

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

VICTORIA LUND, individually) Case No. CV 13-02776 DDP (VBKx)
and as successor-in-interest)
to WILLIAM LUND, deceased;)
DAVID LUND, an individual;) **ORDER DENYING PLAINTIFF'S MOTION**
and SHEILA LUND, an) **FOR ISSUE SANCTIONS OR, IN THE**
individual, as legal heirs) **ALTERNATIVE, AN ADVERSE INFERENCE**
of WILLIAM LUND, Deceased,) **INSTRUCTION FOR SPOILIATION OF**
) **EVIDENCE**
Plaintiff,)
)
v.) [Dkt. 857]
)
3M COMPANY a/k/a MINNESOTA)
MINING & MANUFACTURING)
COMPANY, et al.,)
)
Defendants.)
)
)

Presently before the court is Plaintiffs Victoria Lund,
individually and as successor-in-interest to William Lund,
deceased, David Lund, and Shelia Lund's Motion for Issue Sanctions,
or, in the alternative, an Adverse Inference Instruction Against
Electric Boat Corporation for Spoliation of Evidence. (Dkt. 857.)
Having reviewed the parties' arguments, the court DENIES the Motion
and adopts the following Order.

1 The court has detailed the relevant background of this case in
2 several prior Orders and assumes the parties' familiarity with the
3 facts. (See Dkts. 845, 864.) In brief, the heirs of William Lund
4 bring this action to recover for the injuries and eventual death of
5 Mr. Lund, allegedly caused by exposure to asbestos in the course of
6 his employment as a Navy machinist mate responsible for servicing
7 warships. Of particular relevance to the present motion is
8 Plaintiffs' allegation that Mr. Lund was exposed to asbestos
9 between 1962 and 1965 while working on certain warships that were
10 being constructed at the shipyards of the Electric Boat Division of
11 the General Dynamics Corporation. Accordingly, Plaintiffs sought
12 certain materials from Electric Boat related to the company's
13 knowledge and historical use of asbestos during discovery. (Parker
14 Decl., Ex. F.)

15 Several months after fact discovery closed, Plaintiffs brought
16 a sanctions motion contending that Electric Boat had spoliated four
17 categories of evidence: 1) historical asbestos insulation dust
18 studies conducted by Electric Boat; 2) material safety data sheets
19 (MSDS) provided by manufacturers, which profile a product's
20 chemical composition; 3) certain deposition transcripts from cases
21 in which Electric Boat was a party or its employees testified; 4)
22 certain deposition exhibits associated with the depositions. (Dkt.
23 788 at 1.) The district court judge handling the case for pre-trial
24 purposes denied that motion but stated that "[t]he issue of drawing
25 an adverse inference from alleged spoliation of
26 evidence is referred to the judge who will actually try
27 the case." (Dkt. 829.) On that basis, Plaintiffs have refiled their
28 sanctions motion before this Court arguing that Electric Boat's

1 alleged spoliation of evidence will limit Plaintiffs' ability to
2 prove causation. As a remedy, Plaintiffs seek a ruling that they
3 have met the causation element of their claim against Electric
4 Boat, or, in the alternative, an adverse jury instruction. (Mot.
5 Issue Sanctions ("Mot.") 2.)

6 Spoliation, "refers to the destruction or material alteration
7 of evidence or to the failure to preserve property for another's
8 use as evidence in pending or reasonably foreseeable litigation."
9 Apple Inc. v. Samsung Elecs. Co., 888 F. Supp. 2d 976, 989 (N.D.
10 Cal. 2012). "A district court may, under its inherent power to
11 control litigation, levy sanctions for the spoliation of evidence."
12 Peschel v. City of Missoula, 664 F. Supp. 2d 1137, 1141 (D. Mont.
13 2009), citing Leon v. IDX Systems Corp., 464 F.3d 951, 958 (9th
14 Cir. 2006). "Sanctions may be levied, however, only when a party
15 knew, or reasonably should have known, that the spoliated evidence
16 was potentially relevant to a claim." Peschel, 664 F. Supp. 2d at
17 1141, citing Glover v. BIC Corp., 6 F.3d 1318, 1329 (9th Cir.
18 1993). Bad faith is not required to impose sanctions for the
19 spoliation of evidence. Id. However, the imposition of more severe
20 sanctions, such as dismissal or default judgment, require a finding
21 of "willfulness, fault, or bad faith." Leon v. IDX Sys. Corp., 464
22 F.3d 951, 958 (9th Cir. 2006).

23 Having reviewed the parties' submissions, the court finds that
24 Plaintiffs have not met their burden of demonstrating that Electric
25 Boat has spoliated or withheld any relevant evidence. With regards
26 to each category, Plaintiffs have failed to demonstrate that
27 Electric Boat has either destroyed relevant evidence or violated
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1 its duty to preserve documents that might be relevant in reasonably
2 foreseeable litigation.

3 The first category of documents at issue are asbestos
4 insulation dust studies. According to Plaintiffs, Electric Boat has
5 conducted dust surveys since 1968 and kept records of air
6 monitoring studies since 1971 or 1972. (Mot. 9.) Defendant
7 acknowledges keeping these records beginning in 1971 or 1972 but
8 notes that it "has no air monitoring test during the decedent's
9 tenure at Electric Boat." (Opp'n 10.) In this same filing,
10 Defendant also states that Plaintiffs were allowed to designate new
11 experts after the close of discovery who relied on "industrial
12 hygiene documents, such as the insulation dust studies performed by
13 Electric Boat during the time period Plaintiffs claim exposure to
14 asbestos at Electric Boat (1962 or 1965)." (Opp'n 2.) Plaintiffs
15 contend that these two statements are in conflict and give rise to
16 an inference that Electric Boat has destroyed or withheld
17 responsive documents. This inference is unwarranted. It is both
18 possible that Electric Boat has no air monitoring tests from the
19 relevant period but has nonetheless turned over any documents in
20 its possession related to dust studies conducted between 1962 and
21 1965. If, on the other hand, these are interchangeable terms, which
22 describe the same evidence, then Electric Boat has mitigated any
23 deficiency in time for Plaintiffs to utilize the evidence in
24 preparing its expert reports. Without more, the court cannot
25 conclude that the record here justifies sanctions. Moreover, if
26 Plaintiffs believe that there was additional undisclosed evidence,
27 it should have filed a timely motion to compel rather than seek
28 relief with this sanctions motion.

1 The arguments regarding the second category of evidence, the
2 MSDS, suffers from a similar defect. Plaintiffs seek MSDS that
3 Electric Boat received from manufacturers, which detail the
4 chemical composition of products used in constructing the warships
5 at issue. (Mot. 8.) Both parties agree that Electric Boat only
6 began receiving these MSDS in 1970 or 1971. (Compare Mot. 8 with
7 Opp'n 8.) Defendants explain that, while they continue to possess
8 certain MSDS post-dating 1970, they did not submit these documents
9 in discovery because they were not within the scope of discovery.
10 (Opp'n 8-9.) Here, again, Plaintiffs note a contradiction between
11 this representation and the representation in Electric Boat's
12 opposition to the prior sanctions motion where Electric Boat states
13 "There is nothing . . . implying that Electric Boat would maintain
14 every single MSDS sheet received from 1971 forward to 2015,
15 some 40 years later." (Dkt. 791 at 9.) Whether or not the relevant
16 MSDS were within the scope of discovery, the proper course of
17 action for Plaintiffs would have been to file a motion to compel
18 production. Perhaps if Electric Boat had represented to Plaintiffs
19 that they did not possess these documents in response to a
20 discovery request, there might be a colorable argument that
21 Plaintiffs could not have been expected to attempt to compel
22 production. But Plaintiffs submit no such evidence here. Rather,
23 they attempt to rely on a representation made months after the
24 close of discovery, which cannot explain their failure to timely
25 compel production. Moreover, there is no evidence to support the
26 conclusion that Plaintiffs spoliated relevant evidence or to
27 justify the sanctions Plaintiffs now seek.

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1 Finally, Plaintiffs have not met their burden of showing that
2 Electric Boat spoliated certain deposition transcripts and
3 associated deposition exhibits. According to Plaintiffs, Electric
4 Boat submitted ten depositions from past asbestos personal injury
5 cases involving Electric Boat. (Mot. 5.) Through their own
6 research, Plaintiffs found thirty-three additional depositions of
7 Electric Boat's "former employees and other witnesses" in asbestos
8 personal injury cases. (Id.) Moreover, Plaintiffs note certain
9 exhibits are missing from the ten depositions submitted by Electric
10 Boat, which Plaintiffs believe are relevant to proving Electric
11 Boat's liability in this case. (Id.)

12 Defendants respond that they have submitted all relevant
13 deposition transcripts in their possession, including some of the
14 exhibits which Plaintiffs contend are missing. (Opp'n 5-8.)
15 Moreover, Defendants contend that Plaintiffs have submitted no
16 authority for the proposition that Electric Boat is required to
17 keep a record of all depositions where its "former employees and
18 other persons" have given testimony regarding asbestos nor any
19 evidence that the additional depositions uncovered by Plaintiffs
20 were in Electric Boat's possession. This is particularly relevant
21 given that Plaintiffs are seeking transcripts prepared for
22 litigation that took place decades ago. Defendants also argue that
23 Plaintiffs have suffered no prejudice because its expert witnesses
24 have had access to the allegedly spoliated transcripts for the past
25 two years and have relied on them in developing their expert
26 conclusions that Electric Boat caused Mr. Lund's injuries. (Opp'n
27 12.) Given that Plaintiffs cannot demonstrate that Electric Boat
28 had control over the allegedly spoliated deposition transcripts and

1 exhibits sought, much less a duty to preserve them, the court
2 DENIES Plaintiff's Motion for Sanctions.

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4 IT IS SO ORDERED.

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7 Dated: October 24, 2016

A handwritten signature in cursive script, reading "Dean D. Pregerson".

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DEAN D. PREGERSON
United States District Judge

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