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January 22, 2010

Drs. Steenland, Savitz, and Fletcher
c/o Maryann K. Aiello, Esq.
Assistant General Counsel
The Garden City Group, Inc.
105 Maxess Road
Melville, NY 11747

Re: *Jack W. Leach, et al. v. E.I. duPont de Nemours and Company*
Circuit Court of Wood County, West Virginia, Civil Action. No. 01-C-608
Science Panel

Dear Drs. Steenland, Savitz, and Fletcher:

On behalf of the Plaintiff class in the referenced matter (the "Class"), we are submitting this letter in response to the January 18, 2010, email from Dr. Fletcher seeking guidance from the Parties as to proper interpretation of the "probable link" standard to be applied by the Panel under the Settlement Agreement and the Panel's Contracts. We hope that this letter helps clarify the important and critical differences between traditional "causation" standards that each Panelist has applied for many years in their academic and scientific work and the special evidentiary standard - "probable link" - developed by the West Virginia Supreme Court for the legal claims at issue here.

As discussed during the original interviews of the Panel members approximately five years ago, the Panelists were not retained to undertake a typical academic or scientific epidemiology project but to, in essence, serve as surrogates for the judge and jury in a legal proceeding where the only question to be resolved by the Panel is whether there is any "probable link" between human exposure to PFOA and any human disease, as those terms are specifically defined and used under West Virginia law and the Parties' Settlement Agreement. It was explained that Plaintiffs had originally brought claims against DuPont in West Virginia State Court back in 2001, seeking medical monitoring based on their belief that their exposure to elevated levels of PFOA in their drinking water had increased their risk of developing disease in the future. As was discussed with the Panelists during their interviews, the West Virginia Supreme Court identified the legal requirements to prevail on such a medical monitoring claim in the case of *Bower v. Westinghouse Electric Corp.*, 206 W. Va. 133, 522 S.E.2d 424 (W. Va. 1999). In *Bower*, the West Virginia Supreme Court held that, to prevail on a claim

for medical monitoring, a plaintiff would have to prove to a judge or jury that: "(1) he or she has, relative to the general population, been significantly exposed; (2) to a proven hazardous substance; (3) through the tortious conduct of the defendant; (4) as a proximate result of the exposure, plaintiff has suffered an increased risk of contracting a serious latent disease; (5) the increased risk of disease makes it reasonably necessary for the plaintiff to undergo periodic diagnostic medical examinations different from what would be prescribed in the absence of the exposure; and (6) monitoring procedures exist that make the early detection of a disease possible." *Bower*, 522 S.E.2d at 432-433.

In this case, the Parties, after litigating the issues for many years, agreed that, rather than present all the evidence on all these points to the judge or a jury in Wood County, West Virginia, a mechanism would be set up whereby the entire Class' right to medical monitoring would be decided by unbiased, independent scientists. In addition, the Parties agreed that, rather than require these scientists to weigh all the evidence on each of the six medical monitoring elements identified in *Bower*, the scientists picked to serve as the "surrogate jury" would be asked to focus on only certain specific portions of the *Bower* medical monitoring elements. In this regard, the Parties agreed that the jury's traditional role of weighing the evidence would be assigned to as many as two different groups of scientists: 1) a group of three epidemiologists to be called the "Science Panel"; and (potentially) 2) a group of three medical doctors to be called the "Medical Panel."

The "Science Panel" was formed first to focus exclusively on the second *Bower* element: whether the chemical the Class had been exposed to (in this case, PFOA or "C-8") is a "proven hazardous substance." With respect to that specific element of a medical monitoring claim, the *Bower* Court stated that "the plaintiffs must present scientific evidence demonstrating a *probable link* between exposure to a particular compound and human disease." *Bower*, 522 S.E.2d. at 433 (emphasis added). Thus, the Science Panel was charged exclusively with determining whether there is scientific evidence demonstrating a "probable link" between exposure to PFOA and human disease.

Although the West Virginia Supreme Court has not provided any specific explanation of the "probable link" standard, it has been widely understood within the legal community that "probable link" is a lower standard of proof than a finding of causation. More specifically, the Court's "probable link" test was intended to "be a relaxation of the traditional requirement that a ... plaintiff prove general causation, that is, that the substance in question causes the disease..." Imbriglia, S., *Bower v. Westinghouse: Liberalizing the Prerequisites For Medical Monitoring* (published at www.heckerbrown.com). "Bower ... reduces the necessary proof to a 'probable link' and thereby suggests that testimony from a toxicologist or other expert that Substance A probably causes Disease B in humans is sufficient. This formulation of the 'proven hazardous substance' element [of traditional medical monitoring claims] is unique and

greatly expands the number of substances that are potential bases for medical monitoring claims.” *Id.*

The distinction between the causation standard and the more lenient “probable link” standard of proof is of utmost importance. It is not simply a matter of semantics, nor an alternative way of describing the same general idea to different audiences. It is a fundamental distinction in the level and quantity of evidence necessary to make the determination at issue. Whereas proving a certain chemical actually “causes” a certain adverse health effect traditionally has been viewed as requiring a very substantial weight of the evidence, often with high (often 90 percent or higher) confidence levels, proof of a “probable link” does not require anywhere near such a high a level of proof. See, e.g., *In re MTBE Prod. Liab. Litig.*, 591 F.Supp.2d 259, 289 n. 155 (S.D.N.Y. 2008) (quoting William Glaberson, “The Courts v. Scientific Certainty,” *N.Y. Times*, June 27, 1999 § 4 (Magazine) at 5 (“Science, which never stops searching for answers, has a high threshold for reaching conclusions: 95 percent certainty, some scientists say, is necessary to decide that one thing probably caused another. But the law must stop its search at the conclusion of each case. So juries in civil cases are told that a mere preponderance of the evidence – 51 percent – is enough certainty to render a verdict.”)).

This distinction between scientific standards of causation and legal standards of proof has long been recognized by the courts:

The tension between standards of certainty in science and in the law has been often noted, especially in cases where scientific evidence is necessary to prove causation. The courts have acknowledged that the law imposes liability even where “the cause and effect relationship ... [can] not be established with scientific certainty.” This is because “a court proceeding ... is not simply a search for dispassionate truth.” Unlike science, the law is focused on “resolving social problems [its] concern is whether tort and injury bear a close enough relationship to make it equitable to impose financial responsibility upon a defendant.”

In re MTBE Prod. Liab. Litig., 591 F.Supp.2d at 289-90 (citations omitted). See also *Hodges v. Sec’y. of Dept. of Health and Human Servs.*, 9 F.3d 958, 967 (C.A.Fed.1993) (“Scientists...must understand the reality that the law requires a burden of proof, or confidence level, other than the 95 percent confidence level that is often used by scientists to reject the possibility that chance alone accounted for observed differences.”) (citing *Science and Technology in Judicial Decision Making*, Report of the Carnegie Commission on Science, Technology, and Government (1993) at 28)).

To clarify this critical distinction in the level of proof, the Parties agreed that the “probable link” standard would be specifically defined in their Settlement Agreement to mean that, “based on the weight of the available evidence, it is *more likely than not* that

there is a link between exposure to C-8 and a particular human disease among Class members.” (Settlement Agreement, at Section 1.49 (emphasis added)) This “more likely than not” standard is a traditional standard of proof in legal proceedings also known as the “preponderance of the evidence” standard. As the West Virginia Supreme Court of Appeals has explained, “[t]he generally accepted meaning of the preponderance of the evidence is ‘more likely than not.’” *Cobb v. West Virginia Human Rights Com’n*, 217 W. Va. 761, 777 n. 26 (W. Va. 2005) (citing *Jackson v. State Farm Mut. Auto. Ins. Co.*, 215 W. Va. 634, 640 (W. Va. 2004)).

The “preponderance of the evidence”/“more likely than not” standard is often described as the “50.1% standard.” See, e.g., *U.S. v. Gigante*, 94 F.3d 53, 55-56 (2nd Cir. 1996) (citations omitted) (“Quantified, the preponderance standard would be 50+% probable”); *U.S. v. Voigt*, 89 F.3d 1050, 1087 (3rd Cir. 1996) (preponderance burden is 50.1%). This means that, if the evidence even slightly leans in one direction, by only 50.1% over 49.9%, the standard is met. Courts have explained this concept as follows:

To establish by a preponderance of the evidence means to prove that something is more likely to happen than not to happen. It is a lot of times demonstrated by a scale and if there is enough weight to make the scale unbalance, that’s a preponderance. If the preponderance is the other way, or if everything just stays even, then the defendant should have the verdict, but this preponderance has to be enough just to tip the scale.

The preponderance of the evidence in the case means such evidence as, when considered and compared with that opposed to it, has more convincing force and produces in your mind belief that what is sought to be proved is more likely true than not true.

Moore v. U.S., 1973 WL 3198, *2 (S.D.W.Va. 1973).

This means that, if the evidence is leaning in one direction, “even in the slightest degree,” the preponderance of the evidence standard has been met. *McCullough v. Clark*, 88 W. Va. 22, 106 S.E. 61, 70 (W. Va. 1921); see also *Proposed Model Jury Instructions*,¹ 1.11 Burden of Proof (“In a civil case...it is proper to find that the plaintiff has succeeded in carrying the burden of proof if you believe that the evidence of the plaintiff outweighs that of the defendant even in the slightest degree...”).

In short, the Science Panel’s sole charge is to determine if, looking at all the available evidence, there is just enough information to tip the scales toward a finding of any link between PFOA exposure and any human disease. If the evidence is leaning in

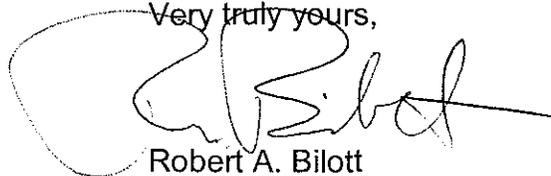
¹ Proposed jury instructions for West Virginia, approved for provisional use by the West Virginia Supreme Court of Appeals. Available at <http://web.archive.org/web/20070301083027/www.state.wv.us/wvsca/jury/civilchg.htm>.

that direction, even in the slightest degree, then the "probable link" standard has been met. This is the same standard of proof that a Wood County, West Virginia, jury would have been charged with, if the Class' medical monitoring claims had proceeded to trial. The Science panel, serving as surrogates for that jury in weighing the evidence on this issue, must apply that same legal standard of proof, and only that standard.

The probable link question is the only aspect of the *Bower* medical monitoring elements that the Science Panel has been charged with addressing. If the Science Panel finds that the weight of the evidence tips in favor of there being any such link, then the separate Medical Panel will be created to address certain other specified (and limited) aspects of the *Bower* medical monitoring elements relating to what type of medical monitoring tests should be made available to the Class members. The Science Panel is not charged with or authorized to address any of those other issues.

Plaintiffs hope that this letter eliminates any confusion about the distinction between the probable link standard to be applied by the Science Panel in the context of this specific legal proceeding and the inapplicable causation standard that the Panel may be more familiar with from its prior academic and scientific work. To the extent there is any remaining confusion or ambiguity as to the way the evidence must be weighed in this matter, Plaintiffs recommend that a hearing be scheduled promptly with the Court so that the Panel can seek and receive whatever additional clarifications or guidance it needs in this regard directly from the Court.

Very truly yours,

A handwritten signature in black ink, appearing to read "R. Bilott", written over a large, faint circular stamp or watermark.

Robert A. Bilott

RAB:mdm