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
CHIEF 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. 23

Motions Directed at Defendant's Expert Dr. Maier

This matter is before the Court on Plaintiff's Motion for Exclusion of Opinions and Testimony of Defense Expert Dr. Maier (ECF No. 4797), Defendant's Memorandum in Opposition to Plaintiff's Motion (ECF No. 4823), and Plaintiff's Reply in Support of his Motion (ECF No. 4840). For the reasons that follow, the Court **GRANTS IN PART AND DENIES IN PART** Plaintiff's Motion.

I.

Plaintiff Larry Ogle Moody is one of the over 3500 plaintiffs who have filed personal injury actions against Defendant E. I. du Pont de Nemours and Company ("DuPont") that make up the cases in this multidistrict litigation ("MDL"). In these cases, the MDL Plaintiffs allege claims for negligence and punitive damages. The Judicial Panel on Multidistrict Litigation describes the cases that make up this MDL 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 to C-8 exposure [("Linked Diseases")] by a study conducted as part of a 2005 between DuPont and a class of approximately 80,000 persons 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)].

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

The first two trials held in this MDL were chosen as bellwether cases and were tried in September 2015 and May 2016, respectively. The first was chosen by DuPont; a case brought by Carla Marie Bartlett (Case No. 2:13-cv-170), who suffered from the Linked Disease of kidney cancer. The plaintiffs chose the second case, which was filed by David Freeman (Case No. 2:13-1103), who suffered from testicular cancer, also a Linked Disease.

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), who had suffered from testicular cancer. Mr. Moody's trial is scheduled for January 17, 2017, and is the second non-bellwether trial. Like Mssrs. Freeman and Vigneron, Mr. Moody suffered from testicular cancer.

For the MDL Plaintiffs to establish a claim for negligence under Ohio law, they must allege facts showing: (1) the defendant owed them 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 plaintiffs 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. *Id.* 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.*

The facts regarding the foreseeability of harm from DuPont's release of C-8 from its Washington Works plant are in dispute. DuPont's position is that it "never had any knowledge or expectation . . . that there was *any* likelihood of *any* harm to community members at the relatively low PFOA levels found outside the plant." (DuPont's Mem. in Opp. to Pls.' Third Mot. for Summ. J. at 14); (DuPont's Answer to *Moody* Compl., 15th Def., ECF No. 2590) (DuPont avers that it "neither knew, nor should have known, that any of the substances to which [Mr. Moody] 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. Moody]."). DuPont offers evidence and expert testimony to support its position, including scientific studies that were available during the relevant time period, its own scientific studies analyzing the effects of C-8 on the surrounding environment, and records of its monitoring of its workers.

From this same historical record, and the availability of scientific evidence at the relevant time period, the MDL Plaintiffs offer expert testimony and evidence to support their position that DuPont possessed information showing that C-8 was harmful and that it released it into their drinking water anyway. Numerous experts have been offered without objection and this Court has issued decisions regarding the admissibility of nine of these experts, wherein it reviewed the historical record from which much of the evidence comes regarding DuPont's knowledge, and the experts' differing conclusions based on that same evidence. (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 10, ECF No. 4808; EMO 11, ECF No. 4835.)

Dr. Maier is a new expert has been offered by DuPont in the *Moody* case to discuss a study that was began in November 2001, when the West Virginia Department of Environmental Protection ("WVDEP") entered into a Consent Order with DuPont. (Consent Order at 1, ECF No. 4797-2.) DuPont and WVDEP entered into the consent Order to establish tasks to be performed to determine the extent of "any impact on human health and the environment" as a result of DuPont releasing C-8 into the environment from its Washington Works facility. Among other tasks, the Consent Order provided for the establishment of the C-8 Assessment of Toxicity Team ("CATT" or "CAT Team" or "CAT panel").

The Consent Order designated the CAT Team as a group of scientists who would "assess the toxicity and risk to human health and the environment associated with exposure ammonium perfluorooctanoate (C8) releases from DuPont's activities." *Id.* at C-1. The CAT Team was charged with assessing the available scientific information to develop "Provisional Reference Doses for C8" and "Screening Levels Based on Protection of Human Health." *Id.* at C-4. The Screening Level and Reference Dose were terms defined by the Consent Order.

The Consent Order established the design and structure of the CAT Team, and Attachment C to the Consent Order identified the members of the CAT Team. *Id.* at 8, C-1–2. The voting members of the CAT Team consisted of two representatives of DuPont, three toxicologists from Toxicology Excellence for Risk Assessment ("TERA"), including Michael Dourson, Ph.D, who previously testified in the *Bartlett* trial on behalf of DuPont, and DuPont's designated expert for the *Moody* trial, Michael Andrew Maier, M.S., Ph.D., CIH, DABT. In addition, there were three scientists from various regional offices of the United States

Environmental Protection Agency and one scientist from the Center for Disease Control's Agency for Toxic Substances and Disease Registry.

Dr. Maier has been offered by DuPont in the dual role of an expert and fact witness. (Maier Expert Rep., ECF No. 4797-4.) Mr. Moody does not challenge Dr. Maier's role as a fact witness or his expertise as a toxicologist, industrial hygienist, or risk assessor based on his educational achievements and his current position as director of the risk science center and professor of environmental and industrial hygiene at the University of Cincinnati College of Medicine; deputy director of the Continuing Education, Environmental and Industrial Hygiene, and Biomonitoring programs of the Education and Research Center funded by the U.S. National Institute for Occupational Safety and Health.

Mr. Moody directs his motion to Dr. Maier's expert opinion that to a "reasonable degree of scientific and professional certainty" the CAT Team was not "improperly influenced by the involvement of DuPont on the panel." (Maier Expert Rep. at 12, ECF No. 4797-4.)

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)).

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.

Mr. Moody moves for exclusion of Dr. Maier's expert opinion that the CAT Team was not improperly influenced by the involvement of representatives of DuPont. Mr. Moody contends that Dr. Maier is not qualified to offer his opinions and testimony that the DuPont CAT panel members' conflicts of interest did not compromise the CAT Team's conclusions. Mr. Moody points out that Dr. Maier relies upon the "working group" structure of the CAT Team, as contrasted by him with the "peer review" structure of scientific research groups, to reach his conclusion that the outcome of the CAT Team's work was unbiased and reliable. Because it is uncontested that Dr. Maier has no expertise in the field of psychology/sociology related to avoiding and controlling bias in groups, Mr. Moody contends Dr. Maier is not qualified to offer these opinions.

DuPont disagrees, asserting:

> To offer his opinions on how CATT controlled for bias, Dr. Maier does not need to be a psychologist or sociologist because his ultimate opinion is that the CATT process (based on generally accepted methods in the science of risk assessment) and results were robust and impartial. In his report, Dr. Maier cites to government standards and best practices for public-private working groups, relies on his experience working with and organizing such groups, and explains

> that the structure of CATT adhered to these widely accepted methodologies. Dr. Maier's credentials, and depth of experience in this area applying these generally accepted principles, including on the CATT, qualify him to offer such opinions. *See, e.g.*, *Kumho*, 526 U.S. at 156; *First Tennessee Bank*, 268 F.3d at 335; *Wood*, 576 F. App'x at 472; *Dickenson*, 388 F.3d at 982; *see also* EMO 9 at 23, 27, 34 (expert testimony based on experience is admissible).
>
> Dr. Maier concludes that due to the structure of the CAT panel—which is widely-accepted for public-private scientific working groups—even if an industry participant tried to assert an agenda, the scientifically rigorous discursive process would control the impact of any such attempt. *See, e.g.*, Maier Depo. at 185:10-186:14, esp. 185:24-186:2 ("Q. So [the CAT] panel helps monitor itself by discussing the material before it? A. And challenging errant opinions"), 199:10-17 (CATT had "a balance in the expertise and affiliations in a way to control any potential conflicts, conflicting behavior or bias through the mechanisms described"), 203:20-24

(Def.'s Mem. in Opp. at 6.) As Dr. Maier testified:

> It's not that you're ignoring biases, you have to have the right expertise. Then you manage bias so you have a reliable outcome.

(Oct. 26, 2016, Deposition of Andrew Maier, M.S., Ph.D., CIH, DABT, at 204; ECF No. 4797-5.)

DuPont continues that, "if Dr. Maier's testimony is limited or excluded, Dr. Siegel should also be precluded from offering testimony regarding the purported bias of the CATT." (Def.'s Mem. in Opp. at 9, ECF No. 4823.) DuPont posits:

> During the *Freeman* trial, Dr. Siegel repeatedly testified on direct that DuPont's participation meant the CATT's scientific conclusions were biased and unreliable. *See, e.g.*, June 2, 2016 Trial Tr. [Freeman ECF No. 108] at 240:22-241:1, 247:22-248:17. Dr. Siegel offered such testimony even though he did not participate in the CATT meeting. *See* Trial Tr. June 3, 2016 [Freeman ECF No. 109] at 114:17-19, 152:22-23. By contrast, Dr. Maier was not only a CAT panel member; his then-employer, the non-profit TERA, was appointed by the Consent Order to design the structure for CATT. If Dr. Meier is prevented from offering rebuttal testimony regarding the robustness of CATT's process and results, as well as how its structure controlled for bias, then Dr. Siegel should also be disqualified from rendering any such testimony to the jury.

Id.

It is clear to the Court that Dr. Maier may testify as a witness who was a participant on the CAT Team. As DuPont correctly states:

> Dr. Maier was a member of CATT, personally reviewed key studies in preparation for the CATT meeting, actively participated in CATT discussions, and communicated his scientific opinions within the group. His opinions are based on his personal observations and experiences on CATT as well as his decades of experience in toxicology, occupational hygiene and risk assessment science.

(Def.'s Mem. in Opp. at 3, ECF No. 4823.)

Further, it is equally apparent that Dr. Maier may opine, as DuPont contends, on his review of key studies in preparation for the CATT meeting, his participation in panel discussions, and communicating his scientific opinions within the group. He may discuss his opinions that are based on his personal observations and experiences on the CAT Team as well as his decades of experience in toxicology, occupational hygiene and risk assessment science.

However, issues arrive when Dr. Maier opines not as to the scientific processes in which the CAT Team engaged, and how those may compare to other groups in which he has participated, but rather when he opines that the structure of CATT "manage[s] bias so you have a reliable outcome." (Maier Dep. at 204, ECF No. 4797-5.) Dr. Maier opines that because of the structure or the CAT Team, the conflicts of interest of the members were controlled so that the results were robust and impartial regardless of any conflicts of interest of the CAT panel participants. Dr. Maier bases these opinions on "the field of collaborative analysis," and more predominantly his "opinion is primarily derived from interacting with lots of different panels with this sort of processes," as his deposition reflects:

> Q. And are you relying upon a particular document to support that view, that the – that there's a different set of conflict rules that apply to a working group as opposed to peer review group, the independent peer review group?

A. There's a field of collaborative analysis that suggests the importance of this type of approach, where you can bring different stakeholders together, including individuals who have these opinions.

Q. Uh-huh.

A. But I'm not aware of a specific guidance document along those lines.

Q. Okay.

A. This is more of an operating principle.

. . . .

Q. What do you call this -- what do you call this? I'm sorry. What did you call – you called this deal, you gave it a term?

A. Yeah, so the idea of collaborative analysis will bring multiple stakeholders together to solve technical problems in working groups, I'm on other working groups that also have similar types of situation, that have industry members and non-industry members working together.

Q. Other than your opinion today that this works out, is there somewhere that I can go out and look at the scientific literature that would affirm your opinion?

A. I believe there are papers that have expressed the idea of having this type of collaborative process but the opinion is most[ly] based on the fact that there are other working examples of the same kind of concept of having industry and the government diverse affiliations working together on panels, that's not unusual.

Q. So it's a pragmatic – it's pragmatically derived?

A. But there is -- there are some studies -- there is a literature base around this area also –

Q. But you can't -- sorry.

A. Well, there is one paper I'm familiar with, that's *Bergenson. I believe. Bergenson, I don't know the exact spelling, but my-

Q. Bergenson?

A. Bergenson. But my opinion is primarily derived on interacting with lots of different panels with this sort of processes.

(Maier Dep. at 201–203, ECF No. 4797-5.)

Even though Dr. Maier has participated on many "working groups" he admits that he has no knowledge of whether any of the purported self-regulating actions actually occurred for the working group members. In the context of the CAT Team, he testified:

> Q. Is it your opinion that the threats of losing credibility kept the biases of [DuPont CAT Team member] Gerry Kennedy in check?
>
> A. I don't know, you'd have to talk to him individually to see what his own thoughts were at the time.

Id. at 205.

The above testimony leaves no question that Dr. Maier is not an expert on the "field of collaborative analysis." And, if a proffered expert "witness is relying solely or primarily on experience, then the witness must explain how that experience leads to the conclusion reached, why that experience is a sufficient basis for the opinion, and how that experience is reliably applied to the facts." Fed. R. Evid. 702 Adv. Comm. Notes (2000). "The trial court's gatekeeping function requires more than simply 'taking the expert's word for it.'" *Id.* (quoting *Daubert v. Merrell Dow Pharms. Inc.*, 43 F.3d 1311, 1319 (9th Cir. 1995) ("We've been presented with only the experts' qualifications, their conclusions and their assurances of reliability. Under *Daubert*, that's not enough.")).

In the case *sub judice*, Dr. Maier's experience does not support the opinion he seeks to provide. That is, while Dr. Maier's credentials and experience qualify him as an expert on the type of work scientific groups perform, he has no expertise on the whether the group dynamic actually accounted in any way for outcome bias. Indeed, DuPont's contention that Dr. Maier and his then employer, TERA, were "appointed to design the structure" of the CATT, is simply inaccurate. Dr. Maier testified that "TERA was not involved in the negotiation of the Consent Order that established the CATT process." (Maier Expert Rep. at 3, ECF No. 4797-4.) Dr.

Maier's hypothesis regarding how humans behave in scientific working groups is dependent upon speculation regarding how members will regulate their own self-interested biases when working in a group so that the outcome will not be impacted by bias from apparent conflicts of interest. He provides no academic support for this conclusion, nor any experiential support for it. This testimony is the type of speculative testimony *Daubert* was intended to exclude.

With regard to DuPont's arguments that it should be permitted to rebut Dr. Siegel's opinion, it relies on Dr. Siegel's (un-objected to) testimony that DuPont's participation on the CAT Team constituted a conflict of interest and caused biased results. While Dr. Maier cannot testify as to his unsupported theory of group dynamics, he can certainly rebut Dr. Siegel's opinions. A comparative explanation may be helpful here.

Dr. Siegel testified that in his experience it is rare for a chemical corporation to pay for and participate in a process with a state health agency like WVDEP to produce a report about a chemical risk that the department is potentially in charge of regulating. Dr. Maier may offer his testimony it is "not unusual" for this type of group to be assembled and that he has participated in many. Both experts can, as they have in the record, discuss conflicts of interest and how these conflicts in their view cause or do not cause biased results. Both experts can, as they have in the record, offer their opinions regarding the process to assemble the CAT Team and its members. (Maier Rep. at 4, ECF No. 4797-4.) ("TERA was not responsible for selecting the CATT, but it was and remains my professional opinion that it was comprised of highly-qualified scientists with extensive expertise in toxicology and risk assessment.") However, Dr. Maier may not bolster his conclusion with an opinion that the results are not biased because human behavior in scientific working groups control for the biases. While there is a body of social science

dedicated solely to group dynamics and bias, Dr. Maier has no formal or experiential expertise in that field.

To be clear, the Court is not prohibiting Dr. Maier from testify about his own experiences and conduct. For example, if Dr. Maier regulated his own self-interested biases in working groups, he may testify to such. Or if he observed a participant "tr[y] to assert an agenda," that may have been controlled by "the scientifically rigorous discursive process" in which the group participants were engaged, he may testify to that as well. He is permitted to testify about his observations of scientists who attempted to "push something out there that is not supportable by the science," and the results of that conduct. But he may not testify that as a general proposition, scientific "working groups" manage human behavior to prevent biased outcomes.

IV.

In accordance with the above, the Court **GRANTS IN PART AND DENIES IN PART** Plaintiff's Motion for Exclusion of Opinions and Testimony of Defense Expert Michael Andrew Maier. (ECF No. 4797.)

IT IS SO ORDERED.

1-14-2017
DATE

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