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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: HON. SHERRY KLEIN HEITLER Justice

PART 30

Macek, Nicholas

- v -

CBS Corp.

INDEX NO. 190085/11

MOTION DATE

MOTION SEQ. NO. 05

MOTION CAL. NO.

The following papers, numbered 1 to _____ were read on this motion to/for Summary Judgment

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	
Answering Affidavits — Exhibits	
Replying Affidavits	

Cross-Motion: ☐ Yes ☐ No

Upon the foregoing papers, it is ordered that this motion

is decided in accordance with the memorandum decision dated 3-22-13.

FILED

MAR 28 2013

NEW YORK COUNTY CLERK'S OFFICE

Dated: 3-22-13

HON. SHERRY KLEIN HEITLER J.S.C.

Check one: ☐ FINAL DISPOSITION ☐ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

☐ SUBMIT ORDER/ JUDG. ☐ SETTLE ORDER/ JUDG.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 30

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NICHOLAS G. MACEK as Executor for the Estate of MILA MACEK and WIJNADA DEROO MACEK

Plaintiff,

-against-

CBS CORPORATION, et al.,

Defendants.

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Index No. 190085/11
Motion Seq. No. 05

DECISION & ORDER

SHERRY KLEIN HEITLER, J.:

Defendant Union Carbide Corporation ("UCC") moves pursuant to CPLR 3212 for summary judgment dismissing the complaint against it. For the reasons set forth below, the motion is denied.

BACKGROUND

Mila Macek was diagnosed with malignant pleural mesothelioma in June 2010. This action was commenced on March 4, 2011 to recover for personal injuries allegedly caused by Mr. Macek's exposure to asbestos-containing products. Mr. Macek died on July 30, 2011 at age 72. Prior to his death he provided deposition testimony concerning his alleged exposure as to which, in relevant part, he testified as having occurred between 1970 and 1977.

Mr. Macek emigrated to the United States from the Czech Republic in 1965. Although a professional artist, Mr. Macek testified that between 1968 and 1978 he spent as much as 70% of his time working in construction to supplement his income. As such, he spent time remodeling his own residences and other buildings in New York City and upstate New York. He testified that during such employment he was exposed to asbestos from various products including joint compound, and that in comparison to other brands of joint compound he used throughout the 1970s, he worked with

Georgia Pacific ("GP") Ready-Mix brand 80% of the time. Mr. Macek testified that he would stir the GP Ready-Mix to an appropriate consistency and then apply it to sheetrock seams and nail holes. After the joint compound dried, Mr. Macek would sand it down. Generally, he used three coats of joint compound per seam, stopping after each coat to sand down the area. Mr. Macek testified that this process would create plumes of joint compound dust in the air around him which, because of his close proximity to the wall, nearly got in his nose and always dusted his clothing. Mr. Macek was also responsible for sweeping up the accumulated dust that had settled on the floor at the end of the day.

Mr. Andres Mannik, for whom Mr. Macek worked on assorted construction projects, also testified. Mr. Mannik testified that Mr. Macek periodically performed drywall and joint compound work for him in the late 1960s and early 1970s, during which time he estimated that he and Mr. Macek spent, in total, a year to a year and a half working with one another. One of the largest projects they worked on was the soundproofing of a 10,000 to 20,000 square foot television studio on 57th Street and 10th Avenue in New York City in or around 1975 that took four to six months to complete. Mr. Macek was responsible for the drywall and joint compound work associated with the erection of a curved wall, called a cyclorama, along the back of the studio. In Mr. Mannik's estimation, Mr. Macek and one other worker used 50 five-gallon buckets of joint compound during the construction of this 60-foot wide by 14 or 16-foot high wall. According to Mr. Mannik, GP Ready-Mix and U.S. Gypsum joint compounds were primarily used on the project, although National Gypsum Gold Bond would occasionally be substituted in if neither of the these two brands were available.

Between 1963 and 1985 UCC sold raw chrysotile asbestos fibers under the brand name "Calidria". One type of Calidria product line, known as "SG-210", was designed, marketed and

sold for use in the manufacture of joint compound. It is undisputed that UCC sold SG-210 to GP and that SG-210 was integrated into GP's joint compound products. UCC contends, however, that it is entitled to summary judgment because it was one of at least three companies which supplied asbestos to GP during the relevant time period, and plaintiffs cannot show that the GP joint compound to which Mr. Macek was allegedly exposed contained SG-210 Calidria as opposed to another form of asbestos. UCC further asserts that it had no duty to warn Mr. Macek of the dangers associated with Calidria because it provided adequate warnings to GP.

Plaintiffs argue that all asbestos-containing joint compound manufactured by GP in the northeastern United States during the relevant time period necessarily contained SG-210 Calidria asbestos and point out that a strike by Canadian asbestos miners and millers in 1975 disrupted the normal supply chain of asbestos to the U.S. such that UCC became the sole supplier of asbestos to the entire United States during that year. Plaintiffs claim further that all formulas of GP Ready Mix manufactured in the northeast in 1975 contained Calidria. As a result plaintiffs submit that, at the least, any joint compound made in the U.S. in 1975 had to have contained Calidria asbestos and that Mr. Macek was therefore necessarily exposed to Calidria that same year while working with GP joint compound in the construction of the television studio on 57th Street and 10th Avenue in New York City. Plaintiffs assert that UCC had a duty to warn of the hazards associated with asbestos and that the adequacy of any warnings provided by UCC to GP in this regard is a question of material fact that must be decided by a jury.

DISCUSSION

Summary judgement is a drastic remedy that must not be granted if there is any doubt about the existence of a triable issue of fact. *Tronlone v Lac d'Aminante du Quebec, Ltee*, 297 AD2d 528, 528-529 (1st Dept 1995). In asbestos-related litigation, once the moving defendant has made a

prima facie showing of entitlement to judgment as a matter of law, the plaintiff must then demonstrate that there was actual exposure to asbestos fibers released from the defendant's product. *Cawein v Flintkote Co.*, 203 AD2d 105, 106 (1st Dept 1994). In this regard, it is sufficient for the Plaintiff to show facts and conditions from which the defendant's liability may be reasonably inferred. *Reid v Georgia Pacific Corp.*, 212 AD2d 462, 463 (1st Dept 1995). All reasonable inferences should be resolved in the plaintiff's favor. *Dauman Displays, Inc. v Masturzo,* 168 AD2d 204, 205 (1st Dept 1990). The identity of a manufacturer of a defective product may be established by circumstantial evidence but such evidence cannot be speculative or conjectural. *See Healey v Firestone Tire & Rubber Co.*, 87 NY2d 596, 601 (1996).

I. Calidria Content

UCC argues that plaintiffs' claims against it are speculative insofar as plaintiffs cannot show whether the GP joint compound alleged to have caused Mr. Macek's injuries contained SG-210 Calidria or the products of other raw asbestos suppliers that GP relied upon, such as Johns Manville and Phillip Carey. UCC asserts that plaintiffs can only show a "mere possibility based upon speculation" that the GP joint compound used by Mr. Macek contained Calidria (Decicco's Affirmation in Support of Motion for Summary Judgement dated October 18, 2012, ¶ ¶ 8, 50).

Plaintiffs assert that the GP joint compound to which Mr. Macek was exposed necessarily contained Calidria because UCC was the exclusive supplier of asbestos to GP's Akron, New York manufacturing facility which supplied the entire northeastern United States, including New York where Mr. Macek was working, during the relevant time period. Plaintiffs rely on the 2006 deposition testimony of Charles W. Lehnert, a GP corporate representative who testified in a case venued in Harris County, Texas as the most knowledgeable person concerning GP's formulations of asbestos-containing joint compounds. During that deposition Mr. Lehnert confirmed a 2003

statement that all formulations of GP's joint compound manufactured at the Akron plant between September 1970 and May 1977 contained SG-210 Calidria, except the asbestos-free formulations first made available to the public in 1976. According to Mr. Lehnert, a person using GP Ready-Mix manufactured at the Akron plant over that seven-year period would "more likely than not have been using a product containing Calidria SG-210 asbestos." (Plaintiff's exhibit 9, pp. 205, 207).

During a later deposition in an unrelated case venued in Harris County, Texas in 2007,[1] Mr. Lehnert testified that his previous testimony was inaccurate as it relied solely on handwritten notes from 2001 that referenced some of GP's asbestos formulas but not others. He then stated that there are actually between 300 and 400 GP Ready-Mix joint compound formulations in all, but that in preparing his 2001 notecards he considered only those formulas that contained Calidria asbestos. UCC thus contends that Mr. Lehnert's 2003 and 2006 testimony is erroneous insofar as it failed to account for any of GP's non-Calidria formulations which contained other suppliers' asbestos, and that the court should therefore rely on his 2007 testimony instead.

The court's function on a motion for summary judgment is to determine whether there exist factual issues that require resolution at trial. *See Ferrante v American Lung Ass'n*, 90 NY2d 623, 631 (1997). It is apparent that the testimony Mr. Lehnert offered in 2007 conflicts with his testimony from 2003 and 2006, and as such the weight to be accorded Mr. Lehnert's conflicting testimony must be decided by a jury. *See Dollas v W.R. Grace & Co.*, 225 AD2d 319, 321 (1st Dept 1996) ("The assessment of the value of a witnesses' testimony constitutes an issue for resolution by the trier of fact . . . ."); *see also Schachat v Bell Atlantic*, 282 AD2d 329 (1st Dept 2001) (summary judgment should be denied where deposition testimony is inconsistent).

Defendant's submission of formula sheets purporting to reinforce Mr. Lehnert's 2007

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[1] Mr. Lehnert's March 7, 2007 deposition testimony is attached as Exhibit 14 to the defendant's moving papers.

testimony does not alter the court's opinion. Defendant maintains that these documents establish the existence of numerous asbestos-containing formulas in use at GP's Akron, New York facility between 1970 and 1977 that did not utilize any Calidria. However, such conclusion is not apparent from the face of the formula sheets themselves and defendant has provided no explanation or understanding of those sheets to support its position.

The defendant failed to rebut plaintiffs' position that UCC was the exclusive supplier of asbestos to the United States during the 1975 miner's strike in Canada. In light of the foregoing, there are questions of fact concerning Mr. Macek's exposure to SG-210 Calidria that militate against summary judgment, and as to this ground the motion is denied.

II. Duty to Warn

A plaintiff "may recover in strict products liability or negligence when a manufacturer fails to provide adequate warnings regarding the use of its product." *Rastelli v Goodyear Tire & Rubber Co.*, 79 NY2d 289, 297 (1992). A manufacturer "has a duty to warn against latent dangers resulting from foreseeable uses of its product of which it knew or should have known." *Liriano v Hobart Corp.*, 92 NY2d 232, 237 (1998).

The defendant submits that it had no duty to warn Mr. Macek of the hazards associated with asbestos because it was a bulk supplier of raw materials to GP which, in turn, was in a better position to warn ultimate users such as Mr. Macek. The cases cited by both parties on this issue reference three doctrines: the bulk supplier doctrine, the sophisticated intermediary doctrine, and the knowledgeable user doctrine.

These doctrines "were developed to impose practical limitations upon the manufacturer's obligation to appropriately warn the ultimate consumer." *Polimeni v Minolta Corp.*, 227 AD2d 64, 66 (3d Dept 1997). However, while the bulk supplier doctrine seeks to limit manufacturers' liability

to the end consumer, it still obligates them to "adequately warn" their distributees. *Id.* ("Thus, where a product . . . is sold in bulk with the contemplation that such will be repackaged and resold by the manufacturer's distributee, the manufacturer will have satisfied its duty . . . if it adequately warns the distributee of the risks and dangers associated with the use of its products."). The sophisticated intermediary doctrine imposes a similar burden on manufacturers. Primarily reserved in New York to cases involving prescription drugs and medical devices, the doctrine has stood for the principle that pharmaceutical drug companies have no duty to warn patients of the risks associated with the drugs they manufacture because physicians are better positioned to have informed discussions with their patients regarding the risks and benefits associated with a medical product. *See e.g. Wolfgruber v Upjohn Co.*, 72 AD2d 59 (4th Dept 1979), *aff'd* 52 NY2d 768 (1980). However, as with the bulk supplier doctrine, the sophisticated user doctrine does not free drug companies, as the manufacturers and initial suppliers of the drugs into the marketplace, of their duty to adequately warn their distributees, the doctors. *Polimeni, supra*, at 66-67. As such, the focal point of such analysis lies in the adequacy of the warning given by a manufacturer to its immediate distributees in the stream of commerce.

UCC refers the court to Justice Helen Freedman's decision in *Rivers v AT&T Tech., Inc.,* 147 Misc. 2d 366 (Sup. Ct. NY Co. 1990), in which case exposure to DMF, a raw ingredient manufactured by the defendant and found in electrical capacitors, was alleged to have caused the plaintiff's death. In *Rivers,* DMF manufactured at the defendant's facility worked its way through the chain of distribution and ultimately came to be incorporated into a dataphone at the decedent's place of work. The defendant, DuPont, had manufactured DMF since the 1930's and supplied approximately one half of the United States market with the compound. DuPont's normal practice was to deliver the chemical in railroad tank cars, tank trucks and 55-gallon steel drums to its

distributors. The distributors then customarily sold the chemical to manufacturers to be used as an electrolytic industrial solvent in capacitors. One such capacitor was used to build a dataphone that was sold to a telephone company, which then supplied it to the plaintiff's employer. The decedent was critically injured when exposed to the chemical's fumes which had leaked from the capacitor. Among other things, the *Rivers* court found the distributors themselves to be responsible intermediaries. In so holding, the court stated that DuPont had no duty to warn the decedent of the toxicological characteristics of its product because she was "too remote in the chain of distribution" and that DuPont had satisfied any remaining burden by "provid[ing] extensive warnings to its immediate distributees." *Id.* at 372.

UCC claims that such ruling stands for the proposition that a bulk supplier who lacks control over the final product has no duty to warn a remote user as a matter of law. However, as set forth above, the focus in this case must be on the quality of warnings UCC delivered to its intermediaries in the supply chain to whom it directly sold Calidria and not on those delivered to Mr. Macek. UCC claims that it is entitled to summary judgment because it satisfied its duty to warn as a matter of law. In support, UCC submits the affidavit of John Myers, former Marketing Manager of UCC's Calidria business, sworn to June 10, 2004 (defendant's exhibit 10). According to Mr. Myers, UCC placed a warning on bags of Calidria asbestos beginning in 1968 which stated, "WARNING: BREATHING DUST MAY BE HARMFUL. DO NOT BREATHE DUST". (Myers Affidavit ¶ 13). He attests further that in 1972 UCC changed the warning on its bags to comply with OSHA regulations, which required that the warnings state: "CAUTION, CONTAINS ASBESTOS FIBERS, AVOID CREATING DUST, BREATHING ASBESTOS DUST MAY CAUSE SERIOUS BODILY HARM". (Myers Affidavit ¶ 14). Mr. Myers avers that UCC prepared asbestos toxicology reports for its customers beginning in 1969 that contained scientific articles regarding the health effects of

asbestos inhalation. (Myers Affidavit ¶ 15-21).

However it appears Mr. Myers had little, if any, knowledge as to what information may specifically have been provided to GP regarding the hazards of asbestos. Subsequent to his 2004 affidavit, in 2005 Mr. Myers testified in an unrelated case venued in Harris County, Texas that UCC maintained files with respect to each of its customers but that he had not looked at the GP file in order to determine what, if anything, UCC had sent to GP regarding the hazards of asbestos. He further testified that he had no direct dealings with GP in terms of customer relations. (Plaintiff's exhibit 16, pp. 135, 140-42, 162).

Unequivocally, the adequacies of any such warnings are questions of fact for the jury. "It is axiomatic that in all but the most unusual circumstances, the adequacy of a warning is a question of fact." *Polimeni, supra*, at 67. This position is consistent with the decisions of other courts that have considered this issue. *E.g., In re Joint E. & S. Dist. Asbestos Litig.*, 827 F. Supp. 1014, 1055 (SDNY July 23, 1993) ("The latent quality of the defects in asbestos products makes the issues of the sophisticated intermediary and intervening negligence questions of fact for the jury to decide . . . . "); *Union Carbide Corp. v Kavanaugh*, 879 So. 2d 42, 45 (Fla. Dist. Ct. App. 4th Dist. 2004) ("it was for the jury to determine the adequacy of UCC's warnings to [GP] and whether, based on the sufficiency of the warnings given, UCC still owed [plaintiff] a duty"); *Conwed Corp. v Union Carbide Chems. & Plastics Co.*, 287 F. Supp. 2d 993, 996 (D. Minn. 2001), *aff'd on other grounds*, 443 F.3d 1032 (adequacy of UCC's warnings to manufacturers about the nature of Calidria and its duty to third parties are questions for the jury). *See also McConnell v Union Carbide Corp.*, 937 So. 2d 148 (Fla. Dist. Ct. App. 4th Dist. 2006) (the defendant could not rely on its intermediaries to provide adequate asbestos-related warnings to end users;"[t]his is especially true when the burden involved in giving the warning is not unduly burdensome. There is almost no burden in imposing on

[the defendant] the duty of contractually requiring its 'learned intermediaries' to affix to the end product an indelible warning of the existence of the asbestos in it and the very serious dangers in using it without proper precautions."). Accordingly, whether the warnings UCC gave to GP, its distributee, were adequate in the first instance is a question of fact for the jury, precluding summary judgement on this ground.

UCC argues that any alleged inadequacy in its warnings does not give rise to an issue of fact because GP knew of the potential hazards associated with exposure to asbestos-containing products. The knowledgeable user doctrine has been held to "relieve[] a manufacturer of liability on a failure to warn theory where the purchaser or user knows or has reason to know of the dangerous propensities of the product independent of the information supplied to him by the manufacturer or distributor." *Billsborrow v Dow Chemical*, 177 AD2d 7, 16, n. 2 (2d Dept 1992). As an example, UCC cites to *Steuhl v Home Therapy Equipment, Inc.*, 51 AD3d 1101 (3d Dept 2008), in which a hospital patient was injured when the head of her bed suddenly dropped flat. The evidence showed that two pins were not installed properly when the bed was assembled. The court held that since the technician who assembled the bed knew that such pins were required, the manufacturer's failure to warn was not a proximate cause of the plaintiff's injury. Similarly, in *Travelers Insurance Co v Federal Pacific Electric Co*, 211 AD2d 40 (1st Dept 1995), *lv. app. den.*, 86 NY2d 712 (1995), a group of electricians were deemed to be knowledgeable users of circuit breakers under wet conditions such that the circuit breaker manufacturer had no duty to warn of the danger of failing to test the operation of a wet switchboard before putting it into use.

In opposition, plaintiffs present evidence to show that UCC may have withheld highly relevant information from its customers regarding Calidria's health effects, raising questions as to the extent of GP's knowledge. Plaintiffs' exhibit 20 is a 1966 study commissioned by UCC

revealing that rats had a more "severe reaction" to Calidria asbestos mined by UCC in California as compared to asbestos mined in Canada by Johns Manville. It is undisputed that this study was marked confidential and was not disclosed to UCC's customers. Plaintiffs also submit a December, 1967 report prepared by an employee in UCC's United Kingdom division, entitled "Asbestos as a Health Hazard in the United Kingdom." (Plaintiffs' exhibit 15). One member of UCC's medical staff interpreted this report to mean that Calidria was potentially "more hazardous to use" than other forms of chrysotile asbestos. (Plaintiffs' exhibit 23).

There is also evidence that UCC may have minimized these health concerns to its customers and neglected to provide them with specific information regarding its own product. Plaintiffs' proof of this is reflected in a letter written by the Manager of the Technical Division of the Castor Oil Company dated July 5, 1972 which says (Plaintiffs' exhibit 18):

> The asbestos we use is a unique type available from just one mine in California. It is produced and processed by the Union Carbide Corporation. They have run extensive medical tests on this asbestos (Calidria RG-144) and we have their assurance it is non-carcinogenic.

Similarly, in December of 1971 a UCC internal memorandum shows that Glidden Paint, a UCC customer, "did not even realize Calidria was asbestos!" (Plaintiffs' exhibit 19). Further underscoring the notice issues between UCC and its customers, plaintiffs submit a UCC internal memorandum dated June 22, 1972 which shows that the company instructed its salespersons to use aggressive tactics when faced with questions about OSHA standards on asbestos exposure (Plaintiffs' exhibit 39):

> Controlling the conversation is paramount. Assure the customer that the new law is reasonable and within the limits of practicality . . . . If the customer is persistent and threatens to eliminate asbestos - a certain amount of aggressiveness may be effective. Words and catch phrases such as 'premature', 'irrational', or 'avoiding the inevitable' will sometimes turn the table. The main objective is to keep the customer on the defensive, make him justify his position.

CONCLUSION

On this record, the court cannot determine as a matter of law that the bulk supplier, sophisticated intermediary, or knowledgeable user doctrines relieve UCC of liability. The submissions raise too many material questions regarding the adequacy of UCC's warnings to its customers and GP's own knowledge of the dangers associated with UCC's product.

The court has considered the defendant's remaining contentions and finds them to be without merit.

Accordingly, it is hereby

ORDERED that Union Carbide Corporation's motion for summary judgment is denied in its entirety.

This constitutes the decision and order of the court.

DATED: 3.22.13

SHERRY KLEIN HEITLER
J.S.C.