UNITED STATES BANKRUPTCY COURT
DISTRICT OF DELAWARE

IN RE	:	
	:	**Chapter 11**
OWENS CORNING, et al.,	:	
	:	**Case Nos. 00-3837 to 3854 (JKF)**
	:	**(Jointly Administered)**
	:	
Debtors.	:	**Related to Docket No. 12288**
		Hearing Date: August 23, 2004

RESPONSE AND OBJECTION OF CREDIT SUISSE FIRST BOSTON, AS AGENT, TO MOTION OF THE DEBTORS FOR ESTIMATION OF PRESENT AND FUTURE ASBESTOS PERSONAL INJURY LIABILITIES

TO THE HONORABLE JUDITH K. FITZGERALD,
UNITED STATES BANKRUPTCY JUDGE:

Credit Suisse First Boston, as Agent, for the prepetition institutional lenders to Owens Corning and certain of its affiliates (the "Banks"), as and for its response and objection to the motion, dated July 30, 2004 (the "Motion"), of Owens Corning and certain of its affiliates (the "Debtors"), for entry of a scheduling order pursuant to section 105(a) of title 11 of the United States Code (the "Bankruptcy Code"), with respect to estimation of asbestos-related personal injury claims, respectfully represents as follows:

Preliminary Statement

As an initial matter, the Banks note that despite the Court's direction at the July 19, 2004 hearing that the Debtors consult with the parties in interest to see if an agreed schedule could be reached, *see* transcript of July 19 hearing (an excerpt of which is attached hereto as Exhibit A) at 120, the Debtors made no effort whatsoever to comply with this directive. Rather, the Debtors simply filed their proposed Case Management

Order ("CMO") without any prior consultation with the Banks. Accordingly, the Banks are compelled to file a competing proposal, which is submitted herewith as Exhibit B.

The Banks firmly believe that there will need to be a rational and efficient process for the estimation of present claims and future demands either asserted or to be asserted against the Debtors for asbestos-related personal injuries. Indeed, based upon the unliquidated nature of these alleged claims, estimation may, in fact, be mandated by 11 U.S.C. § 502(c). The Banks, however, object to the Motion because (i) it fails to take into account critical matters currently pending before the District Court and has therefore proposed a schedule that would be irrational, inefficient and unfair; (ii) it is bereft of any basis for the estimation that the Debtors now seek, or even a description thereof; and (iii) the Debtors' proposed schedule is so unreasonably truncated that it would deprive the District Court of its ability to resolve this matter on the evidentiary record that the Court will need in order to arrive at a legally acceptable resolution, while depriving the Banks of their due process right to a meaningful opportunity to contest the wildly inflated $16 billion asbestos liability valuation upon which the Debtors, the statutory committee of asbestos claimants appointed in these chapter 11 cases and the legal representative for future claimants (collectively, the "Plan Proponents") have agreed to base a plan of reorganization.

Argument

1. The Imposition Of A Discovery Schedule For Asbestos Claims Should Be Coordinated With Matters Pending Before The District Court.

There are two motions pending before the District Court, each of which is critical to the estimation of asbestos-related claims and which should therefore be

resolved before any estimation proceedings occur or a schedule is established. First, the motion filed by the statutory committee of unsecured creditors (the "Committee") to establish a bar date for asbestos personal injury claimants, together with the Banks' joinder and supplement thereto, is currently pending before the District Court. The establishment of a bar date will have profound effects upon any estimation of claims. Most fundamentally, if a bar date is imposed as requested in the pending motion, the parties will not need to extrapolate and speculate from prepetition conduct -- which the Banks will demonstrate to be inapposite at this point -- to establish the value of current claims. Rather, the estimation will be based upon actual claims. However, the Debtors propose to rush into estimation, and to even conclude the process, before a bar date is established -- long before the parties and their experts would obtain or could digest the claims information data that will be obtained through a bar date. A rational estimation process must allow for the time necessary to establish a bar date and to obtain and evaluate the data obtained by the submission of claims.

Second, on July 8, 2004, the Banks filed a motion to withdraw the reference with respect to estimation of asbestos-related personal injury claims. Indeed, as explained in that motion, all parties have now agreed that it is appropriate for the District Court to adjudicate these matters. The Banks respectfully submit that it is appropriate to permit the court that will conduct the estimation to determine the scope of, and schedule for, discovery -- particularly because there are significant disputes regarding the scope of discovery that could have a major impact on the merits of the dispute to be resolved by the District Court. As a result, the Banks submit that the District Court should establish the schedule for the estimation proceedings.

In the event the Court determines to enter a CMO despite the Banks' objections, the Banks submit herewith their proposed CMO. In making this submission in accordance with the Court's direction at the July 19, 2004 hearing, the Banks do not waive any of these objections, and expressly reserve all of their rights with respect to these matters.

2. **The Debtors' Motion Fails to Identify the Relief the Debtors Seek.**

At the July 19 hearing, the Court directed the Debtors to file a motion with respect to their request for an asbestos liability estimation proceeding. *See* Exhibit A at 120. While the Debtors have filed a document captioned "motion" to nominally comply with the Court's directive, the document is devoid of any substantive content. For example, the Debtors have failed to set forth the basis for the relief they seek, the amount of the proposed estimate for each category of claimant, the basis for the estimate in each category, the source data used, or the details of the calculations that support any component of the estimate they intend to ask the Court to approve. In short, all that the parties in interest know is the attorneys who represent the asbestos interests have conditioned their support of a plan process that estimates current asbestos-related claims and future demands at the astronomical sum of $16 billion -- an amount nearly triple the figure reported in the Debtors' current SEC filings, and more than quadruple the amount the Debtors disclosed in prepetition SEC filings. Without the relevant information that should be set forth in the Debtors' motion, creditors such as the Banks lack the notice of the proposed findings sought from the Court necessary to frame their discovery requests with respect to those matters. Accordingly, to begin the process, the Debtors should be

directed to immediately file a motion that sets forth their position with sufficient specificity.

3. The Debtors' Proposed Schedule Fails to Provide Adequate Time for Proper Presentation of the Issues in the Crucial Matter of Estimation.

As set forth below, the Debtors' proposed CMO sets forth an irresponsibly truncated schedule that, if implemented, would undermine the District Court's ability to conduct this asbestos personal injury liability estimation proceeding in a legally acceptable manner upon the kind of adequate evidentiary record the Court will need. Accordingly, if this Court is going to structure and schedule discovery for the critical estimation issue the District Court will decide, it should reject the Debtors' proposal and establish a reasonable schedule that will allow for the creation of an adequate record. All parties have recognized throughout the pendency of this case that estimation of the Debtors' outstanding asbestos liabilities is critical to the Debtors' reorganization. Before the Debtors can confirm any plan, the parties and the Court must understand, with as much certainty as possible, the value of present and future asbestos claims. Unfortunately, the information necessary to establish such liabilities with any degree of certainty is not publicly available, and accordingly, the Banks will need to invoke the Court's process to obtain the discovery and the evidence it will need to fairly litigate these critical issues.

Although, as discussed above, the Debtors have not yet detailed the theories that support their case for estimation of the Debtors' asbestos claims, the methodology that has typically been used by claimants in other asbestos chapter 11 cases

informs this process.[1] Specifically, asbestos claimants in a number of previous chapter 11 cases have relied upon a method that projects the number and value of present and future asbestos claims by relying upon the debtor's prepetition claims. In other words, the Debtors are likely to argue that their past litigation and settlement experience with asbestos claims (both in terms of numbers of claims and amounts paid to claimants) is determinative in the estimation of future claims.

To determine the accuracy of any estimation proposed under such a framework, extensive written, document, and deposition discovery, together with expert discovery, will be required. Moreover, the Banks anticipate opposing the Debtors' anticipated estimation methodology at its most basic level: the claims settlement history of the Debtors was so fundamentally flawed -- indeed, at times apparently infected by collusion and/or fraud -- that it cannot form the basis of any estimation of the Debtors' asbestos personal injury liability.

The systemic problems of the asbestos litigation system are numerous and well documented. *See, e.g.,* Bell, Griffin B., *Asbestos Litigation and Judicial Leadership: the Courts' Duty to Help Solve the Asbestos Litigation Crisis*, NLCPI, Vol. 6, Num. 6 (June 2002) (attached hereto as Exhibit C). Judge Bell formerly served as a judge on the United States Court of Appeals for the Fifth Circuit and was Attorney General of the United States. In his article, Judge Bell documents the "asbestos litigation crisis" that has occurred in this country, in which defendants have been deprived of due

[1] The complete lack of any foundation on which to evaluate the Debtors' proposals for estimation only reinforces the need for a substantive motion to establish such a framework, as discussed above.

process, certain courts have failed to enforce fundamental principles of tort and procedural law and, as a result, scores of defendants have been bankrupted and forced to pay tens of billions of dollars to settle "inventories" of claims -- the vast majority of which has gone to plaintiffs' lawyers and claimants who have not suffered any injury. One of the many disturbing flaws in the system is that a number of physicians ("B-readers") have been willing, for a fee, to review potential claimants' X-rays and certify claims for virtually anybody, regardless of actual impairment. For example, "[o]f the more than nine thousand claims submitted by plaintiff lawyers [to the Manville Personal Injury Trust], a mere ten doctors provided X-ray interpretations for 87% of the claims. The average failure rate for these doctors was a striking 59%. The highest volume doctor accounted for over half of the total X-ray interpretations, failing the audit 57% of the time." *Id.* at 14-15.

Moreover, beyond reviewing the litigation abuses that have occurred, Judge Bell identifies a number of steps that courts around the country have taken to curb such abuses, and to efficiently and fairly manage the asbestos litigation process. In particular, Judge Bell stressed the importance of implementing these steps in the context of bankruptcy proceedings. We respectfully urge that if the Court is going to proceed at this time with establishing a CMO for asbestos estimation, that the Court carefully consider Judge Bell's recommendations, particularly those that relate to bankruptcy cases. *See* Exhibit C at 4, 39-40.

The state of the asbestos litigation system has continued to deteriorate since the creation of the Manville Trust. For example, in a study published just this week, researchers from Johns Hopkins have scrutinized a number of chest radiographs

submitted in asbestos litigations. The B-readers engaged by the plaintiffs' attorneys in those cases had previously opined that approximately **96%** of such radiographs were positive for lung abnormalities. The Johns Hopkins researchers requested six (6) new B-readers to review and analyze the radiographs. Based upon this independent analysis, it appears **a mere 4.5% of such radiographs were, in fact, positive for lung abnormalities.** *See Comparison of "B" Readers' Interpretations of Chest Radiographs for Asbestos Related Changes* (Acad. Radiol. Aug. 2004) (attached hereto as Exhibit D). "Metaphorically speaking, . . . [the Johns Hopkins researchers] . . . have sounded an alarm with regard to the accuracy of B-readers in asbestos-related litigation. The alarm will undoubtedly reverberate, as it should, throughout the courtrooms of the nation, the offices of the Public Health Services National Institute for Occupational Safety and Health (NIOSH), the headquarters of the American College of Radiology, and radiological facilities in every state. The alarm must be heard and heeded." *See* Exhibit E. The fraudulent nature of the medical evidence previously relied upon by Owens Corning in connection with its prepetition settlement activity is but one reason why estimation cannot be based upon an extrapolation from the Debtors' prepetition settlement history, which would simply perpetuate the prepetition fraud. Rather, estimation must be based upon actual claims filed, and all parties, including the Banks, must have an ample opportunity to conduct discovery into all matters relevant to the Debtors' prepetition settlement conduct, including the bogus medical evidence upon which the Debtors relied.

In order to have a fair opportunity to investigate these matters and challenge the Plan Proponents' extraordinary $16 billion claim -- and for the District

Court to adequately examine and assess the Debtors' historical claims experience -- the Banks and the District Court will need to explore, among other things:

- the Debtors' GAAP asbestos liability reserve as reported in their SEC filings, whether or not such estimates comply with GAAP, and if the reserves do not comply with GAAP, the reasons therefor;
- the accuracy of the underlying electronic claims database used by the Debtors to arrive at the GAAP reserve estimate;
- the Plan Proponents' asbestos liability estimate of $16 billion, and the accuracy of the underlying electronic claims database used to arrive at this estimate;
- the reasons for the Debtors' attempt to walk away from the representations contained in their current and prepetition SEC filings and to escalate their asbestos liability valuation estimate by more than $10 billion;
- the existence of fraud and/or other improprieties in connection with personal injury claims that were asserted against and/or settled by the Debtors prior to their bankruptcy, and which the Plan Proponents now seek to use as a basis for their $16 billion valuation;
- the Debtors' prepetition claims settlement history and strategies, including evidence regarding any infirmities that existed at the time in the procedural and legal frameworks in which claims against the Debtors were litigated, and that motivated the Debtors to pay enormous sums with claimants who had suffered no injury;
- the evidence of exposure -- or the lack thereof -- to the Debtors' products that was used to support the claims made against the Debtors;
- the medical evidence of exposure -- or the lack thereof -- to asbestos products that was used to support the claims made against the Debtors, including any challenges to that evidence;
- discovery from the initial B-readers who were the subject of the Johns Hopkins study and the B-readers for the prepetition claims asserted against the Debtors and/or settled by the Debtors to explore the reasons for the vast inconsistency between their conclusions, and discovery from other medical personnel who have conducted similar studies;
- the Debtors' defense costs and the effect thereof on the Debtors' settlement history of their asbestos claims;

- an analysis of the claims registers of other chapter 11 debtors and section 524(g) trusts in order to determine whether asbestos plaintiffs have made inconsistent or duplicative submissions against those other debtors and/or section 524(g) trusts; and

- the relationship, if any, between the projected claims estimated by the Debtors and the historical experience of other section 524(g) trusts.

The foregoing is merely a sample of the significant issues that will need to be examined carefully in discovery, particularly if the Plan Proponents seek to rely on the Debtors' prepetition asbestos claims and settlements to support their valuation of the claims that have been asserted since then or which they speculate will be asserted in the future. This discovery cannot be conducted in the absurdly-compressed amount of time contemplated by the Debtors' proposed Case Management Order -- particularly because it relates to a matter so critical to confirmation of any reorganization plan. The Debtors' proposed CMO and schedule for discovery on estimation contains numerous obvious flaws, including:

(1) The Debtors' proposal fails to provide any time for parties to obtain or review documents or information gathered in written discovery before depositions of fact witnesses begin (much less any time for resolution of any disputes over the information or documents produced pursuant to such written discovery). Thus, the Debtors propose that depositions begin on September 30, 2004, *only fifteen days after discovery requests are served on September 15, 2004. See* Debtors' proposed CMO at pp. 6-7. In order for depositions to be meaningful, the Banks will need to obtain the documents they request, have time to analyze those documents, and then prepare for ensuing depositions -- many of which will be highly technical and require the assistance of experts. Moreover, the Banks will require discovery from third parties, including

medical authorities, plaintiffs' attorneys and others involved with the asbestos litigation history that has led to this and numerous other bankruptcies. There may be a need to seek court assistance in enforcing these third-party subpoenas, as well as to compel compliance with discovery requests served upon the Debtors. The Debtors' proposed schedule simply ignores this feature of the litigation process, while the Banks' proposal incorporates a short period of time for discovery motions. *See* Banks' proposed CMO at II.E.

(2) The Debtors' proposal would allow only two and one-half months of deposition discovery regarding the Debtors' complicated claims history. *See* Debtors' proposed CMO at pp. 6-7. This is plainly insufficient to allow for the number of depositions that will need to be taken, and fails to provide time for the Banks to depose witnesses identified in other deposition testimony. Additionally, the Debtors' proposal would allow only ten (10) depositions of fact witnesses. The Banks respectfully submit that the issues involved in this $16 billion proceeding are far more extensive than an ordinary, run of the mill litigation. The Banks propose to increase the number of fact depositions to thirty (30), while reserving the right to seek additional depositions if facts uncovered in the discovery process so necessitate. Accordingly, to take account of the need to take these depositions, the Banks' proposed CMO provides for a period of six (6) months in which to take depositions of fact witnesses. *See* Banks' proposed CMO at III.B.

(3) The Debtors' proposed CMO provides for the simultaneous exchange of expert reports and simultaneous depositions of experts from the estimation proponents and any opponents. This would require opponents' experts to speculate

regarding what the estimation proponents intend to offer as evidence, and will not adequately frame the issue for the Court's consideration. As the movants, the Debtors and the other proponents of the Debtors' asbestos valuation have the burdens of proof and production on these matters, and it is therefore appropriate that they file their expert reports first, allowing the opposing parties to respond to the positions the movants set forth in their efforts to satisfy their burdens.

(4) The Debtors' proposed CMO would require all opponents to the Debtors' proposed estimation to act through one counsel, presumably the Banks' counsel. *See* Debtors' proposed CMO at pp. 3-5. This proposal is improper and would require counsel to potentially owe duties to entities other than its client, notwithstanding potential or actual conflicts of interest. Parties must be permitted to engage and act through their own attorneys. Moreover, given that this is not a case where there appear to be a large number of parties involved in the estimation litigation, the limitation which the Debtors seek to impose here is entirely unnecessary.

By contrast, the Banks' proposed CMO is reasonable, efficient and fair, and will better assist the District Court in resolving the critical estimation dispute. For example, the Banks' proposed CMO provides that all parties will promptly request documents, interrogatories and admissions prior to the commencement of depositions, and includes a short period for parties to litigate discovery disputes. Similarly, the Banks' proposed CMO provides an adequate amount of time to conduct the numerous depositions that will be required in these cases. Finally, the Banks' proposed CMO provides for sufficient time for the parties' experts to review and analyze the claims filed as a result of the establishment of a bar date, as well as the sequenced filing of expert

reports which will be necessary so that parties opposing estimation can prepare expert reports that are responsive to the reports prepared by the Debtors' experts.[2]

The Debtors should not be heard to complain at this juncture that estimation should now be rammed through on a ridiculously short schedule, rather than being conducted in a manner that affords a reasonable opportunity for the parties to fairly litigate these issues. The Debtors have frustrated virtually every attempt the Banks have made to obtain discovery to date on virtually any issue. They have also steadfastly opposed the establishment of an asbestos personal injury bar date, after having originally indicated that they would seek to have such a bar date established, while the Committee's motion for a bar date, supported by the Banks, has now been pending for some fifteen months. The Banks' proposed CMO is not "delay for delay's sake," but a reasonable schedule that takes into the account the facts and circumstances of these cases.

While the Banks recognize that their proposed CMO provides for a somewhat longer track than the inappropriately truncated schedule provided for in the Debtors' proposed CMO, due process must not be sacrificed in the name of speed. The relevant and legitimate areas of inquiry in these cases are many, complicated, and critical to the integrity of the judicial process and the District Court's ability to decide the

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[2] Additionally, the Debtors' proposed CMO does not address providing a single electronic claims database for all parties' experts to use in preparing their estimates of the asbestos liabilities. Nor does the Debtors' proposed CMO provide for any validation testing by the parties of the information contained in the electronic claims database to the underlying documents. The Banks respectfully submit that this "one database" concept would be useful to ensure that all parties begin building their estimates from the same basic data, and that any flaws or errors in such data are brought to light and resolved among the parties expeditiously. The timeframe contained in the Banks' proposed CMO hopefully will provide sufficient time for the parties to reach agreement on the database, and, failing such agreement, to address the issue to the Court.

estimation issue which is crucial to any reorganization plan in this case. In fact, we believe that discovery will show, and the District Court will ultimately conclude, that the Debtors' prepetition settlement conduct -- upon which the Plan Proponents will now seek to base their $16 billion valuation -- was fraught with the misconduct of medical professionals, legal professionals and perhaps the management of the Debtors themselves. The Debtors' proposed schedule is a transparent attempt to block the Banks and the District Court from scrutinizing these important matters. The Court should not allow such a cover up.

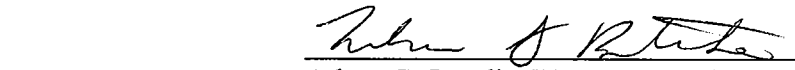
Conclusion

For the foregoing reasons, Credit Suisse First Boston, as Agent, requests that the Court defer the imposition of a Case Management Order with respect to asbestos-related personal injury claims estimation until the District Court has issued its rulings on (i) the pending motion to establish a bar date for such claims; and (ii) the pending motion before the District Court to withdraw the reference with respect to estimation of such claims. In the event the Court elects to go forward with the imposition of a Case

Management Order, the Banks respectfully expressly reserve all of the Banks' rights with respect to these matters, and further request that the Debtors' Motion be denied and that Credit Suisse First Boston's proposed Case Management Order, attached hereto as Exhibit B, be entered.

Dated: August 6, 2004

LANDIS RATH & COBB LLP



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