UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
CIVIL MINUTES—GENERAL

Case No. CV 20-11797-MWF (MAAx) **Date: December 6, 2022**
Title: Janet E. Carpenter et. al. v. 3M Company, et. al.

Present: The Honorable MICHAEL W. FITZGERALD, U.S. District Judge

Deputy Clerk:	Court Reporter:
Rita Sanchez	Not Reported

Attorneys Present for Plaintiff:	Attorneys Present for Defendant:
None Present	None Present

Proceedings (In Chambers): ORDER GRANTING DEFENDANT NIBCO, INC.'S MOTION FOR SUMMARY JUDGMENT OR IN THE ALTERNATIVE SUMMARY ADJUDICATION [323]; AND GRANTING DEFENDANT ASCO VALVE, INC.'S MOTION FOR SUMMARY JUDGMENT [328]

Before the Court are two Motions:

First, Defendant Nibco, Inc.'s ("Nibco") Motion for Summary Judgment or in the Alternative Summary Adjudication (the "Nibco Motion"), filed on October 24, 2022. (Docket No. 323). Plaintiffs Janet E. Carpenter et. al. filed an Opposition on November 14, 2022. (Docket No. 337). Nibco filed a Reply on November 21, 2022. (Docket No. 59).

Second, Defendant Asco Valve, Inc.'s ("Asco") Motion for Summary Judgment (the "Asco Motion"), filed on October 26, 2022. (Docket No. 328). Plaintiffs filed an Opposition on November 14, 2022. (Docket No. 341). Asco filed a Reply on November 21, 2022. (Docket No. 350).

The Court has read and considered the papers filed in connection with the Motion and held a hearing on December 5, 2022.

The Court notes that Nibco was not present at the hearing. Because the Court deemed the Nibco Motion appropriate for decision without oral argument, the Court did not reset the hearing. *See* Fed. R. Civ. P. 78(b); Local Rule 7-15.

The Motions are **GRANTED** because Plaintiffs have failed to adduce sufficient evidence to establish that either of Defendants' products was a substantial factor in causing John Carpenter's death. As explained further below, the Court determines that maritime law applies; nonetheless, under either maritime or California law, because this action is in federal Court, the Ninth Circuit's opinion in *McIndoe* governs and precludes reliance on the type of expert testimony Plaintiffs utilize to establish causation.

Additionally, in connection with the Asco Motion, Plaintiffs and Asco filed evidentiary objections. On ruling on the Motion, the Court relies only upon admissible evidence. To the extent the Court relies upon evidence to which the parties object, the objections are **OVERRULED**. To the extent the Court does not, the objections are **DENIED *as moot***.

I. BACKGROUND

This action stems from the tragic death of decedent John Carpenter. Specifically, Plaintiffs allege that Mr. Carpenter contracted and died from mesothelioma due to exposure to asbestos, which occurred (in part) during his service in the Navy. (Asco's Statement of Undisputed Facts ("ASUF"), No. 1). Plaintiffs are Janet Carpenter (the decedent's wife, suing individually and as successor in interest to the decedent) and Brian Carpenter, Michael Carpenter, Teri Carpenter, and Tanya Hardin (the decedent's children) (collectively "Plaintiffs").

This action was originally filed by Plaintiffs in the Los Angeles Superior Court but was removed to this Court by a Defendant other than these two moving Defendants, pursuant to 28 U.S.C. § 1442. (*Id.* at 2-3; *see also* Notice of Removal (Docket No. 1)). Plaintiffs have sued over 40 non-government Defendants (many of which have settled), alleging that Mr. Carpenter worked with or near asbestos-containing products made or sold to the Navy by each Defendant. In their Complaint, Plaintiffs brought claims for negligence, strict liability, false representation, intentional tort/intentional failure to warn, loss of consortium, and punitive damages. (Notice of Removal, Ex. 1). Plaintiffs do not oppose partial summary judgment as to the intentional failure to warn, false representation, and punitive damages claims. (Asco

Opp. at 17). Therefore, only the negligence, strict liability, and loss of consortium claims remain.

1. Facts Common to Both Defendants

Before outlining the defendant-specific allegations, the Court briefly describes the type of work Mr. Carpenter did in the Navy and the activities that Plaintiffs believe exposed him to asbestos. The Court notes that while it recites the facts in the light most favorable to Plaintiffs, the Court has not always accepted certain assertions of "fact," where unsupported by the record. *See 21st Century Fin. Servs., LLC v. Manchester Fin. Bank*, 255 F. Supp. 3d 1012, 1027 (S.D. Cal. 2017) ("Courts do not consider arguments based on factual assertions that are not supported by the record.") (citing *Daniel F. v. Blue Shield of Calif.*, 305 F.R.D. 115, 122-23 (N.D. Cal. 2014)).

While Mr. Carpenter was allegedly exposed to asbestos from several locations, and possibly from secondary exposure due to Mr. Carpenter's father's work, the only relevant location for the purposes of the two Motions is Long Beach Naval Shipyard ("LBNS"). Mr. Carpenter worked at LBNS from 1973/1974 until 1996. From 1973/74 to 1984, Mr. Carpenter worked as a marine machinist (Plaintiff's Additional Undisputed Facts iso of Asco Opp. ("AAUF") No. 5). In 1984, Mr. Carpenter transferred to design, where he worked as a mechanical engineering technician. (*Id.* at 5-7; *see also* Deposition of Paul A. Shaffell ("Shaffell Depo.") at 17:21-22). It was the job of a marine machinist to work on "various equipment below decks" on Naval ships. (AAUF No. 6). In design, it was the engineering technician's job to "verify engineering drawings, develop engineering drawings, come up with engineering solutions to problems in the waterfront, and to test and ensure ship repairs were done correctly." (*Id.* at 7).

Mr. Carpenter died before he could be deposed, but four of Mr. Carpenter's co-workers, Paul Shaffell, Alan Jackson, Rick Harrod and Thomas Carsten, each testified about the work they did with Mr. Carpenter at LBNS. The only product that certain of the fact witnesses associated with Defendants Nibco and Asco were their valves. Plaintiffs do not claim that the valves themselves contained asbestos. Rather, Plaintiffs contend that certain gaskets attached to both of Defendants' valves contained asbestos,

and that there was asbestos-containing packing (rope-like material wrapped around the stem of the valve to prevent leaking) on or around the valves. (*See* Plaintiffs' Additional Undisputed Facts iso Nibco Opp. ("NAUF") Nos. 18-21, 27, 28). The relevant activities which Plaintiffs claim exposed Mr. Carpenter to asbestos in connection with the moving Defendants' products was the removal and replacement of gaskets and/or packing materials that were affixed to Defendants' valves.

While the fact witnesses explained the processes for such removal and replacement with some discrepancies, the testimony concerning how asbestos dust might be released from asbestos-containing products in or attached to Defendants' products can be generally described. When removing gaskets from the valves, Mr. Carpenter would use a putty knife or a scraper to scrub the majority of the old gasket material off. (*Id.* at 22). To install a new gasket, sheet gasket material was often hit with a ball peen hammer to get the proper dimensions. (*Id.* at 24). A hole-punch was also used to cut out the holes. (*Id.*). Additionally, part of Mr. Carpenter's work at LBNS involved removing and replacing old packing that had become hard, dry, and solid. (*Id.* at 29). To remove it, a packing extractor that looked like a corkscrew was used to dig out the old packing. (*Id.* at 30). To install new packing, it was first measured and cut with a knife, which often required sawing, given the rope-like nature of the material. (*Id.* at 35). Each of the above activities would create visible dust that would be inhaled by the worker performing the task as well as bystanders. (*Id.* at 26, 35). Therefore, assuming the gasket and/or packing materials contained asbestos, such activities would expose Mr. Carpenter to various amounts of asbestos dust. The witnesses, to varying degrees, often identified John Crane (a non-moving Defendant) and Garlock as the manufacturers of the gasket and packing materials, and one witness suggested that it was known throughout the shipyard that those manufacturers' products contained asbestos. (*Id.* at 39-40).

2. Nibco Valves

Plaintiffs' direct evidence of exposure to Nibco's valves is primarily derived from the testimony of two fact witnesses, Carsten and Jackson.

Carsten worked with Mr. Carpenter at LBNS, both as a marine machinist from about 1975 to 1984, and then in design from 1984 until 1996. (NAUF No. 8). Carsten associated Nibco specifically with valves that he and Mr. Carpenter had worked on at the shipyard between 1975 and 1984. (*Id.* at 9). Carsten recalled working on repacking or replacing Nibco valves in Mr. Carpenter's presence and estimated that, over that nine-year period, he saw Mr. Carpenter personally work on Nibco valves "probably 50 times." (*Id.* at 10). Of those 50 times, Carsten estimated that he saw Mr. Carpenter remove Nibco valves from the system (which involved removing the attached gaskets) 25-30 times. The process of removing the gasket and scraping off the old materials often took 20-30 minutes. (*Id.* at 23). The other 20-25 times in which Carsten recalls seeing Mr. Carpenter work with Nibco valves was when Mr. Carpenter would repack the valve with rope-like material. (*Id.* at 15). Carsten did not specify how long the repacking process took. Carsten testified that he was able to identify the Nibco valves he and Mr. Carpenter worked with because the name was embossed on the valve. (*Id.* at 11).

Carsten testified that he did not know the age or maintenance history of any Nibco valves Mr. Carpenter worked on or whether the gaskets or packing materials were original to the valves. (Nibco's Statement of Undisputed Fact ("NSUF") Nos. 12-13). When asked directly, Carsten did not know if any of the gaskets or packing they removed from Nibco valves contained asbestos. (*Id.* at 12). However, at various points in his deposition he identified John Crane as the manufacturer of certain packing material and Garlock as the manufacturer of the gasket materials. (NAUF No. 16).

Jackson also testified that between 1983 and 1995, he saw Mr. Carpenter work with about 20 Nibco gate valves, about 15 Nibco globe valves, and 4-5 Nibco butterfly valves. (*Id.* at 36). Jackson testified that for gate and globe Nibco valves, the type of work that he and Mr. Carpenter would do was limited to packing the valves, which involved either "tightening up the gland nut" or "putting another round" of packing around the valve. (*Id.* at 37). Jackson testified that they did not remove gasket material from the gate or globe Nibco valves. (Deposition of Allen Jackson ("Jackson Depo.") at 279:14-17). As for butterfly valves, they would remove the gasket materials. (*Id.* at 279:20-21). Jackson testified that the gasket materials in the butterfly valves were manufactured by Garlock or John Crane and that it was well-known

throughout the shipyard that John Crane and Garlock contained asbestos. (*Id.* at 282:22, 283:17-20). Moreover, Plaintiffs submit a trial transcript from another case in which a Nibco representative indicates that the Navy specifications required their valves to come with asbestos materials. (NAUF No. 47).

3. Asco Valves

Asco sold valves to the Navy with flanged connections until at least the mid-2000s. (AAUF 49). Asco sold several types of valves to the Navy and some, but not all, called for the use of asbestos-containing gaskets and packing. (*Id.* at 51; *see also* Deposition of David Zdobinski ("Zdobinski Depo.") at 59:18-20). Zdobinski, an Asco corporate witness who testified in another case, testified that the only valves he believed Asco sold to the Navy requiring asbestos-containing gaskets were its steam valves. (Zdobinski Depo at 59:23-24). Generally, the ASCO valves that called for asbestos-containing gaskets were utilized in higher temperature applications. (AAUF No. 52). When ASCO shipped a valve that called for the use of asbestos gaskets and packing, ASCO supplied the asbestos gaskets and packing to be used on that valve, which it would purchase from specified manufacturers, including Garlock. (*Id.* at 54).

Of the five fact witnesses Plaintiffs have identified, only one of the individuals, Rick Harrod, recognized Asco as a relevant manufacturer. Harrod testified that he worked with Mr. Carpenter during both his time as a marine machinist and as an engineer in design. (*Id.* at 8, 46). Harrod testified that while working as marine machinists, he and Mr. Carpenter worked together on hundreds of valves. (*Id.* at 9). And while it is undisputed that Harrod recognized the name Asco and associated it with a valve at the LBNS, the parties disagree about the import of the remainder of his testimony. (*See* Asco Resp. to Pltf. AAUF Nos. 12, 15).

The confusion around Harrod's testimony arises from the fact that shortly after being asked about ***Asco*** valves, Harrod began discussing ***AMOT*** valves. The best way to understand the testimony is to read it in context. Therefore, the Court reproduces much of the relevant testimony below:

> Q: The next one is ASCO. A-S-C-O, all caps. That is short for Automatic Switch Company. Is that company familiar to you?

A: Yes.
Q: Okay. What do you associate with ASCO?
A: Thermal control of the systems if --
Q: I am sorry. Are you finished?
A: Yes. They were a thermal control valve.
Q: Okay. It is a valve then?
A: Yes.

(Deposition of Rick Harrod ("Harrod Depo.") at 60:1-10.)

The testimony then continued and Harrod described how a thermal control valve operates. A few questions later, the testimony continued as follows:

Q: All right. So, these ASCO valves that you were talking about, they don't have stems, do they?
A: Yes. They would have a stem.
Q: They would?
A: Yes.
Q: What is the stem connected to?
A: The thermostat that is controlling it.
Q: Okay. When you say thermostat, I am thinking the home thermostat which is like sometimes in a box, sometimes it is round. So, I don't think that is what you are talking about, right?
A: No. That is not what I am talking about.
Q: Can you describe the thermostat for me, please?

(*Id.* at 61: 5-23)

Harrod responds explaining the thermostat, and then the questioner proceeds to ask Harrod about another six questions concerning how the thermostat and valve are connected and operate in general terms. This line of questioning culminates into the following discussion:

Q: Okay. Let's talk about this valve you have been describing [that is connected to a thermostat]. I am sorry, again, what do you call this valve?
A: Thermostat control. I think our little tech knowledge we called them AMOTS.
Q: What is it again?
A: I think we called them AMOTS. What that stood for, I do not remember.
Q: Is it like A-M-O-T-S?
A: A-M-O-T
Q: A-M-O-T. Okay.
MR. KARST: Is that an acronym?
THE WITNESS: Yes.
. . .
Q: All right. I know you may not know exactly what A stands for, M stands for, O stands for, and T stands for. Well, I don't know. Is there any letter in the AMOT you know might stand for?
A: A would have been automatic. T would have been thermostat. In between, I don't recall.

(*Id.* at 63:8 – 64:4).

When Harrod goes on to describe Mr. Carpenter's exposures to asbestos while working with thermal control valves he continually refers to them as AMOT (not Asco) valves. However, the distinction comes up again later in the deposition in the following discussion:

Q: All right. How do you identify the manufacturer of these A-M-O-T valves?
A: They all had labeling.
. . .
Q: Okay. So earlier you said -- remember this all started out by me asking you about my client, ASCO. So, do you see ASCO on these nameplates, or how do you remember that?
A: ASCO is a very common valve, yes.

Q: The word A-S-C-O would be on the label plate?
A: Yes. If I -- yes.
Q: Other than ASCO, do you remember any other parts of the name itself? Is it just A-S-C-O and nothing else, or anything you remember?
A: No. ASCO is what I remember.

(*Id.* at 72:1-3, 73:6-16).

In its Motion, Asco argues that Harrod was referring to another manufacturer AMOT and provides as an exhibit the United States Patent Office Trademark Registration for AMOT, registered in 1958 (and first in commerce in 1948), which belongs to Amot Controls Corporation. (Declaration of Brett A. Fountain ("Fountain Decl."), Ex. U). The registration states that the trademark is for "thermostatic control devices, namely thermostats, controls, switches, and valves." (*Id.*). Asco also offers a declaration of an Asco engineering manager, who states that "[n]o valve that ASCO ever provided to the Navy with asbestos packing was either a thermal or thermostat control valve." (Declaration of Stephen M. Casadevall ("Casadevall Decl.") at ¶ 4).

In response, Plaintiffs argue that "while Mr. Harrod did refer to the ASCO valves as 'AMOT' valves, it was clear from his testimony that 'AMOT' was an acronym for the type of valve, not the name of the manufacturer of the valve." (Asco Opp. at 7). Plaintiffs further point to the fact that Harrod was "specifically asked if 'AMOT' was an acronym, and he responded 'yes.'" (*Id.*). In its Reply, Asco counters that even if Harrod meant Asco valves, his testimony does not create a dispute of fact because, while the evidence demonstrates that Asco provided asbestos-containing steam valves to the Navy, the evidence shows that Asco did not supply asbestos-containing thermal control valves to the Navy, which are the type of valves Harrod associated with Asco. (Asco Rely at 5).

Assuming the thermal control valves to which Harrod referred were Asco valves, Harrod testified that those valves had two flanges and that gaskets would fill the space between the flanges. (AAUF 16-17). Harrod testified that some of the gaskets they removed were made by Garlock, which he knew because the gaskets had the name Garlock written on them. (*Id.* at 18). Harrod testified that he also knew that

the Garlock gaskets contained asbestos because they were used in heated applications. (*Id*. at 19). Harrod saw Mr. Carpenter remove gaskets from the Asco/AMOT valves while he was a machinist, but he did not testify with what frequency such removals occurred. (*Id*. at 23). Harrod also explained that sometimes Mr. Carpenter's work (as both a machinist and as an engineer in design) involved removing and replacing the packing around the Asco/AMOT valves, but he did not specify the frequency with which Mr. Carpenter performed this task. (*Id.* at 34, 41, 48).

Harrod further testified that he knew the packing material they used was manufactured by John Crane because the rolls of packing were labeled accordingly. (*Id.* at 35). He also testified that he knew John Crane packing contained asbestos because the label stated as much. (*Id.* at 36). Harrod also worked with Mr. Carpenter during their time in design together. (*Id.* at 45-46). As part of their job in design, they sometimes were in the vicinity of others fixing the Asco/AMOT valves. (*Id.* at 46). Harrod recalled this happening about five times during Mr. Carpenter's work in design. (*Id.* at 47).

II. LEGAL STANDARD

In deciding a motion for summary judgment under Rule 56, the Court applies *Anderson*, *Celotex*, and their Ninth Circuit progeny. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986); *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986). "The court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a).

The Ninth Circuit has defined the shifting burden of proof governing motions for summary judgment where the non-moving party bears the burden of proof at trial:

> The moving party initially bears the burden of proving the absence of a genuine issue of material fact. Where the non-moving party bears the burden of proof at trial, the moving party need only prove that there is an absence of evidence to support the non-moving party's case. Where the moving party meets that burden, the burden

> then shifts to the non-moving party to designate specific facts demonstrating the existence of genuine issues for trial. This burden is not a light one. The non-moving party must show more than the mere existence of a scintilla of evidence. The non-moving party must do more than show there is some "metaphysical doubt" as to the material facts at issue. In fact, the non-moving party must come forth with evidence from which a jury could reasonably render a verdict in the non-moving party's favor.

Coomes v. Edmonds Sch. Dist. No. 15, 816 F.3d 1255, 1259 n.2 (9th Cir. 2016) (quoting *In re Oracle Corp. Sec. Litig.*, 627 F.3d 376, 387 (9th Cir. 2010)).

"A motion for summary judgment may not be defeated, however, by evidence that is 'merely colorable' or 'is not significantly probative.'" *Anderson*, 477 U.S. at 249–50. "When the party moving for summary judgment would bear the burden of proof at trial, 'it must come forward with evidence which would entitle it to a directed verdict if the evidence went uncontroverted at trial.'" *C.A.R. Transp. Brokerage Co. v. Darden Rests., Inc.*, 213 F.3d 474, 480 (9th Cir. 2000) (quoting *Houghton v. South*, 965 F.2d 1532, 1536 (9th Cir. 1992)).

III. CHOICE OF LAW

At least in Nibco's view, an important threshold issue is whether federal maritime or California law applies here. In both of their Oppositions, Plaintiffs simply make arguments as to why they have set forth sufficient evidence under both maritime and California law. Given the specific authorities submitted by Nibco that are unrebutted, it seems to the Court that Plaintiffs are tacitly acknowledging that federal maritime law does apply. *See Conden v. Royal Caribbean Cruises Ltd.*, Case No. 20-22956-CIV-ALTONAGA/Goodman, 2021 WL 4973533, *7 (S.D. Fla. June 21, 2021) ("The Court finds Scootaround's failure to meaningfully respond to Plaintiff's counterarguments is a concession by Scootaround of the arguments' persuasiveness and that issues of fact remain."); *see also Dennis v. Air & Liquid Sys. Corp.*, No. CV 19-9343-GW-KSX, 2021 WL 3555720, at *5 n. 8 (C.D. Cal. Mar. 24, 2021) (holding that maritime law applied where the plaintiff failed to take a position on which body of law governed given decedent worked aboard Navy ships that were docked at California

shipyards and noting that "state law may not be applied where it would conflict with [federal] maritime law").

This issue is not all that significant to the Court for two reasons:

First, the Court does not view the issue of which law applies as a jurisdictional question. The basis for removal for this action was 28 U.S.C. § 1442, which provides federal district courts with subject matter jurisdiction over cases where the defendants, such as Asco and Nibco, were acting under the authority of an officer or agency of the United States. (*See* Removal Notice at 3 (Docket No. 1)). Because any equipment manufactured for the Navy by Defendants was done under the direction and control of a federal officer, another (non-moving) Defendant argued that § 1442 applied. Plaintiffs never moved to remand, so the Court has never been afforded a reason to question the propriety of its jurisdiction until these Motions.

California federal district courts have interpreted § 1442 broadly in favor of removal where a manufacturer of equipment demonstrates that it acted under the direction of a federal officer, raises a colorable federal defense to plaintiffs' claims, and establishes a causal connection between its alleged action under the control of a federal officer and plaintiffs' claims. *See, e.g., Ballenger v. Agco Corp.,* 2007 WL 1813821 (N.D. Cal. June 22, 2007). Therefore, based on a review of the exhibits attached in support of the Notice of Removal, the Court is satisfied that § 1442 provides a basis for maintaining subject matter jurisdiction over Plaintiffs' claims, regardless of the substantive law that applies. *See Thompson v. Crane Co.*, Civil No. 11-00638 LEK-RLP, 2012 WL 1344453, *20 n.16 (D. Haw. Apr. 17, 2012) ("As a general rule, the existence of removal jurisdiction is determined at the time the removal petition is filed, irrespective of subsequent events. Federal courts have applied this general rule to federal officer removal jurisdiction.") (citations omitted).

"[W]hen removal of a state court action is available because the defendant is a federal officer, the substantive law to be applied is unaffected by the removal." Wright & Miller, et al., *Federal Practice & Procedure* § 3726 (4th ed. 2012) (citing *Arizona v. Manypenny*, 451 U.S. 232 (1981)).

Second, as discussed more fully at the end of this Order, this Court does not view the applicable law as determining the applicability of the Ninth Circuit precedent that dictates the rulings here.

Nonetheless, in case the issue of the applicable law turns out to be more significant than it appears, the Court does specifically rule that federal maritime law applies. This ruling is based not only on Plaintiffs' silence on the issue but also the Court's own analysis. Federal maritime law applies over a tort claim if two conditions are satisfied: (1) the location test and (2) the connection test. *Jerome B. Grubart, Inc. v. Great Lakes Dredge & Dock Co.*, 513 U.S. 527, 534 (1995). First, under the location test, courts consider "whether the tort occurred on navigable water or whether injury suffered on land was caused by a vessel on navigable water." *Id.* Next, the connection test requires two determinations. Courts must consider whether (i) the incident has a "potentially disruptive impact on maritime commerce" and (ii) the "general character" of the "activity giving rise to the incident" shows a "substantial relationship to traditional maritime activity." *Id.* at 527. If both tests are satisfied, courts must apply federal maritime law — "an amalgam of traditional common-law rules, modifications of those rules, and newly created rules." *E. River S.S. Corp. v. Transamerica Delaval Inc.*, 476 U.S. 858, 865 (1986).

The facts underlying this action satisfy the location test. When Mr. Carpenter was exposed to Defendants' products, he was working at LBNS as a marine machinist, and then later as mechanical engineering technician in design. It was the job of a marine machinist to work on "various equipment below decks" on Naval ships. (AAUF No. 6). In design, it was (in part) the engineering technician's job to "come up with engineering solutions to problems in the waterfront and to test and ensure ship repairs were done correctly." (AAUF 45). "Courts have held that exposure to asbestos as a result of work on ship is sufficient to satisfy the location test so long as the exposure occurred on a vessel on navigable waters." *Shelton v. Air & Liquid Sys. Corp.*, No. 4:21-CV-04772-YGR, 2022 WL 2712379, at *1 (N.D. Cal. June 21, 2022) (citing *Myhran v. Johns-Manville Corp.*, 741 F.2d 1119, 1121 (9th Cir. 1984)) (finding that plaintiff's "expos[ure] to asbestos products during the repair of vessels floating on navigable waters" satisfies the location test). And although there is no evidence indicating whether the ships were docked on drydock or wet dock, for purposes of the

location test, "[i]t is well-settled that vessels in drydock are still considered to be in 'navigable waters.'" *In re Toy Asbestos*, No. 19-CV-00325-HSG, 2021 WL 1930992, at *2 (N.D. Cal. May 13, 2021) (citing *Cabasug v. Crane Co*., 956 F. Supp. 2d 1178, 1187 (D. Haw. 2013)) (holding that federal maritime law, not Hawaii law, applied to claims brought by a Naval shipyard worker who spent approximately three-quarters of his time on Naval ships in drydock)). Therefore, the location test is satisfied.

Next, the Court turns to the first prong of the connection test, which asks whether the incident has a "potentially disruptive impact on maritime commerce." *Grubart*, 513 U.S. at 527. The inquiry focuses on "whether the general features of the incident could hypothetically have an effect on maritime commerce [] [—] [i]t does not require that any impact actually occurred." *Christensen v. Georgia-Pac. Corp.*, 279 F.3d 807, 815 n. 31 (9th Cir. 2002); *see also Grubart*, 513 U.S. at 538 (explaining that the inquiry goes to the "potential effects, not to the particular facts of the incident"). The Ninth Circuit has "taken an inclusive view of what general features of an incident have a potentially disruptive effect on commerce." *In re Mission Bay Jet Sports, LLC*, 570 F.3d 1124, 1128 (9th Cir. 2009) (collecting cases).

"Cases have found that unsafe working conditions aboard a vessel under repairs or maintenance poses a potentially disruptive impact upon maritime commerce." *Shelton*, 2022 WL 2712379, at *2 (citing *Alderman v. Pac. N. Victor, Inc.*, 95 F.3d 1061, 1064 (11th Cir. 1996)); *Coats v. Penrod Drilling Corp.*, 61 F.3d 1113, 1119 (5th Cir. 1995) (en banc) ("Without a doubt, worker injuries, particularly to those involved in repair and maintenance, can have a disruptive impact on maritime commerce by stalling or delaying the primary activity of the vessel."). Here, the premise of the alleged torts is that "the use of asbestos in products and failing to warn U.S. Navy workers who used those products to repair boats at sea," caused Mr. Carpenter's death. *See* 2022 WL 2712379, at *2 (discussing application of maritime law to nearly identical claims). This type of incident has the potential to disrupt maritime commerce. *See id.* So, the first prong of the connection test is satisfied.

As for the second prong, the Court must consider whether the "general character" of the "activity giving rise to the incident" bears on a "substantial relationship to [a] traditional maritime activity." *Grubart*, 513 U.S. at 534. Mr.

Carpenter worked on products such as "pumps, valves, steam traps, blowers, boilers, and anchor windlasses;" and work with at least some of these products involved installing and removing gaskets as well as removing and replacing the packing. (AAUF 23-40; *see also* Deposition of Thomas Carsten ("Carsen Depo.") at 15:17-18). The Court concludes that the repair and maintenance of such products bears a substantial relationship to traditional maritime activity. *See Martinez v. Pac. Indus. Serv. Corp.*, 904 F.2d 521, 524 (9th Cir. 1990) (explaining that maritime law "is concerned with what keeps a ship in good working order").

In sum, the Court holds that both the location and connection tests are met. Accordingly, Plaintiffs' claims are subject to federal maritime law.

IV. DISCUSSION

While the Motions discuss various issues, the dispositive question is whether Plaintiffs have adduced sufficient evidence to create a genuine issue of triable fact regarding causation. Therefore, the Court focuses this Order on that issue.

"Plaintiffs in products liability cases under maritime law may proceed under both negligence and strict liability theories." *Lindstrom v. A-C Prod. Liab. Tr.*, 424 F.3d 488, 492 (6th Cir. 2005), *abrogated by Air & Liquid Sys. Corp. v. DeVries*, 139 S. Ct. 986 (2019). "Under either theory, a plaintiff must establish causation." *Id.*; *see also McIndoe v. Huntington Ingalls Inc.*, 817 F.3d 1170, 1173 (9th Cir. 2016) (adopting *Lindstrom* causation test for asbestos-based maritime claims)).

To prove causation, a plaintiff must have evidence demonstrating that (1) he was "actually exposed" to the defendant's asbestos-containing product (or that the defendant's product required incorporation of an asbestos-containing product) and (2) that such exposure was a "substantial contributing factor in causing his injuries." *McIndoe*, 817 at 1174; *see also DeVries*, 139 S. Ct. at 993 (holding that a defendant may be liable under maritime law for failure to warn where the defendant's product requires an asbestos part, even if those parts are produced by third parties). The Court discusses each of these causation elements in turn.

A. Exposure to Defendants' Products

1. Nibco Valves

Plaintiffs have adduced sufficient evidence to create a genuine dispute of fact regarding exposure to Nibco valves. Plaintiffs' two fact witnesses, together, identified around 90 encounters with Nibco valves over the course of about 21 years. Specifically, Carsten was able to recall about 50 incidents where Mr. Carpenter removed gaskets from, or replaced the packing for, Nibco valves. Jackson identified about 40 incidents where he saw Mr. Carpenter work on Nibco valves. For 35 of those incidents, Mr. Carpenter worked on packing the valve, for the other 4-5 of the incidents, the work involved removing gasket materials. Moreover, Plaintiffs introduce testimony indicating that federal specifications concerning the valves that Nibco produced for the Navy required gaskets and packing to be of an asbestos composition.

Even though the witnesses were not certain as to whether the packing and gasket materials were original to the Nibco valves, it is a reasonable inference from the facts that, if Nibco was required by the Navy to sell the valves with asbestos-containing materials, the Navy would replace those materials with similar asbestos-containing materials. The Supreme Court has indicated that if all other elements of a failure-to-warn claim are met, a manufacturer can be held liable where "a manufacturer itself makes the product with a part that the manufacturer knows will require replacement with a similar part." *DeVries*, 139 S. Ct. at 995.

And although it is perhaps somewhat implausible that the two witnesses would remember, after about 25-50 years, the precise number of times they worked with particular valves among hundreds of other valves, ultimately whether their testimony is plausible goes to the weight of the evidence and creates a triable issue of fact regarding whether Mr. Carpenter worked on Nibco valves. *See McIndoe*, 817 F.3d at 1176 (concluding that although 50-year-old testimony from the decedent's shipmates was "rather implausible," their testimony created an issue of fact as to exposure). Therefore, there is a triable issue of fact as to actual exposure with respect to Nibco valves.

2. Asco Valves

The evidence of Mr. Carpenter's exposure to asbestos-containing Asco valves is much more limited.

As for the Asco/AMOT confusion in Harrod's testimony, it is regrettable that Plaintiffs, on a motion for summary judgment, did not obtain and submit an affidavit from Harrod clarifying the meaning of his testimony on an issue as critical as exposure to Asco's product. *See Van Asdale v. Int'l Game Tech*., 577 F.3d 989, 999 (9th Cir. 2009) (citing *Messick v. Horizon Indus*., 62 F.3d 1227, 1231 (9th Cir. 1995) ("[T]he non-moving party is not precluded from elaborating upon, explaining or clarifying prior testimony elicited by opposing counsel on deposition[.]"). Perhaps that was not possible for some reason.

While the Court tends to agree that the more straightforward reading of the transcript is that Harrod was using AMOT to describe a type of valve (thermal control valves), rather than to identify a third-party manufacturer, a clarifying affidavit was essential in light of these facts in the record: (1) There is another company that produces AMOT valves (*see* Fountain Decl., Ex. U); (2) an Asco representative disclaims ever providing thermal control valves containing asbestos to the Navy (*see* Casadevall Decl. at ¶ 4); and (3) Harrod never testified that all AMOT valves he and Mr. Carpenter worked on were Asco valves, thereby making it entirely unclear what percentage, if any, of the AMOT exposures can be attributed to Asco (*see generally*, Fountain Decl., Ex. N (Harrod Depo.)). While Plaintiffs fault Asco for failing to offer evidence that the other manufacturer, AMOT, ever supplied the Navy with the thermal control valves described by Harrod, it is ***Plaintiffs'*** burden to produce evidence that makes it more plausible than not that Mr. Carpenter worked with asbestos-containing Asco valves.

Moreover, even if there was a genuine issue of fact concerning whether Harrod meant Asco or AMOT, Plaintiffs fail to offer a single piece of evidence that would allow a rational jury to conclude that the valves that Harrod associated with Asco (i.e., thermal control valves) ***required*** incorporation of asbestos-containing materials. The Supreme Court has explained that in the maritime tort context, a product manufacturer has a duty to warn when (i) its product requires incorporation of a part, (ii) the

manufacturer knows or has reason to know that the integrated product is likely to be dangerous for its intended uses, and (iii) the manufacturer has no reason to believe that the product's users will realize that danger. *DeVries*, 139 S. Ct. at 995. Here, Plaintiffs have failed to adduce sufficient evidence to satisfy the first part of *DeVries* because there is no evidence that the Asco valves at issue ***required*** asbestos.

The evidence, then, differs between Asco and Nibco. For Nibco, Plaintiffs have produced trial testimony from a Nibco representative who testified that the Nibco valves sold to the Navy required asbestos. (NAUF at 47). For Asco, the only evidence Plaintiffs rely on to establish that the valves identified by Harrod required asbestos is Harrod's testimony that he recalled Mr. Carpenter handling gasket and packing material supplied by Garlock or John Crane in his work with thermal control valves. (Pltfs.' Response to ASUF No. 41).

At the hearing Plaintiffs' counsel suggested that there was evidence that Asco's valves required asbestos based on the testimony of Zdobinski, an Asco representative, in another case. However, Zdobinski testified that he believed the valves that required asbestos that Asco sold to the Navy were steam valves. (*See* Zdobinski Depo. at 59:18-20). That testimony does not change the conclusion that there is no evidence that Asco ever sold to the Navy thermal control valves (the type of valves Harrod associated with Asco) that contained or required asbestos.

Even viewing the evidence in light most favorable to Plaintiffs, one witness's more-than-25-year-old recollection that Mr. Carpenter removed or replaced asbestos-containing materials from a thermal control valve (which he referred to as an AMOT valve) while in the Navy, does not create a genuine dispute as to whether Asco valves that Mr. Carpenter worked on ***required*** incorporation of asbestos-containing parts, particularly in light of the evidence from Asco that it ***never*** sold a thermal control valve containing or requiring asbestos to the Navy. *See Martinez v. Columbia Sportswear USA Corp*., 553 F. App'x 760, 762 (9th Cir. 2014) (citing *U.S. v. $11,500.00 in U.S. Currency,* 710 F.3d 1006, 1019–20 (9th Cir. 2013)) ("[I]t is well settled that a non-moving party must present 'more' than a 'mere . . . scintilla of evidence' to defeat a motion for summary judgment."). In sum, based on the evidence presented, a rational jury could not find in Plaintiffs' favor on the issue of exposure

attributable to Asco's valves. *See Anderson*, 477 U.S. at 248; *Long v. County of Los Angeles*, 442 F.3d 1178, 1185 (9th Cir. 2006) (A dispute is "genuine" as to a material fact if there is sufficient evidence for a reasonable jury to return a verdict for the non-moving party).

Moreover, as noted below, even if there was a genuine dispute as to exposure, the Court would conclude there is certainly no genuine dispute as to whether Asco's valves were a substantial factor in causing Mr. Carpenter's injuries.

B. Substantial Factor

Central to both Motions is the following question: In an asbestos tort action in federal court, is a plaintiff required to proffer expert causation testimony that is specific to the dose of asbestos attributable to a particular defendant to survive a motion for summary judgment?

Based on a comprehensive review of the case law, the Court concludes that the answer to that question is yes, at least absent an extraordinary showing of actual exposure by a particular defendant's product. The Court notes that although this issue is often litigated, it has seemingly never resulted in a satisfying answer, and is complicated by the long latency periods of asbestos-related diseases and the lack of scientific consensus regarding the minimal exposure necessary to cause such diseases. Nonetheless, there are several well-settled principles that govern this case as described below.

The Court starts its analysis with *McIndoe*, 817 F.3d at 1176, which all parties acknowledge is the leading, binding case on this issue. In *McIndoe*, the Ninth Circuit made clear that even if there is evidence of exposure, asbestos plaintiffs must produce evidence that any such exposure was a ***substantial contributing factor*** to the relevant injuries. 817 F.3d at 1176 (emphasis in original). "Absent direct evidence of causation, a party may satisfy the substantial-factor test by demonstrating that the injured person had substantial exposure to the relevant asbestos for a substantial period of time." *Id.* at 1176 (citing *Menne v. Celotex Corp.,* 861 F.2d 1453, 1462 (10th Cir. 1988)) ("More significant under traditional causation tests than the question of mere exposure to [asbestos-containing] products is whether the exposure was sufficiently

sustained (or frequent) and intense to constitute a proximate cause of [the plaintiff's] mesothelioma."). "Evidence of only minimal exposure to asbestos is insufficient; there must be 'a high enough level of exposure that an inference that the asbestos was a substantial factor in the injury is more than conjectural.'" *Id.* (citing *Lindstrom,* 424 F.3d at 492) (internal quotation marks omitted).

In *McIndoe*, the decedent's heirs had provided evidence that the decedent was "frequently" present during the removal of asbestos-containing insulation produced by the defendants aboard one specific ship and that he was present 20-30 times during such removal aboard another specific ship. *Id.* at 1176. However, there was no evidence regarding the "***amount*** of exposure to dust from [the defendants'] asbestos or the ***duration*** of such exposure during any of these incidents." *Id.* (emphasis in original). The Ninth Circuit concluded that "[w]ithout such facts, McIndoe's heirs can only speculate as to the actual extent of his exposure to asbestos from" the defendants' products. *Id.* at 1176-77.

Acknowledging that they did not provide evidence demonstrating "substantial exposure" for a "substantial amount of time," McIndoe's heirs argued that they were not required to produce specific exposure evidence because they offered direct evidence of causation through a medical expert who opined "that ***every*** exposure to asbestos above a threshold level is necessarily a substantial factor in the contraction of asbestos-related diseases." *Id.* at 1177 (emphasis in original). The Ninth Circuit held that the district court properly rejected this "every exposure" theory because, if accepted, it necessarily renders the substantial-factor test meaningless. *Id.*

"Critically, [the expert] did not speak to the severity of McIndoe's exposure to ***originally installed*** asbestos [i.e., the asbestos that could be attributed to the defendants] — and generally did not make distinctions between the overall dose of asbestos McIndoe breathed aboard the ships and that portion of such exposure which could be attributed to the [defendants'] materials." *Id.* (emphasis in original). Notably, the Ninth Circuit further rejected the expert's testimony to the extent he asserted that the exposures to the defendants' products were at "high level exposures that occurred for a prolonged period of time," because without data concerning the "intensity or duration" of McIndoe's alleged exposures, he had no basis for such a

conclusion. *Id.* at 1177 n.7. The Ninth Circuit reasoned that the expert's testimony "aim[ed] more to establish a legal conclusion — what general level of asbestos exposure is required to show disease causation — than to establish the facts of McIndoe's own injuries. *Id.* at 1177. The Ninth Circuit noted, however, that its holding still "allows a plaintiff to satisfy causation through expert testimony that the plaintiff's actual exposure to certain materials substantially contributed to the development of his injuries" but it prohibits a plaintiff from relying on testimony that "***all*** exposures to asbestos above background levels necessarily and substantially contribute to development of diseases like mesothelioma." *Id.* at 1178 n. 8.

"[C]ourts have also rejected for the same reason the so-called 'cumulative exposure' theory — that every exposure which contributes to a plaintiff's cumulative exposure is a contributing cause to that plaintiff's asbestos-related disease." *Christopher Clarke v. Air & Liquid Sys. Corp.*, No. 2:20-CV-00591-SVW-JC, 2021 WL 1534975, at *5 n. 3 (C.D. Cal. Mar. 18, 2021); *see also Krik v. Exxon Mobil Corp.*, 870 F.3d 669, 677 (7th Cir. 2017); *Suoja v. Owens-Illinois, Inc.*, 211 F. Supp. 3d 1196, 1207-08 (W.D. Wis. 2016).

Here, Plaintiffs offer two expert opinions – but both rely on the prohibited "every exposure" and/or "cumulative exposure" theories to support their conclusions on causation. Specifically, Plaintiffs offer the opinion of Kenneth S. Garza, CIH, MS, an industrial hygiene expert, who provided opinions about Mr. Carpenter's asbestos exposure. (Asco Opp. at 16). Mr. Garza opines as follows:

> From an industrial hygienist perspective, ***asbestos exposures above ambient background levels,*** as reflected in the literature, is to be avoided and ***any such exposure may contribute to disease in some individuals***. The human respiratory system is not selective as to the source (product) of airborne asbestos during inhalation; therefore, if there actually is a lifetime dose-response relationship for some diseases, ***any asbestos body burden added by significant exposure above ambient contributes to increased risk of disease***, regardless of the product types, manufacturers, worksites, or exposure averages.

(Bugatto Decl., Ex. P at 19) (emphasis added).

Mr. Garza clearly establishes his conclusions based on an "every exposure above background levels" theory. Next, Plaintiffs proffer the report of David Y. Zhang, M.D., Ph.D., MPH, as a "causation expert." In the report, Dr. Zhang opines as follows:

> Mr. Carpenter's malignant mesothelioma was related to asbestos exposure ***and each significant exposure he experienced contributed to the cumulative dose*** that caused the development of his pleural malignant mesothelioma, epithelioid type. Additionally, the cumulative significant exposures to each company's asbestos-containing products substantial contributed to the development of his malignant mesothelioma.

(Bugatto Decl., Ex. Q at 24 at 23-24).

Hence, Dr. Zhang's opinion is based on the likewise impermissible "cumulative" exposure theory. Nonetheless, Plaintiffs stake much of their argument on the following conclusion in Dr. Zhang's report:

> There is no reasonable dispute that exposure levels were significantly higher when workers, such as Mr. Carpenter, who routinely ***handled and were in the vicinity of other workers who worked on asbestos containing materials and equipment including boilers, turbines, pumps, valves, steam traps, blowers, piping, anchor windlasses, electrical equipment, flooring materials, brick, mortar, automotive materials, gaskets, packing materials, and insulating materials etc. and performed this work without dust control***. Therefore, ***taken together,*** the evidence and the scientific information regarding the causal relation between asbestos and mesothelioma provides more than sufficient evidence to allow one to conclude within a reasonable degree of medical and scientific certainty that Mr. Carpenter's mesothelioma was caused by ***that*** asbestos exposure.

(*Id.* at 24).

However, Dr. Zhang's conclusion based on a laundry list of various equipment that Mr. Carpenter worked on does not in any way establish that Mr. Carpenter's work with ***Nibco's*** or ***Asco's*** valves caused his mesothelioma.

Plaintiffs seem to offer two arguments to try to overcome the fact that the above testimony is clearly insufficient to satisfy the substantial-factor test under *McIndoe*. First, Plaintiffs seem to attempt to establish a dispute of fact as to whether Dr. Zhang provided a causation opinion as to exposures specifically from Nibco's and Asco's valves. (*See* Pltf. Resp. to NSUF No. 30; Pltf. Resp. to ASUF No. 35). To demonstrate such a dispute, Plaintiffs assert the following with respect to Nibco valves:

> The testimony from Mr. Carsten and Mr. Jackson included nearly 100 documented occasions where Mr. Carpenter worked with asbestos containing gaskets and packing on Nibco valves. ***Based thereon***, Dr. Zhang concludes that "taken together, the evidence and the scientific information regarding the causal relation between asbestos and mesothelioma provides more than sufficient evidence to allow one to conclude within a reasonable degree of medical and scientific certainty that Mr. Carpenter's mesothelioma was caused by ***that*** asbestos exposure.

(Nibco Opp. at 15).

Plaintiffs make the same type of argument as to Asco. (Asco Opp. at 16). In light of such statements, one would expect to find Nibco- and Asco-specific analyses in Dr. Zhang's report. Dr. Zhang performs no such analyses. Rather, the "that" which Dr. Zhang states caused the mesothelioma is the handling and proximity to "***asbestos containing materials and equipment including boilers, turbines, pumps, valves, steam traps, blowers, piping, anchor windlasses, electrical equipment, flooring materials, brick, mortar, automotive materials, gaskets, packing materials, and insulating materials etc. and performed this work without dust control***." (Bugatto Decl., Exhibit Q at 24) (emphasis added). Given Mr. Carpenter worked with several other Defendants' asbestos-containing products, Dr. Zhang's statement cannot in any fashion be characterized as defendant specific. When actually examined, the argument made in the Oppositions underscores the key insufficiency of the report itself; had Dr.

Zhang's report said what Plaintiffs insinuated it said, the evidence on causation perhaps would have been sufficient. All Dr. Zhang opines is that the totality of Mr. Carpenter's asbestos exposure caused his mesothelioma.

At the hearing, Plaintiffs' counsel argued that although the expert reports were framed in generic terms, the experts' testimony at trial would indicate that the specific exposures identified by their fact witnesses caused Mr. Carpenter's disease. However, as Asco's counsel responded, whether Plaintiffs are permitted to proceed to trial is based on the evidence submitted on these Motions, not on hypothetical evidence that may appear at the eleventh hour. Furthermore, as the Seventh Circuit has reasoned "[i]t would be misleading and confusing for an expert to opine — particularly using the legal terminology of "substantial contributing factor"— that [the decedent's] cancer was caused by Defendants when the foundation for the opinion was that every exposure (without regard to dosage) contributes to cause cancer." *Krik*, 870 F.3d at 675 (internal citations omitted).

The second (and more forceful) argument Plaintiffs make to overcome *McIndoe* is that this action is distinguishable from *McIndoe* because here Plaintiffs "have submitted exposure evidence through the testimony of [] Carsten and [] Jackson that was missing" in *McIndoe*. (Nibco Opp. at 9). As an initial matter, to the extent that Plaintiffs are arguing that evidence of some exposure ***alone*** is enough, *McIndoe* squarely rejects such a position. *See* 817 F.3d at 1176 ("But even if the evidence may establish that McIndoe was actually exposed to asbestos installed by the shipbuilders, his heirs still must show that any such exposure was a ***substantial contributing factor*** to his injuries.") (emphasis in original).

However, the Court reads Plaintiffs' Oppositions as instead arguing that where a plaintiff offers evidence regarding the frequency, amount, and duration of the exposure (which the Court refers to as "Specific Exposure Evidence"), the plaintiff is not required to offer defendant-specific expert causation testimony. In other words, Plaintiffs concede that *McIndoe* holds that "every exposure" expert causation testimony cannot ***supplant*** Specific Exposure Evidence. But Plaintiffs contend that if asbestos plaintiffs do offer Specific Exposure Evidence they either can rely on "every

exposure" causation testimony or do not need expert causation testimony at all to survive summary judgment.

This argument, however, is built on the flawed premise that Plaintiffs have offered Specific Exposure Evidence regarding the frequency, amount, and duration of exposure to both of Defendants' products. As for Asco valves, as described above, Plaintiffs have offered virtually no evidence of exposure to asbestos attributable to Asco, and they certainly have not offered evidence regarding the frequency, amount, and duration of such exposures.

While Plaintiffs provide more specific evidence for Nibco, the evidence still falls short. Plaintiffs do provide frequency evidence. The fact witnesses identified around 90 exposures to Nibco valves that may have contained asbestos over the course of 21 years. But Plaintiffs only offer duration evidence for 25-30 exposures (i.e., Carsten testified that it took 20-30 minutes to remove a gasket and 25-30 of the Nibco valve exposures involved gasket removal). So, based on simple math (and a generous interpretation of the fact witnesses' testimony), the evidence allows an inference that Mr. Carpenter was exposed to Nibco's asbestos-containing valves for at least 15 hours over the course of 21 years. But, while Mr. Garza, the industrial hygienist, offers testimony regarding the likely amount of exposure from different tasks that Mr. Carpenter performed, Mr. Garza never engages in an analysis that applies that information to the specific Nibco exposures identified by Carsten and Jackson.

Even giving every benefit of the doubt to Plaintiffs, and assuming they have offered Specific Exposure Evidence (at least for Nibco), the Court must still determine whether that evidence is sufficient to raise a triable issue of fact as to "whether the injured person had substantial exposure to the relevant asbestos for a substantial period of time." *See* 817 F.3d at 1176. Plaintiffs note that the *McIndoe* court does not quantify what amount of exposure or period of time is "substantial." (Opposition at 8). Although Plaintiffs do not complete this line of argument, presumably they are suggesting that, because the Ninth Circuit failed to quantify what is "substantial," so long as a plaintiff has offered Specific Exposure Evidence attributable to a particular defendant, it is up to the jury to decide what is substantial.

While the Court acknowledges that *McIndoe* did not involve a case where there was Specific Exposure Evidence, and therefore, did not necessarily answer the question, there is no doubt that *McIndoe* is still instructive on this point. It simply cannot be the case that proffering ***any*** evidence of amount, frequency, and duration is sufficient to allow a jury to decide if that exposure is substantial, because, like the "every exposure" theory, it would allow even fleeting exposures to be enough, so long as the plaintiff offered specific evidence. But ***specific*** evidence and ***substantial*** evidence are not one in the same. *See McIndoe*, 817 F.3d at 1177–78 ("Because the heirs' argument would undermine the substantial factor standard and, in turn, significantly broaden asbestos liability based on fleeting or insignificant encounters with a defendant's product, we too, reject it."); *see also Borg-Warner Corp. v. Flores*, 232 S.W.3d 765, 772 (Tex. 2007) (holding that "implicit" in the requirement that a plaintiff proffer evidence of "frequency-regularity-proximity" to the defendant's asbestos "must be a requirement that asbestos fibers were released in an amount sufficient to cause" the plaintiffs injuries, and further holding that expert testimony is necessary to provide that link).

Therefore, even if *McIndoe* does not answer the precise question, the Court agrees with the balance of courts that, particularly in cases with multiple defendants, "causation requires that an expert connect the nature of the asbestos exposure and pair it with a *Daubert*-approved methodology that can be used to determine whether such an exposure was a substantial cause of the defendant's injury." *Krik*, 870 F.3d at 675–76; *Richards v. Copes-Vulcan, Inc.*, 213 A.3d 1196, 1203 (Del. 2019) (noting that because "[t]here are many types of asbestos, many degrees of exposure, and many resulting diseases[,] medical expert testimony is needed to establish "the link between the asbestos exposure attributable to each defendant and the disease afflicting the plaintiff' as it "relates to matters beyond the knowledge or experience possessed by laypersons"); *Stark v. Armstrong World Industries, Inc.*, 21 Fed. App'x. 371, 376, 381 (6th Cir. 2001) (noting that although the plaintiff had demonstrated that he was exposed to asbestos from a particular source for a period of about two months, the court concluded that "[w]ithout testimony that the type of exposure he suffered was particularly harmful," it would be "insufficient for a rational jury to find this exposure was a 'substantial factor' in [plaintiff's] mesothelioma").

In *Stark*, the Sixth Circuit specifically expressed the concern that "defendants not be subjected to open-ended liability based solely on a jury's inexpert speculation on proximate cause[.]" 21 Fed. App'x at 376 (internal citations omitted). This Court shares that concern and concludes that, absent an expert testimony requirement, ***courts*** would be forced to take up the task of developing inexpert and artificial lines between substantial and non-substantial exposures. Therefore, it only makes sense to require that an expert opine (employing reliable methodologies) on whether exposure to asbestos attributable to a specific defendant's product can plausibly be deemed ***substantial*** based on the amount, frequency, and duration of that exposure (at least in the absence of overwhelming exposure evidence). Such a requirement ensures that the jury is given concrete and scientifically-sound benchmarks with which it can determine the ultimate legal conclusion as to whether the exposure was a substantial factor in causing the plaintiff's/decedent's illness.

Plaintiffs argue that if "an actual defendant-specific dose is required in every case to prove causation, then no plaintiff could ever prove causation because that type of evidence simply does not exist." (Nibco Opp. at 16). They elaborate, explaining that their industrial hygienist expert, Mr. Garza, cannot testify about the actual dose of asbestos to which Mr. Carpenter was exposed while working on Nibco valves because (1) he was not there when Mr. Carpenter was exposed and (2) no measurements to determine the amount of asbestos exposure were taken when Mr. Carpenter was exposed. (*Id.*). The Court finds Plaintiffs' argument on this point curious and mistaken.

As to the first point, of course Plaintiffs' expert was not present during the actual exposures. Experts are almost never percipient witnesses. But experts may, and indeed must, rely on case-specific evidence to draw their conclusions. *See Stephens v. Union Pac. R.R. Co.*, 935 F.3d 852, 856-57 (9th Cir. 2019) ("Expert testimony cannot create a genuine issue of material fact if it rests on assumptions that are not supported by evidence."). And Plaintiffs' second point seems to be a rejection of their own expert's testimony, which ***does*** provide measurements of the amount (within a range) of asbestos exposures likely produced for each task Mr. Carpenter performed. (*See* Bugatto Decl., Ex. P at 66). If Mr. Garza reviewed the factual evidence that Plaintiffs suggest demonstrates the duration and frequency of exposures to Nibco's and Asco's

asbestos-containing products, it is unclear why he could not calculate an estimated dose per Defendant. *See Clarke v. Air & Liquid Sys. Corp.*, No. 2:20-CV-00591-SVW-JC, 2020 WL 6204564, at *5 (C.D. Cal. Sept. 16, 2020) (noting that the expert "analyze[d] and opine[d] about the independent causal effect of exposure that Clarke experienced while working on Warren pumps" based on fact testimony regarding the duration and frequency of exposure, and "by putting Clarke's exposure while working on Warren pumps in the context of the dose-response curve," and therefore, denying summary judgment).

To the extent, Plaintiffs are arguing that a defendant-specific dose cannot be established with ***absolute precision,*** the Court does not suggest that is what is necessary. *See id.* (noting that although the expert provided "a rough quantification," the action could get to the jury because there was "at least some evidence beyond speculat[ion] as to the actual extent of [the plaintiff's] exposure" from the defendant's product) (internal citation omitted). By contrast, here, there is no expert testimony whatsoever that connects the exposures documented by Plaintiffs' fact witnesses with the amount of asbestos likely emitted from those exposures.

The Court's holding — requiring an expert to testify that the relative dose from a particular defendant was significant enough to allow a jury to find in favor of its being a substantial factor — is in line with the case law and does not prevent asbestos plaintiffs from surviving summary judgment. For instance, experts may be able to establish that exposure to a certain defendant's product is substantial by offering a comparative analysis with exposures from other defendants' products. *See, e.g.*, *Clarke*, 2020 WL 6204564, at *5 (C.D. Cal. Sept. 16, 2020) ("The [*McIndoe* c]ourt was particularly concerned with that expert's failure to distinguish overall exposure from exposure for which liability could be imposed.") (citing *McIndoe*, 877 F.3d at 1177); *Suoja v. Owens-Illinois, Inc.*, 211 F. Supp. 3d 1196, 1208 (W.D. Wis. 2016) ("As [the] defendant notes, one measure of whether an action is a substantial factor is 'the number of other factors which contribute in producing the harm and the extent of the effect which they have in producing it.'") (citing Restatement (Second) of Torts § 433(a)); *Martin v. Cincinnati Gas and Elec. Co.*, 561 F.3d 439, 443 (6th Cir. 2009) (holding that the defendant's liability must be evaluated in the context of other exposures).

Alternatively, asbestos plaintiffs can proffer expert testimony establishing that the exposure caused by a particular defendant would likely have been sufficient on its own to cause the disease. As the Seventh Circuit observed in *Schultz v. Akzo Nobel Paints, LLC*, 721 F.3d 426, 432 (7th Cir. 2013), the notion that it is ***theoretically possible*** that any amount of exposure could cause injury does not inevitably preclude an expert opinion that the particular level of dosage experienced by a plaintiff was ***likely*** sufficient to cause his or her particular injury. Indeed, in *Schultz*, the plaintiff, a painter, suffered from acute myeloid leukemia ("AML") and alleged that his occupational exposure to benzene caused the illness. To support his theory of causation, he offered the expert testimony of a physician, who opined that a person, like the plaintiff, who had been exposed to more than 11 parts per million-years of benzene would be at an 8 times greater risk for developing AML that the general population. *Id.* The Seventh Circuit held that the physician's testimony sufficiently reliable and not in conflict with the expert's concurrent testimony that he could not rule out the possibility that any amount of exposure could cause the disease. *Id.*

Next, the Court notes that Plaintiffs rely heavily on a pre-*McIndoe* district court opinion, *Cabasug*, which discussed causation in an asbestos maritime action. (*See* Nibco Opp. at 10) (citing *Cabasug*, 989 F. Supp. 2d at 1037-38). However, much of the language Plaintiffs quote is from that court's analysis of whether the plaintiff had established actual exposure, not whether the substantial-factor test was satisfied. Regardless, to the extent that *Cabasug* approves (in dicta) of expert testimony based on the "every exposure" theory, the Court concludes that the earlier opinion is inconsistent with *McIndoe*.

The Court briefly returns to the choice-of-law issue. While Nibco and Plaintiffs (but not Asco) seem to take the position that if the Court were to apply California law, Plaintiffs' "every exposure" expert testimony would be admissible and sufficient to establish a genuine issue of fact, the Court disagrees. Even if California state courts would permit such testimony, the Ninth Circuit has made clear in a post-*McIndoe* case that *McIndoe*'s holding regarding the "every exposure theory" is premised on the conclusion that "every exposure" causation testimony is not admissible in asbestos cases in federal court because it is not based on sufficient facts or data as required by Federal Rule of Evidence 702(b). *Stephens*, 935 F.3d at 856-57. Indeed, in *Stephens*,

the Ninth Circuit, applying Idaho substantive law to the plaintiff's asbestos tort claims, noted that the "standards for admitting expert evidence" in a diversity case are "matters that fall on the procedural side of the *Erie* divide" and are governed by federal law, not state law. *Id.* at 857. Therefore, because the expert's evidence was not based on facts concerning the plaintiff's defendant-specific exposure, the Court held it was inadmissible and that the plaintiff's exposure evidence alone did not create a triable issue of fact. *Id.* at 858. Therefore, the Court concludes that the result regarding causation would be the same regardless of whether California or maritime law applies.

Finally, because the Court concludes both that federal maritime law applies and that under either source of law Plaintiffs have failed to offer sufficient causation evidence, the Court need not reach the "bare metals defense" under California law that was raised in the Nibco Motion.

Accordingly, because Plaintiffs have failed to adduce sufficient evidence to establish a triable issue of fact on causation against both Defendants, the Motions are **GRANTED** as to Plaintiffs' claims for negligence and strict liability. The Motions are also **GRANTED** as to the loss of consortium claim because such a claim is not recognized under maritime law. *See Clarke v. Air & Liquid Systems Corp*., 2020 WL 6204564, at *6.

V. CONCLUSION

Both Motions are **GRANTED** and all claims against Defendants Nibco and Asco are **DISMISSED** ***with prejudice.***

Because there are still other Defendants in this action who have not either settled or been dismissed, the Court declines to enter judgment at this time. Once the case is resolved as to each Defendant, a separate judgment will issue.