STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF RICHLAND	)	FOR THE FIFTH JUDICIAL CIRCUIT
CHARLES T. HOPPER and **REBECCA HOPPER,**	)	**C/A NO. 2019-CP-40-00076**
Plaintiffs,	)	*In Re:* Asbestos Personal Injury Litigation Coordinated Docket
v.	)	
AIR & LIQUID SYSTEMS CORPORATION, et al.	)	
Defendants.	)	

ORDER GRANTING PLAINTIFFS' MOTION TO COMPEL, FOR SPOLIATION SANCTIONS AND FOR ADDITIONAL SANCTIONS AS TO DEFENDANT LINCOLN ELECTRIC COMPANY

Plaintiffs moved before the Court for an Order pursuant to South Carolina Rules of Civil Procedure 26(b), 34, and 37 compelling Defendant Lincoln Electric Company (hereinafter "Lincoln") to prepare its corporate representative to discuss topics in the notice of 30(b)(6) deposition of Lincoln. Additionally, Plaintiffs requested that this Court impose sanctions against Lincoln pursuant to South Carolina Rule of Civil Procedure 37 for abuse of the discovery process. Plaintiffs argue that Lincoln deliberately failed to properly prepare its corporate representative for deposition and failed to produce certain records. Additionally, Plaintiffs argue Lincoln failed to produce the historical sales invoices which Lincoln deliberately destroyed. Finally, Plaintiffs seek sanctions to exclude or limit the so-called "consumer" test which was conducted by its non-expert witness John Schuster. The Court finds that the motion is well taken and therefore is GRANTED.

RELEVANT FACTS

A. Missing Sale Invoices.

In its discovery responses in this matter, Lincoln stated that "Lincoln does not have sales records prior to approximately 1984 . . ."[1] Mr. Schuster, Lincoln's corporate representative, confirmed that no sales records are available before 1984.[2] Lincolns' discovery responses in another case, however, reveal the total inconsistency. Lincoln was sued in an asbestos case in 1984 in the United States District Court for the Eastern District of Wisconsin.[3] In that case, Lincoln Electric Company answered interrogatories which stated in part:

> All the invoices that we hold are destroyed after 7 years. Therefore, the copies of the invoices attached go from 1977 to 1980. Of those invoices not one of the products listed contains any asbestos or nickel.[4]

Those answers to interrogatories were signed by Ellis Smolik and Kenneth Brown, the former secretary and corporate representative of Lincoln.[5] Attached to those responses were invoices for Lincoln Welding Rods for the site at issue in that case. Thus, Lincoln clearly admits that (1) invoices existed at the time Lincoln was engaged in asbestos litigation for precisely the years at issue in the *Hopper* case and (2) that those invoices no longer exist. Those admissions are ample evidence to give rise to the inference that Lincoln (1) knew about the importance of these invoices in asbestos litigation and (2) intentionally destroyed them.

Six years ago, Lincoln Electric agreed with this recitation of the facts:

> Q: . . . So in this 1985 document that at least references asbestos, Lincoln stated that it had sales invoices going back to 1977, correct.
> A. Yes.
>
> Q. And it actually attached some of them, presumably the ones that were relevant for that case, correct?

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[1] Lincoln Electric Company's Responses and Objections to Plaintiffs Request for Production in the instant matter at 7.
[2] *See* Schuster Deposition in this case at pp. 15.
[3] Answers to Interrogatories No. 2, *Jaeger v. Raymark Industries, Inc., et al.*, Cause No. 84-C-0924, U.S. District Court, Eastern District of Wisconsin (attaching Lincoln Electric invoices from 1977 and 1980).
[4] *Id.*
[5] *Id.* at interrogatory 25; *see also* Deposition of John Schuster at pp. 120:16-121:17

A. Correct.
Q. Today they don't have those?
A. Apparently not.

Deposition of John Schuster, May 3, 2013 at 125:22-126:7.

Today, Schuster confirms that in the 6 years following the 2013 deposition, where he admits that the invoices existed, he still has not looked or asked anyone about whether these invoices still exist. Specifically, Schuster testified in this case:

Q. Where are the sales invoices for 1984, prior to 1984 that were in existence in 1984?
A. I don't know.
Q. Have you looked?
A. No.
Q. Have you asked anybody?
A. Its my understanding that there's nothing available prior to 1984.
Q. So if that's true today and in 1984 they existed, the only way that's true is if they were destroyed during or after 1984, true?
A. That would seem to be the case.

Deposition of John Schuster July 31, 2019 at 25:10-23.

This information was pointed out to Lincoln more than six years ago in another deposition taken by counsel for the Plaintiffs. In the intervening six years, Lincoln did nothing to determine how, when, or why these documents were destroyed. Indeed, in Lincoln's interrogatory responses in this case, they make the very same statement despite being on clear and unequivocal notice that this is not true.

B. Workers Compensation Records

Plaintiffs contend, and Lincoln does not deny, that two individuals who worked at Lincoln's manufacturing facilities contracted mesothelioma, the same disease that caused Mr. Hopper's death. As a result of their mesothelioma, these individuals filed workers compensation claims against Lincoln. Plaintiffs inquired regarding these two individuals in the Lincoln corporate representative's deposition. Mr. Schuster was unable to testify regarding these two

claims. Mr. Schuster did not review the file or any statements by those two gentlemen. Indeed, Schuster did not know if such statements existed nor did he not look. *Id*. at 31-32.

As Plaintiffs point out, Lincoln will contend in this case that even if Mr. Hopper was exposed to asbestos from Lincoln rods, which it denies, that the type of asbestos at issue, Chrysotile, could not have caused his disease. This is the same type of asbestos that its own workers were working around and, apparently, causing disease in their plant. This evidence materially undermines Lincoln's position regarding fiber type and thus information about those claims is certainly discoverable.[6]

C. Failure to Review Prior Testimony

Mr. Schuster failed to read the depositions of various Lincoln employees taken over the years, including those in sales, marketing, research and development, and others. Mr. Schuster testified that he knows the following people were deposed, but that he has not read their depositions: Robert Shutt, John Carroll, John Gonzalez, Harry Handlin, Jon McCollister, Jerry Rollnick, Jim Rosenthal. Further, Mr. Schuster testified that he read only portions of Ken Brown's testimony.[7] *See* Deposition of John Schuster, July 31, 2019 at pp. 26:4- 30:22. It is an axiomatic rule of discovery that corporations must prepare their corporate representative to testify about what was known or reasonably knowable to the corporation. The entire purpose of Rule 30(b)(6) is that Plaintiffs are not required to guess at who has the information within the corporation and seek to depose that person. Rule 30(b)(6) is a rule of discovery that permits a defendant to educate a person or persons to testify in discovery on behalf of the defendant. This

[6] This court knows and understands that discoverability is a very different question than admissibility. Discovery requires only that the thing sought is reasonably calculated to lead to the discovery of admissible evidence. There is no question that these workers compensation claims, involving the same fiber type at issue in this case and Lincoln's contention that it cannot cause disease, makes these records discoverable as it would in any similarly situated case. Whether the documents are admissible depends on their content and whether Lincoln seeks to introduce evidence that chrysotile cannot cause disease.

[7] Mr. Brown is the former corporate representative of Lincoln.

rule comes with responsibilities and, that is to know what was known or knowable to the corporation.

In this case, Lincoln argues that their corporate representative was not required to read the depositions because he "already knew any relevant information they could have provided." Defendant's Response at 13. This is belied by Schuster's own testimony in this case. Mr. Schuster was specifically asked about Ken Brown's prior testimony about the manufacturing process of asbestos containing rods for testing, a key issue in this case. Mr. Schuster testified as follows:

> Q Okay. Mr. Brown testified that the rods that were manufactured for him, the 100 rods, were made to replicate commercially available rods. Do you agree?
> A No.
> Q You were not involved in the manufacture of the rods that Mr. Brown testified about, correct?
> A Are you talking about the 1987 rods?
> Q Yes, sir.
> A No, I was not there.
> Q So do you have any information, other than what we just discussed, that would contradict what Mr. Brown testified to?
> A I don't know what Mr. Brown's testimony was.

Deposition of Schuster, July 13, 2019 at 81-82.[8]

D. Schuster's "Customer" Test

Lincoln seeks to introduce a so-called "Customer" test. This is a test that Mr. Schuster asserts he conducted in the summer of 1976 along with measurements of workers on the assembly line at Lincoln's manufacturing facility. Deposition of John Schuster, July 13, 2019 at 61. Mr. Schuster has not been offered as an expert in this case. Indeed, he has no qualifications that would

[8] This is but a single example of Schuster not knowing the answer to the question posed to him. Schuster repeatedly stated that he did not know the answers to questions posed, including questions regarding sales invoices, distributorships, what testing had been done beyond the now excluded Schuster test, the location of documents created during his own test, among other things.

permit him to testify as an expert, on either his test or on industrial hygiene generally. The only documentation that remains of this test is four pages. Those pages describe a "reboxing" test. Schuster acknowledges that there were additional documents related to the test which he can no longer locate today. Specifically, when questioned about the whereabouts of documentation reflecting the testing method, Mr. Schuster testified as follows:

> Q. So setting aside 16, the four pages that I gave you and identified on the record, are all that exist today from your testing in 1976?
> A. As far as I know, yes.
> Q. Were there, sometime in the past, additional documents which reflected the testing you did?
> A. Regarding the customer test?
> Q. All of the testing.
> A. There would have been documents with dust sampling, data sheets and results from National Spectrographic Laboratories for the employee monitoring tests as well.
> Q. And to your knowledge, those have been destroyed or do not otherwise exist, correct?
> A. I do not know if those exist or not.
> Q. Have you look for them?
> A. I have not.

Deposition of John Schuster, 7/31/19, at 63:20-64:13.[9]

Today, Mr. Schuster is engaged as a paid defense witness for Lincoln. He describes a much different test than a "reboxing" test he did in 1976. Today Mr. Schuster describes the test as follows:

> So what I did was, I opened each can and I used various methods. I would take a can and, for example, open it up with a hammer and a screwdriver and literally punch a hole through it and rip the top off. And then I would dump out the welding rods onto that table I talked about earlier. And I emptied the cans in -- with various methods as well. So I pulled them out one at a time, I shook them out, I dumped them out, and I then took the rods and looked at them to see what damage I may have caused. And the way I did that is I rolled them on the surface of that steel table

[9] Interestingly, during the argument before this court by counsel for Lincoln, counsel did not confirm that the records do not exist. Instead, counsel argued that they were not relevant. While there was no motion to compel those documents, as set forth above, the conditions in the factory are certainly reasonably calculated to lead to the discovery of admissible evidence. Should the plaintiffs file such a motion, the Court would consider that issue at the appropriate time.

> so I could see if any were bent or chipped or knocked off the coating on any of the rods. And then I set those aside. Took the same number of fresh rods and those along with the nondamaged rods I placed in a new can. And then I did that 11 more times using different methods for opening the can. I used a hydraulic chipper. I used a grinding wheel. There might have been some other methods I don't recall now, and basically did that over a period of two plus hours wearing the MSA sampler, sample filter holder in my breathing zone.

This is clearly not the same thing as a reboxing test. Mr. Schuster also confirms that without his testimony, there is insufficient information to repeat the test as the scientific method requires. *Id*. at 71.

APPLICABLE LAW

The selection of a sanction for discovery violations is within the trial court's discretion. *Kershaw County Bd. of Educ. v. United States Gypsum Co*., 302 S.C. 390, 396 S.E.2d 369 (1990). Sanctions can range up to default or dismissal, and "[i]n determining the appropriateness of a sanction, the court should consider such factors as the precise nature of the discovery and the discovery posture of the case, willfulness, and degree of prejudice." *Griffin Grading & Clearing, Inc. v. Tire Service Equip. Mfg. Co*., 334 S.C. 193, 199, 511 S.E.2d 716, 719 (Ct. App. 1999) (citing *Laney v. Hefley*, 262 S.C. 54, 202 S.E.2d 12 (1974)). The sanction should be aimed at the specific conduct of the party sanctioned. *Id*. (citing *Balloon Plantation, Inc. v. Head Balloons, Inc*., 303 S.C. 152, 399 S.E.2d 439 (Ct. App. 1990)).

A court may award reasonable expenses, including attorneys' fees, for a party's failure to make or cooperate in discovery. SCRCP 37(b); *see, e.g., Davis v. Parkview Apartments*, 409 S.C. 266, 762 S.E.2d 535 (2014) (affirming award of attorneys' fees and costs as sanctions for refusal to comply with discovery rulings); *Arnal v. Arnal*, 363 S.C. 268, 297, 609 S.E.2d 821, 836 (Ct. App. 2005), *aff'd as modified*, 371 S.C. 10, 636 S.E.2d 864 (2006) (court imposed sanctions awarding attorneys' fees for discovery abuse); *Scott v. Greenville Hous. Auth*., 353

S.C. 639, 644, 579 S.E.2d 151, 154 (Ct. App. 2003) (trial court granted attorneys' fees for failure to participate in discovery); *Hundley ex rel. Hundley v. Rite Aid of S.C., Inc*., 339 S.C. 285, 305, 529 S.E.2d 45, 56 (Ct. App. 2000) (trial court assessed attorneys' fees for discovery abuses); *Griffin Grading & Clearing, Inc. v. Tire Serv. Equip. Mfg. Co*., 334 S.C. 193, 511 S.E.2d 716 (Ct. App. 1999) (trial court awarded attorneys' fees for failure to comply with discovery order).

a. Spoliation Law

The spoliation of evidence is the intentional, reckless, or negligent withholding, hiding, altering, fabricating, or destroying of evidence relevant to a current or reasonably anticipated legal proceeding. If proven, spoliation may be used to establish that the evidence was unfavorable to the party responsible. *Black's Law Dictionary* (8th Ed. 2004). The theory behind imposing sanctions for spoliation of evidence is that when a party destroys evidence, it is reasonable to infer that the party had "consciousness of guilt" or other motivations to avoid the evidence being heard or introduced to the jury.

A party bringing a motion for sanctions based on spoliation bears the burden of establishing three (3) independent elements before the Court may determine which sanction, if any, is appropriate. These elements are:

(1) that the party having control over the evidence had a duty to preserve it at the time it was destroyed;

(2) that the evidence was destroyed with a culpable state of mind; and

(3) that the destroyed evidence was relevant to the party's claim or defense such that a reasonable trier of fact could find that it would support that claim or defense.

Hawkins v. College of Charleston, 2013 WL 6050324 (4th Cir. 2013) (citing *Cytec Carbon Fibers, LLC v. Hopkins*, No. 2:11-cv-0217, 2012 WL 6044778 (D.S.C. Oct. 22, 2012).

As to the first element, Lincoln had a duty to preserve this evidence. "A party has a duty to preserve evidence during litigation and at any time "before the litigation when a party reasonably should know that evidence may be relevant to anticipated litigation." *Id.* at *3 (citing *Silvestri v. General Motors Corp.*, 271 F.3d 583, 590 (4th Cir. 2001)). There is a common law duty to preserve evidence and a party can only be sanctioned for destroying evidence it had a duty to preserve. That duty arises when a party has notice that the party possesses evidence that is relevant to litigation or when a party should have known the evidence may be relevant to future litigation. Pre-litigation discussions or requests to inspect can also trigger a duty to preserve relevant evidence and it can be said that the obligation to preserve evidence runs first to counsel, who then has an ethical obligation to notify and advise their client on its obligations to safeguard and preserve the evidence relevant to the litigation on a continuing basis.

Plaintiffs are unable to specifically identify a date on which Lincoln had a duty to preserve records arose. However, by 1976, when Schuster was conducting his "testing" to determine the release of fibers from rods there was a clear understanding of the potential for litigation and certainly by 1984 when Lincoln was involved in asbestos litigation, the same litigation that had been raging for more than a decade, any reasonable company would understand that litigation over their asbestos products was reasonably anticipated. *See* e.g. *Borel v. Fiberboard*, 493 F.2d 1076 (5th Cir. 1973)(affirming a case that was filed in 1969 and discussing the knowledge about asbestos disease for the preceding century).

From this Court's own experience, it is a constant of asbestos litigation that defendants first line of defense is to argue that the Plaintiff did not use a particular defendant's product. Even if a defendant stipulates to the use of a product, the plaintiff is entitled to prove that element of their claim as overwhelmingly as they can. Sales records of where Lincoln sold their asbestos

containing rods and when is a critical piece of evidence to the claim of the plaintiff. Lincoln was on notice of its duty to preserve evidence. Yet, Lincoln admits to not having these records and failing to attempt to locate the records.

Likewise, by failing to maintain documents relevant to pending and future asbestos litigation, Lincoln had a culpable state of mind because it either intentionally or negligently destroyed the evidence. The destruction of the documentary evidence that Plaintiffs seek significantly hampers Plaintiffs' ability to present the evidence to the jury and to prove its case against Lincoln. Lincoln had a duty to maintain and preserve any evidence relevant to pending and future asbestos litigation.

The "culpable" state of mind requirement does not require willful destruction. Rather, the moving party need only show that the evidence was destroyed "knowingly, even without intent [to breach the duty to preserve it], or negligently." "[T]he Fourth Circuit requires only a showing of fault, with the degree of fault impacting the severity of the sanctions." *Sampson v. City of Cambridge, Maryland*, 251 F.R.D. 172, 179 (D. Md. 2008) (citing *Silvestri*, 271 F.3d at 590).

Here, the evidence before the Court shows that Lincoln's conduct of destroying orlosing relevant documents satisfies the required minimum level of culpability needed for spoliation sanctions to be imposed. Because culpability encompasses everything from ordinary negligence to willful conduct, the culpable standard merely requires Lincoln to have some degree of fault, which is the case in this matter. Whether the Court concludes that Lincoln was negligent, grossly negligent, or willful in destroying the evidence, the Court finds that Lincoln had a culpable state of mind when it spoliated the evidence at issue.

The last of the three independent elements, relevance to Plaintiffs' claims, is also clearly present on these facts. Under Rule 401, SCRE, "relevant evidence" means "evidence having any

tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable that it would be without the evidence." Evidence is relevant if it tends to establish or make more or less probable some matter at issue upon which it directly or indirectly bears. *State v. Schmidt*, 288 S.C. 301, 342 S.E.2d 401 (1986). Thus, any evidence which assists a jury at arriving at the truth of an issue is relevant. The determination of the relevancy of evidence is largely within the trial judge's discretion. *Strickland v. Coastal Design Associates, Inc.*, 284 S.C. 421, 365 S.E.2d 226 (Ct. App. 1987).

Here, Plaintiffs have met their burden of showing the spoliated evidence is highly relevant to its case. The fact that Lincoln destroyed or lost such evidence is extremely damaging to Plaintiffs' ability to prove their underlying claims. As such, Lincoln should not profit or benefit from its failure to preserve this evidence. Of course, Plaintiffs have no way of knowing precisely what exactly has been destroyed. However, there is reason to believe that the destroyed evidence would have aided Plaintiffs' case, which has suffered irreparable prejudice due to Lincoln's spoliation.

By destroying relevant evidence, Lincoln has succeeded in hiding significant evidence of its fault and deprived Plaintiffs of the opportunity to present critical liability evidence to the jury. Thus, the Court finds that Lincolns spoliated relevant evidence and should issue an appropriate sanction to deter such conduct in the future and attempt to re-level the now uneven evidentiary playing field.

When a party loses or destroys evidence, an inference may be drawn that the destroyed or lost evidence would have been adverse to that party. *Gathers ex rel. Hutchinson v. S.C. Elec. & Gas Co.*, 311 S.C. 81, 83, 427 S.E.2d 687, 689 (Ct. App. 1993) (citing *Kershaw County Board of Education v. United States Gypsum Co.*, 302 S.C. 390, 396 S.E.2d 369 (1990)). Over the years,

courts have found numerous sanctions to be appropriate for the spoliation of evidence. Courts have allowed adverse inferences to be drawn from the loss or destruction of relevant evidence, dismissed cases or stricken pleadings, issued fines plus attorney's fees and applied almost every other sanction available for the failure to provide discovery.

Among these tools that judges may use to combat spoliation is the adverse inference jury instruction/presumption. Giving the finder of fact the ability to decide what weight to place on the spoliation is the preferred practice in South Carolina. *Karppi v. Greenville Terrazzo Co.,* 489 S.E.2d 679 (S.C. Ct. App. 1997). The presumption does not arise from the failure to present the evidence, but rather from the role that the spoliating party had in preventing it from being reviewed by the jury or court. When a party loses or destroys evidence, an inference may be drawn that the destroyed or lost evidence would have been adverse to that party. *Gathers v. S.C.E.&G. Co.,* 427 S.E.2d 687, 689 (S.C. Ct. App. 1993) (citing *Kershaw County Board of Education v. United States Gypsum Co.,* 302 S.C. 390, 396 S.E.2d 369 (1990)).

Under modern practice in South Carolina, where a party was in possession of evidence but did not make it available to the other party, then the party who sought the evidence is permitted a "negative inference" charge to the jury. If the party in possession of evidence relevant to an on- going legal proceeding simply cannot make it available because the evidence was lost or destroyed, then the party seeking the evidence is entitled to a charge to the jury for it to consider the reasons why the evidence was not preserved and may draw a negative inference if it so desires. Failure to charge on "spoliation of evidence" is prejudicial to the moving party. *Stokes v. Spartanburg Regional Medical Center.* 368 S.C. 515, 629 S.E.2d 675 (Ct. App. 2006).

Therefore, the Court will instruct the jury that Lincoln destroyed relevant evidence in this case. Specifically, Court will instruct the jury that Lincoln destroyed the sales invoices and the

jury may presume that the evidence contained in the invoices would have conclusively shown that Lincoln sold its asbestos containing welding rods to Mr. Hopper's worksites.

b. Compel

South Carolina Rule of Civil Procedure 26(b)(1) provides that a party is entitled to discovery on

> any matter, not privileged, which is relevant to the subject matter involved in the pending action whether it relates to a claim or defense of the party seeking discovery or the claim or defense of any other party, including the existence, description, nature, custody, condition and location of any books, documents, or other tangible things and the identity and location of persons having knowledge of any discoverable matter.

Id.

Rule 34, SCRCP provides that a party shall produce documents within their "possession, custody or control." As the language of Rule 34 makes clear and as the courts have confirmed, a request for production need not be confined to documents or other items in a party's possession, but instead may properly extend to items that are in that party's "control." Rule 34(a)(1), SCRCP. In interpreting the identical provision of the Federal Rules, the Sixth circuit and other courts have held that documents are deemed to be within the "control" of a party if it "has the legal right to obtain the documents on demand." *In re Bankers Trust Co.,* 61 F.3d 465-69 (6th Cir. 1995); *Mercy Catholic Med. Cntr. v. Thompson,*380 F.3d 142, 160 (3d Cir. 2004); *Searock v. Stripling,* 736 F.2d 650, 653 (11th Cir. 1984).

The documents that Plaintiffs seek are clearly or, at least should be, within the custody or control of Lincoln because it has the right to obtain the documents on demand or had an obligation to preserve those documents. It appears that there are workers compensation claim records in the possession of Lincoln which are, at a minimum, reasonably calculated to lead to the discovery of admissible evidence.

This Court finds that the workers compensation records of Lincoln employees who developed mesothelioma are discoverable. Those records shall be produced to counsel for the Plaintiffs within five (5) days of the entry of this order.

c. *Schuster's Failure to Prepare*

As set forth above, Mr. Schuster failed to properly prepare to answer Plaintiffs' questions as the corporate representative of Lincoln electric. He specifically failed to review information available to him in the form of numerous employee witnesses and the former testimony of Ken Brown, the company's prior corporate representative. He additionally failed to seek to discover the sellers and distributors of Lincoln's rods and admitted that he had not sought such information. Additionally, the Court has serious concerns about his lack of knowledge of the existence of the very records that he claims would support his testing at Lincoln's facilities. These are precisely the types of information that 30(b)(6) requires a corporation to educate its witness on. Lincoln has chosen not to do so. That is unacceptable.

Pursuant to Rule 37(b)(2)(C), SCRCP, when a party fails to obey an order to provide or permit discovery, the court may "make such orders in regard to the failure as are just," including an order dismissing the action or proceeding, or any part thereof. *Temple v. Tec-Fab, Inc.*, 370 S.C. 383, 390, 635 S.E.2d 541, 544 (Ct. App 2006). "Where these rights are not accorded, prejudice must be presumed and, unless the party who has failed to submit to discovery can show a lack of prejudice," sanctions must be imposed, or a resulting verdict must be reversed. *Id.* While "[t]he imposition of sanctions is generally entrusted to the sound discretion of the Circuit Court, ... whatever sanction is imposed should serve to protect the rights of discovery provided by the Rules." *Id.* Without adequate sanctions, discovery procedures would be ineffectual. *Id.* As a result, over leniency must be avoided. *Id.* "If a party fails to obey an order or provide or permit discovery,

the trial court may impose sanctions such as striking pleadings, dismissing the action, or rendering a default judgment." *Griffin Grading & Clearing, Inc. v. Tire Serv. Equipment Mfg. Co., Inc.*, 334 S.C. 193, 198, 511 S.E.2d 716, 718 (Ct. App. 1999).

"In determining the appropriateness of a sanction, the court should consider such factors as the precise nature of the discovery and the discovery posture of the case, willfulness, and degree of prejudice." *Id.* at 199, 511 S.E.2d at 719. In *Samples v. Mitchell*, 329 S.C. 105, 495 S.E.2d 213 (Ct. App. 1997), a party failed to disclose the existence of a videotape of the plaintiff in a personal injury case which was relevant to the issue of damages. The South Carolina Court of Appeals stated "[t]he entire thrust of the discovery rules involves full and fair disclosure, to prevent a trial from becoming a guessing game or one of surprise for either party." *Id.* "Discovery sanctions are imposed to penalize those whose conduct may be deemed to warrant such a sanction, and to deter those who might be tempted to such conduct in the absence of such a deterrent." *Creighton v. Coligny Plaza Ltd. P'ship*, 334 S.C. 96, 123, 512 S.E.2d 510, 524 (Ct. App. 1998).

Lincolns' abuse of discovery in this matter is blatant and deliberate. The conduct warrants the imposition of significant sanctions. What form those sanctions take is yet to be determined. At this time, I will not preclude Schuster from testifying. However, the Court will entertain any presumptions the Plaintiffs request based on the lack of preparation and investigation done by Mr. Schuster on the properly noticed 30(b)(6) topics.

Plaintiffs also sought an award of attorneys' fees for the expenses incurred in pursuing this motion. At this time, the Court denies the Motion for attorneys' fees. However, should there not be immediate compliance with this order, the Court will reconsider. Plaintiffs have had not had a full and fair opportunity to depose Lincoln with all of the appropriate information. Lincoln's

failure to cooperate with the discovery process has and continues to prejudice Plaintiffs' ability to present their claims to the jury.

d. The Court's Gatekeeping Function and the Exclusion of the Schuster "Customer" Test

John Schuster has not been tendered as an expert witness on any topic in this matter. However, he purports to offer scientific testimony in the form of the results from his "customer" test. When admitting scientific evidence under Rule 702, SCRE, the trial judge must find the evidence will assist the trier of fact, the expert witness is qualified, and the underlying science is reliable. *State v. Council*, 335 S.C. 1, 20 (1999).

In State v. Council, the South Carolina Supreme Court reviewed South Carolina law and Federal law regarding the admissibility of DNA evidence. *Id.* The Court found that "[w]hen admitting scientific evidence under Rule 702, SCRE, the trial judge must find the evidence will assist the trier of fact, the expert witness is qualified, and the underlying science is reliable." *Id.* at 21. The Court further upheld the reliability factors outlined in *State v. Jones*, 273 S.C. 723, 259 S.E.2d 120 (1979), which include: "(1) the publications and peer review of the technique; (2) prior application of the method to the type of evidence involved in the case; (3) the quality control procedures used to ensure reliability; and (4) the consistency of the method with recognized scientific laws and procedures." *Id.* at 19; *see also Daubert v. Merrell Dow Pharmaceutical*, 509 U.S. 579 (1993) (outlining four factors to consider in deciding the reliability of scientific evidence: scientific methodology, peer review (including publication), consideration of general acceptance and the rate of error of the particular technique.) In addition, the evidence should be scrutinized for relevancy and prejudice. *Id.* at 20.

In *State v. McHoney*, the South Carolina Supreme Court further analyzed Rule 702 and affirmed the trial judge's ruling that polygraph examinations were not admissible because of their

unreliability. 344 S.C. 85, 544 S.E.2d 30 (2001). The Court stated, "Under Rule 702, SCRE, the trial judge must find: (1) the scientific evidence will assist the trier of fact; (2) the expert witness is qualified; and (3) the underlying science is reliable." *Id.* at 96. The Court also examined the reliability of the evidence under the *Jones* factors and held that the defendant did not present any evidence that polygraph examinations were inherently reliable and were conducted properly. Thus, the *Jones* factors and Rule 702 were not met, and the evidence was properly excluded. *McHoney*, 344 S.C. at 97.

John Schuster's "customer" test, the alleged results of the test, testimony regarding the test, and the testimony or opinions of expert and lay witnesses who rely on Schuster's "customer" test, is unreliable under Rule 702. First, Schuster was unqualified to conduct and then offer any opinion regarding this hygienist-type test. John Schuster is a chemical engineer and, admittedly, has no training in industrial hygiene. Additionally, Mr. Schuster confirmed that his test has not been replicated by anyone at Lincoln Electric or outside of Lincoln Electric. Mr. Schuster is unable to testify as to who he shared his results with, other than his boss at Lincoln Electric and, potentially, another employee. There is no documentation reflecting Mr. Schuster's activities during the test. There are no documents confirming that he manipulated the welding rods in the fashion that he has claimed. There are no known publications, texts, or treatises that cite or recommend his methodology for determining or measuring the dust generated from handling welding rods. Similarly, there is no indication that Mr. Schuster has spoken to experts in the industrial hygiene field regarding his methodology or the results of his test. Neither his methodology nor his test results have been subjected to peer review. Therefore, the testimony of John Schuster as to his "customer" test shall be excluded because the test is inherently unreliable.

Lincoln argues that Lincoln's paid experts, specifically Mary Finn and Kim Anderson, may rely on the Schuster test. This Court disagrees. "Under Rule 703, SCRE, an expert may rely on inadmissible evidence if the trial judge examines the reliability of the inadmissible evidence and excludes opinions not deserving of reliance in the specific instance and/or those that rely on grossly unreliable data." *Jamison v. Morris*, 385 S.C. 215, 228, 684 S.E.2d 168, 175 (2009) (internal quotation marks omitted). Because Schuster's "customer" test is grossly unreliable data, this Court should prohibit use of the test, including its results, for all purposes.

As a separate, but equally powerful basis, the Court excludes the "Customer" test because the contemporaneous air monitoring tests that Mr. Schuster conducted of other Lincoln Employees working in the same facility as the "Customer" test are missing and, at least according to Schuster, not available. This adds to the unreliability of all of the tests but this is amplified by the fact that the law required Lincoln to maintain air monitoring records for at least 20 years after the time they took them:

> 1910.1001 Asbestos: (1) Recordkeeping—(1) Exposure records. Every employer shall maintain records of any personal or environmental monitoring required by this section. Records shall be maintained for a period of at least 20 years and shall be made available upon request to the Assistant Secretary of Labor for Occupational Safety and Health, the Director of the National Institute for Occupational Safety and Health, and to authorized representatives of either.

See Federal Register dated March 19, 1976. So, either these records still exist and have not been produced as they, very arguably should have been, or Lincoln has spoliated its air monitoring records.[10] The Court need not decide which here.

[10] Twenty years after 1976 is 1996, a time that not even Lincoln can credibly argue that it was unaware of the potential for relevance of those records in pending and future asbestos litigation against it. *See also* Order, *Taylor v. Air & Liquid Systems Corporation, et al*, 2018-CP-40-04940, February 26, 2019 (finding sanctions appropriate against Bowater for its failure to maintain air monitoring records).

For each of these reasons, the Court hereby excludes any testimony from Schuster, Lincoln or its retained experts regarding Schuster's "customer" test as well as the introduction of the "customer" test itself.

CONCLUSION

What this Court expects of 30(b)(6) witnesses is not new. This issue and the additional issues described above have been heard by this court many times in prior years. The Court greatly appreciates that it has not had to deal with these same issues repeatedly this year, at least until this motion. The Court sincerely hopes that it will be some time before similar issues are raised to the Court in the future.

AND IT IS SO ORDERED.

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Jean Hoefer Toal, Chief Justice of the
South Carolina Supreme Court (Retired),
Acting as Circuit Court Judge

October 30, 2019

Richland Common Pleas

Case Caption: Charles T Hopper , plaintiff, et al vs Air & Liquid Systems Corporation , defendant, et al

Case Number: 2019CP4000076

Type: Order/Other

IT IS SO ORDERED.

s/ Jean H. Toal #2758