APPENDIX

APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT, DECIDED NOVEMBER 27, 2018

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

17-3274 (L), 18-1490 (Con)

TIMOTHY J. RIZZO,

Plaintiff-Appellant,

v.

APPLIED MATERIALS, INC.,
GLOBALFOUNDRIES, U.S., INC.,

Defendants-Appellees,

GLOBALFOUNDRIES, INC., AM TECHNICAL SOLUTIONS, INC.,

Defendants.

November 27, 2018, Decided

PRESENT: PETER W. HALL, GERARD E. LYNCH,
Circuit Judges, PAUL G. GARDEPHE,*
District Judge.

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* Judge Paul G. Gardephe, of the United States District Court for the Southern District of New York, sitting by designation.

Appendix A

SUMMARY ORDER

Appeal from a judgment of the United States District Court for the Northern District of New York (D'Agostino, J.).

UPON DUE CONSIDERATION, IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that the judgment of the district court is **AFFIRMED.**

Appellant Timothy Rizzo, pro se, brought a diversity toxic tort action against GlobalFoundries, U.S., Inc. and Applied Materials, Inc., alleging that he developed granulomatosis with polyangiitis ("GPA"), a severe autoimmune disease, after being exposed to several toxic substances as a result of defendants' negligence. The district court divided discovery into phases, with the first phase addressing general causation, that is, whether any of the substances to which Rizzo was allegedly exposed can cause GPA. The district court excluded the opinions of Rizzo's two experts as unreliable and granted summary judgment to defendants because Rizzo had submitted no other evidence raising a genuine issue of material fact about general causation, which he had to prove to prevail on his claims. In addition to his appellate arguments challenging the district court's summary judgment order, Rizzo moves to set a standard hourly rate for future expert depositions in the case. We assume the parties' familiarity with the underlying facts, the procedural history of the case, and the issues on appeal.

We review de novo a grant of summary judgment, with the view that summary judgment is appropriate only "if

the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." *Sousa v. Marquez*, 702 F.3d 124, 127 (2d Cir. 2012) (internal quotation marks omitted). We review the exclusion of an expert's testimony under a "highly deferential" abuse of discretion standard and will sustain the exclusion "unless manifestly erroneous." *Restivo v. Hessemann*, 846 F.3d 547, 575 (2d Cir. 2017) (internal quotation marks omitted). We review the denial of leave to amend, denial of a motion to amend the judgment, and discovery rulings for abuse of discretion. *McCarthy v. Dun & Bradstreet Corp.*, 482 F.3d 184, 200 (2d Cir. 2007) (leave to amend); *Munafo v. Metro. Transp. Auth.*, 381 F.3d 99, 105 (2d Cir. 2004) (alter judgment); *Wills v. Amerada Hess Corp.*, 379 F.3d 32, 41 (2d Cir. 2004) (discovery rulings).

Under Federal Rule of Evidence 702, district courts must screen scientific evidence to "ensure that . . . [it] is not only relevant, but reliable." *Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 579, 589, 113 S. Ct. 2786, 125 L. Ed. 2d 469 (1993). 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. "If [an expert's] opinion is based on data, a methodology, or studies that are simply inadequate to support the conclusions reached, *Daubert* and Rule 702 mandate the exclusion of that unreliable opinion testimony." *In re Pfizer Inc. Sec. Litig.*, 819 F.3d 642, 662 (2d Cir. 2016) (internal quotation marks omitted).

Appendix A

Upon review of the whole record, we conclude that the district court properly considered the factors in *Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 579, 113 S. Ct. 2786, 125 L. Ed. 2d 469 (1993); excluded the testimony of Rizzo's experts; granted summary judgment to defendants; denied leave to amend; and denied Rizzo's objection to the magistrate judge's fee order. We affirm for substantially the reasons given by the district court in its thorough and well-reasoned September 11, 2017 decision.

We have considered all of Rizzo's arguments on appeal and find them to be without merit. Accordingly, we **AFFIRM** the judgment of the district court and **DENY** as moot the motion to set a standard hourly rate for future expert depositions.

FOR THE COURT:

/s/
Catherin O'Hagan Wolfe,
Clerk of the Court

APPENDIX B — MEMORANDUM-DECISION AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF NEW YORK, FILED MARCH 22, 2016

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

6:15-cv-557
(MAD/ATB)

TIMOTHY J. RIZZO,

Plaintiff,

vs.

APPLIED MATERIALS, INC.; and
GLOBALFOUNDRIES, U.S., INC.,

Defendants.

Mae A. D'Agostino, United States District Judge.

March 22, 2016, Decided
March 22, 2016, Filed

MEMORANDUM-DECISION AND ORDER

I. INTRODUCTION

Plaintiff Timothy J. Rizzo ("Plaintiff") commenced this action on April 30, 2015, and filed an amended complaint on July 29, 2015 asserting eleven causes of

action and seeking at least $75,000 in compensatory and punitive damages. *See* Dkt. No. 35. Currently before the Court is Defendant GlobalFoundries, U.S., Inc.'s ("GlobalFoundries") motion to dismiss Counts III, IV, V, and VII of Plaintiff's amended complaint pursuant to Federal Rule of Civil Procedure 12(b)(6). *See* Dkt. No. 38.

II. BACKGROUND

Plaintiff is 39 years old and has been employed at AM Technical Solutions as a construction manager for tool install since April of 2012. Dkt. No. 35 at ¶ 47. On or about May 2, 2012, Plaintiff was assigned to GlobalFoundries' Fab 8 facility in Malta, New York to work in construction management overseeing the construction of factories for that facility. *Id.* at ¶¶ 48-49. On August 2, 2012, while Plaintiff was working in the chemical metal plating room at the Fab 8 facility, a manufacturing tool labeled as POL2700 allegedly malfunctioned and exposed him to toxic and hazardous substances, which were identified as "Slurry 1" and "Slurry 2." *Id.* at 50. Plaintiff also claims that he was also exposed on a chronic basis to "toxic and hazardous substances, including but not limited to arsenic emanating from a malfunctioning Viista Trident Current Implanter and/or Viista Trident Medium Current Implanter." *Id.* at ¶ 53. The identified POL2700 tool and the Viista Trident Current Implanters were "designed, manufactured, sold, and/or distributed" by Defendant Applied Materials, Inc. ("Applied"). *Id.* at ¶ 24. Plaintiff further contends that he was exposed to numerous other toxic substances while working at the Fab 8 facility from May through August of 2012. *Id.* at ¶ 54. At some point

after the August 2, 2012 incident, Plaintiff developed an autoimmune disease diagnosed as c-ANCA positive Wegener's Granulomatosis. *Id.* at ¶ 67. Plaintiff has suffered numerous physical and emotional ailments since this time and has undergone "extensive chemotherapy, plasmapheresis, and steroid therapy." *Id.* at ¶¶ 68, 69.

III. DISCUSSION

A. Standard of Review

A motion to dismiss for failure to state a claim pursuant to Federal Rule of Civil Procedure 12(b)(6) tests the legal sufficiency of the party's claim for relief. *See Patane v. Clark*, 508 F.3d 106, 111-12 (2d Cir. 2007). In considering the legal sufficiency, a court must accept as true all well-pleaded facts in the pleading and draw all reasonable inferences in the pleader's favor. *See ATSI Commc'ns, Inc. v. Shaar Fund, Ltd.*, 493 F.3d 87, 98 (2d Cir. 2007) (citation omitted). This presumption of truth, however, does not extend to legal conclusions. *See Ashcroft v. Iqbal*, 556 U.S. 662, 678, 129 S. Ct. 1937, 173 L. Ed. 2d 868 (2009) (citation omitted).

To survive a motion to dismiss, a party need only plead "a short and plain statement of the claim," *see* FED. R. CIV. P. 8(a)(2), with sufficient factual "heft to 'sho[w] that the pleader is entitled to relief[,]'" *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 557, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007) (quotation omitted). Under this standard, the pleading's "[f]actual allegations must be enough to raise a right of relief above the speculative level," *id.* at 555 (citation

omitted), and present claims that are "plausible on [their] face," *id.* at 570. "The plausibility standard is not akin to a 'probability requirement,' but it asks for more than a sheer possibility that a defendant has acted unlawfully." *Iqbal*, 556 U.S. at 678 (citation omitted). "Where a complaint pleads facts that are 'merely consistent with' a defendant's liability, it 'stops short of the line between possibility and plausibility of "entitlement to relief."'" *Id.* (quoting *Twombly*, 550 U.S. at 557, 127 S. Ct. 1955). Ultimately, "when the allegations in a complaint, however true, could not raise a claim of entitlement to relief," *Twombly*, 550 U.S. at 558, or where a plaintiff has "not nudged [its] claims across the line from conceivable to plausible, the[] complaint must be dismissed[,]" *Id.* at 570.

B. Counts III, IV, & V

Counts III, IV, and V of Plaintiff's amended complaint assert claims of strict products liability, breach of express warranty, and breach of implied warranty, respectively, against GlobalFoundries. *See* Dkt. No. 35 at ¶¶ 97-114. Pursuant to the Court's diversity of citizenship jurisdiction, New York substantive law applies to Plaintiff's products liability and breach of warranty causes of action. *See Marks v. Abbott Labs. & Co.*, No. 11-CV-4147, 2012 U.S. Dist. LEXIS 40335, 2012 WL 1004892, *3 (E.D.N.Y. Jan. 11, 2012) (citing *Erie R.R. v. Tompkins*, 304 U.S. 64, 78, 58 S. Ct. 817, 82 L. Ed. 1188 (1938)).

New York plaintiffs seeking to recover for injuries sustained by allegedly defective or dangerous products "may base a suit on one or more of four theories: negligence,

breach of express warranty, breach of implied warranty, or strict liability." N.Y. Pattern Jury Instr. — Civil Div. 2 G 3 Intro. § 1 [hereinafter N.Y. P.J.I.] (citing *Denny v. Ford Motor Co.*, 87 N.Y.2d 248, 662 N.E.2d 730, 639 N.Y.S.2d 250 (1995)) (other citations omitted). While each of these claims varies slightly in its application, "there can be 'a high degree of overlap between the substantive aspects' of the [products liability] causes of action." *Monell v. Scooter Store, Ltd.*, 895 F. Supp. 2d 398, 411 (N.D.N.Y. 2012) (quoting *Denny*, 87 N.Y.2d at 256). One common element to any products liability claim is that the plaintiff's alleged injury must have been caused by a product that the defendant sold or placed into the stream of commerce. *See Healey v. Firestone Tire & Rubber Co.*, 87 N.Y.2d 596, 601, 663 N.E.2d 901, 640 N.Y.S.2d 860 (1996).

New York courts considering strict products liability claims have repeatedly held that a defendant is only liable if it placed the allegedly defective and injury-producing product into the stream of commerce. *See id.* ("[O]ne of the necessary elements plaintiff in a strict products liability causes of action must establish by competent proof is that it was the defendant who manufactured and placed in the stream of commerce the injury-causing defective product"); *see also* N.Y. P.J.I. § V ("As a general rule, plaintiff is required to establish that defendant manufactured the product in question and placed it in the stream of commerce"); *Gebo v. Black Clawson Co.*, 92 N.Y.2d 387, 392, 703 N.E.2d 1234, 681 N.Y.S.2d 221 (1998) (holding that a defendant that designed, assembled and installed a modification to a product for its own use, not for market sale, is not subject to strict liability). Thus,

the pool of potential defendants in a strict products liability case includes "any[]one responsible for placing the defective product in the marketplace." *Brumbaugh v. CEJJ, Inc.*, 152 A.D.2d 69, 72, 547 N.Y.S.2d 699 (3d Dep't 1989) (citations omitted); *see also Van Iderstine v. Lane Pipe Corp.* 89 A.D.2d 459, 461, 455 N.Y.S.2d 450 (4th Dep't 1982) ("The [strict products liability] rule is intended to protect persons injured by defective products placed in the stream of commerce" (citing Restatement, Torts 2d, § 402A, comments c, f)).

Likewise, a breach of warranty action "generally requires the sale of a product unless some other duty is imposed by contract." N.Y. P.J.I. § III(E)(1). Plaintiff asserts that he need not "allege[] that he purchased the product(s) at issue [because] warranty liability, express or implied, does not depend on plaintiff being in privity with defendant, or even being a purchaser." Dkt. No. 57 at 12. To support this argument, Plaintiff cites New York's Uniform Commercial Code ("U.C.C.") § 2-318, which he claims stands for the proposition that "warranties, whether express or implied, run to '*any* natural person if it is reasonable to expect that such person may *use, consume or be affected* by the goods and who is injured in person by breach of the warranty.'" *Id.* at 11. However, Plaintiff's argument is entirely misplaced as he failed to reference the first portion of section 2-318, which explicitly refers to "[a] *seller's* warranty . . . ." N.Y. U.C.C. § 2-318 (emphasis added). Further, section 2-102 states that Article 2 of the U.C.C. shall apply only "to transactions in goods." *Id.* at § 2-102. Thus, in order for a plaintiff to recover under a breach of warranty claim, the injury-causing product

must have, at some point, been sold or transferred by the defendant to another party.

In this case, Plaintiff's amended complaint lacks any plausible allegation that he was injured by a product or good that GlobalFoundaries had sold or placed into the stream of commerce. Plaintiff's products liability claims against GlobalFoundaries are based upon his alleged injuries sustained when he "experienced chronic and aggregate exposures to toxic and hazardous substances while on site at Fab 8 . . . ." Dkt. No. 35 at ¶ 54. Plaintiff alleges that "[u]pon information and belief, at all relevant times, the aforementioned chemicals and substances were manufactured, designed, sold, distributed or used in electronics manufacturing by Defendants . . . ." Dkt. No. 35 at ¶ 55. Further, Plaintiff alleges that "[t]he law implies a warranty by [GlobalFoundries], as designer[], manufacturer[], mixer[], and seller[] of the aforesaid chemicals, radiation, and substances on the market, that the chemicals, radiation, and substances were reasonably fit for the ordinary purposes for which they w[ere] used." *Id.* at ¶ 111. The parties debate whether these allegations are sufficient to support Plaintiff's claim that GlobalFoundries uses these chemicals as components in the semiconductors that it manufactures and eventually sells. *See* Dkt. No 57 at 7-9; Dkt. No. 58 at 6-10. However, the Court need not determine this specific question on the instant motion because it is undisputed that any injuries Plaintiff sustained from GlobalFoundries' products occurred prior to those products being sold or placed on the market.

Appendix B

The only allegation of harm attributable to a GlobalFoundries product is that the chemicals used in its Fab 8 plant caused or contributed to Plaintiff's injuries. Dkt. No. 35 at ¶ 54. Regardless of whether these chemicals were ultimately sold in components manufactured by GlobalFoundaries, Plaintiff was not injured by the components after they had been manufactured and placed into the stream of commerce. Rather, Plaintiff was allegedly injured by these chemicals while working at GlobalFoundries' Fab 8 facility, prior to any sale, distribution, or transaction involving the chemicals. Specifically, Plaintiff's claim for relief alleges that GlobalFoundries is "strictly liable for the defective, unsafe and unreasonably dangerous design, manufacture, production, mixture and/or use of the aforesaid chemicals and substances *as used in their tools, facility and premises*." Dkt. No. 35 at ¶ 98 (emphasis added). Thus, there has clearly been no transaction in the specific good that caused Plaintiff's injuries that would subject GlobalFoundries to warranty liability, either express or implied, under Article 2 of the UCC. Further, any contact that Plaintiff had with the allegedly harmful chemicals occurred during the construction process of the Fab 8 facility. Thus, his injuries were not caused by a product that GlobalFoundries placed into the stream of commerce, which removes this claim from the scope of strict products liability. Accordingly, GloablFoundries' motion to dismiss Counts III, IV, and V of Plaintiff's amended complaint is granted.

C. Count VII

Count VII of Plaintiff's amended complaint asserts a cause of action for the willful and wanton misconduct of GlobalFoundries. *See* Dkt. No. 35 at ¶¶ 120-133. However, New York law does not recognize willful and wanton misconduct as a standalone cause of action. *See Convergia Networks, Inc. v. Huawei Techs. Co., Ltd.*, No. 06 Civ. 6191, 2008 U.S. Dist. LEXIS 92271, 2008 WL 4787503, *3 (S.D.N.Y. Oct. 30, 2008) (citing *Abbatiello v. Monsanto Co.*, 522 F. Supp. 2d 524, 543 (S.D.N.Y. 2007)); *see also Rocanova v. Equitable Life Assur. Soc'y*, 83 N.Y.2d 603, 616, 634 N.E.2d 940, 612 N.Y.S.2d 339 (1994) (noting that a demand for punitive damages cannot be its own cause of action, but rather must attach to a substantive claim that allows such damages). Accordingly, GlobalFoundries' motion to dismiss Count VII of Plaintiff's amended complaint is granted.[1]

IV. CONCLUSION

After carefully reviewing the entire record in this matter, the parties' submissions and the applicable law, and for the above-stated reasons, the Court hereby

1. The Court notes that Plaintiff's request for punitive damages is not dismissed as he still has the right to request such damages in connection with his remaining substantive causes of action. The allegations set forth in paragraphs 120-133 of the amended complaint are sufficient to support his request for punitive damages at the motion to dismiss stage, notwithstanding the dismissal of Count VII.

ORDERS that Defendant GlobalFoundries' motion to dismiss (Dkt. No. 38) is **GRANTED** in its entirety; and the Court further

ORDERS that Counts III, IV, V, and VII of Plaintiff's amended complaint (Dkt. No. 35) are **DISMISSED**, and the Court further

ORDERS that the Clerk of the Court shall serve a copy of this Memorandum-Decision and Order on all parties in accordance with the Local Rules.

IT IS SO ORDERED.

Dated: March 22, 2016
Albany, New York

/s/ Mae A. D'Agostino
Mae A. D'Agostino
U.S. District Judge

APPENDIX C — MEMORANDUM-DECISION AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF NEW YORK, FILED SEPTEMBER 11, 2017

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

6:15-cv-557 (MAD/ATB)

TIMOTHY J. RIZZO,

Plaintiff,

vs.

APPLIED MATERIALS, INC.; AND GLOBALFOUNDRIES, U.S., INC.,

Defendants.

September 11, 2017, Decided
September 11, 2017, Filed

Mae A. D'Agostino, U.S. District Judge:

MEMORANDUM-DECISION AND ORDER

I. INTRODUCTION

Plaintiff Timothy J. Rizzo commenced this action on April 30, 2015, and filed an amended complaint on July 29, 2015 asserting eleven causes of action and

seeking at least $75,000 in compensatory and punitive damages against Defendants Applied Materials, Inc. and GlobalFoundries, U.S., Inc. ("Defendants").[1] *See* Dkt. No. 35. In a Memorandum-Decision and Order dated March 22, 2016, the Court dismissed Counts III, IV, V, and VII of Plaintiff's amended complaint. *See* Dkt. No. 106 at 8. Currently before the Court are four motions: (1) Plaintiff's objections to a Text Order issued by Magistrate Judge Baxter, *see* Dkt. No. 157; (2) Plaintiff's motion for leave to file a second amended complaint, *see* Dkt. No. 158; (3) Defendants' motion to exclude the causation testimony of one of Plaintiff's expert witnesses, Dr. Robert S. Wang, *see* Dkt. No. 161; and (4) Defendants' motion for summary judgment, *see* Dkt. No. 162.

II. BACKGROUND

A. Factual Background

According to the amended complaint, in April of 2012, Plaintiff began working for AM Technical Solutions, Inc. ("AMTS") as a construction manager for Tool Install. *See* Dkt. No. 35 ¶ 47. On or about May 2, 2012, Plaintiff was assigned to GlobalFoundries's Fab 8 facility in Malta, New York to work in construction management overseeing the construction of factories for that facility. *Id.* ¶¶ 48-49. On August 2, 2012, while Plaintiff was working in the chemical metal plating room at the Fab 8 facility, a manufacturing tool labeled as POL2700 allegedly malfunctioned and

1. Plaintiff also initially sued AM Technical Solutions, Inc., which has been dismissed from this action. *See* Dkt. No. 52.

exposed him to various substances, including colloidal silica, silicon and solvent solutions, and Trisilane and/or Trisilane compounds. *Id.* ¶ 50. In Plaintiff's proposed second amended complaint, Plaintiff alleges that he was exposed to silica and nanosilica during this incident. *See* Dkt. No. 158-3 ¶ 37. Plaintiff claims that he was also exposed on a chronic basis to "toxic and hazardous substances" from May of 2012 until August of 2012. *See* Dkt. No. 35 ¶ 53. In Plaintiff's proposed second amended complaint, he alleges that his exposure period actually began in the spring of 2011, and he further alleges that he was exposed to various other substances, including dust, fumes, vapors, particles, and nano particles at the Fab 8 facility. *See* Dkt. No. 158-3 ¶ 40. Plaintiff further contends that he was exposed to numerous other toxic substances while working at the Fab 8 facility. *See* Dkt. No. 35 ¶ 54.

According to the amended complaint, at some point soon after the August 2, 2012 incident, Plaintiff developed an autoimmune disease diagnosed as granulomatosis with polyangiitis ("GPA") (formerly known as Wegener's Disease or Wegener's Granulomatosis). *See id.* ¶ 67; Dkt. No. 162-1 ¶ 1. GPA is an antineutrophil cytoplasmic autoantibodies ("ANCA")-associated vasculitis, or AAV. *See* Dkt. No. 162-15 ¶ 16. More specifically, GPA is an ANCA small vessel vasculitis ("ANCA-SVV"). *See id.* Vasculitis is a group of diseases that involves inflammation of blood vessels. *See id.* AAV is a category of vasculitis diseases that includes GPA, microscopic polyangiitis ("MPA"), renal-limited vasculitis and eosinophilic granulomatosis (also referred to as Churg-Strauss syndrome, or CSS). *See id.*; Dkt. No. 162-18 ¶ 12.

B. Procedural Background and Current Motions

The parties participated in an initial telephone conference regarding discovery with Judge Baxter on August 13, 2015. *See* Text Minute Entry dated Aug. 13, 2015. During that conference, Judge Baxter ruled that discovery would be phased, with phase I addressing general causation of Plaintiff's alleged injury and its associated symptoms. *See id.* Judge Baxter approved a phase I scheduling order on September 1, 2015. *See* Dkt. No. 56. As courts have explained, "[g]eneral causation is whether a substance is capable of causing a particular injury or condition in the general population, while specific causation is whether a substance caused a particular individual's injury." *In re Rezulin Prods. Liab. Litig.*, 369 F. Supp. 2d 398, 402 (S.D.N.Y. 2005) (quotation omitted). As such, the crux of this stage of the proceedings is whether any of the substances Plaintiff was allegedly exposed to are capable of causing GPA.

Following the conclusion of expert depositions, Defendants filed a letter requesting that the Court set a reasonable fee for the depositions of one of Plaintiff's experts, Dr. Robert S. Wang. *See* Dkt. No. 155 at 1. Defendants argued that Dr. Wang submitted an invoice based on an excessive hourly rate and excessive preparation time. *See id.* Judge Baxter granted Defendants' motion in part, reducing Dr. Wang's hourly rate and limiting Dr. Wang's preparation time for which he could charge Defendants. *See* Dkt. No. 156. Plaintiff then filed objections to Judge Baxter's order, arguing that Plaintiff should have had a chance to respond to Defendants' letter

motion before Judge Baxter issued his order. *See* Dkt. No. 157-1 at 3. Plaintiff further argues that Judge Baxter should not have reached a conclusion with respect to Dr. Wang's expertise, and that Judge Baxter provided no legal basis for reducing Dr. Wang's hourly rate. *See id.* at 3-4. Defendants contend that Judge Baxter's ruling was not clearly erroneous, and, thus, should be affirmed. *See* Dkt. No. 164 at 8.

On December 20, 2016, the day before the deadline for filing summary judgment motions, Plaintiff filed a motion for leave to file a second amended complaint. *See* Dkt. No. 158. Plaintiff's proposed second amended complaint expands the time of his alleged exposure and adds additional exposures. *See* Dkt. No. 158-4 at 1. Defendants contend that Plaintiff should not be entitled to amend his complaint again, as any amendment would be unduly prejudicial to Defendants, and would be futile in any event. *See* Dkt. No. 165 at 9.

On December 21, 2016, Defendants filed a motion to exclude the causation testimony of Dr. Wang, *see* Dkt. No. 161, and a motion for summary judgment, *see* Dkt. No. 162. Dr. Wang opined that Plaintiff developed GPA as a result of his exposure to substances at GlobalFoundries. *See* Dkt. No. 169-10 ¶¶ 73-75. Defendants contend that Dr. Wang is not qualified to give an expert opinion on the causation of GPA. *See* Dkt. No. 161-1 at 8-12. Defendants argue that Dr. Wang "has never done any clinical research, published any papers, or conducted any epidemiological studies on GPA (or any other disorder)," has only seen two patients with GPA, and only treated those patients with respect to their

pulmonary symptoms. *See id.* at 11. Defendants note that Dr. Wang "admits that he is not an expert in rheumatology, GPA, epidemiology, toxicology, or occupational medicine." *Id.* Moreover, Defendants argue that Dr. Wang's testimony is unreliable because the studies he purportedly relied on do not support his conclusions. *See* Dkt. No. 162-2 at 24.

In their motion for summary judgment, Defendants argue that Plaintiff has failed to raise a genuine issue of fact with respect to general causation, which Plaintiff needs to prove in order to sustain any of his remaining causes of action. *See id.* at 14. Defendants claim that "[i]t is the unanimous view of respected medical institutions, authoritative treatises, and the scientific literature more broadly that GPA has no recognized cause." *Id.* at 15. Defendants present two expert witnesses on general causation, both of whom agree that GPA has no known cause. *See id.* at 12. Defendants reiterate their arguments that Dr. Wang's causation testimony should be excluded, and further argue that the opinions of Dr. Eli Miloslavsky, Plaintiff's other expert, should also be excluded. *See id.* at 19-28.

Plaintiff claims that Dr. Wang is qualified to render a causation opinion and that his opinions are reliable. *See* Dkt. No. 169-13 at 20-27. Since Dr. Wang opined that Plaintiff's disease was caused by his exposures at GlobalFoundries, Plaintiff argues that he has raised sufficient questions of fact with respect to general causation to survive Defendants' motion for summary judgment. *See id.* at 26-28. Moreover, Plaintiff claims that his exposures were not limited to silica, and that his injuries are not limited to GPA. *See id.* at 16-19.

Appendix C

C. The Experts and Their Opinions

1. Dr. David H. Garabrant

Dr. Garabrant is one of Defendants' experts. He is an epidemiologist and a licensed physician who specializes in occupational medicine. *See* Dkt. No. 162-15 ¶ 1. He is Emeritus Professor of Occupational Medicine and Epidemiology at the University of Michigan School of Public Health. *See id.* He has published over 350 articles, book chapters, and abstracts related to the long-term effects of chemicals on humans. *See id.* ¶ 3. He has reviewed scientific papers for numerous journals, including journals on epidemiology and cancer research. *See id.* ¶ 4. He has "devoted [his] career to the study of long-term health effects of chemicals on humans." *Id.* ¶ 6. To that end, he has "published peer-reviewed studies in the areas of autoimmune diseases related to silicon compounds and solvents." *Id.*

Dr. Garabrant opined that GPA has no known cause. *See id.* ¶ 9. He explained that, while "[m]any environmental and occupational exposures have been postulated to cause GPA . . . none ha[ve] been demonstrated to cause (let alone been generally accepted as a cause of) GPA." *Id.* ¶ 10. Dr. Garabrant also acknowledged that some studies have reported associations between silica and GPA, but explained that there is no consistent evidence of an association. *See id.* ¶ 11. Dr. Garabrant further stated that "[n]o studies, reviews, text, or authoritative agencies or organizations have reported a causal association between GPA and any environmental or occupational exposure."

Id. ¶ 12. Specifically with respect to the semiconductor or electronics industry, as relevant here, Dr. Garabrant explained that no studies have reported even an association between exposures in that industry and the development of GPA, let alone a causal association. *See id.* ¶ 13.

2. Dr. Gary S. Hoffman

Dr. Hoffman is Defendants' other expert on general causation. After working for thirteen years in general rheumatology at various institutions, Dr. Hoffman joined and eventually became the head of Dr. Anthony Fauci's Vasculitis and Related Diseases Section at the National Institutes of Health. *See* Dkt. No. 162-18 ¶ 1. Dr. Hoffman later founded the Cleveland Clinic Center for Vasculitis Care and Research. *See id.* ¶ 2. He has "authored over 340 articles and chapters and ha[s] edited four books, including various articles and chapters addressing the epidemiology, diagnosis and treatment of [GPA]." *Id.* ¶ 3.

Like Dr. Garabrant, Dr. Hoffman opined that GPA has no known cause. *See id.* ¶ 5. He explained that "[n]o industrial chemicals or other agents at any exposure level or under any exposure conditions have been demonstrated, or are generally accepted by the medical and scientific community, to cause GPA." *Id.* ¶ 6. Dr. Hoffman also explained that the four different diseases within the broader category of AAV "are clinically and histopathologically distinct entities; they differ with respect to epidemiology (including etiology), diagnosis, prognosis and treatment." *Id.* ¶ 12.

3. Dr. Robert S. Wang

Dr. Wang was Plaintiff's treating pulmonologist from January to December 2013. *See* Dkt. No. 162-1 ¶ 47; Dkt. No. 169-14 ¶ 47. He is board certified in pulmonary, critical care, and sleep medicine. *See* Dkt. No. 169-10 ¶ 1. During Plaintiff's workers' compensation proceedings in March of 2015, Dr. Wang testified that he would defer to a rheumatologist with respect to whether workplace exposures could be connected to Plaintiff's development of GPA. *See* Dkt. No. 162-10 at 16-17. When Dr. Wang submitted an opinion letter on January 22, 2016, he had not yet performed a comprehensive literature search on occupational exposures and whether they can cause GPA. *See id.* at 6-7; Dkt. No. 162-1 ¶ 56; Dkt. No. 169-14 ¶ 56. Moreover, Dr. Wang has only treated two patients with GPA, including Plaintiff, and his treatment focused on the pulmonary symptoms of GPA. *See* Dkt. No. 162-1 ¶ 52; Dkt. No. 169-14 ¶ 52. Dr. Wang admitted that he does not consider himself an expert in GPA, rheumatology, industrial hygiene, occupational medicine, toxicology, epidemiology, or otolaryngology. *See* Dkt. No. 162-10 at 11-12. However, Dr. Wang reviewed relevant literature in the weeks prior to his deposition, and offered a causation opinion. *See* Dkt. No. 162-1 ¶ 59; Dkt. No. 169-14 ¶ 59.

Dr. Wang opined that "[t]here is enough evidence to say that a causal relationship exists between [Plaintiff's] disease and his exposures to nanosilica and [trichloroethylene]." Dkt. No. 169-10 ¶ 73. Dr. Wang claimed that the studies relied on by Dr. Garabrant and Dr. Hoffman are inapplicable to Plaintiff's case, as those

studies involved different types of work environments and exposures. *See id.* ¶ 36. Dr. Wang conceded that "no specific research with nanosilica and GPA exist," but still opined that Plaintiff's exposures to nanosilica caused his GPA. *Id.* ¶¶ 38, 73. Dr. Wang further claimed that "the causal relationship between silica and AAV is sufficient to establish causation in this matter as GPA is a form of AAV." *Id.* ¶ 43.

4. Dr. Eli Miloslavsky

Dr. Miloslavsky is Plaintiff's rheumatologist. *See* Dkt. No. 162-1 ¶ 11; Dkt. No. 169-14 ¶ 11. Dr. Miloslavsky did not submit a declaration or affidavit in response to Defendants' motion for summary judgment. However, during his deposition, Dr. Miloslavsky testified that he believes that there is a causal association between exposure to silica and GPA. *See* Dkt. No. 162-4 at 24-25. Dr. Miloslavsky admitted during his deposition that he did not attempt to comprehensively review all of the literature on silica and the development of GPA. *See id.* at 23. Dr. Miloslavsky only relied on the studies that he believes support an association between crystalline silica and GPA, but he admitted that there are other studies that have not found such an association.[2] *See id.* at 22-24. When asked

2. In Plaintiff's responsive statement of material facts, Plaintiff denies the assertion that "Dr. Miloslavsky reviewed and relied upon only those studies that he believed supported his position that exposure to crystalline silica causes GPA." Dkt. No. 162-1 ¶ 12; Dkt. No. 169-14 ¶ 12. Plaintiff's denial contains no citation to the record. Local Rule 7.1 provides that each denial in a responsive statement of material facts must contain specific citations to the record, and

if he was aware of any authoritative text or professional organization that has published the opinion that there is a causal relationship between exposure to silica and GPA, his response was "I wouldn't know." *Id.* at 26.

5. Plaintiff's Other Physicians

Plaintiff also originally submitted letters from two other physicians, Dr. Michael Hodgman and Dr. Page V. Salenger. *See* Dkt. No. 162-2 at 10. Dr. Hodgman testified at his deposition that Dr. Hoffman, one of Defendants' experts, is a "[b]rilliant man," and that Dr. Hodgman would defer to Dr. Hoffman's opinions on the causes of GPA. *See* Dkt. No. 162-8 at 9-10. Dr. Hodgman did not opine that a causal association exists between silica and GPA. *See id.* at 11, 15, 24-25. Dr. Salenger testified that she has not reached any conclusions with respect to whether exposure to any organic solvents or silica can cause GPA. *See* Dkt. No. 162-9 at 9.

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that "[t]he Court shall deem admitted any properly supported facts set forth in the Statement of Material Facts that the opposing party does not specifically controvert." Local Rules N.D.N.Y. 7.1(a)(3). Since Defendants' statement regarding the studies that Dr. Miloslavsky relied upon is supported by evidence in the record, the Court will deem Defendants' assertion as admitted. Moreover, Dr. Miloslavsky himself admitted that he only relied upon studies that support his conclusions. *See* Dkt. No. 162-4 at 24-25. As will be discussed below, Plaintiff continuously denies assertions in Defendants' statement of material facts without providing any specific citation to the record, and, often, Defendants' citation to the record is to an admission by Plaintiff's own experts. The Court deems such statements as admitted.

Appendix C

III. DISCUSSION

A. Defendants' Motion to Exclude Expert Testimony

1. Rule 702 and *Daubert*

The admissibility of expert testimony is governed by Rule 702 of the Federal Rules of Evidence. That Rule provides as follows:

> 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. "The party offering the testimony has the burden of establishing its admissibility by a preponderance of the evidence." *In re Mirena IUD Prods.*

Liab. Litig., 169 F. Supp. 3d 396, 411 (S.D.N.Y. 2016). As the courts and Advisory Committee have made clear, "the rejection of expert testimony is the exception rather than the rule." Fed. R. Evid. 702, Advisory Committee's Note. Moreover, "the Supreme Court has made clear that the district court has a 'gatekeeping' function under Rule 702—it is charged with 'the task of ensuring that an expert's testimony both rests on a reliable foundation and is relevant to the task at hand.'" *Amorgianos v. Nat'l R.R. Passenger Corp.*, 303 F.3d 256, 265 (2d Cir. 2002) (quoting *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 597, 113 S. Ct. 2786, 125 L. Ed. 2d 469 (1993)).

In reviewing the admissibility of expert testimony, courts must determine whether the expert is qualified to testify. "Qualification 'may be based on a broad range of knowledge, skills, and training.'" *Mirena*, 169 F. Supp. 3d at 412 (quoting *In re Fosamax Prods. Liab. Litig.*, 645 F. Supp. 2d 164, 172 (S.D.N.Y.2009)). "Courts within the Second Circuit have liberally construed expert qualification requirements." *Id.* (quotation omitted). However, "[a]lthough the qualification requirement is liberally construed, it is not a nullity." *Mancuso v. Consol. Edison Co. of N.Y.*, 967 F. Supp. 1437, 1442 (S.D.N.Y. 1997).

A district court must also determine whether the expert testimony is reliable. As the Second Circuit has explained,

> [T]he district court must determine whether the proffered testimony has a sufficiently reliable foundation to permit it to be considered. In

> this inquiry, the district court should consider the indicia of reliability identified in Rule 702, namely, (1) that the testimony is grounded on sufficient facts or data; (2) that the testimony is the product of reliable principles and methods; and (3) that the witness has applied the principles and methods reliably to the facts of the case. In short, the district court must make certain that an expert, whether basing testimony upon professional studies or personal experience, employs in the courtroom the same level of intellectual rigor that characterizes the practice of an expert in the relevant field.

Amorgianos, 303 F.3d at 265 (alterations, quotations, and citations omitted). In *Daubert*, the Supreme Court provided a non-exhaustive list of factors for a district court to consider when determining the reliability of expert testimony, including: "1) whether the theory had been tested, 2) whether it had been subjected to peer review, 3) what the potential or known rate of error is, 4) what sort of standards control the technique's operation, [and] 5) whether the theory or technique has been generally accepted." *Mancuso*, 967 F. Supp. at 1441 (citing *Daubert*, 509 U.S. at 593-94) (other citations omitted). Courts have also considered other factors, such as whether an expert's testimony is based on research conducted independent of the litigation, and whether an expert "has unjustifiably extrapolated from an accepted premise to an unfounded conclusion." Fed. R. Evid. 702, Advisory Committee's Note. "In all cases, 'the test of reliability is flexible,' and a district court has 'the same broad latitude when it decides

how to determine reliability as it enjoys in respect to its ultimate reliability determination.'" *Mirena*, 169 F. Supp. 3d at 413 (quoting *Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 141-42, 119 S. Ct. 1167, 143 L. Ed. 2d 238 (1999)).

"In deciding whether a step in an expert's analysis is unreliable, the district court should undertake a rigorous examination of the facts on which the expert relies, the method by which the expert draws an opinion from those facts, and how the expert applies the facts and methods to the case at hand." *Amorgianos*, 303 F.3d at 267. "A minor flaw in an expert's reasoning or a slight modification of an otherwise reliable method will not render an expert's opinion *per se* inadmissible." *Id.* "The judge should only exclude the evidence if the flaw is large enough that the expert lacks 'good grounds' for his or her conclusions." *Id.* (quotation and citation omitted). Disputes regarding the nature and strength of an expert's credentials, an expert's use or application of her methodology, or the existence or number of supporting authorities for an expert's opinion, go to the weight, not the admissibility of her testimony. *McCullock v. H.B. Fuller Co.*, 61 F.3d 1038, 1044 (2d Cir. 1995). The Second Circuit has held that an expert need not "back his or her opinion with published studies that unequivocally support his or her conclusions." *Amorgianos*, 303 F.3d at 266. "Where an expert otherwise reliably utilizes scientific methods to reach a conclusion, lack of textual support may 'go to the weight, not the admissibility' of the expert's testimony." *Id.* (quoting *McCullock*, 61 F.3d at 1044).

On the other hand, "when an expert opinion is based on data, methodology, or studies that are simply inadequate to support the conclusions reached, *Daubert* and Rule 702 mandate the exclusion of that unreliable opinion testimony." *Id.; accord Ruggiero v. Warner-Lambert Co.*, 424 F.3d 249, 253 (2d Cir. 2005).[3] Furthermore, "it is critical that an expert's analysis be reliable at every step." *Amorgianos*, 303 F.3d at 267. Of course, "the district court must focus on the principles and methodology employed by the expert, without regard to the conclusions the expert has reached or the district court's belief as to the correctness of those conclusions." *Id.* at 266 (citing *Daubert*, 509 U.S. at 595). Nevertheless, "conclusions and methodology are not entirely distinct from one another." *Gen. Elec. Co. v. Joiner*, 522 U.S. 136, 146, 118 S. Ct. 512, 139 L. Ed. 2d 508 (1997). Accordingly, "[a] court may conclude that there is simply too great an analytical gap

3. *See also Zaremba v. Gen. Motors Corp.*, 360 F.3d 355, 358-60 (2d Cir. 2004) (holding that expert testimony that was speculative and unreliable was properly not considered by the district court on summary judgment); *Dreyer v. Ryder Auto. Carrier Group, Inc.*, 367 F. Supp. 2d 413, 416-17 (W.D.N.Y. 2005) (noting that "[a]n otherwise well-credentialed expert's opinion may be subject to disqualification if he fails to employ investigative techniques or cannot explain the technical basis for his opinion"); *Dora Homes, Inc. v. Epperson*, 344 F. Supp. 2d 875, 887-89 (E.D.N.Y. 2004) (declining to consider plaintiff's expert's testimony in deciding pending motions for summary judgment based on a finding that the expert's testimony "is unreliable under Fed. R. Evid. 702 and the principles articulated in *Daubert* and its progeny," given that the expert (1) qualified his opinions, (2) failed to support his opinions with any methodology which the court could analyze, and (3) rested his opinions "upon nothing more than subjective belief and unsupported speculation").

between the data and the opinion proffered." *Id.* at 146 (citations omitted).

Moreover, "[a]fter determining that a witness is qualified to testify as an expert as to a particular matter and that the opinion is reliable, Rule 702 requires the district court to determine whether the expert's testimony will 'help the trier of fact.'" *Mirena*, 169 F. Supp. 3d at 413 (quoting Fed. R. Evid. 702).

As a final note, the primary issue at this stage of the litigation is general causation. As mentioned above, "a plaintiff in a toxic tort case must prove both general causation, that is, that the alleged toxin is capable of causing injuries of the kind suffered by the plaintiff, and specific causation, that is, that the alleged toxin caused the particular plaintiff's injuries." *In re Rezulin Prods. Liab. Litig.*, 369 F. Supp. 2d 398, 422 (S.D.N.Y. 2005). "To establish general causation a plaintiff must show that the toxin alleged to be the cause of the plaintiff's malady is capable of causing the type of injury alleged when a person is exposed to it in a concentration similar to that to which the plaintiff claims to have been exposed." *Green v. McAllister Bros.*, Nos. 02 Civ. 7588, 03 Civ. 1482, 2005 U.S. Dist. LEXIS 4816, 2005 WL 742624, *11 (S.D.N.Y. Mar. 25, 2005) (citing *Mancuso*, 967 F. Supp. at 1445). "The *Daubert* requirements apply alike to expert opinions on general and specific causation." *In re Rezulin*, 369 F. Supp. 2d at 422.

2. Dr. Wang

a. Qualifications

"To determine whether a witness qualifies as an expert, courts compare the area in which the witness has superior knowledge, education, experience, or skill with the subject matter of the proffered testimony." *United States v. Tin Yat Chin*, 371 F.3d 31, 40 (2d Cir. 2004) (citation omitted). "In assessing whether a proposed expert is 'qualified,' the trial judge should remember the 'liberal[ ] purpose' of Fed. R. Evid. 702, and remain 'flexibl[e]' in evaluating the proposed expert's qualifications." *Krause v. CSX Transp.*, 984 F. Supp. 2d 62, 74 (N.D.N.Y. 2013) (citing *United States v. Brown*, 776 F.2d 397, 400 (2d Cir. 1985)). "Accordingly, assuming that the proffered expert has the requisite minimal education and experience in a relevant field, courts have not barred an expert from testifying merely because he or she lacks a degree or training narrowly matching the point of dispute in the lawsuit." *Canino v. HRP, Inc.*, 105 F. Supp. 2d 21, 27 (N.D.N.Y. 2000) (internal citation omitted). "The expert may not, however, offer an opinion on a different field or discipline." *Id.* (citation omitted).

Defendants argue that Dr. Wang is not qualified to give a causation opinion in this case. Defendants largely rely on *Mancuso v. Consol. Edison Co. of N.Y.*, 967 F. Supp. 1437 (S.D.N.Y. 1997) and *Diaz v. Johnson Matthey, Inc.*, 893 F. Supp. 358 (D.N.J. 1995). In *Mancuso*, the court held that a doctor was not qualified to give a causation opinion regarding whether PCBs caused the plaintiffs' injuries.

See Mancuso, 967 F. Supp. at 1442-44. The court noted that the doctor had never testified in a toxic tort case before, that he had no training in environmental medicine or PCBs, that he had written no articles on toxicology or environmental diseases, and that the doctor primarily relied upon books provided by the plaintiffs' lawyer. *See id.* at 1442. Moreover, despite the doctor's contention that he had read numerous articles prior to giving his testimony, he "was unable to answer critical questions regarding PCBs." *Id.* at 1444. Likewise, in *Diaz*, the court held that the plaintiff's doctor was not qualified to give an opinion regarding whether the plaintiff's exposure to platinum salts caused his chronic asthma. *See Diaz*, 893 F. Supp. at 372-73. The court noted that the doctor "has no other qualifications other than his medical education and his years practicing as a pulmonologist; he is neither an epidemiologist nor a toxicologist; he does not specialize in occupational medicine; and he had never treated a patient, before [plaintiff], suffering from the platinum allergy." *Id.* Further, the doctor "only casually studied the literature on the platinum allergy" and "certainly [did] not stud[y] any papers that contradict his opinion . . . ." *Id.* at 372.

Here, as discussed above, Dr. Wang was Plaintiff's treating pulmonologist from January to December 2013. *See* Dkt. No. 162-1 ¶ 47; Dkt. No. 169-14 ¶ 47. Dr. Wang concedes that he is not an expert in GPA, epidemiology, occupational medicine, toxicology, or rheumatology. *See* Dkt. No. 162-1 ¶ 49; Dkt. No. 169-14 ¶ 49. Dr. Wang had not yet formed a causation opinion during Plaintiff's workers' compensation proceedings in March of 2015 or in his January 2016 opinion letter regarding Plaintiff's

GPA. *See* Dkt. No. 162-1 ¶¶ 55-56; Dkt. No. 169-14 ¶¶ 55-56. Dr. Wang admits that he formed his opinion by reviewing literature in the weeks before his deposition. *See* Dkt. No. 162-1 ¶ 59; Dkt. No. 169-14 ¶ 59. Further, prior to this case, Dr. Wang had never given the opinion that someone's GPA was caused by a workplace exposure.[4] *See* Dkt. No. 161-1 ¶ 54; Dkt. No. 162-10 at 24. Moreover, Dr. Wang has only treated two patients with GPA, including Plaintiff, and his treatment focused on only the pulmonary symptoms of GPA. *See* Dkt. No. 162-1 ¶ 52; Dkt. No. 169-14 ¶ 52.

As such, Plaintiff's only argument that Dr. Wang is qualified is based on the literature review that Dr. Wang performed just weeks before giving his opinion. The Court notes that "[i]t is hardly the hallmark of expertise to conduct a survey of medical literature just before testifying and to rely on articles up to then unknown or unread by the expert." *Diaz*, 893 F. Supp. at 373 n.7. Dr. Wang is not an epidemiologist or a toxicologist, and is certainly not an expert on GPA. Moreover, Dr. Wang has not published any paper or acted as a peer reviewer for any peer reviewed publication. *See* Dkt. No. 161-3 at 8. However, the Court is also aware of the liberal purpose of

4. In Plaintiff's response to Defendants' statement of material facts, Plaintiff purports to deny this assertion, citing to Dr. Wang's deposition testimony. *See* Dkt. No. 169-14 ¶ 54. During Dr. Wang's deposition, Dr. Wang was asked whether this is the first case that he has told someone that their GPA was caused by an occupational exposure. *See* Dkt. No. 162-10 at 24. It appears that Dr. Wang did not understand the question at first as he gave an answer that was not responsive to that question. However, the question was then immediately read back to Dr. Wang, and he admitted that this is the first case in which he has given such an opinion. *See id.*

Rule 702. This case is at least somewhat distinguishable from *Mancuso* and *Diaz*, where the purported experts lacked critical knowledge of the subject at issue or only casually reviewed the literature. *See Mancuso*, 967 F. Supp. at 1444; *Diaz*, 893 F. Supp. at 372. Here, Dr. Wang insists that he has extensively reviewed the literature, and he was able to discuss the relevant studies during his deposition. Accordingly, whether Dr. Wang is qualified to give an opinion seems questionable. The Court is concerned with Dr. Wang's utter lack of experience and training with GPA and that Dr. Wang's opinion is solely based on a recent review of literature, but the Court is also mindful that it must remain flexible in determining whether an expert is qualified. That being said, the Court need not linger on the issue of Dr. Wang's qualifications, because it is abundantly clear to the Court that Dr. Wang's opinion is not reliable, and, therefore, inadmissible.

b. Reliability

Dr. Wang opined that Plaintiff's exposures to nanosilica and trichloroethylene ("TCE")[5] are capable of causing (and did cause) his GPA. *See* Dkt. No. 169-10 ¶¶ 42, 45.

During Dr. Wang's deposition, he testified that his opinion that Plaintiff's GPA was caused by Plaintiff's exposure to nanosilica is based on one article, entitled Napierska, D., 2010. The nanosilica hazard: another

5. Trichloroethylene is one of the solvents that Plaintiff alleges he was exposed to at GlobalFoundries's Fab 8 facility. *See* Dkt. No. 158-3 ¶ 41; Dkt. No. 169-10 ¶ 44.

variable entity. Part. Fibre. Toxicol. 7, 39-37 ("Napierska 2010"). *See* Dkt. No. 162-10 at 58-59; Dkt. No. 162-1 ¶ 63. Napierska 2010 reviewed nanosilica, including crystalline and amorphous/colloid forms of silica. *See* Dkt. No. 169-10 ¶ 53. Dr. Wang explained that "[t]he importance of this review is that it looks at multiple in vivo and in vitro studies and provides insight into the mechanism of the inflammatory effects of nanosilica via oxidation from the formation of reactive oxygen species. Cytotoxic and inflammatory effects were seen and cellular changes were observed within 24 hours." *Id.* However, Napierska 2010 did not even mention GPA or AAV. *See* Dkt. No. 162-1 ¶ 64; Dkt. No. 169-14 ¶ 64; Dkt. No. 162-15 ¶ 63. Plaintiff concedes that Napierska 2010 makes no conclusion with respect to the exposure to silica and the development of GPA. *See* Dkt. No. 162-1 ¶ 65; Dkt. No. 169-14 ¶ 65. As Dr. Garabrant explained, "[t]he entirety of the article relates to cell and animal testing as a basis for certain proposed and theoretical mechanisms for toxicity," and does not provide "data or conclusions with respect to any specific disease." Dkt. No. 162-15 ¶ 63. Although noting that Napierska 2010 reviews multiple studies, Plaintiff concedes that Napierska 2010 is not an epidemiological study and that no epidemiological studies have been done on exposure to nanosilica. *See* Dkt. No. 162-1 ¶¶ 66-67; Dkt. No. 169-14 ¶¶ 66-67. Accordingly, Napierska 2010 does not support Dr. Wang's opinion that silica can cause GPA.

This appears to be the extent of the evidence that Dr. Wang relies on to support his causation opinion with respect to nanosilica. However, Dr. Wang makes other assertions in his declaration with respect to nanosilica and

GPA. Dr. Wang notes that Dr. Garabrant acknowledges that some studies have found significant associations between crystalline silica and GPA. *See* Dkt. No. 169-10 ¶ 27. To put Dr. Garabrant's statement in context, he stated that "[t]here is no consistent evidence of an association (let alone a causal association) between crystalline (or any form of) silica exposure and the development of GPA. Although some studies have reported significant associations, others have not demonstrated such associations." Dkt. No. 162-15 ¶ 29. Dr. Garabrant further explained that "[t]he studies that report statistically significant positive associations with crystalline silica exposure generally involve 10 or more years of exposure, with GPA being diagnosed 10 or more years after the beginning of exposure (also known as latency)." *Id.* ¶ 30. Dr. Garabrant also noted that "[n]o studies, or meta-analyses or reviews of this body of scientific literature report the observed association as causal."[6] *Id.* Dr. Garabrant cited and explained numerous studies to support these conclusions. *See id.* ¶¶ 28-50. Dr. Wang does not appear to refute these assertions by Dr. Garabrant, and Dr. Wang's claim that Dr. Garabrant acknowledges a significant association in some studies does nothing to support Dr. Wang's causation opinion.

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6. As Dr. Garabrant explained, observed associations between a substance and a disease do not automatically establish a cause and effect relationship. *See* Dkt. No. 162-15 ¶ 24. Scientists typically determine whether an observed association amounts to a causal relationship by considering the Bradford Hill guidelines, which both Plaintiff's and Defendants' experts outlined. *See id.* ¶¶ 23, 25; Dkt. No. 169-10 ¶ 47.

Appendix C

With respect to TCE, Dr. Wang relies on two articles to support his causation opinion. The first article is Cooper, G.S., 2009. Evidence of Autoimmune-Related Effects of Trichloroethylene Exposure from Studies in Mice and Humans. Envrion. Health Perspectives 117(5), 696-702 ("Cooper 2009"). *See* Dkt. No. 162-10 at 75; Dkt. No. 162-1 ¶ 68. The second article is Miller, F.W., 2012. Epidemiology of environmental exposures and human autoimmune diseases: findings from a National Institute of Environmental Health Sciences Expert Panel Workshop. J. Autoimmun. 39, 259-271 ("Miller 2012"). *See* Dkt. No. 162-10 at 75; Dkt. No. 162-1 ¶ 68.

Cooper 2009 discussed in vitro data, that is, data collected from experiments conducted outside of a living organism. *See* Dkt. No. 162-1 ¶ 69; Dkt. No. 169-14 ¶ 69. During his deposition, Dr. Wang testified that the data suggests a possible mechanism for the development of an autoimmune disease. *See* Dkt. No. 162-10 at 73-74. In his declaration, Dr. Wang stated that "[t]here is a dose response with TCE's and the mechanism seen is that TCE's alters the conformation of proteins and result in an autoimmune response and affects T-cell function." Dkt. No. 169-10 ¶ 55. However, Dr. Wang acknowledged that Cooper 2009 does not point to the development of any specific autoimmune disease, including GPA or even AAVs generally. *See* Dkt. No. 162-10 at 73-74; Dkt. No. 162-1 ¶ 70; Dkt. No. 169-14 ¶ 70. Accordingly, Cooper 2009 does not support Dr. Wang's conclusion that TCE can cause GPA.

Miller 2012 found a causal association between silica and AAV generally. *See* Dkt. No. 162-10 at 69-70, 84. Dr.

Garabrant noted that Miller 2012 presented no new data but simply reviewed other studies, and failed to include several studies with respect to silica and GPA and with respect to silica and the broader group of ANCA-positive diseases. *See* Dkt. No. 162-15 ¶ 64. In any event, Miller 2012 did not make any specific findings with respect to GPA, and specifically noted that they did not have enough evidence to draw a causal association between silica and any subgroup of AAV, such as GPA. *See* Dkt. No. 162-10 at 69-70, 84; Dkt. No. 162-1 ¶ 73; Dkt. No. 169-14 ¶ 73. Moreover, with respect to solvents and AAVs, Miller 2012 did not note an association to be likely. *See* Dkt. No. 162-1 ¶ 75; Dkt. No. 169-14 ¶ 75.

Despite Miller 2012's failure to reach a conclusion with respect to silica and GPA, and with respect to solvents and AAVs, Dr. Wang still opines that Miller 2012 supports his opinion that Plaintiff's exposure to TCE more likely than not caused Plaintiff's GPA. *See* Dkt. No. 169-10 ¶ 45; Dkt. No. 162-10 at 75-76. During Dr. Wang's deposition, he emphasized the fact that Miller 2012 did reach a conclusion with respect to silica and AAV generally, *see* Dkt. No. 162-10 at 69-70, and in his declaration, Dr. Wang stated that "the causal relationship between silica and AAV is sufficient to establish causation in this matter as GPA is a form of AAV," Dkt. No. 169-10 ¶ 43. Dr. Wang cites nothing to support this assertion that causation with respect to AAV is sufficient to establish causation with respect to GPA, and Dr. Wang provides no further explanation on how he reached this opinion.[7]

7. The Court notes that Dr. Wang relies on Miller 2012 to support his causation opinion with respect to TCE, and seemingly

As mentioned above, Dr. Hoffman explained that the four different forms of AAV "are clinically and histopathologically distinct entities; they differ with respect to epidemiology (including etiology), diagnosis, prognosis and treatment." Dkt. No. 162-18 ¶ 12. Dr. Hoffman explained that, while GPA and MPA (which is another form of AAV) share some common clinical features, they are clinically, serologically, pathologically, and genetically distinct. *See id.* ¶ 13. Dr. Hoffman cited various studies and examples to support this, including a study finding unique genetic markers for GPA compared to MPA; that severe nasal inflammation is typical in GPA but absent in MPA; and the presence of inflammatory mass lesions in GPA that is absent in MPA. *See id.* ¶ 14. Dr. Hoffman also provided an illustrative summary highlighting the numerous distinctions between GPA and MPA. *See id.* ¶ 15. Dr. Hoffman further explained that GPA can be studied independently and cited various studies that have considered GPA and other forms of AAV specifically, including one in which Dr. Hoffman was the senior author. *See id.* ¶¶ 17, 20, 24.

Dr. Garabrant also explained that each disease has its own distinct etiology and that studies of the individual diseases need to be conducted to draw causal conclusions with respect to those specific diseases. *See* Dkt. No.

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not nanosilica, despite Miller 2012's finding of a causal association between silica and AAV and its conclusion that no association was likely between solvents and AAV. Regardless, because Miller 2012 found a causal association between silica and AAV, the Court will still analyze Dr. Wang's claim that causation with respect to AAV is sufficient to establish causation with respect to GPA.

162-15 ¶ 16. Likewise, Dr. Miloslavsky, Plaintiff's other expert, testified that each AAV, and each ANCA-SVV, have different manifestations, presentations, diagnosis, treatment, and causes. *See* Dkt. No. 162-4 at 11. Moreover, Plaintiff himself concedes in his responsive statement of material facts that AAV "is a category of diseases that includes a number of individual diseases with differing diagnoses, presentations, treatments and causes." *See* Dkt. No. 162-1 ¶ 18; Dkt. No. 169-14 ¶ 18.

Accordingly, Dr. Wang has offered no support for his opinion that a causal relationship with respect to AAV is sufficient to find a causal relationship with respect to GPA. On the other hand, Dr. Hoffman cited various studies and examples demonstrating that a causal relationship with respect to AAV is insufficient to make a finding with respect to GPA. *See* Dkt. No. 162-18 ¶¶ 12-17. Moreover, Dr. Wang is the only doctor to give this opinion—even Plaintiff's other expert testified that each AAV has distinct treatment and causes. *See* Dkt. No. 162-4 at 11. Dr. Wang does not cite to any facts, data, studies, examples, or anything whatsoever to support his claim that a causal relationship with respect to AAV is sufficient to make a finding with respect to GPA. Nor does Dr. Wang give any kind of medical explanation or justification for his opinion. Moreover, Dr. Wang admitted during his deposition that AAVs are a heterogeneous group of diseases. *See* Dkt. No. 162-10 at 69-70. As such, the Court rejects Dr. Wang's testimony that causation with respect to AAV is sufficient to establish causation with respect to GPA.

In sum, there are no studies that support Dr. Wang's opinion that nanosilica or TCE are capable of causing GPA. Although Dr. Wang purportedly relies on Napierska 2010, Cooper 2009, and Miller 2012, these studies simply do not come close to supporting Dr. Wang's opinion. As the Supreme Court has held, "nothing in either *Daubert* or the Federal Rules of Evidence requires a district court to admit opinion evidence that is connected to existing data only by the *ipse dixit* of the expert. A court may conclude that there is simply too great an analytical gap between the data and the opinion proffered." *Gen. Elec. Co. v. Joiner*, 522 U.S. 136, 146, 118 S. Ct. 512, 139 L. Ed. 2d 508 (1997) (citation omitted). That is exactly the situation presented here.

Plaintiff argues that Dr. Wang and Defendants' experts generally rely on the same studies but just reach different conclusions. *See* Dkt. No. 169-13 at 28. Plaintiff contends that "Dr. Wang's contrary opinion with regard to these studies, particularly as they apply to the specific facts of this case, merely creates a question of fact. It does not render his opinion unreliable." *Id.* However, the studies simply lend no support for Dr. Wang's conclusions in this case.

Of course, as mentioned above, an expert does not need to rely on published studies that unequivocally support his or her conclusion. *See Amorgianos*, 303 F.3d at 266. In *McCullock v. H.B. Fuller Co.*, 61 F.3d 1038 (2d Cir. 1995), the Second Circuit "affirmed the district court's admission of medical expert testimony despite the fact that the expert 'could not point to a single piece of

medical literature' that specifically supported the expert's opinion." *Id.* at 266-67 (quoting *McCullock*, 61 F.3d at 1043). As long as an expert reliably uses scientific methods to reach his or her conclusions, the lack of published studies in support of that opinion may "go to the weight, not the admissibility" of the testimony. *See id.* at 267 (quoting *McCullock*, 61 F.3d at 1044) (other citation omitted).

It does appear that Dr. Wang gives (or attempts to give) other explanations to support his causation opinions beyond his reliance on the aforementioned studies. At the outset, the Court notes that Dr. Wang only recently developed his causation opinion based on a purported review of the literature, so it seems unlikely that Dr. Wang could offer a valid causation opinion based on his own theories, research, or data. Dr. Wang argues that the studies cited by Dr. Garabrant and Dr. Hoffman involve the farming, construction, and sand-blasting industries, while Plaintiff works in the semiconductor industry. *See* Dkt. No. 169-10 ¶ 37. Dr. Wang believes that comparing those industries to the semiconductor industry "is like comparing an auto-mechanic to a car designer, where the exposure is unrefined verses extremely refined." *Id.* Although Dr. Wang concedes that "no specific research with nanosilica and GPA exist[s]," he still believes that a causal relationship exists. *Id.* ¶¶ 37, 42. Dr. Wang provides no real explanation for his opinion, other than his claim that nanosilica is more refined than silica. He does not offer any kind of data or scientific explanation to support this.

With respect to TCE, Dr. Wang claims as follows:

> TCE alters proteins so they are seen by the immune system and can be viewed as foreign and along with the effect of nanosilica to cause cell death and to activate the immune system provides the mechanism behind [Plaintiff's] disease process being activated by his work exposures at GlobalFoundries. It's as if [Plaintiff] is the can of gasoline, the TCE opens that can, and the nanosilica is that match that ignites the flames of his GPA.

Id. ¶ 80. Again, Dr. Wang presents no scientific evidence or data to support this opinion whatsoever, and this is the first time that Dr. Wang has ever given such an opinion.

In sum, Dr. Wang points to no studies that support his causation opinion with respect to nanosilica or TCE. The studies that he purportedly relies on simply do not support his conclusions. To the extent that Dr. Wang purports to offer causation testimony that is not based on studies but based on his own observations, experiments, or analysis, this testimony is also unreliable. Considering the *Daubert* factors outlined above, Dr. Wang has never tested his theories about nanosilica or TCE. Not only are Dr. Wang's theories not generally accepted by the medical community, but it is abundantly clear based on all the evidence in the record that the medical community believes that GPA has no known cause. Moreover, this is the first and only time Dr. Wang has given such an opinion, and his opinion was developed solely for this litigation. As

such, Dr. Wang's causation opinion is not reliable. *See In re Rezulin Prods. Liab. Litig.*, 369 F. Supp. 2d 398, 423 (S.D.N.Y. 2005) (precluding expert testimony when that testimony "appears to have no acceptance outside this litigation, let alone widespread acceptance.").

Accordingly, the Court finds that Dr. Wang's opinion is not reliable, and Defendants' motion to exclude such testimony is granted.

3. Dr. Miloslavsky

Dr. Miloslavsky testified at his deposition that he believes there is a causal association between silica and GPA. *See* Dkt. No. 162-4 at 24-25. Dr. Miloslavsky relies on six articles to support his opinion, including Gomez-Puerta, J.A., 2013. The association between silica exposure and development of ANCA-associated vasculitis: systematic review and meta-analysis. Autoimmun. Rev. 12, 1129-1135 ("Gomez-Puerta 2013"); Hogan, S.L., 2001. Silica exposure in anti-neutrophil cytoplasmic autoantibody-associated glomerulonephritis and lupus nephritis. J. Am. Soc. Nephrol. 12, 134-142 ("Hogan 2001"); Hogan, S.L., 2007. Association of silica exposure with anti-neutrophil cytoplasmic autoantibody small-vessel vasculitis: a population-based, case-control study. Clin. J. Am. Soc. Nephrol. 2, 290-299 ("Hogan 2007"); Nuyts, G.D., 1995. Wegener granulomatosis is associated to exposure to silicon compounds: a case-control study. Nephrol. Dial. Transplant. 10, 1162-1165 ("Nuyts 1995"); Lane, S.E., 2003. Are environmental factors important in primary systemic vasculitis? A case-control study.

Arthritis & Rheumatism 48, 814-823 ("Lane 2003"); and Webber, M.P., 2015. Nested case-control study of selected systemic autoimmune diseases in World Trade Center rescue/recovery workers. Arthritis Rheumatol. 67, 1369-1376 ("Webber 2015"). *See id.* at 22-23; Dkt. No. 162-1 ¶ 15; Dkt. No. 169-14 ¶ 15.

Defendants argue that Dr. Miloslavsky's testimony should be excluded for several reasons. Defendants contend that Dr. Miloslavsky did not perform a comprehensive review of all the available scientific evidence. *See* Dkt. No. 162-2 at 22. Without such a comprehensive review, Defendants contend that Dr. Miloslavsky's testimony is inherently unreliable. *See id.* Defendants further argue that Dr. Miloslavsky's opinion is unreliable because none of the cited studies support his conclusion. *See id.* at 24. Plaintiff did not respond to Defendants' arguments with respect to the admissibility of Dr. Miloslavsky's testimony. Moreover, Plaintiff did not attach a declaration or affidavit from Dr. Miloslavsky in response to Defendants' motion for summary judgment.

During Dr. Miloslavsky's deposition, he testified as follows:

> Q: You have noted on your notes that you produced to us today, which is Exhibit 30, six studies: Nuyts, which is a 1995 publication article; Hogan, a 2001 publication; Hogan, a 2007 publication; Lane, a 2003 publication; Webber, a 2015 publication; and Gomez-Puerta, which is a 2013 publication.

And I take it that these are the studies that—are these the studies you rely on for the opinions you've expressed in the letter?

A: Yes.

Q: So these are a select few studies that exist on the literature in this studying exposures to silica and GPA.

I take it that you did not attempt to undertake a comprehensive review and analysis of all the literature that exists on exposures to silica and GPA; is that correct?

A: That's correct.

Q: And that's because your role really was a treating physician to treat and provide therapy to [Plaintiff]; is that correct?

A: That's correct.

Q: So, in essence, have you cited on this Exhibit 30 just those studies that you believe support such an association between crystalline silica and GPA, but you recognize that there are a number of studies out there that also demonstrate a lack of association between exposure to crystalline silica and GPA?

A: Yes.

Dkt. No. 162-4 at 22-24.

As discussed above, courts consider various factors in determining whether expert testimony is reliable. One such factor, as outlined in the Advisory Committee's Note to Rule 702, is "[w]hether the expert has adequately accounted for obvious alternative explanations." Fed. R. Evid. 702, Advisory Committee's Note. As the Southern District of New York has explained:

> This is appropriate because any theory that fails to explain information that otherwise would tend to cast doubt on that theory is inherently suspect. By the same token, if the relevant scientific literature contains evidence tending to refute the expert's theory and the expert does not acknowledge or account for that evidence, the expert's opinion is unreliable. Accordingly, courts have excluded expert testimony where the expert selectively chose his support from the scientific landscape.

In re Rezulin Prods. Liab. Litig., 369 F. Supp. 2d 398, 425 (S.D.N.Y. 2005) (quotation and citations omitted); *see also In re Zoloft (Sertraline Hydrochloride) Prods. Liab. Litig.*, 26 F. Supp. 3d 449, 460-61 (E.D. Pa. 2014) ("The Court finds that the expert report prepared by [plaintiffs' expert] does selectively discuss studies most supportive of her conclusions, as [plaintiffs' expert] admitted in her deposition, and fails to account adequately for contrary evidence, and that this methodology is not reliable or scientifically sound.").

Here, Dr. Miloslavsky admitted that he only reviewed articles that support an association between crystalline silica and GPA.[8] *See* Dkt. No. 162-4 at 23-24. As other courts have found, this is not a reliable methodology in forming a causation opinion. Moreover, Plaintiff does not even appear to argue that Dr. Miloslavsky's testimony is admissible.[9] *See generally* Dkt. No. 169-13.

The Court also finds that Dr. Miloslavsky's opinion is unreliable because, like Dr. Wang, the studies that Dr. Miloslavsky purportedly relies on simply do not support his opinion that exposure to silica is capable of causing GPA. The Court will briefly discuss the six studies that Dr. Miloslavsky relies on.

Gomez-Puerta 2013 is a meta-analysis on the potential association between silica exposure and the development of AAV. *See* Dkt. No. 162-1 ¶ 17; Dkt. No. 169-14 ¶ 17. This article did not reach a conclusion regarding exposure to

8. Despite Dr. Miloslavsky's admission in his deposition that he only relied on studies that supported an association between crystalline silica and GPA, *see* Dkt. No. 162-4 at 23-24, Plaintiff denies this assertion in his responsive statement of material facts, *see* Dkt. No. 162-1 ¶ 12; Dkt. No. 169-14 ¶ 12. Moreover, Plaintiff's denial is simply a blanket denial with no citation to the record. Accordingly, the Court deems this statement as admitted.

9. Plaintiff also admits both that "[a] comprehensive literature review is a prerequisite to any reliable causation opinion," and that Dr. Miloslavsky did not "attempt to undertake a comprehensive review and analysis of all the literature that exists on exposures to silica and GPA." Dkt. No. 162-1 ¶¶ 9, 11; Dkt. No. 169-14 ¶¶ 9, 11.

silica and the development of GPA specifically.[10] *See* Dkt. No. 162-4 at 32; Dkt. No. 162-1 ¶ 19. The studies reviewed in Gomez-Puerta 2013 involved mean latency periods of more than ten years, and the average duration of exposure was 21 years. *See* Dkt. No. 162-1 ¶¶ 21, 22; Dkt. No. 169-14 ¶¶ 21, 22. Gomez-Puerta 2013 concluded that "[o]ur summary estimates lend support to the hypothesis that silica may act as an environmental 'trigger' for the development of AAV, as well as other autoimmune diseases, and bring us closer to an understanding of the pathogenesis of AAV. However, further studies are warranted . . . ." Dkt. No. 162-4 at 36-37. Dr. Miloslavsky testified that Gomez-Puerta 2013's conclusion accurately reflects his opinion about the science that exists on the subject. *See id.* Moreover, Dr. Wang contends that this article examined studies that do not mirror Plaintiff's work environment or type of exposure. *See* Dkt. No. 169-10 ¶ 61. Accordingly, this article does not support the conclusion that exposure to silica is capable of causing GPA.

Hogan 2001 examined potential associations between silica exposure and the development of AAV and reported subanalyses for GPA. *See* Dkt. No. 162-1 ¶ 24; Dkt. No. 169-14 ¶ 24. The odds ratio, which is a ratio that measures the strength of association between an exposure and an outcome, was not statistically significant for GPA in Hogan

10. Again, Plaintiff denies this assertion in his responsive statement of material facts. *See* Dkt. No. 162-1 ¶ 19; Dkt. No. 169-14 ¶ 19. Plaintiff cites to Dr. Miloslavsky's testimony, but Dr. Miloslavsky agreed that Gomez-Puerta 2013 did not reach a conclusion with respect to GPA. *See* Dkt. No. 162-4 at 32.

2001. *See* Dkt. No. 162-1 ¶ 25; Dkt. No. 169-14 ¶ 25. Dr. Miloslavsky himself testified that "I would just say that this study does not necessarily prove or disprove the GPA association. It could not have done that." Dkt. No. 162-4 at 41. Dr. Miloslavsky further conceded that one cannot conclude from this study that silica exposure causes GPA. *See id.* Moreover, Dr. Wang contends that Hogan 2001 reviewed cases that do not mirror Plaintiff's type of exposure. *See* Dkt. No. 169-10 ¶ 57.

Hogan 2007 examined potential associations between chronic exposure to silica and the development of AAV. *See* Dkt. No. 162-1 ¶ 29; Dkt. No. 169-14 ¶ 29. None of the findings in Hogan 2007 are specific to GPA. *See* Dkt. No. 162-1 ¶ 30; Dkt. No. 169-14 ¶ 30. The minimum amount of exposure required for someone to be considered exposed for the purposes of this study was one year, and the median duration of exposure was thirteen years. *See* Dkt. No. 162-1 ¶¶ 31, 33; Dkt. No. 169-14 ¶¶ 31, 33. Dr. Garabrant explained that this study found a "borderline statistically significant association between ANCA-positive SVV and high lifetime silica exposure, but no association between lifetime medium or low silica exposure." Dkt. No. 162-15 ¶ 48. Dr. Wang also noted that this study found "a positive relationship with silica and AAV's, but only at high lifetime exposure." Dkt. No. 169-14 ¶ 65. Accordingly, Hogan 2007 did not reach any conclusions with respect to GPA, and the association found between silica and ANCA-SVV was only for exposure periods much longer than Plaintiff's.

Nuyts 1995 examined the potential association between silica exposure and the development of GPA specifically.

See Dkt. No. 162-1 ¶ 36; Dkt. No. 169-14 ¶ 36. Dr. Garabrant explained that "[t]his study found a statistically significant association between GPA and long-term exposure to silica in dusty occupations." Dkt. No. 162-15 ¶ 33; *see also* Dkt. No. 162-18 ¶ 40d. All subjects in the study had a minimum of six years of exposure to silica and worked in occupations such as bricklaying, sandblasting, construction, and farming, which result in high exposure to crystalline silica dust. *See* Dkt. No. 162-1 ¶ 37; Dkt. No. 169-14 ¶ 37. Both Dr. Garabrant and Dr. Wang agree that the exposures in that study are not comparable to Plaintiff's exposures, *see* Dkt. No. 162-15 ¶ 33; Dkt. No. 169-10 ¶ 56, and Dr. Miloslavsky does not appear to contend otherwise, *see* Dkt. No. 162-4 at 49. Specifically, Dr. Wang stated that "[t]his study has occupations . . . which unfortunately do not mirror [Plaintiff's] work environment and exposure. The exposures to silica, in the above occupations, do not result in the exposure to nanosilica." Dkt. No. 169-10 ¶ 56. As such, this study does not support a conclusion that type of exposure Plaintiff alleges can cause GPA.[11]

11. In Defendants' statement of material facts, they assert that "[t]he occupations studied in Nuyts 1995 involve far higher silica dust exposures than Mr. Rizzo's alleged exposure and do not fit Mr. Rizzo's case." Dkt. No. 162-1 ¶ 38. Plaintiff responded as follows: "[d]eny to the extent that the studies do not involve far higher silica exposures than Mr. Rizzo's and do fit Mr. Rizzo's case." Dkt. No. 169-14 ¶ 38. Plaintiff then cited generally to Dr. Wang's declaration but gave no citation to a specific page or paragraph. As noted above, Dr. Wang conceded that the occupations studied in Nuyts 1995 "do not mirror Mr. Rizzo's work environment and exposure." Dkt. No. 169-10 ¶ 56. Accordingly, the Court deems Defendants' statement as admitted.

Lane 2003 also examined potential associations between silica exposure and the development of GPA. *See* Dkt. No. 162-1 ¶ 39; Dkt. No. 169-14 ¶ 39. This study found no statistically significant increased risk of GPA, even in the group with high exposure. *See* Dkt. No. 162-1 ¶ 40; Dkt. No. 169-14 ¶ 40. Lane 2003's findings with respect to primary systematic vasculitis, which is a broader group than AAV, were based on an average exposure period of over twenty years with a range exposure period of three to fifty years. *See* Dkt. No. 162-1 ¶ 41; Dkt. No. 162-15 ¶ 54. Dr. Wang conceded that the occupations examined in Lane 2003 do not mirror Plaintiff's work environment. *See* Dkt. No. 169-10 ¶ 58.

Webber 2015 examined potential associations between autoimmune diseases and exposures at the World Trade Center site post 9/11/2001. *See* Dkt. No. 162-1 ¶ 42; Dkt. No. 169-14 ¶ 42. This study contained only one case that reported having GPA. *See* Dkt. No. 162-1 ¶ 43; Dkt. No. 169-14 ¶ 43. The authors did not draw any conclusions with respect to exposures at the World Trade Center and the development of GPA. *See* Dkt. No. 162-1 ¶ 45; Dkt. No. 169-14 ¶ 45. Moreover, Dr. Miloslavsky conceded that no conclusions can be drawn with respect to GPA from this study.[12] *See* Dkt. No. 162-4 at 54-56.

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12. Again, Plaintiff denied that "Webber 2015 is not sufficient to reach a conclusion linking exposures at the World Trade Center site with GPA." Dkt. No. 162-1 ¶ 46; Dkt. No. 169-14 ¶ 46. Plaintiff cited to Dr. Miloslavsky's testimony to support this denial. However, Dr. Miloslavsky testified that one cannot reach a conclusion based on a single case of GPA, and that the exposures in that study are not comparable to Plaintiff's. *See* Dkt. No. 162-4 at 54-56. Accordingly, the Court deems this statement as admitted.

In sum, the studies that Dr. Miloslavsky relies on simply do not support his causation opinion. Accordingly, Dr. Miloslavsky's causation opinion is inadmissible.

B. Defendants' Motion for Summary Judgment

A court may grant a motion for summary judgment only if it determines that there is no genuine issue of material fact to be tried and that the facts as to which there is no such issue warrant judgment for the movant as a matter of law. *See Chambers v. TRM Copy Ctrs. Corp.*, 43 F.3d 29, 36 (2d Cir. 1994) (citations omitted). When analyzing a summary judgment motion, the court "'cannot try issues of fact; it can only determine whether there are issues to be tried.'" *Id.* at 36-37 (quotation and other citation omitted). Moreover, it is well-settled that a party opposing a motion for summary judgment may not simply rely on the assertions in its pleading. *See Celotex Corp. v. Catrett*, 477 U.S. 317, 324, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986) (quoting Fed. R. Civ. P. 56(c), (e)).

In assessing the record to determine whether any such issues of material fact exist, the court is required to resolve all ambiguities and draw all reasonable inferences in favor of the nonmoving party. *See Chambers*, 43 F.3d at 36 (citing *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986)) (other citations omitted). Where the non-movant either does not respond to the motion or fails to dispute the movant's statement of material facts, the court may not rely solely on the moving party's statement of material facts; rather, the court must be satisfied that the citations to evidence in

the record support the movant's assertions. *See Giannullo v. City of N.Y.*, 322 F.3d 139, 143 n.5 (2d Cir. 2003) (holding that not verifying in the record the assertions in the motion for summary judgment "would derogate the truth-finding functions of the judicial process by substituting convenience for facts").

In the present matter, as mentioned above, Plaintiff has the burden of proving general causation, which requires him to "show that the toxin alleged to be the cause of the plaintiff's malady is capable of causing the type of injury alleged when a person is exposed to it in a concentration similar to that to which the plaintiff claims to have been exposed." *Green v. McAllister Bros.*, Nos. 02 Civ. 7588, 03 Civ. 1482, 2005 U.S. Dist. LEXIS 4816, 2005 WL 742624, *11 (S.D.N.Y. Mar. 25, 2005) (citing *Mancuso*, 967 F. Supp. at 1445). Without the opinions of Dr. Wang and Dr. Miloslavsky, Plaintiff cannot point to any evidence in the record establishing that the exposures he alleges are capable of causing GPA. On the other hand, Defendants submitted testimony and reports from two qualified experts that GPA has no known cause. Since all of Plaintiff's remaining claims require him to establish general causation, Defendants are entitled to summary judgment.

In an attempt to survive the instant motion for summary judgment, Plaintiff argues that his exposure was not limited to silica, but included other solvents, chemicals, gases, ionizing radiation, and heavy metals. *See* Dkt. No. 169-13 at 16; Dkt. No. 35 ¶ 54. Plaintiff was free to offer a causation opinion with respect to any substance,

but only offered opinions with respect to silica and TCE.[13] Plaintiff claims that Defendants' experts did not sufficiently address TCE and nanosilica, but Plaintiff has the burden of proving general causation, and Plaintiff's experts have no scientific evidence to support their conclusion that these substances are capable of causing GPA. Furthermore, Defendants' experts opined that there are no substances known to cause GPA, and their opinions were based on numerous articles and studies. Accordingly, no matter how many substances Plaintiff alleges that he was exposed to in the amended complaint (or in the proposed second amended complaint), he has not established that any of these substances are capable of causing GPA.

Moreover, Plaintiff argues that his injury is not merely limited to GPA. *See* Dkt. No. 169-13 at 18-19. However, the Court agrees with Defendants that this case has always been about Plaintiff's GPA, and Plaintiff has not ever appeared to argue that the symptoms associated with GPA are distinct injuries themselves. *See* Dkt. No. 175 at 7-8. As Defendants point out, Plaintiff stipulated to a Phase I scheduling order which directed Phase I of discovery "to

13. Plaintiff asserts that GlobalFoundries provided Plaintiff with a list of chemicals, substances, and gases that workers at the Fab 8 facility were potentially exposed to, but that the list is not exhaustive. *See* Dkt. No. 169-13 at 17. It does not appear that either party attached this list to their motions, but Plaintiff attached a list containing over one thousand additional chemicals that he may have been exposed to. *See* Dkt. No. 169-5. In any event, Plaintiff has not been able to demonstrate that *any* substance is capable of causing GPA, and it appears from all the evidence in the record that the medical consensus is that GPA has no known cause.

address general causation of plaintiff's alleged personal injury, [GPA] and its *associated symptoms*." Dkt. No. 56 at 1 (emphasis added). Moreover, Plaintiff's experts never opined that Plaintiff had any distinct injuries from his GPA itself. During the Workers' Compensation Board Hearing, Dr. Miloslavsky agreed that Plaintiff's "GPA condition explains most of, if not all of, [his] symptoms since the fall of 2012." Dkt. No. 175-5 at 3. Likewise, in Dr. Wang's declaration, he described Plaintiff's other ailments as "symptoms" of his primary diagnosis, GPA. *See* Dkt. No. 169-10 ¶ 20. As such, Plaintiff may not proceed at this late stage in the case on the theory that his symptoms of GPA are distinct injuries.

Accordingly, since Plaintiff has failed to raise any genuine issue of material fact regarding general causation with respect to GPA, Defendants are entitled to summary judgment.

C. Plaintiff's Motion for Leave to File a Second Amended Complaint

As mentioned above, on December 20, 2016, the day before the deadline for filing summary judgment motions, Plaintiff filed a motion for leave to file a second amended complaint. *See* Dkt. No. 158. Plaintiff's proposed second amended complaint expands the time of his alleged exposure and adds additional exposures. *See* Dkt. No. 158-4 at 1. Specifically, Plaintiff alleges in the second amended complaint that his exposure period began in the spring of 2011, when he was "assisting with work in

Global's Fab 8 facility," instead of May 2012.[14] *See* Dkt. No. 158-3 ¶¶ 33, 40. Plaintiff also seeks to add exposures to silica and nanosilica as part of his acute exposure on August 2, 2012, as well as chronic exposures to various substances, including trichloroethylene. *See id.* ¶¶ 37, 40-41. Moreover, when Plaintiff refers to GPA in the second amended complaint, he adds that GPA is an ANCA-associated vasculitis. *See id.* ¶¶ 54-55.

Rule 15(a) of the Federal Rules of Civil Procedure provides that, when a party needs the court's leave to amend a pleading, "[t]he court should freely give leave when justice so requires." Fed. R. Civ. P. 15(a). "Amendments are generally favored 'to facilitate a proper decision on the merits.'" *Bay Harbour Mgmt., LLC v. Carothers*, 474 F. Supp. 2d 501, 502 (S.D.N.Y. 2007) (quoting *Conley v. Gibson*, 355 U.S. 41, 48, 78 S. Ct. 99, 2 L. Ed. 2d 80 (1957)). "Although Rule 15(a) of the Federal Rules of Civil Procedure provides that leave to amend 'shall be freely given when justice so requires,' it is within the sound discretion of the district court to grant or deny leave to amend." *McCarthy v. Dun & Bradstreet Corp.*, 482 F.3d 184, 200 (2d Cir. 2007) (quoting Fed. R. Civ. P. 15(a)) (other citations omitted). "Leave to amend may be denied for undue delay, bad faith, dilatory motive, prejudice to the opposing party, or the futility of the proposed amendment." *Bay Harbour*, 474 F. Supp. at 502-03 (citing *Foman v. Davis*, 371 U.S. 178, 182, 83 S. Ct. 227, 9 L. Ed. 2d 222 (1962)) (other citation omitted).

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14. Although Plaintiff alleges a longer exposure time, the Court notes that Plaintiff was laid off on January 13, 2012, and did not begin working for AMTS until May 2, 2012. *See* Dkt. No. 169-12 ¶¶ 20-21.

Plaintiff claims that he did not unduly delay in bringing the current motion to amend. *See* Dkt. No. 158-4 at 3. Plaintiff contends that "any alleged delay has been slight, particularly since [P]laintiff was a *pro se* litigant for over a year and has only recently obtained counsel." *Id.* at 4. Plaintiff also contends that Defendants will not be prejudiced if the Court grants leave to amend. *See id.* at 4-5. Plaintiff argues that Defendants were put on notice of Plaintiff's proposed amendments in October 2016. *See id.* at 5. Plaintiff claims that the proposed amendments do not change the theory of the case or present new allegations that Defendants are unaware of. *See id.* Finally, Plaintiff contends that proposed amendment would not be futile. *See id.* at 6. Plaintiff argues that futility is determined by the motion to dismiss standard, and Plaintiff has already survived a motion to dismiss on the various claims that would be affected by this amendment. *See id.*

Defendants contend that Plaintiff unduly delayed in seeking leave to amend the complaint. *See* Dkt. No. 165 at 10-13. Defendants note that the motion for leave to amend was filed over four years after the events at issue occurred, approximately one month after discovery on general causation was completed, and only one day before motions for summary judgment were due. *See id.* at 10-11. Defendants also claim that they would be unduly prejudiced by such an amendment because they would have to redo much of discovery, as discovery largely focused on a three-month exposure period. *See id.* at 15-16. Finally, Defendants argue that the proposed amendment would be futile. *See id.* at 18-21. Defendants contend that futility should be evaluated by the summary

judgment standard in this case, as discovery has already been completed. *See id.* at 18. Defendants argue that the amendment would be futile because "no substance, *at any duration of exposure*—has been demonstrated to cause GPA." *Id.* at 19.

With respect to undue delay, it does appear that Plaintiff and his attorneys had knowledge of the additional facts that Plaintiff seeks to allege several years before the proposed amendments. However, "[m]ere delay, . . . absent a showing of bad faith or undue prejudice, does not provide a basis for the district court to deny the right to amend." *Ramos v. O'Connell*, 169 F.R.D. 260, 262 (W.D.N.Y. 1996) (quotation omitted). Accordingly, the Court will consider whether Defendants would be unduly prejudiced if the Court grants Plaintiff leave to amend.

In assessing whether a proposed amendment constitutes prejudice, "the Second Circuit considers whether the assertion of the new claim would: '(i) require the opponent to expend significant additional resources to conduct discovery and prepare for trial; (ii) significantly delay the resolution of the dispute; or (iii) prevent the [opposing party] from bringing a timely action in another jurisdiction.'" *Silva Run Worldwide Ltd. v. Gaming Lottery Corp.*, 215 F.R.D. 105, 107 (S.D.N.Y. 2003) (quoting *Block v. First Blood Associates*, 988 F.2d 344, 350 (2d Cir. 1993)).

In the present matter, as Defendants note, general causation requires a showing that a substance is capable of causing a particular disease "in relevant circumstances."

In re Rezulin Prods. Liab. Litig., 369 F. Supp. 2d 398, 438 (S.D.N.Y. 2005). Accordingly, if the Court were to grant Plaintiff's motion, Defendants would have to redo at least parts of the depositions to focus on a longer exposure period. Likewise, Defendants' experts would have to amend portions of their expert reports. Defendants would also have to file another motion for summary judgment after the conclusion of this additional discovery, despite already having filed one. Granting such an amendment would also significantly delay the resolution of this matter, as the Court has determined that Defendants are entitled to summary judgment. *See Krumme v. WestPoint Stevens Inc.*, 143 F.3d 71, 88 (2d Cir. 1998) ("One of the most important considerations in determining whether amendment would be prejudicial is the degree to which it would delay the final disposition of the action.") (quotation omitted); *see also Ansam Assocs., Inc. v. Cola Petroleum, Ltd.*, 760 F.2d 442, 446 (2d Cir. 1985) ([P]ermitting [a] proposed amendment . . . [is] especially prejudicial . . . [when] discovery had already been completed and [the non-movant] had already filed a motion for summary judgment."). Accordingly, Defendants would suffer undue prejudice if Plaintiff's motion was granted.

The Court also finds that the proposed second amendment would be futile. At the outset, "[o]rdinarily, leave to amend may be denied on the basis of futility if the proposed claim would not withstand a Rule 12(b)(6) motion to dismiss." *Summit Health, Inc. v. APS Healthcare Bethesda, Inc.*, 993 F. Supp. 2d 379, 403 (S.D.N.Y. 2014) (citation omitted). "However, when the motion to amend is filed after the close of discovery and the relevant

evidence is before the court, a summary judgment standard will be applied instead." *Id.* (citing *Huber v. Nat'l R.R. Passenger Corp.*, No. 10 Civ. 09348, 2012 U.S. Dist. LEXIS 173330, 2012 WL 6082385, *5 (S.D.N.Y. Dec. 4, 2012)) ("[W]here the Court is asked to review a proposed amendment with the benefit of a full discovery record, a futility analysis is still possible, but it will then turn on the question of whether the proposed amended complaint would be subject to dismissal under Rule 56 of the Federal Rules of Civil Procedure for lack of a genuine issue of material fact.") (other citations omitted); *see also Azurite Corp. v. Amster & Co.*, 844 F. Supp. 929, 939 (S.D.N.Y. 1994) ("[The plaintiff's] proposed amendment would be futile because the factual foundations of [the plaintiff's] new allegations are insufficient, as a matter of law, to withstand defendants' motion for summary judgment."). Here, since discovery on general causation has been completed and the relevant evidence is before the Court, the proper standard to determine futility is whether Plaintiff's proposed amendments could survive Defendants' summary judgment motion.

Even with Plaintiff's proposed amendments, Dr. Wang's testimony would still be inadmissible as it is not reliably based on any kind of scientific evidence whatsoever. The three studies that Dr. Wang relies on, Napierska 2012, Cooper 2009, and Miller 2012, which the Court discussed above in great detail, still do not support a finding that nanosilica or TCE are capable of causing Plaintiff's GPA, even with the added exposure time in the proposed second amended complaint. Moreover, as discussed above, to the extent that Dr. Wang offers a

causation opinion that is not based on those articles, he has absolutely no scientific evidence to support such an opinion.

With respect to Dr. Miloslavsky, the proposed second amended complaint does nothing to cure the fact that Dr. Miloslavsky's opinion is unreliable as he selectively chose the literature in which he relied upon. Moreover, the studies discussed by Dr. Miloslavsky still do not support a finding that Plaintiff's alleged exposures are capable of causing GPA, even with the additional allegations in the second amended complaint. Dr. Wang concedes that the studies relied upon by Dr. Miloslavsky do not mirror Plaintiff's work environment and type of exposure. *See* Dkt. No. 169-10 ¶¶ 56-58, 61, 65. Similarly, as discussed above, the studies cited by Dr. Miloslavsky that did find positive associations were based on significantly longer exposures and latency periods than Plaintiff alleges, even in the second amended complaint.

Accordingly, even with the proposed amendments, Plaintiff cannot point to any scientific evidence suggesting that his alleged exposures are capable of causing GPA. As Defendants' experts contend, GPA has no known cause, and Plaintiff has failed to offer any evidence to refute this. *See* Dkt. No. 162-18 ¶ 5; Dkt. No. 162-15 ¶ 9. Plaintiff's proposed amendments do nothing to cure this deficiency. As such, Plaintiff's motion for leave to file a second amended complaint is denied.

D. Plaintiff's Objections to Magistrate Judge Baxter's Order

As explained above, in a Text Order dated November 30, 2016, Judge Baxter reduced the amount that Dr. Wang could charge Defendants for his depositions. *See* Dkt. No. 156. Plaintiff filed objections to that order, claiming that Judge Baxter committed clear error by inappropriately assessing Dr. Wang's level of expertise, by not allowing Plaintiff to respond before issuing the order, and by not addressing the relevant factors that courts should consider when determining the reasonableness of expert fees. *See* Dkt. No. 157-1 at 2-4.

"When a party submits objections to a magistrate judge's non-dispositive order, the district court must review the objections and 'modify or set aside any part of the order that is clearly erroneous or is contrary to law.'" *Advanced Analytics, Inc. v. Citigroup Glob. Markets, Inc.*, 301 F.R.D. 47, 50 (S.D.N.Y. 2014) (quoting Fed. R. Civ. P. 72(a)); *see also* 28 U.S.C. § 636(b)(1)(A). "A decision is clearly erroneous where 'the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed.'" *Id.* (quoting *Gualandi v. Adams*, 385 F.3d 236, 240 (2d Cir. 2004)). "An order is 'contrary to law when it fails to apply or misapplies relevant statutes, case law or rules of procedure.'" *Id.* (citation omitted).

To determine whether an expert fee is reasonable, courts consider the following:

> (1) the witness' area of expertise; (2) the education and training that is required to provide the expert insight that is sought; (3) the prevailing rates for other comparably respected available experts; (4) the nature, quality and complexity of the discovery responses provided; (5) the cost of living in the particular geographic area; and (6) any other factor likely to be of assistance to the court in balancing the interests implicated by Rule 26. In addition, courts look to (1) the fee actually being charged to the party who retained the expert; and (2) fees traditionally charged by the expert on related matters.

Mathis v. NYNEX, 165 F.R.D. 23, 24-25 (E.D.N.Y. 1996) (internal citations omitted).

In the present matter, the Court finds no clear error in Judge Baxter's Text Order. Although Judge Baxter did not explicitly analyze the *Mathis* factors in the order, it is clear that he considered them in setting a reasonable fee. Judge Baxter noted that Dr. Wang lacks specific expertise in the areas in which he provided medical opinions, and this Court has already discussed Dr. Wang's utter lack of expertise in these areas. At the time of the first deposition in August 2016, Dr. Wang testified that he was unemployed. *See* Dkt. No. 155-1 at 19. At his second deposition in November 2016, Dr. Wang was contracting with St. Peter's Hospital on a part-time basis for $235 per hour. *See id.* at 80. In sum, after carefully reviewing the factors, the Court finds that Judge Baxter's order

setting Dr. Wang's hourly rate at $235 was far from clearly erroneous or contrary to law.

Moreover, it was not clear error for Judge Baxter to reduce the total number of hours for which Dr. Wang could be compensated. Judge Baxter concluded that Dr. Wang could not be compensated for certain preparation time that instead involved a literature review which he used to formulate his opinions. *See* Dkt. No. 156. The Court agrees with Judge Baxter that the original preparation time claimed was excessive.

Accordingly, the Court finds no clear error in Judge Baxter's order setting a reasonable fee for Dr. Wang's deposition testimony, and Plaintiff's objections are denied.

IV. CONCLUSION

After carefully reviewing the entire record in this matter, the parties' submissions and the applicable law, and for the above-stated reasons, the Court hereby

ORDERS that Plaintiff's objections to Magistrate Judge Baxter's Order (Dkt. No. 157) are **DENIED**; and the Court further

ORDERS that Plaintiff's motion for leave to file a second amended complaint (Dkt. No. 158) is **DENIED**; and the Court further

ORDERS that Defendants' motion to exclude Plaintiff's expert's causation testimony (Dkt. No. 161) is

GRANTED; and the Court further

ORDERS that Defendants' motion for summary judgment (Dkt. No. 162) is **GRANTED**; and the Court further

ORDERS that the Clerk of the Court shall enter judgment in Defendants' favor and close this case; and the Court further

ORDERS that the Clerk of the Court shall serve a copy of this Memorandum-Decision and Order on all parties in accordance with the Local Rules.

IT IS SO ORDERED.

Dated: September 11, 2017
Albany, New York

/s/ Mae A. D' Agostino
Mae A. D' Agostino
U.S. District Judge

APPENDIX D — DECISION AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF NEW YORK, FILED MAY 2, 2018

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

6:15-cv-557 (MAD/ATB)

TIMOTHY J. RIZZO,

Plaintiff,

vs.

APPLIED MATERIALS, INC., and
GLOBALFOUNDRIES, U.S., INC.,

Defendants.

Mae A. D'Agostino, United States District Judge.

May 2, 2018, Decided
May 2, 2018, Filed

DECISION AND ORDER

Appendix D

I. BACKGROUND[1]

On April 30, 2015, Plaintiff Timothy J. Rizzo filed a complaint in the Northern District of New York against Defendants Globalfoundries USA, Inc. and Applied Materials, Inc. ("Defendants"), pursuant to 28 U.S.C. § 1332(a), alleging that Defendants' chemicals and conduct caused him to develop granulomatosis with polyangiitis ("GPA"). *See* Dkt. No. 1. Plaintiff filed an amended complaint on July 29, 2015. *See* Dkt. No. 35. On September 1, 2015, Magistrate Judge Baxter ordered the parties to engage in phased discovery, with phase I addressing the general causation of Plaintiff's GPA. *See* Dkt. No. 56.

On December 20, 2016, Plaintiff moved for leave to file a second amended complaint. *See* Dkt. No. 158. The proposed second amended complaint would have alleged additional chemicals that could have caused GPA and moved the beginning of the exposure period from 2012 back to 2011. *See* Dkt. No. 158-4 at 1. The next day, Defendants filed a joint motion for summary judgment on the grounds that Plaintiff would be unable to establish general causation. *See* Dkt. No. 162. On September 11, 2017, this Court issued a Memorandum-Decision and Order (the "September Order") denying Plaintiff's motion for leave to file a second amended complaint and granting Defendants' motion for summary judgment. *See* Dkt. No. 176. On October 11, 2017, Plaintiff filed a

1. The Court presumes the parties' familiarity with the facts of this case. A thorough account of the facts and pertinent expert opinions can be found in this Court's September 11, 2017 Memorandum-Decision and Order. *See* Dkt. No. 176 at 2-34.

motion to reargue, renew, and amend. *See* Dkt. No. 182. Defendants have filed a joint request to strike Plaintiff's reply memorandum. *See* Dkt. No. 198.

On October 23, 2017, Plaintiff's attorney moved to withdraw as counsel. *See* Dkt. No. 187. Mr. Mills discussed the end of his service with Plaintiff on September 24, 2017. *See id.* at ¶ 6. Mr. Mills states in a sworn affidavit that his retainer agreement with Plaintiff was limited to general causation proceedings, up to and including opposing any motions for summary judgment brought by Defendants. *See* Dkt. No. 187-1 at ¶¶ 3-4. Defendants do not oppose allowing Mr. Mills to withdraw. *See* Dkt. No. 198.

Currently before the Court is Plaintiff's motion to reargue, renew, and amend; Defendants' motion to strike; and Plaintiff's counsel's motion to withdraw.

II. DISCUSSION

A. Standard of Review

"[I]n a *pro se* case, the court must view the submissions by a more lenient standard than that accorded to 'formal pleadings drafted by lawyers.'" *Govan v. Campbell*, 289 F. Supp. 2d 289, 295 (N.D.N.Y. 2007) (quoting *Haines v. Kerner*, 404 U.S. 519, 520, 92 S. Ct. 594, 30 L. Ed. 2d 652 (1972)) (other citations omitted). "Indeed, the Second Circuit has stated that '[i]mplicit in the right to self-representation is an obligation on the part of the court to make reasonable allowances to protect *pro se* litigants from inadvertent forfeiture of important rights because of

their lack of legal training.'" *Govan*, 289 F. Supp. 2d at 295 (quoting *Traguth v. Zuck*, 710 F.2d 90, 95 (2d Cir. 1983)).

"'In order to prevail on a motion for reconsideration, the movant must satisfy stringent requirements.'" *Juliano v. DeAngelis*, No. 06-CV-1139, 2007 U.S. Dist. LEXIS 62382, 2007 WL 2454216, *1 (N.D.N.Y. Aug. 23, 2007) (quoting *C-TC 9th Ave. P'ship v. Norton Co.*, 182 B.R. 1, 2 (N.D.N.Y. 1995)). A motion for reconsideration "will generally be denied unless the moving party can point to controlling decisions or data that the court overlooked—matters, in other words, that might reasonably be expected to alter the conclusion reached by the court." *Shrader v. CSX Transp., Inc.*, 70 F.3d 255, 257 (2d Cir. 1995). "The prevailing rule 'recognizes only three possible grounds upon which motions for reconsideration may be granted; they are (1) an intervening change in controlling law, (2) the availability of new evidence not previously available, or (3) the need to correct a clear error of law or prevent manifest injustice.'" *Maye*, 2007 U.S. Dist. LEXIS 62382, 2011 WL 4566290, at *2 (quoting *In re C-TC 9th Ave. P'ship*, 182 B.R. at 3). "[A] motion to reconsider should not be granted where the moving party seeks solely to relitigate an issue already decided." *Shrader*, 70 F.3d at 257. Reconsideration is not a "vehicle[] for bringing before the court theories or arguments that were not advanced earlier. Nor may the motion present evidence which was available but not offered at the original [motion]." *In re C-TC 9th Ave. P'ship*, 182 B.R. at 3 (quotation omitted).

B. Analysis

Plaintiff makes eleven arguments why the Court should reconsider the September Order. Given Plaintiff's *pro se* status, the Court interprets his motion to reargue, renew, and amend as a motion pursuant to Fed. R. Civ. P 60(b) to vacate summary judgment and a motion pursuant to Fed. R. Civ. P. 54(b) to reconsider Plaintiff's motion for leave to amend.

First, Plaintiff claims that the list of chemicals that Defendants provided during discovery was fraudulent. *See* Dkt. No. 182 at 2-3. However, Plaintiff fails to support his allegation that the chemical list provided by Defendants was "fake." Mere conclusory allegation are insufficient to grant a motion to reconsider. *See Nederlandsche Handel-Maatschappij, N. V. v. Jay Emm, Inc.*, 301 F.2d 114, 115 (2d Cir. 1962); *see also Di Vito v. Fid. & Deposit Co. of Md.*, 361 F.2d 936, 939 (7th Cir. 1966) (holding that "averments of the existence of fraud made on information and belief and unaccompanied by a statement of clear and convincing probative facts which support such belief do not serve to raise the issue of the existence of fraud"). As such, the conclusory allegation of a "fake" list is insufficient to meet Plaintiff's burden.

Plaintiff also argues that Defendants only provided a list of the chemicals used from May 2012 to December 2012. *See* Dkt. No. 182 at 2-3. Plaintiff, however, claims that he was employed at the site from July 6, 2009 through January 31, 2013. *See id.* The Amended Complaint, however, specifically alleged that the harmful exposure

occurred between May 2012 and August 2012. *See* Dkt No. 35 at ¶ 53. Therefore, Defendants were not required to produce during discovery evidence beyond the period alleged. Because the Court already denied Plaintiff leave to file a second amended complaint in order to expand the exposure period, the Court also interprets Plaintiff's first argument as a motion to reconsider Plaintiff's motion for leave to amend. However, as Plaintiff has not provided a justification that satisfies any of the three grounds under which the Court may grant a motion to reconsider, the Court will not reconsider its decision to deny Plaintiff leave to amend his complaint.

Plaintiff's next three arguments all contend that the Court did not consider evidence that Plaintiff was exposed to hazardous chemicals. *See* Dkt. No. 182 at 4-9. However, the issue underlying the September Order was whether Plaintiff could satisfy the general causation requirement. *See* Dkt. No. 176 at 32. This inquiry simply requires the Court to determine whether any chemicals that Plaintiff claims he was exposed to could have caused his disorder—whether he was actually exposed is an entirely separate inquiry. *See Green v. McAllister Bros., Inc.*, Nos. 02 Civ. 7588, 03 Civ. 1482, 2005 U.S. Dist. LEXIS 4816, 2005 WL 742624, *11 (S.D.N.Y. Mar. 25, 2005) (citation omitted). As these three arguments only assert that Plaintiff was exposed to chemicals, they do not speak to general causation and are outside of the scope of the September Order.

Plaintiff then makes four arguments that present Plaintiff's lay interpretation of scientific studies, challenge

the credibility of Defendants' experts, and contest the Court's use of scientific literature in the September Order. *See* Dkt. No. 182 at 11-22. These merely represent arguments that the Court considered and rejected in the September Order and do not set forth any grounds for reconsideration.

Plaintiff then cites two decisions that he believes are indicative of errors in the September Order. First, Plaintiff cites to a decision by the Department of Veterans Affairs suggesting a possible link between chemical exposure and Plaintiff's health conditions. *See* Dkt. No. 182 at 22; Dkt. No. 182-7 at 2. However, Plaintiff admits that this case was not previously presented to the Court. *See* Dkt. No. 182 at 22. Further, the opinion is an administrative decision dealing with veteran compensation, not civil liability, and, therefore, it is not controlling law, it involved a different standard of proof, and was not limited by *Daubert*. As such, the fact that this decision was not addressed in the September Order is not grounds for reconsideration.

Second, Plaintiff suggests that *Sica v. DiNapoli*, 141 A.D.3d 799, 36 N.Y.S.3d 259 (3d Dep't 2016), *rev'd sub nom. Kelly v. DiNapoli*, 30 N.Y.3d 674, 70 N.Y.S.3d 881, 94 N.E.3d 444 (2018), supports his position. *See* Dkt. No. 182 at 23-24. *Sica*, however, only defined the term "accident" under N.Y. Retire. & Soc. Sec. Law § 363 and the panel explicitly declined "to address . . . the issue of causation." *Sica*, 141 A.D.3d at 801. As such, *Sica* is not material to the case at hand.

Finally, Plaintiff argues that he should be entitled to punitive damages. Determining the amount and type of damages that Plaintiff could recover is an entirely separate question from general causation. Thus, this argument is outside the scope of the September Order.

Given that none of Plaintiff's arguments establish grounds for reconsideration, Plaintiff's motion is denied. Further, as Plaintiff's motion is denied, Defendants' request to strike is denied as moot. Finally, having reviewed the motion to withdraw, the Court finds that it is in compliance with Local Rule 83.2 and good cause exists to grant the motion.

III. CONCLUSION

After carefully reviewing the complaint in this matter, the parties' submissions and the applicable law, and for the above-stated reasons, the Court hereby

ORDERS that Plaintiff's motion to reconsider (Dkt. No. 182) is **DENIED**; and the Court further

ORDERS that Defendants' request to strike (Dkt. No. 198) is **DENIED** as moot; and the Court further

ORDERS that the motion to withdraw (Dkt. No. 187) is **GRANTED**; and the Court further

ORDERS that the Clerk of the Court shall terminate Gregory Mills as counsel of record for Plaintiff; and the Court further

ORDERS that the Clerk of the Court shall serve a copy of this Decision and Order on all parties in accordance with the Local Rules.

IT IS SO ORDERED.

Dated: May 2, 2018
Albany, New York

/s/ Mae A. D'Agostino
Mae A. D'Agostino
United States District Judge

APPENDIX E — DENIAL OF REHEARING OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT, FILED DECEMBER 27, 2018

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Docket Nos. 17-3274 (L), 18-1490 (Con).

At a Stated Term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, 40 Foley Square, in the City of New York, on the 27th day of December, two thousand and eighteen,

Before: Peter W. Hall,
Gerard E. Lynch
Circuit Judges,
Paul G. Gardephe,*
District Judge.

TIMOTHY J. RIZZO,

Plaintiff-Appellant,

v.

APPLIED MATERIALS, INC.,
GLOBALFOUNDRIES, U.S., INC.,

Defendants-Appellees,

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* Judge Paul G. Gardephe, of the United States District Court for the Southern District of New York, sitting by designation.

Appendix E

GLOBALFOUNDRIES, INC.,
AM TECHNICAL SOLUTIONS, INC.,

Defendants.

ORDER

Appellant having filed a petition for panel rehearing and the panel that determined the appeal having considered the request,

IT IS HEREBY ORDERED that the petition is DENIED.

For the Court:
Catherine O'Hagan Wolfe,
Clerk of the Court

/s/_____

APPENDIX F — RELEVANT STATUTORY PROVISIONS

Seventh Amendment

In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any court of the United States, than according to the rules of the common law.

Appendix F

FRAP 10. The Record on Appeal

(a) Composition of the Record on Appeal. The following items constitute the record on appeal:

(1) the original papers and exhibits filed in the district court;

(2) the transcript of proceedings, if any; and

(3) a certified copy of the docket entries prepared by the district clerk.

(b) The Transcript of Proceedings.

(1) Appellant's Duty to Order. Within 14 days after filing the notice of appeal or entry of an order disposing of the last timely remaining motion of a type specified in Rule 4(a)(4)(A), whichever is later, the appellant must do either of the following:

(A) order from the reporter a transcript of such parts of the proceedings not already on file as the appellant considers necessary, subject to a local rule of the court of appeals and with the following qualifications:

(i) the order must be in writing;

(ii) if the cost of the transcript is to be paid by the United States under the Criminal Justice Act, the order must so state; and

(iii) the appellant must, within the same period, file a copy of the order with the district clerk; or

(B) file a certificate stating that no transcript will be ordered.

(2) Unsupported Finding or Conclusion. If the appellant intends to urge on appeal that a finding or conclusion is unsupported by the evidence or is contrary to the evidence, the appellant must include in the record a transcript of all evidence relevant to that finding or conclusion.

(3) Partial Transcript. Unless the entire transcript is ordered:

(A) the appellant must—within the 14 days provided in Rule 10(b)(1)—file a statement of the issues that the appellant intends to present on the appeal and must serve on the appellee a copy of both the order or certificate and the statement;

(B) if the appellee considers it necessary to have a transcript of other parts of the proceedings, the appellee must, within 14 days after the service of the order or certificate and the statement of the issues, file and serve on the appellant a designation of additional parts to be ordered; and

(C) unless within 14 days after service of that designation the appellant has ordered all such parts, and has so notified the appellee, the appellee

may within the following 14 days either order the parts or move in the district court for an order requiring the appellant to do so.

(4) Payment. At the time of ordering, a party must make satisfactory arrangements with the reporter for paying the cost of the transcript.

(c) Statement of the Evidence When the Proceedings Were Not Recorded or When a Transcript Is Unavailable. If the transcript of a hearing or trial is unavailable, the appellant may prepare a statement of the evidence or proceedings from the best available means, including the appellant's recollection. The statement must be served on the appellee, who may serve objections or proposed amendments within 14 days after being served. The statement and any objections or proposed amendments must then be submitted to the district court for settlement and approval. As settled and approved, the statement must be included by the district clerk in the record on appeal.

(d) Agreed Statement as the Record on Appeal. In place of the record on appeal as defined in Rule 10(a), the parties may prepare, sign, and submit to the district court a statement of the case showing how the issues presented by the appeal arose and were decided in the district court. The statement must set forth only those facts averred and proved or sought to be proved that are essential to the court's resolution of the issues. If the statement is truthful, it—together with any additions that the district court may consider necessary to a full presentation of the issues on appeal—must be approved by the district court

and must then be certified to the court of appeals as the record on appeal. The district clerk must then send it to the circuit clerk within the time provided by Rule 11. A copy of the agreed statement may be filed in place of the appendix required by Rule 30.

(e) Correction or Modification of the Record.

(1) If any difference arises about whether the record truly discloses what occurred in the district court, the difference must be submitted to and settled by that court and the record conformed accordingly.

(2) If 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.

(3) All other questions as to the form and content of the record must be presented to the court of appeals.

Appendix F

FRCP 15. Amended and Supplemental Pleadings

(a) Amendments Before Trial.

(1) Amending as a Matter of Course. A party may amend its pleading once as a matter of course within:

(A) 21 days after serving it, or

(B) if the pleading is one to which a responsive pleading is required, 21 days after service of a responsive pleading or 21 days after service of a motion under Rule 12(b), (e), or (f), whichever is earlier.

(2) Other Amendments. In all other cases, a party may amend its pleading only with the opposing party's written consent or the court's leave. The court should freely give leave when justice so requires.

(3) Time to Respond. Unless the court orders otherwise, any required response to an amended pleading must be made within the time remaining to respond to the original pleading or within 14 days after service of the amended pleading, whichever is later.

(b) Amendments During and After Trial.

(1) Based on an Objection at Trial. If, at trial, a party objects that evidence is not within the issues raised in the pleadings, the court may permit the pleadings to be amended. The court should freely permit an

amendment when doing so will aid in presenting the merits and the objecting party fails to satisfy the court that the evidence would prejudice that party's action or defense on the merits. The court may grant a continuance to enable the objecting party to meet the evidence.

(2) For Issues Tried by Consent. When an issue not raised by the pleadings is tried by the parties' express or implied consent, it must be treated in all respects as if raised in the pleadings. A party may move—at any time, even after judgment—to amend the pleadings to conform them to the evidence and to raise an unpleaded issue. But failure to amend does not affect the result of the trial of that issue.

(c) Relation Back of Amendments.

(1) When an Amendment Relates Back. An amendment to a pleading relates back to the date of the original pleading when:

(A) the law that provides the applicable statute of limitations allows relation back;

(B) the amendment asserts a claim or defense that arose out of the conduct, transaction, or occurrence set out—or attempted to be set out—in the original pleading; or

(C) the amendment changes the party or the naming of the party against whom a claim is asserted, if

Rule 15(c)(1)(B) is satisfied and if, within the period provided by Rule 4(m) for serving the summons and complaint, the party to be brought in by amendment:

(i) received such notice of the action that it will not be prejudiced in defending on the merits; and

(ii) knew or should have known that the action would have been brought against it, but for a mistake concerning the proper party's identity.

(2) Notice to the United States. When the United States or a United States officer or agency is added as a defendant by amendment, the notice requirements of Rule 15(c)(1)(C)(i) and (ii) are satisfied if, during the stated period, process was delivered or mailed to the United States attorney or the United States attorney's designee, to the Attorney General of the United States, or to the officer or agency.

(d) Supplemental Pleadings. On motion and reasonable notice, the court may, on just terms, permit a party to serve a supplemental pleading setting out any transaction, occurrence, or event that happened after the date of the pleading to be supplemented. The court may permit supplementation even though the original pleading is defective in stating a claim or defense. The court may order that the opposing party plead to the supplemental pleading within a specified time.

Appendix F

FRCP 26 (a). Duty to Disclose; General Provisions Governing Discovery

(a) Required Disclosures.

(1) Initial Disclosure.

(A) In General. Except as exempted by Rule 26(a)(1)(B) or as otherwise stipulated or ordered by the court, a party must, without awaiting a discovery request, provide to the other parties:

(i) the name and, if known, the address and telephone number of each individual likely to have discoverable information—along with the subjects of that information—that the disclosing party may use to support its claims or defenses, unless the use would be solely for impeachment;

(ii) a copy—or a description by category and location—of all documents, electronically stored information, and tangible things that the disclosing party has in its possession, custody, or control and may use to support its claims or defenses, unless the use would be solely for impeachment;

(iii) a computation of each category of damages claimed by the disclosing party—who must also make available for inspection and copying as under Rule 34 the documents or other

evidentiary material, unless privileged or protected from disclosure, on which each computation is based, including materials bearing on the nature and extent of injuries suffered; and

(iv) for inspection and copying as under Rule 34, any insurance agreement under which an insurance business may be liable to satisfy all or part of a possible judgment in the action or to indemnify or reimburse for payments made to satisfy the judgment.

(B) Proceedings Exempt from Initial Disclosure. The following proceedings are exempt from initial disclosure:

(i) an action for review on an administrative record;

(ii) a forfeiture action in rem arising from a federal statute;

(iii) a petition for habeas corpus or any other proceeding to challenge a criminal conviction or sentence;

(iv) an action brought without an attorney by a person in the custody of the United States, a state, or a state subdivision;

(v) an action to enforce or quash an administrative summons or subpoena;

(vi) an action by the United States to recover benefit payments;

(vii) an action by the United States to collect on a student loan guaranteed by the United States;

(viii) a proceeding ancillary to a proceeding in another court; and

(ix) an action to enforce an arbitration award.

(C) Time for Initial Disclosures—In General. A party must make the initial disclosures at or within 14 days after the parties' Rule 26(f) conference unless a different time is set by stipulation or court order, or unless a party objects during the conference that initial disclosures are not appropriate in this action and states the objection in the proposed discovery plan. In ruling on the objection, the court must determine what disclosures, if any, are to be made and must set the time for disclosure.

(D) Time for Initial Disclosures—For Parties Served or Joined Later. A party that is first served or otherwise joined after the Rule 26(f) conference must make the initial disclosures within 30 days after being served or joined, unless a different time is set by stipulation or court order.

(E) Basis for Initial Disclosure; Unacceptable Excuses. A party must make its initial disclosures

based on the information then reasonably available to it. A party is not excused from making its disclosures because it has not fully investigated the case or because it challenges the sufficiency of another party's disclosures or because another party has not made its disclosures.

(2) Disclosure of Expert Testimony.

(A) In General. In addition to the disclosures required by Rule 26(a)(1), a party must disclose to the other parties the identity of any witness it may use at trial to present evidence under Federal Rule of Evidence 702, 703, or 705.

(B) 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. The report must contain:

(i) a complete statement of all opinions the witness will express and the basis and reasons for them;

(ii) the facts or data considered by the witness in forming them;

(iii) any exhibits that will be used to summarize or support them;

(iv) the witness's qualifications, including a list of all publications authored in the previous 10 years;

(v) a list of all other cases in which, during the previous 4 years, the witness testified as an expert at trial or by deposition; and

(vi) a statement of the compensation to be paid for the study and testimony in the case.

(C) Witnesses Who Do Not Provide a Written Report. Unless otherwise stipulated or ordered by the court, if the witness is not required to provide a written report, this disclosure must state:

(i) the subject matter on which the witness is expected to present evidence under Federal Rule of Evidence 702, 703, or 705; and

(ii) a summary of the facts and opinions to which the witness is expected to testify.

(D) Time to Disclose Expert Testimony. A party must make these disclosures at the times and in the sequence that the court orders. Absent a stipulation or a court order, the disclosures must be made:

(i) at least 90 days before the date set for trial or for the case to be ready for trial; or

(ii) if the evidence is intended solely to contradict or rebut evidence on the same subject matter identified by another party under Rule 26(a)(2)(B) or (C), within 30 days after the other party's disclosure.

(E) Supplementing the Disclosure. The parties must supplement these disclosures when required under Rule 26(e).

(3) Pretrial Disclosures.

(A) In General. In addition to the disclosures required by Rule 26(a)(1) and (2), a party must provide to the other parties and promptly file the following information about the evidence that it may present at trial other than solely for impeachment:

(i) the name and, if not previously provided, the address and telephone number of each witness—separately identifying those the party expects to present and those it may call if the need arises;

(ii) the designation of those witnesses whose testimony the party expects to present by deposition and, if not taken stenographically, a transcript of the pertinent parts of the deposition; and

(iii) an identification of each document or other exhibit, including summaries of other evidence—separately identifying those items the party expects to offer and those it may offer if the need arises.

(B) Time for Pretrial Disclosures; Objections. Unless the court orders otherwise, these disclosures must be made at least 30 days before trial. Within 14 days after they are made, unless the court sets a different time, a party may serve and promptly file a list of the following objections: any objections to the use under Rule 32(a) of a deposition designated by another party under Rule 26(a)(3)(A)(ii); and any objection, together with the grounds for it, that may be made to the admissibility of materials identified under Rule 26(a)(3)(A)(iii). An objection not so made—except for one under Federal Rule of Evidence 402 or 403—is waived unless excused by the court for good cause.

(4) Form of Disclosures. Unless the court orders otherwise, all disclosures under Rule 26(a) must be in writing, signed, and served.

Appendix F

FRCP 56. Summary Judgment

(a) Motion for Summary Judgment or Partial Summary Judgment. A party may move for summary judgment, identifying each claim or defense — or the part of each claim or defense — on which summary judgment is sought. The court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law. The court should state on the record the reasons for granting or denying the motion.

(b) Time to File a Motion. Unless a different time is set by local rule or the court orders otherwise, a party may file a motion for summary judgment at any time until 30 days after the close of all discovery.

(c) Procedures.

(1) Supporting Factual Positions. A party asserting that a fact cannot be or is genuinely disputed must support the assertion by:

(A) citing to particular parts of materials in the record, including depositions, documents, electronically stored information, affidavits or declarations, stipulations (including those made for purposes of the motion only), admissions, interrogatory answers, or other materials; or

(B) showing that the materials cited do not establish the absence or presence of a genuine

dispute, or that an adverse party cannot produce admissible evidence to support the fact.

(2) Objection That a Fact Is Not Supported by Admissible Evidence. A party may object that the material cited to support or dispute a fact cannot be presented in a form that would be admissible in evidence.

(3) Materials Not Cited. The court need consider only the cited materials, but it may consider other materials in the record.

(4) Affidavits or Declarations. An affidavit or declaration used to support or oppose a motion must be made on personal knowledge, set out facts that would be admissible in evidence, and show that the affiant or declarant is competent to testify on the matters stated.

(d) When Facts Are Unavailable to the Nonmovant. If a nonmovant shows by affidavit or declaration that, for specified reasons, it cannot present facts essential to justify its opposition, the court may:

(1) defer considering the motion or deny it;

(2) allow time to obtain affidavits or declarations or to take discovery; or

(3) issue any other appropriate order.

(e) Failing to Properly Support or Address a Fact. If a party fails to properly support an assertion of fact or fails to properly address another party's assertion of fact as required by Rule 56(c), the court may:

(1) give an opportunity to properly support or address the fact;

(2) consider the fact undisputed for purposes of the motion;

(3) grant summary judgment if the motion and supporting materials — including the facts considered undisputed — show that the movant is entitled to it; or

(4) issue any other appropriate order.

(f) Judgment Independent of the Motion. After giving notice and a reasonable time to respond, the court may:

(1) grant summary judgment for a nonmovant;

(2) grant the motion on grounds not raised by a party;or

(3) consider summary judgment on its own after identifying for the parties material facts that may not be genuinely in dispute.

(g) Failing to Grant All the Requested Relief. If the court does not grant all the relief requested by the motion, it may enter an order stating any material fact — including an item of damages or other relief — that is not genuinely in dispute and treating the fact as established in the case.

(h) Affidavit or Declaration Submitted in Bad Faith. If satisfied that an affidavit or declaration under this rule is submitted in bad faith or solely for delay, the court — after notice and a reasonable time to respond — may order the submitting party to pay the other party the reasonable expenses, including attorney's fees, it incurred as a result. An offending party or attorney may also be held in contempt or subjected to other appropriate sanctions.

Appendix F

FRE 702. Testimony by Expert Witnesses

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.

Appendix F

FRE 703. Bases of an Expert

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.