

IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

IN RE: ASBESTOS PRODUCTS	:	Consolidated Under
LIABILITY LITIGATION (No. IV)	:	MDL DOCKET NO. 875
	:	
ERIK ROSS PHILLIPS and	:	
TINA LANDERS, spouse	:	E.D. PA Civil Action No.
	:	11-cv-60074
v.	:	
	:	Transferor Court:
ALBANY INTERNATIONAL CORPORATION,	:	District of North Carolina-W
et al.	:	10-00262

ORDER

AND NOW, this 28<sup>th</sup> day of March, 2012, upon consideration of various pending discovery motions and the responses thereto, and after hearing oral argument on these motions, it is hereby **ORDERED** that:

(1) Plaintiffs' Motion For Production by Defendant Genuine Parts Company of Documents for *In Camera* Review [Docket #174] is **GRANTED IN PART, DENIED IN PART** as follows:

(A) Plaintiffs represent that they have withdrawn their motion for *in camera* review of Privilege Log Item #10.

(B) By April 4, 2012, Defendant Genuine Parts Company [GPC] must submit the following privilege log documents to my Chambers for *in camera* review: Privilege Log Item #'s 1 and 14.

© Defendant GPC has made a sufficient showing of attorney client privilege as to the correspondence between Counsel for APRA and GPC as one of its members and will **not** be required to submit the following documents for *in camera* review: Privilege Log Item #'s 15, 18, 19, 20, 21, and 22.

(2) Plaintiffs' Motion to Compel Discovery From Defendant Genuine Parts Company [Docket #196] is **DENIED**. The requested relief - an Order directing GPC to produce another corporate designee for deposition and to produce documents and information about GPC's use of Abex roll brake lining in its own plant - is outside the scope of discovery as previously limited by the Honorable Elizabeth T. Hey and as is defined in Fed.R.Civ.Pro. 26(b).

(3) Plaintiffs' Motion to Compel Defendant BE&K To Provide Complete Answers to Discovery Requests [Docket #197] is **GRANTED** as follows:

Defendant BE&K shall make available to Plaintiffs for review at their Birmingham, Alabama warehouse the 200+ boxes of records in its possession. If the boxes can easily be grouped by year or some other identifying factor, BE&K is to do so. As agreed upon by Counsel, the document review shall occur as scheduled, and must be completed by the end of fact-based discovery.

Plaintiffs' request for sanctions for BE&K's late disclosure of documents is **DENIED**.

(4) Defendant Genuine Parts Company's Motion to Compel [Docket #199] is **GRANTED** as follows:

(A) At the March 27, 2012 oral argument hearing, Counsel for Plaintiffs has represented that all non-privileged exposure documents which are responsive to discovery requests and/or Court Orders have been produced. Plaintiffs are bound by this representation, and are reminded that they are under a continuing obligation to produce any additional exposure documents, including bankruptcy claims filings, which are created or discovered after this Order is entered and while this litigation is pending.

(B) By April 4, 2012, Plaintiffs are to provide written authorization for GPC and its Counsel to obtain records concerning Plaintiffs' pending workers' compensation claim.

(C) Plaintiffs represent that they have provided all bankruptcy claims documents that exist to their knowledge, with the exception of settlement agreements. By April 4, 2012, Plaintiffs are to provide an appropriate privilege log listing all withheld documents and the basis for withholding each document.

(5) Defendant Genuine Parts Company's Motion for Sanctions [Docket #203] and Defendant National Automotive Parts Association's Motion for Sanctions [Docket #211] are **GRANTED** as follows: By April 16, 2012, Plaintiffs are to make Mr. Phillips available for a limited follow-up deposition to answer questions concerning his knowledge of, and participation in, his bankruptcy trust claims and the filing of any related affidavits. The follow-up deposition of Mr. Phillips is limited to no more than four hours. All attorneys fees and costs incurred by Defendants in taking this follow-up deposition are to be paid by Plaintiffs.

I find Plaintiffs had an obligation to disclose the existence of their bankruptcy trust claims when they served their responses to the Court-ordered discovery requests in this case on April 7, 2011, and their failure to do so until late in the discovery process, waiting until after receiving a special request for bankruptcy claims from Defendant GPC, was improper and inconsistent with federal discovery rules.

I further find that this conduct is subject to sanctions under Fed.R.Civ.Pro. 37. Upon consideration of the applicable *Poulis*<sup>1</sup> factors, I decline to impose sanctions in the form of a dismissal of this action. I find that the withholding of the bankruptcy trust information was knowing and intentional, and is a consistent practice of Plaintiffs' Counsel in the MDL asbestos litigation. *See Plaintiffs' Brief in Response to Motion for Sanctions* [Docket #210] at p. 12 (stating: "Wallace and Graham like other plaintiff firms has not produced bankruptcy claims in

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<sup>1</sup> 747 F.2d 863 (3d Cir. 1984).

response to Master Discovery. In fact the first time a defense firm has ever made a special request for bankruptcy claims in a Wallace and Graham case was in this case in their February 21, 2012 letter, and this case was the first time in the MDL that Wallace and Graham has had to produce such documents. No defendant in any other Wallace and Graham MDL case has ever complained about Wallace and Graham not producing bankruptcy claims in any other case prior to the February 21 letter herein.”) This course of conduct has caused prejudice to the Defendants in this case. However, I believe that there is an effective sanction other than dismissal that is available in this case, namely permitting a follow-up deposition of Mr. Phillips to inquire as to his knowledge of, and participation in, the bankruptcy trust claims, with all associated costs to be paid by Plaintiffs. In addition, Plaintiffs’ Counsel has represented at the March 27, 2012 hearing that going forward, it will produce bankruptcy trust claims documents (with the exception of bankruptcy trust claims settlement papers) in all MDL asbestos cases. Based upon this representation, I believe that Plaintiffs’ Counsel’s improper discovery practice will not be repeated in MDL asbestos cases.

(6) All previously imposed discovery and other pretrial deadlines remain unchanged.

(7) During the course of completing discovery, the parties are expected to work together to move this case forward.

No party may file any discovery motion without prior Court permission. To the extent that there are additional discovery disputes arising before the close of discovery on April 30,

2012, which Counsel cannot, in good faith, resolve without court intervention, Counsel are directed to submit a short email to my law clerk <[Judy\\_Kiesel@paed.uscourts.gov](mailto:Judy_Kiesel@paed.uscourts.gov)> listing the areas of dispute, without any argument or statement of positions. A telephone or in-person conference to discuss and resolve the dispute will be scheduled at my discretion.<sup>2</sup>

BY THE COURT:

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M. FAITH ANGELL  
UNITED STATES MAGISTRATE JUDGE

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<sup>2</sup> To the extent that the parties filing the various discovery motions have requested additional relief and/or sanctions which have not been specifically addressed in this Order, the additional requests are denied.

**UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF PENNSYLVANIA  
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United States Magistrate Judge**

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**CASE NO. 11-60074  
LAW CLERK'S INITIALS: JJK**

**TODAY'S DATE: March 28, 2012**

**VIA EMAIL:**

**NAME**

**EMAIL ADDRESS**

The Honorable Eduardo C. Robreno

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