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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: JOAN M. KENNEY J.S.C.
Justice

PART 8

Index Number : 110733/2010
MCCORMACK, JOHN J. JR.
vs.
SAFETY-KLEEN SYSTEMS INC
SEQUENCE NUMBER : 018
SUMMARY JUDGMENT

INDEX NO. 110733/10
MOTION DATE 11/5/13
MOTION SEQ. NO. 018

The following papers, numbered 1 to 84, were read on this motion to/for SJ Motion

Notice of Motion/Order to Show Cause — Affidavits — Exhibits + Memo of Law | No(s). 1-33
Answering Affidavits — Exhibits + Memo of Law in opp | No(s). 34-77
Replying Affidavits + Memo of Law | No(s). 78-84

Upon the foregoing papers, it is ordered that this motion is

MOTION IS DECIDED IN ACCORDANCE WITH THE ATTACHED MEMORANDUM DECISION

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

Dated: July 16, 2013

JOAN M. KENNEY, J.S.C.
J.S.C.

1. CHECK ONE: ..... ☐ CASE DISPOSED ☒ NON-FINAL DISPOSITION
2. CHECK AS APPROPRIATE: .....MOTION IS: ☐ GRANTED ☐ DENIED ☐ GRANTED IN PART ☐ OTHER
3. CHECK IF APPROPRIATE: ..... ☐ SETTLE ORDER ☐ SUBMIT ORDER
☐ DO NOT POST ☐ FIDUCIARY APPOINTMENT ☐ REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 8

----------X

JOHN J. McCORMACK, JR. and PHYLLIS McCORMACK,

Plaintiffs,

- against -

SAFETY-KLEEN SYSTEMS, INC., et al.,

Defendants.

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DECISION & ORDER
Index No.110733/10

JOAN M. KENNEY, J.:

Motion sequence numbers 018, 019, 020, and 021 are consolidated for disposition.

In motion 018, United States Steel Corporation i/s/h/a United State Steel Corporation (USS) moves for summary judgment dismissing the complaint and any cross claims against it.

In motion 019, Safety-Kleen Systems, Inc. (Safety-Kleen) moves for summary judgment on all of plaintiffs' causes of action against it.

In motion 020, defendant Sears, Roebuck and Co., erroneously sued as Sears Holding Corp., successor in interest to Sears Roebuck & Co. (Sears), moves for summary judgment dismissing the complaint in its entirety, as well as any cross claims asserted against it.

In motion 021, defendant Island Transportation Corporation (Island) moves, pursuant to CPLR 3212, for summary judgment dismissing the complaint.

Plaintiffs include John J. McCormack, Jr. (plaintiff) and his wife, Phyllis McCormack. Defendants include Safety-Kleen, Island, Radiator Specialty Company (Radiator Specialty), Sears, Shell Oil Company, Shell Oil Products, LLC, Pennzoil-Quaker State Co., USS, and Sunoco, Inc. Plaintiffs allege that, collectively, defendants manufactured, marketed, and sold benzene-containing solvents, degreasers, gasoline and fuels. The products include "Safety-Kleen 105 solvent" (S-K 105), "Gumout brake cleaner and carburetor cleaner," "Liquid Wrench," gasoline, and Sears penetrating oil and paints (amended complaint, ¶ 16). Plaintiffs allege further that defendants collectively

comprised virtually the entire benzene-containing product manufacturing industry supplying the locations wherein plaintiff worked.

Plaintiff worked for "New York Telephone" from approximately 1971 to 1983 as a splicer helper and mechanic at various locations in New York County. While so employed, plaintiff contends that he was exposed to defendants' benzene-containing products through inhalation, ingestion, and skin contact (*id.*). Plaintiff claims that defendants' conduct proximately caused him to contract myelodysplastic syndrome (MS), diagnosed on October 3, 2007, and non-Hodgkin's lymphoma (NHL) thereafter (*id.*, ¶ 21)

Allegedly, defendants failed to warn plaintiff, and those similarly situated, of the known dangers associated with the use of defendants' benzene-containing products and equipment. Plaintiffs allege further that defendants, acting as part of an industry-wide enterprise to manufacture benzene-containing products, failed to disclose to, or warn, plaintiff of the known dangers associated with the use of defendants' benzene-containing products.

The amended complaint contains five causes of action. The first cause of action (negligence in failing to warn of the dangers of benzene-related products) alleges that, through inhalation, ingestion, and dermal absorption of benzene, benzene vapors and other contaminates found in defendants' benzene-containing products, plaintiff contracted and suffers from incurable benzene-related diseases, namely MS and NHL.

The second cause of action (strict liability) alleges that defendants' benzene-containing products were sold in a defective condition.

The third cause of action (intentional tort) alleges that defendants falsely stated, advertised, or otherwise represented to plaintiff and other purchasers and users of their benzene-containing

products and to the public that there were no significant health hazards associated with these products. Defendants made such statements, advertisements, or misrepresentations with reckless indifference as to whether they were true even though medical and historical data known by the defendants indicated the presence of significant health hazards.

The fourth cause of action (fraudulent misrepresentation) alleges that defendants intentionally defrauded plaintiff and purchasers and users of benzene-containing products, and the public, without legal justification or excuse.

The fifth cause of action (derivative claim) is brought by plaintiff's wife for loss of companionship, consortium, friendship, services, and support.

In their respective answers, movants Safety-Kleen, Sears, and USS cross claim against each other for contribution and indemnification.

In opposition to the motions, plaintiffs rely in large part on the expert affidavit of Robert Laumbach, which describes plaintiff's work history (exhibit C to affirmation of Andrew J. DuPont, Esq., in opposition to motions 019 and 020, dated January 18, 2013, ¶ 21). According to Laumbach's review of Social Security and medical records, plaintiff started with New York Telephone in the first quarter of 1972, first as a splicer's helper from 1972 to 1974/1975. Plaintiff then worked as a garageman from 1974/1975 to 1977, and a mechanic from 1977 to 1982/1983. According to Laumbach, plaintiff essentially performed the same work as a garageman and a mechanic. Plaintiff also recalled having a second job with "Barn Trailer," where he worked four days per week, performing mechanical work about five to ten hours per week. Plaintiff's work as a garageman/mechanic involved cleaning vehicle parts and surfaces with solvents, including "Safety-Kleen, Gum out aerosol solvents and at times gasoline" (Laumbach aff, ¶ 22).

Plaintiff was treated by numerous hematologists and oncologists for his conditions, beginning in 2005 for anemia. He underwent bone marrow biopsies in September and December 2007 (Laumbach aff, ¶ 8). In July 2008, the report of a Dr. Eric Feldman indicated a diagnosis of MS and hemolytic anemia (Laumbach aff, ¶ 11). Another bone marrow biopsy in February 2009, resulted in a diagnosis "consistent with low grade myelodysplasis." It was also opined that the hemolytic anemia could be a complication resulting from NHL (Laumbach aff, ¶ 14).

The movants (USS, Safety-Kleen, Sears, and Island) seek dismissal of the amended complaint as against each of them based on their differing roles pertaining to plaintiff's exposure to the benzene-containing products. USS contends, among other defenses, that plaintiff cannot establish that he was exposed to "Raffinate," a product that contained benzene and which it sold to Radiator Specialty - the manufacturer of Liquid Wrench. Safety-Kleen argues that there is no evidence associating its product (S-K 105) as a cause of the illnesses that plaintiff claims to have contracted. Sears argues that there is no evidence that plaintiff purchased from its stores during the relevant time period any of its products that allegedly caused plaintiff's illnesses. Island argues that, as a mere transporter of goods, it cannot be liable, and, moreover, there is no evidence that it transported any of the allegedly harmful products to plaintiff's work places during the relevant time period.

For the reasons discussed below, these arguments are dispositive in favor of Island and Sears, and, as against them, the motions are granted and the amended complaint dismissed. USS's and Safety-Kleen's motions are granted to the extent of dismissing the fraud and punitive damages claims.

DISCUSSION

Motion 018

USS is a defendant in this lawsuit because it sold Raffinate to defendant Radiator Specialty. Raffinate is a naturally-occurring by-product of USS's coking operations. Radiator Specialty incorporated Raffinate into its penetrant Liquid Wrench, but not all formulations of Liquid Wrench contained Raffinate (aff of John B. Masaitis, ¶¶ 5-7; aff of Larry G. Beaver, ¶¶ 6-7). According to Larry G. Beaver, Radiator Specialty's vice president of technology from 1960 to 1978, Radiator Specialty manufactured and sold several formulations of Liquid Wrench penetrating oil. One formula of Liquid Wrench contained Raffinate which was calculated as containing 5% minimum benzene (Beaver aff, ¶¶ 4-5). Another "deodorized" formula of Liquid Wrench contained petroleum distillates, but did not contain Raffinate.

Plaintiff asserts that Liquid Wrench was one of the principal products that he used while working as a splicer, garage man, and mechanic for New York Telephone from 1971 to 1983, using it daily. As a garage man and mechanic, his hands were wet with Liquid Wrench about five hours per week, and, as a splicer, about one hour per week (*see* DuPont affirmation, ¶¶ 4, 7). Plaintiff argues that there is an issue of fact as to his exposure to the Raffinate-containing Liquid Wrench. Moreover, plaintiff contends, USS failed to adequately warn him about the dangers of its product, because it did not convey to Radiator Specialty the full extent of its knowledge of the health hazards of benzene.

USS moves for dismissal of the complaint (in whole or in part) and any cross claims against it on seven grounds: (1) plaintiffs released their claims against USS; (2) plaintiff has not (and cannot) establish that he used the Raffinate formula of Liquid Wrench; (3) USS discharged its duty to warn;

(4) the Federal Hazardous Substances Act (FHSA) preempts plaintiffs' claims; (5) plaintiffs' product defect theories do not support the claims for negligence and strict liability; (6) the breach of warranty claim fails because USS did not sell the product that allegedly caused the injury; and (7) plaintiffs have no evidence of USS's intent to defraud.

Except for the fraud claim, USS's defenses depend upon the court disposing of factual issues in its favor, which is contrary to the manner in which summary judgment motions are to be decided (*Branham v Loews Orpheum Cinemas, Inc.*, 8 NY3d 931, 932 [2007] [Court must view evidence in the light most favorable to plaintiff on defendant's motion for summary judgment]).

USS first argues that plaintiffs released their claims against it through the execution of a settlement agreement with co-defendant Sunoco, Inc., which also released Sunoco's "predecessors," including USS (*see* exhibit Y to affirmation of Richard E. Leff, Esq.). Specifically, USS asserts that it sold the assets and liabilities of its Chemicals Division (which made Raffinate) to Aristech Chemical Corporation (Aristech), which USS formed in 1986. In 2008, Aristech changed its name to Sunoco Chemicals, Inc. Although co-defendant Sunoco, Inc. sold the capital stock of Sunoco Chemicals, Inc. to Braskem America, Inc., that sale did not include the assets or liabilities related to the "Phenol Business," which included the production of Raffinate. Thus, USS argues, when, in the Settlement Agreement, dated December 23, 2011, plaintiffs released Sunoco, and its "predecessors," the released entities include USS, Sunoco Chemicals, Inc., and Aristech.

Plaintiffs argue, persuasively, that if any of the liabilities of USS were assumed, they were only the liabilities of the USS Chemical Division, and it has not been established that only that division of USS manufactured Raffinate. As noted by plaintiffs, USS itself states that "US Steel Corporation or its former USS Chemicals Division" sold Raffinate to Radiator Specialty from 1960

through 1978; the records do not show any sales of Raffinate by USS or its former USS Chemicals Division to Radiator Specialty after 1978 (Masaitis aff, ¶ 6). USS has not responded to this argument, which raises an issue of fact as to the extent of the release (*see Navillus Tile v Turner Constr. Co.*, 2 AD3d 209, 210 [1st Dept 2003]).

USS next argues that plaintiff has not established that he used the Raffinate version of Liquid Wrench. It bases its argument on the following: Radiator marketed two types of Liquid Wrench, but only the Raffinate version contained benzene, which is USS's connection with Liquid Wrench (and this action). The two versions had different warning labels, and, according to plaintiff's testimony, he did not read the warning labels. Thus, he is unable to identify which of the two versions he used. Because he cannot establish that he used the version which connects USS with this action, he cannot hold USS liable for his alleged injuries.

USS's reliance upon plaintiff's deposition testimony is unconvincing, because it is based upon the questions that USS chose to ask plaintiff. For example, counsel for USS asked whether plaintiff recalled reading the warnings on the cans of Liquid Wrench that he used, as a means of differentiating between the two versions. There are other ways to differentiate the two, however, such as by odor, and plaintiff testified that he smelled a solvent-like odor, which would thereby distinguish it from the non-Raffinate deodorized version. A fact finder could conclude that plaintiff knew that he had used the Raffinate version, because it had an odor distinct from the non-Raffinate version (*see Figueroa v Scharr Indus.*, 81 AD2d 781, 783 [1st Dept 1981] [jury had a reasonable basis for its conclusion in part because the fire department report noted an odor of gasoline which is very different from that of solvents]).

USS's third ground for dismissal is that, as a bulk supplier, it discharged its duty to warn the

end user (plaintiff) because it sold the Raffinate to an industrial customer (Radiator Specialty) that was knowledgeable about the product's properties and hazards.

The "bulk supplier doctrine" provides:

"[W]here a product, such as a gas or a liquid, 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 to act reasonably if it adequately warns the distributee of the risks and dangers associated with the use of its product"

(*Polimeni v Minolta Corp.*, 227 AD2d 64, 66 [3d Dept 1997]). Having stated the availability of the doctrine, the Court in *Polimeni* nevertheless denied the summary judgment motion by Exxon Corporation. Exxon had argued that the bulk supplier required only that it issue adequate warnings to its immediate distributees and not to Polimeni as the ultimate consumer. It argued further that it had established, as a matter of law, that it issued adequate warnings to such entities and, thus, was entitled to summary judgment. In denying the motion, the Court stated:

> "Here, given the highly technical language utilized regarding the ventilating recommendations in the literature transmitted from Exxon to Coates and Hilord, and the total lack of record evidence as to the latters' respective sophistication and expertise regarding the potential health hazards of Isopar G, we cannot determine, as a matter of law, that the warnings were adequate"

(*id.* at 67).

USS seeks to distinguish *Polimeni v Minolta Corp.* by asserting that the "manufacturer's fatal flaw in Polemeni was that it offered no evidence it was even a bulk supplier" (memorandum in further support at 20). However, as demonstrated by the quoted language above, the Court deemed that ground a "starting point," and stated that "[b]eyond that, we agree with Supreme Court that it cannot be said, as a matter of law, that the warnings that were given to Coates and Hilord by Exxon were adequate" (227 AD2d at 67). Such is the case here.

Evidence in the record indicates that Radiator Specialty may not have marketed the Raffinate verison if it had known that it was associated with causing cancer (*see e.g.* Beaver dep tr at 194:13-24, exhibit N to DuPont affirmation). The record indicates that USS knew that it contained that potential health hazard (*see e.g.* Masaitis dep tr at 57-59, exhibit F to DuPont affirmation), and that it had not relayed this information to Radiator Specialty (*see e.g.* Beaver dep tr at 197-198, exhibit B to DuPont aff).

USS's fourth ground for dismissal is that the FHSA preempts plaintiffs' claims. USS argues that "if the claim challenges the adequacy of warnings and other instructional information provided to a hazardous substance user, and the label itself complies with FHSA cautionary labeling requirements, then the claim necessarily seeks to impose non-identical labeling requirements and, as such, is preempted" (memorandum in support at 40).

"The FHSA was enacted in 1960 to provide nationally uniform requirements for adequate cautionary labeling of packages of hazardous substances which are sold in interstate commerce and are intended or suitable for household use" (*Milanese v Rust-Oleum Corp.*, 244 F3d 104, 109 [2d Cir 2001] [internal quotation marks and citation omitted]). Generally, the FHSA (15 USC § 1261, *et seq.*) contains labeling requirements that preempt any claim that a warning label pertaining to a "hazardous substance" as defined therein is inadequate (*Hanly v Quaker Chem. Co., Inc.*, 29 AD3d 860, 861 [2d Dept], *lv denied* 7 NY3d 713 [2006]). However, plaintiffs' causes of action that are not based on improper labeling, are not preempted, including causes of action based on negligence, breach of warranty, and strict products liability (*Lopez v Hernandez,* 253 AD2d 414, 415 [2d Dept 1998]). Moreover, whether USS complied with FHSA remains an issue of fact.

USS also argues that plaintiffs' product defect theories do not support claims for negligence

(first cause of action) and strict liability and manufacturing defect (second cause of action). It asserts that, although it supplied the Radiator Specialty with the chemical raw material Raffinate, it had no involvement in the design, manufacture, or sale of Liquid Wrench. Moreover, it contends, Raffinate is a natural by-product of USS's coke refining process and not a "designed chemical."

"[A] defectively designed product is one which, at the time it leaves the seller's hands, is in a condition not reasonably contemplated by the ultimate consumer and is unreasonably dangerous for its intended use; that is one whose utility does not outweigh the danger inherent in its introduction into the stream of commerce" (*Voss v Black & Decker Mfg. Co.*, 59 NY2d 102, 107 [1983] [internal quotation marks and citation omitted]).[1] There are factual issues as to this standard and the percentage of benzene in Raffinate, whether such amounts fluctuated, and whether USS could exercise control over the Raffinate sold to Radiator Specialty as to its benzene content.

USS argues that the breach of warranty claim (third cause of action) fails because of the absence of privity between it and plaintiffs. However, "the manufacturer of a defective product engaged in its normal course of business may also be held strictly liable for injuries caused by a product, regardless of privity, foreseeability or the exercise of due care" (*Gebo v Black Clawson Co.*, 92 NY2d 387, 392 [1998]). USS also asserts a statute of limitations defense as to the breach of warranty claim, which the court will not consider because USS raises it for the first time in its reply papers (*Sanz v Discount Auto*, 10 AD3d 395, 395 [2d Dept 2004]).

Finally, USS argues that plaintiffs have no evidence of USS's intent to defraud (third and fourth causes of action of the amended complaint). To prevail on a fraud claim, "the plaintiff must

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[1]There are many negative citing references to the Court of Appeals decision in *Voss v Black & Decker Mfg. Co.*, but these are non New York decisions.

prove a misrepresentation or a material omission of fact which was false and known to be false by defendant, made for the purpose of inducing the other party to rely upon it, justifiable reliance of the other party on the misrepresentation or material omission, and injury" (*Lama Holding Co. v Smith Barney*, 88 NY2d 413, 421 [1996]). Here, the record does not contain evidence that USS made any misrepresentations to plaintiff so as to induce him to rely, thereby causing injury. Hence, the fraud claims are dismissed.

Motion 019

Plaintiff testified that he did not use Safety-Kleen every day, but when he did it was for between one and two hours (plaintiff dep tr at 114). He used it to clean vehicle parts such as brake drums, wheel bearings, and backing parts, carburetors, and air filter housings (plaintiff dep tr at 111). He testified that he used it more than other mechanics because of the preventative maintenance work that he performed. He did not wear gloves when he worked.

Safety-Kleen argues that plaintiffs cannot establish general causation (whether the toxin is capable of causing plaintiff's illness) because of the absence of reliable scientific evidence that occupational exposure to S-K 105 solvent or similar solvents such as mineral spirits, white spirits, or Stoddard solvent is associated with MS or NHL. Moreover, plaintiffs cannot establish specific causation (whether plaintiff was exposed to sufficient levels of the toxin to cause his illness) because plaintiff's alleged occupational exposures to benzene from his use of S-K 105 solvent are de minimis, and are well below the levels associated with a meaningful increased risk of an adverse health effect.

In support, Safety-Kleen submitted the expert report of Julie M. Panko, a Certified Industrial Hygienist by the American Board of Industrial Hygiene, and a "Principal Health Scientist" with

ChemRisk, Inc. (exhibit H to affirmation of John Doody, Esq.). As explained by Panko, S-K 105 solvent is comprised primarily of mineral spirits (99.9%) with the remaining 1% being anti-static additives and dye which may contain trace amounts of benzene as an impurity, rather than as an ingredient or additive (Panko aff, ¶ 6). Benzene is a natural chemical that is ubiquitous in the background environment and can be detected in the ambient air in urban and rural areas. Panko concludes that, based largely upon plaintiff's testimony, during the relevant time period, plaintiff's potential exposure to benzene from using S-K 105 solvent as well as his potential range of exposure to benzene from background sources were approximately 3-20 times below ambient background levels, and his eight-hour "time weighted average" benzene exposures and short-term exposures would have been significantly lower than both the contemporaneous and current United States Occupational Safety and Health Administration permissible exposure levels and American Conference of Governmental Hygienists "threshold limit value" (Panko aff, ¶¶ 10-11).

Safety-Kleen also submitted the affidavit of David Pyatt, Ph.D., a "Principal Toxicologist" with the consulting firm Summit Toxicology, L.L.P, and an Adjunct Assistant Professor of Public Health at several universities (exhibit I to Doody affirmation). His report is based in part on Panko's quantitative exposure assessment, showing that plaintiff's cumulative exposure to benzene via inhalation from using S-K 105 solvent was estimated to be ~0.16 ppm-yrs with the maximum 15-minute peak exposure to be no higher than ~0.065 ppm. He states that there is no reliable evidence that this level of exposure to benzene has ever been shown to have any toxicological relevance (Pyatt aff, ¶ 26). Pyatt concludes that there is no scientific or medical support for the hypothetical relationship between mineral spirit exposure and NHL or MS, and, therefore, plaintiff's disease did not result from exposure to S-K 105 solvent (Pyatt aff, ¶ 28).

In opposition, plaintiffs rely largely on the expert affidavit of Robert Laumbach. Laumbach is a Diplomate of the American Board of Preventative Medicine, the American Board of Family Medicine, and the American Board of Industrial Hygiene. Laumbach's affidavit is 54 pages because it addresses plaintiff's exposure to the various solvents at issue in this action. In determining causation, Laumbach states that he used what he characterizes as the generally accepted "Bradford Hill factors," including strength and consistency of association, biological plausibility, dose response, and temporality. Laumbach concludes that plaintiff's exposure from each of defendants' benzene-containing solvent products was a substantial contributing factor in that they contributed significantly to the cumulative dose that plaintiff sustained, which was in excess of that known to cause MS and NHL (Laumbach aff, ¶ 159).

Safety-Kleen challenges plaintiffs' evidence, arguing that the claims are flawed in much the same way as the plaintiff's claims were flawed in the leading case of *Parker v Mobil Oil Corp.* (7 NY3d 434 [2006], *rearg denied* 8 NY3d 828 [2007] [*Parker*]), which also involved a claim that the plaintiff therein contracted serious illnesses from exposure to products containing benzene.

In *Parker v Mobil Oil Corporation*, the plaintiff had worked as a gas station attendant for 17 years, and had been exposed to benzene through the inhalation of, and dermal contact with, gasoline fumes. The plaintiff alleged that exposure to benzene in gasoline caused him to develop acute myelogenous leukemia (AML). The defendants did not warn him of the dangers of benzene exposure (a known carcinogen) or provide him with safety or protective gear (7 NY3d at 442).

The Court of Appeals affirmed the Appellate Division's dismissal of the complaint, but, in so doing, disagreed with some of its rulings. The Court of Appeals found that the plaintiff's experts failed to establish that the methodologies employed led to a reliable result, and they questioned

whether they provided "a reliable causation opinion without using a dose-response relationship and without quantifying Parker's exposure" (*id.* at 447). The Court of Appeals departed from the Appellate Division in that it found that "it is not always necessary for a plaintiff to quantify exposure levels precisely or use the dose-response relationship, provided that whatever methods an expert uses to establish causation are generally accepted in the scientific community" (7 NY3d at 448).

Although the Court of Appeals rejected the Appellate Division's requirement that the amount of exposure need be quantified exactly, it concluded that the plaintiff failed to demonstrate that exposure to benzene as a component of gasoline caused Parker's acute myelogenous leukemia. One expert (Dr. Goldstein) offered a "general, subjective and conclusory assertion - based on Parker's deposition testimony - that Parker had 'far more exposure to benzene than did the refinery workers in the epidemiological studies,'" which was insufficient to establish causation. It neither stated the level of the refinery workers' exposure, nor specified how Parker's exposure exceeded it, thereby lacking in epidemiologic evidence to support the claim (7 NY3d at 449).

The Court found the submissions of the plaintiff's other expert (Dr. Landrigan) also insufficient, because he reported that "Parker was 'frequently' exposed to 'excessive' amounts of gasoline and had 'extensive exposures . . . in both liquid and vapor form,' which - even given that an expert is not required to pinpoint exposure with complete precision - cannot be characterized as a scientific expression of Parker's exposure level." The key was the "relationship, if any, between exposure to gasoline containing benzene as a component and AML" and the expert failed to "make this connection perhaps because, as defendants claim, no significant association has been found between gasoline exposure and AML" (7 NY3d at 449-450). Safety-Kleen impliedly seeks to have its motion disposed of on the basis of *Parker*, in that they both concern benzene contamination.

Plaintiffs' experts do not suffer from the same deficiencies that the Court found in Parker. Both sides present expert evidence that is persuasive in that they are precise and detailed as opposed to merely general opinions (*Martinez v Te*, 75 AD3d 1, 6 [1st Dept 2010]). Rather than showing a mere "association" of a toxin to the illness, plaintiffs' expert establishes a "causal "relationship" (*Fraser v 301-52 Townhouse Corp.*, 57 AD3d 416, 417 [1st Dept 2008], *appeal dismissed* 12 NY3d 847 [2009]). Although not dispositive in plaintiffs' favor, it is adequate to oppose summary judgment. Where there is a conflict of the experts, summary judgment is not warranted (*Peebles v New York State Hous, Auth.*, 295 AD2d 189 [1st Dept 2002]).

The court will not consider on this motion the alternate request for a Frye hearing because that is raised for the first time in the reply papers.[2]

As for the duty to warn claim, Safety-Kleen has not established on these papers that plaintiff was oblivious to warnings on the labels. For example, plaintiff testified that he sometimes read the instructions or the warnings (plaintiff dep tr at 177). Counsel asked repeatedly whether plaintiff knows what was written on the labels (plaintiff dep tr at 178-179) yet the relevant time period is from the 1970's and 1980's. That he does not now remember what was written on the labels does not mean he was unaware then. To be sure, it is clear from the testimony that plaintiff was not particularly concerned with examining the information on the labels for the products he used (*see e.g.* plaintiff dep tr at 178). However, as noted by plaintiffs, a fact finder could consider the name Safety-Kleen as something that may deter a user from looking deeply into the warnings, because the

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[2] A Frye Hearing (*Frye v United States*, 293 F 1013 [DC Cir 1923]) is required when it is necessary to "determine the admissibility of proffered expert witness testimony opining on the causation of plaintiff's personal injuries," and to ensure that the "expert's theory was generally accepted in the scientific community" (*Santos v Nicolas*, 65 AD3d 941, 941 [1st Dept 2009]).

name itself could reasonably be deemed to imply that the product is safe.

The fraud claims are dismissed for the reasons discussed above pertaining to USS.

The demands for punitive damages are stricken, because "there is no evidence in the record of willful or wanton conduct which demonstrates a 'conscious disregard of the rights of others or conduct so reckless as to amount to such disregard'" (*Dubecky v S2 Yachts*, 234 AD2d 501, 502 [2d Dept 1996], quoting *Home Ins. Co. v American Home Prods. Corp.*, 75 NY2d 196, 203-204, *answer to certified question conformed to* 902 F2d 1111 [2nd Cir 1990]).

Finally, based on the foregoing, the request to dismiss the loss of consortium claim on the ground that plaintiff's claim lacks merit is denied.

Motion 020

Sears moves for summary judgment, dismissing the complaint in its entirety, as well as any cross claims asserted against it. Sears argues that there is no evidence that any of the products that plaintiff claims to have purchased at Sears contained benzene.

Plaintiffs contend that the Sears products that plaintiff used contained benzene. These include (1) Liquid Wrench that was purchased from Sears between 1962 and 1974, which he used around the home on bikes and other things; and (2) Sears paint thinners, which were formulated with Naphthenes, Aromatics, Mineral Spirits, Ethyl Benzene, Toluene, and a solvent equivalent to Sinclair Aromatic Solvent # 60 (memorandum of law in support of plaintiffs' opposition at 4).

According to plaintiff's expert Laumbach, plaintiff "had appreciable contact with Sears products that contained benzene, including 3-in-1 Oil that he used at home for general lubrication from 1962 to 1995" and "paint thinner used to clean his hands and brushes during a home renovation project." Laumbach concludes that:

> "Occupational exposure to Gumout carburetor cleaners which, at times, were formulated with solvents that containing [sic] benzene, increased Mr. McCormack's cumulative dose above that calculated above in my assessment. The Sears and Gumout products were formulated with ingredients known to contain benzene (Kopstein [2006], Peckham [2012]) and therefore contributed to his total exposure to benzene and solvents and therefore increased his risk of MDS and NHL"

(Laumbach aff, ¶ 81).

Laumbach's opinion - that plaintiff "had appreciable contact" with Sears products that contained benzene - is based on plaintiff's deposition testimony. However, that testimony does not support the expert's conclusion. Plaintiff testified that he bought paint thinner in connection with the painting of his house in 1980 (plaintiff dep tr at 236, 244-245). Plaintiff testified that he did not know whether the paint thinner that he bought at Sears contained benzene, but that, online, he learned that paint thinner contains benzene (plaintiff dep tr at 249-253). Plaintiffs did not submit any additional evidence to establish that the paint thinner from Sears contained benzene. The speculative deposition testimony fails to create an issue of fact (*Goldin v Riverbay Corp.*, 67 AD3d 489, 489-490 [1st Dept 2009]).

As stated above, plaintiff testified that he bought Sears paint thinner in 1980 and Sears submitted evidence that its paint thinner manufactured after 1977 did not contain benzene, whereas the earlier product did (*see* exhibit z to Dupont aff). The earlier product lists "Toluol," which the parties refer to as Toluene, which is apparently the same substance. Laumbach opines that "Toluene is reported to contain benzene at levels as high as above 2% and there are reports of toluene exposed workers developing AML" (Laumbach aff, ¶ 31). However, Laumbach provided no evidence to establish that the Sears paint thinner that plaintiff used contained toluene that had benzene as a component.

Plaintiff also contends that he used Liquid Wrench purchased from Sears between 1962 to 1974, which contained large amounts of benzene at levels of 5% to 30%. However, plaintiff testified at his October 27, 2011 deposition that he recalled purchasing Liquid Wrench from Sears a "couple of times" and that he did so between 1980 and 1996 (exhibit I to aff of Evan J. Palik, Esq. at 257). Uncontroverted evidence in the record shows that the Liquid Wrench sold by Sears during that time period did not contain benzene (*see* exhibit J to Palik aff, attachment to the aff of Deborah A. Schramm consisting of a "complete copy of the documents that list the ingredients of the paint, paint thinner, and Liquid Wrench products sold by Sears during the relevant time period").

Motion 021

Island argues that it is not liable because (1) it was a transporter of gasoline, not a distributor, and (2) Island did not transport gasoline to plaintiff's workplaces during the relevant time period of 1971 through 1983 (*see* amended complaint, ¶ 16; Dupont aff, ¶ 3).

Island has established a prima facie entitlement to judgment by submitting admissible evidence in support of its contention that it had not made any deliveries to the facilities where plaintiff worked at the time that plaintiff allegedly was exposed to the harmful products. The burden shifted to plaintiffs to raise a triable issue as to Island's potential liability (*Zuckerman v City of New York,* 49 NY2d 557, 562 [1980]; *Donovan v All-Weld Prods. Corp.*, 38 AD3d 227, 229 [1st Dept 2007]). Plaintiffs did not meet their burden.

Island submitted the affidavit of Peter Fioretti Jr., Island's president, who states that Gulf Oil was the only company for which Island transported gasoline to New York Telephone installations, and that, based on company records, as well as his own personal knowledge, it only did so in the mid to late 1990's, and not during the period of 1971-1983 (exhibit K to affirmation of William D.

Gallagher, Esq.). As discussed above, the complaint is based on plaintiff's alleged exposure to the toxins from 1971 through 1983.

Island submitted the May 24, 2001 affidavit of Matt Farron, an employee of Island, who states that, since 1991, he has worked at its "New York City Dispatch Office," located at 5700 47th Street, Maspeth, New York, and that he is familiar with the transportation of gasoline by Island to New York Telephone installations. He states that, based Island's records and his own personal knowledge, it was not until 1994 that Island began transporting gasoline, on behalf of Gulf Oil, to New York Telephone facilities, and continued to do so until 1997 or 1998 (exhibit I to Gallagher affirmation).

Island also submitted the affidavit of William S. Szymanski, a "Logistics Supervisor" for Cumberland Farms, Inc., the parent company of Gulf Oil Limited Partnership. He states that Gulf Oil Limited Partnership supplied Telesector Resources Group, a subsidiary of "N.E. Telephone and N.Y. Telephone," but not until 1994, and the agreement terminated in 1998. He concludes that, from the records of Gulf Oil Limited Partnership, the only time that Island was used to transport gasoline to New York Telephone installations, on its behalf, was no earlier than 1994 (exhibit J to Gallagher affirmation).

Island also cites deposition testimony of plaintiff for the assertion that plaintiff was unable to identify with any certainty that Island made any deliveries of gasoline to the New York Telephone sites where he had worked. Moreover, his testimony that others told him that deliveries were made by Island constitute inadmissible hearsay which is insufficient to defeat summary judgment (*Iurato v City of New York*, 9 AD3d 301, 303 [1st Dept 2004] [in opposition, "Abax failed to raise a triable issue of fact as to Airtek's responsibility for the dangerous condition" because his "deposition

testimony that he [thought] someone mentioned that the persons who put down the plastic covering were from Airtek," was vague, speculative, and pure hearsay]).

Almost the entirety of plaintiffs' opposition is based on the arguments that irrespective of whether Island be deemed a "transporter" or "distributor," it should be held strictly liable for the harm caused by its delivery of gasoline containing benzene. However, as for the argument that Island had not delivered such products during the relevant time period, it presents very little opposition, which consists of the same deposition testimony relied upon by Island, namely that plaintiff was unable to identify with any certainty that Island made any deliveries of gasoline to the New York Telephone sites where he had worked. As stated above, speculative or inadmissible hearsay evidence is insufficient to raise an issue of fact to defeat a motion for summary judgment (*Iurato v City of New York*, 9 AD3d at 303; *Steinsvaag v City of New York*, 96 AD3d 932, 933 [2d Dept 2012] ["defendants met their burden of establishing their prima facie entitlement to judgment as a matter of law by demonstrating that the plaintiff could not establish that his coworker lost his grip on the door buck because he slipped on a wet ramp without relying on speculative or inadmissible hearsay evidence"]).

Accordingly, it is

ORDERED that motion 018 for summary judgment by United States Steel Corporation i/s/h/a United State Steel Corporation dismissing the complaint and any cross claims against it is granted to the extent of dismissing the fraud claims and is otherwise denied; and it is further

ORDERED that motion 019 by Safety-Kleen Systems, Inc. for summary judgment on all of plaintiffs' causes of action against it is granted to the extent of dismissing the fraud claims and striking the request for punitive damages, and is otherwise denied; and it is further

ORDERED that motion 020 by Sears, Roebuck and Co., sued as Sears Holding Corp., successor in interest to Sears Roebuck & Co., for summary judgment, dismissing the complaint in its entirety, as well as any cross claims asserted against it is granted, and the complaint and any cross claims are dismissed as to this defendant with costs and disbursements upon submission of an appropriate bill of costs, and the Clerk is directed to enter judgment accordingly in favor of said defendant; and it is further

ORDERED that motion 021 by Island Transportation Corporation for summary judgment dismissing the complaint is granted, and the complaint and any cross claims are dismissed as to this defendant with costs and disbursements upon submission of an appropriate bill of costs, and the Clerk is directed to enter judgment accordingly in favor of said defendant; and it is further

ORDERED that the action is severed and continued against the remaining defendants; and it is further

ORDERED that the remaining parties proceed to mediation/trial forthwith.

Dated: July 16, 2013

JOAN M. KENNEY J.S.C.