# UNITED STATES DISTRICT COURT

**FOR THE**

**DISTRICT OF MASSACHUSETTS**

Anne Anderson, et al.,

Plaintiffs,

Civil Action No. 82-1672-S

v.

Cryovac, Inc., et al.,

Defendants.

**PLAINTIFFS’ MEMORANDUM IN OPPOSITION TO**

**DEFENDANT W.R. GRACE & CO.’S MOTION FOR SUMMARY JUDGMENT**

# INTRODUCTION

Plaintiffs have accused Defendants and Defendants have admitted to the dumping of halogenated hydrocarbons, trichloroethylene (TCE), tetrachloroethylene (PCE), 1 trans-dichloroethylene (PERC), 2 trans-dichloroethylene (DCE), and carbon tetrachloride (hereinafter referred to as "Suspect Chemicals") in East Woburn. Plaintiffs also allege that these suspect chemicals reached the drinking water supply and caused cases of leukemia and other immunological diseases in the East Woburn Plaintiffs who ingested the contaminated water. Defendants have inaccurately brought summary judgment requesting that the United States District Court for the District Court of Massachusetts (“District Court”) dismiss the Plaintiffs' claim because the Plaintiffs cannot provide an expert on immunology to show the casual connection between the suspect chemicals and these immunological diseases.

In compliance with the Defendant’s request, we now disclose the identity of our immunology expert Alan S. Levin, M.D. ("Dr. Levin"). Furthermore, Dr. Levin’s testimony fulfills the three-pronged Daubert standard allowing for its admissibility: (1) the evidence must be relevant, (2) the expert presenting the evidence must be qualified, and (3) the evidence must be characterized by scientific validity. *See Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993), *Commonwealth v. Lanigan*, 419 Mass. 15 (1994). Therefore, the Plaintiffs request that the District Court admit Dr. Levin’s testimony and deny Defendants’ motion for summary judgment.

# FACTS

According to interrogatories W.R. Grace and Company (“Grace”) has admitted to pouring halogenated hydrocarbons, trichloroethylene (TCE), tetrachloroethylene (PCE), 1 trans-dichloroethylene (PERC), 2 trans-dichloroethylene (DCE), and carbon tetrachloride (hereinafter referred to as "Suspect Chemicals"). (Levin Aff. ¶ 13.) These chemicals have drained into the Woburn drinking supply and affected the drinking water of East Woburn. (*Id*. ¶ 13.) East Woburn residents had statistically significant levels of immune dysregulation abnormalities including leukemia. (*Id*. ¶ 8.) This is the subject of this lawsuit. Grace has filed a summary judgment to dismiss Plaintiffs’ claims because Grace naively believes the dumping of suspect chemicals into the ground would not have any deleterious health effects.

In response to this, Alan S. Levin, M.D. ("Dr. Levin") has filed an attached affidavit showing his scientific research and findings that the deleterious effects of drinking water are consistent with immune dysregulation. (*Id*. ¶ 8.) Dr. Levin has a strong educational background in immunology and their external factors. (*Id*. ¶ 3.) He also has a long practice and has received awards for his work in immunology, leukemia, and etiology. (*Id*. ¶¶ 6, 8, 12.) In private practice he has worked with more than 400 patients with immunology problems that had an external cause. (*Id*. ¶ 8.) Dr. Levin has studied various scientific, medical, and governmental reports on leukemia and immunology problems in East Woburn due to the drinking of suspect chemicals. (*Id*. ¶¶ 9-12.) Based on these studies, Dr. Levin theorizes that the suspect chemicals have caused the onset of immune dysregulation and the development of serious illness in East Woburn. (*Id*. ¶ 16.) Dr. Levin has tested this hypothesis with the assistance of Harvard Medical School Massachusetts General Hospital Immunopathology Unit and has found the East Woburn residents to have significant levels of immune diseases. (*Id*. ¶ 15.) Because of Dr. Levin’s expert knowledge of immological diseases and, specifically, his familiarity with the Woburn case, Dr. Levin would beneficially assist the jury in understanding the complex immunological scientific information related to the facts and issues of this case.

# ARGUMENT

1. DEFENDANT’S MOTION TO DISMISS SHOULD BE DENIED BECAUSE (1) THE EVIDENCE DR. LEVIN USES IS RELEVANT TO THE FACTS AND ISSUES OF THE CASE, (2) DR. LEVIN IS QUALIFIED TO PRESENT THIS EVIDENCE, AND (3) THE EVIDENCE IS CHARACTERIZED BY SCIENTIFIC VALIDITY.

Defendants wrongfully contend that the Plaintiffs’ do not have an admissible expert of immunology that can give testimony showing the causation between halogenated hydrocarbons, trichloroethylene (TCE), tetrachloroethylene (PCE), 1 trans-dichloroethylene (PERC), 2 trans-dichloroethylene (DCE), and carbon tetrachloride (hereinafter referred to as "Suspect Chemical Wastes") and the cases of leukemia and other immunological diseases in East Woburn. However, causation is a question of fact normally left to the jury. Restatement (Third) of Torts § 28 (2005). The Federal Rules of Evidence 702 permits expert testimony that “will assist the trier of fact to understand the evidence or to determine a fact in issue.” Fed. R. Evid. 702. Expert testimony can assist the factfinder as long as the expert has the requisite degree of scientific validity. 509 U.S. 579; 419 Mass. 15. Under the Daubert standard, the trial judge serves as a gatekeeper and can use a three-pronged test to determine scientific validity: (1) the evidence must be relevant, (2) the expert presenting the evidence must be qualified, and (3) the evidence must be characterized by scientific validity. *Id*. at 587-93.

Dr. Levin fulfills and satisfies the three pronged Daubert test and the jury would benefit from his expert testimony on immunology and more specifically the immunological diseases and leukemia of the East Woburn residents who ingested the Defendant’s suspect chemicals. Furthermore, having supplied admissible expert testimony, Defendant’s request for summary judgment should be dismissed.

1. Defendant’s Motion To Dismiss Should Be Denied Because The Evidence Dr. Levin Uses Is Relevant To Show Causation Between The Suspect Chemicals And The Cases Of Immunological Diseases In East Woburn.

Dr. Levin will bring testimony and evidence relevant to showing to a reasonable medical certainty that the chemicals have caused or substantially contributed to serious illnesses, including immune dysfunction and leukemia among the East Woburn Families.

Federal Rules of Rule Evidence 702 assigns the trial judge the gate keeping “task of ensuring that an expert’s testimony both rests on a reliable foundation and is relevant to the task at hand. *Id*. at 580. The requirement of relevance or “fit” considers “whether expert testimony proffered in the case is sufficiently tied to the facts of the case.” *Id*. at 591, quoting *United States v. Downing*, 753 F.2d 1224, 1242 (3d Cir.1985).

There is a genuine issue of fact as to whether the suspect chemicals dumped by the Plaintiffs’ caused the cases of leukemia and other immunological diseases in East Woburn. Dr. Levin’s expert testimony about the immune dysregulation in populations will assist the trier of fact in understanding facts and issues concerning the suspect chemicals and the cases of immunological diseases, including leukemia, in East Woburn.

1. Defendant’s Motion To Dismiss Should Be Denied Because Dr. Levin Is Qualified To Present Evidence Of A Causal Link Between The Suspect Chemicals And The Cases Immunological Diseases, Including Leukemia, In East Woburn.

In order for a trier of fact to determine causation, he or she will be assisted with Dr. Levin’s knowledge, skill, experience, training, and education concerning the suspect chemicals causation or substantially contribution to serious illnesses and immunologic diseases in East Woburn.

Rule 702 provides that an expert witness should be admitted to give testimony because of his or her ‘knowledge, skill, experience, training, or education.’ The disjunctive suggests that an expert may be only be qualified on any one of the five qualifications listed. *Lavespere v. Niagara Machine & Tool Works, Inc.*, 910 F.2d 167, 176 (5th Cir. 1990), *cert. denied*, 510 U.S. 859 (1993). The admissibility should be granted liberally and not exclude expert testimony because the expert is not the best qualified or has the most appropriate specialization. *Pineda v. Ford Motor Co.*, 520 F.3d 237, 244 (3d Cir. 2008). The issue with regard to expert testimony is whether those qualifications provide a foundation for a trier of fact to answer a specific question. *Berry v. City of Detroit,*. 25 F.3d 1342, 1351, (6th Cir. 1994), *cert. denied*, 115 S.Ct. 902 (1995).

Dr. Levin’s knowledge, skill, experience, training, and education relates to Immunologic Diseases and Environmentally Induced Illnesses. He received his M.D. from the University of Illinois in Chicago in 1994 and received a Pre-Doctoral Fellowship in Immunology from Harvard Medical School. (Levin Aff. ¶ 3.) In private practice he has treated at least 400 patients with immunologic diseases, including leukemia, caused by environmental exposures. (Id. ¶ 8.) Due to his skill and experience, he served as a Post-Doctoral Fellow in Immunology at the Harvard Medical School. (Id. ¶ 3.) His expertise led to an academic position as Adjunct Associate Professor of Immunology in Dermatology at the University of California in San Francisco. (*Id*.) Furthermore, he has published numerous technical papers and books in the area of immune system dysfunction and the etiology of cancer. (*Id*. ¶ 7.)

Dr. Levin has the sufficient knowledge, skill, experience, training, and education to assist the trier of fact in determining the facts and issues, including causation, concerning the suspect chemicals and the immunologic diseases, including leukemia, in East Woburn Plaintiffs.

1. Defendant’s Motion To Dismiss Should Be Denied Because The Evidence Dr. Levin Uses To Show A Causal Link Between Suspect Chemicals And The Cases Immunological Diseases In Woburn Is Characterized By Scientific Validity.

Dr. Levin employed generally accepted scientific methodology, utilized published evidence in his review, and subjected his conclusions to testing contrary to Defendant’s motion to dismiss.

Before admitting expert testimony, the court must determine that: “(1) the testimony is based upon sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case.” Fed. R. Evid. 702.

The Supreme Court in *Daubert v. Merril* identified four factors to guide judges in evaluating the reliability of an expert's testimony: (1) whether theory or technique can be (and has been) tested, (2) the error rate inherent therein, (3) whether the theory or technique has been subjected to peer review and/or publication, and (4) and its level of acceptance within the scientific community. *Id*. at 593-95. An expert’s evidence should be based on his or her opinion and facts or data (1) either admitted in evidence or independently admissible, and (2) of the type reasonably relied upon by other experts in the field. *Dep’t of Youth Servs. v. A Juvenile*, 398 Mass. 516, 531 (1986); *Tarpey v. Crescent Ridge Dairy, Inc.*, 47 Mass. App. Ct. 380 (1999).

Dr. Levin’s testimony is based on publications and reports from the United States Center for Disease Control (CDC), the Massachusetts Department of Health, and the Department of Biostatistics of the Harvard School. The information contained in these reports and studies are relied upon by experts for forming opinions concerning immunological diseases. These reports have been published and are subject to peer review.

Dr. Levin bases his opinions on tests on female mice exposed to drinking water with suspect chemicals, on the toxic effect of suspect chemicals on human lymphocytes when cultured in vitro, and other medically known immunological diseases caused by the suspect chemicals. (*Id*. ¶ 11.)

Dr. Levin’s theory is that the medical histories and physical findings of the Woburn Plaintiffs are totally consistent with immune dysregulation and the exposure to the subject chemicals. (*Id*. ¶ 16.) With the assistance of the Harvard Medical School Massachusetts General Hospital Immunopathology Unit, Dr. Levin has performed immunologic blood tests on the surviving Woburn citizens to support this theory. (*Id*. ¶ 15.) The tests show significant levels of abnormalities that are consistent with his theory about immune dysregulation caused by the suspect chemicals. (*Id*.)

The District Court should dismiss Plaintiffs’ summary judgment on a finding that Dr. Levin employed generally accepted scientific methodology, utilized published evidence in his review, and subjected his conclusions to testing.

# CONCLUSION

Plaintiffs Dr. Levin’s expert immunological testimony will assist the trier-of-fact with the immunological facts and issues in this case. Furthermore, Dr. Levin’s testimony satisfies the prongs of the Dauber test: Dr. Levin’s (1) evidence is relevant, Dr. Levin (2) is qualified to give this evidence, and (3) the evidence is characterized by scientific validity. For the reasons set forth above, Defendants' Motion to Dismiss pursuant to Fed. R. Civ. P. 12(b)(6) should be denied.

Dated July 16, 2011

Respectfully submitted,

MACK & ASSOCIATES, LLC

Attorneys for Anne Anderson, et al.

/s/Earl McGowen \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_

Earl McGowen

Registration # 1061

Wolf Law

Boulder, CO 80309

Earl.mcgowen@freedom.com

555-555-5555

**CERTIFICATE OF SERVICE**

I certify that a copy of the above unopposed motion for extension of time was served by mail on July 16, 2011, on the following:

William Cheeseman, Esq.

Foley, Hoag & Eliot, LLP

Seaport World Trade Center West

155 Seaport Boulevard

Boston, MA 02210

Jerome Facher, Esq.

Hale and Dorr, LLP

60 State Street

Boston, MA 02109

/s/ Earl McGowen.

Earl McGowen