

RECEIVED
U.S. E.P.A.

BEFORE THE ENVIRONMENTAL APPEALS BOARD
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C.

2015 AUG 18 AM 10:47
ENVIR. APPEALS BOARD

In the Matter of:

HUDSON OIL REFINERY SUPERFUND SITE

Land O' Lakes, Inc., Petitioner

CERCLA § 106(b)

Petition No. _____

Unilateral Administrative Order

U.S. EPA Region 6

CERCLA Docket No. 06-16-08

**MOTION FOR ADDITIONAL TIME TO RETAIN SUBSTITUTE EXPERT WITNESS
AND FILE SUPPLEMENTAL EXPERT WITNESS AFFIDAVIT, AND SUGGESTIONS
IN SUPPORT**

Petitioner, Land O' Lakes, Inc. ("Petitioner"), by and through undersigned counsel, hereby moves that the Environmental Appeals Board ("EAB") grant Petitioner additional time--until on or before January 18, 2016--to retain a substitute expert witness, and allow Petitioner to file a supplemental expert witness affidavit covering the same subject matter after the substitute expert witness has been retained. Petitioner so moves for the following reasons:

1. Petitioner has filed, of even date herewith, a CERCLA Petition for Reimbursement ("Petition") with the EAB, pursuant to CERCLA § 106(b).
2. In support of its Petition, Petitioner had retained the expert witness services of D. Keith Baugher, an oil refinery expert.
3. Petitioner submitted an unsigned Declaration of D. Keith Baugher ("Declaration") as Exhibit 4 in support of its Petition. The Declaration is true and accurate and contains the extensive work of Mr. Baugher. However, Mr. Baugher's work was cut short by the unfortunate

health circumstances described in the next paragraph. He may have added more opinions or bases for his opinions if he had the opportunity.

4. Mr. Baugher recently and unexpectedly suffered a severe, debilitating stroke, which has left Mr. Baugher partially paralyzed, has been in a rehabilitation hospital, and is currently in a skilled nursing facility. The prognosis is that Mr. Baugher will have a long term period of rehabilitation and will not be able to resume his consulting or expert witness work. Accordingly, due to his health conditions, Mr. Baugher has been forced to end his services as an expert witness.

5. Petitioner must locate and retain the services of a substitute expert witness who is prepared to give testimony on the same subject matter as Mr. Baugher.

6. Therefore, Petitioner hereby respectfully requests: leave to substitute an expert witness who will provide testimony on the same subject matter as Mr. Baugher; additional time to locate and retain such an expert before this matter is heard by the EAB; and, leave to later file a supplemental expert witness affidavit to substitute for Mr. Baugher's filed Declaration.

Suggestions in Support

Broad discretion is given in determining whether to exclude or admit expert witness testimony and findings. *See, e.g., United States v. Barton*, 731 F.2d 669, 672 (10th Cir. 1984). Generally, substitution of one expert witness for another, when a previously retained expert witness suddenly dies or has become medically incapacitated, is allowed. *See, e.g., Manilda Milling Corp. v. Ogilvie Mills, Inc.*, 1991 WL 205691 (D. Kan. 1991) (expert witness suddenly died three months before commencement of trial). Factors courts consider when faced with such a situation are: (1) whether there is justification for the substitution; (2) whether the expert's testimony is important to the issues to be decided; (3) whether the opposing party will be

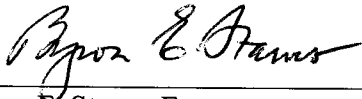
prejudiced by the substitution; and, (4) whether a continuance may be available to cure any such prejudice. *Hamburger v. State Farm Mut. Auto Ins. Co.*, 361 F.3d 875, 883 (5th Cir. 2004).

Federal case law shows that expert witness substitutions due to an expert's death or medical incapacity is nearly always allowed. In *Manilda*, the defendant disclosed the identity of its expert witness on March 15, 1988, pursuant to the court's scheduling order. *Manilda Milling Corp.*, 1991 WL 205691 at *1. That witness died in January 1991, just three months prior to trial. *Id.* The court allowed the defendant to replace the deceased expert with a new expert, but limited the new expert's testimony to those subject matters covered by the deceased expert. *Id.* In *Baumann*, the plaintiff's expert died about thirty days before trial. *Baumann v. Am. Family Mut. Ins. Co.*, 278 F.R.D. 614, 615 (D. Colo. 2012). The court held that a substitution of experts was justified due to the expert's unexpected death; the court also noted favorably that the plaintiff brought its motion to substitute just two days after it learned of its expert's death, and the proposed new expert would be testifying on the same subject matter as the former expert. *Id.* at 616. Likewise, in *Morel*, the court allowed the substitution of an expert witness who had died: "Allowing substitution furthers this goal of a fair contest for both parties because without the new expert the defense would be punished for the death of one of its witnesses, and with the substitution the plaintiffs still have the ability to adequately prepare." *Morel v. Daimler-Chrysler Corp.*, 259 F.R.D. 17, 21 (D. Puerto Rico 2009). Other cases have held similarly when an expert is still living, but suffers an incapacitating event, like a heart attack. See *Fidelity Nat. Fin., Inc. v. Nat. Union Fire Ins. Co.*, 2015 WL 4528913 (S.D. Cal. 2015) (denying motion to substitute due to party's extreme delay in bringing the motion, but specifically noting that, but for the delay, it would have granted the motion due to the expert's heart attack).

Here, Petitioner's request for substitution and for time to locate a substitute expert satisfies all four of the factors stated above. First, the substitution is justified, as Mr. Baugher has suffered a severe and debilitating stroke that leaves him unable to continue his services as Petitioner's oil refinery expert. Second, Mr. Baugher's subject matter, oil refinery operations, is most certainly important to the issue for which Petitioner seeks reimbursement under CERCLA. Third, because notice is being given almost immediately after the filing of its Petition, Petitioner's request will not prejudice anyone involved. Finally, Petitioner is specifically asking for a continuance in order to rectify this matter before it comes to the EAB for hearing.

WHEREFORE, Petitioner respectfully moves that its Motion for Additional Time until on or before January 18, 2016 to Retain Substitute Expert Witness and File Supplemental Expert Witness Affidavit be granted.

Respectfully submitted,



Byron E. Starns, Esq.
Stinson Leonard Street LLP
150 South Fifth Street, Suite 2300
Minneapolis, MN 55402
Telephone: (612) 335-1516
Telefax: (612) 308-2149
E-mail: byron.starns@stinsonleonard.com

Mark E. Johnson, Esq.
Stinson Leonard Street LLP
1201 Walnut Street, Suite 2900
Kansas City, MO 64106-2150
Telephone: (816) 691-2724
Telefax: (816) 412-1208
E-mail: mark.johnson@stinsonleonard.com

Mark D. Coldiron, Esq.
Stephen L. Jantzen, Esq.
Ryan Whaley Coldiron Jantzen
Peters & Webber PLLLC
119 North Robinson, Suite 900
Oklahoma City, OK 73102
Telephone: (405) 239-6040
Telefax: (405) 239-6766
E-mail: mcoldiron@ryanwhaley.com
E-mail: sjantzen@ryanwhaley.com

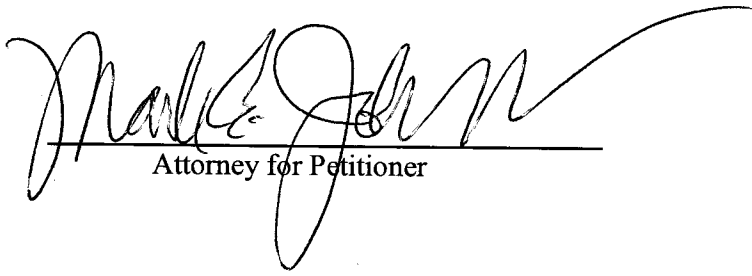
CERTIFICATE OF SERVICE

Pursuant to Revised Guidance on Procedures for Submission and Review of CERCLA Section 106(b) Reimbursement Petitions, Environmental Appeals Board (February 23, 2012), and agreement with Ms. Eurika Durr, Clerk of the Environmental Appeals Board, the undersigned hereby certifies that one paper original and one paper copy set of the foregoing has been hand-delivered to the EAB on this 18th day of August, 2015, to the following:

Eurika Durr
Clerk of the Board
U.S. Environmental Protection Agency
Environmental Appeals Board
1201 Constitution Avenue, NW
WJC East, Room 3332
Washington, D.C. 20460-0006

In addition, on this same date, one copy of the foregoing sent by Federal Express to the following:

George Malone
U.S. Environmental Protection Agency
Region 6
1445 Ross Avenue
Suite 1200
Dallas, TX 75202



Mark E. Johnson

Attorney for Petitioner