

**IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE**

IN RE:	:	Chapter 11
	:	
OWENS CORNING, <i>et al.</i>,	:	Case Nos. 00-3837 (JKF)
	:	
Debtors.	:	(Jointly Administered)
		Related to Docket No. 11719
		Hearing Date: June 21, 2004 at 10:00 a.m.

**RESPONSE AND OBJECTION OF DEBTORS TO MOTION OF CREDIT
SUISSE FIRST BOSTON, AS AGENT, KENSINGTON INTERNATIONAL, LIMITED,
SPRINGFIELD ASSOCIATES, LLC AND ANGELO GORDON PURSUANT TO 11
U.S.C. § 1104 FOR APPOINTMENT OF CHAPTER 11 EXAMINER**

Owens Corning and its affiliated debtors and debtors-in-possession (collectively, the “Debtors”) hereby respond and object to the Motion of Credit Suisse First Boston, as Agent, Kensington International, Limited, Springfield Associates, LLC and Angelo Gordon (the “Bank Debt Holders”) pursuant to 11 U.S.C. § 1104 for Appointment of Chapter 11 Examiner (the “Examiner Motion”).

INTRODUCTION

The proposed plan of reorganization (as amended) (the “Plan”) pending before this Court is the product of a two-year process of extensive discovery and intensive negotiations in which all creditor constituencies, including the Bank Debt Holders, have fully participated. Prior to October 2002, the Bank Debt Holders were active participants in every aspect of this plan negotiation process. Since that time, upon perceiving that the plan negotiation process was moving inexorably towards a result that did not give them a one-hundred percent recovery, the Bank Debt Holders have undertaken a “no holds barred” effort to obstruct any further progress towards this Court’s consideration of the Plan.¹ The Bank Debt Holders’ self-interested

¹ For example, since August 2003, the Bank Debt Holders or their designee, the Official Committee of Unsecured Creditors (“Creditors Committee”), has (a) asserted literally dozens of objections to the Debtors’

campaign to derail, or at least delay, the Plan has reached a new level of urgency now that it is clear that they are the only constituency in this case that has not agreed to terms of a consensual plan of reorganization.

The Bank Debt Holders do not care about what is best for this case or this estate, notwithstanding their transparent protestations to the contrary. They are the only constituency on the outside looking in, and their actions make it clear that they will stop at nothing to derail progress that is not in their interests. They are determined to say anything, allege anything, and argue anything they think will stop this Plan and the Debtors' progress in this case, no matter what relation it has to the facts and the law or other matters already heard and/or decided by the Court. They have chosen to intentionally and repeatedly distort the facts and record in this case. All of their actions and the credibility of those actions should be viewed with that constantly in mind.

In their zeal to impose another roadblock to confirmation, the Bank Debt Holders ignore the fact that this Court has already appointed an examiner (and, thus, satisfied 11 U.S.C. § 1104(c)(2)) and that such appointment order has been appealed, divesting this Court of jurisdiction. In addition, this Motion facially conflicts with the pending motion to appoint a Chapter 11 trustee (the "Trustee Motion") filed by the Official Committee of Unsecured Creditors (the "Creditors Committee"), which has been supported by the Bank Debt Holders. Indeed, the dilatory nature of this new Examiner Motion is well-demonstrated by the Bank Debt Holders' choice to pursue both types of remedies under section 1104. As the appointment of a

proposed disclosure statement; (b) moved twice to appoint a Chapter 11 trustee for the Debtors' estates; (c) moved to "reconstitute" the Official Committee of Asbestos Claimants; (d) moved to impose a constructive trust on assets in the Debtors' estates; (e) sought to remove the Futures Representative on the grounds of alleged conflicts of interests; (f) moved to recuse Judge Wolin; (g) sought to disqualify the Court-appointed mediator in this case; and (h) now seek the appointment of an examiner.

trustee would render this Examiner Motion moot, any proceedings on this Motion must be stayed pending the resolution of the Trustee Motion.

The Bank Debt Holders do not present appropriate grounds to expand the investigation of the existing examiner: (a) the Examiner Motion improperly seeks to re-litigate issues already decided or currently pending before this or another Court; (b) the Examiner Motion seeks discovery of non-discoverable matters regarding the negotiations that led to the formation of the Debtors' Plan that are irrelevant and/or inadmissible even as a plan objection; (c) this Court, having granted one motion to appoint an examiner which has been appealed, lacks jurisdiction and authority to appoint a second examiner in this case; and (d) the plan that the Debtors will seek to confirm will be significantly different from the Debtors' current plan because of the recent settlement with the bondholders and trade creditors (as further described herein).

Debtors respectfully submit that this Court should consider invoking its inherent power under 11 U.S.C. § 105 to strike *sua sponte* this Examiner Motion as it is so burdened with improper, inaccurate and scurrilous allegations and blatant misrepresentations that are over the line and are not worthy of consideration.

THE DEBTORS' FIDUCIARY DUTIES

The Bank Debt Holders have always faced the prospect throughout this case that, unless they came to a negotiated resolution, the Debtors could propose a plan of reorganization that was negotiated with other creditor constituencies that proposed a substantive consolidation of the Debtors. Indeed, almost two years ago, the Bank Debt Holders' counsel openly discussed this prospect:

MR. ECKSTEIN: Your Honor . . . I can't project -- I don't know what plan the Debtor is going to file, but I'm anticipating realistically, Your Honor, that the Debtor will put forth a plan that is not negotiated with the banks. I'm concerned about that. I've been concerned about that for a while. And based upon the lack of

dialogue, I think I have reason to be concerned about that. I'm concerned about it, and I'm concerned that it will contemplate the possibility that if a plan is not accepted at some point 12 months in the future, that at that point in time the Debtor may want to proceed with a substantive consolidation based upon pressure it may feel from other constituents in this case. That is a reality we have to grapple with. . . .

June 20, 2002 Hearing Transcript, at 87-88 (Fitzgerald, J.) (attached hereto as Ex. A) (emphasis added). Debtors' counsel responded to those concerns at that hearing:

MR. PERNICK: [J]ust because a confirmable plan gets filed doesn't mean, as the Court well knows, that it doesn't end up as a consensual plan. We will try our best to get everyone on board. If someone is left out and is not on board right away, I don't expect that negotiations are going to stop particularly with what will prove to be a protracted confirmation hearing. It's not going to be a one-day hearing to get these issues resolved

Id. at 100-101. Put simply, the fact that the Debtors have proposed a Plan negotiated with asbestos claimants arises not out of any breach of the Debtors' fiduciary duties but because the Bank Debt Holders failed to reach a deal first. Moreover, the fact that this Plan has been proposed does not cut off the prospect that the Bank Debt Holders may reach a consensual resolution at some point in the confirmation process.

The Court has recently stated, in the context of the Trustee Motion, that the Debtors' actions are fully in accord with their fiduciary duties:

I do disagree that the debtor is not acting in a fiduciary capacity. I think the debtor has been very diligent in attempting to get the parties together to settle.

December 1, 2003 Hearing Transcript, at 99 (Fitzgerald, J.) (attached hereto as Ex. B). At the same hearing, this Court said:

But for asbestos liabilities [Owens Corning] appears to be a very sound business that ought to be around for a very long time and, therefore, I have some difficulty understanding how management

in that sense, in a financially responsible sense in terms of operating the business is grossly mismanaging the business.

Id. at 83. Nothing has changed.

The Debtors have conducted this case in a manner that is fully within their business judgment, and well within their fiduciary duties. The Bank Debt Holders' allegations have all been heard before, have been actually or implicitly rejected by this Court,² or will properly be heard as part of the confirmation hearing (a result that the Bank Debt Holders have continuously and steadfastly been trying to avoid):

- that the Debtors should have sought the establishment of a bar date for asbestos claims (bar date motion stayed by District Court and will presumably be considered by Judge Fullam);
- that the Debtors should have objected to “unimpaired” and other asbestos personal injury claims (no objection is required, asbestos claim values will be set at the confirmation hearing through the estimation process (*see* Manual for Complex Litigation (Fourth) § 22.56 at 397 (2004)));
- that the Debtors should have pursued litigation to recover settlement funds paid to asbestos claimants prior to the Debtors' bankruptcy filing (tolling agreements or adversary proceedings filed and stay orders entered by the Bankruptcy Court after notice and a hearing);
- that the Debtors' proposed plan of reorganization contains improper incentive payments for management (a confirmation objection that will be decided by the Court when the final plan is considered); and
- generally, that the Debtors have “sold out” to asbestos claimants (nonsense). *See, e.g.*, Examiner Motion, at ¶¶ 4, 9, 10, 19, 29, 30, 46-53, 61-62.

The Debtors firmly believe that they are pursuing the best and most appropriate strategy to realize a fair and equitable resolution of their bankruptcy case, for the benefit of all parties-in-interest. More important than the Debtor's belief, the facts prove this. The official

² *See* Response and Objection of Debtors to Motion of Unsecured Creditors Committee for Appointment of Chapter 11 Trustee (Docket No. 9977), filed November 21, 2003.

representatives of every other constituency in this case have agreed to the terms of a consensual plan of reorganization. The Debtors' strategy has taken time but it has worked.

The Debtors are pleased to report that on June 7, 2004, the Debtors and the Designated Members of the Creditors Committee, the Asbestos Claimants Committee (the "ACC") and the Legal Representative for Future Claimants (the "Futures Representative," and together with the ACC, the "Asbestos Claimants") announced the execution of a term sheet (the "Bondholders Agreement") by which all of the parties agreed to support a modified form of the Debtors' plan, also supported and joined by the Asbestos Claimants. The Bondholders Agreement is the culmination of many months of good-faith, arms-length negotiations and represents what the Debtors believe is a fair and reasonable compromise among the parties involved. A copy of the Bondholders Agreement has been filed with the Court.

All that is left is the Bank Debt Holders, a group of creditors that believes that the only acceptable plan of reorganization involves total capitulation and subordination to their demands. The disputes outlined in the Examiner Motion are already before the Court. Two of the key issues in this case -- asbestos valuation and substantive consolidation -- will be determined by this or another Court, as will the entitlement of the Debtors' management to the incentive payments contained in the Debtors' plan.³ Causes of action regarding the Debtors' pre-petition settlement payments to asbestos claimants and their law firms have been dutifully preserved with Court approval and will be pursued as appropriate by a litigation trustee approved by the Court, after notice to parties-in-interest. The fact that the Bank Debt Holders would have pursued a different strategy regarding these matters cannot support a finding that the Debtors have

³ Up until recently, the Bank Debt Holders' main issue has not been whether those key issues will be decided by the Court, but whether they will be decided in the context of the confirmation hearing on the Plan (as advocated by the Debtors) or as separate issues that can be separately appealed.

breached their fiduciary duties. In reality, the Bank Debt Holders sought a plan that would pay the Bank Debt Holders in full while paying all other creditors substantially less. If the Debtors believed that this approach was an appropriate exercise of their fiduciary duties, a different plan would be on the table.

**THE EXAMINER MOTION IS REPLETE WITH FACTUAL
MISSTATEMENTS AND MATERIAL OMISSIONS**

Out of respect for the dignity of the Court, Debtors have refrained from responding in kind to the unbridled mud-slinging and dilatory pleadings brought by the Bank Debt Holders, but this wholly unnecessary Examiner Motion is beyond the pale. As explained below, the Examiner Motion is so rife with misrepresentations, inaccuracies and half truths, this Court should consider whether it should be stricken *sua sponte*.⁴

a. The Bank Debt Holders Distort the Third Circuit’s Ruling on the Mandamus Petition. The inference on which much of the Examiner Motion rests is that the Debtors’ asbestos creditors and/or the “conflicted advisors” had improper *ex parte* contacts with Judge Wolin, who then improperly directed the Debtors to redraft their proposed plan of reorganization so as to be acceptable to the Asbestos Claimants. Nothing could be further from the truth. First, the Third Circuit specifically found that:

We emphasize that our review of the record has not revealed the slightest hint of any actual bias or partisanship by Judge Wolin. On the contrary, Judge Wolin has throughout his stewardship of the Five Asbestos Cases exhibited all of the judicial qualities, ethical conduct and characteristics emblematic of the most experienced, competent, and distinguished Article III jurists.

⁴ The following list of the Bank Debt Holders’ transgressions in describing the factual background to the Examiner Motion is not intended to be exhaustive.

In re Kensington Int'l, No. 03-4212, slip op. at 6 (3d Cir. May 17, 2004). It is impossible to reconcile the Third Circuit's conclusion regarding Judge Wolin's conduct with the Bank Debt Holders' assertions that he did something wrong.

Second, the draft plan circulated by the Debtors on October 31, 2002 for discussion purposes only provided, and the numerous discussions on the record before this Court made clear, that the draft plan contemplated that the two main issues in this case -- substantive consolidation and asbestos valuation -- would be litigated as part of the confirmation proceedings. *But see* Examiner Motion ¶ 22 n.5 (asserting that these issues were to be litigated before the plan hearing). The Bank Debt Holders ignore the fact that, even before the draft plan was circulated, the Debtors openly discussed on the record their strong preference to litigate the substantive consolidation and asbestos valuation issues as part of the Plan confirmation process:

THE COURT [Judge Fitzgerald]: Okay. So unless the banks intend to file something more, at this point your expectation is you want to do the fraudulent conveyance litigation and whatever other inter-creditor issues [including substantive consolidation] may be encompassed within the plan in conjunction with the plan hearing.

MR. MONK: That's correct.

THE COURT: The banks, however, may want to move forward on the fraudulent conveyance and declaratory judgment actions [including substantive consolidation] independently from the plan process.

MR. MONK: Right. As Mr. Eckstein has consistently reminded us, he'd like to have a separate decision-making on that process, and we think it can be resolved as part of the plan.

October 28, 2002 Hearing Transcript, at 47-48 (attached hereto as Ex. C). The Bank Debt Holders have always been aware that the draft plan made no change in the Debtors' previously-

held position that the asbestos claim valuation and substantive consolidation issues should be litigated within the plan confirmation proceedings. Accordingly, no evidentiary support exists for the charge that the Debtors were improperly influenced to adopt this approach after November 19, 2002. The “influence” that the Bank Debt Holders cite as a motivating factor for the Plan simply did not exist. There is no need for an examiner to review this record again; the result will not change.

b. The Bank Debt Holders Grossly Misquote the Record. In a further effort to create a sense of impropriety, the Bank Debt Holders purport to quote Mr. Inselbuch in Paragraph 42 of their Motion as follows:

“I had been back stage with Judge Wolin and I had an *ex parte* conversation with Judge Wolin and turned him around on an issue that was of some importance to them . . . [F]orget about the fact that he was talking to Joe Rice sometime and he was talking to Perry Weitz. They saw me come out of his chambers on April 21st and they said ah-ha, Inselbuch was back there with the judge and he did it to us.”

Examiner Motion, ¶ 42, at p. 22. The Bank Debt Holders use this purported quotation to support numerous assertions regarding alleged improper *ex parte* communications with Judge Wolin. *See* Examiner Motion, ¶¶ 43-45. However, the complete text of Mr. Inselbuch’s remarks - - which is materially different from the quote cited in the Examiner Motion - - puts the lie to these assertions:

THE COURT: You recall probably Mr. Neal saying
--

MR. INSELBUCH: Yes, I do.

THE COURT: -- he ticked off a number of those conversations and the people involved and then he said I didn't know about it until sometime in September of 2003.

MR. INSELBUCH: Yes. But what he didn't talk about, although he makes a big fuss about it in his brief, is the so-called ex parte conversation that I was supposed to have had with Judge Wolin in April --

THE COURT: Is this part of the record in this case?

MR. INSELBUCH: Oh, yes. It's in his brief. In April of 2003, although he's happy with the February 2003 decision by Judge Wolin, he is not so happy with what happened after that. And there's a whole lot of stuff about that in the record. But the point, the simple point I want to make, they said to this court that they believed on April 21st or 22nd, 2003 that I had been back stage with Judge Wolin and I had an ex parte conversation with Judge Wolin and turned him around on an issue that was of some importance to them. Now the fact that it didn't happen is not relevant to what they thought at the time. But if they thought that at the time. If they thought -- forget about that he was talking to Joe Rice sometime and he was talking to Perry Weitz. They saw me come out of his chambers on April 21st and they said ah-hah, Inselbuch was back there with the judge and he did it to us. Well then where were they on April 22nd, 23rd, 24th and 25th? I submit that it's a contrivance to say ah, we didn't think about these things until David Gross was going to be suggested to be a mediator in USG.

April 19, 2004 Third Circuit Oral Argument Transcript, at 154-55 (emphasis added) (Fuentes, Smith and Garth, JJ) (attached hereto as Ex. D).

The difference between the Movant's recitation of Mr. Inselbuch's comments and the actual substance of such comments is not a mere typographical error.

c. The Bank Debt Holders Ignore Relevant Court Orders. The Bank Debt Holders' selective advocacy does not end there. They have omitted key rulings by this Court and the District Court that relate directly to their factual allegations. In paragraph 4 of the Examiner Motion, the Bank Debt Holders allege that the Debtors have "blocked" the prosecution of certain "NSP-related" fraudulent conveyance actions against certain asbestos claimant law firms, "blocked" discovery needed to support a motion for the appointment of a

Chapter 11 trustee, and failed to set a bar date. Examiner Motion, ¶ 4. Incredibly, nowhere does the Bank's 52-page motion acknowledge that each of these alleged actions was sanctioned by this Court or by the District Court.

- The NSP actions. As the Court is well aware, the Debtors have preserved their potential causes of action against law firms which settled asbestos-related claims immediately prior to the Debtors' bankruptcy filing. The Debtors obtained tolling agreements from the putative law firm defendants; where tolling agreement were unavailable, the Debtors filed adversary proceedings to preserve their claims.⁵ Indeed, in September 2002, after a lengthy discussion regarding the NSP actions in which the Creditors Committees' counsel also suggested that an examiner or trustee review the NSP actions, the Court recognized the Debtors' diligence stating: "I see no basis right now for an independent person. The debtor has not unreasonably refused, in fact the debtor hasn't refused to bring any actions to date." September 24, 2002 Hearing Transcript, at 74 (Fitzgerald, J.) (attached hereto as Ex. E). To date, this Court has entered several Orders approving these tolling agreements and staying filed adversary proceedings while the Debtors proceed with their plan confirmation efforts. The Bank Debt Holders fail to acknowledge these Orders, which they did not contest when entered.
- Asbestos Bar Date. The Bank Debt Holders fail to acknowledge that a motion, (filed by the Creditors Committee), to set an asbestos bar date has been filed and that the District Court has entered an Order staying proceedings on that motion. The Bank Debt Holders have not challenged that Order. Moreover, the Motion was further stayed by the Third Circuit during the mandamus proceedings initiated by certain

⁵ Owens Corning, et al. v. Ness Motley Loadholt Richardson & Poole, et al., Adv. Proc. No. A-02-5830 (JKF); Owens Corning, et al. v. Peyton Parenti & Whittington, et al., Adv. Proc. No. A-02-5831 (JKF); Owens Corning, et al. v. The Estate of David T. Cobb, et al., Adv. Proc. No. A-02-5832 (JKF); Owens Corning, et al. v. Roxie Huffman Viator, et al., Adv. Proc. No. A-02-5871 (JKF); Owens Corning, et al. v. Terrence M. Johnson, Esquire, et al., Adv. Proc. No. A-02-5872 (JKF); Owens Corning, et al. v. Provost Umphrey Law Firm L.L.P., et al., Adv. Proc. No. A-02-5873 (JKF); Owens Corning, et al. v. Reaud, Morgan & Quinn, Inc., et al., Adv. Proc. No. A-02-5874 (JKF); Owens Corning, et al. v. Duke Law Firm, P.C., et al., Adv. Proc. No. A-02-5875 (JKF); Owens Corning, et al. v. Vonachen, Lawless, Trager & Slevin, et al., Adv. Proc. No. A-02-5878 (JKF); and Owens Corning, et al. v. Law Office of Peter T. Nicholl, et al., Adv. Proc. No. A-02-5879 (JKF); Owens Corning, et al. v. Langston, Frazer, Sweet & Freese, P.A., et al., Adv. Proc. No. A-03-56215 (JKF); Owens Corning, et al. v. Robles & Gonzales, P.A., et al., Adv. Proc. No. A-03-56217 (JKF); Owens Corning, et al. v. Robert C. Weisenberger, Esquire, Adv. Proc. No. A-03-56218 (JKF); Owens Corning, et al. v. Foster & Sear, L.L.P., et al., Adv. Proc. No. A-03-56219 (JKF).

of the Bank Debt Holders. Importantly, it now seems likely that Judge Fullam will decide whether to hear the bar date motion.⁶

- Chapter 11 Trustee Motion Discovery. The Bank Debt Holders criticize the Debtors for “block[ing]” discovery on the Creditors Committee’s Trustee Motion. What they do not disclose, however, is that this Court stayed all discovery in connection with the Trustee Motion. December 1, 2003 Hearing Transcript, at 118 (Fitzgerald, J.) (The Court ruled: “I am not opening discovery, I am not hearing argument until some point in the future when I find out what the lay of the land is with the other two motions over which I have no control.”) (attached hereto as Ex. F). The Debtors cannot fairly be criticized under these circumstances.

d. The Bank Debt Holders Falsely Accuse Dr. Thomas Vasquez of Having Conflicts. The Bank Debt Holders accuse the Debtors of engaging Dr. Thomas Vasquez and Analysis, Research & Planning Corp. (“ARPC”) because of an alleged bias in favor of asbestos plaintiffs. They also assert, without any basis, that “with ARPC’s advice the Debtors inflated their estimate of total asbestos liability. . . .” Examiner Motion, ¶ 58. Dr. Vasquez and ARPC are respected and independent experts, who have been engaged by defendant companies, insurance companies, settlement and bankruptcy trusts, future representatives and other parties to provide modeling and forecasting of claims. This *ad hominem* attack by the Bank Debt Holders is typical of their scorched earth tactics and is without factual basis.

Dr. Vasquez was employed because he had worked for the Debtors and the Fibreboard Settlement Trust prior to the bankruptcy case and his expertise was known to them and their attorneys -- not for any connection to asbestos plaintiffs. Dr. Vasquez had worked for the Fibreboard Trust (while at Peat Marwick) and subsequently was engaged by the Debtors to assist Debtors with the tobacco litigation (when he worked for Yankelovich Partners), both prior

⁶ See Manual for Complex Litigation (Fourth) § 22-56 at 397 (“Most courts have found that the bankruptcy courts has the authority to estimate the value of mass tort claims for the purpose of determining the feasibility of a reorganization plan, confirming a plan or establishing a framework for voting on a proposed plan.”)

to his joining ARPC. Dr. Vasquez continued with the tobacco litigation engagement when he moved to ARPC in 1999. After the Debtors' bankruptcy filing in October 2000, the Debtors sought to employ Dr. Vasquez and ARPC to continue to provide services with respect to the tobacco litigation and to assist in projecting future asbestos liabilities.

In submitting an Affidavit and Disclosure Statement accompanying the ARPC retention application, Dr. Vasquez accurately represented that ARPC represented no creditors of the Debtors in connection with the Chapter 11 cases and had no connection with any entity adverse to the Debtors. Dr. Vasquez and ARPC met each and every test of disinterestedness under section 101(14) of the Bankruptcy Code.

Dr. Vasquez and ARPC have well-deserved reputations as highly qualified and independent experts. Their methodology is well known and is applied consistently in all cases, regardless of the identity of the client. There simply is no conceivable basis to suggest that employment by a future claimants' representative in one case disqualifies an expert from rendering independent advice to an asbestos defendant company in another case.⁷ If Dr. Vasquez and ARPC have erred, it was in their inability to predict the viciousness of the litigation tactics that would be employed in this case. ARPC had always provided such services to different parties in different cases without any suggestion of bias or conflict of interest and its work for other clients in other cases clearly cannot violate the Bankruptcy Code.⁸ Exhibit A to the

⁷ In the Recusal Opinion, the Third Circuit majority concluded that Messrs. Hamlin and Gross's loyalty to the future claimants in G-I carried created a conflict which prevented them from being neutral advisors to Judge Wolin in Owens Corning, a conclusion from which Judge Fuentes strenuously dissented. The Debtors believe the majority was in error and Judge Fuentes understanding of this issue is correct and have filed a Petition for Rehearing En Banc. Nonetheless, bound by the Third Circuit's current view on the duties of lawyers, future claimants' representatives and judicial advisors, this analysis has no applicability to independent experts engaged by a Debtor or other party in a bankruptcy case.

⁸ Unlike the judicial advisors that were the focus of the Bank Debt Holders' recusal motion, neither Dr. Vasquez nor ARPC have any adjudicatory role in these cases.

Affidavit, to which the Bank Debt Holders refer as containing false information, was merely designed to identify ARPC's involvement in bankruptcy cases of other debtors that "are claimants of the [Owens Corning] Debtors." Vasquez Affidavit and Disclosure Statement at ¶10. These representations do not constitute "significant connections to asbestos plaintiffs' interests" which affect independence or disinterestedness. Many of the disclosures on Exhibit A involved work for the Center for Claims Resolution, an asbestos-defendant group. In any event, Dr. Vasquez and ARPC will amend their Affidavit and Disclosure Statement to disclose that ARPC provided services to the future claimants' representatives in Babcock & Wilcox and Armstrong World Industries and the debtor in A,C&S.

Dr. Florence, who testified in the Babcock & Wilcox fraudulent conveyance litigation as expert for the future claimants' representative, and currently serves as consultant to several future claimants' representatives, is the subject of further attack by the Bank Debt Holders. His purported sin, allegedly tainting every engagement by ARPC, is attending meetings of future claimants' representatives and allegedly permitting the Washington, D.C. office of ARPC to be used for a future claimants' representative meeting.⁹ Dr. Florence's attendance at these meetings was requested by a future representative, Eric Green (who is not involved in this case), to assist with an educational presentation. Dr. Florence attended meetings at which claims forecasting methods and the Babcock & Wilcox TDP were discussed. He also attended a meeting at which a number of claims processing companies made presentations (Dr. Florence was familiar with claims processing based on his services to the Manville Trust). Dr. Florence, who has provided services to defendants, trusts, future claimants' representatives and other parties, has had no

⁹ The future claimants' representatives wished to schedule a meeting in Washington, D.C. for October, 2003. Because ARPC was in the process of changing office locations, Dr. Florence actually arranged for the meeting to be in a meeting room of a local hotel.

involvement in the Owens Corning engagement. Dr. Florence participated in an educational activity at the request of a client. There can be no rational suggestion that his activities had any affect on ARPC's work for the Debtors.

Most importantly, there is no evidence that Dr. Vasquez, or ARPC or any other party provided any advice which resulted in the Debtors inflating their asbestos liabilities. The Debtors have never inflated their asbestos liabilities. The Bank Debt Holders have no basis to make such an assertion. As the Debtors have consistently articulated, the \$16 billion condition contained in the Plan, unless waived, is the minimum valuation currently required by the Asbestos Claimants for their consent to the section 524(g) channeling injunction. As stated in the proposed Disclosure Statement in language approved by this Court,

The Asbestos Claimants' Committee and the Future Claimants' Representative believe, based on *their* experts' valuations, that \$16 billion is the minimum acceptable valuation for Asbestos Personal Injury Claims.

Disclosure Statement Section IV.D.2 at 26 (Docket No. 10241) (emphasis added). There is simply no basis for accusing the Debtors and Dr. Vasquez or ARPC with involvement in some conspiracy to inflate the Debtors' estimates of total asbestos liability.

RESPONSE AND OBJECTION

A. THE PENDING APPEAL OF THIS COURT'S EXAMINER ORDER HAS DIVESTED THIS COURT OF JURISDICTION TO CONSIDER THIS MOTION

This Court has already appointed an examiner in this jointly administered case. By Order dated April 23, 2003, this Court directed the appointment of an examiner, as a result of a request made by Plant Insulation Company (the "Examiner Order") (Docket No. 7984).

1. This Court Can Only Appoint One Examiner in this Case. The Examiner Order significantly alters the relief the Bank Debt Holders can seek in this Motion. This Court,

having already directed the appointment of an examiner, is precluded from appointing another one. 11 U.S.C. § 1104. Section 1104 of the Bankruptcy Code provides for the appointment of “an examiner to conduct such an investigation of debtor as is appropriate.” 11 U.S.C. § 1104(c). The plain language of the statute does not provide for, nor contemplate, the appointment of more than one examiner in a case.

This interpretation of section 1104(c) is consistent with section 1104(d) which provides that the United States Trustee shall appoint “one disinterested person” to serve as examiner in a case. Compare 11 U.S.C. §§ 1104(c) with 1104(d). Interpretation of a statute begins “with the understanding that Congress says in a statute what it means and means in a statute what it says there.” *Hartford Underwriters Ins. Co. v. Union Planters Bank, N.A.*, 530 U.S. 1, 6 (2000); *Official Committee of Unsecured Creditors of Cybergenics Corp. v. Chinery*, 330 F.3d 548, 559 (3d Cir. 2003). The plain language in section 1104(c) refers to a single examiner. “When the statute’s language is plain, the sole function of the courts – at least where the disposition required by the text is not absurd – is to enforce it according to its terms.” *Id.* The terms of the above-cited provisions of the Bankruptcy Code make clear, only one examiner may be appointed. *Collier on Bankruptcy* ¶ 1104.03, 1104-40.2-41 (15th ed. 2003) (“Section 1104(d) seems to indicate that when a court orders the appointment of an examiner, only one person may be appointed. There is no authority in the subsection for more than one examiner.”); Leonard L. Gumport, *The Bankruptcy Examiner*, 20 Cal. Bankr. J. 71, 124 (1992) (*citing* 1104(c), now 1104(d), for the proposition that only one person can serve as an examiner).¹⁰

¹⁰ Statutory history provides additional support for the proposition that only one examiner can be appointed in a case. The Bankruptcy Act (the “Act”) originally did not provide for the appointment of a trustee or an examiner. In 1938, when Congress overhauled the Act, Rule 10-208(b) provided, “[i]f a debtor is continued in possession it shall perform the duties specified in subdivision (a)(9) and such other duties in subdivision (a) of this Rule as directed by the court or the court may appoint “a” disinterested person as specified in Rule 10-202(c) as examiner to perform all or any of such duties.” Rule 10-208(b) (emphasis

This Court, having previously issued an Order directing the appointment of an examiner, is precluded from appointing another examiner in this case.¹¹ Instead, the Bank Debt Holders may only ask this Court to exercise its discretion to expand the duties of the existing examiner.

2. The Appeal of the Examiner Order Has Divested this Court of Jurisdiction to Expand the Duties of the Existing Examiner. The Examiner Order was appealed to the District Court (Docket Nos. 8074 and 8090) and is currently pending there. Presumably, Judge Fullam will rule on that appeal in due course. In light of this appeal, this Court is divested of jurisdiction to consider the appointment of an examiner, amend or expand the scope of the examiner's duties, or otherwise modify the Examiner Order. It is well established that the filing of a notice of appeal divests the lower court of its control over those aspects of the case involved in the appeal and confers jurisdiction on the appellate court. *Griggs v. Provident Consumer Discount Co.*, 459 U.S. 56, 58 (1982); *U.S. v. Batka*, 916 F.2d 118, 120 (3d Cir. 1990) (when an appeal is taken, the appellate court obtains exclusive jurisdiction over the aspects of the case involved in the appeal); *Iron Mountain Corp. v. AWC Liquidation Corp. (In re AWC Liquidation Corp.)*, 292 B.R. 239, 242 (D. Del. 2003) (general principle is that a lower court is divested of jurisdiction once an appeal is filed). The purpose of the rule is to promote efficiency and avoid confusion by preventing simultaneous jurisdiction and the risk of redundant or contradictory rulings. *Mary Ann Pensiero, Inc. v. Lingle*, 847 F.2d 90, 97 (3d Cir. 1988); *In re AWC*

added). Thus Rule 10-208(b), the precursor to Section 1104 of the Bankruptcy Code, provided for the appointment of a single disinterested person.

¹¹ Even if this Court disagrees that only one examiner can be appointed, it is clear that the appointment of a second examiner is not mandatory as the Bank Debt Holders suggest. See 11 U.S.C. § 1104(c)(2). Indeed, Judge Wolin indicated in ruling on a prior appeal by Plant Insulation that “the authorities cited by the parties reveal a split over whether the courts retain discretion to deny the appointment of an examiner where the \$5,000,000 liquidated debt level of [11 U.S.C. § 1104(c)(2)] is met.” *In re Owens Corning*, Civil Action No. 02-281 Mem. Opinion at 4-5 (D. Del. Dec. 4, 2002) (Docket No. 6458). In any event, a decision to appoint a second examiner or to expand the duties of the existing examiner rests in this Court's sound discretion.

Liquidation Corp., 292 B.R. at 242. Courts have consistently held that a bankruptcy court lacks jurisdiction to vacate or modify an order which is the subject of a pending appeal. *See, e.g., Bennett v. Gemmill (In re Combined Metals Reduction Co.)*, 557 F.2d 179, 201 (9th Cir. 1977); *In re Eddis*, 37 B.R. 217, 218 (E.D. Pa. 1984).

Proceedings on this Examiner Motion must be stayed pending the resolution of the Plant Insulation appeal of this Court's Examiner Order.

B. THE COURT SHOULD NOT RULE ON THE EXAMINER MOTION UNTIL THE COURT DISPOSES OF THE TRUSTEE MOTION

Even if the Court had jurisdiction to modify the existing Examiner Order, it should defer action until it resolves the pending Trustee Motion, filed by the Creditors' Committee, especially given the largely overlapping allegations in the two motions.

The Bankruptcy Code clearly envisions only one neutral third-party - - either a trustee or an examiner. 11 U.S.C. §1104. In fact, an examiner may not be appointed at all if a trustee has been appointed. 11 U.S.C. §1104(c); *see also In re UAL Corp.*, 307 B.R. 80, 83-84 (Bankr. N.D. Ill. 2004). Under the Bankruptcy Code, the appointment of an examiner is a less drastic remedy -- in which management remains with the debtor and the scope of permissible duties of the examiner may be controlled by the Court as appropriate -- than the appointment of a trustee. *UAL*, 307 B.R. at 83-84; *Cf. In re Table Talk, Inc.*, 22 B.R. 706 (Bankr. D. Mass. 1982) (declining to appoint an examiner, which the court found would only add an unnecessary and redundant "functionary"). The Bank Debt Holders assert that the appointment of an examiner would moot the Trustee Motion, but this is clearly not correct under section 1104; rather, only dismissal or a ruling on that motion would terminate that proceeding.¹² *Cf. In re Ionesphere*, 113

¹² But for the consistency of their methods, it would be remarkable that at the hearing on May 18, 2004, in which the scheduling of the additional filings and hearing on the Trustee Motion was discussed and fixed by the Court, the Bank Debt Holders' counsel advised the Court of his personal plans and unavailability for

B.R. 164, 172 (Bankr, S.D.N.Y. 1190) (appointment of trustee terminated examiner's role as examiner, requiring appointment as special advisor to the trustee).

C. THE MOTION PRESENTS NO APPROPRIATE MATTERS FOR THE EXAMINER TO INVESTIGATE

As the Bank Debt Holders acknowledge, the Court has significant discretion in determining the scope of an examiner's duties. *See* Examiner Motion, ¶ 96 (citing *In re UNR Industries, Inc.*, 72 B.R. 789, 795 (Bankr. N.D. Ill. 1987)). If the Court concludes it has jurisdiction to rule on the Examiner Motion, it should exercise this discretion by not assigning the examiner to investigate the inappropriate subjects raised by the Bank Debt Holders' Motion.

Fundamentally, section 1104 calls for the appointment of an examiner to investigate actions by a debtor. 11 U.S.C. § 1104 (empowering courts to appoint an examiner to "conduct such examination of the debtor as is appropriate") (emphasis added). The Third Circuit not only found no actual misconduct whatsoever by Judge Wolin, *In re Kensington Int'l*, No. 03-4212, slip op. at 6, its Majority Opinion nowhere indicates that the Debtors did anything untoward in negotiating their reorganization plan. Therefore, that opinion, which forms the basis for the Examiner Motion, provides no basis for an examination of the Debtors or their case management.¹³

Instead, the Bank Debt Holders present a wholly different set of inappropriate objectives for the examiner: (a) the Bank Debt Holders effectively seek extensive discovery regarding the

Court but made no mention of an imminent fifty page examiner motion, which his clients filed six days later and sought expedited consideration.

¹³ While the Bank Debt Holders cite *In re UNR Industries, Inc.*, 72 B.R. 789, 795 (Bankr. N.D. Ill. 1989) for the proposition that an examiner can be appointed to monitor the status of plan negotiations in that case, the examiner was appointed as a mediator. It is clear from the Examiner Motion that the Bank Debt Holders have no present intention of negotiating and do not seek the appointment of an examiner to mediate the parties' disputes. The Debtors would not be opposed to the appointment of a mediator to replace Professor McGovern if the Bank Debt Holders were willing to express a good faith interest in achieving a consensual resolution.

negotiations that led to the formation of the Debtors' current Plan, when, in this context, such discovery is irrelevant and/or inadmissible to any determination before the Court¹⁴; (b) the investigation by the examiner will divert the parties' attention to matters ancillary to confirmation of the Plan; and (c) the investigation will needlessly re-litigate issues already decided or currently pending before this or another Court.

1. The Motion Seeks an Examiner to Conduct Impermissible Discovery About Plan Negotiations. The manner in which the plan was negotiated is irrelevant to whether the plan is confirmable. Section 1129(a) of the Bankruptcy Code provides that for a plan of reorganization to be confirmed, it must have been, *inter alia*, "proposed in good faith and not by any means forbidden by law." 11 U.S.C. § 1129(a)(3). For purposes of determining good faith under section 1129(a)(3) ... the important point of inquiry is the plan itself and whether such a plan will fairly achieve a result consistent with the objectives and purposes of the Bankruptcy Code." *In re PWS Holding Corp.*, 228 F.3d 224, 242 (3d Cir. 2000) (quoting *In re Madison Hotel Assocs.*, 749 F.2d 410, 425 (7th Cir. 1984)).

Moreover, the "good faith" requirement of section 1129(a)(3) focuses on "the plan itself and not with the actions of the proponents." *In re Sound Radio, Inc.*, 98 B.R. 849, 853 (Bankr. D. N.J. 1988), *aff'd in part, rev'd in part*, 103 B.R. 521 (D.N.J. 1989), *aff'd*, 908 F.2d 964 (3d Cir. 1990). In the context presented here, evidence of plan negotiations is privileged under Rule 408 and, consequently, is beyond the scope of discovery. See *In re Eagle Picher Indus., Inc.*, 69 B.R. 130, 134 (S.D. Ohio 1994) (holding that drafts of a plan of reorganization circulated among the plan proponents were not discoverable by another party); Fed. R. Evid. 408.

¹⁴ Even if discovery into the negotiations that led to the Debtors' current plan would otherwise be appropriate, it would be a waste of resources and cause a huge distraction because the plan currently before the Court will be altered by the Bondholder Agreement.

The Bank Debt Holders seek the appointment of an examiner to do indirectly what they cannot do directly -- undertake discovery on the manner in which the Debtors' plan was negotiated. This Court recently ruled on this issue in the *Pittsburgh Corning Corporation* case:

DEBTOR'S COUNSEL: We told all the carriers who had asked . . . for plan negotiation documents, settlement negotiation documents, prior drafts and we told them we believe that was (sic) not discoverable under Rule 408, under the mediation privilege, under the joint defense privilege, under the common interest privilege and, moreover, Your Honor, and . . . we think the plan is what the plan is.

JUDGE FITZGERALD: The plan is what the plan is. Prior drafts of the plan are not discoverable, they're not admissible, they're wholly irrelevant, I ruled that way in *Combustion Engineering*, I'm going to stick with those same rulings, they're not admissible, they're not discoverable.

Pittsburgh Corning Corp., February 19, 2004 Hearing Transcript, at 64 (attached hereto as Ex.

G).

Moreover, any investigation into the current plan would be wasteful because the Debtors will be amending their current plan of reorganization and disclosure statement to reflect the terms of the Bondholders Agreement. Accordingly, the Plan that the Bank Debt Holders contend is "corrupt" is not the plan that will be presented for confirmation. Under these circumstances, it is difficult to understand the benefit of appointing an examiner to investigate the manner in which the current plan was negotiated.

2. The Examiner Motion Improperly Seeks to Prevent Any Hearing on Confirmation of the Debtors' Plan. Without question, the Bank Debt Holders seek the appointment of an examiner and an investigation into the process by which the Debtors' current plan was proposed in order to delay or avoid altogether any hearing on confirmation of the Debtors' Plan. This is an inappropriate method to contest plan confirmation. Challenges to a plan should be addressed in

the context of a plan confirmation hearing. The Bankruptcy Code provides that the proper procedure for challenging a plan is to file an objection to the plan pursuant to 11 U.S.C. § 1128(b). *See also* Fed.R.Bankr.P. 3020(b) and 9014. In addition, a creditor opposed to a plan may vote against the plan. 11 U.S.C. § 1126; Fed.R.Bankr.P. 3018. Assuming objections are filed to a plan, the Bankruptcy Code contemplates a contested confirmation hearing. The Bankruptcy Code does not provide for, nor recognize, any process whereby an individual creditor, such as the Bank Debt Holders, can stray from the statutorily mandated confirmation process and seek the appointment of an examiner to investigate the plan process. In fact, the Examiner Motion is devoid of any legal authority to support the proposition that an examiner may be appointed in advance of a confirmation hearing to investigate unilaterally the process by which a plan was negotiated, formulated, and ultimately presented for solicitation. As noted above, such an investigation would be futile.

3. The Examiner Motion Represents an Effort to Re-litigate Issues Already Decided or Currently Pending Before This or Another Court. Virtually all of the issues complained of in the Examiner Motion fall into one of the following categories: (a) matters already decided by this or another Court; (b) matters currently pending before this or another Court; (c) matters appropriately raised as part of an objection to plan confirmation; and/or (d) matters otherwise appropriately brought to the Court for consideration. None of these matters warrant an examiner inquiry.

- a) Appointment of Trustee. The Bank Debt Holders request this Court to appoint an examiner to make a recommendation as to whether a Chapter 11 trustee should be appointed in this case. As discussed above, the Trustee Motion is currently pending before the Court. This Court is certainly capable of ruling on the Trustee Motion without any “recommendation” from an examiner. Moreover, having chosen the remedy of moving for and supporting the appointment of a trustee, it is inequitable for the Bank Debt Holders to seek an examiner based on

essentially the same allegations and ask that it be heard before the Trustee Motion is decided.

- b) Sale of Debtors. The Bank Debt Holders seek the appointment of an examiner to determine whether a trustee should be appointed to effectuate a sale of the Debtors as a going concern, pursuant to section 363 of the Bankruptcy Code. The potential sale of the Debtors' assets was raised previously in the case. At the August 27, 2003 hearing on the Debtors' proposed disclosure statement, the Court addressed the potential sale of the Debtors as a going concern and ruled that such issue is a "liquidation analysis confirmation issue." *See* August 27, 2003 Hearing Transcript (afternoon session), at 23 (Fitzgerald, J.) (attached hereto as Ex. H). Moreover, any such inquiry would be futile. Asbestos bankruptcies, by their very nature, effectively require a 524(g) channeling injunction which, as a practical matter, compels a debtor to reach agreement with its asbestos constituencies.¹⁵ Even the independent Federal Judicial Center harbors doubts about the Bank Debt Holders' favored approach. *See* Manual for Complex Litigation (Fourth) § 22.58 at 400 ("Uncertainties remain concerning the existence of any other authority [other than 11 U.S.C. § 524(g)] to enjoin future claimants [in a mass tort bankruptcy case]"). Clearly an examiner could provide nothing more in the way of predicting the validity of any of this untested strategy. More importantly, the Debtors retain exclusivity and the privilege of running the case and proposing a plan of reorganization in a manner that, in the exercise of their business judgment, they determine is appropriate, subject to Court supervision and approval. *See* 11 U.S.C. § 1121. It is simply irresponsible and intentionally inflammatory for the Bank Debt Holders to suggest that these Debtors, which have operated so profitably and successfully in Chapter 11, should be liquidated as a going concern.

¹⁵ *See* S. Elizabeth Gibson, "Case Studies of Mass Tort Limited Fund Class Action Settlements and Bankruptcy Reorganizations," at 69-100 (Federal Judicial Center 2000). The results of this case study are illuminating here. Initially, Eagle-Pitcher engaged in bitter litigation with its asbestos claimants on matters including an asbestos bar date. While an asbestos bar date was set in that case, the bankruptcy court ultimately ordered mediation when the bitter litigation threatened to overwhelm the bankruptcy proceedings. Significantly, the court imposed a communications ban between the parties during that mediation process while the debtors and the asbestos claimants committee sought to negotiate a reorganization plan. *Id.* at 75-76. Under this framework, Eagle-Pitcher reached a settlement on a plan exclusively with the asbestos claimants committee. The unsecured creditors, who had been shut out of this plan negotiation process, challenged the asbestos claims valuation included in the Eagle-Pitcher plan and sought to conduct individual asbestos claims objections. *Id.* at 77. The bankruptcy court rejected that approach in favor of a global claims valuation hearing proposed by Eagle-Pitcher and the asbestos claimants committee. *Id.* at 77-78. Significantly, after that hearing, the bankruptcy court reached an asbestos claims valuation that exceeded the negotiated claims valuation reached by Eagle-Pitcher and the asbestos claimants by \$1 billion and exceeded the unsecured claimants' estimate by over \$2 billion. *Id.* at 79-80.

- c) NSP Complaints. The Bank Debt Holders argue that an examiner is necessary to determine whether the NSP lawsuits, and discovery related thereto, should proceed. This argument overlooks the Court's prior Order staying these lawsuits and addressing related discovery issues. The Bank Debt Holders also complain that the Debtors' Plan contains unworkable or inequitable provisions for the selection and appointment of a litigation trustee to prosecute these causes of action. This issue is appropriately determined in the contest of a plan confirmation hearing and is not an appropriate basis for the appointment of an examiner.
- d) Plaintiffs' Attorneys on ACC. The Bank Debt Holders speculate that the attorneys for members of the ACC have attempted to control the Debtors' plan process. This allegation is similar to allegations raised in the Creditors Committee's Motion for Structural Relief Required to Eradicate the Legal and Ethical Conflicts of Asbestos Law Firms (Docket No. 9915), which seeks to disqualify the ACC and the Futures Representative. This Court denied the motion as related to the Futures Representative and that issue is on appeal. This Court then denied the remainder of the motion relating to the ACC restructuring and ordered the ACC to submit the powers of attorney or written authorizations to the Court. The form of order relating to that aspect of the motion is pending.
- e) Asbestos Bar Date. The Bank Debt Holders complain that the Debtors have not sought a bar date for asbestos personal injury claims. The Creditors Committee's bar date application is currently pending before the District Court and will presumably be heard by Judge Fullam.
- f) Objections to ARPC. The Bank Debt Holders allege inadequate disclosure by ARPC and request the appoint of an examiner to investigate ARPC. Such appointment is unnecessary. As noted above, there is simply no factual basis for accusing the Debtors and Dr. Vasquez or ARPC with involvement in some conspiracy to inflate the Debtors' estimates of total asbestos liability. Furthermore, in the three years since ARPC's retention was approved by this Court in March 2001, the Banks have never challenged ARPC's retention.
- g) Conflicted Advisors. The Bank Debt Holders complain about the actions and interests of two of Judge Wolin's advisors, David Gross and Judson Hamlin. Upon information and belief, such advisors were *de facto* terminated as a result of the Third Circuit's Writ of Mandamus and Judge Wolin's recusal order. None of the terms of the Plan that are subject to confirmation refer, relate or otherwise concern these advisors. As any investigation of the efforts of any advisor to mediate the settlement discussions leading up to the proposal of the Plan would violate Fed. R. Evid. 408. There is nothing for an examiner to investigate.

- h) Disgorgement of Fees. The Bank Debt Holders' request the appointment of an examiner to review the fees of certain advisors and an expert in this case is also duplicative and unwarranted. This Court has established several mechanisms for the review of and objection to professional fees, including review by the Court, fee auditor, United States Trustee, and any party-in-interest in the case (including the Bank Debt Holders). Therefore, the appointment of a separate examiner to review and object to fees is duplicative, costly, unreasonable, and unnecessary.
- i) Mediator McGovern. The Bank Debt Holders seek to examine further into Mediator McGovern's relationships with certain parties and his influence and control over this Chapter 11 case. As set forth above, any investigation into the involvement of any advisor in the settlement negotiations leading up to the proposal of the Plan would violate Fed. R. Civ. P. 408. Therefore, this is not an appropriate matter for an examiner's investigation. Moreover, the Bank Debt Holders have filed a motion seeking to disqualify and terminate the appointment of the Mediator (Docket No. 11716), which is pending before the Court and scheduled for hearing July 19, 2004.
- j) Debtors' Management/Executives. Any questions about whether the Debtors' management of this case has been improperly influenced or affected by their contact with lawyers for asbestos victims should be raised via an objection to specific motions/transactions for which Bank Debt Holders seek approval. To the extent that the Bank Debt Holders are concerned about plan issues, such issues should be raised at confirmation. In addition, many of the allegations against Debtors' executives have been raised in other litigation by the same Bank Debt Holders. Debtors submit that the Bank Debt Holders are simply attempting to obtain discovery in the litigation they have commenced against the Debtors' directors and officers, which has been stayed by this Court. *See Owens Corning v. Kensington Int'l Ltd.*, Adv. Proc. No. A-03-56359 (JKF).

CONCLUSION

The Examiner Motion is merely another tactical ploy to delay the Debtors' emergence from bankruptcy until the Bank Debt Holders obtain the plan treatment they wish. For the reasons set forth above, there are simply no appropriate grounds for examination and, therefore, the Examiner Motion should be stayed or dismissed.

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