

1 IN THE DISTRICT COURT
2 CAMERON COUNTY, TEXAS
3 138TH JUDICIAL DISTRICT

4 --oOo--

5 SAMUEL OLIPHANT WOOLEY,
6 JR., et al.,

7 Plaintiffs,

8 -vs-

 No. 94-09-04823 B

9 OWENS-CORNING FIBERGLAS
10 CORPORATION, et al.,

11 Defendants.
12 -----/

13
14 Deposition of

15 DOUGLAS WAYNE MERRILL

16 Monday, November 20, 1995

17 By Allen M. Stewart, Attorney at Law

18 **DUPLICATE**
19 **FILE COPY**

20
21 Reported by
22 TERI DARRENOUGUE, CM, CRR
23 CSR NO. 5106

24 -----
25 PENINSULA REPORTING
26 CERTIFIED SHORTHAND REPORTERS
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deposed. Kelly Moore
GA



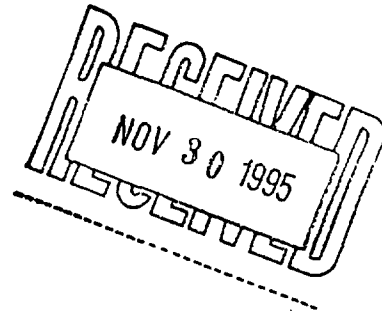
KELLY-MOORE PAINT COMPANY, INC

"Quality is Economy"

987 Commercial Street • P.O. Box 3016 • San Carlos, California 94070 • (415) 592-8337

November 29, 1995

Mr. Howard Churchill
Schofield & Schiller
Attorneys at Law
One Walnut Creek Center
100 Pringle Avenue, Suite 510
Walnut creek, California 94596



Re: Deposition in Samuel Oliphant Wooley Case

Dear Howard:

As per our phone conversation today, I have read the transcription of my deposition given on November 21, 1995.

Please note the following corrections that I have note din pencil on the original:

Page 7, line 20 - The words "plant manager" should be deleted from my answer. (When I was plant manager, Mr. Stubb was my immediate superior.)

Page 13, line 23 - The correct answer should have been No.
(My answer that continues from line 25 was referring to test on asbestos-containing products that occurred from November 1968 onwards)

Page 45, line 17 - The word "set" should be changed to "site".

Please give me a call if you have any questions.

Yours truly,


Douglas W. Merrill
Vice President, Mfg.

A P P E A R A N C E S

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(PRESENT VIA TELEPHONE)

ALSO PRESENT: Hollis Horton (PRESENT VIA TELEPHONE)

--oOo--

INDEX OF EXAMINATIONS

	<u>Page</u>
Examination by MR. STEWART	4
Examination by MR. CHURCHILL	124

PLAINTIFF'S EXHIBITS

	<u>Page</u>
1 Two-page chart	77

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BE IT REMEMBERED that on Monday, November 20, 1995, commencing at the hour of 1:12 p.m. thereof, in the offices of Kelly-Moore Paint Company, 987 Commercial Street, San Carlos California, before me, TERI DARRENOUGUE, a Certified Shorthand Reporter in and for the State of California, there personally appeared

DOUGLAS WAYNE MERRILL,

called as a witness by the Plaintiff, who being by me first duly sworn, was thereupon examined and interrogated as is hereinafter set forth.

--o0o--

EXAMINATION BY MR. STEWART

Q. (BY MR. STEWART): Could you state your name for the court reporter, please.

MR. TRUNCALE: Maybe we ought to just make sure we're clear before you get started, we're taking this in the Wooley case.

MR. STEWART: That's right, Michael. And just so you know, I told the court reporter, since there was confusion about that, I went off and didn't bring a notice with me, but it is in the Wooley case, and I'm going to have Benaye fax to her, if not today, first thing tomorrow, the caption. So it will be Wooley versus whoever the first named defendant is in that November 27th case.

1 MR. TRUNCALE: That's fine. I might have even
2 a cause number I can give you in about two seconds.
3 Samuel Oliphant Wooley is the plaintiff, and it is in the
4 138th District Court, Cameron County, C-a-m-e-r-o-n. And
5 it's number 94 dash 09 dash 04823 dash "B."

6 MR. STEWART: Okay?

7 MR. TRUNCALE: Also, Hollis Horton has arrived.
8 You might want to place him also as being present too.

9 MR. CHURCHILL: H-o-l-l-i-s, H-o-r-t-o-n.

10 Mike, just one other housekeeping matter. Can
11 you hear us clearly?

12 MR. TRUNCALE: Yes, I can. Can you hear me?

13 MR. CHURCHILL: Yes.

14 MR. TRUNCALE: Typically we take these under
15 our rules which is reserve all objections except for,
16 "A," either the form of the question or the
17 responsiveness of the answer.

18 MR. STEWART: Right. We're taking them like
19 you take them in Texas. That's right.

20 MR. TRUNCALE: Right. And it's my
21 understanding we're putting a four-hour cap on this
22 deposition. Is that correct?

23 MR. STEWART: That's my understanding as well.

24 MR. TRUNCALE: It doesn't mean it has to go
25 that long.

26 MR. STEWART: I tell you what. If we start

1 right now, we're probably not in peril of that, so I'm
2 ready to go if you are.

3 MR. TRUNCALE: I believe I'm ready.

4 MR. CHURCHILL: Let's go do it.

5 THE WITNESS: My name is Douglas Wayne Merrill.

6 Q. (BY MR. STEWART): Thank you. And what is your
7 position with the Kelly-Moore Paint Company?

8 A. Vice president of manufacturing.

9 Q. How long have you been the vice president of
10 manufacturing at Kelly-Moore Paint?

11 A. Since April of 1989.

12 Q. Before that who were you employed with?

13 A. Still employed with Kelly-Moore Paint Company.

14 Q. And what was your title at that time?

15 A. I was plant manager.

16 Q. For what plant?

17 A. San Carlos.

18 Q. And what were the years that you were the plant
19 manager of the San Carlos plant of Kelly Paint --
20 Kelly-Moore Paint Company?

21 A. From 1983 through -- or up till that point in 1989.

22 Q. And before you were the plant manager in San Carlos
23 at Kelly-Moore Paint Company, what was your title?

24 A. I was still at Kelly-Moore Paint Company, and for a
25 year, which I recall was 1982, I was assistant to the
26 vice president of manufacturing.

1 Q. Who was the vice president of manufacturing at that
2 time?

3 A. Svend Stubb.

4 Q. Could you spell that, please.

5 A. S-v-e-n-d, S-t-u-b-b.

6 Q. Is Mr. Stubb still living?

7 A. No. He's deceased.

8 Q. And when did he die?

9 A. March 17th or 18th of 1989.

10 Q. Was he the vice president of manufacturing prior to
11 the time that you became vice president of manufacturing?

12 A. Yes.

13 Q. So there was no one in between Mr. Stubb and you; is
14 that correct?

15 A. No.

16 Q. That's correct?

17 A. That's correct.

18 Q. Who was your immediate superior from 1983 to 1989 as
19 the plant manager for Kelly-Moore Paint in San Carlos?

20 A. Mr. Stubb, plant manager.

21 Q. And who was his immediate supervisor during that
22 period of time?

23 A. Well, in 1989 it was -- well, his supervisor was the
24 president of the company. In 1989, that was Joe
25 Cristiano. I'm not sure what year Joe Cristiano came to
26 Kelly-Moore. As I recall, it was in the 1983-1984 period

1 of time.

2 Q. Who is the president of Kelly-Moore right now?

3 A. Joe Cristiano.

4 Q. Has there been anyone in the interim between 1989
5 and 1995 who has acted as president of the company
6 besides Mr. Cristiano?

7 A. No.

8 Q. Prior to Mr. Cristiano, who was the president of
9 Kelly-Moore Company?

10 A. William E. Moore.

11 Q. Is Mr. Moore still living?

12 A. Yes.

13 Q. And what is his present role with Kelly-Moore Paint
14 Company?

15 A. He's chairman of the board.

16 Q. How long has he been chairman of the board?

17 A. On or after the period of time when Joe Cristiano
18 came to the company, be that 1983 or '84, '85.

19 Q. And since that period of time, 1983 to 1985 to the
20 present, has anyone been chairman of the board besides
21 Mr. William E. Moore?

22 A. No.

23 Q. Who is the Kelly of Kelly-Moore?

24 A. As I recall, his first name was William, William
25 Kelly, and he, as I also understand, died in the 1950s.

26 Q. Do you know what he died of?

1 A. No, I do not.

2 Q. Is there anyone from Mr. Kelly's family still
3 employed with Kelly-Moore Paint Company?

4 A. No.

5 Q. Is there anyone with Mr. Kelly's family that has an
6 ownership interest in Kelly-Moore Paint Company?

7 A. No.

8 Q. Who owns Kelly-Moore Paint Company?

9 A. William E. Moore.

10 Q. Is he the sole owner?

11 A. To my knowledge, he is the sole owner.

12 Q. So I take it the Kelly-Moore Paint Company is a
13 privately-held corporation; is that correct?

14 A. That is correct.

15 Q. And is Kelly-Moore incorporated in California?

16 A. Yes.

17 Q. Is there anyone from Mr. Moore, William E. Moore's,
18 family, obviously besides himself, who works for the
19 Kelly-Moore Paint Company?

20 A. No.

21 Q. Has there at any time been someone from his family
22 who worked for the Kelly-Moore Company besides himself?

23 A. Yes.

24 Q. Who would that be?

25 A. His daughter Chris Moore and his son -- I knew him
26 as Bill.

1 Q. When did Chris Moore work for the Kelly-Moore Paint
2 Company?

3 A. I'm not sure when she left. She's been gone for
4 over five years.

5 Q. And how long was she here?

6 A. She had worked -- I'm not sure she worked here
7 consistently. I think she worked for a while in
8 personnel and then I think her last employment was in
9 advertising, and I'm not sure if there's a break in
10 between. As I recall, there may be.

11 Q. Do you know what Chris Moore is doing now?

12 A. She lives in Montana.

13 Q. And do you know what she does in Montana?

14 A. She may have an arts and craft shop.

15 Q. What is her age, if you know, approximately?

16 A. I'm going to have to put this on the record? I
17 don't know.

18 Q. Just approximately. In her thirties? In her
19 forties?

20 A. Forties.

21 Q. Where in --

22 A. Early forties.

23 Q. Where in Montana does she live?

24 A. In the Great Falls area.

25 Q. Has she married?

26 A. Yes.

1 Q. Do you know her husband's name?

2 A. I don't recall.

3 Q. You mentioned that -- Before we get to Bill Moore, I
4 want to get to him in just a second, Chris Moore, did she
5 ever have any sort of executive role in the company?

6 A. No.

7 Q. Was she ever a stockholder in the company?

8 A. I don't know.

9 Q. Now let's go to Bill Moore. What's his age?

10 A. His birthday is this month, and I believe that he
11 will, depending if it's already happened or not, be 78.

12 Q. Bill Moore the son will be 78 years old?

13 A. Oh, I'm sorry. I'm sorry. I misunderstood.

14 Q. Let me rephrase my question. I think I understand
15 the confusion.

16 William E. Moore is the chairman of the board
17 of Kelly-Moore Paint Company; correct?

18 A. Yes, correct.

19 Q. And are you telling me that he, this month, will be
20 or has just recently turned 78 years old?

21 A. Yes. William E. Moore, the chairman of the board,
22 will be turning 78.

23 Q. Now, I take it Bill Moore is his son?

24 A. Yes.

25 Q. And what is Bill Moore's age?

26 A. He's also, I believe, in his forties.

1 Q. And when he was employed at Kelly-Moore Paint
2 Company, what was his job responsibility?

3 A. To the best of my knowledge, his last employment
4 with the company was in a division called Alta Pak, and
5 he worked for me, and it was a company that processed and
6 sold loose-fill packaging, and he was part of that
7 process. I don't recall what his title was.

8 Q. How long did he work for Kelly-Moore?

9 A. It was a very short period of time at that time. He
10 may have worked for the company early on.

11 Q. You said that Alta Pak is loose-fill packaging.
12 What is the principal ingredient in loose-fill packaging?

13 A. Polystyrene.

14 Q. Anything else besides polystyrene?

15 A. No.

16 Q. Is that still a product that Kelly-Moore
17 manufactures?

18 A. No.

19 Q. When did they discontinue making polystyrene Alta
20 Pak?

21 A. To the best of my recollection, we stopped that
22 around the period of 1981.

23 Q. Let's go back to your involvement with the
24 Kelly-Moore Company. I think that we had ended in 1982
25 with you being the assistant to the vice president of
26 manufacturing. Did you work for Kelly-Moore prior to

1 1982?

2 A. Yes. I started with Kelly-Moore in July of 1968.

3 Q. And what was your first job in July of 1968 with
4 Kelly-Moore?

5 A. Quality control chemist.

6 Q. And where were you employed? What facility?

7 A. San Carlos, California.

8 Q. What's your educational background?

9 A. I have a B.S. degree in chemistry.

10 Q. From where?

11 A. State University of Wisconsin, in Oshkosh,
12 Wisconsin.

13 Q. Any further studies beyond your bachelor's of
14 science in chemistry?

15 A. No.

16 Q. How long were you a quality control chemist for
17 Kelly-Moore?

18 A. Till the fall. I think November of that year.

19 Q. And from July to November of 1968, as the quality
20 control chemist for Kelly-Moore, did you do any tests on
21 asbestos-containing product that Kelly-Moore
22 manufactured?

23 A. Yes.

24 Q. What types of tests did you do?

25 A. Various tests from -- majority were in the lines of
26 quality control.

1 Q. And please describe for me every test that you
2 recall doing on asbestos-containing products manufactured
3 by Kelly-Moore.

4 A. We would test for viscosity, we would test for pH,
5 we would test for adhesion, evaluate for appearance, test
6 for shrinkage and cracking, there were tests for
7 freeze-thaw stability. I think that was the majority of
8 the tests that were done on asbestos-containing products.

9 Q. Did you do any tests for specific gravity?

10 A. Not on asbestos-containing products, no.

11 Q. Any particular reason why you didn't do specific-
12 gravity test on asbestos-containing products?

13 A. I don't know of any reason that we would have wanted
14 to.

15 Q. So if I understand the list that you have here, and
16 please tell me if there's anything that should be in the
17 list that you have not included, you tested for
18 viscosity, pH, adhesion, appearance, shrinkage, cracking,
19 freeze-thaw stability, and that's the extent of the tests
20 you did on Kelly-Moore products containing asbestos; is
21 that correct?

22 A. That's the extent I can recall. It's a long time
23 ago.

24 Q. Did you do any tests to determine what the safety
25 aspects of the Kelly-Moore products were?

26 MR. CHURCHILL: I object to the question as

1 being vague. What do you mean by "safety"?

2 MR. STEWART: I'll change the question.

3 Q. Did you do any tests to determine whether
4 Kelly-Moore asbestos-containing products could harm
5 people?

6 A. No, we didn't believe that there were reasons that
7 would harm people to lead us into testing.

8 Q. Let me object to the responsiveness of the question
9 -- or the answer, rather.

10 My question was whether you conducted any test
11 to determine whether Kelly-Moore asbestos-containing
12 products could harm people. Did you do any tests?

13 MR. CHURCHILL: Object.

14 THE WITNESS: Do you have any specific test --

15 MR. CHURCHILL: I'm going to object to the form
16 of the question. It's vague and ambiguous with regard to
17 "harming."

18 Q. (BY MR. STEWART): You can answer.

19 MR. CHURCHILL: You can answer the question,
20 though.

21 THE WITNESS: Do you have a specific test? I
22 can tell you whether we did or didn't.

23 Q. (BY MR. STEWART): You're the chemist. I want to
24 know all the tests you did on the products.

25 A. I told you the ones I can recall.

26 Q. Now I'm asking you, did you do any specific tests to

1 determine whether Kelly-Moore asbestos-containing
2 products can harm people?

3 A. I don't recall doing any other tests than what I've
4 already testified to.

5 Q. And these tests, the tests for viscosity and pH,
6 adhesion, appearance, shrinkage and cracking, they're not
7 tests to determine whether asbestos-containing
8 Kelly-Moore products can harm people; correct?

9 A. Correct.

10 Q. So the answer to my question of whether or not you
11 did tests to determine whether Kelly-Moore asbestos-
12 containing products could harm people, the answer to that
13 is no; correct?

14 MR. CHURCHILL: Objection. That misstates his
15 testimony, Counselor. He said he recalled a specific set
16 of questions that he recalled -- or six specific tests
17 that he recalls, and he answered he had no recollection
18 of any other tests.

19 Q. (BY MR. STEWART): You can answer my question.

20 A. Would you restate the question.

21 MR. STEWART: Sure.

22 Could you read that back for him.

23 (Record read as follows:

24 "Question: So the answer to my question
25 of whether or not you did tests to determine
26 whether Kelly-Moore asbestos-containing

1 products could harm people, the answer to that
2 is no; correct?"

3 MR. CHURCHILL: Object to the form of the
4 question.

5 Q. (BY MR. STEWART): You can answer.

6 A. I don't recall running any tests other than what I
7 testified to. And I don't believe we did it because we
8 didn't have reason to believe there was a safety issue
9 from the standpoint of the quality of the product.

10 Q. How many times did you testify before, Mr. Merrill?

11 A. For deposition?

12 Q. We'll take it one at a time. How many depositions
13 have you given?

14 A. I've given three depositions.

15 Q. And when were those?

16 A. I don't recall. The first one was probably 20 years
17 ago.

18 Q. Where was that taken?

19 A. I don't recall that either, but it would have been
20 in the area of -- would have been in Santa Clara County.
21 I think maybe it was in Mountain View, California.

22 Q. Why were you being deposed?

23 A. I was part owner of a sailboat and there was an
24 injury on the boat.

25 Q. What type of injury on the boat?

26 A. As I recall, it was a foot injury.

- 1 Q. Were you being sued?
- 2 A. It was an insurance issue. There may have been a
3 lawsuit over it.
- 4 Q. Were you named as a --
- 5 A. I don't recall.
- 6 Q. I'm sorry. Were you named as a party?
- 7 A. I don't recall. I believe I was.
- 8 Q. Who did you own the boat with?
- 9 A. I had two partners.
- 10 Q. What were their names?
- 11 A. Andy Jergens and Larry Jessie.
- 12 Q. How do you spell Larry Jessie's last name?
- 13 A. I believe it's J-e-s-s-i-e.
- 14 Q. What was the name of the boat?
- 15 A. I don't recall if it had a name formally.
- 16 Q. What type of boat was it?
- 17 A. It was a sailboat, and it was a Coronado, 25.
- 18 Q. Where was it docked?
- 19 A. In South San Francisco. I don't recall the name of
20 the harbor.
- 21 Q. And you said this was 20 years ago, so this is
22 approximately 1975?
- 23 A. My best estimate is that it was 20 years ago, so
24 that would put it around 1975.
- 25 Q. Who was your attorney?
- 26 A. I didn't have an attorney.

1 Q. Do you recall the name of the attorney who deposed
2 you?

3 A. No.

4 Q. Was anyone else present besides the attorney that
5 deposed you and yourself and a court reporter?

6 A. I don't recall.

7 Q. What was the resolution of that matter?

8 A. It was handled by our insurance company. I never
9 did hear.

10 Q. So you don't know how that matter came out; is that
11 right?

12 A. No, I don't.

13 Q. When was the next time you were deposed?

14 A. The next time, I don't recall the date, but -- or
15 what year, even, but it was involving an asbestos
16 litigation.

17 Q. And who represented you when you were being deposed
18 then?

19 A. I don't recall.

20 Q. Do you recall what firm they were from?

21 A. No, I don't.

22 Q. Do you recall how long ago that was? Approximate.

23 A. Ten, 12 years ago.

24 Q. Where were you deposed?

25 A. As I recall, it was in Oakland.

26 Q. Do you recall where in Oakland?

1 A. I don't.

2 Q. Was it in --

3 A. I'm not even sure it was Oakland.

4 Q. Was it in an attorney's office?

5 A. Yes. I'm pretty certain it was.

6 Q. Was it in your attorney's office or the plaintiff's
7 attorney's office?

8 A. I believe it was an attorney's office.

9 Q. Yeah --

10 A. For the -- Not our attorneys, but some other -- the
11 other attorney's office.

12 Q. The plaintiff's office? Do you recall the
13 attorney's name that deposed you?

14 A. I don't recall the name, but it seems like it's
15 Cassin or something like that.

16 Q. Do you recall the name of the case that you were
17 deposed in?

18 A. I think it's Ferrill or something. Pete Ferrill or
19 something.

20 Q. Do you recall what the outcome of that case was?

21 A. I don't recall.

22 Q. When was the third time you were deposed?

23 A. I don't recall that date either. That was up in
24 Santa Rosa, I think, a little south of Santa Rosa,
25 California. That was an attorney's office.

26 Q. And what kind of case was that?

1 A. That was over asbestosis.

2 Q. Do you recall the name of the case?

3 A. No, I don't recall the name of the case.

4 Q. Do you recall the name of the plaintiff's firm that

5 deposed you?

6 A. I believe the name was Clapper and/or Braden.

7 Q. Do you recall who represented you?

8 A. Yes.

9 Q. Who was that?

10 A. Lou Schofield.

11 Q. And approximately when was this? I know you don't

12 know the specific date, but an approximation, please.

13 A. In the '80s. My best estimate would be the

14 mid-'80s.

15 Q. Have you ever testified in court?

16 A. Yes.

17 Q. All right. Before you tell me about your testimony

18 in court, I want to make sure that we covered all the

19 depositions that you have given. Have we talked about

20 every deposition that you have given?

21 A. As I recall, I only had three.

22 Q. Moving to testimony that you've given in court, how

23 many times have you testified in court?

24 A. The only one I recall was this year.

25 Q. And what month of this year did that occur?

26 A. I believe it was January.

1 Q. Where did you testify?
2 A. In Redwood City.
3 Q. And what was the issue of the case?
4 A. A wrongful termination, discrimination.
5 Q. I take it Kelly-Moore was the Defendant?
6 A. Yes.
7 Q. What was the name of the plaintiff?
8 A. Eugene Evans.
9 Q. Did Mr. Evans work for you?
10 A. He worked for Kelly-Moore, yes.
11 Q. And what was his relationship to you?
12 A. At that time, he worked in the San Carlos warehouse,
13 and he reported to a supervisor. The supervisor reports
14 to a plant manager, and the plant manager reports to me.
15 Q. Is Mr. Evans still in the area?
16 A. To the best of my understanding, he is.
17 Q. When did he stop working for Kelly-Moore?
18 A. As I recall, he did work for us in 1994, and best of
19 my recollection, he worked up until maybe October of '94.
20 Q. Do you recall when he first became employed with
21 Kelly-Moore?
22 A. I believe he worked for Kelly-Moore for about 15
23 years. So late '70s, maybe '79, would be my best guess.
24 Q. What was the outcome of that case?
25 A. It went in favor of the company.
26 Q. Did the jury return a verdict in favor of the

1 company?

2 A. Yes.

3 Q. And was the verdict returned in January of this
4 year?

5 A. The trial was in January, and I think the verdict
6 followed -- well, yeah. The verdict was given -- Was a
7 jury trial. The verdict was given in January, yes.

8 Q. Do you recall the name of the judge that you
9 testified in front of?

10 A. As I recall, his name was Thomas McQuinn Smith, I
11 think.

12 Q. And what were the names of the attorneys that
13 represented Kelly-Moore in that action?

14 A. The attorney representing Kelly-Moore, her name was
15 Cheryl Mills.

16 Q. Do you know what firm Ms. Mills is with?

17 A. I don't know the full title of her firm. It's in
18 San Francisco.

19 Q. Do you know some of the names?

20 A. I should. She's a partner, last name on the door.

21 Q. So her name is in the --

22 A. Yeah.

23 Q. -- masthead?

24 A. I'd be happy to furnish that.

25 Q. That's fine. The name of the plaintiff's lawyer, if
26 you recall, in that action?

1 A. I believe it was Rodney Moore.

2 Q. Do you know where Mr. Moore has his office?

3 A. My understanding was it was in the San Jose area.

4 Q. Besides the court testimony that you gave in
5 Mr. Evans' case, have you given any other court
6 testimony?

7 A. I think I may have, actually, just sitting here. It
8 would go way back. There was a lawsuit in Las Vegas
9 involving product failure in a highrise building, and I
10 believe I -- I know I went down there and I believe I
11 gave testimony.

12 Q. This was while you were employed with Kelly-Moore?

13 A. Yes.

14 Q. You said it was a long time ago. Approximately how
15 long ago?

16 A. Twenty years ago would be my best guess.

17 Q. You said that occurred in Las Vegas; is that
18 correct?

19 A. Yes.

20 Q. Do you recall whether it was state or federal court?

21 A. No.

22 Q. Do you recall who represented you in that action?

23 A. No, I don't.

24 Q. Do you recall who the plaintiff's lawyer was in that
25 action?

26 A. No.

1 Q. Was it a suit brought on behalf of the building
2 owners?

3 A. I don't recall.

4 Q. Do you recall the name of the building?

5 A. No, I don't. It may come to me, but at this point I
6 don't.

7 Q. Do you recall the product at issue in the case?

8 A. It was -- It was cracking the joint compound on
9 certain floors.

10 Q. Do you recall which joint compound was at issue?

11 A. No. I don't even recall if it was ours.

12 Q. Going back to your employment with Kelly-Moore Paint
13 Company, you told me that from July to November of 1968
14 you were in quality control. What was your job
15 responsibilities as a quality control chemist?

16 A. From July to November of 1968?

17 Q. Yes, sir.

18 A. That -- That was quality control tests on paint
19 products.

20 Q. Anything else besides that?

21 A. No.

22 Q. And when you say "quality control," it was doing the
23 tests that you had mentioned earlier; is that correct?

24 A. No, because these were not asbestos-containing
25 products. I was only answering that relating to
26 asbestos-containing products.

1 Q. I understand. So tell me what it is that your job
2 duties were, generally, from July to November of 1968 as
3 a quality control chemist for Kelly-Moore Paint Company.

4 A. The manufacture of paint is a batch process, and
5 each batch, before the product could be filled, had to be
6 tested for different quality aspects similar to those I
7 mentioned, pH and viscosity. Color was important with
8 paint, matching color. The density was weight-per-gallon
9 checks. There was overnight dry test, tests for hide.
10 There may have been others I did that I don't recall.

11 Q. How did your job change in November of 1968?

12 A. I moved from that position to the production manager
13 for Paco Textures.

14 Q. And how long were you the production manager for
15 Paco Textures?

16 A. I was responsible for the production of Paco
17 Textures from that point until approximately the end of
18 1981. And during that course, I think my official title
19 was production and research manager.

20 Q. Tell me what your job responsibilities were from
21 November of 1968 to the end of 1981 as the production
22 manager for Paco Textures.

23 A. I was actually -- excuse me. I was actually
24 responsible for the hiring of employees to -- workers to
25 run the plant, to make sure that all the raw materials
26 were purchased, make sure the orders were filled, product

1 was made, inventory was kept for the product lines that
2 were furnished out of San Carlos, California.

3 I worked on product development. I assisted --
4 well, I didn't assist anyone, but I was responsible for
5 the hiring, the purchasing, the product development, and
6 providing an inventory to fill the sales orders for the
7 San Carlos factory, Paco factory.

8 Q. Anything else that you haven't mentioned?

9 A. No. And again, that's answering specifically to the
10 production and research manager job. During that period
11 of time I also had some other responsibilities.

12 Q. Please tell me what those were.

13 A. The company also owned a division that was called
14 industrial minerals, and from the period of about 1973 --
15 and as I recall, it went to 1978 -- I was responsible for
16 a facility in Sacramento -- or, actually, Florin,
17 California near Sacramento that processed and sold
18 minerals and ceramic material. And then -- And I don't
19 know the period of time, but it would have been at the
20 tail end of that period, I was managing the Alta Pak that
21 I mentioned earlier, the loose-fill packaging. It was a
22 franchise that the company had for a short period of
23 time. But during this time I was still the production
24 and research manufacturer for Paco Textures.

25 Q. Did you have a job with someone other than
26 Kelly-Moore Paint Company prior to July 1968?

1 A. Just prior to July of 1968 I was in the United
2 States Air Force.

3 Q. And how long were you in the Air Force?

4 A. Two years.

5 Q. And what was your job responsibility in the Air
6 Force?

7 A. For the most part, I was a clerk in the aerial
8 delivery part of the Air Force base at Travis,
9 California.

10 Q. What was your rank?

11 A. When I was discharged, I was, as I recall, airman
12 first class.

13 Q. And prior to being in the Air Force what did you do?

14 A. Prior to going into the Air Force I worked almost
15 one year for National Gypsum Company.

16 Q. What year would that have been?

17 A. I started right out of college, so it was, like,
18 June of 1965. And then I went in the Air Force right
19 around July 7th of '66.

20 Q. What did you do for National Gypsum Company?

21 A. I was -- I don't recall what my title was, but I was
22 quality control chemist, I believe.

23 Q. Where were you located?

24 A. Matheson (phonetic), Illinois.

25 Q. Is there a plant in Matheson for National Gyp or was
26 there at the time?

1 A. There was at the time.

2 Q. And what did that plant manufacture?

3 A. They manufactured both the interior dry wall finish
4 compounds and latex paint.

5 Q. And while you were working at National Gypsum from
6 June of 1965 till July of 1966 -- Is that correct? Are
7 those years correct?

8 A. Yes.

9 Q. While you were working at National Gypsum Company
10 from June of 1965 till July of 1966 you were quality
11 control chemist; correct?

12 A. Yes.

13 Q. And did you have occasion while you were working at
14 the National Gypsum Company at that period of time to
15 conduct any tests on any asbestos-containing products
16 that National Gypsum manufactured?

17 A. Yes, I did.

18 Q. And what kind of tests did you do at the National
19 Gypsum Company?

20 A. Well, as I recall, they were the same tests that I
21 testified to earlier, doing viscosity test, pH test,
22 adhesion test, and then that, too, included paint test,
23 paint products that I also testified as doing for
24 Kelly-Moore. They're all basically the same test.

25 Q. Can you tell me the names of the National Gypsum
26 Company products that contained asbestos that you were

1 familiar with in 1965-1966?

2 A. Their products were marketed under Gold Bond name.
3 I don't recall if they had specific brand names under
4 that Gold Bond title, but they manufactured the drywall
5 finishing compounds, taping compounds, finishing
6 compounds, textures, wall textures.

7 Q. And it's your understanding that those textures and
8 joint compounds contained asbestos; correct?

9 A. Yes. In addition to doing quality control work they
10 had me on a development program for making small mixes of
11 product changes and so forth. So I recall mixing things
12 that included asbestos.

13 Q. And when you would mix things that included
14 asbestos, how would you go about doing that?

15 A. These were a batch size of approximately a quart,
16 and we would just measure out things precisely and mix
17 them together.

18 Q. While you were working at National Gypsum, did
19 anyone tell you when you were working with asbestos and
20 mixing it into the product to wear a respirator?

21 A. I don't recall.

22 Q. Do you recall ever wearing a respirator in 1965,
23 1966 when you were working with asbestos making
24 asbestos-containing products?

25 A. I don't recall.

26 Q. Do you recall on how many occasions that you would

1 mix batches of material when you were at National Gypsum
2 Company as a quality control chemist that contained
3 asbestos?

4 A. As a quality control chemist, part of testing each
5 batch, if it was a dry product, required mixing to do the
6 test. The mixing that I was testifying to just previous
7 to that was creating the product from scratch, putting
8 each individual ingredient in to make up a product so we
9 can make changes. On the quality control test, dry
10 products would be mixed with water.

11 Q. And whether you were making the product from scratch
12 or dumping the product out of the bag when you worked for
13 National Gypsum in 1965-1966, did you ever wear a
14 respirator when you were doing either of those activities
15 as a quality control chemist?

16 A. I don't recall.

17 Q. What prompted you to leave the National --

18 A. I actually doubt it. I'm sorry.

19 Q. I didn't mean to interrupt you. I thought you were
20 done.

21 What prompted you to leave the National Gypsum
22 Company in 1966?

23 A. It wasn't voluntary. I had a draft notice. I had
24 to go in the service.

25 Q. So in 1966 you were drafted in the Air Force?

26 A. Correct.

1 Q. Was your employment at the National Gypsum Company
2 your first job out of college?

3 A. Yes.

4 Q. And when did you graduate from college?

5 A. '65.

6 Q. So have we talked about -- from 1965 we talked about
7 your employment with National Gypsum until 1966; correct?
8 Correct? We have that time period, '65 to '66? That's
9 your only employment?

10 A. No. While I was working for -- for National Gypsum
11 I also had a night job working for a department store. I
12 believe the name was Korvette or something like that with
13 a "K." It was a department store. I worked in a jewelry
14 department selling fine jewelry part time, evenings.

15 Q. And that was at nights from 1965 to '66?

16 A. Correct.

17 Q. Okay. From 1966 to 1968, you were in the service;
18 correct?

19 A. Yes.

20 Q. Any other job that you had while you were in the
21 service? Did you do any moonlighting?

22 A. Yes, I did. I worked at a hotel called the
23 Brigadoon Lodge in Vacaville, California, working nights
24 as a night manager for the hotel.

25 Q. Anything else during that time period of '66 to '68?

26 A. Yes. I also worked as a busboy for the officer's

1 club on base at Travis. That's the only -- The only
2 other employment during that period.

3 Q. All right. Then from 1968 until the present, you've
4 worked for Kelly-Moore Paint Company continuously;
5 correct?

6 A. Correct.

7 Q. Have you had any other part-time jobs or
8 moonlighting jobs during that period of time from 1968 to
9 the present?

10 A. No.

11 Q. Now, you stated that in November 1968 you became the
12 production manager of Paco Textures, and you did that
13 until the end of 1981; correct?

14 A. Yes.

15 Q. Please tell me, for Paco Textures, during that
16 period of time from 1968 to 1981, on Paco Textures'
17 products, would all the products have Kelly-Moore on the
18 bag or box or carton they came in?

19 A. As I recall, they had Paco Textures on the bag or
20 box.

21 Q. And my question is did they have the name
22 Kelly-Moore on the bag or the pail or the carton?

23 A. I don't recall it having Kelly-Moore on the label.
24 I'd have to -- I don't recall.

25 Q. So as you sit here today, you don't recall whether
26 Kelly-Moore -- or the words Kelly-Moore were on the bag,

1 the pail or the carton from 1968 to 1981; is that right?

2 A. I don't recall --

3 MR. TRUNCALE: I'm going to object to the
4 question, certainly to the extent that it includes the
5 term "pail" in there. There's no evidence that
6 Kelly-Moore products were ever marketed in a pail.

7 MR. STEWART: Okay. You all need to decide
8 which one of you is going to be doing the objection. So
9 I don't care if it's you, Howard, or Michael, but pick
10 your advocate.

11 MR. TRUNCALE: Why don't you make the
12 objection, then, since I'm not there to whisper in your
13 ear.

14 MR. STEWART: Yeah, I understand that, and
15 that's fine. Just from here on out, is it going to be
16 Howard or is it going to be you, Michael?

17 MR. TRUNCALE: We'll make it Howard, but let me
18 go ahead, without being able to whisper in Howard's ear,
19 okay? And then Howard will make it for the record. How
20 does that sound?

21 MR. CHURCHILL: Sure.

22 MR. STEWART: That doesn't sound good to me.
23 That's doubly interruptive. One of the reasons for
24 Howard being here is so that he can do that for you, I
25 suppose.

26 MR. CHURCHILL: We've been going about an hour.

1 Let me take a break and talk to Michael about this issue;
2 all right? Five minutes?

3 MR. STEWART: .. five-minute break will be fine.

4 MR. CHURCHILL: We're off the record.

5 (Recess taken from 2:08 to 2:19 p.m.)

6 MR. CHURCHILL: We're back on the record.

7 Before we proceed -- Are you there?

8 MR. TRUNCALE: I'm right here.

9 MR. CHURCHILL: Before we proceed, Al, I
10 consulted with my Texas attorneys, and he tells me that
11 under Rule 9 of the Texas Code of Civil Procedure, two
12 attorneys can represent a -- a party or a witness's
13 interest in connection with any question.

14 Is that right, Michael?

15 MR. TRUNCALE: The rule states that not more
16 than two counsel on each side shall be heard on any
17 question --

18 MR. CHURCHILL: Okay.

19 MR. TRUNCALE: -- except in important cases
20 where apparently the court can allow you to have more
21 than that.

22 MR. CHURCHILL: All right. Our position will
23 be, then, that we're not trying to unduly prolong the
24 deposition here, but if I have an objection, I'm going to
25 go ahead and voice it, and then if Michael has an
26 objection, he can also do it.

1 MR. TRUNCALE: I think as a practical matter,
2 too, we've been going for over an hour. That was the
3 first one I've made. So I don't think it's a matter -- I
4 don't think you have to worry about an abusive situation
5 going on, Al.

6 MR. CHURCHILL: Yeah. The record will speak
7 for itself.

8 MR. STEWART: Michael, here is my problem. My
9 problem is, as you know, when you're in court and you've
10 got a witness on the stand, and that's what a deposition
11 is like, having a witness on the stand, only one attorney
12 gets to -- from each side gets to ask the questions and
13 only one gets to object to the question and do
14 cross-examination. That is what a deposition is.

15 That rule, which I just looked at speaks to
16 whether a judge can entertain to hear the viewpoints of
17 more than one attorney, and the rules say they can hear
18 more than two, and the case that's cited for that is one
19 that states you can basically have up to four attorneys
20 if the judge so sees that. That does not mean that four
21 attorneys for the same party get to pound on one witness
22 or make objections. They still have only one shot at a
23 witness. So that's my problem, and I'm going to have a
24 problem with that continuing to go on --

25 MR. TRUNCALE: You've preserved your point, I
26 think, on the record on that.

1 MR. STEWART: Right. Keeping in mind that --
2 what you just stated, and that is you voiced one
3 objection in an hour, I'm more interested than -- in
4 getting as much done as we possibly can than anything
5 else.

6 MR. TRUNCALE: Why don't we proceed.

7 Q. (BY MR. STEWART): When we had left, Mr. Merrill, we
8 were talking about whether your asbestos-containing
9 products -- or an issue was brought up about whether your
10 asbestos-containing products came in pails or not. Do
11 you know whether they came in pails or not?

12 A. Yes, we did have some in pails.

13 Q. So you did, in fact, have asbestos-containing
14 products that came in pails; correct?

15 A. Correct.

16 Q. Now, with respect to Kelly-Moore's asbestos-
17 containing products, please tell me, if you know, what
18 the purpose for the asbestos was in the product.

19 A. The asbestos as an ingredient in the product reduced
20 cracking. It gave the product a buttery, smooth feel for
21 troweling. It controlled the drying time because of the
22 affinity for water and the slow release of water from it.
23 Those were the main things. The cracking was the hardest
24 or the -- probably the primary use of asbestos.

25 Q. And you would agree with me, wouldn't you, sir, that
26 the asbestos was not in Kelly-Moore's asbestos-containing

1 products to somehow ensure the user/consumers' safety in
2 any way. You would agree with that; correct?

3 A. I'm not sure if I understand the question, but --

4 MR. CHURCHILL: Wait a minute. Could you
5 rephrase that?

6 Q. (BY MR. STEWART): Why don't you answer what you
7 think your understanding is and we'll see if you
8 understand what I meant.

9 MR. CHURCHILL: Excuse me, Counsel. He said he
10 didn't believe he understood the question.

11 Do you understand his question?

12 THE WITNESS: If you repeat it.

13 MR. STEWART: Why don't you read the question
14 back, and you tell me what you don't understand in the
15 question, if anything.

16 (Record read as follows:

17 "Question: And you would agree with me,
18 wouldn't you, sir, that the asbestos was not in
19 Kelly-Moore's asbestos-containing products to
20 somehow ensure the user/consumers' safety in
21 any way. You would agree with that; correct?")

22 MR. CHURCHILL: I'll object to the form of the
23 question.

24 THE WITNESS: I would agree that it's not in
25 there for the user's safety.

26 Q. (BY MR. STEWART): And would you also agree that the

1 asbestos was not in Kelly-Moore asbestos-containing
2 products to in any way prevent the user or consumer from
3 some other danger? You would agree with that?

4 MR. CHURCHILL: Object to the form of the
5 question.

6 THE WITNESS: Can you be specific on "some
7 other danger"?

8 Q. (BY MR. STEWART): Sure. I'll rephrase the question
9 if you feel like you can't answer that one.

10 I'm asking whether or not you believe that the
11 asbestos in Kelly-Moore's asbestos-containing products
12 was there to attempt to protect the consumer or user from
13 any other danger such as fire hazard or structural defect
14 or anything like that.

15 MR. CHURCHILL: Object.

16 Q. (BY MR. STEWART): It wasn't -- Let me finish and
17 then you can register your statement.

18 It wasn't there for any of those purposes in
19 Kelly-Moore's products, was it, sir?

20 MR. CHURCHILL: Object to the form of the
21 question. You can answer.

22 THE WITNESS: It wasn't there for the fire
23 aspect that you related to, but in your scenario for
24 structure, without the asbestos, there could be cracking
25 in the material itself which could be a failure in the
26 drywall system.

1 Q. (BY MR. STEWART): Is it your opinion that without
2 the asbestos in Kelly-Moore's asbestos-containing
3 products that people's lives would be in danger by it not
4 being in the product?

5 MR. CHURCHILL: Object to the form of the
6 question.

7 THE WITNESS: Could you restate it.

8 MR. STEWART: Could you read that back for me,
9 please.

10 (Record read as follows:

11 "Question: Is it your opinion that
12 without the asbestos in Kelly-Moore's
13 asbestos-containing products that people's
14 lives would be in danger by it not being in the
15 product?")

16 THE WITNESS: No, it would not be life
17 threatening.

18 Q. (BY MR. STEWART): Now, you stated earlier about the
19 reason that Kelly-Moore did not do any testing with
20 respect to its asbestos-containing products is because
21 Kelly-Moore didn't have any belief that it was dangerous.
22 Is that correct?

23 A. I believe I testified that we did do testing. Do I
24 understand the question right?

25 Q. I don't know whether you do or not. I had asked you
26 earlier about -- questions of whether Kelly-Moore did any

1 testing on its asbestos-containing products to determine
2 their health hazards to users. Do you recall those
3 questions?

4 A. Yes, okay.

5 Q. And you stated that they did not; correct?

6 A. I didn't pick up on the health aspect this time.
7 Okay.

8 Q. Okay. Is that correct?

9 MR. CHURCHILL: Do you have the question in
10 mind?

11 THE WITNESS: Repeat the question.

12 MR. STEWART: Certainly. Why don't we go back
13 and if you could read to me the "Q" and "A" and then the.
14 "Q."

15 (Record read as follows:

16 "Question: I don't know whether you do or
17 not. I had asked you earlier about --
18 questions of whether Kelly-Moore did any
19 testing on its asbestos-containing products to
20 determine their health hazards to users. Do
21 you recall those questions?

22 "Answer: Yes, okay:

23 "Question: And you stated that they did
24 not; correct?")

25 THE WITNESS: Yes.

26 Q. (BY MR. STEWART): Is it true, sir, that until

1 Kelly-Moore did test to determine the health hazard of
2 their product, there would be no way to know whether
3 their products were health hazards; correct?

4 A. No. If -- If there's a health hazard with asbestos,
5 it would be the asbestos company that would be
6 responsible for testing whether the health hazard was
7 there or not.

8 Q. With respect to your products, Mr. Merrill, you
9 would agree that it's Kelly-Moore's responsibility to
10 test their own products to determine whether or not they
11 pose a health hazard to users. You'd agree with that,
12 wouldn't you?

13 A. I would agree it would be in our judgment, yes.

14 Q. And you would also agree with me that it's important
15 for companies like Kelly-Moore to know what dangers the
16 ingredients of their products pose to their consumers and
17 users. You'd agree with that, wouldn't you?

18 A. Yes. Understanding the use of the product, yes.

19 Q. And, Mr. Merrill, you would agree with me that if
20 there was an ingredient in Kelly-Moore's products that
21 could potentially be hazardous to the users of that
22 product, that's something that Kelly-Moore should
23 investigate to determine what that hazard would be. You
24 would agree with that, wouldn't you?

25 A. Yes.

26 MR. TRUNCALE: Object to the form of the

1 question. At what time?

2 MR. STEWART: That doesn't require a time.

3 MR. TRUNCALE: I object to the form of the
4 question being vague and ambiguous.

5 Q. (BY MR. STEWART): Mr. Merrill, would you agree with
6 me that in the 1960s, Kelly-Moore Company was
7 manufacturing products that contained asbestos; correct?

8 A. Correct.

9 Q. You'd also agree with me that in the 1960s
10 Kelly-Moore did no testing to determine whether their
11 asbestos-containing products posed a health hazard to
12 their users or consumers; correct?

13 A. Correct.

14 Q. So you would agree that in the 1960s, Kelly-Moore
15 wasn't testing to determine whether the ingredients in
16 its products could harm the users or consumers of those
17 products; correct?

18 A. I think I testified that, yes.

19 (Off-the-record discussion.)

20 Q. (BY MR. STEWART): Now, Mr. Merrill, you mentioned
21 something about an industrial minerals group that you had
22 some responsibility for from 1973 to 1978. Do you recall
23 that?

24 A. Yes.

25 Q. Tell me what kind of -- kinds of industrial minerals
26 Kelly-Moore was involved with from 1973 to 1978.

1 A. Limestone, clay, bentonite, barite. Those are the
2 ones I recall.

3 Q. How was it that Kelly-Moore got it's industrial
4 minerals? Did they mine them? Did they purchase them?
5 How did they go about acquiring industrial minerals?

6 A. The company or the minerals?

7 Q. That's a bad question. Let me rephrase it.

8 How did Kelly-Moore acquire industrial minerals
9 that it then sold?

10 A. I don't recall how the company was acquired.

11 Q. Did Kelly-Moore make an acquisition of an industrial
12 mineral company during that period of time?

13 A. No.

14 Q. So Kelly-Moore started a new product line; is that
15 correct?

16 A. No.

17 Q. All right. Enlighten me how it was that Kelly-Moore
18 got into the industrial minerals business.

19 A. First of all, industrial minerals existed under
20 Kelly-Moore prior to '73, prior to my involvement. And
21 as I recall, it existed before I joined Kelly-Moore in
22 1968.

23 Q. Did Kelly-Moore mine any industrial minerals?

24 A. Yes.

25 Q. Where were the mines located?

26 A. There was a calcium carbonate deposit that was

1 leased for mining purposes, and it was located near -- or
2 south of Placerville, California. There -- This was
3 prior to my time. I'm just aware of it.

4 There was a barite deposit up near Dunsmuir,
5 California that was leased for short periods of time for
6 mining purposes.

7 That's all I recall as far as Kelly-Moore -- or
8 industrial minerals actually conducting a mining
9 operation. They acquired the crude mineral by purchasing
10 stock piles from other people.

11 Oh, there was -- there was one other deposit
12 that was a clay deposit, but as I recall, the mining had
13 been done and industrial minerals just worked off the
14 stockpile. So I can't really state whether the company
15 did any mining there or not, but that was located in
16 Stanislaus County, California, and it was a California
17 ball clay. But the company had control of a mine set,
18 but I don't recall if it actually did any mining.

19 Q. Any other mining that you can recall that
20 Kelly-Moore was involved in at any time?

21 A. To my knowledge, there was -- well, no, I don't
22 recall any other ones.

23 Q. Turning your attention to the 1970s, did Kelly-Moore
24 Paint Company do any tests to determine what the health
25 hazards of its products, it's asbestos-containing
26 products, were to the user or consumer in the 1970s?

1 A. No. Didn't have any reason to.

2 Q. And the reason that you say that you did not have a
3 reason to, what's your reasoning for that, Mr. Merrill?

4 A. We just didn't have any reason to.

5 Q. Well, why didn't you have a reason to?

6 A. There's nothing that led us to believe that there
7 was a health risk.

8 Q. Did you ever go and look at the medical and
9 scientific literature to determine whether asbestos was
10 causing people to get sick and die?

11 A. No.

12 Q. Well, if you didn't go and look at the medical and
13 scientific literature to determine whether or not
14 asbestos could cause people to get sick and die, how
15 could you know whether or not your product would do that?

16 A. Because the people we bought the asbestos from told
17 us there wasn't.

18 Q. And who were the people that you bought the asbestos
19 from?

20 A. There was Johns-Manville, Carey Canadian, Union
21 Carbide. Those were the three major suppliers.

22 Q. And when did each one of these suppliers tell you
23 about what the health risks were with respect to
24 asbestos?

25 A. I don't recall, but best of my knowledge, this all
26 got started around 1972.

1 Q. Please tell me who you communicated with at the
2 Johns-Manville Company in 1972 regarding the health
3 hazards of asbestos?

4 A. I don't recall anyone's name. It would have been
5 their salesman responsible for our area or their
6 distributor. I don't know if they went direct or through
7 a distributor.

8 Q. Are you telling me you have a recollection of a
9 specific conversation that you had with the
10 Johns-Manville sales representative or distributor
11 regarding the health risks of asbestos?

12 MR. CHURCHILL: Object to the form of the
13 question.

14 THE WITNESS: I don't recall any direct
15 conversation. There was a lot of communications in
16 writing.

17 Q. (BY MR. STEWART): And where are those
18 communications in writing now?

19 A. Should be retained in our files, if we have them.

20 Q. Where would those files be located?

21 A. We have a collection of all the stuff relating to
22 asbestos here at San Carlos.

23 Q. And when you say "here in San Carlos," are we
24 talking about the building we are presently in?

25 A. No. It's at 1057 Commercial Street.

26 Q. That would be three buildings down; is that correct?

1 A. Approximately, yeah.

2 Q. Do you recall having any specific conversations with
3 someone from Carey Canada regarding the health effects of
4 asbestos in 1972?

5 A. I don't recall anything specific.

6 Q. And what about the Union Carbide Company? Do you
7 recall any specific conversations you had with anyone at
8 Union Carbide regarding the health effects of asbestos in
9 1972?

10 A. I don't recall.

11 Q. What about any year? Do you recall any
12 conversations you had with Union Carbide in any year
13 regarding the health effects of asbestos?

14 A. I don't recall any, no.

15 Q. Let me ask that question with regard to Carey
16 Canada. Do you recall having any specific conversations
17 with anyone at Carey Canada at any time about the health
18 effects of asbestos?

19 A. No.

20 Q. Johns-Manville. Do you recall having a specific
21 conversation with anyone at any time from Johns-Manville
22 regarding the health effects of asbestos?

23 A. I vaguely recall having a -- them putting on a
24 seminar or something, but I don't recall anything
25 specific about it.

26 Q. Where was the -- You're saying Johns-Manville? Do

1 you recall a Johns-Manville seminar?

2 A. I don't recall any of the specifics.

3 Q. When do you believe that seminar occurred?

4 A. I don't recall.

5 Q. What was the content of the seminar?

6 A. It was about asbestos.

7 Q. Do you recall specifically what was said about
8 asbestos at the seminar?

9 A. No, I don't.

10 Q. You have no recollection whatsoever about what
11 occurred at that seminar?

12 A. No.

13 Q. Do you recall where the seminar was held?

14 A. My best estimate would be San Francisco.

15 Q. Do you recall who attended?

16 A. Other than myself?

17 Q. From Kelly-Moore, yes.

18 A. I don't recall, but I would suspect that I would
19 probably have been the only one.

20 Q. Do you recall any of the speakers at the seminar?

21 A. I can't recall anything specific about it.

22 Q. So you have no specific recollection from any of the
23 suppliers of asbestos materials regarding what they said
24 or did not say about asbestos; is that correct?

25 MR. CHURCHILL: Object to the form of the
26 question.

1 THE WITNESS: Nothing specific. It was just
2 generally that the asbestos wasn't a hazardous risk.

3 Q. (BY MR. STEWART) So your testimony today is people
4 from Johns-Manville, Carey Canada and Union Carbide told
5 you that there was no risk from asbestos?

6 MR. CHURCHILL: Object to the form of the
7 question.

8 THE WITNESS: The communication from the
9 asbestos companies were that there was not a hazardous
10 use by using asbestos the way we were using it, small
11 amounts.

12 Q. (BY MR. STEWART): And did you do anything to either
13 confirm or contradict those alleged representations to
14 you?

15 A. Well, there would have been some confirmation having
16 come from three different companies. Other than that,
17 no.

18 Q. But you can't tell me as you sit here today who from
19 those three companies told you that information; correct?

20 A. It seems to me they had a representative out of
21 Denver, Colorado for Union -- for Johns-Manville. His
22 name might have been McCarthy or McCormick or something
23 like that.

24 Q. And it's true as you sit here today you can't tell
25 me what the substance of the conversations that you had
26 with him were; correct?

1 MR. CHURCHILL: Well, object to the form of the
2 question.

3 THE WITNESS: Well, relating to the use of
4 asbestos, that it was okay to do it. I don't know what
5 specifically was said, no.

6 Q. (BY MR. STEWART): But your recollection is that
7 some representative from Johns-Manville told you that
8 it's okay to use asbestos in your products?

9 A. Yes.

10 Q. What about -- And do you recall what year that was?

11 A. No.

12 Q. Roughly do you recall approximately what year that
13 was?

14 A. Approximately early '70s.

15 Q. Anything other than what you've just related to me
16 that you can specifically recall about the Johns-Manville
17 rep telling you with respect to asbestos and its hazards?

18 MR. CHURCHILL: I'm sorry; could I have that
19 question read back.

20 THE WITNESS: Yeah, I need it too.

21 (Record read as follows:

22 "Question: Anything other than what
23 you've just related to me that you can
24 specifically recall about the Johns-Manville
25 rep telling you with respect to asbestos and
26 its hazards?")

1 MR. CHURCHILL: Object to the form of the
2 question.

3 THE WITNESS: I don't recall anything else
4 specific.

5 Q. (BY MR. STEWART): And as we sit here today, you
6 can't tell me the name of the Union Carbide
7 representative that spoke with you; correct?

8 A. I recall what he looks like. I don't remember his
9 name.

10 Q. And you can't recall the name of the Carey Canada
11 representative that you spoke with; correct?

12 A. No.

13 Q. And you can't recall what year you spoke with the
14 Carey Canada representative; correct?

15 A. It would have been after 1972. Early '70s.

16 Q. And what about the year that you spoke with the
17 Union Carbide representative? Would that have been after
18 1972?

19 A. Yes.

20 Q. Have you or anyone from Kelly-Moore, to your
21 knowledge, at any time gone back through the medical and
22 scientific literature to find out what was available in
23 the medical and scientific literature regarding the
24 hazards of asbestos?

25 MR. CHURCHILL: Object to the form of the
26 question. You can answer it, if you can.

1 THE WITNESS: We've gone back into our records
2 looking for specific things and tried to group things
3 into similar files, but, no, I don't recall any specific
4 search.

5 Q. (BY MR. STEWART): And that's really my -- I'm
6 sorry. I didn't mean to interrupt you. Were you done?

7 A. No.

8 Q. You can continue. I didn't mean to interrupt you.
9 Were you done?

10 A. (Nods head up and down.) Yes.

11 Q. Okay. Specifically, my question was, Mr. Merrill,
12 that you personally have not gone back at any time and
13 looked at this medical and scientific literature and what
14 was available prior to 1972 about the dangers and hazards
15 of asbestos; correct?

16 MR. CHURCHILL: Object to the form of the
17 question.

18 THE WITNESS: I don't think we have any records
19 prior to 1972 to go back to look at. I'm not aware of
20 any.

21 Q. (BY MR. STEWART): And besides your records, you
22 personally have not gone back and done any --

23 A. When you say -- excuse me.

24 Q. Let me finish my question. Besides your internal
25 records, Kelly-Moore internal records, you have not gone
26 and looked at medical and scientific literature on the

1 subject of asbestos and its hazards to determine what
2 hazards asbestos posed to people using asbestos products;
3 correct?

4 MR. CHURCHILL: Object to the form of the
5 question.

6 THE WITNESS: Correct.

7 Q. (BY MR. STEWART): And that's not something that
8 you're aware of anyone from Kelly-Moore doing at any
9 time; correct?

10 MR. CHURCHILL: Object to the form of the
11 question.

12 THE WITNESS: As I understand your question,
13 there's -- I have no knowledge of anyone else doing it,
14 no.

15 Q. (BY MR. STEWART): With respect to Kelly-Moore
16 asbestos-containing products, how did Kelly-Moore market
17 those products?

18 A. They were sold through Kelly-Moore owned and
19 operated stores under the name of Paco Textures.

20 Q. And when you say they were sold out of Kelly-Moore
21 -- did you say retail stores? I'm sorry.

22 A. I didn't say retail, but company owned and operated
23 stores.

24 Q. Company owned and operated stores. Where
25 in -- Let's do this by decades, if you will. In the
26 1950s, where did Kelly-Moore have retail stores located?

1 A. I wasn't with Kelly-Moore then.

2 Q. So as you sit here, you can't tell me where
3 Kelly-Moore had retail stores located in the 1950s; is
4 that correct?

5 A. That's correct. I have no knowledge of store
6 locations in....

7 Q. All right. In the 1960s, prior to 1968 when you
8 started with Kelly-Moore, do you have any knowledge or
9 recollection of where Kelly-Moore had company owned and
10 operated stores in the United States?

11 A. In the 1960s when I was involved, there were stores
12 in Texas, California, Colorado, Oklahoma, I believe
13 Washington and Oregon.

14 Q. Now, you said when you were involved, and that would
15 have been --

16 A. '68.

17 Q. -- in 1968. My question is prior to 1968 do you
18 have any knowledge of where Kelly-Moore had company owned
19 and operated stores in the United States?

20 MR. CHURCHILL: Object to the form of the
21 question.

22 THE WITNESS: Only that many of the stores when
23 I came on board had been in existence for some time. I
24 was aware of that.

25 Q. (BY MR. STEWART): But --

26 A. Not all of them may have gone back to 1960.

1 Q. But specifically my question is whether you have
2 personal knowledge of what stores that Kelly-Moore owned
3 and operated in the United States prior to 1968.

4 A. No, I do not have knowledge.

5 Q. You can't provide me with --

6 A. Personal knowledge.

7 Q. Right. And you can't provide me with a complete
8 list as you sit here today of where Kelly-Moore had its
9 company owned and operated stores in the United States
10 prior to 1968; correct?

11 MR. CHURCHILL: Based on personal knowledge, as
12 he sits here today?

13 MR. STEWART: That's what he's here to do.
14 Right.

15 THE WITNESS: From memory, no. I could
16 probably obtain that information for you, but from my
17 personal knowledge and memory, no.

18 Q. (BY MR. STEWART): Where would you go to obtain that
19 information, sir?

20 A. Start out with our store operations people and go
21 backwards.

22 Q. And who would be the store operations person you
23 would contact to find out that information?

24 A. Well, the vice president of store operations is Herb
25 Giffins.

26 Q. And where is Mr. Giffins located?

1 A. Right in this building.

2 Q. And how long has he been in that capacity as store
3 operations vice president?

4 A. I recall him being here about nine or ten years. So
5 he'd go back to mid-'80s.

6 Q. After 1968 you mentioned that Kelly-Moore had stores
7 that it owned and operated in Texas, in California,
8 Colorado, Oklahoma, Washington and Oregon; correct?

9 A. That I'm aware of, yes.

10 Q. Did it have any stores in Louisiana?

11 A. No. Never has.

12 Q. Did it have any stores in Alabama?

13 A. No. Never have.

14 Q. In Mississippi?

15 A. No. Never have.

16 Q. In Florida?

17 A. No.

18 Q. In Georgia?

19 A. No.

20 Q. Tennessee?

21 A. No.

22 Q. Missouri?

23 A. No.

24 Q. Arkansas?

25 A. The company plan was to just market west of the
26 Mississippi.

1 Q. You're testing my geography here. That could be a
2 problem. Kansas?

3 A. You said Arkansa ^

4 Q. Arkansas, yes. I see pins in the map in Arkansas.

5 A. Yeah. There's a point in time that -- one of those
6 is real recent, the last couple of years, and Fort Smith,
7 Arkansas, right on the border, it's been there for a
8 while, but not back to the '60s.

9 Q. I notice on this map on the wall there are
10 different-colored pins in different locations. What does
11 an orange pin stand for?

12 MR. CHURCHILL: Perhaps the record should
13 reflect that we're sitting in a corporate conference room
14 and there's a business map to Mr. Merrill's back that
15 he's now looking at, and it has various -- various pins
16 in the map. I'd represent for the record that there are
17 no pins east of the Mississippi river. I think that's
18 correct. Would you agree with that, Counsel?

19 MR. STEWART: Well, I'm not here to say what
20 the map says or doesn't say. I'm just trying to get a
21 sense of what the orange pins mean.

22 MR. CHURCHILL: Right.

23 MR. STEWART: So I'm not going to take this map
24 and make it an exhibit nor do I plan to cross-examine him
25 on the map. I was just wondering what all those orange
26 pins were around that little flag.

1 THE WITNESS: Well, the orange pins, according
2 to the map, is central division, which is the areas
3 expanded from Dallas, For Worth.

4 Q. (BY MR. STEWART): Okay. And --

5 A. That's a division that -- store operations have a
6 management structure and the outside sales have a
7 management structure, and it's a level below the
8 corporate.

9 Q. And the gold pins, what do those represent?

10 A. South -- Southwest, south district.

11 Q. Now, how did --

12 A. Actually, it says division, but we refer to them as
13 districts.

14 Q. How did Kelly-Moore go about -- You've said that
15 they marketed their product -- strike that.

16 You told me that Kelly-Moore marketed its
17 asbestos-containing product through company owned and
18 operated stores; correct?

19 A. Correct.

20 Q. Did someone have the responsibility for selling
21 Kelly-Moore products besides just the people who were
22 there, local retailing?

23 A. Depends on the area. Out of the San Carlos
24 location, in northern California, there was a stronger
25 sales effort where, depending upon the time, but there
26 would be one, two, possibly three salesmen that were

1 exclusively just selling the Paco products and not any of
2 the paint products.

3 In the other areas outside of California, the
4 only exception may be Broken Arrow, the manager there was
5 also heavily involved in sales because that was not a
6 paint manufacturing location. But these other little
7 stores, the people -- the salesmen that worked out of
8 that location would sell both paint and Paco products.

9 Q. Did Kelly-Moore Company have independent sales
10 representatives to market Paco products at any time?

11 A. The only independent agent was a fellow by the name
12 of Cliff Woodland.

13 Q. What was the last name?

14 A. Woodland.

15 Q. And what was Mr. Woodland's job?

16 A. Well, he didn't have a job. He had owned Paco
17 Textures prior to Kelly-Moore, and --

18 Q. When was that?

19 A. Prior to -- Well, he sold it in December of 1960.

20 Q. What type of sale was that? Was it just an asset
21 sale? Was it a merger? Stock transfer?

22 A. I wasn't here then. I don't know.

23 Q. So you don't know how Kelly-Moore acquired Paco from
24 Mr. Woodland?

25 A. No. I was not here. No.

26 Q. All right. You were saying that he owned Paco prior

1 to Kelly-Moore purchasing Paco from him.

2 A. Yes.

3 Q. What was his job responsibility after that?

4 A. He was retained as an employee, but I -- as I was
5 told, he had some bad health. That's why he sold. And
6 then apparently his health situation changed and he
7 wanted to continue working and so forth, so he would go
8 into areas where there really wasn't an established
9 Kelly-Moore store system, like in Oregon, in a place like
10 that, and sell to people in that area.

11 Q. And when you say he would "sell to people in that
12 area," what kind of people would he sell to?

13 MR. CHURCHILL: Object to the form of the
14 question.

15 MR. STEWART: The longer I thought about it, me
16 too. Let me change the question.

17 Q. When Mr. Woodland -- when he sold in Oregon, would
18 he sell to distributors?

19 A. I'm not sure how he classified them, but I think
20 they probably could be classified for resale.

21 Q. And when you say "resale," what you're saying is he
22 would sell to someone who would be like a wholesaler who
23 would turn around and sell to someone else?

24 A. To a contractor, yeah.

25 Q. Did Kelly-Moore keep any records of who Mr. Woodland
26 sold his products to or who he contacted in Oregon?

1 A. We do have some of the files. We -- We tried to, in
2 the '70s, at some point, keep all the files we could, and
3 I believe that some of those files do indicate some of
4 that activity.

5 Q. If I understand what you're saying is you think you
6 have some of the files but not all the files. Is that
7 accurate?

8 A. I know we don't have all the complete files, no.

9 Q. And that would be not only with respect to
10 Mr. Woodland's activity, but would that be to all
11 Kelly-Moore sales activity?

12 A. Chronologically, sure. We don't have files that go
13 back to 1960.

14 Q. Now, you mentioned Mr. Woodland was doing some sales
15 work in Oregon. Did he do that any other place?

16 A. I believe he did.

17 Q. Tell me where.

18 A. I don't know as there is, though.

19 Q. So as you sit here today, you can't tell me what
20 areas he did and didn't sell into; is that correct?

21 A. Not specifically, no.

22 Q. When you say "not specifically," what do you mean?

23 A. I don't know all the areas he sold to.

24 Q. Tell me some of the areas that you know he sold to
25 besides Oregon.

26 A. Salt Lake City, I believe, and there's another

1 location in Utah. Provo or something like that.

2 Q. So if I understand what you're saying is even though
3 Kelly-Moore Company does not have a company owned and
4 operated store in Utah, Mr. Woodland would go and sell
5 product in Utah; correct?

6 A. Yeah. Two -- He had very, very few accounts, but I
7 can recall two of them being in Utah. I don't think they
8 both were in Salt Lake City, but I'm pretty sure one was.
9 And then there was one up around Medford, I think, or
10 someplace.

11 Q. That would be Oregon; correct?

12 A. Yeah, I think Medford, Oregon. I don't think there
13 was anything in Nevada.

14 Q. So if I understand your testimony correctly, it is
15 possible for Paco materials to be sold to distributors in
16 places where Kelly-Moore does not have company owned and
17 operated stores; correct?

18 MR. CHURCHILL: Object to the form of the
19 question.

20 THE WITNESS: It was very limited to -- to
21 accounts of Cliff Woodland which we know where they are.
22 As we sit here, some of these names might start coming
23 back, like the Provo, Utah and Salt Lake City. I think
24 all of his -- his activity could be counted on one hand.
25 Maybe six counts. And they were specific -- I think some
26 of the things, Builders' Supply I think was the name of a

1 company in Utah. I think the files we have shows that
2 activity. And he only worked out of the West Coast
3 plant.

4 Q. (BY MR. STEWART): Besides Mr. Woodland, what other
5 sales representatives did Kelly-Moore have in the --

6 A. As employees?

7 Q. -- 1960s?

8 A. As employees?

9 Q. No, they don't have to be employees. They're just
10 someone who would be --

11 A. He was the only one who was not an employee -- not
12 employed.

13 Q. Let me rephrase the question. Besides Mr. Woodland,
14 were there any non-employee sales representatives of
15 Kelly-Moore?

16 A. No.

17 Q. And in --

18 A. I'm answering for the asbestos-containing products
19 because that's all I'm familiar with.

20 Q. Why is that all you're familiar with?

21 A. Kelly-Moore could have had someone sell paint, but
22 I'm not aware of it. As an outside sales representative
23 for the Paco asbestos-containing products, he was the
24 only one.

25 Q. Does Kelly-Moore market paint east of the
26 Mississippi?

1 A. No.

2 Q. Does Kelly-Moore market any material east of the
3 Mississippi?

4 A. No.

5 Q. And you're not saying that Kelly-Moore would refuse
6 to sell to someone who wanted to buy east of the
7 Mississippi, are you?

8 A. Probably not, but it sure wouldn't be very
9 practical, freight costs and everything.

10 Q. Well, now, it's possible for someone who, say, is in
11 Texas to purchase materials from a Kelly-Moore store in
12 Texas and use them elsewhere. You'd agree with that;
13 correct?

14 MR. CHURCHILL: Object to the form of the
15 question.

16 THE WITNESS: Once someone purchases the
17 product, they could take it to Europe, I guess.

18 Q. (BY MR. STEWART): And so it's possible for someone
19 to purchase product in Texas and use it in some other
20 state; correct?

21 MR. CHURCHILL: Object to the form of the
22 question.

23 THE WITNESS: Not practicable but possible.

24 Q. (BY MR. STEWART): And likewise, it's possible for
25 someone who buys a lot of Kelly-Moore material to use it
26 in more than one location; correct?

1 MR. CHURCHILL: Object to the form of the
2 question.

3 THE WITNESS: Again, it's possible but not very
4 practical.

5 Q. (BY MR. STEWART): Do you have any records or
6 evidence that the Reynolds Aluminum Company has never
7 used Kelly-Moore asbestos-containing products?

8 MR. CHURCHILL: Object to the form of the
9 question. How could he have a record for a non-use?

10 THE WITNESS: Yeah; it doesn't make sense.

11 MR. STEWART: I'll change the question. Nice
12 point.

13 Q. Do you have any records or evidence showing that --
14 let me strike that.

15 You don't know what the Reynolds Aluminum
16 Company's use of Kelly-Moore products were; correct?

17 MR. CHURCHILL: Object to the form of the
18 question.

19 THE WITNESS: I have no knowledge of their use,
20 no recollection of any use.

21 Q. (BY MR. STEWART): And you don't have any knowledge
22 of where they purchased Kelly-Moore products and where
23 they used them; correct?

24 MR. CHURCHILL: Same objection.

25 THE WITNESS: Correct.

26 Q. (BY MR. STEWART): And you're not here to say that

1 the Reynolds Aluminum Company has not purchased
2 Kelly-Moore asbestos-containing products; correct?

3 MR. CHURCHILL: Same objection.

4 THE WITNESS: I have no knowledge of them
5 purchasing or not purchasing.

6 Q. (BY MR. STEWART): And you're not here to say that
7 the Reynolds Aluminum Company has not used Kelly-Moore
8 products in the state of Alabama; correct?

9 MR. CHURCHILL: Same objection.

10 THE WITNESS: Correct.

11 Q. (BY MR. STEWART): And that would be the same with
12 the United States Steel Company; correct? You're not
13 here to say that the United States Steel Company has not
14 used Kelly-Moore asbestos-containing products in the
15 state of Alabama; correct?

16 MR. CHURCHILL: Same objection.

17 THE WITNESS: I have no knowledge of it, but
18 it's not very practical that someone in Alabama would use
19 our product.

20 Q. (BY MR. STEWART): Let me object to the
21 responsiveness. I'm asking whether you have knowledge of
22 the United States Steel Company not using Kelly-Moore
23 products in the state of Alabama.

24 MR. CHURCHILL: Same objection.

25 THE WITNESS: Correct.

26 Q. (BY MR. STEWART): You don't know whether they did

1 or didn't; correct?

2 A. No.

3 Q. And the Browns Ferry nuclear power plant, you don't
4 know whether they used Kelly-Moore asbestos-containing
5 products one way or another at that plant; correct?

6 MR. CHURCHILL: Object to the form of the
7 question.

8 THE WITNESS: Correct. I -- I don't have any
9 knowledge of any of our customers, really.

10 MR. CHURCHILL: Where is that power plant,
11 Counsel?

12 MR. STEWART: Browns Ferry?

13 MR. CHURCHILL: Browns Ferry.

14 MR. STEWART: I think Browns Ferry is in
15 Alabama.

16 Q. So if I understand you correctly, Mr. Merrill, you
17 have no personal knowledge about the use or non-use of
18 Kelly-Moore asbestos-containing products by United States
19 Steel, Browns Ferry nuclear power plant or Reynolds
20 Aluminum plant; correct?

21 MR. CHURCHILL: Object to the form of the
22 question.

23 THE WITNESS: I have no knowledge of anyone
24 using our product in Alabama or any reason that they
25 would.

26 Q. (BY MR. STEWART): No. I'm going to object to the

1 responsiveness.

2 And, likewise, you don't have any knowledge of
3 people not using your product in the state of Alabama;
4 correct?

5 MR. CHURCHILL: Object to the form of the
6 question.

7 THE WITNESS: That's correct.

8 Q. (BY MR. STEWART): It is possible, isn't it, sir,
9 for someone to buy your materials from a distributor in
10 Texas or Oklahoma or even Arkansas and take them
11 somewhere else and use them. That's possible; correct?

12 MR. CHURCHILL: Object to the form of the
13 question.

14 THE WITNESS: I guess it's possible. It's not
15 very practical.

16 Q. (BY MR. STEWART): But you're not running those
17 other companies; correct? You don't know what they did
18 in order to access your material and use it; correct?

19 A. Correct.

20 Q. And if someone wanted to use Kelly-Moore products
21 and they were in Alabama, they would have to go somewhere
22 else to get them; right?

23 MR. CHURCHILL: Object to the form of the
24 question.

25 THE WITNESS: Correct. We have no outlet or
26 never had an outlet in Alabama.

1 Q. (BY MR. STEWART): So if your products show up in
2 the state of Alabama, what that means is someone has
3 chosen to get your products from somewhere else and use
4 them in Alabama; correct?

5 A. Correct.

6 Q. And that's possible; correct?

7 MR. CHURCHILL: Object to the form of the
8 question.

9 THE WITNESS: I don't know how they would have
10 heard of Kelly-Moore in Alabama, but it's possible to go
11 into Texas and make a purchase and then go back out of
12 state.

13 Q. (BY MR. STEWART): Well, it's possible to go to
14 Houston and buy your product; correct?

15 A. Texas, yes.

16 Q. And it's possible to go to Hurst where you have a
17 plant and buy your product; correct?

18 A. Correct.

19 Q. And as a matter of fact, your product, your Hurst
20 plant, it's right next to a rail line, is it not?

21 A. That's correct.

22 Q. And that rail line goes south, doesn't it?

23 A. That's correct.

24 Q. So it's possible to get your product from the state
25 of Texas or the state of Oklahoma or the state of
26 Arkansas to the state of Alabama; correct?

1 MR. CHURCHILL: Object.

2 THE WITNESS: But it was never done by rail.

3 Q. (BY MR. STEWART): And I'm not trying to suggest
4 that it was done by rail. I'm just saying it's possible
5 to get it from the state of Oklahoma or the state of
6 Texas or the state of Arkansas to another state; correct?

7 MR. CHURCHILL: Object to the form --

8 THE WITNESS: I would have known if a rail
9 car --

10 MR. CHURCHILL: -- of the question.

11 I think I stepped on your answer.

12 THE WITNESS: That's okay.

13 Q. (BY MR. STEWART): My point is someone can get your
14 product from where you have stores to where you don't
15 have stores; correct?

16 A. That's correct, unless you're talking about a very
17 large truck car or a rail car or something. We would
18 have been aware of that.

19 Q. And isn't it possible for people who have large
20 facilities to buy your product to be used in Texas and
21 maybe ship it to another one of their facilities in
22 Alabama? That's possible, isn't it?

23 MR. CHURCHILL: Object to the form of the
24 question.

25 THE WITNESS: It's possible, yes.

26 MR. CHURCHILL: Can I have a continuing

1 objection every time you use the word "possibility"?

2 MR. STEWART: Certainly.

3 MR. CHURCHILL: Any time he uses "possible" or
4 "possibility" in his question, I'm going to object to it.
5 Would you agree with that, Michael?

6 MR. TRUNCALE: A running objection any time he
7 uses the word "possibility"?

8 MR. CHURCHILL: Right.

9 MR. TRUNCALE: I think so. And I also would
10 add that it's objectionable if not irrelevant as to
11 whether or not it is possible.

12 MR. STEWART: You can hold your relevance
13 objections. Those you get to hold on.

14 Q. So, Mr. Merrill, in conclusion, with respect to
15 anywhere Kelly-Moore products are used, whether it be in
16 Louisiana or Alabama or Arkansas, you're in agreement
17 that it's possible to purchase your products from
18 somewhere where there are company owned and operated
19 stores and have them sent to Alabama or Louisiana or
20 anywhere where you don't have a company owned store;
21 correct?

22 A. Well, I don't agree with the shipping. We have no
23 distribution.

24 MR. TRUNCALE: Wait a minute. Now, object to
25 the form of the question. It's vague and it's ambiguous.

26 MR. STEWART: All right. You guys need to

1 choose who is going to do the objecting here.

2 MR. TRUNCALE: Under Rule 9 --

3 MR. STEWART: Your Rule 9 isn't going to fly,
4 Mike. You know that's not what it says.

5 MR. TRUNCALE: I'm going to make an objection.
6 It's vague, ambiguous, assumes facts not in evidence. I
7 object to the form of the question.

8 MR. STEWART: Now, why don't you keep making
9 the objections and Howard not make the objections so that
10 we follow the rules.

11 MR. TRUNCALE: We're not required to.

12 MR. STEWART: No, you are required to follow
13 the rules, Mike. That's why we have rules, so they're
14 followed.

15 Q. With respect to shipping, I'm not suggesting or
16 trying to suggest to you that Kelly-Moore would do the
17 shipping. It's possible for someone to buy your product
18 somewhere where Kelly-Moore has a company owned and
19 operated store and have that product shipped themselves
20 to another location; correct?

21 A. That's possible, that's correct, but it wouldn't be
22 a very sizable shipment because our stores only kept a
23 small amount of inventory. So if someone drove over,
24 they could purchase a -- something and put it in their
25 vehicle and go back out of state. We'd have no control
26 of that.

1 Q. Are you saying that Kelly-Moore never sold its
2 products in large inventory quantities?

3 A. Out of a store?

4 Q. Out of the store.

5 A. Yes. For the most part, the accounts, contractors,
6 large accounts, would -- the orders would be processed
7 through a store but the shipments would be made from the
8 factory.

9 Q. So if someone was out of state and they wanted to
10 order -- out of a state where Kelly-Moore had a company
11 owned and operated store, how would they go about
12 ordering from Kelly-Moore?

13 A. If somebody was out of state?

14 Q. Correct.

15 A. I'm not aware of that happening.

16 Q. Whether or not you're aware of it happening or not,
17 if someone wanted to do that, how would they go about
18 doing it?

19 MR. CHURCHILL: I'll object to the form of the
20 question. Are you asking him to speculate on what
21 somebody would do?

22 MR. STEWART: No, I'm not asking him to
23 speculate on what someone would do.

24 Q. How is it, Mr. Merrill, that you fill large orders
25 from the Kelly-Moore Company? You fill large orders;
26 correct?

1 A. Correct.

2 Q. And you would fill a large order from Louisiana,
3 wouldn't you?

4 A. If we had a large order, it would have to be on a
5 will call or on an FOB of the plant because our system
6 did not go into Louisiana.

7 Q. And my question was if someone was in Louisiana and
8 wanted to make a large order from Kelly-Moore, how would
9 they go about doing that?

10 MR. CHURCHILL: Object to the form of the
11 question.

12 THE WITNESS: They would pick up at the
13 factory.

14 Q. (BY MR. STEWART): So they would pick up at one of
15 your factories; correct?

16 A. Yes. The stores would not have inventory for a
17 large order.

18 Q. And that would mean for Louisiana, I suppose, that
19 if someone wanted to order an asbestos-containing product
20 that Kelly-Moore manufactured, they would have to have
21 that material picked up in Hurst, Texas; correct?

22 A. During the period of time we manufactured that, yes.

23 Q. And that is something that is possible to do;
24 correct?

25 A. Possible.

26 Q. Is there a manufacturing facility in Houston?

1 A. No.

2 Q. Has there ever been?

3 A. Yes.

4 Q. When was there a manufacturing facility in Houston?

5 A. I don't recall the specific dates. I think we had
6 that identified in interrogatories, but it would have
7 been in the '60s, I believe. But my understanding is
8 that there weren't any joint compound made there.

9 Q. Were there any asbestos products made in the Houston
10 facilities in the '60s?

11 A. Yes.

12 Q. What products were those?

13 A. Ceiling texture.

14 Q. Anything else?

15 A. I was never there, but my understanding was they
16 made ceiling texture.

17 Q. But you have never actually physically been to that
18 plant?

19 A. I've never been to that facility.

20 Q. The Hurst, Texas facility, that manufactured
21 asbestos-containing products; correct?

22 A. Correct.

23 Q. And that manufactured asbestos-containing products
24 in the 1960s; correct?

25 A. No.

26 Q. When did the Hurst facility manufacture asbestos-

1 containing products?

2 A. That facility started making asbestos products
3 either in 1970 or -- I think it was '71. 1971.

4 Q. And how long did it continue to make asbestos-
5 containing products after 1971?

6 MR. TRUNCALE: I would object to the form of
7 the question in that it's vague. If you want to refer to
8 a specific product, joint compound or something, but the
9 other is pretty vague.

10 Q. (BY MR. STEWART): You can answer.

11 MR. TRUNCALE: I'm not sure what product you're
12 talking about.

13 Q. (BY MR. STEWART): You can answer.

14 A. The last asbestos product, as I recall, was in March
15 of 1978.

16 Q. So the Hurst facility manufactured asbestos-
17 containing products from 1971 to 1978; is that correct?

18 A. Correct. I'm not positive about the starting date,
19 but it was right about the 1971 time period.

20 MR. STEWART: Let's mark that, please, as
21 Plaintiff's Exhibit 1.

22 (Whereupon, Plaintiff's Exhibit 1 was
23 marked for identification.)

24 Q. (BY MR. STEWART): I'm showing you what's been
25 marked as Plaintiff's Exhibit 1, and I ask you if you
26 have ever seen that exhibit before, sir.

1 A. Yes, it looks familiar.

2 Q. I will represent to you that that is a chart that
3 was attached to Kelly-Moore's answers to interrogatories.
4 Does that ring a bell with you now?

5 A. Yes, I believe so.

6 Q. Now, in looking at that chart, it has on the
7 left-hand side the name of the kind of asbestos-
8 containing product that Kelly-Moore manufactured;
9 correct?

10 A. Correct.

11 Q. And then it has the year in which it was first
12 manufactured or something like that, and then the year
13 that it was last manufactured; correct?

14 A. Correct.

15 Q. And then it has the percentage of asbestos contained
16 in that product; correct?

17 A. Correct.

18 Q. And then also on that chart, I believe it has
19 something stated there about the kind of use that product
20 would have; is that correct?

21 A. Correct.

22 Q. Now, please review that for me. Do you -- Did you
23 help put this chart together?

24 A. I believe I did.

25 Q. All right. And I just want to make sure that the
26 chart is complete and accurate. Could you please review

1 that chart and tell me, after you have reviewed that
2 chart, whether you find the chart to be complete and
3 accurate.

4 A. This Exhibit Number 1 looks to be complete. I don't
5 see anything in here that's inaccurate.

6 Q. So do you have any concern, as you sit here today,
7 Mr. Merrill, about the authenticity of that document?
8 That it is what it purports to be?

9 A. I believe it is, yes.

10 Q. And would you call that chart that's been marked as
11 Plaintiff's Exhibit Number 1 an accurate summary of the
12 asbestos-containing products that Kelly-Moore
13 manufactured and the dates that they manufactured them
14 and the percentage asbestos content in those products and
15 the use of those products, what those products' intended
16 use was?

17 MR. CHURCHILL: Object to the form of the
18 question.

19 THE WITNESS: Yes.

20 Q. (BY MR. STEWART): And rather than going through
21 that chart product by product, would you agree with me,
22 sir, that this document accurately reflects all the
23 information that it's intended to relay from Kelly-Moore
24 regarding its asbestos-containing products and their use
25 and when they were no longer used and what they were used
26 for when they were used?

1 A. As I recall, that's a response to an interrogatory,
2 and I believe that to be a complete answer to that
3 interrogatory, which there may be other information
4 that's just not there because it wasn't asked for.

5 Q. Were you the person who signed the interrogatories?

6 MR. CHURCHILL: You mean --

7 Q. (BY MR. STEWART): That this was attached to.

8 MR. CHURCHILL: Doug Merrill?

9 MR. STEWART: Doug Merrill.

10 MR. CHURCHILL: Yeah, I think he did.

11 THE WITNESS: I recall doing it, so I would
12 think I probably did.

13 Q. (BY MR. STEWART): Now, with respect to Quik-Set
14 joint compound, please tell me, if you would, in as much
15 detail as you can, how someone would identify Paco's
16 Quik-Set joint compound.

17 A. First off, by identification on the container.

18 Q. And when you say "container," you're talking about
19 the bag that it came in?

20 A. It's a 25-pound bag, yeah.

21 Q. What would that bag look like?

22 A. As I recall, it was a yellow bag, and there were
23 three different -- three different types that were
24 available depending on period of time. There was a fast
25 set, and a -- which I believe was like a 60- to a
26 90-minute set, and then there was one that was like a

1 two-and-a-half hour set, and then for a very limited time
2 there was a sort of special -- special needs to make --
3 take that product and make it a seven- or eight-hour set.

4 The fast set, the 90-minute set, as I recall,
5 was in red print, the yellow bag, red print, Quik-Set on
6 it. And the other two were with green print, and that
7 was the slow set or extra slow set.

8 Q. Anything else that you would use to identify or
9 describe Paco's Quik-Set joint compound?

10 A. It also had a Paco logo on the bag.

11 Q. Anything else?

12 A. The Quik was spelled Q-u-i-k, I believe.

13 Q. With respect to all of Kelly-Moore's asbestos-
14 containing products, you would agree that in the 1960s
15 and up to 1972 there was no label on the bag which would
16 inform the user or consumer of any dangers associated
17 with asbestos? You'd agree with that; correct?

18 A. Correct.

19 Q. Now, in the 1972 time frame where you mentioned
20 earlier having some discussions with asbestos companies,
21 did anyone -- strike that.

22 Can you tell me the asbestos fiber types?

23 A. The type that we used was called chrysotile, I
24 believe.

25 Q. Can you spell that?

26 A. No.

1 Q. Can you tell me what other types exist?

2 A. There was tremolite which was found in talc, and
3 then there were some others that were basically longer
4 fibers, I believe.

5 Q. And when did you come to acquire that information
6 about the different types of asbestos fibers?

7 A. As I recall, it was after 1972 or about that time
8 frame.

9 Q. So prior to 1972, did you have any knowledge about
10 the different kinds of fiber types?

11 A. Prior to 1972, I had knowledge of different grades
12 which were identified, like, 7RF9, 7RF10, the grades that
13 were made available to us for our purpose, our use.
14 There was a selection of grades. And each supplier had a
15 selection of grades.

16 Q. Other than grades or grade typing, prior to 1972 did
17 you have any knowledge about the different
18 characteristics of the different types of asbestos
19 fibers?

20 A. No.

21 Q. And it's safe to say that prior to 1972 you did not
22 rely upon any information that you had about different
23 types of asbestos fibers to determine whether or not
24 Kelly-Moore asbestos-containing products were hazardous
25 or not hazardous to the user or consumer; correct?

26 MR. CHURCHILL: Object to the form of the

1 question.

2 THE WITNESS: Prior to 1972, companies offered
3 us a type that was -- that they recommended for joint
4 compounds and textures, and I don't recall if they
5 referred to that as a certain chrysotile or whatever, but
6 it was consistent to what we used before and we used
7 after 1972.

8 Q. (BY MR. STEWART): And my question was prior to
9 1972, you didn't rely upon any information that you had
10 about different kinds of fiber types in reaching the
11 conclusion or any determinations about whether
12 Kelly-Moore asbestos-containing products were safe or not
13 safe; correct?

14 MR. CHURCHILL: Object to the form of the
15 question.

16 THE WITNESS: Correct.

17 Q. (BY MR. STEWART): And after 1972, even then you
18 didn't rely upon any information you had about different
19 kinds of fiber types to determine whether or not
20 Kelly-Moore asbestos-containing products were safe or not
21 safe; correct?

22 MR. CHURCHILL: Object to the form of the
23 question.

24 THE WITNESS: We did. Actually, the type that
25 we used, the chrysotile, was reported to be the safe
26 type.

1 Q. (BY MR. STEWART): Where did you learn that?

2 A. From the asbestos companies.

3 Q. So the asbestos companies told you that the
4 chrysotile that you were using was the safe type;
5 correct?

6 A. Correct.

7 Q. Which company told you that, sir?

8 A. Well, I can say that Johns-Manville did. As I
9 recall, Carey Canadian had the same position. Union
10 Carbide's asbestos out of California I think fell in that
11 same category, but it was -- as I recall, it was a little
12 bit different. It had more of a hollow nature to it.
13 But as I recall, it was also in that same type category.

14 Q. And do you have documents from the Johns-Manville
15 Company and the Carey Canada Company and the Union
16 Carbide Company that say that the chrysotile fiber that
17 you were using was safe to use?

18 A. We may have in our records that have been kept.

19 Q. As you sit here today, can you think of one document
20 that states that?

21 A. Not specifically, but I believe we retained that
22 information from the '70s.

23 Q. And that would be in the information that you have
24 three buildings over; correct?

25 A. Either that or with our attorney's office.

26 Q. Are there documents in your attorney's office that

1 used to be in the documents that are three buildings
2 over?

3 A. There may be some duplicates. There may be some
4 exhibits from an earlier deposition that are in the
5 attorney's office.

6 Q. Are you aware of any documents that are in the
7 attorney's office that are not in the building three
8 buildings away?

9 A. I'm not sure about documents, but I think that the
10 attorney's office does have samples of containers or bags
11 that we used to use that we don't have here. I think we
12 have a photograph but not an original.

13 Q. And after you say that you were told that the kind
14 of asbestos that you were using was safe, did you do any
15 independent research to verify that or not?

16 A. I didn't do any independent research myself, no.

17 Q. Did you have anyone do any independent research?

18 A. No.

19 Q. Are you aware of Kelly-Moore ever having anyone do
20 independent research on behalf of Kelly-Moore to
21 determine whether or not chrysotile asbestos was safe to
22 users and consumers?

23 MR. CHURCHILL: Have a conference.

24 MR. STEWART: Hold on. Let the record reflect
25 that counsel is whispering to his client.

26 (Off-the-record discussion.)

1 MR. STEWART: Before you answer my question,
2 you would agree with me, sir, that before giving this
3 answer you're about to give you conferred with your
4 counsel; correct?

5 MR. CHURCHILL: Yeah. He has a right to confer
6 with his attorney, and as part of the fact-finding
7 mission and finding the truth in this case, he conferred
8 with his counsel.

9 Q. (BY MR. STEWART): And, sir, did you ask your
10 counsel a question or did your counsel give you
11 information? Did you ask your counsel a question?

12 MR. CHURCHILL: He's not --

13 MR. TRUNCALE: Well --

14 MR. CHURCHILL: Just a moment.

15 MR. TRUNCALE: Attorney/client privilege
16 certainly applies there.

17 MR. STEWART: I'm not asking what the question
18 was.

19 Q. I'm just asking did you ask your counsel a question?

20 MR. TRUNCALE: Attorney/client privilege.

21 THE WITNESS: No.

22 Q. (BY MR. STEWART): And, in fact, your counsel said
23 something to you in your ear; correct?

24 A. Correct.

25 Q. Okay. Now -- And that was prior to you giving an
26 answer to my previous question; correct?

1 MR. CHURCHILL: Well, it was after he answered
2 your previous question, Counsel.

3 MR. STEWART: I think the record will reflect
4 that I asked a question and before the answer was given,
5 you conferred with your client by whispering in his ear,
6 so --

7 MR. CHURCHILL: Why don't you just --

8 MR. STEWART: Can you read back my question
9 before there was a conference.

10 (Record read as follows:

11 "Question: Are you aware of Kelly-Moore
12 ever having anyone do independent research on
13 behalf of Kelly-Moore to determine whether or
14 not chrysotile asbestos was safe to users and
15 consumers?")

16 THE WITNESS: As I understand your question,
17 the answer is no. However, we did have -- our insurance
18 company did come into our facility and do a study not
19 related -- well, I guess indirectly it would be related
20 to chrysotile, but not specifically for that.

21 Q. (BY MR. STEWART): Okay. Let me object to the
22 responsiveness beyond the answer "no."

23 You've stated that your insurance company did a
24 study. When did that occur?

25 A. I don't recall the years. It was in probably
26 mid-1970s.

1 Q. Who conducted the study?

2 A. It was a -- or an industrial hygienist with Liberty
3 Mutual Insurance Company or sent in by Liberty Mutual
4 Insurance Company.

5 Q. What was the name of the industrial hygienist?

6 A. I don't recall.

7 Q. Who from Liberty Mutual had the study done?

8 A. I don't recall.

9 Q. Who was your contact person at Liberty Mutual?

10 A. I don't recall.

11 Q. Were you directly involved in the study?

12 A. Yes. I set it up and was there when it was done.

13 Q. When the study was done, was it done in your plant?

14 A. Yes.

15 Q. And was it only done at the San Carlos plant?

16 A. I don't recall. It very well could have been done
17 at any other plant at that time.

18 Q. Do you have any knowledge that it was done at any
19 other plant besides the San Carlos plant?

20 A. Only that I recall it may have been.

21 Q. When you say "it may have been," I'm wanting to know
22 whether you actually know whether it was or not?

23 A. I don't recall.

24 Q. How long did the study last?

25 A. If I recall, it was a couple of days.

26 Q. What was studied?

1 A. The exposure of the workers to asbestos.

2 Q. And what workers were studied?

3 A. The workers that were making the products that were
4 in the vicinity where asbestos was being used.

5 Q. And do you recall what products these workers were
6 making when the study was being conducted?

7 A. Joint compounds, wall textures, ceiling textures.

8 Q. Was the study published?

9 A. We were given a copy.

10 Q. Do you still have a copy?

11 A. I believe we do.

12 Q. In the 1970s when the study was being conducted, was
13 your plant here in San Carlos ventilated?

14 A. At the time of the test, and there may have been
15 more than one, it was not -- it was not ventilated.

16 Q. And when you say "it was not ventilated," are you
17 saying it was not exhaust ventilated?

18 A. Later in time we put in a dust collector system.
19 The test was prior to that.

20 Q. So prior to the test, you did not have a dust
21 collection system; correct?

22 A. Correct.

23 Q. After the test, did Kelly-Moore then put in a dust
24 collection system?

25 A. At some point in time we did, yes.

26 Q. Did Kelly-Moore put the dust collection system in

1 due to the results of the test?

2 A. No, not specifically. As I recall, the test was --
3 did not require any further action, but we did that to
4 lessen the amount of dust.

5 Q. And exactly what was measured in the test that
6 you're referring to? What kinds of measurements did the
7 industrial hygienist do?

8 MR. CHURCHILL: Object to the form of the
9 question.

10 THE WITNESS: It was a fiber count per
11 centimeter of air.

12 Q. (BY MR. STEWART): How many industrial hygienists
13 were present?

14 A. I don't recall. I don't recall.

15 Q. When the test was being conducted, were your workers
16 wearing respirators?

17 A. I don't recall.

18 Q. Do your workers wear respirators presently?

19 A. It's not mandatory.

20 Q. In the 1970s after the industrial hygiene test, did
21 your workers begin wearing respirators when they were
22 working with asbestos-containing products?

23 A. Respirators were offered through the whole course of
24 manufacturing period from the time I was there. They
25 were available. I think the law required if there was a
26 certain threshold that you had to wear them, and I think

1 the test showed that we were below that threshold, but I
2 don't recall specifics.

3 Q. When you say that respirators "were available,"
4 where were they available?

5 A. In the factory where the workers worked.

6 Q. Where would a man or woman have to go to get a
7 respirator in the San Carlos factory?

8 A. To their immediate supervisor if they don't have a
9 supply of their own.

10 Q. Why would they have a supply of their own?

11 A. For convenience.

12 Q. Where would they get their own supply of
13 respirators?

14 A. From their immediate supervisor.

15 Q. And where would the immediate supervisor get the
16 respirators?

17 A. He'd keep them in a storage area, and then we
18 purchased from an outside source.

19 Q. And who was the outside source you purchased
20 respirators from?

21 A. Today?

22 Q. In the '70s.

23 A. In the '70s? I think we purchased directly from 3M.

24 Q. And who was in charge of determining what types of
25 respirators would be applicable for people using
26 asbestos-containing products?

1 A. Well, as I recall, we relied on the Bureau of Mines
2 identification of what they were for.

3 Q. In the 1960s, were respirators available for your
4 workers who worked with asbestos-containing product?

5 A. As I recall, they were.

6 Q. Were they required?

7 A. As I recall, they were recommended but not
8 mandatory.

9 Q. And how would the company go about recommending the
10 use of respirators but not mandating it? How was that
11 information given to the workers?

12 A. Through conversation, direct communication.

13 Q. Did Kelly-Moore have any sort of work manual or
14 brochure that it gave to workers regarding safe work
15 practices in the 1960s?

16 A. I don't recall. There may have been.

17 Q. What about in the 1970s? Did Kelly-Moore have a
18 safety practices manual?

19 A. We had safety rules and regulations, yes.

20 Q. Where would those be located?

21 A. I don't know if we still have them for the '70s.
22 Actually, what we have is a continuation. There may have
23 been some things that have been added or changed since
24 then, but we continue to have safety rules and
25 regulations today that started back in -- maybe even into
26 the '60s, but I can't testify today that they're exactly

1 the same today as what they were in the '70s.

2 Q. And where are those safety rules and regulations for
3 Kelly-Moore located?

4 A. Each employee has one of their own, and then they're
5 posted, and then there are extra copies in the office.

6 Q. And when you say "in the office," what office would
7 that be?

8 A. Production office.

9 Q. So if you were to lay your hands on Kelly-Moore's
10 safety rules and regulations, you would go to the
11 production office and you could get a complete copy
12 there; is that correct?

13 A. Correct.

14 Q. And you say that they are also furnished to the
15 employee. Handed to them? I think you stated that.

16 A. Correct.

17 Q. When did Kelly-Moore begin doing that?

18 A. Well, we do it with all our new hires. I don't know
19 when it was started. I don't recall.

20 Q. Were you doing that in the 1970s to your
21 recollection?

22 A. To my best recollection, yes, it was.

23 Q. Tell me to the best -- to your best recollection
24 when Kelly-Moore first started handing employees safety
25 manuals or safety brochures.

26 A. I don't recall.

1 Q. Just give me an approximation.

2 A. I don't recall. It could have been back -- We've
3 had safety rules and regulations as long as I can
4 remember. I don't know if we handed everybody, when they
5 first came on board. They've always been posted.

6 Q. And when you say "They've always been posted," are
7 you saying that -- strike that.

8 Tell me what you mean, "They've always been
9 posted."

10 A. They were put on the board, bulletin board, with --
11 taped on a bulletin board or pinned on a bulletin board.

12 Q. When did Kelly-Moore first pin on a bulletin board
13 that asbestos could be harmful to its workers' health?

14 MR. CHURCHILL: Object to the form of the
15 question.

16 THE WITNESS: We never understood that it was
17 harmful to their health. We told the employees in 1972
18 that -- that -- what the thresholds were and what OSHA
19 was telling us, and that's what we complied with.

20 Q. (BY MR. STEWART): All right. Let me object to the
21 responsiveness. I asked when Kelly-Moore posted on this
22 board for its employees that asbestos could be harmful to
23 their health. When did Kelly-Moore do that, if it ever
24 did?

25 MR. CHURCHILL: Same objection.

26 THE WITNESS: The warnings to asbestos came out

1 in 1972, so that's when the employees first became aware
2 of it.

3 Q. (BY MR. STEWART): And when you say that, you're
4 saying that 1972 was the first time that the government
5 required you to warn people about the dangers of
6 asbestos; correct?

7 A. To my knowledge, it was in 1972.

8 Q. So Kelly-Moore didn't start warning people about the
9 dangers of asbestos until the government required them to
10 do that; correct?

11 A. Correct.

12 Q. Are you aware, sir, that asbestos was the first
13 substance that OSHA regulated when it came into
14 existence? Were you aware of that?

15 MR. CHURCHILL: Object to the form of the
16 question.

17 THE WITNESS: I'm not aware of that, or I don't
18 recall being aware of it.

19 Q. (BY MR. STEWART): Do you consider yourself an
20 expert on the dust levels produced when Kelly-Moore
21 asbestos-containing products are handled or used?

22 A. No.

23 Q. Are you aware of any studies that have been done by
24 the Kelly-Moore Company to determine the levels of dust
25 that are emitted when Kelly-Moore asbestos-containing
26 products are used in the field?

1 MR. CHURCHILL: Wait. Could I have that
2 question read back, please.

3 (Record read as follows:

4 "Question: Are you aware of any studies
5 that have been done by the Kelly-Moore Company
6 to determine the levels of dust that are
7 emitted when Kelly-Moore asbestos-containing
8 products are used in the field?"

9 MR. CHURCHILL: Object to the form of the
10 question.

11 Q. (BY MR. STEWART): You can answer.

12 A. There was a study that was not done by Kelly-Moore
13 but we participated in by setting up the job site so the
14 test could be done, and it was actually conducted by
15 Union Carbide.

16 Q. When was that study done, sir?

17 A. I don't recall.

18 Q. What decade?

19 A. '70s.

20 Q. What part of the '70s? Early or late?

21 A. I don't recall.

22 Q. Who was in charge of the study?

23 A. Union Carbide.

24 Q. What products were used, what products were studied,
25 specifically?

26 A. It was their asbestos product. I don't recall their

1 -- their designation of it.

2 Q. Were you present when the study was conducted?

3 A. As I recall, I was present for at least a portion of
4 it, yes.

5 Q. And where was the study conducted?

6 A. It was at a job site in the San Jose area.

7 Q. What was the name of the job site?

8 A. I don't recall.

9 Q. Who was the user of the material?

10 A. I don't recall.

11 Q. How long was this study conducted?

12 A. Best of my recollection, it was all done in one day.

13 Q. How long were the samples taken?

14 A. I don't recall.

15 Q. Was there an industrial hygienist present?

16 A. I don't recall.

17 Q. Was the study published?

18 A. I don't recall if we got a copy or not. I assume we
19 did.

20 Q. What were the results of the study?

21 A. The only thing I recall is that it was below the
22 threshold level at the time.

23 Q. And what was the threshold level at the time?

24 A. I don't recall that either.

25 Q. What was the threshold level in 1965?

26 A. I don't -- I -- I don't know what it was in 1965.

1 Q. What was the threshold level in 1971?

2 A. Well, as I recall, when the OSHA act was published,
3 it included a threshold level. It was ten fibers per
4 centimeter of air. That's my recollection.

5 Q. What was the threshold limit in 1976?

6 A. I don't recall. It dropped to five and then to two
7 and then down.

8 Q. Can you see 12 fibers per centimeter in the air? Do
9 you know?

10 A. I don't believe I could.

11 Q. Can you see two million fibers per cubic centimeter
12 in the air, or do you know?

13 MR. CHURCHILL: Object to the form of the
14 question.

15 THE WITNESS: I don't know.

16 Q. (BY MR. STEWART): Do you know whether or not you
17 can see five million particles per centimeter in the air?

18 A. I don't know. I suspect you would.

19 Q. Excuse me?

20 A. I suspect you would.

21 Q. What makes you suspect that you would be able to see
22 five million particles?

23 A. That's a large amount of particles.

24 Q. So you're saying that at five million particles per
25 cubic centimeter, you believe you could see that in the
26 air, that that would be visible? Is that what you're

1 saying?

2 MR. CHURCHILL: Object to the form of the
3 question.

4 THE WITNESS: When you say "air," you haven't
5 defined how much air.

6 Q. (BY MR. STEWART): Well, it's five million particles
7 per cubic centimeter of air.

8 A. That's a lot of particles.

9 Q. How about five million particles per cubic foot of
10 air?

11 A. I don't know.

12 Q. So you don't know whether or not you could see five
13 million particles per cubic foot of air?

14 MR. CHURCHILL: Asked and answered.

15 Q. (BY MR. STEWART): You can answer.

16 A. I did.

17 Q. You can answer again.

18 MR. CHURCHILL: I just objected to your
19 question. You've already asked him that question.

20 MR. STEWART: Actually, I think I asked million
21 particles per cubic cc (sic) and now I'm on cubic foot.
22 That was the distinction.

23 MR. CHURCHILL: Go ahead and answer.

24 MR. STEWART: Let me rephrase the question.

25 Q. Is it your understanding that you can see visibly in
26 the air 500 million (sic) particles per cubic foot of

1 air?

2 MR. CHURCHILL: Object to the form of the
3 question of the question.

4 Q. (BY MR. STEWART): Asbestos particles.

5 A. I don't understand the question, but it sounds like
6 a lot of particles so I think you would be able to.

7 Q. But you don't have any independent knowledge of that
8 one way or the other correct?

9 A. Correct.

10 Q. Do you know how much exposure it takes to one of
11 your asbestos-containing products to cause disease?

12 MR. CHURCHILL: Object to the form of the
13 question.

14 THE WITNESS: I don't have any knowledge, no.

15 MR. STEWART: Why don't we take a five-minute
16 break.

17 (Recess taken from 3:56 to 4:09 p.m.)

18 MR. CHURCHILL: It's 10 after the hour so we're
19 back on the record.

20 MR. STEWART: Hey, Michael, before we get
21 started again I want to get some clarification on some
22 things.

23 I know that you and Karen have talked about
24 reviewing the documents; yes?

25 MR. TRUNCALE: I talked to Melissa.

26 MR. STEWART: I'm sorry; Melissa. Where do

1 y'all stand on that?

2 MR. TRUNCALE: I heard she wants to come out
3 here on December 18th.

4 MR. STEWART: "Out here" meaning out here?

5 MR. TRUNCALE: Out in California, but I don't
6 think that's been confirmed.

7 MR. STEWART: Okay. All right. And when you
8 say it hasn't been confirmed, you mean you don't know if
9 that date will work or --

10 MR. TRUNCALE: Well, we talked on the phone.
11 She just said, "That's a possible date I might be able to
12 do it." I don't think it's been a formal request. I
13 never got if that's the date she wants to do it.

14 MR. STEWART: Okay. Let me check over this
15 note. I got a note from her that says we asked for
16 December 4th through the 8th, December 11th through 15th
17 or December 18th through 20th.

18 MR. TRUNCALE: December the 18th. I was typing
19 on my computer screen when I was talking to her.

20 MR. STEWART: Why don't you let me make that
21 formal so we'll have a hard date.

22 MR. TRUNCALE: You know, let me just
23 double-check that and make sure. Yeah. The top
24 selection is either the 18th or the 19th is what I'm
25 showing.

26 MR. STEWART: Okay. Can you do me a favor and

1 get back with her on that because what I'm going to do is
2 slate that for the 18th and the 19th. She basically gave
3 me a little memo here that says that you were going to
4 get back with us regarding those three dates, 4th through
5 the 8th, 11th through the 15th, 18th through the 20th.

6 MR. TRUNCALE: After talking to her on the
7 phone, I think I said the 18th looked good to me.

8 MR. STEWART: Okay.

9 MR. TRUNCALE: And I just was waiting to hear
10 from her.

11 MR. STEWART: I'm sure if it's 88 boxes it's
12 probably going to take longer than the 18th, but in any
13 event --

14 MR. TRUNCALE: 18th or 19th. I've got both.

15 MR. STEWART: If we can do it in a two- or
16 three-day stretch, we can probably get through those.

17 MR. TRUNCALE: And just so you know, there's
18 another group wanting to look at them. And I think just
19 everybody looking at them at the same time, the other
20 group did not want to do that. They did not want to do
21 that with y'all, although I think y'all wanted to but
22 they didn't.

23 MR. STEWART: They're not friendly. All right.
24 Fair enough. Well, I'm going to slate it for the 18th
25 and 19th.

26 MR. TRUNCALE: Okay.

1 MR. STEWART: All right.

2 Q. Back on the record. Mr. Merrill, before the break,
3 we were talking a little bit about dust counts and the
4 like of Kelly-Moore asbestos-containing products. Let me
5 ask you, sir, with respect to the Kelly-Moore
6 asbestos-containing products that were dry powder in
7 25-pound bags, would you agree with me that those
8 products, when they were emptied out of their bag,
9 produced dust? You would agree with me?

10 A. Some dust.

11 Q. And that would be dust that you could see; correct?
12 Visible dust?

13 A. Perhaps, yes.

14 Q. And this would also be dust that could be breathed;
15 correct?

16 A. Correct.

17 Q. And these asbestos containing products, some of
18 them, such as a joint compound, once they were applied
19 would oftentimes be sanded, would they not?

20 A. Sanding occurred on the finishing coat depending on
21 how smooth it was.

22 Q. Well, and sanding could also occur on joint
23 compounds as well; correct?

24 MR. TRUNCALE: Let me interpose more of an
25 objection or question. What do you mean by the term
26 "often"? Go ahead.

1 MR. STEWART: I'm not going to define "often."

2 MR. TRUNCALE: Then I object to the form of the
3 question.

4 MR. STEWART: That's fine.

5 Q. You can answer.

6 A. Well, I'd like to define joint compound is typically
7 used for embedding joint tape and then putting a top coat
8 on, and the top coat would be sanded if there were rough
9 edges to it, rough spots on it, to make it smooth. I'd
10 see no reason to sand it during the earlier applications
11 for applying tape or first coat over the joints.

12 Q. Have you ever applied joint compound --

13 A. Yes.

14 Q. -- professionally?

15 A. No.

16 Q. I take it you've applied it at home --

17 A. Yes.

18 Q. -- something like that? But as a professional, you
19 would agree that you're not a professional drywaller;
20 correct?

21 A. I would agree that I am not a professional drywall
22 contractor, yes.

23 Q. You talked about top coating being sanded; correct?

24 A. The final coat, yes.

25 Q. What about other of your compounds, bedding cement?
26 Do you have any knowledge of whether that would be sanded

1 out in the field or not?

2 A. It would not be.

3 Q. And how do you know that?

4 A. Because it is just used for embedding the tape. It
5 was underneath the other joint treatment.

6 Q. And the taping compound, would it be your contention
7 that that would not be sanded either?

8 A. Yes.

9 MR. CHURCHILL: Object to the form of the
10 question.

11 THE WITNESS: Yes. The bedding cement was an
12 earlier designation of basically the same type of product
13 that was later called taping compound.

14 Q. (BY MR. STEWART): And the finishing compound, would
15 it be your contention that that's not sanded?

16 A. No.

17 MR. CHURCHILL: Object to the form of the
18 question.

19 THE WITNESS: That's a product that would be
20 used for a final coat with joints and nail heads.

21 Q. (BY MR. STEWART): All right. And with -- I'm
22 sorry, I didn't mean to interrupt you. And with respect
23 to the finishing compound, would you agree that at least
24 with respect to that product, that would be something
25 that would be sanded; correct?

26 A. Yes.

1 Q. And when a finishing compound is sanded, that
2 liberates dust, does it not?

3 A. Yes, it can.

4 Q. And that would be dust that you can see and breathe;
5 correct?

6 A. Possibly see it, yes, sure.

7 Q. And you would possibly breathe it; correct?

8 A. Correct.

9 Q. I notice one of the products on the product list is
10 called "All Purpose," and then it has underneath that
11 "Triple Duty." What does that mean?

12 A. All Purpose was a product that, and so is the Triple
13 Duty, the Triple being the taping part of the
14 application, and then the joint topping or the finishing
15 coat that goes over the joints, and then also be used as
16 a texture.

17 Q. And so All Purpose is something you would agree
18 would be sanded at times; correct?

19 A. It could be sanded during the top coat application,
20 yes.

21 Q. And when it would be sanded it would be like the
22 finishing compound in that it would emit visible dust
23 that could be breathed; correct?

24 A. Possible, yes.

25 Q. Now, there are other products listed here, and
26 without going through each and every one of them, would

1 you agree with me that wall texture is something that can
2 be sanded?

3 A. No, I wouldn't.

4 Q. You would not agree with that?

5 A. No.

6 Q. When wall texture is put onto a wall that then needs
7 to be wallpapered, how is that wall texture removed?

8 A. Well, the easiest way to do it is just to fill it
9 in; to leave it on and make a smooth coat over it.

10 Q. Are you aware that oftentimes wall texture is
11 removed by sanding?

12 MR. CHURCHILL: Object to the form of the
13 question.

14 A. It's not a practical way to do things.

15 Q. (BY MR. STEWART): Are you saying that it's not
16 done?

17 MR. CHURCHILL: Object to the form --

18 THE WITNESS: It could be done.

19 MR. CHURCHILL: Object to the form of the
20 question.

21 Q. (BY MR. STEWART): That's all I'm asking, is that's
22 something that could be done, to remove wall texture by
23 sanding it off the wall; correct?

24 A. Possibly, yes.

25 MR. CHURCHILL: Object to the form of the
26 question. Move to strike the answer.

1 MR. STEWART: Anything else?

2 MR. CHURCHILL: No. I just -- I missed the
3 objection before he answered so I had to give the strike
4 answer. Trying to stay on top of your insightful
5 questions.

6 Q. (BY MR. STEWART): Why was asbestos discontinued in
7 the use of Kelly-Moore asbestos-containing product?

8 A. Some of the products, the sprayed-on textures, was
9 required by law in California, at least. The industry
10 was working towards that elimination beginning of 1972.
11 It was a slow process, but we worked towards the complete
12 elimination.

13 Q. You would agree with me that in 1972 Kelly-Moore
14 knew that asbestos and its products could be hazardous.
15 You would agree with that; correct?

16 A. No.

17 Q. You don't agree with that?

18 A. We believed we could use asbestos in 1972 and not be
19 hazardous.

20 Q. Did you know in 1972 that small amounts of asbestos
21 that would be breathed could cause cancer?

22 MR. TRUNCALE: Object to the form of the
23 question, vague and ambiguous.

24 Q. (BY MR. STEWART): You can answer.

25 A. No. It was my understanding or our understanding
26 that small amounts could be used.

1 Q. So you were not aware that there was medical and
2 scientific literature in 1972 that stated that small
3 amounts of asbestos could cause cancer? You were not
4 aware of that?

5 MR. TRUNCALE: Object to the form of the
6 question, vague and ambiguous, did not specify.

7 THE WITNESS: I don't recall if we had any
8 information at that time.

9 Q. (BY MR. STEWART): When did you first learn that
10 small amounts of asbestos could cause cancer,
11 Mr. Merrill?

12 MR. CHURCHILL: Objection. Object to the form
13 of the question. He never testified to that, Counselor.

14 THE WITNESS: I never did learn.

15 Q. (BY MR. STEWART): So as you sit here today, that's
16 not something you ever did know, even as you sit here
17 now?

18 A. Correct.

19 Q. Have you ever gone, to find out whether that's true
20 or not, to a library?

21 A. No, I have not.

22 Q. Would you agree with me that you are probably not
23 the best person to ask about what the dangers of asbestos
24 in products like yours would be?

25 MR. CHURCHILL: Object to the form of the
26 question. You mean taking into account anybody who has

1 knowledge of asbestos, including physicians and
2 epidemiologists, or are you talking about just limited to
3 this company?

4 MR. STEWART: I'll change the question if that
5 will make you feel better.

6 Q. You've never looked to determine one way or the
7 other whether small amounts of asbestos can cause cancer;
8 correct?

9 A. We were advised by the asbestos companies that small
10 amounts would not be hazardous.

11 Q. All right.

12 A. I did not independently go beyond that.

13 Q. All right. Let me object to the responsiveness of
14 that answer.

15 My question was did Mr. Merrill ever go out and
16 read any independent literature to determine whether
17 small amounts of asbestos could cause cancer?

18 MR. CHURCHILL: I think he just answered the
19 question.

20 MR. STEWART: You can answer.

21 MR. CHURCHILL: Answer it again.

22 THE WITNESS: No.

23 Q. (BY MR. STEWART): So you never looked to find out
24 one way or the other; correct?

25 A. Well, I think I testified earlier that I don't
26 recall what information we received regarding health

1 aspects of using asbestos.

2 Q. But even as you sit here today, you don't know
3 whether a small amount of asbestos can cause cancer or
4 not; correct?

5 A. Correct. It's my understanding that a small amount,
6 insignificant amount, during insignificant period of time
7 would not.

8 Q. And what's that understanding based on, Mr. Merrill,
9 if you've never gone and independently looked?

10 A. That's just my understanding. I --

11 Q. And I want to know where that understanding comes
12 from. What's it based on?

13 A. Based on the information we had in the 1970s, from
14 1972 on until we stopped using it.

15 Q. And in the past 25 years, you still haven't gone and
16 looked to find out whether that information is correct or
17 not; right?

18 MR. CHURCHILL: Well, object to the form of the
19 question. You're arguing with the witness. It's
20 argumentative.

21 Q. (BY MR. STEWART): You can answer.

22 A. Correct.

23 Q. And so when I asked earlier whether you would be the
24 best person to talk to to find out whether Kelly-Moore
25 asbestos-containing products were hazardous to people's
26 health, you probably wouldn't be the best person to talk

1 to, would you?

2 A. Outside of Kelly-Moore?

3 Q. Outside of Kelly-Moore.

4 A. Correct.

5 Q. Because you don't know, as you sit here, one way or
6 the other whether they're dangerous or not; correct?

7 A. I'm not a medical expert; correct.

8 Q. And you haven't asked any medical expert to
9 determine whether they're dangerous or not; correct?

10 MR. CHURCHILL: Object to the form of the
11 question.

12 THE WITNESS: Correct.

13 Q. (BY MR. STEWART): And that's true even after the
14 government began requiring you to put labels on your
15 product telling people that asbestos may be harmful to
16 them; correct?

17 MR. CHURCHILL: What -- Object to the form of
18 the question. What's true? What's the preposition?
19 What's the antecedent?

20 THE WITNESS: I was not a medical expert --

21 MR. CHURCHILL: Just a moment. What are you
22 referring to with "what"?

23 MR. STEWART: Let's go back and read the
24 question and see if I can clarify it.

25 MR. CHURCHILL: And when I said the word
26 "preposition" I meant to say the word "pronoun."

1 (Record read as follows:

2 "Question: And that's true even after the
3 government began requiring you to put labels on
4 your product telling people that asbestos may
5 be harmful to them; correct?")

6 THE WITNESS: Correct.

7 Q. (BY MR. STEWART): You stated Union Carbide had done
8 a test on your product and Union Carbide was an asbestos
9 supplier to you; correct?

10 A. Correct.

11 Q. As a matter of fact, I saw that big fish up there on
12 the wall and it talked about that big fish, that
13 Mahi-Mahi, being caught on a Cabo San Lucas fishing trip
14 with Union Carbide; correct?

15 A. I don't know. I haven't read it.

16 Q. Would you agree with me that Union Carbide and
17 Kelly-Moore share a close relationship? Correct?

18 MR. CHURCHILL: Object to the form of the
19 question.

20 MR. TRUNCALE: Object to the form of the
21 question.

22 MR. CHURCHILL: What time period are you
23 talking about?

24 THE WITNESS: Not a special relationship.

25 Q. (BY MR. STEWART): I asked if it was a close
26 relationship. Would you say they share a close

1 relationship?

2 MR. TRUNCALE: Again, I object to the form of
3 the question.

4 THE WITNESS: We have a buyer/seller
5 relationship. Nothing special about it.

6 Q. (BY MR. STEWART): Okay. Well, in Cabo San Lucas in
7 September of 1985 someone from Kelly-Moore went on a trip
8 with Union Carbide; correct?

9 A. I don't recall that happening.

10 Q. Well, I'm looking at this big fish on the wall here
11 with the little deal underneath it and it says,
12 "Cabo San Lucas, Mexico, Union Carbide Trip, September
13 1985, Dorado Mahi-Mahi, 34 pounds, 12 ounces." That's on
14 the wall; right?

15 A. Correct.

16 Q. So you would agree with me that someone from
17 Kelly-Moore was going on fishing trips with people from
18 Union Carbide; correct?

19 A. At least one fishing trip; correct. It wasn't me.

20 Q. Do you go on fishing trips -- not you, but people
21 from Kelly-Moore -- do they go on deep sea fishing trips
22 with all the people that they buy and sell with?

23 A. I've never been on a deep sea fishing trip but I've
24 been on fishing trips. Occasionally that comes up.

25 Q. But that's not something that you do with every
26 person you have a buyer and seller relationship with;

1 correct?

2 A. No. Maybe six major suppliers offer outings like
3 that.

4 Q. And Union Carbide is one of them; correct?

5 A. It apparently was, yeah.

6 Q. And the relationship with Union Carbide that
7 Kelly-Moore has had has been a relationship where Union
8 Carbide was their supplier of asbestos fiber for a number
9 of years; correct?

10 A. Yes. Asbestos was not a major part of what we were
11 purchasing from them, but we did purchase asbestos from
12 them.

13 Q. What other types --

14 A. Not 1985.

15 Q. What other types of things in the 1960s and the
16 1970s did Kelly-Moore purchase from Union Carbide?

17 MR. CHURCHILL: Object to the form of the
18 question.

19 THE WITNESS: Cellulosic thickeners has been
20 the big item that they manufacture for the paint
21 industry. They also make latex, but we don't buy latex
22 from them.

23 Q. (BY MR. STEWART): What else do you purchase from
24 Union Carbide, or did you purchase in the 1960s and
25 1970s, besides -- you mentioned cellulose?

26 A. Cellulosic thickeners.

1 Q. And latex. What else?

2 A. I don't recall. That's the major part, the
3 thickener that goes into the paint.

4 Q. Do your asbestos-containing products -- strike that.

5 Did your asbestos-containing products that
6 Kelly-Moore manufactured have a shelf life?

7 A. Yes.

8 Q. Do you know what it was?

9 MR. CHURCHILL: Object to the form of the
10 question.

11 THE WITNESS: It would have to be specific to
12 each product. The dry products would have a much longer
13 stability. It would depend on storage. If storage was
14 ideal, you could go over five years.

15 Q. (BY MR. STEWART): All right. And when you say dry
16 products that were stored well, you're talking about
17 things that would be, like, in 25-pound bags?

18 A. They would be in bags. Anything in bags would be
19 dry.

20 Q. Earlier we were talking about states in which
21 Kelly-Moore owned and operated a Kelly-Moore store. I
22 want to make sure that we have covered all the states
23 where Kelly-Moore has had a Kelly-Moore store in the past
24 to your knowledge.

25 You mentioned Texas and Oklahoma and Arkansas
26 and Colorado, California, Oregon, and Washington;

1 correct?

2 A. Let me go through all of them and then repeat them.

3 Q. That would be fine.

4 A. Washington, Oregon, California, Nevada, Arizona,
5 Colorado, Oklahoma, Texas, and Arkansas. Those -- We've
6 not had any stores in any other states.

7 Q. What about Montana?

8 A. That's just a ranching and farming location.

9 Q. How many outlets does Kelly-Moore presently have?

10 A. We're approximately 140 right now today.

11 Q. And what is Kelly-Moore's present gross sales? 1994
12 since you probably don't have --

13 A. Probably 200 million.

14 MR. CHURCHILL: Object to the form of the
15 question.

16 Q. (BY MR. STEWART): Let me rephrase the question.
17 Please tell me Kelly-Moore's gross sales figure for 1994.

18 MR. CHURCHILL: Object to the form of the
19 question.

20 THE WITNESS: I believe it was under 200
21 million. 190 something.

22 Q. (BY MR. STEWART): Do you know what Kelly-Moore's
23 assets totaled as of 1994?

24 A. I do not.

25 Q. Do you know what Kelly-Moore's net worth was in
26 1994?

1 A. I do not.

2 Q. Where would you go to get that information?

3 A. Secretary-treasurer.

4 Q. And who is that?

5 A. John Bacigalupo.

6 Q. Can you spell that?

7 A. B-a-c-i-g-a-l-p-o (sic).

8 Q. How would you go about determining in which states
9 that you have just mentioned as being states that
10 Kelly-Moore had stores in, which of those states
11 asbestos-containing products were sold in?

12 MR. CHURCHILL: Object to the form of the
13 question. Do you have that question in mind?

14 THE WITNESS: I believe I do.

15 MR. CHURCHILL: Go ahead.

16 THE WITNESS: Of the states we just mentioned,
17 Arkansas, we didn't market back in that point in time,
18 but Washington, Oregon, California, Arizona, Colorado,
19 Oklahoma and Texas, those were the main states that we
20 were selling asbestos products in.

21 Q. (BY MR. STEWART): And with respect to Utah and
22 Mr. Woodland, would Utah be included in that? Was he
23 marketing asbestos-containing --

24 A. I think in some interrogatories, those -- all the
25 states have been identified.

26 Q. And do you know what years asbestos-containing

1 products were marketed and sold in the states that you
2 just mentioned?

3 A. As I sit here, I couldn't report that, but I think I
4 have done that by earlier research and have answered that
5 in the -- in some interrogatory. I think that
6 information is documented.

7 Q. Did you save that research?

8 A. Yes.

9 Q. So you could get your hands on that if you had to;
10 correct?

11 A. Correct.

12 Q. Where would that be located?

13 A. In the files we have here at this San Carlos
14 location.

15 Q. Three buildings over?

16 A. Possibly even have a copy in my office.

17 MR. STEWART: Michael -- I can do it with
18 Howard or Michael. Do you mind him giving me a copy of
19 what he has in his office or you can -- you can do it one
20 of two ways since I know I'm asking for it right now.

21 MR. TRUNCALE: I really --

22 MR. STEWART: Do you want to look at it and
23 then --

24 MR. TRUNCALE: I'd really rather not respond
25 under the gun like that for obvious reasons.

26 MR. CHURCHILL: No.

1 MR. STEWART: Here's what I'm offering. What
2 I'm offering is that whatever he has, that y'all take a
3 look at it and then produce it to me, and if you feel
4 like you can't produce it to me, if you'll just tell me
5 why it is that you can't, then we can talk about it.

6 MR. CHURCHILL: The documentation you want is
7 the locations of retail outlets and the years in which
8 they marketed asbestos-containing products; is that
9 right?

10 MR. STEWART: Correct. That he's already done.

11 MR. CHURCHILL: Okay. I'll have him provide --

12 MR. STEWART: I'm not asking him to do it if he
13 hasn't done it. I'm just saying if what he's saying --
14 if his recollection is correct and he's already done it
15 and he has it in a form that he can reproduce, then that
16 would be great.

17 MR. CHURCHILL: Yeah. I will have him get a
18 copy to me and I'll look at it. If there's any objection
19 to it, I'll tell you what it is. If there's not, then
20 I'll get you a copy.

21 MR. STEWART: Terrific.

22 MR. TRUNCALE: Okay.

23 MR. CHURCHILL: It may go through Michael's
24 office. Michael, it might go through your office.

25 MR. TRUNCALE: That's fine.

26 Q. (BY MR. STEWART): Mr. Merrill, please tell me every

1 plant or facility that manufactured Kelly-Moore asbestos-
2 containing products.

3 A. There was a factory in Kirkland, Washington;
4 San Carlos, California; Ontario, California; Denver,
5 Colorado; Houston, Texas; Hurst, Texas; Broken Arrow,
6 Oklahoma. And I believe that's all.

7 Q. To your knowledge, has Kelly-Moore ever acquired,
8 through purchase or merger, another company that has ever
9 sold or manufactured asbestos-containing product?

10 MR. CHURCHILL: Well, other than what he's
11 already testified to?

12 MR. STEWART: Other than Paco.

13 THE WITNESS: Other than Paco. I don't recall
14 any.

15 Q. (BY MR. STEWART): Mr. Merrill, does Kelly-Moore use
16 any distributors to distribute its paint products --

17 A. No.

18 Q. -- besides its stores?

19 A. No.

20 Q. If someone wanted to order paint in volume from
21 Kelly-Moore, would they go about it in the fashion that
22 you described earlier about contacting the plant that was
23 manufacturing that paint?

24 MR. CHURCHILL: Objection; misstates his
25 testimony.

26 Q. (BY MR. STEWART): You can answer.

1 A. If someone -- The paint sales go through the store.
2 There are salesmen who get commission on the paint sales.
3 The sales would be on paper, would go through the stores.
4 but the shipment could go direct from the factory to a
5 customer.

6 Q. So if I understand you correctly, the product
7 wouldn't be picked up at the company owned and operated
8 facility but the paperwork would be done at that
9 facility; is that correct?

10 A. The store location. That's possible, yeah. The
11 material could go around the store, but the paperwork
12 would go through the store.

13 Q. And the material could be picked up at the plant
14 where it was being made; is that correct?

15 A. Correct. We don't encourage pickups, but
16 occasionally -- well, very seldom a customer comes in and
17 picks it up at the factory. We're just not set up for
18 large will-calls. We normally deliver to large accounts.

19 Q. All I was trying to find out from that -- and let me
20 just object to the responsiveness. All I was trying to
21 find out is whether your paint distribution differed in
22 any way from your Paco distribution.

23 A. Yeah. The paint is very -- almost nil is anybody
24 picking up. I mean, we just deliver. We go out in so
25 many different directions that we deliver the paint, in
26 most cases, to the customer.

1 MR. CHURCHILL: You can quit early if you want.

2 MR. STEWART: Thanks, Howard. And believe me,
3 I want to.

4 Why don't we go off the record here for a
5 second and see if my understanding is correct about a few
6 things.

7 (Off the record.)

8 MR. STEWART: Mr. Merrill, that's all the
9 questions that I have for you at this time. It's my
10 understanding that the parties have reached an agreement
11 that you could be deposed at a later time which is
12 mutually convenient for all the parties and hopefully
13 will give us an opportunity to look at some of the
14 materials that you all have here at your facility that
15 need to be reviewed.

16 Michael, is that a correct statement of what
17 the agreement is?

18 MR. TRUNCALE: Did you say at a mutually
19 convenient time?

20 MR. CHURCHILL: Yeah, he got that part in,
21 Mike.

22 MR. TRUNCALE: Okay. That will be fine.

23 MR. STEWART: All right. Okay.

24 MR. CHURCHILL: Okay. Looks like we're going
25 to go off the record.

26 MR. TRUNCALE: Before we do, I want to ask the

1 question, this is directed to the court reporter, I want
2 Mr. Merrill to have the opportunity to read and sign his
3 deposition. What provisions are you going to make to
4 give him an opportunity to do that?

5 (Off the record.)

6 MR. STEWART: The bigger issue is how you all
7 are going to handle that. I mean, as far as reading and
8 signing is concerned, if that's something that you want
9 to do, which is fine, then the question is going to be
10 when you're going to do that.

11 MR. CHURCHILL: Michael --

12 MR. TRUNCALE: Yeah.

13 MR. CHURCHILL: Before we do that, I have one
14 question for Doug. I want to clarify something. Why
15 don't we do this first. Let me ask Doug this question;
16 all right?

17 MR. TRUNCALE: All right.

18 EXAMINATION BY MR. CHURCHILL

19 Q. (BY MR. CHURCHILL): Mr. Merrill, it's my
20 understanding that Mr. Woodland, the person we talked
21 about earlier, marketed to just a handful of accounts;
22 correct?

23 A. Correct.

24 Q. And were those accounts primarily in the west?

25 A. They were all in the west.

26 Q. All in the west?

1 A. The farthest east was, like I said, Salt Lake City
2 and it was either Provo or Ogden, Utah. There were two
3 accounts in Utah that I'm aware of.

4 Q. And that's as far east as he went --

5 A. Yeah.

6 Q. -- from the Bay Area?

7 A. He lived right in the Bay Area.

8 MR. CHURCHILL: That's -- You want to follow up
9 on that?

10 MR. STEWART: No; I'm fine.

11 MR. CHURCHILL: I guess that's it for the
12 questions, then.

13 MR. TRUNCALE: We will reserve all other
14 questions till the time of trial.

15 MR. CHURCHILL: Right. What is the Texas law
16 regarding signing of the deposition?

17 MR. TRUNCALE: Well, the --

18 MR. CHURCHILL: You've got a trial date in a
19 week; right?

20 MR. TRUNCALE: Yeah.

21 MR. CHURCHILL: Let me ask the reporter when
22 she can get the transcript out.

23 Do you want to pay for an expedited transcript?

24 MR. STEWART: If she thinks a week is
25 expedited, then I'm paying for it.

26 MR. CHURCHILL: A week is expedited here. And

1 you can charge him through the nose.

2 I guess he wants an expedited transcript which
3 means that Doug will probably have the -- well, even
4 expedited he's not going to get it before next Monday.

5 (Off the record.)

6 MR. CHURCHILL: All right. Doug will have the
7 deposition on Monday. I'll represent to everybody that
8 he can read and correct it and sign it I guess no later
9 -- can you do all that on Monday or do you need an extra
10 day for that? Are you going to be here next Monday?

11 THE WITNESS: Mondays are always meetings.

12 MR. STEWART: Can I make a suggestion?

13 MR. CHURCHILL: Yeah.

14 MR. STEWART: Here's my suggestion; that you
15 deliver to me a copy on Monday; that we have a date by
16 which he can review and sign; that we will agree that an
17 unsigned copy can be used in the event that for some
18 reason he doesn't get to sign it, and that the errata
19 sheet, if there is one, be provided to my office no later
20 than Wednesday.

21 MR. CHURCHILL: Well, that means that I'm going
22 to have to get a copy of it, too.

23 Michael?

24 MR. TRUNCALE: Yes, I'm here.

25 MR. CHURCHILL: Do you want your own copy of
26 this?

1 MR. TRUNCALE: I think I do, and I think you
2 ought to have one, too.

3 MR. CHURCHILL: Make a copy for my office, make
4 a copy for Mr. Truncale's office. Fed Ex it to Truncale;
5 Fed Ex it to me. Take my copy and Fed Ex it to
6 Mr. Merrill. And, Doug, you can read it and when you're
7 done with it you can overnight mail it to me; okay? Make
8 a copy here for yourself.

9 And then we'll have -- let's say the errata
10 sheet, if it occurs at all, will be -- assuming that
11 Mr. Merrill has the depo transcript delivered to him a
12 week from today, that the errata sheet will be faxed to
13 Baron & Budd no later than Thursday at noon.

14 MR. STEWART: That's fine.

15 MR. CHURCHILL: Next week. A week from
16 Thanksgiving.

17 MR. STEWART: Right.

18 MR. CHURCHILL: Whatever date that is.

19 MR. STEWART: It's the 30th. November the 30th
20 at noon.

21 MR. CHURCHILL: Okay. Fair enough?

22 MR. TRUNCALE: Al, is that all right with you?

23 MR. STEWART: Yeah, that would be fine.

24 MR. TRUNCALE: Okay. Very fine, then.

25 MR. CHURCHILL: All right. That concludes the
26 deposition, it appears.

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MR. TRUNCALE: All right.

(4:49 p.m.)

DOUGLAS WAYNE MERRILL

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R E P O R T E R ' S C E R T I F I C A T E

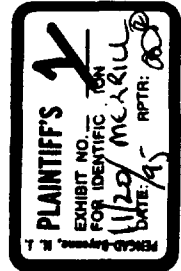
I, TERI DARRENOUGUE, the undersigned, duly authorized to administer oaths pursuant to Section 2093(b) of the California Code of Civil Procedure, do hereby certify that the witness in the foregoing deposition was by me duly sworn to testify to the truth, the whole truth, and nothing but the truth in the within-entitled cause; that said deposition was taken at the time and place therein stated; that the testimony of the said witness was reported by me and was thereafter transcribed under my direction into typewriting; that the foregoing is a full, complete, and true record of said testimony; and that the witness was given an opportunity to read and correct said deposition and to subscribe the same. Should the signature of the witness not be affixed to the deposition, the witness shall not have availed himself of the opportunity to sign or the signature has been waived.

I FURTHER CERTIFY that I am not of counsel or attorney for either or any of the parties in the foregoing deposition and caption named, or in any way interested in the outcome of the cause named in said caption.

Date: November 24, 1995

TERI DARRENOUGUE
TERI DARRENOUGUE, CM, CRR
CSR No. 5106

(a) Product	(b) On Market	(c) Withdrawn	Use of Asbestos Discontinued	(d) (d) (d) (d) Description	Color	(g) Use	Weight
Bedding Cement	12/60	Not Withdrawn	1970	Dry Powder Chrysotile 5.00	Grayish-white Powder	Embedding tape over interior gypsum board joints between 50°F and 100°F	25-lb. bag
Taping Compound	1970	Not Withdrawn	12/15/77	Dry Powder Chrysotile 0-8.30	Grayish-white Powder	Embedding tape over interior gypsum board joints. Between 50°F and 100°F	25-lb. bag
Finishing Compound	12/60	1982	12/20/77	Dry Powder Chrysotile 0-7.50	Yellow or Gray Powder	To conceal joints and nail holes with interior gypsum board. Between 50°F and 100°F	25-lb. bag
Quik-Set Joint Compound	1963	Not Withdrawn	1/8/78	Dry Powder Chrysotile 0-6.00	Off-white Powder	Fast Setting Joint Cement Between 45°F and 80°F	25-lb. bag
All Purpose (Triple Duty)	12/60	1982	1/10/78	Dry Powder Chrysotile 0-8.30	Grayish-white Powder	For taping, tapping and texturing. Between 50°F and 100°F	25-lb. bag
Ready Mix Taping	Unknown	4/76	Unknown	Pre-Mix Chrysotile 2.0 to 2.60	Off-white Paste	Embedding tape over interior gypsum board joints. Between 50°F and 100°F	50-lb. ctn
Ready Mix All Purpose	12/60	Not Withdrawn	1/13/78	Pre-Mix Chrysotile 0-2.60	Off-white Paste	For taping, tapping and texturing interiors. Between 50°F and 100°F	1 gal. pail 40-lb. ctn 50-lb. ctn 62-lb. pail



(a) Product	(b) On Market	(c) Withdrawn	Use of Asbestos Discontinued	(d) (1) Description	Color	(g) Use	Weight
Ready Mix Topping	1963	Not Withdrawn	1/14/78	Pre-Mix Chrysotile 0-2.00	Off-white or Yellow Paste	To conceal joints and nail holes for inter- ior gypsum board. Between 50°F and 100°F	50-lb. ctn 62-lb. pail
Wall Texture (Seetex A)	12/60	Not Withdrawn	2/11/78	Dry Powder Chrysotile 0-8.00	Off-white Powder	Wall texture on interiors. Between 50°F and 100°F	25-lb. bag 50-lb. bag
Texture Paint (not in California)	Unknown	Not Withdrawn	2/11/78	Dry Powder Chrysotile 0-6.70	Off-white Powder	Texture Between 50°F and 100°F	25-lb. bag
Splatter Texture (not in Calif.)	Unknown	1980	1/12/78	Dry Powder Chrysotile 0-6.00	Off-white Powder	Texture Between 50°F and 100°F	25- b. bag
Sand Finish (not in Calif.)	Unknown	Not Withdrawn	1/3/78	Dry Powder Chrysotile 0-7.70	Off-white Powder	Texture Between 50°F and 100°F	25-lb. bag
Ceiling Texture (Seetex B)	1964	Not Withdrawn	1/9/78	Dry Powder Chrysotile 0-10.00	Off-white or White powder	Texture for interior celli- ngs. Between 50°F and 100°F	11-lb. bag 12-lb. bag 60-lb. bag
Product 225	1963	Not Withdrawn	1968	Paint Chrysotile 0-6.10	Paint	Surface Conditioner	1-1/2-lb. pail 5-1/2-lb. pail
Product 235	1972	Not Withdrawn	1978	Paint Chrysotile 0-7.30	Paint	Tex-Bond	1-1/2-lb. pail 5-1/2-lb. pail
Product 321	1974	Not Withdrawn	1978	Paint Chrysotile 0-3.90	Paint	Block Filler	1-1/2-lb. pail 5-1/2-lb. pail
Radiant Heat Fill	1974	Unknown	Unknown, but did not contain asbestos by 1978	Dry Powder Chrysotile	Powder	Radiant Heat Fill	Bag



November 24, 1995

Mr. Douglas Merrill
c/o HOWARD L. CHURCHILL, Attorney at Law
SCHOFIELD & SCHILLER
Pringle Avenue, Suite 510
Walnut Creek, CA 94596

Dear Mr. Merrill:

Re: WOOLEY -vs- OWENS-CORNING, et al.

The original transcript of your deposition taken in the above-named matter has been prepared and a copy is being supplied to you for your review.

Due to the impending trial date, the original transcript has been sent, under seal, to Mr. Stewart. Please communicate any changes or corrections to the transcript directly to your attorney.

Very truly yours,

Teri Darrenougue, CM, CRR
CSR No. 5106

cc: Original Transcript
ALLEN M. STEWART, Attorney at Law
HOWARD L. CHURCHILL, Attorney at Law
MICHAEL TRUNCALE, Attorney at Law