18-1153

No. 18-

IN THE

Supreme Court of the United States

TIMOTHY J. RIZZO,

Petitioner,

v.

APPLIED MATERIALS, INC., GLOBALFOUNDRIES, U.S., INC., GLOBALFOUNDRIES, INC., AM TECHNICAL SOLUTIONS, INC.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

US Supreme Court held historical case law such as *Joiner, Matrixx, Daubert, Kumho Tire*...etc, based upon scientific / technical evidence within a *Daubert* Court, protecting the vested interest of Rizzo to assure that Courts are not "heavy handed" or "abuse of discretion" by the gatekeeper violating the constitutional right to trial by a jury of peers.

1. Whether the courts below erroneously abused their discretion dismissing Rizzo's Experts (Dr. Wang, Dr. Miloslavsky, Dr. Hodgman) in conflict with the decisions of multiple circuits (MDL) even the Second Circuit's past rulings, where experts and scientific knowledge - facts of the case - usurp the jury's right to decide the facts conflicting with *Daubert* upon scientific controversy overstepping the function of the gatekeeper. Where epidemiology and peer review was substantial and opinions derived from Rizzo's clinical picture, while claiming the case is of *ipse dixit* though the science challenges the rulings from the courts below supporting *Daubert*. The rulings are contradictive to the science and unconstitutionally interferes with Rizzo's right to have his claims heard by a jury of peers as required by the Seventh Amendment.[1]

2. Whether the courts below erroneously held a different standard of review for *Daubert* and

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1. Breyer, "Introduction," 4, and Metzger, "The Demise of Daubert in State Courts."

FRE 702 in combination with unsubstantiated Expert Reports where FRCP 26(A)(2b) requires that when referencing data, the data must be presented for confirmation of theories, methodologies, or science and reviewed by the justice. Record indicates NO journals where entered by GF in support of GF's Motion for Summary Judgment, FRCP 56 in conflict with the Record as being inadequate for review and erroneously blocked evidence, initiating FRAP 10(e)(2) (which was denied) where scientific research has proven General and Specific Caution, supporting that a de novo[2] review by the Second Circuit is erroneous and against the science as well as Justice Stevens dissent, "The District Court, however, examined the studies one by one..."*General Elec. Co., v. Joiner*, 522 U.S. at 152.

3. Whether Courts below erroneously denied the Amended Complaint that was filed timely, FRCP 15(a) on December 20, 2016 due to a shift in scheduling and was "directed" by Magistrate Baxter to file after Discovery concluded. The courts below ruled against the Amended Complaint per their directive to file. Rizzo filed on November 21, 2016, 29 days after close of Discovery (USCA ECF 89, p18). Amending the Complaint was to further detail CERCLA (42

2. Reviewing Motions for Summary Judgment de novo consider the evidence in the light most favorable to the non-moving party [Rizzo], see *United States v. Deibold Inc.*, 369 U.S. 654, 655 (1962).

> U.S.C. § 9601-9675), within this *Daubert* case, from site exposures while GF alluded / hinted to this [thing] at Second Circuit Oral Argument, uncontested by GF Experts, as the Briefs and Record support and the courts were erroneous in denying Rizzo's right to amend.

The semiconductor industry has proportional cancer mortality rates (PCMR) ranging from 119% to 367% higher than the general population and is the third largest industry in the private sector, (*Clapp et al.*, 15sa-18sa).[3,4] The case presented is politically motivated in NYS where scientific controversy similar to asbestos and roundup, though based on silica, solvent, heavy metals, and ion radiation exposures within the industry. The semiconductor industry is a new avenue of scientific knowledge that required the US Supreme Court to value the litigation presented. Semiconductor facilities become toxic dumps where communities are impacted and workers are exposed internally and externally (Toxic Substances Control Act vs CERCLA). The questions presented are ripe for the Court's review and this case is an ideal vehicle

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3. "The U.S. Bureau of Labor Statistics (BLS) reported that, averaged across all manufacturing industries, occupational illnesses accounted for 6.3 percent of all work-loss cases in 2001. The rate in the electronics industry was higher, 9.5 percent, and the rate in the semiconductor component was higher yet, 15.4 percent. Moreover, a study of the reporting of occupational illnesses in California found that semiconductor companies properly reported less than half of all cases that should have been reported by Occupational Safety and Health Administration (OSHA) criteria (McCurdy, Schenker, and Samuels 1991)" *(LaDou,* 72sa).

4. See Supplemental Appendix with "sa". Ex: (15sa).

for resolving it upon science protecting the workers.[5] Journals provided in Supplemental Appendix for the US Supreme Court's review referenced within this Writ of Certiorari which will show an erroneous Second Circuit Summary Order helping the Supreme Court Justices understand the importance to this litigation, saving time tracking down references.[6]

5. Justices could infer any other questions, as they see fit, to move this case forward where Rizzo is Prose.

6. Journals are provided to the US Supreme Court in Supplemental Appendix "sa" for your convenience, as referenced in this Writ, in accordance to the Rule 14, Content of a Petition for a Writ Centerior 1.A.i (vi) "any other material the petitioner believes essential to understand the petition" and Rule 33 (c) copies of patents documents, except opinions, may be duplicate in such size as necessary in a separate appendix".

LIST OF PARTIES

All Parties appear in the caption of the case cover page.

Rizzo is a disabled Prose litigant with Wegener's Disease, limited on resources, who is fighting for an ethical cause, and respectfully request the Court to be generous in and shall not be dismissed for informality of form, *Smith v. Berry*, 502 U.S. 244 (1992).

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RULES

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The Orders of the Second Circuit Court of Appeal ("USCA") Petition for Rehearing denial (77a)[1] is reported along with the Summary Order within case #17-3274 (L) and #18-1490(Con), (1a). All Summary Orders by Second Circuit are signed by the Clerk and Judge Gardephe, sitting by designation.

The Decision and Order(s) of the Northern District of New York identified number 6:15-cv-557, (5a-76a).

JURISDICTION

USCA entered Summary Order on November 27, 2018 (1a) and denied Rizzo's Petition for Rehearing on December 27, 2018 (77a). Petition for rehearing filed timely on December 10, 2018, certificate of mailing December 6, 2018. This Court's jurisdiction is invoked under 28 U.S.C. § 1254 (1).

PROVISIONS INVOLVED

Provisions LIMITED in Petition; FRE 702, FRE 703, FRAP 10, FRCP 15, FCRP 26(a), FRCP 56, and Seventh Amendment.

STATEMENT OF THE CASE

Statutory and Regulatory Background

FRE 702 and FRE 703 were not designed to limit opinion and analogy. Independent assessments of

1. See Appendix with "a". Ex: (15a).

witnesses', conclusions, and comparative credibilities, often to stretch the above cited passages in *Daubert* beyond their limit. Or challenge acceptance of scientific controversy between experts and facts usurping the jury's right.

FRE 702 requires that the Expert witness to have the following criteria;

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;

D. The expert has reliably applied the principles and methods to the facts of the case.

The gatekeeper is only allowed to examine "mythologies reliable to the facts of the case" *Milward v. Acuity Specially Products*, 639 F 3.d 11, 15 (2011). "for a trial Court to overreach in the gatekeeping function and determine whether the opinion evidence is correct or worthy of credence is to usurp the jury's right to decide the facts of the case", *Brasher v. Sandoz Pharmaceuticals Corp.*, 160 F. Supp. 2d 1291 (N.D. Ala 2001). Even within a "zone of scientific disagreement" *Milward*, 639 F. 3rd 15, citing *Ruiz-Troche v. Pepsi Cola of P.R. Bottling Co.*, 161 F. 3rd 85 (1st Cir. 1998) the District Court ("DC") may not

determine which of several competing scientific theories has "best province" or take "side on questions that are currently the focus of extensive scientific research and debate – and on which reasonable scientist can clearly disagree" *Milward at 22.*

FRE 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, which includes treating doctors. Thus a physician in his own practice bases his diagnosis on information from numerous sources and of considerable variety, including statements by patients and relatives, reports and opinions from nurses, technicians and other doctors, hospital records, CT Scans, and X rays - helping a jury evaluate the opinion.

FRCP 26(A)(2b) Witnesses who must provide a written report, unless otherwise stipulated or ordered by the court, this disclosure must be accompanied by a written report – prepared and signed by the witness – if the witness is one retained or specially employed to provide expert testimony in the case or one whose duties as the party's employee regularly involve giving expert testimony, including any exhibits that will be used to summarize or support them.

FRCP 56(c) directs the entry of Summary Judgment in favor of a party who "[shows] that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." An issue is "genuine" if sufficient evidence exists on each side "so that a rational trier of fact could resolve the issue either way" and "[a]n issue is 'material' if under the substantive law it is essential to the proper disposition of the claim."

Adler v. Wal-Mart Stores, Inc., 144 F.3d 664, 670 (10th Cir. 1998). In determining whether genuine issues of material fact exist, the court "construe[es] all facts and reasonable inferences in a light most favorable to the nonmoving party" *Pub. Serv. Co. of Colo. v. Cont'l Cas. Co.*, 26 F.3d 1508, 1513-14 (10th Cir. 1994). In setting forward these specific facts, plaintiff must identify the facts "by reference to affidavits, deposition transcripts, or specific exhibits incorporated therein." *Adler*, 144 F.3d at 671. If sufficient evidence exists on which a trier of fact could reasonably find for the plaintiff, Summary Judgment is inappropriate, see *Prenalta Corp. v. Colo. Interstate Gas Co.*, 944 F.2d 677, 684 (10th Cir. 1991).

FRCP 15(a) requires that leave to file an Amended Complaint be "freely given when justice so requires." This standard is readily met here, as the more detailed description of the causation / tier of fact in the Amended Complaint narrows the scope of the issues presented in this litigation and will prevent the Court's time from being wasted at trial.

Federal Courts of Appeals allows consideration of materials not in the DC record can rely on three possible avenues to supplement the Record on Appeal (1) Rule 10(e)(2)(C) of the FRCP, (2) Rule 201 of the FRE, an (3) the inherent equitable authority of the Federal Courts of Appeals.

Seventh Amendment the right of trial by jury shall be preserved.

Facts

Rizzo became ill with **multiple** medical ailments caused from chemical exposures at the GF Site and a major malfunctions within Fab 8.1 on August 2, 2012, reported by Rizzo and within three days became severely ill and ultimately hospitalized on January 31, 2013, in need of intense medical attention – life threatening situation – Wegener's Disease (often die within one year) (*Cotch et al.*, 26sa). Rizzo could not have been sick prior to GF or Rizzo would be DEAD and the illness is not genetic.

Rizzo was exposed to multiple environmental exposures (silica, solvents, heavy metals, ion radiation, VOC's, SVOC's, dust, fumes, particles, and vapors) which "triggered" an aggressive autoimmune disease, Wegener's Disease, named after the Nazi Chemical Scientist who tested on the Jews. ANCA[2] or GPA[3] is used to be politically correct. Wegener's Granulomatosis is a "rare autoimmune disorder" (3/100,000) in which blood vessels become inflamed and restrict blood flow to various organs, destroying tissue, affecting mainly blood vessels in the nose, sinuses, ears, lungs, and kidneys.

It must be well understood that **GPA is ANCA, AAV (ANCA-associated vasculitis), and WG, confirmed by all Experts.** They all mean the same thing with special detail to the bodily involvement and blood characteristics. Rizzo's GPA consisted in **cANCA** (blood determined by ELISA Blood

2. Antineutrophil cytoplasmic antibodies (ANCA) are autoantibodies directed against antigens found in the cytoplasmic granules of neutrophils and monocytes.

3. Granulomatosis with polyangiitis (GPA) (Wegener's).

Test which confirms GPA)[4], **diffuse ground glass opacities** (CT scan of lungs) (ROA, p1647), **and tubular atrophy, focal segmental necrotizing crescentic glomerulonephritis** (kidney biopsy) (ROA, p1360-p1365). **Key features** to this case where silica and solvents are involved proving Causation, which the courts below will NOT detail.

GF Expert written conclusions are contradictive to the clinical picture of the exposures, science, odds ratios, medical records, tier of fact, while Hoffman [GF] failed to appraise the courts below of past publications undermining GF's defense.

1. Hoffman admits;

   a. "Whereas silica is a well established cause of pulmonary disease and nephritis, increasing circumstantial evidence has raised questions about it role in triggering MPA and WG" (ROA, p1367).

   b. "Statistical significant differences in regard to WG patients having a greater degree of exposure to fumes, insecticides, and particulate airborne matter. Others have suggested that inhalation of silica and grain particles may increase the rise in developing WG" (ROA, p1321). Referencing (*Tervaert et al.*, 174sa-179sa), (*Gregorini et al.*, 33sa-52sa), (*Nuyts et al.*, 169sa-172sa), (*Duna et al.*, 32sa), (ROA, p1321).[5]

4. "Virtual diagnostic of Wegener's granulomatosis" referencing ANCA (ROA, p1404).

5. Statistically significant is the likelihood that a relationship between two or more variables is caused by something other than random chance.

c. "Over 75% of patients in all groups noted environmental exposure to inhaled materials during the year prior of onset of the disease" (ROA, p1349).

Also supported by an independent rheumatologist testifying to a VA three judge panel on **solvents**;

> "independent IME...rheumatologist opinioned that it was at least as likely as not that the Veteran's exposure to degreasing solvents, including carbon tetrachloride, during his military service led to his development of Wegener's granulomatosis... would have frequently exposed him to solvents carbon tetrachloride and trichloroethylene... halogenated aliphatic...highly probative and entitled to great weight" (ROA, p1663-p1665).

Mimicking Rizzo's exposures supporting FRE 706 where the courts below did not pursue, where such an independent review would sure the science/law for the complex new precedent helping secure the basic objectives of the FRE, ascertainment of truth and just determinations of proceedings.

GF submitted a fraudulent chemical exposure list, destroyed video footage of the accident, and misguided the DC on employment/exposure duration (6 months vs **3.5 years**) (ROA, p1184, p1527), see USCA ECF 81, 82, 83. Judgments by DC confirm incorrect time frames by GF and the DC which impacts GF tier of fact (6a,17a,69a vs. ROA, p547, p1184), detailed in Rizzo's Briefs along with Motions FRCP 59 and 60 (DENIED).

Violation of CERCLA based on "timing of construction" and failure to have the property remediated prior to the workforce and construction exposing individuals to VOC's, SVOC's, heavy metals, and carcinogens. Example; TCE, Carbon Tet, PCE...etc. (ROA, p1059-p1121, p1431-p1466, p1728).

Rizzo was exposed to ion radiation (29 C.F.R. 1910.1020) and GF violated NY Labor Laws 240 - 241. In addition to nano particles and solvents identified in the Complaint and multiple Affidavit's by Rizzo, CONFIRMED at Oral Argument, Second Circuit on November 6, 2018, by Attorney Amanda Rice [GF], against a Standard of Care with Negligence. GF's Answers to the Complaint DENY such exposures conflicting with GF Expert Reports.

The issue presented is of modern science/law where high stakes are involved against the semiconductor industry, at such a critical time frame of nano technology[6] while attempting to set a "fake" precedent, where NIOSH has published that nano particles are harmful to the humans (ROA, p1396) and the US Senate (ROA, p1394) acknowledges the toxics involved conflict with banned EPA chemicals and Toxic Substances Control Act, *Kisch & King* (173sa), (ROA, p1394).

Proceedings Below

Complaint field on April 30, 2015, and Amended Complaint on July 29, 2015, against GF at Fab 8.1 in Malta, New York. GF field for Motion to Dismiss which was

6. Current technology is 7 nm vs human DNA approximately 2.5 nm.

denied by Judge D'Agostino (5a-14a) and was supported by Rizzo's "Link and Causation Report" (ECF dated February 24, 2016), (USCA ECF 81, 82, 83 (evidence "SEALED/STRIKEN")) partially taken but not entered by Magistrate Baxter (ECF 105, p7). The DC never entered along with doctor's letter reports, resumes, data... etc. but sealed per GF's request, while defeating GF's Motion to Dismiss. Initial evidence being forwarded was suppressed, conflicting with Rizzo's burden.

> "MS. RESIMAN: "...we would request that that be under seal with the Court and not made available publicly."
>
> THE COURT: I don't have any intention of filing any of this stuff I got from Mr. Rizzo.
>
> MS. REISMAN: Perfect. Thank you, Your Honor." (ECF 105, Teleconference, February 24, 2016, p8).

GF conducted confrontational depositions on Rizzo's treating doctors Hodgman (toxicologist), Miloslavsky (rheumatologist), Salenger (nephrology - withdrew due to attacks by GF), and Wang (critical care pulmonologist). GF Experts are Hoffman (rheumatologist) and Garabrant (defense epidemiologist, resume proves he only works for defense firms). Decision and Order entered on September 11, 2017 in favor of GF (15a-67a) denying the evidence of causation while overstepping the gatekeeping function and denial of an Amended Complaint that was in compliance with Magistrate Baxter's directive. Rizzo filed Motion to Renew, Reargue, and Amend on October 11, 2017 (ECF 182). Three days after GF's Response on Appeal, April 30,

2018 (USCA ECF 127), the DC denied Rizzo's Motion to Renew on May 2, 2018 (ECF 182) in an attempt to close the case and block the evidence (68a-76a), 203 days passed. Rizzo Appealed both decisions and consolidated the case at the USCA #17-3274 & #18-1490.

Rizzo satisfied the requirements of USCA and held an Oral Argument on November 6, 2018. Five minutes granted. Within twenty days, November 27, 2018, the USCA provided a Summary Order (1a-4a) denying Rizzo and specifically attacked US Supreme Court precedents and MDL precedents upon screening, rules of evidence, *Daubert*, and methodologies of experts/treating doctors, blocking Rizzo from trial and failing to provide a "hard look". The Order does not correspond to the Records/ Briefs argued upon "screening" of journals or content because the journals were NEVER entered for review, as Rizzo contest numerous times, FRCP 26. Summary Order utilizes FRCP 56 as the primary denial along with "abuse of discretion standard unless manifestly erroneous" *Restivo v. Hessemann*, 846 F.547, 575 (2nd Cir. 2017). Additionally the "abuse of discretion" on discovery or leave to amend for Rizzo's Amended Complaint and evidence challenging FRCP 15(a) even historical Supreme Court Decisions. FRCP 56 and "methodology" is the scapegoat of this case. Material of fact blocked and denied by DC which invalidates the USCA Order and the DC's procedural obligation while limiting/bifurcating a Phasing Schedule. The USCA should have presented a more precise explanation of the Standard of Review where a de novo, "complete and independent" review would have identified the science, methodologies, biologically plausible relationships, OR/RR, particulate matter size, tumor necrosis, natural kill, T cell and B cell data, NY Labor

Law, ion radiation, Hodgman, Hoffman...etc. or "relevant scientific literature on the toxic effects of the substances" see *Joiner v. General Electric Company*, 78 F. 3d 524, as an alternative a three page Summary Order was issued upon a Record of over 3,000 pages lacking scientific journals and exhibits for review.

A de novo review is erroneous – conflicting with the requirements of *Daubert*, imposed substantial harm denying request for discoverable, compel evidence, and entry of additional documents which were referenced by Rizzo – hidden by GF, see *Fernandez v. Bankers Nat. Life Ins. Co.*, 906 F.2d 559 (C.A. 11(Fla.), 1990).

REASONS FOR GRANTING THE PETITION

Abuse of Discretion on Scientific Controversy - Heavy Handed - with Inadequate Record for Daubert

Summary Order (1a-4a) claims that the scientific evidence was "screened" for review in production for relevant and reliable theories referenced by Experts or noted as de novo. ECF 206 identifies that no such screening took place while journals were blocked by the courts below for entry to the Record, failure to include the pleadings (full transcripts and journals by GF) would render GF's motion procedurally defective, *Matsyuk v. Konkalipos*, 35 AD3d 675 (2nd Dept. 2006); *Wider v. Heller*, 24 AD3d 433 (2nd Dept. 2006).

DC wrote "to place all of this evidence before the Court and permitting additional evidence in support of the motion for reconsideration, that was already in plaintiff's

position, is inappropriate" (ECF 206). The DC fails to address the moving party Summary Judgment [GF] who NEVER submitted such evidence, not one journal for review. Rule 26(A)(2)(B) provides that when experts testify before a court, they must submit a report disclosing "the data or other information" they have considered in reaching their conclusions. FRCP 26(A)(2b)(ii), see *Ecuadorian Plaintiffs v. Chevron Corp.*, No 10-20389, (5th Cir 2010).

When an expert relies on such data as epidemiological studies, the trial court should review the studies, as well as other information proffered by the parties, to determine if they are of a kind on which such experts ordinarily rely. The court should then determine whether the expert's opinion is derived from a sound and well-founded methodology that is supported by some expert consensus in the appropriate field, *Rubanick, supra*, 125 N.J. at 449, 593 A.2d 733, universal precedent across the United States, Justice Stevens dissent "The District Court, however, examined the studies one by one..." *General Elec. Co., v. Joiner*, 522 U.S. at 152.

The Eleventh Circuit, has reviewed the Supreme Court's direction for ruling on summary judgment motions found in *Celotex, Anderson,* and *Matsushita* and concluded that the common denominator of those cases is "that summary judgment may only be decided upon an adequate record." *WSB-TV v. Lee*, 842 F.2d 1266, 1269 (11th Cir.1988). The DC ECF indicates that NO studies were ADJOINED to Expert Reports, invalidating the Record and GF's Motion as the moving party. Failure to disclose the information is an omission of a material fact, *Matrixx Initiatives, Inc. v. Siracusano*, 563 U.S. 27 (2011).

The US Supreme Court ruled in Matrixx, that "medical professionals and researchers do not limit the data they consider to the results of clinical trials or to statistically significant evidence" and that the rejection of findings where allegations suffice to "raise a reasonable expectation that discovery will reveal evidence" satisfying the materiality requirement with a plausible causal relationship, *Id. at 563 U.S. 46.* GF limited their discussion upon Rizzo's clinical picture and stepped away from diffuse ground glass opacities, glomerulonephritis, and T cell and B cell data which proved Rizzo's claims.

The lower courts fail to discuss the published science, supporting that the Record is inadequate for Review while Experts cite competing scientific knowledge based on "'good grounds" based on what is known *Daubert*, 509 U.S. at 590, it should be tested by the adversarial process, rather than excluded for fear that jurors will not be able to handle the scientific complexities, *Id. at 596.* "Daubert neither requires nor empowers trial courts to determine which of several competing scientific theories has best province." *Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 153 also see *Brasher,* 160 F. Supp. 2d 1291 (N.D. Ala 2001). "The subject of an expert's testimony must be 'scientific ... knowledge.' The adjective 'scientific' implies a grounding in the methods and procedures of science. Similarly, the word 'knowledge' connotes more than subjective belief or unsupported speculation. The term 'applies to any body of known facts or to any body of ideas inferred from such facts or accepted as truths on good grounds.'" *Daubert*, 589-90, 113 S. Ct. 2786. "Daubert did not erect insurmountable obstacles to the admissibility of expert opinion evidence" Id. "It is equally well established that the motion should not be granted where the facts are in

dispute, where conflicting inferences may be drawn from the evidence, or where there are issues of credibility", *Scott v. Long Is. Power Auth.*, 294 AD2d 348, 348 see *Ruiz v. Griffin*, 71 AD3d 1112, 1115. USCA writes;

> "Under *Daubert*, factors relevant to determining reliability include the theory's testability, the extent to which is has been subjected to peer review and publication, the extent to which a technique is subject to standards controlling the technique's operation, the known or potential rate of error, and the degree of acceptance within the relevant scientific community." *Restivo*, 846 F.3d 575-76. (3a).

Reliability favors Rizzo where GF deliberately utilizes INCORRECT time frames and skewed facts in comparison to Wang's analysis of review (USCA ECF 89, p56), revised conclusions would favors Rizzo - IF - correct time frames and true facts where utilized by GF, leading to a "misrepresentation of fact" (ROA, p1651).

Unlike Wang; such as medical records, Site exposures, internal Fab exposures, ion radiation, heavy metals, VOC's, comparison between particle size and intensity, duration, along with treatment reports enhancing Differential Ideology as FRE 702 implies "mythologies reliable to the facts of the case" *Milward,* 639 F 3.d 11, 15 (2011).[7] Wang's understanding of the inhalation / uptake

7. The use of judgment in the weight of the evidence methodology is similar to that in differential diagnosis, see *Cruz v. Bridgestone/Firestone N. Am. Tire, LLC,* 388 F. App'x 803, 806-07 (10th Cir.2010) (explaining that differential analysis in general is best characterized as a process of reasoning to the

process upon particles, dust, fumes, and vapors as well as particulate size highlights the ideology due to diffuse ground glass opacities (pulmonary) observed in Rizzo's CT Scan (ROA, p1647) imposed by solvents and micro and nano particles (*Napierska et al.*, 143sa-168sa) (*Lane et al.*, 84sa-93sa) impacting the alveolar of the lung. Or chromium and lithium hydride that eroded Rizzo's septum – creating another inflammatory response (*Naik et al.*, 134sa-136sa), (*Aiyer et al.*, 1sa-3sa). Or the biological activation of autoimmunity – ANCA which is GPA (*Maede et al.*, 94sa-105sa). Or crescent glomerulonephritis per Rizzo's kidney biopsy caused from silica and solvents (ROA, p1360-p1365) (Gregorini et al., 33sa-52sa), (Brautbar, 10sa-14sa), (Weeden, 180sa-196sa), (Beaudreuil et al., 4sa-9sa). Reasonable scientific experts can disagree or be on shaky ground *Kumho Tire Co. v. Carmichael*, 526 U.S. at 153. Element of exclusive control, "be it of the chemicals or property need not require Plaintiff's to eliminate every alternative explanation for the event" *Kambat v. St. Francis Hospital*, 89 NY2d 489, 494 (1997).

Peer Review and Publications confirmed by Experts that relevant studies exist supporting that silica causes ANCA/GPA and solvents are adjuvant the immune system, though a high intensity solvent exposure has been documented to causes ANCA/GPA.[8] Silica (micro/nano),

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best explanation), which we have repeatedly found to be a reliable method of medical diagnosis, see *Granfield v. CSX Transp., Inc.*, 597 F.3d 474, 486 (1st Cir.2010).

8. "Significant associations were found for high occupational silica exposure in the index year (with PSV 3.0 [1.0–8.4], with CSS 5.6 [1.3–23.5], and with ANCA 4.9 [1.3–18.6]), high occupational solvent exposure in the index year (with PSV 3.4 [0.9–12.5], with WG 4.8 [1.2–19.8], and with classic ANCA [cANCA] 3.9 [1.6–9.5])...

lithium hydride, chromium, and TCE were the primary concerns during General Causation favoring Rizzo where epidemiology exit supporting a fundamental aspect of *Daubert* which the courts below do not address, raised by Rizzo.

A comprehensive study of interest is *Miller et al.*, (106sa-133sa) determined reliably and weight expressed by Wang that encompassed journals within Expert Reports upon silica;

> "Several case-control studies from Europe [11-13] and the United States [10,14] support the association between crystalline silica exposure and increased risk of anti-neutrophil cytoplasmic antibody (ANCA)-related diseases, including ANCA positivity, ANCA-positive small vessel vasculitis (with pulmonary involvement) [13], or biopsy-confirmed glomerulonephritis [10,14]. The RR associated with silica exposure was greater than 2.0 compared with non-exposed individuals in almost all studies, and a dose effect was reported in one study [14] Nonetheless, a recent large case-control study from Sweden did not find a significant association of Wegener's granulomatosis with 32 occupations evaluated [15]...Summary of assessment of confidante and likely associations between environmental agents and autoimmunity...Crystalline silica exposure contributes to the development of

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A history of high solvent exposure at any time was associated with PSV (OR 2.7 [95% CI 1.1–6.6]) and WG (3.4 [1.3–8.9])" (Lane et al., 88sa).

> several AID. Including RA, SSc, SLE, and ANCA – related Vasculitis." (*Miller et al.*, 109sa).

Authors of *Miller et al.*, (doctors in epidemiology, environmental medicine, and rheumatology) "Epidemiology of Environmental Exposures and Human Autoimmune Diseases" are of value as Wang credits this knowledge of review where GF contests the National Institute of Health, challenging its acceptance, published in 2012 (confirmed, 118sa). GF utilizes a slew of older studies opposing current medical field opinion. Indeed, it is the case where Hoffman and Garabrant testified within their Declarations as their employer wished, see *Gottesman, "From Barefoot to Daubert to Joiner,"* 753. Garabrant and Hoffman only attempt to impeach negative epidemiology per their incentives - against the science though the courts below never explained their methodology and only attacked Wang and Miloslavsky not even Hodgman, explaining why GF utilizes "small" sections of transcripts withholding truth from the courts.

Theories are testable upon human blood (reactivity test) as shown in *Napierska et al.*, (137sa-168sa) and lab rates within *Cooper et al.*, (19sa-25sa) while other studies upon silica were based on surveys and know exposures to silica, including duration. *Maede et al.*, (94sa-105sa) confirms induction of antigens, proteins, and dysregulation are a result of silica inducing autoimmunity, as well as TCE through advances in immune therapy documenting inflammatory responses similar to asbestos (T cell and B cell). Silica is proven to cause glomerulonephritis and diffuse ground glass opacities, part of Rizzo's ROA, (*Tervaert et al.*, 174sa).

Odds Ratios (OR/RR) were documented by Experts that the risk is more than double (2.0). No Order or Judgment acknowledges this fact which was described by BOTH parties that the risk is well within "General Causation" guidelines as a fundamental part of *Daubert* substantiating the claims, reducing the need of reliability and methodologies where such studies are controlled under selected criteria. As Wang testified, such controlled testing would be unethical and dangerous on humans. ANCA/GPA annual incident rate is 3/100,000. Silica has a 2.0 plus RR (from multiple studies up to 14) and solvents have as high as 3.4 OR for ANCA/GPA. Disproving the null hypothesis – positive association consistent with inference of causation. ANCA/GPA is caused from silica and solvent exposure, with inclusion of kidney, lung, and blood disorders. "General causation exists when a substance is capable of causing a disease." *Reinstatement (third) of Torts: Liability for Physical and Emotional Harm* §28 cmt. c(3) (2010) ("Reinstatement"). The biological relationship between the kind of exposure and kind of injury is well established and is consistent with peer review and OR/RR above 2.0.[9] The odds ratios favor Rizzo detailed by Experts moving the case to Specific Causation or Summary Judgment. Summary Judgment can be awarded to Rizzo as "specific causation exists when exposures to an agents caused a particular plaintiff's diseases, Id. § cmt. c(4), while GF does not dispute Rizzo's

9. *Daubert v. Merrell Dow Pharm., Inc.*, 43 F.3d 1311, 1321 (9th Cir. 1995) (for epidemiological testimony to be admissible to prove specific causation, there must have been a relative risk for the plaintiff of greater than two); *In re Bextra*, 524 F. Supp. 2d at 1172 (epidemiological studies "can also be probative of specific causation, but only if the relative risk is greater than 2.0, that is, the product more than doubles the risk of getting the disease").

written claims, announced at Oral Argument inducing Summary Judgment. Amanda Rice [GF] Oral Argument stated **"we'll take what he alleges in the complaint is true"**, signaling that GF's answers to the Complaint are "fraudulent" FRCP 60, impacting GF's Expert's tier of fact.

In the case of a particular scientific technique, the court ordinarily should consider the known or potential rate of error, see, e.g., *United States v. Smith*, 869 F.2d 348, 353-354 (CA7 1989). The courts below deliberately ignored such substantial evidence, supporting Rizzo (ROA, p1523).

Study et al.	OR/RR	Location
Nuyts	5,6.5	171sa
Gregorini	14	47sa
Beaudreuil	2.6,3.4,6.9	4sa
Hogan	2.1	59sa-60sa
Lane	4.8,3.4	88sa
Miller	2.0 plus	109sa
Cooper	Autoimmunity	19sa-25sa
Maede	Biologically plausible	94sa-105sa
Napierska	Biologically plausible	137sa-168sa

See Supplemental Appendix

The First Circuit in Milward, made it clear, in support of *Daubert* and *Baxtra* that even if there was

no causal link that a substantial body of epidemiological evidence challenging causation - cannot be ignored and the difficulties in collecting the data makes it very difficult to conduct within the United States. Conducting such test on humans with the exposures Rizzo received would be lethal and inhuman "deviating from sound practice of methodology" providing grounds for exclusion. Applying *Milward* in either scenario (with/without epidemiology) supports Rizzo. "[T]rial judges may evaluate the data offered to support an expert's bottom-line opinions to determine if that data provides adequate support to mark the expert's testimony as reliable." *Ruiz-Troche*, 161 F.3d at 81. This does not mean that trial courts are empowered "to determine which of several competing scientific theories has the best provenance." *Id. at 85.*

Biological plausibility asks whether the hypothesized causal link is credible in light of what is known from science and medicine about the human body and the potentially offending agent. The court misconstrued the concept of biological plausibility by equating it with a merely plausible or possible hypothesis, *Milward.*

Degree of Acceptance within the scientific community was identified by Garabrant, Hoffman, Hodgman, Miloslavsky, and Wang with publications as well as the general medical field including Hoffman's historical publications (USCA ECF 89, p35-p40, ECF 132, p13), confirmed in *Miller et al.*, which included the relevant studies referenced by Experts that the OR/RR was above 2.0 while weighing the evidence of each study and its reliability. Degree of acceptance is confirmed that such an exposure is "more likely than not" the cause of the ANCA/GPA. The court shall not be "heavy handed"

when the scientific community has accepted and tested such theories of scientific knowledge usurping the jury's right to decide the facts of the case for such a scientific controversy where GF challenges published research and opinions based on facts of the case associated to Rizzo's clinical picture confirmed by reliable and nationally recognized publications.

Garabrant expresses; **"Wegener's Granulomatosis, is an ANCA –Associated, small vessel vasculitis (ANCA-SVV or AAV)"** (ROA, p1577), "minimum of 1-year for exposure" (ROA, p1583), "Nuyts et al., found statistically significant association between GPA and exposure to silica" (ROA, p1585), "statistically significant association between ANCA positive glomerulonephritis (not GPA) and silica exposure...minimum duration of exposure to be included in the study (exposed) was 6 months" (ROA, p1586), "statistically significant association positively and professional exposure to silica" (ROA, p1587)[10], "some studies evaluating occupational and environmental exposures and GPA have evaluated the association between GPA and solvents" (ROA, p1589), "statistically significant results for GPA and high occupational solvent exposure in the index year (OR = 4.8 95% CI =1.2-19.8)" (ROA, p1590), "one study found strong association with GPA for high level, prolonged solvent exposure 3 to 50 year duration" (ROA, p1592), "regular exposure for 1 to 2 years or more" (ROA, p1592), Dr. Salenger "expressed limited opinions" (ROA, p1597), (Note, Rizzo worked at GF from July 6, 2009 to January 30, 2013) (ROA, p547). Garabrant failed to address diffuse ground glass opacities, crescentic glomerulonephritis, Rizzo's cANCA blood, failed researching Hoffman, nano particles, TCE,

10. Semiconductor industry silica is engineered / professional.

PCE, Carbon Tet, Chromium, Lithium Hydride, CT Male Report, MRFA[11], stepped away from solvent exposure and heavy metal research, kidney damage, and statistical relationships with other facilities that identified GPA – "Samsung" (ROA, p1507).

Hoffman's Declaration is flawed while publishing opinions against his Declaration and contradictive to the *"Current Opinion in Rheumatology"* (*Tervaert et al.*, 174sa-179sa). Hoffman expresses: "found an increase frequency of positive blood tests for ANCA in crystalline silica exposed individuals" (ROA, p1615), "these findings support the hypothesis that high dose, chronic silica exposures may play a role in generation of ANCA" (ROA, p1620), "RPGN had either silicosis significant silica exposure" (ROA, p1628), "inhalation of silicon-containing compounds such as silica and grain dust gave a nearly seven-fold risk for GPA" (ROA, p1636), "GPA occurs in about 3 in 100,000" (ROA, p1637), "others found positive association with GPA or ANCA - positive test" (ROA, p1637), approx. 40% lung involvement and 17% kidney involvement (ROA, p1639), B lymphocyte depleting biological agent (rituximab) (ROA, p1640), and "ANCA-positive vasculitis/GPA" (ROA, p1644). Hoffman failed to discuss diffuse ground glass opacities, crescentic glomerulonephritis deliberately, and failed to identify other studies just as Garabrant – example; (*Tervaert et al.*, 174sa-179sa).[12] Hoffman did confirm the correlation

11. GF built within a Superfund; Missile Rocket Fuel Area (MRFA) (ROA, p1090 – p1114).

12. "...association to silica is also associated with ANCA-glomerulonephritis and vasculitis and silica is one of the first well-documented environmental triggers in these disease" (*Tervaert et al.*, 174sa).

in his draft Declaration on nephritis matching Rizzo's kidney biopsy (ROA, p1622). Hoffman should be excluded from the case and is unreliable. See *Claar v. Burlington, N.R.R.*, 29 F.3rd 499 (9th Cir. 1994) testimony excluded where expert failed to consider other obvious causes for plaintiff conditions. Courts have held that witnesses, including experts, may not contradict or undermine their deposition testimony with a later affidavit, see *Cleveland v. Policy Mgmt. Sys. Corp.*, 526 U.S. 795, 806 (1999).

Wang expresses; "insight to the mechanism of the inflammatory effects of nano silica", "TCE alters the confirmation of proteins and result in an autoimmune response and affects T cell function" (ROA, p1170), "positive relationship was seen with WG and solvent exposure" (ROA, p1171), "dose response with TCE and nanosilica" (ROA, p1175), "based on silica, based on looking at the in vivo studies with cellular changes, cellular death, inflammation." (ROA, p741), "article said there was a positive association. Yup. With an odds ratio of 3.4." (ROA, p744), "There's enough in vitro studies on, number one, animal cells, and I believe on cancer cells to show deposition of the particles and cellular changes, cellular death, inflammation to support the damaging effects of silica." (ROA, p759). "Q:...causal relationship between TCE and GPA is based on your extrapolation of studies? A: Correct."(ROA, p874). "So the Miller article was based on expert opinion in regards to silica and AAV specifically in that in their -- in their writing and in their text. In regards to the TCE article, it was beneficial in describing the mechanism of antigen recognition and described the mechanism that is proposed for autoimmune reaction. And then it also provided some human research in regards to the inflammatory mediators, the cell cytokines

that is related to autoimmune disease." (ROA, p917). All supported by studies and professional knowledge identified of Wang.

Abuse of Discretion as Gatekeeper

Expert's data, methodology, or studies that draw a correlation and based upon facts known - such conclusion - as are building blocks of evidence.[13] Wang provided a through Report detailing part of the Hill criterial, facts of the case with appropriate time frames of exposure, and elements of exposure (ROA, p1156-p1179). Even Hodgman explained the temporal relationship with Rizzo's history of exposure upon duration and intensity (USCA ECF 83). Wang's weight of the evidence influence the methodology and best explanation of caution. Wang including the steps described by Dr. Cranor detailed in *Milward*, 639 F 3.d 11, 15 (2011) where FRE 702 is not dependent upon the Hill criteria. "No algorithm exists for applying the Hill guidelines to determine whether an association truly reflects a causal relationship or is spurious." *Restatement § 28 cmt. c(3).* Because "[n]o scientific methodology exists for this process reasonable scientists may come to different judgments about whether such an inference is appropriate." *Id. § 28 reporters' note cmt. c(4).*

1. **Identify association between exposure and disease**; Identified by all Experts that silica is a direct cause of ANCA/GPA. Though Wang and Miloslavsky confirmed that silica and solvents are

13. Opinions derived from building blocks of evidence provided a perfectly reasonable reliable conclusion and is *Joiner v. General Electric Company*, 78 F. 3d 524, at 532.

adjuvant to immune system, dysregulation with cellular destruction, enhancing inflammatory responses. Letter reports, journals, and book publication by testifying Experts conclude that ANCA, nephritis, and pulmonary illnesses were a result of Rizzo's exposure.

a. Miloslavsky; "There is considerable literature in our field demonstrating a connection between exposure to silica and the development of GPA...In my opinion a high degree acute exposure would prompt a similar mechanism leading to the formation of ANCA antibodies." Citing; (*Meade et al.*, 94sa-105sa), (*Nuyts et al.*, 169sa-172sa), (ROA, p1370).

b. Hodgman; "The evidence to date suggests that an association between Wegener's disease and silica exposure exists. A biologic mechanism has been proposed. Mr. Rizzo's exposure period appears to have been brief but we are hampered by a lack of any industrial hygiene measurements for this exposure or any previous exposures at this work site. I summary, Mr. Rizzo is afflicted with a rare and debilitating disease that has been associated with silica exposure in other occupations...There is a temporal relationship with his employment at Global Foundries..." (USCA ECF 83, "Link and Causation Report").

2. **Consider a Range of Plausible Explanations**; Exposures from the GF Site and internal Fab

exposures compared with studies that reflected Rizzo's exposures had direct correlation to causation primarily autoimmunity, inflamed lungs, diffuse ground glass opacities, antibodies, and nephritis caused from silica and solvents.

3. **Rank in rival explanations according to plausibility**; Silica and TCE were among the higher ranked classifications where epidemiology confirmed autoimmunity through in-vivo and in-vitro studies, animal studies, and T cell and B cell antibodies explained in *Meade et al.*, *Cooper et al.*, and *Napierska et al.*, while other studies concentrate on medical subsets from exposure such as diffuse ground glass opacities and glomerulonephritis. The association between silica exposure and ANCA/GPA is "genuine".

    a. Biologically Plausible; "[i]mmunotoxicological effects of both silica and asbestos are presented and contrasted in terms of their abilities to induce immune system dysregulation that then are manifested by the onset of autoimmunity or by alterations in host-tumor immunity." (*Meade et al.*, 95sa).

4. **Seek additional Evidence to separate the more plausible from the less plausible**; Wang identified proper time's frames and duration of exposure supported by peer review and bodily harm that was induced from competing exposures promoting inflammatory responses enhancing the primary exposure, including carcinogenic Site exposures (CERCLA). Wang's

review included the inflammatory responses from nano particles vs micro particles which was ultimately detailed in *Napierska et al.*, supported by *Miller et al.*, while compounded exposures to solvents enhanced Rizzo's inflammatory responses (*Cooper et al.*, 19sa-25sa), (*Meade et al.*, 94sa-105sa), (*Lane et al.*, 84sa-92sa).

5. **Consider all relevant plausible evidence;** All Experts considered micro particle while Wang included nano particle exposures which heightened the inference of causation from the semiconductor industry which Rizzo was being exposed too. *Napierska et al.*, confirms heightened inflammatory responses within lungs and blood while prior studies concentrate on industries utilizing larger particulate airborne matter which was explained by Wang as Rizzo was a Construction Manager receiving multiple exposures from Site and internal Fab processes, where internal exposures were a mixture of toxins and nano particles that are more responsive to the immune system.[14] Rizzo's allegation were confirmed at Oral Argument, inferring that that facility was also dirty with dust, particles, fumes, and vapors and that the Site contaminations were another direct impact, as Rizzo's Affidavit details (ROA, p1184-p1191). GF's Experts failed to raise issue with other competing scientific controversy

14. As a general evidentiary matter, "individual pieces of evidence, insufficient in themselves to prove a point, may in cumulation prove it," and "a piece of evidence, unreliable in isolation, may become quite probative when corroborated by other evidence." *Bourjaily v. United States*, 483 U.S. 171, 179-80 (1987).

by Rizzo, Wang, Miloslavsky, or Hodgman, even medical files.

6. **Integrate the evidence using a professional Judgment**; Wang's intellectual rigor was well balanced considering vast exposures identified, correlating the facts of the case, while implementing scientific research and evaluations drawing a conclusion that was supported by epidemiology, peer review, and weighted, shadowing the facts of exposure Rizzo encountered narrowed the data, "Ruling in" and "Ruling out" scientific research while listing probable causes via process of elimination.

The Second Circuit in McCullock, affirmed the admission of a treating doctor's testimony despite the fact that he "could not point to a single piece of medical literature that says glue fumes cause throat polyps." *McCullock v. H.B. Fuller Co.*, 61 F.3d at 1043. The court explained that the expert's reliance upon his "care and treatment of McCullock; her medical history (as she related it to him and as derived from a review of her medical and surgical reports); pathological studies; review of [Defendant] Fuller's [MSDS], his training and experience, use of a scientific analysis known as differential etiology (which requires listing possible causes, then eliminating all causes but one); and reference to various scientific and medical treatises" was reasonable, *Id. at 1044*.

This rule of "Rule in" vs "Rule out" favors Wang. Wang's opinions are "reliably grounded on known scientific fact from recognized scientific methodology" *Brasher*, 160 F. Supp. 2d 1291 (N.D. Ala 2001), "inference

to the best explanation", *Cruz*, 388 Fed. Appx. at 807. The Record contains MSDS identifying that silica is involved also identified by the DC including the CT scan of the lungs, kidney biopsy, and blood reports.

The Tenth Circuit in Bilter, noted "Unlike a logical inference made by deduction where one proposition can be logically inferred from other known propositions, and unlike induction where a generalized conclusion can be inferred from a range of known particulars, inference to the best explanation-or 'abductive inferences'-are drawn about a particular proposition or event by a process of eliminating all other possible conclusions to arrive at the most likely one, the one that best explains the available data." *Bitler v. A.O. Smith Corp.*, 391 F.3d 1114, 1124 n. 5 (10th Cir.2004).

The Sixth Cuircuit Best, *Best v. Lowe's Home Centers, Inc.*, 563 F.3d 171 (6th Cir. 2009), the Sixth Circuit adopted a rule to assist district courts in its circuit in distinguishing between reliable and unreliable differential diagnoses when determining the admissibility of causation evidence under FRE 702 and *Daubert v. Merrill Dow Pharmaceuticals*, Inc., 509 U.S. 579 (1993). Plaintiff in *Best* alleged anosmia (permanent loss of sense of smell) when the pool chemical Aqua EZ Super Clear Clarifier spilled on his face at a Lowe's store. Plaintiff's expert concluded that because of the temporal relationship between exposure to the chemical and the onset of symptoms, in conjunction with the elimination of other causes, the chemical likely burned Best and caused his anosmia, *Best*, 563 F.3d at 176. The district court excluded the expert's testimony as too speculative and granted summary judgment for Lowe's. The Sixth

Circuit noted that the expert had utilized differential diagnosis in forming his opinion, a methodology in which a physician considers all relevant potential causes of the symptoms and eliminates alternative causes based on physical examination, clinical tests and case history, *Id. at 178.* The Circuit found differential diagnosis a standard scientific technique for identifying the cause of medical ailments and that an overwhelming majority of courts of appeal have held it sufficiently valid to satisfy the first prong (reliability) of a Rule 702 inquiry, *Id.* (citing *Hardyman v. Norfolk*, 243 F.3d 255 (2001)). The district court was thus in error in failing to accept differential diagnosis as a valid technique, *Id. at 178.* The court cited the Third Circuit opinion in *Paoli v. Railroad Yard PCB Litigation,* 35 F.3d 717 (1994) as instructive in adopting a test to be applied by its district courts in determining whether a differential diagnosis is reliable and admissible. A medical causation opinion in the form of a doctor's differential diagnosis is reliable and admissible where a doctor (1) objectively ascertains, to the extent possible, the nature of the patient's injury, (2) rules in one or more causes of injury using valid methodology, and (3) engages in standard diagnostic techniques by which doctors normally rule out alternative causes in concluding which cause is most likely, *Best*, 563 F.3d at 179.

Wang's scientific knowledge is supported by diffuse ground glass opacities identified (CT scan) confirming silica and solvents as a treating pulmonologist (ROA, p1406).

Nebraska Supreme Court Overturns Exclusion of Expert Upon Misapplied Daubert Standard in *King v. Burlington Northern Santa Fe Railway Co.,* 762 N.W.2d

24 (Neb. 2009), plaintiff's expert testified that benzene is the only component of diesel exhaust known to cause multiple myeloma. The expert conceded that contrary opinions existed and that he was unaware of studies explicitly finding either benzene or diesel dust to cause the disease, but explained that scientific studies usually do not find definitive cause, *Id. at 32*. The trial court excluded the testimony under *Daubert* because it did not have general acceptance in the field, confirmed by Nebraska Appeals Court. The Nebraska Supreme Court took the occasion to offer an in-depth discourse on how researchers find associations between a suspected agent and disease and how experts interpret those studies to determine whether the relationship is causal, *Id. at 34*. The court found that under *Daubert*, determination of the admissibility of an expert's opinion must focus on the validity of the underlying principles and methodology, not the conclusions generated. Reasonable differences in scientific evaluation should no compel the exclusion of a witness, *Id. at 43*. The court added that under *Daubert* court should not require general acceptance of a stated causal link if the expert otherwise bases his opinion on reliable methodology, *Id. at 44*. The court held that the trial court needed only to determine if the result of the epidemiological studies relied upon were sufficient to support his opinion and whether the expert reviewed them in a reliable manner, *Id.* Thus, according to the court, the trial court erred in applying a conclusive study standard, *Id. at 49*.

Second Circuit in Restivo, allowed Plaintiffs filing 42 U.S.C. § 1983 action against police detectives after Plaintiffs' convictions for rape and second degree murder were set aside. Plaintiffs offered expert

testimony regarding postmortem root banding (PMRB), a phenomenon that generally occurs to a body's hair days after death. District Court concluded that certain aspects of PMRB had not been established to a degree of scientific certainty, but nonetheless admitted testimony regarding PMRB. Second Circuit ruled that if testimony could not "pass muster" as "scientific" knowledge under the *Daubert* factors, a scientist witness can nonetheless testify on the topic as "technical" or "other specialized" knowledge, so long as the testimony is "reliable" under Rule 702 and *Kumho Tire Co.* "[J]ust as non-scientist experts can testify about their opinions, so too can scientists, when their opinions are based on reliable technical or specialized knowledge, though not scientific fact."

At Oral Argument, Justice Lynch identified that Rizzo's Experts showed **"some kind of correlation between at least heavy exposure to silica and over a long period of time"**, on the subject between Experts that silica is a cause to ANCA/GPA and GF admitted their needs to be no certainty upon Causation. At minimum "when the factual underpinning of an expert's opinion is weak, it is a matter affecting the weight and credibility of the testimony - a question to be resolved by the jury." *Vargas*, 471 F.3d at 264 (quoting *Int'l Adhesive Coating Co. v. Bolton Emerson Int'l*, 851 F.2d 540, 545 (1st Cir.1988)). All avenues of *Daubert* favor Rizzo and the only defense to this case is an attack on "methodology" by GF with "abuse of discretion" from by the courts below, utilizing *Restivo v. Hessemann*, 846 F.547, 575 (2nd Cir. 2017), as an attack on toxic tort, labor law, or scientific controversy.

The Ninth Circuit in Whitelock, held that the testimony of three expert witnesses for the plaintiffs were improperly excluded and that summary judgment for defendants was improperly granted, *Whitlock v. Pepsi Americas*, 9th Cir., No. 11-16958, 5/16/2013. In an unpublished opinion, it addressed whether plaintiffs' three experts, a chemist, a toxicologist and a physician, offered exposure and causation testimony to support the plaintiffs' injury claims which was sufficiently reliable under FRE, arising from alleged exposure to trichloroethylene (TCE) and hexavalent chromium from a chrome-plating facility. The lower court excluded all of the experts' testimony on the grounds that it was scientifically unreliable under FRE 702, and granted summary judgment for defendants on plaintiffs' injury and medical monitoring claims. Reversing the lower court on all but one claim, the Ninth Circuit concluded that the district court abused its discretion in excluding the expert testimony, finding among other things that the basis of the chemist's opinions were more properly subject to attack by cross examination as opposed to exclusion, that the lower court erroneously interpreted the testimony forming the basis of the toxicologist's opinions, and that the lower court improperly excluded the physician's testimony without sufficient explanation for its decision. The Circuit held that the district court properly granted summary judgment to defendants on one claim as to plaintiffs' post-1975 TCE exposure claims, concluding that plaintiffs' experts failed to establish a sufficient link between plaintiffs' exposure at the time period in question. The district court exceeded its gatekeeping function in excluding testimony that the alleged TCE and Chromium exposures levels were "within [a] reasonable range of that known [form several studies] to induce" the alleged injuries, *Id. Whitelock*, and that an

opinion "rest on a reliable foundation and is relevant to the task at hand" *Daubert*, 509 U.S. at 597. Whether it proves causation is not a question of admissibility, see *Primiano*, 598 F. 3d at 564 ("Shaky but admissible evidence in to be attacked by cross examination, contrary to evidence, and attention to the burden of proof, not exclusion.").

There Is No Other Reason Rizzo Should Not Be Given Leave to Amend

The U.S. Supreme Court determined that "[i]n the absence of . . . undue delay, bad faith or dilatory motive... undue prejudice...futility of amendment, etc.--the leave sought should...be 'freely given." *Foman v. Davis*, 371 U.S. 178, 182 (1962). Importantly, courts have granted leave to amend even after a plaintiff had "five previous attempts to state [a] cognizable claim...because [the] Federal Rules suggest [that the] 'artless drafting of a complaint should not allow for the artful dodging of a claim" *Driscoll v. George Washington Univ.*, No 12-0690, 2012 Dist. LEXIS 127870, at *7 [2012], quoting *Poloron Products Inc v. Lybrand Ross Bros & Montgomery*, 72 FRD 556, 561 [SDNY 1976].

No such prejudice exists here. The facts described in the Amended Complaint are well-known to GF, because they were part of the construction management, had full control over reports, production, exposure data, operations, security clearance, billable hours of Rizzo, purchase of lands, and staffing. Moreover, the Magistrate Baxter directed the Amended Complaint (ROA, p256-p287) to be filed after Discovery was completed on November 11, 2016, extended by GF's request for a second Deposition of Wang (ECF Txt Order 130, 152) or extension of time request (ROA, p138-p141).

> "...amend your complaint, you would need to make a motion to amend, provide a complete proposed amended complaint, and a supporting memorandum of law explaining why you are making a good faith motion to amend that would not be futile. Again, however, based on my prior ruling, the first order of business is to complete discovery with respect to the general causation issues..." (ROA, p97).

Rizzo's complied with Magistrate Baxter's directive.

The Sixth Circuit in US allowed Amendment even after the expiration of discovery and after the time for amended pleadings in the scheduling order, see *United States v. Wood*, 877 F.2d 453, 456 (6th Cir. 1989) (allowing United States to add a claim fourteen months after suit was filed, after discovery had closed, and three weeks before trial). The Amended Complaint does not add any causes of action, but rather more clearly describes the causation / tier of fact and causes of action identified in the original complaint, i.e., The Amended Complaint does fail to identify the melanoma skin cancer directly which falls under ion radiation/solvents and specific details to CERCLA though raised under MRFA, all part of the ROA.

Documents prove that TCE, PCE, and Carbon Tet have infiltrated the builds of GF where such a control of the exposure was a responsibility and liable, raised to the courts below in the ROA.

Order (2a) confirms that **"after being exposed to several toxic substances as a result of defendant's**

negligence." Upon GF's NEW admittance at Oral Argument, CERCLA [thing] is substantiated, plus internal Fab exposures, see *CTS Corp. v. Waldburger*, No. 13-339 (U.S. June 9, 2014) upon CERCLA, and *Vega v. Jones, Day, Reavis & Pogue*, 17 Cal. Rptr. 3d 26, 31 (Ct. App. 2004) referring to concealment or suppression of material facts.

"CERCLA is a 'broad remedial statute,'" *B.F. Goodrich v. Betkoski*, 99 F.3d 505, 514 (2d Cir.1996) (quoting *B.F. Goodrich Co. v. Murtha*, 958 F.2d 1192, 1197 (2d Cir.1992) ("Murtha I ")), cert. denied, --- U.S. ----, 118 S.Ct. 2318, 141 L.Ed.2d 694 (1998), enacted to assure "that those responsible for any damage, environmental harm, or injury from chemical poisons bear the costs of their actions." Id. (quoting S. Rep. 848, 96th Cong., 2d Sess. 13 (1980), reprinted in 1 Senate Comm. On Env't and Pub. Works, Legislative History of the CERCLA of 1980, at 305, 320 (1983)). "As a remedial statute, CERCLA should be construed liberally to give effect to its purposes." *Id.* (citing *Schiavone v. Pearce*, 79 F.3d 248, 253 (2d Cir.1996)).

Erroneous Summary Order in Conflict with Daubert, FRAP 10, and De Novo Review

FRAP 10(e)(2)(C) Intended to permit correction of the Appellate Record to accurately reflect what happened in the DC, FRAP 10(e)(2) provides that "[i]f anything material to either party is omitted from or misstated in the record by error or accident, the omission or misstatement may be corrected and a supplemental record may be certified and forwarded" (A) on stipulation of the parties (B) by the District Court before or after the record has been forwarded; or (C) by the Court of Appeals. A majority

of circuits recognize the existence of the courts' equitable authority to supplement the appellate record as justice requires regardless of inadvertent omission, see *Ross*, 785 F.2d at 1474-75; see also *Gibson v. Blackburn*, 744 F.2d 403, 405 n. 3 (5th Cir. 1984); *Lowry*, 329 F.3d at 1024 (referring to "unusual circumstances"). The DC denied to substantiate the Record (ECF 204, 206, 207) as well as the USCA by denying Rizzo's Motion to supplement the journals which were required for Daubert (USCA ECF 60, 73).

The US Supreme Court has held that Courts of Appeal are required to "consider any change, either in fact or in law, which has supervened" since the disputed decision was issued, *Patterson v. Ala.*, 294 U.S. 600, 607 (1935); *Watts, Watts & Co. v. Unione Austriaca Di Navigazione*, 248 U.S. 9, 21 (1918). "new situation demands one result only, and discretion could not be exercised either way," the Court of Appeals may choose to Supplement the Record with information about the new facts rather than to remand the case to the DC, *Korn v. Franchard Corp.*, 456 F.2d 1206, 1208 (2d Cir. 1972), see *Riordan v. State Farm Mut. Auto. Ins. Co.*, 589 F.3d 999, 1004 (9th Cir. 2009) (holding that a pretrial order delivered into the possession of the clerk was part of the record when it had been submitted for review by the court and had been referenced in a motion, even though it was not officially filed).

CONCLUSION

The petition for a Writ of Certiorari should be granted.

Respectfully Submitted,

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