

SUPERIOR COURT OF CALIFORNIA, COUNTY OF ALAMEDA

Rene C. Davidson Courthouse

JEANETTE COMBS et al
Plaintiff/Petitioner(s)
VS.
ABB INC. et al
Defendant/Respondent
(s)

No. 23CV056760

Date: 02/10/2025

Time: 12:00 AM

Dept: 18

Judge: Patrick McKinney

ORDER RE: Contra Costa Electric's
Motion to Compel Genetic
Testing

Contra Costa Electric, Inc.'s motion to compel genetic testing of Jeanette Combs came on for hearing on February 6, 2025, at 1:30 p.m. Ahead of the hearing, the Court issued a tentative ruling, which Contra Costa Electric contested. After hearing from the parties, the Court took the matter under submission. Having considered the parties' written and oral arguments and evidence, the Court partly GRANTS the motion and partly DENIES the motion without prejudice.

I. Background

Contra Costa Electric moved for permission to obtain a saliva or blood sample from Jeanette Combs to conduct genetic testing to determine whether genetic mutation contributed to her mesothelioma.[1] (Mot., Dec. 12, 2024.) Contra Costa Electric argued that the genetic testing may help establish whether Jeanette Combs's mesothelioma was caused by exposure to asbestos or by 20 or 28 inherited gene mutations. (*Id.* 7:21– 9:23.)

In support, Contra Costa Electric offered the declaration of Lewis Chodosh, MD, PhD. (*See* Chodosh Decl., Dec. 12, 2024.) Dr. Chodosh is a professor at the University of Pennsylvania and the chair of the Department of Cancer Biology at the Perelman School of Medicine. (*Id.* ¶ 7.) Dr. Chodosh serves as an associate director for Basic Science in the Abramson Cancer Center at the University of Pennsylvania. (*Id.*) He has served as director of Cancer Genetics, and now serves as director of Tumor Biology, in the Abramson Family Cancer Research Institute. (*Id.*) "As an independent investigator at the University of Pennsylvania, [Dr. Chodosh] ha[s] focused on developing new experimental approaches to understanding the causes of cancer and on using that information to devise better methods for cancer prevention and treatment." (*Id.* ¶ 9.)

Dr. Chodosh stated that "mesothelioma is a genetic disease caused by the accumulation of genetic mutations." (*Id.* ¶ 13.) "Mutations may be either inherited, in which case they are present in every cell of the body, or acquired 'somatically' after birth in an individual cell or cells as a consequence either of normal cellular function and aging or exposure to mutagenic agents." (*Id.* ¶ 14.) "Inherited mutations are often referred to as 'germline' mutations because they are present

SUPERIOR COURT OF CALIFORNIA, COUNTY OF ALAMEDA

Rene C. Davidson Courthouse

in either the sperm or egg (which are classified as ‘germ’ cells) that together give rise to the fertilized egg.” (*Id.*)

Dr. Chodosh declared that a certain gene (called an oncogene), “when constitutively activated by mutation, acts to promote tumor development.” (*Id.* ¶ 16.) “When functioning appropriately, the proteins encoded by tumor suppressor genes act to prevent tumor formation, typically by relaying growth-inhibitory signals that inhibit cell proliferation, sensing and repairing DNA damage, or inducing programmed cell death in response to cellular stresses or warning signals.” (*Id.* ¶ 17.) But “[w]hen mutations inactivate tumor suppressor genes, tumor development is promoted.” (*Id.*) “There are dozens of known tumor suppressor genes, including BAP1.” (*Id.*) Recent genome sequencing has “revealed the presence of mutations (including amplifications and deletions) in a number of different oncogenes and tumor suppressor genes that are believed to contribute to the development of mesothelioma, including BAP1, NF2, TP53, SETD2 and others.” (*Id.* ¶¶ 18, 19.) Dr. Chodosh further declared that “a wealth of evidence now indicates that inherited mutations can cause mesothelioma,” such as “BAP1, TP53, BRCA2, CDKN2A, WT1, MRE11A, BARD1, ATM, ATR, CHEK2, MRE11A, NFI, MSH6, MSH3, SMO, KDR, MLH1, POT1, MUTYH, NBN, RAD51B, SDHA, XPC, and FANCA, FANCC, FANCD2, and FANCM.” (*Id.* ¶ 21.)

From his review of Jeanette Combs’s medical records, Dr. Chodosh opined that there is “a reasonable probability that Ms. Combs inherited a mutation in a tumor suppressor gene that predisposes to the development of mesothelioma.” (*Id.* ¶ 24.) Dr. Chodosh noted that Jeanette Combs is about 30 years younger than the average age of incidence for mesothelioma caused by asbestos exposure—she is 38 years old. (*Id.* ¶ 24(a).) Dr. Chodosh found this “alone suggests a reasonable probability that Ms. Combs inherited a mutation in a tumor suppressor gene that predisposes to the development of mesothelioma.” (*Id.*) Other factors also weighed in favor Dr. Chodosh’s finding, such as lack of “objective medical evidence of significant asbestos exposure” (*id.* ¶ 24(b)), presence of epithelioid mesothelioma (*id.* ¶ 24(c)), and life beyond one year of her diagnosis of pleural mesothelioma (*id.* ¶ 24(d)).) Dr. Chodosh also noted that at 37, Jeanette Combs developed basal cell carcinoma of the skin—a “relatively uncommon” carcinoma for persons under 40—and that her two sisters had also developed basal cell carcinomas while in their 30s or 40s. (*Id.* ¶ 24(e), (f).) In the same vein, Dr. Chodosh noted that Jeanette Combs’s grandmother had developed breast cancer, and her mother and sister had developed malignant melanoma. (*Id.* ¶ 24(g)–(i).) “Together,” Dr. Chodosh opined, “these facts strongly suggest that Ms. Combs’ mesothelioma was caused by a mutation in a tumor suppressor gene that she inherited from one of her parents, and that was present in every cell of her body at birth.” (*Id.* ¶ 24(j).)

Plaintiffs opposed. (Opp’n Mem., Jan. 24, 2025.) Plaintiffs first argued that Contra Costa’s motion was defective because it failed to serve a demand for a physical examination before filing this motion. (*Id.* 7:21–8:3.) Plaintiffs next argued that the proposed genetic testing rested on shaky scientific and legal foundation—specifically, that there is no evidence that any of the 20 or 28 genetic mutations can independently cause mesothelioma without prior exposure to asbestos—constituted an invasion of her privacy rights. (*Id.* 8:4–13:19.)

In passing, Plaintiffs noted that they had agreed to limited genetic testing as to a germline mutation of BAP1 but that Defendants denied stating they were interested in a broader array of

SUPERIOR COURT OF CALIFORNIA, COUNTY OF ALAMEDA

Rene C. Davidson Courthouse

genes. (*See id.* 2:28–3:2; *see also id.* (“Defendants, in the case at bar, had their chance to agree to testing Ms. Combs for a BAP1 mutation but declined.”).)

Contra Costa Electric and Siemens Industry, Inc. filed replies. (Contra Costa Elec.’s Reply Mem., Jan. 31, 2025; Siemens’s Reply Mem., Jan. 31, 2025.) Contra Costa Electric and Siemens argued that the parties’ pathology stipulation precluded a demand for genetic testing “without written authorization and agreement by plaintiffs’ counsel or by order of the court.” (Contra Costa Elec.’s Reply Mem. 2:12–3:3 (quoting Love Decl. Ex. 6, at ¶¶ 2, 3, Dec. 12, 2024); *see also* Siemens’s Reply Mem. 3:4–4:4.) Contra Costa Electric and Siemens next argued that Jeanette Combs placed her genetic composition at issue and its discovery is relevant to determining the cause of her mesothelioma, and thus waived her privacy rights. (Contra Costa Elec.’s Reply Mem. 3:4–4:12; *see also* Siemens’s Reply Mem. 4:5–6:25.)

II. Discussion

With exception to testing for a germline mutation of BAP1, the Court is unpersuaded that good cause exists to compel Jeanette Combs to submit to genetic testing of the breadth requested by Contra Costa Electric. With one exception, the Court is likewise skeptical that the proposed genetic testing is reasonably calculated to lead to the discovery of admissible evidence. (*See* Cal. Civ. Proc. Code § 2017.010 (articulating scope of discovery).)

Defendants did not submit sufficient medical evidence that the proposed 20 or 28 germline mutations independently cause mesothelioma. While some of Dr. Chodosh’s statements indicate that these inherited mutations may independently cause cancers, the Court disagrees that the submissions show there is “a wealth of evidence [that] now indicates that inherited mutations can cause mesothelioma.” Rather, reading Dr. Chodosh’s declaration as a whole and the medical research submitted (*see* Love Decl. Exs. 1, 2, 3), it seems more likely that persons with germline mutations that inactivate tumor suppressor genes are more susceptible than the average person to developing malignant mesothelioma. That is not a defense to causation because a “tortfeasor takes the plaintiff as he finds him.” (*See Harb v. City of Bakersfield* (2015) 233 Cal. App. 4th 606, 626.) The existence of multiple concurrent causes that combine to create an indivisible injury does not preclude recovery by Plaintiffs. (*See Logacz v. Limansky* (1999) 71 Cal. App. 4th 1149, 1159 (finding reversible error in failure to instruct jury on that rule).) Absent additional medical evidence showing that it is generally accepted that inactivated tumor suppressor genes independently cause mesothelioma, the Court will not permit the proposed genetic testing.

At the hearing, all counsel seemed to understand that this was cutting edge medical research; and that evidence of a plausible causal link between a germline mutation of BARD1, for instance, and mesothelioma may be discovered in the coming years. Recognizing that these developments might happen while this case is pending, the Court permits Defendants to renew their motion to compel genetic testing of germline mutation of one of the identified genes if and only if a qualified individual can testify that additional cancer research has demonstrated a plausible causal link between the identified germline mutation and mesothelioma unrelated to exposure to asbestos.

Further, Jeanette Combs has a strong privacy interest in maintaining the privacy of her genetic composition. (*See County of San Diego v. Mason* (2012) 209 Cal. App. 4th 376, 381 (“[A]

SUPERIOR COURT OF CALIFORNIA, COUNTY OF ALAMEDA

Rene C. Davidson Courthouse

person has a privacy interest in [their] own DNA profile and genetic information, even if only obtained and used for identification purposes.”.) Defendants put forth no compelling interest to intrude into Jeanette Combs’s privacy.

* * *

The sole exception is genetic testing for germline mutations of BAP1. First, Plaintiffs had previously offered Jeanette Combs’s consent. Second—and independent of her consent—the Court notes that unlike the other identified germline mutations, there is some evidence that a germline BAP1 mutation can be an independent cause of mesothelioma unrelated to asbestos exposure. (*See, e.g.*, Chodosh Decl. ¶ 21 (“Consistent with the interpretation that mutations in these genes are causes of cancer, deletion of BAP1 in genetically engineered mice has been demonstrated to cause the formation of a variety of cancers, including mesotheliomas.”).) Thus, Defendants have a right to discover whether there is an independent cause of Jeanette Combs’s mesothelioma unrelated to any exposure to asbestos. And to the extent that Jeanette Combs’s privacy will be invaded by this genetic test, the Court finds Defendants’ interest in obtaining evidence of independent cause of Jeanette Combs’s mesothelioma is compelling and overrides the minimal invasion of privacy as to germline mutations of BAP1.

III. Orders

The motion is GRANTED in part.

Jeanette Combs must produce a saliva or blood sample for genetic testing of a germline BAP1 mutation within 14 days of this order.

[1] Several defendants joined Contra Costa Electric’s motion. (*See* Schneider Elec.’s Joinder to Mot., Dec. 13, 2024; Tosco’s Joinder to Mot., Dec. 13, 2024; Eaton’s Joinder to Mot., Dec. 13, 2024; Siemens’s Joinder to Mot., Dec. 18, 2024; Oscar E. Erickson’s Joinder to Mot., Dec. 19, 2024; Gould Elec.’s Joinder to Mot., Dec. 20, 2024.)

Plaintiffs have since dismissed Oscar E. Erickson from the complaint without prejudice. (*See* Req. Dismissal, Jan. 9, 2025.)

The Court orders counsel to obtain a copy of this order from the eCourt portal.

Dated : 02/10/2025



Patrick McKinney / Judge

SUPERIOR COURT OF CALIFORNIA, COUNTY OF ALAMEDA

Rene C. Davidson Courthouse