No. 116 Original

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1989

ALABAMA, ARIZONA, ARKANSAS, CALIFORNIA, CONNECTICUT, DELAWARE, FLORIDA, ILLINOIS, INDIANA, IOWA, LOUISIANA, MAINE, MISSOURI, MONTANA, NEBRASKA, NEW HAMPSHIRE, NEW YORK, NORTH CAROLINA, NORTH DAKOTA, OHIO, OKLAHOMA, RHODE ISLAND, SOUTH DAKOTA, TENNESSEE, TEXAS, UTAH, VERMONT, WASHINGTON, AND WYOMING,

Plaintiffs,

–against–

W.R. GRACE & COMPANY, NATIONAL GYPSUM COMPANY, UNITED STATES GYPSUM COMPANY, USG CORPORATION, AMERICAN BILTRITE, INC., ARMSTRONG WORLD INDUSTRIES, INC., AZROCK INDUSTRIES, INC., BASIC INCORPORATED, CAREY–CANADA, INC., THE CELOTEX CORPORATION, CERTAINTEED CORPORATION, CROWN CORK & SEAL COMPANY, INC., EAGLE–PICHER INDUSTRIES, INC., FIBREBOARD CORPORATION, THE FLINTKOTE COMPANY, GAF CORPORATION, GEORGIA-PACIFIC CORPORATION, H.K. PORTER COMPANY, INC., KEENE CORPORATION, KENTILE FLOORS, INC., OWENS-CORNING FIBERGLAS CORPORATION, OWENS-ILLINOIS, INC., PFIZER, INC., RAYMARK INDUSTRIES, INC., SPRAYED INSULATION, INC., AND TURNER & NEWALL PLC,

Defendants.

ON MOTION FOR LEAVE TO FILE COMPLAINT

BRIEF OF DEFENDANT GAF CORPORATION IN OPPOSITION TO PLAINTIFFS' MOTION FOR LEAVE TO FILE COMPLAINT AND IN OPPOSITION TO NEW JERSEY'S MOTION TO INTERVENE

Sidney S. Rosdeitcher
(Counsel of Record)
Robert N. Kravitz
Paul, Weiss, Rifkind,
Wharton & Garrison
1285 Avenue of the Americas
New York, New York 10019
(212) 373–3000

Randall L. Solomon
Baker & Hostetler
3200 National City Center
Cleveland, Ohio 44114
(216) 621–0200

Patrick J. Lamb
James C. Murray, Jr.
Katten Muchin & Zavis
525 West Monroe Street
Suite 1600
Chicago, Illinois 60606
(312) 902–5200

Attorneys for GAF Corporation

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Defendants.

BRIEF OF DEFENDANT GAF CORPORATION IN OPPOSITION TO PLAINTIFFS' MOTION FOR LEAVE TO FILE COMPLAINT AND IN OPPOSITION TO NEW JERSEY'S MOTION TO INTERVENE

INTRODUCTION

GAF Corporation ("GAF") 1/ respectfully submits this brief in opposition to the plaintiffs' motion for leave to file a complaint in the original jurisdiction of this Court against GAF and twenty-five other former manufacturers of asbestos-containing materials, and in opposition to the State of New Jersey's motion to intervene.

A case more unsuitable to this Court's original jurisdiction can scarcely be imagined. Resolution of plaintiffs' claims would involve intensive fact-finding on sharply disputed issues concerning the existence and degree of any hazards posed by hundreds of different asbestos-containing products in thousands of state-owned buildings, and the individual liability of twenty-six defendants for the costs of abating any such hazards under the laws applicable in twenty-nine different states. Such a massive and unprecedented diversion of this Court's energies from its paramount appellate function is wholly unnecessary because each State's claims can and should be adjudicated in its own state courts.

GAF adopts the arguments of its co-defendants that this case does not fall within this Court's original jurisdiction because a number of the defendant corporations are citizens of plaintiff states. GAF submits, however, that this action so thoroughly and plainly conflicts with the standards governing the discretionary exercise of the Court's original jurisdiction that the Court may reject the plaintiffs' motion on these discretionary grounds, without reaching the constitutional issue of the scope of the Court's jurisdictional grant.

STATEMENT OF THE CASE

Twenty-nine states ask this Court to exercise its original jurisdiction to determine if each of twenty-six manufacturers is liable for

1/ GAF is a Delaware corporation with its principal place of business in New Jersey. Pursuant to Supreme Court Rule 29.1, GAF states that it has no parent companies. The only subsidiary of GAF that is not wholly owned is GAF-Huls Chemie GmbH, a joint venture incorporated in Germany and co-owned by the German corporation Huls A.G.

the costs of abating alleged hazards of asbestos-containing materials in thousands of state-owned buildings throughout those twenty-nine states. [2/] The magnitude, complexity, and time-consuming nature of this case, however, go well beyond the number of parties and the thousands of buildings involved.

The buildings at issue in this action contain hundreds of different asbestos-containing products. [3/] As many courts have recognized, different asbestos-containing products contain different types and amounts of asbestos and may have very different health effects. *See, e.g., Case* v. *Fibreboard Corp.*, 743 P.2d 1062, 1065-67 (Okla. 1987); *Celotex Corp.* v. *Copeland*, 471 So. 2d 533, 538 (Fla. 1985). Moreover, the potential hazardousness of a particular product may differ from building to building, because of differences in use or maintenance of the product. *Cleveland Bd. of Educ.* v. *Armstrong World Indus.*, 22 Ohio Misc. 2d 18, 23-24, 476 N.E.2d 397, 404 (Ct. Com. Pl. 1985). Adjudication of this case, therefore, would have to proceed on a product-by-product, building-by-building basis for each of the hundreds of products and thousands of buildings at issue. *Id.*, 22 Ohio Misc. 2d at 23-25, 476 N.E.2d at 404-06; *Sisters of St. Mary* v. *AAER Sprayed Insulation*, 151 Wis. 2d 708, 717, 445 N.W.2d 723, 726 (Ct. App. 1989).

The States allege that the mere presence of asbestos-containing products in their buildings poses an imminent health hazard to occupants of the buildings, and even to visitors, and that the States must act to abate this hazard. Complaint ¶¶ 9 & 10. Recent studies by scien-

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2/ A thirtieth state, the State of New Jersey, has filed a Motion to Intervene as a Party Plaintiff. This Court plainly has no jurisdiction over New Jersey's claims against GAF, which is headquartered in Wayne, New Jersey, and has its principal place of business in that state. GAF's opposition to New Jersey's Motion to Intervene is discussed below in Point III.

3/ Many of the products potentially at issue in this case are listed and described in reports submitted to the U.S. Environmental Protection Agency ("EPA") by manufacturers of asbestos products pursuant to the Asbestos Information Act of 1988. The reports were too voluminous for the EPA to publish. Instead, the EPA published summaries of the information. The summaries alone take up eighteen pages in the Federal Register. *See* Notice, 55 Fed. Reg. 5144 (1990).

tists at such leading universities as Harvard, Yale, and Johns Hopkins suggest just the opposite. These studies conclude that the asbestos-containing materials most commonly found in buildings generally do not pose a significant health risk to building occupants, and, in fact, that "abatement" efforts may create greater hazards than leaving such materials in place. *See* Mossman, Bignon, Corn, Seaton & Gee, "Asbestos: Scientific Developments and Implications for Public Policy," 247 *Science* 294, 299 (1990) [hereinafter *Science*]; Harvard University Energy and Environmental Policy Center, *Symposium on Health Aspects of Exposure to Asbestos in Buildings*, at 4, 21 (Dec. 1989) [hereinafter *Harvard Symposium*]. 4/ At best, the States' allegation that the defendants' products pose an imminent health hazard is hotly contested, and is an issue that will require painstaking factual analysis on a product-by-product, building-by-building basis.

The States do not assert any federal claims against the defendants. They base their Complaint entirely on a state common-law doctrine that the States refer to as the "public assistance doctrine." Complaint ¶¶ 13 - 18. In Illinois, one of the plaintiff states, the state Supreme Court has already rejected application of this doctrine in the context of asbestos abatement where, as here, the defendants do not have an express statutory duty to take any abatement action. *See Board of Educ.* v. *A, C and S, Inc.*, 131 Ill. 2d 428, 546 N.E.2d 580, 596-98 (1989). In Washington, another plaintiff state, the state Supreme Court has ruled that the doctrine, as applied to claims involving product defects, is preempted by the state's products liability statute. *See Washington Water Power Co.* v. *Graybar Elec. Co.*, 112 Wash. 2d 847, 774 P.2d 1199, 1204 n.4 (1989) (en banc). For claims arising in the other twenty-seven plaintiff states, this Court would have to predict how the highest court in each state would interpret the doctrine, and then apply each state's law to each of the twenty-six defendants with respect to each of their products in each building in each of the twenty-seven states.

4/ GAF has lodged fifteen copies of the *Science* article and the *Harvard Symposium* with the Clerk of this Court.

Nothing in the Complaint filed here suggests that any of the plaintiff states could not bring its claims in the state's own courts. In fact, at least seven states that have not joined this action have done just that. 5/ There are also at least sixty-five other pending asbestos-in-buildings actions brought in state and federal district courts by private and public building owners, none of which is represented here. 6/

As GAF demonstrates below, all of these factors combine to make this case completely inappropriate for adjudication by this Court.

SUMMARY OF ARGUMENT

This Court should exercise its discretion to decline to adjudicate this case. This Court's paramount function is to serve as the nation's supreme federal appellate tribunal. Attempting to adjudicate this huge and fact-intensive case would severely strain the resources of the Court and be a massive and unnecessary diversion from the Court's appellate tasks.

Each of the principal factors this Court has considered in deciding whether to exercise its original jurisdiction weighs against taking jurisdiction over this case. The case would overwhelm the Court in fact-finding and require the court to decide disputed technical issues. All of the substantive legal issues involved would be matters of state law, not federal law. Moreover, the application of state law would

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5/ The seven cases are: *Kentucky* v. *U.S. Gypsum Co.*, No. 85-CI-1915 (Cir. Ct. Ky., filed Dec. 30, 1985); *Virginia* v. *Owens-Corning Fiberglas Corp.*, No. LJ414-2 (Cir. Ct. Va., filed Feb. 26, 1985); *Maryland* v. *Keene Corp.*, No. 110866 (Md. Cir. Ct., filed Sept. 20, 1984); *South Carolina* v. *W.R. Grace & Co.*, No. 87-CP-405052 (Ct. Com. Pl. S.C., filed Sept. 19, 1987); *Minnesota* v. *A, C & S, Inc.*, No. 99081 (Dist. Ct. Minn., filed Mar. 21, 1985); *West Virginia* v. *AAER Sprayed Insulation*, No. 86-C-458 (City Ct. W. Va., filed July 17, 1986); and *Mississippi* v. *Flintkote Co.*, No. 89-5138(2) (Cir. Ct. Miss., filed Apr. 25, 1989).

6/ As of January of this year, at least twenty-three asbestos-in-building cases have been tried to completion, with the defendants winning in about half the cases. *See* Nat'l Jour. Asb. Build. Lit. (McGuire), Cumulative Index (Aug. 1988 - Jan. 1990).

itself be extraordinarily complex. The suit involves claims arising in twenty-nine different states. The claims are barred in two of those states, but the Court would have to divine and apply the law of each of the other twenty-seven states. At the same time, the relief plaintiffs seek, while not clearly delineated, surely would require the Court, for many years to come, to resolve factual questions concerning the need for, and cost of, abatement in thousands of buildings.

No strict necessity compels the Court to exercise its original jurisdiction to resolve these complicated state-law claims. While the States complain that they are unable to find any other single forum in which to combine the claims of all twenty-nine states against all twenty-six defendants, the original jurisdiction of this Court was never intended to provide such a forum. The original jurisdiction was designed to provide a neutral forum for a state which could not sue non-residents in the state's own courts. There is no claim here that any state is unable to bring its claims against defendants in that state's own courts.

Nor, finally, is there any substance to the principal justification advanced by plaintiffs for such an unusual exercise of original jurisdiction — the claim that this Court could provide an equitable apportionment of a "limited fund" to pay for asbestos abatement. The twenty-nine states bringing this suit do not represent the total universe of public and private building owners with potentially similar claims against manufacturers of asbestos products. In addition, there are thousands of other plaintiffs asserting personal injury claims related to asbestos exposure. Rather than resulting in an equitable apportionment of the defendants' assets, therefore, this suit, if successful, could result only in giving an unjustified advantage to these plaintiffs.

New Jersey's motion to intervene should be denied for the same reasons that the Court should decline to exercise its original jurisdiction over the other plaintiffs' claims. Moreover, this Court does not have jurisdiction over New Jersey's claims against GAF, because GAF is a citizen of New Jersey.

ARGUMENT

I. This Court Should Decline to Take Jurisdiction Over This Case to Prevent a Massive Diversion From the Court's Primary Function as the Nation's Supreme Federal Appellate Tribunal

This Court's original jurisdiction over cases involving states and citizens of other states is discretionary, not mandatory. *See Ohio* v. *Wyandotte Chemicals Corp.*, 401 U.S. 493, 497–99 (1971); *Washington* v. *General Motors Corp.*, 406 U.S. 109, 113 (1972). As the Court has recognized, the advent of "long-arm jurisdiction" has enabled states to litigate most such cases in their own courts. Moreover, adjudicating such cases diverts the Court from its primary function as the nation's supreme federal appellate tribunal. *See Wyandotte Chemicals*, 401 at 497–98; *General Motors*, 406 U.S. at 113.

Because of the obvious burdens that original jurisdiction cases impose on the Court at the expense of its appellate functions, the Court seeks to exercise its original jurisdiction "sparingly." *United States* v. *Nevada*, 412 U.S. 534, 538 (1973); *Illinois* v. *City of Milwaukee*, 406 U.S. 91, 93–94 (1972). In suits brought by a state against the citizens of another state, the Court may decline to exercise its original jurisdiction where

> (1) declination of jurisdiction would not disserve any of the principal policies underlying the Article III jurisdictional grant and (2) the reasons of practical wisdom that persuade us that this Court is an inappropriate forum are consistent with the proposition that our discretion is legitimated by its use to keep this aspect of the Court's functions attuned to its other responsibilities.

Wyandotte Chemicals, 401 U.S. at 499.

The cases most likely to divert the Court from its appellate function and least appropriate for the Court to adjudicate in its original jurisdiction are those in which: (1) there is a large amount of fact-finding, *id.* at 498, 503; (2) the fact-finding involves unresolved or dis-

puted scientific issues, *id.* at 503–04; (3) there are no difficult or important questions of federal law to be resolved, *id.* at 497–98; and (4) the relief sought is impractical for the Court to administer, *General Motors*, 406 U.S. at 114–16. Adjudicating cases in which these factors are present is a "serious intrusion" on the Court's primary responsibilities, and can be justified only by the "strictest necessity." *Wyandotte Chemicals*, 401 U.S. at 505.

All of these factors militating against the exercise of the Court's original jurisdiction are present here. The States have demonstrated no necessity whatsoever, much less the "strictest necessity," for burdening the Court with such a patently unwieldy and unmanageable case.

A. This Case Is Inappropriate for Adjudication by This Court Because It Involves Technical and Scientific Issues That Are Sharply Disputed

This Court recognized in *Wyandotte Chemicals* that it was unrealistic for the Court to exercise its original jurisdiction to adjudicate disputed scientific questions "for which there is presently no firm answer." 401 U.S. at 503. Precisely such a situation exists here.

Scientists generally concur that long-term, high-level exposure to asbestos fibers, such as the exposures that were sometimes encountered in the process of manufacturing asbestos-containing materials, has the potential to cause disease. *See Harvard Symposium*, at 16. This case, however, is not about such high-level exposures. Rather, this case is about the alleged risk from the generally low levels of asbestos fibers that may be released from the asbestos-containing materials in the plaintiffs' buildings.

The States' allegation that the mere presence of asbestos-containing materials in the States' buildings poses an imminent health threat warranting abatement is far from accepted scientific fact. To the contrary, recent scientific studies have concluded that asbestos-containing materials in buildings generally do not pose a known unreasonable risk. At best, the issue is in dispute.

A recent symposium of noted health scientists at Harvard University reported:

> In general, these results demonstrate that airborne asbestos levels inside buildings are low and suggest that in many buildings the difference between prevalent indoor and outdoor asbestos fiber concentrations is not significant from a public health perspective.

Harvard Symposium, at 14.

Similarly, in a recent article authored by scientists at the University of Vermont and Johns Hopkins and Yale universities, among others, the authors concluded that:

> The available data and comparative risk assessments . . . indicate that chrysotile asbestos, the type of fiber found predominantly in U.S. schools and buildings, is not a health risk in the nonoccupational environment. Clearly, the asbestos panic in the U.S. must be curtailed . . . .

Science, at 299.

The propriety of the abatement efforts the States are asking the defendants to pay for is also hotly disputed. Both the *Harvard Symposium* and the *Science* article suggest that "abatement" efforts often create a greater hazard than leaving asbestos–containing materials in place. For example, the authors of the *Science* article concluded:

> As a result of public pressure, asbestos often is removed haphazardly from schools and public buildings even though most damaged [asbestos–containing material] is in boiler rooms and other areas which are inaccessible to students or residents. The removal of previously undamaged or encapsulated asbestos can lead to increases in airborne concentrations of fibers in buildings, sometimes for months afterwards, and can result in problems with safe removal and disposal. Asbestos abatement also has led to the exposure of a large new cohort of relatively young asbestos removal workers.

Science, at 299 (footnotes omitted); *see also Harvard Symposium*, at 4, 21.

As this Court has recognized, the resolution of disputed scientific issues is not an appropriate expenditure of this Court's limited time and resources. *Wyandotte Chemicals*, 401 U.S. at 503–04. As in *Wyandotte*, "[t]he notion that appellate judges, even with the assistance of a most competent Special Master, might appropriately undertake . . . to unravel these complexities is, to say the least, unrealistic." *Id.* at 504.

B. Adjudication of This Case Would Deluge This Court in Technical Fact-finding Involving Hundreds of Products in Thousands of Buildings

The magnitude of the fact-finding that this case would entail far exceeds not only the previous cases this Court has adjudicated in its original jurisdiction; it dwarves even those cases the Court has refused to adjudicate. *Wyandotte Chemicals*, a case in which the Court balked at the difficult fact-finding that would be required, involved water-pollution claims of a single State against just three chemical companies. *General Motors* involved antitrust claims of eighteen States against just four defendants. Here, there are twenty-nine states bringing claims against twenty-six defendants.

Moreover, the claims in *Wyandotte* involved the dumping of just a single chemical — mercury — into the waters of Lake Erie. Here, there are hundreds of different asbestos products made by the various defendants.

The plaintiffs have identified the following asbestos-containing products as the products at issue in this litigation: spray-on asbestos used as fireproofing and as acoustical and decorative plasters, pipe coverings, boiler blankets, joint connections, mechanical insulation, ceiling tiles, wall and ceiling plasters, paints, grouts, and floor tiles. Brief in Support of Motion for Leave to File Complaint, at 13 [hereinafter Pl. Br.]. What the plaintiffs fail to point out is that this list de-

scribes generic categories of asbestos-containing materials. Each of these categories includes a wide variety of different products.

One court has determined that there may be as many as 650 different asbestos-containing products used in the construction of buildings in the United States. *Sisters of St. Mary* v. *AAER Sprayed Insulation*, No. 85CV5952, slip op. at 21 (Wis. Cir. Ct. Dec. 17, 1987), *aff'd*, 151 Wis. 2d 708, 445 N.W.2d 723 (Ct. App. 1989). The materials about which the plaintiffs here complain were manufactured and installed in the plaintiffs' buildings over many decades. Each of these products may contain different types of asbestos fibers, different percentages of asbestos by weight or volume, and different additional components, all of which may result in widely varying capacities to release asbestos fibers into the air. *See id.*, 151 Wis. 2d at 716–17, 445 N.W.2d at 726.

These differences among products are not merely cosmetic; they can make a critical difference in potential health effects. That is why the Fifth Circuit and other courts have concluded that "all asbestos-containing products cannot be lumped together in determining their dangerousness." *Gideon* v. *Johns-Manville Sales Corp.*, 761 F.2d 1129, 1145 (5th Cir. 1985); *see also Mullen* v. *Armstrong World Indus.*, 200 Cal. App. 3d 250, 255–58, 246 Cal. Rptr. 32, 36–37 (1988); *Case* v. *Fibreboard Corp.*, 743 P.2d 1062, 1065–67 (Okla. 1987); *In re Related Asbestos Cases*, 543 F. Supp. 1152, 1158 (N.D. Cal. 1982).

Because of the tremendous variety of asbestos-containing materials and the differences among the products of different manufacturers, the fact-finding necessary to adjudicate this litigation would be a mammoth undertaking, requiring nothing less than a product-by-product investigation in each of the thousands of buildings owned by the plaintiff states. *See Sisters of St. Mary*, 151 Wis. 2d at 717, 445 N.W.2d at 726. Indeed, because different uses of the products and different maintenance practices may also affect the extent to which asbestos fibers are released, the trier of fact would have to examine not only each product, but each installation of each product in each building. As one trial court noted:

> Identical applications of an asbestos-containing product may be legally defective in one building but not in another. Also, one defendant's product, because of its use or location, may become friable in one room of a building, but remain without a hazardous defect in another area of the same structure.

Cleveland Bd. of Educ. v. *Armstrong World Indus.*, 22 Ohio Misc. 2d 18, 23-24, 476 N.E.2d 397, 404 (Ct. Com. Pl. 1985) (footnote omitted).

In order to understand how massive a task the fact-finding in this case would be, it would be instructive to consider the factual complexity involved in the resolution of the issues presented by any one of the plaintiffs' buildings.

Each building itself would present as many separate "cases" for resolution as there are separate installations of different products in that building. *See id.* The Court would first have to identify each product installation at issue and determine whether the product contained asbestos. Then it would have to determine the manufacturer of the product. Each of these preliminary steps would require analysis of an enormous amount of factual evidence, such as sales invoices, architectural and engineering plans and specifications, and testimony of installers, contractors, building maintenance personnel, and experts who would conduct chemical analyses of the products.

The plaintiffs' theory of liability would then dictate other facts to be determined. The plaintiffs base their claims on a common-law doctrine — the emergency assistance doctrine, which the States rename as the public assistance doctrine. 7/ This doctrine, as will be discussed in

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7/ Section 115 of the *Restatement of Restitution* (1937) describes this doctrine as follows:

> A person who has performed the duty of another by supplying things or services, although acting without the other's knowledge or consent, is entitled to restitution from the other if
>
> (a) he acted unofficiously and with intent to charge therefor, and
>
> (b) the things or services supplied were immediately necessary to satisfy the requirements of public decency, health, or safety.

more detail in Section C, has been interpreted differently in different states. Under any interpretation, however, the plaintiffs would at least have to prove (1) that each defendant was under a duty to abate the alleged hazard, and (2) that the abatement efforts undertaken for each product were "immediately necessary" to protect public safety. *See Restatement of Restitution* § 115 (1937).

In some states, the question of whether the "duty to abate" requirement has been met may hinge on whether the defendant breached a duty under tort or contract law in manufacturing the product or supplying it to the plaintiff. *See City of New York* v. *Keene Corp.*, 132 Misc. 2d 745, 505 N.Y.S.2d 782 (Sup. Ct. 1986), *aff'd*, 129 A.D.2d 1019, 513 N.Y.S.2d 1004 (App. Div. 1987). For claims arising in these states, the Court would have to do the fact-finding required pursuant to each of the available products liability theories the plaintiffs might pursue.

As discussed in Section C below, determining the legal elements of the various products liability theories in each of the plaintiff states would itself be an arduous task. Even without considering the variations from state to state, however, a schematic, simplified version of the possible theories demonstrates the extremely fact-intensive nature of the case.

If the plaintiffs assert a strict liability claim based upon the "risk-utility" test, the Court, under the law of some states, would be required to determine whether, under the circumstances of the installation in question, any risk associated with the product was outweighed by its utility. *See, e.g., Voss* v. *Black & Decker Mfg. Co.*, 59 N.Y.2d 102, 108–09, 463 N.Y.S.2d 398, 402–03, 450 N.E.2d 204, 208–09 (1983). If the plaintiffs assert a strict liability claim based on the "consumer expectation" test, the Court, under the law of some states, would be required to determine who an "ordinary consumer" of each product would be, what that consumer would expect about the safety of the product, whether the product met this expectation, and, if not, whether the failure to meet the expectation was a proximate cause of the plaintiffs' alleged

damages. *See, e.g., Knitz* v. *Minster Machine Co.*, 69 Ohio St. 2d 460, 465–466, 432 N.E.2d 814, 817-18, *cert. denied*, 459 U.S. 857 (1982).

If the plaintiffs claim liability under negligence or strict liability based upon a "failure to warn" test, the Court, in certain states, would have to determine in regard to each product: (1) whether a warning should have been placed on the product when it was manufactured; (2) if such a warning was in place, whether the warning was adequate; and (3) if no warning was used, whether the lack of a warning was the proximate cause of the plaintiff's alleged damages. *See, e.g., Cleveland Bd. of Educ.*, 22 Ohio Misc. 2d at 24–25, 476 N.E.2d at 405–05.

Factual issues raised by the various available affirmative defenses would also have to be addressed in the context of each product installation. *See id.* For example, at issue may be whether the product was misused or improperly maintained, whether the cause of action was filed within the time permitted by the applicable statute of limitations, whether a statute of repose applies, whether the State's knowledge about the potential health risks posed by the product at the time the product was purchased estops the State from asserting its claim, and whether the product was specified for installation by the State and whether such a government specification precludes liability under a government contractor defense. In one asbestos–in–buildings case, the defendants raised more than forty separate affirmative defenses. *See Sisters of St. Mary*, 151 Wis. 2d at 719, 445 N.W.2d at 727.

To determine a defendant's liability, the Court would also have to consider the second prong of the emergency assistance doctrine: whether the abatement efforts performed by the plaintiffs were immediately necessary to protect public health. *Restatement of Restitution* § 115, comment a. This would require an analysis of the condition of each installation of each product (e.g. whether it was damaged) and the degree of hazard it might pose, based, among other things, upon the type and amount of asbestos it contained and the manner in which the asbestos fibers are bound within the product.

The factual inquiry regarding each installation would not end with the issues of liability. If liability were established, the Court would then have to determine the reasonable amount of damages associated with each installation of each product. *See, e.g., Sisters of St. Mary*, 151 Wis. 2d at 719, 445 N.W.2d at 727. That figure would depend on a number of facts peculiar to each installation, including: the amount of material involved, its location in the building, the abatement steps reasonably necessary to reduce the health risk, and the cost of such abatement.

As the foregoing demonstrates, the fact-finding involved in adjudicating liability and damages in regard to even a single building is a formidable task. The plaintiffs, however, are asking this Court to undertake such fact-finding not in regard to one building, but to thousands of buildings throughout the twenty-nine plaintiff states. Even if this case involved the claims of but a single state, it would severely tax the resources of this Court. Adding the complexity of twenty-nine plaintiff states would overwhelm the Court, wreaking havoc on the Court's appellate responsibilities.

The difficulties presented in the management of omnibus cases such as this have been thoroughly reviewed by lower courts in Ohio and Wisconsin, which refused to certify proposed classes of building owners. *See Cleveland Bd. of Educ.*; *Sisters of St. Mary*. Both courts found that the fact-finding involved in joining together large groups of plaintiffs and defendants would be unmanageable. The Court in *Cleveland Bd. of Educ.* concluded:

> The invitation to declare a multi-plaintiff, multi-defendant and multi-product class creates an allure of a legal paradise where we all may picnic together. This vision seems attractive from afar, but upon closer inspection, is a quicksand upon which this court will not venture . . . .

220 Ohio Misc. 2d at 27, 476 N.E.2d at 407.

As in *Wyandotte*, if this Court were to exercise its original jurisdiction in this case, it would of necessity drastically reduce the Court's

attention to those "controversies for which this Court is a proper and necessary forum." *Id.* at 505. The States' argument that the case would not be unduly burdensome because the Court could rely on a special master to make proposed findings of liability and to allocate damages, Pl. Br. at 26, seriously understates the role the Court would have to play. "In an original suit, even when the case is first referred to a master, this Court has the duty of making an independent examination of the evidence, a time-consuming process which seriously interferes with the discharge of [the Court's] ever-increasing appellate duties." *Georgia* v. *Pennsylvania R.R.*, 324 U.S. 439, 470 (1945) (Stone, C.J., dissenting).

C. The Plaintiffs' Claims Are Based Entirely on State Law, not Federal Law, and the Court Would Both Have to Apply a Number of Inconsistent State Laws and Predict What the Law Would Be in Many States

As this Court recognized in *Wyandotte*, this Court's primary responsibilities in the nation's legal system lie "almost without exception in the domain of federal law," and "much would be sacrificed, and little gained" by exercising the Court's original jurisdiction in cases bottomed on state law. 401 U.S. at 497. Here, the States do not bring their suit under any federal statute. Their only theory of recovery is a claim for restitution based on the common-law emergency assistance doctrine. *See* Complaint ¶¶ 13–18; Pl. Br. at 28–34. Such a claim is a matter of state law. 8/ *See Hebron Public School Dist. No. 13* v. *U.S. Gypsum*, 690 F. Supp. 866, 868 (D. N.D. 1988).

8/ The States baldly assert that "the legal issues presented by the States are not dependent upon the local law." Pl. Br. at 23. On the very same page of their brief, however, the plaintiffs state that "no federal statute covers the matters raised here." *Id.* They make no claim that this litigation would be governed by federal common law. Plainly, therefore, the legal issues presented by the States would be dependent upon nothing but local law.

At heart, this case involves products liability claims by States against manufacturers. Any suggestion by the States that federal common law should govern such claims would violate the principles of *Erie R.R.* v. *Tompkins*, 304 U.S. 64 (1938). As this Court recognized in *Wyandotte*, the grant of original jurisdiction in the Supreme Court in ac-

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Moreover, the emergency assistance doctrine has not been uniformly adopted by all states. Therefore, not only is this case bottomed on state, rather than federal, law, but there is no single state law for the Court to apply. The claims asserted arise in twenty-nine different states. As this Court has ruled in the context of regular diversity jurisdiction in the federal courts, where no single state has sufficient contacts to ensure that the application of its law to out-of-state claims comports with Due Process, claims arising in different states must be adjudicated according to the laws of each of those states, if there are significant conflicts among those laws. *See Phillips Petroleum Co.* v. *Shutts*, 472 U.S. 797, 814–23 (1985); *Allstate Ins. Co.* v. *Hague*, 449 U.S. 302 (1981).

Here, as noted above, decisions of the highest courts of Illinois and Washington, two of the plaintiff states, preclude application of the restitution theory asserted by the plaintiffs. *See Board of Educ.* v. *A, C and S, Inc.*, 131 Ill. 2d 428, 546 N.E.2d 580, 596–98 (1989); *Washington Water Power Co.* v. *Graybar Elec. Co.*, 112 Wash. 2d 847, 774 P.2d 1199, 1204 n.4 (1989) (en banc). The claims of these two states thus are barred.

(Continued)
tions between states and citizens of other states, like the Article III grant of diversity jurisdiction in the federal courts generally, is not a mandate for the creation of general federal common law. *Wyandotte*, 401 U.S. at 498 n.3. Although this dictum of *Wyandotte* has since been overruled in regard to pollution claims arising in interstate waters, *see International Paper Co.* v. *Ouellette*, 479 U.S. 481, 488 (1987), the point is still valid for claims, like those involved in this case, that arise within the territorial borders of states. Indeed, it would be most incongruous for manufacturers to be subject to state law for claims involving products sold to private citizens within a state, but subject to a different, federal common law for sale of the same products to the state itself. It would also invite forum shopping, as appears to be happening here, where, for example, the States of Illinois and Washington join in seeking restitution in this Court, even though their claims are barred under decisions rendered by their own highest courts. *See Board of Educ.* v. *A, C and S, Inc.*, 131 Ill. 2d 428, 546 N.E.2d 580, 596–98 (1989); *Washington Water Power Co.* v. *Graybar Electric Co.*, 112 Wash. 2d 847, 774 P.2d 1199, 1204 n.4 (1989) (en banc).

In other states, however, application of the emergency assistance doctrine may vary. Federal district courts sitting in diversity, applying the law of some of the states that are plaintiffs in this action, have, like the Illinois Supreme Court in *A, C and S*, dismissed asbestos abatement restitution claims based on Section 115 where the defendants were not under an express statutory duty to perform such abatement. *See Town of Hooksett School Dist.* v. *W.R. Grace & Co.*, 617 F. Supp. 126, 134 (D. N.H. 1984); *Franklin County School Bd.* v. *Lake Asbestos of Quebec, Ltd.*, 1988 U.S. Dist. LEXIS 12779 (N.D. Ala. 1986). In other trial courts, however, similar asbestos abatement claims based on the emergency assistance doctrine have survived motions to dismiss, where the plaintiffs alleged the defendants breached a duty in tort or contract by supplying asbestos-containing products. *See, e.g., Hebron*, 690 F. Supp. at 868–69; *City of New York* v. *Keene Corp.*, 132 Misc. 2d 745, 505 N.Y.S.2d 782 (Sup. Ct. 1986), *aff'd*, 129 A.D.2d 1019, 513 N.Y.S.2d 1004 (App. Div. 1987). In most of the plaintiff states, the doctrine has not been tested at all in this context.

This Court, therefore, would face the task of predicting how the highest court of each plaintiff state would interpret the doctrine. Since other similar claims are pending in many jurisdictions, the Court's predictions might prove to be mistaken as the state courts render their judgments.

The potentially different interpretations of the emergency assistance doctrine, however, would be just the beginning of the complex exegesis of state law that would be involved in this case. The Court would also face what for many states is the novel issue of whether restitution is available for the cost of future abatement efforts. *See University of Vermont* v. *W.R. Grace & Co.*, 565 A.2d 1354, 1356 n.2 (Vt. 1989) (holding that claims for future abatement efforts are premature); *accord New York* v. *Schenectady Chemicals, Inc.*, 103 A.D.2d 33, 39, 479 N.Y.S.2d 1010, 1014 (App. Div. 1984). Again, the Court would have to predict how the highest court in each of the plaintiff states would rule on this issue.

Moreover, in those states where application of the emergency assistance doctrine may require a finding that a defendant breached a duty in tort or contract by supplying its asbestos products to the plaintiff, the Court would have to examine the peculiarities of that state's tort and contract law to determine if each defendant were liable under a theory of negligence, breach of warranty, strict liability, or some other products liability theory. The Court would also have to examine issues bearing on affirmative defenses such as the statute of limitations in each state, and conduct by each state that might indicate contributory negligence or superior knowledge of the alleged asbestos hazard. As is well-recognized, the law in each of these areas varies considerably from state to state. 9/

The Court, therefore, in considering the liability of each defendant, would have to view the enormously complex facts through a kaleidoscope of different state laws. *See Sisters of St. Mary*, 151 Wis. 2d at 718, 445 N.W.2d at 726-27. This poses difficulties that far exceed those presented in either *Wyandotte Chemicals* or *General Motors*, where the litigation was governed by but a single body of law.

9/ For example, courts in different states define "unreasonably dangerous" differently for purposes of strict liability. Louisiana and Oklahoma apply a "consumer-expectation" definition. *See DeBattista* v. *Argonaut-Southwest Ins. Co.*, 403 So. 2d 26, 31-32 (La. 1981); *Lamke* v. *Futorian Corp.*, 709 P.2d 684, 686 (Okla. 1985). Texas applies a "risk/utility" definition, and does not consider consumer expectations. *See Turner* v. *General Motors Corp.*, 584 S.W.2d 844, 851 (Tex.1979). Some states, including Arizona, apply both tests. *See Dart* v. *Wiebe Mfg., Inc.*, 147 Ariz. 242, 244-46, 709 P.2d 876, 879-80 (1985) (en banc). Missouri applies neither test; whether a product is unreasonably dangerous is presented to the jury as an ultimate issue with no further definition. *See Nesselrode* v. *Executive Beechcraft, Inc.*, 707 S.W.2d 371, 376-78 (Mo. 1986) (en banc). A plaintiff's failure to maintain a product is a defense to strict liability in Kentucky and North Carolina, *see* Ky. Rev. Stat. Ann. § 411.320(1) (Michie Supp. 1988); N.C. Gen. Stat. § 99B-3 (1985), but not, apparently, in Missouri. *See* Mo. Ann. Stat. § 537.765(3) (Vernon 1988). Nebraska, unlike other states, has a statutory state-of-the-art defense that protects a manufacturer that has employed the "best technology reasonably available at the time." Neb. Rev. Stat. § 25-21,182 (1985 & Supp. 1986). Tennessee and North Dakota each have statutory "government contractor defense" provisions for manufacturers who have supplied products in compliance with government specifications or standards. *See* Tenn. Code Ann. § 29-28-104 (1980); N.D. Cent. Code § 28-01.1-05(3) (Supp. 1985). This list of differences among the States is non-exhaustive, and is meant merely to illustrate the enormous complexity the Court would face in first determining the different laws to apply, and in then applying them.

As this Court acknowledged in *Wyandotte Chemicals*, the Court has "no claim to special competence in dealing with the numerous conflicts between States and nonresident individuals that raise no serious issues of federal law." 401 U.S. at 497–98. Here, adjudication of this case would not only force the Court to expend tremendous resources in a role for which it has no special competence, but the Court would be displacing state courts which do have special competence in interpreting state law and which are the proper forums for the adjudication of the States' claims. To permit such an indiscriminate use of this Court's original jurisdiction would "not only consume [the Court's] own scarce resources, but permit in effect the bypassing of ordinary trial courts where private parties are required to litigate the same issues." *Maryland* v. *Louisiana*, 451 U.S. 725, 765 (1981) (Rehnquist, J., dissenting).

D. The Relief Sought Is Impractical For This Court to Administer

Even should this Court find a way to surmount the tremendous problems involved in adjudicating the liability issues in this case, and should it determine that some defendants are liable, the relief sought by the plaintiffs would impose even further burdens on the Court. The plaintiffs are seeking to require the defendants to pay for all past and future costs of asbestos abatement in state-owned buildings. Complaint ¶¶ 11 & 16. The States, however, provide virtually no details on how such relief might be implemented, and with good reason: it would be totally impractical for this Court to undertake.

Whether the Court established a fund to pay for future abatement efforts, or periodically assessed the defendants as abatement took place, or required payment after all abatement is completed, any such remedy would involve this Court in ongoing administration and supervision of the process and the claims presented pursuant to it until the completion of abatement in every state-owned building throughout the twenty-nine states. Again, the Court would have to review claims on a building-by-building basis. This would takes years, if not

decades, to accomplish and would be an incredible burden which this Court is ill-equipped to bear. [10/]

II. There Is No "Strict Necessity" For This Court to Exercise Its Original Jurisdiction in This Case

As demonstrated in Point I above, adjudication of this case in this Court would be an enormously time-consuming undertaking that would seriously disrupt the Court's appellate functions. Such a serious intrusion on this Court's primary responsibilities may be justified only by the "strictest necessity." *Wyandotte Chemicals*, 401 U.S. at 505.

The States assert two principal reasons for this Court to take jurisdiction: (1) an alleged absence of an alternative single forum in which to adjudicate the claims of all twenty-nine states against all twenty-six defendants; and (2) the potential for a "limited fund" problem. As GAF shows below, neither of these theories furnishes any necessity for the burden plaintiffs would impose on this Court.

A. There Are Other Courts Available in Which the States' Claims May More Properly Be Heard

The primary purpose underlying the Article III grant of original jurisdiction over cases involving states and citizens of other states was

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10/ GAF submits that another factor making it impractical for this Court to adjudicate this case in its original jurisdiction is that although the plaintiffs cast their Complaint as an action for "restitution," an equitable remedy, in reality they are bringing tort claims for money damages. *Cf. Chauffeurs, Teamsters and Helpers, Local 391* v. *Terry*, 58 U.S.L.W. 4345, 4348 (U.S. March 20, 1990); *Dairy Queen, Inc.* v. *Wood*, 369 U.S. 469 (1962); *Board of Educ.* v. *A, C and S, Inc.*, 131 Ill. 2d 428, 546 N.E.2d 580, 598 (1989) ("The facts of these cases do not fit comfortably within our general concept of restitution."). The defendants, therefore, are entitled to a jury trial. *See* 28 U.S.C. § 1872 (1982) ("In all original actions at law in the Supreme Court against citizens of the United States, issues of fact shall be tried by a jury."); *Beacon Theatres, Inc.* v. *Westover*, 359 U.S. 500 (1959). This Court conducted jury trials in the eighteenth century, *see, e.g., Georgia* v. *Brailsford*, 3 U.S. (3 Dall.) 1 (1794), but the idea of the Court conducting a jury trial today, particularly one of this magnitude, is simply inconceivable. As one treatise comments, "The prospect of a jury trial conducted by nine justices at the expense of other cases is appalling." 17 C. Wright, A. Miller & E. Cooper, *Federal Practice and Procedure* § 4054, at 280 (1988).

to make it unnecessary for states to have to litigate in the courts of other states to obtain redress against nonresidents, "since parochial factors might often lead to the appearance, if not the reality, of partiality to one's own." *Wyandotte Chemicals*, 401 U.S. at 500. Plaintiffs do not allege in this case that any state could not bring its claims against defendants in its own state courts. Indeed, as noted above, in at least seven separate cases, states not represented here have commenced and are actively pursuing asbestos-in-buildings claims in their own courts. Accordingly, the States' own courts provide an alternative forum for the plaintiffs' claims, and declining jurisdiction in this Court would in no way disserve the purposes of Article III. *See United States* v. *Nevada*, 412 U.S. 534, 538 (1973); *General Motors*, 406 U.S. at 113-14.

The States' major contention appears to be that there may be no other single forum in which all twenty-nine states could bring their claims collectively against all twenty-six defendants. Pl. Br. at 23. Nothing in Article III suggests, however, that the purpose of this Court's original jurisdiction was to create a super court to adjudicate omnibus actions brought by groups of states. Whether the States, banding together, could bring their claims all in a single state court is therefore irrelevant to the question of whether this Court should adjudicate the States' claims.

The States contend that "manageability problems could preclude the certification of a class action in state courts." Pl. Br. at 24. GAF agrees that multi-plaintiff class actions to recover costs of asbestos abatement are unmanageable, and that some courts have properly refused to hear them. *See Cleveland Bd. of Educ.; Sisters of St. Mary*. But this Court's original jurisdiction was not intended to make this Court a forum for suits that the states' own courts consider unmanageable.

B. The States' "Limited Fund" Theory Does Not Justify the Exercise of This Court's Original Jurisdiction

The second ground the States assert for the exercise of this Court's original jurisdiction is that this Court is the only forum "where

all of the Asbestos Companies may be sued and their resources equitably apportioned after a finding of liability." Pl. Br. at 12. The plaintiffs also contend that litigation in state courts could lead to inconsistent verdicts, and, in the event of punitive damage awards, "the limited pool of assets would be divided by the first few States to reach judgment, depleting funds available for restitution." Pl. Br. at 24.

The States' "equitable apportionment" and "limited fund" theories simply do not square with the facts of this case. Even assuming a "limited fund" problem would arise, there is no way that a suit involving just twenty-nine states could result in "equitable apportionment" of that fund. The States ignore the numerous other plaintiffs and potential plaintiffs who may have similar claims against these defendants, including the twenty-one states not represented here, and the numerous other public and private building owners whose properties contain asbestos-containing materials.

In addition, asbestos-in-buildings cases are not the only claims involving asbestos faced by many of these defendants. Thousands of personal injury cases, generally involving occupational exposures to asbestos, continue to be filed each year. To be truly equitable, any "limited fund" case would also have to include these claimants, as well as others with claims having nothing to do with asbestos. [11]/ Thus, far from being a comprehensive, equitable solution to the asbestos liability problem, this litigation smacks more of an attempt by certain states to gain an advantage over thousands of other claimants. [12]/

11/ These claims by non-state plaintiffs, of course, fall outside this Court's grant of original jurisdiction and could not be joined in this action. *See California* v. *Southern Pacific Co.*, 157 U.S. 229 (1895).

12/ The States' willingness to drop claims against certain defendants in order to preserve this Court's jurisdiction, *see* Complaint ¶ 4 & Exhibit A, also undercuts their assertion that their purpose in bringing the action in this Court is to encompass all claims within a single proceeding.

C. No Other Theory Advanced By The States Justifies the Exercise of This Court's Original Jurisdiction

The other reasons the States assert for why this would be an appropriate case for the exercise of this Court's original jurisdiction are similarly flawed. The States assert that "the issue of asbestos cost recovery is not currently being addressed other than through building-specific lawsuits in the courts." Pl. Br. at 23. This is true, precisely because there is no other way to litigate asbestos abatement claims.

The States contend that "the magnitude of the asbestos litigation problem is such that, in the long run, resolution of these matters may severely reduce the number of cases subsequently appealed to this Court." Pl. Br. at 23. There may well be important issues of law in this case that may ultimately require resolution by this Court. GAF submits, however, that these issues will be better developed through the normal process of percolation through the state and lower federal courts. This Court would serve its function better acting in its traditional role as an appellate court reviewing matters of law it deems worthy of review, rather than involving itself as the original finder of facts in a case presenting numerous and complex questions of state law.

Finally, the States contend that "federal regulation of asbestos in the States' buildings is inevitable," and that such regulation would impose enormous costs on the States. Pl. Br. at 18. Even were this assertion true, it would not automatically create liability on the part of the defendants, nor would it justify this Court's exercising its original jurisdiction over the States' claims when other forums are available. But the underlying premise of this argument is also flawed. A number of regulations at both the state and federal level are already in place to minimize any hazards that might be posed by asbestos-containing materials in buildings. But there is no indication that further federal regulation requiring abatement in state-owned buildings is "inevitable."

Congress, for example, has passed legislation requiring schools to identify asbestos-containing materials present in school buildings,

and to develop management plans for containing any hazards. *See* Asbestos Hazard Emergency Response Act of 1986 ("AHERA"), 15 U.S.C. §§ 2641–2655 (1988). But Congress has not extended AHERA-type regulation to commercial or public buildings generally — the buildings at issue here. Indeed, the EPA, recognizing that unnecessary abatement may itself be hazardous, has concluded that greater regulation of asbestos in public and commercial buildings is not the most responsible approach to take at this time. *See* Denial of Citizens' Petition, 54 Fed. Reg. 13,632, 13,640 (1989). The States' suit, therefore, is not a response to regulations imposed or about to be imposed by Congress and the EPA, but rather an effort to bypass these bodies and go further than they deem advisable.

* * *

Perhaps the best response to all of the States' contentions is the conclusion of Justice Harlan writing for the Court nearly 20 years ago in *Wyandotte Chemicals*:

> To sum up, this Court has found even the simplest sort of interstate pollution case an extremely awkward vehicle to manage. And this case is an extraordinarily complex one both because of the novel scientific issues of fact inherent in it and the multiplicity of governmental agencies already involved. . . . We have no . . . reason to believe that, were we to adjudicate this case, and others like it, we would not have to reduce drastically our attention to those controversies for which this Court is a proper and necessary forum. Such a serious intrusion on society's interest in our most deliberate and considerate performance of our paramount role as the supreme federal appellate court could, in our view, be justified only by the strictest necessity, an element which is evidently totally lacking in this instance.
>
> What has been said here cannot, of course, be taken as denigrating in the slightest the public importance of the underlying problem [the State] would have us tackle. Reversing the increasing contamination of our environment is manifestly a

> matter of fundamental import and utmost urgency. . . . We mean only to suggest that our competence is necessarily limited, not that our concern should be kept within narrow bounds.

401 U.S. at 504–05.

III. New Jersey's Motion to Intervene Should Be Denied

GAF opposes the State of New Jersey's Motion to Intervene as a Party Plaintiff for the same reasons the corporation asks this Court to decline to exercise jurisdiction over the claims of the twenty-nine other states. In addition, New Jersey's motion must be denied because the Article III grant of this Court's original jurisdiction does not extend to claims by New Jersey against GAF, which has its headquarters and principal place of business in New Jersey and is thus a citizen of that state. *Cf.* 28 U.S.C. § 1332 (1982); *Guerrino* v. *Ohio Cas. Ins. Co.*, 423 F.2d 419, 421 (3d Cir. 1970). "Suits between a State and its own citizens are not included within [the Court's original jurisdiction] by the Constitution." *California* v. *Southern Pacific Co.*, 157 U.S. 229, 261 (1895); *see also Georgia* v. *Pennsylvania R.R.*, 324 U.S. 439, 463 (1945) ("Georgia may not of course invoke the original jurisdiction of the Court against one of her citizens.").

CONCLUSION

GAF therefore urges this Court to the deny plaintiffs' Motion for Leave to File Complaint and New Jersey's Motion to Intervene, and to dismiss the action.

Respectfully submitted,

Sidney S. Rosdeitcher
(Counsel of Record)
Robert N. Kravitz
Paul, Weiss, Rifkind, Wharton & Garrison
1285 Avenue of the Americas
New York, New York 10019
(212) 373-3000

Randall L. Solomon
Baker & Hostetler
3200 National City Center
Cleveland, Ohio 44114
(216) 621-0200

Patrick J. Lamb
James C. Murray, Jr.
Katten Muchin & Zavis
525 West Monroe Street
Suite 1600
Chicago, Illinois 60606
(312) 902-5200

Attorneys for GAF Corporation

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