FOR OFFICIAL PUBLICATION

SUPERIOR COURT OF THE VIRGIN ISLANDS
DIVISION OF ST. CROIX

IN RE: ASBESTOS, CATALYST, AND SILICA TOXIC DUST EXPOSURE LITIGATION.	)))	**MASTER CASE NO. SX-15-CV-096**
This Opinion Pertains to All Cases Grouped Under the Master Case.	)))	

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MEMORANDUM OPINION

MOLLOY, Judge.

BEFORE THE COURT are the following motions filed by the Defendants Hess Oil Virgin Islands Corporation ("HOVIC") and Hess Corporation ("Hess"): (1) motion *in limine* to exclude Environmental Protection Agency ("EPA") documents (filed February 1, 2018); (2) motion *in limine* re: Plaintiffs' employment periods (filed February 20, 2018); and (3) motion *in limine* re: evidence and/or testimony concerning catalyst and silica exposure (filed February 20, 2018). Plaintiffs oppose the motions and ask the Court to strike them because Defendants filed them in the master case, not in the two individual cases scheduled for trial. For the reasons stated below, the Court will grant the first motion and grant in part and deny in part second and third motions. The Court will also deny the Plaintiffs' request to strike.

I. PROCEDURAL BACKGROUND

"Hess is a Delaware corporation with a principal place of business in New York, New York. HOVIC is a Virgin Islands corporation and a wholly-owned subsidiary of Hess." (Defs.' Mot. *in Limine* re: Pls.' Employment Periods 2, filed Feb. 20, 2018 ("Empl. Mot.").) "HOVIC was established in 1965 for the sole purpose of operating an oil refinery on St. Croix. HOVIC operated the St. Croix oil refinery until October 30, 1998." *Id.* In 2013 and 2014, approximately 120 people, mostly former refinery workers, sued Hess and HOVIC for damages, claiming they had been exposed to asbestos through their employment at the refinery. The individual cases were grouped together under this master case to manage discovery and pre-trial litigation and twelve cases were later selected as bellwethers for the larger group. Trial in the first case, *Wilfred St. Thor v. Hess Oil Virgin Islands Corporation, et al.*, is slated to commence on May 7, 2018, followed immediately thereafter by *Thomas Charles v. Hess Oil Virgin Islands Corporation, et al.*

Immediately after the cases were grouped under this master case, the Court issued a case management order, which provided in part as follows:

> **(a) Master Case File and Docket**. Any subsequent order, pleading, motion, or other document that applies to more than one of the cases consolidated under this master case file and docket shall bear a caption similar to this Case Management Order ("master case filings") and shall designate immediately under the master case caption the cases to which it applies or state that it applies to all cases. Master case filings shall, when docketed and filed in the master case, be deemed to have been docketed and filed in the individual cases to the extent the master case filing applies to an individual case. The parties shall not file, and the Clerk's Office will not docket, any master case filings in the individual cases unless directed by the Court.
>
> **(b) Individual Case Files and Dockets**. Orders, pleadings, motions, and/or other papers that pertain to only one individual case . . . shall be filed in that individual case, with the caption and case number of that case ("individual case filings"). Examples of individual case filings include, but are not limited to, pleadings (including amendments thereto), voluntary or stipulated dismissals, and dispositive motions that concern facts specific to the merits of an individual case. Individual case filings will not be docketed or deemed filed in the master case. However, every three (3) months, counsel shall file a notice in the master case and list therein each individual case filing counsel filed during the preceding quarter and in which individual case the document was filed in.

(Case Mgmt Order § 1(a)-(b) entered Mar. 19, 2015, as amended by Order entered September 7, 2016, and revised by Order entered July 17, 2017.) After limited discovery was conducted in all the cases and the twelve cases (termed Group A) were selected as bellwethers, the Court issued an amended case management order specific to the Group A cases. The Amended Case Management Order directed in part as follows:

> Because summary judgment concerns the facts of an individual plaintiff's case, all

> summary judgment motion papers, (*see* Case Mgmt. Order § [1](b)), must be filed in that individual plaintiff's case, but with a separate notice filed in the master case listing all Group A cases in which summary judgment motions have been filed and when. . . . [I]f a ruling on a trial-related motion will impact multiple Group A cases, the parties shall file their trial-related (but not dispositive) motion papers under the master case. In contrast, if a trial-related motion concerns only one Group A case, e.g., an expert designated only in one case, then the motion papers shall be filed only in that individual case.

(Amend. Case Mgmt Order § 10(a)-(b), entered Aug. 24, 2016.)

Following an August 14, 2017 status conference in which the Court denied the Defendants' motion to extend discovery deadlines in the Group A cases, *see generally In re: Asbestos, Catalyst, & Silica Toxic Dust Exposure Litig.*, 67 V.I. 544 (Super. Ct. 2017), "[e]ach side was directed to select one case for trial in December 2017, followed by another case for trial in January 2018. The case selected by Defendants' counsel will be tried first, immediately followed by the case selected by Plaintiffs' counsel. The sequence will be reversed in January 2018." *Id.* at 560. Counsel had until August 18, 2017 to file a stipulation designating the four cases for trial. *St. Thor* and *Charles* were selected to proceed to trial first and removed from the master case by Order entered August 23, 2017.

Trial did not proceed in December because of the devastation and disruption Hurricanes Irma and Maria caused in the Virgin Islands in September 2017. "[A]ll time limits prescribed or allowed by rule of procedure, court order, statutes applicable to court proceedings, or otherwise pertaining to court proceedings" were tolled "from 12:01 a.m. on Tuesday September 5, 2017, through 11:59 p.m. on Sunday October 15, 2017," and extended "by forty-one (41) calendar days." *In re: Order Further Extending Legal Time Limits Due to Hurricane Maria*, Admin. No. 2017-0005, 2017 V.I. Supreme LEXIS 63, *3-4 (V.I. Sept. 27, 2017); *see also In re: Order Extending Legal Time Limits After Hurricane Irma*, Admin No. 2017-0001, 2017 V.I. Supreme LEXIS 58, *2 (V.I. Sep. 11, 2017).

To regroup with counsel and get these cases back on track, the Court held a status conference on November 7, 2017 and rescheduled trial in *St. Thor* for May 7, 2018. Counsel were allowed to meet and confer and then submitted, on December 15, 2017, a proposed order resetting the motion deadlines for *St. Thor* and *Charles*, which the Court approved on January 31, 2018. However, the proposed order was filed in the master case, and did not distinguish between motions pertaining to all cases and those pertaining solely to *St. Thor* or *Charles*. Consequently, when the parties began to file summary judgment motions in the master case and trial-related motions pertaining only to the four cases removed from the master case, the Court issued the following Order on February 26, 2018, directing that

> all, *Daubert*, *limine*, and dispositive motions filed in the master case pertaining only to *Wilfred St. Thor v. Hess Oil Virgin Islands Corporation, et al.*, SX-13-CV-45[8], *Thomas Charles v. Hess Oil Virgin Islands Corporation, et al.*, SX-14-CV-169, *Donat Joseph v. Hess Oil Virgin Islands Corporation, et al.*, SX-13-CV-460, and/or *Thomas Casimir v. Hess Oil Virgin Islands Corporation, et al.*, SX-13-CV-444, are **STRICKEN** per the Orders dated and entered August 23, 2017 in *St. Thor* and *Charles*, respectively, as well as Section 1(b) of the Case Management Order entered March 19, 2015. The movant is **DIRECTED** to refile said motions in the individual case or cases the motions pertain to on or before Friday, February 28, 2018. The nonmoving party's response time shall commence from the date said motions are refiled.

(Order 1, entered Feb. 27, 2018.) Counsel immediately sought clarification which prompted the Court, on February 28, 2018, to vacate the prior order, replacing it with the following:

> all *Daubert*, *limine*, and dispositive motions filed in the master case pertaining to one or more of the following cases: *Wilfred St. Thor v. Hess Oil Virgin Islands Corporation, et al.*, SX-13-CV-45[8], *Thomas Charles v. Hess Oil Virgin Islands Corporation, et al.*, SX-14-CV-169, *Donat Joseph v. Hess Oil Virgin Islands Corporation, et al.*, SX-13-CV-460, or *Thomas Casimir v. Hess Oil Virgin Islands Corporation, et al.*, SX- 13-CV-444, are **STRICKEN** per the Orders, dated and entered August 23, 2017, in *St. Thor* and *Charles*, respectively, which removed both cases from the master case and directed that such motions be filed in that case as well as Section 1(b) of the Case Management Order entered March 19, 2015, which spoke to individual case filings. Examples include, but are not limited to, Defendants' Motion *in Limine* Re: Martin D. Barrie, Ph.D. filed on February 20, 2018 (caption states motion relates to four cases), and Defendants'

> Motion *in Limine* Re: the Deposition Testimony of John Piwonka (caption states motion relates to two cases). Motions pertaining to all individual cases or a majority of the cases are **NOT STRICKEN**. Examples include, but are not limited to, Defendants' Motion *in Limine* Re: Christopher Leigh John, M.D. (Specific Causation Expert) and Mark Klepper M.D. (B-Reader Expert) and Request for a Daubert Hearing filed February 20, 2018 (caption states that motion relates to all cases), Defendants' Motion *in Limine* Re: Evidence and/or Testimony Concerning Catalyst and Silica Exposure filed February 20, 2018 (same); and Defendant Hess Corporation's Motion *in Limine* Re: Insurance Policies February 20, 2018 (same).

(Order 1-2, entered Feb. 28, 2018.)

Defendants had filed a number of motions *in limine* in the master case before the February Orders issued, including a motion "to exclude from trial Environmental Protection Agency documents produced by Plaintiffs in this case," (Defs.' Mot. *in limine* to Exclude EPA Docs. 1, filed Feb. 1, 2018 ("EPA Motion")), a motion to bar "Plaintiffs from introducing any evidence or testimony regarding any actions or events that took place prior to the named Plaintiffs ' employment at the HOVIC refinery and subsequent to October 30, 1998, when HOVIC ceased ownership and operations at the refinery," (Empl. Mot. 1), and a motion to bar "Plaintiffs from introducing any evidence and or testimony concerning any alleged exposure to catalyst or silica products or any other alleged toxin at the HOVIC refinery," (Defs.' Mot. *in limine* re: Evidence and/or Testimony Concerning Catalyst and Silica Exposure 1, filed Feb. 20, 2018 (hereinafter "Catalyst/Silica Motion"). Plaintiffs responded by oppositions to Defendants' motions, but in the master case. However, regarding Defendants' Employment and Catalyst/Silica Motions, Plaintiffs requested within their oppositions that both motions should be stricken as "improperly filed." (Pls.' Opp'n to Defs.' Mot. *in Limine* re: Pls.' Employment Periods 2, filed Mar. 12, 2018 ("Empl. Opp'n").)

II. DISCUSSION

A. Requests to Strike Defendants' Motion

In general, "a court has 'inherent authority to strike any filed paper which it determines to be abusive or otherwise improper under the circumstances." *Der Weer v. Hess Oil V.I. Corp.*, 64 V.I. 107, 126 (Super. Ct. 2016) (quoting *Natural Resources Defense Council v. U.S. Food & Drug Admin.*, 884 F. Supp. 2d 108, 115 n.5 (S.D.N.Y. 2012), parenthetically). The Court exercised this authority when it struck all motions filed in the master case in contravention of the Case Management Order, the Amended Case Management Order, and August 23, 2017 Orders removing *St. Thor* and *Charles* from the master case. "[A] court opens a master case as a judicial convenience so that multiple cases with similar claims or parties can be coordinated under a common case file and docket and litigation streamlined and simplified." *Asbestos, Catalyst, & Silica Toxic Dust Exposure Litig.*, 67 V.I. at 550 (quotation marks, emphasis, and citation omitted). "A master case closes when it has served its purpose. That is, when the reason a master was opened—whether to coordinate pre-trial discovery or to streamline pre-trial motion practice—has ended, the master case ends too." *In re: Alumina Dust Claims*, 67 V.I. 172, 195 (Super. Ct. 2017).

In this instance, the master case has not been closed; approximately 120 cases are still being managed under it. Rather, two individual cases were removed from the master case because the master case had served its purpose for those cases. A master case is often used to manage or coordinate multiple cases or distinct phases within multiple cases simultaneously. *See id.* But even when a master case is opened to manage pretrial litigation across multiple cases, the cases grouped under that master case eventually must be removed from it—when pretrial litigation has concluded and the case proceeds to trial, when a case is dismissed on a dispositive motion, or when allowing a case to remain with other cases under the master case would be unfair. *E.g., Mitchell v. Gen. Eng'g Corp.*, 67 V.I. 271, 288 (Super. Ct. 2017) ("[A]llowing this case to remain consolidated with the other cases under a master case would be counterproductive and perhaps also be a disservice to all of the cases. Mitchell has only two claims remaining against only one defendant. In contrast, in the other individual cases, the plaintiffs have multiple claims pending against multiple defendants."); *Williams v. Bayer Corp.* (*In re: Trasylol Prods. Liab. Litig.*), No. 1:08-MD-01928, 2013 U.S. Dist. LEXIS 196554, *33 (S.D. Fla. Feb. 13, 2013) ("All claims of Plaintiff Charles Williams are DISMISSED WITH PREJUDICE due to lack of standing. The Clerk of Court previously closed this case administratively for statistical purposes, and shall now CLOSE this CASE for all purposes. It is further ORDERED and ADJUDGED that Charles Williams's name be removed from the Master Docket.").

The August 23, 2017 Orders removed *St. Thor* and *Charles* from the master case because both cases were scheduled for trial. Those Orders did not close the master case, however. But technically, they did disassociate *St. Thor* and *Charles* from it. So, Plaintiffs are correct in that Defendants' second and third motions were "improperly filed" in the master case because Defendants represented in each motion that it "only applies to bellwether plaintiffs Wilfred St. Thor and Thomas Charles," (Empl. Opp'n 2 (citing Empl. Mot. 1)), not to all Plaintiffs' cases. "'Court papers are deemed filed in every case listed in the caption.'" *Daniel v. Borinquen Insulation Co.*, No. SX-98-CV-192, *et seq.*, 2017 V.I. LEXIS 117, *10 (V.I. Super. Ct. July 28, 2017) (quoting *Edwards v. Hess Oil V.I. Corp.*, SX-15-CV-382, 2017 V.I. LEXIS 94, *9 (V.I. Super. Ct. June 28, 2017). Clearly, the Defendants' second and third motions *in limine* were filed in the master case.

But in their replies, Defendants explain that they did not refile their Employment motion or their Catalyst/Silica motion because they did not understand them to have been stricken by the

Court's February Orders. And the Court cannot find fault with that interpretation. (*See* Defs.' Reply in Supp. of Mot. *in Limine* re: Evidence and/or Testimony Concerning Catalyst & Silica Exposure 2, filed Apr. 3, 2018 ("Catalyst/Silica Reply") ("Taking all of the Orders together, the Defendants interpret the Court as having not stricken the current motion, which equally pertains to all or a majority of the Group A cases, and which therefore must remain filed under the 'master case' and not be filed in individual Group A cases.").) Courts in the Virgin Islands have only recently begun to appreciate the nuances between master cases and how they function, and the individual cases grouped under master cases and what litigation must remain within the individual cases. *Cf. In re: Alumina Dust Claims*, 67 V.I. at 194 ("[M]uch of the confusion here was caused partly by a misunderstanding of how master cases function. . . . The Court takes judicial notice that the Superior Court, and the Territorial Court before it, often designated one plaintiff's case as a master case, akin to a lead plaintiff in a class action." (citing *In re: Cases Removed to the Dist. Ct. of the V.I.*, SX-98-CV-109, *et seq.*, 2016 V.I. LEXIS 154, *24-25 n.16 (V.I. Super. Ct. Sept. 21, 2016))); *see also Augustin v. Hess Oil V.I. Corp.*, 67 V.I. 488, 500 n.3 (Super. Ct. 2017). Any error here is technical and harmless because Defendants' want all EPA documents excluded, all references to catalyst or silica (or any other toxic substances other than asbestos) precluded, and all testimony and documentary evidence limited to the time when each specific plaintiff worked at the refinery—from trial in every Plaintiffs' case. Striking the motions because they were filed in the master case is unnecessary in this instance.

B. Motions *in Limine*

Generally-speaking, all "[e]vidence is relevant if it has any tendency to make a fact more or less probable than it would be without the evidence; and the fact is of consequence in determining the action." V.I. R. Evid. 401 (colon and subsection numbers omitted). But even relevant evidence can be excluded from trial "if its probative value is substantially outweighed by a danger of . . . unfair prejudice; confusing the issues; misleading the jury; undue delay; wasting time; or needlessly presenting cumulative evidence." V.I. R. Evid. 403. "A trial court has wide discretion in determining whether to exclude otherwise admissible evidence under Rule 403." *Fahie v. People*, 62 V.I. 625, 641 (V.I. 2015) (quotation marks and citation omitted). "But courts are not concerned with 'ideal' evidence." *Dennie v. People*, 66 V.I. 143, 154 (Super. Ct. App. Div. 2017). "[A]ll evidence carries with it some prejudicial effect." *Fahie*, 62 V.I. at 641. Instead, the concern is only whether the evidence is relevant and then, whether the relevant evidence should be admitted. "Evidence of a person's habit or an organization's routine practice may be admitted to prove that on a particular occasion the person or organization acted in accordance with the habit or routine practice. The court may admit this evidence regardless of whether it is corroborated or whether there was an eyewitness." V.I. R. Evid. 406.

(1) EPA Motion

Defendants, in their motion, state that Plaintiffs produced during discovery "approximately 1000 pages of documents which appear to be related to" the EPA "application and permit process for the treatment. storage and disposal of refinery waste sludge from the refining processes." (EPA Mot. 1 (emphasis omitted).) Some "documents concern HOVIC's successor as the owner and operator of the refinery, HOVENSA, which is not a party to this action." *Id.* "At least one document in the bunch solely concerns groundwater sampling from a Hess Port Reading Liability, which has no conceivable relevance to the instant case," Defendants state. *Id.* (citation omitted). Among the others "are refinery maps and diagrams, evacuation plans, wastewater treatment schematics and various correspondence related to the HOVIC's and HOVENSA's Permit Renewal Applications under the Resource Conservation and Recovery Act (RCRA)." *Id.* at 2. Defendants argue that none of the documents should be admitted—and conversely, therefore, that they all should be excluded—because "[a]ll the documents are irrelevant to Plaintiffs' premises liability and dangerous chattel supplier claims." *Id.* at 3. "[E]ven if any of these documents had some marginal relevance, and they clearly do not, the Court should exclude them," Defendants argue, "because any probative value would be substantially outweighed by the danger of confusing and misleading the jury." *Id.* at 4 (citing V.I. R. Evid. 403).

In response, the Plaintiffs "concede that documents that do not reference Hess (i.e., documents that only reference HOVENSA) are not relevant to this case, and Plaintiffs will not put such documents on their exhibit lists for trial." (Pls.' Resp. to Defs.' Mot. *in limine* to Exclude EPA Documents 6 n.13, filed Mar. 2, 2018) ("EPA Opp'n").) But Plaintiffs also object to Defendants' motion because it was filed three months before trial, and oppose the motion because the EPA documents are authentic and will be relevant to "demonstrate that Hess was a legal possessor of the St. Croix refinery." *Id.* at 4. "Many of the documents from the EPA show," Plaintiffs counter, "that Hess filed permits for the St. Croix refinery pursuant to the requirements of the Clean Water Act, Clean Air Act, and Resource Conservation and Recovery Act ("RCRA") and that Hess maintained the lines of communication with the regulatory authorities regarding the refinery's compliance with those federal obligations." *Id.* at 5. To that end, the EPA documents are relevant because, "*on the whole*, [they] tend to make the fact that Hess had control over the refinery more probable, and such fact is of consequence in determining the action." *Id.* And even if the documents there could be some unfair prejudice, the Court can give a limiting instruction, Plaintiffs contend. *See id.* at 6 ("An appropriate limiting instruction could be given at trial to minimize any prejudice or confusion. And such an instruction is a more apt remedy than wholesale exclusion." (footnote omitted)).

Defendants reiterate that all EPA "documents should be excluded because they are all irrelevant to Plaintiffs' claim that Hess 'possessed' the refinery as that term is defined under Virgin Islands law, and their admission at trial will unfairly prejudice, confuse and mislead the jurors about the actual issues to be decided." (Defs.' Reply to Pls.' Resp. to Defs' Mot. *in limine* to Exclude EPA Docs 3, filed Mar. 21, 2018 ("EPA Reply").) Also, "Plaintiffs do not allege that they were somehow harmed by the Defendants' disposal and remediation of refinery waste sludge in landfarms on the refinery grounds." Defendants acknowledge "that Hess's status as a 'legal possessor' is an essential element of the Plaintiffs' premises liability claim," but argue that the EPA "documents do not make it more probable that Hess was a 'possessor' of the refinery." *Id.* at 5 (citing V.I. R. Evid. 401(a)). Per the Defendants

> Virgin Islands courts and courts in other jurisdictions have historically . . . define[d] a 'possessor of land' as: (a) a person who is in occupation of the land with intent to control it or (b) a person who has been in occupation of land with intent to control it, if no other person has subsequently occupied it with intent to control it, or (c) a person who is entitled to immediate occupation of the land, if no other person is in possession under Clauses (a) and (b).

Id. (quoting *Vanterpool v. CTF Hotel Mgmt. Corp.*, D.C. Civ. App. No. 2007-31, 2013 U.S. Dist. LEXIS 158582, *13-14 (D.V.I. App. Div. Oct. 30, 2013) (paragraph breaks and emphasis omitted). Since none of the EPA documents show Hess possessed or occupied the St. Croix refinery, they all should be excluded, Defendants argue. This Court agrees.

As Plaintiffs correctly state, the EPA documents would be admissible as public records and ancient documents under Virgin Islands Rule of Evidence 901. But the authenticity of the documents is not the concern here. Rather, the concern here is relevancy and the Court does not find the EPA documents to be relevant. Plaintiffs do have the burden to prove by a preponderance of the evidence "that Hess was a legal possessor of the St. Croix refinery." (EPA Opp'n 4 (footnote omitted).) And possession may "look[] to the occupation of the land—the exercise of physical control over it—with a corresponding intent to control," and "[a] party may be liable if it assumes control over and responsibility for the premises even if it does not own or physically occupy the property." *Id.* at 4 n.7 (quotation marks and citations omitted). But Plaintiffs have not shown how the EPA document depicted herein (which Defendants appended to their motion and which is part of a July 31, 1994 sampling and analysis plan prepared for HOVIC by EMS Environmental, Inc.) shows that Hess possessed or occupied the St. Croix refinery.

In general, on a motion *in limine* the moving party has the burden to show that the evidence is irrelevant or should be excluded. *E.g.*, *Wilson v. Pepsi Bottling Grp., Inc.*, 609 F. Supp. 2d 1350, 1359 (N.D. Ga. 2009) ("The Court will grant a motion *in limine* to exclude evidence only if the evidence in question is clearly inadmissible. The moving party has the burden of proving that the evidence sought to be excluded is inadmissible." (citation omitted)); *see also Armstrong Remodeling & Constr., LLC v. Cardenas*, 417 S.W.3d 748, 754 (Ark. Ct. App. 2012) ("When a motion *in limine* is made, the proponent of the evidence has the burden of showing that the evidence is admissible." (citing *Benson v. Shuler Drilling Co., Inc.*, 871 S.W.2d 552 (Ark. 1994)); *cf. Bunting v. Jamieson*, 984 P.2d 467, 472 (Mont. 1999) ("[A] ruling on a motion *in limine* does not impose the same burden on the party offering the evidence as would be applied on a motion for summary judgment. Rather, the focus is on the admissibility of the testimony, not its ultimate sufficiency in establishing the case."). However, "[t]he burden of proof concerning the admissibility of public records is on the party opposing their introduction" because "the assurances of accuracy are generally greater for public records." *Lorraine v. Markel Am. Ins. Co.,* 241 F.R.D. 534, 574 (D. Md. 2007) (quotation marks and citations omitted).

Defendants have carried their burden here. Admittedly, Defendants most likely selected the least potentially-relevant documents of the over 1,000 documents Plaintiffs produced to persuade the Court to exclude all EPA documents. And during oral argument, Plaintiffs and Defendants informed the Court that Plaintiffs had narrowed the number of documents down to four. But even considering those four documents, copies of which Plaintiffs' counsel tendered in court, the Court cannot conclude that Plaintiffs have shown how the document will not confuse the issues, mislead the jury, waste time, or be cumulative. *See* V.I. R. Evid. 403. The documents Plaintiffs propose to admit relate mostly to a 1985 or 1986 hazardous waste permit application HOVIC submitted to the EPA, and which the EPA approved on or about December 5 or 15, 1998 (HSWA Permit No. VID980536080). Plaintiffs suggest that correspondence issued by or to Rene L. Sagebién, then-Vice President of Refining or Theodore Helfgott, Ph.D., Manager of Environmental Affairs—both with Amerada Hess Corporation but on behalf of HOVIC—should be admitted to "demonstrate that Hess was a legal possessor of the St. Croix refinery." (EPA Opp'n 4 (footnote omitted).) The EPA documents do "show that Hess . . . maintained the lines of communication with the regulatory authorities regarding the refinery's compliance with those federal obligations." *Id.* at 5. But the documents do not show that Hess "*filed* permits for the St. Croix refinery." *Id.* (emphasis added).

Currently, federal regulations require, for corporations, that an EPA hazardous waste program permit applications be signed

> [b]y a responsible corporate officer. For the purpose of this section, a responsible corporate officer means (i) A president, secretary, treasurer, or vice-president of the corporation in charge of a principal business function, or any other person who performs similar policy- or decisionmaking functions for the corporation, or (ii) the manager of one or more manufacturing, production or operating facilities employing more than 250 persons or having gross annual sales or expenditures exceeding $ 25

> million (in second-quarter 1980 dollars), if authority to sign documents has been assigned or delegated to the manager in accordance with corporate procedures.

40 C.F.R. § 270.11(a)(1). These regulations were substantially the same in 1986. However, in 1985, the regulations required only that the "permit applications . . . be signed . . . [f]or a corporation: by a principal executive officer of at least the level of vice-president." Environmental Permit Regulations: RCRA Hazardous Waste; SDWA Underground Injection Control; CWA National Pollutant Discharge Elimination System; CWA Section 404 Dredge or Fill Programs; and CAA Prevention of Significant Deterioration, 48 Fed. Reg. 14146-01, 14234 (Apr. 1, 1983) (subsequently codified at 40 C.F.R. § 270.11, as later amended from time to time). Additionally, the same regulations define "[o]wner or operator [to] mean[] the owner or operator of any facility or activity subject to regulation under RCRA." 40 C.F.R. § 270.2. Presumably, Plaintiffs believe that the EPA documents show that Hess was the legal possessor of the HOVIC refinery on St. Croix. They do not. If Plaintiffs could show that Hess signed the permit application or that Hess listed itself as the owner or operator of the HOVIC facility, then Plaintiffs might be on firmer ground. But the documents merely show activities by a parent company on behalf of its subsidiary. And even those EPA documents that were authored by Defendants' employees—the author concludes by inviting the addressee to contact him at a 201 number or an 809 number. 201 is a New Jersey area code while 809 was formerly the area code for the U.S. Virgin Islands, before the North American Numbering Plan Administration changed it to 340.

Here, the burden to show admissibility of the EPA documents shifted to Plaintiffs once Defendants challenged their relevancy because the proponent of evidence always bears the burden to show that evidence to be offered at trial is relevant and admissible. *E.g.*, *United States v. McCluskey*, 954 F. Supp. 2d 1224, 1237 (D.N.M. 2013) ("The proponent of the evidence has the burden of showing that expert evidence is admissible, by a preponderance of proof.”); *Henricksen v. Conoco Phillips Co.*, 605 F. Supp. 2d 1142, 1154 (E.D. Wash. 2009) (“It is the proponent of the expert who has the burden of proving admissibility." (citation omitted)); *cf. C.S. v. State*, 71 N.E.3d 848, 852-53 (Ind. Ct. App. 2017) (“The proponent of evidence has the burden to show its admissibility.” (citation omitted)). “[T]he purpose of a motion *in limine* . . . is to allow the trial court to rule in advance of trial on the admissibility and relevance of certain forecasted evidence.” *People v. Hatcher*, ___ V.I. ___, ____; 2018 V.I. LEXIS 34, *4 (V.I. Super. Ct. Mar. 22, 2018) (citations omitted). Plaintiffs failed to rebut Defendants’ motion by showing how even one EPA document out of the more than 1000 documents they produced connect the dots, i.e., show how Hess possessed the St. Croix refinery. (*Cf.* EPA Opp’n 2 (“Some of that material may be relevant; some may not be. Some of that material may be introduced as exhibits at trial (whether at the May 2018 trials, or at a future unscheduled trial); some may not.”).) The EPA documents which the Court has examined do not make it more or less likely that Hess possessed the St. Croix refinery.

> To hold a parent corporation responsible for injuries to employees of the subsidiary merely because of the control inherent in the parent-subsidiary relationship would destroy the long established protection afforded shareholders by incorporation. The parent-subsidiary relationship, by definition, includes the same elements which plaintiffs argue show "retained control" by the parent. In such relationship, the parent, as owner of all or most of the subsidiary's stock, is able to exert control over the subsidiary. To protect its investment and control of the subsidiary, the parent and subsidiary frequently share directors or officers and the parent may monitor the subsidiary's fiscal activities and dealings.

Maki v. Copper Range Co., 328 N.W.2d 430, 432-33 (Mich. Ct. App. 1982) (citations omitted). Plaintiffs have not sought to pierce the corporate veil. Rather, they claim that Hess and HOVIC are liable under a premises liability theory and for supplying a chattel dangerous for its intended use.

> The adversarial process gives the parties an incentive to raise evidentiary challenges *at the earliest opportunity* because failure to do so ordinarily results in their

> forfeiture. Raising evidentiary challenges early on also provides the proponent of the evidence the opportunity to respond by offering an alternative theory of admissibility or different, admissible evidence on the same point. Thus, the adversarial process properly places the burden of admissibility upon the interested party, allocates the original determination of admissibility to the district court, which is more familiar with the evidence, and preserves evidentiary disputes for appellate review with the aid of a full trial record.

Owens v. Republic of Sudan, 864 F.3d 751, 786 (D.C. Cir. 2017) (emphasis added). Plaintiffs have shown that the EPA documents may be admissible as public records, but they have not shown why the EPA documents are relevant to proving Hess' possession of the St. Croix refinery.

(2) Employment Motion

Defendants, in their second motion, seek to limit each Plaintiff to proving only "what actions were taken and what precautions were in place on the *first day* of employment for [that] Plaintiff and thereafter during their presence on refinery property." (Empl. Mot. 1 (emphasis added).) But no evidence "after ownership and operations of the refinery by HOVIC ceased" should be admitted, Defendants argue, because it would be "irrelevant and prejudicial." *Id.* St. Thor, for example, was employed by Virgin Islands Industrial Maintenance Corporation beginning in 1989. Evidence before 1989 should be excluded from his trial as well as evidence after 1998 because "the St. Croix oil refinery was no longer operated by HOVIC after October 31, 1998," Defendants state. *Id.* at 3. As for Charles, however, "he worked for Litwin beginning in 1978." *Id.* So, the evidence at his trial should only cover the years between 1978 and 1998 at the outer limit. "[A]cts or omissions that HOVIC or Hess took outside the relevant periods of employment have no probative value to Plaintiffs' cases in chief," Defendants conclude. *Id.* at 6. Instead, "[t]he relevant inquiry for plaintiffs concerns the conditions as the Plaintiffs found the refinery on the first day [of] work. Evidence concerning conditions at the refinery prior to the employment of Plaintiffs – or after – have no bearing on what

Plaintiffs personally experienced," Defendants argue, and should be excluded. *Id.*

Plaintiffs, in response, note that "[i]n premises liability cases, Virgin Islands courts typically require plaintiffs to demonstrate that the dangerous condition existed long enough before the injury that the possessor should have discovered it in the exercise of reasonable care." (Empl. Opp'n 2 (footnoting *Williams v. United Corp.*, 50 V.I. 191, 195-99 (V.I. 2008); *Joseph v. Speedy Gas, Inc.*, 55 V.I. 1219, 1228 (D.V.I. App. Div. 2011)).) Plaintiffs further cite *Perez v. Ritz-Carlton (Virgin Islands), Inc.*, 59 V.1. 522, 526 (V.I. 2013), a slip-and-fall case, and note that there "the plaintiff presented substantial evidence pre-dating the moment of her injury—including evidence that other people had previously slipped in the same location and expert testimony showing structural defects in area where she was injured-which all allegedly contributed to the fall and resulting injuries." *Id.* at 3 (footnote omitted). Plaintiffs argue that, "[t]he Virgin Islands Supreme Court found this evidence predating the plaintiff's injury sufficient to support a jury finding that the defendant had constructive knowledge of the dangerous condition on the premises." *Id.* (footnote omitted). Then in *Machado v. Yacht Haven, USVI, LLC,* 61 V.I. 373 (V.I. 2014), the Virgin Islands Supreme Court "extended the holding of Perez—that the 'foreseeability of harm is the touchstone of the existence of a land possessor's duty of reasonable or ordinary care'—to all premises liability actions," Plaintiffs remark. *Id.* (footnote omitted) (quoting *Machado*, 61 V.I. at 386 (brackets omitted)). "Here, like in *Perez* and *Machado*, evidence predating Plaintiff's injury is directly relevant to the key issues before the jury," Plaintiffs contend, including "whether Defendants knew or should have known of a dangerous condition in the Refinery and failed to protect workers from that danger." *Id.* at 4. They must be able to present such evidence, including evidence to rebut Defendants' expert's conclusion, "namely, that asbestos-containing insulation was present at the Refinery long after Plaintiff's [sic] employment there." *Id.* at 4-5. "This evidence," Plaintiffs argue, "goes to the heart of this case: knowledge, control, and causation. As a result, evidence 'outside the ownership/employment period' is relevant and admissible." *Id.* at 5.

In reply, Defendants reiterate that "[e]ach Plaintiff must prove that, at the time a particular Plaintiff's alleged exposure to asbestos occurred, Defendants knew or had reason to know that asbestos was present in the area that the Plaintiff worked." (Defs.' Reply in Supp. of Mot. *in limine* re: Pls.' Empl. Periods 3, filed Apr. 3, 2018 ("Empl. Reply") (citing *In re: Catalyst Litig.*, 55 V.I. 20 (Super. Ct. 2010).) "Assuming that the first date of employment at the Refinery is the earliest possible exposure date for any Plaintiff, four (4) of the Group A Plaintiffs entered the Refinery in 1988 or after, namely, Wilfred St. Thor (1989)." *Id.* at 4. But "St. Thor's limited time at the Refinery ended in 1991." *Id.* at 8. So, the evidence at trial in his case, Defendants reiterate, should be limited to that period – "the period between 1989 and 1991, [when] Defendants maintained a comprehensive policy to identify asbestos-containing insulation and remove it before work in an area affected by it would be permitted to be performed by workers such as Plaintiffs." *Id.*

The concern here is two-fold. Plaintiffs are correct that a plaintiff, in a premises liability case, may have to present evidence to the jury showing that a defendant had prior notice (actual or constructive) of a condition on the land and failed to take proper steps to eliminate that harm. *Cf. Perez*, 59 V.I. at 529-30 ("To establish that Appellees breached their duty to protect Ms. Perez against a dangerous condition, the Perezes had to show that Appellees had actual or constructive notice of the condition, and that they should have realized this condition involved an unreasonable risk of harm." (citations omitted)). Hess and HOVIC do not dispute that, from time to time, they were placed on actual notice of the presence of asbestos, but only once asbestos was actually discovered and only as to that specific location where it was discovered. In fact, Defendants concede that they "made the assumption that *all insulation* in the Refinery could contain asbestos," but contend that they "could not know that *a particular location* within a unit contained asbestos until it had been tested." (Empl. Reply 5 (emphasis added).) But Defendants veer off-course when they contend that "[t]he issue is not one of constructive notice or knowledge*." Id.* at 6. It is, or it can be—depending on what evidence Plaintiffs present to carry their respective burdens of proof.

"[A] plaintiff can establish that a possessor of land had constructive notice of a dangerous condition by introducing evidence that it had actual knowledge of a recurring dangerous condition." *Perez*, 59 V.I. at 535. Asbestos was repeatedly discovered throughout the refinery, that much is shown by the measures Defendants took to test for it. (*See* Empl. Reply 5-6 ("[B]efore any work was permitted in a unit, insulation in the area of the work was tested for asbestos and, if the presence of asbestos was confirmed, the asbestos was remediated. Thus, upon receipt of positive test results, Defendants had <u>actual knowledge</u> that asbestos existed <u>in the particular location tested</u>.").) Plaintiffs must be allowed to establish that HOVIC—and Hess should they carry their burden of proving that Hess was also a possessor of the St. Croix refinery—had actual knowledge of the presence of asbestos in the past, that asbestos was discovered time and again throughout the refinery, and that HOVIC and Hess, therefore, "had constructive notice of [that] dangerous condition." *Perez*, 59 V.I. at 535.

The flaw in Defendants' thinking is in their fixation on the "particular location[s] tested." (Empl. Reply 6 (emphasis omitted).) Defendants assume that the "premises" will differ for each Plaintiff. (*Cf.* Empl. Mot. 5 ("St. Thor only began employment at the refinery for IMC post Hurricane Hugo (after 9/89) . . . at which point Plaintiffs cannot establish where in the facility Plaintiff St. Thor actually worked nor where in the facility Plaintiff St. Thor worked that contained asbestos-containing products at the time. In fact, Defendant HOVIC had begun active remediation of certain areas identified to contain asbestos beginning in 1983.”).) But when a negligence claim is based on a premises liability theory, the premises is the focus. Here, the premises is the HOVIC oil refinery on St. Croix, not necessarily a particular location within that refinery. If premises liability claims were as narrow as Defendants suggest, Mrs. Perez might have had to show that Ritz-Carlton had constructive notice that the particular step on which she slipped and fell was dangerous, not the entire staircase. *Cf. Perez*, 59 V.I. at 537 (“[T]he Perezes identified sufficient evidence to support a jury finding that Appellees knew that it was raining on the day Ms. Perez fell, knew that whenever it rained leaves and debris would accumulate on the pathway and stairs, and knew that this created a dangerous condition.”). Further, assuming there were another “coral stone pathway and staircase,” *id.* at 525, on the St. Thomas Ritz-Carlton premises—not the same staircase that Mrs. Perez slipped and fell on—and assuming further that someone slipped and fell on this other staircase, then, per Hess and HOVIC’s position, Ritz-Carlton would not be on constructive notice because the other staircase was in a different location. It would not be the “particular location” where Mrs. Perez fell. In other words, the evidence in *Perez* showed that the coral stone “encouraged the growth of moss” and further that how the stairway was constructed “encouraged the accumulation of debris on the stairs during substantial rainfall.” *Id.* at 526. So long as this other “hypothetical” stairway were constructed in a similar way and used the same coral stone materials as the stairway Mrs. Perez slipped on, someone could argue to a jury in another case concerning another stairway that the hotel had constructive notice of the dangerous condition presented by the same construction and the use of the same materials. Clearly, each Plaintiff must be allowed to show that asbestos was present at the refinery before and during their employment.

But Defendants' overall concern—the potential for prejudice if the time frame is not limited in some way—is not lost on the Court. In fact, this is the second part of the Court's concern. "Evidence is relevant if it has any tendency to make a fact more or less probable than it would be without the evidence." V.I. R. Evid. 401. "HOVIC was established in 1965." (Empl. Mot. 2.) If asbestos had been discovered at a particular location within the refinery in 1970, for example, that fact would not be relevant, generally-speaking, to St. Thor, unless St. Thor could somehow show that Defendants did nothing and left the asbestos intact until he began working at the refinery in 1989. But the discovery of asbestos in 1970 could be relevant for Charles, for example. Defendants state in their motion that Charles "worked for Litwin beginning in 1978." *Id.* at 3. But Defendants fail to identify which "Litwin" Charles worked for. Defendants cited Charles' social security records in support and attached a copy of his records to their motion. But according to the same social security records, Charles worked for Litwin Construction, Inc., based out of Wichita, Kansas, from 1968 to 1970, then for Litwin Corporation, based out of Houston, Texas, in 1970 and 1972, before working for Litwin Pan-American Corporation, based out of St. Croix, U.S. Virgin Islands, from 1978 until 1984. Charles also worked briefly for Caribbean Litwin Corporation, based out of Houston, Texas, in 1983. Presumably, Defendants were referring to Litwin Pan-American Corporation when they stated that Charles "worked for Litwin beginning in 1978." *Id.* But if Hess or HOVIC had also contracted Litwin Construction or Litwin Corporation to perform work or services in the St. Croix refinery and Litwin (Construction, Corporation or both) hired Charles to do that work at that St. Croix refinery, then Defendants have not shown why evidence before 1978—assuming he worked for these companies at the refinery—should be excluded.

According to Charles' social security records, Charles also worked for La Compagnie Industrielle de Travaux (CITRA), based out of Santurce, Puerto Rico during the years 1968 to 1970, while working for Boebel & Son, Inc. in 1969, and the Sunny Isle Shopping Center, Inc. in 1970, both on St. Croix. It is possible that his work for CITRA was on a temporary or seasonal basis, allowing him to return from Puerto Rico to St. Croix from time to time and obtain employment here, with Boebel & Son and Sunny Isle Shopping Center, for example. But it is also possible that CITRA was contracted to perform work or provide services at the St. Croix oil refinery and, therefore, Charles worked for CITRA and then for Boebel & Son and Sunny Isle Shopping Center, perhaps in between or on a part-time basis afterward. Other refinery workers who claimed asbestos exposure had worked for CITRA and for Litwin around the same time as Charles. *E.g.*, *Der Weer v. Hess Oil V.I. Corp.*, SX-2005-cv-274, 2014 V.I. LEXIS 51, *2-3 (V.I. Super. Ct. Mar. 4, 2014) ("From 1967 to 1968, Der Weer worked for the Compagnie Industrielle de Travaux (CITRA) and then for Litwin Corporation from 1968 to 1970 with the exception of a few months in 1970 when Der Weer worked for Sud Americana de Electrificacion."). It is also possible that Charles may have worked for CITRA at the Harvey Alumina refinery on St. Croix. The HOVIC oil refinery was not the only refinery on St. Croix.

As the movant, Defendants have the burden to show why evidence pertaining to, for example, Charles' work at the refinery before 1978 must be excluded. That they have not done. Here, for example, it is not clear that Charles began working at the refinery in 1978 as Defendants contend. (*Contra* Ex. A., Letter from Christopher L. John, M.D. to Burns & Charest, LLP re: Thomas Charles, p.1 (Feb. 14, 2017) ("Charles is a 74-year old gentleman who was exposed to asbestos working at Hess Oil of St. Croix, Virgin Islands *from the early 1970s* until the early 1990s." (emphasis added)), attached to Catalyst/Silica Reply.). If the record is not sufficiently clear when each Plaintiff began working at the refinery, the Court cannot wholesale exclude all evidence *in limine* before their employment began because when they began working at the refinery is unclear. But what Defendants have shown is that the Court must ensure that the range or, in other words, the parameters for each Plaintiff's employment period must be tailored. This is in part the reason why the Court excluded a map the Plaintiffs' expert had prepared showing, cumulatively, where all asbestos was identified at the refinery. That map had the potential of misleading the jury because the discovery of asbestos in one location at the refinery in 1983 might not be relevant in St. Thor's case, for example, but could be relevant to in Charles' case. *See generally In re: Asbestos, Catalyst, & Silica Toxic Dust Exposure Litig.*, SX-15-CV-096, ___ V.I. ___, ____; 2018 WL 1940487 (V.I. Super. Ct. Apr. 24, 2018).

Plaintiffs are correct, "evidence before and after Plaintiff's injury are highly probative to [their claim of] Defendants' longstanding failure to protect workers at the Refinery from occupational asbestos exposure." (Empl. Opp'n 5-6.) And "Plaintiffs must be able to prove that asbestos was present at that refinery, but not limited to their first day of work going forward." *In re: Asbestos, Catalyst, & Silica Toxic Dust Exposure Litig*., SX-15-CV-096, ___ V.I. at ___; 2018 WL 1940487 at *5. But the evidence "before and after" each Plaintiff's period of employment must not be so broad that all evidence of asbestos on the premises from 1965 forward comes in, and not so narrow that it is restricted only to the specific period that Plaintiff worked at the refinery. Rather, it must be in a "Goldilocks" zone—not too short, not too long. *Accord Moore v. Baca*, CV 01-03552 FMC (Rcx), 2002 U.S. Dist. LEXIS 10195, *7 n.2 (C.D. Cal. May 21, 2002) ("The dilemma faced by counsel in crafting interrogatories is akin to the dilemma of Goldilocks visiting the home of the three bears. Crafting an interrogatory that is "too narrow" may result in the answering party failing to provide relevant evidence that is related to the interrogatory but is fairly excludable under the terms of the interrogatory. Crafting an interrogatory that is "too broad" results in valid objections due to overbreadth, irrelevance, and burdensomeness.”); *see also State v. Muzzy*, 79 P.3d 324, 329 (Ore. Ct. App. 2003) (“[T]here is a certain Goldilocks-like quality to the ‘some evidence’ standard. How much is enough? (citation omitted)). Defendants’ motion will be denied to this extent that it seeks to limit Plaintiffs to evidence of the first and last date each Plaintiff stepped foot on the refinery. But Defendants’ motion will be granted to the extent Plaintiffs seek to admit evidence too long before or after that individual Plaintiff’s presence on the St. Croix refinery premises.

(3) Catalyst/Silica Motion

In their third motion, Defendants ask the Court to “bar[] the Plaintiffs from introducing any evidence and or testimony concerning any alleged exposure to catalyst, silica or any other toxin at the HOVIC refinery.” (Catalyst/Silica Mot. 2.) Defendants contend that Plaintiffs have failed to produce “any evidence and or testimony concerning any alleged exposure to catalyst or silica products or any other alleged toxin at the HOVIC refinery.” *Id.* at 1. Plaintiffs, in their amended complaints, allege that they were “exposed to toxic dusts of asbestos, catalyst, and silica” while they were performing their “individual work duties” at the refinery. (Amend. Compl. ¶ 6, *St. Thor v. Hess Oil V.I. Corp., et al.*, SX-13-CV-458, filed Feb. 25, 2015; *accord* Amend. Compl. ¶ 6, *Newton v. Hess Oil V.I. Corp., et al.*, SX-14-CV-213, filed Apr. 21, 2015 (“The Plaintiff was exposed to toxic dusts of asbestos, catalyst and silica in the course of his individual work duties as well as when he was in the vicinity of other workers manipulating materials that created friable asbestos, catalyst and silica dust that traveled into his work area.”).) Defendants argue that, “[t]he only issue the Court need consider on this motion is the severe lack of Plaintiffs' support for those allegations in the complaint that surround catalyst and silica." (Catalyst/Silica Mot. 5.) "With ***zero*** evidence exchanged during discovery, including expert reports, which are necessary in order to prove causation, Plaintiffs have failed to offer any support to prove their case in chief that catalyst, silica, or any other toxic product or dust was the cause of their purported injuries." *Id.* (internal citations omitted). Thus, Defendants move *in limine* to bar all evidence of exposure to catalyst or silica.

Plaintiffs counter first, that Defendants "ask for an overly broad remedy," and second, that they should be permitted "to offer evidence and/or testimony concerning catalyst and silica exposure to the extent that such evidence demonstrates a pattern or practice of Defendants neglecting proper safety procedures at the St. Croix refinery. Any prejudice to Defendants will be *de minimus*." (Pls.' Resp. in Opp'n to Defs.' Mot. *in Limine* re: Evidence and/or Testimony Concerning Catalyst and Silica Exposure 1, filed Mar. 12, 2018 ("Catalyst/Silica Opp'n").) Plaintiffs further explain that,

> [w]hile working in the refinery on St. Croix, many of the Plaintiffs in this consolidated litigation worked with catalyst—a nickel and molybdenum compound used to enhance the refining process. And those same Plaintiffs will testify that they were not provided appropriate respiratory protection through the 1980s. Consider this testimony from bellwether plaintiff John Sonson:
>
>> Q. Okay. So before Hugo, did you ever wear any respiratory protection when you were handling catalyst?
>>
>> A. No. Just like I say, a piece of rag we had, because what we was doing is after the drum full, the forklift take it out, bring it on the side, and then we put the lid and cover it. We had no protection.
>>
>> Q. After Hugo, did you have protection?
>>
>> A. After Hugo, everything we do in the refinery, we have to get protection by the law of OSHA.
>
> The testimony of Mr. Sonson matches up with other Plaintiffs who worked with the catalyst material. It speaks to the pattern of practice at the St. Croix refinery

> of not providing the proper protective equipment for workers when handling dangerous substances.
>
> While the first two trial Plaintiffs, Wilfred St. Thor and Thomas Charles may not have been injured by catalyst or silica—that is, neither catalyst nor silica is a cause-in-fact of their pneumoconiosis—a broad prohibition on catalyst and silica testimony and evidence is unwarranted, both in (i) the remaining Group B cases set for trial that do not have finalized expert reports, and (b) every case, when used to show a pattern or practice of failing to provide protective equipment.

Id. at 2 (footnoted citation omitted). Defendants failed to engage in a "real discussion. . . of *how* they would be prejudiced if their lack of enforcement of respiratory protection protocol in the context of catalyst and silica were to be introduced at trial as evidence of a routine practice." *Id.* at 5. So, Defendants' "failures to follow catalyst and silica safety protocol demonstrates a 'routine practice' admissible under Rule 406," *id.* at 6, and therefore, it should be admissible.

In reply, Defendants reiterate that "[n]o expert has opined that the alleged injuries claimed by the Group A Plaintiffs were caused by exposure to anything other than asbestos." (Catalyst/Silica Reply 2.) And Defendants further contend that,

> even assuming that any of the Group A Plaintiffs had experienced exposures to catalyst and/ or silica without respiratory protection, it is Plaintiffs' burden, not Defendants' burden, to develop facts and expert testimony that would support sufficient exposures to such non-asbestos materials that would require respiratory protection and that Defendants practices and procedures relating to such exposures were inadequate. Plaintiffs' have presented no such evidence. They have not developed facts relating to the "habits or routine practices" relating to catalyst and/ or silica use at the HOVIC refinery. This is understandable, as these are asbestos cases. The "facts of consequence" relevant to these matters revolve around alleged asbestos exposures and related safety procedures. Evidence and/or testimony revolving around exposures to catalyst, silica and other toxins is simply not relevant.

Id. at 4 (quoting V.I. R. Evid. 406). The Court agrees.

The proponent of evidence bears the burden to show that the evidence is relevant and admissible at trial. So, Plaintiffs are simply incorrect in contending that they "were under no obligation to develop *their own* testimony on this subject." (Catalyst/Silica Opp'n 5.) Of course, a plaintiff does not depose himself. So, Plaintiffs are correct insofar as "[t]he onus is on the Defendants to ask the appropriate questions during discovery." *Id.* But ultimately, Plaintiffs have the burden of proof at trial and on a motion *in limine*, the proponent of the evidence has the burden to show that the evidence should be admitted. That said, "[a] ruling on a pretrial motion *in limine* is necessarily tentative because subsequent evidentiary developments may change the context." *Rufo v. Simpson*, 103 Cal. Rptr. 2d 492, 516 (Cal. Ct. App. 2001) (citations omitted). Courts recognize that *in limine* rulings are "necessarily tentative because the court retains discretion to make a different ruling as the evidence unfolds." *People v. Rodrigues*, 885 P.2d 1, 67 (Cal. 1994); *accord St. John v. Peterson*, 837 N.W.2d 394, 398 (S.D. 2013) ("The purpose of a motion *in limine* is to prevent prejudicial evidence, argument, or reference from reaching the ears of the jury. However, a trial court's ruling on a motion *in limine* is preliminary and may change depending on what actually happens in trial."). But on the papers presented so far, the Court finds that the danger of unfair prejudice and jury confusion is high.

Plaintiffs would have to explain to the jury what catalyst, asbestos, and silica are, how they are handled, the different forms they take, and what industry standards are for handling asbestos, catalyst, and silica, and then show that all three were present within the St. Croix refinery. Then, once a foundation has been laid, Plaintiffs would have to show Hess and HOVIC's handling of all three fell below the standard of care. Yet, Plaintiffs admit that "Wilfred St. Thor and Thomas Charles may not have been injured by catalyst or silica" because "neither catalyst nor silica is a cause-in-fact of their pneumoconiosis." (Catalyst/Silica Opp'n 2.) Such evidence of catalyst and silica could confuse the jury and is not relevant to Plaintiffs proving that they were exposed to asbestos, harmed by that exposure, or that Hess and HOVIC are responsible for their exposure to asbestos.

III. CONCLUSION

For the reasons stated above, the Court will deny the Plaintiffs' request to strike and grant the Defendants' motion *in limine* regarding EPA documents and grant in part and deny in part Defendants' motions *in limine* regarding Plaintiffs' employment periods and presence of catalyst or silica. An appropriate order follows.

Date: April 26, 2018.

ROBERT A. MOLLOY
Judge of the Superior Court

ATTEST:
ESTRELLA H. GEORGE
Clerk of the Court
By: ____________
Court Clerk Supervisor
Dated: 4/26/18