

1 PETER L. HAVILAND (SBN 144967)
 2 KEVIN D. RISING (SBN 211663)
 3 AKIN GUMP STRAUSS HAUER & FELD LLP
 4 2029 Century Park East, Suite 2400
 5 Los Angeles, California 90067
 6 Telephone: (310) 229-1000
 7 Facsimile: (310) 229-1001

8 JOSEPH P. ESPOSITO, P.C. (Pro Hac Vice)
 9 AKIN GUMP STRAUSS HAUER & FELD LLP
 10 1333 New Hampshire Ave., NW
 11 Washington, DC 20036
 12 (202) 887-4428.

13 AUDREY BYRD MOSLEY (Of Counsel)
 14 Deputy General Counsel
 15 National Academy of Sciences
 16 2101 Constitution Avenue
 17 Washington, DC 20418
 18 (202) 334-2440

19 Attorneys for Non-Parties Dr. Brian
 20 Henderson, Dr. Virginia Ernster, Dr. Diana
 21 Taylor, and for the National Academy of
 22 Sciences

23 SUPERIOR COURT OF THE STATE OF CALIFORNIA
 24 FOR THE COUNTY OF LOS ANGELES

25 AGNES CHRISTIANE CLEGG and
 26 THOMAS W. CLEGG,

27 Plaintiffs,

28 vs.

29 BRISTOL-MYERS SQUIBB COMPANY
 30 and MEDICAL ENGINEERING
 31 CORPORATION,

32 Defendants.

Case No. BS 085263

[Assigned To The Honorable William F.
 Highberger For All Purposes]

~~PROPOSED~~ ORDER GRANTING NON-
 PARTIES' MOTION FOR PROTECTIVE
 ORDER

Date Action Filed: August 21, 2003

Date: October 8, 2003

Time: 9:00 a.m.

Dept.: 32

ORIGINAL FILED

OCT 21 2003

LOS ANGELES
 SUPERIOR COURT

RECEIVED

OCT 16 2003

DEPT. 32

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

PROPOSED ORDER

On October 8, 2003, the motion to quash subpoenas duces tecum, or alternatively, for a protective order ("Motion to Quash") of non-parties Dr. Brian Henderson, Dr. Virginia Ernster, Dr. Diana Taylor, and the National Academy of Sciences ("Non-Parties") came on for hearing before the Honorable William F. Highberger. The parties appeared through their respective counsel of record, Akin Gump Strauss Hauer & Feld, LLP on behalf of Non-Parties, Alan Levin on behalf of plaintiffs Agnes Christiane Clegg and Thomas W. Clegg ("Plaintiffs"), and Jeffrey Kruse on behalf of Defendants Bristol-Myers Squibb Company and Medical Engineering Corporation ("Defendants").

After reviewing all pleadings and evidence in support of and in opposition to Non-Parties' Motion to Quash, and considering the arguments of counsel, and good cause appearing therefor,

IT IS HEREBY ORDERED that:

1. Non-Parties Dr. Brian Henderson, Dr. Virginia Ernster, and Dr. Diana Taylor have agreed to waive their objections to the procedural defects in the issuance and service of the subpoenas duces tecum issued by Plaintiffs to Non-Parties Drs. Ernster, Henderson, and Taylor (specifically, the subpoenas directed to Drs. Ernster, Henderson, and Taylor, bearing an issuance date of August 22, 2003, seeking the depositions on September 26, 24, and 25, respectively, which subpoenas were attached to the Declaration of Joseph P. Esposito), in order that the Court may address Non-Parties' assertion of the need for protection from discovery of information and documents concerning the confidential deliberations related to the National Academy of Sciences' Committee on the Safety of Silicone Breast Implants ("Committee").

2. Pursuant to Non-Parties' waiver of procedural objections to the subpoenas duces tecum, the Court finds that all documents, information, and testimony concerning the confidential deliberations of the Academy are subject to a qualified privilege and, thus, protected from disclosure. *See Kahn v. Superior Court*, 188 Cal.App.3d 752 (1987). The

1 National Academy of Sciences publishes final reports (other than reports which are classified
2 for reasons of national security), but the drafts, documents reflecting internal deliberations of
3 the Committee, internal reviews of reports, correspondence of reviewers, and other similar
4 confidential materials are maintained as confidential. The Court finds that the confidentiality
5 of the Academy's internal deliberations and review processes is crucial to the continued work
6 of the National Academy of Sciences and, accordingly, a protective order shall issue limiting
7 Plaintiffs' discovery from Non-Parties in this action as follows:

8 a. Drs. Ernster and Taylor will appear for deposition in San Francisco at
9 mutually convenient dates and places. Dr. Henderson will appear for his deposition in Los
10 Angeles at a mutually convenient date and place.

11 b. Inquiry at the depositions shall be limited to questions concerning the
12 final report published by the National Academy of Sciences under the auspices of the Institute
13 of Medicine entitled The Safety of Silicone Breast Implants ("Report"); the subsequent press
14 release concerning the Report; and communications with attorneys representing breast implant
15 manufacturers. Inquiry may also be made as to the deponents' current feelings about the
16 Report. Inquiry into the internal deliberations of the Academy, including the Committee and
17 the review process, is expressly prohibited.

18 c. Non-Parties are not required to respond in any respect to Plaintiffs'
19 Document Specification Numbers 1, 2, 5, 7, 8, 9, 10, 11 and 13, as set forth in Schedule "A" of
20 the subpoenas (Exhibits "A", "B" and "C" to the Declaration of Joseph P. Esposito).

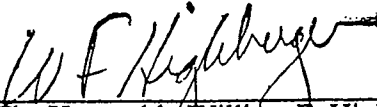
21 d. Dr. Ernster, Dr. Taylor and Dr. Henderson shall respond to Plaintiffs'
22 Document Specifications Numbers 3, 4, 6, 12, and 14 as set forth in Schedule "A" of the
23 subpoenas (Exhibits "A", "B", and "C" to the Declaration of Joseph P. Esposito). Plaintiffs'
24 Document Specifications will be limited to the time period January 1, 1998 through the
25 publication date of the Report in 1999, and the term "attorneys" in Specification Number 4
26 shall be limited to attorneys for breast implant manufacturers.

27

28

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

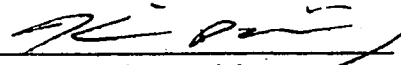
Dated: OCT 21 2003


The Honorable William F. Highberger
Judge of the Superior Court

Presented by:

**AKIN GUMP STRAUSS HAUER
& FELD LLP**

Dated: October 15, 2003

By 

Kevin D. Rising
Attorneys for Non-Parties Dr. Brian
Henderson, Dr. Virginia Ernster, Dr.
Diana Taylor, and for the National
Academy of Sciences

ALAN S. LEVIN, M.D., J.D.

Dated: October __, 2003

By _____

Alan S. Levin
Attorney for Plaintiffs Agnes and
Thomas Clegg

SHOOK, HARDY & BACON LLP

Dated: October __, 2003

By _____

Jeffery A. Kruse
Attorneys for Defendants Bristol-
Myers Squibb Company and Medical
Engineering Corporation