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UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

RICHARD A. BAND and
MARY A. BAND, his spouse,
Plaintiffs,
vs.

Civil No. 07-CV-0267S(Sr)

No Oral Argument Requested

E.I. DuPONT DE NEMOURS AND COMPANY,
and HONEYWELL INTERNATIONAL INC.,
as successor-in-interest to the Allied Chemical
Corporation

**MOTION FOR PERMISSION
TO FILE REPLY**

Defendants.

On August 17, 2009, defendants E.I. du Pont de Nemours and Company (“DuPont”) and Honeywell International Inc. (“Honeywell”) electronically filed with this Court a motion (Docket Item 24) for, *inter alia*, an order staying any *de bene esse* deposition of plaintiffs’ expert David Michaels, Ph.D., and a protective order precluding the *de bene esse* deposition of plaintiffs’ expert David Michaels, Ph.D., and precluding his trial testimony in person or on videotape.

On August 24, 2009, plaintiffs filed their opposition to the motion. In those papers, plaintiffs mischaracterize, among other things, the issues raised by the motion. Given the mischaracterizations and misstatements made by plaintiffs, it is respectfully requested that the defendants be permitted to file the short reply attached hereto, in further support of its motion.

DATED: Buffalo, New York
August 25, 2009

PHILLIPS LYTLE LLP

By s/Paul F. Jones

Paul F. Jones

Kevin M. Hogan

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UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

HARRY D. WEIST and
DIANE M. WEIST, his spouse,

Plaintiffs,

vs.

E.I. DuPONT DE NEMOURS & COMPANY,
individually, and as successor-in-interest to the
First Chemical Corporation;
and FIRST CHEMICAL CORPORATION,

Defendants.

RICHARD A. BAND and
MARY A. BAND, his spouse,

Plaintiffs,

vs.

E.I. DuPONT DE NEMOURS AND COMPANY, and
HONEYWELL INTERNATIONAL INC.,
as successor-in-interest to the Allied Chemical
Corporation;

Defendants.

FRANKLIN D. PARDEE,

Plaintiff,

vs.

E.I. DuPONT DE NEMOURS AND COMPANY,
individually, and as successor-in-interest to the
First Chemical Corporation;
FIRST CHEMICAL CORPORATION; and,
HONEYWELL INTERNATIONAL INC.,
as successor-in-interest to the Allied Chemical
Corporation,

Defendants.

**REPLY AFFIDAVIT IN
FURTHER SUPPORT OF
MOTION FOR A STAY AND
FOR A PROTECTIVE ORDER**

Civ. No.: 05-CV-0534S(Sr)

Civil No. 07-CV-0267S(Sr)

Civil No. 07-CV-0268S(Sr)

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

PAUL F. JONES, being duly sworn, deposes and says:

1. I am a member of the Firm of Phillips Lytle LLP, attorneys for defendants E.I. du Pont de Nemours and Company (“DuPont”) and Honeywell International, Inc. (“Honeywell”) in these actions, and have knowledge of the facts stated in this affidavit. I submit this reply affidavit in further support of DuPont and Honeywell’s motions¹ for (1) an order staying any *de bene esse* deposition of plaintiffs’ expert David Michaels, Ph.D., and (2) a protective order precluding the *de bene esse* deposition of plaintiffs’ expert David Michaels, Ph.D., and precluding his trial testimony² in person or on videotape.

2. Plaintiffs’ opposition (Docket Item 117) to these motions grossly, if not intentionally, mischaracterizes the issues raised by these motions. Plaintiffs assert that “the only issues properly before this Court are: (a) whether the Plaintiffs provided appropriate notice of this deposition under Fed. R. Civ. P. 30 and Local Rule 30(c), and (b) whether the Plaintiffs provided the defendants with sufficient opportunity to conduct discovery of Dr. Michaels’ opinions in these matters before taking his trial testimony.” (¶ 3.)

3. Critically, plaintiffs ignore the real issues at the heart of defendants’ motions, namely, (1) that it would be unethical for Dr. Michaels, the nominee to head the Occupational Safety and Health Administration (“OSHA”), to testify at any trial in these cases,

¹ Separate motions have been filed in each of the three cases captioned above. The cases have not been consolidated; however, for the convenience of the Court and counsel, all three motions are addressed in a single affidavit and in a single memorandum of law.

Plaintiffs’ opposition, although captioned in all three cases, was filed only in Weist (Docket Item 117).

² This motion does not address other challenges to any testimony by Dr. Michaels, including a Daubert challenge, that would be made before trial. Those challenges are expressly reserved by defendants.

and (2) that defendants would suffer severe prejudice if Dr. Michaels is permitted to so testify. Prerecording the testimony before Dr. Michaels is confirmed does not eliminate the ethical violation or the prejudice.

4. Although both issues were addressed at length by defendants,³ plaintiffs have not addressed either issue, but instead merely mischaracterize the issues central to these motions in an attempt to divert the Court from the critical focus.

A. Plaintiffs do not address the ethical prohibitions against Dr. Michaels' testimony.

5. Plaintiffs' only response to the ethics issues is to say that the rules cited by defendants "concern prohibitions applicable to government employees or officials once they had already obtained that status." (§ 35 [emphasis in original].) Plaintiffs ignore the underlying premise that at the time the testimony is read to a jury Dr. Michaels will no longer be a private citizen nor a professor, but instead will be the head of OSHA. The question is not what position did Dr. Michaels hold when he appeared for his videotaped testimony. Rather, the crucial inquiry is what position does Dr. Michaels hold when the jury hears that testimony.

6. Nor do plaintiffs cite any law in support of their position. Plaintiffs' refusal to even acknowledge the issue is persuasive that plaintiffs realize that the same policy considerations (impropriety, appearance of impropriety, and prejudice) apply just as much to nominees as they do to agency heads. Notably, the prohibition against service as an expert witness does not distinguish between live testimony and prerecorded testimony. Yet plaintiffs would insert the word "live" before "testimony" in the prohibition, simply exalting form over substance, and ignoring the important public policy behind the prohibition.

³ See the August 17, 2009, Affidavit of Paul F. Jones (the "Jones Affidavit"), at ¶¶ 21-29, and defendants' Memorandum of Law, pp. 3-8 (Weist Docket Items 32-2 and 33).

7. Plaintiffs concede that once confirmed Dr. Michaels would be prohibited from giving this testimony, but attempt to avoid that result by prerecording the testimony. Dr. Michaels' inability to testify results solely from his own volitional act in accepting a high government post, and he does not cure that inability by racing to complete the videotaping of his testimony before he is confirmed by the Senate.

8. Nor is it any answer to say that Dr. Michaels took his "plan" to testify to his "handlers" in the Executive Branch (the White House and Department of Labor) and that his "plan" was "reviewed" and "approved" by unnamed and unverifiable officials in the Executive Branch.⁴ This argument ignores the fact that the issue of disqualification from testifying in these cases does not reside with the Executive Branch, but with the Judiciary.⁵ Each Branch has different responsibilities and motives. Dr. Michaels' "handlers" are concerned with his nomination and confirmation. On the other hand, this Court is responsible for deciding what testimony will be heard by three juries at some future time after Dr. Michaels has been sworn in as head of OSHA.

B. Plaintiffs do not address the prejudice to defendants that would result from Dr. Michaels' testimony.

9. As the head of OSHA, Dr. Michaels will be empowered to take actions that could directly affect the outcome of these lawsuits. Plaintiffs make no response to this prejudice to defendants that would result from Dr. Michaels' continued involvement as an expert witness in these cases. (See Jones Affidavit, ¶¶ 21 - 29; defendants Memorandum of Law, at pp. 5-6.)

⁴ Notably, plaintiffs have not submitted any affidavit from Dr. Michaels, nor any documentation of the "plan" or its "approval."

⁵ Likewise, the nomination itself is no longer in the hands of the Executive Branch, but rests with the Legislative Branch (specifically, the Senate) which alone will determine the timing and the fate of the nomination.

10. Specifically, as the head of OSHA, Dr. Michaels will oversee:

- OSHA's regulation of exposure to ortho-toluidine in the workplace (Jones Affidavit, ¶ 21);
- OSHA's inspections of workplaces, including Goodyear's chemical manufacturing plant in Niagara Falls, New York (id., ¶ 22);
- OSHA's participation in the work of the National Toxicology Program in the consideration of the classification of ortho-toluidine in the forthcoming 12th Report on Carcinogens (id., ¶ 23); and
- OSHA's Hazard Communication (i.e., warnings) regulations (id., ¶ 24).

11. These are no minor powers. For example, Dr. Michaels' involvement in the forthcoming 12th Report on Carcinogens could give governmental *imprimatur* to Dr. Michaels' causation opinions and have a direct impact adverse to defendants by giving the government's seal of approval to Dr. Michaels' causation opinions on behalf of private civil litigants.⁶ Dr. Michaels simply cannot be the expert witness a jury hears at the same time as he serves as head of OSHA with authority and regulatory responsibility over so many matters directly relevant to these cases. More importantly, plaintiffs do not challenge or contradict any part of this prejudice analysis by defendants.

⁶ In his March 25, 2008, expert report (Jones Affidavit, Ex. B), Dr. Michaels relies on the 11th Report on Carcinogens which describes ortho-toluidine as "reasonably anticipated to be a human carcinogen." (Ex. B, p. 3; ref. 33). (In NTP nomenclature, this classification is based on animal data or on limited human data.) As the head of OSHA, Dr. Michaels could have a hand in reclassifying ortho-toluidine as a "Known To Be A Human Carcinogen," an outcome that could give governmental *imprimatur* to Dr. Michaels' causation opinions in these cases, to the prejudice of the defendants.

C. Other Mischaracterizations and Misstatements by Plaintiffs

12. Plaintiffs' papers in opposition contain numerous other mischaracterizations and misstatements, some of which are addressed below.

i. IARC classification.

13. Plaintiffs' counsel states that "the International Agency for Research on Cancer (IARC) has classified ortho-toluidine into category Group 1" and gives as authority for that statement a 2008 article in Lancet Oncology. (¶ 25.) (See Michaels report [Jones Affidavit, Ex. B], reference no. 31.) If officially published by IARC, this would represent a change from prior IARC classifications of ortho-toluidine.

14. However, even Dr. Michaels acknowledges (in his March 25, 2008, report) that "[t]his assessment is currently in press and will be published as Volume 99 of the IARC Monograph series." (*Id.* at 3.) Plaintiffs fail to inform this Court that Volume 99 has not yet been published. (In fact, according to the IARC website, Volume 97 is the last volume of monographs to have been published.) Nor does plaintiffs' counsel reveal that when Volume 99 is published, it will contain considerably greater analysis than is contained in the single paragraph concerning ortho-toluidine in the Lancet Oncology article.

15. Moreover, IARC's website contains an announcement of a series of meetings in connection with Volume 100 (including a meeting from October 20 to 27, 2009, to do a comprehensive review of "chemical agents and related occupations," including specifically ortho-toluidine).

16. By the time any trial takes place, Dr. Michaels will presumably have been confirmed, and the defendants would not have had an opportunity to examine him concerning IARC's further activities with respect to Volumes 99 and 100 relating to ortho-toluidine. Nor

would the defendants have had an opportunity to examine Michaels further on any other scientific developments that take place between September 2 and the time of trial.

ii. Plaintiffs' misstate the importance of remaining discovery.

17. Plaintiffs' counsel states that the "specific use of ortho-toluidine in any particular plant is beyond the scope of [Dr. Michaels'] proposed testimony." (§ 32.) Plaintiffs would have the Court believe that any factual differences among the Weist, Band and Pardee (and Nicastro) cases are insignificant as they relate to Dr. Michaels' testimony.

18. To the contrary, neither plaintiff Band nor Pardee has been deposed, and at their depositions they will be asked extensively about what they knew about the health hazards of exposure to ortho-toluidine, when they learned it, from whom, and what they did in response.

19. Only after defendants have obtained that testimony from plaintiffs Band and Pardee will defendants even be in a position to assess whether further deposition testimony of Dr. Michaels, as plaintiffs' warnings expert, is warranted, to test Dr. Michaels' opinions as to the adequacy of defendants' warnings as they relate to those individual plaintiffs. By that time, of course, Dr. Michaels likely will no longer be a professor at George Washington University, but will be the head of OSHA and therefore unavailable for further deposition. For this reason alone it is clear that, at a minimum, the *de bene esse* device cannot be used here to "preserve" Dr. Michaels' trial testimony in Band and Pardee.

iii. Testimony concerning Dr. Michaels' current employment status.

20. Plaintiffs' counsel states that Dr. Michaels "will testify that he is currently employed by The George Washington University." (§ 37.) That is at best disingenuous, and at worst, a fraud on the Court and the three juries in these cases when the witness and plaintiffs' counsel know that when the juries hear the testimony, Dr. Michaels will no longer be so employed.

iv. There was no agreement by defendants to any *de bene esse* deposition.

21. Plaintiffs' counsel states that, upon the conclusion⁷ of the deposition on July 23, 2009, he "had a conversation with attorneys Foster, Jones and Kloss about a *de bene esse* deposition" and that "[n]o one objected to the date of September 2, 2009 and Washington, DC as the proposed location." (¶ 65.)

22. However, plaintiffs' counsel omits from that narrative the fact that all counsel left the deposition without any agreement whatsoever that a *de bene esse* deposition would take place at all, or when or where.⁸

v. Deposition location.

23. Plaintiffs assert that "New Jersey is not an inconvenient location" for the deposition. (¶ 71.) To the contrary, someone will be inconvenienced no matter where the deposition would be conducted.

24. Because the deposition is occasioned by Dr. Michaels' nomination, and has been noticed by plaintiffs, it stands to reason that it should be plaintiffs, plaintiffs' counsel, and Dr. Michaels who should be inconvenienced and required to travel. Otherwise, defendants and their attorneys should be reimbursed for their travel time and expenses.

vi. Status of Senate action on nomination.

25. Plaintiffs' counsel states that "a [Senate] vote on Dr. Michaels' nomination could occur any time after the Senate reconvenes" on September 8, 2009. (¶ 20.)

⁷ Plaintiffs' attorney had the opportunity to question Dr. Michaels after the defendants completed their questioning, but elected not to do so. Federal Rule 30(a)(2)(A)(ii) by its express terms requires a party to obtain leave of Court to depose a person if that person has already been deposed in the case. The rule makes no exception for a *de bene esse* deposition.

⁸ Plaintiffs' counsel refers to a similar motion in the New Jersey case, but mentions only one issue, the location of the deposition (¶ 21). That motion, however, raises the same ethical, prejudice, and unfinished discovery issues as these motions.

While theoretically true, that will not happen until the Senate Health, Education, Labor and Pension ("HELP") Committee conducts a hearing and makes a recommendation on the nomination. As of the date of this affidavit, the HELP Committee website does not yet show any hearings scheduled on Dr. Michaels' nomination.

26. As stated in my original affidavit (Jones Affidavit ¶ 20), the last Assistant Secretary to the Department of Labor did not make the HELP Committee agenda until nearly four months after the announcement of his nomination. HELP also is one of the committees that will be dealing with proposed Healthcare Legislation. Plaintiffs' papers do not take issue with this analysis.

27. Accordingly, the urgency suggested by the plaintiffs simply does not exist, and the Court should stay the deposition while it considers the important issues raised by these motions.

* * * * *

28. For the foregoing reasons, and for the reasons articulated in defendants' original papers filed on August 17, 2009, defendants' Motion for a Stay and for a Protective Order should be granted.

s/Paul F. Jones

Paul F. Jones

Sworn to before me this 25th
day of August, 2009.

s/Robin C. Sutton

Notary Public

Robin C. Sutton Notary Public State of New York Qualified in Erie County Commission Expires 04/30/2010

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

RICHARD E. BAND and
MARY A. BAND, his spouse,

Plaintiffs,

v.

Civil No. 07-CV-0267(S)(Sr)

E.I. DuPONT DE NEMOURS & COMPANY,
and HONEYWELL INTERNATIONAL INC.,
as successor-in-interest to the Allied Chemical
Corporation;

Defendants.

CERTIFICATE OF SERVICE

I hereby certify that on August 24, 2009, I caused the foregoing Motion for Permission to File a Reply in Further Support of Motion for a Stay and for a Protective Order to be filed with the Clerk of the District Court using the CM/ECF system, which sent notification of such filing to the following:

1. Steven H. Wodka
stevewodka@verizon.net

2. John N. Lipsitz
lp@lipsitzponterio.com

s/Paul F. Jones
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