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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY
(AT NEWARK)

In re: G-I HOLDINGS INC., et al., Debtors.	Chapter 11 Bankr. Case Nos. 01-30135 (RG) and 01-38790 (RG) (Jointly Administered) Adversary Complaint No. 08-02531(RG)
UNITED STATES OF AMERICA, Plaintiff, v. G-1 HOLDINGS INC., et al., Defendants.	Civ. No.

UNITED STATES' REPLY TO G-I HOLDINGS, INC.'S RESPONSE TO UNITED STATES' MOTION FOR MANDATORY WITHDRAWAL OF REFERENCE ON ALL ISSUES RELATING TO THE UNITED STATES' COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF

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The United States hereby replies to G-I Holding, Inc.'s Response to the United States' Motion for Mandatory Withdrawal of Reference on All Issues Related to the United States' Complaint for Declaratory and Injunctive Relief. The United States seeks withdrawal of the reference on whether environmental law authorities and bankruptcy law defenses, considered together, require G-I to take action to safeguard the public from asbestos mine waste generated at the Vermont Asbestos Group Mine Site ("VAG Site") under Section 303 of the Clean Air Act ("CAA"), 42 U.S.C. § 7603, and Section 7003 of the Resource Conservation and Recovery Act ("RCRA"), 42 U.S.C. § 6973. Resolution of whether G-I must take action to protect the public will require substantial and material consideration of the scope and breadth of the environmental laws in dispute as well as the Bankruptcy Code. Hence, withdrawal is mandatory pursuant to 28 U.S.C. § 157(d). Contrary to G-I's brief, the express language of the statute makes clear that just because there are some alleged bankruptcy law defenses that need to be considered along with environmental law, withdrawal of reference is still mandatory. Moreover, the bankruptcy issues that G-I itself raises require the substantial and material consideration and harmonization of environmental law with bankruptcy law, again demonstrating the clear need to withdraw reference.[1]

I. REPLY TO INACCURATE FACTS AND MISCHARACTERIZATIONS REGARDING THE UNITED STATES' APPROACH TO THIS LITIGATION

G-I mischaracterizes the United States' injunctive complaint as a "last-minute injunction and withdrawal tactic – which is nothing but an effort to gain bargaining leverage and to obtain priority for itself over all other unsecured creditors." G-I Response p. 2. This is a presumptuous slur on the

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[1] The United States is filing a Revised Proposed Order Granting its Motion (Attachment 1) in order to correct an error in the original Proposed Order.

Government and reflects G-I's continued bankruptcy-centric view of these matters. To the contrary, the United States is motivated by public health and safety concerns, not to obtain some pecuniary advantage in bankruptcy.

The United States' focus on health and safety is corroborated by the fact that it is seeking monetary recovery for the long-term cleanup. It seeks injunctive relief only for the short term need to protect public health and safety based on information that has recently come to light about threats posed by the Site. The United States' balanced approach harmonizes environmental and bankruptcy law; G-I's approach improperly seeks to elevate bankruptcy law over environmental law.

As the United States explained in its opening brief, these matters should be looked at from the view of harmonizing both bankruptcy and environmental law (which has been denominated as a "Clash of the Titans"[2/]), not just preferring one over the other. From the perspective of environmental law, it is G-I that is using creative legal maneuvering and tactics to circumvent the protection of public health and safety in a manner that no one else can and is flatly contrary to the express language of the law. The direct conflict between environmental law and bankruptcy law that G-I alleges is evidence of the need for withdrawal of reference so that a district judge can harmonize these bodies of law.

The United States' injunctive complaint arises because of the mountainous tailings piles left behind by G-I at the Vermont Asbestos Group Mine Site ("VAG Site") pose an imminent and substantial endangerment to the surrounding communities. Attachment 2, United States Complaint. The necessity and timeliness of the injunctive action is underscored by the November 3, 2008 Vermont Department of Health (VDH) study of Asbestos-Related Morbidity and Mortality in people

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[2/] See Jill Losch, Bankruptcy v. Environmental Obligation: Clash of the Titans, 52 La. L. Rev. 137 (1991).

who resided in towns within a 10 mile radius of the Site. United States Memorandum, Attachment 4. The United States is thus doing nothing more than exercising its right under the CAA and RCRA to get a polluter to protect public health and safety by reducing exposure to asbestos.

G-I also continues to contend erroneously that the United States' injunctive action and monetary claims at the VAG Site are one and the same. They are not. To address the long-term cleanup of the Site and natural resources damages, the United States has filed a monetary Proof of Claim pursuant to the Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA"), 42 U.S.C. § 9601, et seq. The remedial action, which involves, in part, regrading and capping the tailings piles, is estimated to commence in 2009 and continue until 2015, with operation and maintainance continuing for 200 years. To address the immediate and continuing threat to public health and safety posed by the VAG Site (until the cleanup is implemented) and posed by mine waste now located in the surrounding community, the United States seeks an injunctive order pursuant to CAA and RCRA requiring the Debtor to block access to the property, conduct air monitoring and suppression of asbestos-laden dust that may be blowing off the site (if necessary), and locate and cleanup asbestos tailings trucked off-site.

G-I contends that the United States "threatens to upset the delicate economic balance struck that serves as the basis for the consensual restructuring plan." G-I Response, p. 2. This delicate balance is a farce because it was achieved without inviting United States counsel to the negotiating table or accounting for G-I's responsibility for millions of tons of asbestos mine tailings. It may be "consensual" between the Debtor and the favored parties who took it upon themselves to have a private negotiation. But with respect to the interest of protection of health and safety under environmental law, it is highly doubtful that the subject even came up during the mediation and no

one bothered to check with the Government for its views. Far from being a reason to deny withdrawal of reference, G-I's attempt to rely on the exclusive invitation-only mediation proceeding is indicative of how G-I is seeking to use bankruptcy law to run roughshod over environmental law and why it is therefore essential to have reference withdrawn so that these weighty allegedly conflicting bodies of law can be harmonized.

II. REPLY TO G-I ARGUMENTS

A. Whether G-I Can Be Required To Take Action To Protect Public Health and Safety Requires Material and Substantial Consideration Of Issues of Environmental Law and Bankruptcy Law

An express limitation on the authority of district courts to refer matters to bankruptcy courts is contained in 28 U.S.C. § 157(d). That section provides that:

> The district court may withdraw in whole or in part, any case or proceeding referred under this section, on its own motion or on timely motion of any party, for cause shown. The district court shall, on timely motion of a party . . . withdraw a proceeding if the court determines that resolution of the proceeding requires **consideration of both title ll and other laws** of the United States regulating organizations or activities affecting interstate commerce.

28 U.S.C. § 157(d) (emphasis added). G-I and the United States agree that the applicable standard is whether resolution of the matter will require "substantial and material consideration of the non-bankruptcy laws." In re G-I Holding, Inc., 295 B.R. 222 (D.N.J. 2003), G-I Response, p. 11. Here, substantial and material consideration of environmental law is required both (1) in order to interpret the environmental laws and (2) in order to apply and harmonize bankruptcy and environmental law.

B. Issues Requiring Substantial and Material Consideration of Environmental Law

The Court considering the issuance of an injunctive order – that would require G-I, as a former owner to abate the dangers left behind at the VAG Site and in the surrounding towns – must

thoroughly analyze the statutory parameters of the CAA and RCRA. For example, with respect to the RCRA action, the Court will have to determine whether G-I "contributed or is contributing to such handling, storage, treatment, transportation, or disposal" of waste transported off-Site after G-I sold the mine. As to the CAA, no court has yet addressed this issue of interpretation of Section 303. Hence, a ruling in this case as to whether G-I, as a previous Site-owner, is "causing or contributing" to the pollution – and thus may be compelled to take action both at the mine and beyond – may set national precedent. As discussed in the United States' memorandum, Judge Bassler in In re G-I Holding, Inc., 295 B.R. at 224, stressed that the paramount reason for granting the IRS's withdrawal motion is that the provision of the tax code in dispute was novel. Adjudicating the present complaint will similarly require findings on novel issues of first impression.[3]

G-I also argues, and the United States agrees, that mandatory withdrawal is appropriate for cases requiring "significant interpretation" – in contrast to a simple application – of federal laws apart from the Bankruptcy Code. G-I Response, p. 12. Courts often use both "substantial and material" and "significant interpretation" language when determining whether a matter is appropriate for withdrawal. See In re G-I Holding, Inc., 295 B.R. at 224 and 226 (in withdrawing the reference, the Court recognized that IRS's claim required a "significant interpretation" and "substantial and material consideration" of the tax code); United States v. Johns-Manville Corp., 63 B.R. 600, 602-03 (S.D.N.Y. 1986) (recognizing that a "significant interpretation" and "substantial and material consideration" of CERCLA was necessary, and withdrawal was therefore required, in case involving

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[3] G-I, in acknowledging that no court has interpreted Section 303 of the CAA, argues that the court will not have to interpret the CAA because the United States seeks injunctive relief under RCRA. However, if the court was to find no liability under RCRA, the Court would be compelled to ascertain whether the relief is authorized by the CAA. Moreover, there is only limited precedent that has addressed the issue of whether RCRA applies on the facts of this case.

when claims arose under CERCLA). For the same reasons previously stated regarding why the United States' injunctive action requires a "substantial and material consideration" of RCRA and CAA, this action also requires a "significant interpretation" of these environmental statutes.

G-I attempts to distinguish In re Dana Corp, 379 B.R. 449, 456-62 (S.D.N.Y. 2007), which granted the United States' motion to withdraw the reference finding the case involved substantial analysis under CERCLA. The Dana case involved (1) applicability of joint and several liability (including the matters of whether harm was divisible and capable of apportionment and whether government was responsible because the Defense Department allegedly controlled operations at the Site);[4] (2) whether EPA's response actions were inconsistent with the National Contingency Plan, 40 C.F.R. Part 300, and (3) whether the debtor was entitled to an "act of God" defense. The United States' injunctive complaint in the present action will require equally substantial and even more difficult issues of first impression under environmental law. Because the Debtor's liability to abate the endangerment under Section 303 of the CAA will be a matter of first impression, the Court will have to rely on legislative history, statutory construction, EPA guidance, and emergency authorities under analogous environmental statutes. As explained above, the Court must resolve whether the Vermont Mine is a "pollution source" and whether G-I as a past owner is "any person causing or contributing to such pollution" within the meaning of 42 U.S.C. § 7603. Moreover, complex issues under RCRA will have to be resolved including whether G-I may be compelled to abate dangers due to tailings brought off site by others.

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[4] In its dischargeability motion, G-I stresses that the United States was a responsible party because the Defense Mineral Exploration Administration (DMEA) funded exploration of mining at the Site and received royalties. G-I Dischargeability Memorandum, pp. 8 and 26. The United States responded that DMEA's historic practices of providing mining exploration grants does not make the government a liable party. A dispute as to the United States' liability and whether such liability constitutes a defense under Sections 303 of CAA and 7003 of RCRA could potentially invoke further substantial and material consideration of non-bankruptcy laws.

In any event, as next discussed, the presence here of difficult issues at the intersection of bankruptcy and environmental law, is an even more compelling reason to withdraw reference. In this regard, it is telling that G-I seeks, albeit unconvincingly, to distinguish Dana but does not even attempt to distinguish the United States' citation to United States v. Alex D. Moglia, No. 02 C 6131, slip op. 4-5 (N.D.Ill. Jan.6, 2003) (involving a chapter 7 trustee's obligations to eliminate environmental danger at a facility and comply with an existing consent decree), in which reference was withdrawn in a case in which the defendant raised alleged bankruptcy defenses just as G-I does here.[5]

C. Issues at the Center of the Intersection of Bankruptcy Law and Environmental Law

G-I contends that its dischargeability motion and dispute regarding the exception to the automatic stay involve what are known as "core proceedings" under bankruptcy law, and thus the reference should not be withdrawn. G-I Response, pp. 1 and 13. However, under the express language of the statute, the applicable standard is not whether or not a matter involves a core proceeding. The standard is whether a matter (core or non-core) requires substantial and material interpretation or significant consideration of "**both title ll and other laws of the United States.**" See 28 U.S.C. § 157(d) (emphasis added). In this part of Title 28, Congress was well aware of the distinction between core and non-core proceedings, see 28 U.S.C. §§157(b). If Congress wanted to

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[5] G-I relies heavily on LTV Steel Co. v. Union Carbide Corp., 193 B.R. 669 (S.D.N.Y 1996), which denied a motion to withdraw the reference where the primary issue was when private parties' CERCLA contribution claims arose under bankruptcy law. In contrast to the situation here, the Court found no significant environmental issues in dispute. The Court specifically noted that withdrawal of reference is required where either "significant interpretation" of non-Code statutes is required or where non-bankruptcy federal law "significantly and materially conflicts" with the Bankruptcy Code. Id. at 673. Both apply here (as to the latter, at least to the extent that the Code is interpreted as advocated by G-I).

have a different rule on withdrawal of reference between core and non-core matters, it would have said so. G-I should not be permitted to rewrite the statute.[6]

Moreover, even the application of the alleged bankruptcy-related defenses that G-I raises themselves will require the substantial and material consideration of environmental law and harmonization of bankruptcy and environmental law. With respect to G-I's alleged dischargeability defense, the Court must evaluate whether G-I's injunctive obligation set forth in the United States' complaint is a "claim" as defined in 11 U.S.C. § 101(5). This analysis in turn requires a determination as to whether the equitable remedy for breach of performance "gives rise to a right to payment."[7] A court cannot make this determination without substantially and materially considering environmental law since by its terms the bankruptcy law refers to rights and remedies created under environmental law.

Even a cursory review of the leading decisions in this area, including In re Torwico Electronics, Inc., 8 F.3d 146 (3d Cir. 1993) and In re Chateaugay Corp., 944 F. 2d 997, 1004 and 1008 (2d Cir. 1991), confirms that courts reviewing this issue are required substantially and materially to

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[6] G-I's reliance on Union Carbide in this connection is misplaced. The discussion in Union Carbide of core proceedings that G-I cites to was in the part of the opinion containing the Court's analysis of "permissive" withdrawal of reference. See 193 B.R. at 675. Here, the United States is seeking "mandatory" withdrawal of reference, which involves a different standard for withdrawal.

[7] The term "claim" is defined in Section 101(5) as

> (A) right to payment, whether or not such right is reduced to judgment, liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed, legal, equitable, secured, or unsecured; or
>
> (B) right to an equitable remedy for breach of performance if such breach gives rise to a right to payment, whether or not such right to an equitable remedy is reduced to judgment, fixed, contingent, matured, unmatured, disputed, undisputed, secured, or unsecured.

11 U.S.C. § 101(5) (emphasis added).

consider and interpret environmental law such as whether polluters are allowed to pay the Government in lieu of performing their injunctive obligation to deal with ongoing pollution. The United States asserts that Sections 303 of CAA and 7003 of RCRA do not provide an option to pay money in lieu of complying with an injunctive order to deal with continuing hazards which present an imminent and substantial endangerment to public health. Thus, because no alternative right to payment exists, an injunctive order under these statutes does not constitute a dischargeable "claim" in bankruptcy. The controlling Third Circuit authority, Torwico, establishes that environmental injunctive obligations to abate ongoing releases of pollution are not dischargeable claims – even when such injunctive orders are given to past site-owners and even when the cleanup actions require the expenditure of money. Torwico, 8 F.3d at 150-51. Debtor, nevertheless, argues that Torwico is inapplicable to the statutes at issue here, which makes this heatedly disputed issue a significant matter of first impression requiring withdrawal of reference. Resolution of this matter will require interpretation of the applicable remedy for breaches of Sections 303 of CAA and 7003 of RCRA, and whether the injunctive authorities in the CAA and RCRA are analogous to the state environmental authorities addressed in Torwico. In addition, G-I's novel argument that environmental law precludes the Government from bringing injunctive actions relating to a site if it has brought any separate but different monetary actions relating to the site, G-I Response, p. 4, will also require substantial and material consideration of environmental law in order to determine this novel issue.

Likewise, G-I's alleged bankruptcy defense contending that this matter does not fall within the police and regulatory exception to the automatic stay, pursuant to 11 U.S.C. § 362(b)(4), will

require significant consideration of environmental law.[8] Under the police and regulatory exception, enforcement of an injunctive action is not stayed unless it is an effort to enforce a money judgment. The Third Circuit has held that whether enforcement of an injunction is an attempt to enforce a monetary judgment requires consideration of whether the injunction is: (1) within the framework of what is traditionally considered a recovery of money damages for a sum certain and (2) seeking to perform remedial acts to prevent potential future harm and obtain compliance with law. Penn Terra Ltd. v. Dept. of Envtl. Resources, Commonwealth of Pennsylvania, 733 F.2d 267, 275- 278 (3d Cir. 1984). This issue will thus require the significant consideration of environmental law to determine whether the relief sought by the United States is a monetary judgment under this test.

Finally, as noted in our opening brief, in making decisions in this difficult area at the intersection of bankruptcy and environmental law, courts must substantially and materially consider environmental law in order to harmonize bankruptcy and environmental law. United States Memorandum, pp. 2, 3, 15, and 16.

D. G-I's Extraneous Arguments Do Not Support Its Position

G-I next contends that it will be judicially inefficient to have this Court decide the injunctive action and the Bankruptcy Court adjudicate the United States' monetary claim for the long term remedy. G-I Response, p. 17-18. The injunctive action under the CAA and RCRA and the monetary claims under CERCLA involve wholly distinct statutory provisions and environmental objectives. Estimating the long-term cleanup in the bankruptcy will require different facts and experts than those needed to support a finding of imminent and substantial endangerment. G-I cites no authority that

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[8] The Court in United States v. Johns-Manville Corp., 63 B.R. 600, 603 (S.D.N.Y. 1986), held that reference should be withdrawn when the resolution of bankruptcy issues such as issues relating to the automatic stay require significant statutory interpretation of environmental law.

all issues related to a single environmental site must be addressed in either the bankruptcy court or district court. In fact, the Third Circuit recently stated in In re Mystic Tank Lines Corp., 544 F.3d 524, 528 (3d Cir. 2008), that "[n]o provision of the Bankruptcy Code requires the Bankruptcy Court to hear all 'related to' claims." In reaching this conclusion, the Third Circuit discussed its earlier opinion in Penn Terra Ltd v. Dep't of Envlt. Res., 733 F. 2d 267 (3d Cir. 1984):

> [W]e acknowledged the right of the Pennsylvania state court to issue its order compelling the debtor to proceed with remediation of the contaminated site, notwithstanding that the claim for recovery of the costs was pending in the Bankruptcy Court. This would not have been possible had the jurisdiction of the Bankruptcy Court been exclusive.

Mystic, 544 F. 3d at 528-29. Thus, the District Court's withdrawal of the injunctive complaint, even if the Bankruptcy Court were to retain jurisdiction to resolve the monetary claim, is consistent with Third Circuit authority.

Moreover, G-I's assumption that the monetary claim will be adjudicated in Bankruptcy Court is not necessarily correct. As was the case in Dana, which involved a monetary claim and for which G-I seems to agree withdrawal was appropriate, the reference on the monetary claim in the present case will have to be withdrawn if G-I raises any issues requiring substantial and material consideration of environmental law in any objection that it files. If so, it would be under G-I's position, that two different courts would need to be involved. And if the objection does not raise any such issues, then there will be no inefficiency because the Bankruptcy Court will be handling only routine issues related to the monetary claim while this Court grapples with the difficult issues at the intersection of bankruptcy and environmental law that have already arise with respect to the injunctive action.

Finally, it is important that the statute itself does not provide for any exception to mandatory withdrawal based on whether the bankruptcy court has before it related routine matters. The United States believes that proceeding with the injunctive action in the District Court will ensure that environmental law and bankruptcy law are harmonized and that delays in the bankruptcy will not result in delayed action to abate threats to public health and the environment in Vermont.

Likewise, G-I erroneously argues that withdrawal of the reference as to the United States' complaint is premature because G-I has not yet answered. In the first place, many of the issues requiring withdrawal of reference are evident from the Complaint itself. Second, G-I has already made many of the arguments that it will assert as alleged defenses, which, as discussed above, also require withdrawal of reference. It cannot expect this Court to ignore arguments it has made in Court filings. Furthermore, answers to complaints differ from objections to proofs of claim because under 11 U.S.C. § 502(a), proofs of claims are deemed allowed unless and until objected to. Allegations in a complaint are not similarly treated prior to answer. If the United States waited until G-I filed its Answer which in any event is due in December 2008, G-I might contend that the United States had not met the requirement that a motion to withdraw reference must be "timely." 28. U.S.C. 157(d).

Conclusion

Mandatory withdrawal of the reference is required because the United States' injunctive complaint requires a substantial and material consideration of complex issues of first impression under environmental law and because G-I's alleged bankruptcy defenses also require the substantial and material consideration of environmental law and harmonization of bankruptcy and environmental law. Therefore, the United States respectfully requests that this Court withdraw the reference on all matters related to the United States Complaint under Section 28 U.S.C. § 157(d).

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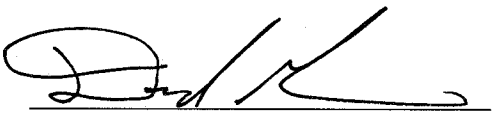
By: 

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I, David L. Gordon, an attorney, hereby certify that on November 24, 2008 I electronically filed the **UNITED STATES' REPLY TO G-I HOLDING, INC.'S RESPONSE TO UNITED STATES' MOTION FOR MANDATORY WITHDRAWAL OF REFERENCE ON ALL ISSUES RELATING TO THE** with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the following.

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