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. 24

Plaintiff's Motions Directed at Defense Experts Dr. Weed, Dr. Rickard, and Dr. Fedoruk

This matter is before the Court on Plaintiff's Motion to Partially Exclude the Opinions and Testimony of Defense Experts Dr. Weed, Dr. Rickard, and Dr. Fedoruk (ECF No. 4781), Defendant's Memorandum in Opposition to Plaintiff's Motion (ECF No. 4822), and Plaintiff's Reply in Support of his Motion (ECF No. 4838). For the reasons that follow, the Court **GRANTS IN PART, DENIES IN PART, AND DENIES AS MOOT IN PART** Plaintiff's Motion to Exclude Experts Weed, Rickard, and Fedoruk.

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"). 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 Disease")] by a study conducted as part of a 2005 settlement [("*Leach* Settlement Agreement")] 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 [("*Leach* Class")]. *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 MDL Plaintiffs chose the second case, which was filed by David Freeman (Case No. 2:13-1103), who suffered from the Linked Disease of testicular cancer.

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 commenced on January 17, 2017, and is the fourth trial held in this MDL. Like Mssrs. Freeman and Vigneron, Mr. Moody suffered from testicular cancer.

The MDL Plaintiffs all allege claims for negligence and punitive damages. To establish their claims for negligence, each Ohio MDL Plaintiff must show that: (1) DuPont owed her or him a duty of care; (2) DuPont breached that duty of care; and (3) as a direct and proximate result of DuPont's breach, the MDL Plaintiff suffered injury. *Menifee v. Ohio Welding Prods., Inc.*,15 Ohio St.3d 75, 77 (1984). Under Ohio law, punitive damages are recoverable in a tort action when compensatory damages have already been awarded and "the actions or omissions of th[e] defendant demonstrate malice . . . ." Ohio Rev. Code § 2315.21(C). The "actual malice,

necessary for an award of punitive damages" can be shown by "a conscious disregard for the rights and safety of other persons that has a great probability of causing substantial harm." *Preston v. Murty*, 32 Ohio St. 3d 334, 336 (1987).

Mr. Moody moves to exclude portions of the reports of the following three experts' who have been offered by DuPont to opine on causation and duty, and whose opinions impact the jury's punitive damages assessment: Robert W. Rickard, Ph.D., D.A.B.T., Douglas L. Weed, M.D., M.P.H., Ph.D., and Marion J. Fedoruk, M.D., C.I.H., D.A.B.T., F.A.C.M.T., F.A.C.O.E.M. (Weed Rep., ECF No. 2807-9; Rickard Rep., ECF No. 2807-4; Rickard Second Rep., ECF No. 4639-7; Fedoruk Rep., ECF No. 4773-5.)

II.

Mr. Moody moves for exclusion of portions of expert opinions under Rules 401, 402, 403, and 702 of the Federal Rules of Evidence and *Daubert v. Merrell Dow Pharmaceuticals*, 509 U.S. 579 (1993).

A. Expert Testimony

Under Rule 702 of the Federal Rules of Evidence and *Daubert*, an expert opinion is not admissible unless it is relevant to the facts at issue in the case. In *Daubert,* the United States Supreme Court held that the Federal Rules of Evidence, in particular Rule 702 and 104(a), govern the admission of expert witness testimony and require that the trial judge "ensure that any and all scientific testimony or evidence admitted is not only relevant, but reliable." *Daubert,* 509 U.S. at 589. Because Rule 702 "requires that the evidence or testimony 'assist the trier of fact to understand the evidence,'" expert testimony "which does not relate to any issue in the case is not relevant and ergo, nonhelpful." *Daubert*, 509 U.S. at 590–90. "In other words, there must be a

'fit' between the proposed testimony and the question(s) presented by the case at bar." *Daubert*, 509 U.S. at 591.

The burden is on the parties 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).

B. Relevance and Balancing Probative Value with Reasons to Exclude Evidence

Rule 401 defines "relevant evidence" as "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Fed. R. Evid. 401. Evidence Rule 402 provides that "[e]vidence which is not relevant is not admissible." Fed. R. Evid. 402. Even if evidence is relevant, a court may still exclude the evidence, under Federal Rule of Evidence 403, which provides that "[a]lthough relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." Fed. R. Evid. 403.

III.

Mr. Moody's Motion is directed at expert opinions that impact his punitive damages claim and the issues of duty and causation, which are elements of his negligence claim.

A. Causation

In the case of each MDL Plaintiff, he or she must prove membership in the *Leach* Class. The *Leach* Settlement Agreement defines the *Leach* Class as a group of individuals who, "for the period of at least one year," have "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. (*Leach* Settlement Agreement ("S.A.") § 2.1.1.) All of the water sources are in Ohio and West Virginia.

In the *Leach* Settlement Agreement, the parties fashioned a unique procedure to determine whether the members of 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 C-8 discharged from DuPont's Washington Works plant. The procedure required DuPont and a representative of the putative plaintiffs 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. at §§ 12.2.1, 12.2.2.) The Science Panel was tasked with determining whether "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.)

If the Science Panel found that it was "more likely than not that there is a link between exposure to C-8 and a particular Human Disease among Class Members," the Panel then issued a Probable Link Finding for that specific disease, and DuPont waived its right to challenge whether "it is probable that exposure to C-8 is capable of causing" the Linked Disease, *i.e.*, general causation. (S.A. § 3.3.)

In Dispositive Motions Order No. ("DMO") 1-A, the Court explained:

> The Science Panel was focused on an identified group of people (the *Leach* Class) with a defined level of exposure (.05 ppb or greater of C-8 for the period of at least one year) to a particular chemical (C-8) and [was directed to] determine, not how much of the chemical it might take to cause various diseases in humans generally, but which diseases were linked to the actual C-8 exposures in that defined group. The Science Panel's Probable Link Findings are, by agreement of the parties and by definition, links that exist and are "probable" in the entire *Leach* Class.

Id. at 15.

Thus, once a putative class members proves that they drank water that contained at least 0.05 ppb of C-8 for at least one year, and that they suffer or suffered from a Linked Disease, they are entitled to have the Probable Link Finding applied. The Probable Link Finding means that for that *Leach* Class member it is more likely than not that there is a link between his or her exposure to C-8 (*i.e.*, drinking water containing at least. 05 ppb of C-8 for at least one year) and his or her Linked Disease. Once the Probable Link Finding is applied to the *Leach* Class member, DuPont cannot challenge whether C-8 is capable of causing the Linked Disease in that member. DuPont reserved the right to contest whether "it is probable that exposure to C-8 caused" a *Leach* Class member's Linked Disease, *i.e.*, specific causation. (S.A. § 3.3.)

If the Science Panel issued a No Probable Link Finding for a particular human disease found among members of the *Leach* Class, it too was contractually agreed to be applied to every member of the class. What that meant is that those *Leach* Class members' personal injury and wrongful death claims against DuPont based on any No Probable Link Disease are forever barred, regardless of any subsequent scientific studies. (S.A. § 3.3.)

The Science Panel engaged in its work for approximately seven years and in 2012 it issued Probable Link Findings for six human diseases and No Probable Link Findings for over forty human diseases. Approximately 3500 members of the *Leach* Class allege that they suffer or suffered from one of the Linked Diseases. They are the MDL Plaintiffs in the instant MDL. The other 70,000-plus members of the *Leach* Class suffer or suffered from one or more non-linked disease. Their claims are forever barred.

Mr. Moody suffered from testicular cancer which is one of the Linked Diseases.

B. Analysis

As just explained, Mr. Moody is not required to prove whether C-8 is capable of causing his testicular cancer, but must prove that it is probable that exposure to C-8 actually caused his testicular cancer. DuPont, however, offers expert reports and testimony from Dr. Rickard, Dr. Weed, and Dr. Fedoruk that contain portions directed whether C-8 is *capable* of causing Mr. Moody's testicular cancer.

Mr. Moody moves the Court to exclude those portions of the opinions and testimony in accordance with this Court's prior rulings excluding as irrelevant this type of evidence because it is directed at general causation. (Evidentiary Mots. Order No. ("EMO") 1, ECF No. 4079; EMO 1-A, ECF No. 4226; EMO 5, ECF No. 4532; DMO 12, ECF No. 4306.) Further, Mr. Moody points out that Dr. Rickard several times refers to studies that were issued both before *and after* the release of the Science Panel's work, which attack general causation. (Rickard Second Rep. at 8, ECF No. 4639-7) ("The cancer classifications for PFOA created both before and after the Science Panel's work also support the conclusion that harm was unlikely to occur at community levels of exposure."). Finally, Mr. Moody contends that Dr. Weed's opinions "relate either to claims of kidney cancer or ulcerative colitis – two diseases not being claimed by Mr. Moody." (Pl.'s Mot. at 9.)

1. General Causation

In DuPont's response to Mr. Moody's Motion, it contends:

> [DuPont] does not intend to elicit opinions from its experts at trial to dispute general causation. To the extent that any challenged opinions appear to run afoul of that understanding, that may merely be the result of DuPont's exercise of its right to preserve the appellate record, as the Court has previously acknowledged is appropriate. *See, e.g.*, Sept. 24, 2015 Trial Tr. [*Bartlett* ECF No. 131] at 200:24-25 ("Right, and I've told you before, and I'll tell you again, I don't want to cut off any appellate rights. So anything up until this point is preserved that goes to any of these issues . . . ."); *see also* June 17, 2016 Trial Tr. [*Freeman* ECF

> No. 121] at 214:25-215:3 (regarding DuPont's directed verdict motion, making "very clear" that DuPont was "preserving any appeal rights and any objection to" issues already decided).

(Def.'s Mot. in Opp. at 1–2.)

The Court will accept DuPont's assurance that it is not offering any of its experts' opinions regarding general causation, which renders moot Mr. Moody's request to exclude the portions of Drs. Weed, Rickard, and Fedoruk that are directed at general causation. The Court, therefore, **DENIES AS MOOT** that request.

2. Dr. Rickard and Post-2012 Documents

Mr. Moody contends that the following statements made by Dr. Rickard in his Second Exert Report go directly to general causation:

> Based upon the well-established toxicological properties of PFOA understood prior to 2011, it was not likely to cause harm at community levels of exposure. This conclusion is also supported by the many risk assessments that were completed or drafted for PFOA both before **and after** the release of the Science Panel's work. These assessments generally resulted in determination of guidance exposure levels, which had various and extensive levels of safety factors built into them. In other words, they were set at levels far below where human health effects were expected to occur. These risk assessments generally included a robust review of the available scientific information and, for the most part, were based on accepted regulatory science-based methodologies.
>
> ([Second] Rickard Report at 8) (emphasis added).
>
> The cancer classifications for PFOA created both before **and after** the Science Panel's work also support the conclusion that harm was unlikely to occur at community levels of exposure.
>
> (*Id.* at 9) (emphasis added).
>
> Numerous agencies have reviewed the data on PFOA and none have classified PFOA as a probable or known human carcinogen and all risk assessment that I am aware of have agreed that a threshold risk assessment is appropriate for PFOA tumor effects. Pg.48
>
> (*Id.* at 48-49.)

(Pl.'s Mot. at 10, ECF No. 4781.)

DuPont responds:

> Plaintiff concedes that Dr. Rickard's opinions are admissible if they are an "assessment of the state of knowledge prior to the issuance of the Probable Link Findings 2012." Mot. at 15. This is precisely what DuPont intends to have Dr. Rickard testify about during his direct examination. DuPont has consistently affirmed that, while it intends to, and does preserve all of its arguments for appeal, it has no intention of ignoring this Court's prior rulings, including the Court's rulings in the Evidentiary Motions Orders referenced by Plaintiff. Thus, DuPont's counsel currently has no intention of eliciting testimony during Dr. Rickard's direct examination regarding previously-excluded opinions—including testimony concerning the issue of whether the current (post-2012) state of scientific knowledge actually recognizes C8 as capable of causing testicular cancer, and whether there is scientific proof that Plaintiff's specific dose or exposure level to C8 was capable of causing his testicular cancer—unless Plaintiff opens the door and this Court permits it.
>
> Plaintiff takes issue with Dr. Rickard's citation to a June 2014 publication, and to his generalized references to post-2012 risk assessments, which Plaintiff mischaracterizes as "inappropriate attacks on 'General Causation.'" *See* Mot. at 9-10. Plaintiff is wrong. Not only does Plaintiff fail to explain how these statements attack general causation, but none of Dr. Rickard's cited references to post-2012 assessments actually contest general causation. To the contrary, his expert report makes clear that he has "been instructed to assume for purposes of this report that DuPont has agreed not to contest general causation (defined as whether 'it is probable that exposure to [PFOA] is capable of causing a particular Human Disease') for class members . . . "

(Def.'s Mem. in Opp. at 6–7, ECF No. 4822) (citing Second Rickard Expert. Rep. at 6).

The Court disagrees with DuPont's assessment of the post-2012 studies. The Court has consistently found those studies and/or any opinions about them or made in reliance upon them inadmissible. It is not sufficient that Dr. Rickard "has been directed to assume for purposes of [his] report that DuPont has agreed not to contest general causation." What is necessary is that Dr. Rickard actually makes that assumption in his opinions. He cannot rely on post-2012 studies to state that harm is unlikely to have occurred at community levels of exposure when the Science Panel said the opposite.

The Science Panel found that it was indeed likely that harm could occur at community exposure levels. Specifically, the Science Panel found that "it is more likely than not that there is a link between exposure to C-8 and [the Linked Diseases] among Class Members," *i.e.,* an individual who, "for the period of at least one year," has "consumed drinking water containing .05 ppb or greater of C-8 attributable to releases from [DuPont's] Washington Works" plant. (S.A. §§ 1.49, 2.1.1.) The parties have contractually agreed in the *Leach* Settlement Agreement to be bound by those Findings, rendering irrelevant any post-2012 studies regarding whether C-8 is capable of causing a Linked Disease in the *Leach* Class. *See Daubert*, 509 U.S. at 590–90 (explaining that expert testimony "which does not relate to any issue in the case is not relevant and ergo, nonhelpful"). Thus, the Court **GRANTS** the portion of Mr. Moody's Motion related to the post-2012 studies.

3. Dr. Weed's Causation Opinions

Last, DuPont asserts that it does not offer Dr. Weed's opinions as they relate to causation. Therefore, the Court finds that Mr. Moody's request to exclude as irrelevant Dr. Weed's causation opinions related to kidney cancer and ulcerative colitis has been rendered moot, and is thus **DENIED AS MOOT.**

Nevertheless, DuPont contends that this Court has previously ruled on whether Dr. Weed's opinions were relevant as to the inquiry related to duty:

> [T]he Court ***confirmed the relevance and admissibility*** of Dr. Weed's testimony regarding "what DuPont knew or should have known about the developing state of the scientific knowledge on C-8 during the relevant years of DuPont's conduct prior to the Science Panel's report in 2012." EMO No. 5 at 10. Because Plaintiff has offered no reason to deviate from the Court's prior rulings regarding Dr. Weed's opinions, Plaintiff's regurgitated challenges should be denied as moot.

(Def.'s Mem. in Opp. at 5) (emphasis by DuPont).

In EMO 5, however, the Court was not asked to, nor did it, "confirm[] the relevance and admissibility of Dr. Weed's testimony." Instead, the Court stated that Dr. Weed's opinions as they may relate to duty and/or punitive damages were unchallenged, as is seen by the entirety of the Court's assessment of that issue:

> DuPont maintains that the testimony it intends to offer from Dr. Weed is directed to "what DuPont knew or should have known about the developing state of the scientific knowledge on C-8 during the relevant years of DuPont's conduct prior to the Science Panel's reports in 2012." (Def.'s Mem. in Opp. at 16.) Mr. Freeman does not dispute that this testimony is admissible.

(EMO 5 at 10, ECF No. 4532.)

The situation addressed in EMO 5 is again before the Court. That is, Mr. Moody does not challenge the admissibility of Dr. Weed's opinions as they relate to the issue of duty and/or punitive damages. Consequently, there is nothing before the Court on which to rule.

B. Duty

To establish his negligence claim, Mr. Moody must not only show causation, he must also prove that DuPont owed him a duty of care. *Menifee,* 15 Ohio St.3d at 77. 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.* This evidence is also relevant to Mr. Moody's punitive damages claim, in that it could be used to support or not support, whether DuPont's conduct exhibited a "conscious disregard for the rights and safety of other persons that ha[d] a great probability of causing substantial harm." *Preston*, 32 Ohio St. 3d at 336.

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) (emphasis by DuPont); (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 the C-8 into their drinking water anyway. Numerous experts have been offered without objection and this Court has issued decisions regarding the admissibility of ten 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. (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; EMO 23, ECF No. 5001.)

DuPont maintains that "[t]his Court's prior Orders make clear that DuPont is allowed to present expert opinions like those of . . . Dr. Fedoruk, that address what was known or should have been known by DuPont prior to the Science Panel findings." (Def.'s Mem. in Opp. at 3.)

Dr. Fedoruk is an expert offered for the first time in Mr. Moody's case. Mr. Moody asks for exclusion under *Daubert* and/or under Federal Rule of Evidence 403 of the opinion testimony offered by Dr. Fedoruk related to: (1) DuPont's Medical Director, and (2) a C-8 study that has previously been excluded by this Court.

1. DuPont's Medical Director

Bruce Karrh, M.D. was the Medical Director at DuPont when he made a presentation at a 1978 conference, entitled "Conference on Ethical Issues in Occupational Medicine," and published an article on the topics he presented at that conference. Dr. Karrh's deposition is part of the record in this MDL. (Karrh Dep. Tr., ECF No. 4034-5) Mr. Moody points out a section of Dr. Fedoruk's opinion that he claims "essentially attacks the findings" of Dr. Karrh by "simply quot[ing] from other conference attendees on other issues." (Pl.'s Mot. at 11, ECF No. 4781.) DuPont responds that Mr. Moody does not provide "any meaningful explanation" with regard to his request for exclusion of Dr. Fedoruk's opinions that refer to Dr. Karrh. This Court agrees, and therefore **DENIES** Mr. Moody's request to exclude all of Dr. Fedoruk's testimony related to Dr. Karrh's publication.

It is unclear to the Court the basis upon which Mr. Moody moves for exclusion of Dr. Fedoruk's statements regarding Dr. Karrh. As the Court reads the expert report, Dr. Fedoruk takes issue with two of Mr. Moody's experts' reliance on Dr. Karrh's publication, which Dr. Fedoruk suggests was inappropriate. (Fedoruk Expert Rep. at 34–37.) Dr. Fedoruk can certainly be questioned about why he believes Dr. Karrh's publication is insufficient to be relied upon by Mr. Moody's experts. As for the documents from the 1978 conference that were not written by a DuPont employee upon which Dr. Fedoruk relies, they obviously cannot be used for the truth of the matters asserted in them. The record is not sufficiently developed as to the speaker, the

statements, or the context for the Court to reach a definitive decision. This matter will be addressed in a conference prior to the offering of the statements.

2. C-8 Cancer Study

In Dr. Fedoruk's expert report, he references a 2010 Scottish study where C-8 was administered to 41 individuals who were suffering from advanced stage terminal cancer, that was designed to determine single oral dose toxicity of C-8 and pharmacokinetics, to recommend a Phase II dosage, as well as any potential benefit of C-8 in the treatment or maintenance of the study subjects' cancers. ("Scotland Cancer Study"). The median duration of treatment was 6.5 weeks, the median age of participants was 64, the participants' cancers were mostly colorectal and pancreatic cancers, a protocol-defined maximum tolerated dose was not reached, and there is no follow-up data available. DuPont first was made aware of the Scotland Cancer Study in November 2010.

DuPont has offered the same general testimony about this Study through another expert, Dr. Rickard, in the last two trials (*Freeman* and *Vigneron*) held in this MDL. The issue was discussed in the *Freeman* pretrial hearing and then was extensively briefed. (May 18, 2016, *Freeman* Pretrial Hr'g Tr. at 635–40, ECF No. 4547; May 27, 2016, *Freeman* Final Pretrial Conf. Tr. at 702, ECF No. 4675; Pl.'s Supp. Mem. in Support of Obj. to Def.'s Use of or Ref. to Trial Ex. D.2885 and the CRX1002 Study, ECF No. 4542; Def.'s Bench Brief Re. the 2010/2011 Phase I Clinical Trial to Investigate the Potential Use of C-8 as a Beneficial Drug to Treat Cancer in Humans, ECF No. 4546; Pl.'s Mot. *in Limine* No. 14 to Preclude C-8 Cancer Drug Trial Evidence, ECF No. 4724; Def.'s Opp. to Pl.'s Mot. *in Limine* No. 14, ECF No. 4765.)

The MDL Plaintiffs have argued that testimony related to the Scotland Cancer Study suggests that C-8 may prevent cancer and is an attack on general causation; that is, C-8 cannot be

capable of causing cancer and concomitantly help cure cancer. They have also argued that "there is a serious risk of misleading and confusing the jury into thinking the chemical as a drug to treat dying cancer patients must mean something about the safety of the material or to cast doubt on whether the chemical being used would actually cause cancer, which would result in unfair prejudice to [the MDL Plaintiffs] by essentially challenging general causation and undermining the Science Panel's Findings." (Pl.'s Mot. *in Limine* No. 14 to Preclude C-8 Cancer Drug Trial Evidence, ECF No. 4724.) The plaintiffs further maintain that allowing this testimony would be a waste of time and would be distracting to the jury because the facts surrounding the effects of C-8 on terminally-ill cancer patients (none of whom had a Probable Link cancer), the study's quality and the merits of any conclusions, would result in a "mini-trial." (Pl.'s Supp. Mem. in Support of Obj. to Def.'s Use of or Ref. to Trial Ex. D.2885 and the CRX1002 Study at 4, ECF No. 4542.)

DuPont responds that the Scotland Cancer Study is relevant to the state of the science, which it characterizes as containing "no proof or even evidence establishing that C-8 was potent or likely to cause cancer or other harm at the extremely low exposure levels in the community." (Def.'s Opp. to Pl.'s Mot. *in Limine* No. 14, ECF No. 4765.) DuPont argues that the opinions of Dr. Fedoruk that rely on the Scotland Cancer Study go to "the state of scientific knowledge relating to C-8 as it developed over the relevant years prior to the Science Panel's reports are highly relevant and admissible to the disputed issue of liability in this case." (Def.'s Mem. in Opp. at 9, ECF No. 4822.) DuPont concludes that "there is no valid basis to preclude Dr. Fedoruk from offering his opinion that based on his review of the scientific information available before 2012, DuPont demonstrated good practices and due scientific diligence." *Id.* This Court disagrees in part.

Dr. Fedoruk may certainly testify that in his opinion DuPont demonstrated good practices and due scientific diligence by reliance on the scientific data available and/or utilized by DuPont during the over sixty-plus years DuPont used C-8. As the previous three trials in this MDL have shown, there are literally tens of thousands of documents and many studies upon which the experts in this MDL have relied. Dr. Fedoruk too has relied upon this voluminous data. Dr. Fedoruk may not, however, rely on a study that this Court has previously excluded. The Court first addressed DuPont's arguments related to the Scotland Cancer Study at a pretrial hearing in *Freeman*, where the following exchange occurred:

> [DuPont's Counsel] MR. MACE: The fact that with DuPont's knowledge, they were actually doing a clinical trial, intentionally giving it to people in extremely high doses prior to the Science Panel's finding helps rebut their claim that DuPont knew or should have known, that this was extremely hazardous, and nobody should be exposed to. . . . [and to go with the Study] there's Dr. Rickard's testimony about what he knew about that as he was evaluating DuPont's conduct and what steps they should take prior to the Science Panel's finding. . . .
>
> THE COURT: At what time?
>
> MR. MACE: The timing of the knowledge[,(*i.e.*, November 2010).
>
> [Mr. Feeman's Counsel] MR. O'BRIEN: It's a 403 issue at some point in the treatment because with chemotherapy, you give people poison to kill stuff like tumors. So they give this – We're getting into a pharmacological/pharmokinetics trial here --
>
> THE COURT: That's a logical leap I can't make when somebody -- I assume these are pretty seriously ill cancer patients we are talking about?
>
> MR. MACE: Yes, sir.
>
> THE COURT: So medical science would say if you are in a grave risk of death, that's the time to take grave risks with treatment. That doesn't mean -- I don't think you can medically imply from that, just as a lay person implies, because people *in extremis* would be given, that that meant the chemical wasn't harmful. I'm not prepared to make that link.

(May 18, 2016, *Freeman* Pretrial Hr'g Tr. at 638–39, ECF No. 4547.)

Additionally, after reviewing all of the subsequent briefing, the Court determined that the probative value of this evidence for notice on the state of the science is minimal. DuPont did not learn about the Scotland Cancer Study until November 2010, over a decade after Mr. Moody (and Mr. Freeman before him) was diagnosed with cancer, and after over fifty years of studies regarding the potential toxicity of C-8. The Court excluded the evidence, stating:

> I want to explain the C-8 and cancer issue, as I understood that study, this was performed with people who were about to die. And in our case it doesn't include that universe of patients. So just by -- certainly by a public policy/risk benefit analysis, people who are about to die from unrelated causes, would be better candidates for something that might have risk than people who were perfectly healthy. So I don't think there is any scientific comparison between that kind of study and the risks posed by C-8 historically as known or not known by DuPont. That study will not be in.

(May 27, 2016, *Freeman* Final Pretrial Conf. Tr. at 702, ECF No. 4675). The Court finds that the probative value is minimal, and it is substantially outweighed by unfair prejudice and the real potential to mislead and confuse the jury. The willingness of a terminal, dying cancer patient to take a potentially dangerous chemical says nothing about the risk to otherwise healthy individuals being exposed to the same chemical in their drinking water.

For these same reasons, the Court excludes the Scotland Cancer Study in this trial as well. Accordingly, the Court **GRANTS** Mr. Moody's Motion on this issue.

IV.

For the reasons stated above, the Court **GRANTS IN PART, DENIES IN PART, AND DENIES AS MOOT IN PART** Plaintiff's Motion to Partially Exclude the Opinions and Testimony of Defense Experts Dr. Weed, Dr. Rickard, and Dr. Fedoruk. (ECF No. 4781.)

IT IS SO ORDERED.

2-7-2017
DATE

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