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IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
MARSHALL DIVISION

OWENS-ILLINOIS, INC.,	§	
	§	
Plaintiff	§	
vs.	§	C.A. No. 2-99CV01117-DF
	§	
T&N, LTD.,	§	
	§	
Defendant.	§	

AFFIDAVIT OF PAUL J. HANLY, JR. IN SUPPORT OF DEFENDANT'S MOTION FOR RELIEF FROM DEFAULT JUDGMENT

STATE OF NEW YORK §
§
COUNTY OF NEW YORK §

PAUL J. HANLY, JR., being duly sworn, deposes and states the following to be true and correct and, except as indicated to the contrary (by context or otherwise), within his personal knowledge:

1. I am an attorney admitted to practice in the State of New York and in certain United States District Courts and Courts of Appeals sitting in New York and elsewhere. I am a partner in the firm of Coblence & Warner, a New York law firm that acts as national coordinating and trial counsel in the asbestos personal injury and property damage litigation for T & N, Ltd. and its predecessors ("T & N"). I make this Affidavit to provide the Court with facts concerning (i) the information that Owens-Illinois, Inc. ("O-I") constructively and actually possessed many years before bringing this action concerning the core factual allegations of its Complaint; (ii) the prior representation of T & N by Richard Josephson, Baker & Botts and other counsel retained by O-I in matters substantially related to those at issue in this case; and (iii) the involvement of O-I in

attempting to improperly influence medical literature on the hazards of asbestos.

Background

2. T & N is a corporation organized and existing under the laws of England. It is at present a wholly-owned subsidiary of Federal-Mogul Corporation, which acquired all of T & N's shares effective March 6, 1998.

3. T & N was formed in England in 1920 as Turner & Newall Limited. In the early 1980s the name was changed to Turner & Newall PLC and later to T & N plc. For many years certain of T & N's subsidiary companies were involved in the manufacture, distribution, sale and installation of asbestos-containing products; some other subsidiaries were involved in the mining, processing, brokerage or sale of asbestos fiber to manufacturing companies both within and without the T & N group of companies. Through certain subsidiaries, some asbestos fiber and asbestos-containing materials distributed by companies within the T & N group were sold to companies in the United States.

4. The first known asbestos personal injury lawsuit against T & N was filed in the United States in July 1976. Since then, T & N has been sued in more than 200,000 cases, of which about 60,000 are presently pending. T & N has also been a defendant in several hundred asbestos property damage cases; only one is now pending.

5. I first began to represent T & N in late 1981, by which time the company had been sued in about a thousand cases. By 1985 I was personally responsible for the coordination of the defense of T & N in thousands of asbestos personal injury and property damage cases throughout the United States. I also served as trial counsel in certain cases in certain jurisdictions. With the exception of the period between mid-1990 and mid-1992, when I was only peripherally involved in T & N's

defense, I have been one of T & N's principal defense counsel in United States asbestos litigation continuously since 1981.

The Early Years: July 1976 to June 19, 1985

6. Between July 1976, when the first case was brought against T & N, until on or about June 19, 1985, T & N was defended throughout the country by its own network of defense counsel, with coordination by one firm located in New York. One of the principal regional defense attorneys for T & N prior to June 1985 was R. Bruce Shaw of Columbia, South Carolina. At that time Mr. Shaw also served as regional counsel to O-I. I worked closely with Mr. Shaw and his then-associate (now partner), David G. Traylor, Jr., in the period 1981 to June 1985 and thereafter. In the course of that work I confided to Mr. Shaw and Mr. Traylor confidences concerning T & N and its defenses to the asbestos claims, and they provided legal representation and advice to T & N, usually through me, concerning discovery responses, litigation strategy and the overall defense of T & N. Mr. Shaw and his firm also reviewed and signed discovery responses on behalf of T & N on numerous occasions.

7. In or around 1982 I began to travel regularly to England to meet with T & N witnesses and to gather and review the historical documents concerning the asbestos activities of T & N's various U.K. subsidiaries. Over the next few years I became very familiar with T & N's asbestos history in the course of reviewing documents and organizing what would later become known as T & N's asbestos document repository. Also at that time I was engaged in the production of documents to plaintiffs' counsel throughout the United States. The general procedure at the time was to invite plaintiffs' attorneys to the T & N repository to review the original documents. I do not recall any plaintiffs' firms accepting the invitation, however, as most agreed instead to accept production in the United States of copies of narrow categories of documents that related mainly to

product identification, i.e., whether T & N had supplied products to particular companies or in particular jurisdictions. With few exceptions, nearly all of the cases brought against T & N in those years were settled before it was necessary to engage in costly discovery.

8. On several occasions during this period (1982 to early 1985), however, T & N was requested to produce larger quantities of documents, usually by members of Ronald L. Motley's law firm, then known as Blatt & Fales. In most instances in which such requests were made, I turned to Mr. Shaw, then counsel for both T & N and O-I, for advice, as he was one of the most experienced asbestos lawyers available to T & N. I had numerous conversations with Mr. Shaw, both on the telephone and in person, in which we discussed the categories of documents sought by plaintiffs' counsel and possible responses to their requests for production. The document categories included development of knowledge about asbestosis and cancer, T & N historical contacts with the U.S., effectiveness of threshold limit values ("TLVs"), fiber supply, product identification and insulation workers. As a result of Mr. Shaw's advice, instead of producing large volumes of documents, T & N entered into informal inventory settlement deals for nearly all of the Blatt & Fales cases and for many of the cases handled by other firms. It was not until later, however, that I was told that production of T & N documents would adversely impact O-I's claimed defenses in the litigation.

The Asbestos Claims Facility Years: June 19, 1985 to Fall 1988

9. On or about June 19, 1985, some 33 companies who were then asbestos defendants in tens of thousands of asbestos personal injury cases in the United States and 14 of their insurers formed an organization known as the Asbestos Claims Facility ("ACF"). One of the purposes of the ACF was to jointly administer and defend asbestos personal injury claims through the use, inter alia, of joint defense counsel sharing arrangements. T & N and O-I joined the ACF at its inception.

10. Following creation of the ACF, the day-to-day defense of the cases against the members was handled by a network of law firms. Each firm engaged "by" the ACF was in fact counsel of record for every ACF member sued in each case handled by the firm. Thus, in each case in which T & N and O-I were defendants, one firm jointly represented both.

11. The firms hired by the ACF to serve as joint defense counsel (known, pursuant to the terms of the ACF agreement, as "liaison counsel") were highly experienced in asbestos cases, all having been aligned with a major asbestos defendant prior to the ACF's formation. Approximately 56 firms, including Baker & Botts, were hired to represent ACF members nationwide. Of those firms, 13 had been O-I counsel previously (apparently Baker & Botts was one), and another three had been counsel to Owens-Corning Fiberglas, the company which had been O-I's distributor in the 1950s and which bought O-I's asbestos product line in 1958. In contrast, with the exception of Mr. Shaw's firm, no ACF counsel had previously represented T&N.

12. The fact that only one of 56 ACF firms had any prior involvement representing T & N meant that confidential details concerning T & N's history, liability profile, documents and defenses had to be disseminated to a wide audience if T & N was to be effectively defended by its then-new counsel. In order to advance the state of knowledge of ACF counsel, I personally conducted several seminars to tell the T & N "story." In addition, over the course of the ACF years (June 1985 through Fall 1988), I personally had hundreds of confidential communications with ACF counsel, including "historic" O-I counsel, such as Baker & Botts, in which I shared confidential information, mental impressions and defense strategies, and revealed thousands of documents relating to plaintiffs' allegations against T & N. Details of those events follow.

13. One of the major consequences of T & N's joinder of the ACF was that it could no

longer decide unilaterally whether to settle cases and thereby avoid the production of documents and of witnesses for depositions. Instead, such decisions were delegated to the ACF. As a result, with the formation of the ACF, T & N found itself the subject of intense discovery.

14. The first major discovery event for T & N occurred in November 1985, when members of Blatt & Fales (Mr. Motley's firm) traveled to the U.K. to depose three T & N witnesses and to review T & N documents. Mr. Shaw, by then an ACF lawyer representing T & N and O-I, came to England to defend the T & N depositions with me. On November 23 and 24, 1985, Mr. Shaw and I met in London to review the documents I was prepared to produce on November 25, 1985 in connection with the depositions scheduled to begin that day. I showed Mr. Shaw two bankers' boxes of documents. We went through the documents one by one. Several related to the subject of cancer, one to TLVs and several to insulation workers. Mr. Shaw asked if we could find a way not to produce certain of the documents in these three categories. When I asked why, he explained that such documents could "kill O-I" because of the position on the state of knowledge taken by O-I in the U.S. litigation. Mr. Shaw and I worked through the documents and withheld some on the basis of privilege, but most were produced the next day.

15. On June 1, 1986 a United States Magistrate sitting in the Western District of Virginia issued an order directed to T & N in a case brought by Mr. Motley's firm entitled *Dalton*. In essence, the Court's Order required T & N to assemble in one place in Manchester, England all documents from all of its U.K. subsidiaries relating, inter alia, to the health hazards of asbestos for inspection later that year by plaintiff's counsel. Although by that time a very large volume of materials had already been assembled, the breadth of the Order required substantial additional efforts to retrieve, review and assemble in a single location what turned out to be millions of documents. At roughly

the same time as the *Dalton* Order was issued, T & N was preparing for a second round of U.K. document production and depositions in a group of cases arising out of the Johns-Manville ("J-M") plant in New Jersey.

16. On or about June 9, 1986, I traveled to England, among other reasons to prepare for the J-M document production and depositions, and to begin the task of compliance with the *Dalton* Order. On the weekend of June 14, 1986, I was joined in London by Andrew T. Berry, another O-I lawyer who, as a consequence of being responsible for ACF cases in New Jersey, was assigned the task of defending T & N at the upcoming depositions. Like Mr. Shaw and his firm, Mr. Berry and his firm counselled T & N, through me, concerning responses to discovery in New Jersey cases, and routinely signed discovery responses on T & N's behalf throughout the ACF years.

17. Over the weekend of June 14-15, 1986, Mr. Berry and I spent a number of hours reviewing the documents I had brought to London from T & N's repository for production to plaintiff's counsel prior to the start of the depositions. Because the cases involved the supply of asbestos fiber by T & N to J-M, I discussed with Mr. Berry at great length the subjects of fiber supply, the relationship between T & N and J-M (including correspondence between the two companies), TLVs and allegations of conspiracy to suppress information about the hazards of asbestos. In addition, because Mr. Berry was defending T & N, O-I and other ACF members in numerous insulator cases in New Jersey, I provided him with information concerning that subject, and showed him documents that could be relevant to alleged knowledge of T & N about the hazards to persons working with finished insulation products. Mr. Berry expressed concern that the documents concerning T & N's knowledge of risks to insulators would adversely affect his defense of O-I in cases in which O-I and T & N were defendants, and specifically asked whether I objected

to his discussing the subject matter with O-I. I told him that I did not object to such discussions. Mr. Berry and I discussed these issues several times while he was in London, from June 14 to June 19, 1986.

18. In December 1986 and March 1987, members of Mr. Motley's firm spent approximately ten days reviewing and designating for copying hundreds of thousands of pages of documents at T&N's repository in Manchester, England. In addition, throughout 1987 and 1988, attorneys representing Prudential Insurance Company in its then-pending asbestos-in-buildings case against T&N spent weeks in Manchester in a similar effort. At about the same time, at least two plaintiffs' firms -- Mr. Motley's firm and Jacobs & Crumplar in Delaware -- began to assert conspiracy claims, alleging unlawful agreements to hide the hazards of asbestos, against T&N and O-I in cases in which both were defendants.

19. One such conspiracy claim was brought in 1987 in the United States District Court for the District of South Carolina in a case called *Watkins*. Numerous defendants, including T & N, filed motions to dismiss, and on October 6, 1987, Judge Joe F. Anderson, Jr. of that Court convened a hearing. In preparation for the hearing I traveled to Columbia, South Carolina the day before to meet with Messrs. Shaw and Traylor, who were then still representing T & N and O-I. I discussed the conspiracy allegations in great detail, and Mr. Shaw, in turn, described to me conspiracy allegations against O-I arising out of its participation in the 1940s in the Saranac Laboratory studies of asbestos hazards of its Kaylo products.

20. By late 1987 T & N's document repository was well-known, and thousands of the documents reviewed by Mr. Motley's firm and by the Prudential attorneys (who were themselves involved in numerous asbestos personal injury cases) began to appear on exhibit lists around the

country in cases in which O-I was also a party. Among the documents on the lists were those relating to the relationship between J-M and T & N and Cape and T & N, fiber supply to the United States, health hazards to insulation workers and TLVs. As a result of this activity, the volume of inquiries to me and others at my firm from ACF attorneys about the T & N "story" dramatically increased, and it was decided that a series of educational seminars on T & N would benefit ACF counsel and T & N's defense.

21. On December 10 and December 17, 1987 I conducted two highly confidential seminars at my firm's offices in New York. The subject of the seminars was the alleged liability case against T & N. At that time I shared my mental impressions, thought processes and litigation strategies, and discussed and exhibited documents concerning, among other subjects, fiber supply, the relationship between T & N and J-M and T & N and Cape, T & N's involvement in research about asbestos hazards, alleged knowledge of risks to insulators, cancer, TLVs, U.K. government regulations and proposed regulations, and conspiracy to suppress asbestos health hazards. By then, T & N's documents concerning these subjects were available for any asbestos litigant, including O-I, to inspect at T & N's repository, and thousands of such documents had already appeared on exhibit lists nationwide.

22. Richard Josephson, of Baker & Botts, was invited to the December 10, 1987 seminar. I recall speaking with Mr. Josephson about T & N's defense by telephone on several occasions, and also met him in person a few times during the ACF years. However, I cannot specifically recall him attending the December 10 or 17 seminars. I do, however, have a recollection of another Baker & Botts attorney, George Shipley, being present. Whether Mr. Josephson was in the room along with Mr. Shipley is not clear to me. By the date of the seminar, Baker & Botts had appeared for and

signed pleadings and discovery responses on behalf of T&N in numerous asbestos cases in Texas, and continued to do so for the better part of the next year.

23. On December 16, 1987 I met with Mr. Shaw in New York. During the course of our meeting, which concerned the defense of T & N, Mr. Shaw informed me that in January 1988 he would be meeting in England on O-I's behalf with Dr. J.C. Wagner (who Mr. Shaw said was on retainer to O-I), one of the landmark asbestos medicine researchers, to discuss the issue of causation of mesothelioma. (Mesothelioma is an incurable cancer associated mainly with exposure to asbestos.) Mr. Shaw invited me to attend. At the December 16 meeting Mr. Shaw also informed me that O-I had been paying Dr. Wagner $6,000.00 per month for some period of time irrespective of whether Dr. Wagner did any work for O-I, and further that the money was paid by O-I to a bank account in the U.S. in the name of a third party.

24. On or about January 14, 1988 I attended a meeting in London with Mr. Shaw and Dr. Wagner. I was informed that the meeting had been ongoing for several hours before I arrived and that it was one of several with Dr. Wagner over the previous few days. The portion of the meeting I attended concerned the potential role of amosite asbestos (a particular type of asbestos fiber used by O-I in its Kaylo insulation product) in the causation of mesothelioma. Mr. Shaw privately confirmed to me after the meeting that he was trying to persuade Dr. Wagner to say or write publicly that only crocidolite asbestos was an undeniable cause of mesothelioma, and that the role of amosite asbestos was non-existent or at most minimal. At the time my own lay view was that this position was scientifically unsupportable. For that reason I also believed that Mr. Shaw would not be able to persuade Dr. Wagner to espouse a position that downplayed the role of amosite. I was therefore quite surprised when, in a paper written two years later, Dr. Wagner wrote in a published paper that

the evidence was overwhelming that the main cause of mesothelioma was crocidolite asbestos – a fiber type that O-I apparently never used – and that amosite asbestos was implicated in just a "few" cases. The paper fails to mention any financial support from O-I.

25. In the summer of 1988 there was extensive trial activity in the asbestos litigation. One venue for such activity was before Judge Parker in this Court. On July 29, 1988, Judge Parker convened a hearing in Tyler concerning the possibility of certifying a class action, and in connection therewith I attended for T & N. The event is particularly memorable for two reasons: first, because I had to fly from London, England, where I was preparing witnesses for depositions, to New York to Dallas to Tyler, all in one day, July 28, 1988; and second, because of my chance encounter with O-I.

26. On the flight from Dallas to Tyler on the evening of July 28, 1988 I happened to take a seat next to an O-I employee involved with the ACF, whose name I believe to have been Mick McConnell. Mr. McConnell was traveling to Tyler for the hearing.

27. During the flight I struck up a conversation with Mr. McConnell, in the course of which I happened to mention that I was rather tired because I had begun the day in England, where I had been working on T & N asbestos litigation. In response to my reference to T&N, Mr. McConnell stated in an agitated tone that he believed that T & N should pay for all of the liability of O-I and others in the asbestos litigation in the United States because T & N, Cape and J-M had been conspirators who had hidden the hazards of asbestos from other U.S. companies for decades. He also said he hoped T & N was found liable for punitive damages someday. I sparred with Mr. McConnell on the subject for a few minutes and then stopped speaking to him.

28. A few days after the July 29, 1988 hearing in Tyler, a Judge in Madison County, Illinois

convened a hearing on whether punitive damages claims against dozens of asbestos manufacturers should be submitted to juries in upcoming asbestos trials there; that hearing was continued later in August. Robert H. Riley, one of O-I's counsel in this case, appeared for O-I and I appeared for T & N and one of its subsidiaries. Despite cross-examination by Mr. Riley of the chief expert for the plaintiffs on punitive damages, it is my recollection that the Court ruled that such claims against O-I should be submitted to the juries. No such finding was made with respect to T & N, however. (Indeed, unlike O-I, I am unaware that T & N has ever been found liable for punitive damages in an asbestos, or any other, case.)

29. A month or so after my chance encounter with O-I and the Madison County hearings, the ACF dissolved, and a new asbestos defense organization, the Center for Claims Resolution ("CCR"), was immediately formed by some of the former ACF members. T & N joined the CCR, but O-I did not.

The Prudential, Chase Manhattan and CCR Years: 1988 to 1995

30. *Prudential v. T & N*, involving claims that a T & N asbestos-containing product was contaminating the Prudential Center in Boston, a 60-odd story office tower, was brought in the United States District Court for the District of Massachusetts in May 1985. *Chase Manhattan Bank v. T & N*, involving similar claims concerning the same product in Chase's world headquarters in New York, also a 60-odd story office tower, was brought in the United States District Court for the Southern District of New York in June 1987. As here, both cases alleged that T&N had engaged in fraud and concealment in connection with the health hazards of asbestos, and both claimed unprecedented sums in damages.

31. For a time in the late 1980s, discovery in *Prudential* and *Chase Manhattan* was consolidated, and plaintiffs' counsel in the two cases routinely visited the document repository in

England. The products of those visits began to turn up on other plaintiffs' attorneys' exhibit lists in 1992 and 1993; the categories related to relationships among T & N, J-M and Cape; risks to insulators; fiber supply; state of knowledge at various periods of time; and communications between T & N and the government concerning the extension of asbestos regulations to the insulation trades. Also, by the summer of 1992, when I began again to become directly involved with the defense of T & N, some documents on these subjects that had earlier been withheld from production on the basis of privilege had been produced in both *Prudential* and *Chase Manhattan*, and were appearing on plaintiffs' attorneys' exhibit lists against T & N in cases in which O-I was also a named party.

32. In June 1992 T & N received a defense verdict in the *Prudential* case. Shortly thereafter, activity accelerated in the *Chase Manhattan* case.

33. By 1993, documents produced in *Chase Manhattan* which had previously been withheld as privileged and which concerned T & N's alleged knowledge of risks to insulators were the subject of media stories and were widely disseminated in the United States and abroad. In particular, in the fall of 1993 previously-withheld documents concerning T & N's alleged knowledge of risks to insulators in the 1940s and its responses on that subject to U.K. government officials were the subject of a newspaper story published in the U.K.

34. In October and November, 1994, one of the attorneys representing Chase took the deposition of an expert witness designated by T & N, Dr. Kevin Browne. Dr. Browne had been the chief medical officer of Cape Asbestos Company, one of the alleged co-conspirators sued herein by O-I. He was also at that time an expert witness for O-I, working directly with Mr. Riley. Following the transcription of Dr. Browne's deposition, I received a call from Dr. Browne, during which he reminded me that he had been doing work for O-I, and specifically asked if he could provide Mr.

Riley a copy of his deposition transcript. I agreed. Dr. Browne's transcript and the exhibits thereto (virtually all of which came from the T & N repository) concern, among other subjects, the relationship of T & N to Cape, T & N's alleged knowledge in the 1930s and 1940s of hazards to insulators and T & N's responses to U.K. government officials concerning such risks.

35. The *Chase Manhattan* case was tried in 1995. Chase lost.

Paul J. Hanly, Jr.

Sworn to before me this
24th day of January, 2000

Notary Public

MITCHEL C. COHN
Notary Public, State of New York
No. 01CO5058612
Qualified In Kings County
Commission Expires March 4, 2000