IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

FLETCHER McDANIEL, et ux,

Plaintiffs,

v.

ARMSTRONG WORLD INDUSTRIES, INC., et al.,

Defendants.

Civil Action No. 83-3520

(Judge Flannery)

FILED

JUN 12 1984

CLERK, U.S. DISTRICT COURT
DISTRICT OF COLUMBIA

SUPPLEMENTAL MEMORANDUM IN SUPPORT OF MOTION OF DEFENDANT TURNER & NEWALL PLC TO DISMISS FOR LACK OF PERSONAL JURISDICTION

Preliminary Statement

Defendant Turner & Newall PLC ("T&N"), by its attorneys, respectfully submits this Supplemental Memorandum, pursuant to the direction of the Court during the hearing held on June 5, 1984, in further support of T&N's Motion to Dismiss the Complaint for lack of personal jurisdiction.

DISCUSSION

I. JURISDICTION MUST BE BASED UPON THE FACTS EXISTING AS OF THE TIME AT WHICH JURISDICTION IS SOUGHT TO BE ASSERTED.

As pointed out in the briefs and in oral argument, this case differs from the cases relied on by Plaintiffs in that the only

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contact which T&N has had with the District of Columbia since at least 1971 is the filing of a single lawsuit in this Court.

Although there appear to be no cases in this Circuit on this point, federal courts in other circuits have held that the facts which determine whether the exercise of personal jurisdiction is proper are those existing as of the date the action is commenced. Thus, in denying jurisdiction in Connecticut Artcraft Corp. v. Smith, 574 F. Supp. 626, 630 (D. Conn. 1983), the Court stated that "Jurisdiction is to be determined at the time of the service of the complaint." Similarly, in Lachman v. Bank of Louisiana in New Orleans, 510 F. Supp. 753, 757 (N.D. Ohio 1981), cited in T&N's Reply Memorandum at page 4, the Court stated

> "Jurisdiction is to be determined by examining the conduct of the defendant as of the time of service of the complaint. The Court does not look to whether the defendant had minimum contacts with the state at the time of the act complained of; rather, the Court looks to whether it could assert personal jurisdiction over the defendant at the time jurisdiction is sought to be asserted."

Accord, In re Puerto Rico Air Disaster Litigation, 340 F. Supp. 492, 498 & n.19 (D.P.R. 1972) (Weinfeld, J.); Optico Corp. v. Standard Tool Co., 285 F. Supp. 46, 48 (E.D. Pa. 1968). See also Hensen v. Fred Harvey, Inc., 308 F. Supp. 218 (E.D. Pa. 1970); Proler Steel Corp. v. Luria Brothers & Co., 225 F. Supp. 412, 413 (S.D. Tex. 1964) ("It is well settled that venue and jurisdiction are determined by the facts as they exist at the time the action is filed").

II. THE MERE FILING OF A LAWSUIT IN THIS COURT DOES NOT CONSTITUTE "DOING BUSINESS" IN THIS JURISDICTION SO AS TO SUBJECT T&N TO THE REACH OF THE D.C. "LONG-ARM" STATUTE.

In an attempt to avoid the foregoing well-settled rule that jurisdiction must be based on facts existing at the time the suit was filed, Plaintiffs asserted for the first time during oral argument that T&N's May 14, 1982 initiation of a lawsuit in this Court 1/ is, by itself, sufficient to constitute "doing business" in the District of Columbia under the D.C. long-arm statute. This argument has been expressly rejected by the D.C. Court of Appeals, which held in Payton v. Summit Loans, Inc., 253 A.2d 459, 461 (D.C. App. 1969), that a foreign corporation was not subject to jurisdiction in the District of Columbia even where it had instituted an average of between one and two suits per month in the D.C. Courts over the two and a half years immediately preceding the filing of that case:

> "Appellant urges that appellee is doing business in the District of Columbia ... by reason of the fact that between January, 1965, and the filing of his complaint in June, 1967, it had initiated in the court below each month on the average between one and two suits. The initiation of an action by a foreign corporation does not in and of itself con-

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1/ Turner & Newall PLC v. American Mutual Liability Co., D.D.C. Civ. Action No. 82-1339, filed May 14, 1982. While Plaintiffs previously cited this case in opposition to T&N's Motion to Dismiss (Opp. at pg. 27), such was to counter any suggestion that it would work an undue hardship on T&N to litigate in this Court, not to support jurisdiction per se. We further note that the American Mutual complaint was filed more than two months in advance of the issuance of this Court's Order dismissing a similar complaint against T&N in Catrett v. Johns-Manville Sales Corp., D.D.C. Civ. Action No. 81-2732, Order issued July 21, 1982, app. dismissed D.C. Cir. No. 83-1694 (Feb. 6, 1984), not several years later as was suggested by Plaintiffs at oral argument.

stitute doing business in the jurisdiction where suit is brought. 18 Fletcher Cyclopedia Corporations, § 8726.1 (1968 Cum. Supp.)."

If the filing of between 30 and 60 cases over a 2 1/2 year period was insufficient to constitute doing business and serve as a basis for jurisdiction, clearly the single suit filed by T&N is insufficient.

During oral argument Plaintiffs cited, for the first time, Ross v. Ross, 258 N.E. 2d. 437 (Mass. 1976), in support of the contention that the mere filing of a lawsuit is sufficient to constitute doing business. Not only is such not the law in the District of Columbia, but, more importantly, the Ross decision does not even support Plaintiffs' premise. Ross involved a husband's suit in Massachusetts State Court for specific performance of a separation agreement where the wife previously had used the Massachusetts courts to obtain an increase in the level of support ordered in a decree nisi of divorce which adopted the support provisions of the separation agreement. In holding the wife subject to jurisdiction in Ross, the Court cited the general rule that the mere execution of a separation agreement in the state is sufficient to confer jurisdiction as to a suit to enforce such separation agreement, and noted further that the wife's invocation of the Massachusetts court's aid in seeking modification of the same separation agreement was sufficient to satisfy any requirement of fairness and substantial justice. Here, in contrast, we are not dealing with a separation agreement or other subject matter peculiarly subject to D. C. jurisdiction. Moreover, the parties here are not the same as those in the American Mutual suit.

Further, this Court should disregard the filing by T&N of its lawsuit in the District of Columbia under the "government contacts" exception to the District's long-arm statute. "That exception holds that the local courts do not exercise personal jurisdiction over a nonresident on the basis of activity in the District relating solely to dealings with the federal government." Stabilisierungsfonds fur Wein v. Kaiser Stuhl Wine Distributors Pty. Ltd., 647 F.2d 200, 205 n.11 (D.C. Cir. 1981); Environmental Research International Inc. v. Lockwood Greene Engineers, Inc., 355 A.2d 808, 813 (D.C. 1976). To hold T&N subject to jurisdiction on account of its filing of a lawsuit in a federal court located here would have a chilling effect upon the exercise of First and Fifth Amendment rights.

III. MOREOVER, T&N SHOULD NOT BE HELD SUBJECT TO JURISDICTION WHERE THERE WERE NO SALES IN THE DISTRICT OF COLUMBIA.

In asserting jurisdiction in this case, Plaintiffs rely primarily on the decisions in Nelson v. Park Industries, Inc., 717 F.2d 1120 (7th Cir. 1983), cert. denied, 104 S. Ct. 1278 (1984), and Kaiser Stuhl, supra, 647 F.2d 200. Unlike the situations in those cases, where there was evidence of actual sales within the respective forum of the relevant product, 2/ the record in this case shows that there were no sales of Limpet in the District of Columbia. Rather, the "stream of commerce" here ended in Virginia where Krafft-Murphy purchased the Limpet. It was the unilateral action of Krafft-Murphy, a third party to this litigation, that

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2/ See Nelson v. Park Industries, Inc., supra, 717 F.2d at 1123, & 1127, and Kaiser Stuhl, supra, 647 F.2d at 202 & 206 n.14.

brought Limpet into this jurisdiction. 3/ The Supreme Court has held that the unilateral activities of a third party are "not ... appropriate consideration[s] when determining whether a defendant has sufficient contacts with a forum ... to justify an assertion of jurisdiction." Helicopteros Nacionales de Colombia, S.A. v. Hall, 104 S. Ct. 1868, 1873 (1984). See also Vencedor Manufacturing Co. v. Gougler Industries, Inc., 557 F.2d 886 (1st cir. 1977); Product Promotions, Inc. v. Cousteau, 495 F.2d 483 (5th Cir. 1974). Such fortuitous acts by others provide an insufficient basis upon which to assert personal jurisdiction over T&N. 4/ Thus, even were T&N's total lack of contacts with the

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3/ It is clear that plaintiffs' stream of commerce theory can only justify jurisdiction under subsection (a)(4) and not under the transacting business element of subsection (a)(1). Walsh v. National Seating Co., 411 F. Supp. 564, 569 (D. Mass. 1976).

4/ Prior to the June 5, 1984 hearing, Plaintiffs submitted the Memorandum and Recommendation of Magistrate DeGiacomo in Sheehan v. Owens-Corning Fiberglas Corp., Civil Action No. 83-2160M. (D. Mass.). That Memorandum recommends that T&N be held subject to personal jurisdiction in Massachusetts, inter alia, for acts which Keasbey & Mattison Company ("Keasbey"), a former T&N subsidiary, allegedly performed within Massachusetts. Although Plaintiffs have not abandoned their claim that T&N is subject to this Court's jurisdiction on account of Keasbey, they have not pressed the issue. In the event this Court thinks the issue relevant, T&N refers this Court to its papers filed in opposition to Magistrate DeGiacomo's recommendation in Sheehan (especially the 1984 Affidavit of Robert R. Porter), arguing that the Magistrate incorrectly decided the issue of T&N's relationship to Keasbey. Copies of T&N's Sheehan papers have been filed with this Court on June 4, 1984. T&N also refers this Court's attention to the affidavits that led the Fifth Circuit to decide that T&N was not the alter ego of Keasbey in Hargrave v. Fibreboard Corp., 710 F.2d 1154 (5th Cir. 1983). Copies of the affidavits of John Mason Atkinson, Group Solicitor to T&N, sworn to December 23, 1981, and of Sir Ralph Melton Bateman, former Chairman of

District of Columbia for more than twelve years to be ignored, there would still be no proper basis upon which to premise jurisdiction over T&N in this case.

CONCLUSION

For the foregoing reasons, and for the reasons set forth in T&N's prior submissions to this Court, T&N's Motion to Dismiss Plaintiffs' Complaint as to T&N should be granted in all respects.

Respectfully submitted,

Hopewell H. Darneille III

Hopewell H. Darneille, III

Bowman Conner Touhey & Petrillo
A Professional Corporation
2828 Pennsylvania Avenue, N.W.
Washington, D.C. 20007
(202) 965-7600

and

Charles E. Dorkey III
Paul J. Hanly, Jr.

Richards O'Neil & Allegaert
660 Madison Avenue
New York, New York 10021
(212) 207-1200

Attorneys for Defendant
Turner & Newall PLC

June 12, 1984

4/ (footnote continued from previous page) T&N, and which were submitted in support of T&N's motion for summary judgment in Hargrave, are annexed hereto as Exhibit A. Moreover, similar affidavits are on file with this Court as part of T&N's submission in Catrett v. Johns-Manville Sales Corp., D.D.C. Civ. Action No. 80-2232.

CA 83-3521

Attachment A

FILED

JUN 12 1984

CLERK, U.S. DISTRICT COURT
DISTRICT OF COLUMBIA

I, Ralph Melton Bateman, Knight of the British Empire, of Prestbury, England, make oath and say as follows:-

(1) I understand that the relationship between Turner & Newall Limited ("T&N") and Keasbey and Mattison Company ("Keasbey") has been put in issue in various proceedings in the United States.

(2) I have been asked by T&N to state my understanding and knowledge of the relationship between T&N and Keasbey and the matters hereafter stated are true to the best of my knowledge, information and belief.

(3) I joined T&N in 1931. On 1st November 1957 I was elected a Director of T&N. From 1959 to July 1967 I was Deputy Chairman and Managing Director of T&N. On 1st July 1967 I was elected Chairman of the Board of Directors of T&N and served in that position until my retirement on 31st July 1976.

(4) From 27th February 1959 to the dissolution of Keasbey I was a Director of Keasbey. For a brief period from 27th February 1959 to 31st August 1959 I served as Chairman of the Board of Directors of Keasbey. It became apparent however that my other duties to T&N would not allow me to preside at meetings regularly. I therefore resigned my position as Chairman of the Board of Directors of Keasbey but remained a Director of Keasbey from 31st August 1959 to the dissolution of Keasbey. I held no other office with Keasbey and no other director, officer or employee of T&N was a director or employee of Keasbey during the period from 27th February 1959 to the dissolution of Keasbey.

(5) Although T&N indirectly owned 100 per cent of the common stock of Keasbey as an investment, Keasbey was an independent corporate entity entirely separate and distinct from T&N operating from its own offices through its own officers, directors, management and staff.

(6) Keasbey held regular meetings of its Board of Directors. I attended only one of these meetings. My contact with Keasbey was extremely infrequent.

(7) Keasbey maintained its own bank accounts, accounting and payroll systems, insurance contracts and ledgers of sales and purchases.

(8) To my knowledge there was never any interference by T&N as a parent corporation with Keasbey's choice of customers or marketing decisions nor for that matter with any other day-to-day corporate decision.

(9) Reporting by Keasbey to T&N was what normally and routinely is done by a subsidiary to a parent corporation and T&N's participating in the affairs of Keasbey was no more than what is normal and usual for a stockholder to do.

(10) Keasbey was never authorised to act as agent of T&N and to my knowledge Keasbey never in fact acted as T&N's agent.

(11) T&N never regarded Keasbey as a division or internal unit but always considered it, as indeed was the business reality, as an independently-operated corporation in which T&N had made an investment.

IN WITNESS WHEREOF, I have hereunto signed my name to the foregoing oath and affidavit.

Dated: 19th May 1981 Ralph Melton Bateman

RALPH MELTON BATEMAN

On this 19th day of May 1981, Ralph Melton Bateman appeared before me, swore to and executed the foreoing instrument and duly acknowledged that he executed the same.

William O'Boffatt

NOTARY PUBLIC

Manchester

England

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ATTENTION MR MARVIN SLOMAN

RE: TEXAS ASBESTOS LITIGATION

FOLLOWING IS TEXT OF AFFIDAVIT SIGNED BY MR J M ATKINSON TODAY

I, JOHN MASON ATKINSON OF 23 ST. MARY'S PARSONAGE, MANCHESTER, ENGLAND, MAKE OATH AND SAY AS FOLLOWS:

(1) I AM THE GROUP SOLICITOR TO THE THIRD PARTY DEFENDANT TURNER " NEWALL LIMITED AND AM AUTHORISED TO MAKE THIS AFFIDAVIT ON THEIR BEHALF. I MAKE THIS AFFIDAVIT IN FURTHER SUPPORT OF THE MOTION FOR SUMMARY JUDGEMENT BY TURNER " NEWALL LIMITED ON THE THIRD-PARTY CLAIMS OF NICOLET, INC.

(2) I UNDERSTAND THAT THE RELATIONSHIP BETWEEN TURNER " NEWALL LIMITED ('T " N') AND KEASBEY AND MATTISON COMPANY ('KEASBEY') HAS BEEN PUT IN ISSUE IN THIS PROCEEDING. I HAVE CAUSED A SEARCH TO BE MADE OF THE BOOKS AND RECORDS OF T " N TO DETERMINE THE RELATIONSHIP BETWEEN T " N AND KEASBEY. THE MATTERS HEREINAFTER STATED ARE STATED ON THE BASIS OF THAT SEARCH AND ARE TRUE TO THE BEST OF MY KNOWLEDGE, INFORMATION AND BELIEF.

(3) T " N WAS FORMED AS A PRIVATE COMPANY UNDER THE LAWS OF ENGLAND ON 12TH FEBRUARY 1920. T " N'S HOME OFFICE HAS AT ALL TIMES BEEN IN MANCHESTER, ENGLAND.

1873 AND WAS INCORPORATED [illegible]

A CORPORATION DULY ORGANIZED AND EXISTING UNDER THE LAWS OF THE COMMONWEALTH OF PENNSYLVANIA, WITH THEIR PRINCIPAL PLACE OF BUSINESS AT AMBLER, PENNSYLVANIA, AND ENGAGED IN THE MANUFACTURE AND SALE OF ASBESTOS, MAGNESIA AND ASPHALT PRODUCTS.

(5) IN 1934, T & N PURCHASED A MAJORITY OF THE STOCK OF KEASBEY AS AN INVESTMENT IN AN OPERATING COMPANY. BY 1938 T & N HAD ACQUIRED THE ENTIRE STOCK INTEREST OF KEASBEY.

(6) EXCEPT AS HEREAFTER STATED, NO OFFICER, DIRECTOR OR EMPLOYEE OF T & N WAS AN OFFICER, DIRECTOR OR EMPLOYEE OF KEASBEY, AND, TO THE BEST OF MY BELIEF, ALL THE OFFICERS AND DIRECTORS OF KEASBEY WERE CITIZENS AND RESIDENTS OF THE UNITED STATES OF AMERICA.

(A) FROM 1934 TO 27TH FEBRUARY 1959, SIR WALKER SHEPHERD WAS A DIRECTOR OF KEASBEY. FROM 28TH OCTOBER 1937 TO 27TH FEBRUARY 1959 SIR WALKER SHEPHERD WAS THE CHAIRMAN OF THE BOARD OF DIRECTORS OF KEASBEY. SIR WALKER SHEPHERD WAS A DIRECTOR OF T & N FROM NOVEMBER 1931 TO 27TH FEBRUARY 1959 AND THE CHAIRMAN OF THE BOARD OF DIRECTORS OF T & N FROM OCTOBER 1944 TO 27TH FEBRUARY 1959.

(B) EFFECTIVE 27TH FEBRUARY 1959 SIR RALPH BATEMAN WAS CHAIRMAN OF THE BOARD OF DIRECTORS OF KEASBEY UNTIL 31ST AUGUST 1959 WHEN BECAUSE HE WAS UNABLE TO PRESIDE AT MEETINGS HE RESIGNED THAT POSITION. FROM 31ST AUGUST 1959 TO THE DISSOLUTION OF KEASBEY SIR RALPH BATEMAN WAS A DIRECTOR OF KEASBEY. SIR

NOVEMBER [illegible]7 TO JULY 1976 AND CHAIRMAN OF THE BOARD OF DIRECTORS OF T " N FROM JULY 1967 TO JULY 1976.

(7) FROM 1934 TO 1938, WHILE THE STOCK OF KEASBEY WAS BEING ACQUIRED SIR WALKER SHEPHERD HELD AN INTERIM PRESIDENCY FOR ABOUT ONE YEAR AND ATTENDED 11 MEETINGS OF THE BOARD OF DIRECTORS OF KEASBEY. AS SOON AS ALL OF THE STOCK OF KEASBEY WAS ACQUIRED AND A FULL TIME PRESIDENT, MR. ERNEST MURDOCH, HAD BEEN ELECTED BY THE BOARD OF DIRECTORS OF KEASBEY, THE OPERATION OF KEASBEY WAS LEFT IN THE HANDS OF THE BOARD OF DIRECTORS AND ELECTED OFFICERS OF KEASBEY.

(8) FROM 1939 TO 27TH FEBRUARY 1959, THERE WERE 277 MEETINGS OF THE DIRECTORS OF KEASBEY. SIR WALKER SHEPHERD ATTENDED ONLY 3 MEETINGS AND NO OTHER OFFICER, DIRECTOR OR EMPLOYEE OF T " N ATTENDED ANY MEETINGS.

(9) FROM 27TH FEBRUARY 1959 TO 1ST FEBRUARY 1963, THE LAST MEETING OF THE DIRECTORS OF KEASBEY, THERE WERE 55 SUCH MEETINGS. SIR RALPH BATEMAN ATTENDED ONLY ONE MEETING AND NO OTHER OFFICER, DIRECTOR OR EMPLOYEE OF T " N ATTENDED ANY MEETING.

(10) FROM AT LEAST 31ST AUGUST 1959, THE BYE-LAWS OF KEASBEY REQUIRED THE ANNUAL ELECTION OF A BOARD OF DIRECTORS OF NOT MORE THAN SEVEN AND NOT LESS THAN FIVE DIRECTORS, EXCEPT THAT ON 15TH JUNE 1962 THE BYE-LAWS OF KEASBEY WERE AMENDED DUE TO THE PENDING LIQUIDATION AND DISSOLUTION OF KEASBEY TO PERMIT A MINIMUM OF THREE DIRECTORS, DURING THE WINDING UP PERIOD. AT NO TIME DID OFFICERS, DIRECTORS OR EMPLOYEES OF T " N FILL

(11) [illegible] ASSETS OF KEASBEY WERE EVER COM-
MINGLED WITH THOSE OF T " N OR USED BY T " N AS THEIR OWN.

(12) IN 1962, KEASBEY'S ASBESTOS PIPE AND COUPLINGS BUSINESS, ASBESTOS TEXTILE BUSINESS AND INDUSTRIAL PRODUCTS BUSINESS WERE PURCHASED BY THREE SEPARATE CORPORATIONS. NICOLET INDUSTRIES, INC. ACQUIRED THE BUSINESS, INCLUDING THE PRODUCT LINES, OF THE INDUSTRIAL PRODUCTS DIVISION.

(13) ON THE 11TH DECEMBER 1962, KEASBEY FILED A CERTIFICATE OF ELECTION TO DISSOLVE WITH THE SECRETARY OF THE COMMONWEALTH OF PENNSYLVANIA. ON 13TH MARCH 1967 A CERTIFICATE OF DISSOLUTION, A COPY OF WHICH IS ATTACHED TO THIS AFFIDAVIT, WAS DULY EXECUTED BY THE SECRETARY OF THE COMMONWEALTH OF PENNSYLVANIA.

IN WITNESS WHEREOF, I HAVE HEREUNTO SIGNED MY NAME TO THE FOREGOING OATH AND AFFIDAVIT. THIS THE 23 DAY OF DECEMBER, 1981.

JOHN MASON ATKINSON

ON THE 23 DAY OF DECEMBER, 1981, JOHN MASON ATKINSON APPEARED BEFORE ME, SWORE TO AND EXECUTED THE FOREGOING INSTRUMENT AND DULY ACKNOWLEDGED THAT HE EXECUTED THE SAME.

NOTARY PUBLIC
MANCHESTER

REGARDS

CAROL GILCHRIST
SECRETARY TO J M ATKINSON

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CARLEM DAL

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CERTIFICATE OF SERVICE

I hereby certify that the foregoing "Supplemental Memorandum in Support of Defendant Turner & Newall PLC to Dismiss for Lack of Personal Jurisdiction" were served this 12th day of June 1984, by delivering true and correct copies thereof by first-class mail, postage prepaid, to James F. Green, Esquire and Peter T. Enslein, Esquire, Ashcraft & Gerel, 2000 L Street, N.W., Washington, D.C. 20036, attorneys for Plaintiffs, and to:

Michael P. Chervenak, Esquire
Ford & O'Neil
17 West Jefferson Street
Rockville, MD 20850
Attorney for Armstrong World Industries

Kevin J. McCarthy, Esquire
O'Malley, Miles, Farrington & McCarthy
99 Commerce Place
Upper Marlboro, MD 20772
Attorney for A. C. and S., Inc.

H. Patrick Donohue, Esquire
Donahue, Ehrmantraut & Montedonico, Chartered
51 Monroe Street - Suite 700
Rockville, MD 20850
Attorneys for Atlas Turner, Inc. and Bell Asbestos Mines, Ltd.

David P. Durbin, Esquire
Jordan, Coyne, Savits & Lopata
1030 15th Street, N.W. - Suite 500
Washington, D.C. 20005
Attorney for Celotex Corporation

Louis R. Moffa, Jr.
Schnader, Harrison, Segal & Lewis
1111 19th Street, N.W.
Washington, D.C. 20036
Attorney for National Gypsum Company

R. G. Guziak, Esquire
Brault, Graham, Scott & Brault
1314 19th Street, N.W.
Washington, D.C. 20036
Attorney for Nicolet, Inc.

Brock R. Landry, Esquire
Keck, Mahin & Cate
1333 New Hampshire Avenue, N.W.
Washington, D.C. 20036
Attorney for United States
Gypsum Company

Patrick James Attridge, Esquire
Macleay, Lynch, Bernhard & Gregg
51 Monroe Street, Suite 806
Rockville, MD 20850
Attorney for United States Mineral
Products Co.

Edward J. Lopata, Esquire
Jordan, Coyne, Savits & Lopata
1030 15th Street, N.W. - Suite 500
Washington, D.C. 20005
Attorney for W. R. Grace Company

Hopewell H. Darneille III

Hopewell H. Darneille, III