SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. NANCY BANNON** **PART** **42**

Justice

----------X

MARINEL LOTREAN and MARIE LOTREAN,

Plaintiffs,

- v -

3M COMPANY f/k/a MINNESOTA MINING AND MANUFACTURING, ALBERT KEMPERLE, INC.,ATLANTIC RICHFIELD COMPANY, CHEVRON U.S.A. INC, CHEVRON PHILLIPS CHEMICAL COMPANY LP, E.I. DU PONT DE NEMOURS AND COMPANY, EXXON MOBIL CORPORATION, H. EDELSTEIN AUTOMOTIVE SUPPLY INC, PPG INDUSTRIES, INC, RUST-OLEUM CORPORATION SUED INDIVIDUALLY AND AS SUCCESSOR-IN-INTEREST TO RUST-OLEUM CORPORATION, SAFETY-KLEEN SYSTEMS, INC, SHELL OIL COMPANY, ZEP INC.,SUED INDIVIDUALLY AND AS SUCCESSOR-IN-INTEREST TO ACUITY SPECIALTY PRODUCTS, A DIVISION OF ACUITY BRANDS, INC.,SUCCESSOR-IN-INTEREST TO LIGHTING EQUIPMENT AND CHEMICAL DIVISIONS OF NATIONAL SERVICES INDUSTRIES, INC., d/b/a ZEP MANUFATURING

Defendants.

----------X

INDEX NO. 153361/2020

MOTION DATE N/A

MOTION SEQ. NO. 011

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 011) 179, 180, 181, 182, 183, 184, 185, 186, 187, 188, 189, 190, 191, 192, 193, 194, 195, 196, 197, 198, 213

were read on this motion to/for ORDER OF PROTECTION.

In this products liability action, plaintiff Marinel Lotrean seeks to recover damages suffered as a result of exposure to products containing the chemical compound known as benzene between 1979 and 1992, when he worked for Camera Auto Body in the State of Texas. The complaint alleges, *inter alia*, that the defendants were in the business of manufacturing, marketing, distributing and/or otherwise placing into the stream of commerce benzene-containing products, that the products were defective when they left the defendants' possession, custody and control, that the products were intended to be used in the manner in which they were used by the plaintiff and that the products were defective in that they caused

diseases such as cancer and were not safe for intended use. The complaint further alleges that the defendants were aware of the defect and danger of the product and failed to take the necessary precautions to warn or otherwise protect the plaintiff. The defendants answered and denied these allegations.

On October 13, 2021, plaintiff served demands which included a Notice to Admit, or Request for Admission, on the defendants, including defendants Safety-Kleen Systems, Inc. ("Safety-Kleen"), Exxon Mobil Corporation ("Exxon") and PPG Industries, Inc. ('PPG"), which consisted of three requests:

1. Please admit the defendant sold a solvent based parts washer to Camera Autobody during the time frame from 1978 through 1994 and maintained said parts washer.
2. Please admit that defendant sold and supplied hydrocarbon-based solvents to Camera Autobody during the time frame from 1978 through 1994 as part of the maintenance performed on the parts washer.
3. Please admit that defendant never provided a warning to Camera Autobody regarding the hazards of benzene and/or benzene contamination before the year 1994.

Several defendants objected to the Notice to Admit. On October 13, 2021, Safety-Kleen filed a motion pursuant to CPLR 3103 for a protective order striking the Notice to Admit, arguing that the admissions sought go "to the fundamental and material factual issues at the heart of this action." Co-defendants Exxon Mobil and PPG each filed a cross-motion for the same relief. The plaintiff opposed the motion and cross-motions. The plaintiff later discontinued the action against Safety-Kleen by stipulation dated July 28, 2022.

CPLR 3123 provides, in relevant part, that "a party may serve upon any other party a written request for admission by the latter . . . of the truth of any matters of fact set forth in the request, as to which the party requesting the admission reasonably believes there can be no substantial dispute at the trial and which are within the knowledge of such other party or can be ascertained by him upon reasonable inquiry" (CPLR 3123 [a]). "The purpose of a notice to admit is only to eliminate from the issues in litigation matters which will not be in dispute at trial. It is not intended to cover ultimate conclusions, which can only be made after a full and complete trial." Ramcharran v New York Airport Servs., LLC, 108 AD3d 610, 610 (2nd Dept. 2013) (internal quotation marks omitted). As a disclosure device, the purpose of Notices to

Admit is to "crystallize issues" (Hodes v City of New York, 165 AD2d 168, 170 [1st Dept 1991]), and "eliminate from contention factual matters which are easily provable and about which there can be no controversy. A Notice to Admit is not to be used as a "'substitute for existing discovery devices.'" Jet One Group, Inc. v Halcyon Jet Holdings, Inc., 111 AD3d 890, 892 (2nd Dept. 2013), quoting Singh v G & A Mounting & Die Cutting, 292 AD2d 516, 516 (2nd Dept. 2002) (some internal quotation marks omitted).

Here, the admissions sought by the plaintiff in the Notice to Admit improperly included matters in dispute that go to the heart of the controversy. See Jet One Group, Inc. v Halcyon Jet Holdings, Inc., supra at 893; Priceless Custom Homes, Inc. v O'Neill, 104 AD3d 664, 664-665 (2nd Dept. 2013); Zohar v Hair Club for Men, 200 AD2d 453, 454 (1st Dept. 1994). Given the circumstances of this case, including the nature of the injuries alleged, the lengthy time period over which exposure is alleged to have occurred, the passage of twenty years since the alleged exposure occurred and the large number of defendants alleged to have provided harmful products, the information sought in the Notice to Admit cannot reasonably be characterized as easily provable or uncontroverted factual matters. See Jet One Group, Inc. v Halcyon Jet Holdings, Inc., supra at 893. Moreover, the information sought in the Notice to Admit may be obtained through other discovery devices such as depositions or interrogatories, provided that a demand for a bill of particulars has not been served on these defendants (see CPLR 3130[1]), or general document exchanges. See Jet One Group, Inc. v Halcyon Jet Holdings, Inc., supra at 893. The plaintiff has not shown that the information sought has not and could not otherwise be obtained through document exchanges, depositions or interrogatories. Indeed, discovery is ongoing with the next conference scheduled for October 13, 2022. The court has considered the plaintiff's arguments in opposition and finds them to be unavailing.

Accordingly, and upon the foregoing papers, it is

ORDERED that, upon the parties' Stipulation of Dismissal Without Prejudice dated July 28, 2022, the action is discontinued, without prejudice and without costs, as against defendant Safety-Kleen, Inc., only, and it is further

ORDERED that the motion of defendant Safety-Kleen Systems, Inc. for a protective order pursuant to CPLR 3101 is deemed withdrawn as moot, and it is further

ORDERED that the cross-motions of defendants Exxon Mobil Corporation and PPG Industries, Inc. for a protective order pursuant to CPLR 3101 are granted and the Notice to Admit contained in the demand dated October 13, 2021, is stricken, and it is further

ORDERED that the remaining parties shall appear for a status conference on October 13, 2022, at 11:00 a.m., as previously scheduled.

This constitutes the Decision and Order of the court.

NANCY M. BANNON, J.S.C.
HON. NANCY M. BANNON

08/08/2022
DATE

CHECK ONE: [ ] CASE DISPOSED [X] NON-FINAL DISPOSITION

[x] GRANTED [ ] DENIED [ ] GRANTED IN PART [ ] OTHER