To commence the statutory time period for appeals as of right [CPLR 5513(a)], you are advised to serve a copy of this order, with notice of entry upon all parties.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER-COMPLIANCE PART

----------x

BERNARD BERMAN and NICOLE BERMAN,

Plaintiffs,

-against-

GENERAL ELECTRIC COMPANY and
ATLANTIC APPLIANCE of MOUNT KISCO, INC.,

Defendants.

----------x

DECISION and ORDER
Index No. 51140/2016
Motion Date: May 1, 2017
Seq. Nos. 5 and 6

LEFKOWITZ, J.

The following papers were read on plaintiffs' motion for an order directing defendant General Electric Company (hereinafter "GE") to provide full and complete responses, documents and information pursuant to the notice for discovery and inspection served by them on July 19, 2016.

Order to Show Cause dated April 5, 2017; Plaintiffs' Affirmation in Support; Exhibits A-P
GE's Affirmation in Opposition; Exhibits A and B

The following papers were read on GE's motion for an order quashing plaintiffs' subpoenas noticed to Jeff Wood, Jerrod Kappler, Brett Begole and Daniel A. Rowley and issuing a protective order in connection therewith and for such other and further relief as this court deems just and proper.

Order to Show Cause dated April 11, 2017; GE's Affirmation in Support; Exhibits A-D
GE's Memorandum of Law in Support of the Motion
Plaintiffs' Affirmation in Opposition

The following supplemental papers were read on both motions, received by the court on or about May 15, 2017, as directed by the court during the proceedings held on May 1, 2017.

Transcript of the proceedings held on May 1, 2017
GE's Supplemental Affirmation in Opposition to Plaintiffs' Motion; Exhibits 1-3 including 2A-2C
Affidavit in Support on Behalf of Plaintiffs

Upon the foregoing papers, including the supplemental submissions, and proceedings held on May 1, 2017, these motions are determined as follows:

This action arises from a fire that occurred on June 5, 2013, at plaintiffs' residence in Chappaqua, New York. Plaintiffs claim that a clothes dryer in their home, manufactured by GE, was responsible for causing the fire. They further allege that the fire caused real and personal property damage, loss of use and enjoyment of their property and inconvenience. They seek recovery of more than three million dollars in damages.

More particularly plaintiffs allege that the fire began inside a GE clothes dryer manufactured in 2012 that they bought at, and was installed by, defendant Atlantic Appliance of Mount Kisco, Inc. some 18 months before the subject fire occurred. Plaintiffs assert that the GE clothes dryer has a "closed-drum" design that has a hidden fire-causing propensity and is unreasonably dangerous. Plaintiffs' claims against GE include, among others, design defect. Plaintiffs served GE with a notice for discovery and inspection dated July 19, 2016.

Motion Sequence Number 5

Presently plaintiffs seek further, more complete responses to their discovery requests. Plaintiffs contend that the documents they seek fit into several categories: (1) documents, data and information related to prior claims, incidents and/or lawsuits involving closed-drum dryers designed, manufactured and distributed by and/or on behalf of GE; (2) documents, data and information related to the design, design changes, alterations and/or modifications for all of the closed-drum or ball-hitch dryers designed, manufactured, distributed and/or sold by or on behalf of GE; (3) documents, data and information related to the testing of GE's closed-drum or ball-hitch dryers; (4) industry specific documents and information in the form of design verification reports and failure mode and effects analysis studies, testing and reports; (5) documents, information and communications with or related to the Consumer Products Safety Commission, trade organizations and/or government entities concerning closed-drum dryers; (6) documents and information that relate to actual or potential hazards, dangers or risks associated with closed-drum dryers; (7) documents related to the cost benefit analysis and reports concerning the materials and design of closed-drum dryers; (8) documents, information and data specifically related to lint accumulation, fire hazards and/or testing and studies related to lint and lint fires; and (9) documents and information related to methods of venting (i.e. installation) and instructions, training and guidance provided to installers and service technicians.

Plaintiffs assert that it is their burden to show that the subject dryer was defectively designed and that GE controls and possesses all the documents and information plaintiffs require to make such a showing. Plaintiffs assert that GE records will show that GE knew that ordinary, intended and foreseeable use of the subject dryer presented a danger. Plaintiffs assert that closed-drum and ball-hitch dryers are synonymous in the industry.

Plaintiffs assert that the closed-drum dryers produced by GE share the same basic design and allegedly defective traits as the subject dryer. They further assert that historical information concerning GE's design process, engineering practices, warranty and claims data, testing data,

internal memoranda and other product information is proprietary to GE, unavailable from other sources and is necessary to discover the scope and timing of GE's notice of these defects. They further assert that the historical data concerning GE's engineering and design processes and GE's implementation of these processes is necessary to discover what GE knew about fire containment and the ability of GE to engineer the potential for property damage, consumer injury or consumer death that is associated with internal lint fires escaping containment during GE dryer use in 2012.

GE opposes this motion. Firstly it contends that a ball-hitch dryer is not the same as the subject dryer in this case, a closed-drum dryer. GE asserts that there are several critical design features which distinguish the subject dryer from all but one other GE dryer model and there are several differences between the subject dryer and the Electrolux ball-hitch dryer. GE notes that certain discovery demands in fact reference Electrolux, one of its competitors and a manufacturer of ball-hitch dryers.

GE contends that plaintiffs also seek discovery relating to any and all other dryers which GE has ever manufactured or sold, without limitation as to time or type of design. GE contends that regardless of whether the designs of the many millions of other clothes dryers GE has manufactured or sold since it entered the dryer market in the early 1900's are substantially similar to the design of the subject dryer, plaintiffs are demanding discovery in relation thereto.

GE asserts that it has made a diligent search for information and documents requested in plaintiffs' discovery demands which relate to the dryer model at issue or to all substantially similar models and has provided what it has in that regard including detailed engineering drawings and specifications. GE notes that it has provided to plaintiffs the following information related to the subject dryer: the owner's manual and installation instructions; GE appliances document retention policy; product specification sheets, engineering design sheets for the dryer and its various components; documents regarding warning labels; installation specifications; safety data sheets; engineering test procedures; the SEE Testing Report; a UL report on clothes dryers; and the UL testing record in accordance with UL 2158. GE asserts that plaintiffs are disingenuous in claiming it has not provided documentation relevant to the subject dryer and that plaintiffs seek unfettered access into its files.

GE states that the subject dryer is a model PFDSS450EL whose production it began in August, 2010.

GE's representative, Jim Allison was deposed on April 26, 2017 (deposition transcript appended to GE's supplemental affirmation, Exhibit 3). He testified that he was first employed by GE in 1969 and started working with GE's laundry appliances in 1996 (11-12). He retired from GE in 2001 and now works there as a senior consulting engineer (6). He considers himself an expert on dryer design (95). He testified that GE doesn't use the terms open-drum and closed-drum. He testified that there are two different drum designs, a fixed rear drum and a rotating rear drum and that the subject dryer has a rotating rear drum design (96; 199-200). Electrolux, too, has rotating rear drum dryers but the subject dryer is different from the Electrolux rotating rear drum dryers in that it has a spindle and bushing system instead of a ball-hitch system (199). Mr. Allison further testified that the product safety manager reported to him

that there were no other incidents of fire associated with the model number tied to the subject dryer (221). He testified that 25,100 dryers with the same model number as the subject dryer, models just like it but of a different color and models lacking the water mist feature, have been sold by GE (222-223). The subject dryer was part of a design platform incorporating two motors and a mica heater and those features distinguished it from other rotating rear drum dryers sold by GE (223-24).

At the proceedings held on May 1, 2017, GE's counsel asserted that the subject dryer is not a ball-hitch dryer and that the subject dryer was manufactured in Mexico by a company known as Mabe. He asserted that GE does produce and sell ball-hitch dryers through other suppliers. He furthermore asserted that the subject dryer was sold as part of a 25,000 unit. GE's counsel represented to the court that the present claim is the one and only claim alleging a fire due to lint accumulation. He identified the subject dryer as a rotating rear drum dryer.

At these proceedings, plaintiffs' counsel asserted that a rotating rear drum dryer is of a ball-hitch design or if you called it a closed-drum dryer, it didn't matter. These dryers all accumulate lint in the same way. Plaintiffs' counsel claimed that to prove their case it is imperative to acquire information about all rotating rear drum dryers made and sold through the GE design process.

In his affidavit dated May 13, 2017, K. Scott Barnhill, a principal with Investigative Forensic Specialist, P.L.L.C., stated that in connection with his work he has examined several different types of dryers and is familiar with the subject dryer. He opined that, to a reasonable degree of scientific certainty and based upon his research, experience and training, the subject dryer was materially different in many significant respects from the Electrolux dryers with the ball-hitch design as well as other models sold by GE (supplied by, e.g., Mabe).

In its supplemental affirmation in opposition to plaintiffs' motion, GE asserted that Mr. Allison's testimony identified unique features of the subject dryer, two motors and a mica heater system, which distinguish it from ball-hitch dryers made by Electrolux and from other rotating rear drum dryers sold by GE. GE further asserted that their witness' testimony considered along with the affidavit of Mr. Barnhill demonstrates that plaintiffs' allegations that the subject dryer is substantially similar to other GE dryers is without merit. GE again asserted that is has provided many documents to plaintiffs.

In his affidavit dated May 15, 2017, submitted on plaintiffs' behalf, Ronald Parsons, a fire analyst employed by the Wright Group, Inc., stated that a rotating rear drum dryer is a closed-drum dryer. He further asserted that in order to assess plaintiffs' alleged damages he needed to review all records containing data related to fire risks posed by normal use of GE rear rotating and fixed drum dryers designed (in whole or in part) or assembled by GE which would demonstrate the relative fire safety risks associated with foreseeable use of both designs.

CPLR 3101(a)(1) provides that there shall be full disclosure of all matter material and necessary in the prosecution or defense of an action. The term material and necessary in the

statute must be interpreted liberally to require disclosure, upon request, of any facts bearing on the controversy which will assist preparation for trial by sharpening the issues and reducing delay and prolixity (*Matter of Kapon*, 23 NY3d 32, 38 [2014] quoting *Allen v Crowell-Collier Publ. Co.*, 21 NY2d 403, 406 [1968]). It is the burden of the party seeking disclosure to demonstrate that the method of discovery sought will result in the disclosure of relevant evidence or is reasonably calculated to lead to the discovery of information bearing on the claims (*Quinones v 9 East 69 Street, L.L.C.*, 132 AD3d 750 [2d Dept 2015]).

The court notes that in its notice for discovery and inspection dated July 19, 2016, plaintiffs made 83 separate demands. GE's first response to this notice is dated October 19, 2016. A review of GE's first response demonstrates that GE complied with some of the demands by providing the requested discovery even though it noted that some of these demands were over broad and unduly burdensome (demands 1, 2, 3, 4, 6, 8, 9, 18, 19, 22, 24, 25 and 28). As to other demands GE stated that it was not in possession of any responsive items (demands 5, 63, 64, 66 and 71). Through discovery a party may be required to provide only those items which are in the possession, custody or control of the party served. Such items must be preexisting and tangible to be subject to discovery and production. A party may not be compelled to provide information that does not exist or create new documents (*Orzech v Smith*, 12 AD3d 1150 [4th Dept., 2004]). Some other demands were improper insofar as they sought information that was privileged or sought information regarding expert evidence about which GE stated it reserved the right to supplement its response once experts were designated (7, 27, 10-16). As to demands 75-82, the court finds that plaintiffs improperly sought discovery relating to dryers designed by another entity, Electrolux. In many of its responses to plaintiffs' various demands, GE stated that it never designed or manufactured ball-hitch dryers and that it never sold a ball-hitch dryer designed or manufactured by the manufacturer of the subject dryer.

GE also served a supplemental response to plaintiffs' discovery demands, dated February 8, 2017. Referring to the model dryer at issue here (PFDSS450EL44 and similar models), GE responded as to some of the demands that it was unable to locate any responsive documents (demands 17, 20, 21, 26, 29-32, 35, 38, 39, 43-44, 46-49, 52-55, 58, 60, 62, 68-70, 74). In response to demands 50 and 59 seek lint screen information, GE stated it has always used steel mesh lint screens.

GE responded as to some demands that it will provide discovery pertaining thereto. In its first response as to demand 34, GE stated it would provide a copy of its Document Management Policy. In its second response GE stated it would provide documents regarding test procedures and results related to fire risk and containment in model PFDSS450EL and similar models (demands 36 and 37); design drawings for the model PFDSS450EL (and it should provide it for similar models, if documents are available and not only for model PFDSS450EL but for similar models as well in regard to demands 40-42, 57); an installation specification which refers to the use of rigid exhaust venting for model PFDSS450EL and similar models (demand 45); a copy of the Underwriters' Laboratories Test Report and Test Record applicable to model PFDSS450EL and similar models (demand 65).

In consideration of the evidence submitted on this motion the court finds that plaintiffs have failed to sustain their burden of showing that all the discovery they seek is relevant to the issues of this case. However, GE should, to the extent it has not already done so, provide the discovery it said it would provide as herein above detailed and furthermore, GE should provide further responses to demand 51, demand 56 (as to non-privileged emails), 61, 67 and 72. GE's responses should pertain to model PFDSS450EL and similar models and cover the time period from August 1, 2010 to the date of the accident.

Motion Sequence Number 6

Presently GE seeks a protective order relating to four nonparty subpoenas noticed by plaintiffs. The subpoenas were presented to GE at the same time plaintiffs filed them with this court seeking them to be so-ordered to be filed with the Kentucky court. GE asserts that the subpoenas seek discovery from four former GE employees who were involved in high level roles in GE's appliance business. GE states that in June, 2016, it sold its appliance business to Haier US Appliance Solutions (hereinafter "Haier"). As part of the sale agreement, GE agreed to retain responsibility for responding to and defending any product liability claims arising from losses involving GE appliances that occurred prior to June 6, 2016. Accordingly, the present action is GE's responsibility. GE contends that the four people named in the subject subpoenas are now Haier employees. They held management level positions at GE at which they acquired sensitive information related to GE's operations in the appliance business. GE notes that one of these former employees, Daniel Rowley, held a position in GE's legal department and asserts that he has knowledge and information related to privileged attorney-client communications. GE asserts that the four people named in the subpoenas are not likely to possess relevant information to the issues in dispute and the topics for the depositions listed in the subpoenas are vague, over broad and unduly burdensome. GE also asserts that the proffered topics listed in each subpoena involves information related to GE's operations in the appliance market prior to June, 2016 and therefore GE has a proprietary interest in the sought-after testimony.

GE contends that the information sought from the four nonparty witnesses is cumulative to topics that had been proposed by plaintiffs for GE's corporate representative's deposition (which was conducted in April).

Plaintiffs oppose this motion asserting there is no basis for quashing the subpoenas. Plaintiffs state that the individuals who were subpoenaed were all identified from public information and they are managers that handle the day to day business of GE and who are certain to have knowledge essential to plaintiffs' claims. Plaintiffs contend that the only way to get access to the design, manufacture, distribution and claims history information that every products liability plaintiff should be afforded is through depositions of GE employees.

At the proceedings plaintiffs' counsel stated that the four individuals from whom he seeks nonparty discovery were GE employees in 2013. He asserted that all four individuals had long-term GE experience.

The threshold for discovery set forth in CPLR 3101(a), discussed herein above, also applies to discovery demanded from a nonparty. In *Kapon v Koch* (23 NY3d 32), the Court of Appeals held that the subpoenaing party only needs to show that the nonparty discovery is "material and necessary" to the prosecution or defense of the action. Moreover, the Court of Appeals in *Kapon v Koch*, citing *Anheuser-Busch, Inc. v Abrams* (71 NY2d 327, 331-332 [1988]), held that "[a]n application to quash a subpoena should be granted '[o]nly where the futility of the process to uncover anything legitimate is inevitable or obvious' ... or where the information sought is 'utterly irrelevant to any proper inquiry'" (*Kapon v Koch*, 23 NY3d at 38).

Attached to plaintiffs' papers in opposition to GE's motion is what they identify as GE's public website entitled "Our Leadership." A review of that submission shows that only three of the four proposed witnesses are mentioned therein and none of the biographies explicitly states that any of these three proposed witnesses was employed by GE in 2012 when the subject dryer was manufactured or in 2013 when the subject fire occurred. Although the biography of the one nonparties states he has 24 years experience in design engineering it does not state that the experience is with GE. Furthermore, the one proposed witness is GE's general counsel. Plaintiffs' information regarding the fourth proposed nonparty allegedly comes from a LinkedIn website. Given the paucity of evidence that any one of these four individuals has relevant information regarding the specific design defect claims made against GE in this matter, GE's motion for a protective order should be granted. Nothing on the record demonstrates that the four subpoenas have been served upon the nonparties. Therefore that part of the motion seeking to quash them is moot.

In light of the foregoing it is:

ORDERED that plaintiffs' motion for an order compelling discovery is granted to the extent that if it has not already done so, GE is directed to provide to plaintiffs, on or before July 14, 2017, discovery responsive to the demands set forth in plaintiffs' notice dated July 19, 2016, as follows: a copy of the Document Management Policy (demand 34); documents regarding test procedures and results related to fire risk and containment in model PFDSS450EL and similar models (demands 36 and 37); design drawings and specifications (demands 40-42, 57); an installation specification which refers to the use of rigid exhaust venting (demand 45); a copy of the Underwriters' Laboratories Test Report and Test Record applicable to model PFDSS450EL and similar models (demand 65); and, further responses to demand 51, demand 56 (as to non-privileged emails), 61, 67 and 72. GE's responses should pertain to model PFDSS450EL and similar models and cover the time period from August 1, 2010 to the date of the accident; and it is further,

ORDERED that the branch of defendant's motion seeking a protective order denying plaintiffs' right to issue subpoenas to the four nonparties, Jeff Wood, Jerrod Kappler, Brett Begole and Daniel Rowley, in connection with this action, is granted; and it is further,

ORDERED that the other branches of defendant's motion are denied as moot; and it is further,

ORDERED that the parties are directed to appear for a conference in the Compliance

Part, Room 800 on July 19, 2017, at 9:30 a.m. as they were previously directed to do so; and it is further,

ORDERED that defense counsel serve a copy of this order with notice of entry upon all parties within seven days of entry.

Dated: White Plains, New York
June 27 , 2017

HON. JOAN B. LEFKOWITZ, J.S.C.

To:

Megan Kathleen Foster, Esq.
Clark & Fox
Plaintiffs' Attorneys
404 5th Avenue, 3rd Floor
New York, New York 10018
By NYSCEF

Thomas M. DeMicco, Esq.
Wilson, Elser, Moskowitz, Edelman & Dicker, L.L.P.
Attorneys for Defendant GE
1133 Westchester Avenue
White Plains, New York 10604
By NYSCEF

Cathleen A. Giannetta, Esq.
Law Offices of Tobias & Kuhn
Attorneys for Defendant Atlantic
100 William Street, 9th Floor
New York, New York 10038
By NYSCEF

cc: Compliance Part Clerk