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**Also member of New Jersey Bar.

November 9, 2009

Honorable Allan L. Tereshko
First Judicial District of Pennsylvania
Court of Common Pleas
Room 234, City Hall
Philadelphia, PA 19107

Re: **<u>IN RE: ASBESTOS LITIGATION</u>**
PCCP NO. 0001, OCTOBER TERM 1986

Response of Plaintiffs represented by Brookman, Rosenberg, Brown & Sander to Motion for Clarification of In Re: Asbestos Litigation Decision

Control No. 102661

Opposing Counsel: Sharon L. Caffrey, Esquire

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Case ID: 861000001
Control No.: 09102661

IN RE:	**: NO. 00001**
	:
ASBESTOS LITIGATION	**: OCTOBER TERM 1986**

ORDER

AND NOW, this _____ day of _____, 2009, upon consideration of Ford Motor Company's Motion for Clarification of *In Re: Asbestos Litigation* Decision, and the responses thereto, it is hereby ORDERED that said Motion is DENIED.

By the Court:

_____
J.

Case ID: 861000001
Control No.: 09102661

Dear Judge Tereshko:

Defendant Ford Motor Company ("Ford") has filed a motion that it has styled as one seeking clarification of the court's September 24, 2008, order and opinion regarding the *Frye* motion filed by Chrysler LLC. Notwithstanding the manner in which Ford has packaged its motion, it is readily apparent that Ford does not seek a mere clarification of a prior order but rather a prospective ruling that would apply in some fashion to all pending and future asbestos personal injury cases in Philadelphia County. Indeed, Ford's proposed order would effectively preclude untold numbers of asbestos victims from recovering compensation from asbestos friction product manufacturers, without a hearing. Plaintiffs represented by Brookman, Rosenberg, Brown and Sandler oppose this motion for a variety of reasons.

Initially, the motion should be referred to the Honorable Sandra Mazer Moss for disposition. Ford's requested relief, as stated in its proposed order, is as follows:

> The *In Re: Asbestos Litigation* decision is applicable to all asbestos cases involving friction defendants in the Philadelphia Court of Common Pleas Mass Tort Program in which the Plaintiffs' experts' opinions are based upon the same or substantively similar theory as those who testified at the *Frye* hearing in February 2008. The *In Re: Asbestos Litigation* decision is not limited to the three template cases before the court at the February 2008 *Frye* hearing.

Thus, it is obvious that Ford seeks not some sort of clarification of the September 24, 2008, order, but rather a ruling affecting pending and future cases in this court's asbestos litigation program. Therefore, the motion should be directed to the Honorable Sandra Mazer Moss, as Coordinating Judge of the Complex Litigation Center.

Regardless of the identity of the judge who decides the motion, it must be denied, as it raises substantially the same legal issue that has twice been rejected by this court. Although Ford argues that the February 2008 *Frye* hearing was intended as some sort of referendum on the general acceptability of the methodological approach on causation taken by plaintiffs' experts, with specific cases chosen as "templates," the actual hearing and result flatly contradicts Ford's interpretation. The court found that two experts who testified in the *Frye* hearing had no recognizable methodology; quite clearly, the court refused to hold that no acceptable methodology exists. To the contrary, the court identified as appropriate the methodology outlined by defense witness Dr. Alfred Franzblau. Order at p. 41. Furthermore, the court's order and opinion effectively refutes Ford's instant claim that clarification is needed because the court declined to rule on the *Frye* motion with respect to the "template" case before it for which expert reports were not yet due. Order at p. 54. This makes it clear that the ruling applies only to those cases for which evidence was presented. There is no need for the court to clarify what is already crystal clear.

Furthermore, subsequent to the court's September 2008 order and opinion, the court rejected Chrysler's attempt to gain essentially the same unwarranted relief Ford requests instantly. In Chrysler's prior motion, filed November 17, 2008, Chrysler sought various grounds of relief, including dismissal of pending and future cases based upon application of the court's ruling on Chrysler's *Frye* motion. Ford will undoubtedly contend that its styling of the instant motion is one for "clarification" of the *Frye* ruling, rather than dismissal based upon the September 24, 2008, order and opinion, distinguishes it from the prior Chrysler motion. However, Chrysler's proposed order included the following language in connection with its motion for application of the *Frye* ruling: "Finally, *to be clear*, any expert causation evidence

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submitted by Plaintiff in an effort to overcome this Court's September 24, 2008 *Frye* ruling must utilize and rely on different methodologies than those already considered and must be more than just a new way of phrasing prior expert opinions." (*Emphasis supplied*; a copy of Chrysler's proposed order is appended hereto as Exhibit "A.") Thus, it could scarcely be clearer that the instant motion for "clarification" requests substantially the same relief sought by Chrysler in the prior motion. Most important, the nub of the instant motion is precisely the same as the Chrysler motion: to have the court apply a *Frye* ruling issued in three specific cases, after a full hearing, to preclude plaintiffs' expert testimony in other cases, without a hearing. Such a procedure is contrary to Pa.R.Civ.P. 207.1 and all notions of due process. Because plaintiffs fully detailed all of the reasons why the result urged by Ford would be unconscionable in their response to the earlier Chrysler motion, we append that response hereto as Exhibit "B," and incorporate all the arguments therein. Because this court has already denied the relief Ford seeks when it declined to rule on the *Young* case that had been listed as part of the *Frye* hearing, and when it denied the Chrysler motion, the instant motion must be denied.

Wherefore, for the foregoing reasons, plaintiffs represented by Brookman, Rosenberg, Brown and Sandler respectfully request that the Motion for Clarification of *In Re: Asbestos Litigation* decision be denied.

Respectfully submitted,

Brookman, Rosenberg, Brown and Sandler

By: /s/
Steven J. Cooperstein, Esquire

SJC:ch
Enclosures

cc: Honorable Sandra Mazer Moss
All counsel

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Control No.: 09102661

EXHIBIT "A"

Case ID: 861000001
Control No.: 09102661

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IN RE: ASBESTOS LITIGATION	: COURT OF COMMON PLEAS : PHILADELPHIA COUNTY :
ALL ASBESTOS FRICTION CASES INVOLVING CHRYSLER LLC	: OCTOBER TERM 1986, NO. 0001

ORDER

AND NOW, this 16th day of January, 2009, upon consideration of the Petition for Issuance of a Rule to Show Cause Why All Cases Against Chrysler LLC Should Not Be Dismissed, and all opposition thereto, it is hereby ORDERED that the Petition is DENIED. No Rule to Show Cause shall be issued. Nor shall any rule be issued in any founder case.

By the Court:

Tereshko

J.

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JAN 16 2009

FIRST JUDICIAL DISTRICT OF PA
USER I.D.:

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COMPLEX LIT CENTER
JAN 16 2009
J. STEWART

Asbestos Litigation Phi-ORDER

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Case ID: 861000001
Control No.: 09102661

EXHIBIT "B"

Case ID: 861000001
Control No.: 09102661

B|R|B|S
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**Also member of New Jersey Bar.

December 8, 2008

Honorable Allan L. Tereshko
First Judicial District of Pennsylvania
Court of Common Pleas
Complex Litigation Center
Room 622, City Hall
Philadelphia, PA 19107

Re: **IN RE: ASBESTOS LITIGATION**
PCCP NO. 0001, OCTOBER TERM 1986

ALL ASBESTOS FRICTION CASES INVOLVING CHRYSLER LLC

RESPONSE OF PLAINTIFFS REPRESENTED BY BROOKMAN, ROSENBERG, BROWN AND SANDLER TO PETITION FOR ISSUANCE OF A RULE TO SHOW CAUSE WHY ALL CASES AGAINST CHRYSLER SHOULD NOT BE DISMISSED

CONTROL NO. 111622

OPPOSING COUNSEL: Alice S. Johnston, Esquire

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Case ID: 861000001
Control No.: 09102661

IN RE: ASBESTOS LITIGATION	**: COURT OF COMMON PLEAS** **: PHILADELPHIA COUNTY** **:**
ALL ASBESTOS FRICTION CASES INVOLVING CHRYSLER LLC	**: OCTOBER TERM 1986, NO. 0001**

ORDER

AND NOW, this _____ day of _____, 2008, upon consideration of the Petition for Issuance of a Rule to Show Cause Why All Cases Against Chrysler LLC Should Not Be Dismissed, and all opposition thereto, it is hereby ORDERED that the Petition is DENIED. No Rule to Show Cause shall be issued.

By the Court:

_____
J.

Case ID: 861000001
Control No.: 09102661

Dear Judge Tereshko:

Defendant Chrysler LLC ("Chrysler") has filed a petition to "implement" this court's September 24, 2008 Findings, Memorandum and Order on Chrysler's Consolidated *Frye* Motion (hereinafter "Order"). The relief Chrysler seeks by way of a supposed mere implementation of the Order could scarcely be more outrageous. Chrysler, asking the court to ignore all notions of due process and fundamental fairness, requests the court to dismiss it from all asbestos cases pending against it in Philadelphia County. In so doing, Chrysler asserts that this court's Order established that it is utterly impossible for *any* plaintiff to establish that exposure to *any* Chrysler product contributed to the plaintiff's asbestos-related disease and thus that all details of a plaintiff's asbestos exposure are irrelevant. Chrysler Petition at pp. 3-4. Chrysler's Petition is without procedural authority, and depends upon both perversion of the record of the litigation of the *Frye* motion and distortion of the Order. Accordingly, Chrysler's Petition must be denied.

I. CHRYSLER'S SHORTCUT DISMISSAL SCHEME IS WITHOUT PROCEDURAL AUTHORITY

No procedural authority exists for the relief Chrysler seeks. Indeed, it is notable that Chrysler fails even to suggest a procedural basis that would empower this court to adopt the shortcut dismissal mechanism Chrysler recommends.[1] Chrysler seems to believe that its proposed dismissal mechanism is akin to a demurrer to a complaint. Indeed, all of the cases cited by Chrysler in its Petition that it asserts support this mechanism are cases involving preliminary objections in the nature of a demurrer to a complaint. Chrysler ignores, however, that the legal standard for granting a preliminary objection in the nature of a demurrer is that the court must accept as true all material facts pleaded in the complaint, and draw all inferences reasonably arising from those facts. *Walter v. Magee-Women's Hospital of UPMC Health System*, 2005 PA Super. 131, 876 A.2d 400, 403-404, *reargument denied* (2005). Chrysler here not only wants the court to refuse to accept as true the facts pleaded in the complaint, but also wants the court to consider matters extraneous to the complaint. Perhaps even more important, preliminary objections in the nature of a demurrer are simply not available to a defendant in a personal injury action arising from exposure to asbestos. Pa.R.Civ.P. 1041.1(d). Thus, no procedural authority for Chrysler's mechanism for dismissal can be found in the rule governing preliminary objections.

Of course, Chrysler's proposed shortcut mechanism actually would accomplish the preclusion of expert testimony on *Frye* grounds and a grant of summary judgment. Preclusion under *Frye* would

---

[1] With apparent seriousness, Chrysler takes umbrage at the characterization of its suggested procedure as a "shortcut." Chrysler Petition at p. 10. Chrysler's Petition requests immediate dismissal in dozens of case on *Frye* grounds, without a hearing. In dozens of other cases, Chrysler recommends immediate dismissal, but would allow those plaintiffs an illusory "right" to produce an expert report within ninety days. The dismissal would become final unless the plaintiff produced an expert report within that absurdly short time frame. Even if the plaintiff produced a report that quickly, the dismissal would still become final unless the expert report differs in some unspecified way from expert causation reports that have been served in other cases. It is difficult to imagine any sense in which labeling this proposed route to dismissal to be a "shortcut" would be inaccurate or inappropriate. Indeed, "shortcut" may be too benign a characterization, as it may connote that it is an expeditious method of reaching an *appropriate* goal; "railroading" a plaintiff's claim against Chrysler out of court may more appropriately communicate what Chrysler is suggesting.

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require a hearing, whether pre-trial or as part of trial itself. Pa.R.Civ.P. 207.1. Certainly, the grant of a *Frye* motion without a hearing would deny due process to the proponent of the witness. The rules governing summary judgment envision that a trial court will not rule on summary judgment unless the responding party has had a reasonable opportunity to develop a factual record through discovery. Pa.R.Civ.P. 1035.3(b). Chrysler's attempt to gain the equivalent of summary judgment before a plaintiff has had a reasonable opportunity to conduct discovery and obtain an expert report would be impermissible under the applicable summary judgment rules. Thus, Chrysler's Petition must be denied because the shortcut procedure it proposes is contrary to the procedural rules and notions of due process.

II. CHRYSLER'S ASSERTIONS THAT THE *FRYE* ORDER REPRESENTED A UNIVERSAL FINDING AGAINST THE POSSIBILITY OF CHRYSLER PRODUCTS CAUSING DISEASE ARE WITHOUT FACTUAL OR LEGAL BASIS

Even if Chrysler's Petition had an appropriate procedural basis, it would still have to be denied because it is substantively meritless. Throughout its Petition, Chrysler asserts that this court's Order amounts to a ruling that it is impossible for any plaintiff to demonstrate, consistent with *Frye*, that exposure to a Chrysler asbestos-containing product was a substantial cause of an asbestos-related disease. Without identifying what this court allegedly found that renders it impossible for a plaintiff to prove causation from a Chrysler product, Chrysler asserts that the court found a "fatal flaw" in the causation analysis (Chrysler Petition at pp. 3-4), that the court found a ". . . universal, generic flaw in the methodology allegedly supporting each of the proffered opinions and by extension in the body of evidence upon which Plaintiffs base their causation as to Chrysler[.]" (Chrysler Petition at p. 8), and that "it is clear that the structural and universal problems found in the opinions of the testifying doctors is [sic] exactly the same for all of the experts proffered by Plaintiffs . . ." (Chrysler Petition at p. 8). Similarly, without any analysis whatsoever, Chrysler asserts that " . . . it is apparent that the Court's conclusions are not case-specific or fact-specific and can be appropriately applied to all cases pending against Chrysler in which plaintiffs allege that their asbestos-related disease was caused in whole or in part by exposure to automotive friction products." Chrysler Petition at p. 4. It can be no wonder that all of the above-quoted statements from Chrysler's Petition are bald conclusions, as they are all manifestly contrary to the facts.

A review of the *Frye* Order demonstrates quite readily that there is a notable absence of any finding that there can be no generally accepted methodology that could link exposure to a Chrysler asbestos-containing product and asbestos-related disease or that the analyses of the testifying experts contained some universal fatal flaw that is impossible of correction. To the contrary, the Order shows that this court found that the experts who testified for the plaintiffs did not demonstrate that they used any "recognizable methodology." Order at p. 53. Far from finding that no appropriate methodology exists, this court found that one of the defense experts who testified during the *Frye* hearing, Dr. Alfred Franzblau, " . . . outlined the generally accepted scientific methodology in determining causation in cases where an asbestos-related disease is suspected." Order at p. 41. The methodology spelled out by Dr. Franzblau and accepted by this court is astoundingly simple, consisting of: (1) diagnosis, (2) exposure, (3) dose, (4) mitigating factors, (5) alternative explanations, and (6) conclusion. Order at p. 41. Chrysler in its Petition has not even mentioned this methodology, much less explained why use of this methodology cannot result in a finding that exposure to a Chrysler product caused an asbestos-related disease on any set of facts.

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Moreover, at the *Frye* hearing, on two different occasions, during the cross-examination of defense witnesses, plaintiffs' counsel attempted to probe whether there existed a "negative epidemiological study" that would prove that exposure to asbestos-containing automotive friction products cannot cause disease. On the first occasion, during the cross-examination of Dr. Dennis Paustenbach, the court sustained an objection, stating: ". . . no one that I understand has ever produced a negative study that I have heard. And I think the reference to a negative study is inappropriate because there has been no evidence of a negative study." N.T., 2/13/08, p.m. session at 35; (a copy of pages showing the context of the cited comment is appended hereto as Exhibit "A"). On the second occasion, during the cross-examination of epidemiologist Mary Jane Teta, the court again sustained an objection, stating that the safety of working around asbestos brake products was not the issue before the court because " . . . it's not questioned that exposure to certain asbestos causes disease. . . . that's not at issue." N.T., 2/15/08, a.m. session at 69; (a copy of pages showing the context of the cited comment is appended hereto as Exhibit "B"). Thus, the evidence at the *Frye* hearing, and this court's interpretation of it, shows that Chrysler is simply wrong in asserting that the *Frye* Order means that it is impossible for any causation expert to demonstrate a generally accepted methodology leading to a conclusion that exposure to Chrysler asbestos-containing automotive friction products was causative of disease.[2]

Chrysler also suggests that it is fair to apply the *Frye* Order to preclude expert witnesses in other cases without hearing their testimony because plaintiffs already produced the best possible evidence in opposition to Chrysler's *Frye* Motion, which this court found to be deficient under *Frye*. Chrysler ignores that plaintiffs did not agree to some sort of representative case procedure and therefore cannot fairly be bound by the evidence put on at the *Frye* hearing with respect to only three individual cases. Although Chrysler asserts that: "as this Court ordered, the Philadelphia *Frye* cases were selected as exemplar or sample cases, and Plaintiffs were to put forth their 'best case' for causation" (Chrysler Petition at p. 8), Chrysler's assertion is refuted by the record. This court, on January 25, 2008, ordered Chrysler to identify as many as six cases in which it was challenging an expert's methodology, " . . . for purposes of judicial administration of the . . . *Frye* Hearing . . ." (a copy of the Order of January 25, 2008, is appended hereto as Exhibit "C"). Thus, the court did not allow plaintiffs to have any input into the selection of the cases, did not suggest that the cases Chrysler selected would be "exemplar" or "sample" cases, and did not order plaintiffs to put on their "best case." Perhaps more important, in a subsequent order, the court explicitly declined to rule that the selected cases would be somehow representative and therefore binding on cases that were not made part of the hearing. Order dated January 30, 2008, a copy of which is appended hereto as Exhibit "D."

Furthermore, Chrysler's own Petition demonstrates that it has recognized the absence of any factual or legal basis upon which to bind other plaintiffs to the *Frye* preclusion Order issued in three individual cases. Chrysler argues that: "The experts who actually testified at the hearing of this matter were *apparently* the ones considered by Plaintiff's counsel to be the most impressive and representative . . .," and that ". . . *it is obvious* that Plaintiffs believe that . . . [the witnesses who actually testified at the *Frye*

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[2] Indeed, Chrysler cannot even succeed through the course of its entire Petition to maintain the pretense that the court found some universal scientific flaw that no expert can overcome. Chrysler states: " . . . it is the 'shortcut' methods employed by plaintiffs' experts that has [sic] resulted in the *Frye* ruling at issue and hence this Petition." Chrysler Petition at p. 10. Thus, in the end, even Chrysler recognizes that the *Frye* Order applied only to what the court perceived as an absence of coherent methodology by the experts whose opinions were precluded by the express terms of the Order, and did not represent a universal finding of impossibility of causation.

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hearing] represented a methodological consensus from the various disciplines and experts, and were attempting to put forth their best case." Chrysler Petition at p. 6 (italics supplied). What is striking about Chrysler's argument is its reliance on the supposedly "obvious" and "apparent". These formulations merely expose that Chrysler has no evidence whatsoever to which it can point to demonstrate that it would be fair to bind all other plaintiffs to the evidence presented at the *Frye* hearing. Because none of the plaintiffs whose cases are subject to the instant Petition have had an opportunity to present their experts' testimony, they cannot be bound by the *Frye* Order in the way Chrysler seeks in this Petition, and in fact to do so would deprive them of due process.

Furthermore, insofar as Chrysler requests dismissal of cases in which expert reports are not yet due (cases identified in Attachment C to Chrysler's Petition), this court has already effectively rejected Chrysler's position. One of the cases selected by Chrysler in response to the order of January 25, 2008, *Young v. A.W. Chesterton, Inc., et al.*, PCCP No. 0962, September Term 2006, had not had discovery completed, and had not reached the deadline for expert reports by the time of the *Frye* hearing. As a result, plaintiffs offered no evidence at the *Frye* hearing with respect to the Young case. Consistent with Chrysler's current request, this court could have granted Chrysler's motion with respect to Young, finding that plaintiff was bound by the evidence put on for the other plaintiffs. The court declined that opportunity, instead explicitly stating that no decision had been made because it was premature. Order at p. 54. For the same reason, all of the cases set forth in Attachment C to Chrysler's Petition cannot be dismissed, because any *Frye* motion with respect to them is premature.

III. CHRYSLER'S SHORTCUT DISMISSAL SCHEME IS FUNDAMENTALLY UNFAIR

Further, it cannot be too strongly emphasized just how egregiously Chrysler's shortcut procedure would violate the rights of each plaintiff involved. As to plaintiffs who have served expert reports, Chrysler would deny them due process by having the court dismiss their claims against Chrysler on *Frye* grounds without affording them the right to present testimony at a hearing.[3] As to plaintiffs whose cases have just recently been filed, Chrysler's plan would essentially prevent many plaintiffs from ever proving their exposure to Chrysler asbestos-containing products. If Chrysler is immediately dismissed in a case before product identification discovery has occurred, then when the plaintiff is deposed, Chrysler will have no requirement to be present, and the plaintiff's deposition testimony will not be admissible against Chrysler. Given that many of these cases involve plaintiffs who have mesothelioma, and in consequence a very short remaining life span, immediate dismissal will prevent them ever from eliciting testimony about their exposure to Chrysler products that would be admissible against Chrysler.

---

[3] It is no answer to say, as Chrysler does, that the expert reports in those cases recite that "each and every breath" of asbestos contributed to the plaintiff's disease. Chrysler Petition at p. 8 n. 6. The issue in each case is whether exposure to Chrysler asbestos-containing products was a substantial cause of the plaintiff's disease. An expert report that broadly asserts that all exposures were causative is sufficient to permit an expert to opine at trial that exposure to Chrysler products specifically was a substantial cause, and to give his reasons therefore. *Andaloro v. Armstrong World Industries, Inc.*, 2002 PA Super. 112, 799 A.2d 71, 84-85, *reargument denied* (2002), *allocatur denied*, 573 Pa. 682, 823 A.2d 143 (2003). Accordingly, that an expert report opines that "each and every breath" of asbestos was causative, rather than analyzing the role played by the plaintiff's Chrysler exposure, does not justify *Frye*-based preclusion of the expert's opinion without a hearing.

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In addition, Chrysler's *Frye* Motion sought preclusion of causation opinions only as to plaintiffs whose exposure was to Chrysler *automotive* friction products. By following Chrysler's shortcut plan, and prejudging even the exposure in these cases, Chrysler ignores the possibility that some of the plaintiffs may have been exposed to other Chrysler products, such as truck brakes. The universe of asbestos-containing products produced by Chrysler is certainly greater than that which was the focus of its *Frye* Motion, and therefore the *Frye* Order cannot legitimately be used as a basis to bind all other plaintiffs who claim exposure to Chrysler asbestos-containing products. Chrysler's Petition must be denied.

For the foregoing reasons, plaintiffs represented by Brookman, Rosenberg, Brown and Sandler respectfully request that the Petition for Issuance of a Rule to Show Cause Why All Cases Against Chrysler Should Not Be Dismissed be denied.

Respectfully submitted,

Brookman, Rosenberg, Brown and Sandler

By: /s/
Steven J. Cooperstein, Esquire

SJC:ch
Enclosures

cc: Alice Johnston, Esquire
James Fitzgerald, Esquire
Robert Paul, Esquire
Denyse Clancy, Esquire
Lee Balefsky, Esquire
Edward Nass, Esquire
Brian Ketterer, Esquire
Benjamin Braly, Esquire
Benjamin Shein, Esquire
Joseph McGill, Esquire

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Control No.: 09102661

EXHIBIT "A"

Case ID: 861000001
Control No.: 09102661

IN THE COURT OF COMMON PLEAS

FIRST JUDICIAL DISTRICT OF PENNSYLVANIA

CIVIL-TRIAL DIVISION

- - -

In Re: Asbestos Litigation	)	October Term, 1986
CERTAIN ASBESTOS FRICTION CASES INVOLVING CHRYSLER LLC	)	NO. 0001 (Control No. 084682)

- - -

February 14, 2008

- - -

Courtroom 243, City Hall
Philadelphia, Pennsylvania

- - -

FRYE HEARING - Afternoon Session

- - -

BEFORE: THE HON. ALLAN L. TERESHKO, J.

- - -

REPORTED BY: ANTOINETTE FOY, RPR

Case ID: 861000001
Control No.: 09102661

Dr. Paustenbach - Cross

MR. LOPEZ: Well, let me object.

THE COURT: I'll sustain it.

BY MR. ROSENBERG:

Q. You indicated in your methodology, one of the reasons that you believe that the methodology used by the physicians in this case was inappropriate was because the epidemiological evidence was -- proves, in your view, that there was no increased risk of mesothelioma among brake workers; is that correct?

A. That was one of the foundations.

Q. Yeah, now with regard to that foundation, are you familiar with the journal, Epidemiology?

A. Yes.

Q. Let me ask you if you agree or disagree -- this comes from the article, Negative Results in Cohort Studies: How to Recognize Fallacies?

MR. LOPEZ: Excuse me.

Your Honor, before he starts reading an article, could we have a copy of it?

THE COURT: Do you expect that you'll be using the same cross-examination on the same document on the epidemiology experts?

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1 Dr. Paustenbach - Cross
2 MR. ROSENBERG: You know, I
3 think maybe -- well, I'm not sure. I don't
4 know. Are you going to use this?
5 MS. CLANCY: I may or may not. I
6 don't know what she is going to say.
7 THE COURT: Well, I don't want
8 this to be -- I don't want to give you and
9 either/or option, either use it on him or use
10 it on the other, because you may have
11 different purposes behind your
12 cross-examination.
13 But if it is to question the
14 epidemiological procedure employed, I think
15 the best way for the -- since you are going
16 to proffer the epidemiology expert, it might
17 be best asked of him.
18 Unless you have some special,
19 individual relevance to a question, and not a
20 general question about the use of
21 epidemiology, I ask that you reserve it for
22 another witness.
23 MR. ROSENBERG: Your Honor, I
24 think that it does, based upon the testimony
25 -- based upon Dr. Paustenbach's testimony

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today, that one of the reasons that he thought the methodology -- he criticized the physicians in their methodology by saying that they did not give appropriate weight to the epidemiological evidence that he believes carries great weight.

THE COURT: I'm not sure I agree with your characterization. But if you have a narrow area, I'll let you pursue it with respect to his testimony.

MR. LOPEZ: Could he provide the witness with a copy? This is entitled Negative Results in Cohort Studies: How to Recognize Fallacies.

THE COURT: Give it to the witness.

Do you have a copy?

THE WITNESS: I don't have it, but I'd be happy to have it.

THE COURT CRIER: That would be P-20.

BY MR. ROSENBERG:

Q. All right. Doctor, first of all, I'm just going to ask you, Dr. Hernberg is with the Institute

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of Occupational Health in Finland; correct?

MR. LOPEZ: Your Honor, let me object. He hasn't laid any foundation with respect to this article and this witness.

THE COURT: Since the science of epidemiology has been discussed so broadly here, I doubt that he needs a foundation.

MR. LOPEZ: But at least let him start with the title for Dr. Paustenbach and see who the author is before he zooms in on the question, which now he is doing.

Do you have a copy of the article, Dr. Paustenbach?

Could I give Dr. Paustenbach a copy of this?

And I'm sure counsel recognizes we have the epidemiologist coming up.

MR. ROSENBERG: Yeah. We're really spending way too much time with this.

BY MR. ROSENBERG:

Q. All I want to ask you is, a, you got this paper? Have you ever seen it before?

A. No.

Q. B, I'm going to ask you this: Do you agree

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1 Dr. Paustenbach - Cross
2 that a true, negative study, meaning an
3 epidemiological study that proves that a substance
4 does not cause disease, do you agree with the
5 statement that a true negative study must fulfill
6 three criteria: It must be large. It must be
7 sensitive. And it must have well-documented
8 exposure data, all three?
9 MR. LOPEZ: Let me object to the
10 extent he's mischaracterized the document. I
11 didn't hear a definition from that document
12 as to what they mean by negative study. And
13 he's just said what he thinks the negative
14 study is.
15 THE COURT: Are you ad-libbing or
16 are you reading from the document?
17 MR. ROSENBERG: No, no. I'm
18 reading from the document.
19 But I haven't described what a
20 negative study is as the author has described
21 it, which, by the way, the author describes a
22 negative epidemiological study as a study
23 that proves that a certain thing doesn't
24 cause a disease as opposed to proving that a
25 certain thing does cause a disease, which

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1 Dr. Paustenbach - Cross
2 would be a positive.
3 THE COURT: When has the subject
4 of a negative epidemiological study ever
5 entered into the discourse in this?
6 MR. ROSENBERG: I believe that's
7 precisely -- I believe that is precisely the
8 basis of their argument that science doesn't
9 support the concept that asbestos brake dust
10 -- that mesothelioma can be caused by
11 asbestos brake dust.
12 I believe what they are arguing is
13 that the epidemiology -- that the studies
14 they have looked up, and that Dr. Paustenbach
15 has written about in his article, Dr. Teta, I
16 believe, is going to testify about it, as
17 well, proves that because they are negative,
18 proves that asbestos from brakes does not
19 cause mesothelioma.
20 MR. LOPEZ: Well, Your Honor, I
21 think counsel has just made clear that what
22 he is saying here has never been asked of
23 this witness on direct examination.
24 He's talking about a cohort study.
25 Dr. Paustenbach didn't talk about

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epidemiology, didn't talk about cohort and case control studies, didn't distinguish between what a negative study is, what a positive study is, what the null hypothesis is.

You know, this whole line of questioning of Dr. Paustenbach was not covered in direct. What he said, and all I heard him say, was there is no indication of an increased risk of mesothelioma with respect to brake mechanic work. That was it.

THE COURT: Well --

MR. ROSENBERG: Your Honor --

THE COURT: -- that's my understanding. But in the interest of fullness and fairness in your scope of cross-examination, within reason, I'll allow you to ask the question.

BY MR. ROSENBERG:

Q. Yeah. Just by way of background, in your direct testimony, I believe that they put up a slide that said hypothesis: Each and every exposure above background causes or contributes to disease. Do you remember that slide?

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Dr. Paustenbach - Cross

A. As a fallacy, yes.

Q. As a fallacy. And then there were six reasons that you gave; isn't that right?

A. Right. And I only dwelled on one sentence regarding the lack of evidence that there was an increased risk. I did not try to expand upon that. Having said that, I'm happy to answer your question, by the way.

Q. Fine. You said that one of the reasons the methodology was bad is because it fails to take into account epidemiology studies that show that auto mechanics are not at increased risk of developing an asbestos-related disease; isn't that what you said?

A. Yes.

Q. All right. And so the question I asked you is whether you agree that a true negative study, meaning one that proves that you are not at increased risk for the disease from exposure to the product must fulfill these three criteria: It must be large. It must be sensitive. It must have well-documented exposure data. Do you agree with what this epidemiologist says?

MR. LOPEZ: Same objection as before, Your Honor.

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Dr. Paustenbach - Cross

THE COURT: Understood. Overruled. Go ahead.

THE WITNESS: I will defer to Dr. Teta as being able to provide a stronger and more in-depth opinion on this.

But to prove the negative, what you are asking me, it takes a very strong data set. And this gentleman has suggested that these are the three criteria he believes are necessary to prove that something doesn't happen. And that's a very high test. I would agree with him.

BY MR. ROSENBERG:

Q. And when you were criticizing these physicians for not taking into account properly the epidemiological studies that exists, that you say exists in connection with brake workers, any one of those studies, large, sensitive and have well-documented exposure data?

MR. LOPEZ: Well, let me object. Again, the article is referring to a cohort study. He's lumping all the epidemiology together. And he's not asking a question that is based on what the article is talking

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about, which is a cohort study.

THE COURT: I'll sustain it, but not for that reason. I don't think the reference to a negative -- no one that I understand has ever produced a negative study that I've heard. And I think the reference to a negative study is inappropriate because there has been no evidence of a negative study.

MR. ROSENBERG: You sustained it.

THE COURT: I wanted to explain why. It wasn't for his reason.

MR. ROSENBERG: My understanding of the way they interpret the epidemiology here --

THE COURT: I understand your position, and I disagree with you. So we don't have to reiterate our differences.

MR. ROSENBERG: So, let me just move on.

BY MR. ROSENBERG:

Q. Now, on the issue of the methodologies and whether all fiber types can cause mesothelioma and how much exposure a person needs in order to

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EXHIBIT "B"

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- - -

IN THE COURT OF COMMON PLEAS
FIRST JUDICIAL DISTRICT OF PENNSYLVANIA
CIVIL TRIAL DIVISION

- - -

PLAINTIFF	:	[!TERM] TERM, 2004
	:	
VS.	:	
	:	
DEFENDANT	:	NO. ^ ##

- - -

JURY TRIAL

DAY

- - -

February 15, 2008

Courtroom number, City Hall

Philadelphia, Pennsylvania

- - -

BEFORE: THE HONORABLE [!JUDGES]

- - -

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Control No.: 09102661

1 *Dr. Teta - Cross Examination*

01:26 2 Q. Okay. Well, we will get to your -- we will
01:26 3 get to your paper, and what assumptions you were
01:26 4 making in a minute?
01:26 5 A. Sure.
01:26 6 THE COURT: Was there a period of
01:26 7 time, and I am trying to recall some of the
01:26 8 testimony yesterday, there was at least an
01:27 9 acknowledgment of an increased risk from
01:27 10 exposure, such that some of the occupational
01:27 11 practices were changed. And let me follow-up.
01:27 12 And you know, and was your study before the
01:27 13 warning or after the warning, assuming there
01:27 14 was such a warning?
01:27 15 THE WITNESS: Well, the warning that I
01:27 16 am thinking of, I am not sure what you are,
01:27 17 Sir, is maybe that first gold book in '86, or
01:27 18 the first time OSHA regulated asbestos,
01:27 19 perhaps. So, we're talking the mid '70's.
01:27 20 THE COURT: Okay. Go ahead, counsel.
01:27 21 BY MISS CLANCY:
01:27 22 Q. Okay. Moving on then, in 1976, are you aware
01:27 23 of the Lorimer study --
01:27 24 A. I am.
01:27 25 Q. -- asbestos exposure?

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1 *Dr. Teta - Cross Examination*

01:27 2 A. Yes, I am. Excuse me, I wouldn't call it a
01:28 3 study, however, there's no comparison group. The
01:28 4 Lorimer survey, I guess.
01:28 5 Q. And you're aware that Lorimer, in 1976,
01:28 6 studied brake repair workers in the United States,
01:28 7 and Lorimer observed that, in the first paragraph,
01:29 8 brake lining posed a potential hazard for asbestos
01:29 9 exposure because they contained thirty-three to
01:29 10 seventy-three percent asbestos. And Lorimer further
01:29 11 went on to observe that asbestosis in brake liners
01:29 12 has been recognized and compensated in Great Britain
01:29 13 for many years, and instances of mesothelioma in
01:29 14 garage workers have also been identified.
01:29 15 Did you take the Lorimer observations
01:29 16 into consideration when you were doing your
01:29 17 historical review of the literature?
01:29 18 MR. SAMMS: Objection, Your Honor.
01:29 19 This question about asbestosis, consistent with
01:29 20 our proffer, this witness is testifying solely
01:29 21 about mesothelioma.
01:29 22 THE COURT: I understand, but it
01:29 23 included the conclusion based upon the
01:29 24 mesothelioma. It's an appropriate question.
01:29 25 Overruled.

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01:29 THE WITNESS: Okay. I certainly
01:29 reviewed the Lorimer work in great detail. I
01:30 would like to see the quote back so I could
01:30 address the points on there.
01:30 BY MISS CLANCY:
01:30 Q. I think you have it up there.
01:30 A. Yes, but you highlighted -- certainly
01:30 asbestosis was seen in asbestos plants going back to
01:30 1930's in manufacturing. Even chrysotile at very
01:30 high exposures, can cause asbestosis. And so
01:30 there's nothing unusual there about being
01:30 compensated. This was in a factory. And we know
01:30 instances of mesothelioma have appeared in garage
01:30 workers. We just went through how that can happen
01:30 very easily. It's not proof that the job caused the
01:30 disease.
01:30 Q. Okay.
01:30 And it's not the job that causes the
01:31 disease, it's asbestos that causes the disease,
01:31 correct?
01:31 A. The disease could be caused, as I showed, by
01:31 could be idiopathic, it could be another job with
01:31 asbestos exposure.
01:31 Q. All right. And Lorimer concludes, as you are

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01:31 aware, he said, as you say it's a preliminary study,
01:31 and even he says, while this preliminary study was
01:31 limited in scope, and was restricted to volunteers,
01:31 and its results therefore -- and it results cannot
01:31 therefore readily be generalized to all brake
01:31 mechanics, maintenance workers in the United States,
01:31 the findings suggest that asbestos disease will be
01:31 present among such workers, and that appropriate
01:32 control measures should be urgently instituted.
01:32 You're aware of Lorimer's conclusion, correct?
01:32 A. I am.
01:32 Q. Now, are you aware of what Ford did in
01:32 response to Lorimer's conclusion?
01:32 A. I am not.
01:32 MR. LOPEZ: Objection, relevance, Your
01:32 Honor.
01:32 MISS CLANCY: Your Honor, these are
01:32 sworn interrogatories of Ford. They discuss
01:32 the Lorimer paper, and how in response to the
01:32 Lorimer paper, they felt a necessity to
01:32 implement warnings to avoid the hazards of
01:32 exposure to asbestos upon friction work.
01:32 THE COURT: Overruled.
01:32 What are we marking, twenty-four?

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01:32 MISS CLANCY: Twenty-four.

01:32 BY MISS CLANCY:

01:33 Q. Okay. If you turn to Ford's response to

01:33 request for production number three, it's the fifth

01:33 page?

01:33 A. I am on page six, is that --

01:33 Q. Is it -- it's right on the bottom -- it says

01:33 five right here, on the lower right hand corner.

01:33 A. I am sorry, mine doesn't seem to look anything

01:33 that. In addition, I see it. I found it --

01:33 Q. Okay.

01:33 A. -- on page five, which is page three here.

01:33 Okay.

01:33 MR. LOPEZ: Objection, Your Honor.

01:33 Could we have a foundation?

01:33 MISS CLANCY: Foundation.

01:33 THE COURT: For the letter you just

01:33 objected to?

01:33 MR. LOPEZ: What she's read, relied,

01:33 considered. I am not sure what's being done

01:33 here.

01:33 THE COURT: I am not, either. But I

01:33 would like to hear her question.

01:33 So, go ahead.

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1 *Dr. Teta - Cross Examination*

01:34 2 BY MISS CLANCY:

01:34 3 Q. You see here where Ford references that it

01:34 4 participated and provided partial funding for the

01:34 5 studies done by Dr. Sellicoff in the paper that he

01:34 6 just discussed, asbestos enclosure during brake

01:34 7 line, and maintenance, and repair. Do you see that?

01:34 8 A. Yes.

01:34 9 Q. And so, when you turn to this page six, Ford

01:34 10 reacted by saying, we have -- Ford says, as a result

01:34 11 of the testing referenced above, it issued on

01:34 12 August 3rd, 1973 memorandum to plant safety

01:34 13 engineers directing that brake drums be cleaned

01:34 14 using industrial type vacuum cleaners. The memo

01:34 15 directed that air hoses should not be used to clean

01:35 16 brake drums.

01:35 17 Do you see, that Ford has now reacted

01:35 18 by prohibiting certain practices in brake work that

01:35 19 could cause exposure to asbestos. Do you see that?

01:35 20 MR. LOPEZ: I just renew my objection.

01:35 21 Relevance.

01:35 22 THE WITNESS: I see that Ford --

01:35 23 THE COURT: Overruled. Go ahead,

01:35 24 doctor.

01:35 25 THE WITNESS: I am sorry.

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1 *Dr. Teta - Cross Examination*

01:35 2 I see that Ford behaved very
01:35 3 responsibly to first try to find out what kind
01:35 4 of exposures actually exist in that workplace,
01:35 5 and they did initiate studies with Dr.
01:35 6 Sellicoff and others. And in the meantime,
01:35 7 until they knew enough, they took precautions
01:35 8 in the workplace to keep exposures -- to reduce
01:35 9 exposures. Very responsible behavior.
01:35 10 BY MISS CLANCY:
01:35 11 Q. Now, would you say, though, that it's your
01:35 12 opinion that no one who is an auto mechanic exposed
01:35 13 to asbestos by means of friction brake products is
01:35 14 in danger of getting any cancer, correct? That's
01:35 15 your opinion?
01:35 16 A. This is -- we're talking here 1970's, the
01:36 17 studies weren't out yet.
01:36 18 Q. Okay. I am asking for your opinion today?
01:36 19 A. My opinion is that working as a vehicle
01:36 20 mechanic doing brake or clutch work does not pose a
01:36 21 risk for mesothelioma. That's my position, based on
01:36 22 studies that were first published in 1980 through
01:36 23 now, 2005.
01:36 24 Q. Okay. And so your opinion -- you hold that
01:36 25 opinion regardless of whether or not protections are

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1 *Dr. Teta - Cross Examination*

01:36 2 put in place? In other words, you don't think it's
01:36 3 dangerous to work with friction -- asbestos
01:36 4 containing brake products whether or not you're
01:36 5 using a compressed air hose, or not using a
01:36 6 compressed air hose, whether or not you're putting
01:36 7 exhaust ventilation system in place or not. You
01:36 8 don't even need safety precautions, because there's
01:36 9 just simply no danger to working with brake
01:36 10 products, is that your opinion?
01:36 11 MR. SAMMS: Objection, Your Honor.
01:36 12 THE COURT: Sustained.
01:36 13 BY MISS CLANCY:
01:36 14 Q. I am trying to understand, do you believe
01:37 15 there is any necessity for productive measures when
01:37 16 a brake worker is working with asbestos containing
01:37 17 friction products? Or is it your opinion, based on
01:37 18 your review of the literature --
01:37 19 THE COURT: You're asking the same
01:37 20 question.
01:37 21 MISS CLANCY: I am trying to
01:37 22 understand --
01:37 23 THE COURT: And I ruled that the
01:37 24 question is inappropriate.
01:37 25 MISS CLANCY: Okay.

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1 *Dr. Teta - Cross Examination*

01:37 2 BY MISS CLANCY:

01:37 3 Q. What I am trying to understand is your opinion

01:37 4 with respect to asbestos brake products and the

01:37 5 safety of working around them?

01:37 6 THE COURT: Please, let's get off --

01:37 7 let's move -- so you understand, that's not the

01:37 8 issue before me, and it's not questioned that

01:37 9 exposure to certain asbestos causes disease.

01:37 10 That's what you are asking her. That's not at

01:37 11 issue.

01:37 12 Move on, please.

01:37 13 MISS CLANCY: Okay.

01:37 14 BY MISS CLANCY:

01:38 15 Q. Your study came out in 1983 on the Connecticut

01:38 16 Registry of -- analyzing the Connecticut Registry of

01:38 17 death by association, right?

01:38 18 A. The Connecticut Tumor Registry, it wasn't

01:38 19 based on deaths, but diagnoses of mesothelioma in

01:38 20 Connecticut.

01:38 21 Q. Okay.

01:38 22 And --

01:38 23 THE COURT: Before we get on, my law

01:38 24 clerk and I, Donna and I, were talking about

01:38 25 the wide confidence interval in your study.

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EXHIBIT "C"

Case ID: 861000001
Control No.: 09102661

THE FIRST JUDICIAL DISTRICT OF PENNSYLVANIA, PHILADELPHIA COUNTY
IN THE COURT OF COMMON PLEAS

IN RE: **ASBESTOS LITIGATION**	**: TRIAL DIVISION- CIVIL** **: OCTOBER TERM, 1986** **: No. 0001**
(Certain Asbestos Friction Cases Involving Chrysler LLC	**Control # 114291**
Motion to Exclude Plaintiff's Causation Expert Testimony that Relies Upon Novel Scientific Evidence and Request for Evidentiary Hearing	

DOCKETED
JAN 25 2008
S. LONERGAN

ORDER

AND NOW, to wit, this 25th day of January, 2008, for purposes of judicial administration of the upcoming Frye Hearing scheduled to commence on February 11, 2008, Chrysler shall identify not more than six (6) cases wherein the expert's methodology used to support their respective opinions on causation are being challenged. This is to be done on or before February 4th, 2008.

Further, the parties shall exchange the identities of the witnesses they plan to offer at the Hearing and the tentative order and time of presentation at the Hearing so that the allocated time is used most effectively. This is to be done on or before February 4th, 2008..

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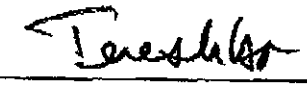
PURSUANT TO Pa.R.C.P. 236(b)
JAN 25 2008
FIRST JUDICIAL DISTRICT OF PA
USER I.D.:

BY THE COURT:



ALLAN L. TERESHKO,
Coordinating Judge,
Complex Litigation Program

All Counsel

Case ID: 861000001
Control No.: 09102661

EXHIBIT "D"

Case ID: 861000001
Control No.: 09102661

THE FIRST JUDICIAL DISTRICT OF PENNSYLVANIA, PHILADELPHIA COUNTY
IN THE COURT OF COMMON PLEAS

IN RE: ASBESTOS LITIGATION	: TRIAL DIVISION- CIVIL : OCTOBER TERM, 1986 : No. 0001
(Certain Asbestos Friction Cases Involving Chrysler LLC	
Motion to Exclude Plaintiff's Causation Expert Testimony that Relies Upon Novel Scientific Evidence and Request for Evidentiary Hearing	Control # 114291

DOCKETED
JAN 30 2008
S. LONERGAN

ORDER

AND NOW, to wit, this 30th day of January, 2008, in response to the parties' letters of January 29, 2008, the following is entered at the request of counsel for Plaintiff in *Duke v. A.W. Chesterton Co.*, et al, December Term 2006, No. 3451. The expert opinions in *Duke* demonstrating the methodology used to determine causation shall be included in the group at the upcoming *Frye* Hearing. The Court declines to require a "pool of cases" designation by Defendant Chrysler since the actual cases will be identified in accordance with the Order of January 25, 2008.

Further, the Court takes no current position on the status of other cases or the effect of any ruling on such cases.

BY THE COURT:

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JAN 30 2008
FIRST JUDICIAL DISTRICT OF PA
USER I.D.:

ALLAN L. TERESHKO,
Coordinating Judge,
Complex Litigation Program

All Counsel

Case ID: 861000001
Control No.: 09102661