SILLS CUMMIS & GROSS

The Legal Center
One Riverfront Plaza
Newark, New Jersey 07102-5400
Tel: (973) 643-7000
Fax: (973) 643-6500

Joshua N. Howley
Member & General Counsel
Direct Dial: (973) 643-5341
E-mail: jhowley@sillscummis.com

101 Park Avenue, 28th Floor
New York, NY 10178
Tel: (212) 643-7000
Fax: (212) 643-6500

January 2, 2026

Via Email & U.S. Mail

Honorable Michael J. Blee, J.A.D.
Acting Administrative Director of the Courts
Attention: MCL Application – Daniel's Law Litigation
Richard J. Hughes Justice Complex, P.O. Box 307
25 Market Street
Trenton, New Jersey 08625-0037
Comments.mailbox@njcourts.gov

Re: ***Atlas Data Privacy Corp., et al. v. Spokeo, Inc., et al.***
Docket No. MRS-L-000227-24

Dear Judge Blee:

We, along with Mayer Brown LLP, represent Defendant Spokeo, Inc. ("Spokeo") in the above-referenced matter. Spokeo respectfully joins in full the Defendants' opposition to the Plaintiffs' application to establish a multicounty litigation. For the reasons articulated in that submission and as explained below, the application should be denied.

Spokeo's case posture highlights why individualized treatment of these cases is necessary. In his Order dated August 15, 2025, the Hon. Jonathan W. Romankow, J.S.C. denied Spokeo's motion to dismiss for lack of personal jurisdiction without prejudice, ordered the parties to engage in jurisdictional discovery, and noted that Spokeo could renew its personal jurisdiction motion at the conclusion of that discovery. See Trans: ID LCV20252278413. Pursuant to the Court's Order, the Plaintiffs have issued discovery requests, to which Spokeo has responded. On September 27, 2025, the case was administratively dismissed for lack of prosecution; plaintiffs did not reinstate the case until November 12, 2025. The parties have not yet begun producing discovery, nor have they scheduled a deposition of Spokeo's corporate witness. Accordingly, a threshold, defendant-specific jurisdictional dispute remains undecided, with the Court having already contemplated a renewed dismissal motion upon completion of jurisdictional discovery.

This procedural posture underscores the broader point raised in the opposition: these cases turn on defendant-specific facts, defenses, and case-management needs that do not lend themselves

to centralized treatment. Centralization at this stage would disrupt ongoing jurisdictional discovery, delay resolution of a dispositive personal-jurisdiction motion unique to Spokeo, and risk conflating distinct records across disparate defendants. The diversity of procedural stages and issues across the docket reinforces that individualized case management within the assigned vicinages is the most efficient and fair path forward.

For these reasons, and those set forth in the Defendants' opposition, the Court should deny the Plaintiffs' application for MCL designation.

Respectfully submitted,

/s/ Joshua N. Howley
Joshua N. Howley

cc: All counsel of record via eCourts

January 2, 2026

VIA EMAIL AND OVERNIGHT MAIL
(comments.mailbox@njcourts.gov**)**

Honorable Michael J. Blee, J.A.D.
Acting Administrative Director of the Courts
Attention: MCL Application – Daniel's Law Litigation
Richard J. Hughes Justice Complex, P.O. Box 307
25 Market Street
Trenton, New Jersey 08625-0037

Re: Notice to the Bar (December 3, 2025)
MCL Application - Daniel's Law Litigation

Dear Judge Blee:

Troutman Pepper Locke LLP represents defendants in eight Daniel's Law matters venued in Bergen, Mercer, Monmouth, and Morris counties (the "Troutman Defendants").[1] We write together with counsel for defendants Black Knight Technologies, LLC and Black Knight, Inc. (Dkt. MER-L-271-24), to oppose the application filed by Plaintiff Atlas Data Privacy Corporation ("Atlas"), and several individual Plaintiffs (collectively with Atlas, the "Plaintiffs"), to establish a multicounty litigation ("MCL") for the 111 Daniel's

[1] The Troutman clients are defendants in the following matters: Atlas Data Privacy Corporation, et al. v. Precisely Holdings, LLC, et al., BER-L-000819-24; Atlas Data Privacy Corporation, et al. v. Enformion LLC, et al., BER-L-000767-24; Atlas Data Privacy Corporation, et al. v. Corelogic, Inc., et al., BER-L-000773-24; Atlas Data Privacy Corporation, et al. v. AtData, LLC, et al., BER-L-000867-24; Atlas Data Privacy Corporation, et al. v. CARCO Group Inc., et al., MRS-L-000270-24; Atlas Data Privacy Corporation, et al. v. Remine, Inc., et al., MRS-L-000258-24; Atlas Data Privacy Corporation, et al. v. Red Violet Inc., et al., MON-L-00482-24; Atlas Data Privacy Corporation, et al. v. Acxiom LLC, et al., MER-L-000283-24.

Law cases currently pending in vicinages throughout the State (the "Subject Cases").[2]

Plaintiffs' MCL Application should be denied because the establishment of an MCL involving 111 individual actions and more than 120 differently situated defendants who are represented by at least 58 different law firms is unprecedented. Indeed, there is no case the Troutman Defendants could find (or that Plaintiffs have identified) where the Supreme Court created an MCL for cases, like those here, which **do not involve** a single product, a mass disaster, an environmental case or toxic tort, or a common or predominant defendant whose conduct is in question. Simply put, the characteristics of cases susceptible to MCL treatment or coordination in a single venue under R. 4:38A and Directive #02-19 simply do not exist here. Plaintiffs' incredible application should be denied.

[2] Plaintiffs also claim they may file "several hundred more actions in the coming months" against additional defendants. Pls' App. at 1. This suggestion of additional actions being filed in the future does not support centralization of the current cases. See In re Carter's, Inc. , Mktg., 766 F. Supp. 3d 1329, 1330 (J.P.M.L. 2025)("The mere possibility that additional actions may be filed sometime in the future does not support centralization."); In re Hotel Indus. Sex Trafficking Litig., 433 F. Supp. 3d 1353, 1354 (J.P.M.L. 2020) ("(T)he mere possibility of additional actions does not support centralization, even where thousands of actions are predicted."); In re Route 91 Harvest Festival Shootings in Las Vegas, Nevada, on October 1, 2017, 347 F. Supp. 3d 1355, 1358 (J.P.M.L. 2018).

As explained below, there is no common defendant in any of the Subject Cases and therefore, each case involves individual facts and legal defenses that will predominate over any common facts or defenses. By way of example, each case involves a myriad of fact-specific issues concerning, among other things, the number of purported Daniel's Law requests each Defendant received, and the specific Protected Information, if any, each Defendant possessed, whether and how each Defendant responded to the requests, and if not, why not. As to liability and damages, each action will require Plaintiffs to prove individualized facts regarding what specific information was possessed by *each* Defendant, and what information was disclosed by *each* Defendant after ten business days in violation of Daniel's Law. A Defendant who did not respond because the requests were blocked by a spam filter and therefore not received would have a much different set of defenses as compared to, say, a Defendant who did not suppress the purported Protected Information because of a good-faith belief that Daniel's Law did not apply to its services.

Moreover, the creation of an MCL or central coordination will prejudice the Defendants. The Subject Cases are being pursued as individual cases and not as class actions. Plaintiffs' attempts to create an MCL or seek consolidation in one venue, after these cases have gone on for almost two years, is a transparent attempt to create an atmosphere where Defendants are treated the same and

their individual facts and defenses are glossed over. In light of the amount in controversy in each individual case (more than $16 million in most or all of the cases), it is particularly important to honor every Defendant's due process right to be heard on all issues relating to case management, pre-trial motions, and discovery disputes so that rulings are not made in a vacuum and without adequate consideration of each Defendant's unique facts. Assigning 111 cases involving different Defendants and different facts to a single judge jeopardizes each Defendant's due process rights.

Further, assigning the 111 cases to a single judge would not be an efficient use of judicial resources and would create serious complications, as many of the Defendants are competitors and should not be forced to disclose sensitive business information – including information related to their business processes, databases, algorithms, and the identity of their customers – during hearings, motion practice, depositions or in written discovery. That alone will make coordinated meet and confers, discovery conferences and motion practice among competitors complicated, at a minimum. Indeed, competitors will want to file individual submissions under seal, and have separate hearings and case management conferences, to avoid the disclosure of sensitive information to entities with whom they compete.

The Supreme Court also should note the almost two-year delay in Plaintiffs pursuing this Application, which suggests their primary motive is forum shopping. Plaintiffs originally chose to file these cases in separate counties even though many of the Defendants could have been sued in the same county. See R. 4:3-2 (for venue purposes, a business resides in any county in which it is actually doing business). Plaintiffs should not be permitted to upend the effective coordination of these cases at the county level.

Simply put, MCL treatment or consolidation in one venue is not necessary. During the almost two years that the Subject Cases have been pending, the parties in each county have worked together informally, where appropriate, on coordinated or consolidated motions to dismiss, written discovery, and some case management orders. As the Subject Cases further progress into discovery, individual facts and individual legal defenses will predominate and require individual consideration, and to the extent there are common issues, informal coordination can continue to occur efficiently in the smaller groups of cases assigned to different judges in each county.

For these reasons and more fully set forth below, this Court should deny Plaintiffs' application for the creation of an MCL or consolidation of all cases before a single judge and allow them to continue to proceed in the counties in which they are pending.

I. BACKGROUND

A. Daniel's Law

Daniel's Law was originally enacted to allow "any covered person" — defined to include current and former judges, law enforcement officers, and certain other public officials, as well as immediate family members residing in the same household – to "prohibit the disclosure of the[ir] home address or unpublished home telephone number" (the "Protected Information") by any "person, business, or association." N.J.S.A. 56:8-166.1(a)(2), (d). Daniel's Law allows an "authorized person" to send written notice seeking nondisclosure of a covered person's Protected Information. N.J.S.A. 56:8-166.1(a)(1), (2). Within ten (10) business days of receipt of a written notice, a recipient "shall not disclose or re-disclose on the Internet or otherwise make available" the covered person's Protected Information. N.J.S.A. 56:8-166.1(a)(1).

Although the current text of Daniel's Law does not include any express *mens rea* requirement, in November 2024, the District of New Jersey read a negligence culpability standard into the law, in a decision denying a consolidated motion to dismiss. Atlas Data Priv. Corp. v. We Inform, LLC, 758 F. Supp. 3d 322, 340 (D.N.J. 2024). Although the District of New Jersey found the text of Daniel's Law contains no *mens rea* for civil liability, it reasoned that such liability can be imposed for a violation of

Daniel's Law "only if a defendant unreasonably disclosed or made available the home addresses and unlisted telephone numbers of covered persons after the statutory deadline had expired." Id. at 341.

The federal defendants appealed the U.S. District of New Jersey's order to the Third Circuit Court of Appeals. The Third Circuit, in turn, entered a petition and order seeking to certify state law questions necessary to resolve the appeal to the New Jersey Supreme Court. See Atlas Data Priv. Corp. v. We Inform, LLC, No. 25-1555 (3d Cir. Mar. 31, 2025), Dkt. No. 103 ("3d Cir. Order"). The New Jersey Supreme Court accepted and reformulated the questions from the Third Circuit and is addressing, "What mental state, if any, is required to establish liability under Daniel's Law?" See Atlas Data Priv. Corp. v. We Inform, LLC, 262 N.J. 69 (2025).

B. Atlas' Barrage of Daniel's Law Requests

In mid-December 2023 and continuing through the New Year 2024, Atlas orchestrated the emailing of tens of thousands of purported Daniel's Law notices from an @Atlasmail.com domain to approximately 150 businesses. The emails, which were sent *en mass* and in rapid succession over the holidays, requested that each business cease the disclosure of Protected Information belonging

to purported Covered Persons.[3] Different volumes of requests were sent on behalf of different alleged Covered Persons to different Defendants.[4] And, each Defendant reacted to the requests differently and in light of different defendants' policies and procedures, business models, and available personnel and financial resources. Moreover, Atlas sent the emails to the Defendants even though it made no effort to confirm that any particular Defendant actually possessed and made available the Protected Information of any specific Covered Person. Indeed, Atlas's terms of service acknowledge that "some recipients of takedown notices may not possess some or all of the information in your notice prior to receipt of your takedown notice."

C. The Subject Cases

On February 4, 2024, after the email barrage was complete, Plaintiffs proceeded to file 140 individual complaints against more than 150 defendant businesses in five vicinages (Bergen,

[3] See, e.g., Complaint, Atlas Data Privacy Corp., et al. v. Enformion, LLC, et al., Dkt. BER-L-000767-24 ("Enformion Cmpl."), at ¶¶52-53 (notices sent starting December 21, 2023); Complaint, Atlas Data Privacy Corp., et al. v. Red Violet, Inc., et al., Dkt. MON-L-000482-24 ("Red Violet Cmpl.") at ¶¶50-51 (notices sent starting December 25, 2023); Complaint, Atlas Data Privacy Corp., et al. v. CARCO Group, Inc., et al., Dkt. MRS-L-000270-24 ("CARCO Cmpl."), at ¶¶52-53 (notices sent starting January 4, 2024).

[4] A chart outlining the variation in purported requests Plaintiffs allege they sent to the Troutman Defendants is attached to the Certification of Angelo A. Stio III ("Stio Cert.") as Exhibit A.

Mercer, Middlesex, Monmouth, and Morris) throughout the State. In October 2024, Plaintiffs filed an additional seven complaints (including complaints filed in Essex County), followed by another twenty-eight complaints in April 2025 (including complaints filed in Union County), and five complaints in October 2025, all against different defendants.

Atlas is a named Plaintiff in every complaint that was filed. Each complaint also names (in different permutations) a group of individual Plaintiffs. Atlas is neither a "Covered Person" nor an "Authorized Person" under Daniel's Law, but claims instead to be the assignee of Daniel's Law claims of between 16,000 and 22,0000 Covered Persons, with the exact number varying by Defendant. See Stio Cert., Ex. A.

Defendants are not all "data broker[s]" as Plaintiffs suggest as part of a false narrative that all Defendants are in the business of selling home addresses and unpublished telephone numbers to any and all comers via the internet. See Plaintiffs' App. at 1, 3. The Defendants in the Subject Cases vary considerably. They vary in their size and include entities with ten or fewer employees up to large, publicly traded corporations. They also vary in the industries in which they conduct business, the products and services they offer, and how they collect, process, and disclose information. By way of example, Defendants include, among other things, (i) entities that assist law

enforcement agencies with criminal investigations and combatting insurance fraud, (e.g., Red Violet, Dkt. MON-L-482-24); (ii) entities that assist finance companies with compliance with know-your-customer obligations and fraud prevention, (e.g., Precisely Software, Inc., Dkt. BER-L-819-24); (iii) entities that assist non-profit organizations and charities with fundraising, (e.g., Blackbaud, Inc., Dkt. MRS-L-243-24); (iv) mail houses and marketing companies (e.g., Giant Partners, Inc., Dkt. MID-L-989-24); (v) entities that facilitate home ownership by assisting realtors and mortgage lenders with intelligence (e.g., Remine, Inc., Dkt. MRS-L-258-24); and (vi) entities whose disclosure of information is regulated by federal and state statutes such as the Gramm-Leach-Bliley Act, Fair Credit Reporting Act, and New Jersey Insurance Information Practices Act (e.g., Black Knight Technologies, LLC, Dkt. MER-L-271-24). These are only a few examples in variations, as each Defendant has a unique business, product(s) and service(s).

Defendants also vary in their business models and include entities that engage only in business-to-business transactions (e.g., Wiland, Inc., Dkt. MON-L-577-24); entities that facilitate access to the same information the State of New Jersey itself makes publicly available (e.g., Information.com LLC, Dkt. MRS-L-245-24); entities that provide subscription services and do not make any information available over the internet (e.g., CheckPeople, LLC,

Dkt. MON-L-506-24); entities that do not process home addresses (e.g., Telnyx LLC., Dkt. MRS-L-000260-24); and entities that do not process phone numbers (e.g., AtData LLC, Dkt. BER-L-867-24).

Critically, each Defendant varies in the databases of information that each maintains for their businesses. Accordingly, any Protected Information actually possessed by each Defendant will differ and be wholly unrelated to that held by any other Defendant. Thus, there is little efficiency to be gained by an MCL or consolidation where, as here, the individualized inquiries that will be required as to each case, will predominate over any potential benefits from consolidation.[5]

The stakes in each case are sizeable. Plaintiffs seek to recover individually, and in Atlas's case as the assignee of between 16,000 and 22,000 covered persons, actual damages of not less than $1,000 for each violation of Daniel's Law as well as punitive damages for "willful noncompliance," injunctive relief, and attorneys' fees and costs of suit. See id., CARCO Cmpl., WHEREFORE Clause and Stio Cert. Ex. A.

[5] Plaintiffs implicitly recognized the differences between and among the Defendants as they sued each Defendant individually, based "upon information and belief," that a Defendant violated Daniel's Law by "ceasing the disclosure or re-disclosure on the Internet or otherwise making available" Protected Information through one or more websites, or applications or "within a searchable list or database." See, e.g., CARCO Cmpl., ¶¶ 29 and 40.

D. The current status of the Subject Cases

According to Plaintiffs, there are currently 111 cases pending in the Superior Court of New Jersey, Law Division, in Bergen, Essex, Mercer, Middlesex, Monmouth, Morris, and Union counties. The cases are at different stages depending on the venue, when the complaints were filed, and whether a case was removed and remanded back to state court. For example, the remanded cases in Mercer, Monmouth and Middlesex counties have pending facial and as-applied constitutional challenges and are stayed (or deadlines have been adjourned) pending resolution of motions to dismiss, the Supreme Court's resolution of the certified question, and/or the Third Circuit's resolution of the pending appeal of the District of New Jersey's Order. The non-remanded cases in these counties have been involved in on-going discovery and are at later procedural stages.

By way of further example, the remanded cases in Bergen county have been moving forward with paper discovery and were about to proceed with the engagement of a Special Discovery Adjudicator and/or discovery motion practice prior to Plaintiffs' filing the MCL Application. Other cases in Bergen, which were not removed and remanded, are at later procedural stages.

The majority of the cases in Essex and Union counties were recently filed in April and October 2025 and are still in nascent

stages. While some of these cases have already proceeded with dispositive motion practice and are beginning written discovery, others still do not have responsive pleadings filed and are not yet in active case management.

II. CRITERIA FOR DETERMINING MCL TREATMENT

An application to establish an MCL is governed by Rule 4:38A and the factors outlined in Directive #02-19. Under Rule 4:38A, the "Supreme Court may designate a case or category of cases as Multicounty Litigation to receive centralized management in accordance with criteria and procedures promulgated by the Administrative Director of the Courts upon approval by the Court." Directive # 02-19 (the "Directive") prescribes criteria to be applied in determining whether MCL designation is warranted.

The criteria most relevant to demonstrate that MCL treatment is not warranted here include: (i) the lack of any claims with common, recurrent issues of law and fact that are associated with a single product, mass disaster, or complex environmental condition or toxic tort; (ii) the absence of any commonality of injury or damages among plaintiffs; (iii) the increased expenses, complications and prejudice to Defendants if an MCL is established; (iv) the absence of evidence of duplicative and inconsistent rulings, orders or judgments; (v) and the significant inefficiencies that will result from centralization. See

Directive # 02-19. Geographical disbursement of the parties also is a factor that is considered. This factor also favors Defendants since that circumstance appears to have been deliberately engineered by Plaintiffs who, after two years, now are engaging in a renewed effort at forum shoping. See Opp., supra at 5.

III. LEGAL ARGUMENT

A. The Subject Cases do not involve recurrent issues of law and fact associated with the conduct of a common defendant or a single product, mass disaster, or complex environmental case or toxic tort.

The Subject Cases do not contain any of the characteristics of the types of cases that would benefit from MCL or coordinated treatment because they **do not** involve: (i) "a large number of claims associated with a single product," such as "diet drugs or other large product liability cases such as tobacco, Norplant, breast implant, Propulsid, Rezulin, PPA and latex litigation"; (ii) "mass disasters characterized by common technical and legal issues," such as the Durham Woods pipeline explosion litigation; (iii) "complex environmental cases and toxic torts . . . arising from a common event," such as "the Ciba-Geigy litigation, alleging air, water and soil pollution"; or (iv) a common or predominant defendant that engaged in a common practice, such as the HealthPlus Surgery Center litigation. See Rabner, S. C.J.S.C., and Grant, G. P.J.A.D., New Jersey Multicounty Litigation Resource Book, 1 (4th

Ed. 2014); Stio Cert., Ex. B (outlining the characteristics of cases on the Court's website that were designated for an MCL).[6]

1. Predominant Individual Issues Arise From The Absence of a Common Defendant.

To begin, the Subject Cases all implicate the unique facts of how each individual Defendant reacted to the Daniel's Law requests. They involve more than 120 different Defendants that vary in size, the industry in which they do business, the types of products and services they offer, and how they collect, process, and share information. See Opp., supra at I(C). They also vary considerably in the different, unique databases that each Defendant maintains to store information. There also is not a single Defendant named as a party in more than one of the Subject Cases.

As a result of the absence of any common Defendant, the material facts in each case differ from Defendant to Defendant and from individual case to individual case. These variations result in numerous individual issues that will predominate, including issues related to: the number of purported Daniel's Law requests a Defendant received; the timing of the requests; whether a Defendant possessed any relevant Protected Information in the first instance; the Defendant's response to the requests,

[6] See also www.njcourts.gov/attorneys/multicounty-litigation#toc-litigation-applications-and-terminations/ (last visited on January 2, 2026).

including resources, systems, policies and procedures a Defendant employed to handle requests; the communications between a Defendant and Atlas or any Covered Person after any Daniel's Law request was received; whether a Defendant disclosed Protected Information and if so, whether the disclosure was done negligently or willfully; whether it would be unconstitutional to apply Daniel's Law to a particular Defendant given its particular circumstances; and, the systems a Defendant utilized to store and/or process the Protected Information.

The federal Judicial Panel on Multidistrict Litigation ("JPML") has refused centralization when presented with such material variations arising from the lack of any common defendant and the Supreme Court here should not hesitate to do the same. See, e.g., In re Hotel Industry Sex Trafficking Litigation, 433 F. Supp. 3d 1355, 1357(J.P.M.L. 2020) (denying centralization where, among other reasons, there were unique issues concerning sex trafficking allegations and "no common or predominant defendant across all actions, further indicating a lack of common questions of fact"); In re Covid-19 Bus. Interruption Prot. Ins. Litig., 482 F. Supp. 3d 1360, 1362 (J.P.M.L. 2020) (denying centralization because, among other things, there "is no common defendant in these actions"); In re Paycheck Prot. Program (PPP) Agent Fees Litig., 481 F. Supp. 3d 1335, 1337 (J.P.M.L. 2020) (denying motion to centralize because underlying cases involved "dozens of different

lenders, and there is no common or predominant defendant across all actions" and "the vast majority of defendants are named in only one action, further indicating a lack of common questions of fact"); In re Cordarone, 190 F.Supp.3d 1346, 1347 (J.P.M.L. 2016) (denying transfer due to "variance" in named defendants); In re CleanNet, 38 F.Supp.3d 1382, 1383 (J.P.M.L. 2014) (denying transfer where "each action involves different Area Operator defendants").

2. Predominant Individual Issues Exist As To The Plaintiffs and Thousands of Assignors.

Individual factual issues also predominate as to the individual Plaintiffs and to Atlas, which has the burden of proof as to the claims being asserted as to each Covered Person assignor it purports to represent, ranging between 16,000 and 22,000 assignors, depending on the case. Those issues include: whether the individual Plaintiffs and/or the thousands of assignors are "Covered Persons" under Daniel's Law; whether a Defendant actually possessed their Protected Information and they had contemporaneous knowledge of such possession; whether they actually made a Daniel's Law request; whether they received a response to a Daniel's Law request; whether they have any knowledge that their Protected Information was disclosed after their Daniel's Law request was sent; whether a Defendant disclosed their information; whether they consented to the disclosure; whether they reside at the

address for which they sought suppression; whether the phone number for which they sought suppression is unpublished; and whether the Atlas assignors validly assigned their claims to Atlas. The fact that each Defendant is sued by a different specific subgroup of individuals who assigned their claims to Atlas, only makes these individual issues more pronounced.

In addition, as discussed below, there are material variations related to each Plaintiff's and Covered Person's injuries, harm, damages and the injunctive relief sought. Such individual differences among claimants also have been found sufficient to make consolidation inappropriate. See, e.g., In re Samsung, 322 F.Supp.3d 1380, 1381 (J.P.M.L. 2018) (denying transfer where actions "involve distinctly separate and non-overlapping putative classes"); In re NebuAd, 716 F.Supp.2d 1370, 1371 (J.P.M.L. 2010)(denying certification of two actions each of which was brought against a different internet service provider defendant and the putative classes sought in each action did not overlap).

3. Plaintiffs Have No Support For Their Extraordinary Request For An MCL or Centralized Consolidation.

Acknowledging the Subject Cases lack a common defendant and do not contain the characteristics of cases suitable for MCL treatment, Plaintiffs contend the existence of numerous defendants does not undermine MCL treatment or consolidation. See Pls' App.

at 7. To try to support that argument, Plaintiffs argue the recent NJ Detention Facilities MCL is an example of "our Supreme Court recently order[ing] cases with numerous different defendants and alleged bad actors to be centralized." Id. But, contrary to Plaintiffs' assertion, the NJ Detention Facilities MCL centralized state court actions involved a common defendant, the State of New Jersey, which owned and operated detention facilities where sexual assaults allegedly had occurred.[7] Accordingly, that case has no applicability here, where the Subject Cases involve no common defendant, no common policies or procedures, and individualized issues concerning causation and damages.

Plaintiffs also rely upon JPML cases to try to support the extraordinary relief they seek, but these cases are not applicable and are readily distinguishable. Id. at 8. For example, In re Nat'l Prescription Opiate Litig. involved a mass tort arising from the manufacturing and distribution of Opioids. 290 F. Supp. 3d 1375, 1376 (J.P.M.L. 2017).[8] The Subject Cases do not involve a

[7] See MCL Application, fn.14, citing Allegations of Sexual Abuse at State-Operated Juvenile Detention Facilities Application, https://www.njcourts.gov/sites/default/files/mcl/ sexual-abuse-in-juvenile-detention-facilities-operated-by-the-state-of-new-jersey/application.pdf. at 2 ("All of these facilities are owned and operated by the State, **who has been named as the Defendant in each case.**") (emphasis added).

[8] Likewise, In re Acetaminophen – ASD/ADHD Prods. Liab. Litig., is distinguishable, because the underlying cases involved common causation associated with a common product, over-the-counter

common class of products or common practices associated with the manufacturing and distribution of a class of products. The cases in In re Nat'l Prescription Opiate Litig. also had common defendants in most cases, as well as claims for RICO violations and civil conspiracy. See id. at 1378 ("The 'Big Three' distributor defendants, which reportedly distribute over 80% of the drugs at issue **and are defendants in most cases**.")(emphasis added). There are no common defendants in any of the Subject Cases and no claims for RICO violations or a civil conspiracy. Indeed, each Defendant is a party to a single case; each Defendant has different databases and systems; and each Defendant's factual circumstances have nothing to do with the factual circumstances of other Defendants' different individual cases.

Further, the defendants in the In re Nat'l Prescription Opiate Litig. cases were grouped into three tracks as part of an MDL depending on the role they each played in the supply chain of Opioids (i.e., manufacturing, distributing and dispensing). No such grouping is available here given the volume of defendants and diversity of and unique facts related to each Defendant. Moreover, Plaintiffs' unsupported characterization of Defendants' businesses, as well as Plaintiffs' conclusory statement that

generic acetaminophen. 637 F. Supp. 3d 1372, 1374 (J.P.M.L. 2022). There is no common product at issue here.

consolidation could occur by industry is simply incorrect. See Pls' App. at 8. There is no sensible "grouping" that makes the adjudication of Subject Cases more efficient. See, e.g., In re Fla., P.R. & V.I., 325 F.Supp.3d 1367, 1368 (J.P.M.L. 2018) (fact that different insurers breached policies in similar ways creates "only a superficial factual commonality"); In re Mortg. Lender, 895 F.Supp.2d 1352, 1353 (J.P.M.L. 2012) (denying transfer, because actions still involved different defendants and contracts); In re Louisiana Coastal Zone, 317 F.Supp.3d 1346, 1346-47 (J.P.M.L. 2018) (denying transfer, because although "certain industry practices may be common across the actions," each action was against a "different cast of defendants" and "most pretrial proceedings, particularly discovery, will be largely individualized").

The In re: FTX Cryptocurrency Exchange Collapse Litigation matter also is unavailing. Although the In re: FTX Cryptocurrency MDL involved a number of different defendants, the claims at issue all arose from the common conduct between FTX's CEO, defendant Samuel Bankman-Fried, and an employee of another Bankman-Fried owned company, Caroline Ellison. 677 F. Supp. 3d 1379, 1380-81 (J.P.M.L. 2023). Moreover, Bankman-Fried and Ellison were common defendants in seven of the eight matters consolidated into the MDL. Id. at 1381. Here, there is no common conduct in the 111 Subject Cases.

Plaintiffs' reliance on In re: Social Media Adolescent Addiction/Personal Injury Products Liability Litigation also is misplaced. That MDL involved the consolidation of cases involving social media products of four primary defendants (Meta, TikTok, Snap and Google) and common factual questions about whether these social media products encouraged addictive behavior in adolescents. 637 F. Supp. 3d 1377, 1378 (J.P.M.L. 2022). The Panel found there were overarching issues of general causation – whether Social Media causes addiction. There is no overarching general causation issue in the Subject Cases because whether any defendant did or did not disclose a covered person's information is a defendant-specific question that has nothing to do with the actions of another defendant. Nor could there be, as there is no predominant defendant, no remotely common practice and no overarching issues – other than the facial challenge to Daniel's Law, to warrant MCL treatment or consolidation before a single judge.

Simply put, the cases cited by Plaintiffs underscore how inappropriate MCL treatment or consolidation would be.

B. There is not a high degree of commonality of injury or damages in the Subject Cases to support the creation of an MCL or consolidation before a single judge.

In their Application, Plaintiffs dedicate a mere three sentences to whether the Subject Cases meet the criterion of "a high degree of commonality of injury and damages" to support MCL

treatment. Pls' App. at 6. Plaintiffs argue commonality exists here because they "assert claims under Daniel's Law for the recovery of actual or liquidated damages, punitive damages, attorney's fees and injunctive relief." Id. That cursory argument about commonality of injury or damages does not remotely support the creation of an MCL or consolidation.

First, individual factual issues predominate over any common issues with regard to Plaintiffs' claims for actual damages or injunctive relief. The Subject Cases are not being pursued in a representative capacity as class actions but rather as individual cases against more than 120 different Defendants. Accordingly, the actual damages and injunctive relief being sought will require the development of facts specific to each Defendant concerning the harm or injury (actual and/or irreparable) that each allegedly caused, and any harm or injury sustained by a Plaintiff or any of the thousands of alleged covered person assignors. Moreover, individual factual issues concerning each Defendant's possession of each Covered Person's Protected Information, each Defendant's response to each Daniel's Law request, and the further issue of whether such response was sufficiently "negligent" to support liability (if such a *mens rea* requirement is read into the

statute,[9]) will predominate any actual damage or injunctive relief discovery.

Second, there is no showing of commonality of proofs with regard to punitive damages or the recovery of any attorney's fees. Both forms of damages would require consideration of unique and Defendant-specific facts. Individual factual issues will predominate in any demand for punitive damages, including facts concerning each Defendant's conduct and whether that conduct was intentional or willful. See Buynie v. Airco, Inc., 2007 N.J. Super. Unpub. LEXIS 2476, *22 (App. Div. 2007) (quoting In re: Baycol Products Litigation, 218 F.R.D. 197, 212 (D. Minn. 2003)) (recognizing a determination of punitive damages is based on individual issues). The same holds true for any demand for the recovery of attorney's fees, because any application for attorney's fees will need to be based on individual issues that include the time spent on each case, whether that time was duplicative and reasonable and whether the legal services were actually performed with regard to the specific case against a specific Defendant. See Hansen v. Rite Aid Corp., 253 N.J. 191,

[9] The only court to thus far address the culpability standard under Daniel's law read a negligence standard into the statute. Atlas Data Priv. Corp. v. We Inform, LLC, 758 F. Supp. 3d 322, 341 (D.N.J. 2024) (implying a negligence standard of fault to determine actual or liquidated damages under Daniel's Law).

213–14, recon. denied, 253 N.J. 552 (2023) (outlining the individual factors required in awarding attorney's fees).

Third, while the potential amount of liquidated damages for each violation is outlined in Daniel's Law, (N.J.S.A. 56:8-166.1(c)), individual facts will still predominate over any common facts in the Subject Cases because the civil liability standard to recover liquidated damages involves an individualized inquiry concerning whether each individual Defendant was negligent (or, e.g., willful or intentional, depending on how the New Jersey Supreme Court resolves the certified questions) in disclosing Protected Information belonging to a specific covered person. See We Inform LLC, 758 F. Supp. 3d at 341 ("Daniel's Law must be read as imposing liability only if a defendant unreasonably disclosed" protected information). Where individualized issues of culpability exist, as is the case here, centralization of cases is not appropriate. In re Belviq (Lorcaserin HCI) Prods. Liab. Litig., 555 F. Supp. 3d 1369, 1370 (J.P.M.L. 2021) ("[I]ndividualized factual issues concerning causation will predominate and diminish the potential to achieve significant efficiencies in an MDL."); In re Baby Food Mktg., Sales Practices & Prods. Liab. Litig., 544 F. Supp. 3d 1375, 1376-77 (J.P.M.L. 2021) (denying centralization because "claims against each defendant thus are likely to rise or fall on facts specific to that defendant.").

Because Plaintiffs present no evidence of commonality of damages or injuries in the Subject Cases, the Court should deny their application for the creation of an MCL or consolidation before a single judge.

C. Centralization is not warranted because it would not be efficient, would increase the expense of the litigation, and would significantly prejudice the Defendants.

Other criteria for determining whether a matter is suitable for MCL treatment include the efficiencies of coordination, increased expenses of litigation and prejudice to a party.

1. *An MCL or Central Coordination Would Be Inefficient.*

The facts here demonstrate that the usual efficiencies created by the handling of common issues through an MCL or centralized coordination will not be realized. This is because each Defendant has unique circumstances and, as outlined above, a host of individual issues as to each Defendant will predominate. It would be tantamount to overwhelming a judge with 111 individual cases and complicated individual issues. Indeed, rather than easing the burden on the judiciary, coordination or consideration of individual issues would require an MCL judge to take on significant work that is currently being spread among judges in seven counties in more manageable dockets of Daniel's Law cases.

2. *Complications Will Arise Because Many Defendants are Competitors.*

Further, additional complications and inefficiencies will arise from the creation of an MCL or coordination because many defendants are competitors. The JPML has repeatedly stated that it is "skeptical of requests to centralize claims filed against multiple defendants who are competitors in a single MDL because it often will not promote judicial efficiency and serve the convenience of the parties and witnesses." In re Cash Sweep Programs Cont. Litig., 766 F. Supp. 3d 1346, 1349 (J.P.M.L. Feb. 7, 2025) (quoting In re Secondary Ticket Mkt. Refund Litig., 481 F. Supp. 3d 1345, 1346 (J.P.M.L. 2020)). The JPML has denied requests for centralization of cases involving competitor defendants noting that "centralizing competing defendants in the same MDL likely would complicate case management due to the need to protect trade secrets and confidential information." In re CP4 Fuel Pump Mktg., Sales Pracs. & Products Liab. Litig., 412 F. Supp 3d 1365, 1367 (J.P.M.L. 2019)(denying centralization of claims against three competitor vehicle makers); see also In re Watson Fentanyl Patch Prods. Liab. Litig., 883 F. Supp. 13510, 1351 (J.P.M.L. 2012) (denying centralization of actions alleging injuries from the use of allegedly defective fentanyl patches irrespective of manufacturer, finding "[c]entralization of all against all manufacturers will add few efficiencies to the

resolution of this litigation" and "could complicate these matters as defendants may need to erect complicated confidentiality barriers, since they are business competitors."); In re Cash Sweep Programs Cont. Litig., 766 F. Supp. 3d 1346, 1349 (J.P.M.L. Feb. 7, 2025)(denying centralization of claims against at least twenty-four financial institutions).

Here, there are Defendants in the same industries who are competitors. The existence of competitors would not only create complications, but also will increase the cost of litigation, and result in delays associated with requests for individual submissions to address unique issues and/or consider confidential facts.

3. An MCL or Centralized Coordination Will Significantly Prejudice Defendants.

MCL treatment or coordination also would significantly prejudice Defendants by diminishing the Court's ability to give individual attention to the unique facts and legal defenses in each individual case, including proofs and issues as to the claims of between 16,000 and 22,000 assignors that Atlas is pursuing.

Indeed, having a single judge oversee 111 cases involving different Defendants has inherent risks associated with the Court treating all Defendants the same and potentially binding them to any rulings made against only one or a subset of Defendants. MCL treatment would, at a minimum, risk having the Court (i) gloss

over unique factual circumstances, or worse still, (ii) deny or limit a Defendant's ability to present its factual and legal defenses, raising serious due process concerns.

By way of analogy, it is well-established that defendant class actions "raise[] nettlesome due process issues that are not implicated by plaintiff classes." 1 McLaughlin on Class Actions § 4:46 (2025). The "crux of the distinction is: the unnamed plaintiff stands to gain while the unnamed defendant stands to lose." *Id.* Because Atlas's proposed MCL does not involve a single product, a mass disaster, an environmental case or a toxic tort, or a common or predominant defendant, the efficiencies of an MCL do not exist because each case involves facts and legal defenses specific to each Defendant. Accordingly, a particular Defendant's interests may not be adequately represented in case management and discovery disputes addressed by other Defendants in the proposed MCL. There also is a substantial risk that discovery and court rulings will effectively bind other Defendants that are not direct parties before the court on a common issue – which may not even be ripe as to the other Defendants for months in light of the significantly disparate procedural postures of the cases.

To safeguard the fundamental due process right to be heard, each Defendant would have to monitor and be given the ability to be heard with respect to all adversarial disputes in order to avoid the risk that its interests are not being effectively represented.

And the prejudice is particularly acute where, as here, Plaintiffs are seeking tens of millions of dollars in damages from each defendant, as opposed to merely injunctive relief. Cf. Ameritech Ben. Plan Comm. v. Commc'n Workers of Am., 220 F.3d 814, 820 (7th Cir. 2000) ("Risks of diverging interests [in defendant classes] are particularly high in actions seeking monetary remedies.") (citing Phillips Petroleum Co. v. Shutts, 472 U.S. 797 (1985)).

The due process risks are further exacerbated by the fact that Atlas's proposed MCL involves different groups of Plaintiffs asserting claims against each Defendant. Not only do the named Plaintiffs differ between and among the lawsuits, but there is no consistency – much less uniformity – in the identity of the Covered Person assignors, on whose behalf Atlas is asserting claims, from case to case. In the requested MCL, case management and discovery decisions in one case may effectively bind Defendants in another case involving claims of different named Plaintiffs and different assignors.

In fact, Plaintiffs' Application itself acknowledges the inherent risks associated with MCL treatment or consolidation before a single judge. For example, Plaintiffs claim that in an MCL "[t]he court could issue one order concerning interim measures such as discovery of computer-based information and electronically stored information, preservation of records, protective orders and document depositories." See Pls' App. at 10. Issuing a single

case-wide order on computer-based information, documents repositories and electronically stored information, would require consideration of unique facts related to each of the more than 120 different Defendants. Those unique facts would include, for example, an understanding of the types of information each Defendant collects, processes and shares, the systems each Defendant uses, the resources each Defendant has in place, and each Defendant's policies and procedures, including whether a Defendant uses an online portal to address suppression requests.

Equally problematic is Plaintiffs' suggestion that an MCL or coordination before a single judge would "permit the scheduling of certain bellwether cases for trial before others have completed discovery." Pls' App. at 11. A bellwether trial is a "test case" which "should produce representative verdicts and settlements." Terry v. McNeil-PPC, Inc. (In re Tylenol (Acetaminophen Mktg., Sales Practices & Prods. Liab. Litig.), 2016 U.S. Dist. LEXIS 97368, at *3, n. 2 (E.D.P.A. 2016) (citing Federal Judicial Center, Manual For Complex Litigation, 4th ed. 360(2004); Duke Law Center For Judicial Studies, MDL Standards and Best Practices 16-21 (2014)). Bellwether trials are useless in individual cases filed against different defendants where findings as to causation or damages cannot be applied across cases. See, e.g., Auchard v. TVA, 2011 U.S. Dist. LEXIS 14771, *13–14 (E.D. Tenn. February 2, 2011) (finding bellwether trial inappropriate where "highly individualized

causation and damages determinations" meant that "[b]eyond determining [the] single issue, there will be little a bellwether trial could hope to accomplish.").

3. An MCL or Centralized Coordination Will Significantly Prejudice Defendants.

Finally, Plaintiffs' arguments that coordinated discovery would achieve efficiencies and savings ring hollow. Pls'. App., at 13. The parties, to the extent they were able to do so, have already attempted to coordinate discovery within their individual counties, which Plaintiffs acknowledge. See Pls'. App. at 9. There is no reason why this coordination cannot continue in the smaller and manageable groups of cases pending before the Judges to whom the cases are currently assigned, especially since the procedural postures of these cases vary significantly by county with discovery in some counties stayed pending decisions on motions to dismiss and discovery in other counties being actively pursued. Regardless, the type of coordination Plaintiffs highlight further demonstrates MCL treatment or coordination before a single court is inappropriate. See, e.g., In re Eli Lilly & Co. (Cephalexin Monohydrate) Patent Litig., 446 F. Supp. 242, 244 (J.P.M.L. 1978) (denying centralization while noting the parties could cross-notice depositions, stipulate that discovery relevant to more than one action be usable in all those actions, seek orders from the involved courts directing coordination of pretrial efforts, or

seek a stay); In re Belviq (Lorcaserin HCI) Prods. Liab. Litig., 555 F. Supp. 3d at 1370 (denying a transfer and noting informal coordination between the parties was practicable).

D. The risk of duplicative and inconsistent rulings does not weigh in favor of MCL treatment.

In their Application, Plaintiffs contend that MCL treatment or coordination before a single judge is appropriate because it would reduce the risk of inconsistent rulings. Pls'. App. at 12. However, because the cases at issue here involve different facts, many rulings will differ simply as a result of applying law to those distinct facts. That is not a bug, but a feature of requiring each case to be individually adjudicated. And, to the extent that judges may reach differing opinions on issues of law, that potential always exists when different Defendants are sued under a statute, particularly a statute as new as Daniel's Law. The fact that multiple cases involve the same statute hardly is enough to warrant their consolidation. Indeed, if that were the case, every complaint filed under the New Jersey Consumer Fraud Act or New Jersey Law Against Discrimination would be consolidated.

Moreover, any divergent rulings of law can be appealed to the Appellate Division, and ultimately to the New Jersey Supreme Court, which can harmonize interpretation of Daniel's Law throughout the state. Having such varying rulings percolate up through the courts

only helps to identify close issues and provides multiple perspectives to better inform appellate decision-making.

Plaintiffs' Application does not challenge any of these fundamental principles concerning inconsistent rulings -- out of the 111 Daniel's Law cases Plaintiffs have identified one example of a supposedly "inconsistent" ruling, but that example is incorrect. Plaintiffs claim Judge Romankow and Judge McMann from Morris County "made conflicting legal rulings on the scope of Daniel's Law as applied to a product that multiple defendants offer." Pls'. App. at 12. However, those two rulings not only considered different facts and allegations in different scenarios, but Judge Romankow and Judge McMann did in fact rule consistently.

The court in Atlas Data Privacy Corp. v. Twilio, Dkt. MRS-L-226-24, declined to dismiss the case at the pleadings stage because it concluded that there were factual questions about whether and how the defendant's products "disclosed" covered persons' information that could not be resolved on a motion to dismiss. Stio Cert., Ex. C; see also Stio Cert., Ex. D(Twilio Hr'g Tr. 46-48). In Atlas Data Privacy Corp. v. Telnyx, Dkt. MRS-L-260-24, by contrast, the court initially dismissed Atlas's complaint based on what it considered to be uncontested facts about the one product at issue, which the court found to imply that the product did not "disclose" covered persons' information. The court later reversed this order on reconsideration because it concluded that it had

erred in considering facts beyond the pleadings. Stio Cert., Ex. E.

The rulings by Judges Romankow and McMann represent different determinations based on distinct scenarios. But to the extent that, in the course of making these rulings, the courts offered different views as to the scope of the statutory term "disclose" under Daniel's Law, those decisions can be reviewed by the Appellate Division, and by the Supreme Court if necessary, which can benefit from considering the reasoning of both courts.

E. There is no evidence supporting the contention an MCL or Consolidation would result in the efficient use of judicial resources.

In their Application, Plaintiffs also contend efficiencies can be gained from establishing an MCL or consolidating all cases because "the judge designated to coordinate these cases will be able to manage discovery, briefing on dispositive motions, and hearings on major motions in a way that reaches uniform rulings of common legal and factual questions, and produces coordinated solutions for discovery issues." Pls' App. at 13. That argument is flawed. The general efficiencies Plaintiffs claim would be created by an MCL already exist through the informal coordination that has been occurring in the Subject Cases.

In addition, there will be fewer and fewer common issues that would benefit from coordination given that some of the cases are moving past the motion to dismiss stage where Defendants have been

responding to virtually identical cookie-cutter complaints and into discovery, where individual factual issues and defenses available to the diverse group of Defendants will predominate and will need to be explored on an individual basis. By way of example, each Defendant is entitled to discovery on Plaintiffs' (including the Covered Person assignor's) allegations against them and what violations, if any, exist. Accordingly, assigning the Subject Cases to a single Judge after they have been pending for almost two years and asking that Judge to get up to speed, will only result in significant complications, delay, increased costs, voluminous submissions, and serious concerns about due process. Opp. supra at III(C)(3).

IV. CONCLUSION

The Court should not grant Plaintiffs' extraordinary request to create an MCL or consolidate 111 cases that lack the characteristics of matters that would benefit from centralization. The Subject Cases should continue to proceed in the smaller groups of 10-15 cases that currently exist in the counties before Judges to whom they are presently assigned. To the extent there are common issues with regard to motions and discovery that can be coordinated, Defendants are willing to work together, where feasible, to coordinate. Managing the Subject Cases in this manner would avoid delays, lengthy submissions and unmanageable case management conferences and reduces the burden on any single Court

having to preside over 111 cases involving different Defendants. In addition, the management of cases in their existing vicinages affords the parties a far better opportunity to have unique factual circumstances considered and their arguments heard.

Respectfully,

TROUTMAN PEPPER LOCKE LLP

/s/ Angelo A. Stio
Angelo A. Stio III (014791997)
Melissa A. Chuderewicz (023392001)
Stephanie L. Jonaitis (015142002)
104 Carnegie Center, Suite 203
Princeton, NJ 08540-6227
(609) 951-4125
Angelo.Stio@troutman.com
Melissa.Chuderewicz@troutman.com
Stephanie.Jonaitis@troutman.com

Attorneys for Precisely Holdings, LLC, Precisely Software Inc., and Precisely Software Ltd. (BER-L-000819-24); Enformion LLC and Enformion Holdco, Inc. (BER-L-000767-24); Corelogic, Inc. (BER-L-000773-24); AtData, LLC (BER-L-000867-24); CARCO Group Inc and IntelliCorp Records, Inc. (MRS-L-000270-24); Remine, Inc. (MRS-L-000258-24); Red Violet Inc. (MON-L-00482-24); and Acxiom LLC (MER-L-000283-24)

McCARTER & ENGLISH, LLP

/s/ Scott S. Christie
Scott S. Christie (037901989)
Four Gateway Center
100 Mulberry Street
Newark, New Jersey 07102-4056
(973) 848-5388

schristie@mccarter.com

Curtis B. Leitner
250 W. 55th Street, 13th Floor
New York, New York 10019
(212) 609-6853
cleitner@mccarter.com

Attorneys for Defendants Black Knight Technologies, LLC and Black Knight, Inc.

Angelo A. Stio III (014791997)
TROUTMAN PEPPER LOCKE LLP
(A Georgia Limited Liability Partnership)
104 Carnegie Center, Suite 203
Princeton, NJ 08540-6227
(609) 452-0808
Angelo.Stio@troutman.com

Attorneys for the Troutman Defendants[1]

ATLAS DATA PRIVACY CORPORATION, et al., Plaintiffs, v. PRECISELY HOLDINGS, LLC, et al., Defendants.	SUPERIOR COURT OF NEW JERSEY LAW DIVISION, CIVIL DIVISION DOCKET NO.: BER-L-000819-24
ATLAS DATA PRIVACY CORPORATION, et al., , Plaintiffs, v. ENFORMION LLC, et al., Defendants.	DOCKET NO.: BER-L-000767-24
ATLAS DATA PRIVACY CORPORATION, et al., Plaintiffs, v. CORELOGIC, INC., et al., Defendants.	DOCKET NO.: BER-L-000773-24

[1] The "Troutman Defendants" are the following defendants in the above-captioned matters: Precisely Holdings, LLC, Precisely Software Inc., and Precisely Software Ltd. (BER-L-000819-24); Enformion LLC and Enformion Holdco, Inc. (BER-L-000767-24); Corelogic, Inc. (BER-L-000773-24); AtData, LLC (BER-L-000867-24); CARCO Group Inc. and IntelliCorp Records, Inc. (MRS-L-000270-24); Remine, Inc. (MRS-L-000258-24); Red Violet Inc. (MON-L-00482-24); and Acxiom LLC (MER-L-000283-24).

ATLAS DATA PRIVACY CORPORATION, et al., Plaintiffs, v. ATDATA, LLC, et al., Defendants.	DOCKET NO.: BER-L-000867-24
ATLAS DATA PRIVACY CORPORATION, et al., Plaintiffs, v. CARCO GROUP INC., et al., Defendants.	DOCKET NO.: MRS-L-000270-24
ATLAS DATA PRIVACY CORPORATION, et al., Plaintiffs, v. REMINE INC., et al., Defendants.	DOCKET NO.: MRS-L-000258-24
ATLAS DATA PRIVACY CORPORATION, et al., Plaintiffs, v. RED VIOLET, INC. et al., Defendants.	DOCKET NO.: MON-L-000482-24
ATLAS DATA PRIVACY CORPORATION, et al., Plaintiffs, v. ACXIOM LLC, et al., Defendants.	DOCKET NO.: MER-L-000283-24

CERTIFICATION OF ANGELO A. STIO III

I, Angelo A. Stio III, of full age, hereby certify as follows:

1. I am an attorney at law of the State of New Jersey, and a partner with the law firm of Troutman Pepper Locke LLP, counsel for defendants in the above-captioned matters.

2. Unless otherwise noted, I have personal knowledge of the facts set forth below.

3. I make this certification in connection with the opposition to the application for the creation of a Multicounty Litigation or consolidation of all Daniel's Law cases before a single court, submitted by the Troutman Defendants and defendants Black Knight Technologies, LLC and Black Knight, Inc.

4. Attached as **Exhibit A** is a true and accurate copy of a chart outlining the variation in the number of covered person assignors, whose claims Atlas Data Privacy Corporation seeks to pursue against the Troutman Defendants.

5. Attached as **Exhibit B** is a true and accurate copy of a chart outlining the characteristics of cases referenced on the New Jersey Courts webpage https://www.njcourts.gov/attorneys/multicounty-litigation, and designated for Multicounty Litigation treatment.

6. Attached as **Exhibit C** is a true and accurate copy of an Order entered in Atlas Data Privacy Corp. v. Twilio, Inc. (Law Div. April 23, 2025, Dkt. MRS-L-226-24).

7. Attached as **Exhibit D** is a true and accurate copy of the Hearing Transcript in the matter of Atlas Data Privacy Corp. v. Twilio, Inc. (Law Div. August 15, 2025, Dkt. MRS-L-226-24).

8. Attached as **Exhibit E** is a true and accurate copy of the Order regarding Plaintiffs' motion for reconsideration entered in Atlas Data Privacy Corp. v. Telnyx (Law Div. Dec. 22, 2025, Dkt. MRS-L-260-24).

9. Attached as **Exhibit F** is a true and accurate copy of the following unpublished opinion: Buynie v. Airco, Inc., 2007 N.J. Super. Unpub. LEXIS 2476 (App. Div. 2007).

10. Attached hereto as **Exhibit G** is a true and accurate copy of the following unpublished opinion: Terry v. McNeil-PPC, Inc. (In re Tylenol (Acetaminophen Mktg., Sales Practices & Prods. Liab. Litig.), 2016 U.S. Dist. LEXIS 97368 (E.D.P.A. 2016).

11. Attached hereto as **Exhibit H** is a true and accurate copy of the following unpublished opinion: Auchard v. TVA, 2011 U.S. Dist. LEXIS 14771 (E.D. Tenn. February 2, 2011).

I hereby certify that the foregoing statements by me are true. I understand that if any of the foregoing statement made by me are willfully false, I am subject to punishment.

/s/ Angelo A. Stio III
Angelo A. Stio III

Dated: January 2, 2026

EXHIBIT A

Case	Case No.	# Assignors Identified in Complaint
Atlas Data Privacy Corporation v. AtData, LLC	BER-L-000867-24	18,964 (Complaint, Para 26)
Atlas Data Privacy Corporation, et al. v. Corelogic	BER-L-000773-24	19,389 (Complaint, Para 26)
Atlas Data Privacy Corporation, et al. v. Enformion LLC, et al.	BER-L-000767-24	19,713 (Complaint, Para 25)
Atlas Data Privacy Corporation et al. v. Precisely Holdings, LLC	BER-L-000819-24	19,369 (Complaint, Para 26)
Atlas Data Privacy Corporation, et al. v. Acxiom LLC, et al.	MER-L-000283-24	19,251 (Complaint, Para 26)
Atlas Data Privacy Corporation, et al. v. Red Violet Inc.	MON-L-00482-24	19,028 (Complaint, Para 25)
Atlas Data Privacy Corporation et al. v. CARCO Group Inc. et al	MRS-L-000270-24	19,460 (Complaint, Para 26)
Atlas Data Privacy Corporation et al. v. Remine, Inc.	MRS-L-000258-24	16,399 (Complaint, Para 25)

EXHIBIT B

Archived	Case Name	Case Type	Date App. Filed	Nos. of Pls.	Nos. of Defs.	Common Product/Service	Common Basis for Liability/Causation	SC's Order Date	SC's Decision	SC's Reasoning
1	Accutane	Personal injury from drug ingestion - Mass Tort	1/25/2005	at least 68	2	Accutane	Claims based on systemic and neurological / psychiatric conditions caused by the ingestion of Accutane.	N/A	N/A	N/A
			3/15/2005	at least 95	2			5/2/2005	Approved	N/A
2	AlloDerm	Personal injury from a tissue graft	3/5/2011	between 12 and 25	1	AlloDerm Regenerative Tissue Matrix (a banked human tissue graft product)	Claims based on the failure of the biologic allograft manufactured by LifeCell called AlloDerm Regenerative Tissue Matrix, which is used by surgeons in various reconstructive surgeries.	7/12/2011	Approved	N/A
3	Benicar	Personal injury from treatment with a drug	5/18/2015	at least 59	5	Benicar®, Benicar HCT®, Azm® and Tribenzor®	Claims based on gastrointestinal sicknesses, sprue-like enteropathy and/or lymphocytic colitis, microscopic colitis or collagenous colitis, and other symptoms, as a result of plaintiffs' treatment with Benicat®, Benicar HCT®, Azm® and Tribenzor®, medications containing olmesartan medoxomil, which treats high blood pressure. Defendants Forest Laboratories, Inc., Forest Laboratories, LLC, Forest Research Institute, Inc., Daiichi Sankyo U.S. Holdings, Inc., and Daiichi Sankyo Company, Limited were allegedly responsible for promoting, labeling, designing, or manufacturing the medicines.	7/14/2015	Approved	N/A
4	Bristol Myers Squibb Environmental	Toxic tort	7/30/2008	152	4	environmental contamination at a New Brunswick Bristol-Myers Squibb site	Claims based on diseases and property damage because of environmental contamination at or emanating from certain property of Bristol-Meyers Squibb in New Brunswick, New Jersey.	10/6/2008	Approved	N/A
5	Firefighter Hearing	Personal injury	5/23/2017	over 100	1	Federal Signal's mechanical "Q" fire engine siren and electronic e-Q type fire engine sirens.	Claims based on loss of hearing by New Jersey fire fighters against Federal Signal Corporation for defects in the design and construction of its mechanical "Q" fire engine siren and the electronic e-Q type fire engine sirens.	9/26/2017	Approved	N/A
6	HealthPlus Surgery Center	Personal injury - surgical center malpractice	8/22/2019	80	1	lapses in infection control in sterilization/cleaning of instruments used during medical procedures at HealthPlus Surgery Center	Claims based on injuries and death caused by lapses in infection control in sterilization/cleaning of instruments used during medical procedures at HealthPlus Surgery Center.	12/2/2019	Approved	N/A
7	Levaquin	Personal injury - drug	4/8/2009	9	3	Levaquin (antibiotic drug)	Claims based on significant tendon-related injuries, including, but not limited to, tendonitis, tendon ruptures and tears caused by antibiotic medicine Levaquin manufactured by Johnson and Johnson, Ortho-McNeil Pharmaceutical, Inc., and Johnson and Johnson Pharmaceutical Research and Development, LLC.	6/16/2009	Approved	N/A
8	Mirena	Personal injury	8/9/2012 (notice date: 8/13/2012)	24	1	Mirena (an IUD)	Claims based on injuries and/or damages as a result of misplacement of the Mirena® IUD device against Bayer Healthcare Pharmaceuticals, Inc.	1/2/2013 (notice date: 1/2/2013)	Denied	N/A
			3/7/2013 (notice date: 3/21/2013)	at least 47	1			5/13/2013	Approved	N/A
9	Pompton Lakes Environmental Contamination	Toxic tort	N/A (notice date 10/4/2010)	N/A	4	environmental contamination in Pompton Lakes, New Jersey	Claims based on injuries caused by alleged environmental contamination by several companies in Pompton Lakes, Passaic County, New Jersey.	3/13/2010	Approved	N/A
10	Propecia	Personal injury-drug	N/A (notice date: 10/31/2011)	N/A	2	Propecia (hair loss drug)	Claims based on persistent sexual side effects from the ingestion of Propecia.	3/7/2012	Approved	N/A
11	Reglan	Personal injury - drug	3/16/2010	22	4	Reglan	Claims based on developing Tardive Dyskinesia, which is a serious and usually permanent neurological condition characterized by repetitive involuntary movements of the face, extremities and other parts of the body; caused by use of Reglan, which treats heartburn, gastric reflux, and nausea; manufactured by Wyeth Pharmaceuticals and sold to Schwarz Parma, Inc. and Baxter Healthcare, Inc., and manufactured by the generic drug manufacturer PLIVA, Inc.	7/8/2010	Approved	N/A
12	Risperdal/Seroquel/Zyprexa	Personal injury - drug	N/A	N/A	4	Risperdal, Seroquel and Zyprexa (antipsychotic drugs indicated for the treatment of schizophrenia, acute manic or mixed episodes associated with Bipolar I Disorder)	Zyprexa: Claims based on the manufacturer's (Eli Lilly and Company) failure to warn of the alleged increased risk of diabetes mellitus and related conditions, including hyperglycemia, ketosis, diabetic acidosis and diabetic coma in patients that use Zyprexa. Seroquel: Claims based on the manufacturers' (AstraZeneca Pharmaceutical, L.P. and AstraZeneca LP) failure to warn of alleged injuries of diabetes mellitus, hyperglycemia, weight gain, and various movement disorders such as tardive dyskinesia and extrapyramidal syndrome caused by Seroquel. Risperdal: Claims based on the manufacturer's (Janssen Pharmaceuticals, Inc.) failure to warn of alleged injuries of diabetes mellitus, hyperglycemia, weight gain, and various movement disorders such as tardive dyskinesia and extrapyramidal syndrome caused by Risperdal.	9/11/2006	Approved	N/A
13	Stryker Trident Hip Implants	Personal injury - medical device	12/30/2008	at least 32	1	Stryker Trident hip implants	Claims based on fractures or shattered devices, bone chipping, abnormal bone growth, infection, bone loss, hardware loosening, device failure and other problems assiciated with Stryker Trident hip implants, manufactured by Howmedica Osteonics Corporation.	3/29/2009	Approved	N/A
14	Yaz/Yasmin/Ocella	Personal injury - drug	N/A	at least 39	5	Yaz, Yasmin, and Ocella (oral contracep	Claims based on increased risks of blood clots, heart attacks, and strokes in women who used Yaz, Yasmin and Ocella against Bayer HealthCare Pharmaceuticals (maker of Yaz/Yasmin) and its affiliates and Barr Pharmaceuticals/Teva Pharmaceuticals (maker/distributor of generic Ocella) caused by oral contraceptives containing progestin drospirenone.	2/9/2010	Approved	N/A
Active										

15	Abilify	Personal injury - drug	11/21/2017	at least 42	3	Ability (atypical antipsychotic medication prescribed to treat schizophrenia, major depressive disorder, bipolar I, irritability associated with autistic disorder and Tourette's disorder)	Claims based on the side effect of Ability in causing patients to engage in compulsive behaviors, including gambling, against its manufactures, Otsuka America Pharmaceutical Inc., Otsuka Pharmaceutical Co., Ltd., and Bristol-Myers Squibb Company.	5/7/2018	Approved	N/A
16	Physiomesh	Personal injury - product	2/28/2018	62	2	Physiomesh Flexible Composite Mesh	Claims based on injuries caused by Physiomesh Flexible Composite Mesh, which allegedly incite an inflammatory response in soft tissue, against its manufacturers, Johnson & Johnson and Ethicon, Inc.	7/17/2018	Approved	N/A
17	Proceed Surgical Mesh/Proceed Ventral Patch	Personal injury - product	12/3/2018	205	2	Proceed Surgical Mesh and Proceed Ventral Patch hernia mesh products	Claims based on adhesion formation and scar tissue proliferation by operation of multiple design defects of Proceed Surgical Mesh and Proceed Ventral Patch hernia mesh products against their manufacturers, Ethicon, Inc. and Johnson & Johnson.	3/12/2019	Approved	N/A
18	Prolene Hernia System Mesh	Personal injury - product	9/6/2019	107	2	Prolene Hernia System (PHS)	Claims based on defective PHS hernia mesh causing the device to fail, resulting in serious injuries and the need for additional medical intervention, against its manufacturers, Ethicon Inc. and Johnson & Johnson.	2/6/2020	Approved	N/A
19	Proton-Pump Inhibitors	Personal injury - product	7/16/2019	47	18	Proton-Pump Inhibitors	Claims based on kidney injuries caused by the use of various brand and generic Proton-Pump Inhibitor medications for treatment of acid reflux.	12/6/2019	Approved	N/A
20	Singulair	Personal injury - drug	7/22/2021	at least 20	2	Singulair	Claims based on neuropsychiatric injuries, including tics, tremors, stuttering, obsessive-compulsive disorder, depression and/or suicidality, caused by taking Singulair.	1/4/2022 (based on information on page)	Approved	N/A
21	Strattice-Hernia-Mesh	Personal injury - product	N/A (notice date: 6/3/2021)	at least 52	3	Strattice® hernia mesh products	Claims based on recurrent hernia or repair, bowel obstruction, infection, abscess, and other injuries caused by use of Strattice® hernia mesh products against their manufacturers, Lifecell Corporation, Allergan, Inc., and Allergan, Inc. USA.	10/1/2021	Approved	N/A
22	Talc-Powder	Personal injury - product	5/19/2015	103	4	Johnson's Baby Powder and Shower to Shower	Claims based on ovarian cancer caused by the use of Johnson's Baby Powder and Shower to Shower, talc-based body powder products used for baby and feminine hygiene purposes, against their manufacturers.	10/20/2015	Approved	N/A
23	Allergan Biocell Textured Breast Impla	Personal injury - product	2/5/2020	at least 68	2	Allergan Biocell Textured Breast Implant	Claims based on breast implant-associated anaplastic large cell lymphoma caused by Allergan Biocell Textured Breast Implants.	5/5/2020	Approved	N/A
24	Bard Implanted Port Catheter Products	Personal injury - product	9/28/2023	at least 3	3	Bard Implanted Port Catheter Products	Claims based on catheter fracture, catheter infection, and thromboembolism caused by defective design of Bard implanted ports designed, manufactured, promoted, marketed, distributed, and sold by the related entities C.R. Bard, Inc., Bard Access Systems, Inc., and Becton Dickinson and Company.	1/29/2024	Denied	The Court based its denial on the limited number of cases at present.
			5/17/2024	41	3			10/15/2024	Approved	N/A
25	DePuy ASR Hip Implant	Personal injury - product	12/1/2010	at least 3 in NJ	2	DePuy ASR™ hip implants	Claims based on the failures of DePuy ASR™ hip implants, causing second hip replacement surgery (a revision surgery) which lead to the manufacturer's voluntary recall of the hip implant in 2010. The manufacturer is DePuy Orthopaedics, Inc., a subsidiary of Johnson & Johnson.	4/12/2011	Approved	N/A
26	Elmiron	Personal injury - drug	7/16/2021	20	5	Elmiron	Claims based on vision-related injuries caused by Elmiron. The defendants are various pharmaceutical companies which have manufactured, marketed, packaged, or sold Elmiron.	N/A (refernece in reassignment order 12/7/2021)	Approved	N/A
27	Pelvic Mesh - Bard	Personal injury - product	5/18/2010	at least 8	1	pelvic mesh products	Claims based on injuries from the use of pelvic mesh products manufactured by C.R. Bard, Inc.	9/13/2010	Approved	N/A
28	Pelvic Mesh - Gynecare	Personal injury - product	2/16/2010	at least 60	4	pelvic mesh products	Claims based on injuires from the use of pelvic mesh products manufactured by Ethicon, Inc., Ethicon Women's Health and Urology, Johnson & Johnson, and Gynecare. Ethicon, Inc. ("Ethicon") is a wholly owned subsidiary of Johnson & Johnson. Ethicon Women's Health and Urology and Gynecare are divisions of Ethicon.	9/13/2010	Approved	N/A
29	Pinnacle Metal-on-Metal (MoM) Hip Implants	Personal injury - product	1/5/2023	at least 51	2	Pinnacle Metal-on-Metal (MoM) Hip Implants	Claims based on injuires from the use of Pinnacle Metal-on-Metal (MoM) Hip Implants, which are designed, manufactured, marketed, distributed, and sold by Johnson and Johnson and Depuy Synthes Sales, Inc.	5/17/2023	Approved	N/A
30	Roundup Products	Personal injury - product	1/22/2024	10	6 (plus 50 John Does)	Roundup Products	Claims based on injuries caused by exposure to Roundup Products, which include products containing the active ingredient glyphosate.	5/28/2024	Denied	"The Court based its denial on the limited number of cases at present."
			2/27/2025	41	5 (plus 50 J. Does)			5/28/2025	Approved	N/A
31	Stryker Hip/ABG II	Personal injury - product	9/19/2012	10	1	Stryker Rejuvenate Hip Stem and the ABG II Modular Hip Stem components	Claims based on injuires caused by fretting and/or corrosion at or about the modular-neck junction of Stryker Rejuvenate Hip Stem and the ABG II Modular Hip Stem components, which are manufactured by Howmedica Osteonics Corporation.	1/15/2013	Approved	N/A
32	Stryker LFIT CoCr V40 Femoral Heads	Personal injury - product	1/24/2017	25	1	Stryker LFITT™ Anatomic Cobalt Chromium (CoCr) V40™1 femoral heads	Claims based on injuries caused by fretting and corrosion in the junction where the femoral head connects to the femoral stem of Stryker LFITT™ Anatomic Cobalt Chromium (CoCr) V40™1 femoral heads.	5/16/2017	Approved	N/A
33	Tasigna	Personal injury - drug	1/19/2021	64	1	Tasigna	Claims based on injuries from taking Tasigna drug, including heart attacks, strokes, peripheral vascular disease and amputations of their extremities.	4/6/2021	Approved	N/A

34	Asbestos	Personal injury - product	3/29/2008	N/A	N/A	Asbestos	Claims based on asbestosis or cancer as a result of exposure to raw asbestos and/or finished products.	4/8/2008	Approved	N/A
35	Fosamax	Personal injury - drug	8/20/2008	at least 34	1	Fosamax	Claims based on dental or jaw-related injuries, including osteonecrosis of the jaw, caused by treatment with Fosamax.	10/6/2008	Approved	N/A
36	Sexual Abuse in Juvenile Detention Facilities Operated by the State of New Jersey	Negligence	3/12/2025	108	1	State of New Jersey for its failure in oversight of juvenile facilities	Claims by inmates, who were incarcerated in New Jersey juvenile facilities, arising out of sexual assaults at New Jersey state owned and/or operated juvenile detention facilities.	5/28/2025	Approved	N/A
37	Taxotere/Docetaxel	Product liability and fraud	3/13/2018	at least 353	4	Taxotere (docetaxel)	Claims by women who have suffered permanent hair loss (alopecia) and other disfigurement, as a result of using the chemotherapy drug known as Taxotere (docetaxel) as treatment for breast cancer. Defendants were Sanofi U.S. Services, Inc., Sanofi-Aventis U.S. LLC, Sandoz Inc., and Actavis LLC, which were involved in designing, manufacturing, distributing, labeling, advertising, marketing, promoting, and selling Taxotere for the treatment of breast cancer.	4/15/2018	Approved	N/A
38	Zostavax	Personal injury - vaccine	2/15/2018	285	1	Zostavax (vaccine)	Claims based on the side effects of Merck and Co., Inc.'s Zostavax vaccine, which Merck markets for individuals over the age of 50, claiming that it can prevent shingles from occurring, while the vaccine is allegedly less than 60% effective in preventing shingles ands can cause severe injuries, including brain damage and death.	7/17/2018	Approved	N/A
			3/6/2018	569	3			7/17/2018		N/A
39	GLP-1 Medications - Gastrointestinal Injuries	Personal injury	6/11/2025	39	3	GLP drugs,Ozempic®, Wegovy®, Rybelsus®, Trulicity®, Mounjaro®, and Zepbound™	Claims based on gastrointestinal injuries because of the use of glucagon-like peptide-I receptor agonist prescription medications Ozempic, Wegovy, Rybelsus, Trulicity, Mounjaro® and Zepbound against Novo Nordisk Inc., Eli Lilly and Company, and Lilly USA, LLC.	10/16/2025	Approved	N/A
40	GLP-1 Medications - Nonarteritic Anterior Ischemic Optic Neuropathy (NAION) Vision Loss	Personal injury	6/12/2025	21	1	Ozempic and/or Wegovy	Claims based on vision loss caused by use of Ozempic and/or Wegovy.	10/16/2025	Approved	N/A

EXHIBIT C

BY THE COURT

ATLAS DATA PRIVACY CORPORATION, as assignee of individuals who are Covered Persons, JANE DOE-1, a law enforcement officer, JANE DOE-2, a law enforcement officer, EDWIN MALDONADO, SCOTT MALONEY, JUSTYNA MALONEY, and PETER ANDREYEV, Plaintiffs, v. TWILIO INC., RICHARD ROES 1-10, fictitious names of unknown individuals and ABC COMPANIES 1-10, fictitious names of unknown entities, Defendants.	SUPERIOR COURT OF NEW JERSEY LAW DIVISION – MORRIS COUNTY DOCKET NO.: MRS-L-000226-24 CIVIL ACTION **ORDER**

THIS MATTER having been brought before the Court by and O'Toole Scrivo, L.L.C. (James DiGiulio, Esq. appearing and Mr. DiGiulio and Thomas P. Scrivo, Esq., on the brief) and Orrick, Herrington & Sutcliffe, L.L.P. (Aravind Swaminathan, Esq., appearing *pro hac vice* and on the brief), attorneys for Twilio, Inc. ("Defendant"), upon a motion, pursuant to Rule 4:6-2(e), to dismiss with prejudice the complaint filed by Plaintiffs, Atlas Data Privacy Corporation, Edwin Maldonado, Scott Maloney, Justyna Maloney, and Peter Andreyev (collectively, "Plaintiffs"), and PEM Law, L.L.P. (Jessica A. Merejo, Esq., appearing and Ms. Merejo and Rajiv D. Parikh, Esq., on the brief) and Boies, Schiller and Flexner, L.L.C. (Adam Shaw, Esq., appearing *pro hac vice*), appearing and filing opposition and the Court having considered the moving, opposition and reply papers and the Court having heard the arguments of counsel on April 23, 2025, and for good cause shown and the reasons stated on the record on April 23, 2025;;

IT IS on this 23rd day of April, 2025;

ORDERED that to the extent Defendant Twilio, Inc. moves to dismiss Plaintiff's complaint for failure to state the elements of a claim upon which relief may be granted, the motion is **denied. By May 9, 2025,** Defendant Twilio, Inc. shall file an answer to the complaint.

IT IS FURTHER ORDERED that to the extent Defendant Twilio, Inc. moves to dismiss Plaintiff's complaint because their services are akin to a telephone directory or directory assistance as defined in N.J.S.A. 56:8-166.1(f), the motion is **denied without prejudice as premature** because resolution of this issue requires a factual determination and there is insufficient competent factual evidence before the court to make this determination.

IT IS FURTHER ORDERED that to the extent Defendant Twilio, Inc. moves to dismiss Plaintiff's complaint on immunity pursuant to the Communications Decency Act, 47 U.S.C. §230, the motion is **denied without prejudice as premature** because resolution of this issue requires a factual determination and there is insufficient competent factual evidence before the court to make this determination.

IT IS FURTHER ORDERED that to the extent Defendant Twilio, Inc. moves to dismiss Plaintiff's complaint based on an as applied challenge to the constitutionality of Daniel's Law, codified in N.J.S.A. 47:1A-1, et. seq. and N.J.S.A. 56:8-166.1, et. seq., the motion is **denied without prejudice as premature** because resolution of this issue requires a factual determination and there is insufficient competent factual evidence before the court to make this determination.

IT IS FURTHER ORDRED that with the consent of the parties, to the extent Defendant Twilio, Inc. has or intends to assert a facial First Amendment challenge to the constitutionality of Daniel's Law, codified in N.J.S.A. 47:1A-1, et. seq. and N.J.S.A. 56:8-166.1, et. seq., as part of a responsive pleading, the motion is **withdrawn** pending the decisions of the United States Court of

Appeals for the Third Circuit issues its decision on the matter of Atlas Data Priv. Corp., et al. v. We Inform, LLC, et al., No. CV 24-10600, 2024 WL 4905924 (D.N.J. Nov. 26, 2024) (Dkt.58) and after the New Jersey Supreme Court issues its decision in the matter of Kratovil v. City of New Brunswick, 2024 N.J. Unpub. A-216-23, 2024 WL 1826867 (App. Div. 2024) certification granted, 258 N.J. 468 (2024). Defendant Twilio, Inc. reserves its right to assert all First Amendment and other facial challenges to Daniel's Law after these decisions are issued. If these decisions do not resolve the issues regarding the constitutional challenges that Defendant Twilio, Inc. intends to raise, **within forty-five days of the last decision issued**, Defendant Twilio, Inc. may file a motion challenging the constitutionality of Daniel's Law. Upon the filing of any motion challenging the constitutionality of Daniel's Law, Defendant Twilio, Inc. shall serve a copy of the motion on the New Jersey Attorney General, as required by Rule 4:28-4. Nothing herein precludes Defendant Twilio, Inc. from requesting relief consistent with the decisions of the United States Court of Appeals for the Third Circuit and the New Jersey Supreme Court in these cases.

IT IS FURTHER ORDERED that **by April 28, 2025,** counsel for Plaintiffs and Defendant Twilio, Inc. shall meet and confer to determine if they can agree upon the terms of the protective order for submitting the information required in this order. If they are unable to agree upon the terms of the protective order, **by April 30, 2025**, counsel for the parties shall contact Michael Eisner, the Morris and Sussex County Civil Division Case Manager and Discovery Mediator to schedule a case management conference to discuss the terms of the order.

IT IS FUTHER ORDERED that **by May 16, 2025**, pursuant to a protective order, Plaintiff Atlas Data Privacy Corporation shall submit to the court and counsel for Defendant Twilio, Inc. a list identifying by name each of the individuals referred to in the complaint as "assignors," if they have not provided this information while the case was pending in Federal

Court. For each assignor, Atlas Data Privacy Corporation shall indicate the following: (1) the factual basis for the person to be considered a "Covered Person" as defined in N.J.S.A. 56:8-166.1(d), that is, a judicial officer, law enforcement officer, child protective investigator in the Division of Child Protection and Permanency, as those terms are identified in N.J.S.A. 47:1A-1.1 or prosecutor and any immediate family member residing the household of as individuals in these categories; (2) whether there was a written assignment of the "Covered Persons" right to bring a civil action for a violation of N.J.S.A. 56:8-166.1 to Atlas Data Privacy Corporation; and (3) whether the written assignment was executed prior to the filing of the complaint.

IT IS FURTHER ORDERED that this Order shall be deemed served upon all parties upon the upload to E-Courts. Pursuant to Rule 1:5-1(a), the movant shall serve a copy of this Order on all parties not served electronically within seven days of the date of this Order.

Marcy M. McMann
Hon. Marcy M. McMann, J.S.C.

__X__Opposed
_____Unopposed
__X__Oral Argument

EXHIBIT D

ATLAS DATA PRIVACY CORP., et al. v. CARCO GROUP INC., et al.
August 15, 2025 - ALL DECISIONS

SUPERIOR COURT OF NEW JERSEY
LAW DIVISION, CIVIL PART
MORRIS COUNTY
DOCKET NO. MRS-L-000270-24,
MRS-L-000243-24, MRS-L-000271-24,
MRS-L-000483-24, MRS-L-000227-24,
MRS-L-000260-24, MRS-L-000258-24
APP. DIV. NO.

ATLAS DATA PRIVACY CORPORATION, ET. AL.	TRANSCRIPT of DECISIONS
Plaintiffs,	
vs.	
CARCO GROUP. INC., ET. AL.	
Defendants.	

Place: Morris Co. Courthouse
56 Washington Street
Morristown, NJ 07960

Date: August 15, 2025

Transcriber Catherine Weigel
ELITE TRANSCRIPTS, INC.
14 Boonton Avenue
Butler, NJ 07405
(973) 283-0196
Audio Recorded
Operator, Jada Jenkins/
Ryan Scott

BEFORE: (Continued)

HONORABLE JONATHAN W. ROMANKOW, J.S.C.

TRANSCRIPT ORDERED BY:

ANGELO A. STIO, III, ESQ. (Troutman Pepper Locke LLP, 104 Carnegie Center, Suite 203, Princeton, New Jersey 08540)

APPEARANCES:

RAJIV D. PARIKH, ESQ. (PEM Law LLP)
VICTOR ANDREOU, ESQ.
Attorney for the Plaintiffs

ADAM R. SHAW, ESQ. (Boies Schiller Flexner LLP)
Attorney for the Plaintiffs

ANGELO A. STIO III, ESQ.
(Troutman Pepper Locke LLP)
Attorney for Defendants Carco, Remine Inc. and Intellicorp Records

CORRI A. HOPKINS, ESQ. (Parker Poe)
Attorney for Defendant Blackbaud, Inc.

MICHAEL T. HENSLEY, ESQ. (Carlton Fields, LLP)
Attorney for Defendant Blackbaud, Inc.

SCOTT S. CHRISTIE, ESQ. (McCarter & English, LLP)
Attorney for Defendant Telnyx

STEPHEN M. TURNER, ESQ. (Dentons US LLP)
Attorney for Defendant Crexi

WILLIAM W. CHENEY, ESQ.
(Freeman Mathis & Gary, LLP)
Attorney for Defendants AGR Group, LLC and AGR Nevada, LLC

BENJAMIN D. BRIGHT, ESQ. (Mayer Brown LLP)
Attorney for Defendant Spokeo, Inc.)

I N D E X

THE COURT: All right, I'm prepared to rule. Daniel's Law was designed to prevent attacks on government officials and their families. The law prohibits disclosure of addresses and phone numbers of individuals who hold certain positions, such as active and retired judges and law enforcement personnel. Those are people or individuals who are referred to as cover persons.

The law sets forth that on notice a person, business or association shall not disclose or re-disclose the home address or -- or unpublished telephone number of a covered person. That's 56:8-166.1(a)(2). Civil penalties may be imposed for violations of the law, including $1,000 per violation, punitive damages and attorney's fees. That's in 166.1(c).

There are also criminal penalties for reckless violation of Daniel's Law. There's a fourth-degree crime and -- for reckless and a third-degree for purposeful violation. When an authorized person seeks to prohibit disclosure of the home address or unpublished phone number of any other -- of any covered person, consistent with Paragraph 1 of the Statute the authorized person shall provide written to the person from whom the authorized person is seeking non-

disclosure, that the authorized person is an authorized person, and they're requesting that the person cease disclosure of the information in order to protect the information from the internet, or wherever -- or where otherwise made available. And that's 166.1(a)(2). And upon such written notice, and not 10 -- later than 10 business days after receipt of the notice, there should be no -- there shall be no disclosure of the home address or unpublished home number -- phone number of any covered -- home telephone number of any covered person.

Now each of the complaints here explain that Atlas provides an online platform, including an e-mail service named Atlas Mail. Covered persons were, by people who qualify as covered persons, may send take-down notices via e-mail, requesting that data brokers cease disclosure or re-disclosure of information about the covered person, in accordance with 166.1(a)(1). Each of the complaints allege that the defendant, or defendant in question, is an entity that discloses or re-discloses on the internet personal identifying information to covered persons, and that by virtue of defendant's business model visitors, users or customers may obtain a name and home address, and/or name and unpublished home phone number of the individual

plaintiffs, or covered person -- persons. In each complaint the plaintiffs further allege that the individual plaintiffs, or covered persons transmitted -- the individual plaintiffs and covered persons transmitted notices in writing to defendants requesting that defendants cease disclosure of their home address and/or unpublished home telephone number, and cease its disclosure or re-disclosure on the internet, or wherever defendants otherwise made it available.

On each complaint the plaintiffs also allege that defendant failed to comply with the request to cease disclosure or re-disclosure of the covered person's information.

Now the standard here the New Jersey Supreme Court has cautioned that motions to dismiss, pursuant to Rule 4:6-2(e) for failure to state a claim upon which relief can be granted "should be granted only -- in only the rarest of instances." PRINTING MART OF MORRISTOWN VS. SHARP ELECTRONICS CORP., 116 N.J. 739, at 772, 1989.

Dismissal is appropriate where no cause of action is identified or suggested by the facts of the complaint. PRINTING MART at 746. When reviewing a complaint on a motion to dismiss The Court must "assume the facts as asserted by plaintiff are true and give

her all the benefit -- give her the benefit of all inferences that may be drawn in her favor." That's from the VALANTZAS VS. COLGATE-PALMOLIVE, 109 N.J. 189, at 192, 1988, and, also, from PRINTING MART at 746.

PRINTING MART-MORRISTOWN at 746 also goes on to say: "At this preliminary stage of the litigation The Court is not concerned with the ability of plaintiffs to prove the allegations contained in the complaint." And for that they cite a 1961 case of SOMERS V. BOARD OF ED.

A complaint need only allege sufficient -- sufficient facts as to give rise to a cause of action or a prima facie case. The reviewing court "searches the complaint in depth and with liberality to ascertain whether the fundament of a cause of action may be gleaned, even from an obscure statement of claim, opportunity being given to amend, if necessary." That's at PRINTING MART, again, quoting a 1957 case of DI CHRISTOFARO.

More from PRINTING MART at 746: "The Court's examination of the allegations of fact in the complaint should be one that is at once painstaking and undertaken with a generous and hospitable approach." The continue by saying: "If a generous reading of the allegations merely suggests a cause of action the

complaint will withstand the motion." On the other hand, if a complaint does not state a basis for relief, and discovery would not provide one, dismissal is appropriate. And that's BANCO POPULAR VS. GANDI, at 184 N.J. 166 at -- 16 -- 184 N.J. 161, at 166, that's a 2005 case.

Now first argument. Defendants Carco, Remine, Crexi and Spokeo, they argue that plaintiff's claim must be dismissed because the complaints fail to allege that the thousands of purported assignors in each complaint are covered persons under Daniel's Law. The Court, um -- frankly, in short, finds that Atlas has not sufficiently pled in any of these four complaints that they are a valid assignee of the covered persons. And this is -- the same finding was made by other courts.

The complaints on these four defendants do not indicate a sufficient basis to conclude that each assignor qualifies as a covered person. Um, there's also no indication if each individual executed a written assignment to Atlas prior to the filing of the complaints, as required by 166.1(d). But instead of dismissing the complaints for these deficiencies The Court will instead order Atlas to submit all this information separately to defense counsel and The Court

under a protective order, and then file an amended complaint with additional pleadings which refer to the information submitted pursuant to the protective order. I know Judge McMann did that, among others.

As I said earlier, I don't -- frankly, I don't know why Atlas hasn't just gone ahead and done that with every single complaint they have. That would eliminate -- eliminate a lot of motion practice and save The Court and the litigants a lot of time and resources, instead of litigating this issue time and again.

As far as the argument about Jane Doe-1 and Jane-2 proceeding under pseudonyms, Defendants Carco and Remine argue that they -- they make this argument that these Jane Does cannot proceed under pseudonyms in the absence of leave being granted. The Court disagrees with that. The plaintiff's motion papers set forth that these two plaintiffs are experienced and highly decorated veterans of law enforcement. Unfortunately, they've been subjected to disturbing breaches of their privacy by criminals whose prosecutions they have been involved with. Jane Doe-1, a major criminal organization identified her personal residence, they took nighttime photos of her young child's bedroom and playroom windows while the child

was playing inside with the light on. That's in the complaint. Also in that same paragraph it states that a criminal organization actually hired a private investigator to search online data broker websites to obtain that officer's home address.

Regarding Jane Doe-2 the complaint sets forth that an inmate uncovered her home address in order to facilitate her murder and -- and murders of her family. Really, I find it somewhat puzzling that the defendants would actually object to these two Jane Does proceeding under pseudonyms, but I -- I find that the plaintiffs have appropriately demonstrated their entitlement to having Jane Doe-1 and Jane Doe-2 proceed under such pseudonyms.

Next argument is that the complaint does not contain factual allegations pertaining to several essential elements of the Daniel's Law claim. I'll go through all the -- all the arguments made. First, Carco, Remine and Crexi make the argument that plaintiffs have failed to adequately prove that the take-down notices were sent by authorized person -- persons. That Daniel's Law requires that a written take-down notice must be provided by an authorized person, and that notice must seek to prohibit the disclosure of the home address or unpublished home

phone number of any covered person. That's in 166.1(a)(2). Under Daniel's Law that authorized person must be either a covered person or satisfy narrow exceptions that we don't have here, like incapacitated covered persons.

Here the defendant claims that Atlas is not an authorized person to request non-disclosure of information because it's not a covered person, and it's not authorized to act on behalf of any other persons identified in the defini-- definition of an authorized person. Defendants ignore that the complaints state that the covered persons, not Atlas, submitted the written requests to defendant to prevent disclosure of the protected information and assigned -- that the assignors, um, assigned the rights to enforce non-compliance with the request to Atlas, as permitted by N.J.S.A. 56:8-166.1. Therefore, The Court finds the plaintiffs have adequately alleged that the written take-down notices were provided by an authorized person pursuant to Daniel's Law.

The next argument made by Carco, Remine, Crexi, Spokeo, is that the plaintiffs' notices were not deficient -- were not -- were -- that the take-down notices were legally deficient. Now, each complaint of Carco, Remine, Crexi, Spokeo, each complaint alleges

that each covered person notify the various defendants in writing that they did not want their home address and/or unpublished home numbers -- phone numbers -- disclosed. That's contained in the complaints. The complaints explain that the written notifications were sent via e-mail using a template created through the Atlas system, and it explains how the covered person logs in, confirms they're a covered person, creates an Atlas e-mail, reviews the list of data brokers to send to whom take-down notices are to be sent. They select which, if any, brokers to send the notice, and then they electronically send the take-down notice to the brokers.

From the complaints it appears that the take-down notices supplied by the defendants provided enough information to ensure that defendants had knowledge of sufficient facts to reasonably determine that disclosure was prohibited. So The Court finds that the plaintiff's take-down notice, as set forth in the complaints, appear on their face to have been legally-sufficient. And in the end that's really a question of fact. Excuse me. At this point The Court finds that the complaints more than adequately set forth the process for take-down requests being submitted to the defense, and sufficiently allege that the plaintiffs

sent take-down notices to defendants in compliance with the requirements of Daniel's Law. And that's all that's needed at this point. And, again, applying the very liberal standard under a motion to -- motion to dismiss, that I went through, giving all favorable inferences to the non-movants, The Court is satisfied that the complaints are sufficient on this issue and are enough to defeat a motion to dismiss.

Next, Carco, Remine, Crexi, Spokeo, make the argument that plaintiffs fail to allege that defendants received the take-down notice, that under Daniel's Law any written down -- any written take-down notice must be "received" to give rise to a potential claim, as Daniel's Law provides that only upon written notification, and not later than 10 business days following receipt thereof, would the recipient be obligated not to disclose, re-disclose, or otherwise make available the protected information. That's at 166.1(a)(1).

Defendants argue plaintiffs are unable to prove that defendants actually received the take-down notices that were allegedly e-mailed, but that's a proof issue. It's not an issue for The Court today. Whether or not they can prove receipt of the take-down notices that goes to the proofs, not something for The

Court to consider today. And, again, I have to give the non-movants the benefit of all favorable inferences, and that inference is that -- here is that the defendants did receive the take-down notices. So, again, under the liberal standard here The Court finds the motions, um, uh, should be denied because the complaints are sufficient on this issue.

Next, Crexi, AGR, Blackbaud, Spokeo, make the argument that the plaintiffs failed to plausibly allege that defendants possess protected information, or disclose that protected information after receiving a take-down notice. And as I've said already, when reviewing a complaint under a motion to dismiss The Court must assume the facts as asserted by plaintiff are true and give the benefit of all inferences that may be drawn in her favor. That's VALANTZAS, The Court is not concerned with the ability of plaintiffs to prove the allegations. Instead, it's just a question of whether the pleadings are adequate on their face to suggest a cause of action, can The Court glean the fundament of a cause of action?

And the complaints here regarding the defendants possessing or disclosing protected information of the plaintiffs, The Court finds they're more than adequate. The complaints certainly suggest a

cause of action. The complaints state that the defendants offer and engage in the disclosure of data and information through one or more websites, or applications, or otherwise, in New Jersey and to businesses and individuals who operate or reside in New Jersey. The complaints set forth how the individual plaintiffs in the assignor's e-mail written non-disclosure requests, and then the complaints state that despite the non-disclosure requests that the defendants failed to cease disclosure or re-disclosure on the internet, or otherwise making available the protected information of the individual plaintiffs and covered persons within the time period required by Daniel's Law. And then the complaint goes on to say the defendants refused to comply with Daniel's Law and, um, um, that the covered persons, uh -- the information about the covered persons and individual plaintiffs remain available from the defendants using defendants' search tools or other means of disclosures, or -- or -- or the information is available, or, uh, uh -- can't read my handwriting -- or viewable, I believe, within a -- within a searchable database, or otherwise made available. That's more than sufficient to defeat a motion to dismiss for failure to state a claim. The allegations in each complaint clearly set forth

allegations of violation of the law that -- that defendants have protected information and disclosed, or re-disclosed, or otherwise made available, this protected information. That's more than enough to -- to establish a prima facie case and survive scrutiny.

Again, this is a proof issue. There's enough here to suggest a cause of action. Yeah, it's not a lot of detail, that's true, but it's enough, and that's all that's needed. These motions to dismiss are rarely granted, because it's not difficult to -- to suggest a cause of action. And, again, The Court only has to glean the fundament of a cause of action, and searching with liberality, and -- and that's what The Court's done here.

The next argument, Carco, Remine, Crexi, Spokeo, argue that the plaintiffs fail to prove that defendant acted in a negligent manner. Now a complaint alleging negligence "must set forth a claim for relief that contains a statement of the facts on which the claim is based, showing that the pleader is entitled to relief and demand -- and a demand for judgment for the relief to which the pleader claims entitlement." That's from TEILHABER VS. GREENE, 320 N.J. Super. 453, at 463, it's a 1999 Appellate Division case, citing Rule 4:5-2.

Moreover, a complaint is not required to spell out the legal authority upon which it's based. FARESE VS. MCGARRY, 237 N.J. Super. 385, at 390, 1989, Appellate Division case.

Now here the complaints allege, in sufficient detail, that the -- that the plaintiffs -- I'll just refer to everybody as the plaintiffs -- they -- the complaints allege, again, in sufficient detail, that the plaintiffs sent non-disclosure requests to the defendants and that defendants did not comply with those requests, despite a legal obligation to do so. Defendant -- defendants allegedly failed to respond to the notices within 10 days, and -- and, also, the complaints set forth that the disclosing or making available of this protected information was undertaken "without sufficient regard for the risks and consequences imposed upon individuals who serve critical judicial and law enforcement roles." That's in the complaints. And, also, in the complaints it states that defendants "wantonly and repeatedly disregard the law and demonstrate a callousness toward the well-being of those who serve." In all of that, um, the word negligence isn't used, but that certainly -- that wording is certainly sufficient to allege negligence. Now, as far as proving that the defendants

were actually negligent that's -- again, that's another fact issue that's not to be determined at this stage. The Court finds the pleadings are adequate to defeat a motion to dismiss under this argument.

Crexi makes the argument, next, a proximate cause of damages have not been adequately pled. I find that argument to be without merit. Plaintiffs are correct that Daniel's Law does not require that a plaintiff show that unlawful disclosure of protected information proximately caused them harm. There's no requirement that harm be shown as a result of the disclosure, aside from the disclosure itself. All that's required is that a plaintiff establish that a defendant possessed protected information and failed to comply with a request to cease disclosure of this information and -- and, um, um, that alone constitutes a violation of Daniel's Law and serves to subject the defendant to damages under the Statute. And the complaint is sufficient regarding pleading damages.

Daniel's Law provides for actual damages not less than liquidated damages at a rate of $1,000 for each violation of the law, but also provides for punitive damages upon proof of wilful or reckless disregard of the law and also provides for reasonable attorneys' fees and other reasonable litigation costs,

and that's all pled in the complaint. I -- the defendants -- the defendant, I should say, individually has not advanced any authority to convince The Court that a complaint under Daniel's Law is different than any other complaint in terms of pleading damages.

The complaint alleges the plaintiffs have suffered damages and they seek damages. That's enough. Now what kind of damages are going to be rewarded, who knows, if -- if there's a finding of violation of Daniel's Law? Maybe it's $1,000, maybe more. Maybe punitive, maybe not. Maybe counsel fees, maybe not. That's a question for another day. At this state, again, The Court's not concerned with the ability of the plaintiffs to prove the allegations in the complaint, and to prove that there were damages. If they can't prove damages down the line that's an issue for another time. The complaint's sufficient on its face as to this issue. And, again, there's not great detail in the complaint, but there's enough to defeat a motion to dismiss here.

Last, Spokeo argues that The Court should strike the plaintiff's request for an injunction. That's an issue for another day, as well. I'm not going to strike the request for an injunction in the complaint. Whether an injunction should be, uh,

issued, that's something to be determined at the resolution of the case. Again, the complaint is sufficiently pled and its inclusion in the complaint is not improper.

Now let me address the motion to dismiss for lack of jurisdiction, and that's made by AGR and Spokeo. Now, a non-resident defendant must have certain minimal contacts with a forum state in order for there to be personal jurisdiction over the defendants. That's from INTERNATIONAL SHOE COMPANY VS. WASHINGTON, 326 U.S. 310, 316-17. That's from 1945.

So the primary focus of the personal jurisdiction inquiry is the defendant's relationship to the forum state. JARDIM VS. OVERLEY, 461 N.J. Super. 367, 275.

Excuse me one second. (Pause) Sorry. Okay, let's continue.

Okay. So two types of jurisdiction, there's general and specific. Gen-- general jurisdiction, I'm not going to belabor this. There's general jurisdiction as long as a defendant's activities can be characterized as continuous and systematic contacts. That's from LEBEL VS. EVERGLADES MARINA, 115 N.J. 317, at 323, a 1989. They quote an order case. Such contacts require that it essentially be at home in the

forum state, such as by having its principal place of business, or being incorporated there. And that's from DAIMLER AG VS. BAUMAN, 571 U.S. 117, 2014, quoting GOODYEAR-DUNLOP. So there must be extensive contacts between defendant and a forum for general jurisdiction to exist.

As far as specific jurisdiction that's when there's evidence of purposeful acts by the defendant directed towards the forum state that make it reasonable for the defendant to anticipate being held in a court there. That's from MASTONDREA VS. OCCIDENTAL HOTELS MANAGEMENT, 391 N.J. Super. 261, at 268, 2007 Appellate Division case. And for specific jurisdiction to exist the minimum-contacts inquiry must focus on the relation among the defendant, the forum and the litigation. That's from LEBEL at 323, and they quote the case of SHAFFER VS. HEITNER. Minimum -- minimum-contacts requirement is satisfied so long as the contacts resulted from the defendant's purposeful conduct, not the unilateral activities of the plaintiff. Again, LEBEL.

The purposeful availment requirement ensures that a defendant will not be held in a jurisdiction solely as a result of random, fortuitous or attentuated contacts. Again, LEBEL at 323-24.

So the -- again, the question is whether the defendant's conduct in connection with the forum state are such that he, or she, should reasonably anticipate being held in a court there. And that's, again, 324 in LEBEL. The Court must thus determine whether defendant purposely created contacts with New Jersey. Again, 324 in LEBEL. And then if it's established that there's general or specific jurisdiction, uh, there's another part, there has to be a finding that maintenance of the suit does not offend traditional notions of fair play and substantial justice. LEBEL at 328. And that determination requires a -- a valuation of factors, like the burden on the defendant, interests of the forum state, plaintiff's interest in obtaining relief, the inter-state judicial system's interest in obtaining the most efficient resolution of controversies, and the shared interests of the several states in furthering fundamental substantial social policies. That's, again, from LEBEL at 328.

Now, when a court is presented with a motion to dismiss due to lack of jurisdiction, a trial court must make findings of fact on the jurisdictional facts disputed because disputed-jurisdictional allegations cannot be accepted on their face. That's from RIPPON VS. SMIGEL, 449 N.J. Super. 344, at 359. It's an

Appellate Division 2017, quoting CITIBANK VS. ESTATE OF SIMPSON, 290 N.J. Super. 519, Appellate Division 2017. When a motion to dismiss for lack of jurisdiction is made it's only the jurisdiction allegations that are relevant, not the sufficiency of the allegations respecting the cause of action. That's at 359-60 in the RIPPON case.

Now, New Jersey Courts recognize that jurisdictional discovery is appropriate to determine whether a court does, indeed, have in personam jurisdiction over a defendant. That's YA GLOBAL INVESTMENTS VS. CLIFF, 419 N.J. Super. 1, 2011 Appellate Division case, citing MAINE VS. SEKAP, ETC., at 392 N.J. Super. 227.

A plaintiff does bear the burden of demonstrating that -- demonstrating facts that support personal jurisdiction. Although that's the case, courts are to assist the plaintiff by allowing jurisdictional discovery, unless the plaintiff's claim is clearly frivolous. And that's from RIPPON, 449 N.J. Super. 359, quoting TOYS 'R US, that's a Federal case from 2003, Third Circuit. Jurisdictional discovery is "typically warranted when the plaintiff seeks to discover facts to establish that a defendant has had sufficient contacts with New Jersey to satisfy the

requirement of due process." And that's from RIPPON, um -- uh, and, furthermore, the record must generally support the existence of disputed or conflicting facts to warrant jurisdictional discovery.

Now, um, let me start out by saying that I -- there does not appear to be general jurisdiction here for AGR or Spokeo. They're located in other states. AGR's in Nevada and Florida, um, and they have their principal place of business in Nevada, I believe, and Spokeo is based in California and incorporated in Delaware. And there don't appear to be any facts that indicate that either of these defendants is essentially at home in New Jersey, so it's a matter of is there specific jurisdiction.

Now, as far as that's concerned, um -- bear with me -- all right um, in this case, you know, the -- the -- whether or not there's specific jurisdiction that's going to depend on -- on, obviously, what the contacts are between the defendants and New Jersey, and -- and the covered persons, and whether the defendants possessed, uh, and disclosed information about the covered persons. So it's very simple. I mean, I -- I'm going to order exactly what Judge Franzblau did. I mean, it's -- I think that's necessary here because, um, I do find that the allegations are -- are

sufficient on their -- on their -- on their face as to all the defendants, and -- and including these AGR and Spokeo. But there is this issue of jurisdictional -- you know, whether there's jurisdiction. And I think, although there is the one paragraph -- I forget off the top of my head what paragraph number it is -- that -- that does allege generally that these defendants, you know, essentially had contacts with New Jersey because they -- they offered up or disclosed this data. I think enough of a question's been raised there that in an abundance of -- abundance of caution, really. I mean, maybe that's not the best way to put it, but I think it -- it -- however you want to term it, I think it's -- it's important that there's enough of a question here that it has to be determined whether there is specific jurisdiction, and I think jurisdictional discovery will -- will solve that -- that question. So I'm going to order the plaintiffs and AGR, and the plaintiffs and Spokeo, to engage in jurisdictional discovery for a period of 60 days, and during that time, um, the parties are going to determine the defendants' contacts with New Jersey, including, but not limited to, whether the defendants maintained, or accumulated, information and disclosed the protected information, uh, about the, uh, uh, about

the covered persons, in short to determine whether a specific jurisdiction exists here. And after that jurisdictional period -- jurisdictional discovery period, um, at that point the defendants may both re-file their motion to dismiss, if they want, or they can file an answer within 14 days after that end of that period, if they -- if they concede that there's personal and specific jurisdiction here. So that the motion to dismiss on that ground is denied with -- without prejudice, obviously. They can come back if they like.

Now, um, as far as the failure to serve the complaint properly, Blackbaud makes this argument, plaintiffs failed to serve them with the complaint under Rule 4:4-4(b)(1), resulting in the lack of personal jurisdiction over the defendant Blackbaud. "The requirement that a court have personal jurisdiction over a defendant is designed to protect the defendant's individual liberty interests flowing from the due process clause." And that's from ROSA VS. ARAUJO, 616 Atlantic 2d 1328, it's a 1992 Appellate Division case. It cites a 1982 case at 456 U.S. 694, INSURANCE CORPORATION VS. COMPAGNIE DES -- DES BAUX -- I don't know, I -- I can't speak French, so I don't know how to pronounce that.

As the New Jersey Supreme Court explained "an elementary and fundamental requirement of due process in any proceeding, which is to be accorded finality, is notice, reasonably calculated, under the circumstances to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections. And that's from O'CONNOR VS. ABRAHAM ALTUS, 335 Atlantic 2d 545, at 555, 1975 case. Accordingly "where due process has been afforded a litigant technical violations of the rule concerning service of process do not defeat the court's jurisdiction." That's from the ROSA case at 1330.

Now in this case, on February 23rd, 2024 the plaintiffs attempted service on Blackbaud by hand delivering the complaint to its registered agent in Delaware. Before doing this, though, the plaintiffs did not comply with the Rule 4:4-4(b) by filing an affidavit explaining why, despite diligent effort and inquiry service could not be made in New Jersey. Basically defendant argues that because the plaintiffs never filed this affidavit that service is ineffective.

Defendant does cite a number of unpublished opinions for their argument. But I -- The Court, I should say, agrees with the plaintiffs that this service of process defect is technical rather than

substantive, and it's not fatal. Now, um, imperfect service has been found sufficient where a defendant had actual notice of the lawsuit prior to the entry of the judgment, and that's SOBEL VS. LONG ISLAND ENTERTAINMENT PRODUCTS, 329 N.J. Super. 285, at 293-94, 2000 Appellate Division case. And, ultimately, sufficient notice can overcome technical defects because "not every defect in the manner in which process is served renders a judgment upon which the action is brought void and unenforceable. That's the ROSA case, again, 260 N.J. Super. 458, at 462. And our Supreme Court has -- New Jersey Supreme Court has also previously espoused a similar belief, noting that "where due process has been afforded a litigant technical violations of the rule concerning due -- service of due process -- where due process has been afforded a litigant technical violations of the rule concerning service of process do not defeat The Court's jurisdiction." And that's from O'CONNOR VS. ALTUS, 67 N.J. 106, at 127, 1975.

And it's clear here that Blackbaud has had notice of this lawsuit since service was attempted on them via hand delivery in -- in Delaware, um, in February of 2025, and -- and Black -- Blackbaud certainly has received notice of the complaint.

They've been participating in litigation both here and in Federal Court. They've had an opportunity to respond to the complaint, and that distinguishes the largely unpublished cases that the defendant cited. Those cases can be differentiated by the one here, because in those cited cases the defendants did not receive notice of the action, or had an opportunity to respond before default judgments were entered against them so. Here Blackbaud was served with process, they were on notice of the suit, they had ample time to respond, and I -- I don't believe that failure to file that affidavit requires dismissal of the action. However, I will order the plaintiffs to still comply with the rules as a belt-and-suspenders' thing, and allow them an opportunity to correct the defect in service. I will not dismiss the complaint at this time for -- for this technical violation, but I will require plaintiffs to file an affidavit, complying with Rule 4:4-4(b) within seven days.

Last issue is Telnyx motion to dismiss. Now to state a claim under Daniel's Law plaintiff must plead facts showing that at some time more than 10 business days following the receipt of a notifi-- notification to stop, defendant nevertheless disclosed, or re-disclosed, on the internet, or otherwise made

available, the home address or unpublished home telephone number of any covered person. That's 166.1(a)(1). Accordingly, a defendant violates Daniel's Law if that defendant discloses a home address or unpublished home telephone number.

Now here it's evident that both Telnyx's opening and reply briefs repeatedly establish, with factual declarations, in the form of a certification, that have not been countered or contested by the plaintiff, that the number lookup tool does not return home addresses or unpublished home telephone numbers. It only returns Caller I.D. information, name and carrier, for a phone number. And even the plaintiffs do not point evidence or allegations that Telnyx provides home addresses in this or any other product. And this is a different -- this is a different case, obviously, than all the other ones, and that's because it's a different type of defendant.

Now plaintiff's allegations about other products are speculative at this point. It -- it's really -- it's clear that Telnyx, that this is the only product here. Plaintiffs -- you know, without -- look, without disclosure of a home address, or unpublished number, Daniel's Law is not violated. The Statute does not cover mere confirmation of information associated

with a known phone number. Now Paragraph 33 of the complaint alleges that the public can obtain from defendant's website a name and -- and home address, and/or a name and unpublished home telephone number of protected persons. Also in Paragraph 33, the plaintiffs provided this redacted exemplar of the information that, uh, the defendant provides, by using this website engine, which they claim is illustrative of how the defendant violates Daniel's Law, and that exemplar has a box where a phone number must be entered. That's what you have to do. You've got to type a number in that box, or even a partial number, evidently, that will result in various information being displayed about the phone country code, the phone carrier, the caller name, or I guess the subscriber name, and the state and city in which the phone is registered. So even though a phone number -- entering a phone number, a -- a published phone number, may reveal that information. No address is disclosed, it's only the state and city.

And, um, the thing is, one has -- in order to use this function at all one has to have a phone number in the first place. So even if, though, let's say somebody overheard a judge or -- or other protected person, heard me whispering my phone -- you know,

here's my unpublished -- unpublished number to somebody, and the person only heard part of it -- overheard part of it, first of all, there's no unpublished numbers on there. But even if it was -- so even entry of a full unpublished number evidently, according to the certifications, have not been countered by the plaintiff. That wouldn't reveal any -- anything, because they -- they don't have information about unpublished numbers. And, even so, there's no address that's disclosed. Even if an unpublished number -- or, rather, a published number was -- was typed in, there's no address. It's a city and state, and the engine doesn't provide unpublished home phone numbers, doesn't provide -- doesn't provide any phone numbers, for that matter, it's just -- it's just confirmation, and that's not -- that's not contemplated under Daniel's Law. So I -- I think it's disingenuous for the plaintiff to assert that the defendant discloses or possesses, etc., unpublished home phone numbers. They don't. They don't offer any phone numbers.

And -- and it's clear from the screenshot it's just the -- the city. So all that -- all that means that the defendant's search engine doesn't provide information, cannot provide information, that

would violate Daniel's Law. It doesn't provide unpublished, or even published, phone numbers. Again, even if a partial number is entered it's got to be a published number. And, also, there's no addresses provided. I think I'm saying the same thing. Therefore, that means the defendant does not disclose, re-disclose, or make available protected information by covered persons and, therefore, the complaint as to Telnyx fails to allege a violation of Daniel's Law, and I'm going to dismiss that complaint. I'm going to dismiss it without prejudice. And I -- you know, look, I'm not going to -- I'm not going to -- well, maybe I should address the last argument.

I also find that the statutory exception for products or services relating to phone -- direct telephone directories, or directory assistance, I find that that exclusion also applies to Telnyx. It's not limited by the Statute's plain text or printed materials. The legislature demonstrably knew how to limit exclusions to printed form when they wanted to, and the number lookup tool falls squarely in the exception. And the plaintiff's attempts to require some kind of publication deadline, there's nothing in the Statute about that, um, and there's nothing excluding these online directories. So for that

reason, too, the -- the argument -- the argument fails and the -- the complaint, um, the complaint should -- should be dismissed with -- without prejudice at this point.

So all that being said, um, the -- the -- the four cases, actually now three, because Telnyx was one of them -- is that in here? Oh, here it is. Carco, Remine, Blackbaud and Telnyx. Okay, Telnyx is gone, so we have Carco, Remine and Blackbaud. Those involve challenges to, uh, in -- in terms of preemption arguments, um, so there remains to be oral argument on those. Therefore, I think what I'm going to do is I'm not going to -- I'm not going to enter an order in Carco, Remine or Blackbaud because -- basically, I guess what I'll do is I'll adjourn, I'll carry the motion to a date to be provided. Although, wait, intervention on which one? Was it Carco? Anybody? Who intervened on -- AG intervened on which case?

MR. STIO: Your Honor, it would be in the Carco Matter.

THE COURT: It's Carco, okay.

MR. STIO: Your Honor, just one other thing.

THE COURT: Yep.

MR. STIO: Remine does not have a preemption, so you could remove it off the list.

THE COURT: Are you sure about --

MR. STIO: I -- I don't mind putting them together, but they don't have a preemption argument.

MR. CHRISTIE: And, Your Honor, just as to that we did not file an intervention motion in Ermine.

THE COURT: Ermine, okay, but Carco does.

MR. STIO: Yes, Your Honor.

THE COURT: Okay. Yeah, there's no intervention motion, okay, but there's arguments about preemption, right?

MR. STIO: Correct.

THE COURT: Okay.

MR. STIO: Not -- not for -- not for Remind.

THE COURT: Remine. Remine doesn't have any of those arguments.

MR. STIO: No, just Carco.

THE COURT: Okay, fine. So, thank you for that. So Carco, Blackbaud and Telnyx, those -- Blackbaud and Telnyx -- Telnyx is not an issue. Blackbaud I'm going to hold off on the arguments, and I'll give a date for continued argument on that, okay. So the motion is adjourned, I guess, on that one.

Carco we'll deal with the motion to intervene, uh, and, um, you know, I'll -- I'll have to figure out exactly, because I'd like to enter an order,

um, as to -- I'll figure out what the procedural thing to do is as far as like addressing these -- these arguments. I may -- I may do some type of partial, or I may just simply, you know, hold off until the, uh, uh -- the intervention motion is decided.

But what I'm trying to say is I won't have a final order for Blackbaud and possibly Carco. The rest I -- I will be issuing final orders, um, with everything that I've just put on the record. The language should all be in there. If one of you gets an order that you feel is not sufficient please let me know, but I think I, believe it or not, have a good handle on what needs to go on each order.

Is there anybody here, um, that -- whose case I did not address in argument for? No hands? Going once, going twice. Okay. So all arguments have been addressed. All right. With that I would like to thank you all, No. 1, for your advocacy. There's an incredible amount of -- of excellent lawyering here, both written and in front of me here orally.

I do apologize for bringing you here on a Friday, okay, but there's -- as I said, I had reasons for doing it. I think it would have been a lot more difficult doing this on Zoom, or any other method. And there's a silver lining here. It's five minutes to 5,

so, you know, in five minutes it's -- it's Miller time, and -- and the weekend starts. It could have been worse. It could be five to 8 right now, you know? So, anyway, thank you, again, I appreciate seeing all of you, and thank you, again, for your advocacy, and I wish you a very nice weekend, okay? All right, thanks very much, everybody.

MR. CHRISTIE: Thanks, Your Honor.

MR. SHAW: Thank you, Your Honor.

(Proceedings concluded)

CERTIFICATION

I, Catherine J. Weigel, the assigned transcriber, do hereby certify that the foregoing transcript of proceedings in the Morris County Superior Court, on August 15, 2025, digitally recorded, from Time Index 4:12:00 – 4:56:42, is prepared in full compliance with the current transcript format for judicial proceedings and is a true and accurate compressed transcript of the proceedings as recorded to the best of my knowledge and ability.

/s/ Catherine Weigel

_____

Catherine Weigel AOC#490
Elite Transcripts, Inc.
Butler, NJ 07405 August 25, 2025

EXHIBIT E

PEM LAW LLP
Rajiv D. Parikh, Esq. (032462005)
Jessica A. Merejo, Esq. (288592020)
Victor Andreou, Esq. (295502021)
One Boland Drive, Suite 101
West Orange, New Jersey 07052
Tel.: (973) 577-5500
Email: rparikh@pemlawfirm.com
jmerejo@pemlawfirm.com
vandreou@pemlawfirm.com

MORGAN & MORGAN COMPLEX LITIGATION GROUP
Ryan J. McGee, Esq. (*pro hac vice* to be filed)
201 N. Franklin Street, 7th Floor
Tampa, Florida 33602
Tel.: (813) 223-5505
Email: rmcgee@forthepeople.com

Attorneys for Plaintiffs

ATLAS DATA PRIVACY CORPORATION, *as assignee of individuals who are Covered Persons*, JANE DOE-1, *a law enforcement officer*, JANE DOE-2, *a law enforcement officer*, and PETER ANDREYEV,

Plaintiffs,

v.

TELNYX LLC, RICHARD ROES 1-10, *fictitious names of unknown individuals*, and ABC COMPANIES 1-10, *fictitious names of unknown entities*,

Defendants.

SUPERIOR COURT OF NEW JERSEY
LAW DIVISION: MORRIS COUNTY
DOCKET NO.: MRS-L-000260-24

CIVIL ACTION

~~[PROPOSED]~~ **ORDER**

THIS MATTER, having been brought before the Court by Plaintiffs Atlas Data Privacy Corporation, as assignee of individuals who are Covered Persons, Jane Doe-1, a law enforcement officer, Jane Doe-2, a law enforcement officer, and Peter Andreyev (collectively, "Plaintiffs"), for the entry of an order reconsidering the Court's Amended Order, filed August 19, 2025, which

granted Defendant Telnyx, LLC's ("Defendant") motion to dismiss, without prejudice, for the reasons stated on the record during oral argument on August 15, 2025, and, upon such reconsideration, denying Defendant's motion to dismiss in its entirety; and the Court having reviewed and considered the papers, and the opposition thereto, if any; and for good cause shown;

IT IS on this 22nd day of December, 2025, hereby:

ORDERED that Plaintiffs' motion for reconsideration is hereby **GRANTED**; and its is further

ORDERED that the Court's Amended Order, filed August 19, 2025, is reconsidered and Defendant's motion to dismiss pursuant to R. 4:6-2(e) is denied in its entirety; and it is further

ORDERED that a copy of this Order shall be deemed served on all parties upon its entry into eCourts.

HON. JONATHAN W. ROMANKOW, J.S.C.

[X] Opposed

[ ] Unopposed

See attached Statement of Reasons.

Statement of Reasons

Atlas Data Privacy Corporation, as assignee of individuals who are Covered Persons, Jane Doe-1, a law enforcement officer, Jane Doe-2, a law enforcement officer, and Peter Andreyev

v.

Telnyx, LLC

MRS-L-260-24

Background

This matter comes before the court by way of a motion for reconsideration filed by Plaintiff Atlas Data Privacy Corporation ("Plaintiff") on 9/4/2025. ("Plaintiff"). On 9/18/2025 Defendant Telnyx LLC filed opposition.

This matter arises out of allegations that Defendant violated Daniel's Law. On 5/9/2025 Defendant filed a motion to dismiss Plaintiff's complaint for failure to state a claim. On 6/13/2025 Plaintiff filed opposition, and on 6/27/2025 Defendant filed a reply. After hearing oral argument on 8/15/2025 the court granted Defendant's motion to dismiss without prejudice.

Arguments

Plaintiff argues that their motion for reconsideration should be granted because (1) good cause and the goal of substantial justice dictate that reconsideration is necessary because the court relied on facts that were outside its purview and inaccurate under applicable law; (2) precedent dictates that Defendant's motion should have been denied; and (3) the Daniel's Law exclusion for telephone directories and directory assistance should not apply to Defendant.

Defendant argues that the motion for reconsideration should be denied because (1) it is inappropriate for Plaintiffs to seek reconsideration of the court's decision; (2) the court properly determined that Plaintiffs failed to sufficiently allege that Defendant disclosed, re-disclosed or otherwise made available any individual's home address or unpublished home telephone number; and (3) the court properly determined that the express exception for services relating to telephone directories or directory assistance is not limited by the exclusion for directories with publication deadlines.

Standard of Review

A motion for reconsideration may be decided based on one of two standards depending on whether the order being reconsidered is final or interlocutory. See Lawson v. Dewar, 468 N.J. Super. 128, 133-134 (App. Div. 2021). If the order is final, then Rule 4:42-9 applies and the standard described in Cummings v. Bahr, 295 N.J. Super. 374 (App. Div. 1996) is applicable. Pursuant to Cummings, such relief is reserved for those limited circumstances in which the court's decision rests on a palpably incorrect or irrational basis, or the court failed to appreciate the significance of probative, competent evidence. Cummings v. Bahr, 295 N.J. Super. 374, 384 (App. Div. 1996) (citing D'Atria v. D'Atria, 242 N.J. Super. 392, 401-02 (Ch. Div. 1990)). A motion for reconsideration is not an opportunity for a second bite at the apple. It is not a mechanism for unhappy litigants to attempt once more to air their positions and re-litigate issues already decided. See Michel v. Michel, 210 N.J. Super. 21 (Ch. Div. 1985) (per Judge Krafte).

For that reason, among others, Rule 4:49-2 requires that a party seeking reconsideration "state with specificity the basis on which [the motion] is made, including a statement of the matters or controlling decisions which the movant believes the Court has overlooked or as to which it erred. See also Johnson v. Cyklop Strapping Corp., 220 N.J. Super. 250, 257, 263 (App. Div. 1987). Moreover, a party cannot rely on facts that were not raised in the initial motion to justify reconsideration when those facts were either known or could have been known at the time of the initial hearing. Del Vecchio v. Hemberger, 388 N.J. Super. 179 (App. Div. 2006).

In Cummings v. Bahr, 295 N.J. Super. 374, 384 (App. Div. 1996), the Appellate Division held that Rule 4:49-2 applies (1) when the court's decision is based upon incorrect reasoning; (2) if the court failed to consider evidence; or (3) if there is good reason for the court to reconsider new information. In short, reconsideration is appropriate only when "the court has expressed its decision upon a palpably incorrect or irrational basis or it is obvious that the court either did not consider, or failed to appreciate the significance of, probative competent evidence." Fusco v. Board of Educ. of the City of Newark, 349 N.J. Super. 455, 462 (App. Div. 2002) (quoting D'Atria v. D'Atria, 242 N.J. Super. 392, 401 (Ch. Div. 1990)). In D'Atria, 242 N.J. Super. at 401, the court stated, "[r]econsideration is a matter within the sound discretion of the court, to be exercised in the interest of justice."

Rule 4:49-2 applies only to motions to alter or amend final judgments and final orders whereas Rule 4:42-2 applies to all interlocutory orders. Rule 4:42-2 provides that motions to

reconsider interlocutory orders "shall be subject to revision at any time before the entry of final judgment in the sound discretion of the court in the interest of justice." See Lawson, 468 N.J. Super. at 134. Furthermore, a motion for the reconsideration of an interlocutory order "does not require a showing that the challenged order was 'palpably incorrect,' 'irrational,' or based on misapprehension or overlooking of significant material presented on the earlier application." Id. Rather, "[u]ntil entry of final judgment, 'only sound discretion' and the 'interest of justice' guides the trial court." Id. Additionally, the Court has found that "a trial court 'has complete power over its interlocutory orders and may revise them when it would be consonant with the interest of justice to do so.'" Id. (quoting Lombardi v. Masso, 257 N.J. 517, 536 (2011)). Moreover, interlocutory rulings are "not considered 'law of the case' and are 'always subject to reconsideration up until final judgment is entered.'" Id. (citing Lombardi, 207 N.J. at 539).

Analysis

Because the court's order granting Defendant's motion to dismiss was a final order, the motion for reconsideration will be considered pursuant to Rule 4:49-2.

The court recognizes that in order to state a claim under Daniel's Law, a plaintiff must plead facts showing that at some time more than "10 business days following the receipt" of a notification to stop, the defendant nevertheless "disclose[d] or re-disclose[d] on the Internet or otherwise ma[d]e available, the home address or unpublished home telephone number of any covered person." N.J.S.A. 56:8-166.1(a)(1). Accordingly, a defendant violates Daniel's Law if it discloses a "home address or unpublished home telephone number." Id.

The court also recognizes that the applicable standard for a motion to dismiss requires the court to "assume the facts as asserted by Plaintiff are true and give her the benefit of all inferences that may be drawn in her favor." Velantzas v. Colgate-Palmolive Co., 109 N.J. 189, 192 (1988); Printing Mart-Morristown v. Sharp Elecs. Corp., 116 N.J. 746, 772 (1989).

Keeping this standard in mind, this court acknowledges that its decision to grant Defendant's motion to dismiss was based upon incorrect reasoning. Cummings, 295 N.J. Super. 374 at 384. Specifically, when rendering its decision the court stated, "... it is evident that both Telnyx's opening and reply briefs repeatedly establish (with factual declarations) that its Number Lookup tool does not return home addresses or unpublished home telephone numbers. It only returns Caller ID information (name and carrier) for a phone number, and even the Plaintiffs do

not point to evidence or allegations that Telnyx provides home addresses in this or any other product." The court mistakenly relied on Defendant's proffered evidence and ignored the factual allegations in the complaint. In fact, this court called Plaintiff's allegations "speculative." The court erred because it did not keep the Printing Mart standard in mind when rendering its decision since it did not take the factual allegations in the complaint as true. Daniel's Law merely requires Plaintiff to "plead facts showing that at some time more than "10 business days following the receipt" of a notification to stop, the defendant nevertheless "disclose[d] or re-disclose[d] on the Internet or otherwise ma[d]e available, the home address or unpublished home telephone number of any covered person." N.J.S.A. 56:8-166.1(a)(1)). Plaintiff's complaint indeed pleads these facts. See Plaintiff's complaint, ¶¶ 38-39; 44-47; 51-54. The court was required to take Plaintiff's facts as true but instead called them speculative and relied on Defendant's factual assertions in granting the motion to dismiss. By going beyond the pleadings and not treating the factual allegations in the complaint as true, the court erred in granting Defendant's motion to dismiss. Therefore, the court's reasoning was incorrect, and therefore its decision must therefore be reversed. Cummings, 295 N.J. Super. 374 at 384.

As such, Plaintiff's motion for reconsideration is GRANTED.

EXHIBIT F

Buynie v. Airco, Inc.

Superior Court of New Jersey, Appellate Division

April 25, 2007, Argued; August 10, 2007, Decided

DOCKET NO. A-3193-05T1

Reporter
2007 N.J. Super. Unpub. LEXIS 2476 *; 2007 WL 2275013

STEPHEN BUYNIE, PETER MARTORANA, MELVIN BANAS, NICHOLAS LEWIS, JR., MIKE RAPAVI and JOE GENARDI, Plaintiffs-Appellants, vs. AIRCO, INC.; AIR PRODUCTS AND CHEMICALS, INC.; ALLSTATE INSURANCE COMPANY; HONEYWELL SSEC and as successor to ALLIEDSIGNAL, INC.; THE AMERICAN CHEMISTRY COUNCIL, f/k/a THE CHEMICAL MANUFACTURERS ASSOCIATION and the MANUFACTURING CHEMISTS ASSOCIATION; B.F. GOODRICH COMPANY; BORDEN CHEMICAL, INC.; BRIDGESTONE/FIRESTONE, INC., individually and as successor in interest to THE FIRESTONE TIRE & RUBBER COMPANY and FIRESTONE PLASTICS COMPANY, a division of THE FIRESTONE TIRE & RUBBER COMPANY; CHEVRON U.S.A., INC., as successor to GULF OIL COMPANY; CONDEA VISTA COMPANY; CONOCO, INC., individually and as successor in interest to the CONTINENTAL OIL COMPANY and THOMPSON-APEX COMPANY and CONOCO CHEMICALS; THE DOW CHEMICAL COMPANY, in its own right and as successor to UNION CARBIDE CORP.; ETHYL CORPORATION, a corporation organized and existing under and by virtue of the laws of the State of Virginia; GENCORP, individually and as successor in interest to GENERAL TIRE AND RUBBER COMPANY; POLYONE CORPORATION, f/k/a THE GEON COMPANY; GEORGIA GULF CORPORATION; THE GOODYEAR TIRE AND RUBBER COMPANY; GULF OIL CORPORATION; MONSANTO COMPANY; NEW JERSEY MANUFACTURERS INSURANCE CO.; OCCIDENTAL CHEMICAL CORPORATION, a Corporation organized and existing under and by virtue of the laws of the State of New York, individually and as successor in interest to OCCIDENTAL ELECTROCHEMICALS CORPORATION, HOOKER CHEMICALS & PLASTICS CORPORATION, HOOKER CHEMICAL CORPORATION, DIAMOND SHAMROCK CHEMICALS COMPANY, DIAMOND CHEMICALS COMPANY, DIAMOND SHAMROCK CORPORATION, and DIAMOND ALKALI COMPANY; OCCIDENTAL ELECTROCHEMICALS CORPORATION; OLIN CORPORATION; PANTASOTE, INC.; PPG INDUSTRIES, INC.; RHONE-POULENC, INC., individually and as successor-in-interest to STAUFFER CHEMICAL COMPANY; SHELL OIL COMPANY; SHINTECH INC.; LIBERTY MUTUAL CORPORATION; THE SOCIETY OF THE PLASTICS INDUSTRY, INC.; TENNECO INC.; PACTIV CORPORATION; EPEC POLYMERS, INC., as successor to TENNECO OIL COMPANY; SENTRY INSURANCE COMPANY; UNION CARBIDE CORPORATION; UNIROYAL, INC., individually and as successor in interest to U.S. RUBBER COMPANY; WHITTAKER CORPORATION, as successor to GREAT AMERICAN CHEMICAL CORPORATION; and ZENECA, INC., f/k/a ICI AMERICAS, INC., a corporation organized and existing under and by virtue of the laws of the State of Delaware, Defendants-Respondents.

Notice: NOT FOR PUBLICATION WITHOUT THE APPROVAL OF THE APPELLATE DIVISION.

PLEASE CONSULT NEW JERSEY RULE 1:36-3 FOR CITATION OF UNPUBLISHED OPINIONS.

Prior History: **[*1]** On appeal from the Superior Court of New Jersey, Law Division, Essex County, L-5502-03.

Core Terms

exposure, vinyl chloride, medical monitoring, disease, class certification, cohesiveness, liver, expose, certificate, workers' compensation, punitive damages, class action, proposed class, surveillance, screen, class member, occupational, cancer, occupational exposure, medical history, manufacture, chemical, punitive, conceal, detect, user, injunctive relief, requisite, asbestos, enhance

Counsel: Mark R. Cuker argued the cause for appellants (Williams Cuker Berezofsky, attorneys; Mr. Cuker, of counsel and on the brief).

W. Ray Persons (King & Spalding) of the Georgia bar, admitted pro hac vice, argued the cause for all respondents (Lowenstein Sandler, and Mr. Persons, attorneys for respondents, American Chemistry Council, The Dow Chemical Co., B.F. Goodrich Corp. f/k/a The B.F. Goodrich Co., PPG Industries, Inc., Shell Oil Co., Union Carbide Corp., Uniroyal, Inc. and Zeneca, Inc. f/k/a ICI Americas Inc., and Liaison Counsel for remaining respondents; David W. Field and Priya R. Masilamani, of counsel and on the joint brief).

Patton Boggs, attorneys for respondents, Pharmacia Corporation f/k/a Monsanto Company, Shintech Incorporated and The Goodyear Tire & Rubber Company, and Liaison Counsel for remaining respondents (Christopher M. DiMuro, of counsel and on the joint brief).

Riker **[*2]** Danzig Scherer Hyland Perretti, attorneys for respondents, Occidental Chemical Corporation, Bridgestone/Firestone, Inc. and Georgia Gulf Corporation (Kelly S. Crawford, on the letter joining in brief of Liaison Counsel).

Graham Curtin, attorneys for respondents, Honeywell International, Inc. f/k/a Allied Signal, Inc. (Robert W. Mauriello, Jr., on the letter joining in brief of Liaison Counsel).

Connell Foley, attorneys for respondents, Hexion Specialty Chemicals, Inc. f/k/a Borden Chemicals, Inc. (Timothy E. Corriston, on the letter joining in brief of Liaison Counsel).

McLaughlin & Cooper, attorneys for respondents, Pactiv Corporation, Tenneco Automotive, Inc. and Epec Polymers, Inc. (Michael E. Downey, on the letter joining in brief of Liaison Counsel).

Morgan, Lewis & Bockius, attorneys for respondent, Rhone-Poulenc Inc. (n/k/a Bayer CropScience, Inc.) as corporate successor by merger to Stauffer Chemical Company (Glen R. Stuart, on the letter joining in brief of Liaison Counsel).

Judges: Before Judges Cuff, Fuentes and Baxter.

Opinion

PER CURIAM

Plaintiffs seek establishment of a fund for the creation of a medical monitoring program to detect occupational diseases, including a rare form of liver cancer, **[*3]** caused by exposure to vinyl chloride during their employment at Pantasote, Inc. in Passaic. Plaintiffs commenced suit against their former employer, Pantasote, a host of suppliers of vinyl chloride, and workers' compensation carriers. Plaintiffs contend that defendants knew of the danger posed by vinyl chloride to workers at the Pantasote facility and conspired to fraudulently conceal the risks of exposure. They appeal from an order denying their motion for class certification and transferring the matter to the Division of Workers' Compensation. We affirm the order denying class certification because the proposed class lacks the cohesiveness required for class certification. We reverse the order transferring the case to the Division of Workers' Compensation except the claim for medical monitoring from occupational exposure to vinyl chloride against their employer and remand for further proceedings.

Pantasote operated a facility in Passaic where it manufactured poly vinyl chloride (PVC) products, including PVC resins, vinyl film and sheeting, plasticized compounds and thermoformed products. It began using poly vinyl in various processes in 1956. Poly vinyl film and sheeting were sold **[*4]** for use in a wide variety of products, including household accessories, wall coverings, apparel, and watertight liners. Pantasote manufactured "panta-packs" or rigid packing trays and sold this packing material to fruit packers and other food distributors. Pantasote used vinyl chloride monomer (VCM) from 1956 to 1984, when the Pantasote facility was sold.

An April 1992 Environmental Protection Agency document describes the hazards of VCM. It is described as "a colorless gas with a mild sweet odor" and possessing an "odor threshold" of "3,000 ppm [parts per million]." Occupational exposure "may occur in those workers concerned with the production, use, transport, storage, and disposal of the chemical." It "can be detected in urine and body tissues, but the tests are not reliable indicators of total exposure."

Under the heading "Health Hazard Information," the document reported that the acute effects of high levels of vinyl chloride exposure to humans through inhalation include "dizziness, drowsiness, headaches, and giddiness." Exposure to extremely high levels "has caused loss of consciousness, lung and kidney irritation, and inhibition of blood clotting in humans and cardiac arrhythmias **[*5]** in animals." Listed among non-cancerous chronic effects in "[a] small percentage of individuals occupationally exposed to high levels of vinyl chloride in air" is the development of

a set of symptoms termed "vinyl chloride disease," which is characterized by Raynaud's phenomenon (fingers blanch and numbness and discomfort are experienced upon exposure to the cold), changes in the bones at the end of the fingers, [1] joint and muscle pain, and scleroderma-like skin changes (thickening of the skin, decreased elasticity and slight edema).

As for cancer risks, "[i]nhaled vinyl chloride has been shown to increase the risk of a rare form of liver cancer (angiosarcoma of the liver) in humans." It has been classified by the Environmental Protection Agency (EPA) "as a Group A, human carcinogen."

According to a report submitted by Doctor Philip Cole, one of defendants' experts, "VCM first was recognized as a human carcinogen in early 1974 as a result of the report of cases of [angiosarcoma of the liver] among employees at a manufacturing facility in Louisville, Kentucky." The Occupational Safety and Health Administration (OSHA) regulations adopted in 1975 established **[*6]** a permissible exposure limit to vinyl chloride as one ppm averaged over an eight-hour period. An "action level" was set at "a 0.5 PPM concentration on a time weighted average 8 hour period." In 1975, OSHA "mandated physical examinations and liver function tests of current employees whose exposure to vinyl chloride exceeded 0.5 ppm, time-weighted average, for an eight-hour workday."

Prior to 1974, engineering and safety controls at the Pantasote Passaic facility included: a closed system for PVC polymerization in Plants 1 and 2; blast-proof walls around the reactor areas; a sprinkler or deluge system and ceiling and side-mounted exhaust fans. Ventilation systems and hooded exhausts were also installed in buildings where calendering, compounding and dicing operations took place. After reports surfaced in the mid-1960's linking vinyl chloride exposure to AOL, Pantasote installed a hydraulic reactor washing system in Plant 2. As early as 1964, Pantasote made an effort to restrict access to the reactor areas and tank farms to essential personnel.

On October 17, 1974, a representative from the National Institute of Occupational Safety and Health (NIOSH) visited the Passaic facility. The visit **[*7]** report stated that Pantasote had an active health, safety and sampling program and was interested in cooperating with a NIOSH survey program. Someone from Pantasote expressed a concern that vinyl chloride levels may be higher than the norm.

An August 1975 NIOSH report stated that "the potential for exposure to vinyl chloride is considerably higher at [Pantasote] than for the other poly vinyl chloride [facilities]." This situation seemed to be related to the proximity of a resin plant.

By the mid-1970s, medical surveillance, including hand x-rays, physicals and blood work, were conducted on Plant 1 and Plant 2 employees. Respirators were available. At this time, Pantasote also instituted industrial and engineering processes to reduce VCM exposures and installed an automatic monitoring system. Signs warning of VCM dangers were posted and bags containing resin were marked with warnings.

On June 23, 2003, plaintiffs Stephen Buynie, Peter Martorana, Melvin Banas, Nicholas Lewis, Jr., Mike Rapavi and Joe Genardi filed a third amended complaint in which they alleged that they were the victims of a conspiracy by their employer, various suppliers and manufacturers of vinyl chloride, trade associations **[*8]** and the vinyl chloride industry, as well as Pantasote's former workers' compensation carriers, to downplay the dangers of vinyl chloride. They sought to certify a class of all Pantasote workers, except full-time office workers, who worked at the Passaic facility for at least one year from 1960 to 1974.

Plaintiffs moved for class certification; the group of defendants referred to as the chemical defendants moved to transfer the complaint to the Division of Workers' Compensation. In an opinion dated January 27, 2006, the motion judge denied class certification and granted the motion to transfer the matter to the Division of Workers' Compensation for adjudication of the claims of the six named plaintiffs for medical monitoring arising from their alleged exposure to vinyl chloride during employment.

In his opinion, the judge found that the four prerequisites for class certification contained in *Rule 4:32-1(a)*, i.e., (1) numerosity, (2) common questions of law and fact, (3) typicality of claims and defenses, and (4) adequacy of representation, were met. The judge held, however, that class certification was not warranted under *Rule* 4:32-1(b)(2) (hereafter referred to as (b)(2)), or under *Rule 4:32-1(b)(3)* **[*9]** (hereafter referred to as (b)(3)). He noted that the essence of a (b)(2) class was cohesiveness, which requires homogeneity of the class members' claims in order to maintain class manageability. He also held that a cohesiveness

[1] This is known as acro-osteolysis (AOL).

analysis is more rigorous than the initial commonality inquiry. The judge then found that the proposed class was not cohesive because the required relief of medical monitoring requires an examination of each class member's exposure history. Moreover, the passage of time between commencement and cessation of exposure raised a question about the risk of any disease process becoming manifest. Finally, the defendants are discrete entities accused of discrete misconduct with disparate claims to justify relief.

The judge also held that the class was not amenable to certification under (b)(3). He cited an overwhelming number of individual issues, legal claims and defenses.

I

Here, the judge found, and defendants concede, that the proposed class satisfies the first tier of requirements for certification of a class action: numerosity, commonality, typicality, and adequacy of representation. R. 4:32-1(a). The issue in this appeal is whether plaintiffs satisfied the requirements **[*10]** of Rule 4:32-1(b)(2). They do not challenge the denial of class certification for medical monitoring pursuant to Rule 4:32-1(b)(3); they do contend, however, that they satisfied the criteria for certification of their punitive damage claim pursuant to Rule 4:32-1(b)(3).

On appeal, plaintiffs claim that the judge applied improper standards in his ruling. They also assert that the judge decided disputed issues of fact, including accepting and rejecting expert opinions proffered by the opposing parties.

"The class action is an 'exception to the usual rule that litigation is conducted by and on behalf of the individual named parties only.'" *Iliadis v. Wal-Mart Stores, Inc., 191 N.J. 88, 103, 922 A.2d 710 (2007)* (quoting *Califano v. Yamasaki, 442 U.S. 682, 700-01, 99 S. Ct. 2545, 2558, 61 L. Ed. 2d 176, 193 (1979)*. *Rule 4:32-1* governs class actions in this State. Although the class action device is considered an exception to the manner in which litigation is prosecuted, the rule is liberally construed. *Ibid.* Such an approach furthers the purpose of a class action and reflects its equitable origin as a means to adjudicate claims where the number of those interested is go great. *Ibid.*

Rule 4:32-1(b)(2) provides:

> (b) **[*11]** Class Actions Maintainable. An action may be maintained as a class action if the prerequisites of paragraph (a) are satisfied, and in addition:
> . . . .
> (2) the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole; . . . .

The plaintiff bears the burden of establishing class status. *Iliadis, supra, 191 N.J. at 106*. A court asked to certify a class must undertake a "rigorous analysis" to determine if the party seeking class certification meets the requirements of the rule. *Id. at 106-07* (citing *Carroll v. Cellco P'ship, 313 N.J. Super. 488, 494-95, 713 A.2d 509 (App. Div. 1998)*; *Goasdone v. Am. Cyanamid Corp., 354 N.J. Super. 519, 527, 808 A.2d 159 (Law Div. 2002)*. In *Iliadis*, Justice Zazzali explained:

> That scrutiny requires courts to look "beyond the pleadings [to] . . . understand the claims, defenses, relevant facts, and applicable substantive law." [*Carroll, supra, 313 N.J. Super. at 495*.] Although class certification does not occasion an examination of the dispute's merits, *Olive v. Graceland Sales Corp., 61 N.J. 182, 189, 293 A.2d 658 (1972)*; *see also Castano v. Am. Tobacco Co., 84 F. 3d 734, 744 (5th Cir. 1996)* **[*12]** (noting "unremarkable proposition that the strength of a plaintiff's claim should not affect the certification decision"), a cursory review of the pleadings is nonetheless insufficient.
>
> [*Iliadis, supra, 191 N.J. at 107*.]

In other words, a court considering a request for class certification must pierce the pleadings. *Ibid.*

A party who invokes *Rule 4:32-1(b)(2)* for class certification must be seeking declaratory or injunctive relief and the defendant(s) must have acted or refused to act on grounds generally applicable to the class. This latter requirement is generally referred to as the need for cohesiveness. *Amchem. Prods., Inc. v. Windsor, 521 U.S. 591, 624, 117 S. Ct. 2231, 2250, 138 L. Ed. 2d 689, 713 (1997)*; *Barnes v. Am. Tobacco Co., 161 F. 3d 127, 142-43 (3d Cir. 1998)*; *Goasdone, supra, 354 N.J. Super. at 531*. Thus, we examine whether the remedy sought is in the nature of injunctive relief and then whether the proposed class is cohesive enough to allow class certification.

In their complaint, plaintiffs seek a court-administered fund to implement a medical monitoring regime to screen plaintiffs and other Pantasote employees for

illnesses and conditions associated with vinyl chloride exposure. **[*13]** Other courts that have examined the amenability of class action certification for claims that seek medical monitoring or surveillance distinguish between a monetary award to defray the costs of periodic medical examinations and an order establishing a court-administered fund to defray these expenses. Barnes, supra, 161 F. 3d at 138-39; Goasdone, supra, 354 N.J. Super. at 532-33. The former is considered an award of compensatory damages; the latter an award of injunctive relief. Only the latter is amenable to class certification pursuant to Rule 4:32-1(b)(2).

Here, as in Goasdone, plaintiffs seek a court supervised medical monitoring program for all members of the class to screen for certain conditions and disease processes associated with exposure to vinyl chloride. This is the only relief they seek. It is not ancillary to a request for compensatory damages. Accordingly, the remedy sought is in the nature of injunctive relief and meets the requirements for certification of a class pursuant to (b)(2). Ayers v. Twp. of Jackson, 106 N.J. 557, 608-09, 525 A.2d 287 (1987); Goasdone, supra, 354 N.J. Super. at 533.

Certification pursuant to Rule 4:32-1(b)(2) also requires that the class be cohesive. In fact, **[*14]** the need for cohesiveness is enhanced for a (b)(2) because individual class members have no ability to opt out of the class. Barnes, supra, 161 F. 3d at 142-43.

Amchem and Barnes provide guidance on the cohesiveness criteria for certification of a class. In *Amchem*, the Supreme Court addressed class certification of a Fed. R. Civ. P. 23(b)(3) class in the context of review of an order decertifying a settlement class exposed to asbestos. Amchem, supra, 521 U.S. at 597, 117 S. Ct. at 2237, 138 L. Ed. 2d at 697. The class included potentially hundreds of thousands, if not millions of people and their families, who had been exposed to asbestos products manufactured by defendants and who had not been parties to any prior litigation. The Court emphasized that predominance and superiority are the paramount criteria in consideration of a proposed (b)(3) class and that cohesiveness is a prominent feature of the predominance criterion. Id. at 615-16, 117 S. Ct. at 2246, 138 L. Ed. 2d at 708. The Court then remarked that cohesiveness cannot be obtained when there are a greater number of questions peculiar to individual class members and those disparate questions, such as individual medical history, **[*15]** may be of legal significance. Id. at 624, 117 S. Ct. at 2250, 138 L. Ed. 2d at 713.

The Court proceeded to identify the factors that undermined class cohesion in that case. Those factors included exposure to different asbestos-containing products, exposure for different amounts of time and in different ways and over different periods of time. *Ibid.* Other factors cited by the Court included the highly disparate consequences of exposure ranging from no injury to asymptomatic conditions to disabling and life-threatening disease processes. Finally, the Court identified the different history of cigarette use of each class member as a significant issue due to its impact on causation of any asbestos-related disease, and the different medical expenses incurred based on individual medical history and need for treatment. *Ibid.*

Soon thereafter, in *Barnes*, the Court of Appeals for the Third Circuit considered whether a medical monitoring class should be certified under Fed. R. Civ. P. 23(b)(2). Barnes, supra, 161 F. 3d at 130. The proposed class consisted of cigarette smokers who filed suit against various tobacco companies. Id. at 130-31. The court held that the District Court properly decertified **[*16]** a class because the proposed class lacked the requisite cohesion required by the rule. Id. at 143. It also recognized that the discussion of cohesiveness in *Amchem* was equally, if not more, applicable to consideration of a (b)(2) class. Id. at 142-43.

Ultimately, the court concluded "that addiction, causation, the defenses of comparative and contributory negligence, the need for medical monitoring and the statute of limitations present too many individual issues to permit certification." Id. at 143. In reaching this conclusion, the court emphasized that state law required that each class member must prove that the monitoring program is different than that normally recommended in the absence of exposure and to do that requires consideration of many facts and circumstances unique to each person. Id. at 146.

Following *Amchem* and *Barnes*, Judge Chambers declined to certify a class of tobacco users who sought creation of court administered fund for a medical monitoring program to screen for bladder cancer. Goasdone, supra, 354 N.J. Super. at 533. Judge Chambers found that the requisite cohesiveness could not be met because "[r]esolution of this case will require the fact finder to resolve **[*17]** a number of individual issues concerning the significance and extent of exposure by each class member to defendants' products, and whether medical monitoring is reasonable and necessary for each class member based on the class member's unique medical history . . . ." Id. at 537.

Defendants urge that the facts of this appeal are markedly similar to the asbestos exposed plaintiffs in *Amchem* and the tobacco users in *Barnes* and *Goasdone* and this similarity requires affirmance. In certain significant respects, however, the tobacco user plaintiffs in *Barnes* and *Goasdone* are different from the occupationally exposed plaintiffs in *Amchem* and in this case. The foremost difference is that the initial use of tobacco is a voluntary act. The next significant difference is that continued use of the product normally leads to addiction. By contrast, occupational exposure to toxic substances cannot fairly be considered a voluntary act. Nevertheless, as in *Amchem*, the exposure history and the personal habits that bear on causation vary so markedly within the class that the proposed class lacks the requisite cohesion to allow the matter to proceed as a class.

The absence of the requisite cohesion is manifest **[*18]** when we examine the nature of the remedy sought by plaintiffs. This State has long recognized a claim for medical surveillance expenses based on an enhanced risk of harm due to exposure to toxic substances. *Ayers, supra, 106 N.J. at 603-04, 606*. The essence of the claim is to "recover the cost of periodic medical examinations intended to monitor plaintiffs' health and facilitate early diagnosis and treatment of disease." *Id. at 599*. In recognizing this claim, the Court remarked that such a claim was entirely consistent with the public interest. *Id. at 604*.

Whether medical intervention in the form of a medical surveillance program is reasonable depends on several factors, including the likelihood of disease, the significance and extent of exposure to a toxic substance, the toxicity of the substance, the seriousness of the diseases associated with exposure to the substances, and the value of early diagnosis. *Id. at 606*. In short, medical monitoring is appropriate

> where the proofs demonstrate through reliable expert testimony predicated upon the significance and extent of exposure to chemicals, the toxicity of the chemicals, the seriousness of the diseases for which individuals are at risk, **[*19]** the relative increase in the chance of onset of disease in those exposed, and the value of early diagnosis, that such surveillance to monitor the effect of exposure to toxic chemicals is reasonable and necessary.
>
> [*Ibid.*]

Later, in *Theer v. Philip Carey Co., 133 N.J. 610, 627, 628 A.2d 724 (1993)*, the Court noted that the costs of medical surveillance is designed to address "the unique harm entailed in an increased risk of future injury arising from the exposure to toxic chemicals." A plaintiff must show that the exposure caused "a distinctive increased risk of future injury" and requires a course of medical surveillance independent of the ordinary regimen of protective screens and tests. *Ibid.* To be sure, medical monitoring programs can be devised when multiple people are exposed to similar toxic substances. *Ayers* illustrates that an effective program can be devised. Notably, however, in *Ayers*, the plaintiffs assembled the requisite evidence to meet their burden of proof. *Ayers, supra, 106 N.J. at 606-07*. Here, even after extensive discovery, plaintiffs have not been able to demonstrate that the relief they seek can be fashioned to meet the needs of the purported class.

In support of class certification, **[*20]** plaintiffs rely on the report of Dr. James Melius, who opined that the proposed class had been exposed to significant concentrations of vinyl chloride, that vinyl chloride is a known potent carcinogen, and that a medical monitoring program "directed at the health consequences of exposure to vinyl chloride monomer" is in order. Melius described the program as follows:

> The standard requires that each worker be provided with a general medical examination focusing on signs and symptoms of adverse health effects caused by vinyl chloride and specific laboratory tests to evaluate liver abnormalities . . . . These medical requirements do not differentiate the required medical surveillance based on individual medical history although that information can inform the interpretation of the test results and subsequent follow-up.

At his deposition, Dr. Melius testified that he had not been asked to devise a medical monitoring program for this class of Pantasote workers. He acknowledged that a program would likely resemble in some respects an ordinary annual physical exam. He also acknowledged that there was no known screening test for early detection of brain cancer. He would include liver function **[*21]** studies to screen for angiosarcoma of the liver but acknowledged that liver function studies are not unique to this condition or to exposure to vinyl chloride.

Dr. Michael Hodgson opined that a medical monitoring program should include "disease detection strategies," and "elements to address viral disease prevention, obesity and weight reduction, and alcohol use." At his deposition, he stated that the medical monitoring

program would include an occupational medical history, a physical examination, blood tests and urinalysis and liver injury tests. He also acknowledged that vinyl chloride disease occurs only during active exposure and that he would not expect to discover any cases of occupational acroosteolysis at this time. As to this issue, he agrees with defendants' expert, Dr. James Seebold, who testified that vinyl chloride disease is an acute reaction to vinyl chloride exposure and remits on cessation of exposure. He also acknowledged that the mortality rate for brain cancer is very high; therefore, early detection is not likely to alter the outcome. Furthermore, there is no way to screen for a soft-tissue sarcoma, such as angiosarcoma, except through general questions about weight **[*22]** loss.

Plaintiffs contend that this inquiry into the effectiveness of a medical monitoring program goes beyond the required rigorous analysis. Several recent cases, however, have considered the lack of effective medical monitoring programs as impediments to class certification.

In *In re: Prempro Products Liability Litigation, 230 F.R.D. 555, 556-58 (E.D. Ark. 2005)*, plaintiffs, consumers of estrogen drugs, sought (b)(2) certification for a medical monitoring class comprised of breast cancer and dementia subclasses in their suit against a pharmaceutical manufacturer. In denying the motion, the judge commented at length about the proposed medical monitoring plan. He emphasized that the program differed only slightly from normal recommended examinations and that certain conditions that created an enhanced risk of harm subsided on discontinuation of use of the product. *Id. at 571*.

Similarly, the court in *In re: Baycol Products Litigation, 218 F.R.D. 197, 212 (D. Minn. 2003)*, in denying a class certification motion noted the absence of a defined protocol of medical monitoring for users of the subject drug. Finally, in *Wyeth, Inc. v. Gottlieb, 930 So. 2d 635 (Fla. Dist. Ct. App. 2006)*, *review* ***[*23]*** *denied*, *950 So. 2d 413 (Fla. 2007)*, the court stated that "neither the FDA, nor any other medical organization, has recommended or developed a medical monitoring program for current or former Prempro users." *Id. at 642*. Thus, the court reversed an order certifying a class of Prempro users. *Id. at 643*.

Plaintiffs also seek medical monitoring due to the enhanced risk of liver damage associated with vinyl chloride exposure. The record demonstrates, however, that this risk is not confined solely to plaintiffs' occupational exposure and that personal habits, such as alcohol use, and personal medical history, such as a history of hepatitis, enhance the risk of liver damage. These facts raise not only individual causation issues, but also demonstrate that a separate screening program to detect liver injury is not required.

II

Plaintiffs, citing *Strawn v. Canuso, 140 N.J. 43, 657 A.2d 420 (1995)*, contend that the judge erred by not certifying a (b)(3) punitive damages class. We disagree.

The *Baycol* court specifically determined that "individual issues of fact and law predominate with respect to punitive damages:"

> To succeed on a punitive damages claim, a plaintiff must prove that the defendant's conduct toward **[*24]** him/her rises to the level required by law. . . . [A] determination of punitive damages is based on individual issues.
>
> The Supreme Court's decision in *State Farm Mutual Automobile Insurance Company v. Campbell, 538 U.S. 408, 155 L. Ed. 2d 585, 123 S. Ct. 1513 (2003)* further illustrates this point. First, the Court reiterated that the reasonableness of a punitive damages award must be based, in part, on the "disparity between the actual or potential harm suffered by the plaintiff and the punitive damages award". *Id. at 1520*. Another factor relevant to the reasonableness of a punitive damages award is "the degree of reprehensibility of the defendant's misconduct." *Id.* With respect to this factor, the Court held that a punitive damages verdict cannot be based on conduct that bore no relation to the plaintiff's harm. *Id. at 1523*. "A defendant should be punished for the conduct that harmed the plaintiff, not for being an unsavory individual or business. Due process does not permit courts, in the calculation of punitive damages, to adjudicate the merits of other parties' hypothetical claims against a defendant under the guise of the reprehensibility analysis. . . .". *Id.*
>
> [*Baycol, supra, 218 F.R.D. at 215*.]

In **[*25]** *Strawn*, the Court did not certify a punitive damages class and commented that "[t]he trial court may have to consider whether class members, as a condition to pursuing the matter as a class action, should agree on a method for allocation of compensatory and punitive damages, although it will be

difficult to ground punitive damages on an unintentional failure to disclose information." *Strawn, supra, 140 N.J. at 68*. Accordingly, the motion judge did not abuse his discretion to deny class certification for the punitive damage claim.

III

Finally, plaintiffs contend that the court erred in transferring their medical monitoring claim to the Division of Workers' Compensation (Division). They protest that this transfer cut off their statutory rights under the Workers' Compensation Act to pursue third-party claims.

In his ruling on defendants' cross-motion to transfer the case to the Division, the judge observed that Buynie had filed a claim "alleging pulmonary and internal injuries resulting from occupational exposure" at Pantasote and that other plaintiffs had also filed claims "for other miscellaneous injuries suffered during the course of their respective employments." The judge held that **[*26]** the Compensation Act recognizes occupational "exposure--illnesses" as compensable and medical monitoring as a remedy. The judge ruled that the Division is the preferred forum for dealing with medical monitoring because it was "granted exclusive original jurisdiction for any claim for compensation as a result of an injury, occupational disease or exposure . . . [arising] out of and during the course of . . . employment" and was "the exclusive and superior mechanism for the resolution and provision of the [medical monitoring] remedy . . . sought . . . by the . . . individual plaintiffs."

The judge acknowledged that plaintiffs also asserted a products liability claim against third parties but found that claim did not bar transfer because the Division had the authority to require medical monitoring. He also observed that while plaintiffs might face statute of limitations issues before the Division, such would not bar a transfer of this case, because plaintiffs were susceptible to the same defense in court proceedings.

Other than their "claim" for punitive damages, plaintiffs only sought medical monitoring to be funded by defendants including, among others, Pantasote, their former employer, **[*27]** and defendants which allegedly supplied VCM to Pantasote. Plaintiffs espouse no other claim.

The fact that plaintiffs asserted a claim against their former employer does not require transfer. Under certain circumstances an employee may maintain a common law action against his or her employer. As the Supreme Court recently noted in *Charles Beseler Company v. O'Gorman & Young, Inc., 188 N.J. 542, 546-47, 911 A.2d 47 (2006)*:

> We have described the workers' compensation system "as an historic 'trade-off' whereby employees relinquish their right to pursue common-law remedies in exchange for prompt and automatic entitlement to benefits for work-related injuries." *Laidlow v. Hariton Mach. Co., Inc., 170 N.J. 602, 605, 790 A.2d 884 (2002)* (citing *Millison v. E.I. du Pont de Nemours & Co., 101 N.J. 161, 174, 501 A.2d 505 (1985)*); *see also N.J.S.A. 34:15-7 to -8*. That system, however, is not without exception. When a worker's injuries have been caused by an employer's "intentional wrong," that "intentional wrong" voids the "trade-off" and the employee may seek both workers' compensation benefits and common-law remedies. *N.J.S.A. 34:15-8*.
>
> The test for "intentional wrong" has evolved. In *Millison, supra*, we defined "intentional wrong" as **[*28]** an action, committed with deliberate intent, that had a "substantial certainty" of causing injury. *101 N.J. at 178-79*. In *Laidlow, supra*, we clarified that an "intentional wrong" included "actions taken with a subjective desire to harm" as well as "instances where an employer knows that the consequences of those acts are substantially certain to result in such harm." *170 N.J. at 613* (citing W. Prosser and W. Keeton, *The Law of Torts* § 80 at 569 (5th ed. 1984)).

In *Millison*, the Supreme Court considered whether *N.J.S.A. 34:15-8* "precludes employees who have suffered occupational disease from maintaining a separate tort action against their employer and against company physicians" based on charges that "the employer and physicians . . . intentionally expos[ed] the employees to asbestos in the workplace, deliberately conceal[ed] from employees the risks of exposure to asbestos, and fraudulently conceal[ed] specific medical information obtained during employee physical examinations that reveal[ed] diseases already contracted by workmen." *Millison, supra, 101 N.J. at 165*.

The Supreme Court held:

> These allegations go well beyond failing to warn of potentially-dangerous conditions or intentionally **[*29]** exposing workers to the risks of disease. There is a difference between, on the one hand,

> tolerating in the workplace conditions that will result in a certain number of injuries or illnesses, and, on the other, actively misleading the employees who have already fallen victim to those risks of the workplace. An employer's fraudulent concealment of diseases already developed is not one of the risks an employee should have to assume. Such intentionally-deceitful action goes beyond the bargain struck by the Compensation Act. But for defendants' corporate strategy of concealing diseases discovered in company physical examinations, plaintiffs would have minimized the dangers to their health. Instead, plaintiffs were deceived -- or so they charge -- by corporate doctors who held themselves out as acting in plaintiffs' best interests. The legislature, in passing the Compensation Act, could not have intended to insulate such conduct from tort liability. We therefore conclude that plaintiffs' allegations that defendants fraudulently concealed knowledge of already-contracted diseases are sufficient to state a cause of action for aggravation of plaintiffs' illnesses, as distinct from any claim **[*30]** for the existence of the initial disease, which is cognizable only under the Compensation Act.
>
> [*Id. at 182*.]

Moreover, an injured employee may maintain an action against a third person. Thus, *N.J.S.A. 34:15-40* provides in part:

> Where a third person is liable to the employee or his dependents for an injury or death, the existence of a right of compensation from the employer or insurance carrier under this statute shall not operate as a bar to the action of the employee or his dependents, nor be regarded as establishing a measure of damage therein.

"The employee . . . is guaranteed recovery for his common-law damages against contributing third-party tortfeasors or for his compensation award, whichever is greater, but he may not duplicate these recoveries." *Schweizer v. Elox Div. of Colt Indus., 70 N.J. 280, 287, 359 A.2d 857 (1976)*.

To the extent that plaintiffs' claims against Pantasote fall within the exclusive jurisdiction of the Division, the court did not err in the transfer. While Pantasote is no longer in business, its compensation carriers, in all probability, remain viable entities. On the other hand, plaintiffs charged Pantasote with intentional acts including: 1) the willful and deliberate exposure **[*31]** of employees "to the extreme dangers of vinyl chloride" while knowing that such exposure "was substantially certain to result in injury to its workers;" 2) the deliberate and systematic deception of its workers "into believing that working conditions were reasonably safe and that the levels of vinyl chloride to which they were not [sic] exposed [were] likely to cause injury," and 3) participation in a wide-spread "cover-up" conspiracy.

To the extent plaintiffs have viable common law claims against Pantasote, those claims should be determined by the trial court in the first instance and those claims should not have been transferred to the Division. Furthermore, to the extent that plaintiffs have third-party claims against supplier-defendants, the court erred in transferring those to the Division. The court has jurisdiction over these two categories of claims.

Affirmed in part; reversed and remanded in part.

EXHIBIT G

Terry v. McNeil-PPC, Inc. (In re Tylenol (Acetaminophen) Mktg., Sales Practices, & Prods. Liab. Litig.)

United States District Court for the Eastern District of Pennsylvania

July 26, 2016, Decided; July 26, 2016, Filed

MDL NO. 2436 2:13-md-02436; Civil Action No. 2:12-cv-07263

Reporter
2016 U.S. Dist. LEXIS 97368 *; 2016 WL 3997046

IN RE: TYLENOL (ACETAMINOPHEN) MARKETING, SALES PRACTICES, AND PRODUCTS LIABILITY LITIGATIONRana Terry, as Personal Representative and Administrator of the Estate of Denice Hayes, Deceased, Plaintiff, vs. McNEIL-PPC, Inc., McNeil Consumer Healthcare, and Johnson & Johnson, Inc., Defendants.

Prior History: *In re Tylenol (Acetaminophen) Mktg., Sales Practices & Prods. Liab. Litig., 2014 U.S. Dist. LEXIS 89981 (E.D. Pa., July 1, 2014)*

Core Terms

liver, causation, acetaminophen, methodology, studies, reliable, fasting, scientific, liver disease, epidemiological, drug-induced, malnutrition, clinical, acetaminophen-induced, expert testimony, doses, recommended, animal, grams, gastric, surgery, bypass, case-controlled, defendants', causality, unreliable

Counsel: **[*1]** IN RE (2:13-md-02436-LS): TYLENOL (ACETAMINOPHEN) MARKETING, SALES PRACTICES AND PRODUCTS LIABILITY LITIGATION.

For RANA TERRY, AS PERSONAL REPRESENTATIVE AND ADMINISTRATOR OF THE ESTATE OF DENICE HAYES, DECEASED, Plaintiff (2:12-cv-07263-LS): LAURENCE S. BERMAN, LEAD ATTORNEY, MICHAEL M. WEINKOWITZ, LEVIN, FISHBEIN, SEDRAN & BERMAN, PHILADELPHIA, PA; WILLIAM G. GAINER, LEAD ATTORNEY, PRO HAC VICE, TOLIVER & GAINER, CONYERS, GA; ADAM WEINTRAUB, HERMAN HERMAN & KATZ LLC, NEW ORLEANS, LA.

For MCNEIL-PPC, INC., JOHNSON & JOHNSON, Defendants (2:12-cv-07263-LS): ADAM SPICER, LEAD ATTORNEY, PRO HAC VICE, BUTLER SNOW O'MARA STEVENS & CANNADA PLLC, RIDGELAND, MS; ALYSON B. JONES, CHRISTY D. JONES, LEAD ATTORNEYS, PRO HAC VICE, BUTLER SNOW LLP, RIDGELAND, MS; DAVID F. ABERNETHY, LEAD ATTORNEY, MELISSA A GRAFF, MEREDITH NISSEN REINHARDT, DRINKER BIDDLE & REATH LLP, PHILADELPHIA, PA; MICHAEL B. HEWES, LEAD ATTORNEY, PRO HAC VICE, BUTLER SNOW LLP, GULFPORT, MS; TRAVIS B. SWEARINGEN, BUTLER SNOW LLP, NASHVILLE, TN.

For MCNEIL CONSUMER HEALTHCARE DIVISION OF MCNEIL-PPC, INC., Defendant (2:12-cv-07263-LS): ALYSON B. JONES, LEAD ATTORNEY, PRO HAC VICE, BUTLER SNOW LLP, RIDGELAND, MS; CHRISTY D. JONES, **[*2]** LEAD ATTORNEY, BUTLER SNOW LLP, RIDGELAND, MS.

Judges: HON. LAWRENCE F. STENGEL, J.

Opinion by: LAWRENCE F. STENGEL

Opinion

MEMORANDUM

Stengel, J.

This case is part of a Multidistrict Litigation (MDL) involving claims of liver damage from the use of Tylenol at or just above the recommended dosage.[1] The first "bellwether" case is scheduled for trial.[2] The plaintiff

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[1] See Master Compl., 13-md-2436, Doc. No. 32. There are over two hundred other cases included in this MDL, along with several similar cases in New Jersey state court.

[2] A "bellwether" case is a test case. "Bellwether" trials should produce representative verdicts and settlements. The parties can use these verdicts and settlements to gauge the strength of the common MDL claims to determine if a global resolution

plans to offer Dr. Neil Kaplowitz, M.D. as a general and specific causation expert. Dr. Kaplowitz opines that recommended doses of acetaminophen, the main ingredient in Tylenol, can cause acute liver failure (ALF). He is of the opinion that the decedent, Denice Hayes, died of acetaminophen-induced ALF after taking recommended doses. The defendants move to exclude his testimony under Daubert. For the reasons stated below, I will deny their motion.[3]

I. LEGAL STANDARD

The admissibility of expert testimony is governed by *Federal Rules of Evidence 702* and *703* as well as by *Daubert v. Merrell Dow Pharms., Inc., 509 U.S. 579, 113 S. Ct. 2786, 125 L. Ed. 2d 469 (1993)*, and its progeny.[4] See *In re Paoli RR Yard PCB Litigation (Paoli II), 35 F.3d 717, 735 (3d Cir. 1994)*. "Under the Federal Rules of Evidence, a trial judge acts as a 'gatekeeper' to ensure that 'any and all expert testimony or evidence is not only relevant, but also reliable.'" *Pineda v. Ford Motor Co., 520 F.3d 237, 243 (3d Cir. 2008)*(quoting *Kannankeril v. Terminix Int'l, Inc., 128 F.3d 802, 806 (3d Cir. 1997))*. The Third Circuit recognizes a "liberal policy of admissibility" regarding *Rule 702*. *Pineda, 520 F.3d at 243* (quoting *Kannankeril, 128 F.3d at 806*); *United States v. Schiff, 602 F.3d 152, 173 (3d Cir. 2010)*.[5]

"[B]ecause expert evidence is often more misleading than other evidence, *Rule 403* gives a judge more power over experts than over lay witnesses." *In re Paoli RR Yard PCB Litigation (Paoli II), 35 F.3d 717, 747 (3d Cir. 1994)*. However, "in order for a district court **[*4]** to exclude scientific evidence, there must be something particularly confusing about the scientific evidence at issue—something other than the general complexity of scientific evidence." Id.

a. *Rule 702*

Federal Rule of Evidence 702 has three major requirements: 1) the expert must be qualified; 2) the expert must testify about matters requiring scientific, technical, or specialized knowledge; and 3) the testimony must assist the trier of fact.[6] *Pineda, 520 F.3d at 243* (citing *Kannankeril, 128 F.3d at 806*). *702*'s inquiry should be a "flexible one." *Daubert v. Merrell Dow Pharms., Inc., 509 U.S. 579, 594, 113 S. Ct. 2786, 125 L. Ed. 2d 469 (1993)*.

i. Expert Must Be Qualified

An expert's qualifications may include education, provided it is in a field related to the one in which the expert intends to testify. *Fedor v. Freightliner, Inc., 193 F. Supp. 2d 820, 827 (E.D. Pa. 2002)*. Overall, the court will consider both academic **[*5]** training and practical experience to determine if the expert has "more knowledge than the average lay person" on the subject. *Id. at 827-28* (citing *Waldorf v. Shuta, 142 F.3d 601, 627 (3d Cir. 1998))*. "An expert may be generally qualified but may lack qualifications to testify outside his area of

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of the MDL **[*3]** is possible. See FEDERAL JUDICIAL CENTER, MANUAL FOR COMPLEX LITIGATION, FOURTH EDITION 360 (2004); DUKE LAW CENTER FOR JUDICIAL STUDIES, MDL STANDARDS AND BEST PRACTICES 16-21 (2014).

[3] In making my decision, I have reviewed all of the materials submitted as attachments to the parties' briefs, including those submitted during oral argument.

[4] Daubert held that the Federal Rules of Evidence, specifically *Rule 702*, controlled the issue of when experts were qualified. *Daubert v. Merrell Dow Pharms., Inc., 509 U.S. 579, 587-88, 113 S. Ct. 2786, 125 L. Ed. 2d 469 (1993)*. It found that *Rule 702* superseded the Court's prior precedent on the subject found in *Frye v. United States, 54 App.D.C. 46, 47, 293 F. 1013, 1014 (1923)*. *Daubert, 509 U.S. at 587*. Daubert went on to clarify what was required under *Rule 702*, as compared to Frye. See *id. at 589-598*.

[5] See also ***Holbrook v. Lykes Brothers Steamship Company, Inc., 80 F.3d 777, 780 (3d Cir. 1996)***; *Zaprala v. USI Servs. Group, No. 09-1238, 2013 U.S. Dist. LEXIS 38377, 2013 WL 1148335, at *6 (E.D. Pa. Mar. 20, 2013)*(quoting *Pineda, 520 F.3d at 243*).

[6] *Federal Rule of Evidence 702* states:

A witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise if:

(a) the expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue;

(b) the testimony is based on sufficient facts or data;

(c) the testimony is the product of reliable principles and methods; and

(d) the expert has reliably applied the principles and methods to the facts of the case.

Fed. R. Evid. 702.

expertise." Calhoun v. Yamaha Motor Corp., U.S.A., 350 F.3d 316, 322 (3d Cir. 2003).

However, this does not mean that the "best qualified" expert must testify. "[W]itnesses may be competent to testify as experts even though they may not, in the court's eyes, be the 'best' qualified." *Holbrook v. Lykes Bros. S.S. Co., Inc., 80 F.3d 777, 782 (3d Cir. 1995)*.[7] "Rule 702 and Daubert put their faith in an adversary system designed to expose flawed expertise." U.S. v. Mitchell, 365 F.3d 215, 244-45 (3d Cir. 2004)(citations omitted). "As long as an expert's scientific testimony rests upon 'good grounds, based on what is known,' it should be tested by the adversary process—competing expert testimony and active cross—examination—rather than excluded from jurors' scrutiny for fear that they will not grasp its complexities or satisfactorily weigh its inadequacies." Id. at 244 (citations omitted).

ii. Expert's Methods Must be Reliable

This Circuit interprets the second factor as one of "reliability," i.e., the testimony is admissible so long as the process or technique the expert used in formulating the opinion is reliable. Pineda, 520 F.3d at 244. An expert's opinion need not be correct, only **[*6]** reliable. See In re Paoli RR Yard PCB Litigation (Paoli II), 35 F.3d 717, 744 (3d Cir. 1994)("This does not mean that plaintiffs have to prove their case twice—they do not have to demonstrate to the judge by a preponderance of the evidence that the assessments of their experts are *correct*, they only have to demonstrate by a preponderance of evidence that their opinions are reliable." (emphasis in original)). "[A]n expert is permitted wide latitude to offer opinions, including those that are not based on firsthand knowledge or observation." Daubert, 509 U.S. at 592. "[I]t is the burden of the party offering the expert scientific testimony to demonstrate reliability by a preponderance of the evidence." In re TMI Litig., 193 F.3d 613, 705 (3d Cir. 1999)(citing Paoli II, 35 F.3d at 744).[8]

"Rule 702 grants the district judge the discretionary authority, reviewable for its abuse, to determine reliability in light of the particular facts and circumstances of the particular case." Kumho Tire Co., Ltd. v. Carmichael, 526 U.S. 137, 158, 119 S. Ct. 1167, 143 L. Ed. 2d 238 (1999). Judges considering this factor should look to whether a theory, technique, or opinion can be tested or has been subject to peer review or publication. Daubert, 509 U.S. at 593. "The fact of publication (or lack thereof) **[*7]** in a peer reviewed journal thus will be a relevant, though not dispositive, consideration in assessing the scientific validity of a particular technique or methodology on which an opinion is premised." Id. at 594. A court should also consider the known or potential rate of error involved in a scientific method. Id. "Reliability" does not require that a technique or methodology be generally accepted by a scientific community. Id. See also id. at 597-98. However, "[w]idespread acceptance can be an important factor in ruling particular evidence admissible" while a minimally supported technique "may properly be viewed with skepticism." Id.

iii. Expert Must be Helpful

The third factor "is typically understood in terms of whether there is a sufficient 'fit' between the expert's testimony and the facts that the jury is being asked to consider." United States v. Schiff, 602 F.3d 152, 172-73 (3d Cir. 2010)(citing Daubert, 509 U.S. at 591). See also In re: TMI Litigation, 193 F.3d 613, 670 (3d Cir. 1999). This factor is about relevance. "Expert testimony which does not relate to any issue in the case is not relevant and, ergo, non-helpful." Daubert, 509 U.S. at 591 (quoting 3 Weinstein & Berger ¶ 702[02], p. 702-18). "Rule 702's 'helpfulness' standard requires a valid scientific connection to the pertinent inquiry as a precondition to admissibility." Id. at 591-92.

b. *Rule 703*

Under Federal Rule of Evidence 703, the data underlying the expert's **[*8]** opinion is the central focus. Rule 703 states:

> An expert may base an opinion on facts or data in the case that the expert has been made aware of or personally observed. If experts in the particular field would reasonably rely on those kinds of facts or data in forming an opinion on the subject, they need not be admissible for the opinion to be admitted. But if the facts or data would otherwise be

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[7] See also Keller v. Feasterville Family Health Care, 557 F. Supp. 2d 671, 675 (E.D. Pa. 2008)(Rice, J.).

[8] See also Fed. R. Evid. 702, Advisory Committee Note (2000 Amendments)("Under that Rule, the proponent has the burden of establishing that the pertinent admissibility requirements are met by a preponderance of the evidence." (citing Bourjaily v. United States, 483 U.S. 171, 107 S. Ct. 2775, 97 L. Ed. 2d 144 (1987)).

> inadmissible, the proponent of the opinion may disclose them to the jury only if their probative value in helping the jury evaluate the opinion substantially outweighs their prejudicial effect.

Fed. R. Evid. 703. The trial court must evaluate whether the data used by an expert is reasonably relied upon by experts in the field. See *In re Paoli RR Yard PCB Litigation (Paoli II), 35 F.3d 717, 747-49 (3d Cir. 1994)*.

II. Dr. Kaplowitz is a Leading Expert in Drug-Induced Liver Injury (DILI)[9]

Neil Kaplowitz, M.D. is a gastroenterologist and hepatologist, specializing in drug-induced **[*9]** liver diseases. He is a Professor of Medicine at the Keck University of Southern California (USC) School of Medicine and Chief of the USC School of Medicine Division of Gastrointestinal and Liver Diseases, positions that he has held since 1990. Since 1993, he has also been a Professor of Physiology. He is Director of USC Medical School's Liver Diseases Research Center, which is funded by the National Institute of Diabetes and Digestive and Kidney Diseases (NIDDK). Since 2006, he has been a Professor of Pharmacology and Pharmaceutical Sciences in USC's School of Pharmacy.

Dr. Kaplowitz is a former president for the American Association for the Study of Liver Diseases (AASLD), the leading organization of scientists and healthcare professionals committed to studying, preventing, and curing liver diseases in the United States.[10] He has received several federal grants from the National Institutes of Health (NIH) and NIDDK for the study of liver disease.

Dr. Kaplowitz is a nationally-recognized expert in drug-induced liver disease and acetaminophen-induced liver injury.[11] He has authored over three hundred peer-reviewed research papers, book chapters, editorials, and symposia on the subject of liver disease. His research is specifically focused on drug-induced liver disease, including articles on acetaminophen toxicity in both humans and animals.[12] He is the editor of several textbooks on Liver Diseases, including the leading textbook in the field, called Drug-Induced Liver Disease, currently in its Third Edition.[13]

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[9] Though the defendants do not challenge Dr. Kaplowitz's qualifications, an overview of his credentials is helpful to understanding their challenge to his methodology. Information about Dr. Kaplowitz's credentials can be found in his Curriculum Vitae (Doc. No. 154, Ex. 2) and his expert report (Doc. No. 154, Ex. 15) unless noted otherwise.

[10] See AASLD website, *http://www.aasld.org/about-aasld/our-story* . Defendants' experts agree that this is an accurate description of the organization and its purpose. See R. Brown Dep., Apr. 30, 2015 at 85-88 (Doc. No. 154, Ex. 3); S. Flamm Dep., May 5, 2015 at 43-45 (Doc. No. 154, Ex. **[*10]** 4).

[11] The defense experts agree with this point. See R. Brown Dep., Apr. 30, 2015 at 39, 43 (Doc. No. 154, Ex. 3); S. Flamm Dep., May 5, 2015 at 26 (Doc. No. 154, Ex. 4).

[12] See, e.g., Kaplowitz, N., Direct protection Against Acetaminophen hepatotoxicity by Prropythiorracil: In Vitro Studies in Rats and Mice, J. Clin. Invest., 67: 688-696, 1980; Kaplowitz, N., Innate Immune System Plays a Critical Role for Determining The Progression and Severity of Acetaminophen Toxicity, Gastroenterology, 127:1760-1774, 2004; Kaplowitz, N., "Neutrophil Depletion Protects Against Murine Acetaminophen Toxicity," Hepatology, 43:1220-1230, 2006; Kaplowitz, **[*11]** N., JNK dependent acute Liver Injury for Acetaminophen of TNF Requires Mitochondrial Sab Expression, J. Biol. Chem., 286:35071-8, 2011; Kaplowitz, N., Protein Kinase C (PKC) Participates in Mediates Acetaminophen hepatotoxicity Through JNK Dependent and Independent Signaling pathways, Hepatology, 59: 1543-1554, 2014; Kaplowitz, N., Acetaminophen Hepatotoxicity, In Gastrointestinal Emergencies (Williams & Witkins, Ed.), 279-289, 1991; Kaplowitz, N., Drug Metabolism and hepatoxicity, in Liver and Billiary Diseases (Ed. N. Kaplowitz), Williams & Witkins, 82-97; Kaplowitz N., New Developments in Drug Hepatoxicity, Curr. Opinion Gastroent., 10:313-18, 1994; Kaplowitz, N., Mechanisms of Drug-Induced Liver Disease, Gastroent. Clin. NA, 24:787-810, 1995; Kaplowitz, N., Fulminate Liver Injury from Drugs and Toxins, In Fulminenet Hepatic Failure (R.W. Williams, W Lee) 19-31, 1977; Kaplowitz N., Causality Assessment verses Guilt by Association in Drug Hepatoxicity, Editorial, Hepatology, 33:308-310, 2001; Kaplowitz, N., Drug-Induced Liver Disorders: Implications for Drug Development and Regulation, Drug Safety, 24:483-390, 2001; Kaplowitz N., Drug-Induced Liver Disorders: Introduction and Overview, **[*12]** in Drug-Induced Liver Disease, First ed. (Ends Kaplowitz, N and DeLeve L), M. Decker, 1-13, 2002; Kaplowitz, N., Acetaminophen Hepatotoxicity: What Do We Know, What Don't We Know, and What Do We Do Next?, Hepatology, 2004: 40(1): 23-26 (Doc. No. 154, Ex. 27); Kaplowitz, N., Drug Hepatoxicity, Clinics Liver Disease, 10:207-217, 2006; Kaplowitz, N., How to Protect against Acetaminophen: Don't Ask for Junk, Editorial, Gastroent., 135: 1407-1051, 2008.

[13] Kaplowitz, N., DeLeve, L., Drug-induced Liver Disease, 3rd Ed. (May 14, 2013).

Dr. Kaplowitz has also been hired as a consultant by numerous pharmaceutical companies, including McNeil, to perform drug-induced liver injury (DILI) "causation assessments" for marketed drugs.[14] This causation methodology is explained more below.

III. Dr. Kaplowitz's General Causation Methodology is Reliable

The defendants challenge the reliability of Dr. Kaplowitz's general causation opinion methodology, claiming it is based on improper scientific methods and subjective experience (not reliable **[*13]** scientific data).

Dr. Kaplowitz opines that: 1) acetaminophen-induced liver failure ALF is a serious public health issue and can be life-threatening; 2) acetaminophen has a narrow therapeutic margin of safety; and 3) acetaminophen can cause liver damage at or near 4 grams (the recommended daily dose of acetaminophen at the time of the decedent's death).[15] In rendering his general causation opinions, Dr. Kaplowitz considered the totality of the evidence and weighed the available information about acetaminophen-induced ALF.[16] He relied on his own clinical experience, case reports, FDA documents including an analysis of the FDA's adverse event reports (AERs) database, published clinical studies and case series involving acetaminophen (including a study he co-authored in 2006), and animal studies.[17] His opinion that there is a risk of liver injury at 4 grams is one he has held since 2004, based on his experience and research in this field.[18] For this reason, he instructs his patients in clinical practice to take no more than 2 grams of acetaminophen a day.[19]

a. Lack of Epidemiological and Case-controlled Studies Does Not Render Opinion Unreliable

The defendants argue that Dr. Kaplowitz's general causation opinion is unreliable because he "cannot identify any controlled study showing a statistically-significant increased risk of ALF from recommended doses of acetaminophen reported at the 95% confidence interval" nor any case-control study of this nature.[20] Essentially, the defendants claim his opinion is

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[14] N. Kaplowitz Dep., Apr. 21, 2015 at 310-312 (Doc. No. 154, Ex. 5)(Hayes Deposition); Doc. No. 154, Ex. 1 (under seal)(McNeil CAM assessment with emails between Kaplowitz and Temple).

[15] N. Kaplowitz Expert Report, May 5, 2014 at 9-10 (Doc. No. 154, Ex. 15).

[16] See N. Kaplowitz Expert Report, May 5, 2014 at 9 (Doc. No. 154, Ex. 15); **[*14]** N. Kaplowitz Dep., June 3, 2014 at 135-36 (Doc. No. 154, Ex. 9)(Lyles Deposition); Kaplowitz Dep., Apr. 21, 2015 at 329-32 (Doc. No. 154, Ex. 5)(Hayes Deposition).

[17] See, e.g., N. Kaplowitz Expert Report, May 5, 2014 at 9, 11-14 (Doc. No. 154, Ex. 15); N. Kaplowitz Dep., June 3, 2014 at 135-36 (Doc. No. 154, Ex. 9)(Lyles Deposition); Kaplowitz Dep., Apr. 21, 2015 at 329-32 (Doc. No. 154, Ex. 5)(Hayes Deposition); Watkins, P., et al., "Aminotransferase Elevations in Healthy Adults Receiving 4 grams of Acetaminophen Daily: A Randomized Controlled Trial," JAMA, 296:87-93, 2006 (Doc. No. 154, Ex. 17).

[18] See Kaplowitz, N., Acetaminophen Hepatotoxicity: What Do We Know, What Don't We Know, and What Do We Do Next?, Hepatology, 2004: 40(1): 23-26 (Doc. No. 154, Ex. 27).

[19] See N. Kaplowitz Dep., June 3, 2014 at 42-45 (Doc. No. 154, Ex. 9)(Lyles Deposition).

Defendants' experts Drs. Brown and Flamm also limit their patients to 2-4 grams a day. See R. Brown Dep., Apr. 30, 2015 at 72-73 (Doc. No. 154, Ex. 3)("I tell them to take no more than six or eight regular-strength tablets in a day, knowing that they'll take more....It's neigh on 2 grams [daily]."); S. Flamm Dep., May 5, 2015 at 168-73 (Doc. No. 95, **[*15]** Ex. 33)(explaining why he only recommends that patients take a maximum of 3 or 4 grams of Tylenol a day but advises them that this is the upper limit on what should be taken because he recognizes the likely risk of patients taking too much).

[20] The defendants argue that Dr. Kaplowitz's methodology is flawed because he did not look for statistically-significant associations between substance exposure and injury and then apply the Bradford-Hill method—a set of nine guidelines to evaluate scientific data to determine causation. The Bradford-Hill methods, enunciated by Sir Austin Bradford Hill in a 1965 speech before the Royal Society of Medicine, includes a collection of "nine different viewpoints" **[*16]** from which to "study association before we cry causation." Hill, A.B., The Environment and Disease: Association or Causation?, PROC. R. SOC. MED., 58(5):295-99 (May, 1965). These nine guidelines are: 1) the strength of the association; 2) consistency of the association; 3) specificity or whether there are multiple causes of a condition; 4) the temporal relationship between a condition followed the exposure to the agent; 5) biological gradient or the existence of a dose-response relationship; 6) how plausible the association is biologically; 7) whether the association is "coherent" with (i.e., does not seriously conflict with) generally known facts of the natural history and biology of the disease; 8) does experimentation—removing the causative agent—improve the condition; and 9)

invalid because it has not been statistically proven.[21]

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analogy. Id. See also *In re Seroquel Prods. Liab. Litig., No. 6:06-md-1769-Orl-22DAB, 2009 U.S. Dist. LEXIS 115653, 2009 WL 3806435, at *5, n. 5 (M.D. Fla. Jun. 23, 2009)*.

The defendants seem to indicate that this is the only method by which a scientist could find a causal connection. From the evidence presented by both parties, this appears not to be true. The defendants' interpretation of the type of association needed before using Bradford-Hill appears to be overstated. There is **[*17]** nothing to say that a statistically-significant association must be found before applying the methodology. See *In re: Lipitor (Atorvastatin Calcium) Marketing, Sales Practices and Products Liability Litigation, 174 F. Supp. 3d 911, 2016 WL 1251828, at *2 (D.S.C. 2016)*("Randomized, double-blind, clinical trials are the 'gold standard' for determining whether an association exists. However, the Reference Manual on Scientific Evidence recognizes that observational studies can be sufficient to establish an association.")(citation omitted); Federal Judicial Center, Reference Manual on Scientific Evidence, at 598-99 (3d ed. 2011)(recognizing that an association is needed first to apply Bradford-Hill but not a statistically significant one); id. at 217-18 (recognizing the role of observational studies in establishing causation).

Furthermore, the cases the defendants cite for this argument are unpersuasive and/or distinguishable from this case. See *In re Zoloft (Sertraline Hydrochloride) Prods. Liab. Litig., 26 F. Supp. 3d 449, 456 (E.D. Pa. 2014)*(excluding expert opinion on teratogenicity, not drug-induced liver injury, because expert failed to follow generally accepted method in that field); *Wade-Greaux v. Whitehall Lab., 874 F. Supp. 1441, 1451, 1483, 29 V.I. 206 (D.V.I. 1994)*(excluding expert opinion regarding teratogenicity because "positive human epidemiologic studies are always required to reach a conclusion as to whether a specific agent is teratogenic in humans" and such data was not relied upon by experts); *Soldo v. Sandoz Pharms. Corp., 244 F. Supp. 2d 434, 514-15 (W.D. Pa. 2003)*(excluding expert opinion because facts established by an evidentiary hearing regarding **[*18]** summary judgment showed Bradford-Hill criteria could not be met); *Magistrini v. One Hour Martinizing Dry Cleaning, 180 F.Supp.2d 584, 608 (D. N.J. 2002)*(excluding opinion because expert did not use a particular methodology beyond expert's own "judgment"). I find nothing that requires the plaintiff's expert to use the methodology as prescribed by the defendants.

[21] I note that the way acetaminophen has been regulated—having been on the market, grandfathered in under the monograph system, and never issued a final monograph—may also explain why this type of research has never been conducted. See *Terry v. McNeil-PPC, Inc. (In re Tylenol (Acetaminophen) Mktg., Sales Practices & Prods. Liab. Litig.), MDL NO. 2436, 2015 U.S. Dist. LEXIS 153972, 2015 WL 7075949, at *7-9 (E.D. Pa. Nov. 13, 2015)*(decision on motion for summary judgment explaining regulatory framework). Unlike other drugs, pre-marketing research was not conducted on acetaminophen. While acetaminophen manufacturers are encouraged to perform research to determine acetaminophen's potential adverse events, they are not necessarily required to perform post-marketing research by regulation. See *21 C.F.R. § 330.12(c)*(explaining how manufacturers of drugs with a Tentative Final Monograph are "encouraged to perform studies to obtain adequate evidence of effectiveness" and make appropriate changes in labels and formulations "to bring the products into conformity with current medical knowledge and experience").

The Fourth Circuit addressed **[*19]** this exact same argument by the defendants in a similar case decided over twenty years ago. In Benedi v. McNeil, a jury found that the defendants failed to warn consumers about the risk of liver damage when acetaminophen was taken with alcohol. *Benedi v. McNeil-P.P.C., Inc., 66 F.3d 1378, 1381 (4th Cir. 1995)*. On appeal, McNeil argued that Benedi's experts should have been excluded because they "did not rely upon epidemiological data in formulating their opinions." *Id. at 1384*. The Fourth Circuit rejected this argument:

> [W]e do not read Daubert as restricting expert testimony to opinions that are based solely upon epidemiological data. Daubert merely requires that the expert testimony be both relevant and reliable; and Daubert clearly vests the district courts with discretion to determine the admissibility of expert testimony. Under the Daubert standard, epidemiological studies are not necessarily required to prove causation, as long as the methodology employed by the expert in reaching his or her conclusion is sound.

Id. See also *id. at 1384-85*. While epidemiological studies can be valuable evidence of causation, they are not a pre-requisite for products liability causation expert testimony in this Circuit.[22] The defense experts admit

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[22] See *Wolfe v. McNeil-PPC, Inc., No. 07-348, 2011 U.S. Dist. LEXIS 47710, 2011 WL 1673805, at *15 (E.D. Pa. May 4, 2011)*(rejecting similar argument from McNeil in Motrin products liability action); *Lanzilotti v. Merrell Dow Pharms., No. 82-0183, 1986 U.S. Dist. LEXIS 23047, 1986 WL 7832, at *2 (E.D. Pa. Jul 10, 1986)*("We note also that it has not been declared in this circuit that epidemiological studies are an indispensable element in the presentation of a prima facie drug product liability case, or that such studies must be the sole basis for expert opinion."); *Mazur v. Merck & Co., Inc., 742 F.Supp. 239, 264 (E.D. Pa. 1990)*(same). See also ***Soldo v. Sandoz Pharms. Corp., 244 F. Supp. 2d 434, 449 (W.D. Pa. 2003)***(discussing the value of epidemiological studies).

that having case-controlled epidemiological **[*20]** data is not a requirement in finding causation for drug-induced liver injuries.[23]

In this case especially, epidemiological studies and/or statistically-significant clinical evidence would be difficult to obtain.[24] Drug-induced ALF or severe liver damage **[*22]** is rare. Case-controlled epidemiologic studies of rare diseases, such as ALF, with control groups are difficult to perform. Drug-induced ALF is unlikely to ever be seen in a human prospective placebo-controlled clinical trial, which studies a small number of patients.[25] Because of the rarity of drug-induced ALF, randomized placebo-controlled clinical trials would not necessarily be feasible to establish a connection between acetaminophen and ALF.[26]

The experts in this case recognize that the types of studies the defendants claim are needed to make an opinion reliable—human prospective placebo-controlled clinical trials—are not feasible or ethical.[27] During his deposition, Dr. Anthony Temple, former Vice President of Medical Affairs at McNeil, also admitted that McNeil consulted with epidemiologists to design a statistically-significant controlled study which would prove or disprove acetaminophen-induced ALF; they found such a study was not feasible and/or was too expensive to conduct.[28]

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[23] See R. Brown Dep., Apr. 30, 2015 at 106-07 (Doc. No. 154, Ex. 3)("Q. My question is very specific, sir. My question is, is there a requirement in any of the peer-reviewed medical literature that before a drug can be ruled in as a potential hepatotoxic drug that there must be a case-controlled epidemiologic study?...A. The answer is, you have to have some data. What form that data takes varies, based upon the drug you're studying and what you're trying to assess. You have to have reliable data. And that reliable data can come from a number of sources. If you have randomized controlled clinical trial data, you don't have need much else. If you're requiring lower -- the way we grade data is you have a quality of the **[*21]** data and a confidence in the data, and then you come up with a strength of the recommendation. And that's a -- that was not a standard process in 1990 and 2000 when many of these articles were done, but it is the standard now. And so the higher the quality of the evidence, the fewer studies you need. The lower the quality of the evidence, the -- either you need stronger data or more research.") and at 107-109; S. Flamm Dep., May 5, 2015 at 97 (Doc. No. 154, Ex. 4)("Q. Okay. And there is no requirement in the causation algorithm that there be an epidemiologic study that would demonstrate a statistically significant 2.0 relative risk to a P-value of .05 standard epidemiologic association in order to rule in a drug as a potential cause for acute liver failure or DILI. True? A. Yes. Again, it's not a requirement, but for you to make a very good clinical decision and really understand an interaction with a particular patient and a product, you have to have some level of comfort in the data that are behind it.") and at 98.

[24] During oral argument, the defendants pointed to other epidemiological studies on other rare diseases which were conducted by Dr. Kaplowitz to show that such data could be produced. Simply because an epidemiological study could be produced for one rare disease does not necessarily indicate it could be designed for another rare disease. Factual differences between rare diseases may account for the availability of data for one disease and not another (i.e., one disease like ALF may lead to death so testing for it is riskier and unethical while another may not result in such dire consequences). Especially given Dr. Temple's own admission that this type of study is not possible for acetaminophen-induced ALF, the defendants' argument on this point **[*23]** is unpersuasive. See A. Temple Dep., Mar. 20, 2014 at 91, 100, 185-86 (Doc. No. 154, Ex. 10).

[25] See Davern, T.J., et al, Drug-Induced Liver Injury in Clinical Trials: As Rare as Hen's Teeth (editorial), Am. J. Gastroenterol., 2009: 104: 1159-1161 (Doc. No. 154, Ex. 8).

[26] See N. Kaplowitz, Dep., Jun. 3, 2014 at 138-142, 164, 214-215 (Doc. No. 154, Ex. 9)(Lyles Deposition). See also A. Temple Dep., Mar. 20, 2014 at 91, 100, 185-86 (Doc. No. 154, Ex. 10).

[27] See N. Kaplowitz Dep., Jun. 3, 2014 at 138-42, 164, 214-15 (Doc. No. 154, Ex. 9)(Lyles Deposition) and at 139 ("I mean, there's no -- first of all, there is no scientific evidence that it does not because the **[*24]** studies are not powered to exclude it. And so, as one always has to do in the setting of rare events, is you have to see an accumulation of rare events. If this happened once in history, you know, one case report in the world's literature, obviously -- or two, even — we wouldn't be sitting here. But there are -- there's enough smoke here, enough case reports, coupled with all the other things that I've just been talking about that I won't repeat that I don't agree with."). See also S. Flamm Dep., May 5, 2015 at 94, 98 (Doc. No. 154, Ex. 4)(admitting that he cannot name one hepatotoxic drug which has statistically significant proof to show liver injury causation); R. Brown Dep., Apr. 30, 2015 at 105-09 (Doc. No. 154, Ex. 3)(same); A. Temple Dep., Mar. 20, 2014 at 84-85 (Doc. No. 154, Ex. 10)("Q. And because it would be inappropriate and unethical to prospectively expose a patient to a drug with the intent of trying to measure harm? A. Well, yeah. That's been an issue with giving overdoses of acetaminophen, yes. You wouldn't do it -- if you knew that giving a drug in a certain dose produced harm, then you wouldn't want to give it to someone.").

[28] See A. Temple Dep., March 20, 2014 at 91 **[*25]** (Doc. No. 154, Ex. 10)(under seal)("I don't think there was an easy way

Like the Fourth Circuit, I find the defendants' argument unpersuasive. Dr. Kaplowitz cites over fifty articles to support **[*26]** his general causation opinions; half of these sources speak directly to whether acetaminophen can cause liver injury at or near 4 grams.[29] As a leading expert in acetaminophen-induced liver injury, he relies on his own clinical experience and research in rendering his opinions. I see nothing wrong with his general causation methodology.[30]

b. Reliance on Clinical Experience and Case Reports is Appropriate

The defendants argue that Dr. **[*29]** Kaplowitz's methods are flawed because he relies on anecdotal evidence and his personal clinical experience.[31] It is true that case reports and anecdotal evidence alone may not be sufficiently reliable for an expert to support a causation opinion. See, e.g., *Wade-Greaux v. Whitehall*

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or even a way to look retrospectively. I mean, we just did another case series with -- he admitted that it's very hard to define ingestion of alcohol or fasting during this period of time. So his case series was what it was. So doing the kind of epidemiology series I think you're describing, we determined wasn't a feasible study, but we have evaluated whether to do that or not, yes."), at 100 ("[W]e talked -- we had talked with epidemiologists, and we had looked at that issue, and I don't know that they -- I don't recall them ever giving us an adequate proposal, but the answer is yes, we did talk to them about the dosing issues and about ways to conduct epidemiology studies."), and at 185-86 ("McNeil has not done an epidemiology study that way because we couldn't find a way to conduct that trial.").

I also note that two different databases (the ALFSG and FDA databases) showed a risk in some people at 4 grams and that the median daily dose for liver injury was 5-7 grams a day. FDA Working Group Report (2008) at 11, n. 41 (Doc. No. 154, Ex. 30).

[29] Among these references, Dr. Kaplowitz cites Larson, A.M., et al., Acetaminophen-induced acute liver failure: results of a United States multicenter, prospective study, Hepatology, 2005 Dec: 42(6): 1364-1372 (Doc. No. 154, Ex. 22). The defendants filed a separate motion to exclude the use of this article. See Motion to Exclude Opinion Testimony of Neil Kaplowitz based on Supplemental Data, Jan. 29, 2016 (Doc. No. 193). I denied that motion. See Memorandum and Order Denying Defendants' Motion to Exclude Plaintiff's Expert Testimony Based on Larson Article/ALFSG Data, Jul. 14, 2016 (Doc. No. 224, 225). I see nothing improper with how Dr. Kaplowitz has used the Larson article—along with other evidence—in rendering his opinion.

[30] The defendants argue that Dr. Kaplowitz cannot rely upon information contained in a 2008 report from the FDA's Acetaminophen Hepatotoxicity Working Group because it **[*27]** is not peer-reviewed and does not offer information to support Dr. Kaplowitz's opinions. See FDA Working Group Report (2008)(Doc. No. 154, Ex. 30). This is a weak argument. See *Heller v. Shaw Industries, 167 F.3d 146, 155 (3d Cir. 1999)*("Given the liberal thrust of the Federal Rules of Evidence, the flexible nature of the Daubert inquiry, and the proper roles of the judge and the jury in evaluating the ultimate credibility of an expert's opinion, we do not believe that a medical expert must always cite published studies on general

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causation in order to reliably conclude that a particular object caused a particular illness.... To so hold would doom from the outset all cases in which the state of research on the specific ailment or on the alleged causal agent was in its early stages, and would effectively resurrect a Frye-like bright-line standard, not by requiring that a methodology be 'generally accepted,' but by excluding expert testimony not backed by published (and presumably peer-reviewed) studies. We have held that the reliability analysis applies to all aspects of an expert's testimony: the methodology, the facts underlying the expert's opinion, the link between the facts and the conclusion, et alia.").

I see nothing inherently unreliable **[*28]** in a report prepared by a group of scientists, who are experts in this area of study, coming together to discuss, discern, and analyze possible concerns on this topic. Not only was the document produced with input from experts on the topic of acetaminophen-induced liver injury, including ones working for the defendants, but it was also sponsored by the FDA. The fact that the national regulatory agency convened a group of experts to discuss the issue of acetaminophen-induced liver injury, to collectively present and analyze the available information about acetaminophen-induced liver injury, provides the document with the indicia of reliability required under Daubert.

The Working Group Report stated that acetaminophen has a narrow therapeutic margin. It discussed cases of liver injury caused by acetaminophen at or near recommended doses. The Working Group considered ways to reduce the risk of unintentional overdose and liver injury to consumers, including decreasing the maximum daily dose from 4000 milligrams to 3250 milligrams. This information would be relevant to Dr. Kaplowitz's opinions.

[31] The defendants further argue that Dr. Kaplowitz's opinion on this point is flawed because it is based on self-reported patient histories. This argument is unpersuasive. Dr. Kaplowitz's opinions based on his clinical experience would, of course, need to be based on patient histories. This is how physicians in practice diagnose patients with certain conditions. Of course, each patient will have multiple factors to take into consideration in making this diagnosis. **[*30]** But Dr. Kaplowitz, as a practicing physician, will have weighed those factors and the other information available in making his diagnoses of his patients.

Lab., 874 F. Supp. 1441, 1483, 29 V.I. 206 (D.V.I. 1994)("...anecdotal human data, whether from published case reports, DERs or other litigation, have inherent biases that make them unreliable."). However, case reports considered in conjunction with other evidence may be an appropriate basis for an expert's opinion on causation.[32] Dr. Kaplowitz does not rely solely on case reports in rendering his opinion. The case reports and case series he does cite also include controls on the information analyzed, which make them more reliable.[33]

In addition, case reports and case series are the types of information on which DILI experts often rely. See Fed. R. Evid. 703; Wolfe v. McNeil-PPC, Inc., No. 07-348, 2012 U.S. Dist. LEXIS 2160, 2012 WL 38694, at *3 (E.D. Pa. Jan. 9, 2012); FDA Working Group Report (2008) at p. 11, n. 41 (Doc. No. 154, Ex. 30)(explaining how members of the working group looked at two different databases of case reports/adverse event reports (AERs) in finding that there is a risk of liver injury **[*32]** for some people at 4 grams).[34] As explained above, epidemiological or case-controlled studies for acetaminophen-induced liver injuries are not available. In the absence of epidemiological data, case reports and case series serve as valuable sources of information for DILI experts, doctors, and scientists in determining causation.[35]

c. Reliance on the Watkins study is Appropriate

The defendants argue the Dr. Kaplowitz's reliance on the study he co-authored with Dr. Paul Watkins is not appropriate because the article discusses elevated

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[32] See Wolfe v. McNeil-PPC, Inc., No. 07-348, 2012 U.S. Dist. LEXIS 2160, 2012 WL 38694, at *3 (E.D. Pa. Jan. 9, 2012)("As for the use of AERs as bases for expert testimony, this Court has previously ruled that expert testimony that relies, in part, on case reports to establish causation satisfies the requirements of Daubert v. Merrell Dow Pharms., Inc., 509 U.S. 579, 113 S.Ct. 2786, 125 L.Ed.2d 469 (1993). See Wolfe v. McNeil-PPC, Inc., No. 07-348, 2011 U.S. Dist. LEXIS 47710, 2011 WL 1673805, at *5 (E.D. Pa. May 4, 2011). The Court reiterates its conclusion that, because plaintiff's experts 'did not solely rely on case reports in forming their opinions on causation but used them to supplement their extensive review' of other evidence, such testimony is admissible."); Wolfe v. McNeil-PPC, Inc., No. 07-348, 2011 U.S. Dist. LEXIS 47710, 2011 WL 1673805, at *5 (E.D. Pa. May 4, 2011)("In this case, the three doctors did not solely rely on case reports in forming their opinions on causation but used them to supplement their extensive review of plaintiff's medical records and deposition testimony of plaintiff's treating physicians. As with defendants' other objections, the three doctors' use of case studies in reaching their conclusion affects only the weight to be given their testimony, not its admissibility. Thus, the proposed testimony of the three doctors is based on sufficiently reliable methods."); Schedin v. Ortho-Mcneil-Janssen Pharms., Inc., 808 F. Supp. 2d 1125, 1139 (D. Minn. 2011) **[*31]** (explaining that AERs are commonly used by experts to determine causation in conjunction with other evidence), rev'd in part on other grounds, In re Levaquin Prods. Liab. Litig., 700 F.3d 1161 (8th Cir. 2012).

[33] See Caraker v. Sandoz Pharms. Corp., 172 F. Supp. 2d 1046, 1050 (S.D. Ill. 2001)(explaining how "an overwhelming amount" of case reports/series with appropriate controls, analysis of alternative causes, temporal proximity may be a reliable basis for expert opinion"). See also ***Soldo v. Sandoz Pharms. Corp., 244 F. Supp. 2d 434, 537-44 (W.D. Pa. 2003)***(finding case reports to be unreliable and "unscientific" bases for causation opinion because are unpublished, not peer-reviewed, did not consider alternative causes, patients' medical history, etc.); McClain v. Metabolife Int'l, Inc., 401 F.3d 1233, 1250 (11th Cir. 2005)(explaining that anecdotal information "without any medical controls or scientific assessment" is unreliable basis for expert opinion); Hollander v. Sandoz Pharms. Corp., 289 F.3d 1193, 1211 (10th Cir. 2002)(finding that exclusion of opinions based on case reports with little information about medical history appropriate but that case reports with more detailed information may be reliable source of expert opinion).

[34] Whether the case reports themselves may be admissible or disclosed to the jury is a separate question, which I will defer until I see how they may be used at trial. See Fed. R. Evid. 703 ("An expert may base an opinion on facts or data in the case that the expert has been made aware of or personally observed. If experts in the particular field would reasonably rely on those kinds of facts or data in forming an opinion on the subject, they need not be admissible for the opinion to be admitted. But if the facts or data would otherwise be inadmissible, the proponent of the opinion may disclose them to the jury only if their probative value in helping the jury evaluate the opinion substantially outweighs their prejudicial effect."); Wolfe v. McNeil-PPC, Inc., No. 07-348, 2012 U.S. Dist. LEXIS 2160, 2012 WL 38694, at *3 (E.D. Pa. Jan. 9, 2012).

[35] See, e.g., N. Kaplowitz Dep., Jun. 3, 2014 at 134-136, 139, 158, 194, 213 (Doc. No. 154, Ex. 9)(Lyles Deposition); Davern, T.J., et al., Drug-Induced **[*33]** Liver Injury in Clinical Trials: As Rare as Hen's Teeth (editorial), Am. J. Gastroenterol., 2009: 104: 1159-1161 (Doc. No. 154, Ex. 8)(explaining how multi-center reporting is important to understanding DILI); FDA Working Group Report (2008) at 3-5, 11, n. 41 (Doc. No. 154, Ex. 30).

aminotransferase levels, not ALF.[36] See Watkins, P., et al., "Aminotransferase Elevations in Healthy Adults Receiving 4 grams of Acetaminophen Daily: A Randomized Controlled Trial," JAMA, 296:87-93, 2006 (Doc. No. 154, Ex. 17).

The Watkins article found that some adults had developed abnormalities in liver enzymes (e.g., aminotransferases or ALTs) after taking recommended doses of acetaminophen. ALF occurs when the liver is severely damaged. Elevated ALTs are markers of liver damage (i.e., liver cell death). Increased ALTs do not necessarily lead to ALF. However, elevated ALTs are one early indicator that ALF might occur.[37]

The defendants fail to acknowledge the fact that the Watkins study was stopped early because the authors were concerned about the harm being caused to study participants. It would not have found ALF because inducing ALF—a life threatening condition—would have been unethical. I see no problem with Dr. Kaplowitz's use of the Watkins data to support his opinions, along with the many other sources he cites.[38]

d. Use of Animal Studies to Support Opinions is Reasonable

The defendants argue that Dr. Kaplowitz's opinions are invalid because they rely on animal studies.[39] Given the ethical considerations in obtaining human studies, the use of animal studies in this instance would be appropriate.[40] Animal studies are what other scientists exploring acetaminophen toxicity rely on because these studies can offer useful information about human liver function.[41] See *Fed. R. Evid. 703*; *Brown v. Southeastern Pa. Transp. Auth. (In re Paoli R.R. Yard PCB Litig.), 35 F.3d 717, 748, 779 (3d Cir. 1994)*. In fact, the defendants themselves point to an animal study about glutathione to support their point that ALF cannot occur at 4 grams.[42] Their argument is unpersuasive.[43]

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[36] The defendants also point out the Watkins article's statements that "acetaminophen clearly has a remarkable safety record when taken as directed, and chronic treatment with 4 g daily has been confirmed to be safe." Watkins, P., et al., "Aminotransferase Elevations in Healthy Adults Receiving 4 grams of Acetaminophen Daily: A Randomized Controlled Trial," JAMA, 296:87-93, 93 (2006)(Doc. No. 154, Ex. 17). The mere fact that the article acknowledges that acetaminophen is typically safe at recommended doses does not mean that other findings in the article should **[*34]** be negated or reliance on the article is inappropriate.

[37] Dr. Temple also admitted that looking at elevated ALTs is one way to study the risk of ALF. See A. Temple Dep., Mar. 20, 2014 at 85 (Doc. No. 154, Ex. 10)("Q. Right. So the way in which you study risk in clinical trials is to look for surrogates for risk. Oftentimes you look for laboratory abnormalities. If there happens to be a patient reaction during the clinical trial, you look for measurements of blood pressure, liver function tests, those kinds of things as a predictor, potential predictor of clinical problems when a drug is more widely used, true? A. You can do that, yes."). McNeil considered liver abnormalities in its own studies. See N. Kaplowitz Dep., June 3, 2014 at 137 (Doc. No. 154, Ex. 9)(Lyles Deposition)(explaining how **[*35]** McNeil's studies showed increased level enzymes at recommended doses).

[38] The defendants claim his reliance on data from the Acute Liver Failure Study Group (ALFSG), including Larson, A.M., et al., Acetaminophen-induced acute liver failure: results of a United States multicenter, prospective study, Hepatology, 2005 Dec: 42(6): 1364-1372 (Doc. No. 154, Ex. 22)(i.e., the "Larson article"), is not appropriate because this data is nothing more than case reports. The defendants filed a separate motion regarding the admissibility and validity of the ALFSG data. See Doc. No. 193. I explained in my decision on that motion why the ALFSG data is admissible and can be relied upon by experts in the field. See Memorandum and Order Denying Defendants' Motion to Exclude Plaintiff's Expert Testimony Based **[*36]** on Larson Article/ALFSG Data, Jul. 14, 2016 (Doc. No. 224, 225). I see no problems with the way Dr. Kaplowitz has used this data in forming his opinions.

[39] See N. Kaplowitz Dep., Jun. 3, 2014 at 86-88, 194-95, 213-14 (Doc. No. 154, Ex. 9)(Lyles Deposition); Kaplowitz Dep., Apr. 21, 2015 at 161, 173 (Doc. No. 123, Ex. B)(Hayes Deposition).

[40] See *Johnson v. Johnson & Johnson (In re Levaquin Prods. Liab. Litig.), 752 F. Supp. 2d 1071, 2010 WL 8400514, at *4 (D. Minn. 2010)*("When courts allow expert testimony premised on animal studies, it is because human studies cannot be done for ethical reasons, or there is a reasonable basis to believe **[*37]** that the results from the animal studies can be reliably extrapolated to humans....Though courts should be cautious in presuming that findings derived from animal studies are applicable to humans, the applicability of animal studies is often appropriately explored during cross-examination.")(citations omitted).

[41] See T. Davern Expert Report, Feb. 16, 2015 at 4-5 (Doc. No. 155, Ex. 1)(explaining how acetaminophen poisoning in mice is similar to humans).

[42] See Mitchell, J., et al., "Acetaminophen-induced hepatic injury: Protective role of glutathione in man and rationale for therapy," Clinical Pharmacology and Therapeutics, Vol. 16, No. 4, 676-84 (1974). See also T. Davern Dep., Mar. 28, 2015 at 147-49 (Doc. No. 155, Ex. 3)(defense attorneys questioning

IV. Dr. Kaplowitz's Causality Assessment Methodology (CAM) in Rendering His Specific Causation [*38] Opinion is Reliable

The defendants also move to exclude Dr. Kaplowitz's specific causation opinions because his methodology is not statistically significant or exacting. Dr. Kaplowitz uses a "science of causality assessment" (i.e., causation assessment methodology or CAM) to reach his opinions about Ms. Hayes' cause of death. This is a common methodology used by DILI clinicians and experts.

Because traditional epidemiological and case-controlled studies are not feasible, DILI experts developed the "science of causality assessment," or CAM, to assess DILI risk.[44] This methodology is used by the Drug Induced Liver Injury Network (DILIN), sponsored by the NIDDK, and by drug-induced liver injury registries in other countries.[45] It has also been used to assess causation between ALF and other hepatotoxic drugs.[46]

While the CAM tool itself may vary, at the core of this methodology is a "differential assessment."[47] DILI causality assessments considers a combination of factors, including: temporal associations, the rate of improvement after cessation of the drug, the definitive exclusion of alternative causes, and the "signature" of the drug as revealed in clinical trials and experience.[48] This "science of [DILI] causality assessment" has been published by DILI experts in various forms since the 1980s.[49]

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regarding animal studies on glutathione).

[43] The defendants' other arguments about Dr. Kaplowitz's prior testimony about the strength of his causation evidence (i.e., that association is not causation, that he has written that acetaminophen is generally safe, etc.) go to weight, not admissibility. They are most appropriately explored on cross-examination.

[44] See N. Kaplowitz Dep., Jun. 3, 2014 at 139 (Doc. No. 154, Ex. 9)(Lyles Deposition)("I mean, there's no -- first of all, there is no scientific evidence that it does not because the studies are not powered to exclude it. And so, as one always has to do in the setting of rare events, is you have to see an accumulation of rare events. If this happened once in history, you know, one case report **[*39]** in the world's literature, obviously -- or two, even — we wouldn't be sitting here. But there are -- there's enough smoke here, enough case reports, coupled with all the other things that I've just been talking about that I won't repeat that I don't agree with....And so we are left with, instead of the — you know, the typical experimental scientific method, we are left with the science of causality assessment, you know, which is not a randomized control trial but a kind of postmarketing assessment of cases that's done by experts in the field in every other situation.") and at 213-15.

[45] See id. at 142 ("But ultimately the approach in a situation like that, and it is the approach followed by hepatologists in practice, it is the approach followed by all the different drug-induced liver injury networks worldwide, including the DILIN Network, the Drug-Induced Liver Injury Network sponsored by NIDDK, which I participate in; the Spanish Registry, which I collaborate with; the Swedish registry; the British registry; the German registry; the Italian. Every country has a registry and follow this methodology to evaluate postmarketing cases of liver injury suspected as being caused by drugs. So that's the **[*40]** science of causality assessment at the present time. It is not the scientific method in the way that your experts describe. Their description of epidemiological methodology and so on is perfectly fine. I don't dispute that. It is just that I don't think it applies in this situation.").

[46] See N. Kaplowitz Dep., Jun. 3, 2014 at 134-36 (Doc. No. 154, Ex. 9)(Lyles Deposition)(explaining how DILI causation assessment was used in determining that Rezulin could cause ALF).

[47] While I cannot find any precedent speaking directly to the use of CAM (and the parties have offered none as well), differential assessment—which is at the heart of CAM—has been approved by the Third Circuit as a reliable method for showing causation. **[*41]** See *Brown v. Southeastern Pa. Transp. Auth. (In re Paoli R.R. Yard PCB Litig.), 35 F.3d 717, 758-9 (3d Cir. 1994)*; *Heller v. Shaw Industries, 167 F.3d 146, 155 (3d Cir. 1999)*; *Feit v. Great W. Life & Annuity Ins. Co., 271 Fed. Appx. 246, 254-55 (3d Cir. Mar. 31, 2008)*. See also *Wolfe v. McNeil-PPC, Inc., No. 07-348, 2011 U.S. Dist. LEXIS 47710, 2011 WL 1673805, at *4-5 (E.D. Pa. May 4, 2011)*; *Benedi v. McNeil-P.P.C., Inc., 66 F.3d 1378, 1384 (4th Cir. 1995)*(discussing how the use of medical history, examination, lab and pathology data, and peer-reviewed literature was reliable method to provide causation opinion); *Baker v. Dalkon Shield Claimants Trust, 156 F.3d 248, 252-53 (1st Cir. 1998)*; *McCullock v. H.B. Fuller Co., 61 F.3d 1038, 1043-44 (2d Cir. 1995)*; *Zuchowicz v. United States, 140 F.3d 381, 385-87 (2d Cir. 1998)*; *Glaser v. Thompson Med. Co., 32 F.3d 969, 978 (6th Cir. 1994)*; *Ambrosini v. Labarraque, 101 F.3d 129, 140-1, 322 U.S. App. D.C. 19 (D.C. Cir. 1996)*; *Kennedy v. Collagen Corp., 161 F.3d 1226, 1228-30 (9th Cir. 1998)*.

[48] See Kaplowitz N., Causality Assessment verses Guilt by Association in Drug Hepatoxicity, Editorial, Hepatology, 33:308-310, 2001 (Doc. No. 154, Ex. 11). See also R. Brown Dep., Apr. 30, 2015 at 103-05 (Doc. No. 154, Ex. 3); S. Flamm Dep., May 5, 2015 at 69, 138-140 (Doc. No. 154, Ex. 4).

[49] See, e.g., Maria, V. & Victorino, R., Development and

Defense experts Drs. Brown and Flamm agree that DILI CAM is an acceptable methodology used by DILI experts to assess causation.[50] McNeil itself uses a differential assessment/CAM methodology in its acetaminophen hepatotoxicity causality data collection instrument.[51] In fact, Dr. Kaplowitz helped develop the CAM tool used by McNeil.[52]

In rendering his specific causation opinion, Dr. Kaplowitz used McNeil's "Causation Assessment Methodology (CAM)" instrument. Dr. Kaplowitz considered Ms. Hayes' medical records and her doctors' depositions.[53] He reviewed the available evidence about acetaminophen to determine acetaminophen's "signature" or track record.[54] He considered whether Ms. Hayes' liver injury had a temporal association with the use of acetaminophen which was consistent with the "signature" of the drug and whether there were other

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Validation of a Clinical Scale for the Diagnosis of Drug Induced Hepatitis, Hepatology, Vol. 26: 664-669, 1997; Aithal, G., et al., Clinical Diagnostic Scale: A Useful Tool in the Evaluation of Suspected Hepatotoxic Adverse Drug Reactions, J. Hepatology, 2000:33: 949-953; Danan G., et al., Causality Assessment of Adverse Reactions to Drugs — I. A Novel Method Based on the Conclusions of the International Consensus Meetings: Application to Drug Induced Liver Injuries [RUCAM], J. Clin. Epidemiol., 1993; 46:1323-1330; Benichou, C., et al., Criteria of Drug Induced Liver Disorders: Report of an International Consensus Meeting [CIOMS], J. Hepatol.,1990:11:272-276; **[*42]** Lucena, M., et al., Comparison of Two Clinical Scales for Causality Assessment in Hepatotoxicity, Hepatology, 2001: 33:123-130; Lee, W.M., Assessing Causality in Drug Induced Liver Injury, J. Hepatology, 2000, 33:1003-1005; Kaplowitz, N., Causality assessment versus guilt-by-association in drug hepatotoxicity, Hepatology, Vol. 33, No. 1, 308-10, 2001; Davern, T., Drug-Induced Liver Disease, in Clinics in Liver Disease, Vol. 13, No. 2, May 2012, 231-239 ("Diagnosis of DILI: Causality Assessment"]; Causality Assessment in Drug Induced Liver Injury, Presentation at the FDA, PhRMA, ASSLD Symposium by Robert J. Fontana, M.D. (Jan. 28, 2005).

[50] See R. Brown Dep., Apr. 30, 2015 at 104-05 (Doc. No. 154, Ex. 3)("Q. In other words, let me ask you this question: These are causation assessments for drug-induced liver injury. True? That's the standard methodology we've been **[*43]** talking about?...A. There isn't a standard methodology, but that is the methodology, yes."); S. Flamm Dep., May 5, 2015 at 69, 138-140 (Doc. No. 154, Ex. 4)("Q. [Have] you employed the same methodology that we have talked about before to assess the probable causation for a drug, in other words, what Dr. Davern and Dr. Kaplowitz have described in their literature as being a causation assessment? A. Yes. Again, I think what Dr. Davern described in[] his chapter in the book I edited, would be the protocol that one would follow to determine if there was drug induced liver injury.") and at 143. See also A. Temple Dep., Mar. 20, 2014 at 312-13 (Doc. No. 154, Ex. 10)("Q. That's right. And so this causation assessment methodology, or some version of it, is the standard way -- standard methodology used by experts in the field based on published medical literature for assessing causation in an individual case irrespective of dose, true? A. Irrespective of dose? You mean all-comers? Q. All-comers. A. Whether they had a dose or if it was the correct dose -- Q. Correct. A. Yes.").

[51] See Doc. No. 154, Ex. 1 (under seal); A. Temple Dep., Mar. 20, 2014 at 311-13 (Doc. No. 154, Ex. 10)(explaining McNeil's **[*44]** causality instrument, describing as one of differential assessment irrespective of dose).

[52] N. Kaplowitz Dep., Apr. 21, 2015, at 310-312 (Doc. No. 154, Ex. 5)(Hayes Deposition); Doc. No. 154, Ex. 1 (under seal)(McNeil CAM assessment with emails between Kaplowitz and Temple).

[53] See N. Kaplowitz Dep., Apr. 21, 2015 at 312-17 (Doc. No. 154, Ex. 5)(Hayes Deposition); History and Physical from Helen Keller Hospital, Aug. 29, 2010 (Doc. No. 154, Ex. 32). See also *Kannankeril v. Terminix Int'l, 128 F.3d 802, 806-07 (3d Cir. 1997)*("Depending on the medical condition at issue and on the clinical information already available, a physician may reach a reliable differential diagnosis without himself performing a physical examination, particularly if there are other examination results available. In fact, it is perfectly acceptable, in arriving at a diagnosis, for a physician to rely on examinations and tests performed by other medical practitioners.").

[54] See, e.g., Lee, W.M., Acetaminophen and the US Acute Liver failure Study Group, Lowering the Risk of Hepatic Failure, Hepatology, Vol. 40: 6-9 (2004)(Doc. No. 154, Ex. 19); Schiodt, F.V., et al., Acetaminophen Toxicity in an Urban County Hospital, N. Eng. J. Med., 1997 (Doc. No. 154, Ex. 20); Ostapowicz, G., et al., Results of a Prospective Study of Acute Liver Failure at 17 Tertiary Hospitals in the United States, Ann. of Internal Med, Vol. 137, 947-954 (2002)(Doc. No. 154, Ex. 21); Larson, A.M., et al., Acetaminophen-induced acute liver **[*46]** failure: results of a United States multicenter, prospective study, Hepatology, 2005 Dec: 42(6): 1364-1372 (Doc. No. 154, Ex. 22); Kurtovic, J. and Riordan, S.M., Paracetamol-Induced Hepatoxicity at Recommended Doses, J. Internal Med., 2003 Feb; 253(2):240-3 (Doc. No. 154, Ex. 23); Forget, P., et al., Therapeutic dose of acetaminophen may induce fulminant hepatitis in the presence of risk factors: A report of two cases, B. J. Anesthesia, Vol. 103, Issue 6; 899-900, 2009 (Doc. No. 154, Ex. 24); Eriksson, L.S., et al., Hepatoxicity Due to Repeated Intake of Low Doses of Paracetamol, J. Intern. Med., 231; 567-570, 1992 (Doc. No. 154, Ex. 25); Whitcomb, C., et al., Association of Acetaminophen Hepatotoxicity with Fasting and Ethanol Use, JAMA, Vol. 22, No. 2, 1994 (Doc. No. 154, Ex. 26).

etiologies (i.e., viral hepatitis, cytomegalovirus (CMV), Epstein-Barr virus (EBV), ischemic hepatitis, Wilson's disease, illicit drugs, or sepsis) that could have caused her liver injury. He determined that acetaminophen at a dose of 3-5 grams a day for 5-6 days was highly likely the cause of Ms. Hayes' ALF. He indicated that the risk factors of malnourishment, fasting, and weight loss surgery likely contributed to her **[*45]** development of acetaminophen-induced ALF. From what has been presented, Dr. Kaplowitz appropriately applied the CAM methodology.

I see nothing suspect about Dr. Kaplowitz's specific causation opinion or his methodology is reaching this opinion.[55]

V. Dr. Kaplowitz's Opinions About Fasting/Malnutrition and Gastric [*47] Bypass Surgery

The defendants move to exclude Dr. Kaplowitz's general opinion that fasting, malnutrition, and gastric bypass surgery are all risk factors which may make a person more susceptible to acetaminophen-induced liver injury.

Dr. Kaplowitz supports his general opinion about fasting and malnutrition with animal studies, case reports, and case series showing that fasting/malnutrition could be a significant risk factor.[56] Other evidence in the record shows that fasting/malnutrition was a known possible risk factor for acetaminophen-induced liver injury.[57] I see nothing unreliable about his fasting/malnutrition opinion. The defendants' arguments go to the weight, not admissibility. Any flaws in his opinion may be explored on cross-examination.

The defendants move to exclude Dr. Kaplowitz's opinion that Ms. Hayes was "susceptible" to ALF from recommended doses of acetaminophen because she had previously undergone weight loss surgery and was malnourished/fasting. They argue that this opinion is unreliable because Dr. Kaplowitz does not know the dose of acetaminophen that Ms. Hayes ingested and that no physician ever diagnosed her with malnutrition.[58] Dr. Kaplowitz reviewed and relied on Ms.

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[55] The defendants' other arguments about Dr. Kaplowitz's specific causation opinion (i.e., the strength of the sources he relied upon, etc.) go to weight, not admissibility. They are most appropriately explored on cross-examination.

[56] See, e.g., James, L., Acetaminophen: Pathology and Clinical Presentation of Hepatotoxicity, at 336 (Kaplowitz, N. Ed.)("The role of fasting in the development of toxicity is widely appreciated by practitioners but has not been well studied in the clinical setting. In the rodent model, fasting reduced GSH stores and reduced the glucuronidation of acetaminophen by accelerating the development of toxicity. Anecdotal case reports have also associated fasting with the development of acetaminophen toxicity in humans."); Whitcomb, C., et al., Association of **[*48]** Acetaminophen Hepatotoxicity with Fasting and Ethanol Use, JAMA, Vol. 22, No. 2 , 1994 (Doc. No. 154, Ex. 26); N. Kaplowitz Expert Report, May 4, 2014 (Doc. No. 154, Ex. 15)(citing Faber, P.J., et al., The Effect of Rate and Weight Loss on Erythrocyte Glutathione Concentration and Synthesis in Healthy Obese Men, Clinical Science, Vol 102(5): 569-577 (2002); McLean, D., The Effect of Diet on the Toxicity of Paracetamol and the Safety of Paracetamol-Methionine, Clinical Therapeutics, Vol. 28, Issue 5, 755-760 (May 2006); Pessayre, D., et al., Effect of Fasting on Metabolite-Mediated Hepatotoxicity in the Rat Gastroenterology, (2), 264-71 (1979); Pessayre, W., et al., Addictive Effects of Inducers and Fasting on Acetaminophen Hepatotoxicity, Biochem. Pharmacol., 29(16): 2219-23 (1980); Price, J., et al., Mechanism of Fasting-Induced Suppression of Acetaminophen Glucoronidation in the Rat, Adv. Exp. Med. Biol., 197: 697-706 (1986); Whitcomb, C., et al., Association of Acetaminophen Hepatotoxicity with Fasting and Ethanol Use, JAMA, Vol. 22, No. 2, 1994).

[57] See, e.g., Kaplowitz, N., Acetaminophen Hepatoxicity: What we know, what we don't know and Where do we go?, Hepatology, Editorial, 40:23:26, **[*49]** 2004. See generally Memorandum Denying Defendants' Motion for Summary Judgment on Plaintiff's Failure-to-Warn Claim, Nov. 13, 2015 (Doc. No. 181)(discussing information presented by the FDA about fasting as a possible risk factor).

Dr. Anthony Temple, former Vice President of Medical Affairs at McNeil, testified that "McNeil has not done an epidemiology study that way because we couldn't find a way to conduct that trial." A. Temple Dep., Mar. 20, 2014 at 185-86 (Doc. No. 154, Ex. 10). Dr. Temple's comment was made specifically about a study to test whether fasting while taking acetaminophen could increase the risk of ALF, indicating that McNeil was aware that fasting may be a risk factor. See id. at 185 ("Had McNeil, to your knowledge, and this really is a yes or no question, ever asked any --asked for any epidemiologist to prepare a protocol to study the fasting issue? A. I think this is the same question you asked me before, and you limited it to preparing a protocol. We've asked them to propose study designs and/or to conduct studies or that help us figure it out. So yes, that -- we've never asked them to write a protocol because we never got a recommendation that would -- we thought was useful **[*50]** to get the answer.").

[58] The defendants also argue this opinion is invalid because the decedent was not diagnosed with anorexia nervosa. I do not see malnutrition and fasting as necessarily analogous with

Hayes' medical records in rendering his opinion. He cites evidence of acetaminophen being taken at the recommended dose and of limited food intake the week and half before her death.[59] The defendants' argument is unpersuasive.

The defendants also argue that Dr. Kaplowitz's opinion that gastric bypass surgery as a risk factor for Ms. Hayes is flawed. They claim it is only supported by one article, E. Holt, **[*51]** et al., "Acute Liver Failure Due to Acetaminophen Poisoning in Patients With Prior Weight Loss Surgery: A Case Series," J. Clin. Gastroenterol., Vol. 00, No. 00, 1-4 (2014)(Doc. No. 154, Ex. 29). Yet, as the defendants point out, Dr. Kaplowitz testified he did not rely on this article in rendering this opinion.[60] Gastric bypass has been linked to malnutrition and fasting because the surgery essentially restricts a person's caloric intake and serves as a forced method of fasting. In this way, Dr. Kaplowitz's gastric bypass opinion relates to his opinion on fasting and malnutrition.[61] Assuming Dr. Kaplowitz is able to explain how gastric bypass is connected to malnutrition and fasting, his opinion will be admissible.

After hearing argument from the parties, I also am satisfied with Dr. Kaplowitz's methodology regarding his fasting, malnutrition, and gastric bypass opinions. Any weaknesses in his opinions relate to weight, not admissibility. They can be explored on cross-examination.

VI. CONCLUSION

For the reasons stated above, I will DENY the defendants' motion to exclude Dr. Kaplowitz's testimony. An appropriate Order follows.

ORDER

AND NOW, this 26th day of July, 2016, upon consideration of the defendants' motion to exclude plaintiff's expert Dr. Neil Kaplowitz, M.D. (Doc. No. 123), all responses thereto, and parties' oral argument on this motion, it is hereby **ORDERED** that the defendants' motion is **DENIED**, as explained in the accompanying memorandum.

BY THE COURT:

/s/ Lawrence F. Stengel

LAWRENCE F. STENGEL, J.

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anorexia nervosa. This argument is unpersuasive.

[59] See N. Kaplowitz Supp. Expert Report Regarding Ms. Hayes, Feb. 16, 2015 (Doc. No. 154, Ex. 13).

[60] See N. Kaplowitz Dep., Apr. 21, 2015, at 170 (Doc. No. 123, Ex. B)(Hayes Deposition)("Q. Are you relying on that study for your opinions in this case? A. No. I think it's an interesting study, and I think it -- it states -- it's an observation which I believe requires more study. Confirmation. But it's very provocative.").

[61] See N. Kaplowitz Dep., Apr. 21, 2015, at 168-170 (Doc. No. 123, Ex. B)(Hayes Deposition)("Q. Was Ms. Hayes' prior weight loss surgery a factor in her illness **[*52]** and death? A. I would say it's reasonable to suspect that, yes. Q. Why do you say that? A. Because I think it affected her overall nutritional status.").

EXHIBIT H

Auchard v. TVA

United States District Court for the Eastern District of Tennessee

February 2, 2011, Filed

No. 3:09-CV-54

Reporter
2011 U.S. Dist. LEXIS 14771 *

ANITA AUCHARD, et al., Plaintiffs, v. TENNESSEE VALLEY AUTHORITY, Defendant.

Subsequent History: Summary judgment granted by, Claim dismissed by *Scofield v. TVA, 2011 U.S. Dist. LEXIS 29511 (E.D. Tenn., Mar. 22, 2011)*

Prior History: *Mays v. TVA, 2011 U.S. Dist. LEXIS 8120 (E.D. Tenn., 2011)*

Core Terms

bellwether, cases, spill, ash, parties, proceed to trial, suits, pool

Counsel: **[*1]** For Sybil Ball, Elaine Barnes, Jim Barnes, Rick A Barrett, Brian T Beaty, Tracy A Beaty, Elizabeth A Bradford, Diane J Breiner, Fred J Breiner, Lance W Brimble, Alexis Bryson, Cortney Bryson, James M Burnette, Sandra P Burnette, Audy L Byrd, Debra L Byrd, Buffy K Clark Individually, Buffy K Clark next friend S.B.O., Gisela Condon, James B Condon, Jason Conway, Rebecca Conway, Rebecca Conway next friend A.C. next friend E.C., Lea Duncan, Luke Duncan, Ron Duncan, Samara Duncan, Doris S Edwards, Nancy Engman, Paul Engman, Bob Gajewski, Janet Gajewski, Elisa Gastineau, Michael Gastineau, Steven L Hay, Susan R Hay, Dollie Hendrickson, Tami Hines-Williams Individually, Tami Hines-Williams next friend T.H., Greg Hoskins, Kelly Hoskins, Susan Hutchinson, Alice McDowell, Marilyn Mitchell, Thomas Mitchell, Jr Individually, Thomas Mitchell, Jr next friend B.M-B, Tony Perez, Charles L Phillips, Pamela J Phillips, Bruce Renzo, Stephen K Renzo Individually, Stephen K Renzo next friend F.R. next friend H.R., John V Riccio, Micah L Rusinek, Judy K Smith, Paul Smith, Victoria Smith, Denise J Sorensen, Wayne P Sorensen, Christine K Sosnowicz, Harry Sosnowicz, Alfred D Steimel, Sylvia A Steimel, Deborah **[*2]** S Stiles, Elizabeth M Stone, Eric M Stone Individually, Eric M Stone next friend B.G.S. next friend E.J.S. next friend M.C.S., Peter M Stresen-Reuter, Gary D Thomas, Robert Trimmer, James F Webb, Terina Webb, Keith Wicks-Pelfrey, Pennie Wicks-Pelfrey, De'Lano Williams, Deborah A Zeckser, Freank Balzer, Patricia Balzer, Jonathan W Bennett, Jeremy Bivens, Blaine Botkin, Daniel A Botkin, David L Botkin, Susan P Botkin, William H Botkin, Jackie E Boyd, Sandra G Brown, Vince Brown, Charles R Brumley, Alexis Bryson, Shirley M Daniel, Clint Davis Individually, Clint Davis next friend C.P.D., Judy M Forrester, Betty S Foy, Michael Foy, Emily Francis, Kent Francis, George B Fulton, MaryAnn E Fulton, Patrick Gough, Terri Gough next friend K.G. next friend L.G., Terri Gough Individually, William Gough, Elisha Hall Individually, Elisha Hall next friend E.T.H. next friend S.S.H., Charles E Hampton, Pamela M Hampton Individually, Pamela M Hampton next friend N.C.H. next friend M.M.H. next friend J.R.H., Kim Harmon, Teresa Harmon, Carly K Harrison, Matthew S Harrison Individually, Matthew S Harrison next friend J.R.H., Danny Hawn, Frankie L Hawn, Ernestine W Johnson, Jessica L Johnson, Sherry A Johnson, **[*3]** Tiffany N Johnson, Timmy D Johnson, Greg Keskey, Dianna D Krupp, Julius J Krupp, Jr next friend B.A.K next friend C.J.K., Dustin B Ladd, Opal I Ladd, Morris Marlow, Terry W McKinney, Wanda K McKinney, Marty R McPeter, Michael Q McPeter, Charli Michaels Individually, Charli Michaels next friend A.M.L., Katrina Poland Individually, Katrina Poland next friend C.P., Kelvin Poland, Joel A Prince, Mary A Prince, Brenna Reed, Demond M Reed, Karen Renzo, Patricia L Roberts, Steven R Roberts, Gary Rolen, Stanley R Rusinek, James Ryan, Holly Schean Individually, Holly Schean next friend J.C., Joan H Sheldon, Cynthia D Shillings, Mary E Simmon, A Ray Simon, Carol A Smith, Paul M Smith, Richard W Snow, Tina S Snow Individually, Tina S Snow next friend H.B.S. next friend J.D.S. next friend J.N.S., Kathy F Snyder, William C Snyder, James - Summers, Dennis A Tollefson, Orville E Wann, Susan L Wann, Sharon Wheeler, William S Wheeler, Crystal R White Individually, Crystal R White next friend L.R.J. next friend M.B.W., Michael - White

Individually, Michael - White next friend C.M.W., Mark Whitlock, Dwayne M Wilds, Karen Wilds, Martha B Young, Robert D Young, Christopher Agne, Imogene Agne, Jeffrey C **[*4]** Allen, Raymond L Allen, Sherrie L Allen, Jackie H Armes, Sr, Barbara D Agee, James A Agee, James A Agee, II, Hailey E Allen, Jessica R Allen, John W Allen, Jr, Jonathan R Allen, Janie Beasley, John Beasley, Sandra Blair, Andy Bullens, Rebecca L Clark, William C Clark, Mitchel L Coffey, Sherry Coffey, Joan-Marie Cummins, Jody Cummins, Cherrie L Davis, Clay Davis, Jr, Pamela Day, Larry D Dorlan, Adelania Ferrante, Joseph Ferrante, Christine J Griffis, Donnie W Griffis, Paul J Houlihan, Theresa A Houlihan, Kelly Jackson, Joe Kartch, Merry C Kartch, Donna Kirby, William P Kirby, Angela D Ladd, Beth Ladd, Brenda F Ladd, Randel E Ladd, Debra D Lowery, Glen Luecke, Sara Luecke, Barbara Marshall, Herbert M Marshall, Judith Nelson, Loren Nelson, Dianne U Payne, James R Payne, Heather Poland, Joshua Poland, Bonnie Robertson, Ora Robertson, Geraldine Seiber, Holly A Seiber, Howard Sheldon, Kathleen Simpson, Ricky Simpson, Jamie Standridge, Brandy Stepp, Pamela Tredway, Seth Tredway, Robert Trimmer, Miguel Velazquez, Thomas E Vereb, Wendy F Vereb, David E Wilder, Julius J Krupp, Jr Individually, Plaintiffs: Anthony S Abato, Bernard Weintraub, Hadley L Matarazzo, Lemuel M Srolovic, Robin L Greenwald, **[*5]** LEAD ATTORNEYS, PRO HAC VICE, Weitz & Luxenberg, P.C. - NY, New York, NY; Edward S Ryan, LEAD ATTORNEY, PRO HAC VICE, May & Ryan, PLC, Nashville, TN; Roger T May, LEAD ATTORNEY, May & Ryan, PLC, Nashville, TN.

For Tennessee Valley Authority, Amor A Esteban, LEAD ATTORNEYS, PRO HAC VICE, Shook, Hardy & Bacon, LLP (CA), San Francisco, CA; David R Erickson, John K Sherk, Mark Anstoetter, LEAD ATTORNEYS, PRO HAC VICE, Shook, Hardy & Bacon, LLP (MO), Kansas City, MO; Brent R Marquand, Edwin W Small, Elizabeth A Ward, LEAD ATTORNEYS, Tennessee Valley Authority, Knoxville, TN; David D Ayliffe, James S Chase, Peter K Shea, Tennessee Valley Authority, Knoxville, TN; Robin L Greenwald, PRO HAC VICE, Weitz & Luxenberg, P.C. - NY, New York, NY.

For Larry Mays, Interested Party: Gordon Ball, LEAD ATTORNEY, Ball & Scott Law Offices, Knoxville, TN.

Judges: H. Bruce Guyton, United States Magistrate Judge.

Opinion by: H. Bruce Guyton

Opinion

MEMORANDUM AND ORDER

This case is before the undersigned pursuant to *28 U.S.C. § 636(b)*, the Rules of this Court, and the order of the District Judge [Doc. 197] referring the Plaintiffs' Motion to Establish Bellwethers for the September 2011 Trial and to Limit Further Plaintiff-Specific Discovery **[*6]** and Expert Witness Disclosures to a Corresponding Pool of Potential Bellwether Plaintiffs [Doc. 195] to the undersigned for disposition.

I. BACKGROUND

The facts underlying the instant suit are familiar to the parties and the Court, having been stated in detail throughout these cases. In summary, the Tennessee Valley Authority ("TVA") operates power production facilities throughout the country, including the Kingston Fossil Plant located in Roane County, Tennessee. The coal ash waste produced at the Kingston Fossil Plant is stored in wet containment facilities at nearby Swan Pond. On December 22, 2008, one of the coal ash containment dikes at the Swan Pond facilities failed. As a result of the dike failure, approximately 5.4 million cubic yards of coal ash sludge spilled from the 84-acre containment area of the Swan Pond facilities to an adjacent area of about 300 acres, consisting of primarily the Watts Bar Reservoir, the Clinch and Emory Rivers, and government and privately owned shoreline properties. See *Mays v. TVA, 699 F. Supp. 2d 991, 995-1000 (E.D. Tenn. 2010)* (providing a more detailed recitation of the events leading up to and following the ash spill).

A total of 592 persons, **[*7]** who alleged their person and/or their property have been damaged by the ash spill, filed approximately fifty-five individual suits with this Court. [1] As of November 17, 2010, a total of 135 persons had dismissed their individual claims, leaving 457 plaintiffs before the Court, spread over approximately fifty suits. Two of these suits seek class

[1] TVA has supplied this total calculated as of November 17, 2010. See Doc. 280-4. The Plaintiffs have presented no evidence to the contrary, and the Court finds this calculation to be an accurate approximation of the total number of plaintiffs in these actions.

certification. On January 19, 2011, the undersigned entered a Report and Recommendation [Doc. 307 in *Case No. 3:09-CV-09, 2011 U.S. Dist. LEXIS 8120*], recommending that the request for certification be denied.

The Plaintiffs in the instant case move for establishment of a group of plaintiffs to be the first to proceed to trial and to serve as bellwethers for the parties in the other ash spill cases. [Doc. 195]. TVA has responded in opposition to the Plaintiffs' request [Doc. 203], and the Plaintiffs have made a final reply [Doc. 212].

Accordingly, the Court finds that the Motion to Establish Bellwethers [Doc. 195] is **[*8]** now ripe for adjudication. [2] For the reasons stated below, the Court finds that the motion is not well-taken, and it will be **DENIED**.

II. POSITIONS OF THE PARTIES

The approximately two hundred and seventy-four (274) persons who are plaintiffs in this action move the Court to order that 11 of these persons will proceed to trial on September 11, 2011, as bellwether plaintiffs for the ash spill related claims. The Plaintiffs request that the Court order that the parties form a pool of 22 plaintiffs, 11 selected by the Plaintiffs and 11 selected by TVA. Though the Plaintiffs do not directly explain this point, presumably the pool of 22 will be whittled down to the 11 bellwether plaintiffs, who will proceed to trial. The Plaintiffs maintain that the trial of these claims, though not binding on other plaintiffs, nonetheless, would provide some information on the value of other cases, and thus, would foster resolution of claims and would be a cost-efficient means for disposing of many of the cases now before **[*9]** the Court. [Doc. 196 at 2-4]. [3] In short, the Plaintiffs propose an "informational" bellwether trial plan.

TVA responds that an informational bellwether trial would be pointless, whether undertaken in the context of this case or the ash spill cases in whole. TVA argues that the plaintiffs in this case and the ash spill cases generally are not numerous enough to require bellwethers, and given the individual issues presented by each claim, an informational bellwether is inappropriate and may do little to further settlement. TVA also maintains that the discovery in this case is not complete, despite devoted efforts by counsel to collect written and deposition discovery from **[*10]** the Plaintiffs. TVA also contends that selecting bellwether plaintiffs would be premature. TVA's position is that establishing a bellwether pool and trial, as proposed, would do little to aid the administration of these cases. [Doc. 203].

III. APPLICABLE LAW

Pursuant to *Rule 42 of the Federal Rules of Civil Procedure*, a court may, "[f]or convenience, to avoid prejudice, or to expedite and economize, . . . order a separate trial of one or more separate issues, claims, crossclaims, counterclaims, or third-party claims." *Fed. R. Civ. P. 42(b)*. A court must, however, "preserve any federal right to a jury trial," when ordering such a trial. *Fed. R. Civ. P. 42(b)*.

Thus, under *Rule 42*, federal courts have the authority to conduct a bellwether trial. As the Court of Appeals for the Fifth Circuit has explained, "the term bellwether is derived from the ancient practice of belling a wether (a male sheep) selected to lead his flock. The ultimate success of the wether selected to wear the bell was determined by whether the flock had confidence that the wether would not lead them astray, and so it is in the mass tort context." *In re Chevron U.S.A., Inc., 109 F.3d 1016, 1019 (5th Cir. 1997)*. "[This] **[*11]** notion that the trial of some members of a large group of claimants may provide a basis for enhancing prospects of settlement or for resolving common issues . . . has achieved general acceptance by both bench and bar." Id.; see Manual for Complex Litig., 4th ed., § 22.93.

IV. ANALYSIS

In the instant case, the Court finds that the bellwether trials proposed by the Plaintiffs would do little to expedite the disposition of these cases.

The Plaintiffs propose an "informational" bellwether trial,

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[2] The Plaintiffs requested oral argument on the Motion to Establish Bellwethers [Doc. 195], but after reviewing the parties' pleadings, the Court found that oral argument was not necessary.

[3] The Plaintiffs devote a large portion of their motion and supporting memorandum to their position that the formation of a bellwether pool and a bellwether trial could be used to limit discovery and, thus, limit the cost and scope of discovery. The Court has addressed these positions in its Order [Doc. 217], denying the Plaintiffs' request for a protective order halting individual discovery. The Court will not re-visit or re-open this decision. Discovery in this matter will continue to proceed as previously ordered.

which will bind only those parties who take part in the proceeding. The Court recognizes that bellwether trials must bind only those persons who take part in the trial in order to assure that each Plaintiff is afforded his or her constitutional rights. The non-binding nature of such proceedings, however, means that they are only appropriate and helpful in certain circumstances. The court finds that the ash spill cases do not present such circumstances.

Initially, the Court finds that, while many plaintiffs have brought suits relating to the ash spill, the numbers are not so great that they cannot proceed to trial independently. There are currently 55 cases, with approximately 450 plaintiffs, before **[*12]** the Court. There are not thousands of plaintiffs or thousands of cases before the Court. The Court finds that the number of persons involved in these cases argues against employing a bellwether procedure. See *In re DuPont Litig., 2006 U.S. Dist. LEXIS 9631, 2006 WL 5097316, at *2 (E.D. Ky. Mar. 8, 2006)* (recognizing, in a case with 340 plaintiffs, that "[m]ost toxic tort cases utilizing a 'bellwether' approach involve much greater numbers of plaintiffs and/or defendants."); *In re Vioxx Products Liability Litig., 2010 U.S. Dist. LEXIS 64388, 2010 WL 2649513, 1 (E.D. La. June 29, 2010)* (discussing bellwethers conducted where thousands of suits had been filed); *In re FEMA Trailer Formaldahyde Prod. Liability Litig., 628 F.3d 157, 2010 WL 5074019 (5th Cir. 2010)* (describing the potential claims to be resolved by bellwether trials as being in the thousands).

More importantly, the Court finds that there are few issues in the ash spill cases that are appropriate for bellwether treatment. The District Judge has ruled that: this case will be tried without a jury; no punitive damages may be awarded; and the Plaintiffs may not maintain claims based upon TVA's removal and remediation conduct following the ash spill. *Mays, 699 F. Supp. 2d at 1033*. The only **[*13]** common issue remaining in the ash spill cases is whether TVA is liable for the spill.

This lone, common issue is to be presented to the District Judge. He will determine whether TVA is liable for the spill. There is no danger of this question being presented to numerous juries who may reach varying decisions on the same issue. After the District Judge determines whether TVA is liable for the spill, the highly individualized causation and damages determinations will remain in these cases. Thus, a bellwether trial would, at best, determine a single issue that will be determined in the first trial of an ash spill case, regardless of any bellwether designation. Beyond determining this single issue, there will be little a bellwether trial could hope to accomplish.

The Plaintiffs have unique interests in unique parcels of real property, which are varying distances from the spill itself. What ash came onto each property, how it came to be on the property (if it came at all), and the effect on a given property owner's use and enjoyment are so varied that bellwethers would provide little guidance beyond the obvious indicators of value readily apparent to the parties and the Court. The Plaintiffs' **[*14]** personal injury and medical monitoring claims will require equally unique causation and damages determinations.

In sum, the Court finds no need to establish a bellwether pool or bellwether trial. The formation and establishment of such a non-binding proceeding would be an unnecessary expenditure of the parties' and the Court's resources. When the first of the ash spilll cases proceeds to trial, th parties will, no doubt, take note of its outcome, and this knowledge will aid settlement in exactly the same manner a bellwether trial would.

V. CONCLUSION

Based on the foregoing, the Court finds that the Motion to Establish Bellwethers **[Doc. 195]** is not well-taken, and it is **DENIED**.

IT IS SO ORDERED.

ENTER:

/s/ H. Bruce Guyton

United States Magistrate Judge

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