

MEMORANDUM

TO: Eddie Roth VIA TELEFAX
FROM: Paul Merrell
RE: Gaffey v. Montague
PRIVILEGED AND CONFIDENTIAL ATTORNEY WORK PRODUCT
DATE: November 21, 1993

As you've requested, here are the deletions and changes that could be made in the Monsanto and Collins subpoenas to pare them clear to the bone. The deletions for the most part do not actually reduce the amount of documents that have to be produced. Instead, we have focused on deleting requests that are in reality redundant of broader categories. Our motion papers should bluntly state that deletion of the more specific categories is not intended as a waiver of documents responsive to the broader categories remaining in the discovery requests.

I am still struggling with the advisability of deleting the more specific requests, based on my experience with Monsanto reading discovery requests extremely narrowly, particularly with Gerson presently unavailable for his input.¹ At the same time, I recognize that we're dealing with a difficult situation needing immediate action that was unforeseen when Gerson left for Hanoi.

The actual big reductions I've identified come from: [i] changes in the definitions and deletions of some specific categories that require the deponents to produce records relating to the morbidity (as opposed to mortality) studies, which means that massive records of health examinations of living workers and the related statistical studies do not have to be produced; [ii]

¹ It's possible that I may hear from Gerson sometime Sunday. I sent him a fax shortly before his departure from Hanoi a few days ago, updating him on the case and telling him I'd like to talk to him before we have to file the motion papers on Monday.

limitation of the scope of the request for results of dioxin sampling, which relieves Monsanto of having to produce mountains of raw mass spectrometer/gas chromatograph analytical data; and [iii] the request to produce the entire court records and all documents claimed privileged or otherwise withheld from discovery in both the Kemner and Nitro cases (rewrite of Monsanto category 7).

Since the same definitions and request categories that are in the Collins subpoena went to all deponents other than Monsanto, we probably need to get out amended subpoenas that tell those deponents they need not bring such materials to their depositions. (However, we should probably go over each subpoena individually, since we've cut items from the Monsanto and Collins subpoena that we may still want to get from other deponents.)

The third and biggest reduction would come if we are able to reach some accommodation that allows us to work with Rex Carr's copies of the Kemner transcripts and exhibits. As we've discussed, the barrier there is the authentication problem and Carr's probable unwillingness to allow Gaffey's attorneys to paw through his files.

One alternative that Carol thought of would dramatically reduce the burden for all concerned, although I doubt that Monsanto would agree to it unless the judge were willing to lean on them. That idea is to have Monsanto's legal department or Coburn & Croft produce their computerized copies of the Kemner depositions and trial transcripts (perhaps for the Nitro litigation as well) on disk, with Gaffey stipulating that both parties could work from the electronic copies or printouts of portions thereof.

This would actually be a tremendous advantage to us, since our text retrieval software makes easy work out of reviewing transcripts for relevant information and we have more than

sufficient hard disk space to handle the Kemner transcripts. However, Monsanto is well aware of the advantages of text information in electronic format and probably isn't eager to have the incredibly damning and wide-ranging information of the Kemner transcript provided in electronic format to the plaintiffs' toxic tort bar. However, copying costs would be negligible,² and it's conceivable to me that we might maneuver the Judge into ordering Monsanto to produce it.

In any event, on to the changes in the subpoenas:

Definition 10 may be deleted from the Monsanto subpoena duces tecum. The corresponding definition in the Collins subpoena is numbered 11 and it may be deleted.

Definition 11 in the Monsanto subpoena and definition 12 in the Collins subpoena are the same. Both should be rewritten as follows to make it clear that they now apply only to mortality as opposed to morbidity studies:

The phrase "Nitro worker studies" shall encompass not only the Zack/Gaffey study and the Zack/Suskind study, but also any or all epidemiologic studies or investigations, or other means of acquiring information at any time regarding the mortality experience of the same groups of workers discussed in EXHIBITS B and C hereto or any member or members of those groups or regarding possible association of mortality among those workers with chemicals in their work place.

² For example, if the transcript were produced in the commonly available format for a Colorado Jumbo Trakker tape backup system (which we have) and could take to Monsanto to do the job, the entire transcript would probably fit on one \$8.50 tape and take less than 3 hours to copy.

Request categories 27 in the Monsanto subpoena and 28 in the Collins subpoena are the same; both should be rewritten as follows to reduce the number of responsive records:

Results of all Monsanto sampling and analyses at the Nitro plant for dioxin, together with sufficient information to determine the location where each sample was taken and to correlate samples with results, as well as all related sampling plans, protocols therefor, and documents discussing the import or implications of analytical results. (Chain of custody, analytical methodology, and raw analytical data need not be produced, except to the extent that analytical results do not exist except in raw form.)

Category 85 in the Collins subpoena should be rewritten as follows to remove an ambiguity:

The most current version of your resume or curriculum vitae.

On both subpoenas, we should indicate that the deponents need not produce computer tapes of data provided to NIOSH. We also would like them to check with us before producing any other computer data to determine if it is needed.

The following document request categories may be deleted from the Monsanto subpoena duces tecum:

1, 5, 9, 12, 13, 15, 16, 18, 19, 20, 21, 22, 23, 24, 25, 29, 35, 36, 38, 40, 41, 42, 43, 44, 46, 48, 49, 50, 52, 53, 54, 57, 58, 60, 64, 65, 66, 70, 71, 72, 73, 74, 75, 76, 77, and 78. (Total, 46 deleted categories.) On the Monsanto subpoena, also delete the first and fourth clauses of document category 7 ("the complaint and all filings produced or prepared by Monsanto;" all documents identified by Monsanto as responsive to any discovery request").

The following document request categories may be deleted from the James F. Collins subpoena duces tecum:

2, 5, 6, 7, 8, 9, 11, 12, 13, 14, 15, 16, 17, 19, 20, 21, 22, 23, 24, 25, 26, 30, 31, 36, 37, 39, 40, 41, 42, 43, 44, 45, 46, 47, 49, 50, 51, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 65, 66, 67, 71, 72, 73, 74, 75, 76, 77, 78, 79, 82, 83, 84, 89, 90. (Total, 64 deletions.)

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PAUL MERRELL
Lawyer
7493 East Five Rivers Road
Tidewater, Oregon 97390
Telephone: (503) 528-7151 Telefax: (503) 528-7105

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