**IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA**

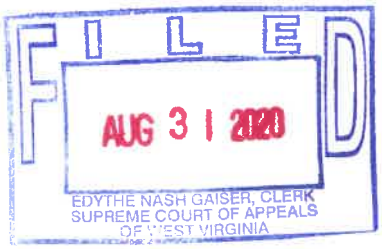
JAMES F. HUMPHREYS & ASSOCIATES, L.C.,

Plaintiff,

v. Kanawha County Civil Action No. 20-C-413
(Honorable Carrie Webster)

THE CALWELL PRACTICE, LC and
CALWELL LUCE DITRAPANO PLLC,

Defendants.




**TO: CHIEF JUSTICE TIM ARMSTEAD**

**DEFENDANTS' RESPONSE OPPOSING MOTION TO REFER TO BUSINESS COURT DIVISION**

COME NOW the Defendants, by and through undersigned counsel, and respond to and oppose Plaintiff's *Motion to Refer to Business Court Division*. For the reasons set forth below, Plaintiff's *Motion* should be denied. Defendants respectfully request that the Chief Justice decline the requested referral.

**Introduction**

The underlying civil action purports to be a new breach of contract claim. This is not accurate. All of the rights/obligations between Humphreys and Calwell related to the settlement of *Bibb* class action were previously litigated at length before the Honorable Derek C. Swope in the original *Bibb* class action case, because Humphreys previously filed an attorney's lien in the *Bibb* case against any settlement monies paid by to Calwell.[1] As a result, all of the

[1] For the convenience of the Court, the Defendants will refer to the Parties as "Humphreys" and "Calwell." This is consistent with the terminology used by Judge Swope in the *Bibb* litigation. Judge Swope was assigned to the *Bibb* case by the Supreme Court of Appeals after the late Judge O.C. Spaulding became terminally ill.

rights/obligations between Humphreys and Calwell with respect to attorneys fees are set forth in a series of orders entered by Judge Swope in the *Bibb* case. With respect to the particular obligation that is the subject of Humphreys' pending lawsuit,[2] that obligation is governed by two orders entered by Judge Swope in the *Bibb* case – one entered August 15, 2014[3] and the other entered September 8, 2017. The trial court will likely need only to review these two orders to decide the merits of Humphreys' underlying claim.[4] For this reason, Humphreys' underlying lawsuit is clearly not a "complex" case involving "highly technical commercial issues" for which the Business Court Division was created. See *W. Va. Code* § 51-2-15(a). It is merely the remnant of a fee dispute that has been recycled and re-packaged as a new lawsuit by a disgruntled lawyer.

**Relevant Background**

The Bibb class action settlement received final approval from Judge Swope in January 2013 (although the implementation of the settlement was delayed for more than a year following unsuccessful appeals by third parties to the West Virginia Supreme Court as well as the United States Supreme Court). Judge Swope awarded Calwell a "base fee" of $20 million (which represented a $13 million fee and $7 in expenses). In addition to this "base fee," Judge Swope ruled that Calwell would receive up to $9.5 million in additional fees if certain contingencies

[2] Humphreys claims that Calwell owes him 12.5% of a $3 million payment made by Monsanto Company to Calwell in September 2017.

[3] Humphreys does not acknowledge the existence of this order in his underlying Complaint.

[4] In his Complaint, Humphreys' references the terms of multiple memorandums of understanding and agreements between Humphreys and Calwell dating back to 2004. These are all irrelevant. Judge Swope has already done the "heavy lifting" and determined all of the rights/obligations between Humphreys and Calwell related to the *Bibb* class settlement.

occurred during the implementation of *Bibb* settlement. As discussed below, Judge Swope ruled that Calwell would receive so-called "Incentive Payments" (up to $3 millions) for each class member that initially registered for the settlement programs. Judge Swope also ruled that Calwell would receive a fee of $6.5 million if a so-called "Triggering Event" occurred within the first five years of the Medical Monitoring Program. This "Triggering Event" was a term of art utilized in the Medical Monitoring Settlement and is discussed more fully below.[5]

1. Calwell satisfied his obligations to Humphreys regarding the "Base Fee."

Calwell fully satisfied his obligations to Humphreys with respect to the Court's award of the $20 million "base fee." This was acknowledged by Humphreys in June 2014. See *James F. Humphreys and James F. Humphrey & Associates, L.C.'s Withdrawal and Release of their Notice of Attorneys' Charging Lien*, dated June 12, 2014, attached hereto as **Exhibit A**. Thus, the only remaining fees that Humphreys could assert a claim to in the *Bibb* litigation were those fees received by Calwell as Incentive Payments or contingent on the occurrence of the Triggering Event. Humphreys then filed a new attorney's lien in *Bibb* pertaining to the Incentive Payments and the Triggering Event. See *Notice of Attorney's Charging Lien*, dated June 19, 2014, attached hereto as **Exhibit B**.

2. Calwell satisfied his obligations to Humphreys regarding the Incentive Payments.

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[5] In his underlying *Complaint*, Humphreys characterizes the "Triggering Event" as an "Incentive Payment." This is inaccurate – the terms are not interchangeable. They pertain to separate fees that would be awarded to Calwell if separate contingencies occurred. As set forth below, the term "Incentive Payments" refers only to those payments made to Calwell based on the number of registrants in the settlement programs.

The *Bibb* class settlement provided class members with the opportunity to participate in (1) a Property Remediation Program as well as (2) a Medical Monitoring Program. The Property Remediation Program permitted (but did not require) class members in the Nitro, W.Va., area to have their homes specially cleaned to remove potentially contaminated indoor dust. The Medical Monitoring Program permitted (but did not require) class members to receive periodic physical examinations and blood work related to the early detection of cancer. Judge Swope believed that class members would benefit by participation in these programs, but he did not believe that class members could be compelled to participate. To bolster participation in these programs, Judge Swope awarded Calwell an additional fee that was contingent on the number of participants in the settlement programs. Calwell would receive Incentive Payments (up to $3 million) for each class member who initially registered for the Property Remediation and/or Medical Monitoring Programs.

Judge Swope ordered Calwell to pay 12.5% of the Incentive Payments he received to Humphreys. See *Order*, entered August 15, 2014, attached hereto as **Exhibit C**, at pp. 4-5. Calwell fully satisfied his obligations to Humphreys with respect to these Incentive Payments. Humphrey acknowledges that Calwell has paid him his proper share of these per-person Incentive Payments:

> Certain Incentive payments were, from time to time, made as various claimants qualified for the medical monitoring program and home cleaning. Class Counsel [Calwell] received a per-person fee for each qualifying claimant. In recognition of the Agreement, Humphreys received his 12.5% negotiated share of Incentive Payments.

See Humphreys' *Complaint* at ¶ 12. Thus, the only remaining obligation that Calwell would have to Humphreys would be if Calwell received a fee contingent on the occurrence of the Triggering Event.

3. Calwell's remaining obligation to Humphreys with respect to *Bibb* settlement is contingent on the occurrence of the Triggering Event.

As indicated above, the Medical Monitoring Program provided participants with periodic physical examinations and certain blood work related to the early detection of cancers. Initially, participants would receive these exams/blood every five (5) years (over a 30-year period). However, the settlement agreement allowed participants to receive these exams/blood work more frequently (up to every two (2) years) if a certain contingency occurred. This contingency is referred to as the Triggering Event. In order to determine whether the Triggering Event would occur, participants in the Medical Monitoring Program underwent additional blood work that measured the concentration of the chemical dioxin in their blood serum.[6] If a certain minimum percentage of participants had exceptionally elevated serum dioxin levels during any given screening period, then the subsequent screening period would occur in two (2) rather than (5) years. Should participants' serum dioxin levels satisfy this pre-determined formula, the "Triggering Event" was deemed to have occurred under the terms of the settlement. Judge Swope awarded class counsel an additional $6.5 million fee that was contingent on the Triggering Event occurring within the first five (5) years of medical monitoring program. Judge Swope ordered Calwell to

[6] This serum dioxin test did not have any therapeutic or diagnostic value. Therefore, it was considered separate from the physical exam/blood work that was provided to each participant as "medical monitoring."

pay Humphrey 12.5% of any contingent fee that Calwell received "based upon the occurrence of the triggering event." See **Exhibit C** at p. 5. In the underlying *Complaint*, Humphreys avers that a $3 million payment made by Monsanto to Calwell in September 2017 was the result of the Triggering Event occurring and therefore he is owed 12.5% of this payment. This is categorically false. The Triggering Event has never occurred, and Calwell has never been paid a fee for the Triggering Event occurring.

4. The Triggering Event has never occurred; Calwell has not further obligation to Humphreys.

After the Medical Monitoring Program commenced, Judge Swope ordered Calwell to remain involved (at Calwell's own expense) in the implementation of the Program. See *Affidavit of Thomas V. Flaherty, Esq.*, dated May 5, 2020, attached hereto as **Exhibit D**. Judge Swope directed Calwell to ensure that the various third-party contractors properly delivered services to participants in a manner consistent with the settlement agreement. *Id.* Calwell hired multiple experts to assist him in the review of class members' exam records, chain of custody documents (participants' serum samples had to be shipped to a highly specialized lab in Vancouver, Canada, for dioxin analysis), and lab data. After doing so, Calwell initiated new litigation in *Bibb* against defendant Monsanto Company related to the failure of third-party contractors, including Thomas Hospital, to comply with various complex medical and scientific protocols for collecting and analyzing participants' blood and serum samples. *Id.* The new legal issues that Calwell brought to the Court's attention threatened to delay the continued implementation of the Medical Monitoring Program. *Id.* Judge Swope directed Thomas V. Flaherty, Esq., who served as the Class Administrator, to help Calwell and Monsanto to negotiate a resolution of these new issues.

*Id.* The negotiations were successful. To resolve the new legal issues, Monsanto agreed to pay Calwell $3 million and the Parties agreed to modify the terms of the original Medical Monitoring Program (1) to eliminate future serum dioxin testing and (2) to nevertheless increase the frequency of participants' medical monitoring exams throughout the life Medical Monitoring Program. *Id.* The Triggering Event never occurred. *Id.* Judge Swope approved the Parties' proposed modification to the Medical Monitoring Class Settlement Agreement and the payment of a $3 million fee to Calwell for negotiating new benefits for participants in the Medical Monitoring Program. See *Agreed Order Adopting Modifications to the MMCSA*, entered September 8, 2017, attached hereto as **Exhibit E**. In doing so, Judge Swope explicitly ruled that the Triggering Event had not occurred. *Id.* ("...[T]he Court finds that the Triggering Event did not occur in the Initial Screening Period and is unlikely to ever occur.") Because the Triggering Event has never occurred, Calwell has no further obligation to Humphreys with respect to the *Bibb* settlement.

**Discussion**

Humphreys claim against Calwell is not a "complex" case involving "highly technical commercial issues" for which the Business Court Division was created. See *W.Va. Code* § 51-2-15(a). It is simply a fee dispute arising out of a separate civil action (the *Bibb* case) which is not clearly not subject to the jurisdiction of the Business Court Division. The merit and scope of Humphreys' underlying claim is not complicated. The trial court need only review the 2014 *Bibb* order that states Calwell must pay Humphreys a percentage of any contingent fee that Calwell received "based upon the occurrence of the triggering event" (**Exhibit C**) and the 2017 order approving payment of a new $3 million fee to Calwell where Judge Swope explicitly ruled that no

Triggering Event occurred (**Exhibit E**). Humphreys' underlying claim is more straightforward than many civil cases that trial courts deal with every day. There is certainly no reason to refer it another judge based on a need for specialized knowledge of commercial law.

There *is* one judge in West Virginia who has specialized knowledge of the *Bibb* litigation, who has already ruled on the rights/obligations as to Humphreys and Calwell as to the *Bibb* settlement, and who continues to retain jurisdiction over all matters relating to the administration of the Bibb settlement, including attorney fees. Yet Humphreys elected not to litigate his claim before Judge Swope in the *Bibb* case and, instead, he filed a new lawsuit in the Circuit Court of Kanawha County. Now Humphreys seeks to have the Chief Justice assign his lawsuit to yet another new judge. The Chief Justice should not condone such patently obvious forum-shopping. If Humphreys believes he requires a judge with specialized knowledge, he remains free to seek a transfer of his case to Judge Swope, *who is already familiar with every issue raised in Humphreys' Complaint.*

The issues of judicial estoppel/bankruptcy raised in Calwell's *Motion to Dismiss* do not change the nature of Humphreys' underlying claim – it remains a fee dispute between lawyers arising out of a still-pending civil tort case. Moreover, the issues of judicial estoppel/bankruptcy raised in Calwell's Motion to Dismiss below do not automatically warrant referral to the Business Court Division. Judicial estoppel is a common law principle long recognized and applied by all West Virginia courts. It has long been the law in West Virginia that, "[p]arties will not be permitted to assume successive inconsistent positions in the course of a suit or series of suits in reference to the same fact or set of facts." Syllabus, *McDonald v. Long*, 100 W.Va. 551, 131 S.E. 252 (1926). Moreover, the issue of judicial estoppel as it pertains to disclosures in bankruptcy

(or lack thereof in the case of Humphreys) has previously been ruled on by numerous courts. Humphreys has provided no reason why the trial court would have difficulty applying longstanding legal principles set forth in an existing body of case law to the facts of his case.

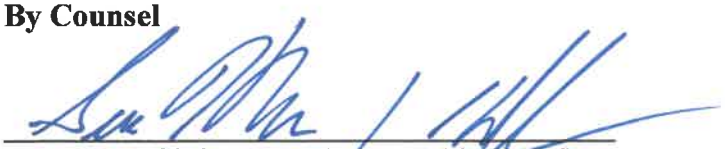
Humphreys' argument that referral to the Business Court Division is necessary to avoid possible "recusals and avoid the appearance of partiality," is, to say the least, premature. If Humphreys believes recusal is warranted, then he ought to move the trial court to do so. It is simply speculation for Humphreys to argue that the "some or all of the judges" in the Circuit Court of Kanawha County "may choose" to recuse themselves when Humphreys has provided no legal argument why recusal would be necessary. Presumably if the current trial judge believed recusal was warranted, she would have done so. Humphreys does not even attempt to link his "recusal argument" to any legitimate need to refer his case to Business Court Division, except to point out that no judges in Kanawha County currently sit on the Business Court panel. Again, it appears that Humphreys is simply abusing the referral process to fish for a new judge.

## Conclusion

Humphrey's underlying lawsuit is a garden-variety fee dispute; it does not involve "highly technical commercial issues." If Humphreys believed he needed a judge with "specialized knowledge" to rule on the issue of whether the Triggering Event occurred, he could have pursued this matter pursuant to the notice of attorney's lien that he filed in the *Bibb* case six years ago. Instead Humphreys elected to file a new lawsuit seeking to re-litigate the same issues that have previously been ruled upon by Judge Swope. Humphreys offers no legitimate argument why his recycled claims merit the attention of the Business Court Division and he should be estopped from

forum-shopping in this manner. Humphreys' *Motion to Refer to Business Court Division* should be denied.

**THE CALWELL PRACTICE, LC and**
**CALWELL LUCE DITRAPANO PLLC,**
**By Counsel**



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IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

JAMES F. HUMPHREYS & ASSOCIATES, L.C.,

Plaintiff,

v. Kanawha County Civil Action No. 20-C-413
(Honorable Carrie Webster)

THE CALWELL PRACTICE, LC and
CALWELL LUCE DITRAPANO PLLC,

Defendants.

**CERTIFICATE OF SERVICE**

I, Sean P. McGinley, do hereby certify that a copy of the foregoing *DEFENDANTS' RESPONSE OPPOSING MOTION TO REFER TO BUSINESS COURT DIVISION,* was served on counsel of record on the 31st day of August, 2020, through the United States Postal Service, postage prepaid, to the following:

Michael B. Hissam, Esq.
Andrew C. Robey, Esq.
Hissam Forman Donovan Ritchie PLLC
P.O. Box 3983
Charleston, WV 25339

Sean P. McGinley, Esq. (WV Bar No. 5836)


IN THE CIRCUIT COURT OF PUTNAM COUNTY, WEST VIRGINIA

ZINA G. BIBB, et al.,

Plaintiffs,

v.

Civil Action No. 04-C-465
*(Derek C. Swope, Circuit Judge)*

MONSANTO COMPANY, et al.,

Defendants.

**JAMES F. HUMPHREYS'S AND JAMES F. HUMPHREYS & ASSOCIATES, L.C.'S WITHDRAWAL AND RELEASE OF THEIR: NOTICE OF ATTORNEYS' CHARGING LIEN**

James F. Humphreys and James F. Humphreys & Associates, L.C. (collectively, "Humphreys") hereby withdraw their Notice of Attorneys' Charging Lien of April 10, 2014, with prejudice, and expressly release any charging lien encumbering the $20 million in attorneys' fees and expenses previously awarded to Class Counsel by the Court in its Order of January 25, 2014. Humphreys's withdrawal and release, however, *does not* extend to the $9.5 million in contingent attorneys' fees established by the Court's January 25, 2014 Order. Any interest Humphreys possesses in the $9.5 million will be addressed separately, at a later time.

JAMES F. HUMPHREYS
and
JAMES F. HUMPHREYS & ASSOCIATES, L.C.

*By Counsel*

Timothy N. Barber (WVSB #231)
Attorney at Law
Post Office Box 11746
Charleston, West Virginia 25339-1746
(304) 744-4400
*Counsel for James F. Humphreys and James F. Humphreys & Associates, L.C.*

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IN THE CIRCUIT COURT OF PUTNAM COUNTY, WEST VIRGINIA

ZINA G. BIBB, et al.,

Plaintiffs,

v.

Civil Action No. 04-C-465
*(Derek C. Swope, Circuit Judge)*

MONSANTO COMPANY, et al.,

Defendants.

CERTIFICATE OF SERVICE

I, Timothy N. Barber, counsel for James F. Humphreys and James F. Humphreys & Associates, L.C., do hereby certify that service of the foregoing **James F. Humphreys's and James F. Humphreys & Associates, L.C.'s Withdrawal and Release of Notice of Attorneys' Charging Lien** was made upon the following by United States mail, postage pre-paid, and by electronic mail to the following on this 12th day of June, 2014:

Charles M. Love, III, Esquire
Bowles Rice LLP
600 Quarrier Drive
Charleston, West Virginia 25301

W. Stuart Calwell, Jr., Esquire
The Calwell Practice PLLC
Law and Arts Center West
500 Randolph Street
Charleston, West Virginia 25302
*Via e-mail: scalwell@calwelllaw.com*

Thomas F. Urban, II, Esquire
Law Firm of Urban & Falk, PLLC
Post Office Box 321043
Alexandria, Virginia 22320
*Via e-mail: urban_law@yahoo.com*

Timothy N. Barber (WVSB #231)

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**IN THE CIRCUIT COURT OF PUTNAM COUNTY, WEST VIRGINIA**

**ZINA G. BIBB, VICKI BAILEY, HERBERT W. DIXON, NORMA J. DIXON, DONALD R. RHODES, WANDA M. RHODES, BETTY TYSON, and CHARLES S. TYSON,**

**Plaintiffs,**

**v.**

**Civil Action No. 04-C-465**
**Derek C. Swope, Judge**

**MONSANTO COMPANY, a Delaware corporation, with its principal place of business in the State of Missouri; PHARMACIA CORPORATION, a Delaware corporation, with its principal place of business in the State of Missouri,**

**Defendants.**

## NOTICE of ATTORNEY'S CHARGING LIEN

James F. Humphreys & Associates, L.C. (Humphreys) is, and was at all times applicable to this document, an entity licenced in West Virginia for the practice of law and a participant in a co-counsel agreement in the representation of the plaintiff(s) in this cause of action. In such capacity he states:

1. A written agreement was executed by Humphreys and The Calwell Practice PLLC (Calwell) on January 18, 2012 regarding the distribution of attorneys fees upon final determination of the issues in this action which directs that Humphreys shall receive a sum 12 ½ % of certain fees generated herein.[1]

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[1]The Calwell Practice PLLC as a party to the agreement was and is headed solely by W. Stuart Calwell, Jr., who executed the contract and whose legal practice also included a designation of him personally as well as Calwell Law and subsequently The Calwell Practice, L. C. all of which are collectively referenced herein jointly and severally as The Calwell Practice, PLLC (Calwell).

2. This action was the subject of a decree entitled "Final Order Awarding Attorneys' Fee and Litigation Expenses and Awarding Class Representatives' Incentive Payments" (fee order) entered January 23, 2013, by the presiding judge. Specific reference to particular terms of that decree are made in this filing for clarity and foundation – page and paragraph numbers are stated.

In turn, that decree references the entered order approving class settlements. In both filings two classes of plaintiffs are identified:

> (a) the "Property Class" which includes plaintiffs who have engaged loss of property or damage to property as a result of the actions alleged to Monsanto and the remediation of those damages to participating plaintiffs, and (b) the "Medical Monitoring Class" which includes plaintiffs who may have suffered or potentially will suffer personal injury by those actions of Monsanto with the periodic testing to identify participating plaintiffs with such afflictions.

3. In both classes, a specific stipend identified as a "base fee" was awarded to Calwell as class counsel – Property Class $2,250.000.00 and Medical Monitoring Class $5,250,000.00 [paragraphs 2 (i) and (ii)] which sums have been accorded consideration in previous proceedings and are not the subject of this lien.

4. Apart from the "base fees" described above, Calwell as class counsel may qualify for additional fees relative to both classes which are the subject of this lien.

5. In the same referenced paragraphs, Calwell will be entitled to fees based upon the number of class participants who undertake the remediation of the Property Class or the testing of the Medical Monitoring Class:

> (a) In the Property Class an attorneys' fee of $200.00 is awarded for

each participant with a cap of $900,000.00 for those fees [page 27 paragraph 2(i)].

(b) In the Medical Monitoring Class an attorney's fee of $500.00 is awarded for each participant with a cap of $2,100.000.00 for those fees [page 28 paragraph 2(ii)]. Further in the Medical Monitoring Class, a "Triggering Event" described at page 28 paragraph 2 (iii) with three ingredients, depending upon actions of Calwell and participants. Again, another "base award" of $5,500.000.00 was provided Calwell which (as with paragraph 3 above) have been accorded consideration in a previous proceeding and is not the subject of this lien. However, a "Contingent Award" of $6,500,000.00 was given Calwell in the event the "Triggering Event" above was realized. That "Contingent Award" as described at page 29 paragraph 2 (iii) is the subject of this lien.

6. The identified portion of the potential fee awards to Calwell are specifically the subject of the fee agreement set out above, are identified in the court decree and will be processed by Monsanto when submitted by Calwell therefore a proper subject of this lien.

6/19/14
DATE

TIMOTHY N. BARBER (WVSB #231)
Counsel for James F. Humphreys & Associates, L.C.
P. O. Box 11746
Charleston, West Virginia 25339-1746
(304) 744-4400

**IN THE CIRCUIT COURT OF PUTNAM COUNTY, WEST VIRGINIA**

**ZINA G. BIBB, VICKI BAILEY, HERBERT W. DIXON, NORMA J. DIXON, DONALD R. RHODES, WANDA M. RHODES, BETTY TYSON, and CHARLES S. TYSON,**

**Plaintiffs,**

**v.**

**Civil Action No. 04-C-465**
**Derek C. Swope, Judge**

**MONSANTO COMPANY, a Delaware corporation, with its principal place of business in the State of Missouri; PHARMACIA CORPORATION, a Delaware corporation, with its principal place of business in the State of Missouri,**

**Defendants.**

**CERTIFICATE OF SERVICE**

I, Timothy N. Barber, counsel of record herein, do hereby certify that I have served a true and exact copy of the forgoing Notice of Attorney's Charging Lien on the parties herein by delivery of the same, to counsel of record this 19th day of JUNE, 2014 as follows:

Charles M. Love, III
Attorney at Law
P. O. Box 1386
Charleston, West Virginia 25325-1386
FAX: (304) 347-1746

W. Stuart Calwell, Jr.
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500 Randolph Street
Charleston, West Virginia 25302
FAX: (304) 344-3684

Thomas V. Flaherty
Attorney at Law
P. O. Box 3843
Charleston, West Virginia 25338

6/19/14
DATE

Timothy N. Barber
TIMOTHY N. BARBER (WVSB #231)
Counsel for James F. Humphreys
P. O. Box 11746
Charleston, West Virginia 25339
(304) 744-4400

IN THE CIRCUIT COURT OF PUTNAM COUNTY, WEST VIRGINIA



**ZINA G. BIBB, et al.,**
***Plaintiffs,***

**v.**

**Civil Action No. 04-C-465**
***(Derek C. Swope, Circuit Judge by temporary assignment to the 29th Judicial Circuit)***

**MONSANTO COMPANY, et al.,**
***Defendants.***

**TERRY BRADSHAW, et al.,**
***Plaintiffs,***

**v.**

**Civil Action No. 07-C-339**
***(Derek C. Swope, Circuit Judge by temporary assignment to the 29th Judicial Circuit)***

**MONSANTO COMPANY, et al.,**
***Defendants.***

## ORDER

On June 26, 2014, came Zina G. Bibb et al., (hereinafter "the Class"), by counsel, Stuart Calwell, Esq., (hereinafter "Class Counsel"), Monsanto Company et al., (hereinafter "Monsanto"), by counsel, Charles M. Love, III, Esq., James Humphreys, Esq., by counsel,

Timothy Barber, Esq., Class Administrator, Thomas V. Flaherty, Esq., and Thomas F. Urban, II, Esq., for a status hearing regarding the administration of the Class Settlements in the above-referenced matter.[1] The Court also addressed the schedule for the resolution of the 194 companion personal injury and wrongful death cases.

**A. Mr. Urban's Motion to Require Disclosure of Entities to Which Attorneys' Fees Payments Were Made**

1) The first matter heard by the Court involved the Motion to Require Disclosure of Entities to Which Attorneys' Fees Payments Were Made (dkt. no. 3350);

2) On June 25, 2014, Mr. Urban filed such Motion, which sought to have the attorney fee agreement between Mr. Humphreys and Mr. Calwell disclosed to all Members of the Class Members pursuant to Rule 1.5(e) of the West Virginia Rules of Professional Conduct. Mr. Urban alleged that he and members of the Class were unaware of any fee agreement arrangement between Mr. Humphreys and Mr. Calwell;

3) Mr. Urban also argues that the Law Office of Sean R. Callagy, Esq., of New Jersey also had a fee agreement with Mr. Calwell. He alleges that the case was settled and a payment was made to Mr. Callagy, without informing the Settlement Classes of this arrangement. Furthermore, Mr. Urban avers that he was not made aware of this fee-sharing agreement or how those payments were made;

4) Rule 1.5(e) of the West Virginia Rules of Professional Conduct states as follows:

> (e) A division of a fee between lawyers who are not in the same firm may be made only if:

[1] Mr. Urban was permitted to appear by telephone.

(1) the division is in proportion to the services performed by each lawyer or, by written agreement with the client, each lawyer assumes joint responsibility for the representations;
(2) the client is advised of and does not object to the participation of all the lawyers involved; and
(3) the total fee is reasonable.

5) Mr. Urban was previously employed by Mr. Humphreys' Law Firm in its' Washington, D.C. office and was also named as counsel on the Complaint when it was filed on December 17, 2004;

6) In 2007, Mr. Urban sued Mr. Humphreys for breach of contract, in addition to several other claims, for attorneys' fees in association with the instant case. This case has been confidentially settled. Mr. Urban now claims that he was unaware of any fee agreement between Mr. Humphreys and Mr. Calwell in this case;

7) The Court FINDS that Mr. Urban and the Class were aware of the association between Mr. Humphreys and Mr. Calwell in this case as he was on the Complaint with them;

8) The Court ordered certain attorneys' fees in its Final Order Awarding Attorneys' Fees and Litigation Expenses and Awarding Class Representatives' Incentive Payments (dkt. no. 3274) and this Order was never appealed and accordingly, is final;

9) The Class was clearly aware from this Order of the total amount of the attorneys' fees and costs;

10) The division of the fees among the attorneys has no effect upon the Class Settlements or the personal injury and wrongful death cases. The allocation of the attorney fee distribution to Humphreys or Callagy has no effect upon any claimant. Finally, the Class Members and the personal injury and wrongful death plaintiffs agreed to Mr. Calwell's ability to enlist the assistance of other attorneys of his choosing (i.e., Humphreys or Callagy) pursuant to paragraph

1(b) of Mr. Humphreys and Mr. Calwell's Chlorinated Compound Litigation Contract of Representation and paragraph 3 of Mr. Humphreys' Contract of Representation[2];

11) The Court hereby **DENIES** the Motion to Disclose Entities to which Attorneys' Fees Payments Were Made[3];

12) Mr. Urban informed the Court that he wants to monitor the implementation of the settlements going forward;

13) The Court FINDS that Mr. Urban no longer has an official role in this matter as his Petition for Writ of *Certiorari* was denied by the United States Supreme Court and therefore, the Order Approving Settlements (dkt. no. 3272) is final;

**B. Division of Attorneys' Fees between Mr. Calwell and Mr. Humphreys**

14) The second matter heard by the Court was the division of fees between Mr. Calwell and Mr. Humphreys arising from the prosecution of the Class Action;

15) Mr. Humphreys filed a lien in the Class Action on June 23, 2014;

16) The Court FINDS and ORDERS that Mr. Calwell and Mr. Humphreys have agreed that Mr. Humphreys shall receive twelve (12) and a half percent from the attorneys' fees Mr. Calwell receives as Class Counsel in both the property and medical monitoring class settlements. The Court further ORDERS that Mr. Humphreys receive twelve (12) and half percent of any incentive payments Mr. Calwell receives for the number of Class Members who register for medical monitoring or property clean-up benefits. Once a level of five hundred (500) participants are registered, the Court will release the incentive fee payments to Mr. Calwell in the

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[2] Since the hearing, the Court has become aware of the representation agreements by Mr. Barber's August 6, 2014 letter. Mr. Urban has since responded to Mr. Barber's letter and is aware of these issues. The Court is sending their written communications to the Putnam County Circuit Clerk's Office for filing.

[3] Mr. Urban's Motion included ethical issues regarding the attorneys' fee agreement between Mr. Humphreys and Mr. Calwell. This Court is not the proper tribunal for any alleged violations of the Rules of Professional Conduct. Accordingly, this issue will not be considered.

amounts of Five Hundred Dollars ($500) for each medical monitoring participants and Two Hundred Dollars ($200) for each property remediation participants. These fees will be released at each interval of 500 persons registered and at the end of the Registration Period. Finally, the Court ORDERS that Mr. Humphreys receive twelve (12) and a half percent of any attorneys' fee payments that Mr. Calwell receives based upon the occurrence of the triggering event. Mr. Calwell must also reimburse Mr. Humphreys for his costs[4];

17) The Court FINDS that Monsanto has deposited Six and one half (6.5) million dollars into J.P. Morgan Chase Bank representing the Contingent Attorneys' Fees Fund per the July 16, 2014 Order (dkt. no. 3353);

**C. Implementation and Administration of the Class**

18) The next topic discussed was the implementation of the Class Settlements. Thomas V. Flaherty, Esq., Class Administrator, discussed the efforts to effectuate them;

19) The Effective Date of the Settlement is May 5, 2014, and all Notices and Questionnaires were scheduled to go out on July 3, 2014 and the Registration Period will end in October;

20) The storefront, with appropriate staffing, was scheduled to open in Nitro on July 8, 2014, and will be open from 10:00 a.m. to 6:00 p.m., every Tuesday through Friday, and from 10:00 a.m., to noon on Saturdays;

21) A 68 inch x 45 inch sign that includes the office hours, the period of time in days that it will be open, the toll-free number, and the style of the case will be placed on the storefront door. The website will also be updated to include this information;

22) Monsanto deposited the funds into three separate accounts with JP Morgan Chase for settlement administration;

[4] During the June 26, 2014 hearing, Mr. Calwell and Mr. Barber agreed that Mr. Humphreys had been paid his costs. (Hr'g Tr. 26: 3-5, June 26, 2014.)

23) Monsanto and the Class Administrator were in the process of determining how he was going to receive his compensation;

24) Monsanto and the Class Administrator will submit an Agreed Order defining the terms of his compensation;

25) The Court notes and emphasizes that it is ***immaterial*** as to who may (i.e., Mr. Flaherty, Mr. Calwell, employees of their respective firms, etc.,) initiate registration of Class Members for medical monitoring and/or property remediation. Each registration will result in an incentive payment to Mr. Calwell, to be divided with Mr. Humphreys as aforesaid;

26) The Class Representatives have been paid by Mr. Calwell;

27) The Science Panel Members have not been chosen and the parties will have Sixty (60) days from the entry of this Order to submit an Agreed Order designating its members;

28) The Medical Monitoring Settlement contains a contingent "triggering event" meaning, that if one hundred (100) registered participate in serum analysis and of that number 25% reach agreed upon background levels during the first five years, then Mr. Calwell will be awarded Six and One Half Million Dollars ($6,500,000.00) as a fee.

**D. Personal Injury/Wrongful Death Cases**

29) Having resolved the issues concerning the Class Action, the Court next addressed the resolution of the companion personal injury and wrongful death cases;

30) Thirty-Nine (39) of the One Hundred Ninety-Four (194) personal injury cases are wrongful death cases that will require court approval.[5] Of the 194 personal injury cases, approximately Eighty (80) of those cases are subject to liens from various governmental agencies and private insurers (i.e., Medicaid, Medicare liens, third-party insurers, etc.) The Court is unaware of the number of wrongful death cases that may also be subject to a lien. Therefore, the

[5] The 194 cases are set out in Exhibit A of this Order.

cases requiring a hearing will be scheduled on as-needed basis as Mr. Calwell receives the necessary lien information;

31) Mr. Barber argued that the plaintiffs in the 194 personal injury/wrongful death cases should be fully informed of all of the other plaintiffs' settlement amounts to avoid any potential conflict of interest pursuant to Rule 1.7 of the West Virginia Rules of Professional Conduct;

32) Pursuant to Rule 1.7 of the West Virginia Rules of Professional Conduct,

> (a) A lawyer shall not represent a client if the representation of that client will be directly adverse to another client, unless:
>
> (1) the lawyer reasonably believes the representation will not adversely affect the relationship with the other client; and
>
> (2) each client consents after consultation.
>
> (b) A lawyer shall not represent a client if the representation of that client may be materially limited by the lawyer's responsibilities to another client or to a third person, or by the lawyer's own interests, unless:
>
> (1) the lawyer reasonably believes the representation will not be adversely affected; and
>
> (2) the client consents after consultation. When representation of multiple clients in a single matter is undertaken, the consultation shall include explanation of the implications of the common representation and the advantages and risks involved.[6]

33) The parties will also submit an Agreed Order regarding how the payments and releases of the 194 personal injury/wrongful death cases are going to be administered. Any matrix or "bands" of differing injuries will be defined and shared with all the plaintiffs so as to explain the various gross recovery amounts for every claimant. Each plaintiff must know the amount of each individual's settlement and Mr. Humphreys must be informed of the individual settlement amounts pursuant to Rule 1.7 of the Rules of Professional Conduct.

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[6] The Court notes that the Rules of Professional Conduct are currently being revised and the revisions were not in effect at the time of these settlements.

34) Mr. Barber states that there is an ongoing issue between Mr. Love and Mr. Calwell as to how the Ten Million Dollars ($10,000,000.00) for the personal injury/wrongful death settlements will be distributed (i.e., either incrementally or in a lump sum amount). The Court ORDERS Mr. Calwell, Mr. Love, and Mr. Barber to communicate and determine within two (2) weeks of the entry of this Order whether Monsanto will settle with the personal injury/wrongful death plaintiffs individually as to each specific case, or only pay the full amount upon all 194 personal injury/wrongful death cases executing a full release or an order dismissing their case.

35) Because there is a dispute between Mr. Calwell and Mr. Humphreys over the division of fees and costs payable from these settlements, the Court is requiring that they mediate this issue. Mr. Calwell and Mr. Barber will submit an Agreed Order regarding a mediator within two (2) weeks from the entry of this Order for the purpose of mediating any issues concerning the division of attorneys' fees in the 194 personal injury/wrongful death cases. Mr. Calwell and Mr. Humphreys will each pay fifty (50) percent of the mediator's fee with a deposit paid in advance unless counsel and the mediator agree to another arrangement. Because counsel has been unable to agree to several proposed mediators since June 26, 2014, the Court will appoint a mediator of its' choosing in the event that counsel cannot reach an agreement as to the mediator in the allotted time.

The Clerk of the Putnam County Circuit Court is directed to file a copy of this Order in each of the 194 personal injury/wrongful death cases as well as in Civil Action No. 04-C-465.

The Clerk of the Putnam County Circuit Court is further directed to deliver true copies of this Order to counsel of record as set forth below.

Derek C. Swope

Derek C. Swope, Circuit Judge

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Telephone: (304) 744-4400
*Counsel for James F. Humphreys, Esq.*


# AFFIDAVIT OF THOMAS V. FLAHERTY, ESQ.

State of West Virginia,
County of Kanawha, to-wit:

The undersigned, Thomas V. Flaherty, Esq., having been first duly sworn, deposes and avers as follows:

1. I am the court-appointed Class Administrator of the Medical Monitoring Program set forth in the Medical Monitoring Class Settlement Agreement ("MMCSA") in the *Bibb v. Monsanto* class action. I have been so for the duration of the Medical Monitoring Program.

2. As Class Administrator I am familiar with the terms of the Medical Monitoring Program, including the so-called "trigger" provision[1] in the original MMCSA, as well as the court-ordered modifications to the MMCSA set forth in the *Agreed Order Adopting Modifications to MMSCA* entered September 8, 2017.

3. When the Initial Screening Period for the Medical Monitoring Program commenced, the Court directed the Calwell Firm (as class counsel) to remain involved (at its own expense) in the implementation of the Program to help ensure that those third-party contractors providing services to class members did so in a manner consistent with the terms of the MMCSA. These third-party contractors included Thomas Hospital, which was responsible for collecting blood and serum samples from class members, as well as laboratories responsible for analyzing serum samples provided by Thomas Hospital.

4. Following its review of class members' exam records, chain-of-custody documents and lab data, the Calwell Firm alleged that these third-party contractors had not fully complied with

[1] The so-called "trigger" provision provided for more frequent medical monitoring exams for eligible class members, but *only if* initial serum dioxin testing of participants revealed that they, as a whole, had exceptionally elevated serum dioxin levels.

proper medical and scientific practices related to the collection and analysis of class members' blood/serum samples. It became apparent that these issues would likely be the subject of continued litigation between class counsel and Monsanto (and potentially the third-party contractors) during the life of the Medical Monitoring Program and might delay the implementation of future Screening Periods. I was instructed by the Court to assist the Parties in negotiating a resolution of these issues to avoid future litigation and further delay.

5. With my assistance, the parties were able to negotiate a proposed modification to the MMCSA. This proposed modification would provide class members with more frequent future medical monitoring exams without the need for any "trigger" provision (a significant benefit to the class), while eliminating future blood/serum sampling and the costs associated therewith (a significant benefit to Monsanto). Monsanto agreed to pay the Calwell Firm $3 million in consideration for the negotiated modification to the MMSCA and the aforementioned benefits it would provide, as well as to reimburse the Calwell Firm more than $80,000 in expenses that the Calwell Firm had incurred independently investigating issues related to the initial blood/serum collection and analysis.

6. The proposed modification was reviewed and approved by the Court in its aforementioned order entered September 8, 2017.

7. The so-called "trigger" event under the original MMCSA never occurred.

Further the affiant sayeth not.

T. V. Flaherty

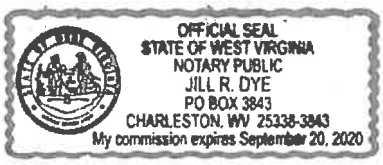
Thomas V. Flaherty, Esq.

**SWORN TO and subscribed before me this** 5 **day of** May **, 2020.**

Jill R Dye

**NOTARY PUBLIC**

**My commission expires** 9/20/2020.






IN THE CIRCUIT COURT OF PUTNAM COUNTY, WEST VIRGINIA

ZINA G. BIBB, et al,

Plaintiffs,

v.

Civil Action No.: 04-C-465
Derek C. Swope, Judge

MONSANTO COMPANY, et al.,

Defendant

**AGREED ORDER ADOPTING MODIFICATIONS TO MMCSA**

On this day came the Class Administrator, Thomas V. Flaherty, Esq.; Defendants Monsanto Company, et al., by counsel Charles M. Love, III, Esq., and Floyd E. Boone Jr., Esq.; and Class Counsel, through Stuart Calwell, Esq., and David H. Carriger, Esq., and, in accordance with the Court's directive as set forth in its *Order* of May 24, 2017, reported to the Court that they had agreed upon certain proposed modifications to the Medical Monitoring Class Settlement Agreement ("MMCSA"), and the administration thereof, in order to resolve those concerns previously raised by Class Counsel, simplify the administration of the Medical Monitoring Program, and enhance the benefits provided through the Medical Monitoring Program to Eligible Class Members.

The Court, having thoroughly reviewed the proposed modifications to the MMCSA, hereby **FINDS** and **ORDERS** the following:

1. The Court approves and adopts the Parties' proposed modifications as set forth in Exhibit A, attached hereto. Exhibit A is incorporated by reference in the MMCSA without further action by the Parties or the Court.

2. Based on Exhibit A and the representations of counsel for the Parties, the Court finds that the Triggering Event did not occur in the Initial Screening Period and is unlikely to ever occur. As a result, the Court finds that the elimination of serum dioxin testing from the Medical Monitoring Program and the elimination of the Triggering Event from the MMCSA is fair, reasonable, and adequate to the Eligible Class Members and should be approved by the Court.

3. The Court finds that the modifications set forth in Exhibit A will provide all Participants (as defined in Section 2.24 of the MMCSA) with the full benefit of Screening Periods occurring on a 2-year cycle for the remainder of the Medical Monitoring Settlement Program. The Putnam County Circuit Clerk is authorized and directed to pay $3,000,000.00 from the Contingent Attorney's Fees Fund,[1] established by Court order dated January 23, 2013, to Class Counsel within three business days of entry of this Order. The Putnam County Circuit Clerk is further authorized and directed to return the remaining balance in said Fund to Monsanto Company within three business days and to then close out said Fund account.

4. The Court grants Class Counsel's pending oral motion to recover costs associated with its Court-ordered involvement in the implementation of the Medical Monitoring Settlement Program. The Class Administrator is authorized and directed to pay Class Counsel the amount of $83,500.72 from the Attorneys' Fees Escrow Account within three business days of entry of this Order.

[1] See page 29 of the January 23, 2013 "FINAL ORDER AWARDING ATTORNEYS' FEES AND LITIGATION EXPENSES AND AWARDING CLASS REPRESENTATIVES' INCENTIVE PAYMENTS". See, also, "ORDER DIRECTING DEPOSIT OF $6.5 MILLION IN CONTINGENT ATTORNEY'S FEES" entered July 15, 2014 and filed with the Circuit Clerk of Putnam County on July 16, 2014.

Agreed to by:

Stuart Calwell, Esq. (WVSB #0595)
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(304)347-1100
*Counsel for Defendants*

9/8/17
4 copies (certified) to S. Calwell to distribute

# EXHIBIT A

## AGREED MODIFICATIONS TO THE MEDICAL MONITORING PROGRAM

## RECITALS

1. Within these Agreed Modifications to the Medical Monitoring Program, unless the context requires a different construction, capitalized terms have the meanings ascribed to them in the Medical Monitoring Class Settlement Agreement ("MMCSA").

2. The Medical Monitoring Program provided by the MMCSA began in 2013 with the registration of Eligible Class Members.

3. Following the submission of registration documentation, the Class Administrator found that 1529 Eligible Class Members had registered for the Medical Monitoring Program.

4. Out of the 1529 Eligible Class Members, approximately 479 Eligible Class Members elected to participate in the Initial Screening Period.

5. Of the approximately 479 Eligible Class Members who participated in the Initial Screening Period, blood samples taken from approximately 427 Eligible Class Members were submitted to the Laboratory for serum dioxin testing.

6. A small number of Eligible Class Members were ineligible for serum dioxin testing because they were younger than 20 years of age. (See MMCSA, Ex. D ¶ 2 ("Serum dioxin testing will be available for eligible class members aged 20 years and older.")

7. For purposes of the Triggering Event, the Laboratory and Monsanto Company's analytical chemist, Dr. Donald Patterson, concluded that none of the tested samples demonstrated dioxin levels in excess of the background range specified in the MMCSA and that the Triggering Event had not occurred.

8. Class Counsel expressed concerns regarding the collection, handling, processing, shipment and analysis of the blood samples, and, ultimately, the reliability of the blood sampling results.

9. Following extensive discussions among the Parties with respect to the collection, handling, processing, shipment, and testing of the blood samples, Class Counsel concedes that, despite the existence of various concerns regarding the reliability of the blood samples, the Court would likely conclude that the Triggering Event did not occur during the Initial Screening Period.

10. Class Counsel also concedes that the likelihood of a Triggering Event occurring in any subsequent Screening Period is unlikely, given various factors including the amount of time that has elapsed and the cleaning of numerous residences within the Class Area as a result of the Property Class Settlement Agreement.

11. Based on the foregoing extensive discussions among the Parties, the Parties have agreed to eliminate serum dioxin testing in subsequent Screening Periods and to eliminate all provisions in the MMCSA pertaining to the Triggering Event.

12. In addition, based on the foregoing extensive discussions among the Parties, the Parties have agreed that, henceforth, Eligible Class Members shall have the benefit of receiving the maximum number of Screening Periods that would have been possible under the MMCSA (without the need for or use of the Triggering Event). Going forward, Screening Periods will occur every two years beginning in the Screening Period that will begin in 2018, with the final Screening Period commencing in 2042.

13. The Parties agree that serum dioxin testing provided by the MMCSA was never provided for diagnostic purposes. (MMCSA, Ex. D ¶ 1 ("Serum dioxin testing will be performed for eligible class members. The purpose is not diagnostic in nature but rather to determine whether a Triggering Event as defined in Section 6 below has occurred.").)

14. The MMCSA generally provides that it may be modified through a written agreement between Class Counsel and Counsel for Defendants. (MMCSA ¶ 14.4 ("This MMCSA represents an integrated document negotiated and agreed to between the Parties and shall not be amended, modified, or supplemented, nor shall any of its provisions be deemed to be waived, unless by written agreement signed by Class Counsel and Counsel for Defendants.").)

Based on the foregoing recitals, the Parties agree to the following modifications of the MMCSA:

A. Screening Periods for all Eligible Class Members shall occur every two years, commencing in 2018 and continuing on that basis until the Screening Period that will commence in 2042. The 2018 Screening Period shall commence on a date to be specified by the Class Claims Administrator.

B. Defendants will deposit $3 million into the Fund prior to the commencement of each Screening Period.

C. For the 2018 Screening Period only, those Participants who were previously ineligible to obtain serum dioxin testing based on their ages at the time of the Initial Screening Period may elect to obtain serum dioxin testing. For these Participants, Sections 1 (except for the last sentence), 3, 4, 5.1, and 5.2 of Exhibit D to the MMCSA shall govern the collection, analysis, and reporting for these serum dioxin tests.

D. Except for the limited purpose set forth above in Modification C, Exhibit D to the MMCSA is hereby stricken and eliminated from the MMCSA.

E. Except for the limited purpose set forth above in Modification C, Section 6.2 of Exhibit E to the MMCSA is hereby stricken and eliminated from the MMCSA.

F. Sections 2.28, 3.11 (except for the first two sentences), and 4.2(g), (h), (i), and (j) of the MMCSA are hereby stricken and eliminated from the MMCSA.

G. For the convenience of Participants, the Hospital shall maintain in one file all documentation pertaining to each Participant and his/her examination. The file shall include all documentation pertaining to the Participant, including but not limited to intake documentation, consent forms, notes, photographs, laboratory notes, and any other documentation pertaining to the examination and tests conducted pursuant to Exhibit E of the MMCSA as modified by Modification E herein.

H. These modifications shall supersede any inconsistent provisions in the MMCSA.