



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 REGARDING EXPERT WITNESS DISCLOSURES

On this day came Defendants, by their respective Liaison Counsel, pursuant to the Court's directives at the January 9, 2012 hearing, in connection with the following:

- a. Manufacturing Defendants' Motion to Strike Plaintiffs' Expert Witness Disclosures and Exclude Plaintiffs' Expert Witnesses ("Motion"), filed December 22, 2011;
- b. Distributor Defendants' Joinder of Manufacturing Defendants' Motion to Strike Plaintiffs' Expert Witness Disclosures, filed December 29, 2012;
- c. Employer Defendants' Joinder of the same, filed December 30, 2012;
- d. Plaintiffs' Opposition to Manufacturing Defendants' Motion to Strike Plaintiffs' Expert Witness Disclosures and Exclude Plaintiffs' Expert Witnesses, filed on January 5, 2012; and
- e. Manufacturing Defendants' Reply Memorandum in Further Support of Manufacturing Defendants' Motion to Strike Plaintiffs' Expert Witness Disclosures and Exclude Plaintiffs' Expert Witnesses, filed January 6, 2012.

On January 9, 2012, the Court heard argument of counsel with respect to the Motion and the responsive memoranda.

Having considered the Motion, the responsive memoranda, and the oral arguments thereto, having noted the exceptions and objections made by Plaintiffs'

counsel on the record during the hearing, and having conferred to ensure uniformity of its decisions, as contemplated by West Virginia Trial Court Rule 26.07(a), the Court **GRANTS IN PART** Manufacturing Defendants’ Motion to Strike Plaintiffs’ Expert Witness Disclosures and Exclude Plaintiffs’ Expert Witnesses, and **ORDERS as follows:**

1. Plaintiffs shall amend their Expert Witness Disclosures, filed on December 15, 2011, as set forth below within 60 days of entry of this Order.

2. 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.

3. Plaintiffs may not disclose any new experts in addition to, or in lieu of, the seven experts identified in Plaintiffs’ December 15, 2011 submission, except upon leave of court for good cause shown.

4. Plaintiffs shall submit amended Expert Witness Disclosures according to the requirements set forth below.

A. In accordance with West Virginia Rule of Civil Procedure 26(b)(4) and the October 18, 2011 “Case Management and Scheduling Order” of this Court, for each expert, Plaintiffs shall submit a report authored and signed by the expert or, alternatively, a disclosure setting forth the subject matter on which each expert is expected to testify, a statement of the facts and opinions to which the expert is expected to testify, and a summary of the grounds for each opinion. The report or disclosure shall

identify each individual Plaintiff or decedent on whose behalf each expert is expected to testify. The reports produced or disclosures provided shall include the required information as set forth herein for each individual Plaintiff on whose behalf the expert is expected to testify so that Defendants may evaluate the opinions each expert may offer as to any given Plaintiff and the grounds for those opinions, and respond accordingly. Specifically, Plaintiffs are required to submit the following information for each expert:

- 1) **Expert's Information:** The name, professional address, and curriculum vitae of the expert, including a list of all publications authored by the witness and all cases in which the witness has been retained and provided an expert report or given testimony;
- 2) **Product and Exposure Information:** For each expert who will address exposure of Plaintiffs to one or more "float-sink chemicals" (as defined by Plaintiffs in their Amended Complaints), provide separately for each Plaintiff the expert's opinion as to:
 - a. The identity (by brand name, manufacturer and chemical name, to the full extent known) of the chemical(s), substance(s) or product(s) allegedly causing the Plaintiff's alleged injuries;
 - b. The dates, nature and circumstances of each alleged exposure of that Plaintiff to the chemical(s), substance(s) or product(s) listed in response to 2(a), including a description of the type (i.e., airborne, dermal, ingestion, etc.) of exposure;

c. A quantification or calculation of the amount or level of alleged exposure of that Plaintiff to the chemical(s), substance(s) or product(s) listed in response to 2(a), and a description of the method used to quantify or calculate the alleged exposure; and

d. A summary of the grounds for the expert's opinions with regards to items a-c.

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.

5) **Failure-to-Warn Claims:** For each expert who will address the adequacy of Defendants' warnings, provide separately for each Plaintiff a list of each and every warning that the expert contends is inadequate, the identity of the Distributor or Manufacturer Defendant who provided the warning, the chemical, substance or product to which the warning relates, and the date of the Material Safety Data Sheet (MSDS), product label, or other document on which the warning appears. For each warning that is listed, provide the expert's opinion as to:

- a. The specific reason(s) why the expert believes the warning is inadequate;
- b. The identity of the specific standard(s) and/or regulation(s) that the warning allegedly fails to meet;

- c. The specific reason(s) the language and/or form of the warning allegedly fails to meet the applicable standards and/or regulations;
- d. The substance of the specific information or warning that should have been, but was not provided; and
- e. A summary of the grounds for the expert's opinions with regards to items a-d.

6) **Medical Monitoring Claims:** For each expert who will address Plaintiffs' medical monitoring claims, provide separately for each Plaintiff the expert's opinion as to:

- a. The specific diseases for which medical monitoring is being requested;
- b. A description of all exposures to one or more "float-sink chemicals" (as defined by Plaintiffs in their Amended Complaints) that the expert will opine are "significant" relative to the general population (as that phrase is used in *Bower v. Westinghouse Electric Corp.*, 522 S.E.2d 424 (W. Va. 1999)), including for each chemical the type, duration, and frequency of each exposure;
- c. An explanation of each reason that the Plaintiff has a significantly increased risk of contracting the diseases identified in 6(a) relative to what would be the case in the absence of the exposures identified in 6(b), including any and all peer-reviewed

scientific literature and/or evidence that demonstrates a proximate link between the exposures identified in 6(b) to the diseases identified in 6(a);

d. A description of all monitoring and diagnostic procedures that the expert opines will make early detection of the diseases listed in response to 6(a) possible, linking the specific procedure to the specific diseases identified in 6(a);

e. The expert's basis for concluding that the procedures listed in response to 6(d) are different from what would be prescribed in the absence of the exposure, and that periodic administration of those procedures is necessary; and

f. A summary of the grounds for the expert's opinions with regards to items a-e.

7) **Deliberate Intent Claims:** For each expert who will provide testimony regarding the "deliberate intent" claims, provide separately for each Plaintiff the expert's opinion, if any, as to:

a. The specific unsafe working condition(s) in the workplace, identifying the employer allegedly responsible for each condition, that the expert will opine presents or did present a high degree of risk and a strong probability of serious injury or death to that particular Plaintiff;

- b. Any knowledge which, in the expert's opinion, the Employer Defendant possessed regarding the specific unsafe working condition and of the high degree of risk and strong probability of serious injury or death presented by such condition;
- c. The manner in which each identified specific unsafe working condition violated any state or federal safety statute, rule or regulation, whether cited or not, specifically identifying every such statute, rule or regulation on which that expert relies and the reasons why each specific statute, rule or regulation applies to each employer;
- d. The manner in which each identified specific unsafe working condition violated any commonly accepted and well-known safety standard within the industry or business of which each employer was a part as defined in W.Va. Code § 23-4-2(d)(2)(ii)C, specifically identifying each such safety standard on which the expert relies and the reasons why each such safety standard applies to each employer;
- e. The manner in which the individual Plaintiff's employer, in the expert's opinion, intentionally exposed that Plaintiff to each specific unsafe working condition identified above;
- f. Each serious compensable injury or death suffered by the identified Plaintiff as a result of said condition; and

g. A summary of the grounds for the expert's opinions with regards to items a-f, including a list of the Plaintiff's medical records reviewed by the expert.

B. If an expert is not identified in the amended disclosures as offering an opinion with respect to a particular Plaintiff, then that expert will be prohibited from later offering testimony regarding that particular Plaintiff absent a showing of good cause to the Court.

5. Upon the filing and service by all remaining Plaintiffs of proper Expert Witness Disclosures as ordered herein, Defendants shall thereafter have a period of sixty (60) days within which to file and serve their Expert Witness Disclosures.

6. Plaintiffs shall submit any rebuttal Expert Witness Disclosures within thirty (30) days after Defendants serve their Expert Witness Disclosures.

The Parties' objections to the rulings set forth herein are noted and preserved.

The Clerk is directed to send certified copies of this Order to Counsel of record.

ENTER: February 13, 2012

_____/s/ John A. Hutchison_____
JOHN A. HUTCHISON
Judge, Circuit Court of Raleigh County

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

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Court Authorizer: John A Hutchison

/s/ Judge John A Hutchison