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February 27, 1997

VIA FEDERAL EXPRESS

Jeffrey Axelrad, Esquire
Director Tort Branch
Department of Justice, Civil
1331 Pennsylvania Avenue N.W.
8th Floor
Washington, D.C. 20004

Dear Mr. Axelrad:

Nikki Calvano confirmed with me that we are scheduled to meet with you and Nikki and Pat Reedy at your offices on Tuesday March 4 starting at 10:00 a.m. As she requested, I am forwarding this letter to confirm who is coming and to enclose some material that you may want to review before we meet.

We expect to have with us Jim Greene from the Plaintiffs' Steering Committee, Tom Kerr from Bayer Corporation, Pam Ullman from Armour, myself on behalf of Baxter and Dick Meltzer who has been consulting with all of the fractionators on how best to proceed on the policy issues in Washington and in the states.

Enclosed is another copy of the memo of January 6, 1997 that Peter Morgan forwarded to Nikki Calvano. This describes the Department of Justice's authority to settle the subrogation and reimbursement claims in the factor concentrate blood products litigation. It also reflects the advantages of one-stop shopping at the Department of Justice to conclude this settlement.

I am also enclosing what I expect to be the final version of the Settlement Agreement we reached with the private insurers dealing with reimbursement and subrogation. This agreement is currently being circulated for final approval and execution by representatives of almost all the major private insurers covering approximately 150 million insured lives in the United States.

Now that the private subrogation/reimbursement issues are virtually resolved, the only remaining issue to complete this settlement is resolving any potential federal interests and any potential state Medicaid interests. Therefore, I am enclosing a draft of a proposed agreement based on the private insurance settlement, but restructured to cover public reimbursement and subrogation and related issues. We are hopeful that this form of agreement will be the basis of a resolution with both the federal and state representatives.

For your background information, I am also including a copy of the reports that were submitted to the Judge on February 25, 1997 about the status of the settlement efforts and some recent disruptive activities. As you will note from those reports, there is enormous pressure to bring this settlement to closure as quickly as possible. In the conference call with the Judge on February 26, he said that he intended to issue an order that he would decide by May 1, 1997 whether to let the settlement go forward, depending on how much progress we had made on resolving the subrogation/reimbursement and related issues with the federal and state authorities. We hope you can help us.

Enclosed for your consideration is a draft of estimated numbers of eligible opt-out and opt-in claimants and opt-ins with potential Medicaid coverage. I prepared this based on reports we received from the Court appointed Settlement Administrator. No one has precise information about how many of the actual opt-ins have Medicaid coverage, but the best guestimates that we could make from the aggregate statistical information available to the Settlement Administrator and provided to us was in the neighborhood of 20 to 25%. These were broken up among the various states. I would ask that you not consider these numbers precise, but they are probably in the right order of magnitude. Because of the Judge's confidentiality orders and the lack of information available to us, and since most of the claimants do not have lawsuits pending, we will probably never be able to tell which particular opt-ins have Medicaid coverage. The private insurers could not determine which particular opt-ins were covered by which particular insurers. That is one of the reasons that the private insurers resolved the issues of subrogation/reimbursement with us based on nationwide "insured lives" since they realized that they could not get the

information and would have difficulty proving the underlying claims and subrogation rights with regard to specific claimants. We are hopeful a similar form of agreement will be the basis of a resolution with both the federal and state interests.

Finally, I am enclosing a brief outline of a potential agenda. As you will note, we want to bring you up-to-date on the status of our settlement efforts with the Court and with the private insurers. We also want to fill you in on the contacts our Washington consultants have made with appropriate people at the policy level in the Administration and on Capitol Hill, as well as their contacts with relevant state officials.

Dick Meltzer was advised by Elena Kagan at the White House that you would be the most appropriate person to talk with about what, if any, legal issues we need to resolve. We recognize that there may still be some policy questions that the White House and various policymakers may need to resolve after we have established a legal framework for concluding these reimbursement/subrogation and related issues, so that we can bring this settlement to a prompt conclusion.

If you are going to have other people involved besides yourself, Nikki and Pat, we would appreciate your letting us know. We look forward to meeting with you.

Very truly yours,

Rick Berkman

Richard L. Berkman

RLB:nlg
Enclosures

cc (w/encs):
Nikki Calvano, Esquire
James R. Greene, Esquire
Elena Kagan, Esquire
Thomas E. Kerr, Esquire
Richard Meltzer, Esquire
Pamela Ullman, Esquire

PRIVILEGED AND CONFIDENTIAL: PREPARED IN CONNECTION WITH AND SOLELY FOR PURPOSES OF SETTLEMENT DISCUSSIONS

MEMORANDUM

TO: Nikki Calvano, Special Counsel
U.S. Department of Justice
Torts Branch, Civil Division

CC: Richard L. Berkman

FROM: Peter W. Morgan

DATE: January 6, 1997

RE: DOJ Authority to Settle Subrogation and Reimbursement Claims (Factor Concentrate Blood Products Litigation)

As you requested, this memorandum considers in a general way the Justice Department's authority, on behalf of HHS and other federal departments and agencies, to settle subrogation, reimbursement, and related claims arising out of the factor concentrate blood products class settlement (the "Blood Products Settlement"). Part I concludes that the Justice Department is indeed the appropriate entity to settle whatever direct federal claims may exist as a result of the Blood Products Settlement and/or the sale of blood products covered by the Settlement. Part II comments on the narrower and more difficult question of the Justice Department's power to compromise Medicaid claims, which federal statutes and regulations require the States to pursue. Part III offers a few concluding observations.

I. DOJ AUTHORITY TO SETTLE DIRECT FEDERAL CLAIMS

There are two overlapping reasons why, although individual federal agencies and departments may have authority to settle individual pieces of the entire federal "pie" of claims relating to the Blood Products Settlement,[1] the Justice Department is the appropriate entity to resolve all of the federal claims. First, an examination of the statutes and regulations regarding the Attorney General's powers leaves no room for doubt that she has the power to settle claims by the United States whether or not suit has been filed. Second, the Justice Department has in fact assumed responsibility for settling similar claims in the past. The example used below to illustrate the second point is the Government's assertion of federal claims in connection with the *Lindsey* breast-implant class settlement.

A. Federal Statutes and Regulations

Among the specific statutory powers reserved to officers of the Department of Justice, under the direction of the Attorney General, is the power, except as otherwise authorized by law, to conduct litigation "in which the United States, an agency, or officer thereof is a party, or *is interested.*" 28 U.S.C. § 516 (emphasis added); *see also* § 517 (authorizing the Attorney General to send Justice Department officers "to attend to the interests of the United States" in any pending case) *and* § 514 (providing for the provision of Justice Department counsel to executive departments and agencies concerning "the legal investigation of any claim"). These supervisory powers include the broad inherent power

[1] *See, e.g.,* 10 U.S.C. § 1095(e)(2) ("The administering Secretary may compromise, settle, or waive a claim of the United States under this section.") (Medical Care Recovery Act; 42 U.S.C. § 2652(b) (conferring settlement, release, and waiver authority under Medicare to the head of the concerned department or agency).

to compromise federal claims in a manner otherwise consistent with federal statutes, *see Swift & Co. v. United States*, 276 U.S. 311, 331-32 (1928), a power that cannot be restricted without a clear and unambiguous expression to that effect by Congress. *United States v. Hercules, Inc.*, 961 F.2d 796, 798-99 (8th Cir. 1992) (and cases cited therein).

There is no apparent congressional restriction on the Justice Department's settlement authority with respect to the direct federal claims being discussed in the blood products litigation. To the contrary, pertinent federal regulations either assume or explicitly recognize the Justice Department's often-superior authority with respect to the compromising of such claims. *See, e.g.*, 28 C.F.R. § 43.3(c)(1) (depriving departments and agencies of settlement authority with respect to Medical Care Recovery Act claims that have been referred to the Department of Justice); 28 C.F.R. § 43.4(b) (requiring Justice Department approval for the settlement and waiver of any MCRA claims in excess of $100,000); 32 C.F.R. § 199.12(i) (discussing the frequent necessity of referral of CHAMPUS claims to DOJ). Indeed, if there is a danger in this area for private parties, it would arise from attempting to settle with a non-DOJ official and then discovering that the Justice Department views that settlement as having exceeded the official's power. *See, e.g.*, *United States v. Walcott*, 972 F.2d 323, 325-27 (11th Cir. 1992) (SBA agent and assistant U.S. attorney did not have requisite authority to settle federal claim against guarantor of SBA loan, and thus the Government could repudiate it; Attorney General was vested with exclusive authority to settle such suits).

It is also pertinent that the Attorney General is the definitive authority for the resolution of legal issues within the executive branch. *See* 28 U.S.C. §§ 511-513 (providing for opinions by the Attorney General).

B. The Breast Implant Precedent

When the United States sought to protect the federal interests implicated by the *Lindsey* breast-implant class settlement,[2] it was the Justice Department that stepped forward. On August 17, 1994, in connection with the fairness hearing in the *Lindsey* settlement, the Department filed a "Statement of Interest" on behalf of the United States. The Statement of Interest was filed in reaction to provisions in the then-proposed settlement purporting to bar subrogation and reimbursement claims. The Statement was submitted by Stuart E. Schiffer, Deputy Assistant Attorney General; Claude Harris, U.S. Attorney; and various attorneys from the Civil Division in Washington.

Ruth A. Harvey, a Civil Division trial attorney, appeared at the fairness hearing on behalf of the United States. Ms. Harvey argued that various federal interests were adversely (and illegally) affected by the proposed settlement. The Statement of Interest describes those federal interests in some detail. They include interests under the Medical Care Recovery Act (CHAMPUS, VA, Army, Air Force, Navy), Medicare, Medicaid,[3] the

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[2] *Heidi Lindsey, et al. v. Dow Corning Corp., et al.*, Civ. Action CV 94-P-11558-S (N.D. Ala.).

[3] The Statement describes the Government's interest in State Medicaid plans in terms of the Government's financing 50% to 80% of the cost of the Medicaid assistance provided. The Statement goes on to note that the "States are required to seek

(Footnote continued)

Indian Health Service Statute, the Federal Employees Health Benefits Program, common law contribution and indemnity rights in Federal Tort Claims Act cases, and the False Claims Act.

Sometime after the fairness hearing, Ms. Harvey initiated settlement discussions with the settling defendants. In May 1995 and again in April 1996, a number of defendants entered into a "Stipulation and Tolling Agreement" with the United States in order to facilitate those discussions. The tolling agreement defines "United States" to mean the United States *and*

> its agencies and instrumentalities, including, but not limited to, the Department of Defense, the United States Army, the United States Navy, the United States Air Force, the Department of Health and Human Services, the Office of Personnel Management, and the Department of Veteran Affairs.

The tolling agreement recites the Government's view that the various defendants are potentially liable under, among other laws, the Medical Care Recovery Act, the Medicare Secondary Payer Statute, the Indian Health Service Statute, the False Claims Act, the Civil Monetary Penalties Law,[4] the Program Fraud Civil Remedies Act,[5] and various State and

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(Footnote continued)

reimbursement if the recovery can reasonably be expected to exceed the cost of obtaining recovery" (citing 42 U.S.C. § 1396a(a)(25)(A); 42 C.F.R. §§ 433.139(d)(3), 433.139(f)(1)), and that States are required to return to the United States the federal share of amounts collected from third parties (citing 42 U.S.C. § 1396k(b); 42 C.F.R. § 433.154(b)). Statement of Interest at 8-9 & n.5.

[4] 42 U.S.C. §§ 1320a-7a.

[5] 31 U.S.C. §§ 3810-3812.

federal common laws. (The tolling agreement does not specifically mention Medicaid.) Ms. Harvey executed the agreement on behalf of the United States.

There have been ongoing settlement discussions with the Justice Department from the spring of 1995 to date. The Government has been represented during the last several meetings by Ms. Harvey and another Civil Division attorney. A representative of the regional HHS office in Atlanta has also participated by telephone. (The Atlanta regional office is responsible for Alabama, the situs of the *Lindsey* settlement.) We held our last meeting with the Government about a month ago. It has been assumed that any final settlement agreement would have the United States compromising *all* of its subrogation, indemnity, contribution, fraud, and similar claims (under federal statutes and common laws) with respect to breast implants covered by the *Lindsey* Revised Settlement Program.

II. THE MEDICAID PROBLEM

The obvious unique characteristic of Medicaid recovery claims is the dual nature of the financing of Medicaid payments, which are made by the States but are partially financed with federal funds. We offer below a few modest conclusions about the federal government's authority with respect to compromise of Medicaid claims.

1. The Justice Department should be able to compromise whatever rights the federal government has under Medicaid laws to reimbursement by the States of the federal portion of recoverable payments. The federal government's interest in how the States operate their Medicaid plans is quintessentially financial. Thus, for example, when the United

States filed a Statement of Interest in *Lindsey* asserting interests in the operation of State Medicaid plans, it described those federal interests exclusively in terms of the States' obligations to reimburse the Government from a portion of the States' own Medicaid recoveries.[6] The Justice Department would certainly seem to have the power to compromise this derivative federal right just as it can compromise the Government's independent rights under schemes such as the Medical Care Recovery Act, or under State or federal common law.

It makes sense for the Justice Department to have unrestricted control over the settlement of the numerous federal claims that might be asserted in a case such as this. The Justice Department can both balance the various competing department and agency interests and deliver complete federal peace to the private parties.

2. ***At a minimum, a release of federal Medicaid rights would make it easier for individual States to decide either to decline to pursue whatever State Medicaid reimbursement/subrogation rights might be implicated by the Blood Products Settlement or to compromise any such claims at the same level.*** The stick that HCFA has used to force States not to ignore or unreasonably compromise Medicaid reimbursement/subrogation rights in specific cases is the threat of disallowing future federal financial participation in an amount equal to the federal share of the amounts that HCFA determines should have been collected in those specific cases. *See, e.g., Washington Dep't of Social and Health Services*, DAB No. 1561 (Feb. 7, 1996); *California Dep't of Health Services*, No. 1504 (Jan. 5,

[6] See note 3 above.

1995). A release of federal Medicaid interests, as part of a comprehensive federal settlement, would remove this financial threat and thereby permit any dealings with the States to focus on the State portions of Medicaid payments.

3. There is no apparent authority for the proposition that the federal government may compromise the States' independent rights to recovery under State Medicaid plans (or other statutory or common laws). We would not expect the Justice Department (even if it theoretically had the power to do so) to try to reach out to waive whatever portions of the Medicaid claims involve only State tax dollars, not federal tax dollars. Settlement discussions at the federal level, however, might well generate ideas as to how to resolve State Medicaid claims in a prompt and efficient manner.

III. CONCLUDING OBSERVATIONS

The above discussion is without benefit of any practical suggestions you or other Administration officials might have on how we can best accomplish our overall objectives. We certainly would not exclude the possibility that we have not considered the best way to handle Medicaid issues, for example. On the other hand, we do believe we have correctly concluded that, in order to be successful under the current circumstances and time pressures, settlement discussions concerning whatever federal claims might be implicated by the Blood Products Settlement should be focused and coordinated by a single federal department -- for the reasons stated, the Justice Department.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

FACTOR CONCENTRATE LITIGATION

INSURANCE SETTLEMENT AGREEMENT

FACTOR CONCENTRATE LITIGATION INSURANCE SETTLEMENT AGREEMENT

This Settlement Agreement ("this Agreement") is made this ____ day of _____, 1997 by and between ALPHA THERAPEUTIC CORPORATION, GREEN CROSS CORPORATION OF AMERICA and THE GREEN CROSS CORPORATION (collectively, "Alpha"), ARMOUR PHARMACEUTICAL COMPANY and RHONE-POULENC RORER INC. (collectively, "Armour"), BAXTER HEALTHCARE CORPORATION and BAXTER INTERNATIONAL INC. (collectively, "Baxter"; which shall also refer to Travenol Laboratories, Inc., and Hyland Therapeutics, a division of Baxter Healthcare Corporation), and BAYER CORPORATION and BAYER A.G. (collectively, "Bayer"; which shall also refer to Cutter Laboratories, Inc., Cutter Laboratories, a division of Miles, Inc., Miles Laboratories, Inc., Miles, Inc. and Miles Inc.) [Alpha, Armour, Baxter and Bayer shall together hereinafter be referred to as "the Fractionators"] and the companies listed on Schedule A (which shall collectively be referred to as the "Insurers"). The Insurers are parties to the settlement provided for herein in both their individual capacities and as agents, administrators or representative of certain self-funded health care plans and/or entities which have not opted out of this settlement (hereafter the "Participating Plans"). Each Insurer shall maintain a list

of all such Participating Plans and the insured lives covered by this settlement, which lists shall be made available if necessary to protect the Fractionators under this Agreement. Self-funded plans which have elected to opt-out of this settlement, if any, are identified on Schedule B hereto. As provided in Section D hereof, each Insurer (i) warrants that it either (a) has the legal authority to bind to this Agreement the Participating Plans that it represents or (b) has or, by March 1, 1997, will have obtained releases from the Participating Plans that it represents which are fully congruent in all material respects to the releases set forth in Section B hereof or (ii) agrees to indemnify, defend and hold harmless the Fractionators, the Claimant Class members and their Related Parties (as hereinafter defined) against claims, including costs, expenses, and fees, by the Participating Plans to the extent any such claims are within the scope of the releases set forth in Section B hereof.

WHEREAS, the Fractionators have entered into a conditional settlement agreement (the "Claimant Class Settlement Agreement"), a copy of which is attached hereto and incorporated herein, with a settlement class (the "Claimant Class") even though the Fractionators, for the reasons set forth in the Claimant Class Settlement Agreement, deny any wrongful actions or any liability to the Claimant Class;

WHEREAS, the Insurers and Participating Plans as a group have paid or provided medical and health benefits on behalf of or to one or more members of the Claimant Class on account of HIV infection or other injuries allegedly arising from or related to the use of Factor Concentrates, as defined in the Claimant Class Settlement Agreement, and may continue to make such payments for an indefinite future period;

WHEREAS, the parties desire to compromise all potential claims against the Fractionators, Claimant Class members and their Related Parties (as defined below) relating to such payments made or to be made by the Insurers and Participating Plans and to bring the tort litigation against the Fractionators substantially to an end:

NOW, THEREFORE, in consideration of the covenants and agreements herein, and INTENDING TO BE LEGALLY BOUND, the parties hereby agree as follows:

A. SETTLEMENT AMOUNT; PAYMENT

1. The Fractionators shall pay to the Insurers the sum of ten cents (10¢) per life insured by Insurers and their Participating Plans in full and final settlement, disposition, compromise and release of the matters described in Section B, provided that Insurers representing 115,000,000 or more insured lives, either directly or as agents, representatives or administrators for Participating Plans, agree to participate in

the Agreement and subject further to the conditions set forth in Section C. December 31, 1995 shall be the controlling date for purposes of determining the number of insured lives represented by each Insurer and Participating Plan. The payments shall be made to the addressee for the respective representative of each Insurer set forth on Schedule C or as the Fractionators and any Insurer may later agree in writing as to that Insurer.

2. The Fractionators shall be responsible for payments to the Insurers in the following shares: Alpha 15%, Armour 20%, Baxter 20% and Bayer 45%. The Fractionators' obligations hereunder are several and not joint. The default of one Fractionator shall not constitute a breach of the Agreement by any other Fractionator, and no Fractionator shall be responsible to pay the share of any other Fractionator, except as specifically provided herein.

3. The Fractionators' payment shall be due on or before the tenth business day after the date that the Court's order approving the Claimant Class Settlement becomes "final" or within 30 business days after the Fractionators shall have made payments to 1,000 Claimant Class members pursuant to the Claimant Class Settlement, whichever occurs first. For purposes this Section "final" means the completion of all proceedings in the United States Court of Appeals and the United States Supreme Court resulting from any appeal or appeals that have arisen or

may still arise from the Claimant Settlement (including, but not limited to, the expiration of all deadlines for motions for reconsideration or petitions for certiorari, all proceedings ordered on remand, and all proceedings arising out of any subsequent appeal or appeals following decisions on remand) or within 30 business days from when the Fractionators make payments under the Claimant Class Settlement Agreement to members of the Claimant Class.

B. RELEASE.

Each Insurer, on behalf of itself and all of the Participating Plans that it represents (each of the foregoing Insurers and Participating Plans being referred to as a "Releasing Party"), hereby releases and discharges each Fractionator, its predecessors and successors, and past, present and future assigns, trustees, subsidiaries, divisions, affiliates, parents (and subsidiaries thereof), officers, directors, agents, employees, attorneys and liability insurance carriers from any and all claims or causes of action, on a theory of subrogation, reimbursement or otherwise for recovery of payments made or benefits provided, in the past, present or future, relating to the care or treatment of Class Members arising from or related to the use of Factor Concentrates as defined in the Claimant Class Settlement Agreement. Each Releasing Party further releases each Claimant Class member and

his or her family members, and their respective assigns, representatives, estates, heirs, executors, trustees, attorneys and administrators, and any trust of which any of them is the settlor or which is for their benefit (any such family member and all such other persons referred to herein as "Related Parties"), from any and all claims or causes of action on a theory of reimbursement or otherwise, for recovery of payments made or benefits provided, in the past, present or future, relating to the care or treatment of Class Members arising from the use of Factor Concentrates.

This release shall take effect upon payment of the funds described in Section A.

C. CONDITIONS; TERMINATION

1. This Agreement is expressly conditioned on each of the following conditions being met:

(a) Delivery by April 1, 1997, of evidence satisfactory to the Fractionators of a statement from an authorized officer of each Insurer, representing the number of insured lives covered by this settlement for that Insurer and its Participating Plans, which together represent at least 115,000,000 insured lives as of December 31, 1995.

(b) Delivery by May 1, 1997 by the Fractionators to the Insurers of written confirmation that the Fractionators

have accepted as sufficient the evidence described in the preceding paragraph;

(c) Within 90 days after the execution of this Agreement the relevant liability insurance carriers for the Fractionators, as determined by each of the Fractionators, agree that the execution of this Agreement and its implementation by each of the Fractionators, respectively, would not contravene any insurance policy provisions and/or other agreements between the Fractionators and their respective insurers governing the entering into settlements by insureds. It shall not be a condition of this Agreement, however, that the Fractionators' liability carriers agree that they owe coverage for the Claims or for the Settlement.

(d) Delivery by the Fractionators to the Insurers of written confirmation that the conditions stated in Section C.1(c) above have been satisfied within seven (7) days of such satisfaction.

(e) Final court approval of or payments made under the Claimant Class Settlement Agreement as set forth in Section A.3.

2. If one, two or three Fractionators give(s) written notice that it will not participate in the Agreement because of the failure of one of the conditions of Section C.1 but one or more of the Fractionators gives no such notice (either because

there has been no failure of such conditions as to it, or because the Fractionator has elected to waive the condition), then the Insurers may, as they may decide in their sole and unfettered discretion, proceed with the Agreement with the non-withdrawing Fractionator(s) based on the non-withdrawing Fractionator's proportionate share, as defined in Section A.2, of the settlement amount. The procedures to be employed in the event that the Agreement goes forward with fewer than all four Fractionators shall be established by further agreement of the Parties to this Agreement. Under no circumstances will a Fractionator that elects not to participate in this Agreement be entitled to any release or other consideration from any Insurer as provided for in this Agreement.

3. If this Agreement is terminated by reason of failure of any of the conditions specified in Section C.1 or if this Agreement otherwise is not fully consummated and effected:

(a) Except as otherwise provided in this Agreement, this Agreement shall have no further force and effect and all negotiations and proceedings connected therewith shall be without prejudice to the rights of the Fractionators and the Insurers;

(b) The Insurers and Participating Plans shall have no right to damages or payment as a result of the failure to consummate the Agreement.

4. The Insurers shall have no right to damages or payment as a result of the failure to consummate the Agreement.

D. REPRESENTATIONS, WARRANTIES AND COVENANTS.

1. Each Insurer severally represents and warrants to each Fractionator as follows: (i) it has the legal power and authority to enter into and perform all of the obligations under this Agreement on its own behalf; (ii) the execution, delivery and performance of this Agreement on its own behalf have been duly authorized and approved by all required action on the part of the Insurer; (iii) the execution and delivery of this Agreement by it on its own behalf and the performance of its obligations hereunder will not violate its governing documents or other agreement to which it is a party or any law, regulation, order, rule or ordinance to which it is subject; (iv) no consent of any third party is required for the execution and performance of this Agreement on its own behalf; and (v) this Agreement has been duly executed and delivered on its own behalf and is its legal, valid and binding obligation enforceable in accordance with its terms, subject to bankruptcy, insolvency, fraudulent conveyance, reorganization, moratorium and similar laws, now or hereafter in effect, affecting creditors' rights and remedies generally and to general principles of equity.

2. Each Insurer severally (i) represents and warrants to each Fractionator that it either has the legal authority to

bind to this Agreement the Participating Plans that it represents, or has or, by March 1, 1997, will have obtained releases from the Participating Plans that it represents which are fully congruent in all material respects to the releases described in Section B or (ii) agrees to indemnify, defend and hold the Fractionators, their predecessors and successors, and past, present and future assigns, trustees, subsidiaries, divisions, affiliates, parents (and subsidiaries thereof), officers, directors, agents, employees, attorneys and liability insurance carriers, the Claimant Class members and their Related Parties harmless against claims, including all costs, expenses and fees, by the Participating Plans that it represents, to the extent any such claims are within the scope of the releases set forth in Section B hereof.

3. Each Fractionator severally represents and warrants to the Insurers as follows: (i) such Fractionator has the legal power and authority to enter into and perform all of its obligations under this Agreement; (ii) the execution, delivery and performance of this Agreement have been duly authorized and approved by all required action on its part; (iii) the execution and delivery of this Agreement by it and the performance of its obligations hereunder will not violate its governing documents, any other agreement to which it is a party, or any law, regulation, order, rule or ordinance to which it is

subject; and (iv) this Agreement has been duly executed and delivered by it and is its legal, valid and binding obligation, enforceable against it in accordance with its terms, subject to bankruptcy, insolvency, fraudulent conveyance, reorganization, moratorium and similar laws, now or hereafter in effect, affecting creditors' rights and remedies generally and to general principles of equity.

4. The representations and warranties of the parties set forth in this Section D shall survive the consummation of the transactions contemplated hereby.

E. EQUITABLE RELIEF.

The parties hereto expressly covenant and agree that they will suffer irreparable damage in the event any of the provisions hereof are not performed or are otherwise breached and that each party shall be entitled as a matter of right (without the need to prove actual damages) to an injunction or injunctions and other relief to prevent a breach and to secure the enforcement of such provisions. Resort to such equitable relief, however, shall not constitute a waiver of any other rights or remedies that the party seeking such relief may have.

F. EXPENSES.

Regardless of whether or not the transactions contemplated hereby are consummated, the Fractionators, on the one hand, and the Insurers, on the other, shall pay their own

respective expenses (including, without limitation, the fees, disbursements and expenses of its attorneys) in connection with the negotiation, preparation and execution of this Agreement and the matters contemplated hereby.

G. BEST EFFORTS.

The Fractionators and the Insurers (only to the extent consistent with the fiduciary duties owed by the Insurers to the Participating Plans) shall use their best efforts to cause the settlement provided for herein to occur as promptly as practicable following the date hereof.

H. THIRD PARTY BENEFICIARIES

The Fractionators, the Insurers and the Participating Plans intend that each Claimant Class member be considered a third-party beneficiary of this Agreement but only to the extent of any release under Section B above in favor of that Claimant Class member.

I. NO ADMISSIONS

Neither this Agreement nor any exhibit, document, or instrument delivered hereunder, nor any statement in connection with the negotiation, execution, or implementation of this Agreement, is intended to be or shall be construed as or deemed to be evidence of (a) an admission or concession by any Fractionator or Claimant Class member concerning the merits of any claim released hereunder, (b) an admission by the

Fractionators of any wrongful actions or liability arising out of or resulting from the Fractionators' processing or distribution of Factor Concentrates, or (c) an admission of coverage or a waiver of any Releasing Party's (or Releasing Party's subsidiary's) rights, if any, to maintain that coverage for HIV/AIDS or Hepatitis A or B care or treatment does not arise under policies or other contracts for health or medical benefits issued to any Claimant Class member or covering any Claimant Class member.

J. NOTICES.

All notices, requests and other communications to any party hereunder shall be given or made in writing and mailed (by registered or certified mail or by overnight courier) or delivered by hand as set forth on Schedule C or such address as such party may hereafter specify for the purpose of notice to the other parties hereto. Each such notice, request or other communication shall be effective when, if delivered by hand, received by the party to which it is addressed or, if mailed in the manner described above, on the third business day after the date of mailing.

K. SUCCESSORS AND ASSIGNS.

The rights and obligations of each party under this Agreement shall inure to the benefit and be binding upon its

successors and assigns and any entity to which its assets and business may be transferred by operation of law or otherwise.

L. GOVERNING LAW

Because this Agreement applies to persons throughout the United States, to ensure uniformity in interpretation and to take advantage of a highly developed body of commercial law familiar to the court presently presiding over In re Factor VIII or IX Concentrate Blood Products Litigation, MDL-986, No. 93-C7452 (N.D. Ill.), which has jurisdiction over all of the parties to this Agreement pursuant to Section Q below, this Agreement shall be construed in accordance with the laws of the State of Illinois (excluding Illinois choice of law rules).

M. COMPLETE UNDERSTANDING

This Agreement supersedes any prior contracts, understandings, discussions and agreements (including the Statement of Principles executed by attorneys for the Fractionators and several of the Insurers) between the Fractionators and the Insurers and constitutes the complete understanding between the Fractionators and the Insurers with respect to the subject matter hereof.

N. MODIFICATION; WAIVER.

1. This Agreement may be amended or waived if, and only if, such amendment or waiver is in writing and signed, in the case of any amendment, by all of the parties hereto or in the

case of a waiver, by the party against whom the waiver is to be effective.

2. No failure or delay by any party in exercising any right, power or privilege hereunder shall operate as a waiver thereof nor shall any single or partial exercise thereof preclude any other or further exercise thereof or the exercise of any other right, power or privilege. The rights and remedies herein provided shall be cumulative and shall not be exclusive of any rights or remedies provided by law or at equity.

O. HEADINGS.

The section headings in this Agreement are for convenience of reference only and shall not control or affect the meaning or construction of this Agreement.

P. COUNTERPARTS.

This Agreement may be signed in any number of counterparts, each of which shall be an original, with the same effect as if the signatures thereto and hereto were upon the same instrument.

Q. CONSENT TO JURISDICTION.

The parties agree that all claims or controversies arising out of this Agreement, or any of its terms, shall be resolved by the Court presiding over In re Factor VIII or IX Concentrate Blood Products Litigation, MDL-986, No. 93-C7452 (N.D. Ill.), and the parties hereby irrevocably submit to the

jurisdiction of the Court for purposes of resolving all claims or controversies arising out of this Agreement, and waive any objection which they may have concerning either the jurisdiction or venue of the Court to the extent of such claims or controversies.

IN WITNESS WHEREOF, each party hereto has caused this Agreement to be duly executed on its behalf, as of the date first written above.

Richard L. Berkman Counsel for Baxter Healthcare Corporation	Mark Fischer*
Sara Gourley Counsel for Armour Pharmaceutical Company & Rhone-Poulenc Royer, Inc.	James Johnson*
Phillip Beck Counsel for Alpha Therapeutic Corporation	Theodore Space*
Geoffrey R.W. Smith Counsel for Bayer Corporation	Jeff Swan*
	Geoffrey Taylor*

Kim West*

Gene Silverman*

Carolyn Clift*

Thaddeus Holt*

*The participating Insurers represented by each counsel are set forth in Schedule A.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

FACTOR CONCENTRATE LITIGATION

SETTLEMENT AGREEMENT

FACTOR CONCENTRATE LITIGATION SETTLEMENT AGREEMENT

This Settlement Agreement ("this Agreement") is made this ____ day of _____, 1997 by and between ALPHA THERAPEUTIC CORPORATION, GREEN CROSS CORPORATION OF AMERICA and THE GREEN CROSS CORPORATION (collectively, "Alpha"), ARMOUR PHARMACEUTICAL COMPANY and RHONE-POULENC RORER INC. (collectively, "Armour"), BAXTER HEALTHCARE CORPORATION and BAXTER INTERNATIONAL INC. (collectively, "Baxter"; which shall also refer to Travenol Laboratories, Inc., and Hyland Therapeutics, a division of Baxter Healthcare Corporation), and BAYER CORPORATION and BAYER A.G. (collectively, "Bayer"; which shall also refer to Cutter Laboratories, Inc., Cutter Laboratories, a division of Miles, Inc., Miles Laboratories, Inc., Miles, Inc. and Miles Inc.) [Alpha, Armour, Baxter and Bayer shall together hereinafter be referred to as "the Fractionators"] and the United States of America ("United States"), acting through the United States Department of Justice.

WHEREAS, the Fractionators have entered into a conditional settlement agreement (the "Claimant Class Settlement Agreement"), a copy of which is attached hereto and incorporated herein, with a settlement class (the "Claimant Class") even though the Fractionators, for the reasons set forth in the

Claimant Class Settlement Agreement, deny any wrongful actions or any liability to the Claimant Class;

WHEREAS, the United States believes it has certain claims and causes of action against the Fractionators arising out of the Fractionators' processing and distribution of Factor Concentrate to persons with hemophilia;

WHEREAS, the parties desire to reach a full and final compromise of any and all such claims and causes of action;

NOW, THEREFORE, in consideration of the covenants and agreements herein, and INTENDING TO BE LEGALLY BOUND, the parties hereby agree as follows:

A. SETTLEMENT AMOUNT; PAYMENT

1. The Fractionators shall pay to the United States by certified checks made out to the Treasurer of the United States the combined sum of $_____ in full and final settlement, disposition, compromise and release of the matters described in Section B subject to the conditions set forth in Section C.

2. The Fractionators shall be responsible for the settlement payment in the following shares: Alpha 15%, Armour 20%, Baxter 20% and Bayer 45%. The Fractionators' obligations hereunder are several and not joint. The default of one Fractionator shall not constitute a breach of the Agreement by any other Fractionator, and no Fractionator shall be responsible

to pay the share of any other Fractionator, except as specifically provided herein.

3. The Fractionators' payment shall be due on or before the tenth business day after the date that the Court's order approving the Claimant Class Settlement becomes "final." For purposes of this Section "final" means the completion of all proceedings in the United States Court of Appeals and the United States Supreme Court resulting from any appeal or appeals that have arisen or may still arise from the Claimant Settlement (including, but not limited to, the expiration of all deadlines for motions for reconsideration or petitions for certiorari, all proceedings ordered on remand, and all proceedings arising out of any subsequent appeal or appeals following decisions on remand).

B. RELEASE.

1. The United States agrees, on behalf of its agencies and instrumentalities, to waive, release and discharge all claims, causes of action and administrative or other proceedings against (1) each Fractionator, its predecessors and successors, and past, present and future assigns, trustees, subsidiaries, divisions, affiliates, parents (and subsidiaries thereof), officers, directors, agents, employees, attorneys and liability insurance carriers relating to or arising out of the processing and distribution to Class Members of Factor Concentrates as defined in the Claimant Class Settlement

Agreement, and against (2) each Claimant Class member and his or her family members, and their respective assigns, representatives, estates, heirs, executors, trustees, attorneys and administrators, and any trust of which any of them is the settlor or which is for their benefit, on a theory of reimbursement or otherwise, for recovery of payments made or benefits provided, in the past, present or future, relating to the care or treatment of Class Members arising from the use of Factor Concentrates except the following:

(1) any claims or causes of action the United States may have based on the obligations created by this Settlement Agreement and

(2) any claims or causes of action that the United States may have under the Internal Revenue Code, Title 26 of The United States Code.

2. This waiver, release and discharge shall take effect upon payment of the funds described in Section A.

C. CONDITIONS; TERMINATION

1. This Agreement is expressly conditioned on each of the following conditions being met:

(a) Within 90 days after the execution of this Agreement the relevant liability insurance carriers for the Fractionators, as determined by each of the Fractionators, agree that the execution of this Agreement and its implementation by

each of the Fractionators, respectively, would not contravene any insurance policy provisions and/or other agreements between the Fractionators and their respective insurers governing the entering into settlements by insureds. It shall not be a condition of this Agreement, however, that the Fractionators' liability carriers agree that they owe coverage for the Claims or for the Settlement.

(b) Final court approval and distribution to the Claimant Class of the settlement funds under the Claimant Class Settlement as defined in section A.3.

2. If one, two or three Fractionators give(s) written notice that it will not participate in the Agreement because of the failure of one of the conditions of Section C.1 but one or more of the Fractionators gives no such notice (either because there has been no failure of such conditions as to it, or because the Fractionator has elected to waive the condition), then the United States shall proceed with the Agreement with the non-withdrawing Fractionator(s) based on the non-withdrawing Fractionator's proportionate share, as defined in Section A.2, of the settlement amount. The procedures to be employed in the event that the Agreement goes forward with fewer than all four Fractionators shall be established by further agreement of the Parties to this Agreement.

3. If this Agreement is terminated by reason of failure of any of the conditions specified in Section C.1 or if this Agreement otherwise is not fully consummated and effected:

(a) Except as otherwise provided in this Agreement, this Agreement shall have no further force and effect and all negotiations and proceedings connected therewith shall be without prejudice to the rights of the Fractionators and the Insurers;

(b) The United States shall have no right to damages or payment as a result of the failure to consummate this Agreement.

4. The United States shall have no right to damages or payment as a result of the failure to consummate the Agreement.

D. REPRESENTATIONS, WARRANTIES AND COVENANTS.

1. The United States Department of Justice represents and warrants to each Fractionator as follows: (i) it has the legal power and authority to enter into and perform all of the obligations under this Agreement on its own behalf and on behalf of the United States and its agencies and instrumentalities; (ii) the execution, delivery and performance of this Agreement have been duly authorized and approved by all required action; (iii) the execution and delivery of this Agreement on behalf of the United States and all its agencies and instrumentalities and the

performance of its obligations hereunder will not violate its governing documents or other agreement or any law, regulation, order, rule or ordinance; (iv) no consent of any third party is required for the execution and performance of this Agreement; and (v) this Agreement has been duly executed and delivered and is a legal and valid obligation, binding the United States and all its agencies and instrumentalities enforceable in accordance with its terms.

2. Each Fractionator severally represents and warrants to the United States as follows: (i) such Fractionator has the legal power and authority to enter into and perform all of its obligations under this Agreement; (ii) the execution, delivery and performance of this Agreement have been duly authorized and approved by all required action on its part; (iii) the execution and delivery of this Agreement by it and the performance of its obligations hereunder will not violate its governing documents, any other agreement to which it is a party, or any law, regulation, order, rule or ordinance to which it is subject; and (iv) this Agreement has been duly executed and delivered by it and is its legal, valid and binding obligation, enforceable against it in accordance with its terms, subject to bankruptcy, insolvency, fraudulent conveyance, reorganization, moratorium and similar laws, now or hereafter in effect,

affecting creditors' rights and remedies generally and to general principles of equity.

E. EQUITABLE RELIEF.

The parties hereto expressly covenant and agree that they will suffer irreparable damage in the event any of the provisions hereof are not performed or are otherwise breached and that each party shall be entitled as a matter of right (without the need to prove actual damages) to an injunction or injunctions and other relief to prevent a breach and to secure the enforcement of such provisions. Resort to such equitable relief, however, shall not constitute a waiver of any other rights or remedies that the party seeking such relief may have.

F. EXPENSES.

Regardless of whether or not the transactions contemplated hereby are consummated, the Fractionators, on the one hand, and the United States, on the other, shall pay their own respective expenses (including, without limitation, the fees, disbursements and expenses of its attorneys) in connection with the negotiation, preparation and execution of this Agreement and the matters contemplated hereby.

G. THIRD PARTY BENEFICIARIES

The Fractionators and the United States intend that each Claimant Class member be considered a third-party

beneficiary of this Agreement but only to the extent of any release under Section B in favor of the Claimant Class member.

H. NO ADMISSIONS

Neither this Agreement nor any exhibit, document, or instrument delivered hereunder, nor any statement in connection with the negotiation, execution, or implementation of this Agreement, is intended to be or shall be construed as or deemed to be evidence of (a) an admission or concession by any Fractionator or Claimant Class member concerning the merits of any claim released hereunder, (b) an admission by the Fractionators of any wrongful actions or liability arising out of or resulting from the Fractionators' processing or distribution of Factor Concentrates, or (c) an admission of coverage or a waiver of the United States' rights, if any, to maintain that a Class Member does not qualify for federal benefits.

I. NOTICES.

All notices, requests and other communications to any party hereunder shall be given or made in writing and mailed (by registered or certified mail or by overnight courier) or delivered by hand as set forth on Schedule A or such address as such party may hereafter specify for the purpose of notice to the other parties hereto. Each such notice, request or other communication shall be effective when, if delivered by hand, received by the party to which it is addressed or, if mailed in

the manner described above, on the third business day after the date of mailing.

J. SUCCESSORS AND ASSIGNS.

The rights and obligations of each party under this Agreement shall inure to the benefit and be binding upon its successors and assigns and any entity to which its assets and business may be transferred by operation of law or otherwise.

K. GOVERNING LAW

Because this Agreement applies to persons throughout the United States, to ensure uniformity in interpretation and to take advantage of a highly developed body of commercial law familiar to the court presently presiding over In re Factor VIII or IX Concentrate Blood Products Litigation, MDL-986, No. 93-C7452 (N.D. Ill.), which has jurisdiction over all of the parties to this Agreement pursuant to Section P below, this Agreement shall be construed in accordance with the laws of the State of Illinois (excluding Illois choice of law rules).

L. COMPLETE UNDERSTANDING

This Agreement supersedes any prior contracts, understandings, discussions and agreements between the Fractionators and the United States and constitutes the complete understanding between the Fractionators and the United States with respect to the subject matter hereof.

M. MODIFICATION; WAIVER.

1. This Agreement may be amended or waived if, and only if, such amendment or waiver is in writing and signed, in the case of any amendment, by all of the parties hereto or in the case of a waiver, by the party against whom the waiver is to be effective.

2. No failure or delay by any party in exercising any right, power or privilege hereunder shall operate as a waiver thereof nor shall any single or partial exercise thereof preclude any other or further exercise thereof or the exercise of any other right, power or privilege. The rights and remedies herein provided shall be cumulative and shall not be exclusive of any rights or remedies provided by law or at equity.

N. HEADINGS.

The section headings in this Agreement are for convenience of reference only and shall not control or affect the meaning or construction of this Agreement.

O. COUNTERPARTS.

This Agreement may be signed in any number of counterparts, each of which shall be an original, with the same effect as if the signatures thereto and hereto were upon the same instrument.

P. CONSENT TO JURISDICTION.

The parties agree that all claims or controversies arising out of this Agreement, or any of its terms, shall be resolved by the Court presiding over In re Factor VIII or IX Concentrate Blood Products Litigation MDL-986, No. 93-C7452 (N.D. Ill.), and the parties hereby irrevocably submit to the jurisdiction of the court for purposes of resolving all claims or controversies arising out of this Agreement, and waive any objection which they may have concerning either the jurisdiction or venue of the court to the extent of such claims or controversies.

IN WITNESS WHEREOF, the parties hereto have caused this Agreement to be duly executed on its behalf, as of the date first written above.

Richard L. Berkman
Counsel for Baxter Healthcare Corporation

Civil Division
United States Department of Justice

Sara Gourley
Counsel for Armor Pharmaceutical Company & Rhone-Poulenc-Rorer

Phillip Beck
Counsel for Alpha Therapeutic Corporation

Geoffrey R.W. Smith
Counsel for Bayer Corporation

SIDLEY & AUSTIN
A PARTNERSHIP INCLUDING PROFESSIONAL CORPORATIONS

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WASHINGTON, D.C.
LONDON
SINGAPORE
TOKYO

WRITER'S DIRECT NUMBER
312/853-7694

February 25, 1997

BY MESSENGER

The Honorable John F. Grady
United States District Court
for the Northern District of Illinois
219 South Dearborn Street
Chicago, Illinois 60604

Re: MDL-986

Dear Judge Grady:

Enclosed is a copy of the Fractionator Defendants' report regarding the current status of the class settlement.

Also enclosed is a separate report, accompanied by the affidavits of counsel, regarding some rather disturbing developments involving reports to us of threats of personal harm and property damage. This morning, I learned of a specific threat made via a voice-mail message to an employee of Armour (now Centeon). An employee received an outside-call message yesterday at approximately 5:00 p.m. Eastern, which said " Hello [name]. I'm calling to let you know I know who you are, I know what you are and I know what you've done and the next time I see you you're going to feel pain. I assure you of this and I will go out of my way to make sure you feel the pain." This call has been reported to the local police in Pennsylvania.

We seek the Court's guidance and advice with respect to how best to deal with these matters.

Respectfully,

Sara J. Gourley

cc: Richard Berkman (w/ enc., by telecopy)
Phillp Beck (w/ enc., by telecopy)
Geoffrey Smith (w/ enc., by telecopy)
Mark Meyer (w/ enc., by telecopy)
Nikki Calvano (w/ enc., by telecopy)
David S. Shrager (w/ enc., by telecopy)
Dianne Nast (w/ enc., by telecopy)

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

IN RE: FACTOR VIII OR IX CONCENTRATE BLOOD PRODUCTS LITIGATION	No. 93 C 7452 MDL-986

FRACTIONATOR DEFENDANTS' REPORT TO JUDGE GRADY RE: SETTLEMENT

The following report is submitted in response to the Court's request to counsel of February 7, 1997.

SUMMARY

The fractionators are committed to making all reasonable efforts to successfully conclude the Settlement Agreement set forth in the Class Notice. They also believe that the settlement can be finalized because the "subrogation/reimbursement" and "eligibility" matters, on which the settlement is currently contingent, can be resolved to the satisfaction of both the fractionators and the overwhelming majority of claimants.

As set forth in greater detail below, the "private sector" subrogation/reimbursement issue is virtually resolved and a binding agreement is expected to be executed by all necessary parties in March. Resolution of the "public sector" reimbursement/subrogation issue appears to be the most "time-sensitive" task yet to be completed. Resolution requires action by both the federal government and at least the majority of the

states, including those identified as having a significant interest. Admittedly, neither the fractionators, Class Counsel nor this Court can control their decision making process. That does not mean, however, that those processes are subject to an "open-ended" time frame. While it may take two to three more months to reach an agreement in principal on this matter, and another month to enter into binding agreements, it is likely that within that time frame, and probably sooner, the parties will know whether such agreements can be reached. Indeed, it is probable that it will be known long before then if the problems cannot be solved. The fractionator defendants propose, therefore that the parties file reports with the Court on April 1 and, if necessary, again on May 1, advising the Court of the status of these ongoing negotiations.

Class Counsel have shared with counsel for the fractionators a "working draft" of a proposal that would permit individual claimants to establish "special needs trusts" allowing them to benefit from the settlement payment without requiring them to forfeit current Medicaid benefits or preclude them from seeking such benefits in the future. Reports from the Settlement Administrator on the survey previously sent to current claimants indicate that at least one-half (and perhaps more) of those who receive some such benefits are already considered legally "disabled" and, therefore, qualified to establish special needs trusts. Many other claimants are likely to be able to apply

their settlement payment to "exempt" assets (i.e. assets which are not considered in determining current or future Medicaid eligibility). Thus it appears that most claimants will be able to accept the settlement payment without compromising Medicaid eligibility even if it not possible promptly to enact federal legislation to address this specific problem.

A. Private sector subrogation/reimbursement.

For the last several months the fractionators have been negotiating with insurance companies representing the vast majority of privately insured persons in the United States. Those negotiations have led to an agreement to be signed between the fractionators and insurers representing approximately 150 million "insured lives" in the United States. Under this agreement, claims for subrogation/reimbursement based on the treatment of HIV infections related to the use of clotting factor concentrates will be extinguished. As third party beneficiaries of this contract, individual claimants (who opt into the settlement) will no longer face potential liability to these insurers from their $100,000 settlement payment.

B. Public sector subrogation/reimbursement.

The federal government provides healthcare under various programs to approximately 35 million Americans. Medicaid, a joint federal/state program, provides coverage to approximately another 35 million Americans. The fractionators have made public

their willingness to enter into an analogous agreement with these public sector "insurers."

Discussions with the "public sector insurers" began shortly after it became clear to the fractionators that it would be possible to reach a satisfactory agreement with the private insurers. Unavoidably, negotiations with government entities are more complex that those involving only private sector entities. For example, it must be determined (often through inquiry) who, within a government entity, has the authority to enter into such agreements and with whom detailed substantive discussions should be held. Contacts with the appropriate officials have already taken place and more are being scheduled. Defense counsel and Class Counsel expect to determine within the next two months whether the federal government and a satisfactory percentage of the state governments are willing to enter into an agreement along the lines noted above.

If, regrettably, it becomes clear that the answer is no, the fractionators will advise the Court immediately. In all events, the fractionators are prepared to file reports with the Court on April 1 and May 1 advising it of the status and progress being made toward resolution of this issue.

C. Accelerated Claims Processing.

In light of the foregoing, and to accelerate, to the extent possible, the actual payment of settlement funds, the fractionators propose that the remaining tasks necessary to close

the settlement begin now on multiple parallel tracks. First and foremost, the fractionators propose that, consistent with the confidentiality provisions of the settlement agreement, a process be established that will allow the merits of individual claims to be determined as soon as possible, including the resolution of any potential disputes relative to those claims. The fractionators believe that they and Class Counsel can and should agree on specific timetables for completing this task. These deadlines, although they must be reasonable, should allow individual claimants to receive their settlement payment as promptly as possible. Other tasks that should be accelerated are:

1. Finalize the ADR procedures and have the Court approve them.
2. Have a hearing (if needed) on any claims rejected by the ADR process.
3. Finalize the necessary releases and have the Court approve them.
4. Perfect the plan for "master" special needs trusts.
5. "Establish" master special needs trusts in each state.
6. Seek local court "pre-approval" of special needs trusts in each state; presumably on some "consolidated" basis.

The fractionators believe that the settlement can be implemented. Moreover, in light of the overwhelming acceptance of this settlement by potential class members, every effort must

be made to do so promptly to avoid any delay in making final payments.

By: Philip Beck /sgj
Philip S. Beck
Bartlit, Beck, Herman,
Palenchar & Scott
54 West Hubbard, Suite 300
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One of the Attorneys for
Alpha Therapeutic Corp.

By: Sara J. Gourley
Sara J. Gourley
Sidley & Austin
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One of the Attorneys for
Armour Pharmaceutical
Company and Rhone-Poulenc
Rorer Inc.

By: Richard Berkman /sgj
Richard L. Berkman
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By: Geoffrey Smith /sgj
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One of the Attorneys for
Bayer Corporation

Sara J. Gourley
Sidley & Austin
One First National Plaza
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(312) 853-7000

CERTIFICATE OF SERVICE

I hereby certify that on February 24, 1997, in accordance with paragraph 8(A)1. of Pretrial Order No. 2 in MDL 986, I caused the foregoing document to be served by guaranteed overnight delivery on plaintiffs' counsel:

David S. Shrager, Esq.
Shrager, McDaid, Loftus
Flum & Spivey
32nd Floor
Two Commerce Square
2001 Market Street
Philadelphia, PA 19103;

Dianne M. Nast, Esq.
Roda & Nast, P.C.
Suite 301
36 East King Street
Lancaster, PA 17602

Debra A. Thomas, Esq.
221 North LaSalle Street
Room 1154
Chicago, IL 60601; and

Ross M. Goodman, Esq.
Levin, Middlebrooks, Mabie,
Thomas, Mayes, Mitchell
& Papantonio, P.A.
226 S. Palafox Street
Pensacola, FL 32501

and to be served by guaranteed overnight delivery on the following defendants' counsel:

Richard L. Berkman, Esq.
Dechert, Price & Rhoads
1717 Arch Street, #4000
Philadelphia, PA 19103-2793
Counsel for Baxter Healthcare Corporation

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Counsel for Alpha Therapeutic Corporation

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Counsel for American Red Cross

One of the Attorneys for
Armour Pharmaceutical Company

Of Counsel:

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Lory A. Barsdale
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Richard L. Bertram
Direct Dial: (215) 994-2684

February 25, 1997

The Honorable John F. Grady
United States District Court
United States Courthouse
219 South Dearborn Street
Chicago, IL 60604

Re: Recent Developments Disrupting Implementation of Settlement

Dear Judge Grady:

Late last week we became aware of certain developments that we believe we must bring to your attention, pursuant to Rule 3.3 of the Rules of Professional Conduct, U.S. District Court for the Northern District of Illinois. We also seek your advice as to how best to prevent these developments from disrupting our implementation of the class settlement.

The Committee of Ten Thousand, in conjunction with lawyers Thomas Mull, Charles Kozak and Warren Radler, has been holding town meetings that we believe are calculated to encourage class members to opt-out of the settlement. Moreover, we believe that at least part of the stated bases for encouraging opt-outs is misinformation. In addition, class counsel has reported to us that the Committee of Ten Thousand has made certain demands relating to the settlement, which if not met will result in a course of action that includes threats of property damage to the fractionator defendants. In addition, some individuals have

allegedly threatened physical harm to certain counsel involved in the proceedings before you.

Attached as Exhibit A is a seven page memorandum on the stationery of Charles Kozak addressed as a letter to the hemophilia community. This was made available to everyone who attended a meeting of the Michigan Hemophilia Foundation on February 13, 1997. We received a copy from NHF counsel Mark Meyer, who was invited to and did attend that meeting. The attached letter sets forth misinformation including allegations about Cutter infusing chimps with AHF in 1981, while failing to disclose the results of the investigation into that issue ordered by the Court. (See letter from David Shrager to the Court dated January 14, 1997, totally rebutting such allegations.) It also encourages people to opt-out of the settlement and write the Court. It gives a 1-800 number for them to call at Mr. Radler's firm.

Also attached as Exhibit B is a notice of a meeting that was held in St. Louis and Kentucky on February 15, 1997 sponsored by COTT. Class counsel Jan Adams attended the meeting in St. Louis. The St. Louis group was connected by audio to the Kentucky meeting with Thomas Mull, Charles Kozak, Warren Radler, Wayne Swindlehurst from COTT and others. Jan Adams has indicated that she has an audiotape of this meeting. A videotape was reportedly prepared at the Kentucky meeting. We understand that the same memo that was passed out in Michigan (or a very similar one) was also passed out in St. Louis and Kentucky.

As set forth on the attached affidavits, Jan Adams called Phil Beck, Geoff Smith, Rick Berkman and Sara Gourley and reported on a conversation on February 20, 1997 with Dana Kuhn. According to Mr. Kuhn, the COTT board has developed a plan of action if the defendants do not fund an escrow account by March 31 and issue checks by June 1, 1997. This plan of action includes seeking massive opt-outs and property damage to defendants' businesses. In addition, some individuals have allegedly threatened physical harm to certain counsel before this Court. This Court should be aware that prior property damage has occurred (see attached Exhibit D, article from the March 5, 1996 edition of the South Bend Tribune reporting on the vandalism against Bayer). Mr. Kuhn said the vandalism done to Bayer would be "child's play" compared to what is contemplated, which might result in "casualties".

As this Court is well aware, Messrs. Kozak and Mull were both members of the Steering Committee, although we are informed that Mr. Kozak has resigned. Members of COTT have also appeared several times before this Court with regard to the proposed settlement.

We and our respective clients are concerned that the developments described in this letter will unduly hamper our ability to move forward with the settlement. While counsel for both plaintiffs and defendants are submitting reports on the progress of the settlement, and remain committed to reasonable measures for bringing the settlement to a conclusion, it is difficult for the parties and their counsel to proceed effectively in an atmosphere of threats and intimidation.

It is also important for this Court to preserve its authority over the class settlement and the dissemination of information to class members and over the lawyers and parties who appear before this Court. See Erhardt v. Prudential Group, Inc., 629 F.2d 843, 846 (2nd Cir. 1980); Kleiner v. First National Bank of Atlanta, 751 P.2d 1193, 1203 (11th Cir. 1985); Georgine v. Amchem Products, Inc., 160 F.R.D. 478, 490 (E.D.P.A. 1995).

We thought we ought to bring this information to the Court's attention immediately by letter before discussing this issue when we speak to you this afternoon. Thank you for your consideration.

Respectfully,

Richard L. Berkman
On behalf of the
Fractionator Defendants

RLB/rm
Enclosures

cc: Philip S. Beck, Esquire
Nikki Calvano, Esquire
Sara J. Gourley, Esquire
Mark C. Meyer, Esquire
Dianne M. Nast, Esquire
David S. Shrager, Esquire
Geoffrey R.W. Smith, Esquire

ATTORNEY AT LAW
KANLÖNI ATRIUM
[illegible] KAIWA STREET, SUITE [illegible]
KAILUA, HI 96734
PH: (808) 262-6171
FAX: (808) 262-6870

EXTREMELY CONFIDENTIAL
Letter To Hemophilia Community

RE: Update regarding theories of Liability in HIV/Hemophilia Litigation

We think it is timely to communicate to each of you, the information you may need to finally decide whether or not to accept the offer of $100,000 from the Fractionators. We will attempt to very succinctly and briefly relate to you the significant evidentiary facts uncovered to date which may assist you, in view of Judge Grady's statements at the Fairness Hearing that he would be very liberal in allowing those people who were advised by attorney's that they had viable, stand-alone cases, to opt out of the settlement, even though they had sent in opt in forms, or had failed to send in any form at all.

STATUTE OF LIMITATIONS

Recently, a member of your community, Terry Rice from Maine, brought to our attention an ingenious argument, which upon further research, has shown significant promise. Basically, at some point in time, the Fractionators had a duty to voluntarily recall their non-heat treated products. This may have been in March 1984, when the HIV virus was identified, August/October, 1984, when the CDC published the results of their prototype ELISA testing on 200 Hemophiliacs which disclosed 75% positivity in Type A's and 40% infection in Type B's, or in May 1985, when the Director of the FDA, Dr. Harry Meyer demanded the surrender of the non-heat treatment licenses from the Fractionators. However, regardless of when this point in time arose, the FDA Guidelines governing voluntary recalls stipulate that the consumer must be NOTIFIED of the product recall. Apparently, this FDA position was recently reinforced by an official at a meeting where Terry Rice was present. Clearly, the Fractionators failed to recall this obviousely contaminated product, even after heat treated products were on the market in February, 1984, because they did not want to give notice to the Hemophilia Community that they were aware of lots into which donors had tested positive for HIV, had been used by individuals in the Community. This would have immediately aroused the consciousness of the Community, resulting in voluminous litigation against the companies involved in the notice. This would have resulted in an entirely different litigation scenario, because the Plaintiff would have a prima facie case, with the jury being aware of the capability of the Defendants to trace the donors into the recipients, and to identify the particular Fractionator implicated in the contaminated lots.

EXHIBIT
A

It is our opinion that until the Fractionators fulfilled their obligation under the FDA regulations to either recall these lots and give notice to the END-USER, or complied with LOOK BACK guidelines, which require the blood product supplier to notify the recipient when he has received blood products from an HIV positive donor, the Statute of limitations has not begun to run. The Fractionators have been actively concealing vital information which the consumer is entitled to have under FDA guidelines, in an effort to evade being sued for infecting their customers with HIV through their own negligence. Until this situation is rectified, the Statute of Limitations should not commence running.

We have recently obtained the affidavit of Dr. Edmund Pellegrino, who is an expert on Medical Ethics, and who was present at the meeting where Dr. Pendergast and other FDA staff members discussed the Fractionator obligations under the Voluntary Recall Regulations. He agrees that the Practionators had an obligation to Recall and to warn of the obvious increased risk of their AHF products in July of 1982, and that the FDA's position is that notice must be given to the end user of the AHF products.

Consistent with the analysis above, the State Supreme Court of Alaska has recently ruled in Waage v Cutter that the Fractionators must allow the jury to decide whether or not the defendants willfully and fraudulently concealed the fact that Factor Concentrates were the cause of Mr. Waage's HIV infection, and further, that HIV infection will cause AIDS. If the jury decides that Cutter was guilty of this conduct, the Statute of limitations is tolled, unless the Plaintiff was "UTTERLY UNREASONABLE" in the discovery of his cause of action.

This decision may be the "final shove" over the abyss for the Practionaters. It is particularly significant for several reasons.

1. The poor undermanned and outgunned Plaintiff's lawyer didn't know the pertinent law, but despite this, the Supreme Court applied law and argument on behalf of the Plaintiff even though the Plaintiff's lawyer did not even make this argument in the lower court.

2. The Court specifically held that where there is a statutory duty by a company to the consumer, such as the FDA imposed responsibility to label drugs appropriately, their is a duty to disclose relevant information concerning risks, to the physician and/or patient. Failure to fulfill this duty, will estop the Practionator from asserting the Statute of Limitations as a defense, unless the Plaintiff was "UTTERLY UNREASONABLE" in the discovery of his cause of action.

3. Even though the Plaintiff and Cutter entered into a settlement and dismissed the appeal prior to the Court's decision, the Supreme Court of Alaska felt that the decision was of sufficient public importance to warrant it's publication despite the settlement.

In our judgment, this decision sends a clear signal to the Fractionators that at least one State Supreme Court has found fraudulent concealment in just the "bare bones" record submitted to them.

EVIDENCE OF NEGLIGENCE

The evidence has raised very strong inferences that three of the Fractionators, Bayer A.G, Baxter and Alpha were engaging in the practice of combining the plasma pools containing known, promiscuous homosexual donors with pools used to manufacture AHF. This undoubtedly resulted in a product which was at much higher risk for the transmission for HIV. Further, when the CDC investigated the source material being used by the Fractionators in July, 1982, the Fractionators, led by Michael Rodell of Baxter, formed a conspiracy of silence, and concealed the use of these extremely high risk donors from the CDC. This conspiracy continued throughout the AIDS epidemic. The Fractionators, through their Responsible Heads, used this coalition to prevent timely warnings, widespread use of Heat Treated products available by March 1983, introduction of surrogate testing, voluntary recall of non heat treated products, influencing the NHF to discourage litigation again the NASAC or the Fractionators or treaters, and continued recommendations by the NHF to continue use of contaminated products, even when donors who had died of AIDS were identified as having donated into AHF lots.

Industry documents have revealed that even after the FDA informed the Fractionators that a prototype HTLV-III test was being used by the NIH and that the HIV virus had been identified on May 7, 1984, Industry continued to market non-heat treated AHF produced from unscreened plasma. Even more amazing is the fact that by this time, every Fractionator had a heat treatment license.

It is our opinion that the failure to warn of these increased risks through use of these donors known to be at very high risk for viral transmission (including prisoners, skid row inhabitants, I.V.drug abusers/Prisoners) even as far back as 1978, provide a compelling case for virtually every consumer of these products who has become HIV infected as a result of using them.

Recent studies have demonstrated that Hemophiliacs have been infected with a rare strain of Hepatitis C, seen only in one other group of at risk populations in the U.S., with notable frequency, I.V. drug abusers. Hemophiliacs who are HIV + are seven times more likely to carry this particular strain of HCV than HCV transfusion

infected populations in general. It is now becoming clear that the Fractionators were using substantial numbers of I.V. drug abusers as plasma donors. The "Myth" that "paid for" plasma was safer than volunteer plasma was just that, a carefully conceived public relations deception, perpetuated by the Fractionators through their paid "experts" in this field, over the years.

It is our further opinion, that the Fractionators have so skewed the epidemiological landscape by their fraudulent manipulations of the information available to them, that they should be estopped from using the Learned intermediary and date of infection defenses. In particular, why should the Defendants be allowed to argue and present evidence that a Plaintiff was infected before warnings were required, when if they had warned, instead of conspiring to delay warnings until their heat-treated products were on the market, we would know for certain whether warnings would have been effective with regards to this particular Plaintiff.

Likewise, If Physicians had been informed of the true risk of viral transmission of these deadly products, even as far back as the late Seventies, they would probably not have prescribed these products for their patients (or dogs).

Incidentally, even the Defendant's own epidemiological studies demonstrate that Factor IX users were not infected until December, 1983, almost one year after it is undisputable that warnings were appropriate. Since only 40% of Hemophilia B patients were eventually sero-positive, it is prima facie evidence that warnings would have prevented infection of this sub-group of patients. Therefor, we see no reason for any sero-positive Hemophilia B patient to opt in to the settlement for evidentiary reasons.

Discovery has also disclosed that some of the companies were engaged in the practice of using plasma collected and frozen prior to the FDA screening requirements for production of AHF products manufactured after the requirements were in place. This is just another example of the Cavalier attitude and conduct of the Fractionator Cartel towards the health and safety of their consumers of so called "Ethical, Biological" Blood Products.

THE FDA DEFENSE

It is becoming increasingly clear that the FDA was improperly influenced by the Fractionators in that they allowed them to continue using donors with a history of viral hepatitis in the production of AHF even after July 1982, when these donors were clearly identified by the CDC as being at risk for AIDS transmission. Further, these donors had been specifically prohibited from donating blood or plasma by FDA regulations dating back to 1972. In addition, the Medical literature had warned against using prisoners or Homosexuals as donors from 1975. Nevertheless, the FDA permitted the Fractionators to use these

donors right through the AIDS epidemic, thereby insuring virtual universal viral infection with Hepatitis or HIV in the Hemophilia Community. However, recent developments indicate that the FDA may be becoming aware that the wind has shifted, and will be less willing to side with Industry and former FDA employees, such as Dr. Dennis Donohue, or Dr. David Aronson, who sold out to the Fractionators, at the expense of consumers.

THE VIRAL INACTIVATION THEORY

Recent informal conversations with Dr. Ed Shanbrom in Japan have been very helpful in understanding the issues involved with these theories. Shanbrom (the inventor of AHF products) states that he offered the Fractionators a Detergent inactivation process starting in 1975, because he realized the risk of using pooled plasma products in human subjects, where viruses of unknown propensities lurked. He was rebuffed by all Fractionators with the exception of Armour, which, according to Shanbrom was extremely close to a very good detergent process in late 1982. However, when Dr. Michael Rodell came over from Baxter in March of 1983, Armour shut down this project forever. Dr. Tom Drees of Alpha admitted that his company refused to use Shanbrom's process in 1982, much to their later regret, when AIDS came along. New York Blood Center, Baxter, Alpha and Bayer A.G. later adopted the Detergent process developed by Shanbrom in 1986-7. Shanbrom related that he got the idea for his detergent process through studying Vaccines and Immune Globulin sterilization processes. This is why the use of donors who are necessary for Vaccine and Immune Globulin Production, in the same plasma pools being used for AHF production, is so dangerous. Dr. Tom Asher, former owner of Hemacare, a plasmapheresis company, and former member of the Board of Directors of ABRA, concurred with Dr. Shanbrom, that this practice by the Fractionators was indeed "shocking". Dr. Asher agreed to act as an expert against his former colleagues, when shown documents confirming this practice.

However, Dr. Shanbrom stated that the theory that the Fractionators should have heat treated their products prior to the onset of the AIDS epidemic is "nonsense". The Fractionators pursued this process as a knee jerk response to the Behrenwerke products in Germany, because their lucrative European Markets were threatened. Behrenwerke developed this heat treatment process to make a product freer from fibrinogen, and not specifically to inactivate viruses. Shanbrom related that heat treatment is not really effective against viruses, and is currently promoting his "Iodine" detergent process, which will eliminate "non-lipid" viruses as well as lipid viruses according to Shanbrom. Because the Fractionators will not buy his patent, Shanbrom claims we are looking at "The Band Played On Part II". He has agreed to act as a "fact" witness if subpoenaed by the Plaintiffs, which means he can give no expert opinions, but can give historical information, which may prove very useful in a trial. In our opinion, the Fractionators are terrified of Shanbrom, and will not give him any

credibility by making a deal with him for his process, until this litigation is concluded.

OTHER DEVELOPMENTS

It is clear that a vast majority of the Plaintiffs represented by the Steering Committee, with the exception of Eric Weinberg and Ron Grayzel, have opted into the Settlement. Tom Mull and Chuck Kozak have recently entered into a co-counsel arrangement with the National Law Firm of Rivkin, Radler and Kremer. This firm has 170 attorneys in offices located in Pasadena, New York, Chicago and Santa Rosa. They have done primarily defense work in the past. They have considerable experience in the Mass Tort field, defending Dow in Agent Orange litigation and GD Seale in the CU-7 IUD Litigation. They are prepared to invest the time, money and personnel to litigate these claims. Some of you may know Leslie Grisham, a very able and dedicated paralegal who has worked with Charles R. Kozak on the Alverado Case. She will be working for the Rivkin Firm out of their Pasadena office, exclusively on these cases. In our judgment, a firm of this dedication and size will be necessary to properly represent any and all meritorious cases, of which there may be hundreds in view of the recent facts described in this communication.

SERENDIPITY MATTERS

Recently, a document surfaced at Fulbright and Jaworski, Bayer's Counsel, which raised the possibility that Cutter was aware of the transmissibility of AIDS through AHF by virtue of several Chimpanzees who died of Pneumocystis Pneumonia, and exhibited T-Cell imbalances, presumably as the result of being infused with Factor VIII during the course of Cutter's Non A Non B viral inactivation Chimp Studies from 1979 to 1983. Depositions of Dr. Schwartz, Milt Mozen, and others involved are being completed before January 1, 1997, as ordered by Judge Grady. If this proves to be true, it would have dramatic effect on the total posture of this entire litigation against Bayer A.G., the deepest pocket. We will try to keep all of you informed of the developments regarding this matter as they occur.

CONCLUSION

It is our personal view that for the vast majority of cases, the sum of $100,000 dollars is woefully inadequate. We say this even considering the statute of limitations defense being bandied about so strongly by the Defendants. However, if the only consideration is when and how Much, and the merits of the case are immaterial, then and only then should such an offer be accepted. We don't see how the Fractionators can sustain many more "wicked body blows" such as "60 MINUTES", The Rivkin Firm, Monkey Documents, Conspiracy and Concert of Action, Conscious failure to recall, Thorough Discovery, (Chuck Kozak has personally reviewed

virtually every document produced to the Steering Committee, and arranged for copying of every relevant document), recent HCV studies, The Alaska Case etc. All of the illegal, devious, deceptive and reckless conduct perpetrated over the last 20 years, is finally catching up with them. The day of reckoning may be fast approaching, hence the gradually increasing urgency to settle with the Hemophilia Community, rather than incur the risk of a substantial, precedent setting verdict. We will do our best to achieve a satisfactory result in each of the cases we undertake representation.

The Rivkin firm can be reached at 1-800-870-7651

LEGAL UPDATE

DATE: THURSDAY FEBRUARY 13, 1997
TIME: 7:00 pm to 10:00 pm

SPONSORED BY: THE COMMITTEE OF TEN THOUSAND

GUEST SPEAKERS:
THOMAS MULL, ESQ. of MULL & MULL, JOE ORTEGO & WARREN RADLER OF THE RIVKIN, RADLER AND KREMER LAW FIRM, AND WAYNE SWINDLEHURST OF THE COMMITTEE OF TEN THOUSAND

CONTACT: WAYNE SWINDLEHURST AT (517) 381-9241 or the COTT office at (800) 488-2688

LOCATION: Moorsbridge Elementary School
7361 Moorsbridge Road
Portage, Michigan

The Committee of Ten Thousand is sponsoring this Town Meeting because there has been so much new evidence uncovered. We feel it is critical that the community have all of the facts when making decisions regarding the settlement, and future litigation against the Pharmaceutical Companies. These Attorneys have a wealth of information to share, concerning both the current settlement, and this new evidence.

Here is an opportunity to have all your questions answered.

Map enclosed

Honorable John F. Grady
United States District Court
United States Courthouse
219 S. Dearborn Street
Chicago, ILL. 60606

Re: MDL 986

Dear Judge Grady,

THE GREATER ST. LOUIS
HEMOPHILIA ASSOCIATION, INC.

LEGAL UPDATE

Date: Saturday, February 15, 1997
Time: 10:00 a.m. to 1:00 p.m.
Place: McCarthy Construction, 1341 North Rock Hill Road, St. Louis, MO (see map)

The Greater St. Louis Hemophilia Association will participate in a teleconference with the Committee of Ten Thousand and The Kentuckiana Hemophilia Foundation. The local hook-up will be at McCarthy (see map on reverse side). Please plan to attend this very informative meeting.

Guest Speakers:
Thomas Mull, Esq. of Mull & Mull; Joe Ortego and Warren Radler of the Rivkin, Radler and Kremer Law Firm; and Wayne Swindlehurst of the Committee of Ten Thousand

The Committee of Ten Thousand is holding this "Town Meeting" because there has been so much new evidence uncovered. They feel it is critical that the hemophilia community has all of the facts when making decisions regarding the settlement and future litigation against the defendant pharmaceutical companies. These attorneys have a wealth of information to share concerning both the current settlement, and this new evidence.

Snacks will be available (soda, fruit, cheese, and pretzels).

Contact Colleen Wilson at 314-773-2347 if you have any questions regarding this meeting. Here is an opportunity to have all of our questions answered.

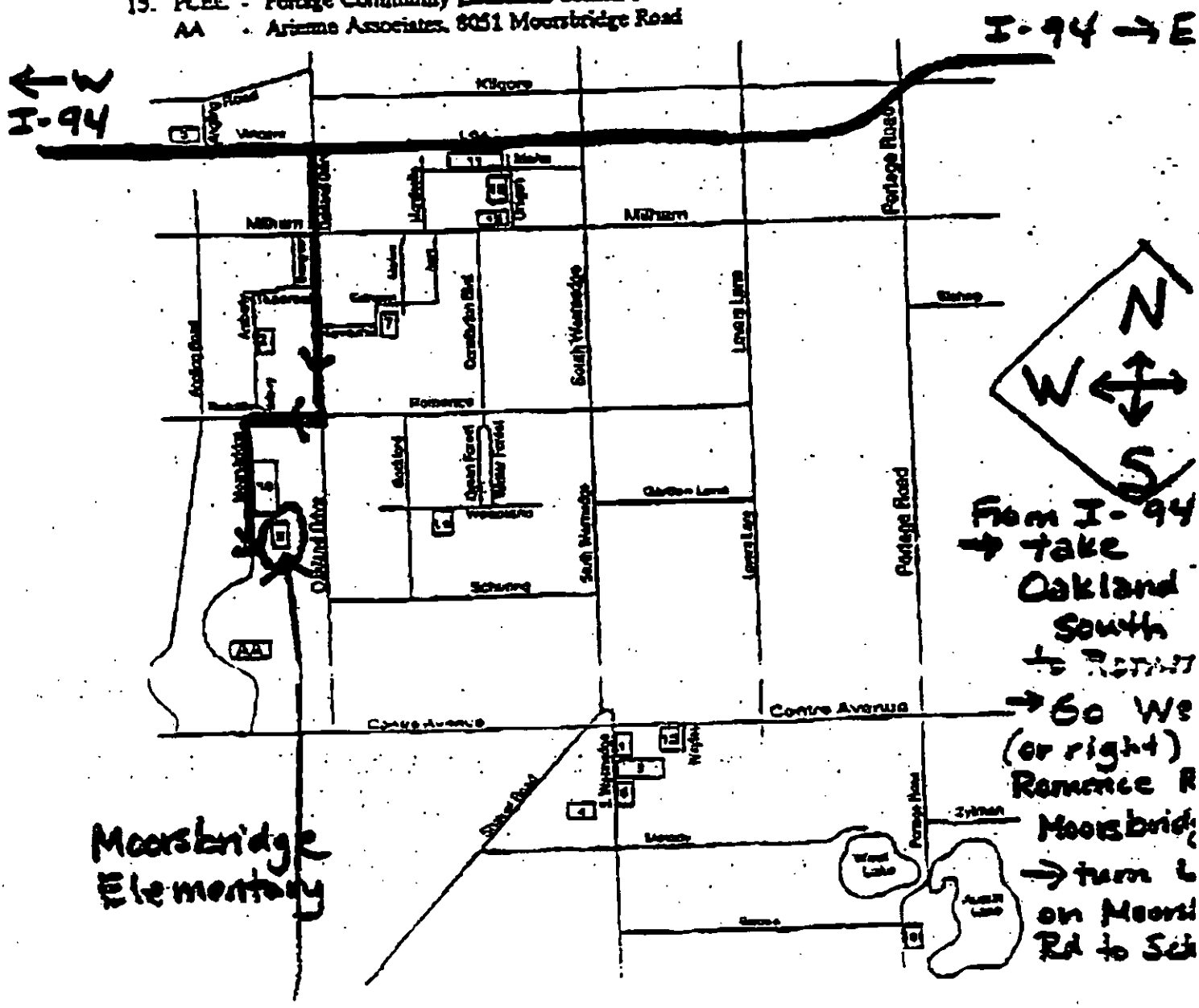
1121 Chouteau Avenue
St. Louis, MO 63103
(314) 241-2814

EXHIBIT
B

GUIDE TO FINDING OUR SCHOOLS

1. ADM - Administration Building, 5111 South Westnedge Avenue
2. AMB - Amberly Elementary, 6637 Amberly Avenue
3. ANG - Angling Road Elementary, 5340 Angling Road
4. CES - Central Elementary, 8422 South Westnedge Avenue
5. CHS - Central High School, 8135 South Westnedge Avenue
6. CMS - Central Middle School, 8305 South Westnedge Avenue
7. HAV - Haverhill Elementary, 6633 Haverhill Avenue
8. LAK - Lake Center Elementary, 10010 Portage Road
9. MRB - Moorsbridge Elementary, 7361 Moorsbridge Road
10. NMS - North Middle School, 5808 Oregon Street
11. NHS - Northern High School, 1000 Idaho Street
12. WAY - Wayles Elementary, 8160 Wayles Avenue
13. WMS - West Middle School, 7145 Moorsbridge Road
14. WDL - Woodland Elementary, 1401 Woodland Avenue
15. PCEC - Portage Community Education Center, 1010 West Milham Road

AA - Arsenne Associates, 8051 Moorsbridge Road



AFFIDAVIT OF PHILIP S. BECK

I, Philip S. Beck, having been duly sworn state as follows:

1. I have personal knowledge of the facts stated below and if called to testify could competently testify thereto.

2. I am a partner of the law firm Bartlit Beck Herman Palenchar & Scott and represent Alpha Therapeutic Corporation in ongoing hemophilia/AIDS litigation. I am also involved in the settlement efforts between Class Counsel and the fractionators.

3. On February 21, 1997, I received a telephone call from Jan Adams, who is a member of plaintiffs' Steering Committee. Ms. Adams informed me about a recent discussion she had with Dana Kuhn, a client of hers who has opted out of the settlement and who is a member of the Board of Directors of the Committee of Ten Thousand ("COTT").

4. According to Ms. Adams, Mr. Kuhn said the following:

a. COTT has decided that the final deadline for the global settlement is March 31, 1997. At a minimum, the fractionators must escrow money by that date. In addition, claimants must receive their checks no later than June 1.

b. If the March 31 deadline is not met, COTT will execute a five-part plan:

(i) COTT will engage in efforts to cause massive opt-outs.

(ii) COTT will launch an organized media campaign telling reporters that the fractionators have "screwed" the hemophiliacs again — this time by promising a big settlement and then breaking their word.

(iii) COTT will take out full-page advertisements in The New York Times, USA Today, and another paper that Ms. Adams could not remember. These ads will

EXHIBIT
C

be similar to the ads directed against Phillip Morris concerning tobacco products. They will use phrases such as "killed their customers." The ads will list the fractionators' non-factor concentrate products and call for a boycott. There will be a footnote to the shareholders explaining that COTT gave the fractionators fair warning but that they ignored them knowing that the stock prices would tumble.

(iv) COTT will call for a boycott of the factor concentrates made by each fractionator in a sequence that reflects its view of which companies are "weakest." Baxter is the weakest and will be hit first, Alpha is second, and Armour is third. Bayer is last, but the boycott against Bayer will be long-term because COTT views Bayer as the most culpable. COTT's intention is to effect a permanent change in market share.

(v) COTT will begin a campaign of activities (which Ms. Adams later described as "sabotage") designed for business interruption. The result will make Lisa Smith's efforts at defacing Cutter's property look like "child's play." They "know there will be casualties."

5. According to Ms. Adams, Dana Kuhn also told her that there have been physical threats voiced against David Shrager, Duncan Barr and Rick Berkman. People are talking about "eye-for-an-eye" justice.

6. Ms. Adams also reported about a recent town meeting in Kentucky headed by Charles Kozak and Thomas Mull and attended by hemophiliacs. Ms. Adams said Kozak and Mull's plain message, which was videotaped for distribution throughout the country, was that hemophiliacs should fire their lawyers and hire them. They said they have associated with a new firm that is ready to devote the necessary resources to winning. They claim to be greatly

encouraged by the Alaska Supreme Court's ruling on statute of limitations. Ms. Adams also said that the Kentucky meeting appeared to be targeted at St. Louis plaintiffs, who attended the meeting remotely. Finally, Ms. Adams stated that Messrs. Kozak and Mull are trying to undermine the settlement.

I declare under penalty of perjury of the law of the United States that the foregoing is true and correct.

Further affiant sayeth not.

Philip S. Beck

SUBSCRIBED AND SWORN TO
before me on the 24th day of
February, 1997

Notary Public

OFFICIAL SEAL
SHIRLEY A AVAKIAN
NOTARY PUBLIC, STATE OF ILLINOIS
MY COMMISSION EXPIRES:11/01/00

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

IN RE FACTOR VIII OR IX CONCENTRATE BLOOD PRODUCTS PRODUCTS LIABILITY LITIGATION	)))))	MDL - 986 No. 93C7452

AFFIDAVIT OF GEOFFREY R.W. SMITH

Geoffrey R.W. Smith, under penalty of perjury, swears and states as follows:

1. On Friday, February 21, 1997, I received a telephone call, as counsel for Bayer, from Ms. Jan Adams, a member of the plaintiffs' Steering Committee in this case. Ms. Adams said that she was calling as "an officer of the court" to relay certain information that she had learned during a conversation that she had recently had with Mr. Dana Kuhn. I am personally acquainted with Mr. Kuhn and know him to be active in several groups which seek to represent the interests of HIV infected hemophiliacs and their families, including a group known as the Committee of Ten Thousand ("COTT").

2. Ms. Adams told me that the COTT Board has set March 31, 1997, as an "absolute deadline" by which the settlement funds must be "in the bank" and that, if they are not, COTT will take certain actions. If the funds are deposited by March 31, the COTT Board has set a second "drop-dead" deadline, of June 1, 1997, by which checks must be "in the mail" or those same actions will begin then. The actions which COTT plans to take if either of these demands is not met include the following.

a. Efforts to encourage massive opt-outs.

b. Contacting the media with whom COTT has been in contact in the past, like "60 Minutes", and expressing COTT's view that the current situation is an "absolute outrage."

c. Taking out full page ads in USA Today, The New York Times (and one other newspaper, the name of which Ms. Adams could not recall) which will be like the "Philip Morris ads." They will be designed to effect the fractionators' stock prices. They will say that the fractionators made products that killed their customers. They will list other products made by the fractionators. That will say that the management of each fractionator was told in advance that such an advertisement would appear if they did not do the things COTT asked them to do.

d. COTT will start a boycott of the fractionators' products; one fractionator at a time. COTT will go after the weakest fractionator first; which COTT perceives to be Baxter because Baxter has several new products. The boycotts will attempt to create significant business losses.

e. COTT will engage in property damage, calculated to cause business interruptions. These acts will make the property damage that previously occurred at the Bayer facility in Elkhart, Indiana "look like child's play."

3. Ms. Adams said that there have also been allusion to inflicting personal injuries on the lawyers defending the fractionators.

Sworn on this 24th day of February, 1997.

Geoffrey R.W. Smith

C:\Docs\Bayer\MDL\Pleading\affidavit.grws.wpd

AFFIDAVIT

COMMONWEALTH OF PENNSYLVANIA)
) ss
COUNTY OF PHILADELPHIA)

Richard L. Berkman, being duly sworn according to law, states under penalty of perjury as follows:

1. On February 21, 1997 Jan Adams, one of the Class Counsel, left an urgent message at about 11:00 a.m. for me to call her. I reached her at about 2:00 p.m.

2. She reported to me the information noted in the attached affidavits of Philip Beck and Geoffrey Smith dated February 24, 1997.

3. In addition, Jan Adams discussed with me the following:

a. She had attended the meeting on February 15, 1997 in St. Louis which was connected by phone to a live meeting in Kentucky. She also said that she understood a videotape was being made of the meeting in Kentucky. She made an audiotape of the same meeting in St. Louis. She said she would send me the audiotape, but on February 24, 1997 she called back to say she was no longer willing to send it.

b. When I told her that I had seen a Charles Kozak handout that was distributed earlier in February at a Michigan Hemophilia Foundation meeting, she said that a similar

or the same handout was made available in St. Louis and presumably in Kentucky on February 15, 1997.

c. She called Dana Kuhn on February 20, 1997 at the suggestion of David Shrager, lead Class Counsel. When she reported to Mr. Shrager what Dana Kuhn said, Mr. Shrager recommended that she call me and other defense counsel to give us the information reported in the attached affidavits of Philip Beck and Geoffrey Smith.

d. I suggested she memorialize what she had learned from Dana Kuhn and from the COTT meetings. I told her that I believed she had a duty to report this information to this Court as well as to defense counsel.

Dated: February 25, 1997

Richard L. Berkman

Sworn to and subscribed
before me this 25th day
of February, 1997.

Joan C. Wagner

Notary Public

My Commission Expires:

NOTARIAL SEAL
JOAN C. WAGNER, Notary Public
City of Philadelphia, Phila. County
My Commission Expires April 19, 1999

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

IN RE: FACTOR VIII OR IX CONCENTRATE LITIGATION	NO. 93 C 7452 MDL-986

AFFIDAVIT OF SARA J. GOURLEY

1. I am counsel of record for Armour Pharmaceutical Company and Rhone-Poulenc Rorer Inc. in the above captioned litigation.

2. On February 21, 1997 I received an urgent message to call Jan Adams, a member of the Plaintiffs' Steering Committee in MDL-986 and class counsel in connection with the settlement class which has been certified by this Court.

3. When I returned Ms. Adams' call on Friday afternoon, she conveyed to me similar information to that which is contained in the affidavits submitted by other defense counsel in this matter. Specifically, Ms. Adams told me that COTT has set a "drop dead" date of March 31 for the payment of settlement money into escrow and June 1 for the transmittal of settlement checks to eligible claimants. If those deadlines are not met, Ms. Adams told me that COTT intends, *inter alia*, to cause property damage to defendants' businesses in a manner which will "make Lisa Smith's actions look like child's play." I understood this reference to be to the criminal damage to property

undertaken by Ms. Smith and others at the Bayer facility in Elkhart, Indiana. Ms. Adams also told me that COTT had threatened certain defense lawyers with personal injury. She told me that they have a "war mentality" and they "know there will be casualties."

FURTHER AFFIANT SAYETH NOT.

Sara J. Gourley

Subscribed and sworn to before me
this 24th day of February, 1997.

NOTARY PUBLIC

"OFFICIAL SEAL"
JOYCE M. BOCHENSKI
Notary Public, State of Illinois
My Commission Expires June 15, 1997

Tuesday March 4, 1997 — South Bend Tribune

Tribune Photo/JEFF KUROWSKI

Bayer Corp. employees prepared Monday to remove graffiti that was spray-painted on a company sign outside the Elkhart office by three women representing hemophiliacs who were infected with HIV from a blood-clotting product.

Three activists arrested in defacing of Bayer sign

By LEJENE BRECKENRIDGE and JEFF KUROWSKI
Tribune Staff Writers

ELKHART — Three out-of-state women, who said they represent hemophiliacs infected with HIV from blood-clotting products made by Bayer Corp., were charged today with causing some $10,000 in property damage Monday at the Bayer Corp.

The trio spray-painted a company sign at Edwardsburg Avenue and Bristol Street.

The women said they painted the sign red to represent the blood of hemophiliacs who became infected with HIV, the virus that causes AIDS, after the hemophiliacs took a blood-clotting product made by Bayer and three other companies.

"The paint was a symbol for us of the blood of hemophiliacs," said Lisa Smith, 35, of Edwardsville, Ill. She said her husband became infected with HIV from the blood-clotting product and died last August.

The women said they painted the sign red to represent the blood of hemophiliacs who became infected with HIV, the virus that causes AIDS, after taking a blood-clotting product made by Bayer and three other companies.

more than $2,500 is a Class D felony and cannot be handled by city court.

Charged with the damage are Smith; Maegie Kellar, 37, Palm Harbor, Fla.; and Brenda Walls Mills, also of Florida.

Bayer Corp. is one of four drug companies that have been sued in federal and state courts by hemophiliacs who claim they became HIV infected during the early 1980s, after taking a blood-clotting

ropean drug company Rhone-Poulenc Rorer Inc., and Japan's Green Cross Corp.

Bayer Corp., formerly known in Elkhart as Miles Inc., became involved in Factor VIII production when it acquired Cutter Laboratories Inc. of Berkeley, Calif., about 10 years ago. It does not produce Factor VIII in Elkhart.

Factor VIII was derived from the blood plasma obtained from thousands of blood donors. Before 1984, some of the plasma was contaminated with HIV, because the medical community either was not aware of the virus or the implications of HIV infection.

HIV infection eventually leads to AIDS.

The hemophiliacs claim the drug companies should have taken steps sooner to prevent the distribution of HIV-contaminated Factor VIII. German researchers discovered in 1978 that heating blood plasma kills the hepatitis virus. The hemophiliacs contend the drug companies should have moved

EXHIBIT D

DAVID S. SHRAGER
EDWARD B. McDAID
WILLIAM A. LOFTUS
JOANNA HAMILL FLUM
WAYNE R. SPIVEY
*MICHAEL S. BLOOM
*ROBERT L. SACHS, JR.
*DANIEL S. WEINSTOCK

*also member New Jersey Bar

Shrager McDaid Loftus Flum & Spivey
ATTORNEYS AT LAW

32nd FLOOR
TWO COMMERCE SQUARE
2001 MARKET STREET
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(215) 568-7771 FAX (215) 568-7495

February 24, 1997

OVERNIGHT DELIVERY

Honorable John F. Grady
United States District Judge
United States District Court
219 South Dearborn Street
Chicago, IL 60604

RE: MDL 986 - Factor Concentrate Litigation

Dear Judge Grady:

May I submit this report concerning the status of the settlement, what realistically remains to be accomplished and within what sort of a time frame. I believe it is better for you to have separate reports on behalf of class counsel and the fractionators, and we are proceeding accordingly.

Since the Court hearing on November 25, the parties have remained actively at work to get the settlement process concluded, specifically to respond to what we all understood at the outset would be the challenge of complying with the representation to otherwise eligible claimants that they needed to have a reasonably high level of assurance that the $100,000 amount would not be subject to public or private sector liens, reimbursement or subrogation claims, and that the funds received would not compromise their eligibility status in the respect of public sector benefit payments in the future (principally Medicaid).

The conclusion is irresistible, despite an enormous work effort which has been ongoing, that while we are confident that the individual requirements to make this settlement happen are being dealt with properly and likely will successfully be satisfied, the process will take more time, to be measured not in weeks, but months. I will describe below our perception of the progress that has been made and what remains to be done. But the important point, which we have many times emphasized to our

defense colleagues, is that people will not stand by while the process goes on to a conclusion at an uncertain time, and beyond a date when the claimants might have supposed that the settlement would be concluded and they could get their money. People who are eligible to receive payment (the clear majority) do not want to hear that there are problems which impact on the minority and could require a significant delay in their receipt of a net $100,000 payment. They want their money here and now. They are increasingly concerned and frustrated. Members of a politically activist group within the hemophilia community (most of whom have opted out of the settlement) have and will continue to agitate, write letters, sponsor letter writing to the Court, and spread hostile messages. They have been doing so for many weeks. On the other hand, the silent majority continue, for the most part, to be patient. They receive reports from their lawyers. The extreme agitation in some quarters is understandable only in the context that there are some people who feel they have nothing to lose.

These realities have been shared with defense counsel, and we have appealed to them to have their clients put the money up in escrow subject to reasonable terms and conditions so that those who are entitled to get paid (likely a group of 4,000 - 4,500) can get paid upon signing appropriate closing papers. We strongly believe that those who have outstanding collateral benefit issues will then, and only then, understand that the money is there collecting interest, but that there will be an additional delay. This group (in the range of 1,500 - 2,000 persons) should know our best estimate of that delay and what is being done to resolve the issues. As Your Honor will see from what follows, many within the minority group who cannot get paid currently will be able to be paid within a brief period of time, but admittedly there will be some who will have to wait a number of months. In making this proposal to the defendants we have, of course, explained, as the Court would no doubt insist, that those claimants who would not be willing to accept the limitations on the amounts received or the risks in terms of reimbursement or eligibility issues would have to enjoy the right to opt out. But we have pointed out to defense counsel that this group predictably would be extremely small since their options are limited. Thus, a person who would be relegated to a tort claim by opting out because of unresolved Medicaid eligibility issues would need to confront precisely those same issues presuming successful prosecution of a tort claim - laying aside the liability, limitation and other challenges on the merits which, in the past, have resulted in adverse verdicts for the plaintiffs.

So again, we believe and have urged that unless eligible claimants are in a position to get paid promptly, the process will not hold together no matter what the Court says or what we say as class counsel. The "hate mail" mounts, and it has even

gotten to the point where threats of punitive action are being made. I have been reliably informed that a few lawyers have been spreading inaccurate information concerning the litigation and effectively, have encouraged people to reject the settlement (months after the deadline date for opting out) unless they are compelled to act as a matter of financial necessity. On the other hand, we know from multiple inquiries that if eligible claimants started to get paid, others who earlier opted out would wish to opt in and give up their law suits. We have had many such requests and I have brought this issue to the attention of defense counsel (i.e., would they agree that persons who earlier opted out be permitted to participate).

Defendants' position as we understand it is that although the process may be moving slower than we would all have liked, substantial progress is being made, the prospect for successful conclusion of the settlement is good, and the claimants should understand that they must be patient a while longer, a period (as they do not question) involving months. With respect to the idea of escrowing the money or accepting the risk of additional opt outs, defense counsel have advised that this would constitute a renegotiation of the terms of the settlement to which their clients are not willing to agree.

In terms of the specific issues:

1. A resolution of private sector subrogation claims is essentially complete. Although the consortium of carriers involved does not include every single major insurer, it is broad enough in scope that it should offer the Court satisfactory assurance that this issue should not stand in the way of a final fairness determination. Defendants have agreed that as additional companies not covered by the master agreement (written draft now in place) are identified, they will keep the same offer on the table for any such insurers identified by any particular claimant. The fractionators have, in my view, worked diligently on this subject and again, the issue has just about been successfully resolved.

2. With respect to public sector liens, meetings have taken place and contact has been established with the White House and the Office of the Vice President. The goal is to obtain a favorable political decision with direction to the Department of Justice to negotiate a compromise of liens in accordance with the same formula employed to resolve the private sector subrogation claims. That process has been moving in a positive direction so far with the active participation of both sides. Once agreement is reached with the federal regulatory officials it is anticipated that a similar formula can be applied with respect to state funding sources. Contact has already been established with the Washington representatives of the governors of the major

states involved. Although, of course, no assurances can be given that each and every claimant will have his/her lien issue resolved, we are confident that this issue too will be favorably dealt with. But this process could well take several more months.

3. Perhaps the most challenging issue is maintaining eligibility for Medicaid. It is in this regard that a special needs trust can be employed. A trust arrangement, however, may not be available to a claimant in the absence of that beneficiary being totally disabled. Thus, there are persons who would be eligible for the settlement (HIV positive) but would not be legally "disabled." Without getting into the details of a trust arrangement as it would apply on these facts, let me assure Your Honor after exhaustive consultation on multiple occasions by several of us with outside counsel who specialize in these issues, a trust can be used for the benefit of many persons who otherwise would confront eligibility issues, but it cannot assure participation for all such persons. Nor can the trust device assure that all amounts remaining in the trust at the death of individual beneficiaries would not revert to the public sector source. So we will likely end up with a few hundred people (who would face eligibility questions) who will not be able to participate in a special needs trust or will end up not receiving the entire $100,000 amount during their lifetimes.

4. Understandably, there are miscellaneous other issues involving the eligibility of claims filed late or alleged to be incomplete. There are still other issues of eligibility which apply to individual cases. All of this would need to be dealt with through an ADR process, likely under the guidance of a special master and subject ultimately to final decision making by the Court in the event of an appeal. The parties are ready to suggest a final format for this within a very short time frame. All of us are confident that these issues and the format for their resolution can be resolved in short order, within a matter of a week or two, so as not to delay payment. I predict that none of this would stand in the way of final court approval.

So what we have, in sum, is a situation in which the class settlement could be approved with payment to the clear majority of persons who are now eligible. This group can receive a strong level of assurance that a net amount of $100,000 would be paid to or on behalf of each eligible live or deceased person. Overall, my best judgment is that within a universe of approximately 6,000 eligible claims, about 4,000 could get paid within a matter of weeks, not later than the second quarter; about 1,000 persons could get paid within the next three to six months; about 500 persons could get paid within the year; the balance would be paid upon the passage of appropriate legislation. In the last mentioned regard, a legislative proposal is in place which apparently enjoys the support of all political

factions within the community which would exclude the $100,000 payment from consideration in eligibility for Medicaid. But what we cannot represent to you is whether, as hoped, such legislation will be enacted within a matter of months.

Thus, as described above, we have argued to defense counsel that the only way to salvage the settlement, in support of which the lawyers on both sides have invested great time and effort, is for the fractionators to solidify the proposal by placing the funds in escrow and permitting payment now to those who are entitled to receive it. Otherwise, while a vacuum exists and uncertainty persists as to whether the settlement will or will not go through, skepticism, criticism and frustration will mount. We do not doubt the fractionators intent to have the process succeed, but none of that responds to the reality of the situation. It could be, at this stage, that mediation by the Court on a prompt basis would be helpful. Frankly, I do not know.

Rather than terminating the process when there remains a prospect for success, I would urge the Court to consider fixing a deadline for the submission in writing of what steps will be taken and when, either to complete the pending settlement under its own terms, or on some revised basis that offers a high probability of success.

Respectfully submitted,

David S. Shrager

DSS/tah

cc: Richard Berkman, Esquire
Geoffrey Smith, Esquire
Sara Gourley, Esquire
Philip Beck, Esquire
Mark Meyer, Esquire
Class Counsel

THE HOLLORAN LAW FIRM

A Professional Corporation

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February 25, 1997

VIA FAX

The Honorable John F. Grady
United States District Court
Northern District of Illinois
219 S. Dearborn
Chicago, IL 60604

Re: MDL-986

Dear Judge Grady:

At 1 p.m. today I received, via fax, copy of the report from the fractionator defendants. During the first week of February, I received, from the St. Louis Hemophilia Association a copy of a notice of a meeting scheduled for Saturday, February 15. I believe that the only reason I received this notice is that I am on the mailing list for the association. When I contacted the coordinator of the meeting, I was told that she had no other information other than what was contained in the notice. I attended the meeting along with approximately 25 members of the association. One of the members of the association received permission to make an audio tape of the meeting. I do not believe that anyone participating in the meeting in Kentucky, including Tom Mull, Chuck Kozak, Warren Radler, Wayne Swindlehurst or Randy Lance were aware that I was participating in St. Louis. After a two hour presentation by the above named persons, there was a question and answer session, at which time I introduced myself and attempted to correct some of the misinformation that was being disseminated. I have obtained a copy of the audio tape that was made.

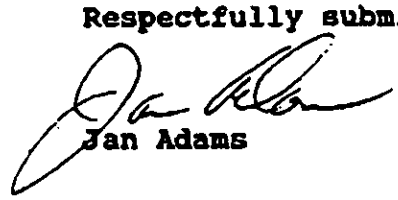
I sent a report of the meeting to members of the Plaintiffs Steering Committee. On Thursday, February 20, David Shrager asked if I would contact Dana Kuhn to see if I could learn more about the intentions of the COTT board. I currently represent Dana Kuhn. I

filed an individual lawsuit for him in the Fall of 1992 in state court. His suit was removed to federal court and is currently in the MDL. Mr. Kuhn, as you will recall, was a named class representative. Mr. Kuhn has filed a claim on behalf of his deceased wife who was infected. He has filed an opt out for his individual lawsuit. I completed a telephone conversation with Mr. Kuhn on Thursday, February 21, at approximately 7:30 p.m. After Mr. Kuhn reported to me the plan of action, I informed him that it was my duty, as an officer of the court, to report this plan. He said he understood that and said that he would be willing to confirm what he told me.

On the morning of February 21 I contacted David Shrager and reported to him my conversation. I suggested a conference call with all of the attorneys to assure that each person received the identical information at the same time. However, because David Shrager, Rick Berkman and Sara Gourley were traveling, that was not possible. For that reason, I contacted attorneys individually.

These recent developments raise the issues of attorney client privilege and attorney work product. For that reason, I believe that we should deal with these issues in-camera.

Respectfully submitted,



Jan Adams

JA:vap

cc: Richard Berkman
Philip Beck
Geoffrey Smith
Mark Meyer
Nikki Calvano
David S. Shrager
Dianne Nast

CUNNINGHAM MEYER & VEDRINE, P.C.

ATTORNEYS AT LAW

WILLIAM F. CUNNINGHAM MARK C. MEYER KEVIN J. VEDRINE

SANDRA L. WRIGHT MAURA W. MOORE JONATHAN S. GUNN CARYN R. SUDER

LEGAL ASSISTANTS

RAE C. ARMBRUST LINDA J. POINDEXTER JENNIFER L. STOCKS

TELECOPIER COVER LETTER

DATE: September 12, 1996 TIME: 2:35 p.m.

TO:		
	The Honorable John F. Grady	312/435-7578
	David Shrager	215/568-7495
	Diane Nast	717/397-1700
	Sara Gourley	312/853-7036
	Richard Berkman	215/994-2222
	Geoffrey Smith	202/625-1230
	Philip Beck	312/494-4440
	Nikki Calvano	202/616-5200

FROM: Mark C. Meyer
TELEPHONE: 630/260-8602 FAX: 630/260-8080 FEB 25 PM 3:17
FILE NUMBER: 8580 MCM/SLW/MWM

RE: MDL 986 - Blood Products Litigation

Please see the attached correspondence from the National Hemophilia Foundation related to the settlement issues and the actions of the National Hemophilia Foundation in seeking resolution of the contingency matters. The Foundation believes that the Court should be aware of the NHF's actions, though they are independent of the efforts of the settling parties.

TOTAL PAGES BEING SENT (INCLUDING COVER SHEET): 4

****

If you do not receive this entire message, please contact the Mark C. Meyer at (630) 260-8602.

Thank you,

Mark C. Meyer

Contact Person/Transmitter

Suite 303
New York, New York 10012
(212)219-8180
Fax (212) 966-9247

The National Hemophilia Foundation

Since 1948

CFC #0543

February 25, 1997

The Honorable John Grady
United States District Court
Northern District of Illinois, Eastern Division
219 S. Dearborn Street
Chicago, Illinois 60604

Dear Judge Grady:

As part of today's conference call update on the progress of the manufacturer's settlement offer, the National Hemophilia Foundation would like to make you aware of our actions toward reintroduction of the Ricky Ray Hemophilia Relief Fund Act into Congress and the impact this legislation can have on the settlement.

During the 104th Congress, the hemophilia community supported and worked tirelessly to obtain passage of the Ricky Ray Relief legislation with two principal goals in mind -- financial relief for individuals and their families and recognition of the federal government's responsibility in the horrible tragedy of hemophilia-related AIDS. Recognizing the new need to address the private settlement's Medicaid and Supplemental Social Insurance (SSI) eligibility concerns, the Foundation has worked with the bill's sponsors to include a separate title in the Ricky Ray Relief bill that would preserve Medicaid and SSI eligibility for persons receiving payment from the private settlement. The Foundation believes it is important to have this legislative option in place, although we know other avenues are being pursued.

The Ricky Ray Hemophilia Relief Fund Act of 1997 will soon be introduced into the United States Senate by Senators Mike DeWine of Ohio and Bob Graham of Florida. A companion bill with over 120 original cosponsors will be introduced into the United States House of Representatives by Representative Porter Goss, also of Florida. We have included the legislative language addressing the eligibility concerns for your information.

We hope you find this information helpful. We will keep you informed of our progress in reintroducing and moving this legislation forward.

Sincerely,

Raymond W. Stanhope
President

cc: Stephen E. Bajardi, Executive Director
NHF Board of Directors

TITLE II—TREATMENT OF CERTAIN PRIVATE SETTLEMENT PAYMENTS IN HEMOPHILIA-CLOTTING-FACTOR SUIT UNDER THE MEDICAID AND SSI PROGRAMS

SEC. 201. TREATMENT OF CERTAIN PRIVATE SETTLEMENT PAYMENTS IN HEMOPHILIA-CLOTTING-FACTOR SUIT UNDER THE MEDICAID AND SSI PROGRAMS.

(a) IN GENERAL.—Notwithstanding any other provision of law, a settlement payment shall not be considered income or resources in determining a class member's eligibility for, or the amount of—

(1) medical assistance under title XIX of the Social Security Act, or

(2) supplemental security income benefits under title XVI of such Act.

(b) DEFINITIONS.—For purposes of this section:

(1) CLASS MEMBER.—The term "class member" means a member of the Settlement Class in the settlement in *In Re Factor VIII or IX Concentrate Blood Products Litigation* (United States District Court, Northern District of Illinois, Eastern Division; Civil Action No. 96–C–5024).

S.L.C.

O:\BAI\BAI97.119

(2) SETTLEMENT PAYMENT.—The term "settlement payment" means a payment to a class member under the settlement described in paragraph (1).

PRIVILEGED AND CONFIDENTIAL
PREPARED FOR SETTLEMENT DISCUSSIONS

PERSONAL & CONFIDENTIAL
ATTORNEY WORK PRODUCT
February 13, 1997

DRAFT ESTIMATED NUMBERS OF ELIGIBLE OPT-OUT AND OPT-IN CLAIMANTS AND OPT-INS WITH POTENTIAL MEDICAID COVERAGE

STATE	OPT-OUTS	OPT-INS	OPT-INS WITH POTENTIAL MEDICAID COVERAGE (≈20-25%)
AE ≈	0	5	1
AK ≈	0	15	3
AL ≈	4	95	20
AP ≈	0	5	1
AR ≈	0	50	10
AZ ≈	19	100	20
CA ≈	83	695	175
CO ≈	1	85	20
CT ≈	1	70	15
DC ≈	1	15	3
DE ≈	0	10	2
FC (the meaning of this abbreviation is unknown) ≈	5	0	0
FL ≈	19	305	85
GA ≈	10	210	40
GM ≈	0	0	0
GU ≈	0	5	1
HI ≈	0	20	4
IA ≈	2	55	15
ID ≈	3	15	3
IL ≈	38	270	45
IN ≈	10	120	25
KS ≈	1	50	10

KY ≈	4	115	25
LA ≈	17	90	20
MA ≈	14	195	40
MD ≈	13	90	20
ME ≈	5	25	5
MI ≈	14	265	55
MN ≈	1	100	20
MO ≈	12	165	35
MS ≈	5	70	15
MT ≈	1	10	2
NC ≈	3	180	35
ND ≈	1	5	1
NE ≈	1	50	10
NH ≈	2	30	10
NJ ≈	73	230	25
NM ≈	0	40	10
NV ≈	2	20	4
NY ≈	72	440	90
OH ≈	12	280	60
OK ≈	0	70	15
OR ≈	9	80	15
PA ≈	14	320	70
PR ≈	0	40	10
RI ≈	1	30	5
SC ≈	2	75	15
SD ≈	0	15	3
TN ≈	9	165	35
TX ≈	31	320	70

UT ≈	4	45	10
VA ≈	8	150	30
VT ≈	0	20	4
WA ≈	3	110	25
WI ≈	3	105	25
WV ≈	1	45	10
WY ≈	0	5	1
XX (the meaning of this abbreviation is unknown) ≈	0	60	15
TOTAL:	≈ 540	≈ 6,250	≈ 1,340

s:\baxter\nicole\settleme\statisti.ber

POTENTIAL AGENDA FOR MEETING ON MARCH 4, 1997
AT THE DEPARTMENT OF JUSTICE

1. Status of class settlement with Judge Grady.

2. Status of agreement with private insurers regarding subrogation/reimbursement.

3. Discussions with policymakers at federal and state levels regarding public subrogation/reimbursement and related issues.

4. What legal issues, if any, need to be resolved?

5. How can we proceed most expeditiously to a final resolution?

6. Discuss any other issues that anyone wants to raise.

FAX

Date 03/07/97

Number of pages including cover sheet

TO: *Elena Kagan*

Phone 202/456-2216
Fax Phone 202-456-7028

FROM: *Dick Meltzer*
Washington Counsel, P. C.
Suite 601
1150 Seventeenth Street, NW
Washington, D. C. 20036

Phone 202/293-7474
Fax Phone 202/293-8811

CC:

REMARKS: ☐ Urgent ☒ For your review ☐ Reply ASAP ☐ Please Comment

Attached is the order issued by Judge Grady establishing the May 1 deadline. Please give me a call when you have a moment, and I will fill you in on our progress and give you our ideas on how to communicate a successful resolution if it occurs.

Thanks.

File - hemophiliac case

93-07452.47

March 5, 1997

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

IN RE	MDL-986
FACTOR VIII OR IX CONCENTRATE BLOOD PRODUCTS LITIGATION	No. 93 C 7452
	THIS DOCUMENT RELATES TO
	CASE NO. 96 C 5024

PRETRIAL ORDER NO. 41

This order supplements Pretrial Order No. 38, dealing with the pending class settlement proposal. The court has under advisement the fairness of that proposal and is awaiting a determination as to whether eligible claimants or claimant groups can receive adequate assurance under the circumstances that they will receive the $100,000.00 settlement payment, net of reimbursement/subrogation claims and without prejudice to public sector benefits, in particular Medicaid entitlement.

Counsel for the class and the fractionator defendants have reported to the court from time to time since November 25, 1996, on the status of efforts to resolve satisfactorily the subrogation/reimbursement and eligibility issues, the most recent report being made on February 25, 1997. The present status is as follows. The obtaining of the required compromises, releases or indemnities, covering private health care insurance, is virtually

complete, and counsel report that there is a good prospect that a binding settlement agreement between the fractionators and representatives of nearly all major health care insurers will be executed before the end of March 1997. The list of insurance companies participating in that settlement will be provided to class members shortly after the agreement with such insurers is executed.

The situation is more complicated and continues to be more time-consuming as far as the public sector reimbursement/ subrogation issues are concerned. Negotiations with the federal government and the state governments are actively underway but must be completed. With regard to continuing eligibility for Medicaid programs, the use of special needs trusts is being pursued actively, but federal legislation may be required in some circumstances. While the court is satisfied that counsel for the class and the fractionators are using their best efforts to resolve these public sector issues as expeditiously as possible, there is no way of predicting with any assurance just how long the process will take.

This brings the court to the point that was emphasized in the last paragraph of Pretrial Order No. 38. Time is of the essence of this proposed settlement. The tragic fact is that class members are dying every day. The relative modesty of the $100,000.00 offer is, to a degree, offset by the advantage of

prompt receipt, as opposed to the uncertainty and delay of litigation. But as the delay in payment increases, that advantage obviously diminishes. Thus, the fairness of the settlement is closely related to the time of payment.

The fairness question, then, involves a variety of competing considerations. But what is clear is that payment of the proposed settlement amounts cannot be put on an indefinite hold pending resolution of the public sector issues noted above. What needs to be done is to establish a procedure that will provide for payment without unnecessary delay to those eligible class members as to whom there are presently no public sector issues, or whose public sector issues appear likely to be resolved within a short time, while delaying payment for an additional period of time only as to those class members whose public sector issues will require further efforts to resolve.

Accordingly, the court now rules that:

1. The court intends to make a fairness determination on or shortly after May 1, 1997.

2. The court, based on the fairness hearing held on November 25, 1996, and the submissions and presentations in connection with the hearing, and on the record as a whole, intends to approve the settlement as fair to the class if, by May 1, 1997, it is informed in writing by the fractionators that they will, within thirty days after the court's fairness order approving the

class settlement becomes final and is no longer subject to appeal, make settlement payments in the amount of $100,000.00 for each eligible claim to class members who have provided satisfactory proof of eligibility for the payment and who have signed the court approved form of release, and will continue with such payments expeditiously as additional eligible class members have their public sector issues resolved. As to these additional class members, the court intends to find that the settlement is fair if they are eligible for payment by December 31, 1997.

3. With respect to class members whose public reimbursement/subrogation or eligibility issues are not resolved by December 31, 1997, the court intends to terminate the settlement as to those class members and deem them opt-outs from the date of such termination.

4. If by May 1, 1997, the court has not received from the fractionators the written notification specified in paragraph 2, supra, the court intends, without further hearing, to reject the settlement as unfair to the class members.

It is obvious that a government entity which has no real objection to waiving, compromising or releasing subrogation and reimbursement claims, or to waiving any challenge to continued Medicaid eligibility, should consider furnishing the desired waiver, compromise, or release sufficiently in advance of May 1,

1997, to allow the settlement to proceed. It would be unfortunate indeed if this settlement were to fail because governmental entities having no objection to the required waivers, compromises, or releases simply did not get around to furnishing them in time.

The groundwork should be laid between now and May 1, 1997, to permit the settlement payments to be made to approved claimants as soon as possible. This should be done on multiple parallel tracks. The parties should establish and proceed with a process that will allow each individual claim to be considered as soon as possible, including the resolution of any disputes relative to such claims. Accordingly, the parties should, on an accelerated basis:

1. Finalize the ADR procedures and request that the court approve them.

2. Request hearings (if needed) on any claims denied by the ADR process.

3. Finalize the necessary releases and have the court approve them.

4. Submit to the court a final plan for special needs trusts.

5. Seek court or regulatory approval where practicable of special needs trusts in individual jurisdictions.

The court will continue to be available for telephone conferences with counsel concerning these matters as often as necessary between now and May 1, 1997.

DATED: March 5, 1997

ENTER:

John F. Grady, United States District Judge

1) Only medicaid?
2) what of states?
Jim Greene - 904-435-7162

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Memorandum

Wants us to ask DOJ to work out subrogation issue for whole govt - Medicaid biggest issue

5,000 × 100,000 = 500,000,000 M

Date: 01/09/97

To: Greg Simon
Chris Jennings

From: Dick Meltzer

RE: Friday 3:30 PM Conference Call

Attached is a memo briefly outlining the federal issues which we would like to discuss. For purposes of our conference call, the critical issue is whether the Department of Justice is willing to assume responsibility for negotiating any and all federal subrogation claims. The parties have agreed to the settlement, and the subrogation issues have been resolved with most of the private insurers, but Judge Grady of the Northern District of Illinois will not approve the settlement unless all the subrogation issues are resolved, including the federal subrogation issues. Both the plaintiffs and the defendants would like to avoid going federal agency by federal agency to resolve the subrogation issues and, in fact, may not have time to do so given Judge Grady's schedule. Because a settlement has been achieved, it would be particularly unfortunate if the federal government was the hold up to Judge Grady's approval.

Present for the conference call tomorrow, in addition to me, will be Jim Greene, a Florida attorney, who, as a member of the plaintiff's steering committee and class counsel, represents the interests of the plaintiffs and Sarah Gregg of Baxter, Mary McGrane of Rhone-Poulenc, and Tom Kerr of Bayer. I hope to preserve order on our side by having Jim and I do most of the talking.

Cheryl —
Plean call me about
This. Thanks much.
Elena

STATEMENT OF FACTS

Status of Class Action Lawsuit

On August 13, 1996, a settlement was reached between persons with hemophilia who used blood clotting factor concentrates processed or distributed from 1978 through 1985 and who are (or were) infected with HIV and four pharmaceutical companies. The settlement terms have been accepted by over 6,000 claimants, and approximately 500 have opted out of the agreement. The settlement, if approved by the Federal District Court Judge hearing the class action, would provide $100,000 to each member of the settlement class.

Federal Issues

Subrogation

An unknown but not insignificant group of members of the settlement class have had some or all of their medical treatment costs for HIV/AIDS paid for by Medicaid and/or other federally-funded programs. The various federal agencies that administer these programs could seek to recover the money to be paid to the members of the settlement class. The District Court Judge has said that he will not approve the settlement unless the subrogation issue is resolved, and the members of the settlement class are assured of receiving the full settlement amount. A subrogation agreement has been reached with private insurers representing over two-thirds of all insured lives in the U.S. in which each private insurer agreed to accept a settlement amount based upon the number of lives each insures, generally.

Eligibility

Members of the settlement class who qualify for Medicaid and other needs based programs may lose their eligibility for such programs if they receive the settlement amount. Alternatives to direct payments to this group of claimants that would preserve eligibility are under consideration. However, legislation to exempt the settlement funds from consideration in eligibility for Medicaid and other needs based programs may be necessary.

Resolution of Subrogation Issue

The Attorney General has the authority to settle direct claims by the federal government of the type present in the class action. Moreover, the Attorney General has exercised this authority in the past (the *Lindsey* breast implant class action settlement, for example). The exercise of settlement authority by the Attorney General is particularly appropriate in the blood products class action because, absent a prompt and centralized settlement of federal subrogation claims, neither the members of the settlement class nor the District Court Judge can be certain as to whether or under what circumstances the myriad federal

agencies that provided support to the members of the settlement class will assert potential subrogation claims. In addition, a prompt resolution of the federal subrogation claims by a single federal decision maker will lay the groundwork for the resolution of any remaining issues with the state agencies that administer Medicaid and other federal and/or state programs. Given the substantial progress toward resolving the potential subrogation claims of private insurers, a decision by the Attorney General to exercise her authority to negotiate the subrogation issue on behalf of all federal agencies will expedite relief to the members of the settlement class.