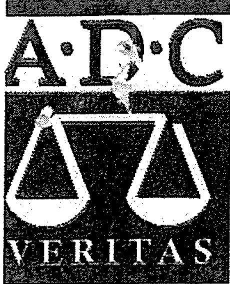

Association of Defense Counsel of Northern California and Nevada

ASCDC

Association of Southern California Defense Counsel

September 17, 2014

VIA FEDERAL EXPRESS OVERNIGHT

Hon. Chief Justice of California
and Associate Justices of the
California Supreme Court
350 McAllister Street
San Francisco, CA 94102-4797

Re: *Ganoe v. Metalclad Insulation Corporation*
(Case No. B248941, July 21, 2014) 227 Cal.App.4th 1577
Request for Depublication

To The Honorable Justices:

The Association of Southern California Defense Counsel ("ASCDC") and the Association of Defense Counsel of Northern California and Nevada ("ADC-NCN") respectfully submit this request for depublication of the Court of Appeal's opinion pursuant to Rule 8.1125 of the California Rules of Court. The opinion was initially ordered not to be published, but on July 21, 2014, was modified and ordered published. This depublication request is timely because filed within 30 days of the date the decision became final. (Cal. Rules of Court, rules 8.1125(a), 8.264(b)(5).) Defendant and Respondent Metalclad Insulation Corporation filed a petition for review, and has indicated it also intends to file a request for depublication.

20743483v.1

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IDENTITY AND INTEREST OF ASCDC AND ADC-NCN

ASCDC is the nation's largest regional organization of lawyers who specialize in defending civil actions. ASCDC counts as members approximately 1000 attorneys in Southern and Central California. ASCDC is actively involved in assisting courts on issues of interest to its members. It has appeared as amicus curiae in numerous cases before both this Court (see, e.g., *Howell v. Hamilton Meats & Provisions* (2011) 52 Cal.4th 541; *Village Northridge Homeowners Assn. v. State Farm Fire & Casualty Co.* (2010) 50 Cal.4th 913; *Reid v. Google, Inc.* (2010) 50 Cal.4th 512) and the Courts of Appeal (see, e.g., *Burlage v. Superior Court* (2009) 178 Cal.App.4th 524).

ADC-NCN is an association of over 800 attorneys primarily engaged in the defense of civil actions. ADC-NCN members have a strong interest in the development of substantive and procedural law in California, and extensive experience with product liability matters. The Association's Nevada members are also interested in the development of California law because Nevada courts often follow the law and rules adopted in California. ADC-NCN has appeared as amicus in numerous cases.

The two Associations are separate organizations, with separate memberships and governing boards. They coordinate from time to time on a number of matters of shared interest, such as this request for depublication.

REASONS WHY THE OPINION SHOULD BE DEPUBLISHED

The *Ganoe* decision should be depublished because it was a fact-specific case that has been, and will continue to be, misconstrued and misapplied too generally. The Court of Appeal's decision arises from a unique set of procedural circumstances in which the moving party discovered and disclosed relevant evidence after the summary judgment motion was filed. Yet the opinion purports, and will be generally misapplied in contravention of California law, to impose a general requirement applicable to all cases that particular evidence must be presented in order for a defendant to meet its burden on summary judgment. The opinion also commends the qualifications of plaintiffs' controversial expert witness to opine on an issue – asbestos content – that was not material to the motion, was never challenged by the defendant, and was completely unnecessary to resolve the appeal. In the short time it has been published, *Ganoe* has already been cited as the basis for denying at least one summary judgment motion in a case that does not share *Ganoe's* unique procedural circumstances.

The Court of Appeal's decision was driven by factors that were unique to the *Ganoe* case, primarily Metalclad's production of relevant evidence after its motion for summary judgment was filed. At the time Metalclad filed its motion, Plaintiffs had no witness who could identify Metalclad, and neither party was aware of any evidence that Metalclad had ever even stepped foot on the sprawling, 42-square-block industrial facility where Mr. Ganoe worked.

After filing its motion, Metalclad discovered a document showing that it had performed work somewhere at the enormous plant in 1974, one of the many years Mr. Ganoe was there. Plaintiffs in turn produced a witness declaration stating that the same type of work described in the belatedly-discovered evidence was performed in Mr. Ganoe's presence, and that the sole witness was not aware of that other similar work was performed anywhere else at the plant that year.

After staying the proceeding to give plaintiffs an opportunity to discover and produce additional evidence, the trial court ruled that Metalclad met its burden as the moving party in light of the information actually known at the time the motion was filed. The Court of Appeal held that it would be unfair to plaintiffs to hold that Metalclad met its burden after having withheld relevant evidence, even if it did so inadvertently. (*Ganoe*, 227 Cal.App.4th at 1583.)

If *Ganoe* is not depublished, it has the potential to prejudice many defendants who are entitled to summary judgment. *Ganoe*'s requirement that specific evidence be presented to meet the moving party's burden, and apparent endorsement of an expert's qualifications, even though those qualifications were not tested by the adversarial system, are not appropriate for a published decision. Allowing the opinion to remain precedent will have unintended negative consequences.

1. The *Ganoe* Court's Determination That Metalclad Did Not Meet Its Initial Burden Is Founded on Case-Specific Circumstances, and Its Resolution of the Issue Is Not Worthy of Publication.

The reason a triable issue was found in *Ganoe* is that no one knows exactly where Metalclad performed its work at the large facility in 1974. It may have been in Mr. Ganoe's presence, and it may have been somewhere else in the 42-square-block campus.

But the Court of Appeal went further. The *Ganoe* opinion holds that a moving defendant cannot meet its burden in a product liability case to show that a plaintiff did not encounter the product, even if the sole product identification witness testifies that he has never heard of the defendant, unless the defendant also <u>shows</u> the witness <u>other evidence to identify that defendant</u> – in this case, the defendant's logo. (227 Cal.App.4th at pp. 1584-1585.) The *Ganoe* court also strayed beyond what would be proper as citable precedent, by addressing at length the qualifications of plaintiffs' controversial expert to opine on asbestos content, which was not even an issue in the appeal. (227 Cal.App.4th at p. 1586, fn. 4.) The opinion has caused, and will continue to cause, confusion and misapplication of the appellate court's statements to deny meritorious summary judgment motions.

For example, in *Gusich v. American President Lines, Ltd* (Los Angeles Superior Court case no. BC473232), Judge Elias denied the motion for summary judgment saying "So you read the [*Ganoe*] decision this week. There's no way this could be granted." (*Gusich* RT, p. 1:18-21) Specifically referencing plaintiffs' expert Charles Ay, the trial court stated: "Basically, you're on the property somewhere and somebody . . . Charles Ay says he was there, it's a triable issue." (*Gusich* RT, 1:24-26, attached as exh. A.) *Gusich* did not involve the late-proffered evidence that drove the result in *Ganoe*.

Also, in *Leonard v. Avantor Performance Materials, Inc.* (Alameda County Superior Court RG13684263), the *Ganoe* opinion was offered by plaintiffs' counsel as a reason to deny the motion for summary judgment, because the plaintiff in that case was not shown a catalog at his deposition. Counsel stated: "we submitted this week a recent case that was published, Rosemary Geneau [*sic*] vs. Metalclad, which is directly on point, where at that deposition, Metalclad, through their counsel, asked the question if the witness recalled Metalclad performing work. And the court found that it was not enough to shift the burden because Metalclad didn't show the witness any logos or any other--to elicit that testimony. And it's a very similar situation here. If Leonard had been shown those catalogs, he could have identified the materials he used." (*Leonard* RT 12:24-13:10, attached as exh. B.)

These are just two examples of the unintended consequences the Court of Appeal's publication order has had.

2. The Court of Appeal's Pronouncement That Metalclad Should Have Showed Its Logo to the Sole Eye Witness In Order To Shift the Burden Goes Too Far, and Is In Conflict With Established Authority.

The *Ganoe* opinion imposes an unrealistically high burden on defendants, a requirement that goes far beyond the proper guidelines set forth in *Scheiding v. Dinwiddie Const. Co.* (1999) 69 Cal.App.4th 64. *Scheiding* properly held that a witness's failure to mention a defendant or its product at deposition did not give rise to an inference that the product was not present, unless the witness is specifically asked about the defendant (e.g. "have you ever heard of x?"). The *Ganoe* opinion imposes a requirement that a defendant provide specific evidence (an unrecognized logo) in order to shift the burden of production. (227 Cal.App.4th at pp. 1584-1585.) A logical extension of this could be to require that defendants show witnesses a list and photos of all their products, which seems more like an opportunity for mischief and "manufactured memory" than it does a vehicle for ascertaining the truth.

Scheiding did not hold that a defendant must ask the deponent whether he or she had ever heard of the company, but did hold that, if such question is not asked, the court cannot infer anything about the witness's knowledge of the defendant. *Ganoe* purports to follow *Scheiding*, but is really an unwarranted extension. Under *Ganoe*, even if the moving defendant establishes that the witness has never heard of the company, an inference does not arise that the witness cannot identify the company unless he or she is shown a logo. (*Ganoe*, 227 Cal.App.4th at pp. 1584-1585.) The *Ganoe* decision references the following statement in *Weber v. John Crane, Inc.* (2006) 143 Cal.App.4th 1433: "It cannot be inferred that Weber would have been unable to recognize a John Crane product had he been shown one, or had he been shown its packaging or its logo." (*Id.* at p. 1439.) However, the *Weber* court did not require showing these to the witness, and explained that such inference could be established through evidence that the witness was able to identify other products by name, or through that testimony coupled with factually devoid discovery responses. (*Id.* at p. 1440.) "Evidence that the plaintiff had no difficulty recalling the products with which he had worked but was unable to recall the defendant's product allowed an inference that he had not worked with the defendant's product." (*Id.* at p. 1441.)

Thus, the *Ganoe* decision's reliance on *Weber* as support for this additional requirement is misplaced. *Scheiding* speaks in terms of inferences based on the evidence, but now *Ganoe* purports to specify what evidence is required. *Weber* does not require that a logo be shown, but merely expresses that some evidence must be provided to show that the witness had the ability to recollect other defendants (or products), such that his inability to recognize the particular defendant gives rise to the inference that the witness has no information about the company.

The *Weber* court specifically refrained from specifying what evidence a defendant must present, which is consistent with the applicable standard: "We do not attempt to define the minimum evidence a defendant must produce to shift the burden to the plaintiff, but we do hold the defendant must in some way show that the plaintiff does not have and cannot reasonably obtain evidence of causation." (*Weber*, 143 Cal.App.4th at 1442.) In contrast, *Ganoe* does "define the minimum evidence," in this case an unrecognized logo. This is inconsistent with not only *Weber*, but also *Andrews v. Foster Wheeler LLC* (2006) 138 Cal.App.4th 96, 102-103, and *McGonnell v. Kaiser Gypsum, Inc.* (2002) 98 Cal.App.4th 1098, 1103-1104, which explained other circumstances under which an inference of "no other evidence" can arise from a witness' testimony that he or she does not recognize the defendant's name. As *McGonnell* held:

> The McGonnell deposition excerpt supporting defendants' summary judgment motion showed McGonnell had no knowledge of any exposure to Kaiser products, let alone any Kaiser products that contained asbestos. Plaintiffs argue this evidence was insufficient to shift the burden to them to demonstrate the existence of triable issues of fact. Plaintiffs believe defendants simply argued there was a lack of evidence of exposure without making the required prima facie evidentiary showing.
>
> McGonnell's deposition excerpt is precisely the type of evidence specified by the Code of Civil Procedure (§ 437c, subd. (b)) and our Supreme Court (*Aguilar, supra*, 25 Cal.4th at p. 855, 107 Cal.Rptr.2d 841, 24 P.3d 493) as proper evidence to support a summary judgment motion. That evidence showed plaintiffs could not establish an element of their case—causation.

Nothing in the *Ganoe* opinion justifies such a radical departure from well-settled summary judgment law in this area.

3. The *Ganoe* Opinion's Affirmation of Charlie Ay's Qualifications To Opine On Asbestos Content Is Not Only Dicta, But Was Also Not an Issue Raised in the Appeal.

The *Ganoe* opinion essentially ratifies Mr. Ay's qualifications, in a lengthy footnote, without the benefit of any evidence or argument on the subject. (227 Cal.App.4th at p. 1586, fn. 4.) The decision's touting of Charlie Ay's qualifications is dicta, because it was not needed to resolve the appeal. What's more, the matter was never even raised as an issue in the appeal, so it was not even before the appellate court.

Ganoe's superfluous commentary is particularly pernicious, because Charlie Ay is a controversial expert in asbestos litigation. Numerous appellate courts have upheld the exclusion of his testimony, *after trial court and appellate briefing on the issue*. (See, e.g., *Andrews v. Foster Wheeler LLC* (2006) 138 Cal.App.4th 96, 112 [rejecting Mr. Ay's "speculations about the presence of Foster Wheeler asbestos-containing products."]; *Rogers v. Raymark Industries, Inc.* (9th Cir. 1991) 922 F.2d 1426, 1430 [affirming trial court's exclusion of Ay's testimony because "the proffered testimony had the potential of confusing the jury by unduly emphasizing a narrow issue," and "Ay's testimony had minimal probative value."]; *Robertson v. Carrier Corp.* (E.D. Pa. 2012) 2012 WL 2989174 *1, fn. 1 [finding Mr. Ay's testimony "speculative and not supported by personal knowledge or scientific/technical/specialized knowledge or expertise."]) If there is to be conflicting appellate authority on his qualifications and methods, it should come from cases that litigate the issue.

CONCLUSION

The *Ganoe* opinion should not remain published. It addresses a unique set of circumstances, and the publication order has had, and will continue to produce, consequences contrary to established precedent, because the opinion will be construed to heighten defendants' burden on summary judgment, contrary to well-established law in

this area, and without any reasoned basis for doing so. The opinion also gives credence to the qualifications of a controversial expert, Charles Ay, without the benefit of any litigation on that issue. ASCDC and ADC-NCN respectfully request that the opinion be ordered depublished.

Respectfully submitted,

Dated: September 17, 2014

GORDON & REES LLP

By: [signature]
Don Willenburg (SBN 116377)
Attorneys for Amicus Curiae
Association of Defense Counsel
of Northern California and Nevada

Dated: September 17, 2014

COLE PEDROZA LLP

By: [signature] for
Joshua C. Traver (SBN 229778)
Attorneys for Amicus Curiae
Association of Southern California
Defense Counsel

Attachments

PROOF OF SERVICE

Ganoe v. Metalclad Insulation Corporation
California Court of Appeal, Second Civil No. B248941

I am a resident of the State of California, over the age of eighteen years, and not a party to the within action. My business address is: Gordon & Rees LLP, 1111 Broadway, Oakland, CA 94607. On September 17, 2014, I served the within documents:

Letter to Supreme Court of California
Request for Depublication

☒ by placing true copy(ies) of the document(s) listed above in a sealed envelope with postage thereon fully prepaid, in UNITED STATES MAIL in the State of California at Oakland, addressed as set forth below.

Simona A Farrise
Farrise Law Firm, P.C.
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Rose Marie Ganoe
Matthew Ganoe
Daniel Ganoe
Marie Derks
Plaintiffs and Appellants

Farah S. Nicol
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Los Angeles, CA 90067

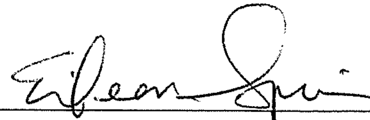
Metalclad Insulation Corporation
Defendant and Respondent

Clerk, California Court of Appeal
Second District, Division Three
300 S. Spring St
2nd Floor, North Tower
Los Angeles, CA 90013

Via U.S. Mail: By placing the document(s) listed above in a sealed envelope, with postage thereon fully prepaid, in United States mail in the State of California at Oakland, addressed as set forth below. I am readily familiar with the firm's practice of collection and processing correspondence for mailing. Under that practice it would be deposited with the U.S. Postal Service on that same day with postage thereon fully prepaid in the ordinary course of business.

I declare under penalty of perjury under the laws of the State of California that the above is true and correct.

Executed on September 17, 2014 at Oakland, California.



Eileen Spiers

EXHIBIT A

1 SUPERIOR COURT OF THE STATE OF CALIFORNIA

2 FOR THE COUNTY OF LOS ANGELES

3 DEPARTMENT 324 HON. EMILIE ELIAS, JUDGE

4

COORDINATED PROCEEDING SPECIAL TITLE RULE (3.550) LAOSD ASBESTOS CASES	) JCCP CASE NO. 4674
SONJA GUSICH, PLAINTIFFS, VS. AMERICAN PRESIDENT LINES LTD., ET AL., DEFENDANTS.	) LASC CASE NO. BC473232

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7
8
9
10
11
12

13 REPORTER'S TRANSCRIPT OF PROCEEDINGS

THURSDAY, JULY 24, 2014

14 APPEARANCES:

15 FOR PLAINTIFFS: THE FARRISE LAW FIRM
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23
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25
26
27

28 CASSANDRA CALDARELLA, CSR NO. 13127
OFFICIAL COURT REPORTER

1 CASE NUMBER: BC473232
2 CASE NAME: SONJA GUSICH V. AMERICAN PRESIDENT
3 LINES, LTD., ET AL.
4 LOS ANGELES, CA THURSDAY, JULY 24, 2014
5 DEPARTMENT 324 HON. EMILIE H. ELIAS, JUDGE
6 APPEARANCES: (AS HERETOFORE NOTED.)
7 REPORTER: CASSANDRA CALDARELLA,
8 CSR NO. 13127
9 TIME: 1:52 P.M.
10
11 (THE FOLLOWING PROCEEDINGS WERE HELD
12 IN OPEN COURT AT 1:52 P.M.:)
13
14 MR. DEJARDIN: GOOD MORNING, YOUR HONOR. BRAD
15 DEJARDIN ON BEHALF OF METALCLAD CORPORATION.
16 MR. ADAMS: GOOD AFTERNOON, YOUR HONOR. BEN ADAMS ON
17 BEHALF OF PLAINTIFF.
18 THE COURT: SO YOU READ THE DECISION THIS WEEK.
19 THERE'S NO WAY THIS COULD BE GRANTED.
20 MR. DEJARDIN: THE GANOE DECISION?
21 THE COURT: YEAH, THE GANOE DECISION.
22 MR. DEJARDIN: YEAH, I'D LIKE TO BE HEARD BECAUSE
23 I --
24 THE COURT: BASICALLY, YOU'RE ON THE PROPERTY
25 SOMEWHERE AND SOMEBODY SAW CHARLEY -- CHARLES AY SAYS HE
26 WAS THERE, IT'S A TRIABLE ISSUE.
27 MR. ADAMS: I KNOW, YOUR HONOR, I DISAGREE WITH THE
28 OPINION, BUT IT IS -- IT JUST CAME OUT.

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1 THE COURT: IT CAN'T BE, AND I THINK THAT'S THE WAY
2 WE OUGHT TO -- THAT'S THE WAY IT IS.
3 MR. DEJARDIN: OKAY. BUT HERE ARE THE FACTS OF THIS
4 CASE: ALL RIGHT. MR. GUSICH, THE DECEDENT, WORKED AT TODD
5 SHIPYARD FROM 1965 TO 1970. THERE IS NO INDIVIDUAL,
6 INCLUDING MR. GUSICH, WHO IDENTIFIES METALCLAD. IT IS
7 UNDISPUTED THAT METALCLAD DID -- WAS A SUPPLIER TO SYD
8 CARPENTER MARINE. THAT'S THE CONNECTION IN THE CASE. TODD
9 SHIPYARD -- SYD CARPENTER MARINE DID INSULATION WORK AT
10 TODD SHIPYARD.
11 IT IS ALSO UNDISPUTED THAT SYD CARPENTER MARINE
12 HAD MULTIPLE SUPPLIES OF INSULATION THAT INCLUDED
13 METALCLAD, THORPE INSULATION, EAGLE PITCHER. THE NAVY ALSO
14 SUPPLIED ACCORDING TO JAMES SYDNEY CARPENTER SUPPLIED AT
15 TIMES 50 PERCENT OF THE INSULATION NEEDED FOR REPAIRS OF
16 NAVY SHIPS. AND THEN ALSO TODD SHIPYARD.
17 AND THAT'S ALL ON THE RECORD. WE HAVE THE PMK
18 FROM TODD SHIPYARD SAYING THAT THEY HAD A PURCHASING
19 DEPARTMENT THAT PURCHASED MATERIALS FOR REPAIRS ON THE
20 SHIPS.
21 NOW, THE IMPORTANT ISSUE IN THIS CASE IS THAT
22 THE ONLY PRODUCT IDENTIFIED BY MR. GUSICH WHO WAS DEPOSED
23 IS KALO. KALO INSULATION. I LEFT OUT ONE OF THE
24 SUPPLIERS. THAT WAS FIBERGLASS ENGINEERING WHO IS THE
25 MAKER OF KALO.
26 NOW, I DIDN'T BRING THAT UP LAST TIME WHEN WE
27 WERE HERE FOR BERKOWITZ BECAUSE I DIDN'T REALIZE IT WAS AN
28 ISSUE. HOWEVER, IN THE DEPOSITION TESTIMONY OF SYDNEY

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1 LOUIS, JUNIOR, HE WAS ASKED -- THIS IS -- LET ME JUST MAKE
2 THE RECORD CLEAR -- DEPOSITION TAKEN ON MARCH 29TH, 1996 IN
3 THE MATTER OF NAOMI HART. ALL RIGHT. AND I WILL REFER TO
4 PAGE 37 OF THAT DEPOSITION TRANSCRIPT, LINE -- WELL, I'LL
5 REFER TO LINE 22
6 QUESTION: "WOULD THE SAME THING BE
7 TRUE FOR FIBERGLASS ENGINEERING OR --
8 ANSWER: "THAT'S CORRECT.
9 QUESTION: "DIVISION OF OWENS
10 CORNING FIBERGLASS.
11 ANSWER: "THAT'S CORRECT.
12 QUESTION: "TO THE EXTENT THAT YOU
13 GOT MATERIALS FROM THEM FOR INSULATION MATERIALS
14 FROM 1957 THROUGH 1980, THOSE INVOICES WOULD ALSO
15 BE CONTAINED IN PLAINTIFF'S EXHIBIT A-1 THROUGH 10?"
16 -- REFERRING TO INVOICES THAT THEY WERE
17 PRODUCED IN THIS DEPOSITION.
18 NOW, THIS IS IMPORTANT BECAUSE THE INVOICES ARE
19 A PART OF PLAINTIFF'S OPPOSITION WHERE THEY ATTACH NUMEROUS
20 INVOICES, SOME FROM METALCLAD, BUT ALSO FOR THE FIRST TIME
21 THAT I'VE EVER SEEN THEM, SOME FROM OWENS CORNING
22 FIBERGLASS.
23 THE OWENS CORNING FIBERGLASS INVOICES FIT THE
24 TIME PERIOD THAT WE'RE TALKING ABOUT, BETWEEN 1950 -- 1965
25 AND 1970. WHY IS THAT IMPORTANT IN BECAUSE THE INVOICES
26 FROM METALCLAD CLEARLY STATE AND ARE ALL SALES FOR PAB CO.,
27 WITHIN THAT TIME FRAME. SO PAB CO. IS A DIFFERENT
28 MANUFACTURER OF INSULATION PIPE COVERING.

REPRODUCTION PER GOVERNMENT CODE SECTION 69954(D) ONLY

1 ALL OF THE INVOICES FOR THAT TIME FRAME FOR
2 METALCLAD ARE PAB CO. PLAINTIFF'S ONLY IDENTIFICATION OF
3 AN INSULATION PRODUCT IS KALO. WE DID NOT SUPPLY KALO
4 DURING THAT TIME PERIOD. THERE ARE INVOICES FROM METALCLAD
5 SUPPLYING KALO AFTER THAT TIME PERIOD IN THE LATER -- IN
6 THE '70'S.
7 AND THE REASON BEING IS THAT WHEN METALCLAD
8 INSULATION CORPORATION WAS FORMED, THE INDIVIDUALS CAME
9 FROM OWENS CORNING, AND OWENS CORNING DIDN'T WANT TO SELL
10 TO THEM SO THEY HAD TO GO TO A DIFFERENT SUPPLIER. THEY
11 ENDED UP WITH PAB CO.
12 SO THAT IS WHY THIS MOTION SHOULD BE GRANTED,
13 BECAUSE THERE IS EVIDENCE FROM THE PLAINTIFF HIMSELF
14 IDENTIFYING THE INSULATION PRODUCT THAT HE RECALLS EVER
15 SEEING.
16 AND I'LL READ THAT TESTIMONY. THIS IS FROM
17 MR. GUSICH, VOLUME IX, PAGE 1462. BEAR WITH ME BECAUSE
18 I'VE GOT TO READ A LITTLE BIT LESS THAN A PAGE.
19 LINE 6:
20 QUESTION: "USED BY SYD CARPENTER
21 EMPLOYEES?
22 ANSWER: "I REMEMBER THIS MATERIAL.
23 I REMEMBER IT VERY WELL THIS MATERIAL. I WAS
24 AROUND THE PIPES. LIKE I SAID BEFORE, THERE
25 WAS" --
26 -- AND I'LL JUST PARAPHRASE. HE IS CROATIAN,
27 SO THERE IS AN INTERPRETER INVOLVED HERE SO IT'S A LITTLE
28 MUDDY, BUT GOING ON:

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1 "LIKE I SAID BEFORE, THERE WAS --
2 WE USING HOW MUCH WE NEED AND SIZE WHAT WE
3 NEED. WE CUT THEM AND PUT THEM ON. AND KALO,
4 I BELIEVE THAT'S THE COMPANY THAT WAS -- THAT
5 MAKE THE -- THAT -- THIS PRODUCT.
6 QUESTION: "YOU REMEMBER THAT
7 BRAND FOR THE STRESS RELIEF WORK YOU DID?
8 ANSWER: "YES.
9 QUESTION: "SIR, DO YOU REMEMBER
10 THAT BRAND FOR WORK YOU SAW OTHERS, LIKE SYD
11 CARPENTER, DOING WHAT YOU WERE DOING CUTTING
12 AND SAWING IT AND PUTTING IT ON PIPES?
13 ANSWER: "I BELIEVE THAT'S --
14 THAT'S -- WAS ON THE -- FOR STRESS RELIEF, THE
15 SAME THING -- THE SAME COMPANY, AND SAME NAME
16 BECAUSE I CANNOT REMEMBER ANY OTHER NAME, ANY
17 OTHER COMPANY THAT PUT THEM ON -- OR THAT PUT
18 THEM ON." YEAH.
19 QUESTION: "YOU DON'T REMEMBER THE
20 NAMES OF THE MANUFACTURERS OF ANY OTHER
21 INSULATION PRODUCTS THAT LOOKED LIKE THIS HALF
22 ROUNDS OR THE BLOCK MATERIAL, CORRECT?
23 ANSWER: "NO. NO, I CAN'T
24 REMEMBER."
25 SO THE ONLY PRODUCT HE REMEMBERS IS KALO. AND
26 THE INVOICES SUPPLIED BY PLAINTIFF IN THEIR OPPOSITION
27 INCLUDE INVOICES FROM FIBERGLASS ENGINEERING WITH KALO AND
28 THE INVOICES FOR METALCLAD DURING THE PERIOD OF TIME '65 TO

REPRODUCTION PER GOVERNMENT CODE SECTION 69954(D) ONLY

1 1970 ARE ALL PAB CO. SO THEY CANNOT MAKE THE CAUSATION
2 CONNECTION. THERE IS -- THEY CANNOT ADDRESS THAT ISSUE. I
3 BELIEVE WE'VE SHIFTED THE BURDEN. I UNDERSTAND THE PREFACE
4 OF THE NEW CASE, BUT I DON'T THINK THAT APPLIES BASED ON
5 THESE SPECIFIC FACTS.
6 MR. ADAMS: WELL, YOUR HONOR, HE WAS ABLE TO IDENTIFY
7 KALO, BUT THAT'S NOT THE ONLY BRAND OF INSULATION THAT
8 METALCLAD SUPPLIED TO SYD CARPENTER.
9 AND ALSO METALCLAD IN ITS OWN DISCOVERY
10 RESPONSES IN ITS OWN DEPOSITION TESTIMONY SAYS THAT IT
11 SUPPLIED KALO UP UNTIL 1973. THIS IS IN ITS OWN
12 INTERROGATORY RESPONSES, WHICH ARE ATTACHED AS EXHIBIT R TO
13 MY DECLARATIONS AT -- MY DECLARATION AT PAGE 3 THROUGH 4.
14 THEY ALSO -- THEIR OWN PERSON MOST
15 KNOWLEDGEABLE ALSO IDENTIFIED KALO AS A BRAND THEY SOLD
16 PRIOR TO 1967. AGAIN, MR. BERKOWITZ WORKED FROM '65 TO '70
17 AT TODD SHIPYARD, AND THE UNDISPUTED EVIDENCE IN THE RECORD
18 IS THAT METALCLAD SUPPLIED AT LEAST 50 PERCENT OF THE
19 INSULATION PRODUCTS USED BY SYD CARPENTER AT TODD SHIPYARD.
20 AND MR. BERKOWITZ WORKED AT TODD SHIPYARD FOR
21 FIVE YEARS. HE WORKED IN THE BOILER SPACES, THE
22 ENGINEERING SPACES, THE ELECTRICAL SPACES ON COMMERCIAL
23 SHIPS, NAVY SHIPS FOR FIVE YEARS. HIS UNDISPUTED TESTIMONY
24 IS THAT EVERY TIME HE WORKED ON ONE OF THOSE SHIPS, SYD
25 CARPENTER EMPLOYEES WERE CUTTING NEW PIPE INSULATION WITH
26 SAWS. SYD CARPENTER EMPLOYEES WERE MIXING
27 ASBESTOS-CONTAINING MUD INSULATION, WHICH CREATED DUST WHEN
28 YOU OPENED THE BAG, WHICH CREATED DUST WHEN YOU DUMPED IT

REPRODUCTION PER GOVERNMENT CODE SECTION 69954(D) ONLY

1 IN THE MIXER, AND WHICH EXPOSED HIM TO ASBESTOS DUST IN
2 ENCLOSED SPACES ON OVER TWO DOZEN SHIPS THAT HE IDENTIFIED.
3 THAT'S THE UNDISPUTED EVIDENCE. JUST BECAUSE
4 HE COULD ONLY IDENTIFY ONE BRAND DOESN'T MEAN THEY DIDN'T
5 SUPPLY NUMEROUS BRANDS. IT'S THEIR BURDEN TO PROVE THAT
6 THEY DIDN'T SUPPLY IT. THEY JUST CAN'T POINT TO HIS
7 TESTIMONY AND SAY WE DIDN'T SUPPLY IT WHEN ALL OF THEIR
8 PMKS' DEPOS AND INTERROGATORIES SAY THEY DID.
9 THE OTHER ISSUE IS JUST THE ISSUE OF,
10 STATISTICALLY, I UNDERSTAND THE COURT SINCE THEY SUPPLIED
11 50 PERCENT OF THE INSULATION, THAT -- YOU KNOW, THE
12 QUESTION IS HOW ARE WE GOING TO GET TO 51 PERCENT? AND THE
13 ANSWER IS THAT IF THEY SUPPLIED ONLY 50 TO SYD CARPENTER
14 AND HE ONLY WORKED AROUND SYD CARPENTER ONE TIME, THEN
15 THAT -- THEY WOULD HAVE A POINT THERE. BUT HE WORKED THERE
16 FOR FIVE YEARS ON SHIPS EVERY DAY FULL TIME AROUND SYD
17 CARPENTER EMPLOYEES, AND THEY SUPPLIED 50 PERCENT OF THE
18 INSULATION PRODUCTS, NOT JUST THE PIPE INSULATION, BUT THE
19 PRODUCTS, EVERYTHING.
20 SO IF HE WORKED AROUND THEM ONE TIME, IF HE
21 WORKED AROUND THEM TWO TIMES, IT'S MORE LIKELY THAN NOT
22 THAT HE WAS EXPOSED TO METALCLAD INSULATION PRODUCTS
23 BECAUSE THEY SUPPLIED HALF OF IT.
24 AND I SEE YOU SHAKING YOUR HEAD, YOUR HONOR --
25 THE COURT: NO, I'M SHAKING MY HEAD ONLY BECAUSE I
26 THINK WHAT -- THIS CASE AND THE OTHER CASE, THERE'S JUST --
27 ITS TRIABLE ISSUES ARE GOING TO BE -- I DON'T KNOW WHAT TO
28 SAY.

REPRODUCTION PER GOVERNMENT CODE SECTION 69954(D) ONLY

1 MR. DEJARDIN: WELL, LET ME -- LET ME JUST STRESS --
2 THE COURT: I MEAN, IF YOU GOT IT ON THE GROUNDS AND
3 YOU WERE THERE WORKING AND YOU WERE DOING IT, IT APPEARS
4 THAT THAT'S GOING TO BE A TRIABLE ISSUE.
5 MR. DEJARDIN: IF THEY GOT -- WHO --
6 THE COURT: I MEAN --
7 MR. DEJARDIN: OKAY. YOUR HONOR, I LISTENED VERY
8 CLOSELY TO WHAT HE SAID.
9 THE COURT: HE MAY NOT RESPOND EXACTLY TO WHAT YOU
10 SAID. HE WILL NOT TALK ABOUT THE INVOICES. THE PROBLEM IS
11 WHETHER THERE'S A TRIABLE ISSUE WHERE THERE IS NO INVOICES
12 FOR THAT TIME, BUT THEY ONLY NAMED ONE PRODUCT. IF THE
13 INVOICES SHOW YOU WERE ALSO THERE ON THE OTHER THINGS, THEN
14 THAT'S A TRIABLE ISSUE.
15 MR. DEJARDIN: I DON'T UNDERSTAND BECAUSE HERE --
16 HERE'S MY POINT AND I'LL ADDRESS WHAT HE SAID.
17 MY POINT IS THAT THE PLAINTIFF AND NO OTHER
18 WITNESSES SAY WHO SUPPLIED THE MATERIAL TO SYD CARPENTER.
19 THE PLAINTIFF HIMSELF SAYS HE RECOGNIZES AND ONLY RECALLS
20 ONE BRAND THE ENTIRE TIME. AND I READ THAT PORTION TO YOU.
21 AND THAT WAS KALO. AND THE INVOICES --
22 THE COURT: I UNDERSTAND. THEY'RE ONLY IN THE PERIOD
23 OF ONLY FOR KALO.
24 MR. DEJARDIN: EXACTLY. AND SO, WAIT, HERE'S THE --
25 HERE'S THE -- MY ADDRESSING -- I'M SORRY -- HERE'S MY
26 ADDRESSING PLAINTIFF'S COMMENT AND THAT WAS DEALING WITH
27 THE PMK, HIS TESTIMONY, AND THE KALO -- OR SALES TO SYD. I
28 DIDN'T SAY THAT WE DID NOT AT SOME POINT IN TIME, BUT NOT

REPRODUCTION PER GOVERNMENT CODE SECTION 69954(D) ONLY

1 AT THE POINT IN TIME THAT IT MATTERED. IN FACT, THERE'S
2 INVOICES IN HERE THAT ARE PAST -- IN LIKE 1977 WHEN WE DID
3 SELL KALO AND IT'S NONASBESTOS-CONTAINING. SO THAT'S
4 NEITHER HERE NOR THERE.
5 THE FACT THAT WE DID IN OUR -- IN OUR RESPONSES
6 SAY, THESE ARE THE PRODUCTS THAT WE DID SUPPLY IN GENERAL.
7 IT'S NOT THESE ARE THE PRODUCTS THAT WE SUPPLIED TO SYD
8 CARPENTER. AND SPECIFICALLY TO SYD CARPENTER DURING THE
9 TIME FRAME 1965 TO 1970. THEY -- THERE IS NO CONNECTION.
10 AND IF I'M MISSING IT, IF THERE'S A CONNECTION BETWEEN THE
11 CAUSATION, I WOULD -- YOU KNOW, I'LL ANSWER ANY QUESTION
12 THAT YOUR HONOR HAS, BUT THEY DO NOT HAVE A CONNECTION TO
13 OUR PRODUCT, AND THEY HAVE TO SHOW THAT IT'S MORE LIKELY
14 THAN NOT THAT OUR PRODUCT CAUSED THE INJURY. AND --
15 THE COURT: OKAY. WHAT I'M GOING TO DO IS -- I WAS
16 SUPPOSED TO BE ON A CONFERENCE CALL AT 2:00 THAT I FORGOT
17 ABOUT, SO WE'RE JUST GOING TO TAKE A FEW-MINUTE BREAK, AND
18 I'M GOING TO SEE WHAT THEY WANT, AND THEN I'M GOING TO COME
19 BACK. OKAY? THANKS.
20 MR. ADAMS: YEP. THANK YOU, YOUR HONOR.
21 MR. DEJARDIN: THANK YOU, YOUR HONOR.
22
23 (A RECESS WAS TAKEN AT 02:06 P.M.)
24
25 (THE FOLLOWING PROCEEDINGS WERE HELD
26 IN OPEN COURT AT 2:34 P.M.:)
27
28 THE COURT: LET'S GO BACK ON THE RECORD.

REPRODUCTION PER GOVERNMENT CODE SECTION 69954(D) ONLY

1 MR. DEJARDIN: WELL, I WAS STILL IN THE MIDDLE, BUT
2 HE CAN GO AHEAD.
3 THE COURT: HE HEARS IT. GO ON.
4 MR. DEJARDIN: ALL RIGHT. I WAS JUST GOING TO SAY I
5 GLOSSED OVER, YOU KNOW, WHAT THESE CASES ARE ABOUT BECAUSE
6 I KNOW THE COURT KNOWS, BUT JUST SO THE RECORD IS CLEAR,
7 YOU KNOW, NO ONE DISPUTES THAT IN ASBESTOS LITIGATION, THE
8 BURDEN IS ON THE PLAINTIFF TO SHOW EXPOSURE TO A
9 DEFENDANT'S PRODUCT. ALL RIGHT.
10 THEY JUST CAN'T SAY THEY WERE -- YOU KNOW, THEY
11 WERE AT A LOCATION AND YOU WERE AT THE LOCATION AND
12 THEREFORE --
13 THE COURT: I CAN'T REALLY SAY THAT THAT'S TRUE. I
14 REALLY CAN'T SAY THAT THAT'S TRUE RIGHT NOW.
15 MR. DEJARDIN: WELL --
16 THE COURT: I CAN SAY THAT THEY CAN SAY THAT THERE'S
17 MANY EVIDENCE THAT THEY MIGHT HAVE BEEN THERE. THE
18 QUESTION IS HOW MUCH EVIDENCE DO THEY HAVE TO HAVE TO HAVE
19 A TRIABLE ISSUE ON IT.
20 MR. DEJARDIN: OKAY.
21 THE COURT: SO THEY PUT ON EVIDENCE THAT THEY WERE
22 THERE.
23 MR. DEJARDIN: ALL RIGHT. WELL, FROM --
24 THE COURT: I DON'T THINK IT'S AS CLEAR AS YOU -- GO
25 AHEAD.
26 MR. DEJARDIN: I'LL JUST READ FROM OUR PAPERS. THIS
27 IS FROM RUTHERFORD.
28 IT'S BLACK LETTER LAW THAT A

REPRODUCTION PER GOVERNMENT CODE SECTION 69954(D) ONLY

1 PLAINTIFF ALLEGING ASBESTOS-RELATED INJURY
2 BEARS THE BURDEN OF PROOF ON THE ISSUE OF
3 EXPOSURE TO DEFENDANT'S PRODUCT.
4 THE COURT: UH-HUH.
5 MR. DEJARDIN: THAT'S FROM RUTHERFORD. AND, YOU
6 KNOW, THAT'S -- THAT'S MY WHOLE POINT HERE. I --
7 THE COURT: IT'S A TRIAL CASE, ISN'T IT?
8 MR. DEJARDIN: YES.
9 MY POINT HERE IS THAT WE'RE NOT DENYING. AND I
10 THINK THAT'S BEEN CLEAR -- THAT WE SUPPLIED TO -- SUPPLIED
11 MATERIALS TO SYD CARPENTER MARINE. AND PLAINTIFF HAS MADE
12 THAT, YOU KNOW, AN ISSUE IN THAT HE -- THAT THE DECEDENT
13 WAS WORKING THERE FOR FIVE YEARS AND ALTHOUGH WE CAN'T SHOW
14 A SPECIFIC TIME, OVER THOSE FIVE YEARS HE MUST HAVE BEEN
15 EXPOSED, BUT AGAIN, THAT GOES AGAINST MAGANO WHICH SAYS
16 EVIDENCE WHICH MERELY ESTABLISHES IT'S WITHIN THE REALM OF
17 POSSIBILITY THAT DECEDENT WAS EXPOSED TO ASBESTOS FROM
18 WHICH -- AND I HAVE METALCLAD IS RESPONSIBLE -- IS
19 INSUFFICIENT TO AVOID SUMMARY JUDGMENT.
20 AND THAT'S WHAT WE HAVE HERE AND WE GO BACK TO
21 GARCIA. GARCIA, YOU HAD TWO SAVORS, AND THE COURT SAID NO,
22 YOU CAN'T DO IT. YOU NEED TO HAVE -- IT NEEDS TO BE MORE
23 LIKELY THAN NOT. HERE, WE HAD -- I HAD FIVE BEFORE, WE NOW
24 HAVE SIX SUPPLIERS OF MATERIALS, AND THE PLAINTIFF
25 IDENTIFIES ONE BRAND. KALO.
26 NOW, PLAINTIFF, I THINK -- IF PLAINTIFF'S
27 COUNSEL WANTS TO TALK ON THE KALO ISSUE, I WOULD BE MORE
28 THAN GLAD TO ADDRESS THE ISSUE THAT HE RAISES.

REPRODUCTION PER GOVERNMENT CODE SECTION 69954(D) ONLY

1 MR. ADAMS: WELL, FIRST OF ALL, WE DO HAVE THE BURDEN
2 OF PROOF OF RE-EXPOSURE AND IT'S NOT JUST WITHIN THE REALM
3 OF POSSIBILITY, BUT IT'S CERTAIN IF YOU LOOK AT THE
4 EVIDENCE AND YOU MAKE THE REASONABLE INFERENCES FROM IT.
5 AND JUST TAKING A STEP BACK TO THE KALO ISSUE,
6 THE ARGUMENT EARLIER WAS THAT THERE'S NO EVIDENCE THAT WE
7 SOLD KALO DURING THE TIME PERIOD WHEN MR. GUSICH WORKED AT
8 TODD SHIPYARD. THAT'S 1965 TO 1970.
9 UNFORTUNATELY, THERE ARE A COUPLE OF PROBLEMS WITH
10 IT. THE FIRST PROBLEM IS THAT THAT WASN'T RAISED IN THEIR
11 PAPERS AT ALL, SO IT'S SORT OF SPRUNG ON ME AT THE HEARING.
12 THAT'S FINE, THAT'S A MINOR PROBLEM.
13 THE BIGGER PROBLEM IS IT'S JUST NOT TRUE. AND
14 I DIRECT THE COURT TO EXHIBIT Q TO THE ADAMS DECLARATION
15 ATTACHED TO OUR OPPOSITION, MY DECLARATION, AND AT PAGE 38,
16 THE BOTTOM OF PAGE 38, LINE 23.
17 MR. DEJARDIN: CAN YOU HOLD ON A SECOND. Q, WHERE
18 WOULD THAT FIT IN HERE?
19 THE COURT: LET ME FIND IT.
20 MR. ADAMS: YOU DON'T HAVE TABS?
21 THE COURT: NO. GIVE ME A HINT HOW FAR DOWN WE'RE
22 LOOKING.
23 MR. ADAMS: IT'S IN LIKE PRETTY FAR. TWO AND A HALF
24 INCHES.
25 THE COURT: IS IT BEFORE OR AFTER THE INVOICES? I'M
26 AT THE INVOICES.
27 MR. DEJARDIN: IT'S AFTER THAT, YOUR HONOR.
28 THE COURT: OKAY.

REPRODUCTION PER GOVERNMENT CODE SECTION 69954(D) ONLY

1 MR. ADAMS: WHICH INVOICES? SYD -- METALCLAD
2 INVOICES OR THE TODD SHIPYARD?
3 MR. DEJARDIN: TODD SHIPYARD.
4 MR. ADAMS: IT'S AFTER THE TODD, ABOUT HALF AN INCH.
5 THE COURT: AFTER THOSE, I'M PRETTY CLOSE TO THE END.
6 MR. DEJARDIN: WHAT PAGE DID YOU SAY?
7 THE COURT: I'VE GOT ALL INVOICES DOWN TO THE END.
8 MR. ADAMS: WELL, I'LL JUST READ IT.
9 THE COURT: WHY DON'T YOU READ IT? I'VE GOT THE
10 INVOICES DOWN TO THE END.
11 MR. ADAMS: WHAT PAGE IS IT, THOUGH?
12 MR. DEJARDIN: IT'S PAGE 38.
13 MR. ADAMS: IT'S AT THE END.
14 THE COURT: OH, I'VE GOT ANOTHER SET. OKAY. OKAY.
15 A SECOND SET.
16 MR. ADAMS: OH, YEAH, IT'S IN THE SECOND SET.
17 THE COURT: YOU'RE GOING TO Q? I GOT Q.
18 MR. ADAMS: PAGE 38, LINE 23.
19 THE COURT: EXHIBIT Q IS ALL BLACKED OUT HERE.
20 MR. DEJARDIN: HE CAN -- I HAVE IT, YOUR HONOR, AND
21 HE CAN READ IT AND I COULD FOLLOW IT.
22 MR. ADAMS: YOU'VE GONE A LITTLE TOO FAR. IT'S THE
23 THIRD PAGE OF EXHIBIT Q.
24 THE COURT: I'VE GOT L. JUST READ IT OUT LOUD.
25 MR. ADAMS: OKAY. SO THE --
26 QUESTION: "OKAY. MOVING TO
27 PREFORMED PIPE COVER" --
28 -- WELL, HOLD ON. LET ME JUST TAKE A STEP

REPRODUCTION PER GOVERNMENT CODE SECTION 69954(D) ONLY

1 BACK. THIS IS DONALD TRUEBLOOD. IT'S METALCLAD'S PMK, SO
2 THE CORPORATION METALCLAD IS TALKING HERE.
3 QUESTION: "MOVING TO PREFORMED
4 PIPE COVERING, WHAT MANUFACTURERS OR BRANDS OF
5 PIPE COVERING DID METALCLAD PROVIDE BETWEEN '67
6 AND '74? PROVIDE FOR SALE TO BE SPECIFIC.
7 ANSWER: "WE SOLD MOSTLY PAB CO.
8 PIPE COVERING AND BLOCK, AND THERE WAS SOME
9 RESIDUAL KALO FROM THE PURCHASE OF ASSETS OF
10 COMPANY."
11 AND I'LL JUST TAKE A BREAK HERE FOR A SECOND.
12 METALCLAD CHANGED OWNERSHIP NAME, YOU KNOW, IN '67. SO
13 THEY'RE TALKING ABOUT IN 1967 WHEN THEY PURCHASED THE
14 ASSETS FROM THIS OTHER METALCLAD COMPANY, THEY HAD A BUNCH
15 OF KALO. AND THEY GO ON.
16 QUESTION: "DO YOU HAVE ANY
17 UNDERSTANDING OF THE QUANTITY OF RESIDUAL KALO
18 THAT WAS ACQUIRED BY METALCLAD IN THE PURCHASE
19 OF ASSETS?"
20 DOWN A COUPLE OF LINES, THERE'S SOME
21 OBJECTIONS.
22 ANSWER: --
23 -- EXCUSE ME. THERE'S SOME OBJECTIONS, THEN
24 ANOTHER QUESTION.
25 MR. DEJARDIN: WELL, THERE'S AN ANSWER THERE.
26 MR. ADAMS: SORRY. THERE'S AN ANSWER.
27 ANSWER: "YES. I APPRECIATE THAT.
28 IT WOULD BE SPECULATION ON MY PART."

REPRODUCTION PER GOVERNMENT CODE SECTION 69954(D) ONLY

1 HE'S ANSWERING THE OBJECTION THERE, HE'S SAYING
2 SPECULATION. THERE'S ANOTHER QUESTION.
3 QUESTION: "DO YOU HAVE AN
4 ESTIMATE?"
5 ANSWER: "WELL, IT FIT IN THE
6 WAREHOUSE THAT WE HAD IN TORRANCE AND IN TERMS
7 OF THE NUMBER OF CARTONS, MAYBE I CAN DO IT
8 MORE IN TERMS OF PALLETS. AND A PALLET MIGHT
9 HAVE NINE BOXES ON IT AND THERE MAY HAVE BEEN
10 25 BOXES OR 25 PALLETS OR SO."
11 SO THERE ARE HUNDREDS AND HUNDREDS AND HUNDREDS
12 OF BOXES OF KALO INSULATION IN 1967 FROM THE PREVIOUS
13 METALCLAD WHERE -- AND MR. BERKOWITZ. SO RIGHT IN THE
14 MIDDLE OF MR. BERKOWITZ'S WORK AT TODD SHIPYARD, THERE'S
15 ALL THIS KALO THAT --
16 MR. DEJARDIN: GUSICH.
17 MR. ADAMS: -- THAT THEY'RE SELLING.
18 SORRY. GUSICH.
19 THE COURT: LET HIM FINISH.
20 MR. DEJARDIN: HE WAS USING THE WRONG PLAINTIFF. I'M
21 SORRY.
22 MR. ADAMS: GUSICH.
23 THERE ARE ALL THESE BOXES OF KALO INSULATION.
24 AND PRESUMABLY, SINCE IT WAS RESIDUAL, THERE WERE BOXES IN
25 KALO IN '65 AND '66, AND THERE'S LEFTOVER IN '67.
26 SO THE ENTIRE ARGUMENT THAT WE JUST HEARD WAS
27 FALSE. THEY DID SELL KALO DURING THE TIME PERIOD. SO IF
28 THERE'S ANOTHER ARGUMENT, I'LL RESPOND TO THAT

REPRODUCTION PER GOVERNMENT CODE SECTION 69954(D) ONLY

1 THE COURT: OKAY. LAST POINT.
2 MR. DEJARDIN: THE LAST POINT IS WHAT I STATED WAS
3 PLAINTIFFS HAVE SUPPLIED THE INVOICES FOR METALCLAD SALES
4 TO SYD CARPENTER. THEY -- DURING THE TIME PERIOD AT ISSUE,
5 THEY ARE SALES THAT START IN 1968 AND THEY'RE ALL FOR PAB
6 CO.
7 HE JUST NOW TALKED ABOUT RESIDUAL BOXES THAT
8 METALCLAD HAD ON HAND. WHO KNOWS WHERE THEY WENT TO? SYD
9 CARPENTER WAS NOT THEIR ONLY PERSON THEY EVER SOLD TO. AND
10 THERE IS NOTHING IN THE RECORD HERE THAT SHOWS THAT DURING
11 THAT PERIOD '65 TO '70 THAT METALCLAD SOLD KALO TO SYD
12 CARPENTER, BUT THERE IS PAB CO. AND THAT'S IMPORTANT
13 BECAUSE THE PLAINTIFF ONLY IDENTIFIES KALO AS THE ONLY
14 PRODUCT HE CAN --
15 THE COURT: OKAY. THE MOTION IS DENIED.
16 THE OTHER CAUSE OF ACTIONS ARE THE BREACH OF
17 WARRANTY IN THAT YOU'RE NOT -- YOU'RE NOT IN ON IT. YOU'RE
18 NOT ADDRESSED IN THOSE.
19 MR. ADAMS: WELL, I JUST HAVE ONE COMMENT -- I GUESS
20 WE'LL BASICALLY REST ON OUR PAPERS.
21 MY ONLY COMMENT ON THE CONSPIRACY ISSUE WAS
22 THAT OUR DISCOVERY RESPONSES ARE FULL OF ALLEGATIONS ABOUT
23 CONSPIRACY, AND THERE'S NOT A SINGLE THING IN THEIR PAPERS
24 ADDRESSING THAT.
25 THE COURT: BUT YOU DIDN'T DO ANYTHING WITH THE
26 REGARD TO THE FALSE REP, THE REQUIRED WARNING FALSE REP, OR
27 CONCEALMENT, FAILURE TO WARN EITHER. YOU'RE CONCEDING
28 THOSE CAUSE OF ACTION? YES OR NO? YES OR NO?

REPRODUCTION PER GOVERNMENT CODE SECTION 69954(D) ONLY

1 MR. ADAMS: WELL, WE'RE NOT --
2 THE COURT: NO.
3 MR. ADAMS: -- WE'RE NOT CONCEDING FAILURE TO WARN.
4 THE COURT: NO. CONCEALMENT FAILURE TO WARN. OKAY.
5 MR. ADAMS: WELL, WE'RE NOT CONCEDING. THE OTHER
6 ONES, I'LL REST ON THE PAPERS.
7 THE COURT: YOU DON'T HAVE ANY FACTS ON IT. YOU
8 OUGHT TO ADDRESS THESE CLAIMS.
9 MR. ADAMS: WELL, THE CONCEALMENT ISSUE IS THAT --
10 THE COURT: BUT YOU DON'T HAVE THEM ADDRESSED IN
11 HERE.
12 MR. ADAMS: WELL, TO ME, THE CONCEALMENT ISSUE AND
13 THE FAILURE TO WARN TIES INTO THE PUNITIVE DAMAGES
14 ANALYSIS.
15 THE COURT: I'M LEAVING IN THE PUNITIVES, BUT THE
16 OTHER CAUSE OF ACTIONS. WELL, I CAN'T --
17 MR. ADAMS: OKAY. WE'LL REST ON THE PAPERS, THAT'S
18 FINE, YOUR HONOR.
19 MR. DEJARDIN: CAN WE ADDRESS THE PUNITIVE DAMAGES
20 THEN?
21 THE COURT: SUMMARY ADJUDICATION. BUT YOU KNEW THE
22 RISK ALONG -- EARLIER IN THE TIME; RIGHT?
23 MR. DEJARDIN: WELL, THERE HAS TO BE SOME CONNECTION
24 TO THE -- TO THE DECEDENT IN THIS CASE. AND OUR -- IF YOU
25 GO WITH THE SALE TO SYD CARPENTER -- OUR CUSTOMER IS SYD
26 CARPENTER -- AND SYD CARPENTER IS NOT MAKING ANY CLAIM
27 AGAINST US THAT WE DID ANYTHING WITH MALICE, OPPRESSION, OR
28 FRAUD IN ANY WAY. THIS TOTALLY IS A THIRD PARTY AND NOT --

REPRODUCTION PER GOVERNMENT CODE SECTION 69954(D) ONLY

1 AND HE TESTIFIES THAT HE HAD NO -- NO KNOWLEDGE OF
2 METALCLAD ACTING WITH INTENT TO HARM HIM.
3 AND METALCLAD, YOU KNOW, OBVIOUSLY DIDN'T ACT
4 WITH MALICE, OPPRESSION OR FRAUD TOWARD MR. GUSICH IN ANY
5 WAY. THERE'S NO EVIDENCE OF THAT.
6 THE COURT: OKAY. I'M LEAVING IN THE PUNITIVE. I'M
7 ONLY LEAVING IN THE ONE WHICH LIABILITY IS AT ISSUE.
8 WHERE'S YOUR ORDER? I DON'T HAVE AN ORDER. DO
9 YOU HAVE AN ORDER?
10 MR. ADAMS: I'M SORRY, YOUR HONOR, WHAT --
11 THE COURT: I NEED TO HAVE AN ORDER THAT I CAN LOOK
12 AT. I'M LOOKING FOR THE ORDER.
13
14 (DISCUSSION BETWEEN CLERK AND COURT.)
15
16 THE COURT: HERE'S THE ORDER. OKAY.
17 OKAY. 7/24 OKAY. HERE'S AN ORDER.
18 MR. ADAMS: I'M SORRY, YOUR HONOR, I DIDN'T -- I
19 DIDN'T CATCH WHAT THE ORDER WAS. I UNDERSTAND IT'S DENIED
20 AS TO PUNITIVES AND AS TO THE NEGLIGENCE CAUSE AND STRICT
21 LIABILITY?
22 THE COURT: RIGHT.
23 MR. ADAMS: OKAY. THANK YOU, YOUR HONOR.
24 THE COURT: OKAY.
25 MR. DEJARDIN: ALL RIGHT. THANK YOU, YOUR HONOR.
26 THE COURT: THANKS VERY MUCH.
27 (WHEREUPON, AT 2:47 P.M., THE
28 PROCEEDINGS WERE ADJOURNED.)

REPRODUCTION PER GOVERNMENT CODE SECTION 69954(D) ONLY

1 SUPERIOR COURT OF THE STATE OF CALIFORNIA

2 COUNTY OF LOS ANGELES

3 DEPARTMENT 324 HON. EMILIE H. ELIAS, JUDGE

4

5 SONJA GUSICH,)
)
6 PLAINTIFFS,)
)
7 VS.)NO. BC473232
)
8 AMERICAN PRESIDENT LINES LTD.,)
ET AL.,)
9)REPORTER'S CERTIFICATE
DEFENDANTS.)
10)

11

12 I, CASSANDRA CALDARELLA, CSR 13127, OFFICIAL REPORTER

13 OF THE SUPERIOR COURT OF THE STATE OF CALIFORNIA, FOR THE

14 COUNTY OF LOS ANGELES, DO HEREBY CERTIFY THAT THE FOREGOING

15 PAGES, 1 THROUGH 18, COMPRISE A FULL, TRUE, AND CORRECT

16 TRANSCRIPT OF THE PROCEEDINGS AND TESTIMONY TAKEN IN THE

17 MATTER OF THE ABOVE-ENTITLED CAUSE ON JULY 24, 2014.

18 DATED THIS 14TH DAY OF AUGUST, 2014.

19

20

21 ______________________________

22 CASSANDRA CALDARELLA, CSR # 13127

23

24

25

26

27

28

EXHIBIT B

1 IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA

2 IN AND FOR THE COUNTY OF ALAMEDA

3 BEFORE THE HONORABLE JO-LYNNE Q. LEE

4 DEPARTMENT 30, POST OFFICE BUILDING, OAKLAND

5 ---oOo---

6 JAMES LEONARD and
LOUISE LEONARD,

7

Plaintiffs,

8

vs. No. RG13684263

9

AVANTOR PERFORMANCE
10 MATERIALS, INC., et al.,

11 Defendants.
_______________________________/

12

13

14 REPORTER'S TRANSCRIPT OF PROCEEDINGS

15 (MSJ/CMC)

16

17

18 Taken before DENISE M. LOMBARDO, CRR, CDR

19 CSR No. 5419

20 July 25, 2014

21

22

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11 ALSO PRESENT:

12 EVANTHIA SPANOS, Designated Defense Counsel
Berry & Berry
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14
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25

1 Friday, July 25, 2014 - 11:18 a.m.
2 P R O C E E D I N G S
3 THE COURT: So let's call the Leonard matter,
4 Leonard vs. Avantor Performance Materials, which is
5 RG13684263.
6 Let me have appearances, please.
7 MR. NICHOLSON: Good morning, your Honor. It's
8 Joe Nicholson for James and Louise Leonard.
9 MR. ROSSE: Good morning, your Honor. Greg
10 Rosse for VWR International LLC.
11 MS. SPANOS: Evanthia Spanos, Designated
12 Defense Counsel.
13 THE COURT: So let's start with the -- we have
14 both a CMC and we also have the motion for summary
15 judgment and summary adjudication.
16 MR. NICHOLSON: Your Honor, we also have the ex
17 parte from this morning that's unresolved.
18 THE COURT: And we have the ex parte.
19 Let's do this: Let's do the motion for summary
20 judgment and summary adjudication. Let's have that
21 heard. And then we need to talk about the schedule.
22 And I don't know if we can go forward with the CMC
23 without the ex parte being heard first or not. We'll
24 address that in a minute. Okay?
25 MR. NICHOLSON: Sure.

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1 THE COURT: There was a motion by VWR
2 International for summary judgment or, in the
3 alternative, for summary adjudication. The tentative
4 ruling was to deny that motion. That's being
5 contested.
6 MR. ROSSE: Yes, your Honor.
7 THE COURT: Counsel, do you want to go on the
8 record, please.
9 MR. ROSSE: Yes.
10 I understand that the Court has overruled our
11 objection to the declaration of plaintiff under -- we
12 made it under Damico.
13 THE COURT: Right.
14 MR. ROSSE: That he has submitted his
15 declaration, having seen new catalogs.
16 I would point out to the Court that he was
17 asked at his deposition all of these questions, not
18 just have you identified these products. He was asked
19 have you seen any packaging or any wrapping the
20 material came in. He said no.
21 He was asked if he had ever -- and it was not
22 in any certain context -- if he had ever ordered this
23 material. He said no.
24 He was asked if he had ever used a catalog to
25 order any asbestos-containing wrap. He said no.

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1 These were not in context to him being a plant
2 operator, but even assuming that he understood that as
3 being the context, he was then asked follow-up
4 questions, if he had ever seen that material used after
5 he became a supervisor, and he said no.
6 He was asked if he had ever used the material
7 after he became a supervisor, and he said no.
8 He was asked earlier in the deposition, when he
9 was first asked about this product, if he had seen any
10 writings or logos or anything on the material itself
11 which he could use to identify it, and he said no.
12 He was asked if the material was there when he
13 arrived on the job, when he first took the job. He
14 said yes. He was asked if that material had ever been
15 replaced while he was on the job, and he said he didn't
16 know; that he had never done it; that he had never
17 ordered it; that he had never seen it in the catalog.
18 Now he comes back with this declaration and he
19 says, I've seen it in the catalog. This is the
20 material I used and I ordered it. That's exactly the
21 opposite of what he said in his deposition. I can't
22 imagine a case that's more on point with Damico than
23 this one.
24 THE COURT: But my recollection of his
25 testimony is that he said at deposition, yeah, he

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1 couldn't remember at that time, but he said if I
2 spent -- if I actually saw it or if I looked in the
3 catalog, I might be able to, and then he does.
4 MS. MESA: Correct.
5 THE COURT: Isn't that correct? I mean, I
6 think that's true. You know, at the time of the
7 deposition, it's true, he did not have that
8 recollection, but he said but if I looked at a catalog,
9 I might be able to do it. And I think that's the
10 critical difference. So I understand what you're
11 saying, Counsel.
12 MR. ROSSE: Well, no. Let me address that.
13 He was asked: As you sit here today, do you
14 recall -- he was asked -- that question that you're
15 talking about was to the effect that could you identify
16 any of the equipment that you worked with, any of the
17 equipment --
18 THE COURT: Right.
19 MR. ROSSE: -- when they asked the broad
20 question. And he said, if I saw a catalog, maybe I
21 could.
22 THE COURT: Okay.
23 MR. ROSSE: But when he's asked about the
24 specifics about this roll, they asked: Did you ever
25 order it? Did you see it in a catalog? Did you see

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1 any products? Did you see any logos? Did you ever see
2 it replaced? He said no to each and every one of
3 those. Now, how would a catalog at a later time
4 help him with that particular product?
5 I could see when he's asked the general overall
6 question about all equipment in the laboratory, if I
7 saw a book, I might be able to identify the
8 manufacturers of this laboratory equipment. But when
9 he's asked a specific question about a specific
10 product, would it help you, and he says no, and when
11 he's asked did you ever order it from a catalog and he
12 says no, and he's asked if he ever saw it ordered and
13 he says no, and he's asked if he ever saw any product
14 numbers or logos or anything on the product that would
15 identify it and he says no, how would a catalog
16 possibly change that testimony?
17 THE COURT: Because it refreshed his
18 recollection, because once he saw it physically in the
19 catalog, he recalled it. That's all I can tell you. I
20 mean, there is an explanation, that, you know, if
21 you're being asked years later to identify something,
22 you know, product number or whatever it may be, and
23 he's saying I can't do it. But he said previously, you
24 know, but if I looked in the catalog, maybe I could do
25 it.

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1 Now, whether he could or not is another
2 question, but I could see that you might not be able to
3 until you looked at a catalog. That's possible.
4 Now, there's all kinds of arguments about that
5 testimony, but I think it's totally irrational. And I
6 don't think that the -- and you're saying that -- but I
7 think the argument you're making in terms of the
8 admissibility of the declaration was that it is a
9 complete contradiction of what he testified to at
10 trial, and, therefore, you know, it should not be
11 allowed because it's just a way of getting around --
12 essentially, getting around the motion for summary
13 judgment. And I don't think that's correct.
14 I think that his testimony that he might be
15 able to remember something if he looked in the catalog
16 is sufficient to get around that problem of the
17 certainty of his answers in his deposition.
18 MR. ROSSE: The cases where they've used
19 pictures, your Honor, have dealt with logos or things
20 that they didn't recall.
21 This is not a case of Mr. Leonard not recalling
22 the catalogs. This is not a case of Mr. Leonard not
23 knowing VWR. He knew those. He was aware of those.
24 THE COURT: Right.
25 MR. ROSSE: He was aware of the catalog.

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1 THE COURT: Right.
2 MR. ROSSE: Now, this isn't a product that VWR
3 manufactured. They are a supplier. Who knows how many
4 suppliers there are out there. The fact that he can
5 point at a catalog and say, yeah, that's a product I
6 used -- it has to be a product supplied by VWR, not
7 just a product that's in their catalog.
8 He did the same thing in the declaration when
9 he identified as to Fisher. Now, if he identifies the
10 same product in Fisher's catalog and the same product
11 in VWR's catalog, and he says in his deposition that he
12 only recalls ever seeing one roll of this product, how
13 can it possibly have been supplied by two different
14 companies?
15 THE COURT: This is a triable issue; is it not?
16 That's the question. Does it raise a triable issue
17 with respect to whether it was your -- VWR or
18 Scientific or whatever the name of the company was that
19 supplied. I think there were only two suppliers, as I
20 recall.
21 MS. MESA: Correct.
22 THE COURT: I do think that they've done enough
23 to actually raise a triable issue.
24 MR. ROSSE: As to supplier? He didn't order
25 the product. He never saw it in a catalog. How does

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1 looking at a catalog later tell him that that's where
2 it came from when this is a product that he can get
3 from any number of sources?
4 Now, if it were a manufacturer -- if it were a
5 product that was manufactured by VWR and he said, yeah,
6 that's the product, and it was a VWR-manufactured
7 product, you know, I might understand where your logic
8 is here, but this is a supplier.
9 It's like going to J.C. Penney and -- when you
10 had a G.I. Joe as a kid and you go to a J.C. Penney
11 catalog and say that's the product I had; therefore, it
12 came from J.C. Penney. But that's not the case here.
13 He admits he doesn't know where this stuff came from.
14 He admitted that over and over in his deposition.
15 Now to say that because I've seen a catalog and
16 I see this picture in a catalog, now, all of a sudden,
17 despite the fact that I said I don't know where it came
18 from, now I do know where it came from when there's no
19 foundation. I admitted I never ordered it. I admitted
20 I never ordered it from a catalog.
21 How would he possibly know where it came from
22 at this point just because he's seen a picture of it in
23 a catalog?
24 THE COURT: It's his testimony. And you can
25 argue that it's not credible, but that is his

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1 testimony. I don't get -- I actually don't think it's
2 totally unreasonable that he can do that.
3 In addition, there's other evidence that the
4 plaintiff has put forward, circumstantial evidence,
5 about the supply of VWR asbestos-containing products.
6 I guess there's asbestos wrap in particular that's at
7 issue.
8 So the Court has indicated who they were in the
9 tentative, this Bonnie Merrill, also Doug Gustafson.
10 And I think that if you -- if you look at the record as
11 a whole -- look at the record as a whole, it raises a
12 triable issue.
13 Now, you can argue at trial, I suppose, as to
14 his credibility and whether this is a really -- whether
15 it's a reliable, you know, identification, based on the
16 circumstances under which it was made, et cetera, et
17 cetera, but I think plaintiff has raised a triable
18 issue.
19 MR. ROSSE: Not one of the witnesses -- Bonnie
20 Merrill said, point blank, she doesn't know where any
21 of this stuff came from. She doesn't recall ordering
22 anything from VWR specifically. So to say that her
23 testimony adds anything, I don't know where that even
24 comes from.
25 But this is really about Damico. What Damico

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1 has said is a defendant has a right to do a deposition
2 and rely upon that deposition. The idea is you can't
3 come back and change your testimony.
4 THE COURT: I understand.
5 MR. ROSSE: This is changed testimony. This
6 isn't refreshed recollection. This is, pure and
7 simple, changed testimony. Now he's saying he ordered
8 material. At deposition, he said he did not. How
9 could it be more directly on point than that?
10 THE COURT: Let me hear from counsel.
11 MS. MESA: If I can address that. It's not
12 changed testimony. When he was asked if you can
13 identify the brand, manufacturer or supplier of the lab
14 equipment he used, he volunteered and said: If you
15 would show me a catalog, I could do that.
16 Despite that these defendants all had catalogs,
17 nobody showed him a catalog. So that's what we've
18 done; we've showed him a catalog. He's now identified
19 what it was that he's used. Those catalogs were
20 available for use. They were in the research
21 department. They were on the door. We have several
22 witnesses identifying the two catalogs that were there
23 were VWR and Fisher.
24 And I also wanted to point out, we submitted
25 this week a recent case that was published, Rosemary

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1 Geneau vs. Metalclad, which is directly on point, where
2 at that deposition, Metalclad, through their counsel,
3 asked the question if the witness recalled Metalclad
4 performing work. And the court found that it was not
5 enough to shift the burden because Metalclad didn't
6 show the witness any logos or any other -- to elicit
7 that testimony.
8 And it's a very similar situation here. If
9 Leonard had been shown those catalogs, he could have
10 identified the materials he used.
11 THE COURT: I won't change my ruling on the
12 evidentiary objection because I don't think -- I
13 understand what the argument is, and I just don't think
14 it applies here where, essentially -- as I recall,
15 that's what the witness said, which is, if you can
16 show -- if I had an opportunity to look at this
17 catalog, I probably could do it or I might be able to
18 do it, but just off my head sitting here, you know, in
19 the deposition, I can't do so.
20 And I think that allowed them to come in with
21 this declaration, once having seen this catalog.
22 Now, as I say, there's a lot of arguments with
23 respect to the reliability of such testimony in terms
24 of what the person remembers. That's a different
25 issue. It's a question of whether that's sufficient to

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1 raise a triable issue, and I think it is, along with
2 some of the other evidence that plaintiffs have
3 provided with respect to the existence of the supply of
4 materials by VWR to the Dow Chemical labs.
5 I understand there's -- the other argument I
6 guess you're making is that even if we were to accept
7 all that evidence, it's still insufficient, I think is
8 the other argument you're making; correct?
9 MR. ROSSE: Well, I don't even think you get to
10 there. I mean, he was asked: Did you use a catalog to
11 order any asbestos insulation?
12 I did not use a catalog.
13 How can he come back now and say, well, gee, if
14 I had been shown something that I never used to order
15 it, that it would refresh a recollection that I never
16 had?
17 THE COURT: But just to say that I didn't order
18 from the catalog is different than saying if I looked
19 at the catalog, then I might be able to recognize the
20 products. That's different. It's just totally
21 different.
22 He may be somebody who gets catalogs and
23 actually never had to order out of it, but it doesn't
24 mean that he didn't look at them, or even if he never
25 looked at them before, that now, looking at it, you do

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1 recognize something.
2 As I say, that's an issue for -- as to
3 whether -- the credibility of that is something for the
4 jury or other fact finder to make a determination on.
5 But I don't think Damico applies.
6 MR. ROSSE: Because a product is in a catalog
7 doesn't mean that that particular company supplied it.
8 THE COURT: True.
9 MR. ROSSE: Those products are supplied by a
10 number of companies. The question is: Did VWR supply
11 it. The fact that it's in a catalog does not get you
12 there. He's not having trouble ID'ing a product. He
13 knew he used the product. He identified the product.
14 THE COURT: But what he does in the declaration
15 is he identifies specific products. He identifies, you
16 know, number -- whatever it is, cloth No. 10930-009.
17 He doesn't just identify, you know, asbestos wrapping.
18 I take it you're saying item number, in that
19 VWR catalog, 10930-009 arguably was supplied by
20 somebody else. Is that the argument?
21 MR. ROSSE: I don't know who it was supplied
22 by.
23 THE COURT: I agree that his declaration goes a
24 lot farther than he ever said in his deposition.
25 There's no question.

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1 MR. ROSSE: It doesn't go farther, your Honor.
2 It changes the testimony. Going farther would be one
3 issue. This changes the testimony.
4 He was asked -- if he had said at his
5 deposition, when they asked him do you recall anything
6 on there, any logos, any product numbers, anything on
7 there, and he said I don't recall, I think there were
8 some, or something to that effect, yeah, it might have
9 been an issue of, you know, I looked at it, now I
10 recall.
11 He said he didn't see any on there. So how --
12 if he never ordered it, never saw it in a catalog,
13 never saw it ordered, never saw it replaced, never saw
14 any packaging it ever came in, how can he now look at a
15 catalog and say I remember that product number? That
16 is a complete opposite to his testimony.
17 MS. MESA: Things are getting very confused
18 here. He did see catalogs at Dow. In the research
19 department, they were on the door. He testified to
20 that. There's testimony from other witnesses as well.
21 We know that Merrill says VWR supplied
22 material, that she recalled Leonard coming to her
23 department requesting material from catalogs. We've
24 got Gustafson saying VWR -- Dow purchased lab supplies
25 from VWR. We have Ferucci, who later becomes a

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1 salesperson for Fisher but originally started off as a
2 salesperson for VWR, testifying to his experience as
3 going to Dow, and that's how he received his training,
4 and that VWR is a key customer.
5 There's lots of testimony and evidence about
6 VWR supply here, and it goes back to -- Leonard said if
7 you could show me a catalog, I could do better. I
8 think it's asking a lot to require someone, 40 years
9 later, to recall a specific product number that they
10 used, you know, in the '70s. That's asking a lot. So
11 to come here and say he didn't remember a product
12 number --
13 THE COURT: My tentative ruling with respect to
14 the motion for summary judgment is going to be
15 affirmed. I just think there's enough there based on
16 that declaration. And I understand the Damico
17 objection, but it's been overruled.
18 All right. Anything further, then, on this
19 motion?
20 MR. ROSSE: No, your Honor.
21 MS. MESA: No, your Honor.
22 THE COURT: So the tentative ruling is
23 affirmed.
24 On the case management calendar, we have this
25 matter, and I know we've got a discovery issue on --

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1 with respect to the ex parte, but let me ask
2 plaintiffs' counsel, do you think that -- who is going
3 to be appearing on --
4 Counsel, do you want to make your record,
5 please?
6 MR. NICHOLSON: Well, am I addressing the CMC?
7 THE COURT: Yes, the CMC.
8 MR. NICHOLSON: Okay. Well, so on the CMC,
9 basically, we just wanted to apprise the court of where
10 we're at right now.
11 THE COURT: Yes.
12 MR. NICHOLSON: I believe that your court is
13 aware that Fisher appears to resolve, and so all the
14 remaining issues are really focused on one defendant,
15 VWR.
16 THE COURT: Okay.
17 MR. NICHOLSON: With respect to VWR, we just
18 have a few things outstanding: One is, we've agreed to
19 take their PMQ depo on August 14th, which is in a few
20 weeks, and it's right up against the current trial
21 date, but that's by agreement.
22 And then we have what we believe is this
23 third-party witness that we should be entitled to
24 depose, and that's the subject of the ex parte and
25 potentially is subject to a motion to compel.

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1 This is the individual that Ms. Mesa just
2 referred to was training Mr. Ferucci. He was a VWR
3 salesman. Dow was his customer while Mr. Leonard
4 worked there. This is not a witness that was disclosed
5 in discovery by VWR. It was through our efforts that
6 we found him.
7 We met and conferred repeatedly, initially with
8 him, until he told us don't talk to me, talk to
9 Mr. Pulliam, who is also an attorney for VWR, to
10 schedule his deposition. So we attempted to meet and
11 confer. We served notice and a subpoena on
12 Mr. Pulliam. That didn't work because the witness
13 didn't appear.
14 So then we reissued a subpoena and we
15 personally served him with that subpoena, and he didn't
16 appear for that deposition.
17 THE COURT: I know, but the question was,
18 really, was it not, whether -- so, are you coming -- do
19 you want to make a motion to compel? As I understand
20 it, you didn't give ten days' notice; is that true?
21 MR. NICHOLSON: Well, so it's true that we gave
22 ten days' notice to all parties, and I believe that
23 that's what the statute requires. There's a separate
24 code section, and it's 2020.220(a), that is distinct
25 from what the notice is for a party. It's for the

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1 witness, the subpoenaed witness. That witness is
2 entitled to -- and I'll read you from the statute --
3 THE COURT: Wait, wait, wait. 2020 -- sorry.
4 MR. NICHOLSON: 2020.220(a).
5 THE COURT: But when is it going to be taken?
6 That's the only other question I had.
7 MR. NICHOLSON: Well, we've attempted to meet
8 and confer on that.
9 THE COURT: 2020 point --
10 MR. NICHOLSON: -- 220, subdivision (a).
11 Here it says that a reasonable opportunity to
12 locate and produce any designated business records,
13 documents, tangible things, and then later down it says
14 a reasonable time to travel to the place of deposition.
15 So Mr. --
16 THE COURT: But subject to subsection (c) of
17 2020.410. In advance of the deposition to provide --
18 no, no. The question is when were you supposed to
19 serve him; right?
20 MR. NICHOLSON: Right.
21 THE COURT: You have to look at the other
22 subsection. The service is ten days, and you're saying
23 that that's only notice to --
24 MR. NICHOLSON: A party.
25 THE COURT: -- a party, that the witness

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1 himself can't -- did you give notice in ten days --
2 MR. NICHOLSON: Yes.
3 THE COURT: -- to the plaintiff -- to the
4 parties?
5 MR. NICHOLSON: Yes. And I don't think that's
6 disputed. I think the only real issue is that there's
7 a difference between the notice to a party and the
8 notice to the actual subpoenaed witness. And for the
9 witness, it's only a requirement that it be reasonable.
10 And here, Mr. Anderson knew that we were
11 seeking his deposition for more than a month before he
12 was personally served, and he was, in fact, informally
13 served repeatedly with different subpoenas that asked
14 for the same exact documents that we requested in the
15 subpoena that was personally served.
16 So when he was served, he had four calendar
17 days at that point to finish any search he wanted for
18 documents, to -- and to appear. He's local, so travel
19 time is really not an issue. So in our view, he had
20 more than reasonable time.
21 He's actually represented by counsel for VWR.
22 So to the extent that he had any issues with, you know,
23 the legality of the process, he could have served
24 objections. There was never any objections served. As
25 far as we're concerned, we personally served this

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1 witness; he's under subpoena, and he failed to appear.
2 MR. ROSSE: Your Honor, notice to a witness is
3 the subpoena. You have to give ten days.
4 THE COURT: I think you have to -- I don't
5 think you can read them totally in conjunction and just
6 say, well, I give ten days to the parties, but the
7 witness -- well, what is reasonable time, I guess?
8 That's the other issue. Is less than ten days
9 reasonable time when you're asking -- I read it --
10 I guess you need to brief it, but as I read it
11 just off the -- you know, reading from the bench at the
12 moment, they're talking about a subpoena has been
13 served. Now you want -- but you want documents. You
14 have to give reasonable time to get the documents. I
15 think that's what that's really talking about. It's
16 not like you can just serve the subpoena whenever you
17 feel like it and then two days before say it's
18 reasonable time.
19 And the only question is this: You're going to
20 take the deposition at some point. So you'll either --
21 even if this is quashed, you're going to serve a timely
22 deposition notice, I take it; right? When is discovery
23 closed in this case?
24 MR. NICHOLSON: Discovery closed on Monday,
25 your Honor, which is the date that Mr. Anderson failed

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1 to appear, and that's why we're moving on shortened
2 time for a motion to compel, because we only have two
3 weeks to bring such a motion, and so we don't have
4 statutory time.
5 On the 21st, which is the close of discovery,
6 he failed to appear. He had four calendar days; the
7 parties had ten calendar days' notice, which is
8 reasonable and proper.
9 The code defines a deposition notice as a
10 specific type of document with specific information,
11 and that's to apprise parties, because parties need --
12 parties have litigation strategy, they have attorneys,
13 they have scheduling issues, but a witness -- a witness
14 is just going to show up and give their testimony.
15 And to the extent that they need reasonable
16 time to find documents or things like that,
17 Mr. Anderson had more than a month to do this, and he
18 had four calendar days after personal service. I don't
19 even know that there is any documents going back --
20 THE COURT: Why did he have more than a month?
21 MR. NICHOLSON: Because we initially had
22 communications with him. We had a meet and confer with
23 his counsel. He had the actual subpoena document
24 request for over a month before he was personally
25 served with it. Once he was served, he had still four

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1 additional days to get -- the point, though, is that
2 this is a key witness, and we've been trying to get his
3 deposition, and we've just been, you know, obstructed
4 all this time from getting it.
5 So I think we're prejudiced without this
6 witness' testimony. I think he's a percipient witness
7 who was a salesman of the defendant who was at this
8 particular location selling the products at issue,
9 potentially at least, and we need to take his
10 deposition.
11 So what we're looking for is to have our motion
12 filed today and we can have it heard next week and we
13 waive the reply.
14 THE COURT: No, no, no, no. So everybody waits
15 till the last minute to do this discovery, right, and
16 then you expect the court just to be jumping in and in
17 a week making these decisions. I really don't
18 understand what is in your head, but we're not going to
19 do it. Okay?
20 MR. NICHOLSON: Okay.
21 THE COURT: So you have a trial date of August
22 18. Your office has Strouse the following week set in
23 this department. And I said we cannot do both. So we
24 are probably going to move Strouse out. But, given
25 that, we will have it heard.

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1 So I think we should have it heard because it
2 sounds like if you are not -- if the court would --
3 doesn't grant your motion to compel, you don't have
4 this witness -- well, you can subpoena him for trial.
5 You just don't know what he's going to say. You won't
6 be able to subpoena -- I mean, you won't be able to
7 take his depo.
8 MR. ROSSE: The witness needs notice of this.
9 I don't represent this witness. This witness needs
10 notice of a motion to compel.
11 THE COURT: That's what I'm saying. We need to
12 have it heard.
13 MR. ROSSE: He needs notice that this is even
14 going on.
15 THE COURT: I thought he was represented by
16 you.
17 MR. ROSSE: I do not represent Mr. Anderson.
18 MR. NICHOLSON: So the issue is, there's two
19 firms that represent VWR. Mr. Rosse represents VWR in
20 this case. Their national counsel is Drinker Biddle.
21 THE COURT: Did you notify them of the ex
22 parte?
23 MR. NICHOLSON: Yes.
24 THE COURT: And they didn't show up?
25 MR. NICHOLSON: I understand that he was

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1 supposed to be here this morning.
2 MR. ROSSE: For purposes of the ex parte, your
3 Honor, I'll appear for that portion. I do not
4 represent Mr. Anderson.
5 The point is, Mr. Anderson is not under any
6 subpoena at this point nor has he been given valid
7 notice of his deposition.
8 THE COURT: Well, I understand that's the
9 argument; right? So the question is, should it be
10 heard; right?
11 MR. ROSSE: I don't know what there is to hear.
12 MR. NICHOLSON: If I can just go back to the
13 issue of when this should be heard, your Honor.
14 THE COURT: Yes.
15 MR. NICHOLSON: You know, we served him the
16 earliest we possibly could. Like I said, we attempted
17 to serve him. When the process server got to him,
18 that's when he got served. It was before the close of
19 discovery.
20 THE COURT: August 15th, Counsel, because we
21 actually don't even know if you need an order
22 shortening time, then, I take it; right?
23 MR. NICHOLSON: That's right.
24 THE COURT: It's going to be heard on August 15
25 for -- that will be the motion to compel the deposition

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1 of the gentleman. What's his name?
2 MR. NICHOLSON: Leland Anderson.
3 THE COURT: That's right. Third-party witness,
4 Anderson. Okay? So we'll just do it, you know, August
5 15. And in any event, I take it you can subpoena him
6 for trial. But let's do our further CMC on the same
7 date.
8 So here is the question, which is whether his
9 testimony is going to impact any other discovery that
10 is either pending or not in this case, or the trial
11 date.
12 MR. NICHOLSON: I don't anticipate that it
13 would, your Honor. We're taking the PMQ on the 14th.
14 Obviously, we won't be able to take Mr. Anderson's
15 deposition till after the 15th, but I don't think that
16 it will lead to any further discovery. We're not
17 planning or intending to bring any further discovery
18 based on Mr. Anderson.
19 THE COURT: Right. And Anderson, as you
20 understand it, he was a foreman?
21 MR. NICHOLSON: He was a salesman.
22 THE COURT: Salesman. And is he with the
23 company still, now?
24 MR. NICHOLSON: I don't believe so.
25 THE COURT: Huh?

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1 MR. NICHOLSON: I don't think he is.
2 THE COURT: So what kind of documents are you
3 going to be asking him to bring?
4 MR. NICHOLSON: Well, just anything he has
5 related to that time. I don't know that he has
6 anything, so --
7 THE COURT: I see. Okay. And you don't know
8 what he's going to say at this point, other than he was
9 a salesperson. So presumably he'll have some knowledge
10 of the time period when things were being purchased by
11 the company?
12 MR. NICHOLSON: We have sworn testimony from
13 Mr. Ferucci that he was a salesman at Dow. That's how
14 we learned about him. So we acted swiftly.
15 Unfortunately, we weren't able to get him served
16 personally until the 11th.
17 THE COURT: I understand. So we'll hear it on
18 the 15th. But in the meantime -- then I guess on the
19 15th, I will need to let you know what we're doing with
20 the trial date. All right? But my sense of it is, as
21 I tell you right now, is that I'm probably not going to
22 proceed on that date because the Strouse case has been
23 set -- I mean, reset -- I think this is like the third
24 time it's on the calendar. It needs to go out.
25 It doesn't sound like -- it doesn't sound as

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1 if -- it sounds as if you folks may need more time on
2 Leonard, in any event. If you're still taking lay
3 depositions a week before trial, you're just not --
4 you're not going to be prepared. You are not going to
5 be prepared to go out on the 18th. If you say you're
6 ready, we'll start picking a jury, but other than that,
7 we are not going to spend weeks on that.
8 And I don't want to start a pretrial
9 conference. I don't want to make any rulings on
10 motions in limine because if I have to send the case
11 out to another judge, I can't do it if I've done that
12 already. So I'm just telling you now that Leonard is
13 going to be, more likely than not, put over. How far
14 put over, I don't know, unless you want to do it right
15 now.
16 MR. ROSSE: We expect to be prepared, your
17 Honor.
18 THE COURT: Okay. So you might want to -- if
19 you trail, you're okay with that, even if you actually
20 get out that day. You know, it could happen, you know,
21 that we find another judge or, you know, other cases --
22 for whatever reason, the others have to be put over.
23 MR. NICHOLSON: I think you asked Mr. McClain
24 today how Strouse was going to go, and he indicated
25 that it was going to go quite quickly and shorter than

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1 normal. And I think trailing that case may be
2 appropriate.
3 THE COURT: You're trailing two cases. You're
4 trailing that and another case is what I'm telling you.
5 There is another case that was a preference case, and
6 it may have to go first. But we'll see.
7 But in the meantime, then, let's just keep our
8 dates. I mean, you never know. Things happen. A lot
9 of things happen at the last minute. We could open up
10 and be available.
11 So we will see you on the 15th and on the 18th.
12 And right now, the pretrial conference is the first day
13 of trial, as I recall; right?
14 MR. NICHOLSON: Right.
15 THE COURT: We'll maintain those dates for now.
16 Good.
17 MR. NICHOLSON: Thank you, your Honor.
18 (Whereupon, proceedings ended at 11:49 a.m.)
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1 REPORTER'S CERTIFICATE

2

3

4 I, DENISE M. LOMBARDO, do hereby certify:

5 That said proceedings were taken before me at said

6 time and place, and were taken down in shorthand by me,

7 a Certified Shorthand Reporter of the State of

8 California, and were thereafter transcribed into

9 typewriting, and that the foregoing transcript

10 constitutes a full, true and correct report of said

11 proceedings that took place;

12 IN WITNESS WHEREOF, I have hereunder subscribed my

13 hand this 30th day of July 2014.

14

15 Denise M. Lombardo

16 __________________________________
DENISE M. LOMBARDO, CSR No. 5419

17 State of California

18

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