FILE NAME: Mead (MEAD)

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DOCUMENT DESCRIPTION: Plaintiff's Objections and Response to Defendant Motion for Summary Judgment

IN THE UNITED STATES DISTRICT COURT FOR

THE EASTERN DISTRICT OF PENNSYLVANIA

IN RE: ASBESTOS PRODUCTS LIABILITY LITIGATION — **MULTIDISTRICT LITIGATION MDL-875**

CHARLES RICHARD ARCHER & PATRICIA ARCHER

V. — **CAUSE NO. 2:09-cv-70093-ER**

MEAD CORPORATION, ET AL

PLANTIFFS' OBJECTION AND RESPONSE TO DEFENDANT MW CUSTOM PAPER LLC'S MOTION FOR SUMMARY JUDGMENT AND JOINDER OF DEFNEDANT CSXT TRANSPORTATION, INC IN CO-DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

COME NOW, Plaintiffs, and file this their *Objection and Response to Defendant MW Custom Paper LLC's Motion For Summary Judgment and Joinder of Defendant CSXT Transportation, Inc.'s in Co-Defendant's Motion for Summary Judgment*. Plaintiff relies on and incorporates arguments, caselaw and exhibits set forth in their *Memorandum of Law in Support* of this Response and their *Motion to Compel* filed contemporaneously with this response and would respectfully show unto this Honorable Court the following:

STANDARD OF REVIEW

1. On summary judgment, the inferences to be drawn from the underlying facts contained in such materials must be viewed in the light most favorable to the party opposing the motion.

PROCEDURAL HISTORY

2. Plaintiff filed this matter in State Circuit Court of St. Clair County, Alabama. Defendant removed this matter into Federal Court on the sole ground of federal question jurisdiction. Plaintiff filed a timely *Motion to Remand* to State Court and, subsequently, this matter was transferred to MDL-875. Plaintiff filed his initial discovery on or about April 30, 2008 to which Defendant had not responded prior to filing of its *Motion for Summary Judgment*. Defendant filed its *Motion for Summary Judgment* on March 2, 2010, the day before this Honorable Court's hearing to enter a scheduling order in this matter, which, when entered, established a discovery deadline of July 15, 2010. The response date has been extended until April 30, 2010.

FACTUAL HISTORY

3. Plaintiff worked as a machinist at Cement Asbestos Products Company (CAPCO) in Ragland, Alabama from 1964 until 1976 and at National Cement from 1976 until 2002. Defendant merged with Woodward Iron Company in 1968 with Woodward Iron becoming one with Defendant at that time. At the time of merger, Woodward Iron Company owned a considerable interest in CAPCO and, through the merger, Defendant retained this interest in CAPCO until it was sold in 1974. Defendant also owned National Cement from the time of merger until 1974. At the time of the merger, Defendant voluntarily assumed independent control of the safety and health operations at CAPCO, including provision of safety warnings, safety procedures and purchase decisions for equipment involving the health and safety of CAPCO's employees.

4. CAPCO owned and operated a facility in Ragland, Alabama, which is the facility made basis of this litigation. CAPCO was in the business of manufacturing products made from a

combination of cement and asbestos fibers. During the relevant time periods, CAPCO used approximately 500 tons of asbestos a month and, as a result, thousands of tons of loose asbestos fiber in plastic bags were brought into the CAPCO facility by rail in boxcars. *Exhibit A, Deposition of Richard Archer, December 13, 2005, p.44, ll. 1-21 and Exhibit C, CAPCO memorandum titled Toxic and Hazardous Substances Inventory dated July 1, 1971.* The CAPCO building was an "open ended" building into which the plastic bags of raw asbestos fiber were unloaded from railroad boxcars. *Exhibit A, Deposition of Richard Archer, December 13, 2005, p 29, ll 16-23, p 30, ll 1, p 41, ll 5-23, p42, ll 1-23, p43, ll 1-5, p133, ll 18-23, p134, ll 1-21* The boxcars used to deliver the asbestos were owned by Seaboard and CSX. *Exhibit A, Deposition of Richard Archer, December 13, 2005, p.27, ll 14-23, p.28, ll 1-15* The bags of raw asbestos were sometimes damaged in transit or from unloading the bags, exposing the raw asbestos fibers to the atmosphere. *Exhibit A, Deposition of Richard Archer, December 13, 2005, p 29, ll 8-14, p47, ll21-23* and *Exhibit D, Seaboard Railroad company invoice, 1966.* The plastic bags, after being unloaded, were opened and poured into machinery by individuals in order to mix the asbestos with the cement. *Exhibit A, Deposition of Richard Archer, December 13, 2005, p16, ll 20-23, p17, ll 1-2* As a result, the CAPCO facility was extremely dusty and dust was "everywhere". *Exhibit A, Deposition of Richard Archer, December 13, 2005, p 16, ll 8-11* Plaintiff was also in and around the CAPCO dumpsite until it was closed in 1982 and had hunted in and around the site since 1982. *Exhibit A, Deposition of Richard Archer, December 13, 2005, p 85, ll22-23, p 86, ll 1-12* Mr. Archer also testified that he had worked at the National Cement plant until 2002 and that his work at that site exposed him to asbestos. *Exhibit A, Deposition of Richard Archer, December 13, 2005, p86., ll 13-16, p.90,ll 3-9 p91, ll 6-17*

5. Dr. Michael Ellenbecker is an expert in the field of industrial hygiene who has previously testified in litigation involving the CAPCO facility. *Exhibit B1, Curriculum Vitae of Dr. Michael Ellenbecker* Asbestos is a durable mineral and, by its nature, is difficult to destroy. *Exhibit B, Deposition of Michael Ellenbecker, January 18, 2000,* p 101, l. 24, p102, ll 1-11 Airborne asbestos fibers are small and frequently microscopic. *Exhibit B, Deposition of Michael Ellenbecker, January 18, 2000 p100, ll18-24, p101 ll1-10* Asbestos fibers often remain airborne for extended periods of time and can easily be reentrained into the atmosphere from a surface upon which they rest long after they originally were brought into a facility. *Exhibit B, Deposition of Michael Ellenbecker, January 18, 2000, p 87, l 24, p 88, ll 1-24, p89, ll 1-24, p90, ll 1-10, p 91, ll 4-24, p.92, ll 1-16, p 102, ll 17-24, p103, ll 1-24, p104, ll 1-9* Such minute fibers, without doubt, may be carried by the movement of air throughout an area powered by fans or wind, especially if bags of asbestos are being dumped into machines by individuals. *Exhibit A, Deposition of Richard Archer, December 13, 2005, p16, ll 20-23, p17, ll 1-2, p*134, ll 7-19 The Ragland CAPCO facility was never cleaned sufficiently to remove all asbestos fibers. *Exhibit B, Deposition of Michael Ellenbecker, January 18, 2000 p 112, ll 19-24, p 113, ll 1-10* Exposure continued to persons, such as Plaintiff, who quit working at the CAPCO site, by handling CAPCO products and other items in the "scrap heap". *Exhibit B, Deposition of Michael Ellenbecker, January 18, 2000 p 120, ll 4-24, p 121, ll 1-10*

6. Asbestos is listed on the *2007 CERCLA Priority List of Hazardous Substances* by the Agency For Toxic Substances & Disease Registry, an agency required to make such a list under CERCLA. *Exhibit E, 2007 CERCLA Priority List of Hazardous Substances.*

I. DEFENDANT'S RELIANCE ON ALABAMA "SHAREHOLDER IMMUNITY DEFENSE" IS MISPLACED

7. Plaintiff's Complaint alleges direct liability under Alabama law for negligence in its independent and voluntary assumption of duties over safety and safety inspections at the CAPCO facility.

8. While discovery remains incomplete, during the time material to Defendant's argument, Defendant voluntarily asserted control over safety and industrial hygiene programs at the CAPCO facility. Defendant made no effort to warn Plaintiff of the dangers of asbestos, despite knowledge of its hazardous nature and, in fact, made efforts to conceal the dangers. In fact, William Bond, President of Woodward Iron, Vice President of Mead made efforts to keep information from persons, such as Plaintiff, by requesting that Mr. S.D. Weaver, plant manager at CAPCO, consult with Mr. Stan Mooney, Woodward Iron's safety director before conducting studies. Mr. Weaver complied, spoke with Mr. Mooney and responded by not conducting studies at that time. *Exhibit G, Bond/Weaver correspondence 9/24/1970 and 1/25/1971.*

9. "The Mead Safety Department makes a periodic report to management." *Exhibit H, Memorandum Re: Safety Performance Report, Mooney, August 30, 1970 and responses.* Several documents reflect the extent of Defendant's assertion of inspection duties, safety and industrial hygiene at the CAPCO facility and knowledge of the dangers of asbestos. In 1971 and 1972, correspondence was exchanged regarding safety and health issues which referred to reporting to Defendants' corporate personnel safety procedures. *Exhibit H, Memorandum Re: Safety Performance Report, Mooney, August 30, 1970 and responses.* Mr. Stan Mooney, the Director of Safety at Woodward Iron, a division of Defendant at that time, was involved with the safety

and health programs at CAPCO, including conducting safety inspections with CAPCO personnel and receiving reports from CAPCO. *Exhibit I, August 18, 1971 Safety Inspection Report and response; Exhibit J, Memorandum re: asbestos dust control, June 13, 1972.*

10. Further, *Exhibit K* contains correspondence and reports between Defendant and CAPCO evidencing the relationship between the companies regarding safety and industrial hygiene expenditures. In February, 1974, a memorandum was generated internally by CAPCO regarding the Ragland plant's status regarding OSHA and EPA compliance. The memorandum unequivovally stated that CAPCO was in violation of both OSHA and EPA regulations. The report further stated that the dumpsite of asbestos waste permitted asbestos to become "airborne" and indicated need to purchase a bulldozer to move and properly contain the material. Subsequently, a letter was generated to Defendant's president from the Chairman of CAPCO with cost estimates for the necessary action to bring the facility into compliance, by making expenditures that will *"take care of the OSHA requirements at the plant"*, including the request for the purchase of a bulldozer. Of particular note is the reference in the first line of the letter dated March 12, 1974 to Defendant's President's request for "get by figures", which apparently initiated the entire process. *Exhibit K, Letter Bond to Batts with reports, March 12, 1974.* Seven months later, Defendant sold its interest in CAPCO to ASARCO.

11. An "Environmental Survey" at CAPCO was conducted by ASARCO in November, 1974, a mere two months after Defendant sold its interest to ASARCO. *Exhibit L, ASARCO Environmental Survey CAPCO Ragland, November 20-22, 1974* Produced in previous litigation regarding the CAPCO site, the survey found numerous issues concerning safety and health at the CAPCO site which appear not to have been corrected. Of note, the memorandum discusses two dump sites which remained in violation of EPA standards, including photographs of one adjacent

to the employee parking lot. Recommendation was made to make them sanitary landfills, the same recommendation made to Defendant in *Exhibit K.* Of additional note, the same memorandum indicated that previous records of testing at CAPCO were improperly interpreted, certain tests were never performed, EPA reporting was not made and that local persons entered the dumpsites for scavenging purposes. Mr. Archer, in fact, testified he entered the dump at times until it was closed in 1982 and hunted in the area after 1982. *Exhibit A, Deposition of Richard Archer, December 13, 2005, p. 86 ll 1-16* The fact that asbestos fibers were dumped in an "open air" dump next to the employee parking lot would necessarily result in exposure to Defendant's waste for years after it was dumped. In fact, the State of Alabama in 1983 indicated continued problems with the CAPCO site. *Exhibit M, Alabama State Environmental documents, 1979 and 1983.*

12. While Defendants may argue that their duties to Plaintiff ended in 1974, without doubt, the impact of their decisions regarding safety and health of the site continued long after they left the premises. The asbestos brought to the property was not safely managed nor disposed of in a manner to protect Plaintiff and others from the continual exposure. Further, despite Defendant's arguments to the contrary, responsibility for its actions at the site continued, as Defendant clearly recognized the need to secure waste products which was not done, if ever, until after 1980.

II. DEFENDANT'S STATUE OF LIMITATIONS ARGUMENT IS INCORRECT

13. Plaintiff's Complaint asserted that his personal injury, in particular, mesothelioma, was based on several grounds, including reference to violation of the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA) standards, originating from his exposure

to asbestos and asbestos containing material. While neither mentioned nor raised in Defendant's *Motion for Summary Judgment*, Defendant, with all other Defendants joining, removed this matter to this Honorable Court on the sole issue of Federal Question jurisdiction, in particular, CERCLA.

14. Defendant, with a deceptively simple argument, now moves this Honorable Court, without discussion of or reference to CERCLA, to grant Judgment against Plaintiff based on Alabama State Statute of Limitations grounds. Defendant claims that (1) Defendant sold all of its interest in CAPCO in 1974 and (2) that Alabama's one year Statute of Limitations in effect in 1974 operates as a bar to any claims against Defendant after 1975. Defendant represents to this Honorable Court that it is, therefore, impossible for Defendant to have liability for Plaintiffs' injuries. Defendant's argument concludes that the date *Defendant* last owned an interest in the CAPCO facility establishes the latest date that Plaintiffs' statute of limitations could began to run against it. Defendant makes no representation as to Plaintiffs' "date of last exposure" to asbestos, only the date that its ownership ceased.

15. Plaintiff does not contest the dates of employment asserted by Defendant, however, would respectfully submit that Defendants are incorrect in their conclusion that the statute of limitations bars this matter.

A. Application of the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA)

> Title 42 USCA sec. 9658, **(a) State statutes of limitations for hazardous substance cases**
>
> **(1) Exception to State statutes**
> In the case of *any action brought under State law* for personal injury, or property damages, which are caused or contributed to by exposure to any hazardous substance, or pollutant or contaminant, released into the environment from a facility, if the applicable

limitations period for such action (as specified in the State statute of limitations or under common law) provides a commencement date which is earlier than the federally required commencement date, such period shall commence at the federally required commencement date in lieu of the date specified in such State statute.

(b) Definitions
As used in this section—
(1) Subchapter I terms
The terms used in this section shall have the same meaning as when used in subchapter I of this chapter.
(2) Applicable limitations period
The term "applicable limitations period" means the period specified in a statute of limitations during which a civil action referred to in subsection (a)(1) of this section may be brought.
(3) Commencement date
The term "commencement date" means the date specified in a statute of limitations as the beginning of the applicable limitations period.
(4) Federally required commencement date
(A) In general
Except as provided in subparagraph (B), the term "federally required commencement date" means the date the plaintiff knew (or reasonably should have known) that the personal injury or property damages referred to in subsection (a)(1) of this section were caused or contributed to by the hazardous substance or pollutant or contaminant concerned. *Emphasis added*

16. Prior to 1979, the State of Alabama had not adopted a "discovery rule" and the Statute of Limitations in an asbestos case in Alabama was held to start to run "on the last date of exposure." *Garrett v. Raytheon Company,* 368 So.2d 516 (Ala. 1979) Less than four months later, the Alabama legislature "fixed" this erroneous ruling and, in line with most States, adopted a "discovery rule". The Supreme Court, determined, however, that this statute would have to be prospective in recognition of the defendant's constitutional right to a defense and its unwillingness to allow a plaintiff's claim to go forward at the expense of a defendant's "vested" defense. In other words, the Statute went into effect on May 19, 1980 and the Supreme Court

held that it could only apply to actions where Plaintiffs had exposure after May 19, 1979. Since the claim of any plaintiff whose exposure was on or after May 19, 1979 would not have been barred, the statute of limitation would not have expired on the effective date of the new statute (i.e. May 19, 1980). As a result, many individuals suffering latent injury as a result of exposure to asbestos have been time-barred *well before they could have known the existence of the injury*. In fact, the Alabama Supreme Court recently held that the *Garrett* case was wrong when it was decided and just six days ago, in *Owens Illinois v. Wells, 1070215, 1070216, 1070217, 1070218, 1070213, 1070214 (Ala, 2010),* the Alabama Supreme Court reiterated that an personal injury and wrongful death action in Alabama does not *accrue* until there is a "manifest present injury."

17. Defendant seeks to avail itself of such a remedy and has requested this Honorable Court to grant Summary Judgment based on this argument. As set forth below in more detail, Defendant's request of this Honorable Court is exactly what CERCLA was enacted to prevent.

CERCLA, the statute made the sole basis of Defendant's removal of this action into this Honorable Court, imposes a federally required commencement date (FRCD) for actions involving Section 9658. *Title 42 USCA sec. 9658 (b) (4)(A), supra.* Under the CERCLA FRCD, the statute of limitations would begin to run on the date "the plaintiff knew (or reasonably should have known) that the personal injury…referred to in subsection (a)(1) of this section were caused or contributed to by the hazardous substance or pollutant or contaminant concerned." In the case at bar, the Statute of limitations would commence on or about the point Plaintiff was diagnosed with Mesothelioma in January, 2003 and was timely filed within the two year statute of limitations under Alabama law. *Exhibit A, Deposition of Richard Archer, December 13, 2005,p. 30, ll 3-5*

18. CERCLA has repeatedly been held by United States Circuit Courts of Appeal and United States District Courts to preempt State Statutes of Limitation. Further, analysis of the legislative intent of Congress by Circuit Courts of Appeal reflects Congressional desire to specifically preempt State Statutes of Limitations which would deny due process to individuals with latent diseases by barring their access to the Courts for injury which is often unrecognized or unrecognizable until long after their last exposure. Further, the United States District Courts of Alabama, Northern and Southern Districts, have also agreed that CERCLA preempts the Alabama Statute of Limitations. The Supreme Court of Alabama has not ruled on CERCLA preemption of the Statute of Limitations of Alabama, but rather has found exclusions to the application of CERCLA.

28. Accordingly, the Alabama Statute of Limitations are more restrictive than those set forth in CERCLA and the facts support preemption of Alabama's Statute of Limitations by CERCLA in this matter. Defendants have not alleged or asserted a date of last exposure suffered by Plaintiff, only that, they were absolved of liability by their own date of last ownership of the site. CERCLA preempts this argument, by imposing a "discovery rule" which states that the FRCD "the date the plaintiff knew (or reasonably should have known) that the personal injury or property damages referred to in subsection (a)(1) of this section were caused or contributed to by the hazardous substance or pollutant or contaminant concerned." As such, Defendants' argument fails as Plaintiff became aware of the injury complained of in this matter at a much later date.

B. Alabama's Statute of Limitations

29. In the alternative, should this Honorable Court find that CERCLA does not preempt the Alabama Statute of limitations or is not applicable, Plaintiffs would respectfully state that Plaintiff was exposed to asbestos and/or asbestos-containing material after 1979. Defendant relies primarily on *Henderson v. Meadwestvaco*, 23 So.3d 625 (Ala. 2009). Plaintiff contends this reliance on *Henderson* is misplaced as the facts in this matter are distinguishable, in that, Plaintiff herein suffered exposure to asbestos after 1979. The Plaintiff in the *Henderson* matter was exposed to asbestos at the CAPCO facility in 1971 and 1972. Mr. Henderson developed mesothelioma in 2004. After his passing, a wrongful death suit was filed against Meadwestvaco. The main analysis in the *Henderson* case is whether a personal injury suit could be filed if the Plaintiff had not passed away. The Alabama Supreme Court found that, in applying Alabama Law at the time Mr. Henderson was last exposed, Mr. Henderson's cause of action was barred by the Statute of Limitations existing in Alabama in 1972. However, unlike *Henderson*, the case at bar involves exposures to Plaintiff well after 1974.

30. Defendant claims that it sold the premises in question in 1974, and accordingly, no liability could exist for its actions after 1974. Defendant's argument is disingenuous. The CAPCO facility consumed an average of 500 tons of raw asbestos a month and, as a result, thousands of tons of raw asbestos fiber were brought into CAPCO during the period of Defendant's involvement. *Exhibit C, CAPCO memorandum re Toxic and Hazardous Substances Inventory dated July 1, 1971* Aside from the previously indicated Exhibits, Defendant assumed control of the safety and health measures at the facility in question. *Exhibit N, Deposition of S.D. Weaver, taken April 14, 1999 p.122, ll 15-23, p.124, ll 5-11 , Exhibit O, Defendant's Memorandum regarding OSHA Compliance and responses, June 22, 1972 ff;*

Exhibit P, Mead Environmental Expenditures, June 5, 1973 CAPCO had no industrial hygienist or permanent safety personnel at the Ragland facility. In fact, safety reporting was sent back to Defendant, safety measures were sent to Defendant for approval and expenditures were authorized through Defendant. See *Exhibit K* Responsibilities assumed by Defendant included matters which involved the safe handling of asbestos and methods of disposal of asbestos waste. Defendants' management exchanged considerable communication regarding asbestos and safety, including oversight of the CAPCO facility and providing Industrial hygiene/safety personnel. Further, decisions with regard to compliance with federal regulations set forth by OSHA and EPA was discussed directly with the President of Defendant. An open air landfill containing large amounts of asbestos fiber and waste was located directly adjacent to the employee parking lot. The open air landfills containing asbestos waste were an issue raised at the CAPCO site prior to the sale of it interests and shortly the sale, and for a long period of time thereafter, resulting in continuous exposure to all who worked at CAPCO, the nearby National Cement and the surrounding areas. Defendant itself was aware of the need for cleanup and, in fact, discussed the budgeting of a bulldozer and additional land to remedy the problem. Based on documents from the CAPCO facility, Defendant failed to remedy this issue, despite the health and safety risks to the persons working at CAPCO and the surrounding area. Further, the 1974 environmental study indicated that piles of asbestos fiber remained in the workplace and expressed the need for cleanup. As this study was made a mere two months after Defendant sold its interest, clearly no effort was made to remedy the safety hazards Defendant had created and allowed to persist while assuming the duties of safety at the CAPCO site. In failing to competently protect persons such as Plaintiff, and by allowing the accumulation of large amounts of asbestos fiber in the facility and around the site, including open air landfills, Defendants'

failures continued to cause injury after it sold its interest. Had Defendant used and enforced proper safety and health procedures, the continued hazardous presence of asbestos containing materials would not have continued to cause exposure to persons, such as plaintiff when he entered the dump site in 1982 or hunted in the area.

31. Under Defendant's reasoning, every asbestos manufacturer which ceased producing asbestos containing products prior to 1974 would escape liability for any injury occurring at a later date.

32. It is uncontested that Plaintiff worked around asbestos and asbestos-containing materials for years at the CAPCO and National Cement sites. Defendant was directly responsible for its failure to adequately maintain and enforce safety and health measures to protect Plaintiff, a duty it voluntarily assumed. Defendant's failure resulted in asbestos fibers remaining in the area, including the dump sites which were not addressed until, at earliest, 1983. Defendant has offered no evidence of any cleanup of asbestos containing materials at the time they ceased to have interest in the sites in question and, undoubtedly, Defendant would argue if same had been completed.

33. The National Cement site produced cement, however, the site is in such close proximity to the CAPCO facility that a conveyor belt was used to transport cement from National Cement to CAPCO. Plaintiff continued to work at the site for years after Defendant "washed its hands" of the National Cement site. Accordingly, Plaintiff would have continued to suffer exposure to asbestos from both facilities during the course of his employment. Further, Defendant has simply refused to produce discovery as to national Cement, hindering Plaintiffs' ability to adequately develop this exposure issue.

34. Defendant would have this Court find that, when the Defendant eliminated its interest in National Cement and CAPCO, it also eliminated its responsibility for any exposure or injury thereafter. Based on records, the CAPCO plant was constructed in 1963 through 1965, three years before Defendant purchased Woodward. *Exhibit N, Deposition of S.D. Weaver, taken April 14, 1999 p.31, ll 7-31* Defendant has provided no discovery responses in this matter nor does their argument support their contention that "...any exposure to asbestos that could possibly be attributed to Mead ended in 1974."

35. In addition, and with respect to at least CAPCO, tons of gaskets were also shipped to CAPCO. A gasket supplier identified in CAPCO records included the Murray Rubber Company, a division of the Mead Corporation. (*See, Exhibit Q, "Murray Rubber Company Division Foremen's Safety Rating," Mead/Henderson 1/71, 2/71, 6/71, 2/72, 9/72 records; Exhibit R , CAPCO "Accounts Payable Distribution Reports" 3/79, 3/78, 9/77, 7/77, 6/77, 6/74, 5/74; CAPCO "Cost Sheet" 12/73).*

36. Consequently, the Mead Defendants were not only involved in plant safety at CAPCO, but, through at least the Murray Rubber Company's gasket plant, they were selling CAPCO gaskets and possible other relevant products. For example, CAPCO "Account" ledgers reflect as follows:

- 2/6/79 Murray Rubber Company $13,370.31 (CAPCO ALV035276);
- 3/78 Murray Rubber Company $10,868.35 (CAPCO ALV034262);
- 9/77 Murray Rubber Company $9,422.87 (CAPCO ALV036457);
- Murray Rubber $82,598.84 (CAPCO ALV036462);
- 7/77 Murray Rubber Company $81,665.08 (CAPCO ALV036474);

- 9/77 Murray Rubber Company $11,904.85 (CAPCO ALV 036465);
- 6/74 Mead Corporation $29,967.37 (CAPCO ALV036860);
- 6/74 Murray Rubber a Mead Company $59,041.45 (CAPCO ALV036860); and,
- 5/74 Murray Rubber a Mead Company $93,858.04 (CAPCO ALV036859).

37. Further, CAPCO records from 1980 reflect "pipe gasket" balances of $77,257.03 (11/2/80), $99,568.90 (9/28/80), $116,189.31 (8/31/80), and $116,755.23 (7/80). (*See, Exhibit T, CAPCO "Statement of Stores," CAPCO ALV028297, 028298, 028299, 028093*). CAPCO "Cost Sheets" dating from, for example, December of 1973 place tonnage of "Gaskets & Lube" per month at approximately eight (8) tons. (See, *Exhibit S, CAPCO "Cost Sheet" CAPCO ALV034294*).

38. In a case involving a continuing tort, such as in an asbestos exposure case, the actions cannot accrue under the previous Alabama statute of limitations as long as the person is still being exposed to asbestos. The date of injury for statute of limitations purposes is the day on which the plaintiff was last exposed. Until that date, the plaintiff does not have an injury for which the statute of limitations would begin to run. In the case at bar, Plaintiff has testified he was exposed to asbestos at both CAPCO and National Cement, his last date of employment was in 2002, well after the Discovery Rule became law in Alabama. Without doubt, an issue of fact exists as to Defendants' assumption of duties regarding health and safety and whether Defendants' failure in its action (or inaction) caused continual presence of and exposure to asbestos to Plaintiff resulting in his injuries.

CONCLUSION

39. Plaintiffs respectfully request and pray that this Honorable Court deny the Summary Judgment Motions of Defendants. Defendant Mead has completely failed to cooperate with discovery and Plaintff responded subject to objection and its Motion to Compel in this matter. Due to the preemptive operation of CERCLA on State Statute of limitations, Plaintiff's cause was timely filed within the FRCD established by CERCLA as to both Defendants. Further, even should CERCLA not preempt the State Statute of Limitations, Plaintiffs suffered exposure to asbestos well after 1979 due to Defendants' actions or inactions, so Alabama's post-1979 discovery rule applies in this matter as to both Defendants. Under Alabama's State Statute of Limitations, Plaintiffs' cause was timely filed. Further, Plaintiffs' direct claims against Defendant Mead are based upon Defendant's independent assumption of duties and, contrary to Defendant's argument are not barred by Alabama Shareholder Immunity. Accordingly, the Motion for Summary Judgment of both Defendants should be denied.

Respectfully submitted this the 30th day of April, 2010.

/S/ Robert G. Taylor, III

ROBERT G. TAYLOR, III

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CERTIFICATE OF SERVICE

I, **Robert G. Taylor, III**, do hereby certify that a true and correct copy of the foregoing pleading was served upon Counsel for Defendants set forth below, via U.S. Mail and/or via electronic service.

This the 30th day of April, 2010.

/S/ Robert G. Taylor, III

ROBERT G. TAYLOR, III

EXHIBIT LIST

A. *Deposition of Richard Charles Archer, taken December 13, 2005*
B. *Deposition of Michael Ellenbecker, January 18, 2000*
   B1 – Curriculum vitae of Dr. Michael Ellenbecker
C. *CAPCO memorandum re Toxic and Hazardous Substances Inventory dated July 1, 1971.*
D. *Seaboard Railroad company invoice, 1966*
E. *2007 CERCLA Priority List of Hazardous Substances*
F. *Memorandum, March 10, 1971*
G. *Bond/Weaver correspondence 9/24/1970 and 1/25/1971.*
H. *Memorandum Re: Safety Performance Report, Mooney, August 30, 1970 and responses*
I. *August 18, 1971 Safety Inspection Report and response*
J. *Memorandum re: asbestos dust control, June 13, 1972*
K. *Letter Bond to Batts with reports, March 12, 1974*
L. *ASARCO Environmental Survey CAPCO Ragland, November 20-22, 1974*
M. *Alabama State Environmental documents, 1979 and 1983*
N. *Deposition of S.D. Weaver, taken April 14, 1999*
O. *Defendant's Memorandum regarding OSHA Compliance and responsess, June 22, 1972 ff*
P. Mead *environmental expenditures*, June 5, 1973
Q. *"Murray Rubber Company Division Foremen's Safety Rating," Mead/Henderson 1/71, 2/71, 6/71, 2/72, 9/72 records;*
R. *CAPCO "Accounts Payable Distribution Reports" 3/79, 3/78, 9/77, 7/77, 6/77, 6/74, 5/74; CAPCO "Cost Sheet" 12/73)*
S. CAPCO "Cost Sheet" CAPCO ALV034294)
T. *CAPCO "Statement of Stores," CAPCO ALV028297, 028298, 028299, 028093*).