UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

IN RE: PHENYLPROPANOLAMINE (PPA) PRODUCTS LIABILITY LITIGATION, This document relates to: All cases	MDL NO. 1407 ORDER GRANTING MDL PLAINTIFFS' MOTION TO STRIKE THE SUPPLEMENTAL RULE 26 AFFIDAVIT OF MDL EXPERT DAVID W. STEWART, Ph.D.

I. INTRODUCTION

This matter comes before the court on plaintiffs' Motion to Strike the Supplemental Rule 26 Affidavit of MDL Defense Expert David W. Stewart, Ph.D. Plaintiffs assert that Dr. Stewart's affidavit is untimely and that its contents contravene rules and orders governing this multi-district litigation ("MDL 1407"). The defendants argue that the affidavit is a proper Rule 26 report of a "later-designated" expert which squares precisely with MDL 1407 protocol, for expert disclosure. Having reviewed the motion, the parties' briefs, and having heard oral argument, the court hereby finds and rules as follows:

II. BACKGROUND

The plaintiffs and defendants were required to designate their generic expert witnesses by dates set by the court. However, as those dates approached, the parties realized that it would not be possible to designate generic experts for thousands of cases across the country. Therefore, instead of attempting to identify the universe of experts that would eventually testify at each trial, the parties agreed to designate prototypical experts. The testimony of these prototypical experts would be subject to *Daubert* challenges, with the understanding that the facts, theories and opinions that survived the *Daubert* process would then be adopted by those experts later designated as the cases approached trial.

The parties presented their agreement to the court in the form of a stipulation. The stipulation and order was entered by the court on September 9, 2002, and provides that plaintiffs and defendants may identify and use later-designated experts if two requirements are met:

1. The later-designated experts rely upon the same of substantially the same opinions, evidence and/or theories advanced by [the parties'] jointly-designated common experts; and
2. The evidence, opinions, and/or theories relied upon by those jointly-designated common experts have not previously been determined by this Court to be

scientifically unreliable or otherwise inadmissible.

On January 10, 2003 the defense identified 18 experts, including Dr. Stewart, on issues of "widespread applicability" and served Rule 26 reports from each attacking the lines of evidence relied upon by the plaintiffs' experts, with a heavy emphasis on attacking the Hemorrhagic Stroke Project (the "HSP" or "Yale Study"). Dr. Stewart's initial report focused on a limited area of the HSP, i.e., the purportedly lower than expected PPA exposure in the appetite suppressant control group when compared to available market survey data. However, on November 13, 2004 the defense filed the Supplemental Rule 26 Affidavit of David W. Stewart, Ph.D. in which he expanded his opinion to express the general overarching opinion that the HSP is seriously flawed and unreliable because the investigators failed to follow generally accepted methods for conducting their research.

The plaintiffs claim that Dr. Stewart's November 3, 2004 report contains previously undisclosed opinions of general applicability that are based on evidence that was available when Dr. Stewart filed his original report. Therefore, plaintiffs contend, the supplemental report should be stricken as either (a) untimely or (b) impermissible under prior orders in this MDL. At the court's request, plaintiffs submitted a supplemental brief in support of their motion to strike. In the brief, plaintiffs divided the November 13th report into 80 plus individual

statements or "opinions" that essentially came down to two objections:

Objection A: Dr. Stewart does not qualify as a "later-designated expert." The purpose of the September 9, 2002 order was to permit new and different expert witnesses identified after January 23 to be substituted for original witnesses, so long as their opinions were the same of substantially the same. Dr. Stewart is not a "new" or "different" witness so he does not meet the criteria of the September 9, 2002 order.

Objection B: Dr. Stewart relies on theories, rationales and analyses that are being advanced for the first time in this litigation. He is citing to medical, scientific and market survey authorities that were not disclosed by any of the prototype witnesses. The theories, rationales, and analyses, and the materials cited in support thereof, were available in January 2003 and therefore do not constitute new evidence warranting a supplemental report.

Plaintiffs conclude their argument by claiming that if the court allows Dr. Stewart's supplemental report to stand, such a ruling will open the door to another wave of expert reports that will prove to be costly and time-consuming, in that both parties will take advantage of the opportunity to submit new opinions and theories, whether by supplemental report or disclosures by subsequently designated experts, which, in turn, will require more depositions.

Defendants respond by arguing that Dr. Stewart's November 13th report squares precisely with the requirements of the "later-designated expert" exception in the September 9th order. First, the report does not express testimony that the court ruled inadmissible during the *Daubert* hearings. Second, according to

defendants, Dr. Stewart's report relies upon "the same or substantially the same opinions, evidence, **and/or** theories..." Defendants reason that while Dr. Stewart uses different words to express his opinions and conclusions, he uses and articulates the same general evidence, theories and opinions as those expressed by other defense experts, namely that the HSP was not properly designed, controlled, performed, analyzed, or reported.

Defendants admit that while some of the treatises and articles relied upon by Dr. Stewart in his November 13th report were not previously cited by any prototypical expert, but argue that the opinions based on these new treatises and articles are still admissible because the opinions, themselves, are not new. "[T]he test under the [September 9th Order] is in the disjunctive – "the same or substantially the same opinions, evidence **and/or** theories." Id. at 3.

III. ANALYSIS

The court agrees with plaintiffs that Dr. Stewart's November 13th report offers opinions or theories that are new to this litigation and relies on evidence that was not previously relied upon by a prototypical expert. The purpose of the September 9th order was to require the parties to timely disclose the opinions and theories of their prototypical experts, but allow the parties some flexibility in designating who would actually present the testimony at trial. It was not the court's intention to allow the later-designated experts to cite new evidence or introduce new

opinions. The court will not permit defendants to define the opinion of a prototypical expert so broadly that it encompasses new versions of the opinion in the guise of being an old opinion.

If, as the defense claims, Dr. Stewart truly is simply parroting the opinions of other prototypical experts, then there is no need for him to file a supplemental report. Instead, he should simply adopt the report(s) of the generic expert(s) he was designated to replace at trial. By means of his supplemental report, Dr. Stewart seeks to introduce new opinions or theories to this litigation. The defense has admitted that Dr. Stewart relied, at least in part, on authorities not previously relied upon by a prototypical expert.

The court finds that the November 13th report goes beyond that contemplated in the September 9th order and therefore, must be stricken. In the future, if replacement experts are needed at trial, the court expects that such experts will adopt the Rule 26 report of the expert they are replacing.

IV. CONCLUSION

Based on the foregoing, plaintiffs' Motion to Strike the Supplemental Rule 26 Affidavit of Dr. Stewart is GRANTED. The defense may resubmit a new report for Dr. Stewart that adopts a report of a previously designated prototypical expert.

DATED at Seattle, Washington this 11th day of February, 2005.

S\Barbara Jacobs Rothstein
BARBARA JACOBS ROTHSTEIN
UNITED STATES DISTRICT COURT
JUDGE