UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES - GENERAL

Case No.	2:12-cv-3013-SVW-PJW 2:12-cv-3037-SVW-PJW	Date	May 9, 2013
Title	David Sclafani, et al. v. Air and Liquid Systems Corp., et al.		

Present: The Honorable	STEPHEN V. WILSON, U.S. DISTRICT JUDGE	
Paul M. Cruz	N/A	
Deputy Clerk	Court Reporter / Recorder	Tape No.

Attorneys Present for Plaintiffs:	Attorneys Present for Defendants:
N/A	N/A

Proceedings: IN CHAMBERS ORDER Re DEFENDANTS' MOTIONS IN LIMINE
Case No. 2:12-cv-3013-SVW-PJW: [170] [172] [179] [180] [181] [182] [183] [184] [221]
Case No. 2:12-cv-3037-SVW-PJW: [116] [117] [118] [119] [120] [121] [122] [132] [133]

Defendants' Motion in Limine Number 1 (Dckt. 179)[1]

Defendants' Motion in Limine Number 1 seeks to limit the admission of "any evidence regarding past medical expenses of David Sclafani through documents, expert testimony, or otherwise, to only those amounts *actually paid* by or on" Sclafani's behalf. Most of Sclafani's medical costs have been covered by the Veteran's Administration. Under California law, a tortuously injured plaintiff whose medical bills are paid by another—such as the plaintiff's health insurer—cannot recover damages for those *past* medical expenses "for the simple reason that the injured plaintiff did not suffer any economic loss in that amount." Howell v. Hamilton Meats & Provisions, Inc., 52 Cal. 4th 541, 548 (2011). Therefore, Sclafani will only be permitted to recover past medical expenses he *actually* paid; any other medical expenses cannot be recovered from Defendants. Plaintiffs do not oppose this portion of Defendants' Motion in Limine Number 1; therefore, to the extent they seek reimbursement for Sclafani's past medical expenses, Plaintiffs will be limited to introducing evidence of amounts actually paid by Sclafani.

[1] All docket numbers refer to case number 2:12-cv-3013-SVW-PJW, except for the motions in limine numbers 9 through 17, which were filed under case number 2:12-cv-3037-SVW-PJW.

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Defendants' Motion in Limine Number 1 also seeks to exclude the opinions of Plaintiffs' economist Dr. David Fractor as speculative an unfounded. At trial, Fractor will opine that Plaintiff would lose future earnings of $68,463 and lost "household services" of $180,233.

"Where lost future earnings are at issue, an expert's testimony should be excluded as speculative if it is based on unrealistic assumptions regarding the plaintiff's future employment prospects." Boucher v. U.S. Suzuki Motor Corp., 73 F.3d 18, 21 (2d Cir. 1996). Here, Dr. Fractor's $68,463 figure was calculated by *assuming* that Sclafani would work to the end of his life and earn the New Hampshire minimum wage of $7.25 an hour. However, prior to his mesothelioma diagnosis, Sclafani was self-employed, and his business was generating no income. Moreover, Plaintiffs have provided no indication that Sclafani—who is at least 70 years old—intended on taking up a full-time, minimum wage job. Fractor's calculations are, by definition, speculative—they are not based either on Sclafani's work history, nor his stated intentions to return to work. Thus, Dr. Fractor will not be permitted to testify as to Sclafani's lost future earnings.

However, Dr. Fractor will be permitted to testify as to the lost "household services." Defendants argue that Dr. Fractor failed to account for the fact that, since Sclafani has become sick, his wife has taken over the household responsibilities from Sclafani. This argument was specifically rejected by the California Court of Appeals in McKinney v. California Portland Cement Co., 96 Cal. App. 4th 1214, 1228 (2002). Defendants present no other objection to Dr. Fractor's methodology as to Plaintiffs' "household services" claim; therefore, Dr. Fractor will be permitted to testify on this point at trial.

Thus, Defendants' Motion in Limine Number 1 is GRANTED IN PART, AND DENIED IN PART.

Defendants' Motion in Limine Number 2 (Dckt. 179-1)

Defendants' Motion in Limine Number 2 is a motion by defendant Foster Wheeler that seeks to exclude any testimony "purporting to identify a Foster Wheel product solely by testimony that its name appeared [on a product], and any testimony relying on such identification" as either inadmissible hearsay or on the basis of the best evidence rule.[2] As this Court determined in ruling on Buffalo's

[2] Foster Wheeler also seeks to strike portions of Sclafani's deposition that were elicited "through impermissible leading questions." At the pretrial conference, Plaintiffs indicated that Sclafani would not be testifying himself; instead, his testimony will be offered by reading his deposition into the record. Plaintiffs' counsel is currently identifying which portions of Sclafani's deposition they seek to

motion for summary judgment, the Ninth Circuit has held that labels affixed to a medium "are most appropriately characterized as circumstantial evidence of origin, rather than as an 'assertion' within the meaning of the hearsay rule." Los Angeles News Serv. v. CBS Broad., Inc., 305 F.3d 924, 935 opinion amended and superseded, 313 F.3d 1093 (9th Cir. 2002) (finding that an identifying "CBS" slate appearing on the opening frames of a videotape is not hearsay and 'is more akin to a postmark or timestamp" such that it is an "indicia of origin" that did not implicate the hearsay rule); see also United States v. Snow, 517 F.2d 441, 443 (9th Cir. 1975) (holding that a piece of tape affixed to a briefcase with the name "Bill Snow" printed on it was *not* hearsay, but rather circumstantial evidence that the briefcase belonged to Bill Snow).

However, as this Court observed in its separate order of May 9, 2013, Sclafani's testimony that he saw the words "Foster Wheeler" is subject to the best evidence rule. The Court will defer ruling on Foster Wheeler's motion to exclude this portion of Sclafani's testimony on the basis of the best evidence rule until the pretrial conference set for May 13, 2013.

Defendants' Motion in Limine Number 3 (Dckt. 179-2)

Defendants' Motion in Limine Number 3 is a motion by defendant Foster Wheeler that seeks to exclude the testimony of Plaintiffs' expert Captain Francis Burger altogether. Foster Wheeler argues that Captain Burger's expert report fails to indicate that he reviewed "any materials regarding Foster Wheeler in preparation for this case." However, in his expert report, Captain Burger states that he reviewed, among other things, the discovery responses of "Naval Defendants"—including Foster Wheeler—and deposition transcripts of the Naval Defendants' "Person Most Qualified," and the ship records for the Naval vessels that Sclafani worked on, which noted, among other things, that there were Foster Wheeler boilers aboard the USS Morton. See Burger Rept. at 11-12.

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introduce; and Foster Wheeler (among others) will respond by identifying, and objecting to, specific items of testimony. The Court will defer on ruling on this objection until this process is complete.

Foster Wheeler also argues that Sclafani's identification of Foster Wheeler gaskets and packing during his deposition lacked foundation and was based on speculation. Specifically, they point out that, while at certain points in his deposition Sclafani recalled seeing the name "Foster Wheeler" on boilers, gaskets, and packing, at other points he could not remember seeing any such logos or writing. These arguments obviously go to Sclafani's credibility, an issue reserved for the jury.

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In the alternative, Foster Wheeler asks this Court to limit Captain Burger's testimony to the opinions disclosed in his expert report, and to exclude any opinions that lack a factual basis. Foster Wheeler argues that many the opinions Captain Burger offered in his declaration in support of Plaintiffs' motion for summary judgment were either not disclosed in Captain Burger's expert report or lack a factual basis. Specifically, Foster Wheeler attacks Captain Burger's opinions 1) that Foster Wheeler boilers were often supplied with asbestos-containing parts already installed; 2) that Foster Wheeler supplied spare parts, including gaskets, for use in and with its boilers; 3) that during Sclafani's service aboard the USS Morton, Foster Wheeler's boilers onboard the Morton "would more likely than not have been insulated with asbestos containing insulation and utilized asbestos containing refractory material, gaskets, and packing;" and 4) that it was more likely than not that Sclafani would have removed and replaced asbestos-containing insulation, refractory material, gaskets, or packing supplied by Foster Wheeler.

Plaintiffs have failed to file an opposition to Defendants' Motion in Limine Number 3. Without greater guidance from Plaintiffs, the Court cannot discern whether Captain Burger included each of these opinions in his initial expert report, nor whether his opinions were formed the factual bases for each opinion. Thus, Plaintiffs shall have until Monday, May 13, 2013 at 10:00 a.m. to respond to Defendants' Motion in Limine Number 3, and to identify where in Captain Burger's report he disclosed these four opinions, and his factual basis for so opining.

Defendants' Motion in Limine Number 4 (Dckt. 179-3)

Defendants' Motion in Limine Number 4 seeks to preclude Plaintiffs from introducing "all evidence post-dating Sclafani's last alleged exposure to asbestos" as irrelevant and as barred by Federal Rule of Evidence 407. Defendants have failed to identify which items of evidence they are seeking to exclude, and thus will defer ruling on this motion until specific items of evidence are identified. However, the Court notes that, to the extent that Plaintiffs seek to introduce evidence of remedial measures taken by Defendants after Sclafani's alleged exposure to asbestos (i.e., post-1963), such evidence will be excluded under Rule 407. See also Pls.' Mot. in Limine No. 3.

Defendants' Motion in Limine Number 5 (Dckt. 179-4)

Defendants' Motion in Limine Number 5 seeks to preclude Plaintiffs' expert Dr. Barry Horn from testifying regarding the cost or value of Sclafani's medical treatment. Defendants' argue that 1) any such opinion was not included in Dr. Horn's Rule 26 report; and 2) if he attempts to amend his previous report, he has failed to review Sclafani's medical records. Plaintiffs concede that Dr. Horn has

not reviewed Sclafani's medical records; therefore, Dr. Horn has no factual basis from which he could opine as to the cost or value of Sclafani's medical treatment.

Therefore, Defendants' Motion in Limine Number 5 is GRANTED.

Defendants' Motion in Limine Number 7 (Dckt. 179-5)[3]

Defendants' Motion in Limine Number 7 is a motion by defendant Foster Wheeler that seeks to preclude Plaintiffs from making any argument that Foster Wheeler is liable for asbestos-containing packing and gaskets that it did not supply or distribute. As this Court previously found, Plaintiffs' claims against Foster Wheeler is premised on their argument that Sclafani was exposed either to the original asbestos-containing parts in the Foster Wheeler boilers, or Foster Wheeler-supplied spares during Sclafani's service on the Morton. Plaintiffs' argument at trial will be limited to these theories of liability.[4]

Defendants' Motion in Limine Number 8 (Dckt. 179-6)

Defendants' Motion in Limine Number 8 seeks to bifurcate the liability and damages phases of the trial. The Court will phase the trial in the matter discussed with the parties; thus, the motion is DENIED as MOOT.

Defendants' Motion in Limine Number 9 (Dckt. 116)

Defendants' Motion in Limine Number 9 seeks to preclude Plaintiffs from offering expert testimony and documents regarding the "historical development of medical and scientific information

[3] Defendants did not file a Motion in Limine Number 6.

[4] Foster Wheeler's motion was likely made to preempt Plaintiffs from arguing that Foster Wheeler is liable because it "was foreseeable [to Foster Wheeler that] workers would be exposed to and harmed by the asbestos in replacement parts and products used in conjunction with their pumps and valves." O'Neil v. Crane Co., 53 Cal. 4th 335, 342 (2012). However, in Crane, the California Supreme Court explicitly rejected this theory of liability, holding that a plaintiff in an asbestos-related personal injury suit must show that the defendant being sued was somehow involved in the manufacturing, distribution, or retail chain of the asbestos product to which a plaintiff was exposed. Id. at 362-63.

the purported dangers of asbestos exposure." Defendants do not identify which specific items of evidence they seek to exclude; as such, the Court will defer ruling on this motion until trial.

Defendants' Motion in Limine Number 10 (Dckt. 132)

Defendants' Motion in Limine Number 10 seeks to preclude Plaintiffs from eliciting opinions from their experts that "every" exposure to asbestos is a substantial factor in causing mesothelioma. Specifically, Defendants object to the opinion of Dr. Arnold Brody, who intends to opine that "[o]nce a person develops an asbestos-related cancer, it is not possible to exclude any of the person's above-background exposures to asbestos from the causal chain. Each and every exposure to asbestos that an individual with mesothelioma experienced in excess of a background level contributes to the development of the disease."

The question of causation in asbestos-related litigation is an exceedingly difficult one. "At the most fundamental level, there is scientific uncertainty regarding the biological mechanisms by which inhalation of certain microscopic fibers of asbestos leads to lung cancer and mesothelioma." Rutherford v. Owens-Illinois, Inc., 16 Cal. 4th 953, 974 (1997). The California Supreme Court addressed this difficulty by articulating a two-part causation test: first, the plaintiff must "establish some threshold *exposure* to the defendant's defective asbestos-containing products[.]" Rutherford, 16 Cal. 4th at 982 (footnote omitted). Second, a plaintiff must establish to a "reasonable medical probability that a particular exposure or series of exposures was a 'legal cause' of his injury, i.e., a *substantial factor* in bringing about the injury." Id. This latter inquiry requires a plaintiff to show that his or her exposure to a particular defendant's asbestos-containing product, "in reasonable medical probability," was a substantial factor in contributing to the "aggregate *dose* of asbestos the plaintiff or decedent inhaled or ingested." Id. at 976-77.

Dr. Brody's opinion—that "each and every exposure . . . contributes to the development of" mesothelioma—is, in fact, the legal conclusion that, under Rutherford, a jury must reach. While an opinion is "not objectionable just because it embraces an ultimate issue," see Fed. R. Evid. 704, the Court finds that this opinion should be excluded for two other reasons.

First, as a legal issue, accepting Dr. Brody's opinion as true would render the "substantial factor" prong of the causation test meaningless. If "each and every exposure" is a *substantial factor* in leading to the development of mesothelioma, then all a plaintiff would have to do is prove 1) that he had mesothelioma; and 2) that he was exposed to asbestos at some time. Similar opinions have been rejected on precisely this basis. Lindstrom v. A-C Prod. Liab. Trust, 424 F.3d 488, 492-3 (6th Cir. 2005)

(upholding the district court's exclusion of an "each and every exposure" opinion and holding that "'[m]inimal exposure' to a defendant's product is insufficient[,]" as"[a] holding to the contrary would permit imposition of liability on the manufacturer of any product with which a worker had the briefest of encounters on a single occasion."); see also Holcomb v. Georgia Pac., LLC, 289 P.3d 188, 197 (Nev. 2012) (Noting that courts that adopt "the three-factor test of frequency, regularity, and proximity" in determining "substantial factor" regularly "reject the 'any' exposure argument.").

Secondly, Plaintiffs have failed to carry their burden of demonstrating this opinion is relevant and reliable, as required by Federal Rule of Evidence 702 and Daubert v. Merrell Dow Pharmaceuticals, 509 U.S. 579 (1993). "Under Daubert, the trial court must act as a 'gatekeeper' to exclude junk science that does not meet Federal Rule of Evidence 702's reliability standards by making a preliminary determination that the expert's testimony is reliable." Ellis v. Costco Wholesale Corp., 657 F.3d 970, 982 (9th Cir. 2011). In making this determination, district courts are to consider, among other things, "(1) whether the scientific theory or technique can be (and has been) tested, (2) whether the theory or technique has been subjected to peer review and publication, (3) whether there is a known or potential error rate, and (4) whether the theory or technique is generally accepted in the relevant scientific community." Elsayed Mukhtar v. California State Univ., Hayward, 299 F.3d 1053, 1064 (9th Cir. 2002) amended sub nom. Mukhtar v. California State Univ., Hayward, 319 F.3d 1073 (9th Cir. 2003) (citing Daubert, 509 U.S. at 593-94.).

Plaintiffs have failed to demonstrate that Dr. Brody's opinion is the product of reliable techniques. It is unclear how Dr. Brody came to his "every exposure" opinion; although he refers to several studies (none of which was provided to the Court by Plaintiffs), each study concludes only that "no amount of exposure to asbestos above the background levels present in ambient air has been established as too low to induce mesothelioma." Most troubling is Dr. Brody's own testimony—when cross-examined in another action about his "each and every exposure" opinion, Dr. Brody conceded that 1) there was no data to establish that all exposures contribute to mesothelioma; 2) his theory could not be tested; 3) his theory had not been published in any peer-review literature; and 4) had not been "put together as a scientific principle and tested." See Decl. of Crane's Counsel Bradley W. Gunning ¶ 8, Ex. G. These admissions demonstrate that, in forming his theory, Dr. Brody has not, and indeed cannot, met at least two of the four criteria Daubert sets forth in assessing a theory's reliability. Thus, the Court GRANTS Defendants' Motion in Limine Number 10.

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CIVIL MINUTES - GENERAL

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Defendants' Motion in Limine Number 11 (Dckt. 121)

Defendants' Motion in Limine Number 11 seeks to preclude Plaintiffs from introducing evidence or making argument that any Defendant manufactured or supplied asbestos-containing products not at issue in this case—for example, Defendants' marketing materials, product catalogues, patents, technical drawings and purchasing specifications regarding products *not* identified by Sclafani or witnesses as the source of Sclafani's asbestos exposure. Plaintiffs argue that this evidence is relevant to establish that Defendants should have known of the dangers of asbestos, an element of their negligence and strict liability claims.

Defendants have failed to identify which items of evidence they are seeking to exclude; thus, the Court will defer ruling on this motion until Plaintiffs seek to introduce specific items of evidence.

Defendants' Motion in Limine Number 12 (Dckt. 133)

Defendants' Motion in Limine Number 12 relates to studies conducted by Material Analytical Services ("MAS"). The MAS studies purported to measure the amount of airborne asbestos fibers created by the removal and wire-scraping of packing and gaskets from valves. Defendants claim that the techniques and methodologies are at odds with the generally accepted scientific methods for making such measurements, and should therefore be excluded under Daubert v. Merrell Dow Pharmaceuticals, 509 U.S. 579 (1993) and its progeny. Defendants present substantial evidence that the techniques used in the MAS study are at odds with the Occupational Safety and Health Administration's methods for measuring exposure, and therefore are *not* the product of "reliable principles and methods," a prerequisite of the introduction of expert testimony under Rule 702. Moreover, several courts have excluded this study on these grounds. Plaintiffs' have submitted no opposition to the motion;[5] therefore, Defendants' Motion in Limine Number 12 is GRANTED.

Defendants' Motion in Limine Number 13 (Dckt. 117)

Defendants' Motion in Limine Number 13 seeks to preclude Plaintiffs from introducing evidence of a test performed at a Shell Oil Company plant in which a "Durabla"[6] gasket was removed with a

[5] Under Local Rule 7-12, the failure to file any required document "may be deemed consent to the granting or denial of the motion."

[6] Durabla was another gasket manufacturer who included asbestos in their gaskets.

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power grinder (Defendants do not indicate what the gasket was removed from). Plaintiffs intend to use this study under to cross-examine Defendants' expert witnesses' opinions that the removal of gaskets "emits practically no asbestos dust." Defendants appear to object to the introduction of this study on hearsay grounds: although statements contained in a "treatise, periodical, or pamphlet" may be introduced to cross-examine an expert witness under the learned treatise exception to the hearsay rule, see Fed. R. Evid. 803(18), Plaintiffs must establish that the treatise is "a reliable authority." They have failed to do so here: the study does not describe the methodology used; it was not published in a journal; and the person who performed the test is not available for cross-examination. Thus, Defendants' Motion in Limine Number 13 is GRANTED.

Defendants' Motion in Limine Number 14 (Dckt. 118)

Defendants Motion in Limine Number 14 seeks to exclude "any evidence, reference, or argument relating to the Southern Power and Industry Trade Journal." Plaintiffs have agreed to the granting of this motion; therefore, Defendants' Motion in Limine Number 14 is GRANTED.

Defendants' Motion in Limine Number 15 (Dckt. 122)

Defendants' Motion in Limine Number 15 seeks to preclude Plaintiffs from introducing documents "relating to trade organizations of which Defendant were never members," such as the National Safety Council. Plaintiffs intend on introducing the identified documents as learned treatises to cross-examine Defendants' experts, specifically as to the issue of what was *knowable* about the dangers of asbestos. Such evidence is plainly relevant to an element of (at least) Plaintiffs' strict liability and negligence failure to warn claims. See CACI 1222 (listing the elements of negligent failure to warn, including "that Defendant knew or *reasonably should have known that the product was dangerous* or was likely to be dangerous when used or misused in a reasonably foreseeable manner") (emphasis added); see also CACI 1205 (listing the elements of strict liability failure to warn, including that the product "had potential risks that were known or *knowable in light of the generally recognized and prevailing best scientific and medical knowledge available at the time of manufacture, distribution, or sale*") (emphasis added).

Defendants' further argue that Plaintiffs cannot authenticate these documents; however, these reports can likely be authenticated either by the testimony of a witness with knowledge (namely, Defendants' experts), see Fed. R. Evid. 901(b)(1), or as a self-authenticating newspaper or periodical. See Fed. R. Evid. 902(6). Thus, Defendants' Motion in Limine Number 15 is DENIED.

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Defendants' Motion in Limine Number 16 (Dckt. 120)

Defendants Motion in Limine Number 16 seeks to exclude "evidence or argument regarding their alleged liability for other manufacturer's products." More specifically, Defendants seek to exclude evidence of exposure to asbestos-products that were not designed, manufactured, supplied or otherwise placed into the stream of commerce by Defendants.[7] Plaintiffs have agreed to the granting of this motion; therefore, Defendants' Motion in Limine Number 16 is GRANTED.

Defendants' Motion in Limine Number 17 (Dckt. 119)

Defendants' Motion in Limine Number 17 seeks to preclude Plaintiffs' expert Captain Francis Burger from opining that equipment manufacturers (such as Defendants) were "required by Navy specifications to warn of the dangers of death and personal injury from asbestos released from the foreseeable work practices involved in installing, repairing, and removing such equipment," because this opinion lacks foundation. This motion also seeks to preclude Captain Burger from opinion that the Navy selected replacement gaskets based on information in the equipment manufacturers' "drawings and technical manuals" and that the Navy "utilized the original equipment manufacturers for replacement parts."

The Court remains unclear how these opinions are relevant to the instant action, and will thus defer ruling on this motion in limine until the May 13, 2013 pretrial conference.

Defendants' Motion in Limine Number 18 (Dckt. 180)

Defendants' Motion in Limine Number 18 is a motion by defendant Buffalo Pumps that seeks to preclude Plaintiffs' expert Captain Francis Burger from offering opinions at trial that were not included

[7] Defendants' motion was likely made to preempt Plaintiffs from arguing that Foster Wheeler is liable because it "was foreseeable [to Defendants that] workers would be exposed to and harmed by the asbestos in replacement parts and products used in conjunction with their pumps and valves." O'Neil v. Crane Co., 53 Cal. 4th 335, 342 (2012). However, in Crane, the California Supreme Court explicitly rejected this theory of liability, holding that a plaintiff in an asbestos-related personal injury suit must show that the defendant being sued was somehow involved in the manufacturing, distribution, or retail chain of the asbestos product to which a plaintiff was exposed. Id. at 362-63.

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in his Rule 26 report. Specifically, Buffalo Pumps argues that Captain Burger's Rule 26 report did not include an opinion about "spare" gaskets, only "replacement" gaskets.

As this Court previously found, Buffalo Pumps did not manufacture the asbestos-containing packing and gaskets at issue in this action; instead, Buffalo Pumps' potential liability was premised on Plaintiffs' theory that Buffalo Pumps supplied these products. There were three potential avenues through which Buffalo Pumps may have supplied the packing and gaskets: either encased in the original pumps aboard the Rogers or the Morton; as "spares" that Buffalo Pumps supplied with the originally installed parts; and as "replacement" parts. This Court found that, as a matter of law, Sclafani could not have been exposed to asbestos from the original packing or gaskets, and that Buffalo Pumps did not supply "replacements," but that a triable issue remained as to whether Sclafani worked with Buffalo Pumps-supplied *spares*.

Integral to the Court's finding was Captain Burger's opinion that "Buffalo provided asbestos-containing spare packing and gaskets for originals[,]" and that the Navy would "use manufacturer-supplied spare parts as replacements for original parts prior to dipping into the general supply stock." See Burger Decl. in Opp. to Buffalo Pumps' MSJ ¶ 21. Buffalo Pumps now contends that this opinion was not previously disclosed in Captain Burger's Rule 26 report, and is based on Captain Burger's review of materials not previously disclosed, and that the opinion should be excluded as prejudicial.[8]

In his Rule 26 report, Captain Burger discusses "replacement" parts, but does not discuss "spares" provided by Buffalo Pumps. See Capt. Burger's Expert Report at pp. 18, 19 (noting that "the industry utilized the original equipment manufacturers [such as Buffalo Pumps] for *replacement* parts, including asbestos gaskets and packing"). Plaintiffs argue that the word "replacement" is the same as "spare," and thus Burger's opinion was adequately disclosed.

The Court has serious reservations about Plaintiffs' argument.[9] However, it appears that this failure was not prejudicial; during Captain Burger's deposition, Buffalo Pumps' counsel appeared to

[8] Buffalo Pumps raised other objections to this portion of Captain Burger's declaration in their motion for summary judgment, objections which this Court overruled.

[9] As this Court previously found, "spares" were provided by pump manufacturers, like Buffalo Pumps, when they sold the original pumps. "Replacements" were additional gaskets and packing purchased by the Navy separately—and it was undisputed that Buffalo Pumps never sold separate "replacements."

distinguish between "spare gaskets" and "subsequent replacement parts." It appears from this portion of the deposition that Buffalo Pumps was aware that Captain Burger intended to opine as to the provision of "spares," and thus the alleged failure to disclose was not prejudicial. Therefore, Defendants' Motion in Limine Number 18 is DENIED.

Defendants' Motion in Limine Number 19 (Dckt. 181)

Defendants' Motion in Limine Number 19 is a motion by defendant Buffalo that seeks to preclude Sclafani from testifying that he saw the name "Buffalo Pumps" or "Buffalo" on the materials he worked with during his time aboard the USS Morton, as either inadmissible hearsay or subject to the best evidence rule. As this Court determined in ruling on Buffalo's motion for summary judgment, the Ninth Circuit has held that labels affixed to a medium "are most appropriately characterized as circumstantial evidence of origin, rather than as an 'assertion' within the meaning of the hearsay rule." Los Angeles News Serv. v. CBS Broad., Inc., 305 F.3d 924, 935 opinion amended and superseded, 313 F.3d 1093 (9th Cir. 2002) (finding that an identifying "CBS" slate appearing on the opening frames of a videotape is not hearsay and 'is more akin to a postmark or timestamp" such that it is an "indicia of origin" that did not implicate the hearsay rule); see also United States v. Snow, 517 F.2d 441, 443 (9th Cir. 1975) (holding that a piece of tape affixed to a briefcase with the name "Bill Snow" printed on it was *not* hearsay, but rather circumstantial evidence that the briefcase belonged to Bill Snow).

However, as this Court observed in its separate order of May 9, 2013, the words "Buffalo" and "Buffalo Pumps" are subject to the best evidence rule. The Court will defer ruling on Buffalo's motion on this basis until the pretrial conference set for May 13, 2013.

Buffalo also seeks to preclude Sclafani from opining that Buffalo Pumps was the "source or origin" of the "spare" parts Sclafani worked with. Buffalo is correct that Sclafani is unqualified to give such an opinion: he was not involved in the Naval supply chain, and has no knowledge of where the packing and gaskets he worked with came from. Thus, Sclafani will not be permitted to opine that the packing and gaskets he worked with were supplied by Buffalo.

Thus, Defendants' Motion in Limine Number 19 GRANTED in part.

Defendants' Motion in Limine Number 20 (Dckt. 184)

Defendants' Motion in Limine Number 20 is a motion by Defendant Buffalo Pumps that seeks to preclude the introduction of any evidence or argument of Sclafani's exposure to any asbestos-containing gaskets or packing allegedly supplied by Buffalo aboard the USS Rogers because that issue was "finally

and fully adjudicated" when this Court granted in part Buffalo Pumps' motion for summary judgment.[10] Plaintiff does not oppose the motion; therefore, Defendants' Motion in Limine Number 20 is GRANTED.

Defendants' Motion in Limine Number 21 (Dckt. 183)

Defendants' Motion in Limine Number 21 is a motion by defendant Buffalo Pumps that seeks to preclude the introduction of any evidence or argument of Sclafani's exposure to any asbestos-containing gaskets or packing during his time aboard the USS Morton that were either originally-installed in the Buffalo Pumps-supplied pumps, or were supplied as "replacement" parts to those pumps, because these issues were "finally and fully adjudicated" when this Court granted in part Buffalo Pumps' motion for summary judgment.[11] Plaintiff does not oppose the motion; therefore, Defendants' Motion in Limine Number 21 is GRANTED.

Defendants' Motion in Limine Number 22 (Dckt. 182)

Defendants' Motion in Limine Number 22 is a motion by Defendant Buffalo Pumps that seeks to preclude the introduction of a declaration signed by Sclafani that was submitted in opposition to Buffalo Pumps' motion for summary judgment as hearsay, pursuant to Federal Rules of Evidence 801 and 802. Plaintiff does not oppose the motion; therefore, Defendants' Motion in Limine Number 22 is GRANTED.

[10] As this Court previously found, Plaintiffs had identified three potential sources of asbestos-containing gaskets and packing that Buffalo Pumps might have supplied for use aboard the USS Morton during Sclafani's service aboard the ship: 1) the originally installed gaskets and packing; 2) the "replacement" gaskets and packing; and 3) the "spare" gaskets and packing. This Court concluded that no triable issue remained as to the first two sources of asbestos-containing gaskets; but that one remained as to whether Sclafani was exposed to "spare" gaskets and packing distributed by Buffalo Pumps.

[11] As this Court previously found, Sclafani was *not* exposed to Buffalo-supplied asbestos-containing parts aboard the Rogers, as Sclafani did not board the Rogers until approximately eighteen years after it was commissioned.

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Defendants' Motion in Limine Number 23 (Dckt. 170)

Defendants' Motion in Limine Number 23 is a motion by defendant Goodyear that seeks to preclude Plaintiffs from introducing evidence or making argument that Goodyear manufactured asbestos-containing products *other* than the ones to which Sclafani alleges he was exposed. This motion is the same as Defendants' Motion in Limine number 11, which sought to exclude evidence all evidence of *any* defendant "manufactured or supplied asbestos-containing products not at issue in this case." Here, as there, Goodyear has failed to identify which items of evidence it seeks to exclude; thus, the Court will reserve ruling on this motion until Plaintiffs seek to introduce specific items of evidence.

Defendants' Motion in Limine Number 24 (Dckt. 172)

Defendants' Motion in Limine Number 24 is a motion by defendant Goodyear that seeks to preclude Plaintiffs, their counsel, and their expert witnesses from "making any reference to asbestos exposure from new Goodyear gasket material after 1969," and from making any reference to "any Goodyear-related documents, manuals, or any other written materials relating to any gasket product manufactured by Goodyear after 1969." Plaintiffs do not oppose the motion; therefore, Defendants' Motion in Limine Number 24 is GRANTED.

Defendants' Motion in Limine Number 25 (Dckt. 221)

Defendants' Motion in Limine Number 25 is a motion to preclude Plaintiffs from using any graphic and illustrative material not timely disclosed. Defendants do not identify what, if any material, they are seeking to exclude; thus, the Court defers ruling on this motion until such material is identified. If Plaintiffs attempt to use graphs, pictures, or other illustrations at trial that were not disclosed at least eleven (11) days before trial (or before May 3, 2013), this Court will prohibit Plaintiffs from using these materials under Local Rule 16-3. ("If not already disclosed . . . the parties shall disclose copies of all graphic or illustrative material to be shown the trier of facts as illustrating the testimony of a witness at least eleven (11) days before trial.").

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