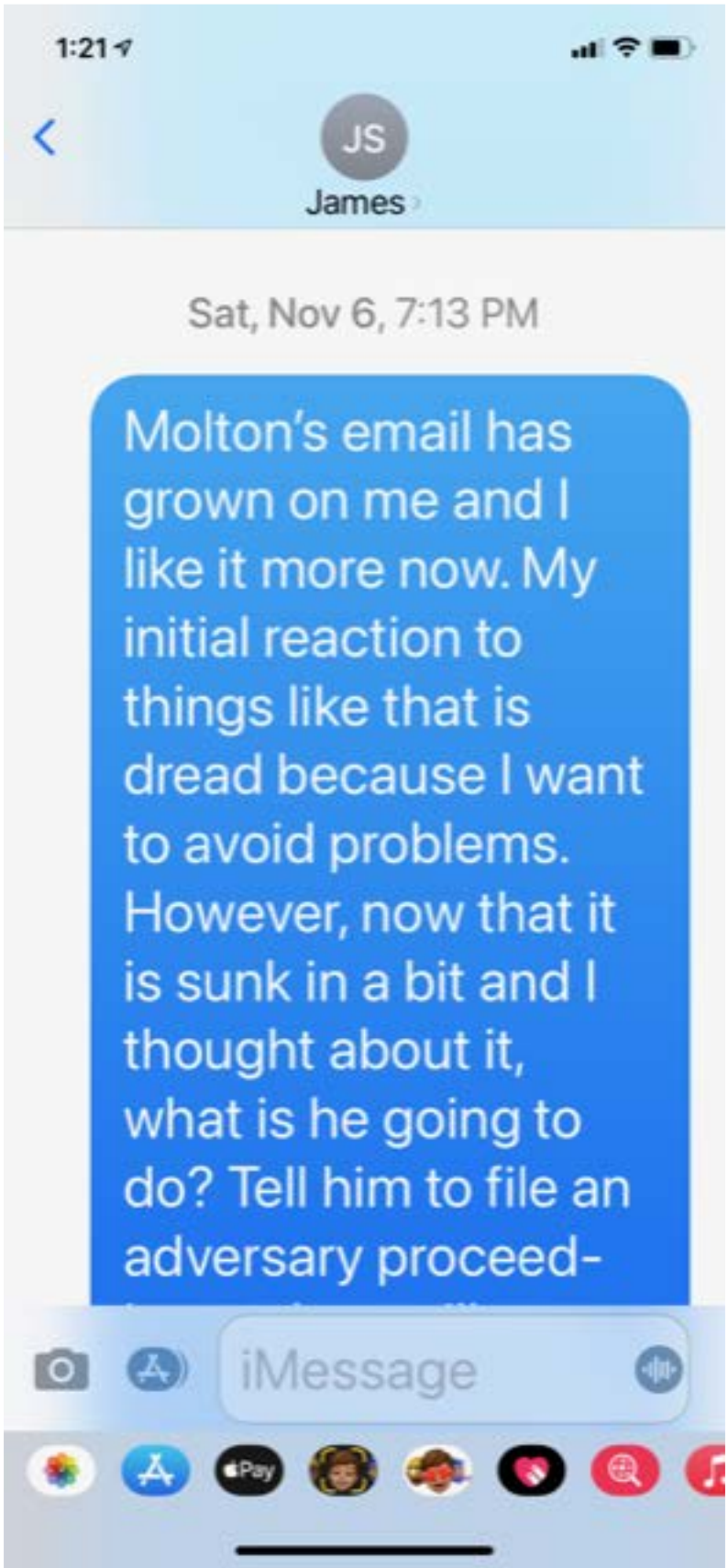
Input:	
Document 1 ID	PowerDocs://DOCS_LA/340286/1
Description	DOCS_LA-#340286-v1-BSA_-_TK_Letter
Document 2 ID	PowerDocs://DOCS_LA/340286/2
Description	DOCS_LA-#340286-v2-BSA_-_TK_Letter
Rendering set	Standard

Legend:	
Insertion	
~~Deletion~~	
~~Moved from~~	
Moved to	
Style change	
Format change	
~~Moved deletion~~	
Inserted cell	
Deleted cell	
Moved cell	
Split/Merged cell	
Padding cell	

Statistics:	
	Count
Insertions	46
Deletions	40
Moved from	0
Moved to	0
Style changes	0
Format changes	0
Total changes	86

Exhibit F

TCC-PlanConf-123770


1:21
JS
James
Sat, Nov 6, 7:13 PM
Molton's email has grown on me and I like it more now. My initial reaction to things like that is dread because I want to avoid problems. However, now that it is sunk in a bit and I thought about it, what is he going to do? Tell him to file an adversary proceed-
iMessage

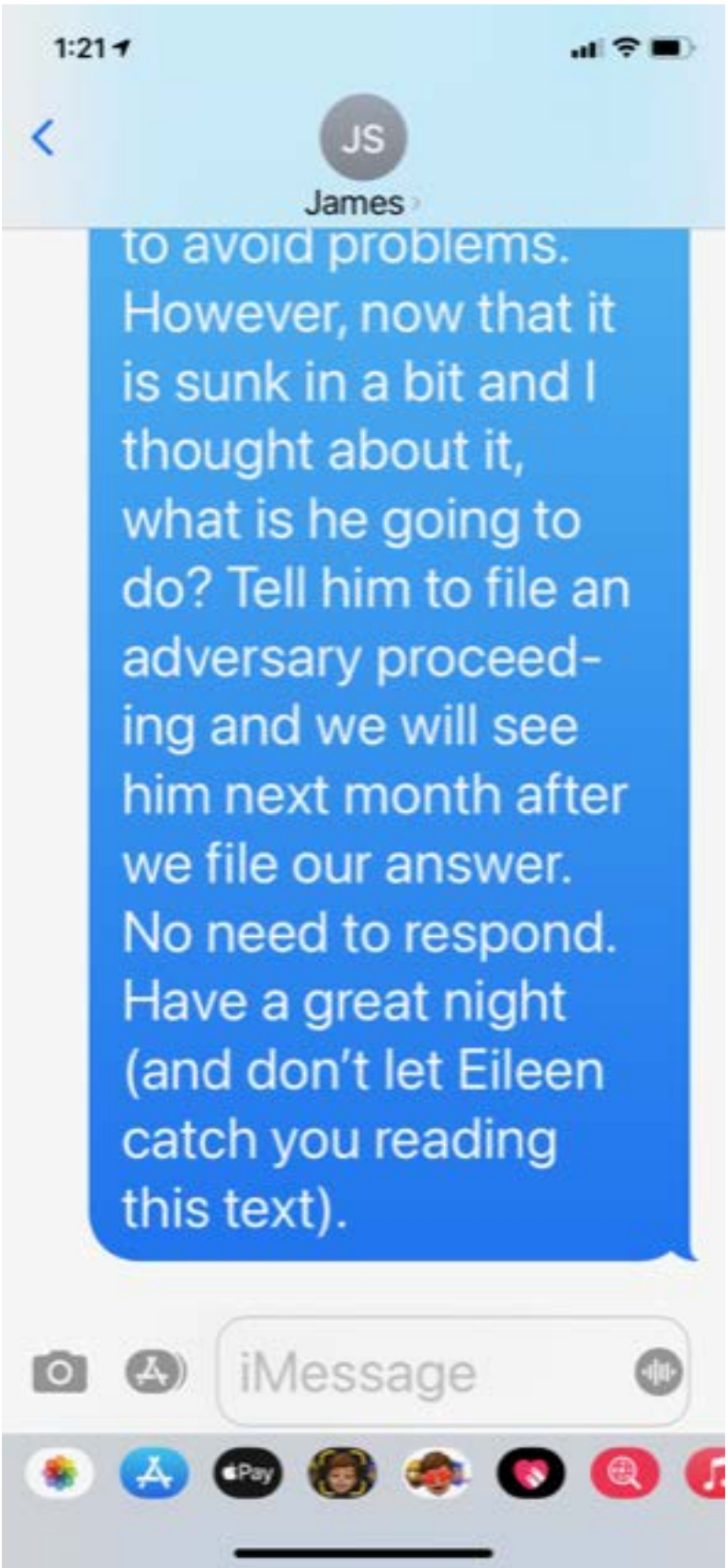

1:21
JS
James
to avoid problems. However, now that it is sunk in a bit and I thought about it, what is he going to do? Tell him to file an adversary proceed-ing and we will see him next month after we file our answer. No need to respond. Have a great night (and don't let Eileen catch you reading this text).
iMessage

Exhibit G

TCC-PlanConf-123793

From: "John W. Lucas" <jlucas@pszjlaw.com>
To: "James Stang" <jstang@pszjlaw.com>
Subject: Re: BSA - Letter to TCC
Date: Sun, 07 Nov 2021 16:00:54 -0000
Importance: Normal

And the follow up from Molton and Eisenberg.

John W. Lucas
Pachulski Stang Ziehl & Jones LLP
Direct Dial: 415.217.5108
Tel: 415.263.7000 | Cell: 415.306.3576 | Fax: 415.263.7010
jlucas@pszjlaw.com
vCard | Bio | LinkedIn

Los Angeles | San Francisco | Wilmington, DE | New York

On Nov 7, 2021, at 7:58 AM, James Stang <jstang@pszjlaw.com> wrote:

I see no reason to reply to Jessica's letter

Sent from my iPhone

Begin forwarded message:

From: "Warner, Blair" <blair.warner@whitecase.com>
Date: November 7, 2021 at 7:34:15 AM PST
To: James Stang <jstang@pszjlaw.com>
Cc: Jessica Lauria <jessica.lauria@whitecase.com>, Michael Andolina <mandolina@whitecase.com>, Matthew Linder <mlinder@whitecase.com>, "Laura E. Baccash" <laura.baccash@whitecase.com>, "Abbott, Derek" <DAbbott@morrisnichols.com>, "John W. Lucas" <jlucas@pszjlaw.com>, Debra Grassgreen <dgrassgreen@pszjlaw.com>, Rob Orgel <rorgel@pszjlaw.com>, James O'Neill <JONeill@pszjlaw.com>, Robert Brady <rbrady@ycst.com>, Edwin Harron <eharron@ycst.com>, David Molton <dmolton@brownrudnick.com>, "Goodman, Eric R." <EGoodman@brownrudnick.com>, Tristan Axelrod <taxelrod@brownrudnick.com>
Subject: BSA - Letter to TCC

Jim:

Please see the attached correspondence from Jessica Lauria.

Blair Warner | Associate

T +1 312 881 5374 **M** +1 312 890 6554 **E** blair.warner@whitecase.com

White & Case LLP | 111 South Wacker Drive, Suite 5100 | Chicago, IL 60606-4302

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<image003.png>
<BSA - Letter to TCC (11.7.21).PDF>

Exhibit H

Excerpt of Golden Deposition Transcript

Transcript of the Testimony of

STEPHEN GOLDEN

November 21, 2021

IN RE: BOY SCOUTS OF AMERICA AND DELAWARE BSA, LLC

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UNITED STATES BANKRUPTCY COURT

FOR THE DISTRICT OF DELAWARE

\- - -

IN RE:	: CHAPTER 11
BOY SCOUTS OF AMERICA AND	: CASE NO.
DELAWARE BSA, LLC,	: 20-10343 (LSS)
Debtors.	: (Jointly Administered)

\- - -

Remote videotaped deposition of STEPHEN GOLDEN, held via videoconference on Sunday, November 21, 2021, beginning at approximately 12:09 p.m. Eastern Standard Time, the proceedings being recorded stenographically by Gail Inghram Verbano, Registered Diplomate Reporter, Certified Realtime Reporter, Certified Shorthand Reporter-CA (No. 8635), and transcribed under her direction.

ORIGINAL

yes, it -- the fact of this communication was, I guess, unusual, sure.

Q. And what did Mr. Lucas and Mr. Stang say in response to your FYI email?

A. I did not receive a response to that email.

Q. Did you have a call then with Mr. Lucas or a text with Mr. Lucas?

A. I had a call with Mr. Lucas -- I believe my first call was on Saturday morning. My recollection is that I -- I went to bed shortly after seeing this -- this -- the email forward that I said FYI on Friday night, and my -- I had a phone conversation with Mr. Lucas at some point on Saturday morning.

Q. Okay. And tell me about that phone conversation.

A. I asked Mr. Lucas what should be done with respect to these email replies that were being received by the BSASurvivors email inbox; and in light of the fact that I -- I noticed that there were, you know, some that started with the words "Dear Tim."

And I determined at that point I was not going to be reading any further because I

happened to know that Mr. Kosnoff's first name is Timothy, and, therefore, I -- I kind of -- I assumed that some individuals could be thinking that they were responding directly to Mr. Kosnoff himself, who I am not.

Q. And what did Mr. Lucas say to you?

A. Mr. Lucas said to put those emails to the side and not open them, not look at them, for the reasons that I just stated, that they could be privileged communications between Mr. Kosnoff and his clients, because the email had gone out to only AIS's clients.

Q. Well, that's not true. It didn't go out only to AIS clients; correct?

A. That is my understanding now, yes.

Q. Okay. What did Mr. Lucas say to you as to why Pachulski made the decision to send the Kosnoff email and the Kosnoff letter from the BSASurvivor email address?

A. He didn't say anything about that.

Q. You didn't ask about that?

A. No.

Q. So the call consisted of, We're getting these responses that seem to be from Tim; what should I do with them, John? That was the

Exhibit I

TCC-PlanConf-123786

From: "Steven W. Golden"
To: "John W. Lucas" <jlucas@pszjlaw.com>
Subject: RE: Boy Scouts - Message from Tim Kosnoff - Co-Counsel to AIS Survivors
Date: Sat, 06 Nov 2021 01:12:16 -0000
Importance: Normal
Inline-Images: image001.jpg

Should I forward those to Tim (those being the ones where they think we are Tim)?

Steven W. Golden
Pachulski Stang Ziehl & Jones LLP
Tel: 212.561.7715 | Fax: 212.561.7777 | Mobile: 301.706.7520
sgolden@pszjlaw.com

Los Angeles | San Francisco | Wilmington, DE | New York | Houston

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From: John W. Lucas
Sent: Friday, November 05, 2021 9:12 PM
To: Steven W. Golden <sgolden@pszjlaw.com>
Subject: Re: Boy Scouts - Message from Tim Kosnoff - Co-Counsel to AIS Survivors

Will do. Thx

John W. Lucas
Pachulski Stang Ziehl & Jones LLP
Direct Dial: 415.217.5108
Tel: 415.263.7000 | Cell: 415.306.3576 | Fax: 415.263.7010
jlucas@pszjlaw.com
vCard | Bio | LinkedIn

Los Angeles | San Francisco | Wilmington, DE | New York

On Nov 5, 2021, at 6:10 PM, Steven W. Golden <sgolden@pszjlaw.com> wrote:

I now see that we sent this out, presumably on his behalf. In the future, please give me a heads up about all mass mailings because I am getting replies I was not expecting coming in mass and am not sure how to reply (because they all think I am Tim Kosnoff and I am not)

Steven W. Golden
Pachulski Stang Ziehl & Jones LLP
Tel: 212.561.7715 | Fax: 212.561.7777 | Mobile: 301.706.7520
sgolden@pszjlaw.com

From: BSA Survivors
Sent: Friday, November 05, 2021 9:07 PM
To: James Stang <jstang@pszjlaw.com>; John W. Lucas <jlucas@pszjlaw.com>
Subject: FW: Boy Scouts - Message from Tim Kosnoff - Co-Counsel to AIS Survivors

In case you had not seen it.

Steven W. Golden
Pachulski Stang Ziehl & Jones LLP
Tel: 212.561.7715 | Fax: 212.561.7777 | Mobile: 301.706.7520
sgolden@pszjlaw.com

From: [redacted]@gmail.com]
Sent: Friday, November 05, 2021 9:03 PM
To: BSA Survivors <BSASurvivors@pszjlaw.com>
Subject: Re: Boy Scouts - Message from Tim Kosnoff - Co-Counsel to AIS Survivors

No need to worry I haven't even read the ballot or anything!! And as to your letter on influence of rejection I haven't read eathier so if you could please send to me again.ty GB!!

On Fri, Nov 5, 2021, 8:13 PM BSA Survivors <BSASurvivors@pszjlaw.com> wrote:

> Dear Clients of AIS:
>
> Today the e-Ballot went out to you a few minutes ago from Eisenberg Rothweiler. I was not expecting it to be sent by that firm. I was not given an opportunity to review it and the reason is because that firm knew I would have objected to its form and content. It was wholly improper and possibly illegal for them to solicit your vote on a ballot that is supposed to be neutral. Instead they used deceit to spew their patently false and misleading statements. There is a simple word for why lawyers do things like that: greed.
>
> Please find my October 19, 2021 letter urging you to REJECT the Plan. I ask you respectfully to read my letter again. If you do, I am confident you will reach the same conclusions I did.
>
> Please stay current on what is happening by following me on Twitter @sexabuseattys. Please feel free to call me or email me with any questions you may have. My email is tim@kosnoff.com<mailto:tim@kosnoff.com>. My cell number is 425-830-8201. I respectfully urge you to listen to the lawyer that listens to you and returns your phone calls.
>
> Thank you.
>
> Timothy Kosnoff
>
> TIMOTHY D. KOSNOFF
> Licensed Attorney
>
> U.S. Mailing address:
>
> 1321 Upland Drive
> PMB 4685
> Houston, TX 77043
> USA
>
> Direct: 425-837-9690
> Main: 206-257-3590
> Fax: 206-837-9690
> Toll free: 855-LAW4CSA
>
> tim@kosnoff.com<mailto:tim@kosnoff.com>