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

Case No. 2:13-md-2433
JUDGE EDMUND A. SARGUS, JR.
Magistrate Judge Elizabeth P. Deavers

This document relates to:

***Larry Ogle Moody v. E. I. du Pont de Nemours and Company*, Case No. 2:15-cv-803**

EVIDENTIARY MOTIONS ORDER NO. 22

Motions Directed at Plaintiff's Expert Dr. Bahnson and Defense Expert Dr. Luongo

This case is before the Court on two matters:

(1) Defendant's Motion to Exclude the Opinions and Testimony of Specific Causation Expert Robert Bahnson, M.D., F.A.C.S. ("Motion to Exclude Bahnson Opinions") (ECF No. 4785), Plaintiff's Memorandum in Opposition to Defendant's Motion (ECF No. 4817), and Defendant's Reply in Support of its Motion (ECF No. 4843); and

(2) Plaintiff's Motion to Partially Exclude the Opinions and Testimony of Specific Causation Rebuttal Expert Tony Luongo, M.D., F.R.C.S.C., F.A.C.S. ("Motion to Partially Exclude Luongo Opinions") (ECF No. 4779), Defendant's Memorandum in Opposition to Plaintiff's Motion (ECF No. 4820), and Plaintiff's Reply in Support of his Motion (ECF No. 4839).

For the reasons that follow, the Court **GRANTS IN PART AND DENIES IN PART** Defendant's Motion to Exclude Bahnson Opinions and **GRANTS** Plaintiff's Motion to Partially Exclude Luongo Opinions.

I.

Plaintiff Larry Ogle Moody's trial is scheduled for January 17, 2017, and is the second non-bellwether trial of the over 3500 cases filed against Defendant E. I. du Pont de Nemours and Company ("DuPont") that make up this multidistrict litigation ("MDL"). The Judicial Panel on Multidistrict Litigation describes the cases in its Transfer Order as follows:

> All the actions are personal injury or wrongful death actions arising out of plaintiffs' alleged ingestion of drinking water contaminated with a chemical, C-8 (also known as perfluorooctoanoic acid (PFOA) or ammonium perfluorooctanoate (APFO)), discharged from DuPont's Washington Works Plant near Parkersburg, West Virginia. All of the plaintiffs in this litigation allege that they suffer or suffered from one or more of six diseases identified as potentially linked [("Linked Diseases")] to C-8 exposure by a study conducted as part of a 2005 settlement [("*Leach* Settlement Agreement" or "Contract")] between DuPont and a class of approximately 80,000 persons [("*Leach* Class")] residing in six water districts allegedly contaminated by C-8 from the Washington Works Plant. *See Leach v. E. I. Du Pont de Nemours & Co.*, No. 01-C-608 (W. Va. Cir. Ct. [(Wood County Aug. 31, 2001), ("*Leach* Case")].

(Transfer Order at 1, ECF No. 1.) DuPont utilized C-8 as a manufacturing aid in the production of Teflon™.

A. The *Leach* Case / This MDL

As indicated by the Judicial Panel in its Transfer Order, the cases that make up this MDL originated in the *Leach* Case. The *Leach* Case was brought by a group of individuals who alleged a variety of claims under West Virginia common law tort theories, as a result of alleged drinking water contamination. In the *Leach* Settlement Agreement, the parties fashioned a unique procedure to determine whether the *Leach* Class would be permitted to file actions against DuPont based on any of the human diseases they believed had been caused by their

exposure to the C-8 discharged from DuPont's Washington Works plant. (*Leach* Settlement Agreement ("S.A."), ECF No. 820-8.)

The procedure required DuPont and the representatives of the *Leach* Class to jointly select three completely independent, mutually-agreeable, appropriately credentialed, epidemiologists ("Science Panel") to study whether there is a connection between C-8 and human disease among the *Leach* Class. (S.A. §§ 12.2.1, 12.2.2.) Pursuant to the agreed procedure the parties set forth in the *Leach* Settlement Agreement, the Science Panel established protocols and studied C-8's connection to numerous human diseases among the *Leach* Class. (S.A. §§ 12.2.2, 12.2.3.) The Science Panel examined health data and blood samples collected through the C-8 Health Project from approximately 69,000 potential members of the *Leach* Class. (http://www. c8sciencepanel.org /c8health. html) ("The Science Panel, as part of the Community Study, received the anonymised and non-identifiable health data collected by Brookmar [in the C-8 Health Project] to examine and analyze as part of its work."). DuPont paid the cost of the study which was more than $20 million dollars. (S.A. § 9.1.)

The *Leach* Settlement Agreement provided that the conclusions of the Science Panel's study would be issued in either a "Probable Link Finding" or a "No Probable Link Finding" for each human disease the Panel studied. (S.A. § 12.2.3.) "[T]he Probable Link reports [are] presented in detail in scientific articles (follow link [on the C-8 Science Panel website to the] Study Publications." (http://www.c8sciencepanel.org/study.html.) The *Leach* Settlement Agreement defines "Probable Link" as follows:

> "Probable Link" shall mean 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 a particular Human Disease among Class Members.

(S.A. § 1.49.)

The Probable Link and No Probable Link Findings apply to the members of the *Leach* Class, which is defined as a group of individuals who, "for the period of at least one year," has "consumed drinking water containing .05 ppb [("parts per billion")] or greater of C-8 attributable to releases from [DuPont's] Washington Works" plant from any of the "six specified Public Water Districts" or any of the Covered Private Sources named in the *Leach* Settlement Agreement. (S.A. § 2.1.1.)

The claims of the *Leach* Class members were stayed for the seven years during which the Science Panel engaged in its work. In 2011 and 2012, the Science Panel reached its conclusions and issued Probable Link Findings for the Linked Diseases, which include testicular cancer, and No Probable Link Findings for over forty human diseases.

The benefit the *Leach* Class received for agreeing to this seven year stay in litigation was DuPont's agreement not to contest the issue of general causation for any Linked Disease. The Contract in relevant part provides:

> Upon delivery of any Probable Link Finding to the Administrator, Defendant agrees that, in any personal injury or wrongful death action brought by, on behalf of, or otherwise pertaining to a Class Member, *Defendant will not contest the issue of General Causation between C-8 and any Human Disease(s) as to which a Probable Link Finding has been delivered*, but *reserves the right to contest Specific Causation* and damages as to any individual Class Member or plaintiff and to assert any other defenses not barred by this Agreement.

(S.A. § 3.3) ("conditional release and covenant not to sue" section).

> The parties defined general and specific causation as follows:
>
> "General Causation" shall mean that it is probable that exposure to C-8 is capable of causing a particular Human Disease.
> . . . .
>
> "Specific Causation" shall mean that it is probable that exposure to C-8 caused a particular Human Disease in a specific individual.

(S.A. §§ 1.25, 1.60.)

In other words, the benefit the *Leach* Class Members received in return for waiting for the Science Panel to determine that it was more likely than not there is a link between their exposure to C-8 and their Linked Disease (Probable Link Finding) is that DuPont agreed not to contest whether C-8 is capable of causing their Linked Disease (general causation). DuPont retained the right to contest that, although it is probable that exposure to C-8 is capable of causing the Class Member's Linked Disease (not contesting general causation), it is not probable that exposure to C-8 caused the Linked Disease in that particular Class Member (contesting specific causation).

As for the benefit to DuPont for funding the Science Panel's work and agreeing not to contest whether general causation was established, it received a seven year reprieve from defending any litigation related to its discharge of C-8 into the drinking water of approximately 80,000 people, nearly 70,000 of whom participated in the C-8 Health Project. DuPont also received the benefit of the No Probable Link Findings. This meant that tens of thousands of potential lawsuits were forever prohibited because, once a No Probable Link Finding issued,

> DuPont was "forever discharge[d] from any and all claims, losses, damages, attorneys' fees, costs, and expenses, whether asserted or not, accrued or not, known or unknown, for personal injury and wrongful death, including but not limited to any claims for injunctive relief and special, general and punitive and any other damages whatsoever associated with such claims [for which a No Probable Link Finding issued], that: (a) relate to exposure to C-8 of Class Members from any and all pathways including, but not limited to, air, water and soil; (b) are based on the same factual predicate as raised in the Lawsuit . . . ."

Id. § 3.3. No *Leach* Class member has challenged application of the No Probable Link Findings, regardless of the results of any subsequent studies, nor under this Court's interpretation of the *Leach* Settlement Agreement could any of these Class Members bring such a challenge.

Because the Science Panel delivered Probable Link Findings for the six Linked Diseases, the *Leach* Settlement Agreement permitted the individual Class Members to pursue claims "for personal injury and wrongful death, including but not limited to any claims for injunctive relief and special, general and punitive and any other damages whatsoever associated with such claims, that . . . relate to exposure to C-8 of Class Members." (S.A. § 3.3.) The individuals who suffered from one or more of the Linked Diseases began to file actions in West Virginia and Ohio. DuPont moved the United States Judicial Panel on Multidistrict Litigation for centralization of these *Leach* Class Members' individual personal injury and wrongful death actions pursuant to 28 U.S.C. § 1407. The Judicial Panel granted DuPont's request and on April 9, 2013, it transferred this MDL to this Court.

From April 2013 through February 2015, the parties engaged in discovery and selection of discovery pool plaintiffs from which the bellwether cases would be chosen. (Case Management Order No. ("CMO") 2, ECF No. 30); (CMO 3, ECF No. 31); (CMO 4, ECF No. 68); (CMO 5, ECF No. 128); (CMO 6, ECF No. 194); (CMO 7, ECF No. 602); (CMO 9, ECF No. 3549); (Discovery Order No. ("DO") 1, ECF No. 213); (DO 2, ECF No. 223); (DO 3, ECF No. 237); (DO 4, ECF No. 247); (DO 5, ECF No. 251); (DO 6, ECF No. 264); (DO 7, ECF No. 270). Through the negotiated processes set forth in these case management and discovery orders, the parties chose, and this Court approved, six plaintiffs whose cases would serve as bellwether trials – three plaintiffs' choices and three chosen by DuPont.

The parties settled three of the bellwether cases and one was withdrawn as a bellwether by the plaintiffs. The remaining two bellwether cases went to trial in September 2015 and May 2016, respectively. The first was chosen by DuPont; a kidney cancer case brought by Carla

Marie Bartlett (Case No. 2:13-cv-170, "*Bartlett* ECF"), which resulted in a $1.6 million jury verdict in favor of Mrs. Bartlett. The plaintiffs chose the second case, which was filed by David Freeman, who suffered from testicular cancer (Case No. 2:13-1103, "*Freeman* ECF"). His case ended in a $5.1 million jury verdict award in his favor on the negligence claim and $500,000 on the claim for punitive damages.

On November 14, 2016, the first non-bellwether case was tried. That case was brought by Kenneth Vigneron, Sr. (Case No. 2:13-cv-136, "*Vigneron* ECF"), who had suffered from testicular cancer. His case ended in a $2 million jury verdict award in his favor on the negligence claim and $10.5 million on the claim for punitive damages.

To prevail on their personal injury claims, the plaintiffs must prove (1) that they are members of the *Leach* Class, (2) that they suffer or suffered from a Linked Disease, and (3) that C-8 was the specific cause of their Linked Disease, *i.e.*, by providing expert testimony that C-8 was a substantial contributing factor to his or her development of the Linked Disease. (Jury Instructions, *Bartlett* ECF No. 139, *Freeman* ECF No. 102; *Vigneron* ECF No. 195) ("Proximate cause is an act or failure to act that was a substantial factor in bringing about an injury and without which the injury would not have occurred.") (relying on Ohio Jury Instructions § 405.01 (modified); *Kelemen v. Williams*, No. 92AP-1205, 1993 WL 55171, at *4, (Ohio Ct. App. Mar. 4, 1993); *In re Gadolinium-Based Contrast Agents Prod. Liability Lit.*, Nos. 1:08 GD 50000, 1:12 GD 50004, 2013 WL 593993, at *3 (N.D. Ohio Feb. 15, 2013); *Skinner v. North Market Dev. Auth., Inc.*, No. 96APE12-1655, 1991 WL 381638, at *3 (Ohio Ct. App. Jul. 10, 1997); *see* Restatement (Second) of Torts § 432 (1965); *see also Burrage v. U.S.*, 134 S. Ct. 881, 890 (2014) (citing W. Keeton, D. Dobbs, R. Keeton, & D. Owen, Prosser and Keeton on Law of Torts § 41, p. 267 (5th ed. 1984)).

Dr. Bahnson was utilized as the specific causation expert in the *Bartlett*, *Freeman*, and *Vigneron* trials. Dr. Luongo was offered but not called as the specific causation expert in the *Freeman* case, and called at trial as the specific causation rebuttal expert in the *Vigneron* case.

B. Mr. Moody's Case

Between 1992 and 2005, Mr. Moody consumed drinking water supplied by the Little Hocking Water Association ("LHWA") and Belpre. (Expert Report of David L. MacIntosh, Sc.D., C.I.H.[1] at 8, ECF No. 4774-2.) It is uncontroverted that LHWA and Belpre are two of the six water districts contaminated by the C-8 released from DuPont's Washington Works Plant. During the period that Mr. Moody was consuming water from Belpre and LHWA prior to the finalization of the *Leach* Settlement Agreement in 2005, the concentration of C-8 in these water supplies ranged from 0.06–5.85 ppb, which is up to 116 times higher than the 0.05 ppb C-8 concentration exposure threshold established under the parties' Contract for *Leach* Class Member status. *Id.* at 6–7.

In early to mid- 2000, Mr. Moody noticed a constant dull ache in his right testicle. (Bahnson Rep. at 8, ECF No. 4774-1; June 28, 2016 Dep Tr. of Pl. Larry Moody at 103, ECF No. 4772-1.) In his deposition, he described the pain as intermittent and coming on only after sitting too long, or overextending himself. When the pain increased and the testicle began turning hard, he saw his family doctor Dr. Tucker on August 21, 2000. In his deposition, Mr. Moody related that Dr. Tucker told him it likely was just a benign calcification. Dr. Tucker's

[1] Dr. MacIntosh is the Chief Officer and Director of Advanced Analytics at Environmental Health & Engineering, and has over twenty years of experience in public health, specializing in environmental and occupational health. Dr. MacIntosh is an adjunct professor of Environmental Health at Harvard School of Public Health. DuPont has not lodged any challenge against Dr. MacIntosh or any of his opinions, including that Mr. Moody is a *Leach* Class Member under the Contract.

records from that date reflect Dr. Tucker's opinion that the testicular mass was "probably benign" and that an ultrasound was ordered at that time.

Mr. Moody underwent the ultrasound on February 4, 2001, which revealed a 2.8 x 2.1x 1.9 cm hyperechoic and somewhat heterogeneous mass in upper portion of right testicle. Dr. Tucker then referred Mr. Moody to urologist Dr. David Mendoza for further evaluation. Dr. Mendoza then recommended Mr. Moody to undergo a right radical orchiectomy which Dr. Mendoza performed on February 16, 2001.

On March 7, 2001, Mr. Moody was then evaluated by oncologists Dr. Robert Dreicer and Dr. Eric Klein to discuss the findings related to a 1cm intra-aortocaval node, as well as a suspicious left periarotic node. Mr. Moody subsequently was admitted to the Cleveland Clinic and underwent a non-nerve sparing bilateral modified retroperitoneal lymph node dissection performed by Dr. Klein on April 17, 2001. Pathology confirmed the presence of metastatic embryonal carcinoma in one of the 16 intra-aortic lymph nodes removed, along with the 13 right para caval and 3 left para-aortic lymph nodes which were removed in the same procedure. Mr. Moody stayed in the hospital for this procedure until April 24, 2001.

In May, June, and July 2001, Mr. Moody underwent chemotherapy with agents including bleomycin, Cisplatin & VP-16. Mr. Moody's records revealed he had significant discomfort and intractable nausea, requiring multiple additional hospitalizations related to the chemotherapy. After completing chemotherapy, Mr. Moody underwent CT-scan and x-ray surveillance for several years before discontinuing the radiological surveillance in 2004. On April 9, 2004, a left testicular ultrasound revealed possible microcalcifications. Dr. Mendoza indicated the lump Mr. Moody felt likely was his epididymis as the physical exam was negative for any masses. On April 21, 2004, a follow-up CT scan of the abdomen and

pelvis was completed and revealed a cluster of small nodes in the left paraaortic area, but no pathologically enlarged lymph nodes were identified.

In 2006, approximately nine years after his testicular cancer diagnosis, Mr. Moody had his C-8 serum blood levels measured as part of the C-8 Health Project. At that time, Mr. Moody's C-8 serum blood level was 304.3 ppb. (MacIntosh Rep. at 9, ECF No. 4774-2.) Mr. Moody's C-8 serum blood level was greater than all of the people who participated in the 2003–04 national survey conducted by the Center for Disease Control, which consisted of 2094 participants in the United States with reported levels of serum PFOA. *Id.*

To meet his burden of showing that his ingestion of C-8 caused his testicular cancer, Mr. Moody has proffered the expert opinion of Dr. Bahnson. (Bahnson Rep., ECF No. 4774-1; Oct. 10, 2016, Bahnson Dep. Tr., ECF No. 4772-4). DuPont offers Dr. Luongo as a specific causation rebuttal expert. (Luongo Rep., ECF No. 4773-3; Oct. 18, 2016, Luongo Dep. Tr., ECF No. 4772-5.)

C. Repetitive Arguments by the Parties

The Court has reiterated numerous times that the parties may ask for reconsideration of a ruling *only* because of new or different circumstances. They may not, as DuPont has done in its current motion, reiterate prior arguments without any explanation as to why the Court should reconsider them and/or based upon its disagreement with the Court's prior rulings. (Def.'s Mot. to Exclude Bahnson Opinions at 8–13, ECF No. 4785) (arguments regarding idiopathic origins of testicular cancer and circular reasoning without indicating that the Court had already ruled on the issues); *Id.* at 11, n.6 (addressing why "Dr. Bahnson's deposition testimony not be used to supplement his deficient report," without indicating that the Court had already ruled on this issue); *Id.* at 15 (regarding increased risk opinions and their ability to form the basis of recovery

under Ohio law, without indicating that the Court already ruled on this issue); (Def.'s Reply in Support of its Mot. to Exclude Bahnson Opinions at 5, n.4) ("disagree[ing] with this Court's decision in Evidentiary Motions Order No. [("EMO")] 9 [ECF No. 4777] that Plaintiff can supplement Dr. Bahnson's deficient expert reports with his deposition testimony," instead of offering new or different circumstances sufficient for reconsideration).

As Section III(A) of CMO 19 provides, and each subsequent pretrial order will provide, the parties need merely indicate that the Court has previously ruled upon the issues and that it wishes to reassert and preserve their prior arguments.

II.

The burden is on the party proffering the expert report to demonstrate by a preponderance of proof that the opinions of their experts are admissible. *Nelson v. Tenn. Gas Pipeline Co.*, 243 F.3d 244, 251 (6th Cir. 2001). Federal Rule of Evidence 702, as amended in 2000 in response to *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993) and *Kumho Tire Co. v. Carmichael,* 526 U.S. 137 (1999), governs admissibility of expert testimony. To qualify as an expert under Rule 702, a witness must establish his or her expertise by reference to "knowledge, skill, experience, training, or education." Fed. R. Evid. 702. "Although this requirement is typically treated liberally, a witness is not an expert simply because he claims to be." *Rose v. Truck Centers, Inc.*, 388 F. App'x 528, 533 (6th Cir. 2010) (citing *Pride v. BIC Corp.*, 218 F.3d 566, 578 (6th Cir. 2000)).

Further, 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." *Daubert*, 509 U.S. at 591. "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. Finally, to determine whether expert testimony is "reliable," the trial court's role, and the offering party's responsibility, "is to make certain that an expert . . . employs in the courtroom the same level of intellectual rigor that characterizes the practice of an expert in the relevant field." *Kumho*, 526 U.S. at 152. The test of reliability is, however, a "flexible" one. *Id.* at 140.

"In *Daubert* the Court charged trial judges with the responsibility of acting as gatekeepers to exclude unreliable expert testimony, and the Court in *Kumho* clarified that this gatekeeper function applies to all expert testimony, not just testimony based in science." *Rose*, 388 F. App'x at 532 (quoting Fed. R. Evid. 702 advisory committee's notes). "*Daubert* attempts to strike a balance between liberal admissibility for relevant evidence and the need to exclude misleading 'junk science.'" *Id.* (quoting *Best v. Lowe's Home Ctrs., Inc.*, 563 F.3d 171, 176–77 (6th Cir. 2009) (internal quotation marks omitted)). Any doubts regarding the admissibility of an expert's testimony should be resolved in favor of admissibility. Fed. R. Evid. 702 Advisory Committee's Notes ("[A] review of the case law . . . shows that rejection of the expert testimony is the exception rather than the rule."); *Jahn v. Equine Services, PSC,* 233 F.3d 382, 388 (6th Cir. 2000) (stating that in *Daubert* "[t]he Court explained that Rule 702 displays a liberal thrust with the general approach of relaxing the traditional barriers to opinion testimony") (internal quotations omitted).

The district court's role as gatekeeper 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).

III.

Dr. Bahnson offers the following opinions in his expert report:

> Mr. Moody's exposure to C8 in his drinking water was a substantial contributing factor to his development of testicular cancer and metastases, his resulting surgeries and chemotherapy, his resulting follow-up care, his related sequelae, his increased risk for development of future cancer related to his C8 exposure, and original cancer and related treatment.
>
> As a result of his testicular cancer, Mr. Moody underwent multiple surgeries, multiple rounds of intense chemotherapy, and related follow-up care and endured severe pain, suffering, and emotional distress.
>
> As a result of his testicular cancer, Mr. Moody is at increased risk for the development of testicular cancer in his remaining testicle, other cancers, and, additionally, he will continue to need physical examinations, imaging studies and laboratory tests through his life to ensure that his cancer remains in remission.
>
> As a result of his exposure to C8, there is a further increased statistical likelihood of recurrence of his testicular cancer in his remaining left testicle, as well as development of each and every other disease for which the C8 Science Panel found a Probable Link excepting pregnancy related hypertension.
>
> It is my opinion that Mr. Moody's tumor had been in existence for six months to two years before it was diagnosed.
>
> . . . .
>
> [After conducting the differential diagnosis explained in my report,] I find to a reasonable degree of medical certainty that Larry Moody's exposure to C8 in his drinking water was a substantial contributing factor in bringing about the development of his testicular cancer. Further, his cancer in the right testis now puts him at increased risk for developing cancer in the left testis. His treatment with multi-agent chemotherapy places him at an increased risk of a second malignancy and peripheral neuropathy. Additionally, because Mr. Moody underwent frequent repeated CT scanning as part of his 3 years of radiological observation, his risk for developing other cancers has also increased.

(Bahnson Expert Rep. at 4–5, 12, ECF No. 4774-1.)

DuPont maintains that Dr. Bahnson's proffered expert opinions are inadmissible because (A) Dr. Bahnson is unqualified to offer his opinions, (B) he failed to appropriately utilize a

differential diagnosis, and (C) his increased risk opinions are inadmissible because they are litigation-driven.

A. Qualifications

DuPont argues that Dr. Bahnson's specific causation opinion should be excluded because he is unqualified to give it based on his background, his deposition testimony, and his loss of privileges to practice at The Ohio State University hospitals. DuPont contends that, "[u]nder Sixth Circuit law, a witness like Dr. Bahnson 'is not an expert simply because he claims to be.'" (Def.'s Mot. to Exclude Bahnson Opinions at 6, ECF No. 4785) (quoting *Rose v. Truck Ctrs., Inc.*, 388 F. App'x at 533). DuPont's arguments are not well taken for several reasons.

First, Dr. Bahnson does not simply make an unsupported claim to be an expert in the field of diseases, including cancers, of the male reproductive system. Dr. Bahnson is a licensed medical doctor, a surgeon, and a Board Certified urologist, a field of medical specialization in diseases of the urinary tract and the male reproductive system. Dr. Bahnson has been practicing medicine, teaching, and researching issues in his field for over thirty years. Dr. Bahnson is a Professor in the Department of Urology at The Ohio State University Wexner Medical Center, which is part of The Ohio State University Comprehensive Cancer Center. He also holds the Dave Longaberger Chair in Urology at the Ohio State University Wexner Medical Center. Until June 30, 2016, Dr. Bahnson practiced at the Arthur G. James Cancer Hospital and Richard J. Solove Research Institute, where he was a department chair and a previous Chief of Staff.

Dr. Bahnson bears little resemblance to the experts whose testimony was excluded in the cases upon which DuPont relies. By way of example, in *In re Aredia and Zometa Products Liab. Litig.*, 483 F. App'x 182, 188 (6th Cir. 2012), the plaintiff developed osteonecrosis of the jaw ("ONJ"), a severe bone disease affecting the jaw, allegedly as a result of using the prescription

medications Zometa and Aredia. The expert "acknowledged in his deposition testimony that he had never been involved in any clinical trials regarding the drugs in question, had never served as a peer reviewer for any articles that involve ONJ, and had never conducted any research on ONJ (or bisphosphonates) other than the two case reports" in which "he did not establish causation." *Id.* at 188–89. In contrast, Dr. Bahnson has authored or co-authored over one-hundred peer-reviewed articles, reviews, and book chapters, many of which focus on different aspects of urologic oncology and include causes and treatment of cancer of the prostate, bladder, kidney, and testicles.

Second, regardless of Dr. Bahnson's credentials listed above and the fact that he was qualified by this Court in three previous trials as an expert witness, DuPont highlights Dr. Bahnson's deposition testimony which it claims reflects his lack of qualifications. Specifically, Dr. Bahnson testified that he had insufficient knowledge to comment on what DuPont refers to as "widely accepted proposed risk factors for testicular cancer," and Dr. Bahnson's testimony that he utilized Internet searches, which DuPont contends, were "to develop litigation-driven 'expertise' on the etiology of testicular cancer and C-8." (Def.'s Mot. to Exclude Bahnson Opinions at 5, ECF No. 4785.) The Court does not find that Dr. Bahnson's deposition testimony renders him unqualified as an expert.

As to the "widely accepted proposed risk factors" to which DuPont refers, such claimed factors are not listed as risk factors for testicular cancer by the American Cancer Society. And, as Mr. Moody points out, none of the risk factors are present in his medical history, and many are simply speculative theories. Mr. Moody, therefore, asks that the Court prohibit DuPont from questioning Dr. Bahnson as to speculative theories and risk factors. The Court will, as it has

done in the last three trials in this MDL, permit questioning on factors that have a scientific basis and prohibit questioning on speculative causes.

The Court similarly does not find support for DuPont's assertion that Dr. Bahnson's expertise on the etiology of testicular cancer and C-8 stems solely from *Google* searches, the *New York Times*, and *Wikipedia*. Instead, as Mr. Moody correctly states, DuPont bases its arguments on statements Dr. Bahnson made in his deposition that have been taken out of context and mischaracterized. For example, DuPont asserts that Dr. Bahnson "Googled 'testicular cancer' to research the risk factors for the disease." (Def.'s Mot. at 6.) However Dr. Bahnson prefaced his statement by noting that there are potential pitfalls when engaging in Internet searches, and that his *Google* searches would lead him to hyperlinks that would take him directly to publications on the subject. (Oct. 10, 2016 Dep. Tr. of Dr. Robert Bahnson at 45, ECF No. 4772-4.) And, with regard to C-8 as a potential cause of human disease, there was a dearth of scientific epidemiological studies prior to 2012 when the Science Panel's Probable Link Reports and Findings were issued. Indeed, this is a main theory of the plaintiffs in the last three trials in this MDL, *i.e.*, DuPont failed to provide the information it had regarding the dangers of C-8 to the scientific community, the regulatory agencies, and the surrounding communities to which the chemical was released for over fifty years. Dr. Bahnson has previously testified that he believes he was at a disadvantage treating patients, many of whom lived in water districts whose water is contaminated with C-8, and studying the causes and treatment of testicular cancer because he was never informed of the potential dangers associated with C-8. Dr. Bahnson was informed of the Probable Link Findings when he was contacted regarding Mrs. Bartlett, one of his patients, whose case was the first bellwether tried in this MDL. Dr. Bahnson's testimony shows that since he was informed of the Science Panel's work and the Probable Link Finding between C-8 and

cancer, he has researched and reviewed all of the available information regarding this link and incorporated it into the knowledge and experience he possesses regarding urologic cancers as a treating physician, researcher/author, peer reviewer, and professor on the topic.

Last, but not of least importance, DuPont suggests that Dr. Bahnson is not qualified because he lost his privileges to practice at Ohio State, which may have been because of his "deficient patient care" and/or "failure to maintain adequate knowledge of his field." (Def.'s Mot. to Exclude Bahnson Opinions at 8, n.3, ECF No. 4785.) DuPont submits:

> The Ohio State University recently stripped Dr. Bahnson of his clinical and surgical privileges at the James Cancer Center and OSU Wexner Medical Center. Because Dr. Bahnson has refused to testify regarding the circumstances surrounding his loss of these privileges, DuPont does not know whether deficient patient care and failure to maintain adequate knowledge of his field played a part in the nonrenewal of his physician employment agreement.

Id.

DuPont's statement is troubling. It is simply not true that Dr. Bahnson lost his privileges because of his qualifications *and DuPont knows that it is not true.* The decision of Ohio State was based on a lengthy report which made no mention of any kind to patient care or knowledge in his field. DuPont has moved the Court on several occasions to permit it to question Dr. Bahnson at trial about the nonrenewal of his privileges, and this Court has found that the reasons for his loss of privileges are not relevant by reviewing the *documents DuPont has in its possession.* [2] (Pl.'s Mot. *in Limine* No. 7 in *Vigneron*, ECF No. 4717; Def.'s Mem. in Opp. to

[2] In the *Vigneron* trial, the Court excluded these documents and Dr. Bahnson's conduct related to them because they do not impact a triable material issue, *i.e.*, they do not "tie into anything to do with his practice of medicine, his scientific work, or his testimony in this case." (Oct. 27, 2016, Tr. of First Final Pretrial Conf. in *Vigneron* at 14,Vigneron ECF 113.) The Court granted DuPont permission to question Dr. Bahnson as to "[h]is current status as to what he's doing, his compensation or lack of, those all come into play. Whether he's still active in the practice, whether he's still teaching, those are all things that go to his credentials." *Id.* at 14. DuPont, however, used the opportunity to suggest to the jury, as it has in its current motion, that Dr.

Mot. *in Limine* No. 7 in *Vigneron*, ECF No. 4750; Pl.'s Mot. *in Limine* No. 7 in *Moody*, ECF No. 4891; Def.'s Mem. in Opp. to Mot. *in Limine* No. 7 in *Moody*, ECF No. 4965; Pl.'s Mot. *in Limine* No. 21 in *Moody*, ECF No. 4986, Def.'s Mem. in Opp. to Pl.'s Mot. *in Limine* No. 21 in Moody, ECF No. 4987.) Those documents include a previously settled lawsuit, of which Dr. Bahnson is under a confidentiality order not to discuss, and the lengthy results of an investigation by his employer, both regarding treatment of subordinates with regard to paternity leave and future employment. These documents leave no question as to the reasons for the nonrenewal of Dr. Bahnson's privileges, which had nothing whatsoever to do with deficient patient care and/or failure to maintain adequate knowledge of his field.

The Court ADMONSHES DuPont's counsel for submitting argument known to be without foundation. Any future such conduct will result in formal sanctions and/or withdrawal of *pro hac vice* status. The Court has indicated previously that these documents and Dr. Bahnson's conduct related to them do not impact a triable material issue in this case and are excluded as irrelevant.

B. Differential Diagnosis

Dr. Bahnson utilized a differential diagnosis to reach his specific causation opinion. As to this scientific technique, the United States Court of Appeals for the Sixth Circuit explains:

Bahnson's privileges were not renewed for some reason that may be related to his qualifications. (Dec. 19, 2016, *Vigneron* Trial Tr., vol. 21, at 176:10-15) ("Now, plaintiff's counsel have talked about Dr. Bahnson's history at Ohio State at least up until 2012. They don't talk about his history beyond 2012, how he's lost his clinical privileges, how, with that, he's lost over $425,000 of income, how he lost his department chair, how he still is on staff as a professor but he has strict limitations on what he can do. . . . "). This type of comment left the jury to speculate as to Dr. Bahnson's qualifications and as to why his privileges were not renewed – perhaps because of deficient patient care or failure to maintain adequate knowledge of his field, or perhaps because he is testifying about C-8. In any event, the evidence is not relevant and even if it were, its probative value would be outweighed by a danger of unfair prejudice, confusing the issues, or misleading the jury. *See* Fed. R. Evid. §§ 401, 402, 403.

> This circuit has recognized differential diagnosis as an "appropriate method for making a determination of causation for an individual instance of disease." *Hardyman v. Norfolk & W. Ry. Co.*, 243 F.3d 255, 260 (6th Cir. 2001); *see also Best* [*v. Lowe's Home Centers, Inc.*], 563 F.3d [171,] 178 [(6th Cir. 2009)] (stating that a causation opinion based upon a reliable differential diagnosis may satisfy the requirements of Rule 702). Differential diagnosis is "a standard scientific technique of identifying the cause of a medical problem by eliminating the likely causes until the most probable one is isolated." *Hardyman,* 243 F.3d at 260 (internal quotation marks omitted). As we explained in *Best,* a physician who applies differential diagnosis to determine causation "considers all relevant potential causes of the symptoms and then eliminates alternative causes based on a physical examination, clinical tests, and a thorough case history." 563 F.3d at 178 (internal quotation marks omitted).

Pluck v. BP Oil Pipeline Co., 640 F.3d 671, 678 (6th Cir. 2011).

> Calling something a 'differential diagnosis' or 'differential etiology' does not by itself answer the reliability question but prompts three more:
>
> > (1) Did the expert make an accurate diagnosis of the nature of the disease? (2) Did the expert reliably rule in the possible causes of it? (3) Did the expert reliably rule out the rejected causes? If the court answers "no" to any of these questions, the court must exclude the ultimate conclusion reached.

Id. (quoting *Tamraz v. Lincoln Elec. Co.*, 620 F.3d 665, 674 (6th Cir. 2010)).

"'The core of differential diagnosis is a requirement that experts at least consider alternative causes.'" *Best*, 563 F.3d at 179 (quoting *In re Paoli Railroad Yard PCB Lit.*, 35 F.3d 717, 759 (3d Cir. 1994)). Yet, "doctors need not rule out every conceivable cause in order for their differential-diagnosis-based opinions to be admissible." *Id.* at 181. "'The fact that several possible causes might remain uneliminated . . . only goes to the accuracy of the conclusion, not to the soundness of the methodology.'" *Jahn,* 233 F.3d at 390 (quoting *Ambrosini v. Labarraque*, 101 F.3d 129, 140 (D.C. Cir. 1996)).

DuPont contends that Dr. Bahnson's opinion and testimony should be excluded because (1) his expert report is insufficient and cannot be supplemented by his deposition testimony, and (2) he failed to "rule in" or "rule out" carcinoma situ and the likelihood that something unknown

caused Mr. Moody's testicular cancer. (Def.'s Mot. to Exclude Bahnson Opinions at 8, 13, ECF No. 4785.)

1. Deposition Testimony to Supplement Expert Report

Dr. Bahnson did not specifically state in his report that he considered that the cause of Mr. Moody's testicular cancer could have been unknown or could have been caused by a carcinoma in situ. Dr. Bahnson addresses each of these issues during his deposition.

> Q. Well, and it's also not in your report, the unknown risk factors?
>
> A. That is correct, it is not in the report.
>
> . . . .
>
> Q. Both of those, though, are things that you considered?
>
> A. Yes.
>
> . . . .
>
> Q. . . . Okay. How did you go about eliminating the unknown cancers -- unknown risks, I'm sorry, of testicular cancer in reaching your opinion regarding Mr. Moody's testicular cancer?
>
> A. I considered all of the reported risk factors, went through each of those, including no known cause.
>
> Q. Including -- I didn't hear what you said.
>
> A. . . . whenever you consider what caused somebody's cancer, in almost every cancer, there's a potential that you won't come up with an answer of what caused it. I believe I've testified twice with -- Mr. Mace has asked me a question that goes something like "Nobody knows really what causes cancer; would you agree, Dr. Bahnson?" And I've answered, "Yes, I agree." So you always have that as a potential, is that there is no cause.
>
> Then there are purported risk factors. You examine those to see whether or not the individual has any of those risk factors. You may also consider some other factors that you think potentially could be involved. And then if there are factors that are known to be related to the cancer and that person has that -- so, for instance, an undescended testicle, then you would presume that that probably was the contributing factor that led to the cancer.

. . . .

Q. Okay. I want to know how you rejected the no known cause.

. . . .

A. There is a relatively common expression, and it applies both to philosophy and religion in a firmer territory or sciences that says for those who believe, no proof is necessary; and for those who don't believe, no proof is positive. So you're asking me how did I rule out an unknown cause for testicular cancer, and my response to you is I considered that. It is not possible to know an unknown cause. You could have faith that there was, but there would be no proof.

Q. So the basis for ruling them out, it was your belief?

. . . .

A. No, no, no.

. . . .

A. No. I think that if -- from a deductive logic standpoint, if your claim is that the cause is unknown, then it would be impossible to rule it in or out because there's no way of knowing, and I considered that there was no known cause.

(Bahnson Dep. at 126–27, 63–64, 67–68, ECF No. 4772-4) (objections omitted).

Similarly, Dr. Bahnson testified that he considered and ruled out carcinoma in situ as a potential cause of Mr. Moody's testicular cancer:

Q. We touched briefly on ITGCN in my earlier questioning. I just want to pin that down. You did consider that as a risk factor?

A. Yes.

Q. But did not reference it in your report?

A. Correct.

Q. And in Vigneron, you testified that you did not regard ITGCN as a precursor to testicular cancer. Do you recall that?

A. I do recall, and I still hold that same opinion.

Q. Okay. Tell me why.

A. The data regarding intratubular germ cell neoplasia –

Q. See, I've been calling it ITGCN for her benefit. Now you've just blown that.

A. And I apologize. You can abbreviate what I said. And some people, to confuse you even more, call it carcinoma in situ of the testicle. It's a histologic diagnosis. There really is insufficient information of rigorous scientific investigations to support that this is indeed a precursor lesion. I think there is -- I believe there is good evidence to suggest that there are findings of this in the testicle that's removed for a testicular cancer. So I believe that's true, that it is seen in men who have testicular cancer. But to say that it's a proven fact that, if present, leads to an increased risk of testicular cancer, I disagree. I don't think that's been proven.

. . . .

Q. But you did not include it in the Moody report?

A. I did not. I don't recall from the medical records that the histology from his resected specimen showed any carcinoma in situ or intratubular germ cell neoplasia.

Id. at 110–11, 113–14.

While it is clear that Dr. Bahnson considered whether Mr. Moody's cancer could have been of unknown origin and that carcinoma in situ was not present in his removed testicle, DuPont contends that Dr. Bahnson's deposition testimony cannot be used to supplement his expert reports. This Court disagrees, and has explained so in detail in EMO 9, which is equally applicable here:

> DuPont relies upon Rule 26 of the Federal Rules of Civil Procedure, stating that the Rule "requires that an expert report contain 'a *complete* statement of *all opinions* the witness will express *and the basis and reasons* for them.'" (DuPont's Mot. at 10) (citing Fed. R. Civ. P. 26(a)(2)(B)(i)) (emphasis added by DuPont). Mr. Vigneron, however, correctly points out that Rule 26 "contemplates that the expert will supplement, elaborate upon, explain and subject himself to cross-examination upon his report." *Thompson v. Doane Pet Care Co.*, 470 F.3d 1201, 1203 (6th Cir. 2006). As a sister district court has explained:
>
> > There are several purposes behind the disclosure requirements of Rule 26(a)(2). An obvious purpose is to prevent "surprise[s] as to the scope of testimony." *Fielden v. CSX Transp., Inc.*, 482 F.3d

> 866, 871 (6th Cir. 2007). This prevention of surprises during later stages of litigation also serves to conserve judicial resources. *Nan Ya Plastics Corp. v. Global Polymers, LLC,* 2005 WL 5988669 at *2 (W.D. Ky.2005) *citing Sylla-Sawdon v. Uniroyal Goodrich Tire Co.,* 47 F.3d 277, 284 (8th Cir. 1995). Another purpose was revealed by the Advisory Committee, which stated: "Effective cross-examination of an expert witness requires advance preparation. The lawyer even with the help of his own experts frequently cannot anticipate the particular approach his adversary's expert will take or the data on which he will base his judgment on the stand." Advisory Committee on Federal Rules, *Notes to 1970 Amendment to Rule 26(b)(4).*

Anderson v. Ridge Tool Co., CIV.A. 06-116-HRW, 2008 WL 3849923, at *2 (E.D. Ky. Aug. 14, 2008); *id.* *4 (finding that "[d]espite the protestations of the Defendant to the contrary, none of the purposes of Rule 26(a)(2) have been contravened by [the expert witness'] report in the present case. . . . [who has offered] sufficient information for the Defense to prepare a very effective cross-examination of [the expert] and his methodology.").

Here, the Court finds that none of the purposes of Rule 26 have been contravened by Dr. Bahnson's testimony. DuPont, of course, does not claim to be surprised by the scope of Dr. Bahnson's testimony and certainly anticipated the particular approach Dr. Bahnson utilized and the data on which he bases his judgment. DuPont's counsel's well informed cross examination during deposition of Dr. Bahnson for the *Vigneron* trial testifies to such. DuPont's counsel likely possessed far more information on the "particular approach" Dr. Bahnson took and the "data on which he will base his judgment on the stand" than is usual for opposing counsel. This is because a distinctive feature of this case is that Dr. Bahnson has appeared in the last two trials held in this MDL, and the last one *Freeman*, was a testicular cancer case. DuPont has deposed Dr. Bahnson several times about his knowledge and experience with testicular cancer and has cross examined him on the same at the *Freeman* trial.

(EMO 9 at 15–16, ECF No. 4777.)

2. Unknown Cause and Carcinoma In Situ

DuPont argues that even if Dr. Bahnson's deposition testimony is considered, his methodology is still flawed because he failed to sufficiently "rule in" or "rule out" the likelihood that something unknown caused Mr. Moody's testicular cancer, and this failure "alone warrants exclusion of his specific causation opinion." (Def.'s Mot. to Exclude Bahnson Opinions at 11,

ECF No. 4785.) DuPont further argues that Dr. Bahnson's expert opinion and testimony should be excluded because "Dr. Bahnson offered no reasonable explanation for how he ruled out carcinoma in situ in [Mr. Moody]'s case." (Def.'s Reply in Support of Motion to Exclude Bahnson Opinions at 7, ECF No. 4843.) DuPont's propositions are not well taken.

The Court has dealt with the exact issue of whether Dr. Bahnson considered the possibility that Mr. Freeman's and Mr. Vigneron's testicular cancer could have unknown origins. EMO 9 is the decision on the *Daubert* motions directed at Drs. Bahnson and Luongo in the *Vigneron* trial, wherein the Court stated:

> Indeed, in *Freeman*, *DuPont raised the exact issue under consideration here*, *i.e.*, whether Dr. Bahnson had appropriately accounted for the possibility that the cause of Mr. Freeman's testicular cancer was of unknown origin. *DuPont filed a Daubert motion on this very issue*, arguing that "Dr. Bahnson's methodology is fatally flawed, and his specific causation opinion should be excluded" because he "completely failed to consider that Mr. Freeman's testicular cancer was more likely than not the result of unknown causes—or idiopathic—as it is in the vast majority of men who get it." (DuPont's Mot. to Exclude the Testimony of Trial Plaintiff David Freeman's Specific Causation Expert, Dr. Robert Bahnson at 7, ECF No. 4314); (DuPont's Reply in Support of its Mot. to Exclude Plaintiff Freeman's Specific Causation Expert, Dr. Robert Bahnson at 13) (asserting that Dr. Bahnson "simply *chose to ignore the idiopathic issue completely* in his expert report").
>
> This Court thoroughly analyzed the issue in Evidentiary Motions Order No. ("EMO") 4, which the Court will not repeat here except to say that it found that Dr. Bahnson had appropriately considered whether Mr. Freeman's testicular cancer was the result of unknown causes. (EMO 4, ECF No. 4518.)

(EMO 9 at 16, ECF No. 4777); (EMO 4 at 15–16, ECF No. 4518) ("[T]he Court notes that DuPont's proposition that Dr. Bahnson was required to 'consider that Mr. Freeman's testicular cancer was more likely than not the result of unknown causes,' misstates the inquiry. Dr. Bahnson was required to consider that no cause is found in the majority of cases of testicular cancer, which he did. He was not required to consider that Mr. Freeman's cancer was more

likely than not the result of unknown causes. Indeed, that statement is a conclusion – a conclusion on which the parties' specific causation experts disagree.").

As for DuPont's argument related to "ruling out," the Court addressed it as well in EMO 9:

> DuPont next argues that "Dr. Bahnson could not have ruled out the possibility of unknown causation merely because Mr. Vigneron is a class member and there are allegedly no other applicable risk factors." (Def.'s Reply at 9.) DuPont argues that this is circular logic that has been rejected by numerous courts. This Court, however, disagrees.
>
> The Court addressed DuPont's arguments related to circular reasoning in EMO 4 and will not reiterate that decision here. (EMO 4 at 20–24) (addressing DuPont's argument that "Dr. Bahnson engages in circular reasoning that has been soundly rejected as legally insufficient by numerous courts in situations like the one present here."). The Court only notes here that by their contractual agreement in the *Leach* Case, the parties have created a closed universe with regard not only to the individuals to whom the Science Panel Findings apply, but also the way in which the parties are bound to litigate the issue of causation.
>
> As to Dr. Bahnson's specific assessment of Mr. Vigneron, he first "ruled out" alternative potential risk factors for testicular cancer based on Mr. Vigneron's medical history and Dr. Bahnson's physical examination of Mr. Vigneron, and was then left with the empirical evidence provided by the Probable Link Finding that it is more likely than not that there is a link between C-8 and the *Leach* Class members' Linked Diseases. He reviewed the data collected through the C-8 Health Project showing the amount of C-8 that was in Mr. Vigneron's blood, and he reviewed Dr. MacIntosh's expert report, which showed Mr. Vigneron's exposure history and confirmed him as a *Leach* Class member. As such, Dr. Bahnson does not conclude that C-8 was the cause of Mr. Vigneron's testicular cancer simply because of the existence of one known risk factor, as DuPont posits. Instead, Mr. Vigneron's status as a Class Member, coupled with the empirical evidence from the Probable Link Report, along with his review of Plaintiff's medical history (regarding testicle placement, lack of family history of testicular cancer, HIV positivity and/or AIDS, carcinoma in situ or a previous cancer in the opposite testicle), his physical examination of Mr. Vigneron, the relevant factual data related to his age, race, ethnicity and body size, and reliance on his 30 years of experience as a medical doctor and cancer specialist, all contributed to his expert opinion on specific causation.

(EMO 9 at 22–23, ECF No. 4777.)

The same is true here with regard to Dr. Bahnson's assessment of Mr. Moody. Dr. Bahnson first "ruled out" alternative potential risk factors for testicular cancer based on Mr. Moody's medical history and Dr. Bahnson's physical examination of Mr. Moody. Dr. Bahnson offered a reasonable explanation in his deposition why he ruled out carcinoma in situ, *i.e.*, the resection of Mr. Moody's cancerous testicle showed no carcinoma in situ, and Dr. Bahnson is not convinced that there is sufficient information of rigorous scientific investigations to support that a carcinoma in situ is a precursor lesion.

Dr. Bahnson was then left with the empirical evidence provided by the Probable Link Finding that it is more likely than not that there is a link between C-8 and the *Leach* Class members' Linked Diseases. He reviewed the data collected through the C-8 Health Project showing the amount of C-8 that was in Mr. Moody's blood, and he reviewed Dr. MacIntosh's expert report, which showed Mr. Moody's exposure history and confirmed him as a *Leach* Class member. As such, Dr. Bahnson does not conclude that C-8 was the cause of Mr. Moody's testicular cancer simply because of the existence of one known risk factor, as DuPont posits.

Instead, Dr. Bahnson reviewed Mr. Moody's status as a Class Member, the empirical evidence from the Probable Link Report, Mr. Moody's medical history (regarding testicle placement, lack of family history of testicular cancer, HIV positivity and/or AIDS, carcinoma in situ or a previous cancer in the opposite testicle), his physical examination of Mr. Moody, and the relevant factual data related to his age, race, ethnicity and body size. Dr. Bahnson also relied upon his 30 years of experience as a medical doctor, surgeon, cancer specialist, professor, author, researcher and reviewer of peer-reviewed articles, and book, many of which focus on different aspects of urologic oncology and include causes and treatment of cancer of the prostate, bladder, kidney, and testicles.

C. Increased Risk Opinions

DuPont argues that Dr. Bahnson's increased risk opinions are irrelevant and unreliable because (1) they are prohibited under Ohio law, (2) he is not an expert on emotional distress, (3) there is no support for his opinions related to chemotherapy-related complications and continued radiographic imaging, and (4) he is unqualified to offer his increased risk opinions related to other Linked Diseases, and they are otherwise inadmissible.

1. Ohio Law and Increased Risk

DuPont contends that "Dr. Bahnson's 'increased risk' opinions are irrelevant and cannot form the basis of recovery under Ohio law because he does not opine any condition is reasonably certain to occur." (Def.'s Mot. to Exclude Bahnson Opinions at 15, ECF No. 4785.) This is the exact same argument DuPont has made in the *Freeman* and the *Vigneron* trials, which this Court addressed in EMO 9, which is equally applicable here:

> DuPont contends that, "[u]nder Ohio law, a plaintiff can only recover for "increased risk" if the condition is 'reasonably certain' to occur." (Def.'s Mot. at 17) (citations omitted). DuPont concludes that, based on its assessment of Dr. Bahnson's expert report, "he falls short (as he must) of opining that any of th[e] conditions [about which he opines] are 'reasonably certain' to occur in the future." *Id.* at 17–18. DuPont's argument is not well taken.
>
> DuPont made this same argument with regard to Dr. Bahnson's increased risk opinions in *Freeman*. The Court explained its reasoning in detail there, and will repeat some of that decision here because it impacts two new arguments that were not addressed in *Freeman*, and are addressed at (2) and (3) below. In addressing this same argument in EMO 4, the Court stated:
>
> > DuPont argues that the evidence supporting either of these propositions is not "reasonably certain" which is required under Ohio law. . . . In his opposition memorandum, Mr. Freeman indicates that he does not offer the evidence to prove that he will develop cancer in the future, but instead to support his emotional distress, which he alleges manifested itself as cancerphobia.
> >
> > "Cancerphobia is a claimed present injury consisting of mental anxiety and distress over contracting cancer in the future, as

> opposed to risk of cancer, which is a potential physical predisposition of developing cancer in the future." *Cantrell v. GAF Corp.*, 999 F.2d 1007, 1012 (6th Cir. Ohio 1993) (quoting *Lavelle v. Owens–Corning Fiberglas Corp.*, 30 Ohio Misc. 2d 14 (1987)).
>
> . . . .
>
> To recover th[e] requested damages for cancerphobia, Mr. Freeman must show that he was aware that he in fact possesses an increased statistical likelihood of developing cancer, and that from this knowledge springs a reasonable apprehension which manifests itself in mental distress. *See Cantrell v. GAF Corp.*, 999 F.2d 1007 (6th Cir. 1993) (citing *Lavelle*, *supra*, for the proposition that damages for cancerphobia were available as a portion of damages in a negligence action where the plaintiffs suffered a contemporaneous physical injury, if the plaintiff could show that he "is aware that he in fact possesses an increased statistical likelihood of developing cancer, and that from this knowledge springs a reasonable apprehension which manifests itself in mental distress").
>
> Consequently, as the Sixth Circuit has recognized, "[e]vidence of an increased risk of cancer is relevant to whether a plaintiff's fear of cancer is reasonable, as required by *Lavelle* . . . . [and] [t]his evidence, in addition to the evidence that [a plaintiff] had an actual fear or concern about the risk of cancer were the necessary predicates for the mental anguish damages they sought." *Id.* at 1012 (holding that "[t]he district court's admission of the risk of cancer evidence was therefore proper"). Accordingly, the evidence Mr. Freeman seeks to introduce related to his alleged increased risk of developing cancer is relevant and probative.

(EMO 4 at 25–27.)

> . . . Mr. Vigneron does not offer Dr. Bahnson's to prove that he will develop cancer in the future, but instead to support his emotional distress, which he alleges manifested itself as cancerphobia.

(EMO 9 at 32–33, ECF No. 4777.)

2. Expert on Emotional Distress

DuPont asserts that "Dr. Bahnson's increased risk opinions are also irrelevant because

. . . Dr. Bahnson is not qualified to testify as an expert on emotional distress." (Def.'s Mot. to Exclude Bahnson Opinions at 16, ECF No. 4785.) Dr. Bahnson, however, is not offered as a expert on emotional distress. Rather, he is offered as an expert regarding the medical conditions that underlie Mr. Moody's alleged emotional distress.

3. Chemotherapy-Related Complications and Continued Radiographic Imaging

DuPont contends that Dr. Bahnson's opinion that Mr. Moody "is at an increased risk of 'second malignancy and peripheral neuropathy'" lacks scientific support based on this Court's previous ruling "in this MDL that if a plaintiff has been exposed to a risk factor for a disease, but an extended period of time passed between the exposure and the onset of disease, then evidence related to that exposure is inadmissible unless specific, reliable scientific evidence indicates that the risk factor could still cause the disease after a significant period of latency." (Def.'s Mot. to Exclude Bahnson Opinions at 17–18, ECF No. 4785.) Further, DuPont maintains that Dr. Bahnson's opinion that Mr. Moody will require radiographic imaging and physical examinations for the remainder of his life should also be excluded because "all claims for medical monitoring are barred in Plaintiff's case under the express terms of Section 3.2 of the *Leach* Settlement Agreement," and Mr. Moody's blood is likely currently at, or close to, the level in the general U.S. population." Id. at 20–21. DuPont's arguments are not well taken.

This Court has already addressed these issues in EMO 9, and its analysis and conclusions are equally applicable here:

> DuPont contends that there is no reliable scientific support for Dr. Bahnson's opinions related to chemotherapy and radiographic imaging. With regard to the former, Dr. Bahnson opines that because of the three cycles of chemotherapy Mr. Vigneron was required to take after his 1997 operation to remove his cancerous testicle, he is at an increased risk of "developing lung damage and breathing disorders, hearing loss, acute myelogenous leukemia, and myelodysplasia." (Bahnson Rep. at 7, ECF No. 4640-2.) DuPont asserts that "Dr. Bahnson provided no support for his theory that Plaintiff is still at increased risk

of developing chemotherapy-related complications in his expert report." (Def.'s Mot. at 19.) DuPont relies upon an *in limine* ruling from the *Freeman* trial, stating:

> This Court already ruled in this MDL that if a plaintiff has been exposed to a risk factor for a disease, but an extended period of time passed between the exposure and the onset of disease, then evidence related to that exposure is inadmissible unless specific, reliable scientific evidence indicates that the risk factor could still cause the disease after a significant period of latency. *See Freeman*, No. 2:13- 1103, MIL Order No. 10 [ECF No. 4554] at 9 (excluding reference to Mr. Freeman's past marijuana use and smoking from decades prior and questioning whether an expert could show that smoking still presented an increased risk twenty years after quitting).

Id. DuPont's argument is not well taken.

In MIL 10, the Court did discuss the admissibility of expert opinion related to risk factors for testicular cancer. Mr. Freeman moved to exclude DuPont's expert's testimony that marijuana and alcohol are potential risk factors for testicular cancer, and therefore, Mr. Freeman's limited use of these substances should not be considered by the jury. In that decision, the Court explained that DuPont's expert failed to offer any scientific support for the proposition that limited use of marijuana and/or tobacco are risk factors for testicular cancer, let alone whether they are risk factors after two decades. Further, DuPont's expert did not contend that alcohol and/or marijuana use are risk factors that are generally accepted in his field of expertise.

Leaving aside the potential prejudice of testimony related to illegal drug use, MIL 10 is unhelpful here. In the present situation, unlike the facts presented in MIL 10, Dr. Bahnson's opinion is based on generally accepted knowledge in his field of expertise, scientific literature, and professional experience. Specifically, Dr. Bahnson testified that "it is generally-accepted in the scientific community that a person in the position of Mr. Vigneron is still at an increased risk of developing these chemo-related complications." (Bahnson Dep. at 162.)

Further, Dr. Bahnson identified two articles in support of his opinions that Mr. Vigneron is at an increased risk of a secondary cancer, one of which states that "[m]en with testicular cancer continue to be at significantly elevated risk of second malignant neoplasms for more than two decades following initial diagnosis. . . . [and that] "[s]econdary leukemia was associated with both radiotherapy and chemotherapy." Travis et al., *Risk of second malignant neoplasms among long-term survivors of testicular cancer*, J. NATL. CANCER. INST., 89(19): 1429-39 (1997). Finally, Dr. Bahnson also testified that he has

had a patient who had chemotherapy related complications almost twenty years after treatment. (Bahnson Dep. at 163.)

In its reply brief, DuPont still takes issue with the relevance of the scientific literature and the "single patient" information on which Dr. Bahnson relies. However, the literature appears to support Dr. Bahnson's opinion and, importantly, Dr. Bahnson testified that his position is one that is generally accepted in his field. "The question of whether [the expert's] opinion is accurate in light of his use of [certain data] goes to the weight of the evidence, not to its admissibility." *In re Scrap Metal Antitrust Litig.*, 527 F.3d 517, 531-32 (6th Cir. 2008) (stating that "the district court appropriately passed the torch to the jury to make this determination.").

As to DuPont's latter argument, Dr. Bahnson opines that, "due to Mr. Vigneron's extensive C-8 exposure, he likewise will require radiographic imaging and physical examinations for the remainder of his life." (Bahnson Rep. at 7, ECF No. 4640-2.) DuPont takes issue with this statement, arguing that, "[a]t his deposition, Dr. Bahnson conceded that this recommendation is completely contrary to the most-recent National Comprehensive Cancer Network's guidelines for the treatment of testicular cancer, which Dr. Bahnson recognizes as typically authoritative, only recommend radiographic imaging for two years after the patient has responded to chemotherapy." (Def.'s Mot. at 23) (citing Bahnson Depo. at 147–53.) DuPont contends that, when an expert expresses an opinion which is not generally accepted within the medical and scientific communities, he has an obligation to provide a reasoned explanation of why his methodology and opinions differ. *Id.* (relying on, *inter alia*, *Conde v. Velsicol Chem. Corp.*, 804 F. Supp. 972, 1024 (S.D. Ohio 1992).

DuPont is correct that Dr. Bahnson testified that "it would be atypical for [physicians] not to look at [the Comprehensive Cancer Network's] guidelines to make sure that, you know, they were well informed about what they should potentially be doing for people" and that these guidelines did not specify radiographic surveillance after year three." (Bahnson Dep. at 150, 153.) However, Dr. Bahnson testified specifically that the guidelines "are not rules" and that "the strength of the recommendation" is discretionary with the practitioner. *Id.* at 151. Dr. Bahnson explained why his opinion differed from the guidelines, based on the fact that Mr. Vigneron was exposed to three rounds of chemotherapy with three separate agents. *Id.* at 152. Dr. Bahnson testified that his "opinion related to the follow-up of individuals who are exposed to multiagent chemotherapy for treatment of their testis cancer [that] to stop seeing them [after the three years], in my opinion, would be tantamount to malpractice." *Id.* at 152. Dr. Bahnson's explanation is a reasoned one, and therefore, the fact that his opinion is different than the guidelines goes to the weight of the evidence, not its admissibility. Evidence that may be seen as conflicting is directly within the jury's purview. *In re Scrap Metal Antitrust Litig.*, 527 F.3d at 531–32 ("The

> question of whether [the expert's] opinion is accurate in light of his use of [certain] data goes to the weight of the evidence, not to its admissibility[.]").

(EMO 9 at 33–36, ECF No. 4777.)

4. Increased Risk of Developing Other Linked Diseases

DuPont asks for exclusion of Dr. Bahnson's opinion in his expert report that "[a]s a result of his exposure to C8, there is a further increased statistical likelihood of recurrence of his testicular cancer in his remaining left testicle, as well as development of each and every other disease for which the C8 Science Panel found a Probable Link excepting pregnancy related hypertension." (Bahnson Rep. at 5, ECF No. 4774-1.) Both parties agree that this evidence is to support Mr. Moody's cancerphobia allegations.

DuPont has filed a Motion for Summary Judgment on the cancerphobia issue, asking the Court to prohibit testimony related to the statistical likelihood of developing other Linked Diseases. (Def.'s Mot. for Summ. J. on Related to Cancerphobia Damages and Fear of Developing Other Probable Link Diseases, ECF No. 4788.) The Court granted DuPont's request in DMO 27, in which it granted in part and denied in part DuPont's motion regarding cancerphobia damages. (ECF No. 27.) Consequently, Dr. Bahnson's opinion on the statistical likelihood of developing other Linked Diseases "does not relate to any issue in the case" and is therefore "not relevant." *Daubert*, 509 U.S. at 590–90.

IV.

DuPont offers expert witness Dr. Luongo to rebut Dr. Bahnson's specific causation opinions. Mr. Moody challenges Dr. Luongo's deposition testimony and/or opinions, arguing that (A) his opinions challenge general causation in violation of the *Leach* Settlement Agreement, (B) he offers an affirmative causation opinion that was not reached via proper

methodology, and (C) he offers unreliable opinions related to alternative causes of Mr. Moody's cancer.

A. General Causation

In his motion, Mr. Moody posits:

> 1) Dr. Luongo challenges the Science Panel's basic finding that proof of Mr. Moody's C-8 exposure as a Class Member is sufficient to show exposure capable of causing his testicular cancer by stating that "there is no serum, tissue, imaging or genomic test that can determine whether Mr. Moody's testicular cancer was caused by C8." (*See* Expert Report of Dr. Tony Luongo ("Luongo Report") [ECF No. 4773-3] at 6.)
>
> 2) Dr. Luongo proffers inappropriate opinions on the "nuances" and alleged limitations of the Science Panel's findings, such as: "the Science Panel found that 'there was little or no evidence of increasing risk' in the studied cohort compared with the US population." (*Id.* at 7, 8.)
>
> 3) Dr. Luongo even goes so far as to directly dispute the Science Panel's probable link finding, stating that he "disagrees . . . that C8 is a 'generally accepted' cause of testis cancer." (*Id.* at 8.)
>
> 4) Inappropriately attempting to point out additional "limitations" of the Science Panel findings, Dr. Luongo states "[t]he claimed association between testis cancer and C8 exposure found by the Science Panel was not strong, was based on a very small number of cases, and has not been replicated." (*Id.*)
>
> 5) Similarly, he goes on to state "[i]ndeed, the Science Panel itself recognized that the 'high exposure group, where the higher risk was observed, comprises only six cases therefore there remains some uncertainty.'" (*Id.*)

(Pl.'s Mot. to Partially Exclude Luongo Opinions at 2–3, ECF No. 4779.)

Mr. Moody contends that "[e]ach of the above-cited opinions is a straight-forward attack on the findings of the Science Panel and a direct violation of this Court's express language in DMOs 1, 1-A, and 12." *Id.* at 9. These opinions are the exact same as those offered in Dr. Luongo's report in the *Vigneron* case, which Mr. Vigneron moved to exclude. (Pl.'s Mot. to Partially Exclude Luongo Opinions in *Vingeron*, ECF No. 4649.) In EMO 9, this Court agreed

with Mr. Vigneron that the opinions were attacks on general causation which violated the *Leach* Settlement Agreement and excluded those opinions.[3] (EMO 9 at 38–42, ECF No. 4777.)

In its memorandum in opposition, "DuPont acknowledges the Court's rulings in EMO No. 9 with respect to these opinions, but DuPont expressly reserves its arguments that these opinions do not constitute an attack on general causation and asks the Court to reconsider based on the reasons presented here and in its Opposition to Plaintiff Vigneron's Motion to Partially Exclude the Opinions and Testimony of Defense Expert Dr. Tony Luongo [ECF No. 4683] at 12-13." (Def.'s Mem. in Opp. to Pl.'s Mot. to Partially Exclude Luongo Opinions at 2, ECF No. 4820.) DuPont, however, offers nothing new that convinces the Court that it was incorrect in excluding these opinions. Therefore, for the same reasons set forth in EMO 9, the Court excludes the above listed opinions.

B. Affirmative Causation Opinions

Mr. Moody moves to exclude Dr. Luongo's opinion and/or testimony that the cause of Mr. Moody's cancer is unclear or unknown. (Pl.'s Mot. to Partially Exclude Luongo Opinions at

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[3] The Court notes that with regard to the third listed opinion, DuPont's position in *Vigneron* was that the opinion was admissible because Dr. Luongo "is merely rebutting Dr. Bahnson's opinion . . . that C-8 is a 'generally accepted' cause of testicular cancer." (Def.'s Mem. in Opp. to Pl.'s Mot. to Partially Exclude Luongo Opinions in *Vigneron* at 12, ECF No. 4683.) In EMO 9, the Court explained that "Dr. Bahnson did not proffer the opinion in his report [*in (the Vigneron) case*] that C-8 is generally accepted in the medical community as a cause of testicular cancer [and therefore], Dr. Luongo's opinion that C-8 is not generally accepted in the medical community as a cause of testicular cancer is not a proper rebuttal opinion." (EMO 9 at 42, ECF No. 4777.) The Court therefore found this issue moot.

In Mr. Moody's case, Dr. Bahnson again does not opine that C-8 is generally accepted in the medical community as a cause of testicular cancer. Instead, Dr. Bahnson indicates that it is an uncontested risk factor, which is an accurate statement. As the Court has explained previously, whether C-8 is capable of causing a *Leach* Class Member's Linked Disease is not determined by reference to the medical or scientific community, but instead the parties limited the inquiry to the Science Panel's Findings.

11, ECF No. 4779.) Mr. Moody contends that this opinion constitutes an affirmative causation opinion, which must be excluded as unreliable because Dr. Luongo failed to engage in an appropriate differential diagnosis to reach the opinion. DuPont agrees that Dr. Luongo did not engage in a differential diagnosis, but posits that he was not required to do so in light of this Court's rulings in EMO 9. DuPont explains:

> Dr. Luongo's expert opinion in *Moody* is structured the same as his opinion in *Vigneron.* Dr. Luongo does not provide an affirmative specific causation opinion as to the cause of Plaintiff's disease. Rather, he critically analyzes and responds to the specific causation opinion offered by Plaintiff's expert, Dr. Robert Bahnson. *See generally* Sept. 22, 2016 Report of Tony Luongo, MD [ECF No. 4773, Ex. C] ("Luongo Report").
>
> The Court recently addressed Plaintiff's argument that Dr. Luongo should be excluded for not conducting a differential etiology in EMO No. 9 and held, "DuPont offers expert witness Dr. Luongo to rebut Dr. Bahnson's specific causation opinions . . . . [B]ecause DuPont does not intend to offer Dr. Luongo's affirmative causation opinion that Mr. Vigneron's cancer was the result of an unknown cause, the issue of whether the opinion was reached utilizing a reliable differential diagnosis is moot." *See* EMO No. 9, at 37-38. There is no reason to deviate from this ruling in *Moody*.

(Def.'s Mem. in Opp. to Pl.'s Mot. to Partially Exclude Luongo Opinions at 3, ECF No. 4820.)

DuPont confuses this Court's analysis. In EMO 9, the Court indicated that no differential diagnosis is necessary if an expert is merely rebutting a specific causation opinion with critical analysis and response to an affirmative causation opinion. However, the Court did not suggest that the opinions and testimony of Dr. Luongo fit that description – indeed the opposite. As quoted above, and in contradiction to DuPont's assessment, the Court described Dr. Luongo's opinion as an "affirmative causation opinion that Mr. Vigneron's cancer was the result of an unknown cause." *Id.* Because DuPont did not intend to offer Dr. Luongo's affirmative causation opinion, the issue of whether it was reached using a differential diagnosis was rendered moot.

Contrarily, here, DuPont does intend to offer Dr. Luongo's opinion that Mr. Moody's "disease was most likely the result of unknown causes. . . . . [if] Plaintiff opens the door to it, as Plaintiff did in deposition." (Def.'s Mem. in Opp. to Pl.'s Mot. to Partially Exclude Luongo Opinions at 3, ECF No. 4820.) The door-opening to which DuPont refers is the question asked of Dr. Luongo of whether he has "an opinion to a reasonable degree of medical probability that an identifiable factor more likely than not caused Mr. Moody's testicular cancer . . . . that [he] identified in [his] report." Dr. Luongo answered that question:

> "My -- you know, my opinion is that there isn't a specific factor that I can say was a clear cause to Mr. Moody's testis cancer. The specific causation is unclear to me."
>
> . . . .
>
> "Based on my review of Mr. Moody's case, it's unclear to me to a medical -- to a reasonable degree of medical certainty what the cause of his testis cancer is."
>
> . . . .
>
> "Well, I'm speaking with respect to my professional opinion with Mr. Moody's case that, again, it's unclear to me with respect to the cause or the risk factor that led to the development of Mr. Moody's testicular cancer. I just don't know."
>
> . . . .
>
> "At this time I'm unable to identify a risk factor with a reasonable degree of medical probability, as you say, to be the cause of Mr. Moody's testis cancer."

(Luongo Dep. Tr. at 23–28, ECF No. 4772-5).

As this Court explained in *Vigneron* and *Freeman*, any specific causation opinion must be valid and be reached through reliable methodology. *Daubert*, 509 U.S. at 589–93; Fed. R. Evid. 702. Simply because Dr. Luongo is asked if he has a specific causation opinion does not open the door to offering an unreliable affirmative causation opinion. Dr. Luongo may state that he was not asked to provide an affirmative causation opinion. But he cannot testify that based

upon his review of Mr. Moody's medical file he is unable to identify a cause, or it is unclear as to what the cause could be. This is just another way of saying that in his opinion the cause of Mr. Moody's testicular cancer is unknown, which is an affirmative causation opinion.

Last, DuPont suggests that, even if the door is not opened, Dr. Luongo's deposition testimony "is consistent with the fact that Dr. Luongo was not asked to perform a differential etiology and is distinguishable from the opinions this Court has previously held constitute affirmative specific causation opinions." (Def.'s Mem. in Opp. to Pl.'s Mot. to Partially Exclude Luongo Opinions at 4, ECF No. 4820) (citing to EMO No. 5, at 24–25) (for the proposition that an opinion that "testicular cancer was more likely than not idiopathic and/or more likely than not the result of any other specific alternative cause" was an affirmative causation opinion). This Court disagrees.

Dr. Luongo's current testimony is not distinguishable from all of the opinions this Court has previously held constitute affirmative specific causation opinions. As the Court just explained, in *Vigneron* it described Dr. Luongo's testimony as an "affirmative causation opinion that Mr. Vigneron's cancer was the result of an unknown cause." (EMO No. 9 at 37–38, ECF No. 4777.)

C. Alternative Causation Opinions

Dr. Luongo opines that in his differential diagnosis, Dr. Bahnson failed to consider or properly "rule out" family history and genetic causes, intratubular germ cell neoplasia, microcalicification, cryptorchidism, and spontaneously occurring testicular cancer as potential causes of Mr. Moody's testicular cancer. (Luongo Rep. at 5–6, ECF No. 4773-3.) Of these, Mr. Moody moves only for exclusion of Dr. Luongo's opinion related to family history/genetic causes. DuPont posits that, "Dr. Luongo intends to offer [his] opinion as a rebuttal to Dr.

Bahnson's opinions, *i.e.*, [Dr. Luongo opines] that genetic links are a *possible* alternative cause of Plaintiff's testicular cancer that Dr. Bahnson should have considered." (Def.'s Mem. in Opp. to Pl.'s Mot. to Partially Exclude Luongo Opinions at 5, ECF No. 4820.) In his report, Dr. Luongo opines:

> Mr. Moody has reported a first degree relative, his sister, as having been diagnosed with ovarian cancer, which (according to Dr. Bahnson) she died of at age 28. Ovarian cancer is also a germ cell cancer. There is support in the medical literature for a heritable link between germ cell ovarian cancer and germ cell testicular cancer (Giambartolomei et al 2009; Cyriac et al 2012; Galani et al 2005). There is no evidence in Mr. Moody's records that he has been tested for any relevant genetic conditions, so this factor cannot be ruled out as a factor or cause.

(Luongo Rep. at 6, ECF No. 4773-3.)

DuPont asserts that "[t]he test for admissibility under *Daubert* is whether Dr. Luongo employed a sufficiently reliably methodology or analysis in reaching his opinions as to which proposed risk factors Dr. Bahnson should have and failed to consider as possible alternative causes of Plaintiff's testicular cancer." (Def.'s Mem. in Opp. to Pl.'s Mot. to Partially Exclude Luongo Opinions at 7–8, ECF No. 4820.) DuPont continues, stating that "Dr. Luongo's opinion concerning the genetic link between ovarian and testicular cancer is admissible because he utilized a reliable methodology—*i.e.*, he employed the "same level of intellectual rigor that characterizes the practice of an expert in the relevant field" to make this determination. *Id.* at 8 (citing *Kumho Tire Co. v. Carmichael*, 526 U.S. at 152; *Best,* 563 F.3d at 177). DuPont concludes that "Dr. Luongo researched the link between ovarian cancer and testicular cancer, found support for it in the scientific literature, and testified that Dr. Bahnson should have considered this proposed link based on the scientific similarities between germ cell ovarian and germ cell testicular cancer." *Id.*

Mr. Moody contends that Dr. Luongo's opinion fails to pass *Daubert* muster because, first, Dr. Luongo does not differentiate between ovarian *germ cell* malignancies and ovarian *epithelial* malignancies. The parties agree that the type of ovarian cancer from which Mr. Moody's sister died is unknown. The National Cancer Institute Surveillance, Epidemiology, and End Results Program ("SEER") malignancy incidence data Dr. Luongo relies upon throughout his expert report puts the *germ cell* rate of ovarian malignancies at 5%, presumably leaving the epithelial ovarian malignancies at greater than 90% of cases.

The scientific literature upon which Dr. Luongo relies consists of three case studies that look to a possible connection between the rarer ovarian *germ cell* malignancy and *germ cell* testicular cancer. In his deposition, Dr. Luongo readily conceded that he is not offering the opinion that ovarian *epithelial* cancer presents any risk factor relationship to testicular *germ cell* cancer, as there is no literature supporting any such relationship of which Dr. Luongo is aware. (Oct. 18, 2016, Luongo Dep. Tr. at 43, 47, ECF No. 4772-5.) Further, Dr. Luongo conceded that ovarian *germ cell* cancer is not on the list of risk factors for testicular cancer published by the American Cancer Society. *Id.* at 46.

Mr. Moody also contends that case studies, the only type of scientific study found by Dr. Luongo, are the weakest type of evidence, more appropriately used to supplement peer reviewed literature, as opposed the studies solely relied upon to support an expert's opinion. (Pl.'s Reply in Support of its Mot. to Partially Exclude Luongo Opinions at 10, ECF No. 4839) (citing, *inter alia*, *Muzzey v. Kerr-McGee Chemical Corp.*, 921 F. Supp. 511, 519 (N.D. Ill. 1996) ("anecdotal case reports . . . are not reliable basis to form a scientific opinion about a causal link"). Indeed, Dr. Luongo testified that, he tried to find the best medical literature supporting the link between ovarian and testicular germ cell malignancies in siblings and that the three articles he found were

small case reports. (Oct. 18, 2016, Luongo Dep. Tr. at 41–42 , 79, ECF No. 4772-5.) Dr. Luongo conceded that, on the hierarchy of evidence, case reports rank fairly low. *Id.* at 55–56 .

Mr. Moody, however, places the most emphasis on what he characterizes as Dr. Luongo's admission "that the ovarian-testicular cancer risk factor link he discussed in his report" is not based upon "good science." (Pl.'s Mot. to Partially Exclude Luongo Opinions at 18, ECF No. 4779) (emphasis omitted). Mr. Moody relies upon the following deposition testimony of Dr. Luongo:

> Q. As it is exists right now, as we sit here in October of 2016, is it good science to say to a reasonable degree of medical probability that a first degree relative with ovarian cancer presents a risk factor for the male relatives' development of testicular cancer, is that good science as it exists right now?
>
> A. Presently we can't make that statement. But we can certainly work - I mean, as I say, with developing research and data, that relationship, as I say, is possibly - - could be established and developed over time.
>
> Q. But it hasn't been at the present, right?
>
> A. You're speaking presently, we don't have the data compelling enough to make an assertion that yes, what you describe there of first degree relative of a woman who has ovarian cancer is at risk of cancer.

(Oct. 18, 2016, Luongo Dep. Tr. at 44–45 , ECF No. 4772-5.)

In response, DuPont characterizes these statements as "Dr. Luongo testif[ying] merely that there is *currently* no such science that familial ovarian cancer is an 'established risk factor' for testicular cancer but that the science is developing." (Def.'s Mem. in Opp. to Pl.'s Mot. to Partially Exclude Luongo Opinions at 5, ECF No. 4820.) DuPont concludes that "[t]his does not mean, however, that there is not sufficient science to support its consideration as a *possible* cause of Plaintiff's testicular cancer." *Id.* at 6. This Court, however, disagrees.

Daubert requires that "the trial judge, pursuant to Rule 104(a), must make a preliminary assessment of whether the testimony's underlying reasoning or methodology is scientifically

valid and properly can be applied to the facts at issue." *Daubert*, 509 U.S. at 579–80. "Many considerations will bear on the inquiry, including whether the theory or technique in question can be (and has been) tested, whether it has been subjected to peer review and publication, its known or potential error rate and the existence and maintenance of standards controlling its operation, and whether it has attracted widespread acceptance within a relevant scientific community." *Id.* "To be deemed reliable, the methodology underlying an expert's conclusions must be scientifically valid." *Hopkins v. Ford Motor Co.*, 1:07-CV-00068, 2011 WL 5525378, at *4 (W.D. Ky. Nov. 14, 2011) (citing Junk *v. Terminix Intern. Co.,* 628 F.3d 439, 448 (8th Cir. 2010)). "In other words, '[s]peculative testimony should not be admitted.'" *Id.* (citing *Junk*, supra.)

Dr. Luongo cannot attack any alleged deficiency in Dr. Bahnson's methodology with theories and/or risk factors relating to testicular cancer that are not generally accepted in the medical community, and for which Dr. Luongo himself testified that there is not any currently compelling data on which they are based. Dr. Luongo concedes that the ovarian-testicular cancer risk factor link he discussed in his report is based upon "emerging" and "evolving" science. Consequently, not only has the theory not "attracted widespread acceptance within a relevant scientific community," Dr. Luongo offers no literature to support his position that was "subjected to peer review and publication," no data showing "whether the theory or technique in question can be (and has been) tested," nor has he offered any information on whether the methodology has "known or potential error rate and the existence and maintenance of standards controlling its operation." *Daubert*, 509 U.S. at 579, 580.

In other words, DuPont is suggesting that Dr. Bahnson should have considered that Mr. Moody's sister may have died from a type of ovarian cancer that constitutes 5% of ovarian

cancers, and while there is currently no science to support a link between that rarer type of ovarian cancer and Mr. Moody's testicular cancer, "with developing research and data, that relationship . . . is possibly - - could be established and developed over time." (Oct. 18, 2016, Luongo Dep. Tr. at 44, ECF No. 4772-5.) In the context of a specific causation rebuttal, this testimony is the type of speculative testimony *Daubert* was intended to exclude.

V.

For the reasons set forth above, the Court **GRANTS IN PART AND DENIES IN PART** Defendant's Motion to Exclude Bahnson Opinions (ECF No. 4785), and **GRANTS** Plaintiff's Motion to Partially Exclude Luongo Opinions (ECF No. 4779).

IT IS SO ORDERED.

1-11-2017
DATE

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