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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

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In Re :
"AGENT ORANGE" :
Product Liability Litigation :
-----x

IN CLERK'S OFFICE
U.S. DISTRICT COURT E.D.N.Y.
MDL No. 383 1982 ★
(ALL CASES)

VERIFIED STATEMENT-----
P.M.-----

Defendant Monsanto Company ("Monsanto"), by its undersigned attorneys, submits this Verified Statement pursuant to Pretrial Order No. 33, Part IX, Paragraph 3, and in accordance with Plaintiffs' Statement of Understanding and Definition of "Agent Orange," dated March 12, 1982 (hereinafter "Plaintiffs' Statement").

Monsanto supplied to the United States Government under contract some of each of the following "phenoxy compounds," as that term is defined in Plaintiffs' Statement:

(1) a herbicide composed of approximately 50 percent by volume of the n-butyl ester of 2,4,5-trichlorophenoxyacetic acid ("2,4,5-T") and 50 percent by volume of the n-butyl ester of 2,4-dichlorophenoxyacetic acid ("2,4-D"), sometimes referred to as "Herbicide Orange" or "Agent Orange";

(2) a herbicide composed of approximately 30 percent by volume of the n-butyl ester of 2,4,5-T, 50 percent by volume of the n-butyl ester of 2,4-D and 20 percent by volume of the iso-butyl ester of

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2,4,5-T, sometimes referred to as "Herbicide Purple" or "Agent Purple"; and

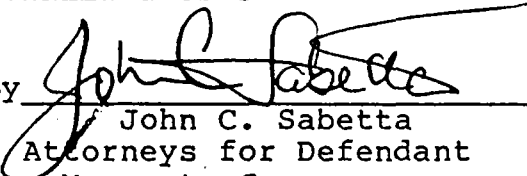
(3) a herbicide composed of approximately 60 percent by volume of the n-butyl ester of 2,4,5-T and 40 percent by volume of the iso-butyl ester of 2,4,5-T, sometimes referred to as "Herbicide Pink" or "Agent Pink."

Monsanto lacks information sufficient to enable it to state what amount, if any, of each of the above-described "phenoxy compounds" so supplied by it to the United States Government was used by the Government in Southeast Asia during the period 1961 through 1974.

On information and belief, and except as stated above, Monsanto supplied no other "phenoxy compounds" for use by the United States Government in Southeast Asia during the period 1961 through 1974. However, Monsanto reserves the right to amend or supplement this Verified Statement if appropriate in the light of facts or information hereafter discovered by Monsanto.

TOWNLEY & UPDIKE

By


John C. Sabetta
Attorneys for Defendant
Monsanto Company
405 Lexington Avenue
New York, New York 10174
(212) 682-4567

Dated: New York, New York
April 9, 1982

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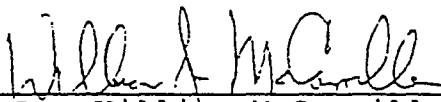
VERIFICATION

STATE OF MISSOURI)

SS:

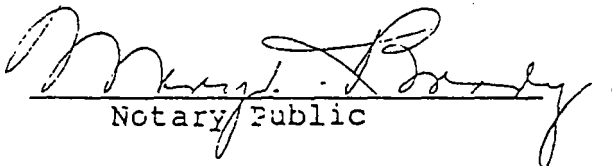
COUNTY OF ST. LOUIS)

Dr. William McCarville, being duly sworn, deposes and says that he is Director of Environmental Affairs of defendant Monsanto Company, a corporation; that he has read the foregoing Verified Statement and is familiar with the contents thereof; and that based upon information and belief and to the best of deponent's knowledge the contents of the Verified Statement are true.



Dr. William McCarville

Sworn to before me this
6th day of April, 1982.



Notary Public

MARY K. EADY
NOTARY PUBLIC STATE OF MISSOURI
ST. LOUIS CO.
MY COMMISSION EXPIRES MAY 21 1984

AFFIDAVIT OF SERVICE BY MAIL

STATE OF NEW YORK)
) ss.:
COUNTY OF NEW YORK)

ISABELLE GANS, being duly sworn, deposes and says:
deponent is not a party to the action, is over 18 years of
age and resides at 2134-72nd Street, Brooklyn, New York. On
the 9th day of April, 1982, deponent served the within
Verified Statement of Monsanto Company
upon the following attorney(s) in this action:

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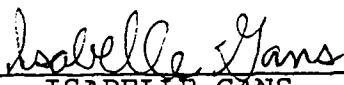
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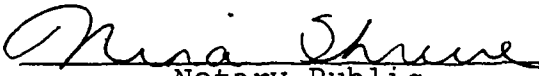
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at the above address(es) designated by said attorney(s) for
that purpose by depositing a true copy of same enclosed in a
postpaid properly addressed wrapper in an official depository
under the exclusive care and custody of the United States
Postal Service within the State of New York.


ISABELLE GANS

Sworn to before me this
9th day of April, 1982.


Notary Public
Notary Public, State of New York
No. 4709088
Qualified in New York County
Term Expires March 30, 1983

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U.S. DISTRICT COURT E.D.N.Y.
IN CLERK'S OFFICE
★ APR 1982 ★

TIME A.M. _____
P.M. _____

★ APR 5, 1982 ★
TIME A.M. _____
P.M. _____

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

in re

AGENT ORANGE

Product Liability
Litigation

MDL No. #381
(all cases)

Victor John Yannacone, Jr.

YANNAZONE & ASSOCIATES

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9333 808

PLAINTIFF'S PROPOSED SCHEDULE
for
DISCOVERY and DEPOSITION
with
PROCEDURAL SUGGESTIONS and EXHIBIT

Plaintiff's have made a number of requests to take the oral depositions of certain employees, or contractors concerning the manufacture, formulation, advertising, promotion, marketing, and sale of phenoxy herbicide to the United States Government during the period of 1961 through 1971. These issues are all directly relevant and material to adjudication of the government contractor defense, albeit plaintiff veterans and their families contend they are decisive on the issue of the defendants' "fault" as well. At the conclusion of such depositions and after review of the documents by the witnesses, plaintiffs intend to move for summary judgment dismissing the affirmative defense of government contractor immunity.

If the plaintiffs are successful on their motion all that will remain for determination by the Court and a jury are the issues of cause-in-fact or generic causation. To wit, were the materials manufactured, formulated, advertised, marketed and sold by the corporate defendant war contractors for use in Southeast Asia during the period 1961 through 1971 capable of causing the physiological effects and genetic damage claimed by the plaintiff veterans and their families?

The corporate defendant war contractors apparently intend to embark upon a hunting and fishing expedition among the government documents in an effort to spin a web of obfuscation from which a jury might infer some mutuality of knowledge as to the contamination of phenoxy herbicides with toxic synthetic organic chemicals such as 2, 3, 7, 8-tetrachloro dibenzo p-dioxin (TCDD or "dioxin") of government knowledge of the toxicity of chemicals commensurate with that enjoyed by employees of the chemical companies. Perhaps that is a

legitimate litigation strategy. However, such a strategy does not justify any further delay in plaintiffs' depositions of employees and former employees of the corporate defendants.

Plaintiffs have been prepared to conduct such depositions since April, 1979. Yet, every effort to conduct them has been frustrated by the corporate defendants insistence upon some presumed right to poke through government documents in an effort to fabricate a defense at law where no such defense exists on the merits. Since it is obvious that the corporate defendants have retained enormous quantities of the trivial effluxia of their business operations, it should be presumed that documents which involve information critical to the health and safety of more than 2 million American servicemen and their allies, would also be retained if such documents ever existed. We believe no such documents ever existed and have repeatedly called upon the corporate defendants, individually and collectively, to produce them if they do exist, or produce witnesses with direct personal knowledge of the substance of such documents as an alternative. The kinds of documents that would clearly raise a government contractor immunity issue are those which would at this time be in the possession of at least some of the corporate defendants.

Nevertheless, assuming that procedural due process requires corporate defendants to depose the United States and review still more government documents, such discovery and depositions must not interfere with plaintiffs' oral depositions of employees of the corporate defendants.

In view of the juxtaposition in early April of two significant and solemn religious observances common to the Judeo-Christian calendars, we suggest that depositions of the corporate defendants' commence on April 12, 1982, the Monday following Passover and Easter and continue on a daily basis until they are

concluded. Depositions of all the corporate defendants' witnesses of interest can be completed by Labor Day, September 6, 1982, assuming that the Court implements by order some of the procedural suggestions which follow.

Upon completion of the depositions of corporate defendants, plaintiffs intend to move for summary judgment dismissing the affirmative defense of the government contractor immunity if indeed the evidence solicited during the depositions supports such a motion. Plaintiffs are prepared to make such a motion on September 20, 1982, returnable Wednesday, October 6, 1982.

If the Court wishes to conduct a hearing on the merits of that motion, or, in the alternative, reserve decision thereon and proceed with the trial of the affirmative defense, then such a trial or hearing could start on Monday, November 1, 1982. Assuming pretrial marking of all documents and exhibits, and the kind of trial management that this Court has already demonstrated in other complex litigation of national significance, plaintiffs estimate that such hearing or trial, could be completed before Thanksgiving, November 25, 1982. Motions following such a hearing or trial could be filed and served on or before Friday, December 3, 1982 and argued on Wednesday, December 15, 1982. The Court could start the New York, 1983, with its decision.

Should the corporate defendants fail in their efforts to establish government contractor immunity as an affirmative defense to the claims of the plaintiff veterans and their families then second wave discovery on the issue of "fault" could commence. Relevant would be information tending to answer the following questions:

1. Did the corporate defendants manufacture "Agent Orange"?
2. Was the "Agent Orange" manufactured by the corporate defendant war contractors, contaminated with toxic synthetic organic chemicals such as 2, 3, 7, 8-tetrachloro dibenzo p-dioxin (TCDD or "Dioxin")?
3. What was the extent of the knowledge of the corporate defendant war contractors, their officers, managers, and employees about such contamination?

4. What was the extent of the knowledge of the corporate defendant war contractors, their officers, managers, and employees of the toxicity of the contaminated "Agent Orange"?

DOCUMENTS

PRODUCTION, STORAGE, INDEXING, and RETRIEVAL

1. A substantial volume of documents is obviously going to be involved in the discovery phase relating to the government contract immunity defense issue. Primarily, we can anticipate the production of documents concerning communications between the government and the defendants. Moreover, there is also the likelihood that there will be discovery of the knowledge of the defendants and the government of the dangers of the phenoxy herbicides and of the dioxin contaminants. This documentation cannot be produced as a single bundle if this case is to be processed with any kind of dispatch. There must be some kind of grouping of documents. Plaintiffs do not intend to be categorical about what these groupings must be, since it is the defendants who know what documents there are, but clearly it must be something more intelligible than, "the files from warehouse B".

2. Almost as important as a proper grouping of the documentation is a useable index to the documents being produced. In ordinary litigation, each side would prepare its own index. The duplication of effort is accepted because it is finite in dimension. Given the volume of documentation in this case, the spectre of so many parties summarizing and indexing so many separate documents is unthinkable. Accordingly, plaintiffs suggest that each party index the documents that it is producing. For the most

part, this will mean nothing more than "letter from Jones to Smith dated such and such re pinwheels." As simple as it is, however, that job is too extensive to be duplicated party by party.

As a corollary to this indexing, plaintiffs are interested in having the index in a form capable of computer processing. Thus, if the name Smith comes up it would be useful to search the index to find all of the documents originated by Smith. This can be accomplished either by having the indexes available both in hard copy and magnetic disc form, or at least by having them in "machine readable" form where a photo-optical scanner can record them on computer tape.

3. Lastly, it is noted that the government has produced its documentation on microfilm. As this case and the evidence associated with it blossoms and bulges, it is clear that it will be impossible to maintain even a selection of the relevant documents in hard copy form at the courthouse or in law offices. It is therefore suggested that each party be responsible for the microfilming of their own records. Moreover, there are a number of systems on the market that make automatic retrieval of microfilmed records a relatively simple task. The records so microfilmed (or similarly micro-recorded) should be capable of processing by at least one of the available systems, to be agreed upon by the parties.

These suggestions are made by plaintiffs not only because they believe that it will simplify the document handling

requirements of this case, but, indeed, will make the processing of case related documentation possible at all.

82-03-17

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PROCEDURAL SUGGESTIONS: COMPUTERS

There is a pressing need at this time for a uniform means of identifying government documents. We presume that such a document identification program would carry over to the identification of documents produced by any of the other parties to the "Agent Orange" litigation. Such identification and designation programs should be consistent with the information retrieval systems maintained by the major parties to the litigation.

In order to bring this case to trial before the end of this year at least on the issues raised by the government contractor immunity defense, we believe that the Court should impose on all parties a common computer data processing and information retrieval system or, at the very least, insist on compatability as far as document coding for identification purposes is concerned. The maintenance of such large masses of data in machine readable form, and as part of a common data base accessible to all the parties, is in the interests of justice and in the best interest of all the parties to the litigation. The improvements, efficiency and reductions in the cost of managing this extraordinarily complex litigation which would necessarily follow such, an order could serve as a model for the entire multidistrict litigation process throughout the nation.

In addition to our suggestions about maintaining a common docket, and the identification of each document therein by date of origin, date of filing, and an exclusive numerical document designation, we suggest that all further transcripts of testimony, hearings and of the trial be furnished in machine readable form for loading as a computer full-text data base.

Counsel for the plaintiff veterans and their families do not have an army of temporary typists to "rekey" all of these transcripts into our computer,

nor do we have legions of paralegals to abstract and code the transcripts. Even if such were available, there is serious question whether your Honor could reasonably allow such expenses as charges against the recovery of the plaintiff veterans since much less expensive and much more convenient methods are available.

We respectfully request the Court to direct the court reporters to type the transcript in machine readable form utilizing an OCR typing element in their typewriters. Alternatively they could key their transcription directly through a remote terminal into one or another of the computer systems maintained by the parties. Subsequent distribution could be made in industry standard format such as nine track magtape. The Court could assure equitable compensation for the court reporters' efforts and the parties could bear their own costs of reproduction and distribution of the magnetic medium containing the data.

Dated at Patchogue, New York
the 17th day of March, 1982.

Victor John Yannacone, Jr.

YANNACONE & ASSOCIATES

Plaintiffs' Lead Counsel
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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

CLERK'S OFFICE
U.S. DISTRICT COURT E.D.N.Y.

In re

"Agent Orange"

Product Liability Litigation

★ MAR 19 1982 ★
: MDL No. 381
Time A.M. _____
: P.M. _____

-----X

DEFENDANTS' PHASE I

DISCOVERY PROPOSALS

RECEIVED
CHAMBERS OF GEORGE C. PRATT
U.S.D.J.

MAR 24 1982

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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

-----x

In re :
"Agent Orange" : MDL No. 381
Product Liability Litigation : (All Cases)
-----x

DEFENDANTS' PHASE I

DISCOVERY PROPOSALS

The undersigned defendants submit this memorandum pursuant to Pretrial Order No. 33, dated February 24, 1982, requiring the defendants to submit a proposed timetable for discovery of the Government Contract Defense.

I. SUMMARY OF PROPOSALS

The undersigned defendants make the following specific proposals to be completed in chronological order, for the discovery required to prepare for the Phase I trial.

1. Immediate deposition by defendants of the custodians of the records for each Government agency which generated records relevant to this litigation.

2. Immediate production by the Government of its remaining documents and ongoing review by defendants.*
Simultaneously, in extremis depositions of ill or infirm Government witnesses.

* The Government shall proceed immediately to take steps to review all documents claimed to be privileged or confidential.

3. Depositions of substantive Government witnesses after completion of Government document production.*

4. Production of documents by the chemical companies.

5. Substantive depositions of chemical company witnesses.

6. A special master to be appointed to rule on all discovery-related disputes.

II. DISCUSSION

1. SEQUENCE OF DISCOVERY

On January 15, 1981, in compliance with Pretrial Order No. 26, the defendants filed a memorandum outlining Defendants' Proposals Concerning Phase I Discovery ("Defendants' January 15 Proposal").

At that time we proposed a "two stage" approach to discovery on the merits: "[T]he schedule for discovery should require first the production of documents, to be followed by depositions that are prepared for with the benefit of information disclosed by those documents." Defendants' January 15 Proposal at 4.

* A procedure shall be adopted whereby the Government, although a non-party, will make witnesses available without the need for subpoenas. Alternatively, if subpoenas are required, all motions to quash should be heard in the Eastern District of New York.

Defendants reaffirm and readopt that "two stage" approach--production and review of documents followed by depositions--with the following additions and modifications regarding the sequence of discovery as between the parties.

a. TWO STAGE DISCOVERY--DOCUMENT PRODUCTION FOLLOWED BY DEPOSITIONS

In the Defendants' January 15 Proposal, we set forth the reasons for proceeding with and completing document production and document review prior to commencing any depositions on the merits of the case.

Briefly, if depositions were conducted prior to the completion of document production, this procedure would undoubtedly result in less than thorough examinations, require the re-examination of witnesses as additional documents are produced, and increase significantly the amount of time needed to complete all discovery proceedings.

Moreover, until document production has been completed we cannot know with any certainty the identity of those witnesses whose testimony will be required.

b. IN EXTREMIS DEPOSITIONS

One exception to our two stage discovery proposal relates to depositions of in extremis Government witnesses.*

* The second exception, depositions of custodians of Government records is discussed infra at 8 and 9.

The facts to be tried in the Phase I trial involve events that occurred some twenty years ago. Important Government witnesses may be ill or infirm. We propose that the Court order the Government to prepare a list of witnesses with knowledge of events relating to the issues raised by the Phase I trial who, due to illness or advanced age, may be unavailable for depositions when document production and review are concluded. In extremis depositions of these Government witnesses should be permitted to go forward without delay, and without further Court order. Of course, the defendants would have the right to re-examine those witnesses who survive once document production by the United States has been completed.

c. PRIORITY OF DISCOVERY AS BETWEEN THE PARTIES

Defendants propose that discovery of the Government commence first, to be followed by discovery of the defendant chemical companies. Plaintiffs and defendants alike require production of Government documents and Government witnesses in order to conduct the Phase I trial. The Government's files are plainly vital to establishing the Government Contract Defense.

Document production and depositions of the chemical companies should follow the two stage Government discovery process.

d. TIMETABLE FOR COMPLETING PHASE I
DISCOVERY ON THE MERITS

Due to the current status of the Government's voluntary document production, defendants are unable to predict when

Phase I document production and review will be completed and depositions can commence. Ms. Bernott, who agrees with defendants' two-stage discovery plan, estimates that the Government will require six months to complete its document production. See March 11, 1982 letter to Ms. Bernott attached hereto as Exhibit A.

The Government commenced voluntary production of documents in December, 1980 in response to Dow's First Rule 34 Request For The Production of Documents to the United States dated January 16, 1980. Thereafter, in compliance with Pretrial Order No. 26, defendants served Phase I First Wave Interrogatories to the United States on January 15, 1981. Those interrogatories sought the identification of documents and witnesses relevant to the issues raised by the Phase I proceedings. For its response to those Interrogatories the United States essentially continued with its voluntary document production, without regard to Phase I issues or defendants' Interrogatories.

As a result, notwithstanding defendants repeated requests to the Government to limit document production to material relevant to Phase I issues, the majority of the documents produced to date by the United States have nothing whatsoever to do with those issues, and are useless to defendants in preparation for the Government Contract Defense.* Moreover, we

* The Government has produced approximately 300,000 pages of documents to date.

have spent much of the past year culling, reviewing and processing documents totally irrelevant to Government Contract Defense issues. Consequently, only recently have we been able to begin to analyze in-depth Government documents responsive to Phase I interrogatories.

Moreover, it appears that the Government has yet to produce millions of pages of documents relevant to Phase I issues. The Government informs us that approximately five million pages of U.S. Department of Agriculture documents relating to phenoxy herbicides have not yet been reviewed for production nor have one million pages in the files of the Environmental Protection Agency been reviewed. Numerous other aspects of the Government's production are still incomplete. See Exhibit A.

Once the production and review of Government documents has been completed, the defendants will undertake to conduct depositions of Government witnesses as well as witnesses from the private sector whom we are able to identify as possessing knowledge relevant to Phase I issues.*

We cannot yet know how many Government witnesses we must depose--that decision awaits completion of document production and the ease with which we identify, early on, those witnesses who can establish Government knowledge equal to that of the defendant

* Potential private sector witnesses include individuals or organizations who conducted research or testing concerning phenoxy herbicides on the Government's behalf.

chemical companies. On the other hand, seeking out those witnesses with knowledge may require an exhaustive search. At this time, prior to completion of document production, we simply cannot begin to predict the number of witnesses we will depose. Doubtless, it is to our benefit to identify and depose the witnesses who can prove Government knowledge as quickly as possible.

2. SUPERVISION OF DISCOVERY

Since the Government is no longer a party to this litigation, we are uncertain as to how to proceed at this time to assure prompt, complete and thorough discovery of Government documents and witnesses. As noted above, in light of this uncertainty, a committee of defense counsel met with Ms. Bernott in Washington on March 4, 1982; a letter to Ms. Bernott reflecting the discussions that took place at that meeting is attached as Exhibit A.

The following are some of the problems facing the defendants in connection with discovery against the Government: Whether the defendants will be required to serve subpoenas all over the country to assure that Government employees and retirees can be deposed; how to obtain rulings with respect to the Government's claims of privilege and confidentiality regarding thousands of pages of Government documents; and how to assure that the Government's search for responsive documents has been thorough and complete.

In order to assure that further discovery proceeds smoothly, defendants propose the following procedures.

a. PRODUCTION OF GOVERNMENT WITNESSES

The Court shall request the Government to make witnesses available without the need for subpoenas. If subpoenas are required, the Court should (1) request that the appropriate Government agencies waive any administrative regulations to the contrary and provide the Justice Department with the authority to accept service of subpoenas for each agency, and (2) direct that all motions to quash be heard in the Eastern District of New York where the trier will be familiar with the facts and can most effectively deal with the issues raised.

b. DEPOSITION OF CUSTODIANS OF GOVERNMENT RECORDS

Defendants' independent investigatory efforts have turned up documents responsive to Phase I issues not yet produced by the Government through voluntary discovery or identified in its response to interrogatories. Ms. Bernott is aware of this problem and agrees that the Government's production is incomplete.

Accordingly, defendants propose that, while document discovery proceeds, defendants depose the custodians of the records for each Government agency identified as holding documents relevant to this litigation on aspects of the agencies'

organization and recordkeeping. We can then ascertain that each agency has conducted a thorough search for all relevant and responsive documents.*

c. REVIEW OF PRIVILEGED AND CONFIDENTIAL
GOVERNMENT DOCUMENTS

Defendants request that Your Honor order the Government to immediately review the thousands of pages of documents the Government has identified as privileged and confidential. It is our understanding, from Ms. Bernott, that a motion to compel production would automatically trigger a review of those documents. We cannot understand why defendants' Phase I Interrogatories have not served that purpose, but apparently the review procedure has not yet begun.

A motion to compel simply to prod the Government to review documents for declassification purposes seems a cumbersome procedure bound to cause unnecessary delay.

d. APPOINTMENT OF A SPECIAL MASTER

Defendants propose that a special master be appointed, pursuant to Rule 53 of the Federal Rules of Civil Procedure, to

* This procedure was described in Standard Oil Co. v. FTC, 475 F. Supp 1266 (N.D. Ind. 1979), where the FTC deposed oil company employees on recordkeeping and organization prior to document production, followed by deposition of oil company officials and employees on substantive matters.

rule on the many items that will require resolution while discovery proceeds. The master would hear objections to deposition questions, rule on issues of privilege and confidentiality, decide motions to quash and decide such other discovery issues as may arise. The appointment of a special master would expedite the entire discovery process. In particular, it would relieve this Court of the burden of involving itself in every step of the discovery proceedings.

As all parties would benefit from the appointment of a special master, we recommend that the cost be shared equally by plaintiffs and defendants, one-half to be borne by the thousands of plaintiffs and the other half to be borne by all of the defendant chemical companies, each chemical company to bear a pro rata share of the defendants' portion of the costs.

Additionally, the master should be authorized to impose costs against the Government as a sanction in the event the master determines that the Government's responses or objections to requests for production of documents or witnesses are frivolous, dilatory or otherwise obstructive.

CONCLUSION

For the foregoing reasons, the undersigned defendants request that the Court adopt the proposals set forth herein.

Dated: Garden City, New York
March 16, 1982

Respectfully submitted,

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Attorneys for Defendant
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STATE OF NEW YORK)
) ss.:
COUNTY OF NASSAU)

MONA KLAFTER , being duly sworn, deposes and says:

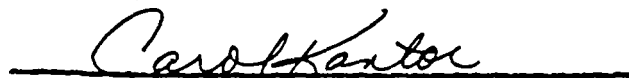
That deponent is not a party to this action, is over 18 years of age and resides in Westbury, N.Y.

That on the 16th day of March, 1982 , deponent serves the within PHASE I DISCOVERY PROPOSALS

upon the attorneys below set forth representing the parties, as indicated, at the addresses shown, said addresses being designated by said attorneys for that purpose, by depositing a true copy of same, enclosed in a postpaid properly addressed wrapper in an official depository under the exclusive care and custody of the United States Post Office Department within the State of New York.


MONA KLAFTER

Sworn to before me this
day of March , 1982.



NOTARY PUBLIC

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Commission Expires March 30, 1982

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March 11, 1982

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U.S. Department of Justice
Safeway Building, Room 904D
521 12th Street, N.W.
Washington, D.C. 20530

Re: In re "Agent Orange" Product
Liability Litigation, MDL No. 381

Dear Joan:

This letter confirms the subject of our discussions in Washington, D.C. on March 4, 1982. Also in attendance were Barbara Rivkind of your office, William Krohley of Kelley Drye & Warren, and Leslie Bennett and Marjorie Feldheim of Rivkin, Leff, Sherman & Radler.

1. U.S. Department of Agriculture documents.
You advised us that approximately five million pages of USDA documents pertaining to phenoxy herbicides have never been reviewed in connection with either the Government's voluntary document production or the preparation of the Government's Response to defendants' Phase I First Wave Interrogatories. At our request, you have now agreed to review the files of the USDA's Agricultural Research Service, as well as the files of all USDA facilities located in Beltsville, Maryland. I refer you to page A-2 of defendants' Interrogatories for certain divisions and operations of the ARS which defendants believe will be particularly important sources of information. You have also agreed to determine to what extent the pesticide registration materials referenced at page 2 of your Notice to All Counsel dated February 13, 1981 have been included in the Government's document production. Any USDA files relating to the Advisory Committee on 2,4,5-T (not discussed during our meeting) should also be reviewed for documents responsive to defendants' Interrogatories.

Based on your descriptions of the types of documents contained in the files of other divisions of the USDA, defendants have agreed to hold off for the time being on further requests for USDA documents. We of course reserve our right to request production of additional USDA documents (and those of any other agency) that appear relevant to Phase I issues. During our meeting, we expressed our continuing interest in the files of the Forest Service and the Science and Education Administration.

2. Environmental Protection Agency files. The Government stated at page 19 of its Response to defendants' Interrogatories that the EPA had not participated in the preparation of that Response, and that its answers would be provided by Supplement. Defendants, however, still have received no response from the EPA. You stated at our meeting that approximately one million pages of EPA documents need to be reviewed. Defendants requested a description of the EPA files, with particular attention to pesticide registration materials transferred from the USDA.

3. Military Assistance Command Vietnam documents. At our request, you agreed to retrieve the documents described in the "First List" of MACV documents sent to you by Sandy Mattingly on December 5, 1980, and advised us that you will require three to four months to respond. You have also agreed, in order to expedite any further review of the MACV materials that may be necessary, to attempt to identify those persons most familiar with the contents, organization and storage of the MACV cartons. We understand that there is someone preparing a history of the Vietnam conflict who has acquired extensive knowledge of the MACV documents, and suggest that you contact him.

4. Inventories received by the Department of the Army in response to inquiries sent to worldwide Army installations. Defendants are in the process of reviewing the inventories referenced in your April 15, 1981 Notice to All Counsel. We expect to complete that review within the next several days and will advise you shortly of which documents are to be produced.

5. Documents withheld on grounds of privilege. The Government has thus far asserted claims of privilege with respect to seven different groups of documents totaling several thousand pages. During our meeting, you requested that the Government's assertions of privilege be resolved by a motion to compel made returnable before Judge Pratt. You noted that such

a motion would qualify as a request to declassify and automatically trigger a review of the documents sought by defendants. You also stated that the Government would not object to such a motion on the grounds that it is no longer a party to MDL No. 381. However, on March 8 you telephoned to request that defendants defer any motion to compel pending further advice from you as to the most efficient means for resolving the Government's privilege claims. Notwithstanding defendants' Interrogatories, you stated that the Government has not yet commenced any declassification process or review of privilege claims.

6. Gaps in productions by agencies that have already participated in the Government's document production. Defendants have become increasingly aware of highly relevant documents located in Government files which are missing from the Government's own document production. During our meeting, defendants stressed their concern at the apparent incompleteness of the productions made to date by the participating Government agencies. You indicated that you shared our concern, and were aware of this problem. You further stated that there is a follow-up or checking process that can be implemented by the agencies to uncover and remedy these gaps, and accordingly agreed to attempt to formulate a proposal for identifying and eliminating the gaps in production that have occurred. At your request, I enclose several examples of relevant documents that we have located in the Government's files, but which were omitted from the Government's production in MDL No. 381:

- (a) Special Report "ZZ" entitled "Classification of Butyl 2,4-Dichlorophenoxyacetate, LNA, and Butyl 2,4,5-Trichlorophenoxyacetate, LNB, as BW Anticrop Agents," dated November 5, 1952, prepared by Department of the Army, Office of the Chief Chemical Officer, Chemical Corps Technical Committee, Army Chemical Center, Maryland;
- (b) Military Specification MIL-V-51239B, dated October 27, 1969, for "Vegetation Control Agent; Orange;"
- (c) 17 documents prepared in 1963 and 1964 pertaining to the use of herbicides in water supplies, located in the files of the Army Environmental Hygiene Agency; and
- (d) Letter dated March 13, 1956 from Office of the Surgeon General, Department of the Army, to Commanding Officer, Army Environmental Health Laboratory, Army Chemical Center, Maryland, and attached draft of technical bulletin on health hazards of insecticides, rodenticides and herbicides.

7. Documents from the "Edgewood Historical Collection". Your Notice to All Counsel dated June 10, 1981 stated that the "Edgewood Historical Collection" was being inventoried for materials relating to this litigation, and that an inventory would be completed at the end of June 1981. Although your Notice to All Counsel dated August 20, 1981 attached an index to allegedly privileged documents from the Edgewood Historical Collection, no mention was made of an inventory of non-privileged materials. At our meeting, you agreed to check to determine whether an inventory of non-privileged materials was ever produced to the parties.

On a related matter, your Notice to All Counsel dated April 15, 1981 attached an inventory of 20 feet of herbicide-related documents that were apparently generated by agencies at Fort Detrick. In your June 10, 1981 Notice, however, you appear to indicate that materials from that inventory "relating to the subject matter of this litigation" were then selected by you and placed on microfilm. Defendants are unclear whether any of the documents listed in the inventory produced on April 15 were omitted from the actual microfilm production. If omissions were made, please identify them.

8. Contracts, specifications and shipping documents. Defendants repeated our request for a complete production of all herbicide contracts, specifications, shipping documents and related materials in the Government's files. In view of the April 22, 1982 deadline set forth in Pretrial Order No. 33, a prompt and exhaustive response by the Government is obviously of the greatest importance.

9. Depositions of present and former Government employees. At our request, you have undertaken to determine whether the Government will voluntarily produce current employees for depositions or require that they be subpoenaed. You have taken under advisement defendants' request that Government employees be made available for preliminary interviews in order to expedite discovery by avoiding cumulative or unproductive depositions.

In addition, defendants requested that you furnish the parties with the current or last known addresses and job titles of the present and former Government employees identified in your Response to defendants' Interrogatories to facilitate scheduling and permit prompt service of any subpoenas that may be required. You stated that you were unwilling to provide this information.

10. Timetable for discovery. You estimated that approximately six months would be required for the Government to respond to or resolve the requests made during our meeting.

Joan M. Bernott, Esq.

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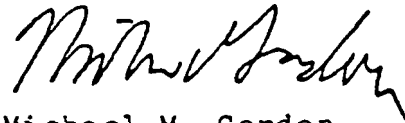
March 11, 1982

You also expressed your view that depositions of present and former Government employees should not commence until the end of that six month period.

Defendants reiterate that our March 4 meeting was a preliminary attempt to identify areas of the Government's document production in which further responses are required. Undoubtedly, additional areas will be identified as defendants continue their review of the documents thus far produced and proceed with other discovery. Neither our discussions on March 4 nor this letter is to be construed in any way as a waiver of any defendant's right to seek to compel discovery from the Government or as acquiescence in the manner in which the Government has chosen to respond to defendants' Phase I Interrogatories.

If this letter does not accurately summarize the substance of our discussions on March 4, please contact me at your earliest convenience.

Very truly yours,



Michael M. Gordon

MMG:slk
Enclosures

BY COURIER

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Leslie R. Bennett, Esq.
John C. Sabetta, Esq.
Morton B. Silberman, Esq.
Thomas Beck, Esq.
Edwin R. Matthews, Esq.
Dennis Rothman, Esq.

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UNITED STATES DISTRICT COURT
for the
EASTERN DISTRICT of NEW YORK

FILED
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U.S. DISTRICT COURT E.D.N.Y.

in re

★ MAR 19 1982 ★

"AGENT ORANGE"

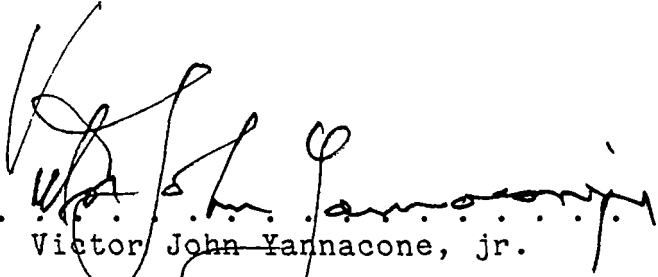
Product Liability Litigation

TIME A.M.
P.M.

MDL No. 381
(all Cases)

PLAINTIFFS' STATEMENT
of
UNDERSTANDING and DEFINITION
of
"AGENT ORANGE"

This Master Document submitted by


Victor John Yannacone, jr.

YANNAcone & ASSOCIATES
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PLAINTIFFS' STATEMENT
of
UNDERSTANDING and DEFINITION
of
"AGENT ORANGE"

PLEASE TAKE NOTICE that pursuant to Pretrial Order No. 33, the plaintiff veterans and their families submit this statement which shall constitute their understanding and definition of "Agent Orange" in the context of this litigation at this time. The source of plaintiffs' information upon which they rely is a document entitled, "Use of Herbicides in Southeast Asia", a history prepared as an active duty assignment by Dorothy A. Craig, Lt Col, USAFR, San Antonio Air Logistics Center, Directorate of Energy Management, Kelly Air Force Base, Texas, dated 1 August 1975, and submitted as an exhibit by the plaintiffs on 2 June 1980 as MDL 381 docket document # 284.

For the purpose of this litigation, the plaintiff veterans and their families understand that the term "Agent Orange" means and is thereby defined as referring generically to any and all phenoxy compounds designed, developed, manufactured, formulated, and produced by the corporate defendant war contractors for use as herbicides or chemical defoliants in Southeast Asia during the period 1961 through 1971. Included in the term "phenoxy compounds" are the several esters of 2,4,5-trichloro phenoxyacetic acid (2,4,5-T) and 2,4-dichloro phenoxyacetic acid

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(2,4-D), any of which were used as herbicides in Southeast Asia during the period 1961 through 1971.

Plaintiffs also include in the term "Agent Orange" certain toxic synthetic organic chemicals such as 2,3,7,8-tetrachloro dibenzo p-dioxin (TCDD or "Dioxin") which contaminated specific herbicide formulations.

PLEASE TAKE FURTHER NOTICE that to the extent the design, manufacture, production, or formulation of "Agent Orange" included chemical ingredients such as tetrachlorobenzene, which may have contributed to the human toxicity of "Agent Orange" or which may have led to contamination of the herbicides with toxic synthetic organic chemicals such as polychlorinated dibenzo p-dioxins (PCDDs) or polychlorinated dibenzo furans (PCDFs), then such chemical ingredients are encompassed in the term "Agent Orange".

PLEASE TAKE FURTHER NOTICE that at this time no information has been furnished by the corporate defendant war contractors as to the precise chemical designation, names, formulae or specific ingredients of the several "phenoxy compounds" supplied to the United States Department of Defense for use as herbicides in Southeast Asia during the period 1961 through 1971. Such information is wholly within the control of the corporate defendants who have not yet made meaningful replies to plaintiffs demands for such information in interrogatories already filed and

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served. Therefore, plaintiff veterans make this statement in conformity with the Court's order, but reserve the right to submit a supplemental amended statement to conform to specific details of chemical compounds, formulae, and methods of production concerning the products generically designated "Agent Orange", which may be made available to the plaintiffs and the Court during discovery in this litigation.

DATED at Patchogue, New York, 12 March 1982.

.....
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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

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U. S. DISTRICT COURT E.D. N.Y.

☆ OCT 1 1981 ☆

TIME A.M. _____

P.M. _____

-----X
IN RE

"AGENT ORANGE"

MDL No. 381

PRODUCTS LIABILITY LITIGATION
-----X

MEMORANDUM OF LAW IN SUPPORT
OF DOW'S MOTION FOR AN ORDER PERMITTING
THE DISPOSAL OF CERTAIN CATEGORIES OF DOCUMENTS

RECEIVED
HAMBERS OF GEORGE L. HART

OCT 1 1981

RIVKIN, LEFF & SHERMAN
ATTORNEYS AND COUNSELLORS AT LAW
100 GARDEN CITY PLAZA, GARDEN CITY, N.Y. 11530

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We submit this memorandum of law on behalf of The Dow Chemical Company ("Dow") in support of Dow's motion for an order permitting Dow to proceed with the disposal of certain categories of documents in accordance with Dow's document retention program.

PRELIMINARY STATEMENT

The relevant facts are set forth in the accompanying affidavit of Leonard L. Rivkin, to which this Court is respectfully referred.

Briefly, in response to an extraordinarily broad Rule 34 document request served by plaintiffs, Dow has collected and is storing millions of pages of documents which, although responsive to plaintiffs' request, have no bearing at all on the Agent Orange controversy. As of January 1, 1981, these irrelevant documents, which have been broken down into 32 categories, became eligible for disposal in accordance with Dow's regularly maintained document retention program. This motion merely seeks an order which would relieve Dow of the obligation of collecting and storing such obviously irrelevant material by permitting Dow to proceed with its document retention program to the extent of disposing of the documents comprising the above 32 categories. As it is not Dow's intention to deny any party to this lawsuit access to these documents, Dow will not commence with the disposal of said documents until 90 days after an order granting this motion is entered.

Significantly, this motion has no bearing on the many pages of relevant documents which Dow has collected, reviewed, sorted and stored.

ARGUMENT

It is firmly established that management of discovery, including resolution of related motions, is within the broad discretionary powers of the trial court. Lewis v. Texaco Inc., 527 F.2d 921, 926 (2nd Cir. 1975); Swanner v. United States, 406 F.2d 716, 719 (5th Cir. 1965); and Community Savings and Loan Association v. Federal Home Loan Bank Board, 68 F.R.D. 378, 381 (E.D.Wis. 1975). The authority to manage discovery is of special significance in lengthy and complex cases such as the Agent Orange litigation. Dolgow v. Anderson, 53 F.R.D. 661, 664 (E.D.N.Y. 1971). The power of the Court to provide a party with relief from an unnecessarily burdensome discovery request, including the power to limit discovery to matters occurring within a particular period of time, is well settled. See generally 8 Wright and Miller, Federal Practice and Procedure § 2040 (1970). See also Wyly Corp. v. American Telephone and Telegraph Co., [1980-1] Trade Cas., ¶ 63,204 (D.D.C. Dec. 12, 1979), in which the Court, in the context of a discovery motion, recognized and approved of document disposal under a party's document retention program.

As indicated above, this motion seeks to provide Dow with relief from plaintiffs' extraordinarily and unnecessarily broad Rule 34 discovery notice, which, as it now stands, requires Dow to collect and store millions of pages of totally irrelevant documents. There is no justification for imposing that obligation on Dow, and, in light of the foregoing, we respectfully submit that this Court is empowered to enter an order permitting Dow to dispose of those documents in accordance with Dow's regularly maintained document retention program.

CONCLUSION

For all of the foregoing reasons, we respectfully request that our motion be granted in its entirety.

Respectfully submitted,

RIVKIN, LEFF & SHERMAN
Attorneys for Dow
100 Garden City Plaza
Garden City, NY 11530
(516) 746-7500

Dated: Garden City, New York
September , 1981.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

- - - - -x

IN RE "AGENT ORANGE"

MDL No. 381

PRODUCTS LIABILITY

- - - - -x

FILED
IN CLERK'S OFFICE
U.S. DISTRICT COURT E.D.N.Y.

MAY 18 1981
P.M.

REPLY MEMORANDUM OF OCCIDENTAL AND HOOKER
IN SUPPORT OF THEIR MOTION FOR SUMMARY JUDGMENT

FACTUAL BACKGROUND

Defendants, Occidental Petroleum Corporation and Hooker Chemicals & Plastics Corp., have filed a Motion for Summary Judgment directed at Plaintiffs' complaints asserting liability against Occidental and Hooker on the basis of allegations that they manufactured Agent Orange; and at complaints alleging as a basis for liability that Hooker manufactured tetrachlorobenzene. Opposing affidavits and memoranda have been filed by all defendants and by plaintiffs in Clark et al vs. Dow et al, CV 81-995 and Gibbs et al vs. Dow et al, CV 81-662. Defendants' Motion for Summary Judgment is opposed on three grounds. All of the defendants take the position that the motion must be denied because Hooker produced TCP which, according to the affidavit of Alexander P. Vandersar submitted by Uniroyal, was utilized by Uniroyal in the manufacture of Agent Orange sold to the United States. Uniroyal also takes the position as do plain-

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tiffs in Clark and Gibbs that Hooker can be held liable for having produced Tetrachlorobenzene which is said to be a precursor of 2, 4, 5-T and may have been used in the production of Agent Orange sold to the United States. Plaintiffs in Clark and Gibbs also note that Hooker's motion does not specifically address itself to the laws of Georgia and Florida.

Significantly, no party has submitted any affidavits or otherwise contested defendants' factual assertions that neither Occidental or Hooker produced any Agent Orange or other product used as a herbicide in Southeast Asia. Nor has any party submitted anything to suggest that the Tetrachlorobenzene produced by Hooker contained any dioxin or furans or was a defective product.

ARGUMENT

1. TRICHLOROPHENOL (TCP)

Hooker does not dispute the assertions of defendants that it produced some quantity of Trichlorophenol (TCP). Hooker did produce TCP at the direction of the United States Government for sale to a subsidiary of Uniroyal. Hooker does not have any knowledge as to whether or not any of this TCP was actually utilized in the production of Agent Orange to which any of the plaintiffs were exposed. However, Hooker does not attempt to challenge, by this summary judgment motion, any claim by any defendant for contribution or indemnity

based on its production of TCP. The motion is addressed to Plaintiffs' complaints and to the extent that they attempt to assert that Occidental or Hooker is liable on the basis of allegations that either of them manufactured Agent Orange or Tetrachlorobenzene.

The fact that Occidental or Hooker may be liable over to one or more of the defendants does not affect its rights to summary judgment against groundless allegations in Plaintiffs' complaints. Schroeter vs. Ralph Wilson Plastics, Inc., 49 FRD 323 (S.D. N.Y. 1969), Axton-Fisher Tobacco Co., Inc. vs. Zeffrin Truck Lines, Inc., 36 F Supp. 777 (W.D. KY 1941), Fed. R. Civ. Proc. 56(d).

2. TETRACHLOROBENZENE

Only Uniroyal and plaintiffs Clark and Gibbs oppose defendants' motion on the basis of Hooker's production of Tetrachlorobenzene. None of these parties have submitted any affidavits suggesting that Hooker's Tetrachlorobenzene was defective. Uniroyal suggests only that Hooker's Tetrochlorobenzene "could conceivably" be found to have been a defective product. It does not set forth any factual basis for this possibility. On the contrary, Exhibit A to Uniroyal's opposition papers shows clearly that TCDD (dioxin), the substance which Plaintiffs consider to be the toxin causing the injuries, is formed only during the production of TCP, not in the formulation of Tetrachlorobenzene. That same exhibit also demon-

strates that the chemical Tetrachlorobenze undergoes a basic molecular change in the manufacturing process. It is not a component or an ingredient of Agent Orange. It is not present at all in Agent Orange or 2, 4, 5-T. It is a raw material which is changed substantially and basically in the several manufacturing processes leading to the production of Agent Orange.

Not only have the opposing parties failed to produce any factual material tending to establish a basis for a finding that Tetrachlorobenzene is defective, they fail to cite any case or other legal authority for the proposition that Hooker can be held liable for selling a non-defective product.

Hooker's Tetrachlorobenzene is not defective. It did not cause any of the alleged injuries sustained by plaintiffs. There is simply no basis for holding Hooker liable to any party for its having produced and sold Tetrachlorobenzene. Hooker, therefore, is entitled to summary judgment on this issue at this time.

3. THE LAW OF FLORIDA AND GEORGIA

Plaintiffs in Clark and Gibbs assert that since their cases are based on diversity, summary judgment cannot be granted since Hooker did not address itself specifically to the law of these forum jurisdictions. Plaintiffs do not, however, offer any

authority from those two states indicating that the applicable law is contrary to the principles set forth in Defendants' Memorandum in Support of the Summary Judgment Motion. They do not, in fact, set forth any cases from any jurisdiction to contest the defendants' contention that a product must be shown to be defective in order to form the basis of a products liability claim. While defendants do not agree that Florida and Georgia law necessarily apply to the Clark and Gibbs cases respectively, or that defendants are required to specifically cite cases from those jurisdictions to support non-liability, it is clear that the law of those states is in accord with the principles set forth in defendants' supporting memorandum.

Both Florida and Georgia have indicated approval of §402A of the American Law Institute Restatement of Torts 2d. In West Caterpillar Tractor Company, Inc., 336 So. 2d. 80 (S. Ct. Fla. 1976), the Supreme Court of Florida answered a question certified to it by the United States Court of Appeals for the Fifth Circuit requesting an opinion as to whether under Florida law a manufacturer may be held liable on a theory of strict liability in tort. In answering this question in the affirmative, the Court stated:

"In order to hold a manufacturer liable on the theory of strict liability in tort, the user must establish the manufacturer's relationship to the product in

question, the defect and unreasonably dangerous condition of the product and the existence of the proximate causal connection between such condition and the user's injuries or damages.

We addopt the doctrine of strict liability as stated by the ALI Restatement (Second) of Torts §402A." (336 So. 2d at 87).

The Supreme Court of Georgia has held that the law of Georgia provides a cause of action for strict liability in tort under section 105-106 Code Ann. providing that the manufacturer is liable if his product was "not merchantable and reasonably suited for the use intended." Center Chemical Company vs. Parzine, 218 SE 2d 580 (S. Ct. Ga. 1975). The Court found that this language was used in the context of strict liability citing §402A of the Restatement of Torts, 2d and holding:

"All of the authorities supporting the doctrine of strict liability in tort have recognized the necessity that the plaintiff establish that there was a defect in the defendant's product"

* * *

"Accordingly, we construe the phrase 'not merchantable and reasonably suited to the use intended' as used in Code Ann. §105-106 to mean that plaintiff must show that the manufacturer's product when sold by the manufacturer was defective."

The existence of a defect in the manufacturer's product is the basic element in a plaintiff's cause of action for product liability. A manufacturer is not liable absent proof that the product in question was defective or dangerous at a time when the defendant had possession or control of it, or when the product left the defendant's possession or control, or when the defendant was otherwise responsible for its condition with respect to the defect or danger, 63 Am. Jur. 2d, Products Liability 20, §10. There has been no attempt to show, or even an allegation of, the existence of a defect in Hooker's Tetrachlorobenzene. There is no factual issue to be tried in this regard and defendant is entitled to a summary judgment on this issue at this time as a matter of law. Markwell vs. General Tire and Rubber Company, 367 F. 2d 748 (7th Cir. 1966), Amik vs. Gooding Amusement Company, 248 F. Supp 782 (S.C. 1966).

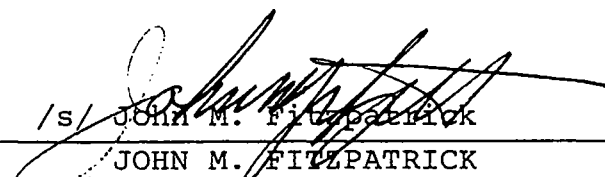
CONCLUSION

Occidental and Hooker have submitted affidavits and answers to interrogatories demonstrating that neither company manufactured any quantity of Agent Orange or any other product used as a herbicide in the Vietnam conflict. They have also set forth affidavits demonstrating that the substance alleged to be cause of the plaintiffs' injuries in this litigation was not present in any Tetrachlorobenzene manufactured by Hooker. No party has offered any factual data to contest defendants' assertions regarding these two

products. Defendants submit that there are no factual issues to be tried with respect to liability of either Occidental or Hooker on the basis of the Plaintiffs' allegations that they produced Tetrachlorobenzene. Hooker does not, at this time, seek summary judgment on any allegations of liability on the basis of Hooker's production of TCP.

Respectfully submitted,

DILWORTH, PAXSON, KALISH & LEVY

By  /s/ JOHN M. FITZPATRICK
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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

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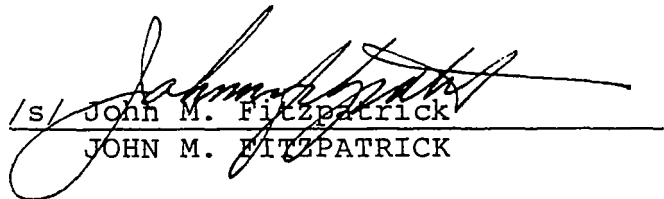
MDL NO. 381
(All Cases)

"AGENT ORANGE"
PRODUCT LIABILITY LITIGATION

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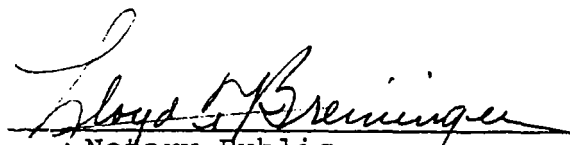
AFFIDAVIT OF SERVICE

JOHN M. FITZPATRICK, having been duly sworn, deposes and says that he is a Partner of the law firm of Dilworth, Paxson, Kalish & Levy and that on May 15, 1981, copies of the foregoing Reply Memorandum of Occidental and Hooker In Support of Their Motion For Summary Judgment, and Reply Affidavit of John M. Fitzpatrick were served on each person listed on the attached service list by first class mail, postage prepaid.


/s/ John M. Fitzpatrick
JOHN M. FITZPATRICK

SWORN TO BEFORE ME

this 15th day of MAY , 1981.


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Clemson, SC 29631

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Bernstein, Bernstein & Harrison
1521 Locust St. 7th Floor
Philadelphia, PA 19102

Dennis B. Francis
Gillenwater, Welchel & Nichol
6401 Baum Drive
Knoxville, TN 37919

DAY 4 AGENT ORANGE TRIAL
MOYER V DOW

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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

IN RE:

"AGENT ORANGE"

Product Liability Litigation

FILED
IN CLERKS OFFICE
U. S. DISTRICT COURT E.D. N.Y.
MAR 31 1983

TIME A.M. :
P.M. :

NOTICE TO TAKE DEPOSITION

MDL #381

NOTICE IS HEREBY GIVEN that, pursuant to Rules 30 and 45 of the Federal Rules of Civil Procedure, the defendants in the above-entitled action will cause to be taken the testimony of WAYLAND JACKSON HAYES, JR., on the 7th day of April, 1983, at 9:30 o'clock in the forenoon of that day or on a date and time thereafter, as stipulated to by counsel for defendants and the deponent. Said deposition shall be taken at the United States Attorney's Office, Federal Court House Building, 801 Broadway, Nashville, Tennessee.

If for any reason the taking of the deposition is not completed on the date indicated, then said deposition shall be adjourned from day to day and from time to time until completed.

The deponent is hereby notified to make the following documents available to counsel for defendants immediately prior to the commencement of the deposition:

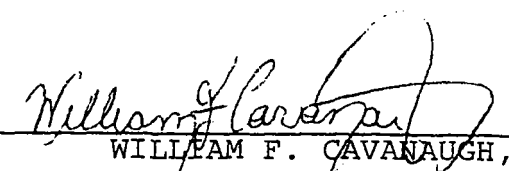
1. A copy of your most recent curriculum vitae.
2. Any and all personal files including, but not limited to, all diaries, logs, notes, and memos in the possession, custody or control of the deponent regarding 2,4,5-T, the

9391

herbicides used in Southeast Asia, and dioxin.

RIVKIN, LEFF, SHERMAN & RADLER
Attorneys for Defendant, THE
DOW CHEMICAL COMPANY

By:


WILLIAM F. CAVANAUGH,

Office & P.O. Address
100 Garden City Plaza
Garden City, NY 11530
(516) 746-7500

9392

STATE OF NEW YORK)
) ss.:
COUNTY OF NASSAU)

JOAN A. LEONOWICZ, being duly sworn, deposes and says:

That deponent is not a party to the action, is over 18 years of age and resides at Uniondale, New York.

That on the 31st day of March, 1983
deponent served the within NOTICE TO TAKE DEPOSITION

upon the attorneys below set forth representing the parties, as indicated, at the addresses shown, said addresses being designated by said attorneys for that purpose.

ATTORNEYS:

Listed on attached service list.

by depositing a true copy of same enclosed in a postpaid properly addressed wrapper in an official depository under the exclusive care and custody of the United States Post Office Department within the State of New York; and upon the deponent, by forwarding a true copy of same to the deponent's home address--2317 Golf Club Lane, Nashville, TN 37215.

Joan A. Leonowicz
JOAN A. LEONOWICZ

Sworn to before me this

31st day of March , 1983

Carol Kantor
Notary Public

Notary Public

CAROL KANTOR
Notary Public, State of New York
No. 30 4732765 Nassau County
Commission Expires March 30, 1988

TO:

MORTON B. SILBERMAN, ESQ.
Clark, Gagliardi & Miller
The Inns of Court
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White Plains, New York 10601

WENDELL B. ALCORN, JR., ESQ.
Cadwalader, Wickersham & Taft
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Department of Justice
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& Specthrie
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WAYLAND JACKSON HAYES, JR.,
M.D., Ph.D.
2317 Golf Club Lane
Nashville, Tennessee 37215

HON. GEORGE C. PRATT
United States District Court
Eastern District of New York
Uniondale Ave. & Hempstead Tpke
Uniondale, New York 11553

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

-----X
: IN RE :
: "AGENT ORANGE" :
: :
PRODUCT LIABILITY LITIGATION
-----X

MDL No. 381

FILED
IN CLERK'S OFFICE
U. S. DISTRICT COURT E.D.N.Y.

★ JAN 17 1983 ★

TIME A.M.
P.M.

SUPPLEMENTAL ANSWERS OF
DEFENDANT MONSANTO COMPANY
TO PLAINTIFFS' INTERROGATORIES
TO DEFENDANTS (FIRST WAVE)
SECOND SET

TOWNLEY & UPDIKE

CHRYSLER BUILDING
405 LEXINGTON AVENUE
NEW YORK, N. Y. 10174

TELEPHONE
(212) 682-4567

9895

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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

-----X
IN RE : MDL No. 381
"AGENT ORANGE" : SUPPLEMENTAL ANSWERS OF
PRODUCT LIABILITY LITIGATION : DEFENDANT MONSANTO COMPANY
: TO PLAINTIFFS' INTERROGATORIES
: TO DEFENDANTS (FIRST WAVE)
: SECOND SET
-----X

Monsanto Company ("Monsanto"), in accordance with Pretrial Order No. 33 and Monsanto's February 11, 1981 Answers to Plaintiffs' "Interrogatories to Defendants (First Wave)," dated January, 1981 ("Plaintiffs' Interrogatories"), provides the following supplemental answers to Plaintiffs' Interrogatories. Like Monsanto's July 9, 1982 "Supplemental Answers" to Plaintiffs' Interrogatories, the supplemental answers herein consist of 13 schedules of additional Monsanto documents containing information responsive to one or more of the interrogatories.

Some of the documents identified herein are subject to a claim of confidentiality because they contain medical information concerning past or present Monsanto employees. These documents will be made available for inspection and copying upon the entry of an appropriate protective order.

Documents identified herein that are not subject to claims of confidentiality or privilege have been segregated according to the 13 schedules and are available for inspection and copying at the offices of Monsanto's attorneys, Townley & Updike, upon reasonable notice.

9397

ANSWERS

INTERROGATORY NUMBER 2

Provide a table of organization of the answering Defendant Company setting forth the following:

Interrogatory 2A

A. The name and location of each division of the defendant responsible for or which participated in the design, production and sale to the United States Government of the herbicide known as Agent Orange for use in Southeast Asia including Vietnam during the period 1960 through 1971.

Supplemental Answer to Interrogatory 2A

See attached Schedules 1 and 3.

INTERROGATORY NUMBER 3

Identify by name and last known address, and if retired so state and supply the last known address of each and every person, scientific, medical, or otherwise, retained by or known to this defendant or known by this defendant to have been retained by or known to any of the other defendants who has studied, evaluated, or reported or directly or indirectly communicated any findings referable to whatever effects were so found upon animals or human beings resulting from exposure, directly or indirectly, in the formulation, design, manufacture and production of phenoxy herbicides such as 2,4,5-Trichlorophenoxy Aliphatics containing but not limited to the synthetic organic chemical 2,3,7,8-Tetrachlor Dibenzo p-dioxin (TCDD or "Dioxin") and other herbicides containing Polychlorinated

Dibenzo-p-dioxins (PCDDs) and Polychlorinated Dibenzo furans (PCDFs) including the ultimate users of those expected to be exposed to same.

Supplemental Answer to Interrogatory 3

See attached Schedule 7.

INTERROGATORY NUMBER 4 (FIRST)

Provide a table or organization as to the United States Government showing:

Interrogatory 4A (First)

A. The division or units of such division of the United States Government with whom Defendants contracted to supply the Agent Orange herbicide to be used in Southeast Asia including Vietnam during the period 1960 through 1971.

Supplemental Answer to Interrogatory 4A (First)

See attached Schedule 1.

Interrogatory 4B (First)

B. The name, address, telephone number, title and duties of every person employed by, under contract with or otherwise related to said division or units of the United States Government with whom the Defendants, or any of their agents, servants, or employees dealt in connection with the negotiations and contract for the supply of the Agent Orange herbicide, including the design and production of such herbicide.

Supplemental Answer to Interrogatory 4B (First)

See attached Schedule 1.

Interrogatory 4C (First)

C. The name, address, telephone number, title and duties of every person employed by said division and units whom Defendants claim were knowledgeable with respect to the following:

Interrogatory 4C(i) (First)

(i) The state of the art and technology at the time the Defendants were under contract with the United States Government to supply the Agent Orange herbicide with respect to the design and method of process of production including manufacturing process of the Agent Orange herbicide.

Supplemental Answer to Interrogatory 4C(i) (First)

See attached Schedule 3.

Interrogatory 4C(ii) (First)

(ii) The risks of dioxin contamination associated with the design and production of the Agent Orange herbicide, the methods of dioxin control, reduction or elimination and the costs thereof.

Supplemental Answer to Interrogatory 4C(ii) (First)

See attached Schedule 4.

Interrogatory 4C(iv) (First)

(iv) The process utilized or proposed to be utilized by defendant to manufacture Agent Orange.

Supplemental Answer to Interrogatory 4C(iv) (First)

See attached Schedule 3.

INTERROGATORY NUMBER 4 (SECOND)

Identify all documents, their location and the name, title, address and telephone number of the custodian in possession or control of, or known to the Defendants which relate to the items 1 through 3 supra, including:

Interrogatory 4A (Second)

A. Any and all research, analyses, tests, testing procedures relative to the manufacture, advertising, sale, promotion, and marketing of phenoxy herbicides such as 2,4,5-Trichlorophenoxy Aliphatics containing but not limited to the synthetic organic chemical 2,3,7,8-Tetracholor Dibenzo p-dioxin (TCDD or "Dioxin") and other herbicides containing Polychlorinated Dibenzo-p-dioxins (PCDDs) and Polychlorinated Dibenzo furans (PCDFs), hereinafter simply "Phenoxy herbicides."

Supplemental Answer to Interrogatory 4A (Second)

See attached Schedule 6.

Interrogatory 4B (Second)

B. Analysis, studies, experiments, results of such experiments, including but not limited to the recommendations concerning the results of experiments relative to the formulation, production, manufacture, sale, marketing,

promotion, and advertising of phenoxy herbicides.

Supplemental Answer to Interrogatory 4B (Second)

See attached Schedule 6.

Interrogatory 4C (Second)

C. Anyone acting by or on behalf of this defendant or known to be acting by or on behalf of any of the other defendants relative to the research, testing, analysis, evaluation, and recommendations relative to the manufacture, sale, distribution, advertising, and promotion of phenoxy herbicides.

Supplemental Answer to Interrogatory 4C (Second)

See attached Schedule 6.

Interrogatory 4D (Second)

D. Effects of exposure of whatever nature and under whatever circumstances or conditions to phenoxy herbicides.

Supplemental Answer to Interrogatory 4D (Second)

See attached Schedule 7.

Interrogatory 4E (Second)

E. The dates, places and times of measuring and testing exposure in animals (identify by animal) of phenoxy herbicides.

Supplemental Answer to Interrogatory 4E (Second)

See attached Schedule 8.

Interrogatory 4F (Second)

F. The dates, times, places, and results of exposure to humans in whatever form of phenoxy herbicides.

Supplemental Answer to Interrogatory 4F (Second)

See attached Schedule 9.

Interrogatory 4G (Second)

G. Any studies conducted by this defendant or known by this defendant to have been conducted by any of the other defendants or by anyone or by any independent organization retained by this defendant or known by this defendant to have been retained by other defendants with respect to the effects, if any, upon the employees of this defendant or the employees of other defendants known to this defendant or their spouses and children who were in any manner, shape, or form associated with or exposed to the manufacture, production and shipment of phenoxy herbicides.

Supplemental Answer to Interrogatory 4G (Second)

See attached Schedule 10.

Interrogatory 4H (Second)

H. Any and all accidents in the production and manufacturing, shipping, and distribution of phenoxy herbicides including the results of any inquiry by this defendant or known by this defendant to have been made by other defendants or any inquiry by any public or private agency relative to such accident or accidents.

Supplemental Answer to Interrogatory 4H (Second)

See attached Schedule 11.

Interrogatory 4I (Second)

I. Identify and set forth the process utilized for the manufacture of phenoxy herbicides.

Supplemental Answer to Interrogatory 4I (Second)

See attached Schedule 3.

Interrogatory 4J (Second)

J. If the process in response to the above was changed from time to time, identify and set forth each and every process and the dates of changes, if any, to date.

Supplemental Answer to Interrogatory 4J (Second)

See attached Schedule 3.

Interrogatory 4K (Second)

K. The existence of Dioxin in the manufacture and production of phenoxy herbicides.

Supplemental Answer to Interrogatory 4K (Second)

See attached Schedule 4.

Interrogatory 4L (Second)

L. Warranties, representations, and assurances, made by this defendant or known by this defendant to have been made by other defendants to the United States Government in respect of phenoxy herbicides.

Supplemental Answer to Interrogatory 4L (Second)

See attached Schedule 2.

Interrogatory 4M (Second)

M. The company's knowledge of the existence of Dioxin in the production, manufacture, distribution, sale, marketing, and promotion of phenoxy herbicides.

Supplemental Answer to Interrogatory 4M (Second)

See attached Schedule 4.

Interrogatory 4O (Second)

O. Negotiations between this defendant or known by this defendant to have been undertaken by or on behalf of the other defendants between this and/or the other defendants and the United States Government with respect to the existence of Dioxin in the manufacture, production, marketing, promotion, sale, advertising, and distribution, on [sic] phenoxy herbicides.

Supplemental Answer to Interrogatory 4O (Second)

See attached Schedule 2.

Interrogatory 4P (Second)

P. The manufacturing process from beginning to end in the production of phenoxy herbicides.

Supplemental Answer to Interrogatory 4P (Second)

See attached Schedule 3.

Interrogatory 4Q (Second)

Q. All documents which refer or relate, directly or indirectly, to any action, investigation, analysis, study, report, or statements by or on behalf of the company or

received by the company or known by this company in respect of the other defendants relating to incidents of medical signs, symptoms, and conditions claimed, suggested, or suspected of being related to exposure in any form to phenoxy herbicides from in or about 1945 to date including but not limited to activities of any treatment organization, study organization and its groups.

Supplemental Answer to Interrogatory 4Q (Second)

See attached Schedule 7.

Interrogatory 4R (Second)

R. All documents which refer or relate, directly or indirectly, to claims filed against this defendant in any local, State or Federal Court, agency, board, or any other entity established to hear such claims for medical conditions claimed to have resulted or be connected directly or indirectly to the formulation, design, production and manufacture of phenoxy herbicides.

Supplemental Answer to Interrogatory 4R (Second)

See attached Schedule 13.

Interrogatory 4S (Second)

S. All documents relative to studies of the effects of phenoxy herbicides when used in Southeast Asia including Vietnam including the dates, times, and places and amounts of use and conditions including but not limited to meteorological conditions for use and any and all instructions, directions, suggestions, indications, and contraindications relative to the

use of phenoxy herbicides in Southeast Asia from 1960 to 1971.

Supplemental Answer to Interrogatory 4S (Second)

See attached Schedule 12..

Interrogatory 4T (Second)

T. Any and all such documents relating to any private organizations, conferences, foundations, which have conducted any studies, experiments, evaluations, or analyses either independently or by and on behalf of the answering defendant or known to have been conducted by or on behalf of the other defendants with respect to the effects, if any, of exposure to phenoxy herbicides on animals and humans and the conclusions and recommendations drawn therefrom and the actions, if any, taken in respect thereto by this defendant or known by this defendant to have been taken by other defendants.

Supplemental Answer to Interrogatory 4T (Second)

See attached Schedule 5.

Interrogatory 4U (Second) .

U. The funding by this defendant or known by this defendant to have been funded by any or all of the other defendants of any organizations commissioned, encouraged, suffered, and/or directed to undertake studies relative to the medical, genetic, and systematic effects and any other medical effects upon animals and humans exposed by whatever means under whatever conditions and circumstances to phenoxy herbicides.

Supplemental Answer to Interrogatory 4U (Second)

See attached Schedule 5.

INTERROGATORY NUMBER 5

Provide an index to and summary of each of said documents and provide and indicate their means of identification such as file number, case, etc.

Supplemental Answer to Interrogatory 5

See attached Schedules.

INTERROGATORY NUMBER 6

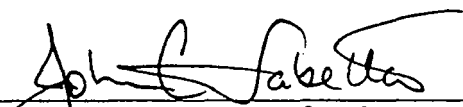
Identify the name, title, address and telephone number of those persons employed by or under contract with, or otherwise related to the Defendants, who were authors of said documents and those persons who are familiar with such documents.

Supplemental Answer to Interrogatory 6

See attached Schedules.

Dated: New York, New York
December 30, 1982

TOWNLEY & UPDIKE

By 

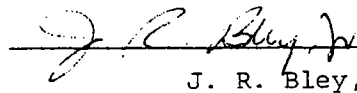
Attorneys for Defendant
Monsanto Company
405 Lexington Avenue
New York, New York 10174
(212) 682-4567

TO: SEE ATTACHED SERVICE LIST

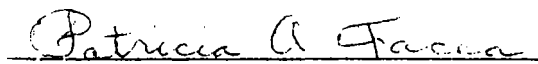
VERIFICATION

STATE OF MISSOURI :
: SS
COUNTY OF ST. LOUIS :

J. R. Bley, Jr., being duly sworn, deposes and says that he is an assistant secretary of defendant Monsanto Company, a corporation; that he has read the foregoing Supplemental Answers of Defendant Monsanto Company to Plaintiffs' Interrogatories to Defendants (First Wave) Second Set and is familiar with the contents thereof; that deponent is without personal knowledge of the matters stated in the foregoing Supplemental Answers, and is informed and believes that no officer or employee of Monsanto Company has personal knowledge of all such matters; that the foregoing Supplemental Answers have been assembled by authorized employees and counsel of Monsanto Company, who have informed deponent that the foregoing Supplemental Answers are true; and that to the best of deponent's knowledge those Supplemental Answers are true.


J. R. Bley, Jr.

Sworn to before me this
5th day of January, 1983.


Notary Public

PATRICIA A. FACEA
NOTARY PUBLIC STATE OF MISSOURI
ST. LOUIS CO.
MY COMMISSION EXPIRES FEB 18 1988

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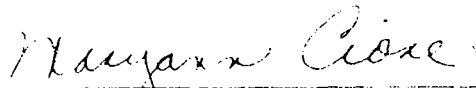
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STATE OF NEW YORK)
 : SS.:
COUNTY OF NEW YORK)

MARYANN CIONE, being duly sworn, deposes and says,
that deponent is not a party to this action, is over 18 years
of age, and resides at 1430 Stadium Avenue, Bronx, New York
10465. That on the 7th day of January, 1983 deponent served
the within Supplemental Answers of Defendant Monsanto Company
to Plaintiffs' Interrogatories to Defendants (First Wave)
Second Set upon the following attorneys:

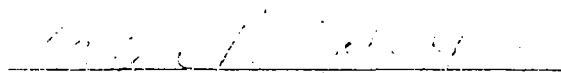
See attached list

at the above address designated by said attorneys for that
purpose by depositing a true copy of same enclosed in a postpaid
properly addressed wrapper in an official depository under the
exclusive care and custody of the United States Post Office
Department within the State of New York.



MARYANN CIONE

Sworn to before me this
____ day of January, 1983



Notary Public

FILED
IN CLERK'S OFFICE
U. S. DISTRICT COURT E.D. N.Y.

☆ JAN 17 1983 ☆

TIME A.M.
P.M.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

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In re

: MDL 381

"AGENT ORANGE"

: (all cases)

PRODUCT LIABILITY LITIGATION

:

JAN 18 1983

CHAMBERS OF GEORGE C. PRATT

U. S. C. J.

-----X
DEFENDANTS' MEMORANDUM REGARDING
IMPUTATION OF KNOWLEDGE WITHIN
THE GOVERNMENT

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PRELIMINARY STATEMENT

Plaintiffs have submitted a memorandum* seeking to impose limitations on defendants' discovery of the United States on the "Government Contract Defense", as defined by the Court in Pretrial Order No. 33. The Government has recently parroted plaintiffs' arguments in an apparent effort to reduce the number of depositions of Government witnesses to be taken by defendants.** The undersigned defendants submit this memorandum in response to Plaintiffs' Memorandum and the issues raised by the Government.

The limitations on defendants' discovery sought by plaintiffs are neither warranted under the Federal Rules of Civil Procedure nor the orders of this Court. They are based on a misreading of the relevant case law and demonstrably false assumptions about the facts concerning the Government's military and other involvement in herbicides. In light of the established rules permitting liberal discovery, the potentially dispositive issues framed by the Court for an early trial, the fruits of discovery to date and the applicable principles of law regarding imputation of knowledge within the Government, it would be inappropriate for

* Plaintiffs' Memorandum Concerning The "Government Contract Defense" Phase of The "Agent Orange" Product Liability Litigation: A Management Plan For The Discovery Phase, dated June 8, 1982. (hereinafter "Plaintiffs' Memorandum")

** See, e.g., Transcript of Hearing, November 22, 1982 at 2429-2431.

the Court to restrict the defendants' efforts to conduct discovery commensurate with the stakes involved in this litigation. To date, neither plaintiffs nor the Government has done anything more than complain that defendants have inconvenienced them by diligently pursuing discovery along lines which have appeared promising and worthwhile. In hindsight, some have proven more productive than others. However, discovery is by its very nature and design a learning process in which a party cannot and should not be expected to guarantee the results in advance. Defendants can only guarantee that there have been and will continue to be good reasons for the discovery they have sought and continue to pursue.

ARGUMENT

I. DEFENDANTS ARE ENTITLED TO TAKE BROAD DISCOVERY TO DETERMINE WHAT "THE GOVERNMENT" KNEW

The description of the Government Contract Defense set forth by the Court in Pretrial Order No. 33 does not define "the Government" for purposes of the defense. In fact, the meaning of the term for those purposes may well have to await the completion of discovery and trial. As will be seen, the "Government's" knowledge concerning the hazards of Agent Orange and its components is unquestionably found in a significant number of branches, departments and agencies -- in addition to the military -- which were all called upon by the military and others to provide information in connection with the use of Agent Orange in Vietnam. These parts of "Government" and the information each possessed were, thus, directly involved in and relevant to the so-called "decision making process."

The knowledge of the "Government" is also found elsewhere in the federal bureaucracy and was available within the government for the asking. The issues here are: Were they asked for that information? What information, if any, did they actually provide? Even, if not asked, were they nevertheless obliged to provide it without the asking? Or, if not asked, should they have been? Defendants admit that they don't have all the answers to these questions.

However they should not be stymied at the threshold of discovery into these matters by abstract distinctions of law in a misguided effort to cut corners. This litigation is simply far too important for such treatment.

Plaintiffs', of course, opine that "the Government" means a very limited number of high level personnel, which is a definition of convenience that is far too restrictive. Regardless of how the term is ultimately defined, defendants discovery to date, and the discovery sought in the future, has been designed to determine the knowledge of the Government on the issues defined in Pretrial Order No. 33.

II. UNDER PRINCIPLES GOVERNING IMPUTATION
OF KNOWLEDGE WITHIN THE GOVERNMENT, DE-
FENDANTS ARE ENTITLED TO BROAD DISCOVERY
FROM THE GOVERNMENT

The number of units within the Government with knowledge relevant to the Government Contract Defense is far larger than plaintiffs suggest. Many parts of the Government were directly involved in the herbicide development and military procurement efforts during the 1960's and earlier.* As an initial matter, defendants are entitled to discovery from these agencies on the issue of what was known. Thus, defendants may be able to establish at trial that the "Government" had actual knowledge of important facts, based on communications within the Government. Failing that, defendants may be able to establish, as a matter of law, that the particular Government personnel or units can be charged with the knowledge held by other personnel or units.

Although any issues which may be presented at trial concerning "imputation" of knowledge within the Government will have to be based upon the unique facts of this litigation, the courts have generally imputed knowledge from one agency to another where the knowledgeable agency had a duty to disclose the information to the other, J. A. Jones

* Certain of the facts now developed that bear on the Government's knowledge are discussed infra, Point III; defendants believe that additional facts in support of this assertion will be developed after additional discovery.

Construction Co. v. United States, 390 F.2d 886 (Ct. Cl. 1968); United States v. Kiefer, 228 F.2d 448 (D.C. Cir. 1955), cert. denied, 350 U.S. 933 (1956); United States v. First National Bank, 138 F.2d 681 (7th Cir. 1943), or where the other agency should have known or inquired about information possessed by the knowledgeable agency, Palmetto Bank v. United States, No. 14-79, slip op. (Ct. Cl. July 28, 1981);* L'Enfant Plaza Properties v. United States, 645 F.2d 886 (Ct. Cl. 1981).**

In J.A. Jones Construction Co., supra, the Court of Claims imputed knowledge held by the Air Force to the ignorant Army Corps of Engineers, with whom plaintiff, as the construction agent for the Air Force, had contracted. The Corps of Engineers was unaware that plaintiff's labor costs would be unusually high because of an Air Force project in the area that would pay workers at a premium, which would dry up the labor supply plaintiff expected to draw from. In

* A copy of the Palmetto Bank decision is submitted herewith.

** Plaintiffs point out that courts appear "willing to impute knowledge horizontally [between agencies] only when to do so reflected realistic opportunities for interagency exchange". Plaintiffs Memorandum p.11. This observation, however, must be the beginning of the analysis, rather than the end, as plaintiffs suggest. Defendants believe that discovery designed to show "realistic opportunities for interagency exchange" has in fact demonstrated those realistic opportunities, and therefore will ultimately warrant imputation. See discussion of facts at Point III,

so holding the Court of Claims distinguished Bateson-Stolte, Inc. v. United States, 172 F. Supp. 455 (Ct. Cl. 1959), pet. dism'd, 305 F.2d 383 (Ct. Cl. 1962) (cited at Plaintiffs' Memorandum p. 21), since in that case "there was no significant bond between the agencies, or their projects, and no reason for the [knowledgeable agency] to look out for [the ignorant agency's] contractors." 390 F.2d at 892.

That the Government is large and its records voluminous is irrelevant.* What counts is the role in Government of the respective agencies concerning the subject matter of the information.** Thus, the Seventh Circuit Court of Appeals rejected the "the-Government-is-huge" argument offered in United States v. First National Bank, 138 F.2d 681 (7th Cir. 1943).

* True, there are an "immense number of federal departments, bureaus and agencies, [with] tons of papers contained in the files of each...[and] various and sundry widely scattered projects, huge labor forces, and [it is a general] impossibility [for] one department [to] know what another department is doing or going to do." See Plaintiffs' Memorandum p.21. Nonetheless, knowledge will be imputed from one agency to another (or within an agency) if appropriate under the circumstances.

** Plaintiffs simply misconstrue the cases when, as with their discussion of Richmond Marine, they focus on whether the agencies were in an "efficient" (Plaintiffs Memorandum p. 12) or "best" (Id. p. 16) position to exchange information. This point is discussed more fully, infra, at pp. 10-14.

In First National Bank, the Seventh Circuit focused on whether the knowledgeable agency had a duty to disclose:

The real issue is whether the matters involved here were unrelated so that on receiving the death certificate, no duty rested upon the Veterans' Bureau to communicate that fact to the Pension Bureau.... [The knowledge] received by one agency was so important to the other that there was a plain legal duty to communicate such information to the other, and in default thereof it must be considered to have constructive notice....

138 F.2d at 684. This principle was applied in Kiefer, supra (cited at Plaintiffs' Memorandum p. 22), resulting in a finding of no imputation because of the particular facts presented.*

The key element in Kiefer was that there was no duty on the knowledgeable agency to disclose the information to the other agency. In fact, not to disclose was found to be administratively efficient and required by well-considered regulations. The Government had a legitimate interest in having the two sections maintain separate files. The insurance section (the ignorant agency) acted pursuant to a regulation (implemented in order to expedite the great number of reinstatement applications) which called for

* The court in Kiefer refused to impute to the life insurance service of the Veterans Administration facts known by the V.A. disability claims service, thereby rejecting plaintiff's contention that he was entitled to recover under his life insurance policy despite a fraudulent statement on his renewal application.

reinstatement on the basis of the insured's own statement (without requiring reference to a claimant's disability file in the other department) as proof that claimant's health was no worse than when the policy lapsed. Id. at 450-451. The court concluded that "the procedure under the regulation is reasonably related to efficient administration of the insurance program and is valid." Id. at 451.*

In Palmetto Bank, supra, knowledge held by the Federal Land Bank was imputed to the Farmers Home Administration based on a duty of FHA to inquire of FLB (which FHA knew to have knowledge relevant to the FHA). The court held that FHA unreasonably relied on an appraisal of secured property because FHA knew that FLB also had information about the property, which, if checked, would have alerted FHA to the inaccuracy of the other appraisal.

On the same analysis, in L'Enfant Plaza, supra, the Court of Claims refused to impute knowledge from the General Services Administration to the District of Columbia Redevelopment Land Agency because, although involved in the

* Many of the cases relied upon by plaintiffs are V. A. benefit cases in which there was, as in Kiefer, a Government interest precluding shared information, rather than a duty to disclose. E.g., United States v. Cooper, 200 F.2d 954 (6th Cir. 1953); United States v. Riggins, 65 F.2d 750 (9th Cir. 1933); Halverson v. United States, 121 F.2d 420 (7th Cir. 1941), cert. denied, 314 U.S. 695 (1942); Jones v. United States, 106 F.2d 888 (5th Cir. 1939) (cited at Plaintiffs' Memorandum pp. 14-15).

same urban redevelopment project, the two agencies acted completely independently of each other and had totally different roles concerning the project. Given their different roles, the court found that RLA was under no duty to investigate about facts known to GSA.*

The court held that:

RLA and GSA are independent entities and have no connection, outside of the fact that both agencies were involved with the urban renewal development of the L'Enfant Plaza complex. There is nothing to show that RLA was required to supervise or control the actions of GSA's contractor or that it was responsible for plaintiff's reliance on the supposed accuracy of building plans submitted by GSA to RLA.

645 F.2d at 890. Absent a duty to investigate, no knowledge was imputed to the ignorant agency.

Plaintiffs have ignored the holdings of the courts in these "duty to disclose" and "duty to investigate" cases, and have instead proffered their own unsupported conclusion that the "consistent pattern" of the cases is that knowledge is imputed to an ignorant Government unit only where another Government unit was in the "best position" to transmit the information, except that where "other persons" are in that

* RLA was lessor to both private and governmental redevelopers (one of whom was GSA) who, in turn, acted as commercial lessees under the terms of their leases and the Area Coordinator Agreement for the project (neither of which imputed knowledge to RLA of facts known to one of its lessees).

"best position," no imputation will be made. See Plaintiffs' Memorandum p. 16. Plaintiffs do not identify any cases that support this position. In fact, courts do not use this analysis.

The courts have not been concerned with whether, on the issue of charging one agency's knowledge to another, some third party may have been in a "better" position than the knowledgeable agency to inform the ignorant agency.

One might be correct in concluding that [based on the reasoning of Bateson-Stolte, supra] knowledge of one Army installation is not imputable to another installation on the basis that both are part of the same command within the Army. It might even be reasonable to conclude, assuming that two different organizational elements on one military installation have their own procurement activities, that knowledge of one should not be charged to the other merely because both are located on the same installation. Such illustrations reveal how extensive the impact of Bateson-Stolte's reasoning might be. However, under certain circumstances knowledge of information may be imputed between different organizations within the government. The key factor in making this determination is whether the procuring organization had reason to know of the information.... The primary consideration in determining whether knowledge should be imputed between governmental agencies is the exercise of due care. (Emphasis added.)

"Government Misrepresentation and Non-Disclosure in Federal Procurement," 6 A.B.A. Public Contract L.J. 39, at 103-104, 106.

That plaintiffs' "better position" analysis is inapposite is demonstrated by Palmetto Bank, supra, where the party that was probably in the "best position"* to advise FHA (the ignorant agency) that the appraisal being used by FHA was inflated was the plaintiff itself. Plaintiff had more information about the secured property than either FHA or FLB. Had plaintiff revealed that information to FHA, there would have been no need to impute FLB's knowledge to FHB. Similarly, in First National Bank, supra,** the court was not concerned with whether the knowledgeable agency or the bank (which had honored checks fraudulently endorsed in the dead payee's name) was in a better position to notify the ignorant agency that the endorsements were fraudulent.

Plaintiffs' "better position" analysis results from a misreading of the relevant cases. The result of this

* It appears from the facts stated that plaintiff in Palmetto Bank was in the "best position". However, not enough facts are given to resolve the "best position" and the court does not itself indicate who was in the "best position". Quite simply, the court did not find that inquiry relevant.

** In First National Bank, the court imputed knowledge of an individual's death to the Bureau of Pensions of the Veterans Administration, so that the defendant bank was not liable to the Bureau for honoring checks fraudulently endorsed in the deceased payee's name. Knowledge was imputed because the Bureau failed to exercise reasonable care to discover information available to the Veterans Bureau. 138 F.2d at 684.

misreading is that plaintiffs identify issues that are not relevant to the Government Contract Defense. For example, plaintiffs assert (without bothering to demonstrate) that defendants were clearly in the best position to have disclosed certain information to relevant units of the Government. Plaintiffs' Memorandum pp 12, 16. Plaintiffs also argue that defendants cannot sustain the Government Contract Defense unless they establish that they satisfied a duty to disclose certain information to "responsible" or "rational" decisionmakers.* Plaintiffs' Memorandum pp. 6, 7, 10, 17, 23.

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- * The "duty" of defendants created by plaintiffs simply does not exist on the Government Contract Defense issue. As formulated by the Court in Pretrial Order No. 33, the primary issue involves a comparison of the knowledge held by the defendants and the Government. See Pretrial Order No. 33 at p. 16. The issue of where the Government's information came from is simply not relevant. Plaintiffs concede this early in their memorandum ("if the government has obtained the relevant knowledge and expertise from other sources...and knows as much as or more than the supplier, no duty may be breached," Plaintiffs' Memorandum p. 4), yet they base their entire argument in the body of the memorandum on this "duty."

Despite plaintiffs' recognition that where information was generated is irrelevant to the Government Contract Defense, plaintiffs purport to find a distinction in the cases based on whether the information is generated inside or outside of the Government. Plaintiffs' Memorandum p. 16. However, plaintiffs cite no cases in support of this "distinction." Where the information sought to be imputed was generated is not germane; courts examine the relationships between the knowledgeable and ignorant agencies.

Plaintiffs have compounded two incorrect interpretations of the case law (the "better position" and "defendants' duty" arguments) into a third unsupported position: that the "equities" do not permit defendants to shift their "duty" to others "in an inferior position" with respect to the information. Plaintiffs' Memorandum p. 17. Again, the courts have not analyzed the cases before them in this manner. The veterans' benefits cases cited (Plaintiffs' Memorandum pp. 14-15)* were not decided on this basis, nor were any of the other cases relied upon by plaintiffs. See e.g., United States v. Accardo, 113 F.Supp. 783 (D. N.J.), aff'd, 238 F.2d 271 (3rd Cir. 1953) (cited in Plaintiffs' Memorandum p. 11).**

The cases that consider whether imputation of knowledge within the Government is appropriate establish at

* Like Kiefer, the cases relied upon (Cooper, Riggins, Halverson and Jones) were decided on the ground that the ignorant agency had no duty to investigate facts in the possession of the knowledgeable agency--in fact, it was administratively more efficient not to investigate, and the pertinent regulations so provide (see supra, pp. 10-11).

** The court in Accardo refused to impute knowledge about defendant's criminal convictions held by several Government units to the Naturalization Branch of the Immigration and Naturalization Service because there was no realistic opportunity for exchange of that information. The court did not bother to consider whether it would be "equitable" to permit defendant to benefit by that imputation.

least two situations that have required imputation: where the "ignorant" agency had a duty to investigate facts known by the other agencies; or, where the knowledgeable agencies had a duty to disclose the information to the ignorant agency. Thus, discovery is appropriate to determine what the Government knew and the extent to which various parts of government were under either one of these duties, what information these duties encompassed, and the role in government of these various parts.

III. FACTS NOW AVAILABLE DEMONSTRATE THAT
THE GOVERNMENT ENGAGED IN A BROAD
BASED EFFORT TO COORDINATE AND DEVELOP
MORE COMPLETE KNOWLEDGE OF HERBICIDES

It is clear from information now available that the Government's herbicide research and development program that resulted in the use of Agent Orange included a broad-based search, throughout the Government and elsewhere, for information about herbicides. The agencies directly involved in the herbicide program apparently were under a duty to, and in fact did, investigate other sources of herbicide information. Other Government agencies appear to have been on notice of this effort and, therefore, should have cooperated with the military's effort.

Coordination among federal agencies to develop information on pesticides has existed through various informal and formal interdepartmental groups since 1940. The Interdepartmental Committee on Pest Control was established in 1940, to consider requirements for research and development; to serve as a consultative body to federal agencies and pesticide manufacturers; to coordinate programs on pest control; and, to emphasize the importance of safe and effective uses of pesticides. Initially the committee was comprised of representatives from the Department of Interior, the Army, the Navy and the United States Public Health Service, but it later grew to include additional represen-

tatives from the Food and Drug Administration, the Department of Agriculture and the Air Force.*

In 1961 the Secretaries of Defense, Interior, Agriculture and Health, Education & Welfare formed the Federal Pest Control Review Board with the intent that such Board would review programs conducted by various federal agencies for the control of plant life and forms of invertebrates and would consider problems and developments in the field of chemical control with "particular reference to the possible adverse effects and the adequacy of provisions for the proper use of pesticidal chemicals." The Board was directed to address all phases of pest control including "safety to man, domestic animals, wildlife and the environment in general" and was instructed to advise the four cabinet departments on modifications in plans that would be in the best public interest.**

Within the Department of Defense, the Advanced Research Projects Agency, under the aegis of the Secretary of Defense, coordinated and funded programs, many of which

* See R.J. Anderson Dep. Ex. 2, Wymer, W.H. "Coordination in the U.S. Federal Government on Pest, Pesticides, and Pest Management" (1971); R.J. Anderson Ex. 4, "Minutes of the 57th Meeting of the Interdepartmental Committee on Pest Control."

** See Buckley Dep. Ex. 8, Forward, "Pesticide Monitoring Journal, June 1967."

were in conjunction with the United States Department of Agriculture, to develop information on herbicides.*

For example, a meeting was held at Edgewood Arsenal at the Chemical Research & Development Laboratories of the Army Chemical Corps on April 26, 1963 to "discuss and evaluate the toxicity of 2,4-D and 2,4,5-T compounds with particular emphasis on use of these materials in military operations as herbicides."** The meeting was chaired by Colonel F. L. Bauer, who was Director of Medical Research at the Chemical Research & Development Laboratories. Presentations were made by representatives from the Army Chemical Corps, Chemical Biological Research Agency at Edgewood Arsenal (Gen. Delmore); Fort Detrick (Dr. Minarik); the Chemical Research & Development Laboratories, which was part of the CBR Agency at Edgewood Arsenal (Col. Bauer, Dr. Bernard McNamara); the Department of Agriculture (Dr. Warren Shaw, Dr. J. H. Leary), and others. Representatives of the Office of the Secretary of Defense and the Patuxent Wildlife Research Center of the Department of the Interior also attended.

* See, e.g., Ennis Dep. Ex. 6, Memorandum, Control for Selection of Defoliation and/or Vegetation Control Agents, dated March 26, 1963.

** See Simmons Dep. Ex. 2, Minutes of Meeting to Discuss And Evaluate The Toxicity of 2,4-D And 2,4,5-T Compounds (26 April 1963).

Dr. Warren Shaw, the USDA representative at the Edgewood meeting, testified that following the meeting he made specific efforts to bring to the attention of Dr. McNamara any evidence of the effectiveness, limitations, toxicity to plants and toxicological effects of 2,4-D and 2,4,5-T by requesting federal agencies and chemical companies to pass such information along. Dr. Shaw further testified that he would be "amazed" if he had not made requests to the Public Health Service for such information in light of his many contacts there.*

On May 9, 1963, barely a week after the Edgewood meeting, representatives from the Army Chemical Corps, Chemical Biological Radiological Agency, briefed the President's Science Advisory Committee on the "Possible Health Hazard of Phenoxyacetates as Related to Defoliation Operations in Vietnam."** Presentations were once again made by Gen. Delmore, Dr. McNamara, Dr. Minarik, Col. Bauer and others.

Ten days later, on May 15, 1963, President John F. Kennedy released the Report of the President's Science Advisory Committee on the "Use of Pesticides" which specifically referred to 2,4-D and 2,4,5-T as extensively used

* See Shaw Dep. Tr. 112-118.

** See Vocci Dep. Ex. 8, "Briefing to the President's Science Advisory Committee May 9, 1963 by CBR Agency Personnel on the Possible Health Hazard of Phenoxyacetates as Related to Defoliation Operations in Vietnam."

herbicides and stated that the "panel is convinced that we must understand more completely the properties of [pesticides] and determine their long-term impact on biological systems", and that "we must now also take measures to insure that continued exposures to small amounts of these chemicals in our environment will not be harmful over long periods of time." The panel recommended that the Department of Health, Education and Welfare develop a comprehensive data-gathering program and "cooperate with other departments to develop a continuing network to monitor residue levels in air, water, soil, man, wildlife and fish."*

In 1964, in response to the President's Science Advisory Committee Report and with the advice and encouragement of the Executive Office of the President (especially the Office of Science and Technology and the Bureau of the Budget), the Secretaries of Defense, Interior, Agriculture and Health, Education and Welfare reorganized the Federal Pest Control Review Board into the Federal Committee on Pest Control.** This reorganization was deemed necessary to "expand the collaboration in two directions: First, to

* See Buckley Dep. Ex. 9, A Report of the President's Science Advisory Committee, "Use of Pesticides," May 15, 1963.

** See Buckley Dep. Ex. 8, Forward, "Pesticide Monitoring Journal, June 1967."

permit the new Committee to cover all aspects of pest control -- research, monitoring of the environment for pesticides, and public information programs -- as well as to review operational programs; secondly, to extend their council to all Federal programs involving pests and their control."* Among those on the Federal Committee on Pest Control at this time were John M. Geary, Department of Defense; Robert J. Anderson, Agricultural Research Service; representatives from the Forest Service, USDA, the Public Health Service, HEW, and others.**

Discovery to date has uncovered important facts relevant to the Government Contract Defense that must be viewed in the context of the formal and informal coordination among federal agencies regarding herbicides described above -- particularly because much of this coordination was directed specifically to the military herbicide program.*** A few of the highlights obtained through defendants' discovery are set forth below.

A Task Force under the supervision of Dr. McNamara was established at Edgewood to study the toxicological

* See id.

** See id.

*** See Shaw Dep. Tr. 112-118; Vocci Dep. Ex. 8, "Briefing to the President's Science Advisory Committee May 9, 1963 by CBR Agency Personnel on the Possible Health Hazard of Phenoxyacetates as Related to Defoliation Operations in Vietnam."

effects of 2,4-D, 2,4,5-T and Agent Purple in 1961 or 1962 in preparation for the April 26, 1963 meeting at Edgewood and for the briefing to the PSAC on May 9, 1963.* Dr. McNamara, head of the Toxicology Division, Medical Labs, CRDL, and his staff provided toxicological data for use in the analysis of chemical compounds as potential chemical warfare agents. Dr. McNamara served on one of the "Review Point Committees" which evaluated potential chemical warfare agents. Dr. McNamara and his staff worked closely with the Agents Research Branch of the Chemical Laboratories, CRDL, which was headed by Dr. Friedrich Hoffmann and which searched for and proposed chemical compounds as potential chemical warfare agents.

Dr. Hoffmann learned of "startling information" concerning the high toxicity of a dioxin compound and learned about German literature linking dioxin with the manufacturing process of trichlorophenol, an intermediate in the production of 2,4,5-T, on a trip to Europe in 1959.** Dr. Hoffmann shared this information with other people at Edgewood involved in the review of the compounds as potential chemical warfare agents. Dioxin was considered as a potential chemical warfare agent by CRDL in the early 1960's.

* See Vocci Dep. Tr. 59-60, 154.

** See Metcalf Dep. Ex. 8, Hoffmann, Friedrich, W. "Report on Trip to Europe" (1959) [redacted version]; Jandorf Dep. Ex. 11 [one page retyped excerpt of the Report].

During this time the Public Health Service maintained a Liaison Office at Edgewood* and was represented on the Federal Pest Control Review Board. In 1963, the Public Health Service, Division of Occupational Health, possessed knowledge of dioxin as a potential chloracnegen in the manufacturing process of 2,4,5-T.** Indeed, in 1964, Dr. Groth from the Public Health Service was encouraged by others in the Public Health Service to conduct a dioxin study and in January 1965 Dr. Groth in fact proposed a study to confirm that 2,3,7,8-tetrachlorodibenzo-p-dioxin was a contaminant in 2,4,5-T in light of "widespread use of 2,4,5-T as a herbicide."***

In 1966, the Food and Drug Administration was informed that what had been known as the Chick Edema Factor was in fact a dioxin compound.**** Prior to 1968 the Food and Drug Administration learned through testing that 2,4,5-T contained dioxin.***** In addition, in 1968 representatives from the Food and Drug Administration and the Public Health Service initiated a health survey of workers in a 2,4-D and 2,4,5-T

* See Simmons Dep. Tr. 164-166.

** See, e.g. Key Dep. Tr. 70, 89-90.

*** See Groth Dep. Tr. 64.

**** See Higgenbothan Dep. Ex. 2, Firestone, "Etiology of Chick Edema Disease".

***** See Higgenbothan Dep. Tr. 102.

plant which revealed the presence of dioxin as an extremely potent acnegen in the manufacturing process of 2,4,5-T.*

In 1963 personnel at the National Cancer Institute were aware of the presence of dioxin in 2,4,5-T and that liver and skin problems were associated with the manufacturing process of 2,4,5-T.**

In December 1966 or January 1967, Mr. Robert Cox of the Weapons Development and Engineering Laboratories at Edgewood, was informed by Monsanto about dioxin and chloracne associated with 2,4,5-T production while investigating the Weldon Springs Project.***

Furthermore, in 1965 Dr. Charles Minarik, Chief of the Crops Division, Chemical Biological Research Agency, Fort Detrick, knew of chloracne problems associated with the manufacturing process of 2,4,5-T.****

Based on the information discussed above, it is clear that the military and other Government units attempted to coordinate efforts to develop more complete knowledge

* See also Birmingham Dep. Ex. 26, Polland, Smith, Metter, Possick, "A Health Survey of Workers in a 2,4-D and 2,4,5-T Plant," March 1971.

** See Transcript of the deposition of Carl Baker, dated December 8, 1982 (not yet available).

*** See Transcript of the deposition of Robert Cox, dated December 8, 1982 (not yet available).

**** See Minarik Dep. Tr. 301-308.

about herbicides. Defendants are therefore entitled to continue discovery about other attempts by the Government to collect herbicide information and to discovery about the information such attempts uncovered.

IV. THE DISCOVERY SOUGHT BY DEFENDANTS
IS REASONABLY CALCULATED TO LEAD TO
THE DISCOVERY OF ADMISSIBLE EVIDENCE
REGARDING THE GOVERNMENT CONTRACT
DEFENSE

Defendants have provided the Government with names of additional potential witnesses concerning the Government Contract Defense. Implicit in these efforts is defendants' belief that the depositions sought are relevant to the subject matter of the Government Contract Defense and reasonably calculated to lead to the discovery of admissible evidence, which is the appropriate standard under Fed. R. Civ. P. 26(b)(1). Defendants have demonstrated in the preceding portions of this memorandum that discovery of many different Government agencies is appropriate under applicable principles of law regarding the imputation of knowledge within the Government.

Plaintiffs are free to pursue discovery under a different theory, if they prefer.* The point, however, is that the restrictions plaintiffs seek to place on defendants' discovery are inappropriate and unnecessary.

* Although Plaintiffs' Memorandum contains the words "A Discovery Plan" in its title, it is really no such thing. Plaintiffs merely argue that defendants should not be permitted to proceed as they have planned. Plaintiffs do not attempt to demonstrate factually that the discovery sought by defendants is irrelevant; they merely state that defendants should conduct discovery according to their "core-concentric circle" theory, starting first with "rational" or "responsible" Government decisionmakers.

Plaintiffs would have this Court impose the "core-concentric circle" discovery management plan suggested by Professor Brazil.* However, Professor Brazil's theories have yet to be implemented in the Federal Rules of Civil Procedure and even he acknowledges that "not all kinds of big cases are best managed in the same way." Brazil, *Improving Judicial Controls*, at p. 906. In fact, this approach is inappropriate for discovery on the Government Contract Defense. Further, as Professor Brazil points out, the core-concentric circle approach imposes limitations on unwilling parties that clash with at least the spirit of the current discovery rules.

Professor Brazil notes the "potential tension" between the core approach and Rule 26 (which permits discovery "relevant to the subject matter" as long as the discovery "appears reasonably calculated to lead to the discovery of admissible evidence," and which permits the use of any discovery device, in any sequence, subject to the parties' right to seek a protective order on motion for good cause). His conclusion is that:

it seems clear that the spirit of Rule 26 contemplates a discovery process in which the parties are for the most part left free to determine in what order and

* Brazil, Wayne D., "Improving Judicial Controls Over The Pretrial Development of Civil Actions: Model Rules for Case Management And Sanctions," 1981 American Bar Foundation Research Journal, 875-965 (hereinafter cited as "Brazil, *Improving Judicial Controls*"), cited at Plaintiffs' Memorandum p. 8 and discussed throughout.

by what means they will explore the whole universe of data that could lead to admissible evidence.

Id. at 910.

Notwithstanding Professor Brazil's suggestion that the core approach may be appropriate, it is not preferable here.^{*} Given the large number of agencies that have knowledge relevant to the Government Contract Defense, the passage of many years since the occurrence of critical events, the loss or destruction of relevant documents, and the unavailability of many important witness, this case probably presents the worst case for the core approach.

The plaintiffs need not be concerned that defendants' plan, in their judgment, is not the best possible plan. They can pursue discovery in any other manner they may deem more appropriate. After all, defendants have more at stake than plaintiffs if, through inefficient use of discovery, defendants are unprepared for trial on the Government Contract Defense. Moreover, as Professor Brazil himself maintains, it is not the kind of discovery management plan, but the

* Professor Brazil's article is intended to support proposed changes in the current rules governing discovery. While he suggests that the core approach is preferable in some cases, he acknowledges that other approaches may be more appropriate, depending on the circumstances, and that, in any event, the current rules give the parties a great deal of leeway. See id. at 906-911.

"fixing early and firm dates for the completion of trial preparation and for the trial itself [that] is probably the single most effective device thus far developed for encouraging prompt and well-focused case development." Brazil, Imposing Judicial Controls, p. 917 (emphasis in original). Of course, Judge Pratt has already done this, and, defendants respectfully suggest that the best way to proceed with and complete discovery is to get on with it.

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In the United States Court of Claims

TRIAL DIVISION

No. 14-79

(Filed: July 28, 1981)

PALMETTO BANK	)	Government loan guarantee;
	)	prudent and reasonable banking
v.	)	practices to obtain adequate
	)	security; rescission for mate-
THE UNITED STATES	)	rial misrepresentation.

A. Camden Lewis, attorney of record, for plaintiff.
William F. Austin and Barnes, Austin and Lightsey, of
counsel.

Lynn J. Bush, with whom was Assistant Attorney
General Alice Daniel, for defendant. Mary K. Osowski,
Department of Agriculture, of counsel.

OPINION*

MEROW, Trial Judge: In this case, plaintiff claims \$177,956.53, plus interest, a sum alleged to be owed to it by defendant pursuant to a loan guarantee contract executed by the United States, acting through the United States Department of Agriculture, Farmers Home Administration (FmHA), pursuant to the Emergency Livestock Credit Act of 1974, as amended (Pub. L. No. 93-357, July 25, 1974, 88 Stat. 391,

* The opinion and conclusion of law are submitted in accordance with Rule 134(h).

Pub. L. No. 94-35, June 16, 1975, 89 Stat. 213) (Act). Upon the borrower's default under its loan with plaintiff, FmHA refused to honor its guarantee contract to pay 90 percent of the bank's loss. The basis for FmHA's refusal to perform the contract with plaintiff was defendant's belief that plaintiff had failed to obtain adequate security and that the borrower had used some of the loan funds for unauthorized purposes.^{1/}

Defendant denies any liability to plaintiff, asserting that, as evidenced by the substantial difference between the appraised value of the security for the loan submitted during the guarantee application process and subsequent appraisals of the same security obtained after the borrower's default, plaintiff failed to fulfill its responsibility to protect the government's interests pursuant to 7 C.F.R. § 1845.15 (1976). Alternatively, defendant argues that, since both FmHA and the bank had a different understanding of what real property was being mortgaged to secure the emergency livestock (EL) loan, there was no meeting

^{1/} Defendant did not present any evidence at trial to support the FmHA's contention that the borrower had used loan funds for unauthorized purposes. In its post-trial brief, defendant stated it would not present any argument to press this issue before the court. Therefore, it is concluded that the amount in question, \$24,703.26, was expended for authorized purposes.

of minds and, hence, no enforceable contract of guarantee.

Plaintiff, in response, relies upon the order issued by this court in Security State Bank v. United States, Ct. Cl. No. 489-78 (Nov. 2, 1979), in urging that diminished value of the loan security does not affect the enforceability of the guarantee, since the bank determined the borrower's real property to be adequate security for the EL loan in accordance with "prudent and reasonable banking practices."

For the reasons discussed below, it is concluded that a valid contract of guarantee exists between the parties under which plaintiff is entitled to compensation for 90 percent of its reported loss, plus interest.

The borrower of the defaulted loan in issue was O-Double-T, Inc. (O-Double-T), a cattle ranching operation. In 1974, shortly after the Emergency Livestock Credit Act was passed, O-Double-T obtained a \$200,000 EL loan from plaintiff. FmHA, the agency within the United States Department of Agriculture responsible for administering the Act, guaranteed 80 percent repayment of the \$200,000 loan in the event of a loss. O-Double-T secured the EL loan with livestock and farm equipment.

In late 1975, Furman Ott, the president of O-Double-T, approached Dwight Patterson, a longtime business acquaintance and then president of Palmetto Bank, to discuss the feasibility of obtaining a second EL loan for \$250,000. Mr. Ott proposed to pay off the first EL loan, which was due shortly, with the proceeds of the second loan and use the remaining \$50,000 for specific farm improvements. The FmHA repayment guarantee on the second EL loan would be increased from 80 percent to 90 percent, pursuant to the recent 1975 amendments to the Act. Mr. Patterson relayed O-Double-T's proposal to the local FmHA offices.

The local FmHA officials, Clarence Rainey, the district supervisor, John Patterson, the Laurens County supervisor, and John Walker, chief of the FmHA farmer programs, considered O-Double-T's request and decided to approve a 90 percent guaranteed loan for \$250,000 if the borrower would offer a second mortgage on its farm as security in addition to the livestock and farm equipment already offered as security. In particular, they requested a second mortgage on the real property the borrower had mortgaged to the Federal Land Bank (FLB) in Spartanburg, South Carolina, in 1974. O-Double-T agreed to provide this additional security.

Once this general accord was achieved, O-Double-T began to submit all the required forms. On or about January 2, 1976, O-Double-T submitted to the local FmHA

office an application for guaranteed loan, the certificates of lender and loan applicant, the bank's note for \$250,000 payable to O-Double-T, the real estate mortgage taken by the borrower on its farm property, and the necessary financing statements. The application form indicated O-Double-T owned livestock valued at \$250,000, farm equipment valued at \$129,000 and a farm consisting of 459 acres valued at \$371,790. Mr. Patterson also submitted a request for contract of guarantee on the bank's behalf at the same time; the request listed the equity value^{2/} of the borrower's real property at \$200,000.

Throughout the entire application process and until the EL loan went into default, FmHA misunderstood what real property the borrower had pledged as security for the loan. The local FmHA officials were aware that the Ott farm had been mortgaged to the FLB and what property was included in that mortgage even before O-Double-T submitted its loan application. When these officials requested the \$250,000 EL loan be secured by the property mortgaged to FLB, they assumed that the security would include the entire farm, including the family residence, and that O-Double-T held title to all the property. Their understanding was not discouraged when they toured the

^{2/} Equity value is the difference between the value of the property and any prior liens on the property.

Ott farm with Mr. Ott and did not observe any physical demarcation between the family residence and the rest of the farm. Neither was this understanding altered by their knowledge that the security offered only encompassed 459 acres since they believed this acreage represented the entire farm. Even both mortgages, the FLB mortgage and plaintiff's mortgage, seemed, at first glance, to support the agency's understanding since descriptions of the mortgaged property were identical.

In fact, O-Double-T held title to 459 acres as reflected in its application for guaranteed loan, and Furman and Mildred Ott, as individuals, held title to the family dwelling and the 30 acres surrounding it. Although both mortgages have the identical property description, the mortgagors are different. The FLB mortgage lists "O-Double-T, Inc., Furman E. Ott and Mildred S. Ott" as the mortgagors and is signed by the Otts in both their corporate and individual capacity. Plaintiff's mortgage lists O-Double-T as the mortgagor and is executed by the Otts only in their corporate capacity. Also, the property, as described in the various appraisals obtained by the lenders, differs. An appraisal obtained for the FLB mortgage included 488.85 acres; plaintiff's

included 459 acres. The FLB mortgage appraisal included five farm buildings and a one-story rock constructed dwelling with six rooms and an enclosed porch. Palmetto's mortgage appraisal included a dwelling and farm buildings, without further description.

Mr. Patterson, plaintiff's representative throughout the loan application process, and Thomas Youngblood, the bank official charged with servicing O-Double-T's EL loan, were aware from the outset that the real property owned by O-Double-T did not include the Ott family residence and surrounding 30 acres, but they were not aware that FmHA did not realize this fact as well. The bank understood FmHA's request for a second mortgage on the property mortgaged to FLB as directed only to that mortgaged property owned by the EL loan applicant, O-Double-T. Consequently, throughout the loan application, FmHA personnel did not request, nor did the bank offer, any information regarding the acreage and precise description of the farm property mortgaged by O-Double-T to secure the 90 percent guaranteed loan. As a result of FmHA's misunderstanding, the officials did not request a personal guarantee from the Otts to repay the loan made to O-Double-T.

Once O-Double-T had agreed to mortgage its farm property to plaintiff as additional security for the \$250,000 loan, plaintiff proceeded to comply with the remaining loan guarantee requirements. Pursuant to 7 C.F.R. § 1845 (1976), plaintiff, as lender, was:

* * * responsib[le] for seeing that proper and adequate security is obtained and maintained in existence and of record to protect the interests of the lender and FmHA * * *.

To ensure that the property offered as security is adequate, the applicable regulations require that:

Property that will serve as security for the loan must be appraised by a qualified appraiser who is experienced in appraising the kind of property involved.

(a) Qualifications of appraisers. The lender will be responsible for determining that appraisers have the necessary qualifications and experience to make the appraisals. If the lender has any questions in this regard, it should check with FmHA before having an appraisal made.

(b) Appraisal fees or charges. The lender must determine that the fees or charges are reasonable.

(c) Appraisal reports. Real estate appraisal reports will be made on forms approved by the lender based on at least two comparable sales.

(7 C.F.R. § 1845.18).

Plaintiff asked Samuel Flemming to appraise O-Double-T's property. Mr. Flemming, a retired local farmer, was a self-taught appraiser who did most of the bank's appraisals for

rural farm properties. Besides his appraisal work, Mr. Flemming served on the bank's board of directors.^{3/}

Mr. Flemming's appraisal of the property was based upon his own inspection of the farm in late 1975 or early 1976 and the two required comparable sales. His appraisal described a 459 acre tract with 75 acres under cultivation, 300 acres of pasture land and 84 acres of timber. On the property he noted there was a dwelling, five barns and buildings, all of which were "frame and steel construction," and a grain bin. For the comparable sales he used two 1973 sales of local farm property, the Copeland, Stone & Wheeler property of 1,866.62 acres and the Rimer property of 1,076 acres. The Copeland property sold for \$600/acre and the Rimer property sold for \$557/acre. Mr. Flemming valued the O-Double-T acreage at \$1,000/acre, or \$459,000, because, in his opinion, it was "in much better shape" than either comparable sale. He valued the buildings at \$120,000 and the grain bin at \$6,000. His total appraisal value for the property was \$585,000.

In the spring of 1975, Furman Ott had, at his own cost, obtained an appraisal of the property by another local appraiser, M. H. Hunter, Jr. Prior to the Flemming appraisal Mr. Ott had sent the Hunter appraisal to plaintiff.

^{3/} The record shows that Mr. Flemming also owned stock in the Palmetto Bank. There is no indication, however, of how much of its stock he held or how long he had owned it.

The Hunter appraisal, which contained no comparable sales, valued O-Double-T's property at \$558,700. Plaintiff was also aware that FLB had appraised the entire Ott farm of 489 acres in 1974 before it approved the mortgage on the property. The manager of the Laurens County FLB office informed Mr. Patterson of the FLB appraisal value before the EL loan guarantee was approved, but did not forward a copy of it until sometime after the loan guarantee was granted. The FLB valued the entire property at \$350,000 (\$450/acre).

When Mr. Patterson calculated the property's equity value, he used Flemming's appraisal value of \$585,000. He had determined that Flemming's appraisal was reasonable in light of Flemming's past performance record with the bank and the proximity in valuation between Flemming's appraisal and Hunter's appraisal.^{4/} After subtracting the balance owing on the FLB mortgage (\$253,512) from \$585,000, the equity value of O-Double-T's property was in excess of the \$200,000 amount reflected on plaintiff's request for contract guarantee. The amount reported to FmHA was intentionally lower than necessary because the bank, as a

^{4/} It is uncertain what consideration, if any, Mr. Patterson gave to the FLB appraisal value of \$350,000 for the entire farm. When questioned about it at trial by defendant's counsel, Mr. Patterson responded that, by the time the information had been received, "we had our own appraisal" and "[w]e were satisfied with our appraisal."

practice, "never lend[s] the full value of * * * the equity appraisal. * * * It's always a percentage, usually 75 to 80 percent. * * *" Plaintiff believed that the \$200,000 equity value on O-Double-T's property, when added to the livestock and farm equipment FmHA had approved earlier as security for the first \$200,000 EL loan, would provide adequate security for an increased EL guaranteed loan of \$250,000.

The local FmHA officials, in accordance with FmHA's policy and practice, totally relied upon the lender; they did not question the accuracy of Flemming's appraisal and they did not perform their own appraisal of the property during the application process. Once O-Double-T had given a second mortgage on its property to plaintiff as additional security for the guaranteed loan, the FmHA officials believed the loan was adequately secured. On March 1, 1976, several months after having received O-Double-T's application, the local FmHA director signed a contract of guarantee. The contract promised that FmHA would pay 90 percent of the:

* * * difference between the total amount of principal and interest owed on any Emergency Livestock loan advances * * * and the then current market value of loan security less the amount owed on any prior liens. * * *

After the contract had been signed, the FmHA county supervisor directed plaintiff to release the entire \$250,000 for O-Double-T's use: \$200,000 was used to satisfy O-Double-T's first EL loan and \$50,000 was deposited in O-Double-T's checking account with plaintiff.

On January 21, 1977, shortly after the first loan payment had come due, the loan went into default and a liquidation of the loan's security was begun. The proceeds from the sale of the borrower's cattle and farm equipment totalled \$96,539.95. This sum was applied against the loan. An auction held to sell the real property resulted in a "no sale" when the highest bid received, \$550/acre, was refused by O-Double-T since the proceeds would have been insufficient to satisfy the outstanding balance on the first mortgage held by FLB.

FmHA, concerned by the drastically reduced market value of O-Double-T's property, decided to investigate local farm property values and particularly to have the O-Double-T property reappraised. Ralph Moore, a FmHA farmer program specialist, appraised the Ott property twice. The first appraisal, made in the spring of 1977, included 489 acres and the family residence. It valued the property at \$325,000. The second appraisal, made in 1978, after substantial correspondence had passed between the parties,

appraised only the 459 acres owned by O-Double-T at \$211,140.^{5/}

Between June 1, 1977 and May 25, 1978, plaintiff filed no less than four "Report of Loss" statements with FmHA. FmHA consistently reported that, in its opinion, the March 1, 1976 contract of guarantee was unenforceable because loan funds had been used for unauthorized purposes and plaintiff had failed to obtain the required security. On one occasion, it also alleged that the property expected as security had not, in fact, been secured. Plaintiff appealed two of the state FmHA's rejections of its loss claim to the FmHA administrator in late 1977. The administrator's response, issued in early 1978, determined that only the 459 acres owned by O-Double-T would be valued and applied against the loss claim. He also stated that FmHA would not reimburse plaintiff for losses due to the bank's alleged failure to obtain the required security. "Loss" was defined as the "difference between the present value of real estate and the value that FmHA relied upon in issuing the guarantee," or "at least \$453,512," the sum of the outstanding balance of the FLB mortgage at the time of O-Double-T's application plus the

^{5/} A substantial portion of the difference between Moore's two appraisal values can be attributed to the damage the property sustained when it was struck by a storm which occurred during the intervening period.

\$200,000 equity value of the property reported by plaintiff in its request for contract guarantee. He requested that plaintiff submit another amended report of loss.

In the aftermath of the administrator's decision, both parties negotiated and agreed upon a market value of \$262,000 for O-Double-T's 459 acres. Plaintiff also attempted to comply with the FmHA administrator's directives in its third and fourth^{6/} "Report of Loss" statements. Yet, despite these changes, FmHA continued to deny plaintiff's loss claim on the ground that the contract of guarantee was unenforceable. When FmHA denied plaintiff's last "Report of Loss" statement filed on or about May 25, 1978, plaintiff filed its claim for breach of contract against the United States in this court. To date, no amount of the claim has been paid to plaintiff.

The ultimate question this court must resolve is whether plaintiff's contract of guarantee is enforceable. If so, defendant must compensate plaintiff for 90 percent of the losses incurred as a result of O-Double-T's default.

6/ In plaintiff's third "Report of Loss" it eliminated from the unpaid loan balance the amount of loan funds allegedly used for unauthorized purposes and listed as the fair market value of the security real property the amount agreed upon by the parties. In plaintiff's fourth "Report of Loss" it still continued to value the real property at \$262,000, the amount agreed upon by the parties.

Defendant does not deny that plaintiff submitted, in a timely fashion, all the forms required by FmHA to obtain an EL loan guarantee. Nor does the government deny that, on March 1, 1976, FmHA entered into a contract of guarantee with plaintiff for the \$250,000 EL loan plaintiff gave to O-Double-T. FmHA also does not accuse plaintiff of negligently servicing the loan before default or during the liquidation process. But the government does dispute the enforceability of the guarantee by challenging the adequacy of the loan's security and the level of care the bank exercised in obtaining it. In doing so, it relies exclusively upon the dramatic decline in the value of the loan's real property security as the basis for its case in chief. This one fact alone, it asserts, is dispositive in establishing that plaintiff was negligent in the exercise of its duty of care, that plaintiff failed to discharge a condition precedent of the contract of guarantee, and that plaintiff was negligent in misrepresenting a material fact.

To find a party negligent, and liable for such negligence, it must first be established that the negligent party

owed a duty of care to the one injured. First American Bank, Henrietta v. SBA, 429 F.2d 280, 286 (5th Cir. 1970).

In usual guaranty arrangements, the creditor is not a party to the guaranty contract and therefore owes no duty of care to the guarantor other than to abstain from fraudulent conduct.^{7/} Id. at 287. The regulations governing FmHA's EL line of credit guarantees, contained in 7 C.F.R. § 1845, attempt to delineate the responsibilities of both the lender and FmHA regarding security. At the outset, the regulations require that the security "must be adequate, in the opinion of the lender and FmHA, to assure repayment of each EL loan advance" (7 C.F.R. § 1845.14(d) (emphasis added)). However, it is the "lender" who is:

* * * responsible for seeing that proper and adequate security is obtained and maintained in existence and of record to protect the interests of the lender and FmHA.

(7 C.F.R. § 1845.15).

Failure to obtain the "required security" renders the contract of guarantee unenforceable to the extent such

^{7/} The government has not alleged, either at trial or in its briefs, that plaintiff engaged in any manner of fraudulent activities in connection with the guarantee in issue. Therefore, it need not be discussed in this opinion.

failure is responsible for any loss. 7 C.F.R. § 1845.13(c). FmHA's responsibility regarding the guaranty's collateral is described as a "Condition precedent to issuance of Contract of Guarantee." It states, in pertinent part, that FmHA officials must:

evaluate the material submitted and obtain any other information it deems necessary to determine:

(1) Whether the applicant appears to be eligible; loan funds have been or will be used for authorized purposes only; the amount of the loan, interest rate, repayment period and schedule, insurance requirements, plan of operations, line of credit agreement, any appraisal or other authorizes fees or charges, and any late payment charges appear to be satisfactory; the loan appears to be sound; the lender plans to service the loan properly; and there is a reasonable probability of accomplishing the loan purposes and collection of the loan.

(7 C.F.R. § 1845.26(a)(1) (emphasis added)).

In an earlier case, Security State Bank v. United States, Ct. Cl. No. 489-78 (order of Nov. 2, 1979), the government had relied upon only § 1845.13(c) and § 1845.15 to support its position that a guarantee was unenforceable against FmHA where the lender had failed to obtain and maintain security adequate to cover the amount of indebtedness, "whether or not culpably." This court, in its order denying the government's motion for summary judgment, rejected defendant's interpretation as "untenable." Instead, the court found the language of § 1845.15:

* * * is susceptible to the interpretation that the required security is to be obtained and maintained according to prudent and reasonable banking practice, and we do so construe it. It is not fairly to be construed as requiring the lender to warranty defendant that the security is adequate.

^{8/}
(Slip op. at 4, emphasis added).

Under the principles set forth in Security State Bank, supra, whether Palmetto Bank failed to obtain and maintain the required security for the loan depends upon whether Palmetto had determined the adequacy of the collateral in accordance with "prudent and reasonable banking practice[s]." In Security State Bank, supra, the government's adequate security argument was characterized as "in the nature of

8/ Clearly, there are similarities between Security State Bank, supra, and the case at bar. Security Bank had sought a FmHA EL guarantee of \$115,000 for the loan which it intended to provide to a cattle rancher who had developed a good banking relationship with the bank over the years. The rancher's cattle, the loan security, were counted by the bank on several occasions, at least one time with the help of a FmHA official, before the guarantee was approved. FmHA made no independent inquiry to verify the ownership or the number of cattle offered as loan security, even when its employee participated in examining the animals. When the rancher defaulted, the bank took possession of the cattle and attempted to sell them. All of the cattle, however, did not belong to the debtor and, as a result, the sale proceeds were insufficient to cover the loss on the loan. When the bank submitted a loss claim for 90 percent of its loss on the loan, FmHA denied all liability on the ground that the bank had not obtained and maintained security roughly equivalent to the amount of the loan. Security State Bank, supra, to the extent applicable to the facts of the instant case, constitutes controlling precedent. See Northern Helex Co. v. United States, 225 Ct. Cl. ___, 634 F.2d 557 (1980).

an affirmative defense." Accordingly, it is concluded that, to prevail in its position that the guarantee is not enforceable, defendant would have had to establish that plaintiff did not conclude the loan was adequately secured in accordance with "prudent and reasonable banking practice." Defendant has not accomplished this requirement. Plaintiff discussed O-Double-T's request for an increased loan with local FmHA officials and was told a guarantee would be forthcoming if the borrower's real property was offered as security. In accordance with the applicable regulations, plaintiff had an appraisal made of the borrower's real estate. The appraiser chosen to make the valuation was someone the bank had used regularly to appraise local rural property and whose work product had been relied upon consistently without incident.^{9/}

^{9/} Given the adverse consequences to Palmetto in the event of a failure to secure adequate security, Mr. Flemming's service upon the bank's board of directors and ownership of Palmetto Bank stock is not considered, in this case, to support any conclusion that his use as an appraiser by Palmetto was not a prudent practice. His position with the bank and his ownership interest would logically indicate that he would be more concerned than an independent appraiser might have been in valuing the property accurately to ensure the bank's interests were sufficiently protected.

Plaintiff compared its appraiser's report with an appraisal of the same property performed during the same time period by another reputable local appraiser whose valuation of the property was close to the amount reached by the bank's appraiser. It must be noted that this other appraisal contained no comparable sales and was performed at the borrower's request and expense. Nevertheless, plaintiff did not report the full equity value established by its appraisal, but discounted it to \$200,000 in accord with its practice of lending only a percentage (usually 75 to 80 percent) of equity value. In the instant case, the loan was only some 60 percent of the appraisal equity value. The record establishes that plaintiff reasonably believed that the borrower's real property, albeit at a much lower equity value, plus the livestock and farming equipment^{10/} already serving as security, would adequately protect both its own interest and that of FmHA.

^{10/} It should be noted that at no time during the proceedings did the government question the significant

Conversely, defendant argues that plaintiff failed to exercise reasonable care and due diligence when it submitted the appraisal performed by Mr. Flemming to FmHA and represented to FmHA that the additional security of real property adequately protected all interests. As noted earlier,^{11/} the basis for this conclusion is the dramatic difference between the property's appraised value before the loan guarantee was approved and its appraised value after the borrower's default, at a time when the government's expert witness insisted local farmland values were not fluctuating significantly. In particular, defendant relies upon the bank's president's

10/ (cont'd)

discrepancy between the valuation of the livestock and farming equipment during the application process and its actual resale value upon liquidation as part of its argument concerning plaintiff's failure to obtain the required security. The borrower valued this security at \$379,000 in its application for a loan guarantee. Plaintiff, in its request for contract guarantee, valued this property at \$173,000. Upon liquidation, the security yielded only \$96,539.95, all of which was applied against the outstanding principal balance of the loan. Upon first impression, it would appear that the significantly lower market value of the borrower's personal property equally contributed to the loss plaintiff incurred on the EL loan.

11/ See pp. 2, 12, supra.

supposed knowledge of local farmland values and his knowledge of the FLB appraisal of the entire Ott farm, valuing it at \$350,000 in 1974, to support its contention that plaintiff knew or should have known that O-Double-T's property was only worth approximately one half of its appraised value.

Defendant's analysis of these two factors warrants scrutiny. The record reflects Mr. Patterson's knowledge of local farmland values amounted to a combination of a "general sense" of the "average values" in the community after 48 years of working in Laurens County and "using common sense." Reliance on his common knowledge of local property can be inferred from his decision to accept a higher value for the property in light of rising real estate prices, but then to reduce the equity value more than the usual 20-25 percent reduction to guard against over-inflation.

The significance which defendant argues Mr. Patterson should have attached to the FLB appraisal is undermined by defendant's own evidence. The government's expert witness, Philip Adams, testified that the USDA index of farm real estate for South Carolina reflects an upward trend in property values from March 1976, when the guarantee was approved, to 1978. In fact, the index, which was admitted into evidence, shows a significant upward trend in property values beginning in November 1973. Yet, despite this upward trend, FmHA's appraisal of the entire Ott Farm performed in March 1977 is

\$25,000 less than the FLB appraisal performed three years earlier in February 1974. The disparity between the two government appraisals clearly demonstrates that, in the final analysis, an appraisal report is simply the author's opinion.

In hindsight, it is apparent that the Flemming appraisal was wrong and that O-Double-T's property was not worth \$1,000/acre. If, when submitted, plaintiff knew or should have known it was inaccurate but still relied upon it in determining the adequacy of the required security, then it failed in its duty to exercise prudent and reasonable banking practices. Plaintiff has presented a prima facie case by establishing that it took all normal banking precautions in evaluating the borrower's application and other required papers and that FmHA approved and signed the contract of guarantee. United States v. Irby, 517 F.2d 1042, 1043 (5th Cir. 1975); Southern Glass & Builders Supply Co. v. United States, 398 F.2d 109, 110 (5th Cir. 1968). Defendant's evidence of plaintiff's "general knowledge" of local property values and the two-year-old FLB appraisal report is not deemed to be sufficient to carry its burden of proof when considered in light of its own responsibility to evaluate each applicant's property appraisals and its special relationship with the FLB.

Both the applicable regulations and Security State Bank, supra, make clear that plaintiff owed a duty of care to FmHA in the handling of EL loan applications. In fact, the expectation that lenders will use reasonable care in conducting such inquiries appears to be a routine obligation in most federal guarantee programs. See American Bank of San Antonio v. United States, Ct. Cl. No. 569-77 (slip op. of July 16, 1980) (federal insured student loan program); Tree Farm Development Corp. v. United States, 218 Ct. Cl. ___, 585 F.2d 493 (1978) (the New Community Development Corporation's loan guarantee program). However, the standard of due care required, or the degree of reasonableness involved, depends directly upon the government's access to the material facts involved in each transaction. The greater the government's need to rely upon the lender's representations, the higher the standard of care to which the lender will be held. In First National Bank, Henrietta, supra, 429 F.2d at 288, an action against SBA to enforce a small business loan guarantee, the court considered the question of the guarantor's reliance on the lender in determining whether the lender breached its duty of care. The factors the court

considered relevant to its determination that the bank had failed to use reasonable care in providing necessary information to the government were that plaintiff was the only party in "proximity to local affairs," the only party with access to records which could reflect upon the soundness of the loan, and was aware that SBA was relying upon its business judgment. Id.

As in First National Bank, Henrietta, supra, a determination of whether the lender failed to exercise reasonable care and whether the lender misrepresented to the government a material fact is also dependent, in large part, upon whether defendant's reliance was justified. In the case at bar, defendant has repeatedly stated that FmHA relied exclusively upon plaintiff's representations regarding the adequacy of the security in determining whether to enter into the contract of guarantee.

Generally, total reliance upon one party's representations is not justified when knowledge of the material facts are equally available to both parties. 12 Williston, Contracts § 151B, pp. 490-91. See also Andrus v. St. Louis Smelting Co., 130 U.S. 643, 647 (1889). In the context of government contract litigation, this principle has been

integrated into the superior knowledge doctrine and applied in mistake-in-bid cases. The superior knowledge doctrine, set forth in Helene Curtis v. United States, 160 Ct. Cl. 437, 312 F.2d 774 (1963), provides that a contractor may prevail against the government if it can be established that the agency involved intentionally withheld superior knowledge from the contractor which the contractor could not be expected to obtain from other sources. The contractor may not prevail, however, "if the contractor can reasonably be expected to seek and obtain the facts elsewhere." H. N. Bailey & Assoc. v. United States, 196 Ct. Cl. 166, 178, 449 F.2d 376, 383 (1971). The government's "duty to advise * * * does not arise where the information is equally available to [the contractor]" (emphasis added). Donald M. Drake Co. v. United States, 194 Ct. Cl. 549, 555, 439 F.2d 169, 172 (1971). See also, Ambrose-Augusterfer Corp. v. United States, 184 Ct. Cl. 18, 38, 394 F.2d 536, 547 (1968); T. F. Scholes, Inc. v. United States, 174 Ct. Cl. 1215, 1226, 357 F.2d 963, 970 (1966); National Concrete and Foundation Co. v. United States, 170 Ct. Cl. 470, 476 (1965); Leal v. United States, 149 Ct. Cl. 451, 460, 276 F.2d 378, 383 (1960).

The contractor's actual knowledge is irrelevant; constructive knowledge is sufficient to eliminate the government's obligation to inform the contractor if the contractor is not disabled from obtaining the same or more complete information on the subject. Aerjet-General Corp. v. United States, 199 Ct. Cl. 422, 434, 467 F.2d 1293, 1301 (1972).

Likewise, in mistake-in-bid cases, it has been held a contractor may recover if the responsible government officials "knew or should have known of the mistake at the time the bid was accepted." Wender Presses, Inc. v. United States, 170 Ct. Cl. 483, 485, 343 F.2d 961 (1965), and cases cited therein. To determine what responsible officials "should have known," the test requires only that the government officials have access to "enough" data to raise the "presumption of error" in their minds and invoke their duty to make inquiry. It does not require the government know with certainty all the necessary details. Wender Presses, supra, 170 Ct. Cl. at 486; Micheal Chernick v. United States, 178 Ct. Cl. 498, 504, 372 F.2d 492, 496 (1967).

The regulations implementing the EL guarantee program impose upon FmHA a duty to evaluate each application and its required enclosures and to make further inquiries, if necessary, to determine whether the accompanying appraisals

a dwelling and five barns and buildings; it describes the dwelling as an occupied one-story rock building with six rooms, three of which were bedrooms and an enclosed porch. The appraisal plaintiff had conducted and submitted to the FmHA officials included only 459 acres. It listed a dwelling and five barns and buildings as constructed on the property. That portion of the appraisal asking the number of rooms, number of baths and type of heating system of dwellings was left blank. Nowhere on the form was a residential dwelling of the type described in the FLB appraisal mentioned.

11. Actually, O-Double-T holds title to 459 acres and Furman and Mildred Ott, as individuals, hold title to the family residence and 30 acres surrounding it.

12. Dwight Patterson, the bank's president, was aware from the beginning of the loan application process that the property owned by O-Double-T did not include either the family residence or the surrounding 30 acres, and that this property was owned by the Otts, as individuals. Having this knowledge, he understood the FmHA request for a second mortgage on the real property originally mortgaged to FLB as directed only to that property included in the FLB mortgage which was owned by the named borrower of the 90 percent guaranteed loan--O-Double-T.

13. Bank officials, particularly Mr. Patterson and Thomas Youngblood, were unaware of FmHA's expectation that the entire Ott farm would be mortgaged as security for the 90 percent guaranteed loan in addition to the livestock and farm equipment.

14. As a result of this misunderstanding, during the entire loan application process, the bank did not advise FmHA officials of the extent and the precise acreage of the farm property O-Double-T had mortgaged to secure the EL loan. Likewise, the FmHA officials, unaware of their misunderstanding, never inquired of either plaintiff or the Otts whether the property mortgaged included the family residence and all of the land surrounding it. As a result of this misunderstanding, FmHA officials considered the \$250,000 loan was adequately secured and did not require a personal guarantee of repayment by the Otts. Repayment of the first 80 percent guaranteed loan was also not personally guaranteed by the Otts, despite the apparent lack

of adequate security.^{1/}

15. After O-Double-T had agreed to comply with FmHA's request to secure the guaranteed loan with a second mortgage on the property mortgaged to FLB, plaintiff proceeded to have the real estate appraised pursuant to the requirements of 7 C.F.R. § 1845 (1976). Section 1845.15 squarely places on the lender the "responsibility for seeing that proper and adequate security is obtained and maintained in existence and of record to protect the interests of the lender and FmHA." To ensure the security is adequate, § 1845.18 requires the lender to have the property appraised as follows:

Property that will serve as security for the loan must be appraised by a qualified appraiser who is experienced in appraising the kind of property involved.

(a) Qualifications of appraisers. The lender will be responsible for determining that appraisers have the necessary qualifications and experience to make the appraisals. If the lender has any questions in this regard, it should check with FmHA before having an appraisal made.

(b) Appraisal fees or charges. The lender must determine that the fees or charges are reasonable.

(c) Appraisal reports. Real estate appraisal reports will be made on forms approved by the lender based on at least two comparable sales.

As the regulation makes clear, the bank is responsible for ensuring an appropriate appraisal is performed.

16. The bank chose Samuel Flemming to perform the appraisal. Mr. Flemming was a retired farmer with no formal appraisal training. However, since approximately 1950 he had been appraising rural farm properties for state authorities, the FmHA, and banks. Most of his appraising work has been done for the plaintiff, Palmetto Bank. At the same time, Mr. Flemming served as a member of plaintiff's board of directors and owned stock in the bank.

^{1/} See finding 3.

17. Mr. Flemming personally examined the 459 acres of the Ott farm in late 1975 or early 1976 and submitted his appraisal to plaintiff around the first part of 1976. It described the acreage as 75 acres under cultivation, 300 acres in pasture land, and 84 acres in timber land. As required, he included two comparable sales. These were the Copeland, Stone & Wheeler property of 1,866.62 acres, sold on November 19, 1973 for \$1,119,972 (\$600/acre), and the Rimer property of 1,076 acres which sold for \$599,500 on May 24, 1973 (\$557/acre). In his opinion, the Ott farm was "in much better shape" than either of these two properties; in fact, he considered it was one of the "best farm lands that [he] had ever been on." Based upon the information gathered from these sales and his personal examination, Mr. Flemming valued the tenant house and barns on the property at \$120,000, valued the grain bin on the property at \$6,000, and valued the 459 acres at \$459,000 (\$1,000/acre), for a total value of \$585,000.

18. When plaintiff received Mr. Flemming's appraisal, Mr. Patterson, the bank's president, compared it with another appraisal of the property performed in the spring of 1975 by M. H. Hunter, Jr., another well-known appraiser, at Mr. Ott's request and cost. Mr. Hunter's appraisal valued the same 459 acres, including the buildings contained thereon, at \$558,700. The appraisal, however, contained no comparable sales.

19. In considering the Flemming appraisal, Mr. Patterson was also aware that the Ott farm had been appraised in 1974 by the FLB before it approved the first mortgage on the property. The manager of the FLB's Laurens office informed Mr. Patterson of the appraised value of the property, without any further details, before the guaranteed loan had been approved. Mr. Patterson did not receive a copy of this appraisal until after the loan had been approved. The 1974 FLB appraisal valued the entire Ott (O-Double-T) farm of 489 acres at \$350,000 (\$450/acre).

20. The proximity in value of the Hunter appraisal to the Flemming appraisal, coupled with Mr. Patterson's own sense of local farmland values, led him to believe the appraisal had been performed satisfactorily and the value was a fairly accurate approximation of the property's market value.

21. The plaintiff bank then calculated equity value of the Ott farm, the amount available as security for a loan after subtracting prior liens from the market value of the property. It subtracted \$253,512, the amount owing on

the FLB mortgage at the time of the guaranteed loan application, from the appraised value of the property by Mr. Flemming, \$585,000, and then reduced this amount by approximately 40 percent to get an equity value of \$200,000 against which the bank would lend. The bank had reduced the equity value of the Flemming appraisal in accordance with its practice "never [to] lend the full value of * * * the equity appraisal." It "always" reduced an appraisal by 15 to 20 percent. This value was reported to FmHA by the bank and FmHA officials understood the figure to represent the bank's "stat[ement] that they were going to provide a security in the form of real estate equity of \$200,000."

22. Based upon the Flemming appraisal of the O-Double-T property, plaintiff believed it had obtained adequate security for the larger EL guaranteed loan requested by O-Double-T.

23. The FmHA officials involved also considered the real estate value of O-Double-T's farm, as represented by the Flemming appraisal and plaintiff's request for contract guarantee was adequate security for the loan. In accordance with FmHA's policy and practice, it did not question the accuracy of the appraisal submitted by the lender bank and it did not perform its own appraisal of the O-Double-T property.

24. After holding O-Double-T's loan application for approximately three to four months, FmHA approved the loan guarantee. On March 1, 1976, Clarence Rainey, the FmHA district director for Laurens County, signed a "Contract of Guarantee" with plaintiff which stated:

In consideration of making loan advance(s) by the Lender within the line of credit ceiling pursuant to the Line of Credit Agreement, the United States of America acting through the Farmers Home Administration of the United States Department of Agriculture (herein called "FmHA"), pursuant to the Emergency Livestock Credit Act of 1974 (P.L. 93-357), as amended, does hereby agree that * * * it will pay to the Lender who holds the note(s) for said advance(s) (or assumption agreement) covered by this contract:

a. Ninety percent of the difference between the total amount of principal and interest owed on any Emergency Livestock loan advances * * * and the then current market value of loan security less the amount owed on any prior liens determined at the time a decision is made by the lender or FmHA that action * * * is necessary for collection of the loan(s) under the terms of the security instruments and this Contract of Guarantee. * * *

25. Once the loan guarantee was approved, John Patterson, FmHA county supervisor, instructed plaintiff to disburse the funds to O-Double-T. Plaintiff, at O-Double-T's request, used \$200,000 of the proceeds to satisfy O-Double-T's first FmHA guaranteed loan obligation and deposited the remaining \$50,000 into O-Double-T's checking account at the Palmetto Bank.

26. The borrower was to repay the loan in seven annual payments of \$35,714.29 plus accrued interest on January 2 of each year.

27. On or about January 21, 1977, the loan went into default and the liquidation of the borrower's security was commenced.

28. The cattle owned by O-Double-T were sold for \$31,679.95; the sale of farm equipment yielded \$61,860 and in May 1976 another piece of equipment was sold for \$3,000. The proceeds, totalling \$96,539.95, were applied against the loan.

29. An auction held to sell the real property resulted in a "no sale" inasmuch as the highest price offered, \$252,450 (\$550/acre), was insufficient to satisfy the amount still owing on the first mortgage to FLB. The "no sale" decision was made by Furman Ott, as president of O-Double-T.

30. The real property involved was still owned by O-Double-T at the time of trial; it had not as yet been sold.

31. Shortly after the "no sale" auction, plaintiff requested the Laurens Board of Realtors perform a second appraisal of the O-Double-T property for the purpose of completing the "Report of Loss" statement required by FmHA before it fulfilled its payment guarantee to the lender.

32. FmHA also proceeded to have the property re-appraised and an investigation conducted to determine whether farm property values had deteriorated measurably since FmHA had signed the contract of guarantee in March 1976. John Walker, FmHA chief of farmer programs, asked Ralph Moore, a farmer program specialist, to do a market value appraisal of the Ott (O-Double-T) property. Mr. Moore performed two appraisals. The first appraisal, performed in the spring of 1977, involved 489 acres,

including the family dwelling and the 30 acres surrounding it, and valued the property at \$325,000 (\$435/acre). The second appraisal, performed in 1978, included 459 acres and valued the property, as of that time, at \$211,140 (\$430/acre). During the intervening period between appraisals, a storm had severely damaged the property. In Moore's opinion, farm property values in the area had not drastically changed between 1974 and 1978.

33. In conducting both appraisals, Mr. Moore, a formally trained farm real estate appraiser, utilized normal appraisal procedures. He obtained plats and aerial maps of the property, personally inspected the property, and searched for the most recent local comparable sales and made appropriate adjustments.

34. The first "Report of Loss" statement submitted by plaintiff to FmHA on or about June 1, 1977 valued the real property owned by the borrower at \$325,000.

35. Plaintiff's second "Report of Loss" statement submitted to FmHA on or about June 17, 1977 valued the same real property owned by O-Double-T at \$222,500.

36. On July 14, 1977, the FmHA South Carolina state office informed plaintiff that, after reviewing its June 17, 1977 "Report of Loss," "it is our determination that the aforesaid June 17, 1977 'Report of Loss,' as submitted, does not represent a loss covered by the March 1, 1976 Contract of Guarantee, and thus, is not enforceable." The basis for this conclusion was FmHA's belief that "the loan funds were apparently not used for planned purposes" and that the "property listed on the Appraisal and on the Request for Contract of Guarantee as an inducement for the United States to execute a Contract of Guarantee * * * was not secured."

37. The FmHA twice reiterated its position that the contract of guarantee of March 1, 1976 was unenforceable. The first time, on September 8, 1977, was in response to a letter from plaintiff to the FmHA; the second time, on September 21, 1977, was in response to a meeting held on September 16, 1977, at plaintiff's request.

38. On November 3, 1977, plaintiff appealed the state FmHA office's rejection of plaintiff's loss claim regarding O-Double-T to the FmHA administrator, Gordon Cavanaugh.

39. On January 17, 1978 Mr. Cavanaugh responded to plaintiff's appeal. He decided that the loss claim would be based upon the market value of the 459 acres owned by O-Double-T, as agreed upon by plaintiff and the FmHA. He also determined that:

FmHA must deny partial liability for any loss caused by unauthorized use of loan funds and losses resulting from the bank's failure to obtain the required security.

The measure of the amount of unobtained security was to be determined, according to Mr. Cavanaugh, by the "difference between the present value of the real estate and the value that FmHA relied upon in issuing the guarantee," after considering market trends and allowing for ordinary wear and tear on the property. Mr. Cavanaugh calculated the value FmHA relied upon in issuing the guarantee as "at least \$453,512." This figure represents the amount of the FLB mortgage, \$253,512, plus the \$200,000 equity value plaintiff reported in its request for contract of guarantee. Mr. Cavanaugh concluded his letter by requesting plaintiff submit a "revised" "Report of Loss" which comported with his above instructions.

40. Plaintiff and FmHA, after some negotiation, agreed upon a market value of \$262,000 for the 459 acres owned by O-Double-T.

41. Shortly thereafter, on April 25, 1978, plaintiff submitted the requested amended "Report of Loss." This report reflected the value of the real property as \$262,000 and eliminated \$24,703.26, the amount of loan fund the FmHA had alleged was used for "unauthorized purposes" from the loss claim. The report stated FmHA owed \$150,860.13 to plaintiff under the terms of the guarantee.

42. By letter dated May 5, 1978, the state FmHA office, after considering plaintiff's third "Report of Loss," denied plaintiff loss claim of \$150,860.13. The basis for the denial was stated as follows:

[I]t is our opinion the revised Report of Loss as submitted does not represent a loss covered by the March 1, 1976, Contract of Guarantee and, thus, is not enforceable in that Farmers Home Administration does not have the responsibility to pay for any loss resulting

from failure of a lender to obtain security for the value stated in the appraisal of the Request for Contract of Guarantee.

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43. As noted earlier, 7 C.F.R. § 1845.15 (1976) confers upon the lender the responsibility to obtain and maintain adequate security for the guaranteed loan. Section 1845.26 of the applicable regulations, entitled "Conditions precedent to issuance of Contract of Guarantee," however, makes it incumbent upon the FmHA to "evaluate the material submitted and obtain any other information it deems necessary to determine "* * * [w]hether * * * any appraisal or other authorized fee or charges * * * appear to be satisfactory."

44. FmHA was aware that the FLB held the first mortgage on the property owned by O-Double-T and the FLB's pattern and practice to have an appraisal of property performed before it would approve any mortgage. In fact, the FLB did have the 489 acres belonging to both O-Double-T and the Otts appraised in 1974. The FLB, a cooperative bank now funded by private sources, is supervised by the Farm Credit Administration, an independent agency of the executive branch of the United States government. As such, FmHA has entered into an agreement with the FLB whereby any and all FLB appraisal reports are made available to FmHA upon its request. Despite this arrangement, at no time prior to O-Double-T's default on the guaranteed loan did any involved FmHA official request a copy of the 1974 FLB appraisal of the Ott farm.

45. On May 25, 1978, plaintiff filed its last "corrected" "Report of Loss" which shows FmHA owing \$177,956.53 to the plaintiff under the terms of the guarantee as of that date. Plaintiff computed this figure as follows: (a) it subtracted from the unpaid principal balance, \$250,000, the gross proceeds generated by the cattle and equipment sales, \$96,539.95, which resulted in the outstanding unpaid balance on the loan of \$153,460.05; (b) it then added to this figure the accrued interest owing on the loan for the period January 1, 1976 through May 25, 1979, \$44,269.42, to get the subtotal amount of \$197,729.47; (c) to this figure it added the outstanding balance owing on the FLB mortgage, \$279,958.12, to get \$477,687.59; (d) then the agreed upon value of the O-Double-T property, \$262,000, was subtracted from \$477,687.59 to get the basic loss of \$197,729.47. The figure \$177,956.53 is

90 percent (the amount of the FmHA guarantee) of the basic loss amount, \$197,729.47.

46. Plaintiff is charging defendant a 9 percent rate of interest per year on the outstanding unpaid principal balance on the loan of \$153,460.05. The daily rate of interest is \$38.37.

47. Plaintiff has requested FmHA pay it the \$177,956.53, plus interest, reflected in its May 25, 1978 "Report of Loss" pursuant to the terms of the contract of guarantee FmHA executed with plaintiff on March 1, 1976. FmHA has refused.

48. On January 5, 1979, Palmetto Bank filed its claim for breach of contract against the United States in the Court of Claims. As of that date, no part of the amount claimed had been paid to plaintiff.

49. A trial was held on April 22-23, 1980 in Columbia, South Carolina. The witnesses called by plaintiff were: Dwight Patterson, president and chairman of the board of directors of the Palmetto Bank during the time in issue, and Thomas Youngblood, the loan administrator of the Palmetto Bank during the years in issue. Defendant called as witnesses: Samuel Flemming, the person who initially appraised O-Double-T's property for plaintiff, John Patterson, Laurens County supervisor of FmHA in 1976, Clarence Rainey, Laurens County's district supervisor of FmHA in 1976, Don Payne, president of the Federal Land Bank Association of Spartanburg, John T. Walker, chief of FmHA farmer programs in South Carolina, Ralph Moore, farmer program specialist in the FmHA state office in South Carolina, Philip Adams, a real estate appraiser who was qualified by the court as an expert in that area, and Dwight Patterson, president and chairman of the board of directors of the Palmetto Bank during the years in issue. Both parties submitted exhibits which were admitted into evidence during the trial proceedings.

50. Philip Adams, defendant's expert witness on real estate appraisals, testified at trial that he had been retained by the government to make a study of pricing trends of farm real estate in Laurens County during the years 1976, 1977 and 1978 with reference to the O-Double-T farm property. Mr. Adams testified that the results of his study, as related to the subject tract, showed a "slight dip" in its value between 1976 and 1977 and a subsequent "upward trend" in the property's value in 1978. He concluded that the value

of "open and/or pasture land" in Laurens County would have been appraised as follows: March 1976 \$500/acre; June 1977 \$460/acre; April 1978 \$500/acre. In his opinion, the O-Double-T land could not have sold for \$1,000/acre at any time from 1972 to the present. Mr. Adams, however, did not make a full narrative appraisal of O-Double-T and did not inspect the property until two days before he submitted his report to the government on April 19, 1980.

CONCLUSION OF LAW

Upon the foregoing findings and opinion, it is concluded that plaintiff is entitled to recover and it is recommended that judgment be so entered.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

-----X

In re	:	MDL 381
"AGENT ORANGE"	:	(all cases)
PRODUCT LIABILITY LITIGATION	:	<u>AFFIDAVIT OF SERVICE</u>

-----X

STATE OF NEW YORK)
 : SS.:
COUNTY OF NEW YORK)

KATHLEEN BABAJKO, being duly sworn, deposes and says, that she is over the age of 18 years, that she resides at 286 Pacific Avenue, Staten Island, New York and that she is not a party to the above-entitled proceeding.

That on the 20th day of December, 1982, she served the annexed Memorandum of Law and Attachments on the attorneys listed on the annexed Service List, by depositing true copies thereof, contained in securely sealed, postpaid wrapper, properly addressed to said attorneys in the letter box regularly maintained and exclusively controlled by the United States Postal Service,

located on the Northeast corner of 41st Street and Park Avenue,
Borough of Manhattan, New York, New York.

Kathleen Babajko

Sworn to before me this
21st day of December, 1982.

Leonard Schindler
Notary Public

LEONARD SCHINDLER
Notary Public, State of New York
No. 80-4879010
Qualified in Westchester County
Certificate filed in New York County
Commission Expires March 30, 1984

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

-----X
In re

:

MDL ¹¹ ~~US~~ 381

"AGENT ORANGE"

:

SPECIAL MASTER'S ORDER JAN 2 1983

Product Liability Litigation

:

TIME A.M. _____
P.M. _____

-----X
WHEREAS lead counsel for plaintiffs has requested that Francis R. Kennedy be deposed on behalf of defendant Diamond Shamrock Corporation; and

WHEREAS Mr. Kennedy is a present employee of Diamond Shamrock who, with Diamond Shamrock's cooperation, will be deposed in New York City, New York; and

WHEREAS Diamond Shamrock has submitted the affidavit of Dean Saunders, sworn to December 14, 1982 (Exhibit A hereto), contending that Mr. Kennedy is not an officer, director or managing agent of Diamond Shamrock;

NOW THEREFORE IT IS ORDERED

that the taking of Mr. Kennedy's deposition in New York is without prejudice to the contention that Mr. Kennedy is not an officer, director or managing agent of Diamond Shamrock for purposes of Fed. R. Civ. P. 32(a)(2) and 37(d); and

that the issue is reserved as to whether the deposition

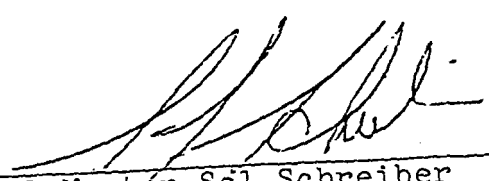
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testimony of Mr. Kennedy is binding on Diamond Shamrock.

Dated:

S O O R D E R E D:


Special Master Sol Schreiber

1/20/

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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

-----X
In re "AGENT ORANGE" : MDL No. 381
Product Liability Litigation : AFFIDAVIT
:
-----X

STATE OF TEXAS)
: ss.:
COUNTY OF HARRIS)

DEAN SAUNDERS, being duly sworn, deposes and says:

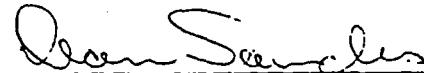
1. I am Human Resources Manager of defendant Diamond Shamrock Corporation's Greens Bayou Plant. I make this affidavit based upon personal knowledge to describe the current employment duties of F.R. Kennedy, an employee at the Greens Bayou Plant.

2. Mr. Kennedy has been employed at Greens Bayou since June 15, 1979 in the position of Purchasing Buyer. As Purchasing Buyer, Mr. Kennedy reports to the Purchasing and Stores Supervisor. No persons report to Mr. Kennedy.

3. As Purchasing Buyer, Mr. Kennedy's primary function is to purchase as directed materials and equipment to specifications and quality. In performing this function, Mr. Kennedy: (a) evaluates requisitions for proper description and establishes a course of action; (b) expedites and traces orders to assure required delivery; (c) coordinates the paper flow to insure proper handling by receiving; (d) submits a monthly activity report; and (e) checks and approves invoices.

4. Mr. Kennedy communicates daily with the Purchasing and Stores Supervisor concerning his work activities. His work is constantly being reviewed by management, although he is allowed latitude and decision making within his area of responsibility. He receives guidance from superiors in vendor selection and expenditures. Quotation bid tabulations are prepared by him and then submitted to superiors for approval.

5. As Purchasing Buyer, Mr. Kennedy is not an officer, director, or managing agent of Diamond Shamrock.


Dean Saunders

Sworn to before me this

14th day of December, 1982.

B. L. SCHROCK
Notary Public, State of Texas
My Commission Expires September 14, 1986
Bonded By Lovell Agency, Lawyers Surety Corp.


Notary Public

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

IN CLERK'S OFFICE
U. S. DISTRICT COURT E.D.N.Y.

☆ JAN 27 1983 ☆

-----X
IN RE "AGENT ORANGE" PRODUCT :
LIABILITY LITIGATION :

TIME A.M. _____
MDL No. 381 (GCP)
(SS)

-----X
ALL CASES

UNITED STATES' MEMORANDUM IN OPPOSITION TO
DEFENDANTS' MOTION TO COMPEL PRODUCTION
OF FOOD AND DRUG ADMINISTRATION DOCUMENTS
AND IN SUPPORT OF THE UNITED STATES' MOTION
FOR PROTECTIVE ORDER

I. INTRODUCTION

On January 10, 1983 defendants moved that the Special Master issue an order compelling production of Food and Drug Administration ("FDA") documents pursuant to Rule 37 of the Federal Rules of Civil Procedure. Because the issuance of the order by the Special Master both is not warranted by the facts concerning FDA document production and would have an oppressive and burdensome effect upon the United States, the United States opposes that motion and order. In addition to requesting denial of the motion, the United States seeks a protective order pursuant to Rule 37(a). This requested order would prevent defendants from continuing to harass and oppress the Government, and, in particular, FDA by preventing defendants from renewing the requests contained in defendants' pending motion and all prior requests for documents from the FDA. Fed.R.Civ.P. 37(a) and 26(c).

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II. ARGUMENT

A. The Special Master Should Deny Defendants' Motion to Compel Production Because The United States Has Already Fully Responded to These Document Production Requests

In their Memorandum in Support of Motion to Compel Production of Food and Drug Administration Documents, defendants have presented an inaccurate picture of the Government's production of FDA documents. Not only have defendants been less than ingenuous in relating to the court their actions and alleged inability to proceed with their defense, but they also have mischaracterized the facts surrounding FDA document production. The United States strenuously objects to this distortion of its good faith effort to supply the parties to this litigation with all pertinent documents currently retained in FDA files.

Defendants have stated that "no significant document production from FDA" has ever occurred. Defendants' Memorandum In Support of Motion to Compel Production of Food and Drug Administration Documents at 4 (hereinafter, "Defs. Mem."). Defendants' further contend that neither the United States' Response to Defendants' Phase I First Wave Interrogatories (hereinafter, the "United States' Response") nor it's

April 15, 1981 Notice to All Counsel mention FDA or FDA documents.
Defs. Mem. at 4.1/

Although defendants are literally correct in that FDA does not appear on either of these documents, the defendants neglect to mention the February 13, 1981 Notice to All Counsel that accompanied the United States' Response. That Notice alerted the parties that an index of government document production that would soon be available from the microfilm distributors, Mathias & Carr. Notice to All Counsel dated February 13, 1981 at 1. That list, released by the end of February, 1981, contained numerous pages of entries demonstrating prodigious production of FDA documents in 1980. See, Selected pages of United States' Index of Document Production attached hereto as Appendix A (hereinafter, "Appendix A").

1/ Defendants also assert that they have continually challenged and objected to the United States' allegedly insufficient answers to these interrogatories. Defs. Mem. at 4. Although the United States has always attempted to respond as fully as possible to defendants' concerns, the Government is compelled to point out that not one of the letters cited by defendants mentions the FDA as a problem or as a neglected area of discovery. See, Appendix to Defs. Mem. at Tabs 2-6.

Additionally, the Government notes that "if a party objects to or fails to answer interrogatories, the party submitting the interrogatories may move the court for an order under Fed.R.Civ.P. 37(a) compelling an answer. Fed.R.Civ.P. 33(a)." Pan-Islamic Trade Corp. v. Exxon Corp., 632 F.2d 539, 552 (5th Cir. 1980). The United States did object to the First Wave Interrogatories. See, United States' Response. However, defendants apparently have never been sufficiently disturbed by the United States' efforts in discovery to file a motion to compel production of documents prior to the pending motion. The defendants' attempt to assert, at this late date, that they have previously sought to correct any alleged inadequacy of production is simply not credible.

FDA has already conducted one full document search and a subsequent follow-up check of relevant FDA files on behalf of the parties to this litigation. FDA first searched its files in response to the requests of counsel for The Dow Chemical Company for documents generally relevant to this litigation. FDA officials searched all Bureau of Foods files likely to contain the requested information, including the files of the Division of Chemistry and Physics, the Division of Chemical Technology and the Division of Toxicology.^{2/} See, Affidavit of Dr. Firestone at 1, attached hereto as Appendix B. That search produced approximately 2772 documents totalling nearly 16,500 pages. In accordance with normal procedures for discovery in this litigation, the United States had these documents microfilmed. The resulting ten rolls of microfilm, each containing up to 2500 frames of information, generally became available to the parties by late September, 1980. See, Appendix A.

FDA employees conducted a second follow-up check of the relevant FDA files in response to Defendants' Phase I, First Wave Interrogatories served on January 15, 1981. That second sweep through FDA files turned up only negligible amounts of informa-

^{2/} In the opinion of FDA, no Bureau of Drugs files could reasonably be expected, in the normal course of FDA business, to contain any of the information sought by defendants. FDA, therefore, limited its search to Bureau of Foods files.

tion that the Government had not previously produced. Specifically, FDA found only 24 pages of previously unproduced material in this subsequent sweep through the relevant files. See, Appendix A at 40. The United States produced that material as Microfilm Batch 1916, entitled "Internal Agency Memos," in June, 1981.

Despite this tremendous effort by FDA, defendants have misrepresented to this court that FDA's response was insignificant, apparently in both size and quality. To the contrary, that response contains a myriad of documents directly related to the FDA work on chick edema factor that the defendants have characterized as so important. These documents, produced over two years ago, were contained in the following microfilm batches:

<u>Batch</u>	<u>Title</u>	<u>Roll and Frames</u>
1282	Chick Edema-Statement before Senate Committee on Commerce-by Verrett	JUS-0166 0958-0969
1292	Dioxin-History FDA letters, Memos, Reports	JUS-0166 1429-1469
1333	Chick Edema Disease Publica- tions	JUS-0168 1640-1909
1342	Chick Edema	JUS-0168 2203-2230
1558	Chick Edema Disease FDA Memoranda	JUS-0179 1908-1938
1571	Investigation of Chick Edema Factor-FDA assignment and analytical findings	JUS-0179 2469-2493
1573	Dioxin methodology for fats and oils; FDA correspondence and memos	JUS-0180 0015-0029

1593	Chick Edema Disease	JUS-0180 0544-0559
1595	Analysis of results of reference toxic fat	JUS-0180 0574-0596
1600	Chick Edema outbreak North Carolina 1969	JUS-0180 1716-0718
1611	Chick Edema Outbreak North Carolina 1969; FDA memos	JUS-0180 0922-1011
1639	Chick Edema Disease	JUS-0180 1939-1944
1641	Chick Edema Disease Chlorinated Pesticides	JUS-0180 1947-1961
1644	Dioxins-1971 Chick Edema Miscellaneous reports	JUS-0180 2027-2052
1645	Dioxins-1971 Chick Edema FDA Reports	JUS-0180 2053-2157
1647	Dioxins/Status Reports; unpub- lished Chick Edema Reports- FDA	JUS-0180 2163-2250
1648	Chick Edema Disease- Miscellaneous report	JUS-0180 2251-2266
1671	Dioxins-Status reports, FDA reports-Chick Edema	JUS-0181 1276-1551
1672	Chick Edema Outbreak North Carolina-1969; FDA reports	JUS-0181 1552-1609
1771	Chick Edema Disease/NIH memo	JUS-0183 1044-1047
1799	Dioxins-1971/Chick Edema/Dept. of Agriculture reports	JUS-0183 1611-1666

For the defendants to contend that there has been "a lack of significant document production from FDA" in view of this and other FDA production is disingenuous at best.

The defendants also allege that the United States has never answered a single one of defendants' requests for documents, including individually identified documents, arising out of an FDA employee deposition. To the contrary, the United States has responded to defendants' requests as information became available from FDA. On November 11, 1982, for example, counsel for the Government issued a Notice to All Counsel that addressed a variety of outstanding document requests. That Notice specifically stated that Dr. Firestone had not been able to locate, inter alia, the first seven items requested by this pending motion within the relevant Bureau of Foods files. Notice to All Counsel dated November 11, 1982 at 5-6, attached hereto as Appendix C (hereinafter, "Appendix C"). This Notice responded, in part, to Mr. Pakula's September 13, 1982 letter to Mr. Maskin requesting these documents. Defendants merely waste government counsel and the Special Master's time by renewing these previously answered requests.

In view of the United States' prior production from FDA and attempts to address later requests for documents, defendants' action of raising this motion cannot be viewed as anything other than harrassment. Defendants obviously seek the Special Master's imprimatur to demand complete duplication of all prior FDA searches and production. Such an Order would have an oppressive and burdensome effect on FDA and the Government and should therefore be denied.

B. The Special Master Should Deny Defendant's Motion to Compel Production Because the Motion Includes New Requests To Which the United States Has Not Had Any Opportunity To Respond.

The defendants' proposed order includes at least five requests for specific documents that the defendants raise for the first time. See, Order attached to the Defs. Mem., Items 13, 14, 15, 16, 17 and 18. The Government recognizes that, as the defendants proceed with discovery, they may develop interest in new areas and generate new requests. However, it seems singularly inappropriate and oppressive for the defendants to demand compelled production by the United States before they have ever given the Government an opportunity to respond.

The Federal Rules of Civil Procedure provide for a procedure of discovery that "encourages extrajudicial discovery with a minimum of court intervention." Fed.R.Civ.P., Depositions and Discovery, Advisory Committee's Explanatory Statement Concerning 1970 Amendments of Discovery Rules at 67. Rule 37(a) provides that:

... if a party, in response to a request for inspection submitted under Rule 34, fails to respond that inspection will be permitted as requested or fails to permit inspection as requested, the discovering party may move for an order compelling... inspection in accordance with the request.

Fed.R.Civ.P. 37(a). As the comment to the rule states:

"Rule 37(a) provides relief to a party seeking discovery against one who, with or without stated objections, fails to

afford the discovery." Fed.R.Civ.P. 37(a), Advisory Committee Note. The Rules do not anticipate or sanction requests, such as that of defendants, for an order compelling production where there has been no prior request for the documents.

To the extent that the defendants' new requests involve new areas of interest not encompassed by prior FDA searches and production, the Special Master should strike these newly-raised requests (Items 13, 14, 15, 16, 17 and 18) as inappropriate to an order to compel production at this time. However, such an order is not, in fact, essential because FDA previously has searched its files for all material relating to the subject matter of these requests. The search resulted in a determination that these documents apparently do not exist in the relevant files. See, Affidavit of Dr. David Firestone at 3-4. Therefore, inclusion of these requests in any order compelling production, which the United States suggests should not be issued at all, should be denied by the Special Master as oppressive.

C. The Special Master Should Deny
the Defendants' Motion to Compel
Production Because the Requests
for Documents are Oppressive,
Overly Broad and Burdensome.

In filing the pending motion, counsel for defendants represented that the Motion consisted of an attempt to narrow their document requests. Tr. Hearing Before Hon. Sol Schreiber, Special Master, January 10, 1983 at 2746. This proffer allegedly had the beneficent purpose of assisting the Government

in focussing its efforts to make any outstanding document production from FDA to the parties. Id., at 2747-2748. However, under the guise of promoting efficient production for limited and discrete documents, defendants request yet another page-by-page search of every relevant file in FDA. See, Order attached to Defs. Mem. Examination of the defendants' order reveals that, although defendants have requested certain specific documents, they also have made sweeping requests that do not comport with the alleged purpose of the motion.3/ As the Special Master apparently recognizes, such broad requests, particularly in the absence of proof that the Government has missed more than the understandable negligible amounts of information in the first FDA production, are not only unreasonable, but also oppressive.4/

3/ In fact, defendants' order is quite artfully arranged to create the impression that it has a narrow scope. Defendants initially list an array of single documents as the documents requested. Once beyond those requests, however, the scope of the requests grows with each succeeding request until, ultimately, defendants in effect require duplication of FDA's initial complete search.

4/ At the Pretrial Conference on January 10, 1983 during a discussion of the pending motion, the Special Master stated:

"[Requests for] categories [of documents] create some difficulty for me unless there be good reason why it could be shown that the Government has not carried out its initial responsibility. . . . I have expressed the opinion that agency by agency makes sense when you are talking about specific documents. When you are talking about categories you are going to have some problems, if you are talking about ten agencies."

Tr. Hearing Before Hon. Sol Schreiber, Special Master, January 10, 1983 at 2751.

For example, defendants have requested production of: "every memorandum, report or communication concerning weekly meetings of the Division of Food for the years 1958-1969." Order attached to Defs. Mem. at 4. It would be virtually impossible for FDA to respond to the request as phrased without searching every single file in the Bureau of Foods. On its face, even without consideration of FDA's enormous prior efforts, this request is patently oppressive. In addition, most of these communications would have absolutely no relation to this litigation. Defendants also have requested production of "[a]ll documents in the possession of FDA that contain research, information or publications relating to 2,4,5-T, 2,4,5-TCP, any dioxin, chloracne or chick edema." Order attached to Defs. Mem. at 4. First, this request contains no temporal limitation. Given the scope of the discovery for the government contractor defense, for defendants to request all such documents, apparently including those of post-1972 vintage, is unreasonable. Second, at a minimum, FDA has produced all of its files concerning 2,4,5,-T, dioxin, and chick edema. See, Affidavit of Dr. David Firestone at 4 (hereinafter, "Appendix B"). FDA has asserted that this prior discovery contained the universe of FDA's information on 2,4,5-TCP and chloracne as well. See, Id. at 4.

These and other of defendants' requests are far too broad for the Government to conduct any reasonable search. What these requests essentially require is yet another sweep through

the same files. Since the second check in 1981 which adhered to the scope of the Phase I, First Wave Interrogatories in 1981 produced only negligible new production, a third sweep, such as the one proposed by defendants, would be oppressive and burdensome. Therefore, to the extent defendants' order contains broad requests, the United States requests that the Special Master deny the proposed order.

D. The United States Specifically Objects
to the Document Requests Embodied in
Defendants' Motion to Compel Production
Food and Drug Administration Documents.

The United States makes the following specific objections to defendants' requests for documents as contained in the defendants' proposed order compelling production of documents:

1. Higginbotham, G.R. and Ress, J., preliminary report dated November 14, 1968 "Analysis of Commerical Chlorophenols for Trace Amounts of Their Condensation and Polymerization Products." Identified in the bibliography to Contaminants Branch, DFCT, "Current Status of the Chick Edema Factor Problem" (1969) (hereinafter "DFCT Report").

The United States previously has responded to defendants' September 13, 1982 request for this document by Notice to All Counsel dated November 11, 1982. That Notice stated that FDA could not locate the requested document in the relevant FDA files. See, Appendix C at 5. Additionally, Dr. Firestone's affidavit indicates that FDA does not have this document in the relevant files. See, Appendix B at 1. To require an additional search of the relevant FDA files would be burdensome and oppressive.

2. Firestone, D. and Flick, D.F., Memo of conference, Dr. Grove et al., February 13, 1963. Identified in the bibliography of the DFCT Report.

The United States previously has responded to defendants' September 13, 1982 request for this document by Notice to All Counsel dated November 11, 1982. That Notice stated that FDA could not locate the requested document in the relevant files. See, Appendix C at 6. Additionally, Dr. Firestone's affidavit indicates that FDA does not have this document in the relevant files. See, Appendix B at 1. To require an additional search of the relevant FDA files would be burdensome and oppressive.

3. Letter from H. van Genderen, Professor, Veterinary Pharmacology and Toxicology, University of Utrecht, to G. Higginbotham, February 25, 1969.

The United States previously has responded to defendants' September 13, 1982 request for this document by Notice to All Counsel dated November 11, 1982. That Notice stated that FDA could not locate the requested document in the relevant files. See, Appendix C at 6. Additionally, Dr. Firestone's affidavit indicates that FDA does not have this document in the relevant files. See, Appendix B at 2. To require an additional search of the relevant files would be burdensome and oppressive.

4. Bureau of Science Research Progress Report Project Y-005, July-December, 1968. Identified in the bibliography of the DFCT Report.

The United States previously has responded to defendants' September 13, 1982 request for this document by Notice to All Counsel dated November 11, 1982. That Notice stated that FDA could not locate the requested document in the relevant files. See, Appendix C at 6. Additionally, Dr. Firestone's affidavit indicates that FDA does not have this document in the relevant files. See, Appendix B at 2. To require an additional search of the relevant FDA files is unduly burdensome and oppressive.

5. Tishler, Merck & Co., Private Communication concerning isolation of crystalline material from a toxic fat and determination that it was an aromatic substance containing 47 percent chlorine, July 29, 1960.

The United States previously has responded to defendants' September 13, 1982 request for this document by Notice to All Counsel dated November 11, 1982. That Notice stated that FDA could not locate the requested document in the relevant files. See, Appendix C at 6. Additionally, Dr. Firestone's affidavit indicates that FDA does not have this document in the relevant files. See, Appendix B at 2. To require an additional search of the relevant FDA files would be burdensome and oppressive.

6. J.D. Wootton, Procter & Gamble Co., 1966, private communication concerning fact that a synthetic hexachlorinated dibenzo-p-dioxin displayed properties similar to material isolated from toxic fat and produced chick edema disease in chickens.

The United States previously has responded to defendants' September 13, 1982 request for this document by Notice to All Counsel dated November 11, 1982. That Notice stated that FDA could not locate the requested document in the relevant files. See, Appendix C at 6. Additionally, Dr. Firestone's affidavit indicates that FDA does not have this document in the relevant files. See, Appendix B at 2. To require an additional search of the relevant files would be burdensome and oppressive.

7. Memo from A.D. Campbell or FDA unit to Dr. Lewis, probably in late 1969, copy to J.W. Cook, Department of Pesticides, FDA, containing details of gas-liquid chromatography and mass spectrometry work.

The United States previously has responded to defendants' September 13, 1982 request for this document by Notice to All Counsel dated November 11, 1982. That Notice stated that FDA could not locate the requested document in the relevant files. See, Appendix C at 6. Additionally, Dr. Firestone's affidavit indicates that FDA does not have this document in the relevant files. See, Appendix B at 2. To require an additional search of the relevant FDA files would be burdensome and oppressive.

8. Organization charts of the Food and Drug Administration for the years 1959 through 1973.

To the extent that such documents exist in FDA files, they are contained in the document production from FDA that the United States made available to the parties in the fall of 1980 or attached hereto as Appendix D. See, Appendix B at 2 and Appendix D. To require an additional search would be burdensome and oppressive.

9. Dr. Firestone's files containing any documents pertaining to any literature search relating to chick edema factor, 2,4,5-trichlorophenol, 2,4,5-trichlorophenoxyacetic acid, any dioxin or chloracne.

To the extent that such documents exist in FDA files, they are contained in the document production from FDA that the United States made available to the parties in the fall of 1980. See, Appendix B at 3. To require yet another search of these files is unduly burdensome and oppressive.

10. All laboratory notebooks and documents of any sort, including drafts, containing information or communications about experiments referred to in the article "Chemical and Toxicological Evaluation of Isolated and Synthetic Chloro Derivatives of Dibenzop-dioxin," Nature, Vol. 220, 702-03 (November 16, 1968).

To the extent that such documents exist in FDA files, they are contained in the document production from FDA that the United States made available to the parties in the fall of 1980. See, Appendix A at 35, Batch 1774 and Appendix B at 3. To require yet another search of these files is unduly burdensome and oppressive.

11. Rowe, V.K. Personal communication, 1970, concerning acute toxicity studies on small animals in 1967.

This document either has been produced or does not exist in the relevant FDA files. See, Appendix B at 3. To require yet another search of these files is unduly burdensome and oppressive.

12. Kettering Laboratory, unpublished reports, Department of Preventive Medicine and Industrial Health, College of Medicine, University of Cincinnati, Cincinnati, Ohio.

To the extent that such documents exist in FDA files, they are contained in the document production from FDA that the United States made available to the parties in the fall of 1980. See, Appendix B at 3. To require yet another search of these files is unduly burdensome and oppressive.

13. G.R. Higginbotham's files containing the results of a bibliography search on the effects of chlorinated dioxins which were given to A.D. Campbell.

To the extent that such documents exist in FDA files, they are contained in the document production from FDA that the United States made available to the parties in the fall of 1980. See, Appendix B at 3. To require yet another search of these files is unduly burdensome and oppressive.

14. Organic synthesis literature by Professor Gilman used for background information on the isolation of the chick edema factor by Procter & Gamble.

This request constitutes a request that defendants have not previously made. As a new request to which the United States has not yet had an opportunity to respond, this request does not belong in an order to compel production. Additionally, to the extent that such documents exist in FDA files, they are contained in the document production from FDA that the United States made available to the parties in the fall of 1980. See, Appendix B at 4. To require yet another search of these files is unduly burdensome and oppressive.

15. Every unpublished item in the bibliography of the DFCT report.

This request constitutes a request that defendants have not previously made in writing in accordance with procedure. As a new request to which the United States has not yet had an opportunity to respond, this request does not belong in an order to compel production. Additionally, to the extent that such documents exist in FDA files, they are contained in the document production from FDA that the United States made available to the parties in the fall of 1980. See, Appendix B at 4. To require yet another search of these files is unduly burdensome and oppressive.

16. Report by Dr. Cowan, Director of Northern Research Laboratory, USDA, on the effect of refining processes on dioxin added to fat, 1970-71.

This request constitutes a request that defendants have not previously made. As a new request to which the United States has not yet had an opportunity to respond, this request does not belong in an order to compel production. Additionally, this document either has already been produced or it does not exist in the relevant FDA files. See, Appendix at B. To require yet another search of these files is unduly burdensome and oppressive.

17. Every memorandum, report or communication concerning weekly meetings of the Division of Food for the years 1958-1969.

This request constitutes a request that defendants have not previously made. As a new request to which the United States has not yet had an opportunity to respond, this request does not belong in an order to compel production. Additionally, this request is overly broad and, therefore, virtually impossible to address. Because the request is so sweeping, the request is burdensome and oppressive.

18. Every memorandum, report or communication concerning weekly meetings of the Bureau of Food Chemistry for the years 1968-1969.

This request is overly broad and, therefore, virtually impossible to address. Because the request is so sweeping, the request is burdensome and oppressive. In addition, it is inappropriate for defendants to include this request in a motion to compel production because they have never requested these documents prior to this time.

19. All documents in the possession of FDA that contain research, information or publications relating to 2,4,5-T, 2,4,5-TCP, any dioxin, chloracne or chick edema.

To the extent that such documents exist in FDA files, they are contained in the document production from FDA that the United States made available to the parties in the fall of 1980. See, Appendix B at 4. To require yet another search of the relevant files is unduly burdensome and oppressive.

20. All correspondence and documents of any description from, to or between FDA and Procter & Gamble that mention or relate to chick edema or any dioxin.

This request is overly broad because it contains no temporal limitation. Consequently, the request is unduly burdensome and oppressive. To the extent that such documents exist in FDA files, they are contained in the document production from FDA that the United States made available to the parties in the fall of 1980. See, Appendix B at 4. To require yet another search of the relevant files is unduly burdensome and oppressive.

21. All notes, memoranda, correspondence or documents of any description that relate to meetings, discussions or communications -- formal or informal -- between any employee of FDA and any other person, including but not limited to any government entity at which chick edema, 2,4,5-T, 2,4,5-TCP, any dioxin or chloracne was mentioned or discussed.

This request is overly broad because it contains no temporal limitations. Consequently, the request is unduly burdensome and oppressive. To the extent that such documents exist in FDA files, they are contained in the document production from FDA that the United States made available to the parties in the fall of 1980. See, Appendix B at 4. To require yet another search of the relevant files is unduly burdensome and oppressive.

22. All documents, including but not limited to transmittal letters, pertaining to the dissemination from 1957 to 1970 of information, reports or data from FDA to any person or government entity or from any person or government entity to FDA, concerning 2,4,5-T, 2,4,5-TCP, any dioxin, chloracne or chick edema.

To the extent that such documents exist in FDA files, they are contained in the document production from FDA that the United States made available to the parties in the fall of 1980. See, Appendix B at 5. To require yet another search is unduly burdensome and oppressive.

E. Because of the Oppressive Effect of Defendants' Motion, the United States Requests that the Special Master Issue a Protective Order Regarding Discovery From the Food and Drug Administration

Rule 37(a)(2) of the Federal Rules of Civil Procedure provides that:

If the court denies the motion [to compel production] in whole or in part, it may make such protective order as it would have been empowered to make on a motion made pursuant to Rule 26(c).

Fed.R.Civ.P 37(a)(2). Rule 26 (c) allows a court to fashion whatever order justice might require to protect "a party or person from annoyance, embarrassment, oppression, or undue burden or expense." Fed.R.Civ.P. 26(c).

Although the United States recognizes a potential need, in theory, to focus on specific discovery requests, it finds the reality of the requests contained in the pending Motion unduly burdensome and oppressive. First, FDA already has conducted at least one full search of all relevant Bureau of Foods files in which the requested documents reasonably would be located. See, Appendix B at 1. The production from these files two years ago was both voluminous and significant. See, Appendix A. For the defendants to require yet another sweep of these files is entirely unreasonable and oppressive. Second, the United States has previously informed defendants that a number of the specific documents requested are not contained in any Bureau of Foods files. Defendants' continued renewal of these requests consists of harrassment of the Government and its agencies which distracts the Government from its goal of completing any incomplete production. It is simply absurd and burdensome to make FDA officials conduct yet another search for these documents. Third, defendants' Motion includes overly broad document requests, most of which would have no relation in any form to the issues in this case. Because of the inestimable effort required to make the requisite searches, the Government also finds these requests unduly burdensome and oppressive.

The United States already has devoted significant resources and effort in providing parties to this litigation with immense production of discovery from a multitude of witnesses and document repositories. With this motion, defendants overstep the bounds of their discovery rights in an effort to harass, burden and oppress the Government, its agencies and its employees.

For these reasons, the United States requests that the Special Master issue the attached Protective Order regarding FDA document production. The Order would prevent the defendants from pursuing or renewing any requests either for the actual documents requested in defendants' pending motion or for documents pertaining to the subject matters encompassed by defendants' pending motion. See, Appendix E. This protective order is necessary to prevent defendants from continuing to harass FDA with both the reassertion of already settled document requests and such burdensome requests as evidenced by the pending motion.

Rule 37(a)(4) provides that, if the court denies a motion to compel production, the court shall

require the moving party or the attorney advising the motion or both of them to pay to the party or deponent who opposed the motion the reasonable expenses incurred in opposing the motion, including attorney's fees

Fed.R.Civ.P 37(a)(4). In addition, under the provisions of Rule 26(c), the court also may award the costs of a motion

for a Protective Order if that motion is granted. Fed.R.Civ.P. 26(c). The United States therefore requests that the Special Master award to the United States the cost of opposing defendants' Motion to Compel and of bringing the attached Motion for Protective Order.

III. Conclusion

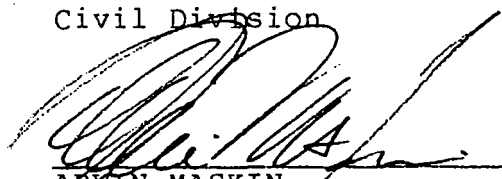
For the reasons cited above, the United States requests that the Special Master deny Defendants' Motion to Compel Production of Food and Drug Administration and issue the attached Food and Drug Administration Protective Order.

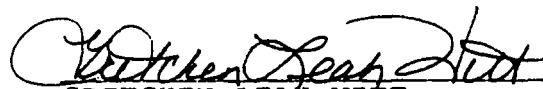
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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the United States' Memorandum in Opposition to Defendants' Motion to Compel Production of Food and Drug Administration Documents and in Support of the United States' Motion for Protective Order was mailed this 24th day of January, 1983 to the following:

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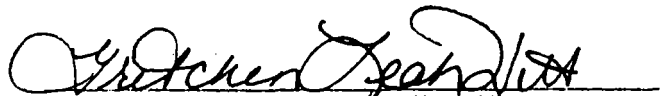
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GRETCHEN LEAH WITT

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

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UNITED STATES' MEMORANDUM IN OPPOSITION
TO DEFENDANTS' MOTION TO COMPEL PRODUCTION
OF NATIONAL CANCER INSTITUTE AND BIONETICS
RESEARCH LABORATORIES, INC. DOCUMENTS AND
IN SUPPORT OF THE UNITED STATES' MOTION FOR
PROTECTIVE ORDER

I. INTRODUCTION

On January 10, 1983 defendants moved that the Special Master issue an order compelling production of National Cancer Institute (hereinafter "NCI") and Bionetics Research Laboratories, Inc. documents pursuant to Rule 37 of the Federal Rules of Civil Procedure.^{1/} Because the issuance of the order by the Special Master both is not warranted by the facts concerning NIH document production and would have an oppressive and

^{1/} Defendants, in a footnote, further state that they include the National Institute of Environmental Health Sciences (hereinafter "NIEHS") in their motion to compel production of NCI documents. Defendants' Memorandum In Support of Motion to Compel Production of National Cancer Institute and Bionetics Research Laboratories, Inc. Documents at 2,n. (hereinafter, "Defs. Mem."). In essence, defendants' motion is directed at the National Institutes of Health (hereinafter "NIH") because NCI and NIEHS are the only institutes within NIH that reasonably could be expected to have the requested documents within their files. See, Affidavit of Joanne Belk at 1, attached hereto as Appendix B.

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burdensome effect upon the United States, the United States opposes that motion and order. In addition to requesting denial of the motion, the United States seeks a protective order pursuant to Rule 37(a). This requested order would prevent defendants from continuing to harass and oppress the Government, and, in particular, NIH and its individual institutes by preventing defendants from renewing the requests contained in defendants' pending motion and all prior requests for documents from the NIH. Fed.R.Civ.P. 37(a) and 26(c).

II. ARGUMENT

A. The Special Master Should Deny Defendants' Motion to Compel Production Because The United States Has Already Fully Responded to These Document Production Requests.

In their Memorandum in Support of Motion to Compel Production of National Cancer Institute and Bionetics Research Laboratories, Inc. Documents, defendants have presented an inaccurate picture of the Government's production of NIH and, in particular, NCI documents. Not only have defendants been less than ingenuous in relating to the court their actions and alleged inability to proceed with their defense, but they also have mischaracterized the facts surrounding NCI document production. The United States strenuously objects to this distortion of its good faith effort to supply the parties to this litigation with all pertinent documents currently retained in NIH files.

In effect, defendants allege that NCI has never produced any material other than six pages relating to the Bionetics Study culled from NCI annual reports. See, Defs. Mem. Defendants further contend that neither the United States' Response to Defendants' Phase I First Wave Interrogatories (hereinafter, "United States' Response") nor its April 15, 1981 Notice to All Counsel mention NCI or NCI documents. Defs. Mem. at 4.2/

Although defendants are literally correct in that NCI or Bionetics do not appear on the face of either of these documents, the defendants neglect to mention the February 13, 1981 Notice to All Counsel that accompanied the United States' Response. That Notice alerted the parties that an index of

2/ Defendants also assert that they have continually challenged and objected to the United States' allegedly insufficient answers to these interrogatories. Defs. Mem. at 4. Although the United States has always attempted to respond as fully as possible to defendants' concerns, the Government is compelled to point out that not one of the letters cited by defendants mentions NIH or NCI as a problem or as a neglected area of discovery. See, Appendix to Defs. Mem. at Tabs B-F.

Additionally, the Government notes that "if a party objects to or fails to answer interrogatories, the party submitting the interrogatories may move the court for an order under Fed.R.Civ.P. 37(a) compelling an answer. Fed.R.Civ.P. 33(a)." Pan-Islamic Trade Corp. v. Exxon Corp., 632 F.2d 539, 552 (5th Cir. 1980). The United States did object to the First Wave Interrogatories. See, United States' Response. However, defendants apparently have never been sufficiently disturbed by the United States' efforts in discovery to file a motion to compel production of documents prior to the pending motion. The defendants' attempt to assert, at this late date, that they have previously sought to correct any alleged inadequacy of production is simply not credible.

government document production that would soon be available from the microfilm distributors, Mathias & Carr. Notice to All Counsel dated February 13, 1981 at 1. That list, released by the end of February, 1981, contained numerous pages of entries demonstrating production of NIEHS documents in 1980. See, Selected pages of United States' Index of Document Production, attached hereto as Appendix A (hereinafter, "Appendix A").

Although at first glance NIEHS production might appear totally unrelated to that of NCI, a separate institute in the National Institutes of Health, that impression is false. NIEHS did not exist as an institute until January 12, 1969. Division of Public Information, National Institutes of Health, Pub. No. 81-5, 1981 NIH Almanac at 78 (1981). Prior to that time and after November, 1966, it existed as the Division of Environmental Health Sciences. Id. at 77. Until NIEHS became an institute, all information relating to the Bionetics study rested in the hands of NCI. At some point after NIEHS came into being, the materials relating to Bionetics apparently were transferred from NCI to NIEHS. See, Affidavit of Joanne Belk at 1-2. This transfer of documents reflected the transfer of various program functions and responsibilities, including the NCI Bioassay Program, from NCI to NIEHS. Id. at 1. Therefore, if this material exists in NIH files, most, if not all, NCI material requested by defendants would be located in NIEHS files

or archives. See, Affidavit of Joanne Belk at 1-2. 3/

NIEHS already has conducted one full document search and a subsequent follow-up check of all relevant files on behalf of the parties to this litigation. NIEHS first searched its files in response to the requests of counsel for The Dow Chemical Company for documents generally relevant to this litigation. NIEHS officials notified all program leaders and senior staff at NIEHS, including officials of the intramural program, the extramural program, Director's office and National Toxicology Program. The officials searched all correspondence and research report files to collect all documents relating to 2,4-D, 2,4,5-T, TCDD, dioxin and herbicides. See, Affidavit of Joanne Belk at 2. That search produced approximately eight file drawers of material consisting of approximately 1066 documents totalling nearly 19,800 pages. In accordance with normal procedures for discovery in this litigation, the United States had these documents microfilmed. The resulting twelve rolls of microfilm generally became available to the parties by September, 1980. See, Appendix A.

NIEHS employees conducted a second follow-up check of the relevant files in response to defendants' document request

3/ NIH determined that the files of NIEHS and possibly NCI were the only NIH files that, in the normal course of NIH business, reasonably could be expected to contain any of the information sought by defendants. See, Affidavit of Joanne Belk at 1.

in September, 1982.^{4/} That second sweep through NIEHS files revealed no information that the United States had not previously produced. See, Affidavit of Joanne Belk at 2.

Those same September, 1982 requests also resulted in a computer check of NCI files to ensure that everything relating to the subject had been transferred to NIEHS and produced. NCI checked its files repository for material relating to Agent Orange, chloracne, 2,4-D, 2,4,5-T, pesticide studies and dioxin. See, Affidavit of Joanne Belk at 2. Although nothing was located at that repository, NCI did locate another repository at which the following volumes, totalling over one thousand pages of material, were located:

1. "Program of Carcinogenesis Studies" - Vol. I of the final Bionetics Report;
2. "Program of Carcinogenesis Studies" - Vol. II (pages 52-232) of the final Bionetics Report;
3. "Teratology Study";
4. Index from the Bionetics Research Reports; and
5. Index from the Bionetics Research Reports.

Id. at Exhibit A, p.2. In addition, the search located a file folder of correspondence and reprints. Id. at Exhibit A, p.1. NCI sent this material to NIH who, in turn, transferred it to the Department of Justice. However, instead of marking the material as NCI/Bionetics information, NIH referred to it as

^{4/} This request consisted of Charles Mattingly's September 9, 1982 letter to Arvin Maskin which was sent to NIH on September 15, 1982.

grants from NIEHS and correspondence and reports on the President's Working Group on Pest Control. See, Letter to A. Maskin from J. Belk, dated October 22, 1983, attached hereto as Appendix C. Therefore, the Department of Justice had this material microfilmed and released as Batch 1936, "Grants & Materials from President's Working Group on Pesticides," when in actuality it was NCI production. See, Appendix A.

NCI also searched its annual reports from 1963-1970 for references to the Bionetics study and located a negligible amount of information. See, Affidavit of Joanne Belk at Exhibit A, p.2. Those pages were microfilmed and produced as Batch 1940, "Reports referring to contract between NCI and Bionetics." See, Appendix A at 11.

The United States already has provided the parties with an opportunity to inspect the personal files of Dr. Diane Courtney, a former Bionetics employee now in the employ of the Environmental Protection Agency. On January 19, 1983 the parties searched through Dr. Courtney's over six linear feet of documents to select those that the United States will produce on microfilm. Dr. Courtney's documents may have included many of those documents sought by the order attached to the pending motion, such as some periodic or interim reports relating to the Bionetics study, documents prepared in the course of the Bionetics study that mention 2,4,5-T, and reports on the toxicology or chemistry of 2,4,5-T prepared in connection with the Bionetics study. See, Order attached to Defs. Mem. For defendants to demand that the United

States produce, under court order, documents that it already has made available to the parties is unreasonable and burdensome.

The defendants also allege that the United States has never answered a single one of defendants' requests for documents arising out of an NCI or Bionetics employee deposition. To the contrary, the United States has responded to all of defendants' requests as information became available from NIH. On November 11, 1982, for example, counsel for the Government issued a Notice to All Counsel that addressed a variety of outstanding document requests. That Notice specifically answered the outstanding document request from defendants relating to NIH document production and informed all parties that the custodians of the relevant files had completed all production of all requested information existing in those files. Notice to All Counsel dated November 11, 1982, at 2-3, attached hereto as Appendix D (hereinafter, "Appendix D"). This Notice responded, in part, to Mr. Mattingly's September 9, 1982 letter to Mr. Maskin requesting documents from NIH and NCI in particular. Defendants merely waste government counsel and the Special Master's time by renewing these previously answered requests.

In view of the United States' prior production from NIH and its response to defendants' later requests for documents, defendants' maintenance of the pending motion cannot be viewed as anything other than harrassment. Defendants obviously

seek the Special Master's imprimatur to demand complete duplication of all prior NIH searches and production. Such an order would have an oppressive and burdensome effect on NIH and the Government and therefore should be denied outright.

B. The Special Master Should Deny Defendants' Motion to Compel Production Because the Motion Includes Documents Not in the Possession, Custody or Control of The National Institutes of Health

In the order accompanying the pending motion, the defendants request "[a]ll files in the possession of Bionetics or NCI that contain research information or publications on 2,4,5-T, 2,4,5-TCP, any dioxin or chloracne." Order Attached to Defs. Mem. at 2 (emphasis added). In addition, defendants have requested production of the personal files of Dr. Carl Baker, a former government employee. These documents, and others requested by defendants, are not in the possession, custody or control of NIH. See, Affidavit of Joanne Belk at 3. The United States has no responsibility or authority to produce documents in the control of either Bionetics Research Laboratories, Dr. Baker or any other independent entity or person.

Rule 34(a) of the Federal Rules of Civil Procedure provides that:

[a]ny party may serve on any other party a request (1) to produce and permit the party making the request, or someone acting on his behalf, to inspect and copy, any designated documents . . . which constitute or contain matters within the scope of Rule 26(b) and which are in the possession, custody or control of the party upon whom the request is served.

. . . .

Fed.R.Civ.P. 34(a) (emphasis added).^{5/} Upon a showing that a party does not have possession, custody or control of the requested documents, that party cannot be compelled to produce them. La Chemise Lacoste v. Alligator Company, Inc., 60 F.R.D. 164, 171 (D. Del. 1973); United States v. Dempster Brothers, Inc., 31 F.R.D. 207, 208 (E.D. Tenn. 1962). As one court stated:

The "control" requirement of Rule 34 - which presumes a legal right to obtain the necessary documents . . . - has not been interpreted to order defendants to produce documents within the exclusive possession and control of third parties, such as non-party licensees [of the defendant].

United Sheeplined Clothing Co., Inc. v. National Broadcasting Co., Inc., 11 F.R.Serv.2d 892, 894 (S.D.N.Y 1968).

Bionetics Research Laboratories, Inc. (hereinafter, "Bionetics") is an independent corporation that, under contract, provided certain services to NCI during the 1960s. Before now, defendants fully recognized not only this fact, but also the inherent difficulties in requesting the United States to produce documents in the possession, custody or control of Bionetics. See, Tr. Hearing Before Sol Schreiber,

^{5/} Use of this rule presupposes that the United States is a party to this litigation, a fact that the United States and, when convenient, the parties dispute. Citation to this rule or to Rule 37 by the United States does not constitute an admission of party status in this litigation and the United States expressly reserves the right to argue a position to the contrary.

belongs solely to Bionetics and not the United States. See, Affidavit of Joanne Belk at 3. The defendants' cognizance of this fact was reflected in a discussion of Bionetics at a hearing in which counsel for one defendant admitted:

We are perfectly happy to proceed by subpoena against the private individuals and the company in requests that the documents be produced in a timely fashion.

Tr. Hearing Before Sol Schreiber, Special Master, July 14, 1982 at 1275-1276. Yet apparently defendants have never done so. For defendants, more than six months later, to request an order compelling production by the United States of these documents that belong to a private corporation is nothing less than harrassment.

In addition, defendants have requested the production of the private files of Dr. Carl Baker, Director of NCI from 1969 to 1972. However, Dr. Baker is no longer an employee of the United States and any of his files that have not been produced are not in the possession, custody or control of the Government. See, Affidavit of Joanne Belk at 3. Although the United States will request the cooperation of Dr. Baker in producing his files for the benefit of the parties to this litigation, inclusion of these private files in an order compelling production by the United States is, to say the least, inappropriate. The United States therefore requests

the Special Master to strike the request from any order issued, if the Special Master deems that such an order is still necessary.

C. The Special Master Should Deny Defendant's Motion to Compel Production Because the Motion Includes New Requests To Which the United States Has Not Had Any Opportunity To Respond.

The defendants' proposed order includes at least five requests for specific documents that the defendants raise for the first time.^{6/} See, Order attached to the Defs. Mem., Items 12, 13, 14, 15, and 16. The Government recognizes that, as the defendants proceed with discovery, they may develop interest in new areas and generate new requests. However, it seems singularly inappropriate and oppressive for the defendants to demand compelled production by the United States before they have ever given the Government an opportunity to respond.

The Federal Rules of Civil Procedure provide for a procedure of discovery that "encourages extrajudicial discovery

^{6/} During the week of January 10, 1983, the day upon which defendants served the pending motion, the United States received a January 5 letter from William F. Cavanaugh, Jr. of Rivkin, Leff, Sherman & Radler that requested certain of these items. That letter requested production of Dr. Baker's personal files (Item 12) and of any notes or minutes of weekly meetings of the NCI Scientific Directorate (Item 13). Although the United States now has received this written request, its receipt does not negate the fact that the United States had no opportunity to respond before defendants served the pending motion.

with a minimum of court intervention." Fed.R.Civ.P.,
Depositions and Discovery, Advisory Committee's Explanatory
Statement Concerning 1970 Amendments of Discovery Rules at
67. Rule 37(a) provides that:

... if a party, in response to a request
for inspection submitted under Rule 34,
fails to respond that inspection will be
permitted as requested or fails to permit
inspection as requested, the discovering
party may move for an order compelling...
inspection in accordance with the request.

Fed.R.Civ.P. 37(a). As the comment to the rule states:
"Rule 37(a) provides relief to a party seeking discovery
against one who, with or without stated objections, fails to
afford the discovery." Fed.R.Civ.P. 37(a), Advisory Committee
Note. The Rules do not anticipate or sanction requests, such
as that of defendants, for an order compelling production
where there has been no prior request for the documents.

To the extent that the defendants' new requests involve
new areas of interest not encompassed by prior NIH searches
and production, the Special Master should strike these newly-
raised requests (Items 12, 13, 14, 15, 16 and 17) as
inappropriate to an order to compel production at this time.
However, such an order is not, in fact, essential because NIH
previously has searched its relevant files for all material
relating to the subject matter of these requests. That search
resulted in a determination that, if they have not already
been produced, these documents apparently do not exist in the
relevant files. See, Affidavit of Joanne Belk at 3-4

(hereinafter, "Appendix B"). Therefore, inclusion of these requests in any order compelling production, which the United States suggests should not be issued at all, should be denied by the Special Master as oppressive.

D. The Special Master Should Deny
the Defendants' Motion to Compel
Production Because the Requests
for Documents are Oppressive,
Overly Broad and Burdensome.

In filing the pending motion, counsel for defendants represented that the Motion consisted of an attempt to narrow their document requests. Tr. Hearing Before Hon. Sol Schreiber, Special Master, January 10, 1983 at 2746. This proffer allegedly had the beneficent purpose of assisting the Government in focussing its efforts to make any outstanding document production from NIH to the parties. Id., at 2747-2748. However, under the guise of promoting efficient production for limited and discrete documents, defendants request yet another page-by-page search of every relevant file in NIH. See, Order attached to Defs. Mem. Examination of the defendants' order reveals that, although defendants have requested certain narrow categories of documents, they also have made sweeping requests that do not comport with the alleged purpose of the motion. As the Special Master recognizes, such broad requests, particularly in the absence of proof that the Government has missed more than the understandable negligible amounts of information in the first NIH production, are not only

unreasonable, but also oppressive.7/

For example, defendants have requested production of:

"Records of meetings attended by FDA scientists and Dr. Baker."

Order attached to Defs. Mem. at 4. It would be virtually impossible for NIH to respond to the request as phrased. On its face, even without consideration of NIH's prior production efforts, this request is patently oppressive. In addition, many of these records would most likely have absolutely no relation to this litigation. Defendants also have requested production of:

All documents relating to Dr. Courtney's attendance at any workshops, conferences, meetings or seminars concerning teratology, including but not limited to all notes pertaining to Dr. Courtney's trip to Canada and meetings with Canadian scientists in which 2,4,5-T, 2,4,5-TCP, any dioxin or chloracne was mentioned.

Order attached to Defs. Mem. at 3. First, this request contains no temporal limitation. Given the scope of the discovery for the government contractor defense, for defendants to request all such documents, apparently including those of post-1972

7/ At the Pretrial Conference on January 10, 1983 during a discussion of the pending motion, the Special Master stated:

"[Requests for] categories [of documents] create some difficulty for me unless there be good reason why it could be shown that the Government has not carried out its initial responsibility. . . . I have expressed the opinion that agency by agency makes sense when you are talking about specific documents. When you are talking about categories you are going to have some problems, if you are talking about ten agencies."

Tr. Hearing Before Hon. Sol Schreiber, Special Master, January 10, 1983 at 2751.

vintage, is unreasonable. Second, Dr. Courtney is an active scientist with acknowledged expertise in the area of teratology. She has attended untold numbers of scientific conferences on teratology at which "2,4,5-T, 2,4,5-TCP, dioxin or chloracne" might have been mentioned. In effect, defendants are requesting that Dr. Courtney or NIH turn over every note of every conference ever attended by Dr. Courtney. This request unquestionably is overbroad and should be denied.

These and other requests are far too broad or vague for the Government to undertake any reasonable search. What these requests essentially require is yet another sweep through the same files. Since NIH performed a second check in 1982 specifically in response to defendants' request for information concerning Bionetics, a third sweep, such as the one proposed by defendants, would be oppressive and burdensome. Therefore, to the extent defendants' order contains broad or vague requests, the United States requests that the Special Master deny the proposed order.

E. The United States Specifically Objects to the Document Requests Embodied by Defendants' Motion to Compel Production of National Cancer Institute and Bionetics Research Laboratories, Inc. Documents

The United States makes the following specific objections to defendants' requests for documents as contained in the defendants' proposed order compelling production of documents:

1. All contracts, and any and all supplements or modifications thereto, between the United States or NCI and Bionetics for the study of carcinogenicity and/or teratogenicity of various compounds, including but not limited to the contract executed in 1963 pursuant to which a report titled "Evaluation of Carcinogenic, Teratogenic and Mutagenic Activities of Selected Pesticides and Industrial Chemicals" was prepared.

The United States previously has responded to defendants' September 9, 1982 request for this material by Notice to All Counsel dated November 11, 1982. That Notice stated that NIH had completed its search and had produced any such documents contained within its files. See, Appendix D at 3. Additionally, Ms. Belk's affidavit indicates that, if they have not already been produced, these documents do not exist in NIH files. See, Appendix B at 2-3. To the extent that any such documents exist in the files of Dr. Courtney, the parties had an opportunity on January 19, 1983 to inspect and select them for production by the United States. To require any additional search of NIH files would be unduly burdensome and oppressive.

2. Any periodic reports, interim reports, final reports, correspondence or reports or memoranda of any description by Bionetics to NCI or any other agency, or by NCI or any other agency of the United States Government to any other agency or person, that mention test results or findings by Bionetics pertaining to 2,4,5-T and/or its possible hazards, including teratogenicity.

The United States previously has responded to defendants' September 9, 1982 request for this material by Notice to All Counsel dated November 11, 1982. That Notice stated that NIH had completed its search and had produced any such documents contained within its files. See, Appendix D at 3. Additionally, Ms. Belk's affidavit indicates that if they have not already been produced, these documents do not exist in NIH files. See, Appendix B at 2-3. To the extent that any such documents exist in the files of Dr. Courtney, the parties had an opportunity on January 19, 1983 to inspect and select them for production by the United States. To require any additional search of NIH files would be unduly burdensome and oppressive.

3. All documents that relate to the selection of 2,4,5-T for study by Bionetics, including but not limited to all reports, notes or memoranda of any meetings, formal or informal, within or outside NCI on the subject of possible hazards, including teratogenicity, of 2,4,5-T.

The United States previously has responded to defendants' September 9, 1982 request for this material by Notice to All Counsel dated November 11, 1982. That Notice stated that NIH had completed its search and had produced any such documents contained within its files. See, Appendix D at 3. Additionally, Ms. Belk's affidavit indicates that if they already have have not been produced, these documents do not exist in NIH files. See, Appendix B at 2-3. To the extent that any such documents exist in the files of Dr. Courtney, the parties had an opportunity on January 19, 1983 to inspect and select them for production by the United States. To require any additional search of NIH files would be unduly burdensome and oppressive.

4. All files in the possession of Bionetics or NCI that contain research information or publications on 2,4,5-T, 2,4,5-TCP, any dioxin or chloracne.

This request is overly broad because it contains no temporal limitation. Consequently, the request is unduly burdensome and oppressive.

Moreover, the United States previously has responded to defendants' September 9, 1982 request for this material maintained in the possession, custody, or control of NIH by Notice to All Counsel dated November 11, 1982. That Notice stated that NIH had completed its search and had produced any such documents contained within its files. See, Appendix D at 3. Additionally, Ms. Belk's affidavit indicates that if they have not already been produced, these documents do not exist in NIH files. See, Appendix B at 2-3. To the extent that any such documents exist in the files of Dr. Courtney, the parties had an opportunity on January 19, 1983 to inspect and select them for production. To require an additional search of NIH files would be unduly burdensome and oppressive.

Finally, to the extent this request seeks documents in the possession of Bionetics, it seeks production of documents not in NIH's possession, custody and control. See, Appendix B at 3. Consequently, the United States cannot make the requested production and to demand that it do so is unduly burdensome and oppressive.

5. All documents prepared in the course of the Bionetics study that mention 2,4,5-T, 2,4,5-TCP, any dioxin or chloracne.

The United States previously has responded to defendants' September 9, 1982 request for this material by Notice to All Counsel dated November 11, 1982. That Notice stated that NIH had completed its search and had produced any such documents contained within its files. See, Appendix D at 3. Additionally, Ms. Belk's affidavit indicates that, if they have not already been produced, these documents do not exist in the relevant NIH files. See, Appendix B at 2-3. To the extent that these documents exist in the files of Dr. Courtney, the parties had an opportunity on January 19, 1983 to inspect and select them for production by the United States. To require any additional search of NIH files would be unduly burdensome and oppressive.

6. All documents that relate to or evidence the dissemination of information developed in the course of the Bionetics research concerning any potential hazard of 2,4,5-T, including but not limited to notes, lists or documents of any description indicating to whom and when any data, information, results, drafts or versions of the Bionetics reports were disseminated.

This request is overly broad because it has no temporal limitation and thus also asks for recently generated documents that happen to mention the Bionetics study. Consequently, the request is unduly burdensome and oppressive.

Moreover, the United States previously has responded to defendants' September 9, 1982 request for this material by Notice to all Counsel dated November 11, 1982. That Notice stated that NIH had completed its search and had produced any such documents contained within its files. See, Appendix D at 3.

Additionally, Ms. Belk's affidavit indicates that, if they have not already been produced, these documents do not exist in NIH files. See, Appendix B at 2-3. To the extent that any such documents exist in the files of Dr. Courtney, the parties had an opportunity on January 19, 1983 to inspect and select them for production by the United States. To require any additional search of NIH files would be unduly burdensome and oppressive.

7. All notes, memoranda and correspondence, from NCI employees to Bionetics employees, and from Bionetics employees to NCI employees, that pertain to the Bionetics study, including but not limited to transmittal letters accompanying reports, data or other correspondence or documents submitted by Bionetics to NCI or by NCI to Bionetics.

This request is overly broad because it has no temporal limitation and thus also asks for recently generated documents that happen to mention the Bionetics study. Consequently, the request is unduly burdensome and oppressive.

To the extent that such documents exist in NIH files, they have previously been produced in either the fall of 1980 or November, 1982. See, Appendix B at 2-3. Additionally, if any such documents exist in the files of Dr. Courtney, the parties had an opportunity on January 19, 1983 to inspect and select them for production by the United States. To require any additional search of NIH files would be unduly burdensome and oppressive.

8. All notes, memoranda, correspondence or documents of any description that relate to meetings, discussions or communications -- formal or informal -- held from 1960 to 1970 and attended by Bionetics employees, NCI employees, or any other representatives of any government or private entity, at which the Bionetics study was discussed or mentioned.

This request is overly broad because it seeks material that is unrelated to 2,4,5-T, 2,4,5-TCP, herbicides, Agent Orange, dioxin or chloracne. Consequently, the request is unduly burdensome and oppressive.

To the extent that such documents exist in NIH files, they have previously been produced in either the fall of 1980 or November, 1982. See, Appendix B at 2-3. Additionally, if any such documents exist in the files of Dr. Courtney, the parties had an opportunity on January 19, 1983 to inspect and select them for production by the United States. To require any additional search of NIH files would be unduly burdensome and oppressive.

9. All LD-50 reports and/or other reports on the toxicology and/or chemistry of 2,4,5-T prepared in connecton with the Bionetics study.

The United States previously has responded to defendants' September 9, 1982 request for this material by Notice to All Counsel dated November 11, 1982. That Notice stated that NIH had completed its search and had produced any such documents contained within its files. See, Appendix D at 3. Additionally, Ms. Belk's affidavit indicates that, if they have not already been produced, these documents do not exist in NIH files. See, Appendix B at 2-3. To the extent that any such documents exist in the files of Dr. Courtney, the parties had an opportunity on January 19, 1983 to inspect and select them for production by the United States. To require any additional search of NIH files would be unduly burdensome and oppressive.

10. All written protocols, including the Food and Drug Administration Phase II teratology protocol, utilized or consulted in the course of the Bionetics study.

The United States previously has responded to defendants' September 9, 1982 request for this material by Notice to All Counsel dated November 11, 1982. That Notice stated that NIH had completed its search and had produced any such documents contained within its files. See, Appendix D at 3. Additionally, Ms. Belk's affidavit indicates that, if they have not already been produced, these documents do not exist in the relevant NIH files. See, Appendix B at 3. To the extent that any such documents exist in the files of Dr. Courtney, the parties had an opportunity on January 19, 1983 to inspect and select them for production by the United States. To require any additional search of NIH files would be unduly burdensome and oppressive.

11. All documents relating to Dr. Courtney's attendance at any workshops, conferences, meetings or seminars concerning teratology, including but not limited to all notes pertaining to Dr. Courtney's trip to Canada and meetings with Canadian scientists in which 2,4,5-T, 2,4,5-TCP, any dioxin or chloracne was mentioned.

This request is overly broad and, therefore, virtually impossible to address. Because the request is so sweeping, it is unduly burdensome and oppressive.

In any event, the United States previously has responded to defendants' September 9, 1982 request for this material by Notice to All Counsel dated November 11, 1982. That Notice stated that NIH had completed its search and had produced any such documents contained within its files. See, Appendix D at 3. Additionally, Ms. Belk's affidavit indicates that these documents are not in the possession, custody or control of NIH. See, Appendix B at 3. Consequently, NIH cannot make the requested production and to demand that it do so is unduly burdensome and oppressive. Moreover, to the extent that any such documents exist in the files of Dr. Courtney, the parties had an opportunity on January 19, 1983 to inspect and and select them for production by the United States. To require any additional search of NIH files would be unduly burdensome and oppressive.

12. Personal records of Dr. Baker relevant to 2,4,5-T.

This request constitutes a request that defendants had not previously made in writing in accordance with procedure. As a new request to which the United States has not yet had an opportunity to respond, this request does not belong in an order to compel production. Additionally, this material either has already been produced or it does not exist in the relevant NIH files. See, Appendix B at 3-4. To require yet another search of these files would be unduly burdensome and oppressive.

To the extent that this request seeks material in Dr. Baker's possession, it seeks material not in the possession, custody or control of NIH or the United States. See, Appendix B at 4. The United States cannot compel production of this material from Dr. Baker and should not, in turn, be compelled to produce the material. For that reason, the request is unduly burdensome and oppressive.

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13. Minutes, notes or memoranda of meetings, or referring to meetings, of NCI directors where 2,4,5-T 2,4,5,-TCP, any dioxin or chloracne was discussed.

This request constitutes a request that defendants have not previously made in writing in accordance with procedure. As a new request to which the United States has not yet had an opportunity to respond, this request does not belong in an order to compel production. Additionally, this request is overly broad partially because it contains no temporal limitation and, therefore, it is virtually impossible to address. Because the request is so sweeping, the request is unduly burdensome and oppressive.

To the extent these documents exist in the relevant NIH files, they have previously been produced. See, Appendix A. Additionally, Ms. Belk's affidavit indicates that, if these documents have not already been produced, they do not exist in the relevant NIH files. See, Appendix B at 4. To require yet another search of NIH files would be unduly burdensome and oppressive.

14. Records of meetings attended by FDA scientists and Dr. Baker.

This request constitutes a request that defendants have not previously made in writing in accordance with procedure. As a new request to which the United States has not yet had an opportunity to respond, this request does not belong in an order to compel production. Additionally, this request is overly broad and, therefore, virtually impossible to address. Because the request is so sweeping, it is unduly burdensome and oppressive.

To the extent these documents exist in the relevant files, they have previously been produced. See, Appendix A. Moreover, Ms. Belk's affidavit indicates that, if these documents have not already been produced, they do not exist in the relevant NIH files. See, Appendix B at 4. To require yet another search of NIH files would be unduly burdensome and oppressive.

15. Bound compendiums of studies of chemical compounds for carcinogenicity published by and/or in possession of United States Public Health Service.

This request constitutes a request that defendants have not previously made. As a new request to which the United States has not yet had an opportunity to respond, this request does not belong in an order to compel production. Additionally, this request is so vague that it is virtually impossible to address. Because that vagueness prevents an adequately narrow search scope, it is unduly burdensome and oppressive.

Moreover, to the extent that such documents exist in NIH files, they are contained in the prior document production from NIH that the United States has made available to the parties. See, Appendix B at 4. To require yet another search of these files is unduly burdensome and oppressive.

16. Dr. Fishbein's files in the custody of NCI, including but not limited to the literature reviewed in deciding to include 2,4,5-T in the Bionetics study, and notes or literature received at a toxicology meeting in Atlanta on 3/12/70 attended by Dr. Fishbein.

This request constitutes a request that defendants have not previously made. As a new request to which the United States has not yet had an opportunity to respond, this request does not belong in an order to compel production.

Additionally, Ms. Belk's affidavit indicates that, if they have not already been produced, these documents do not exist in the relevant NIH files. See, Appendix B at 4.

To the extent this request seeks material in Dr. Fishbein's possession, it seeks material not in the possession, custody or control of NIH or the United States. See, Appendix B at 4. The Government cannot compel production of this material by Dr. Fishbein and should not, in turn, be compelled to produce the material. For that reason, the request is unduly burdensome and oppressive.

- F. Because of the Oppressive Effect of Defendants' Motion, the United States Requests that the Special Master Issue a Protective Order Regarding Discovery From the National Institutes of Health

Rule 37(a)(2) of the Federal Rules of Civil Procedure provides that:

If the court denies the motion [to compel production] in whole or in part, it may make such protective order as it would have been empowered to make on a motion made pursuant to Rule 26(c).

Fed.R.Civ.P 37(a)(2). Rule 26 (c) allows a court to fashion whatever order justice might require to protect "a party or person from annoyance, embarrassment, oppression, or undue burden or expense." Fed.R.Civ.P. 26(c).

Although the United States recognizes a potential need, in theory, to focus on specific discovery requests, it finds the reality of the requests contained in the pending motion unduly burdensome and oppressive. First, NIH already has conducted at least one full search of the relevant NIH files in which the requested documents reasonably would be located. See, Appendix B at 1. The production from these files has been both sizeable and significant. See, Appendix A. For the defendants to require yet another sweep of these files is entirely unreasonable and oppressive. Second, the United States has previously informed defendants that the requested material is not currently contained in any NIH files, specifically those of NIEHS and NCI. See, Appendix D. Defendants' continued renewal of these requests consists of harrassment of the Government and its agencies which distracts the Government from its goal of completing any incomplete production. It is simply absurd and burdensome to make NIH officials conduct yet another search for these documents.

Third, defendants' Motion includes overly broad or vague requests which encompass documents which would have no relation in any form to the issues in this case. Because of the inestimable effort required to make the requisite searches, the Government also finds these requests unduly burdensome and oppressive.

The United States has devoted significant resources and effort in providing parties to this litigation with immense production through discovery from a multitude of witnesses and document repositories. With this motion, defendants overstep the bounds of their legitimate discovery rights with the effect of harrassing, burdening and oppressing the Government its agencies and its employees.

For these reasons, the United States requests that the Special Master issue the attached Protective Order regarding NIH document production. The Order would prevent the defendants from pursuing or renewing any requests either for the actual documents requested in defendants' pending motion or for documents pertaining to the subject matters encompassed by defendants' pending motion. See, Appendix E. This protective order is necessary to prevent defendants from continuing to harrass NIH with both the reassertion of already settled document requests and such burdensome requests as evidenced by the pending motion.

Rule 37(a)(4) provides that, if the court denies a motion to compel production, the court shall

require the moving party or the attorney advising the motion or both of them to pay to the party or deponent who opposed the motion the reasonable expenses incurred in opposing the motion, including attorney's fees

Fed.R.Civ.P. 37(a)(4). In addition, under the provisions of Rule 26(c), the court also may award the costs of a motion for a Protective Order if that motion is granted. Fed.R.Civ.P. 26(c). The United States therefore requests that the Special Master award to the United States the cost of opposing defendants' Motion to Compel and of bringing the attached Motion for Protective Order.

III. Conclusion

For the reasons cited above, the United States requests that the Special Master deny Defendants' Motion to Compel Production of National Cancer Institute and Bionetics Research Laboratories, Inc. Documents and issue the attached National Institutes of Health Protective Order.

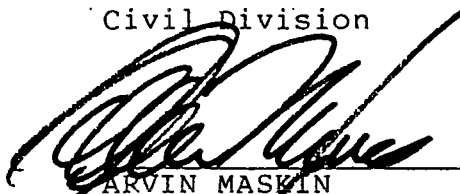
Respectfully Submitted,

J. PAUL McGRATH
Assistant Attorney General
Civil Division

RAYMOND J. DEARIE
United States Attorney



JEFFREY AXELRAD
Director, Torts Branch
Civil Division



ARVIN MASKIN
Trial Attorney, Torts Branch
Civil Division



GRETCHEN LEAH WITT
Trial Attorney, Torts Branch
Civil Division
U.S. Department of Justice
Washington, D.C. 20530
Telephone: (202) 724-6725

Attorneys for the United States
of America.

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the United States' Memorandum in Opposition to Defendants' Motion to Compel Production of National Cancer Institute and Bionetics Research Laboratories, Inc. and in Support of the United States' Motion for Protective Order was mailed this 29th day of January, 1983 to the following:

Victor J. Yannacone, Jr.
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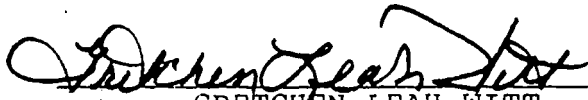
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& Specthrie
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Clerk of the Court
U.S. District Court
Eastern District of New York
Hempstead Turnpike
Uniondale Avenue
Uniondale, New York 11553


GRETCHEN LEAH WITT

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK
CLERK'S OFFICE
COURT E.D.N.Y.

★ FEB 17 1983 ★

TIME A.M. _____
P.M. _____

MDL No. 381

In re; "AGENT ORANGE"

Product Liability Litigation

NOTICE TO TAKE ORAL
DEPOSITION AND PRODUCTION
OF DOCUMENTS

PLEASE TAKE NOTICE that, pursuant to Rule 30(b) of the Federal Rules of Civil Procedure, the defendants in the above captioned action will cause to be taken the testimony of a Representative from the National Academy of Sciences, on the 7th day of March 1983 at 10:30 o'clock in the forenoon at the Law offices of Kelley, Drye & Warren, 1333 New Hampshire Avenue, N.W. Washington, D.C. 20036. Pursuant to Rule 30(b)(6) The National Academy of Sciences should designate the appropriate person or persons to testify as to the location or authenticity of the following described documents.

PLEASE TAKE FURTHER NOTICE that, at the above time and place, the National Academy of Sciences shall produce and make available for inspection and copying any and all documents in the possession, custody, or control of the National Academy of Sciences or any of its subdivisions including, but not limited to, final reports, interim reports, notes, memoranda, correspondence, research notes relating to a 1974 research project by the National Academy of Sciences/National Research Council or any

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of its subdivisions for the Department of Defense or any of its subdivisions on the effects of herbicides in Vietnam and any contract files relating to said study. The National Academy of Sciences shall also produce any and all documents in the possession, custody, or control of the National Academy of Sciences or any of its subdivisions including, but not limited to, final reports, interim reports, notes, memoranda, correspondence, research notes relating to any study performed by the National Academy of Sciences/National Research Council or any of its subdivisions on herbicides, dioxin, or industrial health problems in the production of 2,4,5-trichlorophenoxy acetic acid or trichlorophenol and any contract documents and contract files between the National Academy of Sciences/National Research Council or any of its subdivisions and any United States Government Agency pertaining to herbicides or dioxin. Said studies and contract files are to cover the period 1960-1970.

BUDD, LARNER, KENT, GROSS,
PICILLO & ROSENBAUM

BY: Alan G. White
ALAN G. WHITE

Attorney for The Thompson
Chemical Company
33 Washington Street
Newark, New Jersey 07102
(201) 622-7400

STATE OF NEW JERSEY)

ss.:

COUNTY OF ESSEX)

I, Caren C. Cunningham, of full age, being duly sworn according to law, upon my oath deposes and says:

1. I am employed by the firm of Budd, Lerner, Kent, Gross, Picillo & Rosenbaum, attorneys for Thompson Chemical Company.

2. On February 10th, 1983, I caused to mail, by regular mail, a copy of the enclosed Notice to Take Deposition upon the attorneys below set forth representing the parties, as indicated, at the addresses shown, said addresses being designated by said attorney for that purpose.

ATTORNEY:

Listed on attached service list

3. I caused to mailed by certified mail, return receipt requested the above Notice to Take Deposition to the National Academy of Sciences 2101 Contitution Avenue, N.W. Washington, D.C. 20418.

4. On February 10th, 1983 I caused to be mailed by express messenger the above Notice to Take Deposition for filing to the Clerk, United States District Court for the Eastern District of New York, Uniondale Avenue at Hempstead Turnpike Uniondale, New york 11533.

I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment.


CAREN C. CUNNINGHAM

Sworn to and subscribed
before me this 10th day
of February, 1983



MARY K. PICILLO
A Notary Public of New Jersey
My Commission Expires March 1, 1985

TO:

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Garden City, N.Y. 11530

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

IN CLERK'S OFFICE
U.S. DISTRICT COURT E.D.N.Y.

★ MAR 8 1983 ★

In re:

"AGENT ORANGE"

TIME A.M.

P.M.

NOTICE TO TAKE DEPOSITION

Product Liability Litigation

MDL No. 381

-----x

PLEASE TAKE NOTICE that, pursuant to Rules 30 and 45 of the Federal Rules of Civil Procedure, defendants will take the deposition upon oral examination of THE INSTITUTE FOR DEFENSE ANALYSIS, by an officer, director or managing agent thereof having knowledge of the documents described in the attached Schedule of Documents, at the offices of Boothe, Prichard & Dudley, 711 Princess Street, Alexandria, Virginia at 10:00 a.m. on March 16, 1983. If for any reason the taking of the deposition is not completed on the date indicated, then said deposition shall be adjourned from day to day until completed.

PLEASE TAKE FURTHER NOTICE that, pursuant to the Federal Rules of Civil Procedure, the person to be examined is commanded to produce at said examination the documents requested in the attached Schedule of Documents.

Dated: Garden City, New York
March 7, 1983

RIVKIN, LEFF, SHERMAN & RADLER
Attorneys for Defendant, THE
DOW CHEMICAL COMPANY

By *Maynard Mintz*
A Member of the Firm

9643

100 Garden City Plaza
Garden City, New York 11530
(516) 746-7500

TO: See Attached Service List

1118

Schedule of Documents

1. All documents that refer or relate to proposed research, development, testing, evaluation, toxicity, or use of herbicides for military purposes, including but not limited to 2,4,5-trichlorophenoxyacetic acid, 3-amino 1,2,4-triazole (ATA, amitrole, aminotriazole), or an ester, amine, salt, or other form thereof, including Agents Orange, Pink, Purple, and Green.

2. All documents that refer or relate to research, development, testing, evaluation, toxicity, or use of herbicides for military purposes, including but not limited to 2,4,5-trichlorophenoxyacetic acid, 3-amino 1,2,4-triazole (ATA, amitrole, aminotriazole), or an ester, amine, salt, or other form thereof, including Agents Orange, Pink, Purple, and Green.

3. All documents not called for in response to paragraphs "1" OR "2" relating to any communication to or from Edgewood Arsenal (including but not limited to all communications to or from J. H. Coastes, L. M. Sharpe, H. Pollack, S. S. Penner, Robert J. Heaston, J. F. Ruina, S. J. Deitchman, or any agent, employee or representative of the Institute for Defense Analyses or any predecessor or successor agencies thereof), which refer or relate to dioxin, trichlorophenol, 2,4,5-trichlorophenoxyacetic acid, 3-amino 1,2,4-triazole (ATA, amitrole, aminotriazole), or an ester, amine, salt, or other form thereof, including Agents Orange, Pink, Purple, and Green.

4. All documents not called for in response to paragraphs "1" or "2" relating to any communication to or from Fort Detrick

(including but not limited to all communications to or from J. H. Coates, L. M. Sharpe, H. Pollack, S. S. Penner, Robert J. Heaston, J. F. Ruina, S. J. Deitchman, or any agent, employee or representative of the Institute for Defense Analyses or any predecessor or successor agencies thereof), which refer or relate to dioxin, trichlorophenol, 2,4,5-trichlorophenoxyacetic acid, 3-amino 1,2,4-triazole (ATA, amitrole, aminotriazole), or an ester, amine, salt, or other form thereof, including Agents Orange, Pink, Purple, and Green.

5. All documents not called for in response to paragraphs "1" or "2" relating to any communication to or from the Advanced Research Projects Agency ("ARPA") (including but not limited to all communications to or from J. H. Coates, L. M. Sharpe, H. Pollack, S. S. Penner, Robert J. Heaston, S. J. Deitchman, J. R. Ruina, or any agent, employee or representative of the Institute for Defense Analyses or any predecessor or successor agencies thereof), which refer or relate to dioxin, trichlorophenol, 2,4,5-trichlorophenoxyacetic acid, 3-amino 1,2,4-triazole (ATA, amitrole, aminotriazole), or an ester, amine, salt, or other form thereof, including Agents Orange, Pink, Purple, and Green.

6. All documents not called for in response to paragraphs "1" or "2" relating to any communication to or from the United States Department of Agriculture (including but not limited to all communications to or from H. H. Coates, L. M. Sharpe, H. Pollack, S. S. Penner, Robert J. Heaston, J. F. Ruina, S. J. Deitchman, or

any agent, employee or representative of the Institute for Defense Analyses or any predecessor or successor agencies thereof), which refer or relate to dioxin, trichlorophenol, 2,4,5-trichlorophenoxyacetic acid, 3-amino 1,2,4-triazole (ATA, amitrole, aminotriazole), or an ester, amine, salt, or other form thereof, including Agents Orange, Pink, Purple, and Green.

7. All documents not called for in response to paragraphs "1" or "2" relating to any communication to or from the Office of the Secretary of Defense (including but not limited to all communications to or from J. J. Coates, L. M. Sharpe, H. Pollack, S. S. Penner, Robert J. Heaston, J. F. Ruina, S. J. Deitchman, or any agent, employee or representative of the Institute for Defense Analyses or any predecessor or successor agencies thereof), which refer or relate to dioxin, trichlorophenol, 2,4,5-trichlorophenoxyacetic acid, 3-amino 1,2,4-triazole (ATA, amitrole, aminotriazole), or an ester, amine, salt, or other form thereof, including Agents Orange, Pink, Purple, and Green.

8. All documents not called for in response to the preceding paragraphs which refer or relate to dioxin, trichlorophenol, 2,4,5-trichlorophenoxyacetic acid, 3-amino 1,2,4-triazole (ATA, amitrole, aminotriazole), or an ester, amine, salt, or other form thereof, including Agents Orange, Pink, Purple, and Green.

9. All notes, drafts, source materials, and other documents used in the preparation of or related to Institute for Defense Analyses Technical Note 62-68 (December 1962) entitled, "The

Present Status of Chemical Control of Vegetation in Relation to Military Needs", by J. H. Coates, L. M. Sharpe and H. Pollack.

10. All notes, drafts, source materials, and other documents used in the preparation of or related to a January 1963 Institute for Defense Analyses appendix to the report cited in Paragraph 9 entitled, "Appendix--Chemicals for Control of Vegetation", by J. Coates and L. M. Sharpe.

11. All copies of studies, reports, publications, and other literature which refer to or relate to dioxin, trichlorophenol, 2,4,5-trichlorophenoxyacetic acid, 3-amino 1,2,4-triazole (ATA, amitrole, aminotriazole), or an ester, amine, salt, or other form thereof, including but not limited to any of the following:

(a) Kimmig, J., Schulz, K. H.: Chlorierte aromatische cyclische Ether als Ursache der sogenannten Chlorakne, Naturwissenschaften 44,337-338 (1957);

(b) Kimmig, J., Schulz, K. H.: Berufliche Akne (sog. Chlorakne) durch chlorierte aromatische cyclische Ether, Dermatologica 115,540-456 (1957);

(c) Schulz, K. H.: Klinische und experimentelle Untersuchungen zur Ätiologie der Chlorakne, Arch. Klin. Exp. Dermatol, 206,589-596 (1957);

(d) Bauer, H., Schulz, K. H., Spiegelberg, U.: Berufliche Vergiftungen bei der Herstellung von Chlorophenol-Verbindungen, Arch. Gewerbepathol. Gewerbehyg. 18,538-555 (1961);

(e) Sandermann, W., Stockmann, H., Casten, R.: Uber die Pyrolyse des Pentachlorphenols, Chem. Ber. 90,690-692 (1957);

(f) Bleiberg, J., Wallen, M., Brodtkin, R., Appelbaum, I. L.: Industrially acquired porphyria, Arch. Dermatol. 89,793-797 (1964); and

(g) Jones, E. L., Krizek, H.: A Technic for Testing Acnegenic Potency in Rabbits, Applied to the Potent Acnegen, 2,3,7,8-Tetrachlorodibenzo-P-Dioxin, Journal of Investigative Dermatology 511 (1962).

12. All organization charts for each division, branch, section, and other unit of the Institute for Defense Analyses and all predecessors or successors thereto from January 1, 1956 to January 1, 1972.

DEFINITIONS

As used herein:

A) "Document" shall include the whole, any part, any draft, any writing and record of every type and description, including but not limited to letters, memoranda, reports, manuals, publications, raw and refined data, graphs, drawings, notes, lists, studies, agreements, telegrams, analyses, summaries of personal conversations, diaries, surveys, statistical statements, charts, pictures, reports and/or summaries of investigations, opinions or reports of consultants, contracts, projections, drafts, proposals, books, articles, tape or other recordings, whether printed, typed, handwritten, reproduced, magnetically recorded, or in any other way made readable or retrievable. This definition specifically includes any and all copies of any documents that contain any notation or which otherwise differ from the original or other copies thereof.

B) "Communication" means any transfer or exchange between two or more persons of any information, whether by writing, electronic or other means, including but not limited to, correspondence, telegrams, telexes, mailgrams, or any other document. This definition includes all communications for which you may claim privilege.

C) "Person" or "persons" means all natural persons, corporations, partnerships, or other business associations and all other legal entities.

STATE OF NEW YORK)
) ss.:
COUNTY OF NASSAU)

THERESA A. MENNA , being duly sworn, deposes and says:

That deponent is not a party to this action, is over
years of age and resides in Lynbrook, NY

That on the 7th day of March, 1983 , deponent sees
the within

NOTICE TO TAKE DEPOSITION

upon the attorneys below set forth representing the parties, as
indicated, at the addresses shown, said addresses being designat-
ed by said attorneys for that purpose, by depositing a true
copy of same, enclosed in a postpaid properly addressed wrapper
in an official depository under the exclusive care and custody
of the United States Post Office Department within the State of New
York.

See Attached Service List

Theresa A. Menna

Sworn to before me this 7th
day of March , 1983

Colleen A. Carney
NOTARY PUBLIC

COLLEEN A. CARNEY
NOTARY PUBLIC, STATE OF NEW YORK
NO. 4714759
QUALIFIED IN SUFFOLK COUNTY
COMMISSION EXPIRES MARCH 30, 1984

9650

TO:

MORTON B. SILBERMAN, ESQ.
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THE INSTITUTE FOR DEFENSE
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Alexandria, Virginia 22311

HON. GEORGE C. PRATT
United States District Court
Eastern District of New York
Uniondale Ave. & Hempstead Tpke.
Uniondale, New York

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

IN CLERK'S OFFICE
U.S. DISTRICT COURT E.D.N.Y.

★ MAR 8 1983 ★

In re:

"AGENT ORANGE"

TIME A.M.
NOTICE TO TAKE DEPOSITION

Product Liability Litigation

MDL No. 381

-----x

PLEASE TAKE NOTICE that, pursuant to Rules 30 and 45 of the Federal Rules of Civil Procedure, defendants will take the deposition upon oral examination of THE RAND CORPORATION, by an officer, director or managing agent thereof having knowledge of the documents described in the attached Schedule of Documents, at the offices of Haight, Dickson, Brown & Bonesteel, 815 Moraga Drive, Los Angeles, California at 10:00 a.m. on March 16, 1983. If for any reason the taking of the deposition is not completed on the date indicated, then said deposition shall be adjourned from day to day until completed.

PLEASE TAKE FURTHER NOTICE that, pursuant to the Federal Rule of Civil Procedure, the person to be examined is commanded to produce at said examination the documents requested in the attached Schedule of Documents.

Dated: Garden City, New York
March 7, 1983

RIVKIN, LEFF, SHERMAN & RADLER
Attorneys for Defendant, THE
DOW CHEMICAL COMPANY

By Margaret Muntz
A Member of the Firm

100 Garden City Plaza
Garden City, New York 11530
(516) 746-7500

To: See Attached Service List

9652 1119

Schedule of Documents

1. A report titled, "A Statistical Analysis of the U.S. Crop Spraying Program in South Vietnam", October, 1967, by Anthony J. Russo, and all notes, drafts, source materials, and other documents used in preparation of or related to this report.

2. A report titled, "An Evaluation of Chemical Crop Destruction in Vietnam", October, 1967, by Russell Betts and Frank Denton and all notes, drafts, source materials, and other documents used in preparation of or related to this report.

3. A report titled, "Some Findings of the Viet Cong Motivation and Morale Study: June - December 1965", February, 1966 by L. Goure, A. J. Russo, and D. Scott, and all notes, drafts, source materials, and other documents used in preparation of or related to this report.

4. All documents that describe, contain information about, or refer or relate in any way to any proposed research, development, testing, evaluation, or use of herbicides for military purposes.

5. All documents that describe, contain information about, or refer or relate in any way to any research, development, testing, evaluation, toxicity, or use of herbicides for military purposes.

6. All documents not called for in response to paragraphs "1" through "5" relating to any communication to or from the Advanced Research Projects Agency ("ARPA") which describe, contain information about or refer or relate to in any way to dioxin, trichlorophenol, 2,4,5-trichlorophenoxyacetic acid, 3-amino, 1,2,4-triazole

1,2,4-triazole (ATA, amitrole, aminotriazole), or an ester, amine, salt, or other form thereof, including Agents Orange, Pink, Purple, and Green.

6. All documents not called for in response to the preceding paragraphs which refer or relate to dioxin, trichlorophenol, 2,4,5-trichlorophenoxyacetic acid, 3-amino 1,2,4-triazole (ATA, amitrole, aminotriazole), or an ester, amine, salt, or other form thereof, including Agents Orange, Pink, Purple, and Green.

DEFINITIONS

As used herein:

A) "Document" shall include the whole, any part, any draft, and any writing and record of every type and description, including but not limited to letters, memoranda, reports, manuals, publications, raw and refined data, graphs, drawings, notes, lists, studies, agreements, telegrams, analyses, summaries of personal conversations, diaries, surveys, statistical statements, charts, pictures, reports and/or summaries of investigations, opinions or reports of consultants, contracts, projections, drafts, proposals, books, articles, tape or other recordings, whether printed, typed, handwritten, reproduced, magnetically recorded, or in any other way made readable or retrievable. This definition specifically includes any and all copies of any documents that contain any notation or which otherwise differ from the original or other copies thereof.

B) "Communication" means any transfer or exchange between two or more persons of any information, whether by writing, electronic or other means, including but not limited to, correspondence, telegrams, telexes, mailgrams, or any other document. This definition includes all communications for which you may claim privilege.

C) "Person" or "persons" means all natural persons, corporations, partnerships, or other business associations and all other legal entities.

STATE OF NEW YORK)
) ss.:
COUNTY OF NASSAU)

THERESA A. MENNA , being duly sworn, deposes and says:

That deponent is not a party to this action, is over 18 years of age and resides in Lynbrook, NY

That on the 7th day of March, 1983 , deponent serve the within

NOTICE TO TAKE DEPOSITION

upon the attorneys below set forth representing the parties, as indicated, at the addresses shown, said addresses being designated by said attorneys for that purpose, by depositing a true copy of same, enclosed in a postpaid properly addressed wrapper in an official depository under the exclusive care and custody of the United States Post Office Department within the State of New York.

See Attached Service List

Theresa A. Menna

Sworn to before me this 7th
day of March , 1983

Colleen A. Carney
NOTARY PUBLIC

COLLEEN A. CARNEY
NOTARY PUBLIC, STATE OF NEW YORK
NO. 4714759
QUALIFIED IN SUFFOLK COUNTY
COMMISSION EXPIRES MARCH 30, 1984

9656

TO:

MORTON B. SILBERMAN, ESQ.
Clark, Gagliardi & Miller
The Inns of Court
99 Court Street
White Plains, New York 10601

WENDELL B. ALCORN, JR., ESQ.
Cadwalader, Wickersham & Taft
One Wall Street
New York, New York 10005

JOHN SABETTA, ESQ.
Townley & Updike
405 Lexington Avenue
New York, New York 10174

WILLIAM KROHLEY, ESQ.
Kelley, Drye & Warren
101 Park Avenue
New York, New York 10178

DAVID R. GROSS, ESQ.
Budd, Larner, Kent, Gross, Picillo
& Rosenbaum
33 Washington Avenue
Newark, New Jersey 07102

THOMAS A. BECK, ESQ.
Arthur, Dry & Kalish, P.C.
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New York, New York 10020

VICTOR J. YANNACONE, JR., ESQ.
Yannacone & Yannacone
P. O. Box 109
Patchogue, New York 11772

IRVING LIKE, ESQ.
200 West Main Street
Babylon, New York 11702

ARVIN MASKIN, ESQ.
Department of Justice
Safeway Building
Room 904 D
Washington, D.C. 20530

SOL SCHREIBER, ESQ.
SPECIAL MASTER
Milberg, Weiss, Bershad & Specthrie
One Pennsylvania Plaza
New York, New York 10019

HOWARD LESTER, ESQ.
Lester, Schwab, Katz & Dwyer
120 Broadway
New York, New York 10271

PAUL ESPOSITO, ESQ.
Lewis, Overbeck & Furman
135 South LaSalle Street
Suite 1060
Chicago, IL 60603

The Rand Corporation
1700 Main Street
Santa Monica, California 90406

HON. GEORGE C. PRATT
United States District Court
Eastern District of New York
Uniondale Ave. & Hempstead
Tpke.
Uniondale, New York

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

IN CLERK'S OFFICE
U.S. DISTRICT COURT E.D.N.Y.

★ MAR 8 1983 ★

In re:

"AGENT ORANGE"

TIME A.M.
P.M.
NOTICE TO TAKE DEPOSITION

Product Liability Litigation

MDL No. 381

-----x

PLEASE TAKE NOTICE that, pursuant to Rules 30 and 45 of the Federal Rules of Civil Procedure, defendants will take the deposition upon oral examination of THE MIDWEST RESEARCH INSTITUTE, by an officer, director or managing agent thereof having knowledge of the documents described in the attached Schedule of Documents, at the offices of Lathrop, Koontz, Righter, Clagett & Norquist, 2345 Grand Avenue, Mutual Benefit Life Building, Kansas City, Missouri at 10:00 a.m. on March 16, 1983. If for any reason the taking of the deposition is not completed on the date indicated, then said deposition shall be adjourned from day to day until completed.

PLEASE TAKE FURTHER NOTICE that, pursuant to the Federal Rules of Civil Procedure, the person to be examined is commanded to produce at said examination the documents requested in the attached Schedule of Documents.

Dated: Garden City, New York
March 7, 1983

RIVKIN, LEFF, SHERMAN & RADLER
Attorneys for Defendant, THE
DOW CHEMICAL COMPANY

By Margaret M. Rivkin
A Member of the Firm

100 Garden City Plaza
Garden City, New York 11530
(516) 746-7500

TO: See Attached Service List

9658

1120

Schedule of Documents

LIST OF DOCUMENTS TO BE PRODUCED

1. A report titled, "Assessment of Ecological Effects of Extensive or Repeated Use of Herbicides", by W. B. House, L. H. Goodson, H. M. Gadberry, and K. W. Dockler, and all notes, drafts, source materials, and other documents used in preparation of or related to this report.

2. All documents that describe, contain information about, or refer or relate in any way to any proposed research, development, testing, evaluation, or use of herbicides for military purposes.

3. All documents that describe, contain information about, or refer or relate in any way to any research, development, testing, evaluation, toxicity, or use of herbicides for military purposes.

4. All documents not called for in response to paragraphs "1", "2" or "3" relating to any communication to or from the Advanced Research Projects Agency ("ARPA") which describe, contain information about or refer or relate in any way to dioxin, trichlorophenol, 2,4,5-trichlorophenoxyacetic acid, 3-amino 1,2,4-triazole (ATA, amitrole, aminotriazole), or an ester, amine, salt, or other form thereof, including Agents Orange, Pink, Purple, and Green.

5. All documents not called for in response to paragraphs "1" through "4" relating to any communication to or from any other agency of the United States Government which refer or relate to dioxin, trichlorophenol, 2,4,5-trichlorophenoxyacetic acid, 3-amino

(ATA, amitrole, aminotriazole), or an ester, amine, salt, or other form thereof, including Agents Orange, Pink, Purple, and Green.

7. All documents not called for in response to paragraphs "1" through "5" relating to any communication to or from any other agency of the United States Government which refer or relate to dioxin, trichlorophenal, 2,4,5-trichlorophenoxyacetic acid, 3-amino 1,2,4-triazole (ATA, amitrole, aminotriazole), or an ester, amine, salt, or other form thereof, including Agent Orange, Pink, Purple, and Green.

8. All documents not called for in response to the preceding paragraphs which refer or relate to dioxin, trichlorophenol, 2,4,5 trichlorophenoxyacetic acid, 3-amino 1,2,4-triazole (ATA, amitrol aminotriazole), or an ester, amine, salt, or other form thereof, including Agents Orange, Pink, Purple, and Green.

DEFINITIONS

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3.3.1 07 11 1983)
COUNTY OF NASSAU) 83.:

THERESA A. MENNA

, being duly sworn, deposes and says:

That deponent is not a party to this action, is over 18 years of age and resides in Lynbrook, NY

That on the 7th day of March, 1983 , deponent served the within

NOTICE TO TAKE DEPOSITION

upon the attorneys below set forth representing the parties, as indicated, at the addresses shown, said addresses being designated by said attorneys for that purpose, by depositing a true copy of same, enclosed in a postpaid properly addressed wrapper in an official depository under the exclusive care and custody of the United States Post Office Department within the State of New York.

See Attached Service List

Theresa A Menna

Sworn to before me this 7th
day of March , 1983

Colleen A Carney

NOTARY PUBLIC

COLLEEN A. CARNEY
NOTARY PUBLIC, STATE OF NEW YORK
NO. 4714759
QUALIFIED IN SUFFOLK COUNTY
COMMISSION EXPIRES MARCH 30, 1984

9062

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99 Court Street
White Plains, New York 10601

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200 West Main Street
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ARVIN MASKIN, ESQ.
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PAUL ESPOSITO, ESQ.
Lewis, Overbeck & Furman
135 South LaSalle Street
Suite 1060
Chicago, Illinois 60603

THE MIDWEST RESEARCH INSTITUTE
425 Volker Street
Kansas City, Missouri 64110

HON. GEORGE C. PRATT
United States District Court
Eastern District of New York
Uniondale Ave. & Hempstead Tpke
Uniondale, New York

IN CLERK'S OFFICE
U.S. DISTRICT COURT S.D.N.Y.

★ MAR 1 1983 ★

TIME A.M.
P.M.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

- - - - - x

IN RE

"AGENT ORANGE"

PRODUCT LIABILITY LITIGATION

- - - - - x

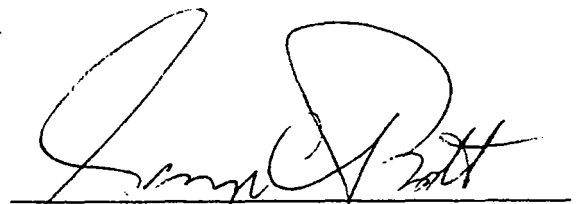
MDL #381
(All Cases)

Pretrial Order No.47

On March 7, 1983, Special Master Sol Schreiber submitted the attached "Recommended Protective Order Governing Documents Obtained From the Files of Dr. Robert W. Boverly, United States Department of Agriculture." No party has objected to the terms of the order, and the court approves and adopts it in full.

SO ORDERED.

Dated: Uniondale, New York
March 9, 1983



GEORGE C. PRATT
U. S. CIRCUIT JUDGE*

* Of the United States Court of Appeals,
Second Circuit, sitting by designation.

9664 (1128)

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

-----X	:	MDL No. 381 (All Cases)
IN RE "AGENT ORANGE" PRODUCT	:	
LIABILITY LITIGATION	:	SPECIAL MASTER'S RECOMMENDED
	:	PROTECTIVE ORDER GOVERNING
-----X	:	DOCUMENTS OBTAINED FROM THE
	:	FILES OF DR. ROBERT W. BOVEY,
	:	UNITED STATES DEPARTMENT OF
	:	<u>AGRICULTURE</u>

The United States of America, having requested an order pursuant to Rule 26(c) of the Federal Rules of Civil Procedure to protect the confidentiality during discovery and trial preparation of certain documents produced pursuant thereto by the United States Department of Agriculture; and

WHEREAS, the United States of America has represented a need to maintain the confidentiality of those documents and the information contained therein; and

WHEREAS, the United States Department of Agriculture regards the files of Dr. Robert W. Bovey as confidential in that they contain his personal notes and various research data, and that some of these files reflect the cooperation of a number of private corporations and individuals; and

WHEREAS, a separate order will protect the confidentiality of such documents at the trial or trials of the action which comprise this litigation; and

WHEREAS, the parties by this order concede nothing with respect to the use or non-use of such documents at the trial or trials of the actions which comprise this litigation; and

WHEREAS, all parties to this litigation have agreed upon the terms of the order as set forth herein and have agreed to abide by the terms of this order in all respects,

IT IS HEREBY ORDERED that all those documents the Government identifies and produces which comprise the "Bovey Collection" are protected by this Confidentiality Order as follows:

1. These documents and the information contained in them will be used exclusively for the purpose of discovery and trial preparation in this litigation as contemplated by the Federal Rules of Civil Procedure, and will be kept confidential and will not be exhibited or described to, or discussed with anyone not Designated (as described in paragraph 3, infra) or Qualified (as described in paragraph 4, infra) or counsel for the United States. No use will be made of these documents or the information contained in them for any purpose other than such discovery and trial preparation in this litigation.

2. These documents may be copied only to the extent necessary to permit their use in accordance with the terms of this Order and no further. Any Designated Person who requests and receives a copy of any original of any of these documents

will henceforth be held responsible and accountable for that copy of the document and all copies made of that copy for any purpose.

3. A Designated Person is one who, in advance of seeing any of these documents, (i) is designated by counsel of record for any party to this litigation, and (ii) signs a formal consent (annexed hereto as Exhibit "A") to be bound by all the terms of this Order. Each counsel of record will be responsible for forwarding copies of the designation and signed consent forms to this Court where they will be filed under seal.

(a) Plaintiffs' Designees may include a reasonable number of: each plaintiff's counsel of record, their paralegals and/or their professional consultants or expert witnesses, and no others.

(b) Defendants' Designees may include a reasonable number of: each defendant's counsel of record, their paralegals, their professional consultants or expert witnesses, and no others.

(c) The professional consultants or expert witnesses referred to in subparagraphs (a) and (b) supra, may not be employees, corporate representatives or corporate consultants of chemical companies; however, they may include independent consultants or expert witnesses paid by the companies.

4. A Qualified Person is a witness to a deposition noticed by any party to this litigation, provided that:

(a) all persons in attendance at the deposition, except for the Court Reporter, and counsel for the United States are Designated or Qualified Persons;

(b) the witness is advised in writing or on the record at the deposition of this Order and the witness agrees in writing or on the record to be bound by all its terms;

(c) copies of documents covered by this Protective Order though identified and numbered as exhibits to the deposition, will not be made a physical attachment to the transcript of the deposition to be filed with the Court (unless filed under seal).

5. No copy of these documents will be made a part of the Court record of this multidistrict litigation for any purpose whatsoever except under seal.

6. Upon the termination (by District Court order or verdict, or settlement) of all the actions consolidated in this multidistrict litigation, all designees of all parties will provide to the counsel of record for the United States either (i) all copies of these documents retained by them, or (ii) a statement to the effect that all such copies have been destroyed.

7. At any point in time prior to the termination of these actions that any party's counsel no longer needs these documents for the purposes outlined herein, that party's designees will provide the counsel of record for the United States either (i) all copies of these documents retained by them, or (ii) a statement to the effect that all such copies have been destroyed.

8. No modification of this Order will be made, nor any additional use of these documents authorized, except by order of the District Court for the Eastern District of New York upon written application to the Court and after an opportunity for all parties and the United States Government to be heard.

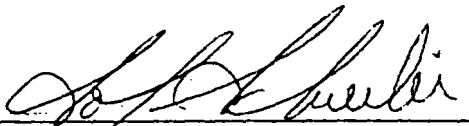
9. This Order shall be binding upon all persons, including parties, Designated Persons and Qualified Persons. It is enforceable by the contempt power of the United States District Court and by any other applicable or appropriate sanction imposed in the discretion of a District Judge of competent jurisdiction.

10. If any Designated or Qualified Person becomes the subject of any Court's subpoena for the production of any of these documents, or information contained therein, that person will promptly notify the Government and all parties to this litigation of the pending subpoena, and notify the issuing Court of this Protective Order.

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11. If at any time any party wishes a waiver relative to a certain document or documents from the restrictions imposed by the conditions in this Order, the party may request such a waiver from this Court in writing, with notice to all other parties and the Government, specifically identifying the document or documents in question and the purpose for which the waiver is requested.

Dated: March 7, 1983


SOL SCHREIBER

9670

EXHIBIT "A"

AGREEMENT CONCERNING DOCUMENTS OBTAINED
FROM THE FILES OF DR. ROBERT W. BOVEY,
UNITED STATES DEPARTMENT OF AGRICULTURE
SUBJECT TO PROTECTIVE ORDER ENTERED IN
THE UNITED STATES DISTRICT COURT FOR
THE EASTERN DISTRICT OF NEW YORK ON
_____, 1983

The undersigned hereby acknowledges that he has read
the Protective Order, dated _____, 1983 and
entered in the United States District Court for the Eastern
District of New York _____, 1983 in the action
entitled In Re Agent Orange Product Liability Litigation, MDL
No. 381 (All Cases), understands the terms thereof and agrees
to be bound by such terms as if he were signatory thereto.

(Date)

Signature

Business Address

Designating Counsel

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

IN CLERK'S OFFICE
U.S. DISTRICT COURT E.D.N.Y.

★ MAR 2 1983 ★

----- x
:
:
IN RE "AGENT ORANGE"
PRODUCT LIABILITY LITIGATION :
:
----- x

TIME AM.....
PM.....
MDL # 381 (GCP)
(All Cases)

MOTION OF NON-PARTIES GILMORE, INC.
AND CHEMIE LINZ, AG FOR A PROTECTIVE
ORDER PURSUANT TO RULE 26(c) AND PRE-
TRIAL ORDER 42 AND SUPPORTING AFFIDAVIT

Non-parties Gilmore, Inc. and Chemie Linz, AG move this Court for a protective order, pursuant to Rule 26(c) of the Federal Rules of Civil Procedure and Pre-Trial Order 42, preventing the disclosure by the United States Environmental Protection Agency ("EPA") of two of their documents submitted to EPA in 1982 on the grounds that (i) the Federal Insecticide, Fungicide and Rodenticide Act, as amended, (FIFRA) specifically prohibits disclosure of trade secrets or commercial information (ii) the documents of non-parties to a litigation contain trade secrets that notwithstanding FIFRA, should not be disclosed to competitors

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and (iii) the documents are immaterial and irrelevant as beyond the temporal scope of this litigation. This motion is made upon the affidavit of Roger E. Gilmore, sworn to on March 14, 1983, and the exhibit annexed thereto.

Dated: March 18, 1983

Fernie K. Linn

Of the Firm of
BURNS SUMMIT ROVINS & FELDESMAN
Attorneys for Gilmore, Inc. and
Chemie Linz, AG
445 Park Avenue
New York, New York 10022
(212) 980-3200

ROSENFELD BOROD & KREMER
P.O. Box 3070
Memphis, Tennessee 38103
(901) 525-6361

TO: CADWALADER, WICKERSHAM
& TAFT
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Shamrock
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New York, New York 10005

TOWNLEY & UPDIKE
Attorneys for Defendant
Monsanto Company
Chrysler Building
405 Lexington Avenue
New York, New York 10017

CLARK, GAGLIARDI & MILLER
Attorneys for Defendant T.H.
Agriculture & Nutrition Co., Inc.
The Inns of Court
99 Court Street
White Plains, New York 10607

UNITED STATES DEPARTMENT OF JUSTICE
Civil Division
521 12th Street, Northwest
Room 822
Washington, D.C. 20530

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ASHCRAFT & GEREL
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Washington, D.C.

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Garden City, New York 11530

LEWIS, OVERBECK & FURMAN
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Chicago, Illinois 60603

KELLEY, DRYE & WARREN
Attorneys for Defendant
Hercules, Inc.
101 Park Avenue
New York, New York 10178

ARTHUR, DRY & KALISH, P.C.
Attorneys for Defendant UniRoyal
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New York, New York 10020

SHEA & GOULD
Co-Counsel for UniRoyal
330 Madison Avenue
New York, New York 10017

BUDD, LARNER, KENT, GROSS
PICILLO & ROSENBAUM
Attorneys for Defendant
Thompson Chemicals
33 Washington Street
Newark, New Jersey 07102

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

-----§
IN RE "AGENT ORANGE"
PRODUCT LIABILITY LITIGATION
-----§

MDL #381 (all cases)

AFFIDAVIT OF
ROGER E. GILMORE

ROGER E. GILMORE, being duly sworn, deposes and states:

1. I am President of Gilmore, Inc. (hereinafter "Gilmore"), a Tennessee corporation which is the exclusive agent for Chemie Linz, AG, a corporation organized under the laws of Austria (hereinafter "Chemie Linz"), for 2, 4, 5-T products in the United States of America. Under the licensee/broker agreements, Gilmore, Inc. has the obligation to maintain secrets of Chemie Linz. Gilmore has been specifically authorized by Chemie Linz to represent Chemie Linz's interests in this multi-district litigation regarding "Agent Orange" (see attached telex, Exhibit A).

2. On behalf of Gilmore and Chemie Linz, I previously objected to the production and disclosure of two documents: (1) a gas chromatogram requested by the Environmental Protection Agency (hereinafter "EPA") on May 13, 1982, and submitted to the EPA on June 22, 1982; and (2) a two-page document of the current method of manufacture of 2, 4, 5-T. I am advised that the EPA has stated during the March 4, 1983, hearing that it "is confident" it can segregate the original of both these documents and all copies thereof. (See Transcript of March 4, 1983, at p. 3299.)

3. I am also advised that we were asked to respond to certain questions propounded during that conference, as follows (Transcript, p. 3302):

Question 1: Whether any of the documents in question refer in any way to dioxin?

Response: By letter of May 13, 1982, the EPA requested "raw data chromatograms for 2, 4, 5-T samples spiked with 10ppb or less of 2, 3, 7-8-tetracholoro-dibenzo-p-dioxin (TCDD)." The gas chromatogram was produced by Chemie Linz subsequent to this request, and was submitted to the EPA on June 22, 1982.

Question 2: Whether [the documents] contain a historical process chronology, including statements as to what the processes were in the 1960 to 1971 period?

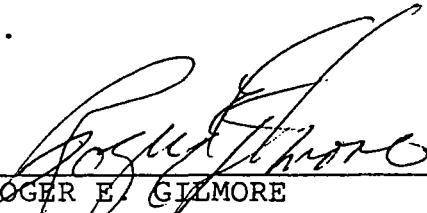
Response: No.

Question 3: When this type of information, contained in the documents, was first submitted to the government?

Response: The manufacturing process data was first submitted to the EPA on August 19, 1982. The gas chromatogram was first submitted to the EPA on June 22, 1982. Neither Chemie Linz nor Gilmore submitted any information relating to dioxin or manufacturing processes prior to these submissions.

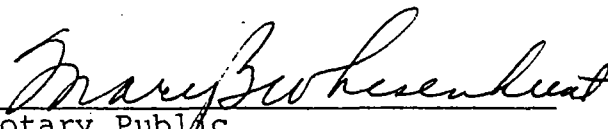
4. Your Affiant respectfully requests that the gas chromatograms submitted on June 22, 1982, and the data reflecting the manufacturing process submitted on August 19, 1982, not be produced pursuant to pre-trial Order No. 42.

Further, Affiant saith not.



ROGER E. GILMORE

SWORN TO AND SUBSCRIBED before me this 14th day of
March, 1983.



Notary Public

My commission expires:
July 15, 1984

International Telex

GILMORE MFS

21324Y LIN Z A 1983 03 01 10.10 UHR FSNR. 52/KZE LE=

RE.:

AGENT ORANGE PRODUCT LIABILITY LITIGATION -

HEARING MARCH 4TH

WE AUTHORIZE GILMORE INC. TO REPRESENT CHEMIE LINZ AG
WITH THE EPA IN THE AGENT ORANGE PRODUCT LIABILITY
LITIGATION ON MARCH 4TH, 1983 IN THE SAME WAY AS
POINTED OUT IN LETTER OF MESSRS. GILMORE INVEEE INC. TO
SPECIAL MASTER SOL SCHREIBER DATED FEB. 24TH, 1983.

Inc.

Western Union International,

REGARDS

CHEMIELINZ/KZE/KUERNSTEINER +++

21324Y LIN Z A#

GILMORE MFS

.....

VIA RADIO-AUSTRIA

01/03/83 0913GMT

ex

Western Union International, Inc.

International Telex

9678

STATE OF NEW YORK)
) ss.:
COUNTY OF NEW YORK)

JACQUELINE GEBHARD, being sworn deposes and says:

Deponent is over 18 years of age, not a party to the action and resides in New York, New York.

On March 18, 1983 I served the enclosed Motion of Non-Parties Gilmore, Inc. and Chemie Linz, AG for a Protective Order Pursuant to Rule 26(c) and Pre-Trial Order 42 and Supporting Affidavit and Memorandum of Law of Non-Parties Gilmore, Inc. and Chemie Linz, AG in Support thereof upon

Clark, Gagliardi & Miller
Attorneys for Defendant T.H.
Agriculture & Nutrition Co.,
The Inns of Court
99 Court Street
White Plains, New York 10607

United States Department of Justice
Civil Division
521 12th Street, Northwest
Room 822
Washington, D.C. 20530

Ashcraft & Gerel
2000 L Street, N.W.
Washington, D.C.

Rivkin, Leff, Sherman & Radler
Attorneys for Dow Chemical
100 Garden City Plaza
Garden City, New York 11530

Lewis, Overbeck & Furman
135 South LaSalle Street
Chicago, Illinois 60603

Budd, Larner, Kent, Gross,
Picillo & Rosenbaum
Attorneys for Defendant
Thompson Chemicals
33 Washington Street
Newark, New Jersey 07102

by depositing a true copy thereof enclosed in a pre-paid properly addressed wrapper under the exclusive care and custody of the Federal Express mail delivery service, next day delivery.

On March 18, 1983 I served the enclosed Motion of Non-Parties Gilmore, Inc. and Chemie Linz, AG for a Protective

Order Pursuant to Rule 26(c) and Pre-Trial Order 42 and Supporting Affidavit and Memorandum of Law of Non-Parties Gilmore, Inc. and Chemie Linz, AG in Support thereof upon

Yannacone & Associates
Attorneys for Plaintiffs
Post Office Draw 109
Patchogue, New York 11772

by depositing a true copy thereof enclosed in a pre-paid properly addressed wrapper in an official depository under the exclusive care and custody of the United States Postal Service within the State of New York.

Jacqueline Gebhard
Jacqueline Gebhard

Sworn to before me this
18th day of March, 1983

Bernice H. Leber
Notary Public

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No. 31-4711164
Qualified in New York County
Certificate Filed in New York County
Commission Expires March 30, 19...

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

In re

"Agent Orange"

Product Liability Litigation

MDL No. M381
(All Cases)

SPECIAL MASTER'S RECOMMENDED
ORDER AND MEMORANDUM RE:
DEFENDANTS' MOTION TO COMPEL
PRODUCTION OF FDA DOCUMENTS

On January 10, 1983, defendants moved, pursuant to Rule 37 of the Fed. R. Civ. P., before the Special Master for an order compelling the government's production of additional documents in the possession of the Food and Drug Administration ("FDA").

In its papers in opposition to defendants' motion to compel, the government represents that the FDA has conducted one full search for documents relevant to this litigation which included a search through the FDA's Bureau of Food files (including the files of its Division of Chemistry and Physics, Division of Chemical Technology and Division of Toxicology). This search resulted in the production of 2,772 documents totalling approximately 16,500 pages, which the government asserts it made available on microfilm in September 1980. According to the government's papers, a follow-up search by FDA revealed a negligible amount of additional relevant information (approximately 24 pages) which the government states it made available on microfilm in June 1981. Replying to the defendants' assertion that they served individual requests identifying specific documents, the government states

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that it responded to such requests by way of a Notice to Counsel dated November 11, 1982 which stated that a search of the relevant files did not uncover the items sought by defendants.

The government also objects to defendants' proposed order to compel production because it contains five new requests to which the United States has had no opportunity to respond; the government urges that these requests be stricken as oppressive in view of the previous search (and follow-up search) of FDA files which revealed that these documents do not exist in the relevant files.

Replying to the government's papers, the defendants reiterate their position that the government has not made a sufficient search for the requested documents. As an example, the defendants cite the government's response to their request for the first seven documents contained in their motion to compel. The defendants state that these documents were cited in a report which indicated that files in the Contaminants Branch of the FDA contained the unpublished documents referred to in the report; inasmuch as these documents have never been produced and that, therefore, according to the government, they are not contained in the relevant files, the defendants' question the criteria by which the government determined files to be relevant for its search. The defendants also request that the Special Master require the government to provide an affidavit detailing its search efforts when even it cannot locate a particular document.

After carefully considering the submissions of both the defendants and the government, and after hearing oral argument on the issue, I conclude that requiring the government to conduct yet another full search of the same "relevant" files would be wasteful and probably futile, in view of the fact that the follow-up search, conducted after defendants submitted their Phase I First-Wave Interrogatories, turned up a negligible amount of new material. However, I recommend that so much of defendants' motion which covers Items #1-9 and #11-13 be granted. These requests are specific in nature, basically seeking particular documents. Although the government has stated that FDA could not locate these documents in earlier searches of relevant files, I believe a further, specific search is advisable. In complying with this Order, the government will submit an affidavit indicating who conducted the search, which files were searched and by what criteria it was determined that the files searched were relevant.

With respect to Items #14-16, the government represents that these are new requests to which they have not had an opportunity to respond. I agree with the government that Rule 37 does not anticipate requests for orders compelling production where there has been no prior request for documents. However, in view of the fast approaching June 27, 1983 trial date, and to avoid

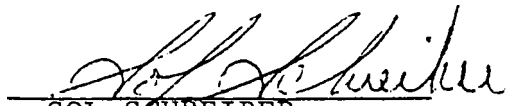
further delay, I believe that rulings on these requests are in order at this time. Items #14 and 15 are denied as being too broad in nature and scope. The government is directed to search for the report requested in Item #16 and to indicate by affidavit, as described above, which files were searched, by whom, and by what criteria the files were determined to be relevant.

Items #10 and #17 to #22 in defendants' motion to compel are denied. These requests are far too general and broad in nature and scope, are duplicative of prior requests and would not further the discovery process.

The attached Recommended Order sets forth the specific documents in the possession of the FDA for which the government is to conduct a search, and outlines the contents of the affidavit which shall be submitted with further production of the documents sought.

Respectfully submitted

Date: March 17, 1983


SOL SCHREIBER
Special Master

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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

In re

"AGENT ORANGE"

Product Liability Litigation

FILED
IN CLERK'S OFFICE
U. S. DISTRICT COURT E.D. N.Y.
MAR 28 1983
TIME A.M.
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DEFENDANT THE DOW
CHEMICAL COMPANY'S
REQUEST FOR PRODUCT-
ION OF DOCUMENTS
DIRECTED TO THE UNITED
STATES OF AMERICA
RE: NATIONAL SECURITY
AGENCY

MDL No. 381

-----X

PLEASE TAKE NOTICE, that pursuant to Rule 34 of the Federal Rules of Civil Procedure, the Defendant The Dow Chemical Company ("Dow") requests the United States of America to produce for inspection and copying the documents requested herein which are in the possession, custody or control of the National Security Agency and its predecessor or successor agencies or offices, if any, within thirty days of service of this Notice or such other date as may be directed by the Special Master.

DOCUMENTS REQUESTED

In accordance with the definitions and instructions set forth in Defendants' Phase I First Wave Interrogatories (First Set) dated January 15, 1981, a copy of which is annexed hereto as Exhibit A, you are requested to produce the following documents for inspection and copying by Dow:

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1. All documents that refer or relate to proposed research, development, testing, evaluation, toxicity, or use of herbicides for military purposes, including but not limited to 2,4,5-trichlorophenoxyacetic acid, or an ester, amine, salt, or other form thereof including Agents Orange, Pink, Purple, and Green.

2. All documents that refer or relate to research, development, testing, evaluation, toxicity, or use of herbicides for military purposes, including but not limited to 2,4,5-trichlorophenoxyacetic acid, or an ester, amine, salt, or other form thereof including Agents Orange, Pink, Purple, and Green.

3. All documents not called for in response to paragraphs 1 or 2 relating to any communication to or from Edgewood Arsenal which refer or relate to dioxin, trichlorophenol, 2,4,5-trichlorophenoxyacetic acid, or an ester, amine, salt or other form thereof, including Agents Orange, Pink, Purple and Green.

4. All documents not called for in response to paragraphs 1 or 2 relating to any communication to or from Fort Detrick which refer or relate to dioxin, trichlorophenol, 2,4,5-trichlorophenoxyacetic acid, or an ester, amine, salt or other form thereof, including Agents Orange, Pink, Purple and Green.

5. All documents not called for in response to paragraphs 1 or 2 relating to any communication to or from the Advanced Research Projects Agency ("ARPA") which refer or relate to dioxin, trichlorophenol, 2,4,5-trichlorophenoxyacetic acid, or an ester, amine, salt or other form thereof, including Agents Orange, Pink, Purple and Green.

6. All documents not called for in response to paragraphs 1 or 2 relating to any communication to or from the Institute for Defense Analyses (including but not limited to all communications to or from J.H. Coates, L.M. Sharpe, H. Pollack, S.S. Penner, Robert J. Heaston, J.F. Ruina, S.J. Deitchman, or any agent, employee or representative of the Institute for Defense Analyses or any predecessors or successors thereof), which refer or relate to dioxin, trichlorophenol, 2,4,5-trichlorophenoxyacetic acid, or an ester, amine, salt or other form thereof, including Agents Orange, Pink, Purple and Green.

7. All documents not called for in response to paragraphs 1 or 2 relating to any communication to or from the Office of the Secretary of Defense which refer or relate to dioxin, trichlorophenol, 2,4,5-trichlorophenoxyacetic acid, or an ester, amine, salt or other form thereof, including Agents Orange, Pink, Purple and Green.

8. All documents not called for in response to the preceding paragraphs which refer or relate to dioxin, trichlorophenol, 2,4,5-trichlorophenoxyacetic acid, or an ester, amine,

salt or other form thereof, including Agents Orange, Pink, Purple and Green.

9. All copies of studies, reports, publications and other literature which refer to or relate to dioxin, trichlorophenol, 2,4,5-trichlorophenoxyacetic acid, or an ester, amine salt or other form thereof, including but not limited to any of the following:

(a) Kimmig, J., Schulz, K.H.: Chlorierte aromatische Zyklische Ather als Ursache der sogenannten Chlorakne, Naturwissenschaften 44,337-338 (1957), or an English or other translation thereof;

(b) Kimmig, J., Schulz, K.H.: Berufliche Akne (sog. Chlorakne) durch chlorierte aromatische zyklische Ather, Dermatologica 115,540-546 (1957), or an English or other translation thereof;

(c) Schulz, K.H.: Klinische und experimentelle Untersuchungen zur Atiologie der Chloracne, Arch. Klin. Exp. Dermatol. 206,589-596 (1957), or an English or other translation thereof;

(d) Bauer, H., Schulz, K.H., Spiegelberg, U.: Berufliche Vergiftungen bei der Herstellung von Chlorphenol-Verbindungen, Arch. Gewerbepathol. Gewerbehyg. 18,538-555 (1961), or an English or other translation thereof;

(e) Sandermann, W., Stockmann, H., Casten, R.: Uber die Pyrolyse des Pentachlorphenols, Chem. Ber.

90,690-692 (1957), or an English or other translation thereof;

(f) Bleiberg, J., Wallen, M., Brodtkin, R., Appelbaum, I.L.: Industrially acquired porphyria, Arch. Dermatol. 89,793-797 (1964); and

(g) Jones, E.L., Krizek, H.: A Technic for Testing Acnegenic Potency in Rabbits, Applied to the Potent Acnegen, 2,3,7,8-Tetrachlorodibenzo-P-Dioxin, Journal of Investigative Dermatology 511 (1962).

10. All organization charts for each division, branch, section and other unit of the National Security Agency and all predecessors or successors thereto from January 1, 1956 to January 1, 1972.

11. All documents not called for in response to the preceding paragraphs that are responsive to Defendants' Phase I First Wave Interrogatories (First Set) dated January 15, 1981 (Exhibit A hereto), but which have not yet been produced to the parties by the United States of America in In re "Agent Orange" Product Liability Litigation, MDL No. 381. This request incorporates by reference the definitions and instructions contained in Exhibit A hereto, including, in particular definitions of "dioxin", "herbicide", and "document".

Dated: Garden City, New York
March 23, 1983

RIVKIN, LEFF, SHERMAN & RADLER

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A Member of the Firm

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EXHIBIT A

DEFENDANTS'
PHASE I
FIRST WAVE
INTERROGATORIES
(FIRST SET)

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

-----X
In re : MDL No. 381
"AGENT ORANGE" : DEFENDANTS' PHASE I
Product Liability Litigation : FIRST WAVE INTERROGATORIES
: (FIRST SET)
-----X

PLEASE TAKE NOTICE that, pursuant to Rule 33 of the Federal Rules of Civil Procedure and Pretrial Order No. 26, filed December 29, 1980, the undersigned defendants demand that the United States of America and each plaintiff herein serve and file answers to each of the following Interrogatories under oath on or before February 13, 1981, in accordance with the definitions and instructions attached hereto and made a part hereof.

INTERROGATORIES

A. RESEARCH, DEVELOPMENT, TESTING
AND EVALUATION OF HERBICIDES

1. Identify separately each unit of the United States, as defined herein, including those listed on Appendix A hereto, that engaged during the period prior to January 1, 1972 in any activities relating to the research, development, testing or evaluation of herbicides for potential use in connection with military activities, and as to each such unit, describe:

a. The nature and extent of its involvement in such activities; and

b. The duration of its involvement in such activities.

2. As to each separate unit of the United States identified in the response to Interrogatory 1, identify each

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person in charge of or with responsibility for any of its activities relating to the research, development, testing or evaluation of herbicides for potential use in connection with military activities.

3. Give an organization chart for each separate unit of the United States identified in the response to Interrogatory 1 for each period prior to January 1, 1972 during which it was involved in activities relating to the research, development, testing or evaluation of herbicides for potential use in connection with military activities.

4. Identify each communication, meeting, contract or other transaction between the United States and any of the defendants herein, or any officer, agent, employee or other person acting or purporting to act on behalf of a defendant, that concerns or relates to any research, development, testing or evaluation of herbicides prior to January 1, 1972 for potential use in connection with military activities.

5. Identify each document constituting, memorializing, disclosing, referring or relating to each communication, meeting, contract or other transaction identified in the response to Interrogatory 4.

6. Identify each project concerning the research, development, testing or evaluation of herbicides for potential use in connection with military activities, including those projects listed on Appendix B hereto.

7. As to each project identified in the response to Interrogatory 6, identify each document that constitutes, memorializes, discloses, refers or relates to the results of research,

development, testing or evaluation that was conducted pursuant to that project.

B. SPECIFICATION, SELECTION, PURCHASE,
PROCUREMENT, PRODUCTION, SHIPMENT
AND DELIVERY OF HERBICIDES

8. Identify separately each unit of the United States, as defined herein, including those listed on Appendix A hereto, that engaged during the period prior to January 1, 1972 in any activities relating to the specification, selection, purchase, procurement, production, shipment or delivery of herbicides for potential use in connection with military activities, and as to each such unit, describe:

a. The nature and extent of its involvement in such activities; and

b. The duration of its involvement in such activities.

9. As to each separate unit of the United States identified in the response to Interrogatory 8, identify each person in charge of or with responsibility for any of its activities relating to the specification, selection, purchase, procurement, production, shipment or delivery of herbicides for potential use in connection with military activities.

10. Give an organization chart for each separate unit of the United States identified in the response to Interrogatory 8 for each period prior to January 1, 1972 during which it was involved in activities relating to the specification, selection, purchase, procurement, production, shipment or delivery of herbicides for potential use in connection with military activities.

11. Identify each communication, meeting, contract or other transaction between the United States and any of the defendants herein, or any officer, agent, employee or other person acting or purporting to act on behalf of a defendant, that concerns or relates to the specification, selection, purchase, procurement, production, shipment or delivery of herbicides prior to January 1, 1972 for potential use in connection with military activities.

12. Identify each document constituting, memorializing, disclosing, referring or relating to each communication, meeting, contract or other transaction identified in response to Interrogatory 11.

13. Identify each herbicide used or tested by the United States prior to January 1, 1972 for potential use in connection with military activities, and with respect to each such herbicide:

- a. State the dates during which it was used and/or tested;
- b. Identify each geographical location at which it was used and/or tested; and
- c. Identify the suppliers and/or manufacturers, and state the amounts contracted for by the United States and the amounts delivered to the United States by each such supplier and/or manufacturer...

14. For the period from January 1, 1961 to January 1, 1972, identify each person in charge of, with responsibility for, or who participated in or was consulted with respect to:

- a. Selecting, contracting with or making changes in suppliers and manufacturers of herbicides for potential use in

connection with military activities;

b. Preparing, evaluating, selecting, modifying or approving technical specifications for each herbicide selected, purchased or procured by the United States for potential use in connection with military activities;

c. Preparing, evaluating, selecting, modifying or approving labeling specifications for each herbicide selected, purchased or procured by the United States for potential use in connection with military activities; and

d. Preparing, evaluating, selecting, modifying or approving shipping and financial specifications for each herbicide selected, purchased or procured by the United States for potential use in connection with military activities.

15. For the period from January 1, 1961 to January 1, 1972, identify each document that describes, refers or relates to:

a. The selection of, contracts with, or the making of changes in suppliers and manufacturers of herbicides for potential use in connection with military activities;

b. The preparation, evaluation, selection, modification or approval of technical specifications for each herbicide selected, purchased or procured by the United States for potential use in connection with military activities;

c. The preparation, evaluation, selection, modification or approval of labeling specifications for each herbicide selected, purchased or procured by the United States for potential use in connection with military activities; and

d. The preparation, evaluation, selection, modification or approval of shipping and financial specifications for each herbicide selected, purchased or procured by the United States for potential use in connection with military activities.

16. For the period from January 1, 1961 to January 1, 1972, identify each person in charge of, with responsibility for, or who participated in or was consulted with respect to:

a. Contacting and negotiating with suppliers and manufacturers concerning contracts for, and the purchase or procurement of herbicides for potential use in connection with military activities;

b. Evaluating, considering or determining conformity or compliance by suppliers and manufacturers with technical specifications for each herbicide selected, purchased or procured by the United States for potential use in connection with military activities;

c. Evaluating, considering or determining conformity or compliance by suppliers and manufacturers with labeling specifications for each herbicide selected, purchased or procured by the United States for potential use in connection with military activities;

d. Evaluating, considering or determining conformity or compliance by suppliers and manufacturers with shipping and financial specifications for each herbicide selected, purchased or procured by the United States for potential use in connection with military activities; and

e. Evaluating, considering or determining performance by suppliers and manufacturers of any contracts for herbicides selected, purchased or procured by the United States for potential use in connection with military activities.

17. For the period from January 1, 1961 to January 1, 1972, identify each document that describes, refers or relates to:

a. Contracts and negotiations with suppliers and manufacturers concerning contracts for, and the purchase or

procurement of herbicides for potential use in connection with military activities;

b. The evaluation, consideration or determination of conformity or compliance by suppliers and manufacturers with technical specifications for each herbicide selected, purchased or procured by the United States for potential use in connection with military activities;

c. The evaluation, consideration or determination of conformity or compliance by suppliers and manufacturers with labeling specifications for each herbicide selected, purchased or procured by the United States for potential use in connection with military activities;

d. The evaluation, consideration or determination of conformity or compliance by suppliers and manufacturers with shipping and financial specifications for each herbicide selected, purchased or procured by the United States for potential use in connection with military activities; and

e. The evaluation, consideration or determination of performance by suppliers and manufacturers of any contracts for herbicides selected, purchased or procured by the United States for potential use in connection with military activities.

18. For the period from January 1, 1961 to January 1, 1972, identify each person in charge of, with responsibility for, or who participated in or was consulted with respect to:

a. The implementation, application or use of the Defense Production Act of 1950, the Defense Materials System, or any regulations, orders, procedures, directives or priority ratings issued or available pursuant thereto, in connection with the production, procurement, purchase or shipment of herbicides for use in connection with military activities.

19. For the period from January 1, 1961 to January 1, 1972, identify each document that:

a. Discusses, refers or relates to the implementation, application or use of the Defense Production Act of 1950, the Defense Materials System, or any regulations, orders, procedures, directives or priority ratings issued or available pursuant thereto, in connection with the production, procurement, purchase or shipment of herbicides for use in connection with military activities; and

b. Contains a reference to the Defense Production Act of 1950, the Defense Materials System, or any regulations, orders, procedures, directives or priority ratings issued or available pursuant thereto, and which was prepared in connection with the production, procurement, purchase or shipment of herbicides for use in connection with military activities.

C. USE, APPLICATION AND
DISPOSAL OF HERBICIDES

20. Identify separately each unit of the United States, as defined herein, including those listed on Appendix A hereto, that engaged during the period from January 1, 1961 to January 1, 1972 in any activities relating to the use, application (i.e., dispersal) or disposal of herbicides in connection with military activities in Southeast Asia, and as to each such unit, describe:

a. The nature and extent of its involvement in such activities; and

b. The duration of its involvement in such activities.

21. As to each separate unit of the United States identified in the response to Interrogatory 20, identify each

person in charge of or with responsibility for any of its activities relating to the use, application or disposal of herbicides in connection with military activities in Southeast Asia.

22. Give an organization chart for each separate unit of the United States identified in the response to Interrogatory 20 for each period between January 1, 1961 and January 1, 1972 during which it was involved in activities relating to the use, application or disposal of herbicides in connection with military activities in Southeast Asia.

23. Identify each communication, meeting or other transaction between the United States and any of the defendants herein, or any officer, agent, employee or other person acting or purporting to act on behalf of a defendant, that concerns or relates to the use, application or disposal during the period from January 1, 1961 to January 1, 1972 of herbicides in connection with military activities in Southeast Asia.

24. Identify each document describing, referring or relating to each communication, meeting or other transaction identified in the response to Interrogatory 23.

25. Identify each person in charge of, with responsibility for, or who participated in or was consulted with respect to:

a. Evaluating, considering or determining whether and the purposes for which herbicides would be used in connection with military activities in Southeast Asia;

b. Evaluating, considering or determining which herbicides would be used in connection with military activities in Southeast Asia;

c. Developing, considering, evaluating, selecting, modifying, issuing and approving procedures, guidelines, instructions, directives, orders or rules and regulations relating to the time, place and manner of application of each herbicide used in connection with military activities in Southeast Asia;

d. Developing, considering, evaluating, selecting, modifying, issuing and approving procedures, guidelines, instructions, directives, orders or rules and regulations relating to the conditions for and all other considerations pertaining to the application of each herbicide used in connection with military activities in Southeast Asia;

d. Evaluating, considering or determining the effectiveness, usefulness and tactical or strategic value of each herbicide used in connection with military activities in Southeast Asia; and

e. Evaluating, considering or determining whether to suspend, modify or discontinue the application of any herbicide used in connection with military activities in Southeast Asia.

26. Identify each document that constitutes, memorializes, discloses, describes, refers or relates to:

a. The evaluation, consideration or determination of whether and the purposes for which herbicides would be used in connection with military activities in Southeast Asia;

b. The development, consideration, evaluation, selection, modification, issuance and approval of procedures, guidelines, instructions, directives, orders or rules and regulations relating to the time, place and manner of application of each herbicide used in connection with military activities in Southeast Asia;

c. The development, consideration, evaluation, selection, modification, issuance and approval of procedures, guidelines, instructions, directives, orders or rules and regulations relating to the conditions for and all other considerations pertaining to the application of each herbicide used in connection with military activities in Southeast Asia;

d. The evaluation, consideration or determination of the effectiveness, usefulness and tactical or strategic value of each herbicide used in connection with military activities in Southeast Asia; and

e. The evaluation, consideration or determination of whether to suspend, modify or discontinue the application of any herbicide used in connection with military activities in Southeast Asia.

D. HEALTH EFFECTS AND DIOXIN

27. For the period prior to January 1, 1972, identify each person in charge of, with responsibility for, or who participated in or was consulted with respect to:

a. Evaluating, considering or determining the toxicity or health effects of dioxin, 2,4,5-trichlorophenoxyacetic acid, 2,4-dichlorophenoxyacetic acid or any of the herbicides involved in this action;

b. Evaluating, considering or determining matters relating to the synthesis, analysis, identification, origin, destruction or removal of dioxin; and

c. Evaluating, considering or determining matters relating to the presence or possible presence of dioxin in 2,4,5-trichlorophenoxyacetic acid, 2,4-dichlorophenoxyacetic acid or any of the herbicides involved in this action.

28. For the period prior to January 1, 1972, identify each document that discusses, mentions, refers or relates to:

a. The toxicity or health effects of dioxin, 2,4,5-trichlorophenoxyacetic acid, 2,4-dichlorophenoxyacetic acid or any of the herbicides involved in this action;

b. The synthesis, analysis, identification, origin, destruction or removal of dioxin; and

c. The presence or possible presence of dioxin in 2,4,5-trichlorophenoxyacetic acid, 2,4-dichlorophenoxyacetic acid or any of the herbicides involved in this action.

DEFINITIONS AND INSTRUCTIONS

1. The following definitions apply herein:

a. "Dioxin" means all polychlorinated dibenzo-p-dioxins (PCDDs) and all polychlorinated dibenzofurans (PCDFs).

b. "Document" is used in the broadest possible sense and means any written or graphic matter of whatever kind or nature, or any other means of preserving thoughts or expression (including, without limitation, tape recordings and/or transcriptions thereof), and all tangible things from which information can be processed or transcribed, whether originals, copies or drafts (including without limitation, non-identical copies), however produced or reproduced. Note that a document with handwritten or typewritten notes, editing or other marks, etc., is not and shall not be deemed identical to one without such notes, marks, etc. "Documents" also means all graphic, mechanical, or electronic reproductions, representations, recordings, or compilations of data of any kind, including but not limited to, drawings, charts, graphs, motion picture films, microfilms, microfiles, photographs, tape recordings,

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videotapes, any transcripts or printouts produced therefrom, and all drafts of any of the foregoing.

c. "Draft" means any earlier, preliminary, preparatory or tentative version of all, or part of the document, whether or not such draft was superseded by a later draft, and whether or not the terms of the draft are the same as, or different from the terms of the final document.

d. "Herbicide" means any substance containing 2,4,5-trichlorophenoxyacetic acid, 2,4-dichlorophenoxyacetic acid, or an ester, amine, salt or other form thereof, including Agent Orange, Agent Pink, Agent Purple, Agent Green and any other herbicide involved in this action.

e. "Identify" when used with reference to a natural person means state:

- (i) his full name and present address (or if his present address is not known, his last known address); and
- (ii) his present (or, if his present is not known, his last known) job, position, rank, and/or professional affiliations, and the same information for the time of the acts or other matters to which the Interrogatory is addressed.

f. "Identify" when used with reference to any person other than a natural person means state:

- (i) the full name thereof;
- (ii) the nature of the activity engaged in;
- (iii) the address and principal place of business; and
- (iv) if applicable, the jurisdiction under the laws

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of which it has been organized and the date of such organization.

g. "Identify" when used with reference to a document means state:

- (i) its nature (e.g., letter, telegram, memorandum, chart, report, list, etc.), date, and the identity of the author and addressees;
- (ii) the identity of each person who signed the document and each person who participated in preparing the document;
- (iii) its title or heading;
- (iv) its substance; and
- (v) its present (or, if the present is not known, the last known) location and custodian.

h. "Identify" when used with reference to a communication, meeting or transaction means state:

- (i) its nature (e.g., telephone conversation, face-to-face conversation or meeting, letter, memorandum, etc.);
- (ii) the date and place thereof (and if a telephone conversation, the place each participant was located);
- (iii) the identity of each person participating in, present during, or witness to, all or any part thereof; and
- (iv) the substance thereof.

i. "Identify" when used with reference to a herbicide means state its full chemical formulation and any trade or other names by which it is known.

j. "Identify" when used with reference to a project or military operation means state any names by which it was known, its purpose or goal, the dates it began and ended, the locations at which it was conducted, and identify separately persons:

- (i) who approved or authorized its undertaking;
- (ii) who were responsible for operational management; and
- (iii) who were responsible for evaluating its results.

k. "Identify" when used in any context other than hereinabove set forth means describe the pertinent act, work, situation, event, etc., as fully as possible, and identify each person in any way involved therein and each document or communication in which such act, work, situation, event, etc., is recorded, described, discussed or otherwise referred to.

l. "Labeling specifications" means those portions of contract specifications for a product that direct what markings shall be made on the product or its container.

m. "Person" means any natural person, individual, partnership, company, corporation, government body or any other entity.

n. "Shipping and financial specifications" means those portions of contract specifications for a product that direct the packing and manner of shipping for the product and that pertain to the price and payment terms.

o. "Technical specifications" means those portions of contract specifications that detail the chemical or other composition, performance and production standards of the product.

p. "United States" means THE UNITED STATES OF AMERICA and its offices, departments, bureaus, agencies, representatives, department heads, agency heads, bureau chiefs, agents, attorneys, employees, or any other persons, acting or purporting to act for, or on behalf of THE UNITED STATES OF AMERICA, under the authority or control of THE UNITED STATES OF AMERICA, or any one or more of the foregoing.

q. "You" means the United States, as defined above, and each plaintiff herein.

2. Each Interrogatory is to be answered to the extent of all information available to you, including all documents and other sources of knowledge within your possession, custody or control, or within the possession, custody or control of your attorneys, wherever located, and including your documents placed in independent storage facilities.

3. Unless otherwise indicated, each Interrogatory requests information for the period prior to January 1, 1972, including all information available from documents dated, prepared, sent or received, in whole or in part, prior to January 1, 1972. In addition, however, when any document refers or relates to the period prior to January 1, 1972, you should include the information from that document in your response without limitation as to when the document was dated, prepared, sent or received.

4. Each Interrogatory that refers to any group of persons is to be answered separately and with particularity, as to each member of any such group.

5. Each Interrogatory that refers to herbicides is to

be answered separately and with particularity as to each applicable herbicide.

6. Except where explicitly indicated otherwise, each Interrogatory herein should be construed independently and not by reference to any other paragraph for the purpose of limitation.

7. If the answer to all or any part of an Interrogatory is not now known or you are otherwise not able to answer fully, so state in response to such Interrogatory or part thereof, state the reasons, and furnish whatever responsive information is now known or otherwise available.

8. If any privilege is claimed as to any information called for, or as to any document required to be identified by an Interrogatory:

- (i) state the nature of the privilege claimed (e.g., attorney-client, work product, etc.);
- (ii) state the basis for claiming the privilege as to the specific information or document;
- (iii) if the privilege is claimed with respect to any information, identify each person who has knowledge of such information, or to whom such information has been communicated in any way, at any time; and
- (iv) if the privilege is claimed as to any document, identify such document.

9. Certain of the Interrogatories herein seek disclosure that goes beyond the issues defendants contend should be tried in Phase I. Defendants have nevertheless included such Interrogatories because the issues for Phase I trial have not yet

been defined by the Court. Defendants reserve their right to modify or supplement these Interrogatories to the extent required by the Court's determinations as to the standards and elements of the government contract defense.

10. "And" as well as "or" shall be construed either disjunctively or conjunctively as necessary to bring within the scope of the specification all responses which might otherwise be construed to be outside its scope. "Each" shall be construed to include the word "every" and "every" shall be construed to include the word "each". "Any" shall be construed to include the word "all" and "all" shall be construed to include the word "any". "Including" shall be construed to include the phrase "without limitation".

Dated: New York, New York
January 15, 1981

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TO: MDL SERVICE LIST

APPENDIX A

EXECUTIVE BRANCH

I. Department of Defense

A. Defense Supply Agency

1. Defense General Supply Center
Richmond, Virginia
 - a. Directorate of Procurement
and Production
2. Contract Administration Services
 - a. Office of Contracts Compliance
 - b. Offices of Contract Administration
Services Regions

B. Defense Advanced Research Projects Agency

C. Department of the Army

1. Fort Detrick, Maryland
 - a. Biological Laboratories
2. Edgewood Arsenal, Maryland
 - a. Weapons Development and Engineering
Laboratories - Chemical Process Laboratory
 - b. Office of Procurement and Production
3. Camp Drum, New York
4. Dugway, Utah Proving Grounds

D. Department of the Air Force

1. Eglin Air Force Base, Florida
 - a. Armament Development and Test Center
2. Brooks Air Force Base, Texas
 - a. Occupational and Environmental Health
Laboratory
3. Wright-Patterson Air Force Base, Ohio
 - a. Aerospace Research Laboratories
 - b. Air Force Logistics Command

- 4. Directorate of Aerospace Fuels
 - a. Kelly Air Force Base, Texas
 - b. Aerospace Fuels Field Offices -
Transportation Branch
- 5. Surgeon General
- 6. Operation RANCH HAND
- E. Department of the Navy
 - 1. Naval Construction Battalion Center
Gulfport, Mississippi
- F. Military Assistance Command in Vietnam
 - 1. "203 Committee"
- G. Institute for Defense Analyses
 - 1. Project AGILE

II. Department of Commerce

- A. Business and Defense Services Administration
 - 1. Chemicals and Allied Products Division
 - 2. Office of Industrial Mobilization

III. Department of Agriculture

- A. Office of Science and Education
 - 1. Agricultural Research Service
 - a. Pesticide Regulation Division
 - b. Crop Research Division -
Crops Protection Research Branch
 - c. Texas and Puerto Rico operations
 - d. Plant Industry Station
Beltsville, Maryland
- B. Advisory Committee on 2,4,5-T
- C. Forest Service

IV. Department of Health, Education and Welfare

- A. Public Health Service
 - 1. National Institute of Environmental Health
Sciences
 - a. NIEHS Laboratories
Research Triangle, North Carolina

2. Food and Drug Administration

V. Department of State

- A. American Embassy, Republic of Vietnam

VI. Department of the Interior

VII. Executive Office of the President

- A. Office of Civil and Defense Mobilization
B. Council on Environmental Quality
C. National Security Council
 1. Central Intelligence Agency
D. Office of Science and Technology
 1. Panel on Herbicides of the President's Science
 Advisory Committee

INDEPENDENT AND QUASI-OFFICIAL AGENCIES

VIII. National Academy of Sciences

- A. "ABC Committee" (a committee to investigate biological and chemical warfare)
B. Committee on the Effects of Herbicides in Vietnam

IX. National Research Council

X. Environmental Protection Agency

- A. Advisory Committee on 2,4,5-T

MISCELLANEOUS

XI. Department of War

- A. War Research Service

APPENDIX B

1. Projects concerning the testing of herbicides for potential use during World War II;
2. Projects undertaken after World War II which were conducted in greenhouses and/or Puerto Rico;
3. Projects conducted at or involving Fort Detrick, Maryland, Eglin Air Force Base, Florida and Camp Drum, New York;
4. Projects rendering assistance to or undertaken in cooperation with foreign nations, including specifically the United Kingdom;
5. Projects undertaken pursuant to or in connection with a request by the Department of Defense in or about May 1961 to determine the feasibility of herbicide operations in Vietnam;
6. Projects concerning the possible manufacture of herbicides by or under the direct control of the United States at Weldon Springs, Missouri, Muscle Shoals, Alabama or elsewhere;
7. Operation HADES;
8. Operation RANCH HAND; and
9. Project AGILE.

MDL No. 381

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

In re

"AGENT ORANGE"

Product Liability Litigation

DEFENDANTS' PHASE I
FIRST WAVE INTERROGATORIES
(FIRST SET)

CADWALADER, WICKERSHAM & TAFT

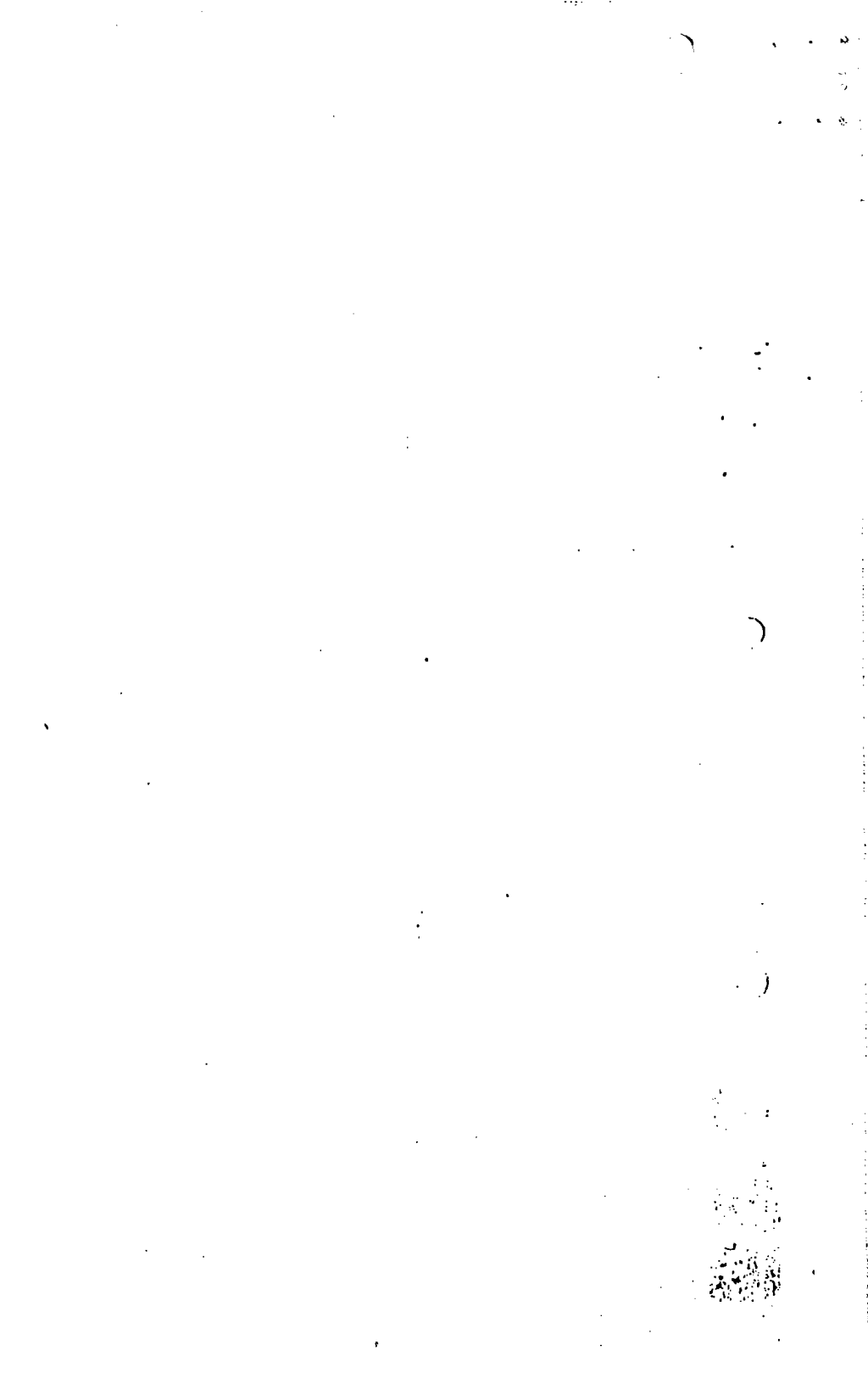
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Attorneys for Defendant
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9716



STATE OF NEW YORK)
) ss.:
COUNTY OF NASSAU)

Roberta Ringler , being duly sworn, deposes and says:

That deponent is not a party to this action, is over 18 years of age and resides in

That on the 25th day of March , deponent serve the within Dow Chemical Company's Request for Production of Documents directed to the U.S.A. re: National Security Agency

upon the attorneys below set forth representing the parties, as indicated, at the addresses shown, said addresses being designated by said attorneys for that purpose, by depositing a true copy of same, enclosed in a postpaid properly addressed wrapper in an official depository under the exclusive care and custody of the United States Post Office Department within the State of New York.

See attached list

Roberta Ringler

Sworn to before me this 25
day of March 1983

Theresa A. Young

NOTARY PUBLIC

TERESA A. YOUNG
NOTARY PUBLIC, State of New York
No. 204185110
Qualified in Nassau County
Term Expires March 30, 1983

9717

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WRITERS DIRECT DIAL: (516) 228-4318

March 25, 1983

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U.S. Department of Justice
Safeway Building
521 12th Street, N.W.
Washington, D.C. 20530

Re: AGENT ORANGE PRODUCT LIABILITY LITIGATION
MDL No. 381

Dear Mr. Maskin:

I enclose Defendant The Dow Chemical Company's Request for Production of Documents directed to the United States of America re: National Security Agency. We would appreciate your prompt attention to this matter.

Very truly yours,

RIVKIN, LEFF, SHERMAN & RADLER


By: Steven Brock

SB/rr
enc
cc: See annexed service list

9718

RIVKIN, LEFF, SHERMAN & RADLER

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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

-----X

In re:

"AGENT ORANGE"

MDL No. 381

Product Liability Litigation

-----X

Defendants' Memorandum In Support of
Motion to Compel Production of Public
Health Service Documents

FILED
IN CLERK'S OFFICE
U. S. DISTRICT COURT E.D. N.Y.
★ MAR 30 1983 ★
TIME A.M. _____
P.M. _____

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

-----X
In re:

"AGENT ORANGE"

MDL No. 381

Product Liability Litigation
-----X

Defendants' Memorandum In Support of
Motion to Compel Production of Public
Health Service Documents

PRELIMINARY STATEMENT

This motion seeks to compel the production of documents relevant to the Agent Orange litigation in the possession, custody, or control of the United States Public Health Service ("USPHS"). Defendants have requested the United States to produce these documents on numerous occasions, as discussed infra, but the government has not produced any of these documents as of this date.

RELEVANCE OF USPHS DISCOVERY

The testimony given by USPHS witnesses has clearly demonstrated the importance of USPHS documents to the defendants' position in the litigation. The government's failure to produce any of the relevant USPHS documents has seriously impaired the defendants' ability to properly defend themselves and has unjustly frustrated the defendants' attempts to complete discovery.

A former USPHS official, Dr. Donald J. Birmingham, has testified that the USPHS was aware that there was a chloracne problem associated with the manufacture of 2,4,5-T as early as 1949 (Birmingham Dep. Tr. P. 20-23). Two witnesses have indicated that they visited at least two chemical plants which produced 2,4,5-T to study this particular problem while they were employed by the USPHS. (Birmingham Dep. Tr. P. 20-23, Key Dep. Tr. P. 144-153). In 1963, Dr. Marcus Key, then the Assistant Chief Dermatologist in the USPHS, was notified that a U.S. Forestry Service worker had developed chloracne after using 2,4,5-T. Indeed, Dr. Key induced chloracne on his own arm by applying commercial 2,4,5-T. (Key Dep. Tr. P. 60-69). A subsequent study conducted at the USPHS facility in Cincinnati in 1964 confirmed that three commercial samples of 2,4,5-T produced chloracne in rabbits. (Key Dep. Tr. P. 126-130). Furthermore, former USPHS officials have testified that they knew in 1963-1964 that dioxin was reported to be the contaminant in 2,4,5-T which was responsible for the chloracne problem. Specifically, these USPHS employees had read a German scientific journal article (Kimmig and Schulz, 1957) which identified dioxin as the chloracne-producing contaminant in 2,4,5-T. (Key Dep. Tr. P. 79-84, Groth Dep. Tr. P. 41-43). In 1965, Dr. David Groth, a pathologist with the USPHS, submitted a formal project proposal seeking funding for a study designed to positively identify the

chloracnecic contaminant in 2,4,5-T, but apparently the funding was denied by high level USPHS officials. (Groth Dep. Tr. P. 64-68, 94-98). In sum, the PHS was well aware by 1964 that chloracne had been associated with 2,4,5-T production and that dioxin was the suspected contaminant.

PRIOR EFFORTS TO HAVE THE GOVERNMENT
PRODUCE USPHS DOCUMENTS

Defendants have attempted to obtain relevant USPHS documents on several occasions. However, despite these efforts (as detailed below), the government has failed to produce any such documents.

The original request for the USPHS documents occurred on January 15, 1981, on which date defendants' served the government with Defendants' Phase I First Wave Interrogatories (First Set) pursuant to Rule 33 of the Federal Rules of Civil Procedure and Pre-trial Order No. 26, filed December 29, 1981. However, despite the obvious applicability of the interrogatories to USPHS documents,* no USPHS documents were produced or mentioned in the United States' Response to Defendants' Phase I First Wave Interrogatories (First Set), dated February 13, 1981, nor were USPHS documents referred to in the government's subsequent

* The pertinent interrogatories are attached as Exhibit A.

Notice to All Counsel, dated April 15, 1981, which supplements the original response.

Defendants have also requested USPHS documents at the depositions of several USPHS witnesses. At the deposition of Dr. Marcus Key, defendants orally requested the production of documents from the files previously or currently maintained by the USPHS which deal with the Newark, New Jersey manufacturing facility of the Diamond Alkali Company (presently the Diamond Shamrock Company), and in particular, any documents prepared or received by any USPHS officials concerning investigations or trips made to this facility. Defendants further requested the production of any dermatoses investigation reports prepared by the USPHS relating to chloracne, 2,4,5-T or dioxin. Defendants also requested the government to produce any trips reports prepared by Dr. Key which related to any trips made to Edgewood Arsenal for occupational health seminars. These document requests were subsequently made in writing by letter on September 9, 1982.* The government responded to these requests by letter on November 11, 1982, at which time it stated that the custodian of the USPHS files, the National Institute for Environmental Health Sciences (NIEHS), no longer has any relevant trip reports and that any other documents in its files which are responsive to these requests have already been produced.

*A copy of this letter is attached as Exhibit B.

During the deposition of Dr. Donald J. Birmingham, the defendants requested the production of any USPHS files relating to chloracne and production of the agendas from USPHS staff meetings held at the Cincinnati facility. Again, these requests were later made in writing to the government on September 9, 1982.* The government has never produced any documents in response to these requests, and its only response was in the November 11, 1982 letter (referred to above) in which it stated that the appropriate government agency had not responded to the requests.

At the deposition of Dr. Douglas Lee, defendants requested the government to produce all documents relating to herbicides, 2,4,5-T, TCDD, and chloracne maintained in the files of either the Division of Occupational Health or the Division of the Bureau of State Services, both divisions within the USPHS. This request was subsequently made in writing by letter dated January 20, 1983.** The government responded to this request by letter on March 1, 1983, at which time it indicated that NIOSH (National Institute for Occupational Safety and Health), the successor agency to the Bureau of Occupational Health, could not locate any of the requested files. The government did not respond to the request for documents from the Bureau of State Services.

* A copy of this letter is attached as Exhibit B.

** A copy of this letter is attached as Exhibit C.

At the deposition of Dr. Paul Possick, defendants requested that the government produce all the files which were maintained at the USPHS facility in Cincinnati concerning chloracne, acne or acne formed dermatoses, and any related files. This request was later made in writing by letter dated February 24, 1983.* The government has not responded to this request.

NECESSITY FOR ORDER TO COMPEL
PRODUCTION OF USPHS DOCUMENTS

Despite the repeated efforts made by defendants to have the government produce relevant USPHS documents, no such documents have been produced nor has the government adequately explained any reasons for the non-production. Defendants are forced to make this motion for three reasons. First, it is clear, based upon the testimony of a USPHS witness (Dr. Paul Possick) that the USPHS facility in Cincinnati maintained extensive files on the subject of chloracne.** Therefore, there is no doubt that relevant documents did exist within the files of

* A copy of this letter is attached as Exhibit D.

** Included in these chloracne files were reprints of articles and correspondence on the subject. (Possick Dep. Tr. P. 28-29). Dr. Possick testified these files included the following specific information: Kimmig and Schultz article (Id. at P. 46-47), Bleiberg article (Id. at 47), Dermatoses Investigation of Diamond Alkali plant by Birmingham and Key (Id. at 48-50), Birmingham and Key presentation to International Congress on Occupational Health (Id. at 55-56), Schwartz article on halowax acne (Id. at 56-57), correspondence between Key and Goldstein on U.S. Forestry worker with chloracne (Id. at 59-60).

the USPHS facility in Cincinnati. Second, defendants have evidence which indicates that some of these documents are still within the control of the government. Specifically, Dr. David Groth produced a copy of a relevant USPHS document (project protocols on a proposed study to identify the contaminant in 2,4,5-T) in response to a Freedom of Information Act request made in 1980. Dr. Groth testified he provided this document from the government files he personally maintains within his current government office. (Groth Dep. Tr. P. 9). Defendants take the position that the existence of this document within government files clearly demonstrates that the government has either refused to review appropriate files for discovery purposes or has inadequately conducted its search of the files. Third, defendants are forced to make the present motion in part because they find the government's response to their requests both confusing and incomplete. In response to defendants' request for any dermatoses investigation reports contained in the files of the USPHS facility in Cincinnati (Key deposition, see Exhibit "B"), the government indicated that the present government agency with custody of such files is NIEHS.* Later in response to defendants' request for documents relating to herbicides located in the files of the Bureau of Occupational Health,** the government indicated that NIOSH is the current

* A copy of this response letter is attached as Exhibit E.

** A copy of this letter is attached as Exhibit C.

government agency which has custody of these files.* These inconsistent responses by the government make it unclear as to which government agency (or agencies) has custody of the relevant USPHS files. Furthermore, other document requests made by the defendants (such as the request for documents from the Bureau of State Services, and the request for the "chloracne files" maintained at the USPHS facility in Cincinnati) have simply been ignored by the government. Consequently, defendants have no way of knowing exactly what measures the government has taken to insure that all the relevant files have been searched.

The significance of the USPHS documents to the litigation is obvious. It is imperative for defendants to have the government produce all these relevant documents. Consequently, an order to Compel Production of USPHS documents is appropriate.

RELIEF REQUESTED

Defendants respectfully request that the government be ordered to conduct a thorough search of all files which may contain the USPHS documents described in the proposed Order attached hereto and to produce these documents within thirty days. Defendants further request that the government be required to document the steps it takes in conducting this search.

Respectfully submitted,

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* A copy of this response letter is attached as Exhibit F.

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Defendants' Phase I First Wave Interrogatories (First Set)

1. Identify separately each unit of the United States, as defined herein, including those listed on Appendix A hereto, that engaged during the period prior to January 1, 1972 in any activities relating to the research, development, testing or evaluation of herbicides for potential use in connection with military activities, and as to each such unit, describe:

(a) the nature and extent of its involvement in such activities; and

(b) the duration of its involvement in such activities;

2. As to each separate unit of the United States identified in the response to Interrogatory 1, identify each person in charge of or with responsibility for any of its activities relating to the research, development, testing or evaluation of herbicides for potential use in connection with military activities;

3. Give an organization chart for each separate unit of the United States identified in the response to Interrogatory 1 for each period prior to January 1, 1972 during which it was involved in activities relating to the research, development, testing or evaluation of herbicides for potential use in connection with military activities;

6. Identify each project concerning the research, development, testing or evaluation of herbicides for potential use in connection with military activities, including these projects listed in Appendix B hereto;

7. As to each project identified in the response to Interrogatory 6, identify each document that constitutes, memorializes, discloses, refers or relates to the results of research, development, testing or evaluation that was conducted pursuant to that project;

27. For the period prior to January 1, 1972, identify each person in charge of, with responsibility for, or who participated in or was consulted with respect to:

(a) evaluating, considering or determining the toxicity or health effects of dioxin, 2,4,5-trichlorophenoxyacetic acid, 2,4-dichlorophenoxyacetic acid or any of the herbicides involved in this action;

(b) evaluating, considering or determining matters relating to the synthesis, analysis, identification, origin, destruction or removal of dioxin; and

(c) evaluating, considering or determining matters relating to the presence or possible presence of dioxin in 2,4,5-trichlorophenoxyacetic acid, 2,4-dichlorophenoxyacetic acid or any of the herbicides involved in this action; and

28. For the period prior to January 1, 1972, identify each document that discusses, mentions, refers or relates to:

(a) the toxicity or health effects of dioxin, 2,4,5-trichlorophenoxyacetic acid, 2,4-dichlorophenoxyacetic acid or any of the herbicides involved in this action;

(b) the synthesis, analysis, identification, origin, destruction or removal of dioxin; and

(c) the presence or possible presence of dioxin in 2,4,5-trichlorophenoxyacetic acid, 2,4-dichlorophenoxyacetic acid or any of the herbicides involved in this action.

Arvin Maskin, Esq.

-2-

September 9, 1982

Defendants have maintained that no further requests for the documents are necessary. These documents have been requested in our first wave interrogatories, dated January 15, 1981, numerous written requests from January 1981 to June 1982, and on the record during the depositions. Nevertheless, defendants hereby repeat the requests for documents already made during depositions of witnesses claimed to be represented by the United States.

Deposition of Richard R. Bates

June 13, 1982

Dr. Bates was questioned on the nature, scope and requirements of the contract between Bionetics and the National Cancer Institute and testified that he knew such a contract existed (Tr. 47), and that periodic reports were prepared pursuant to that contract (Tr. 50). He was unable, however, to do more than speculate as to what the contract or the reports contained, as his recollection had dimmed. (Tr. 47-51.) Nor could counsel develop a meaningful line of inquiry on the subject, or attempt to refresh Dr. Bates's recollection without the documents that were the subject of our questions.

Counsel also attempted to procure information from Dr. Bates on the method and significance of selecting 2,4,5-trichlorophenoxyacetic acid ("2,4-T") and 2,4-dichlorophenoxyacetic acid ("2,4-D") for inclusion in the Bionetics study. (Tr. 52-57.) Dr. Bates confirmed that "some communications" took place between Bionetics and National Cancer Institute on this subject (Tr. 56) and that there had been some "short toxicology studies" on the compounds (Tr. 54), but he could not remember any specific information to answer the questions put to him. Again, counsel were prevented from refreshing his recollection or asking fact-based questions by their lack of documents.

Dr. Bates testified to the existence of written interim progress reports indicating the possible teratogenicity of 2,4,5-T (Tr. 65,66) as early as 1965, but he could not recall the number or dates of reports, with whom he spoke, or to whom he wrote about the reports or the contents of reports. (Tr. 66-71.) While he did testify that he would be able to testify about the contents of the reports if he could see them (Tr. 67), counsel were unable to procure such testimony because we lacked the reports.

Similarly, no meaningful attempt could be made to refresh Dr. Bates's recollection or to develop a complete line of questioning on the subjects of meetings concerning the possible teratogenicity

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Arvin Maskin, Esq.

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September 9, 1982

of 2,4,5-T (Tr. 71-75) or dissemination of information on possible teratogenicity of 2,4,5-T. (Tr. 75-78.) Although Dr. Bates confirmed that documents containing such information might exist (Tr. 71, 76), their unavailability frustrated counsel's inquiry.

Deposition of K. Diane Courtney

July 27, 1982

Counsel questioned Dr. Courtney on the characteristics of the chemical compounds she tested in the Bionetics Study and on a protocol for conducting a teratogenicity study. Dr. Courtney testified that Bionetics researchers provided her with reports on the "LD50's" of various compounds (Tr. 31-32), that the National Cancer Institute is likely to possess the detailed protocol prepared for the study (Tr. 37-38), and that she had consulted the Food and Drug Administration teratology protocol in her Bionetics work (Tr. 38-39). But as Dr. Courtney had forgotten the contents of these documents and they had not been produced to counsel, we could neither pursue our inquiry on these subjects nor attempt to refresh the witness's recollection of them.

Dr. Courtney was questioned on the results of her studies, and on her interpretation of the results. She confirmed that her laboratory records from the Bionetics study are in her possession. (Tr. 32-33, 45-46.) She testified that quarterly and annual reports were submitted by Bionetics to the National Cancer Institute (Tr. 46-47) reflecting interim findings and interpretations, and that she has copies of some such reports (Tr. 70.) Dr. Courtney was unable, however, to recall dates (Tr. 50-51, 52, 53, 56, 57, 58, 67-68, 69, 75, 90, 91-92) and specific information concerning the results of the study (Tr. 89), or to attest to the authenticity and veracity of the data in a report in counsel's possession (Bates Ex. 2) without consulting documents requested by defendants (Tr. 61, 64, 100, 132). As counsel did not possess those documents, however, we could not thoroughly question Dr. Courtney on the dates and results of her tests or attempt to refresh her recollection as to her conclusions or interpretations.

Counsel also asked Dr. Courtney for the names of other persons employed on the Bionetics study, but she was unable to recall them without viewing Bionetics's personnel records (Tr. 41). Thus, counsel must await those records before questioning Dr. Courtney on the identity of other Bionetics personnel who may have knowledge relevant to this action.

Arvin Maskin, Esq.

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September 9, 1982

Documents Requested

We hereby reiterate our request for the following documents that are necessary to complete the depositions of Dr. Bates and Dr. Courtney:

1. All contracts, and any and all supplements or modifications thereto, between the United States or the National Cancer Institute and Bionetics for the study of carcinogenicity and/or teratogenicity of various compounds, including but not limited to the contract executed in 1963 pursuant to which a report titled "Evaluation of Carcinogenic, Teratogenic and Mutagenic Activities of Selected Pesticides and Industrial Chemicals" was prepared.
2. Any periodic reports, interim reports, final reports, correspondence or reports or memoranda of any other description by Bionetics to National Cancer Institute or any other agency, or by National Cancer Institute or any other agency of the United States government to any other agency or person, that mention test results or findings by Bionetics as to 2,4,5-T and/or its possible hazards, including teratogenicity.
3. Any documents that relate to the selection of 2,4,5-T or 2,4-D as compounds to be studied by Bionetics, including but not limited to all reports or memoranda of any meetings, formal or informal, within or outside National Cancer Institute on the subject of possible hazards, including teratogenicity, of 2,4,5-T.
4. All documents prepared in the course of the Bionetics study that mention 2,4,5-T.
5. All documents that relate to or evidence the dissemination of information developed in the course of the Bionetics research concerning any potential hazard of 2,4,5-T.
6. All LD50 reports and/or other reports on the toxicology and/or chemistry of 2,4,5-T prepared in connection with the Bionetics study.
7. All written protocols, including the Food and Drug Administration Phase II teratology protocol, utilized or consulted in the course of the Bionetics study.
8. All documents relating to Dr. Courtney's attendance at any workshops, conferences, meetings or seminars concerning teratology, including but not limited to all notes pertaining to

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Arvin Maskin, Esq.

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September 9, 1982

Dr. Courtney's trip to Canada and meetings with Canadian scientists in which 2,4,5-T was mentioned.

9. All laboratory records generated during the Bionetics study.

Deposition of Bernard J. Jandorf

June 29, July 1, 1982

The United States agreed to confirm whether the copy of RL SOP 70-3 dated June 1, 1967 that was marked as Jandorf Exhibit 15 constitutes that entire document and, if not, to produce a complete copy of that document (Tr. 211). You have not yet done so.

Defendants requested production of CRDL SOP 70-3 dated May 6, 1965 (Tr. 215), which, as noted on the first page of Jandorf Exhibit 15, was superseded by Jandorf Exhibit 15. Dr. Jandorf testified that he could not recall how the 1965 and 1967 versions of SOP 70-3 differed from one another.

Deposition of Van M. Sim

July 1, 19, 1982

Dr. Sim testified about semiannual program reviews held at the Chemical Research and Development Laboratory, Edgewood Arsenal, and at the Biological Laboratories, Fort Detrick, during the 1960's (he also referred to the reviews at Edgewood as "Research Laboratory Scientific Conferences"). Defendants requested production of any notes, minutes, agenda, written presentations or other documents prepared in connection with the semiannual review programs at Edgewood or Fort Detrick which refer or relate to dioxin or herbicides (Tr. 59-65; 196-200).

Deposition of Thomas C. Simmons

June 9, 1982

Documents requested at this deposition were the subject of a letter to Ms. Bernott from Michael M. Gordon dated June 17, 1982.

Deposition of Marcus M. Key

July 8, 30, 1982

Defendants requested production from files previously or currently maintained by the Public Health Service of documents that

Arvin Maskin, Esq.

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September 9, 1982

refer or relate to the Newark, New Jersey 2,4-D and 2,4,5-T manufacturing facility of the Diamond Alkali Company (now the Diamond Shamrock Corporation), including specifically any documents prepared or received by Dr. Key, Donald J. Birmingham, David Groth, Norman Olivier, Kenneth Arndt or Paul Possick, or any other USPHS employee concerning investigations of, or visits to, that facility (Tr. 142-154) (also requested at the deposition of David H. Groth, July 1982 (Tr. 219)). Defendants are in possession of certain of these documents, from sources other than Government production of documents in this litigation. Several such documents have been marked as exhibits at the depositions of Public Health Service personnel.

Dr. Key testified about the preparation of documents called "dermatoses investigations". These are results of an investigation of occupational skin disease by USPHS which were usually sent to the initiating agency, the files of the Cincinnati USPHS facility, and possibly also to the regional USPHS office (Tr. 40, 43, 59). Defendants requested production of any dermatoses investigation reports relating to chloracne, 2,4,5-T or dioxin (Tr. 249). Dr. Key also testified about a trip he made to Edgewood Arsenal for occupational health seminars; defendants requested production of any trip reports prepared by Dr. Key concerning that visit (Tr. 244).

Deposition of David H. Groth

July 20-21, 1982

Defendants requested production of Dr. Groth's curriculum vitae (Tr. 222).

Deposition of Donald J. Birmingham

August 26, 1982

The Government was asked to produce Dr. Birmingham's personal files, and USPHS files, concerning chloracne (no transcript is yet available) and the agendas of USPHS staff meetings at the Cincinnati facility while Dr. Birmingham was there. Defendants requested production of written materials from Dr. Birmingham's 1958 course at Wayne State University School of Business Administration on health aspects of cutting fluids. Dr. Birmingham testified about a second visit he made to the (then) Diamond Alkali plant in Newark, New Jersey prior to October 31, 1964; defendants requested production of any trip report or other written materials prepared by Dr. Birmingham concerning such visit.

Arvin Maskin, Esq.

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September 9, 1982

Deposition of William M. Upholt

August 4, 1982

Defendants requested production of any written minutes, agendas, reports or other documents submitted to the Federal Committee on Pest Control (Tr. 115), or documents generated by the FCPC (Tr. 115). Defendants also requested production of a "clinical handbook" (Tr. 115-116) about which Dr. Upholt testified. Dr. Upholt testified about a USPHS clinical handbook for pesticides that was written to aid physicians in identifying and treating pesticide poisoning cases (Tr. 109-110).

Deposition of William Buckingham, Jr.

June 2, 1982

During the deposition of Major Buckingham (which was noticed by the plaintiffs and which was attended by the Special Master) Major Buckingham testified that primary source documents for his report were at billet 5681, Bolling Air Force Base (Tr. 105). In the discussion about these materials, the Special Master requested that the whereabouts of these materials be confirmed, and the Government should make a report about that (Tr. 102-109). Similarly, Major Buckingham stated other source material may be located at the Albert F. Simpson Historical Research Center, Maxwell Air Force Base, and the Government was also instructed to report on those materials (Tr. 109-110). As far as defendants are aware, the Government has failed to make these reports.

Major Buckingham testified about correspondence between himself and a Professor Westing, stating that he replied in writing to the Professor's letter to him (Tr. 195). Despite a request from defendants (Tr. 195), and a direction from the Special Master (Tr. 197-198), that letter has not been produced.

Deposition of Robert A. Darrow

July 13, 1982

Defendants requested production of Dr. Darrow's notes relating to a meeting he attended March 6, 1970 at ACSFOR, Washington, D.C. (Tr. 145) and his personal files relating to 2,4-D and 2,4,5-T (Tr. 199).

If there is going to be any delay in the production of any of these documents, please let me know. In some cases (particularly Drs. Bates and Courtney), these documents are necessary to defendants' preparation for another deposition session with the witness. In all cases, however, the requested documents are necessary for defendants' preparation for the future depositions of related witnesses.

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Arvin Maskin, Esq.

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September 9, 1982

A copy of this letter is being hand-delivered to you today in New York City at the office of Townley & Updike, while you are here for the Shaw deposition.

Very truly yours,

Charles M. Mattingly

CMM:FP

cc: Sol Schreiber, Esq.
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Donald Russo, Esq. (By Hand)
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* NOT ADMITTED IN NEW YORK

September 9, 1982

Arvin Maskin, Esq.
Department of Justice
Safeway Building
521 12th Street N.W.
Washington, DC 20530

Re: Agent Orange Litigation
MDL No. 381

Dear Arvin:

During many of the depositions in this litigation defendants have requested the production of certain documents about which a Government witness has testified. Based on the descriptions of the requested documents provided by the witnesses during their testimony, we know that at least some of the documents are currently under the control of the witnesses or the Government.

The United States has continuously represented to the Judge, the Special Master and the parties in this litigation that Government document production has been complete and that allegedly duplicative document searches have been necessitated by defendants' additional and supplemental document requests. The requested documents have not been produced. The failure of the United States to produce these documents (many of which are so clearly relevant that their relevance would be obvious to anyone) prior to the depositions has, to say the least, inconvenienced the parties and the witnesses. The defendants have been handicapped in our efforts to develop meaningful, fact-based inquiries, or to refresh the witnesses' memories; several witnesses will have to be examined again after very important documents have been made available.

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MARJORIE H. MINTZER

PARTNER
DIRECT DIAL
(516) 228-4320

January 20, 1983

Arvin Maskin, Esq.
Torts Branch, Civil Division
U.S. Department of Justice
Safeway Building
521 12th Street, N.W.
Washington, D.C. 20530

Re: AGENT ORANGE PRODUCT LIABILITY LITIGATION
MDL #381

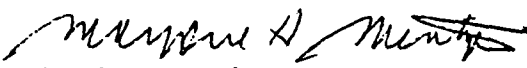
Dear Mr. Maskin:

On January 11, 1983, defendants deposed Dr. Douglas Lee, who was Chief of the Division of Occupational Health, United States Public Health Service in Cincinnati during the 1960s. Dr. Lee testified that he reported directly to the Division of the Bureau of State Services and the Division of Occupational Health. Both were divisions of the United States Public Health Service and were located in Washington, D.C. This is to request that the Government produce all documents relating to herbicides, 2,4,5-T, TCDD, and chloracne which were located in the files of the above-mentioned divisions.

At the deposition, Dr. Lee testified that after he was notified of the deposition by the Department of Justice, he wrote a letter to Dr. Marcus Key outlining the facts that he recalled regarding his work with the United States Public Health Service in Cincinnati and asking Dr. Key's advice regarding those facts. Dr. Lee further testified that he kept a copy of his letter to Dr. Key. This is to formally request that the Government produce immediately any correspondence between Dr. Lee and Dr. Key regarding their work at the Cincinnati facility and any correspondence regarding the Agent Orange depositions.

Yours truly,

RIVKIN, LEFF, SHERMAN & RADLER


Marjorie H. Mintzer

MHM:tm

8 JAN 21 1983
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February 24, 1983

Arvin Maskin, Esq.
Torts Branch Civil Division
United States Dept. of Justice
Safeway Building
521-12th Street N.W.
Washington, D.C. 20530

Dear Arvin:

Please arrange for production of the chloracne, occupational acnegens, acneform dermatitis and related files, which were maintained at the Broadway Building of the USPHS facility at Cincinnati. These files contained "reprints of certain articles. There was probably some correspondence, letters, that I reviewed", as indicated in the deposition of Dr. Paul Possick.

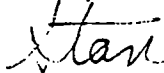
Additionally, we request production of documents which were referred to by Dr. Possick and which were maintained at a library at the Public Health Service facility in Cincinnati. If library materials (for this latter request only) are voluminous in nature, I would appreciate it if you would call me. Perhaps an indexing of materials or other methods of reducing the volume of production may be mutually arranged, if such is necessary.

Attached to this letter, please find transcript pages (28, 29, 31 through 35) from the deposition of Dr. Possick which refer specifically to such files.

Thank you for your cooperation in these matters.

Very truly yours,

RIVKIN, LEFF, SHERMAN & RADLER


Stanley Pierce

SP:mk
Encls.
cc: See attached list
(without enclosures)

9742

13 FEB 25 1983

RIVKIN, LEFF, SHERMAN & RADLER

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UNITED STATES DEPARTMENT OF JUSTICE

WASHINGTON, D.C. 20530

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and Refer to Initials and Number

November 11, 1982

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157-0-107

Telephone:
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NOTICE TO ALL COUNSEL

Re: In re "Agent Orange" Product Liability
Litigation, MDL #381

This Notice responds to James Tyrrell's October 20, 1982 request for a status report on outstanding document requests arising out of government witness depositions. Mr. Tyrrell's letter attached the 11 requests outstanding at the time. This Notice will discuss each of those letters.

1. October 13, 1982 letter from E. Matthews re Dr. Darrow

Mr. Matthews' letter requested production of documents "presently maintained at his home or elsewhere concerning Agent Orange and 2,4,5-T." Dr. Darrow in response to inquiries by the Army has indicated he may have some reprints of open literature articles. By letter, the Army has requested production of any documents he may have in his personal files responsive to the issues in the litigation. Dr. Darrow has not produced those documents at this time.

2. September 2, 1982 letter from P. Pakula re Mr. Garnett
Higginbotham

The government has sent this request to Mr. Higginbotham. Mr. Higginbotham presently is on leave, but will search his files and respond to the request by November 17. If his search produces any documents, the government will have them microfilmed for release to the parties. Any Food and Drug Administration documents not in the possession of Mr. Higginbotham have either been produced or are located in David Firestone's files.

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3. September 9, 1982 letter from P. Pakula re Dr. David Firestone

Dr. Firestone is the custodian of the FDA files that would respond to this discovery request. Unfortunately, Dr. Firestone has been out of the country for much of the time since his deposition and did not return until November 8. He has not been able to make the search of the relevant files to respond to this request and will not be able to do so for at least another month. Dr. Firestone entered the hospital during the week of October 8 for major surgery and will be out of the office for another month. He will, however, conduct a thorough search for the requested materials as soon as he returns to work. As the only individual thoroughly familiar with all of the materials dealing with chick edema factor, Dr. Firestone is the person best able to search the files and to recognize relevant documents. Therefore, the government is unable to produce the documents sought for at least another month.

The government regrets this inconvenience but, in fairness, both Dr. Firestone and Mr. Higginbotham have complied fully with at least two extensive document requests and have conducted rigorous searches of relevant files to comply with those earlier requests.

4. September 9, 1982 letter from C. Mattingly re outstanding document requests

a. Dr. Bates: The National Institute of Environmental Health Sciences (NIEHS), the custodian of the relevant files, has searched its files and has already produced any and all of the requested materials that it had in its possession.

b. Dr. Courtney: The letter requested a variety of documents contained in Dr. Courtney's files, including primary laboratory records for several research projects. During most of the intervening period since her July 27, 1982 deposition, Dr. Courtney has been in ill health and has been unable to undertake the search and review necessary to comply with the request. On October 27, Dr. Courtney advised the government that she is now sufficiently recovered to begin the search and has indicated that she should be able to ship the documents to the Department of Justice for micro-filming by the end of November.

c. Dr. Bates and Dr. Courtney: The National Institutes of Health (NIH), including the National Cancer Institute (NCI), has completed the search of its files for the documents requested. NIH has produced all of its relevant documents, including grants from the National Institute of Environmental Health Sciences (NIEHS), correspondence and reports of the President's Working Group on Pesticides, and portions of NCI annual reports referring to the contract between NCI and Bionetics. These documents are in the process of being microfilmed. On November 8, 1982 the government produced hard copies of relevant portions of the NCI annual reports from 1963 to 1968 to Mr. Mattingly and Mr. Yannacone to expedite matters.

d. Dr. Jandorf: On November 1, 1982 Mr. Mattingly advised Major Wittmayer that he had a complete copy of Jandorf Exhibit 15, RL SOP 70-3.

Mr. Mattingly's letter further requested production of CRDL SOP 70-3 dated May 6, 1965. The Army has been unable to locate the document and presumes that, since it was superseded by RL SOP 70-3, that it was destroyed in the course of routine document retirement and destruction.

e. Dr. Sim: The letter requested production of notes, minutes, agendas, written presentations or other documents prepared in connection with semiannual review programs at Edgewood or Ft. Detrick which refer or relate to dioxin or herbicides. The Army has produced any such existing documents in prior productions, but has undertaken a follow-up check at Edgewood. The search has located a few documents that may be new. The Army currently is reviewing the documents to determine if they have been produced previously. If not, they will be produced for microfilming and release to the parties.

f. Mr. Simmons: The Army states that the documents requested in Michael Gordon's June 17, 1982 letter have been produced.

g. Dr. Key: The Department of Health and Human Services and the custodian of the relevant files, NIEHS, no longer have any relevant trip reports. NIEHS has already produced any other documents still maintained in its files that would be responsive to this request.

h. Dr. Groth: The defendants requested a copy of Dr. Groth's curriculum vitae. Dr. Groth has informed the government that he has already sent a copy to one of the requesting attorneys.

i. Dr. Birmingham: The government cannot request Dr. Birmingham to produce the written materials from his 1958 course at Wayne State University School of Business Administration on the health aspects of cutting fluids. These materials respond to activity outside the scope of Dr. Birmingham's employment with the government. We suggest the defendants contact Dr. Birmingham directly for that material. Unfortunately, we have been unable to secure a response from the agency regarding the other materials in the request in time to include it in this report.

j. Dr. Upholt: The defendants requested a copy of the "Clinical Handbook on Economic Poisons" that Dr. Upholt mentioned in his deposition. Although he did not have a copy in his custody, control or possession, Dr. Upholt secured a copy to assist the defendants to the best of his ability. On November 5, 1982 the government produced a copy of the Handbook to Mr. Mattingly and Mr. Yannacone for their current use while the government has the Handbook micro-filmed.

The defendants also requested relevant records of the Federal Committee on Pest Control (FCPC). After following many barren leads, the EPA has located at least some materials which appear to be responsive to the request. Three boxes of documents from the Federal Working Group on Pest Management (formerly the FCPC) were archived at the Federal Records Center in 1973. EPA has requested recall of these records and expects their arrival sometime during the week of November 15. At that time, EPA representatives will begin their review to determine if these documents are responsive to the document request and intend, if the documents arrive on schedule, to have the documents ready for microfilming in two or three weeks.

k. Major Buckingham: The defendants requested three items in relation to Major Buckingham: (1) confirmation that the primary source documents for his report were located at Bolling A.F.B., D.C.; (2) confirmation that other source materials were located at Albert A. Simpson Historical Research Center, Maxwell A.F.B., AL; and (3) production of a letter from Major Buckingham to Prof. Westing.

The Air Force has confirmed that the primary source documents for Major Buckingham's report are preserved at the Office of Air Force History at Bolling A.F.B. The Air Force has begun segregating the classified documents contained in that primary source material so that the unclassified material can be microfilmed and released to the parties. The classified materials will undergo a declassification review and either will be declassified or withheld as privileged. For any documents withheld, the Air Force will seek the appropriate United States v. Reynolds affidavits.

The Air Force also has confirmed that some source documents exist at the Simpson Center. Mr. Lloyd Cornett, the director of the Simpson Center, has provided references to all documents at the Center that refer to Agent Orange. That list of references is attached. These documents and all other documents at Simpson Center that mention the word "herbicide" have been microfilmed and are preserved at the Office of Air Force History, Bolling A.F.B.

Major Buckingham has provided a copy of his letter to Prof. Westing and a copy of a magazine piece to which the letter refers. A copy of each is attached for the convenience of the parties and also will be available on microfilm.

1. Dr. Darrow: As stated, Dr. Darrow currently is searching his files for responsive relevant documents. In addition, Dr. Darrow has advised the Army that he has no notes concerning a March 6, 1970 meeting at ACSFOR, Washington, D.C.

5. September 13, 1982 letter from P. Pakula re Dr. Firestone and Mr. Higginbotham

On his one day in the office before entering the hospital, Dr. Firestone searched relevant files in the Bureau of Foods in response to this request. He did not find the following documents in any Bureau of Foods files:

Higginbotham, G.R. and Ress, J., preliminary report of November 14, 1968 "Analysis of Commercial Chlorophenols for Trace Amounts of Their Condensation and Polymerization Products."

Firestone, D. and Flick, D.F., memo of conference, Dr. Grove et al., February 13, 1963.

Letter from H. Van Genderen, Professor, Veterinary Pharmacology and Toxicology, U. of Utrecht, to G. Higginbotham, February 25, 1969.

Bureau of Science Research Progress Report Project Y-005, July-December 1968.

Tishler, Merck & Co., Private communication concerning isolation of crystalline material from a toxic fat and determination that it was an aromatic substance containing 47% chlorine.

J.C. Wootton, Proctor & Gamble Co., 1966 - Private communication concerning fact that a synthetic hexachlorinated dibenzo-p-dioxin that displayed properties similar to material isolated from toxic fat and produced chick edema disease in chickens.

Cantrell, Webb & Mabis - Abstracts, Am. Crystallographic Assn. Meeting, p. 27 (1967).

Memo from Campbell or FDA unit to Dr. Lewis, probably in late 1969, copy to J.W. Cook, Dept. of Pesticides, FDA, containing details of gas-liquid chromatography and mass spectrometry work.

In addition, Dr. Firestone believes that the following documents are readily available from any scientific library and did not obtain them:

Harman, Davis, G.E., Ott, W.H., Brink, N.G., Kuehl, F.A., J. Am. Oil Chem. Soc. 1960 vol. 82, 2078.

Wootton, J.C., Courchene, W.I., J. Agric. Food Chem 1964 vol. 12, 94.

Campbell, T.C. and L. Friedman, "Chemical Assay and Isolation of Chick Edema Fact." JAOAC (1966) 49, 824.

Campbell, et al. Chem. and Eng. News 45, No. 5, 10 (1967).

Hartman, et al., J. Am. Chem. Soc. 32, 2078, 1960.

6. September 14, 1982 letter from B. Roth re Dr. Firestone and Mr. Higginbotham

These documents fall within the scope of the September 2, 1982 request for production (page one of this Notice).

7. September 15, 1982 letter from James Tyrrell re Dr. Jesse L. Steinfeld

A thorough search of all relevant files has been conducted on all points raised in this request and nothing was found that has not already been produced to the parties. To the best of the agency's knowledge, none of the requested documents from 1969 or earlier exist in NIEHS files. A search of the NIEHS Reprint and the National Toxicology Program files reveals that the earliest documents contained in the files are from 1970.

Specifically addressing item 4 in this request, NIEHS advises that it does not have a copy of the program and it is unlikely that NIEHS would have copies of all reports and documents presented at the conference.

8. September 22, 1982 letter from James Tyrrell re Dr. DuBridge

The Executive Office of the President has indicated that the documents requested have been archived with the Nixon Administration materials. Access to these materials can only be obtained only by following procedures set out in 41 C.F.R. §§105-63.302 and 105-63. The government has initiated these procedures by requesting production of the documents by November 29, 1982. Upon receipt of the request the archivist must give notice to Mr. Nixon's attorney who in turn has five working days to either object to the request or indicate his intention to be present during the document search if he deems it necessary. When those five days have elapsed, the search will begin. After completion of the search, for a privilege review by the Executive Office of the President and then for microfilming. The government has no choice but to follow these cumbersome and time consuming procedures and will do our best to expedite production of any responsive documents.

9. September 30, 1982 letter from W. Cavanaugh re Col. Bauer

The government will request Col. Bauer, a former employee of the United States, to search his personal files for relevant responsive documents. The government reiterates that the defendants must realize that the government cannot pressure government employees to produce documents. We will, however, continue to seek the most expeditious production possible.

10. October 1, 1982 letter from R. Stalbow re Dr. Ennis

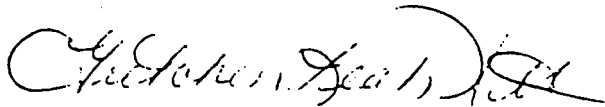
The Department of Agriculture has indicated that the Department does not have any responsive documents that have not already been produced in this litigation. Most documents of the type and age requested are no longer retained by the Department and any that it has retained have been previously produced. If, for some reason, some of these documents are still within the Department, apparently they are being maintained in files well outside the scope of normal and rational storage locations and the Department cannot locate them. Further, Dr. Ennis has stated that he has not maintained any personal files.

11. October 6, 1982 letter from L. Bennett re Mr. Avellino

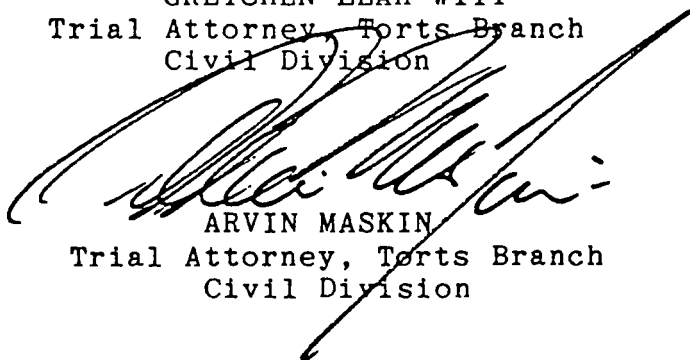
Army has begun the task of attempting to locate these documents.

If and when more documents or information are available, we will inform the parties.

Very truly yours,



GRETCHEN LEAH WITT
Trial Attorney, Torts Branch
Civil Division



ARVIN MASKIN
Trial Attorney, Torts Branch
Civil Division

Attachments



DEPARTMENT OF THE AIR FORCE
HEADQUARTERS ALBERT F. SIMPSON HISTORICAL RESEARCH CENTER
MAXWELL AIR FORCE BASE, ALABAMA 36112

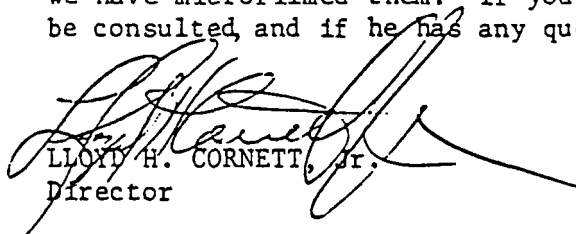
29 Sep 82

Major Glenn Parr
HQ USAF/JACC
1900 Half St SW
Washington DC 20324

Dear Major Parr

Reference our telecon on 27 September. Attached are references to the documents in the Simpson Center which specifically mention Agent Orange. These documents have been microfilmed and can be viewed at the Office of Air Force History at Bolling AFB, Washington DC.

This does not include every document which mentions the word "herbicide" because they are legion. But they too can be viewed at Bolling because we have microfilmed them. If you go to Bolling, Mr William Heimdahl should be consulted, and if he has any questions he can contact us for assistance.


LLOYD H. CORNETT, Jr.
Director

1 Atch
List of Documents Linked to
Orange Herbicide

9752

ATCH 2

Documents at the AFSHRC that are linked specifically to Orange Herbicide.

A. Entries that have "orange" in the title of the document, from our Southeast Asia KWOC (Key Word Out of Context) index.

1. Msg, (Declassified), CINCPAC to CINCPACAF, 210030Z Nov 71, subj: Classification for Return and Subsequent Disposition of Herbicide Orange. 1 page.
2. Staff Summary Sheet w/4 attachments (Decl), dtd 3 March 1971, subj: Disposal of Orange Herbicide. 5 pages.
3. Msg (Decl), COMUSMACV to 7AF, 131055Z Nov 71, subj: Disposition of Herbicide Orange. 1 page.
4. Two unclassified messages on herbicide orange from CHECO microfilm CH-85-4-10. 9 pages.
5. Collection of messages (Decl) on disposition of herbicide orange from CHECO microfilm CH-89-40-146. 16 pages.
6. Ltr (Decl), SAALC/OQ to OR, dtd 20 Feb 1970, subj: Orange Herbicide. 1 page.
7. Collection of messages (Decl) on restriction on use of herbicide orange from CHECO microfilm CH 64-9-171. 10 pages.

B. Documents identified in the footnotes of William A. Buckingham's Operation RANCH HAND: The Air Force and Herbicides in Southeast Asia, 1961-1971, where Buckingham's text specifically mentions orange herbicide.

8. CHECO Report (Secret), Herbicide Operations in Southeast Asia, July 1961-June 1967, by Charles V. Collins, 11 Oct 1967.
9. History (Top Secret) of MACV, 1966, pp 403-404.
10. Report (Declassified) on the Herbicide Policy Review prepared at the direction of the American Ambassador to Vietnam by a special Committee representing the Embassy, MACV, USAID and JUSPAO, 28 Aug 1968. (Footnotes reference appendices C and D.) 138 pages.
11. Report (Unclassified), Robert A. Darrow, Reed C. Bunker, and J. Ray Frank, subj: Report of Trip to Republic of Vietnam, 15 Aug-2 Sep 1969, Sep 23, 1969. 4 page extract of quoted pages.
12. Msg (Uncl), JCS to CINCPAC, 042341Z Nov 69, subj: Restriction on Use of Defoliants and Herbicides and Msg (Uncl), CINCPAC to MACV, 052216Z Nov 69, same subject. 2 pages.

13. Ltr, (Uncl), Glenn C. Klingman, et. al., to Dr. Lee A. DuBridge, Dec 22, 1969. 7 pages.

14. CHECO Report (Secret), RANCH HAND: Herbicide Operations in SEA, by James R. Clary, 13 Jul 1971.

C. Specific references to orange herbicide from our Card Catalog.

15. History (For Official Use Only) of Air Force Logistics Command, 1 Jul 1973 - 30 Jun 1974, Vol 1, Chap. 5 "Disposal of Herbicide Orange," pages 67-90. See also Supporting Documents, Vol 6 (FOUO), Section E.

16. History (Confidential) of Air Force Logistics Command, 1 Jul 1974 - 31 Dec 1975, Vol 1, Chap. 6 "Distribution," pages 93-101. See also Supporting Documents, Vol 5 (FOUO), Section F.

Quarters 4211A
U.S. Air Force Academy, Colorado 80840
January 19, 1982

Professor Arthur H. Westing
Hampshire College
Amherst, Massachusetts 01002

Dear Professor Westing:

Thank you for the copies of your letter to Mr. Milford of September 8 and your letter which appeared in Nature. I have corrected the error you discovered on page 417 of my manuscript as submitted for publication. Thank you for bringing it to my attention.

Concerning the record of spraying in Laos, my data was taken from an official contemporary history which was completed in 1971. I don't know what that historian's source was, but he would have had access to the official records. I think you are probably right in assuming that most if not all of the Agent Blue was sprayed on crops. However, some of the Orange and White may have been also. From the beginnings of the herbicide program in South Vietnam, the number "2" was associated with crop destruction targets while "20" referred to defoliation. I cannot be sure that the same labels applied to Laos, but it seems possible. If this was the case, then the two projects in September and October 1966 listed under project number "24" in Table 5, p. 419, also would have been crop destruction.

My history is now in the galley proof stage and should be published by the G.P.O. sometime this year. Again, thanks for keeping me informed.

Sincerely,

William A. Buckingham, Jr.
Major, USAF

9755

Laotian postscript

Six — The clandestine US war against Laos during the Second Indochina War was for the United States substantially an air war — in terms of environmental impact almost entirely so. Its operational aspects have been well described¹. Laos received more than 2.2 million tonnes of air-delivered munitions, fully 31 per cent of the US air war against all Indochina². The massive wide-area saturation bombing from B-52 stratofortresses alone ultimately added up to 800,000 tonnes of bombs, accounting for 36 per cent of all such missions flown during the war throughout Indochina. The air war against Laos was carried out during the years 1965–73; the three peak years were 1969–71, which were almost equally intense and together accounted for 68 per cent of the Laotian total. An estimated 70 per cent of the entire US air assault upon Laos was in southern Laos (the panhandle), carried out primarily against the supply routes into South Viet Nam (the Ho Chi Minh trail). The remaining 30 per cent of the bombing was directed against northern Laos, to a major extent against the Plain of Jars in central Xieng Khouang province.

Herbicidal chemical warfare attacks by the United States during the Second Indochina War were at one time or another directed against all four of the Indochinese nations of the time, overwhelmingly so against South Viet Nam and in only small but unknown amounts against the others. However, the United States has recently released some relevant information regarding Laos³. During

the years 1965–69, the United States flew some 100 anti-plant missions (over 400 sorties), with 1966, the peak year, accounting for 76 per cent of them. Altogether 1,600 cubic metres of herbicides were dispensed, mostly (83 per cent) Agent Orange. This Laotian spraying thus represented 2 per cent of the total Indochina effort. The area sprayed was some 67,000 hectares (not counting overlap), 0.2 per cent of the area of Laos. Most by far of this spraying occurred in southern Laos; and most of the spraying was for purposes of forest destruction to expose the Ho Chi Minh trail. A very small but unknown amount of the total spraying (perhaps 3 per cent, the proportion of Agent Blue dispensed) was devoted to crop destruction in the Plain of Jars and possibly elsewhere.

The Plain of Jars was especially hard hit during the war in terms of both social and environmental upheaval⁴ and is recovering extraordinarily slowly^{5–8}.

ARTHUR H. WESTING

*Hampshire College,
Amherst, Massachusetts, USA*

1. Lissauer, R. & Uphoff, N. *Air War in Indochina*. Rev. edn, Ch. 5, 6 (Beacon, Boston, 1972).
2. Westing, A.H. *Ecological Consequences of the Second Indochina War*, p. 14 (Almqvist & Wiksell, Stockholm, 1976).
3. Buckingham, W.A. *It Operation Ranch Hand: The Air Force and Herbicides in Southeast Asia, 1961–1971*. Ch. 7, Appendix 2 (U.S. Air Force, Washington, Office of Air Force History, unpublished).
4. Branfman, I. *Voices from the Plain of Jars: Life Under an Air War* (Harper & Row, New York, 1972).
5. Chanda, N. *Far Eastern Economic Rev.* 98, 22 (1977).
6. Kubicki, E. *Friends* 11, 11 (1978).
7. Kubicki, L.R. *Progressive* 42, 22 (1978).
8. Swartendrubet, J. *Christianity & Crisis*, 40, 243 (1980).

Nature, London

294(5842):606.

17 December 1981



U.S. Department of Justice

EXPRESS MAIL

Washington, D.C. 20530

March 1, 1983

JA:GLWitt:bf
157-0-107

Telephone:
(202) 724-6725

NOTICE TO ALL COUNSEL

Re: In re "Agent Orange" Product
Liability Litigation, MDL No. 381

This Notice provides the response of the United States to several outstanding requests from the defendants for production of documents by the United States.

1. January 20, 1983 Request from M. Mintzer re Dr. Douglas Lee. In late January, the Government received a request for certain documents from the 1960s in Public Health Service files, specifically the Bureau of State Services or Bureau of Occupational Health (BOSH). On January 31, 1983 this office transmitted the request to NIOSH, the successor agency to BOSH, for handling.

On February 16, NIOSH reported that it could not locate any of the requested files either in active files or in storage. NIOSH reports that it generally has no files from the 1960s.

Ms. Mintzer's letter also requested that the United States produce any correspondence between Dr. Lee and Dr. Marcus Key regarding certain matters. The Government has written to Dr. Lee to request that he send us copies of any such correspondence. We will inform all parties of his response upon receipt.

2. February 4, 1983 Request from M. Mintzer. During the second week of February, the Government received this request for a copy of the "DOD Index of Specifications and Standards." On February 9, this office transmitted this request to the Department of Defense for handling.

9757

7 MAR 07 1983

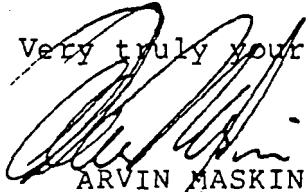
On February 28, DOD transmitted a microfiche copy of the requested document to this office. We have transmitted the microfiche to Mathias & Carr for copying and release. It should be available for purchase shortly. DOD could not locate a copy dated earlier than January, 1983. However, although the list is updated regularly, references to earlier specification are often retained.

In addition, DOD has produced copies of the herbicide specifications referenced in the Index. These include:

- a. Military Specifications -
2,4-D (7 Nov. 66)
- b. Military Specifications -
2,4,5-T (7 Nov. 66)
- c. Military Specification -
2,4,5-T (26 Sept. 69)
- d. Military Specification -
2,4-D (6 Nov. 80)
- e. Military Specification -
2,4-D (5 May 69)
- f. Military Standard Herbicides
(28 Aug. 70)

We have sent these documents for micro-filming as Batch No. 1974, entitled "Military Herbicide Specs. and Standards." With the response of DOD, the United States has completed its efforts in response to this request.

Very truly yours,



ARVIN MASKIN

Trial Attorney, Torts Branch
Civil Division



GRETCHEN LEAH WITT

Trial Attorney, Torts Branch
Civil Division

STATE OF NEW YORK)
) ss.:
COUNTY OF NASSAU)

THERESA A. MENNA , being duly sworn, deposes and says:

That deponent is not a party to this action, is over 18 years of age and resides in Lynbrook, NY

That on the 28th day of March, 1983 , deponent served the within Defendants' Memorandum in Support of Motion to Compel Production of Public Health Service Documents upon the attorneys below set forth representing the parties, as indicated, at the addresses shown, said addresses being designated by said attorneys for that purpose, by depositing a true copy of same, enclosed in a postpaid properly addressed wrapper in an official depository under the exclusive care and custody of the United States Post Office Department within the State of New York.

See Attached Service List

Theresa A. Menna
THERESA A. MENNA

Sworn to before me this 28th
day of March , 1983

Colleen A. Carney
NOTARY PUBLIC

COLLEEN A. CARNEY
NOTARY PUBLIC, STATE OF NEW YORK
NO. 4714759
QUALIFIED IN SUFFOLK COUNTY
COMMISSION EXPIRES MARCH 30, 1984

9759

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

FILED
IN CLERK'S OFFICE
U. S. DISTRICT COURT E.D. N.Y.
MAR 31 1983

In Re:

"AGENT ORANGE"

Product Liability Litigation

NOTICE TO TAKE DEPOSITION
TIME A.M. P.M. MDL No. 381

-X

PLEASE TAKE NOTICE that, pursuant to Rules 30 and 45 of the Federal Rules of Civil Procedure, defendants will take the deposition upon oral examination of THE RAND CORPORATION, by an officer, director or managing agent thereof having knowledge of the documents described in the attached Schedule of Documents, at the offices of Hagenbaugh & Murphy, 3701 Wilshire Boulevard (4th Floor), Los Angeles, California 90010 at 10:00 a.m. on April 11, 1983. If for any reason the taking of the deposition is not completed on the date indicated, then said deposition shall be adjourned from day to day until completed.

PLEASE TAKE FURTHER NOTICE that, pursuant to the Federal Rules of Civil Procedure, the person to be examined is commanded to produce at said examination the documents requested in the attached Schedule of Documents.

Dated: Garden City, New York
March 31, 1983

RIVKIN, LEFF, SHERMAN & RADLER
Attorneys for Defendant, THE DOW
CHEMICAL COMPANY

By Margaret H. Montoya
A Member of the Firm

100 Garden City Plaza
Garden City, NY 11530
(516) 746-7500

9760

TO:

See Attached Service List

#1164

Schedule of Documents

1. A report titled, "A Statistical Analysis of the U.S. Crop Spraying Program in South Vietnam", October, 1967, by Anthony J. Russo, and all notes, drafts, source materials, and other documents used in preparation of or related to this report.

2. A report titled, "An Evaluation of Chemical Crop Destruction in Vietnam", October, 1967, by Russell Betts and Frank Denton, and all notes, drafts, source materials, and other documents used in preparation of or related to this report.

3. A report titled, "Some Findings of the Viet Cong Motivation and Morale Study: June - December 1965", February, 1966, by L. Goure, A. J. Russo, and D. Scott, and all notes, drafts, source materials, and other documents used in preparation of or related to this report.

4. All documents that describe, contain information about, or refer or relate in any way to any proposed research, development, testing, evaluation, or use of herbicides for military purposes.

5. All documents that describe, contain information about, or refer or relate in any way to any research, development, testing, evaluation, toxicity, or use of herbicides for military purposes.

6. All documents not called for in response to paragraphs "1" through "5" relating to any communication to or from the Advanced Research Projects Agency ("ARPA") which describe, contain information about or refer or relate to in any way to dioxin, trichlorophenol, 2,4,5-trichlorophenoxyacetic acid, 3-amino, 1,2,4-triazole

(ATA, amitrole, aminotriazole), or an ester, amine, salt, or other form thereof, including Agents Orange, Pink, Purple, and Green.

7. All documents not called for in response to paragraphs "1" through "5" relating to any communication to or from any other agency of the United States Government which refer or relate to dioxin, trichlorophenol, 2,4,5-trichlorophenoxyacetic acid, 3-amino 1,2,4-triazole (ATA, amitrole, aminotriazole), or an ester, amine, salt, or other form thereof, including Agent Orange, Pink, Purple, and Green.

8. All documents not called for in response to the preceding paragraphs which refer or relate to dioxin, trichlorophenol, 2,4,5-trichlorophenoxyacetic acid, 3-amino 1,2,4-triazole (ATA, amitrole, aminotriazole), or an ester, amine, salt, or other form thereof, including Agents Orange, Pink, Purple, and Green.

DEFINITIONS

As used herein:

A) "Document" shall include the whole, any part, any draft, and any writing and record of every type and description, including but not limited to letters, memoranda, reports, manuals, publications, raw and refined data, graphs, drawings, notes, lists, studies, agreements, telegrams, analyses, summaries of personal conversations, diaries, surveys, statistical statements, charts, pictures, reports and/or summaries of investigations, opinions or reports of consultants, contracts, projections, drafts, proposals, books, articles, tape or other recordings, whether printed, typed, handwritten, reproduced, magnetically recorded, or in any other way made readable or retrievable. This definition specifically includes any and all copies of any documents that contain any notation or which otherwise differ from the original or other copies thereof.

B) "Communication" means any transfer or exchange between two or more persons of any information, whether by writing, electronic or other means, including but not limited to, correspondence, telegrams, telexes, mailgrams, or any other document. This definition includes all communications for which you may claim privilege.

C) "Person" or "persons" means all natural persons, corporations, partnerships, or other business associations and all other legal entities.

STATE OF NEW YORK)
) ss.:
COUNTY OF NASSAU)

THERESA A. MENNA , being duly sworn, deposes and says:

That deponent is not a party to this action, is over 18 years of age and resides in Lynbrook, NY

That on the 31st day of March, 1983 , deponent served the within

NOTICE TO TAKE DEPOSITION

upon the attorneys below set forth representing the parties, as indicated, at the addresses shown, said addresses being designated by said attorneys for that purpose, by depositing a true copy of same, enclosed in a postpaid properly addressed wrapper in an official depository under the exclusive care and custody of the United States Post Office Department within the State of New York.

See Attached Service List

Theresa A. Menna
THERESA A. MENNA

Sworn to before me this 31st
day of March , 1983

Colleen Carney
NOTARY PUBLIC

COLLEEN A. CARNEY
NOTARY PUBLIC, STATE OF NEW YORK
NO. 4714759
QUALIFIED IN SUFFOLK COUNTY
COMMISSION EXPIRES MARCH 30, 1984

CERTIFICATE OF SERVICE

Robert A. Taylor, Jr., states under penalty of perjury:

That deponent is not a party to the action, is over 18 years of age and resides in Washington, D.C.;

That on the 4th day of April, deponent hand delivered copies of the foregoing Notice of Deposition dated April 4, 1983, to the Clerk of Court for the United States District Court for the Eastern District of New York and delivered copies via Federal Express to the Special Master, Sol Schreiber and mailed, postage prepaid copies to the

attorneys below set forth representing the parties, as indicated:

ATTORNEYS FOR PLAINTIFFS

Victor J. Yannacone, Jr., Esq.
Yannacone & Associates
Post Office Drawer #109
Patchogue, New York 11772

Irving Like, Esq.
Reilly, Like & Schneider
200 West Main Street
Babylon, New York 11702

ATTORNEYS FOR DEFENDANTS

Marjorie F. Mintzer, Esq.
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100 Garden City Plaza
Garden City, New York 11530
Counsel for Dow Chemical Company

Morton B. Silberman, Esq.
Clark, Gagliardi & Miller
The Inns of Court
99 Court Street
White Plains, New York 10601
Counsel for TH Agriculture & Nutrition Co.

Michael M. Gordon, Esq.
Cadwalader, Wickersham & Taft
One Wall Street
New York, New York 10005
Counsel for Diamond Shamrock

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Townley & Updike
405 Lexington Avenue
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Counsel for Monsanto

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Counsel for Hercules, Inc.

Marilyn Neiman, Esq.
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Counsel for Uniroyal

Edwin R. Matthews, Esq.
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Chicago, IL 60603

Dennis Rothman, Esq.
Lester, Schwab, Katz & Dwyer
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New York, New York 10005

John Fitzpatrick, Esq.
Dilworth, Paxon, Kalish, Levy &
Kauffman
2600 The Fidelity Bldg.
Philadelphia, PA 19101

OTHERS

Arvin Maskin
U.S. Department of Justice
Torts Branch
Civil Division
Washington, D.C. 20530

CERTIFICATE OF SERVICE

Robert A. Taylor, Jr., states under penalty of perjury:

That deponent is not a party to the action, is over 18 years of age and resides in Washington, D.C.;

That on the 4th day of April, deponent hand delivered copies of the foregoing Notice of Deposition dated April 4, 1983, to the Clerk of Court for the United States District Court for the Eastern District of New York and delivered copies via Federal Express to the Special Master, Sol Schreiber and mailed, postage prepaid copies to the

attorneys below set forth representing the parties, as indicated:

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Victor J. Yannacone, Jr., Esq.
Yannacone & Associates
Post Office Drawer #109
Patchogue, New York 11772

Irving Like, Esq.
Reilly, Like & Schneider
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Babylon, New York 11702

ATTORNEYS FOR DEFENDANTS

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Morton B. Silberman, Esq.
Clark, Gagliardi & Miller
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Counsel for Diamond Shamrock

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Counsel for Monsanto

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Counsel for Hercules, Inc.

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Arthur, Dry & Kalish
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Counsel for Uniroyal

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135 South La Salle Street
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Chicago, IL 60603

Dennis Rothman, Esq.
Lester, Schwab, Katz & Dwyer
120 Broadway
New York, New York 10005

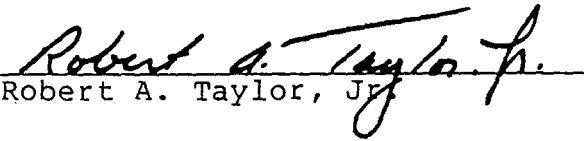
John Fitzpatrick, Esq.
Dilworth, Paxon, Kalish, Levy &
Kauffman
2600 The Fidelity Bldg.
Philadelphia, PA 19101

OTHERS

Arvin Maskin
U.S. Department of Justice
Torts Branch
Civil Division
Washington, D.C. 20530

Judicial Panel on Multidistrict Litigation
Patricia D. Howard
Clerk of the Panel
1120 Vermont Avenue, N.W.
Suite 1002
Washington, D.C. 20005

Clerk,
United States District Court, EDNY
Uniondale Avenue
Hempstead Turnpike
Uniondale, NY 11553


Robert A. Taylor, Jr.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

★ APR 14 1983 ★

TIME A.M. WHS

P.M. _____

-----X
In re: :

"AGENT ORANGE" :

NOTICE TO TAKE DEPOSITION
MDL 381

Product Liability Litigation :
-----X

PLEASE TAKE NOTICE that, pursuant to Rules 30 and 45 of the Federal Rules of Civil Procedure, defendant will take the deposition upon oral examination of LITTON BIONETICS, INC., by an officer, director or managing agent thereof having knowledge of the documents described in the attached Schedule of Documents, at the offices of Kirkland & Ellis, 1776 K Street, N.W., Washington, D.C. at 10:00 a.m. on April 21, 1983. If for any reasons the taking of the deposition is not completed on the date indicated, then said deposition shall be adjourned from day to day until completed.

PLEASE TAKE FURTHER NOTICE that, pursuant to the Federal Rules of Civil Procedure, the person to be examined is commanded to produce at said examination the documents requested in the attached Schedule of Documents.

Dated: New York, New York
April 13, 1983

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Attorneys for Defendant
Monsanto Company

By Philip D. Palmula
A Member of the Firm
405 Lexington Avenue
New York, New York 10174
(212) 682-4567

TO: See Attached Service List

9770

1186

TO:

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One Penn Plaza
New York, NY 10019

SCHEDULE OF DOCUMENTS

1. All contracts, and any and all supplements or modifications thereto, between the United States or the National Cancer Institute and Bionetics Research Laboratories ("Bionetics") for the study of carcinogenicity and/or teratogenicity of various compounds, including but not limited to the contract executed in 1963 pursuant to which a report titled "Evaluation of Carcinogenic, Teratogenic and Mutagenic Activities of Selected Pesticides and Industrial Chemicals" was prepared.
2. Any periodic reports, interim reports, final reports, correspondence, communications or memoranda of any other description by Bionetics to National Cancer Institute or any other agency, or by National Cancer Institute or any other agency of the United States Government to Bionetics, that mention or discuss tests or test results or findings by Bionetics as to 2,4,5-T and/or its possible hazards, including teratogenicity.
3. Any documents that relate to the selection of 2,4,5-T as a compound to be studied by Bionetics, including but not limited to all reports or memoranda of any communications, meetings, formal or informal, with National Cancer Institute or any other agency of the United States Government on the subject of possible hazards, including teratogenicity, of 2,4,5-T.
4. All documents prepared in the course of the Bionetics study that mention 2,4,5-T.
5. All documents that relate to or evidence the dissemination or communication of information developed in the course of the Bionetics research concerning any potential hazard of 2,4,5-T.
6. All LD-50 reports and/or other reports on the toxicology and/or chemistry of 2,4,5-T prepared in connection with the Bionetics study.
7. All written protocols developed for, or utilized or consulted in, the course of the Bionetics study.

DEFINITIONS

As used herein:

A) "Document" shall include the whole, any part, any draft and any writing and record of every type and description, including but not limited to letters, memoranda, reports, manuals, publications, raw and refined data, graphs, drawings, notes, lists, studies, agreements, telegrams, analyses, summaries of personal conversations, diaries, surveys, statistical statements, charts, pictures, reports and/or summaries of investigations, opinions or reports of consultants, contracts, projections, drafts, proposals, books, articles, tape or other recordings, whether printed, typed, handwritten, reproduced, magnetically recorded, or in any other way made readable or retrievable. This definition specifically includes any and all copies of any documents that contain any notation which otherwise differ from the original or other copies thereof.

B) "Communication" means any transfer or exchange between two or more persons of any information, whether by writing, electronics or other means, including but not limited to, correspondence, telegrams, telexes, mailgrams, or any other documents. This definition includes all communications for which you may claim privilege.

C) "Person" or "persons" means all natural persons, corporations, partnerships, or other business associations and all other legal entities.

AFFIDAVIT OF SERVICE BY MAIL

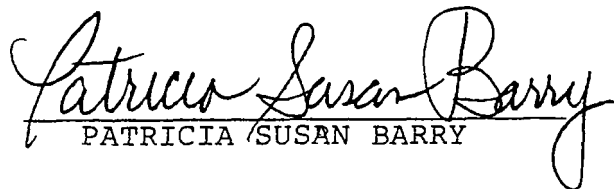
STATE OF NEW YORK)
 : ss.:
COUNTY OF NEW YORK)

PATRICIA SUSAN BARRY, being duly sworn, deposes and says that deponent is not a party to this action, is over 18 years of age and resides at 110 North Street, Monroe, New York.

On April 13, 1983, deponent served the within Notice to Take Deposition upon the following:

SEE ATTACHED SERVICE LIST

at the above addresses by depositing a true copy of same enclosed in a post-paid, properly addressed wrapper by Courier.


PATRICIA SUSAN BARRY

Sworn to before me this
13th day of April, 1983


Notary Public

VALERIE ANN PACI
Notary Public, State of New York
No. 41-4740400
Qualified in Queens County
Commission Expires March 30, 1985

TO:

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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

FILED
IN CLERK'S OFFICE
U. S. DISTRICT COURT E.D. N.Y.
★ APR 20 1963 ★
TIME A.M. _____
P.M. _____

-----X
In Re :

"AGENT ORANGE" :

PRODUCT LIABILITY LITIGATION :
-----X

MDL No. 381 (GCP)(SS)
(ALL CASES)

DEFENDANTS' REPLY TO UNITED STATES'
RESPONSE TO MOTION TO COMPEL PRODUCTION
OF NATIONAL CANCER INSTITUTE AND BIONETICS
RESEARCH LABORATORIES DOCUMENTS AND RESPONSE
TO UNITED STATES' MOTION FOR A PROTECTIVE ORDER

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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

- - - - -X

In Re :
"AGENT ORANGE" : MDL No. 381 (GCP)(SS)
PRODUCT LIABILITY LITIGATION : (ALL CASES)
- - - - -X

DEFENDANTS' REPLY TO UNITED STATES'
RESPONSE TO MOTION TO COMPEL PRODUCTION
OF NATIONAL CANCER INSTITUTE AND BIONETICS
RESEARCH LABORATORIES DOCUMENTS AND RESPONSE
TO UNITED STATES' MOTION FOR A PROTECTIVE ORDER

On January 10, 1983, defendants served a Motion to Compel Production of National Cancer Institute ("NCI") and Bionetics Research Laboratories ("Bionetics") documents. In that motion, defendants detailed their repeated requests before, during and after the depositions of NCI-related and Bionetics-related witnesses for documents within the possession, custody or control of NCI. Defendants have been unable to complete these depositions as a result of the failure of the government to produce the critical documents necessary to refresh the recollection of witnesses and to provide information about events 15 to 25 years ago that are relevant to the government contract defense.

Without the aid of these documents, we have developed evidence indicating that in 1963-1964, in the course of choosing chemicals to be tested by Bionetics, NCI scientists

knew 2,4,5-T contained dioxin, which caused skin and liver problems; that Bionetics tests showed teratogenicity of 2,4,5-T in mice as early as 1965 or 1966; and that the first draft of the Bionetics teratogenicity study with its positive findings as to 2,4,5-T reached NCI and/or the National Institute of Environmental Health Sciences ("NIEHS") in August 1968.

The Bionetics report was released in October 1969, more than a year after NCI/NIEHS received it. During that year-plus, the report (or its findings) were distributed "unofficially" within and outside of government to Dr. Minarek at Fort Detrick, Dr. Fitzhugh at the Food and Drug Administration ("FDA"), the National Academy of Sciences, President Nixon's Environmental Quality Council and possibly to others we have not yet been able to identify. Its release caused a scientific and political furor, including charges of concealment, and led directly to limitation of the uses of 2,4,5-T and the first serious studies of the possible human health hazards of 2,4,5-T and dioxin.

Despite all this, the government has not yet supplied us with:

A single document relating to the choice by NCI of 2,4,5-T as one of the compounds to be tested by Bionetics.

A single contemporaneous document recording early findings by Bionetics of the apparent teratogenicity of 2,4,5-T.

A single document reporting the early findings from Bionetics to NCI, NCI to NIH or NIH to the Secretary of Health, Education and Welfare, or indeed from anyone to anyone.

A single contemporaneous document commenting on these extraordinary and unexpected early findings.

A single document prepared in the time between the government's receipt of the report in August 1968 and the release of the report in October 1969, either from NCI, NIH, HEW or elsewhere in government, forwarding the draft report, describing it or commenting on it.

There can be no question in anyone's mind that defendants will benefit by proving the earliest possible knowledge in the highest levels of HEW, the Department of Defense and the White House of the facts described above. There can be no question that documents in these categories existed. Are we to believe they all have disappeared? Yet that is what the government asks this Court to believe. We submit the Court should not believe it.

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POINT I

THE UNITED STATES HAS BEEN
UNRESPONSIVE TO DOCUMENT REQUESTS

A. The Government Has Not Demonstrated Diligent and Thorough Searches for Specific Documents

The Appendix to defendant's moving papers confirms the numerous and repeated requests to the government for NCI/Bionetics documents. The record demonstrates that until this Motion to Compel, those requests went virtually unanswered.

The government's response to this Motion to Compel leaves the Court -- and defendants -- with no factual basis on which to make an independent judgment as to the sufficiency of the government's search for specific documents. Statements that "all relevant files" have been searched for documents "generally relevant" to this litigation, but that "these documents apparently do not exist in the relevant files," United States Memorandum at 5, 13,* hardly prove that these vital documents cannot be found. The government states that it produced documents from NIEHS files because "materials relating to Bionetics apparently were transferred from NCI to NIEHS"

* All references to United States' Memorandum in Opposition to Defendants' Motion to Compel Production of National Cancer Institute and Bionetics Research Laboratories, Inc. Documents and in Support of the United States' Motion for Protective Order will be cited as "United States Memorandum at ____."

and thus "most, if not all, NCI material located by defendants would be located in NIEHS files or archives." United States Memorandum at 4-5 (emphasis added). These conclusory and rather guarded statements must leave the Court with doubt as to whether enough has been done to find these documents.

While the government repeatedly claims to have searched "all relevant files," it does not indicate what the "relevant" files are, or what criteria it used in characterizing only certain files as "relevant." In a footnote, the government offers its view that "the files of NIEHS and possibly NCI were the only NIH files that, in the normal course of NIH business, could reasonably be expected to contain any of the information sought by defendants." United States Memorandum at 5 n.3. On the basis of this statement, how can the Court or defendants know why the government does not expect to find responsive documents in other files? What other files were considered for inspection by the United States? What efforts were made to ascertain the contents of other files to determine whether they were possible sources of documents? These unanswered questions betray the inadequacy of the government's response to defendants' Motion to Compel, and demonstrate why defendants -- and this Court -- have ample reason to doubt the sufficiency and thoroughness of the search for specific documents.

Not only has the government confined its search to files it alone deemed to be relevant for reasons not set forth, it has further reduced the possibility for meaningful discovery by conducting only broad-sweep searches. As the government concedes in its memorandum, these searches were conducted pursuant to general criteria obtained from the Dow Chemical Company in the initial stages of discovery. Depositions and other discovery have permitted defendants to narrowly define their requests for specific documents and files known to be in the custody of NCI. Nevertheless, the government has chosen to utterly ignore the defendants' specific requests and now relies on its earlier general search, which the government concedes did not include within search criteria references to the Bionetics study.

The government does not even assert that it specifically inquired as to the location of the NCI-Bionetics contract pursuant to which the Bionetics study was performed, or the quarterly progress reports produced during that study,* or the LD-50 reports prepared in connection with the study, or the written protocol by which the study was conducted. The government merely alleges that it made general "sweeps" in those files it believed were "likely" to contain

* Defendants procured by their own efforts -- and the government recently produced -- only four of the reports, all of which were specifically identified and requested by defendants as early as July 1982.

what it decided were "relevant" documents.* It does not -- even now -- give defendants or the Court any reason to believe that it made any effort to locate specific extant documents identified by deponents. The government's disregard for defendants' specific requests is further demonstrated by the statements of former and present NCI and Bionetics employees who testified at depositions that they were never asked to search their files for documents. See, e.g., deposition of Dr. Carl G. Baker at 15-17, appended hereto as Exhibit 1.

The government offers a vague, general affidavit from Joanne Belk, an Assistant Freedom of Information Officer at NIH, to bolster its claim that it has conducted a thorough search of all "relevant" files and has produced all documents responsive to defendants' requests. Ms. Belk attests that she has been "generally responsible" for document searches, and that she has "directed that searches be conducted in all the places where such records would be expected to exist. Persons in such places have furnished records, indicating that no other [sic] exist, or have reported that no such records exist." Belk Aff't, ¶ 2 (emphasis added). Such a statement hardly demonstrates that a thorough search has been conducted. It

* The general, early search did produce almost 20,000 pages of documents. However, as the search criteria employed were not specifically designed to discover Bionetics-related documents, none of the early documents contained information sought by defendants on this important study.

does not identify the places searched, does not state a basis for believing that documents "would be expected" to reside in those unidentified places and does not name the "persons in such places" who were asked to search for documents. Nor is there a clue that Ms. Belk possesses firsthand knowledge of these searches to which she swears. While Ms. Belk attests that only NCI and NIEHS are "likely to have Agent Orange documents,"* Belk Aff't, ¶ 3, she does not state whether, in fact , they are the only agencies that do possess responsive documents related to Bionetics' findings as to 2,4,5-T and whether any efforts have been made to determine if other files contain such documents.

Even Ms. Belk's attempt to describe the methods used to search for responsive documents lacks substance. She states that NIEHS "notified all program leaders and senior staff at NIEHS," Belk Aff't, ¶ 3.A., but does not identify the method of notification or who was notified. She says that these unnamed "officials," using an unspecified "broad definition regarding Agent Orange . . . searched correspondence and research report files." Id. She does not, however, identify the search criteria, what files actually were searched, what files were considered but not searched, the basis on which only

* It is unclear from Ms. Belk's affidavit whether her references to "Agent Orange documents," Belk Aff't, ¶¶ 2,3,13, encompass all documents responsive to defendants' document requests, or merely refer to documents relating to the specific herbicide Agent Orange.

"correspondence and research report files" were selected for a search, the method by which files were searched (drawer-by-drawer, file-by-file, page-by-page, etc.) or efforts to contact current and former employees concerning document locations. Nor does Ms. Belk provide this information concerning the search that she implies was conducted at NIEHS in or around October 1982. Id.

The Belk affidavit, ¶ 3.B., also discusses a search by computer of unspecified files in or around October 1982. Again, the search methodology, search criteria and person(s) performing the search are unidentified.

The memorandum of Maralyn Farber Berlin, to which Ms. Belk refers, is similarly incomplete and vague. It speaks of queries to various persons, but does not contain firsthand identification of their efforts, if any, to determine whether they possessed responsive documents. Further, while Ms. Berlin's memorandum apparently was prepared for purposes of this motion, it is not sworn on personal knowledge. Neither the Court nor defendants can ascertain how Ms. Berlin verified the contents of her memorandum three months after the events she describes.

Ms. Belk further "presumes" that a variety of documents possessed by Drs. Courtney and Fishbein (current government employees) and Dr. Baker (a former government employee) pertaining to work performed pursuant to government

contract or employment "may be" in their personal possession. Belk Aff't, ¶¶ 6, 7, 8, 12, and thus need not be produced by the government. As these documents were prepared in connection with government work, and as the government has represented these persons at their depositions and required that defendants make written requests to the government for documents within these deponents' possession, the government should not now be permitted to argue that it will not produce such records.

It is incredible that the government has not located any of the documents requested by defendants. All the documents requested have been specifically identified by deponents as being within the possession, custody or control of a government agency, and there is no indication they were destroyed. Further, defendants have provided the government with specific citations to deposition testimony where the documents were identified and discussed. For example, in his deposition at pp. 51-54, appended hereto as Exhibit 2, Dr. Lawrence Fishbein testified to the existence of "bound compendiums put out" by the United States Public Health Service "of compounds that either have been studied for tumorigenicity, carcinogenicity...." Id. at 51. Dr. Fishbein testified that while these compendiums are not available in public libraries, "National Institutes of Health would be a primary source." Id. at 52-53. Rather than producing these compendiums -- for which defendants provided a complete testimonial citation -- the

government merely argues that "the description of Item 15. is ... vague." Belk Aff't, ¶11.

B. The United States Has Been Silent
on Defendants' Document Requests

Discovery of government witnesses and documents has been conducted, with the Court's approval, on a predominantly informal basis.* With the commencement of NCI/Bionetics depositions and the identification by deponents of specific documents, it became apparent that further, more specific document production was necessary. Defendants' requests for such particularized production, however, have been met with silence.

In early July 1982, while preparing for depositions on July 21, 1982 and July 27, 1982 of the first NCI/Bionetics-related witnesses, Dr. Richard Bates and Dr. K. Diane Courtney, defendants determined that the preliminary drafts of the Bionetics study were essential documents for questioning the deponents. At the July 14, 1982 pretrial hearing, defendants informed Special Master Schreiber of their need for these documents (Tr. 1278). The Special Master instructed defendants

* Thus, the United States' contention (United States Memorandum at 3, n.2) that defendants should have made a formal Motion to Compel earlier is both inconsistent with established discovery practice in this litigation and illogical; a Motion to Compel at an earlier date, when defendants had not yet identified the specific documents needed and when the government was still in the process of production, would have been premature and purposeless.

to establish by witness testimony the existence of these documents, after which he would order the government to search for them. Id . As discussed fully in the principal memorandum in support of this motion (at 5), defendants did adduce such testimony, and requested -- orally on the record at the depositions and again in a letter dated September 9, 1982 -- production of those documents. The government did not respond.

On October 20, 1982, James E. Tyrrell, Jr. of Townley & Updike requested a status report on the many outstanding document requests on which the government had been silent. The government responded briefly and generally on November 11, 1982, stating that NIEHS "has searched its files and has already produced any and all of the requested materials that it had in its possession." United States Memorandum, Appendix D, at 2. The government added that it had located additional NCI documents, which were being produced. Id . at 3. That production did not, however, contain the specific documents sought by defendants, and did not indicate that a specific search had been made for any particular documents. The government further informed defendants then, for the first time, that Dr. Courtney had been ill, and would produce documents in November. Her documents were not produced in November.

Immediately after this Motion to Compel was served on January 10, 1983, defendants received a Notice to All

Counsel informing them that some of the documents requested before, during, and after the Courtney deposition six months earlier -- Dr. Courtney's laboratory records from the Bionetics study -- would be made available for inspection and copying on January 19, 1983 in Research Triangle Park, North Carolina. On that date, defendants went to North Carolina, inspected the records and requested copies of selected documents. Despite several requests in the three ensuing months, the government has yet to produce even one of the requested copies. Defendants are unable to complete the deposition of Dr. Courtney without them.

Not until this Motion to Compel did the government inform defendants that some NCI documents were mislabeled as NIEHS documents (United States Memorandum at 3-4), or had been mismarked as "Grants & Materials from President's Working Group on Pesticides." See United States Memorandum, Appendix A, Batch 1936. Defendants have examined these mislabeled documents, but none is responsive to any document specifically identified and sought by this Motion to Compel.

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POINT II

THE GOVERNMENT'S OBJECTIONS TO DEFENDANTS' REQUESTS ARE UNSUPPORTABLE CONCLUSORY ASSERTIONS

The Government's specific objections to the document requests embodied in defendants' proposed Order Compelling Production of Documents consist of conclusory assertions unsupported by fact. Defendants have made specific requests for:

1. All contracts, and any and all supplements or modifications thereto, between the United States or NCI and Bionetics for the study of carcinogenicity and/or teratogenicity of various compounds, including but not limited to the contract executed in 1963 pursuant to which a report titled "Evaluation of Carcinogenic, Teratogenic and Mutagenic Activities of Selected Pesticides and Industrial Chemicals" was prepared. Identified and orally requested at the deposition of R.R. Bates, 7/21/82 at 57 and by letter of 9/9/82.
2. Any periodic reports, interim reports, final reports, correspondence or reports or memoranda of any description by Bionetics to NCI or any other agency, or by NCI or any other agency of the United States Government to any other agency or person, that mention test results or findings by Bionetics pertaining to 2,4,5-T and/or its possible hazards, including teratogenicity. Identified and orally requested at the deposition of R.R. Bates, 7/21/82 at 67 and by letter of 9/9/82.
3. All documents that relate to the selection of 2,4,5-T for study by Bionetics, including but not limited to all reports, notes or memoranda of any meetings, formal or informal, within or outside NCI on the subject of possible hazards, including teratogenicity, of 2,4,5-T. Identified and orally requested at the deposition of R.R. Bates 7/21/82 at 57 and by letter of 9/9/82.

5. All documents prepared in the course of the Bionetics study that mention 2,4,5-T, 2,4,5-TCP, any dioxin or chloracne. Identified and orally requested at the deposition of R.R. Bates, 7/21/82 at 73-74 and by letter of 9/9/82.
9. All LD-50 reports and/or other reports on the toxicology and/or chemistry of 2,4,5-T prepared in connection with the Bionetics study. Identified and orally requested at the deposition of K.D. Courtney, 7/27/82 at 31-32 and by letter of 9/9/82.
10. All written protocols, including the Food and Drug Administration Phase II teratology protocol, utilized or consulted in the course of the Bionetics study. Identified and orally requested at the deposition of K.D. Courtney, 7/27/82 at 37-39 and by letter of 9/9/82.

The government asserts that these documents have been produced or do not exist, United States Memorandum at 17-21, without certifying that a specific search has been made for them. Broad-brush searches earlier in discovery do not obviate the need for specific responses to defendants' particularized, narrowly defined requests. The Government's obligation to produce these important specific documents cannot be avoided by a conclusory affidavit based on secondhand information that fails to identify the universe of documents searched and the criteria used for selecting the agencies and files to be searched.

The Government further objects to the following defendants' requests on the basis of "oppressiveness" and "burdensomeness," or because of a purported lack of "temporal limitation":

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4. All files in the possession of Bionetics or NCI that contain research information or publications on 2,4,5-T, 2,4,5-TCP, any dioxin or chloracne.
6. All documents that relate to or evidence the dissemination of information developed in the course of the Bionetics research concerning any potential hazard of 2,4,5-T, including but not limited to notes, lists or documents of any description indicating to whom and when any data, information, results, drafts or versions of the Bionetics report were disseminated. Identified and orally requested at the deposition of R.R. Bates, 7/21/82 at 78 and by letter of 9/9/82.
7. All notes, memoranda and correspondence from NCI employees to Bionetics employees, and from Bionetics employees to NCI employees, that pertain to the Bionetics study, including but not limited to transmittal letters accompanying reports, data or other correspondence or documents submitted by Bionetics to NCI or by NCI to Bionetics.

These objections, especially those attacking the lack of a time frame as to Bionetics-related information, are hard to reconcile with a desire to cooperate. There is no doubt that the Bionetics study took place from 1963 to 1969. Obviously, a request for all information disseminated "during the course" of the Bionetics study concerning any potential hazard of 2,4,5-T by its terms refers to information disseminated from 1963 to 1969.

The Government asserts that the following request is overly broad because it fails to specifically request information on 2,4,5-T, dioxin, chloracne, herbicides or Agent Orange:

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8. All notes, memoranda, correspondence or documents of any description that relate to meetings, discussions or communications -- formal or informal -- held from 1960 to 1970 and attended by Bionetics employees, NCI employees, or any other representatives of any government or private entity, at which the Bionetics study was discussed or mentioned.

The government's objection, however, utterly ignores defendants' ongoing interest in the rationale for selecting test compounds, and in the level of government interest in the other test compounds as against interest in 2,4,5-T.

The government professes inability to understand and address the following defendants' requests for specific documents:

11. All documents relating to Dr. Courtney's attendance at any workshops, conferences, meetings or seminars concerning teratology, including but not limited to all notes pertaining to Dr. Courtney's trip to Canada and meetings with Canadian scientists in which 2,4,5-T, 2,4,5-TCP, any dioxin or chloracne was mentioned. Identified and orally requested at the deposition of K.D. Courtney, 7/27/82 at 140-43 and by letter of 9/9/82.
14. Records of meetings attended by FDA scientists and Dr. Baker. Identified and orally requested at the deposition of C.G.Baker, 12/15/82 at 89-90.

Part of the Government's confusion may come from its failure to read the citations to testimony where the documents sought are fully discussed by the witnesses. Contrary to the government's opinion, these requests are both narrow and specific, and relate to specific documents clearly identified by deponents.

The government argues that it need not respond to the following defendants' requests because they were not previously made in writing:

12. Personal records of Dr. Baker relevant to 2,4,5-T. Identified and orally requested at the deposition of C.G. Baker, 12/15/82 at 147.
13. Minutes, notes or memoranda of meetings, or referring to meetings, of NCI directors where 2,4,5-T, 2,4,5-TCP, any dioxin or chloracne was discussed. Identified and orally requested at the deposition of C.G. Baker, 12/15/82 at 148.
15. Bound compendiums of studies of chemical compounds for carcinogenicity published by and/or in possession of United States Public Health Service. Identified at the deposition of L. Fishbein, 12/14/82 at 52-53.
16. Dr. Fishbein's files in the custody of NCI, including but not limited to the literature reviewed in deciding to include 2,4,5-T in the Bionetics study, and notes or literature received at a toxicology meeting in Atlanta on 3/12/70 attended by Dr. Fishbein. Identified at the deposition of L. Fishbein, 12/14/82 at 70-72, 142-43.

The Special Master expressly rejected this same objection when raised by the government in response to defendants' motion to compel production of Food and Drug Administration documents. See Recommended Order and Memorandum Re: Defendants' Motion to Compel Production of FDA Documents, at 2. As the Special Master noted, the brief time remaining for discovery does not allow for further written requests or procedures that would engender delay.

POINT III

THE GOVERNMENT SHOULD BE ORDERED TO ATTEST WITH SPECIFICITY TO ITS EFFORTS TO COMPLY WITH DOCUMENT REQUESTS

Defendants have offered proof, in their moving papers, of the existence of specific NCI/Bionetics-related documents. See Proposed Order Compelling Production of Documents, at 2-4, which references deponents' testimony that the documents exist and defense counsel's months-old oral and written requests for them. No evidence has been offered by any deponent, or by the government, to indicate that these documents were destroyed.

The government did not promptly respond to defendants' document requests -- whether made before, during or after depositions -- and has been silent with respect to efforts to locate specific documents. It is now clear that the assistance of this Court is needed to insure that defendants receive all necessary documents, or a detailed testimonial representation of the government's diligent efforts to find those documents. Conclusory, argumentative, unsworn statements by government counsel that they have searched "all relevant files" or all files that "reasonably could be expected to contain" the requested information do not prove that a thorough search has been made. Defendants cannot ascertain, on the basis of the government's characterizations of its search for these important documents, the precise extent and nature of the

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government's efforts, and whether those efforts were sufficiently detailed and complete.

There is, of course, no totally reliable method to determine the extent of the government's efforts; defendants do not have knowledge of every extant file that possibly could be searched. Nevertheless, defendants have devised a procedure by which they hope, to the best of their ability, to insure that an adequate search has been conducted for specific, important documents. Defense counsel request that when the government contends that it cannot locate a particular document, this Court order that the government provide an affidavit documenting its search efforts. Such an affidavit should identify:

- a. Which bureaus, divisions, sections and branches were searched; which were not searched; and the basis for these decisions.
- b. Who was contacted in each bureau, division, section and branch, and by what means.
- c. The precise files actually searched, and their location.
- d. The method of search (page-by-page, by file folder, by drawer, etc.).
- e. The files that were not searched.
- f. The basis on which the government decided to search certain files, and not to search others.
- g. The person(s) conducting the search.
- h. The criteria used in conducting the search.

An affidavit containing the above-described information would inform defense counsel of the nature and scope of the search performed, and thus would allow defendants and the Court to make an informed determination whether a thorough search in fact had been performed. To the extent that defendants, after receiving the affidavit, could specifically identify a location in which a document may be found, they could ask that a search be conducted in that particular location.

Defendants request that the Court adopt this procedure to assist them in gaining access -- to the maximum extent possible -- to the documents that are so crucial to completion of discovery and preparation for Phase I trial.

CONCLUSION

For all the foregoing reasons, defendants respectfully request that their Motion to Compel Production of National Cancer Institute and Bionetics Research Laboratories Documents be granted and that the United States' Motion for a Protective Order be denied.

Respectfully submitted,

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1 You asked him that question about five questions ago

2 MS. ROTH: I asked him that question with
3 respect to Barbara Rivkind. This is with respect to
4 Ms. Roberts.

5 THE WITNESS: I think the answer to that
6 is no in the sense that we didn't get into pros and
7 cons of viewpoints about this kind of evidence. It
8 was mostly procedural guidance she was giving me.

9 BY MS. ROTH:

10 Q. Did you review documents in preparation
11 for your deposition?

12 A. Yes.

13 Q. Did you review them with anyone?

14 A. No.

15 Q. Did you review documents other than the
16 ones that were provided to you by us?

17 A. No.

18 Q. Did you bring the documents provided
19 along with you?

20 A. Yes.

21 Q. Did you discuss your review of the
22 documents with anyone?

23 A. No.

24 Q. When we provided the documents to you
25 included in that the letter accompanying the

1 documents was a request for production of other
2 documents. Did you conduct a search of your files?

3 A. No.

4 Q. Did you bring any other documents with
5 you today?

6 A. No.

7 Q. Other than your curriculum vitae --

8 MR. FIORELLA: Let me make an inquiry.
9 Did you supply documents directly to the witness?

10 MS. ROTH: No.

11 MR. FIORELLA: You said to the witness.
12 You implied by your questioning, by the use of "you"
13 that you had supplied documents to this witness
14 directly and you had sent a letter to this witness
15 directly. Did you do that?

16 MS. ROTH: I have not finished my
17 questions.

18 MR. FIORELLA: This relates to the last
19 two questions.

20 MS. ROTH: I asked Dr. Baker if he
21 conducted a search of his files for documents.

22 MR. FIORELLA: Ask Dr. Baker if he
23 received your documents, the documents you sent him.
24 But go ahead, finish, as long as it is on the record

25 MS. ROTH: Ms. Roberts, did you receive a

1 request for documents in connection with this
2 deposition along with the documents that were
3 provided to the witness?

4 MS. ROBERTS: There is a request for
5 documents in the December 9 letter from you to Mr.
6 Arvin Maskin of the Justice Department.

7 MS. ROTH: Do you know if any search was
8 made for the documents described in the document
9 request?

10 MS. ROBERTS: I think the witness has
11 answered that.

12 MS. ROTH: He has not made a search. I
13 am wondering if you have made a search or know
14 whether one has been made?

15 MS. ROBERTS: No, I don't.

16 MS. ROTH: Do you know if such a search
17 is ongoing, in process?

18 MS. ROBERTS: No, I don't, other than the
19 searches that are being made in discovery in this
20 case.

21 BY MS. ROTH:

22 Q. Did you discuss the fact that you were to
23 be deposed today with anyone?

24 A. My wife.

25 Q. Did you speak with any of your current or

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1 discover what was known about 2,4,5-T?

2 A. Research meaning just an examination of the
3 literature, not research in a study, per se.

4 Q. Yes, not primary research. Did you do a
5 literature review to ascertain what was known about
6 2,4,5-T?

7 A. To some extent.

8 Q. Can you tell me what you read?

9 A. The initial examination would be compendium of
10 compounds that had already been studied for
11 tumorigenicity or carcinogenicity.

12 Q. Had 2,4,5-T already been studied for
13 tumorigenicity or carcinogenicity?

14 A. Not to my best knowledge.

15 Q. How did you go about doing research on
16 2,4,5-T?

17 A. Research --

18 Q. When I say research, I mean the
19 literature research, to discover what was known
20 about it?

21 A. There are bound compendiums put out by the PHS,
22 of compounds that have -- Public Health Service,
23 compounds that either have been studied for
24 tumorigenicity, carcinogenicity and/or to the best
25 of my recollection, compounds on study and it'

1 included compounds being studied or that had been
2 studied by the Cancer Institute or again, to my
3 recollection, of a worldwide review of the
4 literature of compounds that had been tested for
5 carcinogenicity or tumorigenicity.

6 Q. Do you recall if 2,4,5-T was one of the
7 compounds that was included in the Public Health
8 Service compendiums of compounds that had been
9 tested for tumorigenicity or carcinogenicity?

10 A. My recollection, it was not. My recollection
11 it was not.

12 Q. It was not recommended in your
13 recollection?

14 A. It was not.

15 Q. Are these volumes updated periodically?

16 A. Yes.

17 Q. Do you know how often they're updated?

18 A. No.

19 Q. Do you know the location of the -- do you
20 know if the volumes that you utilized in
21 approximately 1963 to seek information on the
22 chemicals that were being considered for the
23 Bionetics study are still in existence?

24 A. I would say yes, still in existence.

25 Q. Do you know where they are?

Fishbein

1 A. National Institutes of Health would be a
2 primary source.

3 Q. Are these contained in public librar

4 A. Not public libraries.

5 Q. What sort of --

6 A. Public meaning, like, the New York Public

7 Q. Are they contained in university
8 libraries?

9 A. Not generally. They can be obtained by th
10 librarian, but generally, they are not widely
11 disseminated to the average university library.
12 cost would preclude it.

13 Q. Who does the work that results in the
14 information contained in these Public Health Ser
15 volumes?

16 A. I don't know specifically.

17 Q. Do you know if it is done by Public
18 Health Service scientists?

19 A. It could be done by -- I don't know
20 specifically, to answer that. It could be done b
21 regular GS -- Government employees, civil servant
22 who are not -- or could be done on contract. I
23 specifically couldn't answer that.

24 Q. When you wanted to look at these volu
25 how did you go about getting them?

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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

FILED
IN CLERK'S OFFICE
U. S. DISTRICT COURT E.D. N.Y.

★ APR 20 1983 ★

TIME A.M. _____
P.M. _____

-----X
:
In re: :

"AGENT ORANGE" :

MDL No. 381

:(ALL CASES)

Product Liability Litigation :
:
-----X

DEFENDANTS' MEMORANDUM IN SUPPORT OF MOTION TO COMPEL
PRODUCTION OF DEPARTMENT OF DEFENSE DOCUMENTS

9805

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#111

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

-----X
:
In re: :
"AGENT ORANGE" : MDL No. 381
: (ALL CASES)
Product Liability Litigation :
-----X

DEFENDANTS' MEMORANDUM IN SUPPORT OF MOTION TO COMPEL
PRODUCTION OF DEPARTMENT OF DEFENSE DOCUMENTS

PRELIMINARY STATEMENT

Defendants move pursuant to Fed. R. Civ. P. 37 for an order compelling production from the United States of certain documents in the possession, custody, or control of the Department of Defense. Those documents have previously been requested by defendants, but have not been produced.¹ Defendants respectfully request that an order be entered setting a specific date not later than April 22, 1983 for production of the documents requested by this motion.

I. RELEVANCE OF DEPARTMENT OF DEFENSE DISCOVERY

The need for production of the documents requested by this motion is urgent because of the clear relevance of those

1. Defendants' various letter requests and the government's various notices responding to those letters are annexed as Exhibit 1 to this memorandum in chronological order. Defendants Request for Production of Documents Directed to the United States of America Re: United States Army Chemical Corps Intelligence Agency, dated October 4, 1982, is annexed as Exhibit 2.

documents to the government contract defense, and the imminence of the June 27, 1983 date for commencement of the Phase I trial. As more fully set forth below, those documents have been either specifically identified and requested at depositions of former government employees or otherwise specifically requested by defendants. None, however, has been produced by the government.²

A. Air Force Environmental Health Laboratory

The Air Force Environmental Health Laboratory, located at Eglin Air Force Base, conducted studies of interest to the Air Force Logistics Command. The Air Force Logistics Command, through the San Antonio Air Material area, was responsible for ordering herbicides for use in South Vietnam. Dr. Walter Melvin, Chief of the Environmental Health Laboratory, testified he was ordered by the Command Surgeon of the Air Force Logistics Command to conduct tests evaluating the effects of herbicide in the environment. Dr. Melvin testified that he began these evaluations in the early to mid 1960's. (Melvin Tr. at 55). As part of his evaluations, he conducted a brief literature search and read the article on occupational chloracne by Kimmig & Schulz. At that time Dr. Melvin was aware that dioxin was a possible

2. The government indicated by letter dated March 11, 1983 that a group of documents from the Advanced Research Projects Agency has become available for microfilming from batches 1972 and 1973. Pending review of those documents, defendants make no request for ARPA documents at this time.

contaminant in the manufacture of 2,4,5-T. He also had been aware since the mid-1950's that chloracne was associated with the manufacture of 2,4,5-T. (Melvin Tr. at 111).

Dr. Melvin stated that he submitted regular reports on the results of his evaluations to the Command Surgeon of the Air Force Logistics Command and possibly to the Air Force Surgeon General. (Id. at 27). Col. Nicholas Cox, of Eglin Air Force Base, has also testified about the testing of herbicides at Eglin and that he was aware of dioxin in the mid-1960's. (Cox Tr. at 36).

B. Army Surgeon General

The interest in herbicides of the Office of the Army Surgeon General dates from at least the early 1960's. Research for the 1962 article by Jones & Krizek, "A Technic for Testing Acnegenic Potency in Rabbits," which identifies dioxin as a potent acnegen, was supported by a grant from the Research Development Division of the Office of the Army Surgeon General. Defendants have thus far been unable to determine what prompted the Surgeon General's Office to fund that research project.

The Army Environmental Hygiene Agency (AEHA) was part of the Army Surgeon General's Office. In 1962, in response to requests from base commanders for information, AEHA commenced research into the toxicity of several pesticides including 2,4-D and Silvex, particularly with respect to usage around water supplies. (Kaplan Tr. at 38-39). AEHA corresponded with

several organizations and agencies in this regard, including Dow, the Food and Drug Administration, the Department of Agriculture, and the Public Health Service. As a result of this research, the Army Surgeon General drafted a circular to all base commanders limiting the use of herbicides around water supplies. (*Id.* at 16-17). At the time the circular was drafted, AEHA was aware that the same herbicide they were restricting domestically was being used in Vietnam for defoliation. At least some of AEHA's research apparently was being forwarded to Army Surgeon General headquarters. (*Id.* at 16).

In 1968 the Occupational Health Division of AEHA commented on a proposed military specification for Agent Orange, recommending that the product contain a precautionary label stating: "Caution. May cause skin irritation. Avoid contacts with eyes, skin and clothing." (Sinclitico Tr. at 70, and Ex. 11).

On August 31, 1966, Ralph Wands of the Advisory Center on Toxicology, National Academy of Sciences (NAS), sent a letter to the Chief, Preventative Medicine Division, Office of the Army Surgeon General, in response to a July 22, 1966 request for toxicity information on "2,4-D; 2,4,5-T; Cacodylic Acid, and Tordon." The August 31, 1966 letter states that chloracne had been observed as a result of skin contact with 2,4-D and 2,4,5-T, and that the problem of chloracne was somewhat controversial, noting that additional data was needed to confirm or refute those observations. The July 22, 1966 letter from the Surgeon General

was not found in the documents recently produced for and reviewed by defendants at NAS on March 24, 1983. Although Wand's letter states that enclosures were attached, the enclosures also were not in the NAS documents. Defendants requested the July 22, 1966 letter and the enclosures by letter from A. White to A. Maskin, dated March 28, 1983.

C. Navy Surgeon General

On July 6, 1966 the Bureau of Medicine and Surgery of the Department of the Navy transmitted a request to NAS asking for inter alia, toxicology information on the dermatological effects of 2,4,5-T. NAS responded on July 26, 1966 with information that porphyria and chloracne had been clinically associated with 2,4,5-T. The Navy Surgeon General's request and the response from NAS occurred within weeks of the similar correspondence between the Army Surgeon General and NAS, described above. Defendants first learned of the Navy Surgeon General's interest in 2,4,5-T during their recent review of NAS files on March 24, 1983. Defendants requested those documents concerning the Navy Surgeon General's interest by letter from A. White to A. Maskin, dated March 28, 1983.

D. Defense General Supply Agency

The Department of Defense, Defense General Supply Agency (DGSA) requested that the Business and Defense Services Administration (BDSA) (also known as the Office of Industrial Mobilization) of the Department of Commerce assume responsibility

for facilitating the purchase and delivery of Agent Orange and certain of its chemical components. BDSA undertook those responsibilities for approximately a two-year period, from September 1966 to September 1968. In performing its responsibilities, BDSA issued mandates setting forth delivery schedules for Agent Orange and demanding full compliance from all manufacturers.

In order to assess fully each manufacturer's production capabilities, BDSA gained access to information concerning defendants' manufacturing processes, including production methods and difficulties. Defendants believe that information was then communicated to the Department of Defense.

DGSA's function was to manage, procure, and store military supplies, including herbicides, used by the Armed Forces. Purchase descriptions for herbicides, were reviewed by DGSA chemists to assess the herbicide's suitability for use in procurement. After approval of a specification, DGSA solicited industry for proposals to supply the product.

In a Notice to All Counsel dated April 15, 1981, the government informed defendants that "approximately 90 documents" relevant to this litigation were generated by the Department of Commerce in connection with its responsibilities under the Defense Production Act, but were claimed to be privileged. The government has refused to produce those materials or to furnish additional information necessary for defendants to determine the

significance of those documents. (See Notice to All Counsel dated April 15, 1981, and letter from M. Gordon to J. Bernott dated May 4, 1981.)

E. Chemical Corps Board

The Chemical Corps Board (the "Board") consisted of approximately 75 to 100 civilian scientists and senior Army Chemical Corps officers, whose functions included making recommendations on long-range plans for research, development, and use of chemical weapons. (Delmore Tr. at 7-14). General Fred Delmore, the President of the Board from 1957 to 1959, testified that Dr. Hoffmann's trip reports were reviewed by the Board to keep "up to date as to the status of the search for new chemicals that might be used in the weapons systems of the Chemical Corps." (Delmore Tr. at 18).

Defendants were unaware of the existence of the Board until General Delmore's deposition on February 2, 1983. On February 16, 1983, defendants requested Board documents relating to dioxin, 2,4,5-T, Agent Purple, Agent Orange and the Hoffmann Trip Report. (See letter from P. Tuohy to A. Maskin, dated February 16, 1983). The requested documents have not yet been produced.

F. Edgewood Arsenal

The U.S. Army Chemical and Medical Research Laboratories at Edgewood Arsenal (the "Laboratories") are of particular importance to defendants' Phase I discovery. The Laboratories

evaluated the toxicity of herbicides containing 2,4,5-T in the early 1960's, and it was Dr. Bernard McNamara, Chief of the Laboratories' Toxicology Division, who briefed the President's Science Advisory Committee on possible health hazards of 2,4,5- and 2,4-D compounds "as related to defoliation operations in Vietnam." (See Vocci Tr. Ex. 8). Shortly before then, of course, Dr. Friedrich Hoffmann of the Laboratories' Agent Research Branch identified dioxin as a potential chemical warfare agent in the "Hoffmann Trip Report." (See, e.g., Sultan Tr. at 87-88; Jandorf Tr. at 95-96, 243).

Although the government has answered many of defendants' requests with regard to the Laboratories, it still has not produced several documents described by Edgewood deponents. (See e.g., letters from M. Gordon to A. Maskin, dated December 6 and 23, 1982). In a Notice to All Counsel dated February 23, 1983, the government represented that additional documents relating to the depositions of three of the Laboratories deponents, Dr. Van Sim, Lester Miller and John F. Callahan, had been transmitted to the Department of Justice by the Army on February 9, 1983 and had been sent out for microfilming. That material, however, still has not been released to the parties for review. Defendants also have received no report on the status of requested documents described by another Laboratories deponent, Frank Vocci, the search for which was to have been completed by the end of February (See Id.; Letter from S. Pierce to A. Maskin, dated December 6, 1982). In addition, defendants have recently

requested copies of relevant correspondence from the personal files of Dr. William H. Summerson, who served as Director of Research and Chief Scientist at Edgewood in the late 1950's and early 1960's. Defendants also requested a copy of the trip report that Dr. Summerson testified he prepared for General Delmore's office after a visit he made to Vietnam to inspect the herbicide program. (Summerson Dep. Tr. at 10,83; Letter from J. Mariani to A. Maskin, dated April 5, 1983).

G. U.S. Army Chemical Corps Intelligence Agency

A "DA Intelligence Report" index page attached to the redacted copy of the Hoffmann Trip Report that was produced by the government states not only that Dr. Hoffmann was the source for the information contained in the Trip Report, but also that the Report was prepared by the U.S. Army "CCIA," the military abbreviation for the Army Chemical Corps Intelligence Agency. An important function of the CCIA was to transmit information it acquired from abroad concerning new chemical agents to the Laboratories for further examination. Apparently, the CCIA maintained an office at Edgewood to help perform that function, and Laboratories deponents have testified to various contacts with the CCIA. (See, e.g., Horton Tr. at 83-93.) Thus, a clear tie-in exists between the information concerning dioxin that Dr. Hoffmann obtained during his 1959 visit to Germany and the work of the CCIA. Despite this connection, the government has not yet responded to any of defendants' requests for discovery from the

CCIA. Not even the CCIA's own copy or copies of the Hoffmann Trip Report, which presumably must exist, have been produced.

On October 4, 1982, defendants served on the United States a Rule 34 request for documents in the possession of the CCIA or its successor agency, the Army Foreign Science and Technology Center. (See Exhibit 2). That request sought the same categories of documents that had been requested in defendants' subpoenas to the Chemical Laboratories and its successor departments. In a Notice to All Counsel dated November 12, 1982, the government reported that "pre-1962 CCIA materials most likely have not been searched" and that the Army would "begin and complete that search in the most expeditious manner possible." In its response to defendants' motion for an adjournment of the Phase I trial, the government stated only that the Army had "managed to locate a small group" of responsive documents, that it was reviewing those documents for declassification, and that it expected production by the end of April. At the April 4, 1983 pre-trial conference the Special Master directed the government to expedite production of those documents. (See Tr. at 3895).

H. Army Research Office

Dr. Francis Morthland testified at his deposition on February 23, 1983, that he had been an employee of the Army Research Office and that in the course of his duties he prepared certain relevant documents, including a report of a meeting held to discuss and evaluate the toxicity of 2,4-D and 2,4,5-T compounds at Edgewood Arsenal on April 26, 1963. Dr. Morthland also

testified that the Army Research Office regularly received and reviewed copies of Dr. Hoffmann's trip reports. Defendants have requested production of the relevant documents identified by Dr. Morthland, as well as other relevant records of the Army Research Office. (See letter from W. Heck to A. Maskin, dated March 14, 1983). None has been produced.

I. "Weldon Springs" and "CS" Documents

In 1966 the government became concerned about the inability of private industry to keep pace with the military's projected requirements for Agent Orange. (See, e.g., Shead Dep. Ex. 20). Accordingly, several government agencies, including the Weapons Development and Engineering Laboratories (WDEL) at Edgewood Arsenal, were ordered to evaluate the problem. (See, e.g., Traub Tr. at 21-22). The WDEL, and in particular its Chemical Process Laboratory, was charged with determining the feasibility of converting a pre-existing government facility into an Agent Orange production plant. (Eckhaus Tr. at 59-61).

Deponents have testified that during late 1966 and early 1967 members of the WDEL staff, including Sigmund Eckhaus, Robert Cox and John Gerety, made numerous trips to defendants' 2,4,5-T and trichlorophenol plants to become familiar with the manufacturing process for Agent Orange. (See, e.g., Eckhaus Tr. at 72-76; Cox. Tr. at 51-52). Sigmund Eckhaus testified that during those visits the government was informed of chloracne problems associated with 2,4,5-T. (Eckhaus Tr. at 75-76, 92,

126, 177-78). Eckhaus, Cox, and Gerety have testified that trip reports of these visits were prepared and distributed to interested parties "up the line" (Gerety Tr. at 41-42) and "through the chain of command" (Cox Tr. at 54-55; 99-100). Defendants require those trip reports to determine which WDEL personnel learned about chloracne and other possible health effects associated with the manufacture of Agent Orange, when they acquired that information, and to whom it was communicated.

In 1967 the government decided to convert a facility in Weldon Springs, Missouri to Agent Orange production. In response to the government's solicitation for bids for the design, construction, and operation of the Weldon Springs plant, Dow, in a series of letters, expressly alerted the government to the "chloracne problem" associated with the manufacture of trichlorophenol. (See letters dated September 26, 1967 from A. P. Beutal of Dow to Col. C.G. Shead, Andrew W. Anderson and W. G. Kratz).

One of the Dow letters was addressed to Andrew W. Anderson, who, as Edgewood's Commodity Manager for Agent Orange, was responsible for overseeing and coordinating the conversion and operation of the Weldon Springs plant. (Anderson Tr. at 25-26). The "Commodity Managers Charter for Herbicide Orange," dated August 21, 1967 (Stone Tr. Ex. 5 and Anderson Tr. Ex. 1), required Anderson to prepare and distribute "Weekly Significant Action Reports" to the Commanding General of the United States Army Munitions Command ("USAMUCOM"), "minutes of all meetings" and "[a]ny other special reports that may be deemed desirable by

the Commanding General, USAMUCOM or the Commanding General, Edgewood Arsenal." Defendants believe those documents may reflect the information contained in the Dow letters (or other information concerning health effects), and need to determine who received copies of those documents.

Several deponents who were involved in the government's efforts to increase production of Agent Orange testified that they learned of chloracne much earlier than the Weldon Springs project, probably prior to 1962 and possibly as early as 1959. They acquired that information in connection with Edgewood Arsenal's production of "CS", a riot control agent. (Eckhaus Tr. at 77-78; Cox Tr. at 32-34; Ringenberg Tr. at 16-23 ("skin irritation" associated with the production of "CS")). Despite repeated requests by defendants, however, the government has refused to produce materials pertaining to "CS" and chloracne on the grounds, inter alia, that "[t]he United States has taken the position that 'CS' is irrelevant to the 'Agent Orange' litigation." (Notice to All Counsel, dated December 16, 1982).

The government's position is without merit. The "CS" documents requested by defendants concern the incidence of chloracne at Edgewood and the government's response to that situation. Those materials are likely to reveal the extent of the government's knowledge at that early date as to the causes of chloracne, and are clearly relevant.

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J. MACV Collection of Documents

The Military Assistance Command Vietnam (MACV) collection of documents consists of approximately 40,000 linear feet of combat, medical, and other records generated during the Vietnam conflict and retrieved from Vietnam. On March 3, 1983, Judge Pratt entered Pretrial Order No. 46, adopting in full "the Special Master's Recommended Order to Protect the Confidentiality of Documents Contained within the MACV Collection of Documents," dated February 11, 1983 (the "MACV Protective Order"). Shortly thereafter, on March 7, 1983, defendants commenced their limited review of the MACV collection for the purpose of identifying to the government the documents to be produced. They completed this review on March 16, 1983.

Under the terms of the MACV Protective Order, the government must, within 20 business days of the completion of the review, either produce the documents to the parties or follow the procedures for claiming privilege set forth in the Special Master's Recommended Guidelines. (MACV Protective Order, ¶ 10). Thus, the government has until April 13, 1983 to produce or assert a claim of privilege as to each document identified by defendants. For this reason defendants are not at this time moving to compel production of the MACV documents, but, pending production of all documents by April 13, reserve their right to do so at the appropriate time.

II. DOCUMENTS REQUESTED

For the reasons set forth above, defendants request that an order be entered compelling production of the following documents:

1. Documents in the possession of the Army Surgeon General, especially the Research and Development Division, pertaining to contract number VA-49-007-MD-411 with the Department of Dermatology of the University of Chicago. (Requested by defendants by letter from M. Gordon to J. Bernott, dated March 11, 1982).
2. Documents in the possession of the Headquarters of the Army Surgeon General relating to the Army Environmental Hygiene Agency's work on the restriction of the use of herbicides around water supplies. (Requested by defendants by letter from M. Gordon to J. Bernott, dated March 11, 1982).
3. Documents in the possession of the Preventative Medicine Division of the Army Surgeon General pertaining to its July 22, 1966 request to the National Academy of Sciences for toxicity information on 2,4,5-T and other herbicides. This request includes any information sent to the Preventative Medicine Division by the National Academy of Sciences and documents in the possession of the Army Surgeon General Headquarters relating to this request. (Requested by defendants by letter from A. White to A. Maskin, dated March 28, 1983).
4. Documents in the possession of the Army Environmental Hygiene Agency and/or the Army Surgeon General Headquarters pertaining to AEHA's recommendations on the proposed military specification MIL-H-51310, herbicides, N-butyl esters, concerning a precautionary label on the product. AEHA transmitted its recommendation on December 9, 1968.
5. Documents in the possession of the Command Surgeon of the Air Force Logistics Command and the Headquarters of the Air Force Logistics Command pertaining to reports from Dr. Walter Melvin or his Agency concerning the results of evaluations of herbicides.

6. Documents in the possession of the Surgeon General of the Air Force pertaining to work at Eglin Air Force Base on evaluations of herbicides.
7. The "approximately 90 documents" described in the Government's Response to Defendants' Interrogatories and Notice to All Counsel dated April 15, 1981, which were generated by the Commerce Department in connection with its responsibilities under the Defense Production Act. (See letter from M. Gordon to J. Bernott, dated May 4, 1981).
8. Correspondence and documents relating to the production of 2,4,5-T and explosions in manufacturing plants in the United States, and more specifically, a May 1, 1967 letter in which BDSA advised DGSA that "the production of 2,4,5-T is more complex and more dangerous than the production of 2,4-D and in recent years several U.S. plants have exploded." (Requested by defendants by letter from M. Gordon to J. Bernott, dated May 4, 1982).
9. Correspondence and documents in the files of the DGSA concerning the procurement of 2,4,5-T from "off-shore sources," including materials which indicate familiarity with incidents of chloracne of knowledge concerning the dioxin assays of foreign manufacturers.
10. All documents referring or relating to compound 125413, including the name of the source of that compound. (See letters from M. Gordon to A. Maskin, dated November, 23, 1982 and March 14, 1983, and Notice to All Counsel, dated March 30, 1983).
11. Documents showing the identity of the source who submitted CS 66422 to the Army Chemical and Medical Research Laboratories' Industrial Liaison Office. (See Letter from M. Gordon to A. Maskin, dated March 14, 1983, and Notice to All Counsel, dated March 30, 1983).
12. Classified paper on use of herbicides, presented by Gen. F. Delmore at April 26, 1963 meeting at Edgewood Arsenal. (Requested by defendants at deposition of Gen. F. Delmore, Tr. at 99, and by letter from P. Tuohy to A. Maskin, dated February 16, 1983).
13. Copy of volume containing results of toxicological studies by Dr. B. McNamara, which was transmitted

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by him to various government officials in or about 1962 or 1963 (including the names of the officials). (Requested by defendants at deposition of W.C. Shaw, Tr. at 279, and by letter from J. Burke to A. Maskin, dated February 1, 1983).

14. All relevant material responsive to defendants' First Wave Interrogatories dated January 15, 1981 and to the subpoena to the United States Army Chemical Systems Laboratory, dated May 17, 1982, from the personal files of F. Vocci, including, but not limited to: (a) notes of F. Vocci pertaining to a meeting of the medical panel for NATO held at WRAIR; (b) handouts and minutes distributed at an earlier meeting at WRAIR; and (c) list of names of those responsible for distributing minutes of NATO meeting. Vocci stated during his deposition that these materials are in his possession and that he is willing to supply them for production. (Requested by defendants at the deposition of Frank Vocci, Tr. at 12-13, and by letter from S. Pierce to A. Maskin, dated December 6, 1982).
15. The film, "The CRDL Story," and other films relating to research done at Edgewood Arsenal, including rabbit ear tests and methods of introduction of toxic substances. (Requested by defendants at the deposition of F. Vocci, Tr. at 31, and by letter from S. Pierce to A. Maskin, dated December 6, 1982).
16. Reports relating to herbicides, dioxins or furans sent to F. Vocci upon completion of "task force" projects. (Requested by defendants at the deposition of F. Vocci, and by letter from S. Pierce to A. Maskin, dated December 6, 1982).
17. Data books of Dr. B. McNamara, C. Punte, F. Vocci or others relating to testing with respect to toxicity of herbicides, dioxins or furans. (Requested by defendants at the deposition of F. Vocci, Tr. at 204, and by letter from S. Pierce to A. Maskin, dated December 6, 1982).
18. Tables of organization, or lists with specific names, of those assigned at Edgewood Arsenal to the position of Branch Chief and above during the 1960's. (Requested by defendants at the deposition of F. Vocci, Tr. at 217, and by letter from S. Pierce to A. Maskin, dated December 6, 1982).

19. All relevant material responsive to defendants' First Wave Interrogatories dated January 15, 1981 and to the subpoena to the United States Army Chemical Systems Laboratory dated May 17, 1982, from the personal files of Dr. William A. Summerson. (Requested by defendants at the deposition of Dr. Summerson, Tr. at 10, and by letter from J. Mariani to A. Maskin, dated April 5, 1983).
20. The Trip Report prepared by Dr. Summerson describing his trip to Vietnam in the mid-1960's. (Requested by defendants at the deposition of Dr. Summerson, Tr. at 83, and by letter from J. Mariani to A. Maskin, dated April 5, 1983).
21. Complete copies of those articles from the reprint files of Dr. B. McNamara that contain any underlining or annotation and which were assigned the following identifying numbers by Lester Miller: 5924, 5985, 6087, 6178 and 6636. (Requested by defendants at the deposition of L. Miller, Tr. at 119, and by letter from M. Gordon to A. Maskin, dated December 6, 1982).
22. All copies of test results for any dioxin, 2,4,5-T or trichlorophenol compound which are located in the former files of the Toxicity Screening Branch, including all 8 1/2" by 10" data sheets that were prepared for those compounds. (Requested by defendants at the deposition of L. Miller, Tr. at 51, 53 and 141, and by letter from M. Gordon to A. Maskin dated December 6, 1982).
23. The group of documents entitled "Follow-up Production: Sim, Miller, Cox, Callahan depositions and CSL New Find," designated by the government as Batch No. 1968 (See Notice to All Counsel, dated February 23, 1983).
24. Trip Reports of visits by Sigmund Eckhaus, Robert E. Cox, John Gerety and others from the Weapons Development and Engineering Laboratory at Edgewood Arsenal to commercial 2,4,5-T and trichlorophenol plants in connection with the project to create a government facility for the production of Agent Orange. (Requested by defendants at the deposition of Sigmund Eckhaus, Tr. at 94-95, and at the deposition of Robert Cox, Tr. at 146, and by letter from E. Matthews to A. Maskin, dated October 28, 1982).

25. The "Weekly Significant Action Reports", "minutes of all meetings", and "special reports", which the Commodity Manager for the Weldon Springs project was required to prepare and distribute under the terms of his Charter. (Requested by defendants at the deposition of William W. Stone, Jr., Tr. at 144).
26. All documents relating to any incidents involving skin disorders, including chloracne, among producers of the Anti-Riot Agent "CS" at Edgewood Arsenal, including all "after-action" reports which were filed or prepared as a result of any such incidents. (Requested by defendants by letters from S. Pierce to A. Maskin and from E. Matthews to A. Maskin, dated October 1, 1982 and October 28, 1982, respectively).
27. All documents relating to health effects among producers and/or users of "CS", including all medical records or other documents concerning treatment of any Edgewood Arsenal employees or others afflicted with chloracne or skin disorders. (Requested by defendants by letters from S. Pierce to A. Maskin and from E. Matthews to A. Maskin, dated October 1, 1982 and October 28, 1982, respectively).
28. All copies of records pertaining to "CS" which have been transferred to civilian manufacturers of "CS", including The Fisher Chemical Company, Brunswick and Thyocol Chemical Companies and Federal Laboratories. (Requested by defendants by letter from E. Matthews to A. Maskin, dated October 28, 1982).
29. All documents which refer to research activities to determine the cause or causes of health effects among producers or users of "CS". (Requested by defendants by letter from S. Pierce to A. Maskin, dated October 1, 1982).
30. All documents relating to the synthesis or production of "CS" and any precursors, intermediates and raw materials used in its production. (Requested by defendants by letter from S. Pierce to A. Maskin, dated October 1, 1982).
31. Minutes of meetings of the Chemical Corps Board relating to dioxin, 2,4,5-T, Agent Purple, Agent Orange or the Hoffmann Trip Report for the period 1955-1970. (Requested by defendants by letter

from P. Tuohy to A. Maskin, dated February 16, 1983).

32. All documents of the Chemical Corps Board relating to dioxin, 2,4,5-T, Agent Purple, Agent Orange or the Hoffmann Trip Report for the period 1955-1970. (Requested by defendants by letter from P. Tuohy to A. Maskin, dated February 16, 1983).
33. Written notes and reports prepared by Dr. F. Morthland in connection with the meeting held to discuss and evaluate the toxicity of 2,4-D and 2,4,5-T compounds at Edgewood Arsenal on April 26, 1963, and the meeting of the President's Science Advisory Committee on May 9, 1963. (Identified at the deposition of F. Morthland, Tr. at 64-65, and requested by defendants by letter from W. Heck to A. Maskin, dated March 14, 1983.)
34. All documents relating to dioxin, 2,4,5-T, Agent Purple, Agent Orange or the Hoffmann Trip Report (including the Report itself) in the files of the Army Research Office, and any predecessor or successor office, prepared prior to 1970. (Identified at the deposition of F. Morthland, Tr. at 64-65 and 105, and requested by defendants by letter from W. Heck to A. Maskin, dated March 14, 1983).

CONCLUSION

Defendants respectfully request that their motion to compel production of Department of Defense documents be granted in full.

Dated: New York, New York
April 8, 1983

Respectfully submitted,

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May 4, 1981

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U. S. Department of Justice
Safeway Building, Room 904D
521 12th Street, N.W.
Washington, D.C. 20530

Re: In re "Agent Orange" Product
Liability Litigation, MDL No. 381

Dear Joan:

Defendants Diamond Shamrock, Dow, Hercules, Monsanto, Thompson-Hayward, Thompson, Uniroyal and Hooker are in receipt of your April 15, 1981 "Notice to All Counsel," in which you update the Government's prior Notice and Response of February 13. As discussed below, however, your continuing failure to comply with defendants' Interrogatories and address the need for first wave discovery limited to Phase I issues has in large part defeated the point of your update, and makes only a limited response to your inquiries possible.

1. You have attached to your April 15 Notice as Tab A a cryptic index of approximately 11,000 pages of documents that purportedly "are not available for purchase or inspection." It is impossible from the index to determine whether the referenced documents pertain to Phase I issues. However, if those documents are responsive to defendants' Interrogatories, please comply with Instruction 8 by adequately identifying them and describing the privileges claimed. (Your February 13 Notice merely asserts that the documents are protected by "the government privilege and other privileges, including provisions of the Privacy Act.")

May 4, 1981

Pretrial Order No. 26, my letters of February 27 and March 20, and Mr. Mattingly's letter of March 25 should have made it clear to you by now that documents not responsive to defendants' Interrogatories are not to be identified or produced at this time.

2. Your treatment of the 335 pages of inventories received by the Department of Army in response to two TWIX's sent to Army installations, referenced by Batches 1902 and 1903 on the two updated pages of the summary index attached as Tab B to your April 15 letter, exemplifies the reasons for defendants' dissatisfaction with the Government's performance to date in connection with Phase I discovery. Simply by producing an index that indiscriminately references all documentation at Army installations which may at some time or other be relevant to this litigation, the Government has neither responded to defendants' Interrogatories nor participated in Phase I discovery. In open court, you agreed to accept first wave interrogatories directed to Phase I issues. Accordingly, please review the documents referenced on the inventories received by the Department of Army and identify all documents that are responsive to defendants' Interrogatories. The Government is helping no one to prepare for Phase I trial by providing hundreds of pages of indexes to documents that have apparently not even been reviewed to determine whether they have any relevance to Phase I issues.

In this connection, your letter dated April 7, 1981 to Mr. Mattingly concerning the MACV documents is particularly disconcerting. In my letter to Judge Pratt of March 20, and again in Mr. Mattingly's letter to you of March 25, defendants emphasized that all MACV documents pertaining to Phase I issues must be identified by the Government in response to defendants' Interrogatories. Indeed, Mr. Mattingly specifically reiterated that the Interrogatories "supersede and are independent of all prior informal discovery requests," and requested that the Government "please concentrate on complying with Pretrial Order No. 26 by providing a complete response to our First Wave Interrogatories rather than producing documents for our review that do not relate to the Government Contract Defense."

In disregard of our admonitions, you state in your April 7 letter to Mr. Mattingly:

"I take it from your letter of March 25, 1981, that defendants' request for production of particular MACV documents is withdrawn.

May 4, 1981

If you desire to re-examine the locator data for materials pertinent to the Phase I trial, please let me know how many persons will be looking at the data and what date or dates are convenient. * * *

[I]f you wish to prepare efficiently for the Phase I trial, you should proceed as quickly as possible with examination of the locator data."

Defendants' Phase I Interrogatories, however, nowhere exclude MACV materials from their ambit. Your apparent confusion concerning defendants' earlier request for particular MACV documents, made before Pretrial Order No. 26 was issued, will not relieve the Government from its commitment to review the MACV files and identify all documents that are responsive to our Interrogatories.

3. Attachment C to your letter is a cursory listing of the contents of several boxes of documents "apparently generated" by agencies at Fort Detrick, which you have stated the Government will make available upon request to the extent that they are not privileged or classified. Although a few of the descriptions appear relevant to Phase I issues (e.g., "Proceedings of the First Defoliation Conference 29-30 July 63 Jan 64"), in most instances the listings are too obscure to indicate whether the documents are part of Phase I discovery (e.g., "Commanders Conference" or "Administrative Report FY 54"). In compliance with defendants' Interrogatories, please review the 20 feet of documents encompassed by Tab C, determine which are relevant to Phase I issues, and either identify them pursuant to Definition 1(g) or produce them.

4. Paragraph "4" of your April 15 letter and the accompanying Attachments D, E and F describe three sets of documents that are purportedly sensitive or privileged.

a. Your description of the Department of Commerce documents (Tab D) is confusing and unhelpful, and it is unclear whether Tab D is an attempt to respond to Interrogatory 19, or instead simply part of the Government's unfocused production of documents without regard to Phase I issues. According to your letter, there are only about 90 documents that were generated by the Department of Commerce in connection with herbicide production, while the description set forth in Tab D seems to indicate that there were considerably more. (From the description, defendants are unable to determine whether

May 4, 1981

defendants' monthly report forms, the files of Special Priorities Assistance Requests in the Office of Industrial Mobilization and applications for special priorities assistance are included in the "ninety document" figure). In any event, there is no basis for the Government's failure to comply with Instruction 8 by supplying the requested information for each Phase I document that is claimed to be privileged. When that information is received, defendants will be able to determine whether a motion to compel the production of the Department of Commerce documents is warranted. In addition, if there are any, please identify documents responsive to Interrogatory 19 which you do not claim are privileged.

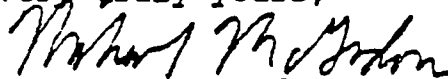
b. As to the National Security Council materials (Tab E), again defendants are unable on the basis of the descriptions provided to determine which of the documents pertain to Phase I issues. Obviously, however, with respect to the documents that are responsive to defendants' Phase I Interrogatories, the National Security Council should have already made the "formal determination as to assertion of privilege" referred to in your letter, since such documents have already been requested by us.

c. Based on our review of Tab F, it does not appear that the documents from the Office of Management and Budget are responsive to defendants' Interrogatories, and therefore they should not have been cited in your letter. Nevertheless, please review those documents to confirm that our conclusion is accurate. If it turns out that one or more of the OMB documents does need to be identified in answer to our Interrogatories, please furnish the information requested by Instruction 8.

5. With respect to the Army documents awaiting disposition which are referred to in paragraph "5" of your letter, we reiterate that only those documents responsive to defendants' Interrogatories are to be identified or produced at this time. Thus, for example, the several feet of documents stored at Aberdeen Proving Ground and referenced in paragraph 5(c) must be reviewed by the Government in order to limit discovery to Phase I issues, as required by Pretrial Order No. 26.

We also await identification by the Government of other documents that are responsive to defendants' Interrogatories, such as those in the files of the United States Department of Agriculture and the Environmental Protection Agency.

Very truly yours,


Michael M. Gordon

BY COURIER

cc: Attached Service List

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March 11, 1982

Joan M. Bernott, Esq.
Torts Branch, Civil Division
U.S. Department of Justice
Safeway Building, Room 904D
521 12th Street, N.W.
Washington, D.C. 20530

Re: In re "Agent Orange" Product
Liability Litigation, MDL No. 381

Dear Joan:

This letter confirms the subject of our discussions in Washington, D.C. on March 4, 1982. Also in attendance were Barbara Rivkind of your office, William Krohley of Kelley Drye & Warren, and Leslie Bennett and Marjorie Feldheim of Rivkin, Leff, Sherman & Radler.

1. U.S. Department of Agriculture documents.

You advised us that approximately five million pages of USDA documents pertaining to phenoxy herbicides have never been reviewed in connection with either the Government's voluntary document production or the preparation of the Government's Response to defendants' Phase I First Wave Interrogatories. At our request, you have now agreed to review the files of the USDA's Agricultural Research Service, as well as the files of all USDA facilities located in Beltsville, Maryland. I refer you to page A-2 of defendants' Interrogatories for certain divisions and operations of the ARS which defendants believe will be particularly important sources of information. You have also agreed to determine to what extent the pesticide registration materials referenced at page 2 of your Notice to All Counsel dated February 13, 1981 have been included in the Government's document production. Any USDA files relating to the Advisory Committee on 2,4,5-T (not discussed during our meeting) should also be reviewed for documents responsive to defendants' Interrogatories.

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Based on your descriptions of the types of documents contained in the files of other divisions of the USDA, defendants have agreed to hold off for the time being on further requests for USDA documents. We of course reserve our right to request production of additional USDA documents (and those of any other agency) that appear relevant to Phase I issues. During our meeting, we expressed our continuing interest in the files of the Forest Service and the Science and Education Administration.

2. Environmental Protection Agency files. The Government stated at page 19 of its Response to defendants' Interrogatories that the EPA had not participated in the preparation of that Response, and that its answers would be provided by Supplement. Defendants, however, still have received no response from the EPA. You stated at our meeting that approximately one million pages of EPA documents need to be reviewed. Defendants requested a description of the EPA files, with particular attention to pesticide registration materials transferred from the USDA.

3. Military Assistance Command Vietnam documents. At our request, you agreed to retrieve the documents described in the "First List" of MACV documents sent to you by Sandy Mattingly on December 5, 1980, and advised us that you will require three to four months to respond. You have also agreed, in order to expedite any further review of the MACV materials that may be necessary, to attempt to identify those persons most familiar with the contents, organization and storage of the MACV cartons. We understand that there is someone preparing a history of the Vietnam conflict who has acquired extensive knowledge of the MACV documents, and suggest that you contact him.

4. Inventories received by the Department of the Army in response to inquiries sent to worldwide Army installations. Defendants are in the process of reviewing the inventories referenced in your April 15, 1981 Notice to All Counsel. We expect to complete that review within the next several days and will advise you shortly of which documents are to be produced.

5. Documents withheld on grounds of privilege. The Government has thus far asserted claims of privilege with respect to seven different groups of documents totaling several thousand pages. During our meeting, you requested that the Government's assertions of privilege be resolved by a motion to compel made returnable before Judge Pratt. You noted that such

March 11, 1982

a motion would qualify as a request to declassify and automatically trigger a review of the documents sought by defendants. You also stated that the Government would not object to such a motion on the grounds that it is no longer a party to MDL No. 381. However, on March 8 you telephoned to request that defendants defer any motion to compel pending further advice from you as to the most efficient means for resolving the Government's privilege claims. Notwithstanding defendants' Interrogatories, you stated that the Government has not yet commenced any declassification process or review of privilege claims.

6. Gaps in productions by agencies that have already participated in the Government's document production. Defendants have become increasingly aware of highly relevant documents located in Government files which are missing from the Government's own document production. During our meeting, defendants stressed their concern at the apparent incompleteness of the productions made to date by the participating Government agencies. You indicated that you shared our concern, and were aware of this problem. You further stated that there is a follow-up or checking process that can be implemented by the agencies to uncover and remedy these gaps, and accordingly agreed to attempt to formulate a proposal for identifying and eliminating the gaps in production that have occurred. At your request, I enclose several examples of relevant documents that we have located in the Government's files, but which were omitted from the Government's production in MDL No. 381:

- (a) Special Report "ZZ" entitled "Classification of Butyl 2,4-Dichlorophenoxyacetate, LNA, and Butyl 2,4,5-Trichlorophenoxyacetate, LNB, as BW Anticrop Agents," dated November 5, 1952, prepared by Department of the Army, Office of the Chief Chemical Officer, Chemical Corps Technical Committee, Army Chemical Center, Maryland;
- (b) Military Specification MIL-V-51239B, dated October 27, 1969, for "Vegetation Control Agent; Orange;"
- (c) 17 documents prepared in 1963 and 1964 pertaining to the use of herbicides in water supplies, located in the files of the Army Environmental Hygiene Agency; and
- (d) Letter dated March 13, 1956 from Office of the Surgeon General, Department of the Army, to Commanding Officer, Army Environmental Health Laboratory, Army Chemical Center, Maryland, and attached draft of technical bulletin on health hazards of insecticides, rodenticides and herbicides.

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March 11, 1982

7. Documents from the "Edgewood Historical Collection". Your Notice to All Counsel dated June 10, 1981 stated that the "Edgewood Historical Collection" was being inventoried for materials relating to this litigation, and that an inventory would be completed at the end of June 1981. Although your Notice to All Counsel dated August 20, 1981 attached an index to allegedly privileged documents from the Edgewood Historical Collection, no mention was made of an inventory of non-privileged materials. At our meeting, you agreed to check to determine whether an inventory of non-privileged materials was ever produced to the parties.

On a related matter, your Notice to All Counsel dated April 15, 1981 attached an inventory of 20 feet of herbicide-related documents that were apparently generated by agencies at Fort Detrick. In your June 10, 1981 Notice, however, you appear to indicate that materials from that inventory "relating to the subject matter of this litigation" were then selected by you and placed on microfilm. Defendants are unclear whether any of the documents listed in the inventory produced on April 15 were omitted from the actual microfilm production. If omissions were made, please identify them.

8. Contracts, specifications and shipping documents. Defendants repeated our request for a complete production of all herbicide contracts, specifications, shipping documents and related materials in the Government's files. In view of the April 22, 1982 deadline set forth in Pretrial Order No. 33, a prompt and exhaustive response by the Government is obviously of the greatest importance.

9. Depositions of present and former Government employees. At our request, you have undertaken to determine whether the Government will voluntarily produce current employees for depositions or require that they be subpoenaed. You have taken under advisement defendants' request that Government employees be made available for preliminary interviews in order to expedite discovery by avoiding cumulative or unproductive depositions.

In addition, defendants requested that you furnish the parties with the current or last known addresses and job titles of the present and former Government employees identified in your Response to defendants' Interrogatories to facilitate scheduling and permit prompt service of any subpoenas that may be required. You stated that you were unwilling to provide this information.

10. Timetable for discovery. You estimated that approximately six months would be required for the Government to respond to or resolve the requests made during our meeting.

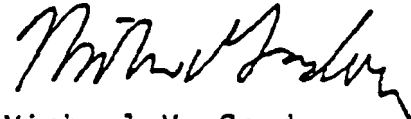
March 11, 1982

You also expressed your view that depositions of present and former Government employees should not commence until the end of that six month period.

Defendants reiterate that our March 4 meeting was a preliminary attempt to identify areas of the Government's document production in which further responses are required. Undoubtedly, additional areas will be identified as defendants continue their review of the documents thus far produced and proceed with other discovery. Neither our discussions on March 4 nor this letter is to be construed in any way as a waiver of any defendant's right to seek to compel discovery from the Government or as acquiescence in the manner in which the Government has chosen to respond to defendants' Phase I Interrogatories.

If this letter does not accurately summarize the substance of our discussions on March 4, please contact me at your earliest convenience.

Very truly yours,



Michael M. Gordon

MMG:slk
Enclosures

BY COURIER

cc: William A. Krohley, Esq.
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October 1, 1982

Arvin Maskin, Esq.
Trial Attorney
Torts Branch, Civil Division
United States Department of Justice
Washington, D.C. 20530

Re: In re Agent Orange Product
Liability Litigation

Dear Arvin:

We hereby request that the United States promptly produce the following documents:

1. All documents relating to an incident involving skin disorders (chloracne) among producers of the Anti-Riot Agent, CS at Edgewood Arsenal, as set forth in the deposition of Sigmund Eckhaus, pertinent portions of which are attached hereto.

2. All documents relating to any health effects among producers and/or users of CS, including the incident described by Mr. Eckhaus, and any and all other such incidents.

3. All documents which refer to research activities to determine the cause or causes of health effects among producers or users of CS, including but not limited to medical records, treatment records, other reports, agendas, and minutes or summaries of meetings.

4. All documents relating to the synthesis or production of CS, including but not limited to the precursors, intermediates and raw materials used in such production.

5. All documents relating to health effects in respect to the process and materials referred to in Paragraph 4.

5035

-2-

Arvin Maskin, Esq.

October 1, 1982

Re: In re Agent Orange Product
Liability Litigation

Arvin, the term CS may also be found as
CS-1 or CS-2, and is often chemically identified as:

o-Chlorobenzalmalononitrile, or
2-Chlorobenzalmalononitrile, or
o-chlorobenzylidene malononitrile, or
2-chlorobenzylidene malononitrile;

other chemical synonyms have also been used.

At this time, I further request that the documents identified
by John Buckley during his deposition, consisting of materials
maintained at his home, be produced.

Since the depositions of Mr. Eckhaus and
Dr. Buckley have not been completed, your prompt attention to
these matters would be sincerely appreciated.

With thanks in advance for your cooperation, and
with my best personal regards, I am,

Very truly yours,



Stanley Pierce

Copies to: Attached list

SP/bb

625-

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FEDERAL EXPRESS

October 6, 1982

CW & T

Rec'd 10-7-82
WBAjr.

Arvin Maskin, Esq.
Torts Branch, Civil Division
United States Department of Justice
Safeway Building
521 12th Street, N.W.
Washington, D.C. 20530

Re: "Agent Orange" Product Liability
Litigation - MDL No. 381

Dear Arvin:

Pursuant to the Special Master's order, we enclose herewith documents which, based upon currently available information, may be used at the deposition of Joseph Avellino currently scheduled for October 20, 1982. A list of these documents is appended to this letter. Please arrange for the review of the enclosures by the deponent in advance of the deposition in accordance with the Master's instructions.

By copy of this letter, copies of the enclosures are also being forwarded to lead counsel for plaintiffs.

In order to insure that all pertinent documents are available for completion of the Avellino deposition, we ask that you make the following documents available as promptly as possible:

- (a) All documents contained in any personal files in Mr. Avellino's possession, custody or control, which are responsive to the Phase I interrogatories and document requests served by the defendants upon the United States on January 15, 1981.

8038

Arvin Maskin, Esq.
October 6, 1982
Page 2

- (b) The Ennis letter (or letters) referred to in the Minutes of the July 29, 1963 Meeting of the Subcommittee on Herbicides (item 7 on attached list) and the memo by McCall & Avellino dated July 30, 1963 (item 8);
- (c) Copies of all minutes of the Interdepartmental Committee on Pest Control, including any and all drafts thereof);
- (d) The Draft Circular dated March 15, 1963 entitled "Use of Chemicals as Herbicides" referred to at page 15 of the Minutes of the Meeting of the Interdepartmental Committee on Pest Control on June 13, 1963 (item 9);
- (e) Comments on Draft Circular by Colonel C.B. Lyle, Corps of Engineers, Chief, Repairs & Utilities Division, dated April 15, 1963, referred to at pp. 16-17 of the Minutes of the Meeting of the Interdepartmental Committee on Pest Control on June 13, 1963 (item 9);
- (f) All enclosures to the memorandum by Colonel R.J. Phillips dated August 6, 1963 (item 6);
- (g) Letter from H.P. Haller to Lt. Colonel Converse R. Lewis dated July 18, 1963 referred to in the memo by Colonel R.J. Phillips dated August 6, 1963 (item 6);
- (h) The final and all modified, revised or updated versions of a Technical Bulletin on Pesticides prepared by the Army Environmental Health Laboratory (see March 19, 1956 letter of Robert T. Callison to Commanding Officer, Army Environmental Health Laboratory with attachment (item 17)).

RIVKIN, LEFF, SHERMAN & RADLER

Arvin Maskin, Esq.
October 6, 1982
Page 3

Thank you for your cooperation in this matter.

Very truly yours,

RIVKIN, LEFF, SHERMAN & RADLER



By: Leslie R. Bennett

LRB:mae
Enclosures

cc: Victor J. Yannacone, Jr., Esq.
(with enclosures) (Federal Express)

cc: Attached Service List
(without enclosures)

Documents Which May Be Used At
Deposition of Joseph Avellino

1. Memo of Robert G. McCall and Joseph D. Avellino dated July 30, 1963 regarding a draft of DA Circular, "Use of Chemicals as Herbicides."
2. Letter from Richard J. Phillips to Regional Program Director, Region IV, USPHS dated September 20, 1963.
3. Memo by Avellino dated October 18, 1963 of telephone or verbal conversation with Dr. Wayland Hayes.
4. Disposition Form, dated September 9, 1963 by Alois Peczenik.
5. Letter from Richard J. Phillips to Justus C. Ward dated October 6, 1963.
6. Memo by Richard J. Phillips dated August 6, 1963 re: Draft of DA Circular, "Use of Chemicals as Herbicides."
7. Minutes of Meeting of Subcommittee on Herbicides dated July 29, 1963.
8. Memo of Robert G. McCall and Joseph D. Avellino dated July 30, 1963 re: Draft of DA Circular, "Use of Chemicals as Herbicides."
9. Minutes of Interdepartmental Committee on Pest Control dated August 20, 1963.
10. Report on trip to Europe (U), CWL Special Publication 1-12, by Friedrich W. Hoffmann, dated October 5, 1959.
11. Extract of CWL Special Publication 1-12, item no. 10.
12. "Use of Pesticides," A Report of the President's Science Advisory Committee dated May 15, 1963.
13. Kimmig, J., Schulz, K.H.:
Chlorierte aromatische zyklische Ather als Ursache der sogenannten Chlorakne, Naturwissenschaften 44, 337-338 (1957).

14. Kimmig, J., Schulz, K.H.:
Occupational Chloracne Caused By Aromatic
Cyclic Esters, Dermatologica 115, 540-546
(1957).
15. Bleiburg, J., Wallen, M., Brodtkin, R.,
Appelbaum, I.L.:
Industrially acquired porphyria, Arch.
Dermatol. 89, 793-797 (1964).
16. E. Linn Jones & Helen Krizek, A Technic
for Testing Acnegenic Potency in Rabbits,
Applied to the Potent Acnegen, 2,3,7,8-
tetrochlorodibenzo-P-dioxin, Journal of
Investigative Dermatology 511, 517 (1962).
17. Letter, Robert T. Callison to Commanding
Officer, Army Environmental Health Laboratory,
dated March 19, 1956 with attached draft of
Health Hazards from Insecticides, Rodenticides
and Herbicides.
18. Key, N.M. and Birmingham, D.J., "Occupational
Chloracne", Proceedings of 15th Intl. Congress
of Occupational Health, Vienna, 1966.

623

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October 22, 1982

CT & L
Rec'd 11-2-82
WDA:j

Arvin Maskin, Esq.
Torts Branch, Civil Division
United States Department of Justice
Safeway Building
521 12th Street, N.W.
Washington, D.C. 20530

Re: "Agent Orange" Product Liability
Litigation - MDL No. 381

Dear Arvin:

At the deposition of Carlton G. Shead, I asked the Government to search for and determine whether other documents similar to Exhibits 15 and 16, which bear the title and consist of a chronological summary of events relating to herbicides, are available in Government files, and if so, to produce them. Additionally, I asked that to the extent that Exhibits 15 and 16 and any similar documents located referred to other documents, that those documents be searched for and produced. Please consider this letter a formal request for the production of the above documents. For your convenience, I enclose herewith copies of Shead Exhibits 15 and 16.

At the deposition of Joseph Avellino, held on October 20, counsel for the Government, Judith Wheeler, Esq., advised that she was unaware of the requests for documents set forth in my October 6, 1982 letter to you. As you will recall, that letter sought the production of documents for possible use at the deposition of Dr. Avellino. Since we did not receive any of the documents requested in my letter in advance of the deposition, the deposition was concluded subject to the production of additional documents. We would appreciate receiving a prompt response to our request.

9843

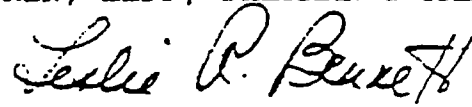
RIVKIN, LEFF, SHERMAN & RADLER

Arvin Maskin, Esq.
October 22, 1982
Page 2

Thank you for your anticipated cooperation.

Very truly yours,

RIVKIN, LEFF, SHERMAN & RADLER

A handwritten signature in cursive script, reading "Leslie R. Bennett".

By: Leslie R. Bennett

LRB:mae
Enc.

cc: Attached Service List

BUDD, LARNER, KENT, GROSS, PICILLO & ROSENBAUM

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JOHN P. BEYEL
ALBERT L. PEIA
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JAMES M. MASCELLI
ALAN G. WHITE

October 28, 1982

Gretchen Witt, Esq
Trial Attorney Torts Branch,
Civil Division
U.S. Dept. of Justice
Washington, D.C. 20530

Re: In re Agent Orange Product Liability
Litigation.

Dear Gretchen:

Reference is made to the deposition of Mr. Sigmund R. Eckhaus, taken on September 23, 1982 and continued on October 6, 1982.

Mr. Eckhaus related information concerning the presence of chloracne during the manufacture and production of the riot agent, CS, at Edgewood Arsenal. Mr. Eckhaus testified that, in preparation for his deposition, he reviewed personal files containing documents and correspondence relating to the production and manufacture of Herbicide Orange. Consistent with our prior, oral agreement, the purpose of this letter is to formally request that copies of all relevant documents be provided to the defendants.

In order to expedite his search for these documents, we specifically request copies of the following:

1. Any and all documents in Mr. Eckhaus' personal files which deal with Herbicide Orange or CS or which he may have reviewed in preparation for his deposition.

Page 2

2. Any documents which contain the minutes or summaries of any and all meetings held between 1962 and 1966 during which Edgewood Arsenal personnel would have reviewed the specifications and purchase descriptions for any and all herbicides which they produced.
3. Any and all documents which refer to the work Mr. Eckhaus performed subsequent to December of 1966 on the project to create a facility which would enable the government to manufacture Herbicide Orange. Such a review would included any and all reports which he submitted in January of 1967 to either the Department of the Army or the AMC.
4. Any and all medical records or other documents concerning the treatment of any employees or others, who may have been afflicted with chloracne during the manufacture of CS.
5. A Trip Report which he would have filed subsequent to his visit to the Diamond Alkali Plant.
6. Any and all sick lists, even if they only included military personnel, which were circulated during the period 1962 thru 1966.
7. Any "after-action" reports which would have been filed or prepared as a result of the CS manufacturing process.
8. Any and all copies of records which have been transferred to the civilian manufacturers of CS, specifically, The Fisher Chemical Company, The Brunswick and Thyocel Chemical Company and Federal Laboratories.
9. Any and all trip reports, either in Mr. Eckhaus' own files, or elsewhere, which describe his visit to industrial plants which produced trichlorophenol.

Thank you for your anticipated cooperation in this matter. Should you have any questions on the above, please do not hesitate to contact me.

Very truly yours,



Edwin R. Matthews

ERM/cc

9946



Washington, D.C. 20530

JA:GLWitt:bf
157-0-107

November 12, 1982
Telephone: (202) 724-6725

NOTICE TO ALL COUNSEL

Re: In re "Agent Orange" Product Liability
Litigation MDL No. 381

This Notice responds to Les Bennett's November 1, 1982 letter concerning outstanding document requests. We have attempted to get as complete responses as possible to each request in the short time available.

Requests Related to Particular Depositions

1. October 1, 1982 Letter from S. Pierce re Mr. Eckhaus and Dr. Buckley

a. Mr. Eckhaus: Army has indicated that it currently is working to respond to this request.

b. Dr. Buckley: We have requested that Dr. Buckley review the files he indicated that he had in his possession for any responsive or relevant documents. Since Dr. Buckley is retired and is merely acting in cooperation with the government, we cannot exert undue pressure on Dr. Buckley. If we have not received a response from him in 10 days, we will contact him again.

2. October 22, 1982 Letter from L. Bennett re Col. Shead

Mr. Bennett requested production of all documents similar to Shead Exhibits 15 and 16 as well as all documents referenced by those Exhibits. Exhibits 15 and 16 are nothing more than inventories of documents contained in the file in which they were located. In other words, all documents mentioned on those Exhibits can be found in the microfilm batches from which they were taken, i.e., batches 513 and 512, respectively.

If any other documents similar to Exhibits 15 and 16 exist, they have been produced and microfilmed and are in the hands of the parties. Similarly, any documents referenced in any documents like Exhibits 15 and 16 are in the hands of the parties as well. The custodian of this material has reconfirmed its previous production.

3. October 26, 1982 Letter from B. Roth re Dr. Firestone

The request was forwarded to the Bureau of Foods for response. As indicated in the accompanying Notice to All Counsel, Dr. Firestone is the only individual thoroughly familiar with all of the relevant files. Dr. Firestone currently is hospitalized and will not return to work for another month. Upon his return, he will conduct the search for the requested materials.

4. Notice of Deposition served May 27, 1982

The Notice requests production of documents responsive to defendants' Phase I Interrogatories and the personal files of the individual witnesses. The government has either produced or is in the process of producing responsive documents from the personal files of witnesses that are in the possession of the government.

Responsive documents from the personal files of the witnesses that are in the witnesses' possession have proved more difficult to obtain. As counsel for all parties are fully aware, the amount of time between the date a particular witness deposition is scheduled and the date of the deposition itself is often quite short. In the rare instances where the witness has had personal files in his possession, the process involved has prevented the government from getting any responsive documents to the parties prior to the deposition. To locate documents related to the witness' work for the United States, he must search his files and send the documents to the relevant agency for privilege review. Once that review is completed the documents can be released for microfilming and production to the parties.

The situation involving Dr. Benjamin Harris is a perfect example. The government scheduled his November 10 deposition during the last week of October. He searched his files and got all of his relevant documents to the government by November 8. Those documents have been sent to Army for review and then microfilming. It simply was impossible to obtain and release the documents any faster. The government cannot impose deadlines on retired employees and cannot unduly pressure these individuals who are cooperating without risking the loss of their cooperation. The government will continue to attempt to produce these documents in the most expeditious manner possible, but the parties must recognize the difficulties inherent in the process.

5. October 20, 1982 Letter from James Tyrell listing eleven requests for documents.

The United States has given a report on the status of these requests in the accompanying Notice to All Counsel.

Requests Not Related to Particular Depositions

1. June 18, 1982 Letter from M. Gordon summarizing outstanding requests.

- a. Privilege Material: An accompanying Notice to All Counsel addresses these items.

- b. Non privileged Edgewood documents:

The searches and document production from Edgewood are completed except for the outstanding issue of the SF 135 "locator data" and any "new finds" that might be discovered from unlikely sources during the course of regular operations at Edgewood. Personnel at Edgewood have developed a special sensitivity to the need to produce herbicide and dioxin related records and have forwarded "new finds" when they come upon relevant records in files that were not files in which these documents were rationally expected to be located. Any such future finds will be produced, but other than those types of finds, the production from Edgewood is complete.

- c. EPA documents: The EPA document production has been resolved by a proposed Protective Order and procedure outlined at the October 5, 1982 hearing before the Special Master. The defendants have yet to sign the order, thus preventing the government from proceeding with the devised document production procedures. As soon as the defendants see fit to sign the order, the appropriate notice will be published in the Federal Register and examination of the documents by the parties can begin.

- d. USDA documents: Counsel for the government have requested an update from the agency representative and anticipate a response by November 16.

- e. MACV documents: The government will announce its plan for the production of this material within the week, and expects production to begin soon thereafter.

2. April 14, 1981 Letter from L. Rivkin re Ranch Hand Report.

The United States has produced copies of Major Buckingham's Ranch Hand report to the parties. The Air Force currently is segregating the classified materials from the non-classified primary source documents for the report. When the Air Force has completed that segregation, the non-classified materials will be produced for microfilming. At that time, the Air Force will undertake a declassification review for the classified material and either produce the newly declassified documents or seek U.S. v. Reynolds affidavits for any remaining classified documents.

In addition, the Air Force will attempt to locate any existing drafts of the report. It is likely that the Air Force will claim privilege for any such drafts. Russell v. Department of the Air Force, 682 F.2d 1045 (D.C. Cir. 1982).

3. July 8, 1982 Letter from L. Bennett re SF 135s

The government provided the SF 135s in an attempt to make expedient production of relevant documents. Apparently, the defendants found the first installment of the SF 135s unintelligible. The Army has since provided the defendants with a glossary of military abbreviations as a useful first step in better understanding the materials. The government contemplated that the next step would be a meeting at the defendants' request to discuss the SF 135s. While the government has been available to discuss the subject, the defendants have failed to request any such meeting.

4. July 28, 1982 Letter from M. Gordon

As previously stated, the searches and document production from Edgewood are completed except for the outstanding issue of the SF 135 "locator data" and any "new finds" that might be discovered from unlikely sources during the course of regular operations at Edgewood. Personnel at Edgewood have developed a special sensitivity to the need to produce herbicide and dioxin related records and have forwarded "new finds" when they come upon relevant records in files that were not files in which these documents were rationally expected to be located. Any such future finds will be produced, but other than those types of finds, the production from Edgewood is complete.

5. July 16, 1982 Letter from S. Pierce re Kapalama documents

The United States has produced all responsive Kapalama documents. The materials are being microfilmed and will be released under the batch title "Kapalama, Hawaii Entomology/Herbicide Records". The vast majority of these documents have little or no relevance to this litigation. The government has gone to considerable effort and expense to produce this material and intends to formally seek the Army's cost of production in the sum of \$3,781.16.

6. August 20, 1982 Letter from S. Pierce re Report on CBR Weapons

The Army currently is attempting to locate this document.

7. September 13, 1982 Letter from M. Feldheim re Dr. McNamara

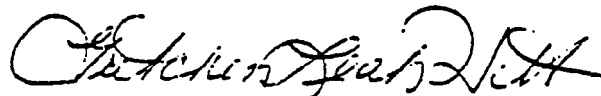
The Army states that all requested materials pertaining to Dr. McNamara have already been produced and has confirmed that fact with the Chemical Systems Laboratory.

8. October 4, 1982 Production Request concerning Army Chemical Corps Intelligence Agency (CCIA) and Army Foreign Science and Technology Center (FSTC).

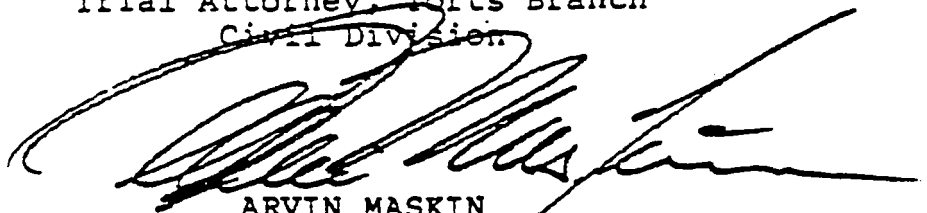
FSTC materials were searched in 1980 in response to the first Army worldwide discovery search. Government records reflect that five documents were discovered and produced on microfilm. The government's understanding is that FSTC was established on August 1, 1962 to replace the concurrently discontinued Army technical service intelligence agencies, including CCIA. The pre-1962 CCIA materials most likely have not been searched. However, Army will begin and complete that search in the most expeditious manner possible.

If and when more documents or information are available, we will inform the parties,

Very truly yours,



GRETCHEN LEAH WITT
Trial Attorney, Torts Branch
Civil Division



ARVIN MASKIN
Trial Attorney, Torts Branch
Civil Division

(m)

Cadwalader, Wickersham & Taft

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November 23, 1982

Arvin Maskin, Esq.
Torts Branch, Civil Division
United States Department of Justice
Safeway Building
521 12th Street, N.W.
Washington, D.C. 20530

Re: In re "Agent Orange" Product
Liability Litigation, MDL No. 381

Dear Arvin:

Pursuant to our discussions at yesterday's pre-trial conference, I enclose copies of the transcript and exhibits for the deposition of Lester L. Miller, taken on November 9, 1982. Mr. Miller's testimony concerning the alteration of documents produced by the United States without notice of the alterations to the parties occurs at pages 67 to 77 of the transcript.

In accordance with the request of Special Master Schreiber at the pre-trial conference, please furnish as soon as possible a description and explanation from Mr. Ron Kassel and other appropriate Government representatives of the alterations that were made. In addition, please furnish immediately copies of the documents in question in their original form, together with all documents referring or relating to the redacted "CS number" for "Compound B," such as Commercial Source Sample Record Logs and Review Point Committee minutes. If you have any questions, please contact me at once so that you will be able to respond at the next pre-trial conference, scheduled for December 3, 1982.

As I advised Mr. Cormier, I will send a letter shortly

(9852

Arvin Maskin, Esq.

-2-

November 23, 1982

which confirms defendants' requests for production by the United States of certain documents described by Mr. Miller during his deposition.

Thank you for your attention to this matter.

Very truly yours,



Michael M. Gordon

MMG/mam

Enclosures

BY COURIER

cc(w/o encls.): Hon. Sol Schreiber
Attached Service List

9853

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December 6, 1982

Arvin Maskin, Esq.
Torts Branch Civil Division
United States Dept. of Justice
Safeway Building
521 - 12th Street, N.W.
Washington, D.C. 20530

Dear Arvin:

During the deposition of Frank Vocci, several requests for documents were made. These include:

1. Relevant materials from the personal files of Mr. Vocci.
2. Notes of Mr. Vocci pertaining to a meeting of a medical panel for NATO held at WRAIR.
3. Handouts and minutes distributed at an earlier meeting at WRAIR.
4. List of names of those responsible for sending out minutes of such NATO meetings.

The above are in Mr. Vocci's possession, and he has indicated his willingness to supply these materials. Additionally, at this same deposition, Mr. Vocci identified the following documents for which we request production.

5. The clinical document worked on with Dr. Seidell, which is probably at the offices of the Army Surgeon General.
6. A film--"The CRDL Story".
7. Other films relating to research done at Edgewood Arsenal and including rabbit ear tests, and methods of introduction of toxic substances.

9854

RIVKIN, LEFF, SHERMAN & RADLER

Arvin Maskin, Esq.

December 6, 1982

Page 2

8. Reports sent to Mr. Vocci upon completion of "task force" projects--our interest is in those relating to herbicides and/or dioxins or furans.
9. Data books of Bernard McNamara, Frank Vocci, Charles Punte or others, relating to testing in respect to toxicity of herbicides and/or dioxins or furans.
10. Tables of organization, or lists with the specific names of those assigned at Edgewood Arsenal during the 1960's, to the positions of Branch Chief and above.

Please note that for each request appropriate pages from the deposition transcript of Mr. Vocci are enclosed.

Thank you for your cooperation in these matters.

Very truly yours,

RIVKIN, LEFF, SHERMAN & RADLER


Stanley Pierce

SP:mk
Enc.

Cradwalader, Wickersham & Taft

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December 6, 1982

Arvin, Maskin, Esq.
Torts Branch, Civil Division
U. S. Department of Justice
Safeway Building
521 12th Street, N.W.
Washington, D.C. 20530

Re: In re "Agent Orange" Product Liability
Litigation, MDL No. 381

Dear Arvin:

This letter confirms defendants' requests for production by the United States of certain documents described by Lester Miller during his deposition on November 9, 1982, or for additional information concerning such documents. Please refer also to my letter of November 23, 1982, which requested that the Government furnish immediately copies of all altered Edgewood documents in their original form together with all documents referring or relating to the redacted "CS Number" for "Compound B", such as Commercial Source Sample Record Logs and Review Point Committee minutes.

Transcript

Request

8-9

The curriculum vitae for Mr. Miller. In accordance with defendants' standing request, and in order to save time at the depositions, please also have all present and former Government employees bring their respective curricula vitae to future depositions.

9856

TranscriptRequest

- 63 All Agent Status Reports that refer to a "CS" or "EA" number assigned to any dioxin compound.
- 80 All Unit Work Guides that refer to a "CS" or "EA" number assigned to any dioxin compound.
- 83 All interoffice memos prepared at Edgewood which report receipt of a sample of any dioxin compound.
- 91-92 All Technical Data Brochures that refer to a dioxin compound or to a "CS" or "EA" number assigned to a dioxin compound.
- 94 All correspondence or other records that refer or relate to the transmission to a commercial or other source of information concerning toxicity testing at Edgewood of any dioxin compound, or of trichlorophenol or 2,4,5-T.
- 119 Complete copies of those articles from Dr. Bernard McNamara's reprint files which contain any underlining or annotation and were assigned the following identifying numbers by Mr. Miller: 5924; 5985; 6087; 6178; 6636. In addition, please identify the title and source of the folder or folders that contain the documents referenced by microfilm frame numbers 256 and 258 in Batch 1933.
- 135 Please furnish the title and source of the folder in which Miller Deposition Exhibit No. 8 (Dr. Jandorf's June 5, 1970 memo for Director of Research Laboratories) was located.
- 141 All copies of test results for any dioxin, 2,4,5-T or trichlorophenol compound which are located in the former files of the Toxicity Screening Branch. This request includes all 8 1/2" x 10" data sheets that

Arvin Maskin, Esq.

-3-

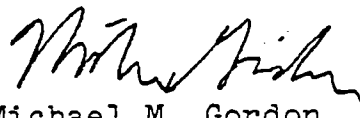
December 6, 1982

Transcript

Request

were prepared for such compounds
(see Tr. at 51, 53).. —

Very truly yours,



Michael M. Gordon

MMG/mam
BY COURIER

cc: Hon. Sol Schreiber
Attached Service List

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Washington, D.C. 20530

December 16, 1982

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157-0-107

Telephone:
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*See L
23 Dec 82*

NOTICE TO ALL COUNSEL

Re: Deposition Document Requests for In re "Agent Orange" Product Liability Litigation, MDL No. 381

This Notice concerns a number of the outstanding requests for documents that have arisen out of government witness depositions.

1. Dr. Darrow: On December 14, the Army provided our office with relevant materials culled from the personal files of Dr. Darrow. On December 16, we sent this material for microfilming as Batch 1948, entitled "Dr. Robert A. Darrow's 'Personal Files'." The microfilm should be available to the parties for purchase in a few weeks. This completes the Government's production in response to the September 1, 1982 request from Mr. Matthews and that portion of the September 9, 1982 request from Mr. Mattingly relating to Dr. Darrow.
2. Dr. Buckley. On December 13, our office received relevant materials from Dr. Buckley that he found in his personal files. On December 16, we forwarded the material for expeditious review by the Executive Office of the President prior to release. As soon as that review is complete, we will have the material microfilmed on a priority basis.
3. Mr. Cox. We have forwarded four notebooks containing entries about "Agent Orange" that Mr. Cox mentioned at his deposition to the Army for review prior to release. As soon as that review is complete, we will have the notebooks microfilmed for release to the parties.

In addition, upon further reflection, Mr. Cox realized he had other notebooks pertaining to his employment at Edgewood. Although he believes that the contents of the notebooks are entirely irrelevant, he has provided those materials to us. Those notebooks also have been forwarded to the Army to determine if their contents have any relevance to the litigation. If relevant entries are found, they will be microfilmed for release to the parties.

4. Mr. Eckhaus:

a. "CS" materials: In requests dated October 1 and October 28, Messrs. Pierce and Matthews, respectively, requested materials concerning the Riot Control Agent "CS" and chloracne. On September 29, 1982 the Army received a F.O.I.A. request concerning "CS" and chloracne from Lise Andre of Rivkin, Leff, Sherman and Radler.

By letter dated December 10, the Army responded to the F.O.I.A. request from Ms. Andre and sent all responsive material to her. The United States has taken the position that that "CS" is irrelevant to the "Agent Orange" litigation. Unless the parties demonstrate the relevance of "CS", the Army has decided that its response to the F.O.I.A request closes the "CS" matters contained in Messrs Pierce and Matthews' requests. It will not produce any other material on "CS" in the "Agent Orange" discovery.

b. "Agent Orange" Materials: On December 14, the Army provided our office with materials responding to both Mr. Pierce and Mr. Matthews' requests. On December 16, those materials were sent for microfilming as Batch 1947, entitled "Sigmund Eckhaus' 'Personal Files'," and Batch 1946, entitled "Eckhaus Deposition Materials Responsive to Mr. Matthews' Request dated October 28, 1982." The microfilm should be available to the parties for purchase in a few weeks. This completes the Government's response to the October 1, 1982 request of Mr. Pierce relating to Mr. Eckhaus and the September 23, 1982 request of Mr. Matthews.

5. Major Buckingham. On December 14, the Air Force provided our office with all unclassified footnote material from Operation Ranch Hand. We sent this material for microfilming on December 16, 1982, as Batch 1945, entitled "Ranch Hand Unclassified Footnote Material." The microfilm should be available to the parties for purchase in a few weeks.

We have attached the transmittal letter from Major Parr of the Air Force which outlines the steps taken by the Air Force and attaches a file inventory of all footnote material, classified or unclassified. The Air Force will attempt to declassify the classified material in the most expeditious manner possible.

6. Dr. Harris: Prior to his deposition, Dr. Harris reviewed certain personal files. At our request, he turned those files over to the Army for review. On December 3, we sent these files for microfilming as Batch 1942, entitled "Personal Files of Dr. Benjamin Harris." The microfilm should be available to the parties for purchase soon.

7. Dr. Upholt: As announced in our November 11 Notice to All Counsel, EPA located three boxes of material archived by the Federal Working Group on Pest Management (formerly the Federal Committee on Pest Control). Dr. Upholt and an EPA representative searched for documents with information pertaining to 2,4,5-T, 2,4-D, phenoxy and chlorophenoxy herbicides, dioxin, Agent Orange, defoliant use in Vietnam and the Bionetics study. They pulled all relevant documents and transmitted them to our office on December 16. On December 16, we sent this material for microfilming as Batch 1949, entitled "Records From the Federal Committee on Pest Control." The microfilm should be available to the parties for purchase in a few weeks. This completes the Government's response to that portion of the September 9, 1982 request from Mr. Mattingly relating to Dr. Upholt.

Very truly yours,



GRETCHEN LEAH WITT
Trial Attorney, Torts Branch
Civil Division

ARVIN MASKIN
Trial Attorney, Torts Branch
Civil Division

Enclosures

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