

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX

-----X		:
ROSA MARIA JEREZ,		:
	Plaintiff,	:
		:
-against-		:
		:
JOHN BEAN TECHNOLOGIES CORPORATION,		:
	Defendant.	:
		:
-----X		:

Index No. 301914/11

**MEMORANDUM OF LAW IN OPPOSITION TO
PLAINTIFF’S MOTION FOR SUMMARY JUDGMENT**

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PRELIMINARY STATEMENT

This is a products liability action arising out of a workplace accident involving a machine manufactured more than 50 years ago. Since that time, the machine has been in the possession and under the control of plaintiff's employer, Old London. Plaintiff claims her injuries were caused by the machine's defective design and the original manufacturer's failure to warn her about the dangers posed by the machine's cutting head, an enclosed part which contained heated knives. She also asserts claims of negligent design and breach of implied warranty. Despite the fact-intensive nature of design defect cases generally, not to mention one involving a 50-year old machine that has been substantially altered by its owner, plaintiff seeks summary judgment on her entire case. Plaintiff's motion must be denied because:

1. Plaintiff's motion ignores several clusters of contested facts that preclude summary judgment and can only be resolved by a jury trial. These issues of fact undermine plaintiff's theory that her accident was caused by a design defect that allegedly required the machine operator's to place her hands near the wrapper's cutting head to clear frequent jams.
2. The opinions of the plaintiff's experts are disputed by defendant John Bean Technology Corporation's ("JBTC") experts and other witnesses. Among the contested expert issues are:
 - a. The wrapping machine's original design and configuration at the time it left the control of the manufacturer;
 - b. The modifications, alterations and re-configuration of the machine and related components as it existed at the time of the Plaintiff's accident;

- c. Whether the machine complied with industry practices at the time of its manufacture;
 - d. Whether the machine was reasonably safe at the time of its manufacture;
 - e. Whether the accident was caused by plaintiff's own negligence instead of any issue with the machine;
 - f. Whether plaintiff knew and understood the risks posed by operation of the machine, obviating the need for any warnings; and
 - g. Whether plaintiff's accident was caused by modifications and alterations made to the wrapper and its components by plaintiff's employer and third parties.
3. The entire motion is based on inadmissible evidence, namely, the improper testimony of plaintiff's expert and plaintiff's attorney, which consists of conjecture, supposition, and argument and hence lacks foundation. The expert's opinions, moreover, are subject to credibility attack and can be disregarded by the fact-finder on that basis alone.
4. Plaintiff's motion is premature and defective because JBTC has not been allowed to conduct adequate discovery in this case.

Finally, summary judgment should be entered AGAINST plaintiff on her breach of warranty claims because they are time barred.

For these reasons, as explained below, plaintiff's motion for summary judgment should be denied, and plaintiff's breach of implied warranty claim dismissed with prejudice as time barred.

FACTS

Plaintiff Rosa Maria Jerez was injured while working with a wrapping machine in her employer's food processing and packaging plant. Plaintiff's hand got caught in the cutting head of the machine, referred to as a "wrapper." The cutting head of the wrapper is an enclosed area that both cuts and seals small cellophane packages of melba toast.

Plaintiff was using a Hudson Sharp 2W6-1579 wrapper ("Wrapper" or "Subject Wrapper") originally manufactured by FMC Corporation ("FMC") in 1961.¹ In 1961, a company by the name of Devonsheer, later known as Old London Foods, Inc. ("Old London"), ordered and then purchased the Subject Wrapper. (*See* Exhibit B to the Humecki Aff.) For the last 50 years, Old London has been responsible for the maintenance of the Subject Wrapper.² Since FMC delivered the Subject Wrapper in 1961, neither FMC nor any successor company of FMC serviced, maintained, or otherwise worked on the Subject Wrapper. (*See* Humecki Aff. at ¶ 7.)³ Old London has had complete control over the Subject Wrapper since its original delivery in 1961. Old London's employees were responsible for maintaining the Subject Wrapper. Old London's independent contractor, "No Tolerance," substantially modified and redesigned the Subject Wrapper and specifically the cutting head assembly in 2006, two years before Plaintiff's accident. (Humecki Aff. at ¶¶ 14-16.)

¹ *See* contract for the original manufacture and sale of the #2W6-1579 wrapper, attached as Exhibit B to the Affidavit of John Humecki, dated September 16, 2013, submitted herewith in opposition to plaintiff's motion for summary judgment ("Humecki Aff."); *see also* Affirmation of plaintiff's counsel Joseph M. Kelly, Jr., Esq., dated June 21, 2013 (the "Kelley Affirmation" or "Kelley Aff."), ¶ 15.

² At the time it purchased the machine in 1961, Old London was known as Devonsheer. Devonsheer became part of the Old London brand in approximately 1983 or 1984. (*See* Kelley Aff., ¶ 15.)

³ Through a series of spin-off transactions and divestitures, JBTC retained the liabilities for FMC's former wrapping equipment business, including the Subject Wrapper. (*See* excerpt of the transcript of the deposition of Noelle J. Day, JBTC's corporate representative, taken on February 23, 2011 (the "Day Tr."), attached as Exhibit __ to the Affirmation of Craig S. Kesch, Esq., dated September 18, 2013, submitted herewith in opposition to plaintiff's motion for summary judgment ("Kesch Aff."), at pp. 12-13, 27-28.)

Over the past 50 years, Old London, directly or through its contractors, substantially modified the Subject Wrapper in the following ways:

1. It added a permanent cover over the front hand wheel that prevents the operator from manually and incrementally cycling the machine without energizing it;
2. It removed the original guard/cover over the cutting blades assembly and the installation of two completely different designs of covers of unknown origin. Both of these covers are not original and do not follow the original design of the cover which was originally sold with the 2W6-1579 wrapper in 1961;
3. It removed tubing tuckers and in their place installed what appear to be guide 'wheels' of unknown origin which do not in any way resemble the original tubing tuckers nor do they replicate the tubing tucker's operation. This modification would cause synchronization issues with the processing of toast packages, leading to multiple jams of the kind described by plaintiff and her co-employees.
4. The top tubing belt assembly and chain drive is completely missing, a modification that would encourage the operator to place her hand on top of the toast to guide it through the machine, as plaintiff did at the time of her accident.
5. It added an electrical control of unknown origin which appears to add an On/Off control which energizes and de-energizes the 2W6-1579 wrapper. This 'new' switch has been attached to the Subject Wrapper on the right side of the machine which would be to the right of where the operator would stand to operate the machine. This 'new' control of unknown origin does not have a 'Jog' or 'Inch' switch. This modification would result in a complete change in how and where the operator would be positioned to run the Subject Wrapper.

(*Id.* at ¶¶ 17-19.)

ARGUMENT

“Where, as here, plaintiff has asserted claims based on design defects and failure to warn, summary judgment is generally inappropriate” in light of the factual questions that arise from such claims. *Legari v. Lawson Co.*, 189 A.D.2d 1089, 1091, 593 N.Y.S.2d 336, 338 (3d Dep’t 1993). Plaintiff’s motion for summary judgment illustrates the wisdom of this rule: there are many material issues of fact, any one of which precludes summary judgment on all of plaintiff’s claims. JBTC’s experts dispute the opinions of plaintiff’s expert and additional issues of fact; plaintiff’s motion is also based upon inadmissible evidence that fails to establish even a prima facie case, let alone justify summary judgment; and plaintiff has stonewalled JBTC’s ability to conduct even the most basic discovery, making her motion for summary judgment at best premature. Indeed, to the extent summary judgment is appropriate on any of plaintiff’s claims, it is plaintiff’s plainly time-barred breach of warranty claims that should be summarily dismissed.

POINT I

PLAINTIFF IGNORES SEVERAL CLUSTERS OF CONTESTED FACTS THAT UNDERMINE HER THEORY OF LIABILITY AND PRECLUDE SUMMARY JUDGMENT

In moving for summary judgment, plaintiff bears the burden of showing “clearly ... that no material and triable issue of fact is presented.” *Sillman v. Twentieth Century-Fox Film Corp.*, 3 N.Y.2d 395, 404, 165 N.Y.S.2d 498, 505 (1957). Summary judgment is a “drastic remedy [that] should not be granted where there is any doubt as to the existence of such issues, or where the issue is ‘arguable.’” *Id.* (citations omitted). Accordingly, “[w]here, as here, plaintiff has asserted claims based on design defects and failure to warn, summary judgment is generally inappropriate” in light of the factual questions that arise from such claims. *Legari v. Lawson*

Co., 189 A.D.2d 1089, 1091, 593 N.Y.S.2d 336, 338 (3d Dep't 1993); *see also Lugo by Lopez v. LJM Toys, Ltd.*, 146 A.D.2d 168, 170, 539 N.Y.S.2d 922, 923-24 (1st Dep't 1989) ("Questions of design defect, such as those raised here, have specifically been held to be inappropriate for summary judgment relief. Likewise, where the claim of liability is based upon a manufacturer's failure to warn, a theory also presented by plaintiffs herein, summary judgment will generally not lie."). Ironically, the very cases cited by plaintiff in support of her motion underscore the impropriety of summary judgment in her favor.⁴

Plaintiff's claims are based on the theory that the Subject Wrapper was defective because (1) it was designed in such a way that it would constantly jam; (2) these jams required workers to place their hands near the unprotected cutting head to clear the Wrapper and re-position the cellophane; and (3) these defects of design were the proximate cause of plaintiff's accident. Plaintiff's motion for summary judgment fails, however, because it ignores several clusters of material issues of fact about the cause of the Wrapper's frequent jams, the proper method of

⁴ All of the cases plaintiff cites with respect to these product liability issues in support of her arguments involve trials and jury determinations, or cases in which the manufacturer -- not the plaintiff -- sought summary judgment. *See, e.g., Adams v. Genie Indus., Inc.*, 14 N.Y.3d 535, 903 N.Y.S.2d 318 (2010) (affirming *jury* verdict finding personnel lift sold in 1986 to have been defectively designed) (cited at Plaintiff's Memorandum of Law in Support of Motion for Summary Judgment, dated June 21, 2013 ("Pl. Br."), p. 11); *Reiss v. Volvo Cars of N. Am., Inc.*, 73 A.D.3d 420, 901 N.Y.S.2d 10 (1st Dep't 2010) (affirming trial court's denial of defendants' motion for summary judgment on design defect claims because of triable issues of fact raised by non-movant's expert) (although this case supports the denial, rather than the grant, of plaintiff's motion, it is cited by plaintiff at Pl. Br., pp. 11, 25-26); *Lopez v. Precision Papers, Inc.*, 107 A.D.2d 667, 484 N.Y.S.2d 585 (2d Dep't 1985) (finding a "legitimate jury question" as to whether the manufacturer breached its duty with respect to the design of a forklift) (again, while supporting the denial of plaintiff's motion rather than the granting of it, this case is cited at Pl. Br., pp. 15-16). Plaintiff also cites to *Gunn v. Hytrol Conveyor Co.*, No. 10-CV-00043, 2013 WL 2249241 (E.D.N.Y. May 22, 2013), as "a case with strikingly similar facts to the one herein...." (Pl. Br., p. 17.) However, as with the other cases cited by plaintiff, *Gunn* supports the denial of plaintiff's motion. In *Gunn*, the *manufacturer* -- *not* the plaintiff -- was awarded summary judgment dismissing plaintiff's claims of breach of warranty, manufacturing defect, and design defect. *Gunn*, 2013 WL 2249241, at *14.

Plaintiff has not numbered the pages in her brief. For ease of reference and the Court's convenience, JBTC refers to the page of plaintiff's brief that begins with the Preliminary Statement as page 1 and has numbered the pages consecutively through page 29.

clearing them, and the cause of plaintiff's accident. Contrary to plaintiff's assertions, these jams were caused by the substantial modifications made to the Wrapper over the last 50 years and the Wrapper's poor maintenance. In fact, plaintiff's accident was caused by these factors, inadequate training, and/or her own inattention and carelessness.

A. There Is At Least A Question Of Fact As To Whether The Frequent Jams Of The Subject Wrapper Were Caused By The Substantial Modifications Made To And The Poor Maintenance Of The Wrapper.

Plaintiff's expert testified that the Subject Wrapper was defectively designed because it did not have an interlock device or adequate cover over the cutting head. (*See* Affidavit of Engineer Thomas J. Cocchiola, P.E., C.S.P., dated June 14, 2013, submitted in support of plaintiff's motion for summary judgment ("Cocchiola Aff.") at Points I & II.) These safeguards were necessary, according to the plaintiff's expert, because operators of the Wrapper needed "quick and easy access to the cutting" head "to repair and attend to frequent production problems, i.e., cellophane jams, which was [sic] a common problem experienced by workers on this machine." (*Id.* at ¶ 12.)

The testimony of JBTC's expert, John Humecki, raises an issue as to whether these jams were the result of modifications made to and the improper maintenance of the wrapper. Mr. Humecki has worked in the wrapper machine business as a draftsman and engineer for more than 40 years, during which time he designed and serviced various wrapper machines and components and is knowledgeable about the design, assembly, manufacture, operation, sale and repair of FMC wrapping machines manufactured from as early as the 1950s to the present, including the Subject Wrapper. (Humecki Aff. at ¶¶ 1-4.) Mr. Humecki states that a "properly maintained [Subject Wrapper] would not have multiple cellophane jams." (Humecki Aff. at ¶ 26.) In

support of that statement, Mr. Humecki noted several instances in which the “causes of cellophane jams signify the wrapper has not been properly maintained”:

- a. If the plate located at the point at which the cellophane travels through the portion of the #2W6-1579 wrapper that forms and seals packages (Former” and “fin sealer”) is worn and not replaced, it can cause cellophane jams of the kind described by Plaintiff. This plate is depicted on the left side of the tubing drawing on the page bearing Bates stamp No. CW00028, attached as part of Exhibit G to the Humecki Aff.
- b. If the fin sealer, which is powered and pulls the cellophane toward the conveyors, is out of sync with the upper and lower conveyor belts it can result in jams of the kind described.
- c. If the side plate which guides the cellophane into the fin sealer is not sized to the product, it could cause jams of the type described. (*See* CW 00044, attached as part of Exhibit G to the Humecki Aff.)
- d. If the Former is worn out it could cause jams of the type described by Plaintiff.
- e. If the toast is misplaced in the tube and the spacing of the toast is not correct, it could cause jams of the type described by Plaintiff.
- f. If the tubing tuckers are not synchronized with the system it could cause jams of the type described by Plaintiff.

(*Id.* at ¶ 27.)

Mr. Humecki further states that one of the modifications made to the Wrapper could cause precisely the kind of production problems at issue here: “The removal of these tubing tuckers and replacement with stationary rollers could cause the toast in the tube to stall which would in turn cause jams of the type described.” (*Id.* at ¶ 27.g; *see also id.* at ¶ 17.c.)

Mr. Humecki’s sworn statements about the effects of poor maintenance and the substantial modifications made to the Subject Wrapper raise a number of issues of fact: Was it any one or some combination of these modifications and/or maintenance problems that caused the jams that plaintiff contends led to her accident? Because plaintiff has not, and cannot,

establish that the frequent jams of the Subject Wrapper were the result of a defective design, as opposed to modification or poor maintenance, summary judgment is improper.

B. There Is At Least An Issue Of Fact Regarding Whether The Wrapper Jams Required Workers To Place Their Hands Near The Unprotected Cutting Head To Clear The Wrapper And Re-Position The Cellophane.

Plaintiff's expert stated that because of the Wrapper's frequent jams, a "manufacturer should have anticipated that workers would respond to jams and production problems by raising the upper belt conveyor and accessing the cutting/crimping station components." (Cocchiola Aff. at ¶ 17.) Similarly, with respect to cover guards, he stated that "[t]he manufacturer should have anticipated that in order to respond to jams and production problems, workers would be exposed to the rotating cutting head and heated element." (*Id.* at ¶ 24.)

Mr. Humecki, however, disputes this point: "If this procedure [the procedure that "should be employed" to clear a cellophane jam] is followed, there is no need for the operator's hand to be anywhere near the top tubing belt or the cutting head assembly when the machine is running." (Humecki Aff. at ¶ 22.) Mr. Humecki's sworn statement raises at least a material issue of fact as to whether plaintiff's method of clearing the jam, and hence her accident, was necessitated by the modifications made to the Wrapper by her employer, plaintiff's improper training by her employer, and/or her own inattention and carelessness.

In his affidavit, Mr. Humecki described in detail the procedure to clear a cellophane jam:

- a. Turn off the wrapper by pushing the "Off" button on the electrical control on the left side of the machine. (*See* P 025, attached as part of Exhibit N to the Humecki Aff.)
- b. Tear the cellophane tube before it has reached the upper and lower conveyor belts.
- c. If the jam was located between the upper and lower conveyor belts, the operator would pull the jammed cellophane to the left and out.

- d. After the jam was cleared, the operator would push the Jog button so as to ‘jog’ the product and cellophane forward to come into contact and proceed between with the upper and lower conveyor belts.
- e. A push of the “Jog” button, cycles the machine once and turns it off. The purpose of the “Jog” button is to cycle the wrapper briefly to insure that the top tubing belt has made contact with the toast without continuously running the machine.

(*Id.* at ¶ 21.)

As Mr. Humecki explained, the “operator should never need to use his or her hand to push the cellophane tube and toast forward toward the cutting head because the [Subject Wrapper] was *originally configured* so that the upper and lower conveyor belts adequately pull the toast product toward the cutting head assembly.” (*Id.* at ¶ 24. (emphasis added).) Mr. Humecki qualified his statements about the proper procedure for clearing Wrapper jams by limiting it to the machine’s “original design” or as “originally configured.” (*Id.* at ¶¶ 21, 22, 24.) Elsewhere, Mr. Humecki noted numerous modifications that would have caused an operator to clear a jam by placing her hands near the cutting head or energizing the machine (as opposed to using the “jog” button), as plaintiff did.

- The placement of “a permanent cover of unknown origin ... over the machine’s hand wheel, as depicted in P019 and P021 (Ex. N), which renders it impossible for the operator to rotate the machine manually. The hand wheel was a safety feature that gave the operator an option to manually operate the machine when advancing the toast and cellophane incrementally without having to energize the wrapper. (*See* CW00218 (Ex. I) compared to P019 and P021 (Ex. N).)” (*Id.* at ¶ 17.a.)
- The replacement of the “original cover over the cutting blade assembly [with] a completely re-designed cover of unknown origin Neither of the [two replacement] covers in the present day photos is original or bears any resemblance to the original cover supplied by FMC in 1961. Furthermore, the design of the two different covers in the present day photos render the use of the machines unsafe.” (*Id.* at ¶ 17.b.)
- “[T]he top tubing belt assembly is completely missing. Although it is possible to operate the machine without the top tubing belt assembly in place, *doing so would encourage the operator to place her hand on top of the toast to guide the toast into the machine. This is precisely what the Plaintiff described she was doing at the time of the accident.* The

complete absence of the top tubing belt assembly in conjunction with the non-original cover to the cutting blades depicted in the photographs attached as Exhibit K would allow open access to the cutting blades as the machine is processing the packages of toast.” (*Id.* at ¶ 18 (emphasis added).)

- “[T]he ... addition of an On/Off electrical operator control without a Jog switch, which is out of place and to the right of the operator (as depicted in P018 and P023 (Ex. N)) effectively results in a complete change in how and where the operator would be positioned to run the machine:
 - Giving the operator the choice to run the machine from a control on the right results in the re-positioning of the operator from where she should be standing, which is to the left of the cutting blade assembly, to the right of the cutting blade assembly, which is closer to the cutting blades.
 - Installing an additional On/Off control permits the operator to choose to ignore utilizing the safety Jog switch when re-positioning the cellophane and toast as it enters the upper and lower conveyor belts. This additional switch defeats an important safety feature of the original design of the #2W6-1579 wrapper.” (*Id.* at ¶ 19.)

That some of plaintiff’s co-employees knew how to properly clear a jam or, at least, knew better than to try to clear a jam in the manner plaintiff did, raises an issue as to whether Old London simply failed to properly train plaintiff or her own carelessness or inattention caused her accident. Plaintiff’s supervisor, for example, mentioned that plastic sticks were made available to machine operators to clear jams and that, in any event, workers should not raise the upper conveyor belt, exposing the knives in the cutting head, when clearing jams:

- The wrapper had plastic sticks (12 to 18 inches long) in the work area around it that the workers were instructed to use to clear jams when they were jogging or running the wrapper. (*See* excerpt of the transcript of Misbah Khan, plaintiff’s supervisor, taken on October 11, 2011 (the “Khan Tr.”), attached as Exhibit __ to the Kesch Aff., at 36:18 to 37:18.)
- The upper conveyor belt should be down when a worker is clearing jammed cellophane. (*See* excerpt of Khan Tr., attached as Exhibit __ to the Kesch Aff., at 34:12-25.)

Similarly, plaintiff’s co-workers understood that, given the danger posed by the knives in the cutting head area, a machine operator needed to exercise caution:

- Plaintiff’s co-workers tried not to touch the cellophane near the wrapper machine’s cutting head because “we tried not to put our hands where there was danger.” (See excerpt of the transcript of Luz Mendez, plaintiff’s co-worker, taken on December 8, 2011 (the “Mendez Tr.”), attached as Exhibit __ to the Kesch Aff., at 21:9 to 23:11, 24:2-12.)
- Plaintiff’s co-workers understood that the wrapper was dangerous and that “if you don’t pay attention to what you are doing, it could grab onto your gloves, take your fingers, as it happened to her.” (Excerpt of the transcript of Carmen Rivera, plaintiff’s co-worker, taken on December 8, 2011, attached as Exhibit __ to the Kesch Aff., at 32:7-11; see also excerpt of Mendez Tr., attached as Exhibit __ to the Kesch Aff., at 45:21 to 46:10.)

Mr. Humecki’s affidavit, as well as other record evidence shows that the factual basis of plaintiff’s motion is robustly disputed. Because these factual disputes demonstrate the existence of triable issues of material fact, plaintiff’s motion for summary judgment must be denied.

POINT II

THE CONFLICTING EXPERT OPINIONS REQUIRE A JURY TO DETERMINE CREDIBILITY AND THUS PRECLUDE SUMMARY JUDGMENT

It is well settled in New York that when conflicting expert opinions are submitted in connection with a motion for summary judgment, there is a “credibility battle between the parties’ experts” and such “issues of credibility are properly left to a jury for its resolution.” *Barbuto v. Winthrop Univ. Hosp.*, 304 A.D.2d 623, 624, 760 N.Y.S.2d 199, 200 (2d Dep’t 2003); see also *Frye v. Montefiore Medical Ctr.*, 70 A.D.3d 15, 25, 888 N.Y.S.2d 479, 487 (1st Dep’t 2009) (“Resolution of issues of credibility of expert witnesses and the accuracy of their testimony are matters within the province of the jury.”).

Even if the Cocchiola Affidavit were admissible for the purposes of this motion and were credible (and, as explained below, it is not), JBTC’s experts, Messrs. Humecki and Longacre, dispute several key conclusions of plaintiff’s expert:

1. What was the machine’s original design and manufacture in 1961?

To make a prima facie showing on any of her claims, plaintiff must establish how the machine was originally designed and manufactured in 1961. *See, e.g., Santorelli v. Apple & Eve, L.P.*, 282 A.D.2d 731, 732, 742 N.Y.S.2d 352, 353 (2d Dep’t 2001) (plaintiff asserting products liability claims must establish “that the defect complained of existed at the time the product left the manufacturer”) (quoting *Tardella v. RJR Nabisco, Inc.*, 178 A.D.2d 737, 737, 576 N.Y.S.2d 965, 966 (3d Dep’t 1991)). Plaintiff claims that the machine was defective because, according to plaintiff’s expert opinion, it was designed and manufactured without a safety guard. (Cocchiola Aff at ¶ 24.) However, JBTC’s expert John Humecki, who worked on contemporaneous versions of the machine, stated as a point of fact, not opinion, that the machine was manufactured with a guard, that the guard was subsequently permanently removed, and that a different cover was substituted. Mr. Humecki’s opinion is that “the design of the two different [unoriginal] covers in the present day photos renders the use of the machines unsafe.” (Humecki Aff. at ¶¶ 10.b., 17.b.)

Similarly, JBTC’s other expert, Mr. Longacre, stated in his attached affidavit that “[t]he subject wrapping machine was equipped with substantial fixed guards at the time it was originally manufactured.” (Affidavit of Engineer Charles J. Longacre, P.E., dated September 16, 2013, submitted herewith in opposition to plaintiff’s motion for summary judgment (“Longacre Aff.”) at ¶ 10.) Mr. Longacre further stated that “the guarding of the wrapping machine was suitable for its intended use.” (*Id.* at ¶ 7.) Such “[g]uarding ... can be expected to do no more than prevent inadvertent or accidental access to the moving parts.” (*Id.*) But “Ms. Jerez’s actions,” Mr. Longacre explained, “could not be characterized ... as inadvertent or accidental,” and “it is beyond the ability of any guard [fashioned for its intended use] to prevent intentional access to the moving parts of a machine.” (*Id.*) In drawing this conclusion, Mr. Longacre relied

upon Mr. Humecki's affidavit; photographs of similar wrapping machines manufactured around the same time as the Subject Wrapper; and the document dated September 16, 1955 and addressed to Old London's predecessor indicating that the wrapping machine "is completely guarded with solid and closed guards for safety requirements." (*Id.* at ¶ 10.) Based on this evidence, and the fact that plaintiff's expert relied on his misinterpretation (as explained in more detail below) of a so-called "Shop Book," Mr. Longacre stated that it was "his professional opinion that the opinions formed by Mr. Cocchiola with respect to any lack of guarding of the subject machine ... are unsupportable and inaccurate." (*Id.*)

Plaintiff's failure to establish that there is no issue of fact concerning the original design and manufacture of the machine is fatal to all her claims.

2. Whether the machine was made consistent with industry practices at the time of its manufacture in 1961.

A plaintiff may not recover on a theory of defective design where, as here, a machine was compliant with applicable industry standards and/or practices at the time of its design and manufacture. *See Ramos v. Howard Indus., Inc.*, 10 N.Y.3d 218, 223, 855 N.Y.S.2d 412, 415 (2008) (manufacturer entitled to summary judgment on products liability claims where plaintiff could not rebut manufacturer's showing that product was "designed and manufactured under state of the art conditions... and that its manufacturing process complied with applicable industry standards."); *Wesp v. Carl Zeiss, Inc.*, 11 A.D.3d 965, 967, 783 N.Y.S.2d 439, 441 (4th Dep't 2004) (manufacturer entitled to summary judgment on design defect claims where plaintiff could not rebut its expert's affidavit establishing that products "were state of the art at the time of their design and manufacture, and complied with all applicable industry standards.").

JBTC's expert, Mr. Longacre, opines that the wrapping machine at issue complied with industry practices in both its design and manufacture in 1961:

In particular, guarding of the wrapping machine was suitable for its intended use, and was in compliance with industry practice at the time of its original manufacture. The subject wrapping machine incorporated fixed guards over all potential hazards.... There was no regulatory requirement, nor was it within the standard practice in industry in 1961, to provide interlocked guards where fixed guards were suitable and practical.

(Longacre Aff. at ¶ 14.)⁵

Plaintiff's expert, in contrast, contends that the machine did not comply with industry practices and the industry standards in place at the time of its manufacture because, among other things, the wrapper lacked a fail-safe interlock device. (Cocchiola Aff., ¶ 14.) But Mr. Longacre noted that "[t]he concept of an 'interlocked' guard was not the custom and practice of industry when the subject wrapping machine was manufactured in 1961" (Longacre Aff. at ¶ 6), and that while "the concept of an 'interlocked' or 'interlocking' guard was present within the time frame of interest, ... the form, function, and relationship of the guard to the machine was not consistently defined and varied within the literature." (*Id.* at ¶ 6.) Thus, an interlocked guard "was never defined as a mandatory feature in that time frame and, in fact is not considered mandatory today." (*Id.*)⁶

Mr. Longacre also disputes the use of certain publications by plaintiff's expert, Mr. Cocchiola. For example, it is Mr. Longacre's professional opinion that the National Safety Council Accident Prevention Manual for Industrial Operations, 4th Edition, 1959, the document

⁵ The machine was originally manufactured 11 years before OSHA came into existence in 1970, and long before there was any regulatory body setting forth a consensus of design and manufacturing standards, such as ANSI. Rather, in 1961 there were only industry practices which were followed by such manufacturers. The Wrapper fully complies with those applicable industry practices. (Longacre Aff. at ¶ 6.)

⁶ Mr. Longacre concluded from his review of the historic literature that the concept of an 'interlocked' or 'interlocking' guard was present before the time frame of interest, although some guarding standards and literature published before **and after** this time did not mention the concept at all. When the concept was mentioned, it was often not well defined, or defined in different ways, and often advocated "when practicable" or when fixed barrier guards were "impracticable." The functional relationship of the 'interlocked' or 'interlocking' guard to machine starting, operation, and stopping often varied within the literature. In some cases, the 'interlocked' guard only served a warning function. (Longacre Aff. at ¶ 6.)

primarily relied upon by plaintiff's expert, was not an authoritative reference, and that it carried no regulatory weight upon manufacturers in the 1959 time frame. (*Id.* at ¶ 8.) It did not represent the standard practice within the industry with respect to guarding, either fixed or interlocked, or safety practices at that time; it was instead a wish list of sorts, containing a series of ideas and concepts created by those whose primary concern was increasing the importance of guarding and accident prevention, with little or no consideration for practicality or the realities of the work place. (*Id.*)

Thus, “[i]t is [Mr. Longacre’s] opinion within a reasonable degree of engineering certainty that the subject wrapping machine was designed and manufactured in accordance with prudent engineering and safety principles, was reasonably fit for the intended use, and posed no unreasonable hazard or risk to operating personnel while exercising ordinary care or utilizing accepted safety practices.” (*Id.* at ¶ 7.)

The dispute among the experts regarding whether the Subject Wrapper complied with then industry practices precludes summary judgment.

3. Whether the machine was reasonably safe at the time of its manufacture.

In addition to showing how the machine was originally designed and manufactured, plaintiff must establish that the machine was “not reasonably safe” in its design. *See, e.g., Rose v. Brown & Williamson Tobacco Corp.*, 53 A.D.3d 80, 82, 855 N.Y.S.2d 119, 121 (1st Dep’t 2008) (“The standard to be applied in determining (in both negligence and strict product liability actions) whether or not a product is defectively designed is whether the product as designed was ‘not reasonably safe.’”) (citations omitted). A product may be deemed “not reasonably safe” only if the alleged design defect was “known at the time of manufacture [and] a reasonable person would conclude that the utility of the product did not outweigh the risk

inherent in marketing a product designed in that manner.” *Voss v. Black & Decker Mfg. Co.*, 59 N.Y.2d 102, 108, 463 N.Y.S.2d 398, 402 (1983). Under this standard, “it will be for the jury to decide whether a product was not reasonably safe... after weighing the evidence and balancing the product’s risks against its utility and cost....” *Voss*, 59 N.Y.2d at 108-09, 463 N.Y.S.2d at 402. The Court of Appeals has determined that this risk-utility analysis “demands an inquiry” by the jury into several factors, including:

- (1) the product’s utility to the public as a whole, (2) its utility to the individual user, (3) the likelihood that the product will cause injury, (4) the availability of a safer design, (5) the possibility of designing and manufacturing the product so that it is safer but remains functional and reasonably priced, (6) the degree of awareness of the product’s potential danger that can reasonably be attributed to the injured user, and (7) the manufacturer’s ability to spread the cost of any safety-related design changes.

Denny v. Ford Motor Co., 87 N.Y.2d 248, 257, 639 N.Y.S.2d 250, 255 (1995); *see also Voss*, 59 N.Y.2d at 109, 463 N.Y.S.2d at 402-03 (identifying same factors).

Based on these factors, plaintiff will be unable to demonstrate to the jury at trial – much less to the Court on this motion – that the wrapping machine at issue was not reasonably safe when it was manufactured in 1961. JBTC’s expert, Mr. Longacre, states that the subject wrapping machine was designed and manufactured in accordance with prudent engineering and safety principles, was reasonably fit for the intended use, and posed no unreasonable hazard or risk to operating personnel while exercising ordinary care or utilizing accepted safety practices. (Longacre Aff. at ¶ 7; *see also id.* at ¶ 14.) *See Voss*, 59 N.Y.2d at 108, 463 N.Y.S.2d at 402.

Plaintiff’s expert claims that the machine was not reasonably safe because of its purported lack of a safety guard or an interlock device. (Cocchiola Aff. at ¶¶ 14, 24.) Setting aside the fact that the machine *was* manufactured with a safety guard -- a key disputed fact --

JBTC's expert, Mr. Longacre, states that the machine was reasonably safe as of 1961. This conflict of opinions precludes summary judgment.

4. Whether plaintiff's accident was caused by her own inattention or failure to use the "jog" switch.

To recover on each of her claims, plaintiff must establish that a defect in the machine caused her accident. *See, e.g., Voss*, 59 N.Y.2d at 107, 463 N.Y.S.2d at 402 (to establish a prima facie case of design defect, plaintiff must show "that the defective design was a substantial factor in causing plaintiff's injury"); *Smith v. 2328 Univ. Ave. Corp.*, 52 A.D.3d 216, 218, 859 N.Y.S.2d 71, 73 (1st Dep't 2008) (same); *Clarke v. Helene Curtis, Inc.*, 293 A.D.2d 701, 742 N.Y.S.2d 325, 326 (2d Dep't 2002) ("[W]hether the action is pleaded in strict products liability, breach of warranty or negligence, it is a consumer's burden to show that a defect in the product was a substantial factor in causing the injury.") (quoting *Tardella*, 178 A.D.2d at 737, 576 N.Y.S.2d at 966); *Derienzo v. Trek Bicycle Corp.*, 376 F. Supp. 2d 537, 551 (S.D.N.Y. 2005) (applying New York law) ("Each of the challenged claims—manufacturing defect, failure to warn and breach of warranty—requires proof that the accident was caused by a failure of the [product].... Thus, if plaintiff cannot show that the failure of the [product] caused the accident (an assertion that requires the support of admissible expert testimony), the case is over, under any theory.").

Here, plaintiff has not proffered any admissible evidence that an allegedly defective design or other failure of the machine caused her injuries. (*See* Point III, *infra*.) Rather, the evidence demonstrates that plaintiff's accident was caused by her own inattention or failure to use the "jog" switch.

JBTC's expert, Mr. Longacre, noted that plaintiff, who was never trained by her employer to use the wrapper and lacked any prior experience operating machines, learned to

operate the wrapper by observing her co-workers. (*Id.* at ¶ 12.) However, Ms. Jerez “apparently failed to properly interpret the actions of some of her co-workers”; for “[c]o-workers such as Mendez and Rivera testified as to the proper method of clearing a jam of wrapping material and re-starting the machine using the ‘JOG’ button, whereas Ms. Jerez testified she did not know the purpose of the ‘JOG’ button and restarted the machine using the “green” [RUN] button.” (*Id.*)

If she had known or followed the proper method of clearing a jam, as described in the affidavit of Mr. Humecki or demonstrated by her co-workers, plaintiff would have used the “jog” switch to re-thread the cellophane, and not, as she did, the re-start button. (Humecki Aff. at ¶ 22.e.) On this basis, Mr. Longacre further concluded that Mr. Cocchiola’s opinion that “an interlock was required on the upper conveyor is clearly inaccurate,” because it “was not necessary to raise the upper conveyor or place one’s hand(s) into the machine in order to clear a jam or re-thread the machine.” (Longacre Aff. at ¶ 12.) Thus Mr. Longacre states his “professional opinion within a reasonable degree of engineering certainty that Ms. Jerez’s accident ... would not have occurred had she been instructed and supervised in the proper operation of the subject wrapping machine, and the proper response to ... a jam” (*Id.*)

That plaintiff’s accident was caused by her failure to follow the proper technique for clearing a jam, and not some design defect that made this procedure unreasonable dangerous, is therefore another material issue of fact precluding summary judgment.

5. Whether plaintiff understood the risks associated with the machine, thereby obviating the need for a warning.

Under New York law, no duty to warn arises when the injured party is already aware of the specific hazard at issue. *See Liriano v. Hobart Corp.*, 92 N.Y.2d 232, 241, 677 N.Y.S.2d 764, 769 (1998) (“[W]here the injured party was fully aware of the hazard through general

knowledge, observation or common sense, or participated in the removal of the safety device whose purpose is obvious, lack of a warning about that danger may well obviate the failure to warn as a legal cause of an injury resulting from that danger.”). “Thus, it may well be the case that a given risk is not ‘obvious,’ in the sense of precluding any duty to warn, but that nevertheless, because the risk was well understood by the plaintiff, a warning would have made no difference.” *Burke v. Spartanics, Ltd.*, 252 F.3d 131, 139 (2d Cir. 2001) (citing *Brady v. Dunlop Tire Corp.*, 275 A.D.2d 503, 711 N.Y.S.2d 633, 634–36 (3d Dep’t 2000)). Under such circumstances, the failure to warn cannot be a cause of the harm. *Burke*, 252 F.3d at 139.

Accordingly, New York courts routinely dismiss failure to warn claims in cases involving gears and blades, similar to the cutting head at issue here, in light of the obviousness or plaintiff’s actual awareness of the danger. *See Scardefield v. Telsmith, Inc. a Div. of Aztec Indus. Inc.*, 267 A.D.2d 560, 563, 699 N.Y.S.2d 235, 238 (3d Dep’t 1999) (affirming dismissal of failure to warn claim because “the risk of placing one’s hand near an operating gear is an obvious one”); *Ploof v. Stone Constr. Equip., Inc.*, 221 A.D.2d 1008, 634 N.Y.S.2d 278 (4th Dep’t 1995) (affirming denial of plaintiff’s motion for summary judgment and reversing trial court’s denial of defendant’s cross-motion for summary judgment dismissing plaintiff’s failure to warn claims, where plaintiff admitted that he was aware of the danger of putting his hand in the mixing machine while the blades were rotating).

Although plaintiff has not yet been deposed in this action, the evidence adduced in what plaintiff describes as the so-called “companion action” establishes that plaintiff knew and reasonably understood the obvious risks associated with putting one’s hands near the machine’s blades while the machine was in operation.⁷

⁷ The so-called “companion action” was brought by plaintiff in 2009 against The Hudson Sharp Machine Company, Inc., Campbell Wrapper Corp., FMC Technologies, Inc., SASIB Corporation of America,

- Plaintiff worked on the Wrapper for approximately eight to nine months before her accident. (*See* excerpt of the transcript of the July 28, 2010 deposition of plaintiff Rosa Maria Jerez (“Plaintiff’s Tr.”), attached as Exhibit __ to the Kesch Aff., at 21:24 to 22:7, 113:9-12.)
- Plaintiff understood that a “knife” was under the Wrapper’s cover/guard. (*See* excerpt of Plaintiff’s Tr., attached as Exhibit __ to the Kesch Aff., at 35:13-18.)
- Plaintiff understood that the “knife” would “go down.” (*See id.*, at 35:19-20.)
- Plaintiff understood that the “[knife] would **cut**, and it would seal [the cellophane packaging].” (*See id.*, at 35:20-21.)
- Plaintiff understood that the “knife” rotated and she observed the knife rotate prior to her accident. (*See* excerpt of Plaintiff’s Tr., attached as Exhibit __ to the Kesch Aff., at 35:22 to 36:3.)

Disputing Mr. Cocchiola’s opinion to the contrary, Mr. Longacre stated that “Ms. Jerez’s accident and injury was not related to the absence of any warning or label on the subject machine.” (Longacre Aff. at ¶ 13.) As Mr. Longacre notes, it was not the custom or practice of manufacturers of such equipment in 1961, much less a regulatory requirement, to provide numerous warnings or operating instructions on the machinery; it would have been even more unreasonable to expect such warnings and instructions in 1961 to be in Spanish so that Ms. Jerez would be able to understand them; and, in any event, Ms. Jerez testified that she was aware of the rotating knife under the cover. (*Id.*) “Therefore,” Mr. Longacre concludes, “an additional warning label, assuming Ms. Jerez could have read and understood it, would not have provided her with any information or knowledge she did not already have.” (*Id.*)

SASIB Packaging Inc., SASIB North American, Inc., and SASIB Packaging North America, Inc. Counsel for JBTC has appeared in the other action only as successor in interest to FMC Technologies, Inc. For the purposes of this motion, JBTC will refer to this other action as the “companion action” solely because that is how plaintiff has referenced it in her papers. But the actions have not been consolidated and are proceeding on entirely different tracks.

Thus, there are material issues of fact regarding whether plaintiff knew and understood the dangers posed by the heated knives in the Wrapper's cutting head, obviating any duty to warn. These issues of fact preclude summary judgment on plaintiff's failure to warn claim.

6. Whether plaintiff's injuries were caused by the substantial modifications made to the machine by plaintiff's employer.

It is well settled under New York law that manufacturers may not be liable for injuries caused by subsequent third-party modifications to their machine. As the New York Court of Appeals held in *Robinson v. Reed-Prentice Div. of Package Mach. Co.*, 49 N.Y.2d 471, 426 N.Y.S.2d 717 (1980):

[A] manufacturer of a product may not be cast in damages, either on a strict products liability or negligence cause of action, where, after the product leaves the possession and control of the manufacturer, there is a subsequent modification which substantially alters the product and is the proximate cause of plaintiff's injuries.

Robinson, 49 N.Y.2d at 471, 426 N.Y.S.2d at 717; *see also Rios v. Minster Mach. Co.*, 243 A.D.2d 399, 399, 664 N.Y.S.2d 548, 548 (1st Dep't 1997) (affirming trial court's dismissal of complaint "upon the basis of uncontroverted evidence that plaintiff's employer had substantially altered the machine").

The *Hierro v. E.W. Bliss Co.* case is illustrative. 145 A.D.2d 731, 535 N.Y.S.2d 264 (3d Dep't 1988). In that case, plaintiff injured his hand while operating a punch press machine that had been manufactured nearly 30 years earlier. Agreeing that the machine had been substantially modified by plaintiff's employer to include a protective guard, both the trial court and Appellate Division determined that there were "questions of fact as to whether these modifications exculpate the [manufacturer] defendant." The court stated:

The machine was not equipped with a point-of-operation guard at the time it left defendant's hands, and the guard installed by the employer was not adequate to prevent plaintiff from placing his hand inside the machine while it was capable of being activated. In our view, factual issues exist,

including whether defendant had an obligation to furnish a guard on the machine and, if so, whether the failure to install a guard was a proximate cause of plaintiff's injuries.

Hierro, 145 A.D.2d at 732, 535 N.Y.S.2d at 265.

The same questions defeat plaintiff's motion for summary judgment here, where, among other modifications, plaintiff's employer added a guard to the wrapping machine that failed to prevent plaintiff from placing her hand inside the running machine. There is no dispute that the wrapping machine at issue was modified by plaintiff's employer, Old London, at various times during the 50 or so years that it has owned and controlled the machine. As noted above, JBTC's expert, Mr. Humecki, has described in detail the numerous and substantial modifications made to the machine over the last 50 years by Old London, including the replacement of the original safety cover over the cutting heads, the addition of a permanent cover over the front hand wheel, the removal of tubing tuckers and their replacement with guide wheels, the removal of the upper conveyer belt, and the addition of an On/Off control. (Humecki Aff. at ¶ 10.)

Even plaintiff concedes that the machine had been modified after it left the manufacturer's possession and control, but before plaintiff's accident, so that it included a guard to cover the wrapping machine's cutting head:

[A]t some point after the machine had been designed and manufactured, inadequate guards were put in place to cover the cutting/crimping station in what can only be determined as a [sic] inadequate effort. It is clear based on the documents reviewed that neither of these two covers were designed, manufactured or installed by the original manufacturer.

(Kelley Aff., ¶ 28 (internal citation omitted); see also Cocchiola Aff., ¶ 23 (“[I]t is clear that at some point after the machine had been designed and manufactured, inadequate guards were installed on the cutting/crimping station.”).)

According to JBTC's expert, Mr. Longacre, the Subject Wrapper had undergone “significant and substantial modifications to [its] basic design and operational functions” that

“significantly affected the operational performance, as well as the safety and guarding aspects of the machine.” (Longacre Aff. at ¶ 11.) Mr. Longacre observed the Subject Wrapper in a video taken by plaintiff’s former expert in September 2009 and in person at a May 2010 inspection. (*Id.*) His investigation revealed that Old London or possibly aftermarket modifiers hired by Old London had altered the upper conveyor so that it could no longer operate. (*Id.*) This modification, together with those noted by JBTC’s other expert, Mr. Humecki, “most likely caused or contributed to the frequent ‘jams’ of the plastic wrapping material within the machine, as testified to by Ms. Jerez and other operators.” (*Id.*)

Because these “frequent jams” were the reason why plaintiff sought to access the cutting head, resulting in her accident, Mr. Longacre stated the following “professional opinion within a reasonable degree of engineering certainty”: “Ms. Jerez’s accident and injury was caused by the significant and substantial modification of the operational and safety features of the subject wrapping machine [by Old London or its vendors], and by the failure of [Old London] to properly maintain the subject machine.” (*Id.* at 14; *see also id.* at ¶ 12.) Because of these modifications to the machine by Old London prior to plaintiff’s accident, and the fact that these modifications proximately caused plaintiff’s injuries, plaintiff’s motion for summary judgment should be denied. *See, e.g., Rios*, 243 A.D.2d at 399, 664 N.Y.S.2d at 548.

* * * *

Therefore, in light of the various disputes between the parties’ experts on these issues, and the numerous related issues of fact, plaintiff’s motion for summary judgment should be denied in its entirety. It is for a jury to assess the credibility of each expert and resolve these questions of fact.

POINT III

**PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT
SHOULD BE DENIED BECAUSE IT IS PROCEDURALLY DEFECTIVE**

**A. Plaintiff's Motion Is Premature In Light Of Her Denying
JBTC The Opportunity To Conduct Adequate Discovery
And Her Violation Of This Court's Discovery Orders.**

Even though their client initiated this action, plaintiff's counsel has frustrated JBTC's efforts to depose plaintiff and conduct discovery, in violation of several court orders and the parties' agreed discovery plan. At a Preliminary Conference on October 10, 2012, plaintiff's counsel attempted to avoid plaintiff's deposition by claiming it would be duplicative of a deposition of plaintiff that was conducted more than two years earlier in a separate action in which JBTC was not a named defendant. Rejecting that argument, the Court told plaintiff that JBTC is entitled to depose plaintiff in this action. The parties agreed to schedule plaintiff's deposition for November 29, 2012, as memorialized in the Preliminary Conference Order. (*See* Exhibit F to the Kelley Aff.)

The ensuing cat-and-mouse game is recounted in JBTC's Motion to Compel Discovery, filed on July 30, 2013. *See* Kesch Aff. Ex. __.⁸ Plaintiff's counsel failed to produce plaintiff for her deposition scheduled for November 29, 2012, because "lead counsel was "on vacation"; for her deposition rescheduled for May 1, 2013, because a "virus [was] going around [plaintiff's counsel's] office"; and for her deposition rescheduled for June 12, 2013, because plaintiff argued her forthcoming summary judgment motion would stay discovery, despite the fact that the Court rejected this excuse.⁹ Plaintiff similarly has either failed to respond meaningfully, or has failed

⁸ A copy of JBTC's moving papers on its motion to compel, including the July 30, 2013 Affirmation of Craig S. Kesch, Esq., which contains a detailed explanation of the facts giving rise to JBTC's motion to compel ("Kesch Aff. on Motion to Compel"), is attached as Exhibit __ to the Kesch Aff. on this motion. Pursuant to a briefing schedule agreed to by the parties, plaintiff's motion to compel will be fully submitted on September 19, 2013.

⁹ *See* JBTC's July 30, 2013 Memorandum of Law in Support of its Motion to Compel (part of Kesch Aff. Ex. __), at pp. 2-4; Kesch Aff. on Motion to Compel (part of Kesch Aff. Ex. __), at ¶¶ 8-14, 17-30.

to comply with her obligations, to JBTC's Request to Obtain Copy of Statement, Notice for Discovery and Inspection, Interrogatories, and Authorizations for employment records including W-2's from 2006-Present. (*Id.* at 4-6.) It was only after JBTC filed its Motion to Compel that Plaintiff produced anything at all, and its response was woefully inadequate. While JBTC's requests were "reasonably propounded to clarify and amplify plaintiff's allegations regarding the defectiveness" of the wrapping machine (*Wiseman v. Am. Motors Sales Corp.*, 101 A.D.2d 859, 859, 475 N.Y.S.2d 885, 886-87 (2d Dep't 1984)), plaintiff's responses were "devoid of factual detail and... fail[ed] to provide [JBTC] with the particulars needed to interpret and defend against plaintiff's" allegations. *Novick v. DeRosa*, No. 030526/03, 2006 WL 6160662, at *1 (Sup. Ct. Suffolk Co. July 10, 2006).

In the midst of this discovery dispute, plaintiff moved for summary judgment on all her claims. Plaintiff's counsel stated in his affirmation that "[t]here is no dispute between this office and counsel for **JOHN BEAN TECHNOLOGIES CORPORATION** that all relevant evidence was already exchanged in the companion action." (Kelley Aff., ¶ 5 (capitals and emphasis in original).) This statement is wrong, and Plaintiff's counsel knew it at the time it was made. In addition to the reasons stated above, plaintiff's motion for summary judgment should be rejected as premature because of her failure to allow JBTC to conduct even the most basic, and Court-ordered, discovery.

As plaintiff's counsel is aware and as JBTC's motion to compel sets forth, JBTC disputes that "all relevant evidence was exchanged in the companion action." (*Id.*) On June 11, 2013, at the latest, Plaintiff's counsel was on notice that JBTC intended to file a motion to compel in light of plaintiff's refusal to comply with discovery -- at the Status Conference held that day, counsel for JBTC explicitly advised plaintiff's counsel that it intended to move to compel, and followed

up with an e-mail recounting the events at the Status Conference and reiterating its intention to move to compel. (See Kesch Aff. on Motion to Compel (part of Kesch Aff. Ex. ___), at ¶¶ 2, 28; Exhibit A to the Kesch Aff. on Motion to Compel.). That was ten days *prior* to plaintiff’s counsel’s statement in his affirmation, dated June 21, 2013, that “[t]here is no dispute between this office and counsel for **JOHN BEAN TECHNOLOGIES CORPORATION** that all relevant evidence was already exchanged in the companion action.” (Kelley Aff., ¶ 5 (capitals and emphasis in original).)¹⁰

In light of plaintiff’s continued failure to appear for deposition and provide this long outstanding discovery, plaintiff’s motion for summary judgment should be denied as premature. *See, e.g., Amico v. Melville Volunteer Fire Co.*, 39 A.D.3d 784, 785, 832 N.Y.S.2d 813, 813 (2d Dep’t 2007) (denying motion for summary judgment as premature where party had not been “afforded a reasonable opportunity to conduct discovery prior to the determination of a motion for summary judgment.”); *Venables v. Sagona*, 46 A.D.3d 672, 673, 848 N.Y.S.2d 238, 239 (2d Dep’t 2007) (same).

B. Plaintiff Has Not Submitted Any Admissible Evidence To Support Her Motion.

As the party moving for summary judgment, plaintiff bears the burden of “mak[ing] a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case.” *Greenidge v. HRH Constr. Corp.*, 279 A.D.2d 400, 402, 720 N.Y.S.2d 46, 49 (1st Dep’t 2001) (internal quotation marks omitted). “[A] summary judgment motion ‘shall be supported by affidavit’ of a person ‘having knowledge of

¹⁰ In light of plaintiff’s failure to appear for deposition or comply with her discovery obligations in this action, JBTC has referred to testimony and discovery taken in the “companion action” for the purposes of opposing plaintiff’s motion. For the reasons set forth in JBTC’s motion to compel (Kesch Aff. Ex. ___), discovery of plaintiff is necessary in this action in order for JBTC to fully test plaintiff’s claims against it and to avoid trial by ambush.

the facts’ as well as other admissible evidence.” *JMD Holding Corp. v. Congress Fin. Corp.*, 4 N.Y.3d 373, 384, 795 N.Y.S.2d 502, 510 (2005) (citations omitted). “[I]n the absence of admissible evidence sufficient to preclude any material issue of fact, summary judgment is unavailable.” *Greenidge*, 279 A.D.2d at 402, 720 N.Y.S.2d at 49.

Here, plaintiff’s prima facie case rests entirely on the Kelley Affirmation and its exhibits (many of which are unauthenticated and inadmissible), including the affidavit of plaintiff’s expert Thomas J. Cocchiola. (Ex. A1 to the Kelley Aff.) However, neither the Kelley Affirmation nor the Cocchiola Affidavit constitutes admissible evidence that can be considered on a motion for summary judgment. Because of her reliance on inadmissible evidence, plaintiff has failed to make a prima facie showing and her motion for summary judgment should be denied. *See JMD Holding Corp.*, 4 N.Y.3d at 384, 795 N.Y.S.2d at 510.

1. The Kelley Affirmation Does Not Satisfy CPLR 3212(b)

CPLR 3212(b) requires a party moving for summary judgment to support its motion with an “affidavit... by a person having knowledge of the facts.” In this case, plaintiff supports her motion only with her attorney’s affirmation and its exhibits. But the Kelley Affirmation does not assert – and could not assert – that plaintiff’s counsel has any personal knowledge of the facts and events leading up to plaintiff’s accident. Plaintiff seeks to obscure this deficiency by purporting to cite evidence in support of *some* of her lawyer’s statements. These citations are marred by numerous flaws and inaccuracies that undermine plaintiff’s proof. *See Gonzalez v. City of New York*, 21 Misc. 3d 1105(A), 873 N.Y.S.2d 233, at *5 (Kings Co. Sup. Ct. 2008) (holding that plaintiff’s attorney’s affirmation was insufficient on motion for summary judgment where it did not identify evidence in support of statements within, or where evidence cited did not substantiate the statements made).

The Kelley Affirmation asserts several alleged facts without citing to *any* evidence in the record (*see, e.g.*, Kelley Aff., ¶¶ 2, 3, 5, 36, 41), or cites to evidence for some alleged facts within a paragraph of his affidavit but not others, (*see, e.g.*, Kelley Aff., ¶¶ 11, 12, 19, 22, 29, 33, 38, 39.) Examples of such unsupported statements within the Kelley Affirmation include, among others:

- “Due to the frequency of cellophane jams during each shift at the cutting head site, worker’s [sic] would have to clear jams.” (Kelley Aff., ¶ 12);
- “The subject machine was designed to operate in a continuous production mode even when the upper conveyor belt is raised.” (Kelley Aff., ¶ 22);
- “The manufacturer clearly anticipated the need to access the cutting/crimping station to clear cellophane jams by designing a hinged upper conveyor belt.” (Kelley Aff., ¶ 22);
- “The installation of this purported safety guard was an inadequate attempt to place a cover over the cutting head and heating element because its exposure was clearly dangerous and hazardous to worker’s [sic].” (Kelley Aff., ¶ 29);
- “The fact that an inadequate safety cover had been subsequently installed, by Old London Foods, Inc, does change [sic] the fact that the original design of the subject wrapping machine failed to include a safety guard; and that this machine was designed to operate without one.” (Kelley Aff., ¶ 29);
- “[T]he machine was designed without any warning labels offering instructions on how an operator should feed the machine with cellophane in the event of a jam” (Kelley Aff., ¶ 38);
- “In light of the fact that cellophane jams were known to occur frequently (hence resulting in a design permitting ease of access to the blades where the jams took place), the defendant was fully aware that operators would be lifting the top conveyor belt in order to gain access to the feeder.” (Kelley Aff., ¶ 38);
- “[P]laintiff would have appreciated the danger of loose articles of clothing becoming caught in the feeder” (Kelley Aff., ¶ 38); and
- [T]he machine “constantly jammed and required operators to free the jams manually and feed new cellophane manually into the feeder while the machine was still fully operating” (Kelley Aff., ¶ 41).

These *ipse dixit* assertions by counsel are not evidence, and should be summarily stricken. See *U.S. v. Alessi*, 599 F.2d 513, 514-15 (2d Cir. 1979) (affirming district court's order striking portions of attorney's affidavit submitted in support of summary judgment motion because they did not appear to have been made on personal knowledge). In light of these defects, the Kelley Affirmation in its entirety should be deemed inadmissible and insufficient to support plaintiff's burden under CPLR 3212(b). See *Gonzalez*, 21 Misc. 3d 1105(A), 873 N.Y.S.2d 233, at *5; *Sprecher by Tenenbaum v. Port Washington Union Free School Dist.*, 166 A.D.2d 700, 561 N.Y.S.2d 284 (2d Dep't 1990) (plaintiff's attorney's affirmation, which attached several exhibits, "did not supply the necessary admissible evidentiary showing to successfully" satisfy CPLR 3212(b)).

2. The Cocchiola Affidavit is Inadmissible and of No Probative Value

Plaintiff cannot establish a prima facie case under *any* of her theories without an admissible expert opinion. See *Lessard v. Caterpillar, Inc.*, 291 A.D.2d 825, 825, 737 N.Y.S.2d 191, 191-92 (4th Dep't 2002) (after striking plaintiff's expert's testimony, trial court properly granted defendant's motion for directed verdict because plaintiff cannot establish a prima facie case in products liability action in the absence of expert testimony); see also *Powles v. Wean United Corp.*, 126 A.D.2d 624, 625, 511 N.Y.S.2d 61, 62 (2d Dep't 1987) (plaintiff could not establish prima facie products liability case on summary judgment motion without submission of "evidentiary facts, by expert affidavit").

New York courts may deem expert affidavits inadmissible or of no probative value where they: (i) lack foundation; (ii) are conclusory or speculative; or (iii) are based on inadmissible evidence, such as hearsay or unsworn or unauthenticated documents. See, e.g., *Costa v. 1648 Second Ave. Restaurant Inc.*, 221 A.D.2d 299, 300, 634 N.Y.S.2d 108, 109 (1st Dep't 1995)

(expert's affidavit inadmissible on motion for summary judgment because its conclusions were dependent upon other inadmissible evidence); *Avella v. Jack LaLanne Fitness Ctrs., Inc.*, 272 A.D.2d 423, 424, 707 N.Y.S.2d 678, 679 (2d Dep't 2000) (expert affidavit based upon unauthenticated photographs was of no probative value on motion for summary judgment); *Gardner v. Ethier*, 173 A.D.2d 1002, 1003, 569 N.Y.S.2d 835, 836 (3d Dep't 1991) (expert affidavit inadmissible on motion for summary judgment because it was conclusory and speculative and the views it conveyed were based on hearsay statements). Plaintiff's expert affidavit is inadmissible because it suffers from each of these defects and others as well.

Here, plaintiff has submitted an expert opinion, the Cocchiola Affidavit, in support of such crucial facts or opinions as the design of the wrapping machine at the time of its manufacture and sale, the manner in which it was intended to work, and the adequacy of its warnings. The fundamental flaw of plaintiff's expert affidavit is that all of Mr. Cocchiola's purported conclusions regarding the original design and manufacture of the wrapping machine are based on inadmissible and incomplete evidence. To opine that the wrapping machine "was not reasonably safe for its intended purpose," Mr. Cocchiola first concluded that the machine, as originally designed and manufactured in 1961, lacked an interlock guard or safety guard. (*See Cocchiola Aff.*, ¶ 14.) Notably, Mr. Cocchiola does not claim that he has ever personally inspected the machine at issue. Rather, his conclusion was based solely on his review of three items: a "Shop Book," which was attached as Exhibit 23 to the Kelley Affirmation and described as a "document produced by the manufacturer that... identifies all of the materials/components used to build the subject machine"; photographs attached as Exhibits 16, 17, 19, and 21 to the Kelley Affirmation; and videos purportedly taken of the machine in operation in September 2008 and May 2010. (*Cocchiola Aff.*, ¶¶ 3, 13.). There are two flaws

that fatally undermine Mr. Cocchiola's conclusions about the original design and manufacture of the wrapping machine: (1) what Mr. Cocchiola calls the "Shop Book" is incomplete and, in any event, even a complete Shop Book would not have shown all the details of the Subject Wrapper, such as the original cover on its cutting head; and (2) all of the items he relied upon – the incomplete "Shop Book," photos, and video – are inadmissible.¹¹ First, Mr. Humecki stated that even the complete Shop Book for the Subject Wrapper does not have show every detail of the machine as designed and manufactured: "[t]hese drawings were not intended to be a complete, as-built, as-sold depiction of the machine." (Humecki Aff. at ¶ 29.) In particular, Mr. Humecki explains why the complete Shop Book would not have shown, as Mr. Cocchiola assumed it would, the cover that was on the Subject Wrapper at the time of its manufacture and sale:

No detail of the safety cover to the cutting head was included in the Shop Book because in the early 1960's the Shop Book was created and maintained in the Engineering Department of FMC. The machine's guarding was fashioned by the Sheet Metal Department which was separate from the Engineering Department. The Sheet Metal Department made its own sketches of the safety cover to the cutting head, which were not retained. There was never a drawing of the safety cover to the cutting head in the Engineering Department.

(*Id.*) Thus, Mr. Cocchiola's depiction of the Subject Wrapper as designed and manufactured is based not only on an incomplete Shop Book, but also on a fundamental misunderstanding of what even a complete version of that document would have shown.

Second, Mr. Cocchiola's incomplete version of the "Shop Book" (Exhibit 23 to the Kelley Affirmation) is unauthenticated and inadmissible hearsay. Exhibit 23 to the Kelley Affirmation consists of three separate pages: two one-page documents and a photograph that were marked as separate exhibits at the deposition of Todd Goodwin, Vice President of Finance and Administration at Campbell Wrapper Corporation, a defendant in the "companion action."

¹¹ A complete version of the Subject Wrapper's Shop Book is attached as Exhibit G to the Humecki Aff.

At his deposition, Mr. Goodwin testified that the first page of Exhibit 23 to the Kelley Affirmation was only the cover page to the two-to-three inch thick “Shop Book.” (Kesch Aff. ¶ __; Ex. __.) He also testified that the manufacturer’s engineers maintain the “Shop Book,” though they are not obligated to do so. (Kesch Aff. ¶ __; Ex. __.) As to the second page of Exhibit 23 to the Kelley Affirmation, Mr. Goodwin testified that he “belie[ved]” it applied to the wrapping machine at issue, but his testimony was plainly equivocal. (Kesch Aff. ¶ __; Ex. __.) With respect to the third and final page of Exhibit 23 to the Kelley Affirmation, Mr. Goodwin never testified that it was part of the “Shop Book” or even a photograph of the particular wrapping machine at issue. (Kesch Aff. ¶ __; Ex. __.) In fact, at no point during his testimony did Mr. Goodwin authenticate the documents that appear at Exhibit 23 of the Kelley Affirmation as the “Shop Book,” nor did he authenticate any other document purporting to be a “Shop Book.” The photographs attached to plaintiff’s summary judgment motion as Exhibits 16, 17, 19, and 21 also are unauthenticated. Each of the photographs contained in these exhibits were marked at various depositions in the “companion action.” No witness was ever asked to authenticate the photographs or establish when and where they were taken.

Similarly, the purported post-accident videos of the machine that Mr. Cocchiola relies upon are unauthenticated and may not serve as a basis for the admission of his expert opinion. None of these videos has been produced in this action, attached as exhibits on this motion, or otherwise provided to JBTC. (Kesch Aff. ¶ __.)

Because the “Shop Book,” photographs and videos are unauthenticated, they are inadmissible. And because Mr. Cocchiola’s underlying conclusions regarding the original design and manufacture of the machine are based on this unauthenticated and inadmissible evidence, as well as the incomplete and misinterpreted “Shop Book,” the Cocchiola Affidavit is

flawed and inadmissible as well. *See, e.g., Costa*, 221 A.D.2d at 300, 634 N.Y.S.2d at 109 (1st Dep’t 1995) (expert’s affidavit inadmissible on motion for summary judgment because its conclusions were dependent upon other inadmissible evidence); *Avella*, 272 A.D.2d at 424, 707 N.Y.S.2d at 679 (expert affidavit based upon unauthenticated photographs was of no probative value on motion for summary judgment).

Thus, plaintiff has failed to bear her burden of making a prima facie case and should not even be allowed to do so. Her motion for summary judgment is premature, given that she has denied JBTC an opportunity to conduct adequate discovery. Plaintiff’s motion is also based on inadmissible, incomplete, and misinterpreted evidence, in the form of her lawyer’s and expert’s affirmations. For all these reasons, plaintiff’s motion for summary judgment should be denied.

POINT IV

PLAINTIFF’S BREACH OF WARRANTY CLAIMS ARE TIME BARRED PURSUANT TO UCC § 2-725 AND SHOULD BE DISMISSED AND SUMMARY JUDGMENT ENTERED IN FAVOR OF JBTC

As mentioned above, one group of plaintiff’s claims is amenable to summary determination – albeit summary dismissal in favor of JBTC. Plaintiff seeks summary judgment on her claim for breach of implied warranties of merchantability and fitness pursuant to §§ 2-314 and 2-315 of the Uniform Commercial Code (“UCC”) (Pl Br. at 26-27). However, because her breach of warranty claims are time barred, plaintiff’s motion should be denied and her claim dismissed.

CPLR 3212(b) authorizes this Court to grant summary judgment to a non-moving party such as JBTC. *Id.* (“If it shall appear that any party other than the moving party is entitled to a summary judgment, the court may grant such judgment without the necessity of a cross-motion.”). In deciding a motion for summary judgment, the Court “is empowered to search the

record and may, even in the absence of a cross motion, grant summary judgment to a nonmoving party [on] causes of action or issues that are subject of the motion” if it concludes that no triable issues exist and that the non-moving party is entitled to judgment as a matter of law. *See New Hampshire Ins. Co. v. MF Global, Inc.*, 108 A.D.3d 463, 465-67, 970 N.Y.S.2d 16, 19-20 (1st Dep’t 2013) (affirming in part trial court’s denial of plaintiff’s motion for summary judgment and granting summary judgment instead to the non-moving defendant); *DCA Adver., Inc. v. The Fox Group, Inc.*, 2 A.D.3d 173, 174, 769 N.Y.S.2d 514, 515-16 (1st Dep’t 2003) (granting summary judgment to non-moving party on issue where there were no triable questions of fact because “a motion for summary judgment, irrespective of by whom it is made, empowers a court, even on appeal, to search the record and award judgment where appropriate”). Here, the record demonstrates that JBTC should be awarded summary judgment on plaintiff’s breach of warranty claims because there are no triable issues of fact with respect to the expiration of the statute of limitations on these claims.

UCC § 2-725 governs the statute of limitations on claims regarding contracts for sale, including claims for breach of warranty. It states, in pertinent part:

(1) An action for breach of any contract for sale must be commenced **within four years after the cause of action has accrued**. By the original agreement the parties may reduce the period of limitation to not less than one year but may not extend it.

(2) A cause of action accrues when the breach occurs, regardless of the aggrieved party’s lack of knowledge of the breach. **A breach of warranty occurs when tender of delivery is made**, except that where a warranty explicitly extends to future performance of the goods and discovery of the breach must await the time of such performance the cause of action accrues when the breach is or should have been discovered.

UCC § 2-725 (emphasis added).

The Court of Appeals has held that this provision requires a breach of warranty claim to be commenced within four years after it accrues, which, in cases involving manufacturers, is the date they tender delivery of the product. *Heller v. U.S. Suzuki Motor Corp.*, 64 N.Y.2d 407, 410-11, 488 N.Y.S.2d 132, 133-34 (1985). “[T]he cause of action accrues upon tender of delivery despite the aggrieved party’s lack of knowledge of the breach. This rule is equally applicable to suits by a party not in privity with the manufacturer,” such as an employee of the purchaser of the product. *Vanata v. Int’l Mach. Corp.*, 269 A.D.2d 175, 176, 702 N.Y.S.2d 293, 295 (1st Dep’t 2000). Thus, in *Vanata* the First Department set aside a jury verdict for a personal injury arising out of an accident that occurred 22 years after the manufacture of the machine, finding plaintiff’s breach of warranty claims against the manufacturer were time barred. *Vanata*, 269 A.D.2d at 176, 702 N.Y.S.2d at 295.

Here, there is no dispute about the facts that warrant dismissal of plaintiff’s breach of warranty claims: the wrapping machine at issue was manufactured and tender of delivery made in 1961; plaintiff’s accident occurred in March 2008; and this lawsuit was commenced in March 2011. (*See Kelley Aff.*, ¶¶ 2, 4, 15.) Because plaintiff commenced this action in 2011 -- exactly 50 years after the cause of action accrued in 1961, and 46 years after the statute of limitations expired in 1965 -- plaintiff’s breach of warranty claims should be dismissed as time barred and summary judgment entered on that claim in favor of JBTC.

CONCLUSION

For the foregoing reasons, JBTC respectfully requests that this Court deny plaintiff’s motion for summary judgment in its entirety, and exercise its discretion pursuant to CPLR 3212(b) to award summary judgment to JBTC on plaintiff’s breach of warranty claim.

Dated: New York, New York
September 18, 2013

VALOREM LAW GROUP

A handwritten signature in black ink, appearing to read "Mark D. Sayre", written over a horizontal line.

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