SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. LYNN R. KOTLER** **PART** **08**

Justice

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DONNA MCLEAN, Individually and as Administratrix of the ESTATE of GARDNER MCLEAN,

Plaintiff,

- v -

ASHLAND, LLC, CHAMPION BRANDS, L.L.C, CHASE PRODUCTS CO., CLING-SURFACE CO., INC., CUMBERLAND PRODUCTS, INC., DAP PRODUCTS, INC., FUJIFILM HUNT CHEMICALS U.S.A., INC., D/B/A PARENT AND SUCCESSOR TO ANCHOR LITHKEMKO, ICC CHEMICAL CORPORATION, INTERNATIONAL AUTOBODY MARKETING GROUP, LAMI-LUBE, LLC, MIDWAY HARDWARE, INC., MITCHELL HARDWARE, INC., RADIATOR SPECIALTY COMPANY, SCHRADER-BRIDGEPORT INTERNATIONAL, INC., INDIVIDUALLY AND AS SUCCESSOR-IN-INTEREST TO BRIDGE PRODUCTS, INC., BRIDGEPORT BRASS COMPANY AND H.B. EGAN MANUFACTURING COMPANY, SUN CHEMICAL CORPORATION INDIVIDUALLY AND AS SUCCESSOR-IN-INTEREST TO POLYCHROME CORPORATION, THE SHERWIN-WILLIAMS COMPANY SUCCESSOR-IN-INTEREST TO AND D/B/A WESTERN AUTOMOTIVE FINISHES AND SUCCESSOR-IN-INTEREST TO AND D/B/A M.L. CAMPBELL AND SUCCESSOR-IN-INTEREST TO INSILCO TECHNOLOGIES AND SUCCESSOR-IN-INTEREST TO RED DEVIL PAINTS, INC., UNION OIL COMPANY OF CALIFORNIA D/B/A UNOCAL AND SUCCESSOR-IN INTEREST TO AMERICAN MINERAL SPIRITS COMPANY D/B/A TO AMSCO, UNITED STATES STEEL CORPORATION, W.M. BARR & COMPANY, INC., ZIP-CHEM PRODUCTS, INC.,

Defendants.

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SCHRADER-BRIDGEPORT INTERNATIONAL, INC., named herein as SCHRADER-BRIDGEPORT INTERNATIONAL, INC., Individually and as Successor-in-Interest to Bridge Products, Inc., Bridgeport Brass Company and H.B. Egan Manufacturing Company,

Third-Party Plaintiff

INDEX NO.	152792/2019
MOTION DATE	01/28/2025, 01/28/2025, 01/28/2025, 01/28/2025, 01/28/2025
MOTION SEQ. NO.	021 022 023 024 025

DECISION + ORDER ON MOTION

-v-

PLEWS, INC. d/b/a PLEWS & EDELMANN,

Third-Party Defendant.

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The following e-filed documents, listed by NYSCEF document numbers (Motion 021) 340, 341, 342, 343, 344, 345, 346, 347, 348, 349, 350, 351, 352, 353, 354, 368, 390, 391, 392, 393, 394, 395, 396, 397, 398, 399, 400, 458, 459, 460, 461

were read on this motion to/for PARTIAL SUMMARY JUDGMENT.

The following e-filed documents, listed by NYSCEF document number (Motion 022) 355, 356, 357, 358, 359, 360, 361, 362, 363, 364, 369, 375, 376, 377, 378, 379, 380, 381, 382, 383, 384, 385, 386, 387, 388, 389, 464, 465, 466

were read on this motion to/for SUMMARY JUDGMENT (AFTER JOINDER).

The following e-filed documents, listed by NYSCEF document number (Motion 023) 311, 312, 313, 314, 315, 316, 317, 318, 319, 320, 321, 322, 323, 324, 366, 401, 402, 403, 404, 405, 406, 407, 408, 409, 410, 411, 412, 413, 414, 415, 416, 417, 418, 419, 420, 421, 422, 423, 424, 425, 426, 453, 454, 455, 456, 457, 463, 470, 471

were read on this motion to/for JUDGMENT - SUMMARY.

The following e-filed documents, listed by NYSCEF document number (Motion 024) 325, 326, 327, 328, 329, 330, 331, 332, 333, 334, 367, 427, 428, 429, 430, 431, 432, 433, 434, 435, 436, 437, 438, 439, 440, 441, 442, 443, 444, 445, 446, 447, 448, 449, 450, 451, 452, 462

were read on this motion to/for JUDGMENT - SUMMARY.

The following e-filed documents, listed by NYSCEF document number (Motion 025) 335, 336, 337, 338, 339, 370, 371, 372, 373, 374

were read on this motion to/for JUDGMENT - SUMMARY.

Motions designated Sequence Numbers 021, 022, 023, 024, and 025 in this toxic tort action are consolidated for disposition.

In Motion Sequence Number 021, defendant DAP Products, Inc. ("DAP Products") moves pursuant to CPLR 3212 for partial summary judgment dismissing the First Amended Complaint ("Complaint") against it to the extent that the causes of action alleged therein accrued before DAP Products was incorporated on July 31, 1991. Plaintiff opposes the motion.

In Motion Sequence Number 022, defendant Schrader-Bridgeport International, Inc. ("SBI"), Individually and as Successor-in-Interest to Bridge Products, Inc., Bridgeport Brass Company and H.B Egan Manufacturing Company, moves pursuant to CPLR 3212 for summary judgment dismissing the Complaint against it. Plaintiff opposes the motion.

In Motion Sequence Number 023, defendant The Sherwin-Williams Company, s/h/a The Sherwin-Williams Company, Successor-in-Interest to and d/b/a Western Automotive Finishes and Successor-in-Interest to and d/b/a M.L. Campbell ("Sherwin-Williams"), moves pursuant to CPLR 3212 for summary judgment dismissing the Complaint against it. Plaintiff opposes the motion.

In Motion Sequence Number 024, defendant Lami-Lube, LLC ("Lami-Lube") moves pursuant to CPLR 3212 for summary judgment dismissing the Complaint against it. Plaintiff opposes the motion.

In Motion Sequence Number 025, third-party defendant Plews, Inc., d/b/a Plews and Edelmann ("Plews") moves pursuant to CPLR 3212 for summary judgment dismissing the Third-Party Complaint. SBI, as third-party plaintiff, opposes the motion.

BACKGROUND

Plaintiff Donna McLean, individually and as administratrix of the estate of Gardner McLean, her late husband, commenced this action to recover damages from approximately twenty defendants alleged to have manufactured and marketed products containing benzene, a hazardous substance, to which Gardner McLean was exposed. Plaintiff claims that, on or after September 1, 2016, as a result of such exposure, Gardner McLean was diagnosed with Myelodysplastic Syndrome ("MDS"), a type of bone marrow cancer characterized by ineffective production of red blood cells, platelets, and white blood cells, which directly and proximately caused his death on August 6, 2017.

Benzene is a petroleum-derived organic solvent that, as relevant here, may be present in small amounts as a toxic contaminant in a variety of industrial and commercial chemicals, including mineral spirits, engine solvents, cleaners, degreasers, and automotive paints. It is recognized as a human carcinogen by all major agencies and authorities that regulate or produce guidelines to prevent and control cancer from occupational and environmental chemicals, including the International Agency for Research on Cancer, the US Environmental Protection Agency, the National Toxicology Program, the Occupational Safety and Health Administration, and the National Institute for Occupational Safety and Health, and has been scientifically linked to the development of multiple cancers, including MDS and Acute Myeloid Leukemia ("AML"), an extremely rare type of blood cancer that is closely related to, and often progresses from, MDS.

The products at issue in this action manufactured and marketed by defendants include penetrating solvents, paint removers, paints, stains, lacquer thinners, enamel reducers, solvents, adhesives, tire repair kit and degreasers. These products contained a variety of solvents and other chemical ingredients known to often be contaminated with trace amounts of benzene, including xylene, toluene, ethylbenzene, and other hydrocarbons. Gardner McLean allegedly worked with these products, and was thereby exposed to the benzene contained within them, on an almost daily basis between 1966 and 2017 while engaged in automotive mechanical work, woodworking, and other non-occupational

activities. He was also allegedly exposed to these products while employed by Yorktown Pennysaver Corporation from 1969 to 1972, while employed by Haggerty Millwork from 1975 to 1980, and while working as a carpenter in his own woodworking business, McLean Enterprises, from 1980 to 1990.

Plaintiff commenced this action following her husband's death, asserting causes of action for (1) negligence/gross negligence; (2) breach of warranty; (3) strict products liability; (4) fraudulent misrepresentation; (5) wrongful death; (6) survival damages pursuant to EPTL 11-3.1, et seq.; and (7) loss of consortium. The Complaint seeks compensatory and punitive damages and alleges, in effect, that defendants knew their products contained benzene and that benzene causes cancer and is unsafe at any level of exposure; that they nevertheless carried on manufacturing and selling their products without providing adequate warnings regarding the products' known dangers; and that they thereby caused Gardner McLean's exposure to their benzene-containing products resulting in his illness and death.

Sherwin-Williams moved to dismiss the causes of action for breach of warranty and fraudulent misrepresentation, as well as plaintiff's request for punitive damages (MOT SEQ 003). Several additional defendants including, as relevant here, Lami-Lube, joined Sherwin-Williams and cross-moved for the same relief. By decision and order dated May 29, 2020, the court dismissed the second cause of action for breach of warranty and otherwise denied the motion and cross-motion (NYSCEF Doc. No. 122).

SBI subsequently impleaded third-party defendant Plews, seeking contribution or common law indemnification. Plaintiff's claims against SBI in the first-party action are premised on Gardner McLean's alleged exposure, between 1966 and 1973, to a "Camel Tire Repair Kit" product manufactured and marketed by SBI, individually and as successor-in-interest to Bridge Products, Inc., Bridgeport Brass Company, and H.B. Egan Manufacturing Company. The third-party complaint alleges that SBI ceased manufacturing and marketing the Camel Tire Repair Kit in 2004; that the manufacture and marketing of the product was then taken over by Plews; and thus, if SBI should be found liable to plaintiff, Plews should be held liable to SBI for any portion of plaintiff's damages attributable to the sale of the Camel Tire Repair Kit product from 2004 onwards.

The note of issue was filed in May 2024 and the present motions then ensued.

DISCUSSION

On a motion for summary judgment, the proponent bears the initial burden of making a prima facie showing that it is entitled to summary judgment as a matter of law, providing sufficient evidence that no material issues of triable fact exist (*see Trustees of Columbia Univ. in the City of N.Y. v D'Agostino Supermarkets, Inc.*, 36 NY3d 69, 74 [2020]; *Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]). Once met, the burden shifts to the opposing party to "produce evidentiary proof in admissible form sufficient to require a trial of material questions of fact" (*Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]; *see De Lourdes Torres v Jones*, 26 NY3d 742, 763 [2016]). However, if the proponent fails to make out its

prima facie case for summary judgment, its motion must be denied regardless of the sufficiency of the opposing papers (*Alvarez*, 68 NY2d at 324; *Ayotte v Gervasio*, 81 NY2d 1062 [1993]). Summary judgment is a drastic remedy that should not be granted where there is any doubt as to the existence of a triable issue, and the court's function on these motions is limited to "issue finding," not "issue determination" (*see Vega v Restani Constr. Corp.*, 18 NY3d 499, 503, 505 [2012]).

I. DAP Products (MOT SEQ 021)

Plaintiff's claims against DAP Products are based on Gardner McLean's use of DAP-branded contact cement. Dap Products seeks partial summary judgment dismissing all of plaintiff's causes of action against it to the extent they are based on Gardner McLean's alleged exposure to DAP-branded contact cement prior to 1991, the year of Dap Products' incorporation and acquisition of the DAP-branded line of products.

Generally, a corporation that purchases the assets of another corporation is not liable for its predecessor's torts (*see Semenetz v Sterling & Walden, Inc.*, 7 NY3d 194, 196 [2006]). However, a successor corporation may be held liable for the torts of its predecessor if "(1) it expressly or impliedly assumed the predecessor's tort liability, (2) there was a consolidation or merger of seller and purchaser, (3) the purchasing corporation was a mere continuation of the selling corporation, or (4) the transaction is entered into fraudulently to escape such obligations" (*Schumacher v Richards Shear Co.*, 59 NY2d 239, 245 [1983]).

DAP Products submits records from the New York and Delaware Departments of State showing that it was incorporated on July 31, 1991, under the name "Wassall USA Acquisition, Inc.," and subsequently changed its corporate name to "DAP Products, Inc." on November 4, 1991. It further submits excerpts from an Asset Purchase Agreement ("APA"), dated August 23, 1991, pursuant to which it purchased the DAP product line, including the DAP-branded contact cement, from non-party DAP Inc., an independent company. DAP Products contends that the APA does not provide for the assumption of any pre-acquisition liabilities from Dap Inc. and demonstrates that the other bases for successor liability are inapplicable. Plaintiff does not dispute that there is no basis for successor liability based on a theory of consolidation/merger, mere continuation, or fraud, but argues that the APA provides for DAP Products' assumption of its predecessors' relevant tort liabilities.

"[A] contract is to be construed in accordance with the parties' intent, which is generally discerned from the four corners of the document itself. Consequently, 'a written agreement that is complete, clear and unambiguous on its face must be enforced according to the plain meaning of its terms'" (*MHR Capital Partners LP v Presstek, Inc.*, 12 NY3d 640, 645 [2009], quoting *Greenfield v Philles Records*, 98 NY2d 562, 569 [2002]). Whether a contract is clear or ambiguous is for the court to determine as a matter of law (*see WWW Assoc. v Giancontieri*, 77 NY2d 157, 162 [1990]). Further, a contract should not be read to render any portion of it meaningless (*Cortlandt St. Recovery Corp. v Bonderman*, 31 NY3d 30, 39 [2018]),

but should instead be construed "so as to give full meaning and effect to [its] material provisions" (*Beal Sav. Bank v Sommer*, 8 NY3d 318, 324 [2007]; *see Isaacs v Westchester Wood Works*, 278 AD2d 184, 185 [1st Dept. 2000] [contract should be construed "so as not to leave any provision without force and effect"]).

The APA is executed by DAP Products as Buyer and DAP Inc., its parent company, USG Corporation ("USG"), another USG subsidiary, DAP Canada Inc. (together with DAP Inc., the "Companies"), and a fourth company, BHI International Inc., as Seller, and provides, as relevant here, for the acquisition by DAP Products of "substantially all the assets" of DAP Inc. Section 1.3 of the agreement, titled "Assumption of Liabilities," provides for DAP Products' limited assumption of Seller's liabilities.

Pursuant to Section 1.3(a), Buyer agrees to "absolutely and irrevocably assume and be solely liable and responsible for any and all of the following [six categories of] Liabilities of Seller, unless such Liabilities are Excluded Liabilities (the 'Assumed Liabilities')[.]" Section 1.3(b) provides that, "except as specifically provided in this Agreement," Buyer "shall [not] assume or have any responsibility or liability for Liabilities of any kind or nature whatsoever . . . of USG or any of the Companies[,]" and that these "Excluded Liabilities" shall be retained by Seller. The APA thus broadly provides that, except for the list of Assumed Liabilities set forth in Section 1.3(a), all liabilities are Excluded Liabilities retained by Seller and not assumed by Buyer.

Section 1.3(b) further states that, "[w]ithout limiting the generality of the foregoing, the following Liabilities shall be Excluded Liabilities[,]" followed by a non-exhaustive list of ten Excluded Liabilities, including "any and all Liabilities of USG and its affiliates, other than the Companies, including, without limitation, Liabilities for . . . environmental and personal injury matters[.]" Plaintiff contends that, pursuant to the above language, the Companies'—and thus DAP Inc.'s—liabilities for environmental and personal injury matters are not Excluded Liabilities. That is not, however, what the APA says. Rather, the subject language, read together with the rest of Section 1.3, limits the applicability of Section 1.3(a)'s list of Assumed Liabilities to only the liabilities of the Companies, and not those of the other Seller entities. It does not, however, provide that none of the Companies' liabilities are Excluded Liabilities. To the contrary, the agreement broadly provides that all the Companies' liabilities are Excluded Liabilities unless expressly included among the Assumed Liabilities set forth in Section 1.3(a).

Turning back, then, to Section 1.3(a), the six categories of Assumed Liabilities set forth therein includes, as relevant here, DAP Products' assumption pursuant to Section 1.3(a)(v) of "all Environmental Liabilities to the extent assumed as set forth in Section[ ] 9.5(b)[.]" Section 9.5(b) provides, in pertinent part, that Buyer agrees to:

> [I]ndemnify and hold harmless Seller from and against any and all Environmental Liabilities arising from the ownership of the Assets or the operation of the Business after the [closing] (including, without limitation,

> the off-site Disposal after the Determination Time of Hazardous Materials by facilities on the Real Property).

The APA defines "Environmental Liabilities" to mean, as relevant here, any liabilities suffered by a contracting party "arising out of or resulting from an Environmental Claim . . ., whether known or unknown as of the Closing Date." An "Environmental Claim," is defined to include, *inter alia*, any accusation, allegation, action, or claim for personal injury which "results from or is based upon . . . the Release (including, without limitation, sudden or non-sudden accidental or non-accidental Releases) of any Hazardous Material . . . in, into or onto the environment[.]" The definition given for "Hazardous Material" includes any substance that is "regulated by any Governmental Body pursuant to any Environmental Law . . . including but not limited to, petroleum products[.]" And "Environmental Law" is defined, in pertinent part, as "any Law [including common law] existing on the Closing Date concerning Releases of Hazardous Materials into any part of the natural environment, or any Law that is concerned in whole or in substantial part with . . . protecting public health[.]

DAP Products contends that Section 9.5(b) of the APA is unambiguous and does not provide for its express or implied assumption of liability for personal injury claims arising or resulting from DAP Inc.'s manufacture and marketing of DAP-branded products. The court disagrees and concludes that the relevant contract language is ambiguous. DAP Products reads Section 9.5(b)'s reference to "Environmental Liabilities arising from the ownership of the Assets or the operation of the Business after the [closing]" to mean, in the context of this case, claims resulting from exposure to DAP-branded products manufactured and marketed by DAP Products following its completed acquisition of DAP Inc.'s product line. While that may be a reasonable interpretation of the contract language, Section 9.5(b) may also be reasonably understood to refer to claims filed after the APA's closing date, but which may arise or result from an exposure to DAP-branded products that preceded the closing (*see Berkeley Rsch. Grp., LLC v FTI Consulting, Inc.*, 157 AD3d 486, 489 [1st Dept. 2018] [ambiguity exists where contract is '"reasonably or fairly susceptible of different interpretations or may have two or more different meanings'"], quoting *New York City Off–Track Betting Corp. v Safe Factory Outlet, Inc.*, 28 AD3d 175, 177 [1st Dept. 2006]).

"Environmental Liabilities arising from the ownership of the Assets or the operation of the Business" does not obviously describe the factual circumstances of an exposure to DAP-branded products that might give rise to or result in a claim. By contrast, the contract's definition of "Environmental Liabilities" expressly speaks in terms of liabilities "arising out of or resulting from [a release of injurious hazardous material], whether known or unknown as of the Closing Date." Moreover, the very notion of an assumption of liabilities as provided for in Section 1.3(a)(v) presupposes that the liabilities to be assumed would otherwise be retained by DAP Inc. DAP Products' preferred interpretation of the contract, however, would seemingly render Section 1.3(a)(v) meaningless, at least insofar as it cross-references Section 9.5(b), by restricting its scope to liabilities that would belong to DAP Products regardless of the APA by

virtue of its post-acquisition ownership, manufacture and marketing of the DAP product line (*see Cortlandt St. Recovery Corp.*, 31 NY3d at 39; *Beal Sav. Bank*, 8 NY3d at 324; *Isaacs*, 278 AD2d at 185).

DAP Products' further contention that Section 1.3(a)(v) only provides for its indemnification of the Seller entities, pursuant to Section 9.5(b), but does not provide for its assumption of direct liability to personal injury plaintiffs, would likewise render Section 1.3(a)(v) meaningless and redundant. If the intent was to provide only for indemnification but not for any broader assumption of liability, then it would be sufficient to include only Section 9.5(b) in the agreement without also including Section 1.3(a)(v). Further, DAP Products' indemnification-only interpretation is contrary to the express language of Section 1.3(a), which states that DAP Products "irrevocably assume[s] and [will] be solely liable and responsible for" the Assumed Liabilities.

There is thus a triable issue of fact as to the intent of the contracting parties with respect to the liabilities to be assumed by DAP Products pursuant to Section 1.3(a)(v). Therefore, DAP Products' motion for partial summary judgment is denied.

II. SBI (MOT SEQ 022)

Plaintiff's claims against SBI are based on Gardner McLean's use of a "Camel Tire Repair Kit" product between 1966 and 1973, which was allegedly manufactured and marketed by SBI, individually and as successor-in-interest to Bridge Products, Inc. SBI seeks summary judgment dismissing the claims against it, arguing that, at the time of Gardner McLean's alleged exposure, the Camel Tire Repair Kit was manufactured by H.B. Egan Manufacturing Company ("H.B. Egan"); that in 1983 the Camel-brand line of products was sold to SBI's predecessor, Bridge Products, Inc., which was then operating under the name ECP Inc. ("ECP"), in an all-cash transaction pursuant to an asset purchase agreement (the "ECP APA"); and that the ECP APA did not provide for any assumption of liabilities related to H.B. Egan's pre-1983 manufacture of the Camel Tire Repair Kit.

SBI's motion turns on its submission of what is purported to be the 1983 ECP APA. However, the document submitted is not fully executed, bearing the signature of only H.B. Egan's parent company, National Distillers and Chemical Corporation. Further, SBI offers no affidavit, affirmation or deposition testimony by a person with personal knowledge who can confirm the contract was counter-signed in the form now submitted or else establish the final terms agreed upon by the contracting parties, especially with respect to ECP's assumption of liabilities. Plaintiff argues these defects render the document inadmissible, while SBI contends the document is admissible under the ancient document rule, or else as a business record based on the affirmation of the in-house attorney who located the document in the company's archived records.

SBI's reliance on the ancient document rule is misplaced. "Under the ancient document rule, a record or document which is found to be more than 30 years of age and which is proven to have come

from proper custody and is itself free from any indication of fraud or invalidity proves itself" (*Tillman v Lincoln Warehouse Corp.*, 72 AD2d 40, 44 [1st Dept. 1979] [internal quotation marks omitted]). The rule "dispenses with the proof of the execution of a record or document on the proof of its antiquity" as "[i]t presumes that the entrant of the record or document is dead after the passage of 30 years" (*id.* at 44-45). Here, because the copy of the ECP APA submitted by SBI is not fully executed, it is not "free from any indication of . . . invalidity[.]" To be sure, "'an unsigned contract may be enforceable, provided there is objective evidence establishing that the parties intended to be bound'" (*Ajche v Park Ave. Plaza Owner, LLC*, 171 AD3d 411, 414 [1st Dept. 2019], quoting *Flores v Lower E. Side Serv. Ctr., Inc.*, 4 NY3d 363, 369 [2005]). As noted, however, SBI submits no evidence other than the unsigned contract itself to establish the parties' intent to be bound with respect to the relevant terms of the agreement concerning assumption of liabilities. Further, references in the case law to the ancient document rule "dispens[ing] with the proof of the execution of a record or document" does not mean, as SBI suggests, that an unsigned document may be admitted for its truth based solely on proof of its antiquity. Rather, the rule merely dispenses with the normal requirements of proof in regard to the genuineness of a document's execution (*see In re Hehn's Will*, 6 Misc. 2d 801, 802, 160 NYS2d 417, 418–19 [Sur. 1957] ["an ancient document, under certain conditions, is to be taken as sufficiently evidenced, in regard to its genuineness of execution"]; *In re Barney's Will*, 185 AD 782, 798–99, 174 NYS 242, 254 [App. Div. 1919] [ancient document rule allows for admission of document "without proof of handwriting or of the death of the parties to [its] execution"]).

SBI's alternative assertion that the document is admissible as a business record is likewise unavailing. Assuming, without deciding, that the document is admissible on that basis, it is still insufficient to establish, *prima facie*, that there was no assumption by ECP of pre-1983 liabilities related to the Camel Tire Repair Kit. Absent a fully executed agreement or some other evidence, such as an affidavit or affirmation by a person with personal knowledge of the agreement, SBI cannot establish that the document submitted accurately reflects the final, agreed-upon contract terms with respect to ECP's assumption of liabilities, or lack thereof.

Therefore, SBI's motion for summary judgment is denied.

III. Sherwin-Williams and Lami-Lube (MOT SEQ 023 & 024)

Sherwin-Williams moves for summary judgment dismissing the Complaint (MOT SEQ 023), principally arguing that plaintiff cannot establish general causation with respect to its relevant products and Gardner McLean's illness and death. It further argues that plaintiff cannot meet her evidentiary burden at trial with respect to her causes of action for gross negligence, breach of warranty, and fraudulent misrepresentation, or else that these claims are inadequately pleaded, that plaintiff likewise lacks the evidence necessary to support her request for punitive damages, and that the cause of action for breach of warranty is also partially time barred.

Lami-Lube likewise moves for summary judgment dismissing the Complaint (MOT SEQ 024), submitting the deposition testimony of its founder and sole operator, Charles Kirstner, who testified that, at all relevant times, Lami-Lube sold only a single rebranded product that was manufactured and packaged by Sherwin-Williams with no input from Lami-Lube. As such, Lami-Lube adopts the arguments advanced by Sherwin-Williams in its own summary judgment motion. Additionally, Lami-Lube contends it lacked the knowledge and/or intent required for gross negligence, fraudulent misrepresentation, and punitive damages, pointing to Kirstner's testimony that he has only a seventh-grade education and no technical or scientific training; the list of component chemicals he was provided by Sherwin-Williams for the single Lami-Lube product did not include benzene; he was not otherwise aware the product contained benzene; and he did not even know what benzene was.

a. General Causation

It is well-established that a plaintiff in a toxic tort action must establish causation by means of expert testimony based on generally accepted methodologies (*see Nemeth v Brenntag North America*, 38 NY3d 336, 342-43 [2022]). An opinion on causation should "'set forth a plaintiff's exposure to a toxin, that the toxin is capable of causing a particular illness (general causation) and that plaintiff was exposed to sufficient levels of the toxin to cause the illness (specific causation)'" (*id.*, quoting *Parker v Mobil Oil Corp.*, 7 NY3d 434, 448 [2006]). To prevail on a motion for summary judgment in a toxic tort case, the defendant must demonstrate the lack of general or specific causation (*Dyer v Amchem Prods., Inc.*, 207 AD3d 408, 410 [1st Depts 2022]).

To demonstrate the absence of general causation, Sherwin-Williams, joined by Lami-Lube, submits the affidavit of its expert, Patrick J. Kerzic, Ph.D., a board-certified toxicologist, who opines that none of the Sherwin-Williams products cited by plaintiff, including the rebranded product sold by Lami-Lube, contain benzene as a direct additive or ingredient; there are no reports in the scientific literature of increased risk of MDS from exposure to those products; and none of the solvents contained in those products, which include hexane, acetone, lacquer diluent, toluene, naphtha, and methylene chloride/dichloromethane, are considered carcinogenic to humans, including the solvents potentially containing benzene. Kerzic states that the International Agency for Research on Cancer ("IARC"), which is part of the World Health Organization, and the National Toxicology Program ("NTP") within the U.S. Department of Health and Human Services, maintain and periodically update lists of known and suspected human carcinogens, and that the United States Environmental Protection Agency ("USEPA") also maintains information on the potential carcinogenicity of chemicals. He further states that none of the relevant product solvents he reviewed has been identified as a known human carcinogen by the IARC, USEPA, or NTP. Thus, Sherwin-Williams and Lami-Lube demonstrate, *prima facie*, that their products, and the solvents contained within them, to which Gardner McLean was allegedly exposed are not capable of causing MDS.

Plaintiff, however, raises a triable issue of fact in opposition. Plaintiff submits the affidavit of her own expert, Dr. Robert Laumbach, a board-certified physician, toxicologist, and certified industrial hygienist. Laumbach opines that benzene is recognized as a human carcinogen by all major agencies and authorities that regulate or produce guidelines to prevent and control cancer from occupational and environmental chemicals, including the IARC, USEPA, NTP, the Occupational Safety and Health Administration ("OSHA"), and the National Institute for Occupational Safety and Health ("NIOSH"). He opines that the relevant Sherwin-Williams products contain hydrocarbon solvents known to contain benzene and cites numerous studies demonstrating benzene exposure from the occupational use of such solvents. He further cites numerous epidemiological studies showing that occupational exposure to benzene can significantly increase the risk of developing MDS/AML, and states that the IARC has recognized benzene as a known cause of MDS specifically. Laumbach thus opines that occupational and hobbyist exposure to benzene, including organic solvents containing benzene, is a cause of MDS, and that there is no known threshold level of exposure below which benzene does not increase the risk of cancers including MDS.

Laumbach also opines regarding the opinions offered in Kerzic's affidavit, stating that Kerzic's review of the relevant scientific literature was woefully incomplete in that Kerzic "ignores that the scientific literature on benzene exposure and its generally-accepted, causative association with leukemia and MDS, is based on occupational exposure to benzene as a component of hydrocarbon mixtures containing benzene and not pure benzene by itself." Laumbach further explains that "the vast majority of benzene epidemiology studies are conducted on workers exposed to hydrocarbon mixtures, such as crude oil, gasoline, solvents, and others which contain toluene, xylene, petroleum distillates and other similar hydrocarbons[,]" and that "there are highly consistent findings of increased risks of MDS, AML and other leukemias and hematologic cancers in populations exposed to benzene emitted from hydrocarbon mixtures." He similarly faults Kerzic for his claim that the relevant product solvents are not carcinogenic because the IARC, USEPA, and NTP have not listed the pure form of the relevant solvents as known human carcinogens, while omitting that both the IARC and USEPA "identify that hydrocarbon solvents are contaminated with benzene[,]" as demonstrated by several cited IARC studies.

Thus, given the competing expert evidence, Sherwin-Williams' and Lami-Lube's motions for summary judgment (MOT SEQ 023 & 024) are denied to the extent they are based on the purported lack of general causation (*see Sason v Dykes Lbr. Co., Inc.*, 221 AD3d 491, 492 [1st Dept. 2023]).

b. Gross Negligence, Breach of Warranty, Fraud, & Punitive Damages

Sherwin-Williams' motion is likewise denied to the extent it specifically seeks the dismissal of plaintiff's causes of action for gross negligence, breach of warranty, and fraudulent misrepresentation, as well as her request for punitive damages. The motion is denied as moot to the extent it seeks the dismissal of the breach of warranty cause of action, as that claim has already been dismissed (*see*

NYSCEF Doc. No. 122). As to the gross negligence and fraudulent misrepresentation claims and the request for punitive damages, Sherwin-Williams' fails to demonstrate its prima facie entitlement to summary judgment.

Rather than point to any evidence to affirmatively demonstrate its entitlement to the relief it requests, Sherwin-Williams' merely argues that the gross negligence and fraudulent misrepresentation claims and the request for punitive damages are inadequately pleaded, or else that plaintiff lacks the evidence necessary to prevail on these claims at trial. However, "pointing to gaps in an opponent's evidence is insufficient to demonstrate a movant's entitlement to summary judgment" (*Koulermos v A.O. Smith Water Prods.*, 137 AD3d 575, 576 [1st Dept. 2016]; *see Ricci v A.O. Smith Water Prods. Co.*, 143 AD3d 516, 516 [1st Dept. 2016]; *Sabalza v Salgado*, 85 AD3d 436, 437-38 [1st Dept. 2011]). Moreover, the court previously considered and rejected the argument that plaintiff's allegations are insufficient to state claims for fraudulent misrepresentation and punitive damages when the argument was raised in Sherwin-Williams' motion to dismiss (MOT SEQ 003) (*see* NYSCEF Doc. No. 122). Having had "a full and fair opportunity to litigate when the initial determination was made," Sherwin-Williams is precluded under the doctrine of law of the case "from relitigating an issue that has already been decided" (*Chanice v Federal Express Corp.*, 118 AD3d 634, 635 [1st Dept. 2014]). Sherwin-Williams' arguments

The court's analysis in its prior decision on Sherwin-Williams' motion to dismiss is likewise dispositive with respect to the present argument regarding gross negligence. Gross negligence "is conduct that evinces a reckless disregard for the rights of others or 'smacks' of intentional wrongdoing" (*Colnaghi, U.S.A., Ltd. v Jewelers Protection Servs.*, 81 NY2d 821, 823-824 [1993], quoting *Sommer v Federal Signal Corp.*, 79 NY2d 540, 554 [1992]). Sherwin-Williams argues that, with respect to it, "Plaintiff has failed to allege any conduct . . . that could rise to the recklessness necessary to constitute gross negligence." However, as stated in the court's prior decision on Sherwin-Williams' motion to dismiss:

> Plaintiff asserts that the defendants researched, tested, manufactured, distributed, labeled and marketed benzene and benzene-containing products "with conscious disregard for the safety of the users of said benzene-containing products, in that said defendants had specific prior knowledge that benzene is an insidious blood and bone marrow poison, that there is no safe level of exposure to benzene and that there was a high risk of injury or death resulting from exposure to benzene and benzene-containing solvents, including, but not limited to, leukemia, acute myeloid leukemia (AML), aplastic anemia, and other blood and other bone marrow diseases, including MDS." Plaintiff essentially alleges that the defendants knew their products contained benzene and that benzene causes cancer.

(NYSCEF Doc. No. 122). The court finds that these allegations adequately assert the recklessness necessary to state a cause of action for gross negligence (*see In re New York City Asbestos Litig.*, 121 AD3d 230, 248 [1st Dept. 2014], citing *Matter of New York City Asbestos Litig.*, 89 NY2d 955, 956 [1997]). Moreover, plaintiff, in opposition, raises a triable issue of fact with respect to gross negligence by

submitting deposition testimony and internal company records demonstrating that Sherwin-Williams knew, as early as the 1970s and 1980s, that benzene causes leukemia and other cancers, that benzene was present as a contaminant in its solvents, and that its own employees suffered exposure to benzene, very likely via the solvents used in its products.

Therefore, Sherwin-Williams' summary judgment motion (MOT SEQ 023) is denied to the extent it specifically seeks the dismissal of plaintiff's claims for gross negligence, breach of warranty, fraudulent misrepresentation, and punitive damages. For the same reasons, Lami-Lube's summary judgment motion (MOT SEQ 024) is likewise denied to the extent it adopts Sherwin-Williams' arguments for the dismissal of these claims.

However, in addition to adopting Sherwin-Williams' summary judgment arguments, Lami-Lube separately demonstrates, *prima facie*, that it lacked the knowledge and/or intent required for gross negligence, fraudulent misrepresentation, and punitive damages. As noted, gross negligence requires conduct that "evinces a reckless disregard for the rights of others or 'smacks' of intentional wrongdoing" (*Colnaghi, U.S.A., Ltd.*, 81 NY2d at 823-824; *see Vissichelli v Glen-Haven Residential Health Care Facility, Inc.*,136 AD3d 1021, 1023 [2d Dept 2016] [gross negligence requires conduct that is "so reckless or wantonly negligent as to be the equivalent of a conscious disregard of the rights of others"]). Fraudulent misrepresentation requires, *inter alia*, "a misrepresentation or a material omission of fact which was false and known to be false by defendant" (*Mandarin Trading Ltd. v Wildenstein*, 16 NY3d 173, 178 [2011]). And punitive damages may be awarded in tort actions where there are "circumstances of aggravation or outrage, such as spite or 'malice,' or a fraudulent or evil motive on the part of the defendant, or such a conscious and deliberate disregard of the interests of others that the conduct may be called willful or wanton" (*Prozeralik v Cap. Cities Commc'ns, Inc.*, 82 NY2d 466, 479 [1993]).

Lami-Lube submits the deposition testimony of its founder and sole operator, Charles Kirstner, who testified that: Lami-Lube sold only a single rebranded product that was manufactured and packaged by Sherwin-Williams without any input from him; he has only a seventh-grade education and no technical or scientific training; the list of component chemicals he was provided by Sherwin-Williams for the single Lami-Lube product did not include benzene; he was not otherwise aware the product contained benzene; and he did not even know what benzene was. This testimony suffices to demonstrate, *prima facie*, that Lami-Lube was unaware its product potentially contained benzene, and thus could not have acted knowingly or with the conscious disregard required to be held liable for gross negligence or fraudulent misrepresentation, or for the imposition of punitive damages. Plaintiff, in opposition, fails to raise a triable issue of fact as to Lami-Lube's knowledge in this regard.

Therefore, Lami-Lube's summary judgment motion (MOT SEQ 024) is granted to the extent it seeks the dismissal of plaintiff's gross negligence, fraudulent misrepresentation, and punitive damages claims against it.

IV. Plews (MOT SEQ 025)

Plews moves for summary judgment dismissing the third-party complaint, which essentially alleges that Plews took over the manufacture and marketing of the "Camel Tire Repair Kit" product from SBI in 2004, and thus Plews should be held liable for plaintiff's claims against SBI to the extent any such claims relate to the sale of the Camel Tire Repair Kit in or after 2004. Plews submits the affidavit of Hamilton McLean, the bother of Gardner McLean, which states that Gardner McLean used the Camel Tire Repair Kit to repair his Volkswagen bus, and that he last used the subject product in 1973, the year that he sold his Volkswagen bus. By this submission, Plews establishes prima facie that it is not liable for any part of plaintiff's alleged damages because Gardner McLean did not use the Camel Tire Repair Kit in or after 2004.

SBI fails to raise any triable issue of fact in opposition. SBI's sole contention in opposition—that Plews fails to submit evidence demonstrating that it did not assume the historical liabilities of SBI and SBI's predecessors—is a red herring. The third-party complaint only seeks to hold Plews liable for sales of the subject product in or after 2004 and, as such, the absence of evidence demonstrating that Plews did not assume its predecessors' liabilities is irrelevant to Plews' prima facie case. Therefore, Plews' motion for summary judgment dismissing the third-party complaint is granted.

CONCLUSION

Accordingly, it is

ORDERED that defendant DAP Products, Inc.'s motion for partial summary judgment (MOT SEQ 021) is denied; and it is further

ORDERED that defendant Schrader-Bridgeport International, Inc.'s motion for summary judgment (MOT SEQ 022) is denied; and it is further

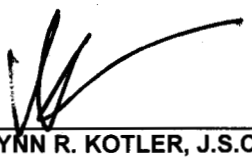
ORDERED that defendant The Sherwin-Williams Company's motion for summary judgment (MOT SEQ 023) is denied; and it is further

ORDERED that defendant Lami-Lube, LLC's motion for summary judgment (MOT SEQ 024) is granted to the extent it seeks the dismissal, as against it, of that part of the first cause of action alleging gross negligence, the fourth cause of action for fraudulent misrepresentation, and plaintiff's request for punitive damages, which are hereby dismissed as against defendant Lami-Lube, LLC, and the motion is otherwise denied; and it is further

ORDERED that the motion of third-party defendant Plews, Inc., d/b/a Plews and Edelmann, for summary judgment dismissing the third-party complaint (MOT SEQ 025) is granted, and the third-party complaint is hereby dismissed; and it is further

ORDERED that the Clerk shall mark the file accordingly.

This constitutes the Decision and Order of the court.



7/7/2025
DATE

LYNN R. KOTLER, J.S.C.

CHECK ONE:		CASE DISPOSED			X	NON-FINAL DISPOSITION	
		GRANTED		DENIED	X	GRANTED IN PART	OTHER
APPLICATION:		SETTLE ORDER				SUBMIT ORDER	
CHECK IF APPROPRIATE:		INCLUDES TRANSFER/REASSIGN				FIDUCIARY APPOINTMENT	REFERENCE