UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

IN RE: E. I. DU PONT DE NEMOURS AND COMPANY C-8 PERSONAL INJURY LITIGATION,

Civil Action 2:13-md-2433
CHIEF JUDGE EDMUND A. SARGUS, JR.
Magistrate Judge Elizabeth Preston Deavers

This document relates to:

***Kenneth Vigneron, Sr. v. E. I. du Pont de Nemours and Company*, Case No. 2:13-CV-136**

EVIDENTIARY MOTIONS ORDER NO. 10

Plaintiff's Motion to Exclude Opinion of Expert Witness Marianne L. Horinko

This matter is before the Court on Plaintiff's Motion to Exclude Opinion and Testimony of Defendant's Expert Witness Marianne L. Horinko (ECF No. 4648), Defendant's Memorandum in Opposition to Plaintiff's Motion (ECF No. 4684), and Plaintiff's Reply in Support of his Motion (ECF No. 4695). For the reasons that follow, the Court **GRANTS** Plaintiff's Motion.

I.

Plaintiff Kenneth Vigneron, Sr., alleges that he is a member of the class ("*Leach* Class") of individuals who are permitted under a contractual agreement ("*Leach* Settlement Agreement") to file claims against Defendant E. I. DuPont de Nemours and Company ("DuPont") based on six human diseases ("Linked Diseases") that they believe were caused by their exposure to ammonium perfluorooctanoate ("C-8" or "PFOA") discharged from DuPont's Washington Works plant. (*Leach* Settlement Agreement ("S.A."); ECF No. 820-8.) A seven year

epidemiological study ("Science Panel study") found that, "based upon the weight of the available scientific evidence, it is more likely than not that there is a link between exposure to C-8 and" the Linked Diseases ("Probable Link Finding"). *Id.* § 1.49. DuPont and a representative of the *Leach* Class contractually agreed that the Probable Link Findings would apply to the members of the *Leach* Class who suffer or suffered from a Linked Disease. It is not contested that Mr. Vigneron suffered from testicular cancer, which is a Linked Disease.

As does Mr. Vigneron, all of the 3500-plus plaintiffs in this multidistrict litigation ("MDL") allege that they are members of the *Leach* Class and that they suffer or suffered from a Linked Disease. The Court has tried two bellwether cases. The first, chosen by DuPont, was a kidney cancer case brought by Carla Marie Bartlett (Case No. 2:13-cv-170), and the plaintiffs picked a testicular cancer case filed by David Freeman (Case No. 2:13-1103), which was tried second. Both of those cases resulted in a jury verdict in the plaintiffs' favor. Mr. Vigneron's case is the first non-bellwether case selected for trial, which is scheduled for November 14, 2016.

The claims of all of the plaintiffs in this MDL arise from DuPont's alleged negligence and/or recklessness in releasing the C-8 from the Washington Works plant, which contaminated six water districts that are located in Ohio and in West Virginia. All of the plaintiffs' claims are subject to either the law of Ohio or of West Virginia. (Dispositive Motions Order No. 3, ECF No. 3551.) Ohio law governs Mr. Vigneron's case.

To establish a claim for negligence in Ohio, a plaintiff must allege facts showing: (1) the defendant owed him a duty of care; (2) the defendant breached that duty of care; and (3) as a direct and proximate result of the defendant's breach, the plaintiff suffered injury. *Menifee v. Ohio Welding Prods., Inc.*,15 Ohio St.3d 75, 77 (1984). The existence of a duty derives from the foreseeability of the injury, which usually depends upon the defendant's knowledge. *Menifee*, 15

Ohio St. 3d at 77. The "test for foreseeability is whether a reasonably prudent person would have anticipated that an injury was likely to result from the performance or nonperformance of an act." *Id.*

In its defense, DuPont avers that it "neither knew, nor should have known, that any of the substances to which [Mr. Vigneron] was allegedly exposed were hazardous or constituted a reasonable or foreseeable risk of physical harm by virtue of the prevailing state of the medical, scientific and/or industrial knowledge available to DuPont at all times relevant to the claims or causes of action asserted by [Mr. Vigneron]." (Def.'s Answer to Vigneron Compl. ¶ 227; ECF No. 47.) DuPont further answered that it has "complied with all applicable statutes and regulations set forth by local, state and/or federal government(s) with regard to the conduct alleged in the Complaint, and" that "all conduct and activities of DuPont related to matters alleged in the Complaint conformed to industry standards based upon the state of medical, scientific and/or industrial knowledge which existed at the time or times that [Mr. Vigneron] is alleged to have been exposed." *Id.* ¶¶ 232, 235.

DuPont and the MDL plaintiffs have retained experts to opine on whether DuPont conformed to the industry standards based upon the state of the medical, scientific and/or industrial knowledge available to DuPont during the relevant time period. DuPont has offered and in some instances has utilized for trial: Shane A. Snyder, Ph.D; Thomas C. Voltaggio, B.S., M.A.; Douglas L. Weed, M.D., M.P.H., Ph.D,; and, Robert W. Rickard, Ph.D, D.A.B.T. The plaintiffs have offered and in some cases have called at trial: Barry S. Levy, M.D., M.P.H.; Michael B. Siegel, M.D., M.P.H.; Stephen E. Petty, P.E., C.I.H., C.S.P.; Steven Amter, B.S., M.S.; James S. Smith, Ph.D., CPC.; and, Carrie Redlich M.D., M.P.H. The parties refer to these witnesses generally as "corporate conduct" experts and have brought the issue of whether these

experts offer testimony that is admissible in numerous motions, on which this Court has issued several decisions. (Evidentiary Motions Order No. ("EMO") 2, ECF No. 4129); (EMO 3, ECF No. 4178); (EMO 5, ECF No. 4532); (EMO 6, ECF No. 4551); (EMO 7, ECF No. 4596); (ECF No. 8, ECF No. 4617).

Mr. Vigneron directs his current motion to the exclusion of the report and anticipated testimony of Marianne L. Horinko, who was retained by DuPont as an expert witness for the *Vigneron* trial. (Expert Rep. of Marianne L. Horinko, ECF No. 4639-5; Horinko Dep., ECF No. 4641-8.) Mr. Vigneron's motion is fully briefed and ripe for decision.

II.

In *Daubert v. Merrell Dow Pharmaceuticals, Incorporated*, 509 U.S. 579 (1993), the United States Supreme Court held that the Federal Rules of Evidence, in particular Rules 702 and 104(a), govern the admission of expert witness testimony and require that the trial judge "ensure that any and all scientific testimony or evidence admitted is not only relevant, but reliable." *Daubert,* 509 U.S. at 589. Because Rule 702 "requires that the evidence or testimony 'assist the trier of fact to understand the evidence,'" expert testimony "which does not relate to any issue in the case is not relevant and ergo, nonhelpful." *Id.* at 590–90. "In other words, there must be a 'fit' between the proposed testimony and the question(s) presented by the case at bar." *Id.* at 591.

The burden is on the party proffering the expert report to demonstrate by a preponderance of proof that the opinion of his expert is admissible. *Nelson v. Tenn. Gas Pipeline Co.*, 243 F.3d 244, 251 (6th Cir. 2001). A district court exercises its responsibility in acting as the "gatekeeper" for expert testimony. *Daubert*, 509 U.S. at 588; *Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 141 (1999). This role, however, is not intended to supplant the adversary system

or the role of the jury. *In re Scrap Metal Antitrust Litig.*, 527 F.3d 517, 531–32 (6th Cir. 2008). Arguments regarding the weight to be given any testimony or opinions of an expert witness are properly left to the jury. *Id.* "Vigorous cross-examination, presentation of contrary evidence, and careful instruction on the burden of proof are the traditional and appropriate means of attacking shaky but admissible evidence." *Id.* (quoting *Daubert*, 509 U.S. at 596).

The particular *Daubert* factors that this Court considers depends upon the unique circumstances of the expert testimony involved. *Kumho Tire Co.,* 526 U.S. at 151–52. As the United States Court of Appeals for the Sixth Circuit has recognized, there is need for flexibility when the expert testimony at issue is non-scientific, as is the testimony of Ms. Horinko. *First Tenn. Bank Nat'l Ass'n v. Barreto,* 268 F.3d 319, 332 (6th Cir. 2001).

III.

In the *Bartlett* and *Freeman* trials, this Court permitted the plaintiffs to offer evidence of a complaint filed by the United States Environmental Protection Agency ("EPA") against DuPont, in which the EPA alleged that DuPont failed to properly report information about the potential hazards to humans from C-8 in violation of the Toxic Substances Control Act ("TSCA") and the Resource Conservation and Recovery Act ("RCRA"). In this vein, the parties were permitted to elicit testimony related to the complaint filed by the EPA, the answer DuPont provided to the EPA, the consent agreement and final court order on this issue, and documents upon which DuPont relied in making its decisions related to the TSCA and RCRA reporting. The Court found that this evidence was relevant to DuPont's defense that it neither knew, nor should have known, that its release of C-8 constituted a reasonable or foreseeable risk of physical harm to individuals living in the areas surrounding the Washington Works plant.

DuPont now offers the expert opinions and testimony of "Ms. Horinko—a former Acting Administrator of the EPA—to put in context the facts and offer perspective regarding the evolving regulatory program and industry practices, and to help the jury understand the reasonableness of DuPont's actions in view of these evolving regulations and practices." (Def.'s Mem. in Opp. at 2.) Ms. Horinko is educated as an attorney, but has "more than thirty years of industry and regulatory experience." (Def.'s Mem. in Opp. at 2.) DuPont contends that "principles of simple fairness" require admission of Ms. Horinko's opinions and testimony because "[i]n the *Bartlett* and *Freeman* trials, plaintiffs were permitted to introduce testimony from both a medical doctor/epidemiologist and an industrial hygienist regarding the 2005 settlement of allegations that DuPont violated" TSCA and RCRA.

Mr. Vigneron moves to exclude the opinions and testimony of Ms. Horinko "on the basis that such opinions are inappropriate and inadmissible legal conclusions." (Pl.'s Mot. at 1.) Mr. Vigneron states:

> Ms. Horinko has confirmed that all of her opinions, as set forth in her Report, are nothing more than inappropriate and inadmissible legal conclusions repeating the same legal arguments made by DuPont's other lawyers in past legal briefs and filings, simply repackaged and signed off on by a former, high-ranking government official for the purpose of trying to mislead the jury into viewing these purely legal arguments as somehow representing the opinions of a governmental entity, which they do not.

(Pl.'s Mot. at 1.) While the Court does not agree that DuPont is purposely trying to mislead the jury, the remainder of Mr. Vigneron's argument is well taken.

First, the Court notes that while misleading the jury into viewing Ms. Horinko's opinions as those of the EPA may not be DuPont's purpose in offering her testimony, it may be the effect of her testimony. That is, Ms. Horinko "interprets" TSCA in a way that the EPA did not. This is purely legal opinion testimony. Ms. Horinko opines that DuPont's conduct did not violate

TSCA, even though the EPA's complaint alleges that DuPont's conduct did violate the statute. Again, this is purely legal opinion testimony. Thus, the jury is left with evidence of the EPA complaint alleging violations of TSCA, and a high-ranking EPA official testifying that the EPA improperly interpreted TSCA, and that DuPont's conduct did not violate the statute. The law, however, "is well-settled that a witness – expert or not – may not merely express legal conclusions." *U.S. v. E. Kentucky Power Co-op. Inc.*, CIV.A. 04-34-KSF, 2007 WL 4732047, at *1 (E.D. Ky. Mar. 30, 2007) (citing as an example *Berry v. City of Detroit,* 25 F.3d 1342, 1353 (6th Cir. 1994)). And, "courts are generally more concerned when an expert is offering such conclusions to a jury rather than to a judge." *Id.*

Moreover, here, the relevant inquiry is not whether DuPont actually violated TSCA. Instead, the focus is on DuPont's knowledge that the EPA believed it violated TSCA. This information goes directly to DuPont's defense that it had no reason to believe that the C-8 it was releasing from the the Washington Works plant had any potential to harm the surrounding community. As the Court explained to the *Freeman* jury during the testimony related to this issue:

> THE COURT: I want to make sure the jury gets this. I think you do. So, these are the allegations made by the EPA. The witness is saying, DuPont disagreed with them.
>
> We're not going to try that issue, because that's not what you're going to be deciding. You are going to consider all of this when you look at DuPont's conduct. But what happened here, as you'll recall, these were allegations made. DuPont disputed them. A judge found the case would have to go to trial. After that finding, then there was a settlement issued.
>
> So these are the claims. DuPont didn't admit liability, or wrongdoing. But both sides agreed to an agreement that became a court order.

(June 28, 2016 Trial Tr. at 201–215, Freeman ECF No. 127) (objections omitted).

Second, DuPont is correct that Ms. Horinko's law degree does not transform her opinions into legal conclusions. The opinions themselves, however, actually constitute legal opinions. In her report, Ms. Horinko ***restates*** the ***same arguments*** made by DuPont's counsel in its answer to the EPA's complaint, letters to the EPA, and other briefs to the court hearing the EPA action, and adds that she finds the conduct reasonable. (DuPont's Answer, ECF No. 4087-5; DuPont's Letter Submission, ECF No. 4648-1.) In the "Expert Opinion" section of her expert report, Ms. Horinko goes through each allegation made by the EPA in its complaint:

> Count I of the TSCA Action alleged that DuPont failed to submit a 1981 document describing the human blood sampling results . . . . Count II of EPA's Complaint alleged that DuPont failed to report the presence of PFOA in community drinking water samples . . . . Count III of the EPA's Complaint was premised on DuPont's alleged failure to provide "known toxicological information" concerning C8 in response to a 1997 request made by EPA as part of a RCRA site investigation." . . . . Counts IV and V of the TSCA Action relate to alleged failure to report blood sampling information obtained by DuPont in 2002 and 2004 for individuals that lived in the vicinity of the Washington Works or one of DuPont's landfills.

(Horinko Exp. Rep. at ¶¶ 67–76.)

Ms. Horinko then offers her opinion as to why these allegations are not in accord with TSCA, and that DuPont's actions were in compliance with TSCA.

> DuPont's belief that the information [in the 1981 document on human blood sampling] was not reportable under TSCA 8(e) was reasonable. . . . [It] was reasonable for DuPont not to report [C-8 in the drinking water] under TSCA . . . DuPont's position that the information [on the potential of C-8 to "cross the placental barrier"] was not reportable as substantial risk information in early 1980s was reasonable. . . . [I]t was reasonable to not provide "known toxicological information" concerning C8 in response to a 1997 request made by the EPA . . . . DuPont's interpretation of and actions in compliance with [TSCA and the implementing Regulations] were reasonable and appropriate . . . . With respect to the TSCA 8(e) reporting requirements that were the subject of the TSCA Action, it was reasonable for DuPont to conclude that the information that was not shared with EPA concerning PFOA did not constitute "reasonable support" for "substantial risk" under the statute and associated policy, or that in certain cases, EPA was already adequately informed of such information.

Id.

Ms. Horinko's opinions do not, as DuPont asserts, simply "put in context the facts and offer perspective regarding the evolving regulatory program and industry practices, and to help the jury understand the reasonableness of DuPont's actions in view of these evolving regulations and practices." To the contrary – Ms. Horinko offers her legal conclusions regarding DuPont's actions, which is not helpful to the jury. As the Sixth Circuit has explained in this regard:

> Under Rule 701 and 702, opinions must be helpful to the trier of fact, and Rule 403 provides for exclusion of evidence which wastes time. These provisions afford ample assurances against the admission of opinions which would merely tell the jury what result to reach . . . .

Torres v. County of Oakland, 758 F.2d 147, 150–51 (6th Cir. 1985).

Indeed, Ms. Horinko testifies on deposition that her opinions are actually restatements of the legal analysis and argument previously offered by DuPont's other lawyers in letters and legal briefing on these same issues, with which Ms. Horinko agrees. During her deposition, Ms. Horinko was questioned as to her role as an expert witness in the *Vigneron* case:

> Q. [You were retained by DuPont] to [p]rovide your opinion on the interpretation of EPA laws, regulations, and policies.
>
> A. That is largely correct.
>
> Q. And it's your understanding, though, that that's what you did. You were providing your opinion as to how these EPA statutes, TSCA 8(e), RCRA reporting requirements, were to be interpreted and applied; correct?
>
> A. That's largely correct.
>
> Q. And whether DuPont's interpretation of those laws and regulations was accurate or reasonable –
>
> A. Correct.
>
> Q. -- is that right?
>
> A. That is correct.

. . . .

Q. *You're aware that DuPont, though,* ***made the exact arguments you're making in your report*** *in their answer to the EPA's complaint; right?*

A. ***That is correct.***

Q. And that answer was drafted by DuPont's lawyers; right?

A. I would assume so. I have no direct knowledge.

. . . .

Q. And, in fact, DuPont's attorney already made the argument about why their interpretation of -- of these laws was reasonable; correct?

A. That is correct.

. . . .

Q. Ms. Horinko, I'm handing you what's been marked Exhibit 14, and I ask if you can identify this as one of the documents you reviewed for purposes of preparing your opinions in this case.

A. I can.

. . . .

Q. You can. Okay. And, in fact, this is a document that you notice at the top here was prepared by Andrea Malinowski, corporate in-house counsel at DuPont at the time; correct?

A. That is correct.

Q. And she's sending her analysis of the law here to Mr. Richard Hefter, chief of the High Production Volume Chemicals Branch at U.S. EPA at the time; correct?

A. That is correct.

Q. And you're familiar with the fact that Mr. Hefter was in the division we've referred to before as OPPT; correct?

A. That is correct.

Q. And that's the division that was responsible for dealing with TSCA 8(e) and

reporting issues; correct?

A. That is correct.

Q. *And you understand this letter from June of 2003 from DuPont's attorney to make* ***the same arguments you make*** *with respect to DuPont's interpretation of the 8(e) reporting requirements was reasonable or not; correct?*

A. ***That is correct.***

Q. In fact, Ms. Malinowski ***uses the exact same words*** about whether this is reasonable to have interpreted it this way; correct?

A. ***That is correct.***

Q. And you understand that those same legal arguments were made in DuPont in their legal briefing to the EPA and through that -- that whole enforcement action process; correct?

A. I did read those pleadings, yes.

(Horinko Dep. at 196–202, ECF No. 4641-8) (objections omitted; emphasis added). A comparison of DuPont's answer and letter submission confirms Ms. Horinko's testimony. (DuPont's Answer, ECF No. 4087-5; DuPont's Letter Submission, ECF No. 4648-1.)

Permitting a former high-ranking EPA official to repeat DuPont's previously-made legal arguments which were rejected by the EPA, cloaks DuPont's position with the authority of the EPA. Had these legal arguments been credited by the EPA, the agency would not have filed the TSCA or RCRA action against DuPont. DuPont offers Ms. Horinko, not just as an expert, but as a high ranking EPA official, who not coincidentally disagreed with the EPA's position in 2004 as to DuPont. Thus, even if this evidence were relevant, its minimal probative value would be substantially outweighed by a danger of unfair prejudice, confusion, and of misleading the jury. *See* Fed. R. Civ. P. 403.

Finally, the Court finds unpersuasive DuPont's argument that, as a matter of fairness, Ms. Horinko should be permitted "to help the jury evaluate the reasonableness of DuPont's actions,

particularly in response to the evidence Plaintiff will proffer." (Def.'s Mem. in Opp. at 2.) DuPont's contention implies that this Court permitted only the plaintiffs to offer testimony related to TSCA and/or RCRA and the EPA's complaint filed against DuPont for alleged failures to report under these statutes. The Court, however, permitted DuPont to offer expert testimony "to help the jury evaluate the reasonableness of DuPont's actions, . . . in response to the evidence" the plaintiffs offered in *Bartlett* and *Freeman*.

DuPont offered the expert testimony of Robert W. Rickard, Ph.D., D.A.B.T. related to reporting under TSCA and/or RCRA, the EPA's complaint, DuPont's answer to the complaint, and the resulting consent agreement and final order resolving the claims. Not only was Dr. Rickard permitted to offer expert testimony, he also provided factual testimony as to DuPont's internal processes in evaluating its reporting duties under these statutes generally, and DuPont's particular decisions regarding its reporting related to the EPA complaint. By way of example, Dr. Rickard testified on direct exam at the *Freeman* trial as follows:

> Q All right. Sir, I wanted to move to a new area. We've heard, in this case, about some allegations made in 2004 by EPA regarding TSCA, T-S-C-A?
>
> A Yes.
>
> Q. Are you knowledgeable about TSCA?
>
> A. Yes, I am.
>
> Q. How are you knowledgeable about TSCA?
>
> A. Well, first of all, as a toxicologist, you know, you have a personal responsibility in terms of reporting anything under TSCA 8(e) if you have information that needs to be reported. The company has a process that feeds in. So that information goes to a committee, and then they can make the decision whether to report it or not. If they decide not to report it, they tell you. And then you still have the right to report it. But I've, actually, been on the DuPont 8(e) committee for several years, many years.

Q. Are you familiar with the guidance from EPA, over the years, regarding TSCA?

A. Yes.

Q. And, you know, I guess, backing up -- let's back up two steps on this one. Why don't you just send in every scrap of paper on C-8?

A. The EPA doesn't want you to do that, one reason, because they would just have information overload.

Q. All right. When was the first time -- so, I'm going to focus on these allegations that were made [against DuPont] by U.S. EPA with regard to C-8. When was the first time those TSCA allegations were made regarding C-8?

. . . .

A. Yes. I believe it was 2004, if my memory serves me correct.

Q. And did DuPont agree with the allegations that were being made by EPA?

A. No.

Q. Were you involved at the time?

A. I was -- I wasn't involved in, actually, being on the 8(e) committee at the time. I was involved in helping prepare the response to the allegation.

Q. So you had personal involvement in responding to the allegations once they were made?

A. Yes.

Q. And did you believe that DuPont had a good-faith basis to dispute the allegations?

A Yes. I was confident of that.

. . . .

Q. All right. 2005, December. Let's go down to the cover page there. It's titled "Consent Agreement and Final Order"?

A. Correct.

Q. And was this a settlement between U.S. EPA and DuPont?

A. Yes.

Q. Was it a settlement reached before the taking of any testimony, without adjudication of any issue of fact or law, and on consent of the parties?

A. That is correct.

Q. Okay. And we don't have to march through it, but are you aware that there were agreements that this settlement would not be an admission of liability by DuPont? Was that one of the stipulations?

A. Yes, it was.

Q. I want to address some of the documents that have been used on this. Let's look at P1.558. So, P1.558, do you see that's dated December 14 of 2005?

A. Yes.

Q. And it's an internal document at U.S. EPA. Do you see that?

A. Yes, I do.

Q. Now, this document is not the actual consent agreement. Are we clear on that?

A. Yes. This is an internal EPA document.

Q. Okay. And one of the paragraphs that's been shown with the witness is over at dot 4. And, at dot 4, we have this paragraph up at the top. It talks about the fact that, in December of '04 and January of '05, DuPont submitted 41 boxes of information related to C-8 to EPA. EPA reviewed these documents to see if any of the information had not been submitted to EPA as required by TSCA 8(e).

MR. MACE: And you can underline this one: Most of the information had been submitted previously to the agency. Can you underline that one, please?

Q. Of the information that had not been previously submitted, EPA determined that three studies should have been submitted under TSCA. Now, I don't know if you're familiar, if you could even give us a ballpark, of how many different studies were included in those 41 boxes of information that were given to EPA. Can you even ballpark it? If you can't, just tell us you can't.

A. No. It was -- it was a lot of studies, obviously. It was studies, as well as presentations, abstracts. It was, basically, all of the information we had.

Q. All right. So, you give them 41 boxes, and they say three. Let's see what they were talking about.

[Dr. Rickard's testimony continues about the studies that were available at that time and that they were provided to the U.S. EPA.] . . . .

MR. MACE: Will you blow up Count 1 [of the EPA complaint]?

Q. Count 1 alleges, claims, that DuPont failed to comply with TSCA 8(e) when it failed to submit to EPA information from 1981 that demonstrated transplacental movement of C-8 in humans. This data was substantial risk information concerning PFOA. Did you evaluate that, sir?

A. Yes, I did.

Q. And what did you determine about that?

A. Well, we disagreed that this information would be reportable, TSCA 8(e).

Q. Why is that?

A. One, you would expect PFOA to cross the placenta.

Q. What is that?

A. Just given the nature of the chemical physical properties. It was in textbooks at the time that chemicals readily crossed the placenta. And in 1982, we actually sent a letter, with a report, telling the EPA that PFOA readily crosses the placenta of the rat.
. . .

Q. Count 2, could we go to that? . . . . Count 2 alleges DuPont failed to comply with 8(e), TSCA 8(e), when it failed to submit to EPA information concerning C-8 contamination of drinking water inside people's homes. This data was substantial risk information concerning PFOA. Did you investigate this?

A. Yes.

Q. And what was the conclusion of DuPont?

A. Again, we don't believe this meets 8(e) criteria reporting.

Q. Why not?

A. All the information we had was that those levels were safe. You report information to the EPA when you think that there's a substantial risk. We have an

> overwhelming amount of information that indicated that it wasn't. And there was no standards that were in place, federally or state, at this time, in terms of standards for C-8 in drinking water.
>
> Q. Does this relate to our conversation earlier today where you were talking about the water samples taken back in the '80s and the fact that they came in various numbers under five parts per billion –
>
> A. Correct.
>
> Q -- and that DuPont had guidance from Haskell, at the time, that said less than five parts per billion is – did DuPont have guidance, back in that time period, that it had issued -- D.17, I believe it is -- that said five parts per billion, or less, is not to be concerned? . . . . So, did the CEG [Community Exposure Guideline] in water exist back in the 1980s when
> that data was gathered?
>
> A. No. It didn't exist until 1992. There was a memo from Haskell Laboratory indicating that five part per billion, in water, would be a safe level.
>
> Q. And, sir, even when the CEG for water was adopted in the early '90s when it was set at the three and the one, three if all your exposure came from drinking water, one if you've got the relative-source contribution, 80 percent from air, did DuPont expect harm even if you slightly exceeded that, up to five or six parts per billion?
>
> A. No.
>
> MR. MACE: All right. Let's go to Count 3.

(June 28, 2016 Trial Tr. at 201–215, Freeman ECF No. 127) (objections omitted; emphasis added). DuPont's counsel continues questioning Dr. Rickard, a qualified toxicology expert, eliciting extensive testimony regarding each of the remaining relevant Counts in the EPA complaint.

Dr. Rickard's testimony shows that, contrary to DuPont's suggestion that only the plaintiffs have been permitted to offer "evidence concerning alleged violations of TSCA and RCRA and the 2005" consent agreement, DuPont as also been permitted to, and did, offer evidence "to help the jury evaluate the reasonableness of DuPont's actions." (Def.'s Mem. in

Opp. at 7.) Contrarily, Ms. Horinko's opinions are a reiteration of DuPont's counsel's legal conclusions, with which she agrees. These opinions are at best unhelpful to the jury; at worst, unduly prejudicial, confusing, misleading, and an unproductive use of trial time.

IV.

For the reasons set forth above, the Court **GRANTS** Plaintiff's Motion to Exclude Opinion and Testimony of Defendant's Expert Witness Marianne L. Horinko. (ECF No. 4648.)

IT IS SO ORDERED.

11-7-2016
DATE

EDMUND A. SARGUS, JR.
CHIEF UNITED STATES DISTRICT JUDGE