UNITED STATES BANKRUPTCY COURT
DISTRICT OF NEW JERSEY

IN RE:	: Case No. 01-30135 (RG)
	:
G-I HOLDINGS, INC.,	: Newark, New Jersey
et al.,	: July 22, 2009
Debtor.	: 11:20 A.M.

TRANSCRIPT OF MOTION HEARING
BEFORE THE HONORABLE ROSEMARY GAMBARDELLA
UNITED STATES BANKRUPTCY COURT JUDGE

APPEARANCES:

For the Debtor: Riker, Danzig, Scherer,
Hyland & Perretti, L.L.P.
BY: MARK E. HALL, ESQ.
DENNIS J. O'GRADY, ESQ.
Headquarters Plaza
One Speedwell Avenue
Morristown, New Jersey 07962-1901

Special Counsel: Arnold & Porter, L.L.C.
to the Debtor BY: JOEL GROSS, ESQ.
CHRISTOPHER ANDERSON, ESQ.
555 Twelfth Street, N.W.
Washington, D.C. 20004-1206

Audio Operator: Juan Filgueiras

Transcriber: Isabel E. Cole
COLE TRANSCRIPTION AND RECORDING SERVICE
Certified Court Transcribers
P.O. BOX 1216
OCEAN GATE, NEW JERSEY 08740-1216
1-877-245-4876

Proceedings were electronically recorded, transcript produced by transcription.

APPEARANCES:

For the Debtor:	Dewey & LeBoeuf BY: ARIELLE D. KANE, ESQ. 1301 6th Avenue New York, New York 10019
Special Counsel	Quinn Emanuel, Urquhart, Oliver & Hedges, L.L.P. BY: ANDREW ROSSMAN, ESQ. JEFFREY BERMAN, ESQ. 51 Madison Avenue New York, New York 10010
Outside Counsel:	Sandak, Hennessey & Greco, L.L.P. BY: MARC J. KURZMAN, ESQ. 707 Summer Street Stamford, Connecticut 06901
For the Creditors: Environmental Agencies:	U.S. Department of Justice BY: DIANNE SHAWLEY, ESQ. 1425 New York Avenue, N.W. Washington, D.C. 20005
New York City Housing: Authority	Fox Rothschild, L.L.P. BY: JEFFREY M. POLLOCK, ESQ. 100 Park Avenue - Suite 1500 New York, New York 10017
	Michael B. Serling, P.C. ERIC B. ABRAMSON, ESQ. 280 N. Old Woodward Avenue Suite 406 Birmingham, Michigan 48009
	Philip J. Goodman, P.C. BY: PHILIP J. GOODMAN, ESQ. 280 N. Old Woodward Avenue Suite 407 Birmingham, Michigan 48009

THE COURT: Let me take the appearances on the motion under 9019 to authorize an approve entry by the Debtor, G-I, to consent decree and settlement by and amongst G-I, United States and other parties, including the State of Vermont.

MR. O'GRADY: Dennis O'Grady and Mark Hall, Riker, Danzig, Scherer, Hyland & Perretti, appearing for the Debtor, G-I.

MR. GROSS: And Joel Gross from Arnold & Porter, special counsel to the Debtor, G-I.

MS. SHAWLEY: Good morning, Your Honor, and my apologies for being late this morning.

Dianne Shawley, U.S. Department of Justice, on behalf of the Environmental agencies.

THE COURT: There are parties also on the phone that wish to enter their appearance here.

MR. ANDERSON: This is Christopher Anderson, Arnold & Porter, special counsel to G-I.

THE COURT: Are there any other parties in court that wish to enter their appearances on this matter?

Very well. Thank you.

MR. GROSS: Again, Your Honor, Joel Gross. Arnold & Porter, special counsel for the Debtor, G-I.

Good morning, Your Honor. May it please the Court.

THE COURT: Good morning.

1 MR. GROSS: I am very pleased to be presenting
2 Debtor's Motion under Rule 9019 for approval of a consent
3 decree and settlement agreement entered with the United States
4 Environmental agencies and the State of Vermont.
5 The agreement relates principally to a site called
6 the Vermont asbestos site, and I will address that site.
7 There are also a number of other sites and Mr. O'Grady will
8 address those sites briefly when I'm, when I'm done.
9 So on behalf of the Debtors, we're very pleased that
10 we're able to reach a settlement of these important matters
11 and avoid contested litigation, and we're especially pleased
12 that the motion this morning is uncontested. And given that
13 it's uncontested I will briefly summarize the background and
14 terms of the settlement, and would be pleased to answer any
15 questions that the Court has.
16 Now, there's an unusual aspect of the settlement
17 which we've set forth in our papers and I just wanted to
18 highlight at the beginning, which is that this settlement
19 requires approval of the Court from two different and separate
20 perspectives. One, because the Debtor is a debtor it
21 requires, the settlement requires approval under 9019 as being
22 in the best interests of the Debtor and its estate; and
23 second, because it's an environmental settlement with the
24 United States under the CERCLA statute and government
25 regulations, it also requires approval of the Court as being

1 fair, reasonable and in the public interest.
2 We are here today on only the first --
3 THE COURT: The first step.
4 MR. GROSS: And to be clear because one might ask,
5 well, why not do both today, or why not do both in a month or
6 two, and the reason for that is we can't do both today because
7 the Government requires a 30-day public comment period which
8 they're in the midst of. They published notice of the
9 settlement in the Federal Register on July 10th. So that will
10 run through about August 10th and if there are comments
11 received they'll review that and file the motion with the
12 Court. So it's not ripe yet for the second approval. And the
13 reason we haven't waited and done both approvals once the
14 public comment period was done is because it was very
15 important to the Government that we get approval for G-I to
16 fund some limited additional work at the Vermont asbestos
17 site, which I'll talk about to basically make the site secure,
18 to keep trespassers and others off the site. That will be
19 about, up to $350,000 of work that can start once Your Honor
20 approves a settlement as being in the best interest of the
21 estate. And so we didn't want to wait and the Government, it
22 was important for them as part of the settlement that we not
23 wait an additional 30 to 45 days or whatever it will take to
24 get to the second step. So that's why we're, we've asked the
25 Court to give us a first approval today and then Ms. Shawley

1 may have something to add about the second approval.
2 Now, the, as the, as the Court is aware of, the
3 Vermont Asbestos Group site is a large, 1600-acre site located
4 in Vermont that had been operated until 30 years ago but not
5 since by Ruberoid, a predecessor to G-I, and while we have,
6 while we assert that it operated lawfully and appropriately, a
7 number of environmental statues impose liability retroactively
8 and strictly on past conduct, even if it was lawful. The
9 Government has raised concerns about some very large tailing
10 piles that are located on the site and the environmental
11 consequences of that. They are also concerned about locations
12 offsite to which some of these materials may have come to be
13 located either through wind erosion or through the transport
14 of these materials by third-parties for use as fill and the
15 like.
16 Now, the Government asserted two legal theories and,
17 you know, we tend to call them two claims. The Government
18 would say that one of them isn't technically a claim.
19 THE COURT: Well, it was a protected proof of claim
20 the Government would argue.
21 MR. GROSS: A protected proof of claim which has two
22 components to it. Right there is what we would call an
23 injunctive claim or an injunctive remedy and a monetary claim.
24 Now, the injunctive, the injunctive claim or injunctive remedy
25 that the Government asserted was based on the Clean Air Act

1 and the Resource Conservation Recovery Act. They asserted it
2 in an adversary complaint, and asserted that, that what they
3 were seeking was not the payment of money but the performance
4 of work, and because they were seeking the performance of work
5 it was not a claim that could be addressed and discharged in
6 the bankruptcy.
7 Litigation commenced in that. We filed a motion
8 that, and there were briefs filed.
9 THE COURT: That issue has been thoroughly briefed.
10 MR. GROSS: And that issue has been thoroughly
11 briefed. The Debtor's position, as set forth in that, is that
12 what the Government's seeking is a payment of money. That the
13 only way for G-I to perform is by payment of money, and that
14 is, the so-called injunctive claims or obligations are a claim
15 and can be discharged in this case.
16 That issue which is a very intriguing legal issue
17 and someday maybe the Supreme Court will decide, but hopefully
18 now not in this case, because if Your Honor approves the
19 settlement that issue will be resolved. And to talk briefly
20 about how it will be resolved, the, under this agreement, G-I
21 has agreed to fund the performance of certain work at the
22 Vermont Asbestos Group site consisting of site, certain site
23 security work to make sure that trespassers and others don't
24 get on site; certain air monitoring to determine whether there
25 are air emissions leaving the site and what they are. If

1 necessary, dust suppression activities to reduce materials
2 leaving the site, if necessary; and finally, some
3 investigatory work to assist the State in determining if there
4 are, which offsite locations materials have come to be located
5 at.
6 THE COURT: Again, there are other documents that
7 pertain to this with regards to the consent decree and
8 settlement agreement.
9 MR. GROSS: Yes.
10 THE COURT: Custodial trust agreement, statement of
11 work.
12 MR. GROSS: Yes. The factual background I should
13 say, we submitted a declaration from Celeste Wills and we've
14 submitted the documentation, and the documentation certainly
15 is extensive and the consent decree is an extensive document
16 that reflects a lot of constructive, arm's-length
17 negotiations, and I think we were fortunate in that both sides
18 had an interest in getting this resolved quickly. The
19 Government because they wanted the work to be done quickly,
20 the Debtor because it wanted to get this done to facilitate
21 reorganization. So the agreement is set forth in full in the
22 documents and the consent decree and settlement agreement.
23 Three aspects of the agreement on the injunctive
24 side of it, which are particularly beneficial to the Debtors
25 is that the obligation is defined not in terms of a specific

1 amount of work, but in terms of a funding obligation which is
2 capped at $7.75 million. That provides predictability and
3 certainty to the Debtors. Second, there's an annual cap of $1
4 million. So this money will be spent over a period of eight
5 or perhaps nine years. Again, that provides certainly
6 unpredictability. And finally, because the Debtors are not in
7 the remediation business and want to be able to focus post
8 emergence on their business, the Government agreed that we
9 could set up a custodial trust. One of the exhibits to the
10 consent decree is a custodial trust agreement.
11 We are, we have recommended and the Government has
12 approved as trustee a gentleman named Alan Parsons, who's a
13 distinguished and very experienced environmental professional
14 who's agreed to serve as the trustee. And so this, again,
15 will allow an environmental professional to manage the work.
16 It takes away from the Government the obligation to do it
17 itself, but also takes away from G-I the obligation to focus
18 on that.
19 And you know, the $7.75 million is a greater payment
20 certainly that had to be prevailed on the legal issue; but, on
21 the other hand, it's far less than had the Government
22 prevailed on that issue. And the cleanup of the facility I'm,
23 and hopefully confirmation can proceed sooner than might have
24 been the case had the litigation proceeded.
25 So that's the injunctive part of the settlement.

1 Let me briefly mention the monetary part.
2 So the Government also acknowledged that it did have
3 a monetary claim, the principal focus of which is that the
4 Government asserts that there will be a need for a long-term
5 cleanup of these tailings piles. The Government -- now, no
6 one knows today for sure what that will cost because the
7 studies that usually proceed that determination haven't been
8 done. We're only focusing on it because of this Chapter 11
9 proceeding.
10 So the Government in its proof of claim asserted
11 that those costs based on its best available estimate would be
12 $239 million. That didn't include offsite locations which, as
13 part of this agreement, we're agreeing can be part of the
14 monetary claim.
15 THE COURT: There was a $300 million figure in the
16 reference in the pleadings. Is that --
17 MR. GROSS: Yes, so the 239 is what they asserted in
18 their proof of claim for what they thought it would cost for
19 onsite remediation. There's an additional amount of money
20 which could be tens of millions to, you know, perhaps more
21 than $100 million they have asserted. We think it will be far
22 less for offsite. So that's what the claim asserted was. We
23 think the cleanup will be far less than that. But rather,
24 again, than asking the Court now to predict what the cleanup
25 will be, the settlement we've reached will allow the claim to

1 be based on what the actual costs turn out to be. So instead
2 of predictions, actual costs with the proviso that G-I will
3 pay 8.6 percent of what those costs turn out to be consistent
4 with what's expected to be paid under the Plan of
5 Reorganization.
6 So again, we avoid litigation and here there are a
7 number, again a number of benefits to G-I of this process in
8 addition to avoiding litigation. There are, because of
9 concerns about regularizing cash flow, there are agreements on
10 annual caps and how much will have to be spent at the 8.6
11 percent rate, which are lower in the initial years because
12 we'll be funding the trust. So for the first eight or nine
13 years the total payments, the trust plus the injunctive
14 obligations will be $1.5 million. After that when the trust
15 ends, the cap will be $2 million, but there will be an overall
16 cap of $300 million, which is the number Your Honor referred
17 to, and that's a total amount of cost for which we would have
18 to pay 8.6 percent, meaning that the total obligation will not
19 exceed $25.8 million. That's 8.6 percent of 300 million.
20 Again, we anticipate it will be far less than that, but time
21 will tell and whatever it will be it will be. And again, this
22 avoids litigation, provides predictability and fairness.
23 And the one other, well, two other aspects of that
24 to mention. One, there were also claims filed on behalf of
25 the Fish & Wildlife Service of the Department of Interior for

1 damages to natural resources. That was filed as a general
2 unsecured claim in the amount of $12.7 million. We've reached
3 an agreement to allow, to pay that based on 8.6 percent is
4 somewhat less than $10 million, so it comes to $850,000, and
5 that will be paid over a schedule of a number of years.
6 Again, fitting in with the cash flow needs of the Debtor.
7 And then the final aspect of it worth mentioning is
8 the Government had to ask because they had, they thought they
9 might have some shorter term need for the funds to be able for
10 the Debtor to up-front the first $2 million of the obligation
11 and so there are provisions over the first five years for the
12 Debtor not to pay at 8.6 percent but to pay at 100 percent but
13 then get credited at the 8.6 percent rate so the first $2
14 million will cover the first 23-plus-million dollars of costs
15 and then it will kick in again at 8.6 percent. Again, a
16 negotiated provision we're pretty confident that the, although
17 we think the number will be low that it will at least get to
18 the $23 million level.
19 Two other benefits of the settlement just worth
20 mentioning before I turn it over to Mr. O'Grady. One, as Your
21 Honor, is aware, we've had a number of settlements with
22 insurers and there are a number of others that we expect to
23 come before the Court. The Government has agreed as part of
24 this not to object to those settlements. They had raised
25 issues that perhaps they had some special entitlement to some

1 or all of those proceeds. They've agreed not, to waive
2 whatever those objections are and not to raise them so that
3 will facilitate getting those insurance settlements approved.
4 And additionally, they've agreed, assuming that our plan stays
5 consistent with how it's presently proposed and that we make
6 certain modifications which have been made and what's been
7 submitted to you in the last plan submitted and set forth in
8 the agreement that they'll not oppose confirmation of our
9 plan, which, again, is an important step in facilitating that
10 important step.
11 So all of this taken together we think the
12 settlement clearly is in the best interests of G-I, its
13 creditors and its estate. And with that, unless Your Honor
14 has any questions?
15 THE COURT: I know there is reference to
16 contribution protection to the Debtor and that, I think is
17 raised, in terms of the generator sites which are separate,
18 but is there also that --
19 MR. GROSS: Yes.
20 THE COURT: -- nature of protection in terms of the
21 VAG site?
22 MR. GROSS: VAG site. The CERCLA statute --
23 THE COURT: And how does that operate?
24 MR. GROSS: The CERCLA statute has a provision which
25 says that if you settle with the Government you get protection

1 from claims for contribution by other parties. It's provided
2 by statute in Section 113 at Superfund of CERCLA.
3 THE COURT: That is set out in Section 113 as to
4 CERCLA?
5 MR. GROSS: As to, yes. And so, so this just is
6 based on that statute making clear that, you know, not only,
7 and that is another benefit of the settlement, not only are we
8 making peace and getting peace with the federal government but
9 the State of Vermont, which I should add has been an important
10 player in this process; but, with any other parties who down
11 the road might find that they have liability for this site or
12 other of the sites being resolved.
13 Thank you, Your Honor.
14 MR. O'GRADY: Good morning, Your Honor.
15 THE COURT: Good morning, Counsel.
16 MR. O'GRADY: Dennis O'Grady, Riker, Danzig,
17 Scherer, Hyland & Perretti, appearing for the Debtor.
18 The, as Mr. Gross had stated, the consent decree
19 does deal with the Vermont Asbestos mine. However, it also
20 deals with 12 other sites. The way in which the Debtor
21 approached the Division of Labor with respect to negotiating
22 with the federal environmental agencies is that Mr. Gross'
23 firm was hired as special counsel for the Vermont Asbestos
24 mine. And with respect to the 12 other sites that were set
25 forth in the Environmental agency's Proof of Claim, that was

1 handled by my firm.
2 The sites fall into two different categories. On
3 the one hand there is what's denominated in the consent decree
4 generator sites. Those are nine sites throughout the United
5 States which were never owned or operated by the Debtor, but
6 were owned and operated by third parties. Primarily they are
7 landfill sites to which the Debtor contributed asbestos
8 containing material which was placed at these sites.
9 In connection with its Proof of Claim, the
10 Environmental agencies originally asserted a claim in excess
11 of $13 million. In the consent decree the claim has, in fact,
12 been liquidated in terms of payment and on the effective date,
13 or after the effective date G-I will, in fact, fund $104,000
14 with respect to that claim, which is, again, 8.6 percent,
15 which is the same distribution being given to other creditors.
16 As a result of that payment G-I is also being
17 offered contribution protection.
18 THE COURT: Under the same statute?
19 MR. O'GRADY: Under the same statute and it's
20 specifically set forth in the consent decree.
21 There are three other sites that are referenced in
22 the Environmental agencies proof of claim. These are what are
23 generally denominated the Linden sites, which consist of AGF,
24 GAF Chemical site in Linden, New Jersey, an LCP Chemical
25 Superfund site, and a Diamond Alkali Superfund site. In the

1 proof of claim, again, there are specific claims that are made
2 in the monetary amount; approximately 58 million for the LCP
3 future response costs and 48 to 57 million for natural
4 resource damage claims.
5 With respect to these sites, G-I denies that it is a
6 corporate successor to the former owner and operator at each
7 of these sites, and it has shared its corporate history
8 information with the Government with respect to those sites.
9 After receiving that information the Government and G-I
10 decided that rather than burden this Court with deciding
11 whether G-I was an appropriate corporate successor that that
12 issue would be resolved in the future, if necessary. And as a
13 result, the consent decree provides that if, in the future the
14 Environmental agencies seek to assert a claim against G-I and
15 in the event they should be successful either by way of a
16 judgment and/or a settlement, any payment would be solely at
17 the distribution amount set forth in the plan of
18 reorganization.
19 THE COURT: So 8.6 percent of --
20 MR. O'GRADY: 8.6 percent.
21 THE COURT: -- the face value of any judgment or
22 settlement?
23 MR. O'GRADY: Yes.
24 Given the amounts that were initially set forth in
25 the Environmental agencies proofs of claim, it's fairly clear

1 that this settlement certainly enhances G-I's estate since it
2 only calls for a payment from G-I in connection with its plan
3 of reorganization of $104,000.
4 If you have any other specific questions, Your
5 Honor, I'm happy to answer them, but that's the short and
6 sweet version of the various 12 sites.
7 THE COURT: I want to hear from obviously Ms.
8 Shawley, who is here on behalf of the Government, and any
9 other parties, and then I believe, obviously, the Martin
10 standards are well-known. I do not know if we need to add
11 anything to address those specifically; but, let me hear from
12 Ms. Shawley.
13 MS. SHAWLEY: Good morning, Your Honor.
14 THE COURT: Good morning, Counsel.
15 MS. SHAWLEY: Dianne Shawley for the United States.
16 We have this, this consent decree, as you can see,
17 was signed off on by the Assistant Attorney General at the
18 Department of Justice. So we acknowledge that we think it's a
19 very favorable resolution of the Unites States' cause of
20 action and monetary claim in this case, and we are
21 recommending it. We're out for public comment. As Mr. Gross
22 pointed out, that comment period should end on August the
23 10th. In the event that we receive any comments that would
24 require us to either modify or pull back the consent decree we
25 would not abandon this settlement, Your Honor.

1 We would, I think, both parties are determined that,
2 and convinced that this is a very good outcome for everyone
3 concerned. So in the event that we have comments we need to
4 address, we would request leave of the Court to get back to
5 the table, fix any issues and, and present the consent decree
6 with, with the view that we will have addressed any
7 shortcomings. I don't believe that that's gonna happen. We
8 haven't received comments so far, and we, as I said, view it
9 as a very favorable result.
10 One correction on a citation that appeared in the
11 Debtor's 9019 motion. I think the section of CERCLA that was
12 cited was remedial section. It should be monetary costs
13 recovery section, which would be Section 107.
14 Our public comment period, since we have multiple
15 environmental statutes involved relying on the United
16 States --
17 THE COURT: I am sorry, you say Section 107 in --
18 MS. SHAWLEY: CERCLA.
19 THE COURT: In place of what section that was cited?
20 MS. SHAWLEY: I cited CERCLA 106 of the remedial
21 section, cited. We'll look at that and provide a correct
22 citation at the close of the hearing, Your Honor, but, so you
23 can get that down specifically.
24 We've recited 28 C.F.R. Section 50.7, which is the
25 federal regulation that requires public comment in the event

1 that we have an environmental settlement that has an
2 injunctive relief component to it.
3 THE COURT: Well, Section 122(d) was cited in regard
4 to the 30-day prior notice.
5 MS. SHAWLEY: That, that could be, Your Honor.
6 THE COURT: Is that the particular citation you
7 wanted to clarify?
8 MS. SHAWLEY: I'd prefer the overarching authority,
9 which is at 28 C.F.R. 50.7, and since that's a --
10 THE COURT: 50.7?
11 MS. SHAWLEY: 50.7. And that will cover us for each
12 of the environmental statutes, as well as --
13 THE COURT: I see. As well as the citation set
14 forth in the moving papers.
15 MS. SHAWLEY: Right. That's correct, Your Honor.
16 THE COURT: That is fine.
17 MS. SHAWLEY: And we, we don't have the State of
18 Vermont represented this morning, but --
19 THE COURT: Yes, I see.
20 MS. SHAWLEY: -- you know that they've approved the
21 settlement. I don't believe that they have a public comment
22 period that's ongoing, but I believe that they would also sit
23 down and work through any issues that come up as a result of
24 the public comment period.
25 And unless Your Honor has any further questions, I

1 would say that's it for the United States.
2 THE COURT: No, I did want to refer to Judge
3 Wigenton's orders because Judge Wigenton, I believe, did enter
4 two orders in regard to what was, I believe, a motion to
5 withdraw reference at one time in connection with the
6 adversary proceeding, United States v G-I Holdings. I believe
7 Judge Wigenton entered an order on February 17 of 2009
8 supplemented by an order of March 5, 2009, which I believe
9 referenced the procedures which recognized ongoing settlement
10 discussions between the parties and then referenced the
11 procedures outlined to ultimately approve the settlement.
12 MS. SHAWLEY: Yes.
13 THE COURT: And I believe in that latter order 28
14 C.F.R. Section 50.7 is noted. The parties are operating under
15 Judge Wigenton's orders as well here.
16 MS. SHAWLEY: As well, right.
17 THE COURT: And I believe the consent judgment
18 references the District Court's orders.
19 MS. SHAWLEY: We provided notice to the Federal
20 District Court, to Judge Wigenton, and a copy of the consent
21 decree, but the consent decree is before Your Honor for --
22 THE COURT: Yes.
23 MS. SHAWLEY: -- for entry, approval and entry.
24 THE COURT: Thank you, Counsel.
25 MS. SHAWLEY: Thank you.

1 THE COURT: I do not know if it is necessary, I
2 think it may be self-evident, but did Counsel want to address
3 the Martin factors briefly since this is a 9019 settlement?
4 MR. GROSS: Yes, Your Honor.
5 Let me just say with respect to Ms. Shawley's
6 citation, we certainly defer to her as to the basis on which
7 they're getting public comment and their procedures for going
8 forward.
9 We've referred to the Martin standards in our
10 motion, and just to briefly them. I mean under those
11 standards the issues are the probability of success in
12 litigation. I think on that, on that factor we've briefed the
13 issues before Your Honor. The issues are issues that are
14 complex. Whatever decision came out of it, whatever decisions
15 were reached either by Your Honor or by Judge Wigenton if the
16 motion for withdrawal of reference were granted would almost
17 be appealed just given the importance of the issue, which
18 would result in prolonged litigation and great cost and delay
19 of both the cleanup and, and the confirmation process. I
20 think while both parties felt strongly about the strength of
21 their position, I think both parties would agree that this is
22 an area of some uncertainty in the law.
23 The likely, the second Martin standard, the likely
24 difficulties in collection, is not really a factor here.
25 The third, the complexity of the litigation involved

1 and the expense, inconvenience and delay necessarily attending
2 it, I addressed. And you know, this would be, in terms of the
3 underlying legal issue of, of whether the injunctive claim is
4 a claim there'd be expense and delay on that. But in addition
5 in terms of the monetary claim in determining what the amount
6 of that claim would be, in the absence of this settlement
7 there'd be the necessity probably for an estimation hearing,
8 which would be a very extensive hearing in which we'd
9 probably, with a full, extensive evidentiary record, which
10 would require both sides to hire experts and develop testimony
11 on what a remedy will be in the future. All of which is
12 avoided by the settlement, which will allow the remedy to be
13 determined as it ordinarily would under the environmental
14 regulations, and so all of that is spared by this settlement.
15 And finally, the paramount interests of the
16 creditors we think clearly supports approval of this
17 settlement because this dissolves some very substantial issues
18 in this case, resolves it in a way which while there will be
19 some substantial payments of money it's still far less than
20 would have been the case had the Government succeeded and
21 allows confirmation to proceed on the schedule now before Your
22 Honor with, without, with the support of the Environmental
23 agencies and the State of Vermont for the settlement.
24 I should, and let me just add just if it wasn't
25 clear before, the, we would, if Your Honor were to approve

1 this, we will go ahead and create the trust. It will be
2 funded to do this initial site security work which will cost
3 $350,000. There will be some amount of administrative cost
4 during this period as well. But the total cost won't be far
5 in excess of $400,00 and then no further sums will be expended
6 until the second approval is received should the Government go
7 ahead, as we think they're likely to because we think this is
8 a favorable settlement for them as well, and seek approval and
9 the plan is confirmed and goes effective. So we have a small
10 window for a limited amount of work and then, and then if the
11 plan is effective the remaining work will be done and we think
12 this settlement is an important step in facilitating
13 confirmation of this case and is the interest of creditors.
14 Thank you, Your Honor.
15 THE COURT: Thank you, Mr. Gross.
16 Was there anything else Counsel wanted to add at
17 this time?
18 And the Counsel on the phone, I haven't forgotten
19 about you.
20 I want to put some findings on the record in this
21 matter. Thank you for your presentation.
22 Before the Court is a motion of G-I Holdings
23 pursuant to Bankruptcy Rule 9019 for approval to enter into a
24 consent decree and settlement agreement amongst G-I, the
25 United States on behalf of the U.S. Environmental Protection

1 Agency, the United States Department of the Interior, Fish and
2 Wildlife Service and the National Oceanographic and
3 Atmospheric Administration and the State of Vermont concerning
4 environmental liabilities of G-I and ACI, a corporate
5 affiliate of the Debtor and related parties at some 12
6 contaminated sites in addition to the Vermont Asbestos Group,
7 or VAG site as it's been referred to.
8 By this motion, G-I also seek court approval of
9 certain provisions of the settlement agreement and for
10 authority to pay certain settlement monies prior to the
11 pending plan's effective date.
12 As has been indicated by Counsel today pursuant to
13 28 C.F.R. Section 50.7, in addition to other statutory
14 provisions, the consent decree must be lodged with the Court
15 for at least 30 days prior to entry of the final judgment and
16 the United States and the State of Vermont reserve the right
17 to withdraw from the consent decree of comments regarding the
18 consent decree to close facts or considerations indicating
19 that the consent decree is improper, inappropriate or
20 inadequate. If the United States chooses to withdraw its
21 consent and the consent decree and G-I's obligations
22 thereunder will terminate at the conclusion of the comment
23 period which I believe is in process as indicated. If the
24 United States continues to believe the consent decree is fair,
25 reasonable and in the public interest the Government will file

1 a separate motion to approve the consent decree and enter it
2 as a final judgment.
3 Just briefly in terms of background, on January 5,
4 2001 G-I Holdings commenced the present Chapter 11 proceeding.
5 On August 3, 2001 ACI, Incorporated, a corporate affiliate of
6 G-I Holdings, commenced a separate Chapter 11 proceeding.
7 These cases have been jointly administered by order of the
8 Court and since the bankruptcy filings the Debtors have
9 continued to operate and manage their businesses as debtors-
10 in-possession, pursuant to Sections 1107 and 1108 of the
11 Bankruptcy Code. An Official Committee of Creditors has been
12 appointed by the United States Trustee to represent
13 individuals who have allegedly suffered injures related to
14 exposure to asbestos from products manufactured by
15 predecessors of G-I Holdings and the Court has appointed C.
16 Judson Hamlin as the Legal Representative to represent persons
17 who hold present and future asbestos-related claims against
18 the Debtors.
19 As set forth in the moving papers, and I intend to
20 summarize some of these facts and to the extent inconsistent
21 obviously the settlement documents rule and they're
22 comprehensive and extensive. So this is meant solely as a
23 summary for purposes of the record.
24 As set forth in the moving papers from 1936 until
25 1975 G-I's predecessor, the Ruberoid Company and the General

1 Analine & Film Corporation owned and operated an asbestos mine
2 in Eden, Vermont and Lowell, Vermont, which produced
3 commercially marketable asbestos through mining asbestos from
4 several quarries and milling the ore on site. The milling
5 process resulted in waste product or tailing, which was placed
6 in multiple piles at the site, and according to the Government
7 was trucked offsite and used for road base construction and
8 fill material.
9 In 1975 the VAG site was sold by G-I's predecessor
10 to Vermont Asbestos Group, Incorporated, which continued to
11 operate the mine until 1993, at which time the mining
12 operations were shut down. In 2005 the Vermont Department of
13 Environmental Conservation conducted several studies at the
14 site, which according to the Government revealed significant
15 impact from the eroding tailing piles.
16 In June and July of 2006 the State of Vermont filed
17 several proofs of claim for costs incurred in connection with
18 the VAG site. On October 17, 2008 the State of Vermont filed
19 an amended proof of claim seeking $195,515.37 in past response
20 costs incurred at the VAG site, as well as a claim of up to
21 $211,500,513 in estimated future response costs contending
22 that G-I was liable under 42 U.S.C. Section 9607(a)(2) of
23 CERCLA and certain Vermont statutes, 10 V.S.A. Section 6615 of
24 Vermont law. Because G-I's predecessors were owners and
25 operators of the VAG site at the time hazardous substances

1 were released there and liable to the State under 10 V.S.A.
2 1259(a) and 1274(a) for discharging waste into state waters
3 without a permit. Vermont also asserted a claim for natural
4 resource damages as a co-trustee with the U.S. Department of
5 the Interior, Fish and Wildlife Services in an amount of some
6 $12,721,199.
7 If I misquote these numbers at any time along the
8 way Counsel is free to correct me.
9 On October 12, 2008 the United States filed a proof
10 of claim asserting monetary claims against G-I totaling more
11 than $385 million for response costs and natural resource
12 damages, including assessment costs under the Comprehensive
13 Environmental Response Compensation and Liability Act, or
14 CERCLA, at 42 U.S.C. Section 9601, et seq., and a protected
15 proof of claim seeking the right to seek injunctive relief
16 against G-I to abate conditions that may present an imminent
17 and substantial endangerment at the VAG site, which the United
18 States contends is not a dischargeable claim in the Debtor's
19 bankruptcy proceeding.
20 The Government's proof of claim alleges that
21 pursuant to 42 U.S.C. Section 9607(a)(2) G-I is liable to the
22 United States for all costs of response incurred at the VAG
23 site set forth by the EPA to be $1,815,508.90 in past response
24 costs and estimated future response costs of over $239 million
25 because, again as argued, G-I's predecessors were owners or

1 operators of the VAG site at the time the hazardous substances
2 were released there. The Government's proof of claim also
3 asserts, pursuant to 42 U.S.C. Section 9607(f)(1) that G-I is
4 liable for damages to natural resources associated with
5 releases from the VAG site estimated by the EPA to be some
6 $12,721,199.
7 The United States' proof of claim alleges, again,
8 that pursuant to 42 U.S.C. Section 9607(a)(2) that G-I is
9 liable for response costs and natural resource damages at
10 three additional sites, here referred to as the Linden sites,
11 which include the GAF Chemical site and the LCP Chemical,
12 Incorporated, Superfund site, both located on the Tremley
13 Point peninsula in Linden, New Jersey on the Arthur Kill or
14 tributaries of the Arthur Kill and the Diamond Alkali
15 Superfund site which encompasses the Newark Bay study area
16 including portions of the Arthur Kill.
17 The United States has asserted here that G-I is
18 liable for the Linden sites, again, because predecessors of
19 G-I owned and operated the GAF and LCP sites at the time
20 hazardous substances were released there and asserts future
21 response costs at the LCP site of some $58,397,000 in natural
22 resource damages related to the Linden site of between 48 and
23 $57 million. Those are all round numbers. G-I disputes the
24 Untied States' allegations related to the Linden site.
25 Additionally, the EPA contends to have incurred

1 response costs under CERCLA, 42 U.S.C. Section 9607(3) at nine
2 generator sites. Those are set forth in the pleadings so I
3 will not recite all of those cites. Which are sites at which
4 the United States alleges G-I or its predecessors disposed of
5 hazardous materials such as landfills or metal reclamation
6 facilities. The EPA alleges that G-I is jointly and severally
7 liable for some $13,983,238 in past and future response costs
8 with other parties who it is asserted dispose of hazardous
9 materials at these sites. Again, G-I disputes the United
10 States' allegations in this regard.
11 Additionally, the Government asserts that G-I is
12 jointly and severally liable for costs of assessing natural
13 resource damages at the Kinbuck Landfill site in the amount of
14 some $28,713.32.
15 As to the litigation that's preceded this
16 settlement, on or about October 20, 2008 G-I filed a motion
17 for determination that all of its liabilities to the United
18 States with respect to the Vermont Asbestos Group mine site
19 were dischargeable. On November 5, 2008 the Government filed
20 an adversary proceeding, 08-2531, against G-I seeking
21 injunctive relief with respect to the VAG site and alleging
22 that G-I was liable under Section 7003 of the Resources
23 Conservation and Recovery Act and that 42 U.S.C. Section 6973,
24 since according to the Government, G-I's predecessors
25 contributed to the handling, storage, treatment,

1 transportation or disposal of solid waste at the VAG site
2 which may present, and in the Government's words, "An imminent
3 and substantial endangerment within the meaning of the RCRA
4 statute."
5 The Government also alleges in the complaint that
6 G-I is liable under Section 303 of the Clean Air Act, 42
7 U.S.C. Section 7603, since G-I's predecessors' actions at the
8 VAG site are contributing to air pollution that presents,
9 again in the Government's words, "An imminent and substantial
10 endangerment to the environment within the Act's definition.
11 Additionally, the United States sought by the
12 adversary proceeding an order enjoining G-I to take certain
13 actions at the VAG site including restricting access to the
14 site, preventing access to onsite buildings, providing
15 security at the site, engaging in dust suppression efforts at
16 the site, conducting ambient air monitoring at the site, and
17 investigating and abating the offsite use of asbestos-
18 containing materials from the site. The Government contends
19 that the adversary proceeding is not subject to the automatic
20 stay and that the injunctive relief requested in the
21 proceeding is not dischargeable.
22 On or about November 5, 2008 the Government filed a
23 motion for mandatory withdrawal of reference of all issues
24 related to the United States' complaint for declaratory and
25 injunctive relief as regards the adversary proceeding. The

1 Debtor filed a memoranda in opposition to the motion for
2 withdrawal of the reference and there was pleadings filed
3 before the District Court on February 17, 2009. United States
4 District Judge Susan Wigenton of the United States District
5 Court for the District of New Jersey entered an order
6 dismissing the action subject to the rights of the parties and
7 to good cause within 45 days to reopen the action if the
8 settlement was not consummated. As referenced at the hearing
9 today, Judge Wigenton also entered a supplemental order on
10 March 6, 2009 which set forth the protocol or procedure for
11 presenting any settlement to the court, and I will simply
12 refer to that order. It has the specific provisions therein.
13 The consent decree and settlement agreement contains
14 injunctive provisions and monetary obligations which resolved
15 the United States and State of Vermont's claims for the VAG
16 site, as well as the adversary proceeding and the United
17 States' claims concerning the generator site. The injunctive
18 provisions of the consent decree and settlement agreement
19 require G-I to create and fund a custodial trust subject to
20 certain funding caps which will be responsible for undertaking
21 certain response actions at the VAG site, including making
22 certain site improvements to restrict access to the site,
23 securing certain buildings at the site subject to a $250,000
24 cap, providing the security presence at the site, performing
25 meteorological and air monitoring and undertaking dust

suppression activities if deemed necessary by the EPA, collectively subject to a $2.5 million cap, supporting the State of Vermont's investigation of the offsite use of asbestos-containing tailing from the mine subject to a $5 million cap.

The injunctive provisions also require G-I to provide the EPA with documents and other information in its possession related to the offsite use of tailing from the mines and impose ancillary record keeping and reporting requirements on G-I and the custodial trust. G-I's funding obligations are subject to an annual cap of $1 million for the first seven years of the consent decree's implementation and a $750,000 cap in the eighth year of implementation making G-I's total obligation to fund the work activities of the custodial trust capped at $7,750,000 not including the custodial trust's administrative costs which are subject to a cap of $75,000 in the first year and $50,000 in each of the following years subject to an inflation adjustment. The total cost to G-I of the injunctive obligations will not exceed $8.3 million. Additionally, G-I will reimburse the custodial trust for the actual cost of reasonable insurance coverage procured by the custodial trust currently estimated at $5,000 a year.

As a condition of the settlement, the EPA sought that the custodial trust be established, funded and take certain initial measures to begin implementing the injunctive

1 relief before G-I's plan of reorganization is confirmed. The
2 consent decree defines a preliminary period beginning on the
3 latter of the date on which the Court approves G-I's entry
4 into the settlement and ending on the last day of the month in
5 which the effective date for G-I's plan occurs during which
6 G-I is obligated to provide work funding to the custodial
7 trust up to $350,000 and the custodial trust is required to
8 begin implementing the injunctive relief according to a work
9 plan to be prepared by the custodial trust and approved by the
10 EPA. Additionally, G-I is obligated to provide funds for the
11 administration of the custodial trust up to $75,000 plus the
12 cost of liability insurance for the trustee, and the Court has
13 been advised that, in fact, there has been a designation or a
14 recommendation of a party to serve as trustee here, a Mr. Alan
15 Parsons.
16 Under the consent decree G-I will pay the EPA
17 $154,000 and pay the State of Vermont $6,800 to the complete
18 satisfaction of EPA's and the State of Vermont's past response
19 costs representing 8.6 percent of the United States' and the
20 State of Vermont's past cost claims. Under the terms of the
21 proposed plan, claims of general unsecured creditors are to be
22 paid at 8.6 percent of the allowed amounts of those claims.
23 Regarding the EPA and the State of Vermont's claims for future
24 response costs for both the VAG site and offsite locations or
25 materials from the VAG site are now located, G-I's total

1 aggregate obligation to reimburse the United States is limited
2 to $25,8000, which is stated at 8.6 percent of what has been
3 at least projected as future costs of $300 million, although
4 G-I contends that the actual payments will be, in its view at
5 least, substantially less than $25,800,000.
6 In each of the four years following date G-I will
7 make payments to the EPA and the State of Vermont of up to
8 $450,000. In the fifth year following the effective date G-I
9 will make payments of up to $200,000. These some $2 million
10 in payments will be made in advance of the EPA and in the
11 State of Vermont's incurring response costs based on estimates
12 prepared by EPA and the State of Vermont for the work to be
13 done in each year. If the EPA and the State of Vermont incur
14 less then the $2 million in response costs in the first five
15 years following the effective date they may request that G-I
16 provide the difference in subsequent settlement years.
17 Beginning in the sixth year following the effective
18 date, G-I will reimburse the EPA for 8.6 percent of its actual
19 response costs at the VAG site in excess of $23,000,255.83
20 incurred after October 15, 2008. As noted here, G-I's
21 obligations here will have been covered by the $2 million in
22 payments referred to previously.
23 In the sixth and seventh year following the
24 effective date G-I's obligation to reimburse the EPA and the
25 State of Vermont for response costs is limited to $450,000 per

1 year. In the eighth year following the effective date G-I's
2 obligations to reimburse EPA and the State of Vermont is
3 capped at $700,000. In the ninth year G-I's obligation to
4 reimburse the EPA and the State of Vermont is capped at $1.8
5 million. In the tenth and subsequent years G-I's obligation
6 to reimburse the EPA for response costs incurred in connection
7 with the VAG site is capped at $2 million per year.
8 Additionally, G-I will pay $850,000 which represents 8.6
9 percent of a negotiated amount of 9.883721 over nine years on
10 a specified schedule and full satisfaction of the United
11 States and the State of Vermont's natural resource damage
12 claims with response to the VAG site.
13 The consent decree also provides that with regard to
14 all existing or future third-party claims with respect to the
15 VAG site, including claims for contribution, the parties agree
16 that G-I, ACI, those entities designated as the G-I Holdings
17 entities and covered G-I derivative entities that cover the
18 G-I holding derivative entities, the ISP entities and the
19 covered ISP derivative entities are entitled to protections
20 from actions or claims as provided by Section 113(f)(2) of
21 CERCLA, 42 U.S.C. Section 9613(f)(2). I am just reading a
22 portion of that consent decree. There is additional language
23 as pertains to that protection.
24 G-I will also pay the United States $104,615
25 following the effective date to settle the United States'

1 claims with respect to the generator sites. Again, it is set
2 forth that this represents 8.6 percent of the sum of the
3 agreed to amounts of the United States' claims for each of the
4 generator sites. Again, the consent decree will also protect
5 G-I and other parties from contribution claims as provided
6 under Section 113(f)(2) of CERCLA, 42 U.S.C. Section
7 9613(f)(2), and those particular protections again are set
8 forth in the consent decree. So I will not recite that entire
9 language for the sake of preserving the record.
10 Additionally, G-I contends that the proposed
11 resolution for the Linden sites, as is set forth in the
12 present consent decree, avoids the need to litigate those
13 claims ow but provides that any liabilities resulting from
14 those sites against the reorganized G-I will be paid at an 8.6
15 percent rate. All of the United States's claims with respect
16 to the Linden sites under CERCLA or under the RCRA based on
17 G-I's past actions will be discharged in the bankruptcy
18 proceeding without any payment from G-I. However, the Untied
19 States will retain the right to seek relief against the
20 reorganized G-I notwithstanding the discharge and the
21 reorganized G-I will retain all rights and defenses it would
22 have had if the United States' claims with respect to the
23 Linden site had been liquidated in G-I's bankruptcy
24 proceeding. In the event, again, that the United States
25 obtains a judgment against the reorganized G-I or liquidates a

1 claim against the reorganized G-I in settlement G-I will only
2 be obligated to pay the Untied States 8.6 percent of the face
3 value of any judgment or settlement.
4 The Debtors here contend that the instant settlement
5 reflects a reasonable and appropriate compromise among the
6 parties as a result of arm's-length negotiations and note that
7 the instant settlement resolves a substantial claim against
8 the estate and facilitates the path to confirmation as part of
9 the settlement, and neither the Untied States nor the State of
10 Vermont will object to the plan. I believe it was also
11 referenced here on the record today by counsel that there have
12 also been certain agreements regarding the Government not
13 objecting to certain pending insurance settlements as well.
14 In any event, G-I contends that the terms and
15 conditions of the consent decree are fair and reasonable and
16 in the best interests of the creditors and its estate and
17 represents sound business judgment, as the Debtors contend
18 that the risks of continuing to defend the adversary
19 proceeding and the dispute over the United States' and the
20 State of Vermont's proofs of claim are significant in light of
21 the costs and potential risks associated with continued
22 litigation, and especially since the United States' protective
23 proof of claim and adversary proceeding assert the right to
24 seek injunctive relief requiring G-I to take any actions that
25 may be necessary to address conditions at the VAG site or

1 related offsite locations, which, again, the Untied States has
2 taken the position those obligations are not dischargeable.
3 While disputing the EPA's estimate of future
4 response measures at the VAG site and disputing the
5 Government's authority to seek injunctive relief under the
6 Clean Air Act and the RCRA, G-I acknowledges that continued
7 litigation of the adversary proceeding poses substantial risk
8 and contends that continuing to defend the adversary
9 proceeding and disputing the proofs of claim would cause the
10 Debtors' estates to incur substantial additional costs and
11 suffer significant delays which would decrease the value of
12 the estate.
13 The Debtor here maintains that there is a risk
14 regarding the amount of the monetary claims as the total
15 estimated value of claims asserted by the United States and
16 the State of Vermont's proofs of claim are more than
17 $400 million with over $250 million in future response costs
18 at the VAG site. Debtors contend that the proposed settlement
19 mitigates the risk of the Government and State of Vermont
20 wrongly estimating future response costs at the site by
21 limiting such claims to a 8.6 percent equivalent to that
22 proposed for other creditors based on the cost actually
23 incurred by the parties.
24 The Debtor also contends that the consent decree
25 provides significant protections for G-I's bankruptcy estate

1 and its creditors, as the consent decree limits the aggregate
2 amount of G-I's obligations to resolve the United States' and
3 State of Vermont's claims and provides a schedule for
4 satisfying those claims that ensure that the Debtor will have
5 the necessary resources available to meet its other
6 commitments and allows for the injunctive obligations for the
7 VAG site to be undertaken by G-I through a custodial trust
8 which will allow G-I to focus on running its businesses.
9 G-I asserts that providing funding of up to $350,000
10 to this trust in advance of the plan's effective date is
11 appropriate as it is done to protect the public health and
12 environment. Also, asks that the Court consider that the
13 Government could have sought a preliminary injunction at this
14 time and that funding to be provided prior to the effective
15 date reflects only a small portion of the settlement funds and
16 that G-I believes that there is only a very small risk that
17 the Government will withdraw from the settlement based on
18 public comments. Debtor contends that the proposed resolution
19 for the generator site is as well a reasonable compromise for
20 the estate as it reflects G-I's share of liability for each
21 site and the estimated total site costs and the 8.6 percent
22 recovery for creditors.
23 It should also be noted that that same formula is
24 also reflected in the resolution to, at this point, in
25 essence, defer issues going to the Linden sites for future

1 litigation as may occur.

2 The G-I motion I should state and would reference
3 also includes the declaration of Celeste Wills, the Assistant
4 General Counsel, Environmental, G-I and in that declaration
5 Ms. Wills likewise supports the settlement and sets forth
6 similar arguments that is set forth in the moving papers.

7 Bankruptcy Rule 9019 provides that on motion by a
8 trustee or here debtor-in-possession after notice and hearing
9 the Court may approve a compromise or settlement upon proper
10 notice given to creditors, as the Court may direct. The Third
11 Circuit has stated that to minimize litigation and expedite
12 the administration a bankruptcy estate's compromises are
13 favored in bankruptcy. See, In Re: Martin, 91 F.3d 389 (3rd.
14 Cir. 1996). Additionally, the settlement of complex
15 litigation before a trial is favored by federal courts. See,
16 Eisenholtz v Brennan, 52 F.3d 478 (3rd. Cir 1995). As well,
17 it is further well-settled that the approval of a settlement
18 lies within the sound discretion of the court. Here, the
19 Bankruptcy Court. See, In Re: Neshaminy Office Building
20 Associates, 62 B.R. 798 (803 E.D.Pa. 1986).

21 The approval of any settlement requires the Court to
22 assess and balance the value of the claim being compromised
23 against the value to the estate of the acceptance of the
24 compromise proposal as set forth in the Martin case.
25 Additionally, under normal circumstances the Court would defer

to the Trustee or here, debtor-in-possession's judgment so long as there is a legitimate business justification.

As set forth in Protected Committee for Independent Stockholders of TMT Trailer, 390 U.S. 414 (1968), the Third Circuit in Martin recognized the four criteria that the Court should consider in striking this balance; the probability of success in litigation, the likely difficulties in collection, the complexity of the litigation involved in expense, inconvenience and delay attendant to it, and the paramount interests of creditors. Here, see the Martin case. See also the Nutraquest case, 434 F.3d 639 (3rd Cir. 2006).

In determining whether to approve a motion to approve settlement of controversy the Court does not substitute its judgment for that of the, here, the debtor-in-possession, nor is the Court to decide the numerous questions of law and fact raised but rather to canvass the issues to see whether the settlement falls below the lowest point in the range of reasonableness. That's set forth at the Neshaminy case cited previously.

Here, in looking at the Martin factors in approval of the settlement including the first factor, the probability of success in litigation, this Court agrees with the Debtors that there are numerous uncertainties and risks regarding the adversary proceeding and the dispute of proofs of claim filed by the United States and the State of Vermont to justify the

Debtor's business judgment to enter into the instant consent decree and settlement agreement.

As to the second Martin factor, the likely difficulty in collection, as noted by Counsel here, that is not a factor necessarily relevant to consideration of this settlement.

However, concerning the third Martin factor, the complexity of litigation involved and the expense, inconvenience and delay necessarily attendant to it, it is certainly clear to the Court and the parties have made clear that the present litigation is complex as indicated by the record of this case to date, including numerous pleadings and briefs filed on the legal issues pertaining thereto.

Furthermore, it has been asserted that the continued litigation with the United States and the State of Vermont would cause G-I to incur substantial additional costs and suffer substantial additional delays to its reorganization efforts. And in that respect the Court finds that certainly the complexity of the litigation, expense, delay and inconvenience attendant thereto support the Debtor's entry into the present consent decree and settlement agreement.

Concerning the fourth Martin factor, the paramount interest of creditors, the Court is satisfied that the pro settlement is fair and in the best interests of creditors and fair and equitable within the meaning of that term, as set

1 forth under the case law under Rule 9019.
2 It is clear that the Debtor and the Government
3 disagree as to whether the injunctive relief sought by the
4 Government in the protective proof of claim in the adversary
5 proceeding require the Debtor to take actions that may be
6 necessary to address conditions at the VAG site and related
7 offsite locations, and there is also considerable disagreement
8 over whether those claims and the claims here are
9 dischargeable. However, were the Debtor to forego the instant
10 settlement it certainly would require the estate to expend
11 additional estate funds to litigate the adversary proceeding,
12 including the Government and State of Vermont's proofs of
13 claim and potentially reduce creditors eventual recoveries.
14 As well and as noted by Counsel I believe in argument, this
15 settlement injects reasonableness and predictability into the
16 obligations of the parties going forward. The settlement
17 provides a mechanism to resolve certain present claims, as
18 well defer certain litigation to a date after confirmation of
19 any plan, and there I am referring to particularly the Linden
20 sites, but does allow the Debtor to preserve its resources and
21 as well to have a concrete plan in terms of funding these
22 obligations.
23 The Court also notes that the instant consent decree
24 at relevant points obligates the Debtor to pay 8.6 percent of
25 certain claims which is consistent with the treatment proposed

1 to creditors under the present pending plan. As also
2 indicated as part and parcel of this agreement, both the
3 Government and the State of Vermont have agreed not to object
4 to confirmation, which is a valuable concession, which is
5 beneficial to the estate as a whole.
6 All in all, in viewing all of the factors necessary
7 to consider the reasonableness of this settlement, the Court
8 is satisfied that the Debtors have properly exercised business
9 judgment in determining to enter into this agreement and that
10 the consent decree and settlement agreement, in fact, is in
11 the best interests of the estate. And for those reasons the
12 Court will approve, at least in this first stage of approval,
13 approve and authorize the Debtor to enter into the consent
14 decree and settlement agreement with the respective parties.
15 I have said a lot, but I probably have not said the
16 most important thing which is I want to obviously commend and
17 compliment the parties in what I know was a long and vigorous
18 and I am sure at times difficult negotiation; but, it has
19 resulted in a very beneficial settlement agreement, apparently
20 beneficial for all involved and I am very pleased to be able
21 to approve in this first stage this settlement today. You can
22 also pass that along to the parties representing the State of
23 Vermont who are not here today but obviously were active
24 participants in the settlement.
25 MR. GROSS: Thank you, Your Honor.

1 MS. SHAWLEY: Thank you, Your Honor.
2 THE COURT: I know there is an order somewhere here.
3 I believe I have it. I have the order. I believe the order,
4 I do not know if the parties want to review it, it approves
5 the motion, authorizes the parties to execute documents
6 necessary to effectuate the settlement, authorizes
7 expenditures not to exceed $450,000. I believe that would be
8 the $350,000 referenced plus there's a $75,000 cost of
9 liability insurance.
10 MR. GROSS: $75,000 administrative costs.
11 THE COURT: Yes.
12 MR. GROSS: And then $5,000 liability insurance.
13 THE COURT: I am sorry, and then there was an
14 additional --
15 MR. GROSS: $5,000.
16 THE COURT: $5,000 --
17 MR. GROSS: For liability insurance.
18 THE COURT: -- for liability insurance.
19 MR. GROSS: Which comes to 430, and just in case
20 there was some unexpected --
21 THE COURT: Yes, so that is just to have some
22 tolerance in terms of the numbers to have it capped at an
23 amount not to exceed $450,000, which I believe is reasonable.
24 MR. GROSS: Yes.
25 THE COURT: Does the order need to be modified in

1 any way or can it simply be signed?
2 MS. SHAWLEY: Yes, Your Honor. It's fine. Thank
3 you.
4 THE COURT: The order has been entered. Thank you.
5 Thank you very much. Thank you.
6 I don't know if other counsel are going to be
7 leaving now so I am going to move on to the next case.
8 (Recess - 12:29 p.m. -12:44 p.m.)
9 THE COURT: Good afternoon.
10 MALE VOICE: Good afternoon to you, Judge.
11 THE COURT: Let me have, in the G-I Holdings matter
12 this is on Debtor's objection to New York City Housing
13 Authority's proof of claim. Let me take the appearances,
14 Counsel.
15 MR. ROSSMAN: Good afternoon, Your Honor.
16 Andrew Rossman with Quinn Emanuel. My colleague,
17 Jeff Berman is here. We're special counsel to the Debtors.
18 And Marc Kurzman who is outside counsel to the Debtors, who's
19 helped them with their asbestos claims in the past is also at
20 counsel table.
21 MR. POLLOCK: Good afternoon, Your Honor.
22 Jeff Pollock from Fox Rothschild, and with me is
23 Phil Goodman and Eric Abraham.
24 MR. ABRAMSON: Abramson.
25 MR. POLLOCK: Abramson, sorry.

1 THE COURT: Welcome, Counsel.
2 MALE VOICE: Thank you, Judge.
3 (Recording off from 12:45:31 p.m. - 12:46:42 p.m.)
4 THE COURT: Certainly the matter has been well
5 briefed and I just want to, in terms of the briefing, I
6 believe there was an amended scheduling order entered on July
7 13, and I believe the last pleading that was received was the
8 surreply on behalf of the New York City Housing Authority.
9 MR. ROSSMAN: That's correct, Your Honor.
10 THE COURT: So obviously, there are a significant
11 amount of exhibits as well and documents, but we'll begin.
12 MR. ROSSMAN: Thank you, Your Honor, and I thank the
13 Court for its patience in scheduling this matter and all the
14 other matters that we've been dealing with.
15 Andrew Rossman, again, special counsel for G-I.
16 Your Honor, you spend enough time in Bankruptcy
17 Court and you get used to almost anything, and you certainly
18 get used to people throwing around pleadings and throwing
19 around big numbers and claims; but, but I will tell you
20 receiving the claim of the New York City Housing Authority was
21 certainly quite a surprise from the perspective of the
22 Debtors. This is a company that has a history that is not
23 marked, you know, particularly by asbestos property damage
24 claims. We have never been held liable for an asbestos
25 property damage claim. All of the claims that have been filed

1 in the past have either been dismissed or they have been
2 settled for modest amounts.
3 So when we read this claim and we saw that it was in
4 the amount of $500 million by the New York City Housing
5 Authority, which had not darkened our doorstep in terms of
6 asbestos claims of any sort in the past, we were shocked to
7 say the least. And you know, perhaps their keyboard was
8 malfunctioning and spit out too many zeroes, but when you look
9 at the claim it's quite clear that there is no substance to
10 it. We think none factually and the presentation today, Your
11 Honor, is gonna focus on whys there is zero substance to it
12 legally. And I think it is well briefed but I think it is
13 worth illuminating for Your Honor the main points here.
14 THE COURT: As I understand the posture of the
15 issues as they are raised, there is the threshold issue of, of
16 statute of limitations and whether there is a time bar to the
17 claim, and then there is obviously, when one gets beyond that,
18 the issue of the claim itself. So I assume that counsel are
19 going to be addressing both of those issues. There may be
20 other issues. I think those are the major issues, as I see
21 it, but I think obviously the threshold issue is whether the
22 claims are timely and then one gets on to the issue of the
23 substance of the claim.
24 MR. ROSSMAN: Well, Your Honor, what we had imagined
25 for today was that for purposes of our objection and what we

1 believe should lead to the summary disposition of this claim
2 in its entirety, it's a statute of limitations argument that
3 controls and coupled with that is their failure to state a
4 claim on certain of the claims, on the claims that they raise,
5 which they claim are their true claims and which the parties
6 have a legal dispute about, okay.
7 Now, let me talk about this claim for a moment. If
8 you look at the proof of claim what you will see is that it is
9 based on New York City Housing projects that date back as far
10 as I believe it's in the 1940s, and perhaps even more --
11 THE COURT: Just so we're looking at the same thing,
12 because I have a lot of exhibits here, but there was an
13 original proof of claim and then there was a supplemental
14 submission; is that correct?
15 MR. ROSSMAN: There was a supplemental submission.
16 I'm referring to the October 13, 2008 proof of claim, the
17 original proof of claim.
18 THE COURT: I think there are exhibits to the
19 response so if we can refer to the exhibits that might be
20 helpful for the record. I think it is --
21 MR. ROSSMAN: Yeah, I don't know that the proof of
22 claim was attached as an exhibit.
23 THE COURT: I know there was --
24 MR. ROSSMAN: It was filed separately. The original
25 proof of claim that is, Your Honor.

1 THE COURT: Well --
2 MALE VOICE: Do you need a copy of that, Your Honor?
3 MR. ROSSMAN: Well, I --
4 THE COURT: No, I have it.
5 MALE VOICE: I can hand one up, Your Honor.
6 THE COURT: No, I think it was Exhibit 2. Does
7 Counsel have the exhibits?
8 MALE VOICE: Yeah, I believe Exhibit 2 was
9 abbreviated, Your Honor, in the brief, but the actual proof of
10 claim has more attachments to it. I don't think the Exhibit 2
11 had the list of all of the complexes within the Housing
12 Authority.
13 THE COURT: My Exhibit 2 looks like this. I am just
14 showing you this. It has documents attached. Is that the
15 proof of claim? There was also reference to a disk so I do
16 not know if there was --
17 MR. ROSSMAN: We have received the disk, Your Honor.
18 I am -- allow me to short-circuit the clutter a little bit.
19 THE COURT: All right.
20 MR. ROSSMAN: It's a very simple point.
21 THE COURT: I do not have the disk at my fingertips.
22 I have a lot of papers. So in any event, if I do need another
23 copy of the disk I'm sure Counsel can give that to me at the
24 end of the hearing. Go on.
25 MR. ROSSMAN: Yeah, if it becomes necessary we can

1 supply that, Your Honor. The very simple point, which I think
2 is undisputed that we're making here is the source of the
3 claims that the Housing Authority asserts are based on housing
4 projects that were developed from as early as, I think 1940
5 may be the earliest to as late as, as the mid or late 1980s,
6 maybe even a stray one or two that gets into the early 1990s.
7 Now, the -- what you've got to -- do you have it now
8 in front of you, Your Honor?
9 THE COURT: Yes. Well, I do have a copy of it, yes.
10 I believe so.
11 MR. ROSSMAN: That, that was the only point that I'm
12 going to make for the moment on the proof of claim, okay.
13 The claim itself --
14 THE COURT: You are speaking about the housing sites
15 that are -- I am sorry, but I do want to take a little time
16 with this.
17 MR. ROSSMAN: No, please.
18 THE COURT: I am not as familiar with this paper as
19 Counsel is.
20 There is a statement in support of the proof of
21 claim and then there is a document that says, "New York City
22 Housing Authority Developments."
23 MR. ROSSMAN: Yes.
24 THE COURT: And it has housing sites?
25 MR. ROSSMAN: Yes, Your Honor.

1 THE COURT: And that is a multiple page document.
2 MR. ROSSMAN: Yes.
3 THE COURT: We are looking at the same thing. Okay.
4 Very good.
5 MR. ROSSMAN: That's precisely it, Your Honor. And
6 hold onto the statement in support of proof of claim because
7 that is one document I will return to.
8 So, if I understand the claim has been made here, it
9 is that asbestos-containing materials which were manufactured
10 by GAF made their way into New York City Housing Authority
11 buildings from the 1940s to the 1980s, and the Housing
12 Authority is now involved in an abatement program of its own
13 design where it is taking these materials out and replacing
14 them. Predominantly, this claim consists of vinyl asbestos
15 floor tile. Okay, VAT we call it for short. VAT, as you
16 should know, Your Honor, a non-friable product. It is
17 recognized to be non-hazardous by federal regulations, and it
18 is a product which even the Housing Authority itself
19 recognizes that as long as it is not deteriorating in
20 condition there is no need to remove it, it may remain, and
21 it's a very common product that exists in older shopping
22 malls, in big box stores, in schools across the country, and
23 if left undisturbed presents no danger whatsoever.
24 So if I understand the chronology of the claim here,
25 this tile that was put in could have been lifetimes ago, or at

1 least a full lifetime ago, has sat there undisturbed. The
2 Housing Authority by its own account in these papers starting
3 in the 1980s began an abatement program whereby they would
4 inspect and when they found it appropriate choose to remediate
5 and replace asbestos-containing materials including these
6 floor tiles with something else, okay.
7 Specifically, if you look at, for example, the
8 affidavit of Mr. Clark, of Brian Clark, that's one of the
9 exhibits that they submit.
10 THE COURT: I have it.
11 MR. ROSSMAN: Okay. What Mr. Clark says is, when a
12 resident, Paragraph 4 of his affidavit,
13 "When a resident moves out of a public housing
14 apartment, New York Housing Authority inspects
15 the floor tile in the apartment to determine if
16 it requires replacement. They assess the floor
17 tile to determine if it has vinyl asbestos
18 floor tile. They remove and replace the VAT,
19 conduct air monitoring, retile the apartment."
20 And presumably at that point some other family moves
21 into the unit, okay. And what they say is since 2000, so in
22 roughly the last decade, they have abated some 8800 units and
23 the total cost that they associate with that is roughly $40
24 million; removal, $32 million, another five-and-change for
25 monitoring costs, And then, they also would like to charge

1 the estate, Your Honor, for about $5 million of the cost of
2 new tile that they're putting in. So we also are being asked
3 to bear the burden of the remodeling expenses for the New York
4 City Housing Authority.
5 Do you want to take a break, Your Honor?
6 THE COURT: There are some parties that were on the
7 phone that we just want to be sure, they appear to have
8 indicated a desire to be back on the phone. So I think it
9 will take about a couple of minutes just to see if there are
10 any other parties that wish to continue to be on the phone for
11 this part of the hearing. Let me --
12 MR. ROSSMAN: Take a quick break?
13 THE COURT: Two minutes.
14 (Recess 12:57 p.m. - 1:01 p.m.)
15 THE COURT: Thank you. We have another party that
16 is going to be on the telephone.
17 Can I have your appearance for the record please.
18 MS. KANE: This is Arielle Kane with Dewey & LeBoeuf
19 on behalf of the Debtors.
20 THE COURT: Very good. Thank you, Ms. Kane.
21 We had just begun the argument so Mr. Rossman is
22 presenting argument to the Court.
23 You may continue.
24 MR. ROSSMAN: Thank you, Your Honor. I was just
25 getting revved up.

1 So, I, during the pause, I'm glad I brought Mr.
2 Kurzman because he pointed out something that I should have
3 made clear in my presentation.
4 If you look at Mr. Clark's affidavit, Paragraph 4
5 specifically, and this is about the subject of replacing these
6 floor tiles, what he says is,
7 "When a resident moves out of a public housing
8 apartment, New York City Housing Authority
9 inspects the floor tile in the apartment to
10 determine if it requires replacement."
11 So presumably if they walk into the apartment, they
12 see there is title but it is not in a deteriorating condition,
13 it's not chipped and worn and so forth, even if it is vinyl
14 asbestos floor tile they leave it in place as is and in comes
15 the next family to live on the vinyl asbestos floor tile,
16 which poses no health hazards, okay.
17 Now, so to return to the chronology of events here,
18 Your Honor, because this is, of course, a statute of
19 limitations issue and chronology is important. So, we talked
20 about these claims going bak to housing complexes built all
21 the way in the 1940s. Now if you look at the Housing
22 Authority's response, not the surreply their response, in
23 Paragraph 2 they say specifically that,
24 "In the past ten years New York City Housing
25 Authority has expended over $40 million just

1 for removal and replacement of asbestos-
2 containing floor tiles."
3 They don't say that that's only G-I or G-I
4 predecessor or GAF floor tile. In fact, they say,
5 "Among the hundreds of projects that they have
6 a large number involved removal and replacement
7 of asbestos-containing materials manufactured
8 and sold by G-I's predecessors."
9 So the $40 million number that they have includes
10 some $5 million for the cost of new tile, which presumably
11 they'd give if the tile was falling apart whether it contained
12 asbestos or not, okay. And it's all of the manufacturers in
13 the world not just G-I. So how their claim gets from 40 to
14 $500 million or in their proposed complaint somewhere between
15 500 million and $1 billion, you know, is the wonders of word
16 processing, I have no idea, but that's their claim.
17 Now let's return to the chronology. That's what
18 they've done in the past ten years. They say that, in effect,
19 this is an immediate public health threat, and I'm going to
20 return to that, Your Honor, because it's critically important
21 to the legal standard. So for ten years they've been spending
22 millions of dollars abating asbestos from these buildings
23 because they say, they would have to say for them to have a
24 claim here, that it poses some immediate threat, okay. And
25 yet in Paragraph 5 of their submission they say the first time

1 that they considered doing anything with respect to this
2 estate was on or about September 25, 2008, okay, when suddenly
3 they learned that there's a bar date and they're going to be
4 required to submit a proof of claim.
5 So for all these decades from the 1940s through the
6 last ten years when apparently they've been actively abating
7 it, they've been under a haystack fast asleep and only moments
8 to midnight before the bar date in this case did they wake up
9 and file a claim and then they put as many zeroes and comas in
10 it as they could possibly fit in a space, okay. That's the
11 history of this claim.
12 Now, how do we know that this claim is time barred?
13 If you look at their own submissions, okay, including Mr.
14 Clark's affidavit and the hand, something that we submitted,
15 which is the handbook of the New York City Housing Authority,
16 they say quite forthrightly that they have had an asbestos
17 abatement program, active program in place since the 1980s.
18 People have known about the dangers of asbestos for a very
19 long time. Certainly not later than the 1980s the Housing
20 Authority was aware of it and they were actively dealing with
21 it. In the property damage context that is when the clock
22 starts ticking at the latest, okay. The actual date of injury
23 is upon installation in the building, okay.
24 The New York Legislature adopted a statute that
25 specifically does two things. In part, it saves some of these

1 property damage and personal injury cases by creating a three-
2 year statute of limitations from discovery, okay, and this is
3 Section 214(c) of the CPLR. But it also is a statute of
4 repose. At the end of the three years that's it, okay. We
5 know for certain that that three-year period began running
6 sometime in the 1980s and no claim was filed. No claim was
7 filed in the '80s, no claim was filed in the decade of the
8 1990s, no claim was ever filed before the petition in this
9 case in 2001.
10 There's actually no dispute here, Your Honor, that
11 if the claim that they had were one for property damage then
12 it would be time barred, and the Jensen case which my
13 adversaries cite, they actually miscite it, it's a New York
14 Court of Appeals case, stands for the proposition that for
15 this statute 214(c) to be meaningful you cannot get around it
16 with some never-ending statute of limitations argument.
17 There, the issue that was addressed was a question of
18 continuing nuisance and the argument that was made was that
19 you don't need to time bar continuing nuisance claims because
20 they arise again every day, okay. My opponents cite that as
21 the law. They actually are citing what the dissent was in
22 that case.
23 In the majority opinion, which is the law of New
24 York, that's not the case. The continuing nuisance continues,
25 okay. 214(c) put an end to it and the three years was meant

1 to punctuate as a statute of repose when people could be free
2 from these claims, okay.
3 Now how did we get here, okay, if it's so crystal
4 clear that all these claims are time barred? My opponents say
5 that we have miscast their claim. We claim it's a property
6 damage claim. In fact, it's not a tort claim. It is an
7 equitable claim for either indemnification or restitution.
8 Well, let's see, where did I get that funny idea
9 that we're dealing with an asbestos property claim here? Hmm,
10 perhaps it's their proof of claim. If you look at the first
11 sentence of Paragraph 1 of their statement in support of proof
12 of claim, New York City Housing Authority writes, "The
13 asbestos property damage claim of New York City Housing
14 Authority," to which this statement attached, and then it goes
15 on to describe the claim. And again in Paragraph 4 they
16 describe the legal grounds as including property damages,
17 "Claim is based on causes of action including but not limited
18 to," and then they give a list of causes of action, which
19 includes negligence, breach of warranty, nuisance, restitution
20 and indemnity, okay. We'll get to restitution and indemnity
21 in a minute.
22 So, I am only, I am not holding them to some other
23 claim that they've submitted. I'm allowing them to be the
24 master of their own claim. That's the claim that they've
25 submitted.

1 Now, is there New York law on the question of
2 whether you can take an asbestos property damage claim and
3 recast it, as my adversaries have tried to do, as a nuisance
4 -- not a nuisance, rather, Your Honor, as an indemnity or
5 restitution claim? Yes. In fact, this is a decided issue by
6 appellate courts in New York. We cite the MRI case, the 888
7 case and the Germantown case. And in each one of those cases
8 the Court was unequivocal in the asbestos property damage
9 context, and they say nice try but not so fast. You cannot
10 take a claim, a legal claim that is time barred, recast it as
11 an equitable claim and then defeat the running of the statute
12 of limitations. Specifically what you can't --
13 THE COURT: You are citing the MRI Broadway Rental
14 case?
15 MR. ROSSMAN: That's right, Your Honor.
16 THE COURT: That was affirmed by the Court of
17 Appeals?
18 MR. ROSSMAN: It was affirmed by the Court of
19 Appeals.
20 THE COURT: Obviously, your adversary cited the Lead
21 Industries case which is Supreme Court, but what do you take
22 away from that case? I guess I am looking at Judge Freedman's
23 case?
24 MR. ROSSMAN: Yes, Judge Helen Freedman's case.
25 THE COURT: I am certainly familiar with it, and as

1 I understand that holding, she stated,
2 "As previously indicated, it is a breach by
3 defendant of an underlying duty owed to a
4 third-party even if an action based thereon by
5 that party against defendant is time barred.
6 That is critical to a plaintiff's right to
7 bring an indemnity action, recover the damages
8 which plaintiff was caused to pay as a result
9 of defendant's breach of its duty to the third-
10 party."
11 MR. ROSSMAN: Yes, Your Honor.
12 THE COURT: I think that is --
13 MR. ROSSMAN: That --
14 THE COURT: I know Counsel has not spoken yet, but I
15 believe it is that proposition that Counsel relies on to ask
16 that the Court recognize equitable claim.
17 MR. ROSSMAN: I think that's exactly right, Your
18 Honor. And in fact, what they have said in their surreply is
19 essentially they took the Lead Industries case, they crossed
20 out "Lead", they wrote in "Asbestos" and tried to model their
21 complaint on that case, okay.
22 THE COURT: You're speaking about the draft
23 complaint that was --
24 MR. ROSSMAN: Correct.
25 THE COURT: As I understand, that was filed in order

1 to clarify the issues more than anything else. Obviously, it
2 is not a complaint that has been filed, but --
3 MR. ROSSMAN: That's correct, Your Honor.
4 THE COURT: -- was meant to demonstrate what the
5 claims are and what they would be at some point that a
6 complaint would be able to be filed.
7 MR. ROSSMAN: Yes, Your Honor.
8 Now, so let's, let's take Lead Industries, okay,
9 which is the sole threat on which they base their entire case.
10 It's a Supreme Court decision. I have, you know, great
11 respect for Justice Freedman, but she's wrong, okay, and I'm
12 going to tell you why she's wrong on the law, and I'll give
13 you the law to support it, and I'll tell you why even we
14 believe even under her reasoning should come out to a very
15 different conclusion in this case on these facts, okay.
16 The law, all right, it's a 1999 trial court
17 decision. It's never been cited anywhere, okay. My opponents
18 accuse me of not being ethical in citing all the legal
19 decisions. That's quite demonstrably false. You know, the
20 Lead Industries III case, the Appellate Division case from
21 1996, it has been cited, it's been cited in the cases that we
22 cite to the Court. There's no issue with that, okay, and I'm
23 going to get to that case in a minute. But Lead Industries
24 IV, the Justice Freedman decision, has never been cited.
25 Now, what see recites is that,

1 "Time barred, otherwise time barred legal
2 claims cannot be revived by -- can be -- I'm
3 sorry -- revived by turning them into
4 restitution or indemnity claims."
5 Okay. That's the precise opposite of the holding in
6 the MRI decision, okay. The MRI decision, which was a, an
7 Appellate Division decision, which I'll get the date. I
8 believe it's 19, at the Appellate Division level it was 1998.
9 THE COURT: 1998.
10 MR. ROSSMAN: 1997 at the Appellate Division, okay.
11 At the Court of Appeals, the Court of Appeals affirmed the MRI
12 case.
13 THE COURT: The Court of Appeals decision is 1998.
14 Correct. The Court of Appeals decision affirmed the
15 MRI case after the Appellate Division's decision in Lead
16 Industries. So we believe MRI is the right statement of the
17 law of New York and that a time barred legal claim cannot be
18 revived as an equitable claim, and we think that's quite
19 consistent with the idea of repose that the Court of Appeals
20 talked about in the Jensen case, okay.
21 Now, how else do we know that to be the case?
22 Because after not only the Appellate Division Lead Industries
23 case, but also after Justice Freedman's case, there is another
24 appellate decision of the New York court dealing with this
25 very issue, with the question of indemnity and restitution in

1 the asbestos property damage context, and that's the
2 Germantown decision, and that's 2002. So there's no question
3 that this is a later in time higher court decision than
4 Justice Freedman's decision in the actual context of the
5 abatement of asbestos and asbestos property damage-related
6 claims in that case a school district, okay. So clearly,
7 factually, timewise, legally authority of the Court we all
8 think for all those reasons it's superior, okay.
9 It grapples directly with the Appellate Division's
10 Lead Industries case, and I'm looking at the -- I'll give you
11 the cite, Your Honor, so you can turn to it later. It's
12 294 A.D.2d 93, okay. And if you look at that case including
13 at Footnote 2 and in the text beyond Footnote 2, it is
14 presented with a question of can the plaintiffs who have had
15 their legal claims dismissed for property damage, can they
16 amend their complaint to assert, what else, indemnity and
17 restitution claims based on asbestos in their property, okay.
18 And in this case the allegation would be that there
19 was a duty owed to the students and employees who worked in
20 those school buildings to protect them from the hazards of
21 asbestos, okay. And that court specifically addresses Lead
22 Industries and says the answer is no, that you don't have a
23 restitution claim and you don't have an indemnity claim. And
24 specifically it says permitting plaintiffs to add these tort
25 claims by recasting them in indemnification and restitution

1 language would improperly circumvent the statute of
2 limitations bar on these claims citing Lead Industries and the
3 MRI decision affirmed by the New York Court of Appeals, okay.
4 As such, plaintiff has failed to show that the proposed new
5 causes of action have any legal or evidentiary merit and the
6 motion should be denied, okay. So we think clearly the law of
7 New York settled in the MRI case, settled in the Germantown
8 case in this specific context is that you cannot substitute
9 these equitable claims for time barred legal claims, okay.
10 Now, let's look at the claims themselves and
11 consider what factual decision, what decision Justice Freedman
12 would have made presented with these facts, okay. Now, there
13 are two claims. Look at them individually. There's a
14 restitution claim. The restitution claim is built on, there's
15 no dispute about this, it's built on the restatement Section
16 115 that tells you what the governing law is for restitution.
17 My adversaries have described that as the emergency assistance
18 doctrine, okay. That's very important. And what the
19 emergency assistance doctrine says is that there has to be an
20 immediate need, immediate need to abate the hazard in order to
21 protect the public, okay.
22 What is the basis for the immediate need to protect
23 public health and safety in this case, okay? Something that
24 they have known about since the 1980s, something that they've
25 spent the last ten years working with, and something with only

1 moments before the bar date did they ever show up and raise
2 their hand and say, "We've got a problem here."
3 Well, they give us the affidavit of Mr. Clark, okay.
4 They give us a whole bunch of old affidavits going back to
5 1993 and 2001, affidavits in other cases. But in this case we
6 have the affidavit of Mr. Clark, okay. And what they say in
7 his affidavit and what I've already described is that there's
8 no immediate need at all. They only replace these tiles on a
9 convenience basis. When one family moves out they inspect,
10 okay. If the inspection determines that the floor is
11 deteriorating, like presumably they would do no matter what
12 the floor is made of, they take that opportunity when the
13 fammily has moved out to remove the old and put in the new,
14 okay. If it happens to contain asbestos, yes, I'm sure there
15 are some added precautions; people have to wear a mask or
16 whatever they have to do to comply with OSHA regulations,
17 okay. But this is not an immediate need.
18 What this isn't is lead paint, okay. We don't have
19 a circumstance where we have children who are being monitored,
20 health tested and treated for suffering from lead poisoning,
21 okay. What we have is the Housing Authority that's taking an
22 opportune moment to remodel floor tile in their building,
23 okay. Floor tile which they themselves say in their handbook
24 is not dangerous. Let's take a look at this.
25 THE COURT: Okay. Are you suggesting that Justice

1 Freedman would have come to a different conclusion had it not
2 been lead paint?
3 MR. ROSSMAN: I, I -- look, we don't --
4 THE COURT: You disagree with the holding itself?
5 MR. ROSSMAN: I think Justice Freedman's holding was
6 legally erroneous and I think the explanation for that case is
7 very simple. I think when presented with a situation where
8 she was under the belief that there was a clear and present
9 danger to the health of children, okay, that one would, you
10 know, maybe as a sympathetic jurist, as Justice Freedman
11 certainly is, looked to stretch the law to accommodate that
12 problem, okay. This is not that case. Not even close. And
13 if it were that case then I would suggest that New York City
14 Housing Authority wouldn't have showed up as last minute
15 Louies here, you know, a couple days before the bar date, but
16 they would have been banging on our door a long time ago to
17 say that they have a clear and present health danger, okay.
18 They don't. This is their handbook, okay. This is
19 what they say about asbestos. There's no skull and crossbones
20 here, okay. It says,
21 "Asbestos is a naturally occurring mineral that
22 has been used in thousands of products. It is
23 important to recognize that the majority of
24 people who have experienced adverse health
25 effects as a result of asbestos exposure were

1 workers employed in the mining, manufacturing
2 and insulating industries, who work with raw or
3 processed asbestos. New York City Housing
4 Authority established a comprehensive asbestos
5 detection and abatement program in the late
6 1980s to --
7 THE COURT: Are you reading from the handbook?
8 MR. ROSSMAN: I'm reading from their own handbook.
9 "-- to manage asbestos safely in place. Under
10 no circumstances should a resident attempt to
11 remove material that may contain asbestos such
12 as floor tile or pipe insulation. Disturbing
13 such material might create a health hazard
14 where none existed before."
15 So what do you know from there manual, okay? This
16 terrifying manual doesn't say that there's an immediate health
17 need. They're not suggesting that 9.2 percent of the New York
18 City residents should evacuate their public housing so that
19 this highly dangerous vinyl asbestos floor tile that's been
20 there for decades undisturbed and which they have never cared
21 about before should be removed. That's not what they're
22 saying, okay. What they're saying is when it's convenient for
23 them, when it fits their remodeling program they'll take it
24 out, they'll remodel it, and they'd like us to pay all of the
25 costs associated with that times ten or more, okay. Now,

1 that's on their restitution claim. They don't come close to
2 meeting the standard for emergency assistance.
3 What's their other claim? Their other claim is for
4 indemnity. Now for indemnity they've got to show two things,
5 neither of which they can come close to showing. Number one,
6 they would have to show that there is a duty owed by GAF to
7 some third-party, to the public, okay. Ask them what the duty
8 is. Ask them to identify what's the legal basis for GAF's
9 duty to the public. I don't see it in their proposed claim.
10 It's not in their proof of claim, and I don't see it in their
11 proposed complaint. I don't see it in their briefs. There is
12 no duty as far as we're aware.
13 We cite the Chicago Board case, albeit a case out of
14 Illinois. But in that case the court said as much, that there
15 is no duty here, okay. Section 115, Cause of Action, this is
16 the restitution section that's being referred to, does not
17 merely arise because the defendant's product may be hazardous
18 or damage the plaintiff's buildings. There must be an
19 independent basis which establishes a duty upon the defendant
20 to act, and the defendants must have failed to abide by that
21 duty. The only --
22 THE COURT: Was that also what Justice Freedman
23 says?
24 MR. ROSSMAN: No, no. Justice Freedman is not
25 dealing with the asbestos case and the duty in Lead Industries

1 I think is a real weakness in the holding of the case. There
2 is no articulation of what the duty is. There's some vague
3 notion of representations being made to the public. Not an
4 issue that we have here, okay, but there's no articulation of
5 what the duty is that would be owed by the defendants in that
6 case.
7 What I can tell you is this, there's none here,
8 okay. There is --
9 THE COURT: All I was suggesting was that Justice
10 Freeman in her opinion indicates that,
11 "It is the breach by defendant of an underlying
12 duty owed to a third-party, even if that action
13 is time barred that is critical to the
14 plaintiff's right to bring an indemnity action
15 to recover damages."
16 You take the position there is no duty.
17 MR. ROSSMAN: No duty -- there has to be two duties
18 for an indemnity claim, okay. There has to be a duty on the
19 part of the Housing Authority presumably to their tenants,
20 which is a public safety, okay. But there also has to be a
21 duty on the part of GAF, okay, a duty on the part of the
22 estate as a defendant in this case, and that's the area where
23 they completely fall down on the job. They don't identify
24 what the duty is.
25 In the Chicago Board case -- they don't cite any

1 cases at all that say that there is a duty on the asbestos
2 property damage context.
3 And the Chicago Board case says, in fact, there is
4 no duty and they say it in the context of another school case
5 involving asbestos in buildings where they say, "The only
6 parties who are directed to inspect, repair, replace or
7 maintain, according to the statute, are the plaintiff school
8 boards." So if they cite New York City statutes or
9 regulations that require them to inspect, maintain and repair
10 buildings and take certain precautions if it involves
11 asbestos-containing products that's not enough. They've also
12 got to show that there's some duty on the part of GAF and none
13 is identified.
14 Now, the other thing, the other completely
15 independent reason why their indemnity claim fails is because
16 to be held for indemnity you actually have to have been
17 determined to be liable to the third-party. As the Lead
18 Industries as in Lead Industries III, okay, I'm citing from
19 their own case, says you've got to be held liable or cast in
20 damages to a third-party. They don't plead that they ever
21 were. The only pleading here is that they have this voluntary
22 program of asbestos abatement; they have spent some $40
23 million all totaled on every conceivable element of that
24 program including the remodeling program on all aspects
25 whether it relates to this estate or relates to other

1 companies; but, they don't tell you that any third-party, any
2 tenant in their housing project has ever obtained a legal
3 judgment against them which they are liable to pay on which
4 they say there is a legal duty for GAF, as G-I's predecessor,
5 to pay that judgment. In the absence of that they don't make
6 an indemnity claim.
7 So Your Honor, just to sum up and then I'm done,
8 okay. Clearly these claims are time barred as tort claims.
9 There's no dispute about them. We think the law is settled in
10 New York and the Justice Freedman case is an anomaly and it's
11 wrong. We think it is settled in New York that you cannot
12 revive a time barred legal claim with an equitable claim. We
13 think that's true in Germantown, we think it's true in MRI,
14 and we think the policy behind it's well articulated in the
15 Jensen case by the Court of Appeals. But even if you could
16 theoretically make that case the only basis for it ever was
17 the Lead Industries case where the thrust of the action, and
18 I'm quoting from the appellate decision, the Lead Industries
19 III case,
20 "The thrust of the complaint is that the
21 plaintiffs took the immediate action necessary
22 to protect the health and safety of the
23 residents of their buildings, particularly
24 children, from the well-recognized hazards of
25 lead paint."

1 Those facts are absent here. They are not even
2 alleged here. There's no question that there's no immediate
3 need for actions. They haven't taken any action in all of
4 this time. It doesn't meet the emergency assistance doctrine.
5 There's no duty and their claims need to be dismissed for
6 failure to state a claim and because they are time barred.
7 Thank you, Your Honor.
8 MR. POLLOCK: Your Honor, would you like me to
9 proceed?
10 THE COURT: Yes.
11 MR. POLLOCK: Good afternoon, Your Honor.
12 THE COURT: Good afternoon.
13 MR. POLLOCK: My name is Jeff Pollock on behalf of
14 Fox Rothschild and the New York City Housing Authority.
15 THE COURT: Good afternoon, Counsel.
16 MR. POLLOCK: Thank you, Judge.
17 If I go on too long, if we get hungry, let me know,
18 we'll take a break.
19 THE COURT: I'll let you know.
20 MR. POLLOCK: I'm going to start with in part in
21 response to Mr. Rossman's eloquent argument point, and I'm not
22 going to do it on a point-by-point basis. I will address, I'm
23 not looking to avoid any of the issues he's raised, but I
24 think in sum I can dismiss most of the arguments on one simple
25 proposition.

1 Respectfully, the job of this Court is to not try
2 and divide New York law and to render it anew and to create
3 New York law the way New York law doesn't see itself. Mr.
4 Rossman criticizes --
5 THE COURT: I agree with that.
6 MR. POLLOCK: He criticizes a sitting judge of the
7 New York court and says she's a liberal. She went out too
8 far. You know, this was just a case that was --
9 THE COURT: Well --
10 MR. POLLOCK: -- very sympathetic.
11 MR. ROSSMAN: I have to stand to object.
12 THE COURT: I don't think that's what Counsel --
13 MR. ROSSMAN: I, I have great respect for Justice
14 Freedman. I've tried cases in front of her. I didn't intend
15 any disrespect.
16 THE COURT: I think Counsel just indicated a
17 disagreement with the holding, but --
18 MR. ROSSMAN: Yes.
19 THE COURT: -- I am sure there are cases of every
20 judge where there's some disagreement by Counsel urged before
21 other judges.
22 MR. POLLOCK: Respectfully, but he went --
23 THE COURT: I'd rather stick, obviously to the case.
24 MR. POLLOCK: Sure. I will. I'll let the record
25 stand as to what he said.

1 THE COURT: Very good.
2 MR. POLLOCK: Notably, the Appellate Division itself
3 in City of New York v College Point, 61 A.D.3d 33, which we
4 provided as Exhibit 2 to our supplement or surreply disagreed
5 with learned Counsel and points out specifically that the City
6 of New York Lead Industries case is cited on Page 48. Here,
7 I'm referring to 61 A.D.3d at 48, and going on, and the Court
8 cites directly to Lead Industries and cites the proposition
9 that Counsel seems to indicate is wrong, that the true
10 restitution theory is an oddity of New York law. which that
11 really, it was just a mistake, frankly we should stick with
12 tort and contract.
13 Instead, the Appellate Division just this year has
14 affirmed that exact concept which is at the core of our claim.
15 So I would respectfully submit that when we try and summarize
16 or analogize the cases what we need to do is to look at the
17 New York law in totality and, in fact, if we take for example
18 Germantown --
19 THE COURT: You cited the City of New York v College
20 Point case?
21 MR. POLLOCK: I did Your Honor.
22 THE COURT: I have the case here.
23 MR. POLLOCK: Sure.
24 THE COURT: I would like you --
25 MR. POLLOCK: It's on Page 14 of the West Law

1 printout.
2 THE COURT: Okay.
3 MR. POLLOCK: It's in the top right-hand corner,
4 Judge.
5 THE COURT: You were citing to what portion of that
6 opinion?
7 MR. POLLOCK: If you see the headnote on the left-
8 hand side, which is 16, 17 and 18?
9 THE COURT: I have that, yes.
10 MR. POLLOCK: It cites there the City of New York v
11 Lead Industries.
12 THE COURT: When it states, "A common law indemnity
13 and restitution are separate and discreet causes of action."
14 MR. POLLOCK: Yes, Your Honor, and that goes on to
15 that page and into the next, and the Court, again, drives home
16 the fact that it's not some quirky oddity of New York law that
17 happened one time but over almost 15 years later it is a core
18 part of the New York court and we, I'm not going to repeat our
19 briefs, I know you've read them.
20 THE COURT: Yes.
21 MR. POLLOCK: In there we cite multiple doctrine.
22 There's secondary sources. There's other decisions that have
23 looked at this issue, and no one's ever said, "By the way, you
24 know, New York I was just a burp. It was, Lead Industries I
25 was just wrong." So I respectfully submit that we're starting

1 from a wrong premise if we're going to start criticizing some
2 New York cases saying it's an oddity and it's wrong.
3 The, this is a motion, this is a motion to dismiss,
4 in essence, and therefore, all facts are to be construed in
5 favor of the non-moving party. In this case, what is this
6 case really about and who is the New York Housing Authority?
7 As you may be aware, the New York City Housing Authority is
8 the largest single residential housing authority in North
9 America. We have about 17 percent, give or take a little bit,
10 of the housing stock in New York City. Nearly all of the
11 NYCHA buildings, and if you don't mind I'll refer to it as
12 NYCHA --
13 THE COURT: That's fine.
14 MR. POLLOCK: -- since it will get us quicker to
15 lunch, have, at least have child care centers and day care
16 centers; and therefore, the, some of these buildings contain
17 the most vulnerable members of our society and that of New
18 York City.
19 The products that they are, that we're using, the
20 floor tiling, these are the ones the kids are running across
21 with -- and we will submit proofs on this if need be -- they
22 have blocks, they have, lying on the floor where they run
23 across on tricycles, et cetera. The flooring doesn't sit
24 there in a box. It is used every day. It is cleaned and,
25 therefore, over time it's going to, and we submit we've

1 already got proofs that do identify the fact and we identified
2 this in Exhibit 5 of our material that they have, in fact,
3 they've released asbestos fibers already.
4 THE COURT: Just again because I want to make sure
5 the record is clear, you are speaking about the supplemental
6 submission?
7 MR. POLLOCK: Yes, that's the, yes, Your Honor,
8 that's the Richard Hatfield document from October 18, 1999,
9 and I'll follow your lead, Judge, and identify the documents
10 from this point on.
11 THE COURT: All right.
12 MR. POLLOCK: I apologize.
13 THE COURT: No, that's quite all right.
14 MR. POLLOCK: The, but the point being is that at
15 this points since it is a summary-judgment motion there is at
16 least some proof, and I would argue that Exhibit 5 to our
17 surreply exhibits provide that some proof along with some of
18 the EPA documents I'll cite to in a second, that there is a
19 risk, a current risk and a future risk of inhalation of
20 asbestos fibers from floor tiling that contains asbestos
21 products.
22 We are not seeking to call a chicken a duck, if you
23 will, and to recast New York law and to revive a dead tort
24 claim. Rather, we're sitting to fit squarely within it. The
25 -- bear with me for one second, Judge.

1 THE COURT: Just so the record is clear, this
2 document from Mr. Hatfield, as senior consultant --
3 MR. POLLOCK: Yes, Your Honor.
4 THE COURT: -- at MAS, that's October 18, 1999
5 report?
6 MR. POLLOCK: Yes, Your Honor.
7 THE COURT: Analysis.
8 MR. POLLOCK: And this document which I think speaks
9 for itself --
10 THE COURT: Materials and Analytical Services is the
11 company.
12 MR. POLLOCK: Yes, Judge.
13 THE COURT: Again, since I have you here and can put
14 some flesh on the bones, what, what is this document presented
15 to demonstrate in the context of --
16 MR. POLLOCK: Sure, Your Honor. This, this man who
17 is a consultant, environmental consultant did a survey of the
18 buildings identified therein, if you look at the pages after
19 the first page, and he completed an analysis of floor tiling
20 and found, and I'll jump to the core point, that,
21 "Dust samples were taken in areas where floor
22 tiles were cracked, broken, scratched or
23 deteriorated. The dust samples revealed that
24 these tiles -- excuse me, gentlemen -- are
25 releasing significant amounts of asbestos

1 structures. The results range from 55.6
2 million to 4.6 billion asbestos structures per
3 square foot."
4 The next paragraph,
5 "Additionally, the two dust samples associated
6 with the asbestos contained roofing materials
7 also showing high levels of contamination. The
8 sample results were 99.3 million and 2 billion
9 asbestos structures per square foot."
10 So in short, he's saying, "I'm looking at the dust
11 that's coming off of the floor tiling. I'm also looking at
12 the roofing materials and I am finding that there are free
13 asbestos fibers available."
14 The Debtor argues that there's no such proof to it.
15 The fact is, we've submitted at least a scintilla of proof,
16 i.e., an engineering report stating that's exactly what's
17 happening. When you couple that with the environmental
18 documents that are issued, and I'll cite here the one public
19 record which is EPA document 560, a March 1993, "Guidance for
20 Controlling Friable Asbestos-Containing Materials in
21 Buildings," that document which is issued by the EPA, and
22 notably by way of full disclosure, is a guidance document so
23 it's not a binding regulation. It is not a statute.
24 It is simply a guidance document which means it's an
25 interpretive material designed to help the public. They

1 specifically state that, exposure to airborne asbestos
2 regardless of the level involves some health risk. Children -
3 - exactly the kind that are could be exposed in NYCHA's
4 buildings -- are the most vulnerable. No exposure standards
5 have been established for nonindustrial settings and that's
6 actually very important because I agree with Mr. Rossman on
7 one critical question which is: Is there a current obligation
8 by NYCHA to go out and to remediate each one of those
9 buildings?
10 There is no statute that requires us to do it. On
11 the other hand, there is an obligation that we believe that
12 they are under, and I'll get into why in a second.
13 THE COURT: When you say "they" you mean the Debtor?
14 MR. POLLOCK: That's correct, Your Honor.
15 Because they have made a product that's inherently
16 dangerous for which they are strictly liable under New York
17 law, and there is case law to support that proposition.
18 The potential for exposure to airborne asbestos in
19 buildings and the associate risk of asbestos-related disease
20 cannot be ignored, the EPA warned. Given those two factors,
21 and I would submit that under 903 of the Federal Rules of
22 Evidence it's a self-authenticating document, given that
23 scintilla of proof, if you will, and obviously we can adduce
24 more and could produce extra testimony and hopefully we have
25 the opportunity to do so, we will prove that, in fact, there

1 is a real and comparable risk by, of asbestos exposure in the
2 buildings as a result of the product the Debtor has
3 manufactured.
4 True restitution is recognized as a valid legal
5 theory. Not only was it recognized in --
6 THE COURT: Counsel, can I just interrupt you. I am
7 not asking you for concession necessarily, but is your client
8 asserting these claims as tort claims or as equitable claims?
9 MR. POLLOCK: It's an equitable claim, Your Honor.
10 THE COURT: You are not --
11 MR. POLLOCK: In the pure tort claims, I frankly
12 agree with Mr. Rossman. As to the pure tort claims those
13 claims would be time barred.
14 THE COURT: So that is not an issue here?
15 MR. POLLOCK: No, it is not, Your Honor.
16 THE COURT: The issue is the ability of your client
17 to assert restitution and indemnification-type claims.
18 MR. POLLOCK: Yes, on indemnity, if you don't mind
19 if I jump to that one for one second since the issue was
20 raised, on indemnity there is a gray area here which I think
21 is one that may require a factual analysis by the Court in
22 order to figure out which one of us is right because if the,
23 under the indemnity, we did, in fact, cite in our draft
24 complaint which I prepared solely -- obviously given the bar,
25 I cannot serve a complaint. I prepared the, I prepared it in

1 order of essence to avoid some of the debate we would have
2 today, to shorten things, to state specifically what our claim
3 is and what our claim is not, and therefore I thought that
4 would be helpful for people to have by way of a discussion.
5 It's also why I didn't disclose it to the Court in January
6 when I served it upon all counsel because it was really meant
7 to guide hopefully what might lead to some settlement
8 discussions between the parties if, in fact, we state a valid
9 legal theory. But I also thought it was important to state
10 clearly what we're really pleading.
11 THE COURT: Can you take that opportunity now then.
12 I have the complaint in front of me, but I would like to have
13 your summary of what the claim is and what the claim is not.
14 MR. POLLOCK: Sure. The claim is, the claim is one
15 in true restitution. I want to jump for one second to the
16 indemnity section. Here it is. If you jump to Paragraph 43
17 of the complaint, it's on Page 11.
18 THE COURT: I have it.
19 MR. POLLOCK: Counsel, you have that as well.
20 We state in expending such funds -- these are funds
21 to address the asbestos floor tiling over the last ten years,
22 and frankly, you know, I will agree with Mr. Rossman. If, in
23 part, if, in fact, to the extent that the product is not a G-I
24 product, formerly GAF product, we recognize that New York law
25 does not recognize like New Jersey does market share

1 liability.
2 One of the burdens we carry, and this is why we
3 hedged our bets. We provided some of our proofs and said, "By
4 the way, they're voluminous. If you want the rest of the
5 please let us know," was we didn't want to inundate the Court,
6 but we are fully prepared to demonstrate as to some or all of
7 the NYCHA buildings that GAF products were, in fact, used
8 there and that those are the ones so when the argument's
9 raised that we spent $40 million and that only some percent is
10 attributable to GAF now G-I, that's correct in part. We are
11 prepared to carry on that burden of proof. I don't think it's
12 an issue we need to address today.
13 With regard to this one we say specifically in
14 expending such funds and incurring the other costs related to
15 the abatement of asbestos hazards from G-I products in Housing
16 Authority, plaintiff has borne a duty that in law or equity
17 and fairness ought to have been and should be borne by
18 defendant, specifically the duty to abate all asbestos caused
19 by G-I-built products in its buildings.
20 If you take that concept and go back for one second
21 to our surreply at Exhibit 3, and I go to the same page I just
22 referred to you a second, Judge.
23 THE COURT: Are you talking about the City of New
24 York case?
25 MR. POLLOCK: I am, Your Honor. On Page 14, which

1 is the right-hand column at Paragraph 9 at 19 or Headnote 19,
2 the Court states,
3 "I think the issue very squarely the primary
4 difference between common law indemnity and
5 restitution appear to be two-fold. First, a
6 plaintiff seeking common law indemnity must
7 have acted to discharge a duty which more
8 properly should have been discharged by the
9 indemnitor. Whereas a plaintiff seeking
10 restitution must have acted not pursuant to a
11 duty but to satisfy the more generalized
12 requirements of public decency, health or
13 safety."
14 And realistically, that is the core of our goals
15 here. We are not under -- there is -- I am unaware of any
16 statute, and Counsel can tell me if I'm wrong, under either
17 New York law or under federal law that requires us, obligates
18 us to go out and take out asbestos from any particular
19 building. On the other hand, we have a duty to our tenants
20 and to our residents and we also look at the, we are aware of
21 the developing law which -- or the developing facts and we
22 are, therefore, taking action when we can.
23 One of the questions regarding emergency, which
24 Counsel harped on at the beginning of his argument, I note, by
25 the way, in the Lead Industries case, which I think we

1 attached as Exhibit 2 -- is that right? I'm in the wrong
2 place here. It's attached to their papers. I'm sorry.
3 THE COURT: Yes.
4 MR. POLLOCK: In the Lead Industries case, which is
5 -- I need their exhibits.
6 Bear with me one minute, Judge. We have an
7 operating difficulty. I'm sorry, Judge.
8 It's attached to Reply in Further Support of
9 Debtor's Objection to New York City Housing Authority's Proof
10 of Claim, and that's from Riker, Danzig, Quinn, Emanuel and
11 Dewey LeBoeuf. And they actually have attached to it the Lead
12 Industries complaint. I thought it would be worthwhile
13 briefly talking about the Lead Industries summons and
14 complaint that's in there because the facts are actually kind
15 of interesting, especially given the historical discussion
16 we'd had a few minutes ago.
17 First of all in this case, and I note at Page 2 of
18 the summons that's attached to Debtor's reply in further
19 support, the City of New York, which by the way, NYCHA was a
20 plaintiff in that case, states,
21 "The greatest danger of lead poisoning for New
22 York City children under 7 years of age is
23 posed by the ingestion of,"
24 And they go into lead building, lead paint. What's
25 interest is, when you look at our facts, Counsel noted that

1 some of our buildings had asbestos as of 1940 and that some of
2 our buildings, you know, go on for the next two decades
3 getting asbestos. In this case, the New York City Housing
4 Authority in the Lead Industries case, and here I'm at Page 6,
5 Paragraphs 24 and 25, this claim was allowed under true
6 restitution and in this claim they say, "As early as the mid-
7 19th --
8 THE COURT: I am sorry. Are you citing --
9 MR. POLLOCK: I'm citing from the Lead Industries
10 complaint.
11 THE COURT: And that is attached to the reply in
12 further support of Debtor's objection?
13 MR. POLLOCK: It is, Your Honor. And on Page --
14 THE COURT: I am just looking for. I am sorry.
15 MR. POLLOCK: Sure.
16 THE COURT: Sorry for the delay.
17 MR. POLLOCK: No problem.
18 THE COURT: I have exhibits that say Exhibit A. I
19 do not have it attached. These exhibits have attached 888 7th
20 Avenue Associates decision and a settlement agreement, but it
21 does not have the complaint. So it must be in a different
22 set. I am sorry to. . .
23 MR. POLLOCK: I have an overly aggressive paralegal
24 and I apologize if I mischaracterized that.
25 THE COURT: Is that complaint part of the record at

1 this point?
2 MR. ROSSMAN: We haven't received it.
3 MR. POLLOCK: I apologize, Your Honor. I thought it
4 -- I didn't mean to mislead the Court. I thought it was part
5 of the, the document was attached.
6 THE COURT: No, I understand that you did. I do not
7 think I have it or Counsel.
8 Well, your point regarding that complaint, is it --
9 MR. POLLOCK: Well let me do this, if you don't
10 mind, to be fairer to my learned colleague --
11 THE COURT: Yes, I would assume you might want to
12 get the document.
13 MR. POLLOCK: I'll give you my copy right now and
14 then --
15 THE COURT: Yes, I think that is a good idea.
16 MR. POLLOCK: -- if -- so they can --
17 THE COURT: Yes, why don't you show it to Counsel
18 because you want to make a point about it. I will allow you
19 to do that.
20 MR. POLLOCK: Sure. In the Lead Industries
21 complaint, which is the, and this is the actual doctrine from
22 which Lead Industries I, II and III stem, on Page 6, Counts 24
23 and 25 it states as follows:
24 "At least as early as the mid-19th century --
25 so they're looking back into the 1800's -- the

1 hazards of lead paint, including the hazards of
2 lead paint to children were well-known."
3 Paragraph 25,
4 "At least by 1900 nontoxic pigments such as
5 zinc oxide were available."
6 And then the matter goes on, I'll skip to one more.
7 Page (sic) 35, on Page 8,
8 "In the 1940s defendant, Lead Industries
9 Association, launched an investigation and
10 promotional campaign to rebut a 1943 Time
11 Magazine article which reported developmental
12 problems in children poisoned by lead."
13 My point being this, is that while it's true that
14 New York law uses the word "immediate" or "emergent", the fact
15 is the concept is not, if you will, one that requires, at
16 least as the New York courts have interpreted it, one that
17 requires that you act like that; but rather, that you act
18 promptly in the face of a, of a problem. In this case, they
19 obviously knew about these problems for over 100 years. There
20 came a point in time when the court, when the New York City
21 Housing Authority, which was a plaintiff in that case, took
22 action and that claim was allowed. Again, I think this is
23 where we run a risk of imposing a foreign meaning onto New
24 York law and we have to act synthetic with it.
25 Debtor has no duty --

1 THE COURT: Counsel, you will supply the Court with
2 a copy of that --
3 MR. POLLOCK: Absolutely. In fact, I can give
4 you --
5 THE COURT: -- at some convenient time?
6 MR. POLLOCK: I can give it to you right now, Judge,
7 if you like.
8 THE COURT: Yes.
9 MR. POLLOCK: I'll give you my copy which is. . .
10 May I approach, Your Honor?
11 THE COURT: Yes.
12 MR. POLLOCK: I apologize for the inconvenience.
13 THE COURT: That is quite all right. That is quite
14 all right.
15 MR. POLLOCK: We believe that there is -- we start
16 from the fundamental premise that in a motion to dismiss such
17 as this we have to demonstrate in essence two things; one,
18 that we have a valid legal theory, and we believe that the New
19 York courts, as enunciated not only in the lone decision of
20 Lead Industries, but also as reaffirmed by the Appellate
21 Division in the City of New York case just a few months ago,
22 that we have a valid theory of restitution. There's a gray
23 area I believe which is the area of indemnification, and one
24 of questions there is going to be if a claim occurred more
25 than six years or three years, depending on which statute of

1 limitations you use, prior to the 2001 filing date should that
2 claim be time barred. My guess is it probably should.
3 One question, however, that I think that I would
4 respectfully submit this Court will need to consider based
5 upon a fully developed record, which I don't think we have
6 right now, is as to those claims that fell after that, if you
7 will, after that date, after that six years or three years,
8 depending on which statute of limitations we use, are the
9 facts, based upon the facts what is the proper conclusion to
10 reach with regard to indemnity; are we out of time or not. I
11 don't think it's a simple as simply pulling up a rule because
12 I think in part it is fact-sensitive.
13 With regard to restitution on that claim, the
14 precise purpose of this is to protect people into the future
15 where claims on, going into time. And we take a look for
16 example going back to the City of New York case that is
17 precisely the concept that the Court is talking about here
18 where there is a duty to protect people into the future. And
19 that's exactly what we are seeking to do.
20 There will be a factual question and the factual
21 question is what exactly is that quantum of damages. I think,
22 to me, I think that would be, there is no doubt that there is
23 an obligation to, there is a, that we have a legitimate right
24 to try and protect our residents; but, I think to quantify it
25 is something that right now no one knows exactly what the

1 number is. We had to provide the best proofs we had so we've
2 done so. I think, again, that area, that is an area that is
3 subject to factual interpretation and, therefore, require a
4 hearing.
5 G-I argues there is clearly no duty right now and
6 they prevailed, they argue that they have prevailed in many
7 case. That's true, but they've also settled others. They
8 cite to the Adams Arapaho case which is a case out of Colorado
9 in which the Court looked at one case and said, "Well, you
10 have failed to prove in tort that there was actual injury."
11 Our claim is not in tort. Our claim is one that again arises
12 in restitution. And by the way in that case they were
13 applying Colorado law. We are applying New York law. So the
14 one question comes, well, given the approximate cause that has
15 to be shown under Paulsgraf in New York, given the fact that
16 we are not using tort law and we're instead looking at true
17 restitution, I would argue, one, that that case is
18 distinguishable on the fact that we actually have a duty, and
19 I submit, again, go back to Exhibit 5, which is in our
20 surreply, which is the Richard Hatfield document where we
21 actually indicate that there is exposure from asbestos
22 currently and into the future. I also relied upon the EPA
23 document that I cited before. So that -- and apparently that
24 proof was not in the Adams Arapaho case. So I would argue
25 factually the case is distinguishable because we've done what

1 that court did not have, which was a factual nexus.
2 Second of all, that case was decided on tort law.
3 We're looking at a theory of equity and the theory of equity
4 here is that we want to make the place better, the world
5 better for our residents. We cannot, by the way, simply dump
6 a -- one of the questions in regard to acting immediately is
7 the question of why didn't we simply, as I follow Counsel's
8 argument, it would be, "Well, if you really thought it was so
9 immediate, what you would do is you would kick everyone out of
10 the building; you would remediate the asbestos; and then, you
11 would put them back in."
12 We can't simply, and these buildings they are
13 mammoth buildings, we simply can't dump those people out into
14 the street and say, "See you in a few months." Though it's
15 true, we do have to take it bit-by-bit because we have no
16 other choice. There's no other -- we are providing a housing
17 to some of the poorest people in New York. We have no other
18 options at this juncture.
19 THE COURT: How do you fit in what appears to be
20 obviously holdings in the MRI cases and the Germantown case
21 that, you know, deal with the concern of those courts to
22 allowing equitable remedies when the legal cause of action is
23 time barred with obviously what you say are, you know, recent
24 New York cases. I mean in the, you know, chronology of these
25 many cases do you disagree with what the holdings of those

1 cases would appear to say or do you believe that the case law
2 is developed?
3 MR. POLLOCK: No, in fact, I think New York law is
4 very well developed. Where Mr. Rossman and I vehemently
5 disagree, however, is, and I respectfully, Judge, take it from
6 your question as well, that there is somehow this chasm in New
7 York law and some of the courts simply aren't on the same
8 page, if you will.
9 The Germantown case --
10 THE COURT: No, I would hope that one would attempt
11 to reconcile all these decisions before taking that view, and
12 I do not take that latter view. I am just asking you because
13 obviously there's language in Germantown and MRI that if taken
14 in isolation would certainly perhaps raise a bar here or could
15 raise a bar.
16 MR. POLLOCK: Absolutely.
17 THE COURT: Obviously, my job is to reconcile the
18 law and not to find differences.
19 MR. POLLOCK: I'm glad it's yours and not mine
20 because frankly I was very confused. I really was. I mean I
21 spent a lot of time in this area and I looked at it and I was
22 trying to make sense out of it myself.
23 When you look at Germantown, for example, one of the
24 things that's interesting about that case is while it's true
25 that that case arises out of remediation of asbestos, what's

1 the allegation? The allegation is that the architect was
2 negligent, and what the, you know, looking at my notes here,
3 in Germantown while it's true the Court of Appeals found the
4 plaintiff could not maintain an indemnity to restitution claim
5 against the architect because the defendant had not caused the
6 asbestos to be used. In this case one of the points here that
7 we need to set, that we believe is very significant is that
8 under New York law there is authority for the simple
9 proposition that the, that NYCHA is liable -- I'm sorry --
10 that G-I, now GAF (sic) is liable in strict liability on the
11 basis that the product it sold is one that contained asbestos.
12 There is case law -- we believe that that is a
13 distinguishing factor, if you will, where the architect in
14 Germantown was found not to have caused the choice or
15 influence it. So my point is that when you go through these I
16 think it is critical that we take it apart and look at it
17 fact-by-fact.
18 Your Honor, at this point, we believe we have
19 demonstrated, we have stated a valid legal theory that there
20 is a synthetic law of New York, that we have not tried to call
21 a chicken a duck and put a claim that doesn't belong where it
22 belongs. We respectfully submit that having carried that
23 burden at this point there is an issue which, and I don't know
24 whether the Court wishes to address it now or address it later
25 on, which is what do we do. You have worked for almost nine

1 years on a major filing with this matter in trying to reach a
2 resolution. There are people who have mesothelioma claims and
3 they are looking to resolve these. We are not even on a
4 Creditors Committee and yet, potentially, if our legal theory
5 is valid we would have a, one of the largest single claims in
6 the entire case.
7 At some juncture, I think we need to discuss if, in
8 fact, there is, what is the right thing to do. We believe
9 that the right thing to do at this juncture is to have a
10 factual hearing to find out whether we can prove the quantums
11 of proofs because a legal theory of true restitution remains a
12 valid theory under New York law. And that being the case, we
13 would respectfully request that we have a hearing either
14 before you, or, if you would like, we are prepared to have the
15 matter remanded to state court to, under 28 U.S.C. 1452
16 because New York has a particular knowledge obviously of its
17 own law and this is a quirky area. And I mean obviously no
18 disrespect to you, Judge. My simple point being is that we,
19 we --
20 THE COURT: I don’t take it that way.
21 MR. POLLOCK: Okay. And I hope you understand my
22 thought in raising it is that this claim raises, I think begs
23 it, requires in order to properly parse which claims are valid
24 and, because if you look at all of our claims, let’s assume
25 the 500 and $600 million that so offended my adversary here,

1 there's got to be some portion of that claim that falls within
2 the theory of true restitution, is it 2 percent, is it 90
3 percent. There is some theory, there is some portion that is
4 being taken to protect the citizens of New York from a harm
5 that's being caused by the floor tiling products manufactured
6 by GAF. Can we prove it? That's our job. If we can't prove
7 it obviously that that floor tiling was used we recognize that
8 we will lose those claims. We believe we can carry that duty.
9 Can we prove that, in fact, there really is palpable
10 harm to the individuals who are in those buildings as a result
11 of floor tiling just being there? GAF says absolutely we've
12 won every case although we settled some. Clearly there are
13 other cases, we can show you those exact kinds of claims had
14 succeeded.
15 At this point, I would respectfully submit it is a
16 factual question at the least as to whether we can demonstrate
17 those proofs because there is no rule of law that says that
18 floor tiling is not dangerous, and we've adduced some proof
19 that it is.
20 Unless you have any further questions, Your Honor,
21 I'll rest at this point.
22 THE COURT: Thank you, Mr. Pollock.
23 I think I just want to get a sense of how much
24 longer Counsel expect to be because I would take a break now
25 if we're going to be --

1 MR. ROSSMAN: If your preference is to try to
2 finish, I think I can certainly do it in less than ten
3 minutes, Your Honor.
4 THE COURT: Let me just ask my --
5 MR. ROSSMAN: If you want to come back after lunch
6 I'm at your disposal.
7 THE COURT: I am told we can keep going.
8 I do want you to also address the W.R. Grace case.
9 MR. ROSSMAN: I will, Your Honor.
10 THE COURT: Thank you.
11 MR. ROSSMAN: Understanding that we're long past due
12 for lunch and I am (indiscernible) I will be very brief.
13 THE COURT: I want to give Counsel as much time as
14 they need on this matter.
15 MR. ROSSMAN: You always do, Judge.
16 A couple -- my adversary cites the City of New York
17 against College Point, and he cites some 1999 case, cases --
18 I'm sorry, 2009 cases to give the Court the impression that
19 Lead Industries is alive and kicking and good law. It's
20 important to note a couple of things.
21 First of all, those cases don't have the slightest
22 thing to do with this case. Those cases involve, for example,
23 in that case, the City of New York against College Point case,
24 illegal dumping of hazardous waste. So there is no question
25 that there is a duty that was owed by the party that did the

1 illegal dumping, a statutory duty, okay.
2 In addition, it's also important to note that that
3 case cites the Lead Industries Appellate Division case, the
4 1996 case not the Justice Freedman case. Justice Freedman who
5 -- I'm sorry I rose to interrupt the argument, but who I have
6 a great deal of respect and admiration for, but I just happen
7 to think that her prediction of what would happen in New York
8 law turned out to be wrong, okay, and that is emphasized by
9 the MRI case which was affirmed in the Court of Appeals, more
10 recently the Germantown case, and I think there's really no
11 case law support at all for the proposition that this loan
12 trial decision in the lead paint context should be translated
13 into the asbestos context.
14 Now, I want to talk about time frames for a second.
15 My adversary cites to the affidavit of Mr. Hatfield, which was
16 submitted I think in the Celotex case, okay. Yes, Board of
17 Education of Detroit against Celotex. I note that that
18 affidavit has a date, May 26, 1994. He proffers that
19 affidavit for the proposition that the children who are in
20 these child care centers on a daily basis in the New York City
21 Housing Authority who are riding their tricycles over this
22 vinyl asbestos floor tile are in imminent danger because
23 asbestos fibers are becoming airborne, okay.
24 If that were the case, is the New York City Housing
25 Authority taking the position that it is putting these

1 children at risk, that it has been putting these children at
2 risk from at least 1994 when Mr. Hatfield submitted this
3 affidavit to the present and that in those 17 years, I'm
4 sorry, in those 15 years they have slept blissfully on their
5 rights without ever raising their hand and saying GAF -- which
6 was then not a debtor, okay -- should respond to this? That's
7 seven years before the petition date. Was it hazardous then?
8 If it was hazardous then, then they should have done something
9 or said something about it.
10 We think the law is to the contrary. They may have
11 a paid expert who said in 1994 that this was dangerous. The
12 C.F.R., which we cite in our briefs, 40 C.F.R. 61.1(4)(1) says
13 vinyl asbestos floor tile's not friable. The Delaware
14 District Court in the Armstrong decision said and rejected on
15 a Daubert grounds an expert report a lot like this one that
16 said that there is sufficient asbestos fibers that are
17 airborne to be dangerous. In the case of vinyl asbestos floor
18 tile the Armstrong court said no, that that's not based on
19 sound science. We don't think that that's right. But even if
20 there was something to that argument, Your Honor, the time has
21 passed. They should have made it. If they had, if they have
22 a restitution or indemnity claim by their own submission they
23 should have had one back in 1994 or earlier and they should
24 have brought it. Okay.
25 I found particularly interesting my, my learned

1 Counsel's comments about, you know, the plan having a need to
2 address their situation, that they don't even have a
3 committee. Well if they were interested in having a property
4 damage committee perhaps they should have knocked on the U.S.
5 Trustee's door in approximately January of 2001 when this case
6 was filed and committee's were formed. So even during the
7 pendency, the long pendency of this case they have completely
8 slept on their rights, Your Honor, and at the last minute they
9 raise their hand and they say, "Well, we think we have these
10 creative claims for restitution and indemnity."
11 Now, one point that I want to make --
12 THE COURT: That is your reference to the laches
13 argument that you --
14 MR. ROSSMAN: It is.
15 THE COURT: -- raised briefly in the pleadings?
16 MR. ROSSMAN: Well, I think the statute of
17 limitations is so controlling here that we don't need to visit
18 the laches question, but if there were some argument where
19 their claim could possibly survive statute of limitations we
20 would say the ship has sailed, too many things have gone by
21 the wayside here in all the passage of time and they should be
22 barred by laches.
23 Now a couple of more points and then I'm done, Your
24 Honor.
25 The -- it is important to note that they are not

1 entitled to these amorphous, future costs of what, you know,
2 they think they may expend the next time, you know, any of
3 400,000 residents decide to move out of their apartments,
4 which may or may not contain vinyl asbestos floor tile which
5 may or may not have been manufactured by GAF, okay. The law
6 is clear that they are not entitled to future costs, okay, on
7 their equitable claims, only actual expenditures. And they
8 admit this in their own surreply. And I didn't miss it
9 because they underlined it for us. So if you turn to -- I had
10 it a moment ago and I'll pull it up, if you turn to their
11 surreply at Page 9 they say that their claims are only based
12 on actual expenditures not future costs.
13 Now, I want to talk about lead and asbestos for a
14 second. How do you separate these two, okay, without need to
15 insult Justice Freedman or, or rain on her decision. To me
16 the central difference here is that in the lead paint case,
17 although I think it was a stretch and although I think it was
18 not an accurate prediction of what the law turned out to be,
19 okay, in the lead paint case the focus was the immediate need
20 for action, as the Appellate Division says. And in that case
21 there was an allegation that's missing here that there was a
22 need for medical monitoring and actually treating children who
23 are suffering from lead poisoning. So there's a tie to the
24 third-parties and actual alleged personal injury to the third-
25 parties.

1 In this case there is no claim asserted by the
2 Housing Authority for indemnity, restitution or otherwise,
3 that is grounded in any actual personal injury to tenants.
4 They don't claim they're doing medical monitoring. They don't
5 claim that they're paying for the cost of treating asbestos
6 illness in any of their tenants. They're not even telling
7 their tenants that there's a danger here. It's only being
8 removed if, as and when they get around to it, which comes to
9 my last point, Your Honor, and then I'll mention the Grace
10 case, as you asked me to.
11 The, in an opinion in the 888 case, an opinion by
12 Justice Sklar, who's got a fair bit of experience in these
13 matters, and one which was affirmed by the Appellate Division,
14 he says, rejects these claims for, for the, that are based on
15 the notion that your statute of limitations only begins to run
16 when you actually go out-of-pocket and spend money on the
17 removal of asbestos. Okay. And why is that the case? He
18 says it's because the owner can choose to expend the money 78
19 years from now or even 250 years from now. In effect, it
20 eliminates any statute of limitations at all.
21 What the Court there says, and it was affirmed by
22 the Appellate Division, is the injury isn't when the owner
23 chooses to abate the asbestos whenever it's convenient. The
24 injury is when the asbestos was actually installed in the
25 building. Otherwise you undermine the policy of repose upon

1 which the very concept of statute of limitations is based.
2 And specifically in that case one of the things that was
3 talked about is the notion that normal wear and tear, aging,
4 abrasions, contacts, impacts will cause damage to asbestos-
5 containing products and that will cause the asbestos to come
6 into the air.
7 So there's nothing new here. It's already been
8 addressed by the New York courts. We know what the policy is.
9 It comes right out of the Court of Appeals and the statute,
10 which is one of repose. We know how it's been dealt with in
11 the specific context of asbestos in buildings. We know that
12 there is no such thing as a never-ending statute of
13 limitations. That's not fair. That's not the law of New
14 York. And here, there is no public policy imminent threat
15 exception, which we found in the lead paint case, that would
16 justify any deviation from that well-settled law and this
17 precise issue was presented in the Grace case.
18 What the Grace case sums up to ultimately, Your
19 Honor, is a money damage claim is a money damage claim, okay.
20 You can't take this basic property damage claim, which is
21 right on the face of their proof of claim, and try to
22 repackage it as some other claim.
23 THE COURT: Does it make any difference that in
24 Grace the Court was dealing with California and Delaware law?
25 MR. ROSSMAN: Well, we think it's the law of, we

1 think that the --
2 THE COURT: I believe that is what Judge Fitzgerald
3 determined were the potential --
4 MR. ROSSMAN: That is correct, Your Honor.
5 THE COURT: -- applicable state law.
6 MR. ROSSMAN: We cite cases from, the Chicago Board
7 case involves Illinois law. That case, the Grace case dealt
8 with, I think you're right, California law, New York law.
9 They all come back to restitution, okay.
10 My adversary essentially admitted that his indemnity
11 claim has a gray area. I think that's lawyer speak for he
12 recognizes that that claim's not so good, okay. What he's got
13 is he's got a restitution claim. In every state restitution
14 comes back to one thing, it's restatement Section 115.
15 Restatement Section 115 says that it is only, restitution is
16 only appropriate in the instance of emergency assistance,
17 okay. It is my neighbor's house is burning to the ground and
18 I grab a hose while my neighbor is out and put out the fire
19 and then I ask my neighbor to reimburse me for the cost of the
20 water, okay. That's emergency assistance. Emergency
21 assistance stretched is let's protect children who have to be
22 treated medically and monitored from lead poisoning which they
23 might get from friable paint chips in their apartments.
24 Emergency assistance isn't, okay, and the Grace case
25 I think recognized that, same standard, Section 115, emergency

1 assistance isn't that there's vinyl asbestos floor tile that's
2 been sitting there for decades untouched. Housing Authority's
3 own handbook says it doesn't have to be touched, okay. The
4 applicable regulations say it's not dangerous, doesn't have to
5 be removed. That's not a restitution claim, Your Honor.
6 Thank you.
7 MR. POLLOCK: Your Honor, I'll be brief.
8 THE COURT: Yes, Mr. Pollock.
9 MR. POLLOCK: Looking at Supreme Court of New York
10 vs Lead Industries Association, June 27, 1996, which is 222 --
11 this is Lead Industries III, 222 A.D.2d 119, the Court there
12 is quoting the New York Court of appeals states,
13 "As stated by Justice Wallach in our prior
14 decision --
15 THE COURT: I am sorry, what page is this?
16 MR. POLLOCK: This is on Page 128, 222 A.D.2d.
17 THE COURT: 128. I have it.
18 MR. POLLOCK: Page 128,
19 "As stated by Justice Wallach in our prior
20 decision the reasonable costs of abatement are
21 recognized as recoverable on such a claim. It
22 may also be noted that restitution has been
23 characterized as a particularly relevant remedy
24 for the cost of abatement of asbestos, a
25 problem of similar widespread consequence as

1 lead paint, and that flexibility and discretion
2 may be exercised in fashioning a restitution
3 remedy in light of the particular equities
4 involved."
5 With regard to the Grace case and I note that here
6 in Lead Industries III the New York Court of Appeals, and I
7 cited the facts before in the complaint and I apologize, I
8 thought, as I mentioned before, I thought it had been part of
9 the record and I was wrong, the facts there are far more --
10 we, we are moving at lightening speed compared to the Lead
11 Industries Association. We moved within 40 years. They moved
12 within a century-and-a-half.
13 More importantly perhaps when you look at the
14 equities, even to today GAF/G-I takes the position our product
15 is perfect. It caused no harm. I didn't see any notification
16 from them ever telling us, "By the way, do you realize our
17 product is killing people? Do you know that you shouldn't put
18 the product in buildings because little kids might be snarfing
19 up bits of asbestos when they come across and the janitor
20 polishes the floor at the end of the night?"
21 So to me it is odd at best that they claim that we
22 had to move like lightening, that we had to move with absolute
23 certainty, that we had to know all along that their product
24 was, in fact, killing people because we had every reason to
25 believe that they, as the master of their product, the one who

1 manufactured, designed it, sold it and marketed it and
2 profited from it, we assumed, perhaps negligently, that they
3 were telling the truth. So to argue that we somehow sat on
4 our rights when we were relying upon what they were telling us
5 and what we understood, this is an evolving science. This is
6 an evolving area.
7 So I respectfully disagree to the extent that the
8 W.R. Grace case, and I'm not sure it was properly, with all
9 due respect to Mr. Rossman, that when you talk about emergency
10 or moving with emergent assistance, I think we are clearly
11 moving exactly faster than the Court has repeatedly recognized
12 in Lead Industries I, II and III, and as the most recent court
13 decided and the Appellate Division finds as well, we read Lead
14 Industries I think to understand why MRI doesn't apply.
15 THE COURT: Now what is your position regarding the
16 W.R. Grace? You indicate you believe that is a different
17 case, should not have any binding --
18 MR. POLLOCK: I think that --
19 THE COURT: It should not be persuasive on this
20 Court.
21 MR. POLLOCK: I think if the -- it depends on which
22 proposition we're trying to derive from W.R. Grace. I'm not
23 trying to be evasive, Judge.
24 THE COURT: No, I understand.
25 MR. POLLOCK: But if the proposition is that

1 asbestos is good for you and everyone should have one, I think
2 the answer is I would respectfully disagree and say that we
3 have adduced some facts that say that court is wrong. And if
4 the answer is that we're incorrect, we're entitled to the
5 opportunity to a day in court to be heard to adduce facts to
6 show that, in fact, asbestos floor tiling is killing people
7 and does cause a substantial health risk.
8 We have the right, and I think given the fact that
9 we have offered more than a scintilla of proof we have that
10 right. If you are citing it instead for the proposition that
11 somehow restitution doesn't apply to floor tiling, again, when
12 you look at the Lead Industries I, II and III cases I don't
13 think the Court could be more clear on the page I just cited
14 to, 222 A.D.2d at Page 128 when they're saying specifically
15 paint, lead and asbestos. They aren't far distant cousins.
16 They're closely related and the Court, in fact, analogizes the
17 two not us. They do.
18 Your Honor, respectfully, I think we have more than
19 carried our burden at this point in response to a summary-
20 judgment motion to provide a valid legal theory of true
21 restitution which is not an oddity of New York law, although
22 clearly New York law has taken it different than, for example,
23 New Jersey. New Jersey I wouldn't be talking about true
24 restitution. I would be talking about the Environmental
25 Rights Act which allows by statute for injunctive relief. New

1 York has chose not to deal with it by statute but to, rather,
2 deal with it by common law.
3 Whether the, with regard to reviving dead claims,
4 yes, the fact is there is a real question of parsing, and I
5 apologize for foisting upon you the difficult task that I'm
6 sure Mr. Rossman and I have both struggled with, which is how
7 do you reconcile New York law. Where I depart from my
8 colleague and from G-I is I do not, I do not believe that
9 there is a schism in New York law, that that is schizophrenic.
10 I believe, in fact, it's very synthetic and that when you look
11 at the MRI case and the Germantown case those cases are based
12 on a different proposition in tort or in contract and those,
13 for example, the statute of limitations can run. I'll concede
14 it. Never fought the proposition.
15 In this case, however, we're looking at a different
16 concept. We're looking at exactly what restitution's designed
17 to do. And I'm going to end where I started, which is that
18 this is not so much about whether G-I/GAF has to pay less
19 money or New York City Housing Authority has to get more
20 money. This is about the duty to a third person that is being
21 assumed without a legal obligation, the public health and
22 welfare issue, which is precisely the citation I gave earlier
23 on today. That is precisely what true restitution, as opposed
24 to indemnity is about. True restitution is about taking on
25 the obligation to try to protect someone else against a harm

1 where they properly should be taking on the obligation are
2 failing to do so.
3 Thank you, Your Honor.
4 THE COURT: Thank you very much.
5 Anything else?
6 MR. ROSSMAN: No, I think you have it well in hand.
7 I just, now that I have it in my hand the Grace decision, Your
8 Honor, I can confirm that it does, in fact, cite the same
9 exact standard which is Section 115 on the restitution claim.
10 It is not a tort based claim that's being rejected. It's a
11 restitution claim that's being rejected on statute of
12 limitations grounds and the Court says money damages are money
13 damages and DGS, which is the plaintiff in that case, cannot
14 recast its claim as one that did not seek money damages when,
15 in fact, that is exactly what it sought, whether on a legal or
16 equitable theory.
17 So Judge Fitzgerald reaches the same conclusion
18 whether legal or equitable the claim is untimely. They've
19 slept on their rights. The claim should be barred in its
20 entirety. Thank you, Your Honor.
21 THE COURT: Thank you very much.
22 Do you want the final word?
23 MR. POLLOCK: No, I guess the last point I have now
24 and we'll break and I'll be real quick.
25 To me, when you look at Midlantic, you look at

1 Shadowgay, you look at Torwico the argument debtors always
2 argue is, "Well, you're asking for money and, therefore, you
3 get put in a different category. You're time barred."
4 Unfortunately, that's how you deal with environmental
5 exposure. You end up -- someone has to incur the cost. So to
6 me the extent that the Court is saying you're asking for money
7 and, therefore, it's really a tort or contact claim, that's
8 not what our claim's about. It's true someone will have to
9 take a course of action, but I think that that's really a
10 distinction that really doesn't merit commenting on further.
11 THE COURT: Thank you.
12 I am going to reserve decision on this matter. I do
13 want to review this law and review your arguments. I want to
14 compliment Counsel on your excellent presentation. I will be
15 issuing a written opinion here.
16 Thank you.
17 VOICES: Thank you, Your Honor.
18 (Adjourned 2:24 p.m.)

I N D E X

Motion by Mr. Gross	4
Motion by Mr. O'Grady	14
Response by Ms. Shawley	17
Response by Mr. Gross	21
The Court: Decision	23
Objection by Mr. Rossman	47
Response by Mr. Pollock	73/106/111
Response by Mr. Rossman	98/112
The Court: Reserved	110

CERTIFICATION:

I certify that the foregoing is a correct transcript from the electronic sound recording of the proceedings in the above-entitled matter.

/s/Isabel E. Cole
Isabel E. Cole
COLE TRANSCRIPTION AND RECORDING SERVICE

Dated: September 4, 2009