UNITED STATES DISTRICT COURT
DISTRICT OF DELAWARE

OWENS CORNING, *et al.*,	:	
	:	**Civil Action**
v.	:	
	:	**No. 04-905**[1]
CREDIT SUISSE FIRST BOSTON, AS AGENT	:	

MOTION OF CREDIT SUISSE FIRST BOSTON, AS AGENT, FOR ORDER BARRING PLAN PROPONENTS FROM OFFERING EVIDENCE OR TESTIMONY FOR PURPOSE OF CHALLENGING STATISTICAL VALIDITY OF METHODS OR SAMPLES UNDERLYING CERTAIN MEDICAL REPORTS

TO THE HONORABLE JOHN P. FULLAM
UNITED STATES DISTRICT JUDGE:

Credit Suisse First Boston ("CSFB"), as agent for the prepetition bank lenders to Owens Corning and certain of its affiliates (the "Banks"), respectfully moves this Court, based on CSFB's brief, dated January 5, 2005 (the "Brief"), for an order barring the Plan Proponents—consisting of Owens Corning and its seventeen affiliated debtors and debtors in possession (collectively, the "Debtors"), the Official Committee of Asbestos Claimants, and the Legal Representative for Future Claimants—from offering evidence or testimony for the purpose of challenging the statistical validity of the methods or samples underlying certain Medical Reports (as defined in the Brief) at the preliminary estimation hearing in the above-captioned case, to commence on January 13, 2005.

The facts and circumstances supporting this Motion and grounds therefore are set forth in the Brief filed herewith.

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[1] Pursuant to the Court's November 23, 2004 Order, a copy of this Motion and the Brief will be filed simultaneously in the United States Bankruptcy Court for the District of Delaware in *In re Owens Corning, et al.*, Ch. 11 Case Nos. 00-3837 to 00-3854.

Oral argument is waived unless an objection is filed.

WHEREFORE CSFB, as Agent for the Banks, respectfully requests entry of an order granting the relief requested herein. A proposed form of order approving the Motion is annexed hereto as Exhibit "A."

Dated: January 5, 2005

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STATEMENT PURSUANT TO D. DEL. L.R. 7.1.1

Credit Suisse First Boston, as agent for the pre-petition bank lenders to Owens Corning and certain of its affiliates (the "Banks") hereby state that they conferred with counsel for the Plan Proponents regarding the substance of the Motion of Credit Suisse First Boston, as Agent, for Order Barring Plan Proponents from Offering Evidence or Testimony for Purpose of Challenging Statistical Validity of Methods or Samples Underlying Certain Medical Reports (the "Motion"). The parties were unable to reach an agreement on the matters addressed in the Motion.

Dated: January 5, 2005

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EXHIBIT A

UNITED STATES DISTRICT COURT
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CREDIT SUISSE FIRST BOSTON, AS AGENT	:	

ORDER BARRING PLAN PROPONENTS FROM OFFERING EVIDENCE OR TESTIMONY FOR PURPOSE OF CHALLENGING STATISTICAL VALIDITY OF METHODS OR SAMPLES UNDERLYING CERTAIN MEDICAL REPORTS

Upon consideration of the motion of Credit Suisse First Boston ("CSFB"), as agent for the prepetition bank lenders (the "Banks") to Owens Corning and certain of its affiliates (the "Motion") and brief in support thereof (the "Brief") for an order barring the Plan Proponents—consisting of Owens Corning and its seventeen affiliated debtors and debtors in possession (collectively, the "Debtors"), the Official Committee of Asbestos Claimants, and the Legal Representative for Future Claimants—from offering evidence or testimony for the purpose of challenging the statistical validity of the methods or samples underlying certain Medical Reports (as defined in the Brief) at the preliminary estimation hearing in the above-captioned case, to commence on January 13, 2005 (the "Estimation Hearing"); and it appearing that the Court has jurisdiction to consider and determine the Motion pursuant to 28 U.S.C. § 1334; and it appearing that

[1] Pursuant to the Court's November 23, 2004 Order, a copy of the Motion and this Brief will be filed simultaneously in the United States Bankruptcy Court for the District of Delaware in *In re Owens Corning, et al.*, Ch. 11 Case Nos. 00-3837 to 00-3854.

due and proper notice of the Motion has been given; and it appearing that the relief requested in the Motion is necessary; and after due deliberation and sufficient cause appearing therefore; this _____ day of January, 2005, it is hereby:

ORDERED that the Motion is granted; and it is further

ORDERED that the Plan Proponents are barred from offering evidence or testimony at the Estimation Hearing for the purpose of challenging the statistical validity of the methods or samples used in the Medical Reports.

_____
United States District Judge

UNITED STATES DISTRICT COURT
DISTRICT OF DELAWARE

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BRIEF IN SUPPORT OF MOTION OF CREDIT SUISSE FIRST BOSTON, AS AGENT, FOR ORDER BARRING PLAN PROPONENTS FROM OFFERING EVIDENCE OR TESTIMONY FOR PURPOSE OF CHALLENGING STATISTICAL VALIDITY OF METHODS OR SAMPLES UNDERLYING CERTAIN MEDICAL REPORTS

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Dated: January 5, 2005

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By its Motion dated January 5, 2005, filed contemporaneously herewith, Credit Suisse First Boston ("CSFB"), as agent for the prepetition bank lenders (the "Banks") to Owens Corning and certain of its subsidiaries, requests an order barring the Plan Proponents—consisting of Owens Corning and its seventeen affiliated debtors and debtors in possession (collectively, the "Debtors"), the Official Committee of Asbestos Claimants (the "ACC"), and the Legal Representative for Future Claimants (the "Futures Representative")—from offering evidence or testimony at the January 13, 2005 preliminary estimation hearing for the purpose of challenging the statistical validity of the methods or samples used in two recent studies—the report of Owens Corning's medical

[1] Pursuant to the Court's November 23, 2004 Order, a copy of the Motion and this Brief will be filed simultaneously in the United States Bankruptcy Court for the District of Delaware in *In re Owens Corning, et al.*, Ch. 11 Case Nos. 00-3837 to 00-3854.

expert Dr. Gary K. Friedman (the "Friedman Report")[2] and the report performed by a team at Johns Hopkins Medical Institutions (the "Johns Hopkins Study"),[3] which establish serious medical deficiencies in the evidence plaintiffs have submitted in support of nonmalignant claims against Owens Corning. (The Friedman Report and the John Hopkins Study are together referred to as the "Medical Reports.")

The Plan Proponents should be precluded from attacking the statistical validity of the Medical Reports because they actively and successfully opposed CSFB's motion to conduct a study of X-rays and other medical records based on a statistically significant sample and methodology that would have addressed and resolved the technical statistical objections to the Medical Reports which the Plan Proponents now plan to assert at trial.[4] As CSFB previously argued in connection with the Medical Records Motion: "the Plan Proponents should be ordered to make a simple choice: they should either be ordered to cooperate in the proposed study so that it can be conducted expeditiously, or they should be precluded from voicing any objection to the size or randomness of the samples used by Drs. Friedman and Gitlin."[5] The Plan Proponents

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[2] Gary K. Friedman, M.D., *Owens Corning Impaired Nonmalignant Claim Submissions 1994-1999.*

[3] Joseph N. Gitlin, *et al.*, *Comparison of "B" Readers Interpretations of Chest Radiographs For Asbestos Related Changes*, 11 J. Acad. Radiol. 843 (2004).

[4] (Motion of CSFB, as Agent, to Establish Procedures to Obtain a Sample of Medical Records, Including X-rays, from Asbestos Personal Injury Claimants Asserting Nonmalignant Claims Against the Debtors and to Modify the Court's August 19, 2004 Scheduling Order, dated Oct. 4, 2004 [hereinafter *Medical Records Motion*].)

[5] (Reply Brief in Support of Motion of CSFB, as Agent, to Establish Procedures to Obtain a Sample of Medical Records, Including X-rays, from Asbestos Personal Injury Claimants Asserting Nonmalignant Claims Against the Debtors and to Modify the

made their choice: They opposed the Medical Records Motion that would have addressed their technical objections—and argued that the study requested therein would have been "cumulative"—rather than give the Banks, the Court, and themselves the opportunity to resolve those concerns. Under these circumstances, having affirmatively opposed the course requested by CSFB that would have addressed and resolved their technical objections, the Plan Proponents should not be permitted to turn around at trial and attack the Medical Reports based on purported statistical concerns that would have been obviated but for their conduct.

ARGUMENT

I.

THE PLAN PROPONENTS SHOULD BE BARRED FROM CHALLENGING THE VALIDITY OR SIGNIFICANCE OF THE FRIEDMAN REPORT OR THE JOHNS HOPKINS STUDY

On October 4, 2004, CSFB moved for an order seeking a sample of medical records from asbestos personal injury claimants asserting nonmalignant claims against Owens Corning as detailed in the Medical Records Motion. The need for such a sample in the context of estimating the Debtors' future asbestos liability was emphasized by Dr. Friedman—the Debtors' own expert, paid with assets of the Debtors' estates—who wrote "the single greatest factor which may determine the future number of unimpaired nonmalignant claims rests largely on the willingness of all parties to provide for ongoing review of the claims and the underlying data including X-rays and PFTs." (Friedman Report at 35.)

Court's August 19, 2004 Scheduling Order, dated Oct. 28, 2004 at 6 [hereinafter *Medical Records Reply Brief*].)

The Medical Records Motion would have permitted all parties access to a randomly selected, statistically significant set of claimants' medical records. Each party could have participated in designing an appropriate study, generated its own analysis of the medical records, and drawn its own conclusions for estimation purposes. (*See* Brief in Support of Motion of CSFB, as Agent, to Establish Procedures to Obtain a Sample of Medical Records, Including X-rays, from Asbestos Personal Injury Claimants Asserting Nonmalignant Claims Against the Debtors and to Modify the Court's August 19, 2004 Scheduling Order, dated Oct. 4, 2004, at 30-31.)

The Plan Proponents opposed the Medical Records Motion. The Debtors argued that it should be denied because the proposed study was "essentially cumulative of the Friedman Report and the Gitlin Study." (Debtors' Objection to the Medical Records Motion at 2.)[6] The Debtors conceded that Dr. Friedman's conclusion that the vast majority of nonmalignant asbestos claimants are unimpaired "has long been common knowledge," and that the issue with plaintiffs' attorney-sponsored B-readers addressed by the Johns Hopkins Study (and the Friedman Report) "has long been publicized." (*Id.* at 15-16.) The ACC also argued that the Medical Records Motion should be denied on similar grounds because a study would "prove nothing that the settlement history does not already reflect," and any notion that a new study would prove "something that Owens

[6] Of course, given that the ACC and Futures Representative had already attacked the methodology and sample size of the Friedman Report, the Debtors' argument was inappropriate.

Corning did not already know and take into account in its decision to settle or try cases is pure sophistry." (Objection of the ACC to the Medical Records Motion at 3, 4.)[7]

While the Plan Proponents were, on the one hand, arguing that any new study would be cumulative of the Medical Reports, with the other hand they vituperatively attacked both the statistical methodology and sample of the Medical Reports in their expert reports. The ACC's expert, Dr. Peterson, posited a similar criticism of the Banks' proposed study in his report. In response, the Banks offered to "cast a wider net" in an effort to resolve any concerns related to the proposed sample. (*Medical Records Reply Brief* at 17 n.21.) The Banks were also willing to design a study that met Dr. Peterson's specific concerns about methodology and sampling. (*Id.* at 18.)

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[7] The Plan Proponents' "cumulative" argument is in one important respect essentially correct, as it is beyond dispute that virtually every study confirms that asbestos plaintiffs routinely submit spurious evidence in support of nonmalignant claims. In addition to the Friedman Report and the Johns Hopkins Study, Owens Corning commissioned a study by Dr. Robert Crapo, a highly respected and credentialed pulmonologist, of over 50,000 pulmonary function tests submitted by plaintiffs' attorneys in the 1990s, which found substantial defects in an overwhelming percentage of those tests. Dr. Robert O. Crapo & Dr. Robert L. Jenson, *Pulmonary Function Test Investigation* (Dec. 10, 1998). Dr. Gitlin, the author of the Johns Hopkins Study, also did a study in 1998 for Owens Corning which found massive over-reading of X-rays by plaintiff-selected B-readers; a panel of medical experts appointed in nonmalignant asbestos cases by U.S. District Court Judge Carl Rubin found that 65% of the claims had no evidence of any asbestos-related disease (i.e., not just no injury, but no disease at all). *See* Carl Rubin & Laura Ringenbach, *The Use of Court Experts in Asbestos Litigation*, 137 F.R.D. 35, 38 (1991); R.B. Reger, *et al.*, *Cases of Alleged Asbestos-Related Disease: A Radiologic Re-Evaluation*, 32 J. Occup. Med. 1088 (1990) (finding that of 439 X-rays reviewed and found positive for asbestos-related disease by plaintiffs' experts, a likely prevalence of asbestos-related conditions existed in between only eleven and sixteen people – or 2.5 to 3.5%).

Moreover, Dr. Friedman's statistically tested calculation that at most 13.3% of future nonmalignant claimants were likely to qualify as "impaired" is fully consistent with the testimony of Owens Corning's own lawyers who oversaw asbestos litigation in the mid to late 1990s. (*See* Deposition of Clyde Leff at 120.)

The Banks also placed the Plan Proponents squarely on notice that if they persisted in objecting to a study of medical records, and the Medical Records Motion were denied, the Banks would assert, as they do now, that the Plan Proponents should be precluded at trial from lodging their objections to the statistical validity of either study, which would have been addressed and resolved but for their opposition and refusal to cooperate. (*Id.* at 6.)

The Court denied the Medical Records Motion on November 22, 2004, noting that there is "substantial evidence to support the notion that Owens Corning's history of dealing with asbestos claims has included payments to large numbers of claimants who actually sustained little or no harm from their exposure to Owens Corning's products." (Memorandum and Order, dated Nov. 22, 2004 (the "November 22 Order").[8]) The Medical Reports are critical components of this "substantial evidence." Moreover, they constitute important evidence that Owens Corning paid thousands of claims based on medical reports that are now known to have been false or medically untenable. The conclusions in the Medical Reports are important to this case, because they provide significant evidence that Owens Corning would not have paid in the past—and, more importantly, would not pay in the future—a great many of the claims in the prebankruptcy data base from which the ACC's and the Futures Representative's

[8] Although not an issue in the Motion, the Banks will establish that many past claimants did not establish that they were ever exposed to Owens Corning's products and that reasonable product identification standards are necessary to ensure that only claimants who can prove injury by Owens Corning can recover.

respective experts inappropriately seek to extrapolate in forecasting the number of nonmalignant claims that would be paid in the future.[9]

In discovery, the Plan Proponents have continued their attacks on the samples and methodologies of the Medical Reports. Undoubtedly, they will seek to do so at the estimation hearing as part of their effort to divert attention from the fact that the Medical Reports demonstrate how frequently people with minimal or no injury submitted asbestos claims supported by bogus medical evidence. The Plan Proponents should not be permitted to do so in light of their opposition to the Medical Records Motion.

Moreover, any contention by the Plan Proponents that they objected to the study because the Medical Records Motion was untimely is groundless in light of the undisputed fact that the Debtors withheld the Friedman Report—and fought to avoid producing it to the Banks—for two years, until the fall of 2004, after this Court had already scheduled the January 13 estimation hearing.

In sum, the Plan Proponents should be required to live with the consequences of their choices, rather than to exploit them unfairly. Accordingly, CSFB requests that the Court enter an order barring the Plan Proponents from offering any evidence or testimony for the purpose of challenging the validity of the samples underlying the Medical Reports or the methods that Dr. Friedman or Dr. Gitlin employed to analyze the samples on which their respective reports were based.

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[9] Dr. Vasquez, the Debtors' own expert, made a substantial adjustment to decrease the amount of money to be paid to unimpaired nonmalignant claims (almost all of which rely on the type of unreliable evidence highlighted in the Medical Reports) in his forecast based on the Friedman Report. Dr. Vasquez's estimation of Owens Corning's future asbestos liabilities for unimpaired nonmalignant claims is consistent with the Banks', and a small fraction of the ACC's estimation.

II.

ALTERNATIVELY, THE PROPOSED STUDY OF THE MEDICAL RECORDS SHOULD BE PERMITTED TO ASSIST IN ESTIMATING FUTURE LIABILITY

In the November 22 Order, the Court stated that if the information "now available proves insufficient to enable a reasonably correct estimate of future claims," that issue would be addressed at the estimation hearing. (November 22 Order at 2.) If the Plan Proponents are permitted to attack the Medical Reports, the Banks believe there will be insufficient evidence to make a reasonable estimate of the number of *valid* and *legitimate* nonmalignant current and future claims against Owens Corning. Therefore, the Banks respectfully submit that the study of medical records proposed in the Medical Records Motion be granted in the event the Plan Proponents are not precluded from introducing evidence designed to undermine the Medical Reports.

CONCLUSION

For the foregoing reasons, the Motion to bar the Plan Proponents from putting forth certain testimony and evidence should be granted.

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