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6 **IN THE UNITED STATES DISTRICT COURT**  
7 **FOR THE DISTRICT OF ARIZONA**

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9 Ahmad Alsadi and Youssra Lahlou,  
10 husband and wife,

No. CV-16-03738-PHX-DGC

11 Plaintiffs,

**ORDER**

12 vs.

13 Intel Corporation, a Delaware corporation,

14 Defendant.  
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17 The trial in this tort action was set for May 2020, but was postponed because of the  
18 COVID-19 pandemic. The Court plans to reset the trial at the earliest opportunity. The  
19 parties have filed 14 motions in limine (“MILs”) and Plaintiffs have filed a motion for  
20 negative inference. Docs. 207-08, 231-43. The Court heard oral argument on July 17,  
21 2020. This order resolves each motion.

22 **I. Background.**

23 Intel owns an industrial wastewater system (“IWS”) housed in the CH-8 building of  
24 its technology development campus in Chandler, Arizona. Technicians at Jones Lange  
25 LaSalle (“JLL”) operate the IWS. Plaintiff Ahmad Alsadi worked for JLL as a HVAC  
26 technician at Intel’s Chandler campus.

27 On February 28, 2016, an overdose of the chemical Thio-Red caused the IWS to  
28 emit hydrogen sulfide (“H<sub>2</sub>S”) and possibly other toxic gases. CH-8 and the nearby CN-3

1 building, where Alsadi was working at the time, were evacuated. Alsadi and other JLL  
2 employees were assembled near CH-8. Alsadi began experiencing a tingly throat, cough,  
3 headache, and watery eyes. He was evaluated by a nurse and then taken to an urgent care  
4 facility for treatment.

5 Plaintiffs filed suit against Intel in September 2016. Doc. 1-2 at 5-8. The second  
6 amended complaint asserts negligence and loss of consortium claims. Doc. 20. Plaintiffs  
7 allege that as a result of Alsadi's exposure to toxic gases, he has experienced coughing,  
8 pulmonary and respiratory distress, and other injuries requiring medical care. *Id.* ¶ 21.  
9 Alsadi seeks damages for his alleged injuries and future medical care. *Id.* ¶ 26. He claims  
10 that he is permanently disabled. *See* Docs. 161 at 5, 195 at 3.

11 The Court denied Intel's motion for summary judgment on Alsadi's negligence  
12 claim. Doc. 204 at 26-30. The Court granted Intel's motions to preclude Plaintiffs' experts  
13 from offering causation opinions in Plaintiffs' case-in-chief (*see id.* at 2-19, 22-25), but  
14 denied summary judgment on the issue of causation because a jury reasonably could find,  
15 without the benefit of expert medical testimony, that Alsadi was exposed to H<sub>2</sub>S and the  
16 exposure caused an immediate toxic inhalation injury (*see id.* at 30-33). Following  
17 supplemental briefing, the Court granted summary judgment in Intel's favor on whether  
18 Alsadi's exposure to H<sub>2</sub>S caused reactive airways dysfunction syndrome ("RADS"), but  
19 denied summary judgment on the extent and duration of his symptoms. Doc. 216 at 2-7.

## 20 **II. Plaintiffs' Motion for Negative Inference (Doc. 207).**

21 John MacDonald, Intel's emergency response team ("ERT") leader, responded to  
22 the chemical release at CH-8. Doc. 197-1 ¶ 39. MacDonald and Michael Torbert, a JLL  
23 employee, obtained an H<sub>2</sub>S reading of 11.7 parts per million ("ppm") inside CH-8 using a  
24 digital Altair 5X Gas Detector ("Altair detector"). *Id.* ¶ 43. The 11.7 ppm measurement  
25 is reflected as the "highest level detected" in an ERT report MacDonald prepared after the  
26 incident. Doc. 196-10 at 5. The ERT report is the only record of H<sub>2</sub>S measurements taken  
27 during the incident. Doc. 207 at 2, 7. Intel contends that an H<sub>2</sub>S level of 11.7 ppm could  
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1 not have caused the permanent symptoms claimed by Alsadi, and that there is no evidence  
2 that Alsadi was exposed to even that level. Doc. 210 at 4.

3 Plaintiffs contend that to accurately assess the highest level of Alsadi's actual  
4 exposure, "adequate data would be required – measurements of ambient gas levels over  
5 numerous points in time from the locations where [Alsadi] was working throughout the  
6 day." Doc. 207 at 3. Plaintiffs assert that no such data exist because Intel failed to preserve  
7 data recorded by the Altair detector and did not collect other data of H<sub>2</sub>S levels. *Id.*  
8 Plaintiffs request that a negative inference be applied in light of Intel's alleged failure to  
9 collect and preserve data showing actual levels of hazardous emissions, and that an  
10 appropriate jury instruction be given at trial. *Id.* at 2-3; Doc. 207-1 at 1. Since the briefing  
11 of this motion, the parties have agreed to a bench trial. Doc. 276 at 2. The issue presented  
12 by the motion, therefore, is whether the Court should apply a negative inference when  
13 deciding this case.<sup>1</sup>

14 Intel argues that it had no duty to preserve evidence before it received notice that  
15 litigation was probable, that it had no duty to create evidence of hazardous emission levels,  
16 and that Plaintiffs ignore Federal Rule of Civil Procedure 37(e), which governs negative  
17 inference sanctions for the loss of electronically stored information ("ESI"). Doc. 210  
18 at 2-3.

19 **A. Sanctions for Spoliation of Evidence.**

20 "It is well established that [a] 'duty to preserve arises when a party knows or should  
21 know that certain evidence is relevant to pending or future litigation.'" *Surowiec v. Capital*  
22 *Title Agency, Inc.*, 790 F. Supp. 2d 997, 1005 (D. Ariz. 2011) (quoting *Ashton v. Knight*  
23 *Transp., Inc.*, 772 F. Supp. 2d 772, 800 (N.D. Tex. 2011)). The failure to preserve relevant  
24 evidence, "once the duty to do so has been triggered, raises the issue of spoliation of  
25 evidence and its consequences." *Id.* (quoting *Thompson v. U.S. Dep't of Hous. & Urban*

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28 <sup>1</sup> The parties' agreement to a bench trial was confirmed during the hearing on  
July 17, 2020.

1 *Dev.*, 219 F.R.D. 93, 100 (D. Md. 2003)). “Spoliation is the destruction or material  
2 alteration of evidence, or the failure to otherwise preserve evidence, for another’s use in  
3 litigation.” *Id.* (citing *Ashton*, 772 F. Supp. 2d at 799-800); *see Pettit v. Smith*, 45 F. Supp.  
4 3d 1099, 1104 (D. Ariz. 2014) (same).

5 Rule 37(b)(2) permits a court to sanction a party for disobeying a discovery order,  
6 and Rule 37(e) permits a court to sanction a party for losing or destroying ESI it had a duty  
7 to preserve. Plaintiffs do not contend that Intel violated a discovery order or that a negative  
8 inference otherwise is warranted under Rule 37(b)(2). Nor do Plaintiffs address Rule 37(e)  
9 in their motion. *See* Doc. 207. Plaintiffs instead seek a negative inference based on the  
10 Court’s inherent authority to make appropriate rulings in response to the spoliation of non-  
11 ESI evidence. *Id.* at 3 (citing *Glover v. Bic Corp.*, 6 F.3d 1318, 1329 (9th Cir. 1993)).

12 The evidence Intel allegedly failed to preserve – electronic data recorded by the  
13 Altair detector (*see id.* at 2) – clearly constitutes ESI. Plaintiffs note in their motion that  
14 the Altair detector “has the ability to store data readings.” Doc. 207 at 5. They noted in  
15 their reply brief that Altair detectors “have the capability to log their data, and this data can  
16 be uploaded to a computer.” Doc. 215-1 at 8.<sup>2</sup>

17 Plaintiffs argued during the July 17 hearing that the data recorded on the Altair  
18 detector is not ESI within the meaning of Rule 37(e) because it was not stored on a  
19 computer system, but this is too narrow a reading of the phrase “electronically stored  
20 information.” That phrase was first added to the Federal Rules of Civil Procedure in 2006  
21 and is used in a number of rules. *See, e.g.*, Fed. R. Civ. P. 16, 26, 34, 37. Rule 34 states  
22 that ESI includes “writings, drawings, graphs, charts, photographs, sound recordings,  
23 images, and other data or data compilations – stored in *any medium* from which information  
24 can be obtained either directly or, if necessary, after translation by the responding party  
25 into a reasonably usable form.” Fed. R. Civ. P. 34(a)(1)(A) (emphasis added). The 2006

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27 <sup>2</sup> *See also* MSA, The Safety Company, Home/Portable Gas Detection/Multi-Gas/  
28 ALTAIR® 5X Multigas Detector, available at [https://us.msasafety.com/c/ALTAIR  
%C2%AE-5X-Multigas-Detector/p/000080001600001023](https://us.msasafety.com/c/ALTAIR%20AE-5X-Multigas-Detector/p/000080001600001023) (last visited July 9, 2020).

1 advisory committee note to Rule 34 explains that the meaning of ESI “is expansive and  
2 includes any type of information that is stored electronically.” Fed. R. Civ. P. 34(a)(1)  
3 advisory committee note to 2006 amendment. Although Rule 37(e) was not amended to  
4 its current form until 2015, the advisory committee note for the 2015 amendment makes  
5 clear that it was intended to apply to ESI as defined broadly in 2006: “The new rule applies  
6 only to electronically stored information, also the focus of the 2006 rule.” Fed. R. Civ. P.  
7 37(e) advisory committee note to 2015 amendment. That the 2015 rule was not limited to  
8 data stored on a computer system – as Plaintiffs argued at the hearing – is also made clear  
9 by the advisory committee’s observation that the amendment to Rule 37(e) was warranted  
10 by “the ever-increasing volume of electronically stored information and *the multitude of*  
11 *devices that generate such information[.]*” *Id.* (emphasis added). The Altair detector is  
12 one of those devices, and data recorded electronically on it clearly constitute ESI within  
13 the meaning of Rule 37(e).

14 Plaintiffs’ citation to *Glover* and their reliance on the Court’s inherent authority to  
15 sanction a party for spoliating evidence is not persuasive. “The 2015 amendment to  
16 Rule 37(e) now ‘forecloses reliance on inherent authority’ to determine whether and what  
17 sanctions are appropriate for a party’s loss of discoverable ESI.” *Small v. Univ. Med. Ctr.*,  
18 No. 2:13-CV-0298-APG-PAL, 2018 WL 3795238, at \*66 (D. Nev. Aug. 9, 2018) (quoting  
19 Rule 37(e) advisory committee’s note to 2015 amendment); *see Sherwood v. BNSF Ry.*  
20 *Co.*, No. 2:16-CV-00008-BLW, 2019 WL 1413747, at \*1 (D. Idaho Mar. 28, 2019) (noting  
21 that *Glover* may be revisited given the 2015 amendment to Rule 37(e)).

22 The drafters of Rule 37(e) specifically “intended to preempt use of other sources of  
23 sanctions – such state law or the long-established ‘inherent power’ doctrine – and require  
24 findings consistent with Rule 37(e) as the only path to remedying the loss of [ESI].”  
25 *Stevens v. Brigham Young University-Idaho*, No. 4:16-CV-530-BLW, 2019 WL 6499098,  
26 at \*3 (D. Idaho Dec. 3, 2019). They did so because they were seeking to bring uniformity  
27 to an area of the law that had been badly splintered by various courts’ reliance on inherent  
28 authority. *See* Rule 37(e) advisory committee note to 2015 amendment (“Federal circuits

1 have established significantly different standards for imposing sanctions or curative  
2 measures on parties who fail to preserve [ESI]. . . . Rule 37(e) . . . authorizes and specifies  
3 measures a court may employ if information that should have been preserved is lost, and  
4 specifies the findings necessary to justify these measures. It therefore forecloses reliance  
5 on inherent authority or state law to determine when certain measures should be used.”).

6       Once adopted through the procedures of the Rules Enabling Act, Rule 37(e) became  
7 the controlling authority for sanctions that can be imposed for the loss of ESI. *See* 28  
8 U.S.C. § 2072 (“All laws in conflict with such rules shall be of no further force or effect  
9 after such rules have taken effect.”). The exclusive nature of Rule 37(e) sanctions for the  
10 loss of ESI has been widely recognized. *See, e.g., Mannion v. Ameri-Can Freight Sys. Inc.*,  
11 No. CV-17-03262-PHX-DWL, 2020 WL 417492, at \*5 (D. Ariz. Jan. 27, 2020) (“[A] court  
12 cannot rely on its inherent authority or state law when deciding whether sanctions based  
13 on the loss of ESI are appropriate – the standards supplied by Rule 37(e) are exclusive.”)  
14 (citing S. Gensler, 1 Federal Rules of Civil Procedure, Rules and Commentary, Rule 37,  
15 at 1073 (2018)); *Nguyen v. Lotus by Johnny Dung, Inc.*, No. SACV 17-1317 JVS (JDEx),  
16 2019 WL 1950294, at \*4 (C.D. Cal. Mar. 14, 2019) (“Rule 37(e) . . . was amended to  
17 establish the findings necessary to support certain curative measures for failure to preserve  
18 [ESI]. This amendment ‘forecloses reliance on inherent authority . . . to determine when  
19 certain measures should be used’ to address spoliation of [ESI].”) (emphasis in original);  
20 *Waymo LLC v. Uber Techs., Inc.*, No. C 17-00939 WHA, 2018 WL 646701, at \*14 (N.D.  
21 Cal. Jan. 30, 2018) (“Because the evidence in question consists of [ESI], [Rule] 37(e),  
22 not inherent authority, supplies the controlling legal standard.”); *Tipp v. Adeptus Health*  
23 *Inc.*, No. CV-16-02317-PHX-DGC, 2018 WL 447256, at \*3 (D. Ariz. Jan. 17, 2018)  
24 (“A party seeking sanctions for spoliation of [ESI] must address the factors set forth in  
25 Rule 37(e) . . . . That rule, which was amended on December 1, 2015, identifies the  
26 circumstances under which various kinds of sanctions can be imposed for the loss of ESI.”).  
27 Plaintiffs’ reliance on *State v. Willits*, 393 P.2d 274 (Ariz. 1964), is unhelpful for the same  
28 reason. *See* Doc. 207 at 6.

1 Plaintiffs do not address the requirements of Rule 37(e) in their motion. *See*  
2 Doc. 210 at 3. Intel’s response argues that a negative inference is not appropriate under  
3 Rule 37(e) because Plaintiffs do not contend that Intel acted with intent to deprive Plaintiffs  
4 of ESI. *Id.* at 11-14. Plaintiffs counter in their reply that a negative inference is warranted  
5 under Rule 37(e). Doc. 215-1 at 10-12.

6 **B. Negative Inferences Under Rule 37(e).**

7 Under Rule 37(e), if ESI that “should have been preserved in the anticipation or  
8 conduct of litigation is lost because a party failed to take reasonable steps to preserve it,  
9 and it cannot be restored or replaced through additional discovery, the court:

10 (1) upon finding prejudice to another party from loss of the information,  
11 may order measures no greater than necessary to cure the prejudice; or

12 (2) only upon finding that the party acted with the intent to deprive  
13 another party of the information’s use in the litigation may:

14 (A) presume that the lost information was unfavorable to the party;

15 (B) instruct the jury that it may or must presume the information was  
16 unfavorable to the party; or

17 (C) dismiss the action or enter a default judgment.

18 There are two levels of sanctions under Rule 37(e). Rule 37(e)(1) permits a court,  
19 upon finding prejudice to another party from loss of ESI, to order measures no greater than  
20 necessary to cure the prejudice. Rule 37(e)(2) permits a court to impose more severe  
21 sanctions – including a negative inference – only if it finds that the spoliating party “acted  
22 with the intent to deprive another party of the information’s use in the litigation.” Fed. R.  
23 Civ. P. 37(e)(2); *see Miller v. Thompson-Walk*, No. CV 15-1605, 2019 WL 2150660, at \*10  
24 (W.D. Pa. May 17, 2019); *Sherwood*, 2019 WL 1413747, at \*1; *Mfg. Automation &*  
25 *Software Sys., Inc. v. Hughes*, No. CV 16-8962-CAS (KSX), 2018 WL 5914238, at \*6  
26 (C.D. Cal. Aug. 20, 2018); *Leidig v. BuzzFeed, Inc.*, No. 16-CV-542, 2017 WL 6512353,  
27 at \*7 (S.D.N.Y. Dec. 19, 2017).  
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1 “Rule 37(e)(2)’s drafters included its intent standard with a specific purpose: to  
2 reject cases that had authorized an adverse-inference instruction ‘on a finding of negligence  
3 or gross negligence.’” *EPAC Techs., Inc. v. HarperCollins Christian Publ’g, Inc.*, No.  
4 3:12-CV-00463, 2018 WL 1542040, at \*18 (M.D. Tenn. Mar. 29, 2018) (quoting  
5 Rule 37(e)(2) advisory committee’s note to 2015 amendment). The reason was explained  
6 by the Advisory Committee:

7 Adverse-inference instructions were developed on the premise that a party’s  
8 intentional loss or destruction of evidence to prevent its use in litigation gives  
9 rise to a reasonable inference that the evidence was unfavorable to the party  
10 responsible for loss or destruction of the evidence. Negligent or even grossly  
11 negligent behavior does not logically support that inference. Information lost  
12 through negligence may have been favorable to either party, including the  
party that lost it, and inferring that it was unfavorable to that party may tip  
the balance at trial in ways the lost information never would have.

13 Fed. R. Civ. P. 37(e) advisory committee note to 2015 amendment.

14 Plaintiffs do not contend that Intel intentionally lost or destroyed data of H<sub>2</sub>S levels  
15 to preclude Plaintiffs from using the data in litigation. Plaintiffs instead assert that the  
16 Altair detector “MacDonald used on the night of the incident to check H<sub>2</sub>S emission levels  
17 has the ability to store data readings, *but for whatever reason* Intel did not preserve the data  
18 collected that night.” Doc. 207 at 5 (emphasis added). “Whatever reason” is not sufficient  
19 to support an adverse inference under Rule 37(e)(2). Without evidence that Intel’s reason  
20 was to deprive Plaintiffs of the collected data, a negative inference is not available. *See*  
21 *Wolff v. United Airlines, Inc.*, No. 1:18-CV-00591-RM-SKC, 2019 WL 4450255, at \*4 (D.  
22 Colo. Sept. 17, 2019) (declining to impose a severe sanction under Rule 37(e)(2) where  
23 Plaintiff “produced no evidence to suggest that Defendant, when failing to suspend its  
24 automatic deletion of emails, acted with the intent to deprive Plaintiff of that evidence”);  
25 *Robinson v. Renown Reg’l Med. Ctr.*, No. 3:16-CV-00372-MMD-WGC, 2017 WL  
26 2294085, at \*3 (D. Nev. May 24, 2017) (denying motion for spoliation sanctions where the  
27 Plaintiff presented “no credible evidence of any intent by Renown to deprive Plaintiff of  
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1 the telephonic data, an indispensable element of the criteria for imposition of [an] adverse  
2 jury instruction”); *Porter v. City & Cty. of S.F.*, No. 16-CV-03771-CW(DMR), 2018 WL  
3 4215602, at \*4 (N.D. Cal. Sept. 5, 2018) (finding an adverse inference instruction  
4 unwarranted where there was no evidence that the defendant intentionally spoliated a  
5 phone call record). The Court will deny Plaintiffs’ motion for a negative inference to the  
6 extent it is based on Intel’s alleged failure to preserve electronic data the Altair detector  
7 collected on the night of the incident.<sup>3</sup>

8 Plaintiffs contend that the factfinder must be fully informed of the reasons behind  
9 Intel’s single H<sub>2</sub>S measurement of 11.7 ppm so that it may evaluate that evidence in the  
10 appropriate context. Doc. 215-1 at 12. The Court agrees. Plaintiffs will be free at trial to  
11 present admissible evidence about the measurement and other relevant facts, and to argue  
12 that the measurement is not a reliable indicator of Alsadi’s H<sub>2</sub>S exposure.

### 13 **C. Evidence Intel Did Not Collect.**

14 Plaintiffs assert that Intel was required to have early warning detection systems in  
15 place for hazardous emissions, including a “fixed 24/7 monitoring system” and “personal  
16 monitoring devices[.]” Doc. 207 at 5-6. Plaintiffs claim that Intel is to blame for the lack  
17 of adequate data because it had no such systems in place at the time of the incident. *Id.* at 3.

18 But spoliation sanctions apply when a party has lost or destroyed evidence, not when  
19 it has failed to create evidence. *See Mizzoni v. Allison*, No. 3:15-cv-00313-MMD-VPC,  
20 2018 WL 3203623, at \*4 (D. Nev. Apr. 4, 2018). “When determining whether to impose  
21 discovery sanctions for spoliation, the threshold question that the court must decide is  
22 whether relevant evidence existed. If no relevant evidence existed, then the motion for  
23 spoliation is moot.” *Burton v. Walgreen Co.*, No. 2:14-CV-84 JCM VCF, 2015 WL  
24 4228854, at \*2 (D. Nev. July 10, 2015)); *see Garcia-Garrido v. Outback Steakhouse of*  
25 *Fla., LLC*, No. 2:16-CV-01294-CWH, 2018 WL 2434062, at \*4 (D. Nev. May 30, 2018)

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28 <sup>3</sup> Given this ruling, the Court need not decide whether Intel had a duty to preserve  
ESI or when the duty was triggered. *See* Docs. 207 at 3-4, 210 at 6-9.

1 (“[B]efore a court will sanction a party for spoliation of relevant evidence, the moving  
2 party must demonstrate that the relevant evidence existed.”); *Lakes v. Bath & Body Works,*  
3 *LLC*, No. 2:16-CV-02989 MCE AC, 2019 WL 2124523, at \*4 (E.D. Cal. May 15, 2019)  
4 (“The court will not order an adverse inference instruction with respect to documents  
5 related to the possible chemical analysis or the alleged recall of the Pina Colada candle  
6 because there is an insufficient basis to conclude that such documents actually exist.”).

7 The Court will deny Plaintiffs’ motion for a negative inference. This ruling does  
8 not preclude Plaintiffs from presenting admissible evidence concerning Intel’s alleged  
9 failure to collect data of hazardous emission levels.

### 10 **III. Plaintiffs’ MIL Regarding the 11.7 ppm Measurement of H<sub>2</sub>S (Doc. 241).**

11 Plaintiffs move to preclude Intel from presenting evidence or argument  
12 that 11.7 ppm was the maximum level of H<sub>2</sub>S that Alsadi inhaled during the incident  
13 because any such suggestion has no evidentiary basis. Doc. 241. Intel notes that 11.7 ppm  
14 was the highest measured level of H<sub>2</sub>S in the vicinity of Alsadi’s alleged injury. Doc. 254  
15 at 2; *see* Doc. 196-10 at 5. Intel contends that it is Plaintiffs, not Intel, who would confuse  
16 the factfinder about the amount of H<sub>2</sub>S to which Alsadi was exposed. Doc. 254 at 3.

17 Alsadi’s level of H<sub>2</sub>S exposure will be for the factfinder to decide on the basis of  
18 available evidence. That evidence includes the 11.7 ppm reading by the Altair detector.  
19 The factfinder will be free to determine the significance, if any, of Intel’s failure to take  
20 additional measurements of H<sub>2</sub>S levels. *See E.E.O.C. v. GLC Restaurants, Inc.*, No. CV05-  
21 618 PCT-DGC, 2007 WL 30269, at \*8 (D. Ariz. Jan. 4, 2007) (denying motion in limine  
22 where the significance of a personnel file’s absence was for the jury to decide). The Court  
23 does not agree that Defendants should be precluded from presenting available evidence on  
24 H<sub>2</sub>S concentration levels and making arguments about the findings that should be made  
25 from that evidence. Plaintiffs may do the same. Now that this is a bench trial, the Court  
26 finds no risk of unfair prejudice or confusion and will deny Plaintiffs’ MIL. Doc. 241.

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1 **IV. Plaintiffs' MIL on Causation and Permanence of Symptoms (Doc. 208).**

2 Alsadi filed a workers' compensation claim with the Industrial Commission of  
3 Arizona ("ICA") several months before bringing this tort action in September 2016.  
4 Alsadi, JLL, and Hartford Accident & Indemnity Company ("Hartford") – JLL's workers'  
5 compensation insurer – were parties to the ICA proceeding. In October 2017, and pursuant  
6 to a stipulation of the parties, the ICA issued a decision awarding Alsadi permanent partial  
7 disability. *See* Doc. 208-6. Plaintiffs now invoke the doctrine of offensive collateral  
8 estoppel and contend that the ICA's decision bars Intel from disputing causation and the  
9 permanence of Alsadi's injury in this case. Doc. 208 at 2-5. The Court does not agree.

10 **A. Collateral Estoppel.**

11 Federal courts apply the collateral estoppel doctrine of the state where the prior  
12 decision was rendered. *Migra v. Warren City Sch. Dist. Bd. of Educ.*, 465 U.S. 75, 81  
13 (1984); *see Pardo v. Olson & Sons, Inc.*, 40 F.3d 1063, 1066 (9th Cir. 1994). Under  
14 Arizona law, offensive collateral estoppel applies where (1) the issue was actually litigated  
15 in the prior proceeding, (2) there was a full and fair opportunity to litigate the issue,  
16 (3) resolution of the issue was essential to the decision, (4) a valid and final decision on the  
17 merits was entered, and (5) there is common identity of the parties. *Hullett v. Cousin*, 63  
18 P.3d 1029, 1034 (Ariz. 2003); *see also Garcia v. Gen. Motors Corp.*, 990 P.2d 1069, 1073  
19 (Ariz. Ct. App. 1999); *N. Improvement Co. v. United States*, 398 F. Supp. 3d 509, 527 (D.  
20 Ariz. 2019). As the parties asserting collateral estoppel, Plaintiffs bear the burden of  
21 establishing each of the five elements. *Bayless v. ICA*, 880 P.2d 654, 659 (Ariz. Ct. App.  
22 1993). Plaintiffs have failed to establish the first, second, and fifth elements.

23 **1. The Issues Were Not Actually Litigated.**

24 "An issue is 'actually litigated' when it 'is properly raised by the pleadings or  
25 otherwise, and is submitted for determination, and is determined.'" *Faulkner v. Wausau*  
26 *Bus. Ins. Co.*, No. CV-10-1064-PHX-ROS, 2011 WL 13092025, at \*3 (D. Ariz. June 1,  
27 2011) (quoting *Chaney Bldg. Co. v. City of Tucson*, 716 P.2d 28, 30 (Ariz. 1986)). Where  
28 a decision is entered by stipulation, consent, or default, "none of the issues is actually

1 litigated.” *Id.* And “[i]f the issue was not actually litigated, that issue simply cannot be  
2 given issue preclusive effect.” *Id.*; *see 4501 Northpoint LP v. Maricopa Cty.*, 128 P.3d  
3 215, 219-20 (Ariz. 2006) (“Issue preclusion . . . applies only as to issues that have in fact  
4 been litigated and were essential to a prior judgment.”).

5 Plaintiffs assert that “[i]n determining the amount of benefits to which Alsadi was  
6 entitled, the ICA necessarily had to determine whether his medical limitations were caused  
7 by the [i]ncident and whether they were permanent[.]” Doc. 208 at 6. But Plaintiffs admit  
8 that the ICA’s decision was based in part on a stipulation between the parties. *Id.* at 4, 9;  
9 *see also* Doc. 208-6 at 2 (ICA decision explaining that Hartford, “[t]he defendant insurance  
10 carrier[,] notified the [ICA] that a permanent partial disability pursuant to A.R.S. § 23-1047  
11 exists”). “The Arizona Supreme Court does not apply issue preclusion when the issue was  
12 resolved by way of stipulation.” *Faulkner*, 2011 WL 13092025, at \*3; *see Chaney Bldg.*,  
13 716 P.2d at 30.

14 Plaintiffs argue that the ICA considered a great deal of evidence before determining  
15 the amount of Alsadi’s benefits, but have not shown that the issues of causation and  
16 permanence were “actually litigated” in the ICA proceedings. *Hullett*, 63 P.3d at 1034.  
17 Because the issues Plaintiffs “asks the Court to give preclusive effect to were not ‘actually  
18 litigated’ before the ICA [they] are not binding on [Intel] in this case.” *Faulkner*, 2011  
19 WL 13092025, at \*3; *see Kloberdanz v. Pellino*, No. 2:13-CV-2182 JWS, 2017 WL 20253,  
20 at \*2 (D. Ariz. 2017) (“The party asserting issue preclusion bears the burden of proof as to  
21 all elements and must introduce a sufficient record to reveal the controlling facts and the  
22 exact issues litigated.”) (citation omitted).

## 23 **2. Intel Had No Full and Fair Opportunity to Litigate the Issues.**

24 Plaintiffs assert that “JLL had a full and fair opportunity to litigate this matter and  
25 did so.” Doc. 7 at 13. But JLL’s litigation of issues in the ICA proceeding is irrelevant.  
26 Plaintiffs seek to bind Intel, which had no opportunity to participate in the ICA proceedings  
27 between Alsadi, JLL, and Hartford. *See* A.R.S. § 23-901(10) (defining an “[i]nterested  
28 party” for purposes of Arizona’s workers’ compensation statute as “the employer, the

1 employee, . . . the commission, [and] the insurance carrier”); *see also Smith v. CIGNA*  
2 *HealthPlan of Ariz.*, 52 P.3d 205, 212 (Ariz. Ct. App. 2002) (finding that the plaintiff “was  
3 never afforded a ‘full and fair opportunity’ to litigate the issues that were before the NLRB”  
4 where she “was ‘not allowed to examine or cross-examine witnesses, lodge objections,’ or  
5 otherwise litigate her claim”) (citations omitted).

### 6 **3. There Is No Common Identity of the Parties.**

7 “Although the doctrine of collateral estoppel precludes parties and their privies from  
8 relitigating issues, it is axiomatic that a stranger to a litigation may not be bound by a  
9 determination made therein for purposes of subsequent litigation.” *Fremont Indem. Co. v.*  
10 *ICA*, 697 P.2d 1089, 1092 (Ariz. 1985) (citing *Blonder-Tongue Labs., Inc. v. Univ. of Ill.*  
11 *Found.*, 402 U.S. 313, 329 (1971)). “This rule is premised upon preventing the inherent  
12 unfairness of binding a party to an issue determination he had no opportunity to contest.”  
13 *Id.* at 1092-93.

14 Plaintiffs make several arguments in an attempt to show that Intel was not a stranger  
15 to the ICA proceedings. Doc. 208 at 5, 7-9. None has merit.

16 Plaintiffs contend that JLL is the “real party in interest” in this case because JLL  
17 accepted Intel’s tender of defense and will be responsible for paying any judgment or  
18 settlement amount. Doc. 208 at 5. Plaintiffs argue that collateral estoppel “applies to  
19 prevent JLL, Alsadi’s employer standing in Intel’s shoes, from relitigating issues it has  
20 already conceded and that were properly decided by the ICA.” *Id.* at 8 (citing *Fremont*,  
21 697 P.2d at 1095; *Pollard v. ICA*, 767 P.2d 22, 23-24 (Ariz. Ct. App. 1988)).

22 It must be remembered, however, that Intel, not JLL, is the defendant in this case.  
23 Plaintiffs must establish Intel’s liability if they are to recover anything in this litigation.  
24 The fact that JLL has agreed to defend and indemnify Intel does not change this fact; it  
25 merely means that Intel, if held liable, can turn to JLL for indemnification. The question  
26  
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28

1 to be litigated remains Intel’s liability, and Intel took no part in the previous ICA  
2 proceeding.<sup>4</sup>

3 Plaintiffs’ reliance on *Fremont* is not persuasive. The Arizona Supreme Court made  
4 clear in *Freemont* that the “common identity of the parties” element “applies in  
5 compensation-related applications of the [collateral estoppel] doctrine.” 697 P.2d at 1093.  
6 *Fremont* involved separate work-related injuries sustained by the claimant in New Jersey  
7 and Arizona. In deciding whether to treat the New Jersey disability judgment as dispositive  
8 on the issue of earning capacity, the Arizona Supreme Court held that the parties were not  
9 bound under principles of collateral estoppel: “[B]ecause neither the employer nor the  
10 carrier were parties to the New Jersey disability judgment, neither could be collaterally  
11 estopped . . . from contesting that judgment’s validity.” *Id.* at 1094.

12 Plaintiffs cite no Arizona case holding that one who was not a party to ICA  
13 proceedings can be bound by ICA findings in a subsequent civil action for tort damages.  
14 Plaintiffs’ citation to *Pollard* is inapposite. Doc. 208 at 8. *Pollard* held that “where the  
15 employer is the same for two industrial injuries, and the first injury is determined to be  
16 scheduled, a subsequent carrier may not challenge that characterization[.]” 767 P.2d at 24.  
17 This case does not involve separate injuries involving the same employer, and it is Intel –  
18 not JLL’s carrier – that seeks to challenge causation and the permanence of symptoms in  
19 this tort action.

20 Plaintiffs’ citation to *Special Fund Division/No Insurance Section v. ICA*, 891 P.2d  
21 854 (Ariz. Ct. App. 1994), fares no better. Doc. 208 at 7, 9. In that case, the Special Fund  
22 Division of the ICA brought a special action challenging a disability classification of a  
23 successive claim because it was not a party to the underlying proceedings. 891 P.2d  
24 at 858-59. The court of appeals “concluded that notice and an opportunity to be heard are

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25  
26 <sup>4</sup> Intel notes that if JLL is in fact the real party in interest, this tort action must be  
27 dismissed based on the exclusivity provisions of the workers’ compensation statute.  
28 Doc. 211 at 9; *see* A.R.S. § 23-1022(A) (“The right to recover compensation pursuant to  
this chapter for injuries sustained by an employee . . . is the exclusive remedy against the  
employer[.]”). Plaintiffs’ briefing is silent on this point.

1 not required to bind a party *such as the Special Fund Division[.]*” *Id.* at 859 (emphasis  
2 added). Plaintiffs cite no case extending this rule to a private-party defendant in a tort  
3 action.

4 Plaintiffs further contend that “based on the nature of the relationship between Intel  
5 and JLL in this litigation, they clearly stand in privity with each other.” Doc. 208 at 8. But  
6 “privity between a party and a non-party requires both a substantial identity of interests  
7 and a working or functional relationship in which the interests of the non-party are  
8 presented and protected by the party in the litigation.” *Hall v. Lalli*, 977 P.2d 776, 779  
9 (Ariz. 1999) (internal quotations and citation omitted). The protection must have occurred  
10 in the prior litigation – the one argued to have preclusive effect. *Id.* (“the determinative  
11 question was whether mother and child had been in privity *at the time of the previous*  
12 *paternity claim*”) (emphasis added). Plaintiffs have not shown that JLL and Intel had a  
13 working or functional relationship in the ICA proceedings, or that JLL protected Intel’s  
14 interests in that proceeding. JLL clearly did not protect Intel’s interests by stipulating to  
15 causation and permanency, issues that are hotly contested in this case and which affect the  
16 amount of tort damages that could be awarded. In short, there is no “substantial identity  
17 of interests” between Intel and JLL or Hartford. *Hall*, 977 P.2d at 779.

18 Plaintiffs cite *French v. Rishell*, 254 P.2d 26 (Cal. 1953), for the proposition that  
19 JLL was acting as Intel’s agent in the ICA proceedings and Intel therefore is bound by the  
20 ICA’s decision. Doc. 208 at 9. In *French*, a fire department’s pension board claimed that  
21 it was not bound by a decision of California’s industrial accident commission where the  
22 city, but not the pension board, was a party to the proceedings. But under the city charter,  
23 the pension board and the city had an agency relationship. *French*, 254 P.2d at 29.  
24 Plaintiffs present no similar evidence to support their agency theory, and Intel notes that  
25 the Facilities Management Services Agreement between Intel and JLL makes clear that  
26 JLL is not Intel’s agent. Doc. 211 at 11-12; see Doc. 211-3 at 4 (“No contract of agency  
27 . . . [is] intended hereby. [JLL] is not an agent of Intel and has no authority to represent  
28 Intel as to any matters[.]”).



1                   **4. Collateral Estoppel Conclusion.**

2                   Plaintiffs have not shown that the issues of causation and permanence were actually  
3 litigated in the ICA proceedings, that Intel had a full and fair opportunity to litigate those  
4 issues, or that there is common identity of the parties. *See Hullett*, 63 P.3d at 1034.  
5 Collateral estoppel therefore does not apply and Intel is not barred from challenging  
6 causation and the permanence of Alsadi’s symptoms.

7                   **B. Presumptive Validity.**

8                   Alternatively, Plaintiffs argue that the ICA’s decision is entitled to “presumptive  
9 validity.” Doc. 208 at 10-12. The Court does not agree.

10                  “Because we live in a society with a highly mobile workforce, to require that an  
11 injured employee prove again the fact and degree of a prior disability, remote in place and  
12 time, would place an impractical burden upon him.” *Fremont*, 697 P.2d at 1095. Arizona  
13 courts thus have discretion to apply a presumptive validity rule in the workers’  
14 compensation context, which allows workers to continue receiving benefits awarded in one  
15 state when they move to another state. *See id.* (“[B]y reasons of comity, we recognize that  
16 the claimant suffered an industrial injury in New Jersey.”). In this case, Plaintiffs seek tort  
17 damages allegedly caused by negligent conduct in Arizona, not workers’ compensation  
18 benefits awarded in another state.

19                  Citing *Gnatkiv v. Machkur*, 372 P.3d 1010, 1015 (Ariz. Ct. App. 2016), Plaintiffs  
20 also contend that “no compelling reason exists not to defer to the ICA’s findings.”  
21 Doc. 208 at 11. But as explained above, the ICA’s decision was based in large part on a  
22 stipulation that a permanent disability exists. *See* Doc. 208-6 at 2. Neither the permanence  
23 of Alsadi’s symptoms nor the issue of causation was actually litigated before the ICA. The  
24 Court, in its discretion, declines to accord presumptive validity to the ICA’s decision. *See*  
25 *Fremont*, 697 P.2d at 1095 (“[T]he principle of ‘comity’ is that the courts of one state or  
26 jurisdiction will give effect to the laws and judicial decisions of another state or  
27 jurisdiction, not as a matter of obligation, but out of deference and mutual respect.”);  
28

1 *Gnatkiv*, 372 P.3d at 1014 (“The scope and applicability of comity rest within the court’s  
2 discretion.”).

3 The Court will deny Plaintiffs’ motion to exclude evidence and argument  
4 challenging causation and the permanence of Alsadi’s symptoms. Doc. 208.

5 **V. Plaintiffs’ MIL to Exclude Evidence of Alsadi’s Convictions (Doc. 240).**

6 On September 30, 2010, Alsadi was sentenced to probation after pleading guilty to  
7 misdemeanor simple assault and disorderly conduct in Pennsylvania. Doc. 258-1 at 3.  
8 Plaintiffs move to exclude evidence of the convictions under Federal Rules of Evidence  
9 609 and 403 because the convictions do not involve dishonesty and their probative value,  
10 if any, is substantially outweighed by the danger of unfair prejudice, confusing the issues,  
11 misleading the jury, and wasting time. Doc. 240 at 1-2.

12 During oral argument, the parties agreed that the COVID-delayed trial in this case  
13 will now occur more than 10 years after Alsadi’s conviction. As a result, the conviction is  
14 admissible only if “its probative value, supported by specific facts and circumstances,  
15 substantially outweighs its prejudicial effect.” Fed. R. Evid. 609(b). This standard is not  
16 met. The conviction has little or no probative value – it bears no relationship to the facts  
17 of this case, and would have little impeachment effect. *See* 4 Weinstein’s Federal Evidence  
18 § 609.05 (2020) (“crimes of violence generally have limited probative value concerning  
19 the witness’s character for truthfulness”). The Court will grant Plaintiffs’ motion to  
20 exclude evidence of Alsadi’s convictions for assault and disorderly conduct. Doc. 240.<sup>5</sup>

21 **VI. Plaintiffs’ MIL to Exclude Untimely Disclosed Evidence (Doc. 242).**

22 Plaintiffs move to exclude testimony from Intel employee Nathan Anders and four  
23 documents Intel disclosed in its sixth supplemental disclosure statement on April 19, 2019.

24  
25 \_\_\_\_\_  
26 <sup>5</sup> Intel asserts that Plaintiffs waived their objection by not raising it in the meet and  
27 confer process (*see* LRCiv 7.2(1)), but doing so clearly would not have changed the briefing  
28 as shown by Intel’s opposition to the motion. *See GEICO Indem. Co. v. Smith*, No. 3:12-  
CV-08127 JWS, 2017 WL 1282789, at \*1 n.1 (D. Ariz. Apr. 5, 2017) (electing to waive  
the meet and confer requirement in light of the parties’ briefing).

1 Doc. 242; *see* Doc. 242-1 at 3-4. Intel does not oppose the motion with respect to the four  
2 documents at issue. The Court will grant the MIL in this regard.<sup>6</sup>

3 On May 16, 2018, Plaintiffs’ served a Rule 30(b)(6) deposition notice on Intel.  
4 Doc. 242 at 2. Topic 9 of the notice sought a knowledgeable deponent to explain the  
5 “meaning and significance of . . . alarm messages, event titles, and report details contained  
6 in the Alarm Logs dated 2/26/16, and the ERT Event Details Report dated 1/26/18[.]” *Id.*  
7 Intel designated witness Robbie McGill. *Id.* She appeared for her deposition on  
8 September 14, 2018 – the discovery cutoff date – and testified that she was not able to  
9 address Topic 9. *Id.* More than four months later, on February 4, 2019, Intel disclosed  
10 Nathan Anders as its Rule 30(b)(6) witness for Topic 9. Doc. 255-1 at 2.

11 Citing Rule 37(c)(1), Plaintiffs argue that Intel should be precluded from calling  
12 Anders as a witness at trial due to the late disclosure. Doc. 242 at 2-3. Rule 37(c)(1)  
13 provides that a party that fails to disclose information required by Rule 26(a) “is not  
14 allowed to use that information . . . at a trial, unless the failure was substantially justified  
15 or harmless.” Intel asserts that any prejudice is of Plaintiffs’ own making because Intel  
16 offered to make Anders available for a deposition. Doc. 255 at 3. But Intel’s offer was  
17 made months after the close of fact discovery, and the Court had made clear before that  
18 time that “**no further** extensions of deadlines shall be granted absent extraordinary  
19 circumstances.” Doc. 98 at 1 (emphasis in original). Intel notes that it had asked Plaintiffs  
20 about the relevance of Topic 9, but Intel never sought a court order precluding testimony  
21 by a Rule 30(b)(6) witness on the topic.

22 During the July 17 hearing, Intel argued that its delay in identifying Anders was  
23 substantially justified because Plaintiffs worked cooperatively with Intel in awaiting the  
24 identification of a Topic 9 witness. But “the burden is on the party facing the sanction to  
25 demonstrate that the failure to comply . . . is substantially justified or harmless.”

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26  
27 <sup>6</sup> Two of the documents are job descriptions dated September 2015 and July 2016,  
28 the third document is a JLL organizational chart dated December 2015, and the fourth is  
an “Events Log” detailing the dosing of Thio-Red. Doc. 242 at 3.

1 *Transoceanic Cable Ship*, 2018 WL 3521174, at \*2-3 (quoting *Torres v. City of L.A.*, 548  
2 F.3d 1197, 1213 (9th Cir. 2008)); *see Yeti by Molly*, 259 F.3d at 1107 (“Implicit in  
3 Rule 37(c)(1) is that the burden is on the party facing sanctions to prove harmlessness.”).  
4 And Intel makes no showing that plaintiffs acquiesced in the four-month delay. The only  
5 communication attached to Intel’s response is an email identifying Anders four months  
6 after the close of discovery. Doc. 255-1 at 2.

7 Absent a showing of substantial justification or harmlessness, the exclusion of  
8 untimely disclosed witnesses under Rule 37(c)(1) “has been described by courts as a ‘self-  
9 executing, automatic sanction to provide a strong inducement for disclosure of material.’”  
10 *West v. City of Mesa*, 128 F. Supp. 3d 1233, 1247 (D. Ariz. 2015) (quoting *Yeti by Molly*,  
11 259 F.3d at 1106); *see* Fed. R. Civ. P. 37 advisory committee’s note to 1994 amendment.  
12 Indeed, “Rule 37(c)(1) gives teeth to [disclosure] requirements by forbidding the use at  
13 trial of any information required to be disclosed by Rule 26(a) that is not properly  
14 disclosed.” *Yeti by Molly*, 259 F.3d at 1106. Because Intel has not shown that its failure  
15 to timely disclose Anders as a witness is substantially justified or harmless, the Court will  
16 grant Plaintiffs’ motion and preclude Anders from testifying at trial. *See Nunes v. Cty. of*  
17 *Stanislaus*, No. 1:17-cv-00633-DAD-SAB, 2020 WL 1324808, at \*1 (E.D. Cal. Mar. 20,  
18 2020) (“Where a party does not provide a sufficient explanation for its late disclosure,  
19 preclusion of the witness and/or evidence is appropriate.”); *Wong v. Regents of Univ. of*  
20 *Cal.*, 410 F.3d 1052, 1061-62 (9th Cir. 2005) (upholding preclusion where party did not  
21 provide adequate explanation for late disclosure); *Quevedo v. Trans-Pacific Shipping, Inc.*,  
22 143 F.3d 1255, 1258 (9th Cir. 1998) (affirming preclusion of witness due to the plaintiff’s  
23 failure to justify his disregard for court’s discovery deadline); *Carpenter v. Universal Star*  
24 *Shipping, S.A.*, 924 F.2d 1539, 1547 (9th Cir. 1991) (upholding decision to disregard  
25 evidence based on “tardy submission of the evidence without explanation”).

## 26 **VII. Plaintiffs’ MIL Regarding the Cause of the Off-Gassing Incident (Doc. 243).**

27 Plaintiffs move to preclude Intel from presenting evidence or argument that it did  
28 not cause the IWS “off-gassing” incident because this would confuse and mislead the jury

1 regarding the concept of negligence and would invite the jury to assign fault to JLL.  
2 Doc. 243 at 1. Plaintiffs contend that because Intel retained affirmative duties with respect  
3 to the safety of the IWS, “it retained sufficient control to be liable for negligently exercising  
4 its safety responsibilities.” *Id.* at 2 (citing *Rause v. Paperchine, Inc.*, 743 F. Supp. 2d 1114,  
5 1122 (D. Ariz. 2010)).

6 Intel notes, correctly, that Plaintiffs essentially seek a summary judgment ruling on  
7 the issues of duty and causation. Doc. 256 at 1. A “motion in limine is not the proper  
8 vehicle for seeking a dispositive ruling on a claim, particularly after the deadline for filing  
9 such motions has passed.” *Hana Fin., Inc. v. Hana Bank*, 735 F.3d 1158, 1162 (9th Cir.  
10 2013) (citing *Dubner v. City & Cty. of S.F.*, 266 F.3d 959, 968 (9th Cir. 2001)). Moreover,  
11 the issue of retained control is “a *question of fact* which ordinarily should be left to the fact  
12 finder.” Doc. 204 at 29 (quoting *Lewis v. N.J. Riebe Enters., Inc.*, 825 P.2d 5, 11 (Ariz.  
13 1992) (emphasis in *Lewis*); *see also Lee v. M & H Enters., Inc.*, 347 P.3d 1153, 1159 (Ariz.  
14 Ct. App. 2015) (the issue of retained control generally is for the jury to decide “[b]ecause  
15 the issue of a breach of duty is inextricably linked with the scope of retained control”)  
16 (citing *Lewis*).

17 The Court will deny Plaintiffs’ motion to exclude evidence that Intel did not cause  
18 the off-gassing incident. Doc. 243.

### 19 **VIII. Intel’s MIL Regarding Health Effects Not at Issue (Doc. 231).**

20 Intel moves to exclude (1) the use of “inflammatory language” to describe H<sub>2</sub>S, such  
21 as the terms “toxic,” “hazardous,” and “poisonous”; (2) evidence and argument regarding  
22 health effects that H<sub>2</sub>S exposure can cause but that were not suffered by Alsadi; and  
23 (3) testimony from Plaintiffs’ standard of care expert, Greg Gerganoff, about the dangerous  
24 nature of H<sub>2</sub>S and health effects caused by exposure to the gas. Doc. 231.

#### 25 **A. The Purported Inflammatory Language.**

26 The Environmental Protection Agency classifies H<sub>2</sub>S as an “extremely hazardous  
27 substance.” 40 C.F.R. pt. 355, App. B. The Occupational Safety and Health  
28 Administration (“OSHA”) describes H<sub>2</sub>S as “a highly flammable, explosive gas” that

1 “produces other toxic vapors and gases, such as sulfur dioxide.” U.S. Dep’t of Labor,  
2 OSHA, <https://www.osha.gov/SLTC/hydrogensulfide/hazards.html> (last visited July 9,  
3 2020). The OSHA fact sheet for H<sub>2</sub>S explains that it is an “extremely hazardous gas” and  
4 “both an irritant and a chemical asphyxiant[.]” OSHA Fact Sheet, [https://www.osha.gov/  
5 OshDoc/data\\_Hurricane\\_Facts/hydrogen\\_sulfide\\_fact.pdf](https://www.osha.gov/OshDoc/data_Hurricane_Facts/hydrogen_sulfide_fact.pdf) (last visited July 9, 2020). The  
6 Centers for Disease Control describes H<sub>2</sub>S as a “flammable, highly toxic gas,” noting that  
7 “[t]here is no proven antidote for [H<sub>2</sub>S] poisoning.” CDC, Agency for Toxic Substances  
8 and Disease Registry, <https://www.atsdr.cdc.gov/mmg/mmg.asp?id=385&tid=67#> (last  
9 visited July 9, 2020). Thus, referring to H<sub>2</sub>S as toxic, hazardous, and poisonous is not  
10 inflammatory; it is a technically-correct description of the gas. The Court will deny Intel’s  
11 motion in this regard.

12 **B. Potential Health Effects Caused by H<sub>2</sub>S Exposure.**

13 Intel contends that reference to health effects caused by H<sub>2</sub>S that Alsadi did not  
14 experience would serve only to confuse and mislead the jury. Doc. 231 at 2. Because this  
15 will now be a bench trial, that risk is reduced significantly. In addition, the potential  
16 dangers posed by exposure to H<sub>2</sub>S are relevant to the standard of care. *See* Doc. 262 at 4.  
17 The Court does not find that the probative value of potential health effects caused by H<sub>2</sub>S  
18 exposure is substantially outweighed by the danger of confusing the issues or misleading  
19 the factfinder. *See* Fed. R. Evid. 403; *see also Benson Tower Condo. Owners Ass’n v.*  
20 *Victaulic Co.*, 702 F. App’x 537, 541 (9th Cir. 2017) (“Given the relevance of the health-  
21 related evidence, the district court did not abuse its discretion in finding that its probative  
22 value was not substantially outweighed by the danger of unfair prejudice.”). The Court  
23 will deny Intel’s motion in this regard.

24 **C. Gerganoff’s Proposed Testimony.**

25 Gerganoff is a work-place safety expert whose opinions are based on his technical  
26 knowledge, training, and experience. *See* Doc. 164-3. He opines that Intel failed to  
27 reasonably safeguard workers from a known hazardous condition and the failure caused  
28



1 Alsadi's injuries. *See* Doc. 180 at 13. The Court denied Intel's motion to exclude  
2 Gerganoff's safety-related opinions. Doc. 204 at 19-22.

3 Intel now moves to preclude Gerganoff from (1) describing H<sub>2</sub>S as "an extremely  
4 flammable gas, inhalation hazard, and deadly poison," and (2) opining that H<sub>2</sub>S "causes  
5 damage to the cardiovascular, central nervous, and respiratory systems" and is "known to  
6 cause apnea, coma, convulsions, dizziness, headache, weakness, irritability, insomnia, and  
7 stomach upset." Doc. 231 at 3 (quoting Doc. 164-4 at 4-5). For reasons stated above, the  
8 Court will not preclude Gerganoff from describing H<sub>2</sub>S as an extremely flammable gas,  
9 inhalation hazard, or deadly poison, or from describing the health effects it is known to  
10 cause.

11 Gerganoff is not a medical causation expert – he expressly states that his "role in this  
12 matter was not to make determinations of medical causation[.]" Doc. 181 at 5. Instead,  
13 his "role is to address how Intel's knowledge of hazardous conditions associated with its  
14 wastewater treatment system should have steered its safety practices and procedures, and  
15 how Intel fell woefully short." *Id.* Gerganoff may describe the hazardous nature of H<sub>2</sub>S  
16 in opining on the adequacy of Intel's safety practices, but he may not give medical  
17 causation opinions – he may not opine that H<sub>2</sub>S caused any particular illness or symptoms  
18 in Alsadi. *See* Doc. 262 at 4. The Court will grant Intel's motion with respect to such  
19 causation opinions.

#### 20 **IX. Intel's MIL Regarding Causation and Alsadi's Symptoms (Doc. 232).**

21 Three of Plaintiffs' experts opined that Alsadi's alleged symptoms were caused by  
22 H<sub>2</sub>S exposure: treating physician Dr. Anselmo Garcia and rebuttal experts Drs. Kelly  
23 Johnson-Arbor and Charles Landers. Applying Rule 702, the Court ruled that Dr. Garcia's  
24 causation opinions are not admissible and Dr. Landers's and Dr. Johnson-Arbor's opinions  
25 that exposure to H<sub>2</sub>S caused Alsadi to develop RADS are not admissible. Doc. 204 at 3-13,  
26 18-19. The Court further held that Dr. Johnson-Arbor's general causation opinion  
27 concerning RADS is not relevant given the grant of summary judgment on Plaintiffs' claim  
28 that Alsadi's exposure to H<sub>2</sub>S caused RADS. Doc. 216 at 8. The Court made clear,



1 however, that it has made no ruling on the admissibility of any opinion of Dr. Johnson-  
2 Arbor that H<sub>2</sub>S can cause some of the symptoms Alsadi has experienced since the exposure.  
3 *Id.*

4 Intel now contends that Plaintiffs' experts "should be precluded from offering *any*  
5 opinions on causation of any of Alsadi's claimed symptoms or diseases, whatever  
6 Plaintiffs' experts choose to call such outcomes." Doc. 232 at 3 (emphasis in original).  
7 Plaintiffs concede that the Court has excluded all three experts from testifying to specific  
8 causation – that Alsadi's exposure caused his symptoms – and vow to abide by the Court's  
9 rulings. Doc. 266 at 2-3.<sup>7</sup>

10 **A. Dr. Garcia.**

11 Plaintiffs assert that Dr. Garcia's testimony will not stray beyond the observations  
12 and opinions he formed as part of Alsadi's treatment. Doc 266 at 3. They argue that such  
13 observations and opinions are "percipient witness" testimony, not expert testimony, and  
14 therefore are not subject to Rule 702 of the Federal Rules of Evidence. *Id.* 1-2. In support,  
15 Plaintiffs rely on two unpublished decision of the Ninth Circuit – *Hoffman v. Lee*, 474 F.  
16 App'x 503, 505 (9th Cir. 2012), and *Oakberg v. Zimmer, Inc.*, 211 F. App'x 578, 580 (9th  
17 Cir. 2006) – and one published decision – *Goodman v. Staples The Office Superstore, LLC*,  
18 644 F.3d 817 (9th Cir. 2011). *Id.* The Court does not agree with Plaintiffs' arguments.  
19 The unpublished Ninth Circuit decision are not binding on the Court, and the published  
20 decision does not support their argument.

21 The published decision, *Goodman*, concerned the disclosure requirements of  
22 Rule 26 of the Federal Rules of Civil Procedure, not the admissibility of expert opinions  
23 under Rule 702 of the Federal Rules of Evidence. Whether a treating physician's testimony  
24 is expert testimony subject to Rule 702 or non-expert fact testimony (including non-expert  
25 opinions subject to Rule 701) must be determined by looking at the Federal Rules of

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26  
27 <sup>7</sup> The Court also found inadmissible Dr. Johnson-Arbor's opinions that Alsadi likely  
28 was exposed to concentrations of H<sub>2</sub>S higher than 11.7 ppm and that he likely has RADS.  
Doc. 204 at 16-18. Plaintiffs shall abide by these rulings as well.

1 Evidence. What is more, Rule 26 was amended in 2010, after the decision in *Goodman*, to  
2 clarify the disclosure requirements for treating physicians like Dr. Garcia.<sup>8</sup> A brief review  
3 of the rule’s history is relevant to Plaintiffs’ claim that Dr. Garcia can testify about his  
4 treatment of Alsadi without regard to Rule 702.

5 Before the 2010 amendments, Rule 26 required detailed expert reports from  
6 witnesses who were “retained or specially employed to provide expert testimony in the  
7 case or one whose duties as the party’s employee regularly involve giving expert  
8 testimony.” Fed. R. Civ. P. 26(a)(2)(B). Because treating physicians generally were not  
9 retained or specially employed to provide expert opinions in a case, but instead were asked  
10 to testify and express opinions on the basis of their treatment of the plaintiff, they were not  
11 required to prepare expert reports. *See* Fed. R. Civ. P. 26(a)(2)(B) advisory committee note  
12 to 1993 amendment (“A treating physician, for example, can be deposed or called to testify  
13 at trial without any requirement for a written report.”). This is not because the physicians  
14 were not giving expert opinions, but because they were not “retained or specially  
15 employed” as required by Rule 26(a)(2)(B).

16 The Ninth Circuit drew a sensible line in *Goodman*: physicians can testify about  
17 conclusions and opinions formed during the course of their treatment of the plaintiff  
18 without having to provide a Rule 26(a)(2)(B) expert report, but they cannot express new  
19 opinions formed for purposes of the litigation without disclosing them in such a report. In  
20 effect, physicians were deemed to be “retained or specially employed,” and therefore  
21 subject to the report requirement, if they develop opinions for purposes of the litigation.  
22 *Goodman*, 644 F.3d at 826 (“Today we join those circuits that have addressed the issue and  
23 hold that a treating physician is only exempt from Rule 26(a)(2)(B)’s written report  
24 requirement to the extent that his opinions were formed during the course of treatment.”).

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28 <sup>8</sup> *Goodman* was issued in 2011, but it concerned events that occurred before  
December 1, 2010, the effective date of the Rule 26 amendments.

1           The expert disclosures rules were amended in 2010 to close the discovery gap  
2 between retained experts who were required to provide a detailed report and non-retained  
3 experts who could provide expert testimony without a report. Rule 26(a)(2)(C) was added  
4 to require that any party who planned to call a non-retained expert to express expert  
5 opinions must disclose the “subject matter on which the witness is expected to present  
6 evidence under Federal Rule of Evidence 702” and “a summary of the facts and opinions  
7 to which the witness is expected to testify.” Fed. R. Civ P. 26(a)(2)(C). The advisory  
8 committee note provided this explanation:

9           A witness who is not required to provide a report under Rule 26(a)(2)(B) may  
10 both testify as a fact witness and also provide expert testimony under  
11 Evidence Rule 702, 703, or 705. Frequent examples include physicians or  
12 other health care professionals and employees of a party who do not regularly  
13 provide expert testimony. Parties must identify such witnesses under Rule  
26(a)(2)(A) and provide the disclosure required under Rule 26(a)(2)(C).

14 Fed. R. Civ. P. 26(a)(2)(C) advisory committee note to 2010 amendment.

15           These rules make clear, contrary to Plaintiffs’ suggestion, that treating physicians  
16 can provide expert testimony subject to Rule 702 even when they are not required to  
17 provide an expert report. For disclosure purposes, the line drawn in *Goodman* continues  
18 to make sense even after the 2010 amendments – treating physicians who will testify only  
19 to conclusions and opinions formed in the course of treating the plaintiff need only be  
20 disclosed in the party’s Rule 26(a)(2)(C) summary of the testimony, but treating physicians  
21 who will express opinions developed outside of their treatment must provide a Rule  
22 26(a)(2)(B) report for those opinions. Both categories of physicians, however, are subject  
23 to challenges under Rule 702 because both can present expert opinions. True, some of a  
24 treating physician’s testimony may be purely factual (“I provided plaintiff with a breathing  
25 treatment on June 1, 2017”), but some may be expert opinion under Rule 702 even though  
26 the opinion was developed in the course of treatment (“I provided the June 1, 2017  
27 breathing treatment because I had concluded that the plaintiff suffered from chemically-  
28 induced asthma due to his exposure on March 1, 2017.”).

1 In summary, Plaintiffs are incorrect in their claim that Dr. Garcia can testify about  
2 his treatment of Plaintiff without regard to Rule 702. If he expresses opinions formed  
3 during the course of treatment, those opinions likely will be based on based on Dr. Garcia’s  
4 scientific, technical, or other specialized knowledge and therefore will be subject to the  
5 requirements of Rule 702. *See* Fed. R. Evid. 701(c), 702. As the Court stated in a previous  
6 order, “any testimony Dr. Garcia might give about the cause of Alsadi’s injuries would be  
7 expert opinion under Rule 702.” Doc. 204 at 7 (citing cases).

8 The Court held in its previous order that Plaintiffs had not shown by a  
9 preponderance of the evidence that Dr. Garcia’s causation opinions are based on sufficient  
10 facts or data to which reliable principles and methods had been applied reliably. *Id.* at 10.  
11 The Court therefore concluded that his causation opinions are not admissible under  
12 Rule 702. *Id.*

13 Plaintiffs now suggest that Dr. Garcia may testify about “the *opinions*, actions, and  
14 observations formed during and relating to Alsadi’s treatment.” Doc. 266 at 3 (emphasis  
15 added). But the Court clearly has ruled that he cannot state causation opinions, and this  
16 ruling applies to opinions that identify the cause of Alsadi’s injuries even if they are  
17 couched in language other than causation. Intel may object if it thinks Dr. Garcia is  
18 expressing a causation opinion. Further, any other opinions he states likely will be based  
19 on his scientific, technical, or other specialized knowledge and therefore will be subject to  
20 the requirements of Rule 702, even if the opinions were formed during the course of his  
21 treatment of Alsadi. Intel may object if it believes any such opinion is not admissible under  
22 Rule 702.

23 **B. Drs. Landers and Johnson-Arbor.**

24 Intel contends that Dr. Landers should be precluded from providing any causation  
25 testimony at trial with respect to any of Alsadi’s symptoms. Doc. 232 at 4. The Court  
26 agrees. The Court previously held that Plaintiffs have not shown by a preponderance of  
27 the evidence that Dr. Landers’ causation opinion is based on reliable principles and  
28 methods applied reliably to the facts of this case. Doc. 204 at 13. The Court therefore held

1 that his causation opinion is not admissible under Rule 702. *Id.* As with Dr. Garcia, this  
2 ruling applies to any opinion that identifies the cause of Alsadi's injuries even if it is  
3 couched in language other than causation. Intel may object if it thinks Dr. Landers is  
4 expressing a causation opinion.<sup>9</sup>

5 Intel contends that Dr. Johnson-Arbor should not be permitted to provide any  
6 causation testimony at trial with respect to any of Alsadi's symptoms. Doc. 232 at 4. The  
7 Court agrees as to specific causation. The Court previously held that Plaintiffs have not  
8 shown by a preponderance of the evidence that Dr. Johnson-Arbor is qualified to render a  
9 specific causation opinion in this case or that her causation opinion is reliable. Doc. 204  
10 at 19. The Court therefore held that her causation opinion is not admissible under Rule 702.  
11 *Id.* As with Drs. Garcia and Landers, this ruling applies to any opinion that identifies the  
12 cause of Alsadi's injuries even if it is couched in language other than causation. Intel may  
13 object if it thinks Dr. Landers is expressing a causation opinion.

14 Plaintiffs suggest, however, that Dr. Johnson-Arbor may provide general causation  
15 opinions with respect to Alsadi's non-RADs symptoms. Doc. 266 at 4. The Court agrees.  
16 The Court previously clarified that it "has made no ruling on the admissibility of any  
17 opinion of Dr. Johnson-Arbor that H<sub>2</sub>S can cause some of the symptoms Alsadi has  
18 experienced since the exposure event. Intel has not challenged any such opinion."  
19 Doc. 216 at 8. Thus, the Court has not precluded Dr. Johnson-Arbor from giving a general  
20 causation opinion that H<sub>2</sub>S can cause symptoms of the kind Alsadi is experiencing. But  
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24 <sup>9</sup> With respect to Dr. Landers, Plaintiffs note, correctly, that the Court found his  
25 diagnosis of RADS sufficiently reliable to be admissible under Rule 702. *Id.* (citing  
26 Doc. 204 at 15). But the Court made this finding before granting summary judgment to  
27 Intel on whether Alsadi's alleged exposure to H<sub>2</sub>S caused RADS. Doc. 216 at 5. Because  
28 Plaintiffs are now "precluded from seeking to recover for RADS" (*id.*), Dr. Landers'  
diagnosis of RADS is irrelevant. *See id.* at 16 ("The Court will enter summary judgment  
on Plaintiffs' claim that Alsadi's exposure caused RADS, and with no such claim in the  
case, Dr. Johnson-Arbor's general causation opinion is not relevant.") (citing Fed. Rs.  
Evid. 401-02). Intel, however, did not challenge Dr. Landers's RADS diagnosis as  
irrelevant in its MIL. *See* Doc. 266 at 3. Intel may object at trial.

1 she cannot testify to specific causation – that the exposure in fact caused those symptoms.  
2 That finding, if made in this case, must be based on Plaintiff’s non-expert evidence.

3 **X. Intel’s MIL Regarding New and Worsening Symptoms (Doc. 233).**

4 The Court denied summary judgment on the issue of causation because a jury  
5 reasonably could find, without the benefit of expert medical testimony, that Alsadi was  
6 exposed to H<sub>2</sub>S and the exposure caused a toxic inhalation injury on the night in question  
7 and immediately thereafter. Doc. 204 at 30-33. After receiving supplemental briefing, the  
8 Court granted summary judgment on the issue of whether Alsadi’s exposure to H<sub>2</sub>S caused  
9 RADS and denied summary judgment on the extent and duration of Plaintiffs’ injuries.  
10 Doc. 216 at 9 (“[A]lthough Plaintiff now lacks evidence to show that he suffers from  
11 RADS, he is not precluded under Arizona law from presenting evidence that he suffered an  
12 inhalation injury on the night in question, that has persisted.”) (citations omitted).

13 Intel now moves to exclude evidence and argument of new and worsening  
14 symptoms. Doc. 233. Intel claims that Plaintiffs intend to present evidence that Alsadi’s  
15 initial symptoms “somehow ‘triggered’ the development of new and different symptoms,  
16 such as wheezing, coughing fits, ‘electric shock’ type chest pain, shortness of breath,  
17 vomiting, and incontinence.” *Id.* at 3. Intel contends that proving such new and different  
18 symptoms requires admissible expert testimony that Plaintiffs cannot offer, and that such  
19 evidence is also necessary to show that “Alsadi’s immediate symptoms grew substantially  
20 worse over the months and years following the alleged exposure.” *Id.* at 3-4.

21 As previously explained, the Court intends “to permit Plaintiffs to present evidence,  
22 if offered in admissible form, that Alsadi’s symptoms which developed immediately upon  
23 exposure (and which the jury therefore could properly conclude were caused by the  
24 exposure) have continued and likely will continue into the future, but not to permit them  
25 to present evidence of new or different symptoms that were not immediately apparent upon  
26 exposure.” Doc. 216 at 7. The Court maintains its view that this is the correct approach  
27 given Plaintiffs’ lack of expert causation evidence, but the Court must “engage in this line-  
28 drawing as the evidence is presented at trial.” *Id.* The Court’s task will be to determine

1 from the evidence whether Alsadi's claimed injuries are new and different symptoms or a  
2 continuation of the symptoms he experienced at the time of exposure. The parties will be  
3 permitted to present evidence and arguments on this issue, and the Court will make its  
4 findings based on what the evidence proves, not on speculation. Intel's motion (Doc. 233)  
5 will be denied.<sup>10</sup>

6 **XI. Intel's MIL Regarding Michael Torbert's Trial Testimony (Doc. 234).**

7 Torbert worked for JLL at Intel's Chandler campus when the off-gassing incident  
8 occurred. Intel asserts that Torbert offers three categories of inadmissible testimony in his  
9 deposition – expert opinions, hearsay, and “additional objectionable testimony.” Doc. 234  
10 at 2. Intel provides various examples of the purported inadmissible testimony, but “has  
11 not attempted to list every instance of inadmissible testimony in [Torbert's] deposition.”  
12 *Id.*

13 Intel's motion “sweeps too broadly and is an improper attempt to pre-try the case.”  
14 *Smilovits v. First Solar, Inc.*, No. CV12-0555-PHX-DGC, 2019 WL 6698199, at \*4 (D.  
15 Ariz. Dec. 9, 2019); *see PCT Int'l Inc. v. Holland Elecs. LLC*, No. CV-12-01797-PHX-  
16 JAT, 2015 WL 875200, at \*14 (D. Ariz. Mar. 2, 2015) (“motions in limine are not an  
17 opportunity to pre-try the case”); *Universal Engraving Inc. v. Metal Magic Inc.*, No. CV  
18 08-1944 PHX RJB, 2011 WL 13070114, at \*1 (D. Ariz. July 12, 2011) (same). Intel may  
19 object at trial to testimony it believes is expert opinion, hearsay, or inadmissible under  
20 Rule 403. The Court will be far better equipped to rule on specific testimony at that time.

21 The Court will deny Intel's motion regarding Torbert's trial testimony. Doc. 234.

22 **XII. Intel's MIL Regarding Testimony of Gases Other than H<sub>2</sub>S (Doc. 235).**

23 Intel moves to preclude Dr. Thomas Abia, an Intel chemical engineer, and three of  
24 Plaintiffs' experts, from testifying about sulfur dioxide or gases other than H<sub>2</sub>S. Doc. 235.

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27 <sup>10</sup> Intel asserts in a footnote that Plaintiffs did not timely disclose Dr. Gerald  
28 Schwartzberg to offer expert opinions as required by Rule 26(b)(2). Doc. 233 at 3, n.3.  
Plaintiffs address this argument in their response to Intel's motion in limine regarding  
expert testimony of certain medical professionals (Docs. 237, 267).



1           **A. Dr. Johnson-Arbor.**

2           The rebuttal expert disclosure deadline in this case was January 11, 2019. Doc. 142  
3 at 1. On March 29, 2019 – more than two months after the deadline – Plaintiffs filed a new  
4 declaration from Dr. Johnson-Arbor in which she opines, among other things, that Alsadi  
5 inhaled sulfur dioxide (“SO<sub>2</sub>”) and possibly other hazardous gases and the exposure caused  
6 various symptoms and RADS. Doc. 159-2. Intel moved to strike the declaration as  
7 untimely and because Johnson-Arbor’s new SO<sub>2</sub> opinions are inadmissible speculation.  
8 Doc. 167. The Court denied the motion as moot given its ruling that Dr. Johnson-Arbor is  
9 not qualified to render a causation opinion in this case and her causation opinions are not  
10 reliable. Doc. 204 at 19 & n.13.

11           Intel contends that if Dr. Johnson-Arbor’s belated SO<sub>2</sub> exposure opinion survived  
12 the Court’s exclusion of her causation opinions and H<sub>2</sub>S exposure opinion (*see* Doc. 204  
13 at 16-19), her SO<sub>2</sub> opinion should be precluded for reasons stated in Intel’s motion to strike  
14 and *Daubert* motion (*see* Docs. 147, 167). Doc. 235 at 2-3. In response to this argument,  
15 Plaintiffs do not explain their failure to comply with the January 11, 2019 rebuttal expert  
16 disclosure deadline. Doc. 142 at 1. The Court cannot conclude that Plaintiffs’ failure was  
17 “substantially justified or harmless,” Fed. R. Civ. P. 37(c)(1), and will grant Intel’s motion  
18 to exclude Dr. Johnson-Arbor’s SO<sub>2</sub> exposure opinion set forth in her March 29, 2019  
19 declaration (Doc. 159-2). *See Nunes*, 2020 WL 1324808, at \*1; *Food Servs. of Am., Inc.*  
20 *v. Carrington*, No. CV-12-00175-PHX-GMS, 2013 WL 4507593, at \*17 (D. Ariz. Aug. 23,  
21 2013) (striking untimely expert disclosures).

22           **B. Greg Gerganoff.**

23           Intel asserts that Gerganoff’s expert reports and declarations “are littered with  
24 unsupported speculation that SO<sub>2</sub> and other unknown ‘hazardous gases’ might have  
25 been released during the incident at issue.” Doc. 235 at 3 (citing Docs. 164-4 at 3-5,  
26 181 ¶¶ 12, 22). Intel argues that because Gerganoff provides opinions from a safety  
27 standpoint, and not from a scientific perspective, he should be precluded from speculating  
28 that SO<sub>2</sub> and other toxic gases may have been released. *Id.* (citing Doc. 204 at 20-21).

1 Plaintiffs assert that they do not seek to introduce evidence of a specific amount of  
2 SO<sub>2</sub> or any other gas in the ambient air on the night in question, but only the likelihood that  
3 SO<sub>2</sub> was present based on the known fact that SO<sub>2</sub> is a by-product of the IWS System and  
4 Intel's own testimony. Doc. 261 at 2. But Plaintiffs do not explain why expert testimony  
5 is necessary for this purported "known fact." Nor have Plaintiffs shown that Gerganoff is  
6 qualified to offer a scientific opinion that there was a significant release of SO<sub>2</sub> from the  
7 overdosing of the chemical Thio-Red. *See, e.g.*, Doc. 181 ¶ 22.

8 Plaintiffs note that Gerganoff formed his opinion about the potential for SO<sub>2</sub>  
9 exposure from data provided by Intel and the testimony of Dr. Abia and Jennifer Francis,  
10 an Intel industrial hygienist. Doc. 261 at 2. Gerganoff may rely on that testimony and  
11 Intel's data in offering standard of care opinions, but he may not opine from a scientific  
12 perspective that SO<sub>2</sub> and toxic gasses other than H<sub>2</sub>S may have been released. The Court  
13 will grant Intel's motion in this regard.

14 **C. Derrick Denis.**

15 Intel moves to preclude Derrick Denis, an indoor environmental quality expert, from  
16 opining that SO<sub>2</sub> may have been present because H<sub>2</sub>S can be involved in certain chemical  
17 reactions that produce SO<sub>2</sub>. Doc. 235 at 4. But Intel provides only four pages of Denis'  
18 25-page declaration in support of its motion. The Court cannot conclude on the present  
19 record that Denis is not qualified to offer the challenged opinion. The Court will rule at  
20 trial on any objection to Denis' testimony. Intel's motion will be denied in this regard.

21 **D. Dr. Abia.**

22 Dr. Abia is an Intel chemical engineer and the "system owner" of Intel's IWS. *See*  
23 Doc. 261 at 3. Intel moves to preclude Dr. Abia from testifying that SO<sub>2</sub> likely was released  
24 because Plaintiffs "completely mischaracterize Dr. Abia's testimony." Doc. 235 at 4. But  
25 Intel presents no argument or legal authority for excluding "mischaracterized" testimony.  
26 *See id.*; Doc. 190 at 10.

27 Intel contends that any such testimony from Dr. Abia would constitute expert  
28 opinion that was not properly disclosed. Doc. 235 at 4-5. But Dr. Abia is a fact witness

1 whom Intel designated as its Rule 30(b)(6) deponent on “what other hazardous gases,  
2 fumes or substances could have potentially been released on the date of the subject incident  
3 as a result of the IWS processes.” *Id.* (quoting Doc. 261-6 at 3). “Courts routinely permit  
4 witnesses to offer lay opinion testimony concerning matters they learn or experience they  
5 gain as a result of their employment.” *Vasserman v. Henry Mayo Newhall Mem’l Hosp.*,  
6 65 F. Supp. 3d 932, 946-47 (C.D. Cal. 2014) (citing cases). The Court will not preclude  
7 Dr. Abia from testifying as a fact witness about the possible release of SO<sub>2</sub>. If Plaintiffs  
8 seek to elicit inappropriate expert opinions from Dr. Abia, Intel may object. *See Wilson v.*  
9 *Maricopa Cty.*, No. CV-04-2873-PHX-DGC, 2007 WL 686726, at \*16 (D. Ariz. Mar. 2,  
10 2007) (allowing the defendants’ consultant on the issue of inmate safety in Tent City to  
11 testify as a fact witness at trial, but noting that defendants could object to any inadmissible  
12 expert opinions). Intel’s motion will be denied with respect to Dr. Abia’s testimony as a  
13 fact witness.

### 14 **XIII. Intel’s MIL Regarding Certain OSHA Regulations (Doc. 236).**

15 The Ninth Circuit has recognized that “safety standards such as those contained in  
16 OSHA assist ‘a jury’s determination of negligence because they represent the community’s  
17 judgment as to what conduct is reasonable and what conduct is not.’” *Cooper v. Firestone*  
18 *Tire & Rubber Co.*, 945 F.2d 1103, 1107 (9th Cir. 1991) (citations omitted). Consistent  
19 with this authority, the Arizona Court of Appeals has held that “an OSHA standard may be  
20 considered as some evidence of the standard of care even when OSHA requirements are  
21 not binding on the defendant, so long as there is sufficient foundation (1) establishing that  
22 the standard at issue is directly related to the exercise of reasonable care and (2) a  
23 reasonable nexus exists between the proffered standard and the circumstances of the  
24 injury.” *Wendland v. AdobeAir, Inc.*, 21 P.3d 390, 396 (Ariz. Ct. App. 2009).

25 Intel contends that certain OSHA-based opinions Gerganoff sets forth in his report  
26 (Doc. 164-4) are inadmissible under *Wendland* because the OSHA rules do not set a  
27 standard of care and otherwise are irrelevant. Doc. 236 at 3-4. As the Court previously  
28 explained, Gerganoff is not required to accept Intel’s interpretation of OSHA standards.

1 Doc. 204 at 21. The Court cannot conclude on the present record that Gerganoff's  
2 OSHA-based opinions are inadmissible. Intel will be free to cross-examine Gerganoff at  
3 trial and to object on the basis of foundation, relevancy, Rule 403, or other grounds. The  
4 Court will rule on objections as they are made. *See id.* Intel's motion regarding certain  
5 OSHA regulations will be denied.

6 **XIV. Intel's MIL Regarding Certain Medical Professionals (Doc. 237).**

7 **A. Drs. Vu, Spangenberg, Shobe, and Kamarinos.**

8 Plaintiffs disclosed various treating physicians who may testify about their  
9 evaluations and treatment of Alsadi's injuries, the extent of those injuries, and treatment  
10 costs. Docs. 237-2, 267-1, 267-2. Intel moves to preclude Drs. Le Vu, Bethanie  
11 Spangenberg, Darren Shobe, and Syros Kamarinos from offering expert opinions of any  
12 kind, including on causation, diagnosis, and prognosis, because they were not properly  
13 identified as expert witnesses under Rule 26(a)(2). Doc. 237 at 2-3. Plaintiffs vow that  
14 the doctors will not testify to causation, but assert that as properly disclosed percipient fact  
15 witnesses, they "may testify to and opine on what they saw and did[.]" Doc. 267 at 2  
16 (quoting *Goodman*, 644 F.3d at 819).

17 As explained above, however, treating physicians are not exempt from the  
18 requirements of Rule 702 simply because they formed their opinions in the course of  
19 treatment, and therefore are not exempt from the disclosure requirements of Rule  
20 26(a)(2)(C). As other courts have recognized, treating physicians "are often considered  
21 'hybrid experts' because they can provide both fact testimony (as percipient witnesses to  
22 the services rendered to the patient) and expert testimony (based on their specialized  
23 knowledge)." *Scolaro v. Vons Cos., Inc.*, No. 2:17-cv-01979-JAD-VCF, 2019 WL  
24 7284738, at \*3 (D. Nev. Dec. 27, 2019) (citing *Goodman*, 644 F.3d at 819; Fed. R. Civ. P.  
25 26, advisory committee's note to 2010 amendment). If Plaintiffs intended to call treating  
26 physicians to opine about the treatment of Alsadi, they were required by Rule 26(a)(2)(C)  
27 to disclose "the subject matter on which the witness is expected to present evidence under  
28 Rule 702" and "a summary of the facts and opinions to which the witness is expected to

1 testify.” *Alsadi*, 2019 WL 4849482, at \*3; *see Transoceanic Cable Ship Co. LLC v.*  
2 *Bautista*, No. CV 17-00209 ACK-KSC, 2018 WL 3521174, at \*2 (D. Haw. July 20, 2018)  
3 (“Treating physicians testifying as to opinions formed during the course of treatment are  
4 ‘experts’ regarding whose testimony the Rule 26(a)(2)(C) disclosures are required.”)  
5 (citing *Republic of Ecuador v. Mackay*, 742 F.3d 860, 865 n.1 (9th Cir. 2014)). The  
6 Rule 26(a)(2)(C) “summary, although clearly not as detailed as a Rule 26(a)(2)(B) report,  
7 must be sufficiently detailed to provide fair notice of what the expert will say at trial.”  
8 *Leland v. Cty. of Yavapai*, No. CV-17-8159-PCT-SPL (DMF), 2019 WL 1547016, at \*6  
9 (D. Ariz. Mar. 18, 2019); *see Flonnes v. Prop. & Cas. Ins. Co.*, No. 2:12-cv-01065-APG,  
10 2013 WL 2285224, at \*5 (D. Nev. May 22, 2013) (“[I]dentification of the subject matter  
11 on which the witness is expected to testify is insufficient to comply with the summary of  
12 facts and opinions requirement of Rule 26(a)(2)(C).”).

13 Plaintiffs’ disclosures identify the subjects on which the treating physicians may  
14 opine under Rule 702 – the treatment of Alsadi’s injuries, the extent of those injuries, and  
15 the cost of treatment – but come “nowhere close to providing a summary of the facts and  
16 opinions of any single physician[,] as required by Rule 26(a)(2)(C).” *Frederick v.*  
17 *Frederick*, No. CV-17-00368-PHX-JJT, 2018 WL 3738199, at \*1 (D. Ariz. Aug. 7, 2018);  
18 *see Meza v. Wacker Neuson Sales Ams. LLC*, No. 2:18-CV-0574-HRH, 2019 WL 2417396,  
19 at \*5 (D. Ariz. June 10, 2019) (“While plaintiffs’ disclosure as to Dr. Foltz arguably  
20 identifies the subject matter on which he will testify, it does not contain a summary of  
21 Dr. Foltz’s facts and opinions. Plaintiffs have not complied with Rule 26(a)(2)(C).”);  
22 *Garrett v. Woodle*, No. CV-17-08085-PCT-BSB, 2018 WL 6110924, at \*4 (D. Ariz.  
23 Nov. 21, 2018) (plaintiff’s disclosures failed to comply with Rule 26(a)(2)(C) where they  
24 indicated that “the healthcare providers will have opinions in certain areas, including  
25 [p]laintiff’s injuries and the causation of those injuries, but do not state what the opinions  
26 are, and do not identify the factual basis for those opinions”); *Deguzman v. United States*,  
27 No. 2:12-CV-0338 KJM AC, 2013 WL 3149323, at \*4 (E.D. Cal. June 19, 2013)  
28 (“Plaintiff’s disclosure of Dr. Anderson was accompanied by a statement that fails to meet

1 even the most liberal interpretation of Rule 26(a)(2)(C). That Dr. Anderson intended to  
2 testify to ‘the nature and extent of plaintiff’s injuries, cause of those injuries, diagnosis,  
3 prognosis, reasonableness of medical expenses and necessity of treatment’ is obvious  
4 and hardly promotes the goal of increasing efficiency and reducing unfair surprise.”);  
5 *Pineda v. Cty. of S.F.*, 280 F.R.D. 517, 523 (N.D. Cal. 2012) (merely stating that the  
6 treating physician “will present fact and opinion testimony on causation, diagnosis,  
7 prognosis, and extent of injury” based on medical records was an inadequate disclosure  
8 under Rule 26(a)(2)(C)).

9 A party that fails to disclose information required by Rule 26(a) is not allowed to  
10 use that information at a trial unless the failure was substantially justified or harmless. Fed.  
11 R. Civ. P. 37(c)(1). Plaintiffs do not contend that their failure to comply with the disclosure  
12 requirements of Rule 26(a)(2)(C) was substantially justified or harmless. The Court will  
13 grant Intel’s motion to preclude Drs. Vu, Spangenberg, Shobe, and Kamarinos from  
14 offering expert opinions at trial.<sup>11</sup>

15 **B. Drs. Leff and Schwartzberg.**

16 Plaintiffs disclosed Drs. Ben Leff and Gerald Schwartzberg as persons who may  
17 have knowledge regarding their findings and independent medical examinations of Alsadi  
18 in his worker’s compensation matter. Docs. 237-2 at 4, 267-2 at 4. Intel moves to preclude  
19 the doctors from offering expert opinions because Plaintiffs failed to comply with the  
20 Rule 26 expert disclosure requirements. Docs. 233 at 3 n.3, 237 at 4.

21 Plaintiffs do not contend that they disclosed Drs. Leff and Schwartzberg as expert  
22 witnesses under Rule 26(a)(2). *See* Doc. 161-1. Instead, Plaintiffs state that they have “no  
23 interest in any opinions these doctors formed outside of their examinations of Alsadi,” and

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24  
25 <sup>11</sup> The doctors may testify as percipient fact witnesses because Plaintiffs properly  
26 disclosed them under Rule 26(a)(1)(A)(i). *See* Doc. 267-2; *Transoceanic Cable Ship*, 2018  
27 WL 3521174, at \*6 (“Dr. Joaquin may testify at trial in the limited capacity of a fact  
28 witness, but . . . he may not give any testimony that draws on his medical expertise. Said  
another way, Dr. Joaquin may testify regarding what he perceived and did during his visits  
with Bautista, the timing and frequency of such visits, and other matters to which he is  
competent to testify by way of personal – but not specialized – knowledge.”).



1 that the doctors’ “opinions and reports are [to be] treated as would be those of a treating  
2 doctor and percipient witnesses.” Doc. 267 at 2. Again, however, if Plaintiffs intend to  
3 call the physicians to offer opinions under Rule 702 about their evaluation or treatment of  
4 Alsadi, they must make Rule 26(a)(2)(C) disclosures. Plaintiffs did not provide the  
5 information required by this rule in their disclosures about Drs. Leff and Schwartzberg.

6 Plaintiffs contend that the Court should allow Dr. Leff to testify consistent with his  
7 reports because their failure to properly disclose him as an expert witness was substantially  
8 justified and harmless. Doc. 267 at 3-4 (citing Fed. R. Civ. P. 37(c)(1)). The Court does  
9 not agree.

10 Dr. Leff examined Alsadi and prepared a report of his findings on January 18, 2017.  
11 Doc. 161-12.<sup>12</sup> But Plaintiffs did not disclose him as a potential witness until May 2018,  
12 and have never disclosed him as an expert witness. *See* Docs. 237 at 4, 267 at 3. The fact  
13 that the Court has excluded certain opinions of Plaintiffs’ designated experts does justify  
14 the failure to properly disclose Dr. Leff as an expert witness. *See* Doc. 267 at 4 n.3; *Mettias*  
15 *v. United States*, No. CIV. 12-00527 ACK-KS, 2015 WL 998706, at \*5 (D. Haw. Mar. 6,  
16 2015) (failure to disclose medical providers as experts was not substantially justified where  
17 their identities were known to the government when the action was commenced and it had  
18 more than a year to provide expert disclosures); *see also Bauer Bros., LLC v. Nike, Inc.*,  
19 No. 09-CV-0500-WQH BGS, 2011 WL 12828588, at \*3-4 (S.D. Cal. Oct. 19, 2011)  
20 (finding that the plaintiff’s failure to provide an expert report more than two months after  
21 the court clarified the role of “hybrid experts” in light of *Goodman* was not substantially  
22 justified).

23 Plaintiffs contend that so long as an expert’s opinions at trial do not differ  
24 substantially from opinions offered in the expert report, they are not late for purposes of  
25 Rule 26(a) and therefore are not subject to Rule 37 preclusion. *Id.* at 4 (citing *Godinez v.*

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28 <sup>12</sup> Dr. Leff corrected a mistake he made concerning Alsadi’s weight in a subsequent  
addendum. *See* Doc. 267 at 4.



1 *Huerta*, No. 16-CV-0236-BAS-NLS, 2018 WL 2018048, at \*8 (S.D. Cal. May 1, 2018)).  
2 But Plaintiffs never disclosed Dr. Leff as an expert witness. Plaintiffs' citation to *Godinez*  
3 is misplaced because the plaintiff in that case properly disclosed its expert witness and his  
4 report under Rule 26(a)(2). 2018 WL 2018048, at \*8.

5 The fact that Intel has been aware of Dr. Leff's examination of Alsadi for workers'  
6 compensation purposes does not render harmless Plaintiffs' failure to affirmatively  
7 disclose him as an expert witness in this case. The issue is not whether Intel knew of the  
8 existence and work of Dr. Leff, but whether they knew Plaintiffs intended to call him as a  
9 Rule 702 witness at trial. Only the latter knowledge would enable Intel to prepare to meet  
10 his opinions at trial. *See* Doc. 267 at 3; *Pac. Indem. Co. v. Nidec Motor Corp.*, 203 F.  
11 Supp. 3d 1092, 1097 (D. Nev. 2016) ("Harmlessness may be established if a disclosure is  
12 made sufficiently before the discovery cutoff to enable the movant to depose the expert  
13 and challenge his expert report.") (citations omitted). "This is not a case where Plaintiffs  
14 have substantially complied with the rule but a minor, technical failing . . . is at issue.  
15 Plaintiffs have clearly failed to comply with the basics of the rule, and their attempt to  
16 downplay the significance of this failure to comply by speculating as to [Intel's] prejudice  
17 (or lack thereof) is unavailing." *Montalvo v. Am. Family Mut. Ins.*, No. CV-12-02297-  
18 PHX-JAT, 2014 WL 2986678, at \*7 (D. Ariz. July 2, 2014).

19 Plaintiffs assert that they should be allowed to call Dr. Schwartzberg to offer  
20 opinions about his examination of Alsadi because he "was retained and properly disclosed  
21 by Intel" and Plaintiffs disclosed "any witnesses listed by [Intel], whether or not withdrawn  
22 prior to trial." Doc. 267 at 3. This tactic, if accepted, would defeat the purpose of Rule 26  
23 disclosures, which are meant "to give each side clear notice of who will be giving opinion  
24 testimony . . . so that each side can prepare to respond, including taking depositions. A  
25 vague cross-reference to the other side's witnesses does not provide that notice." *Castillo*  
26 *v. City & Cty. of S.F.*, No. C 05-00284 WHA, 2006 WL 618589, at \*2 (N.D. Cal. Mar. 9,  
27 2006) (holding that the defense disclosure did not adequately put plaintiff on notice that it  
28 intended to call a doctor and ask him Rule 702 opinion questions).

1 The Court will grant Intel's motion to preclude Plaintiffs from calling Drs. Leff and  
2 Schwartzberg as expert witnesses. Docs. 233 at 3 n.3, 237 at 4-5.<sup>13</sup>

3 **XV. Intel's MIL Regarding Gerganoff's Opinions and Building CH-8 (Doc. 238).**

4 The Court denied Intel's motion for summary judgment on the duty element of  
5 Alsadi's negligence claim because a jury reasonably could find that Intel retained some  
6 control over the work that allegedly caused Alsadi's injuries. Doc. 204 at 26-30. The  
7 Court also denied Intel's motion to exclude Gerganoff's opinions that Intel failed to  
8 reasonably safeguard workers from a known hazardous condition. *Id.* at 19-22.

9 Intel now claims that the issue of duty at trial should focus not on what could have  
10 been done to prevent an H<sub>2</sub>S release inside the CH-8 building, but rather the duty of care  
11 applicable to Alsadi outside of CH-8 once Intel recognized there was an off-gassing  
12 occurrence. Doc. 238 at 2. Intel essentially seeks a summary judgment ruling on the scope  
13 of its duty in this case. A "motion in limine is not the proper vehicle for seeking a  
14 dispositive ruling on a claim[.]" *Hana Fin*, 735 F.3d at 1162.

15 Moreover, Intel's argument that what happened inside CH-8 is irrelevant to Alsadi's  
16 negligence claim is not convincing. *See* Docs. 238 at 2-3, 259 at 1. Intel does not dispute  
17 that it owns the entire Chandler campus, including the CH-8 building and the evacuation  
18 area where Alsadi allegedly was injured. Doc. 196-3 at 6; *see* Doc. 204 at 27. Scott  
19 Graunke, Intel's environmental health and safety manager, testified that Intel controls both  
20 the mixture of chemicals used in the IWS and the amount of H<sub>2</sub>S in the ambient air.  
21 Doc. 196-3 at 3-4, 14-15. From this evidence, a jury reasonably could find that Intel  
22 retained at least some measure of control over JLL's operation of the IWS and H<sub>2</sub>S  
23 emissions inside CH-8. *See* Doc. 204 at 28.

24 The Court will deny Intel's motion to exclude Gerganoff's opinions regarding what  
25 occurred in CH-8 and Intel's IWS operations. Doc. 238.

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28 <sup>13</sup> Given this ruling, the Court need not decide whether Dr. Leff's causation opinion  
is sufficiently reliable. *See* Doc. 237 at 4.

1 **XVI. Intel’s MIL Regarding Bakkenson’s Opinions (Doc. 239).**

2 Intel moves to exclude the opinions of Gretchen Bakkenson, Plaintiffs’ vocational  
3 expert, because some of her opinions are based in part on the now-inadmissible opinions  
4 of Drs. Garcia and Landers regarding causation and RADS. Doc. 239.

5 Plaintiffs note, correctly, that although they lack evidence to show that Alsadi  
6 suffers from RADS, they are not precluded from presenting evidence that Alsadi suffered  
7 an immediate inhalation injury that has persisted, or from seeking future damages for his  
8 symptoms, provided Plaintiffs can present evidence that the symptoms are likely to  
9 continue into the future. Doc. 264 at 2 (citing Doc. 216 at 6). Plaintiffs make clear that  
10 Bakkenson will offer no opinion regarding the cause of Alsadi’s injuries, that she will not  
11 vouch for the assumed facts on which her vocational opinions are based, and that her  
12 opinions will be based on assumed facts that comport with evidence presented at trial. *Id.*  
13 at 2-3. Whether such facts have been proved will be for the factfinder to decide at trial,  
14 absent a contrary ruling after Plaintiffs have presented their case in chief. *See* Fed. R. Civ.  
15 P. 50(a); *see also Bustamante v. Graco, Inc.*, No. CV03-182 TUC JMR, 2006 WL 5156868,  
16 at \*2 (D. Ariz. Mar. 9, 2006) (holding that whether the vocational expert’s reliance on wage  
17 rates was reasonable was “an issue that goes to the weight of the evidence and should be  
18 left to the jury to decide” where the expert’s opinions were “not wholly unsupported  
19 speculation or based only on subjective beliefs”).

20 The Court will deny Intel’s motion regarding the expert opinions of Bakkenson.

21 **XVII. The Parties’ Motion to Seal (Doc. 213).**

22 The parties move to seal exhibits one and three to Plaintiffs’ reply in support of their  
23 motion for negative inference. Doc. 213. Plaintiffs’ have lodged the proposed unredacted  
24 sealed versions of the exhibits with the Court. Docs. 214-1, 214-2.

25 Sealing the exhibits will have no effect on the public’s ability to understand the  
26 issues in this case because lightly redacted copies will be filed in the public docket. The  
27 Court finds compelling reasons to seal and will grant the parties’ motion. *See Kamakana*  
28 *v. City & Cty. of Honolulu*, 447 F.3d 1172, 1179 (9th Cir. 2006).

1           **IT IS ORDERED:**

2           1.       Plaintiffs' motion for negative inference (Doc. 207) is **denied**.

3           2.       Plaintiffs' MIL regarding the 11.7 ppm measurement of H<sub>2</sub>S (Doc. 241) is  
4 **denied**.

5           3.       Plaintiffs' MIL to preclude evidence or argument challenging causation and  
6 the permanence of Alsadi's symptoms (Doc. 208) is **denied**.

7           4.       Plaintiffs' MIL to exclude evidence of Alsadi's misdemeanor convictions  
8 (Doc. 240) is **granted**.

9           5.       Plaintiffs' MIL to exclude untimely disclosed testimony and documents  
10 (Doc. 242) is **granted**.

11          6.       Plaintiffs' MIL regarding the cause of the off-gassing incident (Doc. 243) is  
12 **denied**.

13          7.       Intel's MIL regarding health effects not at issue (Doc. 231) is **denied in part**  
14 **and granted in part**. The motion is denied with respect to the purported inflammatory  
15 language and potential health effects caused by H<sub>2</sub>S exposure, and granted with respect to  
16 Gerganoff's causation opinions.

17          8.       Intel's MIL regarding causation and Alsadi's symptoms (Doc. 232) is  
18 **denied**.

19          9.       Intel's MIL regarding new and worsening symptoms (Doc. 233) is **denied**.

20          10.       Intel's MIL regarding trial testimony of Michael Torbert (Doc. 234) is  
21 **denied**.

22          11.       Intel's MIL regarding testimony of gases other than H<sub>2</sub>S (Doc. 235) is  
23 **granted in part and in denied part**. The motion is granted with respect to Dr. Johnson-  
24 Arbor's SO<sub>2</sub> exposure opinion and Gerganoff's opinion that there was a release of SO<sub>2</sub>,  
25 and denied with respect to Denis's opinion that SO<sub>2</sub> may have been present and Dr. Abia's  
26 testimony as a fact witness.

27          12.       Intel's MIL regarding certain OSHA regulations (Doc. 236) is **denied**.

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1           13. Intel's MIL regarding expert testimony from certain medical professionals  
2 (Doc. 237) is **granted**. Drs. Vu, Spangenberg, Shobe, and Kamarinos are precluded from  
3 offering expert opinions at trial, and Plaintiffs may not call Drs. Leff and Schwartzberg as  
4 expert witnesses.

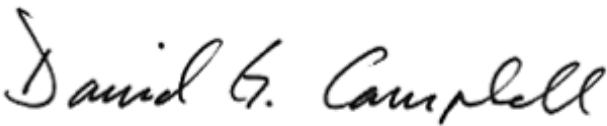
5           14. Intel's MIL regarding Gerganoff's opinions and the CH-8 building  
6 (Doc. 238) is **denied**.

7           15. Intel's MIL regarding Bakkenson's opinions (Doc. 239) is **denied**.

8           16. The parties' motion to file exhibits one and three to Plaintiffs' reply brief  
9 under seal (Doc. 213) is **granted**. The Clerk is directed to file the lodged exhibits  
10 (Docs. 214-1, 214-2) under seal. The parties shall file redacted public versions of the  
11 exhibits on the docket by **July 24, 2020**.

12           17. The Court will schedule the bench trial in this case, and set a final pretrial  
13 conference, once it is clear that the trial can be held without jeopardizing the health of all  
14 participants.

15           Dated this 17th day of July, 2020.

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18           David G. Campbell  
19           Senior United States District Judge  
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