GADSDEN, ALABAMA, FRIDAY, MARCH 15, 2002

MORNING SESSION

(9:20 a.m. Jury not present.)

THE COURT: Good morning. Are y'all ready?

MR. FETTERMAN: We're just about ready, Judge.

MR. STEWART: Judge, to save time, if we could get these stipulations on the record and get the signatures on it?

THE COURT: Certainly. I meant to bring my copy with me this morning. I got it off of my file cabinet, but I couldn't find it.

MR. STEWART: This is signed and initialed and there's the stipulation and agreement. We made a change that's signed and initialed and agreed upon.

THE COURT: Okay. I've got one more concern about this stipulations and that is submitting jury

THE COURT: All right. Mr. Peck.

EXAMINATION

BY MR. PECK:

Q. Dr. Frank, you're currently at the University of Texas Tyler?

A. Yes, sir.

Q. And you don't have much of a clinical practice there at this time, do you?

A. Not a whole lot. I have certainly seen more patients earlier in my career. I have a lot of other different things I do now.

Q. And the patients you do see are generally seen when you're working on call for residents; is that right?

A. Yes. Except for my research patients. I was recently out in Amarillo, Texas. And in three days we put through a hundred and seventy-eight people as part of a research study. I spoke to every one of them, looked at all their x-rays, and will be looking at all their datas. But that's not the same as a regular clinical --

Q. Treating?

A. Right, clinical practice.

Q. Speaking of research, you're not currently doing any research on PCBs?

A. That is correct.

Q. You've never published on the subject of PCBs?

A. That is also correct.

Q. You've never treated a patient for PCB exposure?

A. Well, that's correct. I was involved with some of the PCB research done by the

Mount Sinai group back in the 1980s. But I was part of the research team. And we weren't treating people. We were trying to understand something about the hazards associated with PCB.

Q. When we talked about that, I think you told me you were not sure if you had ever even diagnosed or seen any person with a PCB related illness? You thought maybe you did, but you couldn't --

A. Right. I was examining workers. Again, doing one of these surveys. We talked about a one-time evaluation. And may not have seen any illness, at least any physical illness. There may have been things seen on lab tests that I wouldn't have seen the results of.

Q. You have been deposed, I think, or testified as an expert witness seven or eight hundred times; is that correct?

A. I have been deposed about seven or eight hundred times. Testified, at least in a setting like today, a lesser number of times. Certainly a lot of depositions.

Q. But this is your first PCB case?

A. Yes. It's not a common problem.

Q. You have written on the subject of cancer a good bit?

A. Yes.

Q. You have talked about written articles on breast cancer?

A. I have one publication that addresses the issue of breast cancer. But it's not an area I published on. Most of my publications

on cancer have to do with lung cancer. But I have talked about other cancers as well.
Q. Cancer of the head and neck?
A. Yes.
Q. Brain and nervous system cancer?
A. Yes.
Q. Soft tissue and bone cancer?
A. Yes.
Q. Skin cancer?
A. Yes.
Q. Cancer in children?
A. Yes.
Q. And if we were to look at all those articles that you have written on cancer, in none of them did you talk about PCBs causing those cancers, did you?
A. No. Many of those were written twenty-five years ago in some of the data about PCBs. And its probable cancer causing ability had not yet been determined.
Q. But even in the ones written more recently, we won't find anything about PCBs and cancer written by you?
A. Not specifically, no.
Q. Other than in this case for Mr. Stewart and Mr. Cunningham, you have never developed a medical monitoring program for a PCB-exposed population; is that right?
A. I have never had the opportunity to be asked to do that. I have developed it for other populations, but not a PCB-exposed population, that's correct.
Q. Are you aware of any programs that exist for medically monitoring workers or environmentally-exposed people for PCBs?

A. Well, I'm now aware, from what Mr. Cunningham asked me, that Monsanto had one back in the 1940s. I don't know the details of it. But apparently this was not a new concept with regard to these chemicals.
Q. I understand his question. Other than that question -- And I will tell you we take issue with that question.

Other than that question and before hearing that question, you were unaware of any medically monitoring of either environmentally-exposed people or for workers for PCB exposure; is that right?
A. It's not an issue I've ever looked into. But correctly, not having studied the issue or asked such programs existed, I was not aware of it.
Q. And are you aware of any federal workplace requirements for monitoring PCB-exposed workers?
A. I don't know most of the federal regulations. I don't know if there is or is not one.
Q. Are you aware of any peer review publications calling for medical monitoring of workers or environmentally-exposed people for PCB exposure?
A. Not in so many words. The idea of medical monitoring is implied by some of the risks and hazards that people have talked about. But I'm not aware of a specific statement where somebody says there should be a medical monitoring program.
Q. Would you agree that there appears to be a fundamental difference in the approach

to monitoring among environmentally- exposed populations compared to the usual manner by which monitoring is adopted in workplace settings?

A. Not from a medical point of view. Certainly from I think a legal point of view there are some fundamental differences. Some are mandated by law; some perhaps end up having to be mandated by courts. But the basic approach and the principles that I would use as a public health physician would be the same no matter where the exposure took place.

Q. Let me ask you another question. In the workplace, monitoring programs are established based upon -- I'm reading from something. "Monitoring programs are established based upon known hazards following exposure. Among environmentally-exposed groups, the exposure may be different. Even if the exposures are the same as those that exist in the workplace, there may be issues of levels of exposure that carry with it much less scientific certainty than is commonly encountered in workplace settings." Do you agree with that statement?

A. Generally, I would agree with that. Because it has to do with the Willie Sutton Rule. When Willie was asked why he robbed banks, "That's where the money is," is what his answer was.

If you are going to look for hazards of chemicals, you are going to look at what are traditionally -- not always, but

traditionally the most highly exposed group, which is workers.

So you will go study a problem in workers and see if there is a problem. If there isn't one, you can pretty much presume it's not going to be affected in the general environment.

But if you do find a particular problem in workers, then by implication it should be recognized that the same health problems can exist in people in the general environment.

The reason it's not as scientifically sound is because the studies tend to be done in workers, not environmentally-exposed people. But the chemicals are the same.

And if you have evidence that people in the general environment are exposed, such as we have here, at levels that rival what workers ever had, they should be approached in exactly the same way.

Q. Let me ask you about one more statement. "The uncertainties associated with environmental exposures coupled with the generally lowered levels exposure cause quite different rationales in making judgments about the appropriateness of monitoring among such populations and require a great deal more judgment because of those uncertainties." Do you agree with that statement?

A. Again, as a general rule, I would agree with that statement, because there are more uncertainties in most situations. But this

not such a situation, I would respectfully like to suggest.

We have here a situation where there is documented soil contamination. There is air contamination. There is water contamination. And it has contaminated people. And we have evidence in people that their levels rival or exceed that of what you get in workers.

This is not a question of uncertainty. This is not a generic issue of comparing what we know about workers to what we know about people in the environment. We know a lot about the people in this environment; though not everything we would like to know. And we still need to learn more. But clearly there is not one of these situations of uncertainty.

Q. So you're proposing to monitor a wide geographic area, including people with very low level exposure, aren't you?

A. Well, there are two issues there. First of all, I haven't suggested what the geographic area would need to be. I think I already told the Judge I wasn't sure what the population parameters are to be yet.

But even presuming that there is some geographic constraint that's fairly wide, it's certainly greater than a block or two from the factory gates.

We are looking at a situation in 2001 or 2002 where the blood levels may in fact be zero. But we don't know what they were in the '60s and '70s. These are

materials that will be eliminated, albeit slowly, from the body over time.

So just because you monitor somebody's blood in the year 2000 or in this century and you find low levels, if they meet certain criteria, where they lived or a contaminated food or drank water that would have had PCBs in it thirty years ago, they sure as heck ought to be part of that medical evaluation program.

Just because there is zero now doesn't mean they are not carrying risks of imprints of disease that started thirty and forty years ago.

Q. To be clear, you are talking about -- I think you have been pretty clear about this. You are talking about medically monitoring people who have no present manifest illness or injury, correct?

A. You don't medically monitor people with manifest illness. Once you have manifest illness, you treat those people.

Q. So the answer to my question is yes?

A. The whole concept of medical monitoring is to detect those illnesses or prevent those illnesses and ultimately then move to a mode of treating them when they occur.

Q. So the answer to my question was yes?

A. I gave you the answer to your question. It's not a simple --

Q. You are proposing to medically monitor people who have no present manifest illness or injury?

A. If you want a yes or no answer, I would say that is an improper question. You don't

use the term "medically monitor" and "existing illness" in the same question. It's mixing two different things.

You monitor people to look for illness. Once they've developed illness, you don't monitor them any longer.

And I'm sorry if I was unclear in my answer. It's not a yes or no question, because you're not comparing the same -- you're not comparing things that go together.

Q. You are proposing to treat -- We have a medical monitoring -- You are proposing in this program to treat and examine people who have no manifest present illness or injury, correct?

A. Absolutely not. As I understand medical treatment, it is a specific care that you give someone for a defined disease or illness.

What I am proposing is to evaluate people to see if they have illness and then move into the realm of treatment.

Q. Let me ask it a different way. You are proposing to screen people who have no present manifest illness or injury, correct?

A. Absolutely, that's exactly what I'm proposing.

Q. And you are proposing to do that based on their exposure to PCBs?

A. That is the whole principle of medical surveillance, medical screening, medical monitoring, whatever you want to call it. That's exactly the principle that's used in the workplace, sometimes mandated by law, and is exactly what we propose here that is from

a public health and preventative health standpoint. Absolutely appropriate for this population.

Q. Outside the context of litigation, have you ever set up a medical surveillance program for an environmentally-exposed population?

A. No. Because those groups tend to only come together in the setting of litigation.

Workplaces, you set them up because they are mandated by law or companies want to do it.

A group of people in the general environment don't come on their own partly because they don't know, partly because they don't have resources, come to you and say, "Set up a medical evaluation or a monitoring program for us."

So the few times this actually gets done in environmental situations is in fact because of litigation.

But one exception to that, interestingly, was the time I was asked to set up a medical monitoring program for prisoners because of their asbestos exposure.

And I think technically they were not considered employees. They weren't workers. So I guess they were environmentally-exposed in the environment of a prison. And that was under litigation as well.

Q. I asked you that question at your deposition. Have you ever set up a medical surveillance program outside the context of litigation for environmentally-exposed

populations. And your answer was one simple word. Can you read it for me?
A. What was the question?
Q. Right there.
A. "No." It still applies. But it applies with the further understandings I tried to share with you.
Q. You just didn't want to share them with me the last time, in your deposition?
A. It was a different context.
Q. You have not examined or treated any of the plaintiffs in this case, correct?
A. That is correct.
Q. You have not seen the medical records, except for some blood results, for any of the plaintiffs in this case; is that correct?
A. That is correct.
Q. You have not done your own exposure assessment of any of the plaintiffs in this case?
A. That is correct.
Q. You are assuming significant exposure, correct?
A. No, I'm not assuming. The blood data alone, if I saw nothing more than that, would tell me they had significant exposure.
Q. But you're not relying on mere blood data to put people within the program?
A. No.
Q. You're going to put people in the program who are just in the area, correct?
A. I have not yet sat down and constructed how I would want to put people in this program.

The Judge asked me that. I will answer you the same way I answered him. I have not done that assessment so for.

I know the principles of that assessment, but I have not actually constructed that group.

Q. Just because you have a higher than normal exposure to PCBs doesn't mean you are going to get sick from that exposure; is that correct?

A. That is correct.

Q. And many of the people you propose to medically monitor will never get sick?

A. Hopefully that will indeed be true. And that's what I would expect.

But the issue again the Judge raised with me is the question of risk. These people are at a greater risk than the general population and deserve extra attention because of that increased risk.

Q. Let me ask if you agree with this statement. You have probably figured out by now all of these statements I'm reading are from the article you wrote called "Scientific and Ethical Aspects of Human Monitoring." Do you recall that article?

A. Actually, no. Okay.

Q. That is the same Dr. Frank we have here on the stand?

A. Yeah. I just didn't recall this one. I'm trying to remember under what circumstances I wrote this. Okay.

Q. I was going to ask you if you agreed with this statement: "Testing for screening, monitoring, examinations should reach all the

appropriate requirements of good screening tests; simplistically, what should be kept in mind are such concepts as sensitivity, specificity, the invasiveness of the test procedures, the costs of test procedures, and the ability to change outcomes based upon the data collected."

A. Of course I agree with that. And that's exactly how I testified earlier today.

Q. You wanted the tests to have adequate sensitivity and specificity to avoid the problems with false positives and false negatives?

A. Correct.

Q. What's false positive?

A. False positive is when you say somebody has a problem when they really don't.

Q. And what's a false negative?

A. When you say they are well when they are actually sick.

Q. The problem with false positives is that you may end up conducting more and more invasive procedures on a person who is actually, it turns out, healthy?

A. Certainly. That's one of the known consequences of doing testing.

Q. And the problem with false negatives is you might miss people who have the disease?

A. Correct.

Q. In addition, you may not pay attention to things that you should pay attention to because you have been told that they are okay, correct?

A. Would you repeat that?

Q. You may not pay attention to other signs that they have the disease because you've got this false negative telling you they are okay; you or the patient themselves may not pay attention?
A. Well, that's a question of how well anybody practices medicine. Hopefully you don't just ignore something and you don't treat people just by numbers.
Q. That's a risk, though, of a false negative; isn't it?
A. Yes. That you assume somebody is well when they are actually ill and you pick them up at a later stage in the development of the disease.
Q. I only have one of these books. Well, I've two. I've got mine, and I've got the one I'm going put into evidence. So I can't pass it around.

THE STEWART: We object, then, Judge.

MR. PECK: It didn't seem worth killing all the trees.

(Plaintiff's Exhibit Number I-2 was marked for identification.)

Q. I'm going to show you what I have marked as Defendant's Exhibit I-2 and ask if you recognize that.
A. Yes.
Q. That's the Guide to Clinical Preventive Services?
A. Yes, sir.
Q. I think you told us at your deposition that you have a copy of this guide yourself?
A. I think I do, yes.

Q. And you reference it from time to time?
A. It hasn't been for some time. But yes, I have looked at it before. This is a commercial publication. I think I have the earlier government version.
Q. You generally agree with the methodology in this book for evaluating screening tests, don't you?
A. Yes.
Q. Let me talk to you about some specifics on this subject of specificity, sensitivity, and false negatives.

I have a real hard time with Roman numerals. But I'm going go to XLIII.
A. Okay. Forty-three.
Q. "Specificity" -- I'm right in the middle of that page. See where I am?
A. Yes.
Q. "Refers to the proportion of persons without the condition who currently test negative when screened."
A. Correctly; not currently.
Q. I'm sorry. Thank you. Correctly test negatively. "A test with poor specificity will result in healthy persons being told that they have the condition."
A. Yes.
Q. That's the false positive thing we talked about?
A. Right.
Q. You agree with that?
A. Yes.
Q. I'm going to drop down and talk about the paragraph above that. "Persons who receive false negative results may result --

may experience important delays in diagnosis and treatment."

A. Sure. That's one of the consequences. You've already asked me about that.

If I do a blood test and it comes back normal and they really have leukemia and it's in their bone marrow, it's a false positive or false negative. Until they become sicker, I will have missed it.

Q. Right. "Some might develop a false insecurity resulting in inadequate attention to risk producing behaviors and delays in seeking medical care when warning symptoms becoming present."

A. Sure. You tell people all the time not to smoke. You know who the biggest group of ex-smokers are? People who develop lung cancer.

Q. The next page, top of the next page. "False positive results can lead to follow-up testing that may be uncomfortable, expensive, and in some cases potentially harmful. If follow-up testing does not disclose the error, the patient may receive unnecessary treatment, but there also may be psychological consequences." Do you agree with that?

A. Sure. What you're reading is the section on methodology of screening. And they've laid this out very nicely in this book.

All of these things are true. But I'm sure they wouldn't write the rest of the book and say, "You don't do screening

because of all these potential problems." You have to recognize what the problems are.

But sure, I agree with this.

Q. And in fact, they used this methodology to develop all the screens that they approved of in this book, correct?

A. And I used those same methodologies as I tried to develop the screens that I suggested here.

Q. Let me go to the next full paragraph. "A proper evaluation screening result must therefore include the determination of the likelihood that the patient has the condition. This is done by calculating the positive predictive value for PPV of test results in the population to be screened. PPV is a proportion of positive tests results that are correct, true positives." Do you --

A. Yes.

Q. -- agree it's important to understand the positive predictive value of the test as part of determining whether you should use the test?

A. Right. If the test doesn't have a good positive predictive value, you don't use it.

Q. Why is that?

A. Because you get too many false positives or false negatives, which are what you are trying to avoid. But no test is perfect.

Q. I'm reading the next sentence. "For any given sensitivity and specificity, the PPV increases and decreases in accordance with prevalence of target conditions in

screened populations." Do you agree with that one?

A. Sure. And that's the principle that you don't screen everybody for everything. You screen those people that are highest risk because you're expecting the prevalence is going to be higher.

So there is a judgment that's made -- We have learned, for example -- Just by way of example here, when I did my training, everybody was supposed to get a chest x-ray every year. Then we realized that wasn't really useful. And then we said, "Okay. Everybody who is a heavy smoker will get a chest x-ray every year." And then a study came out and said, "That wasn't really useful because it didn't even change the outcome there." So we dropped that as a screening test.

The only thing we are left with and people are looking at -- in fact, I'm part of a study to look at that -- is do we do chest x-rays on a regular basis on those people that are at even a higher risk than cigarette smokers, like people exposed to asbestos and cigarettes together.

So we are constantly trying to refine this and decide what is the right test for the right group at the right time. And that is not static but is dynamic and changes over time.

So sure, there is nothing there I would take any disagreement with.

Q. And to determine positive predictive value for any given screening, you have to

know the prevalence of the disease in target population, right, and that is what this is saying?

A. For any given sensitivity, specificity, prevalence in the targeted -- Either have to know it or have an expectation of it or have some estimate of it. You don't actually have to know it. Sometimes you have to develop that information.

For rare conditions like PCB-induced thyroid disease, we don't have a general population base or database that you can go to. We have to go to very specific populations. And there you don't have that data, but you can have a presumption that whatever the normal risk of the population is, be it one in whatever -- here it's two or three in ten in whatever.

Q. The only way to determine positive predictive value, though, is to know that critical number, which is the prevalence of the disease in the screened population --

A. Right. That's to get that particular calculation.

Q. And to make no judgment call on it?

A. No. That just tells you what the value of that test is. The judgment comes before that in terms of is it appropriate to test people for a particular condition.

The actual number, the positive predictive value, you'll only get -- If we would implement this, I could tell you after a period of time what the positive predictive value is of finding immune disturbances in a

PCB-exposed population. I can't tell you that now.
Q. Right. In fact, you can't tell us the positive predictive value for any of the tests that you suggest at this time?
A. Not in this population. Certainly there are data about positive predictive value for, let's say, colon cancer and stool guiac, which is one of the tests in there. I'd have to go look it up. I don't know what that number is.

But what it applies to in a PCB-exposed population, I don't know, because nobody has ever studied that.
Q. You don't know the prevalence of any given disease that you suggest that we test for in this exposed population?
A. No. I don't know what the exact number is. But I know there is a risk that these people have a higher probability of getting diseases compared to what the known risk is in the general population without this exposure.
Q. Ultimately you would agree that the decision to conduct any test, any of the tests on your list, any screening test, is a decision that is made between an individual physician and an individual patient, correct?
A. No.
Q. You disagree with that?
A. I would disagree. The judgment about doing any test is the judgment of the patient if they are going to let that test be done.
Q. Well, nothing you're suggesting here is trying to override that judgment?

A. Absolutely not.
Q. And that judgment has to occur after the individual physician discusses the benefits and the risks with that individual patient of the test, correct?
A. Well, an individual physician or through an educational pamphlet that a program could put out to say, "You as somebody exposed to PCBs are at higher risk for thyroid disease. We recommend that you have a blood test for thyroid disease. The risk of a blood test is the pain of a skin prick and some people bleed a little bit afterwards."
Q. Do you know what the risk differential is between the unexposed population and the exposed population, PCB-exposed population for any of the diseases for which you're monitoring in Plaintiff's Exhibit 600-A?
A. Specifically, no. Because nobody has ever studied the specific risk for a PCB-exposed population such as this that I can compare to the general population, for which we do have good data.

One of the very reasons for doing some of this is to establish what those exact numbers are.
Q. So some of them are experimental in that sense?
A. Well, every time you do something, it could be said to be experimental. It's data collected for specific data knowing that you have an increased risk. You just don't know exactly how much that increased risk is. Is it twofold, ten-fold, a hundred-fold?

Are we going to use this anymore?
Q. Maybe. I'm sorry. You can put it down a second if you'd like.

What's the increased risk of breast cancer in the PCB-exposed population?
A. You just asked me if I was aware of what the increased risk was for anything on that list, and I told you I don't know. So we could go down that list one by one, and I would have to give you the same answer. I do not know.
Q. Okay. In developing that list that you have given us, did you in fact rely upon some other people?
A. Yes, I did.
Q. For information for the list?
A. People who know more about the specie of PCB and have much greater experience with it than I have.
Q. Specifically I think you talked with a Dr. carpenter?
A. Yes, I did.
Q. That was the one expert you talked to; is that right?
A. That's the one I recall speaking to about these issues, yes. I can't remember if I talked to anybody else. I don't think so, but I may have.
Q. The one last question I said I might ask you about is on page -- I think I can get this one. XXX and an I, thirty-one, of P-2, the guide.

At the bottom of the page, right above that little point. "An appreciation of the risk profile of the patient is also

necessary to set priorities for preventative interventions."
A. Can I just see -- I didn't pick it up. Let see me see if we're on the same page.
Q. Down here.
A. Right.
Q. Appreciation.
A. An appreciation.
Q. "An appreciation of the risk profile of the patient is also necessary to set priorities for preventative interventions. The need for assessing individual risks underscores a time-honored principle of medical practice. The importance of a complete medical history and detailed discussion with patients regarding their personal health practices focused on identifying risk factors for developing disease."
A. That exactly what I proposed in here. Right here, the very first item is medical history, which is what they talk about, a complete medical history and detailed discussion regarding their personal health practices and exposures, including the fact that for this topic we're talking about those people with PCBs and focusing on identified risk factors for those diseases. I couldn't agree with this more.
Q. And that process may result in several of your tests being given or not given or changed; is that right?
A. As in fact listed here. Not every test is for everybody every time. That's why it has to be thought out.

Q. You talked with Mr. Cunningham about educational programs I think for the general public and for physicians.
A. Yes.
Q. I think it was Mr. Cunningham. It may have been the Judge.
A. Or both of them.
Q. When I deposed you, you had not looked into what education ATSDR has done or the Alabama Department of Public Health has done in terms of providing education materials both to physicians and the general population.
A. I still haven't done that.
Q. You still haven't done that?
A. No. And if they have, all to the good.
Q. And if they have, that may take care of some of the educational needs, correct?
A. It may. In fact, if the materials are thought to be good, then you just adopt those and make sure they get appropriately distributed, identify the group that you're interested in and mail one to everybody.
Q. Are you aware, Dr. Frank, that the Medical Association of the State of Alabama opposed allowing for medical monitoring for people who were exposed to hazardous contaminants but had not been diagnosed with a manifest illness or injury?

MR. STEWART: Judge, I would object to that question or the premise of that question being based on the fact that lawyers, in fact, for the Medical Association of the State of Alabama opposed medical

monitoring and not the medical doctors themselves.

There was no vote taken, as I understand, of the medical doctors in the state of medical monitoring.

THE COURT: Overruled under my usual statement. Overruled.

You can answer.

Did you finish the question?

MR. PECK: Yes, sir.

A. I did have the opportunity to read the document prepared on behalf of the Alabama Medical Association, which I must respectfully state I found greatly flawed and totally inappropriate.

Q. You disagree with that?

A. That's another way to put it, yes.

MR. PECK: Your Honor, I'd just offer Defendant's Exhibit I-2 for Your Honor and the record.

THE COURT: It's admitted.

(Whereupon Plaintiffs' Exhibit I-2 was offered and admitted into evidence.)

MR. PECK: And that's all I have.

THE COURT: Anything from ADEM?

MR. WRIGHT: No, sir.

THE COURT: Anything from the state?

MR. KNEISEL: No, sir.

THE COURT: Anything from the city?

MR. MONK: No, sir.

THE COURT: Anything else from the plaintiffs?

You're going to have to hurry to get to the airport.

FURTHER EXAMINATION

BY MR. CUNNINGHAM:

Q. Doctor, what you tried to do with this program is to find injuries that may have already begun that would be manifest to the medical community using these tests even if the patient isn't aware of it yet, correct?

A. Correct.

Q. So when you say you're not going to screen people with a present manifest injury, you might actually have a present manifest injury and you're going to try to pick that up with this test?

A. That is correct.

MR. CUNNINGHAM: Thank you. That's all I have.

THE COURT: Anything else?

MR. PECK: No, sir.

THE COURT: Thank you. You can step down.

Plaintiffs go ahead and call the next witness.

MR. STEWART: We call Dr. Kaley, please.

THE COURT: Dr. Kaley, you are still under oath.

RICHARD KALEY,

having previously been duly sworn, was examined and testified further as follows; to wit:

EXAMINATION

BY MR. STEWART:

Q. Dr. Kaley, you recall being deposed, do you not, on -- I'm looking for the date on this -- I think it was in August, August 21st, 2001?

A. I recall being deposed. I don't recall the date specifically.

Q. At the law office of Lightfoot, Franklin, and White?

A. I believe that's where it was, yes.

Q. And Mr. Kelley was there, and I was there deposing you on that date?

A. Yes, yes.

Q. And that was at a time, certainly, after you all had had your discussions in Washington, was it not, the meeting in Washington sometime in January of 2001?

A. Well, if that is when there was a meeting in Washington and I was there, it would have been after that, yes.

Q. Do you remember me asking you about a trip that was made to Washington that was arranged by a gentleman named Glen Ruskin with EPA?

A. Well, I'm not sure if that particular meeting had anything to do with arrangements made by Mr. Ruskin or not.

Q. I asked you on the date that I mentioned have you been to Washington any time recently with Mr. Ruskin to meet with

the people at EPA, and you said you had been to Washington in the company of Glen Ruskin, and we have met with people at EPA. Are you saying now --

A. I don't recall specifically. I have been to Washington more than once and met with EPA or other agency people sometimes with Mr. Ruskin, sometimes not. I just don't remember specifically, number one, which meeting you are speaking about and whether Mr. Ruskin had an involvement in that or not. If I said that at the time, that was my recollection at the time. I just don't know. I don't recall.

Q. And do you recall being there at a meeting in Washington where y'all met with some representatives? You indicated at your deposition y'all met with some representatives from EPA at Region Four and a gentleman named Weinischke.

A. Yes. And I believe that meeting was not arranged by Mr. Ruskin. If that is the meeting you are speaking about, I believe that had nothing to do with Mr. Ruskin.

Q. What was the meeting for, to discuss dealing with an order on consent?

A. Yes.

Q. Do you recall me asking you what area that would cover at the time?

A. I don't recall that specifically. You may very well have.

Q. Do you recall me asking you what about the residential areas and you saying that is dealing with the residential areas which we

are dealing with that are covered by EPA or CERCLA?
A. Yes. At the time that was the correct response, yes.
Q. And do you remember saying in the deposition that if there was any effort made to work out an agreement for dealing with the plant site, that would be done with ADEM because they were regulating the plant site and surrounding areas?
A. I would have probably said something like that at the time in response to that question, yes.
Q. And certain other areas under RCRA, dealing with that under RCRA? Isn't that what you said?
A. I'm sure it is, yes.
Q. That was in fact the case as of August 21st, 2001, wasn't it?
A. I believe that would have been the case, yes.
Q. And that was the case as of the date you received a draft order, which is Plaintiff's Exhibit I-18, from EPA, isn't it?
A. I don't know which draft you are talking about, so I can't really answer that.
Q. It was the draft that was provided to me and to the Court by your attorney, Mr. Cox, just yesterday, and it is --
MR. STEWART: May I approach, Judge?
THE COURT: Certainly.
Q. -- marked I-18, and it is -- I assume that is 2002 --
A. 2001.

Q. 2001.
A. I assume that's correct.
MR. COX: I'm sorry. I was just looking over your shoulder, Donald.
MR. STEWART: It is the document you gave me. I still have your little Post-it on it.
Q. Now, turn to page eight and I'll get mine and turn to page eight. And when you look at site there, the site that is referred to on page eight of mine means residential, commercial, and public properties, which is, again, still the area, Dr. Kaley, that you were talking about back at the other meeting in Washington with EPA, correct?
A. That would be correct, yes.
Q. So as of 11-17 of 2002 -- or 2001 -- wait just a minute -- 2001, y'all were still talking about the EPA residential properties, not the plant site, not the creeks, as of that date?
A. That is what the document is addressing, yes.
Q. Well, I'm not necessarily looking now, Dr. Kaley, for the document. But certainly your understanding of that document is what I'm looking for. And what we are talking about in that document is the site that was going to be governed by this order on consent. You understand that, don't you?
A. Yes, I do.
Q. And that was the area that EPA had for all intents and purposes historically taken the responsibility for; isn't that correct?

A. I don't know what you mean by forever taken responsibility for, but at the time of this draft that was our understanding of the area that EPA had responsibilities for, vis-a-vis the areas ADEM had responsibility for, yes.

Q. And on that date -- I'm glad you said what you did. But on that date as a practical matter, ADEM had the responsibility for the plant site, creeks and streams, certain residential areas adjacent to the plant and the tributaries leading a way from the plant, didn't they?

A. Generally I would agree with that characterization, yes.

Q. Then we got Plaintiff's Exhibit I-20, and for the life of me I can't find my copy of this.

MR. STEWART: Can I approach again, Judge?

THE COURT: Certainly.

MR. COX: Judge, I have a copy, if he would like for me to give Dr. Kaley my copy.

Q. If you will turn to page seven in that one, it talks about site in that one, and this is something you all forwarded to them on January 22nd of 2002 -- well, not you, but Allen J. Topol, who is an attorney representing your company. And he sent it to Bill Weinischke and Dustin F. Minor, and it is styled "Dear Bill and Dustin." We turn to page seven of that document and you talk about site then. And then you are talking

about broadening things just a tad, aren't you?
A. Well, I don't know that we are broadening things. We are attempting in this exchange of drafts to clarify which areas were under which regulatory responsibility, yes.
Q. We are? Who is we, Dr. Kaley?
A. The agencies that are involved and Solutia.
Q. Well, now, y'all have had a series of meetings after you had this initial meeting in Washington, and the people that were meeting, Dr. Kaley, were perhaps you, Craig Branchfield, some representatives from Region Four either in Atlanta or some offices up in the Justice Department. There weren't any ADEM people meeting, were there?
A. I don't recall them specifically at the meeting, no.
Q. So when you talk about agencies, you really mean one agency, and that is EPA. Now, whose idea --
A. No. I would say it was my understanding that EPA and ADEM were in communication during this entire period.
Q. They weren't at your meeting, though, were they?
A. They weren't at the meeting, but my understanding is they were in communication.
Q. Then there were some creeks added in. Snow Creek from the confluence of the Eleventh Street ditch where it crosses Interstate 20, right?
A. Yes.

Q. And then all land and structures and other appurtenances and improvements on the land owned as of this date of this consent decree by Solutia. But then it says "exclusive of the operating facility," right?
A. Yes, that's what it says.
Q. What did that include? That operating facility would not include the landfills or the plant site, would it?
A. I'm sorry?
Q. The operating facility would not include the landfills and plant site, would it?
A. Yes, it certainly would.
Q. The operating facility would include the plant site and the landfills?
A. Yes.
Q. So you took that out?
A. Well, we didn't take it out. It was part of ongoing negotiations.
Q. Now, the trial had started as of this time, this trial?
A. Yes.
Q. Been underway for a while. Had y'all discussed the trial in any of those -- any of those meetings?
A. Other than the fact it was going on, no. I mean, everyone was aware obviously that the trial was going on.
Q. Is it your testimony as you sit here today, Dr. Kaley, that there have been no discussions about injunctive relief and the injunctive relief phase of this case as of the time y'all got this draft which was 5-20

-- or sent this draft which is dated January 22nd, 2002?
A. I don't know that injunctive relief was not mentioned at one point or another. It certainly has always been a part of this case. I don't recall any specific discussions about it.
Q. Well, y'all started discussing it, then, after that letter was written on January 22nd?
A. I'm sorry? We had had discussions with EPA for a year and a half.
Q. You started discussions about the injunctive relief phase of this trial after y'all sent this letter of January 22nd, 2002, didn't you?
A. The injunctive phase of this trial had been discussed and the fact that it may or may not occurred during the entire time of that negotiation.
Q. What I'm talking about, Dr. Kaley, was in fact y'all had increased discussions about the injunctive relief phase of this case in the three meetings Mr. Branchfield testified that took place within the last month, didn't you?
A. I don't recall any increased intensity in those discussions, no.
Q. Isn't it a fact y'all had three meetings in the last month with the folks at EPA?
A. I believe there have three, yes.
Q. And you attended the meetings, didn't you?
A. I attended two of them.

Q. Where did those meetings take place?
A. In Atlanta.
Q. And was Mr. Weinischke down there trying to work something out with y'all sometime in the past couple of weeks about this order on consent?
A. Mr. Weinischke has been involved in all these ongoing discussions in attempt to reach agreement with the agencies on this order on consent. Yes, Mr. Weinischke has been involved.
Q. With the agencies?
A. Yes.
Q. How many of those meetings that you attended in Atlanta did ADEM attend?
A. One.
Q. Just one?
A. Just one.
Q. That was the one that lasted, according to Mr. Branchfield, about two or three hours?
A. It was the better part of a morning as I recall, yes.
Q. There is a charge in this site -- Take a look at page seven of Exhibit I-21 -- We have it up here. Y'all supposedly got this one at noon, and there is another one -- We will talk about this one. There is something added to that. And that is this site includes -- well, you took something out and added. This site includes but is not limited to the area covered by the RCRA permit. Who added that language? Who suggested that it be added?
A. I don't recall specifically. I mean, I have not been in the language adding and

taking out phases of the discussion. I don't know specifically who added or took out that language. I mean, it is consistent.
Q. Did some lawyer recommend it?
A. Pardon?
Q. Did some lawyer recommend it?
A. I don't know who recommended it.
Q. Well, there were people there representing you, weren't there?
A. Yes.
Q. Who was that?
A. Mr. Topol was there.
Q. Mr. Topol, is that right?
A. Mr. Topol was attending the meetings, yes.
Q. Now, this is a document that y'all got apparently a draft of on 3-13 of 2002, wasn't it?
A. I'll take your word for that. I mean, that is what it says.
Q. I was told that by --
MR. COX: We will stipulate to that, Your Honor.
Q. -- Mr. Cox. You don't recall who from your side recommended that?
A. I don't know that anybody from our side recommended it. It may have been somebody from EPA, may have been somebody from ADEM. I don't know who recommended that particular language.
Q. Who was it from EPA that told -- Strike that.
Who told the EPA folks that Mr. Cobb had testified and the substance of his

testimony from that witness stand that you are sitting in right there?
A. Who told the EPA folks that?
Q. Yeah. Who shared with the EPA people what Mr. Cobb testified about ADEM's regulatory authority in this courtroom when we were talking about injunctive relief before y'all got this draft document?
A. I'll cut to your question about who spoke about Mr. Cobb's testimony with EPA. The rest of it I'm not sure I got. But the answer to that is I don't know if anyone did or, if they did, who did.
Q. Is it your testimony here today, Dr. Kaley, that there was no discussion between Solutia and EPA, you being one of the parties or participants in that particular negotiation, about the fact that Mr. Cobb and them felt they had the regulatory authority at ADEM to govern the plant site and also the creeks leading away from that plant site and the creeks and streams going down to Lake Logan Martin, including Snow and Choccolocco Creek?
A. I'm sorry. Are you asking me whether I was aware that that testimony by Mr. Cobb was transmitted to EPA after his testimony? I was not aware of that. Am I aware that has been in the past a position consistent with ADEM's view of their responsibility under the RCRA permit, I believe that is consistent with that, yes.
Q. Did y'all try to get EPA to get ADEM to sign on to a memorandum indicating y'all were going to go over to federal court and try to

get an order on consent spread over the record of the district court? Did y'all try to get them to do that?

A. At EPA and ADEM we felt -- and I believe the agency felt, EPA felt it would be advantageous to have ADEM as a signatory to the consent decree which we were negotiating with the agency.

Q. When exactly did y'all decide you needed to get ADEM involved?

A. I don't recall when that was.

Q. Didn't y'all go to try to see them Friday after the testimony ended up over here last week?

A. Not that I'm aware of.

Q. You are not aware there was some effort by EPA to get ADEM to sign on to that sometime last week?

A. Not that I'm aware of.

Q. Tell me if you would, Dr. Kaley, why EPA told y'all they felt like it would be important to have ADEM sign on? Isn't it a fact that that was done because ADEM had been seen as the agency that has the authority to regulate the RCRA plant site?

MR. COX: Objection to what EPA felt or what EPA believed. If he has an understanding, I believe he can testify to it.

Q. What did they express to you? Why did they say to you, they felt like it would be advantageous? You just got through saying they felt like it was. What did they say the reason for that was, Dr. Kaley?

A. I'm sorry, Mr. Stewart. You have lost me in your speech. I'm sorry. Would you please repeat your question?
Q. You just indicated a minute ago that EPA felt like it would be advantageous to have the signature of ADEM's representative on this consent order. What did they tell you about why they felt it would be advantageous --
A. I don't recall what they said. I think we also felt it would be advantageous to have ADEM for the very reason you said, that we are trying to negotiate a consent decree which will regulate the further investigation and remediation of the site under both agencies, whatever RCRA was responsible for with ADEM and whatever CERCLA was responsibility for under EPA. Certainly I can't speak to what EPA felt, but I think we believed and believe that it would be better if all the investigation and remediation of this site were dealt with under a single consent decree.
Q. Isn't it a fact, Dr. Kaley, that what y'all were trying to do is just avoid the jurisdiction of this court? Isn't that a fact?
A. I have no idea that that would be true, no.
Q. Is it your testimony here today that Mr. Weinischke didn't tell you that is what would happen if y'all signed that?
A. That would be my testimony, yes.
Q. He hasn't stated that to anybody?
A. Not that I'm aware of.

Q. Has Dustin Minor ever said that to you, that he felt like this Court didn't have the authority or capability to circumvent anything that EPA was doing if y'all went running over there to federal court and signed this order on consent and got it spread on the record?
A. Is there a question in there?
Q. I'm asking you if he ever told you that.
A. No, he never told me that.
Q. Well, y'all didn't have a suit filed against you by EPA, have you?
A. I think we have been put on notice under a CERCLA decree that -- I don't know that we have had a suit filed. I know we have been put on notice. We have responsibilities under CERCLA.
Q. Y'all do not have a pending matter of litigation, do you?
A. Not that I'm aware of.
Q. They haven't sued you, have they?
A. Not that I'm aware of.
Q. Never have fined you, have they?
A. No, they have not fined us.
Q. Who is Linda Fisher?
A. Linda Fisher is at this point an administrator in the Environmental Protection Agency.
Q. Who did she used to work for?
A. She used to work for Monsanto Company.
Q. How long did she work for Monsanto before she became a -- What does she do now?

A. She is one of the assistant administrators. I don't know specifically what her title is.
Q. To Christie Todd Whitman?
A. To Administrator Whitman, yes.
Q. How long did she work for you all?
A. I don't know. Five or six years I would guess. I don't recall.
Q. I thought you said eight at your deposition, that she left EPA where she worked previously when the administrations changed and during the Clinton administration she worked for y'all up there, didn't she?
A. During some of that time she worked for Monsanto Company, yes.
Q. Worked for Monsanto Company as a lobbyist?
A. I'm not sure what her responsibilities were.
Q. She was in Washington, wasn't she?
A. She was in Washington.
Q. When the administration changed last year, she went back to work for EPA?
A. She was asked to join EPA by Administrator Whitman.
Q. What part did she play in getting old Bill -- to enter into this order on consent with you?
A. None whatsoever.
Q. Did she encourage you to do that?
A. None whatsoever.
Q. Help you arrange a meeting up there?
A. I doubt she even knows about it.
Q. Who is it that picked -- By the way, what are y'all penalized generally if you

fail or violate an order of the EPA? Can't they fine y'all up to $25,000 a day?
A. I don't know what the specifics are. I'm sure they have the ability to fine us if we violate a specific order, yes. I don't know what the provisions are.
Q. Well, y'all have got some real stiff penalties in this last draft, don't you?
A. I don't recall what the numbers are. There is a section that deals with penalties, yes.
Q. Take a look at page ten.
A. Are you talking at 3-13, I-21?
Q. Yes. Page ten, y'all's stipulated penalties.
A. All right.
Q. And tell us if you would what the violations are if you violate and don't comply for the first through the fourteenth day.
A. $750 a day.
Q. And what is the penalty if you don't comply the fifteenth through the thirtieth day?
A. $2,000.
Q. And the thirty-first day and beyond?
A. $5,000.
Q. That's certainly a good bit less, is it not, than $27,500 a day, isn't it, Dr. Kaley?
A. Certainly smaller numbers, yes.
Q. Aren't you aware of the fact that some of the people who have had their property polluted by Monsanto with threatened of being fined by EPA of $27,500 a day?
A. No, I wasn't aware of that.

Q. And old Bill had that letter sent out to those people, Bill Weinischke, the gentleman y'all met with up there in the Justice Department?
A. I assume you are talking about letters with regard to Solutia access to properties of your clients either for sampling or cleanup. And I don't know whether Mr. Weinischke was involved in that or not. I thought that was EPA. May have been Department of Justice. I don't know.
Q. Let me ask you this much: Who was it that suggested that y'all not have to put up any kind of typical assurance or bond or whatever you call it? Who suggested that?
A. I don't know the specifics of that.
Q. Didn't y'all suggest that?
A. I believe -- Again, I'm treading on ground I really have very little knowledge of. But I believe that we suggested or told the agency that in other situations the viability of the company was such that those guarantees were not required in consent orders of this type. But as I said, I'm way beyond what I really know.
Q. Isn't it a fact that your financial liability as far as a company was a little different at that point than it is today?
A. I don't believe that's true, no.
MR. COX: Objection, relevance and foundation.
THE COURT: Overruled.
A. I don't believe that is true, no.
Q. Haven't y'all lost value of stock since this case started?

MR. COX: Same objection.

THE COURT: Overruled.

A. Yes.

Q. What is your cap? Y'all are worth about six hundred and something million dollars today?

MR. COX: Same objection, Your Honor.

THE COURT: Overruled.

A. I have no idea.

Q. If y'all had to pay out a billion dollars, Solutia couldn't do it, could they?

A. I don't know.

Q. You don't know if Solutia could?

A. That's correct.

Q. Aren't y'all presently paying out about thirty million dollars a year based on what Mr. Hunter and Mr. Barnacle and Mr. Clausen said in a recorded statement that they made, all these analysts, when this case first started on January 7th or 8th?

MR. COX: Objection. He is asking him to comment on hearsay, and lack of foundation.

THE COURT: Overruled.

A. I believe that thirty million dollars is a reflection of our budgeted -- expected budgeted cost for remediation over some time period, basically based on previous costs.

Q. But isn't that what he said y'all had the financial capability to pay?

A. I don't believe that is true, no. I believe he said those were our budgeted costs.

Q. So you have the capability as you sit here today, if this Court would order you to spend about a billion dollars over here to clean up this plant site, at Solutia to pay that?

MR. COX: Objection, speculation, foundation.

THE COURT: Overruled.

A. I have no idea.

Q. Who would?

A. Mr. Hunter.

Q. Mr. Hunter would know about that?

A. Yes.

Q. Would Mr. Clausen know about that?

A. I believe he should.

Q. Those are two people who would be aware of what y'all's capabilities were?

A. Yes.

Q. Now, did y'all ever have, you, Mr. Branchfield, any of those gentlemen I just mentioned, ever have any discussions with Linda Fisher, after she took her position, about the Anniston plant site?

A. I certainly did not. I can't speak to whether anybody else has or not.

Q. There is a possibility they have, then?

MR. COX: Objection, speculation.

THE COURT: Overruled.

A. Anything is possible. I know of no circumstances under which that would have occurred, but I'm certainly not aware of any. And there certainly were none by me.

Q. None by you?

A. Nor am I aware of any by any of the other people you mentioned.

Q. What about Glen Ruskin?
A. I don't know.
Q. Isn't it a fact that Glen would be the one meeting with her since she serves as y'all's Washington public relations person?
A. I don't know

MR. STEWART: Judge, I believe I'm at a stopping point. I can start with some other things depending on how long you want to go.

THE COURT: Are y'all going to save him?

MR. COX: We were going to ask him some questions. We were planning on doing that now. If it would be possible to save Dr. Kaley a trip, if we could finish him up today.

THE COURT: I really kind of needed to be out of here by five.

MR. STEWART: I'm going into some taped conversations and get him to identify those. They will take about forty-five minutes each to play.

MR. COX: That is not going to happen, obviously. This doesn't need to be on the record.

(Discussion held off record.)

MR. MONK: We brought up my potential conflict of interest, and these guys have provided me with a waiver of conflict, which the Court asked for. I need it on the record. It does say that -- it is from Jere White -- saying in accordance with our conversation the defendants have no

objection to me representing the City of Anniston.

I just want to document in the record what our conversation was in that regard. I don't want that to be left hanging or have any dispute about our conversation.

After I made my potential conflict aware in open court, Jere and I had a discussion on that date. Were you here?

MR. PECK: No.

MR. COX: I wasn't.

MR. MONK: I don't remember who was, but I want it on the record and I would like this to be confirmed. He simply asked me if I had any specific knowledge of the case from the period it was filed until Mr. Fite physically removed himself and Mr. Miller from my law firm, which would have been June of 1999.

And I told him no. Certainly I had general information regarding the case. I think Buddy and a lot of these defense lawyers were in and out of our office during that period of time. But I know I didn't have any specific discussions with you regarding the details of the case.

MR. COX: No. And probably the conversations we had you don't want on the record.

MR. MONK: But they weren't about the case.

MR. COX: Not about the case.

MR. MONK: I will represent that neither did I have any specific conversations with Mr. Fite about the details of the defense strategy or any information in the case.

If I talked to him about it, it was purely on a level of what's going on, you know, procedurally what is happening in the case. That was it.

I may not have gotten that much in detail with Mr. White, but that is the limit of our information, and Mr. Fite was quite diligent in not sharing any information regarding Monsanto's information, their strategies, tactics, or anything such as that with any member of the firm that I knew of up there and certainly not with me.

THE COURT: I guess to that extent, exactly how much was communicated to Mr. Fite to begin with? That might have been limited.

MR. COX: How much was communicated, or how much did he remember?

MR. PECK: Or receive?

THE COURT: We won't go any further.

MR. MONK: I will simply say this: I don't want my participation to be a problem in this case.

MR. COX: And we have agreed it is not.

MR. MONK: I don't want it to be a problem with my insurance company either.

THE COURT: All right. I'll see you in Gadsden at eight o'clock Monday morning.

(Court adjourned at 4:10 p.m.)