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October 23, 2009

VIA HAND DELIVERY
The Honorable Sandra Mazer Moss
Coordinating Judge
Complex Litigation Center
City Hall, Room 622
Philadelphia, PA 19107

CONTROL # :

Attention: Stan Thompson

Re: In re Asbestos Litigation
P.C.C.P., October Term 1986, No. 0001

Novotny v. DFT, Inc., et al., Phila. CCCP, November Term 2007, No. 00963
Adamkovic v. DFT, Inc., et al., Phila. CCP, December Term 2007, No. 00239
Llewellyn v. DFT, Inc., et al., Phila. CCP, December Term 2006, No. 03591
Ochs v. DFT, Inc., et al., Phila. CCP, December Term 2007. No. 03604
Privito v. DFT, Inc., et al., Phila. CCP, February Term 2007, No. 00011
Smyth v. DFT, Inc., et al., Phila. CCP, December Term 2007, No. 02670
Love v. DFT, Inc., et al., Phila. CCP, December Term 2006, No. 03593
Pfeifer v. DFT, Inc., et al., Phila. CCP, December Term 2007, No. 04574

Plaintiffs' Counsel: Benjamin P. Shein, Esq.
Counsel for Defendant Goodyear-Canada: M. Douglas Eisler, Esq.
Counsel for Defendants DFT, Inc. a/k/a Durabla Manufacturing Co. and David Moser: Andrew J. Trevelise, Esq. and Henry F. Reichner, Esq.

Filing: Motion of Defendant Goodyear-Canada for Reconsideration to Lift Protective Order

Dear Judge Moss:

Goodyear-Canada ("Goodyear"), by and through its undersigned counsel, hereby submits this Letter Brief pursuant to the asbestos procedures adopted by the Court, and moves this

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Honorable Court to grant the Motion for Reconsideration to lift the Protective Order entered on December 15, 2008 (a true and correct copy of the Court's Order is attached hereto as Exhibit "A"), with respect to defendant Goodyear only. For the reasons set forth below, Goodyear respectfully requests that this Honorable Court lift the Protective Order and in the interests of justice permit Goodyear to obtain access to the discovery taken under the Court's Order.

I. SUMMARY OF THE ARGUMENT

A. Factual Background

As the Court is aware, the above-referenced cases included within the In re Asbestos Litigation docket incorporate a number of defendants, involve very discrete, complex issues of liability, and concern the alleged manufacture and distribution of certain asbestos-containing products, during specific time periods, at specific locations and under specific circumstances. The liability issues raised in these cases are particularly complex with regard to several of the named defendants – Durabla Manufacturing Company ("Durabla Manufacturing"), Durabla Canada, Ltd., DFT, Inc. a/k/a Durabla Manufacturing Co. ("DFT"), David W. Moser ("Moser) and Goodyear Canada – because the allegations in some if not all of these cases is that Goodyear supplied sheet gasket material that was sold by Durabla Manufacturing during a specific time period.[1] In the *Novatny* case for example, it has been alleged that plaintiff was exposed to gasket material sold by Durabla Manufacturing during the time period of 1970 to 1973, but that this gasket material was supplied by Goodyear. (*See* Exhibit "B", Plaintiff's Opposition to Goodyear-Canada's Motion for Summary Judgment, at 6). Despite these allegations however, at no point during the deposition of James Scandle, plaintiff's co-worker, did Mr. Scandle identify *Goodyear* as a manufacturer or supplier of asbestos-containing products that he or the plaintiff worked with or around during their careers. *See* Video Deposition Testimony of James Scandle, taken on March 25, 2009. On the contrary, at this juncture the only allegation against Goodyear in *Novatny* and potentially any of the other asbestos cases involving these defendants, is linked to Goodyear's alleged relationship with the Durabla defendant entities, and by implication, DFT and Durabla Manufacturing's president, David Moser. As such, any information or material uncovered in discovery with regard to these defendants would be both significant and directly relevant to the allegations against Goodyear in these cases, as well as to Goodyear's cross-claims against DFT and Moser.

Despite the significance of these discovery materials to these asbestos cases – and perhaps because of that significance – counsel for defendants DFT and Moser sought a Protective Order from this Court, seeking to keep discovery involving these defendants confidential and

[1] As a background with respect to the relationship of these entities, David Moser is the President of DFT, Inc. and Durabla Manufacturing Company, and serves as the director of Durabla Canada, Ltd. (*See* Exhibit "C", Motion of Defendants David W. Moser and DFT., Inc. to Sever Alter Ego and Successor Liability Claims from Plaintiffs' Asbestos Personal Injury Claims, in *Novatny v. DFT, Inc., et al.,* at p. 3). Defendant David Moser has been sued in these cases "individually and in his capacity as President of Durabla Manufacturing Company, Inc. and Durabla Canada, Ltd., and DFT, Inc." *See* Plaintiffs' First Amended Complaint, in *Novatny v. DFT Inc., et al.*, November Term, 2007, No. 00963, ¶ 19. Defendant DFT, Inc. is named "individually and as successor to and/or predecessor of and/or parent of and/or subsidiary of Durabla Manufacturing Company and/or Durabla Canada, Ltd." *See id.*, ¶ 20. Similarly, Defendant Durabla Canada, Ltd. has been sued in this case "individually and as successor to and/or predecessor of and/or parent of and/or subsidiary of Durabla Manufacturing Company, Inc. and/or DFT, Inc." *See id.*, ¶ 21.

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seeking to have the deposition of Moser taken under seal. Apparently, DFT and Moser's attorneys approached this Honorable Court with a stipulation purportedly agreed to by all parties in support of its request for a Protective Order. This purported stipulation was granted by Judge Tereshko on December 15, 2008, thereby imposing a broad-sweeping Protective Order limiting all discovery pertaining to defendants DFT and Moser and restricting disclosure of Moser's deposition testimony. Despite counsel's representations to the Court however, Goodyear, the party with perhaps the most significant interest in obtaining discovery materials relating to DFT and Moser, did not consent or agree to such an Order. On the contrary, Goodyear did not and would not have agreed to the entry of such a broad-sweeping Protective Order as such a restriction on discovery is extremely prejudicial to Goodyear and severely impedes its ability to properly defend itself in this litigation. In fact, upon learning of the entry of this Protective Order, the undersigned counsel communicated with counsel for DFT and Moser and specifically requested copies of depositions and any other discovery materials obtained or produced pursuant to the Stipulation and Protective Order. To date however, neither Goodyear nor its undersigned counsel has received any such document.

B. <u>Legal Argument</u>

The broad-sweeping Protective Order entered herein should be lifted pursuant to the extensive case law interpreting this issue, because the information revealed in discovery is directly relevant to the cross-claims between Goodyear and the Durabla defendants and further bears directly upon those defendants' attempts to foist their liability in asbestos cases onto Goodyear. Clearly, restricting Goodyear's access to such information in not only this but all cases involving defendants DFT and Moser would be extremely prejudicial to Goodyear, as doing so would severely impede Goodyear's ability to defend itself against litigation in which those defendants are involved. This is perhaps most clearly evidenced by the extensive number of cases to which this Protective Order applies. Specifically, the Protective Order entered by the court pursuant to the purported Stipulation applies to "the pretrial proceedings and trial or settlement of <u>In Re Asbestos Litigation</u>, Phila. CCP, October Term 1986, No. 0001, including any and all suits filed by Shein Law Center, Ltd. on behalf of individual asbestos plaintiffs where the defendants include David Moser and/or DFT, Inc." *See* Exhibit "A", at ¶ 1.7. Presumably, this would include not only all eight of the asbestos cases captioned above, but also any future cases that the Shein Law Center files on behalf of asbestos plaintiffs which name Moser and/or DFT as defendants. The entry of such a broad-sweeping Protective Order is extremely prejudicial to Goodyear as these defendants have purported to establish some sort of link between Durabla-brand gasket material and Goodyear, and therefore any information produced on behalf of DFT and Moser, two of the Durabla-related entities, would be directly relevant to the claims against Goodyear. As such, restricting access to material related to these entities would be unjust to Goodyear and prejudicial to the extreme. In stark contract however, defendants DFT and Moser have not shown – and cannot show – what, if any harm they would suffer if the information revealed in discovery is disclosed to Goodyear.

Pursuant to Pennsylvania Rule of Civil Procedure 4012, a court may, "*for good cause shown*", issue any order "*which justice requires* to protect a party or person from unreasonable annoyance, embarrassment, oppression, burden or expense . . . ." Pa.R.C.P. 4012(1). (emphasis added). In order for a protective order to issue however, "the moving party bears the burden of proving its necessity." *Ornsteen v. Bass*, 18 Phila. 328, 338 (Pa. C.P. 1988) (citing *Cipollone v.*

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Ligget Group, Inc., 106 F.R.D. 573, 583 (D. N.J. 1985). Indeed, "the granting of relief in a discovery proceeding is dependent upon a prima facie showing of necessity, since the relief is not to be granted as a matter of right." *In re Estate of Roart*, 568 A.2d 182, 187 (Pa. Super. 1989). The party moving for a protective order based on Pa.R.C.P. 4012 "bears the burden of establishing the objectionable nature of the discovery he [or she] is withholding." *Griffiths v. Ulmer*, 55 D.& C.4th 370, 373 (Lacka. Cty. 2002); *Platinum Corp. v. Blong*, 43 D.&C.4th 445, 446-47 (Fayette Cty. 1998) (citing *Cipollone*, *supra*. at 585). To establish the "good cause" requirement, the party moving for the protective order must produce, "at a minimum, some evidence upon which a court can make a determination that harm will result from disclosure." *Ornsteen*, *supra*. at 374. "The determination of whether good cause does or does not exist *must be based upon appropriate testimony and other factual data, not the unsupported contentions and conclusions of counsel.'" Id.* (citing *Davis v. Romney*, 55 F.R.D. 337, 340 (1972)). (emphasis added).

Moreover, with regard to the unsealing of records that have been previously sealed, our Superior Court has followed legal treatises and federal cases, "as well as common sense", in determining whether such records may be unsealed. *In re Estate of DuPont*, 966 A.2d 636, 638 (Pa. Super. 2009). "Where court records have been properly sealed, they are subject to being reopened upon a showing of good cause." *Id.* (quoting 20 AMJUR 2d COURTS § 31). Furthermore, the United States District Court for the Eastern District of Pennsylvania has held that "whether a record remains sealed is within the discretion of the district court, and the court must: (1) recognize the common law presumption of public access; (2) apply a balancing test to determine prospectively whether the material to be sealed was the type of information normally protected or whether there is a clearly defined injury to be prevented and (3) provide and explain its clear reasoning for sealing the record." *Id.* at 639 (citing *Zurich American Ins. Co. v. Rite Aid Corp.*, 345 F.Supp.2d 497, 504 (E.D. Pa. 2004).[2] Similarly, "in considering whether good cause exists for a protective order", courts have generally adopted a balancing test. *Pansy v. Borough of Stroudsburg*, 23 F.3d 772, 787 (3d Cir. 1994). Moreover, when considering whether to grant orders of confidentiality at any stage of the litigation, "the court . . . must balance the requesting party's need for information against the injury that might result if uncontrolled disclosure is compelled. When the risk of harm to the owner of [a] trade secret or confidential information outweighs the need for discovery, disclosure [through discovery] cannot be compelled, but this is an infrequent result." *Id.* (quoting Arthur R. Miller, *Confidentiality, Protective Orders, and Public Access to the Courts*, 105 Harv. L. Rev. 427, 433-35 (1991)). Once the court determines "that the discovery policies require that the materials be disclosed, the issue becomes whether they should 'be disclosed only in a designated way . . . .'" *Id.* Significantly, "whether the disclosure will be limited depends on a judicial balancing of the harm to the party seeking protection (or third persons) and the importance of disclosure to the public." *Id.*

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[2] Although federal court decisions are not binding upon this Court, federal analyses regarding issuance/vacation of protective orders and sealing of records are nonetheless instructive as Pennsylvania discovery rules are modeled upon federal discovery rules. *See Chrysler v. Zigray*, 1990 Pa. Dist. & Cnty. Dec. LEXIS 214 (Pa. C.P. 1990) ("In determining whether there is good cause to issue a protective order restricting dissemination, the federal courts (Pennsylvania discovery rules are modeled upon the federal discovery rules) require the moving party to show that the information sought to be protected is confidential and that public disclosure of the information will result in a clearly defined and very serious injury.")

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In this case, defendants DFT and Moser have not shown – and cannot show – what, if any, harm they would suffer if the information revealed in discovery is disclosed to Goodyear. *Ornsteen*, 18 Phila. at 374. Likewise, those defendants cannot meet their burden of establishing the requisite necessity for sealing of such discovery. *Id.* at 338. Indeed, at no point have DFT or Moser set forth any specific or concrete factual allegations which would support a finding that disclosure of information sought in discovery would cause any "unreasonable annoyance, embarrassment, oppression, burden or expense." Pa.R.C.P. 4012. Therefore, there is simply no justification for the sealing under the Protective Order of Moser's deposition or of any documents produced in conjunction with the deposition, nor has any evidence been presented that would suggest the need for limiting the discovery taken of DFT and/or Moser. On the contrary, while disclosure of such information would not harm those defendants, restricting Goodyear from obtaining discovery taken of them would in fact extremely prejudice Goodyear, as this information is directly relevant to Goodyear's existing cross-claims against DFT and Moser. Specifically, despite the fact that product testimony and evidence presented by the plaintiffs has identified Durabla Manufacturing (and by implication the other Durabla defendant entities) as the manufacturer of asbestos-containing gasket material with which the plaintiffs worked, the Durabla entities have attempted to impose their potential liability in these matters onto Goodyear. They have done so by alleging a relationship between Goodyear and Durabla Manufacturing in the supply of gasket material during specific time period, via the testimony of Durabla Manufacturing and DFT's president, defendant Moser as well as presumably any number of materials they have produced in discovery under seal, claiming that Goodyear supplied the gaskets sold by Durabla Manufacturing. Restricting Goodyear's access to such materials, particularly where the plaintiffs' claims against Goodyear are directly related to their claims against the Durabla defendants, would severely prejudice Goodyear in its defense of this litigation and in the prosecution of its cross-claims against those defendants.

Perhaps even more significant than the cross-claims between the defendants however, is the fact that this information directly relates to the product identification claims that seek to impose any liability upon Goodyear whatsoever. In *Novatny* and the seven other above-captioned cases to which this Protective Order applies, as well as any other asbestos cases where Goodyear and one of the Durabla related-entities are named as defendants, the primary issue between these parties is not how they will *share* liability; but rather, *which* of these defendants is the properly liable party and for what alleged conduct. Without having access to the information produced in discovery pertaining to the Durabla defendants, Goodyear will be significantly impeded in defending against the Durabla defendants' attempts to foist liability upon Goodyear and in proving its lack of liability for the plaintiffs' injuries. Therefore, it is clear that information revealed in discovery pertaining to those defendants would not only significantly implicate the cross-claims between Goodyear and these entities, but would further have a direct impact upon the very allegations on which the lawsuits are based.

Accordingly, the factors delineated under Rules 4011 and 4012 of the Pennsylvania Rules of Civil Procedure, and the case law discussed above interpreting those rules, weigh heavily in favor of vacating the Protective Order and allowing disclosure of the discovery materials to defendant Goodyear. Indeed, it is without question that in products liability personal injury cases, many of which assert claims of wrongful death and all of which involve allegations of joint liability among numerous defendants, information obtained during the deposition of the President and Director of

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several related co-defendants, and materials produced or obtained throughout discovery, would be extremely relevant to the litigation and the parties thereto. In fact, defendant Moser has been sued in these matters both individually and in his capacity as the President of DFT and Durabla Manufacturing. Moreover, DFT, has likewise been named "individually and as successor to and/or predecessor of and/or parent of and/or subsidiary of Durabla Manufacturing Company and/or Durabla Canada, Ltd." *See* Plaintiffs' First Amended Complaint, ¶ 20. As such, it is clear that any discovery materials and information obtained in relation to David Moser or DFT are directly related to the claims against and involving Durabla Manufacturing, and in turn directly related to the claims against Goodyear, who is alleged to have supplied sheet gasket material that was sold by Durabla Manufacturing during a particular time period. Indeed, this is exactly the sort of information contemplated by courts in establishing the mechanism of discovery as part of the litigation process. Imposing this broad-sweeping restriction upon such relevant and significant discovery information, where many of the other defendants including Goodyear were not afforded the opportunity to oppose such a restriction, is per se prejudicial.

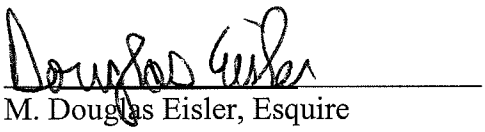
Accordingly, since DFT and Moser simply cannot show any clearly defined injury that would result from disclosure of discovery materials produced or obtained pursuant to the Stipulation and Protective Order, cannot meet their burden of establishing the requisite necessity for the sealing or restriction of information obtained in discovery, and because the established jurisprudence in this Commonwealth regarding limiting discovery weighs strongly against the imposition of a protective order, the Protective Order should be vacated as to Goodyear.

II. CONCLUSION

For the foregoing reasons, Goodyear-Canada respectfully requests this Honorable Court vacate the Protective Order entered on December 15, 2008, and permit access to discovery materials pertaining to defendants DFT, Inc. a/k/a/ Durabla Manufacturing Company and David Moser.

Respectfully submitted,

WILSON, ELSER, MOSKOWITZ,
EDELMAN & DICKER LLP

By: 
M. Douglas Eisler, Esquire
Attorney for Defendant
Goodyear-Canada

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Control No.: 09103556

IN THE COURT OF COMMON PLEAS
OF PHILADELPHIA COUNTY, PENNSYLVANIA

NADINE COLLIER NOVOTNY, Executrix of the Estate of Edward J. Novotny, Deceased,	:	COURT OF COMMON PLEAS OF PHILADELPHIA COUNTY FIRST JUDICIAL DISTRICT CIVIL TRIAL DIVISION **ASBESTOS CASE**
v.	:	
GOODYEAR-CANADA, et al.,	:	NOVEMBER TERM 2007 No. 00963
MARY ADAMKOVIC	:	COURT OF COMMON PLEAS PHILADELPHIA COUNTY
v.	:	
GOODYEAR-CANADA, et al.,	:	DECEMBER TERM 2007 No. 00239
JOHN LLEWELLYN	:	COURT OF COMMON PLEAS PHILADELPHIA COUNTY
v.	:	
GOODYEAR-CANADA, et al.	:	DECEMBER TERM 2006 No. 03591
JOSEPH STONE OCHS	:	COURT OF COMMON PLEAS PHILADELPHIA COUNTY
v.	:	
GOODYEAR-CANADA, et al.	:	DECEMBER TERM 2007 No. 03604
ALBERT PRIVITO	:	COURT OF COMMON PLEAS PHILADELPHIA COUNTY
v.	:	
GOODYEAR-CANADA, et al.	:	FEBRUARY TERM 2007 No. 00011

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Control No.: 09103556

JOHN SMYTH	:	COURT OF COMMON PLEAS
	:	PHILADELPHIA COUNTY
v.	:	
	:	DECEMBER TERM 2007
GOODYEAR-CANADA, et al	:	
	:	No. 02670
ROY LOVE	:	COURT OF COMMON PLEAS
	:	PHILADELPHIA COUNTY
v.	:	
	:	DECEMBER TERM 2006
GOODYEAR-CANADA, et al.	:	
	:	No. 03593
ALBERT PFEIFER	:	COURT OF COMMON PLEAS
	:	PHILADELPHIA COUNTY
v.	:	
	:	DECEMBER TERM 2007
GOODYEAR-CANADA, et al.	:	
	:	No. 04574

ORDER

AND NOW, to wit, this _____ day of _____, 2009, upon consideration for the Motion for Reconsideration to Lift Protective Order of Defendant Goodyear-Canada, and any response thereto, it is hereby ORDERED AND DECREED that said Motion is GRANTED, and that the Protective Order is hereby lifted. It is further ORDERED that Defendants DFT, Inc. and David W. Moser must provide copies of all deposition transcripts, documents and/or other materials produced during discovery under the Protective Order to Defendant Goodyear-Canada within ten (10) days of the date of this Order.

BY THE COURT:

_____

Hon. Sandra Mazer Moss

Case ID: 861000001
Control No.: 09103556

IN THE COURT OF COMMON PLEAS
OF PHILADELPHIA COUNTY, PENNSYLVANIA

NADINE COLLIER NOVOTNY, Executrix of the Estate of Edward J. Novotny, Deceased, v. *GOODYEAR-CANADA, et al.,*	COURT OF COMMON PLEAS OF PHILADELPHIA COUNTY FIRST JUDICIAL DISTRICT CIVIL TRIAL DIVISION **ASBESTOS CASE** NOVEMBER TERM 2007 No. 00963
MARY ADAMKOVIC v. *GOODYEAR-CANADA, et al.,*	COURT OF COMMON PLEAS PHILADELPHIA COUNTY DECEMBER TERM 2007 No. 00239
JOHN LLEWELLYN v. *GOODYEAR-CANADA, et al.*	COURT OF COMMON PLEAS PHILADELPHIA COUNTY DECEMBER TERM 2006 No. 03591
JOSEPH STONE OCHS v. *GOODYEAR-CANADA, et al.*	COURT OF COMMON PLEAS PHILADELPHIA COUNTY DECEMBER TERM 2007 No. 03604
ALBERT PRIVITO v. *GOODYEAR-CANADA, et al.*	COURT OF COMMON PLEAS PHILADELPHIA COUNTY FEBRUARY TERM 2007 No. 00011

Case ID: 861000001
Control No.: 09103556

JOHN SMYTH	:	COURT OF COMMON PLEAS
	:	PHILADELPHIA COUNTY
v.	:	
	:	DECEMBER TERM 2007
GOODYEAR-CANADA, et al	:	
	:	No. 02670
ROY LOVE	:	COURT OF COMMON PLEAS
	:	PHILADELPHIA COUNTY
v.	:	
	:	DECEMBER TERM 2006
GOODYEAR-CANADA, et al.	:	
	:	No. 03593
ALBERT PFEIFER	:	COURT OF COMMON PLEAS
	:	PHILADELPHIA COUNTY
v.	:	
	:	DECEMBER TERM 2007
GOODYEAR-CANADA, et al.	:	
	:	No. 04574

ATTORNEY CERTIFICATION OF GOOD FAITH

The undersigned counsel for movant hereby certifies and attests that she has conferred with opposing counsel and has been unsuccessful in resolving the instant dispute.

CERTIFIED TO THE COURT BY:

M. Douglas Eisler, Esquire
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Independence Square West
The Curtis Center, Suite 1130 E
Philadelphia, PA 19106
Attorney for Defendant Goodyear-Canada

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CERTIFICATE OF SERVICE

I, M. Douglas Eisler, do hereby certify that a true and correct copy of the attached Motion to Lift Protective Order was mailed via First Class, United States Mail, to the following parties on October 23, 2009:

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Case ID: 861000001
Control No.: 09103556

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