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SUPERIOR COURT OF CALIFORNIA

COUNTY OF SANTA CLARA

TIA POPE HUDSON, et al.,

Plaintiffs,

vs.

SPECTRA-PHYSICS, INC.; NEWPORT CORPORATION as successor-in-interest to Spectra-Physics, Inc.; and DOES 1 through 100, inclusive,

Defendants.

CASE NO. 110-CV-188516

MEMORANDUM SUPPORTING DEFENDANTS' MOTION FOR SUMMARY JUDGMENT – NO MEDICAL CAUSATION

Accompanying Documents:
1) Notice of Motion & Motion
2) Separate Statement of Undisputed Material Facts
3) Request for Judicial Notice
4) Evidence, including Declarations of Enns, Fischman, Fryzek, Kelman, Robbins & Willenburg

Date: June 6, 2013
Time: 9:00 a.m.
Dept.: 8
Judge: Hon. Peter Kirwan

Trial Date: July 10, 2013

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I

INTRODUCTION

"The law is well settled that in a personal injury action causation must be proven within a reasonable medical probability based upon competent expert testimony." (*Jones v. Ortho Pharm. Corp.* (1985) 163 Cal.App.3d 396, 402.) Plaintiffs have no "competent expert testimony" showing that any of the chemicals to which they claim Ms. Flores was exposed at Spectra -Physics, Inc. ("Spectra") caused injury to either her or her son Mark.[1] The undisputed facts establish that: (1) there is no known link between Ms. Flores' blood disorder, essential thrombocythemia, and exposure to chemicals; and (2) there is no known link between Mark's condition and exposure to the chemicals at issue here, even at much higher levels of exposure than the evidence can support on this record

Plaintiffs lack evidence of "general causation," that the chemicals of which they complain can cause the medical issues complained of. For example, according to the medical literature, Ms. Flores's blood disorder is not caused by chemical exposure. Her other medical complaints – headaches, etc. – are either subject to too many possible causes to single out any one, or are so far removed in time from her exposure that they simply cannot be attributed to chemical exposure. Mark's conditions are also not known to be caused by chemical exposure. Many are the exact *opposite* of what the medical literature, including that relied on by Plaintiffs in discovery responses, says would be the result of chemical exposure. His condition is, more likely than not, the result of genetic or other factors.

Plaintiffs also lack evidence of "specific causation," meaning that even if any of the substances could cause any of the health problems Plaintiffs have, there is no evidence that Ms. Flores inhaled, ingested or otherwise absorbed a dose known to be sufficient to trigger that adverse effect.

Plaintiffs' argument will instead likely be some variation on "Ms. Flores was

[1] Because of the shared family name, this brief sometimes uses the parties' first names. No disrespect is intended. (See *Maughan v. Correia* (2012) 210 Cal.App.4th 507, 509 n.2.)

exposed to these chemicals in some amount we cannot quantify, and sometimes these chemicals may cause problems, so the chemicals must have caused the problems Plaintiffs have." Even if Plaintiffs' experts attempt this logical leap, their testimony would be inadmissible and insufficient to create a triable issue of fact on causation due to an evidentiary gap that cannot be filled: the lack of any scientific or evidentiary basis for such testimony. Accordingly, the Court should grant summary judgment.

II

FACTS

Plaintiffs claim Ms. Flores was exposed to chemicals when she worked at Spectra in the late 1970s that caused injuries to her and her then-in-utero son Mark. She was diagnosed with a blood disorder in 2005, which Plaintiffs claim is an aggravation of what Plaintiffs call her "systemic chemical poisoning" at Spectra.

Defendants agree that chemicals were used at Spectra, but dispute that any of them caused Plaintiffs' conditions.

First and foremost, the epidemiology and other medical literature contradicts Plaintiffs' position. Plaintiffs have no scientific evidence that exposure to these chemicals at any level would cause "systemic chemical poisoning," or cause Yvette's blood disorders [much less 30 years after exposure], or cause in utero developmental disabilities. "Essential thrombocythemia, also known as essential thrombocytosis, is a condition of unknown etiology (cause) . . . . There are no recognized chemical causes of essential thrombocythemia." (EV 23[2], Fischman Dec., ¶ 11.) "[N]o chemicals of any type have been shown to be capable of causing ET." (*Ibid.*) Her own doctor does not believe that Yvette's current blood condition is related to chemical exposure. (EV 111-115, 1 Levitt Transcript, 18 ["toxin exposures are not classically associated with the etiology of these . . . diseases"], 24-25 ["these mutations are not believed to be caused by toxin or

[2] "EV" plus a number refers to the stamped page number of the evidence collected in the EVIDENCE SUPPORTING DEFENDANTS' MOTION FOR SUMMARY JUDGMENT – NO MEDICAL CAUSATION – AND INDEX THERETO filed contemporaneously herewith.

chemical exposure"], 38-39.)

Similarly, neither lead not the other chemicals at issue here are recognized in the relevant medical literature as causing Mark's conditions. (EV 30-31, Fischman Dec., ¶¶ 24-25; EV 43-45, Kelman Dec., ¶¶ 9-10, 14-16.) Although "prenatal exposure to lead may cause deficits in cognitive development . . . reported deficits have been relatively mild and do not persist; exposed children do not show noticeably different cognition by the time they reach school age. There are no data to support the contention that lead exposure in utero causes the degree of mental impairment observed in Mark Flores." (EV 6, Enns Dec., ¶ 12.)

Mark's conditions are in fact the exact opposite of what would be expected from lead exposure. "[I]f significant lead exposure in utero were to have occurred, growth retardation (not macrosomia) and microcephaly (not macrocephaly) would have been the likely consequences." (EV 6, Enns Dec., ¶ 12; see also EV 47, Kelman Dec., ¶ 21.b [Mark's conditions the opposite of typical exposure symptoms].) Mark's head and body are large, not small.

This point is conceded by Plaintiffs in their discovery responses, where they assert: "[A] detailed picture of lead's effect on human growth and development had been formed by the middle of the twentieth century . . . . 'It is generally agreed that if pregnancy does occur it is frequently characterized by miscarriage, intrauterine death of the fetus, premature birth and, if living children are born, they are usually smaller, weaker, slower in development and have a higher infant mortality.'" (EV 89, 90-100, Responses to Special Interrogatories, Set Two (Mark), Nos. 2, 4-7.) This does not describe Mark. He was not miscarried; he was born late, not early; he did not die; he is not small or weak. Plaintiffs' own authorities point away from the causation Plaintiffs claim.

The medical literature does not associate any of the other alleged chemical exposures with Mark's conditions. "For the remainder of the substances, mixed or poorly documented exposures (or no data on exposures at all) do not allow any of these

substances to be considered a human reproductive hazard. Environmental chemical exposure is common. Indeed, 99-100% of women in the United States have evidence of exposure to multiple combinations of chemicals . . . in pregnancy. There is not a reported association between any of these alleged exposures with Mark Flores' features." (EV 6, Enns Dec., ¶ 13.)

In short, Plaintiffs' claim that "alleged exposure to numerous chemicals in utero . . . caused the observed mental retardation in Mark Flores . . . has no basis in medical fact." (EV 8, Enns Dec., ¶ 8.) Instead, "Mark Flores' constellation of features likely reflects a developmental or genetic etiology." (*Ibid.*) "His clinical features are unrelated to any alleged in utero exposures." (EV 6-7, *Id.*, ¶ 14.)

Plaintiffs have no evidence of the level of Ms. Flores' exposure to any of the chemicals of which they complain. Without such evidence, it is impossible to demonstrate that the "dose-response" relationship is sufficient to cause any particular malady, including those of which Plaintiffs complain. (EV 68-69, Robbins Dec., ¶¶ 4, 7-8; EV 42, Kelman Dec., ¶ 8.)

Given that there are no "data showing that Mark Flores had in utero exposure to lead, methanol, beryllium, and volatile degreasing solvents . . . the claimed exposure of Mrs. Flores cannot be regarded as a substantial contributing factor to Mark Flores' developmental deficits" and other problems. (EV 40-41, 47-48, Kelman Dec., ¶¶ 5, 21-22; see also EV 6, Enns Dec., ¶ 13.)

Any expert opinion Plaintiffs might offer on the issue of causation will, in light of the above, founder and likely be so unreliable as to be inadmissible.

III

ARGUMENT

A. A defendant is entitled to summary judgment upon showing the nonexistence of a triable issue, and need not "conclusively negate" plaintiff's claims.

The Court must grant summary judgment where, as here, there is no triable issue of material fact. A "motion for summary judgment *shall be granted* if all the papers

submitted show that there is no triable issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." (Code Civ. Proc., § 437c, subd. (c), emphasis added.)

"A defendant . . . has met [this] burden of showing that a cause of action has no merit if that party has shown that one or more elements of the cause of action . . . cannot be established, or that there is a complete defense to that cause of action." (Code Civ. Proc., § 437c, subd. (p)(2).) "[T]he party moving for summary judgment bears an initial burden of production to make a prima facie showing of the nonexistence of any triable issue of material fact; if he carries his burden of production, he causes a shift, and the opposing party is then subjected to a burden of production of his own to make a prima facie showing of the existence of a triable issue of material fact." (*Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 845.)

A moving defendant is not required "to conclusively negate an element of plaintiff's cause of action" – i.e., prove the negative - in order to shift the burden. (*Aguilar*, 25 Cal.4th at 853.) The defendant need only show that the plaintiff "does not possess" and "cannot reasonably obtain" needed evidence, "that the plaintiff cannot establish at least one element of the cause of action -- for example, that the plaintiff cannot prove element X." (*Id.* at 853, 854.) That a plaintiff "cannot reasonably obtain" the "needed evidence" is shown where, as here, "plaintiff [is] allowed a reasonable opportunity to oppose the motion" and still does not present needed evidence. (*Ibid.*) This is also demonstrated by "admissions by the plaintiff following . . . discovery to the effect that he has discovered nothing." (*Ibid.*)

Where there are "evidentiary gaps" in plaintiffs' case, summary judgment is proper. (*Doe v. Salesian Society* (2008) 159 Cal.App.4th 474, 481.) "Filling in these gaps requires [the court] to speculate about the basis for the [contentions] asserted by [plaintiffs]. Such speculation is impermissible, however, and is grounds for granting summary judgment." (*Ibid.*)

"The purpose of summary judgment is to separate those cases in which there are

material issues of fact meriting a trial from those in which there are no such issues. . . . For this purpose, responsive evidence that gives rise to no more than mere speculation cannot be regarded as substantial, and is insufficient to establish a triable issue of material fact." (*Barker v. Hennessy Industries, Inc.* (2012) 206 Cal.App.4th 140, 146, citations omitted, emphasis in original.)

B. A plaintiff must have evidence that the alleged toxins caused the alleged injuries, based on valid expert testimony.

1. Plaintiffs must have evidence, amounting to more than mere possibility, (1) of specific alleged toxins that allegedly caused the injury, (2) that as a result of the exposure, the toxins entered the body, and (3) that each toxin that entered plaintiff's body was a substantial factor in causing a specific malady.

"The law is well settled that in a personal injury action causation must be proven within a reasonable medical probability based upon competent expert testimony." (*Jones v. Ortho Pharm. Corp.* (1985) 163 Cal.App.3d 396, 402, citations omitted [granting nonsuit for failure to prove causation], quoted and applied in *Miranda v. Bomel Construction Co., Inc.* (2010) 187 Cal.App.4th 1326, 1336 [affirming summary judgment on same basis]; *Bromme v. Pavitt* (1992) 5 Cal.App.4th 1487 [partial nonsuit affirmed for failure to demonstrate causation in medical negligence case].) "Mere possibility alone is insufficient to establish a prima facie case." (*Ibid*; accord, *Cottle v. Superior Court (Oxnard Shores Co.)* (1992) 3 Cal.App.4th 1367 [excluding as inadequate expert testimony on causation that plaintiffs' medical conditions "could possibly" be due to chemical exposure; trial court held it would have granted nonsuit].)

In a "toxic tort" or chemical exposure case, this means that plaintiffs must prove which specific products and chemicals caused which specific harm or injury. (*Bockrath v. Aldrich Chemical Co.* (1999) 21 Cal.4th 71.) "[W]hen the pleaded facts do not naturally give rise to an inference of causation, the plaintiff must plead specific facts affording an inference the one caused the other." (*Id.* at 79, quoting *Christensen v. Superior Court* (1991) 54 Cal.3d 868, 900-901.)

Bockrath requires that a toxic tort plaintiff must, at a minimum, plead all of the

following:

"(1) Plaintiff must allege that he was exposed to each of the toxic materials claimed to have caused a specific illness.

(2) He must identify each product [or alleged toxin] that allegedly caused the injury.

(3) He must allege that as a result of the exposure, the toxins entered his body.

(4) He must allege that he suffers from a specific illness, and that each toxin that entered his body was a substantial factor in bringing about, prolonging, or aggravating that illness."

(21 Cal.4th at 80; cf. *Setliff v. E.I. Du Pont deNemours & Co.* (1995) 32 Cal.App.4th 1525, 1529 [sustaining order granting defendants' motion for judgment on the pleadings because "plaintiff's inability to identify the substance that caused his injuries render[ed] his complaint fatally defective"].) Of course, if failure to plead such matters is fatal, so too is failure to have any evidence to prove them.

2. Plaintiffs must also have evidence of the amount of an alleged toxin necessary to cause their specific illness, and that they were exposed to that "threshold amount" or more of the toxin.

As Paracelsus, the "father of toxicology," famously pronounced: "The dose makes the poison." (Eaton, Scientific Judgment and Toxic Torts – A Primer in Toxicology for Judges and Lawyers (2003) 12 J.L. & Policy 5, 11.) Even if Plaintiffs were able to come up with evidence that, as a general matter, exposure to the chemicals alleged could result in the medical conditions complained of, that would not be enough to defeat summary judgment. Plaintiffs would also have to have evidence that the exposures rose to a level scientifically accepted as sufficient to trigger that result. (EV 68-69, 71 Robbins Decl., ¶¶ 4, 7-8, 13.)

"Scientific knowledge of the harmful level of exposure to a chemical, plus knowledge that the plaintiff was exposed to such quantities, are minimal facts necessary to sustain the plaintiff's burden in a toxic tort case." (*Allen v. Penn. Eng'g. Corp.* (5th

Cir. 1996) 102 F.3d 194, 198.) "It is not adequate to simply establish that 'some' exposure occurred. Because most chemically induced adverse health effects clearly demonstrate 'thresholds,' there must be reasonable evidence that the exposure was of sufficient magnitude to exceed the threshold before a likelihood of 'causation' can be inferred." (*Borg-Warner Corp. v. Flores* (Tex. 2007) 232 S.W.3d 765, 773, citing *Rutherford v. Owens-Illinois, Inc.* (1997) 16 Cal.4th 953.) If the dose does not exceed this threshold, then the product at issue cannot be a cause of harm, and cannot be a danger requiring warning.

The California Supreme Court has set forth a two-part test for causation in toxic tort actions:

> [T]he plaintiff *must first establish some threshold exposure* to the [toxin for which defendant is responsible], *and must further establish* in reasonable medical probability that a particular exposure or series of exposures was a 'legal cause' of his injury, i.e., a substantial factor in bringing about the injury.

(*Rutherford v. Owens-Illinois, Inc.* (1997) 16 Cal.4th 953, 982 [emphasis partially in original; footnote omitted].) To be substantial, the exposure's effect must be more than "negligible or theoretical." (*Id.* at 978.) A "substantial factor" necessary to prove causation must be truly substantial, not just "minor . . . negligible, theoretical, or infinitesimal," or a "mere possibility." (*Bockrath*, 21 Cal.4th at 79.)

Plaintiffs' arguments and evidence in opposition to this motion will likely focus on part of the first step, the question of whether Yvette or Mark was exposed to chemicals. But the Supreme Court did not say "any" exposure would suffice. Instead, it said a "threshold exposure" is required. Establishing an adequate "threshold" requires a determination of what "dose makes the poison." Further, the Supreme Court requires a second step: "evaluat[ing] whether the exposure was a substantial factor," i.e. more than a negligible or theoretical factor, in causing the plaintiff's disease. (*Rutherford*, 16 Cal.4th at 982, citation omitted.) Arguing that any exposure is unsafe would ignore this second step and would impose liability even where exposure was not a "substantial factor," or indeed any factor at all.

The Texas Supreme Court relied on *Rutherford* in holding that a plaintiff must, to establish causation, prove that the dose of exposure from a particular product exceeds a threshold level medically sufficient to cause disease. (*Borg-Warner Corp. v. Flores* (Tex. 2007) 232 S.W.3d 765, 773.) If the dose does not exceed this threshold, then the product at issue cannot be a cause of harm, and cannot be a danger requiring warning. Because the *Borg-Warner* plaintiff could demonstrate only that he was exposed to "some" asbestos fibers from Borg-Warner brake pads, but could not quantify the dose, the Texas Supreme Court reversed a jury verdict and awarded judgment to Borg-Warner. "[T]here must be reasonable evidence that the exposure was of sufficient magnitude to exceed the threshold before a likelihood of 'causation' can be inferred." (*Id.* at 773, citations omitted; see also *Gregg v. V. J. Auto Parts, Inc.* (Pa. 2007) 596 Pa. 274, 291 [experts' "generalized opinions" that "any exposure . . ., no matter how minimal, is a substantial contributing factor to . . . disease . . . do not suffice to create a jury question"].)

The *Borg-Warner* court's formulation is completely consistent with California law. Indeed, *Rutherford* is cited no fewer than three times in the *Borg-Warner* opinion. (*Id.* at 772-773.) Like *Borg-Warner*, *Rutherford* recognized that a factor could not be considered "substantial" unless it rises to a particular evidentiary threshold, because something that "plays only an 'infinitesimal' or 'theoretical' part in bringing about injury, damage, or loss is not a substantial factor." (*Rutherford*, 16 Cal.4th at 969.)

3. Plaintiffs' evidence of causation must be founded on reliable medical expert testimony.

The California Supreme Court has stressed that a plaintiff must prove causation "through *reliable* medical expert testimony," and that "[e]xpert medical opinion, however, does not always constitute substantial evidence." (*Lockheed Martin Corp. v. Superior Court (Carillo)* (2003) 29 Cal.4th 1096, 1107, emphasis added.) *Lockheed*, and many other cases, held that "an expert's opinion which rests upon guess, surmise, or conjecture, rather than relevant, probative facts, cannot constitute substantial evidence." (*Id.* at 1110 [internal citations and quotation marks omitted].)

The California Supreme Court has even more recently re-affirmed that expert testimony needs to be carefully scrutinized for reliability. "Under California law, trial courts have a substantial 'gatekeeping' responsibility," because of "the need to exclude unreliable evidence." (*Sargon Enters., Inc. v. Univ. of Southern Cal.* (2012) 55 Cal.4th 747, 769, citations omitted.) *Sargon* underscored that the Evidence Code empowers courts to inquire into the "matter" "upon which [expert opinion] is based." (Evid. Code, §§ 801, 802.). "The *reasons* for the experts' opinions are part of the matter on which they are based just as is the *type* of matter." (55 Cal.4th at 771, emphasis in original.)

Thus, "a court may inquire into, not only the type of material on which an expert relies, but also whether that material actually supports the expert's reasoning. 'A court may conclude that there is simply too great an analytical gap between the data and the opinion proffered.'" (55 Cal.4th at 771, quoting *General Elec. Co. v. Joiner* (1997) 522 U.S. 130, 146.) "[T]he matter relied on must provide a reasonable basis for the particular opinion offered, and . . . an expert opinion based on speculation or conjecture is inadmissible." (*Id.* at 770, quoting with approval *Lockheed Litigation Cases* (2004) 115 Cal.App.4th 558, 564.)

"[A]n expert opinion must be based on matter that provides a reasonable basis for the opinion" or it should be excluded. (*Lockheed Litigation Cases*, 115 Cal.App.4th at 561.) Expert opinions "are worth no more than the reasons and factual data on which they are based." (*Griffith v. County of Los Angeles* (1968) 267 Cal.App.2d 837, 847.) "[T]he *ipse dixit* of the most profound expert proves nothing except it finds support on some adequate foundation." (*Estate of Teed* (1952) 112 Cal.App.2d 638, 646 [reversing judgment because expert physician's testimony lacked factual foundation].) The court must give "critical consideration to the expert's reasoning." (*Pacific Gas & Electric Co. v. Zuckerman* (1987) 189 Cal.App.3d 1113, 1136 [excluding poorly reasoned expert valuation].) If the reasons on which the opinion is based fail, the opinion "cannot rise to the dignity of substantial evidence." (*San Diego Gas & Elec. Co. v. Sinclair* (1963) 214 Cal.App.2d 778, 783; see also *City of San Diego v. Sobke* (1998) 65 Cal.App.4th

379 [reversing jury verdict where expert opinion based on flawed methodology]; *Hewiston v. Hewiston* (1983) 142 Cal.App.3d 874, 884 [reversing judgment based on expert's improper valuation methods]; *People v. Dellinger* (1984) 163 Cal.App.3d 284 [reversing verdict where foundational errors invalidated expert's conclusions].)

When viewed through the lens of this well-developed case law, Plaintiffs do not have, and cannot expect to obtain, admissible evidence demonstrating causation.

C. Plaintiffs' expert testimony will be insufficient to demonstrate a triable issue of fact as to causation, or inadmissible, or both.

Plaintiffs have no evidence that any specific chemical with which Ms. Flores worked is a cause of Mark's condition, or of her blood disorder or other complaints. The evidence instead is that the medical literature does not recognize any chemical exposure as a cause of their problems. Mark's conditions are likely the result of genetic or other factors. Indeed, even authorities cited by Plaintiffs describe symptoms related to lead that are diametrically different than his condition and medical history. Any contrary testimony from Plaintiffs' experts would be speculative, lack the reliability required for this Court to admit the evidence under *Sargon*, and fail to "rise to the dignity of substantial evidence." (*San Diego Gas & Elec. Co.*, 214 Cal.App.2d at 783.)

1. Ms. Flores' blood disorder is not caused by chemical exposure, and there is no evidence it was caused by any exposures at Spectra.

Plaintiffs will have no admissible expert testimony establishing general or specific causation of Ms. Flores' blood disorder.

Plaintiffs have no evidence that any chemical is a general cause of Ms. Flores' blood disorder. To the contrary, Ms. Flores' own treating physician knows of no established connection between her blood disorder and chemical exposures. (EV 111-115, 1 Levitt Transcript, 18 ["toxin exposures are not classically associated with the etiology of these . . . diseases"], 24-25 ["these mutations are not believed to be caused by toxin or chemical exposure"], 38-39.) This is confirmed by the declaration of epidemiologist John Fryzek, which establishes that there is absolutely no basis in the

scientific literature for a link between Ms. Flores' blood disorder and chemical exposures. (EV 13-14, Fryzek Dec., ¶¶ 16-18.)

Even if there was an established general connection between chemical exposures and Ms. Flores' blood disorder, Plaintiffs can offer no specific evidence showing (1) that the chemicals Ms. Flores actually encountered in her workplace can cause the disorder, (2) the threshold level at which exposure to such chemicals could cause her disorder, or (3) that she was in fact exposed at such levels. (See EV 42-43, Kelman Dec., ¶¶ 8-12 ; EV 68-69, Robbins Dec., ¶¶ 4, 7-8 .) No expert testimony can fill this "evidentiary gap." Any such testimony would lack a scientific or evidentiary basis, would be entirely speculative and would, therefore, be inadmissible. "[T]he courtroom is not the place for scientific guesswork, even of the inspired sort. Law lags science; it does not lead it." (*Rosen v. Ciba-Geigy Corp.* (7th Cir. 1996) 78 F.3d 316, 319 [Posner, J.].) Accordingly, summary judgment must be granted in favor of Defendants on Ms. Flores' claims.

2. Mark's conditions are not caused by chemical exposure, and there is no evidence they were caused by any in utero exposures at Spectra.

Similarly, Plaintiffs will have no admissible expert testimony establishing general or specific causation of Mark's alleged injuries. The only substance Plaintiffs have identified in discovery that, according to the medical literature, may cause developmental problems in fetuses is lead. For the other chemicals, there is no known association. (EV 6, Enns Dec. ¶¶ 12-13; EV 43, Kelman Dec. ¶ 10.)

Ms. Flores worked with small quantities of a solder glass "frit" material containing lead oxide. However, the declarations filed herewith establish that this was not the cause of Mark's condition for all the following reasons:

(1) There is no connection in the scientific literature between lead exposure and Mark's severe developmental deficits. For example, the literature supports only a marginal, temporary drop in IQ points. Although "prenatal exposure to lead may cause deficits in cognitive development . . . reported deficits have been relatively mild and do not persist; exposed children do not show noticeably different cognition by the time they

reach school age. There are no data to support the contention that lead exposure in utero causes the degree of mental impairment observed in Mark Flores." (EV 6, Enns Dec., ¶ 12.)

(2) The symptoms Plaintiffs say lead causes are not presented in this case. In fact, Mark's symptoms are the opposite of what would be expected of harmful prenatal exposure to lead or other substances. As Plaintiffs themselves represent: "It is generally agreed that if pregnancy does occur it is frequently characterized by miscarriage, intrauterine death of the fetus, premature birth and, if living children are born, they are usually smaller, weaker, slower in development and have a higher infant mortality." (EV 89, 90-100, Responses to Special Interrogatories, Set Two (Mark), Nos. 2, 4-7.) This picture does not describe Mark. He was not miscarried; he was born late, not early; he did not die; and he is neither small nor weak.

(3) Even if such a general connection did exist, Ms. Flores was not exposed to sufficient quantities of lead to cause the deficits. Among other things, the lead in the frit was not "bio-available," meaning it would not be taken into Ms. Flores's system. (EV 48, Kelman Dec., ¶ 22.) Further, lead "poisoning" is the result of a dose-response relationship. For an amount of lead sufficient to harm Mark, his mother Yvette would have displayed signs of lead poisoning when she was pregnant, and this is not indicated in her medical records.

(4) The much more probable cause of Mark's problems is either birth trauma or genetic factors. (EV 4-6, Enns Dec., ¶¶ 9-13; EV 45-46, Kelman Dec., ¶ 18; EV 29-30, Fischman Dec., ¶¶ 22-24.) Unlike chemical exposure, these are associated with the various conditions Mark presents.

IV

CONCLUSION

Courts have a special responsibility regarding expert evidence. Many other evidentiary questions may be resolved by saying "let the jury decide" on the basis of the collective experiences of the jurors. But expert testimony is only admissible if on a

subject "beyond common experience" (Evid. Code, § 801), and therefore by definition outside the jury's experience. Because the subject matter is outside the jury's experience, and because "[l]ay jurors tend to give considerable weight to 'scientific' evidence when presented by 'experts' with impressive credentials," such evidence can have a "misleading aura of certainty." (*People v. Kelly* (1976) 17 Cal.3d 24, 31, 32 [citations omitted].) The court's oversight is necessary to prevent lay jurors from being improperly swayed by experts. That oversight is apparent from the special statutory restrictions and the many California decisions limiting or excluding improper expert testimony.

> The expert witness is the only kind of witness who is permitted to reflect, opine, and pontificate, in language as conclusory as he may wish. Once we recognize the expert witness for what he is, an unusually privileged interloper, it becomes apparent why we must limit just how far the interloping may go. A witness cut loose from time-tested rules of evidence to engage in purely personal, idiosyncratic speculation offends legal tradition quite as much as the tradition of science. Unleashing such an expert in court [is] not just unfair, it is inimical to the pursuit of truth. The expert whose testimony is not firmly anchored in some broader body of objective learning is just another lawyer, masquerading as a pundit.

(*People v. Johnson* (1993) 19 Cal.App.4th 778, 789-790, quoting Huber, Galileo's Revenge: Junk Science in the Courtroom (2d ed. 1993), p. 204.)

Because the medical and scientific literature holds that Plaintiffs' medical problems were not caused by chemical exposure, and Plaintiffs lack admissible expert testimony regarding causation, this Court should grant Defendants summary judgment.

Respectfully submitted,

Dated: March 25, 2013

GORDON & REES LLP
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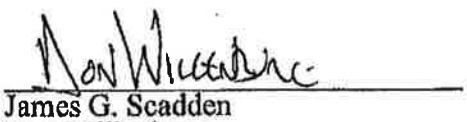
By: 

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