IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MISSOURI
SOUTHEASTERN DIVISION

IN RE: DICAMBA HERBICIDES LITIGATION	)	MDL NO. 2820
This Document Relates To:	)	
All Cases	)	

MONSANTO COMPANY'S AND BASF CORPORATION'S JOINT MOTION TO EXCLUDE OR STRIKE CHARLES D. COWAN FROM TESTIFYING AS AN EXPERT WITNESS

Monsanto Company and BASF Corporation move to exclude or strike the testimony and report of Plaintiffs' expert witness Charles D. Cowan.

The district court acts as a "gatekeeper" in determining the admissibility of expert testimony and "must ensure that any and all scientific testimony or evidence admitted is not only relevant, but reliable." *Daubert*, 509 U.S. at 589. Reliability requires that the expert testimony: (1) "is based on sufficient facts or data"; (2) "is the product of reliable principles and methods"; and (3) involves the reliable application of "the principles and methods to the facts of the case." *Daubert*, 509 U.S. at 589; *Menz v. New Holland N. Am., Inc.*, 507 F.3d 1107, 1114 (8th Cir. 2007). "The proponent of the expert testimony bears the burden to prove its admissibility." *Id.* at 1114.

While the basic principle is the same -- that the Court should exclude unhelpful and/or unreliable expert testimony -- courts in the Eighth Circuit have applied a "tailored" *Daubert* analysis at the class certification stage. *See In re Zurn Pex Plumbing Prods. Liab. Litig.*, 644 F.3d 604, 614 (8th Cir. 2011). Defendants maintain that this Court should conduct a full *Daubert* analysis at this stage in this case.[1] However, even under *Zurn*, the district court must "scrutinize the reliability of the expert testimony," "in light of the criteria for class certification and the current state of the evidence." *Id.* Accordingly, the Court still must exclude expert opinions at the class certification stage if they do not meet Rule 702's standards. *See, e.g., In re Hardieplank Fiber Cement Siding Litig.*, 2018 WL 262826, *8-11 (D. Minn. 2018) (discussing *Zurn* and excluding opinions under *Daubert* in class certification context). Under *Daubert* or *Zurn*, Cowan's opinions are unreliable.

In an effort to marshal supposedly common evidence on consumer perception, Cowan purports to: "provide[] a basis for the court to conclude, in conjunction with other expert reports and other materials, that reliable methodologies exist and can be used to

[1] While the Supreme Court has not directly addressed whether a full or "tailored" *Daubert* analysis is required at the class certification stage, recent precedent suggests the need for a full *Daubert* analysis. *See Wal-Mart Stores, Inc. v. Dukes*, 546 U.S. 338 (2011). The tailored *Daubert* approach adopted in *Zurn* has been rejected by the weight of the circuit courts. *See Campbell v. Nat'l R.R. Passenger Corp.*, 311 F. Supp. 3d 281, 294 (D.D.C. 2018) ("Most circuit courts that have addressed the issue have found that, where an expert's testimony is critical to class certification, 'a district court must conclusively rule on any challenge to the expert's qualifications or submissions prior to ruling on a class certification motion' -- *i.e.*, 'the district court must perform a full *Daubert* analysis before certifying the class.'") (collecting cases). Additionally, the court in *Zurn* noted that, because discovery was bifurcated in that case, there was "a limited record at the class certification stage" which left "gaps in the available evidence" that prevented a "full and conclusive *Daubert* analysis." *Zurn*, 644 F.3d at 612-23. That is not true here. Thus, this Court can and should conduct a full *Daubert* inquiry at this stage.

demonstrate that issues which will or might arise in this litigation can, if needed, be established through common proof." Cowan offers no concrete survey proposal. Instead, he testifies that he ***could*** design a survey that may ***potentially*** collect common evidence, which ***might*** be relevant to Plaintiffs' claims. Cowan's as-yet-undefined and unrealized hypothetical survey cannot survive the requisite scrutiny at the class certification stage.

Among other deficiencies, Cowan has not designed a questionnaire and has not committed to a single question. He admits nothing like his proposed survey has ever been subject to scrutiny and that he has never designed a survey to establish alleged crop loss. He cannot identify any supporting literature in support of his proposal. He lacks a sampling frame and the necessary data for extrapolation. Cowan's proposed methodology relies on unsupported assumptions that respondent farmers can properly identify symptomology, diagnose its cause, or determine its source – assumptions contradicted by the testimony of Plaintiffs and their own experts. Given these flaws, Cowan's proposed survey cannot yield results constituting common proof – the very purpose for which he offers his methodology. For these reasons, and more, Cowan's opinions warrant exclusion pursuant to Fed. R. Evid. 702.

WHEREFORE, for all the reasons set forth above and in the contemporaneously filed Memorandum in Support, Defendants Monsanto Company and BASF Corporation respectfully request that the Court grant their motion and exclude the testimony and report of Charles D. Cowan.

Dated: July 1, 2019

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on July 1, 2019, the foregoing was filed electronically with the Clerk of Court to be served by operation of the Court's electronic filing system to all counsel of record.

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