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8 **UNITED STATES DISTRICT COURT**
9 **NORTHERN DISTRICT OF CALIFORNIA**

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11 *In re Toy Asbestos Litigation*

Case No: 4:19-cv-00325-HSG

12 **AMENDED JOINT RULE 26(F) REPORT AND**
13 **INITIAL CASE MANAGEMENT CONFERENCE**
14 **STATEMENT**

15 Date Removed: January 18, 2019
[Removed from the Alameda County Superior Court,
Case No. RG18932350]

16 **TO THE HONORABLE COURT:**

17 Counsel for Plaintiffs Thomas and Agnes Toy (collectively “Plaintiffs”) and Defendants
18 (collectively “Defendants,” and together with “Plaintiffs,” known as the “the Parties”) have met and
19 conferred as required by the Federal Rules of Civil Procedure 26(f), Civil Local Rule 16-9, and the
20 Standing Orders for All Judges of the Northern District of California. The Parties hereby submit the
21 following Joint Rule 26(f) Report and Initial Case Management Conference Statement:

22 Where applicable, the Joint Report provides the parties’ differing proposals and/or positions
23 in sub-sections identified as “Plaintiffs’ Proposal” and “Defendants’ Proposal.” Neither side
24 contributes to, or approves of, the language in any of the opposing party’s sub-sections. Nor do they
25 agree with the assertions made in any of the opposing party’s sub-sections.

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1 **1. Jurisdiction and Venue:**

2 Plaintiffs filed this case for personal injury in the Alameda County Superior Court on
3 December 14, 2018, bringing causes of action for (1) Negligence; (2) Breach of Implied Warranty;
4 (3) Strict Liability; (4) Negligence- Clutch and Brake Assemblies, Mechanisms & Components; (5)
5 Strict Liability- Clutch & Brake Assemblies, Mechanisms & Components; (6) Fraud &
6 Concealment; (7) Conspiracy to Defraud and Failure to Warn; and (8) Loss of Consortium.
7 Plaintiffs are also claiming punitive damages against Defendants. Plaintiffs’ Summons and
8 Complaint was subsequently served on all Defendants and Parties.

9 Defendant Copes-Vulcan, Inc. removed the Action to this Court on January 18, 2019, and was
10 assigned Case Number 3:19-cv-00325-JSC. Defendant Viad Corp. removed the Action to this Court
11 on January 18, 2019, and was assigned Case Number 3:19-cv-0326-HSG. Defendant The William
12 Powell Company removed the Action to this Court on January 18, 2019, and was assigned Case
13 Number 3:19-cv-00336-JSC. On April 2, 2019, the Court entered an order consolidating the three
14 cases under Case No.: 4:19-cv-00325-HSG.

15 **2. Facts of Case:**

16 This case was initially filed as a personal injury action brought by Thomas H. Toy and his wife
17 Agnes Toy. Mr. Toy was diagnosed with pleural mesothelioma, a terminal cancer of the lining of the
18 lung associated with exposure to asbestos. Plaintiffs filed the instant action against forty-three (43)
19 defendants who manufactured, sold, distributed, or specified asbestos-containing products that
20 Plaintiffs allege Mr. Toy worked with and worked around during his time in the United States Army
21 (1953 – 1956), at Hunter’s Point Naval Shipyard (1962 – 1973), and at Treasure Island Naval Station
22 (1974-1980). Mr. Toy also worked for the Navy Public Works Center from 1980 until his retirement
23 in 1990, and may have been exposed to asbestos during this employment as well. Plaintiffs allege that
24 Defendants are strictly liable and liable in negligence for Mr. Toy’s mesothelioma based on the failure
25 to warn of the dangers of their products, and based on the defective and/or negligent design of their
26 products. On April 23, 2019, Plaintiffs’ counsel advised defendants that Mr. Toy passed away on the
27 same day.

1 Defendants, each and all, generally deny that Plaintiff inhaled any asbestos fibers released from
2 products that they manufactured, sold, supplied or utilized and deny that any such exposure was a
3 substantial factor in causing his injury. Defendants deny that Plaintiffs suffered damages that were
4 caused by any action or failure to act by each defendant, and offer numerous affirmative defenses to
5 Plaintiffs' causes of action and prayer for punitive damages.

6 This case is complex and will involve a number of witnesses, including expert witnesses. The
7 complexities of the case are somewhat ameliorated by the fact that counsel for the various parties are
8 familiar with the legal and medical issues involved in asbestos lawsuits like this one.

9 **3. Legal Issues:**

10 Plaintiffs' Position.

11 Defendants have the identical burden of proof regarding causation as Plaintiffs with respect to
12 the joint tortfeasors, if any, Defendants contend caused or contributed to Mr. Toy's mesothelioma.
13 *Soto v. BorgWarner Morse TEC Inc.* (2015) 239 Cal.App.4th 165, 205. In other words, Defendants
14 have the burden of establishing, as to each joint tortfeasor they contend is responsible for Mr. Toy's
15 mesothelioma, that Mr. Toy inhaled asbestos fibers, for which each such tortfeasor is responsible, in
16 an amount and fiber type that was a substantial factor in causing his mesothelioma. *Id.*

17 Additionally, if asked in discovery, Defendants must disclose the identity of any joint
18 tortfeasors they contend caused or contributed to Mr. Toy's mesothelioma. Failure to do so may
19 preclude Defendants from attempting to apportion fault at trial to a joint tortfeasor willfully omitted
20 from an answer to written discovery. *Thoren v. Johnson* (1972) 29 Cal.App.3d 270.

21 Defendants' Position.

22 Plaintiffs have the burden of establishing diagnosis and cause of death, both of which may be
23 disputed by Defendants. Additionally, Defendants assert that dose and asbestos fiber type are crucial
24 factors in determining legal causation of an asbestos-related disease. Defendants assert that Plaintiffs
25 must, as to each Defendant, establish that Mr. Toy inhaled asbestos fibers, for which each Defendant
26 is responsible, in an amount and fiber type that was a substantial factor in causing his malignancy. To
27 the extent that it is determined that Mr. Toy did have an asbestos-caused malignancy, all of Mr. Toy's
28 actual exposures to asbestos must be presented to the jury and all potential tortfeasors considered for

1 apportionment of fault, including the U.S. military, non-parties and bankrupt entities. *See, e.g., Collins*
 2 *v. Plant Insulation*, 185 Cal. App. 4th 260, 270 (2010) (holding that “the Navy is properly included
 3 among those entities to which fault may be apportioned in an asbestos case.”).

4 Defendants deny that Mr. Toy was exposed to their products and/or deny that they are legally
 5 responsible for any alleged exposures to asbestos-containing materials associated with any such
 6 products. Defendants further dispute that Mr. Toy was exposed to asbestos for which Plaintiffs claim
 7 they are responsible. Defendants further assert defenses based on government contractor, bare metal,
 8 sophisticated user/sophisticated intermediary and causation. Defendants may also dispute that Mr. Toy
 9 died from an asbestos-related disease. *See, e.g., Rutherford v. Owens-Illinois, Inc.* 16 Cal. 4th 953,
 10 975-976 (1997); *Lineaweaver v. Plant Insulation Co.*, 31 Cal. App. 4th 1409, 1415-1416 (1995); *Boyle*
 11 *v. United Technologies Corp.*, 487 U.S. 500 (1988); *O’Neil v. Crane Co.*, 53 Cal.4th 335 (Cal. 2012);
 12 *Conner v. Alfa Laval, Inc.*, 799 F.Supp.2d 455 (E.D. Pa. 2011); *Webb v. Special Electric Company,*
 13 *Inc.*, 63 Cal.4th 167 (2016); and *Johnson v. American Standard, Inc.*, 43 Cal.4th 56 (2008). Defendants
 14 will also ask that damages be modified based on *Howell v. Hamilton Meats, Inc.*, 52 Cal.4th 541
 15 (2011). Defendants also assert defenses as articulated below.

16 • **Defendants’ Issue 1: Whether Mr. Toy Was Exposed to Asbestos-Containing**
 17 **Products for Which Defendants Are Liable.**

18 Defendants contend that they cannot be held liable for any of Mr. Toy’s exposures to asbestos-
 19 containing products that they did not manufacture, sell, distribute or utilize, and/or for products,
 20 materials, and/or equipment that did not contain asbestos. *See, e.g., O’Neil, supra*, 53 Cal.4th 355;
 21 *Conner, supra*, 799 F. Supp.2d 455; *Lindstrom v. A-C Prod. Liab. Trust*, 424 F.3d 488 (6th Cir.
 22 2005); *Taylor v. Elliot Turbomachinery Co., Inc.*, 171 Cal.App.4th 564 (Cal. Ct. App. 2009).

23 • **Defendants’ Issue No. 2: Whether Mr. Toy Was Exposed to Asbestos-Containing**
 24 **Products Manufactured, Supplied, or Specified by Defendants Such That Any**
 25 **Exposures Were a Substantial Factor in Causing His Injuries.**

26 Defendants contend that Plaintiffs will be unable to establish that Mr. Toy’s work with or around
 27 any asbestos-containing products/ materials/ equipment or defendants’ work with any asbestos-
 28 containing products/ materials/ equipment occurred with sufficient frequency and regularity in

1 locations from which asbestos fibers could have traveled to Mr. Toy's vicinity or work area so that it
2 was a reasonable medical probability that Mr. Toy's exposure was a substantial factor in causing his
3 injuries. *See e.g. Hunter v. Pacific Mechanical Corp.*, 37 Cal.App.4th at 1289 (1995); *See also*
4 *Lineweaver, supra*, 31 Cal.App.4th 1409; and *Rutherford, supra*, 16 Cal. 4th 953.

- 5 • **Defendants' Issue 3: Whether Defendants Are Immune from Liability for Failure To**
6 **Warn-Based Claims Because Of The Sophisticated Intermediary Defense Under**
7 ***William B. Webb v. Special Electric Company, Inc.*, 63 Cal.4th 167 (2016), Or The**
8 **Sophisticated User Defense Under *Johnson v. American Standard, Inc.*, 43 Cal.4th 56**
9 **(2008).**

10 Defendants contend that they are not liable for any failure to warn regarding Mr. Toy's
11 exposures while serving in the U.S. Army, while working at Hunter's Point Naval Shipyard and
12 Treasure Island Naval Shipyard, and while working for the Navy's Public Works Center, because the
13 U.S. Department of Defense was a sophisticated user of its products, and Defendants had no duty to
14 warn the U.S. Government about any hazards associated with asbestos. Defendants further contend
15 that because they had no duty to warn the U.S. Government, as a matter of law they owed no duty to
16 warn the Department of Defense's employees of any hazards associated with the alleged exposure to
17 asbestos from their products.

18 Defendants maintain that a manufacturer has no duty to warn end users about hazards that are
19 known or should be known to the immediate purchaser. *Webb v. Special Electric Company, Inc.*, 63
20 Cal. 4th 167 (2016). Under the "sophisticated intermediary" defense, "a supplier may discharge its
21 duty to warn end users about known or knowable risks in the use of its product if it: (1) provides
22 adequate warnings to the product's immediate purchaser, or sells to a sophisticated purchaser that it
23 knows or should be aware of the specific danger, and (2) reasonably relies on the purchaser to
24 convey appropriate warnings to downstream users who will encounter the product." (*Id.* at 187).

25 Defendants also argue that a manufacturer has no duty to warn a purchaser about hazards the
26 purchaser knows or should reasonably be expected to know. *Johnson v. American Standard, Inc.*, 43
27 Cal.4th 56, 65 (2008). Under the "sophisticated user" doctrine, when a manufacturer, distributor,
28 seller or supplier provides a product to a purchaser who is knowledgeable of the dangers of the

1 product, there is no duty to warn either the purchaser or the purchaser's employees of that danger.
2 *See, e.g., McKay v. Rockwell Int'l Corp.*, 704 F.2d 444, 454 n. 14 v (9th Cir. 1983); *In re Related*
3 *Asbestos Cases*, 543 F. Supp. 1142, 1151 (N.D. Cal. 1982).

4 • **Defendants' Issue No. 4: Whether Defendants Are Immune from Liability Because**
5 **of the Government Contractor Defense Under *Boyle v. United Technologies Corp.*,**
6 **487 U.S. 500 (1988)**

7 Some defendants contend that they are not liable for claims of products liability because the
8 U.S. Government approved reasonably precise specifications for the products at issue. *See, e.g.,*
9 *Boyle v. United Technologies Corp.*, 487 U.S. 500 (1988); *Fung v. Abex Corp.*, 816 F. Supp 569,
10 572 (N.D. Cal. 1992); *Faddish v. General Electric Co.*, No. 09-70626, 2010 WL 4166108 (E.D. Pa.
11 Oct. 20, 2010).

12 • **Defendants' Issue No. 5: Whether contractor defendants can be held liable under a**
13 **strict liability theory of recovery pursuant to *Hernandezcueva v. E.F. Brady Co., Inc.***
14 **(2015) 243 Cal.App.4th 249.**

15 Defendants contend that the contractor defendants cannot be held liable pursuant to any strict
16 liability theory of recovery.

17 • **Defendants' Issue 6: Whether or Not Maritime Law Applies to Some of Plaintiffs'**
18 **Claims Against Defendants.**

19 Some Defendants take the position that Federal Maritime Law is not applicable to Mr. Toy's claims
20 against them because of the operative pleadings, choice of law considerations, and the unique facts of
21 Mr. Toy's claims of exposure to certain products and at certain locations. *Air & Liquid Sys. Corp. v.*
22 *DeVries*, 139 S. Ct. 986, 994 (2019). Should there be a question of the applicability of Federal
23 Maritime Law to certain portions of this case, the scope of Federal Maritime Law to be applied, and
24 plaintiffs' burden of proof on the various elements that need to be established for potential liability to
25 attach under *DeVries*, will need to be addressed. Additionally, if Federal Maritime Law may be
26 applied to some of the claims in this case, the issue of the applicability of the upper limit on punitive
27 damages awardable under Federal Maritime Law will need to be addressed as well. *Exxon Shipping*
28 *Co. v. Baker*, 554 U.S. 471, 513 (2008).

- 1 • **Defendants' Issue No. 7: Whether *Howell v. Hamilton Meats, Inc.*, 52 Cal.4th 541**
2 **(2011), Applies to Determination of Damages in This Case.**

3 Defendants contend that Plaintiffs' claims for past medical damages should be limited
4 to the amounts actually paid by or on Mr. Toy's behalf, and not the amounts that were billed by Mr.
5 Toy's medical providers. *Howell v. Hamilton Meats, Inc.*, 52 Cal. 4th 541 (2011); *Bermudez v. Ciolek*,
6 237 Cal. App. 4th 1311, 1330 (2015) ["the measure of medical damages is the lesser of (1) the amount
7 paid or incurred, and (2) the reasonable value of the services provided"]. Moreover, evidence of the
8 amounts *billed* for past medical services, as opposed to the amounts *paid*, are inadmissible to support
9 an expert opinion as to the value of future medical expenses, or to demonstrate or argue the value of
10 non-economic damages (e.g., pain and suffering or loss of consortium). *Corenbaum v. Lampkin*, 215
11 Cal. App. 4th 1308 (2013).

12 **4. Motions:**

13 Plaintiffs' Position.

14 Plaintiffs anticipate filing various discovery motions. Certain defendants routinely refuse to
15 provide substantive, non-evasive, and complete responses to written discovery or produce any
16 documents. Others refuse to produce their 30(b)(6) witness for deposition without extensive motion
17 practice. Plaintiffs may file motions for disclosure of the financial condition of certain Defendants.
18 See CCP § 3295(c). Plaintiffs will also likely file motions for summary adjudication of Defendants'
19 affirmative defenses. For example, the sophisticated user/intermediary defense has no applicability
20 because, Plaintiffs anticipate, there will be no evidence that Defendants actually and reasonably relied
21 on any sophisticated intermediary to convey warnings to end users (i.e., the second prong of the
22 sophisticated intermediary defense). *Webb v. Special Electric* (2016) 63 Cal.4th 167, 192-193.

23 Defendants' Position.

24 It is anticipated that Defendants will file either motions for summary judgment and/or motions
25 for summary adjudication of issues. In addition, the Parties may file discovery motions for the
26 production of documents and/or witnesses. Defendants may intend to file Motions in Limine/ Daubert
27 Motions prior to trial. Defendants may also seek to bifurcate punitive damages.

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1 **5. Amendment of Pleadings:**

2 It is anticipated that Plaintiffs' Complaint for Personal Injury will be amended to assert claims
3 for wrongful death in light of Mr. Toy's recent passing.

4 **6. Evidence Preservation:**

5 The parties certify that they have reviewed the Guidelines Relating to the Discovery of
6 Electronically Stored Information ("ESI Guidelines"), and confirm that they have met and conferred
7 pursuant to Federal Rules of Civil Procedure 26(f) regarding reasonable and proportionate steps
8 taken to preserve evidence relevant to the issues reasonably evident in this action. *See ESI*
9 *Guidelines 2.01 and 2.02, and Checklist for ESI Meet and Confer.*

10 **7. Disclosures:**

11 *Plaintiffs' Position.*

12 Plaintiffs will make timely disclosures in compliance with Federal Rules of Civil Procedure
13 26(a) (1)(A) & (C).

14 *Defendants' Position.*

15 All parties will make timely disclosures in compliance with Federal Rules of Civil Procedure
16 26(a) (1)(A) & (C). The disclosures made, as dictated by Federal Rules of Civil Procedure 26(a)(1)(A),
17 include the identification of those individuals known at the time the disclosure is made that are likely
18 to have discoverable information that may support the party's claims or defenses and the subject matter
19 of that information, the description of the documents and things to be used to support the claims and
20 defenses in this matter, and the categories of damages claimed by Plaintiffs.

21 In fact, the initial disclosures require disclosure of all applicable witnesses and documents, whether
22 applicable to one, some or all parties. If Plaintiffs have Defendant-specific witnesses, information or
23 documents, such information must be disclosed at the outset; the lack of such information further
24 prejudices Defendants' preparation for any dispositive motions and trial.

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8. Discovery

Plaintiffs' Position.

Plaintiffs anticipate taking the deposition of Defendants' 30(b)(6) witnesses, as well as the depositions of some of Mr. Toy's co-workers. Mr. Toy's wife, Agnes Toy, and son, Thomas Toy Jr., will be produced for deposition when requested.

Defendants' Position.

Mr. Toy's deposition concluded prior to his passing. Mrs. Toy's deposition remains outstanding. The Parties also anticipate taking the depositions of Mr. Toy's co-worker/percipient witnesses.

9. Class Actions

Not applicable to this action.

10. Related Cases

There are no known related cases to this action.

11. Relief

Plaintiffs bring claims for economic and non-economic damages, as well as punitive damages. As detailed above, Defendants contend that Plaintiffs' claims for past medical damages should be limited to the amounts actually paid by or on Mr. Toy's behalf, and not the amounts that were billed by his medical providers. *Howell v. Hamilton Meats, Inc.*, 52 Cal. 4th 541 (2011); *Bermudez v. Ciolek*, 237 Cal. App. 4th 1311, 1330 (2015). Defendant will also challenge Plaintiffs' claims for punitive damages on factual and legal grounds.

12. Settlement and ADR

All parties agree that this case is not amenable for mediation or arbitration. Efforts will be made to settle or resolve the case after the completion of discovery in this action, and no specific plan is needed for maximizing settlement prospects as counsel for all parties have significant experience in resolving asbestos-related actions. Notwithstanding the foregoing, some defendants are amenable to the involvement of a Magistrate Judge in some form of formal Settlement Conference proceedings at an appropriate time.

13. Consent to Magistrate Judge for All Purposes:

1 There is not unanimous consent among the parties as to the submission of this matter to a
2 Magistrate Judge.

3 **14. Other References:**

4 None at this time.

5 **15. Narrowing of Issues**

6 At this juncture, the parties are unaware of any issues that can be narrowed prior to the close
7 of discovery.

8 **16. Expedited Trial Procedure:**

9 This is not a proper case for expedited trial procedures, nor is one being requested at this time.
10 In short, Defendants request that any trial date be set no sooner than September of 2020, in light of
11 Mr. Toy's recent passing and the significant amount of discovery that is required by Defendants to
12 adequately prepare for Trial.

13 **17. Scheduling:**

<u>Matter</u>	<u>Parties' Agreed Proposed Dates</u>
Trial Date (Jury) Estimated Length: <u>15-20</u> Days	July 27, 2020 ¹
Last Day to Meet and Confer Re MILS/ evidentiary issues	June 22, 2020 (Per Standing Order, paragraph 23)
Last Day to File Motions in Limine and to Designate Former Testimony	21 Days prior to date set for Pre-Trial Conference. (Per Standing Order, Paragraph 24)
Oppositions to Motions in Limine and Objections to Former Testimony	14 Days prior to Pre-Trial Conference (per Standing Order paragraph 25)
Final Pretrial Conference; Discuss Previously-Filed Motions in Limine; File Agreed-Upon Set of Jury Instructions and Verdict Forms and Joint Statement re Disputed Instructions and Verdict Forms; File Proposed Voir Dire Questions and Agreed- To	July 13, 2020

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¹ Per the standing order of the Court, the parties shall allow twelve weeks between proposed dispositive motion hearing deadline and proposed final pre-trial conference; should the Court wish to enforce this order, Defendants will need the previously proposed trial date of September 14, 2020, to comply with this Court Order.

1	Statement of Case; File Witness List, Exhibit List, and Trial Brief	
2		
3	Fact Discovery Cut-Off	December 13, 2019
4	Last Day to Conduct Settlement Conference	June 2020 per Court availability
5	Last Day to Amend Pleadings or Add Parties	June 5, 2019
6	Plaintiffs' Expert Reports	January 17, 2020
7	Defense Expert Reports	January 17, 2020
8	Rebuttal Expert Reports	February 7, 2020
9	Deadline to depose Plaintiffs' Experts	March 6, 2020
10	Deadline to Depose Defendants' Experts	March 27, 2020
11		
12	MSJ/MSA and Daubert Motions filed by:	April 6, 2020
13	Oppositions to MSJ/MSAs and Daubert Motions filed by:	April 20, 2020
14	Replies to MSJ/MSAs and Daubert Motions filed by:	April 27, 2020
15	Hearing date on MSJ/MSAs and Daubert Motions	May 28, 2020 (per Court's availability)
16		

17 **18. Trial**

18 The Parties have requested a jury trial, which the Parties anticipate will last 15 to 20 days.

19 **19. Disclosure of Non-party Interested Entities of Persons:**

20 Defendants have all complied and served their respective Certificates of Interested Entities or
21 Parties pursuant to Federal Rules of Civil Procedure, Rule 7.1, and Local Rules 7.1-1 and 3-15.

22 **20. Professional Conduct**

23 All attorneys of record for the Parties have reviewed the Guidelines for Professional Conduct
24 for the Northern District of California.

25 Dated: May 17, 2019

DEAN OMARY BRANHAM SHIRLEY, LLP

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27 By: /s/ Benjamin H. Adams
Benjamin H. Adams
Attorney for Plaintiffs

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CERTIFICATE OF SERVICE BY ELECTRONIC FILING

In Re Toy Asbestos Litigation
U.S. District Court, Northern District of California
Case No. 4:19-cv-00325-HSG

I declare that I am over the age of eighteen (18) and not a party to this action. I am an employee of Dean Omar Branham Shirley, LLP, Counsel for Plaintiffs. My business address is 302 N. Market Street, Suite 300, Dallas, Texas 75202.

On May 17, 2019, I served the following entitled document:

**AMENDED JOINT RULE 26(F) REPORT AND
INITIAL CASE MANAGEMENT CONFERENCE STATEMENT**

by electronic service via the Electronic Court Filing System (ECF) on all parties opting for e-service and is available for viewing and downloading form the Court’s CM/ECF system.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct. Executed on May 17, 2019.

/s/ Teresa Gilliland
Teresa Gilliland