

SUPERIOR COURT OF CALIFORNIA, COUNTY OF ALAMEDA

Rene C. Davidson Courthouse

<p>Janel Davis Plaintiff/Petitioner(s) VS. Albertson's LLC et al Defendant/Respondent(s)</p>	<p>No. RG21112811 Date: 05/25/2023 Time: 3:00 PM Dept: 18 Judge: Richard Seabolt ORDER re: Hearing on Motion for Summary Judgment</p>
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The Motion for Summary Judgment filed by CHARLES B. CHRYSTAL COMPANY, INC. on 12/16/2022 is Granted.

Prior to the hearing, the Court issued a tentative ruling which was contested and the matter is argued, submitted and affirmed as set forth below.

Defendant Charles B. Chrystal Company’s (“Defendant”) Motion for Summary Judgment (“MSJ”) is GRANTED.

Defendant’s alternative Motion for Summary Adjudication (“MSA”) is DENIED as moot.

ANALYSIS OF MOTION FOR SUMMARY JUDGMENT

Plaintiff Janel Davis (“Plaintiff”) alleges that she developed malignant mesothelioma as a result of her exposures to asbestos-containing cosmetic talc supplied to various manufacturers of cosmetic talc and makeup products between 1968 and 1992. Plaintiff contends that she or her household members used the following products incorporating Defendant’s cosmetic talcs during specific time periods as follows: Muguet brand body powder (1968 to 1973); White Shoulders brand body powder (1970 to 1975); Estee Lauder White Linen cosmetic body powder (1979 to 1987); Chanel No. 5 body powder (1981 to 1988); and Mary Kay brand eye shadow and blush (1988 to 1992).

Defendant attempts to meet its initial burden of production on summary judgment by pointing to Plaintiff’s assertedly “factually devoid” responses to Defendant’s sufficiently comprehensive written discovery requests and deposition discovery. (See *Andrews v. Foster Wheeler LLC* (2006) 138 Cal.App.4th 96, 106-107.)

The Court finds Defendant’s Special Interrogatories (“SROG”) Nos. 3-6, seeking all facts and identification of all witnesses and documents regarding threshold exposure, to be sufficiently comprehensive written discovery. (Mayfield Dec. Exh. 3 at pp. 3:25-4:10.)

In response to SROG No. 3, seeking all facts that Plaintiff was exposed to Defendant’s asbestos-containing products, Plaintiff incorporates her prior Response to SROG No. 2. The Court finds

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Plaintiff's Response to SROG No. 2 to be "factually devoid" as to threshold exposure. Although the Response identifies the brands of cosmetic talc and makeup products and a general statement the Defendant supplied the talc for these products, the Response contains no specific facts to support these contentions. (See *Id.* at Exh. 4 at pp. 2:10-7:6.) The Response also fails to state specific facts regarding what specific talcs supplied by Defendant were incorporated into the products she used or what evidence, if any, Plaintiff has that the talcs were contaminated with asbestos. (*Ibid.*)

This Response contains a list of documents but does not state any specific facts as to what evidence these documents contain that would prove a claim of threshold exposure. Plaintiffs' Response to SROG No. 4, seeking identification of all documents regarding threshold exposure, appears to incorrectly incorporate by reference Plaintiff's prior Response to SROG No. 1, a prior Response that identifies no documents. The Response to SROG No. 4 also identifies non-specific transcripts of prior depositions of Defendant's employees, officers, directors, representatives, etc. and Defendant's discovery responses in this action, but neither the Response to SROG Nos. 2 or 4 state what, if any, evidence to support a claim for threshold exposure these documents contain. (*Id.* at p. 7:7-23.)

Plaintiffs' Response to SROG No. 5, seeking identification of witnesses with personal knowledge to support the threshold exposure claim, specifically identifies only Plaintiff herself, but states that Plaintiff "may" call unspecified employees, officers, directors, representatives or custodians of records of Defendant or other defendants in this action and Plaintiff's treating physicians. (*Id.* at pp. 7:24-8:15.) Neither of Plaintiff's Responses to SROG No. 2 or 5 contains any specific facts regarding what personal knowledge any such witnesses might have to support a threshold exposure claim.

Defendant also attempts to present affirmative evidence that none of the products identified at deposition by Plaintiff contained Defendant's talc. However, none of this evidence is admissible against Plaintiff.

Nevertheless, Defendant's showing regarding Plaintiff's factually devoid responses to Defendant's sufficiently comprehensive written discovery is sufficient to shift the burden of production to Plaintiff to present evidence sufficient to create triable issues of material fact regarding threshold exposure, specifically whether it is more likely than not that Defendant supplied the talc for the products Plaintiff testified to using during discreet periods of time and whether it is more likely than not that Defendant's talc was contaminated with asbestos.

In Opposition, Plaintiff contends that Defendant has not proven that Plaintiff herself does not have personal knowledge that Defendant supplied talc to the manufacturers of the products she used or that Defendant's talcs were contaminated with asbestos. However, the Court has yet to see a plaintiff who has alleged asbestos exposure from the use of cosmetic talc products who also possesses personal knowledge of who supplied the cosmetic talc to the manufacturers of the products he or she used or any personal knowledge that the talc was contaminated with asbestos, a fact that plaintiffs can typically prove only by means of defendants' own documents produced in discovery or through expert witness testimony. Further, Plaintiff's Complaint's Third and Fourth Causes of Action, sounding in Plaintiff's alleged reliance on Defendant's intentional misrepresentations or fraudulent concealments, implicitly allege that Plaintiff has no personal

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knowledge of these facts.

The Court has reviewed Plaintiff's 540-page evidentiary submission in Opposition and finds that even if all of the evidence were credited, it is not sufficient to create triable issues of material fact that Plaintiff was exposed at asbestos-contaminated talc attributable to Defendant.

In Opposition, Plaintiff seeks to establish solely that the Estee Lauder White Linen body powder ("White Linen powder") she testified to using between 1979 and 1987 contained either or both of Defendant's 907 talc from Death Valley, California ("907 Talc") or 00 talc from an unspecified region of France ("00 Talc"). Plaintiff's Additional Material Facts ("PAMF") Nos. 4 and 7 assert that Defendant sold to defendant Estee Lauder, Inc. ("Estee Lauder") at least 319,600 pounds of 907 Talc between 1977 and 1989 and at least 87,178 pounds of 00 Talc between 1984 and 1986. Although the Court is not reasonably able to confirm the claimed amounts of talc based on the evidence cited in support of PAMF Nos. 4 and 7, Defendant did not respond to any of Plaintiff's PAMF and did not object to any of the underlying evidence in support of PAMF Nos. 4 and 7. Therefore, PAMF Nos. 4 and 7 are credited. PAMF No. 11 establishes that Defendant last sold 907 Talc to Estee Lauder in 1991.

Plaintiff does not submit admissible evidence that Defendant was the sole or majority supplier of either 907 Talc or 00 Talc during the periods described above. (See Rulings on Objections below. Note also that even if PIOE Exh. F were admissible against Defendant, PAMF Nos. 12 and 14 and the evidence in support thereof indicate that Estee Lauder had talc suppliers other than Defendant during the relevant time period.) Further, Plaintiff presents no evidence regarding the total amounts of all talcs purchased by Estee Lauder from all suppliers during the relevant period.

Plaintiff has presented no actual evidence that White Linen powder contained 907 Talc at any time between 1979 and 1987, the period of Plaintiff's use. Further, Plaintiff presents no evidence regarding what Estee Lauder products incorporated 907 Talc at any time.

Instead, Plaintiff submits evidence with the apparent intent to create a reasonable inference that White Linen powder must have contained 907 Talc during the 1979 to 1987 period. (See *Miller v. Department of Corrections* (2005) 36 Cal.4th 446, 470 (on summary judgment all reasonable inferences should be drawn in favor of nonmoving party).) First, Plaintiff presents evidence that, although Estee Lauder contends that White Linen powder contained 00 Talc and "Ace P-2 Talc" during the relevant period, Estee Lauder no longer has any formula cards earlier than 1993 for White Linen, that talcs used for Estee Lauder's approximately half dozen body powders sometimes changed over time, and that Estee Lauder's person most qualified ("PMQ") was unable to explain at her deposition in this action how exactly Estee Lauder made the determination that White Linen powder contained 00 Talc and Ace P-2 Talc during the 1979 to 1987 period. (PAMF Nos. 22-25 and evidence in support thereof.)

Plaintiff relies on Exhibit S to her Index of Exhibits ("PIOE") for the proposition that Estee Lauder internally authorized 907 Talc for use in its cosmetic talc products as of 2005, but that in 1991 907 Talc was replaced by "1625 Talc." However, Plaintiff presents no evidence White Linen powder ever contained 1625 Talc.

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Plaintiff presents evidence creating a reasonable inference that none of Estee Lauder's Youth-Dew, Cinnabar, Beautiful or Estee dusting body powders or Moisture Balance translucent face powder contained 907 Talc during the relevant period. Instead, these products appear to have contained American-milled Italian talc (under two names used by different suppliers), 00 Talc, Ace P-2 Talc or "Jet A24 RC Talc." However, Plaintiff presents no evidence to support a finding that White Linen, Youth-Dew, Cinnabar, Beautiful and Estee body powders and Moisture Balance translucent face powder were the only products manufactured by Estee Lauder that incorporated any type of talc.

Further, Plaintiff's evidence begs the question: if Estee Lauder was not using 907 Talc for any of its other body and face powders manufactured during the 1979 to 1987 time period, why would Estee Lauder have elected to use 907 Talc for White Linen powder exclusively? There is no evidence in the record that addresses this question. Instead, Plaintiff's record more reasonably creates an inference that the principal difference between Estee Lauder's various brands of body powder was the fragrance of each body powder. (See e.g. Exh. L: Estee Lauder Christmas 1987 Calendar stating in relevant part: "Youth-Dew – Evocative. Provocative. This is not a scent to be taken (or given) lightly;" "White Linen – Gets fresh with flowers. ...;" "Cinnabar – Spicy. A little dicey. Wear it. And beware.") Thus, it appears more likely than not that Estee Lauder would have used the same talcs to make White Linen powder that it used to make Youth-Dew, Cinnabar, Beautiful or Estee body powders during the same time period.

In sum, Plaintiff's evidence is too speculative for a reasonable jury to infer that it is more likely than not that at any time during the 1979 to 1987 period White Linen powder contained 907 talc. Instead, it is at least as likely that Estee Lauder was using the 907 talc it purchased for non-body powder products. One could also just as readily speculate based on Plaintiff's record that Estee Lauder used the 907 talc it purchased for products marketed to foreign countries. (See PAMF No. 32. The Court notes that Exh. T appears to contain no evidence supporting PAMF No. 33.)

The Court finds that Estee Lauder's PMQ deposition testimony establishes for purposes of this MSJ that 00 Talc was incorporated into White Linen powder between 1979 and 1987. However, Plaintiff does not present sufficient admissible evidence to establish that during the period between 1984 to 1986, when Defendant supplied more than 87,000 pounds of 00 talc to Estee Lauder, Defendant was the exclusive, majority or significant minority supplier of 00 Talc to Estee Lauder.

Even if a reasonable jury could infer that it is more likely than not that some of Defendant's 87,000 pounds of 00 Talc was incorporated into the White Linen powder Plaintiff used between 1984 and 1986, Plaintiff presents insufficient evidence to create triable issues of material fact that Defendant's 00 Talc was contaminated with asbestos.

The only evidence presented by Plaintiff on this issue is Exhibit Z to the PIOE. (See PAMF No. 42.) Exhibit Z contains an analysis of a single sample of "French talc" collected on 11/10/2015, 28 years after Plaintiff contends she last used White Linen powder, which sample tested positive for asbestos contamination by MVA Scientific Consultants on behalf of a different law firm presumably for another action. Plaintiff presents no evidence that the French talc sample taken in 2015 was the same talc as 00 Talc. The Opp. Renken Declaration at ¶ 27 states that a Dr. Compton has been designated as an expert by Plaintiff in this action. The Expert Witness

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designation at PIOE Ex. AA identifies Dr. Compton as affiliated with MV Scientific Consultants but does not state what expert witness testimony Dr. Compton is anticipated to provide at trial. Further, while Plaintiff presents a 162-page geological expert witness declaration of Mark Krekeler, Ph.D. regarding in part asbestos-contamination of California-mined talcs, Plaintiff provides no expert witness declaration regarding alleged asbestos-contamination of French talcs.

Plaintiff requests a CCP § 437c(h) continuance in order to (1) obtain a sample of 907 Talc from Defendant for asbestos testing; and (2) to obtain further responses to Special Interrogatories from Estee Lauder regarding the identity of the talc suppliers for Estee Lauder's talc-containing products marketed between 1975 and the present.

Plaintiff's request for a § 437c(h) is DENIED. Testing samples of 907 Talc for asbestos-contamination will not produce evidence that White Linen powder manufactured between 1979 and 1987 incorporated 907 Talc. Further, Estee Lauder served its Third Amended Responses to Plaintiff's First Set Special Interrogatories on 10/21/2022. (PIOE Ex. CC.) Defendant's MSJ/MSA was originally noticed for hearing on 3/2/2023 but has been continued at least twice to the present 5/25/2023 hearing date. However, as of 5/24/2023, Plaintiff has not filed or served a Motion to Compel Further Responses from Estee Lauder. Plaintiff presents no evidence why she could not have done so in the more than seven months since the Third Amended Responses were served. Finally, Estee Lauder's Special Interrogatory Responses cannot be used against Defendant in this action. (CCP § 2030.410.)

Wherefore, the Court GRANTS Defendant's MSJ.

The Court DENIES Defendant's alternative MSA as moot.

The Court SUSTAINS all of Plaintiff's Objections Nos. 1-4 to Defendant's Moving evidence.

The Court SUSTAINS Defendant's Reply Objection No. 1 to Plaintiff's Opposition Evidence. A party's interrogatory responses are only admissible against the responding party. (CCP § 2030.410.)

The Court OVERRULES Defendant's Reply Objections Nos. 2(1)-2(6).

The Court SUSTAINS Defendant's Reply Objections Nos. 2(7)-2(11). Having a deponent agree that the examining attorney has accurately read into the record the contents of a document the deponent has not previously seen and cannot properly authenticate does not create admissible evidence. The Court also reminds defense counsel that written objections to evidence must be consecutively numbered. (CRC Rule 3.1354(b).)

The Court OVERRULES Defendant's Reply Objections Nos. 3-4. Counsel for Defendant attended these depositions, and Berroteran, 12 Cal.5th 867 applies to the admissibility of deposition transcripts at trial and not on summary judgment.

The Court OVERRULES Defendant's Reply Objections Nos. 5-7 and 10. The documents are

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adequately authenticated as business records of Estee Lauder or Johns-Manville.

The Court SUSTAINS Defendant's Reply Objection Nos. 8-9. The cited deposition testimony does not adequately establish these documents as business records of Estee Lauder.

The Court OVERRULES Defendant's Objections to the Opp. Krekeler Declaration.

To the extent that Plaintiff contests this Tentative Ruling and argues at the hearing that evidence in her overly voluminous record creates triable issues of material fact, Plaintiff should be prepared to provide specific citations to evidence in the record at the hearing. Many of Plaintiffs' 47 PAMF contain excessive citations to evidence, either as a result of unnecessary repetition, citing to entire lengthy documents rather than to specific pages, and by incorporating multiple prior PAMF as purported support for later PAMF. (See e.g., PAMF Nos. 18-19, each citing in relevant part to the entirety of a 95-page set of Responses to a Set of 80 Special Interrogatories, and PAMF No. 19 improperly incorporating by reference 14 prior PAMF and all evidence in support of the 14 PAMF.)

Clerk is directed to serve copies of this order, with proof of service, to counsel and to self-represented parties of record.

Dated: 05/25/2023



Richard Seabolt / Judge

SUPERIOR COURT OF CALIFORNIA COUNTY OF ALAMEDA	Reserved for Clerk's File Stamp
COURTHOUSE ADDRESS: Rene C. Davidson Courthouse 1225 Fallon Street, Oakland, CA 94612	FILED Superior Court of California County of Alameda 05/25/2023
PLAINTIFF/PETITIONER: Janel Davis	Chad Finke, Executive Officer / Clerk of the Court By: <u><i>Nicole Hall</i></u> Deputy N. Hall
DEFENDANT/RESPONDENT: Albertson's LLC et al	
CERTIFICATE OF ELECTRONIC SERVICE CODE OF CIVIL PROCEDURE 1010.6	CASE NUMBER: RG21112811

I, the below named Executive Officer/Clerk of Court of the above-entitled court, do hereby certify that I am not a party to the cause herein, and that on this date I served one copy of the Order re: Hearing on Motion for Summary Judgment entered herein upon each party or counsel of record in the above entitled action, by electronically serving the document(s) from my place of business, in accordance with standard court practices.

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Dated: 05/25/2023

By:

Nicole Hall

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SHORT TITLE: Davis VS Albertson's LLC

CASE NUMBER: RG21112811

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