

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA**
Richmond Division

LISA SYKES and SETH SYKES,
Individually and as Parents and Natural
Guardians of **WESLEY ALEXANDER
SYKES**, a minor child,

Plaintiffs,

v.

Case No. 3:07CV660

**BAYER HEALTHCARE
CORPORATION**, fka Bayer
Corporation, Individually and as
Successor-In-Interest to Miles, Inc.

and

ELI LILLY AND COMPANY,
An Indiana Corporation,

and

**JOHN DOE THIMEROSAL
MANUFACTURING COMPANIES,**

and

DOMINION RESOURCES, INC.,
A Virginia Corporation,
120 Tredegar Street
Richmond VA 23219

Defendants.

PROPOSED AMENDED COMPLAINT
Personal Injury Action (28 U.S. C. §1332)

The Plaintiffs, Lisa and Seth Sykes, Individually and as Parents and Natural Guardians of Minor Child Wesley Sykes, by and through undersigned counsel, complaining of the Defendants, allege as follows:

SUMMARY OF ALLEGATIONS

1. Since approximately 1978, Defendant Bayer Corporation, its licensees, affiliates, subsidiaries and their distributors, have engaged in the sale and distribution of HypRho-D[®] to hundreds of thousands of Rh-negative mothers and their unborn children in order to prevent an uncommon condition of blood incompatibility between some pregnant women and their unborn children.

2. HypRho-D[®] is an Rh-immune globulin product, which contained 0.01% Thimerosal (100 micrograms (mcg) per milliliter (ml)), a preservative, and almost fifty percent (50%) organic mercury by weight. With an average fill volume of 0.7 ml, a dose of HypRho-D[®] would have contained 35 micrograms of organic mercury. Organic mercury is a highly poisonous neurotoxicant, *especially to unborn children*. HypRho-D[®] was typically administered via injections in the arm or hip of the mother of a fetus at 28 weeks gestation with an average fetal weight of approximately three pounds. Thus, Rh-negative women and their extremely vulnerable unborn children were unknowingly exposed to a highly poisonous chemical substance *two hundred fifty seven (257) times beyond federal safety limit thresholds during the administration of prenatal HypRho-D[®] injections*. Bayer Corporation and Bayer Biological Products sold and distributed HypRho-D[®] without any apparent regard for the poisonous effects of mercury to the children whose mothers received the injection. Finally, in 1996, the Defendants Bayer and Bayer Biological Products quietly discontinued the use of the mercury-

laden Thimerosal preservative in HypRho-D[®] by revamping the formula and changed the name of the product to BayRho-D.

3. The Thimerosal used in HypRho-D and in other products injected directly into Wesley Sykes, was designed, invented, tested (or rather not tested), marketed, manufactured, distributed, and sold in commerce for use in such products by the Thimerosal Defendants referred to below.

4. Wesley Sykes and his mother were subjected to additional daily exposures to mercury as the result of the negligent actions and inactions of Dominion Resources, Inc., all as set forth below.

5. Wesley Sykes was also exposed to additional mercury as the result of the negligent actions of the Thimerosal Defendants, all as set forth below.

6. Upon information and belief, Plaintiff, Minor Child Wesley Sykes, developed severe neurodevelopmental disorders associated with high mercury exposure levels as a result of HypRho-D[®] exposure in utero, and the other exposures to mercury caused by the Thimerosal Defendants and Dominion Resources, Inc., and as a result he has suffered serious permanent injury.

PARTIES AND JURISDICTION

7. Plaintiffs, Lisa and Seth Sykes, are the natural parents and guardians of Plaintiff, Minor Child Wesley Sykes, and at all times relevant were citizens and residents of Richmond, Virginia.

8. Defendant, **Bayer Corporation, Individually and as Successor-in-Interest to Miles, Inc.**, hereinafter referred to as Bayer, is an Indiana corporation doing business in the State of Virginia. Plaintiffs are further informed and believe that at all times relevant, Defendant

Bayer promoted, marketed, tested, labeled, developed, distributed, manufactured, warranted and sold HypRho-D[®] containing mercury (Thimerosal) in this state and interstate commerce.¹

9. Upon information and belief, HypRho-D[®] was originally designed, developed, manufactured and sold by Cutter Laboratories. Cutter was acquired by Bayer in 1974. In 1978, Bayer purchased Miles, Inc. Cutter formerly merged into Miles, Inc. in 1993 under the Bayer corporate umbrella and Miles was renamed Bayer Corporation.

10. Defendant **Bayer Biological Products** is a division of Bayer Corporation. Upon information and belief, Defendant Bayer Biological Products is the division of Bayer responsible for the manufacture, sale and distribution of Bayer's immune globulin products. Upon information and belief, the worldwide headquarters of Bayer Biological Products is located in Research Triangle Park, Durham County, North Carolina.

11. Defendant **Dominion Resources, Inc.** (hereinafter "Dominion") is a Virginia corporation that is responsible for generating power for Virginia Electric & Power Company, d/b/a Dominion Power Company. Upon information and belief, Dominion operates the coal-burning power plant in Richmond, Virginia that is responsible for emitting tons of mercury into the air in the Richmond area each year.

12. Defendant, **Eli Lilly and Company**, is an Indiana corporation doing business in the State of Virginia. Plaintiffs are further informed and believe that at all times relevant, Eli Lilly and Company designed, patented, promoted, marketed, tested, labeled, developed, distributed, manufactured, warranted and sold Thimerosal in this state and interstate commerce. Defendant "John Doe Thimerosal Manufacturing Companies" are any corporations that specifically

¹ Counsel has recently been informed that Bayer Corporation was recently acquired by Bayer Healthcare Corporation, Inc., a Delaware corporation with its principal place of business in New Jersey, but without any discovery having been allowed to date, this information cannot be confirmed.

produced the Thimerosal used in the HypRho-D received by Mrs. Sykes, as well as other products received by Wesley Sykes.

13. The Defendant Eli Lilly and Company and the John Doe Thimerosal Manufacturing Companies are hereinafter collectively referred to as the Thimerosal Defendant.

14. This Court has jurisdiction over this cause or action and personal jurisdiction over the defendants under VA Code § 8.01-328.1.

15. Venue for this case is proper pursuant to VA Code § 8.01-261.

FACTUAL ALLEGATIONS

16. Mercury is one of the most toxic substances on earth.² The correlation between mercury exposure and neurological damage *even at relatively low doses especially in prenatal exposure* is well established in scientific and medical literature.³ Fetuses and newborns are highly susceptible to mercury's effect as it interferes with the developmental processes of the infant brain. Organic mercury readily crosses the placenta and blood-brain barrier.

17. The symptoms of mercury poisoning have been recognized since the Eighteenth century. Symptoms of mercury poisoning include paresthesias, ataxia, and impairments of speech, hearing, and vision. In children exposed during fetal development, severe neurological dysfunctions and developmental abnormalities, including mental retardation, cerebral palsy, deafness, and blindness have been reported.⁴

² Instances of mercury poisoning have been reported since Roman times.

³ Mercury deposits can be found in all body tissue and its effects can involve multiple organ systems. Developing fetuses and infants are more susceptible to mercury's effect as it interfered with the developmental process of the brain and central nervous system and impairs digestive function of the body.

⁴ *Immunization Safety Review: Thimerosal-containing Vaccines and Neurodevelopmental Outcomes*, Institute of Medicine (2001) p. 44.

18. The medical and scientific literature contains many reports of injury to human beings as a result of exposure to mercury. As a result, over the years, many uses of mercury have been discontinued due to concerns of mercury poisoning in humans associated with the use of these products.

19. Thimerosal is an organic mercury antiseptic compound, almost fifty percent (50%) organic mercury by weight, used as a preservative in pharmaceutical preparations.

20. Thimerosal was used as a preservative in HypRho-D[®], an Rh- immune globulin product provided to pregnant women with an uncommon blood incompatibility with their unborn children. HypRho-D[®] is typically injected into a pregnant woman at 28 weeks gestation, when the fetus weighs approximately 3 pounds.

21. A single dose of HypRho-D[®] is generally .7 ml and contained 100 mcg of Thimerosal per milliliter. Thus, a single dose of HypRho-D[®] contained approximately 35 mcg of organic mercury.

22. The EPA safety standard for mercury exposure is 0.1 mcg per kilogram (kg) per day. The average weight of a fetus at 28 weeks gestation is three pounds or 1.36 kg. *Thus, the unborn HypRho-D[®] recipient received mercury as much as two hundred fifty seven (257) times in excess of current EPA safety threshold limits.*

23. As a result of a HypRho-D[®] injection in the mother at approximately 28 weeks gestation, a highly toxic amount of mercury, as much as two hundred fifty seven (257) times in excess of EPA guidelines, was rapidly transported into the bloodstream of the developing fetus, crossing the blood brain barrier into the brain and migrating to organs and tissue. Upon information and belief, the placenta actually pumps the mercury into the fetal capillaries. Thus,

throughout the pregnancy, the mercury concentration in the fetus can rise to a much higher level than that in the mother.

24. Upon information and belief, a developing fetus is 5 to 10 times more sensitive to toxic insult than an adult as a result of underdeveloped body mechanisms, which do not protect the brain and brain systems.

25. As a result, mercury that migrates to the brain, organs and tissue, stays in the body and is not excreted. Upon information and belief, mercury exposure during this stage of life can cause severe neurodevelopmental disorders.

26. Defendants are responsible for the design, promotion, manufacturing, sale and/or distribution of Thimerosal-containing HypRho-D[®] routinely administered to Rh-negative mothers and their unborn and newborn children.

27. HypRho-D[®] was promoted by the Defendants at all relevant times without any reference to the toxic hazards and potential public health ramifications resulting therefrom.

28. Upon information and belief, in 1996, Defendants Bayer and Bayer Biological Products quietly discontinued the use of Thimerosal in HypRho-D[®] by reformulating the design and issued a new Thimerosal-free product, BayRho-D[®], in the midst of growing concern of the association of neurodevelopmental disorders in children exposed to mercury products.

29. On or about December 16, 1994, Plaintiff, Minor Child Wesley Sykes, at approximately 28 weeks gestation, was exposed to highly toxic organic mercury through a HypRho-D[®] product injected into his mother.

30. Upon information and belief, said HypRho-D[®] product injected into Lisa Sykes can be identified as HypRho-D[®].

31. Upon information and belief, said HypRho-D[®] product, contained Thimerosal and was manufactured by Defendants Bayer and Bayer Biological Products.

32. Upon information and belief, at all times relevant, Defendant Bayer and Bayer Biological Products had actual knowledge that HypRho-D[®] products would be injected into the mothers of developing fetuses, that said products had never been subjected to safety and efficacy studies, and that said products contained a known neurotoxin, namely mercury.

33. The HypRho-D[®] that caused Plaintiff Minor Child Wesley Sykes to suffer from mercury poisoning was manufactured and/or marketed and/or sold by the Defendants without adequate testing, without any adequate warnings and despite the availability of substitute preservatives.

34. The Defendants continuously misrepresented to the consuming public the efficacy of such products because of their failure, in all instances, to advise such persons that the Thimerosal-containing HypRho-D[®] used in its ordinary fashion could result in mercury poisoning due to the result of the underlying toxicity of the mercury in HypRho-D[®].

35. Defendants Bayer and Bayer Biological Products added Thimerosal to HypRho-D[®] without regard for the impact of mercury on fetuses and infants.

36. Prior to and during the period that the Defendants Bayer and Bayer Biological Products added Thimerosal to HypRho-D[®], Defendants knew or should have known that mercury is a neurotoxicant and is highly toxic to the human system, particularly to the vulnerable, developing systems of fetuses and newborns.

37. The Defendants promoted the use, sale and distribution of Thimerosal and/or Thimerosal-containing HypRho-D[®] despite growing concern in the scientific and medical

professions for the association of neurodevelopmental disorders and mercury poisoning in children exposed to mercury containing products.

38. As a direct and proximate result of the mercury in HypRho-D[®] to which minor child Plaintiff was exposed he suffers from neurological damage. He has sustained mental, developmental and neurological incapacity and associated learning disabilities. He has required, and will continue to require, intense medical treatment and continual psychological, educational, occupational, rehabilitative and dietary therapies. Minor Child Plaintiff has suffered reduced earnings capacity, loss of enjoyment of life and loss of economic opportunity. His permanent injuries encompass medical, mental and social damage disabling him from the usual and customary activities of a child his age and of those which children can normally experience and enjoy in their lifetime. Due to the constant care required by their child, Lisa and Seth Sykes have incurred medical expenses, have rendered, and will continue to render, nursing care and have suffered emotional distress and loss of opportunities.

SECTION A: DEFENDANTS BAYER AND BAYER BIOLOGICAL PRODUCTS

COUNT ONE: NEGLIGENCE

39. Plaintiffs incorporate by reference the earlier paragraphs of this Complaint.

40. At all material times, Defendants Bayer and Bayer Biological Products had a duty to exercise reasonable care in the design, manufacture, testing, labeling, processing, packaging, distribution, promotion and sale of mercury-containing HypRho-D[®]. Upon information and belief, Defendants Bayer and Bayer Biological Products were negligent and breached their duty in their actions, misrepresentations, and omissions toward the Plaintiffs, in the following respects:

- a. Failed to include adequate warnings that would alert the Plaintiffs and Plaintiffs' medical care providers that HypRho-D[®] contained mercury and the amount of mercury contained therein;
- b. Failed to adequately warn and fully disclose to Plaintiffs and/or Plaintiffs' medical care providers that mercury contained in HypRho-D[®] is recognized by the manufacturers of Thimerosal, as well as the scientific and medical community, as highly toxic;
- c. Failed to adequately warn and fully disclose to Plaintiffs and Plaintiffs' medical care providers of the risk of mercury exposure in HypRho-D[®] and the potential for mercury poisoning and neurodevelopmental disorders;
- d. Failed to adequately and properly test effects of mercury exposure in utero prior to placing HypRho-D[®] on the market;
- e. Failed to adequately and properly provide post marketing warnings or instructions after the Product Defendants knew or should have known of the significant risk of neurodevelopmental disorders associated with the mercury contained in HypRho-D[®].
- f. Failed to manufacture a product without Thimerosal that would be far safer, when they had the ability to do so and knew that such a product would be far safer; and
- g. Failed in other respects which shall be proven in the trial of this action.

41. Defendants Bayer and Bayer Biological Products knew or should have known that the aforementioned HypRho-D[®] could cause unreasonably dangerous risks and serious side effects of which consumers and their medical care providers would not be aware.

42. Defendants Bayer and Bayer Biological Products knew or should have known that HypRho-D[®] would cause serious injury, including mercury poisoning, to persons such as the Plaintiffs, and that reasonable, foreseeable and intended use could and would cause significant injury.

43. As a direct and proximate result of the conduct of the Defendants Bayer and Bayer Biological Products as described above, the minor Plaintiff has sustained mental, intellectual, developmental and neurological incapacity and associated learning disabilities, affect disorders and impairments, and resultant health care expenses, reduced earnings capacity, loss of enjoyment of life, loss of economic opportunity, permanent disability, and other injuries entitling the Plaintiffs to receive compensatory damages in an amount to be determined by a jury in the trial of this action, but in any event, in excess of the sum of Ten Thousand Dollars (\$10,000.00).

COUNT TWO: NEGLIGENT FAILURE TO WARN

44. Plaintiffs incorporate by reference the earlier paragraphs of this Complaint.

45. The HypRho-D[®] manufactured and/or supplied by the Defendants Bayer and Bayer Biological Products was at all material times unaccompanied by proper warnings concerning possible neurodevelopmental disorders and mercury poisoning and all possible side effects associated with the use of this product.

46. The products manufactured and/or supplied by Defendants Bayer and Bayer Biological Products were therefore defective due to inadequate warnings and/or instructions.

47. Defendants Bayer and Bayer Biological Products knew or should have known of the risk of mercury poisoning and neurodevelopmental disorders, and failed to provide adequate warnings to users or consumers of the products.

48. Defendants Bayer and Bayer Biological Products failed to provide adequate post-marketing warnings and/or instructions and as a direct and proximate result of said conduct, the Plaintiffs were injured as described above.

COUNT THREE: NEGLIGENT MISREPRESENTATION

49. Plaintiffs incorporate by reference the earlier paragraphs of this Complaint.

50. Defendants Bayer and Bayer Biological Products falsely represented to the Plaintiffs and/or their health care providers that Thimerosal-laden HypRho-D[®] was safe for its intended use when used as instructed and labeled, when Defendants Bayer and Bayer Biological Products knew or should have known such representations were false, as Thimerosal-laden HypRho-D[®] was, in fact, dangerous to the health of the minor Plaintiff when used as intended.

51. Defendants Bayer and Bayer Biological Products failed to exercise reasonable care in ascertaining the accuracy of the information regarding the safe use of HypRho-D[®], and otherwise failed to exercise reasonable care in communicating the information to the Plaintiff and Plaintiff's health care providers.

52. In reasonable reliance upon the misrepresentations of Defendants Bayer and Bayer Biological Products, the Plaintiffs and the Plaintiffs' healthcare providers were induced to, and did, use HypRho-D[®].

53. Defendants Bayer and Bayer Biological Products negligently misrepresented and/or actively concealed from the Plaintiffs, their health care providers and the consuming public:

- a. that relatively high dose exposures of Thimerosal are associated with neurological damage;

- b. that extensive toxicological and epidemiological literature establishes low dose organic mercury as a neurotoxicant to the prenatal developing nervous system;
- c. that some children could be particularly vulnerable or susceptible to mercury exposures due to genetic or other differences; and
- d. the highly toxic nature of the HypRho-D[®].

54. The Plaintiffs' health care providers expressly relied upon and were induced by the misrepresentations and active concealment of the risks of their products by Defendants Bayer and Bayer Biological Products, and the Plaintiffs have suffered serious damages as a direct and proximate result as described above.

COUNT FOUR: INTENTIONAL MISREPRESENTATION AND FRAUD

55. Plaintiffs incorporate by reference the earlier paragraph of this Complaint.

56. Defendants Bayer and Bayer Biological Products intentionally and fraudulently misrepresented the safety and effectiveness of their products and fraudulently concealed from the Federal Drug Administration, consumers and the general public material information regarding adverse reactions, toxic hazards, side effects, and potential public health ramifications associated with the use of its mercury-containing products.

57. Defendants Bayer and Bayer Biological Products intentionally and fraudulently made these misrepresentations and actively concealed adverse information at a time when they knew, or should have known, its products had defects, dangers, and characteristics much more serious than those which they were then representing to prescribing physicians, the FDA, and the consuming public, including the Plaintiffs herein.

58. Specifically, Defendants Bayer and Bayer Biological Products intentionally and fraudulently misrepresented and/or actively concealed from the Plaintiffs, their health care providers, the FDA, and the consuming public, information including, but not limited to, the following:

- a. that relatively high dose Thimerosal exposures are associated with neurological damage;
- b. that extensive toxicological and epidemiological literature establishes low dose organic mercury as a neurotoxicant to the prenatal developing nervous system;
- c. that some children could be particularly vulnerable or susceptible to mercury exposures due to genetic or other differences; and
- d. the highly toxic nature of the Thimerosal-containing HypRho-D[®].

59. Upon information and belief, Defendants Bayer and Bayer Biological Products made these misrepresentations and/or actively concealed information with the specific intention and desire that health care providers and the consuming public, including Plaintiffs, would rely upon that information in the use of HypRho-D[®].

60. The Plaintiffs and the Plaintiffs' health care providers expressly relied upon and were induced by the misrepresentations and active concealment of the risks of their products of Defendants Bayer and Bayer Biological Products, and the Plaintiffs have suffered serious damages as a direct and proximate result as described above.

**SECTION B: DEFENDANT ELI LILLY AND COMPANY
AND OTHER THIMEROSAL DEFENDANTS**

**COUNT ONE: NEGLIGENCE IN THE DESIGN, TESTING, MARKETING,
PROMOTION, LICENSING AND SALE OF THIMEROSAL**

61. Plaintiffs incorporate by reference the earlier paragraphs of this Complaint.

62. Defendant Eli Lilly and Company (“Eli Lilly”) and any other Thimerosal Defendants at all relevant times herein were engaged in the business of designing, testing, manufacturing and selling drugs, health care products and chemicals for sale to and use by their customers and members of the general public. (References hereinafter to Eli Lilly shall, depending on what is learned in discovery, include any other Thimerosal Defendants as well.)

63. Defendant Eli Lilly designed and/or held a design patent for the mercury-laden product known as Thimerosal and has actively marketed and promoted its design in the United States of America and in the international community for over six decades.

64. In addition to holding this design patent, Defendant Eli Lilly has manufactured, marketed and promoted Thimerosal as “Merthiolate[®]” and has obtained trademarks for its product name in over fifty countries.

65. While retaining trademark rights to Merthiolate[®], Defendant Eli Lilly entered into licensing agreements with other manufacturers, thereby granting others the right to use its formula and design. Under these agreements, Defendant Eli Lilly shared in the profits resulting from the implementation and use of its design by other manufacturers.

66. Defendant Eli Lilly had a duty to exercise ordinary care in the promotion, sale and distribution of its product and the licensing of its Thimerosal design and formula.

67. Defendant Eli Lilly breached its duty to exercise ordinary care by failing to adequately warn the FDA, its licensees, consumers and the general public, including Plaintiffs herein, of the grave risks associated with the use of Thimerosal. Instead, Defendant Eli Lilly continued to promote, market and license its design and formula for pecuniary gain.

68. Upon the expiration of its patent for Thimerosal, Defendant Eli Lilly had knowledge that other manufacturers were copying its design. As a result of this knowledge, Defendant Eli Lilly was under a duty to exercise reasonable care to prevent the risks associated with its design from taking effect. Defendant Eli Lilly knew or should have known that the use of Thimerosal in healthcare products, particularly injectables, a foreseeable use, could and would cause serious injuries to the persons injected and/or their unborn children. Defendant Eli Lilly, however, failed to adequately warn the copying manufacturers, the FDA, consumers and the general public, including Plaintiffs herein, of the adverse risks associated with its design.

69. The injection of mercury-containing Thimerosal, as formulated, designed, marketed and promoted by Defendant Eli Lilly, into Plaintiff Lisa Sykes, and directly into Wesley Sykes proximately caused the injuries of Minor Child Wesley Sykes.

70. Additionally, the Thimerosal contained in the HypRho-D[®] products received by Plaintiffs herein was manufactured without substantial modification or alteration of Defendant Eli Lilly's original design.

71. Throughout all relevant times contained herein, Defendant Eli Lilly derived economic benefit from the promoting sales, distribution and licensing of Thimerosal. At this filing, Defendant Eli Lilly continues to receive benefit from the fruits of its design and continues to maintain international trademarks for Thimerosal under the trade name Merthiolate[®].

72. Defendant Eli Lilly knew or should have known that its acts and omissions as described in the preceding paragraphs would be likely to result in serious mental deficiency, impairment or injury to others.

73. Defendant Eli Lilly's acts and omissions did in fact cause Minor Child Wesley Sykes to experience serious neurological impairments and other injuries.

74. As a direct and proximate result of the actual conscious indifference and conduct of Defendant Eli Lilly and other Thimerosal Defendants, Plaintiffs are entitled to recover actual, punitive or treble damages as provided by law against Defendant Eli Lilly and the appropriate Thimerosal Defendants in an amount to be determined by a jury in the trial of this action but in any event in excess of the sum of Ten Thousand Dollars (\$10,000.00).

SECTION C: BAYER AND ALL THIMEROSAL DEFENDANTS

COUNT ONE: NEGLIGENT INFLICTION OF EMOTIONAL DISTRESS

75. Plaintiffs incorporate by reference the earlier paragraphs of this Complaint.

76. The conduct of the Defendants as described above constitutes negligent infliction of emotional distress.

77. As a direct and proximate result of the conduct of the Defendants as described above, the Plaintiffs have suffered extreme emotional and mental anguish and are entitled to compensatory damages in an amount to be determined by a jury in the trial of this action but in any event in excess of the sum of Ten Thousand Dollars (\$10,000.00).

COUNT TWO: INADEQUATE DESIGN OR FORMULATION

78. Plaintiffs incorporate by reference the earlier paragraphs of this Complaint.

79. At all materials times, the Thimerosal and HypRho-D[®] manufactured and/or supplied by the Defendants jointly or severally were placed into the stream of commerce by the Defendants in a defective and unreasonably dangerous condition, in that the known and

foreseeable risk of neurotoxicity associated with the use of these products exceeded the benefits associated with their design and/or formulation.

80. Alternatively, the Thimerosal and HypRho-D[®] manufactured and/or supplied by the Defendants jointly or severally were defective in design or formulation such that when they were placed in the stream of commerce, they were unreasonably dangerous in that they were more dangerous than the ordinary consumer would expect.

81. Upon information and belief, at the time they left the Defendants' control, the Thimerosal and HypRho-D[®] were defective products and unreasonably dangerous for use and, as a direct and proximate result of said conduct, the Plaintiffs were injured as described above.

COUNT THREE: BREACH OF EXPRESS WARRANTY OF MERCHANTABILITY

82. Plaintiffs incorporate by reference the earlier paragraphs of this Complaint.

83. The Defendants, jointly or severally, expressly warranted that HypRho-D[®] and/or Thimerosal were safe for use.

84. These products did not conform to these express representations because they were in fact not safe and thus had serious life threatening side effects and, as a direct and proximate result of said conduct, the Plaintiffs were injured as described above.

COUNT FOUR: BREACH OF IMPLIED WARRANTIES

85. Plaintiffs incorporate by reference the earlier paragraphs of this Complaint.

86. The Defendants, jointly or severally, impliedly warranted to prospective purchasers and users, including the Plaintiffs, that HypRho-D[®] and/or Thimerosal were merchantable and fit for the ordinary purposes for which such goods are used.

87. The Plaintiffs herein reasonably relied upon the skill and judgment of the Defendants as to whether the products were of merchantable quality and safe and fit for its intended use.

88. Upon information and belief, and contrary to such implied warranties, these products were not of merchantable quality, safe, or fit for their intended use, because the products were and are unreasonably dangerous and unfit for the ordinary purposes for which they were used as previously described above and as a direct and proximate result of said conduct, the Plaintiffs were injured as described above.

COUNT FIVE: GROSS NEGLIGENCE

89. Plaintiffs incorporate by reference the earlier paragraphs of this Complaint.

90. The conduct of the Defendants as described above was willful or wanton, in reckless or heedless disregard for the rights and safety of the minor Plaintiff, and constitutes gross negligence.

91. As a direct and proximate result of the conduct of the Defendants as described above, the minor Plaintiff has sustained permanent, severe physical injuries, requiring medical care and treatment, and has suffered severe mental and physical pain and suffering, loss of enjoyment of life, reduced earning capacity and economic opportunity, permanent disability and other losses which shall be proved at the trial of this action, including but not limited to claims for on going medical treatment expenses, compensatory and punitive damages on behalf of the minor Plaintiff

and his parents, in an amount to be determined by a jury in the of this action, but in any event in excess of the sum of Ten Thousand Dollars (\$10,000.00).

COUNT SIX: PUNITIVE DAMAGES

92. Plaintiffs incorporate by reference the earlier paragraphs of this Complaint.

93. The Defendants' conduct as described was fraudulent, malicious, and willful or wanton in that it demonstrated a conscious and intentional disregard of and indifference to the rights and safety of others, including the Plaintiffs, which Defendants knew or should have known was likely to result in injury, damage, or other harm. Defendants are therefore liable to the Plaintiffs for punitive damages.

94. The above said injuries to the minor Plaintiff were directly and proximately caused by the conduct of the Defendants, jointly and severally, as described above.

95. As a direct and proximate result of the conduct of the Defendants, Plaintiffs are entitled to recover actual, punitive or treble damages as provided by law against the Defendants in an amount to be determined by a jury in the trial of this action but in any event in excess of the sum of Ten Thousand Dollars (\$10,000.00).

SECTION D: DOMINION RESOURCES, INC.

COUNT ONE: NEGLIGENCE

1. Plaintiffs incorporate by reference the earlier paragraphs of this Complaint.

2. Dominion Resources, Inc. (hereinafter "Dominion" or "Power Plant Defendant") owns, profits from, operates, maintains and/or markets energy created in part by fossil fuel/coal-

burning power plants. Mercury is present in coal used as feedstock in the utility boiler. The coal is combusted and mercury is released into the air and environment. Dominion emits excessive and harmful amounts of mercury vapors into the air and environment, exposing the public, including Plaintiff, to harmful quantities of mercury.

3. Power Plant Defendant had actual knowledge that said emissions occurred. It reports on its website the pounds of mercury released each year into the environment from each of its fossil fuel/coal-burning power plants.

4. According to the Environmental Protection Agency's report to Congress in February of 1997, fossil fuel fired power plants are the largest remaining source of mercury emissions into the air. Further, mercury from coal-fired utilities is the air pollutant of greatest concern to public health.

5. It was known to Power Plant Defendant that persons in the vicinity of its fossil fuel/coal-burning power plants would be exposed to toxic emissions of mercury. The results of a United States Congressional study have shown that particulate mercury, once emitted, can travel up to 600 miles from its originating source.

6. Power Plant Defendant's toxic emissions of mercury have devastating effects upon the environment. Airborne mercury settles over waterways, polluting rivers and lakes and contaminating fish.

7. It was also foreseeable to Power Plant Defendant that persons exposed to toxic mercury from their emissions could receive cumulative levels of mercury in conjunction with other mercury exposure in the environment and through other products.

8. Despite actual knowledge and foreseeability of harm, Power Plant Defendant failed to warn Plaintiffs of its continuous exposure to mercury and airborne environmental mercury

caused by toxic emissions from its plants.

9. The Environmental Protection Agency has concluded that a plausible link exists between mercury from industrial and combustible sources in the United States and mercury concentrations in humans and wildlife. The study also indicates that some women of childbearing age eat fish in amounts that could put their fetuses at risk for mercury exposure.

10. The Food and Drug Administration (FDA) has also issued warnings that pregnant women should not eat more than two cans of tuna fish for fear of exposure to mercury *in utero* to the fetus that could cause neurological damage.

11. Power Plant Defendant was unreasonable in its toxic emission of mercury

12. At all times relevant hereto, the Power Plant Defendant had available to it cost effective means to reduce mercury emissions and failed to do so.

13. Plaintiffs' exposure to airborne mercury in the environment through inhalation, the food chain, and other sources contributed to the cumulative mercury toxicity and was a substantial factor causing Plaintiffs neurological damage.

14. The Power Plant Defendant had a duty to use reasonable care to prevent the foreseeable harm caused by its excessive mercury emissions.

15. Power Plant Defendant owed a duty to warn the public at large, including the Plaintiffs, of their exposure to mercury vapors from fossil fuel/coal-burning power plants. Despite this duty, it failed to adequately warn the Plaintiffs and/or public at large of its exposure to toxic mercury.

16. Plaintiff had a heightened vulnerability to suffer neurological injuries from industrial mercury as a direct result of Thimerosal exposure.

17. Power Plant Defendant breached its duties to the Plaintiffs, and its acts and omissions contributed to cause, were substantial factors in causing, and/or did proximately cause, the

damages and injuries complained of by Plaintiffs.

DEMAND FOR JURY TRIAL

THE PLAINTIFFS DEMAND A JURY TRIAL ON ALL ISSUES OF FACT SO TRIABLE.

WHEREFORE, the Plaintiffs, Individually and in their representative capacity as Guardians ad Litem of Minor Child Wesley Sykes, respectfully request that that they have and recover of the Defendants, jointly or severally, as follows:

1. Compensatory, consequential and punitive damages in an amount to be determined by a jury in the trial of this action, but in any event, in excess of the sum of Ten Thousand Dollars (\$10,000.00);
2. The costs of this action, including reasonable attorney fees and interest as provided by law, and as this honorable court deem just and proper;
3. For such other and further relief as this Honorable Court may deem just and proper as to each count alleged in this complaint.

Respectfully submitted
this 22nd day of January, 2008.

LISA SYKES, et al.

/s/Clifford J. Shoemaker
Clifford J. Shoemaker
Attorney for Lisa Sykes, et al.
Va. Bar No. 17142

SHOEMAKER & ASSOCIATES
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Email: cliff@attorneyaccess.net

CERTIFICATE OF SERVICE

I hereby certify that on the 22nd day of January, 2008, I will electronically file the foregoing with the Clerk of Court using the *CMIECF* system, which will then send notification of such filing to the following:

**Bayer Pharmaceuticals
Corporation**
*Individually and as Successor-In-
Interest to Miles, Inc.
formerly known as
Bayer Corporation*

represented by **David Alan Rudlin**
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