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

IN RE: ASBESTOS PRODUCTS LIABILITY LITIGATION (NO. VI)	:	Civil Action NO. MDL 875
This document relates to all cases listed on the attached Exhibit A	:	

ORDER

AND NOW, this 26th day of July, 2012, upon consideration of Defendants' Motion to Quash Plaintiffs' Second Subpoena Issued to Dr. Daniel Henry (01-MD-875 Doc. 8600) ("Defs' Mot."), plaintiffs' response (01-MD-875 Doc. 8613), defendants' reply (10-61461 Doc. 88), plaintiffs' sur-reply (01-MD-875 Doc. 8663), and counsel's arguments during the July 13, 2012 hearing in Philadelphia, it is hereby **ORDERED** that the motion is **GRANTED in part and DENIED in part:**

(1) defendants' plea to quash document requests one and two of the subpoena is **GRANTED** and the requests are **QUASHED** in that CVLO does not dispute that these documents have been previously produced;

(2) defendants' pleas to quash document requests three through five of the subpoena are **DENIED** in that: (a) Dr. Henry must either produce the relevant materials in his possession, custody, or control relating to the 2010 Dr. McElroy study or Dr. Henry and the defendants must affirm that the study was not utilized in the current study and will not be referenced in defendants' Daubert motion; and (b) Dr. Henry must either produce the relevant B-reads of the control films utilized in the W.R. Grace litigation or affirm that he is not able to reasonably obtain the B-reads. Dr. Henry and the defendants shall provide this discovery

to CVLO **by August 9, 2012**;

(3) defendants' plea to quash document requests six through nine of the subpoena are **GRANTED** and the requests are **QUASHED** as they are substantially similar to requests which we previously quashed on August 29, 2011.[1]

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[1] Preliminarily, we reject CVLO's contention that the defendants lack standing to pursue this motion on behalf of Dr. Henry who is a third-party, as defendants' interests could be negatively affected by the outcome of this discovery. 8A Fed. Prac. & Proc. Civ. § 2035; see Kida v. EcoWater Systems LLC, 10-4319, 2011 WL 1883194, at *2 (E.D. Pa. May 17, 2011) (recognizing that courts routinely consider a party's motions to quash subpoenas addressed to that party's expert witnesses). Moreover, denying the motion on this ground only to have it re-filed by Dr. Henry's counsel would not serve the interests of justice or the parties in light of the compact discovery deadlines set in these cases.

The May 9, 2012 subpoena CVLO issued to Dr. Henry lists nine categories of documents for production. Defendants contend that Dr. Henry has already produced all of the relevant documents regarding the first five requests. Requests one and two call for attendant documents to the X-rays and B-reads used in Dr. Henry's study for this litigation. Requests three and five call for documents concerning Dr. Henry and ChemRisk. Request four calls for B-reads of control films from the W.R. Grace litigation. See May 9, 2012 subpoena (Defs' Mot., Ex. B.). CVLO responds only that Dr. Henry has not provided the B-reads of the control films utilized in the W.R. Grace litigation or all of the documents regarding Dr. Henry and ChemRisk, specifically, documents related to a study of a Dr. McElroy allegedly performed in 2010. Defendants answer that Dr. Henry testified at his September 9, 2011 deposition that he did produce all of the records he had, including those related to ChemRisk, and that he does not have the B-reads from the W.R. Grace proceedings. Sept. 9, 2011 Dep. of Dr. Henry, pp. 194:3-8; 13:11-16:14 (Defs' Mot., Ex. L).

Regarding the McElroy study, we held during an August 29, 2011 telephonic oral argument on a previous subpoena issued to Dr. Henry that CVLO was entitled to all documents that would be used in connection with defendants' forthcoming Daubert motion. Aug. 29, 2011 Hr'g Tr., p. 22:1-7 (01-MD-875 Doc. 8107). To the extent that the McElroy study was utilized in Dr. Henry's current study or defendants will rely on the McElroy study in their Daubert motion, Dr. Henry must produce any related materials in his possession. Regarding the W.R. Grace B-reads, pursuant to Fed. R. Civ. P. 45(a)(1)(A)(iii), Dr. Henry must produce relevant documents in his "possession, custody, or control", which would include the B-reads at issue even if Dr. Henry does not actually have them but has the "legal right or ability to obtain [them] from another source upon demand." Mercy Catholic Med. Cent. v. Thompson, 380 F.3d 142, 160 (3d Cir. 2004).

Thus, document requests one and two of the subpoena have been quashed in that CVLO does not dispute that these documents have been previously produced. However, defendants' pleas to quash requests three through five have been denied in that: (1) Dr. Henry must either produce the relevant materials in his possession, custody, or control relating to the Dr. McElroy study or Dr. Henry and the defendants must affirm that the study was not utilized in the current

(continued...)

It is hereby further **ORDERED** that defendants' requests for fees is **DENIED**.[2]

BY THE COURT:

/s/ David R. Strawbridge
DAVID R. STRAWBRIDGE
UNITED STATES MAGISTRATE JUDGE

(...continued)
study and will not be referenced in defendants' Daubert motion; and (2) Dr. Henry must either produce the relevant B-reads of the control films utilized in the W.R. Grace litigation or affirm that he is not able to reasonably obtain the B-reads. Dr. Henry and the defendants shall provide this discovery to CVLO by August 9, 2012.

Defendants claim that this court previously rejected requests for the information sought in current document requests six through nine during the August 29, 2011 argument on the previous subpoena issued to Dr. Henry. Request six of the current subpoena calls for payment records regarding certain law firms from 1980 to the present. Request seven calls for all B-reads from 1980 to the present. Request eight calls for all transmittal documents concerning services provided to various law firms from 1980 to the present. Request nine calls for all documents related to B-reading performed for legal consultation in asbestos matters. CVLO does not dispute that we quashed very similar requests on August 29, 2011. Instead, CVLO argues that the requests are now narrower because they have a 32 year temporal limitation and are specifically limited to asbestos cases.

During the August 29, 2011 argument, we made clear that CVLO was entitled to all of Dr. Henry's documents regarding the study in this litigation and in the W.R. Grace litigation, both of which will likely be utilized in defendants' Daubert motion regarding Drs. Schonfeld, Anderson, and Sadek. Aug. 29, 2011 Hr'g Tr., pp. 8:11-11:21; 21:12-22:1 (01-md-875, Doc. 8107). However, we also held that CVLO was not entitled to all other documents unrelated to the two studies such as Dr. Henry's: (1) records concerning work done for certain law firms; (2) documents indicating the results of any X-ray testing; and (3) documents and correspondences relating to testing, screening or diagnosing people. Id., pp. 11:22-12:2; 15:8-25; 18:11-19:13. The current subpoena requests six through nine fall squarely into these prohibited categories. Moreover, a 32 year limitation on the production time frame does not make these new requests any more relevant than the old requests. Therefore, requests six through nine have been quashed.

[2] While it is unfortunate that CVLO has chosen to re-submit certain subpoena requests we have previously quashed, we do not find the bad faith necessary for sanctions under 28 U.S.C. § 1927. Grider v. Keystone Health Plan Cent., Inc., 580 F.3d 119, 142 (3d Cir. 2009) (holding that sanctions arising from Section 1927 may not be imposed absent a finding that counsel's conduct resulted from bad faith, rather than misunderstanding, bad judgment, or well-intentioned zeal).