

Carbide documents. These documents were not attached to any disclosure certificate or any motion. Whether plaintiffs intended to use these documents for some actual purpose in this litigation is unknown. The privileged Union Carbide documents filed with the Court on June 23, 2003 include most of the documents handed to Ms. Birk on June 13, 2003 plus some additional privileged documents.

3. The motive of plaintiffs' counsel in filing these privileged documents with the Court is highly suspect since there is no current need for them in Colorado. If the intent was to show the Court why the West Virginia court did not deem the documents privileged, then the documents could have been filed under seal for an *in camera* review. Instead, plaintiffs simply attached the documents to a copy of the West Virginia court's order. The third prong of the test for waiver by inadvertent disclosure under *Floyd* is whether "meaningful confidentiality" may be restored. The Court should reject plaintiffs' blatant attempt to manipulate the outcome of this test through unnecessary, contrived and arguably unethical dissemination of privileged documents for no known purpose other than to destroy the privilege.¹ See also Union Carbide's Response to Affidavits Filed by Plaintiffs on 6/2/03 Concerning Plaintiffs' "Motion for Summary Judgment" Regarding Privileged Documents at 3, ¶ 7 (outlining plaintiffs' counsel's failure and refusal to produce Union Carbide-related documents when requested by Union Carbide's counsel beginning in October 2001; plaintiffs' counsel's failure to notify Union Carbide that they were in possession of facially privileged documents in violation of Colorado's ethical rules; and plaintiffs' counsel's exploitation of Dr. Egilman and his website to disseminate privileged documents for the purpose of destroying privilege).

4. The Kanawha County, West Virginia court's order is not determinative nor particularly persuasive with respect to Union Carbide's assertion of privilege in Colorado. West Virginia statutes, West Virginia procedural rules and West Virginia case law are not identical to Colorado law. In addition, Union Carbide is appealing the West Virginia court's ruling with respect to the privileged documents.

5. Union Carbide's counsel has never misrepresented the outcome of the West Virginia proceedings or any other facts to this Court. At the June 13, 2003 hearing in this Court, Union Carbide's counsel frankly stated to this Court that the West Virginia and Texas courts' rulings were unfavorable to Union Carbide, while the California court ruled in Union Carbide's favor, upholding the privileges and ordering the return of the privileged documents. In its briefs, Union Carbide described the letters written to plaintiffs' counsel (including Goldberg Persky) and the motion for protective order filed in the West Virginia litigation to rebut plaintiffs' unsupported assertions that Union Carbide had "never told" Goldberg Persky that privileged documents were inadvertently produced.

¹ Once again, this flies in the face of plaintiffs' counsel's ethical duties with respect to his possession of privileged documents. Colorado Bar Association Ethics Committee Formal Opinion 108, adopted May 20, 2000, 29 Colo. Law. 55 (Sept. 2000).

For the reasons stated above, in Union Carbide's Motion to Strike, in Union Carbide's Response in Opposition to Plaintiffs' "Motion for Summary Judgment," in its Response to Affidavits Filed by Plaintiffs on 6/2/03 and in its Motion for Protective Order, Union Carbide respectfully requests that the Court enter an order striking or denying Plaintiffs' Motion for Summary Judgment Re: Waiver of Privilege by Union Carbide in its entirety.

Union Carbide Corporation also requests that the Court enter a protective order requiring Plaintiffs to return to Union Carbide the six privileged documents described in Union Carbide's original Motion for Protective Order, and all copies of all documents attached to "Plaintiffs' Filing of the Previously Provided Kanawha County, West Virginia Order of 10/2/02 with Documentation in Support of Their Motion for Summary Judgment Re: Union Carbide Corporation's Privilege Claims," and prohibiting any further use of any of these documents in this litigation; and such further relief as the Court deems appropriate.

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By: 

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 8th day of July 2003, a true and correct copy of the above and foregoing **UNION CARBIDE'S RESPONSE IN OPPOSITION TO: 1. PLAINTIFFS' FILING OF THE PREVIOUSLY PROVIDED KANAWHA COUNTY, WEST VIRGINIA ORDER OF 10/2/02 WITH DOCUMENTATION IN SUPPORT OF THEIR MOTION; AND 2. PLAINTIFFS' SUPPLEMENTAL FILING RE: WAIVER OF PRIVILEGE BY UNION CARBIDE AS TO DISCLOSED DOCUMENTS** was served via JusticeLink or by U.S. mail, postage prepaid, as indicated to:

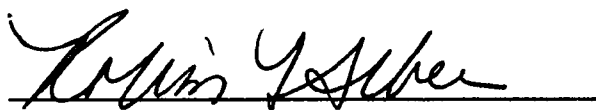
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Sent: Tuesday, July 08, 2003 12:40 PM
Subject: Case: 1989CV2000; Filing: 2120996 - Notification of Service

John Conard Metcalf requested that you, Nancy Dene Adler, receive a copy of this notification for Filing ID 2120996. The details for this filing are listed below.

To: John Conard Metcalf
From: LexisNexis File & Serve
Subject: Service of Documents in IN RE ASBESTOS vs. AP GREEN INDUSTRIES INC et al

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Court: CO Boulder County District Court 20th JD

Case Name: IN RE ASBESTOS vs. AP GREEN

INDUSTRIES INC et al

Case Number: 1989CV2000

Filing ID: 2120996

Document Title(s):

Union Carbide Response in Opposition to 1 Plaintiffs Filing of the Previously Provided Kanawha County West Virginia Order of Oct 2 2002 with Documentation in Support of Their Motion and 2 Plaintiffs Supplemental Filing re Waiver of Privilege by Union Carbide as to Disclosed Documents

Authorized Date/Time: Jul 8 2003 2:39PM ET

Authorizing Attorney: Mary Price Birk

Authorizing Attorney Firm: Baker & Hostetler LLP-Denver

Served Parties:

IN RE ASBESTOS

Filing Party: UNION CARBIDE

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