APPENDIX

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

LAURETTA ROBERTS,	)	
	)	
Plaintiff,	)	
	)	
v.	)	No. 4:13-CV-541 CAS
	)	
GENERAL MOTORS, LLC,	)	
	)	
Defendant.	)	

MEMORANDUM AND ORDER

This diversity matter is before the Court on defendant General Motors, LLC's ("GM") motions to exclude the testimony of plaintiff's expert witnesses Larry Sicher and Joseph Burton, M.D., pursuant to Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579 (1993). Plaintiff Lauretta Roberts opposes the motions and they are fully briefed. Also pending is plaintiff's motion to exclude the testimony of GM's expert witness Jeya Padmanaban. GM opposes the motion and it is fully briefed. No party has requested an evidentiary hearing, and the parties have submitted an evidentiary record including exhibits and deposition testimony.[1] No party requested an evidentiary hearing or oral argument and the Court finds it can make a proper Daubert analysis without the need for a hearing or argument.

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[1]The parties were ordered to submit paper courtesy copies of the Daubert motion briefing and all exhibits thereto. Although the Court did not specify the manner in which the exhibits were to be provided, GM's method of submission is unacceptable. GM submitted more than 40 exhibits without any label or other indication of the exhibits' letter designations. Also, GM did not staple or otherwise secure its exhibits, and instead merely separated them with blank pieces of colored paper. Confusingly, some of GM's exhibits bear deposition or other exhibit labels that do not correspond to the exhibit designations as stated in the accompanying Declaration of Mary E. Bolkcom. Considerable chambers resources were expended in labeling and stapling GM's exhibits to avoid confusion and disarray, and to permit the Court's accurate reference to the exhibits. In the future, GM must label all exhibits submitted to the Court and secure each with an appropriate fastener.

For the following reasons, GM's motions to exclude plaintiff's expert witnesses Sicher and Burton will be denied. Plaintiff's motion to exclude GM's expert witness Padmanaban will be granted.

I. Background

Plaintiff Lauretta Roberts filed this case against GM on March 22, 2013, following a motor vehicle accident on February 23, 2012, outside of Gainesville, Florida. The complaint alleges that plaintiff was driving a 2004 GMC Savana full-size van (the "vehicle") on Interstate 75, and as she was exiting the highway at a rest area exit ramp, the vehicle went off the south side of the ramp and completed two full rolls before coming to rest on its wheels. During the rollover, the interior compartment of the vehicle buckled and the roof caved in on plaintiff. Plaintiff alleges that she suffered serious and permanent injuries as a result, including spinal fracture and permanent paralysis.

The complaint alleges that the vehicle was defective in its design and manufacture and was unreasonably dangerous because (1) GM failed to use a technologically feasible and available electronic stability control system to prevent a rollover; (2) the structure of the vehicle, including the roof, doors and supporting pillars, failed to protect occupants during a rollover event; (3) GM failed to design the roof and supporting structure to minimize intrusion into the occupant compartment; (4) the restraint system failed to adequately restrain occupants in a foreseeable accident sequence; (5) GM failed to use technologically feasible and available side and/or canopy air bags; (6) the vehicle was designed and manufactured with a defective restraint system, body

joints and driver side structural support; and (7) the vehicle was manufactured with insufficient bonds, welds, and seams of the driver side structural support. Complaint ¶ 26 at 4-5 (Doc. 1).[2]

The complaint alleges that GM failed to adequately test the vehicle before and during its design, production and sale to the public, and/or knowingly placed the dangerously designed vehicle into the stream of commerce. The complaint also alleges that GM rendered the vehicle defective and unreasonably dangerous by failing to adequately warn consumers about the hazard of driving the vehicle with a defective and/or inadequately designed, tested and manufactured electronic stability control system, structural system, and restraint system.

Plaintiff asserts claims for strict product liability (Count I) and negligence (Count II), and seeks actual and punitive damages.

II. Legal Standard

The admission of expert testimony in federal court is governed by Federal Rule of Evidence 702. In Daubert, the United States Supreme Court interpreted Rule 702 to require district courts to be certain that expert evidence based on scientific, technical or other specialized knowledge is "not only relevant, but reliable." Daubert, 509 U.S. at 589. The district court must make a "preliminary assessment of whether the reasoning or methodology underlying the testimony is scientifically valid and of whether that reasoning or methodology properly can be applied to the facts in issue." Id. at 592-93.

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[2]As discussed *infra*, plaintiff has subsequently narrowed the scope of her claims against GM. On October 1, 2015, plaintiff was ordered to file an amended complaint solely to include additional factual allegations concerning the parties' citizenship. Plaintiff complied with the Court's Order and filed an amended complaint which is identical to the original complaint, except for allegations concerning the parties' citizenship. See Doc. 84.

The Eighth Circuit Court of Appeals has stated that proposed expert testimony must meet three criteria to be admissible under Rule 702. "First, evidence based on scientific, technical, or other specialized knowledge must be useful to the finder of fact in deciding the ultimate issue of fact. This is the basic rule of relevancy." Lauzon v. Senco Prods., Inc., 270 F.3d 681, 686 (8th Cir. 2001). "Second, the proposed witness must be qualified to assist the finder of fact." Id. (citation omitted). "Third, the proposed evidence must be reliable or trustworthy in an evidentiary sense, so that, if the finder of fact accepts it as true, it provides the assistance the finder of fact requires." Id. (internal quotation marks omitted). To meet the third requirement, the testimony must be "based on sufficient facts or data" and be "the product of reliable principles and methods," and the expert must have "reliably applied the principles and methods to the facts of the case." Fed. R. Evid. 702(b)-(d). "Rule 702 reflects an attempt to liberalize the rules governing the admission of expert testimony[,]" Weisgram v. Marley Co., 169 F.3d 514, 523 (8th Cir. 1999), and "favors admissibility if the testimony will assist the trier of fact." Clark ex rel. Clark v. Heidrick, 150 F.3d 912, 915 (8th Cir. 1998). Doubt regarding "whether an expert's testimony will be useful should generally be resolved in favor of admissibility." Id. (citation and internal quotation omitted).

Under Rule 702, the trial court has gatekeeping responsibility to "ensur[e] that an expert's testimony both rests on a reliable foundation and is relevant to the task at hand." Kumho Tire Co. v. Carmichael, 526 U.S. 137, 141 (1999) (citing Daubert, 509 U.S. at 597). "When making the reliability and relevancy determinations, a district court may consider: (1) whether the theory or technique can be or has been tested; (2) whether the theory or technique has been subjected to peer review or publication; (3) whether the theory or technique has a known or potential error rate and standards controlling the technique's operation; and (4) whether the theory or technique is generally accepted in the scientific community." Russell v. Whirlpool Corp., 702 F.3d 450, 457 (8th Cir.

2012) (citing Daubert, 509 U.S. at 593-94). "This evidentiary inquiry is meant to be flexible and fact specific, and a court should use, adapt, or reject Daubert factors as the particular case demands." Unrein v. Timesavers, Inc., 394 F.3d 1008, 1011 (8th Cir. 2005). "There is no single requirement for admissibility as long as the proffer indicates that the expert evidence is reliable and relevant." Id.

As a general rule "the factual basis of an expert opinion goes to the credibility of the testimony, not the admissibility, and it is up to the opposing party to examine the factual basis for the opinion in cross-examination." Nebraska Plastics, Inc. v. Holland Colors Am., Inc., 408 F.3d 410, 416 (8th Cir. 2005) (quoted case omitted). However, "if the expert's opinion is so fundamentally unsupported that it can offer no assistance to the jury, it must be excluded." Id. (quoted case omitted). An expert opinion is fundamentally unsupported when it "fails to consider the relevant facts of the case." Id.

III. Discussion

A. GM's Motion to Exclude Expert Witness Joseph Burton, M.D.

GM moves to exclude testimony and evidence from plaintiff's biomechanical expert, Joseph Burton, M.D., concerning his theory of the mechanism of plaintiff's cervical spinal column injury. GM argues that Dr. Burton's opinions are unique to him and are unsupported by the literature on which he relies, testing, or any other scientific basis.

Plaintiff responds that Dr. Burton is qualified to opine on the mechanism of plaintiff's spine injury, and his opinions are supported by peer-reviewed literature as well as his own experience. Plaintiff also asserts that Dr. Burton's opinions are widely accepted by the independent scientific community.

1. The evidence would assist the finder of fact

The Court finds that an expert's testimony on the mechanism of the cervical spine injury plaintiff sustained in the rollover of the subject vehicle would assist the jury in determining an ultimate issue of fact in this case. Dr. Burton's proposed testimony is therefore relevant.

2. Dr. Burton is qualified to assist the finder of fact

GM does not challenge Dr. Burton's qualifications as an expert in the field of biomechanics. Dr. Burton is a trained forensic pathologist and a licensed medical doctor in the State of Georgia. and has been a State Medical Examiner in Atlanta, Georgia since 1974. Dr. Burton has consulted on over 1,270 vehicle rollover cases and evaluated over 500 additional vehicle rollover cases as a medical examiner. Dr. Burton has been a consultant for the National Transportation Safety Board and the National Highway Traffic Safety Administration. Dr. Burton is qualified to testify as an expert in biomechanics.

3. Reliability and Trustworthiness of the Proposed Evidence

a) Reliability of Principles and Methods

GM argues that Dr. Burton's opinions are his alone, and are not supported with any data, test results, scientific protocol or objective methodology. GM also asserts that Dr. Burton's opinions concerning the timing of plaintiff's injury are inconsistent with rollover testing he accepts as authoritative.

Dr. Burton conducted his own inspection of the subject vehicle and reviewed deposition summaries of plaintiff, her passenger in the subject vehicle and several fire rescue personnel who responded to the accident scene. In forming his analysis of how plaintiff was injured in the accident, Dr. Burton used the State of Florida's motor vehicle crash report data, the Collision Analysis Report of engineer Tom Green on accident reconstruction and roof crush, the subject vehicle's Crash Data

Retrieval ("CDR") report, GM's drop testing conducted in this case, and plaintiff's medical records. In forming his opinions, Dr. Burton used his own knowledge, medical training and experience gained from his evaluation of over 1,200 individual rollover cases, the testimony of other automotive safety experts concerning occupant kinematics in rollover cases, and peer-reviewed scholarly literature and testing concerning occupant kinematics in rollover situations. Dr. Burton's report discusses the amount of force required to cause plaintiff's injury, his understanding of the forces involved in the rollover, and how the vehicle kinematics would dictate the movement of plaintiff's body during the rollover. Dr. Burton's deposition testimony explained how he used this information to support his opinions.

The Court finds that Dr. Burton has used reliable principles and methods in formulating his opinions. GM's criticisms of Dr. Burton's opinions appear to misstate his testimony and do not warrant the exclusion of his opinions, but rather are matters for testimony by its own experts and cross-examination of Dr. Burton.

b) Application to the Facts of this Case

GM argues that Dr. Burton's opinions are based on "minimal analysis" of Dr. Roberts' accident, and asserts that he "has little to offer on the subject of how Dr. Roberts' body moved in the crash," did not perform an analysis of how much motion or excursion an occupant of her height and weight would experience in the crash, did not analyze the magnitude of the roof to ground impacts in the crash, "was not provided with an accident scene [report] that would inform him about the vehicle motion in the crash," and does not know what the drop heights were in the crash. GM Mem. Supp. Mot. Exclude Testimony of Joseph Burton at 4 (Doc. 69-1).

As stated above, Dr. Burton inspected the subject vehicle and reviewed the official crash report, an engineer's analysis on accident reconstruction and roof crush, the vehicle's CDR report,

deposition summaries of plaintiff, her passenger and the fire rescue personnel who responded to the accident scene, GM's drop testing conducted in this case, and plaintiff's medical records. Dr. Burton took this evidence and applied it to the accident: two complete rolls of plaintiff's vehicle which involved roof crush and a restraint system that allowed plaintiff's head to come into contact with the roof of the subject vehicle. Dr. Burton used the charts GM created to reflect the results of its drop testing which illustrate the pressure increase on a head during both the roof's initial ground contact and the subsequent crushing of the roof. Dr. Burton uses this data to hypothesize that the crush on plaintiff's spinal column was caused by her body being pinned between the crushing roof and the seat. This hypothesis is not unique as defendant argues, and plaintiff has provided several studies that support Dr. Burton's theory. See George Rechnitzer, et al., Rollover Crash Study—Vehicle Design and Occupant Injuries, 15th ESV, 821, 827 (1996), and other sources cited in plaintiff's opposition memorandum. Pl.'s Response to Mot. Exclude Testimony of Burton at 2, n.1 (Doc. 72). The matters raised by defendant can be addressed by its expert witness as well as on cross examination of Dr. Burton.

The Court finds that plaintiff has shown Dr. Burton will be able to assist the jury as a qualified expert, as the reasoning or methodology underlying his opinions are scientifically valid and have been applied to the facts in issue.

B. GM's Motion to Exclude Expert Witness Larry Sicher

GM moves to exclude testimony and evidence regarding the following three opinions of plaintiff's expert Larry Sicher:

1. Alternative seat belt design theories as applied to this crash;

2. Inversion and drop testing upon which Sicher relies to support his opinions concerning alternative seat belt designs and/or the performance of the driver's seat belt in the subject vehicle; and

3. Any opinions concerning the efficacy or availability of a rollover sensor for the subject vehicle.[3]

GM asserts that Mr. Sicher has "minimal qualifications, at best" to opine on the design of restraint systems for automotive applications. GM argues that Mr. Sicher's alternative design opinions should be excluded because they are not supported with scientifically valid data, test results, scientific protocol or objective methodology. GM also argues that the testing Mr. Sicher relies on is flawed and unrealistic and has no real comparative value to the issues presented in the case, as Mr. Sicher has never tested a GM full-size van similar to the subject vehicle, does not know of any similar van that incorporates his purported design alternatives, and has done no study of the efficacy of any design alternatives.

Plaintiff responds that Mr. Sicher is well qualified to offer his opinions through his education and extensive experience, as his career has focused on finding solutions for restraining occupants during crashes. Plaintiff asserts that Mr. Sicher's opinions are well grounded in peer-reviewed literature, testing conducted by others including GM itself, and his own non-litigation testing. Finally, plaintiff states that Mr. Sicher's testing is repeatable, reliable and universally accepted in the automotive industry.

1. The evidence would assist the finder of fact

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[3]Plaintiff's counsel stated on the record at Mr. Sicher's deposition that he is not offering opinions on rollover sensors, (Sicher Dep. 61:17-20, 65:19-20; GM Ex. Q (Doc. 69-19), and Mr. Sicher testified that he is not offering opinions about rollover sensors in this case. (Id. 53:6:8.) GM's motion to exclude Mr. Sicher's testimony is therefore moot to the extent it seeks to exclude testimony concerning rollover sensors.

The Court finds that an expert's testimony on the safety of the restraint system in the subject vehicle, as well as the possibility of alternative designs, would assist the jury in determining an ultimate issue of fact in this case. Mr. Sicher's proposed testimony is therefore relevant.

2. Mr. Sicher is qualified to assist the finder of fact

GM does not appear to contend seriously that Mr. Sicher is unqualified to testify as an expert witness in this case. GM states that Mr. Sicher has a bachelor's degree in engineering, "took some graduate courses in math computations," and has had "some involvement in government contract work," but observes that "none of his government work has ever resulted in improvements to motor vehicles driven by the motoring public." GM Mem. Supp. Mot. Exclude Testimony of Sicher at 4 (Doc. 70-1). GM states that since 2011, Mr. Sicher has "done nothing but litigation cases on the plaintiff side of cases." (Id.) GM notes that Mr. Sicher is not a biomechanic and disclaims any knowledge about injury mechanisms in general and about the injury mechanism in this case.

Mr. Sicher has a mechanical engineering degree from Pennsylvania State University. After graduation he worked as an engineer designing, testing, developing and analyzing restraints worn in fighter jets, including ejection seats, at the Department of Defense's Naval Air Development Center. One of the focuses of his testing and development was finding ways to keep pilots in a normal seating position when inverted and prior to ejection, which required extensive testing of more than a dozen restraint systems.

Since 1997, Mr. Sicher has been employed as an occupant crash protection engineer at ARCCA, Incorporated and has tested, designed, evaluated and developed restraint systems under government contracts. Among other projects, Mr. Sicher was the lead designer for a project on the U.S. Army's High Mobility Multipurpose Wheeled Vehicle (HMMWV), tasked with evaluating the lap and shoulder belt system and creating a better design. Mr. Sicher conducted full vehicle rollover

testing and static inversion testing using alternative designs, including a three-point, seat-mounted lap and shoulder belt with a cinching latch plate. The results of this project were published in three separate scholarly articles. Mr. Sicher obtained a patent for the seat-mounted restraint system, and it was later installed in the Army's Mine Resistant Ambush Protected (MRAP) vehicles. Mr. Sicher has three patents related to occupant crash protection and has authored over twenty publications related to occupant crash protection, including articles on seat belt pretensioners, vertical occupant excursion, and occupant protection during rollover events.

The Court finds that Mr. Sicher is qualified by education and experience to testify as an expert on the use and effectiveness of different restraint system designs in passenger cars, including full-size vans such as the subject vehicle in this case.

3. Reliability and Trustworthiness of the Proposed Evidence

a) Reliability of Principles and Methods

GM argues that Mr. Sicher's opinions concerning alternative design theories are unreliable because they are not supported with scientifically valid testing. GM asserts that the ARCCA inversion testing on which Mr. Sicher relies and the resulting design recommendations have no reasonable relationship to the vehicle or issues in this case and would only serve to confuse and mislead the jury. GM argues that the ARCCA drop testing followed no accepted protocol, the tested configurations were modified so there is no reasonable basis to compare a production design to an alternative design, and the alternative design tested in the drop test contains a pretension that Mr. Sicher expressly disclaims as a design alternative in this case.

Mr. Sicher's report cites to significant literature to support his opinions, including numerous peer-reviewed papers, presentations and publications concerning, among other things, performance of automotive seats belts and restraint systems during rollover conditions and inverted drop tests.

Mr. Sicher's report also relies on testing conducted by others, including GM's 1995 confidential non-litigation testing, and his own non-litigation testing to support his opinions. Mr. Sicher's analysis supporting his opinion that better restraint systems existed than the one found in the subject vehicle relies on, among others, Benda, B.J., et al. (2006), Performance of Automotive Seat Belts During Inverted (-Gz) Rollover Drop Tests, Icrash 2006—International Crashworthiness Conference, Athens, Greece, University of Bolton; Herbst, Brian, et al. (1996), The Ability of 3-Point Safety Belts to Restrain Occupants in Rollover Crashes, 1996 ESV Conference (Australia), Paper No. 96-S5-O-12; Bahling, G., et al. (1990), Rollover and Drop Tests – The Influence of Roof Strength on Injury Mechanics Using Belted Dummies (SAE 902314) ("Malibu II"). Warrendale, PA: Society of Automotive Engineers; Pywell, J., et. al. (1997); "Characterization of Belt Restraint Systems in Quasistatic Vehicle Rollover Tests", (SAE 973334) Warrendale, PA: Society of Automotive Engineers. Mr. Sicher's report cites to these articles, other literature and multiple studies he used to formulate his opinions. In addition, Mr. Sicher's company, ARCCA, has conducted its own, non-litigation testing regarding vehicle restraint systems, different from the one in the subject vehicle, in rollover circumstances.

Mr. Sicher's testing uses repeatable methods that have been consistently utilized in the automotive industry, including by GM, to study belt design in rollover situations, specifically inversion testing to measure static excursion and drop testing to measure dynamic excursion. The testing uses vehicle seats attached to a test fixture that can be rotated, inverted and sometimes dropped, and test dummies, human cadavers, or volunteer test subjects.

The Court finds that Mr. Sicher's opinions are grounded in the methods and procedures of science, and meet at least three of the four Daubert factors for evidentiary reliability, as they have

been tested, the testing methods have been peer reviewed and published, and the methods have general acceptance within the relevant scientific community.

b) Application to the Facts of this Case

GM also argues that the testing Mr. Sicher relies on for his opinions is flawed and unrealistic, and has no real comparative value to the issues presented in this case. Mr. Sicher testified in his deposition, however, that he relied on the accident reconstructionists' opinions for the vehicle kinematics during rollover (Sicher Dep. 32:2-16; GM Ex. Q (Doc. 69-19); used the defense expert's report as the source of information concerning the crush in the vehicle (id. 34:2-18); accepted as accurate the defense's accident reconstruction and its examination and documentation of the seat belts; (id. 34:15-22); used the defense's determinations regarding the subject vehicle's orientation when plaintiff was injured (id. 41:23-42:7) and plaintiff's biomechanics and mechanism of injury as the rollover occurred (id. 41:14-42:8; 42:25-43:1; 44:7-15; 49:2-8; 90:18-91:4-7). Mr. Sicher then applied this data to the known capabilities of various restraint systems, including the one in the subject vehicle. (Sicher Report at 12-18; GM Ex. O (Doc. 69-17)). The Court finds Mr. Sicher's opinions are well grounded in the facts of this case.

The Court finds plaintiff has shown that Mr. Sicher is qualified to testify as an expert in this matter, and the reasoning or methodology underlying his testimony is scientifically valid and can be applied to the facts in issue. GM's motion to exclude testimony and evidence regarding Mr. Sicher's opinions as to alternative seat belt design theories, and inversion and drop testing used to support his opinions, should therefore be denied. GM's motion is denied as moot to the extent it seeks to exclude any opinions by Mr. Sicher concerning the efficacy or availability of a rollover sensor for the subject vehicle.

C. Plaintiff's Motion to Exclude Expert Witness Jeya Padmanaban

Plaintiff moves to exclude the opinions of GM's expert witness statistician Jeya Padmanaban.[4] Ms. Padmanaban opines about statistical associations and comparative risk, and will not offer any opinions about the cause of plaintiff's injury, accident reconstruction, vehicle design, or the nature and severity of plaintiff's injury.

Plaintiff characterizes Ms. Padmanaban's opinions as follows:

> 1. "Safety belts are the most effective crashworthiness countermeasure to reduce fatalities in rollovers."
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> 2. "NASS/CDS data shows that for belted drivers in vans, fewer than 1% sustains serious head/face/neck injuries in rollover crashes. These rates are lower than the serious head/face/neck injury rates for belted drivers in passenger car rollovers."
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> 3. "Police-Reported State Accident data . . . showed that the serious injury rate for belted drivers in the GMC Savana Group is low and is comparable to the serious injury rates for other vans."
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> 4. The serious injury rate and severe injury rate for belted drivers in the GMC Savana group is comparable to the rates for belted drivers in the Volvo XC-90s and Subaru Foresters.
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> 5. "Field data from NASS/CDS shows that a belted occupant in rollover with a topography impact (impact with change in terrain) is about two times more likely to sustain serious head/face/neck injury than in a non-arrested rollover with a level ground-only impact."
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> 6. "NASS/CDS data shows that for light trucks, the serious injury rates for belted drivers in rollover crashes are comparable for vehicles with a roof SWR

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[4]The Court notes that Ms. Padmanaban's deposition, submitted as an exhibit to plaintiff's motion to exclude her testimony, was taken in a similar case in this district involving a driver who suffered a permanent spinal injury in a rollover accident in a GMC Savana, Bavlsik v. General Motors LLC, No. 4:13-CV-509 DDN (E.D. Mo.). Plaintiff did not take Ms. Padmanaban's deposition in this case and refers to her deposition from Bavlsik. Plaintiff asserts that the two cases present "identical issues, and the majority of Ms. Padmanaban's opinions are, word for word, the same." Pl.'s Mem. Supp. Mot. Exclude Defendant's Statistician Jeya Padmanaban at 4 n.2 (Doc. 67).

[strength-to-weight ratio] greater than or equal to 4.0 [and] for vehicles with a roof SWR less than 4.0."

7. "Several factors, including crash severity factors, influence injury outcome in rollovers. This demonstrates that rollovers are complex event and that a single parameter (such as roof strength) cannot explain the injury potential for occupants."

8. "[T]here is no relationship between roof SWR and likelihood of fatality or serious injury for belted or unbelted occupants in rollovers."

9. "When important confounding factors are accounted for (belt use, ejection, alcohol, rural/urban, driver age), roof SWR is not a statistically significant predictor of likelihood of fatality or serious injury in single-vehicle rollovers."

10. "NASS/CDS data shows that there is no relationship between roof strength to weight ratio and roof deformation at position."

11. Five percent of seriously injured occupants in rollovers are belted front seat occupants with serious head, face, and neck injury resulting from roof contact where roof deformation is also coded at the seating position. Even for these, testing shows that the roof contact occurs before there is any significant roof deformation.

12. Rollovers are complex events and that a single parameter (such as roof performance or pretensioners) cannot explain the injury potential for occupants.

13. A rollover crash with 2 or more complete rolls is an extremely rare event. Of all tow-away crashes involving light trucks, 0.6% are rollovers with 2 or more rolls.

14. There is no statistically significant difference between fatality or serious injury rates for belted drivers in vehicles with seat integrated belts versus conventional belts in single vehicle accident rollovers. Both seat integrated belts and conventional belts reduce fatalities and injuries in rollovers.

15. The presence of Seat Integrated Restraint Systems is not a statistically significant predictor influencing the odds of fatality or serious injury to belted drivers in rollover crashes.

16. The risk of serious injury, including serious head/face/beck injuries to belted front outboard occupants increases as the number of rolls increases.

17. 65-year old occupants involved in rollovers with 8 quarter turns and 10.5 inches of intrusion are 2.5 times more likely to sustain serious head/face/neck injuries than are 65-year old occupants involved in rollovers with only 2 quarter turns and 10.5 inches of intrusion.

Pl.'s Mem. Supp. Mot. Exclude Padmanaban at 5-6 (Doc. 67).

Plaintiff argues that Ms. Padmanaban's statistical opinions are irrelevant and unreliable because they are based on dissimilar accidents and dissimilar injuries to those in this case, and that she made no effort to restrict her data to similar accidents or injuries. Plaintiff contends that some of Ms. Padmanaban's opinions are unreliable because they are merely general observations about rollover accidents that have no relation to the issues in this case. Plaintiff argues that Ms. Padmanaban's sixth opinion is based on a sample size too small to be reliable, and that she has manipulated the data by controlling certain variables in order to reach pre-conceived conclusions. Plaintiff contends Ms. Padmanaban's testimony will confuse and mislead the jury and cause needless delay.

GM responds that plaintiff's experts' opinions are based on the same type of statistical analysis presented by Ms. Padmanaban in rebuttal. GM asserts that plaintiff's experts' opinions rely heavily on field statistics concerning rollover crashes, belt use, injury rates and roof crush to bolster their views, and Ms. Padmanaban's testimony is directly addressed to these contentions as well as whether plaintiff can meet her burden to show the subject vehicle was in a defective condition unreasonably dangerous. GM states that Ms. Padmanaban's testimony covers four distinct areas:

> 1. Opinions on the relationship between vehicle roof strength and likelihood of injury to belted occupants, using field data;
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> 2. Injury risk associated with conventional belts versus All Belts to Seats (ABTS) systems, using field data on rollover crashes;
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> 3. The safety record of the subject GMC Savana group vehicles involved in rollover crashes, using field data; and
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> 4. Key statistical studies heavily relied on by plaintiff's engineering experts Burton and Batzer to address rollover injuries, using field data.

GM Mem. Opp. Mot. at 6-7 (Doc. 74).

GM argues that Ms. Padmanaban's opinions are premised on well-accepted statistical principles and reliable data used by lawmakers, federal agencies, the automotive industry and the highway safety community, and are based on adequate sample sizes. GM asserts that Ms. Padmanaban's report directly addresses and rebuts a statistical analysis on which plaintiff's expert Dr. Batzer relies and is responsive to the alternative design opinion of plaintiff's expert Mr. Sicher.

1. The evidence would assist the finder of fact

For a court to allow scientific or technical testimony, it must find that the jury needs the specialized testimony to determine an ultimate issue in the case. Lauzon, 270 F.3d at 686. Experts in the field of statistics often offer testimony in product liability cases to compare and contrast the safety of the product at issue with similar products on the market. See, e.g., Jaramillo v. Ford Motor Co., 116 F. App'x 76, 78-79 (9th Cir. 2004) (rollover statistics); Glastetter v. Novartis Pharm. Corp., 252 F.3d 986 (8th Cir. 2001) (per curiam) (statistics linking stroke and medication); Morales v. American Honda Motor Co., Inc., 151 F.3d 500 (6th Cir. 1998) (motorcycle-related accident statistics). The Court finds that an expert in statistics could be helpful to the jury in the present case.

2. Ms. Padmanaban is qualified to assist the finder of fact

Plaintiff does not challenge Ms. Padmanaban's qualifications as a statistician and the Court finds she is qualified to assist the jury. Ms. Padmanaban has a bachelor's degree in Advanced Mathematics from the University of India and a Master of Science in Operations Research/Statistics from George Washington University. Since 1995, she has been the president and owner of a research company, JP Research, Inc., and previously was a Principal Managing Scientist, a Senior Operations Research Analyst, and a Statistical Consultant at various companies. Ms. Padmanaban has experience in data analysis and statistical methods to evaluate field performance of motor vehicles and consumer products. She has extensively published and researched regarding the subject

of motor vehicle safety statistics, and has received a number of awards and industry recognitions. Ms. Padmanaban serves on several boards, including the Association for the Advancement of Automotive Medicine, is on the Editorial Advisory Board for the journal *Accident Analysis and Prevention*, and has served on numerous Society of Automotive Engineers committees.

3. Reliability and Trustworthiness of the Proposed Evidence

a) Reliability of Principles and Methods

Ms. Padmanaban used two different data sources for her statistics: the National Automotive Sampling System/Crashworthiness Data System ("NASS/CDS") and police-reported motor vehicle accident data files from state highway patrol agencies ("state accident data"). The NASS/CDS is a

> nationally representative probabilistic sample of police-reported, tow-away crashes that occur on public traffic ways and result in death, injury or property damage. Selected crashes meeting these criteria are invested in detail by NASS teams to obtain detailed descriptions of injuries and crash factors. The NASS investigative teams consist of engineers, biomechanical experts, medical personnel, and statisticians who investigate about 5,000 crashes a year involving passenger cars, light trucks, vans, and utility vehicles.

Padmanaban Report of July 18, 2014 at 3-4 (Doc. 67-5).

The NASS/CDS is a database of crash descriptions and factors collected by the National Highway Transportation Safety Administration ("NHTSA") from 24 different geographic sites nationwide. Each crash is weighted to represent all police-reported motor vehicle crashes occurring in the United States during the year involving passenger cars, light truck and vans that were towed due to damage. Selected crashes are then investigated in detail. The NASS/CDS provides insight into the types of injury, crash types, crash severity, vehicle damage, nature of injury by body region, and other factors associated with a crash.

The state accident data consists of data compiled from police reports on all vehicle crashes that meet each state's reporting threshold. The state accident data provides basic crash information from 29 participating states' law enforcement agencies.[5] It does not have as many variables as the NASS/CDS, because it is dependent on the information placed in databases by the state law enforcement agencies.

The two databases are used by the federal government in analyzing vehicle safety, examining vehicle defect petitions, and in rule making for motor vehicle safety standards. NHTSA and other highway safety organizations use the databases for rule making regulatory activity, safety standard assessment, and to see how vehicles perform in the field. NHTSA has used NASS data for a variety of studies including rollover prevention, passenger car front-seat occupant protection, child seat and booster seat standards, cell phone use while driving, improving fire safety standards, the economic impact of motor vehicle crashes, truck underride protection, door latch integrity, and the effect of vehicle crashworthiness design changes on injuries and fatalities. NHTSA has used state accident data for investigating the relative risk of subject and peer vehicles to support defect investigation programs, crashworthiness analysis, anti-lock braking system analysis, comparative analysis, rollover analysis, effectiveness of restraint systems, fire analysis, safety impact of permitting right turn on red, vehicle compatibility issues, and assessment of effects of fuel system integrity standards.

The databases have been tested and are in wide use by not only government agencies but also academic entities. The possibility of errors and small sample sizes are known and can be accounted for. The Court finds the data and methods used by Ms. Padmanaban are reliable.

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[5]Ms. Padmanaban used data from 20 states for the calendar years 1995 through 2011, chosen on the basis of availability of data and codes, to form her opinions concerning rollover accidents; from 22 states for her opinions regarding injury rates for seat-belted drivers; and from 19 states for her opinions regarding injury rates for seat-belted front outboard occupants.

b) Application to the Facts of this Case

In a recent case also involving a GMC Savana rollover accident, the Court stated,

> In order to introduce comparative statistics in a strict liability claim the evidence's proponent must show that the other accidents "occurred under circumstances substantially similar to those surrounding the accident in the instant case." Lockley v. Deere & Co., 933 F.3d 1378, 1386 (8th Cir. 1991). This is because dissimilar accidents may "raise extraneous controversial issues, confuse the issues, and be more prejudicial than probative." Katzenmeier v. Blackpowder Prods., Inc., 682 F.3d 948 (8th Cir. 2010).

Bavlsik v. General Motors LLC, 4:13-CV-509 DDN, 2015 WL 4920300, at *5 (E.D. Mo. Aug. 18, 2015).

Plaintiff characterizes her cause of action as a crashworthiness case. Plaintiff, the driver of a GMC Savana van, was exiting an interstate highway at a rest stop when her vehicle left the roadway and completed two full rolls, landing upright on its tires. The rollover began when plaintiff's vehicle was traveling at a trip speed of between 20 and 30 miles per hour, and the rollover started in the direction of the passenger side. Plaintiff suffered a permanent cervical spinal injury when her head came into contact with the vehicle's roof during the rollover. Plaintiff's front seat passenger was not injured. In narrowing the allegations of her complaint, plaintiff now contends her injuries were caused either because (1) the GMC Savana's roof crushed into her head, as the roof structure was too weak to withstand an otherwise survivable accident, or (2) the GMC Savana's seat belt did not properly restrain plaintiff and permitted her head to touch the roof at the same time the roof struck the ground, causing a "diving" injury.

Ms. Padmanaban offers two sets of opinions contained in two separate expert reports: (1) those involving roof strength and the propensity of the GMC Savana's roof to crush, causing head injury, Padmanaban Report of July 18, 2014 (Doc. 67-5); and (2) those involving the seat belt system, Padmanaban Report of April 28, 2015 (Doc. 67-6). Ms. Padmanaban testified she was asked

to "look at the field data and address the risk of serious injury to belted drivers in GMC Savana . . . and then to compare it to other peer vans," to use "field data that address the relationship between – or lack of, between [roof] strength-to-weight ratio and likelihood of injury or fatality in a rollover," and to look at field data and address "the risk of serious injury to a belted driver in a rollover." Padmanaban Dep. 28:23-29:15. The issue presented by plaintiff's motion is whether GM can demonstrate that the statistical data upon which Ms. Padmanaban would testify are relevant to this case.

i) *Rollover Injury Rate Opinions*

Based on state accident data, Ms. Padmanaban opined that (1) the serious and severe injury rates for belted drivers in rollover accidents in GMC Savana vans are low, (2) the GMC Savana's rates in such accidents are comparable to the serious and severe injury rates for other vans, and (3) there is no relationship between vehicle roof strength-to-weight ratio and the likelihood of serious injury or fatality.

Ms. Padmanaban testified the data show there are 275,000 rollover crashes each year; 65% of fatalities in rollovers were unbelted occupants, 50% involved alcohol impairment, 66% occurred at night, and 72% occurred on high-speed (55+ mph) roads. Of these variables, only the last potentially applies to the accident in this case, as plaintiff was wearing a seatbelt, no alcohol was involved, and the accident occurred at approximately 7:45 a.m. Further, although plaintiff's vehicle was exiting an interstate highway, the accident occurred at a trip speed of only 20 to 30 mph.

Ms. Padmanaban testified that there are different types of rollovers with different injury rates, and opined that "rollovers are complex events and [] one single parameter such as roof strength-to-weight ratio does not influence the likelihood of fatality/serious injury. Factors such as rural/urban, age, and rollover type contribute significantly to injury likelihood to belted occupants

in SVA [single vehicle accident] rollovers." Padamanaban Report of July 18, 2014 at 12 (Doc. 67-5). Ms. Padmanaban testified that speed is correlated to the severity of a rollover event, but the NHTSA data she relied on for her opinions does not address trip speed separately and instead uses the speed limit on the highway or roads where the rollover occurred. As stated above, in the instant case, plaintiff was exiting an interstate highway, but was traveling at non-highway speed when the accident occurred.

Ms. Padmanaban testified she used state accident data to identify 1,300 rollovers involving a GMC Savana van, from which she derived her opinions concerning the likelihood of serious injury in the Savana, and how it compared to peer vans. Of the 1,300 rollovers, only 46 involved injuries categorized as MAIS© 3 to 6 (serious, severe, critical or maximum).[6] Nine of the accidents resulted in fatalities. Ms. Padmanaban found 60 rollovers involving a belted driver in a Volvo XC-90. Three were MAIS© 3-6 injuries. She found 1000 rollovers involving a belted driver in a Subaru Forester, 31 of which were MAIS© 3-6 injuries.

Ms. Padmanaban cannot offer any further information about these rollovers. Because the police-reported state accident data does not include such information, Ms. Padmanaban could not provide the number of quarter turns involved in the rollover for any of the vehicles; could not say whether the driver was injured before, during or after the rollover, state how many of the rollovers, if any, resulted in a spinal cord injury, provide the trip speed at the time of rollover, state if the vehicles' roofs actually touched the ground, state whether there was any vehicle roof deformation,

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[6]"The Abbreviated Injury Scale (AIS©) is an anatomically based, consensus derived, global severity scoring system that classifies each injury by body region according to its relative importance on a 6-point ordinal scale (1=minor and 6=maximal)." Assoc. for the Advancement of Automotive Medicine, http://www.aaam.org/about-ais.html (last accessed Nov. 2, 2015). "MAIS©" stands for Maximum Abbreviated Injury Scale.

state the direction the vehicle rolled, state whether the driver was injured because of contact with the roof, or state if it was a single-vehicle or multi-vehicle accident, although Ms. Padmanaban testified that multi-vehicle rollover accidents are more severe. Further, the state accident data included rollovers where the vehicle hit a fixed object and its momentum was arrested as a result (i.e., "arrested rollovers").

Ms. Padmanaban opines that the GMC Savana's rollover performance was comparable to that of other similar vehicles, but as described above the data on which she relies is too generalized to permit her to know how the Savana itself or comparable vehicles perform in accidents like those in which plaintiff was injured. From the generalized state accident data, Ms. Padmanaban cannot know if any of the drivers sustained a cervical spinal injury in a comparable vehicle, much less whether the injury occurred under comparable circumstances. General observations about thousands of dissimilar rollover accidents will not be helpful to the jury in this case, as such opinions are not connected to the facts. The fact that the highway safety community and NHTSA use this type of general accident data for research into motor vehicle safety issues and to inform highway safety decisionmaking cannot support the admission of Ms. Padmanaban's opinions in the context of this case, as the data does not permit her to control for relevant variables.

The Eighth Circuit has instructed that "when an expert 'fail[s] to take into account a plethora of specific facts' his or her testimony is properly excluded." David E. Watson, P.C. v. United States, 668 F.3d 1008, 1014 (8th Cir. 2012) (quoting Nebraska Plastics, 408 F.3d at 417); see also Concord Boat Corp. v. Brunswick Corp., 207 F.3d 1039, 1056 (8th Cir. 2000) ("Even a theory that might meet certain Daubert factors, such as peer review and publication, testing, known or potential error rate, and general acceptance, should not be admitted if it does not apply to the specific facts of the case.").

The Court finds that the data from which Ms. Padmanaban draws her opinions are too generalized and too inadequately controlled to permit meaningful comparisons of injury rates between the GMC Savana and its peers in rollover accidents. Therefore, the statistical opinions she would offer lack an adequate foundation and do not fit the facts of this case. As a result, her offer will not tend to prove or disprove anything about the safety of the subject vehicle in the context of plaintiff's complaint, and instead risk misleading or confusing the jury where its job is to evaluate the crashworthiness of the vehicle. Where there is not an adequate foundation for statistical probabilities, such evidence can become "an item of prejudicial overweight." Marx & Co., Inc. v. Diners' Club Inc., 550 F.2d 505, 511 (2d Cir. 1977). The excluded opinions are Padmanaban opinions no. 3 and 4, *supra*.

ii) *Roof Strength-to-Weight Ratio Opinions*

Plaintiff seeks to exclude Ms. Padmanaban's opinions on roof strength based on state accident data: (1) "there is no relationship between roof SWR [strength-to-weight ratio] and likelihood of fatality or serious injury for belted or unbelted occupants in rollovers," (Padmanaban opinion no. 8, *supra*); and (2) "[w]hen important confounding factors are accounted for (belt use, ejection, alcohol, rural/urban, driver age), roof SWR is not a statistically significant predictor of likelihood of fatality or serious injury in single-vehicle rollovers." (Padmanaban opinion no. 9, *supra*.)

Plaintiff also seeks to exclude Ms. Padmanaban's opinions on roof strength based on NASS/CDS data: (1) for light trucks, the serious injury rates for belted drivers in rollover crashes are comparable for vehicles with a roof SWR greater than or equal to 4.0 and for vehicles with a roof SWR less than 4.0 (Padmanaban opinion no. 6, *supra*); and (2) there is no relationship between roof strength to weight ratio and roof deformation at position (Padmanaban opinion no. 10, *supra*).

As discussed above, *supra* at 24, it is impossible for Ms. Padmanaban to control for key relevant variables when using state accident data in forming her statistical opinions.[7] As a result, Ms. Padmanaban's opinions related to roof strength that are based on state accident data (opinion nos. 8, 9) will be excluded because they lack an adequate foundation and are not sufficiently tied to the facts of the case.[8]

Ms. Padmanaban's opinion no. 6 is that: "NASS/CDS data shows that for light trucks, the serious injury rates for belted drivers in rollover crashes are comparable for vehicles with a roof SWR greater than or equal to 4.0 [and] for vehicles with a roof SWR less than 4.0." Plaintiff asserts that the size of the NASS/CDS data set supporting this opinion – 25 vehicles with roof SWR greater than 4.0 that Ms. Padmanaban extrapolated to 4,243 vehicles, but involving only four serious injuries – is too small to be adequate.

An expert must start her analysis with sufficient facts and data to make the subsequent conclusions reliable predictions regarding the case at hand. Tyler v. University of Ark. Bd. of Trs., 628 F.3d 980, 990 (8th Cir. 2011) (sample of only six applicants too small to infer discrimination); see generally Harper v. Trans World Airlines, Inc., 525 F.2d 409, 412 (8th Cir. 1975) ("statistical

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[7]Specifically, Ms. Padmanaban cannot provide the number of quarter turns involved in the rollover for any of the vehicles; cannot say whether the driver was injured before, during or after the rollover; cannot say how many of the rollovers, if any, resulted in a spinal cord injury; cannot provide the trip speed at the time of rollover; cannot say if the vehicles' roofs actually touched the ground; cannot say whether there was any vehicle roof deformation; cannot say the direction the vehicle rolled; cannot say whether the driver was injured because of contact with the roof; cannot say if it was a single-vehicle or multi-vehicle accident; and included rollovers where the vehicle hit a fixed object and its momentum was arrested.

[8]The Court also notes that Ms. Padmanaban's opinions concerning roof strength-to-weight ratio appear somewhat contradictory to the statement in her report that "several factors, including crash severity factors, influence injury outcome in rollovers. This demonstrates that rollovers are complex events and that a single parameter (such as roof strength) cannot explain the injury potential for occupants." Padmanaban Report of July 18, 2014 at 7.

evidence derived from an extremely small universe . . . has little predictive value and must be disregarded.").

Ms. Padmanaban testified in her deposition that the sample size was adequate and in the range of the industry standard:

> A. Twenty-five is adequate. As a matter of fact, NHTSA's final rulemaking is based on 31 cases of which only 12 of them they used, out of which only four of them are coded for 90 percent of the sampling weight. So their whole rulemaking benefit model was based on four data points. So if you ask me, 25 is good enough? Twenty-five is good enough for me, yes. To make this kind of comparison.

Padmanaban Dep. 132:6-15. Ms. Padmanaban admits, however, that there is not "a lot of data for vehicles with 4-plus SWR, yet," id. 125:20-21, and that she has "only few data points for 4-plus right now." Id. 128:23-24.

Ms. Padmanaban offers an opinion about serious injury rates for belted drivers in rollover crashes, that serious injury rates are comparable for vehicles with roof SWR greater than or equal to 4.0, and for vehicles with a roof SWR less than 4.0. While the 25-vehicle sample size from which the opinion is derived is not too small for statistical analysis, the fact that only four serious injuries are included in the sample renders the relevant sample size too small to have predictive value with respect to serious injury rates between vehicles with stronger and weaker SWRs. Ms. Padmanaban's opinion no. 6 should therefore be excluded.

Finally, plaintiff argues that Ms. Padmanaban's other SWR opinions based on NASS/CDS data should be excluded because although Ms. Padmanaban could have controlled relevant variables in the NASS data, she did not do so. These opinions are that: (1) there is no relationship between roof strength-to-weight ratio and roof deformation at position (Padmanaban opinion no. 10, *supra*), and (2) five percent of serious injured occupants in rollovers are belted front seat occupants with serious head, face and neck injuries resulting from roof contact where roof deformation is also coded

at the seating position. Even for these, testing shows that the roof contact occurs before there is any significant roof deformation (Padmanaban opinion no. 11, *supra*). Plaintiff states that Ms. Padmanaban did not control for the number of quarter turns in rollovers or for other relevant variables, and therefore "was able to manipulate the data enough to reach the untenable conclusion that weak roofs don't crush more than strong roofs." Pl.'s Mem. Supp. Mot. Exclude Padmanaban at 13 (Doc. 67).

Ms. Padmanaban testified that the accident data she used for comparing injuries in vehicles with roof strength-to-weight ratios greater than 4.0 to injuries in vehicles with roof strength-to-weight ratios less than 4.0 included all numbers of rolls, except for one-quarter turns; was based on posted speed limits but not the trip speed at which the rollover occurred; did not exclude rollovers where the vehicle rolled into an object but its momentum was not arrested, although arrested rollovers were excluded; did not limit to injuries caused by roof contact; did not exclude accidents where the driver was partially or fully ejected from the vehicle; and did not exclude multiple-vehicle rollover accidents, which she testified were more severe than single vehicle rollovers.

Ms. Padmanaban admits in her deposition that she has not controlled for several significant variables, which seems to indicate she is comparing wholly dissimilar accidents. Ms. Padmanaban did not separate crashes based on the number of turns completed during the rollover. Thus, while plaintiff's vehicle is alleged to have turned eight quarter turns at a relatively low speed, Ms. Padmanaban also considered accidents with unlimited full rolls and as few as one quarter turns, accidents occurring at highway speeds, and those involving other vehicles. Ms. Padmanaban testified she could have compared vehicles with stronger and weaker roof ratios that experienced a roll of eight quarter turns a comparable speeds, but she did not do so, and admitted she did not

know if the results would be the same if she had controlled the data for the number of rolls. Padmanaban Dep. 187:15-188:8.

The Court finds that Ms. Padmanaban's SWR opinions no. 10 and 11 are inadmissible because they fail to fit the facts of this case, as the expert inadequately controlled for relevant variables. Therefore, the opinions lack adequate foundation and will not tend to prove or disprove anything about the safety of the subject vehicle in the context of the plaintiff's complaint, and instead risk misleading or confusing the jury where its job is to evaluate the crashworthiness of the vehicle.[9]

The Court rejects GM's argument that Ms. Padmanaban's opinions are properly admitted as rebuttal evidence, for the reasons set forth in plaintiff's Reply, which the Court adopts. (Doc. 78 at 4-7.) The Court also notes GM's Response incorrectly states that an article authored by Dr. Stephen Batzer, plaintiff's engineering expert, titled Rollover Crashworthy Automotive Roofs Design Report, is Dr. Batzer's expert report in this case. GM Mem. Opp. at 3 (Doc. 74). GM's arguments regarding the use of Ms. Padmanaban's opinions for rebuttal repeatedly cite to material contained in the article, but refer to it as Dr. Batzer's expert report. Id. at 4-5. The material GM cites is not present in Dr. Batzer's *actual* expert report, however. This appears to be a deliberate attempt by GM to mislead the Court. Such practice is totally unacceptable and will not be tolerated.

iii) *Seat Belt Opinions*

Ms. Padmanaban's supplemental expert report dated April 28, 2015 contains her opinions that: (1) there is no statistically significant difference between fatality or serious injury rates for belted drivers in vehicles with seat integrated belts versus conventional belts in single vehicle

[9]This is also true of Ms. Padmanaban's opinion no. 6, and is an alternative basis for its exclusion.

accident rollovers. Both seat integrated belts and conventional belts reduce fatalities and injuries in rollovers. (Padmanaban opinion no. 14, *supra*); and (2) the presence of Seat Integrated Restraint Systems is not a statistically significant predictor influencing the odds of fatality or serious injury to belted drivers in rollover crashes (Padmanaban opinion no. 15, *supra*).

Plaintiff seeks to exclude these opinions on the basis that they are not sufficiently connected to the facts of this case because they are based on state accident data, see Padmanaban Report of Apr. 28, 2015 at 2, which does not permit Ms. Padmanaban to control for significant variables, as discussed above. For the reasons discussed above with respect to Ms. Padmanaban's rollover and roof strength-to-weight ratio opinions that are based on state accident data, the Court finds her opinions related to seat belt systems based on state accident data should be excluded because they lack an adequate foundation and are not sufficiently tied to the facts of the case to be useful to the jury. Because the opinions lack foundation and do not fit the facts, they are also not admissible as rebuttal to plaintiff's expert Mr. Sicher's alternative design opinions.

iv) *Irrelevant General Opinions*

Plaintiff seeks to exclude the remainder of Ms. Padmanaban's opinions, nos. 1, 2, 5, 7, 12, 13, 16 and 17, which plaintiff characterizes as general observations about rollover accidents. Plaintiff asserts that these opinions are "irrelevant and unreliable because they are unhinged from the facts." Pl.'s Mem. Supp. Mot. Exclude Padmanaban at 10. Plaintiff also asserts that "[m]isdirecting the jury to general rates of injury, for all kinds of injuries, under widely varying circumstances, is inappropriate because it encourages the jury to ignore the Court's instructions and decide the case based on impermissible factors." Id. at 14. The Court finds these opinions are inadmissible because they are not sufficiently tied to the facts of the case to be useful to the jury.

IV. Conclusion

For the foregoing reasons, GM's Daubert motions to exclude the opinions and testimony of plaintiff's expert witnesses Larry Sicher and Joseph Burton, M.D., should be denied. Plaintiff's Daubert motion to exclude the opinions and testimony of GM's expert witness Jeya Padmanaban should be granted.

Accordingly,

IT IS HEREBY ORDERED that General Motors, LLC's motion to exclude expert testimony of Joseph Burton, M.D. is **DENIED**. [Doc. 69]

IT IS FURTHER ORDERED that General Motors, LLC's motion to exclude expert testimony of Larry Sicher is **DENIED**. [Doc. 70]

IT IS FURTHER ORDERED that plaintiff's motion to exclude expert testimony of Jeya Padmanaban is **GRANTED**. [Doc. 66]

CHARLES A. SHAW
UNITED STATES DISTRICT JUDGE

Dated this 10th day of November, 2015.

2017 WL 1196990
Only the Westlaw citation is currently available.
United States District Court,
N.D. Illinois, Eastern Division.

IN RE: FLUIDMASTER, INC.,
WATER CONNECTOR COMPONENTS
PRODUCTS LIABILITY LITIGATION

Case No. 14-cv-5696
|
MDL No. 2575
|
Signed 03/31/2017

MEMORANDUM OPINION AND ORDER

Robert M. Dow, Jr., United States District Judge

***1** Before the Court are Plaintiffs' motions to exclude Defendant's experts [378; 379; 381; 382; 384; 387; 390], Plaintiffs' motion to strike declarations submitted by two of Defendant's experts [446], Defendant's motions to exclude Plaintiffs' experts [334; 336; 337; 339], and Plaintiffs' motion for class certification [284; 286]. For the reasons set forth below, Plaintiffs' motions to exclude Defendant's experts [378; 379; 381; 382; 384; 387; 390] are granted in part and denied in part, Plaintiffs' motion to strike [446] is granted in part and denied in part, Defendant's motions to exclude Plaintiffs' experts [334; 336; 337; 339] are granted in part and denied in part, and Plaintiffs' motion for class certification [284; 286] is denied. The Courtroom Deputy will contact the parties to arrange a mutually agreeable time for the next status hearing before Judge Dow and Magistrate Judge Gilbert, at which time the parties may raise any issues regarding discovery, motions for reconsideration, and future motion practice before either of the assigned judges.

I. Background

This MDL is about a plumbing product. Defendant **Fluidmaster**, Inc., a California company, manufactures and designs water supply lines or "connectors" used to transport water from a supply pipe to a plumbing fixture like a toilet or a kitchen sink faucet. The product at issue here consists of a flexible inner tubing made of EPDM or Santoprene (types of polymers or rubbers), an outer braided wire made of stainless steel, and a coupling nut used to connect the supply line to a plumbing fixture. For a period of time, Defendant's toilet connector used a coupling nut made of acetal (a kind of plastic). Its other connectors use a metal coupling nut. Defendant's connector sells for about $10, and Defendant has sold more than 153 million water connectors since the 1980s.

Plaintiffs allege that Defendant's product has two design defects. First, the toilet connector's acetal coupling nut contains a notch or sharp indentation, which is a focal point for any stress that builds on the coupling nut over time. According to Plaintiffs, Defendant's design causes thin cracks known as "crazing" to form on the coupling nut. As the crazing spreads over time, the coupling nut can fail—a process known as "creep rupture." Defendant contends that the vast majority of coupling nut failures result from the improper use of a wrench or similar tool during the toilet connector's installation, which "overtightens" and places excessive stress on the coupling nut, eventually causing the connector's failure.

Second, Plaintiffs argue that the hose body comprised of a stainless steel braid plus inner tubing was defectively designed. According to Plaintiffs, the inner tubing is insufficient to withstand ordinary water pressure, which is why Defendant relies on the stainless steel braid. However, the stainless steel is thin and can degrade in the presence of chlorine. Chlorine is common in many household products. Thus, although Defendant labels its product "NO BURST," Plaintiffs contend that the hose body bursts because of the insufficient strength of the inner hose body and the propensity for the braided sheath to corrode. Defendant responds that the vast majority of hose failures occur because of improper exposure to corrosive materials, either because homeowners fail to properly close their cleaning products stored under their sinks or because they improperly clean their hoses with chlorine-containing products.

***2** The Plaintiffs here are people who experienced property damage after Defendant's connector failed, people who did not experience any failure of Defendant's product, and subrogated insurers. Most of the Plaintiffs did not personally buy Defendant's product. Some bought a home with Defendant's product already installed. Some relied on a plumber to choose which connector to buy. At least one relied on her friend to purchase Defendant's connector. Some, however, purchased and installed Defendant's product on their own.

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Plaintiffs filed a motion for class certification [284; 286], seeking to certify a nationwide class and various state law subclasses related to these two alleged design defects. Plaintiffs seek a nationwide class under California's Consumers Legal Remedies Act ("CLRA"), which prohibits "unfair methods of competition and unfair or deceptive acts or practices" in transactions for the sale or lease of goods to consumers. Cal. Civ. Code § 1770(a). They also seek six state law subclasses for breach of warranty claims (Pennsylvania, Vermont, Alabama, Minnesota, Arizona, and Tennessee) as well as eleven state law issue subclasses for negligence and strict liability claims (Pennsylvania, Vermont, Alabama, Minnesota, Arizona, Illinois, North Dakota, Georgia, Maine, California, and New Hampshire) involving seventeen issues. In response to this class certification motion, Defendant filed two motions to exclude Plaintiffs' experts. Plaintiffs returned the favor by filing five motions of their own plus a motion to strike. The Court held a four-hour oral argument on all of the pending motions on February 22, 2017.

II. Legal Standard

A. *Daubert*

Federal Rule of Evidence ("Rule") 702 and ***Daubert*** *v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993), govern the admissibility of expert testimony. See *Gayton v. McCoy*, 593 F.3d 610, 616 (7th Cir. 2010).[1] Rule 702 permits the admission of expert opinion testimony if "scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue." Fed. R. Evid. 702(a).

Trial courts are "tasked with determining whether a given expert is qualified to testify in the case in question." *Gayton*, 593 F.3d at 616. "Whether a witness is qualified as an expert can only be determined by comparing the area in which the witness has superior knowledge, skill, experience, or education with the subject matter of the witness's testimony." *Carroll v. Otis Elevator Co.*, 896 F.2d 210, 212 (7th Cir. 1990). "[A] court should consider a proposed expert's full range of practical experience as well as academic or technical training when determining whether that expert is qualified to render an opinion in a given area." *Smith v. Ford Motor Co.*, 215 F.3d 713, 718 (7th Cir. 2000).

Trial courts are also obligated to act as gatekeepers to ensure that the expert testimony is both relevant and reliable. See *Kumho Tire Co., Ltd. v. Carmichael*, 526 U.S. 137, 147–49 (1999); ***Daubert***, 509 U.S. at 589. To establish relevance, the proponent must show that the expert's "reasoning or methodology properly can be applied to the facts in issue," and "the testimony will assist the trier of fact with its analysis of any of the issues involved in the case." ***Daubert***, 509 U.S. at 593; *Smith*, 215 F.3d at 718; Fed. R. Evid. 702.

*3 To establish reliability, the proponent must show that the expert's testimony is based on "sufficient facts or data," that it is "the product of reliable principles and methods," and that those methods have been "reliably applied * * * to the facts of the case." Fed. R. Evid. 702. District courts have "latitude in determining not only how to measure the reliability of the proposed expert testimony but also whether the testimony is, in fact, reliable." *Gayton*, 593 F.3d at 616. ***Daubert*** lists a number of relevant considerations in evaluating an expert's reasoning and methodology, including testing, peer review, error rates, and acceptability in the relevant scientific community. ***Daubert***, 509 U.S. at 593–94. "[T]he test of reliability is flexible," however, "and ***Daubert's*** list of specific factors neither necessarily nor exclusively applies to all experts or in every case." *Kumho Tire*, 526 U.S. at 141 (internal quotation marks omitted). The overriding purpose of the ***Daubert*** inquiry is to scrutinize proposed expert witness testimony to determine whether it has "the same level of intellectual rigor that characterizes the practice of an expert in the relevant field" so as to be deemed reliable enough to present to a jury. *Lapsley v. Xtek, Inc.*, 689 F.3d 802, 805 (7th Cir. 2012) (quoting *Kumho Tire*, 526 U.S. at 152). Expert testimony may not be based on "subjective belief or unsupported speculation." ***Daubert***, 509 U.S. at 590; *Gen. Elec. Co. v. Joiner*, 522 U.S. 136, 146 (1997) ("A court may conclude that there is simply too great an analytical gap between the data and the opinion proffered."). And "*any* step that renders the analysis unreliable under the ***Daubert*** factors renders the expert's testimony inadmissible." ***In re*** *Paoli R.R. Yard PCB Litig.*, 35 F.3d 717, 745 (3d Cir. 1994).

Thus, in evaluating a motion to exclude expert testimony under Rule 702 and ***Daubert***, the Court considers whether the proffered expert (1) is qualified, (2) has employed a reliable methodology, (3) offers opinions that follow rationally from the application of the

expert's methodology and qualifications, and (4) presents testimony on a matter that is relevant to the case at hand. See *Kumho Tire*, 526 U.S. at 151–53; *Joiner*, 522 U.S. at 146; ***Daubert***, 509 U.S. at 589–93; *Walker v. Soo Line R. R. Co.*, 208 F.3d 581, 586 (7th Cir. 2000). "The proponent of the expert bears the burden of demonstrating that the expert's testimony would satisfy the ***Daubert*** standard." *Lewis v. CITGO Petroleum Corp.*, 561 F.3d 698, 705 (7th Cir. 2009).

B. Federal Rule of Civil Procedure 23

To be certified as a class action, a proposed class must satisfy the requirements of Federal Rule of Civil Procedure 23(a) and one of the three alternative requirements in Rule 23(b). *Messner v. Northshore Univ. HealthSystem*, 669 F.3d 802, 811 (7th Cir. 2012). Rule 23(a) provides that a named party may sue on behalf of individuals who are similarly situated if: (1) the class is so numerous that joinder of all putative class members is impracticable ("numerosity"); (2) there are questions of law or fact common to the putative class ("commonality"); (3) the claims or defenses of the named party are typical of the claims or defenses of the putative class members ("typicality"); and (4) the named party will fairly and adequately protect the interests of the class ("adequacy"). Fed. R. Civ. P. 23(a). "[A] proposed class must always meet the Rule 23(a) requirements." *Messner*, 669 F.3d at 811. "Because Rule 23(a) provides a gate-keeping function for all class actions, ordinarily we * * * begin there and only turn our attention to Rule 23(b) after we [are] certain that all of Rule 23(a)'s requirements ha[ve] been met." *Bell v. PNC Bank, Nat. Ass'n*, 800 F.3d 360, 374 (7th Cir. 2015).

When certification is sought under Rule 23(b)(3), as it is here, the proponents of the class must also show that: (1) questions of law or fact common to the members of the proposed class predominate over questions affecting only individual class members ("predominance"); and (2) a class action is superior to other available methods of resolving the controversy ("superiority"). *Messner*, 669 F.3d at 811. Moreover, the class must also meet Rule 23's "implicit requirement of 'ascertainability,' " meaning that the class is "defined clearly and based on objective criteria." *Mullins v. Direct Digital, LLC*, 795 F.3d 654, 659 (7th Cir. 2015).[2]

*4 Plaintiffs bear the burden of proving that they are entitled to class certification. *Messner*, 669 F.3d at 811. Although class certification proceedings are not "a dress rehearsal for the trial on the merits," *id.*, the Court does not presume that all well-pleaded allegations are true for purposes of deciding the certification question. See *Szabo v. Bridgeport Machs., Inc.*, 249 F.3d 672, 676–77 (7th Cir. 2001). Rather, before the Court allows a case to proceed as a class action, it "should make whatever factual and legal inquiries are necessary under Rule 23." *Id.* at 676. "A party seeking class certification must affirmatively demonstrate his compliance with the Rule—that is, he must be prepared to prove that there are *in fact* sufficiently numerous parties, common questions of law or fact, etc." *Wal-Mart Stores v. Dukes*, 564 U.S. 338, 350 (2011) (emphasis in original). But the showing need not be "to a degree of absolute certainty. It is sufficient if each disputed requirement has been proven by a preponderance of evidence." *Messner*, 669 F.3d at 811. The Court exercises broad discretion in determining whether class certification is appropriate given the particular facts of the case. See *Keele v. Wexler*, 149 F.3d 589, 592 (7th Cir. 1998).

III. Analysis

Both parties have filed several ***Daubert*** motions in connection with Plaintiffs' motion for class certification.[3] "[A] district court must make the necessary factual and legal inquiries and decide all relevant contested issues prior to certification," including ***Daubert*** motions. *Am. Honda Motor Co. v. Allen*, 600 F.3d 813, 817 (7th Cir. 2010). Here, Plaintiffs have moved to exclude Scott Meek, Dr. Sanjay K. Rao, Dale Edwards, Dr. Vijay Gupta, and Brian Palmer, Ph.D. Defendant has moved to exclude five of Plaintiffs' technical experts and two of their experts who opine on issues related to damages. The Court begins with Plaintiffs' motions.

A. Plaintiffs' *Daubert* Motions

1. Scott Meek

Defendant retained Scott Meek to opine on the technical design of the coupling nut, whether that design is defective, and the stresses that could cause the coupling nut to fail. Meek holds a Bachelor of Science in Mechanical Engineering and a Bachelor of Arts in Materials Science. He is one of the owners of Forensic

Engineering Consultants, which performs failure analyses in the field of mechanical engineering and material sciences. [386-1, at 3.] Meek has served as a consultant performing failure analyses of various products for the last 40 years, the last fifteen of which "have largely involved analyzing failures in connection with the plumbing industry." [339-15, at 3.] In that capacity, he has "evaluated hundreds of plumbing component failures on behalf of the plumbing industry and over two thousand plumbing component failures on behalf of the insurance industry." *Id.* He is a Registered Professional Engineer with the State of Texas and a member of the Society of Plastics Engineers.

Despite this extensive, highly specialized experience, Plaintiffs argue that Meek lacks the "specialized knowledge" needed to assist the jury for two reasons. [385, at 3.] First, Plaintiffs argue that Meek is "not an expert in the field of elastomers"—that is, polymers with elastic properties such as rubber. This argument rests on a single exchange from Meek's deposition:

> Q: Do you consider yourself an expert on elastomers?
>
> A: Probably not elastomers per se because I haven't done much failure analysis with those.

[386-1, at 32:8–12.] Because Meek's opinions are premised in part on the interactions between Defendant's cone washer (made of an elastomer) and its coupling nut, Plaintiffs contend that Meek's lack of qualifications precludes him from offering his opinions. Second, Plaintiffs argue that Meek cannot opine on plastic design because he lacks "formal education in plastics design," "has never taken any college level classes in plastic design," "has never designed a plastic part himself," and has never published on plastic design. [386, at 5.] Plaintiffs seek to exclude "any opinion in his report related to the design or failure of [Defendant's] coupling nut." *Id.*

***5** These qualifications challenges are without merit. Plaintiffs do not question Meek's qualifications as an expert in the broader field of material sciences, which encompasses polymers like elastomers. Their only argument is that he is not "an expert in the more specialized field of elastomers"—a "subset" of material sciences. [432, at 3.] "Ordinarily, courts impose no requirement that an expert be a specialist in a given field." *Gayton*, 593 F.3d at 618 (citation omitted). "The fact that an expert may not be a specialist in the field that concerns [his] opinion typically goes to the weight to be placed on that opinion, not its admissibility." *Hall v. Flannery*, 840 F.3d 922, 929 (7th Cir. 2016).

Here, Defendant does not offer Meek as an "elastomers expert" and Plaintiffs never explain why specialization in the component parts underlying Meek's failure analysis is necessary to admit his opinions. In other words, apart from this single deposition answer, Plaintiffs offer no reason to believe that Meek's relevant education and four decades of experience with material sciences and mechanical engineering would not qualify him to opine on a particular application of that education and experience to the facts of this case. Meek's unwillingness to accept Plaintiffs' framing and reluctance to describe himself as an expert in elastomers "per se" despite his extensive relevant experience with plastics and polymers is fodder for cross-examination, not a basis for exclusion under Rule 702.[4]

The same is true regarding Meek's qualifications to offer design opinions. In evaluating his qualifications under ***Daubert***, this Court must "consider [Meek's] *full range* of experience and training." *United States v. Pansier*, 576 F.3d 726, 737 (7th Cir. 2009) (emphasis added). Yet, Plaintiffs' motion largely consists of asking this Court to focus narrowly on one alleged gap in Meek's resume and ignore the rest of his experience. For example, Plaintiffs assert that Meek lacks a "formal education in plastics design," but omit any of discussion of the fact that his "formal education in material science * * * encompasses plastics," "much of his college level [training] dealt with design, engineering and material science," and he has attended "probably 20 seminars" since college involving plastics, some of which addressed design. [386-2, at 125:24–128:1.] Likewise, Plaintiffs stress that Meek "has never designed a plastic part himself" [385, at 5], but never grapple with the fact that Meek spent the last forty years analyzing the failure of products he did not personally design. While Plaintiffs dismiss as "conclusory" the claim that "assessing the conditions under which products fail inherently involves analysis of their design" [432, at 5; 415, at 13], Plaintiffs do not explain why that intuitively obvious statement is wrong. Moreover, Meek testified that his mechanical engineering and plastics background qualify him to opine on issues connected to plastic design. [See 386-1, at 31:4–13.] That Plaintiffs elicited this answer but chose not to explore his claim any further does not render this testimony "conclusory." It makes it unrebutted.

*6 An expert may be qualified based on experience alone. See *Trustees of Chi. Painters & Decorators Pension, Health & Welfare v. Royal Int'l Drywall & Decorating, Inc.*, 493 F.3d 782, 787–88 (7th Cir. 2007) ("[W]hile extensive academic and practical expertise in an area is certainly sufficient to qualify a potential witness as an expert, Rule 702 specifically contemplates the admission of testimony by experts whose knowledge is based on experience." (citations and quotation marks omitted)). And "[t]he notion that [***Daubert***] requires particular credentials for an expert witness is radically unsound." *Tuf Racing Prod., Inc. v. Am. Suzuki Motor Corp.*, 223 F.3d 585, 591 (7th Cir. 2000). Meek's opinions regarding the reasons for the coupling nut's failure (misuse rather than design) appear to be well within the scope of his forty years of experience working in failure analysis, material sciences, and mechanical engineering. Plaintiffs' bare assertion that Meek cannot opine on design-related issues without possessing specialized design-related formal education and particularized experience "designing plastic parts for manufacture" [386, at 5] is inconsistent with the requirements of Rule 702 and ***Daubert***. Plaintiffs fail to explain why the experience that Meek actually possesses is insufficient to qualify him to offer his opinions, and that failure dooms their ***Daubert*** challenge.

Plaintiffs' motion to exclude Meek's opinions and testimony [385] is denied.

2. Dr. Sanjay K. Rao

Defendant retained Dr. Sanjay K. Rao to assess the efficacy of Plaintiffs' proposed conjoint survey sampling plan and design, which would be used to calculate classwide damages. Conjoint analysis is a statistical technique used to determine how consumers value the different individual attributes of a product. See *Saavedra v. Eli Lilly & Co.*, 2014 WL 7338930, at *4 (C.D. Cal. Dec. 18, 2014). Dr. Rao is a Vice President in Life Sciences at the consulting firm Charles River Associates and oversees the practice group's strategic marketing research, including survey modeling, design, and execution. He received his Ph.D. in Marketing from the Wharton School of the University of Pennsylvania, and his doctoral dissertation was titled, "An Empirical Appraisal of Conjoint Choice Simulators," which "studied alternative methods for simulating consumer choices and market shares from their evaluations of product features and concepts." [334-7, ¶ 2.]

Plaintiffs do not challenge Dr. Rao's qualifications. Instead, they raise two objections to the substance of Dr. Rao's opinions. First, they argue that his report is "replete" with "*ipse dixit* conclusions." [380, at 2.] Here is one example of what Plaintiffs characterize as *ipse dixit*:

> Factors such as advertising, product availability in a store, the type and amount of shelf space given to it, in-store price discounting and product promotions have an impact in influencing product choice at the actual point of purchase. Such factors are especially important to consider when a product is not directly sold to a customer by the manufacturer, but finds its way to him/her through a distribution network comprising of wholesalers and retailers, who also engage in valid marketing practices including, but not limited to, price mark ups, discounting and non-price promotional programs. These factors become so much more important in influencing customer choice at the store when the product category contains several competing brands all vying for the same customer's choice. The more differentiated a product is perceived to be relative to its competition, for example, the lower the role of product price (compared to competitors) in influencing product choice.

[334-7, ¶ 13.] Second, Plaintiffs challenge Dr. Rao's statements using the phrase "common knowledge" (or some variant) as offering improper expert testimony because they "do not provide something more than what is obvious to the layperson." [380, at 6.] This is one of the representative examples that Plaintiffs highlight: "It is commonly understood that conjoint analysis is a preference scaling methodology, i.e. it is designed and best utilized to understand respondent preferences

for components of a product as presented to them through concise and realistic descriptions in a research setting." [334-7, ¶ 13.] Plaintiffs argue that Dr. Rao "does not explain how he knows this information to be 'common knowledge,' " and that this "common knowledge" is really his own knowledge. [380, at 4.]

*7 As both examples show, Plaintiffs' arguments miss the mark by a wide margin. In an *ipse dixit* opinion, the expert asserts a "bottom line" conclusion, but lacks any articulable facts to substantiate that conclusion or completely fails to explain the reasoning or methods employed to reach that conclusion. *United States v. Noel*, 581 F.3d 490, 497 (7th Cir. 2009) ("[Expert's] testimony that the photos met the definition of child pornography was a bare conclusion that provided nothing but the bottom line, i.e., that [defendant] possessed illegal photos. Had [expert] provided some basis for this explanation, perhaps her testimony would have been of some use for the jury. But she did not do so. She, in essence, told the jury nothing more than, 'I am familiar with the definition of child pornography, and this meets that definition because I said so.' "); *Minasian v. Standard Chartered Bank, PLC*, 109 F.3d 1212, 1216 (7th Cir. 1997) ("[Expert] asserts that banks just don't accelerate the principal indebtedness because of shortcomings of the kind [borrower] displayed. Apparently we are supposed to take this on faith, because [expert] did not gather any data on the subject, survey the published literature, or do any of the other things that a genuine expert does before forming an opinion[.] * * * [A]n expert's report that does nothing to substantiate this opinion is worthless, and therefore inadmissible."). Some *ipse dixit* opinions are merely subjective assertions that are impermeable to challenge and incapable of repetition by anyone other than the professed expert. See, *e.g.*, *Zenith Elecs. Corp. v. WH-TV Broad. Corp.*, 395 F.3d 416, 418 (7th Cir. 2005) ("Asked repeatedly during his deposition what methods he *had* used to generate projections, [expert] repeatedly answered 'my expertise' or some variant ('my industry expertise', '[my] awareness,' and 'my curriculum vitae')—which is to say that he either had no method or could not describe one."). Others are simply bare conclusions with "no facts, no hint of an inferential process, no discussion of hypotheses considered and rejected." *Mid-State Fertilizer Co. v. Exch. Nat. Bank of Chicago*, 877 F.2d 1333, 1339 (7th Cir. 1989). In all cases, the "gap between the data and the opinion proffered" is connected only by the expert's say-so, making it insurmountable. *Joiner*, 522 U.S. at 146.

This bears no resemblance to Dr. Rao's opinions here. Dr. Rao amply explains the reasons he finds the proposed survey design insufficient to achieve its desired result. [334-7, ¶¶ 8–21.] In the example above, Dr. Rao articulates differences between estimating consumer behavior in retail versus research settings, such as "factors" that may be important influences on in-store purchasers, but less important when a product is not sold directly to customers. After listing these factors, Dr. Rao concludes that "[a]t no point in the [Plaintiffs' expert's] Report does [she] mention these factors, let alone discuss how she would respect their influence on the two classes of customers" in her analysis. *Id.* ¶ 13. He further critiques the groups included and excluded from the survey plan (*id.* ¶¶ 8–9, 11), the failure to disclose information related to sample size calculations (*id.* ¶ 10), gaps in how the survey will address a survey respondent's familiarity with the product or attributes (*id.* ¶¶ 14–15), the survey's omission of product attributes and failure to ensure proper measurement of trade-offs between attributes (*id.* ¶¶ 16–20), and the failure to incorporate market level data to inform the survey design (*id.* ¶ 21). In other words, Dr. Rao critiques the survey design by identifying *specific* flaws in that design and connecting those flaws to his conclusion. To assert his opinions are "devoid of analysis" [433, at 4] misapprehends the substance of Dr. Rao's report and the requirements of Rule 702.

In large part, Plaintiffs' motion appears to conflate the requirement that an expert support his or her conclusions with reasons and the concept that each sentence in an expert report should have a citation. [380, at 5 ("The majority of Dr. Rao's declaration consists of numerous statements devoid of citation or substantiation.").] Rule 702 imposes no minimum citation requirement. That principle has particular purchase here because (1) many of Dr. Rao's survey critiques can be found in the Federal Reference Manual on Scientific Evidence—a source of generally accepted principles of survey research that courts routinely rely on to evaluate expert opinions;[5] (2) Dr. Rao's list of reliance materials cites a Journal of Choice Modeling article, which discusses many of the same conjoint analysis issues Dr. Rao raised [347-7, at 32]; (3) Dr. Rao wrote his doctoral dissertation on conjoint analysis; and (4) Plaintiffs do not argue that *any* of these "unsupported" statements is contrary to well-established

survey principles. See *Erickson v. Baxter Healthcare, Inc.*, 151 F. Supp. 2d 952, 965 (N.D. Ill. 2001). Dr. Rao's relative lack of inline citations does not make his survey design critiques "subjective" or *ipse dixit.* If Plaintiffs believe his critiques are misplaced, they can attempt to show that through cross-examination.

***8** The same result is required for Plaintiffs' challenge to Dr. Rao's "common knowledge" statements. Even a cursory reading of these statements [see 380, at 3–4] shows that Dr. Rao uses "common" or analogous language to mean generally understood by survey design experts. [See, *e.g.*, 334-7, ¶ 13 ("It is commonly understood that the results from a conjoint analysis conducted in such a setting should not be extrapolated to the real world setting such as a retail store."); *id.* ¶ 14 ("It is intuitive and reasonable to expect that consumers participating in a survey-based exercise designed to collect raw data for conjoint analysis are familiar with product brand names and other product attributes to which they are expected to respond.").] The phrase "common knowledge" is not a talismanic incantation that, when invoked, unthinkingly mandates an expert's exclusion. Plainly, these opinions derive from Dr. Rao's specialized knowledge related to survey design and are not commonplace observations governed by Rule 701.

Plaintiffs' focus on Dr. Rao's statement that, "It is common knowledge that products such as water supply lines and toilet connectors are purchased by professional plumbing specialists who are called upon by homeowners and residents to install new supply lines or connectors, or to fix damaged lines or connectors, in their places of residence" (*id.* ¶ 9) is equally misplaced. The Court does not read this prefatory statement as Dr. Rao's expert "opinion." It is a background premise to set up why Dr. Rao believes Plaintiffs' sampling plan is flawed—an opinion that turns on the application of his specialized knowledge and experience to the facts of this case. [6] This premise also appears to be undisputed, as Dr. Rao cites in his report a June 2009 survey of plumbers "actively purchasing water supply lines" that was relied on by Plaintiffs' expert. See *id.* ¶ 13 n.2. This is not an instance where the "subject matter [of Dr. Rao's opinions] *as a whole* is obvious to a lay person." *Schutt Mfg. Co. v. Riddell, Inc.*, 673 F.2d 202, 205 (7th Cir. 1982) (emphasis added). And this "court is not compelled to exclude the expert just because the testimony may, to a greater or lesser degree, cover matters that are within the average juror's comprehension." *Hall*, 93 F.3d at 1342. Thus, the fact that some of the underlying premises of Dr. Rao's opinions may, in part, be derived from generally known facts does not remove his opinions from the "specialized knowledge" encompassed by Rule 702.

Plaintiffs' motion to exclude Dr. Rao's opinions and testimony [378; 379] is denied.

3. Dale Edwards, P.E.

Defendant retained Dale Edwards to analyze eight of Plaintiffs' failed water connectors, and opine on the causes of those failures. He performed a "non-destructive" examination of these connectors that included digital photography, dimensional measurements, scanning electron microscopy, and electronic dispersive x-ray spectroscopy. Edwards's original expert report describes the physical characteristics of each of the connectors and the results of his analysis, concluding that all of the connectors exhibit some corrosion from chlorine or chloride on the surfaces of the stainless steel wire braids. [339-20, at 2–9.] He opines that the failure of the connectors was "due to exposure to corrosive chlorine-containing chemicals." *Id.* at 10.

The conclusion section of his report, however, goes significantly further. Edwards also opines that (1) all of the connectors were permanently deformed from "excessive bending" that occurred during "improper installation"; (2) the corrosion on the water connectors "would have been clearly visible for months or possibly even years," which means "the majority of the failures, which are an extremely small percentage of the number of connectors in the field, could have and should have been detected by normal inspections"; (3) "[p]eople normally understand that they should exercise care for their stainless steel appliances by not subjecting them to corrosive cleaners or environments"; and (4) the faucet connectors that Edwards examined "were properly designed for their intended use and would not have failed in the manner observed if proper care had been exercised during their installation and use." *Id.* at 9–10. All of these opinions purport to be based on a "reasonable degree of scientific and engineering certainty." *Id.* at 10. Except for the third opinion, Edwards does not elaborate on these conclusions elsewhere in his report. Regarding the third point, Edwards includes the following discussion:

> *9 It is clear that the presence of chlorine on the surfaces of the connectors was likely due to improper exposure of the connectors to corrosive chlorine-containing products that were improperly stored under the sinks where the connectors were installed. The exposure may have been due to storage of open containers that caused a corrosive atmosphere in the sink cabinet or in some cases, may have been improperly applied directly to the connectors. Improper storage or application of such corrosive chlorine-containing products to the connectors for cleaning or otherwise, would contradict common warnings and/or instructions on such products. In fact, warnings on the packaging of many of these chlorine-containing cleaning products relate to it being a corrosive material and that, among other things, contact with metals should be limited to avoid pitting and corrosion. Exposure to these corrosive chemicals is not something that the product was designed for and a corrosive environment is one that should not be expected. Properly closed containers of cleaning products would not have caused contamination of the stainless steel connector surfaces and would not have led to the failures that occurred.

Id.

Edwards also submitted a rebuttal report to respond to one of Plaintiffs' experts, Dr. Tim A. Osswald. [339-21.] Edwards's rebuttal report largely attempts to qualify Dr. Osswald's conclusions by pointing out why alternative materials were not superior to the materials Defendant used or, at least, do not show that the materials that Defendant used are inadequate. Edwards also analyzes the literature relied on by Dr. Osswald, which Edwards claims actually reinforces these two points.

Plaintiffs move to exclude Edwards's opinions on two grounds. First, they claim that the "great majority" of the opinions in his original expert report "lack foundation, lack a scientific basis, and are unreliable under Rule 702." [392, at 7.] Second, they claim that Edwards's rebuttal opinions are not true rebuttal and are *ipse dixit*. *Id.* at 11–13. Defendant's response brief focuses almost entirely on Edwards's qualifications (which, other than a cursory attempt to label him as a "professional expert" (*id.* at 6–7), were not seriously questioned) and the reliability of his inspection methodology (which appears not to have been challenged at all (*id.* at 10–11)). Defendant also explains how Edwards's opinions substantively "rebut" Dr. Osswald's conclusions, such as by pointing out how Dr. Osswald's comparisons are "misleading and irrelevant from an engineering perspective." [419, at 13.] The defense of the *relevance* of Edwards's other opinions in his original report about improper installation, inspection, and chemical storage—all purportedly "based on his vast experience"—is limited to one paragraph. *Id.* at 12. Defendant makes no attempt to defend the *reliability* of these opinions.

i. Edwards's Original Report

The Court agrees that many of Edwards's opinions in his original expert report are unsupported and therefore unreliable. "If an opinion is fundamentally unsupported, then it offers no expert assistance to the jury." *Viterbo v. Dow Chem. Co.*, 826 F.2d 420, 422 (5th Cir. 1987). Here, there is a striking disconnect between the "Laboratory Investigation" section of the report and the "Conclusions" section. The investigation section includes photographs, measurements, and descriptions of the physical characteristics of the connectors as well as the chlorine measurements detected. At least three of Edwards's conclusions have no discernable link to this investigation.

First, Edwards concludes, "The faucet connectors that I examined were properly designed for their intended use and would not have failed in the manner observed if proper care had been exercised during their installation and use." [339-20, at 10 ("Conclusion 5").] Edwards's report does not say *how* he concluded that the connectors were "properly designed" or "would not have failed" had "proper care been exercised." He does not identify

a method for determining a "proper" versus improper design, how he applied that method here, or even what specific facts, literature, or experience he relied on to conclude the design was proper. He does not explain how he ruled out the possibility that the connectors would still have failed even with proper care. He simply asserts this conclusion to be true without any support. Rule 702 demands more.

***10** Second, Edwards concludes, "The majority of the failures, which are an extremely small percentage of the number of connectors in the field, could have and should have been detected by normal inspections of the connectors." *Id.* at 10 ("Conclusion 3"). Edwards analyzed *eight* connectors, not a "majority of the failures" that occurred in the field, and thus has no factual basis to conclude whether the majority "could or should have" been uncovered through inspection. To the extent that Edwards really meant a majority of the eight connectors, this conclusion fares no better.[7] Edwards does not indicate what "normal inspections" are or how he determined what "could or should have" been uncovered by them. If this conclusion is based on Edwards's experience, he never explains "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, Advisory Committee note on 2000 Amendments.

In connection with Conclusion 3, Edwards also states that "[m]any of the failures that were examined were grossly corroded along the entire length of the connectors and this would have been clearly visible for months and possibly years before the failures occurred." [339-20, at 10.] An opinion about the degree of corrosion on the connectors that he analyzed is within the scope of his expertise and supported by the inspection, measurements, and testing that Edwards performed. Plaintiffs do not contend otherwise. However, Edwards does not explain how he can conclude that this corrosion "would have been clearly visible for months and possibly years." Without *any* support, this opinion is unreliable under Rule 702 and cannot be considered.[8] See, *e.g.*, *Threet v. Correctional Health Care Mgmt. of Okla., Inc.*, 2009 WL 3335596, at *5 (W.D. Okla. Oct. 15, 2009) ("[I]t does not suffice for an expert to say, in effect, 'I have 30 years experience in the field. So trust me, the answer is X.' That formulation is the classic *ipse dixit* approach foreclosed by [the Supreme Court].").

Third, Edwards concludes that "[p]eople normally understand that they should exercise care for their stainless steel appliances by not subjecting them to corrosive cleaners or environments. The same level of care should be used with any stainless steel product including stainless steel braided water supply connectors." [339-20, at 10 ("Conclusion 4").] Unlike Dr. Rao, Edwards advances this kind of opinion as his "conclusion." It is not apparent how this conclusion is based on any "scientific, technical, or other specialized knowledge." Fed. R. Evid. 702(a). At his deposition, Edwards testified that this opinion is "based on [his] own use of stainless steel appliances," and he has "no specific data" regarding what people normally understand about such care, "other than just conversations through the years that I've had with people and seeing the instructions that come with these products." [392-1, at 71:13–74:7.] Defendant does not argue that such undescribed hearsay conversations "through the years" with unknown people are a sufficiently reliable basis to offer expert testimony about the public's general understanding of the proper care for stainless steel appliances. Nor does Defendant argue that Edwards, with his decades of experience and materials and forensic engineering background, is representative of what "[p]eople normally understand." Whether his opinion is unsupported or offers nothing more than a lay opinion, it is inadmissible under Rule 702.

***11** This is also true of Edwards's opinions about improper chemical storage, which are not listed as "Conclusions" but appear in the report's terse "Discussion" section. As noted, Edwards concludes that "[i]t is clear that the presence of chlorine" was due to improperly stored chlorine-containing products "under the sinks where the connectors were installed," which may contradict the warnings on the products. [339-20, at 10.] Edwards offers *no* factual basis for this conclusion, let alone any reason to believe this conclusion is "clear." "[T]he courtroom is not the place for scientific guesswork, even of the inspired sort." *Myers v. Ill. Cent. R. Co.*, 629 F.3d 639, 645 (7th Cir. 2010) (citation omitted). And, again, if this opinion is an inference from Edwards's experience, his report does not explain what specific experience supports his conclusions or how that experience has been reliably applied here. Such unsupported speculation falls short of the reliability required under Rule 702.[9]

This leaves only two of Edwards's opinions with a connection to his laboratory analysis: his unchallenged opinion regarding chlorine-caused corrosion on the connectors [339-20, at 10 ("Conclusion 1")] and the conclusion that the "kinking" and "excessive bending" on the connectors indicate "improper installation" (*id.* at 9–10 ("Conclusion 2")). Edwards's installation opinion, however, must fall too. His report is silent as to how he determined that the bending occurred during installation rather than at some other point in time. He does not describe any tests performed, interviews conducted, testimony reviewed, specific experience relied upon, or *any* other facts or data that could lead him to exclude any other events (*e.g.*, the bursting of the connector) and time periods (*e.g.*, breakdown of the connector over time) as a cause of the kinking or bending. See *Schultz v. Akzo Nobel Paints, LLC*, 721 F.3d 426, 434 (7th Cir. 2013) ("[A] court may consider '[w]hether the expert has adequately accounted for obvious alternative explanations.' " (citation omitted)). This opinion is little more than *ipse dixit.*

Accordingly, Plaintiffs' motion to exclude Edwards's opinions and testimony [390] is granted with respect to Conclusions 2, 3, 4, and 5, including the opinions contained in the Discussion regarding improper storage, but denied as to the remainder of his original report.

ii. Edwards's Rebuttal Report

Plaintiffs' arguments about Edwards's rebuttal report are somewhat in tension. On the one hand, they argue that Edwards does not "actually rebut" Dr. Osswald's conclusions because Edwards agrees that certain facts are "true" or "undisputed." [392, at 11.] On the other hand, they claim that Edwards "criticize[s]" Dr. Osswald's conclusions in what amounts to "cross-examination material," but those criticisms are without sufficient support. *Id.* at 12–13. Neither argument withstands scrutiny.

"The proper function of rebuttal evidence is to contradict, impeach or defuse the impact of the evidence offered by an adverse party." *Peals v. Terre Haute Police Dep't*, 535 F.3d 621, 630 (7th Cir. 2008) (citation omitted). Testimony offered under the guise of a rebuttal expert report that simply provides additional support for the expert's original opinions is improper. *Id.* Here, Dr. Osswald opines that an alternative material (polyvinyl chloride or PVC) could have been used to make the water connector's hose and that PVC's properties are superior to the materials used by Defendant. Edwards attempts to "impeach" or "diffuse" these opinions in several ways. He opines on the ways in which PVC is inferior to Defendant's materials, such as temperature resistance, flexibility, and potential negative health effects. [339-21, at 2–3.] He explains that the literature relied on by Dr. Osswald concerns the wrong product (that is, not plasticized PVC). *Id.* at 4. He also includes a "detailed" section of the report analyzing the literature relied upon by Dr. Osswald, pointing out how those sources show PVC is not superior to Defendant's materials on various metrics or could be offered to support the use of Defendant's materials. *Id.* at 4–6.

***12** Plaintiffs are correct that Edwards agrees in passing with Dr. Osswald on certain characteristics of PVC (such as its availability, its higher short-term tensile strength, and its acceptability as a product). However, Edwards does so to contextualize Dr. Osswald's opinions and explain why these conceded facts are less important, distinguishable, or irrelevant to assessing the defectiveness of the materials used by Defendant. See, *e.g.*, *id.* at 3 ("While *it is true* that plasticized PVC has been around for several decades and has been used in various hose applications, many of these applications were not NSF-61 (National Sanitation Foundation-61) compliant for use with potable water." (emphasis added)). This is standard rebuttal.

Unlike Edwards's original report, his rebuttal report is not *ipse dixit.* Again, Plaintiffs fixate on counting citations, not on whether Edwards provided reasons for his conclusions and those reasons are sufficiently reliable. [10] Plaintiffs overlook the fact that Edwards's purpose is to use the same "handbooks and other literature" that Dr. Osswald cites to rebut his opinions. *Id.* at 5–7. In doing so, Edwards does not simply assert that Dr. Osswald is wrong, but explains why. For example, Edwards includes a page of technical reasons why he believes Defendant's materials "maintain their strength to much higher temperatures" than PVC. *Id.* at 4. His literature critiques similarly explain how, for example, some of Dr. Osswald's sources "have little to do with potable water applications that must be tested for extraction of plasticizers and other chemicals due to long-term exposure" because they relate to only "propane and butane gas, farming applications,

heating oil, gasoline and pharmaceutical applications." *Id.* at 6. Plaintiffs' belief that Edwards should have cited something else *in addition to* the sources cited by Dr. Osswald is not a valid ***Daubert*** challenge, since "[t]he soundness of the factual underpinnings of the expert's analysis and the correctness of the expert's conclusions based on that analysis are factual matters to be determined by the trier of fact." *Smith*, 215 F.3d at 718. Edwards provides an independent analysis of sources relied on by an opposing expert and an explanation as to why those sources undermine the conclusions reached by that expert. Cf. *Amari Co. v. Burgess*, 2012 WL 5389787, at *15 (N.D. Ill. Nov. 2, 2012) ("Rather than independently analyzing the data to provide an alternative conclusion, the experts simply criticize [plaintiff's expert]."). This is not *ipse dixit.* See *Mid-State*, 877 F.2d at 1339; *Zenith*, 395 F.3d at 419. Accordingly, Plaintiffs' motion to exclude Edwards's rebuttal opinions and testimony [390] is denied.

4. Dr. Vijay Gupta

Defendant retained Dr. Vijay Gupta to opine on the existence of design, material, or manufacturing defects in the 1-304 coupling nut used in Defendant's toilet connector and whether creep rupture would occur if the coupling nut was properly installed. [423, at 4.] Dr. Gupta is a Professor of Mechanical and Aerospace Engineering at the University of California Los Angeles, with a Ph.D. in Mechanical Engineering and a M.S. in Structural Engineering. According to his expert report, "At age 31, [he] became one of the youngest Full Professors with tenure in the US, only 5 years after receiving [his] Ph.D. degree." [339-17, ¶ 2.] He has "lectured on applied mechanics, fracture mechanics, materials science, biomechanics, mechanical engineering design, and manufacturing-related courses and topics for over 25 years." *Id.* ¶ 3.

*13 Plaintiffs move to exclude Dr. Gupta's opinions on two grounds. First, they argue that Dr. Gupta "tested the wrong product" because he brought the wrong coupling nut to his deposition. [389, at 2.] Second, they claim that Dr. Gupta's conclusions are unreliable because at his deposition, he testified that one part of his analysis was based on a "back-of-the envelope" calculation. *Id.* The Court takes the second argument first.

i. Dr. Gupta's "Back-Of-The-Envelope" Statement

Plaintiffs argue that Dr. Gupta "conceded the crudeness of his calculations" to generate the "failure analysis data he relied upon in forming his opinions." [389, at 8.] Here is the relevant exchange from Dr. Gupta's deposition:

Q: What was involved in the failure analysis?

A: Well, the first step in the failure analysis is to—for whether or not the hand tightening can result in the failure, would be to look at what levels of torque one can generate using their hand. And that was the first step. Then you estimate what kind of axial force you're going to generate inside the coupling nut assembly by understanding the mechanism by which the force is generated. And then you look at what is the maximum stress you're going to generate inside the body of the nut. And then you compare that with some failure limits of the material to come to a conclusion whether or not the hand tightening torques can result in the failure of the material or not.

Q: And did you do all that in connection with your assignment for **Fluidmaster**?

A: I did.

Q: Is that included—are the results of your failure analysis included in your report which you filed in this case?

A: Yes, it is.

Q: Were there any other written documents created as a result of your failure analysis?

A: No.

Q: Was there data generated?

A: No. I did a back-of-the-envelope calculation, and it is something you can just do it just using a calculator. And those numbers are all within less than 800 PSI as the highest stress levels which you will generate inside the body of the coupling nut. And so there was no calculations I provided on a piece of paper, but that is something I can do just on—

Q: The back of an envelope?

A: —the back of an envelope.

Q: Okay. How much time have you spent on you assignment for **Fluidmaster** since you were retained?

A: I have not added all the hours, but it is definitely well beyond 200 hours.

[389-4, at 26:8–27:23.] Plaintiffs did not seek to clarify what Dr. Gupta meant by the phrase "back-of-the-envelope," content to rest their entire ***Daubert*** argument on any potential ambiguity that could be read into that phrase.

The Court is not persuaded. Dr. Gupta testified that the results from his failure analysis are in his report, which is filled with charts, figures, formulas, calculations, and cited sources. Plaintiffs do not point to any specific analysis in his report that is "crude" or "off-the-cuff" [437, at 11] because his detailed, complicated calculations unquestionably are not. As the context from deposition questions shows, Dr. Gupta's answers are about written documents and data that are *not* in his report. To claim, as Plaintiffs do, that Dr. Gupta "conceded he generated *no* data or even a single document" (*id.* at 10) when he spent "well beyond 200 hours" preparing a fifty-page report is a patent misreading of his testimony.

Here, Dr. Gupta referenced one calculation he made that is not in his report, which he views as "something you can just do * * * using a calculator." [389-4, at 27:10–13.] The fact that a Mechanical and Aerospace Engineering Professor found the calculation of pressure per square inch simple enough to do on a calculator (or even the back of an envelope) does not—without significantly more—suggest his opinions are "the antithesis of scientifically reliable expert opinion testimony." [389, at 9.] Plaintiffs did not ask him to perform those calculations or otherwise challenge his PSI calculation. They do not identify an alternative, purportedly more rigorous method for calculating PSI that they claim should have been employed here. Nor do they explain precisely how calculating PSI on a calculator, even assuming it was a rough calculation, fatally undermines the reliability of his conclusions. Plaintiffs simply seize on Dr. Gupta's word choice—which they opted not to explore further at his deposition—and then proclaim his opinions are entirely unreliable. [11] Such a ***Daubert*** challenge lacks merit.

ii. Dr. Gupta's Deposition Mistake and Subsequent Declaration

14** Plaintiffs' first ***Daubert argument appears to be mainly a factual dispute. Dr. Gupta was asked to bring to his deposition the physical materials that he tested in connection with his June 29, 2016 supplemental expert report. [437, at 4.] At the deposition, he agreed that the materials he brought were representative examples of what he used in his experiments. [373-3, at 76:10–17.] The hose that Dr. Gupta brought to the deposition, however, has a "Made in China" label. *Id.* at 85:3–6, 103:18–23. The coupling nut that is relevant to this litigation —the 1-304 coupling nut—was not made in China. In 2010, Defendant started outsourcing production of its coupling nut to Coastal, a manufacturer in China, which produced a "two-winged design comprising acetal" that looks different than the 1-304 coupling nut. [389, at 5.] Plaintiffs conducted the remainder of Dr. Gupta's deposition apparently thinking that Dr. Gupta had tested the wrong coupling nut, making the opinions in his 2016 supplemental report irrelevant.

Following the deposition, Defendant did not revise Dr. Gupta's report or otherwise indicate there was any error in Dr. Gupta's testimony. Dr. Gupta submitted an errata sheet making only two minor changes to his deposition testimony, but neither correction related to the materials brought to the deposition. As a result, Plaintiffs filed their ***Daubert*** motion, leading off with an argument challenging this seemingly significant error in Dr. Gupta's analysis.

Defendant responds that Dr. Gupta "accidentally caused" "confusion" at his deposition by bringing the wrong product with him. [423, at 7 n.3.] Defendant attaches a declaration from Dr. Gupta dated September 9, 2016, in which he states, "I checked my laboratory records and files and confirm[ed] that I inadvertently brought the wrong hose body to the deposition." [423-1, ¶ 4.] The hose he brought to the deposition "belongs to a Coastal toilet connector that [he] had taken apart and examined at a different time and which was not the subject of [his] supplemental expert report." *Id.* Dr. Gupta reiterated that "[t]he tests [he] conducted, and which are the subject of [his] 2016 Supplemental Expert Rebuttal Report, were performed only on **Fluidmaster** 1-304 coupling nuts, the acetal coupling nut that is at issue in this case." *Id.* ¶ 5. His declaration includes photographs of the 1-304 coupling

nut and the Coastal coupling nut and states that a "visual inspection" shows that the two products are "readily distinguishable." *Id.* ¶ 7. According to Defendant, then, "the evidence confirms that the correct and representative product was analyzed and tested" by Dr. Gupta, and Plaintiffs' **Daubert** arguments must fail. [423, at 11–12.]

Plaintiffs cry foul. They claim the fact that Dr. Gupta "mixed-up the hoses and coupling nuts" means he "did not maintain the parts he tested in any particular manner" and it is impossible to know which products, in fact, Dr. Gupta tested. [437, at 8–9.] They also argue that Dr. Gupta's failure to "maintain chain of custody" and "sloppy" lab practices show that all of his opinions are unreliable. *Id.* at 9. Plaintiffs note that they "previously requested exemplar plastic nuts from [Defendant] for their own testing" but were informed none existed, which means that either Dr. Gupta tested the wrong product or Defendant violated its discovery obligations. *Id.* at 6–7. Plaintiffs also filed a motion to strike Dr. Gupta's new declaration, claiming it is a new untimely "expert report" submitted in violation of Federal Rule of Civil Procedure 26.[12] [See 450.] As a remedy for this alleged misconduct, Plaintiffs seek exclusion of Dr. Gupta's declaration and his supplemental report or, alternatively, discovery of all documents referenced in his new report, all correspondence between Defendant's counsel and Dr. Gupta, another deposition of Dr. Gupta, and for Defendant to pay the fees and costs for Dr. Gupta's original deposition, any additional document discovery, and the ***Daubert*** motion. *Id.* at 16.

15** Defendant offers several responses. First, it points out two important facts that it neglected to emphasize in its ***Daubert response brief: (1) Dr. Gupta "clearly brought" the correct 1-304 *coupling nut* to the deposition, just not the correct *hose* [460, at 6–7]; and (2) "Dr. Gupta provided several videos and photos of the testing on the **Fluidmaster** 1-304 coupling nuts (clearly without 'wings'), which were produced to Plaintiffs prior to Dr. Gupta's deposition" (*id.* at 7). Thus, Dr. Gupta's declaration confirming that he tested the correct coupling nut was not a "new" expert opinion. Second, Defendant argues that parties may submit declarations attached to ***Daubert*** response briefs that offer limited responses to points raised by the opposing party's motion (or, alternatively, such declarations are permissible supplementation under Federal Rule of Civil Procedure 26(e)). *Id.* at 9–10, 12–13. Third, Defendant claims that there is no prejudice or unfair surprise to Plaintiffs and no bad faith by Defendant, and thus additional discovery and striking the declaration are unwarranted.

The Court finds this dispute to be significantly overstated. If Dr. Gupta brought the correct coupling nut to the deposition and Defendant disclosed video and photos of him testing the correct coupling nut, then that should be sufficient to resolve whether Dr. Gupta, in fact, tested the correct coupling nut. Plaintiffs do not contend that these videos and photos [see 464, at 2–5] show Dr. Gupta tested the Coastal coupling nut. While Plaintiffs assert in their reply that Defendant does not present "evidence" that Dr. Gupta brought the correct coupling nut to the deposition [466, at 6], this fact should be *easily* verifiable. Either the plastic bag of "exemplars" from the deposition—which apparently was not marked as a deposition exhibit—has the 1-304 coupling nut in it or it does not. If Plaintiffs do not have the bag, they could look at the video of Dr. Gupta's deposition [437, at 4] or talk with someone who attended the deposition to confirm this fact. The Court finds it inconceivable given the volume of paper that has been filed on this issue that, if Plaintiffs were correct and Defendant had misrepresented to the Court that Dr. Gupta brought the 1-304 coupling to his deposition, Plaintiffs would not present *something*—a picture of the bag, a close-up screenshot from the deposition video, a declaration from a deposition attendee—to show that this was a lie. The fact that Plaintiffs do not is telling; it suggests that there is no genuine dispute over the fact that Dr. Gupta brought the correct coupling nut to his deposition.

In other words, Plaintiffs' ***Daubert*** challenge seeks to extrapolate from the fact that Dr. Gupta admittedly and mistakenly brought the wrong hose to the deposition to mean that Dr. Gupta tested the wrong coupling nut, his lab is in disarray, and all of his opinions are unreliable. Other evidence (*e.g.*, the photographs and video contemporaneous with his testing, the references to the 1-304 coupling nut in his report, the 1-304 coupling nut he brought to the deposition, and his declaration) refutes those inferences. Except for this all-but immaterial mistake, Plaintiffs do not otherwise seriously challenge the reliability of Dr. Gupta's methodology. They cite no authority holding that Dr. Gupta's opinions are unreliable unless he performed a "material analysis" on Defendant's coupling nut to verify it was "the same as the 1-304 coupling nuts at issue." [389, at 6.] And Rule 702 does not

require experts to second guess whether the attorneys who retained them have supplied them with relevant materials to analyze absent some reason to believe these materials are incorrect. See *Tuf*, 223 F.3d at 591; *Walker*, 208 F.3d at 588. If Plaintiffs wanted to challenge Dr. Gupta's "chain of custody" or preservation of evidence practices, they easily could have done so during his deposition. They did not. Plaintiffs cannot layer speculation upon speculation —*e.g.*, this concession "raises more questions than it answers" [437, at 9]—to successfully challenge an expert's reliability, and doing so falls well short of persuading this Court to strike Dr. Gupta's entire 2016 supplemental report.

16** Nor does Dr. Gupta's short September 2016 declaration clarifying factual issues constitute a "new" expert report that violates the expert disclosure rules. Supplemental declarations from experts that merely respond to specific ***Daubert criticisms or "harmlessly repeat information provided in the earlier reports" do not violate Rule 26. *Allgood v. Gen. Motors Corp.*, 2006 WL 2669337, at *5 (S.D. Ind. Sept. 18, 2006). Such clarifying declarations from experts are a routine part of ***Daubert*** motions.[13] Here, Dr. Gupta responds to factual issues raised at his deposition that serve as the basis for Plaintiffs' motion—namely, whether he tested the coupling nut associated with the hose he brought to the deposition. Such clarification of a factual mistake does not trigger mandatory sanctions under Federal Rule of Civil Procedure 37.

But this entire course of events was avoidable. After reviewing Plaintiffs' ***Daubert*** motion, Defendant should have contacted Plaintiffs, explained the mistake, and offered to have Dr. Gupta sit for limited deposition on this issue. Plaintiffs should have agreed and withdrawn their ***Daubert*** motion, enabling them to reevaluate whether to raise a reliability challenge based on Dr. Gupta's additional deposition testimony. Instead, the parties have wasted their time on a declaration from Dr. Gupta, a ***Daubert*** response and reply, and a full round of motion to strike briefing debating the range of possible sanctions.

The Court will order what should have been obvious and agreed upon by everyone: Dr. Gupta must sit for another deposition. This deposition will be limited to 60 minutes and the deposition's topic is limited to issues raised by Dr. Gupta's mistake in bringing the wrong hose to his August 5, 2016 deposition, including his laboratory protocols and how Dr. Gupta confirmed from his laboratory files that he tested the correct coupling nut. In advance of that deposition, Dr. Gupta will be required to produce all documents that he relied on to determine that he tested the correct coupling nut (subject to any applicable privilege or protection). Defendant must produce to Plaintiffs the 1-304 coupling nut(s) that Dr. Gupta tested. No fees and costs will be awarded.[14]

Before moving on, the Court addresses one issue raised mainly by Plaintiffs' motion to strike. Dr. Gupta's declaration tacks on a response to another issue that arose at his deposition: whether he reviewed a rebuttal report from Plaintiffs' expert, Dr. Michael Bak. Dr. Gupta stated that following his deposition, he "reviewed [his] files," found a copy of Dr. Bak's report, and confirmed that he had previously reviewed it. [408, ¶ 9.] He stated, "Nothing in the Bak Rebuttal Report changes my opinions rendered in this case," and his previously submitted report "rebuts the points made in the Bak Rebuttal report." *Id.* ¶¶ 9–10.

***17** Plaintiffs claim prejudice, arguing that Dr. Gupta completely changed his deposition testimony in his declaration. Here is how Plaintiffs present Dr. Gupta's testimony in their brief: Dr. Gupta "was questioned at his 2016 deposition and *confirmed he did not consider* Dr. Bak's report: Q: So you didn't consider that [October 2014 report] in preparing your supplemental report, then? A: That's correct." [437, at 7–8 (emphasis added).]

Here is Dr. Gupta's actual testimony:

> Q: And with respect to the 2014 expert report of Michael Bak, is that the September 2014 expert report which would be the expert report that you had before you prepared your first report?
>
> A: Yes.
>
> Q: Okay. Are you aware that there's a second report by Dr. Bak?
>
> A: These are—and I may have missed that report. I remember there was a report submitted toward the end of—after my deposition, and so I don't have a good recollection whether I saw it or not. Yeah.
>
> Q: So you didn't consider that in preparing your supplemental report, then?
>
> A: That's correct.

Q: Okay. Do you have—but—do you have any information or—let me start over. Do you have any recollection about what Dr. Bak addressed in the second report?

A: I have a—if I had read it, then I will—I don't have a recollection of that.

Q: And I will tell you that the report was filed in October 2014—

A: Okay.

Q: —and it was subsequent to your deposition. anD it is entitled, 'thE Rebuttal Report of Michael Bak, Ph.D.'

A: Okay.

Q: But you didn't consider it in connection with your supplemental report, correct?

A: If I read that report at some point and—because of all the opinions I've written over here are basically based on all information I have, you know, remembered from my last deposition and everything I've considered in this case.

Q: Okay. But it wasn't something you've told your lawyers to put on this list, correct?

A: This is correct. So if I read it—because there is a lot of—so even if I read it and there were certain opinions he may have expressed and if those opinions did not change my opinion, then I basically thought there was no reason to bring that in this particular list here.

[437-3, at 54:14–56:8.]

The Court should not have to fact-check whether the parties' representations are accurate. Only by ignoring all of the surrounding testimony could Plaintiffs represent that Dr. Gupta "stated clearly and unequivocally that he did not consider Bak's rebuttal report." [466, at 7.] Dr. Gupta testified repeatedly that he could not recall whether he looked at this report. He indicated that if he had and it did not change his opinions, he would not have put it on his reliance list. In his declaration, Dr. Gupta stated that he had, in fact, received the report and it did not change his opinions. Dr. Gupta's declaration is not a "new" opinion—after all, he says his opinions are unchanged—or even inconsistent with his deposition testimony. Plaintiffs opted not to ask further questions about Dr. Bak's rebuttal report despite Dr. Gupta's uncertainty about whether he had read it. [See 437-3, at 55:25–56:12.] Plaintiffs cannot manufacture "prejudice" by offering snippets of testimony that misrepresent the testimony's substance as a whole. Questions about Dr. Bak's rebuttal report are off-limits at Dr. Gupta's next deposition.

Plaintiffs' motion to exclude Dr. Gupta's opinions and testimony [387] is denied, and Plaintiffs' motion to strike Dr. Gupta's September 9, 2016 declaration [446] is denied in part and granted in part.

5. Dr. Brian Palmer

***18** Defendant retained Dr. Brian Palmer, a Vice President of Charles River Associates with a Ph.D. in economics from the Massachusetts Institute of Technology, to "analyze **Fluidmaster's** claims data and other related information to assess the failure rate of **Fluidmaster's** 1-304 coupling nut used in connection with toilet connectors." [383-1, ¶ 1.] Plaintiffs raise a host of methodological challenges to Dr. Palmer's opinions, arguing that these flaws collectively undermine the reliability and relevance of Dr. Palmer's conclusions.

To start, Plaintiffs explain that a "failure rate" (*i.e.*, the number of products that fail divided by total sales) is not the same as a "claims rate" (*i.e.*, the number of claims filed with a company about a product's failure divided by the total sales). At his deposition, Dr. Palmer agreed that these are "two different things"—the claims rate will almost always be smaller than the failure rate. [383-3, at 17:7–17, 21:2–5.] Nevertheless, Defendant euphemistically characterizes Dr. Palmer's claims rate opinion as the "known failure rate" and insists that a claims rate is the "best proxy" for a failure rate. [411, at 5, 9.] Defendant offers no statistical, economic, scientific, or otherwise reliable basis to support that claim. Neither could Dr. Palmer at his deposition. "[A]n inference or assertion must be derived by the scientific method." ***Daubert***, 509 U.S. at 590. "A supremely qualified expert cannot waltz into the courtroom and render opinions unless those opinions are based upon some recognized scientific method and are reliable and relevant." *Clark v. Takata Corp.*, 192 F.3d 750, 759 n.5 (7th Cir. 1999). Defendant is likely

correct that, "statistically speaking, there would need to be drastically more failures in the field than reported for any difference in the failure rate and claims rate" to matter. [411, at 10.] But that does not mean Dr. Palmer can simply assert these measures are the same without a reasoned basis for doing so. Dr. Palmer has not measured and cannot opine on the "failure rate" of Defendant's product.

Next, Plaintiffs challenge whether Dr. Palmer's "claims rate" methodology is reliable, attacking both the calculation of total sales (the denominator) and total claims (the numerator). With respect to total sales, Plaintiffs identify three alleged errors: (1) Dr. Palmer used *manufacturing* data, not sales data, to estimate total sales—meaning that he assumed that every manufactured product was sold and installed; (2) Dr. Palmer included roughly 4.6 million toilet connectors with Coastal coupling nuts, inflating his total sales of the 1-304 coupling nut by 14%; and (3) to determine the amount of United States sales, Dr. Palmer used the ratio of U.S. to non-U.S. sales in 2010 and then applied that same ratio for every year between 1993 to 2009. With respect to total claims, Dr. Palmer eliminated 22% of coupling nut claims and 13% of hose burst claims—without any decrease in total sales—because of missing data associated with those claims. Thus, Plaintiffs claim that Dr. Palmer manipulated his methodology to deflate his numerator and inflate his denominator, creating an artificially and unreliably low "claims rate."

In an effort to place Plaintiffs' criticisms in context, Defendant attaches a declaration from Dr. Palmer to its response brief. [See 411-1.] Dr. Palmer's declaration states that even if he accepted all of Plaintiffs criticisms, his analysis would be materially unchanged—mainly because the size of the denominator (total sales) is so large that it dwarfs the impact of these changes. Dr. Palmer's report indicates that the claims rate for plastic nut claims is 0.0050% and the rate for hose bursts is 0.0047%. [339-22, ¶ 4.] In other words, 99.995% and 99.9953% of products manufactured did not result in a filed claim. According to Dr. Palmer, even if he (1) assumed that 40% of the manufactured water connectors were never sold; (2) removed all of the Coastal coupling nuts claims and sales; and (3) added back in the previously excluded 22% of coupling nut claims and 13% of hose burst claims, it would only change his analysis by roughly .004% for plastic nut claims and .003% for hose burst claims. [411-1, ¶ 5.] Thus, even accepting Plaintiffs' criticisms, 99.99% of Defendant's products did not result in a filed claim.

***19** Defendant also attempts to explain why Dr. Palmer's methodological choices are reliable. Defendant argues that Dr. Palmer used "the best data available" to reach his conclusion because this is the data that Defendant uses in the ordinary course of business. [411, at 11–12.] Dr. Palmer, in fact, used actual sales data for 2003 through 2015 and only used manufacturing data for 1993 to 2002. Regardless, "it simply defies reason and the company's profit motive to believe that **Fluidmaster** would manufacture goods and not sell them." *Id.* at 15. With respect to the Coastal coupling nuts, Defendant takes a position inconsistent with its argument concerning Dr. Gupta, arguing that Coastal coupling nut sales are properly counted because that product is part of the class definition. *Id.* at 7. Dr. Palmer also explained why he excluded certain claims, including that they fell outside the relevant time period or the basis for the claim was irrelevant (*e.g.*, failures caused by "abuse" or "electrical"). [15]

The Court largely agrees with Plaintiffs' criticisms of Dr. Palmer's calculations. It is highly improbable that *every* product that Defendant manufactured was sold, and Defendant offers no reason to believe this occurred here. If the 2003 through 2015 sales data was available, Defendant could have compared those figures with the manufacturing data from those years to justify the use of manufacturing data (or some appropriate ratio) for prior years. Instead, Defendant simply assumes they are same. The fact that a party asserts data is the "best available" does not mean, absent more, it is sufficiently reliable for any purpose for which it is used. Likewise, Defendant cannot seriously contend that the Coastal coupling nuts are part of this case given the lengths it went through to avoid exclusion of Dr. Gupta's opinions when he was thought to have tested the Coastal coupling nut (rather than the 1-304 coupling nut). Moreover, Defendant never attempts to justify why it was reliable to use the 2010 domestic to foreign sales ratio across the entire time period of sales at issue.

At the end of the day, however, these criticisms do not meaningfully impact whether Dr. Palmer's conclusions are admissible. ***Daubert*** demands reliability, not perfection. "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." ***Daubert***, 509 U.S. at 596. As Dr. Palmer's declaration shows, Plaintiffs' identified errors, if credited, cumulatively result in a less than .005% change in the estimated claims rate.[16] The Court does not agree that errors of this scale render his methodology fatally unreliable under Rule 702. Fluctuations at the outer margins of the claims rate do not obscure the point of Dr. Palmer's opinions: well over 99% of Defendant's products sold during the relevant time period did not result in a filed claim. Plaintiffs do not undermine the reliability of *that* conclusion (which, taking a step back, is really the level of generality that matters), and thus attacks on the precise claims rate (99.995% versus 99.991%) go to weight, not admissibility. *Stutzman v. CRST, Inc.*, 997 F.2d 291, 296 (7th Cir. 1993) ("We adhere to the rule that an expert's lack of absolute certainty goes to the weight of his testimony, not to its admissibility.").

***20** Finally, Plaintiffs also seek to exclude Dr. Palmer's opinions about the percentage of claims that were filed within Defendant's 10-year warranty period. To determine the start date of the warranty period, Dr. Palmer relied on information supplied by one of Defendant's employees, a senior manager of Global Risk Management. That employee indicated that he "believes that the connectors are generally sold * * * within a month or two of the manufacturing dates." [339-22, at 6 n.5.] Based on that information, Dr. Palmer estimated the commencement of the warranty period as within 1 month, 6 months, and 12 months from the date of manufacture. *Id.* Plaintiffs argue that calculations resting on an employee's "belief" are too speculative because there is no "scientific basis for this analysis." [435, at 10.]

These arguments miss the mark. "[E]xperts may rely on data and other information supplied by third parties." *Southwire Co. v. J.P. Morgan Chase & Co.*, 528 F. Supp. 2d 908, 934 (W.D. Wis. 2007). This is true "even if the data were prepared for litigation by an interested party." *Id.*; see also *DSU Med. Corp. v. JMS Co.*, 296 F. Supp. 2d 1140, 1148 (N.D. Cal. 2003) ("[W]hen the parties' experts rely on conflicting sets of facts, an expert may testify on his party's version of the disputed facts. The proper way for a party to challenge an expert in such a situation, reasoned the court, is through cross-examination of the expert."). Here, Dr. Palmer's warranty opinions are based on assumptions about when the warranty period began. "It is not improper for an expert witness to assume as true some fact that will be presented during the trial even if that fact is hotly disputed. Indeed, such happens all the time." *Wilson v. Gen. Motors Acceptance Corp. (GMAC)*, 2008 WL 2593792, at *2 (E.D. Tenn. Apr. 3, 2008). "As a general rule, questions relating to the bases and sources of an expert's opinion affect only the weight to be assigned that opinion rather than its admissibility." *Loeffel Steel Prod., Inc. v. Delta Brands, Inc.*, 372 F. Supp. 2d 1104, 1119 (N.D. Ill. 2005); accord *Smith*, 215 F.3d at 718 ("The soundness of the factual underpinnings of the expert's analysis and the correctness of the expert's conclusions based on that analysis are factual matters to be determined by the trier of fact."). Plaintiffs can attempt to undermine the persuasiveness of Dr. Palmer's conclusions by showing these assumptions are erroneous. But that does not render the methodology accepting those assumptions unreliable. ***In re*** *Se. Milk Antitrust Litig.*, 2010 WL 8228838, at *2 (E.D. Tenn. Dec. 8, 2010) ("[P]laintiffs are free to show that [expert] is wrong and his data flawed. This is not, however, a ***Daubert*** issue."); *Smith v. Bankers Life & Cas Co.*, 2008 WL 2845081, at *6 (S.D. Iowa Mar. 3, 2008) ("Indeed, Defendants' only argument is that Plaintiff will be unable to prove at trial the premise on which [expert's] report is based[.] * * * That question, however, is a factual one for the jury to decide and, simply put, does not bear on the methodology employed by [expert] in reaching his conclusions or on the reliability of his opinions and conclusions.").

Plaintiffs' motion to exclude Dr. Palmer's opinions and testimony [381; 382] is denied in part and granted in part, and Plaintiffs' motion to strike Dr. Palmer's declaration [446] is denied.

B. Defendant's *Daubert* Motions

1. Plaintiffs' "Technical" Experts

Defendant filed an omnibus motion to exclude Plaintiffs' five "technical" experts: Dr. Michael Bak, Dr. David Kazmer, Walter J. Fallows, Dr. Timothy Osswald, and Dr. David Pope. These experts opine on the various ways that Defendant's coupling nuts and hoses were defectively designed. Defendant raise one challenge common to all five experts and several others specific to each expert. The Court starts with the common ***Daubert*** argument.

i. Consideration of the "Failure Rate"

***21** Defendant argues that all five experts' defectiveness opinions are "rendered unreasonable by the directly contradicting infinitesimal failure rate." [337-1, at 9.] According to Defendant, the "failure rate" is an "indisputable record fact[ ]" refuting any conclusion that its product was defective and these experts' failure to account for the "failure rate" in their opinions "amounts to 'cherry-picking' facts which fails to satisfy the scientific method." *Id.* at 10. Plaintiffs argue (again) that there is no evidence of a failure rate and the claims rate is "irrelevant and unreliable," spending roughly 20 percent of their response brief repeating the same arguments from their motion to exclude Dr. Palmer. [See 375, at 8–10.]

As explained above, the Court agrees that there are no "indisputable" record facts establishing a failure rate. Defendant identifies a claims rate, not a failure rate. Moreover, Defendant never explains how a claims rate is directly germane to the reliability of an opinion on, for example, how stresses impact the design and materials comprising Defendant's connectors. Said differently, a claims rate does not "contradict" whether the product's design causes sufficient stress to "exceed the creep rupture limits." *Id.* at 3. It is simply evidence that few claims were reported. The kind of impermissible data "cherry picking" in the cases that Defendant cites involve experts who arbitrarily pick and choose among the same kind of scientific data when formulating their opinions.[17] Nor is there any obvious inconsistency between a defectively designed product and a low claims rate: a defective design could make the possibility of catastrophic failure significantly more likely without either triggering an actual failure or the filing of a claim. Defendant is certainly free to argue that the claims rate is important evidence of non-defectiveness, but a low claims rate is not a silver bullet that renders any expert who concludes a product was defective unreliable and unreasonable under Rule 702, and Defendant offers no authority to the contrary.

ii. Dr. Michael Bak, Ph.D.

Plaintiffs retained Dr. Bak to conduct a finite element analysis (a computer-based model to evaluate how a product performs under various conditions) to opine on how Defendant's coupling nut performs during its installation and over its life cycle. Dr. Bak concludes that a particular feature of the coupling nut's design causes high stress concentration that leads to creep rupture. He also concludes that stress in a coupling nut can result in rupture based on hand tightening alone.

Defendant challenges these opinions in three ways. First, Defendant claims that visible evidence of tool marks on the coupling nuts means they were installed with a tool, which contradicts and refutes Dr. Bak's conclusion that "simple hand tightening" can cause failure. [337-1, at 11.] The Court does not see how these are mutually exclusive. Dr. Bak's conclusion that the lesser amount of stress from hand tightening can cause failure does not preclude the possibility that even greater stress from using a tool would also cause failure. Even accepting that Plaintiffs' coupling nuts reveal evidence of tool marks, this does not undermine the reliability of a computer model showing that significantly less stress would still cause Defendant's product to fail.

***22** Second, Defendant claims that Dr. Bak's model is "based on incorrect parameters" that inflate the amount of stress on the coupling nut. *Id.* at 11–12. In particular, Defendant states that Dr. Bak ignores significant stress relaxation in the cone washer and coupling nut and overestimates the pre-load stress by using the wrong friction coefficient values. *Id.* at 12. Defendant's sole support for these critiques comes from Dr. Gupta's expert report. *Id.* In response, Plaintiffs point to Dr. Bak's October 2014 rebuttal expert report, which responds to Dr. Gupta's criticisms [see 375-3]. In particular, Dr. Bak explains (1) how his model accounts for stress relaxation in the coupling nut, (2) why Dr. Gupta's cone washer stress relaxation estimate is "illogical" and inconsistent with "hyperelastic material law," and (3) how he researched friction coefficients of acetal materials. *Id.* Moreover, Dr. Bak's report cites the material sciences and engineering textbooks that served as the foundation of his analysis. In reply, Defendant argues that Dr. Bak ignores Dr. Gupta's 2016 supplemental report, which allegedly refutes Dr. Bak's findings.

"In essence, the defendants are asking the [C]ourt to determine which [party's stress relaxation] model is *most* accurate, which is ultimately a merits decision." ***In re Ethylene Propylene Diene Monomer (EPDM) Antitrust Litig.***, 256 F.R.D. 82, 100 (D. Conn. 2009). The Court will not accept—especially at the class certification stage

—this invitation to resolve a battle between Dr. Gupta and Dr. Bak over how to properly calculate and model coupling nut stress relaxation. See ***In re*** *Ready-Mixed Concrete Antitrust Litig.*, 261 F.R.D. 154, 170–71 (S.D. Ind. 2009); ***In re*** *Sulfuric Acid Antitrust Litig.*, 2007 WL 898600, at *8 (N.D. Ill. Mar. 21, 2007) (holding that class certification is not "the right time to engage in a 'battle of experts' "). "In a case of dueling experts * * * it is left to the trier of fact * * * to decide how to weigh the competing expert testimony." *Wipf v. Kowalski*, 519 F.3d 380, 385 (7th Cir. 2008). Defendant's arguments about the correctness of Dr. Bak's "parameters" are really about the correctness of his conclusions, not the reliability of his methodology. *Manpower, Inc. v. Ins. Co. of Penn.*, 732 F.3d 796, 808 (7th Cir. 2013) ("[A]rguments about how the selection of data inputs affect the merits of the conclusions produced by an accepted methodology should normally be left to the jury."); ***In re*** *Zimmer Nexgen Knee Implant Prod. Liab. Litig.*, 2015 WL 3669933, at *25 (N.D. Ill. June 12, 2015) ("Rule 702 does not permit 'the district court to choose between * * * two [competing] studies at the gatekeeping stage' or evaluate the quality of an expert's data, inputs, or conclusions." (citation omitted)). But this Court's inquiry under ***Daubert*** is "solely on principles and methodology, not on the conclusions they generate." *Chapman v. Maytag Corp.*, 297 F.3d 682, 687 (7th Cir. 2002).

Third, Defendant argues that Dr. Bak erroneously "selects a single factor, the notch sensitivity of acetal" in reaching his conclusions about stress concentration. [337-1, at 12.] Defendant claims that Dr. Bak should have also considered other factors, such as "the absolute value of the impact strength at a given root radius," again citing Dr. Gupta's expert report for support. *Id.* "Our case law has recognized that experts in various fields may rely properly on a wide variety of sources and may employ a similarly wide choice of methodologies in developing an expert opinion." *Cooper v. Carl A. Nelson & Co.*, 211 F.3d 1008, 1020 (7th Cir. 2000). Defendant makes no serious attempt to show that any reliable methodology *must* include these factors, let alone articulate how Dr. Bak's methodology is unreliable because he did not consider these factors. Simply providing a "laundry list of factors" allegedly missed by an expert does not, by itself, suggest that the expert's methodology is unreliable. *Tilstra v. Bou-Matic, LLC*, 2014 WL 4662483, at *7 (W.D. Wis. Sept. 19, 2014) (holding that expert's factors "all affect the weight" of the expert's opinion, not the reliability of the "method to calculate the result he reached"). Absent a significant link to the reliability of the expert's methodology, this is plainly a matter for cross-examination, not a basis for exclusion.[18] ***Daubert***, 509 U.S. at 596; *Phillips v. Raymond Corp.*, 364 F. Supp. 2d 730, 745 (N.D. Ill. 2005) ("[Plaintiff's] quarrels with [expert's] inclusion or rejection of certain factors or calculations (such as grip strength), implicate his conclusions and are thus properly left for exploration through cross-examination.").

iii. Dr. David Kazmer, Ph.D.

***23** Plaintiffs retained Dr. Kazmer to opine on how the coupling nut's design affects its long-term performance. Dr. Kazmer concludes that (1) the coupling nut has a sharp corner that acts as a stress concentrator; (2) the coupling nut was not designed for long-term creep, and (3) Defendant used inferior materials to make its coupling nut.

In an attempt to exclude these three opinions, Defendant argues that Dr. Kazmer "cherry-picks" facts and ignores "conflicting data." [337-1, at 14.] In connection with the first opinion, Defendant argues that Dr. Kazmer cited an irrelevant cantilever beam article in his report, used the wrong design guideline, and ignored that Defendant's thread radius is already the widest allowed by industry standards. Defendant never explains why Dr. Kazmer's mere citation to a cantilever article as an "example" of stress concentration in plastics product design renders his opinion inadmissible. See *Loeffel Steel*, 372 F. Supp. 2d at 1119 (noting that questions about the "bases and sources" of an opinion go only to weight, not admissibility). In addition, Defendant does not indicate where in Dr. Kazmer's report he used the wrong design guideline (or how this impacted his opinions) or opines on the thread radius. Defendant's only "support" for these two critiques is a citation to three paragraphs of Meek's Supplemental Report that actually relates to Fallows's opinions.

For the second opinion, Defendant argues that Dr. Kazmer failed to consider whether other factors like age or exposure to corrosive chemicals could cause failure and did not take into account the stress relaxation of the cone washer. As with Defendant's challenge to Dr. Bak's opinions, Defendant does not explain how failure to consider these factors shows Dr. Kazmer's opinions are unreliable. See ***Daubert***, 509 U.S. at 596; *Cooper*,

211 F.3d at 1020; *Tilstra*, 2014 WL 4662483, at *7. Nor does Defendant explain how Dr. Kazmer's opinions that Defendant failed to design for long-term creep is inconsistent with the possibility that other factors might *also* cause failure.

For the third opinion, Defendant argues that Dr. Kazmer considered the wrong type of acetal material—Celcon M90—which Defendant used for only a year in 1989. Defendant submits a declaration from one of its managers attesting to this point. [339-23.] According to Defendant, not only is there "nothing wrong with using Celcon M90" but its limited use "far outside any applicable warranty period" means "analysis of Celcon M90 has limited, if any, relevance." [337-1, at 9.] None of these are meritorious ***Daubert*** arguments. The fact that an expert's opinion has "limited" relevance does not mean it is irrelevant. Nor does simply asserting there is "nothing wrong" with the materials Defendant used demonstrate that an expert's methodology arriving at a contrary conclusion is flawed. *Paul v. Holland Am. Line, Inc.*, 2006 WL 3761368, at *3 (W.D. Wash. Dec. 21, 2006) ("[A]n opinion is not inadmissible simply because defendants disagree with its conclusion."). Finally, Plaintiffs argue that the documents attached to Defendant's employee's declaration show that Defendant switched *to* Celcon M90 in 1989 and used it until 1995. This kind of factual dispute bearing on how many putative class members would have received a coupling nut made of Celcon M90 goes to the weight of Dr. Kazmer's opinions, not their reliability under ***Daubert***. *Smith*, 215 F.3d at 718; *Loeffel Steel*, 372 F. Supp. 2d at 1119.

***24** In addition, Defendant seeks to exclude two of Dr. Kazmer's "ancillary non-technical opinions" based on his lack of qualifications. Dr. Kazmer states in his report that there were a "vast array of product failures in the field." [339-3, ¶ 21.] When asked about this line at his deposition, Dr. Kazmer responded that, based on his experience, "for every failure that's reported, there is typically several that are not. So if there is 3,000 reported failures, it could be much higher than that." [339, at 24:1–24.] Dr. Kazmer's opinion is essentially the flipside of Dr. Palmer's opinion that the claims rate and failure rate are the same. Neither expert's conclusion is supported by anything other than speculation. *Clark*, 192 F.3d at 759 n.5. Dr. Kazmer's lack of "qualifications" as a "consumer behavior" expert is really another way of saying that he has no basis to speculate about the vastness of Defendant's product failures in the field. Merely prefacing a deposition answer with the phrase "based on my experience" does not save a completely unsupported opinion from exclusion. *Zenith*, 395 F.3d at 419.

Finally, Defendant seeks to exclude Dr. Kazmer's opinion that Defendant's "decision to develop and outsource a new design indicates that the previous design was inadequate." [339-3, ¶ 52.] Plaintiffs make no attempt to save this opinion, and the Court agrees that it is improper. Dr. Kazmer's engineering background gives him no expert insight into the motivations, intent, and state of mind of a corporation. ***In re Rezulin Prod. Liab. Litig.***, 309 F. Supp. 2d 531, 545 (S.D.N.Y. 2004); *Klaczak v. Consol. Med. Transp. Inc.*, 2005 WL 1564981, at *8 (N.D. Ill. May 26, 2005). The jury will not be aided by Plaintiffs' expert speculating about why Defendant made design changes and outsourcing decisions. Fed. R. Evid. 702(a).

iv. Walter J. Fallows

Plaintiffs retained Fallows, a Mechanical Engineer with more than 35 years of experience, to test whether Defendant's coupling nut would fail from creep rupture by conducting a visual examination, photo microscopy, and scanning electron microscopy analysis of the coupling nuts. Fallows concludes that the coupling nuts consistently fail due to creep rupture. He then goes somewhat further and opines, based on Dr. Bak's and Dr. Kazmer's opinions, that this creep rupture-related failure was a caused by a "design defect."

Defendant seeks to exclude Fallows's design defect causation opinions as the "unsupported parroting of another expert's opinion." [337-1, at 16.] Plaintiffs respond that Fallows "concluded that all of the Plaintiffs' [coupling nuts] were under stress and failed as a result of creep and creep rupture," [375, at 15] but do not otherwise attempt to explain how Fallows can opine "to a reasonable degree of engineering certainty that each [coupling nut] failed as the result of defective design" [339-5, ¶ 37]. Fallows was not retained as an expert on structural analysis, finite analysis, or the design specifications of Defendant's product. Plaintiffs never explain how Fallows is qualified to testify about the analyses underlying Dr. Bak's and Dr. Kazmer's opinions or how Fallows did anything more than merely repeat their conclusions as his own. While an expert can rely on another expert's findings or

opinions in developing his own opinions, he cannot simply adopt wholesale the ideas of another expert without any independent analysis. See *Eberli v. Cirrus Design Corp.*, 615 F. Supp. 2d 1357, 1364 (S.D. Fla. 2009) ("While it is true that 'an expert's testimony may be formulated by the use of the facts, data and conclusions of other experts,' such expert must make some findings and not merely regurgitate another expert's opinion." (internal citations omitted)). This kind of impermissible bolstering is neither helpful to the trier of fact nor is it based on sufficient facts or data. *Town of Wolfeboro v. Wright-Pierce, Inc.*, 2014 WL 1806843, at *2 (D.N.H. Apr. 2, 2014) ("To the extent Moore simply parrots the conclusions of other experts' reports in his report, those are not his opinions based on facts or data appropriately relied on in his field."). Fallows cannot opine on the coupling nut's design and whether the connectors fail because of that design.

***25** Defendant also seeks to exclude Fallows's opinions about the cause of the creep and creep rupture on the grounds that he fails to account for overtightening as a possible alternative cause. Fallows repeatedly testified that it was impossible to measure if a coupling nut failed due to overtightening or to assign a level of torque based on tool markings on the product. According to Fallows, tool marks could be left whether the coupling nut was overtightened, tightened just right, or undertightened, and thus such marks are "meaningless." [339-8, at 46:3–15.] Defendant points out that Fallows reached the opposite conclusion in another case, concluding that tool marks on a coupling nut designed for hand installation and significant compression on the cone washer indicated improper installation. [See 339-26, at 9–11.]

This is all fodder for cross-examination. Fallows indicated that he did not believe tool marks by themselves were indicative of overtightening, and Defendant identifies no objective source showing that viewpoint is unreliable. [19] "[U]nless the expert can offer 'no explanation' as to why he concluded an alternative cause was not the sole cause," arguments about alternative explanations typically go to weight, not admissibility. *Troutner v. Marten Transp., Ltd.*, 2006 WL 3523542, at *4 (N.D. Ind. Dec. 5, 2006) (citation omitted). Defendant does not, for example, show that Fallows ignored the standard level of torque recognized by mechanical engineering experts that should be assigned if tool marks are present. Nor does Defendant point to any universally recognized methodology for assessing tool marks. Defendant's belief that Fallows ignored "visible tool marks" on Plaintiffs' coupling nuts provides grounds to cross-examine him on the support for his conclusions. See *Pruitt v. BROC, LLC*, 2014 WL 5089115, at *3 (W.D. Va. Oct. 9, 2014); *Voter Verified, Inc. v. Election Sys. & Software, Inc.*, 2011 WL 2580786, at *3 (M.D. Fla. June 29, 2011). Simply put, Defendant's only evidence that Fallows ignored an alternative cause is the opinions offered by its own expert, Meek. The purpose of Rule 702's gatekeeping function is not to empower the Court to pick Meek's methodology over Fallows's. The fact that each party's expert reaches different conclusions about the presence and significance of tool marks on Plaintiffs' coupling nuts is a matter for the trier of fact to resolve.

v. Dr. Tim A. Osswald, Ph.D.

Plaintiffs retained Dr. Osswald to analyze the properties of the materials used to manufacture Defendant's coupling nut and hose. According to Dr. Osswald, Defendant selected "a weak, sub-standard material" based on its notch sensitivity, and "the failures of the coupling nuts * * * could have been avoided with the use of a stronger material." [339-9, ¶¶ 34–36.] Moreover, Dr. Osswald concludes that alternative "superior" materials were available for Defendant to use to manufacture its hose.

Defendant advances a series of short arguments for excluding Dr. Osswald's coupling nut opinion. Defendant claims that Dr. Osswald "ignores other possible reasons" for the coupling nut's failure, such as age or exposure to corrosive chemicals. Just like its challenges to Dr. Kazmer, Defendant does not explain how Dr. Osswald's failure to consider these factors renders his opinions unreliable. See ***Daubert***, 509 U.S. at 596; *Cooper*, 211 F.3d at 1020; *Tilstra*, 2014 WL 4662483, at *7. The fact that chlorine exposure might make Defendant's product fail does not preclude the possibility that Defendant's product is made of substandard materials. Defendant further argues that Dr. Osswald erroneously bases his conclusion on tests of the Celcon M90, but the Court has already explained that this kind of factual dispute does not go to the reliability of an expert's opinion under Rule 702. *Loeffel Steel*, 372 F. Supp. 2d at 1119.

***26** Defendant also claims somewhat vaguely that Dr. Osswald "merely compared a few specific properties of

acetal to polypropylene" but "did not test his conclusion" and "cites no scientific literature showing that acetal was an improper material for this application." [337-1, at 17–18.] Dr. Osswald's entire report offers detailed, substantive reasons (with sources) to show that the notch sensitivity of Defendant's acetal makes it "sub-standard." Defendant never states how the methodology that Dr. Osswald actually used—his comparison of a "few specific properties"—is unreliable, what "test" he should have performed to verify his conclusion (or why that test was required as a precondition of admissibility under Rule 702), or why the literature that he does cite is insufficient to support his conclusions. Defendant is free to probe Dr. Osswald's conclusions by cross-examining him with the tests or literature that it believes he should have considered. *Smith*, 215 F.3d at 719; *Loeffel Steel*, 372 F. Supp. 2d at 1119.

With respect to Dr. Osswald's hose opinion, Defendant argues that Dr. Osswald only compared the component parts of Defendant's product "in isolation," not the combined product as Defendant "actually used them." [337-1, at 19.] According to Defendant, this is not an "apples to apples" comparison, and thus lacks reliability. *Id.* Dr. Osswald, however, compares the same types of data about tensile strength for Defendant's materials and plasticized PVC to conclude that PVC is stronger "on its own" than either material used by Defendant. [339-11, ¶¶ 2–5; 375, at 15.] Defendant does not articulate how the data Dr. Osswald relies on to make this comparison is dissimilar. While the *relevance* of Dr. Osswald's comparison may be debatable,[20] Defendant's challenge to the *reliability* of his methodology goes, at best, to weight.

Defendant also challenges Dr. Osswald's hose opinion on the grounds that he "failed to consider other critical factors such as health concerns with using plasticized PVC." [337-1, at 20.] Plaintiffs note that Dr. Osswald's report discusses how health concerns with PVC largely disappeared by the early 1980s [see 339-11, ¶¶ 23–24]. Thus, Dr. Osswald did consider this criticism and found it inapplicable. To the extent that Defendant believes Dr. Osswald should have considered other health concerns or evidence suggesting these concerns did not dissipate in the 1980s, Defendant can expose the shakiness of his conclusions on cross. Defendant also argues that Dr. Osswald "did not consider the relative manufacturing ease of the different materials" [337-1, at 20], but (again) does not explain why his opinion is unreliable for not doing so. That Defendant wishes Dr. Osswald would have emphasized different factors or looked at additional evidence does not mean his methodology fails Rule 702. *Smith*, 215 F.3d at 718.

vi. Dr. David P. Pope, Ph.D.

Plaintiffs retained Dr. Pope to opine that Defendant's use of a braided stainless steel sheath is a design defect because stainless steel will corrode when it comes in contact with chlorine and chlorides, which are commonly found in household products such as table salt. Defendant does not dispute the first premise (*i.e.*, chlorides will corrode stainless steel), but challenges Dr. Pope's conclusion (*i.e.*, a product is defective for failing to account for such corrosion) as entirely unsupported and speculative. The Court agrees.

***27** Dr. Pope's analysis boils down to this: it is "virtually certain that some fraction of the supply lines in service will come in contact with chlorine," the stainless steel sheaths "will be compromised," and the line "will burst" if the inner lining of the hose is "insufficiently strong." [339-13, at 5–6.] Therefore, he concludes, Defendant's products were "defectively designed by not anticipating and accounting for corrosion of the braided stainless steel sheath." *Id.* at 6. Dr. Pope never indicates what "fraction" of supply lines will have chlorine contact, how this contact occurs, how much exposure to chlorine is needed to "compromise[ ]" the sheath, how much time it takes to compromise the sheath's integrity, how he determined whether or what percentage of Defendant's hose lining would be "insufficiently strong," or the relative costs or feasibility associated with switching to a different design. Dr. Pope employs no discernable methodology for distinguishing a product that fails because of a design defect rather than consumer misuse or any other reason. His conclusion that "some [unknown] fraction" of supply lines "will burst" because of an unknown amount chlorine contact for an unknown amount of time based on an unknown reason means *ipso facto* Defendant's product was defectively designed bears no resemblance to the relevant test for determining whether a product's design is defective. See, *e.g.*, *McCabe v. Am. Honda Motor Co.*, 100 Cal. App. 4th 1111, 1120 (2002) (explaining California's "consumer expectation test" and "risk-benefit

test" for proving design defects). This *ipse dixit* conclusion is neither helpful nor reliable and will be excluded.

Defendant also seeks to exclude Dr. Pope's alleged opinions about "homeowner behavior," including whether homeowners fail to follow the labels on certain cleaners by using them on Defendant's connectors. [337-1, at 19.] These opinions do not appear in Dr. Pope's report. Rather, *Defendant* elicited these opinions during Dr. Pope's deposition. If Defendant did not think he was qualified to offer such opinions, it should not have directly asked him to do so. [See 339-14, at 132:10–14 (Q: "So would you expect a homeowner to use this [cleaner] to clean a connector." A: "Again, we're getting out of my area of expertise, but I would not be surprised if a homeowner did do that.").] The Court will not strike such deposition testimony simply because Defendant does not like his answers.

Accordingly, Defendant's motion to exclude Plaintiffs' technical experts' opinions and testimony [337] is denied in part and granted in part.

2. Dr. Melissa Pittaoulis and Frank Bernatowicz

Plaintiffs retained Dr. Melissa Pittaoulis to develop a conjoint study to assess the impact that two attributes—the "NO BURST" representation and 10-year warranty —have on consumers' willingness-to-pay ("WTP") for Defendant's product. [377, at 4.] Dr. Pittaoulis' conjoint study will include 400 participants who bought a water supply line within the past year or intend to do so next year. [318, ¶ 16.] Her survey targets ordinary consumers, not plumbers or other professionals. Survey respondents will be shown a set of products, each described in terms of five "attributes" or product characteristics, and asked to select which product they would be likely to purchase. *Id.* ¶ 12. Dr. Pittaoulis aims to measure how consumers trade-off different features of Defendant's product, so that one can "estimate the increase (or decrease) in value associated with" these attributes. [377, at 5.] These attributes will, in theory, serve "as a proxy to measure consumers' perceived difference in value between defective and non-defective connectors." *Id.* at 4–5.

Dr. Pittaoulis has not carried out her planned study yet, but once she does, Frank Bernatowicz will then use the WTP measurement that results from Dr. Pittaoulis' study to calculate the damages. Specifically, Bernatowicz will use the average WTP coefficient for the warranty and no-burst attributes to determine how much a consumer "overpaid" for products that did not have these attributes, and multiply that number by the total number of connectors sold. [336-1, at 8.] Under this measurement, every purchaser of Defendant's product was injured when they received a defective product "without regard to later manifestation of the defect" [71, ¶ 37] and thus "damages" are the "difference between the market value of the products as promised (i.e.—non-defective) versus the value of the products as delivered at the point of sale (i.e. —defective)" [377, at 6]. Plaintiffs rely on this Pittaoulis–Bernatowicz combination to show that "damages are capable of measurement on a classwide basis." *Comcast Corp. v. Behrend*, 133 S. Ct. 1426, 1433 (2013).

28** Defendant raises two main challenges to Dr. Pittaoulis's conjoint study: (1) it does not measure damages for any relevant or legally cognizable theory of liability, and thus fails to satisfy *Comcast*; and (2) its methodology and assumptions are unreliable under ***Daubert. [See 334.] Defendant also contends that Bernatowicz's calculation incorrectly assumes that damages for a "defective" product would be the absence of these attributes at the point of sale. The Court defers discussion of Defendant's first and third arguments, which are more appropriately directed to Plaintiffs' class certification motion, and instead turns to Defendant's methodological challenge to Dr. Pittaoulis's proposed study. See ***In re ConAgra Foods, Inc.***, 90 F. Supp. 3d 919, 946 (C.D. Cal. 2015) (discussing how *Comcast* arguments are not ***Daubert*** arguments).

"Courts have generally found consumer survey evidence admissible under ***Daubert*** if a qualified expert testifies that the survey was conducted according to generally-accepted principles of survey research." *Menasha Corp. v. News Am. Mktg. In-Store, Inc.*, 238 F. Supp. 2d 1024, 1030 (N.D. Ill. 2003). A court assessing whether a survey employs a reliable methodology examines whether "(1) the 'universe' was properly defined; (2) a representative sample of that universe was selected; (3) the questions to be asked of interviewees were framed in a clear, precise and non-leading manner; (4) sound interview procedures were followed by competent interviewers who had no knowledge of the litigation or the purpose for which the survey was conducted; (5) the data gathered was accurately reported; (6) the data was analyzed in

accordance with accepted statistical principles[;] and (7) objectivity of the entire process was assured." *LG Elecs. U.S.A., Inc. v. Whirlpool Corp.*, 661 F. Supp. 2d 940, 952 (N.D. Ill. 2009) (citation omitted). "Although these criteria generally address the weight a fact finder should give the survey, a survey method that ignores these criteria may be of so little utility as to be rendered irrelevant—and thus inadmissible." *Id.*; *Evory v. RJM Acquisitions Funding LLC*, 505 F.3d 769, 776 (7th Cir. 2007) ("[S]urvey evidence in debt-collection as in trademark cases must comply with the principles of professional survey research; if it does not, it is not even admissible."). Nonetheless, only in "rare" situations will a proffered survey be "so flawed as to be completely unhelpful to the trier of fact and therefore inadmissible." *AHP Subsidiary Holding Co.*, 1 F.3d 611, 618 (7th Cir. 1993).

Because Dr. Pittaoulis's survey has not been conducted yet, most of these metrics do not apply to assessing the reliability of her proposed study.[21] Defendant's methodological challenge focuses on the first two of these metrics. First, Defendant argues that Plaintiffs' survey selects an unrepresentative sample of respondents because it measures only ordinary consumer preferences. It is undisputed that the vast majority of Defendant's products are purchased by plumbing professionals for subsequent installation in the end-user's home or business. Specifically, from 2009 to 2015, "approximately 66 to 76 percent of the U.S. connector sales were made in the wholesale channel." [334-8, ¶ 13.] Ten out of the fourteen class representatives did not purchase Defendant's products directly—instead purchasing a home with Defendant's product already installed or relying on a plumber to purchase the product for them. [340, at 29.] Because the majority of consumers purchase Defendant's products "indirectly through a plumber," a survey directly measuring the price premium that an ordinary consumer might pay for a "missing attribute" is unrepresentative and irrelevant. [403, at 9.]

***29** Plaintiffs respond by arguing that professional plumbers are not part of the proposed class definition —only "consumers" are—and so Dr. Pittaoulis plans to survey only ordinary consumers "who have or will purchase" Defendant's products. [377, at 9.] Plaintiffs argue that these consumers are the correct population to sample "because it is consumers who are the ultimate users of the products and consumers who bear the burden of the defects." *Id.* Thus, Defendant's concerns are "highly academic" and irrelevant. *Id.*

The Court disagrees. "For a survey to be valid, 'the persons interviewed must adequately represent the opinions which are relevant to the litigation.' " *Scott Fetzer Co. v. House of Vacuums Inc.*, 381 F.3d 477, 487 (5th Cir. 2004) (citation omitted). If Dr. Pittaoulis is seeking to "examine the trade-offs that consumers make among different features *when buying a product* or service," then she needs to identify a representative sample of those who buy Defendant's products. [334-3, ¶ 11 (emphasis added).] In the clear majority of cases, that purchaser is a plumber, plumbing professional, or wholesale buyer. Just because end-users will "bear the burden" of any alleged defect does not make their preferences representative if 99 percent of the time a plumber with potentially different preferences is making the purchasing decision.[22] Dr. Pittaoulis does not evaluate whether the preferences of plumbers and ordinary consumers are the same or account for any differences if they are not. She simply ignores the majority of typical purchasers in her survey. That significantly undermines the relevance of her survey.[23] See *LG Elecs.*, 661 F. Supp. 2d at 952 ("A survey that provides information about a wholly irrelevant universe of respondents is itself irrelevant." (citation omitted)); *Competitive Edge, Inc. v. Staples, Inc.*, 763 F. Supp. 2d 997, 1008 (N.D. Ill. 2010) (finding survey's relevance "greatly harmed" by "failure to focus the study on the consumers in the market at issue in this case").

Nor do Plaintiffs explain how a conjoint study will reliably measure the WTP for consumers who indirectly acquire a toilet connector through a third-party. In fact, Plaintiffs' class certification motion relies heavily on the fact that Defendant sells predominately to wholesalers and "does not sell 'No Burst Connectors' directly to consumers." [See 371, at 16–18 (arguing that California law should apply nationwide).] All of the cases cited by Plaintiffs on conjoint studies involve products that almost always are directly purchased by consumers.[24] Plaintiffs never explain why the WTP of a consumer purchasing a home with hundreds of products already installed (including a toilet connector) is comparable to a consumer making an isolated purchase of a toilet connector presumably for home repairs.[25] Likewise, Plaintiffs offer the Court no reason to equate the WTP of

a consumer who directly purchases a toilet connector with one who outsources that decision to a plumber but never personally evaluates the significance of the "NO-BURST" statement or warranty. While it is possible that the price premium that a plumber paid for that attribute was not absorbed by the plumber and was passed along undiluted to the ultimate consumer, Plaintiffs have no reliable basis for making this assumption. The failure to address *any* of these methodological issues raises reliability and relevance concerns under Rule 702.

***30** Second, Defendant advances several challenges to whether Dr. Pittaoulis's survey will reliably measure purchasers' WTP. Most of Defendant's arguments—the survey's small sample size,[26] unrepresentative sample composition,[27] whether the results of conjoint studies can be adequately extrapolated to the retail setting, whether "price" is an appropriate attribute to measure, and whether her study adequately accounts for various supply side factors like shelf space, market share, competition, and retailer discounts—go to weight, not admissibility. One other aspect of Dr. Pittaoulis's survey design, however, merits further discussion.

Dr. Pittaoulis plans to measure five attributes: brand name, tubing material (*e.g.*, PVC, copper, stainless steel), package phrase (*e.g.*, "No Burst"), warranty length, and total price. [334-3, ¶ 21.] Her report does not state why she chose these particular attributes. Cf. *ConAgra*, 90 F. Supp. 3d at 954 ("Contrary to [defendant's] suggestion, moreover, [expert] does explain why she chose to limit her analysis to six attributes and why she chose the attributes she did."). Plaintiffs simply assert—without support—that this proposed study "contains a sufficient number and appropriate mix of product attributes." [377, at 10.] Dr. Pittaoulis's report indicates that "[t]o the extent that there is any other feature that may have an impact on consumers' preferences for water supply lines (other than size specifications), I will consider adding a sixth attribute." [334-3, ¶ 21 n.21.] Neither Dr. Pittaoulis nor Plaintiffs explain how she how she will identify this "feature" or ultimately decide whether to add another attribute.

In other conjoint analyses cases, experts first "ask[ ] respondents to prioritize 18 attributes of each accused product to come up with a list of six attributes that have similar values," and then attempt to estimate an attribute's relative value through a second survey. See *TVI*, 929 F. Supp. 2d at 1021; see also *Oracle Am., Inc. v. Google Inc.*, 2012 WL 850705, at *10 (N.D. Cal. Mar. 13, 2012) (finding that expert performing a conjoint analysis "had no reasonable criteria for choosing the four non-patented features to test; instead, he picked a low number to force participants to focus on the patented functionalities, warping what would have been their real-world considerations"). Here, two of the studies on Dr. Pittaoulis's reliance list state that factors influencing the purchasing decisions for water supply lines include "quality, strength/durability, appearance, specificity in product specifications/features, promotions, counter recommendations, * * * ease and quickness of installation, reliability, universal fit, availability in a variety of lengths, ability to stop leaks, corrosion resistance material, and easy to follow instructions." [334-7, ¶ 17.] One of those studies indicates "quality, availability, and accessibility are more important reasons for purchase than price." *Id.* ¶ 13 n.2.

***31** In response, Plaintiffs argue that "several" of these metrics "do not translate into concrete features" [377, at 11]—a point they immediately undermine by stating that terms like "No Burst" or a warranty serve as "proxies that customers may use to gauge" these features (*id.*). Dr. Pittaoulis does not indicate how she decided these other attributes were unimportant, how she determined they could not be measured, or whether she attempted to come up with a proxy for these other attributes. It appears she simply disregarded them.[28] By selecting these four non-price attributes without determining if they play an important role in real-world consumers' preferences, Dr. Pittaoulis's survey potentially elevates the two attributes linked to Plaintiffs' damages claims and inflates respondents' WTP estimate for these attributes.

While any one of these methodological issues, standing alone, might not be fatal, the Court is sufficiently concerned that their combination renders Dr. Pittaoulis's proposed survey unreliable. Asking an unrepresentative group of purchasers to artificially assign values among an arrangement of potentially unimportant attributes that fails to approximate real-world purchasing decisions does not seem designed to produce a reliable WTP estimate that can be used to calculate class-wide damages. Indeed, Plaintiffs conceded at oral argument that asking the wrong people the wrong questions would pose admissibility issues under ***Daubert***. While the Court does not hold that no reliable conjoint study could

be developed here, Plaintiffs have failed to show that Dr. Pittaoulis's proposed study as presently designed is sufficiently reliable to satisfy Rule 702. Accordingly, Defendant's motion to exclude Dr. Pittaoulis's proposed survey [334; 336] is granted.

C. Preliminary Issues Regarding Class Certification

In their motion for class certification [284], Plaintiffs seek to certify a Rule 23(b)(3) class with the following definition:

- Class 1—Nationwide class under California CLRA: All persons who purchased or leased a No-Burst Line, not for resale, or sustained damage from the failure of a No-Burst Water Supply Line, between April 24, 2011, and the date of certification.

[286, at 27.] Plaintiffs also propose three state subclasses:

- Subclass 1: Pursuant to Rule 23(b)(3), breach of warranty on behalf of all persons who purchased or acquired a No-Burst Line, or sustained damage from the failure of a No-Burst Line, between April 24, 2004, and the date of certification in Pennsylvania, Vermont, Alabama, Minnesota, Arizona, and Tennessee.

- Subclass 2: Pursuant to Rule 23(c)(4), negligence on behalf of all persons who sustained damage from the failure of a No-Burst Line, between April 24, 2012 [or applicable statute of limitation], and the date of certification in Pennsylvania, Vermont, Alabama, Minnesota, Arizona, Illinois, North Dakota, Georgia, Maine, California and New Hampshire.

- Subclass 3: Pursuant to Rule 23(c)(4), strict liability on behalf of all persons who sustained damage from the failure of a No-Burst Line, between April 24, 2012 [or applicable statute of limitation], and the date of certification in Pennsylvania, Vermont, Alabama, Minnesota, Arizona, Illinois, North Dakota, Georgia, Maine, California and New Hampshire.

Id. Plaintiffs also seek certification of 17 issues for the state subclasses. [See 286-72, at 5–7.]

*32 Before the Court can turn to the viability of these classes, it must first address the choice of law issues presented by Plaintiffs' nationwide class and the application of the Federal Rules of Evidence to Plaintiffs' class certification motion.

1. Choice of Law

Plaintiffs seek to certify a nationwide class based on violations of California's CLRA. The parties agree there is a potential conflict between the laws of California and other states. [286, at 28; 340, at 19–20.] Accordingly, whether CLRA can apply nationwide turns on choice of law principles, which begs another question: *Which* state's choice of law principles apply? "When cases are based on diversity of citizenship, the transferee court [in an MDL proceeding] must apply the state laws that the transferor forums would have, according to that forums' choice-of-law rules." ***In re Sulfuric Acid Antitrust Litig.***, 743 F. Supp. 2d 827, 852 (N.D. Ill. 2010); see also *Chang v. Baxter Healthcare Corp.*, 599 F.3d 728, 732 (7th Cir. 2010). Here, there are five transferor forums: Arizona, California, Illinois, New Hampshire, and Pennsylvania. [See 35.] Neither party argues that any other forum's laws should be analyzed.

Plaintiffs' opening brief addresses choice of law principles from only four of these states, omitting New Hampshire. They then change course in their reply, arguing that their "initial choice of law analysis was over inclusive" because their CLRA class only has two class representatives: Steve Rensel, whose original forum was the Central District of California, and Karen Rhyne, whose original forum was the Northern District of Illinois. [371, at 13 n.23.] As a result, only Illinois's and California's choice of law rules should be considered. Plaintiffs cite nothing to show that the choice of law principles from only the class representatives' transferor fora should be analyzed to determine if one state's law may apply nationwide in a class action.

Nevertheless, the Court need not decide whether Plaintiffs are correct because Illinois's choice of law principles are effectively identical to Arizona, Pennsylvania, and New Hampshire. Both parties agree that Illinois, Arizona, and Pennsylvania adopt the choice of law analysis of the Restatement (Second) of Conflicts of Laws ("Second Restatement"). [See 286, at 28; 340, at 21.] The Second Restatement adheres to the "most significant relationship" test for torts involving property damage.

Second Restatement § 147. That test, described in greater detail below, applies the "local law of the state where the injury occurred" unless another state "has a more significant relationship," which is determined by weighing seven factors. *Id.*

Although Plaintiffs ignore New Hampshire's choice of law rules, Defendant does not do much better. Defendant states that "the place of injury is the controlling factor" under New Hampshire law. [340, at 24.] The New Hampshire Supreme Court case that Defendant cites for that proposition shows that the law is exactly the opposite: "[T]his court has *rejected* the traditional *lex loci delicto* rule that the law of the forum where the injury occurs is paramount." *LaBounty v. Am. Ins. Co.*, 122 N.H. 738, 741 (1982) (emphasis added). Instead, New Hampshire applies a five factor "choice influencing" test: "(1) the predictability of results; (2) the maintenance of reasonable orderliness and good relationships among the States in the federal system; (3) simplification of the judicial task; (4) advancement of the governmental interest of the forum; (5) and the court's preference for what it regards as the sounder rule of law." *Id.*

***33** Numerous courts have recognized New Hampshire's test to be substantially similar to the "most significant relationship" test. See *Gray v. St. Martin's Press, Inc.*, 1999 WL 813970, at *1 (D.N.H. June 8, 1999); *Baum v. Centronics Computer Corp.*, 1986 WL 15784, at *5 (D.N.H. May 15, 1986); *Wise v. Kentucky Fried Chicken Corp.*, 555 F. Supp. 991, 994 (D.N.H. 1983); *Dunlap v. Aulson Corp.*, 90 F.R.D. 647, 650 n.5 (D.N.H. 1981). Others courts view these two tests as compatible, but continue to apply the five factor test. See, *e.g.*, *Glowski v. Allstate Ins. Co.*, 134 N.H. 196, 198 (1991). Still others apply the "choice influencing" test to tort claims and the "most significant relationship" test to contract claims. *See Aftokinito Properties, Inc. v. Millbrook Ventures, LLC*, 2010 WL 3168295, at *3 (D.N.H. Aug. 9, 2010); *Smith v. Morbark Indus., Inc.*, 733 F. Supp. 484, 487 (D.N.H. 1990). The Court agrees with those who have treated New Hampshire's test as similar to the Second Restatement test. To the extent there are any differences, the Court will discuss them in the context of its analysis below.

i. The "Most Significant Relationship" Test

The parties agree that Section 147 of the Second Restatement is the starting point for a choice-of-law analysis under Illinois's choice of law rules. Section 147 states that:

> In an action for an injury to land or other tangible thing, the local law of the state where the injury occurred determines the rights and liabilities of the parties unless, with respect to the particular issue, some other state has a more significant relationship under the principles stated in § 6 to the occurrence, the thing and the parties, in which event the local law of the other state will be applied.

The same test applies "[w]hen the plaintiff has suffered pecuniary harm on account of his reliance on the defendant's false representations and when the plaintiff's action in reliance took place in the state where the false representations were made and received." Second Restatement § 148.

These sections raise a "rebuttable presumption" that " 'the law to be applied is that of the state where the injury occurred.' "[29] *Fed. Ins. Co. v. J.K. Mfg. Co.*, 933 F. Supp. 2d 1065, 1074 (N.D. Ill. 2013) (citation omitted); *Robinson v. McNeil Consumer Healthcare*, 615 F.3d 861, 865 (7th Cir. 2010) (the "most significant relationship" test "points presumptively to the law of the jurisdiction in which the tort occurred" and "a tort can't be said to occur until an injury is produced—the place where the injury was inflicted."). In other words, "the Second Restatement contemplates a two-step process in which the court (1) chooses a presumptively applicable law under the appropriate jurisdiction-selecting rule [such as Sections 147 or 148], and (2) tests this choice against the principles of § 6 in light of relevant contacts identified by general provisions like § 145 (torts)." *Townsend*, 227 Ill. 2d at 164.

***34** In the instant case, Plaintiffs were injured in their respective home states—whether because this is the state where they acquired Defendant's product or where Defendant's product allegedly failed. Thus, for all putative class members who are not California residents, the presumption is that their home state's law, not California law, should apply. "This presumption is a strong one that is difficult to overcome." *Fed. Ins.*, 933 F. Supp. 2d at 1074; see also *Townsend*, 227 Ill. 2d at 163 (rejecting

the argument that this presumption is " 'evanescent' and 'easily overcome' by any contact with another state"). It can be "overcome only by showing a *more* or *greater* significant relationship to another state." *Townsend*, 227 Ill. 2d at 163.

To see if this presumption is overcome, a court tests "the presumptive choice * * * against the principles of § 6 of the Second Restatement in light of the contacts identified in § 145(2) of the Second Restatement." *Fed. Ins.*, 933 F. Supp. 2d at 1074–75. The Court starts with Section 145(2), which states that the relevant contacts are the place where the injury occurred, the place where the conduct causing the injury occurred, "the domicil, residence, nationality, place of incorporation and place of business of the parties," and "the place where the relationship, if any, between the parties is centered." Second Restatement § 145(2). "These contacts are to be evaluated according to their relative importance with respect to the particular issue." *Id.* "Generally, in a tort case, the two most important contacts are the place where the injury occurred and the place where the conduct causing the injury occurred." *Miller v. Long-Airdox Co.*, 914 F.2d 976, 978 (7th Cir. 1990). The Court analyzes these contacts one at a time.

First, both sides agree that the "place of the injury" is each consumer's home state. Plaintiffs, however, argue that this contact is irrelevant and the presumption in favor of applying the place of the injury should not apply "in light of the fortuitous nature of the place of injury." [371, at 17.] The Second Restatement states that there will be situations "where the place of injury will not play an important role in the selection of the state of the applicable law" because "the place of injury can be said to be fortuitous" or it otherwise "bears little relation to the occurrence and the parties with respect to the particular issue." Second Restatement § 145, comment e. Plaintiffs argue that this situation is present here because "a large portion" of Defendant's sales were to wholesalers and Defendant has "no control over where the end of the distribution chain, where the ultimate retailer or where the ultimate consumer and subsequent injury would be," which means the place of a consumer's injury was "unpredictable and fortuitous." [371, at 16–17.] Thus, this case is not like *Townsend* or *Federal Insurance* because those cases involve products "directly sold to a single individual" and the parties "knew with certainty or could foresee where the product would be used." *Id.* at 17 n.32.

"Although there is indeed a line of cases dismissing the place of the injury as 'fortuitous,' these cases typically involve automobile or airplane accidents that occurred while the vehicle was in transit." *Hernandez v. Cottrell, Inc.*, 2014 WL 1292336, at *4 (N.D. Ill. Mar. 31, 2014) (collecting cases); accord *Labuda v. Schmidt*, 2005 WL 2290247, at *5 (N.D. Ill. Sept. 19, 2005) (discussing fortuity cases); *Fisher v. Brilliant World Int'l*, 2011 WL 3471222, at *2 (N.D. Ill. Aug. 4, 2011) ("Cases in which an injury's location was deemed merely fortuitous usually concerned accidents occurring during interstate travel."). [30] This case has "none of the trappings of a 'flyover' case." *Jaurequi v. John Deere Co.*, 986 F.2d 170, 175 (7th Cir. 1993). During oral argument, Plaintiffs were given an opportunity to identify cases applying this fortuity doctrine outside of the interstate travel context [see 486, at 2 (Question 12)]. They did not do so.

***35** Plaintiffs and the products they bought have a "settled connection with the state" where the injury occurred. Second Restatement § 147, comment e ("The local law of the state where the injury occurred is most likely to be applied when the injury is done to * * * a chattel that has a settled connection with the state, which means that it is located in the state for other than a temporary purpose. The same law will usually be applied even though the chattel has no settled connection with the state, if the person seeking recovery * * * has a settled relationship to the state, either because he is domiciled or resides there."). Simply put, Plaintiffs live in the state where they were injured. See *Quaid v. Baxter Healthcare Corp.*, 392 Ill. App. 3d 757, 774 (2009) ("The fact that the injury occurred in California is not fortuitous, since that is where plaintiffs live."); *Hammond v. Sys. Transp., Inc.*, 2012 WL 3234865, at *12 (C.D. Ill. Aug. 6, 2012) ("[T]he place of injury here is not fortuitous: decedents were driving on the roads of their home state when their Jeep was struck."). They also purchased and installed the connector in their home states. *Townsend,* 227 Ill. 2d at 168. Nothing about Plaintiffs' injury from an allegedly defective product bought and used in their homes makes their home states "fortuitous."

Plaintiffs cite nothing to support their claim that the place of the injury is fortuitous (and thus less important) unless the defendant selling the product controls the entire distribution chain. [31] Plaintiffs pled that Defendant "conducts substantial business in Illinois and throughout the United States, including the sale and distribution of its water supply lines." [127, ¶ 95.] The fact that Defendant

intended to sell its products to nationwide stores like "Home Depot, Lowe's, Menards, TrueValue, Walmart, and Ace Hardware" (*id.*) demonstrates that it intended to sell their connectors in states like Illinois where those stores were located. That Plaintiffs acquired Defendant's product through an intermediary in their home states does not make Plaintiffs' home states a fortuity.

The second contact—the place where the conduct causing the injury occurred—is a wash. When evaluating this contact, "[t]he Illinois Supreme Court instructs courts to consider 'all conduct from any source contributing to the injury,' including affirmative defenses." *Fisher*, 2011 WL 3471222, at *3 (quoting *Townsend*, 227 Ill. 2d at 169). Plaintiffs argue that Defendant's "decisions regarding the design, manufacture, distribution, and labeling" of its products occurred in California. [286, at 29.] Defendant argues that Plaintiffs' comparative fault during installation and alleged misuse occurred in their respective homes. [340, at 23.]

To avoid this outcome, Plaintiffs responded in their briefs that contacts based on affirmative defenses "should have no bearing" in cases dealing with a latent defect. [371, at 17.] They offer no support for that rule—likely because the law is otherwise. See, *e.g.*, *Fed. Ins.*, 933 F. Supp. 2d at 1075. [32] Plaintiffs also sought to emphasize California's significance at oral argument by describing this case as one where "all of the key decisions * * * emanate from the State of California" and there is "absolute and truly undisputed centralization of conduct emanating from the state of California." For this reason, according to Plaintiffs, this is a "unique case where you can thread the needle" on choice of law issues to find for Plaintiff. The Illinois Supreme Court has rejected this very argument. *Avery v. State Farm Mut. Auto. Ins. Co.*, 216 Ill. 2d 100, 189 (2005) ("The appellate court's conclusion that a scheme to defraud was 'disseminated' from [defendant's] headquarters is insufficient."); see also *Barbara's Sales*, 227 Ill. 2d at 70 ("Plaintiffs' further attempt to tie this case to California law because Intel's representation emanated from there does not accord with any previous precedent of any Illinois court."). No "state has applied a uniform place-of-the-defendant's-headquarters rule to products-liability cases." ***In re Bridgestone/Firestone, Inc.***, 288 F.3d 1012, 1016 (7th Cir. 2002). [33] Indeed, the fact that Plaintiffs describe their *own* claims as requiring needle threading shows just how shaky their choice-of-law argument is.

*36 The third contact—the parties' domicile or place of business—is also a wash. Plaintiffs emphasize that Defendant is headquartered and incorporated in California, where it conducts its "sales, marketing, product development, engineering, and research, for the products at issue." [286, at 30.] Defendant has "more employees" in California than other states, "all of the design and labeling decisions" are made in California, the department that responds to customer complaints is located in California, and Defendant either manufactured or oversaw the manufacturing of its product from California. *Id.* [34] According to Plaintiffs, "No conduct concerning [Defendant's] potential liability occurred outside of California." *Id.* Plaintiffs, however, ignore the respective domiciles of the putative class members, which are also the states where each class member purchased, installed, used, and maintained Defendant's product. Both Plaintiffs' and Defendant's contacts matter in the Court's analysis. *Townsend*, 227 Ill. 2d at 169.

The fourth relevant contact is where the relationship between the parties is centered, but this factor is less important in a case like this one. "[P]roduct liability arises out of the most casual 'relationship' imaginable, the one-time purchase and sale of the product." *Ness v. Ford Motor Co.*, 1993 WL 996164, at *3 (N.D. Ill. July 20, 1993). "The relationship between the Plaintiff and Defendant is, at best, second-hand and impersonal." *Piska v. Gen. Motors Corp.*, 2004 WL 2423830, at *6 (N.D. Ill. Oct. 28, 2004). Whether one accepts that the relevant relationship "arise[s]" from each Plaintiffs' acquisition of Defendant's product, *Townsend*, 227 Ill. 2d at 169, or that the alleged injury "was caused by an act done prior to any relationship formed," [286, at 30], the Court does not view this factor as significant in the instant case.

In sum, the place of the injury favors the Plaintiffs' respective home states, the place of the conduct and location of the parties are a wash, and the center of the parties' relationship is a non-factor. None of these factors points to California having a more significant relationship to this case than Plaintiffs' home states. [35] But courts should not simply "count contacts." *Barbara's Sales*, 227 Ill. 2d at 61. Instead, they must consider those contacts in light of the principles of Section 6 of the Second Restatement. *Townsend*, 227 Ill. 2d at 169.

*37 The principles identified in Section 6 direct the Court to consider: (a) the needs of the interstate systems; (b)

the forum's relevant policies; (c) "the relevant policies of other interested states and the relative interests of those states in the determination of the particular issue"; (d) "the protection of justified expectations"; (e) "the basic policies underlying the particular field of law"; (f) "certainty, predictability and uniformity of result"; and (g) "ease in the determination and application of the law to be applied." Second Restatement § 6(2). Three of these factors (b, c, and e) are most relevant in tort cases. *Fed. Ins.*, 933 F. Supp. 2d at 1076; *Fisher*, 2011 WL 3471222, at *4. The needs of the interstate system, the protection of "justified expectations," and the "predictability and uniformity" of the result have little relevance in product defect cases like this one. See *Dougherty v. Lincare, Inc.*, 2011 WL 1361553, at *3 (D. Ariz. Apr. 11, 2011) ("In this negligence case, it is highly unlikely that the parties gave any thought to the tort consequences of their transaction."). [36]

Defendant provides a nationwide survey of the consumer protection laws of all fifty states and the District of Columbia. [See 342-31.] "State consumer-protection laws vary considerably, and courts must respect these differences rather than apply one state's law to sales in other states with different rules." *Bridgestone*, 288 F.3d at 1018. All fifty-one jurisdictions' consumer protection laws differ significantly on procedural (length and accrual of the statute of limitations, statutory standing, and notice) and substantive (reliance, causation, state of mind, and remedies) dimensions. [See 342-31.]

"[T]he State with the strongest interest in regulating such conduct is the State where the consumers—the residents protected by *its consumer*-protection laws—are harmed by it." *Pilgrim v. Universal Health Card, LLC*, 660 F.3d 943, 946 (6th Cir. 2011) (applying the Second Restatement); *Clark v. Experian Info. Sols. Inc.*, 2005 WL 1027125, at *4 (N.D. Ill. Apr. 26, 2005) ("The primary purpose of consumer-protection statutes is to protect consumers from fraudulent sales. The focus of the statutes is protecting the consumer."). Plaintiffs' home states have "an interest in ensuring that safe products are used within [their] borders," "deterring the use of defective products within [their] borders," and "protecting [their] citizens * * * whose property is injured within [their] borders." *Fed. Ins.*, 933 F. Supp. 2d at 1076; see also *Jaurequi v. John Deere Co.*, 986 F.2d 170, 175 (7th Cir. 1993). "[T]here does not appear to be any interest on the part of Illinois in the application of its standards in preference or deference to California's standards to protect Illinois consumers." *Barbara's Sales*, 227 Ill. 2d at 63.

It is "undoubtedly true that California has an interest in regulating [Defendant], as its principal place of business is located there." *Id.* "[I]t is also true that California has a consumer-friendly consumer protection law * * * which may inure to the benefit of plaintiffs." *Id.* But California consumers can still sue Defendant in California and "neither California consumers, nor the interests of California in regulating [Defendant], will necessarily suffer" if other states apply their own laws in cases involving their own citizens and injuries that occurred in their own states. *Id.* "While, to be sure, [California] has an interest in deterring misconduct by corporations headquartered within its borders, it is far from clear that this interest would be sufficient to outweigh other significant contacts with a plaintiff's home state." *Maniscalco v. Brother Int'l (USA) Corp.*, 709 F.3d 202, 210 (3d Cir. 2013) (applying Second Restatement).

***38** Plaintiffs argue that "application of a single state's law to a nationwide class would be simple and ensure certainty, predictability, and a uniform result." [286, at 31.] But the relevant choice of law issue is whether the particular foreign state's law is easy to apply, not whether it is easier to apply one state's law rather than all fifty states' laws. See *Mazza v. Am. Honda Motor Co.*, 666 F.3d 581, 594 (9th Cir. 2012) ("Plaintiffs' argument that California law is the best choice for this nationwide class is based on a false premise that one state's law must be chosen to apply to all 44 jurisdictions."). A court cannot disregard federalism "in order to facilitate class treatment." *Bridgestone*, 288 F.3d at 1020. "Differences across states may be costly for courts and litigants alike, but they are a fundamental aspect of our federal republic and must not be overridden in a quest to clear the queue in court." *Id.*; *BMW of North America, Inc. v. Gore*, 517 U.S. 559, 570–71 (1996). Here, "while use of California law may not be difficult, the use by a forum of its own laws does not present any further difficulty." *Barbara's Sales*, 227 Ill. 2d at 64. "California's stated interest in applying its laws outside of its borders does not override" the contacts of Plaintiffs' home states. *Clark*, 2005 WL 1027125, at *5.

While most of the Section 6 factors are either irrelevant or neutral in this case, one factor—the relevant policies of the forum—strongly suggests that each consumer's home state has a stronger interest in protecting its own consumers

than California. In light of the Section 147 contacts described above, the Section 6 analysis also favors the consumer's home state. [37] Therefore, each Plaintiff's home state has the most significant relationship to his or her claims.

ii. California's "Governmental Interest" Test

California undertakes a "two-step" choice of law analysis. *Arroyo v. TP-Link USA Corp.*, 2015 WL 5698752, at *3 (N.D. Cal. Sept. 29, 2015). Plaintiffs must first show that the application of California law comports with due process, meaning that "California has 'significant contact or significant aggregation of contacts' to the claims of each class member." *Mazza*, 666 F.3d at 589 (citation omitted). Once that showing is made, "the burden shifts to the other side to demonstrate 'that foreign law, rather than California law, should apply to class claims.' " *Id.* at 590 (citation omitted). That second step is decided based on the three-factor "government interest" test, which directs a court to (1) determine if there are differences between the "potentially affected jurisdictions with regard to the particular issue in question"; (2) examine "each jurisdiction's interest in the application of its own law under the circumstances of the particular case to determine whether a true conflict exists"; and (3) "compare[ ] the nature and strength of the interest of each jurisdiction in the application of its own law to determine which state's interest would be more impaired if its policy were subordinated to the policy of the other state." *Id.* (citation omitted). Ultimately, the Court is to apply "the law of the state whose interest would be more impaired if its law were not applied." *Id.* (citation omitted).

***39** Plaintiffs do not conduct any specific analysis of California's contacts for each class member's claims. [See 286, at 32.] At oral argument, Defendant conceded that this requirement was met (at least with respect to Defendant's due process rights). Defendant is headquartered and incorporated in California, its marketing, design, and labeling decisions occur there, and the alleged misrepresentations appear on Defendant's product itself, whose sale originated from California. *Id.* at 30. In these circumstances, "application of the California consumer protection laws would not be arbitrary or unfair to [D]efendant[ ]," and thus, constitutional due process is satisfied. *Chavez v. Blue Sky Nat. Beverage Co.*, 268 F.R.D. 365, 379 (N.D. Cal. 2010); accord *Wolph v. Acer Am. Corp.*, 272 F.R.D. 477, 485 (N.D. Cal. 2011).

Moving to the second step, Plaintiffs do not dispute that Defendant comprehensively and "exhaustively detail[s]" the ways that all fifty-one jurisdictions' consumer protection laws differ. [340, at 18–19; 342-21]; *Mazza*, 666 F.3d at 591 (outlining the differences in consumer product statutes); see also *Gianino v. Alacer Corp.*, 846 F. Supp. 2d 1096, 1100 (C.D. Cal. 2012) (summarizing the "differences among the states' consumer protection laws"); ***In re** Hitachi Television Optical Block Cases*, 2011 WL 9403, at *6 (S.D. Cal. Jan. 3, 2011) ("[T]here are material conflicts between California's consumer protection laws and the consumer protection laws of the other forty-nine states."). [38] Nor do Plaintiffs dispute that these differences are material—involving the "essential requirements to establish a claim" and "the types of relief or remedies available to a plaintiff." *Gianino*, 846 F. Supp. 2d at 1102. "Many of them will mean the difference between success and failure" for Plaintiffs' claims. *Id.* [39]

Likewise, Plaintiffs do not contest that there is a "true conflict" here between California and the interests of the other 49 states (plus the District of Columbia). "[E]ach state has a strong interest in applying its own consumer protection laws to" the purchases of products within its borders. *Mazza*, 666 F.3d at 592;*Gianino*, 846 F. Supp. 2d at 1102. "[E]ach state has an interest in setting the appropriate level of liability for companies conducting business within its territory" and " 'assur[ing] individuals and commercial entities operating within its territory that applicable limitations on liability set forth in the jurisdiction's law will be available to those individuals and businesses in the event they are faced with litigation in the future.' " *Mazza*, 666 F.3d at 592–93 (citation omitted). And each state has an interest in balancing "its duty to protect its consumers from injuries caused by out-of-state businesses with its duty to shield those businesses from what the state may consider excessive regulation or litigation." *Gianino*, 846 F. Supp. 2d at 1102. "These interests are squarely implicated in this case." *Mazza*, 666 F.3d at 593.

***40** The only dispute here is over the nature and strength of each state's interest, which determines the state's interest that is most impaired. California law answers that question in Defendant's favor. Each consumer's home state "ha[s] a compelling interest in protecting their

consumers from in-state injuries caused by an out-of-state company doing business within their borders, and in setting the scope of recovery for consumers under their own laws." *Darisse v. Nest Labs, Inc.*, 2016 WL 4385849, at *15 (N.D. Cal. Aug. 15, 2016). Although "California has a significant interest in applying its laws to the consumer transactions that took place within its borders," its "interest in applying its laws to residents of other states who purchased and used the [connectors] in those other states is much more attenuated." *Id.*; *Mazza*, 666 F.3d at 594 ("California's interest in applying its law to residents of foreign states is attenuated."). "[A]pplying California law to the claims of foreign residents concerning acts that took place in other states where [the connectors] were purchased or [acquired]" is not necessary to achieve California's interest in protecting its own citizens and regulating its own corporate citizen, Defendant. *Mazza*, 666 F.3d at 594.

Plaintiffs argue that because most of Defendant's sales were to "plumbers, contractors, and wholesalers," and "[a]ll of those sales were direct sales that occurred in California," the policies of foreign jurisdictions in balancing consumer protection and encouraging business are not served here. [371, at 15.] In other words, because Plaintiffs purchased Defendant's products through intermediaries in their home states rather than directly from Defendant, their home states' interests in shielding an out-of-state business like Defendant from "excessive litigation" will not be impaired. *Id.* at 14–15 ("[T]he policies of foreign jurisdictions (to encourage commerce by enacting more lenient consumer protection statutes) is not served in this instance."). In contrast, California's interests in regulating its corporate citizens will be impaired if its law is not applied here. *Id.*

Even assuming that all of Defendant's sales to wholesalers and plumbers occurred in California—and Plaintiffs cite nothing to show that is true—Plaintiffs' argument actually emphasizes the weakness of California's interest. First, CLRA regulates only sales to a "consumer"—that is, one who buys a good for a "personal, family, or household purpose." Cal. Civ. Code § 1770(d). Thus, Defendant's direct sales to California wholesalers and plumbers are excluded from CLRA coverage. Whatever interest California has in regulating Defendant's sales to California plumbers, it is not a "consumer protection" interest and so that particular interest is not "impaired" by applying another state's consumer protection law.

Second, "California recognizes that 'with respect to regulating or affecting conduct within its borders, the place of the wrong has the predominant interest.' " *Mazza*, 666 F.3d at 593 (citation omitted). Under California law, the "place of the wrong" is the "state where the last event necessary to make the actor liable occurred." *Id.* at 593–94 (citing California case law showing that the "geographic location of an omission is the place of the transaction where it should have been disclosed" and the "place of the wrong" for a misrepresentation is the state "where the misrepresentations were communicated to the plaintiffs"). Here, no wrong implicated by a consumer protection law could have occurred until the consumer purchased Defendant's product in their home state. Cal. Civ. Code § 1770(a) (requiring a "transaction" to sue under CLRA). "These foreign states have a strong interest in the application of their laws to transactions between their citizens and corporations doing business within their state." *Mazza*, 666 F.3d at 594. Since the requisite "transaction" that could trigger application of CLRA occurred outside of California and involved a non-California citizen, California's interest is, at best, attenuated. *Id.*

Third, the Court does not see why another state's interest in limiting excessive litigation is implicated only when a company sells products directly to the end-user in the state. As the Ninth Circuit in *Mazza* explained, "states may permissibly differ on the extent to which they will tolerate a degree of lessened protection for consumers to create a more favorable business climate for the companies that the state seeks to attract to do business in the state." *Mazza*, 666 F.3d at 592. If in-state intermediaries (like Home Depot) depend on products from a foreign supplier (like Defendant), then allowing the foreign supplier to be sued based on in-state sales through the intermediary would disincentive business in state. The foreign supplier might elect not to do business with the in-state intermediary (and thus in-state consumers) at all, raise its prices directly, secure an indemnity from the in-state intermediary, or purchase additional insurance. *Id.* ("More expansive consumer protection measures may mean more or greater commercial liability, which in turn may result in higher prices for consumers or a decrease in product availability."). All of these actions potentially undermine the state's interest in a "more favorable business climate." *Id.* Plaintiffs also fail to cite anything showing that—let alone explaining why—states would

choose to offer "lessened protection for consumers" when buying a business's product directly rather than through an intermediary. And, even if Plaintiffs were correct, they pled that Defendant "conducts substantial business in Illinois and throughout the United States." [127, ¶ 95.] They offer nothing to explain why this "substantial business" is not the kind of "business in the state" described by *Mazza* and undermined by their request to apply California law nationwide.

*41 Plaintiffs also argue the Court should apply California law because "all consumers affected by [Defendant's] conduct will benefit from California's consumer protection law." [371, at 15.] However, a court cannot " 'weigh' the conflicting governmental interests in the sense of determining which conflicting law manifested the 'better' or the 'worthier' social policy on the specific issue." *Mazza*, 666 F.3d at 593.[40] Instead, courts must "recognize the importance of federalism and every state's right to protect its consumers and promote those businesses within its borders." *Darisse*, 2016 WL 4385849, at *14. In similar circumstances, courts have found that consumers' home state laws should not be subordinated to California law.[41] As a result, the Court concludes that for non-California class members, their home states' interests would be more impaired if California law were applied nationwide. Accordingly, each class member's claims must be governed by the laws of their respective home state.

2. Federal Rules of Evidence and Class Certification

*42 Defendant attaches to its response brief a set of "objections" to the "Non-Expert Evidence" Plaintiffs cite in their class certification motion. Almost every single objection is that Plaintiffs mischaracterize the evidence. [See 342-1.] In addition, Defendant makes hearsay, personal knowledge, expert knowledge, authentication, and the rule of completeness objections. *Id.* They also object that Plaintiffs rely on deposition testimony that exceeds the scope of a Federal Rule of Civil Procedure 30(b)(6) topic (*id.* at 2), although they do not explain how that it is an evidentiary objection. Notably, Defendant does not cite a single case in support of its objections. Plaintiffs filed an opposition brief [372], responding to the "objections" and arguing that the Federal Rules of Evidence do not apply as strictly when considering a class certification motion. Saving any case law support until its reply (after Plaintiffs had responded), Defendant argues that strict application of the rules of evidence is necessary even for class certification motions [402].

The Court is not persuaded. Class certification must be decided "[a]t an early practicable time," Fed. R. Civ. P. 23(c)(1), often before merits discovery has occurred. Setting aside ***Daubert*** and Rule 702, a rigid application of the Federal Rules of Evidence for evaluating the authenticity and admissibility of deposition testimony and affidavits attached to a motion for class certification is not required, as numerous courts have found.[42] The Seventh Circuit permits the same relaxation of the Federal Rules of Evidence for other preliminary motions, like preliminary injunctions. See *Dexia Credit Local v. Rogan*, 602 F.3d 879, 885 (7th Cir. 2010).

Defendant argues that such a result ignores Seventh Circuit cases like *Messner* or *Szabo* [402, at 2–6], but those cases do not address the application of the Federal Rules of Evidence to class certification. Defendant more properly directs the Court to *Mars Steel Corporation v. Continental Bank N.A.*, where the Seventh Circuit stated that "fairness hearings conducted under Fed. R. Civ. P. 23(e) are not among the proceedings excepted from the Rules of Evidence." 880 F.2d 928, 938 (7th Cir. 1989). What Defendant leaves out is any context. *Mars Steel* concerned whether the district court abused its discretion in imposing sanctions against the class's attorneys under Rule 11 for filing a motion to strike affidavits submitted at a fairness hearing. The Seventh Circuit affirmed the sanction, but noted that simply because the attorneys "did not construct a plausible legal argument" does not mean they "couldn't have." *Id.* The Seventh Circuit then posited one such "plausible" argument: the Federal Rules of Evidence apply to a fairness hearing. *Id.* The court stated, "No case of which we are aware holds that Rule 1101(d) suspends the usual rules of evidence for fairness hearings; no case expressly holds that affidavits are admissible in such hearings, although several cases mention their use without deciding the propriety of that use." *Id.* From that context, it is clear the Seventh Circuit reached no "decision" that the Federal Rules of Evidence apply in full force to all issues related to class certification. Even if this statement were not dicta, *Mars Steel* did not hold that courts should rigidly apply the rules of evidence to a class certification *motion*, rather than a live hearing.[43]

*43 That does not mean that the Court adopts a "mere pleading standard" to evaluate the parties' evidence

submitted with class certification. *Comcast,* 133 S. Ct. at 1432 (citation omitted). As will be clear below, the Court has engaged in a "rigorous analysis" to evaluate if Plaintiffs have "affirmatively demonstrate[d]" compliance with Rule 23's requirements by a preponderance of the evidence. *Id.*; *Wal-Mart*, 564 U.S. at 350; *Messner*, 669 F.3d at 811. The Court has not presumed something is true merely because one party asserts it to be—a rule that applies equally to Defendant's assertions. And the volume of exhibits and deposition testimony attached to the briefs shows the parties have gone well beyond the four corners of any pleading. The Court has considered this evidence and given it appropriate weight, including by evaluating if the characterizations and interpretations of that evidence offered by the parties are supported by the evidence—which, again, relates to the bulk of Defendant's objections. To the extent Defendant intends its "objections" to serve as a motion to strike [see 342-1, at 2], it is denied.

D. Class Certification

After much ado, the Court can now turn to class certification. Plaintiffs must meet the implicit requirement of ascertainability, the four Rule 23(a) prerequisites (numerosity, commonality, typicality, and adequacy), the two Rule 23(b)(3) requirements (predominance and superiority), and the requirements for issue certification under Rule 23(c)(4). Leaving nothing to chance (and as will surprise no reader by now), the parties dispute whether Plaintiffs have satisfied any of these requirements.

Based on the outcome of the Court's choice of law analysis, Plaintiffs cannot pursue a class action applying California CLRA nationwide and must instead apply the laws of all fifty states. As explained in greater detail below, this means that nationwide class certification must be denied. "[A] failure in any one of the requirements of Rule 23 results in a denial of class certification." *McCabe v. Crawford & Co.*, 210 F.R.D. 631, 644 (N.D. Ill. 2002). At a minimum, the different legal issues arising out of the claims of class members from all 50 states will eclipse any common issues of law or fact. Nevertheless, the Court will also address if Plaintiffs' proposed nationwide CLRA class could be certified had Plaintiffs prevailed in their argument that California law should be applied nationwide under choice-of-law principles. Likewise, the Court will address the various subclasses that Plaintiffs propose in their motion.

The Court starts with ascertainability, then takes the Rule 23(a) requirements in turn, followed by the Rule 23(b) requirements, and ends with the Rule 23(c) requirements.

1. Ascertainability

To show ascertainability, the class must be "defined clearly and based on objective criteria." *Mullins*, 795 F.3d at 659. "There can be no class action if the proposed class is amorphous or imprecise." *Id.* (citation omitted). A vague definition is problematic "because a court needs to be able to identify who will receive notice, who will share in any recovery, and who will be bound by a judgment." *Id.* at 660. "To avoid vagueness, class definitions generally need to identify a particular group, harmed during a particular time frame, in a particular location, in a particular way." *Id.*

i. Nationwide Class of All Fifty States' Laws

Plaintiffs did not offer an alternative class definition in the event that all fifty states' laws had to be applied instead of California's CLRA. Each state's statute of limitations, applicability of the discovery rule, and definition of who can sue under the various consumer protection laws (individuals or businesses) all would impact how such a class should be defined. Because Plaintiffs bear the burden to show ascertainability, their failure to make this showing is fatal to their nationwide class action claim based on all fifty states' laws. *Messner*, 669 F.3d at 811.

ii. Nationwide CLRA Class

Even if the CLRA class were viable, Plaintiffs' proposed class definition would need some tweaking. Plaintiffs' proposed nationwide CLRA class is defined as "[a]ll persons who purchased or leased a No-Burst Line, not for resale, or sustained damage from the failure of a No-Burst Water Supply Line, between April 24, 2011, and the date of certification." [286, at 27.] This definition identifies a particular group (all purchasers or leasers of a "No-Burst Line"[44] or all persons who sustained damage from the failure of this product), a particular time period (between April 24, 2011 and certification), and a particular location (nationwide). Defendant does not

specifically argue that these requirements have not been satisfied. Instead, Defendant argues that this definition must be modified because it exceeds CLRA's scope.

*44 Specifically, Defendant argues that (1) the definition "all persons who purchased" Defendant's products "not for resale" includes people who are not "consumers" under CLRA; (2) the definition "all persons who * * * sustained damage from the failure" of Defendant's product includes anyone who was damaged regardless of whether they are "consumers" (such as a consumer's neighbor who suffered property damage when Defendant's product failed); and (3) those who purchased Defendant's product before April 2011, but were injured afterwards, should be excluded from the class definition. [340, at 14–15.] Plaintiffs respond that they "are open to an alternative class definition" and "do not seek more than what is permitted under California law." [371, at 11.] They also argue that putative class members injured after April 2011 are properly included in the class definition because the delayed discovery rule tolls the running of California's three-year statute of limitations until after the consumer discovered the defect, which could not have occurred before the connector failed. *Id.* at 12; see *Yumul v. Smart Balance, Inc.*, 733 F. Supp. 2d 1134, 1141 (C.D. Cal. 2010).

Both sides' arguments have some merit here. Plaintiffs' class definition could be more precise regarding CLRA standing. And some class members whose connectors failed after April 2011 but were purchased before then may still recover from Defendant under the CLRA based on California's delayed discovery rule. *Yumul*, 733 F. Supp. 2d at 1141 (explaining that consumers pursuing CLRA claims can invoke the delayed discovery rule by pleading facts that "show (1) the time and manner of discovery and (2) the inability to have made earlier discovery despite reasonable diligence"). But that does not mean a consumer whose connector failed in 2012 but purchased Defendant's product in the 1980s is properly included within the class. Plaintiffs' damages theory for its CLRA claim purports to measure and seek recovery for the price premium that consumers overpaid for a 10-year warranty. [336-5, ¶ 35.] Accordingly, only consumers whose connectors failed within the life of their 10-year warranty should be putative class members.

"[A] district court has the authority to modify a class definition." ***In re Motorola Sec. Litig.***, 644 F.3d 511, 518 (7th Cir. 2011); accord *Schorsch v. Hewlett-Packard Co.*, 417 F.3d 748, 750 (7th Cir. 2005) ("Litigants and judges regularly modify class definitions."); *Streeter v. Sheriff of Cook Cty.*, 256 F.R.D. 609, 611 (N.D. Ill. 2009) ("A district court has broad discretion to certify a class and may modify a proposed class definition if modification will render the definition adequate."). In an effort to address Defendant's CLRA standing and overbreadth concerns, the Court proposes the following class definition, which it will use for assessing whether Plaintiffs have satisfied Rule 23:

> (1) All persons who purchased or leased a No-Burst Line for personal, family, or household purposes and not for resale ("Consumers"), between April 24, 2011, and the date of certification, and (2) all Consumers who sustained damage from the failure of a No-Burst Line between April 24, 2011, and the date of certification, if their No-Burst Line was acquired by the Consumer within ten years of the date of that failure.

Assuming Plaintiffs offer a definition of "No-Burst Line" that specifically and clearly delineates which of Defendant's products fall within and outside of the class,[45] this class definition provides the level of ascertainability required under *Mullins*.

iii. State Subclasses

Defendant does not challenge the ascertainability of the subclass definitions, and Plaintiffs did not devote any attention specifically to the ascertainability of the subclasses. The Court does not see any obvious problems with the ascertainability of the negligence or strict liability state subclass definitions, both of which turn on the failure of Defendant's product, the date, and require a person in that state to have sustained damage from the failure of the product.

*45 The Alabama, Arizona, Pennsylvania, Minnesota, Tennessee, and Vermont warranty subclasses are more challenging because so many issues are conflated in Plaintiffs' class definition. Like the CLRA class, the

warranty subclasses includes people who "purchased or acquired" Defendant's product or those who "sustained damage" from the product's failure. As best the Court can tell, Plaintiffs pursue express warranty claims for all of these state subclasses except Tennessee and Pennsylvania. [286, at 27 n.160, 38–39; 371 at 27.] It is unclear whether the express warranty claims are based on the Uniform Commercial Code.[46]

Moreover, Plaintiffs seek two types of damages for their warranty claims: the "loss of the benefit of their bargain" and "property damage." [286, at 38.] The "benefit of the bargain" damages are economic losses—that is, they do not relate to personal injuries or damage to property other than the product itself, but concern a product not performing as expected. See, *e.g.*, *Americoach Tours, Inc. v. Detroit Diesel Corp.*, 2005 WL 2335369, at *2 (W.D. Tenn. Sept. 23, 2005). These six states all vary on who can bring a warranty claim. In Tennessee, a breach of implied warranty claim requires privity of contract for an economic loss, but not other losses like property damage.[47] In Alabama and Vermont, there is no privity requirement.[48] In Arizona, it depends on whether the claims are based on the U.C.C. or not.[49] In Minnesota, third parties can only bring an express warranty claim for economic losses if they have property damage.[50] In Pennsylvania, " '[t]hird parties may enforce express warranties only under circumstances where an objective fact-finder could reasonably conclude that: (1) the party issuing the warranty intends to extend the specific terms of the warranty to the third party (either directly or through an intermediary); and (2) the third party is aware of the specific terms of the warranty, and the identity of the party issuing the warranty.' " *Am. Stores Properties, Inc. v. Spotts, Stevens & McCoy, Inc.*, 678 F. Supp. 2d 328, 332 (E.D. Pa. 2009) (citation omitted).

46** Plaintiffs' proposed subclass definitions do not address *any* of these issues. Rather, their subclass definitions for each state would sweep in countless people who would never have standing to pursue a "warranty" claim on their own. See *Oshana v. Coca-Cola Co.*, 472 F.3d 506, 514 (7th Cir. 2006) (denying class certification where proposed class definition was "not sufficiently definite" because it included "millions who were not deceived and thus have no grievance under the ICFA"); *Messner*, 669 F.3d at 825 (distinguishing "between class members who *were not* harmed and those who *could not* have been harmed," and explaining that "a class should not be certified if it is apparent that it contains a great many persons who have suffered no injury at the hands of the defendant"); ***In re McDonald's French Fries Litig., 257 F.R.D. 669, 673 (N.D. Ill. 2009) (denying certification for class that "is both overinclusive and too indefinite for certification"). Equally problematic, the subclass definitions do not weed out class members with products that lack a warranty or whose products failed after the warranty expired—a group that Plaintiffs conceded at oral argument should not be able to recover damages. Defendant maintains that it did not offer any warranty between 2004 and 2007, and offered a five-year or ten-year warranty thereafter. [340, at 33–34.] Plaintiffs label that claim a "sham," and submit discovery responses from Defendant where it appears to state that some warranty remained in effect between 2004 and 2007. [371, at 10.] Whichever party is right, Plaintiffs do not explain how their warranty subclasses could properly include purchasers or acquirers with products not covered by any warranty or people who sustained damage from a product not covered by a warranty. Neither group is excluded from the subclass definitions.

In short, the Court does not know who Plaintiffs really intend to cover in these subclasses or which claims they intend to pursue, which prevents the Court from fashioning its own subclass definitions on Plaintiffs' behalf. Accordingly, the Court finds that Plaintiffs have failed to satisfy the ascertainability requirement for their warranty subclasses.

2. Numerosity

Numerosity is satisfied if "the class is so numerous that joinder of all members is impracticable." Fed. R. Civ. P. 23(a)(1). " 'Impracticable' does not mean 'impossible,' but rather, extremely difficult and inconvenient." *Fields v. Maram*, 2004 WL 1879997, at *3 (N.D. Ill. Aug. 17, 2004) (citation omitted). "When determining whether joinder is impracticable, the court considers not only the size of the class, but also its geographic dispersion, the relief sought, and the ability of individuals to bring their own claims." *Id.* (citation omitted). "Generally, where the membership of the proposed class is at least 40, joinder is impracticable and the numerosity requirement is met." *Pope v. Harvard Banschares, Inc.*, 240 F.R.D. 383, 387 (N.D. Ill. 2006). "[A] plaintiff does not need to

demonstrate the exact number of class members as long as a conclusion is apparent from good-faith estimates." *Barragan v. Evanger's Dog & Cat Food Co., Inc.*, 259 F.R.D. 330, 333 (N.D. Ill. 2009). Courts rely on "common sense" to determine whether an estimate of class size is reasonable and estimates "may not be based on pure speculation." *Murray v. E*Trade Fin. Corp.*, 240 F.R.D. 392, 396 (N.D. Ill. 2006).

i. Nationwide Classes

Plaintiffs argue that they satisfy numerosity for their nationwide class because there are roughly 1,400 pending claims for damages related to Defendant's products. [286, at 33.] Defendant offers several responses. First, they argue that 99% of the filed claims are held by insurance companies. [340-2, ¶ 27(a).] Because, according to Defendant, "insurance companies cannot possess CLRA claims," and there are fewer than 10 open claims held by a non-insurance company, numerosity has not been satisfied. [340, at 24–25.] Plaintiffs respond that insurers who have paid part of an insured's loss are only subrogated to that part of the loss, while the insured remains the real party in interest for any unreimbursed losses. [371, at 19–20.] They also point out that insurers are subrogated to the rights of insured (here, consumer who acquired Defendant's product) and can seek to recoup their payments in tort directly against Defendant. *Id.* Defendant cites no case law showing that insurers subrogated to the rights of insured-consumers cannot pursue the consumer's claim under CLRA or that the hundreds of consumers with partial subrogation [see 371-1] should not be counted for numerosity purposes. And, given that Defendant has sold "more than 153 million water connectors" since 1980 [340, at 9], it is reasonable to estimate that there are more than forty purchasers of Defendant's product—including some who did not file claims—who would be members of a nationwide class.

*47 Second, Defendant argues that Plaintiffs fail to satisfy numerosity for every "cause of action" asserted and "product type" that Defendant sold. [340, at 25.] Defendant states that there are six types of connectors (toilets, dishwashers, ice makers, washing machines, water heaters, and faucets) that were "manufactured using different materials," with "different warnings," and made for "different use environments." [340, at 11.] But Defendant offers no reason why these differences defeat *numerosity*. Presumably, Defendant believes there must be separate subclasses for each product type for each cause of action for each state, which could theoretically raise numerosity issues for the subclasses. That, however, is not the class action that Plaintiffs seek to certify. Defendant does not identify a single court that has agreed with its approach or explain why these are sensible requirements to impose here. See *Butler v. Sears, Roebuck & Co.*, 702 F.3d 359, 361 (7th Cir. 2012) (certifying class action despite the fact that defendant sold 27 different models that involved five design changes), *judgment reinstated*, 727 F.3d 796 (7th Cir. 2013). And, regardless, Defendant does not articulate how any design defects related to the coupling nut and hose or any owner misuse would vary by product type.

ii. State Subclasses

Third, Defendant argues that Plaintiffs fail to satisfy numerosity for their identified state subclasses for Alabama, Arizona, California, Georgia, Illinois, Maine, Minnesota, New Hampshire, North Dakota, Pennsylvania, Tennessee, and Vermont. "Subclasses must satisfy the class action requirements before they may be certified." *Retired Chi. Police Ass'n v. City of Chi.*, 7 F.3d 584, 599 (7th Cir. 1993). Defendant submits a declaration showing the number of open claims in Alabama is 10, Georgia is 17, Illinois is 9, Maine is 3, Minnesota is 17, New Hampshire is 7, North Dakota is 2, Tennessee is 17, and Vermont is 3. [340-2, ¶ 27(c).] Plaintiffs' opening brief makes no effort to satisfy numerosity for their subclasses, their reply fails to respond to Defendant's argument, and they made no specific showing at oral argument to address this issue. While the Court "may draw reasonable inferences about the size of the subclass" and the number of claims likely underrepresents the number of failures in the field, the Court would only be speculating that there are sufficient class members to satisfy numerosity for every putative state subclass. *Gentry v. Floyd Cty.*, 2016 WL 4088748, at *4 (S.D. Ind. July 25, 2016); *Hill v. Gateway 2000, Inc.*, 1996 WL 650631, at *3 (N.D. Ill. Nov. 7, 1996). Because it is Plaintiffs' burden to show numerosity, their failure to do so for these particular state subclasses precludes certification for those subclasses.[51] The only exceptions relate to the Arizona, California, and Pennsylvania subclasses. Defendant omitted these states from its declaration [see 340-2, ¶ 27(c)] and the Court

can readily determine that numerosity is satisfied based on Plaintiffs' exhibits on partial subrogation [see 371-1].

3. Typicality

Claims of the class representative and the class members are "typical" if the class representative's claim " 'arises from the same event or practice or course of conduct that gives rise to the claims of other class members and his or her claims are based on the same legal theory.' " *Keele v. Wexler*, 149 F.3d 589, 595 (7th Cir. 1998) (citation omitted). "Typical does not mean identical, and the typicality requirement is liberally construed." *Gaspar v. Linvatec Corp.*, 167 F.R.D. 51, 57 (N.D. Ill. 1996). It requires "enough congruence between the named representative's claim and that of the unnamed members of the class to justify allowing the named party to litigate on behalf of the group." *Spano v. The Boeing Co.*, 633 F.3d 574, 586 (7th Cir. 2011). While "some factual variations may not defeat typicality, the requirement is meant to ensure that the named representative's claims 'have the same essential characteristics as the claims of the class at large.' " *Oshana*, 472 F.3d at 514 (citation omitted).

i. Nationwide Class of All Fifty States' Laws

***48** As a threshold matter, Plaintiffs makes no attempt to show that any class representative's claim could be typical for a nationwide class that applies every state's consumer protection law. See, *e.g.*, *Block v. Abbott Labs.*, 2002 WL 485364, at *5 (N.D. Ill. Mar. 29, 2002) (finding typicality not satisfied for nationwide class based on state consumer fraud statutes and describing such a class as a "logistical and procedural nightmare"). Accordingly, Plaintiffs have failed to show typicality for a nationwide class action claim based on all fifty states' laws.

ii. Nationwide CLRA Class

Plaintiffs do offer one brief paragraph in support of their contention that typicality is satisfied for its nationwide CLRA class and its state subclasses, stating that the named Plaintiffs' claims "are substantially the same as the classes' claims and arise from the same course of conduct" as the absent class members, and Defendant's "defenses to the claims are also the same: the No-Burst Lines are not defective and they only fail because of so-called misuse." [286, at 34.] Defendant challenges typicality for both the nationwide class and the subclasses.

With respect to the nationwide CLRA class, Defendant argues that the claims of the two class representatives—Steven Rensel (Arizona) and Karen Rhyne (Tennessee)—are not typical of *every* class member's claims because they experienced only a coupling nut failure, not a hose failure. [286, at 22-23.] The Court agrees. Plaintiffs allege "two" defects. *Id.* at 8.[52] They have not alleged "*a* defect common to all instances of a consumer product." ***In re IKO Roofing Shingle Prod. Liab. Litig.***, 757 F.3d 599, 602 (7th Cir. 2014) (emphasis added); see also *Baker v. Microsoft Corp.*, 797 F.3d 607, 611 (9th Cir. 2015) ("[R]egardless of when the premature tire wear was experienced, the fact remained that all class members at some point experienced the same injury *due to the same defect.*" (emphasis added)). In fact, Plaintiffs' opening brief sorts their class representatives by defect under the headings "Coupling Nut" or "Hose Burst." *Id.* at 21–25. Even Dr. Pittaoulis divides her 400-person sample size into a "toilet connectors" group (for coupling nut issues) and a "water supply lines" group (for hose failure issues). [334-3, ¶ 18.]

Each defect involves different parts (coupling nut versus hose), different materials (plastic versus rubber and stainless steel), different flaws (creep rupture versus corrosion), different environments (an open area versus an enclosed cabinet), and different labels tailored to different warnings (overtightening versus exposure to corrosive chemicals). [340, at 26–27.] These are not minor factual differences. These claims lack the "same essence," and do not "stand or fall" together. Cf. *Suchanek*, 311 F.R.D. at 255, 257 (claims "all * * * stand or fall on the issue of whether a reasonable consumer was likely to be misled by the overall packaging, not any one particular attribute or omission").

Plaintiffs seek to overcome that obstacle by arguing that "all Class Members were injured in the same way * * * when they were relieved of their money by [Defendant's] deceptive conduct."[53] [371, at 23.] But not every class member claims to have experienced the *same* deceptive conduct. Rensel's and Rhyne's hoses did not fail. [286, at 22–23.] They have not suffered property damage from a defective hose. *Id.* They do not claim to have relied on hose-related representations or omissions or that these

representations or omissions caused their actual losses. *Chamberlan v. Ford Motor Co.*, 369 F. Supp. 2d 1138, 1145 (N.D. Cal. 2005) ("Relief under the CLRA is specifically limited to those who suffer damage, making causation a necessary element of proof."). Their claims do not depend on the accuracy of labels regarding exposure to corrosive materials. Nor do Defendant's defenses concerning improper cleaning or chemical storage impact Rensel's and Rhyne's recovery. If the factfinder concludes that the coupling nut was not defective, Rensel and Rhyne cannot merely swap out their defective design claims for an entirely unrelated alleged defect. The incentive that Rensel and Rhyne have to show the coupling nut was defective does not sufficiently overlap with consumers who were injured only by a hose failure. See *Czuchaj v. Conair Corp.*, 2016 WL 4272374, at *3 (S.D. Cal. Aug. 15, 2016) ("[Plaintiff's] claims are not typical of unnamed class members who suffered a cord defect because the evidence needed to prove her coil claim is not probative of unnamed class members' cord claims. [Plaintiff] does not need to present evidence of the cord defect to prevail on her coil claim. She never had a cord defect and could not have had a cord defect. Therefore, [Plaintiff] has no incentive to represent unnamed class members who suffered from cord defects."). Therefore, while Rensel's and Rhyne's coupling nut claims are typical of absent class members who experienced coupling nut-related failures (and Defendant does not argue otherwise), they are not typical of the absent class member with hose-related claims. [54]

iii. State Subclasses

***49** Defendant raises a similar objection to the putative state subclass representatives: they suffered either a coupling nut failure or a hose body failure, but not both, and cannot represent subclass members with a different defect. [340, at 28.] And, for the same reasons regarding the proposed nationwide class, the Court agrees. Subclass representatives asserting one defect type are only typical of absent class members claiming the same alleged defect.

One unique exception involves Minnesota. [55] It is undisputed that the only proposed class representative for a Minnesota subclass, Steve Larson, has not experienced any product failure. [286, at 22.] Minnesota's "economic-loss doctrine precludes 'product defect tort claim[s]' alleging damage to a defective product unless the product caused harm to the buyer's additional personal property or real property." *Driscoll v. Standard Hardware, Inc.*, 785 N.W.2d 805, 815 (Minn. Ct. App. 2010). Because he has suffered no property damage, Larson plainly cannot pursue strict liability or negligence claims under Minnesota law, and thus he cannot satisfy typicality for any Minnesota negligence or strict liability subclass.

Plaintiffs argue that "Larson's role in the negligence and strict liability claims is solely for purposes of issue certification pursuant to Rule 23(c)(4)." [371, at 25.] But Rule 23(c)(4) does not exempt class representatives from the threshold requirements of Rule 23(a). *Retired Chi. Police*, 7 F.3d at 599 ("Subclasses must satisfy the class action requirements before they may be certified."); *Schmidt v. Smith & Wollensky, LLC*, 268 F.R.D. 323, 325 (N.D. Ill. 2010) (applying Rule 23(a) to class action pursued under Rule 23(c)(4)). Without meeting typicality, Larson cannot be the class representative for any Minnesota "issue certification" subclass.

Plaintiffs also argue that Larson is an appropriate class representative for a Minnesota breach of warranty subclass because this cause of action does not require property damage. See *Peterson v. Bendix Home Sys., Inc.*, 318 N.W.2d 50, 53 (Minn. 1982) (explaining that the Minnesota Uniform Commercial Code provides "three types of damages for the kinds of harm caused by a breach of warranty" including general damages, which are "the difference in value between the goods as accepted and what they would have been worth as warranted"). But Plaintiffs gloss over the fact that their warranty subclasses definition encompasses class members who sustained damage from the failure of Defendant's product. [See 286, at 7.] "When there is a claim by a buyer for damage to the defective product itself (and this includes consequential damages), the U.C.C. remedy is exclusive and tort will not lie." *Lloyd F. Smith Co. v. Den-Tal-Ez, Inc.*, 491 N.W.2d 11, 15 (Minn. 1992). Based on this exclusivity, Larson's warranty claims do not have the "same essential characteristics" as the claims of absent class members with property damage. *Oshana*, 472 F.3d at 514. Plaintiffs have not attempted to certify—or establish any of the Rule 23(a) requirements for—a Minnesota U.C.C.-exclusive subclass for product owners who lack other property damage, and the Court cannot find on this record that Larson's claims are typical.

iv. Defendant's Other Typicality Arguments

Defendant's remaining "typicality" arguments seem to be more appropriately directed to other Rule 23 requirements. Defendant argues that none of the class representatives for the nationwide class or the state subclasses satisfy typicality because each "has a different story as to who purchased and installed their respective Connectors." [340, at 28–29.] Only three Plaintiffs personally purchased their connectors. *Id.* at 28. According to Defendant, this matters because it determines who is a "consumer" under CLRA. *Id.* But Defendant does not actually argue that any particular class representative is not a "consumer" and therefore his or her claim is not typical. In fact, Defendant ignores the Court's motion to dismiss opinion, which already addressed who is a "consumer" at least for pleading purposes. [231, at 11–14.] Defendant's cursory and conclusory assertion that these "gatekeeping issues as to liability * * * vary by individual plaintiff" adds nothing to that legal analysis. [340, at 29.]

***50** Likewise, Defendant argues that only four Plaintiffs installed their own connectors, which will raises issues related to causation and consumer misuse. [340, at 29.] Defendant makes similar arguments about reliance, claiming that thirteen out of fourteen Plaintiffs "either did not see the Connector before it was installed or were not aware of any labels or advertising related to [Defendant] and *never* inspected the label or relied on any warranty in the selection of the product." *Id.* "To be typical, a class member need not prove that she is immune from any possible defense, or that her claim will fail only if every other class member's claim also fails." *Keegan*, 284 F.R.D. at 525. "Instead, she must establish that she is not subject to a defense that is '[a]typical of the defenses which may be raised against other members of the proposed class.' " *Id.* (citation omitted); accord *J. H. Cohn & Co. v. Am. Appraisal Assocs., Inc.*, 628 F.2d 994, 999 (7th Cir. 1980) ("[T]he presence of even an arguable defense peculiar to the named plaintiff or a small subset of the plaintiff class may destroy the required typicality of the class as well as bring into question the adequacy of the named plaintiff's representation."). Here, Defendant argues that "the vast majority [of connectors fail] due to improper installation and misuse." [340, at 12.] Thus, if most consumers *did not* install their own connectors and will face a consumer misuse defense, then these facts appear to support the proposition that Plaintiffs' claims are typical of the absent class members. To the extent that reliance is even an element of state warranty claims [see 286, at 38–39], most consumers likely used someone else to purchase and install their connector, which means they will face the same arguments from Defendant as Plaintiffs do here. See *Suchanek*, 764 F.3d at 758 ("If very few members of the class were harmed, that is 'an argument not for refusing to certify the class but for certifying it and then entering a judgment that would largely exonerate' [defendant]." (citing *Butler*, 727 F.3d at 799)).

Finally, to the extent Defendant believes that the differences among its products require different state subclasses for each *product type* for each alleged defect, the Court also is not persuaded. The existence of "some factual variations" among Defendant's products does not defeat typicality. *Oshana*, 472 F.3d at 514. For example, all of the hoses within the class definition used an EPDM or Santoprene inner-hose body. [342-32.] Plaintiffs complain that both materials "had insufficient bursting strength to withstand ordinary household water pressure." [286, at 17.] Defendant does not explain how a claim involving a hose connected to a faucet would fare differently than a claim involving a hose connected to a washing machine. Defendant asserts a common defense to *all* hose-related claims—insisting that 97 percent of these claims involved failures due to "improper exposure to corrosive materials." [340, at 13.] The mere fact that a similarly designed product connects to different appliances or fixtures does not preclude typicality in a product defect case, and Defendant cites nothing to the contrary. See *Butler*, 702 F.3d at 361 (certifying class for 27 different models of product with five design changes because "[t]he basic question in the litigation—were the machines defective in permitting mold to accumulate and generate noxious odors?—is common to the entire mold class, although the answer may vary with the differences in design").

To sum up, Plaintiffs' nationwide class action claim based on all fifty states' consumer protection laws does not satisfy typicality. Alternatively, Plaintiffs' class representatives for a nationwide CLRA claim could satisfy typicality for coupling nut-related defects, but not hose-related defects. Plaintiffs would need to identify a suitable class representative for any nationwide class for hose-related defects. Furthermore, the class

representatives for the state law subclasses for Vermont, Alabama, Arizona, and Tennessee are typical of only coupling nut-related claims, not hose-related claims. The class representatives for the state law subclasses for Pennsylvania, Illinois, North Dakota, Georgia, Maine, New Hampshire, and California[56] are typical of hose-related claims, but not coupling nut-related claims. Likewise, Plaintiffs would need to identify suitable class representatives in these states for the other alleged defect to advance further. Plaintiffs also fail to satisfy typicality for their Minnesota state law subclasses.

4. Adequacy

Rule 23(a)(4) requires a plaintiff to show that "the representative parties will fairly and adequately protect the interests of the class." To satisfy adequacy, Plaintiffs must demonstrate: (1) the class representative lacks conflicting or antagonistic interests compared with the class; (2) the class representative is sufficiently interested in the outcome of the case to ensure vigorous advocacy; and (3) class counsel is experienced, competent, qualified, and able to conduct the litigation vigorously. See *Retired Chi. Police*, 7 F.3d at 598; *Randall v. Rolls-Royce Corp.*, 637 F.3d 818, 824 (7th Cir. 2011); *Cavin v. Home Loan Ctr., Inc.*, 236 F.R.D. 387, 392–93 (N.D. Ill. 2006). In some ways, typicality overlaps with adequacy: "if [a named plaintiff's] claim is atypical, he is not likely to be an adequate representative; his incentive to press issues important to the other members of the class will be impaired." *Robinson v. Sheriff of Cook Cty.*, 167 F.3d 1155, 1157 (7th Cir. 1999).

***51** Defendant does not contest that Plaintiffs have demonstrated the latter two aspects of adequacy. The class representatives are sufficiently interested in the outcome in this case, evidenced by their retention of experienced counsel, production of documents, and active participation in discovery. [286, at 35.] Plaintiffs' class counsel has sufficient experience bringing class actions and acting as class counsel [see 286-66]. Defendant's only challenge to this requirement is whether there are conflicts of interest that defeat adequacy.

Defendant argues that "individual factual variances" will require the class representatives to "tailor their arguments to their respective highly-specific factual circumstances." [340, at 30.] But Defendant does not explain why those variances will create a conflict with any of the absent class members. Again, most class members did not directly purchase or install their connectors, which means the class representatives' incentives to disprove the significance of those facts aligns with the interests of the absent class members. Similarly, Defendant claims that Rhyne's coupling nut "shows signs of nicks and chips consistent with tool installation, requiring significant focus on contributory negligence for failure to comply with instructions." *Id.* But Defendant also maintains that 95 percent of claims involving coupling nut failures are "due to provable over-tightening." [340, at 13.] The Court does not see how Defendant's contributory negligence defense will be "unique to the named Plaintiff or a small subclass," and thus Defendant fails to undermine Plaintiffs' showing of adequacy—at least for those claims where Plaintiffs could satisfy typicality (*e.g.*, named plaintiffs with hose-related claims seeking to represent absent class members with hose-related claims). *Id.* (citation omitted).[57]

5. Commonality

Rule 23(a)(2) requires "questions of law or fact common to the class." "Commonality demands more than a showing that the class members 'have all suffered a violation of the same provision of law' at the hands of the same defendant." *Suchanek v. Sturm Foods, Inc.*, 764 F.3d 750, 755 (7th Cir. 2014) (citation omitted). "What matters to class certification * * * [is] the capacity of a classwide proceeding to generate common answers apt to drive the resolution of the litigation." *Wal-Mart*, 564 U.S. at 350. "Even a single common question will do." *Id.* at 359 (internal punctuation omitted); see also *Walker v. Bankers Life & Cas. Co.*, 2007 WL 2903180, *4 (N.D. Ill. Oct. 1, 2007) ("Not all factual or legal questions raised in a lawsuit need be common so long as a single issue is common to all class members."). A question is common if "determination of its truth or falsity will resolve an issue that is central to the validity of each one of the claims in one stroke." *Wal-Mart*, 564 U.S. at 350.

Plaintiffs seemingly argue that commonality is satisfied whenever "the claim at issue relate[s] to a defective product design." [286, at 33.] The law is not so uniform; commonality is present in some product defect cases, but not others. Compare *IKO Roofing*, 757 F.3d at 603 (commonality shown where the issue was whether the

product conformed to a particular industry standard), with *Bridgestone*, 288 F.3d at 1018 (no commonality because of significant variations in the product design and state law requirements). In fact, "the Ninth Circuit," where most of the CLRA case law cited by Defendant comes from, "has acknowledged the danger of *per se* class certification of defect claims." *McVicar v. Goodman Glob., Inc.*, 2015 WL 4945730, at *13 (C.D. Cal. Aug. 20, 2015) (citing *Wolin v. Jaguar Land Rover N. Am., LLC*, 617 F.3d 1168 (9th Cir. 2010), and *Baker*). When commonality is not satisfied in product defect cases, it is often because of one of two reasons.

*52 First, where the putative class's product defect claims are governed by many different states' laws, commonality is often lacking. See, *e.g.*, *Bridgestone*, 288 F.3d at 1015 ("No class action is proper unless all litigants are governed by the same legal rules. Otherwise the class cannot satisfy the commonality" requirement.); *Szabo*, 249 F.3d at 674 ("Differences of [state law] cut strongly against nationwide classes."); *Miller v. Gen. Motors Corp.*, 2003 WL 168626, at *2 (N.D. Ill. Jan. 26, 2003) ("No court has held that the fifty states' consumer fraud statutes, or common laws of fraudulent omission, are so similar that a single forum state's law could be applied to a multi-state class. In fact, virtually every court to face the issue has steadfastly refused to certify nationwide class actions due to variance in states' laws." (collecting cases)); *Siegel*, 256 F.R.D. at 585 (collecting cases). This same concept is also analyzed—maybe more properly—in terms of predominance. See, *e.g.*, *Bridgestone*, 288 F.3d at 1018.

Second, where the class seeks to include materially different products under an overarching product defect theory, commonality can be lacking. *Bridgestone*, 288 F.3d at 1019 ("The six trade names listed in the class certification order comprise 67 master tire specifications * * * [that] come in multiple diameters, widths, and tread designs; their safety features and failure modes differ accordingly. Plaintiffs say that all 67 specifications had three particular shortcomings that led to excess failures. But whether a particular feature is required for safe operation depends on *other* attributes of the tires, and as these other attributes varied across the 67 master specifications it would not be possible to make a once-and-for-all decision about whether all 60 million tires were defective, even if the law were uniform."); ***In re Gen. Motors Corp. Dex-Cool Prod. Liab. Litig.***, 241 F.R.D. 305, 326 (S.D. Ill. 2007) (collecting cases).

i. Nationwide Class of All Fifty States' Laws

Because the Court has concluded that Plaintiffs' nationwide class action must be based on the consumer protection laws of all fifty states, there is no common issue of law. See *Bridgestone*, 288 F.3d at 1015–18. Plaintiffs vaguely assert that there is a "single, significant common issue of liability" [286, at 34], but "liability," of course, depends on the elements of a cause of action. "[S]tate consumer fraud laws differ with regard to several key issues—the type of prohibited conduct, proof of injury-in-fact, available remedies, scienter, statute of limitations, and reliance." *Siegel*, 256 F.R.D. at 585. The Court cannot frame a question that turns on application of fifty state's different laws in a way that will generate an answer that is "apt to drive the resolution of the litigation." *Wal-Mart*, 564 U.S. at 350.

ii. Nationwide CLRA Class

If the nationwide CLRA class is viable, Plaintiffs can establish at least one common legal question. *Wal-Mart*, 564 U.S. at 359 ("Even a single common question will do."). For example, "[u]nder the CLRA, causation can be shown as to an entire class by proving materiality." *Keegan*, 284 F.R.D. at 530. "A misrepresentation or omission is material under California law 'if a reasonable man would attach importance to its existence or nonexistence in determining his choice of action in the transaction in question.' " *Id.* at 529. Whether an objective "reasonable man" would consider Defendant's alleged representations or omissions about the product important to purchasing Defendant's product is a question common to the CLRA class. See *Suchanek*, 764 F.3d at 758 (holding that district court abused its discretion in failing to recognize an "objective question"—whether the defendant's packaging "was likely to mislead a reasonable consumer"—that satisfied the commonality requirement of Rule 23(a)(2)). Defendant does not argue otherwise.

*53 Defendant's only argument concerns whether the variability in its product precludes commonality. [340, at 32.] But here too Defendant does not explain *how* these product differences matter to commonality. In *Bridgestone*, whether a tire's design feature caused the tire to fail was too dependent on "*other* attributes of the

tires," which "varied across the 67 master specifications" of the tire. 288 F.3d at 1019. Putting aside Defendant's customer misuse defense, Defendant does not identify any attribute of the connector itself that would preclude a common determination of whether hose or coupling nut design would cause the product to fail. If an EPDM inner-hose body with a braided stainless steel sheath was insufficiently strong and constitutes a defect, why does it matter for commonality whether that hose was connected to a washing machine or a water heater? Defendant does not articulate this reason if it exists or attempt to square its position with its consumer misuse defense. And, to the extent Defendant contends that the existence of a customer misuse affirmative defense precludes commonality [340, at 32], it is unclear why that is true and Defendant does not cite anything to support that argument. Such an argument is more properly directed to whether predominance is satisfied. In short, Defendant has failed to show what prevents a finding that its coupling nut or hose is defective or not from driving the resolution of the litigation. See *Wal-Mart*, 564 U.S. at 350.

iii. State Subclasses

Defendant does not raise any challenge to whether commonality is satisfied for the state law subclasses. As with the CLRA claim, each subclass requires application of only a single state's law and the product differences do not vary to defeat commonality. For the negligence and strict liability issue subclasses, the existence of inherent defects is a question of fact and law that is sufficiently common for all class members per state. See ***In re Gen. Motors Corp. Dex-Cool Prod. Liab. Litig.***, 241 F.R.D. 305, 312 (S.D. Ill. 2007). For the warranty claim, while Defendant argues that the length of the warranty varied, it does not contend that its content varied. [See 340, at 33–34.] Accordingly, the legal question of whether the warranty is properly read to contain a promise as to the "quality and characteristics of the connectors" is common to the class. [371, at 26]; see *Daffin v. Ford Motor Co.*, 458 F.3d 549, 552 (6th Cir. 2006) ("[T]he legal question of whether the warranty contract is properly read to contain a promise to repair the type of common 'defect' in all the 1999 or 2000 throttle body assemblies (regardless of whether or not manifested during the warranty period) is also common to the class.").

6. Predominance

The Court now turns to the first requirement of Rule 23(b)(3): predominance. Although related to the commonality requirement, "the predominance criterion is far more demanding." *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 624 (1997). It requires "that the questions of law or fact common to class members predominate over any questions affecting only individual members." Fed. R. Civ. P. 23(b)(3). The predominance inquiry tests whether the proposed class is "sufficiently cohesive to warrant adjudication by representation." *Amchem*, 521 U.S. at 623. Plaintiffs satisfy predominance requirement only if they can show that " 'common questions represent a significant aspect of [a] case and * * * can be resolved for all members of [a] class in a single adjudication.' " *Messner*, 669 F.3d at 815 (citation omitted). " 'If, to make a prima facie showing on a given question, the members of a proposed class will need to present evidence that varies from member to member, then it is an individual question. If the same evidence will suffice for each member to make a prima facie showing, then it becomes a common question.' " *Id.* (citation omitted); see also *Tyson Foods, Inc. v. Bouaphakeo*, 136 S. Ct. 1036, 1045 (2016) (Common questions are where "the same evidence will suffice for each member to make a prima facie showing [or] the issue is susceptible to generalized, class-wide proof.").

As the Supreme Court recently explained, "[t]he predominance inquiry 'asks whether the common, aggregation-enabling, issues in the case are more prevalent or important than the non-common, aggregation-defeating, individual issues.' " *Tyson Foods*, 136 S. Ct. at 1045 (citation omitted). "When 'one or more of the central issues in the action are common to the class and can be said to predominate, the action may be considered proper under Rule 23(b)(3) even though other important matters will have to be tried separately, such as damages or some affirmative defenses peculiar to some individual class members.' " *Id.* (citation omitted).

i. Nationwide Class of All Fifty States' Laws

***54** Plaintiffs make no attempt to show that predominance could be satisfied if all fifty states' consumer protection laws applied to a nationwide class. Thus, Plaintiffs fail to sustain their burden on

predominance for that proposed class—a result in accordance with courts from this Circuit and across the country. See, *e.g.*, *Bridgestone*, 288 F.3d at 1018 ("Because these claims must be adjudicated under the law of so many jurisdictions, a single nationwide class is not manageable."); *Pilgrim*, 660 F.3d at 947 ("[I]n view of plaintiffs' appropriate concession that the consumer-protection laws of the affected States vary in material ways, no common legal issues favor a class-action approach to resolving this dispute."); *Zinser v. Accufix Research Inst., Inc.*, 253 F.3d 1180, 1189–90 (9th Cir. 2001) ("The complexity of the trial would be further exacerbated to the extent that the laws of forty-eight states must be consulted to answer such questions" about causation); ***In re** Am. Med. Sys., Inc.*, 75 F.3d 1069, 1085 (6th Cir. 1996) ("If more than a few of the laws of the fifty states differ, the district judge would face an impossible task of instructing a jury on the relevant law," which defeats predominance.); *Castano v. Am. Tobacco Co.*, 84 F.3d 734, 741 (5th Cir. 1996) ("In a multi-state class action, variations in state law may swamp any common issues and defeat predominance."); *Gianino*, 846 F. Supp. 2d at 1103 ("Considering that the laws of 50 states will have to be applied in this case, the Court concludes that the common questions of law do not predominate over the questions affecting individual class members."); *Marshall v. H & R Block Tax Servs. Inc.*, 270 F.R.D. 400, 407 (S.D. Ill. 2010) ("Application of multiple states' laws to class members' claims may eliminate common questions among the class members." (collecting cases)); *McDonald's*, 257 F.R.D. at 673–74 (denying certification of consumer protection class action because of "material conflicts among the fifty states' laws"); *Siegel*, 256 F.R.D. at 585 (denying certification for 45-state consumer protection class action). "[O]nly 'a decentralized process of multiple trials, involving different juries, and different standards of liability, in different jurisdictions' will yield the information needed for accurate evaluation of mass tort claims." *Bridgestone*, 288 F.3d at 1020.

ii. Nationwide CLRA Class

The parties mainly focus their attention on whether predominance has been shown for a nationwide CLRA class. One challenge to answering this question is pinning down what exactly Plaintiffs' CLRA liability theory is. From the briefs, Plaintiffs' theory appears to be that Defendant "omitted material information about the propensity" of its product to fail because of design defects. [286, at 37.] But Plaintiffs often describe their theory in terms of representations, not omissions. [See, *e.g.*, 286, at 10 ("Due to the defects, none of these representations were true."); *id.* at 28 (describing this case as "an action where the plaintiff has suffered purely pecuniary harm on account of false representations" as part of the choice of law inquiry).] This conflation of omissions and representations is most apparent in Plaintiffs' pursuit of the same "price premium" damages methodology for its breach of *express* warranty claim and CLRA "omission" claim. [See 336-5, ¶¶ 35–36, 51–52; 377, at 15 n.21.] Plaintiffs plan to use their conjoint study to "estimate the increase (or decrease) in value associated with the *representations* that the No-Burst Lines are covered by a 10-year warranty and that they will not burst," and then use that estimate to calculate damages. [286, at 40 (emphasis added); see also *id.* at 40 n.35 ("Dr. Pittaoulis's analysis uses the 10-year *representation* in order to show that the survey methodology is workable." (emphasis added)).] Said differently, Plaintiffs argue that Defendant made an express representation that its products would not burst (*e.g.*, "NO BURST") for purposes of the warranty claim, but its failure to disclose that its products might have some "propensity" to burst is an actionable omission, but not a representation, for the CLRA claim. Plaintiffs never explain how the same fact is an omission for one claim but a misrepresentation for another while the damages for both claims are measured the same way.[58]

*55 Even accepting that Plaintiffs' CLRA theory is one of omissions still encounters predominance problems. To the extent Plaintiffs argue that there is no need to show reliance under an omissions theory [286, at 37; 371, at 29], that is not the law. "An essential element for a fraudulent omission claim [under CLRA] is actual reliance." *Daniel v. Ford Motor Co.*, 806 F.3d 1217, 1225 (9th Cir. 2015). In fact, "actual reliance must be established for an award of damages under the CLRA." *Cohen v. DIRECTV, Inc.*, 178 Cal. App. 4th 966, 980 (2009).

"To prove reliance on an omission, a plaintiff must show that the defendant's nondisclosure was an immediate cause of the plaintiff's injury-producing conduct." *Daniel*, 806 F.3d at 1225. The nondisclosure must be a "substantial factor" in the decision to purchase the

product. *Id.* Reliance can be "presumed, or at least inferred, when the omission is material," which is based on the objective reasonable consumer standard. *Id.* However, it is "necessary for everyone in the class to have viewed the allegedly misleading" information to invoke this presumption. *Mazza*, 666 F.3d at 596. A presumption of reliance does not arise when class members "were exposed to quite disparate information." *Id.*

Here, most class members did not directly purchase Defendant's product—either because they outsource that responsibility to a plumbing professional or because they purchased their home with Defendant's product already installed. [371, at 15; 340, at 37.] If these class members were not the direct purchasers of Defendant's product, then it is at best an open question—and more likely a dubious proposition—whether they ever saw Defendant's product labeling or marketing. That makes this case much more like *Mazza*, where the Ninth Circuit reversed class certification for an omissions theory because many class members were not exposed to the defendant's misleading advertisements. 666 F.3d at 595–96. While Plaintiffs assert that "all Class members were injured in the same way * * * when they were relieved of their money by [Defendant's] deceptive conduct" [371, at 23], that presumes that (1) all class members were exposed to Defendant's conduct and (2) this conduct caused their alleged loss.

Without a presumption of reliance, individual issues of who was exposed to statements about Defendant's product and what they knew about the product predominate over common issues. See *Campion v. Old Republic Home Prot. Co.*, 272 F.R.D. 517, 538 (S.D. Cal. 2011) ("Many putative class members, in fact, may not have even seen the home warranty plans before acquiring them. Thus, an inference of reliance on behalf of the proposed class is not permissible, and individual issues would once again overwhelm any common issues."); *Turcios v. Carma Labs., Inc.*, 296 F.R.D. 638, 646 (C.D. Cal. 2014) (finding no commonality and predominance on CLRA claim where "Plaintiff cannot show that all class members suffered the same injury because he cannot show that all class members relied on the alleged misrepresentation"); ***In re Zurn Pex Plumbing Prod. Liab. Litig.***, 644 F.3d 604, 619 (8th Cir. 2011) ("Claims requiring individual proof of reliance are generally not amenable to class certification."); see also *Amgen Inc. v. Conn. Ret. Plans & Trust Funds*, 133 S. Ct. 1184, 1193 (2013) ("Absent the fraud-on-the-market theory, the requirement that Rule 10b–5 plaintiffs establish reliance would ordinarily preclude certification of a class action seeking money damages because individual reliance issues would overwhelm questions common to the class."). [59]

***56** Plaintiffs rely on *Tait v. BSH Home Appliances Corp.*, 289 F.R.D. 466 (C.D. Cal. 2012), but that case involved consumers who purchased washing machines and the representations "on the product itself" were allegedly misleading. *Id.* at 486. Plaintiffs never explain why *Tait*'s reasoning should apply to consumers who did not purchase a product directly and never saw the statements on the product itself. See also *Cohen*, 178 Cal. App. 4th at 979 (no predominance because class included subscribers who never saw the offending advertisements before purchasing services, saw different advertisements without the allegedly misleading information, or purchased the services "based on word of mouth" or because they saw the service in a store or another person's home).

The same is true of *Keilholtz v. Lennox Hearth Prod. Inc.*, 268 F.R.D. 330 (N.D. Cal. 2010). In *Keilholtz*, a class action of homeowners with glass-enclosed fireplaces was certified against the fireplace manufacturers on a single uniform omissions theory—that the fireplaces may reach over 475 degrees Fahrenheit. The court explained that "as long as Plaintiffs can show that material misrepresentations were made to the class members, an inference of reliance arises as to the entire class." *Id.* at 343. The court anticipated that defendants might only be able to "defeat the showing of causation as to a few individual class members," but that this would not overwhelm the common issues of law and fact. *Id.* Here, Plaintiffs point to several advertising statements beyond the label terms that also purportedly are express warranties and false "representations." [See 371, at 26; 286 at 10.] Thus, there is no single uniform omission (or misrepresentation) in this case and no basis to assume that the alleged misrepresentations reached the class members in any event, which means that reliance cannot be presumed on a classwide basis. See *Campion*, 272 F.R.D. at 538 ("Even if it were permissible to infer common reliance in a CLRA claim, * * * an inference of reliance would only be permitted when a specific material misrepresentation of a particular fact was made to each class member and the claims of all the class members stem from this source.").

That brings us to the second obstacle to predominance: Plaintiffs' CLRA damages theory. As a reminder, Plaintiffs plan to conduct a conjoint study to estimate the "impact that a NO BURST representation and representation of a 10-year warranty have on consumers' preferences for" connectors [334-3, ¶ 14], and then use the output of that study to calculate the "difference between the market value of the products as promised and as delivered," which is equal to each class member's damages since every consumer "overpaid" for their defective product [334-5, ¶ 37]. The Court excluded Dr. Pittaoulis's proposed survey [334] as presently constructed. Because Bernatowicz's damages formula depends on that survey, Plaintiffs do not have a common damages formula that they can rely on for class certification. Nevertheless, the Court will assume that some version of this survey is salvageable and could be input into Bernatowicz's damages formula.

Defendant argues that Plaintiffs' common damages theory is fatally disconnected from their CLRA theory and fails *Comcast*. In *Comcast*, the Supreme Court explained that "a model purporting to serve as evidence of damages in this class action must measure only those damages attributable to that theory." 133 S. Ct. at 1433. "If the model does not even attempt to do that, it cannot possibly establish that damages are susceptible of measurement across the entire class for purposes of Rule 23(b)(3)." *Id.* "[F]or purposes of Rule 23, courts must conduct a rigorous analysis to determine whether that is so." *Id.* (citation and internal quotation marks omitted).

*57 To be clear, this does not mean that commonality of damages is essential. *IKO Roofing*, 757 F.3d at 602. If that were true, "then class actions about consumer products [would be] impossible." *Id.* What is necessary is that the "theory of loss" matches the "theory of liability." *Id.* Thus, this Court must determine "if there is a classwide method for proving damages, and if not, whether individual damage determinations will overwhelm the common questions on liability and impact." *Kleen Prod. LLC v. Int'l Paper Co.*, 831 F.3d 919, 929 (7th Cir. 2016).

A damages calculation that reflects the difference between the market price of the product as represented and as delivered is neither novel nor problematic from a class certification perspective. See *IKO Roofing*, 757 F.3d at 603. In fact, that is a standard remedy for buyers provided by the U.C.C. for a breach of warranty. See Uniform Commercial Code § 2–714(2). Moreover, a "price premium" theory based on a conjoint analysis has been accepted by several courts. See, *e.g.*, *ConAgra*, 90 F. Supp. 3d at 953–54. Courts have even sanctioned a price premium damages theory related to a failure to disclose a product's propensity for non-conformance. See *Tait*, 289 F.R.D. at 479; ***In re Whirlpool Corp. Front-Loading Washer Prod. Liab. Litig.***, 722 F.3d 838, 857 (6th Cir. 2013).

The problem for Plaintiffs, however, is that their Pittaoulis–Bernatowicz price premium damages model does not measure damages attributable to their liability theory. If class members were injured by the fact that Defendant "omitted material information about the propensity" of its product to fail [286, at 37], then damages should be the difference in the market price for a product with and without this "propensity" to fail. Yet, even a non-defective product would still have a propensity to fail sometimes.[60] For example, if the non-defective version of Defendant's product as represented would fail one percent of the time and Defendant's product as delivered fails five percent of the time, then damages should be the difference in market price between those two products. The Court does not see how measuring a consumer's preference for a ten-year warranty or a "No Burst" representation has anything to do with an "omission of failure propensity" theory. Why does it matter whether that the survey participants prefer the attribute "NO BURST" over "Fits All"? Even assuming that the "NO BURST" is somehow connected to Defendant's failure to disclose its product's propensity to fail, determining the WTP for that attribute provides no insight into the value of the product that consumers ultimately received.

Similarly, no expert opines that Defendant's product typically fails after a certain length of time (*e.g.*, the product has a "propensity" to fail in the ninth year). Again, one would need to know the baseline age of failure for a non-defective version of Defendant's product—the product as represented—for any meaningful comparison. Maybe Plaintiffs think that the benchmark should be ten years because that is the length of the warranty. If that is true, then it is unclear why that would not be a misrepresentation, rather than an omission. Even so, how will measuring the WTP for warranty durations of "None, 1 year, 5 years, 10 years, [and] Lifetime" provide an answer to the damages question? Bernatowicz measures damages by assuming that the ten-year warranty attribute

was "missing" at the point of purchase. [334-5, ¶ 36.] Unless the product had a propensity to fail immediately, this "attribute" was not missing entirely. If Defendant's product fails after nine years, then the consumer's WTP for a ten-year warranty would still need to be reduced by the WTP for a product that lasts nine years—the product that the consumer actually received—before any damages are calculated. This is simply not the class-wide damages model that Plaintiffs submit for class certification. [61]

*58 Defendant also challenges the appropriateness of averaging WTP for all class members based on any overpayment theory, arguing that class members with *no* WTP for the missing attributes will still be awarded damages under this theory. [334-1, at 17–18.] Plaintiffs respond that the "use of statistical sampling to determine averages is a concept accepted by the courts," citing *Tyson Foods*. [377, at 14.] But *Tyson Foods* held only that class action plaintiffs may use averages based on a representative sample "to establish classwide liability." 136 S. Ct. at 1049. The Supreme Court expressly declined to address whether "uninjured class members" can share in the class's recovery where liability is established through averages or whether there must be " 'some mechanism to identify the uninjured class members prior to judgment and ensure that uninjured members (1) do not contribute to the size of any damage award and (2) cannot recover such damages.' " *Id.* at 1049–50 (citation omitted). As Chief Justice Roberts stated in his concurrence, "Article III does not give federal courts the power to order relief to any uninjured plaintiff, class action or not. * * * Therefore, if there is no way to ensure that the jury's damages award goes only to injured class members, that award cannot stand." *Tyson Foods*, 136 S. Ct. at 1053 (Roberts, C.J., concurring).

In the instant case, Plaintiffs do not seek to establish liability through averages. Instead, they skip that step and try to prove damages through averages. This is not merely an incidental aspect of their damages theory, but an intentional design choice that Plaintiffs have made to create a "common" damages formula. [See 286, at 40.] *Tyson Foods* does not speak to such an expansive theory as a means to manufacture predominance. And it runs afoul of the Seventh Circuit's distinction between certifying classes where "class members who *were not* harmed and those who *could not* have been harmed." *Messner*, 669 F.3d at 825. Courts do not require "proof * * * that every [class] member has been harmed"—an issue related to the claim's outcome that should be decided after certification. *Suchanek*, 764 F.3d at 757; *Parko v. Shell Oil Co.*, 739 F.3d 1083, 1085 (7th Cir. 2014) ("How many (if any) of the class members have a valid claim is the issue to be determined *after* the class is certified."). They do require, however, that the class members *could have* pursued a claim. *Suchanek*, 764 F.3d at 757–78. Certifying a class based on a common damages model that is designed to award damages to millions of absent class members who "could not [have] br[ought] a valid [CLRA] claim even under the best of circumstances" is inconsistent with these mandates. *Messner*, 669 F.3d at 825.

Plaintiffs do not identify any other court that has accepted an average WTP price premium theory in similar circumstances. Cf. *Opperman v. Path, Inc.*, 2016 WL 3844326, at *14–15 (N.D. Cal. July 15, 2016) (rejecting at class certification a conjoint damages theory predicated on averages). [62] "[C]onsumers do not have identical preferences." *Id.* at 14. Plaintiffs claim to measure the "loss of the benefit of each class member's bargain" [286, at 40], but some consumers may place no value on a 10-year warranty and thus lose nothing in this bargain. See *Opperman*, 2016 WL 3844326, at *14 ("No damages number arising from this model will apply to all class members, particularly since some of the class members, by this measure, will not have been injured at all, *i.e.*, they would have not have required any premium to allow [defendant] to access their contacts, because they don't attach any value to them."). Such a consumer might include those who plan on moving out of their house before 10 years or plan to remodel their homes within that time period. "It may be that the average damages that [the Pittaoulis–Bernatowicz] model would predict will be very close to the damages actually suffered by every class member, but there is no way of knowing this. It is equally or more likely that [their] model would overcompensate some class members, while undercompensating others." *Id.*

*59 Moreover, a theory that awards damages to people who were not damaged seems to be foreclosed by the CLRA. "[I]n order to bring a CLRA action, not only must a consumer be exposed to an unlawful practice, but some kind of damage must result." *Meyer v. Sprint Spectrum L.P.*, 45 Cal. 4th 634, 641 (2009). "If the [California] Legislature had intended to equate 'any damage' with being subject to an unlawful practice by itself, it presumably would have omitted the causal

link between 'any damage' and the unlawful practice, and instead would have provided something like 'any consumer who is subject to a method, act, or practice declared to be unlawful by Section 1770 may bring an action' under the CLRA." *Id.* Courts are equally skeptical that a class member whose product has functioned properly and warranty has run still can recover under CLRA absent some safety concern. See *Daugherty v. Am. Honda Motor Co.*, 144 Cal. App. 4th 824 (2006); *Wilson v. Hewlett-Packard Co.*, 2009 WL 3021240, at *1 (N.D. Cal. Sept. 17, 2009). Even assuming that Plaintiffs could overcome the Article III issues presented by their damages theory, awarding damages to people without "some kind of damage" caused by the "deceptive conduct" or after expiration of a ten-year warranty does not measure damages attributable to any actionable theory of liability. *Comcast*, 133 S. Ct. at 1433.

Without a common "price premium" damages theory, Plaintiffs are left with their effort to recover property damages caused by the failure of Defendant's product.[63] And here is where individualized issues overwhelm the common ones. Defendant's claims rate shows that 99.9% of Defendant's sold products do not result in a claim of failure being reported (and the potential number of unreported failures does not appear to meaningfully change this percentage). Once the parties wade through the class members to find the roughly 0.1% of claims that experienced a failure, individualized inquiries into each consumer's installation, maintenance, misuse, causation, and the damages attributable to the failure would be required.[64] "[W]here the portion of the proposed class that even suffered malfunctions appears to be tiny, plaintiffs' proposal to certify the class of all [purchasers], then determine which few suffered [failures], and then determine which few of those few even arguably can attribute the [failures] to the design defect here alleged, would render the class action device nothing more than a facade for conducting a small number of highly individualized cases." *Canon*, 237 F.R.D. at 360; accord *Payne v. FujiFilm U.S.A., Inc.*, 2010 WL 2342388, at *6 (D.N.J. May 28, 2010) ("Because the great majority of the proposed class has not experienced any malfunction with the [product] and because individual issues of causation will still need to be adjudicated, the question of whether a defect exists in this case will need to be determined based on facts that are particular to each individual proposed class member.").

Plaintiffs argue that "multiple courts have held [that] the 'consumer misuse' defense in design defect cases is not a bar to certification" [371, at 24], but none of the three cases they cite reached any such broad holding. One refused to consider an argument not addressed by the district court and for which no details were provided. See *Butler*, 702 F.3d at 363 ("[Defendant] also makes arguments that were not considered by the district court, such as that mold problems may reflect how the owner of a washing machine uses it. That would be a defense of mishandling to the charge of breach of warranty. [Defendant] offers no details."). One found that "individual factors such as driving habits or weather" that might cause the manifestation of a defect did not predominate over the common question that the defendant's product was sold with a design defect. *Wolin*, 617 F.3d at 1173. Issues related to weather and driving habits implicate generalized questions about causation, not a consumer misuse defense. The last case on which Plaintiffs rely cited *Wolin* for the proposition that a class may be certified even if the defect has not caused the problem to manifest in all consumers, but did not specifically discuss any consumer misuse defense. ***In re Whirlpool Corp. Front-Loading Washer Prod. Liab. Litig.***, 678 F.3d 409, 420 (6th Cir. 2012). Other courts have found that misuse can be a reason for failing to satisfy predominance. See *Am. Honda Motor Co. v. Superior Court*, 199 Cal. App. 4th 1367, 1378 (2011); *Canon*, 237 F.R.D. at 360; *Galitski v. Samsung Telecomms. Am., LLC*, 2015 WL 5319802, at *6 (N.D. Tex. Sept. 11, 2015). Because customer misuse will be directly relevant to Plaintiffs' efforts to recover property damages under their CLRA claim, these issues present predominance problems. And because these varied individualized issues will swamp any common questions of law or fact, Plaintiffs have failed to show predominance for their nationwide CLRA claim.

iii. Warranty Subclasses

***60** The parties devote very little attention to whether Plaintiffs satisfy predominance for their state law warranty subclasses. Plaintiffs assert that "the same common evidence and expert analysis" will be used to show Defendant's product is defective at the point of sale and damages will be established through their experts' "common" Pittaoulis–Bernatowicz damages formula or "by individual proof of property damages." [286, at 38–40.] Defendant argues that warranty claims require

individualized inquiries into whether consumer misuse voids the warranty and whether the warranty was in effect at the time of the failure. [340, at 31–32.]

Plaintiffs' failure to provide a clear class definition presents a significant obstacle to determining predominance. As drafted, Plaintiffs' warranty subclasses definition includes class members who: (1) personally purchased Defendant's product; (2) acquired Defendant's product because someone else (*e.g.*, a plumber, home builder, friend, or family member) decided to buy it; (3) saw Defendant's "No-Burst" and ten-year "express warranties" before purchasing Defendant's product; (4) saw one of these warranties before acquiring Defendant's product; (5) saw neither of these warranties before acquiring Defendant's product; (6) saw the other "statements" about Defendant's product that Plaintiffs claim rise to the level of "express warranties as to the quality and characteristics of the connectors" [371, at 26]; (7) did not see these other "express warranties"; (8) suffered property damage; (9) suffered no property damage; (10) suffered property damage even though they never bought or acquired Defendant's product (*e.g.*, a neighbor or house guest); (11) renters (since they "acquire" the product); (12) owned a connector that failed because of a coupling nut-related issue; (13) owned a connector that failed because of a hose-related issue; (14) owned a connector that did not fail; (15) have an unexpired warranty; (16) sold their house (and connector) within the life of the warranty; (17) have an expired warranty; and (18) never had a warranty. Some of the claims are based on express warranties. Others are based on implied warranties. Some are based on the U.C.C. Some are not. Sweeping all these disparate claims and class members together under a breach of warranty umbrella —even if there are six separate state subclasses—creates predominance problems.

Let's just take Pennsylvania as an example. An express warranty can be created by "[a]ny affirmation of fact or promise made by the seller to the buyer which relates to the goods and becomes part of the basis of the bargain." 13 Pa. Stat. and Cons. Stat. Ann. § 2313(a)(1). "A promise becomes the basis of the bargain if the plaintiff can prove 'that she read, heard, saw or knew of the advertisement containing the affirmation of fact or promise.' " *Starks v. Coloplast Corp.*, 2014 WL 617130, at *6 (E.D. Pa. Feb. 18, 2014). The Court can only determine whether Defendant's other "repeated and continuing statements" [371, at 26] outside of anything appearing on the product became part of the "basis of the bargain" through individual inquiries into whether the class member "read, heard, saw, or knew of" those statements. A similar rule applies to any third party recipient of an express warranty—which, presumably, would be most of the class members. In that case, "the third party recipient of an express warranty must be aware of the *specific terms* of the warranty in order to sustain a claim for breach of that warranty." *Penn. Employees Ben. Trust Fund v. Astrazeneca Pharm. LP*, 2009 WL 2231686, at *4 (M.D. Fla. July 20, 2009); see also *Peters v. LG Elecs. USA, Inc.*, 2007 WL 4591405, at *4 (D.N.J. Dec. 28, 2007). Plaintiffs do not explain how the Court can answer this basic question without individualized inquiries.

***61** Moreover, "defects discovered after the term of the warranty are not actionable * * * even where the defect may have existed at the time of purchase but did not manifest itself until after the expiration of the warranty period." *Osness v. Lasko Prod., Inc.*, 868 F. Supp. 2d 402, 410–11 (E.D. Pa. 2012) (citations and internal quotation marks omitted). Individual inquiries into whether each class member's warranty has expired or whether they suffered property damage before this expiration are required. Furthermore, Plaintiffs propose including both those seeking economic losses and those seeking property damages in the same warranty subclasses. For the same reasons as Plaintiffs' CLRA theory, the Pittaoulis–Bernatowicz price premium damages model does not "measure only those damages attributable" to a breach of warranty theory. *Comcast*, 133 S. Ct. at 1433. That leaves, as Plaintiffs concede, only property damages claims that must be established by "individual proof." [286, at 39.] Those claims, which are shared by only a subset of class members, will all trigger individualized inquiries into each consumer's installation, maintenance, misuse, causation, and the damages attributable to the failure. Because similar issues will crop up in every warranty subclass, the Court finds that predominance has not been satisfied for the warranty subclasses.

7. Superiority

The second Rule 23(b)(3) requirement is that the "class action is superior to other available methods for fairly and efficiently adjudicating the controversy." Fed. R. Civ. P. 23(b)(3). Issues relevant to superiority include (1)

the class members' interests in individually controlling their cases; (2) "the extent and nature of any litigation concerning the controversy already commenced by or against members of the class"; (3) whether it is desirable to concentrate "litigation of the claims in the particular forum"; and (4) "the difficulties likely to be encountered in the management of a class action." *Szabo*, 249 F.3d at 676. "[W]hen a separate evidentiary hearing is required for each class member's claim, the aggregate expense may, if each claim is very small, swamp the benefits of class-action treatment. And that is the case here." *Pastor v. State Farm Mut. Auto. Ins. Co.*, 487 F.3d 1042, 1047 (7th Cir. 2007).

Plaintiffs did not even attempt to show that the Court could efficiently resolve this dispute in the event that all fifty states' consumer protection laws had to be applied. *Bridgestone*, 288 F.3d at 1018 ("Because these claims must be adjudicated under the law of so many jurisdictions, a single nationwide class is not manageable."). Nor have Plaintiffs identified a sensible and "practicable way for the court to resolve efficiently the individual factual issues that bear on liability" such as reliance, causation, and damages "without conducting hundreds or thousands of mini-trials." *Lipton v. Chattem, Inc.*, 289 F.R.D. 456, 463 (N.D. Ill. 2013). The Court does not see how bifurcation, creating even more subclasses, or appointing a special master would make classwide treatment *more* efficient. Considering the differing incentives of class members without and with property damage, the two distinct defects alleged by Plaintiffs, the fractional difference in price for the product that Plaintiffs allegedly received, and the need for individualized hearings for the absent class members to establish their injuries, share of responsibility, and damages, the Court does not see the efficiency gains for classwide treatment. That is true even if the Court needs to apply *only* seven states' laws (California and the six states in the warranty subclasses). Plaintiffs have failed to show that a class action is superior to other methods of adjudication.

8. Issue Certification: Negligence and Strict Liability Subclasses

Rule 23(c)(4) provides that "[w]hen appropriate, an action may be brought or maintained as a class action with respect to particular issues." Courts differ over whether plaintiffs pursuing an issue certification under Rule 23(c)(4) must also satisfy predominance under Rule 23(b)(3). The Fifth Circuit at least arguably appears to require predominance. See *Castano*, 84 F.3d at 745 n.21. The Second, Third, and Ninth Circuits do not. See ***In re** Nassau County Strip Search Cases*, 461 F.3d 219, 226 (2d Cir. 2006); *Hohider v. United Parcel Service, Inc.*, 574 F.3d 169, 200–02 (3d Cir. 2009); *Valentino v. Carter-Wallace, Inc.*, 97 F.3d 1227, 1234 (9th Cir. 1996). The Seventh Circuit has not expressly picked a side. See *Jacks v. DirectSat USA, LLC*, 2015 WL 1087897, at *4 (N.D. Ill. Mar. 10, 2015). And district courts in this circuit have divided. See *Gen. Motors*, 241 F.R.D. at 314 (predominance required); *Hamilton v. O'Connor Chevrolet, Inc.*, 2006 WL 1697171, at *6 (N.D. Ill. June 12, 2006) (predominance required); *Jacks*, 2015 WL 1087897, at *4 (no predominance); *Healey v. Int'l Bhd. of Elec. Workers, Local Union No. 134*, 296 F.R.D. 587, 596 (N.D. Ill. 2013) (no predominance); *Fedex*, 2010 WL 1652863, at *2 (no predominance); ***In re** Factor VIII or IX Concentrate Blood Prod. Litig.*, 2005 WL 497782, at *2 (N.D. Ill. Mar. 1, 2005) (no predominance).

***62** The Court believes that the Seventh Circuit likely would follow the trend of authority holding that a court may employ Rule 23(c)(4) "to certify a class as to liability regardless of whether the claim as a whole satisfies Rule 23(b)(3)'s predominance requirement." *Nassau County*, 461 F.3d at 227. As other courts have recognized, this approach aligns with the Seventh Circuit's efforts to "devise imaginative solutions to problems created by the presence in a class action litigation of individual damages issues." *Carnegie v. Household Int'l, Inc.*, 376 F.3d 656, 661 (7th Cir. 2004); accord *Jacks*, 2015 WL 1087897, at *4 (collecting Seventh Circuit authority). As the Seventh Circuit has stated, "a class action limited to determining liability on a class-wide basis, with separate hearings to determine—if liability is established—the damages of individual class members, or homogeneous groups of class members, is permitted by Rule 23(c)(4) and will often be the sensible way to proceed." *Butler*, 727 F.3d at 800.

The main problem for Plaintiffs is that even if they do not have to satisfy predominance, their negligence and strict liability issue subclasses are not a viable path forward. Plaintiffs submit *seventeen* issues for certification, the answers to which will turn on applying *eleven* states' laws. That is 187 distinct legal issues for certification under Rule 23(c)(4). Plaintiffs do not direct the Court to any case that certified so many issues, and the Court cannot see how consolidated oversight of so many disparate factual and legal issues is sensible. See *McDaniel v. Qwest*

Comm'ns Corp., 2006 WL 1476110, at *16 (N.D. Ill. May 23, 2006) (declining to certify issue subclasses because of "the breadth of the six issues upon which Plaintiffs request certification vis-a-vis the underlying cause of action"). Of course, "merging the negligence" and strict liability standards of these eleven states to create "a kind of Esperanto instruction" is a non-starter. *Matter of Rhone-Poulenc Rorer, Inc.*, 51 F.3d 1293, 1300 (7th Cir. 1995).

Furthermore, many of these issues are designed to preempt Defendant's affirmative defenses. [See 286-72, at 6 ("Issue Four: Whether [Defendant] is barred from asserting an affirmative defense to any claim from an acetal coupling nut failure based on 'over tightening' because the coupling nut cannot withstand the 12 ft-lbs of installation torque"; "Issue Five: Whether [Defendant] possessed knowledge of the defect in workmanship and material of the acetal coupling no later than 2003; and therefore, all warranty periods are tolled as of that date.").] The factual circumstances in which a defendant could be "barred" from asserting a defense or every consumer's warranty period could be "tolled" are complex, varied, and potentially dependent on the actions of the consumer.[65] Likewise, Plaintiffs seek to certify as an issue "Whether the No-Burst Water Lines were expected to and did reach the user or consumer without substantial change in the condition in which [they were] sold." *Id.* at 6 (Issue Eight). Whether the end-user, in fact, received Defendant's product "without substantial change in the condition in which it was sold" seems to require individualized determinations into how each consumer's connector was installed. These are not the kind of discrete factual or legal matters amenable to classwide issue certification.

Even Issues One, Two, and Three—all of which relate to the different ways in which Defendant's product is allegedly "defective"—are not proper issues for certification. In *Rhone-Poulenc*, the Seventh Circuit addressed the interplay between proximate cause, negligence, and contributory negligence in a product defect case. The Court explained that "the judge must not divide issues between separate trials in such a way that the same issue is reexamined by different juries." 51 F.3d. at 1303. "The right to a jury trial in federal civil cases, conferred by the Seventh Amendment, is a right to have juriable issues determined by the first jury impaneled to hear them (provided there are no errors warranting a new trial), and not reexamined by another finder of fact." *Id.* In *Rhone-Poulenc*, the first jury was not asked to determine liability, but "merely whether one or more of the defendants was negligent under one of the two theories." *Id.* The Court explained:

> ***63** The first jury may go on to decide the additional issues with regard to the named plaintiffs. But it will not decide them with regard to the other class members. Unless the defendants settle, a second (and third, and fourth, and hundredth, and conceivably thousandth) jury will have to decide, in individual follow-on litigation by class members * * *, such issues as comparative negligence * * * and proximate causation. Both issues overlap the issue of the defendants' negligence. Comparative negligence entails, as the name implies, a comparison of the degree of negligence of plaintiff and defendant. Proximate causation is found by determining whether the harm to the plaintiff followed in some sense naturally, uninterruptedly, and with reasonable probability from the negligent act of the defendant. It overlaps the issue of the defendants' negligence even when the state's law does not (as many states do) make the foreseeability of the risk to which the defendant subjected the plaintiff an explicit ingredient of negligence. A second or subsequent jury might find that the defendants' failure to take precautions * * * could not be thought the *proximate* cause of the plaintiffs' [injury]. How the resulting inconsistency between juries could be prevented escapes us.

Id. (citations omitted). The same kind of inescapable inconsistency and inefficiency is present with Plaintiffs' negligence and strict liability issue subclasses. This is not a case where Plaintiffs request certification of an issue that will establish "liability," leaving only damages to be decided by individual inquiries. Cf. *Butler*, 727 F.3d at

800. Rather, Plaintiffs have sought piecemeal certification of aspects of their negligence, strict liability, and warranty claims that will lead to classwide determination of one issue by one jury followed by the inevitable partial re-litigation of that same issue by subsequent juries. *Gates v. Rohm & Haas Co.*, 655 F.3d 255, 273 (3d Cir. 2011) (citing "the risk subsequent triers of fact will need to reexamine evidence and findings from resolution of the common issue(s)" as one of the factors courts should consider before certifying an issue subclass).

"The district court is not obligated to grant partial certification if particular issues are common to a class," but may do so in its discretion. *Clark v. Experian Info. Sols., Inc.*, 256 Fed.Appx. 818, 822 (7th Cir. 2007). Here, "little efficiency would be gained by certifying a class for only particular issues." *Id.* Accordingly, Plaintiffs' request for issue certification under Rule 23(c)(4) is denied.

E. *Pella* Subclasses

For the first time at oral argument, Plaintiffs proposed that, if they did not prevail on choice of law, the Court should consider certifying consumer protection subclasses like the ones described in *Saltzman v. Pella Corporation*, 257 F.R.D. 471 (N.D. Ill. 2009). In *Pella*, the plaintiff moved to certify six Rule 23(b)(3) statutory consumer fraud subclasses from California, Florida, Illinois, Michigan, New Jersey, and New York. *Id.* at 476. The court ultimately certified a liability-only class, excluding issues of causation and damages from the class. *Id.* at 479. Moreover, the court specified that "the six statutory consumer fraud subclasses will consist only of plaintiffs with manifest defects" because "[d]amages are an essential element of the claim, and it is clear * * * that a latent defect does not qualify." *Id.* In distinguishing *Bridgestone*, the court explained:

> Defendants point to [*Bridgestone*] for the proposition that latent defect members and manifest defect members should not recover alongside one another. The court in *Bridgestone* noted that a mixed system, compensating buyers for the risk of a latent defect and buyers who have a manifest defect overcompensates buyers and may lead to excess precaution by the manufacturer. However, in this case, class members whose defect has not yet manifested are included in the damages class. Only those class members who have experienced a manifest defect and have paid to repair or replace these windows may be entitled to damages. Those class members whose windows have not manifested any defect may be entitled to declaratory and injunctive relief. Only once their windows experience any manifest defect, if indeed they ever do, then those members will be able to submit a claim to Pella for repair. There is no side-by-side recovery here.

***64** *Id.* at 486–87 (internal citations omitted). The Court then certified "a Rule 23(b)(3) statutory consumer fraud class, consisting of the following six state subclasses: California, Florida, Illinois, Michigan, New Jersey, and New York, for all members whose windows have exhibited wood rot and who have replaced the affected windows." *Id.* at 487. Finally, in affirming the district court's certification order, the Seventh Circuit explained, "[t]he narrow way in which the district court defined the classes here eliminates concern that the definitions are overbroad or include a great many people who have suffered no injury." *Pella Corp. v. Saltzman*, 606 F.3d 391, 394 (7th Cir. 2010).

Without question, Plaintiffs did not properly move for certification of state-specific consumer protections subclasses, and they do not meet their burden under Rule 23 by simply raising this idea as an afterthought at oral argument. Indeed, the district court opinion from *Pella* is cited in one footnote (out of 248) in Plaintiffs' opening brief [286, at 26 n.157] and is absent from their reply. Moreover, Plaintiffs do not have class representatives from four of these states (Florida, Michigan, New Jersey, and New York), and so at present *Pella* is unquestionably a non-starter as a fallback for Plaintiffs. But all those issues aside, it is obvious that the classes certified in *Pella* bear practically no resemblance to this case. *Pella excluded* consumers with latent defects from the 23(b)(3) classes, while Plaintiffs' classes are intentionally designed to include them.[66] The *Pella* classes are limited to those who have manifested the defect *and* "replaced" the affected product, while Plaintiffs' classes do not require

any consumer to have made a request to Defendant for replacement of their connector. The *Pella* classes do not include issues related to damages, while Plaintiffs propose certification of their class-wide damages theory. Based on the parties' current submissions, the Court does not see how *Pella* provides Plaintiffs any sanctuary.

F. Further Reflections

At the beginning of oral argument on the parties' motions, one of Plaintiffs' attorneys succinctly articulated what appears to have been their approach to class certification. He said, "There is a class in here somewhere." What that class is, however, has changed from brief to brief, and sometimes paragraph to paragraph within briefs. At oral argument, the class changed yet again. Plaintiffs proposed a new class (a six-state subclass of consumer protection laws), new class representatives (any of the 14 class representatives besides Larson for the CLRA class), and a new damages theory (replacement costs). To say that Plaintiff's class certification arguments have been a moving target would be an understatement.

The Court has also continued to receive supplemental authority from Plaintiffs that raise additional questions about the class they seek. Just last week, they submitted a fourth notice of supplemental authority [491] from a court in this district that *denied* certification of a nationwide consumer protection class, but subsequently granted certification of a liability-only class after renewed and focused briefing where the plaintiffs "narrowed their proposed class to residents of five states" (California, Illinois, Missouri, New Jersey, and New York). [See 491-1, at 5–6, 35 (*Mednick v. Precor, Inc.*, 2017 WL 1021994, at *1–2, 12 (N.D. Ill. Mar. 16, 2017)).] It is hard to know what to make of this submission. Maybe Plaintiffs are implicitly acknowledging that their present motion cannot succeed, but another one could. Or maybe Plaintiffs are asking this Court to certify a five-state consumer fraud liability-only subclass even though they never briefed that request and they lack class representatives from Missouri, New Jersey, and New York. Or maybe Plaintiffs thought the Court needed to see how one of the non-precedential cases that Defendant submitted as supplemental authority [477-4] turned out, regardless of whether the facts or arguments advanced there fit this case in its present posture. None of these reasons bolster the prospects for the present motion.

*65 Whether refinement of Plaintiffs' opaque liability theories and indefinite class contours will ultimately show that a class *is* in here somewhere, the Court cannot say. It can only decide that, on the present motion, Plaintiffs have failed to meet their burden to show that *these* proposed classes satisfy every requirement of Rule 23. The motion for class certification [284; 286] therefore must be denied.

IV. Conclusion

For the foregoing reasons, Plaintiffs' motions to exclude Defendant's experts [378; 379; 381; 382; 384; 387; 390] are granted in part and denied in part, Plaintiffs' motion to strike [446] is granted in part and denied in part, Defendant's motions to exclude Plaintiffs' experts [334; 336; 337; 339] are granted in part and denied in part, and Plaintiffs' motion for class certification [284; 286] is denied. The Courtroom Deputy will contact the parties to arrange a mutually agreeable time for the next status hearing before Judge Dow and Magistrate Judge Gilbert, at which time the parties may raise any issues regarding discovery, motions for reconsideration, and future motion practice before either of the assigned judges.

All Citations

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Footnotes

1 Seventh Circuit precedent on ***Daubert*** governs here. See *McMasters v. United States*, 260 F.3d 814, 819 (7th Cir. 2001) (holding that, with respect to cases transferred under 28 U.S.C. § 1404(a), "the transferee court is usually 'free to decide [federal issues] in the manner it views as correct without deferring to the interpretation of the transferor circuit' " (citation omitted)). Just like the Federal Rules of Civil Procedure, the Federal Rules of Evidence were "not intended to be geographically non-uniform." *Id.*

2 The circuits have split over the correct legal standard for ascertainability. See *Briseno v. ConAgra Foods, Inc.*, 844 F.3d 1121 (9th Cir. 2017) (summarizing the current landscape as the First, Second, Third, and Fourth Circuits require a showing of "administrative feasibility" to satisfy ascertainability while the Sixth, Seventh, Eighth, and Ninth Circuits do not).

3 Portions of nearly all of these motions and their appendices were filed under seal. Both parties agreed that this Court could freely quote their contents without requiring this opinion to be redacted or placed under seal.

4 Meek's directly relevant experience with plastics and polymers distinguishes him from the experts excluded in the cases cited by Plaintiffs. See *Ancho v. Pentek Corp.*, 157 F.3d 512, 517 (7th Cir. 1998) (affirming exclusion of "mechanical engineer" who was "without any experience in the field of architectural design relating to plants of this nature" or "familiar[ity] with the operation of this type of [machine]"); *Wintz, By & Through Wintz v. Northrop Corp.*, 1995 WL 758114, at *3 (N.D. Ill. Dec. 22, 1995) (concluding that toxicologist who lacked qualifications to offer a medical causation opinion after he admitted he was not expert in bromides, birth defects, or the specific genetic disorder at issue, had not "dealt extensively with bromide exposure throughout his career," and his testifying experience was largely from drunk driving cases).

5 See, *e.g.*, *Wintz*, 110 F.3d at 513 (citing the manual); accord *Suchanek v. Sturm Foods, Inc.*, 311 F.R.D. 239, 246 (S.D. Ill. 2015); *LG Elecs. U.S.A., Inc. v. Whirlpool Corp.*, 2010 WL 3397358, at *5 (N.D. Ill. Aug. 24, 2010); *Bobak Sausage Co. v. A & J Seven Bridges, Inc.*, 2010 WL 1687883, at *3 (N.D. Ill. Apr. 26, 2010);*DeKoven v. Plaza Assocs.*, 2009 WL 901369, at *6 (N.D. Ill. Mar. 31, 2009); ***In re** Fedex Ground Package Sys., Inc., Employment Practices Litig.*, 2007 WL 3027405, at *5 (N.D. Ind. Oct. 15, 2007); *Menasha Corp. v. News Am. Mktg. In-Store, Inc.*, 238 F. Supp. 2d 1024, 1030 (N.D. Ill. 2003); *Nat'l Football League Properties, Inc. v. ProStyle, Inc.*, 57 F. Supp. 2d 665, 669 (E.D. Wis. 1999).

6 Plaintiffs note that plumbers are not part of the proposed class, which they argue means that some of Dr. Rao's criticisms are "invalid." [380, at 7.] Defendant responds that plumbers' willingness to pay for certain attributes is relevant for assessing the premium passed on to consumers. [417, at 15 n.5.] The persuasiveness of an expert's critiques is not a basis for exclusion. ***Daubert***, 509 U.S. at 595 ("The focus, of course, must be solely on principles and methodology, not on the conclusions that they generate.").

7 According to Plaintiffs, the only factual basis for Edwards's conclusion about what percentage of Defendant's connectors failed in the field is (1) Dr. Palmer's opinion, which is excluded as described below; and (2) a prior conversation with Defendant. [392, at 10 (citing 392-1, at 69:19–71:6).] The cited testimony also indicates that Edwards relied on his "prior knowledge" of the "failure rates or claim rates for these products." [392-1, at 70:16–21).] Defendant makes no effort to argue that Edwards has a reliable basis to offer this opinion independent of Dr. Palmer, and because Dr. Palmer cannot opine on failure rates, Edwards cannot do so either. See Fed. R. 702(b).

8 Such an opinion, in theory, could have been based on Edwards's experience. For example, he could have opined (with factual support) that he has conducted X number of inspections, he typically examines Y features during inspections, his inspections are typical of other inspections, he has observed chlorine corrosion during those inspections, corrosion takes Z months to build up and become visible, and chlorine corrosion would be visible and detected based on the standard manner and frequency in which inspections are performed. His report offers nothing close to this level of substantiation for this opinion.

9 This is not to say that an expert like Edwards would be prohibited from opining that the corrosion is consistent with improper chemical storage based on his experience once a factual predicate for such testimony is established by other witnesses. But what an expert *cannot* do is what Edwards did in his report: speculate about possible ways the connectors "may have been" exposed to chlorine, unmoored from any reliable factual foundation. [339-20, at 10]; see *Myers*, 629 F.3d at 645.

10 [See 392, at 5 ("Edwards makes exactly zero citations to his own scientific sources—none."); *id.* at 12 ("no citation to any source"); *id.* ("Nor is there any citation or authority"); *id.* ("completely without citation to authority"); *id.* (not "supported by citation to scientific data analysis, to any contradictory literature, or to any authority"); *id.* ("unsupported by citation to actual facts or authority").]

11 Plaintiffs rely on *Henry v. St. Croix Alumina, LLC*, 572 Fed.Appx. 114 (3d Cir. 2014), but the only similarity between Dr. Gupta and the experts in *Henry* is the phrase "back-of-the envelope." In *Henry*, the plaintiffs' experts concluded that "160,000 pounds of particulates escaped" from a refinery, of which bauxite residue was a "preponderance." *Id.* at 118. Each expert, however, used a "unique, qualitative methodology to reach these conclusions." *Id.* One expert admitted that this "isn't an estimate or emission rate that you would want to take to the bank" and was not "the kind of number that he would typically include in a report like this." *Id.* at 118 n.4. The other stated that he determined the bauxite residue was a "preponderance" of the dust that escaped based on a "simple, back-of the envelope kind[ ] of thing." *Id.* Dr. Gupta's claim to calculate PSI with a calculator is in no way comparable to experts offering an admittedly unreliable estimate of proportions of dust particles based on a "qualitative methodology."

12 This same motion pertains to a declaration submitted by Dr. Brian Palmer, which is discussed below.

13 See, *e.g.*, ***In re*** *Washington Mut. Mortg. Backed Sec. Litig.*, 2012 WL 2995046, at *7 (W.D. Wash. July 23, 2012); *Bryant v. Wyeth*, 2012 WL 11924298, at *3 (W.D. Wash. July 19, 2012); *Pritchard v. Dow Agro Scis.*, 263 F.R.D. 277, 285 (W.D. Pa. 2009); *City of Owensboro v. Kentucky Utilities Co.*, 2008 WL 4542706, at *2 (W.D. Ky. Oct. 8, 2008); *Lyman v. St. Jude Med. S.C., Inc.*, 580 F. Supp. 2d 719, 725 n.3 (E.D. Wis. 2008); see also *E*Trade Fin. Corp. v. Deutsche Bank AG*, 2008 WL 2428225, at *1 n.1 (S.D.N.Y. June 13, 2008) (undisclosed expert declarations offered on summary judgment); *Murata Mfg. Co. v. Bel Fuse, Inc.*, 2008 WL 656045, at *4–5 (N.D. Ill. Mar. 5, 2008) (same).

14 Subject to Plaintiffs showing otherwise, the Court does not see a reason to permit supplemental rebuttal expert reports based on what should be a limited deposition. While Plaintiffs are free to file another ***Daubert*** motion limited to issues arising from the deposition, Plaintiffs should think seriously about the merits of this challenge and if it will be a good use of the parties' and the Court's time and resources.

15 Defendant argues that Plaintiffs do not present "expert testimony" to challenge Dr. Palmer's methodology and "Plaintiffs' attorneys are neither statisticians nor persons who otherwise possess education and experience to qualify them to opine on the reliability of Dr. Palmer's data or methodology." [411, at 6.] That is a non-sequitur. It is *Defendant*'s burden to show the reliability of its expert's methods. *Lewis*, 561 F.3d at 705. Rule 702 does not require the moving party to offer expert testimony to challenge the admissibility of an opposing party's expert, and whether a party's attorneys are "statisticians" is not part of the Court's analysis.

16 As with Dr. Gupta, the Court declines to strike Dr. Palmer's declaration. This five-paragraph declaration plainly does not offer "new opinions" or amount to a "wholesale revision[ ]" of his analysis [450, at 7], but merely responds to the few specific methodological arguments raised by Plaintiffs in their ***Daubert*** motion. Plaintiffs do not suffer unfair prejudice simply because Dr. Palmer explains why the criticisms that they raised, even if accepted, are insignificant. No additional discovery is warranted.

17 See *Barber v. United Airlines, Inc.*, 17 Fed.Appx. 433, 437 (7th Cir. 2001) ("Dr. Hynes relied on weather data, but he rejected some weather data that contradicted his opinion."); *Holden Metal & Aluminum Works, Ltd. v. Wismarq Corp.*, 2003 WL 1797844, at *2 (N.D. Ill. Apr. 3, 2003) (excluding expert who purportedly relied on "numerous testing reports and data," but "failed to familiarize himself with existing data and research from prior tests regarding paint failure and to account for conclusions in such reports opposite to his own" and "could not point to one single test conducted by anyone else in support of his theories"); *LeClercq v. The Lockformer Co.*, 2005 WL 1162979, at *4 (N.D. Ill. Apr. 28, 2005) (excluding expert who, without reason, ignored 17 wastewater samples that detected no containments and conflicted with his opinion that certain chemicals had contaminated the groundwater).

18 Because the Court will not exclude Dr. Bak's opinions, the Court rejects Defendant's argument that Dr. Kazmer's, Mr. Fallows's, and Dr. Osswald's opinions must be excluded because of their reliance on Dr. Bak's conclusions [337-1, at 13].

19 Fallows's expert report from the prior case seems to focus on washer deformation as much as the presence of tool marks to conclude that "a large amount of compression force was developed with a tool during installation." [339-26, at 11.] This report also opines merely that a tool was used, not that the tool marks showed "overtightening" as opposed to an appropriate amount of tightening with a tool.

20 If Defendant's connector appears in the field as a combination of stainless steel braids over the hose lining, then it is unclear how Dr. Osswald's comparison of the "strength" of the hose's component parts in isolation is helpful to the trier of the fact—especially if these parts, when combined, are stronger than PVC. But Defendant does not directly challenge this opinion's relevance, and the Court cannot say at this juncture that this opinion lacks any tendency to make a fact of consequence more or less probable.

21 To the extent Defendant challenges Dr. Pittaoulis's survey as unreliable because she "has not performed a survey or even conducted any preliminary testing to ensure that the survey she designed will be meaningful" [336-1, at 7], the Court disagrees that ***Daubert*** imposes such a requirement. See *Guido v. L'Oreal, USA, Inc.*, 2014 WL 6603730, at *9 (C.D. Cal. July 24, 2014) ("***Daubert*** does not require plaintiffs to actually run their damages models to make [expert's] testimony admissible for purposes of class certification."); *Sanchez-Knutson v. Ford Motor Co.*, 310 F.R.D. 529, 539 (S.D. Fla. 2015) ("[T]he Court disagrees with Defendant that [expert] must have already performed his proposed conjoint analysis for the Court to consider the proffered methodology."). If the survey, once conducted, does not generate a WTP coefficient for these attributes, then this fact will go to the merits of Plaintiffs' claims.

22 [See, *e.g.*, 334-4, at 178:8–18 (Q: "If 99 percent of the actual purchasers are professionals, all you're measuring in your survey is the one percent, correct? A: My survey results apply to just that one percent of consumers." Q: "And did you do anything to determine whether the group you proposed studying is one percent of the market, ten percent of the market, 50 percent of the market? A: No.").]

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23 Plaintiffs argue that Dr. Rao "conceded" at his deposition that plumbers did not need to be surveyed. [377, at 9.] Dr. Rao was asked—confusingly—if plumbers "should" be the "target" of a survey if they were "not part of the class definition" [380-2, at 58:3–8], which is not the same as asking if a survey that entirely excludes plumbers is reliable. The question seems to presume that the class definition establishes whose preferences matter. It does not speak to the test for admissibility under Rule 702, and the Court is not persuaded that this single answer from Dr. Rao satisfies Plaintiff's burden under ***Daubert***.

24 See *ConAgra*, 90 F. Supp. 3d at 939 (cooking oil); *Sanchez-Knutson*, 310 F.R.D. at 533 (automobiles); *Khoday v. Symantec Corp.*, 93 F. Supp. 3d 1067, 1072 (D. Minn. 2015) (anti-virus software "download insurance"); ***In re*** *Whirlpool Corp. Front-Loading Washer Prod. Liab. Litig.*, 45 F. Supp. 3d 724, 730 (N.D. Ohio 2014) (washing machines); *Guido*, 2014 WL 6603730, at *1 (hair care products); *TV Interactive Data Corp. v. Sony Corp.*, 929 F. Supp. 2d 1006, 1020 (N.D. Cal. 2013) (video players and video game consoles);*Microsoft Corp. v. Motorola, Inc.*, 904 F. Supp. 2d 1109, 1112 (W.D. Wash. 2012) (video game consoles); *Chavez v. Blue Sky Nat. Beverage Co.*, 268 F.R.D. 365, 368 (N.D. Cal. 2010) (beverages).

25 When asked at oral argument for Plaintiffs' best case where a court admitted a conjoint study that measured the "preferences" of the "ultimate users of the products" who were not direct users [486, at 1 (Question 4)], Plaintiffs offered *Intel Corporation v. Advanced Micro Devices, Incorporated*, 756 F. Supp. 1292 (N.D. Cal. 1991). This microprocessor trademark infringement case analyzes whether end users or direct purchasers are the appropriate group of purchasers to test "purchaser perception on the issues of purported genericness." *Id.* at 1293. The court chose the direct purchasers (the "usual buyers"). *Id.* at 1294–95. Thus, Plaintiffs' best case does not address the survey's admissibility under Rule 702 (it predates ***Daubert***), it does not test consumer preferences, and it comes out in favor of surveying the direct purchasers rather than the ultimate users. Furthermore, the court in *Intel*' s reasoning was that a microprocessor is "an ingredient of another product" like a computer and not "a single product" that passes unchanged to the consumer (which *Intel* reasoned could warrant measuring the end user). Defendant's connector is much more like a microprocessor than a "single product, complete in itself" like a Teflon frying pan. *Id.* at 1294. Most consumers buy a finished product (a new house, a remodeled bathroom, a fixed toilet, etc.) that contains Defendant's product as a component part, just like a microprocessor is a component part of the computer purchased by the consumer.

26 Defendant argues that the 400-person sample size of Pittaoulis's study is too small to provide meaningfully reliable results. Plaintiffs respond that sample size challenges go to weight, courts have admitted conjoint studies with sample sizes as small as 309 respondents, and Dr. Pittaoulis asserts that her survey population "is large enough that the results will be statistically meaningful." [377, at 9.] While the Court is not required to take Dr. Pittaoulis's assertion "on faith,"*Minasian*, 109 F.3d at 1216, and Dr. Pittaoulis does not explain how she selected a 400-person sample size, how she verified this will produce statistically meaningful results, or how she confirmed that splitting her sample into two groups of 200 respondents will still produce statistically meaningful results, the Court cannot say that Defendant's sample size challenge goes to more than the weight of Dr. Pittaoulis's opinions.

27 While Dr. Pittaoulis's survey design states that "[g]ender and age quotas will be used to ensure that the sample does not over or under-represent any particular gender or age category" [334-3, ¶ 18], Defendant argues that 70 percent of homeowners who purchase plumbing parts are male (while 92 percent of plumbers are male and between 25 and 64 years old). [336-1, at 11 n.7.] Dr. Pittaoulis testified at her deposition, however, that she meant that the starting pool of 4,800 respondents would be balanced through gender and age quotas, and she would rely on the survey screening questions (such as whether they are likely to purchase a water supply line) to determine the ultimate age and gender makeup of the 400-person sample. [334-4, at 85:2–20.] Defendant does not explain why that methodology is unreliable.

28 Plaintiffs argue that Defendant "fails to present any credible evidence—other than Dr. Rao's personal opinion—that the attributes Dr. Rao suggests are somehow more important than the ones proposed by Dr. Pittaoulis." [377, at 11.] That largely misses the point. Defendant is arguing that Dr. Pittaoulis arbitrarily and unreliably chose which attributes she would measure. *Plaintiffs* have the burden to show why Dr. Pittaoulis's selection of certain attributes makes her methodology sufficiently reliable.

29 To be clear, the Second Restatement does not follow the simpler "place-of-the-injury" rule. *Townsend v. Sears, Roebuck & Co.*, 227 Ill. 2d 147, 157 (2007) ("[T]he First Restatement of Conflict of Laws directed a court to apply the *lex loci delicti* to a choice-of-law issue in a tort case, regardless of the nature of the contacts the parties may have possessed with other states."); *Barbara's Sales, Inc. v. Intel Corp.*, 227 Ill. 2d 45, 61 (2007) ("We have jettisoned the *lex loci delicti* rule—also termed the place-of-the-injury rule—and do not merely count contacts, recognizing that other jurisdictions may have an interest in the controversy that are not adequately reflected by a simple tally." (internal citation omitted)). Nevertheless,

the Second Restatement provides "specific presumptive rules" that give weight to the location of the injury. *Barbara's Sales*, 227 Ill. 2d at 62.

30 For that reason, Plaintiffs' reliance on car accident cases like *Murphy v. Mancari's Chrysler Plymouth, Inc.*, 2012 WL 6964868 (Ill. App. Ct. Aug. 6, 2012), is misplaced. [See 371, at 17 n.33.]

31 Accepting Plaintiffs' argument that Defendant had "little, or no, reason to foresee that his act would result in injury in the particular state" [371, at 17 n.33] begs the question of whether any federal court outside of California could exercise specific personal jurisdiction over Defendant in a consumer product defect case. *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 474 (1985) ("[D]efendant [can]not be haled into a jurisdiction solely as a result of 'random,' 'fortuitous,' or 'attenuated' contacts.").

32 At oral argument, counsel for Plaintiffs acknowledged that "the Court does get to take affirmative defenses into account" in its choice of law analysis.

33 This one-size-fits-all choice of law rule could exist, of course. It is just not the Second Restatement's rule. While Plaintiffs believe that this rule would aid consumers in this case, such a one-way ratchet could just as easily harm consumers in the next one, depending on the defendant's headquarters.

34 The evidence on this last point is somewhat in conflict. [Compare 340-2, ¶ 5 (stating Defendant manufactured its products in Mexico from 2001 to 2010), with 286, at 30 ("[Defendant] also manufactured the defective products in California until 2010").]

35 Neither side invests much effort in analyzing Second Restatement Section 148, which Plaintiffs invoke in their opening brief. [See 286, at 28.] That may be because Section 148 does not apply "where the false representations result in physical injury to * * * tangible things," deferring to Section 147. See Second Restatement § 148, comment a. Even so, Section 148 points more emphatically away from California. "[T]he Illinois Supreme Court has endorsed the Restatement's position that the plaintiff's domicile or residence is 'of substantial significance' because a financial loss usually will be of greatest concern to the state to which the person suffering the loss has the greatest relationship." ***In re*** *Testosterone Replacement Therapy Prod. Liab. Litig. Coordinated Pretrial Proceedings*, 159 F. Supp. 3d 898, 925 (N.D. Ill. 2016); *Barbara's Sales*, 227 Ill. 2d at 68 (" '[A] financial loss will usually be of greatest concern to the state with which the person suffering the loss has the closest relationship. * * * The domicil, residence and place of business of the plaintiff are more important than are similar contacts on the part of the defendant.' " (quoting Second Restatement § 148, comment i)). The Illinois Supreme Court has also rejected the argument that the law of the defendant's headquarters controls simply because the "scheme to defraud" or misrepresentations "emanated" from there. *Barbara's Sales*, 227 Ill. 2d at 68. Moreover, "where a plaintiff relies on a representation in the same state where that representation was made and received, the law of that state applies." *Siegel v. Shell Oil Co.*, 256 F.R.D. 580, 585 (N.D. Ill. 2008). Any alleged injury here occurred in the state where each plaintiff received the alleged misrepresentation (Second Restatement § 148(2)(b)) and relied on it (*id.* § 148(2)(a)), which occurred when that plaintiff acquired Defendant's product (*id.* § 148(2)(e)). See also ***In re*** *Bridgestone/Firestone, Inc.*, 288 F.3d 1012, 1017 (7th Cir. 2002) ("If recovery for breach of warranty or consumer fraud is possible, the injury is decidedly where the *consumer* is located, rather than where the seller maintains its headquarters."); *Lyon v. Caterpillar, Inc.*, 194 F.R.D. 206, 214–15 (E.D. Pa. 2000) (holding that the "putative class members' residence is a contact of greater significance than defendant's principal place of business" and concluding that "each putative class member's claim arises under the consumer fraud act of his or her state of residence or the state in which his or her [product] was purchased"). That means the Plaintiffs' home states have a more significant relationship to this action than California.

36 New Hampshire's choice of law analysis is the same here, see *LaBounty*, 122 N.H. at 742–43, effectively leaving "advancement of the governmental interest of the forum" and "the court's preference for what it regards as the sounder rule of law" as the only other two factors.

37 Plaintiffs cite several cases [see 286, at 31–32 nn.178–182], but none bear any resemblance to this one because they either do not apply the Second Restatement's test or their facts are not analogous. See *Mann v. GTCR Golder Rauner, L.L.C.*, 351 B.R. 685, 695 (D. Ariz. 2006) (applying law of state where conduct causing injury occurred because most parties were located there, the parties' contractual relationship was based in that state, and there were no significant differences on the relevant liability issues between the various fora); *Wolph v. Acer Am. Corp.*, 272 F.R.D. 477, 485 (N.D. Cal. 2011) (analyzing whether application of California law satisfies due process and applying the California choice of law test because "the parties have an agreement that another jurisdiction's law will govern their disputes"); *Rutledge v. Hewlett-Packard Co.*, 238 Cal. App. 4th 1164, 1187–89 (applying California choice of law test and, ultimately, California law after concluding injuries occurred in California); *Clark v. TAP Pharm. Prod., Inc.*, 343 Ill. App. 3d 538, 547 (2003) (relying on analysis from *Avery v. State Farm Mut. Auto. Ins. Co.*, 321 Ill. App. 3d 269 (2001) that was subsequently reversed and vacated by the Illinois Supreme Court in *Avery*, 216 Ill. 2d at 189–190); *Donovan v. Idant Labs.*, 625 F.

Supp. 2d 256, 70–71 (E.D. Pa. 2009) (finding contract claims weighed in favor of New York law, and then adopting the same conclusion with little analysis for tort claims).

38 The cases cited by Plaintiffs [286, at 32 n.186] all involve defendants who failed to offer any analysis of states' laws. *Allen v. Hyland's Inc.*, 300 F.R.D. 643, 658 (C.D. Cal. 2014) (Defendants "fail to provide *any case-specific analysis* addressing the differences among the state laws at issue." (emphasis added)); *Forcellati v. Hyland's, Inc.*, 876 F. Supp. 2d 1155, 1160 (C.D. Cal. 2012) ("Defendants do not even discuss the differences between the consumer protection laws of [different states], let alone address whether these differences are material based on the facts and circumstances of *this* case." (emphasis in original)); *Bruno v. Eckhart Corp.*, 280 F.R.D. 540, 549–550 (C.D. Cal. 2012) (same).

39 For example, "CLRA claims * * * benefit [from] the discovery rule[, which] * * * does not apply to delay commencement of the limitations period on Florida [or New York] consumer protection claims." *Keegan v. Am. Honda Motor Co.*, 284 F.R.D. 504, 543–44 (C.D. Cal. 2012) (collecting cases). Applying CLRA to "New York and Florida plaintiffs whose claims are time-barred under their own states' laws * * * would expand defendants' liability beyond the liability they would face if Florida and New York plaintiffs sued under the laws of those states." *Id.* at 544–45. New York's consumer protection law also requires "proof of malfunction." ***In re*** *Canon Cameras*, 237 F.R.D. 357, 360 (S.D.N.Y. 2006). As another example, Plaintiffs' "benefit of the bargain" damages theory fails to state a claim under Pennsylvania's statute because of the economic loss doctrine. See *Whitaker v. Herr Foods, Inc.*, 2016 WL 4060127, at *9 (E.D. Pa. July 29, 2016).

40 This might be the one area where New Hampshire choice of law analysis differs, since the fifth choice influencing factor is "the Court's preference for what it regards as the sounder rule of law." *LaBounty*, 122 N.H. at 741. "It is not uncommon for a court to conclude after conscientious consideration, * * * 'that its local rules of law are wiser, sounder, and better calculated to serve the total ends of justice under law in the controversy before it than are the competing rules of the other state' involved in the case." *Benoit v. Test Sys., Inc.*, 142 N.H. 47, 53 (1997). The Court follows the same path here by deferring to the local laws of each consumer's home states rather than California's competing rules.

41 See, *e.g.*, *Mazza*, 666 F.3d at 594 (vacating class certification order and holding that "each class member's consumer protection claim should be governed by the consumer protection laws of the jurisdiction in which the transaction took place"); *Glenn v. Hyundai Motor Am.*, 2016 WL 3621280, at *9–10 (C.D. Cal. June 24, 2016) (explaining that "[w]hile it is true [Defendant] is headquartered in California, and Plaintiffs allege the fraudulent omissions originated in California, the transactions at issue took place in [other states and] * * * Plaintiffs are residents of those states" and thus "each of Plaintiffs' individual claims must be governed by the consumer protection laws of their home states," not CLRA); *Cover v. Windsor Surry Co.*, 2016 WL 520991, at *7–8 (N.D. Cal. Feb. 10, 2016) ("Although [Defendant's] marketing materials and warranty emanated from California, the company is headquartered in California, and it designs its products in California," the "last events necessary for liability in this case—the communication of the marketing materials, the purchase of the products, and product deterioration—all occurred in Rhode Island," which meant Rhode Island's interest outweighed California's interest."); *Davison v. Kia Motors Am., Inc.*, 2015 WL 3970502, at *3 (C.D. Cal. June 29, 2015) ("Plaintiff's home state of Washington and other states have a compelling interest in protecting their consumers from in-state injuries caused by a California corporation doing business within their borders and in delineating the scope of recovery for the consumers under their own laws."); *Frezza v. Google Inc.*, 2013 WL 1736788, at *7 (N.D. Cal. Apr. 22, 2013) (although Defendant was headquartered in California, "the last events necessary for liability—the communication of the advertisements to the plaintiffs and their reliance thereon in signing up for the trial period—took place in North Carolina, not in California," which meant North Carolina law applied over California law); *Ford Motor Co. Ignition Switch Prod. Liab. Litig.*, 174 F.R.D. 332, 348 (D.N.J. 1997) (rejecting the argument that Michigan law applied under the governmental interest test, notwithstanding the fact that "Ford's headquarters are located in Michigan, the vehicles in question were manufactured there, decisions relating to the allegedly defective ignition switches were made there, and any misrepresentations, statements or advertisements regarding the Ford vehicles originated in Michigan," as well as that "Michigan has an interest in regulating Ford's behavior and in making sure that it adheres to minimum levels of care expected of Michigan corporations," because "[e]ach plaintiff's home state has an interest in protecting its consumers from in-state injuries caused by foreign corporations and in delineating the scope of recovery for its citizens under its own laws").

42 See, *e.g.*, *Paxton v. Union Nat. Bank*, 688 F.2d 552, 562 n.14 (8th Cir. 1982); *Fond Du Lac Bumper Exch., Inc. v. Jui Li Enter. Co., Ltd.*, 2016 WL 3579953, at *2 (E.D. Wis. June 24, 2016); *Flores v. Anjost Corp.*, 284 F.R.D. 112, 124 n.3 (S.D.N.Y. 2012); *Sherman v. Am. Eagle Exp., Inc.*, 2012 WL 748400, at *3 (E.D. Pa. Mar. 8, 2012); *Gonzalez v. Millard Mall Servs., Inc.*, 281 F.R.D. 455, 459 (S.D. Cal. 2012); *Heffelfinger v. Elec. Data Sys. Corp.*, 2008 WL 8128621, at *2 n.18 (C.D. Cal. Jan. 7, 2008); *Fisher v. Ciba Specialty Chems. Corp.*, 238 F.R.D. 273, 279 (S.D. Ala. 2006); *Charleswell v. Chase Manhattan Bank, N.A.*, 223 F.R.D. 371, 378 (D.V.I. 2004); *Blihovde v. St. Croix Cty., Wis.*, 219 F.R.D. 607, 618 (W.D. Wis. 2003);*Rockey v. Courtesy Motors, Inc.*, 199 F.R.D. 578, 582 (W.D. Mich. 2001);*Vinson v. Seven Seventeen*

HB Philadelphia Corp., 2001 WL 1774073, at *20 n.28 (E.D. Pa. Oct. 31, 2001);***In re** Hartford Sales Practices Litig.*, 192 F.R.D. 592, 597 (D. Minn. 1999); *Dicker v. Allstate Life Ins. Co.*, 1990 WL 106550, at *6 (N.D. Ill. July 12, 1990). Courts in this Circuit have generally followed the same approach for evaluating Fair Labor Standards Act collective actions. See *Quality Mgmt. & Consulting Servs., Inc. v. SAR Orland Food Inc.*, 2013 WL 5835915, at *3 (N.D. Ill. Oct. 30, 2013); *Howard v. Securitas Sec. Servs., USA Inc.*, 2009 WL 140126, at *3 (N.D. Ill. Jan. 20, 2009);*Molina v. First Line Sols. LLC*, 566 F. Supp. 2d 770, 788 n.20 (N.D. Ill. 2007); *Coan v. Nightingale Home Healthcare, Inc.*, 2005 WL 1799454, at *1 n.1 (S.D. Ind. June 29, 2005).

43 The Court notes that preliminary injunctions are not specifically excepted from Rule 1101(b) either. Moreover, the purpose of a class action fairness hearing is to reject or approve a settlement, which terminates the litigation. Cases are not terminated *ipso facto* by the grant or denial of class certification, since it is necessarily preliminary to and separate from deciding the merits of the underlying claim.

44 The definitions of "No-Burst Lines" and "No-Burst Water Supply Lines" appear to be identical. [See 286, at 8.] Plaintiffs' inclusion of both phrases in their proposed class definition is (or at least could be) confusing. This appears to have been an oversight, not an attempt to delineate different products.

45 The closest they come is the first footnote of their opening brief [286, at 8 n.1], but even that definition includes other undefined terms (*e.g.*, "Toilet Supply Line") and appears to be further refined by qualifications referenced in their reply brief [371, at 18–19].

46 [Compare 286, at 38 ("All of these states have adopted the U.C.C.'s definition of an express warranty."), with *id.* at 39 ("[T]he 'lack of privity between a manufacturer and retail purchaser does not preclude a claim *outside the U.C.C.* for breach of express warranty.' " (citation omitted))].

47 *Messer Griesheim Indus., Inc. v. Cryotech of Kingsport, Inc.*, 131 S.W.3d 457, 473 (Tenn. Ct. App. 2003) ("Tennessee law does not allow recovery of economic losses under a breach of warranty theory absent privity," but plaintiff "is entitled to pursue its claim for property damage under a breach of warranty theory in Tennessee even in the absence of privity.).

48 *Hobbs v. Gen. Motors Corp.*, 134 F. Supp. 2d 1277, 1284 (M.D. Ala. 2001) ("non-privity consumer buyer must timely notify a remote manufacturer of alleged defects, at least when the buyer seeks recovery for economic loss" for an express warranty claim); *Vt. Plastics, Inc. v. Brine, Inc.*, 79 F.3d 272, 280 (2d Cir. 1996) ("[P]rivity of contract is not required to recover contractual damages for breach of an express warranty when the manufacturer expressly warrants its goods to the consumer and the ultimate consumer brings an action for breach of express warranty under the Magnuson-Moss Warranty Act" but "[Vermont law] does not dispense with the need for privity" in other circumstances.).

49 *Flory v. Silvercrest Indus., Inc.*, 129 Ariz. 574, 580 (1981) ("No privity of contract [is] required for recovery based on * * * non-U.C.C. express warranties" but privity is required for economic losses for U.C.C. based claims.)

50 *Minnesota Min. & Mfg. Co. v. Nishika Ltd.*, 565 N.W.2d 16, 21 (Minn. 1997) ("Those who lack any such connection to the warranted goods must demonstrate physical injury or property damage before economic losses are recoverable.").

51 This outcome is more straightforward for the negligence and strict liability subclasses, which require proof of property damage. The warranty subclasses also include claims without property damage, but Plaintiffs raise so many distinct warranty theories that it is unclear who should be counted for numerosity. In theory, a subclass of purchasers without property damage whose warranties were breached at the time of sale (instead of, for example, when they requested but were denied a replacement product) and whose claims are still within the statute of limitations might satisfy numerosity. It is not clear which if any, of the warranty subclasses might fit this description and, again, Plaintiffs never made this showing.

52 Plaintiffs describe *Butler v. Sears, Roebuck & Co.*, 727 F.3d 796 (7th Cir. 2013), as involving "a single product with two independent discernible defects" and claim this posed no obstacle to certifying a single class [286, at 33–34]. But the Seventh Circuit stressed that "this class action [in *Butler*] is really two class actions" and "the classes have different members and different claims." *Butler*, 727 F.3d at 797, 801.

53 In the next paragraph, Plaintiffs chastise Defendant for " 'urg [ing] the Court to focus on the injury' caused by the defective connectors," claiming that this "is not what typicality requires." [371, at 23.]

54 Plaintiffs asserted at oral argument that any of the other subclass representatives (with one exception) could serve as named representatives of the nationwide CLRA class in place of Rensel or Rhyne. However, the time for identifying class representatives for the instant motion was before oral argument.

55 Defendant frames this as an "adequacy" challenge [340, at 31], but it is really a typicality argument.

56 Defendant argues that there is no class representative for a California subclass [340, at 24 n.18], but apparently overlook Plaintiff Kevin Smith [286, at 25].

57 As discussed *supra*, the incentives of Plaintiffs who argue that one of the alleged defects caused their property damage do not align with absent class members who suffered no damages or claim damages were caused by a different alleged defect.

58 Despite arguing in their briefs that Defendant "misstate[d]" Plaintiff's CLRA theory as involving misrepresentations when it is an "omissions" theory [371, at 29], Plaintiffs shifted slightly at oral argument and described their claim as a "blended omissions and misrepresentation" theory. Of course, "[e]very misrepresentation, to some extent, involves an omission of the truth." *Universal Am. Corp. v. Partners Healthcare Sols. Holdings, L.P.*, 176 F. Supp. 3d 387, 401 (D. Del. 2016) (citation and internal quotation marks omitted). Purporting to advance a "blended" theory does not clarify much.

59 At oral argument, Plaintiffs relied heavily on *Suchanek*, in which the Seventh Circuit rejected the district court's "supposed rule that individual issues necessarily predominate" in cases involving "subjective inquiries into causality" or a showing of "reliance or causation * * * that requires an investigation of each purchaser." 764 F.3d at 759. The Seventh Circuit explained that such a "rule" was an "error of law." *Id.* What the Seventh Circuit did not do, however, was adopt the mirror-image of the district court's rule: that reliance issues can *never* predominate in a consumer fraud case. Otherwise, there would have been no need for the Seventh Circuit to remand with anything other than instructions to certify a class. *Id.* at 761 ("All of that said, we are not holding that the district court must certify the class on remand."). Instead, the Seventh Circuit required that the district court undertake "rigorous" and nuanced analysis of these issues, rather than relying on a blanket "rule." *Id.* at 760. This Court has endeavored to do precisely that.

60 Plaintiffs expressly reject the implication that they are arguing that Defendant represented that its products are perfect. [376, at 16.] If Defendant did not promise perfection, then there must be some baseline "propensity to fail" rate to measure against. Plaintiffs do not direct the court to any such baseline, and Bernatowicz does not incorporate one into his damages formula. Even if one accepts that this difference in propensity should be measured by the number of failures per million compared with Defendant's standard recall rate [see 286, at 20], this difference in propensity is exceptionally small. A difference between the baseline rate and the omitted "propensity" that is close to zero makes it hard to see how materiality, causation, or reliance can be satisfied.

61 Defendant advances (and repeats) several arguments about the meaning of its warranty (that it is one for repair and replacement, not design defects) and that its "No Burst" statements are non-actionable puffery. [340, at 33–35; 336-1, at 10–12; 403, at 9.] These arguments go to the merits of Plaintiffs' claims, not the propriety of class certification. To the extent that is the basis for Defendant's ***Daubert*** motion against Bernatowicz, it is denied without prejudice to later renewal.

62 Where the claim is that the product received is worthless, no WTP needs to be calculated and there are no predominance problems. See *Doster Lighting, Inc. v. E-Conolight, LLC*, 2015 WL 3776491, at *18 (E.D. Wis. June 17, 2015) ("As for damages, [plaintiff] contends that they can be calculated by a common methodology—subtracting the value of the defective LED products (which [plaintiff] claims to be zero) from the value of the LED products as warranted, i.e., the sale price."). In ***In re:*** *Syngenta AG MIR 162 Corn Litigation*, the court allowed the class to use averages to calculate the "general market price decrease" for sales of corn, which would be used to show "liability *and* damages." 2016 WL 5371856, at *5 (D. Kan. Sept. 26, 2016) (emphasis added). In that case, no ***Daubert*** motion was filed and plaintiffs' theory would not have compensated class members who suffered no damages. Plaintiffs also cite *Fleisher v. Fiber Composites, LLC*, 2012 WL 5381381 (E.D. Pa. Nov. 2, 2012), which addresses a motion to dismiss, not class certification, and does not discuss the specific damages methodology at issue.

63 At oral argument, Plaintiffs belatedly proposed a third damages theory: replacement damages. That theory does not appear in Plaintiffs' class certification motion [see 286, at 38–39, 40 (raising two damages theories)], and the Court will not address it other than to say that Plaintiffs' ability to pursue classwide replacement damages for people who never requested a replacement connector is not obvious.

64 Plaintiffs cite the Ninth Circuit's decision in *Baker* as standing for the proposition that "a class could be certified where only '0.4%' of owners reported defects. [371, at 7 n.1] However, *Baker* addressed the district court's decision to strike class action allegations from the plaintiffs' complaint, not a motion for class certification. The Ninth Circuit "express[ed] no opinion on whether the specific common issues identified in this case are amenable to adjudication by way of a class action, or whether plaintiffs should prevail on a motion for class certification if such a motion is filed." *Baker*, 797 F.3d at 615.

65 Plaintiffs do not cite any case law related to the tolling of a warranty. Case law addressing the tolling of a statute of limitations based on fraudulent concealment "focus[es]" on the actions of the plaintiff. See, *e.g.*, *Knopick v. Connelly*, 639 F.3d 600, 607 (3d Cir. 2011).

66 *Pella* only included these latent defect consumers in the Rule 23(b)(2) declaratory and injunctive relief class. 257 F.R.D. at 480–81. Plaintiffs here do not pursue such a class.

End of Document

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STANDING ORDER ON CHALLENGES TO THE ADMISSIBILITY OF EXPERT TESTIMONY UNDER RULE 702 AND *DAUBERT*

This Standing Order governs challenges to the admissibility of expert testimony pursuant to Rule 702 and the Supreme Court's decisions in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 113 S.Ct. 2786, 125 L.Ed.2d 469 (1993), and *Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 119 S.Ct. 1167, 143 L.Ed.2d 238 (1999).

General Procedures. Any party may challenge the admissibility of expert testimony offered by another party. The party seeking to challenge the admissibility of expert testimony shall do so by motion, in accordance with any schedule set by the Court. In the motion, the moving party shall identify the specific opinion(s) that the movant seeks to exclude and the legal basis for exclusion, together with sufficient background information to provide context. The movant shall electronically file, in a searchable format, the relevant expert report(s) and, if the expert was deposed, the full transcript of the expert's deposition.

Legal Framework. The parties should be familiar with the legal standard governing the admissibility of expert testimony in federal court. The following discussion is not intended to be an exhaustive discussion of the law, but instead seeks to remind the parties of certain guiding principles:

> "Federal Rule of Evidence 702 governs the admissibility of expert testimony, as does the Supreme Court's seminal case of *Daubert* ...." ; *United States v. Lupton*, 620 F.3d 790, 798 (7th Cir. 2010); *Lewis v. CITGO Petroleum Corp.*, 561 F.3d 698, 705 (7th Cir. 2009)
>
> "The proponent of the expert bears the burden of demonstrating that the expert's testimony would satisfy the *Daubert* standard." *Lewis*, 561 F.3d at 705 (citing Fed. R. Evid. 702 – Adv. Comm. Notes ("[T]he admissibility of all expert testimony is governed by the principles of Rule 104(a). Under that Rule, the proponent has the burden of establishing that the pertinent admissibility requirements are met by a preponderance of the evidence")).
>
> "The district court is responsible for acting as a gatekeeper to ensure that all admitted expert testimony satisfies [Rule 702's] reliability and relevance requirements." *Stollings v. Ryobi Techs, Inc.*, 725 F.3d 753, 765 (7th Cir. 2013) (*citing Daubert,* 509 U.S. at 592–93). "[T]he key to the gate is not the ultimate correctness of the expert's conclusions. Instead, it is the soundness and care with which the expert arrived at her opinion: the inquiry must 'focus ... solely on principles and methodology, not on the conclusions they generate.'" *Schultz v. Akzo Nobel Paints, LLC*, 721 F.3d 426, 431 (7th Cir. 2013) (*citing Daubert*, 509 U.S. at 595).

***Daubert* Hearing.** The Court, upon request of a party or on its own, may conduct a *Daubert* hearing. *See United States v. Ozuna*, 561 F.3d 728, 737 (7th Cir. 2009) (district court has discretion over whether to conduct a *Daubert* hearing); *Lewis,* 561 F.3d at 704 (noting that "the district court may consider the admissibility of expert testimony *sua sponte*"). A *Daubert* hearing permits the parties to examine the challenged expert in open court to develop his or her testimony for purposes of evaluating its admissibility.

General Principles: The hearing shall be limited to the issues raised in the *Daubert* motion, unless the Court indicates otherwise. Although the expert at issue will testify, the hearing is not a forum to develop the expert's testimony for any purpose other than evaluating its admissibility. The parties should avoid inquiry into undisputed issues of admissibility. The Court encourages the parties, where possible, to stipulate to any uncontested issues of admissibility, such as the expert's qualifications, prior to the hearing. The proponent of the expert is responsible for procuring the expert's attendance at the hearing.

Before the Hearing: One week prior to the hearing, the parties shall file a Joint Report stating whether any party intends to present testimony from any witness other than the expert at issue. The Court does not anticipate that the parties will present any witness other than the expert at issue. The Joint Report shall also include an exhibit list and copies of any exhibits that the parties intend to use at the hearing.

The Hearing: The hearing will proceed as follows, absent an order to the contrary:

Opening Remarks (brief; if requested)
Direct Examination (proponent)
Cross Examination (movant)
Re-Direct Examination (if requested)
Re-Cross Examination (if requested)
Closing Remarks (brief; if requested)

After the Hearing: The parties shall not file post-hearing briefs, unless ordered to do so by the Court.

Amy J. St. Eve

Michael H. Gottesman

Admissibility of Expert Testimony After Daubert: The "Prestige" Factor

43 Emory L.J. 867, 867 (1994)

Among the handful I've been fortunate to represent in this new capacity have been the families of Jason Daubert and Eric Schuller, the petitioners in the case that has mistakenly come to be called the "Dough-bear" case. My principal contribution to this Symposium is to report that the folks who brought this case to the Supreme Court pronounce their name "Dow-burt"--or, as some might say, exactly as it's spelled. The penchant for foreign fancies has caused many to show their expertise in French pronunciation at the expense of this all-American family.[1].

The confusion was hardly mitigated during the Supreme Court argument. The first Justice to use the name in framing a question chose "dough-bear," and I faced the tricky tactical question of whether to spend my precious time (and all hope of kindly reception) correcting this judicial mispronunciation. I opted not to, and the rest of the Justices all then assumed, gallingly, that the Gallic was apropos.

Let me, then, use this occasion to make amends to my clients. The family's name is not dough-bear. Whether this will (or should) affect the way people pronounce the name of the Supreme Court's opinion is, of course, another matter. Do the litigants or the Court own title to the pronunciation of the name of a Court opinion?

FOOTNOTE

1. If I appear to take too seriously the family's plight, the explanation may lie in a lifetime of hearing my own name pronounced, variously, as Gotts-man, Got-a-man, Gutterman, Gasman, and some variations less elegant still; Gutterball was the one that stuck longest in grade school.

APPENDIX

A

Advisory Committee of the Supreme Court of Missouri

Formal Opinion 125

AGREEING TO INDEMNIFY OPPOSING PARTY AS A TERM OF SETTLEMENT

We have been asked whether it is a violation of the Rules of Professional conduct for an attorney to agree to indemnify the opposing party for debts owed by the attorney's client. We have further been asked whether it is a violation for an attorney to request or demand that another attorney agree to such indemnification.

Rule 4-1.8 (e) provides:

> (e) **A lawyer shall not provide financial assistance to a client in connection with pending or contemplated litigation,** except that:
> (1) a lawyer may advance court costs and expenses of litigation, including medical evaluation of a client, the repayment of which may be contingent on the outcome of the matter; and
> (2) a lawyer representing an indigent client may pay court costs and expenses of litigation on behalf of the client.

(emphasis added).

Financial assistance can take many forms. It includes gifts, loans, and loan guarantees. Any type of guarantee to cover a client's debts constitutes financial assistance. If a client owes a debt to a third party who expects payment from the client's recovery by settlement or judgment, an attorney may not agree to pay the third party from the attorney's own funds, if the client does not pay the third party.

We note that this opinion is consistent with opinions from Illinois, Arizona, Florida, and North Carolina.[1]

Under Rule 4-1.15(f):

> Upon receiving funds or other property in which a client or third person has an interest, a lawyer shall promptly notify the client or third person. Except as provided in this Rule 4-1.15 or otherwise permitted by law or by agreement with the client, a lawyer shall promptly deliver to the client or third person any funds or other property that the client or third person is entitled to receive and,

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[1] IL Adv. Op. 06-01, 2006 WL 4584284 (Ill.St.Bar.Assn.); Arizona Ethics Opinion No. 03-05; FL Eth. Op. 70-8, 1970 WL 10144 (Fla.St.Bar Assn.); 2000 NC Eth. Op 4, 2001 WL 473974 (N.C.St.Bar.)

> upon request by the client or third person, shall promptly render a full accounting regarding such property.

If the third parties have a legal interest in the particular funds the attorney is holding and the attorney has notice of that legal interest, the attorney must either disburse the funds to the third party or hold the funds in trust for a reasonable time to allow the dispute between client and the third party to be resolved. If the dispute is not resolved within a reasonable time, the attorney usually[2] must interplead the funds.

An attorney may include a provision in a settlement agreement in which the attorney agrees to perform obligations that the attorney already has under the Rules of Professional Conduct. An attorney may not assume the further obligation to indemnify the opposing party if the attorney ethically disburses the funds to the client but the client does not use the funds to pay a debt to a third party.

A client may owe a debt to a third party under circumstances that will not require an attorney to hold the amount of the debt in the trust account, if the client does not want the attorney to disburse the funds to the third party. A debt, even one reduced to a judgment, does not establish a legal claim against the particular funds held by the attorney. However, a valid lien against, or garnishment of, those funds would place the attorney under an obligation to hold the funds in trust if the client directs the attorney not to disburse the funds to the third party.

Because an attorney who agrees to indemnify an opposing party will violate Rule 4-1.8(e), it is a violation for another attorney to request or demand that an attorney enter into such an agreement. The second attorney would violate Rule 4-8.4, which provides, in part:

> It is professional misconduct for a lawyer to:
>
> (a) violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through the acts of another....

Therefore, it is a violation of Rule 4-8.4(a) for an attorney to propose a settlement that includes a provision that would involve a violation of any of the Rules of Professional Conduct by another attorney.

November 13, 2008

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[2] Exceptions would include instances when the amount in dispute is less than the cost of the interpleader action or when other litigation that will resolve the dispute has already been filed.

APPENDIX

B

BURGER LAW FIRM

Trial Lawyers
Licensed in Missouri and Illinois
(314) 542-2222

April 25, 2017

Greater MO Imaging
Attn: Patient Accounts
PO Box 392455
Pittsburg, PA 15251-9455

RE:	Alexander Klepper
DOB:	X/XX/XXXX
SSN:	XXX-XX-XXXX
DOI:	XXXXXXXXXX

Dear Sir or Madam:

Thank you for advising our office of your lien in the amount of $1,695.00 for Alex Klepper. There is $37,489.44 in liens total asserted against him in this case. The case settled for $90,000, and we have reduced our fee. The amount due to Alex, after attorney fees and expenses, is $59,224.78. Pursuant to the Missouri Revised Statute 430.225, Alex gets half ($29,612.39) and his medical providers split half. So, for your balance of $1,695.00 you are entitled to a pro rata share of 4.52% of this amount or $1,338.86. All other medical providers' bills have been reduced using the Missouri Lien Statute. Enclosed please find a check in that amount of $1,338.86 as full and final payment. Please do not hesitate to contact me should you have any questions.

Very truly yours,

Casey Fluegel
Paralegal

Enclosures

500 N. Broadway, Suite 1350, St. Louis, MO 63102
Fax: 314-542-2229

Total Settlement		$90,000.00
Attorney's Fee	$	30,000.00
Medical Records Expense	$	418.87
Mileage & Parking	$	-
Filing Fee / Service	$	250.35
Police Report	$	6.00
Expert Fee	$	-
Deposition Fee		
Office Expense 1%	$	100.00
TOTAL FEE AND EXPENSE	$	**30,775.22**

Disposable Amount **$59,224.78**

1/2 of Disposable Amount **$29,612.39**

LIEN HOLDER	LIEN AMOUNT	PERCENTAGE	1/2 Disposable	REDUCTION AMOUNT
Dr. Naseem Shekhani	$ 3,870.00	10.32%	$29,612.39	$3,056.86
Greater MO Imaging	$ 1,695.00	4.52%	$29,612.39	$1,338.86
Dr. Paul Amato	$ 7,354.00	19.62%	$29,612.39	$5,808.82
Orthopedica Assocaites	$ 1,325.00	3.53%	$29,612.39	$1,046.60
South County Anesthesia	$ 3,970.00	10.59%	$29,612.39	$3,135.85
Des Peres Square Surger Center	$ 12,407.00	33.09%	$29,612.39	$9,800.12
St. Anthony's Medical Center	$ 3,636.44	9.70%	$29,612.39	$2,872.37
South County Radiology	$399.00	1.06%	$29,612.39	$315.16
Dr. Justin Hill	$ 2,833.00	7.56%	$29,612.39	$2,237.75
	$ -	0.00%	$29,612.39	$0.00
	$ -	0.00%	$29,612.39	$0.00
Total Lien Amount	$ 37,489.44	1.000		$29,612.39

November 12, 2013

American Ambulance
Attn: Patient Accounts
1501 South 5th Street
Springfield, MO 62703

Re: Debi Johnson (Houston)

Dear Sir or Madam:

We have received your lien in the amount of $679.04. We tried this case to a jury in Springfield, Illinois in August of this year. The jury rendered a verdict of only $36,500.00. To determine your share of this amount as a lien holder we look to a formula in the Illinois lien reduction statute.

The amount of money from the judgment due to Debi, after attorney fees and expenses, is $14,622.27. Pursuant to the Illinois lien reduction statute, 770 ILCS 23/10, you are entitled to a pro rata share of 20% of this amount as you are a health provider; or a pro rata share of $2,924.45. The total medical liens for health providers in this case are $4,236.84. Thus your pro rata share of this amount is $468.70. Enclosed is a spreadsheet outlining this lien reduction calculation and a check in the amount of $468.70 for full and final payment for Debi's lien.

Thank you in advance for your cooperation.

Very Truly Yours,

Gary K. Burger

GKB/cjf
Enclosure

ILLINOIS LIEN LAW	CLIENT: _____		OFFER
SETTLEMENT			$36,905.00
MEDPAY			$0.00
TOTAL			**$36,905.00**
DEDUCTIONS			
ATTORNEY FEE (30%)			$11,071.50
EXPENSES			$11,211.23
ADMIN FEE			$0.00
MEDICARE			$0.00
MEDICAID			$0.00
TOTAL DEDUCTIONS			**$22,282.73**
REMAINDER			**$14,622.27**
HEALTH CARE PROFESSIONAL	**See Lien Law Facts*	***Max per Category***	***$2,924.45***
HEALTH CARE PROVIDER	*on Tab 3*	**$4,874.09**	**$2,924.45**
TOTAL AVAILABLE	*40% after fees/expenses*		**$5,848.91**

HEALTH PROFESSIONALS	TOTAL	PERCENTAGE	SHARE
Dr. Jeffrey Birkenmier	$4,220.00	9.74%	$284.89
Pain and Rehab Specialists	$84.00	0.19%	$5.67
MFG,Spine (Dr. Gornet)	$31,513.07	72.75%	$2,127.42
Ortho Center of STL	$7,502.40	17.32%	$506.48
		0.00%	$0.00
	$0.00	0.00%	$0.00
	$0.00	0.00%	$0.00
TOTALS	***$43,319.47***	***100.00%***	***$2,924.45***
HEALTH PROVIDERS			
American Ambulance	$679.04	16.03%	$468.70
CT Partners of St. Louis	$2,990.00	70.57%	$2,063.83
STL Spine and Ortho Surgey Center	$567.80	13.40%	$391.92
		0.00%	$0.00
		0.00%	$0.00
		0.00%	$0.00
	$0.00	0.00%	$0.00
TOTALS	***$4,236.84***	***100.00%***	***$2,924.45***

LOANS/OTHER PAYMENTS		*Loan Payment*
The Rawlings Company -AETNA	$83,078.74	**$8,773.36**
		$0.00
		$0.00
CLIENT NET PROCEEDS		**$0.00**

When Applying IL Lien Law the following rules apply:

1. We must reduce our fees to 30%

2. 40% of the total settlement is available for lienholders

3. That 40% is allotted as follows: 20% for Hospital Liens & 20% for other provider Liens

4. If the 20% available to a set of lienholders is more than total liens, the difference carries over to other set
ie: if $10K total, so 5K for Hospitals, and $5K for Providers, and Provider liens only total 2K, the providers get paid
in full, and the remaining 3K is added to the allotment for Hospital, making $8K total available for Hospital

5. No single lienholder category can receive more than 1/3 of the total settlement

6. Medicaid/Medicare/Erisa Plan/MP/Child Support - come out of client portion, lien law does not apply
Typically, Medicaid and Erisa Lienholders will reduce 1/3 if provided with settlement info
MP is typically an auto. 1/3 red

7. LIENHOLDER CATEGORY BREAKDOWN
HEALTH CARE ***PROFESSIONALS***: Dentists, Optometrists, Naprapaths, Psychologists, Physical Therapists, Chiropractors
HEALTH CARE ***PROVIDERS***: Hospitals, Ambulance/EMS, MRI Facilities, Home Health Care Agencies, Ambulatory Surgical Treatment Centers, Long Term Care Facilities

APPENDIX C

KeyCite Yellow Flag - Negative Treatment
Disagreement Recognized by Huey v. Meek, Mo.App. S.D., April 29, 2013

950 S.W.2d 537
Missouri Court of Appeals,
Eastern District,
Division Five.

Kathy SCHWEISS, Plaintiff/Respondent,
v.
SISTERS OF MERCY, ST. LOUIS, INC., Defendant/ Appellant.

No. 71329.
|
June 24, 1997.
|
Motion for Rehearing and/or Transfer to Supreme Court Denied Aug. 26, 1997.
|
Application to Transfer Denied Sept. 30, 1997.

Insured participant brought suit against health plan to compel payment of her medical bills for accident. The Circuit Court, St. Louis County, Maura B. McShane, J., entered summary judgment for insured participant, and employer appealed. The Court of Appeals, Crandall, J., held that: (1) reimbursement provision in plan was unenforceable as against Missouri public policy, and (2) insurer could not refuse to pay medical expenses based on insured's refusal to sign reimbursement agreement.

Affirmed.

West Headnotes (4)

[1] **Assignments**
Injuries to Person

Missouri law prohibits assignment of bodily injury claims for reasons of public policy.

7 Cases that cite this headnote

[2] **Insurance**
Medical Insurance

Health care insurer may not be subrogated to its insured's right to recover from third party tort-feasor because it would constitute impermissible partial assignment of insured's action for damages for bodily injury.

Cases that cite this headnote

[3] **Insurance**
Reimbursement from Insured

Reimbursement provision requiring insured to reimburse health plan for medical expenses out of proceeds of any recovery from tort-feasor was unenforceable as against Missouri public policy.

4 Cases that cite this headnote

[4] **Insurance**
Reimbursement from Insured

Health care plan could not refuse to pay insured participant's medical expenses because of her refusal to sign invalid reimbursement provision requiring her to reimburse plan for any medical expenses paid out of damages recovered from third person.

Cases that cite this headnote

Attorneys and Law Firms

*538 Keith A. Rabenberg, Jeffery T. McPherson, St. Louis, for Appellant.

Stephen F. Meyerkord, Prudence W. Kramer, St. Louis, for Respondent.

Opinion

CRANDALL, Judge.

Plaintiff, Kathy Schweiss brought this action against defendant, Sisters of Mercy, St. Louis, Inc. (Sisters of Mercy) to compel payment of her unpaid medical bills to her medical providers. Sisters of Mercy appeals from

the trial court's grant of summary judgment in favor of Schweiss. We affirm.

Kathy Schweiss pays a monthly premium on a contract for health care provided by her employer, Sisters of Mercy. The plan covers Schweiss and her children. It provides, in pertinent part, that if a covered person is injured by a third party and the plan covers the medical expenses, the covered person must agree to reimburse the plan if he or she recovers damages from the third party.

Schweiss and her son were involved in an automobile accident. Their covered medical expenses were approximately $100,000.00. Schweiss and her family brought an action for damages against the other driver involved in the accident.

Pursuant to the health plan, Sisters of Mercy required Schweiss to sign a "reimbursement" agreement before it would pay the medical expenses she incurred. When Schweiss refused to sign the agreement, the plan refused to pay the expenses.

Schweiss and Sisters of Mercy both filed motions for summary judgment. The trial court granted Schweiss' motion and entered judgment accordingly.

The issue on appeal is whether the trial court erred in finding the reimbursement provision of the health care plan unenforceable.

[1] [2] It is conceded by Sisters of Mercy that Missouri law prohibits the assignment of bodily injury claims for reasons of public policy. *Forsthove v. Hardware Dealers Mutual Fire Ins. Co.*, 416 S.W.2d 208, 217 (Mo.App.1967). It is also clear that a health care insurer may not be subrogated to its insured's right to recover from a third party tort-feasor because it would constitute an impermissible partial assignment of the insured's action for damages for bodily injury. *Travelers Indemnity Co. v. Chumbley*, 394 S.W.2d 418, 425 (Mo.App.1965).

[3] Sisters of Mercy argues that the reimbursement provision at issue in this case is different from *Forsthove* and *Travelers* because it involves the assignment of the *proceeds*, not an assignment of the *claim*. Although this may be a distinction, it is a distinction without a difference.

[4] In *Waye v. Bankers Multiple Line Ins. Co.*, 796 S.W.2d 660 (Mo.App.1990), the appellate court considered a similar reimbursement provision. The court held that the effect of the reimbursement provision *539 was the assignment of an action for bodily injury and invalid as against public policy. *Waye v. Bankers Multiple Line Ins. Co.*, 796 S.W.2d 660 (Mo.App.1990). We find *Waye* persuasive. We hold that the reimbursement provision in question is invalid as against public policy.

The judgment of the trial court is affirmed.

AHRENS, C.J., and ROBERT E. CRIST, Senior Judge, concur.

All Citations

950 S.W.2d 537

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APPENDIX

D

Tips for Negotiating ERISA Liens in Personal Injury Cases

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This article has been updated to include the U.S. Supreme Court's decision in *US Airways v. McCutchen*, which is also discussed in *What US Airways v. McCutchen Means for Your Personal Injury Cases*.

ERISA liens are quickly becoming one of the biggest sources of frustration for personal injury attorneys. ERISA is the Employee Retirement Income Security Act of 1974, 29 U.S.C. 1001, et seq. which governs most employee health plans. Many ERISA plans rely on preemption principles to assert that they are under no obligation to reduce their lien claims, and purport that they are entitled to their entire reimbursement claim regardless of the circumstances of the case. Needless to say, this does not bode well for clients, who may end up with very little out of their personal injury settlement, particularly if the third party has a limited policy.

How can you tackle these ERISA liens and try to negotiate them down?

Before we begin the discussion on ERISA, remember, as advised in the article *7 Steps to Approaching Lien Claims in Personal Injury Cases*, make sure to negotiate lien claims BEFORE you finalize the third party settlement. Reiterate that everyone needs to get on board so that the settlement offer can work, and everyone can get paid something. After the settlement is finalized, you have lost your leverage to gain significant reductions.

Tip #1: Understand the Law Governing ERISA Plans

First, understanding the case law that abounds in this complicated area of law is paramount. This summary is not intended to be exhaustive, as the commentary and case law on this issue are far reaching. The intent is to provide broad highlights relevant to attempts to negotiate ERISA liens, but as noted below, this is an extremely complicated area of law and there are practitioners who specialize in understanding the intricacies that are beyond the scope of this article.

Under section 502(a)(3) of ERISA, a civil action may be brought by a fiduciary to obtain appropriate equitable relief to redress violations of the plan or to enforce any provisions of the subchapter or the terms of the plan. See, 29 U.S.C. Section 1132(a)(3).

A. Self-Funded v. Insured Plans and the Savings Clause of 29 USC 1144

Generally, federal law governing ERISA plans preempts state law. However, under 29 U.S.C. 1144(b)(2)(A), referred to by many as the "saving clause," an exception exists to the rule of federal preemption. This clause states that "nothing in this title shall be construed to exempt or relieve any person from any law of any State which regulates insurance."

The "deemer" clause, 29 USC 1144 (b)(2)(B), states that an employee benefit plan governed by ERISA shall not be deemed an insurance company, an insurer, or engaged in the business of insurance for purposes of state laws purporting to regulate insurance companies or insurance contracts.

What affect do these clauses have?

FMC Corp. v. Holliday (1990) 498 U.S. 52 held that the "deemer clause" exempts self-funded ERISA plans from state laws that regulate insurance within the meaning of the saving clause. "State laws that directly regulate insurance are "saved" but do not reach self-funded employee benefit plans because the self-funded plans may not be deemed to be insurance companies, other insurers, or engaged in the business of insurance for purposes of such state laws." Id, at 61. "[I]f a plan is insured, a State may regulate it indirectly through regulation of its insurer and

its insurer's insurance contracts; if the plan is uninsured, the State may not regulate it." Id, at 64.

The take away from *FMC* is that if the plan at issue is self-funded, then only the federal law of ERISA will apply. If the plan is an insured plan, it is subject to state law regulation.

For example, in California, many attorneys make the argument that in the case of an insured plan, the "savings clause" allows California Civil Code section 3040 to apply, which limits the amount a lien claimant can recover from a third party settlement.

For a more in-depth discussion on this topic, see *Deem and Deemer: ERISA Preemption Under the Deemer Clause As Applied to Employer Health Care Plans with Stop-Loss Insurance: Legislative Reform*.

B. Sereboff Case and the Right of Self-Funded ERISA Plans to Seek Reimbursement Out of Personal Injury Settlements

In *Sereboff v. Mid Atlantic Medical Services, Inc.*, (2006) 547 U.S. 356, the Supreme Court affirmed that a self-funded ERISA plan could enforce reimbursement provisions under federal law and that an action for the same was equitable in nature and could therefore proceed under section 502(a)(3)(B) against the person holding the funds under the theory of constructive trust or equitable lien.

Sereboff discussed the significance that the plan was seeking funds from a specific identifiable source in the possession of the defendant: "it [the plan] sought its recovery through a constructive trust or equitable lien on a specifically identified fund, not from the Sereboffs' assets generally, as would be the case with a contract action at law." Id, at 363.

The court did not address whether relief sought was "appropriate equitable relief" under 502(a)(3) when the language in the plan did not allow for reductions pursuant to the "make whole" doctrine. See, Id, at 369, fn. 2.

C. US Airways v. McCutchen -- When Plans Exclude Equitable Defenses

The U.S. Supreme Court made the job of settling ERISA liens significantly more difficult with the opinion it issued in *US Airways v. McCutchen* (2013) 133 S. Ct. 1537, which answered a previous question left open by the *Sereboff* case. It held that in a section 502(a)(3) reimbursement action under ERISA based on an equitable lien by agreement, the ERISA plan's terms govern, and equitable principles will not override the language of the contract.

"Neither general unjust enrichment principles nor specific doctrines reflecting those principles--such as the double-recovery or common-fund rules invoked by McCutchen--can override the applicable contract."

Equitable defenses should still be available when the plan language is silent. While "equitable rules cannot trump a reimbursement provision, they may aid in properly construing it," wrote Justice Kagan. Because US Airways' plan was silent as to allocating attorney's fees, the Court held that the common fund doctrine applied as the default rule.

Tip #2: Be Sure to Explain to the Client that ERISA Liens Can Be Difficult to Negotiate

Setting expectations for your client is key. Let them know that ERISA liens can be difficult to negotiate, and that success in reducing the lien claims will depend greatly on the plan language and whether the plan is insured or self-funded.

Tip #3: Read the Contract

Obtain a copy of the contract language and read it carefully. Be sure that the contract is in fact an ERISA governed plan, as the lien claimant argues. If it is not governed by ERISA, and is instead an HMO or PPO, see the article on *Negotiating Health Insurance Liens in Personal Injury Cases*, for a discussion on negotiating those claims.

The contract language will be instructive on several issues, including: 1) the type of plan -- either self-funded or insurance plan; 2) whether the lien claimant may seek reimbursement

only from the third party settlement or from settlement funds obtained pursuant to Uninsured Motorist cases or Underinsured Motorist cases (1st party claims); 3) whether the plan language identifies a specific source for recovery; and 4) whether the plan language waives the make whole or common fund doctrines.

Tip #4: Narrow the Claim

When you read the contract language, determine the parameters of the plan's claim for reimbursement. First, make sure they have a right to the claim that they are making. Second, know what settlement funds the plan can go after. Most contract language limits recovery to 3rd party cases, and do not have a right to settlement funds from Uninsured Motorist cases or Underinsured Motorist cases (1st party claims). However, note that some plans do include recovery from all sources so be sure to check what the contract entitles them to.

The plan language will specify the source from which it can recover. If it is not a specific source, i.e. the settlement funds, then it may not fit under the rule set forth in *Sereboff*.

Additionally, the contract language will reveal whether the insurer has contracted around certain defenses, such as the "make-whole" or common fund doctrines. These will be discussed in more detail below, but it's important to be aware, at the outset, whether these arguments are going to be available to you.

If the contract does not allow for make whole or common fund, do not despair. All is not lost, but it may be much more difficult to get the claims settled.

Tip #5: Reduce for Unrelated and Unreasonable Charges and Obtain Credit for Co-pays

Review the itemization of charges for any unrelated charges or double billing, and have these charges removed.

Also, review the charges to make sure that the charges are reasonable. This may be difficult, considering that most charges on any medical bills seem exorbitant these days, but once you have reviewed a slew of medical bills, you start to get a feel for pricing for certain services in the geographical area that you practice. When it comes time to negotiate, raise the issue of reasonableness, and if the defendant in your case is raising the issue, advise of that as well.

Importantly, be sure to obtain a credit for co-pays made by your client. These should be subtracted from the total lien claim.

Tip #6: Reduce for Actual Recovery of Medical Bills

If certain medical bills are not part of the settlement offer, obviously, argue that they should not be included in the lien claim.

Additionally, if you have a case where the policy limits are smaller than the value of your case, and the amount of wage loss exceeds or makes up a large portion of the policy limits, or the limits are so small that the amount is less than the value for pain and suffering, make the argument that some, if not all, of the medical bills have not been recovered, and therefore the lien claimant cannot seek reimbursement for the same.

For a related discussion on this topic in the context of Medicaid liens, see *State Medicaid Liens Limited by U.S. Supreme Court in Wos v. E.M.A.* But see this discussion of the passage of Section 202 of the Bipartisan Budget Act and its effect on the holdings of these cases.

Tip #7: Determine What Law Applies and Whether Equitable Defenses Are Available

If the plan is an insured plan, then make the argument that under the "savings clause," state laws regulating insurance are applicable, as many attorneys in California do. For example, under California Civ. Code section 3040, the lien claim would be limited for comparative fault and common fund, and common law principles of the make whole doctrine may apply, as described below.

If the plan is self-funded and fits under the rule of *Sereboff*, the federal law of ERISA applies. If the language of the plan specifically excludes application of common fund or make whole doctrines, you will be stuck with the language of the plan, per the holding of *US Airways v. McCutchen*. Obtaining reductions will be far more difficult, if not impossible. However, you can use your negotiating skills, raise the circumstances of the case prior to settlement, and argue that your client might walk away from the case if the plan is not willing to reduce their claim. If the language of the plan does not contain a waiver for common fund or make whole reductions (and any other defenses), then argue that those should apply those doctrines to reduce the claim.

As stated above, *US Airways v. McCutcheon* held that the common fund doctrine serves as the default rule if the plan is silent on this issue.

Tip #8: Argue that Equitable Defenses Reduce the Lien Claim

As appropriate (see Tip #7), use the following equitable arguments to reduce the lien claim:

Comparative Fault

If the settlement was reduced because the plaintiff was at fault for a percentage of their damages, use this to negotiate the lien down.

See, Arkansas Dept. of Health and Human Services v. Ahlborn, (2006) 126 S. Ct. 1752. There, the court reduced the lien claim to one-sixth of the amount because the recovery by the plaintiff in that case was only one-sixth of the value of the case due to plaintiff's comparative fault, as evidenced by the stipulation of the parties.

If you have an insured plan, use the applicable statutory scheme to make this argument. For example, in California, Cal. Civil Code section 3040(e) provides for a reduction for the percentage of comparative fault on the part of your client, if certain conditions are met:

"Where a final judgment includes a special finding by a judge, jury, or arbitrator, that the enrollee or insured was partially at fault, the lien subject to subdivision (a) or (b) shall be reduced by the same comparative fault percentage by which the enrollee or insured's recovery was reduced."

If there is no special finding and the lien claimant pushes back on this, you can ask the third party's adjuster or counsel to put in writing that their settlement offer reflects the percentage of fault assigned to your client.

Made Whole Doctrine

The made whole doctrine is a principle of equity that generally limits the ability of an insurer to exercise its right of subrogation until the insured has been fully compensated or made whole. The interpretation of the rule may vary depending on the jurisdiction.

Thus, if the third party has a limited policy, and your client is not going to be made whole by the settlement, make the argument to the lien claimant that the settlement does not fully compensate your client for their injuries or damages.

As stated above, after *US Airways v. McCutchen*, this argument will be foreclosed if there is plan language to the contrary. However, if the plan language is silent on this issue and does not waive this defense, this argument should be available.

Common Fund

The common fund doctrine may be available depending on your jurisdiction.

"[A] litigant or a lawyer who recovers a common fund for the benefit of persons other than himself or his client is entitled to a reasonable attorney's fee from the fund as a whole." *US Airways v. McCutchen* citing *Boeing Co. v. Van Gemert* (1980) 100 S.Ct. 745.

That is, the lien claims must be reduced by the same percentage for attorney fees as the client is being charged, and the lien claimant must reduce for their proportionate share of the costs incurred by your client.

If you have an insured plan, again, use the applicable statutory scheme. In California, this reduction is reflected in California Civ. Code section 3040(f) which states: A lien subject to subdivision (a) or (b) is subject to pro rata reduction, commensurate with the enrollee's or insured's reasonable attorney's fees and costs, in accordance with the common fund doctrine. Note that in light of *US Airways v. McCutchen*, this argument will not be available against self-funded plans that specifically waive this defense. Importantly though, if the plan is silent on this issue, US *Airways v. McCutchen* specifically holds that the common fund rule is the default.

Tip #9: Know When You Are in Over Your Head

This is an extremely complicated area of law, and the consequences for improperly handling an ERISA lien are steep. Your client could end up with little and possibly nothing if the ERISA lien does not have to be reduced and there are not sufficient funds to go around.

There are practitioners who focus solely in this area of law, and are well versed in the intricacies that it involves. Know when to bring in an attorney specialized in this area, and do so before it is too late.

Tip #10: Common Sense and Courtesy Should Prevail

As with any liens, a little knowledge and a lot of common sense and courtesy go a long way in this area of law. Innovative legal theories and arguments can take you part of the way, but building rapport with the lien claimant, and appealing to their common sense is just as important. Generally, people recognize that getting paid something now is much better than risking it all and ending up with nothing.

- See more at: http://practice.findlaw.com/practice-guide/tips-for-negotiating-erisa-liens-in-personal-injury-cases.html#sthash.KEmxmebJ.dpuf

APPENDIX

E

carpenters' benefit plans
HEALTH & RETIREMENT SERVICES

October 19, 2015

Cantor & Burger
Gary K. Burger, Attorney at Law
12283 Olive Blvd
St. Louis, Mo. 63141

RE: Member: Steven J Bartosik
Patient: Nicholas Bartosik
ID# XXXXXXXXX
Date of Accident: XXXXXXX/ Motor Vehicle Accident

Dear Mr. Burger

We are in receipt of your request for a reduction of our subrogation lien regarding medical benefits paid on behalf of Nicholas Bartosik.

The policy of the Carpenters' Health and Welfare Trust Fund is to require full reimbursement for any monies paid under the Subrogation provisions when the settlement is sufficient to satisfy all liens involved. You have indicated that the proposed settlement amount is $51,000.00 As it appears this settlement is sufficient to satisfy our lien, your attorney fees, and the member's out-of-pocket costs, the Fund must deny your request for reduction of our subrogation lien.

You have the right to appeal this decision to the Board of Trustees. Please refer to the attached Carpenters' Health and Welfare Right to Appeal document for instruction.

Reimbursement is expected 30 days following settlement and should be made payable to Carpenters' Health and Welfare Trust Fund in the amount of $18,236.03

If you should have any further concerns regarding this matter, please feel free to contact me at (314) 269-5567.

Sincerely,

Tammy Tolliver

Tammy Tolliver
Claims Department Research and Recovery Unit
Carpenters' Health and Welfare Trust Fund

CC: Steven J Bartosik
Nicolas Bartosik

RIGHT OF APPEAL

If your claim receives an adverse benefit determination, you or your authorized representative may file an appeal. An "adverse benefit determination" is defined as a denial, reduction, or termination of, or failure to provide or make payment (in whole or in part) for, a benefit. This determination may be based on, but not limited to, lack of eligibility, as a result of the applicable utilization review, plan limitations, a review indicating the services to be experimental or investigational, or not medically necessary or appropriate treatment for the condition.
To challenge an adverse benefit determination, you must file a written appeal within 180 days of the date you receive this decision. Your appeal should be directed to:

The Board of Trustees
Appeals
c/o The Benefit Plan Administrator
1419 Hampton Avenue
St. Louis, MO 63139

Your written appeal should clearly state the reason(s) you believe your appeal should be granted and should include any other comments, documents, records or other information you wish to be considered. The Trustees will consider all such submission as part of the review. The claimant or his/her authorized representative may have reasonable access to, and copies of all documents, records or other information relevant to the claim upon request free of charge.
If your appeal is in response to a decision that was made in whole or in part on a medical judgment, the Plan will consult with a healthcare professional who has the appropriate training and experience to render an informed opinion. The healthcare professional will not be the one used for the original claim determination or his/her subordinate. Such individual or entity will be disclosed upon written request to the Board of Trustees.

- If your appeal involves urgent care services, the Plan will make a decision, taking into account the medical information of the case, as soon as possible, but not later than 72 hours after it receives your request for an appeal.
- If your appeal is a pre-service appeal, (an appeal based on an adverse benefit determination of a request for services for which you needed prior authorizations and the requested services have not yet been provided), the Plan will make a decision on the review within 30 days after receipt of the request for review. If the care or treatment which is the subject of the claim has been provided at the time the claim or appeal is filed or under consideration, then the time frames generally applicable to post-service claims shall apply.
- If your appeal is a post-service appeal (an appeal based on an adverse benefit determination of a request for services which have already been provided), the Board of Trustees will generally make a decision on the review within 45 days after receipt of the request for review, unless special circumstances require an extension of time for the processing in which case a decision will be made as soon as possible, but not later than 90 days after receipt of the request for review.

Notice of a decision to deny the appeal in whole or in part on the review will be in writing and will include the specific reason for the decision, as well as specific references to the pertinent Plan provisions on which the decision is based. The decision of the Trustees is final. Federal regulations require that plans advise all claimants that after a claimant's appeal process has been exhausted, the claimant may bring a civil action under Section 502(a) of the Employee Retirement Income Security Act (ERISA). Any civil action must be filed within two years of the date of the Trustees' decision.

APPENDIX

F

IN THE CIRCUIT COURT OF ST. LOUIS COUNTY
STATE OF MISSOURI

ANTHONY CASTRO	)	
	)	Cause No.: 16SL-CC03022
Plaintiff,	)	
	)	Division: 15
v.	)	
	)	
SEJLA MEHMEDOVIC,	)	
	)	
Defendant.	)	

MOTION TO ADJUDICATE LIEN

COME NOW Plaintiff Anthony Castro, by and through his undersigned attorney, and moves the Court to adjudicate the Optum lien from $1,820.96 to 910.48. This lien is too much and under principles of equity the Court should reduce this lien from this lien holder. Plaintiff has tried to resolve this lien with the lien holder, but has been unable to do so.

WHEREFORE, Plaintiff respectfully request the Court adjudicate this lien in this case to the amount stated herein, and for any further just and proper relief.

Respectfully submitted,

BURGER LAW, LLC

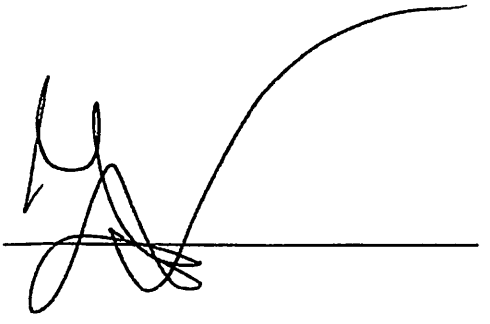
Gary K. Burger, #43478
500 N .Broadway, Suite 1350
St. Louis, Missouri 63102
Telephone: (314) 542-2222
Facsimile: (314) 542-2229
gary@burgerlaw.com
Attorneys for Plaintiff

CERTIFICATE OF SERVICE

The undersigned hereby certifies that the foregoing was served via Missouri eFiling system and emailed, on 18th January 2017, to:

Mary Carol Parker
Law Office of Jerry Crowder
319 N. 4th Street, Suite 810
St. Louis, MO 63102

Optum
Tammy Sutherland
1100 Optum Circle
Eden Prairie, MN 55344



11000 Optum Circle
MN102-0300
Eden Prairie, MN 55344

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January 18, 2017

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Eden Prairie, MN 55344
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BURGER LAW FIRM
GARY BURGER
500 N BROADWAY
SUITE 1350
ST LOUIS, MO 63102

RE:		
	Your Client:	**Anthony M Castro**
	Insured Party:	**Anthony M Castro**
	Date of Injury:	XXXXXXXX
	Group/Client:	XXXXXXXX #XXXXXX
	File #:	XXXXXXX

Dear Gary Burger,

This letter confirms our previous communications. Optum was retained by United Healthcare Services to pursue a recovery for medical expenses arising out of the above captioned loss.

Our office has reviewed your offer of a 20% reduction with the Plan or $1,456.77. The Plan has asked that I respectfully decline that offer, however, in an effort to amicably resolve this matter, my client will accept $1,638.86 (10%) in full settlement of its interest. In addition, provided Anthony M Castro meets the Plan requirements and remains a Plan Beneficiary, the Plan will provide benefits for future necessary incident related treatment.

Please issue your reimbursement check for $1,638.86, payable to "Optum", Federal Tax Identification Number 41-1858498, and send it to the following address:

Optum
75 Remittance Drive, Suite 6019
Chicago, IL 60675-6019

Any communication concerning a dispute about this settlement, including an instrument tendered as full satisfaction of the recovery interest where the tendered amount differs from the above-mentioned settlement amount, is to be sent to my attention at the address listed on the letterhead.

On behalf of my client and myself, thank you for your cooperation and assistance in bringing this matter to resolution.

Sincerely,

In the
CIRCUIT COURT
of St. Louis County, Missouri

[For File Stamp Only]

Anthony Castro
Plaintiff(s)

vs.

Sejla Mehmedovic
Defendant(s)

3/1/17
Date

16SL-CC03022
Case Number

15
Division

FILED
MAR 0 1 2017
JOAN M. GILMER
CIRCUIT CLERK, ST. LOUIS COUNTY

Order

Cause called on Plaintiff's Motion to Adjudicate Lien asserted by Optum. IT IS HEREBY ORDERED that said lien is adjudicated to $910.48.

Cause dismissed with prejudice.

SO ORDERED

Judge

ENTERED: 3/1/17
(Date)

CCOPR47 Rev. 5/95

43478
Attorney Bar No.
atty for Pl
Address

Phone No. Fax No.

Attorney Bar No.

Address

Phone No. Fax No.

BURGER LAW
Trial Attorneys

Licensed in Missouri and Illinois

(314) 542-2222 BurgerLaw.com

March 1, 2017

Optum
Attn: Tammy Sutherland
75 Remittance Drive, Ste 6019
Chicago, IL 60675-6019

Re:		
	Injured Party:	Anthony Castro
	Date of Injury:	XXXXXXXXX
	Group:	XXXXXXXXX
	File No.	XXXXXXXXX

Dear Ms. Sutherland:

Enclosed please find a copy of the Order from today's Motion to Adjudicate Lien hearing in St. Louis County. The Court has Ordered Optum to accept $910.48 as full and final payment to Optum for our client Anthony Castro. Therefore, enclosed please find check no. 1731 in the amount of $910.48 as full and final payment. Please do not hesitate to contact our office should you have any questions.

Thank you.

Very truly yours,

Gary K. Burger

GKB/cjf
Enclosure

500 N. Broadway, Suite 1350, St. Louis, MO 63102
Facsimile (314) 542-2229

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March 10, 2017

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11000 Optum Circle
Eden Prairie, MN 55344
www.optum.com

BURGER LAW FIRM
GARY BURGER
500 N BROADWAY
SUITE 1350
ST LOUIS, MO 63102

RE: **Injured Party:** **Anthony M Castro**
Date of Injury: **XX/XX/XXXX**
Group: **XXXXXX, #XXXXXXX**
File #: **XXXXXXXXX**

Dear Gary Burger,

We received the Order from your Motion to Adjudicate Lien. You were on notice that the health plan is set up under the federal Employee Retirement Income Security Act of 1974 (ERISA), 88 Stat. 829, as amended, 29 U.S.C. §1001 et seq. Self-insured ERISA plans are protected from state law regulation by the "deemer" clause. See FMC Corp. v. Holliday, 498 U.S. 52 (1990)(ERISA's deemer clause prohibits the application of state insurance laws such as subrogation to self-insured plans.

Accordingly, the Order has absolutely no bearing on the reimbursement rights of this Plan. Further, the language in the Penn National Gaming Health Plans SPD is clear that it has the right to 100% reimbursement. In *US Airways v. McCutchen*, 133 S. Ct. 1537 (2013) the Supreme Court ruled that ERISA §502(a)(3) reimbursement claims are controlled by the terms of the plan. Specifically, the Court held that the plan's reimbursement claim cannot be challenged or defeated by equitable rules or defenses when the plan is entitled to full reimbursement.

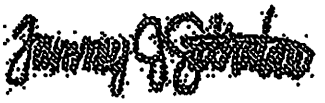
Mr. Castro is still a member of this Plan. Your misunderstanding of the applicable law in this matter may affect you clients future benefits as the Plan is entitled to offset future benefits.

The last communication received from your office stated that you are remitting $910.48. That will not satisfy the Plans reimbursement interest. Please remit the full balance of $1,820.96 and send it to the following address:

Optum
75 Remittance Drive, Suite 6019
Chicago, IL 60675-6019

If full payment is not received by March 24, 2017 we will work with our client to resolve this matter directly with Mr. Castro.

Sincerely,



Tammy Sutherland, Analyst
Phone: 952.833.6392 Fax: 800.842.8810
E-mail: Tammy.J.Sutherland@Optum.com

BURGER LAW
Trial Attorneys
Licensed in Missouri and Illinois
(314) 542-2222 BurgerLaw.com

March 10, 2017

SENT VIA EMAIL TO: tammy.j.sutherland@optum.com

Optum
Attn: Tammy Sutherland
75 Remittance Drive, Ste 6019
Chicago, IL 60675-6019

Re:	Injured Party:	Anthony Castro
	Date of Injury:	xx/xx/xxxx
	Group:	XXXXXXX
	File No.	xxxxxxxxx

Dear Ms. Sutherland:

I have received your March 10, 2017 letter. I disagree with your position. You were on notice of the hearing to adjudicate the lien. The Court in Missouri has authority to adjudicate the liens in a case pending before it. You had every opportunity to present with legal counsel or someone else at the hearing for argument and apparently Optum elected not to do so.

As you know, Mr. Castro is represented so I would appreciate any attempt to resolve this with Mr. Castro is through me and our office.

Thank you.

Very truly yours,

Gary K. Burger

GKB/cjf

500 N. Broadway, Suite 1350, St. Louis, MO 63102
Facsimile (314) 542-2229

APPENDIX

G

BARBARA J. COGHLAN
GREGORY J. SIMON
MARK J. COGHLAN
JULIE M. JANOTA
DAVID W. GROUNDWATER

COGHLAN LAW LLC
ATTORNEYS AT LAW
161 NORTH CLARK STREET • SUITE 1325
CHICAGO, ILLINOIS 60601-3295
OFFICE (312) 357-9200
FAX (312) 357-0961
WRITER'S DIRECT DIAL NUMBER
(312) 357-2308

MARCIA E. GARDINO
TRACIE K. PRETET
AILEEN L. CIESIELSKI
ANDREA G. CRUSH

September 6, 2016

VIA TELEFACSIMILE & U.S. MAIL

Gary K. Burger, Esq.
Burger Law Firm
500 N. Broadway, Suite 1350
St. Louis, MO 63102

Re:	**Fund Member:**	**John E. Cooper**
	Your Client (Our Cl):	**Cynthia, wife**
	Date of Accident:	XX/XX/XXXX
	CL File No.:	**MO-XXXXX**
	Lien Amount:	**$76,193.77**

Dear Mr. Burger:

This letter is in response to your letter dated August 19, 2016 regarding the captioned subrogation claim asserted on behalf of our client, the Central States, Southeast and Southwest Areas Health and Welfare Fund ("Central States"). As of this time, Central States has paid $76,193.77 in medical benefits on behalf of Covered Individual Cynthia Cooper as a consequence of injuries she sustained as result of the April 28, 2014 accident.

The position that some of the treatment received by Cynthia Cooper is not related to her April 28, 2014 accident is not a conclusion that Central States is required to accept. Central States' Trustees make their own determinations with regard to proximate cause issues. Central States' trust agreement and Plan Document vest with the Trustees the discretionary and final authority for construing plan documents and adopting rules and regulations for the administration of Central States. If challenged, the Trustees' interpretation of Plan terms is subject only to the arbitrary and capricious standard of review. See Firestone Tire & Rubber Co. v. Bruch, 489 U.S. 101 (1989); Exbom v. Central States, Southeast & Southwest Areas Health & Welfare Fund, 900 F.2d 1138,1141 (7th Cir. 1990).

In order for Central States to conduct such a review in this case, Central States will require a copies of all demand letters presented to Liberty Mutual Insurance together with copies of any pertinent submissions on behalf of Cynthia Cooper and all pertinent medical records, including, without limitation, the discharge summary, admitting diagnosis, and doctors notes related to treatment rendered to her.

If you have any questions regarding Central States' claim, I will be happy to discuss this matter with you.

Sincerely,
Coghlan Law LLC

By: _____
David W. Groundwater

DWG/sml

G:\DOCS\CSS\SEP.16\MO-17126A.DWG

COGHLAN LAW LLC
ATTORNLYS AT LAW
161 North Clark Street • Suite 1325
Chicago, Illinois 60601-3295
(312) 357-9200
Fax (312) 357-0861
Writer's Direct Dial Number

(312) 357-2308

Barbara J. Coghlan
Gregory J. Simon
Mark J. Coghlan
Julie M. Jancia
David W. Groundwater

Marcia E. Gardino
Tracie K. Pretet
Andrea G. Crush
Arianne C. Clayton
Sheila M. Geraghty

September 20, 2016

QK

VIA TELEFACSIMILE & U.S. MAIL

Gary K. Burger, Esq.
Burger Law Firm
500 N. Broadway, Suite 1350
St. Louis, MO 63102

Re:	**Fund Member:**	**John E. Cooper**
	Your Client (Our Cl):	**Cynthia, wife**
	Date of Accident:	XX/XX/XXXX
	CL File No.:	**MO-XXXXX**
	Lien Amount:	**$165.90**

Dear Mr. Burger:

Enclosed for your review is an updated summary of accident-related medical benefits in the amount of $165.90 that have been provided to Covered Individual Cynthia Cooper by the Central States, Southeast and Southwest Areas Health and Welfare Fund as a consequence of injuries she sustained in the April 28, 2014 accident.

If you have any questions, I will be happy to discuss this matter with you.

Sincerely,
Coghlan Law LLC

By: _____
David W. Groundwater

DWG/sml
Enclosure

G:\DOCS\CSS\SEP.16WO-17126B.DWG

APPENDIX

H

BURGER LAW FIRM

Trial Lawyers
Licensed in Missouri and Illinois
(314) 542-2222

April 25, 2017

Trover Solutions
Attn: Andrea Morrow
PO Box 34060
Louisville, KY 40232

RE:	Jessica Gorse
DOB:	XXXXXXXXXX
SSN:	XXX-XX-XXXX
DOI:	XXXXXXXXXX

Dear Andrea:

Thank you for your May 19, 2016 letter. Please be advised that our office is no longer Cantor & Burger- we are now Burger Law. As you know, we represent Jessica Gorse. You have indicated that there is a $2,126.43 outstanding lien. We are aware that this is an ERISA and of the plan language. At this time, please consider this request to reduce this lien by 20% and accept $1,701.15 as full and final payment.

Our client has other other outstanding balances in this case along with future medical treatment. We have a portion of money to try to resolve all balances for Jessica Gorse. I realize the lien in this case needs to be satisfied; however, I am making an effort to satisfy both my client and Trover Solutions.

Please contact me at your earliest convenience to discuss possible resolution of this outstanding balance should you have any questions. If you agree to this amount please provide our office with written indication.

Very Truly Yours,

Gary K. Burger

GKB/cjf

500 N. Broadway, Suite 1350, St. Louis, MO 63102
Facsimile (314) 542-2229

April 25, 2017

VIA FAX ONLY TO: 800-842-7788

Healthcare Recoveries
Attn: Andrea

RE:	Timothy Frymire
DOB:	XXXXXXXX
SSN:	XXXXXXXX

Dear Andrea:

This letter is to request a reduction on the above referenced account. We are in the process of settling this case. Timothy Frymire has died and we have settled his case through his estate. Please advise whether this is an ERISA lien in writing. Please advise how much the death of the beneficiary affects your ability to collect on the claim. Further, due to the extensive liens and medical expenses in this case we are hereby requesting a balance reduction to fully settle and close this account. The details of this settlement, including attorney's fees and cases expenses, are as follows:

Total Settlement:	$120,000.00
Attorney's Fees:	$40,000.00
Case Expenses:	$1,134.00
Total Medical Liens:	$26,659.00

Other medical providers that have held liens and balances have cut their lien amounts and balances down. We request that you accept $15,000.00 to fully satisfy the above referred bill. This is a 41% reduction of your bill. Please let me know your response to this request as soon as possible. Once we have received the information regarding the balance reduction in this matter, payment can be forwarded once settlement is complete.

Thank you for your cooperation in this regard.

Very Truly Yours,

Gary K. Burger, Jr.

GKB/cjf
By signing below, I agree that Healthcare Recoveries will accept $15,000.00 for the full and final settlement regarding the lien for Timothy Frymire.

Signature_____

Date_____

APPENDIX

I

MODEL LANGUAGE

PROOF OF REPRESENTATION

The language below should be used when you, the Medicare beneficiary, want to inform the Centers for Medicare & Medicaid Services (CMS) that you have given another individual the authority to represent you and act on your behalf with respect to your claim for liability insurance, no-fault insurance, or workers' compensation, including releasing identifiable health information or resolving any potential recovery claim that Medicare may have if there is a settlement, judgment, award, or other payment. You are not required to use this model language, but proof of representation must include the information provided in this model language. Your representative must also sign that he/she has agreed to represent you. This model language also makes provisions for the information your representative must provide.

Type of Medicare Beneficiary Representative (Check one below and then print the requested information):

( ) Individual other than an Attorney: Name: _____

( ) Attorney* Relationship to the Medicare Beneficiary: _____

( ) Guardian* Firm or Company Name: _____

( ) Conservator* Address: _____

( ) Power of Attorney* _____

_____

Telephone: _____

* Note -- If you have an attorney, your attorney may be able to use his/her retainer agreement instead of this language. (If the beneficiary is incapacitated, his/her guardian, conservator, power of attorney etc. will need to submit documentation other than this model language.) Please visit www.msprc.info for further instructions.

Medicare Beneficiary Information and Signature/Date:

Beneficiary's Name (please print exactly as shown on your Medicare card): _____

Beneficiary's Health Insurance Claim Number (number on your Medicare card): _____

Date of Illness/Injury for which the beneficiary has filed a liability insurance, no-fault insurance or workers' compensation claim: _____

Beneficiary Signature: _____ Date signed: _____

Representative Signature/Date:

Representative's Signature: _____ Date signed: _____

MSPRC

CMS
CENTERS for MEDICARE & MEDICAID SERVICES

Learn about your letter at www.msprc.info

Final Settlement Detail Document

Beneficiary Name:
Medicare Number:
Date of Incident:

When a beneficiary receives a settlement, judgment, award, or other payment, Medicare is entitled to recover associated payments made by the Medicare program. If certain conditions are met, Medicare reduces its conditional payment to take into account a proportionate share of the costs incurred in resolving the beneficiary's claim. See 42 C.F.R. 411.37. In general, the recovery demand must be against the individual or entity that received payment, the costs must have been incurred because the matter was disputed, and the costs must be paid by the individual or entity against whom/which Medicare seeks recovery. There is no proportionate reduction if payment is not in dispute – for example a payment for no-fault insurance.

In order for Medicare to properly calculate the net refund it is due, please supply the information outlined below. This information will also be used to update the beneficiary's records to show resolution of this matter. If you have a representative, this information should be submitted by your representative on his/her letterhead.

Total Amount of the Settlement: _____
Total Amount of Med-Pay or PIP: _____
Attorney Fee Amount Paid by the Beneficiary: _____
Additional Procurement Expenses Paid by the Beneficiary: _____
(Please submit an itemized listing of these expenses)
Date the Case Was Settled: ____/____/____

This information should be submitted **along with a copy of this notice** to:

Medicare Secondary Payer Recovery Contractor
MSPRC-NGHP
Post Office Box 138832
Oklahoma City, OK 73113

If you have any questions concerning this matter, please call the Medicare Secondary Payer Recovery Contractor (MSPRC) at 1-866-677-7220 (TTY/TDD: 1-866-677-7294 for the hearing and speech impaired) or you may contact us in writing at the address above. If you contact us in writing, please be sure to include the beneficiary's name and his/her Medicare health insurance claim number.

Fairness in Class Action Litigation Act of 2017

(Sec. 3) This bill amends the federal judicial code to prohibit federal courts from certifying class actions unless:

- in a class action seeking monetary relief for personal injury or economic loss, each proposed class member suffered the same type and scope of injury as the named class representatives;

- no class representatives or named plaintiffs are relatives of, present or former employees or clients of, or contractually related to class counsel; and

- in a class action seeking monetary relief, the party seeking to maintain the class action demonstrates a reliable and administratively feasible mechanism for the court to determine whether putative class members fall within the class definition and for the distribution of any monetary relief directly to a substantial majority of class members.

The bill limits attorney's fees to a reasonable percentage of: (1) any payments received by class members, and (2) the value of any equitable relief.

No attorney's fees based on monetary relief may: (1) be paid until distribution of the monetary recovery to class members has been completed, or (2) exceed the total amount distributed to and received by all class members.

Class counsel must submit to the Federal Judicial Center and the Administrative Office of the U.S. Courts an accounting of the disbursement of funds paid by defendants in class action settlements. The Judicial Conference of the United States must use the accountings to prepare an annual summary for Congress and the public on how funds

paid by defendants in class actions have been distributed to class members, class counsel, and other persons.

A court's order that certifies a class with respect to particular issues must include a determination that the entirety of the cause of action from which the particular issues arise satisfies all the class certification prerequisites.

A stay of discovery is required during the pendency of preliminary motions in class action proceedings (motions to transfer, dismiss, strike, or dispose of class allegations) unless the court finds upon the motion of a party that particularized discovery is necessary to preserve evidence or to prevent undue prejudice.

Class counsel must disclose any person or entity who has a contingent right to receive compensation from any settlement, judgment, or relief obtained in the action.

Appeals courts must permit appeals from an order granting or denying class certification.

(Sec. 4) Federal courts must apply diversity of citizenship jurisdictional requirements to the claims of each plaintiff individually (as though each plaintiff were the sole plaintiff in the action) when deciding a motion to remand back to a state court a civil action in which: (1) two or more plaintiffs assert personal injury or wrongful death claims, (2) the action was removed from state court to federal court on the basis of a diversity of citizenship among the parties, and (3) a motion to remand is made on the ground that one or more defendants are citizens of the same state as one or more plaintiffs.

A court must: (1) sever, and remand to state court, claims that do not satisfy the jurisdictional requirements; and (2) retain jurisdiction over claims that satisfy the diversity requirements.

(Sec. 5) In coordinated or consolidated pretrial proceedings for personal injury claims conducted by judges assigned by the judicial panel on multidistrict litigation, plaintiffs must: (1) submit medical records and other evidence for factual contentions regarding the alleged injury, the exposure to the risk that allegedly caused the injury, and the alleged cause of the injury; and (2) receive not less than 80% of any monetary recovery. Trials may not be conducted in multidistrict litigation proceedings unless all parties consent to the specific case sought to be tried.

Forbes



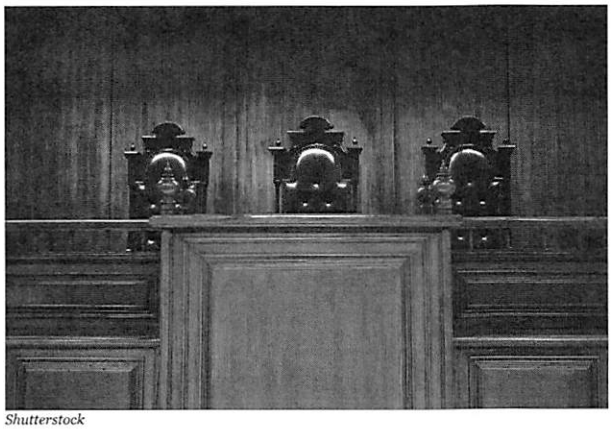


Daniel Fisher Forbes Staff

I cover finance, the law, and how the two interact.

INVESTING 2/16/2017 @ 7:00AM | 2,760 views

House Bill Would Make Life Much, Much Harder For Class-Action Lawyers



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Class Action Claims - Claims Compensation Bureau

Maximizing Class Action Recoveries - Retroactive & Current Case Filing

claimscompensation.com

A new bill in Congress would make class-action lawyers work much harder for their money, by requiring courts to peg legal fees to the actual amount of money their clients receive and throwing obstacles in the way of consumer class actions where a vanishingly small percentage of consumers get anything at all.

The Fairness in Class Action Litigation Act of 2017 was introduced Feb. 10 by U.S. Rep. Bob Goodlatte (R-Va.), the same congressman who introduced the Class Action Fairness Act of 2005 banning coupon settlements and pushing many class actions into federal court where judges tend to be a little more skeptical of lawyer-driven litigation.

Rep. Goodlatte's latest bill would go much farther, eliminating most of the tactics plaintiff lawyers use to extract large fees for themselves while delivering little or nothing to their clients. It wouldn't close the courthouse doors to consumers, as critics are sure to say. Nothing in the law would prevent a group of plaintiffs who suffered the same damages to hire a single lawyer and ask the court to join their cases together for efficiency. What it would do is discourage lawyer-driven litigation, where plaintiff

attorneys target a company with a class-action suit knowing full well the bulk of their clients will never learn of the lawsuit or seek to claim their piece of the settlement.

Plaintiff lawyers say that's the same thing as outlawing class actions, since nobody will hire a lawyer to pursue a $2 overcharge on their cellphone bill. But they are engaging in ends-justifies-the-means reasoning that not incidentally puts money in their pockets. If mass consumer litigation is worthwhile, consumers should be able to join it willingly, not be forced into it without their knowledge.

The proposed law has already drawn strong criticism from, among others, Myriam Gilles of Cardozo Law and Elizabeth Burch of the University of Georgia Law School. Allison Frankel at Reuters also thinks it would "gut class actions" and discourage some types of civil rights litigation (which was the original intent behind Rule 23, the federal rule approved by Congress that established the class action in the first place). I examine at the bill's major provisions and some of their criticisms below:

- **Uniform damages.** Class members would have to have suffered damages of "the same type and scope of injury" to be bundled into a single action. This would discourage lawsuits where plaintiffs have a wide variety of damages, including some with no damages at all, which defendant companies say unfairly complicates their defense. Gilles and Burch say this requirement conflicts with decisions including last year's *Tyson Foods v. Bouaphakeo*, which upheld a class action verdict even though some class members weren't entitled to anything. It's practically impossible to construct a class with no zero-damages members, Gilles and Burch say. But how does that square with the U.S. Constitution's requirement that courts hear only cases and controversies where plaintiffs have an actual claim?

- **Ascertainability.** This is a big one, and it is surprising judges don't require it already. The bill would require plaintiff lawyers to demonstrate there is a "reliable and administratively feasible mechanism" to identify who their clients are and distribute money to them directly. Burch says this would "mire the courts and the parties in unnecessary and costly discovery," and Gilles says it would eliminate the deterrent value of small-dollar consumer class actions where consumers don't have records of their purchases. The first criticism assumes plaintiff lawyers would even get to discovery with lawsuits that lack identifiable plaintiffs. The second assumes there is a meaningful deterrent value to consumer class actions, which typically settle for little more than the fees of the plaintiff lawyers which are covered by insurance. It also assumes the goal of deterrence outweighs the cost of litigation. Both are debatable at best. If a company's behavior is egregious enough, regulators and state attorneys general can and do deliver the deterrence.

- **Fees.** Plaintiff lawyers could only be paid a percentage of what their clients actually recover, not some fanciful calculation of what might get paid out if everybody submitted a claim, which almost never happens. They'd also have to wait until all the money is paid out to get their fee. Critics say this would discourage settlements like the NFL players' concussion suit, where the money will flow for

decades. Fair enough. Allow judges to present-value settlements that pay out over time and award a fee based on that. But tying fees to the actual amounts paid out would eliminate the glaring conflict facing plaintiff lawyers, who have an incentive to collude with defendant companies on a settlement that looks good on paper but only really represents their fee.

- **Reporting.** Another proposal that is long overdue. Before they could collect their fees, class counsel would have to submit to the Federal Judicial Center data on the amount actually paid by the defendant company, the number of class members who were paid, the average and median payment per class member, and any money paid to non-class members. Burch says she supports reporting but that holding lawyers' fees hostage to it "could create a bottleneck and backlog." Or not, if lawyers comply promptly with the requirement, and negotiate settlements that pay out quickly and reliably. Now, plaintiff lawyers hide the data showing how ineffective their settlements are. They also tend to disguise payments to rival firms that otherwise might have competed against them on fees and friends and relatives who may or may not have earned a piece of the settlement pie. These are plaintiff lawyers who claim to be defending consumers against sharp practices by corporate defendants; they should be held to the same standards of disclosure and honesty as their targets.

- **No conflicts.** Class-action lawyers couldn't tap relatives, employees or present or former clients to serve as class representatives. This would eliminate the squalid practice of recruiting friends 'n' family to serve as bogus representatives in bogus lawsuits designed only to elicit a nuisance settlement. It also would tighten considerably the widely ignored requirement under the Private Securities Litigation Reform Act limiting lead plaintiffs in securities class actions to five cases in a three-year period. A complete ban on law firms representing former clients in class actions might go too far, but under the current rules too many nuisance suits feature "representative" plaintiffs that are too close to the lawyers they are supposed to be watching with a critical eye.

- **MDL procedures.** The bill also would require plaintiffs to present solid evidence of injury before their cases are included in multidistrict litigation, a technique federal courts use to consolidate mass litigation before a single judge to resolve common issues. Too often lawyers salt the mine with a few high-dollar cases and then throw in hundreds or thousands of lawsuits with little evidence behind them to negotiate big settlements. Under this law, questionable cases would be dismissed within 30 days.

This bill is sure to draw strong criticism from trial lawyers, who represent some of the best-paid and most important contributors to the Democratic Party. But examine their message closely. It's likely to be more ends-justifies-the-means rhetoric, claiming their rich fees are the price the public must pay to hold corporations accountable for overcharging consumers a penny a widget. Maybe so, but who can argue with them at the very least being required to supply the information they possess showing how effective they are at achieving their mission?

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RECOMMENDED BY FORBES

The Richest Person In Every State

How Matthew Mercer & 'Critical Role' Changed Dungeons & Dragons

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E-FILED
Wednesday, 22 February, 2017 03:35:30 PM
Clerk, U.S. District Court, ILCD

**IN THE
UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF ILLINOIS
ROCK ISLAND DIVISION**

JOSEPH SWISEGOOD,
Plaintiff,

v.

GENERAC POWER SYSTEMS,
Defendant.

Case No. 4:17-cv-04058-SLD-JEH

Order

The Plaintiff, Joseph Swisegood, filed a Complaint on February 17, 2017. (D. 1)[1] The Plaintiff's Complaint asserts diversity of citizenship as a basis of this Court's subject matter jurisdiction. (D. 1 at pg. 2). The allegations of the Complaint are not sufficient to support that assertion.

The court may *sua sponte* raise the issue of federal subject matter jurisdiction. *Tylka v. Gerber Products Co.*, 211 F.3d 445, 447 (7th Cir. 2000) (citations omitted). Here, the Plaintiff alleges he is a "resident" of Illinois. *Id.*

The Seventh Circuit has repeatedly warned that an allegation of residency is insufficient to invoke federal subject matter jurisdiction. See, *e.g.*, *Tylka v. Gerber Prods. Co.*, 211 F.3d 445, 448 (7th Cir.2000); see also *Page v. Wright*, 116 F2d 449, 451 (7th Cir. 1940) ("[i]n federal law citizenship means domicile, not residence"). Parties asserting diversity jurisdiction based on parties hailing from different states must allege the citizenship of each party, not the residence. See *Held v. Held*, 137 F.3d 998 (7th Cir.1998); *Pollution Control Indus. of Am., Inc. v. Van Gundy*, 21 F.3d 152, 155 (7th Cir.1994).

[1] Citations to the Docket in this case are abbreviated as "D. __."

The Court may grant leave to amend defective allegations of subject matter jurisdiction pursuant to 28 U.S.C. § 1653. See also, *Leaf v. Supreme Court of State of Wis.*, 979 F.2d 589, 595 (7th Cir. 1992) ("leave to amend defective allegations of subject matter jurisdiction should be freely given") (citations omitted). Accordingly, it is hereby ORDERED that the Plaintiff file an Amended Complaint not later than fourteen (14) days from the date of entry of this Order. In the Amended Complaint, the Plaintiff shall properly allege the basis for the Court's jurisdiction.

It is so ordered.

Entered on February 22, 2017.

s/Jonathan E. Hawley
U.S. MAGISTRATE JUDGE

BEFORE THE UNITED STATES JUDICIAL PANEL ON MULTIDISTRICT LITIGATION

IN RE: DAILY FANTASY SPORTS MARKETING AND SALES PRACTICES LITIGATION	**MDL Docket No. ____**

MOTION OF PLAINTIFF DAVID WHITE, ON BEHALF OF HIMSELF AND ALL OTHERS SIMILARLY SITUATED, FOR TRANSFER AND CONSOLIDATION OF RELATED ACTIONS TO THE SOUTHERN DISTRICT OF NEW YORK PURSUANT TO 28 U.S.C. § 1407

Plaintiff David White, on behalf of himself and all others similarly situated, respectfully moves the Judicial Panel on Multidistrict Litigation, pursuant to 28 U.S.C. § 1407 and Rule 7.2 of the Rules of Procedure for the Judicial Panel on Multidistrict Litigation, for an Order Consolidating and Transferring Related Actions to the United States District Court for the Southern District of New York. This Motion is supported by the accompanying Memorandum of Law and Schedule of Actions.

1. Five related deceptive trade practices lawsuits have been recently filed against companies that operate daily fantasy sports websites.[1] These five related actions are currently pending in four different United States District Court and include the following:[2]

Southern District of New York

- *White, et al. v. DraftKings, et al.*, No. 1:15-cv-08123 (filed Oct. 15, 2015)

[1] These daily fantasy sports websites permit individuals to play one-day fantasy sports competitions against other players on the same website. In order to participate in the daily fantasy sports contests, a player on the websites is required to create an account, place money in it, and then use that money to pay entry fees into each game. At the end of each day, winners of each fantasy sports contest are awarded prize money, which is credited to the players' accounts. The fantasy sports websites at issue in this litigation advertise and market their services as games of skill and strategy and therefore avoid gambling industry regulations, including the Unlawful Internet Gambling Enforcement Act.

[2] The five related actions described herein are referred to as the "Related Actions."

- *Johnson, et al. v. FanDuel, Inc., et al.*, No. 1:15-cv-07963 (filed Oct. 8, 2015)

Southern District of Illinois

- *Guarino, et al. v. DraftKings, Inc., et al.*, No. 3:15-cv-1123 (filed Oct. 9, 2015)

Eastern District of Louisiana

- *Genchanok, et al. v. FanDuel, Inc., et al.*, No. 2:15-cv-05127 (filed Oct. 13, 2015)

District of Massachusetts

- *Wicksman, et al. v. DraftKings, Inc.*, No. 1:15-cv-13559 (filed Oct. 13, 2015)

2. The Related Actions all involve class allegations of unfair, deceptive, fraudulent, and negligent commercial practices by an identical group of Defendants – DraftKings, Inc. and FanDuel, Inc. (collectively "Defendants").

3. Plaintiffs in these Related Actions allege that they were deceived by Defendants' misrepresentations that their fantasy sports contests were fair games of skills and omissions that their employees were permitted to participate in competitors' fantasy sports contests using non-public information that gave them a competitive advantage.

4. The Related Actions are brought by representative plaintiffs and seek relief for a nationwide putative class of consumers who paid entry fees to and competed in Defendants' daily fantasy sports contests. The Related Actions seek injunctive relief and damages, among other remedies.

5. Litigation in the five Related Actions is just commencing. The earliest complaint against Defendants was filed October 5, 2015. Procedurally, all five Related Actions are situated the same. No discovery has occurred in any of the Related Actions.

6. The Related Actions involve one or more common questions of fact as required by 28 U.S.C. § 1407. Common questions of fact include:

(a) Whether Defendants engaged in a course of fraudulent and deceptive conduct in the daily fantasy sports contests made available on their respective websites;

(b) Whether Defendants violated the laws of Massachusetts, Florida, and New York by their fraudulent and deceptive course of conduct, as described in the complaints, in the daily fantasy sports contests made available on their respective websites;

(c) Whether Defendants' fraudulent and deceptive conduct harmed Plaintiff and the Classes described in the Related Actions;

(d) Whether Defendants negligently allowed employees with access to non-public information to participate in their daily fantasy sports contests;

(e) Whether Defendants were unjustly enriched by their deceptive practices.

(f) The appropriate injunctive and related equitable relief; and

(g) The appropriate measure of damages sustained by the Plaintiffs and other members of the classes in the Related Actions.

7. As a consequence, transfer of the Related Actions for coordination or consolidation will prevent duplication of discovery, eliminate the possibility of conflicting pretrial rulings, and conserve judicial resources.

8. The United States District Court for the Southern District of New York is the most appropriate forum for coordination or consolidation of the Related Actions for the following reasons:

(a) Defendant FanDuel, Inc. is headquartered in the Southern District of New York;

(b) Defendant DraftKings, Inc. is headquartered in Boston, Massachusetts, which is in close proximity to the Southern District of New York;

(c) The Southern District of New York is easily accessible for geographically diverse Parties; and

(d) The Southern District of New York is well-suited to manage this litigation because it has an extraordinary amount of experience in multi-district litigation.

Accordingly, Plaintiff David White in the Southern District of York action respectfully request that the Judicial Panel on Multidistrict Litigation issue an Order transferring all Related Actions to the Southern District of New York for coordinated or consolidated pretrial proceedings.

Dated October 15, 2015

Respectfully submitted,

/s/ Charles J. LaDuca

Charles J. LaDuca
CUNEO GILBERT & LADUCA, LLP
507 C Street NE
Washington, DC 20002
Telephone: (202) 789-3960
Facsimile: (202) 789-1813
E-mail: charles@cuneolaw.com

BEFORE THE UNITED STATES JUDICIAL PANEL ON MULTIDISTRICT LITIGATION

IN RE: DAILY FANTASY SPORTS MARKETING AND SALES PRACTICES LITIGATION	**MDL Docket No. ____**

MEMORANDUM OF LAW IN SUPPORT OF MOTION OF PLAINTIFF DAVID WHITE, ON BEHALF OF HIMSELF AND ALL OTHERS SIMILARLY SITUATED, FOR TRANSFER AND CONSOLIDATION OF RELATED ACTIONS TO THE SOUTHERN DISTRICT OF NEW YORK PURSUANT TO 28 U.S.C. § 1407

Plaintiff David White respectfully submits this memorandum of law in support of his motion to transfer related *Daily Fantasy Sports Deceptive Trade Practices Litigation* actions to the Southern District of New York for coordinated pretrial proceedings pursuant to 28 U.S.C. § 1407. Plaintiff respectfully submits that the Southern District of New York is the most appropriate forum for coordination of the Related Actions (identified below) because it offers the best combination of accessibility, expertise, and efficiency and because it is the site of the first-filed case, as well as the plurality of cases. For these reasons, and for others set forth below, transfer to and pretrial coordination in the Southern District of New York will most effectively promote the just and efficient conduct of these Related Actions.

I. INTRODUCTION

As of the filing of this motion, five lawsuits alleging violations of common-law and statutory laws have been filed in federal district courts throughout the United States:

Southern District of New York

- *White, et al. v. DraftKings, et al.*, No. 1:15-cv-08123 (filed Oct. 15, 2015)
- *Johnson, et al. v. FanDuel, Inc., et al.*, No. 1:15-cv-07963 (filed Oct. 8, 2015)

Southern District of Illinois

- *Guarino, et al. v. DraftKings, Inc., et al.*, No. 3:15-cv-1123 (filed Oct. 9, 2015)

Eastern District of Louisiana

- *Genchanok, et al. v. FanDuel, Inc., et al.*, No. 2:15-cv-05127 (filed Oct. 13, 2015)

District of Massachusetts

- *Wicksman, et al. v. DraftKings, Inc.*, No. 1:15-cv-13559 (filed Oct. 13, 2015)

The actions Plaintiff seeks to consolidate are consumer class action lawsuits against DraftKings, Inc. and FanDuel, Inc. (collectively "Defendants"), Delaware corporations that operate daily fantasy sports websites. These actions meet all of the recognized criteria for transfer and consolidation.

Plaintiff seeks the transfer of the Related Actions for coordinated pretrial proceedings to the District Court for the Southern District of New York pursuant to 28 U.S.C. § 1407. All actions filed to date involve common questions of fact and, thus, centralization of the cases "will serve the convenience of the parties and witnesses and promote the just and efficient conduct of the litigation." *In re Long-Distance Tel. Serv. Fed. Excise Tax Refund Litig.*, 469 F. Supp. 2d 1348, 1350 (J.P.M.L. 2006). Plaintiff respectfully submits that the appropriate transferee forum is the Southern District of New York because (i) it is the site of the first-filed case; (ii) a plurality of the cases are there; (iii) it has the resources and expertise to manage this matter expeditiously; and (iv) it is the most convenient and easily accessible jurisdiction for the attorneys and witnesses in this action.

II. LEGAL STANDARD

Actions containing allegations with common questions of fact may be transferred and consolidated under § 1407 if transfer will be for the convenience of the parties and witnesses, and will promote the just and efficient conduct of the transferred cases. 28 U.S.C. § 1407. The Panel typically considers the following four factors in deciding whether to transfer a case under § 1407:

a. the elimination of duplication in discovery;

b. the avoidance of conflicting rules and schedules;

c. the reduction of litigation cost; and

d. the conservation of the time and effort of the parties, attorneys, witnesses and courts.

See Manual for Complex Litigation (Third) § 31.131 (1995) (citing *In re Plumbing Fixture Cases,* 298 F. Supp. 484 (J.P.M.L. 1968)). Each of these factors favors transfer and consolidation of the cases filed against Fifth Generation.

III. ARGUMENT

A. The Litigation Satisfies the Requirements for Consolidation and Transfer Under 28 U.S.C. § 1407

Pretrial transfer and consolidation under § 1407 is appropriate and necessary. These cases involve the same allegations and legal standards and they will likely be numerous. Unless these cases are consolidated, the parties will incur excessive costs due to duplicative discovery, and will face the risk of inconsistent rulings on a variety of matters.

1. The Litigation Involves Common Questions of Fact

In assessing the appropriateness of consolidation under section 1407, the Panel looks to the pleadings to determine the extent to which common questions of fact are present. The Complaints in these cases clearly present common questions of fact. Each Complaint is based on

allegations that Defendants engaged in deceptive business practices by misrepresenting that their fantasy sports contests were fair games of skills and omitting that their employees were permitted to participate in competitors' fantasy sports contests using non-public information that gave them a competitive advantage.

The cases also present other common questions of fact. As plaintiffs in these cases have pleaded, the actions will require adjudication of fact questions, such as whether Defendants engaged in unlawful, unfair, or deceptive business practices and whether Defendants negligently allowed employees with access to non-public information to participate in their daily fantasy sports contests. In addition, the Complaints generally seek certification of similar classes.

2. The Parties Face Duplicative Discovery Absent Transfer and Consolidation

Because the allegations of all the cases are essentially the same, the parties face duplicative discovery if the cases are not consolidated and transferred. This is an important consideration for the Panel in that transfer and consolidation "ensure[s] that the actions are supervised by a single judge who, from day-to-day contact with all aspects of the litigation, will be in the best position to design a pretrial program that will prevent duplicative discovery . . . and substantially conserve the time and efforts of the parties, the witnesses and the federal judiciary." *Resource Exploration Inc. Sec. Litig.*, 483 F. Supp. 817, 821 (J.P.M.L. 1980).

The parties in these actions will necessarily engage in duplicative discovery. All plaintiffs will be seeking the same documentation from Defendants and will likely request to depose the same parties. In response, Defendants will raise the same class certification objections and discovery objections, seek the same protective orders, and assert the same privileges in each case. However, if the Panel consolidates and transfers the cases, the parties will coordinate their efforts and thus save all parties time and money.

3. Transfer and Consolidation Will Prevent Inconsistent Rulings

The Panel considers the possibility of inconsistent rulings on pretrial issues because of the possible res judicata or collateral estoppel effects on other cases. *See In re Enron Securities Derivative & ERISA Litig.*, 196 F. Supp. 2d 1375, 76 (J.P.M.L. 2002) (granting a transfer in part to prevent inconsistent pretrial rulings, particularly with respect to questions of class certification). Because of the similarity of the allegations in the Complaints, and the likelihood that future filed actions will contain the same, the possibility of inconsistent rulings on pretrial motions is substantially increased.

4. There is Sufficient Numerosity to Support Transfer and Consolidation

The Panel has routinely ordered transfer and consolidation of five or fewer cases. *See In re Wireless Tel. Replacement Protection Programs Litig.*, 180 F.Supp.2d 1381, 1382 (J.P.M.L. 2002) (granting transfer and centralization of three consumer protection cases and determining that pending motions can be presented to and decided by the transferee judge); *In re Phila. Life Ins. Co. Sales Practices Litig.*, 149 F.Supp.2d 937, 938 (J.P.M.L. 2001) (granting transfer of two deceptive insurance sales cases and finding that such transfer would promote the just and efficient conduct of the litigation); *In re Amoxicillin Patent & Antitrust Litig.*, 449 F. Supp. 601, 603 (J.P.M.L. 1978) (granting transfer of three cases involving patent and antitrust issues); *In re Alodex Corp.*, 380 F. Supp. 790, 791 (J.P.M.L. 1974) (granting transfer of three securities actions). There have already been five cases filed regarding this matter. Moreover, it is likely that additional cases will be filed in a multitude of districts, making transfer and consolidation essential. As a result, there is sufficient authority for the transfer and consolidation of these actions against Defendants.

B. The Southern District of New York Is the Appropriate Transferee Forum.

Based on the Panel's jurisprudence, a number of potential transferee forums can be appropriate venues for nearly any multidistrict litigation. However, careful analysis of the key factors make the United States District Court for the Southern District of New York the most appropriate district for transfer of the current and future Related Actions for pretrial proceedings.

1. The Southern District of New York Is the Site of the First-Filed Action

The Panel tends to favor consolidation at the site of the first-filed and most advanced action. *See, e.g.*, *In re Land Rover LR3 Tire Wear Products Liab. Litig.*, 598 F. Supp. 2d 1384, 1386 (J.M.P.L. 2009) ("The Central District of California is an appropriate transferee forum because the first-filed and most procedurally advanced actions are pending there."); *In re Wireless Tel. Fed. Cost Recovery Fees Litig.*, 293 F. Supp. 2d 1378, 1380 (J.P.M.L. 2003) (transferring cases to a district which, among other things, presides over "the first-filed and furthest advanced actions"). Here, the first-filed action – *Johnson, et al. v. FanDuel, Inc., et al.*, No. 1:15-cv-07963 – was filed on October 8, 2015 in the Southern District of New York.

2. A Plurality of the Actions Are in the Southern District of New York

There are two cases pending in the Southern District of New York, while all other districts have only one case. This, too, militates towards consolidation in the Southern District of New York. *In re Conseco Life Ins. Cost of Ins. Lit.*, 323 F. Supp. 2d 1381, 1383 (J.P.M.L. 2004) (centralizing where a "plurality of cases" were pending).

3. The Southern District of New York Has Relevant Expertise

The Southern District of New York is well equipped to manage this type of multi-district litigation, given the District and its judges' vast experience handling complex litigation. It currently hosts 33 MDLs, and given the complexity of class action litigation, the Southern

District of New York's expertise will be advantageous to the organization and management of the claims and discovery.

4. Convenience and Accessibility Favor Transfer to the Southern District of New York

A proposed transferee forum's accessibility to parties and witnesses is a factor that the Panel has given significant weight in choosing transferee forums. *See, e.g., In re Hypodermic Prods. Antitrust Litig.,* 408 F. Supp. 2d 1356, 1357 (J.P.M.L 2007) (choosing transferee forum, in part, because it was "easily accessible"). Defendant FanDuel, Inc. is headquartered in the Southern District of New York. Additionally, the Southern District of New York is an easily accessible transferee forum, a consideration that is particularly important here, because the plaintiffs are geographically dispersed across the United States. *See In re Mirena IUD Products Liab. Litig.,* 938 F. Supp. 2d 1355, 1358 (J.P.M.L. 2013) (consolidating actions in the Southern District of New York in part because the district would "be easily accessible for this nationwide litigation").

IV. CONCLUSION

For the reasons set forth herein, the Southern District of New York is the most appropriate district for transfer and pretrial coordination of the Related Actions. Plaintiff David White respectfully requests that the Panel transfer the Related Actions, and any future Related Actions, to the United States District Court for the Southern District of New York.

Dated: October 15, 2015

Respectfully submitted,

/s/ Charles J. LaDuca

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SCHEDULE OF ACTIONS

DATE FILED	CAPTION	COURT	CASE NO.	JUDGE
10/8/2015	*Adam Johnson, Kelly Griffin, Keith Wesolowski, Brackie Bryant, and Peter Johnson* *v.* *Fanduel, Inc. and DraftKings, Inc.*	Southern District of New York	1:15-cv-07963	Gregory H. Woods
10/9/2015	*Thomas Guarino* *v.* *DraftKings, Inc and Fanduel, Inc.*	Southern District of Illinois	3:15-cv-01123-NJR-PMF	Nancy J. Rosenstengel
10/13/2015	*Artem Genchanok* *v.* *Fanduel, Inc. and DraftKings, Inc.*	Eastern District of Louisiana	2:15-cv-05127-MVL-KWR	Mary Ann Vial Lemmon
10/13/2015	*Nathan Wicksman* *v.* *Draftkings, Inc.*	District of Massachusetts	1:15-cv-13559-LTS	Leo T. Sorokin
10/15/2015	*David White* *v.* *DraftKings, Inc. and FanDuel, Inc.*	Southern District of New York	1:15-cv-08123	Not Yet Assigned

902 F.Supp. 1394
United States District Court,
D. Kansas.

Norman LAW, Andrew Greer, Peter Herrmann, Michael Jarvis, Jr., and Charles M. Rieb, Individually and on Behalf of All Other Similarly Situated, Plaintiffs,

v.

NATIONAL COLLEGIATE ATHLETIC ASSOCIATION, Defendant.

No. 94–2053–KHV.
|
Aug. 2, 1995.

Basketball coaches and particular division institutions which were members of national college athletic association challenged rule imposed by association setting salary cap for entry level coaches. The District Court, **Vratil**, J., held that: (1) although not subject to application of "per se illegal" rule, restriction on salaries for coaches would be subject to rule of reason analysis; (2) restricted earnings coach rule was restraint of trade, and (3) association failed to meet its burden of showing that restraint enhanced competition or promoted legitimate, procompetitive goal.

Motion for summary judgment sustained.

West Headnotes (30)

[1] Antitrust and Trade Regulation
⇦ Rule of Reason

Under Sherman Anti-Trust Act, which provides that every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among several states, or with foreign nations, is illegal, only "unreasonable" restraints are unlawful. Sherman Act, § 1, as amended, 15 U.S.C.A. § 1.

Cases that cite this headnote

[2] Antitrust and Trade Regulation
⇦ Per Se

Under Sherman Anti-Trust Act, some activities are condemned as matter of law, without inquiry into their reasonableness, under "illegal per se" approach because probability that such activities are anticompetitive is so high. Sherman Act, § 1, as amended, 15 U.S.C.A. § 1.

Cases that cite this headnote

[3] Antitrust and Trade Regulation
⇦ Per Se

Activities are considered "illegal per se" under Sherman Anti-Trust Act if practice facially appears to be one that would always or almost always tend to restrict competition and decrease output. Sherman Act, § 1, as amended, 15 U.S.C.A. § 1.

Cases that cite this headnote

[4] Antitrust and Trade Regulation
⇦ Horizontal Arrangements

Illegal per se rule, under which activity is considered in violation of Sherman Anti-Trust Act without inquiry into reasonableness, is generally applied to price fixing among competitors because that is an activity which almost always restricts competition. Sherman Act, § 1, as amended, 15 U.S.C.A. § 1.

Cases that cite this headnote

[5] Antitrust and Trade Regulation
⇦ Horizontal Arrangements

Horizontal price fixing arrangements are unreasonable on their face and are thus per se in violation of restraint of trade provision of Sherman Act, regardless of reasonableness of arrangements or possible justifications for existence. Sherman Act, § 1, as amended, 15 U.S.C.A. § 1.

Cases that cite this headnote

[6] Antitrust and Trade Regulation

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⇦ Price Fixing in General

Sherman Act's protection against price fixing extends to sellers of goods as well as buyers and to providers of labor or services as well as providers of goods. Sherman Act, § 1, as amended, 15 U.S.C.A. § 1.

Cases that cite this headnote

[7] **Antitrust and Trade Regulation**

⇦ Price Fixing in General

Schemes to fix maximum prices are subject to same antitrust scrutiny as are schemes to fix minimum or other uniform prices. Sherman Act, § 1, as amended, 15 U.S.C.A. § 1.

Cases that cite this headnote

[8] **Antitrust and Trade Regulation**

⇦ Employers and Employer Associations

Attempt of intercollegiate athletic competition association to fix maximum compensation which members would pay to one class of employees for coaching services is appropriate subject for examination under Sherman Act. Sherman Act, § 1, as amended, 15 U.S.C.A. § 1.

Cases that cite this headnote

[9] **Antitrust and Trade Regulation**

⇦ Employers and Employer Associations

Although national collegiate sports association's "vital role" in making college sports available to public entitled it to rule of reason review of legislation attempting to fix maximum compensation which association members would pay to one class of employees for coaching services, association was not entitled to carte blanche in imposing restraints of trades on its member institutions or other parties because of its role in the marketplace. Sherman Act, § 1, as amended, 15 U.S.C.A. § 1.

1 Cases that cite this headnote

[10] **Antitrust and Trade Regulation**

⇦ Employers and Employer Associations

National association of college athletics is subject to antitrust laws, so that, even though it escapes having attempt to fix maximum compensation which association members would pay to one class of employees for coaching services struck down as per se violation of Sherman Act, association would still be required to justify restraint under rubric of rule of reason. Sherman Act, § 1, as amended, 15 U.S.C.A. § 1.

Cases that cite this headnote

[11] **Antitrust and Trade Regulation**

⇦ Rule of Reason

Under "rule of reason" as applied to Sherman Act, true test of legality is whether restraint imposed is such as merely regulates and perhaps thereby promotes competition or whether it is such as may suppress or even destroy competition, which is determined by considering facts peculiar to business to which restraint is applied. Sherman Act, § 1, as amended, 15 U.S.C.A. § 1.

Cases that cite this headnote

[12] **Antitrust and Trade Regulation**

⇦ Presumptions and Burden of Proof

Under rule of reason, plaintiff in antitrust action has initial burden of showing that alleged anticompetitive agreement causes adverse, anticompetitive effects in relevant marketplace, which plaintiff may satisfy either by showing actual anticompetitive effects or by offering proof of defendant's market power.

Cases that cite this headnote

[13] **Antitrust and Trade Regulation**

⇦ Presumptions and Burden of Proof

Once plaintiff in antitrust action has adduced sufficient evidence of actual anticompetitive effects on market power, burden shifts under rule of reason to defendant to show

that challenged conduct promotes sufficient procompetitive objective.

Cases that cite this headnote

[14] **Antitrust and Trade Regulation**
⇦ Presumptions and Burden of Proof

If defendant shows that challenged conduct under Sherman Act promotes sufficiently procompetitive objective, burden shifts back to plaintiff to show that restraint is not reasonably necessary to accomplish stated objective. Sherman Act, § 1, as amended, 15 U.S.C.A. § 1.

Cases that cite this headnote

[15] **Antitrust and Trade Regulation**
⇦ Restraints and Misconduct in General

If defendant in antitrust action does not offer any legitimate justifications for alleged agreements which plaintiff has shown have actual anticompetitive effects or if plaintiff has shown sufficient proof of defendant's market power, finding of adverse competitive impact or market power prevails and court will condemn practice without further ado. Sherman Act, § 1, as amended, 15 U.S.C.A. § 1.

Cases that cite this headnote

[16] **Antitrust and Trade Regulation**
⇦ "Quick Look" and Other Tests

If per se condemnation of practice is inappropriate, but no elaborate industry analysis is necessary to reveal anticompetitive character of inherently suspect restraint, courts consider alleged agreement under "quick look" rule of reason standard which allows court to move directly to analysis of proffered competitive justifications for restraint. Sherman Act, § 1, as amended, 15 U.S.C.A. § 1.

Cases that cite this headnote

[17] **Antitrust and Trade Regulation**
⇦ Sports

Antitrust and Trade Regulation
⇦ Sports

Antitrust and Trade Regulation
⇦ Employers and Employer Associations

Fact that coaches affected by National Collegiate Athletic Association's restricted earnings rule could avoid restraining effect of rule by obtaining coaching positions outside of particular association divisions amounted to assertion that restricted earnings positions represented such a small portion of market that association had no market power so that restraint would have no adverse competitive impact, which would not foreclose finding of anticompetitive behavior under Sherman Act. Sherman Act, § 1, as amended, 15 U.S.C.A. § 1.

Cases that cite this headnote

[18] **Antitrust and Trade Regulation**
⇦ Market Power;Market Share

Absence of proof of market power does not foreclose finding of anticompetitive behavior under Sherman Act. Sherman Act, § 1, as amended, 15 U.S.C.A. § 1.

Cases that cite this headnote

[19] **Antitrust and Trade Regulation**
⇦ Price Fixing in General

If there is agreement not to compete in terms of price, no elaborate industry analysis is required to show anticompetitive character of agreement. Sherman Act, § 1, as amended, 15 U.S.C.A. § 1.

Cases that cite this headnote

[20] **Antitrust and Trade Regulation**
⇦ Market Power;Market Share

If restraint runs counter to Sherman Act's requirement that price be responsive to consumer preference, proof of market power is unnecessary because agreement's

anticompetitive character is evident. Sherman Act, § 1, as amended, 15 U.S.C.A. § 1.

Cases that cite this headnote

[21] **Antitrust and Trade Regulation**
⇦ Sports
Antitrust and Trade Regulation
⇦ Employers and Employer Associations

Restricted earnings coach rule proposed by national association for collegiate athletics which specifically prohibited free operation of market responsive to demand was inconsistent with Sherman Act's mandates and it was thus not necessary for court to undertake extensive market analysis to determine that restricted earnings coach rule had anticompetitive effect on market for coaching services. Sherman Act, § 1, as amended, 15 U.S.C.A. § 1.

Cases that cite this headnote

[22] **Antitrust and Trade Regulation**
⇦ Sports
Antitrust and Trade Regulation
⇦ Employers and Employer Associations

Absent any showing that collegiate institutions were on brink of financial disaster or that de minimis effect of reducing salaries of lowest paid member of each school's coaching staff by a few thousand dollars would pull them back from abyss, placing maximum salary cap on coaches in particular divisions would not have procompetitive effects for purposes of showing violation of Sherman Anti-Trust Act. Sherman Act, § 1, as amended, 15 U.S.C.A. § 1.

Cases that cite this headnote

[23] **Antitrust and Trade Regulation**
⇦ Price Fixing in General

Procompetitive justifications for price fixing must apply to same market in which restraint is found, and not to some other market. Sherman Act, § 1, as amended, 15 U.S.C.A. § 1.

Cases that cite this headnote

[24] **Antitrust and Trade Regulation**
⇦ Employers and Employer Associations

Because restricted earnings coach rule which constituted restraint on operation of free market for employees of colleges providing coaching services had effect of stabilizing and in some cases depressing prices in market for coaching services, association of national college athletics had burden of establishing affirmative defense which competitively justified infringement on Sherman Act's protected domain. Sherman Act, § 1, as amended, 15 U.S.C.A. § 1.

Cases that cite this headnote

[25] **Antitrust and Trade Regulation**
⇦ Sports
Antitrust and Trade Regulation
⇦ Employers and Employer Associations

National association of college athletics failed to show competitive justification for infringement on Sherman Act caused by restricted earnings coach rule which set maximum salary for coaching services in particular sports divisions, particularly where explicit intent of restricted earnings coach rule was both to stabilize and to depress compensation of particular coaches. Sherman Act, § 1, as amended, 15 U.S.C.A. § 1.

Cases that cite this headnote

[26] **Antitrust and Trade Regulation**
⇦ Presumptions and Burden of Proof

Under rule of reason, proponent and not challenger of facially anticompetitive measure has heavy burden of establishing affirmative defense which competitively justifies apparent deviation from operations of free market. Sherman Act, § 1, as amended, 15 U.S.C.A. § 1.

Cases that cite this headnote

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[27] **Antitrust and Trade Regulation**
⇦ Sports
Antitrust and Trade Regulation
⇦ Employers and Employer Associations

Relationship between restricted earnings coach rule's salary cap imposed by national college athletic association and prices in market for coaching services was direct, substantial, and demonstrable, so that, absent any plausible evidence that restraint imposed by rule related directly and effectively to preservation of competitive balance, rule violated Sherman Anti-Trust Act. Sherman Act, § 1, as amended, 15 U.S.C.A. § 1.

Cases that cite this headnote

[28] **Antitrust and Trade Regulation**
⇦ Sports
Antitrust and Trade Regulation
⇦ Employers and Employer Associations

Even though cost cutting measures were needed and amateurism and competitive equity had to be maintained with regard to coaching salaries at entry level of institutions which were members of national college athletic association, association failed to demonstrate necessary link between stated objectives and a restricted earning coach rule which placed salary cap, and, thus, rule violated Sherman Anti-Trust Act. Sherman Act, § 1, as amended, 15 U.S.C.A. § 1.

1 Cases that cite this headnote

[29] **Antitrust and Trade Regulation**
⇦ Rule of Reason

Even if anticompetitive restraint is intended to achieve legitimate objective, restraint only survives rule of reason analysis if it is reasonably necessary to achieve legitimate objectives proffered by defendant. Sherman Act, § 1, as amended, 15 U.S.C.A. § 1.

Cases that cite this headnote

[30] **Antitrust and Trade Regulation**
⇦ Rule of Reason

To determine if restraint is reasonably necessary, court examines whether restraint furthers legitimate objectives proffered by defendant and then whether comparable benefits could be achieved through substantially less restrictive means. Sherman Act, § 1, as amended, 15 U.S.C.A. § 1.

Cases that cite this headnote

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Memorandum and Order [1]

VRATIL, District Judge.

This matter comes before the Court on *Plaintiffs' Motion for Summary Judgment on the Issue of Liability* (Doc. # 73). Plaintiffs ***1398** in this suit allege that the Division I members of the National Collegiate Athletic Association ("**NCAA**"), in violation of the Sherman Antitrust Act, 15 U.S.C. § 1 (the "Sherman Act"), have conspired to limit the maximum compensation they will pay to one category of basketball coaches, the "restricted earnings coaches." Defendant argues that the agreement at issue here—**NCAA** Bylaw 11.02.3, adopted in January 1991—does not restrict plaintiffs' potential compensation; defendant further argues that in any case, Bylaw 11.02.3 does not violate the Sherman Act because the restriction is justified under the circumstances presented. Therefore, defendant maintains that the agreement embodied in

Bylaw 11.02.3 is not an unreasonable restraint of trade. Plaintiffs move for summary judgment, asserting that there is no dispute about the existence or the terms of the restriction, that the restriction on its face is an impermissible restraint of trade, and that the **NCAA** can thus demonstrate no set of facts that would allow the restriction to pass muster under the Sherman Act. [2]

Summary judgment is appropriate where "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed.R.Civ.P. 56(c). The Court considers all evidence and reasonable inferences therefrom in the light most favorable to the nonmoving party. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587–88, 106 S.Ct. 1348, 1356, 89 L.Ed.2d 538 (1986). The nonmoving party, however, "may not rest on its pleadings but must set forth specific facts showing that there is a genuine issue for trial as to those dispositive matters for which it carries the burden of proof." *Applied Genetics Int'l, Inc. v. First Affiliated Sec., Inc.*, 912 F.2d 1238, 1241 (10th Cir.1990). Thus, summary judgment may be entered "against a party who fails to make a sufficient showing to establish the existence of an element essential to that party's case." *Celotex Corp. v. Catrett*, 477 U.S. 317, 322, 106 S.Ct. 2548, 2552, 91 L.Ed.2d 265 (1986).

Factual disputes about immaterial matters are irrelevant to a summary judgment determination. *Frank v. U.S. West, Inc.*, 3 F.3d 1357, 1361 (10th Cir.1993) (citing *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248, 106 S.Ct. 2505, 2510, 91 L.Ed.2d 202 (1986)). If, given the operative facts of the case, the nonmoving party fails to set forth specific facts showing that there is a genuine issue for trial and the moving party is entitled to judgment as a matter of law, then summary judgment is appropriate. *Devery Implement Co. v. J.I. Case Co.*, 944 F.2d 724, 726–27 (10th Cir.1991) (citing *Anderson*, 477 U.S. at 256–57, 106 S.Ct. at 2514). While it is not the trial judge's function to weigh the evidence and determine the truth of the matter at the summary judgment stage, summary judgment in favor of the moving party is nonetheless proper if the record taken as a whole could not lead a rational trier of fact to find for the nonmoving party. *Concrete Works of Colorado, Inc. v. City and County of Denver*, 36 F.3d 1513, 1518 (10th Cir.1994), *cert. denied*, 514 U.S. 1004, 115 S.Ct. 1315, 131 L.Ed.2d 196 (1995).

Having examined the record in light of the relevant law, the Court finds that plaintiffs' motion should be sustained for the reasons stated below.

I. *Background* [3]

The **NCAA** is an association of over 800 colleges and universities engaged in intercollegiate athletic competition. Its members are divided into Division I, Division II and Division III schools, depending on the number ***1399** of sports offered at the school, its philosophy towards athletics and athletic scholarships, the number of participants in its athletic programs, the level of attendance at athletic events, the size of the school's facilities and a number of other factors. **NCAA** Division I basketball programs are generally of a higher stature and have more visibility than Division II and III basketball programs. The **NCAA** has approximately 300 Division I schools. Each Division I member of the **NCAA** hires and employs its own basketball coaches.

In 1989, the **NCAA** established a Cost Reduction Committee, charged with the task of formulating recommendations to **NCAA** members for reducing costs in intercollegiate athletics without compromising access of student-athletes to higher education or disturbing the competitive balance of the **NCAA**. At that time, many **NCAA** member institutions perceived difficulties in meeting costs associated with the maintenance of intercollegiate athletic programs. For example, many **NCAA** institutions were reducing the number of sports they offered as a means of controlling the overall cost of their athletic programs. In addition, because of troubles in managing their overall athletic budgets, some **NCAA** schools found themselves in noncompliance with Title IX requirements regarding women's athletics. Financial problems notwithstanding, many **NCAA** institutions meanwhile felt pressure to maintain, or even increase, spending on recruiting talented players and coaches and on other aspects of their sports programs in order to stay athletically competitive with rival schools. In defendant's words, they experienced pressure to "keep up with the Joneses." The **NCAA** formed the Cost Reduction Committee in response to what some viewed as a catastrophic cost spiral which, if not controlled, would eventually cause the complete demise of intercollegiate athletics.

The Committee included financial aid personnel and intercollegiate athletic administrators, college presidents, a university chancellor and university faculty members. Eugene Corrigan, Commissioner of the Atlantic Coast Conference, chaired the Cost Reduction Committee. In his initial letter to committee members, Corrigan thanked them for joining "this gigantic attempt to save intercollegiate athletics from itself." Corrigan later explained the phrase "to save intercollegiate athletics from itself" to mean that a collaborative effort among **NCAA** members was required to maintain a level playing field because unilateral cost reduction efforts by individual members were ineffectual. [4]

Every four years, the **NCAA** commissions the "Raiborn Report," an analysis of financial trends and relationships in intercollegiate athletics prepared by Mitchell H. Raiborn, a professor of accounting at Bradley University. The Cost Reduction Committee used the 1986 Raiborn Report (covering the period 1981–85) to map out its task of reducing costs in intercollegiate athletics. According to the 1986 Raiborn Report, personnel, scholarships and travel comprised the largest items in the athletic budgets of member institutions, and ***1400** the majority of institutions across the country were running deficit football and basketball programs. The 1986 Raiborn Report found that in 1985, forty-two percent of **NCAA** Division I schools reported deficits averaging $824,000 in their overall athletic program budgets. Regarding overall athletic department expenses, the report noted:

> The percentage increase in average expenses between 1978 and 1985 exceeds 100 percent for all institutions except [member institutions in Division III that do not have football programs].... Average 1985 [Division I] expenses of $4,609,000 are 286 percent of the 1973 average, which indicates a 186 percent increase since 1973. The long-run trend analysis ... indicates a significant percentage increase in the average expenses of each responding group.

According to the 1986 Raiborn Report, fifty-one percent of the responding Division I institutions incurred expenses exceeding revenues in their basketball programs in 1985, sustaining an average deficit of $145,000.

Early in its discussions, the Cost Reduction Committee identified five areas in which cost reduction could be achieved: financial aid, recruiting, staffing policies, competitive policies and ancillary support services. The Committee identified personnel as the largest expense in intercollegiate athletic programs and determined that costs could be reduced by curtailing football and basketball staffs and by limiting personnel in other sports as well. The Cost Reduction Committee directed its subcommittee on personnel limitations to consider, in particular, the coaching categories in football and basketball for graduate assistants, volunteers and part-time coaches.

As a result of its deliberations, the Cost Reduction Committee proposed legislation (collectively, the "Restricted Earnings Coach Rule"), which limited the number of coaches in all Division I sports and required institutions to designate one of their coaches in every sport other than football a "restricted earnings coach." [5] In Division I men's basketball, the limit set for coaching staffs was three head or assistant coaches and one restricted earnings coach. The Restricted Earnings Coach Rule also required that restricted earnings coaches' compensation be limited to $12,000 during the academic year and $4,000 during the summer months. The Cost Reduction Committee determined that these figures approximated the cost of out-of-state tuition at public institutions and average tuition at private institutions, and was thus roughly equivalent to the salaries previously paid to graduate assistant coaches. [6] Under the rule, restricted earnings coaches may receive additional compensation for performing duties for another department of the institution during either the summer or the academic year, provided that (1) such compensation is commensurate with that received by others performing the same or similar assignments, (2) the ratio of compensation received for coaching duties and any other duties is directly proportionate to the amount of time devoted to the two areas of assignment, and (3) the individual is qualified for and performing the duties outside the athletic department for which the individual is compensated. The Division I members of the **NCAA** voted in January 1991 to adopt the Restricted Earnings Coach Rule effective ***1401** August 1, 1992. [7]

The limitations set forth in the Restricted Earnings Coach Rule reflect an effort by the Cost Reduction Committee, in its own words, to "establish a 'restricted earnings' category that will encourage the development of new coaches while more effectively limiting compensation to such coaches."[8] In addition, the chairman of the Committee told **NCAA** members in January 1990 that the goal of the Cost Reduction Committee was to "cut costs and save money" and that "the basic premise that we need to create legislation to save us from ourselves has overwhelming support."

The Restricted Earnings Coach Rule does not attempt to limit what member institutions spend on their basketball programs, except as to salaries of restricted earnings coaches. It does not prevent member institutions from increasing expenditures on other aspects of their athletic programs as they implement the cost reduction measures involving restricted earnings coaches. The Cost Reduction Committee did not recommend and the **NCAA** did not adopt any measure limiting salaries or compensation paid to other employees in athletic departments, such as head or assistant coaches.

The Restricted Earnings Coach Rule is binding on all Division I members and all restricted earnings coaches. All plaintiffs are or were employed as restricted earnings basketball coaches at **NCAA** Division I institutions, and their compensation as restricted earnings coaches thus is subject to and governed by the Restricted Earnings Coach Rule.

II. *Discussion*

A. Material Facts Undisputed

Although in resisting this motion for summary judgment the **NCAA** purports to controvert several of the facts set forth by plaintiffs, most of the **NCAA's** disputes are either about immaterial facts or merely about the implications of certain facts and their legal significance. A close review of the parties' contentions reveals that the material facts are undisputed, and the real dispute lies not in what the facts are but in how the law should be applied to those facts.

The Restricted Earnings Coach Rule speaks for itself. The parties do not dispute what it says on its face or what it requires of member institutions and restricted earnings coaches in practice. The parties do not genuinely dispute that plaintiffs fall within the category of those whom the rule was intended to affect. Likewise, the parties do not dispute that the **NCAA's** stated objectives in enacting the Restricted Earnings Coach Rule were to reduce costs, maintain competitive equity among member institutions and retain an entry-level position for coaches wishing to gain experience at the Division I level. Finally, the record reveals no real dispute (despite the **NCAA's** halfhearted attempt to create one) that Division I members of the **NCAA**, in the absence of rules curtailing such competition, compete with each other for the services of basketball coaches—otherwise **NCAA** members would have perceived ***1402** no need for a rule such as the Restricted Earnings Coach Rule, and the **NCAA's** repeated assertion that the rule is necessary to maintain competitive equity and to prevent schools from escalating personnel expenditures in order to "keep up with the Joneses" would be senseless. Finding no material factual dispute on this record, the Court moves directly to its analysis of the parties' legal arguments.

B. The *Per Se* Rule

[1] Section 1 of the Sherman Antitrust Act provides that "[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal...." 15 U.S.C. § 1. Recognizing that under this definition, almost any commercial contract could be held in violation of the law, the Supreme Court has held that only "unreasonable" restraints are unlawful. *See, e.g., Standard Oil Co. of New Jersey v. United States,* 221 U.S. 1, 60, 31 S.Ct. 502, 515–16, 55 L.Ed. 619 (1911).

[2] **[3]** **[4]** **[5]** Some activities, however, are condemned as a matter of law, without inquiry into their reasonableness, under an "illegal *per se* " approach because the probability that such activities are anticompetitive is so high. ***NCAA** v. Board of Regents of the University of Oklahoma,* 468 U.S. 85, 100, 104 S.Ct. 2948, 2959, 82 L.Ed.2d 70 (1984) ("*Board of Regents* "). This *per se* approach is used in situations where "the practice facially appears to be one that would always or almost always tend to restrict competition and decrease output." *Broadcast Music, Inc. v. Columbia Broadcasting Sys., Inc.,* 441 U.S. 1, 19–20, 99 S.Ct. 1551, 1562, 60 L.Ed.2d 1 (1979). The *per se* rule is ordinarily applied to price-fixing among competitors because that is an activity which almost always tends to restrict competition.

See Board of Regents, 468 U.S. at 100, 104 S.Ct. at 2959; *see also, United States v. Socony–Vacuum Oil Co.,* 310 U.S. 150, 223, 60 S.Ct. 811, 844, 84 L.Ed. 1129 (1940). In *Socony–Vacuum,* the Supreme Court explained that because of "their actual or potential threat to the central nervous system of the economy," all price-fixing agreements are banned without inquiry into their reasonableness. *Id.* at 224 n. 59, 60 S.Ct. at 845 n. 59. As plaintiffs correctly point out, a strong line of cases since *Socony–Vacuum* has firmly established that horizontal price-fixing arrangements are unreasonable on their face and are therefore *per se* violative of Section 1 of the Sherman Act, regardless of their reasonableness or possible justifications for their existence. *See, e.g., FTC v. Superior Court Trial Lawyers Ass'n,* 493 U.S. 411, 432–35, 110 S.Ct. 768, 780–81, 107 L.Ed.2d 851 (1990); *Arizona v. Maricopa County Medical Soc'y,* 457 U.S. 332, 348–51, 102 S.Ct. 2466, 2475–76, 73 L.Ed.2d 48 (1982); *Catalano, Inc. v. Target Sales, Inc.,* 446 U.S. 643, 646–47, 100 S.Ct. 1925, 1927, 64 L.Ed.2d 580 (1980).

[6] **[7]** **[8]** The Sherman Act's protection against price-fixing extends to sellers of goods as well as buyers, *Mandeville Island Farms v. American Crystal Sugar Co.,* 334 U.S. 219, 235–36, 68 S.Ct. 996, 1005–06, 92 L.Ed. 1328 (1948), and to providers of labor or services as well as providers of goods, *see, e.g., Roman v. Cessna Aircraft Co.,* 55 F.3d 542, 544–45 (10th Cir.1995).[9] Schemes to fix maximum prices are subject to the same antitrust scrutiny as are schemes to fix minimum or other uniform prices. *See, e.g., Arizona v. Maricopa County Medical Soc'y,* 457 U.S. 332, 347–48, 102 S.Ct. 2466, 2474–75, 73 L.Ed.2d 48 (1982). Therefore, the **NCAA's** attempt to fix the maximum compensation its members will pay to one class of employees for their coaching services is clearly an appropriate subject of examination under the Sherman Act.

On the authority of *Socony–Vacuum* and its progeny, plaintiffs in this case urge the Court to adopt the *per se* analysis and strike down the Restricted Earnings Coach Rule as an illegal price-fixing scheme without further inquiry into its reasonableness. Defendant argues persuasively, however, that although a *per se* analysis would normally apply in a ***1403** case of horizontal price-fixing such as this, Supreme Court precedent forecloses application of the *per se* rule in this context.

In *Broadcast Music, Inc. v. Columbia Broadcasting Sys., Inc.,* 441 U.S. 1, 99 S.Ct. 1551, 60 L.Ed.2d 1 (1979), the Supreme Court reviewed a music company practice of issuing "blanket licenses," which authorized licensees to use a number of copyrighted musical compositions for a set fee, and found that the practice did not constitute illegal price-fixing. The blanket license was a different product, in the Court's view, than the individual compositions: it included efficiencies in integrating sales, monitoring and enforcement that the individual composers could not achieve alone. *Id.* at 20–23, 99 S.Ct. at 1562–64. Thus the Court found that the blanket license was a cooperative arrangement in which the "agreement on price [wa]s necessary to market the product at all." *Id.* at 23, 99 S.Ct. at 1564. Under these unique circumstances, the Court held that cursory application of the *per se* rule would be inappropriate and, instead, determined that the agreement should be subjected to the more discriminating examination required under the rule of reason. *Id.* at 24, 99 S.Ct. at 1564–65.

The Supreme Court declined again to apply the *per se* rule in a later case involving the **NCAA**. In ***NCAA** v. Board of Regents of the Univ. of Oklahoma,* 468 U.S. 85, 104 S.Ct. 2948, 82 L.Ed.2d 70 (1984), the Court evaluated an **NCAA** plan which limited the conditions and prices that member institutions could negotiate in television contracts for college football games. Noting that "[w]hat the **NCAA** and its member institutions market ... is competition itself —contests between competing institutions," the Court found that the **NCAA** was "an industry in which horizontal restraints on competition are essential if the product is to be available at all." *Id.* at 101, 104 S.Ct. at 2960; *see also Banks v. **NCAA**,* 977 F.2d 1081, 1088 (7th Cir.1992), *cert. denied,* 508 U.S. 908, 113 S.Ct. 2336, 124 L.Ed.2d 247 (1993); *Hennessey v. **NCAA**,* 564 F.2d 1136, 1152–53 (5th Cir.1977). Thus the Court decided again that it would be inappropriate to apply a *per se* rule, and it instead chose to undertake the wider-ranging rule of reason inquiry. *See Board of Regents,* 468 U.S. at 100, 104 S.Ct. at 2959.

The **NCAA's** argument in this case, both for the application of the rule of reason rather than the *per se* rule and for its ultimate conclusion that the Restricted Earnings Coach Rule is a justifiable and necessary restraint of trade, substantially tracks the Supreme Court's reasoning in *Board of Regents.* Therefore, it will be useful

to quote at length from that opinion. The Court there explained:

> A myriad of rules affecting such matters as the size of the field, the number of players on a team, and the extent to which physical violence is to be encouraged or proscribed, all must be agreed upon, and all restrain the manner in which institutions compete. Moreover, the **NCAA** seeks to market a particular brand of [sports] —college [sports]. The identification of this "product" with an academic tradition differentiates college [sports] from and makes [them] more popular than professional sports to which [they] might otherwise be comparable.... In order to preserve the character and quality of the "product," athletes must not be paid, must be required to attend class, and the like. And the integrity of the "product" cannot be preserved except by mutual agreement; if an institution adopted such restrictions unilaterally, its effectiveness as a competitor on the playing field might soon be destroyed. Thus, the **NCAA** plays a vital role in enabling college [sports] to preserve [their] character, and as a result enables a product to be marketed which might otherwise be unavailable.

Id. at 101–02, 104 S.Ct. at 2960. Thus, the Court concluded that although the *Board of Regents* case involved restraints on the ability of member institutions to compete in terms of price and output, because of the **NCAA's** unique position in the marketplace for college sports, a fair evaluation of the competitive or anticompetitive character of the restraints required consideration of the **NCAA's** justifications for adopting such restraints ***1404** —a rule of reason rather than a *per se* analysis. *Id.* at 103, 104 S.Ct. at 2961. [10]

[9] **[10]** Although this Court concludes from the Supreme Court's analysis in *Board of Regents* that the **NCAA's** "vital role" in making college sports available to the public entitles it to a rule of reason review of the **NCAA** legislation at issue here, the Court does not believe that the Supreme Court intended to give the **NCAA** carte blanche in imposing restraints of trade on its member institutions or other parties because of its role in the marketplace. There can be no doubt that the **NCAA** is subject to the antitrust laws, and even though it escapes having the bylaw struck down as a *per se* violation of the Sherman Act, the **NCAA** still must justify the restraint under the rubric of the rule of reason.

C. The Rule of Reason

[11] The Supreme Court first defined the rule of reason in *Board of Trade of City of Chicago v. United States,* 246 U.S. 231, 38 S.Ct. 242, 62 L.Ed. 683 (1918) ("*Chicago Board of Trade* "):

> The true test of legality is whether the restraint imposed is such as merely regulates and perhaps thereby promotes competition or whether it is such as may suppress or even destroy competition. To determine that question the court must ordinarily consider the facts peculiar to the business to which the restraint is applied; its condition before and after the restraint was imposed; the nature of the restraint and its effect, actual or probable. The history of the restraint, the evil believed to exist, the reason for adopting the particular remedy, the purpose or end sought to be attained, are all relevant facts.

Id. at 238, 38 S.Ct. at 244. The contours of the inquiry have remained largely unaltered since then. *See United States v. Brown University,* 5 F.3d 658, 668 n. 8 (3d Cir.1993). Basically, the test involves a balancing of all of the circumstances of the case to determine whether the challenged restraint unreasonably restricts competitive conditions. *See id.* at 668 (citing *Continental T.V. v. GTE Sylvania, Inc.,* 433 U.S. 36, 49, 97 S.Ct. 2549, 2557, 53 L.Ed.2d 568 (1977)). The fundamental inquiry under the rule of reason is the same as under the *per se* rule: what the competitive significance of the challenged restraint is and whether the restraint enhances competition. *Board of*

Regents, 468 U.S. at 103–04, 104 S.Ct. at 2961. There is often no bright line separating rule of reason from *per se* analysis. *Id.* at 104 n. 26, 104 S.Ct. at 2961 n. 26.

[12] [13] [14] [15] Under the rule of reason, the plaintiff bears an initial burden of showing that the alleged agreement causes adverse, anticompetitive effects in the relevant market. *See Brown University,* 5 F.3d at 668. The plaintiff may satisfy this burden either by demonstrating actual anticompetitive effects or by offering proof of the defendant's market power. *Id.* Once the plaintiff has adduced sufficient evidence of actual anticompetitive effects or market power, "the burden shifts to the defendant to show that the challenged conduct promotes a sufficiently pro-competitive objective." *Id.* at 669. If the defendant does so, the burden shifts back to the plaintiff to show that the restraint is not reasonably necessary to accomplish the stated objective. *Id.* If the defendant does not offer any legitimate justifications, the finding of adverse competitive impact or market power prevails, and " 'the court condemns the practice without ado.' " *Id.* (quoting *Chicago Professional Sports Ltd. Partnership* ***1405** *v. National Basketball Ass'n,* 961 F.2d 667, 674 (7th Cir.), *cert. denied,* 506 U.S. 954, 113 S.Ct. 409, 121 L.Ed.2d 334 (1992)).

[16] In *Board of Regents,* the Supreme Court adopted a "quick look" rule of reason standard. This abbreviated inquiry applies in cases where *per se* condemnation of a practice is inappropriate, but where no elaborate industry analysis is necessary to reveal the anticompetitive character of an inherently suspect restraint. *Id.* (citing *Board of Regents,* 468 U.S. at 109, 104 S.Ct. at 2964). Thus, under the quick look standard because adverse effects on competition are apparent, the court does not require proof of market power, and instead moves directly to an analysis of the defendant's proffered competitive justifications for the restraint.

D. Effects of the Restricted Earnings Coach Rule

[17] The **NCAA** first argues that the Restricted Earnings Coach Rule has no anticompetitive effect because restricted earnings coaches may avoid the restraining effect of the rule by obtaining coaching positions with high school teams, non-**NCAA** college teams, **NCAA** Division II or III teams, overseas teams or, in fact, by obtaining other employment not related to their coaching duties.[11] At best, this argument amounts to an assertion that because Division I restricted earnings coach positions represent such a small portion of the market, the **NCAA** has no market power in this arena and thus its restraint can have no adverse competitive impact.

[18] [19] [20] This argument by the **NCAA** is wholly unconvincing. The absence of proof of market power does not foreclose a finding of anticompetitive behavior under the Sherman Act. *See Board of Regents,* 468 U.S. at 109, 104 S.Ct. at 2964. In fact, where there is an agreement not to compete in terms of price, " 'no elaborate industry analysis is required to demonstrate the anticompetitive character of such an agreement.' " *Id.* (quoting *National Soc'y of Professional Engineers v. United States,* 435 U.S. 679, 692, 98 S.Ct. 1355, 1366, 55 L.Ed.2d 637 (1978)). Where a restraint runs counter to the Sherman Act's requirement that price be responsive to consumer preference, proof of market power is unnecessary because such an agreement's anticompetitive character is evident. *See Board of Regents,* 468 U.S. at 110, 104 S.Ct. at 2965.

[21] The **NCAA** acknowledges that before the rule was enacted, some restricted earnings coaches were paid $60,000 to $70,000—apparently because the schools that employed them believed their services were worth that amount. Controlling such responses to consumer preference was in fact the very objective which the **NCAA** sought to achieve in enacting the rule. Sometimes the rule of reason may be applied "in the twinkling of an eye," *Id.* at 109 n. 39, 104 S.Ct. at 2964 n. 39 (quoting P. Areeda, The "Rule of Reason" in Antitrust Analysis: General Issues 37–38 (Federal Judicial Center, June 1981)); and this is surely one such case. Because the Restricted Earnings Coach Rule specifically prohibits the free operation of a market responsive to demand and is thus inconsistent with the Sherman Act's mandates, it is not necessary for the Court to undertake an extensive market analysis to determine that the rule has had an anticompetitive effect on the market for coaching services.

[22] The **NCAA** next argues that its regulation may even be procompetitive because, if the **NCAA** does not collapse as a result of its skyrocketing costs, it will be able to continue providing the product of college basketball and there will thus continue to be jobs available in the market for basketball coaches. For all its alarming rhetoric, however, the **NCAA** has offered no compelling evidence that its member institutions are on the ***1406** brink of financial disaster or that the *de minimus* effect which

reducing the salaries of the lowest paid member of each school's coaching staff by a few thousand dollars would pull them back from the abyss. Moreover, even if the situation of intercollegiate athletics was every bit as dire as the **NCAA** makes it out to be in resisting the coaches' challenge to the Restricted Earnings Coach Rule, the **NCAA's** argument—that the regulation is procompetitive because it will help the **NCAA** schools stay in the black so that they can continue providing intercollegiate athletics at all—cannot succeed.

[23] The market for coaching services is different from the market for intercollegiate sports. In the market for coaching services, coaches are the producers and schools are the consumers, whereas in the market for intercollegiate sports, the schools become the producers and the public the consumers. Procompetitive justifications for price-fixing must apply to the same market in which the restraint is found, not to some other market. *See United States v. Topco Assoc., Inc.*, 405 U.S. 596, 610, 92 S.Ct. 1126, 1135, 31 L.Ed.2d 515 (1972) (competition "cannot be foreclosed with respect to one sector of the economy because certain private citizens or groups believe that such foreclosure might promote greater competition in a more important sector of the economy"); *United States v. Philadelphia Nat'l Bank*, 374 U.S. 321, 370, 83 S.Ct. 1715, 1745, 10 L.Ed.2d 915 (1963) (anticompetitive effects in one market cannot be justified by procompetitive consequences in another); *Sullivan v. National Football League*, 34 F.3d 1091, 1112 (1st Cir.1994) (it seems "improper to validate a practice that is decidedly in restraint of trade simply because the practice produces some unrelated benefits to competition in another market"), *cert. denied*, —— U.S. ——, 115 S.Ct. 1252, 131 L.Ed.2d 133 (1995). If price-fixing buyers were allowed to justify their actions by claiming procompetitive benefits in the product market, they would almost always be able to do so by arguing that the restraint was designed to reduce their costs and thereby make them collectively more competitive sellers. To permit such a justification would be to give businesses a blanket exemption from the antitrust laws and a practically limitless license to engage in horizontal price-fixing aimed at suppliers. This license the Court will not issue—even in the unique context of intercollegiate athletics.

E. **NCAA** Justifications for the Restricted Earnings Coach Rule

[24] Because the Restricted Earnings Coach Rule constitutes a restraint on the operation of a free market, and because the uncontroverted facts demonstrate that its effect has been to stabilize and, in some cases, depress prices in the market for coaching services, the rule of reason next places on the **NCAA** a "heavy burden of establishing an affirmative defense which competitively justifies" this infringement on the Sherman Act's protected domain. *See Board of Regents*, 468 U.S. at 113, 104 S.Ct. at 2966–67.

[25] The **NCAA** attempts to carry its burden by emphasizing the importance of maintaining a level playing field in the sports arena, retaining and fostering the spirit of amateurism which is one of college athletics' defining characteristics, and protecting **NCAA** member institutions from self-imposed, ruinous cost increases.[12] In doing so, the **NCAA** relies heavily on two earlier cases which held that **NCAA** coaching restrictions were not inconsistent with the antitrust laws and were, in fact, legitimate and necessary ***1407** means of maintaining competitive equity and the other values the **NCAA** seeks to protect. Those cases are: *Board of Regents of the Univ. of Oklahoma v. National Collegiate Athletic Ass'n*, 561 P.2d 499 (Okla.1977) ("*Oklahoma Board of Regents* "), and *Hennessey v. National Collegiate Athletic Ass'n*, 564 F.2d 1136 (5th Cir.1977).

The *Hennessey* case and the *Oklahoma Board of Regents* case, decided well before the Supreme Court issued its opinion in *Board of Regents*, were both challenges to an **NCAA** bylaw adopted in 1976 that limited the number of Division I football and basketball coaches member institutions could employ. In upholding the bylaw, the Fifth Circuit in *Hennessey* and the Oklahoma Supreme Court in *Oklahoma Board of Regents* both gave deference to the **NCAA's** motives in enacting the challenged restriction. In *Hennessey*, the court noted that plaintiffs had presented no evidence that the **NCAA** intended to *injure* the affected coaches by adopting the bylaw and that, to the contrary, "the fundamental objective in mind was to preserve and foster competition in intercollegiate athletics—by curtailing, as it were, potentially monopolistic practices by the more powerful —and to reorient the programs into their traditional role as amateur sports operating as part of the educational processes." *Hennessey*, 564 F.2d at 1153. The **NCAA**, of course, asserts the same motivating objective in this litigation.

Significantly, in attempting to balance the **NCAA's** professed good intentions with the anticompetitive nature of the coaching restriction, the *Hennessey* court noted that on the evidence presented, it was difficult to determine what the actual effects of the restriction would be, since the rule had only been in effect for one month. *See id.* The court recognized that one possible consequence of that bylaw would be to "stabilize, if not depress, the compensation which any assistant coach can obtain for his services." *Id.* However, the court concluded that if that should happen and actual experience under the bylaw run counter to the **NCAA's** expectations and good intentions, a court could certainly consider that evidence in reevaluating the restraint in a later case. *See id.* at 1154.

In contrast to the bylaw at issue in *Hennessey,* the explicit intent of the Restricted Earnings Coach Rule at issue here was both to stabilize *and* depress the compensation of restricted earnings coaches. This Court therefore does not need the experience of time which the *Hennessey* court felt it was lacking in order to make a judgment about the potential effects of the restraint. Moreover, we believe that the *Hennessey* court placed undue emphasis on the **NCAA's** stated good intentions—not only in light of the Supreme Court's clear articulation of the proper antitrust analysis in *Board of Regents,* but also in light of clearly established precedent existing at the time of the *Hennessey* decision itself. Although intent is relevant in helping a court interpret facts and predict consequences in this type of case, "a good intention will [not] save an otherwise objectionable regulation...." *Chicago Board of Trade,* 246 U.S. at 238, 38 S.Ct. at 244; *see also Board of Regents,* 468 U.S. at 101 n. 23, 104 S.Ct. at 2960 n. 23 ("it is ... well settled that good motives will not validate an otherwise anticompetitive practice").

Similarly, in *Oklahoma Board of Regents,* the court deferred to the **NCAA** membership's "avowed" purpose in enacting the limitation of coaching staffs, which was maintaining the principles of a level playing field and the spirit of amateurism through cutting costs. The Oklahoma Supreme Court noted there that it was the "considered opinion of a majority of the [member institutions] that a limit on coaching staffs [wa]s the best way to achieve [those] goals," and it declined to substitute its own judgment for theirs. *Oklahoma Board of Regents,* 561 P.2d at 507. Since the plaintiff in that case did not establish that it was *un* reasonable for the **NCAA** to concern itself with those goals, and since the plaintiff could not demonstrate that the bylaw would *not* effect the cost reduction and competitive equity that the **NCAA** sought to achieve, the Oklahoma court found in favor of the **NCAA.**

[26] The Supreme Court in *Board of Regents,* however, clarified that the burden of proof in an antitrust case is somewhat different ***1408** from what the Oklahoma court articulated: under the rule of reason, the proponent —not the challenger—of a facially anticompetitive measure carries "a heavy burden of establishing an affirmative defense which competitively justifies [such an] apparent deviation from the operations of a free market." *Board of Regents,* 468 U.S. at 113, 104 S.Ct. at 2966. [13] The **NCAA** has repeatedly and vigorously urged this Court to shift the burden and require the coaches here to "prove a negative"—that the Restricted Earnings Coach Rule is *un* justifiable under rule of reason antitrust analysis. In support, the **NCAA** quotes the following language from *Board of Regents:*

> It is reasonable to assume that most of the regulatory controls of the **NCAA** are justifiable means of fostering competition among amateur athletic teams and therefore procompetitive because they enhance public interest in intercollegiate athletics. The specific restraints on football telecasts that are challenged in this case do not, however, fit into the same mold as do rules defining the conditions of the contest, the eligibility of participants, or the manner in which members of a joint enterprise shall share the responsibilities and the benefits of the total venture.
> *Id.* at 117, 104 S.Ct. at 2969. This language does not create a presumption of reasonableness for any regulation the **NCAA** chooses to enact, nor does it alter the burden of proof. Rather, the Court's general observation merely reiterates its previous comment that certain regulations which may restrain economic competition—rules dictating the size of the field, the number of players on each team, the extent to which physical violence should be allowed, that athletes should not be paid and that they must attend class —are crucial to the well-being of amateur athletic competition. *See id.* at 101–02, 104 S.Ct. at 2960. Moreover, the regulations referred to by the *Board of Regents* court are qualitatively a far cry from a regulation limiting the amount of compensation a professional coach, or even a graduate student assistant

coach, can earn as a livelihood for providing services to NCAA member schools. [14]

*1409 [27] In this litigation, the NCAA attempts to obtain leniency for its restricted earnings salary cap by characterizing it as a noncommercial regulation. The NCAA cites the district court's opinion in *Board of Regents* to support its position that noncommercial activities of the NCAA are reasonable methods of preserving competition in college sports. Finding previous cases regarding noncommercial NCAA regulations inapposite to its evaluation of the commercial restrictions on television contracts at issue, the court in that case noted,

> Several courts have analyzed the non-commercial activities of NCAA and concluded that they were reasonable methods of preserving and regulating competition in intercollegiate football.... However, none of these cases dealt with the commercial activities of NCAA. These [commercial] activities are far different from regulations governing the size of coaching staffs or rules on academic eligibility. There is only a tenuous relationship between such non-commercial regulations and the marketplace. Moreover, the non-commercial regulations relate more directly and effectively to the preservation of competitive balance. In this case, the commercial activities of NCAA have a direct and substantial anti-competitive effect on the marketplace, and contribute only indirectly, if at all, to the legitimate non-commercial goals of NCAA.

Board of Regents of the Univ. of Oklahoma v. National Collegiate Athletic Ass'n, 546 F.Supp. 1276, 1316 (W.D.Okla.1982) (citations omitted). The NCAA has not persuaded this Court that the relationship between the Restricted Earnings Coach Rule's salary cap and prices in the market for coaching services is at all tenuous or indirect. On the contrary, the relationship is direct, substantial and demonstrable. As the NCAA admits, the rule is directly responsible for a reduction in certain coaches' salaries. Furthermore, the NCAA has not demonstrated through any plausible evidence that the rule's restraint relates directly and effectively to the preservation of competitive balance, amateurism or any other legitimate, *non* commercial goal; instead, it offers only argument on this point. It is far from clear to this Court that the act of imposing a ceiling on the salaries of one class of employees in the labor market could possibly be characterized as "noncommercial," especially given the NCAA's express purpose of cutting costs in doing so.

[28] While the Supreme Court in *Board of Regents* accepted competitive balance as a legitimate objective for the NCAA and was willing to assume that most NCAA regulations are justifiable means of accomplishing that objective, the Court required that regulations with anticompetitive effects be somehow related or tailored to the interests they purport to protect. *See Board of Regents,* 468 U.S. at 118–19, 104 S.Ct. at 2969. Because the television restrictions in that case were not closely tailored to the NCAA's proffered justifications regarding competitive balance and amateurism—the same justifications *1410 the NCAA offers here—the Court invalidated the restraints. *Id.* For purposes of this motion, the Court accepts that cost-cutting measures are needed, that amateurism and competitive equity should be maintained, and that retaining a coaching position for an entry-level coach benefits both coaches and NCAA member institutions. Nevertheless, the NCAA has not demonstrated the necessary link between these stated objectives and the Restricted Earnings Coach Rule.

[29] [30] "Even if an anticompetitive restraint is intended to achieve a legitimate objective, the restraint only survives a rule of reason analysis if it is reasonably necessary to achieve the legitimate objectives proffered by the defendant." *Brown University,* 5 F.3d at 678–79. To determine if a restraint is reasonably necessary, a court first examines whether the restraint furthers the legitimate objectives, and then whether comparable benefits could be achieved through substantially less restrictive means. *Id.* at 679; *see also North American Soccer League v. National Football League,* 670 F.2d 1249, 1261 (2d Cir.), *cert. denied,* 459 U.S. 1074, 103 S.Ct. 499, 74 L.Ed.2d 639 (1982).

The NCAA has not cleared the first of these two hurdles. As noted previously, the NCAA has offered no evidence that the Restricted Earnings Coach Rule furthers its stated objectives at all. The NCAA's stated objectives are to level the playing field to obtain competitive equity, to provide

for an entry-level coaching position and to cut costs. The **NCAA** has submitted no evidence to this Court that requiring schools to pay their fourth-ranked basketball coaches all the same low salary levels the playing field in any significant way, especially when there is no limit on how disparately the three more senior coaches may be paid by competitor schools. Similarly, the **NCAA** has presented no evidence that the restricted earnings coach positions are now more likely to be filled by young or inexperienced coaches than they were when salaries were competitive. Nor has the **NCAA** offered any evidence that the Restricted Earnings Coach Rule really achieves an overall reduction in costs; as stipulated by the parties, nothing in the Restricted Earnings Coach Rule prevents **NCAA** schools from spending money saved (if any) from fixing the restricted earnings coach's salary on some other aspect of their basketball programs, such as increasing the head coach's salary. Because the **NCAA** has failed to meet its burden of establishing that the Restricted Earnings Coach Rule actually promotes a legitimate, procompetitive objective, it is unnecessary for plaintiffs to demonstrate that the Restricted Earnings Coach Rule is the least restrictive alternative available to the **NCAA** to achieve its stated goals or that comparable benefits could be achieved through viable, less restrictive means.

Because the Restricted Earnings Coach Rule is a restraint of trade as prohibited by the Sherman Act, the **NCAA** bears a heavy burden in this case to establish that the restraint enhances competition or, in other words, promotes a legitimate, procompetitive goal. On this record, the Court finds that the **NCAA** has not met this weighty burden and that plaintiffs are entitled to judgment as a matter of law on the issue of liability.

IT IS THEREFORE ORDERED that *Plaintiffs' Motion for Summary Judgment on the Issue of Liability* (Doc. # 73) be and hereby is sustained.

All Citations

902 F.Supp. 1394, 1995-2 Trade Cases P 71,150, 104 Ed. Law Rep. 1104

Footnotes

1 This amended Memorandum and Order supersedes the Court's previously filed Memorandum and Order, dated July 25, 1995, on the same matter.

2 Coaches in two other lawsuits have brought similar antitrust challenges to Bylaw 11.02.3. *See Hall v.* ***NCAA***, Case No. 94–2392, filed September 30, 1994; *Schreiber, et al. v.* ***NCAA***, Case No. 95–2026, filed January 13, 1995. Plaintiffs as well as the **NCAA** in those cases have agreed to be bound by this Court's ruling on the pending summary judgment motions with respect to the issue of liability. *See Hall,* Stipulation and Order (Doc. # 26), filed December 19, 1994; *Schreiber,* Stipulation and Order (Doc. # 8), filed February 6, 1995.

3 The following facts are either uncontroverted or, where controverted, construed in the light most favorable to the nonmoving party. Immaterial facts and factual averments not properly supported by the record are omitted.

4 Another member of the Cost Reduction Committee explained this point further. Donna Lopiano testified that if one educational institution cuts costs, and its athletic competitor does not make the same reductions, the latter will be more competitive on the field than the former. To illustrate, if institution "A" unilaterally cuts its number of scholarships from 85 (the number permitted in Division I–A) to 50, institution "A" necessarily becomes less competitive than institutions that use 85 scholarships to recruit their teams. Similarly, if **NCAA** legislation allows 10 football coaches, and institution "A" unilaterally reduces that number to 2 football coaches, then the schools with 10 coaches will have a valuable recruiting tool, in that they will be able to offer better coach-student ratios and guarantee more individualized attention for the student-athlete's experience. Ms. Lopiano further testified that when an institution loses athletic contests due to an "unlevel playing field," it suffers diminished revenues because it loses spectators, has disconcerted alumni and experiences other disadvantageous effects. The concept of a "level playing field" has frequently been referred to in this litigation as "competitive equity."

The **NCAA's** constitution describes the concept of competitive equity in this way:

> *The Principle of Competitive Equity.* The structure and programs of the Association and the activities of its members shall promote opportunity for equity in competition to assure that individual student-athletes and institutions will not be prevented unfairly from achieving the benefits inherent in participation in intercollegiate athletics.

NCAA 1994–95 Manual, Const. 2.9.

5 **NCAA** Bylaw 11.02.3 defines the position of "restricted-earnings coach"; Bylaw 11.3.4 details other aspects of compensation, benefits and expenses for restricted earnings coaches; and Bylaw 11.7.4 sets forth the number of coaches each institution may employ for each sport.

6 Prior to the enactment of the Restricted Earnings Coach Rule, **NCAA** rules provided that **NCAA** Division I basketball programs could employ one head coach and two full-time assistant coaches, and could fill two additional positions with part-time assistants, graduate assistants or volunteer coaches. Volunteer coaches were not entitled to receive any compensation during the academic year or the summer months; graduate assistant coaches were allowed to receive the full value of their educational experiences, based upon their status as in-state or out-of-state residents (a "grant-in-aid"); and part-time coaches were limited in compensation to the value of a grant-in-aid based upon non-resident status. **NCAA** member institutions that did not have graduate schools obviously could not fill the positions designated as graduate assistant coaches. The "restricted-earnings coach" position of Bylaw 11.02.3 was intended to collapse the categories of part-time assistants, graduate assistants and volunteer coaches into a single category.

7 **NCAA** members also enacted a "grandfather clause" pertaining to prior contractual obligations between member institutions and their personnel. Bylaw 11.2.3 provides that limitations on the number of coaches do not apply in circumstances where academic tenure, enforceable written contracts or formal written security-of-employment commitments make it impossible to comply with such limits. Such exceptions continue until the end of the contract period or until normal attrition—through death, retirement or voluntary resignation—makes it possible for the institution to comply with the limitations.

8 The fuller rationale offered by the Committee for the proposed rule is as follows:

> ... The largest expense item in the athletics budget is personnel. Currently, only football and basketball have limits on the number of coaches who may be employed, and the existing categorical designation of part-time graduate student and volunteer coach have not been effective in reducing the number of full-time paid employees associated with the sport. In addition, the committee recognizes the recent proliferation of part-time personnel associated with many Division I sports. Proposed limitations reflect an effort to: (1) reduce the number of coaches associated with each sport by at least one full-time equivalent position; (2) establish an "unrestricted" head or assistant coach category that will accommodate any type of volunteer, paid, full-time or part-time coach, and (3) establish a "restricted-earnings" category that will encourage the development of new coaches while more effectively limiting compensation to such coaches.

9 The parties agree that **NCAA** restricted earnings coaches are not unionized, that no collective bargaining agreement exists in this case, and that therefore no labor exemption from the antitrust laws applies.

10 The Court's decision to apply rule of reason analysis in *Board of Regents* does not necessarily mean that it adopted the same exception to the *per se* rule that it found applicable in *Broadcast Music.* In the end, although the **NCAA** argued that its actions, like the music companies' actions in *Broadcast Music,* constituted a cooperative "joint venture" which created efficiencies in the market and thus were procompetitive, the *Board of Regents* Court rejected the conclusion that the television rights in that case presented a situation similar to the one in *Broadcast Music.* Rather, the Court noted that "[u]nlike *Broadcast Music* 's blanket license covering broadcast rights to a large number of individual compositions, here the same rights are still sold on an individual basis, only in a non-competitive market." *Board of Regents,* 468 U.S. at 113–14, 104 S.Ct. at 2967. Plaintiffs argue here that they still attempt to sell their coaching services to **NCAA** member institutions which compete with each other in the hiring of coaches, only they too now do so in a non-competitive market.

11 Defendant's argument—essentially that price-fixing victims can simply go elsewhere and get a job in another part of the economy that is not fixed—is, of course, absurd and cannot carry the day for the **NCAA** in this litigation. *See, e.g., Roman v. Cessna Aircraft Co.,* 55 F.3d 542, 544 (10th Cir.1995) ("plaintiffs whose opportunities in the employment market have been impaired by an anticompetitive agreement directed at them as a particular segment of employees have suffered an antitrust injury under the governing standard").

12 The **NCAA** also asserts that by enforcing the Restricted Earnings Coach Rule it is maintaining an "entry-level" position for coaches who are young and/or inexperienced in the field. By enacting the salary cap, the **NCAA** sought to level the playing field by weeding out more experienced and seasoned coaches; ostensibly, more experienced coaches would not be willing to work for only $16,000 per year. However, the **NCAA** has introduced no evidence whatsoever that its method has been effective in making more opportunities available for younger or more inexperienced coaches. Nor has it introduced evidence that any seasoned coaches who were drawing $60,000 to $70,000 under the old salary regime have ceded their positions to the younger and more inexperienced coaches waiting to fill their shoes. In fact, the **NCAA** has not introduced evidence of a single restricted earnings coaching position which has been made available to a younger, more inexperienced coach that would not have been available in the previously unrestricted market for coaching services.

13 Another statement in *Oklahoma Board of Regents* requires comment here because the **NCAA** in briefs submitted to this Court misconstrues its significance. In support of its argument that Bylaw 11.02.3 is reasonable, the **NCAA** cites the Oklahoma Supreme Court's statement that "[t]he fundamental test of the reasonableness of restraint is its effect on the public." *Oklahoma Board of Regents,* 561 P.2d at 506. The **NCAA's** argument goes something like this: the cost spiral of personnel expenses under which the **NCAA** currently labors, if not curbed, will eventually and inevitably cause the complete demise of intercollegiate athletics; since Bylaw 11.02.3 cuts costs, it forestalls such demise and is thus good for the public interest because the public enjoys intercollegiate athletics. Even if the **NCAA's** scenario is a true depiction of the current economic landscape of intercollegiate athletics, the Supreme Court has emphasized that the actual test for reasonableness is much more limited: the relevant test is the restraint's effect on economic competition, not merely on the public interest. *See Board of Regents,* 468 U.S. at 104, 113, 104 S.Ct. at 2962, 2966–67. The Oklahoma court in mentioning the public interest may have had in mind not the wide-ranging reasonableness test that the **NCAA** urges us to adopt here, but something more akin to the Tenth Circuit's recent holding in an antitrust case—that the public's interest is in "open and unrestrained competition." *See Reazin v. Blue Cross and Blue Shield of Kansas, Inc.,* 899 F.2d 951, 974 (10th Cir.) (jury instruction defining public interest as "open and unrestrained competition" did not invite jury to consider matters other than effects of restraint on competition), *cert. denied,* 497 U.S. 1005, 110 S.Ct. 3241, 111 L.Ed.2d 752 (1990). The public's interest in and enjoyment of intercollegiate sports is, in this case, entirely irrelevant.

14 The **NCAA's** argument that the Restricted Earnings Coach Rule preserves the spirit of amateurism strays from the concept of amateurism as it was originally conceived by the **NCAA** and as it is discussed in other cases.

Defendant relies heavily on *Banks v. **NCAA,*** 977 F.2d 1081 (7th Cir.1992), and *Justice v. **NCAA,*** 577 F.Supp. 356 (D.Ariz.1983), in advancing its argument that the **NCAA** must be afforded plenty of room under the antitrust laws in order to preserve the amateur character of intercollegiate sports contests; however, neither case is on point. *Banks* dealt with no-draft and no-agent eligibility rules imposed by the **NCAA** on student-athletes; *Justice* involved sanctions imposed upon an **NCAA** member institution for infractions of **NCAA** rules against providing compensation and other benefits to student-athletes. Those cases are about ensuring that college *players*—student-athletes—are amateurs; they are not about preserving the amateurism of *coaches* by capping their salaries or by any other means. Likewise, the article of the **NCAA's** own constitution defining the principle of amateurism refers only to student-athletes:

> Student-athletes shall be amateurs in an intercollegiate sport, and their participation should be motivated primarily by education and by the physical, mental and social benefits to be derived. Student participation in intercollegiate athletics is an avocation, and *student-athletes* should be protected from exploitation by professional and commercial enterprises.

NCAA 1994–95 Manual, Const. 2.8 (emphasis added).

In this litigation, the **NCAA** has not indicated any way in which the Restricted Earnings Coach Rule would enhance amateurism among student-athletes in the way that other regulations designed to foster amateurism have done so.

Referring to cases where sports associations had regulated permissible racquet size in tennis, player safety requirements in hockey, and drug use in horse showing, the *Justice* court noted that "actions by sports organizations in preserving the integrity of the sport and fair competition are reasonable restraints under the rule of reason, even if they operate to exclude some competitors and thus have an incidental anticompetitive effect." *Justice,* 577 F.Supp. at 382 n. 17. The **NCAA** attempts to use this statement to support its position that the Restricted Earnings Coach Rule is a reasonable restraint of trade. However, not only is the statement dicta, from an inapposite case, taken out of context, but it also underscores a fundamental problem in defendant's case: namely, that the **NCAA** has not proven that the Restricted Earnings Coach Rule was implemented to "preserv[e] the integrity of the sport and fair competition." Furthermore, the **NCAA** has not proven that the Restricted Earnings Coach Rule's anticompetitive effect is merely "incidental" to the action.

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Disagreed With by In re: Cathode Ray Tube (CRT) Antitrust Litigation, N.D.Cal., October 25, 2016

185 F.R.D. 324
United States District Court,
D. Kansas.

Norman LAW, et al., Plaintiff,
v.
NATIONAL COLLEGIATE ATHLETIC ASSOCIATION, Defendant.
William Hall, Plaintiff,
v.
National Collegiate Athletic Association, Defendant.
Doug Schreiber, et al., Plaintiff,
v.
National Collegiate Athletic Association, Defendant.

Nos. Civ A 94–2053–KHV, Civ A 94–2392–KHV, Civ A 95–2026–KHV.
|
Jan. 15, 1999.
|
Order Granting in Part Motion to Amend Judgment, Jan. 15, 1999.

College basketball coaches brought class action suits challenging rule of intercollegiate athletic association limiting their compensation, on ground that it violated the Sherman Antitrust Act. After judgment in favor of plaintiffs, defendant filed post trial motions. Plaintiffs filed motions to alter or amend judgment. The District Court, **Vratil**, J., held that: (1) expert's testimony, along with other evidence, was sufficient to support jury verdict with respect to fact of injury; (2) adjustment of antitrust damage awards to present value based on the Consumer Price Index was not the functional equivalent of prejudgment interest awardable under section of the Clayton Act only if the court finds that defendant acted in bad faith to delay the proceedings; and (3) permanent injunctive relief under section of the Clayton Act was unwarranted.

Defendants' motions overruled; plaintiffs' motion sustained in part and overruled in part.

West Headnotes (20)

[1] **Federal Civil Procedure**
⇐ Conclusions or inferences from evidence

Judgment as a matter of law is appropriate under civil procedure rule only if the evidence, viewed in the light most favorable to the nonmoving party, points but one way and is susceptible to no reasonable inferences supporting the nonmoving party. Fed.Rules Civ.Proc.Rule 50(b), 28 U.S.C.A.

1 Cases that cite this headnote

[2] **Federal Civil Procedure**
⇐ Weight and Sufficiency of Evidence

Judgment as a matter of law is proper only when the evidence so strongly supports an issue that reasonable minds could not differ. Fed.Rules Civ.Proc.Rule 50(b), 28 U.S.C.A.

Cases that cite this headnote

[3] **Federal Civil Procedure**
⇐ Construction of evidence

In determining whether judgment as a matter of law is proper, court may not weigh the evidence, consider the credibility of witnesses, or substitute its judgment for that of the jury. Fed.Rules Civ.Proc.Rule 50(b), 28 U.S.C.A.

Cases that cite this headnote

[4] **Federal Civil Procedure**
⇐ Scintilla of evidence

In determining whether judgment as a matter of law is proper, court must find more than a mere scintilla of evidence favoring the nonmovant; the court must find that evidence was before the jury upon which it could properly find against the movant. Fed.Rules Civ.Proc.Rule 50(b), 28 U.S.C.A.

Cases that cite this headnote

[5] **Federal Civil Procedure**

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⇦ Discretion of court

Decision to grant a motion for new trial under civil procedure rule is committed to the trial court's sound discretion. Fed.Rules Civ.Proc.Rule 59(a), 28 U.S.C.A.

Cases that cite this headnote

[6] **Federal Civil Procedure**
⇦ New Trial

Motions for new trial are not regarded with favor and are only granted with great caution. Fed.Rules Civ.Proc.Rule 59(a), 28 U.S.C.A.

Cases that cite this headnote

[7] **Federal Civil Procedure**
⇦ Grounds

Federal Civil Procedure
⇦ Presumptions; construction of evidence

In considering a motion for new trial, the Court must view the evidence in the light most favorable to the prevailing party, and should not grant the motion unless prejudicial error has occurred or substantial justice has not been done. Fed.Rules Civ.Proc.Rule 59(a), 28 U.S.C.A.

1 Cases that cite this headnote

[8] **Federal Courts**
⇦ Admission or exclusion of evidence

A contemporaneous objection must be made when evidence is offered at trial in order to preserve for appeal the issue of admissibility, for only by timely objection can the trial court avoid error.

Cases that cite this headnote

[9] **Federal Courts**
⇦ Admission or exclusion of evidence

In the absence of a timely and proper objection, an alleged error in admission of evidence cannot be raised on appeal unless it constitutes plain error resulting in manifest injustice. Fed.Rules Civ.Proc.Rule 103(a)(1), 28 U.S.C.A.

Cases that cite this headnote

[10] **Federal Courts**
⇦ Admission or exclusion of evidence

It was not plain error to allow testimony of expert that antitrust conspiracy "touched" or "nicked" all class members, despite contention that the testimony was a "new opinion" that was flatly inconsistent with expert's pretrial opinion and testimony on cross-examination, to the effect that many class members sustained no damages.

1 Cases that cite this headnote

[11] **Antitrust and Trade Regulation**
⇦ Restraints and misconduct in general

Evidence
⇦ Nature of Subject

Expert's testimony, along with other evidence, was sufficient to support jury verdict with respect to fact of injury in antitrust suit brought against intercollegiate athletic association by class of basketball coaches challenging association rule which placed limit on their annual compensation.

Cases that cite this headnote

[12] **Antitrust and Trade Regulation**
⇦ Particular cases

Basketball coaches who challenged, on antitrust grounds, rule of intercollegiate athletic association limiting their annual compensation did not need to prove that the rule was the sole cause of their injury.

Cases that cite this headnote

[13] **Federal Courts**
⇦ Admission or exclusion of evidence

Allowing eight witnesses to testify how salary cap hurt them was not plain error in antitrust suit challenging rule of

intercollegiate athletic association limiting salaries of certain basketball coaches, despite contention that testimony made improper reference to pain, suffering, humiliation, emotional distress or "marital woes," as such passing references did not materially affect the fairness of the trial as a whole or cause substantial injustice to the defense.

Cases that cite this headnote

[14] **Evidence**
⇦ Hearsay or evidence otherwise incompetent

Hearsay information which economist gleaned through a mass of telephone calls to athletic directors and university officials at member institutions was properly excluded in antitrust suit challenging rule of intercollegiate athletic association placing salary cap on certain basketball coaches, as expert could not be used as a channeler of non-expert, otherwise inadmissible hearsay.

2 Cases that cite this headnote

[15] **Federal Civil Procedure**
⇦ Admissibility of evidence

Exhibit which was not identified or exchanged pursuant to scheduling order was properly excluded at trial.

Cases that cite this headnote

[16] **Evidence**
⇦ Private Memoranda and Statements in General

Expert's written report is generally inadmissible. Fed.Rules Civ.Proc.Rule 702, 28 U.S.C.A.

2 Cases that cite this headnote

[17] **Evidence**
⇦ Private Memoranda and Statements in General

Submission of a written expert report to the jury may call undue attention to the expert's trial testimony, and such material should not be admitted if the risk of prejudice substantially outweighs its probative value. Fed.Rules Civ.Proc.Rules 403, 702, 28 U.S.C.A.

3 Cases that cite this headnote

[18] **Antitrust and Trade Regulation**
⇦ Particular items or elements

Adjustment of antitrust damage awards to present value based on the Consumer Price Index was not the functional equivalent of prejudgment interest awardable under section of the Clayton Act only if the court finds that defendant acted in bad faith to delay the proceedings. Clayton Act, § 5(a), 15 U.S.C.A.§ 15(a).

3 Cases that cite this headnote

[19] **Antitrust and Trade Regulation**
⇦ Injury to Business or Property

Section of the Clayton Act authorizes injunctive relief upon a showing of "threatened" injury; plaintiffs need only demonstrate a significant threat of injury from an impending antitrust violation or from a contemporary violation that is likely to continue or recur. Clayton Act, § 5, § 15 U.S.C.A. § 16.

2 Cases that cite this headnote

[20] **Antitrust and Trade Regulation**
⇦ Injunction

Permanent injunctive relief under section of the Clayton Act was unwarranted in suit by basketball coaches against intercollegiate athletic association, absent evidence that coaches were presently threatened with loss or damage from action that the association had taken or might take against them. Clayton Act, § 5, § 15 U.S.C.A. § 16.

Cases that cite this headnote

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MEMORANDUM AND ORDER

VRATIL, District Judge.

This matter comes before the Court on *Post Trial Motions Pursuant To Federal Rules Of Civil Procedure 23, 50 and 59* (Doc. # 852) which the National Collegiate Athletic Association ("**NCAA**") filed on May 18, 1998. In those motions, the **NCAA** renews its request for judgment as a matter of law. In the alternative, it asks the Court to remit the damages awarded to each class or vacate the judgments, decertify the classes and order a new trial. The prior proceedings in this case are well documented and for the purpose of the present motions, the Court will not repeat its previous rulings. [1] For reasons stated more fully below, the Court finds that defendant's motions should be overruled.

Standards of Review

[1] [2] [3] [4] Judgment as a matter of law is appropriate under Rule 50(b) of the Federal Rules of Civil Procedure "only if the evidence, viewed in the light most favorable to the nonmoving party, points but one way and is susceptible to no reasonable inferences supporting the nonmoving party." *Riggs v. Scrivner, Inc.*, 927 F.2d 1146, 1149 (10th Cir.), *cert. denied*, 502 U.S. 867, 112 S.Ct. 196, 116 L.Ed.2d 156 (1991). Such judgment is proper only when "the evidence so strongly supports an issue that reasonable minds could not differ." *Ryder v. City of Topeka*, 814 F.2d 1412, 1418 (10th Cir.1987). In determining whether judgment as a matter of law is proper, the Court may not weigh the evidence, consider the credibility of witnesses, or substitute its judgment for that of the jury. *See Lucas v. Dover Corp.*, 857 F.2d 1397, 1400 (10th Cir.1988). Nevertheless, the Court must find more than a mere scintilla of evidence favoring the nonmovant; the Court must find that "evidence was before the jury upon which it could properly find against the movant." *Cooper v. Asplundh Tree Expert Co.*, 836 F.2d 1544, 1547 (10th Cir.1988).

[5] [6] [7] The decision to grant a motion for new trial under Rule 59(a) of the Federal Rules of Civil Procedure is committed to the trial court's sound discretion. *Marsh v. Coleman Co.*, 806 F.Supp. 1505, 1509 (D.Kan.1992). Motions for new trial are not regarded with favor and are only granted with great caution. *Id.* In considering a motion for new trial, the Court must view the evidence in the light most favorable to the prevailing party, *Neyman v. United Telecomms., Inc.*, No. 90–2033–O, 1992 WL 97808 (D.Kan. April 7, 1992), *aff'd*, 1 F.3d 1249 (10th Cir.1993), and should not grant the motion unless prejudicial error has occurred or substantial justice has not been done. *Miller v. City of Mission, Kansas*, 516 F.Supp. 1333, 1337 (D.Kan.1981). Moreover, the Court should "exercise judgment in preference to the automatic reversal for 'error' and ignore errors that do not affect the essential fairness of the trial." *327 *McDonough Power Equip., Inc. v. Greenwood*, 464 U.S. 548, 553, 104 S.Ct. 845, 78 L.Ed.2d 663 (1984).

Analysis

The **NCAA** seeks judgment as a matter of law, claiming a generalized failure of proof as to the fact of injury and amount of damages. This argument can be rejected out of hand because at trial the **NCAA** admitted some liability as to each of the classes. Perhaps anticipating this flaw in its position, the **NCAA** also seeks judgment as a matter of law as to specific categories of damages: (1) for any given year, damages for class members whose compensation was below the salary cap imposed by the restricted earnings rule ("the Rule"); (2) damages for class members whose compensation was above the salary cap; (3) damages

incurred after the **NCAA** rescinded the Rule; (4) damages for class members for whom plaintiffs' expert, Dr. Robert D. Tollison, made no individualized findings; (5) damages incurred after May 25, 1998, when the **NCAA** claims that it withdrew from the conspiracy; (6) damages suffered by coaches who did not return class questionnaires; and (7) damages for restricted earnings coaches who got their jobs because the Rule had forced their predecessors out of position, *i.e.*, coaches allegedly benefitted rather than harmed by the Rule. Also in the alternative, the **NCAA** asks that the Court set aside the jury verdict and order a new trial because the verdict was contrary to the manifest weight of the evidence and resulted from faulty jury instructions and evidentiary rulings. The **NCAA** also reasserts its arguments on the class certification issue. Finally, the **NCAA** requests a remittitur (before trebling) to $117,390 in *Schreiber*, $297,263 in *Law*, and $442,376 in *Hall*.[2]

The Court has previously rejected many of these arguments, in orders dealing with summary judgment, decertification and motions in limine. *See Memorandum And Order* (Doc. # 815) filed April 20, 1998 (reported as *Law v. National Collegiate Athletic Ass'n*, 5 F.Supp.2d 921 (D.Kan.1998) (overruling defendant's motion for partial summary judgment)); *Memorandum And Order* (Doc. # 814) filed April 17, 1998 (overruling defendant's motion to decertify classes); and *Memorandum And Order* (Doc. # 822) filed April 23, 1998 (overruling defendant's motion in limine to exclude opinion of plaintiffs' expert on fact of injury). These rulings—be they good, bad or indifferent —constitute the law of the case. Some of the prior rulings addressed novel legal issues on which precedent is conflicting or altogether lacking, but the Court has addressed the issues fully and to the best of its ability. Reargument does not persuade the Court of error, or of any need for further discussion. As to issues previously addressed, the Court stands on the record and does not further elaborate.[3]

***328 I. Proof of Fact of Injury and Amount of Damages**

The **NCAA** claims that on a classwide basis, plaintiffs failed to prove fact of injury or the amount of damages. In support of that position, the **NCAA** argues that (1) the Court committed reversible error when it allowed Dr. Tollison to take the witness stand; (2) the Court erred in refusing to strike Dr. Tollison's totally new opinion that the Rule "touched" or "nicked" all class members who worked as restricted earnings coaches ("RECs") between 1992 and 1997; and (3) Dr. Tollison's analysis was "hopelessly circular" and thus insufficient to sustain a verdict. The **NCAA's** first point is a re-argument of issues raised in its motion under *Daubert v. Merrell Dow Pharms.*, 509 U.S. 579, 113 S.Ct. 2786, 125 L.Ed.2d 469 (1993). The Court has already rejected those arguments, *see Memorandum And Order* (Doc. # 822) filed April 23, 1998, and the **NCAA's** post-trial assignment of error does not warrant relief. Without further elaboration on that issue, the Court addresses the **NCAA's** two remaining arguments.

A. Motion to strike Dr. Tollison's testimony

On the afternoon of April 14, 1998, Dr. Tollison testified without objection that the **NCAA's** antitrust conspiracy "touched" or "nicked" any coach who worked as a restricted earnings coach between 1992 and 1997. Tr. 1615. The following day, on the morning of April 15, 1998, Dr. Tollison testified that "it's not hard to see the evidence of the impact of the rule." Tr. 1639. The **NCAA** objected that said testimony was beyond the scope of Dr. Tollison's expert report, but the Court overruled that objection and the **NCAA** did not move to strike his testimony. At the close of the day on April 16, 1998—two days after Dr. Tollison's testimony that the Rule "touched" or "nicked" any coach who worked as a restricted earnings coach between 1992 and 1997 (and indeed after Dr. Tollison had left the jurisdiction of the Court)—the **NCAA** made an oral motion to strike all testimony by Dr. Tollison. In doing so it incorporated all reasons previously stated in its *Daubert* motion and stated other reasons which consumed six full pages of trial transcript. Tr. 2243–48. This multi-faceted objection included an argument that Dr. Tollison "offered a new opinion, that because the market wasn't free, all were touched."

[8] As noted above, the **NCAA** argues that it is entitled to judgment as a matter of law or a new trial because the Court erred in overruling its motion to strike Dr. Tollison's opinion that the Rule "touched" or "nicked" all class members. Dr. Tollison rendered that testimony on April 14, 1998. The **NCAA** first objected and moved to strike on April 16, 1998. "A contemporaneous objection must be made when evidence is offered at trial in order to preserve for appeal the issue of admissibility, for only by timely objection can the trial court avoid error." *Hinds v. General Motors Corp.*, 988 F.2d 1039, 1046 (10th Cir.1993)

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(citing *McEwen v. City of Norman, Oklahoma,* 926 F.2d 1539, 1544 (10th Cir.1991) ("[i]n recognition of the broad discretion vested in the trial court, evidentiary rulings made over contemporaneous objection will be upheld on appeal unless they constitute an abuse of discretion.")). *See also United States v. Nathan,* 127 F.3d 1110 (table; text available in Westlaw at 1997 WL 659420, at *4) (10th Cir.1997) (evidentiary objections must generally be made at time evidence is offered) (citing cases).[4]

[9] In the absence of a timely and proper objection, the alleged error cannot be raised on appeal unless "it constitutes plain error resulting in manifest injustice." *United States v. Norman T.,* 129 F.3d 1099, 1106, *cert. denied,* 523 U.S. 1031, 118 S.Ct. 1322, 140 L.Ed.2d 485 (1998) (citations omitted). ***329** *See also McEwen,* 926 F.2d at 1545 (citing Rule 103(a)(1), (d), Fed.R.Evid.). The "plain error" exception in civil cases is limited to errors which seriously affect the "fairness, integrity or public reputation of judicial proceedings." *Id.* (citations omitted).

[10] The **NCAA's** objection and motion to strike did not preserve any error. At the time Dr. Tollison testified to his "new opinion," the **NCAA** should have reasonably known that the objection was available. Its failure to contemporaneously object deprived plaintiffs of the opportunity to respond and the Court to undertake further inquiry. Moreover, for reasons which follow, admission of the challenged testimony did not materially affect the fairness, integrity or public reputation of the judicial proceedings. Consequently the "plain error" exception does not apply.

The **NCAA** seeks judgment as a matter of law or a new trial because Dr. Tollison's testimony was a "new opinion" that was flatly inconsistent with his pretrial opinion and testimony on cross-examination, to the effect that many RECs sustained no damages. If Dr. Tollison's testimony was internally inconsistent, however—and the Court does not agree that it was—that fact was a matter for the jury to consider in evaluating his opinion. The jury was not required to adopt the **NCAA's** view of Dr. Tollison's testimony and its failure to do so does not entitle the **NCAA** to relief.

More importantly, the **NCAA's** argument does not fairly characterize Dr. Tollison's testimony, which was neither new nor unsupported. As plaintiffs correctly point out, Dr. Tollison stated in his reports, declarations and testimony at the *Daubert* hearing that the **NCAA** had engaged in the exercise of monopsony power, singled out the class of RECs in order to extract salary concessions, and levied its superior bargaining power against them. *See, e.g., Declaration of Robert D. Tollison* (January 19, 1998), ¶ 8 ("economic theory and common sense suggest that plaintiff coaches were in a radically different bargaining environment after the imposition of the restrictions so that there is every reason to predict that RECs earning less than $12,000 were impacted by these restrictions"); ¶ 9 ("it is entirely possible that coaches [hired] after May 25, 1995, and who were paid more than $12,000 were injured by the REC compensation limitations"); *Declaration of Robert D. Tollison* (April 3, 1997), ¶ 9 ("[t]he effect of this enhanced bargaining power was levied against all RECs in their individual negotiations with their schools") (emphasis in original), ¶ 10 ("[a]ll REC wages were subject to a new bargaining environment in which bargaining power had shifted significantly to schools"), and ¶ 14 ("[i]n this world all coaches arguably suffered damages as a result of the rule. And if they did not suffer damages, my model will not find damages."). *See also Memorandum And Order* (Doc. # 822) filed April 23, 1998 (overruling defendant's motion in limine to exclude opinion of plaintiff's expert on fact of injury); *Memorandum And Order* (Doc. # 815) filed April 20, 1998 (reported as *Law v. National Collegiate Athletic Ass'n,* 5 F.Supp.2d 921 (D.Kan.1998) (overruling defendant's motion for partial summary judgment)).

While the **NCAA** challenges the sufficiency of Dr. Tollison's trial testimony, it mainly reiterates arguments previously advanced in support of its motion for partial summary judgment and its motion in limine to exclude Dr. Tollison's testimony, and during the *Daubert* hearing. The **NCAA** again argues that Dr. Tollison's methodology is flawed, that he merely assumes fact of injury and damages, and that his opinion regarding causation has no adequate basis in fact. The **NCAA** also argues that because plaintiffs chose to rely solely on Dr. Tollison to prove fact of injury, it is entitled to judgment as a matter of law. The **NCAA's** real complaint appears to be with the jury, which obviously and for good reason attached more credence to Dr. Tollison's testimony than it did to the testimony of the **NCAA's** expert, Dr. John Umbeck.[5] As the Court has previously noted, the case presented a classic battle of the experts, a battle in which the jury must ***330** decide

the victor. *See Jenkins v. United States,* 307 F.2d 637, 646 (D.C.Cir.1962).

Moreover, plaintiffs did not rely solely on Dr. Tollison to establish fact of injury. Testimony of head coaches, class members, Dr. Umbeck and other witnesses revealed that the Rule caused generalized decreases in REC salaries, that **NCAA** member institutions were concerned that salaries would spike upward when the **NCAA** rescinded the Rule, and that salaries indeed did increase after that point. *See, e.g.,* Tr. 347, 716, 1439–42, 2407–09, and 2771. In addition, the so-called Gilardi chart, Plaintiffs' Exhibit 77, and three other similar charts (Plaintiffs' Exhibits 78, 79 and 80) confirmed the macroeconomic effects of the Rule. *See* Tr. 1365–97.

The **NCAA** takes special aim at the Gilardi chart, arguing that it shows only that the Rule forced highly compensated coaches out of the Division I coaching market and allowed member institutions to replace them with lower-paid individuals. At most, according to the **NCAA**, the Gilardi chart reinforces its so-called "substitution theory" and does not demonstrate that class members suffered any diminution of income on account of the Rule.[6] The Gilardi chart was subject to other interpretations, however, especially when considered in the light of other evidence. The jury was entitled to reject the **NCAA's** interpretation and to infer from the Gilardi chart that after the Rule went into effect, member institutions paid lower salaries for REC positions than they previously had paid.

In summary, Dr. Tollison's testimony was neither new nor unsupported, and the **NCAA** is not entitled to a new trial or to judgment as a matter of law because the Court let him testify that the **NCAA's** antitrust conspiracy "touched" or "nicked" any coach who worked as a restricted earnings coach between 1992 and 1997.

B. Sufficiency of the evidence

[11] The **NCAA** argues that "the same flaws that made Dr. Tollison's testimony legally insufficient to prove fact of injury also made that formula insufficient to prove a reasonable estimate of the amount of damages." The **NCAA** devotes less than one page to its attack on the damage calculations. It does not suggest any flaw in the jury's damage calculations, other than the fact that Dr. Tollison influenced them. The **NCAA** does not suggest that the jury was in any respect obligated to accept the damage calculations of *its* expert, nor does it suggest what amount of damages—other than the damages proposed by Dr. Umbeck—the jury should ***331** have awarded. The Court finds that Dr. Tollison's opinion, along with the other evidence of record, is sufficient to support the jury verdict with respect to fact of injury and that the **NCAA's** argument does not occasion further inquiry into the amount of the damage awards. Although the Court cannot recreate the jury's deliberative process, that situation is far from unique to this case. It is evident that the jury awarded only such damages as it found had been proven, and nothing in the **NCAA** argument convinces the Court that the jury's assessment of damages resulted from mere speculation or conjecture.

In short, the jury verdict is supported by much more than a scintilla of evidence. It reflects a thoughtful and critical evaluation of the evidence, after a long and well-fought trial, and the Court is satisfied that it is amply supported by the record.[7] Accordingly, the **NCAA's** motion for judgment as a matter of law or a new trial must be overruled.

II. The Jury Instructions Correctly Stated the Applicable Law

The **NCAA** argues that it is entitled to judgment as a matter of law or a new trial because the Court delivered "a series of jury instructions ... that effectively removed the individual issues from the case by eviscerating plaintiffs' burden of proof." The Court has previously rejected the **NCAA** argument that class certification and other pretrial rulings eviscerated the requirement that plaintiff prove fact of injury and improperly allowed the jury to *presume* fact of injury. The Court does not further address those contentions.

In further support of its motion, the **NCAA** argues that the instructions (1) denied the **NCAA** a fair trial by instructing the jury "in grim detail" that the **NCAA** had committed an antitrust violation and pelting the jury with prejudicial terms like "unlawful" and "anticompetitive" and other "loaded terms"; (2) improperly instructed the jury on multiple causes; (3) forced the jury to consider only academic year compensation; (4) improperly invited the jury to award damages for **NCAA** rules that plaintiff did not challenge; (5) allowed the jury to award damages on behalf of persons who were not even class members; (6) defined Division I as the relevant market when

even plaintiffs would not do so; (7) improperly added a subjective "good faith" element to the instruction on withdrawal; (8) improperly gave instructions 9, 11, 12, 13, 14, 16, 17 and 21; and (9) utilized a defective verdict form.

A. "Grim detail" instructions

At the beginning and the end of the three-week trial,[8] the Court summarized the history of the case and the issues which had been resolved, so that jurors could understand what issues remained for decision. The **NCAA** attacks those pre-trial and post-trial instructions, complaining that the Court denied it a fair trial by instructing the jury "in grim detail" that the **NCAA** had engaged in illegal activity and "repeatedly us[ing] inflammatory terms like 'wrongful,' 'unlawful,' 'conspiracy,' and 'violation' to describe the Rule and the **NCAA**." The **NCAA** does not (and cannot) deny that it engaged in illegal activity when it conspired with member institutions to violate the federal antitrust laws, and that the Court was at least accurate when it so instructed the jury. The **NCAA** apparently argues, however, that the Court breached its duty to sanitize the subject and that its failure to do so "prevented the jury from fairly assessing the issues of injury and damages that were before it, and denied the **NCAA** a fair trial." No authority for this proposition appears in the **NCAA's** 144–page brief.

Rule 56(d), Fed.R.Civ.P., states that if summary judgment is rendered on part but not all of the case and a trial is necessary, the court shall ascertain what material facts exist without substantial controversy and what matters are actually and in good faith ***332** controverted. Rule 56(d) further directs that "[u]pon the trial of the action the facts so specified shall be deemed established, and trial shall be conducted accordingly." In this case, the Court told the jury what matters had been established without substantial controversy on the summary judgment record. The Court was required to do so not just by Rule 56, but by the fact that the proceedings in this case had been bifurcated. This bifurcation, which had the blessing of all parties, meant that the Court first decided whether the **NCAA** had violated the antitrust laws and then decided whether plaintiffs were entitled to damages on account of the violation. This bifurcation involved a considerable overlap between two issues: whether the Rule had an anticompetitive effect (an issue which this Court and the Tenth Circuit Court of Appeals answered affirmatively in the first phase of the trial) and whether plaintiffs sustained antitrust injury (an issue which the jury had to decide in the second phase of the trial).

The **NCAA** offers no adequate suggestion as to how —*without* the use of so-called "loaded" language—the Court might have discharged its duty under Rule 56(d) and instructed the jury what material facts existed without substantial controversy and what matters were actually and in good faith controverted. It would make no sense to ask the jury to assess antitrust damages without telling it that an antitrust violation had occurred, or to instruct the jury how to evaluate the testimony of co-conspirators without using the term "conspiracy." The duty of fairness stops somewhere short of a duty to pretend that a violation of federal antitrust law is a technical foul like a lane violation, an illegal substitution, excessive celebration, or failure to tuck in a jersey. If the **NCAA** had had its way, the Court would have instructed the jury that the Rule was unlawful but not told it why, leaving the **NCAA** free to prove that the Rule was not anticompetitive but was benign in both purpose and effect. This option was foreclosed by the partial summary judgment in favor of plaintiffs.[9]

B. Causation instructions

[12] The **NCAA** argues that the Court erred in instructing the jury on "multiple causes," *see* Instructions 18, 20 and 21, because plaintiffs' theory was that "but for the REC Rule, they would have earned more."[10] ***333** According to the **NCAA**, the Rule was either the sole cause of plaintiffs' injury or it was no cause at all, and the Court erred in failing to so instruct the jury. This argument is not faithful to either the law or the facts in this case. Plaintiffs did not need to prove that the Rule was the sole cause of their injury. *E.g., Zenith Radio Corp. v. Hazeltine Research, Inc.*, 395 U.S. 100, 114 n. 9, 89 S.Ct. 1562, 23 L.Ed.2d 129 (1969). Also, because plaintiffs proved that the Rule had a generalized anticompetitive effect which tended to depress compensation across the board, the jury was entitled to consider that fact along with evidence that within the non-competitive market, other factors also had a bearing on individual compensation levels.

C. Academic year compensation

In Instruction 15, the Court advised the jury of plaintiffs' claim that because of the Rule, "they lost academic year compensation."[11] The **NCAA** argues that this instruction

"pulled the rug out" from under its claim that the jury should base its verdict on calendar year compensation, because it failed to instruct the jury to do so and erroneously described the cap as $12,000 rather than $16,000. These arguments are frivolous. Instruction 15 did not tell the jury how to decide anything; it summarized the claims of the respective parties and told the jury who had the burden of proof. The **NCAA** offered no credible evidence in support of its johnny-come-lately hypothesis that the Rule set a unitary cap of $16,000 per year rather than a $12,000 cap for the academic year and a $4,000 cap for summer compensation. Even if it had done so, Instruction 15 contains no reference to a $12,000 cap. The Court correctly instructed the jury that plaintiffs only sought compensation for academic year losses. The **NCAA** argued (and presented evidence) that certain summer compensation was disguised academic-year compensation that was intended to evade the Rule. This argument raised a factual issue which was vigorously litigated and properly submitted to the jury—albeit without an instruction that the jury must resolve it in favor of the **NCAA**. In that regard, however, Instruction 15 did not err.

D. **NCAA** rules that plaintiffs did not challenge

The trial transcript in this three-week case includes passing references to **NCAA** rules other than the restricted earnings rule. The **NCAA** cites less than ten such references but it claims that they required the Court to give its tendered Instructions 13 through 24, and that the Court's failure to do so invited the jury to award damages for **NCAA** rules that plaintiffs did not challenge. This argument, to borrow plaintiffs' words, is utterly without substance or merit. The instructions left no doubt that the jury was to award damages for the **NCAA's** imposition of the *restricted earnings* rule. To suggest that the jury awarded damages on account of other rules is an insult to the intelligence of the jury and is an accusation which is totally unsupported by the record. The Court did not err in refusing to give the **NCAA's** instructions ***334** on matters which were sufficiently, and more clearly, addressed by the Court's own instructions.

E. Damages on behalf of persons who were not even class members

In another affront to the intelligence of the jury, the **NCAA** argues that Instruction 19 invited the jury to award damages for coaches who were not class members. [12] This argument is spurious. The instructions told the jurors that they could award damages *for class members* and told them who the class members were. The record contains no suggestion that the jury found fact of injury or awarded damages to anyone other than class members, and the **NCAA's** argument must be rejected.

F. Definition of relevant market

The **NCAA** attacks Instructions 18 and 19 because they "amounted to a directed finding that Division I constitutes a 'relevant market,' " in that they "told the jury to disregard evidence that numerous class members had employment opportunities outside of Division I that enabled them to mitigate their damages, and to uncritically accept plaintiffs' position that such opportunities were undesirable." [13] This argument can be summarily rejected. First, Instructions 18 and 19 addressed the question whether plaintiffs had sustained economic injury on account of the Rule; they did not deal with the subject of mitigation, much less tell the jury that employment opportunities outside of Division I are undesirable and should not be considered on the subject of mitigation. Also, the jury did not have to decide whether Division I was a "relevant market" under federal antitrust law. When the Court used that term it did not invade the province of the jury or direct any findings on that issue. The **NCAA's** argument on this subject is without merit.

G. "Good faith" element to the instruction on withdrawal

The **NCAA** argues that the Court should have instructed the jury not to award damages after May 25, 1995, when it withdrew from the conspiracy. *See* Defendant's Proposed Post–Trial Instruction 26. In the alternative, the **NCAA** argues that in giving Instruction 23, the Court created a "novel subjective test, telling the jury that 'withdrawal must be complete and in good faith.' " [14] The **NCAA** also attacks Instruction ***335** 23 on the ground that it repeatedly used "the loaded and unjustified [sic] term 'conspiracy.' " The **NCAA** further attacks Instruction 8, claiming that it implies that **NCAA** members were agents of the **NCAA** during and after the conspiracy period, when it should have told the jury that they were *not* **NCAA** agents "in any actions inconsistent with the **NCAA's** cancellation of the REC Rule." [15]

These objections are without merit. First, whether the **NCAA** withdrew from the conspiracy, and when, were disputed factual issues. The Court could not property instruct the jury to credit either side of the evidence on this point and it did not err in failing to instruct the jury that it should not award damages after the **NCAA** withdrew from the conspiracy on May 25, 1995. Second, the good faith requirement of withdrawal is not unsupported in pattern instruction and precedent. *E.g., United States v. Wilson,* 134 F.3d 855, 863 (7th Cir.1998); *United States v. Bullis,* 77 F.3d 1553, 1562 (7th Cir.1996); *United States v. Varah,* 972 F.2d 357 (table; text available in Westlaw at 1992 WL 186530, *3) (10th Cir.1992); *United States v. Andrus,* 775 F.2d 825, 850 (7th Cir.1985); *United States v. Diaz,* 662 F.2d 713, 717 (11th Cir.1981); *United States v. Continental Group, Inc.,* 603 F.2d 444, 466 (3d Cir.1979). Finally, Instruction 8 properly told the jury that the **NCAA**, as a voluntary association, could act only through its officers, agents and employees acting within the scope of their authority. Whether **NCAA** members acted on behalf of the **NCAA** when they continued the conspiracy after May 25, 1995 was a question for the jury and the instructions properly communicated the legal standards to be applied to that analysis.

H. Instructions 9, 11, 12, 13, 14, 16, 17 and 21

The **NCAA** challenges Instruction 9, complaining that it "confused and misled the jury into believing that the twenty-five [plaintiff] witnesses who came to court were truly representative of the thousands of remaining class members."[16] Instruction 9 is an accurate statement of the law, however, and the **NCAA's** objection to it is nonsensical.

The **NCAA** attacks Instruction 11, arguing that it "compounded the prejudice of the Court's exclusion of certain charts submitted by the **NCAA** ... while admitting similarly founded charts submitted by plaintiffs."[17] ***336** This objection is incomprehensible, given that the **NCAA** does not claim that it incorrectly stated the law. Nor does it identify how the instruction "compounded" the Court's evidentiary errors or tell us what charts the **NCAA** has in mind when it lodges this attack. A new trial is not warranted on this ground.

The **NCAA** also criticizes Instruction 12,[18] arguing that it "undermined" Defendant's Exhibit 659 when it correctly reminded the jury that unless the data in Defendant's Exhibit 659 had been verified in court, through witnesses, deposition testimony or other evidence which the Court had received into evidence, it was hearsay and could not be considered as evidence that the underlying data was true. This and the remaining objections to Instruction 12 are frivolous and are rejected.

The **NCAA** next disparages Instruction 13,[19] on the ground that it "injected the ***337** purpose of the REC Rule into the case, and then incorrectly stated that the purpose was cost-cutting," then "compounded the error by stating the cost-cutting was not sufficiently pro-competitive, and therefore that the REC Rule was illegal." According to the **NCAA**, the jury was entitled to consider "the fact that the REC Rule was intended to create new entry level coaching positions," which was itself relevant to show "why so few class members actually had their salaries reduced when the REC Rule came into effect." While this argument may make sense to the **NCAA**, it has never cited a single case or statute for the proposition that its state of mind in enacting the Rule (benevolent or otherwise) tells us *anything* about who sustained damages, or why. The Court did not err in giving the jury a 60-second tutorial to the effect that the Court had determined that (1) the Rule unreasonably restrained trade because it had a substantially adverse effect on competition, that is, that there was an agreement to fix salaries; (2) the agreement was effective; (3) the salaries set by the agreement were more favorable to **NCAA** members than otherwise would have resulted from the operation of competitive market forces; and (4) the procompetitive benefits of the Rule (including cost-cutting) did not justify the anticompetitive effects, so that the Rule on balance was reasonable.

The **NCAA** also attacks Instruction 14[20] because while it defined the burden of proof, it did not state which party had the burden of proof. This argument, again, is frivolous. Instruction 15, among others, recited plaintiffs' claims and instructed that the **NCAA** denied plaintiffs' claims and that plaintiffs had the burden of proving by a preponderance of the evidence that their claims were more probably true than not true.

The **NCAA** challenges Instruction 16[21] on the ground that it misstated plaintiffs' burden of proof. The Court has previously addressed and rejected the argument that the jury was required to find fact and amount of damage

for each individual class member, and the remaining objections to Instruction 16 are without merit.

The **NCAA** complains that Instruction 17[22] "exacerbated the Court's fundamental error ***338** of allowing plaintiffs to evade their burden of proving injury to individual class members ... and virtually directed the jury to conclude that if some of the class members established that they were injured by the REC Rule, all class members were entitled to damages." This complaint is without merit, as are the remaining objections to Instruction 17.

Finally, the **NCAA** argues that Instruction 21[23] erred because it "exaggerated the lightening of plaintiffs' burden on damages," was based on market exclusion cases which are "completely inapposite to this case," and refused to instruct the jury that it must not impose treble damages (the latter instruction being allegedly necessitated by the "many news stories reporting that the damages award will be trebled."). As with most of the foregoing objections, the **NCAA's** arguments are fanciful but ultimately baseless. The objections are without merit and they are summarily overruled.

I. Verdict Form

Finally, the **NCAA** argues that the verdict form was fatally flawed because it did not require the jury to state whether each individual class member had sustained injury and if so, the amount of damages to be awarded; it used the term "conspiracy;" it failed to state the consequences of withdrawal; it promoted inconsistent verdicts; it failed to mention the burden of proof, and it otherwise "set into stone" errors committed elsewhere in the jury instructions. These ***339** arguments have been addressed elsewhere and they are without merit.

The Court concludes that the jury instructions properly stated the law and that the forms of verdict did not incorporate prejudicial error or deny substantial justice to the **NCAA**. *Miller v. City of Mission, Kansas,* 516 F.Supp. at 1337. Accordingly, defendant's motion for a new trial based on faulty jury instructions must be overruled.

III. Evidentiary Rulings

The **NCAA** argues that the Court committed reversible error (1) when it allowed plaintiffs to "repeatedly" introduce evidence relating to hardships purportedly caused by the Rule; (2) when it allowed plaintiffs to "repeatedly" introduce hearsay evidence of what third parties said about the Rule after the **NCAA** announced its rescission; (3) when it allowed plaintiffs to "repeatedly" introduce evidence about **NCAA** rules that had been in effect before the Rule went into effect; (4) when it allowed plaintiffs to introduce hearsay evidence without sufficient foundation concerning average salaries before, during and after the Rule; (5) when it refused to let the **NCAA** prove that the "rear" purpose of the Rule was not to contain costs but to create entry level positions; (6) when it excluded evidence of amounts which RECs earned after the Rule went into effect; (7) when it excluded the "white notebook" from evidence; (8) when it erroneously precluded the **NCAA** from introducing the class notice into evidence; and (9) when it excluded evidence during the testimony of Roy Williams.

A. Hardship cases

[13] The **NCAA** argues that plaintiffs were not entitled to recover damages for pain, suffering, humiliation, emotional distress or "marital woes," and that the Court therefore erred in allowing eight witnesses to testify how the salary cap hurt them. The **NCAA** argues that such testimony was offered solely to buy the jury's sympathy and prevented the jury from taking a "reasoned, dispassionate look at plaintiffs' damage claims."

Plaintiffs were required to introduce proof of antitrust injury, however, and that proof necessarily included evidence that adoption of the Rule had financial consequences (sometimes devastating) for those who experienced it firsthand. Some of the witnesses were understandably emotional when they testified about the heavy price they paid to assume or remain in REC positions after the Rule went into effect, or how the Rule had forced them to abandon their chosen professions. In receiving such evidence of tangible economic loss, the Court not only allowed plaintiffs to prove the fact of injury, but also to meet **NCAA** evidence regarding mitigation and circumvention and to prove the fair market value of REC positions.[24] To the extent that such testimony made reference to pain, suffering, humiliation, emotional distress or "marital woes," it was largely embodied in random remarks and passing references that did not materially affect the fairness of the trial as a whole or cause substantial injustice to the defense. *Miller,* 516 F.Supp. at 1337. Because the Court should ignore errors

that do not affect "the essential fairness of the trial," *McDonough Power Equip.*, 464 U.S. at 553, 104 S.Ct. 845, such error—if it was error—does not warrant a new trial or judgment as a matter of law on any claims.

Moreover, to the extent that such evidence was erroneously received, the **NCAA** invited such error. It opened the door by continued insistence, through counsel and witnesses, that the **NCAA** had a pure heart when it enacted the Rule to create entry level positions for the benefit of young coaches. In fact, both sides attempted to play off the sympathy of the jury: **NCAA** witnesses, for their part, told heart-warming stories about how they had overcome obstacles similar to the Rule and had risen through the ranks of ***340** poverty and adversity. The **NCAA** also insinuated that a damage award against it would only hurt deserving student athletes.[25] Such evidence was irrelevant to this (and perhaps any) phase of the trial. Like plaintiffs' evidence of pain, suffering, humiliation, emotional distress and "marital woes," however, such plays to passion, sympathy and prejudice were too isolated, too brief and too infrequent to have had any material effect on the lengthy trial in this case.

The **NCAA** also invited any error with respect to pain, suffering, humiliation, emotional distress and "marital woes" when it insisted—under its "substitution theory"—that RECs suffered no adverse impact under antitrust law. The **NCAA** injected into the trial the legally erroneous argument that "[i]f new people came in that were happy to work for $7,000 or $10,000 or $12,000 or $15,500, there's no adverse impact." Tr. 2002–04. In doing so, it put in issue the question whether plaintiffs were "happy" to work in a market that was fixed by an antitrust conspiracy, and the Court did not err in allowing plaintiffs to counter that argument through proof of emotional distress.

B. Hearsay evidence of what third parties said about the Rule after May 25, 1995

The **NCAA** argues that it unequivocally withdrew from the antitrust conspiracy on May 25, 1995 and that the Court erred in admitting evidence to the contrary. At trial the Court made an extensive record with regard to the admissibility of such evidence under Rule 801(d)(2)(e) and Rule 803(3), Fed.R.Evid. The record speaks for itself. The Court is not persuaded of error in its rulings and the **NCAA's** motion for a new trial on this ground is overruled.

C. Prior **NCAA** rules

The **NCAA** complains that the Court improperly received evidence regarding salary caps that existed before 1992 for basketball and football, because such evidence (1) created the false and irrelevant impression that the **NCAA** has a habit of imposing improper and burdensome rules on coaches; (2) implied that plaintiffs were somehow entitled to damages for the earlier period; and (3) allowed Dr. Tollison to proclaim that compensation in basketball and football, prior to the Rule, was "fixed." The **NCAA** does not deny that basketball and football had salary caps even before the Rule went into effect on August 1, 1992, and the jury had to know this fact in order to understand Dr. Tollison's damage calculations, as well as those of Dr. Umbeck. This objection is specious; the challenged evidence was not irrelevant, nor was it prejudicial.

D. Hearsay evidence concerning average salaries before, during and after the Rule

The **NCAA** argues that the Court erred in admitting the so-called Gilardi chart, Plaintiffs' Exhibit 77, because plaintiffs did not produce it until the night before trial began; because it represented a new expert opinion and constituted inadmissible hearsay; because it was irrelevant and unduly prejudicial; and because it created a misleading impression that REC salaries had been cut when in fact it merely demonstrated the so-called "substitution effect." This complaint has been exhaustively addressed on the trial record. Given the **NCAA's** failure to lodge a contemporaneous objection at trial, along with the other facts referenced in plaintiffs' opposition brief, the Court is not convinced of error in regard to the Gilardi exhibit.

***341** E. Evidence regarding the "real" purpose of the Rule

The **NCAA** complains that the Court denied it an opportunity to prove that while the Rule came out of a cost reduction committee, its *primary purpose* was *not* to cut costs but to create entry level coaching positions. As a result, the **NCAA** contends, it was "unable to prove or argue that the REC rule had worked as *intended* and because it worked as *intended*, the population of RECs after the rule [sic] into effect was primarily entry level, not experienced coaches who took a pay cut or were held down by the REC rule." The Court has never understood

this argument and it does not understand it now. The **NCAA** had ample opportunity to prove that the *effect* of the Rule was to create entry level coaching positions, and the **NCAA** took full advantage of the opportunity to do so. Whether that effect was intentional, coincidental or otherwise, had absolutely no bearing on any issue that was properly before the jury.

In closing argument, plaintiffs' counsel made the passing comment that the Rule "hurt people, and the people it hurt were the coaches it was aimed at." Tr. 3718. The **NCAA** apparently construes this comment as a claim that the primary purpose of the Rule was to cut costs or hurt experienced coaches. It therefore argues—even though the comment occurred after both sides had rested their cases —that the **NCAA** should have been allowed to prove that the primary purpose of the Rule was *not* to cut costs or to hurt experienced coaches but to create entry level coaching positions. The **NCAA** did not ask to re-open the case to present such evidence from the various **NCAA** executives and university presidents who appeared on its witness list. And the fact that plaintiffs made this statement in closing did not retroactively open the door to "purpose" evidence at trial.

F. Amounts which RECs earned after the Rule went into effect

[14] The **NCAA** argues that the Court improperly prevented it from introducing "circumvention evidence," principally in the form of hearsay information which Dr. Umbeck gleaned through a mass of telephone calls to athletic directors and university officials at member institutions. The record on this issue is already complete. Suffice it to say that the record contains no evidence that expert economists do the job that Dr. Umbeck purported to do in his damage calculations, much less that expert economists reasonably rely on random telephone calls to athletic directors and university officials to calculate free market wages and damage calculations. *See* Rule 703, Fed.R.Evid. The **NCAA** basically presented Dr. Umbeck as a channeler, seeking to present non-expert, otherwise inadmissible hearsay through the mouth of an economist.

In *Gust v. Jones,* 162 F.3d 587 (10th Cir.1998), the Tenth Circuit Court of Appeals noted:

> We previously have held that it is not an abuse of discretion to exclude proffered expert testimony " 'when the normal life experiences of the jury would permit it to draw its own conclusions ..., based upon the lay testimony of eyewitnesses.' " *See Getter v. Wal–Mart Stores, Inc.,* 66 F.3d 1119, 1124 (10th Cir.1995) (citation omitted), *cert. denied,* 516 U.S. 1146, 116 S.Ct. 1017, 134 L.Ed.2d 97 (1996); *see also Thompson v. State Farm Fire & Cas. Co.,* 34 F.3d 932, 941 (10th Cir.1994) (holding that when expert testimony is offered to explain a question the jury is capable of assessing for itself, the trial court may exclude the testimony because it would not assist the trier of fact).

162 F.3d 587, 594–95. For reasons previously stated, the Court does not believe that it erred in limiting Dr. Umbeck to lay witness stature, insofar as he purported to channel into the jury box his hearsay conversations with athletic directors and university officials.

G. "The white notebook"

[15] In discovery, Dr. Umbeck generated a computer printout which contained an individualized analysis of 179 potentially damaged coaches, including their names, ages, coaching histories and income information, calculations whether each was injured and if so, by how much. The printout was approximately ***342** one-fourth of an inch thick. By trial, the **NCAA** had reinvented Dr. Umbeck's report and it appeared as a shiny white three-ring binder, approximately six inches thick, bursting—literally—with re-formatted information from the original report, and more.[26] The **NCAA** contends that the altered format made the data more "user-friendly," in that it was alphabetized,[27] included page breaks and tabs between individual coaches, contained detailed summary sheets, set out Dr. Umbeck's notes on a separate page, and had an ample quantity of blank paper in case the jury ran short.[28]

The **NCAA** complains that the Court erroneously excluded this notebook, Defendant's Exhibit 616, as well as Defendant's Exhibit 616B and alternative submissions which the **NCAA** offered sequentially, because no rule of evidence requires a party to present its evidence to the jury in the format tendered to the opposing party during discovery. In fact, the **NCAA** argues, a party is entitled to present evidence to the jury in a way that it believes effectively communicates the evidence.

The Court's scheduling order specifically directed that exhibits not identified and exchanged as required by the order, prior to trial, would not be permitted in evidence,

except by agreement of counsel or by order of the Court, or in proper rebuttal. *Fifth Supplemental Scheduling Order* (Doc. # 603) filed December 10, 1997, at 3. The **NCAA** did not identify and exchange Defendant's Exhibit 616 in accordance with that order and exclusion was therefore proper. Moreover, the fact that the **NCAA's** preferred format did not get to the jury did not affect the essential fairness of the trial, *McDonough Power Equip.*, 464 U.S. at 553, 104 S.Ct. 845, because the jury did receive all of the admissible information contained within the report. The **NCAA** does not contend otherwise, nor could it, given the fact that the Court received Defendant's Exhibit 616A into evidence.[29] Tr. 2279–80. Therefore, prejudicial error did not occur. *Miller,* 516 F.Supp. at 1337.

[16] **[17]** In addition, an expert's written report is generally inadmissible. *See, e.g., Engebretsen v. Fairchild Aircraft Corp.*, 21 F.3d 721, 728 (6th Cir.1994) ("Rule 702 permits the admission of expert opinion testimony not opinions contained in documents prepared out of court.") (citing Fed.R.Evid.702). Submission of a written expert report to the jury may call undue attention to the expert's trial testimony, and such material should not be admitted if the risk of prejudice substantially outweighs its probative value. *Id.* (citing Fed.R.Evid. 403 and *Nachtsheim v. Beech Aircraft Corp.*, 847 F.2d 1261, 1270–71 (7th Cir.1988)). The **NCAA's** present argument —that no rule of evidence requires that a party's evidence be shown to the jury in the format originally tendered to the opposing party—ignores the fact that in most cases, expert reports do not go to the jury in any format.

H. The class notice

The **NCAA** complains that the Court's refusal to receive the class notice in evidence deprived it of the opportunity to argue "the obvious inference" that if a class member did not personally submit a claim for money ***343** damages, "the class member did not believe he or she had been hurt by the REC rule." The Court sustained plaintiffs' objection, agreeing with plaintiffs' counsel that the notice was not relevant and that any potential relevance was outweighed by the danger of unfairly misleading the jury, inasmuch as the record contained no evidence that "anybody, other than the people who returned it, received it." Tr. 3000–01. In addition, the Court believed that without a complicated and lengthy tutorial on class action proceedings, the jury would be unduly confused and perhaps misinterpret the language of the class notice and the consequence of a failure to respond.

In retrospect, the Court remains unconvinced of error. The **NCAA** did not lay a sufficient foundation to warrant a presumption, arising from evidence that they were properly mailed and placed in the care of the postal service, that the notices were actually received. *Witt v. Roadway Express,* 136 F.3d 1424, 1429–30 (10th Cir.), *cert. denied,* 525 U.S. 881, 119 S.Ct. 188, 142 L.Ed.2d 153 (1998). Moreover, the fact that the notice was not in evidence did not prevent the **NCAA** from arguing that class members who failed to return the so-called RECIS forms in fact sustained no injury. Any error in the Court's evidentiary ruling was therefore without material prejudice to the rights of the **NCAA**.

I. Roy Williams

The **NCAA** complains that plaintiffs brought University of Kansas basketball coach Roy Williams to attend oral argument on summary judgment issues in November 1994, in order to influence the outcome of the proceedings, and that plaintiffs again "got away with it" at trial when they "use[d] Coach Williams' celebrity to sway the jury and deflect the jury's attention away from the inherent weaknesses of their case." The **NCAA** objects that the Court precluded this line of inquiry and excluded documents in which plaintiffs' counsel explicitly embraced a plan to influence the Court through the presence of Coach Williams.

At trial, the Court prohibited the **NCAA** from offering such evidence. The obvious effect of such evidence was to denigrate the summary judgment ruling on the antitrust violation issue (which the Tenth Circuit had already affirmed) by suggesting that the process which led to the summary judgment order had been corrupted by Coach Williams' presence at the summary judgment argument. Tr. 382, 390. Such evidence was therefore more prejudicial and misleading than it was probative. Moreover, any error in this regard was harmless. Fed.R.Evid. 403. The excluded evidence was not necessary for the **NCAA** to argue that plaintiffs "brought Coach Williams here to try to influence the jury, and he had very little substantive testimony to give." That argument was not only available to the **NCAA**; the **NCAA** in fact made it. Tr. 3775.

IV. Trial Court Bias

The **NCAA** argues that the Court "made no attempt to treat the parties equally" and that its manifest bias against the **NCAA** and its attorneys denied the **NCAA** a fair trial. This argument rests upon a version of the trial proceedings that is so twisted and one-sided that it does not bear repeating. At trial, the **NCAA's** counsel did not miss an opportunity to disparage plaintiffs, plaintiffs' witnesses, plaintiffs' counsel, and indeed the Court, with any available "slime factor." Tr. 390. That tactic continues in the recitation of grievances which the **NCAA** lodges against the impartiality of the judicial process itself, and it is consistent with the contempt and disdain which certain **NCAA** defense counsel have exhibited throughout the course of these proceedings. The Court will not dignify the **NCAA's** arguments by further discussion. Because it agrees with the reasoning set forth in *Plaintiffs' Joint Brief In Response To NCAA's Post–Trial Motions,* at 91–97, the Court adopts those arguments by reference as the ruling on this issue.

IT IS THEREFORE ORDERED that defendant's *Post Trial Motions Pursuant To Federal Rules Of Civil Procedure 23, 50 and 59* (Doc. # 852) filed May 18, 1998, be and hereby are **OVERRULED** in their entirety.

MEMORANDUM AND ORDER NUNC PRO TUNC

On May 4, 1998, the Court entered judgment in the foregoing cases. *See* Doc. # 839 ***344** in *Law,* Doc. # 97 in *Hall,* and Doc. # 46 in *Schreiber.* This matter comes before the Court on *Plaintiffs' Motion To Alter Or Amend Judgments* (Doc. # 848) filed May 15, 1998. [1] Pursuant to Rule 50(e), Fed.R.Civ.P., and Sections 4 and 16 of the Clayton Act, 15 U.S.C. §§ 15 and 26, plaintiffs seek an order which alters or amends the judgments nunc pro tunc by (1) adjusting their damage awards to present value based on the Consumer Price Index, (2) granting permanent injunctive relief, and (3) trebling the judgments under federal antitrust law.

For reasons stated more fully below, the Court finds that plaintiffs' motion should be sustained in part and overruled in part.

I. Adjustment Of Damage Awards To Present Value Based On Consumer Price Index

[18] Plaintiffs ask the Court to adjust the damage awards, using the Consumer Price Index ("CPI") to restore the purchasing power which they lost by virtue of the Restricted Earnings Rule ("the Rule"). According to plaintiffs, such an adjustment would bring the damage awards to net present value by accounting for inflation and (before trebling) increase the jury verdicts by $842,737.00 in *Law,* $708,669.00 in *Hall,* and $123,944.00 in *Schreiber.* [2] The National Collegiate Athletic Association ("**NCAA**") objects to the proposed adjustment on the ground that it equates to prejudgment interest and that plaintiffs have not established grounds for such an award under 15 U.S.C. § 15(a). [3]

The parties agreed that the issue of plaintiffs' entitlement to a CPI adjustment would be bifurcated and tried to the Court after the jury rendered its verdicts on damages. On April 14, 1998, the Court conducted an evidentiary hearing on that issue, outside the presence of the jury. At the hearing, Dr. Tollison explained his CPI calculations and testified that the proposed adjustment is not the same as interest. [4] The Court took under advisement the question whether the proposed CPI adjustment is the functional equivalent of prejudgment interest and is thus awardable only under Section 15(a). The issue is now ripe for decision.

Plaintiffs argue that the adjustment which they seek is not the same as prejudgment interest, citing two Fifth Circuit antitrust cases which allowed net present value adjustments, and note that their method of computing net present value results in a more conservative adjustment than those which the Fifth Circuit approved. [5] The **NCAA** argues ***345** that plaintiffs' adjustment is prejudgment interest in disguise because "compensation for the loss of use of money is, by definition, interest,"*Southern Pac. Transp. Co. v. United States,* 471 F.Supp. 1186, 1197 (E.D.Cal.1979), and because Dr. Tollison admits that interest includes an "inflation premium." Tr. 1466, 1469. The **NCAA** complains that because the Clayton Act would treble an inflation adjustment but not an award of prejudgment interest under Section 15(a), plaintiffs' proposed adjustment would allow them to recover more than the amounts permitted by Section 15(a). [6] The **NCAA** also argues that because antitrust damages are automatically trebled, any damage award more than compensates plaintiffs for the time value of money and that even if plaintiffs' awards were not fully compensatory,

the Clayton Act does not authorize inflation or interest adjustments. More specifically, the **NCAA** argues that the 1980 amendments to the Clayton Act permit prejudgment interest in only limited circumstances and that even before the 1980 amendments, courts rejected plaintiffs' "full compensation" rationale. *See Locklin v. Day–Glo Color Corp.*, 429 F.2d 873 (7th Cir.1970), *cert. denied,* 400 U.S. 1020, 91 S.Ct. 582, 27 L.Ed.2d 632 (1971); *Trans World Airlines, Inc. v. Hughes,* 449 F.2d 51 (2d Cir.1971), *rev'd on other grounds,* 409 U.S. 363, 93 S.Ct. 647, 34 L.Ed.2d 577 (1973).[7]

Congress has not yet provided that prejudgment interest can be awarded as a matter ***346** of course to private litigants in antitrust suits. Under the 1980 amendments to the Clayton Act, Antitrust Improvements Act, Pub.L. No. 96–349, § 4(a)(1), 94 Stat. 1156 (Sept. 12, 1980), where an antitrust case involves private litigants, plaintiffs' right to prejudgment interest is limited to situations in which a litigant has acted in bad faith to delay the proceedings. *See Fishman v. Estate of Wirtz,* 807 F.2d 520, 561 (7th Cir.1986) (Clayton Act amendments only permit private antitrust plaintiff to recover prejudgment interest if defendant guilty of unnecessary delay). Section 15(a), which codifies the 1980 amendments, provides as follows:

> § 15. Suits by persons injured
>
> (a) Amount of recovery; prejudgment interest
>
> ... The court may award under this section, pursuant to a motion by such person promptly made, simple interest on actual damages for the period beginning on the date of service of such person's pleading setting forth a claim under the antitrust laws and ending on the date of judgment, or for any shorter period therein, if the court finds that the award of such interest for such period is just in the circumstances. In determining whether an award of interest under this section for any period is just in the circumstances, the court shall consider only—
>
> (1) whether such person or the opposing party, or either party's representative, made motions or asserted claims or defenses so lacking in merit as to show that such party or representative acted intentionally for delay, or otherwise acted in bad faith;
>
> (2) whether, in the course of the action involved, such person or the opposing party, or either party's representative, violated any applicable rule, statute, or court order providing for sanctions for dilatory behavior or otherwise providing for expeditious proceedings; and
>
> (3) whether such person or the opposing party, or either party's representative, engaged in conduct primarily for the purpose of delaying the litigation or increasing the cost thereof.

15 U.S.C. § 15(a).

At the evidentiary hearing on April 14, 1998, Dr. Tollison testified that the Consumer Price Index is a price index constructed by the United States Bureau of Labor Statistics, which samples the prices of goods over time so that adjustments for inflation can be made in indexed government benefit programs and the like. Tr. 1457, 1459. Dr. Tollison proposed a CPI adjustment "to essentially maintain constant purchasing power of the dollar [ ] damages that accrue[d] to the coaches." Tr. 1456–57.

According to Dr. Tollison, interest is a different concept The function of the CPI adjustment is "to reflect changing purchasing power of a dollar ... over time." Interest, on the other hand, is a function of the balance between the supply and demand for loanable funds; it does not represent the "change in the market prices of a bundle of goods,"[8] and it therefore does not "restore coaches to the same purchasing power dollars" they would have enjoyed without the Rule. Tr. 1457, 1459–60, 1466. Dr. Tollison also explained that nominal interest rates (which represent what "most of us think of as the rate if we go to the bank") include not only a "real rate of interest" but an inflation rate of return. The "real rate of interest" represents the productivity of capital, *i.e.*, the pure rate for the use of money. The "inflation rate of return" attempts to capture the anticipated change in purchasing power which results from the fact that "the dollars [the lender is] going to be paid in are worth less than the dollars he lent." Tr. 1462–63, 1465. In this respect nominal interest rates are no different from any other price in the economy: all prices —whether for groceries, bank loans or running shoes— include inflation rates. Tr. 1464, 1466–67.

From Dr. Tollison's testimony that loans in an inflationary economy will be repaid with deflated currency and that nominal interest rates include an inflation rate of return to ***347** hedge against future loss due to inflation, the **NCAA** suggests that CPI and other inflation

adjustments are the functional equivalent of simple interest under Section 15(a) and that if plaintiffs were to receive both prejudgment interest and a CPI adjustment, they would be twice compensated for any loss in the purchasing power of the dollar over time. Plaintiffs do not seek prejudgment interest under Section 15(a), however, and the **NCAA's** concern on this score is unwarranted. The **NCAA** also argues that in Section 15(a), "Congress has said that that rate which includes cost of living may be awarded if, and only if" the Court finds that defendant acted in bad faith to delay the proceedings. Tr. 1475. Stated otherwise, the **NCAA** reasons that Section 15(a) authorizes an inflation component which is recoverable *only* as part of prejudgment interest.[9]

The Court is unpersuaded by the **NCAA's** position. The **NCAA** cites no authority for its argument that Section 15(a) permits compensation for the decreased purchasing power of the dollar over time, but only in the guise of prejudgment interest. Moreover, the Court is in substantial agreement with the Fifth Circuit decisions in *Heatransfer Corp. v. Volkswagenwerk A.G.* and *Multiflex, Inc. v. Samuel Moore & Co.*, and the dissent of Judge Easterbrook in *Fishman v. Estate of Wirtz.* Losses due to the decreased purchasing power of the dollar represent real losses to plaintiffs. Although the comments of Judge Easterbrook concern the recoverability of prejudgment interest in private antitrust litigation, they are arguably more germane to the issue presented by this case:

> Neither a count of judicial noses nor the observation that the Sherman Act was silent should obscure the fact that the time value of money works in defendants' favor. Antitrust cases can be long-lived affairs. This one has lasted 14 years, 2 ½ of which passed between the finding of liability and the award of damages. During all of the time, the defendants held the stakes and earned interest.... To deny prejudgment interest is to allow the defendants to profit from their wrong, and because 14 years is a long time the profit may be substantial.
>
> Is this small beer, to be made up by the trebling of the damages? Hardly. Any erosion of the trebling on account of a denial of interest undermines the deterrent force of the antitrust law. Trebling makes up for the fact that antitrust violations are hard to detect and prove. The acts of the defendants were easy to detect, but the court's rule presumably applies in a cartel case as well. These may be detected only belatedly, and the denial of interest will make trebling much less useful in increasing the damages defendants expect to pay. The expected damages are the deterrent. Today's decision reduces that deterrent....The denial of prejudgment interest systematically undercompensates victims and underdeters putative offenders. We should allow, indeed require, such awards.

807 F.2d at 584.

In this case, plaintiffs would have earned, possessed, spent or invested the compensation which they lost by virtue of the Rule. The Rule effectively forced plaintiffs to invest that compensation with their employers, the member institutions of the **NCAA**, and they should receive damages which compensate not merely for the fact of nonpayment but also for any demonstrated loss of purchasing power which has resulted from the delay in payment. Trebling may or may not keep pace with inflation; the **NCAA** does not argue in this case that it has. To deny a CPI adjustment would be to allow the **NCAA** and its members to profit from a wrong. Because these actions have been pending for four years, the profits of **NCAA** member institutions have without doubt been substantial. To deny plaintiffs a CPI adjustment would undercompensate them and underdeter the **NCAA** and other putative offenders.

The Court finds by a preponderance of the evidence presented at the hearing on April 14, 1998, that the CPI adjustment which plaintiffs propose is not merely "interest" in disguise. Consequently, the Court finds that Section 15(a) does not prohibit the requested ***348** adjustment without proof of delay and other factors enumerated in the statute. The Court also finds that the proposed adjustment is necessary to fully compensate plaintiffs for losses which they have sustained and that it should be allowed in this case.

The parties waived their right to a jury trial on the CPI issue, and the Court must therefore decide how much of a CPI adjustment to allow. In doing so the Court is guided by familiar rules that govern the award of antitrust damages. In economic terms, plaintiffs are entitled to recover the difference between what they could have made in a hypothetical free economic market and what they actually made in spite of **NCAA's** anticompetitive activities. *Bigelow v. RKO Radio Pictures, Inc.*, 327 U.S. 251, 264, 66 S.Ct. 574, 90 L.Ed. 652 (1946). Once an antitrust violation has been established, however, the burden of proving damages is "to some extent lightened."

J. Truett Payne Co. v. Chrysler Motors Corp., 451 U.S. 557, 568, 101 S.Ct. 1923, 68 L.Ed.2d 442 (1981). Our willingness to accept a degree of uncertainty in fixing the amount of damages rests in part on the difficulty of ascertaining business damages, in that "[t]he vagaries of the marketplace usually deny us sure knowledge of what plaintiff's situation would have been in the absence of the defendant's antitrust violation." *Id.* at 566, 101 S.Ct. 1923. Our willingness also rests on the principle that "it does not come with very good grace" for the wrongdoer to insist upon specific and certain proof of the injury which it has itself inflicted. *Id.* Therefore damages may be awarded under relaxed rules, on the basis of plaintiffs' damage estimate. *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 395 U.S. 100, 89 S.Ct. 1562, 23 L.Ed.2d 129 (1969). "In the absence of more precise proof, the factfinder may 'conclude as a matter of just and reasonable inference from the proof of defendants' wrongful acts and their tendency to injure plaintiffs' business, and from the evidence of the decline in prices, profits and values, not shown to be attributable to other causes, that defendants' wrongful acts had caused damage to the plaintiffs." [10] *Id.* at 123–24, 89 S.Ct. 1562. Therefore, to establish the amount of injury, plaintiffs need not establish their damages with "mathematical precision." *Cackling Acres, Inc. v. Olson Farms, Inc.*, 541 F.2d 242, 246 (10th Cir.1976), *cert. denied*, 429 U.S. 1122, 97 S.Ct. 1158, 51 L.Ed.2d 572 (1977). Plaintiffs need only provide such evidence that the factfinder is not left to "speculation or guesswork" in determining the amount of damages to award. *Bigelow*, 327 U.S. at 263–65, 66 S.Ct. 574; *see also Zenith Radio Corp.*, 395 U.S. at 123–24, 89 S.Ct. 1562.

Bearing in mind that the proof necessary to set the amount of damages need not be exact, the Court does not hesitate in finding that each class should be awarded 75% of the CPI adjustment which Dr. Tollison attributed to it. The Court also agrees with plaintiffs' proposed adjustment for Mary Beth Spencer Dyson, a member of the *Hall* class. At trial, the parties stipulated that Dyson suffered $32,000.00 in damage as a result of the Rule. Plaintiffs note that because that amount exceeds the damage estimate which Dr. Tollison calculated for Dyson ($18,304.00 without a CPI adjustment), the total proposed adjustment for the *Hall* class should be slightly higher than 75% of Dr. Tollison's figure.

The Court rejects the **NCAA** argument that Dr. Tollison's figures are unreliable because, whereas the jury verdicts covered the classes, Dr. Tollison applied his CPI adjustment to individual class members. His methodology does not present an "insuperable problem" because the Court does not agree that "there is no accurate way to translate and apply Dr. Tollison's adjustment to the verdicts." It is obvious to the Court that in its deliberations, the jury conducted a painstaking review of the evidence and in particular the conflicting expert testimony of Dr. John Umbeck (defendant's expert) and Dr. Tollison, concerning the fact and amount of damages. The jury obviously compared Dr. Umbeck's figures to those of Dr. Tollison ***349** and having done so, concluded that Dr. Tollison's opinion was the weightier and more convincing of the two. The jury gave substantial but not undue weight to Dr. Tollison's figures, discounting them by 25% across the board for each class. It is obvious that in doing so, the jury implicitly found that all class members in each class had suffered antitrust injury and that they were therefore entitled to damages—but not to the extent claimed by Dr. Tollison. Stated otherwise, the jury must have concluded that Dr. Tollison's damage calculations! were too liberal and required a 25% reduction across the board.

The Court does not disagree with anything it can surmise about the jury deliberations in this long, arduous and acrimonious case. As a matter of just and reasonable inference from proof of the **NCAA's** wrongful acts and their tendency to injure plaintiffs' business, the jury concluded that the **NCAA** had caused damages that were reasonably estimated at 75% of the level predicted by Dr. Tollison. The Court does not second-guess that conclusion and consequently finds that it is reasonable to award each class 75% of the requested CPI adjustment, as follows:

	Original Verdict	**Proposed CPI Adjustment**
Law	$11,210,791.00	$842,737.00
Hall	$ 9,486,192.00	$708,669.00
Schreiber	$ 1,580,115.00	$123,944.00

The damage awards in each case are therefore adjusted to reflect the following totals: $12,053,528 in *Law*, $10,194,861 in *Hall* and $1,704,059 in *Schreiber*.

II. Permanent Injunctive Relief

Plaintiffs ask the Court to enter a comprehensive order which permanently enjoins the **NCAA** and its members from future antitrust violations, to restore competition and to "bring home to the **NCAA** and its members their obligations under the antitrust laws." *Plaintiffs' Joint Memorandum In Support Of Motions To Alter Or Amend Judgments* (Doc. # 849) filed May 15, 1998, at 7 Specifically, plaintiffs ask that each judgment be amended "to include appropriate injunctive relief including but not limited to an order enjoining the **NCAA** ... and any person in active concert or participation with them ... from enacting any restrictions or limitations on the compensation of coaches employed by **NCAA** member institutions." *Plaintiffs' Motion To Alter Or Amend Judgments* (Doc. # 848) filed May 15, 1998, at 3.

Plaintiffs argue that permanent injunctive relief is appropriate because the jury found that the **NCAA** did not withdraw from the conspiracy on May 25, 1995, and because the **NCAA** "has displayed a complete lack of understanding of the seriousness of the antitrust violation involved in this case" and made it clear that it "will modify its unlawful conduct only by as much and for as long as it has to." *Id.* Plaintiffs note that the permanent injunction which the Court entered on January 5 1996, *see* 1996 WL 104328 (D.Kan. Jan. 5, 1996), applied only to *Law* and was limited by its terms to the two representative plaintiffs in that case. Accordingly, plaintiffs ask the Court to enter a more comprehensive injunction in favor of all classes.

In response, the **NCAA** argues that plaintiffs fail to demonstrate their entitlement to permanent injunctive relief and do not even attempt to satisfy the requirements for issuance of an injunction. Specifically, the **NCAA** argues that the jury's finding on lack of withdrawal does not satisfy the requirements for such relief, and that any lack of "repentance" is irrelevant. The **NCAA** also notes that mere proof of a past violation does not justify injunctive relief because an injunction is only available to prevent continuing or future harm. *See e.g., United States v. Oregon State Med. Soc'y*, 343 U.S. 326, 333, 72 S.Ct. 690, 96 L.Ed. 978 (1952).

One month after the Court granted permanent injunctive relief to the named plaintiffs in Law, the Court took up the issue in *Schreiber*. *See Schreiber v. National Collegiate Athletic Ass'n*, 916 F.Supp. 1105 (D.Kan.1996). Relying on the previous injunction order in *Law*, plaintiffs sought an order which permanently enjoined the **NCAA** from enforcing or attempting to enforce a compensation limitation against named plaintiff Collozzo, the only plaintiff in *Schreiber* who was then employed as a restricted earnings coach. The Court declined to grant injunctive relief reasoning that Collozzo was not threatened with real and immediate injury because the **NCAA** had rescinded the ***350** Rule at its recent convention, no similar legislation had been presented or enacted, and no further convention was scheduled for twelve months. *Id.* at 1106.

[19] **[20]** Section 16 of the Clayton Act authorizes injunctive relief upon a showing of "threatened" injury; plaintiffs need only demonstrate a significant threat of injury from an impending antitrust violation or from a contemporary violation that is likely to continue or recur. *Zenith Radio Corp.*, 395 U.S. at 130, 89 S.Ct. 1562; *accord, United States v. W.T. Grant Co.*, 345 U.S. 629, 633, 73 S.Ct. 894, 97 L.Ed. 1303 (1953) (court's power to grant injunctive relief survives discontinuance of illegal conduct but moving party must prove "cognizable danger of recurrent violation"). Here, plaintiffs have failed to prove an impending antitrust violation or a contemporary violation that is likely to continue or recur. They argue that a permanent injunction is necessary to restore competition, prevent future violations and inform the **NCAA** of its obligation not to violate the antitrust laws. They offer no evidence, however, of a cognizable danger that the **NCAA** is poised to re-enact compensation limits like those found in the Rule. As the Court has previously noted, injunctive relief is unwarranted absent evidence that plaintiffs are presently threatened with loss or damage from action that the **NCAA** has taken or might take against them. *Schreiber*, 916 F.Supp. at 1106.

In contrast with the circumstances in January of 1996, when the Court did enter an injunction in this case, *see Law*, 1996 WL 104328, plaintiffs point to no real or immediate threat that **NCAA** members will re-enact the Rule or similar provisions, either at an annual convention or otherwise. [11] The Court has no way of judging whether

the **NCAA** is repentant, or sincerely so, and this line of inquiry is ultimately unproductive because injunctive relief is not designed to extract repentance but to secure compliance. The finding that the **NCAA** did not withdraw from the conspiracy on May 25, 1995 may hint that the **NCAA** is predisposed to commit future antitrust violations. That prospect, however, seems remote; if the history of this case proves anything, it proves that the **NCAA** made a monstrous miscalculation about the costs and the benefits of the Rule. Whether that miscalculation was born of arrogance, inattention, stupidity or even —as it claims—the purest of altruistic motives, is now beside the point. If the **NCAA** has learned nothing else, it has surely acquired a more informed understanding of its obligations under federal antitrust law. If the **NCAA** should nonetheless commit future antitrust violations, an appropriate remedy can be fashioned. On this record, plaintiffs have not justified their request for permanent injunctive relief. Accordingly, their motion must be overruled.

III. Treble Damages

Plaintiffs ask the Court to treble their damages under 15 U.S.C. § 15. The **NCAA** has no basis on which to object and plaintiffs' motion must be sustained. The Clerk is directed to enter an amended damage award of $36,160,584 in *Law,* $30,584,583 in Hall, and $5,112,177 in *Schreiber.*

IT IS THEREFORE ORDERED that *Plaintiffs' Motion To Alter Or Amend Judgments* (Doc. # 848) filed May 15, 1998 be and hereby is **SUSTAINED** as to plaintiffs' request for a CPI adjustment of damages and for treble damages, and that the Clerk enter judgments nunc pro tunc in the amount of $36,160,584 in *Law,* $30,584,583 in *Hall,* and $5,112,177 in *Schreiber.* Plaintiffs' motion is otherwise overruled.

All Citations

185 F.R.D. 324, 1999-2 Trade Cases P 72,630

Footnotes

1 For detailed information regarding the facts and proceedings in this action, see the Court's *Memorandum And Order* (Doc. # 103) filed July 25, 1995, sustaining plaintiffs' motion for summary judgment (reported as *Law v. National Collegiate Athletic Ass'n,* 902 F.Supp. 1394 (D.Kan.1995), *aff'd,* 134 F.3d 1010 (10th Cir.), *cert. denied,* 525 U.S.822, 119 S.Ct. 65, 142 L.Ed.2d 51 (1998)); the *Memorandum And Order* (Doc. # 815) filed April 20, 1998, overruling defendant's motion for partial summary judgment (reported as *Law v. National Collegiate Athletic Ass'n,* 5 F.Supp.2d 921 (D.Kan.1998)); and the *Memorandum And Order* (Doc. # 814), filed April 17, 1998, overruling defendant's motion to decertify classes.

2 The request for a remittitur appears in the **NCAA's** *Brief In Support Of Post Trial Motions* (Doc. # 853) at 3. The **NCAA** offers no argument or authority to justify this request but simply cites closing argument where defense counsel entreats the jury, "when you're all finished, after your deliberations, please ... do not award more than ... these amounts of money." Tr. 3836. Plaintiffs oppose the request for a remittitur, arguing that the Court should exercise its discretion to reduce an award of damages only where the verdict is so plainly excessive that it shocks the conscience and it is reasonable to infer that the award was the product of bias, passion or prejudice. *See Sheets v. Salt Lake County,* 45 F.3d 1383, 1390 (10th Cir.1995); *Moore v. Subaru of America,* 891 F.2d 1445, 1451–52 (10th Cir.1989). The verdict in this case is not plainly excessive and it is not reasonable to infer that it was the product of bias, passion or prejudice. *See* discussion, *infra.* Moreover, the damage analysis which the **NCAA** asked the jury to adopt was inherently implausible, on any number of grounds. Even if the Court were otherwise inclined to grant a remittitur, it could not endorse the **NCAA** calculations in good conscience. Those calculations reflect the work of Dr. John Umbeck, the **NCAA** expert whose testimony was inherently untenable in many respects. The jury astutely concluded as much. The Court agrees and overrules the **NCAA's** request for a remittitur.

3 The Court does not further discuss the **NCAA's** request for judgment as a matter of law as to specific categories of damages, class certification or issues under *Daubert v. Merrell Dow Pharm., Inc.,* 509 U.S. 579, 113 S.Ct. 2786, 125 L.Ed.2d 469 (1993). As to the allegation that the **NCAA** has no liability for damages which plaintiffs sustained after the date of its alleged withdrawal from the conspiracy, the Court draws counsel's attention to *United States v. Gonzalez,* 797 F.2d 915, 916–17 (10th Cir.1986) ("Once any conspirator commits ... an overt act, the crime of conspiracy is complete; and no member of the conspiracy can withdraw from that crime. Effective withdrawal is limited to future crimes the remaining conspirators might commit.") (footnote omitted).

4 Under the Federal Rules of Evidence, error may not be predicated upon a ruling which admits or excludes evidence unless a substantial right of the party is affected, and "a timely objection or motion to strike appears of record, stating the specific ground of the objection, if the specific ground was not apparent from the context;" however, "[n]othing in this rule precludes taking notice of plain errors affecting substantial rights although they were not brought to the attention of the court." Rule 103(a)(1), (d), Fed.R.Evid.

5 Perhaps understandably, the **NCAA's** brief on this point makes only passing reference to Dr. Umbeck. Defendant's critique of Dr. Tollison's methodology comes straight from the mouth of Dr. Umbeck, however, and it is one which the jury in substance rejected.

6 This "substitution theory," which is aptly described as "theory" rather than a proven fact of general applicability to the plaintiff classes, provided the platform for the **NCAA's** argument that the Rule *benefitted* RECs by creating job vacancies that otherwise would not have existed and that RECs had no standing to complain about mere loss of compensation when—but for the good graces of the **NCAA**—they would have lacked jobs. As defense counsel stated otherwise, in antitrust lingo, "[i]f new people came in that were happy to work for $7,000 or $10,000 or $12,000 or $15,500, there's no adverse impact" and defendant was entitled to judgment as a matter of law. Tr. 2002–04.

This theory of defense, which was not anchored in established case law, ignored the fact that before the Rule went into effect, the market established competitive salaries for the positions which later became restricted. The effect of the rule, and indeed its very purpose, as established by the summary judgment record, was to inhibit the effect of those free market forces—whether by reducing the compensation of existing coaches *or by forcing them out* and creating entry level positions for new coaches. The record contains no evidence that plaintiff RECs were less accomplished than their predecessors or that passage of the Rule worked any change in REC job responsibilities. Dr. Tollison testified that no major environmental factors other than the Rule could have caused the salary patterns revealed by the evidence. On such evidence the jury was entitled to find that the Rule prevented RECs from earning that compensation which the free market had previously established as competitive wages for their positions. The fact that RECs agreed to work for less than competitive wages does not mean that they were (in the **NCAA's** words) "happy" about it or that the Rule caused them no injury.

Viewing the evidence in the light most favorable to plaintiffs, the record shows that the Rule injured *both* those highly paid coaches who had to quit their positions because of the salary cap and those less highly paid coaches who succeeded them. On these facts, it does not matter why the latter got their jobs or how long they had held them; regardless of why the jobs were created or how recently the RECs had been employed, they were entitled to work in a market that was not infested with a conspiracy to violate the federal antitrust laws.

7 In closing arguments plaintiffs' counsel asked the jury to return verdicts of $14,947,722 in *Law,* $2,106,820 in *Schreiber,* and $12,648,257 in *Hall.* The jury returned verdicts which totalled exactly 75% of the amount requested for each class: $12,210,791 in *Law,* $1,580,115 in *Schreiber,* and $9,486,192 in *Hall.*

8 The trial lasted 16 days, starting on April 6, 1998 and ending on April 28, 1998.

9 The **NCAA** complains that "telling the jury the outcome of the summary judgment proceeding deprived the **NCAA** of the key benefit it would have derived from a unitary trial: being able to put all of its evidence and all of its arguments before the jury." The fact is, however, that very early on, the **NCAA** consented to bifurcation. It cannot consent to bifurcation and simultaneously be heard to complain that the Court denied it the key benefits of a unitary trial.

10 Instruction 18 instructed the jury, in relevant part, that in order to prevail, plaintiffs must prove that the Rule was "a material cause of some of their injury." It continued as follows:

[Y]ou may conclude as a matter of just and reasonable inference from the proof of defendant's antitrust violation and its tendency to injure plaintiffs in their business or property, and from any evidence of a decline in the compensation of restricted earnings coaches which is not shown to be attributable to other causes, that the **NCAA's** wrongful act caused injury to members of the class. Under this test, so long as injury to the class was widespread, the fact that certain class members may have escaped injury altogether would not defeat a finding that members of the class suffered injury.

Causation is established if the Rule played a substantial part in bringing about or actually causing injury in the business or property of class members and the injury was either a direct result or a reasonably probable consequence of the Rule. This does not mean that the law recognizes only one cause of injury, consisting of only one factor or thing or the conduct of only one person. On the contrary, many factors or things, or the conduct of two or more may operate at the same time, either independently or together, to cause injury, and, in such a case, each may be a cause.

Instruction 20 stated as follows:

The term "by reason of," as used in Instruction No. 18, refers to causation. Plaintiffs must establish that as a matter of fact and with a fair degree of certainty, the Rule was a material cause of some of their injury. They need not prove that the Rule was the sole or exclusive cause of their injury, and they are not required to rule out all possible alternative sources of injury. It is enough that the Rule contributed substantially to plaintiffs' injury, even if other factors amounted in the aggregate to a more substantial cause. Plaintiffs must prove, however, that but for the Rule, they would not have sustained injury in their business or property.

Instruction 21 stated in relevant part as follows:

Plaintiffs have the burden of proving the amount of damages which were proximately caused by the conspiracy. Once plaintiffs have proved by a preponderance of the evidence that the Rule was a material cause of some of their injury, however, their burden of proving damages is to some extent lightened.

* * *

Proximate cause is established if the Rule played a substantial part in bringing about or actually causing the damage and the damage was either a direct result or a reasonably probable consequence of the Rule. This does not mean that the law recognizes only one proximate cause of damage, consisting of only one factor or thing or the conduct of only one person. On the contrary, many factors or things, or the conduct of two or more persons, may operate at the same time, either independently or together, to cause damage; and in such a case, each may be a proximate cause.

11 Instruction 15 stated in relevant part as follows:

This instruction sets forth the claims of the parties. The claims are not evidence in the case, but rather must be proved by the evidence in the case.

Plaintiffs claim ... that they lost academic year compensation that they would have received if the Rule had not been adopted; ... and that they are entitled to recover from the **NCAA** their damages for lost academic year compensation beginning August 1, 1992, when the Rule went into effect.

Plaintiffs have the burden of proving by a preponderance of the evidence that their claim are more probably true than not true.

The **NCAA** denies plaintiffs' claims.

12 Instruction 19 stated as follows:

Since the purpose of the antitrust laws is the prevention of restraints to free competition in business and commercial transactions, the term "injury in their business or property" is given a naturally broad and expansive meaning which includes injury in plaintiffs' competitive positions, that is, in their ability to earn a competitive wage as coaches in Division I sports at **NCAA** member institutions.

You are instructed that plaintiffs have been injured in their "business" if you find that they have suffered injury to any of their commercial interests or enterprises. You are further instructed that a person whose money has been diminished has been injured in his or her "property"; therefore plaintiffs have been injured in their "property" if you find that their compensation was artificially reduced by reason of the Rule. Loss of employment or the opportunity to seek employment is included within the meaning of the term "business or property."

The term "injury in business or property" does not include personal injuries such as emotional distress or humiliation.

13 Instruction 18 stated in relevant part as follows:

The law permits you to find that members of the class suffered some injury in their business or property if you find that:

(1) the members of the conspiracy were able to effectuate the conspiracy;

(2) compensation for restricted earnings coaches in Division I sports experienced generalized decreases, to below competitive levels, while the Rule was in effect; and

(3) the **NCAA** and its members dominated or controlled the market for such coaching services.

Instruction 19 provided in pertinent part as follows:

Since the purpose of the antitrust laws is the prevention of restraints to free competition in business and commercial transactions, the term "injury in their business or property" is given a naturally broad and expansive meaning which includes injury in plaintiffs' competitive positions, that is, in their ability to earn a competitive wage as coaches in Division I sports at **NCAA** member institutions.

14 Instruction 23 stated as follows:

The **NCAA** claims that it withdrew from the conspiracy on May 25, 1995. In order for you to find that the **NCAA** withdrew from the conspiracy, it must prove that the following are more probably true than not true:

1. That beginning May 25, 1995, the **NCAA** engaged in conduct which was inconsistent with the object of the conspiracy; and

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2. That the **NCAA** acted in a manner reasonably calculated to notify co-conspirators that it was no longer participating in the conspiracy.

Mere inactivity is not proof of withdrawal, nor is a mere change of policy. Furthermore, even if defendant may tell others of its intention to withdraw, it has not withdrawn if it continues to act in furtherance of the object of the conspiracy. Withdrawal from a conspiracy requires affirmative action which disavows or defeats the purpose of the conspiracy, by communication of the abandonment in a manner reasonably calculated to reach co-conspirators. The withdrawal must be complete and in good faith.

15 Instruction 8 provided as follows:

You are instructed that defendant, the National Collegiate Athletic Association, is a voluntary association, rather than a natural person, and thus it can act only through its officers, agents, and employees. Therefore, whenever mention is made of the **NCAA** doing or not doing something, then of course it means defendant or any of its officers, agents or employees, acting within the scope of their authority.

You are also instructed that the **NCAA**, even though a voluntary association, is entitled to the same fair and impartial consideration as an individual under like circumstances.

16 Instruction 9 stated as follows:

The law does not require any party to call as witnesses all persons who may have been present at any time or place involved in the case, or who may appear to have some knowledge of the matters in issue at this trial. Nor does the law require any party to produce as exhibits all papers and things mentioned in the evidence in the case.

17 Instruction 11 stated as follows:

Certain charts and summaries have not been received into evidence, but have been shown to you in order to help explain the facts disclosed by the testimony of witnesses and the books, records, and other documents which are in evidence in the case. Such charts or summaries not in evidence are not in and of themselves evidence or proof of any facts. If such charts or summaries do not correctly reflect facts or figures shown by the evidence in the case, you should disregard them.

In other words, such charts or summaries are used only as a matter of convenience; so if, and to the extent that you find they are not in truth summaries of facts or figures shown by the evidence in the case, you are to disregard them entirely.

18 Instruction 12 stated as follows:

Some evidence has been received for only a limited purpose, and you must consider it for that limited purpose and no other. Those exhibits are as follows:

Plaintiffs' Exhibit 103 and Defendant's Exhibit 659: Plaintiffs' Exhibit 103 and Defendant's Exhibit 659 reflect salary data and other information which Dr. Tollison and Dr. Umbeck relied upon in formulating their opinions in this case. These exhibits were received into evidence because they may assist you in understanding and evaluating the testimony of Dr. Tollison and Dr. Umbeck. However, the data in these exhibits has not necessarily been established through the testimony of any witness who has appeared in court, under oath, to vouch that it is true. Except to the extent that the data has been verified in court, through witnesses, deposition testimony or other evidence which the Court has received into evidence, it is hearsay. To that extent, you may not consider Exhibit 103 or Exhibit 659 as evidence that the underlying data is true, or use it for any purpose other than to assist you in understanding the testimony of Dr. Tollison and Dr. Umbeck.

Plaintiffs' Exhibit 12: Plaintiffs' Exhibit 12 is the **NCAA** compliance file which concerns the Rule which is at issue in this case. Plaintiffs offered this file into evidence to show how **NCAA** members perceived the binding effect of the Rule. The Court received it for that limited purpose, but as with Exhibits 103 and 659, the information in the file has not necessarily been established through the testimony of any witnesses who appeared in court, under oath, to vouch that it is true. Except to the extent that such information has been verified in court, through witnesses, deposition testimony or other evidence which the Court has received into evidence, it is hearsay and you may not consider the file as evidence that the information contained in it is true, or use it for any purpose other than what I have instructed.

19 Instruction 13 stated as follows:

As I mentioned at the beginning of the case, effective August 1, 1992, the **NCAA** enacted a rule which limited the annual compensation of certain assistant coaches. In this case we have referred to this rule as the "restricted earnings rule" or simply "the Rule." The Court has certified the three cases as class actions, which means that the named individual plaintiffs bring suit not only on their own behalf, but also on behalf of all other coaches in the classes. The classes in this. case consist of all persons who were employed on a paid basis as restricted earnings coaches in **NCAA** Division I programs on or after August 1, 1992. The *Law* class consists of restricted earnings coaches in the

sport of men's basketball. The *Schreiber* class consists of restricted earnings coaches in the sport of men's baseball. The *Hall* class consists of restricted earnings coaches in all other sports.

Plaintiffs in the three cases claimed that the **NCAA** conspired with its members to reduce salary competition in the market for coaching positions in Division I sports. Specifically, they challenged the Rule's limit on compensation under Section 1 of the Sherman Antitrust Act, 15 U.S.C. § 1, which prohibits any unlawful "contract, combination ... or conspiracy, in restraint of trade." Under the law, a conspiracy may consist of any mutual agreement or arrangement, knowingly made, between two or more competitors. To prevail on a Section 1 claim under the Sherman Act, the coaches needed to prove that the **NCAA** (1) participated in an agreement that (2) unreasonably restrained trade. The parties did not dispute the first element, the existence of an agreement. Therefore the Court had to decide whether the Rule was an unreasonable restraint of trade. In resolving this issue, the Court determined that the Rule unreasonably restrained trade because it had a substantially adverse effect on competition, that is, that there was an agreement to fix salaries, the agreement was effective, and that the salaries set by the agreement were more favorable to **NCAA** members than otherwise would have resulted from the operation of competitive market forces. The Court then examined whether the procompetitive benefits of the Rule justified the anticompetitive effects, so that the Rule on balance was reasonable. The Court rejected the **NCAA's** argument that cost-cutting was a valid procompetitive justification under federal antitrust law, and held that the Rule did not have procompetitive benefits which outweighed its anticompetitive effects. Therefore the Court concluded that the Rule was illegal under federal antitrust law.

We have now completed the second phase of the trial. Your job is to decide whether the Rule caused injury to plaintiffs and if so, the amount of damages which they should recover. At this point you should not be concerned with the reasons why the Rule was enacted, or whether the **NCAA** enacted the Rule in a good faith belief that it would not violate the federal antitrust laws. A conspiracy to fix prices is unlawful, even though the conspiracy may be formed or engaged in for what may appear to the conspirators to be laudable motives. A conspiracy cannot be justified under the federal antitrust laws, for example, even though the conspiracy may have been formed or engaged in to prevent ruinous competition. A claim of good motives, like a claim of ignorance of the law, cannot justify or excuse a violation of the federal antitrust laws, and so would be no defense in this case. Your sole job is to examine the effect of the Rule, to decide whether the Rule caused injury to plaintiffs and if so, to what extent.

20 Instruction 14 stated as follows:

Burden of proof means burden of persuasion, and is sometimes referred to as establishing something by a preponderance of the evidence. Parties who have the burden of proof on any issue must persuade you that their claims are more probably true than not true. In determining whether a party has met this burden, you will consider all the evidence, whether produced by plaintiffs or by defendant.

The weight of the evidence on any issue is not determined by the number of witnesses, but by how reasonable, persuasive and satisfying the evidence is to you.

21 Instruction 16 stated as follows:

Proof that the **NCAA** committed an antitrust violation does not afford plaintiffs an automatic right to damages, since such proof establishes only that injury may result and does not mean that plaintiffs have been actually injured. In order to recover damages under federal antitrust law, plaintiffs must establish that they are entitled to damages under Section 4 of the Clayton Act, 15 U.S.C. § 15. Section 4 provides that "any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States."

22 Instruction 17 stated as follows:

Under the law, a person may file suit not only on his or her individual behalf but on behalf of other persons who are similarly situated, where the class is so large that individual plaintiffs could not practically be joined in one lawsuit, where there are questions of fact and law that are common to the class, where the claims of the named parties are typical of the claims of the class, and the named parties will fairly and adequately protect the interests of the class. As I noted earlier, the Court has allowed all three cases to proceed on a class action basis.

Because plaintiffs have elected to proceed as classes rather than as individual plaintiffs, your verdicts will reflect your judgments concerning the class as a whole. The form of the verdict is not intended to influence your consideration of the evidence in any way and it is not meant to suggest that the evidence must be evaluated only on a class wide basis.

23 Instruction 21 stated as follows:

If you find that any class of plaintiffs has sustained injury under Instruction Nos. 18 through 20, it is entitled to fair and adequate compensation for the difference between what class members could have earned in a hypothetical free economic market and what they actually earned by reason of the Rule.

Plaintiffs have the burden of proving the amount of damages which were proximately caused by the conspiracy. Once plaintiffs have proved by a preponderance of the evidence that the Rule was a material cause of some of their injury, however, their burden of proving damages is to some extent lightened. Our willingness to accept a degree of uncertainty in fixing the amount of damages rests in part on the difficulty of ascertaining economic damages, in that the vagaries of the marketplace usually deny us sure knowledge about what plaintiffs' situation would have been in the absence of an antitrust violation. For this reason, plaintiffs need not establish the amount of their damages with mathematical precision, but need only provide such evidence that the jury is not left to speculation or guesswork in determining the amount of damages. In the absence of precise evidence, you may make a fair and reasonable estimate of damages based on just and reasonable inferences from the facts which you find to be proven about the operation of the Rule, its tendency to injure plaintiffs in their business or property, and any decline in compensation not shown to be attributable to other factors.

Proximate cause is established if the Rule played a substantial part in bringing about or actually causing the damage and the damage was either a direct result or a reasonably probable consequence of the Rule. This does not mean that the law recognizes only one proximate cause of damage, consisting of only one factor or thing or the conduct of only one person. On the contrary, many factors or things, or the conduct of two or more persons, may operate at the same time, either independently or together, to cause damage; and in such a case, each may be a proximate cause.

As I mentioned earlier, when persons enter into a conspiracy, they become agents for each other, and each is liable for the damages which are proximately caused by the conspiracy. As a result, the **NCAA** is liable for the acts of all conspirators during the course of and in furtherance of the conspiracy. If you find that the **NCAA** withdrew from the conspiracy on May 25, 1995, it would nonetheless be liable for damages which are the proximate result of the conspiracy. It is not liable, however, for any acts which other members of the conspiracy committed after the **NCAA** withdrew.

In considering the amount of damages, you are not to consider interest, inflation, costs of suit or attorneys' fees. Plaintiffs' right to such damages is a matter for the Court.

24 This issue became relevant because of the **NCAA's** position that where the Rule forced a highly paid coach out of position, the Rule *benefitted* the REC who succeeded him or her because it created a job opportunity that otherwise would not have existed. According to the **NCAA**, the REC in that position had no standing to complain about the money because "[i]f new people came in that were happy to work for $7,000 or $10,000 or $12,000 or $15,500, there's no adverse impact." Tr. 2002–04. The **NCAA** thus put in issue the question whether plaintiffs were "happy" to work in a market that was fixed by its antitrust conspiracy.

25 For example, Cedric Dempsey, the Executive Director of the **NCAA**, testified that he had grown up in a home without electricity or indoor plumbing, surviving on federal food stamps, and that even his position as **NCAA** Executive Director was a "hardship" on his family. Tr. 1854, 1856, 1988. Dempsey also testified that he had succeeded in the face of a salary cap which was not dissimilar to the Rule. Tr. 1852, 1853–54, 1977–79. He further testified that the majority of money which the **NCAA** generates goes back to member institutions "to help serve student athletes," Tr. 1870, approximately 24,000 of whom participate in national championships, Tr. 1875, and that the **NCAA** and its member institutions are "having a very difficult time funding programs." Tr. 1859.

26 The notebook also contained "a few coaches" that Dr. Umbeck identified after he issued his final report. The Court excluded that information on grounds unrelated to its exclusion of Defendant's Exhibit 616.

27 Upon further inquiry by the Court, **NCAA** counsel conceded that the original version was in alphabetical order, but complained that the print was very small. Tr. 2273.

28 When the **NCAA** proffered the exhibit, the Court asked the **NCAA** to justify the re-invention. Its purported explanations (such as the fact that the notebook contained a separate page for each individual, which made it easier for the jury to go person by person, Tr. 2275–77) were unsatisfactory and left the Court with the conviction that the sole purpose of the "white notebook" was to draw undue attention to Dr. Umbeck's report by manipulating its size, format, color and tonnage to suggest by its sheer heft and volume that it deserved attention which it might not command in its unadulterated format. Tr. 2208, 2211.

29 Defendant's Exhibit 616A, which the **NCAA** describes as a "court-imposed alternative," is a printout of the spreadsheet which the **NCAA** had originally tendered to plaintiffs on a computer disk. Defendant's Exhibit 616A does not include Dr. Umbeck's notes.

1 For detailed information regarding the facts and proceedings in this action, see the *Memorandum And Order* (Doc. # 103) entered July 25, 1995, sustaining plaintiffs' motion for summary judgment (reported at 902 F.Supp. 1394 (D.Kan.1995), *aff'd,* 134 F.3d 1010 (10th Cir.), *cert. denied,* 525 U.S.822, 119 S.Ct. 65, 142 L.Ed.2d 51 (1998)); the *Memorandum And Order* (Doc. # 815) entered April 20, 1998, overruling defendant's motion for partial summary judgment (reported at 5 F.Supp.2d 921 (D.Kan.1998)); and the *Memorandum And Order* (Doc. # 814) entered April 17, 1998, overruling defendant's motion to decertify classes.

2 The jury awarded each class 75% of the damages which plaintiffs' expert, Dr. Robert D. Tollison, calculated it had sustained. Plaintiffs therefore ask the Court to award each class 75% of the CPI adjustment which Dr. Tollison attributed to it.

Plaintiffs seek an additional adjustment for Mary Beth Spencer Dyson, a member of the *Hall* class. At trial, the parties stipulated that Dyson suffered $32,000.00 in damage as a result of the Rule. Plaintiffs note that because that amount exceeds the damage estimate which Dr. Tollison calculated for Dyson ($18,304.00 without a CPI adjustment), the total proposed adjustment for the *Hall* class is slightly higher than 75% of Dr. Tollison's figure.

The **NCAA** attacks plaintiffs' proposal to increase the verdicts by 75% of Dr. Tollison's proposed adjustment, arguing that the jury verdicts covered the classes but that Dr. Tollison applied his CPI adjustment to individual class members. For this reason, according to the **NCAA**, Dr. Tollison's adjustment cannot be applied across the board to the class verdicts.

3 Plaintiffs do not ask the Court to award prejudgment interest under 15 U.S.C. § 15(a), which authorizes simple interest, if just, under circumstances described later in this order.

4 No other witnesses testified at the hearing.

5 In *Heatransfer Corp. v. Volkswagenwerk A.G.,* 553 F.2d 964, 986 n. 20 (5th Cir.1977), *cert. denied,* 434 U.S. 1087, 98 S.Ct. 1282, 55 L.Ed.2d 792 (1978), plaintiff's damages included $326,000.00 in interest on a capital value computation. Defendants challenged the inclusion, arguing that as a matter of law, prejudgment interest was not allowable. Plaintiff responded that the figure did not represent interest but was simply a means of establishing capital value loss at the date of trial. The district court held that the portion of the damage award which had been labeled "interest" could not be considered improper prejudgment interest. It noted some reservations about the manner in which plaintiff had calculated capital value loss, but declined to grant a remittitur in view of the Fifth Circuit rule that a court may not remit damages below that which a jury might have awarded. On appeal, without explanation, the Fifth Circuit rejected defendant's argument that prejudgment interest is not allowable as a matter of law.

In *Multiflex, Inc. v. Samuel Moore & Co.,* 709 F.2d 980 (5th Cir.1983), *cert. denied,* 465 U.S. 1100, 104 S.Ct. 1594, 80 L.Ed.2d 126 (1984), plaintiff's expert adjusted the damage estimates to create a net present value for plaintiff's previous injury. Defendant argued that the expert's projections "amount[ed] to nothing more than prejudgment interest, which normally would not be recoverable in an antitrust action." *Id.* at 996 (citing *Volkswagenwerk* and 15 U.S.C. § 15). Relying on *Volkswagenwerk,* the Fifth Circuit held that plaintiff was entitled to recover amounts that its lost profits would have earned in an open investment market. It therefore affirmed the net present value adjustment to the damage award, finding that the claim was based on an economic theory and not on a claim to statutory or common law prejudgment interest. *Id.* at 997.

6 In addition to the fact that the proposed CPI adjustment would be trebled, the **NCAA** complains that it would cover a greater time period than that permitted under Section 15(a) for the award of prejudgment interest. Under Section 15(a), the Court can only award prejudgment interest from the date of service of plaintiff's antitrust pleading to the date of judgment, or for any shorter period. Here, the date of service is not clear. Plaintiffs filed suit, however, on November 5, 1993, and September 3, 1994 (*Law* and *Hall*) and January 13, 1995 (*Schreiber*), and the Court entered judgment on May 4, 1998 in all three cases. Accordingly, statutory prejudgment interest could not cover a period longer than 40 to 53 months.

Under plaintiffs' theory, the proposed CPI adjustment apparently runs from "the year of damage" for each particular coach, and runs to January 1997, so that damages for each coach are stated in 1997 dollars. Tr. 1456–58. For a coach who was employed when the Rule went into effect on August 1, 1992, the CPI adjustment could span as much as 68 months. For other coaches the time could be a much shorter one. The **NCAA** does not suggest whether the net outlay under the CPI adjustment would be greater or less than an adjustment that might be allowed for prejudgment interest.

7 In *Locklin,* the Seventh Circuit Court of Appeals affirmed a trial court's refusal to increase antitrust damages to account for "inflationary shrinkage." It found no authority for an adjustment to offset a decrease in the value of the dollar, and—with the single observation that plaintiffs' damages were trebled—rejected the argument that plaintiffs would not receive full compensation without an adjustment for interest. 429 F.2d at 876. In *Hughes,* the Second Circuit agreed. It interpreted

congressional silence as a sign that trebled damages would adequately serve the remedial interests of the antitrust laws and noted that "trebled damages will more than adequately compensate [plaintiff] for its injuries." 449 F.2d at 80.

See also, Colorado v. Goodell Bros., Civ. A. No. 84–A–803, 1987 WL 6771, at *4 (D.Colo. Feb. 17, 1987) (inflation adjustment not allowed in antitrust action where treble damages awarded, citing *Locklin*); *Smith v. Pro–Football, Inc.*, 528 F.Supp. 1266, 1275 (D.D.C.1981) (because of treble damages, prejudgment interest not needed to compensate plaintiff for injuries); and 4 Julian O. von Kalinowski, *Antitrust Counseling and Litigation Techniques* § 42.02[5], pp. 42–8 (Matthew Bender 1993) ("it appears that no adjustment can be made for inflation," citing *Locklin*).

8 No one asked Dr. Tollison to define what interest *does* represent, but the textbook definition of interest is "the return paid to those who loan money." *Economics* (13th ed.) by Samuelson & Nordhaus (McGraw–Hill 1989).

9 The **NCAA** apparently argues that the statutory interest authorized in Section 15(a) includes an inflation component, but that fact has not been established as a matter of fact or law.

10 In *Bigelow,* the Supreme Court explained that "[a]ny other rule would enable the wrongdoer to profit by his wrongdoing at the expense of his victim" and that "[f]ailure to apply it would mean that the more grievous the wrong done, the less likelihood there would be of a recovery." 327 U.S. at 264–65, 66 S.Ct. 574.

11 The Court notes that the **NCAA** has just concluded another annual convention and that, so far as the record suggests, no movement was afoot to re-enact the Rule or its equivalent.

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United States District Court, D. Colorado.

David **Helmer**, Felicia Muftic, Michael Muftic, Craig Kania, and Oliver Martin, on behalf of themselves and all others similarly situated, Plaintiffs,

v.

The **Goodyear** Tire & Rubber Co., an Ohio Corporation, Defendant.

Civil Action No. 12–cv–00685–RBJ–MEH
|
Signed March 21, 2014

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ORDER

R. Brooke Jackson, United States District Judge

I. *Introduction*

*1 Plaintiffs are owners of homes in Colorado and Wisconsin who used defendant **Goodyear's** Entran 3 brand of rubber hose in their radiant heating systems. They allege that Entran 3 tubing degrades and leaks—a problem, they believe, caused by a defective design that will cause inevitable failure in all Entran 3 tubing. They are suing **Goodyear** under a theory of strict liability for design defect, and they purport to represent other owners of property in Colorado and Wisconsin where Entran 3 tubing was installed. Their motion for class certification has been fully briefed and was argued on February 28, 2014. For the reasons that follow, I conclude that plaintiffs have met the requirements of Rule 23 for purposes of certifying the Colorado class.

II. *Facts*

Entran 3 hose is a component of a radiant heating system. Basically the hose is embedded in various parts of a home (the floor, walls, or driveways, for example) and conveys heated fluids through those areas, dispersing heat in the process. Of course, the hose itself is only part of the radiant heating system. It must be connected to a manifold that heats the fluid and pumps it through the hose. The hose is connected to the manifold using clamps or adhesives.

Over the last two decades, **Goodyear** has manufactured different versions of Entran hose for an intermediary called Heatway. An earlier version, Entran II, was the subject of extensive litigation, including class litigation. Even before that litigation began, however, **Goodyear** began designing Entran 3. [ECF No. 88, Ex. 5 and 6.] This new design would be an inner tube of EPDM rubber surrounded by an ethylene vinyl (EVOH) barrier designed to prevent oxygen transmission. The entire hose was encased in an EPDM outer cover. [*Id.* at Ex. 9, p. 3.]

Plaintiffs define the injury in this case as the design defect common to all members of the putative class. Specifically, plaintiffs identify two defects that, they claim, will lead to inevitable failure resulting from ordinary use. [ECF No. 99, Ex. B (Moalli Rebuttal) at 5, 7, 9.] The first alleged defect is "the use of EPDM rubber in Entran 3 to carry hot liquid for the lifetime of homes where the product was installed." [ECF No. 99 at 2.] The second alleged defect is inconsistent thickness and bonding between the EVOH and EPDM layers of the Entran 3 hose. [ECF No. 99 at 7 n.8.]

According to the testimony of one of the plaintiffs, David **Helmer**, the Entran 3 hoses in his home have caused significant problems. The hose is brittle and crispy (**Helmer** Dep., pp. 22–23); black particles from the hose

have ended up in other components of the heating system (*id.* at 29); and he has found fluid leaking from the system (*id.* at 36). The Muftic plaintiffs have also experienced problems with their heating system. In June 2010, the Entran 3 hose in their home split and caused a massive leak resulting in damage to the flooring, walls, and fixtures. (Felicia Muftic Dep., pp. 35–39, 46–47, 52–55). [1]

*2 Plaintiffs offer the opinion of Dr. John E. Moalli in support of their arguments. According to Dr. Moalli, using EPDM rubber for use in radiant heating systems and attempting to bond a rigid layer of EVOH to a flexible hose were poor design choices. These choices led to a product that was destined to fail under foreseeable use. [ECF No. 99, Ex. B (Moalli Rebuttal) at 5, 7, 9.] Dr. Moalli performed several tests to reach this conclusion.

Goodyear attacks Dr. Moalli's opinion, claiming that his analysis was limited to one section of hose which was destroyed after testing and was therefore unavailable to **Goodyear's** experts. **Goodyear** offers the competing expert opinion of Dr. Jorgen Bergstrom. Dr. Bergstrom performed additional laboratory tests on Entran 3 hose, including some joint testing with Dr. Moalli. He concluded that Entran 3 is not defective, and any crispiness, embrittlement, or leakage of the hose would be due to improper installation. [ECF No. 116 at 228–33 (Dr. Bergstrom's testimony regarding his conclusions).] Bolstering Dr. Bergstrom's conclusions, **Goodyear** also provides the reports of Mr. Gary Tompkin, a former chief chemist at **Goodyear**, who examined hose in plaintiffs' homes. He concluded that improper clamps and adhesives were used, and that hoses were subject to excessive bending near the manifold connection. [ECF No. 93, Ex. B (Tompkin Report) at 2–20.]

Dr. Moalli and the plaintiffs respond that Dr. Bergstrom's methods were incapable of capturing the "progressive degradation and embrittlement of the hose from the failing rubber. [ECF No. 99, Ex. B (Moalli Rebuttal) at 3–6, 9–10.] Moreover, Mr. Tompkin's testimony was based primarily on visual field inspections and little scientific testing. [Def.'s Br. at 10.] These inspections, Dr. Moalli states, do not account for degradation of the interior of the hose.

Finally, evidence from the home of an unnamed putative class member, the Malmgren home, exhibits a leak in a hose that was otherwise installed correctly. [ECF No. 99, Ex. B (Moalli Rebuttal) at 7 ("The Malmgren hose was operated at relatively low temperatures, was not noted to be subjected to excessive bending stresses, and also had a constant tension clamp at the connection point."); ECF No. 93, Ex. B (Tompkin Report) at 15.] As Dr. Moalli points out, this supports the theory of a design defect and tends to undermine **Goodyear's** argument that individualized factors contributed to injuries among the putative class. [ECF No. 99, Ex. B (Moalli Rebuttal) at 7.]

III. *Discussion*

A. Strict Liability for Design Defect.

At the hearing on class certification plaintiffs abandoned all claims except strict liability for design defect. "To recover on a theory of strict products liability [in Colorado], a plaintiff must establish that: (1) the product is in a defective condition unreasonably dangerous to the user or consumer; (2) the product is expected to and does reach the consumer without substantial change in the condition in which it was sold; (3) the defect caused the plaintiff's injuries; (4) the defendant sold the product and is engaged in the business of selling products; and (5) the plaintiff sustained damages." *Bartholic v. Scripto–Tokai Corp.*, 140 F.Supp.2d 1098, 1106 (D.Colo.2000) (citing *Barton v. Adams Rental, Inc.*, 938 P.2d 532, 536–37 (Colo.1997).

B. Class Certification Requirements.

It is axiomatic that a class action lawsuit is an exception to the general rule that "litigation is conducted by and on behalf of the individual named parties only." *Wal–Mart Stores, Inc. v. Dukes*, 131 S.Ct. 2541, 2550 (2011) (quoting *Califano v. Yamasaki*, 442 U.S. 682, 700–701 (1979)) (internal quotation marks omitted). Federal Rule of Civil Procedure 23 sets out the parameters governing class actions in federal courts. Rule 23(a) requires plaintiff to prove that

> *3 (1) the class is so numerous that joinder of all members is impracticable; (2) there are questions of law or fact common to the class; (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class; and (4) the representative parties

> will fairly and adequately protect the interests of the class.

Fed.R.Civ.P. 23(a). These prerequisites "limit the class claims to those fairly encompassed by the named plaintiff's claims. *Dukes,* 131 S.Ct. at 2550 (quoting *General Telephone Co. of Northwest v. Falcon,* 457 U.S. 147, 156 (1982)) (internal quotation marks omitted).

In addition to satisfying the four prerequisites in Rule 23(a), the putative class must fall into one of the categories listed in Rule 23(b). Plaintiffs here rely on the third category which permits certification if "the court finds that the questions of law or fact common to class members predominate over any questions affecting only individual members, and that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy." Fed.R.Civ.P. 23(b)(3).

The U.S. Supreme Court recently emphasized that Rule 23 imposes weighty obligations on plaintiffs and certifying courts. *Dukes,* 131 S.Ct. at 2551 (quoting *Falcon,* 457 U.S. at 161) ("certification is proper only if 'the trial court is satisfied, after a rigorous analysis, that the prerequisites of Rule 23(a) have been satisfied' "). "Frequently that 'rigorous analysis' will entail some overlap with the merits of the plaintiff's underlying claim." *Id.* Put another way, "sometimes it may be necessary for the court to probe behind the pleadings before coming to rest on the certification question." *Id.* (quoting *Falcon,* 457 U.S. at 160).

Nevertheless, a peek at the merits is not an invitation to "turn the class certification proceedings into a dress rehearsal for the trial on the merits." *Messner v. Northshore Univ. HealthSys.,* 669 F.3d 802, 811 (7th Cir.2012). On the contrary the Supreme Court, after its decision in Dukes, explained that "Rule 23 grants courts no license to engage in free-ranging merits inquiries at the certification stage. Merits questions may be considered to the extent—but only to the extent—that they are relevant to determining whether the Rule 23 prerequisites for class certification are satisfied." *Amgen Inc. v. Conn. Retirement Plans & Trust Funds,* 133 S.Ct. 1184, 1194–95 (2013). Keeping these broad principles in mind I turn to an analysis of each of the requirements.

1. *Numerosity.*

A certifiable class must be so numerous that joinder is impracticable. *Trevizo v. Adams,* 455 F.3d 1155, 1162 (10th Cir.2006). Numerosity also requires that the members of the class be ascertainable with the use of objective criteria. *Joseph v. Gen. Motor. Corp.,* 109 F.R.D. 635, 638 (D.Colo.1986) (finding numerosity in a class of at least 1,760 potential class members where those members could be identified as former owners or lessees of allegedly defective Cadil lacs notwithstanding the fact that some of them were satisfied customers with no wish to assert claims against the defendant).

In the instant case, the plaintiffs have so far identified 132 homes in Colorado and 6 homes in Wisconsin that have Entran 3 installed. [ECF No. 115.] Based on the fact that **Goodyear** produced approximately 33 million feet of Entran 3 hose, the plaintiffs project that many more homes in Colorado and Wisconsin contain Entran 3. *Id.*

***4** The rub, if there is one, is that plaintiffs have only identified 10 homes in which the Entran 3 hose is causing problems. *Id.* at 18. **Goodyear** argues that relying on such a small number of allegedly problematic Entran 3 systems to demonstrate numerosity is impermissibly speculative. *See Dukes,* 131 S.Ct. at 2551 ("Rule 23 does not set forth a mere pleading standard. A party seeking class certification ... must be prepared to prove that there are in fact sufficiently numerous parties, common questions of law or fact, etc."). In my view, however, **Goodyear's** challenge misses the mark. The plaintiffs' theory is that the design defects in the Entran 3 hose will lead to inevitable failure in a product designed to function indefinitely. Therefore the relevant inquiry for purposes of determining numerosity is who owns or owned property with Entran 3 installed, not who owns or owned property with presently malfunctioning Entran 3.

Plaintiffs have proven that at least 132 homes in Colorado contain the allegedly defective product. These members are not only ascertainable, they are ascertained. Moreover, other unidentified members are relatively easily ascertainable. People with Entran 3 in their homes can "ascertain if they're a class member by going to their basement, looking at the pipe, and seeing if it says Heatway.... It's objective." [ECF No. 116 at 26.] *Cf. Carrera v. Bayer Corp.,* 727 F.3d 300, 308 (3rd Cir.2013) (finding that a class in a false advertising case could not be ascertained using retailer sales records and affidavits from members attesting to prior purchases).

A related issue is whether joinder of a group of plaintiffs of this size is impracticable. In the Tenth Circuit, "there is 'no set formula to determine if the class is so numerous that it should be certified.' " *Trevizo,* 455 F.3d at 1162 (quoting *Rex v. Owens ex rel. State of Okla.,* 585 F.2d 432, 436 (10th Cir.1978)). Prior cases offer little in the way of concrete guidance. *Compare Trevizo,* 455 F.3d at 1162 (holding that a district court did not abuse its discretion in determining a putative class of 84 members could be joined rather than certified) *with Colo. Cross–Disability Coal. v. Abercrombie & Fitch Co.,* No. 09–2757, 2012 WL 1378531, at *2 (D.Colo. Apr. 20, 2012) (granting class certification where the putative members were an unidentified group of patrons of 249 retail stores using non-accessible entrances).

Here, even looking only at the number of homes identified to date, the putative Colorado class is larger than the putative class in *Trevizo.* The relatively large size of the group and the geographic diversity of the members—who are scattered throughout relatively remote mountain towns in the state—suggest that joinder would be difficult to manage. Judicial economy and convenience to the parties supports a finding of numerosity for the Colorado class.

The Wisconsin class, however, is a different story. The six members identified to date are a far smaller group than the Colorado class. There probably are additional homes in Wisconsin that have Entran 3 hose, but we are starting with a very small number. Applying the "rigorous analysis" standard, and holding plaintiffs strictly to their burden to support certification, I cannot conclude that joinder of the Wisconsin class would be impracticable. Rather, I conclude that plaintiffs have not established the numerosity required by Rule 23(a).[2] There is no reason that the Wisconsin plaintiff cannot seek certification in Wisconsin of a Wisconsin class if he is insistent on class treatment and can develop an appropriate case for it.

2. *Commonality.*

*5 In order to satisfy the prerequisite of commonality, a putative class must raise a common contention that is "capable of classwide resolution—which means that determination of its truth or falsity will resolve an issue that is central to the validity of each one of the claims in one stroke." *Dukes,* 131 S.Ct. at 2551. In *Dukes,* the Court found a lack of commonality where the putative class raised a contention that basically asserted the members had all suffered the same violation of law: gender-based employment discrimination in violation of Title VII. Such a violation, however, could have arisen in any number of ways—either intentionally or via a disparate impact theory, for example—and certifying a class based on such a variety of facts and theories would not promote a classwide resolution. As the Court put it, the plaintiffs in *Dukes*

> wish[ed] to sue about literally millions of employment decisions at once. Without some glue holding the alleged *reasons* for all those decisions together, it will be impossible to say that examination of all the class members' claims for relief will produce a common answer to the crucial question *why was I disfavored.*

Dukes, 131 S.Ct. 2552.

By contrast, the plaintiffs in this case have provided the glue. They claim that **Goodyear** designed a defective product, identify two alleged defects, and provide scientific and technical evidence to support their theory. Certifying a class based on this claim and asking a fact-finder to decide whether the product is indeed defective in the way that the plaintiffs allege would "generate common answers apt to drive the resolution of the litigation." *Id.* at 2551. Moreover, "[f]actual differences between class members' claims do not defeat certification where common questions of law exist. *DG ex rel. Stricklin v. Devaugh,* 594 F.3d 1188, 1195 (10th Cir.2010) (holding that commonality existed in a putative class of children exposed to the same risk of harm from defendant agency's inadequate oversight despite the fact that the vast majority of children in the program suffered no physical harm).

Goodyear argues that recent rulings from the U.S. Supreme Court have made it harder to certify a class and require a stronger showing that the putative class meets al l the requirements of Rule 23. To be sure, *Dukes* and *Comcast* arguably raised the bar on class certification, but they do not appear to overrule the Tenth Circuit's earlier holdings in *Stricklin* in any way that is relevant to the instant case. In *Dukes* the Court found a lack of commonality where factual differences among the

gigantic purported class would have made it impossible to determine whether discrimination took place and what caused it.

Like the plaintiffs in *Stricklin,* however, the potential class members in this case were exposed to the same injury regardless of the factual differences between them. In *Stricklin* it was the unacceptably high risk of child abuse. In this case it is the allegedly inevitable degradation of a product embedded in concrete that is designed to function appropriately for a long time.

To require absolute homogeneity of factual and legal circumstances among a putative class would grant defendants in products liability actions like this one a trump card of sorts. Merely by alleging that some members used the product improperly and thereby caused injury, a defendant could instantly raise enough doubt about commonality to defeat certification. It is not necessary for the plaintiffs to pick a perfect plaintiff who can demonstrate at the class certification stage that he can prove each element of the tort and is subject to no defenses. This is not a motion for summary judgment; it is a motion for class certification.

3. *Typicality.*

"[T]ypicality exists where, as here, all class members are at risk of being subjected to the same harmful practices, regardless of any class member's individual circumstances." *Stricklin,* 594 F.3d at 1199. As the U.S. Supreme Court has noted, the commonality, typicality, and adequacy requirements "tend to merge." *Dukes,* 131 S.Ct. 2541, 2550 n.5 (quoting *Falcon,* 457 U.S. 157–58 n.13). It should be no surprise, then, that many of the same factors bearing on the commonality analysis above are relevant to the typicality analysis as well.

*6 **Goodyear** repeats its arguments that the Entran 3 owned by most members of the putative class has not manifested a defect. It claims or estimates that no problems with Entran 3 have been experienced in 99.9% of homes in which it has been installed, and that Dr. Moalli's experiments that purport to prove a defective design were based only on one sample of Entran 3 hose that was subsequently destroyed and never made available to **Goodyear's** experts. Ultimately the problems experienced by the named plaintiffs were caused by faulty installation, according to **Goodyear**.

Goodyear cites a case out of the Northern District of Illinois that seems to suggest that typicality is not met where the putative class includes "[plaintiffs] who have claims and [plaintiffs] who do not have claims." *Korsmo v. American Honda Motor Co., Inc.,* 2012 WL 1655969, at *6 (N.D.Ill., May 10, 2012). The *Korsmo* court, however, based this conclusion on the fact that the plaintiffs were suing based on alleged deceptive advertising and therefore would have to prove reliance on the defendant's statements. Deposition evidence revealed that many putative class members did not rely on those statements and were not deceived. In the Seventh Circuit, beliefs of the proposed class members cannot be presumed in fraud cases, so the court concluded that in light of evidence that disproved reliance by some class members, the claims of those who were deceived were not typical of the rest of the class. *Id.* at *6 (citing *Oshana v. Coca–Cola Co.,* 472 F.3d 506, 513, 515 (7th Cir.2006).

To hold that the named plaintiffs' claims in this case are not typical of the proposed class would require this Court to conclude at this stage that the named plaintiffs' injuries were caused by something other than the alleged design defect (i.e., caused by excessively tight angles on the hoses, improper clamps, etc.). The plaintiffs have demonstrated, however, that in homes where the installation was proper —even by **Goodyear's** estimation—similar cracking and rupturing can occur and has occurred. [ECF No. 99, Ex. B (Moalli Rebuttal) at 7; ECF No. 93, Ex. B (Tompkin Report) at 15.] They also offer arguably persuasive evidence in rebuttal to Dr. Bergstrom's conclusions that the EPDM rubber was sufficient for its intended purpose.

Goodyear also alleges that there is no evidence that all Entran 3 will inevitably fail during its expected lifetime. According to **Goodyear**, the plaintiffs cannot "simply make that allegation and have [themselves] a class action." [ECF No. 116 at 18.] I agree. However the named plaintiffs do more than offer unsubstantiated evidence of inevitable failure. Here they demonstrated that failure occurred in several homes owned by named plaintiffs. They also demonstrated that Dr. Bergstrom's conclusions did not fully explain the failure of the Entran 3. As a result, plaintiffs have demonstrated the typicality of named plaintiff's claims and **Goodyear's** defenses to those claims.

4. *Adequacy.*

Rule 23(a) also requires that the plaintiffs adequately represent the class. This prerequisite incorporates many of

the same factors analyzed above in the commonality and typicality sections. However, it also requires consideration of 1) whether there are any conflicts between members of the class or class counsel and 2) whether the named class members and their counsel will vigorously prosecute the case. *See Rutter & Wilbanks Corp. v. Shell Oil Co.*, 314 F.3d 1180, 1187–88 (10th Cir.2002) (citing *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 626 n.20 (1997)).

Goodyear suggests that there are conflicts among class members, namely, between present and former owners of the same property. "Classes of those who 'own or owned' property are inherently conflicted as current and former owners of the same property vie for priority." [ECF No. 93 at 32]. **Goodyear** does not further explain the nature of the conflict, and as such, the argument (to which the motion devotes three conclusory sentences) appears to be a make-weight. Current and former owners might have different degrees of damage, but given that the plaintiffs ask to certify a class only for liability purposes that seems to be a distinction without a difference. **Goodyear** offers no evidence to support the idea that these two groups have different interests at the liability phase.

*7 **Goodyear** also argues that the plaintiffs have failed to pursue this case energetically. Again, the record demonstrates no such lack of vigorous prosecution. The sharpest arrow in **Goodyear's** quiver is the fact that after the stay of proceedings was "automatically lifted on January 29, 2013 when the Court granted **Goodyear's** motion [to disqualify certain of plaintiff's original counsel]," it took approximately seven months for the plaintiffs to initiate discovery. Actually, during that hiatus, if one could call it that, plaintiffs were apparently seeking new counsel, as several new entries of appearance were filed in mid-June. Plaintiffs' delay in commencing discovery, and their plan to go forward with discovery, were explained in a Joint Status Report filed on June 20, 2013. [ECF No. 66].

This is a complex case. Already it has been the subject of extensive motion practice, and even now, despite the resolution of the class certification issue, several motions including motions for summary judgment and partial summary judgment (filed by both sides) remain pending. The vigor with which the class issue was litigated, including the expert and non-expert testimony developed and presented at the certification hearing, demonstrates that the plaintiffs are litigating the case with substantial resolve. Plaintiffs' lawyers are experienced in similar litigation. The record of this case hardly suggests inadequate representation.

B. Rule 23(b)(3) Requirements.

In addition to the prerequisites in Rule 23(a), the putative class must fit into one of the categories described in Rule 23(b). This case falls into the third category of predominance and superiority.

1. *Common Issues Predominate.*

In order to meet the predominance requirement, plaintiffs must prove that the "proposed classes are sufficiently cohesive to warrant adjudication by representation." *Amchem*, 521 U.S. at 623. The Supreme Court recently elaborated on the stringency of this test in *Amgen Inc. v. Connecticut Retirement Plans and Trust Funds*, 133 S.Ct. 1184 (2013) and *Comcast Corp. v. Behrend*, 133 S.Ct. 1426 (2013). "If anything, Rule 23(b)(3)'s predominance criterion is even more demanding than Rule 23(a)." *Comcast*, 133 S.Ct. at 1432.

In *Amgen*, the Court held that proof of materiality of alleged misrepresentations was not a prerequisite to class certification in a securities fraud case. *Amgen*, 133 S.Ct. at 1191. Because materiality is judged by an objective standard, whether the misstatements were material was a question common to the class. *Id.* So if plaintiffs could not prove materiality, individual questions would not predominate; rather the entire case would fail. *Id.*

In the instant case, proof of a design defect and causation will be objective. If the plaintiffs cannot prove these elements, the class will lose. The presence of various factors defeating the defect or proof of causation would end the case, not cause individual questions to predominate over common ones. *See Amgen*, 133 S.Ct. at 1196. **Goodyear** essentially asks this Court to require what the Supreme Court rejected in *Amgen*—that the plaintiffs prove at the outset "that [they] will win the fray." *Id.* at 1191.

Comcast presents a slightly more daunting hurdle for plaintiffs. Yet for all its language about the stringency of the predominance requirement, *Comcast* is not quite on point here. The Supreme Court's reversal of certification in *Comcast* was motivated by two considerations not present in this case. First, the Court held that certifying

courts may not refuse to consider arguments relevant to Rule 23 simply because those arguments also relate to the merits of the case. *Comcast,* 133 S.Ct. at 1432–33. That is not a concern here. This Court is considering all evidence and arguments relevant to the requirements of Rule 23, even evidence and arguments related to the merits. What this Court will not do, however, is refuse to certify a class that otherwise meets the requirements of Rule 23 simply because the defendant raises potentially persuasive arguments about why the plaintiffs will fail on the merits.

***8** Second, the district court in *Comcast* certified the class based on one theory of liability while simultaneously accepting expert evidence of damages that relied on several theories of liability in its calculations (including a few that were previously dismissed by the district court). *Id.* at 1433. Acceptance of those damage calculations was internally inconsistent and would have led to "[q]uestions of individual damage calculations ... inevitably overwhelm[ing] questions common to the class." *Id.* Damages are not at issue in this case because the purported class is a liability-only class.

Comcast prompted the Supreme Court to vacate and remand a few products liability cases to lower courts for reconsideration in light of the opinion. Examining how these circuits dealt with *Comcast* on remand further supports certification in this case. In *Butler v. Sears, Roebuck & Co.,* 727 F.3d 796, 799 (7th Cir.2013), the Seventh Circuit upheld its earlier approval of class certification in a case involving allegedly defective front-loading washing machines that developed a mold problem. Writing for the Seventh Circuit, Judge Posner pointed out that in an effort to demonstrate a lack of predominance

> Sears argued that most members of the plaintiff class had not experienced any mold problem. But if so, we pointed out, that was an argument not for refusing to certify the class but for certifying it and then entering a judgment that would largely exonerate Sears—a course it should welcome, as all class members who did not opt out of the class action would be bound by the judgment.

727 F.3d 796, 799 (7th Cir.2013) *cert. denied,* 13–430, 2014 WL 684064 (U.S. Feb. 24, 2014).

The Court of Appeals for the Sixth Circuit also received a remand in light of *Comcast,* again dealing with allegedly defective Whirlpool washing machines. Like the Seventh Circuit, the Sixth followed Amgen's lead. *In re Whirlpool Corp. Front–Loading Washer Prods. Liab. Litig.,* 722 F.3d 838, 859 (6th Cir.2013). Finding that Whirlpool pointed to a "fatal similarity" in the plaintiffs' case—i.e. the failure to prove an element of liability—rather than a fatal dissimilarity, the court opted to uphold its earlier approval of class certification. *Id.*

In this case, **Goodyear** likewise fails to demonstrate a fatal dissimilarity that would defeat plaintiffs' showing of predominance. Under Colorado law, proof of a design defect requires proof of causation, *see Barton v. Adams Rental, Inc.,* 938 P.2d 532, 536–37 (Colo.1997), although it should be noted that "the focus [of a strict products liability suit] is on the nature of the product rather than the conduct of either the manufacturer or the person injured." *Boles v. Sun Ergoline, Inc.,* 223 P.3d 724, 727 (Colo.2010).

Goodyear's strongest argument, again, is that incorrect installation caused the named plaintiffs' injuries. If true, **Goodyear** suggests, this mode of causation would cause individualized questions to overwhelm common questions. **Goodyear** supports this argument with evidence that the type of malfunction varies from named plaintiff to named plaintiff, that upon inspection **Goodyear** could find nothing wrong with the hose in several homes, and that only three named plaintiffs exhibit hose that is "crispy" or "crunchy" in accordance with plaintiffs' theory of defect. [3]

***9** None of this evidence changes the facts supporting certification. The type of malfunction does not appear to vary from plaintiff to plaintiff. Just because one plaintiff experienced a split in the hose and another experienced leaking around the manifold and particles in the tank does not suggest different injuries. In fact, both of those types of malfunctions seem to be precisely the type of malfunction that would result from degradation of the interior of the hose as demonstrated by Dr. Moalli. And again, the plaintiffs put forward several named plaintiffs, including some who did not exhibit the type of improper installation alleged by **Goodyear** to cause the injury.

In other words, this range of facts looks like the typical, normal range of installations that al l purchasers of the tubing would employ. Therefore a class directed at answering the question of whether the rubber was bound to degrade and the EVOH was improperly bonded would generate common answers rather than require an individualized inquiry in each case. If the plaintiffs cannot show that these alleged defects existed and caused the injury, then the entire class will lose on the merits, but the facts do not suggest that individual questions would predominate.

2. *Class Treatment Superior.*

Finally, Rule 23(b)(3) also requires proof that class treatment is superior to individualized litigation. The rule requires consideration of the following: "(a) class members' interest in individually controlling the prosecution or defense of separate actions; (b) the extent and nature of any litigation concerning the controversy already begun by or against class members; (c) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; and (d) the likely difficulties in managing a class action."

I am convinced that the class action is a superior method to resolve this case, especially in light of the bifurcation of liability and damages. Individual members have little or no interest in controlling this litigation in light of the economic cost of bringing individual actions. To the Court's knowledge, other class members have not initiated litigation concerning this controversy. And consolidating litigation in this forum presents significant benefits. Judge Kane succinctly described these benefits years ago in a different case:

> First, relitigation of the same issues and presentation of the same evidence in hundreds of individual actions or arbitration proceedings would be grossly inefficient and wasteful of judicial resources. Second, maintenance of individual actions would be prohibitively expensive. Many of the crucial issues in this case will require substantial discovery, expert testimony, and trial time, all of which would render uneconomical individual actions.

Joseph v. General Motors Corp., 109 F.R.D. 635, 642 (D.Colo.1986).

Goodyear claims certification would consume as much if not more time than individual trials. However, **Goodyear** gets it backward. Rejecting a similar argument by the defendants in *Amgen,* the U.S. Supreme Court explained that requiring proof of materiality before certification would require a "mini-trial [on that issue] at the certification stage." *Amgen,* 133 S.Ct. at 1201. And if certified, that issue would have to be proven again at trial. *Id.* On the other hand if certification failed, "nonnamed class members would not be bound by that determination. They would be free to renew the fray, perhaps in another forum, perhaps with a stronger showing of materiality." *Id.* (citation omitted).[4]

***10** Similarly, refusing to certify a class for liability purposes here would not save time. It is possible that certification would not save as much time as the plaintiffs allege, but at least certification presents a possibility of judicial efficiency. Indeed, it would appear to be more than a mere possibility. Getting the issue of liability out of the way is likely to save considerable time in the future since repeated litigation of that element would require presentation of repetitive evidence.

C. Article III Standing

Goodyear also raises an argument unrelated to Rule 23, arguing that even if certification is proper under the rule, the putative class lacks standing to bring these claims under Article III of the U.S. Constitution. Standing to bring suit requires every plaintiff to demonstrate a concrete and particularized injury. *Hollingsworth v. Perry,* 133 S.Ct. 2652, 2661 (2013). The alleged injury must also be actual or imminent. *Wyoming v. U.S. Dep't of Interior,* 674 F.3d 1220, 1230 (10th Cir.2012). Injury that is merely speculative will not satisfy the requirements of Article III. *Id.* at 1235.

Here, **Goodyear** claims that many members of the putative class have suffered no injury because their Entran 3 systems have not malfunctioned. However, plaintiffs have introduced evidence demonstrating that Entran 3 hoses will degrade over time, within the expected lifetime of the product, and that such degradation will cause malfunctions. That theory, if proven, would establish actual, concrete injury to any homeowner with Entran

3 installed. The value of the home would be instantly reduced. Replacement and repair would be required to avoid damage to other parts of plaintiffs' property.

The cases cited by **Goodyear** do not stand for the proposition that any plaintiff bringing suit for a latent defect lacks Article III standing until the defect manifests. Rather they stand for the proposition that losses cannot be speculative. They cannot be guesses. *See, e.g., In re Deepwater Horizon,* 732 F.3d 326, 340–43 (5th Cir.2013) ("There is a distinction here between whether a claim is colorable and whether it is meritorious. A plaintiff's claim is colorable if he can allege standing and the elements necessary to state a claim on which relief can be granted —whether or not his claim is ultimately meritorious— whether he can prove his case."); *Wyoming,* 674 F.3d at 1235 (noting that the economic data about lost future tax revenue was purely speculative).

Goodyear cites as persuasive authority a bench ruling from the District of New Jersey dismissing a different case involving Entran 3. [ECF No. 93, Ex. J.] That case, *Nagy v. **Goodyear** Tire & Rubber Co.,* 12–cv–4235–MAS–DEA (D.N.J. Aug. 21, 2013), dealt with class certification in a suit for breach of implied warranty against **Goodyear**. The court held that the plaintiffs could not establish injury in fact merely by pointing to hard and brittle hose that had not failed. [ECF No. 93, Ex. J at 13–16.] It seems to me that the plaintiffs in the instant case have presented a stronger argument for inevitable failure by identifying plaintiffs who are currently experiencing problems from the manifest defect as well as by putting forward scientific evidence supporting their theory. In addition, the fact that the *Nagy* court was asked to certify a class under a breach of contract theory rather than a products liability theory casts doubt on the case's persuasive value here.

IV. *Conclusion*

For the forgoing reasons, the Court finds that plaintiffs have met the requirements of Rule 23, and the motion to certify a class [ECF No. 88] is GRANTED in part. Only the Colorado class is certified, and only for the purposes of determining strict liability for design defect.

All Citations

Not Reported in F.Supp.2d, 2014 WL 1133299

Footnotes

1 Named plaintiffs in the putative Wisconsin class also suffered damage allegedly caused by defects in Entran 3 hose. However because I decline to certify the Wisconsin class for lack of numerosity, I do not summarize the alleged injuries experienced by the named plaintiffs in Wisconsin.

2 Because I conclude that the Wisconsin class lacks sufficient numerosity, I do not address any of the parties' related arguments about how differences in tort law between Colorado and Wisconsin might impact the Rule 23 analysis of commonality, typicality, or predominance. Claims will be analyzed according to Colorado law.

3 **Goodyear** offers testimony from Dr. Bruce Strombom, an expert in economic and statistical analysis, concluding that "the likelihood that the true defect rate in the population is greater than 50 percent is nearly zero." [ECF No. 93, Ex. G, 12 at ¶ 29.] It follows, Dr. Strombom states, that individual inquiry would be required to distinguish between the defects caused by faulty installation and those caused by a defect in the Entran 3 hose. *Id.* at 22–23. The Court respects Dr. Strombom's analysis but thinks his statistics do not drive the legal conclusion he reaches. The devil is in how Dr. Strombom defined "true defect" as a manifested defect. Plaintiffs, however, allege that their injury includes hardened and brittle Entran 3 which will fail and manifest a defect during the expected life of the product. Therefore the rate of defect, according to the plaintiffs, is 100 percent. Moreover, the rate of "true defect" does not necessarily tell us anything about whether the defect can only be uncovered through individual inquiry rather than through scientific testing and analysis.

4 At the hearing, the Court asked counsel to explain the possible effect of collateral estoppel if the class was not certified but plaintiffs nonetheless prosecuted the design defect issue to final judgment. No clear answer was provided. Ultimately it appears that there is no guarantee that other courts in future proceedings would use collateral estoppel to bind these parties or others on the issue of liability for design defect.

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