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DOCUMENT DESCRIPTION: Legal - Direct Examination of R.F. Ward

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF TENNESSEE
SOUTHERN DIVISION

ATHENS CITY BOARD OF EDUCATION,

Plaintiff.

vs.

NATIONAL GYPSUM COMPANY,

Defendant.

CIVIL ACTION NO.
1-85-355

Chattanooga, Tennessee
January 23, 1987

BEFORE:

THE HONORABLE THOMAS HULL, JUDGE
UNITED STATES DISTRICT COURT

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January 23, 1987 9:00 a.m.

THE COURT: All right, you can proceed. It wasn't so bad getting in today, was it?

JUROR: Pretty rough.

THE COURT: Was it? Okay.

RUSSELL F. WARD,

having been previously sworn, was examined and testified further as follows:

FURTHER DIRECT EXAMINATION

BY MS. HERSCHEL:

Q May it please the Court, good morning, Mr. Ward.

A Good morning.

Q Mr. Ward, you told me yesterday, just to get us started today, over your 31 years with National Gypsum, you had visited most of the National Gypsum plants; is that correct?

A Yes, ma'am.

Q And you visited plants, therefore, where asbestos-containing products were made. Is that correct?

A Yes, I did.

Q Mr. Ward, did the company ever take any precautions against dust, whether it was asbestos or any other kind of dust, in its plants or factories?

A Yes, they did. They had a safety program in effect at each plant that was administered both by the plant manager and by the personnel safety supervisor, and that, among other things, contained instructions for operating equipment properly so that dust would be minimized. They made respirators available in locations that might be dusty, and they installed dust collection equipment, exhaust fans and such. They were quite careful about it.

Q Let me ask you a question I asked you in a slightly different context yesterday. In your experience and based on your review, did the company always do a perfect job in keeping its plants clean?

A I don't think you can characterize it as a perfect job, no. No, they are only human. But I do know that top management always emphasized safety, and there may have been a manager in the field here and there that didn't carry it out to the fullest extent, but they certainly tried.

Q Now, again, Mr. Ward, to pick up from yesterday, today, in 1987, does the company make or sell any asbestos-containing products?

A No, they have not for several years.

Q Does it have today, the company, any asbestos-containing construction products in place in

its plants or factories?

A Yes. I would say almost all the plants have some pipe and boiler insulation, and some of them would have asbestos cement sheets as part of the exterior siding on the plant.

Q Did you say sheets?

A Yes. They are a heavy corrugated sheet such as are used to build the large shed-like buildings that contain large machinery.

Q During the time that National Gypsum made asbestos-containing products, did it make what you are referring to as asbestos cement sheets?

A Yes.

Q Did it put any of its own asbestos-containing sheets in its own plants or factories?

A Yes.

Q In your plants or factories do you have in place any accoustical ceiling plaster?

A No, I don't believe so.

Q Mr. Ward, does the company have any policy today regarding maintenance or repair of its in-place asbestos-containing products in its plant, its piping insulation, asbestos cement sheets?

A Yes, they follow the OSHA regulations with that, and if the job is any more than minimal, they

would use an outside contractor.

Q Does the company have any policy with respect to what you do to replace asbestos-containing products in place, if you need to replace them?

A Yes. We have employed nine asbestos-containing products and replaced them.

Q Mr. Ward, again, how many documents have you reviewed while preparing to present information in this case and other cases?

A I really don't know how many, but it's in the thousands.

Q And how many former and present National Gypsum employees have you talked to, interviewed about the company's history?

A I have said I think dozens of them, and it probably approaches a hundred or maybe a little more.

Q Now, have you looked specifically for documents or information in your files showing when anyone at National Gypsum might have been aware in any way that asbestos-containing products in-place might constitute a hazard to building occupants?

A Yes, I did look.

Q You made that specific search?

A Yes.

Q What were the first documents or information

in point of time, is what I'm talking about; when were the first documents or information dated, if they had dates on them, that you found in the company's files that referred in any way to possible hazards to building occupants from in-place asbestos-containing products?

A We found some clippings of newspaper articles that would have been in the latter half of the '70's.

Q In the latter half of the '70's?

A Yes. I think '76 may have been the first one. I'm not sure of the exact date.

Q Mr. Ward, have you found any evidence from any source, whether from documents, or from people, or from anywhere else that suggests that the people at National Gypsum Company were aware in any way of a possible hazard to building occupants from in-place asbestos-containing products when the Athens Junior High was built in 1966?

A No, definitely not.

Q You said that the company did get some information on possible hazards in buildings in maybe 1976 or the late '70's. Is that what you said?

A That's right..

Q At that time why didn't the company pass this information on to building owners?

A Well, with products such as acoustical

plaster, those were normally sold through a dealer network, and we did not have information ordinarily or keep track of information about what specific job that product may have wound up in. It's not like automobiles where everything is registered.

Q But we have seen evidence in this courtroom that the company knew, at least at one point in time, that it was in the Athens Junior High because of the correspondence on the lime problem in the late '60's. You are aware of that, aren't you, Mr. Ward?

A Yes, I am.

Q Okay. Why, then, didn't you pass the information on to Athens?

A Well, I think that information was pretty well buried in ten-year-old files at the time that we first got those newspaper clippings. I don't think there was anything that would have necessarily called it to mind.

Q Have you ever passed on any information to building owners with respect to potential hazards from in-place materials?

A Yes.

Q When did you start doing that and in what context did you do that?

A The latter part of the '70's, maybe '78 or

'79. I'm not sure again of the exact date, but we did get requests from building owners for information as to whether a product that they knew to be installed in their building contained asbestos. If it did, we told them, yes, it does, and we referred them to the EPA's regional office for guidance.

Q Mr. Ward, in your review of the company documents have you ever come across any complaints about Sprayolite's dusting?

A Yes, there are some, what we would call quality complaints in the latter part of the '50's, while the product was still fairly new, where it was determined that perlite had dropped out when research investigated those, but the formula for that product was stabilized, I think in 1959. I don't believe it changed after that until it was discontinued in 1972, and I don't recall dusting complaints after '59.

Q What is perlite, Mr. Ward?

A Perlite is a lightweight mineral that was used as an aggregate in Sprayolite.

Q Now, in the documents discussing the dusting complaint, some of which we have seen -- let me start over again. Let me refer you to those documents, some of which we have seen in this courtroom, about the dusting complaint. From your research into the

company's records, is there ever any suggestion in connection with those dusting complaints, either from the people at National Gypsum or from the people who were making the complaints, that the concern was any kind of a health hazard?

A No. I think people just objected to dust as dust.

Q Mr. Ward, to your knowledge, were any tests ever done by National Gypsum that would relate to the dusting of Sprayolite?

A I have seen a report of some dusting tests that were made in 1967.

Q In what year, sir?

A 1967.

Q And what kind of tests were they? Can you describe them generally?

A There was a job that we were interested in, I think in the Chicago area, we were bidding on, and we had to demonstrate to the owners or the architects that this product would meet what was then either a government standard or a proposed standard.

Q Standard for what, Mr. Ward?

A For dusting, for acoustical materials. And we sent some test samples out to Boyle Labs to test it. They subjected it to an air stream under controlled

conditions, and determined that it would pass the proposed standard.

Q They subjected it to an air stream under controlled conditions. Would you try that in a little more detail.

A As I recall the report, they had some spans of Sprayolite which were mounted in a tube or tunnel and air under a certain velocity -- I don't recall exactly how many feet per minute -- was sent through that tunnel to simulate the conditions that might be found in an air plenum, or where the material would be subjected to a stream of air from a heating or ventilating air register. That was the purpose of it, to find out if it would degrade under those conditions.

Q Now, again, did the purpose of those tests have anything to do with anybody's concern about a health hazard, Mr. Ward?

A No. The specifics of that job proposal, I think, involved a switch gear room for the telephone company, where, of course, they would be rather sensitive to any dust. They wanted to be sure it wouldn't emit enough dust that would have any bad effect on their switching for their telephone calls.

Q Now, these dusting tests that were done in the '60's, did the company pass, Mr. Ward?

A Yes, they met the standard or proposed standard.

Q They met the standard?

A Yes.

Q Now, let's see, today is Friday. On Wednesday, Mr. Ward, we read -- I think I mentioned this to you yesterday -- a rather long deposition of a Dr. Schepers. Do you remember that?

A I remember your reading it. I don't recall the details of it.

Q Do you remember hearing Dr. Schepers say that he had written a letter to National Gypsum at some point in time warning them not to put asbestos in gypsum wallboard. Do you remember that testimony?

A Yes, I remember that particularly.

Q Okay. In your review of National Gypsum Company's documents, have you ever found a letter anything like that, Mr. Ward?

A No, I never have.

Q Did National Gypsum's flat gypsum wallboard ever contain asbestos?

A Never.

(Continued without omission.)

Q I would like to show you a letter marked as Plaintiff's Exhibit 4098. We have seen this before, Mr. Ward, but let's take a quick look at it again. Have you got it, sir?

A Yes.

Q It is dated May 30th, 1984, is it not?

A Right.

Q From an attorney, Mr. Biddle?

A Right.

Q To National Gypsum Company, stating that Athens was going to remove the ceiling from the Junior High School and possibly file a claim for its replacement against National Gypsum. Is that the gist of the letter, sir?

A Yes. He also mentions, the letter is also written to U. S. Gypsum Company, and the same information is directed to them.

Q And this is a May 30, 1984 letter, correct?

A That's correct.

Q You have seen this letter before and we have seen it in this courtroom. Is that correct?

A Yes, that's right.

Q Now, I think there has been a suggestion made here that National Gypsum never responded to that letter. Is that so, Mr. Ward, did the company not

respond to that letter?

A The company did respond through its attorneys.

Q Okay. Let me show you a letter marked as Defendant's Exhibit 4.245, dated June 14, 1984. Would you take a look at it, Mr. Ward, while Mr. Hopkins is setting up the projector. Do you recognize this letter, sir?

A Yes, I have seen this.

Q It's a letter to William Biddle dated June 14, 1984, re City of Athens, Board of Education. Mr. Hopkins, would you show the signature line, and it is signed, Sincerely Yours, Margaret M. Powers for Schnader, Harrison, Segal & Lewis. Mr. Ward, Mrs. Powers is dead, isn't she?

A Yes, I understand.

Q Who was she?

A She was an attorney with the Schnader, Harrison firm who were at that time were representing National Gypsum Company.

Q Is this the reply to Mr. Biddles letter?

A Yes, it is.

MS. HERSCHEL: Your Honor, I would like to publish this letter to the Jury.

THE COURT: All right. Has it been filed

yet?

MS. HERSCHEL: It will be as soon as I finish with it.

THE COURT: All right.

BY MS. HERSCHEL:

Q All right. This is a June 14, 1984 letter to William P. Biddle, III, Esq., Higgins, Biddle & Chester, 111 Church Street, Athens, Tennessee, re,the City of Athens Board of Education.

"Dear Mr. Biddle:

"Your letter of May 30, 1984 to United States Gypsum Company and Gold Bond Building Products, a National Gypsum division, has been referred to me by my client National Gypsum Company. This firm is national counsel for National Gypsum Company in the asbestos litigation. Because your letter refers to a, quote, potential of a claim, quote, against National Gypsum Company, I would like to respond. First, I would like to thank you for providing the opportunity to inspect and take samples prior to the removal. I understand that arrangements to complete this inspection and sampling are under way. The purpose of this letter is to respond to the statement made in the opening paragraph of your letter that the City of Athens Board of Education, quote, have been confronted with a

requirement by the EPA to remove asbestos in its school buildings, close quote. I am puzzled by this statement, because although the EPA has required schools to identify the presence of friable asbestos containing materials within their buildings, it has not required the removal of such products. In fact, the EPA suggested that the required notification to parents include the following statement. It is important to note that not all friable asbestos containing material need be removed from schools. Once such material has been identified, a program can be implemented to insure that the material is maintained in good condition, and that appropriate precautions are followed when the material is disturbed for any reason."

The 2nd page.

"I wanted to bring this to your attention in case the school district was under the erroneous belief that removal of asbestos containing product was required by the EPA or any other federal agency or law. In this regard, you may be interested in the report of the Ontario Royal Commission issued on May 7, 1984, which was based upon extensive hearings over four years at which 53 expert witnesses testified.

"In this report the commissioners concluded that in most circumstances, quotation marks, we deemed

the risk which asbestos poses to building occupants to be insignificant, and therefore find that asbestos in building air will almost never pose a health hazard to building occupants, close quotation marks. Reported at page 14. As the Royal Commission report found, asbestos levels in public buildings in fact sometimes increased following removal action. Furthermore, such action will inevitably expose workers to asbestos and such exposures could well pose more risk than that posed by leaving the asbestos in place. Thus, the Royal Commission's review of efforts of the United States and Canada to remove asbestos from schools concluded, and I quote, "Asbestos removal projects conducted on a crash basis therefore involve some needless expenditure. The crash nature of the removal work probably increased the risk that asbestos removal workers may contract disease. This risk arises from elevated asbestos exposures occasioned by careless work practices frequently associated with inexperienced contractors." End of quoted material. And that is in the report at page 28.

"Based on its extensive analysis, the Royal Commission urged action only where, quote, significant quantities of friable insulation have fallen onto building surfaces and are being disturbed." And that is in the report at page 589.

"I hope this information will be of assistance to you in clarifying the question of removal of asbestos containing products from school buildings. If I can be of additional assistance, please let me know. Sincerely yours, Margaret M. Powers, for Schnader, Harrison, Segal and Lewis.

MS. HERSCHEL: Your Honor, I would like to offer that document.

THE COURT: All right, let it be filed and passed to the Jury.

MS. HERSCHEL: Thank you, Mr. Ward. Now, you can answer Mr. Speights' questions.

(Continued without omission)

CROSS-EXAMINATION

BY MR. SPEIGHTS:

Q Just while that letter is on our mind, before I get to the questions I plan, Mr. Ward, National Gypsum historically advised building owners to follow EPA's guides in a number of letters to building owners around the country?

A I think what they did was to inform the building owner, when asked, that the product inquired about did or did not contain asbestos and referred them to the EPA regional administrator.

Q And this letter, Ms. Powers was Ms. Herschel's law partner, don't you know that?

A I'm sorry.

Q Ms. Powell has practiced law with Ms. Herschel?

A In another firm, that's correct.

Q They represented National Gypsum and another firm at the time?

A That's right.

Q And in this letter Ms. Powers advised, the attorney for the Athens School District where significant quantities of friable insulation had fallen on to building surfaces and are being disturbed, that is a distinct situation?

A I think she was quoting from the report of the Ontario Royal Commission, yes.

Q She quoted that to the attorney for the School District and pointed out that is a distinct situation where material is being disturbed or that there are significant quantities which have fallen; that is what the letter says, doesn't it?

A That is what the letter says.

Q All right. Mr. Ward, I understand that you are the Corporate Director of Public Affairs. Is that your title now, Mr. Ward?

A That's correct.

Q In that position you give speeches for National Gypsum, presentations?

A No, I have not given speeches on National Gypsum's behalf in that job.

Q Do you appear before regulatory bodies, bodies considering what to do about asbestos?

A No, I have not.

Q Is it your job now, one of your primary functions to appear in court on behalf of National Gypsum Company?

A If required, I appear in court. I wouldn't call that my primary function.

Q All right, sir. That is a job that you have

been trained for for some period of time, to appear on behalf of National Gypsum Company as its Corporate Director of Public Affairs?

A Well, I think I explained when Ms. Herschel asked me why I was in the job, I have had over 30 years of experience, and I have made a study of the company's history, particularly in the last year and a half.

Q And you got involved in that at the request of the attorneys who are involved in this litigation?

A I got involved in this at the request of the Chairman of National Gypsum Company.

Q Yes, sir. And for the last year and a half you have been going through documents and meeting with people concerning National Gypsum's history and historical policies?

A Among other things, that is correct.

Q You understand today and yesterday that you are appearing here as a representative of National Gypsum Company?

A That's true.

Q Okay. I want to make this point up front. If I get a little antagonized with National Gypsum Company, you understand that I am not criticizing Russ Ward as an individual; you understand you are not appearing here today as Mr. Ward, as an individual, but

as the representative of National Gypsum Company?

A Yes, I understand that.

Q All right, sir. You were not involved historically in these decisions about what to do about asbestos-containing products back at the time in '49 or '53, '56, '59, '62, et cetera; you were not involved at that time in the decisions of whether to put asbestos in or take asbestos out?

A Can you break that down a bit? That is kind of a long question.

Q All right, sir. You did not make the decision or participate in the decision to put asbestos in any product made by National Gypsum Company, did you?

A No, not directly. I was not involved in the formulation of the products.

Q You did not make the decision or recommend to anyone that asbestos be removed from any product manufactured by the company?

A I wasn't involved in the product formulation, Mr. Speights.

Q You were not involved in the manufacturing side of the company which manufactured Sprayolite?

A Well, I reported directly to the Vice-President of Manufacturing Operations for 12 years or more, so I was involved in the manufacturing side,

yes.

Q Well, you weren't involved, yourself, in the manufacturing of Sprayolite?

A I did not make Sprayolite, if that is what you mean, no.

Q You for many years were concerned with whether or not someone could get credit to buy products, including Sprayolite?

A During my early years with the company, that's right.

Q All right, sir. And you were not the field representative at any time that would call on people like Mr. Guthrey and give them advice concerning Sprayolite?

A No, that would normally be the sales representative that would do that.

Q All right, sir. When did you actually go into your new position as the Corporate Director of Public Affairs, Mr. Ward?

A That was in August of 1985.

Q Were you interviewed for the position?

A Yes.

Q Who interviewed you for the position?

A I spoke with David Bern, who was our Vice-President of Human Resources. I spoke with Jack

Hays, the Chairman. I spoke with Ed Fordyce, our General Counsel. At one point I talked with Mr. Larry Hoyle of Hoyle, March, and Kerr.

Q That is Ms. Herschel's law partner?

A And I spoke with Ms. Herschel, all of these on different occasions.

Q You knew from very early on that one of your responsibilities would be assisting in the trial of these asbestos cases?

A Yes, to the extent that I could help, I knew that was part of the job.

Q And you interviewed with the Vice-President and President Hays, you interviewed, I assume, with them out in Dallas, Texas, the corporate headquarters?

A Yes. I would say they interviewed me.

Q Okay. And they are what we would call corporate management?

A That is correct.

Q You would agree with me that those in corporate management make the decisions for the company?

A I think they make the major decisions for the company, yes. Decisions are made at a number of levels.

Q And they are there today, as far as you know, both Hays, and the Vice-President for the company, they are there today in Dallas, Texas, working away?

A I would like to think so, yes.

Q Now, there were other people before you that had some involvement in representing National Gypsum or working with National Gypsum's lawyers on the legal side of this asbestos situation, weren't there?

A I think there have been a number of people who have been involved from time to time, yes.

Q One of those I believe you mentioned in direct was Mr. Oberkircher?

A That's right.

Q Another one was Mr. Eikenberry?

A I think Mr. Eikenberry had some responsibility for this at one point.

Q How long do you have until retirement, Mr. Ward?

A I'm not sure what you mean. I think mandatory retirement would be at age 70, if the law has not changed by then, so I still have 13 years.

Q And you plan to maintain this position for as long as National Gypsum wants you to maintain this position; that is, being the spokesman for National Gypsum Company?

A I frankly have not given a great deal of thought to what job I might move on to, but I have had a number of assignmewnts over the years, as my record will

show, and I'm prepared to do whatever is assigned to me in the way of the next job.

Q Mr. Ward, would you agree that one of the best ways to determine a company's concern for health and safety is to see how it treats its own employees' health and safety?

A I think that might be an indicator, yes.

Q Certainly National Gypsum, I believe you have said in direct examination, I wrote it down, that top management was always concerned with safety?

A Yes, I believe that's true.

Q And it is your testimony that was true in the '60's, the '70's, and the '80's?

A It was true, in my experience, all the years I have been with the company.

Q And they certainly would not have been less concerned in the '60's than they were in the '70's or '80's, would they?

A Well, I think they may have had concerns in different areas, as perceptions changed. Certainly, no less concern.

Q They may have become more concerned in the '70's or '80's, as they had maybe more knowledge, but certainly they didn't become less concerned over the years, did they?

A I don't believe they did, no.

Q Mr. Ward, for many years when you worked with National Gypsum, while you were an employee in these various positions, you did not know that Sprayolite had asbestos in it, did you?

A I'm not sure when I came into that knowledge, Mr. Speights, but it was commonly known that Sprayolite contained asbestos.

Q Isn't it true that even in the 1970's, you, Mr. Ward, personally, did not even know; you did not even know personally until the 1970's tnat Sprayolite contained asbestos?

A It may have been. I really don't recall exactly when I got that knowledge.

Q There was no way, from looking at the bag that Sprayolite was sold in, that you could tell it contained asbestos, could you?

A No. The ingredients were not listed on the bag.

Q There was no way you could tell by looking at the brochures supplied to architects, and other advertising brochures, that Sprayolite contained asbestos, was there?

A We didn't publish the product ingredients, Mr. Speights.

Q There is no way of looking at the material itself and telling that it contained asbestos, is there?

A You would have to analyze it.

Q There is no way of looking at this technical bulletin that you referred to yesterday about mixing lime, there is nothing in there that says anything about Sprayolite containing asbestos, is there?

A No, I don't believe there is.

Q There is nothing under that section that says "Caution" about the product containing asbestos or being especially careful in dealing with the product because of a possible health concern; correct?

A I don't think there was any possible health concern in the times when that technical bulletin was published.

Q In 1962, it did not say anything about any health concern in the bulletin. We will talk about what you knew or didn't know in a few minutes, but it didn't say anything in the bulletin about a health concern, did it?

A No, it didn't, because I don't think there was any concern.

Q There was no concern. My understanding also, Mr. Ward, you personally saw Sprayolite being applied only on one occasion?

A That's true, one that I can recall.

Q You never saw a Sprayolite job being cleaned up?

A No, we didn't stay around until that point. The job was still in progress when I left.

Q You never saw, Mr. Ward, a Thermocoustic job?

A No.

Q There would be people in the company who would have been on the scene when these jobs took place, when these materials were applied from time to time?

A What materials?

Q Sprayolite and Thermocoustic. Like a field representative might have been out there on a number of occasions and seen them applied?

A That's possible.

Q But that wasn't your job?

A No.

Q Aren't there people today with National Gypsum Company, Mr. Ward, who had involvement with the formulation of Sprayolite?

A There may be a couple people in research who had some involvement with it.

Q Wouldn't Don Peterson be one of those people?

A Yes.

Q Mr. Peterson is still employed by National

Gypsum?

A Yes, he's in the research department.

Q And do you know whether Mr. Peterson is going to be testifying at the trial of this case?

A I don't know, but I don't expect him to be.

Q And he was involved with the formulation of Sprayolite?

A Well, he was working in research when the product was being formulated. He wasn't the man with the principal responsibility for it, as I understand it.

Q You never worked in research on Sprayolite or other acoustical plasters?

A No, I didn't.

Q And research is up in Buffalo, New York?

A That's right.

(Continued without omission.)

Q Mr. Ward, I think we have gotten the preliminaries out of the way. Do you know whether the question of whetner to put a warning on asbestos products such as Sprayolite ever came up at National Gypsum?

A The question of warnings came up. I don't know if it was ever associated with Sprayolite.

Q All right, sir. Specifically, I'm going to show you what has already been entered into evidence as Exhibit 1754, dated September 10, 1971. That's an internal National Gypsum document, isn't it, Mr. Ward?

A May I see a copy of that? I can't make it out from here very well.

Q Certainly.

A I'm not sure about the date, because somebody has written in the year, but it certainly looks like an interoffice memorandum.

Q Would you look at the second page, Mr. Ward, and see if the date --

A Yes, I see the date there.

Q You would agree with me it is September 10, 1971?

A That's right.

Q You would agree with me that is an internal National Gypsum document?

A That's right.

Q And a number of people got copies, including Mr. Faye, who was a vice-president, and Mr. Zimmerman?

A That's right.

Q Mr. Zimmerman was Safety Director of National Gypsum, wasn't he?

A Yes, he was.

Q And Mr. Pollard was the Safety Director before Mr. Zimmerman?

A Yes.

Q Mr. Zimmerman is still alive today?

A Yes, he is.

Q You were never in the safety department of National Gypsum Company?

A No, I never had any assignment to that department.

Q Now, it says here, see if you agree with me, you may read the copy there or here, "At the present time no products containing asbestos fibers which are manufactured by the Gold Bond Building Products division are, to my knowledge, being labeled with a caution statement. It has not been my intention to take any action in this area until the regulations from the Environmental Protection Agency have been published." Did I read that correctly, Mr. Ward?

A Yes.

Q Does that reflect the National Gypsum policy at that time, that it would not provide any caution on its products, even in 1971, until EPA required it?

A Well, I think he goes on to say that "Upon publication of the regulations, they will be analyzed and a program presented with appropriate recommendations to effect compliance with the requirements."

Q Yes, sir, but doesn't the memorandum, the effect of this memorandum is that National Gypsum would not put warnings on its asbestos containing products until EPA required it?

A Well, I would say that a fair characterization would be that they would put warnings on when the requirements became known.

Q Now, are you aware, Mr. Ward, that for years before, other companies had warnings on their products?

A What kind of companies?

Q Spray applied acoustical products?

A No, I'm not.

Q Are you familiar with a company called U. S. Mineral Company?

A Yes, I have heard of that firm.

Q I see. I want to read to you from an answer of an interrogatory of U. S. Mineral in a Wisconsin

case, and I will hand you a copy. I believe I have one.

MS. HERSCHEL: Excuse me, Mr. Speights, has this been marked as an exhibit?

MR. SPEIGHTS: No, it has not, and I'm not offering it.

MS. HERSCHEL: May I see a copy, then?

MR. SPEIGHTS: You and Mr. Ward may share a copy.

MS. HERSCHEL: Your Honor, do you mind if I take a look at the document before we proceed?

THE COURT: No. You may. Pass it to her.

MS. HERSCHEL: Thank you.

THE COURT: Okay. Where are we? She has it, he has it, let's go.

BY MR. SPEIGHTS:

Q I want to know if you agree with me this document reflects, reading on 10 C, on the second page, "Beginning in May, 1962, this defendant began including a label on its asbestos containing products which said" --

A Where are you, Mr. Speights, please?

Q On the second page, answer 10 C?

A Is that page eight as this document is labeled, is that what you are talking about?

Q Yes, sir.

A This thing goes from no number to page eight to page 34, to no number again. This is not complete, is it?

Q Well, I can give you the whole set. It is about a hundred questions asked to U. S. Mineral, and I only have this case to show you where it came from and the answer to the question concerning warnings, and then the signature page on the last page?

A I have never seen this document before and I'm not acquainted with U. S. Mineral's internal policies.

Q All right. Let me ask you to assume, beginning in May 1962, this defendant, U. S. Mineral, began including a warning label on its asbestos containing products which said "Caution, this product contains asbestos. Inhalation of asbestos dust over long periods of time may be harmful. If employees are exposed to dust during use and application, those employees should be equipped with adequate personal protective devices."

Now, assuming this sworn answer to interrogatory is correct, you would agree with me that this reflects that this company which you are familiar with, this company was putting a warning on its bag as early as 1962?

A In 1962, we took our competing product off the market.

Q Thermocoustic?

A That's right.

Q This was a spray-applied product, U. S. Mineral made spray-applied products?

A That's right, but it was a mineral wool product, very dusty in application, as was Thermocoustic, and our competitive product was taken off the market.

Q Was it taken off the market because it had asbestos in it?

A No. I think the perception was that the market had declined to the point where it was not effective.

Q Are you aware the product was sold to a company called Sealtite Insulation Manufacturing Corporation?

A I have heard that name. I don't know the details of any sale.

Q Are you aware that when you sold the product Sealtite took the asbestos out of the product?

A No, I don't know anything about Sealtite.

Q Let me show you an affidavit of the Sealtite, I believe its president?

MS. HERSCHEL: I'm sorry to interrupt again. Mr. Speights, have I seen, has our side seen this?

MR. SPEIGHTS: I believe you have seen it in the case in which it was filed.

THE COURT: Do you want to look at it?

MS. HERSCHEL: Yes, sir, please, Your Honor.

THE COURT: Come around and look at it.

MS. HERSCHEL: Your Honor, I think it is technically objectionable, but let's go anead with it.

THE COURT: All right.

BY MR. SPEIGHTS:

Q It certainly reflects that Sealtite didn't ever manufacture a product with asbestos in it. Isn't that correct?

A I didn't have a chance to finish reading it, Mr. Speights. Just give me a moment.

Q I'm sorry.

A It says that Sealtite Insulation Manufacturing Corporation did not sell, manufacture or mine asbestos products at any time.

Q All right, sir. You sold the product Thermocoustic to Sealtite and Sealtite continued to make the product and it had no asbestos in it if that

document is correct?

A I have no knowledge of that.

Q All right.

A All this says is they didn't make asbestos products. I don't know what they did with any product they may have bought from us.

Q Well, you don't know that Sealtite manufactured Thermocoustic after you sold it to them?

A That's right.

Q All right. I will have to get another document in a while. Let me cut through some of this. Thermocoustic was a product which was applied on ceilings and on other surfaces in a building; correct?

A Principally ceilings, I believe.

Q And although the material, you called it dry, had a water hose right next to it and as the material came out the hose, there was water applied as it went onto the ceiling?

A That's my understanding, yes.

Q And in 1949 the asbestos floats, the document we discussed, in 1949 the asbestos floats, it was noted they should be removed as a possible source of asbestosis; correct?

A That's correct, that's in the research report.

Q But the other asbestos remained in the product Thermocoustic; correct?

A That's correct.

Q Now, at no time did National Gypsum Company, from 1949, when it knew that asbestos floats caused asbestosis, until 1962, when it sold the product, or stopped making the product, at no time did National Gypsum Company place a warning on the bag of Thermocoustic saying that under any circumstances it could cause a hazard?

A No, there was no warning on the bag, but there were application instructions.

Q There was nothing --

A Which if followed would protect the workers who were exposed to the dust.

Q There was nothing on the bag which said this product contains asbestos and it may cause disease?

A No, it was not on the bag.

Q Okay. There was nothing, there was nothing, in fact, National Gypsum Company actually in its brochures showed Thermocoustic being applied without any respiratory equipment whatsoever; correct?

A I'm not sure whether they did. I don't recall those pictures.

Q Let me back up a little. We have talked

about these exhibits several times during the trial and you talked about them in your examination, and that is the so-called Spoylar letters; correct, there are several of them?

A Okay.

Q Okay. Somebody within National Gypsum thought the Safety Director, Mr. Pollard, was making a big mistake by telling the Indiana Board of Health to wear respirator equipment. You would agree with me there?

A The sales manager was concerned about it, yes.

Q Okay. And he wrote "Your letter to Dr. Spoylar is full of dynamite," and this document reflects the letter was pulled. Correct?

A I'm not sure what you mean by pulled.

Q It says "Handy succeeded in stopping letter to Spoylar, will be modified." This document reflects that the letter was pulled?

A Well, you quoted what it says accurately, yes.

Q There is nothing equivocal there, that is what it reflects. If we just had this document here, there would be no question the document didn't go out, is that right?

A Apparently that is what happened, he took it out of the out going mail.

Q All right. Now, I understand your position is you weren't involved in any way with any of this back in 1953, were you?

A No, sir, I was not.

Q I understand you have gone back and you have looked at the documents and you believe that the document actually later went out. We have a disagreement on that, but you believe that?

A Yes.

Q All right. In any event, whether it went out or not, National Gypsum told somebody, if it did go out in 1953, that respiratory equipment was suggested for Thermocoustic?

A That's right. If it was dusty in applications.

Q Now, this is a brochure, Mr. Ward, of spraying Thermocoustic in places that appears in Sweet's catalog, would you agree with me in the advertisements showing Thermocoustic being sprayed, these people do not have any respiratory equipment?

A Can I get a better look at that, Mr. Speights? That's not very understandable here.

Q Here is the whole document.

THE COURT: I guess the question is, can you tell from that picture whether they were using any equipment?

THE WITNESS: I actually can't, Your Honor.

THE COURT: He can't say for sure.

THE WITNESS: It is pretty indistinguishable in the area of the face.

BY MR. SPEIGHTS:

Q In this situation here you can't tell whether they have any respiratory equipment or not?

A It isn't obvious to me from this picture, Mr. Speights.

MR. SPEIGHTS: All right, I would like to have that marked as an exhibit, please.

THE COURT: All right. That has not been marked.

MR. SPEIGHTS: It may have been buried in something else, but I would like to have it marked and passed to the Jury, if I could, Your Honor.

THE COURT: All right, mark it and number it something and send it to the Jury.

THE CLERK: Two.

THE COURT: It will be Exhibit 2 of the not premarked exhibits.

BY MR. SPEIGHTS:

Q Now, you would agree -- do you have the rest of the document in front of you that I just handed you, the other three pages, or did I take it back?

A I'm sorry, I don't have it.

Q Let me hand you a complete part. You would agree with me this is a Sweet's catalog advertisement on Thermocoustic?

A Yes, it looks like their numbering system up in the corner of the page, so I would say this probably came out of of Sweet's.

Q All right. Would you review that document and show me where it says that Thermocoustic, in applying Thermocoustic you should wear respiratory equipment?

A I don't think that information was in Sweet's' catalog, Mr. Speights.

Q It was not, no caution, no warning like Mr. Spoylar may have gotten in '53, seven years earlier, was placed in the brocnure?

A I think that was, I think, the admonition to provide protective equipment to the applicators in the case of dustings was contained in a product supplement issued by research.

Q Nothing in the advertising literature for

this product suggested that respiratory equipment would be required or suggested for Thermocoustic, was it?

A No. That was information furnished to the applicators.

Q Do you have those documents with you?

A I think we have those documents here, yes.

Q Let me go anead, I will get back to that. I want to look at this Seal Spray document, and ask about the last page, about the products and the manufacturer and read that to us, please, sir?

A On the final page it says, "About the products and the manufacturer. Sealtite Insulation Manufacturing Corporation has been known for many years as a manufacturer of top quality mineral wool and other insulation products. Sealtite and Seal Spray jet applied mineral fiber have now been added to the Sealtite line. Formerly these products were manufactured and sold under the trade name Thermocoustic, and as such, were installed with outstanding success in important projects throughout the USA." The document is dated 1968.

Q That document reflects that what Sealtite was making was formerly known as Thermocoustic; correct?

A That's what they say.

Q And the affidavit which I let you read

reflects, according to the affidavit, that Sealtite never put asbestos in its products; correct?

A That's what it says.

Q Now, let me show you another document. Doesn't that document, isn't that a brochure of Sprayolite, of a person spraying Sprayolite, in your brochures?

(Continued witnout omission)

A This looks like it might be a tear sheet from an advertisement somewhere.

Q Yes, sir, that is an exhibit. That shows in your literature, that appeared numerous times in your literature, that type of representation or advertisement, didn't it?

A I think advertising frequently showed jobs that were being done with our products, yes.

Q And in that picture, clearly the person spraying the Sprayolite in the 1960's does not have any respiratory equipment; is that correct?

A No, he doesn't. It wouldn't be needed there. It is not a dusty product in application.

Q You have seen Sprayolite applied?

A Yes, I have.

Q One time?

A That's right, and I saw no dust.

Q Can you see the asbestos that causes disease, Mr. Ward?

A It is my understanding you can't see that.

Q Now, I want to move to another subject with you. It's clear, without going through all the documents -- maybe if it was Tuesday we would go through them all, but on Friday I don't want to go through them all. It is clear that in the '50's, at least, there

were a number of problems with bond failures and dusting on the product Sprayolite?

A I have seen some documents that referred to dusting.

Q You have seen documents which referred to bond failure?

A Not at that time.

Q At anytime?

A Later on, specifically with relation to the Athens Junior High job.

Q Let me take the dusting ones first and I will come back to the others. I have them in different packets. It's clear there are documents in the 1950's, some of which I showed yesterday, which reflect that Sprayolite would dust; correct?

A That's right. After application there were a few instances where some perlite apparently dropped out of the matrix of the product.

Q This is a document, 1956, "In reply to your report of the 20th, a super white Sprayolite which was used on the Hollywood Bowling Alley, we don't see how it is at all possible to write a letter to Mr. Anderson and Mr. Eaton that we can guarantee that acoustical plaster will not dust. Sprayolite is a spray textured finish which has a tendency to dust to a certain extent."

That is one of those internal documents you found, wasn't it, Mr. Ward?

A That's right. That is the first year that the product was introduced.

Q All right, sir. And then on another document -- there are several of these documents, without putting every one up there -- in the 1950's where Sprayolite dusts; correct?

A Yes. I have already told you I saw some in the '50's.

Q And yet later on you received an inquiry from the LAWCC. Do you know what the LAWCC is?

A I could only speculate. I don't know that.

Q You know that is the plastering industry group, the walls and ceilings group. Let me ask you, in 1975 --

A I think that is the IAWCC, isn't it, Mr. Speights?

Q Yes, sir.

A International Association of Walls and Ceilings Contractors.

Q Yes, sir.

A Yes, I'm familiar with that organization.

Q That is an organization, an industry organization, isn't it?

A Yes, it is.

Q Okay. They were seeking information on products manufactured by you, weren't they?

A Give me a moment to read this and I will answer you.

Q All right, sir.

THE COURT: Okay, he has it about read.

A I've read it.

Q You would agree with me in '75 you wrote -- not you, Mr. Ward. Again, I keep saying you; I mean National Gypsum Company.

A I understand.

Q National Gypsum Company says, "We know of no reason why asbestos acoustical ceiling material should crumble into dust, nor have such conditions, to our knowledge, been reported to us." That is what that letter reflects, isn't it?

A He is referring to asbestos cement acoustical products.

Q Asbestos acoustical ceiling materials. If you go on to the next paragraph, "Dust is created when material of this type is cut with a power saw. Such dust should be removed from the face and eyes before the material is erected. Asbestos cement ceiling boards are often used in clean rooms, clean in quote."

Asbestos cement ceiling boards are not asbestos material?

A It could be.

Q Are you telling me when he says acoustical materials, that you have never heard that, the person receiving this letter should say that is except for Sprayolite and Thermocoustic and these other products?

A No, I believe this letter addresses a specific question about a specific product, and the answer is correct in the context. Asbestos cement ceiling boards do not ordinarily crumble into dust or flake, and the man clearly says nor nave such conditions ever to our knowledge been reported.

Q He says -- we can go back and forth for 20 minutes -- but he says acoustical ceiling materials, to our knowledge, have never been known to dust or flake. That is what the letter says, isn't it?

A The letter, you can't take that out of context. He is referring to asbestos cement ceiling board.

Q All right.

A It wasn't an acoustical material used as asbestos cement ceiling board.

Q The letter will be to the Jury and speak for itself. Now I want to go back to bond failures. My

understanding is you didn't recall any bond failures; correct?

A That's right.

Q All right, sir. I'm trying to get it so I can get it on there. I ought to know after all these days. Do you need a copy of this document?

A I would like to see it, please.

THE COURT: Go anead, he will read along with you.

BY MR. SPEIGHTS:

Q Does that document reflect, "From samples from jobs in the field, it does not seem our material is as well knit or bonded together as other products of this type?"

A I haven't gotten to that. Where is that?

Q Second paragraph.

A Maybe I'm not looking at the same document.

Q "We believe that when they refer to plaster --"

A On, third paragraph, okay. I'm sorry.

Q Excuse me.

THE COURT: That's what it says.

BY MR. SPEIGHTS:

Q All right, sir.

A You quoted it accurately, yes, sir.

Q And then in 1969, a document you referred to yesterday, this was written to Mr. Galloway, Mr. Guthrey's partner, concerning the product Sprayolite in the Athens Junior High School. Do you recall that letter?

A Yes.

Q Would you read the last paragrapn to me?

A "We have manufactured Sprayolite since 1956, and have never had a bond failure with this product. I am sure that on future jobs you will have no problem, provided the material is mixed with only water." Signed by Rober Keeler of Masons Supply, Product Manager.

Q All right, sir. I want to move to anotner subject. Starting in the 1970's, I believe you said some people started naving inquiries about what to do about asbestos materials; correct?

A I think they were asking whether or not a particular product contained asbestos, yes.

Q Some of them asked more than that; they asked for recommendations, didn't they?

A There may have been some asked for recommendations, yes.

Q As a result of getting all these inquiries, National Gypsum Company had to devise or come up with a policy about how to respond to those inquiries, didn't

they?

A That's right.

Q And a meeting was held to try to come up with a -- well, are you familiar with this letter, November 29, 1978, Exhibit 7042?

A Could I see it, please?

Q I will get you one in just a minute, Mr. Ward. It may be just quicker if you want to come down here and stand and we will go over it together down here, if we can?

A All right.

Q Unfortunately, lawyers have a lot of documents. Do you need to refresh your memory by looking at that document, Mr. Ward?

A I haven't looked at this for some time. I would like just a moment to review it.

Q Yes, sir.

THE COURT: It may not take much. Why don't you ask what the question is. He may not have to review it much.

BY MR. SPEIGHTS:

Q Well, this document reflects that you were getting numerous inquiries about your Sprayolite acoustical plaster?

THE COURT: Second paragraph.

BY MR. SPEIGHTS:

Q Second paragraph.

A Yes.

Q It reflects that you have no material data sheet on that particular product?

A That's right.

Q All right, sir. Now --

A Because the product was no longer produced.

Q That's right. You had no material data sheet?

A Uh-huh (affirmative).

Q Included in the request for information on Sprayolite are such questions as what percentage of asbestos is present; that is what you said a minute ago, correct?

A Yes. They asked if asbestos were in the product, I remember that.

Q Two. Do you consider it harmful. That is what the letter reflects that people were asking, doesn't it?

A Yes.

Q Three, should it be removed. That is what people were asking, weren't they?

A That is what it says.

Q Four, procedure for removing. That is what

it reflects, doesn't it?

A You read it accurately, yes, sir.

Q Five, asbestos dust is flaking off. These are inquiries concerning Sprayolite, aren't they?

A Yes, that's the subject of the memorandum.

Q All right, sir. And there are other inquiries from school districts and other building owners. This document reflects that people weren't just asking does Sprayolite contain asbestos; they were asking a lot more than that, weren't they, Mr. Ward?

A They had questions about it, yes.

Q They were asking for help, weren't they, Mr. Ward?

A No, I don't see that related, but --

Q They are saying do you consider it harmful. They are asking the manufacturer, Do you consider the product that is in our schools harmful? They are asking for help, aren't they?

THE COURT: Well, I guess the Jury will have to determine what the letter says. It's in.

BY MR. SPEIGHTS:

Q Well, sir, let's look at what happened at the meeting. There was a meeting to try to decide what to do about it, about all these inquiries, wasn't there?

A I recall there was a meeting, yes. There is

a document.

Q All right, sir. I want to go over that memorandum of that meeting, January 4, 1979. Why don't you just come down here and we will go over it together. Wait a minute, I believe we have it.

THE COURT: Is this it?

MR. SPEIGHTS: Yes, sir. If you need to step down here, we will go over it here, if you would, Mr. Ward.

BY MR. SPEIGHTS:

Q You are familiar with this document, aren't you? This is one of the documents you reviewed, Eikenberry, Forayce?

THE COURT: Are you familiar with it?

THE WITNESS: Yes, I have seen that before.

BY MR. SPEIGHTS:

Q This is a meeting, the subject is Sprayolite, January 3, 1979. You agree that is the subject of that meeting?

A That's right.

Q And there were a number of people in attendance at that meeting, including Mr. Eikenberry, correct?

A Yes.

Q Mr. Fordyce, who is the corporate counsel, the lawyer for National Gypsum Company, was in attendance at that meeting, correct?

A That's right.

Q Mr. Volk, who wrote that report on the lime, that you talked about, spent all those hours, he was in attendance at that meeting, wasn't he?

A That's right.

Q Let's see if we can agree on what this says. "Each of the Sprayolite inquiries -- " let me back up. You were not at that meeting, were you?

A No, I did not attend that meeting.

Q You had nothing to do with this at that time, did you?

A With --

Q Responding to Sprayolite inquiries.

A No, I wasn't involved in those responses.

Q "Each of the Sprayolite inquiries were reviewed and discussed, resulting in an agreed format response to answer these as well as future inquiries. Replies will be handled by Mr. Volk and will be of a low profile nature and not an elaborative nature."

That is the policy that was adopted by National Gypsum Company as to how to respond to a school district like Athens if it inquired as to what to do

about its Sprayolite, isn't that correct?

A Well, that memorializes the meeting. I don't know if you can call that the policy.

Q Well, it says this is a decision, wasn't it? "replies will be handled by Mr. Volk and will be of a low profile nature and not an elaborative nature."

A That is what they are recommending, yes.

THE COURT: Just have a seat up here. You can see that, can't you, or not?

THE WITNESS: Not not very well -- yes, I can see that.

BY MR. SPEIGHTS:

Q The last paragraph, I have it sideways now, because I have to to get it on there, "We will have to wait and see if our answers satisfy the individuals making inquiries. If they do not and more specific information is requested, most assuredly Mr. Volk will advise everyone concerned on the next course of action to take."

In other words, if you did not satisfy them with this nonelaborative answer, then you would have another meeting and decide what to do next, correct?

A Presumably, if they needed more information, we would figure out a way to give it to them.

Q The information, though, again they were

requesting, included information as to whether asbestos was harmful, or your product was harmful, correct?

A There were apparently some inquiries that asked that, yes.

Q And you have seen those letters that have gone out -- you described them to us earlier -- where you said simply Sprayolite contains asbestos, contact the EPA, correct?

A That was the gist of it. I think we may have said a little more than that.

MR. SPEIGHTS: Your Honor, we better approach the bench on this one.

THE COURT: All right.

(Bench Conference.)

THE COURT: Let's let the Jury go out for ten minutes. We will take a 10-minute break.

(Brief recess.)

THE COURT: Be seated. All right. Do you want to make your statement on the record, Mr. Speights, so we will have it in here?

MR. SPEIGHTS: Yes, sir. At this time I would ask the Court to allow me to cross-examine Mr. Ward on Mr. Eikenberry's affidavit marked as Exhibit 1779.1 wherein Mr. Eikenberry -- within 30 days --

THE COURT: The affidavit is not in

evidence, right?

MR. SPEIGHTS: That's correct, Your Honor.

THE COURT: But you are wanting to cross-examine him about an affidavit that is not in evidence?

MR. SPEIGHTS: Yes, sir. Your Honor excluded it from evidence. We wanted to put it in evidence. My position is now in light of Mr. Ward's testimony concerning all the great things National Gypsum supposedly did, et cetera, they opened the door for me to cross-examine him on this affidavit was Mr. Eikenberry right with the idea, "We are going to low profile these things." Mr. Eikenberry said National Gypsum didn't make any products with asbestos in them.

THE COURT: How long did the affidavit stay in publication before it was repudiated by the company?

MR. SPEIGHTS: Mr. Westbrook knows more about it than I do, Your Honor.

MR. WESTBROOK: Your Honor, it was a number of years and it is disputed as to who struck John. It is our position that in the Georgia asbestos litigation, co-defendant informed our firm that National Gypsum was not telling the truth, and we began to look around and simultaneously Mr. Larry Hoyle, Ms.

Herschel's partner in Philadelphia, apparently began to start informing co-counsel around the country that something needed to be done.

MS. HERSCHEL: Your Honor, the affidavits of Mr. Eikenberry were filed in personal injury litigation in '79 and '80. In the fall of 1980, National Gypsum's corporate management instructed my partner, Mr. Hoyle, to review all files of personal injury cases brought against National Gypsum Company; find every place where Mr. Eikenberry's inaccurate information may have been filed verifying interrogatories, motions on summary judgment; in every context, every place it had been filed, to notify Plaintiff's counsel there had been inaccurate information disseminated in the personal injury litigation. We are not talking about Mr. Eikenberry's responding to product inquiries from building owners about whether or not there was asbestos in their ceiling.

THE COURT: Yes, but you have gone broad; you have taken a day and a half here, almost, to tell about a lot of things that weren't even relevant to this lawsuit. Of course, no objections were made, so I just let it go. They are suing you for a lot in punitive damages.

MS. HERSCHEL: Your Honor, Mr. Eikenberry isn't here. What Mr. Eikenberry did, Mr. Eikenberry did, however you want to characterize it. The company corrected it. It is very prejudicial, Your Honor.

THE COURT: Well, it is prejudicial, but it is a question of wnether it is admissible or not, and -- there is no question but wnat it is prejudicial. Tnat is the reason they want to put it on.

MS. HERSCHEL: Your Honor, the company, as a company, as soon as it came to their attention, made a rather unusual effort.

THE COURT: You can't say it didn't come to their attention, because Mr. Eikenberry was an agent of the company at all times.

MS. HERSCHEL: He filed affidavits in personal injury litigation --

THE COURT: What difference would that make?

MS. HERSCHEL: Because it didn't affect Athens in any way, or any building owner.

THE COURT: I know that, out there is a lot of evidence you put on that didn't affect Athens either, but it tells what a good company National Gypsum was for any and all purposes, wnich I thought, since there was a punitive damage claim, I will let it in, and

there was no objection, anyway. Maybe the reason they didn't want to object, they wanted to put the Eikenberry affidavit in.

MS. HERSCHEL: Your Honor, if you would like us to resubmit the brief on Mr. Eikenberry --

THE COURT: It is not a question -- I know pretty well what it is.

MS. HERSCHEL: If Mr. Eikenberry were here to cross-examine, that would be one thing, Your Honor, but he is not here.

THE COURT: Is he dead?

MS. HERSCHEL: He's retired. No, no, he is not dead, Your Honor.

THE COURT: Well, there is no question but what he made the affidavit, is there?

MS. HERSCHEL: Oh, no, sir.

THE COURT: There is no question but what it was inaccurate?

MS. HERSCHEL: That is correct.

THE COURT: And there is no question but at some time the company, or somebody in the company, learned it was inaccurate, and they ordered it repudiated?

MS. HERSCHEL: That is correct. All I'm saying --

THE COURT: You see, the only thing about it is you put the company's reputation on the line for any and all purposes. I mean, we have stayed here since -- I don't know, about six hours, I guess, going over what the company has done well, not just in the Athens City Board of Education suit, in their instance, but all over; what their policy was and how they treated their employees and what they did, and now he is coming in and saying yes, you have done that, we have let it in, but we want to say what else you did.

I'm about inclined to think I may let -- if this man didn't come on to testify, I would be happy with my ruling.

MS. HERSCHEL: Let me make an objection to Your Honor allowing the Jury to hear about the scenario with Mr. Eikenberry, which occurred in the late '70's, 12 or 14 years after the product was sold, in a case in which punitive damages is at issue. The relevance is minimal; the prejudice is great.

THE COURT: You are talking about -- well, why is it not pretty relevant as to punitive damages?

MS. HERSCHEL: That a company official passed out, one company official passed out inaccurate information that was corrected by the company?

THE COURT: Yes, why isn't that --

MS. HERSCHEL: Number one, Your Honor, you know our position is nothing after the plasterer finished installing that ceiling in the school is relevant to punitive damages, because nothing could have ever changed after that. To tar us --

THE COURT: When was the affidavit of Mr. Eikenberry; after the Athens school, you say?

MS. HERSCHEL: 12 to 14 years, Your Honor. The Eikenberry affidavits were filed in the late '70's; '78, '79 and '80. We corrected them. The company corrected them across the country in the fall of 1980. I was there, Your Honor.

THE COURT: I'm sure you were, and I'm sure you had a good bit to do about having it corrected, causing it to be done.

MS. HERSCHEL: Your Honor --

THE COURT: How long is is it going to take to do this, an hour and a half? I guess that is irrelevant.

MR. SPEIGHTS: I think if you give me five minutes, if this isn't the total ten minutes, I can probably finish with this witness in less than ten minutes.

THE COURT: Yes, but she is going to come

on and tell about -- she is going to have to come along and tell about how they repudiated it and everything.

MR. SPEIGHTS: They have told about everything in the world for the last --

THE COURT: Here is the thing about it, Ms. Herschel. I believe it is admissible. I have let you have a broad latitude of telling, not only in this instance, but many instances going back to this man's total experience with the company he works for, and which he is proud of, and he is proud of the job they have done, and I have let you go into it, not only on matters that affected this lawsuit, but broadly.

Now, they are wanting to go into it broadly to say -- well, they won't say this, but they say you say you are pretty good, we say you are not that good, and here is why, and on punitive damages that is -- that's the only reason it is relevant.

MS. HERSCHEL: Your Honor, you have me at a disadvantage. On my examination I was relying on your ruling the Eikenberry affidavits wouldn't come in.

THE COURT: I'm sorry. I didn't know the plaintiff -- there is a lot of it shouldn't come in, but it's in. I don't mean to have you at a disadvantage, but I have got to kind of take them as they are, and nothing is final until we get there. I'm just inclined

to think it is admissible, and I'm going to admit it.

We will take 10 minutes from now for everybody to get organized.

MR. SPEIGHTS: Thank you, Your Honor.

MS. HERSCHEL: Your Honor, excuse me. May I speak with Mr. Ward on this one subject?

THE COURT: Sure.

MS. HERSCHEL: Thank you.

THE COURT: Yes, you may.

(Brief recess.)

(Continued without omission.)

BY MR. SPEIGHTS:

Q Let me see if I can go through something pretty quick with you. If I go too fast, let me know. National Gypsum advertised that it's acoustical plaster Sprayolite could be applied to a lime base coat; correct?

A Are you reading from an advertisement?

Q Yes, sir. I mean, if you don't know I will be glad to hand it up?

A I don't remember the wording of it. That is not wording I remember.

Q Okay. It says specifically to properly prepare gypsum base coat, Portland cement, lime base coat, and so forth. That is a National Gypsum advertisement?

A That's right, or maybe technical literature. I'm not sure where it came from.

Q 1949 is the document you found concerning asbestosis, or the document you referred to about taking the asbestos floats out of the product, correct?

A That's right, there was a research report on the development of a new product.

Q Now, actually that document was not produced until very recently, was it?

A I don't know that, Mr. Speights.

Q You weren't involved when the big dispute was over that particular document?

MS. HERSCHEL: Objection, Your Honor.

MR. SPEIGHTS: If you don't know, I will withdraw it.

MS. HERSCHEL: May we approach the bench?

THE COURT: Okay.

(Bench Conference)

BY MR. SPEIGHTS:

Q Then in the 1950's -- well, let's get it in sequence. In 1953 we have got the Spoylar documents that we have discussed about respirators for Thermocoustic. All right, sir. Then in the 1950's, I believe you said around 1956, National Gypsum bought an asbestos mine; correct?

A We purchased the property, I think it was completed in 1955, and it took some years to develop the mine. It made its first shipments in 1958.

Q Good, I'm glad you gave me an eight, because I can make that an eight.

A I was glad to help.

Q So, you have an asbestos mine in operation?

A That's right.

Q Then after that you started selling asbestos fiber world wide?

A I think some of our literature refers to world wide. I'm not sure how literally correct that was, but it was available for world wide distribution.

Q All right, we saw the chart yesterday of all those arrows pointing all over the world, didn't we?

A That's true.

Q Then National Gypsum advertised, without putting on the board, the Gold Bond division, asbestos floats that are grit free and uniform in three ranges of bulking; correct?

A Yes, asbestos floats were used in a wide variety of products by many manufacturers.

Q Then in 1963, Exhibit 7024 National Gypsum internally said "Develop saleable fibers or fillers from Thetford Waste Material." In other words, '63, our policy, or sometime in there, was "Develop using these fillers or floats?"

A No, I think there is a mistake in your interpretation, Mr. Speights. Waste material was the rock that was discarded because it was not feasible to remove further asbestos from it.

Q And you wanted to use that material rather than disposing of it; correct?

A Yes, that rock that was left over after the asbestos extraction took place.

Q There was a policy, however, that National Gypsum would try to use its own asbestos fibers. It makes sense to buy it from you rather than somebody else, once you got in the business?

A That was our practice, yes.

Q And you used your own asbestos floats?

A Just as we used gypsum from our own mines to make wallboard and just as we make our own paper for that wallboard, yes.

Q 1949 you took floats out of this product because of a risk of asbestosis?

A That is correct, that was a very dusty product in application and there was good reason to remove the floats.

Q After you got your asbestos mines, you started using floats and selling them to other people?

A Yes, we did.

Q Now, you were here yesterday, two days ago, when some question was raised by Mrs. Herschel, you remember with -- you remember Mr. Hatfield, the microscopist from Atlanta that was talking about all the dust samples?

A Yes, the man from McCrone.

Q You were here when Mrs. Herschel was cross examining -- it may have been Mr. Henson questioning

whether or not dust sampling was an accepted way to evaluate a building, weren't you?

A I recall some discussions about how it was to be done. There was some discussion as to air samples versus so called wipe samples or scrape samples.

Q Exhibit 1719?

A Yes.

Q That is an internal National Gypsum document, isn't it?

A No, I think that this is a letter from a company that performed services for National Gypsum Company.

Q It is to --

A Addressed to National Gypsum.

Q Attention Mr. Pollard the safety director?

A That's correct.

Q 1959 concerning the New Orleans plant.

A Right.

Q Then on the last page of that letter it reflects, next to the last paragraph "We took several samples of settled dust for chemical analysis to determine the percentage of free silica." Correct?

A That is what it says, yes, sir.

Q In your own plants in 1959 dust samples were being taken, settled dust samples; correct?

A In 1959, yes.

Q Thank you, sir. Now, 1962, have you seen this document of the air hygiene, Exhibit 60, September 13, 1962, minutes of the Air Hygiene and Manufacturing Committee meeting?

A I think I have seen it, but not for some time. I'm not familiar with it.

Q All right, sir. You would agree that it reflects that in that meeting one member reported a case of cancer where the actual exposure was in fact very slight?

A Is that where your thumb is?

Q Yes, sir.

A In reporting settlement industrial attributing lung cancer to asbestos dust where the actual exposure was in fact very slight. There is no mention of what the exposure was or whether it was confirmed that it caused lung cancer.

Q It mentioned that exposure was very slight. It didn't give the specific number, but it mentioned it was very slight. Don't you believe, Mr. Ward, when we know something, or even somebody claims that something causes cancer, we should be concerned about it?

A I think it depends on the conditions, Mr. Speights.

Q Don't you believe, Mr. Ward, that National Gypsum Company, once it knew or should have known that something caused cancer, should at least pause and think about that situation a little bit? You don't ignore that type evidence, do you, Mr. Ward?

A No.

A When you are talking about evidence, no, you don't ignore it. I don't think in 1962 there was adequate evidence.

Q When somebody claims something in National Gypsum's product causes cancer, don't you think that somebody should just pause and say, hey, let's think about that a minute?

A Perhaps, Mr. Speights, but I don't know that there was any connection between National Gypsum's product and that document you just showed me.

Q National Gypsum Company manufactured a number of products with asbestos?

A Yes, they did.

Q National Gypsum Company had an asbestos mine?

A That, they did.

Q National Gypsum Company -- asbestos was a product, if somebody said it causes cancer, it wasn't like National Gypsum Company didn't have any asbestos around, was it?

safety director, right?

A That is what it says, but I don't think that came from our files.

Q You didn't find any --

A I'm not familiar.

Q You didn't find this letter about cancer in your files?

A No, sir, I have not seen that letter in our files.

Q How about these minutes of the Gypsum Association meeting in 1967, did you find those in your files when you went back years later and started looking at documents? Would you hand me 15? Here is a copy.

A Thank you very much. Yes, I have seen this some time ago, Mr. Speights.

Q Did you find this document in the National Gypsum files?

A Yes, I believe we did.

Q September 19, 1967, that reflects that Mr. Zimmerman was chairman of this committee and that Mr. Zimmerman and a Mr. Tolin attended this meeting, correct?

A That's correct.

Q Mr. Zimmerman was the safety director for National Gypsum Company?

A Yes, he was at that time.

Q Would you read for me on the second page under air and stream pollution, the second paragraph, please.

A "One mechanic noted a recent problem involving the asbestos industry where a number of lung carcinoma cases had been reported by inhabitants of the neighborhood surrounding an asbestos plant. It was further noted that clinical tests and investigations had resulted in legal action against the manufacturer by the claimants."

Q Again, you weren't at that meeting back there, you had nothing to do with the corporate safety policy then?

A I did not attend that meeting and I didn't make the safety policy.

Q If you were told, if National Gypsum was told that there was a contention that asbestos could cause cancer to people living in the neighborhood of an asbestos facility, wouldn't that be something to cause the company to pause and say, hey, let's think about this a little bit"?

A I think that if we were aware that our plant could produce that kind of a condition in the neighborhood, we might pause, but I think we were

careful not to produce that condition.

Q 1968, May 17, 1968, the year after that, are you familiar with that document?

(Continued without omission)

Q Well, we have already had a lot of medical testimony. My question is, the fact that I'm breathing the asbestos in the plant, if I'm breathing the same amount in the neighborhood, or I'm breathing the same amount spraying Thermocoustic or dealing with asbestos cement products, National Gypsum wouldn't distinguish that, would it?

A If you are breatning in a large amount of asbestos dust over a long period of time you are likely to risk illness, that is correct.

Q I'm talking about back in the '60's when National Gypsum was being told in a variety of situations that asbestos caused cancer. Just because somebody told you that asbestos could cause cancer in your asbestos cement products, doesn't mean you wouldn't consider it might be a problem in another product, would it?

A I'm sorry, I didn't get that.

Q If you were told in the '60's that asbestos could cause cancer for someone dealing with asbestos cement products, you wouldn't just ignore or shouldn't just ignore the fact it could cause cancer dealing with another type of product, would you?

A I don't recall being told in the '60's of any cancer associated with using asbestos cement products.

Q If you were told in the '60's that living in the neighborhood of a plant, just living in the neighborhood, not working in the plant, could cause cancer, shouldn't National Gypsum consider, well, there are other circumstances outside of our plant that asbestos could cause cancer?

A I think it would depend on what kind of a plant these reports were coming from, and the conditions that prevailed.

Q All I'm saying is, shouldn't National Gypsum look into that?

A We were concerned about it. We provided dust collection equipment within our plants.

Q Within your plants?

A And protection for our workers and we were careful not to spew dust out from our plants.

Q 1968, National Gypsum opposed a booklet to workers with asbestos products, that people like Johns-Manville?

A Asbestos cement products.

Q Asbestos cement products?

A Well, there are distinguishing features.

Q Johns-Manville wanted to inform people working with this product and putting it in buildings and other places of how to effectively and safely work

with that product. Isn't that correct?

A I think Johns-Manville wanted to put this out as an application instruction that would allow people to follow recommendations which would keep the dust down on the job.

Q And National Gypsum opposed that policy, quote, the booklet creates fear in the mind of buyers, users and workers without justification?

A We opposed it because we didn't believe there was any danger in the use of those products.

Q Was there any harm in telling somebody to be careful, if the evidence was unknown?

A No, and we did support the publication of the book and distributed it.

Q After it was modified?

A That's right.

Q Then I'm back where I was before we took the break. 1969 rolls around, and you are getting documentation here on asbestos air pollution in New York City. Are you familiar with that document?

A Yes, I believe I have seen this, but it was some time ago. I'm not familiar with all its contents.

Q It reflects that National Gypsum became aware of Dr. Selikoff's presentations and concerns over the exposure to asbestos from spraying asbestos?

THE COURT: Where are we?

MR. SPEIGHTS: He wanted to review that a minute, Your Honor. He said ne needed to refresh his memory. Just let me know when you are ready, Mr. Ward.

THE WITNESS: I guess I'm ready for your question, I don't want to take the time to read your entire document, unless I find out I can't answer your question without it.

BY MR. SPEIGHTS:

Q On page one it says tne material presented by Dr. Selikoff evokes serious concern about the relevance of asbestos in the ambient air, as a health hazard; correct?

A That is what it says, yes, sir.

Q This is an internal document of National Gypsum Company, and then on the second page, "we wish", do you see where I am?

A Yes, the second sentence, right.

Q "We wish to determine specific information as to the form in which asbestos is used, raw material, finisned product, end producer use, and the conditions under which it is being used. This will all be done with specific reference to its potential for community air pollution during and as a result of such use."

THE COURT: Is that what it says, is what

he wants to know.

A Yes, that is what it says.

Q On the next page, on page three, "In addition," do you see where I am, second paragraph?

A Yes, I have it.

Q "In addition, the disintegration of asbestos fibers is" --

A Asbestos materials.

Q "Asbestos materials is tangentially associated; demolition problems being a special example. Right?

A That is what it says.

Q 1969, Dr. Selikoff is talking about problems with demolishing buildings with asbestos in them and problems that can occur along with ambient air; correct?

A I don't know what Dr. Selikoff said. I only have this digest of his report.

Q You have here Mr. Zimmerman, your director of safety, attaching the report; correct?

A Yes.

Q Now, in 1969 Mr. Zimmerman is up here and Dr. Selikoff is talking about cancer from ambient air and demolition, and you have got your head of research, Mr. Volk, down here dealing with Athens Junior High, at the same time, 1969, about whether there is any question

about lime in the product, right?

A Wasn't that a year earlier, '68?

Q I believe it is '69?

A That's right. The final answer from Mr. Keeler came out in '69.

Q All right, sir. If I can have that back. Now, at no time --

A It came out in January, and this meeting was in October.

Q All right, sir. In 1969, when he found out about that, or in '68, '67, '65, '62, at no time did National Gypsum Company mention to Athens Junior High or the architect hey, this product has got asbestos in it, and because your ceiling has droppings or dustings, you ought to take some special precautions. Is that correct?

A I think the perception was that there were no special precautions necessary because we are not talking about the kinds of exposures that Dr. Selikoff and others were concerned about.

Q Dr. Selikoff was talking about exposures in the ambient air?

A I think he meant around construction jobs and where materials were being sprayed on.

Q You weren't there at the time dealing with

this?

A Neither of us were there.

Q We are just reading documents?

A That's right.

Q Five years before, let's assume that you, the National Gypsum Company had notice of cancer, if not before that. Was there anything wrong with telling Athens Junior High in '69, or '66, hey, there, somebody is concerned about asbestos?

THE COURT: That is kind of argumentative. We will let you argue. You can ask did you send anything out, and if you didn't, why didn't you.

BY MR. SPEIGHTS:

Q You don't know, because you weren't there?

A I think I have already answered that, Mr. Speights.

Q Then right before the break, I was asking you about the policies of National Gypsum in responding to inquiries. Starting in at least 1976 National Gypsum got all these inquiries from school districts raising concerns about asbestos in buildings. Correct?

A I think that's the earliest ones that came in, yes.

Q All right, sir. And of course National

Gypsum knew that its product was down here in Atnens?

A Knew in what sense, Mr. Speights?

Q Mr. Volk, I think you said, spent hundreds of hours looking at the stuff under the microscope or something. It knew Sprayolite was down here?

A Well, it knew in the sense that the files were containing that information, but that information was pretty old at that time. Those were long since forgotten at that point.

Q You could have very easily pulled --

THE COURT: That's also a little argumentative.

Q You had sales records showing the sales of Sprayolite?

A Not to Athens Junior High School, it doesn't show up.

Q You had sales records showing the sales of Sprayolite; correct?

A That's right. It went to dealers and no record was necessarily made of what jobs it went to.

Q You had information as to who your field representatives were, didn't you?

A Yes, we did.

Q You had brochures showing spraying of Sprayolite in specific locations, didn't you?

A Yes, a few.

Q Okay. You had communications with architects through Sweet's and other publications?

A In what sense?

Q You provided technical information and advertising literature to architects; correct?

A Oh, yes, routinely.

Q You had research files on some jobs like the bowling alley we talked about earlier and like Athens Junior High?

A Yes, sir, there were a few noted in research files.

Q If National Gypsum had wanted to; it at least could have tried, '69, '76, '80, '82, whenever, it could have tried to go out and contact those people which had Sprayolite acoustical plaster in the buildings. You could have made a reasonable attempt to get in contact with those people, write them a simple letter, couldn't you?

A I really don't think there was any perception that there was any significant risk to building occupants --

THE COURT: The question is, if you had thought it was a risk, could you have done that or could you not have?

A I guess it is theoretically possible, Your Honor.

BY MR. SPEIGHTS:

Q You had hundreds of inquiries concerning this Sprayolite product, didn't you?

A Yes, sir, and we answered every one of them truthfully.

Q You never went out with any letter saying, hey, you have asbestos in your building and at least upon renovation or demolition, you have to do something about it?

A Are we talking 1966.

Q '77, '78, '80, '81, '82?

A I think the regulations on renovation and demolition came out later than this time period that you are in here.

Q That's the first time you have gotten in my area and that is a question of law. I'm going to ask you to assume the regulations are already in before the late 1970's and early '80's. You certainly could have gone out and written these people?

THE COURT: He said he could have, and the question is why didn't you; if you have an --

Q Thank you, sir. I want to go back, I think I have three more documents for you, exhibit 7050. This

is a teletype message. Have you ever seen this document?

A I would like to look at it.

THE COURT: Ask him questions about it, maybe he won't have to read the whole document.

BY MR. SPEIGHTS:

Q This is a document from out in the field, -- excuse me, I put the second one up first. I didn't write the document. Every time I try to go faster, I go slower, Mr. Ward.

A I know the feeling. Okay, I have it.

Q This reflects a letter to Mr. Eikenberry, it says "architect has existing Sprayolite," this is 1980, right?

A Yes, sir.

Q "Architect has existing Sprayolite acoustical ceiling on concrete. Because of asbestos he has to remove and requests our recommendations. I suggested three possibilities. Remove Sprayolite by scraping, apply bonding agent and sealer, then paint, plaster or apply ceiling spray. Drop suspended lay in ceiling. I would like to know if you concur, and if not what your recommendation as to the architect's requesting letter with our suggestions or specifications." Okay. This is one of your field people that made some suggestions,

right?

A That's right.

Q And wrote Mr. Eikenberry. Mr. Eikenberry didn't write him back, he sent him a teletype, didn't he?

A Yes, I think the message is in teletype, so he would have replied in kind.

Q Your wire on Sprayolite. "You cannot make recommendation to architect nor can you write letter regarding removal of Sprayolite. For any information architect must write on his stationery requesting information directly to my attention. His letter will be answered by our environmental service department. Through my office is the only source for this information." Right?

A That's what it says.

Q And of course, you nad a policy then that we went over earlier where you would not elaborate concerning these requests from architects or building owners?

A Well, the report of the meeting that you showed us said the replies would be of a low profile and not of any elaborative nature. But it also provided for giving more information if it was necessary.

Q Can you give me a document where National

Gypsum recommended removal, or gave specifications on how to remove?

A No, I can't give you that, Mr. Speights.

Q Now I want to show you an affidavit. The meeting, I believe we established, was in early 1979; correct?

A I think that's right.

Q February, '79, wasn't it, January, '79?

A I'm sorry, I don't recall the exact date, but if you will read it off, I will be willing to trust you.

Q Well, it was January of '79 and I'm going to publish a document in a few minutes, once I locate it.

A Okay.

Q Now, Mr. Eikenberry attended that meeting. Mr. Eikenberry was very involved in this, wasn't he?

A I believe he attended that meeting.

Q That was a meeting at which Sprayolite acoustical plaster was discussed?

A That's right.

Q Mr. Eikenberry, you are aware, signed an affidavit in the State of Georgia in an asbestos case. Are you aware of that?

A Yes, I'm aware of that.

Q It says personally, this is an affidavit, something under oath, right?

A That's correct.

Q "Personally appeared, W. S. Eikenberry before the undersigned officer duly authorized to administer oaths." Okay. "Deponent makes this affidavit of his own personal knowledge and experience. For the past 33 years and Director of Marketing Service for Gold Bond Building Products," that is Mr. Eikenberry, right?

A That's correct.

Q Would you read paragraph seven to me of that affidavit signed by Mr. Eikenberry?

A Paragraph seven says " National Gypsum Company has never manufactured a plaster containing asbestos fiber."

Q Now it's 1981. I believe even you would agree with me, Mr. Ward, that by 1981 National Gypsum had a lot of evidence concerning asbestos?

A Evidence of what nature?

Q About asbestos causing disease?

A Well, yes, yes, they had more than they did years before, certainly.

Q And they got out of the asbestos business at some point in time in the '80's, didn't they?

A 1981.

Q I want to show you Plaintiff's Exhibit 1836, a letter from Jack Jones. Let me see if I have a copy

for you. Are you familiar with that document?

A Not offhand, but I may well have seen it. I have looked at an awful lot of documents. I'm pretty sure I -- anyway, I have read it.

Q January 16, 1981. Would you read that to us, please, sir?

A This is going to regional managers, from the then commercial sales manager. It says "This is your final region report for 1980. We sold over $12 million in asbestos products during 1980. This includes direct sales and top loaded sales. As of this date the New Orleans plant is still a Gold Bond facility. We are still in the business of making and selling asbestos products. Please continue to emphasize this point with your salespeople. The sales dollars are good as long as they last" exclamation point.

Q Thank you, sir. Mr. Ward, the best people to tell us about the policies and decisions of National Gypsum Company would be the corporate management, wouldn't it, people who were involved in these decisions?

A The people who are actually there when the music was played, as it were.

Q People who have been in management and are familiar with management decisions, are people who know

how National Gypsum makes decisions?

A As I said earlier, decisions in the company are made at several levels, Mr. Speights.

Q Major decisions are made at high levels?

A Yes.

MR. SPEIGHTS: Thank you, sir.

MS. HERSCHEL: Your Honor, may we take a short break so I can organize some of these exhibits that Mr. Speights has been using?

THE COURT: How long?

MS. HERSCHEL: Can I have ten minutes? I have to pull them, Your Honor.

THE COURT: I guess so. We will take a ten minute recess, Ladies and Gentlemen.

(Brief recess.)

MR. SPEIGHTS: Just for the record, Your Honor.

THE COURT: I haven't got you again, have I?

MR. SPEIGHTS: No, sir.

THE COURT: Are we ever going to get done? Every time we have a break, you all get stronger. Okay, what else have you got?

MR. SPEIGHTS: I wanted to say for the record, when I was cross-examining on Exhibit 1770, that has been renumbered as Exhibit 7045, which is in evidence.

THE COURT: All right, fine. Proceed.

MS. HERSCHEL: Thank you, Your Honor.

BY MS. HERSCHEL:

Q Okay, Mr. Ward. Who is Mr. Eikenberry?

A Mr. Eikenberry was the Director of Market Services at the time he retired about a year ago.

Q What was his position, if you know, in the '79-80 time period?

A I think he had essentially the same job. I'm not exactly certain the title was the same.

Q That position that you have described to us, was he a member of corporate management?

A Well, he reported -- he was in the Gold Bond

Building Products Division, and he reported to manufacturing management.

Q Was he a top-level decision-maker at National Gypsum?

A No. I think it is fair to say he was a middle manager.

Q Now, is he still with the company?

A No. He retired, it was either at the end of '85 or the beginning of '86, but right in there.

Q Now, as part of his duties in the '79-80 time period, did he provide information on products to attorneys in what we call products liability litigation?

A Yes, he did.

Q And in fact, he provided some information in lawsuits that had been brought by people who thought they were harmed from being occupationally exposed to asbestos, isn't that correct?

A Yes, some of those were involved.

Q Okay. And in fact, he even signed affidavits on behalf of the company, did he not, explaining what ingredients were in products; is that correct?

A Yes, he did.

Q Were a number of his affidavits -- do you need a drink of water?

A I'm okay. I just have something in my

throat, I'm sorry.

Q Were a number of the affidavits that he signed in the '79-80 time frame inaccurate? Did they contain inaccurate information?

A Yes, I'm aware that they did.

Q Have you ever spoken with Mr. Eikenberry about that?

A No, I haven't.

Q Now, among the inaccurate information that Mr. Eikenberry executed an affidavit to was the statement that Mr. Speights showed you that National Gypsum's plasters never contained asbestos; is that correct?

A Yes.

Q Okay. Did that misstatement come to the attention of the major decision makers in the company at any time?

A Yes. I think it did. I'm not sure exactly how long after, but somewhere within about a year or something like that they did become aware of it.

Q Okay. And who are we talking about now and where are those folks?

A These would be the top people in the corporation at the Dallas headquarters.

Q The top brass?

A Yes.

Q Okay. Did they do anything when they found out that Mr. Eikenberry had disseminated inaccurate information about the plasters?

A It is my understanding that they asked their counsel to carefully go over the records of the company and correct any errors that they found in his affidavits.

Q Was that done, Mr. Ward?

A Yes, it was.

Q You mean the lawyers went out and corrected the record around the country?

A That's my understanding, yes.

Q I think that something Mr. Speights said suggested that the '49 document having to do with Thermocoustic in which one of the employees recommended that they not use a specific fiber in there, he suggested that it was very difficult for him to get that document. Is that document in the records warehouse in Charlotte, of which you are custodian?

A Oh, yes, it's there.

Q Was it there when his people came on several occasions to look?

A It had to be there; it couldn't be anywhere else.

Q All right. Let's try another subject, now, that you have discussed with Mr. Speights. He showed you, I think, a couple documents and discussed with you the topic of a booklet directed to people who apply asbestos cement products that was under consideration in the late '60's. Do you remember that?

A Yes.

Q Now let's talk a little bit about asbestos cement products first. Are they quite different from Sprayolite?

A I would say they are about as different as they can get and still be a building product, yes.

Q All right. Would you tell the Jury what asbestos cement building products consist of, what the line is?

A Yes. Probably the one most of us would be familiar with was a product called asbestos cement siding, which was an exterior residential siding, coming in various textured finisnes and colors. We made asbestos flat sheets, made essentially out of the same material, but these were typically four feet by eight feet and were used for utility rooms and mecnanical rooms, that sort of thing.

Q Now, what generally are the ingredients in that line of products, Mr. Ward?

A Principally cement and sand, and they have some other fillers and binders, and they do contain asbestos fibers.

Q Can you give me a range of asbestos content for that line of products?

A I'm not really familiar with those formulas, but I believe it's 10 to 15 percent, something like that.

Q Were those products generally dusty in application, Mr. Ward?

A No, they were fully finished and you simply nailed them in place. The dust -- there could be some dust, if they were sawed or drilled, but ordinarily you wouldn't call them a dusty product.

Q Now, when the people at J-M raised the issue of a booklet directed to applicators of asbestos cement products, National Gypsum had some reservations at first, did they not?

A Yes, they did.

Q What were their reservations?

A I believe that they felt that this was not a dusty product and that therefore the booklet was really not necessary and that the way it was originally written was perhaps inflammatory.

MS. HERSCHEL: I'm trying to borrow a

transparency, Your Honor.

MS. HERSCHEL: Your Honor, would you bear with me for a moment.

THE COURT: All right.

MS. HERSCHEL: I apologize, Your Honor. I was going to borrow Mr. Speights' document.

MR. SPEIGHTS: I will be glad to give it to her, but I got more documents than Piggly Wiggly's got loaves of bread, Your Honor. I can't find it, either, right now.

BY MS. HERSCHEL:

Q All right, Mr. Ward, let' try it this way. Mr. Ward, from your investigation into the company history, are you aware whetner or not in connection witn this asbestos, this proposed asbestos cement practices booklet, National Gypsum consulted with any outside consultant?

A I don't recall seeing that. I'm sorry.

Q All right. Mr. Ward, let me show you --

MR. SPEIGHTS: If you give me a number, I will try to find it.

MS. HERSCHEL: Don't worry about it.

BY MS. HERSCHEL:

Q I would like to show Mr. Ward a document that has been marked as Defendant's Exhibit 2.021. Would you

take a quick look at that, Mr. Ward, and then I will ask you a few questions.

(Continued without omission.)

A I'm vaguely familiar with this.

Q Was there some discussion in the company as to what an asbestos practices booklet should contain?

A Yes.

Q Did the company eventually support the publication of a booklet recommending practices for handling asbestos cement products?

A Yes, they did.

Q Did they distribute it to their customers?

A It's my understanding they did.

Q Do you know what customers they distributed it to?

A I believe it was intended for and went to asbestos cement applicators.

Q Why would you pick them out as a group?

A Well, they would be the people most likely to use the products.

Q The document that I have just handed you, Mr. Ward, is a copy of a booklet which is entitled Recommended Practices for Fabricating, Handling and Applying Asbestos Cement Products in the Building and Construction Industries?

A That's right.

Q It is prepared by the Health and Safety Council of the Asbestos Cement Products Association, 521

Fifth Avenue, 20th Floor, New York, New York. Was National Gypsum, in the '68-70 time period, a member of the Asbestos Cement Products Association?

A Yes, we were.

Q Mr. Ward, is this a copy of the booklet that was eventually put together, published and distributed by National Gypsum to its customers?

A Yes, it is.

Q Mr. Ward, would you look at the first -- turn over the cover page.

MS. HERSCHEL: And if Your Honor will bear with me, I would like Mr. Ward to read the right-hand column on the cover page, and the little squib on one of the last pages there.

THE COURT: All right.

BY MS. HERSCHEL:

Q Would you read the introduction to that booklet into the record, please, Mr. Ward?

A That's the right-hand side of this sheet?

Q Beginning with "Discovery and production."

A Okay. "The discovery and production of hundreds of natural and synthetic materials, including asbestos cement products, has in some instances prompted the need for special protective equipment and practices that should be employed by all in the industry where

dust is created. Manufacturers of asbestos cement products have for years been taking protective measures to eliminate exposure of their workers to the inhalation of dust. The fabricating, handling and applying of asbestos cement products are diverse and range from the installation of a single piece, to extensive operations involving cutting and machining by mechanical equipment.

While care should always be exercised, special precautions are necessary when dusts in excess of federal, state or provincial allowable threshold limits are generated as a result of sawing, drilling or other operations. Respirators should be worn.

The following practices are recommended for fabricating, handling and applying asbestos cement products in the building and construction industries. Contractors and applicators are urged to study these recommended practices carefully to see that they are observed by all workers. It is in the best interest of both employer and employee to see that these recommended practices are strictly observed."

Q And would you turn to page seven where there is a little summary down at the bottom of the right-hand column there. Do you have that, Mr. Ward?

A Yes, I have it.

Q Would you just read that little summary

there?

A "Three major points to keep in mind in the fabricating, handling and applying of asbestos cement products. Keep dust to a minimum. Wear U. S. Bureau of Mines approved respirators when exposed to dusts above federal, state or provincial allowable threshold limits, and maintain good housekeeping at all times."

Q Mr. Ward, did National Gypsum Company support the publication of this booklet?

A Yes, we did.

Q Did you distribute it to your customers?

A We did.

Q Mr. Ward, Mr. Speights asked you about whether or not the company listed the ingredients in Sprayolite on its bags in the '50's and '60's. Do you remember that?

A Yes.

Q You said, no, they did not?

A That's right.

Q Do you know from your experience in the company whether there would have been any particular reason why they didn't list the ingredients in the '50's and '60's?

A Well, it was a proprietary product.

Q What do you mean by a proprietary product?

A It was our own. We developed it, we orignated the formula, and I guess to protect it from competitors, we did not reveal what the ingredients were.

Q Have you found anything in your research anywhere that would suggest tnat the reason that ingredients were not listed on that bag was to conceal from anybody that there was asbestos in tnat product?

A No, definitely not.

Q Nothing?

A No.

Q Mr. Ward, I would like to show you another document.

MS. HERSCHEL: Your Honor, this document is a rebuttal document that has not been marked.

THE COURT: All right, it will be Number 3 of the unpremarked exhibits.

MR. SPEIGHTS: I would like to see it, Your Honor.

THE COURT: I will be glad to show it to you. Let's see, are we ready?

MR. SPEIGHTS: Judge, it's about a 12-page document -- it has never been provided to us -- that I am just reading for the first time.

THE COURT: Well, let's go to luncn.

Ladies and Gentlemen, you all are excused until 1:00 o'clock. Same admonition. Every time we give them a little opportunity to get more prepared, it seems like it gets longer and longer. We'll see what happens. You're excused until 1:00 o'clock.

(Continued without omission.)

AFTERNOON SESSION

JANUARY 23, 1987

THE COURT: All right.

MR. SPEIGHTS: Excuse me, Your Honor. I located the transparency Ms. Herschel wanted.

THE COURT: Let's see, who was up? Ms. Herschel?

MS. HERSCHEL: I'm sorry.

THE COURT: Are you at bat? Proceed.

FURTHER REDIRECT EXAMINATION

BY MS. HERSCHEL:

Q Mr. Ward, I just want to show you again a transparency that Mr. Speights showed you having to do with the question of possible dangers associated with asbestos cement products in application so we can read in one sentence that you and Mr. Speights didn't read in when you were on cross-examination. Mr. Ward, do you remember seeing this document this morning when you were talking with Mr. Speights?

A Yes.

Q Can you see it?

A Yes. I can't see it very well.

Q Would you --

THE WITNESS: May I go around, Your

Honor?

THE COURT: We will turn the lights off, and he will be able to see it well.

MS. HERSCHEL: This is going to be real quick.

THE COURT: Okay, does that help you?

THE WITNESS: I think I can read it. Right on the fringes.

THE COURT: You can go on down there.

THE WITNESS: It will help, sir.

THE COURT: Okay.

BY MS. HERSCHEL:

Q Now let's look at the conclusion again. It reads, "Asbestos cement is not, at this time, proven to be a culprit." I don't think we read that this morning. "National Gypsum should continue to oppose distribution to the public, any literature damaging to these products. The handling of fibers may cause asbestosis. Protection should be provided employees."

Was this the thinking of the company? Does this express the thinking of the company based on your research on the subject of possible hazards to applicators from asbestos cement products?

A Yes, I believe it does.

Q Mr. Ward, I would like to hand up to you a

document and ask if you will take a look at it and identify it for me, if you can.

THE COURT: Have you shown it to him?

MS. HERSCHEL: I'm sorry.

THE COURT: You have seen it, haven't you?

THE WITNESS: Yes, I'm familiar with this document. This is a March 10th, 1952 product supplement issued by the research division.

BY MS. HERSCHEL:

Q Mr. Ward, would you explain a little further what that document is, what the function of that kind of document is, where it ends up, that kind of stuff?

A Well, it was the practice of the research department to publish technical information on products which would specifically give designers or architects, the types that would be interested in the technical performance of the product, data about fire ratings or sound absorption, those type characteristics. And when appropriate, it might also include detailed application instructions, as it does in this document relating to Thermocoustic.

Q And that is a document about Thermocoustic, is that correct?

A Yes, that's the subject.

Q And it would be used where?

A This would be published by research to the -- well, people in marketing, but also to the district sales offices where it would be channeled to sales representatives who handled these products for use in their own training and being sure that the people using the products were properly instructed.

Q Is there any instruction in that document -- I know it is a several-page document, Mr. Ward -- having to do with possible dust problems on the job?

A Well, there is a note on page seven referring to protective equipment.

Q Would you read that into the record, please?

A Yes. This is Section 5, Capital I, Protective Equipment. "The workmen should be provided with goggles and dust masks.

Q And that instruction would be provided to your sales people for their use in discussing the product with the customer, is that correct?

A Yes, that's right.

Q What is the date on that document, Mr. Ward?

A March 10th of 1952.

Q Okay. Mr. Ward, did you locate that document personally in the company's files?

A As it happens, I did, yes.

Q Where --

A I was reviewing research documents on microfilm that had been in the files for some years, simply because I was trying to acquaint myself with the history on the product Thermocoustic, and I found this one.

Q That microfilm you are talking about that you reviewed and on which you found that document, is that also among the documents that are available to plaintiff's counsel in this litigation?

A Oh, yes, certainly.

Q And is it among the documents that have been available and have been reviewed at least in part by lawyers for the Athens Board of Education?

A It is in the same place where all the documents they have reviewed are, but I have no way of knowing whether they actually saw that role of microfilm or not.

Q They would have had access to it?

A Oh, absolutely. It has been there all along.

Q Mr. Ward, one last question. One more time, in your research have you found any evidence from any source, whether it is documents, people, or anywhere else, that anyone at National Gypsum was aware of possible hazards to building occupants from in-place

asbestos-containing products in 1966 when the Athens Junior High was built?

A I found nothing whatever.

MS. HERSCHEL: Thank you.

THE COURT: All right. Is that it? I'll give you 10 minutes, 5 for rebuttal.

RECROSS-EXAMINATION

BY MR. SPEIGHTS:

Q Were the Spoylar documents -- you know what I mean by the Spoylar documents?

A 1953, sir.

Q Were they there available to plaintiff's lawyers?

A I believe they were.

MS. HERSCHEL: Your Honor, may we approach the bench on that one?

THE COURT: Yes.

MR. SPEIGHTS: Does this count toward my 10 minutes, Your Honor?

(Bench conference.)

THE COURT: All right. Back on the clock.

BY MR. SPEIGHTS:

Q Did you not know that these documents were withheld by the attorneys based on some claim of

privilege?

A I'm not aware of that, Mr. Speights.

MS. HERSCHEL: Your Honor, might we define that claim of privilege?

THE COURT: There is a doctrine of attorney-client privilege, and the doctrine is if some client tells a lawyer something in confidence, that the attorney cannot tell that, if there is a certain test met; it was told by the client with the idea in mind it would be a privileged communication, and all the other necessary things. And this is what we are talking about. That is the reason it wasn't released, because of an attorney-client privilege. That is what is meant by that, as opposed to somebody withholding it for other reasons. Okay.

BY MR. SPEIGHTS:

Q I believe I heard you, in redirect, but asbestos cement products are hard products, aren't they?

A Yes, typically they are very hard.

Q You have to cut into them for them to release asbestos fibers?

A That's my belief, yes, sir.

Q That's the booklet you went out with -- you went out with a booklet concerning these products. Finally after some initial objections, you finally

joined the other companies and went out with a booklet providing some cautions or warnings on these hard products?

A That's correct.

Q Okay. You never went out with a booklet concerning the spraying of any of the spray-applied products, Sprayolite or FireShield or perlite, correct?

A I think those products were off the market in 1972.

Q Yes, sir, but at no time, at anytime did you go out with any booklet on those products, correct?

A There was a lot of literature published on those products. I'm not sure what you mean by a booklet.

Q There was nothing, no caution or warning concerning asbestos in those products?

A No, none that I'm aware of.

Q Thank you, sir.

A I don't believe that anyone thought that one was required.

Q I understand that is your position, or the company's position. Are you familiar with that document?

A No, I'm not.

Q You would agree with me it reflects in 1970

that National Gypsum is trying to --

MS. HERSCHEL: Excuse me, Mr. Speights. May I know what we are talking about?

THE COURT: What is tne the number of that at the top there?

THE WITNESS: 1747.

MS. HERSCHEL: 1747?

BY MR. SPEIGHTS:

Q You would agree with me it reflects in 1747 that the company decided to try to get asbestos out of one of its ceilings products for a sales advantage?

A Yes. It is talking about searching for a new spray texture formula that does not contain asbestos.

Q For a sales advantage?

A Yes, that's the final comment, "Maybe we can use this as a sales advantage."

THE COURT: That has already been introduced, right?

MR. SPEIGHTS: 1747, I believe.

THE COURT: Did you want to introduce this other document you handed him?

MS. HERSCHEL: Thank you, Your Honor.

THE COURT: It wasn't prefiled, right?

MS. HERSCHEL: That's correct.

THE COURT: What is the next number? I'm

not charging you for this, either. I'm just trying to get the housekeeping.

MR. SPEIGHTS: I was going to say for the record that document was not listed or provided, but I understand it is on rebuttal and for that reason I'm not objecting to it.

THE COURT: All right, fine. It will be Exhibit Number 4 to the documents that weren't prefiled, premarked.

BY MR. SPEIGHTS:

Q Was it your testimony on redirect that the New Orleans plant was clean?

A I'm not sure what you mean by that.

Q Well, was the New Orleans plant a clean plant insofar as asbestos was concerned?

A All I can tell you is that the company made every effort to make it so.

Q All right, sir.

A It may not have always been characterized that way by everyone who saw it.

Q When Ms. Herschel was asking you about Mr. Eikenberry, I wrote down several times, taking notes back there, my understanding is that it was later changed?

A Yes, sir.

Q You weren't directly involved in that, were you?

A No, I was not.

Q Who told you all about this?

A I think initially I heard that from Bob Oberkircher.

Q Okay. Who else have you discussed that with?

A From time to time I have discussed it with attorneys.

Q Like Ms. Herschel?

A Yes.

Q I believe you said that you are National Gypsum's representative on the National Institute of Building Sciences?

A That's correct.

Q Are you familiar with this publication, July 2, 1984, Asbestos in Schools and Public Buildings?

A I'm aware of it. I wouldn't say that I'm familiar with it.

Q All right, sir. Would you read to the Jury the part that I have yellowed there?

A "The NIBS task force agrees that the case in which asbestos material is progressively delaminating from the building components, resulting in visible deposits of asbestos on horizontal surfaces within

occupied spaces, is a situation appropriately requiring immediate containment or removal."

Q Thank you, sir. Now, that is an industry organization which National Gypsum is a member of and you are the representative, correct?

A It's an organization. I don't know that I would call it an industry organization. It is partly funded by industry and partly funded by the government.

Q But National Gypsum is represented by you?

A And others, yes.

MR. SPEIGHTS: Thank you, sir.

THE COURT: Is that it?

MS. HERSCHEL: Just a few follow up on just what Mr. Speights asked.

MR. SPEIGHTS: I beat my time limit.

THE COURT: Yes, you did. Cut yours down to three.

FURTHER REDIRECT EXAMINATION

BY MS. HERSCHEL:

Q Mr. Ward, you and Mr. Speights talked a little bit about warnings on products. Did National Gypsum at some point in time put any warnings on any asbestos-containing products?

A Yes. They put warnings on asbestos fiber.

Q When was that?

A About 1968 or '69. In about 1972 warnings went on other asbestos-containing products.

Q Okay. Can you tell me what asbestos-containing products warnings went on in about 1972?

A Joint cement, many of the asbestos cement products, I believe spray textures.

Q And in 1972, where were we with respect to our Sprayolite business?

A We had taken Sprayolite off the market in 1972.

Q Did the company also -- does the company still sell joint treatment and textures?

A Yes, they do.

Q And you said at some point we had warnings on them because of the asbestos in them, is that correct?

A That's correct.

Q Very briefly would you tell the Jury what joint treatment and texture is?

A Joint treatment is the substance that is used to finish the place where two pieces of gypsum wallboard would be put together. Ordinarily, you would see a crack there, so that crack is filled with joint cement so that the finished wall will be smooth and show no seams. The spray texture is typically used on ceilings

to give it a finished appearance with the least labor cost.

Q Now, you have told us that you had warnings on them in the early '70's because they contained asbestos?

A Yes.

Q Do you still make joint treatment and textures today?

A Yes, we do.

Q Okay. You have told us that National Gypsum doesn't make any other asbestos-containing products today, is that correct?

A That's correct. We don't make any asbestos-containing products.

Q All right. Then what happened to the joint treatment and the texture?

A In '74 and '75 those products were reformulated and were then offered without asbestos.

Q Mr. Ward, is there any doubt in your mind that when corporate management realized that Mr. Eikenberry had disseminated inaccurate information, they ordered it retrieved and corrected; is there any doubt in your mind?

A None whatever.

MS. HERSCHEL: Thank you, Mr. Ward.

THE COURT: All right, you're excused.

(Witness excused.)

THE COURT: Call your next witness.

MR. HENSON: Dr. Morton Corn, if the Court please.

THE COURT: All right.

MR. HENSON: While he is being called, may I ask the Court officer to take his CV. That may speed the dates.

(Continued without omission.)