



IN THE CIRCUIT COURT OF RALEIGH COUNTY, WEST VIRGINIA

IN RE: FLOAT-SINK LITIGATION

**CIVIL ACTION NO.: 11-C-5000000
(Honorable John A. Hutchison)**

THIS DOCUMENT APPLIES TO ALL CASES

**ORDER GRANTING IN PART DISTRIBUTOR DEFENDANTS' MOTION TO
DISMISS BASED ON THE PLAINTIFFS' INSUFFICIENT RESPONSES TO
AMENDED FLOAT-SINK PLAINTIFF FACT SHEETS**

On July 20, 2012 the parties, by counsel, came before the Mass Litigation Panel ("the Court") for a hearing on "Employer Defendants' Motion to Dismiss Based on Plaintiffs' Insufficient Responses in Their Amended Float-Sink Plaintiff Fact Sheets," filed March 27, 2012 (TID# 43327421), a related "Distributor Defendants' Motion to Dismiss Based on Plaintiffs' Insufficient Responses to Amended Float-Sink Plaintiff Fact Sheets and Joinder in 'Employer Defendants' Motion to Dismiss Based on Plaintiffs' Insufficient Responses in Their Amended Float-Sink Plaintiff Fact Sheets'" filed April 3, 2012 (TID# 43454645), Plaintiffs' Opposition filed April 10, 2012 (TID# 43584700), Employer Defendants' Reply brief filed April 18, 2012 (TID# 43742217), Plaintiffs' Opposition to the Distributor Defendants Motion filed April 18, 2012 (TID# 43739978) and Distributor Defendant's Reply brief filed April 24, 2012 (TID# 43862510).

The Distributor Defendants' Motion was originally filed on behalf of Preiser Scientific, Inc. and Interstate Chemical Company. By separate order entered July 27, 2012, Interstate Chemical Company has been dismissed from this action (TID# 45589379). Question No. 7 of the Amended Float-Sink Plaintiff Fact Sheet Responses is addressed in a separate Order with regard to the Employer Defendants and it results in a dismissal of all Employer Defendants from this civil action as a sanction. Preiser Scientific, Inc. is the only remaining active defendant with

Granted Judge Hutchison, John A Aug 30 2012 03:07PM

regard to Plaintiffs in this civil action.¹ This Order addresses Questions Nos. 6 and 12 of the Plaintiffs' Amended Float-Sink Plaintiff Fact Sheet responses ("Amended Fact Sheet Responses").

After consideration of the written and oral arguments of the parties and after consultation with each other to ensure uniformity of opinion, the Court makes the following Findings of Fact and Conclusions of Law:

FINDINGS OF FACT

1. The history of these cases dates back to 2002, when some Plaintiffs and their counsel allege they gained knowledge of the claims and issues relevant to the exposure to chemicals used in the coal float-sink process.

2. The lawsuits began in 2004 when the proposed class action of *Katy Addair et al. v. Litwar Processing et al.*, Civil Action No. 04-C-252, was filed in the Circuit Court of Wyoming County, West Virginia ("*Addair*"). *Addair* raised claims against employers, manufacturers and distributors of the chemicals used or alleged to be used in the coal float-sink process and the companies who employed persons who worked in the coal float-sink process or claimed exposure to chemicals used or alleged to be used in the coal float-sink process.

3. As early as April 15, 2008 Plaintiffs were ordered to disclose their expert witnesses in *Addair*. Plaintiffs failed to do so and further failed to abide by other Court Orders and meet other deadlines.

4. The circuit court in *Addair* eventually sanctioned the plaintiffs for "repeated failure to comply with the court's scheduling orders." As a sanction, the Court barred the

¹ This Order does not address the cross-claims of the remaining Distributor Defendant Preiser Scientific, Inc. against the Employer Defendants. Those are preserved and may be subject to subsequent briefing among the relevant parties.

plaintiffs from offering any expert witnesses. *Addair v. Litwar*, No. 11-0397, fn. 7 (W.Va. Supreme Court, February 9, 2012) (memorandum decision).

5. In the *Addair* case, the Circuit Court of Wyoming County, granted certain Motions for Summary Judgment filed by various employer Defendants. The West Virginia Supreme Court of Appeals affirmed these summary judgment rulings on the basis of plaintiffs' inability to proffer expert witness testimony in a complex chemical exposure case such as *Addair*. *Id.* at 8.

6. *Addair* is, essentially, the parent case to the multiple individual cases that were consolidated before this Mass Litigation Court. Some of the Plaintiffs before the Court in this case sought inclusion in the *Addair* case but abandoned that effort when these cases were filed.

7. The cases presently before the Court were filed in early 2010, and referred to the Mass Litigation Panel in November 2010.

8. By Orders dated June 28, 2011 (TID# 38386487), and August 12, 2011 (TID# 39248578) Plaintiffs were ordered by the Court to complete Float-Sink Plaintiff Fact Sheets ("Fact Sheets") to provide basic information regarding their claims. Completion of the Fact Sheets was made subject to enforcement under the West Virginia Rules of Civil Procedure, but did not bar the parties from also conducting discovery. The Court made clear that the Fact Sheet requirements in no way relieved any party's discovery obligations.

9. The June 28, 2011 Order specifically held, "Fact Sheets constitute discovery under Rules 26, 33 and 37 of the West Virginia Rules of Civil Procedure, and shall be subject to all sanctions for failure to respond to discovery, up to and including dismissal." *Id.* at p. 2.

10. Plaintiff Fact Sheet Question No. 6 stated:

Please provide a detailed description of all monetary damages you allege you suffered as a result of your alleged exposure to chemicals utilized in float-sink labs.

11. Plaintiff Fact Sheet Question No. 12 stated:

Have you had discussions with any health care provider about whether any of the injuries, illnesses, diseases or conditions you have identified were caused by exposure to chemicals used in float-sink labs? Yes ___ No ___

If yes, check one of the following:

a. I was told that one or more of the injuries, illnesses, diseases or conditions that I identified above was caused by exposure to chemicals used in float-sink labs:

(1) Yes ___ No ___

(2) Date of first visit to health care provider: _____

(3) Diagnosis and date of diagnosis: _____

(4) Identify the health care provider that made the diagnosis, along with his/her specialty, address and telephone number:

b. I was told that none of the injuries, illnesses, diseases or conditions that I identified above were caused by exposure to chemicals used in float-sink labs:

(1) Yes ___ No ___

(2) Date of first visit to health care provider: _____

(3) Diagnosis and date of diagnosis: _____

(4) Identify the health care provider that made the diagnosis, along with his/her specialty, address and telephone number:

c. I was told by the health care provider that he/she does not know whether any of the injuries, illnesses, diseases or conditions that I identified above was caused by exposure to chemicals used in float-sink labs:

(1) Yes ___ No ___

(2) Reason, if any, given by health care provider why he/she could not diagnose the cause of my injuries, illnesses, diseases or conditions:

-
-
- (3) Date of first visit to health care provider: _____
- (4) Date of statement regarding inability to determine causation:

- (5) Identify the health care provider that made the statement, along with his/her specialty, address and telephone number:

12. Each Plaintiff responded in a similar general fashion to Fact Sheet Question No. 6 on October 10, 2011. An example of that very general answer is:

Pain & Suffering: The value of these damages either requires calculation by one or more experts, or is a question for the trier of facts. Plaintiff also incorporates here the individual medical problems that he has developed and experienced, identified in question 12 or in plaintiff's medical records, due to his exposure to perchloroethylene and all other chemicals used in float-sink testing.

Past Medical Costs: The value of these damages either requires calculation by one or more experts, or is a question for the trier of facts.

Future Medical Costs: The value of these damages either requires calculation by one or more experts, or is a question for the trier of facts.

Emotional Distress Based on Fear of Future Illness: The value of these damages either requires calculation by one or more experts, or is a question for the trier of facts.

Lost Income, Earnings and Earning Potential: The value of these damages either requires calculation by one or more experts, or is a question for the trier of facts.

Out of Pocket Expenses: Plaintiff's out of pocket expenses are continuing and plaintiff is unable at this time to fully list such expenses. Without limiting plaintiff's right or ability to supplement this answer, to date plaintiff has identified at least the following expenses in connection with the claims made: Medical Expenses

Plaintiff also seeks to recover punitive damages from the manufacturing and distributor defendants.

See e.g. E-Service TID # 40271851.

13. Each Plaintiff responded to Fact Sheet Question No. 12 by listing every medical ailment that Plaintiffs alleged they were suffering from and generally attributed all of their medical ailments to exposure to “float-sink chemicals,” as defined in the Amended Complaints.

14. The Court addressed Plaintiffs’ original Fact Sheet responses at the January 9, 2012, hearing in this matter. One of the orders resulting from that hearing, the Court’s February 13, 2012 Order Regarding Defendants’ Motions to Strike (TID# 42472270) held:

a. “Plaintiffs’ responses to the Plaintiff Fact Sheet are deficient insofar as they are boilerplate and lack the plaintiff-specific detail required to be fully responsive.” *Id.* at ¶6.

b. “Plaintiffs shall make detailed amendments to their Responses to the Plaintiff Fact Sheet and supply additional plaintiff-specific detail no later than sixty (60) days from the January 9, 2012 Hearing.” *Id.* at ¶12.

c. “In Plaintiffs’ Amended Responses to the Plaintiff Fact Sheet, Plaintiffs are barred from stating that any Response requires an expert opinion. **Plaintiffs are further barred from referring to original or amended Answers and Responses to Defendants discovery requests. Plaintiffs shall provide individual and complete Responses to each and every Plaintiff Fact Sheet Question.**” *Id.* at ¶13 (emphasis added).

15. Similarly, at the January 9, 2012, hearing the Court found the Plaintiffs’ initial expert witness disclosures made on December 15, 2011, to be egregious and totally unacceptable.

16. The February 13, 2012 Order Regarding Defendants’ Motions to Strike (TID# 42472270) specifically found:

a. “Plaintiffs failed to respond appropriately to the October 18, 2011 Case Management and Scheduling Order (hereinafter “Case Management Order”) when they served Plaintiffs’ Expert Witness Disclosures on December 15, 2011.” *Id.* at ¶1.

b. “Plaintiffs’ conduct in regards to the service of Plaintiffs’ Expert Witness Disclosures was egregious and totally unacceptable.” *Id.* at ¶2.

c. “Due to the Plaintiffs’ failure to appropriately supply information regarding their experts, Defendants are unable to make their expert disclosures as required by the Case Management Order on January 16, 2012.” *Id.* at ¶3.

d. “Based upon the Court’s review of the history of this action and the egregiousness of Plaintiffs’ present conduct, **Plaintiffs’ actions regarding Plaintiffs’ Expert Witness Disclosures are sanctionable.**” *Id.* at ¶5 (emphasis added).

17. This Court’s February 13, 2012 Order Regarding Expert Witness Disclosures (TID# 42471949) included the following requirements in paragraph 4.A.:

- 3) **General and Specific Causation:** For each expert who will opine that a particular disease or condition of a Plaintiff was caused by exposure to one or more “float-sink chemicals” (as defined by Plaintiffs in their Amended Complaints), provide separately for each Plaintiff and for each chemical the expert’s opinion as to:
 - a. The identity of the Plaintiff’s specific diseases, illnesses or injuries allegedly caused by exposure to each such chemical, substance or product;
 - b. The type of exposure resulting in each such disease, illness or injury (e.g., airborne, dermal, ingestion, etc.);
 - c. A summary of the grounds for the expert’s opinions with regards to items a-b, including a list of the Plaintiff’s medical records reviewed by the expert; and
 - d. Any and all reliable scientific and/or medical evidence, i.e., peer-reviewed and/or scientific medical literature, showing a causal link between the Plaintiff’s alleged exposure scenario to each chemical, substance, or product and the specific type of injury claimed, and a summary of any other grounds upon which the expert’s opinion is based.
- 4) **Damages Information:** For each expert who will address Plaintiffs’ damages (including, but not limited to, costs of medical monitoring, past and/or future wage loss or any other economic or other type of claimed loss), provide separately for each Plaintiff the specific grounds upon which that testimony will be based, along with an itemization of the type and corresponding amount of damages upon which that expert will opine.

18. The Plaintiffs were cautioned: “Plaintiffs are notified that failure to provide amended Expert Witness Disclosures, according to the below requirements, on or before the date specified herein shall subject them to all sanctions, up to and including dismissal of their respective civil actions with prejudice.” *Id.* at ¶2.

19. On or about March 8, 2012, Plaintiffs filed their Amended Float-Sink Plaintiff Fact Sheets (“Amended Fact Sheet Responses”). The Amended Fact Sheet Responses to Question No. 6 generally provide as follows:

Pain & Suffering: The value of these damages is ultimately a question for the trier of facts. In an effort to provide basic information, plaintiff asserts that he is entitled to an award of damages in excess of \$220,000. Plaintiff also incorporates here the individual medical problems that he has developed and experienced, identified in question 12 or in plaintiff’s medical records, due to his exposure to perchloroethylene and all other chemicals used in float-sink testing.

Past Medical Costs: Between \$7,500 and \$15,000.

Future Medical Costs: The value of these damages is ultimately a question for the trier of facts. Plaintiff is currently unaware of the amount sought under this category of damages, which will rely on factors that are beyond plaintiff’s knowledge.

Emotional Distress Based on Fear of Future Illness: The value of these damages is ultimately a question for the trier of facts. In an effort to provide basic information, plaintiff asserts that he is entitled to an award of damages in excess of \$100,000.

Out of Pocket Expenses: Plaintiff’s out of pocket expenses are continuing and plaintiff is unable at this time to fully list such expenses. Without limiting plaintiff’s right or ability to supplement this answer, to date plaintiff has identified at least the following expenses in connection with the claims made: Medical Expenses

Medical Monitoring (Manufacturing Defendants/Distributor Defendants): Plaintiff understands that chronic exposure to perchloroethylene and other float-sink chemicals can adversely impact the central nervous system, resulting in conditions such as Parkinson’s disease and cognitive dysfunction; increases the risk of developing certain cancers, such as kidney cancer, liver cancer and non-Hodgkins lymphoma; and leads to other medical conditions, such as peripheral neuropathy. Plaintiff further understands that patient education, bi-annual medical examinations, including certain blood tests, and annual neurological examinations could aid in the early detection and management of such conditions, and that the current annual cost for such examinations and tests exceeds \$1,500.00.

Plaintiff also seeks to recover punitive damages from the manufacturing and distributor defendants in the amount of at least two times the amount of compensatory damages.

See e.g. E-Service TID # 42974891.

20. Plaintiffs' Amended Fact Sheet Responses to Question No. 6 demonstrated that the Plaintiffs merely substituted one non-specific boilerplate response with another. The only difference appears to be the lack of reference to expert opinion and alternating between three to four generic answers instead of providing the same answer for each Plaintiff. The Plaintiffs' amended responses to Question No. 6 of the Fact Sheet are not individualized as to each specific Plaintiff nor do they provide substantive information.

21. Specifically, with regard to past medical costs, Plaintiffs' Amended Fact Sheet Responses to Question No. 6 of the Fact Sheet are by and large a check the box approach with one of four responses utilized for every Plaintiff: 1) "costs less than \$1,000," thirty-three (33) Plaintiffs; 2) "costs between \$1,000 and \$7,500," fifty-four (54) Plaintiffs; 3) "costs between \$7,000 and \$15,000," five (5) Plaintiffs; 4) "costs of more than \$15,000," four (4) Plaintiffs.²

22. Forty-eight (48) Plaintiffs claimed damages for pain and suffering "in excess of \$100,000." The remaining Plaintiffs provided a random number that appears to have no correlation to a fact or circumstances, or at least no correlation or explanation that has been provided to Defendants or this Court. All Plaintiffs claimed emotional distress damages "in excess of \$100,000." Not one Plaintiff provided a reference to reasoning or facts supporting such an award. All living Plaintiffs, without reference or regard for differing levels of exposure or current condition, claimed that they require annual examinations and testing for at a cost that "exceeds \$1,500." Virtually all Plaintiffs asserted they are entitled to "Out of Pocket Expenses"

²² Since the filing of the Amended Fact Sheet Responses and the Motions filed by the Employers and Distributor Defendants, a number of Plaintiffs have been dismissed from these cases based upon their Notices of Discontinuances. The Court refers to the responses of the Plaintiffs at the time of the filing of the Motions herein.

but few provided detail with regard to the actual amount of those expenses or the nature of the expenses, other than “medical expenses” and occasionally “co-pays.” Occasionally, a Plaintiff will provide slightly more detail in this category, however, complete responses were the exception and not the rule.

23. The Plaintiffs’ Amended Fact Sheet Responses for Question No. 12 continued to provide generic information regarding every ailment for the Plaintiffs. For example, one Amended Fact Sheet contained the following response:

Plaintiff states that he suffers from various conditions that are likely associated with exposure to float-sink chemicals, including breathing problems, numbness that starts in plaintiff’s arms and covers him from the neck down, numbness in hands and feet, and loss of balance.

These injuries are based on plaintiff’s own personal, preliminary assessment. For example, plaintiff also suffers from high blood pressure and had pneumonia 7 or 8 times from 1978 to 1982, and was hospitalized 7 – 10 days each time. After leaving Badger in 1982, he never had pneumonia again. Plaintiff is uncertain whether those conditions are associated with float-sink chemical exposure.

Plaintiff understands that chronic exposure to perchloroethylene and other float-sink chemicals can adversely impact the central nervous system resulting in a variety of injuries that neither plaintiff nor his general doctor would attribute to chemical exposure (for example, impairment of visual memory). Plaintiff expressly reserves the right to edit or augment this response through continuing discovery.

See e.g. E-Service TID # 42979404.

24. Apparently in an attempt at *pro forma* compliance in their Amended Fact Sheet Responses, Plaintiffs divided their alleged ailments into two categories – those which they affirmatively allege are related to “float-sink chemical” exposure and those which they are “uncertain” as to whether or not they are related to exposure.

25. For example, Plaintiff Rickey Hicks’ Amended Float Sink Plaintiff Fact Sheet (TID# 42981548), alleges a host of injuries and conditions which fail to appear in the Amended Expert Witness Disclosure of Plaintiff Rickey Hicks Pursuant to February 13, 2012 Orders

(TID# 43670802) (“Hicks’ Amended Expert Witness Disclosure”). Plaintiff Rickey Hicks claims to suffer: “memory loss, liver conditions resulting in surgery, lightheadedness, and uncontrollable shaking” which “are likely associated with [his] exposure to float-sink chemicals.” Amended Fact Sheet Response (TID# 42981548), Question 12, at p. 10. However, Charles Wertz, D.O., M.P.H. the Plaintiff’s specific causation expert, only supports Plaintiff Hicks’ claim for “memory loss.” Hicks’ Amended Expert Witness Disclosure at Ex. B, p. 1. Specifically, Dr. Wertz states that he is of the opinion that only “Subjective Memory Loss” is related to Plaintiff Rickey Hicks alleged exposure to “float-sink chemicals.” *Id.* at Ex. B, p.1. Further, within the evaluation of Anna Allen, M.D., Dr. Allen notes that Plaintiff Hicks “has had occasional tremors, but none lately” but does not mention Plaintiff Hicks alleged lightheadedness. *Id.* at Ex. B, p. 2. Additionally, as to Plaintiff Hick’s “liver conditions resulting in surgery[,]” Dr. Allen notes that rather than a “liver condition,” Plaintiff Hicks was having abnormal liver testing, which resulted in surgery to remove his gallbladder in the 1980’s. *Id.* at Ex. B, pp. 2-3. Moreover, Dr. Allen notes alleged systems claimed by Plaintiff Hicks which were never mentioned within his Amended Fact Sheet Responses including sleep apnea; hearing loss; sinus problems and congestion and general muscle aches and weakness. *Id.* at Ex. B, pp. 2-3.

26. As another example of Plaintiffs’ unsupported generalizations, Plaintiff Donald Shannon identifies the following injuries, illness, disease or other health condition in his Amended Float-Sink Plaintiff Fact Sheet (TID# 42995848) that he claims resulted from his exposure to chemicals used in float-sink labs: “Plaintiff states that he suffers from various conditions that are likely associated with exposure to float-sink chemicals, including colon cancer, squamous cell carcinoma, malignant melanoma, severe dry skin, short-term memory loss,

hand and finger tremors, and mood swings.” Amended Fact Sheet Response, Question No. 12 at p. 9. In the Amended Expert Witness Disclosure of Plaintiff Donald Shannon Pursuant to February 13, 2012 Orders (TID# 43726289) (“Shannon’s Amended Expert Witness Disclosure”), Plaintiff Shannon identifies as “Symptoms/conditions claimed as related to Float-Sink Chemical Exposure” – “Colon cancer, squamous cell carcinoma, malignant melanoma, severe dry skin, short-term memory loss, hand and finger tremors, and mood swings.” Shannon’s Amended Expert Witness Disclosure at p. 2. Based upon these representations, one could conclude that perhaps Plaintiff Shannon is claiming that he developed different types of cancer and other injuries as a result of his alleged “float-sink chemical” exposure. However, this becomes less clear when the report of Plaintiff Shannon’s “specific causation” expert report is reviewed. Plaintiff Shannon identified Charles Wertz, D.O., M.P.H. as the expert who will offer opinions as to which injuries were caused by his alleged exposure and produces a report signed by Dr. Wertz. In this report, Exhibit B to Plaintiff Donald Shannon’s Amended Expert Witness Disclosure, Dr. Wertz opines that “the following conditions are related to [Plaintiff Shannon’s] exposure to workplace chemicals used in the float/sink laboratory process: subjective Memory Loss; Dry, thickened skin on hands.” *Id.* at Ex. B, p. 1. The Plaintiff’s specific causation expert makes no effort to link colon cancer, squamous cell carcinoma, malignant melanoma, hand and finger tremors and mood swings, claimed injuries identified by Plaintiff Shannon in his Amended Fact Sheet Response. *Id.* at Ex. B.

27. The Amended Fact Sheet Response of Plaintiff Dwayne Boothe (TID# 42974234) provides yet another example of Plaintiffs’ disregard for the specificity required by this Court’s Orders. Plaintiff Boothe, in response to Question No. 12, at pp. 13-14, identifies the following

injuries, illness, disease or other health condition that he claims resulted from his exposure to chemicals used in float-sink labs:

Plaintiff had Pleurisy. His respiratory problems took 4-6 weeks to kick in and get really bad. It came on slowly and lasted for 3 months. When the plaintiff would breath there would be sharp pains at the top of his lungs. He was restrained to a recliner because he couldn't walk and would get very dizzy upon standing. Plaintiff would feel a sharp pain under his collarbone when he took a deep breath. Plaintiff has had sleeping problems since 1996 and has trouble falling asleep and staying asleep because his body feels restless and unsettled and he can't relax. He also experiences a violent shaking of his torso and legs about twice a month before he falls asleep. Plaintiff had depression and anxiety for about one year, causing him to feel unmotivated, anxious, and have strange thoughts. Plaintiff also has memory loss that causes him to have difficulty remembering names and facts.

Plaintiff Boothe set forth the same description of his "Symptoms/conditions claimed as related to Float-Sink Chemical Exposure" in the Amended Expert Witness Disclosure of Plaintiff Dwayne Boothe Pursuant to February 13, 2012 Orders (TID# 43668571) (" Boothe's Amended Expert Witness Disclosure") at pp 1-2. Accordingly, one could possibly conclude that Plaintiff Boothe is claiming that he suffered significant lung problems as a result of his alleged exposure to "float-sink chemicals." However, Plaintiff Boothe's specific causation witness, Dr. Wertz, once again offers a much more limited opinion as to what problems may be attributable to Plaintiff Boothe's alleged float sink chemical exposure. Dr. Wertz opines in his Preliminary Summary of Expert Opinion (TID# 43796013) that after reviewing the medical literature and the report of one of the Plaintiff's other experts, that it is his opinion, "to a reasonable degree of medical certainty, that the following conditions are related to [Plaintiff Boothe's] exposure to workplace chemicals used in the float/sink laboratory process: Subjective Memory Loss." Preliminary Summary of Expert Opinion (TID# 43796013) at Ex. A, p. 2.

28. The Court finds that the discrepancies between the Amended Fact Sheet Responses to Question 12 and the Amended Expert Witness Disclosures of Plaintiffs Pursuant to February 13, 2012 Orders with regard to the Plaintiffs' myriad ailments make it difficult, if not impossible, for the remaining Defendant Preiser to know what ailments are alleged to be a result of exposure to "float-sink chemicals" and so to adequately assess claims and prepare defenses, including identifying rebuttal experts. The purpose of requiring the Plaintiffs to provide Amended Fact Sheet Responses was to avoid this type of uncertainty.

29. The Court finds that, with regard to the Amended Fact Sheet Responses to Question No. 6, the remaining Defendant Preiser has not been provided with plaintiff-specific information to support Plaintiffs' past medical expense claims set forth in the Plaintiffs' Amended Fact Sheets. This Court previously found that the Plaintiffs' original Responses to the Fact Sheets were deficient and it provided clear direction as to the need of the Plaintiffs to properly amend their responses and advised the Plaintiffs that their failure to do so could result in sanctions up to and including dismissal of the claims. Despite this warning, the Plaintiffs failed to provide substantive amendments with focused, consistent and plaintiff-specific information, as Ordered by the Court.

CONCLUSIONS OF LAW

1. "[A] trial court has broad authority to enforce its orders and to sanction any party who fails to comply with its discovery rulings." *Bartles v. Hinkle*, 196 W. Va. 381, 389, 472 S.E.2d 827, 835 (1996).

2. According to Rule 37(b)(2) of the West Virginia Rules of Civil Procedure,

[i]f a party or an officer, director, or managing agent of a party or a person designated under Rules 30(b)(6) or 31(a) to testify on behalf of a party fails to obey an order to provide or permit discovery, including an order made under subdivision (a) of this

rule or Rule 35, or if a party fails to supplement as provided for under Rule 26(e), or if a party fails to obey an order entered under Rule 26(f), the court in which the action is pending may make such orders in regard to the failure as are just, and among others are the following:

(A) An order that the matters regarding which the order was made or any other designated facts shall be taken to be established for the purposes of the action in accordance with the claim of the party obtaining the order;

(B) An order refusing to allow the disobedient party to support or oppose designated claims or defenses, or prohibiting that party from introducing designated matters in evidence;

(C) An order striking out pleadings or parts thereof, or staying further proceedings until the order is obeyed, or dismissing the action or proceeding or any part thereof, or rendering a judgment by default against the disobedient party[.]

3. Rule 37 “is designed to ensure that persons who are subject to discovery requests respond promptly and adequately” and, further, “to permit the use of sanctions against a party who refuses to comply with the discovery rules, i.e., Rules 26 through 36.” *Doulamis v. Alpine Lake Prop. Owners Ass’n, Inc.*, 184 W. Va. 107, 110, 399 S.E.2d 689, 692 (1990) (quoting Syl. Pt. 1, *Shreve v. Warren Assoc., Inc.*, 177 W. Va. 600, 355 S.E.2d 389 (1987)).

4. The “imposition of sanctions by a circuit court under [Rule] 37(b) for the failure of a party to obey the court’s order to provide or permit discovery is within the sound discretion of the court and will not be disturbed upon appeal unless there has been an abuse of that discretion.” Syl. Pt. 1, *Cattrell Companies, Inc. v. Carlton, Inc.*, 217 W. Va. 1, 614 S.E.2d 1 (2005) (quoting Syl. Pt. 1, *Bell v. Inland Mutual Ins. Co.*, 175 W. Va. 165, 332 S.E.2d 127 (1985)).

5. In determining the appropriate sanction(s) in a given case, the Court “may consider the seriousness of the conduct, the impact the conduct had in the case and in the

administration of justice, any mitigating circumstances, and whether the conduct was an isolated occurrence or was a pattern of wrongdoing throughout the case.” Syl. Pt. 2, in part, *Bartles v. Hinkle*, 196 W. Va. 381, 472 S.E.2d 827 (1996) (quoted in *Mills v. Davis*, 211 W. Va. 569, 575, 567 S.E.2d 285, 291 (2002)).

6. The Court “must have good cause to issue a sanction, and . . . when used, the sanction must bear some reasonable relationship to the conduct at issue[.]” *Mills*, 211 W. Va. at 574, 567 S.E.2d at 290.

7. A “party seeking sanctions under Rule 37(b) has the burden of establishing noncompliance with the circuit court’s order to provide or permit discovery[.]” and, “[o]nce the noncompliance is established, the burden is upon the disobedient party to avoid the sanctions sought under Rule 37(b) by showing that the inability to comply with the court’s order or special circumstances render the particular sanctions unjust.” *Bell*, 175 W. Va. at 173, 332 S.E.2d at 134.

8. Apart from the authority granted by Rule 37, the Court has the authority to issue sanctions “pursuant to the ‘inherent power [of a court] to do all things that are reasonably necessary for the administration of justice within the scope of its jurisdiction.’” *State ex rel. Richmond Am. Homes of W. Va., Inc. v. Sanders*, 226 W. Va. 103, 111, 697 S.E.2d 139, 147 (2010) (quoting Syl. Pt. 3, in part, *Shields v. Romine*, 122 W. Va. 639, 13 S.E.2d 16 (1940)).

9. The “[i]mposition of sanctions of dismissal and default judgment for serious litigation misconduct pursuant to the inherent powers of the court to regulate its proceedings will be upheld upon review as a proper exercise of discretion when trial court findings adequately demonstrate and establish willfulness, bad faith or fault of the offending party.” Syl. Pt. 7, *Richmond Am. Homes*, 226 W. Va. at 106, 697 S.E.2d at 142.

10. Rule 37(b)(2) does not contain any express meet-and-confer requirement, *see* W. Va. R. Civ. P. 37(b)(2), and the meet-and-confer requirements contained in Rules 37(a)(2) and 37(d) do not apply to this situation, where the Court has ordered supplementation. *See* W. Va. R. Civ. P. 37(a)(2), (d).

11. The Distributor Defendants were not required, under Rule 37, to meet and confer with Plaintiffs before filing the Motion that is the subject of this Order. *See* W. Va. R. Civ. P. 37; *Cattrell*, 217 W. Va. at 6-7, 614 S.E.2d at 6-7.

12. *Cattrell* holds that a party seeking relief under Rule 37(b) need only meet and confer with opposing counsel when the latter requests clarification of discovery issues. *Cattrell* at 217 W. Va. at 6-7, 614 S.E.2d at 6-7 (“[A] party who has successfully obtained an order compelling discovery has a duty to act in good faith with the opposing party when the opposing party seeks clarification of what is sought under the order compelling discovery.”).

13. Plaintiffs’ counsel did not seek from the Distributor Defendants clarification of the Fact Sheet questions or the issues that had been raised by Defendants, and that had already been addressed by the Court regarding Plaintiffs’ Fact Sheet responses. Indeed, such clarification was not necessary under the instant circumstances.

14. The Court made clear when it ordered the filing of the Fact Sheets that they would be treated like discovery and subject to all the sanctions and punishments applicable to discovery responses. *See* June 28, 2011 Order (TID# 38386487); August 12, 2011 Order (TID# 39248578).

15. In its February 13, 2012 Order Regarding Defendants’ Motions to Strike (TID# 42472270), wherein it found Plaintiffs’ initial Fact Sheet responses to be deficient, this Court expressly ordered Plaintiffs to make detailed amendments to their initial Fact Sheet responses

and provide additional plaintiff-specific detail therein, without referring to other discovery or expert opinions.

16. In that same Order, this Court found Plaintiffs' initial Expert Witness Disclosures to be "egregious and totally unacceptable" and ordered Plaintiffs to amend their disclosures to comport with certain necessary requirements, as discussed above. *See* February 13, 2012 Order Regarding Defendants' Motions to Strike (TID# 42472270).

17. Despite the clear directives to Plaintiffs with respect to amending their Fact Sheets and Expert Witness Disclosures, the Court finds that Plaintiffs' amended responses to Fact Sheet Question No. 6 and 12 fail to comply with the Court's February 13, 2012 Order Regarding Defendants' Motions to Strike Plaintiffs' Expert Witness Disclosures (TID# 42472270).

18. Plaintiffs' Amended Fact Sheet Responses to Question Nos. 6 and 12, which do not contain "additional plaintiff-specific detail," fail to correct the deficiencies in their initial responses, leaving the remaining Defendant Preiser unable to adequately assess Plaintiffs' claims, prepare its defenses to those claims, and identify expert witnesses.

19. Specifically, Plaintiffs' Amended Fact Sheet Responses:

a. Failed to identify damages related to past medical expenses with any plaintiff-specific detail, instead using boilerplate and generic monetary amounts of alleged past medical expenses;

b. Failed to explain how past medical expenses related to their alleged injuries; and

c. Failed to provide specific information related to injuries or conditions alleged to be related to plaintiffs' employment in a float-sink laboratory or exposure to "float sink chemicals."

20. In other words, Plaintiffs failed to respond with the most fundamental information: what specific illnesses or conditions and past medical expenses they allege are related to their employment in a float-sink laboratory or exposure to "float-sink chemicals."

21. The Court finds that Plaintiffs have disobeyed the February 13, 2012 Order Regarding Defendants' Motions to Strike Plaintiffs' Expert Witness Disclosures of the Court as related to the Amended Fact Sheet Responses. This is in addition to the egregiousness of Plaintiffs' conduct in disregarding the October 18, 2011 Case Management and Scheduling Order when they served Plaintiffs' Expert Witness Disclosures on December 15, 2011.

22. The Court further finds that the Plaintiffs' disregard for this Court's Orders have resulted in significant delays in this litigation and an abandonment of the original Case Management Order.

23. As such, the Court finds that the Plaintiffs have demonstrated a pattern of wrongdoing that has had a significant impact on these cases.

24. Distributor Defendants have satisfied their burden of showing that Plaintiffs failed to comply with the Court's prior Orders, including the June 29, 2011 Order Regarding Proposed Fact Sheets (TID 38386487), August 12, 2011 Order (TID # 39248578), and the February 13, 2012 Order (TID # ID 42472270), which shifts the burden to Plaintiffs to prove that their non-compliance is justified.

25. Plaintiffs have not carried their burden: they have not demonstrated that they were unable to comply with the Court's Order, nor have they demonstrated that special circumstances

exist which make the imposition of sanctions unjust. *See Bell*, 175 W. Va. at 173, 332 S.E.2d at 134.

26. Based upon the Court's review of the history of this action and the egregiousness of Plaintiffs' present conduct, Plaintiffs' actions regarding the responses to Questions 6 and 12 of the Amended Fact Sheet Responses are sanctionable.

27. Based upon the considerations enumerated by the West Virginia Supreme Court of Appeals in Syllabus Point 2 of *Bartles*, 196 W. Va. 381, 472 S.E.2d 827, the Court finds that the appropriate sanction regard to Plaintiffs' failure in the Amended Responses to identify and produce plaintiff-specific past medical expenses as an element of damages in response to Question No. 6 is to strike all evidence related to medical expenses and all claims for such damages for medical expenses from these cases.

28. Based upon the considerations enumerated by the West Virginia Supreme Court of Appeals in Syllabus Point 2 of *Bartles*, 196 W. Va. 381, 472 S.E.2d 827, the Court finds that the appropriate sanctions regard to Plaintiffs' failure in the Amended Responses to specify and identify what conditions and illnesses they allege are related to their employment in a float-sink laboratory or from exposure to perchloroethylene is to strike Plaintiffs' responses and amended responses to Question No. 12 of the amended Fact Sheets. Plaintiffs may only assert allegations of an illness or medical conditions and exposure to perchloroethylene that is disclosed in the Amended Expert Reports filed in April, 2012.

29. The Court's sanction addresses Plaintiffs' conduct in failing to provide sufficient responses to Fact Sheet Questions No. 6 and 12 on two separate occasions. Plaintiffs' misconduct impaired the administration of the case by preventing the remaining Defendant

Preiser from proceeding with depositions and/or other discovery, and inhibiting the remaining Defendant Preiser in evaluating Plaintiffs' claims and alleged damages.

30. Plaintiffs' repeated failure to abide by this Court's Orders and to meaningfully participate in discovery evidences a pattern of wrongdoing throughout this case and warrants the limiting of Plaintiffs' claims to those supported by expert testimony and striking all claims for past medical expenses. *See Bartles*, 196 W. Va. at 390, 472 S.E.2d at 836 (noting that "counsel's disregard of a prior warning from the court in the same case exacerbates the offense").

31. The Court has found no mitigating circumstances here. Plaintiffs have had multiple opportunities to provide the appropriate disclosure of information (initial Fact Sheet responses, Amended Fact Sheet responses, initial Expert Disclosures, and Amended Expert Disclosures) and all have been inadequate and failed to provide the information ordered by the Court.

32. As a sanction available to the Court under Rule 37(b)(2) of the West Virginia Rules of Civil Procedure and pursuant to its inherent power to regulate the proceedings before it, the Court is limiting Plaintiffs' claims to an illness or medical condition and exposure to perchloroethylene that is disclosed in the Amended Expert Reports filed in April, 2012, and by striking all evidence related to medical expenses and all claims for such damages for medical expenses from these cases.

33. The Court has considered the positions argued by Plaintiffs and the remaining Defendant Preiser and thoroughly considered whether less onerous sanctions were warranted. The Court considered its prior Orders in this case finding Plaintiffs' initial Fact Sheet responses and expert witness disclosures to be deficient and, indeed, has levied lesser sanctions related to the same issues brought before the Court. Because those sanctions were, apparently, ineffective,

the Court must impose harsher sanctions. The Court has determined that it could not fashion an alternate remedy that would be appropriate.

34. Pursuant to Rule 37(b)(2) of the West Virginia Rules of Civil Procedure and its inherent power to regulate the proceedings before it, the Court finds good cause to limit Plaintiffs' claims to an illness or medical condition and exposure to perchloroethylene that is disclosed in the Amended Expert Reports filed in April, 2012, and by striking all evidence related to medical expenses and all claims for such damages for medical expenses from these cases and that the sanction bears a reasonable relationship to the conduct at issue. *See Richmond Am. Homes*, 226 W. Va. at 106, 697 S.E.2d at 142; *Mills*, 211 W. Va. at 574, 567 S.E.2d at 290.

35. This Order reflects the unanimous decision of the three member panel of judges.

36. The Court further notes that the new Liaison Counsel for Employer Defendants is Jonathan L. Anderson, Esq. of Jackson Kelly PLLC.

37. The following Plaintiffs are excepted from this order:

a. The claims of Plaintiff Earl Holt, who has been afforded additional time to advise the Court whether he has secured new counsel or will proceed *pro se*; and,

b. The claims of Plaintiff Michael Bibbee, who is serving in the United States military overseas, and his claims are stayed by separate order of the Court.

CONCLUSION

Based on the foregoing Findings and Conclusions, Distributor Defendants' Motion to Dismiss Based on Plaintiffs' Insufficient Responses in Their Amended Float-Sink Plaintiff Fact Sheets is hereby **Granted in part** as it pertains to Question Nos. 6 and 12 of the Fact Sheet. It is hereby **Ordered, Adjudged, and Decreed** that with regard to Question No. 6 of the Fact Sheet, all evidence related to medical expenses and all claims for such damages for medical expenses

from these cases are stricken, and with regard to Question No. 12 of the Fact Sheet, claims are limited to an illness or medical condition and exposure to perchloroethylene that is disclosed in the Amended Expert Reports filed in April, 2012.

The Court notes and preserves the objections of any party aggrieved by this Order.

The Clerk is directed to send certified copies of this order to counsel of record and any unrepresented party.

ENTER: _____

John A. Hutchison
Lead Presiding Judge
Float-Sink Litigation

Presented by:

/s/ Webster J. Arceneaux, III
Webster J. Arceneaux, III (WVSB No. 155)
Lewis, Glasser, Casey & Rollins, PLLC
P. O. Box 1746
Charleston, West Virginia 25326
(304)345-2000
(304)343-7999 (facsimile)
Counsel for Defendant Preiser Scientific, Inc.

This document constitutes a ruling of the court and should be treated as such.

File & Serve

Transaction ID: 45666697