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

PAULA ROBERTSON,	:	CONSOLIDATED UNDER
	:	MDL 875
Plaintiff,	:	
	:	Transferred from the
	:	Northern District of
v.	:	California
	:	(Case No. 08-04490)
CARRIER CORPORATION ET AL.,	:	E.D. PA CIVIL ACTION NO. 2:09-64068-ER
	:	
Defendants.	:	

O R D E R

AND NOW, this **22ND** day of **June, 2012**, it is hereby **ORDERED** that the Motion for Summary Judgment of Defendant Carrier Corporation (Doc. No. 94) is **GRANTED**.[1]

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[1] 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 Paula Robertson is the successor-in-interest to and wrongful death heir of John Robertson ("Decedent" or "Mr. Robertson"). Plaintiff alleges that Decedent was exposed to asbestos while serving in the Navy during the period April of 1968 to September of 1969. Defendant Carrier Corporation ("Carrier") manufactured compressors. The alleged exposure pertinent to Defendant Carrier occurred during work aboard:

- USS Enterprise (CVAN-65)

Plaintiff asserts that Decedent developed lung cancer as a result of asbestos exposure. He was deposed in October 2010.

Plaintiff brought claims against various defendants. Defendant Carrier has moved for summary judgment, arguing that (1) Plaintiff cannot establish that Defendant (or any product of Defendant's) caused Decedent's illness, and (2) it is immune from liability by way of the government contractor defense.

The parties do not make clear what law they contend applies.

I. 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

1. Government Contractor Defense (Federal Law)

Defendant's motion for summary judgment on the basis of the government contractor defense is governed by federal law. In matters of federal law, the MDL transferee court applies the law of the circuit where it sits, which in this case is the law of the U.S. Court of Appeals for the Third Circuit. Various Plaintiffs v. Various Defendants ("Oil Field Cases"), 673 F. Supp. 2d 358, 362-63 (E.D. Pa. 2009)(Robreno, J.).

2. State Law Issues (Maritime versus State Law)

The parties do not make clear what law they contend applies. Where a case sounds in admiralty, application of a state's law (including a choice of law analysis under its choice of law rules) would be inappropriate. Gibbs ex rel. Gibbs v. Carnival Cruise Lines, 314 F.3d 125, 131-32 (3d Cir. 2002). Therefore, if the Court determines that maritime law is applicable, the analysis ends there and the Court is to apply maritime law. See id.

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 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.

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 Carrier occurred aboard a ship during Decedent's service in the Navy. 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 Carrier. 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.).

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. Government Contractor Defense

To satisfy the government contractor defense, a defendant must show that (1) the United States approved reasonably precise specifications for the product at issue;

(2) the equipment conformed to those specifications; and (3) it warned the United States about the dangers in the use of the equipment that were known to it but not to the United States. Boyle v. United Technologies Corp., 487 U.S. 500, 512 (1988). As to the first and second prongs, in a failure to warn context, it is not enough for defendant to show that a certain product design conflicts with state law requiring warnings. In re Joint E. & S.D.N.Y. Asbestos Litig., 897 F.2d 626, 630 (2d Cir. 1990). Rather, the defendant must show that the government "issued reasonably precise specifications covering warnings-specifications that reflect a considered judgment about the warnings at issue." Hagen v. Benjamin Foster Co., 739 F. Supp. 2d 770, 783 (E.D. Pa. 2010)(Robreno, J.)(citing Holdren v. Buffalo Pumps, Inc., 614 F. Supp. 2d 129, 143 (D. Mass. 2009)). Government approval of warnings must "transcend rubber stamping" to allow a defendant to be shielded from state law liability. 739 F. Supp. 2d at 783. This Court has previously cited to the case of Beaver Valley Power Co. v. Nat'l Engineering & Contracting Co., 883 F.2d 1210, 1216 (3d Cir. 1989), for the proposition that the third prong of the government contractor defense may be established by showing that the government "knew as much or more than the defendant contractor about the hazards" of the product. See, e.g., Willis v. BW IP Int'l, Inc., 811 F. Supp. 2d 1146 (E.D. Pa. Aug. 29, 2011)(Robreno, J.); Dalton v. 3M Co., No. 10-64604, 2011 WL 5881011, at *1 n.1 (E.D. Pa. Aug. 2, 2011) (Robreno, J.). Although this case is persuasive, as it was decided by the Court of Appeals for the Third Circuit, it is not controlling law in this case because it applied Pennsylvania law. Additionally, although it was decided subsequent to Boyle, the Third Circuit neither relied upon, nor cited to, Boyle in its opinion.

F. Government Contractor Defense at Summary Judgment Stage

This Court has noted that, at the summary judgment stage, a defendant asserting the government contractor defense has the burden of showing the absence of a genuine dispute as to any material fact regarding whether it is entitled to the government contractor defense. Compare Willis, 811 F. Supp. 2d at 1157 (addressing defendant's burden at the summary judgment stage), with Hagen, 739 F. Supp. 2d 770 (addressing defendant's burden when Plaintiff has moved to remand). In Willis, the MDL Court found that defendants had not proven the absence of a genuine dispute as to any material fact as to prong one of the Boyle test since plaintiff had submitted affidavits controverting

defendants' affidavits as to whether the Navy issued reasonably precise specifications as to warnings which were to be placed on defendants' products. The MDL Court distinguished Willis from Faddish v. General Electric Co., No. 09-70626, 2010 WL 4146108 at *8-9 (E.D. Pa. Oct. 20, 2010)(Robreno, J.), where the plaintiffs did not produce any evidence of their own to contradict defendants' proofs. Ordinarily, because of the standard applied at the summary judgment stage, defendants are not entitled to summary judgment pursuant to the government contractor defense.

II. Defendant Carrier's Motion for Summary Judgment

A. Defendant's Arguments

Exposure / Causation / Product Identification

Carrier argues that Plaintiff cannot establish that Decedent's illness was caused by any product for which Carrier is liable. Specifically, Carrier argues that the only pieces of Carrier equipment aboard the USS Enterprise were two (2) turbine-driven compressors initially designed and built to be used with the ship's aircraft catapult system, then converted to be used with the aircraft cooling and jet engine starting system. Carrier contends that these units were located at Frame 110 on the part and starboard sides of the ship on its "Upper Level" and were never used with the ship's air-conditioning and refrigeration equipment. In support of this argument, Defendant provides a declaration of U.S. Navy Commander Thomas McCaffery.

In connection with its reply brief, Carrier submitted objections to the declaration of Plaintiff's expert, Charles Ay.

Government Contractor Defense

Carrier asserts the government contractor defense, arguing that it is immune from liability in this case, and therefore entitled to summary judgment, because the Navy exercised discretion and approved reasonably precise specifications for the products at issue, Defendants provided warnings that conformed to the Navy's approved warnings, and the Navy knew about the hazards of asbestos. In asserting this defense, Carrier relies upon the affidavit of Commander McCaffrey.

B. Plaintiff's Arguments

Exposure / Causation / Product Identification

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

- Deposition Testimony of Decedent
  Decedent testified that he worked aboard the USS Enterprise in 1968 and 1969, as a petty officer in charge of all the air conditioning and refrigeration equipment on the ship. He testified that, as part of this job, he did "all repairs, all troubleshooting" on the air conditioning and refrigeration equipment.

  Decedent testified that he worked on Carrier compressors and that this worked required removing head gaskets and housing gaskets. He testified that the gaskets were the original gaskets supplied by the manufacturer and that he knew this because (1) the maintenance records for the equipment indicated that they were original - and the maintenance records on this "showboat" were "exact," and (2) at the time of his service aboard the ships, the gaskets were still within the expected life span of the original gaskets that would have been supplied in the compressor when distributed by the manufacturer. He also testified that use of the gasket supplied by the manufacturer was critical on this type of equipment because it was necessary to have the "exact clearance" that the manufacturer called for.

  Decedent testified that removal of the gaskets created dust, which he breathed. He testified that he usually used a scraper or a wire brush to remove the gaskets, and he explained that this was sometimes necessary "[b]ecause there's a tremendous amount of heat. Those air compressors are air cooled,

so the heat of combustion is extensive on those big refrigeration compressors." He testified that the process typically took fifteen (15) minutes to one (1) hour. He testified that he removed housing gaskets on refrigeration units on the USS Enterprise twice, and that he removed head gaskets four times.

(Pl. Ex. 1, Doc. No. 108-1, pp. 50-51, 128-130, and 148-161.)

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

17. I am familiar with the process of removing and installing gaskets from combustion engines, including during vehicular repair and maintenance work that I personally performed, and owner and repair manuals that I read and reviewed. I have personally tested numerous types and brands of gaskets, including head, intake manifold and exhaust manifold gaskets. **My testing revealed that the majority of the engine gasket material, including head gaskets, from the 1950s, 1960s, 1970s, and into the 1980s, contained asbestos.** These types of gaskets contained asbestos during these time periods due to the high temperature and high pressure environments in which they were used.

18. I have reviewed Appendix F to "Regulatory Impact Analysis of Controls on Asbestos and Asbestos Products," Final Report, January 19, 1989, prepared for the EPA by ICF. I have specifically reviewed the section on automotive gaskets, which states asbestos-containing gaskets were usually used for exhaust systems and turbo chargers, cylinder head and intake manifolds, and carburetors and transmissions. **The report states that even as late as 1989, non-asbestos substitute gaskets only had a 50%**

market share. This supports my opinion that the gaskets, including the head gaskets that decedent removed from the CARRIER-brand compressors during the late-1960s and early-1970s aboard the USS Enterprise, more likely than not contained asbestos.

19. I have reviewed the following United States patents, all of which evidence the routine use of asbestos in various types of engine gaskets: Patent No. 3,532,349, "No Retorque Cylinder Head Gasket," granted October 6, 1970, assigned to Dana Corporation; Patent No. 3, 738,558, "Thin Laminated Gasket," granted June 12, 1973, assigned to Felt Products Mfg. Co.; Patent No. 4,126,318, "Gasket Assembly With Lock Plate," granted November 21, 1978, assigned to Dana Corporation.

20. In the course of my work as an asbestos consultant, I routinely conduct product research and review discovery responses of companies involved in asbestos litigation. I have reviewed excerpts from CARRIER CORPORATION's Responses to General Order No. 129 Interrogatories, dated November 18, 2002. . . . In my experience, admissions of the manufacturers of asbestos-containing products in response to discovery requests in asbestos litigation are a reliable and authoritative source of information on the brands and descriptions of asbestos-containing products. In my line work, these discovery responses are generally acted upon as genuine and reliable by experts and consultants, such as myself. I note that these Responses indicate that CARRIER CORPORATION continued to incorporate asbestos-containing components in CARRIER units through the early 1960s, that such components included asbestos-containing gaskets and some CARRIER CORPORATION units may have contained asbestos-containing gaskets after that date.

21. I have reviewed the deposition given by decedent, John Robertson in this case. In his deposition, Mr. Robertson stated that he served aboard th USS ENTERPRISE as a Petty Officer from July 1968 until January 1970. Mr. Robertson worked on air compressors which he testified he knew were CARRIER-brand because they had "Carrier" written on them in raised letters as well as on a little name tag attached to it that said the manufacturer's name. Deposition of John Robertson p. 148: 21-24; 149:16-23.

Mr. Robertson identified work with these compressors where he had to disturb and remove the head gaskets. Id. at p. 130:4-15. Decedent testified that he knew the gaskets he was removing were original gaskets due to the compressor still being within its regular life expectancy and because the maintenance record showed that this equipment had not been previously repaired and decedent testified that when he worked on a piece of equipment, he always reviewed the maintenance record to see when and if this particular work had been done previously." Id. at p. 161:1-21; p. 148:3-14. Decedent testified that the gaskets were on these air-cooled compressors which created a "tremendous amount of heat" due to the combustion. Id. at p. 152:20-25.

Decedent testified that when he removed these head gaskets he used a scraper or wire brush to get the surface "perfectly clean" due to a limited amount of clearance. Id. at p. 152:3-20 - 153:2. Decedent stated that when he removed these CARRIER-supplied gaskets, it took him anywhere from 15 minutes to an hour to scrape off the gasket and then use a wire brush to get off what he could not with the scraper and that he was "always breathing that dust . . . that [he was] throwing up from the old gaskets." Id. at pp. 40:16-51:3.

22. Based on my asbestos training, education, and experience in the trades as an insulator, personal testing of gaskets and other materials for the presence of asbestos, review of the literature, career in asbestos detection and abatement, my knowledge of the work performed during United States Naval overhauls and conversions and decedent's description of these gaskets in high-temperature applications, **it is my opinion that the gaskets as described by decedent, John Robertson more likely than not were asbestos-containing materials.**

(Pl. Ex. 3, Doc. No. 108-1 ¶¶ 17-22 (emphasis added).)

- Declaration of Expert John Fening

John Fening was a machinist mate in the Navy during the period 1972 to 1994. Mr. Fening opines in his declaration that the information contained in maintenance manuals aboard the USS Enterprise would have provided a "highly reliable" account of the maintenance history of equipment on the ship. He concludes as follows: "Based on the fact that less than 7 years had passed between the installation of these Carrier-brand compressors and decedent's service aboard the ship, and decedent's testimony that the equipment's maintenance records showed that this work had never been done to this equipment, it is more likely than not that the gaskets decedent removed from the Carrier-brand compressors were the original manufacturer-installed gaskets. My opinion is further supported by decedent's own description of the gaskets he encountered and his understanding that they were original to the compressors."

(Pl. Ex. 2, Doc. No. 108-1, ¶¶ 5 and 8.)

- Discovery Responses of Defendant
  Plaintiff points to discovery responses of Defendant from another case, which Plaintiff contends indicate that Carrier admits that it (1) engaged in the supply, distribution, marketing, sale and manufacturing of asbestos-containing products, (2) marketed its products under the "Carrier" brand name, (3) continued to incorporate asbestos-containing components in Carrier units until at least the early 1960s, and (4) included asbestos-containing gaskets in some Carrier units.

  (Pl. Ex. 4, Doc. No. 108-3.)

Government Contractor Defense

Plaintiff argues that summary judgment in favor of Defendant on grounds of the government contractor defense is not warranted because there are genuine issues of material fact regarding its availability to Defendant. Plaintiff contends that Defendant has (1) not produced its contract with the government or otherwise proven that it was a government contractor, and (2) not demonstrated a genuine significant conflict between state tort law and fulfilling its contractual federal obligations (i.e., that its contractual duties were "precisely contrary" to its duties under state tort law). Furthermore, Plaintiff asserts that the government contractor defense is not warranted because (3) SEANAV Instruction 6260.005 makes clear that the Navy encouraged Defendant to warn, (4) military specifications merely "rubber stamped" whatever warnings Defendant elected to use (or not use) and do not reflect a considered judgment by the Navy, (5) there is no military specification that precluded warning about asbestos hazards, and (6) Defendant cannot demonstrate what the Navy knew about the hazards of asbestos relative to the knowledge of Defendant, nor that the Navy knew more than it did at the time of the alleged exposure.

To contradict the evidence relied upon by Defendant, Plaintiff cites to(a) MIL-M-15071D, and (b) SEANAV Instruction 6260.005, each of which Plaintiff contends indicates that the Navy not only permitted but expressly required warnings.

Plaintiff has also submitted objections to Defendant's evidence pertaining to the government contractor defense (expert affidavit of Commander McCaffrey).

C. Analysis

Admissibility of Plaintiff's Evidence

As a preliminary matter, the Court considers the admissibility of Plaintiff's evidence, including Defendant's objections to the declaration of Charles Ay:

(i) Charles Ay

Defendant contends that the declaration of Charles Ay is inadmissible and should be stricken because he is not a qualified expert and his opinions are based on subjective belief and/or unsupported speculation. In particular, Defendant contends that (1) Mr. Ay has never tested gaskets from Carrier military equipment and the fact that he has tested other gaskets is irrelevant and does not provide any basis for his testimony in this case, and (2) is not an industrial hygienist or qualified in any way to opine on the quantities of asbestos to which Decedent was exposed and/or the significance of that exposure.

The Court has reviewed Mr. Ay's opinion testimony and has concluded that it does not meet the requirements of Federal Rule of Evidence 702(b), which requires that expert testimony be based on "sufficient facts or data." Fed. R. Evid. 702(b). In particular, his testimony is speculative and not supported by personal knowledge or scientific/technical/specialized knowledge or expertise. Mr. Ay bases his conclusion that Decedent was exposed to asbestos (i.e., that the gaskets at issue contained asbestos) on the following things: (1) his own personal "testing" of gaskets - without any details or explanation of any method or means of scientific analysis - which concludes that "the majority" of engine gaskets during a 40-year period contained asbestos, (2) market share statistics from 1989 (at which time 50% of the gaskets on the market contained asbestos, and most), (3) his review of three patents for gaskets from the 1970s - without any details or explanation as to how or why these three particular patents were chosen for review or why they should be considered representative of gaskets in general - which he concludes indicates that asbestos was routinely used, (4) his review of defendant's discovery responses, which he deems "reliable and authoritative," and which indicate that some

Carrier gaskets in the early 1960s had asbestos, and (5) Decedent's deposition testimony (which did not state that the gaskets had asbestos), without any explanation as to why this testimony suggests the gaskets had asbestos (as opposed to being non-asbestos containing gaskets). Because Mr. Ay's testimony does not meet the requirements of Rule 702(b), it is inadmissible as expert testimony. Fed. R. Evid. 702(b).

(ii) John Fenig

In light of the above determination regarding the declaration of Charles Ay, the Court has determined that it is not necessary to reach Defendant's objections to the declaration of John Fenig, and the Court therefore declines to do so.

Exposure / Causation

Plaintiff alleges that Decedent was exposed to asbestos from gaskets supplied by Defendant Carrier as original gaskets in compressors that Carrier manufactured and supplied for use aboard the USS Enterprise. There is evidence that Decedent worked aboard the USS Enterprise for about one (1) to two (2) years, and that this work began about seven (7) years after the ship was built.

There is evidence that Decedent worked removing gaskets from Carrier compressors on six (6) different occasions and that, during five (5) of these occasions, the gaskets removed were original gaskets supplied with the equipment. There is evidence that this work generated dust, which Decedent inhaled.

There is testimony from Mr. Ay that the gaskets likely contained asbestos. Plaintiff presents Mr. Ay as an expert witness. Importantly, however, Mr. Ay's testimony, while based in part on experience, is not based on personal knowledge or "sufficient facts or data," and is impermissibly speculative. See Fed. R. Evid. 702(b); Lindstrom, 424 F.3d at 492 (quoting Harbour, 1991 WL 65201, at *4). As such, it is not admissible as expert witness testimony or lay witness testimony. See Fed. R. Evid. 701 and 702(b); Lindstrom, 424 F.3d at 492.

Without the declaration of Mr. Ay, there is no evidence that the gaskets to which Decedent was exposed in connection with Carrier equipment contained asbestos. Therefore, no reasonable jury could conclude that Plaintiff was exposed to asbestos from original gaskets supplied by Defendant such that it was a "substantial factor" in the development of his illness. See

AND IT IS SO ORDERED.

EDUARDO C. ROBRENO, J.

Lindstrom, 424 F.3d at 492; Stark, 21 F. App'x at 376; Abbay, 2012 WL 975837, at *1 n.1. Accordingly summary judgment in favor of Defendant is warranted.

In light of the Court's determination above, it is not necessary to reach Defendant's argument regarding the government contractor defense.