IN THE CIRCUIT COURT OF WOOD COUNTY, WEST VIRGINIA

JACK W. LEACH, et al.,

Plaintiffs,

v.

CIVIL ACTION NO. 01-C-608
(Judge Hill)

E. I. DU PONT DE NEMOURS AND COMPANY,
a Delaware corporation,

Defendant.

ORDER GRANTING INJUNCTIVE RELIEF AGAINST DUPONT

On April 18, 2003, came Plaintiffs, by their counsel, Robert A. Bilott, Larry A. Winter, and R. Edison Hill; Defendant E. I. du Pont de Nemours and Company ("DuPont"), by its counsel, Laurence F. Janssen, Stephen A. Fennell, Diana Everett, and Heather Heiskell Jones; and Defendant Lubeck Public Service District, by its counsel, John R. McGhee, for a hearing on Plaintiffs' Motion for Partial Summary Judgment Against DuPont on Liability for Plaintiffs' Medical Monitoring Claims ("Plaintiffs' MSJ"), and pursuant to discussions at the said hearing the Court also heard and considered Plaintiffs' Motion for Injunctive Relief Against DuPont made during the said discussions. As explained below, the Court, having considered the filings, motion for injunctive relief made during the hearing and arguments of the parties on each of these issues, hereby **DENIES** Plaintiffs' MSJ and **GRANTS** Plaintiffs' Motion for Injunctive Relief Against DuPont.

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CAROLE JONES
CLERK CIRCUIT COURT

PLAINTIFFS' MOTION FOR PARTIAL SUMMARY JUDGMENT/INJUNCTIVE RELIEF

The Court, having considered the pleadings and filings of the parties in support of and in opposition to Plaintiffs' MSJ and Plaintiffs' Motion for Injunctive Relief Against DuPont, and having considered the arguments and representations of counsel during the April 18, 2003, hearing on these Motions, hereby **FINDS** as follows:

1. Ammonium perfluorooctanoate (a/k/a APFO/PFOA/FC-143/C-8) (hereinafter "C-8") is toxic and hazardous to humans and is biopersistent, meaning that it is absorbed into and persists in the blood of humans exposed to C-8.

2. DuPont has tortiously contaminated the drinking water of the Class members[1] with C-8 without the permission of the Class members by virtue of DuPont's past and continuing releases of C-8 from DuPont's Washington Works Plant in Wood County, West Virginia.

3. The Class members have been unwittingly exposed to C-8 from DuPont through the unauthorized presence of C-8 in their drinking water, which, because of the biopersistent nature of C-8, necessarily results in the unauthorized presence of C-8 in the blood of the Class members.

4. The legal test for determining whether medical monitoring will be provided in West Virginia for those tortuously exposed to a hazardous substance is set forth in *Bower v. Westinghouse Elec. Corp.*, 206 W. Va. 133, 522 S.E.2d 424 (1999), in which the West Virginia Supreme Court of Appeals held that medical monitoring will be provided where the plaintiff proves that

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[1]The Court previously certified this case to proceed as a class action on behalf of a Class defined as "all persons whose drinking water is or has been contaminated with ammonium perfluorooctanoate (a/k/a/ "C-8") attributable to releases from DuPont's Washington Works Plant" in Wood County, West Virginia. (Order on Class Certification and Related Motions, at 1 (April 10, 2002))

> (1) he or she has, relative to the general population, been significantly exposed; (2) to a proven hazardous substance; (3) through the tortious conduct of the defendant; (4) as a proximate result of the exposure, plaintiff has suffered an increased risk of contracting a serious latent disease; (5) the increased risk of disease makes it reasonably necessary for the plaintiff to undergo periodic medical examinations different from what would be prescribed in the absence of exposure; and (6) monitoring procedures exist that make early detection of a disease possible.

Bower, 206 W. Va. at 135, 522 S.E.2d at 426.

5. In opposing Plaintiffs' MSJ seeking medical monitoring for the Class exposed to C-8 in their drinking water, DuPont asserted that Plaintiffs had failed to establish that the exposure of the Class is "significantly" above that found in the general U.S. population, within the meaning of the *Bower* medical monitoring test, because the Plaintiffs "have provided no evidence that they have actually been exposed to C-8 at any level, much less at a significant one" and that the "best way to establish actual exposure is by testing the level of C-8 in their blood." (DuPont's Memorandum in Opposition to Plaintiffs' MSJ, at 9)

6. In response to Plaintiffs' argument that DuPont's own C-8 blood model from October 2001 is sufficient to accurately predict levels of C-8 in the blood of Class members over 1000 times higher than that reported to be present in the blood of the general U.S. population without having to perform actual C-8 blood tests, DuPont argued that its own C-8 blood model is based upon unproven assumptions, is inaccurate, and cannot be relied upon to produce accurate estimates of C-8 blood levels in the Class.

7. In response to DuPont's argument that DuPont "has actively pursued" C-8 blood testing, Plaintiffs explained and DuPont agreed that, although DuPont has agreed to test the blood of the individually-named Plaintiffs for C-8, DuPont has refused Plaintiffs' request that DuPont make C-8 blood testing available to all Class members who request it.

8. DuPont already has an arrangement with at least one laboratory to perform C-8 blood testing for its own employees and has been offering and paying for such tests among its own employees for many years.

9. DuPont has not identified to Plaintiffs an independent laboratory that can test for C-8 levels in human blood using the same methodology used by DuPont and its contractors that is not already under contract with or otherwise working for or being paid by DuPont, and it would be prohibitively expensive for Plaintiffs to equip an independent laboratory to perform the type of C-8 blood tests that DuPont insists is needed.

10. Although DuPont continues to actively and intentionally release C-8 from its Washington Works Plant into the air and water, it has represented to the Court that there are no alternatives to using C-8 in any of the Washington Works Plant's manufacturing operations and has told the Court that there is no way for DuPont to prevent its C-8 emissions from getting into the Class members' drinking water. DuPont also has represented to the Court that it is in the process of dramatically decreasing the amount of those emissions in comparison with past emissions levels, which DuPont further represents should decrease the amount of future C-8 exposure to the Class members.

11. Because DuPont claims to be actively reducing its emissions of C-8 into the environment while this case is pending and claims that the level of C-8 in human blood decreases over time as exposure decreases, DuPont's effective control over the C-8 blood testing process and continuing refusal to arrange for C-8 blood testing of the Class members will cause immediate and irreparable harm to Plaintiffs' ability to preserve and prevent the loss of evidence of the Class

members' current and past C-8 exposure levels, thereby depriving Plaintiffs of the evidence DuPont insists is necessary for Plaintiffs to prevail on the merits of their medical monitoring claims.

12. Although the parties dispute the extent to which increased risk of certain serious latent human diseases detected by DuPont among its Washington Works employees, such as kidney and bladder cancer, heart disease, and diseases of blood and blood-forming organs among male employees, is linked to C-8 exposure, DuPont's continuing refusal to make C-8 blood testing available to the Class is causing immediate and irreparable harm to the Class members' ability to accurately and timely assess whether the level of C-8 in their blood warrants medical attention for such diseases, thereby depriving the Class of medical information and knowledge that may be essential to proper diagnosis of and treatment of any physical injuries actually caused by their C-8 exposure.

13. Because DuPont already has a working relationship with at least one laboratory that can perform human C-8 blood test analysis according the methodology adopted by DuPont and DuPont already has adopted procedures for having such C-8 blood tests performed for a large number of individuals through its efforts to test C-8 blood levels among its own employees, there is little likelihood of unreasonable harm to DuPont from requiring DuPont to offer the same C-8 blood testing to members of the Class, particularly when that data is what DuPont insists is necessary to decide the merits of Plaintiffs' medical monitoring claims and the merits of DuPont's defense to such claims.

14. Because of the potential widespread public health concerns implicated by DuPont's C-8 contamination of public drinking water supplies, the inability of the public to determine the extent of their blood contamination based upon exposure to DuPont's C-8 without the use of

DuPont's blood model or the assistance of DuPont or its blood testing contractors who effectively control the C-8 blood testing process, and the imminent potential loss of the evidence that DuPont insists is relevant to determining the extent of public exposure to DuPont's contamination (assuming DuPont's argument that its own C-8 blood model is inaccurate), requiring DuPont to make such testing available to the Class is clearly within the public interest.

15. The legal standard for granting injunctive relief in West Virginia, pursuant to Rule 65 of the West Virginia Rules of Civil Procedure, was recently summarized by the West Virginia Supreme Court of Appeals as follows:

> The granting of an injunction, whether mandatory or preventive, calls for the exercise of sound judicial discretion in view of all the circumstances of the particular case; regard being had to the nature of the controversy, the object for which the injunction is being sought, and the comparative hardship or inconvenience to the respective parties involved in the award or denial of the writ. *State ex rel. Donley v. Baker*, 112 W. Va. 263, 164 S.E. 154, at Syl. pt. 4 (1932); *accord, Jefferson County Board of Education v. Jefferson County Education Ass'n*, 183 W.Va. 15, 393 S.E.2d 653 (W.Va. 1990); *State ex rel. East End Assoc. v. McCoy*, 198 W.Va. 458, 481 S.E.2d 764 (1996).

Camden-Clark Memorial Hosp. Corp. v. Turner, No. 30459, 2002 W.Va.LEXIS 240, at *11-12 (W.Va. Dec. 6, 2002). In making this balancing inquiry, the Fourth Circuit has held that a court should consider, "in flexible interplay," the following four factors: (1) the likelihood of irreparable harm to the plaintiff without the injunction; (2) the likelihood of harm to the defendant with an injunction; (3) the plaintiff's likelihood of success on the merits; and (4) the public interest. *Camden-Clark*, 2002 W.Va.LEXIS 240, at *11-12 (referencing *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Bradley*, 756 F.2d 1048, 1054 (4th Cir. 1985)).

Upon careful consideration of the filings, pleadings, and argument of the parties in the context of applicable West Virginia medical monitoring law as set forth in *Bower* and the applicable

standards for summary judgment under Rule 56 of the West Virginia Rules of Civil Procedure, the Court **CONCLUDES** that there is a material question of fact in dispute with respect to the issue of whether the Class has been significantly exposed to C-8 sufficient to prove Plaintiffs' medical monitoring claims, thereby precluding summary judgment in Plaintiffs' favor on that issue.

Upon further consideration and balancing of all of the circumstances of this case, including the nature of the controversy, the object for which an injunction is being sought, and the comparative hardship or inconvenience to the respective parties involved, according to the standards for granting injunctive relief referenced by the West Virginia Supreme Court of Appeals in *Camden-Clark* and under Rule 65 of the West Virginia Rules of Civil Procedure, the Court further **CONCLUDES** that injunctive relief is appropriate to require DuPont to make available and pay for the C-8 blood testing that DuPont insists is essential to prove a material issue of fact in dispute on Plaintiffs' medical monitoring claims.

The Court, therefore, **DENIES** Plaintiffs' MSJ on the grounds that there is at least one material issue of fact in dispute and hereby **GRANTS** Plaintiffs' Motion for Injunctive Relief to obtain and preserve the evidence that DuPont claims is necessary to resolve this particular material issue of fact.

WHEREFORE, the Court hereby **ORDERS** the following injunctive relief, pursuant to West Virginia Rule of Civil Procedure 65:

1. DuPont shall, without unnecessary delay, obtain, test, and analyze all samples of Class members' blood voluntarily made available to DuPont by such Class members pursuant to this Order and shall report the results of the C-8 blood testing to the person(s) whose blood is tested and to Plaintiffs' counsel simultaneously, using such confidentiality protections as are required by law.

2. DuPont shall pay all costs and expenses associated with obtaining, testing, and analyzing the blood of the Class members for C-8, along with all costs and expenses associated with notifying the Class of the availability of the testing and all costs and expenses associated with reporting the results of the tests to the Class members and Plaintiffs' counsel.

3. Notice shall be given to the Class through publication in *The Marietta Times*, *The Parkersburg News*, *The Parkersburg Sentinel*, and *USA Today* containing the language of the two immediately preceding paragraphs of this Order or a summary of the same, along with instructions for the Class members regarding the times and locations where such testing will be performed. Cost of the Notice shall be paid by DuPont as indicated in the immediately preceding paragraph of this Order.

4. Implementation of this injunction Order shall be stayed for a period of 30 days from entry of this Order (the "Stay Period") to allow the parties to confer regarding submission to the Court of an agreed order providing for the specific terms and provisions for the prompt implementation of this Order, or, in the event the parties fail to reach agreement upon implementation of this Order, to allow DuPont to file an appeal, if so desired, of this injunction Order. If no appeal is filed within the Stay Period, the injunctive relief provided in this Order shall become effective and immediately enforceable at the conclusion of the Stay Period.

ENTER this 10th day of April 2003.

George W. Hill, Judge
Circuit Court of Wood County, West Virginia

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NTY OF WOOD, TO-WIT:

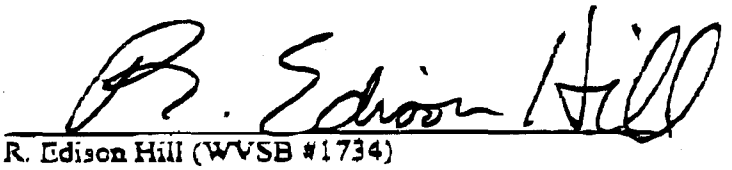
AROLE JONES, Clerk of the Circuit Court of County, West Virginia, hereby certify that egoing is a true and complete copy of an ntered in said Court, on the 1ST day of , 2003, as fully as the same appears of record.

n under my hand and seal of said Court his the 1ST day of MAY 2003

Clerk of the Circuit Court of Wood County, West Virginia

By: Deputy

PRESENTED BY:



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