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UNITED STATES DISTRICT COURT
FOR THE 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.

Civil Action No. 05-CV-0534S(Sr)

RICHARD E. 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.

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

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 Allied
Chemical Corporation,

Defendants.

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

CERTIFICATION OF STEVEN H. WODKA
IN OPPOSITION TO DEFENDANTS' MOTION FOR A PROTECTIVE ORDER

I, Steven H. Wodka, do hereby certify, pursuant to 28 U.S.C. § 1746, as follows:

1. I am lead counsel for the Plaintiffs in this case and I am personally familiar with the following facts.

2. I make this Certification in opposition to defendants DuPont's and Honeywell's Motion for a Protective Order which would bar the Plaintiffs from taking the de bene esse deposition of their expert David Michaels, PhD, on September 2, 2009 in Eatontown, New Jersey. This is a videotaped deposition of a proposed expert noticed pursuant to Fed.R.Civ.P.30 and Local Rule 30(c) of the Western District of New York.

PRELIMINARY STATEMENT

3. As shown below, 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.

4. Since 1989, Dr. Michaels has appeared for the plaintiffs in ortho-toluidine bladder cancer claims filed against DuPont, First Chemical, or Honeywell in the Western District of New York. Prior to the filing of the instant cases, Dr. Michaels had been deposed by these defendants for eight days. The cases and dates of the deposition are as follows:

Case	Deposition dates
<u>Gibbs, et al. v. DuPont et al.</u> C. A. No. 93-CV-0497	September 28, 1995 July 9, 1996
<u>Higgins v. Bethlehem Steel, et al.</u> C. A. No. 95-CV-1089	October 6, 1998 October 7, 1998

5. In Weist, Dr. Michaels submitted an expert report in 2006 and was deposed by the defendants on September 20, 2006.

6. On March 28, 2008 in the Band and Pardee cases, the Plaintiffs served the defendants with Dr. Michaels' March 25, 2008 expert report¹, pursuant to the provisions of Fed.R.Civ.P.26(a)(2)(B). There is no allegation that Dr. Michaels' report did not comply with this rule. Rather, it contained a complete statement of his opinions and the basis for his opinions, the facts and other information which he considered, a listing of his exhibits, and his qualifications.

7. On March 31, 2008, this Court issued an order (Doc.#92) in the Weist case permitting the Plaintiffs to serve an expert report in rebuttal to defense expert Denese Deeds.

8. On June 16, 2008 in the Weist case, the Plaintiffs served the defendants with the exact same March 25, 2008 report of Dr. Michaels, both as a supplement to the 2006 report and as a rebuttal to Ms. Deeds. On the same day, the defendants were also provided with a letter from Dr. Michaels dated June 12, 2008², which supplemented his report with a recent communication from the U. S. Department of Transportation which approved the use of a cancer warning label, developed by Dr. Michaels, for

¹ Attached to Defendants' Motion at Exhibit B (Doc.#32-4).

² Attached to Defendants' Motion at Exhibit C (page 2 of Doc.#32-5).

railroad tank cars carrying ortho-toluidine.

9. On April 27, 2009, this Court issued a text order in the Weist case, which stated in part:

Defendants may depose plaintiffs expert, Dr. Michaels, regarding his supplemental report no later than 6/30/2009. The deposition of Dr. Michaels in this case shall apply to the related cases of Band v. DuPont (07-cv-267) and Pardee v. DuPont (07-cv-268), and no further deposition of Dr. Michaels shall be permitted in those cases absent application from defendants demonstrating a distinct fact pattern necessitating additional questioning.

(Doc.#105).

10. On June 11, 2009, I alerted attorney David Kloss, who represents defendant First Chemical, that Dr. Michaels was under consideration by The White House to be the head of the Occupational Safety and Health Administration (OSHA). Due to the sensitivity of the matter, I asked Mr. Kloss to check with the other defense counsel and see if an agreement could be reached whereby they would refrain from questioning Dr. Michaels with respect to this possible appointment.

11. For two full days, on July 22 and 23, 2009, Dr. Michaels testified in a discovery deposition in Washington, DC regarding the opinions in his March 25, 2008 report, his June 12, 2008 supplemental letter, and on his qualifications.

12. The dates and the location of this deposition were set by the defendants. The deposition was noticed by the defendants in Weist, Band, and Pardee. This deposition was also noticed by DuPont and First Chemical in another ortho-toluidine bladder cancer case which I am handling in the Superior Court of New Jersey entitled Nicastro v. Aceto Corporation, et al., Docket No. MON-L-3062-08.

13. All questions put to Dr. Michaels were answered. When the deposition

ended at 4:51 PM on July 23, 2009, there were no pending questions. None of the defense counsel asserted that any additional deposition time was needed to complete their questioning of Dr. Michaels. No questions were asked concerning Dr. Michaels' pending governmental appointment.

14. Nearly all of the defense questioning at the deposition was conducted by attorney Albert Foster of the firm of Nelson Mullins Riley & Scarborough in Washington, DC. I had been repeatedly advised by defendants DuPont and First Chemical that Mr. Foster was responsible for preparing their examination of the plaintiffs' experts. This discovery deposition was arranged to meet Mr. Foster's schedule and was conducted in his office in Washington.

15. After the conclusion of the deposition, there was a discussion with defense counsel that September 2, 2009 was available on everyone's calender for a de bene esse deposition of Dr. Michaels and that Washington, DC would be a convenient location.

16. Now, the defendants take the position that upon the conclusion of the discovery deposition that the Plaintiffs should have immediately launched into their de bene esse deposition of Dr. Michaels. Jones Aff. at ¶10. The suggestion is absurd.

17. The entire purpose of a discovery deposition is to provide the opposing parties with an opportunity to probe the witness and develop impeachment material for use at trial. After two days of testimony and hundreds of pages of deposition transcript, the defendants were certainly entitled to some reasonable period of time to review the transcript and prepare their cross-examination.

18. On July 29, 2009, President Barack Obama announced his intention to

nominate Dr. Michaels to be Assistant Secretary of Labor for Occupational Safety and Health in the United States Department of Labor.

19. On August 1, 2009, the Plaintiffs served their notice to take Dr. Michaels' videotaped deposition on September 2, 2009 for use at trial. See Def. Ex. D (pages 4-6 of Doc.#32-5). Simultaneously, the same deposition was noticed in the New Jersey state court case. See Def. Ex. E (pages 8-11 of Doc.#32-5). Washington, DC was the site for the deposition. Both deposition notices were served on Mr. Foster.

20. On August 6, 2009, The White House sent Dr. Michaels' nomination to the United States Senate for a confirmation vote. The United States Senate is currently in recess and will reconvene for business on September 8, 2009. A vote on Dr. Michaels' nomination could occur anytime after the Senate reconvenes.

21. On August 12, 2009, defendants DuPont and First Chemical filed a motion in the Superior Court of New Jersey to bar the de bene esse deposition of Dr. Michaels³. This motion was based in part on a New Jersey court rule which provides a New Jersey preference as the site for depositions, in the absence of an agreement.

22. Accordingly, two days later, on August 14, 2009, to meet the objection lodged by DuPont and First Chemical, I issued amended deposition notices which moved the site of the deposition from Washington, DC to Eatontown, New Jersey. See Def. Ex. F and G (pages 13-20 of Doc.#32-5). The notices for both the state and federal court cases were again served on Mr. Foster. The same date of September 2, 2009 has been maintained for the deposition.

³ The return date for this motion is August 28, 2009, and a decision is expected to be rendered on that date.

BACKGROUND OF THIS LITIGATION

23. These cases are product liability, toxic tort claims due to each plaintiff's development of bladder cancer as a result of his exposure to ortho-toluidine while employed at The Goodyear Tire & Rubber Company plant in Niagara Falls, New York.

24. Ortho-toluidine is a liquid aromatic amine, which is a family of chemicals which has been linked to human bladder cancer since the late 19th century.

25. The International Agency for Research on Cancer (IARC) has classified ortho-toluidine into category Group 1 which means that the chemical is "carcinogenic to humans." IARC's designation is based on epidemiological studies of exposed workers which have reported "greatly increased risks of bladder cancer" and on the basis of animal studies where rats developed bladder tumors after exposure to this chemical⁴.

26. At the Goodyear plant, at least forty-three workers have developed bladder cancer. In a study published in 1991 in the Journal of the National Cancer Institute, researchers from the federal government's National Institute for Occupational Safety and Health (NIOSH) reported that workers who were employed for 10 or more years in the department at the Goodyear plant where ortho-toluidine was used have a 27 fold excess risk of developing bladder cancer. The NIOSH researchers concluded that it was "more likely" that ortho-toluidine was the cause of these bladder cancers than exposure to any other chemical⁵.

⁴ Baan R, et al. Carcinogenicity of some aromatic amines, organic dyes, and related exposures. Lancet Oncol 2008;9(4)322-3.

⁵ Ward E, et al. Excess number of bladder cancers in workers exposed to ortho-toluidine and aniline. J Natl Cancer Inst 1991;83(7): 501-6.

27. The Goodyear plant began using ortho-toluidine in 1957 and its use continues to the present. Due to NIOSH's intervention, the Plaintiffs' failure to warn case ends in 1990. DuPont supplied ortho-toluidine to the plant from 1957 through 1990. Allied Chemical (now Honeywell International, Inc.) supplied ortho-toluidine from 1957 through 1968. First Chemical supplied ortho-toluidine from 1967 through 1990. In 2002, DuPont acquired First Chemical and operates it as a wholly owned subsidiary of DuPont.

28. The three plaintiffs were employed by Goodyear as follows: Richard Band, 1957 to 1966; Franklin Pardee, 1957 to 1995; and Harry Weist, 1977 to the present.

BACKGROUND OF DR. MICHAELS AND HIS PROPOSED TESTIMONY

29. Plaintiffs' expert David Michaels, PhD, is a historian, an epidemiologist, and an expert in the field of occupational safety and health. He received his bachelor's degree in history in 1977 from The City College of New York, a masters of public health degree in epidemiology from Columbia University in 1981, and a doctorate degree in sociomedical sciences from Columbia in 1987. He conducted research and taught epidemiology at the Albert Einstein College of Medicine in New York from 1977 to 1990 and at The City University of New York Medical School from 1990 to 1998. From 1998 to 2001, he served as Assistant Secretary of Energy for Environment, Safety and Health in the United States Department of Energy. After leaving the government, he joined The George Washington University School of Public Health and Health Services in Washington, DC and is now the Interim Chairman of the school's Department of Environmental and Occupational Health. His current curriculum vitae is attached at

Exhibit A.

30. I first met Dr. Michaels in 1989 after the publication of his groundbreaking article on the failure of the U. S. chemical industry, including DuPont, to act on the information which they possessed on the carcinogenic risk of exposure to aromatic amines, entitled "Waiting for the Body Count: Corporate Decision Making and Bladder Cancer in the U. S. Dye Industry." At my request, Dr. Michaels began his research into ortho-toluidine. In 1995, he published a paper tracing the development of scientific knowledge on ortho-toluidine in the International Journal of Occupational and Environmental Health.

31. At trial, Dr. Michaels would render the following opinions which are contained in his March 25, 2008 report:

- a general causation opinion that ortho-toluidine is capable of causing bladder cancer in humans;
- a review of the worldwide history of the development of scientific knowledge that exposure to ortho-toluidine can cause bladder cancer in humans;
- the specific knowledge of the three U. S. manufacturers of ortho-toluidine, DuPont, Allied Chemical (Honeywell), and First Chemical, as it developed over time on the causal relationship between ortho-toluidine and bladder cancer;
- a detailed analysis of the deficiencies in the warnings, labels, material safety data sheets and other information provided by DuPont and First Chemical to their customers of ortho-toluidine; and,
- the content of model warnings, health information, and product stewardship programs which the ortho-toluidine manufacturers should have either

placed on the containers of their product or provided to their customers and the employees of their customers.

32. Significantly, Dr. Michaels' testimony focuses on the product, ortho-toluidine, and on the failure of the manufacturers to provide adequate warnings. The specific use of ortho-toluidine in any particular plant is beyond the scope of his proposed testimony. Similarly, the specific facts of a plaintiff's exposure, work history, or medical history are not covered in Dr. Michaels' report and are also beyond the scope of his proposed testimony. In short, Dr. Michaels will offer a generic opinion on the product and on the manufacturers' knowledge which are not dependent on the facts of a particular case. The information in the scientific literature, the defendants' knowledge, and what they did or failed to do as a result of that knowledge are wholly independent of any particular facts of the Weist, Band, or Pardee claims.

DR. MICHAELS HAS OBTAINED APPROPRIATE ETHICS APPROVAL

33. Throughout the process of considering, investigating, and vetting him for this position, Dr. Michaels informed his contacts at The White House and in the U. S. Department of Labor that he had a long-standing commitment to render an opinion in this private litigation.

34. Specifically, Dr. Michaels advised that he intended to: (a) provide his trial testimony on video-tape in a deposition for use at a later time after he would become a government employee, and (b) that the deposition would be taken, completed, and any financial compensation would be received while he was still a private citizen and before the U. S. Senate considered his nomination. This plan was reviewed by the appropriate Federal ethics officials and was approved, provided that the deposition was completed

by September 2, 2009.

35. When filing their Motion, the defendants failed to consider that Dr. Michaels will provide his testimony while he remains a private citizen and that he will not receive any compensation for his testimony once he becomes a government official, no matter when his testimony is ultimately shown to a jury. Every ethics rule and example cited by the defendants concern prohibitions applicable to government employees or officials once they had already obtained that status. It is undisputed that Dr. Michaels will remain a private citizen through September 2, 2009.

36. Specifically, all compensation for Dr. Michaels' time spent in the deposition on September 2, 2009 will be paid by that date. No payment will be made after that date. When the videotaped deposition is played back before the jury in the trial of this case, Dr. Michaels will not receive any compensation. Thus, Dr. Michaels will not be "using his public office for private gain."

37. In addition, the Plaintiffs will not elicit any testimony from Dr. Michaels during his de bene esse deposition as to his pending appointment to the head of OSHA, his consideration and nomination to this position by the President of the United States, or his pending confirmation by the U. S. Senate. Rather, Dr. Michaels will testify that he is currently employed by The George Washington University.

38. Moreover, at the trial of these cases, neither the Plaintiffs nor their counsel will infer, state, or argue to the jury that Dr. Michaels has since become the head of

OSHA⁶.

39. Thus the defendants will not be subjected to the type of undue prejudice which can be excluded under the provisions of Fed.R.Evid. 403. There will not be any testimony from Dr. Michaels that his opinions on the deficiencies in the defendants' warnings should be followed because they carry the imprimatur of OSHA.

40. The defendants claim that the "jurors will necessarily be informed of Dr. Michaels' past positions and his then-current position at OSHA in order to properly explore bias and avoid conflicts." Def. Brief at 9. No rule or case is cited in support of this statement. At trial, Plaintiffs' counsel will not make any statements to the jury as to Dr. Michaels' then-current position. As for the defendants, it is unlikely that they would want to embellish Dr. Michaels' credentials before the jury.

41. It is the routine practice to ask prospective jurors during voir dire if they know any of the potential witnesses by name. If they do, the matter can be further discussed at side bar. A prospective juror who personally knows the parties, the attorneys, or any of the witnesses typically presents grounds to be struck for cause. It ought to be noted, however, that the head of OSHA is hardly a household name.

42. It is also the routine practice to elicit biographical information from prospective jurors. Such inquiries would permit the identification of a prospective juror who worked for OSHA, or who was knowledgeable of the field of occupational safety and health. In these cases, even without Dr. Michaels' testimony for the Plaintiffs, both

⁶ Before filing their Motion, defense counsel never made any inquiry to Plaintiffs' counsel as to how the de bene esse deposition would be conducted, the ground rules which the Plaintiffs intended to follow at trial, or if Dr. Michaels had obtained the approval of the Federal ethics officials to provide this deposition.

sides would want to know if any of the prospective jurors had any special interest or expertise in this field.

43. The defendants argue that even if the jurors are not told about Dr. Michaels' then current position, they "may privately find out." This case is not the first time that private research has the potential for affecting the impartiality of a jury. Once a jury is seated, jurors are always and repeatedly instructed that they are not to do their own research or make their own investigation into the case. See NY PJI 1:11.

NO ADDITIONAL FACT DISCOVERY IS NECESSARY BEFORE THIS DEPOSITION

44. Defendants contend that there is "[f]act and expert discovery in these lawsuits is still going" that makes Dr. Michael's de bene esse deposition "premature."

45. In the Weist case, all discovery is closed except on the issue of negligent entrustment. The only open issue is the pending Plaintiffs' Motion to Compel Disclosure of documents withheld by DuPont as privileged. If the Court denies the Motion, it has no effect on Dr. Michaels' proposed testimony.

46. If that Motion is granted, the resulting discovery could only support Dr. Michaels' proposed testimony. If the documents reveal that DuPont did know that Goodyear was mishandling the ortho-toluidine, or was oblivious when it should have been knowledgeable, such evidence will buttress Dr. Michaels' opinion that DuPont was negligent, not detract from it. However, due to the timing of these motions, the Plaintiffs will be required to forego Dr. Michaels' reliance upon this possible evidence.

47. At bottom, DuPont knows what is contained within its privileged documents. The Plaintiffs do not. In cross-examination of Dr. Michaels at his de bene esse deposition, DuPont will have that advantage.

48. In Band and Pardee, the plaintiffs have answered the defendants' interrogatories, produced their Goodyear work records and their medical records, and have produced their expert reports. The defendants have demonstrated that they know precisely when these plaintiffs claim exposure to ortho-toluidine. See Jones Aff. ¶¶3-4.

49. It should also be remembered that on July 27, 2007, attorney Paul Jones, on behalf of defendant DuPont, filed a "Report on Discovery Planning and Proposed Case Management Order" in the Pardee case (Doc.#11). In that pleading, Mr. Jones related that Frank Pardee's claim was the 19th action filed in the Western District of New York since 1987 "involving virtually identical claims" from the Goodyear plant. Id. at 2. Mr. Jones stated that he had represented DuPont in all of these claims for the past 20 years. Id.

50. Because Mr. Jones and his client had so much information that was relevant to the Pardee claim, Mr. Jones contended that it would be a "monumental task" for DuPont to comply with the mandatory initial disclosure requirement under Fed.R.Civ.P.26(a)(1).

There has been considerable discovery conducted in the prior actions over the past 20 years. The undersigned's files for the prior actions take up approximately 140 linear feet of filing space, and the defendants themselves and counsel for First Chemical Corporation likewise maintain separate voluminous files as well. The undersigned are in possession of more than 100 deposition transcripts taken in the prior actions. The depositions include the plaintiffs themselves, co-workers, experts, and current and former employees of Goodyear, First Chemical Corporation, Honeywell and its predecessors, and DuPont.

Id. at 3. Due to the "voluminous" material which Mr. Jones had on file, he requested that the Court either exempt the case from the initial disclosure requirements or provide

the defendants with five months to make the disclosure⁷. Id. at 3-4. The Court overruled these objections (see Doc.#12).

A SINGLE CONSOLIDATED DEPOSITION IS NOT PREJUDICIAL

51. As stated above, this deposition has also been simultaneously noticed in the Nicastro case which is pending in the Superior Court of New Jersey. Joseph Nicastro worked at two plants in New Jersey where ortho-toluidine was used. DuPont was the supplier to both plants and First Chemical was also a supplier to one of the plants.

52. The defendants' inadequate warnings were identical to both the Goodyear plant and the plants in New Jersey where Mr. Nicastro was employed. In Nicastro, Dr. Michaels submitted the exact same March 25, 2008 expert report and June 12, 2008 supplementary letter as he did in the Weist, Band, and Pardee cases.

53. Thus, when the defendants took Dr. Michaels' discovery deposition on July 22-23, 2009, they were able to chronologically proceed through Dr. Michaels' report over the two days, even though one deposition day was noticed in Nicastro and the other day in Weist, Band, and Pardee, because the same testimony applied to all four cases. Likewise, when Dr. Michaels presents his de bene esse testimony, he will proceed chronologically on the subject matter of ortho-toluidine without any reference to any particular case or particular plant.

54. The Nicastro case does involve additional carcinogenic exposures and

⁷ Also on July 27, 2007, Mr. Jones filed a nearly identical pleading in the Band case (Doc.#10), and objected to complying with the mandatory initial disclosure requirement under Fed.R.Civ.P.26(a)(1) due to the "voluminous" material which he had on file.

additional defendants who do not appear in Weist, Band, and Pardee. However, none of the additional defendants and none of the additional exposures are the subject of Dr. Michaels' testimony in Nicastro.

55. In fact, during the entire two days of the consolidated discovery deposition on July 22-23, 2009, none of the Nicastro defense attorneys who represented the additional defendants asked any questions of Dr. Michaels. (Three were present in the room and one listened by telephone.) Moreover, on July 22, 2009, I made the following stipulation which was accepted by all defense counsel and is recorded on page 190 of the transcript:

This is a stipulation that in the Nicastro case Dr. Michaels is not going to be offering any opinions at trial of Nicastro with respect to para-cresidine, o-tolidine, or 5-CAT.

Thus, the chart which appears on pages 10-11 of the Defendants' brief and in Mr. Jones' Affidavit at ¶35 bears no relationship to the parameters of Dr. Michaels' testimony. He does not address the particular facts of Mr. Nicastro's exposure and the issue has been settled by a stipulation.

56. The operation of the Goodyear plant in Niagara Falls is also not addressed in Dr. Michaels' report and will not be a subject of his testimony. Any questions as to the plant's operation go to issues of specific causation, which will be addressed by our causation expert, Steven Markowitz, MD.

57. In summary, the assertions in the defendants' brief that the jurors will hear testimony unrelated to ortho-toluidine or about another worksite are entirely baseless.

58. Dr. Michaels will testify that manufacturer Allied Chemical (now Honeywell) failed to provide any warnings. This subject will consume about one or two

questions and answers. Allied (Honeywell) is not a defendant in the Weist case.

59. This deposition will be taken by digital video and the transcript of the deposition will be synchronized to the video when played back to the jury. This technology allows for precise editing of the final tape to be shown to the jury.

60. Local Rule 30(c) provides a specific procedure for the parties, in advance of trial, to file and obtain a ruling on objections made during the course of a videotaped deposition. Thus, the Weist jury will never hear Dr. Michaels' testimony about Allied's failure to warn. It will be edited out. Similarly, any other direct testimony or cross-examination which is not germane to Weist, Band, or Pardee can be edited out.

RULE 30(a)(2)(A)(ii) DOES NOT APPLY TO THE FACTS OF THESE CASES

61. The defendants claim that the Plaintiffs need to obtain the Court's permission before taking the de bene esse deposition of their own expert.

62. Defendants rely upon Fed.R.Civ.P.30(a)(2)(A)(ii). However, this rule has only been applied where the same party is seeking to depose a person whom they have already deposed once before. Such was the case in every case which they cited: Morrison v. Stephenson, 2008 U.S. Dist. LEXIS 6512 (S.D.Ohio Jan. 10, 2008) (defendants seeking to take second deposition of plaintiff and one of her physicians); Burdick v. Union Security Ins. Co., 2008 U.S. Dist. LEXIS 99994 (C.D.Cal. Dec. 3, 2008) (plaintiff issued a second Rule 30(b)(6) deposition notice to the same defendant without leave of the court); In Re Sulfuric Acid Antitrust Litigation, 2005 U.S. Dist. LEXIS 17420 (N.D.Ill. Aug.19 2005) (defendants moved to compel a second round of Rule 30(b)(6) depositions of all named plaintiffs); and, Innomed Labs, LLC v. Alza Corp., 211 F.R.D. 237 (S.D.N.Y.2002) (plaintiff served a subpoena to compel a second

deposition of a non-party pursuant to Rule 30(b)(6)).

63. The record is clear that the Plaintiffs have never noticed and have never taken a deposition of Dr. David Michaels. Thus, this rule is inapplicable. The defendants' twisted interpretation, that the rule is triggered when a discovery deposition of an expert followed by a deposition of the expert by the witness' proponent in order to preserve the testimony, has never been adopted by any court.

**DuPONT AND FIRST CHEMICAL ARE PRECLUDED FROM OBJECTING TO
NEW JERSEY AS THE SITE FOR THIS DEPOSITION**

64. When the Plaintiffs originally noticed Dr. Michaels' de bene esse deposition on August 1, 2009, they were under the impression that Washington, DC was the preferred location for the defendants.

65. The task of preparing for the defendants' two-day July discovery deposition of Dr. Michaels was assigned to Washington, DC attorney Albert Foster. The deposition was held in his office. From the Nicastro case, a New Jersey attorney representing DuPont and First Chemical attended the deposition. From Buffalo, attorney Paul Jones, representing DuPont and Honeywell, and attorney David Kloss, representing First Chemical, were in attendance both days.

66. After the deposition concluded, I had a discussion with attorneys Foster, Jones and Kloss about a de bene esse deposition. No one objected to the date of September 2, 2009 and Washington, DC as the proposed location.

67. On August 12, 2009, in the Nicastro case, defendants DuPont and First Chemical filed objections to deposition notice and stated:

Here, the Nicastro trial testimony notice should comply with the New Jersey Court Rules by producing Dr. Michaels for the proposed testimony

in Monmouth County or some other agreed-upon location in New Jersey or reimbursing defendants for reasonable travel and lodging expenses as well as the attorneys' fees for traveling to the out-of-state proceeding.

DuPont and First Chemical Brief in Support of Motion to Bar the De Bene Esse

Deposition of David Michaels, PhD at 13.

68. To meet this objection, on August 14, 2009, the plaintiffs re-noticed the deposition to a location in Eatontown, New Jersey. See Def. Ex. F and G (pages 13-20 of Doc.#32-5).

69. Then on August 17, 2009, defendants DuPont and Honeywell filed the instant Motion and argued that the deposition should either be taken in the Western District of New York or the defendants' costs should be paid by the plaintiffs. Defs. Memo. of Law at 12-13.

70. There is going to be only one de bene esse deposition of Dr. Michaels on September 2, 2009. Having first demanded that the site of the deposition be moved to New Jersey, DuPont's subsequent objections to that location should now be overruled.

71. New Jersey is not an inconvenient location. DuPont is headquartered in Wilmington, New Jersey, less than 100 miles from Eatontown, New Jersey. Honeywell's corporate headquarters is in Morristown, New Jersey, less than 50 miles from Eatontown.

72. In the Weist case, defense counsel traveled to Red Bank, New Jersey to

take the deposition of plaintiffs' expert Frederick Stone, MD on September 19, 2007⁸.

73. This case does not present the extremes found in the cases cited by the defendants. In Frederick v. Columbia University, 2003 U.S. Dist. LEXIS 1604 (S.D.N.Y. Feb. 4, 2003), the expert made himself available to be deposed only in California on two days divided by a weekend. Besides travel to California, this arrangement required five to six days of defendants' time. In the case of In re Fosamax Products Liability Litigation, 2009 U.S. Dist. LEXIS 27209 (S.D.N.Y. March 4, 2009), the litigation was filed in New York, NY and the plaintiffs insisted that defense counsel travel to Australia for a deposition of the plaintiffs' expert.

74. In summary, applying the factors of cost, convenience, and litigation efficiency, one deposition in New Jersey on September 2, 2009 meets these criteria. If New Jersey was truly an inconvenient location, DuPont, on notice that Dr. Michaels' trial testimony was going to be taken on one day in one location, should not have demanded that the deposition be moved to New Jersey.

CONCLUSION

75. The Plaintiffs' deposition notice complies with the rules and the defendants have conducted multiple discovery depositions of Dr. Michaels over the past fourteen years, including a recent two-day deposition on his latest report. Thus, all of the provisions of the rules with respect to notice, timing, opportunity for a discovery

⁸ Similarly in the Weist case, plaintiffs' counsel has cooperated with the defendants and has traveled at his own expense to Jackson, Mississippi to take a deposition of First Chemical on January 10, 2006, to Biloxi, Mississippi for additional depositions of First Chemical on May 17, 2008, and to Birmingham, Alabama to depose one of the defense causation experts on January 23, 2007.

deposition, and location have been met. Every other issue raised by the defendants is either groundless or fails to provide good cause for the extraordinary relief sought by these defendants.

76. The reality is that Dr. Michaels is facing a September 2, 2009 deadline and the Plaintiffs are entitled to take his trial testimony on videotape by that date. He will not be available to testify after September 2, 2009. The defendants fail to provide any grounds to delay this deposition. They have known since July 23, 2009 that the Plaintiffs intended to take this trial testimony on September 2, 2009. The defendants do not claim that they will not be ready to proceed on that date.

77. The Court should permit the deposition to go forward on September 2, 2009 in Eatontown, New Jersey. The defendants' Motion should be denied in its entirety.

78. I certify under penalty of perjury that the foregoing is true and correct.

BY: /s/Steven H. Wodka
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Executed on August 24, 2009.

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PROFESSIONAL EMPLOYMENT AND APPOINTMENTS

Employment and Primary Academic Appointments.

The George Washington University School of Public Health and Health Services

Department of Environmental and Occupational Health

Interim Chairman

2008-present

Research Professor

2001-present

Associate Chairman

2004-2008

The United States Department of Labor

Consultant

2001-2004

The United States Department of Energy

Assistant Secretary for Environment, Safety and Health

1998-2001

The City University of New York Medical School

Department of Community Health and Social Medicine

Professor

1996-2001

Associate Professor

1990-1995

Acting Chairperson

1992, 1996-7

Montefiore Medical Center/Albert Einstein College of Medicine

Department of Epidemiology and Social Medicine

Director, Division of Public Health

1988-1990

Director, Program in Occupational Health

1981-1988

Curriculum Coordinator

1979-1981

Research Associate

1977-1979

Additional Academic Appointments.

The Albert Einstein College of Medicine

Department of Epidemiology and Social Medicine

Visiting Associate Professor

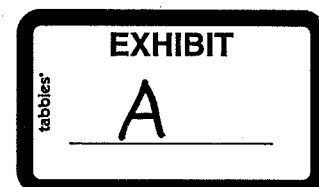
1990-2008

Assistant Professor

1981-1990

Instructor

1980-1981



The Mount Sinai School of Medicine
Department of Community and Preventive Medicine
Adjunct Professor
Adjunct Associate Professor

2001-present
1993-1993

EDUCATION

The City College of New York 1977 BA History (cum laude)

Columbia University 1981 MPH Epidemiology
 1987 PhD Sociomedical Sciences

ADDITIONAL POST-GRADUATE TRAINING

Quantitative Methods in Cancer Epidemiology. The International Agency for Research on Cancer, Lyon, France, 1985.

AWARDS AND HONORS

Jay S. Drotman Memorial Award, American Public Health Association, 1984
Bicentary Keynote Lecturer, Sydney Hospital, Sydney, Australia, 1988
World Health Organization Travel Fellowship, 1992
Robert Wood Johnson Health Policy Fellowship, 1993-1994
Samuel Gompers Award, International Assoc. of Industrial Accident Boards & Commissions, 2000
Meritorious Service Award, United States Department of Energy, 2001
Honorary Kentucky Colonel, 2001
Honorary Duke of Paducah (Kentucky), 2001
David P. Rall Award for Advocacy in Public Health, American Public Health Association, 2001
American Association for the Advancement of Science Scientific Freedom and Responsibility Award, 2005

ORIGINAL COMMUNICATIONS

1. Velasquez E, Hassan A, Belmar R, Drucker E, Michaels D. Inorganic Mercury Poisoning-Nicaragua. MMWR 29:393, 1980.
2. Hassan A, Velasquez E, Belmar R, Coye M, Drucker E, Landrigan P, Michaels D, Sidel K. Mercury Poisoning in Nicaragua. A Case Study of Environmental and Occupational Health Hazards by a Multinational Corporation. Int J Health Serv 11:221-226, 1981.
3. Michaels D. Occupational Cancer in the Black Population. The Health Effects of Job Discrimination. J Nat Med Ass 75:1014-1018, 1983.

4. Michaels D, Nagin D, Zoloth S. Occupational Hazards in the Dental Office. NY State Dent J 50:294-297, 1984.
5. Michaels D, Barrera C, Gacharna MG. Economic Development and Occupational Health in Latin America. New Directions for Public Health in Less Developed Countries. Amer J Pub Health 75:536-542, 1985.
6. Zoloth S, Michaels D. Asbestos Disease in Sheet Metal Workers. The Results of a Proportional Mortality Analysis. Amer J Ind Med 7:315-321, 1985.
7. Zoloth SR, Michaels DM, Villalbi JR, Lacher M. Patterns of Mortality Among Commercial Pressmen. J Nat Cancer Inst 76:1047-1051, 1986.
8. Zoloth S, Michaels D, Lacher M, Nagin D, Drucker E. Asbestos Disease Screening by Non-Specialists. The Results of an Evaluation. Amer J Pub Health 76:1392-1395, 1986.
9. Michaels D, Zoloth S, Lacher M, Holstein E, Lilis R, Drucker E. Asbestos Disease in Sheet Metal Workers II. Radiologic Signs of Asbestosis among Active Workers. Amer J Ind Med 12:595-603, 1987.
10. Michaels D, Zoloth S. Asbestos Disease in Sheet Metal Workers. Proportional Mortality Update. Amer J Ind Med 13:731-734, 1988.
11. Michaels D. Waiting for the Body Count. Corporate Decision Making and Bladder Cancer in the U.S. Dye Industry. Med Anthro Q 2:215-232, 1988.
12. Solet D, Zoloth S, Sullivan C, Jewett J, Michaels D. Patterns of Mortality in Pulp and Paper Workers. J Occup Med 31:627-630, 1989.
13. Alcabes P, Vossenas P, Cohen R, Braslow C, Michaels D, Zoloth S. Compliance with Isoniazid Prophylaxis in Jail. Amer Rev Resp Dis 140:1194-1197, 1989.
14. Shenson D, Dubler N, Michaels D. Jails and Prisons. The New Asylums? Amer J Pub Health 80:655-656, 1990.
15. Michaels D, Zoloth S. Mortality Among Urban Bus Drivers. Int J Epidem 20:399-404, 1991.
16. Michaels D, Zoloth S, Stern FB. Does Low-Level Lead Exposure Increase Risk of Death? A Mortality Study of Newspaper Printers. Int J Epidem 20:978-983, 1991.

17. Michaels D, Zoloth S, Alcabes A, Braslow C, Safyer S. Homelessness and Indicators of Mental Illness among Inmates in New York City's Correctional System. *Hospital and Community Psychiatry* 43:150-155, 1992.
18. Michaels D, Zoloth S, Bernstein N, Kass D, Schrier K. Workshops Are Not Enough. Making Right-To-Know Training Lead to Workplace Change. *Amer J Ind Med* 22:637-649, 1992.
19. Michaels D, Levine C. Estimates of the Number of Motherless Youth Orphaned by AIDS in the United States. *JAMA* 268:3456-3461, 1992.
20. Zoloth S, Safyer S, Rosen J, Michaels D, Alcabes P, Bellin E. Anergy Compromises Screening for Tuberculosis in High Risk Populations. *Amer J Pub Health* 83:749-751, 1993.
21. Welch LS, Michaels D, Zoloth SR. The National Sheet Metal Worker Asbestos Disease Screening Program. Radiologic Findings. *Amer J Ind Med* 25:635-648. 1994.
22. Michaels D. When Science Isn't Enough. Wilhelm Hueper, Robert A.M. Case and the Limits of Scientific Evidence in Preventing Occupational Bladder Cancer. *Int J Occup Environ Health* 1:278-288, 1995.
23. Michaels D. Fraud in the Workers' Compensation System. Origin and Magnitude. *Occupational Medicine State of the Art Reviews* 13:439-442, 1998.
24. Michaels D, Bingham E, Boden L, et al. Advice without Dissent. *Science* 298:703, 2002.
25. Michaels D. Environmental Health Science and the Legacy of Popular Literature. *Environ H Perspectives* 111:14-5, 2003.
26. Michaels D, Wagner W. Disclosure in Regulatory Science. *Science* 302:2073, 2003.
27. Wagner W, Michaels D. Equal Treatment for Regulatory Science. Extending the Controls Governing the Quality of Public Research to Private Research. *Amer J Law Med* 30:119-154, 2004.
28. Michaels D. *In Memoriam*. Thomas F. Mancuso, MD, MPH 1912-2004. *Amer J Ind Med*. 47:1-3, 2005. (Also published in *Eur J Oncol* 9:189-190, 2004.)
29. Michaels D. Scientific Evidence and Public Policy (editorial) *Amer J Public Health* 95:Suppl1.S5, 2005.

30. Michaels D, Monforton C. Manufacturing Uncertainty. Contested Science and the Protection of the Public's Health and Environment. *Amer J Public Health* 95.Suppl1:S39-48, 2005.
31. Michaels D, Monforton C. Scientific Evidence in the Regulatory System. Manufacturing Uncertainty and the Demise of the Formal Regulatory System. *J Law Policy* 13(1): 17-41, 2005.
32. Michaels D. Doubt is their Product. *Scientific American* 292:74-80, June 2005.
33. Dweck A, Lurie P, Michaels D, Wolfe S. Hexavalent chromium study's conclusions unjustified. *J Occup Environ Med.* 47:980-1, 2005.
34. Michaels D, Monforton C. Lurie P. Selected science. an industry campaign to undermine an OSHA hexavalent chromium standard. *Environmental Health* 5:5, 2006.
35. Neutra RR, Cohen A, Fletcher T, Michaels D, Richter ED, Soskolne CL. Toward guidelines for the ethical reanalysis and reinterpretation of another's research. *Epidemiology.* 17:335-8, 2006.
36. Michaels D. Mercenary epidemiology – data reanalysis and reinterpretation for sponsors with financial interest in the outcome. *Ann Epidemiol.* 16:583-5, 2006.
37. Michaels D. Manufactured uncertainty. protecting public health in the age of contested science and product defense. *Ann NY Acad Sci.* 1076:149-62, 2006.
38. Michaels D. Sarbanes-Oxley for Science. *Law & Contemp Problems* 69(3):1-19, 2006.
39. Michaels D, Monforton C. The beryllium occupational exposure limit. historical origin and current inadequacy. *J Occup Environ Med.* 48:998-1001, 2006.
40. Michaels D, Monforton C, Lurie P. Lung cancer mortality in the German chromate industry, 1958 to 1998. *J Occup Environ Med.* 48:995-7, 2006.
41. Welch LS, Haile E. Dement J, Michaels D. Change in Prevalence of Non-Malignant Asbestos-Related Disease among Sheet Metal Workers 1988-2004. *Chest.* 131:863-9, 2007.
42. Michaels D, Monforton C. How Litigation Shapes the Scientific Literature. Asbestos and Disease Among Automobile Mechanics. *J Law & Policy* 5(3):1137-1169, 2007.
43. Michaels D, Monforton C. Beryllium's Public Relations Problem. Protecting Workers When There Is No Safe Exposure Level. *Public Health Reports* 123:79-88, 2008.

BOOKS, CHAPTERS, TRANSLATIONS, REPORTS, AND REVIEW ARTICLES

1. Michaels D. Minority Workers and Occupational Cancer. The Hidden Costs of Job Discrimination. In Behavior, Health Risks and Social Disadvantage. National Academy of Sciences Interim Report No. 6. Washington, DC. National Academy Press, 1982.
2. Michaels D, Zoloth S. Occupational Safety. Why Do Accidents Happen? Occ Health Nursing 30.12-16, 1982.
3. Michaels D, O'Leary K, Frumkin H. How to Determine the Hazard of a Substance. In Occupational Health. Recognizing and Preventing Work-Related Disease. Levy B and Wegman D, editors. Boston. Little, Brown and Company, 1983.
4. Michaels D, Zoloth S. Securite du Travail. Pourquoi les Accidents Arrivent-Ils? Histoire des Accidents du Travail (Nantes, France), 15.71-83, 1983.
5. Michaels D, Barrera C, Gacharna MG. Occupational Health and the Economic Development of Latin America. Multinational Monitor 9.11-13, 1984.
6. Michaels, D. Tackling Tight Building Syndrome. What Can Workers Do? In Human Aspects in Office Automation. Cohen BGF, editor. Amsterdam, The Netherlands; Elsevier Science Publishers, 1984.
7. Michaels D, Barrera C, Gacharna MG. O Desenvolvimento Economico e a Saude Ocupacional na America Latina. Novas Tendencias para a Saude Publica em Paisessubdesenvolvidos. Revista Brasileira de Saude Ocupacional (Sao Paolo, Brazil), 13:7-14, 1985
8. Michaels D, Barrera C, Gacharna MG. Occupational Health and the Economic Development of Latin America. In The Export of Hazards. Transnational Corporations and Environmental Control Issues. Ives J, editor. Boston. Routledge & Kegan, Paul, 1985.
9. Dubler NN (ed). Standards for Health Services in Correctional Institutions, 2nd Edition. (Contributed chapter "Occupational Health Services") Washington DC. American Public Health Association, 1986.
10. Drucker E, Michaels D, Nagin D, Zoloth S. Exposure of Sheet Metal Workers to Asbestos during Construction and Renovation of Commercial Buildings in New York City. A Case Study in Social Medicine. Ann NY Acad Sci 502:230-244, 1987.
11. Michaels D. Remarks on the Role of the University. In Asbesto y Salud en America Latina. Mitastein M, editor. Mexico City. Pan American Health Organization, 1987.

12. Michaels D, Mendes R, Christiani DC, Xue-qi G. Occupational Health in Selected Developing Countries. In Occupational Health. Recognizing and Preventing Work-Related Disease (2nd Edition). Levy B and Wegman D, eds. Boston. Little, Brown and Co., 1988.
13. Michaels D, Zoloth S. How to Research the Toxic Effects of Chemical Substances. In Occupational Health. Recognizing and Preventing Work Related Disease (2nd Edition). Levy B and Wegman D, eds. Boston. Little, Brown and Co., 1988.
14. Welch LS, Michaels D, Zoloth S. Asbestos-Related Disease among Sheet Metal Workers. Preliminary Results of the National Sheet Metal Worker Asbestos Disease Screening Program. Ann NY Acad Sci 643:287-295, 1991.
15. Michaels D, Mazzocchi A, Eller SW, Edelsack P. A Labor Perspective on the Role of the Health Care Provider in Occupational Health and Safety. In Environmental and Occupational Medicine (2nd Edition). Rom W, editor. Boston. Little, Brown and Co., 1992.
16. Geiger HJ, Rush D, Michaels D. Dead Reckoning. A Critical Review of the Department of Energy's Epidemiologic Research. Washington DC. Physicians for Social Responsibility, 1992.
17. Kaminsky M, Klitzman S, Michaels D. Health Profile of Cancer, Asthma and Childhood Lead Poisoning in Greenpoint/ Williamsburg. New York City Department of Health, 1992.
18. Belmar R, Hofmeister V, Michaels D, Moreno AR, Romieu I. Air Pollution. In Environmental Epidemiology. A Project for Latin America and the Caribbean. Finkelman J, Corey G, Calderon R, editors. Mexico City. Pan-American Health Organization, U.S. Environmental Protection Agency, International Programme on Chemical Safety and Global Environmental Epidemiology Network (WHO). 1993.
19. Michaels D. Colorfast Cancer. The Legacy of Corporate Malfeasance in the U.S. Dye Industry. In Toxic Circles. Workplace to Community. Sheehen HE and Weeden RP, editors. New Brunswick. Rutgers University Press 1993.
20. Michaels D, Levine C. The Youngest Survivors. Estimates of the Number of Motherless Youth Orphaned by AIDS in New York City. In A Death in the Family. Orphans of the HIV Epidemic. New York. United Hospital Fund 1993.

21. Michaels D. Projections of Motherless AIDS Orphans under 15 in Six Countries. In Action for Children Affected by AIDS. Programme Profiles and Lessons Learned. A Joint World Health Organization/United Nations Children's Fund Document. New York. UNICEF 1994.
22. Zoloth S, Michaels D. How to Research the Toxic Effects of Chemical Substances. In Occupational Health. Recognizing and Preventing Work-Related Disease (3rd Edition). Levy B and Wegman D, editors. Boston. Little, Brown and Company 1995.
23. Michaels D. ERISA - State Flexibility. In Winning Issues in Health Care Reform. A Report from the 1993-1994 RWJ Health Policy Fellows. Advances. The Newsletter of the Robert Wood Johnson Foundation 8(1):2, 1995.
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25. Michaels D. Estimated Number of Children and Adolescents Orphaned by Maternal HIV/AIDS in New York State. In Families in Crisis. A Report of the Working Committee in HIV Families and Children New York. Federation of Protestant Welfare Agencies 1996.
26. Michaels D. Estimates of Motherless Youth in New Jersey. In Issues Affecting New Jersey's Orphans of the HIV Epidemic New Jersey AIDS Partnership 1997.
27. Forest W, Kubota C, Zoloth S, Michaels D, Cone J. How to Research the Effects of Chemical Substances or Other Workplace Hazards. In Occupational Health. Recognizing and Preventing Work-Related Disease (4th Edition). Levy B and Wegman D, editors. Philadelphia. Lippincott Williams and Wilkins 2000.
28. Michaels D. Regulatory Science. Does Peer Review Help or Hurt? In Rescuing Science from Politics. Regulation and the Distortion of Scientific Research. Wagner W and Steinzor S, editors. New York. Cambridge University Press 2006.
29. Michaels D. Manufactured Uncertainty. Contested Science and the Protection of the Public's Health and Environment. In Agnotology. The Making and Unmaking of Ignorance. Proctor RN and Schneider L, editors. Stanford. Stanford University Press 2008.
30. Michaels D. Doubt is Their Product. How Industry's War on Science Threatens Your Health. New York. Oxford University Press 2008.

INTERNATIONAL CONSULTANTSHIPS

Pan American Health Organization - Center for Human Ecology and Health (Mexico)
United Nations Centre on Transnational Corporations (New York)
Inter-American Center for the Study of Social Security (Mexico)
Ministry of Health and Institute of Social Security (Colombia)

PEER REVIEWER FOR REFEREED JOURNALS

AIDS

American Journal of Industrial Medicine
American Journal of Preventive Medicine
American Journal of Public Health
International Journal of Epidemiology
Journal of the American Medical Association
Public Health Reports

MEMBERSHIP IN PROFESSIONAL SOCIETIES

ASPH/Pfizer Public Health Academy of Distinguished Teachers
The American Public Health Association
The Collegium Ramazzini (Fellow)
The Council of Excellence in Government (Principal)
The National Academy of Social Insurance (Elected Member, 2000)

Certificate of Service

I hereby certify that on this 24th day of August, 2009, I electronically filed the foregoing pleadings with the Clerk of the District Court using its CM/ECF system, which would then electronically notify the following CM/ECF participants in these cases:

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3400 HSBC Center
Buffalo, NY 14203-2887

DuPont
Honeywell

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69 Delaware Avenue
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Buffalo, NY 14202

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