

MEMORANDUM

TO: Eddie Roth,
cc: Carol Van Strum

FROM: Paul Merrell

RE: Gaffey v. Montague

DATE: October 4, 1994

Following this memo is a marked up copy of your last draft. Very minor corrections for the most part, but some of them are important. I'll discuss in a moment.

Regarding your note on copying charges for Monsanto's production of documents, I've left messages for Peter and Gerson and will get a note out to them early in the morning if I can't reach Peter right away. I don't think there is going to be any problem. In any event, I'm home all day Tuesday without a lot else to do so I'll get on it and let you know as fast as I can.

Regarding the marked up discovery requests, I believe most of it is self-explanatory, so I'll just cover what isn't and some of the critical distinctions. These copies don't have Carol's input, since lack of sleep finally caught up with her and she crashed and burned. I've indicated her name in bold face caps two places where the two of you need to talk.

Some of the requests reference earlier categories. I found numbering errors in most if not all of those, apparently resulting from deleting a category before the present number four. They're marked.

Still need to put in exhibit numbers wherever they're referenced. I'm not sure I got them all marked.

In category 9, pg. 3, the added language is intended to avoid a narrow reading that would allow nonproduction on the theory that Suskind never participated in the study and on the theory that no one ever contemplated he

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would participate in something specifically identified as the Zack/Gaffey study.

Category 11: The need for corrections is mostly obvious. The added comma on the first line of page 4 removes an ambiguity.

Category 14, pg. 5: Deletion of the "relating" is important. The case law says the courts won't enforce a discovery request that uses the word and you have to repromulgate. I'm concerned that we aren't getting these out after several drafts. Can you do an <F2> global search to make sure you locate them all?

Category 15, pg. 5: I don't know what was intended by "sample handling and destruction" because it apparently needs a word afterward. It's probably "instructions," but might be "records." Could you make sure you and CAROL talk about that. (I'll be giving her a copy of this.)

Category 17, pg. 6. This is apparently an exact duplicate of category 14.

Category 18, pg. 6: This is apparently a duplicate of category 16.

Category 21, pg. 6: Another "relate" that needs to be deleted. Also, was there some reason that Peter and E.R.F. are omitted from the scope of this category?

Category 1, pg. 7: Delete "including any." If it isn't deleted, we ain't "lite" anymore; we're asking for every communication any of the identified folks ever had on any subject since they were born.

Category 2, pg. 7: Insert "resources," where indicated. Important to change the "and" to "or"; otherwise we only get documents that discuss all of those terms rather than any of the terms.

Category 3, pg. 7: Insert the phrase "any portion of" where indicated. Otherwise we're limiting ourselves to the Zack/Suskind study, the Zack/Gaffey study, and studies of the entire population of workers at the Nitro plant.

Category 5, pg. 8: Delete the word "published." There was no "published" report presented at the conference. The report was published after the conference. Therefore, as presently worded the category does not request any documents that ever existed.

Category 6, pg. 8: The deletion is intended to make it clear that we want relevant information for studies other than studies of the plant's entire population. Also, delete "relating to" and replace it with "within the field of".

Category 7, pg. 8: Replace "dioxin health studies" with "any of the Nitro Worker studies". Removes the excuse that nobody was doing dioxin experiments on humans; makes it clear we're after what we're going to be able to prove exists.

Category 8, pg. 8: I don't understand what is being requested by this category. Is it investigations of Gaffey, or his work? Be sure to delete the "relating." Also, "in connection with" is vague and ambiguous. I recall caselaw chucking requests that used "in conjunction with," which seems too close for comfort. You and CAROL should talk about this one.

I don't know either - CJ

Category 9, pg. 9: We should exhibit the document or describe it a little better.

Category 11, pg. 9: Insert "records of" before communications. This is more inclusive, and nets you telephone notes, stenographic notes, memos to the file referring to communications, minutes of meetings, etc., that are otherwise excluded. On the other hand, you could change the definition of "commu-

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nications" on page 13 to include any records discussing or referring in any way thereto.

Category 12, pg. 9: Delete "documents constituting", which is unnecessary.

Categories 15 and 18, pg. 10: In the references to the Adkins case, delete "consolidated cases of" and replace with "cases consolidated with and including". I believe but am not sure that the caption name on the lead case was "Boggess" but I really don't know what the court did in its consolidation order. The suggested change is to remove any ambiguity nonetheless.

Category 16, pg. 10: I've changed "cash" to "money" so it would include payments by check, etc.

Category 17, pg. 10: Another "relating" to get rid of. Plus, the "and" between the names of the law firms needs to be in the disjunctive "or." Otherwise, we only get payments made out to both firms, which probably don't exist.

Category 19: The request for notary certifications needs to be limited to the extent they are available. Otherwise, the grammatical construction relieves them from producing any transcripts that don't have a notary certification.

Second page of definitions, category E: Change "responses" to "records." I think that's one of my old mistakes coming back to haunt me.

Last page of definitions, category K: Add "other epidemiologic" and "experience" where indicated to limit definition to epidemiologic studies of the type we're dealing with, rather than also including studies of the impact of worker deaths on retirement benefits, etc. VERY IMPORTANT: insert a comma at the end and add the phrase "or any other groups that include any study

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subject of said groups." If you don't add some such modifier, we're asking only for studies that precisely replicate the selection of individuals in the exhibited studies and the two published studies. It's extremely unlikely there are any.

Finally, one last new definition to add, for Monsanto itself. The reason is that Monsanto has been breaking itself up recently into a family of related companies and we don't know where records have wound up in the process. My suggested language: "The phrase 'Monsanto Company' shall encompass not only the named company but also any subsidiary company over which Monsanto Company exercises control."

-- Fini --

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A. Monsanto Dragnet

1. All reports of conclusions and analyses of the Zack/Gaffey study, including, without limitation, prior drafts of the study report finally published.

2. All proposals, contracts, study plans, rationales, protocols, progress reports, for the Zack/Suskind study or any antecedent study however denominated considered in its completion, whether completed or not, including any and all amendments, corrections, or other alterations to any of the foregoing, as well as all documents which refer to any of the foregoing.

3. All proposals, contracts, study plans, rationales, protocols, progress reports, for the Zack/Gaffey study or any antecedent study, however denominated, relied on or considered in the completion of the Zack/Gaffey study (whether such antecedent study was completed or not), including any and all amendments, corrections, or other alterations to any of the foregoing, as well as all documents which refer to any of the foregoing.

4. Except to the extent already produced in response to the foregoing requests numbered 1 through 3, all documents constituting or referring in any way to any and all epidemiologic studies, investigations, tests, etc., however denominated and whether actually completed, partially completed, proposed, or hypothesized, that did or would examine in whole or in part the mortality experience at any time of the population of workers at Monsanto Company's Nitro, West Virginia plant exposed or potentially exposed to dioxin or other substances found in association therewith, together with any control groups ("worker mortality studies"), including by way of example but without limitation (i) The Zack/Gaffey study, (ii) The Zack/Suskind study (iii) The study described in the published report of

the Zack/Suskind Study as "an analysis of the chloracne cases and exposures not associated with this accident but rather with the normal TCP/2,4,5-T production processes"; (iv) The study performed by the National Institute for Occupational Safety & Health combining a Nitro worker population with populations from other plants and companies (including the "Dioxin Registry Report" for the Nitro plant); (v) the workers' union study conducted by or through Mt. Sinai Hospital.

5. Except to the extent already produced ⁱⁿ response to the foregoing requests numbered 1 through 5 above, for each such study responsive to the foregoing requests, all records constituting or referring to: (a) any and all proposals, study plans, rationales, contracts, classification criteria, protocols, drafts and progress reports ("study documents"), including for each such study document actual or suggested amendments or corrections thereto or critiques thereof; (b) any and all records generated as part of the effort to hypothesize, propose, justify, design, or perform each study; and (c) any and all records generated by, between, among, directed to, or received by each study participant or subject that discuss or refer to any such study in any manner, including all records of Monsanto Company's "Nitro Health Study Task Force."

6. All documents referring to the table and handwritten notes titled, "Table 9 Observed and Expected Number of Deaths during 1955-1977 by Cause and 2,4,5-T Exposure Category Showing Proportional Mortality Ratios (PMRs) (Not Including Deaths from TCP Incident)", a copy of which is appended as EXHIBIT "C" hereto.

7. All communications discussing, describing or referring to whether or not a follow up to the Zack/Suskind study should consist of an "analysis of the chloracne cases

with the normal TCP/2,4,5-T production processes" as proposed in the Zack/Suskind study.

8. All communications discussing, describing or referring to the participation of William R. Gaffey in any of the Nitro Worker studies, including without limitation the participation of William R. Gaffey in any of the Nitro Worker studies during the period he was employed by Stanford Research Institute or other academic institution.

9. All ~~communications~~ *actual or proposed* discussing, describing, or referring to the participation of Raymond Suskind in the Zack/Gaffey study, including, without limitation, documents which refer to any decision to omit Raymond Suskind as a co-author of what became the Zack/Gaffey study. *what became known as*

10. All communications referring to any follow-up study (actual or contemplated) to the Zack/Suskind study concerning the mortality experience at any time of the population of workers at Monsanto Company's Nitro, West Virginia plant exposed or potentially exposed to dioxin or other substances found in association therewith, together with any control groups, including any communications to which Raymond Suskind, George Roush, Marcie Straus, Dan Bishop, Ferdinand C. Meyer, Monte C. Therodahl, Clayton F. Callis or Richard Mahoney, members of the "Nitro Health Study Task Force," or representatives of the National Institute for Occupational Safety and Health, the Environmental Protection Agency, the United States Department of Justice, or any other agency of government (Federal, state or local) were participants or recipients.

11. All minutes of meetings of the Monsanto Company Board of Directors, Corporate Management Committee, Corporate Administrative Committee, any committee, task force, or other group created by or reporting to the Monsanto Company Board of Directors or any committee or

in any way

subdivision thereof or any management-level group which discuss or refer to (a) any mortality study responsive to requests 1 through 5 above, (b) 2,4,5,-T, (c) trichlorophenol, (d) dioxin, (e) Agent Orange, (f) defendants in this action, (g) Rachel's Hazardous Waste News, including without limitation #171, (g) William R. Gaffey, or (h) Judith Zack, together with any reports or documents reviewed or considered by any of the foregoing committees or groups or any of their members in preparation for, during or as a result of such topics being discussed, presented to or considered by any such committee or group.

12. All documents constituting or referring to communications between Dr. Raymond Suskind (or any person acting on behalf of Monsanto) and any Person concerning the position of the American Medical Association (or of any body affiliated therewith) on the hazards of dioxin.

13. All records that refer to studies responsive to requests numbered 1 through 5 above, including records of communications with the press or public officials or employees of public agencies, peer reviews, records of litigation, post-study records, and any and all records reviewing, criticizing, or otherwise discussing or referring to the possibility of fraud, scientific irregularity or invalidity, inaccuracy, or incompetence in the conduct of each such study.

14. Except to the extent produced in response to any other request made herein, all documents constituting, relating or referring to reviews, critiques or investigations of the Nitro Workers studies performed by Persons other than Monsanto employees, including without limitation, peer reviews and any investigations by the U.S. Environmental Protection Agency or other governmental agencies into matters relating to the Nitro worker studies, whether civil or criminal, actual or contemplated.

f 15. Except to the extent produced in response to any other request made herein, all documents constituting, discussing, or referring in any way to sampling and analyses of acenegens, dioxin, or other materials associated therewith at or near the Nitro plant, including but not limited to such efforts by Monsanto, the U.S. E.P.A., or any other entity, including (a) all sample plans, maps and other sampling site identification records, sample decoding information, protocols, sample handling and destruction, laboratory communications, and analytical results; and (b) all affidavits or transcripts of testimony at trial or deposition, including all exhibits discussed or identified thereby, of all people who have testified in any case or proceeding about contamination of the Nitro plant premises with acenegens, dioxin, or other materials associated therewith. ? records

16. Except to the extent produced in response to any other request made herein, all documents constituting, relating or referring to internal (Monsanto or Kettering) reviews, critiques or investigations of the Nitro worker studies, including, without limitation, investigations performed by Monsanto or any Person on behalf of Monsanto into whether any or all of the Nitro worker studies were the product of fraud, dishonesty, incompetence or scientifically irregularity.

Same as category 14?

17. Except to the extent produced in response to any other request made herein, all documents constituting, or referring to reviews, critiques or investigations of the Nitro Workers studies performed by Persons other than Monsanto employees, including without limitation, peer reviews and any investigations by the U.S. Environmental Protection Agency or other governmental agencies into matters relating to the Nitro worker studies, whether civil or criminal, actual or contemplated.

18. Except to the extent produced in response to any other request made herein, all documents constituting, relating or referring to internal (Monsanto or Kettering) reviews, critiques or investigations of the Nitro worker studies, including, without limitation, investigations performed by Monsanto or any Person on behalf of Monsanto into whether any or all of the Nitro worker studies were the product of fraud, dishonesty, incompetence or scientifically irregularity.

Same
as
16

19. All documents discussing or referring in any way to any demand for retraction from Peter Montague of statements claimed to be defamatory.

20. All documents constituting or referring to any demand of retraction (actual or contemplated) of allegations of fraud or scientific inadequacy attributed to the Nitro worker studies or their authors, together with any such retraction actually made by any Person.

21. All documents which relate or refer to the taking of any legal or public-relations action, actual or contemplated, against any person, other than defendants Peter Montague and Environmental Research Foundation, who published criticisms of the Nitro worker studies.

Why omit
Peter and
ERF?

B. Monsanto Lite

Other wise, asking
we're asking
for every document
any of these people
ever sent or
received on
any subject

1. All documents constituting (a) minutes of meetings, (b) reports by or to or (c) communications from, to or among members or staff of the committee sometimes referred to as the "Nitro Health Study Task Force," including any which discuss or refer to any activity contemplated or undertaken pursuant to the Task Force's responsibility.

resources

2. All documents discussing or referring to the creation, composition, organization, mission, and purpose at any time of the committee sometimes referred to as the "Nitro Health Study Task Force."

any portion of

3. All documents constituting or referring to press releases, "backgrounders," position papers, or public relations documents disseminated by any Person, including without limitation Monsanto Company or any chemical or paper industry trade or lobbying organization, to any Person, including without limitation any news organization, labor organization, medical association, governmental agency or governmental representative, or private public health agency, which discuss or refer to the Zack/Suskind or Zack/Gaffey studies or to the mortality experience at any time of the population of workers at Monsanto Company's Nitro, West Virginia plant exposed or potentially exposed to dioxin or other substances found in association therewith.

4. All documents constituting or referring to news or other media reports or accounts (including print and broadcast news media and scientific or public-health media) of the Zack/Gaffey study.

delete wasnt published
at that time

5. All documents constituting, discussing or referring to the presentation of the published report of the Zack/Gaffey study at the 1981 International Dioxin Symposium, including documents actually presented at that conference.

6. All documents constituting, discussing or referring to public presentations, speeches or statements, or statements to the press by William R. Gaffey concerning (a) the mortality experience at any time of ~~the population~~ within the field of ~~of~~ workers at Monsanto Company's Nitro, West Virginia plant exposed or potentially exposed to dioxin or other substances found in association therewith, including, without limitation, the presentation made by William R. Gaffey before the American Medical Association, Council on Scientific Affairs' Advisory Panel on Toxic Substances, 17 November 1983 and (b) other matters relating to occupational or public health.

7. All documents discussing or referring to allegations of fraud, dishonesty, incompetence, or scientific inadequacy or irregularity in any of the Nitro worker studies or their authors, including, without limitation, all communications relating or referring to Dr. Cate Jenkins' allegations or comments regarding ~~down~~ any of the Nitro
worker studies ~~health studies~~ performed by or for Monsanto Company.

8. All documents constituting, relating or referring to critiques, criticisms, reviews, or investigations of William R. Gaffey in connection with any of the Nitro worker studies.

I don't understand this
investigations of Gaffey's
or his work?

Exhibit or
describe more
fully

9. All documents constituting, discussing or referring to Marcie Strauss's "Verbatim & Critique," including, without limitation, documents and communications used in its preparation and dissemination.

10. All attachments and materials that accompanied Marcie Strauss June 4, 1987 letter to Dr. Marilyn Fingerhut, a copy of which is appended as EXHIBIT "D" hereto.

records of

11. All documents, including communications, which refer to this lawsuit, including, without limitation, any communications between William R. Gaffey and George Roush or any other Person.

unnecessary

12. All documents constituting scholarly papers (reports, summaries, surveys, etc.) authored or co-authored by William R. Gaffey, whether ultimately published or unpublished.

13. All documents (including audio or video recordings, press reports, personal communications, etc.) discussing or referring in any way to William R. Gaffey's character or integrity.

14. William R. Gaffey's Monsanto Company personnel file and/or any documents known to have been placed in it at any time that are no longer in that file, including, without limitation, documents which discuss or refer to the reasons or purposes for which he was originally hired and subsequently employed by Monsanto Company and his job responsibilities at any time.

*Cases consolidated with
and including*

15. All documents relating or referring to the designation of William R. Gaffey as an expert witness in any litigation relating to dioxin, including in connection with the consolidated cases of Adkins et. al v. Monsanto Company.

16. All documents which discuss, refer to or record the payments of cash to William R. Gaffey since his retirement from Monsanto Company. *money*

17. All documents constituting, relating or referring to payments, directly or indirectly, by Monsanto Company, to the law firms of Coburn & Croft and Lewis, Rice & Fingersh or otherwise for the benefit of plaintiff William R. Gaffey in connection with this lawsuit, including without limitation agreements under which Monsanto, directly or indirectly, has paid legal fees to either Coburn & Croft or Lewis, Rice & Fingersh, reimbursed William R. Gaffey for such legal fees, or otherwise compensated or made payment *to* Gaffey or his attorneys for matters relating to this lawsuit, from the inception of the lawsuit to the present. *on*

18. All documents marked for identification at the depositions in the consolidated cases of Adkins et. al v. Monsanto Company of Ferdinand C. Meyer, Monte C. Throdahl, Clayton F. Callis and William R. Gaffey, as indicated in part by the pages appended hereto and identified, collectively, as Exhibit " ".

5
19. Except to the extent already produced pursuant to the foregoing request, all affidavits or transcripts (including notary certification page) of testimony (whether given at trial or deposition) by Judith Zack, Mary Gaffey, William Gaffey, Jan Yung, Raymond Suskind, George Roush, Clayton Callis, Monte Throdahl, Dan Bishop, and Ferdinand C. Meyer together with copies of any exhibits identified or discussed by or presented to such witnesses during testimony or in such affidavit.

20. All communications between William R. Gaffey and any Person discussing or referring to any of the Nitro studies.

21. All communications between Judith Zack and any Person relating or referring to any of the Nitro studies.

if available

if not added, working believes then of
producing any transcripts that ~~the~~
do not include the certification page.

II.

DEFINITIONS AND INSTRUCTIONS.

Please interpret each of the preceding discovery requests in accordance with the following special definitions and instructions, as supplemented by the Federal Rules of Civil Procedure, the Federal Rules of Evidence, and jurisprudence thereunder;

A. "Produce" means to produce any and all originals and any and all non-identical copies of the same document described in its or their most complete form, including, without limitation, any and all surviving portions thereof, and including any and all annexes, appendices, tabs, exhibits, indexes, cover sheets, transmittal letters, or other documents found attached to or in the same file with the same document or documents, including, without limitation, whenever available, the file identification and identification of the system of records in which each document and any and all copies are found. Wherever you are asked to produce affidavits or trial or deposition transcripts, also produce any and all exhibits thereto.

B. The words "document" or "record" shall have the same interpretation as "documents or other things" within the meaning of Fed. R. Civ. P. 34, and shall also include all drafts, alterations, modifications, changes or amendments thereof.

C. The term "person" or "persons" includes not only natural persons, but also all forms or organizations including without limitation unincorporated associations, partnerships, corporations, joint ventures, proprietorships, firms, syndicates, and all subsidiaries, affiliates, divisions, departments, branches or other units thereof.

D. The term "communication" refers to any written or oral transmission of information, belief or opinion, including any correspondence, letters, telegraphs, telexes, notes, memoranda, reports, circulars, press releases, discussions or conversations.

Records
E. The connectives "and" and "or" shall be construed either disjunctively or conjunctively or both as necessary to bring within the scope of the discovery request all responses that might otherwise be construed to be outside of its scope.

F. Where words or terms are not defined, they shall be given their common and accustomed meaning within the context stated.

G. The words "dioxin or "dioxins" mean any or all of the congeners, homologues, or isomers of the mono-through poly- chlorinated classes of dibenzo-p-dioxins or dibenzofurans.

H. For purposes of this discovery request, the words "dioxin" or "dioxins" shall also include 2,4,5-T and trichlorothenol or any waste byproducts thereof.

I. The phrase "Zack/Gaffey study" shall encompass the final published report of the purported study exhibited hereto as EXHIBIT "C", as well as other study designs or results contemplated, performed, or generated as a follow-up mortality study to the Zack/Suskind study.

that
J. The phrase "Zack/Suskind study" shall encompass the final published report of the purported study exhibited hereto as EXHIBIT " ", as well as other study designs or results contemplated, performed, or generated in connection with study as finally published, irrespective of whether such designs or results were incorporated in the study as finally published. *other epidemiologic*

K. The phrase "Nitro worker studies" shall encompass not only the Zack/Gaffey study, and the Zack/Suskind study but also any or all studies, investigations, examinations, or other means of acquiring information at any time regarding the mortality of the same groups of workers discussed in EXHIBITS " " through " " inclusive, or any other groups including any subject of said groups. *experience*

Very important. Otherwise, definition is limited to studies that precisely replicate the selection of individual workers in the exhibited studies & Z-G & Z-S.

Add definition of "Monsanto Company" to include any ~~the~~ subsidiary company over which it exercises control. Problem is we have asked for specific records of "Monsanto Company," when it is actually a group of companies organized thereunder. We don't know which subsidiary actually has each record we seek. ****END****