FILE NAME: Kennecott (KENN)

DATE: 1965

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Affidavit of J. Romeo Miglietta, Read in Opposition to Motion

SUPREME COURT OF THE STATE OF NEW YORK

COUNTY OF NEW YORK

[SAME TITLE]

STATE OF NEW YORK }
COUNTY OF NEW YORK } ss.:

J. ROMEO MIGLIETTA, being duly sworn, deposes and says:

1. I am a plaintiff in the above-entitled action. I make this affidavit in opposition to defendant's motion to dismiss the amended complaint.

2. In light of Kennecott's present position that Mr. Millar and I are merely finders and that it has no obligation to provide the financing or to proceed with the mining and exploitation of the asbestos deposits which are the subject of our venture, I think it appropriate to bring certain facts, not detailed in the amended complaint, to the Court's attention.

3. First of all, Kennecott's charge that Mr. Millar and I are mere finders is not true. We did far more than bring a business opportunity to Kennecott's attention!

4. As recited in our joint venture agreement with Kennecott ("the Agreement"), a copy of which is annexed to the Amended Complaint as Exhibit A, Millar originally discovered the asbestos deposits which are the subject of our joint venture in 1951 "and interested Kennecott in exploring and developing such deposits with him on a *co-ownership* basis" (Agreement, p. 1). (Emphasis added.)

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5. As recited in Millar's 1951 letter agreement with Kennecott, a copy of which is annexed to this affidavit as Exhibit A, Millar personally *owned* an option to one of the asbestos deposits, which he assigned to Kennecott.

6. In September 1952, after Kennecott had terminated its original joint venture with Millar and assigned that option, and a subsequently acquired one to him, he and I entered into a joint venture with respect to the same asbestos deposits.

7. That same month I went to Greece and spent more than two months negotiating amendments to the option contracts. During this time Mr. Millar and I paid $5,000 to keep the options alive.

8. From November 1952 until June 1953, I discussed the financing of the asbestos mining projects with various interests in Europe and the United States.

9. In November 1954, Kennecott revived its interest in the Greek asbestos venture. This took place when, following a lunch I had with the late Mr. C. R. Cox, at that time the President of Kennecott, Kennecott agreed orally with Millar and myself to revive the Greek asbestos project on the following terms:

> (a) I would attempt to revive (on basically the former terms) the Brovas and Komninos options which had reverted to Millar and myself and had been allowed by us, due to political conditions, to lapse in June, 1953. I would try to obtain a new option period of at least three years.
>
> (b) During the new option period Kennecott would do such exploration work as it in its sole discretion deemed appropriate. It was to be under no obligation to do any particular amount of work or to exercise the options.

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(c) If Kennecott decided to drop the project and not to exercise the options, it would (as it did in 1952) return the options to Millar and myself a reasonable time before the expiration dates, free and clear of any obligations to Kennecott. Millar and I would then be free either to exercise the options, to negotiate further extensions, or to deal with them as we saw fit.

(d) Alternatively, however, if Kennecott did decide to exercise the options and to purchase the properties (thus foreclosing any reversion to Millar and myself) it was to be obligated to proceed to exploit the properties.

(e) Unless and until the options reverted to Millar and myself, Kennecott, Millar and I would be co-venturers. Any and all asbestos deposits in Greece in which any of us might have an interest were to be turned over to the venture and we would at all times co-operate fully with each other in the development and exploitation of asbestos deposits in Greece.

10. At this time Kennecott's interest in the venture was reduced from 97 to 95 per cent. This was done in recognition of the fact that the time, effort and money invested in the project between 1952 and 1954 by Millar and myself should be rewarded with a greater participation in the venture's profits.

11. Shortly after this conversation I left for Greece and there re-established the options.

12. I returned to Greece in the spring of 1955 and engaged in almost continuous negotiations with the Greek government until October 1956. These negotiations terminated successfully with the ratification by the Greek Parlia-

ment of an agreement regulating every aspect of our operations in Greece. During this same period I arranged to have the asbestos itself tested by several European consumers.

13. From the spring of 1955 until the autumn of 1957 Millar made numerous trips to Greece to organize and supervise the exploration of the asbestos deposits and the procurement of necessary drilling and pilot plant equipment.

14. As can readily be seen Mr. Millar and I contributed substantial amounts of our own time, talent and capital to the joint venture.

15. At about the time my negotiations with the Greek government neared completion Kennecott proposed to Millar and myself that the oral arrangements under which we had agreed to participate with Kennecott in the revival of the asbestos project be formalized by a written agreement. Discussions regarding this formal agreement began in late September or early October, 1956, and continued through February, 1957. There was no particular urgency since we had been working together under our oral agreement for the past two years and Millar and I were out of the country a great deal during this period.

16. Kennecott's counsel suggested that Kennecott should have the right at any time to terminate any exploration, development or exploitation of the deposits covered by the Brovas and Komninos options, whether before or after the exercise of the options, and Millar and I took the position that it was our understanding that our oral agreement provided that if Kennecott decided not to exercise the options it would assign the options back to us (as it had in 1952), and that if it did exercise the options (so that they could no longer be assigned to us) Kennecott would proceed to develop the properties with due diligence.

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17. We contended that Kennecott had already had nearly two years in which to make its geological, business, legal and policy decisions and that it should not frustrate our "expectancy" in this venture by being allowed to purchase the properties and not to develop them. It had also been our understanding, we stated, that if the options were to be assigned back to us this would be done at least 90 days before they expired so that we would have sufficient opportunity to negotiate further extensions, to find other interested parties, to obtain outside financing, etc.

18. The agreement as finally negotiated reflected various compromises and provided, in substance:

(a) That Kennecott was to have no obligation to do any "exploratory or development" work on the optioned property (paragraph 1 of the Agreement);

(b) That if the options were not exercised within 30 days prior to their expiration (instead of the 90 days we believed reflected our original agreement), the options would be assigned to us free and clear of any claims by Kennecott (paragraph 2 of the Agreement);

(c) A new point, namely, that Kennecott had the right to sell the options to outsiders (prior to 30 days before their expiration) in which case Millar and I would collectively receive 50% of the proceeds after deducting Kennecott's expenses (paragraph 3 of the Agreement);

(d) That if Kennecott exercised the options it would form a new company and that the parties' interests would be turned over to the new company "for the purpose of developing, mining and exploiting" the deposits (paragraph 4 of the Agreement); and

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(e) For the next 10 years (i. e. until March 29, 1967) any asbestos deposits in Greece which any of the parties acquired or had an interest in would be turned over to the venture and during the same 10 year period the parties would fully cooperate in the development and exploitation of asbestos deposits in Greece (paragraphs 4(f) and (g) of the Agreement).

19. I wish to point out that the Agreement in these essential respects merely reflected the basic oral agreement which had been in effect for more than two years. Kennecott's right not to proceed, mentioned in paragraph 1 of the Agreement, *relates only to "exploratory and development" work* on the *optioned* properties and not to the obligations of the new company which Kennecott was specifically obligated in paragraph 4 to form if it exercised the options (but which is intentionally *not* mentioned in paragraph 1).

20. I should also point out that paragraph 4, which is headed *"Rights if Options Are Exercised"* (i. e. the present situation) specifically obligates Kennecott to form a new company *"for the purpose of developing, mining and exploiting" the asbestos deposits.* The words "mining and exploiting" are words of art in the mining business and were intentionally omitted from paragraph 1 which deals *only* with Kennecott's discretion in doing or not doing "exploratory and development" work.

21. In other words, Kennecott's right not to do any work was limited to "exploratory or development" work, was limited to Kennecott itself, and did not in any way relate to the obligation of the new company to do "mining and exploiting", as specifically encompassed by paragraph 4 if the options were in fact exercised.

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22. At this point I would like to point out that prior to exercising the options Kennecott asked me to negotiate two extensions of its time to do so, which I did. These extensions gave Kennecott additional time to deliberate before finally committing itself to the venture, and, incidentally, prevented the provisions requiring it to reassign the options to Millar and myself 30 days before expiration from becoming operative.

23. I point out that this Agreement was carefully prepared by the executives and by counsel for Kennecott, all of them skilled and experienced in the drafting of mining agreements, and that, if Kennecott had not intended to have the new company (which it was obligated to form if it exercised the options) do any "mining and exploiting", this could easily have been mentioned in the Agreement. Kennecott, I contend, is now trying to use its admitted freedom to do the "exploratory or development" work covered by paragraph 1 to escape its obligations to do the "mining and exploiting" covered by paragraph 4.

24. I also understand that Kennecott has taken the position that our relationship as joint venturers terminated when the Greek corporation was formed. This is most surprising to me since Kennecott's representatives have repeatedly referred to our common undertaking as a joint venture orally and in writing since the Greek corporation was formed. For example, on July 21, 1960, some six months after the formation of the Greek corporation, Mr. L. F. Butler, one of the executives then in charge of this project in Kennecott, wrote me referring to

"our joint asbestos venture in Greece".

A copy of that letter is annexed hereto as Exhibit B.

25. In addition, I understand that the defendant takes the position that it had the right to abandon the project

and to refuse to proceed with the exploitation and mining of the asbestos in its sole discretion. This is contrary to my understanding of Kennecott's undertaking and is, I believe, contrary to Mr. James Boyd's, who was the Vice President in charge of exploration for Kennecott until April of 1960 and who has been intimately involved in this project. Mr. Boyd was the Vice President who signed our Agreement with Kennecott on March 29, 1957. Mr. Boyd then believed and now believes that this deposit could be developed economically, in light of the continuing world-wide expansion in the use of asbestos, the absence of any other major asbestos deposits in Europe, the richness of the mineralization, the freight advantage, and various other relevant factors.

26. I have spoken on occasion to Mr. Boyd, as a personal friend, about this project subsequent to his leaving Kennecott in April 1960. On a few occasions we have discussed my rights under the Agreement of March 29, 1957 with Kennecott. Mr. Boyd has told me that as a former officer of Kennecott he had to be "neutral" with regard to any events that transpired while he was such an officer, and that he could not therefore give me or my counsel any written statements regarding the intent of the parties at the time he, on behalf of Kennecott, signed the Agreement of March 29, 1957 between us and Kennecott.

27. He also told me that, in his opinion, the legal effect of the contract was a legal question on which he did not feel either free or competent to give a legal opinion.

28. He did tell me, however, that he thought that Millar and I had a legitimate case and that he understood that, subsequent to his leaving Kennecott, the officers of Kennecott had been so advised by their house counsel. When the time came, he said, he would give his testimony with

the utmost candor and frankness, but in the meantime did not, for the reasons I have stated, wish to say any more than I have set forth above.

29. I am confident that upon a trial any ambiguity concerning Kennecott's obligations under the Agreement will be resolved in favor of plaintiffs, and I believe that Mr. Boyd will substantiate our view of the understanding of the parties.

30. Finally, I understand that Kennecott takes the position that it had the right to kill the project if it decided to do so. While this is contrary to my understanding, I am advised and believe that, even if Kennecott had such a right, if it exercised that right in bad faith it would be liable for breach of contract.

31. I believe that Kennecott's apparent decision not to proceed was the product of bad faith. Specifically, the complaint (¶15(iii)) alleges that Kennecott has conspired with Johns-Manville to keep this large Greek asbestos deposit out of production.

32. Asbestos is a worldwide commodity which is primarily found in Canada and in Africa (and, recently, Russia). The largest markets for asbestos are in the United States and Europe. Worldwide production of raw asbestos is in the zone of $200,000,000 per year. Less than 5% of the asbestos in the world is located in Europe (primarily in Italy and Cyprus with a little in France) and the European sources are only a small fraction of the European market which is supplied primarily from Canada and Africa.

33. Johns-Manville Corporation, with large mines in Canada and elsewhere, is, I believe, the largest single pro-

ducer of raw asbestos in the world. It is obviously not in the interests of Johns-Manville to have a large competing deposit opened in Europe which would have a $10 to $15 per ton freight advantage for most European markets, a very material advantage for a product which, for the most part, sells in the zone of $50 to $150 per ton, depending on grade, quality, etc.

34. As is well known, Johns-Manville Corporation and Kennecott Copper Corporation have for a long time been closely identified with each other, and there are a good many interlocking relationships between the companies. For example, Mr. Henry C. Alexander, Chairman of the Morgan Guaranty Trust Company, is a director of Johns-Manville, and Mr. Charles D. Dickey, a director and Chairman of the Trust Committee of Morgan Guaranty Trust Company, is a director of Kennecott.

35. The same kind of "delicate" inter-relationship exists with regard to the First National City Bank. Messrs. Joseph A. Grazier and William C. Stolk are both directors of the First National City Bank of New York and Johns-Manville, and two of the other directors of such Bank, J. Peter Grace and Clifton W. Phelan, are directors of Kennecott.

36. A recent past President of Kennecott, Mr. Stannard, had been a director of Johns-Manville. In business and publishing circles, the two companies are frequently referred to as "Morgan companies".

37. One of the largest asbestos companies in Europe is the so-called Eternit Group, which is dependent on Johns-Manville for a major source of raw asbestos and which has several interlocking relationships with Johns-Manville in the ownership of asbestos mines. The Eternit Group, I believe, has about 30% to 40% of the European market.

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38. I am informed and believe that Kennecott has discussed the Greek asbestos deposit on many occasions with Johns-Manville. I was personally not privy to all of these discussions, although I was from time to time told about them. I have reason to believe that in the course of these discussions consideration was given to the effect of the Greek deposit on Johns-Manville's competitive position in this country and in Europe, but since I was not present and the records and minutes of these meetings are not yet available to me, I cannot give any details.

39. I do know, however, that in November 1957 (while I was in Greece negotiating the extension of the options which were about to revert to Millar and myself), Mr. Andre Emsens, the head of the Eternit Group, was in New York and had discussions with Mr. C. R. Cox, the President of Kennecott, and with other Kennecott people about the deposit which he then stated to the Kennecott people, he believed, would produce a salable finished product worth $150 per ton. At the same time, samples of the Greek asbestos were being tested by the Johns-Manville Corporation which at that particular time advised Kennecott that the fiber was inferior.

40. Subsequently, in Brussels, in May 1958, Mr. Emsens personally told me that Mr. C. R. Cox, the President of Kennecott, had personally told him, during his November 1957 visit to New York, that Kennecott would not go into the Greek asbestos venture unless it could do so in cooperation with Johns-Manville. A report of this conversation was subsequently sent by Mr. Leonard Butler, an executive of Kennecott (who was present with me), to Mr. James Boyd, a Vice President of Kennecott, as follows:

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"Dear Jim:

The meeting with Emsens was most cordial—hence my cable to you. However, I was rather taken aback when Emsens told me that on his last visit to N. Y. Mr. Cox said

(A) That without Johns-Manville as partners he would not develop the Greek property.

(B) Would Emsens purchase the Greek property outright.

Emsens said that (A) above was logical as we were two Morgan Bank companies (no comment from me), and as for (B) no unless to protect Eternit interests.

Emsens told us that his engineers after their visit to Greece reported that the property had great potential value but that we had not evaluated the value of the fiber by grades or determined the overall economic possible development in the European market. * * *"

41. In other words, in November 1957, when Kennecott was renewing its Greek asbestos options which were about to expire, its President was telling the head of one of the largest European asbestos cartel groups (which had close connections with Johns-Manville) that Kennecott would only develop the properties with Johns-Manville's participation so that if Johns-Manville decided it was in its interests to keep the deposits from being developed, Johns-Manville merely had to tell Kennecott that Johns-Manville was not interested in developing them.

42. Having purchased the asbestos properties in September 1958, Kennecott took no steps to do any mining thereon or any exploitation thereof. Various discussions took place between Kennecott and Johns-Manville in 1959 and in 1960, but I do not know the details.

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43. In the summer of 1961, Kennecott had desultory discussions with Fulgurit Works, one of the largest users of asbestos in Western Germany. Fulgurit had no asbestos mines of its own and is depending on the raw asbestos suppliers, such as Johns-Manville, for its raw material. Fulgurit was interested in developing the Greek asbestos deposits, its tests having shown that the Greek asbestos was well suited for its products.

44. On August 30, 1961, while the Kennecott-Fulgurit discussions were taking place, I had a meeting with Mr. Leonard Butler, the Kennecott executive handling the same. My notes of this meeting (which I made immediately thereafter) contain the following summary of the statements made to me by Mr. Butler regarding Johns-Manville's interest in Kennecott's talks with Fulgurit:

> "Butler revealed an interesting sidelight on the reaction of Johns-Manville to Kennecott's negotiations with Fulgurit. Apparently the subject was discussed during an interview he had with Johns-Manville executives who expressed surprise that Kennecott would by-pass them in favor of Fulgurit. Butler stated he explained to them the matter of an arrangement with Johns-Manville had been discussed off and on in the past years and always ended in a turn down. (This is not surprising while J-M had good reasons to believe that Kennecott would not go ahead without them.) Butler said that following this interview Morgan's Bank approached Mr. Milliken on the matter.
>
> "Another significant gesture on the part of Johns-Manville as reported to me by Butler is that while he was in Hanover Mr. Oesterheld showed him a cable received from J-M offering to supply him with 55,000 tons of fibre per year for three years. (What conclusions is it permissible to draw from such an offer at this particular time?)"

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45. Thereafter, in December 1961, without any explanation, Fulgurit terminated negotiations.

46. In these circumstances, I am advised and believe that, even if defendant had the right not to proceed in good faith, there is an issue in this case as to whether its action was in good faith or, as I believe, the product of an unlawful conspiracy with Johns-Manville.

WHEREFORE, I respectfully pray that defendant's motion be denied.

J. ROMEO MIGLIETTA

Sworn to before me this
26th day of January, 1965.

.....
Notary Public

EDWARD FRANCIS MALONE
Notary Public, State of New York
No. 30-7683695
Qualified in Nassau County
Commission Expires March 30, 1966

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Exhibit A, annexed to Affidavit of J. Romeo Miglietta

KENNECOTT COPPER CORPORATION
120 BROADWAY
NEW YORK 5, N. Y.

July 24, 1951

ANTON GRAY
VICE PRESIDENT
REGISTERED MAIL

Mr. William B. Millar
Silver Bay
New York

Subject: Option Relative Asbestos Concessions Held by A. C. Brovas in the Area of Mikrovalton, Tranovalton and Palialona (Nezisko) Greece.

Dear Mr. Millar:

The purpose of this letter is to confirm the oral agreement which Mr. Anton Gray, Vice President of our Corporation, acting in behalf of the undersigned, made with you on July 17, 1951 on the above subject, namely:

I. Attached hereto for ready reference and marked Exhibit "A" is a photostatic copy of the option agreement entered into between yourself and Mr. A. C. Brovas of No. 5 Syngrou Street, Salonica, Greece.

II. Under authority of the provisions of paragraph 10 of said option agreement, you have agreed to and do herewith assign to the undersigned corporation all your right, title and interest in said option agreement. Moreover, you will take such action as may be necessary to reform such paragraph 10 so that the option agreement will provide in its terms that you have the authority to assign your right therein to

the undersigned or any corporation or legal entity created by it.

III. You will take such action as we may request to confirm our representative or representatives to Mr. A. C. Brovas in order that we may proceed with the examination and study of the various problems and actions—including among others those specified in paragraph 5 of the option agreement—having relation to the above-mentioned asbestos concessions in order that we may determine whether or not we shall desire to exercise the option contained in said agreement between Brovas and yourself.

IV. In return for such assignment of the option agreement and your other undertakings herein set out, the undersigned agrees:

(1) To send one or more representatives to Greece to make such studies and examinations within the time limits as specified in the option as seem to it in the discretion of its officials, necessary, proper or desirable in order to determine whether or not it shall desire to exercise such option.

(2) If the undersigned shall determine (as it may freely do) not to exercise such option either before or after making any one or more payments provided for in paragraphs Numbers 6, 7 and 8 in said option agreement, it will so advise you in writing and will, without cost to or further consideration from you, either re-assign to you the option agreement of May 29, 1951 between you and A. C. Brovas (as it may by that time have been amended) or will assign to you any other or more formal option agreement which may have been entered into by or for the undersigned applicable to these asbestos concessions hereinbefore mentioned in the caption of

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this letter-agreement. It is understood that any payment, expense or obligation which the undersigned may have made or incurred prior to such reassignment of the May 29, 1951 option or the assignment of such other or more formal option abovementioned, shall be for the account of the undersigned for which reimbursement, in whole or part, shall not be due from you.

(3) If the undersigned shall determine to exercise either the option of May 29, 1951 (in its present or amended form) or any other or more formal option referred to in IV (2) above, then it will:

(i) create or cause to be created a corporation or other legal entity empowered by the Greek Government to develop and operate said asbestos concessions which were the subject of the option between you and A. C. Brovas dated May 29, 1951;

(ii) transfer or cause to be transferred to such corporation or legal entity the said asbestos concessions, the subject of such option agreement;

(iii) will issue or cause to be issued to you an interest in said corporation or legal entity equal to 3% of the equity thereof; and it further undertakes so long as it shall control such venture, that you shall have a continuing 3% equity interest in such venture represented by such corporation or legal entity which was created to develop and operate such asbestos concessions identified in the caption of this letter-agreement.

It is understood that if additional or other asbestos concessions shall be acquired in Greece by or for the undersigned, then such additional or other asbestos concessions will be transferred to

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and included as a part of that venture in which you will have the 3% equity interest.

V. The undersigned has the right and privilege at any time after the execution of this letter-agreement, that is to say, either before or after any option hereinabove mentioned has been exercised or after a corporation or other legal entity has been created which owns, controls or operates the venture containing such asbestos concessions referred to in IV (3) above, to purchase and acquire from you on 30 days written notice your entire interest (whether legal, equitable or in any other form) in such venture as defined in IV above by paying to you the sum of $1,000,000. Within 15 days after receiving the written notice from the undersigned that it has exercised its right to purchase your interest in such venture, you will deposit the documents evidencing your entire interest in such venture (with transfer stamps or funds) in escrow with the Guaranty Trust Company of New York, 140 Broadway, New York; and upon payment by the undersigned of $1,000,000. to said Guaranty Trust Company of New York, said bank shall release and surrender to the undersigned your interest in said venture as evidenced by the deposited documents.

VI. The dealing with the option relative to the asbestos concessions referred to in the caption of this letter-agreement, after the signing of this document, rests entirely in the control of the undersigned and it fully intends if it does not exercise the option, to carry out the terms of IV (2) hereof but it is understood that in the event that the said option for the asbestos concessions expires or shall be lost or become ineffective for any reason even through inadvertence, oversight or negligence on the part of

the undersigned or any servant, agent or employee thereof, it is agreed that you will have neither claim, in money or otherwise, nor right nor cause of action against the undersigned arising or growing therefrom.

VII. Whenever either party sends notice to the other hereunder, such notice shall be sent to the respective address shown on the letter-agreement or to such other address as either party may in writing have advised the other shall be the proper address for notification hereunder.

If the foregoing accords with your understanding of the agreement made between us, will you be good enough to note your acceptance at the foot of each of the two counterparts of this letter and return one thereof to the undersigned whereupon either of such counterparts shall represent the agreement between us on this subject matter.

Very truly yours,

KENNECOTT COPPER CORPORATION

By (illegible)
Vice President

Accepted: Aug. 4, 1951
At Silver Bay, New York

(illegible)

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Exhibit B, annexed to Affidavit of J. Romeo Miglietta

KENNECOTT COPPER CORPORATION
161 East 42nd Street
New York 17, N. Y.

July 21, 1960

Mr. J. R. Miglietta
205 West 57th Street
New York 19, New York

Dear J. R.:

I tried to reach you by telephone today to advise you on the status or lack of progress of our joint asbestos venture in Greece.

At your convenience would you call me so that I can explain what has happened so far even if the results are negative.

Sincerely,

(illegible)
L. F. Butler

LFB/rae