

IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

BEVERLY JAMES LOWE,	:	CONSOLIDATED UNDER
Plaintiff,	:	MDL 875
	:	
	:	Transferred from the
	:	Northern District of
	:	California
	:	(Case No. 08-04461)
v.	:	
	:	
GENERAL ELECTRIC COMPANY,	:	E.D. PA CIVIL ACTION NO.
ET AL.,	:	2:09-64063-ER
	:	
Defendants.	:	

**FILED**

JUN 25 2012

MICHAEL E. KUNZ, Clerk  
By \_\_\_\_\_ Dep. Clerk

ORDER

**AND NOW**, this **21st** day of **June, 2012**, it is hereby **ORDERED** that the Motion for Summary Judgment of Defendant Warren Pumps, LLC (Doc. No. 44) is **DENIED**.<sup>1</sup>

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<sup>1</sup> This case was transferred in March of 2009 from the United States District Court for the Northern District of California to the United States District Court for the Eastern District of Pennsylvania as part of MDL-875.

Plaintiff, Admiral Beverly James Lowe ("Plaintiff" or "Admiral Lowe"), alleges that he was exposed to asbestos while serving in the Navy during the period July of 1958 to 1964. Defendant Warren Pumps, LLC ("Warren" or "Warren Pumps") manufactured pumps. The alleged exposure pertinent to Defendant Warren Pumps occurred during Plaintiff's work at the Mare Island Naval Shipyard (Vallejo, California), Naval Submarine Base (New London, Connecticut), and the Electric Boat Division of General Dynamics Corporation (Groton, Connecticut), while overseeing new construction of the following submarines:

- USS Sargo
- USS Theodore Roosevelt
- USS Ethan Allen

Plaintiff asserts that he developed asbestosis as a result of asbestos exposure. He was deposed in 2009.

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Plaintiff brought claims against various defendants. Defendant Warren Pumps has moved for summary judgment, arguing that (1) it is entitled to summary judgment on grounds of the bare metal defense, (2) there is insufficient product identification evidence to establish causation with respect to its product(s), (3) Plaintiff's medical evidence is insufficient to establish causation, and (4) there is no evidence to support an award of punitive damages. The parties agree that maritime law applies.

## II. Legal Standard

### A. Summary Judgment Standard

Summary judgment is appropriate if there is no genuine dispute as to any material fact and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(a). "A motion for summary judgment will not be defeated by 'the mere existence' of some disputed facts, but will be denied when there is a genuine issue of material fact." Am. Eagle Outfitters v. Lyle & Scott Ltd., 584 F.3d 575, 581 (3d Cir. 2009) (quoting Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 247-248 (1986)). A fact is "material" if proof of its existence or non-existence might affect the outcome of the litigation, and a dispute is "genuine" if "the evidence is such that a reasonable jury could return a verdict for the nonmoving party." Anderson, 477 U.S. at 248.

In undertaking this analysis, the court views the facts in the light most favorable to the non-moving party. "After making all reasonable inferences in the nonmoving party's favor, there is a genuine issue of material fact if a reasonable jury could find for the nonmoving party." Pignataro v. Port Auth. of N.Y. & N.J., 593 F.3d 265, 268 (3d Cir. 2010) (citing Reliance Ins. Co. v. Moessner, 121 F.3d 895, 900 (3d Cir. 1997)). While the moving party bears the initial burden of showing the absence of a genuine issue of material fact, meeting this obligation shifts the burden to the non-moving party who must "set forth specific facts showing that there is a genuine issue for trial." Anderson, 477 U.S. at 250.

### B. The Applicable Law

The parties assert that maritime law is applicable. Whether maritime law is applicable is a threshold dispute that is a question of federal law, see U.S. Const. Art. III, § 2; 28 U.S.C. § 1333(1), and is therefore governed by the law of the

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circuit in which this MDL court sits. See Various Plaintiffs v. Various Defendants ("Oil Field Cases"), 673 F. Supp. 2d 358, 362 (E.D. Pa. 2009) (Robreno, J.). This court has previously set forth guidance on this issue. See Conner v. Alfa Laval, Inc., 799 F. Supp. 2d 455 (E.D. Pa. 2011) (Robreno, J.).

In order for maritime law to apply, a plaintiff's exposure underlying a products liability claim must meet both a locality test and a connection test. Id. at 463-66 (discussing Jerome B. Grubart, Inc. v. Great Lakes Dredge & Dock Co., 513 U.S. 527, 534 (1995)). The locality test requires that the tort occur on navigable waters or, for injuries suffered on land, that the injury be caused by a vessel on navigable waters. Id. In assessing whether work was on "navigable waters" (i.e., was sea-based) it is important to note that work performed aboard a ship that is docked at the shipyard is sea-based work, performed on navigable waters. See Sisson v. Ruby, 497 U.S. 358 (1990). This Court has previously clarified that this includes work aboard a ship that is in "dry dock." See Deuber v. Asbestos Corp. Ltd., No. 10-78931, 2011 WL 6415339, at \*1 n.1 (E.D. Pa. Dec. 2, 2011) (Robreno, J.) (applying maritime law to ship in "dry dock" for overhaul). By contrast, work performed in other areas of the shipyard or on a dock, (such as work performed at a machine shop in the shipyard, for example, as was the case with the Willis plaintiff discussed in Conner) is land-based work. The connection test requires that the incident could have "a potentially disruptive impact on maritime commerce," and that "the general character" of the "activity giving rise to the incident" shows a "substantial relationship to traditional maritime activity." Grubart, 513 U.S. at 534 (citing Sisson, 497 U.S. at 364, 365, and n.2).

#### Locality Test

If a service member in the Navy performed some work at shipyards (on land) or docks (on land) as opposed to onboard a ship on navigable waters (which includes a ship docked at the shipyard, and includes those in "dry dock"), "the locality test is satisfied as long as some portion of the asbestos exposure occurred on a vessel on navigable waters." Conner, 799 F. Supp. 2d at 466; Deuber, 2011 WL 6415339, at \*1 n.1. If, however, the worker never sustained asbestos exposure onboard a vessel on navigable waters, then the locality test is not met and state law applies.

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Connection Test

When a worker whose claims meet the locality test was primarily sea-based during the asbestos exposure, those claims will meet the connection test necessary for the application of maritime law. Conner, 799 F. Supp. 2d at 467-69. But if the worker's exposure was primarily land-based, then, even if the claims could meet the locality test, they do not meet the connection test and state law (rather than maritime law) applies. Id.

It is undisputed that the alleged exposure pertinent to Warren Pumps occurred aboard ships (specifically, a barge and various submarines). Therefore, this exposure was during sea-based work. See Conner, 799 F. Supp. 2d 455. Accordingly, maritime law is applicable to Plaintiff's claims against Warren Pumps. See id. at 462-63.

C. Bare Metal Defense Under Maritime Law

This Court has recently held that the so-called "bare metal defense" is recognized by maritime law, such that a manufacturer has no liability for harms caused by - and no duty to warn about hazards associated with - a product it did not manufacture or distribute. Conner v. Alfa Laval, Inc., No. 09-67099, - F. Supp. 2d -, 2012 WL 288364, at \*7 (E.D. Pa. Feb. 1, 2012) (Robreno, J.).

D. Product Identification/Causation Under Maritime Law

In order to establish causation for an asbestos claim under maritime law, a plaintiff must show, for each defendant, that "(1) he was exposed to the defendant's product, and (2) the product was a substantial factor in causing the injury he suffered." Lindstrom v. A-C Prod. Liab. Trust, 424 F.3d 488, 492 (6th Cir. 2005); citing Stark v. Armstrong World Indus., Inc., 21 F. App'x 371, 375 (6th Cir. 2001). This Court has also noted that, in light of its holding in Conner v. Alfa Laval, Inc., No. 09-67099, - F. Supp. 2d -, 2012 WL 288364 (E.D. Pa. Feb. 1, 2012) (Robreno, J.), there is also a requirement (implicit in the test set forth in Lindstrom and Stark) that a plaintiff show that (3) the defendant manufactured or distributed the asbestos-containing product to which exposure is alleged. Abbay v. Armstrong Int'l., Inc., No. 10-83248, 2012 WL 975837, at \*1 n.1 (E.D. Pa. Feb. 29, 2012) (Robreno, J.).

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Substantial factor causation is determined with respect to each defendant separately. Stark, 21 F. App'x. at 375. In establishing causation, a plaintiff may rely upon direct evidence (such as testimony of the plaintiff or decedent who experienced the exposure, co-worker testimony, or eye-witness testimony) or circumstantial evidence that will support an inference that there was exposure to the defendant's product for some length of time. Id. at 376 (quoting Harbour v. Armstrong World Indus., Inc., No. 90-1414, 1991 WL 65201, at \*4 (6th Cir. April 25, 1991)).

A mere "minimal exposure" to a defendant's product is insufficient to establish causation. Lindstrom, 424 F.3d at 492. "Likewise, a mere showing that defendant's product was present somewhere at plaintiff's place of work is insufficient." Id. Rather, the plaintiff must show "'a high enough level of exposure that an inference that the asbestos was a substantial factor in the injury is more than conjectural.'" Id. (quoting Harbour, 1991 WL 65201, at \*4). The exposure must have been "actual" or "real", but the question of "substantiality" is one of degree normally best left to the fact-finder. Redland Soccer Club, Inc. v. Dep't of Army of U.S., 55 F.3d 827, 851 (3d Cir. 1995). "Total failure to show that the defect caused or contributed to the accident will foreclose as a matter of law a finding of strict products liability." Stark, 21 F. App'x at 376 (citing Matthews v. Hyster Co., Inc., 854 F.2d 1166, 1168 (9th Cir. 1988) (citing Restatement (Second) of Torts, § 402A (1965))).

#### E. Punitive Damages

The Court has previously determined that the issue of punitive damages must be resolved at a future date with regard to the entire MDL-875 action and, therefore, all claims for punitive or exemplary damages are to be severed from the case and retained by the Court within its jurisdiction over MDL-875 in the Eastern District of Pennsylvania. See, e.g., Ferguson v. Lorillard Tobacco Co., Inc., No. 09-91161, 2011 WL 4915784, at n.2 (E.D. Pa. Mar. 2, 2011) (Robreno, J.) (citing In re Collins, 233 F.3d 809, 810 (3d Cir. 2000) ("It is responsible public policy to give priority to compensatory claims over exemplary punitive damage windfalls; this prudent conservation more than vindicates the Panel's decision to withhold punitive damage claims on remand."); In re Roberts, 178 F.3d 181 (3d Cir. 1999)).

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**III. Defendant Warren Pumps's Motion for Summary Judgment**

**A. Defendant's Arguments**

Product Identification / Causation / Bare Metal

Warren Pumps contends that Plaintiff's evidence is insufficient to establish that any product for which it is responsible caused Plaintiff's illness. Specifically, Warren Pumps contends that there is no evidence that the gaskets to which Plaintiff was exposed contained asbestos, or that the gaskets and packing associated with the Warren Pumps aboard the ship were manufactured or supplied by Warren Pumps (as opposed to being replacement parts manufactured and supplied by another entity).

In connection with its reply brief, Warren Pumps submitted objections to Plaintiff's declaration (including objections that it is a "sham affidavit"), the declaration of Plaintiff's experts Charles Ay, Dr. David Schwartz, and Dr. Herman Bruch.

No Medical Evidence of Causation

Warren Pumps asserts that Plaintiff's medical evidence is "woefully deficient" and does not establish any causal link between Decedent's illness and asbestos from a Warren product.

Punitive Damages

Warren Pumps argues that at least partial summary judgment is warranted on Plaintiff's punitive damages claims because Plaintiff has failed to identify any evidence that Defendant's conduct was malicious, oppressive, or recklessly indifferent in any manner.

**B. Plaintiff's Arguments**

Product Identification / Causation / Bare Metal

Plaintiff contends that he has identified sufficient product identification/causation evidence to survive summary judgment. In support of this assertion, Plaintiff cites to the following evidence:

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• Declaration of Plaintiff

Plaintiff's declaration states: "while serving in the Navy, overseeing the new construction of submarines as described above, I observed as others removed original packing from Warren Pumps aboard ships between approximately 5 and 30 times in my close proximity. I knew they were Warren pumps because I saw the name 'Warren' on the pumps. These pumps were new Warren pumps that had been installed with the original packing from the manufacturer inside the stem, but which failed during sea trials, and were reported on the 'weep' list, necessitating repairs and removal of this original packing. During my deposition I was not asked about the circumstances under which I observed the removal of original packing from Warren pumps. Had I been asked I would have testified that I observed removal of original packing in Warren Pumps beginning while I served as an Engineering Officer at Mare Island Naval Shipyard, and throughout the remainder of my career with the Navy as described above. . . . I observed as the original packing was removed from the Warren Pump and replacement packing was installed. When I observed the removal of the packing original to the Warren Pumps, I observed visible dust. Because of the limited space within a submarine, when I observed the re-packing of pumps aboard these ships, I was not more than 10 feet away from the individual repacking of the pump. I did not wear a mask during this work. . . . Due to my extensive training and experience in overseeing the new construction and overhaul of submarines in the Navy, I became aware of what asbestos containing packing looked like and why it would be used in certain applications. Based upon my knowledge, training and experience, it is my opinion that the packing that I observed being removed from the Warren pumps as described above was asbestos containing."

(Pl. Ex. A, Doc. No. 45-4, ¶¶ 15-18.)

- Declaration of Expert Charles Ay  
Mr. Ay's declaration provides the following pertinent testimony:

17. I have inspected valves and pumps that were used in a variety of industries, including pumps that were used aboard Naval vessels. Almost all of the pumps, with the exception of some oil products, incorporated asbestos-containing gaskets and packing. The asbestos is used because of the pressure, not because of the temperature of the contents. I have personally removed pumps or valves that were associated with water wells, and those valves were packed with asbestos packing and the gaskets were all asbestos. I have tested a number of gaskets and packing materials associated with submersible pumps and have found almost exclusively asbestos.

18. ... Using this method of analysis, I have analyzed samples of packing and gaskets from marine pumps which operated under high pressure and high pressure and high temperature and the results have consistently been positive for the presence of asbestos. Based upon my research and testing, I can state that, prior to the 1980s, virtually all packing and gaskets incorporated into marine pumps that operated under high pressure and high temperature contained asbestos.

21. Also, in my experience, product catalogs and manuals of asbestos-containing products are a reliable and authoritative source of information on the brands and descriptions of asbestos-containing products. I have reviewed Warren Pumps manual for its main condenser circulating pumps, main condensate pumps, and lubricating oil service pumps aboard DE51 Class Escort Vessels. This

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manual indicates that Warren Pumps main condenser circulating pumps incorporated five rings of 3/8" square metallic plastic packing, which was John Crane-brand Super Seal #1 packing. On the fold-out specifications page, Warren Pumps indicates that the main condenser circulation pump also includes a gasket made from "asbestos sheet." The manual also states that the Warren Pumps main condensate pump incorporates five rings of 3/8" square metallic plastic packing, which was John Crane Super Seal #1 packing. The fold-out specifications page for the main condensate pumps indicates that Warren Pumps include a gasket made from "asbestos sheet." The fold-out specifications page for the Warren Pumps lubricating oil service pump incorporated "John Crane S.S. #1 5/16" plastic metallic rod packing. Relevant excerpts from the Warren Pumps catalog is attached as Exhibit 3.

22. I am familiar with the types of brand and type of packing that Warren Pumps incorporated into their pumps according to its manual. I have encountered John Crane, In. Super Seal #1 and similar types of packing while working in the field of asbestos abatement. I have seen documents, including catalogs from John Crane, Inc., which indicate that John Crane, Inc.'s Super Seal #1 packing is "manufactured of white metal particles, graphite, binder, and special long fibre asbestos." Relevant excerpts from John Crane, Inc.'s catalog are attached as Exhibit 4.

23. The above documents corroborate and substantiate my belief that all high temperature and high pressure pumps, such as those pumps the client describes in his declaration, incorporated asbestos-containing gaskets and packing during the relevant time period.

24. I have reviewed the declaration of Beverly James Lowe in Support of Plaintiff's Opposition to Warren Pumps, LLC's Motion for Summary Judgment, in which he states that he observed original packing removed from Warren Pumps associated with the trim and drain systems and bilge pumps on submarines between five and thirty times in his career with the Navy between 1958 and 1964. Attached as Exhibit 5. Admiral Lowe states that he was within approximately 10 feet of the individuals removing this packing, and saw visible dust when the packing was removed from the Warren Pumps pumps. Admiral Lowe opines that this packing was asbestos containing. Admiral Lowe states that he was not wearing a mask when this occurred.

25. Based on my asbestos training, education, and experience gained from working around other trades as an insulator, personal testing of the type of packing and gasket material in marine pumps similar to the Warren Pumps pumps described in Admiral Lowe's declaration, review of the literature and documents regarding the packing and gaskets in different types of pumps manufactured by Warren Pumps, career in asbestos detection and abatement, and Admiral Lowe's declaration in which he described observing removal of packing original to Warren Pumps pumps which created visible dust, it is my opinion that the original packing that Admiral Lowe observed being removed from Warren Pumps pumps aboard submarines in the 1950s and 1960s more likely than not contained asbestos. It is also my opinion that Admiral Lowe would have been exposed to respirable asbestos fibers above ambient levels while observing others removing the packing that had been originally installed by Warren Pumps.

(Pl. Ex. B, Doc. No. 45-5, ¶¶ 17-25.)

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- Declaration of Expert Herman Bruch, M.D.  
Dr. Bruch states in his declaration that, with respect to the asbestos exposures related to Warren Pumps that were testified about by Plaintiff, every occupational exposure to asbestos above background levels, given sufficient minimum latency, was a substantial contributing factor in the development of his disease.

(Pl. Ex. C, Doc. No. 45-7, ¶¶ 15-18.)

#### No Medical Evidence of Causation

Plaintiff contends that his medical evidence is sufficient to establish causation. He cites to evidence from Dr. Herman Bruch and Dr. David Schwartz.

Citing to a decision from the First Circuit, Plaintiff also contends that an expert report need only cover "the expert's qualifications, the **gist** of his opinion, and the sources of information underlying that opinion." Lohnes v. Level 3 Communications, Inc., 272 F.3d 49, 59 (1st Cir. 2001).

#### Punitive Damages

Plaintiff does not respond to Defendant's argument regarding punitive damages.

### **C. Analysis**

#### Admissibility of Plaintiff's Evidence

As a preliminary matter, the Court considers Defendant's objections to Plaintiff's evidence:

##### (i) Plaintiff's Declaration

Warren Pumps contends that Plaintiff's declaration should be deemed inadmissible because (1) it contradicts prior deposition testimony, (2) it contradicts discovery responses, and (3) it was served after the close of discovery. These arguments are considered in turn:

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First, the Court has reviewed the various deposition excerpts submitted by Defendant and has compared those with his declaration. Plaintiff testified at his deposition about working around Warren pumps (while packing was being changed) on five (5) to thirty (30) occasions. He was not questioned as to whether the gaskets and packing were original. The Court concludes that the deposition testimony submitted by Defendant does not contradict Plaintiff's declaration. Therefore, Plaintiff's declaration is not a "sham affidavit" and is not inadmissible on that basis.

Second, Warren Pumps has not submitted the discovery responses that it contends are contradicted by Plaintiff's declaration. Therefore, Defendant has not established that there is any contradiction between Plaintiff's declaration and his discovery responses. Accordingly, Plaintiff's declaration is not inadmissible on this basis.

Lastly, there is nothing impermissible about Plaintiff submitting a declaration to oppose Defendant's motion - even though it is, as Defendant argues, a "new" declaration whose sole purpose is to oppose the motion. See Fed. R. Civ. P. 56(c)(1)(A). Accordingly, Plaintiff's declaration is not inadmissible on this basis.

(ii) Declaration of Expert Charles Ay

Warren Pumps challenges the testimony of expert Charles Ay, making various objections. The Court has determined that it is not necessary to rule on the admissibility of Mr. Ay's testimony. As the Court explains further herein, Plaintiff's own declaration constitutes sufficient product identification evidence to survive summary judgment, such that Plaintiff need not rely on Mr. Ay's declaration for that purpose. Whether Mr. Ay's testimony is admissible for purposes of trial is a determination that is best made by the trial judge. Therefore, the Court declines to reach this issue.

(iii) Declaration of Expert David Schwartz, M.D.

Warren Pumps challenges the testimony of expert David Schwartz, M.D., making various objections. The Court has determined that it is not necessary to rule on the admissibility of Dr. Schwartz's testimony. Plaintiff has identified sufficient evidence of product identification to survive summary judgment without the testimony of Dr. Schwartz (with solely Plaintiff's

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own declaration). As the Court explains further herein, Plaintiff has identified sufficient medical causation evidence to survive summary judgment without the testimony of Dr. Schwartz (with the expert declaration of Dr. Herman Bruch, below). Whether Dr. Schwartz's testimony is admissible for purposes of trial is a determination that is best made by the trial judge. Therefore, the Court declines to reach this issue.

(iv) Declaration of Expert Herman Bruch, M.D.

Warren Pumps challenges the testimony of expert Herman Bruch, M.D., making various objections. With respect to his testimony regarding medical causation, Defendant contends that Dr. Bruch's testimony lacks foundation. However, because Dr. Bruch examined, interviewed, and personally diagnosed Plaintiff, his testimony does not lack foundation as Defendant contends. Defendant also contends that Dr. Bruch's declaration should be excluded because it is "new" evidence that was not previously produced. However, because Plaintiff disclosed Dr. Bruch as an expert, his testimony is not inadmissible on that basis. Rather, Plaintiff is permitted to submit Dr. Bruch's declaration to oppose Defendant's motion - even though it is, as Defendant argues, a "new" declaration whose sole purpose is to oppose the motion. See Fed. R. Civ. P. 56(c)(1)(A). Accordingly, Plaintiff's declaration is not inadmissible on this basis.

No Medical Evidence of Causation

For the reasons explained above, Dr. Bruch's declaration is not inadmissible and constitutes medical evidence of causation. Accordingly summary judgment in favor of Defendant is not warranted on this basis.

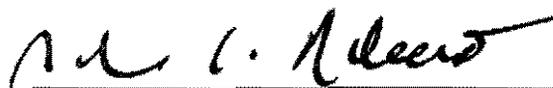
Having addressed Defendant's objections to Plaintiff's evidence, the Court now addresses the sufficiency of Plaintiff's evidence for establishing causation with respect to Defendant Warren Pumps.

Product Identification / Causation / Bare Metal

Plaintiff alleges that he was exposed to asbestos from original packing supplied by Defendant Warren Pumps. There is evidence that Plaintiff was exposed to original packing supplied by Warren Pumps, that it contained asbestos, that its removal created dust, which Plaintiff inhaled, and that this occurred on numerous occasions (as many as thirty (30) separate occasions).

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AND IT IS SO ORDERED.

  
EDUARDO C. ROBRENO, J.

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Therefore, a reasonable jury could conclude from the evidence that Plaintiff was exposed to asbestos from original packing supplied by Defendant such that it was a "substantial factor" in the development of his illness. See Lindstrom, 424 F.3d at 492; Stark, 21 F. App'x at 376; Abbey, 2012 WL 975837, at \*1 n.1. Accordingly summary judgment in favor of Defendant is not warranted on grounds of insufficient evidence of product identification/causation.

Punitive Damages

The Court has previously determined that the issue of punitive damages must be resolved at a future date with regard to the entire MDL-875 action and, therefore, all claims for punitive or exemplary damages are to be severed from the case and retained by the Court within its jurisdiction over MDL-875 in the Eastern District of Pennsylvania. See, e.g., Ferguson, 2011 WL 4915784, at n.2. Accordingly, Defendant's motion for summary judgment as to claims for punitive damages is denied as moot.