IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
CHARLESTON DIVISION

IN RE: LIPITOR (ATORVASTATIN CALCIUM) MARKETING, SALES PRACTICES AND PRODUCTS LIABILITY LITIGATION	**MDL No. 2:14-mn-02502-RMG** **CASE MANAGEMENT ORDER NO. 38** **This Order relates to case:** **Daniels v. Pfizer, No. 2:14-cv-1400** **Hempstead v. Pfizer, No. 2:14-cv-1879**

Pfizer's Motion to Strike New Opinions and Report from Dr. David Handshoe

For the reasons stated below, Pfizer's motion to strike (Dkt. No. 943) is GRANTED IN PART AND DENIED IN PART.

A. Background

Plaintiffs' case-specific expert reports were due on May 1, 2015. (CMO 29, Dkt. No. 746). Plaintiffs served two case-specific reports from Dr. David Handshoe,[1] one for each of the plaintiffs in the first two cases selected for trial. In the reports, Dr. Handshoe conducts differential diagnoses for the Plaintiffs and concludes that both of them have "statin-induced" Type 2 diabetes. Pfizer deposed Dr. Handshoe on June 10 and 11, 2015.

Pfizer served case-specific expert reports on June 12, 2015. (CMO 34, Dkt. No. 869). Some of these experts opine that Ms. Daniels' diabetes was not statin-induced and that Ms. Daniels substantially benefited from taking Lipitor. Two of them opine that statins are especially recommended in cases of familial hypercholesterolemia. In one of the reports, Dr. Lopes-Virella

[1] Dr. Handshoe is an internist specializing in pulmonology, critical care, and sleep medicine. He practices in Summerville and North Charleston.

attacks Dr. Handshoe's analysis and opines that "Dr. Handshoe's report . . . ignored the fact that Ms. Daniels had severe hypercholesterolemia, mostly likely familial FH, when she started on therapy with Lipitor, which would place her at markedly increased risk of having a premature cardiovascular event . . . if not aggressively treated." (Lopes-Virella Report at 29).

A month later, on July 13, 2015, Plaintiffs served the "rebuttal" report at issue from Dr. Handshoe, which opines that Ms. Daniels's hypercholesterolemia is secondary hypercholesterolemia (i.e. hypercholesterolemia causes from lifestyle factors), rather than familial hypercholesterolemia (i.e. genetic hypercholesterolemia). Pfizer moves to strike this report. Plaintiffs contend that this report was a timely served rebuttal report.

Also at issue are two letters sent from Dr. Handshoe to Ms. Sharon Reavis on June 23, 2015. Reavis, a registered nurse and rehabilitation counselor, is also one of Plaintiff's experts. Plaintiff served two timely expert reports from Ms. Reavis, one for each of the first two Plaintiffs selected for trial. These reports opine on the future care that Plaintiffs will require as a result of their diabetes. In the letters to Ms. Reavis, Dr. Handshoe stated that he agreed with her Life Care Plans for the Plaintiffs and that, "[i]t is my opinion that Ms. Hempstead's PVD is directly attributable to her statin-induced Type 2 Diabetes."

On July 1, 2015, Plaintiffs served the Dr. Handshoe letters on Pfizer as "supplemental materials" in support of Ms. Reavis' opinion. Pfizer moves to exclude these opinions. Plaintiffs readily concede that these letters are not expert reports and do not contain the information required by Rule 26. However, Plaintiffs argue that the PVD opinion was disclosed at Dr. Handshoe's deposition and, thus, should be allowed, and also appear to argue that the opinions should be allowed into evidence through Ms. Reavis.

B. Dr. Handshoe's July 13, 2015 Report

Plaintiffs agree that Dr. Handshoe's opinion that Ms. Daniel's hypercholesterolemia is secondary, rather than familial, hypercholesterolemia is new and not part of his initial expert report. However, Plaintiffs argue that the report is a rebuttal report and that under Rule 26, they are allowed to serve rebuttal reports within 30 days of receiving Pfizer's report. As an initial matter, because the scheduling order is silent, rebuttal reports must be served within thirty (30) days of the reports that they rebut. Fed. R. Civ. P. 26(a)(2)(D). Dr. Handshoe's report was served within thirty (30) days of Pfizer serving their case-specific expert reports.

1. Legal Standard

Rebuttal reports are "intended solely to contradict or rebut evidence on the same subject matter identified by another party . . ." Fed. R. Civ. P. 26(a)(2)(D)(ii). "Rebuttal evidence is defined as evidence given to explain, repel, counteract, or disprove facts given in evidence by the opposing party." *City Grill Hospitality Grp., Inc. v. Nationwide Mut. Ins. Co.*, No. 5:12-CV-610-F, 2013 WL 6092231, at *2 (E.D.N.C. Nov. 19, 2013) (quoting *United States v. Stitt*, 250 F.3d 878, 897 (4th Cir. 2001)).

"A party may not offer testimony under the guise of 'rebuttal' only to provide additional support for his case in chief." *Wise v. C. R. Bard, Inc.*, No. 2:12-CV-01378, 2015 WL 461484, at *2 (S.D.W. Va. Feb. 3, 2015). Thus, "[r]ebuttal experts cannot put forth their own theories; they must restrict their testimony to attacking the theories offered by the adversary's experts." *Boles v. United States*, No. 1:13CV489, 2015 WL 1508857, at *2 (M.D.N.C. Apr. 1, 2015). However, rebuttal reports "may cite new evidence and data so long as the new evidence and data is offered to directly contradict or rebut the opposing party's expert." *Withrow v. Spears*, 967 F. Supp. 2d 982, 1002 (D. Del. 2013) (quoting *Glass Dimensions, Inc. ex rel. Glass Dimensions,*

Inc. Profit Sharing Plan & Trust v. State St. Bank & Trust Co., 290 F.R.D. 11, 16 (D. Mass. 2013)). "Expert reports that simply address the same general subject matter as a previously-submitted report, but do not directly contradict or rebut the actual contents of that prior report, do not qualify as proper rebuttal or reply reports." *Boles*, 2015 WL 1508857, at *2 (quoting *Withrow v. Spears*, 967 F. Supp. 2d 982, 1002 (D.Del.2013)).

2. Discussion

Plaintiffs claim that Dr. Handshoe's July 13, 2015 report rebuts the expert reports of Dr. Elasy, Dr. Lopes-Virella, and Dr. Spratt. The Court finds that Dr. Handshoe's report is a rebuttal report to Dr. Lopes-Virella. Dr. Lopes-Virella opines that "Ms. Daniels' lipid levels placed her in the group of familial hypercholesterolemias (FH). . . . The fact that MS. Daniels' daughter had a heart attack at age 36 and one of her brothers, died at age 50 from a heart attack strongly suggests a diagnosis of heterozygous FH in Ms. Daniels and supports the need to simultaneously start statin therapy and lifestyle changes . . ." (Lopes-Virella Report at 25). She also states that the goal in treating patients with FH is "to achieve at least a 50% reduction of the baseline LDL-cholesterol levels," and the "[l]ifestyle modifications and increased activity would lead, at most, to a 20% reduction in lipid levels." (*Id.*). Finally, and most importantly, in the portion of her report attacking Dr. Handshoe's opinion, she specifically attacks Dr. Handshoe's opinion on the ground that he "ignored the fact that Ms. Daniels had severe hypercholesterolemia, mostly likely familial FH . . ." (*Id.* at 29). The Court finds that Dr. Handshoe's July 13, 2015 report rebuts this line of attack and, therefore, denies Pfizer's motion to strike. The Court does allow Pfizer to reopen Dr. Handshoe's deposition for the sole purpose of exploring the opinion contained in his July 13, 2015 rebuttal report.

C. Agreement with Ms. Reavis' Life Care Plans

Plaintiffs readily admit that the letters served on July 1, 2015 are not reports with the information required by Rule 26. Therefore, Dr. Handshoe will not be allowed to testify to the opinions contained in them. To the extent that Plaintiffs intended to introduce the letters under Rule 703, the Court also excludes them.

Rule 703 provides that

> An expert may base an opinion on facts or data in the case that the expert has been made aware of or personally observed. If experts in the particular field would reasonably rely on those kinds of facts or data in forming an opinion on the subject, they need not be admissible for the opinion to be admitted. But if the facts or data would otherwise be inadmissible, the proponent of the opinion may disclose them to the jury only if their probative value in helping the jury evaluate the opinion substantially outweighs their prejudicial effect.

Fed. R. Evid. 703. First, in developing the life care plans at issue, Ms. Reavis could not have relied on Dr. Handshoe's opinion that he "agreed" with the life care plans. She developed the plans, then he agreed, not the other way around. Second, Plaintiffs have not explained how a statement that simply "agrees" with Ms. Reavis' conclusion would help the jury evaluate Ms. Reavis' opinion and the prejudicial effect here is great. Plaintiffs are attempting backdoor undisclosed expert opinions into evidence by having another expert "rely" on them. "Rule 703 [is] not an exception to the hearsay rule," and one expert cannot "be the mouthpiece for another." *In re Sulfuric Acid Antitrust Litig.*, 235 F.R.D. 646, 653 (N.D. Ill. 2006). In short, Plaintiffs cannot get this opinion before the jury by introducing a one-sentence letter that another expert, who never disclosed this opinion, never provided a basis for this opinion and was never deposed with regard to this opinion, "agrees."

D. The Cause of Ms. Hempstead's PVD

In one of the June 23, 2015 letters, Dr. Handshoe makes the conclusory statement that "[i]t is my opinion that Ms. Hempstead's PVD is directly attributable to her statin-induced Type 2 Diabetes," without any basis or explanation for the opinion. Again, Plaintiffs agree that the letters are not expert reports and do not comply with Rule 26. Thus, Dr. Handshoe cannot offer this opinion at trial.

Plaintiffs argue that Dr. Handshoe should be allowed to testify as to this opinion because he disclosed this opinion in response to questioning at his deposition, and that "[n]ow–only after asking [Dr. Handshoe] if he thought Ms. Hempstead's diabetes was induced by her diabetes and receiving an affirmative answer–Pfizer seeks to prevent that opinion from seeking the light of day."[1] (Dkt. No. 948 at 4-5). Plaintiffs do not cite any authority for the proposition that Dr.

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[1] The exchange to which Plaintiffs refer is below. In Dr. Handshoe's reports, he listed the Plaintiffs' other medical conditions but did not opine on their causes. This prompted the following exchange at deposition:

Q: And in your report in this case you do not give any opinion as to whether any of those conditions are related to her diabetes, correct?
A: Correct. I state what she has.
Q: Okay. And am I correct, that when you testify in this case, that you will not give any opinions that are not stated in your report?
A: That's correct.
. . .
Q: In other words, you don't have any intention at the trial of this case to give an opinion that any of these conditions that you listed in your report were induced by diabetes, correct?
A: I believe her peripheral arterial disease is related to diabetes.
Q: I understand that you testified that you believe that, but since you did not include that opinion in your opinion do you agree that you do not intend to offer that opinion at trial?
A: Okay.
Q: You agree?
A: That's a legal think, I guess. Yes.

An off-the-record discussion by counsel followed.

Handshoe's opinion should be allowed because simply because Pfizer asked about it at deposition. Another court in this district has explicitly rejected such an argument:

> Plaintiff argues, citing no legal authority, that defendants 'opened the door' during Messerschmidt's deposition to broaden the scope of opinions he will offer at trial. The court finds that merely confirming that an expert does not intend to offer opinions in a certain area cannot be said to open the door for that expert to offer previously undisclosed opinions in a previously unidentified area of expertise.

Boling ex rel. Boling v. Mohawk Indus., Inc., No. CA 3:09-46-JFA, 2010 WL 9944254, at *1 (D.S.C. Mar. 19, 2010).

"Rule 26(a)(2) does not allow parties to cure deficient expert reports by supplementing them with later deposition testimony." *Ciomber v. Coop. Plus, Inc.*, 527 F.3d 635, 642 (7th Cir. 2008). "The purpose of Rule 26(a)(2) is to provide notice to opposing counsel–before the deposition–as to what the expert witness will testify." *Id.*; *see also In re C.R. Bard, Inc.*, 948 F. Supp. 2d 589, 644 (S.D.W. Va. 2013) (excluding an opinion because the opinion espoused at deposition was "a new opinion, not discussed in her Rule 26 expert report . . . and no supplemental report has been filed."); *Boling v. Mohawk Indus., Inc.*, No. 3:09-CV-00046-JFA, 2010 WL 2998470, at *2 (D.S.C. July 27, 2010) ("The court struck the portions of Messerschmidt's testimony that were not contained in his reports, that were raised for the first time in his deposition, and that were on an entirely different subject matter than what Messerschmidt was proffered to testify.").

Dr. Handshoe never supplemented his report to include this opinion, and the basis of this opinion has never been provided to Defendant, by report, deposition, or otherwise. Therefore, the Court grants Pfizer's motion to strike the opinion.

E. Rule 37(c) Analysis

Finally, Plaintiffs argue that Dr. Handshoe's opinions should be admitted under Rule 37(c). Rule 37 provides that if a party fails to make a timely disclosure under Rule 26, then the party "is not allowed to use that information or witness to supply evidence on a motion, at a hearing, or at a trial, unless the failure was substantially justified or is harmless." Fed. R. Civ. P. 37(c)(1). The court may "[i]n addition to or instead of this sanction," impose other appropriate sanctions. *Id.* In determining whether a nondisclosure is "substantially justified or harmless,"

> a district court should be guided by the following factors: (1) the surprise to the party against whom the evidence would be offered; (2) the ability of that party to cure the surprise; (3) the extent to which allowing the evidence would disrupt the trial; (4) the importance of the evidence; and (5) the nondisclosing party's explanation for its failure to disclose the evidence.

S. States Rack And Fixture, Inc. v. Sherwin-Williams Co., 318 F.3d 592, 597 (4th Cir. 2003). The first four factors "relate mainly to the harmlessness exception," while the fifth factor relates to the substantial justification exception. *Id.*

The Court finds that Plaintiffs failure to properly disclose the opinions contained in Dr. Handshoe's June 23, 2015 letters to Ms. Reavis is not substantially justified or harmless. As to justification, Plaintiffs provide no reason for their failure to provide a written report, timely or untimely, for these opinions. As Plaintiffs have failed to provide a reason for their failure to include these opinions in an expert report, the Court finds that the failure is not substantially justified.

As to harmlessness, the Court finds that there is simply no way to cure the surprise and prejudice to Pfizer without moving the trials in the *Daniels* and *Hempstead* cases, which the Court is unwilling to do. Plaintiffs still have not provided any basis for these opinions, and

Pfizer has not any opportunity to rebut them[1] or depose Dr. Handshoe about them. While Dr. Handshoe's deposition could be taken before trial, Pfizer will be prejudiced by not having the opportunity to rebut Dr. Handshoe's opinions. In order to allow for rebuttal, Plaintiffs will first have to provide a basis for the opinions at issue, Pfizer then will have to be allowed adequate time to serve rebuttal report(s), and the parties will have to be allowed time to depose any rebuttal experts along with Dr. Handshoe. The parties will then have to be given an opportunity to file Daubert motions as to these experts before trial. This is simply untenable under the current scheduling order. Thus, the first three factors of *Southern States* support excluding the opinions.

As to importance, Plaintiffs stated at the July 23, 2015 Status Conference that the opinion on PVD went to damages, not liability. As to the life care plans, Plaintiffs have Ms. Reavis opining on this issue, so it is not crucial that Dr. Handshoe do so. In sum, the Court finds that the failure to disclose is not harmless. Curing the surprise requires moving the bellwether trials, which is a major disruption in this large MDL. Therefore, the opinions in the July 23, 2015 letters are excluded. *See In re C.R. Bard, Inc.*, No. 2:10-CV-01224, 2013 WL 2432861, at *4 (S.D.W. Va. June 4, 2013) (late disclosure found "not harmless" because the court was unwilling to move trial and, therefore, allowing the expert "would likely prejudice [the other party's] ability to properly challenge the expert[].").

For the reasons stated above, Pfizer's motion to strike (Dkt. No. 943) is **GRANTED IN PART AND DENIED IN PART**. Pfizer's motion is **GRANTED** as to the opinions contained

[1] This is especially true for the opinion that diabetes caused Ms. Hempstead's PVD. While the life care plans were at least previously disclosed by Ms. Reavis, there is no indication in the record that the PVD opinion was espoused by another expert.

in the June 23, 2015 letters from Dr. Handshoe to Ms. Reavis and **DENIED** as to Dr. Handshoe's July 13, 2015 rebuttal report.

AND IT IS SO ORDERED.

Richard Mark Gergel
United States District Court Judge

July 23, 2015
Charleston, South Carolina