



Daniel Schreck
973-368-6207
dschreck@tresslerllp.com

Attorneys at Law
163 Madison Avenue
Suite 404
Morristown, NJ 07960
973-848-2900
Fax 973-623-0405
www.tresslerllp.com

January 5, 2025

Via Federal Express and Electronic Mail (comments.mailbox@njcourts.gov)

Honorable Michael J. Blee, J.A.D.
Acting Administrative Director of the Courts
Attn: 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:

We represent Defendant Data Axle, Inc. in the Monmouth County action Atlas Data Privacy Corp., et al. v. Data Axle, Inc., Docket No. MON-L-483-24 (the “Data Axle Action”). We write in opposition to the November 3, 2025 application of Atlas Data Privacy Corporation (“Atlas”) and several individual Plaintiffs to consolidate 111 pending Daniel’s Law actions in which Atlas is a plaintiff, including the Data Axle Action, and classify the proceeding as a Multicounty Litigation, or alternatively, to transfer all 111 actions to a single vicinage and assign a single judge to all proceedings (the “Atlas Application”). To that end, Data Axle joins and adopts the positions set forth in the January 2, 2026 opposition to the Atlas Application submitted by Troutman Pepper Locke LLP and McCarter & English LLP (the “January 2, 2026 Opposition”). A copy of the January 2, 2026 Opposition is attached hereto.

For the reasons stated in the January 2, 2026 Opposition, among others, Data Axle Inc. opposes the formation of an MCL for the Daniel’s Law litigations brought by Atlas.

We thank the Court for its attention to this matter.

Respectfully submitted,
TRESSLER LLP

By: /s/ Daniel Schreck
Daniel Schreck, Esq.

Tressler LLP

To: Honorable Michael J. Blee, J.A.D.

January 5, 2026

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163 Madison Ave., Suite 404
Morristown, New Jersey 07960
973-848-2900
dschreck@tresslerllp.com
Attorneys for Defendant Data Axle, Inc.

Encl.

cc: Judge McCarthy (via eCourts)

All Counsel of Record in Atlas Data Privacy Corp., et al. v. Data Axle, Inc., Docket No. MON-L-483-24 (via eCourts)

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 Defendants¹

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 2	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 associated 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 contraceptives)	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 manufacturers, Otsuka America Pharmaceutical Inc., Otsuka Pharmaceutical Co., Ltd., and Bristol-Myers Squibb Company.	5/7/2018	Approved	N/A
16	Physiomes	Personal injury - product	2/28/2018	62	2	Physiomes Flexible Composite Mesh	Claims based on injuries caused by Physiomes 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 Implants	Personal injury - product	2/5/2020	at least 68	2	Allergan Biocell Textured Breast Implants	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 (refernce 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 injuries 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 injuries 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 injuries 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 LFIT™ Anatomic Cobalt Chromium (CoCr) V40™ 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 LFIT™ Anatomic Cobalt Chromium (CoCr) V40™ 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 and 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-1 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 ORDERED 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 FURTHER 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
Plaintiffs,)	DECISIONS
)	
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

ATLAS DATA PRIVACY CORP., et al. v. CARCO GROUP INC., et al.
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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
Intelllicorp 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 Telnix

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.)

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1 THE COURT: All right, I'm prepared to rule.
2 Daniel's Law was designed to prevent attacks on
3 government officials and their families. The law
4 prohibits disclosure of addresses and phone numbers of
5 individuals who hold certain positions, such as active
6 and retired judges and law enforcement personnel.
7 Those are people or individuals who are referred to as
8 cover persons.
9 The law sets forth that on notice a person,
10 business or association shall not disclose or re-
11 disclose the home address or -- or unpublished
12 telephone number of a covered person. That's
13 56:8-166.1(a)(2). Civil penalties may be imposed for
14 violations of the law, including \$1,000 per violation,
15 punitive damages and attorney's fees. That's in
16 166.1(c).
17 There are also criminal penalties for
18 reckless violation of Daniel's Law. There's a fourth-
19 degree crime and -- for reckless and a third-degree for
20 purposeful violation. When an authorized person seeks
21 to prohibit disclosure of the home address or
22 unpublished phone number of any other -- of any covered
23 person, consistent with Paragraph 1 of the Statute the
24 authorized person shall provide written to the person
25 from whom the authorized person is seeking non-

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1 disclosure, that the authorized person is an authorized
2 person, and they're requesting that the person cease
3 disclosure of the information in order to protect the
4 information from the internet, or wherever -- or where
5 otherwise made available. And that's 166.1(a)(2). And
6 upon such written notice, and not 10 -- later than 10
7 business days after receipt of the notice, there should
8 be no -- there shall be no disclosure of the home
9 address or unpublished home number -- phone number of
10 any covered -- home telephone number of any covered
11 person.
12 Now each of the complaints here explain that
13 Atlas provides an online platform, including an e-mail
14 service named Atlas Mail. Covered persons were, by
15 people who qualify as covered persons, may send take-
16 down notices via e-mail, requesting that data brokers
17 cease disclosure or re-disclosure of information about
18 the covered person, in accordance with 166.1(a)(1).
19 Each of the complaints allege that the defendant, or
20 defendant in question, is an entity that discloses or
21 re-discloses on the internet personal identifying
22 information to covered persons, and that by virtue of
23 defendant's business model visitors, users or customers
24 may obtain a name and home address, and/or name and
25 unpublished home phone number of the individual

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

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

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

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

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

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

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

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

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1 complaint will withstand the motion." On the other
2 hand, if a complaint does not state a basis for relief,
3 and discovery would not provide one, dismissal is
4 appropriate. And that's BANCO POPULAR VS. GANDI, at
5 184 N.J. 166 at -- 16 -- 184 N.J. 161, at 166, that's a
6 2005 case.

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

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

9

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

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

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

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

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

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

11

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

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

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

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

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

13

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

9 Next, Carco, Remine, Crexi, Spokeo, make the
10 argument that plaintiffs fail to allege that defendants
11 received the take-down notice, that under Daniel's Law
12 any written down -- any written take-down notice must
13 be "received" to give rise to a potential claim, as
14 Daniel's Law provides that only upon written
15 notification, and not later than 10 business days
16 following receipt thereof, would the recipient be
17 obligated not to disclose, re-disclose, or otherwise
18 make available the protected information. That's at
19 166.1(a)(1).

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

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

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

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

15

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

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

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

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

17

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

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

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

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

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

19

Decision

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

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

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

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

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

12 So the primary focus of the personal
13 jurisdiction inquiry is the defendant's relationship to
14 the forum state. JARDIM VS. OVERLEY, 461 N.J. Super.
15 367, 275.

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

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

21

Decision

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

7 As far as specific jurisdiction that's when
8 there's evidence of purposeful acts by the defendant
9 directed towards the forum state that make it
10 reasonable for the defendant to anticipate being held
11 in a court there. That's from MASTONDREA VS.
12 OCCIDENTAL HOTELS MANAGEMENT, 391 N.J. Super. 261, at
13 268, 2007 Appellate Division case. And for specific
14 jurisdiction to exist the minimum-contacts inquiry must
15 focus on the relation among the defendant, the forum
16 and the litigation. That's from LEBEL at 323, and they
17 quote the case of SHAFFER VS. HEITNER. Minimum --
18 minimum-contacts requirement is satisfied so long as
19 the contacts resulted from the defendant's purposeful
20 conduct, not the unilateral activities of the
21 plaintiff. Again, LEBEL.

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

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

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

23

Decision

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

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

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

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

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

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

25

Decision

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

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

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

27

Decision

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

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

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

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1 substantive, and it's not fatal. Now, um, imperfect
2 service has been found sufficient where a defendant had
3 actual notice of the lawsuit prior to the entry of the
4 judgment, and that's SOBEL VS. LONG ISLAND
5 ENTERTAINMENT PRODUCTS, 329 N.J. Super. 285, at 293-94,
6 2000 Appellate Division case. And, ultimately,
7 sufficient notice can overcome technical defects
8 because "not every defect in the manner in which
9 process is served renders a judgment upon which the
10 action is brought void and unenforceable. That's the
11 ROSA case, again, 260 N.J. Super. 458, at 462. And our
12 Supreme Court has -- New Jersey Supreme Court has also
13 previously espoused a similar belief, noting that
14 "where due process has been afforded a litigant
15 technical violations of the rule concerning due --
16 service of due process -- where due process has been
17 afforded a litigant technical violations of the rule
18 concerning service of process do not defeat The Court's
19 jurisdiction." And that's from O'CONNOR VS. ALTUS, 67
20 N.J. 106, at 127, 1975.

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

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Decision

1 They've been participating in litigation both here and
2 in Federal Court. They've had an opportunity to
3 respond to the complaint, and that distinguishes the
4 largely unpublished cases that the defendant cited.
5 Those cases can be differentiated by the one here,
6 because in those cited cases the defendants did not
7 receive notice of the action, or had an opportunity to
8 respond before default judgments were entered against
9 them so. Here Blackbaud was served with process, they
10 were on notice of the suit, they had ample time to
11 respond, and I -- I don't believe that failure to file
12 that affidavit requires dismissal of the action.
13 However, I will order the plaintiffs to still comply
14 with the rules as a belt-and-suspenders' thing, and
15 allow them an opportunity to correct the defect in
16 service. I will not dismiss the complaint at this time
17 for -- for this technical violation, but I will require
18 plaintiffs to file an affidavit, complying with Rule
19 4:4-4(b) within seven days.

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

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1 available, the home address or unpublished home
2 telephone number of any covered person. That's
3 166.1(a)(1). Accordingly, a defendant violates
4 Daniel's Law if that defendant discloses a home address
5 or unpublished home telephone number.

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

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

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Decision

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

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

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

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

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Decision

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

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

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1 reason, too, the -- the argument -- the argument fails
2 and the -- the complaint, um, the complaint should --
3 should be dismissed with -- without prejudice at this
4 point.
5 So all that being said, um, the -- the -- the
6 four cases, actually now three, because Telnyx was one
7 of them -- is that in here? Oh, here it is. Carco,
8 Remine, Blackbaud and Telnyx. Okay, Telnyx is gone, so
9 we have Carco, Remine and Blackbaud. Those involve
10 challenges to, uh, in -- in terms of preemption
11 arguments, um, so there remains to be oral argument on
12 those. Therefore, I think what I'm going to do is I'm
13 not going to -- I'm not going to enter an order in
14 Carco, Remine or Blackbaud because -- basically, I
15 guess what I'll do is I'll adjourn, I'll carry the
16 motion to a date to be provided. Although, wait,
17 intervention on which one? Was it Carco? Anybody?
18 Who intervened on -- AG intervened on which case?
19 MR. STIO: Your Honor, it would be in the
20 Carco Matter.
21 THE COURT: It's Carco, okay.
22 MR. STIO: Your Honor, just one other thing.
23 THE COURT: Yep.
24 MR. STIO: Remine does not have a preemption,
25 so you could remove it off the list.

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Decision

1 THE COURT: Are you sure about --
2 MR. STIO: I -- I don't mind putting them
3 together, but they don't have a preemption argument.
4 MR. CHRISTIE: And, Your Honor, just as to
5 that we did not file an intervention motion in Ermine.
6 THE COURT: Ermine, okay, but Carco does.
7 MR. STIO: Yes, Your Honor.
8 THE COURT: Okay. Yeah, there's no
9 intervention motion, okay, but there's arguments about
10 preemption, right?
11 MR. STIO: Correct.
12 THE COURT: Okay.
13 MR. STIO: Not -- not for -- not for Remind.
14 THE COURT: Remine. Remine doesn't have any
15 of those arguments.
16 MR. STIO: No, just Carco.
17 THE COURT: Okay, fine. So, thank you for
18 that. So Carco, Blackbaud and Telnyx, those --
19 Blackbaud and Telnyx -- Telnyx is not an issue.
20 Blackbaud I'm going to hold off on the arguments, and
21 I'll give a date for continued argument on that, okay.
22 So the motion is adjourned, I guess, on that one.
23 Carco we'll deal with the motion to
24 intervene, uh, and, um, you know, I'll -- I'll have to
25 figure out exactly, because I'd like to enter an order,

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

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

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

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

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Decision

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

8 MR. CHRISTIE: Thanks, Your Honor.

9 MR. SHAW: Thank you, Your Honor.

10 (Proceedings concluded)

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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

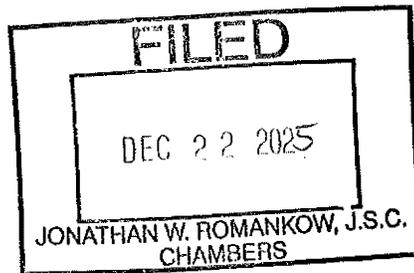
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Butler, NJ 07405

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

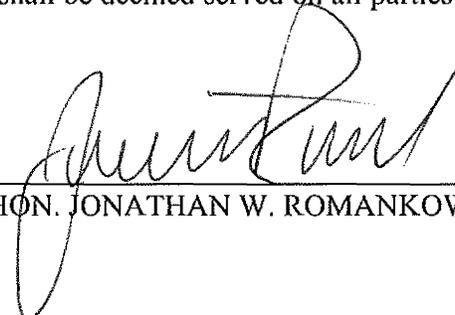
granted Defendant Telnix, LLC's ("Defendant") motion to dismiss, without prejudice, for the reasons stated on the record during oral argument on August 15, 2025, and, upon such reconsideration, denying Defendant's motion to dismiss in its entirety; and the Court having reviewed and considered the papers,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

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 Telnix’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 Telnix 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



Neutral

As of: January 2, 2026 2:19 PM Z

[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 calendaring, 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 so 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 *Goasdane* and this similarity requires affirmance. In certain significant respects, however, the tobacco user plaintiffs in *Barnes* and *Goasdane* 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.

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EXHIBIT G



Neutral

As of: January 2, 2026 2:20 PM Z

[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 LITIGATION Rana 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

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

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).

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

⁴Daubert 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.

⁵See 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).

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

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

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 \(1987\)](#))).

"[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

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

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 Proropythiorracil: 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 hepatotoxicity, in Liver and Biliary Diseases (Ed. N. Kaplowitz), Williams & Witkins, 82-97; Kaplowitz N., New Developments in Drug Hepatotoxicity, 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 Fulminant Hepatic Failure (R.W. Williams, W Lee) 19-31, 1977; Kaplowitz N., Causality Assessment verses Guilt by Association in Drug Hepatotoxicity, 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. (Eds 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 Hepatotoxicity, 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).

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).

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

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).

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).

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

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 Zolofit \(Sertraline Hydrochloride\) 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

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

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").

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

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).

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

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

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

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*

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

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.

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

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

³⁶The 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.

³⁷Dr. 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).

³⁸The 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,

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

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.

³⁹See 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).

⁴⁰See 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).

⁴¹See 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).

⁴²See 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

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

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

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); [McCulloch 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 Hepatotoxicity, 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

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

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

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 Hepatotoxicity 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., Hepatotoxicity 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/Malnourishment 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/malnourishment could be a significant risk factor.⁵⁶ Other evidence in the record

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

shows that fasting/malnourishment was a known possible risk factor for acetaminophen-induced liver injury.⁵⁷ I see nothing unreliable about his fasting/malnourishment 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.

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 Glucuronidation 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 Hepatotoxicity: 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.

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.").

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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EXHIBIT H



Neutral

As of: January 2, 2026 2:21 PM Z

[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 [Scotfield 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

Emily Silkowski

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, Adelanía 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.

²The 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.

³The 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.

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,

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 Formaldehyde 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 spill cases proceeds to trial, the 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