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IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

STATE OF ALABAMA, *et al.*,

Plaintiffs,

vs.

W.R. GRACE & COMPANY, *et al.*,

Defendants.

ON MOTION FOR LEAVE TO FILE COMPLAINT

BRIEF OF DEFENDANT KEENE CORPORATION IN OPPOSITION TO MOTION FOR LEAVE TO FILE COMPLAINT

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**STATEMENT PURSUANT TO RULE 29.1
OF THE RULES OF THE SUPREME COURT
OF THE UNITED STATES**

Keene Corporation is a wholly owned subsidiary of Bairnco Corporation.

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**BRIEF OF DEFENDANT KEENE CORPORATION
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TO FILE COMPLAINT**

Keene Corporation ("Keene")¹ respectfully submits this brief in opposition to plaintiffs' motion for leave to file an original complaint in this Court.²

¹ Keene has never mined asbestos, nor manufactured, fabricated, sold, distributed or otherwise placed into commerce thermal insulation or acoustical products containing asbestos. Keene's involvement in asbestos-related litigation stems from its stock acquisition of Baldwin-Ehret-Hill, Inc. ("BEH") in 1968 for 8 million dollars. BEH was formed by the merger of Ehret Magnesia Manufacturing Company ("Ehret"), a Pennsylvania corporation, and Baldwin-Hill Company ("B-H"), a New Jersey corporation. A former subsidiary of Keene, Keene Building Products Corporation ("KBPC") and KBPC's corporate predecessors, BEH, Ehret and B-H, did at one time manufacture and sell thermal insulation and acoustical products containing asbestos. Keene expressly denies that it is the successor to the unknown and unforeseen contingent tort, contractual or other liabilities of KBPC, BEH and BEH's corporate predecessors.

² On April 3, 1990 Keene was served with the State of New Jersey's motion to intervene as a party plaintiff to this action. Keene reserves the right to oppose this motion, and adopts and incorporates all arguments advanced by other parties in opposition to New Jersey's motion.

COUNTERSTATEMENT OF THE CASE

The first asbestos-in-building case was brought in May of 1980 against former manufacturers of asbestos-containing building materials. *Cinnaminson Township Board of Education v. U.S. Gypsum Co.*, No. 80-1842 (D.N.J. 1988). Approximately 200 cases followed in the state and federal trial courts. Almost 30 cases have gone to trial and many are in various pretrial stages. Among these cases are several actions brought by States in their own State courts, including the States of Maryland, Mississippi, and West Virginia, and the Commonwealths of Kentucky and Virginia.

Despite the obvious familiarity of trial courts in the state and federal systems with these actions, twenty-nine State Attorneys General seek to invoke the original jurisdiction of this Court to deal with what is in essence another asbestos-in-building case. Plaintiffs assert that the "seriousness and dignity of their claim require the attention of this Court." Plaintiffs' Brief In Support Of Motion For Leave To File Complaint ("Plaintiffs' Brief") at 21. The "serious" nature of their claim, however, is nothing more than what the trial courts of this country have been dealing with for almost ten years. Plaintiffs point to nothing that would distinguish their claims from those brought by the States of West Virginia and Maryland, for example, or from those brought by private building owners.

Plaintiffs attempt to justify their "seriousness and dignity" claim by engaging in the same type of "asbestos panic" that has recently been exposed and criticized in various scientific journals. See, e.g., Mossman, Bignon, Corn, Seaton & Gee, *Asbestos: Scientific Developments and Implications for Public Policy*, Science, at 294-300 (January 19, 1990) ("The available data do not indicate that asbestos associated malignancies or functional impairment will occur as a result of exposure to most airborne concentrations of asbestos in buildings. . ."); Abelson, P.H., *The Asbestos Removal Fiasco*, Science, at 1017 (March 3, 1990) ("The content of fibers in the air of buildings containing asbestos is harmlessly small and essentially the same as in outdoor air"). The Environmental Protection Agency recently concurred,

stating that "there is no available evidence that disabling asbestosis is caused by non-occupational exposure or relatively low levels of occupational exposure." 54 Fed. Reg. No. 132 at 29460, 29470 (July 12, 1989). There is no current federal regulation requiring the removal of products containing asbestos from state buildings.³

Indeed, the most recent studies confirm that massive removal of asbestos-containing building products is not supported by scientific data:

In the absence of epidemiologic data or estimations of risk that indicate that the health risks of environmental exposure to asbestos are large enough to justify high expenditure of public funds, one must question the unprecedented expenses on the order of \$100 billion to \$150 billion that could result from asbestos abatement.

Mossman & Gee, *Medical Progress, Asbestos Related Diseases*, The New England Journal of Medicine 1721, 1729 (June 29, 1989).

Asbestos-in-building cases are complex product liability actions, often involving many buildings, which require active judicial attention from the initiation of the suit until its conclusion. The cases generally require more than three years of prolific discovery closely supervised by the trial court. For example, the State of West Virginia's action was brought on September 8, 1986. Despite almost four years of intense discovery, plaintiff has yet to complete its initial burden of identifying buildings, products and defendants at issue. Defendants have just begun their discovery against the plaintiff. Trial has tentatively been scheduled for January 20, 1992, 6 years after the action was brought.

³ Plaintiffs admit this fact by stating that "[i]t *appears* that federal regulation of asbestos in the States' buildings is *inevitable*." (emphasis added) Plaintiffs' Brief at 18.

The trial court has held conferences almost on a monthly basis in order to closely supervise all aspects of discovery and hear and decide numerous pretrial motions.

These cases are peculiarly fact intensive. After plaintiffs identify each building and all products at issue, and demonstrate the nexus between an individual defendant, a particular product and a specific building, they must prove that each asbestos-containing product in each building presents an imminent danger to building occupants. Discovery regarding those issues requires close judicial supervision including devising, implementing and enforcing case management orders; inspection and testing orders; massive document productions involving tens of millions of documents; lengthy and numerous depositions of both fact and lay witnesses; inspections of each building put at issue by industrial hygienists, photographers and attorneys; and bulk sampling and testing of products.

In addition to the foregoing, which only relates to the product identification prong of plaintiffs' case, plaintiffs will be required to show actual damages resulting from the presence of products allegedly manufactured by defendants. Proving damages requires discovery and testimony of, among others, industrial hygienists, economists and engineers.

Plaintiffs, of course, must ultimately prove that the products at issue present an imminent hazard to building occupants. This inquiry alone will require the discovery and introduction of evidence presented by a host of experts, including epidemiologists, pathologists, oncologists, pulmonologists, industrial hygienists and risk assessors.

These factual complexities and the legal obstacles discussed below strongly argue that this Court should deny plaintiffs' motion and remit the present complaint to the trial judges who have been handling like cases for almost a decade.

ARGUMENT

I.

IN ITS FULL VERSION, THE CASE IS NOT
WITHIN THE ORIGINAL JURISDICTION OF THIS
COURT BECAUSE THE ABSENCE OF COMPLETE
DIVERSITY PUTS IT OUTSIDE THE FEDERAL
JUDICIAL POWER

The moving States invoke the provision of Section 2 of Article III of the Constitution extending the original jurisdiction of this Court to "all cases in which a State shall be a party." As movants apparently recognize, however, it has long been settled that this grant is restricted to cases otherwise within the judicial power of the United States, defined in the previous clause of Section 2. In the Court's words, "[t]his second clause distributes the jurisdiction conferred upon the Supreme Court in the previous one into original and appellate jurisdiction; but does not profess to confer any." *Pennsylvania v. Quicksilver Co.*, 77 U.S. (10 Wall.) 553, 556 (1871); *see also United States v. Texas*, 143 U.S. 621, 643-644 (1892); *Duhne v. New Jersey*, 251 U.S. 311, 314 (1920); *Monaco v. Mississippi*, 292 U.S. 313, 321 (1934). Thus, here, because several States are seeking to be parties, the real question is whether the case is within federal jurisdiction at all.*

Significantly, movants assert that their case falls within the judicial power of the United States only because it is a controversy "between a State and Citizens of another State" and "between a State . . . and foreign . . . citizens." U.S. Const., art. III, § 2, cl. 1. Plaintiffs' Brief at 11. There is no suggestion that the case is one "arising under [the] Constitution [or] the laws

* Congress could not wholly withdraw any part of the original jurisdiction the Constitution itself has conferred, which, indeed, can be exercised without any implementing legislation. *See Arizona v. California*, 440 U.S. 59, 65-66 (1979); *Kentucky v. Dennison*, 65 U.S. (24 How.) 66, 86 (1861). Accordingly, Keene does not rely on any "gap" in 28 U.S.C. § 1251.

of the United States.” *Id.* To the contrary, in distinguishing cases where a federal district court was an alternative forum, the States here expressly disclaim any reliance on federal law. Plaintiffs’ Brief at 23. Yet, absent a federal question or the United States as a party, Article III does not confer on any federal court jurisdiction of controversies between a state and its own citizens. That is the problem here — as drafted, 20 of the 26 defendants named in the purported complaint are citizens of the plaintiff States. This defeats federal jurisdiction and, therefore, this Court’s original jurisdiction.

Indeed, it is long established that jurisdiction premised on the clause of Article III that embraces controversies between a state and citizens of another state requires complete diversity. This wholly unsurprising proposition was announced as early as *California v. Southern Pacific Co.*, 157 U.S. 229, 257, 258, 261 (1895), and has been consistently followed since. *E.g.*, *Minnesota v. Northern Securities Co.*, 184 U.S. 199, 246-247 (1902); *Louisiana v. Cummins*, 314 U.S. 577 (1941). *See also Georgia v. Pennsylvania Railroad Co.*, 324 U.S. 439, 464 (1945); *Ohio v. Wyandotte Chemicals Corp.*, 401 U.S. 493, 496 (1971).

Perhaps an argument can be mounted for re-examining the extension of the complete diversity rule to cases in which federal jurisdiction rests on the existence of a federal question or the presence of the United States as a party. *See New Mexico v. Lane*, 243 U.S. 52, 58 (1917); *Texas v. I.C.C.*, 258 U.S. 158, 163 (1922). It was in such a context that the Court in *Utah v. United States*, 394 U.S. 89, 96 (1969) commented that “a difficult constitutional question” was presented. *See also* C.A. Wright, *The Law of the Federal Courts* 765, 768 (4th ed. 1983); Hart & Wechsler, *The Federal Courts and the Federal System* 304 (3d ed. 1988). But no comparable basis exists for reconsidering the requirement of absolute diversity in cases like this one, where diversity between the State and the opposing parties is the sole premise for both federal jurisdiction and the original jurisdiction of this Court.

II.

**THE ALTERNATIVE PLEA FOR LEAVE TO FILE
SEVERAL INCOMPLETE ORIGINAL SUITS
SHOULD BE REJECTED**

Anticipating the objection just made, movants have suggested a “cure” involving the voluntary dismissal by each of five States of all defendants enjoying the citizenship of the respective plaintiff State. Thus, Ohio and Texas would strike one defendant each, Connecticut and New York would strike two each, and Delaware would eliminate 16 defendants. Plaintiffs’ Brief at 5, 9. The originality of the device must be applauded. But it ought not succeed.

Keene assumes the Court would waive any technical flaw in pleading procedure and would consider the papers as though filed in their amended form — perhaps after denial of the original motion, with leave granted to refile. But that does not overcome the problem. In order to obviate the jurisdictional obstacle, it seems clear *six separate actions* are required, each reflecting complete diversity. No other procedure meets this difficulty. Since the omitted parties in each case are not indispensable, this solution is jurisdictionally possible. It cannot, however, commend itself to this Court’s discretion.

Presumably, the several cases could be consolidated for trial. But they must be kept separate in all other respects. As discussed below, differing State laws must be applied. *See* Point IV (B), *infra*. Beyond this, any judgments adverse to the defendants cannot be merged. Assuming *arguendo* that the States prevail, some States will end up with a judgment running against all defendants, others against only some defendants. Similarly, some defendants will be accountable to less than all the plaintiff States.

Thus, it is obvious that the benefits claimed for a single action in this Court cannot be realized. If there is any merit to the suggestion that the total claims vindicated will exceed the

assets of some of the defendants, the severance of the case into several distinct lawsuits destroys that basis for asking this Court to preside over something akin to an interpleader proceeding. *Cf. Texas v. Florida*, 306 U.S. 398 (1939); *Texas v. New Jersey*, 379 U.S. 674 (1965); *California v. Texas*, 457 U.S. 164 (1982). Even assuming less dramatic scenarios, the advantages normally attaching to resolution of a dispute by this Court are dissipated once several lawsuits are involved.

III.

AT MOST, THIS COURT'S ORIGINAL JURISDICTION OVER THE CASE IS NON-EXCLUSIVE AND MAY BE DECLINED AS A MATTER OF DISCRETION

Although Congress cannot wholly withdraw any aspect of the constitutionally conferred original jurisdiction of this Court, it is long settled that legislation may render that jurisdiction non-exclusive. *Bors v. Preston*, 111 U.S. 252 (1884); *Ames v. Kansas*, 111 U.S. 449 (1884); *Plaquemines Tropical Fruit Co. v. Henderson*, 170 U.S. 511 (1898). Ever since the Judiciary Act of 1789, Congress has provided that this Court's original jurisdiction of cases between a State and citizens of other States, or aliens, is "not exclusive." Act of September 24, 1789 § 13, c. 20, 1 Stat. 80; 28 U.S.C. § 1251(b)(3). Here, then, the Court is expressly given the discretion to decline jurisdiction.

The Court has sometimes denied leave to file a case apparently invoking its exclusive or "obligatory" original jurisdiction — limited to suits between States, 28 U.S.C. § 1251(a). *E.g., Louisiana v. Mississippi*, 109 S. Ct. 551 (1988); *California v. West Virginia*, 454 U.S. 1027 (1981); *Arizona v. New Mexico*, 425 U.S. 794 (1976). But these instances are truly exceptional, and, even so, have provoked dissent. *E.g., Louisiana v. Mississippi*, 109 S. Ct. at 551 (White, J., dissenting); *California v. West Virginia*, 454 U.S. at 1027 (Stevens, J., dissenting). Unsurprisingly, the Court has exercised its discretion to decline to accept an original jurisdiction case much more freely when, as here, Congress itself

has declared that such jurisdiction is non-exclusive. This is true even though Congress may have failed to rest concurrent jurisdiction in any other federal court, thereby relegating the plaintiff State (or States) to State courts. *E.g.*, *Ohio v. Wyandotte Chemicals Corp.*, 401 U.S. at 498 n.3.

On this ground alone, *Maryland v. Louisiana*, 451 U.S. 725 (1981) is distinguishable as a case within this Court's exclusive original jurisdiction. As the Court there noted, that suit — unlike the present one — involved the United States, whose presence added to the appropriateness of invoking this Court's original jurisdiction. 451 U.S. at 744.⁵ Here, only the exercise of discretion is implicated and the Court is entirely free to decline the invitation to hear the matter at first instance.

IV.

EXERCISING ITS DISCRETION, THE COURT SHOULD DENY LEAVE TO FILE HERE

The complaint tendered does not present the kind of controversy that, as a matter of discretion, this Court ought to decide originally. The present case is in all relevant respects like *Wyandotte*, in which leave to file was denied both because the “two principles” primarily underlying the Article III grant of original jurisdiction to this Court were not implicated (401 U.S. at 500), and because the complex nature of the case and the fact-bound determinations involved made it inappropriate for initial resolution in this Court. This case, like *Wyandotte*, would constitute “a serious intrusion” on the Court’s “paramount role as the supreme federal appellate court.” *Id.* at 505. *See also Illinois v. City of Milwaukee*, 406 U.S. 91 (1972); *Washington v. General Motors Corp.*, 406 U.S. 109 (1972). In those circumstances, only “the strictest necessity” justifies the exercise of original jurisdiction. *Wyandotte*, 401 U.S. at 505. No such necessity has or can be shown here.

⁵ Until 1948, the presence of the United States in a suit to which a State was a party brought the case within this Court's *exclusive* original jurisdiction. *See* Judiciary Act of Sept. 24, 1789, § 13, *supra*; Note, 38 N.Y.U. L. Rev. 405 (1963); Hart & Wechsler, *supra*, at 306.

A. *Alternative Forums Are Available to Plaintiffs*

Here, even more clearly than in *Wyandotte*, the plaintiff States are free to invoke their own courts. There can be no doubt about obtaining personal jurisdiction over companies whose actions within the State underlie the complaint. Unlike the situation assumed in *Georgia v. Pennsylvania R. Co.*, 324 U.S. 439, 465-468 (1945), no obstacle here prevents each State joining in one case and one court all potential defendants. Thus, no State is “compelled to resort to the tribunals of other States for redress.” See *Wyandotte*, 401 U.S. at 500. Accordingly, there is no “necessity . . . to resort to this Court in order to obtain a tribunal competent to exercise jurisdiction over the acts of nonresidents of the aggrieved State.” *Id.* There is a wholly adequate alternative forum.⁶ It is no objection that all the plaintiff States may not be able to sue together in a single State court. Needless to say, “the sheer number of States that seek to invoke [the Court’s] original jurisdiction” is not reason enough for this Court to acquiesce. *Washington v. General Motors Corp.*, 406 U.S. at 113. Nor is there any compelling reason for a single suit or single forum. After all, some 21 States⁷ have not joined in the proposed complaint and several have initiated their own lawsuits.⁸ Non-governmental building owners have brought similar claims in state courts.⁹ These suits have named most of the defendants named herein; others have named many more.¹⁰ There is no

⁶ Keene does not concede that any cause of action raised by plaintiffs is valid, but only that alternative forums exist in which those causes of action may be initiated.

⁷ The State of New Jersey’s motion to intervene, filed on April 2, 1990, is now pending before this Court.

⁸ E.g., the States of Maryland and West Virginia, and the Commonwealths of Virginia and Kentucky.

⁹ E.g., *Park Comcar Associates, et al. v. Anchor Packing, et al.*, No. 02442/88 (Supreme Court N.Y. County); *California Federal Bank v. Carey Canada, Inc., et al.*, No. C 728819 (Super. Ct. L.A. County).

¹⁰ For example, the State of West Virginia initially named 75 defendants, including 25 of the 26 defendants named in this action (Appendix A). The State of Maryland named 48 defendants in its cost recovery action, 19 of which were named here (Appendix B).

indication, and plaintiffs have not alleged, and certainly have offered no explanation, as to why they cannot proceed in the same manner.

B. *Local Law Governs the Issues of this Case*

It would be improper for this Court to resolve the local issues involved in this case other than in its appellate role. *See Ohio v. Wyandotte Chemicals Corp.*, 401 U.S. at 497-498. This case invokes local issues including state tort law, statutes of limitations and many factual issues. While recognition that no question of federal law is involved prevents a federal district court from entertaining the suit, it also makes it inappropriate for this Court to exercise original jurisdiction over the controversy.

This Court is ill-equipped to discover, and, in any event, ought not be burdened with implementing the governing law of each of the plaintiff States. Keene knows of no case in which the Court has undertaken such an unwieldy task. Obviously, *Maryland v. Louisiana* was very different, involving only federal questions under the supremacy and commerce clauses of the Constitution. Similarly, *Georgia v. Pennsylvania R. Co.*, heavily relied on by movants, involved a claim under the federal anti-trust laws. Of course, it is not enough that the complaint rests on federal law, as *Illinois v. City of Milwaukee* and *Washington v. General Motors Corp.* attest. But it must be a very rare case indeed in which this Court should exercise its discretionary original jurisdiction to resolve issues of state law, especially when *twenty-nine different* state laws are involved. *See Wyandotte*, 401 U.S. at 497-498.

Nor will it do to posit some general, but non-federal, governing law, against which all the acts of all the defendants may be judged, no matter what their place of business or where the alleged harm occurred. The day is long passed when one can invoke some "transcendental body of law outside of any particular state but obligatory within it." *Black and White T&T Co. v. Brown and Yellow T&T Co.*, 276 U.S. 518, 533 (1928) (Holmes, J., dissenting). Besides, the defendants have a right

to insist that the appropriate local law is applied, including the relevant statute of limitations.

In place of a statement of which plaintiff States' law applies to this action, the plaintiffs base their claim on the Restatement of the Law, specifically the Public Assistance Doctrine found in § 115 of the Restatement of Restitution, as if it were some nationwide statutory code. This is a misuse of the Restatement, which never was intended to substitute for each state's own interpretation of the common law. Worse still, to accommodate this case, the plaintiffs would have the Court interpret the Restatement in derogation of established state precedent. In one of the cases cited by plaintiffs, the Illinois Supreme Court rejected a plaintiff's claim that a viable cause of action in restitution was stated or created under the Restatement's version of the Public Assistance Doctrine. *Board of Education of City of Chicago v. A, C, and S, Inc.*, 131 Ill. 2d 428, 546 N.E.2d 580, 137 Ill. Dec. 635 (1989). Yet the Illinois Attorney General now asks this Court to allow that State to pursue the precise cause of action denied it by its own highest court. The independence of the state judiciary cannot be sacrificed on the grounds that "resolution of these matters may severely reduce the number of cases subsequently appealed to this Court." Plaintiffs' Brief at 23.

C. *The Form of Remedy is Legal not Equitable*

While the plaintiffs choose to frame this action as one seeking an "equitable remedy," (Plaintiffs' proposed complaint at 67), this action seeks only the costs of removal of products containing asbestos from State buildings. The plaintiffs here thus claim a right of relief neither to equitably benefit the general public nor to allay generally the costs of asbestos removal, but to reimburse the plaintiff States for those costs they themselves bear as a result of their ownership of buildings in which asbestos-containing products were installed. It is, therefore, merely an ordinary suit for money damages and defendants are entitled to a jury trial.

In principle, the original jurisdiction of this Court extends to actions at law, triable by jury. 28 U.S.C. § 1872; *see United*

States v. Louisiana, 339 U.S. 699, 706 (1950). But the awkwardness of such a procedure is obvious and the Court has not held a jury trial since the eighteenth century. See *Wyandotte*, 401 U.S. at 511 (Douglas, J., dissenting); Hart & Wechsler, *supra*, at 299. For like reasons, the Court must be reluctant to accept original jurisdiction of any case, even sounding in equity, which requires the assessment of unliquidated damages.

Typically, original actions in this Court involve only declaratory or injunctive relief. Here, however, there can be no avoiding the need to determine the monetary cost of the “corrective” measures the States allege they have undertaken.

D. *Complex and Technical Factual Issues Are Involved*

This Court has recognized that its essential nature is to function as an appellate tribunal, and that it is “ill-equipped for the task of fact finding. . .” *Ohio v. Wyandotte Corp.*, 401 U.S. at 498. In *Wyandotte*, when confronted with numerous factual determinations involving disputed scientific questions, the Court declined to accept jurisdiction, noting:

[T]his court has found even the simplest sort of interstate water 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. Its successful resolution would require primarily skills of fact finding, conciliation, detailed coordination with — and perhaps not infrequent deference to — other adjudicatory bodies, and close supervision of the technical performance of local industries. We have no claim to such expertise or 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.

401 U.S. at 505.

Asbestos-in-building cases involve significant factual disputes of a scientific, technical and medical nature which the Court would have to decide, in addition to the onerous role the Court must play in devising, implementing and enforcing:

- a. case management orders;
- b. inspection and testing orders;
- c. massive document production involving tens of millions of documents;
- d. numerous interrogatories involving:
 - i. product identification
 - ii. liability
 - iii. damages;
- e. lengthy and numerous depositions of fact and expert witnesses;
- f. actual inspections of buildings put at issue in the litigation; and
- g. bulk sampling and testing of products put at issue by plaintiffs.

For example, the *West Virginia* case is a cost recovery action involving less than 500 buildings brought by the State of West Virginia in 1986 against many former manufacturers and installers of asbestos-containing building products, including 25 of the 26 defendants named here. To date, the plaintiff still has not identified all of the buildings and products at issue in that litigation. The state court judge has been intimately involved in each aspect of the litigation, issuing almost twenty pretrial orders and holding hearings virtually on a monthly basis.¹¹ The earliest projected trial date is sometime in 1992.

¹¹ Among the pretrial orders entered by the West Virginia trial judge are a case management order, an order appointing liaison counsel, a confidentiality order, an inspection and testing order, an abatement order, numerous discovery schedules and an order regarding discovery of product formulas.

In this case, plaintiffs have yet to enumerate the many thousands of buildings which are at issue. The previous statewide cases leave no doubt that discovery will be protracted and require close supervision. Among the myriad factual issues to be determined in this case are:

- a. the identity of the asbestos containing building products used in each of the thousands of buildings owned by the plaintiffs;
- b. when each product was installed;
- c. each product's present condition and the need for removal;
- d. plaintiffs' knowledge of product presence;
- e. the "immediacy" of the need for abatement in each building; and
- f. whether, in fact, any asbestos-containing building products have been abated.

In addition to these factual issues which this Court must consider, abundant scientific evidence must be heard. In the typical asbestos-in-building case more than 20 experts, including microscopists, industrial hygienists, pulmonologists, pathologists, radiologists, epidemiologists, biostatisticians, economists and comparative risk experts are consulted and deposed, and many are called to testify at trial. A fundamental issue this Court would be called on to assess is the extent of hazard, if any, of exposure to ultra-low levels of asbestos which may result from the mere presence of in-place asbestos-containing building products. The resolution of this issue will require this Court to cull through libraries of medical, scientific and technical data devoted to this subject.

The abundant factual issues of a highly complex, technical and scientific nature militate against the Court accepting this case. Rather, the plaintiffs should avail themselves of the appropriate state courts that have been adjudicating these cases for almost a decade.

CONCLUSION

For the foregoing reasons, the motion for leave to file should be denied.

Respectfully submitted,

IRENE C. WARSHAUER, Esq.
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DEBORAH J. PETERSON, Esq.
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and

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144 Second Street
San Francisco, California 94105
(415) 543-8131

APPENDIX

APPENDIX A

A-1

IN THE CIRCUIT COURT OF MONONGALIA COUNTY, WEST VIRGINIA

STATE OF WEST VIRGINIA, *ex rel.*, GOVERNOR ARCH A. MOORE, JR., ON BEHALF OF AGENCIES, BOARDS AND COMMISSIONS OF THE STATE OF WEST VIRGINIA, including: THE BOARD OF REGENTS; STATE BUILDING COMMISSION; DEPARTMENT OF HEALTH; DEPARTMENT OF HIGHWAYS; DEPARTMENT OF FINANCE & ADMINISTRATION; BOARD OF VOCATIONAL EDUCATION, DIVISION OF VOCATIONAL REHABILITATION; DEPARTMENT OF EDUCATION; DEPARTMENT OF COMMERCE; DEPARTMENT OF PUBLIC SAFETY; DEPARTMENT OF HUMAN SERVICES; DEPARTMENT OF VETERANS AFFAIRS; DEPARTMENT OF AGRICULTURE; GEOLOGICAL AND ECONOMIC SURVEY; ADJUTANT GENERAL; DEPARTMENT OF CORRECTIONS; and OTHERS,

Plaintiff,

v. Civil Action No. 86-C-458
JURY TRIAL DEMANDED

AAER SPRAYED INSULATIONS; ACANDS, INC., individually and as successor-in-interest to Armstrong Contracting and Supply Corporation; A.H. BENNETT CO.; A.H. FORMAN CO.; AIR-OTHERM APPLICATION COMPANY; ARMSTRONG WORLD INDUSTRIES, INC., individually and as successor-in-interest to Armstrong Cork Company; ASBESTOS CORPORATION, LTD.; ASBESTOSPRAY CORPORATION; AZROCK INDUSTRIES, INC.; BASIC INCORPORATED; BELL ASBESTOS MINES, LTD.; BES-TEX, INC.; BRINCO MINING, LTD.; CAPE ASBESTOS;

CAREY-CANADA, INC.; THE CELOTEX CORPORATION, individually and as successor-in-interest to Philip Carey Manufacturing Company, Philip Carey Corporation, Briggs Manufacturing Company and Panacon Corporation; CERTAINTED CORPORATION; COLUMBIA ACOUSTICS & FIREPROOFING CO.; COMBUSTION ENGINEERING, INC.; CROWN CORK & SEAL COMPANY, INC., individually and as successor-in-interest to Mundet Company; C. TENNANT & SONS; DANA CORPORATION; EAGLE-PICHER INDUSTRIES, INC.; EMPIRE ACE INSULATION MANUFACTURING CORPORATION; FIBREBOARD CORPORATION, individually and as successor-in-interest to Fibreboard Paper Products Corporation, Plant, Rubber and Asbestos Company and Pabco; THE FLINTKOTE COMPANY; GAF CORPORATION, individually and as successor-in-interest to Ruberoid Corporation; GARLOCK, INC.; GEORGIA-PACIFIC CORP.; J. HAMPSHIRE, INC., individually and as successor-in-interest to Hampshire Industries, Inc.; H.K. PORTER COMPANY, INC., individually and as successor-in-interest to Southern Asbestos Company; J.W. ROBERTS, LTD.; KAISER CEMENT CORP.; KEENE CORPORATION, individually and as successor-in-interest to the Ehret Magnesia Manufacturing Company, Baldwin-Ehret-Hill, Inc., Mundet Company, and Keene Building Products Corporation; KENTILE FLOORS, INC.; LAC D'AMIANTE Du QUEBEC, LTD.; LAKE ASBESTOS OF QUEBEC, LTD.; LLOYD E. MITCHELL, INC.; SONNEBORN BUILDING PRODUCTS, INC.; MAC ARTHUR CORP.; MARLEY CO.; MCIC, INC.; NATIONAL

GYPSUM CO., individually and as successor-in-interest to Gold Bond Building Products Corporation; NICOLET, INDUSTRIES, INC., individually and as successor-in-interest to Keasbey & Mattison Company; NORTH AMERICAN ASBESTOS CORP.; OWENS-CORNING FIBERGLAS CORPORATION; OWENS-ILLINOIS, INC.; PFIZER, INC., individually and as successor-in-interest to Charles Pfizer & Company, Inc., Kelley Island Lime & Transport Company, Gibsanburg Lime Products Company and Basics, Inc.; PITTSBURGH CORNING CORPORATION, individually and as successor-in-interest to Unarco Industries, Inc.; PORTER-HAYDEN COMPANY; PPG INDUSTRIES, INC.; PROKO INDUSTRIES, INC.; RAPID-AMERICAN CORPORATION; RAY-MARK INDUSTRIES, INC., individually and as successor-in-interest to Raybestos-Manhattan, Inc.; ROCK WOOL INDUSTRIES, INC.; SOUTHERN TEXTILE CORPORATION; SPRAYED INSULATION, INC.; SPRAYO-FLAKE COMPANY; SPRAYON INSULATION & ACOUSTICS, INC.; SPRAYON RESEARCH CORP.; STANDARD INSULATIONS, INC., individually and as successor-in-interest to Standard Asbestos Insulating and Manufacturing Company; SUPERIOR COMBUSTION INDUSTRIES, INC.; TURNER ASBESTOS FIBRES, INC.; TURNER & NEWALL PLC., individually and as successor-in-interest to Turner & Newall, Ltd.; UNION CARBIDE; UNIROYAL, INC.; UNITED STATES GYPSUM CO.; UNITED STATES MINERAL PRODUCTS COMPANY, INC.; THE WALLACE AND GALE CO.; WALLACE INSULATION, INC.; WILKINS INSULATION CO.; WORBEN CO., INC.; W.R.

GRACE CO., individually and as successor-in-interest to Western Mineral Products Company, Inc. and Zonolite Corporation; WYOLITE INSULATING PRODUCTS; YORK BUILDING PRODUCTS CO., INC.; AND OTHERS, PRESENTLY UNKNOWN, (HEREIN THE "JOHN DOE" DEFENDANTS),

Defendants.

APPENDIX B

A-5

STATE OF MARYLAND

Plaintiff

v.

KEENE CORPORATION
A New York Corporation
200 Park Avenue
New York, New York 10007

Service of Process Upon:
Resident Agent
The Prentice-Hall Corp. System
929 N. Howard Street
Baltimore, Maryland 21201

and

OWENS-ILLINOIS, INC.
An Ohio Corporation
c/o David A. Ward
One Seagate
Toledo, Ohio 43666

Service of Process Upon:
Resident Agent
The Corporation Trust Incorporated
32 South Street
Baltimore, Maryland 21202

and

EAGLE-PICHER INDUSTRIES, INC.
An Ohio Corporation
American Building
Cincinnati, Ohio

Service of Process Upon:
Resident Agent
The Corporation Trust Incorporated
32 South Street
Baltimore, Maryland 21202

IN THE
CIRCUIT COURT
FOR
ANNE ARUNDEL
COUNTY

CIVIL ACTION
NO. 1108600

COMPLAINT FOR
DAMAGES AND
INJUNCTIVE RELIEF
AND DECLARATORY
RELIEF

JURY TRIAL
DEMANDED

and

COMBUSTION ENGINEERING, INC.

A Delaware Corporation

277 Park Avenue

New York, New York 10017

Service of Process Upon:

Resident Agent

The Corporation

Trust Incorporated

32 South Street

Baltimore, Maryland 21202

and

W.R. GRACE & CO.

A Connecticut Corporation

101 North Charles Street

Baltimore, Maryland 21201

Service of Process Upon:

Resident Agent

The Corporation

Trust Incorporated

32 South Street

Baltimore, Maryland 21202

and

CERTAINTIED CORPORATION

A Maryland Corporation

14339 Tridelphia Road

Baltimore, Maryland

Service of Process Upon:

Resident Agent

The Corporation

Trust Incorporated

32 South Street

Baltimore, Maryland 21202

and

U. S. GYPSUM CO.
An Illinois Corporation
101 South Wacker Drive
Chicago, Illinois 60606

Service of Process Upon:
Resident Agent
The Corporation
Trust Incorporated
32 South Street
Baltimore, Maryland 21202

and

NATIONAL GYPSUM CO.
A Delaware Corporation
325 Delaware Avenue
Buffalo, New York

Service of Process Upon:
Resident Agent
The Corporation
Trust Incorporated
32 South Street
Baltimore, Maryland 21202

and

THE CELOTEX CORPORATION
A Delaware Corporation
P.O. Box 22602
Tampa, Florida 33622

Service of Process Upon:
Resident Agent
The Corporation
Trust Incorporated
32 South Street
Baltimore, Maryland 21202

and

U.S. MINERAL PRODUCTS CO.
A New Jersey Corporation
Furnace Street
Stanhope, New Jersey 07874

Service of Process Upon:
Resident Agent
James P. Verhalen
Furnace Street
Stanhope, New Jersey 07874

and

OWENS-CORNING FIBERGLASS CORPORATION
A Delaware Corporation
Box 1035
Toledo, Ohio

Service of Process Upon:
Resident Agent
The Corporation
Trust Incorporated
32 South Street
Baltimore, Maryland 21202

and

STANDARD INSULATIONS, INC.
A Missouri Corporation
c/o Iris B. Ryder
410 N. Olive Street
Kansas City, Missouri 64120

Service of Process Upon:
Resident Agent
Iris B. Ryder
410 N. Olive Street
Kansas City, Missouri 64120

and

CHAS. PFIZER & CO., INC.

A Delaware Corporation
235 East 42nd Street
New York, New York 10017

Service of Process Upon:

Resident Agent
Corporation Trust Company
100 West 10th Street
Wilmington, Delaware 19801

or:

C.T. Corporation System
277 Park Avenue
New York, New York 10017

and

GEORGIA-PACIFIC CORPORATION

A Georgia Corporation
Augusta, Georgia

Service of Process Upon:

Resident Agent
The Corporation
Trust Incorporated
32 South Street
Baltimore, Maryland 21202

and

PROKO INDUSTRIES, INC.

A Texas Corporation
18601 LBJ Fallway
Dallas, Texas 75150

Service of Process Upon:

Resident Agent
c/o H. Myrle Sels
1910 Wall Street
Dallas, Texas 75201

and

C. TENNANT & SONS
A New York Corporation
9 Rockefeller Plaza
New York, New York 10017

Service of Process Upon:
Resident Agent
Herbert M. Brune, Jr.
7 East Redwood Street
Baltimore, Maryland 21202

and

H. K. PORTER CO.
A Pennsylvania Corporation
601 Grant Street
Pittsburgh, Pennsylvania 15219

Service of Process Upon:
Resident Agent
The Corporation
Trust Incorporated
32 South Street
Baltimore, Maryland 21202

and

NICOLET INDUSTRIES, INC.
A Pennsylvania Corporation
Maple Avenue
Ambler, Pennsylvania

Service of Process Upon:
Resident Agent
Guy Gabrielson, Jr.
Maple & Wissahickon Avenues
Ambler, Pennsylvania 19002

and

**ARMSTRONG CONTRACTING
AND SUPPLY CORPORATION**

A Delaware Corporation
Liberty & Charlotte Streets
Lancaster, Pennsylvania 17602

Service of Process Upon:

Resident Agent
The Corporation
Trust Incorporated
32 South Street
Baltimore, Maryland 21202

and

ARMSTRONG WORLD INDUSTRIES, INC.

A Pennsylvania Corporation
Liberty and Charlotte Streets
Lancaster, Pennsylvania 17604

Service of Process Upon:

Resident Agent
The Corporation
Trust Incorporated
32 South Street
Baltimore, Maryland 21202

and

AAER SPRAYED INSULATIONS, INC.

A Division of ROGERS INSULATING
AND ROOFING COMPANY, INC.
An Illinois Corporation

Service of Process Upon:

Resident Agent
Donald Rogers
418 South Mercantile
Wheeling, Illinois 60090

AIR-O-THERM APPLICATION COMPANY, INC.

An Illinois Corporation
225 N. Arlington Heights Road
Elk Grove Village, Illinois

Service of Process Upon:

Resident Agent
Robert Blatt
209 South LaSalle Street
Chicago, Illinois 60604

and

WILKINS INSULATION COMPANY

An Illinois Corporation
20 North Wacker Drive
Chicago, Illinois 60606

Service of Process Upon

Resident Agent
Bryan Orr
20 North Wacker Drive,
Suite 2900
Chicago, Illinois 60606

and

FORTY-EIGHT INSULATIONS, INC.

An Illinois Corporation
Box 158
Aurora, Illinois 60507

Service of Process Upon:

Resident Agent
David Maxam, Vice President
Box 1148
Aurora, Illinois 60597

and

G.A.F. CORPORATION
A Delaware Corporation
140 West 51st Street
New York, New York 10020

Service of Process Upon:
Resident Agent
Prentice-Hall
Corporation System
929 North Howard Street
Baltimore, Maryland 21201

and

RAPID-AMERICAN CORPORATION
A Delaware Corporation
Prentice-Hall Corp.
Systems, Inc.
229 S. State Street
Dover, Delaware 19901

Service of Process Upon:
Resident Agent
Prentice-Hall Corp.
229 S. State Street
Dover, Delaware 19901

and

THE FLINTKOTE CO.
A Delaware Corp.
4 Embarcadero Center
San Francisco, California 94111

Service of Process Upon:
Resident Agent
The Corporation
Trust Incorporated
32 South Street
Baltimore, Maryland 21202

and

FIBREBOARD CORPORATION

A Delaware Corporation
1300 S.W. 5th Avenue
Portland, Oregon 97201

Service of Process Upon:

Resident Agent
Louisiana Pacific Corporation
1300 S. W. 5th Avenue
Portland, Oregon 97201

and

RAYMARK INDUSTRIES, INC.

A New Jersey Corporation
1000 Oakview Drive
Trumbull, Connecticut 06611

Service of Process Upon:

Resident Agent
100 Oakview Drive
Trumbull, Connecticut 06611

and

PITTSBURGH CORNING CORPORATION

A Pennsylvania Corporation
800 Presque Isle Drive
Pittsburg, Pennsylvania

Service of Process Upon:

Resident Agent
800 Presque Isle Drive
Pittsburgh, Pennsylvania 15239

and

LAKE ASBESTOS OF QUEBEC, LTD.

A Delaware Corporation
100 West Tenth Street
Wilmington, Delaware 19801

Service of Process Upon:
Resident Agent
100 West Tenth Street
Wilmington, Delaware 19801

and

TURNER & NEWALL LIMITED
A Foreign Corporation
20 St. Mary's Parsonage
Manchester M3 2NL England

Service of Process Upon:
Resident Agent
20 St. Mary's Parsonage
Manchester M3 2NL England

and

J. W. ROBERTS, LTD.
A Foreign Corporation
20 St. Mary's Parsonage
Machester M3 2NL England

Service of Process Upon:
Resident Agent
20 St. Mary's Parsonag
Manchester M3 2NL England

and

CAPE ASBESTOS
A Foreign Corporation
P.O. Box 8644
Johannesburg, Tvl. 2000

Service of Process Upon:
Resident Agent
P.O. Box 8644
Johannesburg, Tvl. 20000

and

BELL ASBESTOS MINES, LTD.
A Canadian Corporation
c/o Societe Nationale de l'Amiante
Thetford Mines
Quebec, Canada

Service of Process Upon:
Resident Agent
c/o Societe Nationale de l'Amiante
Thetford Mines
Quebec, Canada

and

ASBESTOS CORPORATION LIMITED
A Canadian Corporation
1940 Sun Life Building
Montreal, Quebec H3B24C Canada

Service of Process Upon:
Resident Agent
1940 Sun Life Building
Montreal, Quebec H3B24C Canada

and

LAC D'AMIANTE DU QUEBEC, LTEE
A Delaware Corporation
100 West Tenth Street
Wilmington, Delaware 19801

Service of Process Upon:
Resident Agent
100 West Tenth Street
Wilmington, Delaware 19801

and

CAREY-CANADA, INC.
A Foreign Corporation
P.O. Box 190
East Broughton Station
Quebec GON 1HO Canada

Service of Process Upon:
Resident Agent
P.O. Box 190
East Broughton Station
Quebec GON 1HO Canada

and

BRINCO MINING, LTD.,
formerly known as
CASSIAR RESOURCES, LTD.
A Foreign Corporation
2000 Guinness TWR
1055 West Hastings
Vancouver V6E3V3
British Columbia, Canada

Service of Process Upon:
Resident Agent
2000 Guinness TWR
1055 West Hastings
Vancouver V6E3V3
British Columbia, Canada

and

TURNER ASBESTOS FIBRES, LTD.
A Foreign Corporation
20 St. Mary's Parsonage
Manchester ME 2NL England

Service of Process Upon:
Resident Agent
20 St. Mary's Parsonage
Manchester ME 2NL England

and

ABC COMPANIES
(John Doe Defendants)

and

MCIC, INC.
A Maryland Corporation
3620 Woodland Avenue
Baltimore, Maryland

Service of Process Upon:
Norvin C. McCormick
3620 Woodland Avenue
Baltimore, Maryland

and

HAMPSHIRE INDUSTRIES, INC.
A Maryland Corporation
330 W. 24th Street
Baltimore, Maryland 21211

Service of Process Upon:
Cleaveland D. Miller
10 Light Street
Baltimore, Maryland 21202

and

COLLEGE PARK CONTRACTING, INC.
A Maryland Corporation
5111 Berwyn Road
College Park, Maryland

Service of Process Upon:

Irving L. Kidwell
5111 Berwyn Road
College Park, Maryland 20741
and

LLOYD E. MITCHELL, INC.

A Maryland Corporation
1300 Mercantile & Trust Building
2 Hopkins Plaza
Baltimore, Maryland 21201

Service of Process Upon:

Howard H. Conaway
1300 Mercantile & Trust Building
2 Hopkins Plaza
Baltimore, Maryland 21201
and

WALLACE INSULATION, INC.

A Maryland Corporation
4122 W. Belvedere Avenue
Baltimore, Maryland

Service of Process Upon:

Constable, Alexander, Daneker & Skeen
1000 Maryland Trust Building
Calvert and Redwood Streets
Baltimore, Maryland 21202
and

WALLACE & GALE COMPANY

A Maryland Corporation
300 W. 24th Street
Baltimore, Maryland

Service of Process Upon:

J. Albert Taylor
911 Beaumont Avenue
Baltimore, Maryland
and

A.H. FORMAN CO., INC.
A Maryland Corporation
18 W. 25th Street
Baltimore, Maryland

Service of Process Upon:
A. Haslup Forman
7005 Capeleigh Road
Baltimore, Maryland

and

PORTER-HAYDEN COMPANY
A Maryland Corporation
715 South Haven Street
Baltimore, Maryland

Service of Process Upon:
Resident Agent
Hamilton Whiteford
20th Floor
25 S. Charles Street
Baltimore, Maryland 21201

and

XYZ COMPANIES
(John Joe Defendants)

Defendants.

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