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James B. Re
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July 19, 2002

**VIA OPTIMA COURIER TO ALL ADDRESSEES;
ADDITIONAL COPY TO DIRECTORS OF NUCLEAR REACTOR REGULATION AND NUCLEAR MATERIAL SAFETY AND SAFEGUARDS VIA CERTIFIED MAIL, RETURN RECEIPT REQUESTED;
ADDITIONAL COPY VIA TELECOPIER AND E-MAIL TO MR. SIMKIN**

Director of Nuclear Reactor Regulation
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555

Director of Nuclear Material Safety and Safeguards
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555

Marjorie S. Nordlinger, Esquire
Office of the General Counsel
U.S. Nuclear Regulatory Commission
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Brian M. Simkin, Esquire
Senior Trial Counsel
Commercial Litigation Division, Civil Branch
U.S. Department of Justice
ATTN: Classification Unit, 8th Floor
1100 L Street, NW
Washington, D.C. 20530

Re: 1. *Evelyn Heinrich, et al. v. William H. Sweet, M.D., et al.*
Civil Action No. 97-CV-12134-WGY, United States District Court for the District of Massachusetts; formerly Civil Action No. CV 95-3845 in the United States District Court for the Eastern District of New York;
now on appeal to the United States Court of Appeals for the First Circuit, Nos. 00-2553, 00-2554, 00-2555

2. *Elizabeth Dutton Sweet and Fredrick H. Grein, Jr., in their capacities as Executors under the will of William H. Sweet, et al. v. United States of America*
Nos. 00-274C, 00-292C, 01-434C (Consolidated) (Judge Firestone), United States Court of Federal Claims

Ladies and gentlemen:

This letter confirms and reiterates the demand by and for William H. Sweet, M.D. for defense and indemnity by the Nuclear Regulatory Commission (NRC) in accordance with Indemnity Agreement E-39 between the Atomic Energy Commission (AEC) and Massachusetts Institute of Technology (MIT), and in accordance with other indemnity agreements between the AEC and Brookhaven National Laboratory (Brookhaven).[1] In the present letter, I will focus on

[1] Dr. Sweet is now deceased, but he and his estate are referred to together throughout this letter as "Dr. Sweet."

Dr. Sweet's demand under Indemnity Agreement E-39, but that focus is not to be construed as a waiver of his demand and claim under any applicable indemnity agreements between the AEC and Brookhaven.

Dr. Sweet's claim is well known to you, as it was first reported and presented to the NRC in a letter dated November 8, 1995 from Francis C. Lynch, counsel to MIT. Since that time, numerous letters have been exchanged between counsel for MIT and Dr. Sweet on the one hand, and the NRC through its Office of the General Counsel on the other. Many of those letters are contained in the Appendix to the motion dated January 12, 2001 that the United States has brought in the Court of Federal Claims litigation captioned above, styled "Defendant's Motion to Dismiss, in Part, and Defendant's Motion for Partial Summary Judgment." In those letters, MIT's and Dr. Sweet's position that they are entitled to be indemnified for any liability that they might be found to have to patients whom Dr. Sweet treated at MIT's AEC-licensed nuclear reactor, or their families, as well as their defense costs in claims presented by such persons, is spelled out very clearly.

Just as clearly, the NRC has rejected those claims. For example, Ms. Nordlinger of the NRC's Office of the General Counsel summarized the NRC's position in her letter to Mr. Lynch dated May 4, 1999, well before the case of *Evelyn Heinrich, et al. v. William H. Sweet, M.D., et al.* began trial in the United States District Court for the District of Massachusetts:

> "[O]ur 1996 correspondence ended with my August 29, 1996 letter affirming our opinion that Congress did not intend the mandatory Price-Anderson liability provisions for nuclear incidents to include in their scope activities involving prescription of radiation doses within a doctor-patient relationship. To our knowledge, nothing has changed. . . . In that light, we believe your tender was mistaken and we decline it."

Similarly, on September 15, 1999, when the trial of *Evelyn Heinrich, et al. v. William H. Sweet, M.D., et al.* was just beginning, the NRC reiterated its position in response to repeated requests for defense and indemnity of Dr. Sweet by his counsel, James E. Harvey, Jr.:

> "The [Price-Anderson] Act and legislative history, including that which you cite, are very clear that if there is indemnification at all, it covers any person liable for the nuclear incident. Not every nuclear incident is indemnified. Whether there is indemnification at all depends on whether it is required under the Price Anderson Act or if not required whether the Commission or Dept. of Energy has exercised its statutory discretion to indemnify. As I have previously explained, it is our view that the acts involved in Heinrich v. Sweet are not covered by either the terms of the Act or by any discretionary action of the Commission."

Despite those plain admissions that the NRC has considered and rejected MIT's, Dr. Sweet's, and Massachusetts General Hospital's claims for defense and indemnity, and the even clearer rejection presented by the "Defendant's Motion to Dismiss, in Part, and Defendant's Motion for Partial Summary Judgment" that the United States has brought in the Court of Federal Claims litigation captioned above, the Government maintains that it has "arguments regarding exhaustion of administrative remedies" to present against Dr. Sweet, MIT, and MGH. *See* Defendant's Motion to Dismiss, at p. 5. It also maintains that the claims by Dr. Sweet et al. for payment of legal costs is in some fashion barred because "no party has submitted its legal bills to the Commission for approval, a statutory prerequisite to any payments of legal costs." *See* Defendant's Motion to Dismiss, at p. 39.

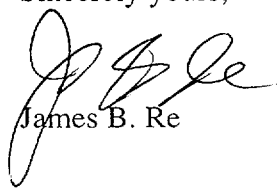
Because of those stated positions, which fly in the face of the NRC's flat rejection of the notion that it has any liability at all to Dr. Sweet et al. under Indemnity Agreement E-39, Dr. Sweet is taking the step of formally confirming and reiterating by this letter his demand for defense and indemnity by the NRC in accordance with Indemnity Agreement E-39, and in accordance with any indemnity agreements between the AEC and Brookhaven. In so doing, Dr. Sweet offers to provide itemized bills to the NRC for his costs of "investigating and defending claims for public liability," in the words of Article III, § 3 of the Indemnity Agreement. (He has no costs for "settling" such claims, as he has not settled any.) In light of the fact, however, that the NRC already has rejected Dr. Sweet's claim that the Indemnity Agreement requires it to pay those costs (at least insofar as they exceed $250,000, which they do), Dr. Sweet has not engaged in the empty gesture of providing the bills to date, but will be pleased to do so if the NRC wishes. Similarly, although it is an empty gesture in light of the NRC's stated position, Dr. Sweet stands ready to cooperate fully with the Government in the event that it decides to invoke any rights that it has under the Indemnity Agreement, such as its right under Article IV, § 1 to collaborate or appear in, or settle or defend the *Heinrich* matter or any other case arising out of Dr. Sweet's use of MIT's (or Brookhaven's) licensed reactors.

In summary, Dr. Sweet remains eager to cooperate fully with the NRC in defending the *Heinrich* matter or any other case arising out of Dr. Sweet's use of licensed reactors. He is eager to provide to the NRC any information or documentation that it wishes or claims that it must be provided as a condition precedent to its obligations of defense, defense cost reimbursement, and liability indemnity under Indemnity Agreement E-39 or any other applicable indemnity agreement. He is eager to comply with any "statutory prerequisites" that the NRC identifies.

To the best of Dr. Sweet's knowledge, he has met all of his notice and other procedural obligations to the NRC and is entitled to indemnity if the court finds that the Indemnity Agreement includes the claims against him. If the NRC agrees with him, Dr. Sweet requests that it confirm that fact. If the NRC maintains that he has failed to meet any such obligations, he requests that the NRC inform him of that failure so that he may remedy it. In the event that the NRC gives him no guidance on that point, or requests nothing of him, Dr. Sweet will infer that the NRC requires nothing more by way of notice or presentation of his claim. Moreover, Dr. Sweet will ask in the present litigation or in any future litigation with the NRC over its indemnity obligations to him that the NRC be estopped by its silence from claiming that he failed in any way to perfect his claim to indemnity for defense costs and liability to third parties arising from his use of AEC-licensed reactors in medical treatment.

Thank you for your attention to this letter.

Sincerely yours,



James B. Re

Enclosure
cc: Mrs. Elizabeth Dutton Sweet (via regular mail)
Frederick H. Grein, Jr., Esquire (via regular mail)
NRC02-07-19.doc