Scientific Evidence in Federal Litigation

Federal Bar Association Chapter for the Districts of Kansas and Western Missouri

Bob Dole Federal Courthouse, Kansas City, Kansas
Ceremonial Courtroom 655

Agenda:

8:00-8:30 Registration/Light Breakfast 6th Floor Hall

8:20-8:30 Introductory Remarks President-elect John Shaw

8:30-9:40 Panel 1: Criminal Law

Moderator: Tony Mattivi (D. Kan. Asst. US Attorney)

Panelists: J. R. Hobbs (Wyrsch Hobbs Mirakian); Tanya Treadway (D. Kan. Asst. US Attorney); Christopher M. Joseph (Joseph Hollander & Craft); Matt Wolesky (W.D. Mo. Asst. US Attorney)

9:50-10:30 Panel 2: Civil Law – Commercial

Moderator: Rachel Schwartz (Stueve Siegel Hanson, LLP)

Panelists: Barrett Vahle (Stueve Siegel Hanson, LLP); Nicholas L. DiVita (Berkowitz Oliver LLP)

10:40-11:20 Panel 3: Civil Law – Products Liability

Moderator: Dan Hodes

Panelists: Wes Shumate (Davis, Bethune & Jones); Mark Anstoetter (Shook Hardy & Bacon)

11:30-12:20 Panel 4: View from the Bench

Moderator: John Shaw

Panelists: Judge Beth Phillips (W.D. Mo.); Magistrate Judge John Maughmer (W.D. Mo.); Magistrate Judge Waxse (D. Kan.); Chief Magistrate Judge James O'Hara (D. Kan.)

12:20-12:30 Annual Meeting

12:30-1:30 Reception & Lunch 6th Floor Hall

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Discussion outline:

1. Harnessing and Identifying Financial Information
2. Assessing and Using Cell Phone Data
3. Gathering and Using Cyber Evidence
4. Discovery Issues Surrounding Scientific Evidence
5. Trends in Computer Hacking

Tony Mattivi began his legal career as a legal intern in the Shawnee County DA's Office in 1993, prosecuting speeding tickets and DUIs. He has been an Assistant United States Attorney in the District of Kansas for the past 18 years. He deployed to Baghdad with the Department of Justice in 2007 to advise Iraqi prosecutors handling cases against members of Saddam Hussein's regime, working primarily with the prosecutors of "Chemical Ali" (Ali Hassan al Majid) in the 1991 Intifada (Uprising) case. From 2009 to 2013 he was lead counsel for the United States in the capital military commission of Abdul Rahim al Nashiri, the mastermind of the October 2000 attack on the USS COLE in Yemen that killed 17 US sailors. He now prosecutes mostly national security cases, along with violent crime, controlled substance, and white collar cases.

J.R. Hobbs graduated with a B.A. from the University of Kansas and a J.D. from the University of Missouri at Kansas City in 1981. He is a shareholder at the law firm of Wyrsch Hobbs & Mirakian and practices primarily criminal defense, including white-collar, health care and business crime litigation. He is past president of the Missouri Association of Criminal Defense Lawyers and is listed in the “Best Lawyers in America” in criminal law. He is a past recipient of the Lon O. Hocker Trial Lawyer Award for the Missouri Bar Foundation, which is an honor selected with input by the state and federal trial judges. He is a member of the American Board of Trial Advocates, Fellow in the American College of Trial Lawyers, a Fellow in the International Society of Barristers, Fellow in the International Academy of Trial Lawyers; and Fellow of the American Board of Criminal Lawyers. He is also an adjunct professor at the UMKC Law School.

Tanya J. Treadway is a 1987 graduate of the University of Kansas School of Law, having previously been a high school English, Speech and Drama teacher. Following law school, she served as a law clerk to then Chief Judge Earl E. O'Connor, of the United States District Court in Kansas City, Kansas, then entered private practice in Kansas City, Missouri, with Polsinelli, White, Vardeman and Shalton, where she enjoyed a complex litigation and securities transaction practice. Since 1990, Ms. Treadway has been an Assistant United States Attorney for the District of Kansas, concentrating on complex fraud matters. Since 1994, she has been the lead prosecutor for health care fraud cases in Kansas, and has been nationally recognized by former Attorney General Janet Reno and former FBI Director Louis Freeh for her successful prosecutions of complex fraud. In October 1999, Ms. Treadway received a Director's Award from the Executive Office for United States Attorneys for her commitment to health care fraud prosecutions. In 2010, Ms. Treadway received the Kansas Consumer Champion Award, and led the prosecution which was named the NHCAA "Investigation of the Year." In 2011, Ms. Treadway received EOUSA recognition for her work with crime victims, and was named the Top Federal Female Fraud Prosecutor by the Women in Federal Law Enforcement Foundation.

Chris Joseph is a partner with Joseph Hollander & Craft with offices in Topeka, Lawrence and Wichita. Chris graduated Wichita State University in 1996 and KU Law School in 2000. He clerked for District Judge John Lungstrum before commencing practice with his firm in 2002. Chris is admitted to practice in all Kansas state courts, as well as the District Courts for the District of Kansas and the Western District of Missouri. Chris is an active participant in bar activities and has served on the Bench-Bar Committee for the United States District Court for the District of Kansas from 2009 to 2010, was the Chair of the Merit Selection Panel for the reappointment of a federal magistrate judge in 2010, and a member of the Tenth Circuit Merit Selection Panel for the Kansas Federal Defender in 2013.

Chris is a Fellow in the Litigation Counsel of America, is recognized in the peer-review publication Best Lawyers in America, is designated as one of the top five percent of Kansas lawyers in Super Lawyers® by Thomson Reuters, and has been named "Top 100 Trial Lawyers" in Kansas by The National Trial Lawyers.

Matt Wolesky has worked as an Assistant United States Attorney in the Western District of Missouri since 2003. He is currently assigned to the Computer Crimes Unit and is the National Security Cyber Specialist for the Western District of Missouri, where he handles national security cyber intrusion and computer fraud cases. Mr. Wolesky also handles cases involving computer hacking, spamming, other computer and Internet fraud, theft of trade secrets and intellectual property fraud. Mr. Wolesky prosecuted the first spamming case in the Western District of Missouri, and several large hacking cases including the prosecution of the Capital Grille Hack and the University of Central Missouri Hack. Previously, Mr. Wolesky worked as an Assistant Prosecuting Attorney in Platte County, Missouri and is a graduate of the University of Notre Dame Law School. Mr. Wolesky frequently speaks at conferences and teaches classes on Using the Internet in Your Investigations, Social Media, Internet Safety, and Using Technology in the Courtroom, including recently teaching a series of classes for the Kansas City, Missouri Police Department Academy as part of an Internet and Social Media Bootcamp for Law Enforcement.

FINANCIAL ISSUES WITH EXPERTS

1. IDENTIFY AREAS OF POSSIBLE NEED FOR EXPERTS AND/OR FINANCIAL ISSUES

a. Price-Fixing Cases

b. Health Care Cases

c. Environmental – Money spent on Safety/Training/Personnel

d. Embezzlement or Tax Fraud or Financial Motive Issues

2. RESEARCH, SELECT AND PREPARATION OF EXPERT

a. Retain Best Expert Possible

b. Privilege / Work Product Concerns / Retention Letter

c. *Kovell* Expert or Testifying Expert

d. Record of Information Fed to Expert

3. DOES ISSUE RAISE A NEED FOR SUMMARY OR 1006 ISSUE?

a. What Are 1006 Concerns – Summaries or Calculations

b. Charts or Demonstration

Summaries are compilations are not opinions so long as the person who prepared the charts is available for examination. *United States v. Orlowski*, 807 F.2d 1283 (8th Cir. 1986); *United States v. Behrens*, 689 F.2d 154 (10th Cir. 1982); Also be sure to admit underlying data.

4. DOES THE PROPOSED TESTIMONY RAISE A DAUBERT CONCERNS?

a. Is There An Issue Implicating An Opinion?

b. *Daubert* Applies to All Types of Expert (J. Vratil Example)

The Supreme Court further addressed the gatekeeping function of the trial court in *Kumho Tire Co. v. Carmichael*, 526 U.S. 137 (1999). In Kumho, the Court determined that the basic principles of *Daubert* apply to all expert testimony whether it is scientific in nature, technical in nature or based on other specialized knowledge. In *Kumho*, 526 U.S. at 147-49. The *Kumho* Court also reiterated that "nothing in either *Daubert* or the Federal Rules of Evidence requires a district court to admit opinion evidence that is connected to existing data only by the *ipse dixit* of the expert." *Id*. At 157 (quoting *Gen. Elec. Co. v. Joiner*, 522 U.S. 136, 146 (1997)).

c. Preparation Tips

Stan Sexton, a skilled trial lawyer, writes in his article, "The Nine Most Common Mistakes with Experts" Winning with Experts (Mo. Bar. 2008) that "You should prepare your expert or prepare to cross-examine the other side's expert with some idea of determining the scientific methodology used by the expert or to arrive at their opinion."

Daubert and its progeny has established several factors that must be satisfied in order to validate an expert's findings, opinions, and conclusions; namely (1) determine whether a theory or technique can be or has been tested; (2) if so, research whether the theory or technique has been subjected to peer review and publication; (3) calculate the potential rate of error of the technique or theory; (4) determine whether the theory is generally accepted in the field. (Federal Rule 702 has codified these factors.) If these criteria are not met, an attorney exposes the expert witness's findings to *Daubert* challenges and this may jeopardize the case.

Issues may go to an expert's *Daubert* methodology and proper scope of opinions under Rule 702 and 704. Included in materials is an example of a motion *in limine* to exclude claiming damages by an expert in a parallel price-fixing case brought by the government and arising from an underlying criminal investigation. This example shows how methodology may be subject to an argument that the theory or opinion is flawed as a matter of law.

5. **FINALLY, A WITNESS OR DISGRUNTLED EMPLOYEE MAY HAVE A LAPTOP OR DESKTOP AFTER LEAVING EMPLOYMENT OF A TARGET COMPANY OR INDIVIDUAL TARGET.**

   a. Who Takes Control or Has Ownership of Computer?

   b. Image the Computer?

   c. If Requested By Government, Should Subpoena Be Invited?

   d. How Should Contents Be Viewed or Inventoried?

GATHERING AND USING CYBER EVIDENCE

EXAMPLE NO. 1: (Gathering)

FERC (Federal Energy Regulatory Commission) investigation regarding manipulation of electricity. Related obstruction investigation arising first in Southern District of Florida. Our client was a Kansas City resident and co-owner of target company.

Facts- Two principals are instant messaging or chatting back and forth. The chat conversations discuss the prices going up and down. There is a concept known as a "zero risk" transaction, but the participants still get paid. By downloading programs, it would automatically save these chats.

First Issue

A FERC subpoena had been issued. The lead principal said there were no responsive chats. Our client told his principal he should produce the chats. Our client left the business. When he left, he kept his desktop computer. An administrative subpoena and request for interview was subsequently issued to our client by FERC. Whose computer is it? (abandonment issue).

Second Issue

Produce hard copies of chats or IM's to FERC (and later to G.J.)

Third Issue

Always image the computer with the assistance of an expert. Have an investigator or expert maintain record of chain of custody. Ultimately, our client saved the information and produced it. The chat traffic itself proved that the target subject knew of the chats. This avoided prosecution of our client.

Example No. 2: **(Using Digital Evidence)**

1. Enhance sound or video recordings
2. Police shoot– only 1.349 seconds for 4 shots; important

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MATERIALS REGARDING SELECT ISSUES WITH EXPERTS

1

ATTORNEY-CLIENT PRIVILEGE

A discussion of privileges is another timely topic as to issues that touch upon the presentation of evidence. Privileges include the traditional attorney-client privilege, which protects attorney-client communications, as well as the privileges protecting the client from incrimination by his own attorney in the very matter for which the attorney was retained. *See, Fisher v. United States*, 425 U.S. 391 (1976); *Baird v. Koerner*, 279 F.2d 623 (9th Cir. 1960); United States v. Zweig, 548 F.2d 1347 (9th Cir. 1977); *United States v. Strahl*, 590 F.2d 10 (1st Cir. 1978). Additionally, there is also a "work product privilege" in the criminal law context which belongs both to the client and the attorney. *See, United States v. Nobles*, 422 U.S. 225 (1975); *In re Special September 1978 Grand Jury*, 640 F.2d 49 (7th Cir. 1980).

ACCOUNTANT, INVESTIGATOR PRIVILEGES

Another aspect in which criminal practitioners and their clients are confronted concerns the use of investigators and investigative accountants. In this regard, one should be familiar with the use of a so-called *Kovel* accountant. *See, United States v. Kovel*, 296 F.2d 918 (2d Cir. 1981). For example, the privilege of communications by client to an attorney's agent acting in a subordinate capacity has long been recognized, but communications to that agent for the purpose of transmission to an attorney need not limit the privilege to menial or ministerial employees. The complexities of modern existence prevent attorneys from effectively handling a client's affairs without the help of others. "The assistance of these agents being indispensable to his work and the communications of the client being often necessarily committed by the attorney or by the client himself, the privilege must include all the persons who act as the attorney's agents." Wigmore on Evidence, Vol. VIII, Section 2292 at 554 (1961).

Recognition of the attorney-client privilege has been extended to an accountant who had been retained by taxpayer's attorneys to assist in accumulation of business and financial information required to provide adequate and complete legal advice. *United States v. Schmitt*, 360 F. Supp. 339 (M.D. Pa. 1973). "Accounting concepts are a foreign language to some lawyers in almost all cases, and to almost all lawyers in some cases," so the *Kovel* court likened the necessity of an accountant to that of an interpreter when deciding the privilege should apply. *Kovel, supra,* at 922. "What is vital to the privilege is that the communication be made in confidence for the purpose of obtaining legal advice from the lawyer if what is sought is not legal advice at only in the accounting service or if the advice sought is the accountant's rather than the lawyer's, no privilege exists." *United States v. Gurtner*, 474 F.2d 297, 298 (9th Cir. 1973); *quoting, Kovel, supra*, at 922. *See also, United States v. Cote*, 456 F.2d 142, 144 (8th Cir. 1972).

Importantly, in utilizing a *Kovel* accountant, or an investigator, the attorney should document the existence and nature of the professional relationship. One of the best methods of doing this is by way of a letter. The following letter is an example of how to set forth the relationship in a method that documents the agreement:

> Dear Accountant,
>
> This will confirm the arrangement agreed to between us on (date) whereby you will undertake work for us along the lines specified below.
>
> In connection with the retainer of our firm to render legal services of Mr. John Taxpayer, we have express authority to retain an accountant who shall work under our direction and report directly to us. This work contemplates services of character and quality which would be necessarily adjunct to our services as lawyers. The accountant is authorized to bill us for his services and we, in turn, will charge the client therefor as our necessary out-of-pocket disbursements.
>
> In connection with said employment, all communications between you and Mr. Taxpayer, as well as communications between you and any attorney, agent, or employee acting in his behalf, shall be regarded as confidential and made solely for the purpose of assisting counsel I giving

legal advice to Mr. Taxpayer. You will not disclose to anyone, without our written permission, the nature or content of any oral or written communication, nor any information gained from the inspection of any record(s) or document(s) submitted to you, including information obtained from corporate records or documents and you will not permit the inspection of any papers or documents without our permission in advance.

All work papers, records, or other documents regardless of their nature and the source from which they emanate, shall be held by you solely for our convenience and subject to our unqualified right to instruct you with respect to possession and control. Work papers prepared by your, or under your direction, belong to this law firm.

As part of the agreement to provide accounting services in this matter, you will immediately notify this law firm of the happening of any one of the following events: (a) the exhibition or surrender of any documents or records prepared by or submitted to you or someone under your direction, in a manner not expressly authorized by this law firm; (b) a request by anyone to examine, inspect, or copy such documents or records; and (c) any attempt to serve, or the actual service of, any court order, subpoena, or summons upon you which requires the production of any such documents or records. You will immediately return all documents, records and work papers to us at our request.

Thank you for your attention.

Very truly yours,
John Lawyer

The Sixth National Institute on Criminal Tax Fraud. A Workshop for Accountants & Lawyers, (1989)

Of course, if the Kovel accountant ultimately testifies, then, this protection may be waived. Therefore, two accountants may ultimately be necessary. One should serve as an advisor (i.e., Kovel accountant), and the other as a testifying accountant.

Another aspect of privileges and th work product doctrine includes the use of investigators. The work product doctrine has long been recognized emanating from the decision in *Hickman v. Taylor*, 329 U.S. 495 (1947). The work product doctrine, in short, operates to protect certain mateirals prepared by an attorney "acting for his client in anticipation of litigation." Hickman at 508. The doctrine is also one which protects th mental processes of the attorneys themselves. For

example, in *United States v. Nobels*, 422 U.S. 225, 238 (1975), the United States Supreme Court held:

> "At its core, the work product doctrine shelters the mental processes of the attorney, providing a privileged area within which he can analyze and prepare his client's case. But the doctrine is an intensely practical one, grounded in the realities of litigation in our adversary system. One of those realities is that attorneys often must rely on the assistance of investigators and other agents in the compilation of materials in preparation for trial. It is therefore necessary that the doctrine protect material prepared by agents for the attorney, as well as those prepared by the attorney himself."

Nobels at 238, 239. It is clear that agents acting on behalf of an attorney may engage in collecting information. After the information is collected, it may be related to the attorneys so that they can sift through it and determine what, if any, will best serve the interests of their clients. The rule, to be an effective one, is grounded in the practicality with a realistic attitude respecting what attorneys can and cannot do for their clients by themselves. As stated in *State v. Pratt*, 284 Md. 516, 398 A.2d 421 (1979):

> "Initially we observe that, given the complexities of modern existence, few if any lawyers could, as a practical matter, represent the interest of their clients without a variety of non-legal assistance. Recognizing this limitation, it is now almost universally accepted in this country that the scope of the attorney-client privilege, at least in criminal causes, embraces those agents whose services are required by the attorney in order that he may properly prepare his client's case."

Pratt at 423, 424. It simply cannot be disputed that lawyers must have the assistance of investigators, paralegals and secretaries to adequately represent their clients. Communications prepared in anticipation of litigation are within the well-recognized "work product" and "attorney-client privilege" protections. Practitioners should be aware of the parameters concerning "privileges" and work product to prevent a "waiver" from developing.

2

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
ALEXANDRIA DIVISION

UNITED STATES OF AMERICA ex rel. Kurt Bunk and Daniel Heuser, Plaintiffs, v. Birkart Globistics GmbH & Co. et al., Defendants.	)	Civil No. 1:02cv1168
UNITED STATES OF AMERICA *ex rel.* Ray Ammons, Plaintiff, v. The Pasha Group, *et al.*, Defendants.	)	Civil No. 1:07cv1198

MEMORANDUM IN SUPPORT OF DEFENDANTS' MOTION *IN LIMINE* TO EXCLUDE DR. JUNE LEE'S TESTIMONY AND EXPERT REPORTS

Defendants seek an order *in limine* precluding the Government and Relators from presenting any testimony from Plaintiffs' expert June Lee, PhD. and precluding the use of two reports she prepared, her February 15, 2011 expert report (the "Lee Report") (a copy of which is attached hereto and incorporated by reference herein as Exhibit A) and her April 14, 2011 rebuttal expert report (the "Lee Rebuttal Report" attached hereto and incorporated by reference herein as Exhibit B), pursuant to Fed. R. Evid. 104(a), 403, 702, and 703, and the holding in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993).

I. INTRODUCTION

The Government alleges that the Gosselin Defendants and alleged co-conspirators "conspired to restrain trade by fixing the bids submitted to the United States for the shipment of personal property of members of the United States Armed Forces and civilian employees of the U.S. Department of Defense . . . between Germany and the United States." *See* United States' Complaint in Intervention (the "Complaint"), Doc. 110 at 3. As a result of the alleged conspiracy, "the defendants submitted or caused to be submitted false and inflated claims for payment to the United States . . . ." *Id.* Defendants vigorously dispute these allegations.

Dr. June Lee is a career employee of the Antitrust Division of the Department of Justice and was engaged by the Government in this case to examine (among other things) the impact of collusion on firms' behavior, the effects of price-fixing by subcontractors on the bids of prime contracts, and whether a price-fixing cartel can be effective without 100% participation. *See* Lee Report, Exhibit A at p. 2. Dr. Lee concluded that "when firms collude and engage in cartel activity, their prices are likely to be higher than when they compete against each other. As a result of the cartel activity, consumers have to pay higher prices." *Id.* at pp. 9-10. Dr. Lee also concluded that "[p]rice-fixing agreements by subcontractors will likely cause an increase in bids of auction participants that require the services of those subcontractors." *Id.* at p. 10. Dr. Lee further concluded that "not all companies in a given industry have to participate in a price-fixing scheme for it to be effective." *Id.*

It would appear that the Government intends to use Dr. Lee's report and testimony either: (1) as a way to improperly bolster its arguments about the virtues of competition and evils of collusion, which should be excluded under Rule 402 as irrelevant, or under Rule 403 even if

relevant, because any probative value is outweighed by its prejudicial effect; or (2) as a causation expert, as the clear inference from her generalized opinions that competition is good for consumers and overall market efficiency would be that a lack of such competition would cause harm to the Government. If Dr. Lee is offered essentially as a causation expert, her testimony and reports should be excluded in this case as unreliable because the methodologies she employed in reaching her purported opinions are flawed. She failed to consider or evaluate several critical factors, including important efficiency-enhancing benefits associated with the landed rate system in dispute, and the impact of non-compensatory rates being charged immediately prior to the alleged conspiracy period. In addition, Dr. Lee failed to perform any empirical analyses and failed to sufficiently tie her opinions to the facts of this case. Dr. Lee's failure to consider these factors renders her opinion unreliable and irrelevant.

II. ARGUMENT

A. Trial Court's Role under Fed. Rule Evid. 702, Fed. Rule Evid. 403, and the holding in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*

The trial judge serves as a gatekeeper for purported expert testimony. *See Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 592-93, 113 S.Ct. 2786, 125 L.Ed.2d 469 (1993). The Federal Rules of Evidence assign to the trial judge the task of ensuring that an expert's testimony is both relevant to the issues at hand and sufficiently reliable. *Id.* at 589.

Federal Rule of Evidence 702 authorizes the admission of expert testimony if it "will assist the trier of fact to understand the evidence or to determine a fact in issue . . . ." As interpreted in *Daubert*, Rule 702 requires the Court, pursuant to Federal Rule of Evidence 104(a), to make "at the outset . . . a preliminary assessment of whether the reasoning or

methodology underlying the testimony is scientifically valid and of whether the reasoning or methodology properly can be applied to the facts in issue." *Id.* at 592.

Thus, before the proffered testimony may be admitted, the potential expert witness must pass a threshold inquiry consisting of (1) a reliability requirement ("whether the expert is proposing to testify to . . . scientific knowledge"), and (2) a relevance requirement (whether the scientific knowledge to which the expert proposes to testify "will assist the trier of fact to understand or determine a fact in issue"). *Daubert*, 509 U.S. at 587-592. Federal Rule of Evidence 403 permits the exclusion of relevant evidence "if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury." *Daubert*, 509 U.S. at 595. The trial judge must ensure "that an expert's testimony both rests on a reliable foundation and is relevant to the task at hand." *Id.* at 597.

The Supreme Court further addressed the gatekeeping function of the trial court in *Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 119 S.Ct. 1167, 143 L.Ed.2d 238 (1999). In *Kumho*, the Court determined that the basic principles of *Daubert* apply to all expert testimony whether it is scientific in nature, technical in nature or based on other specialized knowledge. *Kumho*, 526 U.S. at 148. Quoting its decision in *General Electric Co. v. Joiner*, 522 U.S. 136, 146, 118 S.Ct. 512, 139 L.Ed.2d 508 (1997), the *Kumho* Court reiterated that "'nothing in either *Daubert* or the Federal Rules of Evidence requires a district court to admit opinion evidence that is connected to existing data only by the *ipse dixit* of the expert.'" *Id.* at 157.

In scrutinizing the reliability of the expert testimony, the Court is guided by *Daubert, Joiner* and *Kumho.* Further, the Court must consider whether the expert has applied the principles and methods faithfully to the facts of the case. Courts should "make certain that an

expert . . . employs in the courtroom the same level of intellectual rigor that characterizes the practice of an expert in the relevant field." *Berlyn, Inc., v. Gazette Newspapers, Inc.,* 214 F.Supp.2d 530, 536 (D.Md. 2002) (*citing Cooper v. Smith & Nephew, Inc.,* 259 F.3d 194, 200 (4th Cir. 2001)) (quoting *Kumho,* 526 U.S. at 152, 119 S.Ct. 1167).

B. Dr. Lee's Testimony Should be Excluded Pursuant to Fed. Rule Evid. 402 and 403.

The Lee Report indicates that the Government seeks to introduce her opinion testimony "about the impact of collusion on firms' behavior." *See* Lee Report, Exhibit A at p. 2. However, Dr. Lee has done no empirical analyses of any facts relating to this case and it is clear that her testimony can be anticipated to serve as a conduit for the Government to make arguments about the virtues of competition and evils of collusion. These generalized conclusions and arguments will do nothing to aid the jury in understanding the facts, but rather are simply an effort to bolster the Government's legal arguments, and should be excluded. Dr. Lee's opinions in this regard are not relevant and therefore not admissible under Rule 402 of the Federal Rules of Evidence. Even if relevant, the purported relevancy of her testimony is outweighed by the danger of unfair prejudice, confusion of the issues and potential for misleading the jury under Rule 403 of the Federal Rules of Evidence.

Dr. Lee's testimony is also inadmissible and irrelevant to the extent that the testimony would merely vouch for the credibility of government witnesses. "Improper vouching may occur when the government: (1) refers to facts outside the record or implies that the veracity of a witness is supported by outside facts that are unavailable to the jury; (2) implies a guarantee of truthfulness; or (3) expresses a personal opinion about the credibility of a witness." *United*

States v. Santana, 150 F.3d 860, 863 (8th Cir. 1998) (*citing United States v. Beasley,* 102 F.3d 1440, 1449 (8th Cir.1996), *cert. denied,* 520 U.S. 1246, 117 S.Ct. 1856, 137 L.Ed.2d 1058 (1997)). In this case, Dr. Lee's anticipated testimony referencing the impact of collusion on competition would be offered merely to support the Government's theory, and therefore, the credibility of the Government's witnesses and evidence. Testimony offered merely to support credibility is both inadmissible and argumentative. *United States v. Azure*, 801 F.2d 336, 340 (8th Cir. 1986) ("putting an impressively qualified expert's stamp of truthfulness on a witness' story goes too far").

To the extent the Government asserts that the evidence is simply "educational," utilizing Dr. Lee as a purported "educational witness" is also merely a thinly-veiled attempt by the government to present a witness that will vouch for the credibility of their witnesses.[1] For example, Dr. Lee concluded "when firms collude and engage in cartel activity, their prices are likely to be higher than when they compete against each other. As a result of the cartel activity, consumers have to pay higher prices." Lee Report, Exhibit A at pp. 9-10. Testimony in this regard improperly directs the jury to conclude that collusion results in damages. As explained by Judge Weinstein, "[e]xpert evidence can be both powerful and quite misleading because of the difficulty in evaluating it. Because of this risk, the judge in weighing possible prejudice against probative force under Rule 403 of the present rules exercises more control over experts than over lay witnesses." *Daubert*, 509 U.S. at 595, *citing* Jack B.Weinstein, *Rule 702 of the Federal Rules of Evidence is Sound; It Should Not Be Amended*, 138 F.R.D. 631, 632. The

[1] Dr. Lee testified "I was retained to be a teaching expert for the jury." *See* Lee Deposition Excerpts, Exhibit C, Tr. at 53.

information offered by Dr. Lee merely implies that the veracity of the Government's witnesses is supported by outside facts that are unavailable to the jury. Such information is improper when it invades the province of the jury. *See United States v. Azure*, 801 F.2d at 339-41.

Dr. Lee's testimony should be excluded as it fails to meet the relevance requirement under Rule 402 and the holding in *Daubert* in that her testimony will not assist the trier of fact to understand or determine a fact in issue. Even if the Court should find tangential relevance to her anticipated testimony, it should conclude that the danger of unfair prejudice, confusion of issues, or misleading the jury requires that her testimony be excluded under Rule 403.

C. Dr. Lee's Testimony Should Be Excluded Pursuant To Federal Rule of Evidence 702 and *Daubert v. Merrell Dow Pharmaceuticals, Inc.*

Courts have long insisted that economic testimony meant to show the fact of injury and causation of damages must meet certain standards. In particular, it must deal with the world as it is and recognize that there are circumstances other than anticompetitive behavior that affect prices. *Pac. Coast Agr. Export Ass'n. v. Sunkist Growers, Inc.*, 526 F.2d 1196, 1207 (9th Cir. 1975), *cert. denied*, 425 U.S. 959 (1976) (expert must show that the changes in the market are not attributable to other causes). In law as in economics, testimony must account for the consequences of significant factors that would affect price, and therefore an evaluation of claimed damages.

In this case, Dr. Lee fails to recognize the specific facts of this case and the impact of these facts on the rates at issue during the relevant time periods. As the Seventh Circuit explained in *MCI Communications Corp. v. AT&T*, 708 F.2d 1081 (7th Cir.), *cert denied*, 464 U.S. 891 (1983),

> when a plaintiff improperly attributes all losses to a defendants' illegal acts, despite the presence of significant other factors, the evidence does not permit a jury to make a reasonable and principled estimate of the amount of damage. This is precisely the type of "speculation or guess work" not permitted for antitrust jury verdicts. To allow otherwise would force the defendants to pay treble damages for conduct that was determined to be entirely lawful.

Id. at 1062-63 (citations omitted).

If the Government offers Dr. Lee as a causation expert, or if the jury infers a causation opinion from her testimony, it is clear that the only reasonable inference to be drawn from her anticipated testimony is that only competition is good for consumers and for overall market efficiency, and that the Government's complaints of a lack of such competition must have caused the Government harm. However, in rendering her opinions, Dr. Lee has failed to perform any empirical analyses and failed to account for factors specific to this matter that must affect any evaluation of claimed damages.

1. Dr. Lee Failed To Evaluate Efficiency-Enhancing Benefits Associated With The Landed Rate System.

Dr. Lee recognizes the value in cooperation among competitors in that it may increase efficiency and better serve their customers (Lee Report, Exhibit A at p. 3, ¶3), but she rejects out of hand the value that such cooperation could have brought to this industry. *See* Lee Deposition Excerpts, Exhibit C, Tr. at 95-96, 100, 102-03, 126-131. Numerous witnesses have testified in this case that the landed rate systems in place during the time periods in question were efficiency-enhancing because they reduced transaction costs, monitoring costs, policing costs, administrative costs, and eliminated payment risks associated with the transportation of military

household goods. *See* Exhibit D, excerpts from various depositions.[2] Dr. Lee did not analyze or even acknowledge these efficiency-enhancing benefits associated with landed rates, rendering her analysis incomplete and irrelevant. *See* Lee Deposition Excerpts, Exhibit C, Tr. at 95-96, 100, 102-03, 126-31.

2. Dr. Lee Failed To Evaluate The Impact Of Non-Compensatory Rates, Bankruptcies And The Cyclical Nature Of The Industry, Failed To Perform Any Empirical Analysis, And Did Not Tie Her Opinions To The Facts Of This Case.

Further, Dr. Lee failed to acknowledge the non-compensatory rates, bankruptcies, and cyclical nature of the industry immediately prior to the claimed conspiracy period. *See* Lee Deposition Excerpts, Exhibit C, Tr. at 158-60. She does not deem it important to factor into her opinion that prime rates might be higher because previous prime rates were non-compensatory. *Id.*, Tr. at 130-31. Similarly, she does not deem it important to factor into her opinion that prime rates might be higher because of the impact of bankruptcies and the resultant fewer carriers in the market. *Id.*, Tr. at 132, 144-45, 150. Further, she does not deem it important to factor in to her opinion that prime rates might be higher due to the cyclical nature of the industry. *Id.*, Tr. at 150-51.

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2 German Agents Lynn Appleton, Tr. at 233 (price payment guarantee); Horst Baur, Tr. at 89 (agents' payment guarantee), 124 (claims charge back guarantee); Jurgen Graf, Tr. at 38-39 (rate, payment and claims guarantees), 206 (currency rate fluctuation protection), 255-56 (single invoice; currency rate protection); Horst Labbus, Tr. at 22 (eliminated currency risk, higher packing densities); Kurt Schaefer, Tr. at 57-58 (payment guarantee), 63-64, 131-33 (payment guarantee, claims/charge backs procedure benefits, reweigh charge benefits, eliminated currency rate risks); Erwin Weyand, Tr. at 35-36 (payment guarantee), 140-41 (claims agreement benefits, currency rate fluctuation benefits, reweigh charge benefits); Udo Wolfgramm, Tr. at 69-70 (single invoice and financial control), 83-84 (reweigh charge benefits, claims procedure benefits, currency rate fluctuation benefits). Carrier Randall Groger, Tr. at 51-52 (eliminated currency rate risk), 99 (single invoice).

Dr. Lee's testimony amounts to an abdication of economic "analysis" in favor of "general" statements without taking into account other factors in the real world and in this case. This approach fatally flaws Dr. Lee's opinions because she does not consider case-specific facts, and therefore the Court should preclude her testimony. *See McGlinchy v. Shell Chem. Co.*, 845 F.2d 802, 806-07 (9th Cir. 1988) (affirming exclusion of expert who failed to support his opinion with specific facts).

Dr. Lee has not performed any empirical analysis relevant to this matter. Her "conclusions" are based upon "basic principles of economics" and "empirical literature." *See* Lee Report, Exhibit A at 9. She admitted that her "opinions are general in nature" (Lee Rebuttal Report, attached hereto as Exhibit B, at 2) and "do not relate to the facts of this case." *See* Lee Deposition Excerpts, Exhibit C, Tr. at 166. Dr. Lee simply did not consider any case-specific facts that may render her opinions applicable to this matter. She did not perform any analysis to support her generalized statement that 100% industry participation would not be needed for a price-fixing cartel to be effective. *See* Lee Deposition Excerpts, Exhibit C, Tr. at 85. She did not even discuss the possibility that any observed increases in prime rates are the direct result of non-compensatory rates that permeated the ITGBL business and are consistent with the cyclical nature of the business. *Id.*, Tr. at 144-45.

D. Dr. Lee's Opinions Are Unreliable And Irrelevant In This Matter and Should Be Excluded Pursuant to Federal Rule of Evidence 403.

Because Dr. Lee's unsupported and generalized opinions are divorced from the facts of this case, it is clear that her opinions are unreliable and irrelevant and have no place in the evidence to be presented at trial. Dr. Lee has provided general economic observations that may

be true in many circumstances; however, she fails to apply these concepts to the relevant facts in this case. Expert testimony must be sufficiently tied to the facts of the case that it will aid the jury in resolving a factual dispute. *United States v. Downing*, 753 F.2d 1224, 1242 (3d. Cir. 1985). In addition, her opinions are not based upon any empirical inquiry. Dr. Lee simply provided opinions about how price fixing amongst subcontractors can affect the final price in a government procurement, but she did not consider the economic evidence pointing to the efficiency-enhancing benefits achieved through the landed rate system, she did not consider the impact of non-compensatory rates on the subsequent filing of prime rates, and she did not consider the impact of carrier bankruptcies and the cyclical nature of the ITGBL business on prime rates. *See* Lee Deposition Excerpts, Exhibit C, Tr. at 53-54. Without such analyses, her opinions are unreliable and irrelevant in this matter. As such, her testimony should be excluded. *See Berlyn, Inc., v. Gazette Newspapers, Inc.,* 214 F.Supp.2d 530, 536 (D.Md. 2002) *citing Cooper v. Smith & Nephew, Inc.,* 259 F.3d 194, 200 (4th Cir. 2001) (quoting *Kumho,* 526 U.S. at 152, 119 S.Ct. 1167)).

III. CONCLUSION

Because Dr. Lee's proposed testimony and reports do not meet the threshold requirements as set forth in Fed. R. Evid. 104(a), 403, 702 and 703 and the holding in *Daubert v. Merrell Dow Pharmaceuticals, Inc.,* this Court should exclude her testimony and the use of her reports.

Respectfully submitted,

/s/

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CERTIFICATE OF SERVICE

I hereby certify that this 1st day of June, 2011, the above and foregoing was filed with the Clerk of the Court using the CM/ECF system which sent notification of such filing to the following:

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		Mensch. 3. denying 881 United States' Motion in Limine to Exclude Evidence of or Reference to Immunity Under Antitrust Laws for Actions of Gosselin Defendants and Co-conspirators. 4. granting in part and denying in part 873 United States' Motion in Limine to Exclude Evidence of Gosselin Defendants' Equitable Defenses of Estoppel, Laches, Unclean Hands, In Pare Delicto, Waiver, and Failure to Mitigate Damages. 5. granting 861 United States' Motion in Limine To Exclude Evidence of Potential Financial Harm. 6. granting in part and denying in part 859 United States' Motion in Limine to Exclude Evidence Contesting Criminal Statement of Facts. 7. granting 857 United States' Motion in Limine to Exclude Evidence of or Reference to the Absence of Criminal Charges for Remaining ITGBL Channels.8. granting 855 United States' Motion in Limine To Exclude Reference to Court's Statutory Duties To Award Treble Damages and Impose Penalties 9. As to Relators' Combined 867 Motion in Limine to Exclude Certain Opinions and Statements of Keith Ugone, Ph.D. and Various Lay Witnesses, and Supporting Memorandum of Law is DEFERRED. 10. As to Relators' 864 Motion in Limine to Bar Admission of an Ineffective Release is DEFERRED. 11. granting Relators' Combined 863 Motion in Limine to Exclude Evidence Regarding Settlements, Prior Litigation and Non-intervention, and Supporting Memorandum of Law. 12. denying 849 Defendants' Motion for a Pretrial Hearing Regarding Alleged Co-Conspirator Statements and/or for Other Relief. 13. granting in part and denying in part 865 Defendants' Motion in Limine to Preclude Evidence of Criminal Conviction and Related Underlying Facts. 14. granting 870 Defendants' Motion in Limine to Preclude Evidence Identified as Rule 404(b) Evidence by the Government and Relators. 15. denying 839 Defendants' Motion in Limine to Preclude Evidence of Lawful, Antitrust Immune Discussions Between Gosselin and U.S. Carriers, or for Alternative Relief. 16. granting 878 Defendants' Motion in Limine to Exclude Dr. June Lee's Testimony and Expert Reports.17. granting in part and denying in part 846 Defendants' Motion for Summary Judgment on Relator Bunk's Non-Intervened Claims (see order for details). Signed by District Judge Anthony J Trenga on 7/1/2011. (klau,) (Entered: 07/01/2011)
07/05/2011	961	ORDER Upon consideration of the parties' pending motions *in limine* and for other relief set forth in Doc. Nos. 843, pertaining to "lingering effects," and 852 and 887, pertaining to Dr. Marshall's expert opinions, the oppositions thereto, and the arguments of counsel at the hearing held on July 1, 2011, it is hereby ORDERED as follows: 1. As to Defts' 852 Motion Pursuant to Rule 37(c)(1) to Exclude Dr.

3

SUBJECT: (8:21:23 AM): hey

SUBJECT: (8:21:39 AM): did a little homework last night

SUBJECT: (8:21:49 AM): looking through my IM archives

SUBJECT: (8:21:57 AM): do you archive yours?

TARGET: returned at 8:53:07 AM

TARGET: (8:53:42 AM): unfortunately not

TARGET: (8:55:30 AM): so, are we guilty or righteous?

SUBJECT: (8:55:46 AM): 6/28 – first IM discussion

SUBJECT: (8:55:58 AM): you literally wrote EUREKA!

SUBJECT: (8:56:42 AM): we mention losses a lot

SUBJECT: (8:57:17 AM): I don't know – most of the conversation is benign

SUBJECT: (8:57:34 AM): we do identify certain trades as "loss" trades

TARGET: (8:59:40 AM): the only question is how many trades had zero risk

SUBJECT: (9:00:34 AM): we talk about the SE trade

SUBJECT: (9:00:42 AM): saying that's one we're not comfortable with

4

Q. (By Mr. Hobbs) Now, before exploring the CD and the video in further detail, were you asked to identify whether or not gunshots on the 911 call could be ascertained?
A. Yes, I was.
Q. Were you able to do this?
A. Yes, I was.
Q. How were you able to do this?
A. Well, once the tape was finally cleared up and the offending background noises were taken out, the shots were perfectly audible to me.
Q. Were you also asked to time the length of time that it required for all of the shots to occur?
A. Yes, I was.
Q. And were you able to do this?
A. Yes, I was.
Q. How many shots were heard upon further scrutiny of the tape?
A. I heard four shots.
Q. Now, in this regard, did you also create a chart showing the images of the sounds as it occurs during the time-frame of the shots? And I'll show you Exhibit UU.
A. Yes, I created that.
Q. And what does UU indicate?
A. It -- it -- it indicates a time line. The top graph, the

red part of it indicates -- is a visual depiction of the actual sound that's on the tape, the second line is a transcription of the words that are being spoken, and the third line is an indication of where the shots fall in that time line relative to the words being spoken.

MR. HOBBS: All right. Your Honor, at this time I'd offer Defendant's Exhibit UU.

THE COURT: No objection.

MR. TOMASIC: (Shook head from side to side.)

THE COURT: That exhibit is admitted.

MR. HOBBS: And Your Honor, if I could pass this to the jury for a moment, and I'll keep examining as they look at it. Thank you.

Q. (By Mr. Hobbs) Now, Mr. Griffin, as a person listens to the 911 calls, which of the three calls do the shots appear on?

A. The three shots occur approximately three seconds into the last call.

Q. All right. And did you notice any difficulties when you were trying to listen for the shots?

A. Well, to me it was very obvious, because I'm listening under a very good quality playback system, under a controlled environment. However, if you -- as it -- as you listen on various systems, including this one, you may have to work a little hard to -- to hear where they

are.

Q. Are there words spoken simultaneously with the shots?

A. Yes.

Q. All right. And what is the sentence that occurs before the shots are -- occurred?

A. The sentence, we're inside the bar now and there's a gun involved, and it's in the middle of that sentence where you hear the first shot.

Q. All right. And then how many shots followed thereafter?

A. Four shots.

Q. Total?

A. Total of four shots.

Q. A total of four shots. All right. And then there's some words after that that are spoken as well?

A. Correct.

Q. All right. What is the length of time between the initiation of the first shot and the beginning of the fourth shot?

A. It's 1.349 seconds.

Q. How are you able to verify that?

A. The computer program which we use to -- to depict this sound and generate this graph, once you identify a particular sound that you're looking for, you can stop it and mark it and the computer will give you a digital readout of what the time is of that particular point.

Q. And did you indicate there was a total of four shots?
A. That's correct.
Q. What is the length of pauses between each of the four shots?
A. Between shot one and two is .448 seconds, between shot two and three is .573 seconds, between shot three and four is .328 seconds.
Q. So, you're speaking in terms of less than five/tenths of a second?
A. Yes, that's correct. On two occasions, one of 'em is slightly more than half a second.
Q. All right. So, on Exhibit UU, the shot number one is 3.324 seconds, the next shot occurs at 3.772 seconds, is that --
A. That's correct, and the difference in those is .448.
Q. All right. The third shot occurs at 4.345 seconds?
A. That's correct.
Q. And the difference between the second and third shot then would be?
A. .573.
Q. And the fourth shot is 4.7673 seconds?
A. Uh-huh.
Q. And the difference between shot three and four?
A. .328.
Q. All right. So that again, between shot one and the

beginning of shot four?
A. 1.349 seconds.
Q. All right.
A. And that would be accurate to within a couple of milliseconds.
Q. All right.
A. A milliseconds being one thousandth of a second.
Q. All right. So, does your chart which is now in evidence, Exhibit UU, attempt to track the shots as they occur while those words are spoken?
A. That's correct.
Q. All right. At this time, with leave of Court then, I'd like you to first play the CD before we examine the video format.
A. Okay.
Q. And for the record, Your Honor, that's Exhibit H.
A. And by way of further explanation, I might add that we're going to hear four separate segments. The first three being the first three calls, the last segment I have isolated the sentence where the shots occur, and repeated it four times so that you can get used to hearing where the shots fall in relation to the conversation, so we'll hear a total of four segments.
Q. All right. Recognizing that there are only three 911 calls?

SCIENTIFIC EVIDENCE - CRIMINAL PANEL

Chris Joseph, Joseph Hollander & Craft LLC

I. Cell phone data

A. Cell phones like computers – files and metadata

1. Need a search warrant to search a phone

B. Cell phone location data – sources of information

1. Real time

a. GPS chip in your phone

b. Triangulation of cell towers

2. Historical

a. GPS data recorded by an application

b. File metadata (e.g. geo-tagged pictures)

c. Provider call detail records

(1) Exhibit 1 – data spreadsheet

(2) Exhibit 2 - map of a tower with data point

(3) Exhibit 3 - map of actual tower range/coverage

C. Accessing cell tower data

1. Practical tip – subpoenas often not accepted; providers require court order

2. Admission of records – custodian of records may not be enough

II. Computer forensics

A. Gathering

1. Pay attention to metadata

2. Exhibit 4 - last access date and write-blocker

B. Using

1. Was the file ever viewed, printed, modified?

a. Last accessed date BUT Windows 8-10

b. Print spooler files - SPL and SHD files
C:\Winnt\System32\Spool\Printers

c. Cached files

(1) Temporary internet files folder

(2) Cookies, application history, web cache - index.dat file is user-specific

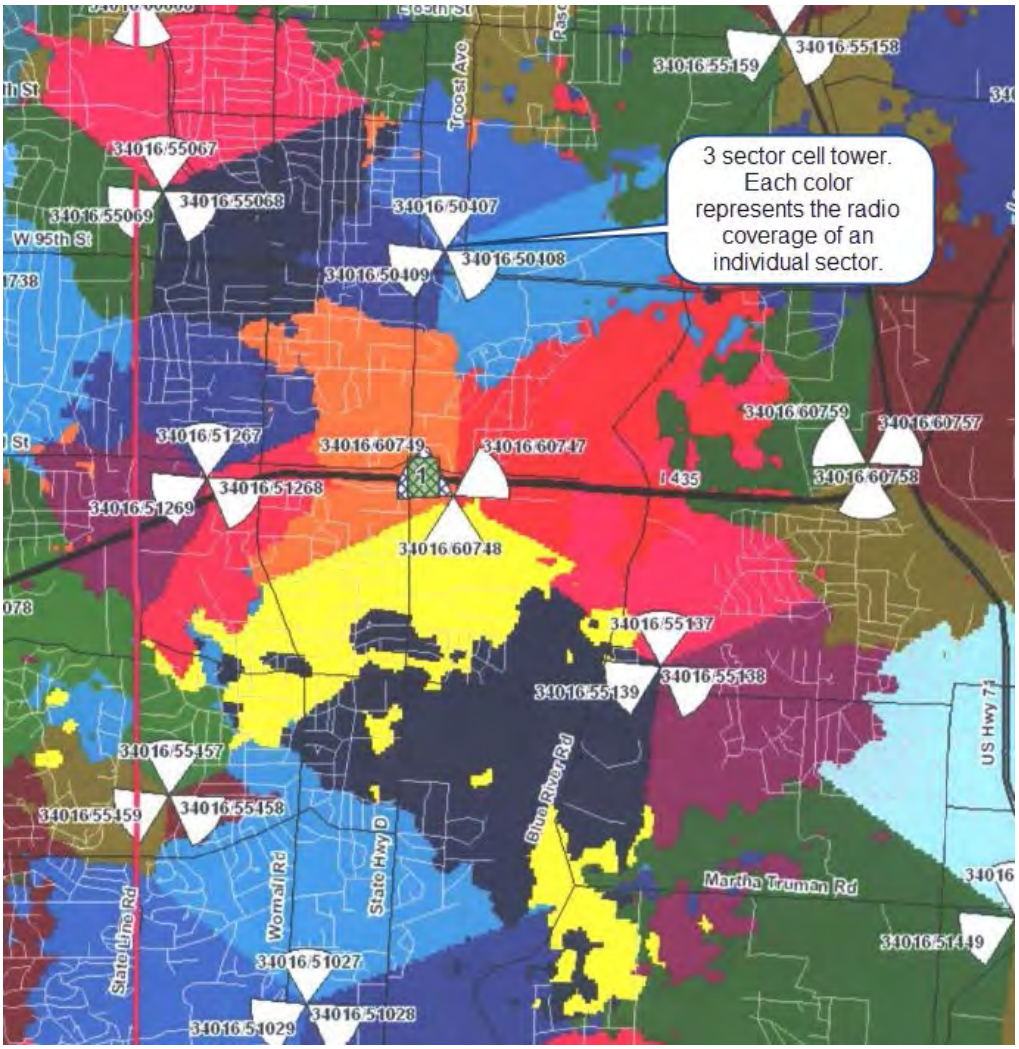
(3) Odd file locations, including system folders usually means automated caching

ECP #	Active VoL	Date *	Access Time	Call End Tir	Call Length	Origin	Subscrib	Tech Ty	Init Cell	Init Sector	Access Dist (mi)	Calling Par	Call Location Confidence
2	No	18-Jul	16:19:40	16:20:06	25.7	0	5E+09	3GV	547	3	0.57	7.86E+09	M
2	No	18-Jul	16:14:59	16:15:58	59.5	0	5E+09	3GV	547	3	0.61	7.2E+09	M
2	No	18-Jul	16:09:52	16:09:52	0	0	5E+09	SMS	547	3	0.53	7.86E+09	L
2	No	18-Jul	16:03:56	16:04:24	27.7	8E+09	5E+09	3GV	260	2	0.8	0	M
2	No	18-Jul	16:01:04	16:01:25	21.1	0	5E+09	3GV	260	2	0.76	3.17E+09	M
2	No	18-Jul	15:54:30	15:54:57	27.7	0	5E+09	3GV	547	1	1.1	7.2E+09	L
2	No	18-Jul	15:52:27	15:53:01	33.7	0	5E+09	3GV	541	2	2.23	7.86E+09	H
2	No	18-Jul	15:47:50	15:48:27	36.9	0	5E+09	3GV	440	3	0.72	7.85E+09	M
2	No	18-Jul	15:44:00	15:44:21	20.7	0	5E+09	3GV	541	2	0.91	9.09E+09	H
2	No	18-Jul	15:41:14	15:41:42	28.2	8E+09	5E+09	3GV	541	2	0.87	0	M
2	No	18-Jul	15:40:20	15:40:20	0	0	5E+09	SMS	550	2	1.02	7.86E+09	H
2	No	18-Jul	15:37:46	15:38:09	23	0	5E+09	3GV	550	2	0.23	0	M
2	No	18-Jul	15:36:35	15:36:55	20.9	0	5E+09	3GV	550	3	0.23	0	M
2	No	18-Jul	15:36:09	15:36:25	15.8	0	5E+09	3GV	550	3	0.45	9.09E+09	L
2	No	18-Jul	15:29:55	15:29:55	0	0	5E+09	SMS	545	2	1.02	7.85E+09	L
2	No	18-Jul	15:29:25	15:29:45	20.9	0	5E+09	3GV	545	1	0.83	7.85E+09	M
2	No	18-Jul	15:17:23	15:18:43	80.2	0	5E+09	3GV	545	1	0.72	3.17E+09	M
2	No	18-Jul	15:16:43	15:16:43	0	0	5E+09	2GV	0	0	0	3.17E+09	N
2	No	18-Jul	15:15:51	15:15:51	0	0	5E+09	SMS	545	1	0.91	7.85E+09	L
2	No	18-Jul	15:15:04	15:15:30	25.7	0	5E+09	3GV	545	1	0.76	3.17E+09	M
2	No	18-Jul	15:15:13	15:15:13	0	0	5E+09	SMS	545	1	0	7.85E+09	H
2	No	18-Jul	15:11:01	15:11:01	0	8E+09	5E+09	SMS	545	1	0.91	0	L
2	No	18-Jul	15:06:12	15:06:59	47.5	0	5E+09	3GV	545	1	0.87	7.85E+09	M
2	No	18-Jul	15:04:14	15:04:14	0	0	5E+09	SMS	545	1	0.87	7.85E+09	M
2	No	18-Jul	14:57:40	14:57:40	0	0	5E+09	SMS	545	1	0.76	7.86E+09	M
2	No	18-Jul	14:55:47	14:56:50	62.3	0	5E+09	3GV	545	1	0.76	7.86E+09	M
2	No	18-Jul	14:54:00	14:54:00	0	0	5E+09	SMS	545	1	0.38	7.85E+09	L
2	No	18-Jul	14:51:52	14:52:17	25.7	0	5E+09	3GV	545	1	0.76	7.86E+09	M
2	No	18-Jul	14:49:08	14:49:08	0	0	5E+09	SMS	545	1	0.87	7.86E+09	M
2	No	18-Jul	14:47:41	14:48:07	25.8	0	5E+09	3GV	545	1	0.87	7.61E+09	M
2	No	18-Jul	14:46:18	14:47:32	74.4	8E+09	5E+09	3GV	545	1	0.95	0	M
2	No	18-Jul	14:46:59	14:47:15	16.5	0	5E+09	3GV	545	1	0	7.61E+09	M
2	No	18-Jul	14:45:54	14:45:54	0	0	5E+09	SMS	545	1	0.95	7.86E+09	L
2	No	18-Jul	14:04:30	14:04:56	25.7	0	5E+09	3GV	439	2	0.3	7.85E+09	H
2	No	18-Jul	14:03:13	14:03:39	25.7	0	5E+09	3GV	439	1	0.23	3.17E+09	H
2	No	18-Jul	13:55:17	13:55:43	25.8	0	5E+09	3GV	439	1	0.23	7.86E+09	M
2	No	18-Jul	13:48:07	13:48:33	25.7	0	5E+09	3GV	439	1	0.23	7.86E+09	M
2	No	18-Jul	13:20:49	13:20:49	0	0	5E+09	SMS	545	1	0.87	7.85E+09	L
2	No	18-Jul	13:20:03	13:20:29	26.2	0	5E+09	3GV	545	2	0.83	7.86E+09	M


LEVDORT Record showing GPS point and accuracy range.
Plus / Minus 1/10 Mile
9:10:54 PM
3300 SE Humboldt
3655 SE Indiana Ave
This GPS point can be anywhere in this 120 degree sector.
SE 27th St
SE 28th St
SE 30th St
SE 34th St
SE 37th St
SE 38th St
29th St
Virginia Ave
SE Kentucky
SE Indiana Ave
Powell St
S Kansas Ave
SW Van Buren St
SE Minnesota Ave
SE Iowa Ave
SE Colorado Ave
SE Turnpike Ave
SE Golden Ave
SE Irvingham St
SE Bryant St
SE Ohio Ave
SE Girard St
SE Humboldt St
SE Truman Ave
SE Evans Dr
470

Verizon Wireless RTT Report and Round Trip Delay Disclaimer:

The latitude and longitude measurements on the Real Time Tool "RTT" report are derived solely from the Round Trip Delay measurement. They are best estimates and are not related to any GPS measurement. Measurements with a high confidence factor may be more accurate than measurements with a low confidence factor, but all measurements contained on this report are the best estimates available rather than precise location.



The map illustrates the wide variation in radio coverage at ground level for cell tower sectors in an area.

HDD-3-C:\Documents ands Settings\bb\My Documents\My Pictures

Last Accessed	File Created
1465 Files	
09/01/09	08/03/09
09/02/09	06/25/09
09/02/09	04/15/09
09/02/09	04/30/09
09/02/09	05/16/09
09/02/09	05/30/09
No Date Record	No Date Record
09/01/09	04/07/09
09/01/09	04/11/09
09/01/09	04/07/09
09/01/09	08/22/09
09/01/09	08/22/09
09/01/09	08/22/09
09/01/09	08/22/09
09/01/09	08/22/09
09/01/09	08/22/09
09/01/09	08/26/09
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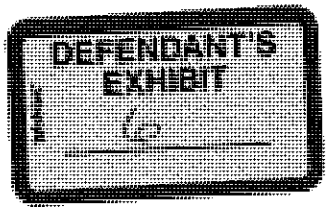
09/01/09	08/22/09
09/01/09	08/22/09



Addresses of Interest and T-Mobile and Sprint Tower Locations

Manhattan

Riley

Ogden

Junction City

Geary

Dickinson

52 96 378 3563 4240 146 2 23 80 11

ID	Address
1	126 w 12th st
2	412 Roosevelt
3	235 E 3rd St
4	311 S Jefferson St
5	1405 Dries Circle
6	227 W 14th St
7	215 E 13th St
8	706 W 9th St
9	218 W 11th St
10	631 W 9th St
11	521 W 4th St
12	407 Riley Ave
13	2035 Fort Riley Blvd

Legend

- Addresses of Interest
- Calls Made per Tower in 8th Judicial District
- Towers Used by Targets Bordering 8th Judicial District
- Sprint Towers
- T-Mobile Towers

0 1.25 2.5 5 Miles

Kansas Bureau of Investigation
Criminal Intelligence Unit
Analyst Pamela Miller

9:50-10:30 Panel 2: Civil Law – Commercial

Moderator: Rachel Schwartz (Stueve Siegel Hanson, LLP)

Panelists: Barrett Vahle (Stueve Siegel Hanson, LLP); Nicholas L. DiVita (Berkowitz Oliver LLP)

Discussion Outline:

1. The increasing importance and relevance of ESI Protocols in complex civil cases; and
2. The impact of the attached Supreme Court decision in *Tyson Foods, Inc. v. Bouaphakeo*, 136 S. Ct. 1036 (2016), on expert evidence in class actions

Rachel Schwartz is a partner at Stueve Siegel Hanson LLP, where she focuses on commercial litigation on behalf of plaintiffs. Rachel is a *Missouri & Kansas Super Lawyer* and a Fellow in the Litigation Counsel of America. She has served on the Magistrate Judge Merit Selection Panel and the Bench-Bar Committee for the District of Kansas. She is currently the Senior Member-at-Large for KCMBA's Federal Courts Advocates Section and is the Kansas City Regional Membership Vice President for the local chapter of the Federal Bar Association. Rachel graduated Phi Beta Kappa from the University of Kansas and obtained her law degree from the University of Michigan Law School.

As a partner at Stueve Siegel Hanson LLP, Barrett Vahle represents plaintiffs nationwide in a variety of commercial and class action litigation. He serves as the co-chair of the Data Breach Subcommittee within the ABA Litigation Section, and on The Missouri Bar's Task Force on Complex Litigation. Before beginning his law practice, Barrett was Editor-in-Chief of the Missouri Law Review and served as a law clerk for Judge Duane Benton of the United States Court of Appeals for the Eighth Circuit, and then for Judge Dean Whipple of the United Stated District Court for the Western District of Missouri.

Nick is an experienced, tested trial lawyer with jury and bench trial credentials in state and federal courts across the country. In a career spanning three decades, Nick brings to courtroom battles a breadth of exposure to complex procedural and substantive legal controversies. Early in his career, Nick practiced in diverse areas of substantive law including mineral title opinions for coal and gas producers and exploration companies, residential title opinions for banks, creditor's rights and collections, bankruptcy filings and litigation (Chapters 7, 11 and 13), administrative law, banking, domestic relations, will and probate matters, corporate mergers and acquisitions, and secured transactions. After five years of developing a broad exposure to these and other areas of substantive law, Nick began to focus entirely on litigation and trials. Nick's trial experience went on to draw from a wide variety of commercial tort, insurance and general contract cases, product liability and employment discrimination matters. Nick has used this background to make himself more effective and perceptive in the litigation and trial process. Nick has substantial experience in complex damage and causation questions where expert witnesses and competing data analyses are involved. Emphasis over the last dozen years has been in employment discrimination defense, class action defense, product liability defense and complex business litigation.

Syllabus

NOTE: Where it is feasible, a syllabus (headnote) will be released, as is being done in connection with this case, at the time the opinion is issued. The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States* v. *Detroit Timber & Lumber Co.*, 200 U. S. 321, 337.

SUPREME COURT OF THE UNITED STATES

Syllabus

TYSON FOODS, INC. *v.* BOUAPHAKEO ET AL., INDIVIDUALLY AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

No. 14–1146. Argued November 10, 2015—Decided March 22, 2016

Respondents, employees of petitioner Tyson Foods, work in the kill, cut, and retrim departments of a pork processing plant in Iowa. Respondents' work requires them to wear protective gear, but the exact composition of the gear depends on the tasks a worker performs on a given day. Petitioner compensated some, but not all, employees for this donning and doffing, and did not record the time each employee spent on those activities. Respondents filed suit, alleging that the donning and doffing were integral and indispensable to their hazardous work and that petitioner's policy not to pay for those activities denied them overtime compensation required by the Fair Labor Standards Act of 1938 (FLSA). Respondents also raised a claim under an Iowa wage law. They sought certification of their state claims as a class action under Federal Rule of Civil Procedure 23 and certification of their FLSA claims as a "collective action." See 29 U. S. C. §216. Petitioner objected to certification of both classes, arguing that, because of the variance in protective gear each employee wore, the employees' claims were not sufficiently similar to be resolved on a classwide basis. The District Court concluded that common questions, such as whether donning and doffing protective gear was compensable under the FLSA, were susceptible to classwide resolution even if not all of the workers wore the same gear. To recover for a violation of the FLSA's overtime provision, the employees had to show that they each worked more than 40 hours a week, inclusive of the time spent donning and doffing. Because petitioner failed to keep records of this time, the employees primarily relied on a study performed by an industrial relations expert, Dr. Kenneth Mericle. Mer-

Syllabus

icle conducted videotaped observations analyzing how long various donning and doffing activities took, and then averaged the time taken to produce an estimate of 18 minutes a day for the cut and retrim departments and 21.25 minutes for the kill department. These estimates were then added to the timesheets of each employee to ascertain which class members worked more than 40 hours a week and the value of classwide recovery. Petitioner argued that the varying amounts of time it took employees to don and doff different protective gear made reliance on Mericle's sample improper, and that its use would lead to recovery for individuals who, in fact, had not worked the requisite 40 hours. The jury awarded the class about $2.9 million in unpaid wages. The award has not yet been disbursed to individual employees. The Eighth Circuit affirmed the judgment and the award.

Held: The District Court did not err in certifying and maintaining the class. Pp. 8–17.

(a) Before certifying a class under Rule 23(b)(3), a district court must find that "questions of law or fact common to class members predominate over any questions affecting only individual members." The parties agree that the most significant question common to the class is whether donning and doffing protective gear is compensable under the FLSA. Petitioner claims, however, that individual inquiries into the time each worker spent donning and doffing predominate over this common question. Respondents argue that individual inquiries are unnecessary because it can be assumed each employee donned and doffed for the same average time observed in Mericle's sample.

Whether and when statistical evidence such as Mericle's sample can be used to establish classwide liability depends on the purpose for which the evidence is being introduced and on "the elements of the underlying cause of action," *Erica P. John Fund, Inc.* v. *Halliburton Co.*, 563 U.S. 804, 809. Because a representative sample may be the only feasible way to establish liability, it cannot be deemed improper merely because the claim is brought on behalf of a class. Respondents can show that Mericle's sample is a permissible means of establishing hours worked in a class action by showing that each class member could have relied on that sample to establish liability had each brought an individual action.

Anderson v. *Mt. Clemens Pottery Co.*, 328 U. S. 680, shows why Mericle's sample was permissible in the circumstances of this case. There, where an employer violated its statutory duty to keep proper records, the Court concluded the employees could meet their burden by proving that they in fact "performed work for which [they were] improperly compensated and . . . produc[ing] sufficient evidence to

show the amount and extent of that work as a matter of just and reasonable inference." *Id.,* at 687. Here, similarly, respondents sought to introduce a representative sample to fill an evidentiary gap created by the employer's failure to keep adequate records. Had the employees proceeded with individual lawsuits, each employee likely would have had to introduce Mericle's study to prove the hours he or she worked. The representative evidence was a permissible means of showing individual hours worked.

This holding is in accord with *Wal-Mart Stores, Inc.* v. *Dukes*, 564 U. S. 338, where the underlying question was, as here, whether the sample at issue could have been used to establish liability in an individual action. There, the employees were not similarly situated, so none of them could have prevailed in an individual suit by relying on depositions detailing the ways in which other employees were discriminated against by their particular store managers. In contrast, the employees here, who worked in the same facility, did similar work, and were paid under the same policy, could have introduced Mericle's study in a series of individual suits.

This case presents no occasion for adoption of broad and categorical rules governing the use of representative and statistical evidence in class actions. Rather, the ability to use a representative sample to establish classwide liability will depend on the purpose for which the sample is being introduced and on the underlying cause of action. In FLSA actions, inferring the hours an employee has worked from a study such as Mericle's has been permitted by the Court so long as the study is otherwise admissible. *Mt. Clemens*, *supra,* at 687. Pp. 8–15.

(b) Petitioner contends that respondents are required to demonstrate that uninjured class members will not recover damages here. That question is not yet fairly presented by this case, because the damages award has not yet been disbursed and the record does not indicate how it will be disbursed. Petitioner may raise a challenge to the allocation method when the case returns to the District Court for disbursal of the award. Pp. 15–17.

765 F. 3d 791, affirmed and remanded.

KENNEDY, J., delivered the opinion of the Court, in which ROBERTS, C. J., and GINSBURG, BREYER, SOTOMAYOR, and KAGAN, JJ., joined. ROBERTS, C. J., filed a concurring opinion, in which ALITO, J., joined as to Part II. THOMAS, J., filed a dissenting opinion, in which ALITO, J., joined.

SUPREME COURT OF THE UNITED STATES

No. 14–1146

TYSON FOODS, INC., PETITIONER *v.* PEG BOUAPHAKEO, ET AL., INDIVIDUALLY AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

[March 22, 2016]

JUSTICE KENNEDY delivered the opinion of the Court.

Following a jury trial, a class of employees recovered $2.9 million in compensatory damages from their employer for a violation of the Fair Labor Standards Act of 1938 (FLSA), 52 Stat. 1060, as amended, 29 U. S. C. §201 *et seq*. The employees' primary grievance was that they did not receive statutorily mandated overtime pay for time spent donning and doffing protective equipment.

The employer seeks to reverse the judgment. It makes two arguments. Both relate to whether it was proper to permit the employees to pursue their claims as a class. First, the employer argues the class should not have been certified because the primary method of proving injury assumed each employee spent the same time donning and doffing protective gear, even though differences in the composition of that gear may have meant that, in fact, employees took different amounts of time to don and doff. Second, the employer argues certification was improper because the damages awarded to the class may be distributed to some persons who did not work any uncompen-

sated overtime.

The Court of Appeals for the Eighth Circuit concluded there was no error in the District Court's decision to certify and maintain the class. This Court granted certiorari. 576 U. S. ___ (2015).

I

Respondents are employees at petitioner Tyson Foods' pork processing plant in Storm Lake, Iowa. They work in the plant's kill, cut, and retrim departments, where hogs are slaughtered, trimmed, and prepared for shipment. Grueling and dangerous, the work requires employees to wear certain protective gear. The exact composition of the gear depends on the tasks a worker performs on a given day.

Until 1998, employees at the plant were paid under a system called "gang-time." This compensated them only for time spent at their workstations, not for the time required to put on and take off their protective gear. In response to a federal-court injunction, and a Department of Labor suit to enforce that injunction, Tyson in 1998 began to pay all its employees for an additional four minutes a day for what it called "K-code time." The 4-minute period was the amount of time Tyson estimated employees needed to don and doff their gear. In 2007, Tyson stopped paying K-code time uniformly to all employees. Instead, it compensated some employees for between four and eight minutes but paid others nothing beyond their gang-time wages. At no point did Tyson record the time each employee spent donning and doffing.

Unsatisfied by these changes, respondents filed suit in the United States District Court for the Northern District of Iowa, alleging violations of the FLSA. The FLSA requires that a covered employee who works more than 40 hours a week receive compensation for excess time worked "at a rate not less than one and one-half times the regular

rate at which he is employed." 29 U. S. C. §207(a). In 1947, nine years after the FLSA was first enacted, Congress passed the Portal-to-Portal Act, which clarified that compensable work does not include time spent walking to and from the employee's workstation or other "preliminary or postliminary activities." §254(d). The FLSA, however, still requires employers to pay employees for activities "integral and indispensable" to their regular work, even if those activities do not occur at the employee's workstation. *Steiner* v. *Mitchell*, 350 U. S. 247, 249, 255 (1956). The FLSA also requires an employer to "make, keep, and preserve . . . records of the persons employed by him and of the wages, hours, and other conditions and practices of employment." §211(c).

In their complaint, respondents alleged that donning and doffing protective gear were integral and indispensable to their hazardous work and that petitioner's policy not to pay for those activities denied them overtime compensation required by the FLSA. Respondents also raised a claim under the Iowa Wage Payment Collection Law. This statute provides for recovery under state law when an employer fails to pay its employees "all wages due," which includes FLSA-mandated overtime. Iowa Code §91A.3 (2013); cf. *Anthony* v. *State*, 632 N. W. 2d 897, 901–902 (Iowa 2001).

Respondents sought certification of their Iowa law claims as a class action under Rule 23 of the Federal Rules of Civil Procedure. Rule 23 permits one or more individuals to sue as "representative parties on behalf of all members" of a class if certain preconditions are met. Fed. Rule Civ. Proc. 23(a). Respondents also sought certification of their federal claims as a "collective action" under 29 U. S. C. §216. Section 216 is a provision of the FLSA that permits employees to sue on behalf of "themselves and other employees similarly situated." §216(b).

Tyson objected to the certification of both classes on the

same ground. It contended that, because of the variance in protective gear each employee wore, the employees' claims were not sufficiently similar to be resolved on a classwide basis. The District Court rejected that position. It concluded there were common questions susceptible to classwide resolution, such as "whether the donning and doffing of [protective gear] is considered work under the FLSA, whether such work is integral and [in]dispensable, and whether any compensable work is *de minim[i]s*." 564 F. Supp. 2d 870, 899 (ND Iowa 2008). The District Court acknowledged that the workers did not all wear the same protective gear, but found that "when the putative plaintiffs are limited to those that are paid via a gang time system, there are far more factual similarities than dissimilarities." *Id.*, at 899–900. As a result, the District Court certified the following classes:

> "All current and former employees of Tyson's Storm Lake, Iowa, processing facility who have been employed at any time from February 7, 2004 [in the case of the FLSA collective action and February 7, 2005, in the case of the state-law class action], to the present, and who are or were paid under a 'gang time' compensation system in the Kill, Cut, or Retrim departments." *Id.*, at 901.

The only difference in definition between the classes was the date at which the class period began. The size of the class certified under Rule 23, however, was larger than that certified under §216. This is because, while a class under Rule 23 includes all unnamed members who fall within the class definition, the "sole consequence of conditional certification [under §216] is the sending of court-approved written notice to employees . . . who in turn become parties to a collective action only by filing written consent with the court." *Genesis HealthCare Corp.* v. *Symczyk*, 569 U. S. ___, ___ (2013) (slip op., at 8). A

total of 444 employees joined the collective action, while the Rule 23 class contained 3,344 members.

The case proceeded to trial before a jury. The parties stipulated that the employees were entitled to be paid for donning and doffing of certain equipment worn to protect from knife cuts. The jury was left to determine whether the time spent donning and doffing other protective equipment was compensable; whether Tyson was required to pay for donning and doffing during meal breaks; and the total amount of time spent on work that was not compensated under Tyson's gang-time system.

Since the employees' claims relate only to overtime, each employee had to show he or she worked more than 40 hours a week, inclusive of time spent donning and doffing, in order to recover. As a result of Tyson's failure to keep records of donning and doffing time, however, the employees were forced to rely on what the parties describe as "representative evidence." This evidence included employee testimony, video recordings of donning and doffing at the plant, and, most important, a study performed by an industrial relations expert, Dr. Kenneth Mericle. Mericle conducted 744 videotaped observations and analyzed how long various donning and doffing activities took. He then averaged the time taken in the observations to produce an estimate of 18 minutes a day for the cut and retrim departments and 21.25 minutes for the kill department.

Although it had not kept records for time spent donning and doffing, Tyson had information regarding each employee's gang-time and K-code time. Using this data, the employees' other expert, Dr. Liesl Fox, was able to estimate the amount of uncompensated work each employee did by adding Mericle's estimated average donning and doffing time to the gang-time each employee worked and then subtracting any K-code time. For example, if an employee in the kill department had worked 39.125 hours of gang-time in a 6-day workweek and had been paid an

hour of K-code time, the estimated number of compensable hours the employee worked would be: 39.125 (individual number of gang-time hours worked)+2.125 (the average donning and doffing hours for a 6-day week, based on Mericle's estimated average of 21.25 minutes a day) − 1 (K-code hours)=40.25. That would mean the employee was being undercompensated by a quarter of an hour of overtime a week, in violation of the FLSA. On the other hand, if the employee's records showed only 38 hours of gang-time and an hour of K-code time, the calculation would be: 38+2.125−1=39.125. Having worked less than 40 hours, that employee would not be entitled to overtime pay and would not have proved an FLSA violation.

Using this methodology, Fox stated that 212 employees did not meet the 40-hour threshold and could not recover. The remaining class members, Fox maintained, had potentially been undercompensated to some degree.

Respondents proposed to bifurcate proceedings. They requested that, first, a trial be conducted on the questions whether time spent in donning and doffing was compensable work under the FLSA and how long those activities took to perform on average; and, second, that Fox's methodology be used to determine which employees suffered an FLSA violation and how much each was entitled to recover. Petitioner insisted upon a single proceeding in which damages would be calculated in the aggregate and by the jury. The District Court submitted both issues of liability and damages to the jury.

Petitioner did not move for a hearing regarding the statistical validity of respondents' studies under *Daubert* v. *Merrell Dow Pharmaceuticals, Inc.*, 509 U. S. 579 (1993), nor did it attempt to discredit the evidence with testimony from a rebuttal expert. Instead, as it had done in its opposition to class certification, petitioner argued to the jury that the varying amounts of time it took employees to don and doff different protective equipment made

the lawsuit too speculative for classwide recovery. Petitioner also argued that Mericle's study overstated the average donning and doffing time. The jury was instructed that nontestifying members of the class could only recover if the evidence established they "suffered the same harm as a result of the same unlawful decision or policy." App. 471–472.

Fox's calculations supported an aggregate award of approximately $6.7 million in unpaid wages. The jury returned a special verdict finding that time spent in donning and doffing protective gear at the beginning and end of the day was compensable work but that time during meal breaks was not. The jury more than halved the damages recommended by Fox. It awarded the class about $2.9 million in unpaid wages. That damages award has not yet been disbursed to the individual employees.

Tyson moved to set aside the jury verdict, arguing, among other things, that, in light of the variation in donning and doffing time, the classes should not have been certified. The District Court denied Tyson's motion, and the Court of Appeals for the Eighth Circuit affirmed the judgment and the award.

The Court of Appeals recognized that a verdict for the employees "require[d] inference" from their representative proof, but it held that "this inference is allowable under *Anderson* v. *Mt. Clemens Pottery Co.*, 328 U. S. 680, 686–688 (1946)." 765 F. 3d 791, 797 (2014). The Court of Appeals rejected petitioner's challenge to the sufficiency of the evidence for similar reasons, holding that, under the facts of this case, the jury could have drawn "a 'reasonable inference' of class-wide liability." *Id.*, at 799 (quoting *Anderson* v. *Mt. Clemens Pottery Co.*, 328 U. S. 680, 687 (1946)). Judge Beam dissented, stating that, in his view, the class should not have been certified.

For the reasons that follow, this Court now affirms.

II

Petitioner challenges the class certification of the state-law claims and the certification of the FLSA collective action. The parties do not dispute that the standard for certifying a collective action under the FLSA is no more stringent than the standard for certifying a class under the Federal Rules of Civil Procedure. This opinion assumes, without deciding, that this is correct. For purposes of this case then, if certification of respondents' class action under the Federal Rules was proper, certification of the collective action was proper as well.

Furthermore, as noted above, Iowa's Wage Payment Collection Law was used in this litigation as a state-law mechanism for recovery of FLSA-mandated overtime pay. The parties do not dispute that, in order to prove a violation of the Iowa statute, the employees had to do no more than demonstrate a violation of the FLSA. In this opinion, then, no distinction is made between the requirements for the class action raising the state-law claims and the collective action raising the federal claims.

A

Federal Rule of Civil Procedure 23(b)(3) requires that, before a class is certified under that subsection, a district court must find that "questions of law or fact common to class members predominate over any questions affecting only individual members." The "predominance inquiry tests whether proposed classes are sufficiently cohesive to warrant adjudication by representation." *Amchem Products, Inc.* v. *Windsor*, 521 U. S. 591, 623 (1997). This calls upon courts to give careful scrutiny to the relation between common and individual questions in a case. An individual question is one where "members of a proposed class will need to present evidence that varies from member to member," while a common question is one 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." 2 W. Rubenstein, Newberg on Class Actions §4:50, pp. 196–197 (5th ed. 2012) (internal quotation marks omitted). The 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." *Id.,* §4:49, at 195–196. 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." 7AA C. Wright, A. Miller, & M. Kane, Federal Practice and Procedure §1778, pp. 123–124 (3d ed. 2005) (footnotes omitted).

Here, the parties do not dispute that there are important questions common to all class members, the most significant of which is whether time spent donning and doffing the required protective gear is compensable work under the FLSA. Cf. *IBP, Inc.* v. *Alvarez*, 546 U. S. 21 (2005) (holding that time spent walking between the locker room and the production area after donning protective gear is compensable work under the FLSA). To be entitled to recovery, however, each employee must prove that the amount of time spent donning and doffing, when added to his or her regular hours, amounted to more than 40 hours in a given week. Petitioner argues that these necessarily person-specific inquiries into individual work time predominate over the common questions raised by respondents' claims, making class certification improper.

Respondents counter that these individual inquiries are unnecessary because it can be assumed each employee donned and doffed for the same average time observed in Mericle's sample. Whether this inference is permissible becomes the central dispute in this case. Petitioner con-

tends that Mericle's study manufactures predominance by assuming away the very differences that make the case inappropriate for classwide resolution. Reliance on a representative sample, petitioner argues, absolves each employee of the responsibility to prove personal injury, and thus deprives petitioner of any ability to litigate its defenses to individual claims.

Calling this unfair, petitioner and various of its *amici* maintain that the Court should announce a broad rule against the use in class actions of what the parties call representative evidence. A categorical exclusion of that sort, however, would make little sense. A representative or statistical sample, like all evidence, is a means to establish or defend against liability. Its permissibility turns not on the form a proceeding takes—be it a class or individual action—but on the degree to which the evidence is reliable in proving or disproving the elements of the relevant cause of action. See Fed. Rules Evid. 401, 403, and 702.

It follows that the Court would reach too far were it to establish general rules governing the use of statistical evidence, or so-called representative evidence, in all class-action cases. Evidence of this type is used in various substantive realms of the law. Brief for Complex Litigation Law Professors as *Amici Curiae* 5–9; Brief for Economists et al. as *Amici Curiae* 8–10. Whether and when statistical evidence can be used to establish classwide liability will depend on the purpose for which the evidence is being introduced and on "the elements of the underlying cause of action," *Erica P. John Fund, Inc.* v. *Halliburton Co.*, 563 U. S. 804, 809 (2011).

In many cases, a representative sample is "the only practicable means to collect and present relevant data" establishing a defendant's liability. Manual of Complex Litigation §11.493, p. 102 (4th ed. 2004). In a case where representative evidence is relevant in proving a plaintiff's individual claim, that evidence cannot be deemed im-

proper merely because the claim is brought on behalf of a class. To so hold would ignore the Rules Enabling Act's pellucid instruction that use of the class device cannot "abridge . . . any substantive right." 28 U. S. C. §2072(b).

One way for respondents to show, then, that the sample relied upon here is a permissible method of proving class-wide liability is by showing that each class member could have relied on that sample to establish liability if he or she had brought an individual action. If the sample could have sustained a reasonable jury finding as to hours worked in each employee's individual action, that sample is a permissible means of establishing the employees' hours worked in a class action.

This Court's decision in *Anderson* v. *Mt. Clemens* explains why Mericle's sample was permissible in the circumstances of this case. In *Mt. Clemens*, 7 employees and their union, seeking to represent over 300 others, brought a collective action against their employer for failing to compensate them for time spent walking to and from their workstations. The variance in walking time among workers was alleged to be upwards of 10 minutes a day, which is roughly consistent with the variances in donning and doffing times here. 328 U. S., at 685.

The Court in *Mt. Clemens* held that when employers violate their statutory duty to keep proper records, and employees thereby have no way to establish the time spent doing uncompensated work, the "remedial nature of [the FLSA] and the great public policy which it embodies . . . militate against making" the burden of proving uncompensated work "an impossible hurdle for the employee." *Id.*, at 687; see also *Hoffmann-La Roche Inc.* v. *Sperling*, 493 U. S. 165, 173 (1989) ("The broad remedial goal of the statute should be enforced to the full extent of its terms"). Instead of punishing "the employee by denying him any recovery on the ground that he is unable to prove the

precise extent of uncompensated work," the Court held "an employee has carried out his burden if he proves that he has in fact performed work for which he was improperly compensated and if he produces sufficient evidence to show the amount and extent of that work as a matter of just and reasonable inference." 328 U. S., at 687. Under these circumstances, "[t]he burden then shifts to the employer to come forward with evidence of the precise amount of work performed or with evidence to negative the reasonableness of the inference to be drawn from the employee's evidence." *Id.*, at 687–688.

In this suit, as in *Mt. Clemens*, respondents sought to introduce a representative sample to fill an evidentiary gap created by the employer's failure to keep adequate records. If the employees had proceeded with 3,344 individual lawsuits, each employee likely would have had to introduce Mericle's study to prove the hours he or she worked. Rather than absolving the employees from proving individual injury, the representative evidence here was a permissible means of making that very showing.

Reliance on Mericle's study did not deprive petitioner of its ability to litigate individual defenses. Since there were no alternative means for the employees to establish their hours worked, petitioner's primary defense was to show that Mericle's study was unrepresentative or inaccurate. That defense is itself common to the claims made by all class members. Respondents' "failure of proof on th[is] common question" likely would have ended "the litigation and thus [would not have] cause[d] individual questions . . . to overwhelm questions common to the class." *Amgen Inc.* v. *Connecticut Retirement Plans and Trust Funds*, 568 U. S. ___, ___ (2013) (slip op., at 11). When, as here, "the concern about the proposed class is not that it exhibits some fatal dissimilarity but, rather, a fatal similarity—[an alleged] failure of proof as to an element of the plaintiffs' cause of action—courts should engage that question as a

matter of summary judgment, not class certification." Nagareda, Class Certification in the Age of Aggregate Proof, 84 N. Y. U. L. Rev. 97, 107 (2009).

Petitioner's reliance on *Wal-Mart Stores, Inc.* v. *Dukes*, 564 U. S. 338 (2011), is misplaced. *Wal-Mart* does not stand for the broad proposition that a representative sample is an impermissible means of establishing class-wide liability.

Wal-Mart involved a nationwide Title VII class of over 1½ million employees. In reversing class certification, this Court did not reach Rule 23(b)(3)'s predominance prong, holding instead that the class failed to meet even Rule 23(a)'s more basic requirement that class members share a common question of fact or law. The plaintiffs in *Wal-Mart* did not provide significant proof of a common policy of discrimination to which each employee was subject. "The only corporate policy that the plaintiffs' evidence convincingly establishe[d was] Wal-Mart's 'policy' of allowing discretion by local supervisors over employment matters"; and even then, the plaintiffs could not identify "a common mode of exercising discretion that pervade[d] the entire company." *Id.,* at 355–356 (emphasis deleted).

The plaintiffs in *Wal-Mart* proposed to use representative evidence as a means of overcoming this absence of a common policy. Under their proposed methodology, a "sample set of the class members would be selected, as to whom liability for sex discrimination and the backpay owing as a result would be determined in depositions supervised by a master." *Id.,* at 367. The aggregate damages award was to be derived by taking the "percentage of claims determined to be valid" from this sample and applying it to the rest of the class, and then multiplying the "number of (presumptively) valid claims" by "the average backpay award in the sample set." *Ibid.* The Court held that this "Trial By Formula" was contrary to the Rules Enabling Act because it "'enlarge[d]'" the class members'

"'substantive right[s]'" and deprived defendants of their right to litigate statutory defenses to individual claims. *Ibid.*

The Court's holding in the instant case is in accord with *Wal-Mart*. The underlying question in *Wal-Mart*, as here, was whether the sample at issue could have been used to establish liability in an individual action. Since the Court held that the employees were not similarly situated, none of them could have prevailed in an individual suit by relying on depositions detailing the ways in which other employees were discriminated against by their particular store managers. By extension, if the employees had brought 1½ million individual suits, there would be little or no role for representative evidence. Permitting the use of that sample in a class action, therefore, would have violated the Rules Enabling Act by giving plaintiffs and defendants different rights in a class proceeding than they could have asserted in an individual action.

In contrast, the study here could have been sufficient to sustain a jury finding as to hours worked if it were introduced in each employee's individual action. While the experiences of the employees in *Wal-Mart* bore little relationship to one another, in this case each employee worked in the same facility, did similar work, and was paid under the same policy. As *Mt. Clemens* confirms, under these circumstances the experiences of a subset of employees can be probative as to the experiences of all of them.

This is not to say that all inferences drawn from representative evidence in an FLSA case are "just and reasonable." *Mt. Clemens*, 328 U. S., at 687. Representative evidence that is statistically inadequate or based on implausible assumptions could not lead to a fair or accurate estimate of the uncompensated hours an employee has worked. Petitioner, however, did not raise a challenge to respondents' experts' methodology under *Daubert*; and, as a result, there is no basis in the record to conclude it was

legal error to admit that evidence.

Once a district court finds evidence to be admissible, its persuasiveness is, in general, a matter for the jury. Reasonable minds may differ as to whether the average time Mericle calculated is probative as to the time actually worked by each employee. Resolving that question, however, is the near-exclusive province of the jury. The District Court could have denied class certification on this ground only if it concluded that no reasonable juror could have believed that the employees spent roughly equal time donning and doffing. Cf. *Anderson* v. *Liberty Lobby, Inc.*, 477 U. S. 242, 250–252 (1986). The District Court made no such finding, and the record here provides no basis for this Court to second-guess that conclusion.

The Court reiterates that, while petitioner, respondents, or their respective *amici* may urge adoption of broad and categorical rules governing the use of representative and statistical evidence in class actions, this case provides no occasion to do so. Whether a representative sample may be used to establish classwide liability will depend on the purpose for which the sample is being introduced and on the underlying cause of action. In FLSA actions, inferring the hours an employee has worked from a study such as Mericle's has been permitted by the Court so long as the study is otherwise admissible. *Mt. Clemens*, *supra*, at 687; see also Fed. Rules Evid. 402 and 702. The fairness and utility of statistical methods in contexts other than those presented here will depend on facts and circumstances particular to those cases.

B

In its petition for certiorari petitioner framed its second question presented as whether a class may be certified if it contains "members who were not injured and have no legal right to any damages." Pet. for Cert. i. In its merits brief, however, petitioner reframes its argument. It now

concedes that "[t]he fact that federal courts lack authority to compensate persons who cannot prove injury does not mean that a class action (or collective action) can never be certified in the absence of proof that all class members were injured." Brief for Petitioner 49. In light of petitioner's abandonment of its argument from the petition, the Court need not, and does not, address it.

Petitioner's new argument is that, "where class plaintiffs cannot offer" proof that all class members are injured, "they must demonstrate instead that there is 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." *Ibid.* Petitioner contends that respondents have not demonstrated any mechanism for ensuring that uninjured class members do not recover damages here.

Petitioner's new argument is predicated on the assumption that the damages award cannot be apportioned so that only those class members who suffered an FLSA violation recover. According to petitioner, because Fox's mechanism for determining who had worked over 40 hours depended on Mericle's estimate of donning and doffing time, and because the jury must have rejected Mericle's estimate when it reduced the damages award by more than half, it will not be possible to know which workers are entitled to share in the award.

As petitioner and its *amici* stress, the question whether uninjured class members may recover is one of great importance. See, *e.g.,* Brief for Consumer Data Industry Association as *Amicus Curiae.* It is not, however, a question yet fairly presented by this case, because the damages award has not yet been disbursed, nor does the record indicate how it will be disbursed.

Respondents allege there remain ways of distributing the award to only those individuals who worked more than

40 hours. For example, by working backwards from the damages award, and assuming each employee donned and doffed for an identical amount of time (an assumption that follows from the jury's finding that the employees suffered equivalent harm under the policy), it may be possible to calculate the average donning and doffing time the jury necessarily must have found, and then apply this figure to each employee's known gang-time hours to determine which employees worked more than 40 hours.

Whether that or some other methodology will be successful in identifying uninjured class members is a question that, on this record, is premature. Petitioner may raise a challenge to the proposed method of allocation when the case returns to the District Court for disbursal of the award.

Finally, it bears emphasis that this problem appears to be one of petitioner's own making. Respondents proposed bifurcating between the liability and damages phases of this proceeding for the precise reason that it may be difficult to remove uninjured individuals from the class after an award is rendered. It was petitioner who argued against that option and now seeks to profit from the difficulty it caused. Whether, in light of the foregoing, any error should be deemed invited, is a question for the District Court to address in the first instance.

* * *

The judgment of the Court of Appeals for the Eighth Circuit is affirmed, and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

SUPREME COURT OF THE UNITED STATES

No. 14–1146

TYSON FOODS, INC., PETITIONER *v.* PEG BOUAPHAKEO, ET AL., INDIVIDUALLY AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

[March 22, 2016]

CHIEF JUSTICE ROBERTS, with whom JUSTICE ALITO joins as to Part II, concurring.

Petitioner Tyson Foods presents two primary arguments. First, it claims that class certification was improper because each individual plaintiff spent different amounts of time donning and doffing protective gear. Therefore, according to Tyson, whether and to what extent it owed damages to each individual employee for uncompensated overtime was not a question capable of resolution on a class-wide basis. Second, Tyson argues that the verdict cannot stand because, while no one disputes that the class as certified contains hundreds of uninjured employees, the plaintiffs have not come up with any way to ensure that those employees do not recover damages from the jury's lump-sum award.

The Court rejects the first argument and leaves the second for initial resolution by the lower courts. I join the Court's opinion in full. I write separately to explain my understanding of the Court's resolution of the case and to express my concern that the District Court may not be able to fashion a method for awarding damages only to those class members who suffered an actual injury.

I

A class may be certified under Federal Rule of Civil Procedure 23(b)(3) only if "questions of law or fact common to class members predominate over any questions affecting only individual members." A common question is one in which "the issue is susceptible to generalized, class-wide proof." *Ante*, at 9 (quoting 2 W. Rubenstein, Newberg on Class Actions §4:50, pp. 196–197 (5th ed. 2012)) (internal quotation marks omitted).

To prove liability and damages, respondents had to establish the amount of compensable (but uncompensated) donning and doffing time for each individual plaintiff. The Court properly concludes that despite the differences in donning and doffing time for individual class members, respondents could adequately prove the amount of time for each individual through generalized, class-wide proof. That proof was Dr. Mericle's representative study. As the Court observes, "each class-member could have relied on that [study] to establish liability if he or she had brought an individual action." *Ante,* at 11. And when representative evidence would suffice to prove a plaintiff's individual claim, that evidence cannot be deemed improper merely because the claim is brought as part of a class action. See *ante,* at 10–11.

I agree with JUSTICE THOMAS that our decision in *Anderson* v. *Mt. Clemens Pottery Co.*, 328 U. S. 680 (1946), does not provide a "special, relaxed rule authorizing plaintiffs to use otherwise inadequate representative evidence in FLSA-based cases." *Post,* at 7 (dissenting opinion). But I do not read the Court's opinion to be inconsistent with that conclusion. Rather, I take the Court to conclude that Dr. Mericle's study constituted sufficient proof from which the jury could find "the amount and extent of [each individual respondent's] work as a matter of just and reasonable inference"—the same standard of proof that would apply in any case. *Ante,* at 12 (internal quotation marks

omitted). It is with that understanding that I join the opinion of the Court.

II

As for Tyson's second argument, it is undisputed that hundreds of class members suffered no injury in this case. See Brief for Respondents 52–53; Tr. of Oral Arg. 30. The question is: which ones? The only way to know is to figure out how much donning and doffing time the jury found Tyson owed the workers in each department. But the jury returned a lump-sum verdict of $2.9 million on a class-wide basis, without specifying any particular amount of donning and doffing time used to calculate that number. If we knew that the jury had accepted the plaintiffs' proposed average donning and doffing times in calculating the verdict, we could easily overcome this problem. But we know the jury did no such thing. And with no way to reverse engineer the verdict to determine how much donning and doffing time the jury found Tyson owed workers in each department, we do not know which plaintiffs the jury found to be injured (or not).

Tyson contends that unless the District Court can fashion a means of identifying those class members not entitled to damages, it must throw out the jury's verdict and decertify the class. I agree with the Court's decision to leave that issue to be addressed in the first instance by the District Court. But I am not convinced that the District Court will be able to devise a means of distributing the aggregate award only to injured class members.

As the Court explains, each plaintiff in this case suffered actual harm only if he: (1) was not compensated for at least some compensable donning and doffing time; *and* (2) worked more than 40 hours in a workweek, including any compensable donning and doffing time. See *ante*, at 16–17. In other words, it is not enough that a plaintiff was uncompensated for compensable donning and doffing

time; unless that plaintiff also worked more than 40 hours in a week (including compensable donning and doffing time), he is owed no overtime pay and therefore suffered no injury.

If the jury credited Dr. Mericle's averages—18 minutes per day of donning and doffing time for employees in the fabrication (cut and retrim) departments, 21.25 for employees in the kill department—the District Court could have assumed that the jury found that each plaintiff from those departments donned and doffed the average amounts of time and used those averages to determine which plaintiffs had worked more than 40 hours (and awarded damages on that understanding).

The problem is that the jury obviously did not credit Dr. Mericle's averages. According to Dr. Fox, another of the plaintiffs' experts, those averages would have resulted in a $6.7 million verdict across the 3,344 member class. *Ante*, at 7. The jury, however, awarded the plaintiffs only $2.9 million.

How, then, did the jury arrive at that $2.9 million figure? The jury might have determined that Dr. Mericle's average was correct for the kill department, but overstated for the fabrication departments. Or vice versa. Or the jury might have found that Dr. Mericle's averages overstated the donning and doffing time in all departments, by varying degrees. Any of those conclusions would have been permissible on these facts, and any of those options would have reduced the jury verdict from the $6.7 million proposed by Dr. Fox. But in arriving at the $2.9 million verdict, we have no way of knowing how much donning and doffing time the jury actually found to have occurred in the kill and fabrication departments, respectively.

And there's the rub. We know that the jury must have found at least one of Dr. Mericle's two averages to be too high. And we know, as Dr. Fox testified, that if Dr. Mericle's averages were even slightly too high, hundreds of

class members would fall short of the 40-hour workweek threshold that would entitle them to damages. See *post*, at 5–6. But because we do not know how much donning and doffing time the jury found to have occurred in each department, we have no way of knowing which plaintiffs failed to cross that 40-hour threshold.

To illustrate: Take a fabrication employee and a kill employee, each of whom worked a 39-hour workweek before counting any compensable donning and doffing time. If the jury credited Dr. Mericle's kill department average but discounted his fabrication average to below one hour per week, the jury would have found that the kill employee was injured, while the fabrication employee was not. But the jury also might have done the exact opposite. We just don't know—and so we have no way to determine which plaintiffs the jury concluded were injured.

The plaintiffs believe they can surmount this obstacle. As the Court explains, they propose to work backward from the damages award by assuming that each employee donned and doffed for an identical amount of time. *Ante*, at 16–17. That won't work, however, because there is no indication that the jury made the same assumption. Indeed, the most reasonable guess is that the jury did *not* find that employees in different departments donned and doffed for identical amounts of time. After all, the plaintiffs' own expert indicated that employees in different departments donned and doffed for *different* amounts of time.

Given this difficulty, it remains to be seen whether the jury verdict can stand. The Court observes in dicta that the problem of distributing the damages award "appears to be one of petitioner's own making." *Ante*, at 17. Perhaps. But Tyson's insistence on a lump-sum jury award cannot overcome the limitations placed on the federal courts by the Constitution. Article III does not give federal courts the power to order relief to any uninjured plain-

tiff, class action or not. The Judiciary's role is limited "to provid[ing] relief to claimants, in individual or class actions, who have suffered, or will imminently suffer, actual harm." *Lewis* v. *Casey*, 518 U. S. 343, 349 (1996). Therefore, if there is no way to ensure that the jury's damages award goes only to injured class members, that award cannot stand. This issue should be considered by the District Court in the first instance. As the Court properly concludes, the problem is not presently ripe for our review.

SUPREME COURT OF THE UNITED STATES

No. 14–1146

TYSON FOODS, INC., PETITIONER *v.* PEG BOUAPHAKEO, ET AL., INDIVIDUALLY AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

[March 22, 2016]

JUSTICE THOMAS, with whom JUSTICE ALITO joins, dissenting.

Our precedents generally prohibit plaintiffs from maintaining a class action when an important element of liability depends on facts that vary among individual class members. This case concerns whether and when class-action plaintiffs can overcome that general rule by using representative evidence as common proof of an otherwise individualized issue. Our precedents resolve that question: Before class-action plaintiffs can use representative evidence in this way, district courts must undertake a rigorous analysis to ensure that such evidence is sufficiently probative of the individual issue to make it susceptible to classwide proof. The District Court did not satisfy that obligation here, and its failure to do so prejudiced defendant Tyson Foods at trial. The majority reaches a contrary conclusion by redefining class-action requirements and devising an unsound special evidentiary rule for cases under the Fair Labor Standards Act of 1938 (FLSA), 29 U. S. C. §201 *et seq.* I respectfully dissent.

I

"The class action is an exception to the usual rule that litigation is conducted by and on behalf of the individual

named parties only." *Comcast Corp.* v. *Behrend*, 569 U. S. ___, ___ (2013) (slip op., at 5) (internal quotation marks omitted). Plaintiffs thus "must affirmatively demonstrate [their] compliance" with Rule 23. *Wal-Mart Stores, Inc.* v. *Dukes*, 564 U. S. 338, 350 (2011). Where, as here, a putative class seeks money damages, plaintiffs also must satisfy the "demanding" standard of predominance, *Comcast*, *supra,* at ___ (slip op., at 6), by proving that "questions of law or fact common to class members predominate over any questions affecting only individual members." Fed. Rule Civ. Proc. 23(b)(3).

District courts must also ensure continued compliance with Rule 23 throughout the case. When a district court erroneously certifies a class, then holds a trial, reversal is required when the record shows that improper certification prejudiced the defendant. And an incorrect class certification decision almost inevitably prejudices the defendant. When a district court allows class plaintiffs to prove an individualized issue with classwide evidence, the court relieves them of their burden to prove each element of their claim for each class member and impedes the defendant's efforts to mount an effective defense.

Here, the District Court misconstrued the elements of the plaintiffs' claims. And it failed to recognize that one critical element of those claims raised an individual issue that would predominate over any common issues. The court therefore did not ask whether that individual issue was susceptible to common proof. That error, at the class certification stage, then prejudiced Tyson at trial. It was only at trial that the plaintiffs introduced the critical evidence at issue in this case. They introduced, as representative of the class, a study by the plaintiffs' expert, Dr. Kenneth Mericle. The District Court still declined to consider whether this evidence was appropriate common proof—even though the study showed wide variations

among class members on an important individual issue. These errors prejudiced Tyson and warrant reversal.

A

The District Court erred at the class certification stage by holding that the plaintiffs satisfied Rule 23's predominance requirement. The plaintiffs alleged that Tyson failed to adequately pay workers overtime for donning and doffing protective gear, in violation of the Iowa Wage Payment Collection Law, Iowa Code §91A.3 (2013). This Iowa law mirrors the FLSA.[1] An employer violates these laws if it employs someone "for a workweek longer than forty hours" and fails to adequately compensate him for the overtime. 29 U. S. C. §207(a)(1). Here, the plaintiffs could establish Tyson's liability to all class members only if: (1) the donning and doffing at issue is compensable work; (2) all employees worked over 40 hours, including donning and doffing time; and (3) Tyson failed to compensate each employee for all overtime.

The District Court should have begun its predominance inquiry by determining which elements of the plaintiffs' claims present common or individual issues, and assessed whether individual issues would overwhelm common ones. See *Halliburton Co.* v. *Erica P. John Fund, Inc.*, 573 U. S. ___, ___ (2014) (slip op., at 14–15); *Erica P. John Fund, Inc.* v. *Halliburton Co.*, 563 U. S. 804, 809 (2011). The plaintiffs' claims here had one element that was clearly individualized: whether each employee worked over 40 hours without receiving full overtime pay. The amount of time that employees spent on donning and doffing varied by person because individuals take different amounts of time to don and doff the same gear, and their gear varied.

[1] The plaintiffs also brought a collective action under the FLSA. Because the jury verdict combined the two actions, deficiencies in the class action require reversal of the entire judgment.

This issue was critical to determining Tyson's liability because some employees would not have worked over 40 hours per week without counting time spent on donning and doffing. The critical issue for class certification thus was whether the individualized nature of employees' donning and doffing times defeated predominance.

The District Court, however, certified a 3,344–member class without acknowledging the significance of this individual issue, let alone addressing whether it was susceptible to common proof. The court acknowledged that "[i]ndividual questions may exist" and that Tyson was objecting to being "forced to defend against *un* common evidence" because the plaintiffs had no common evidence establishing what gear all employees wore "or how long [they] spend donning and doffing their [gear]." 564 F. Supp. 2d 870, 900, 909 (ND Iowa 2008). But, in the District Court's view, common issues predominated because the plaintiffs could establish classwide liability just by showing that Tyson was not paying any employee for the time it took to don or doff basic gear. *Id.,* at 909; see *id.,* at 900, 904, 905 (similar).

The District Court thus did not give proper consideration to the significance of variable donning and doffing times. Establishing an FLSA violation across the entire class was impossible without evidence that *each* employee would have worked over 40 hours per week if donning and doffing time were included. But the District Court did not fully appreciate that this was a critical individual issue that defined Tyson's liability, and it did not analyze, in any way, whether this issue was susceptible to common proof. As a result, the District Court erred when it certified the class.

B

It was only later at trial that the plaintiffs introduced the critical evidence that they claimed could establish all

employees' donning and doffing times on a classwide basis. This evidence came from the plaintiffs' expert, Dr. Mericle, who studied how long certain Tyson employees took to don and doff various gear. This was the "most important" evidence at trial. *Ante,* at 5. Without it, the plaintiffs almost certainly could not have obtained a classwide verdict. But rather than showing that employees' donning and doffing times were susceptible to classwide proof, Mericle's evidence showed that employees' donning and doffing times varied materially. Mericle's evidence thus confirmed the inappropriateness of class treatment.

Mericle used about 53 employees per donning- or doffing-related activity to extrapolate averages for the 3,344–person class. By averaging the times that sample employees spent per activity, Mericle estimated that all cut or retrim department employees spent 18 minutes per day on uncompensated activities (including donning and doffing), while kill department employees averaged 21.25 minutes.

Mericle's data, however, revealed material variances in the amount of time that individual employees spent on the same activities. Cut and retrim employees took between 0.583 minutes and over 10 minutes to don preshift equipment at their lockers. Postshift doffing took one employee less than two minutes, and another over nine minutes. Kill department employees had similar variances. No two employees performed the same activity in the same amount of time, and Mericle observed "a lot of variation within the activity." App. 387.

The plaintiffs' trial evidence also showed that variances in the amount of time that employees spent on donning and doffing activities significantly affected the number of class members who could assert overtime claims. The plaintiffs' other expert, Dr. Liesl Fox, added Mericle's average times to individual employees' timesheets to determine which class members had overtime claims. She discovered that 212 of the 3,344 class members had no

claims at all because they had not worked over 40 hours per week. If Mericle's averages even slightly overestimated average donning and doffing times, another 282 class members would have no overtime claims. If average donning or doffing times dropped from 18–21 minutes to 15 minutes, Fox stated, another 110 employees had no overtime claims. According to Fox, incremental changes to donning and doffing times mattered so much that her estimated damages figure ($6.6 million) would be meaningless if the jury discounted Mericle's data at all. Yet the jury ultimately rejected that damages figure—seemingly disagreeing that Mericle's average times reflected the amount of time that every class member spent donning and doffing.

Because the District Court did not evaluate Mericle's and Fox's evidence in its initial class certification decision, it should have revisited certification when faced with this evidence at trial. It declined to do so even after Tyson objected to using this evidence to establish the amount of time all class members spent donning and doffing. See 2011 WL 3793962 (ND Iowa, Aug. 25, 2011) (rejecting decertification motion); 2012 WL 4471119 (ND Iowa, Sept. 26, 2012) (summarily denying post-trial decertification). The court thus never made findings or analyzed whether, under Rule 23(b)(3), Mericle's study could be used as common proof of an individual issue that would otherwise preclude class treatment.

The District Court's jury instructions did not cure this deficiency. No instruction could remedy a court's failure to address why an individual issue was susceptible to common proof. In any event, the court instructed the jury that "expert testimony"—like Mericle's—should get "as much weight as you think it deserves." App. 471. The court also let the jury rely on representative evidence to establish each class member's claim even if the jury believed that employees' donning and doffing times varied considerably.

See *ibid.*

In sum, the plaintiffs at no time had to justify whether the variability among class members here was too much for representative evidence to fill the gap with common proof. Nor did the District Court address whether Mericle's study—which showed significant variability in how much time employees spent on donning and doffing—was permissible common proof. These errors created an unacceptable risk that Tyson would be held liable to a large class without adequate proof that each individual class member was owed overtime. Before defendants can be forced to defend against a class action, courts must be sure that Rule 23's criteria are met. The District Court's failure to do so warrants reversal.

II

The majority reaches a contrary result by erring in three significant ways. First, the majority alters the predominance inquiry so that important individual issues are less likely to defeat class certification. Next, the majority creates a special, relaxed rule authorizing plaintiffs to use otherwise inadequate representative evidence in FLSA-based cases by misreading *Anderson* v. *Mt. Clemens Pottery Co.*, 328 U. S. 680 (1946). Finally, the majority points to Tyson's litigation strategy and purported differences from prior Rule 23 precedents. None of these justifications withstands scrutiny.

A

The majority begins by redefining the predominance standard. According to the majority, if some "'central issues'" present common questions, "'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.'" *Ante*, at 9 (quoting, 7AA C.

Wright, A. Miller, & M. Kane, Federal Practice & Procedure §1778, pp. 123–124 (3d ed. 2005; footnotes omitted)).

We recently—and correctly—held the opposite. In *Comcast,* we deemed the lack of a common methodology for proving damages fatal to predominance because "[q]uestions of individual damage calculations will inevitably overwhelm questions common to the class." 569 U. S., at ___ (slip op., at 7).[2] If, as the majority states, this case presents "no occasion" to announce "broad and categorical rules governing the use of representative and statistical evidence in class actions," *ante,* at 15, it should most certainly not present an occasion to transform basic aspects of the predominance inquiry.

B

The majority further errs in concluding that the representative evidence here showed that class members' claims were susceptible to common proof. See *ante,* at 8–15. As the majority observes, representative evidence can be used to prove an individual issue on a classwide basis if each class member, in an individual action, could rely on that evidence to prove his individual claim. *Ante,* at 11. But that premise should doom the plaintiffs' case. Even testifying class members would seem unable to use Mericle's averages. For instance, Mericle's study estimated that kill department employees took an average 6.4 minutes to don equipment at their lockers before their

[2]The majority relies on the same treatise citations that the *Comcast* dissent invoked to argue that individualized damages calculations should never defeat predominance. 569 U. S., at ___–___ (slip op., at 3–4) (opinion of BREYER, J.). Since then, these treatises have acknowledged the tension between their views of predominance and *Comcast.* See 7AA C. Wright, A. Miller, & M. Kane, Federal Practice and Procedure, §1778, p. 37 (3d ed. Supp. 2015); 2 W. Rubenstein, Newberg on Class Actions §4:54, p. 21 (5th ed. Supp. June 2015).

shift—but employee Donald Brown testified that this activity took him around 2 minutes. Others also testified to donning and doffing times that diverged markedly from Mericle's estimates. So Mericle's study could not sustain a jury verdict in favor of these plaintiffs, had they brought individual suits.

According to the majority, this disparity between average times and individual times poses no problem because *Anderson* v. *Mt. Clemens Pottery Co.*, 328 U. S. 680, allows plaintiffs to use such representative evidence as common proof. See *ante,* at 11–14. In the majority's view, *Mt. Clemens* established that (1) if the employer did not record the time that employees spent on compensable work, employees can use representative evidence to establish the employer's liability, *ante,* at 11–12; and (2) employees can use "the experiences of a subset of employees" to establish "the experiences of all of them" if "each employee worked in the same facility, did similar work[,] and was paid under the same policy," *ante,* at 14.

The majority's reliance on *Mt. Clemens* is questionable given that decision's shaky foundations. Seventy years ago, *Mt. Clemens* construed the FLSA broadly to vindicate the Court's understanding of the FLSA's "remedial" purposes. 328 U. S., at 687. Within a year, Congress rejected that interpretation. Citing the "emergency" this Court had created by spurring "excessive and needless litigation," Congress repudiated this Court's understanding of what the FLSA meant by "work" and the "workweek" and limited employees' ability to sue collectively. 29 U. S. C. §§251(a)–(b); see *Integrity Staffing Solutions, Inc.* v. *Busk*, 574 U. S. ___, ___ (2014) (slip op., at 3–5) (noting repudiation in the Portal-to-Portal Act of 1947); *Hoffmann-La Roche Inc.* v. *Sperling*, 493 U. S. 165, 173 (1989) (noting repudiation of representative actions). Since then, this

Court has decided many FLSA cases, but has never relied on *Mt. Clemens* to do so.[3]

Putting these concerns aside, the majority today goes beyond what *Mt. Clemens* held. First, *Mt. Clemens* does not hold that employees can use representative evidence in FLSA cases to prove an otherwise uncertain element of liability. *Mt. Clemens* involved an employer's alleged failure to pay employees for time they spent walking to and from their work spaces and on preshift preparatory activities. See 328 U. S., at 684–685. The Court held that the FLSA required employers to compensate employees for those activities. *Id.,* at 690–692 (overruled by 29 U. S. C. §§252, 254). The employer was thus presumptively liable to all employees because they all claimed to work 40 hours per week. See Record in *Mt. Clemens*, O.T. 1945, No. 342 (Record), pp. 10–11 (complaint). All additional uncompensated work was necessarily unpaid overtime. That explains why the Court "assum[ed] that the employee has proved that he has performed work and has not been paid in accordance with the statute." 328 U. S., at 688.

Mt. Clemens also rejected the notion that employees who had *already* established the employer's liability had to prove damages using precise, employee-specific records. *Id.*, at 687. Rather, if the employer failed to keep records but its liability was certain, employees could use evidence that "show[s] the amount and extent of that work as a

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[3]THE CHIEF JUSTICE believes that the majority does not actually depend upon *Mt. Clemens* as a special evidentiary rule, and instead applies "the same standard of proof that would apply in any case." *Ante*, at 2. That interpretation is difficult to credit given that the majority never explains why Dr. Mericle's representative evidence could have sustained a jury finding in favor of any individual employee in an individual case, and instead devotes several paragraphs to the proposition that "[t]his Court's decision in [*Mt. Clemens*] explains why Dr. Mericle's sample was permissible in the circumstances of this case." *Ante,* at 11; see *id.,* at 11-12.

matter of just and reasonable inference." *Ibid.* The Court, however, limited this holding to instances where the employer's FLSA violation was "certain," as in *Mt. Clemens* itself. *Id.,* at 688; see *ibid.* (inference permissible "as to the extent of the damages"). *Mt. Clemens* does not justify the use of representative evidence in this case, where Tyson's liability to many class members was uncertain.

Second, the majority misreads *Mt. Clemens* as "confirm[ing]" that when employees "worked in the same facility, did similar work and w[ere] paid under the same policy," representative evidence can prove all of their claims. *Ante*, at 14. *Mt. Clemens* said nothing about whether or why the employees there shared sufficient similarities for their claims to be susceptible to common proof. The *Mt. Clemens* plaintiffs were the local union and seven employees. See 328 U. S., at 684. They brought a representative action, a type of collective action that allowed employees to designate a union to pursue their claims for them. See §16(b), 52 Stat. 1069; Record 7 (complaint). Some 300 employees did so. See *Mt. Clemens Pottery Co.* v. *Anderson*, 149 F. 2d, 461 (CA6 1945); Record 33–41. The District Court did not make findings about what made these employees similar, instead reasoning that the FLSA's broad objectives supported a liberal approach to allowing class suits. Record 29–32 (June 13, 1941, order). This Court also said nothing about whether the employees suffered the same harm in the same manner; that issue was not before it. In *Mt. Clemens*' aftermath, however, Congress eliminated representative actions, like the one in *Mt. Clemens*, that required too few similarities among plaintiffs and allowed plaintiffs "not themselves possessing claims" to sue. *Hoffman-La Roche*, *supra*, at 173. *Mt. Clemens* thus offers no guidance about what degree of similarity among employees suffices for representative evidence to establish all employees' experiences.

In any event, *Mt. Clemens* did not accept that the representative evidence there would be probative even were the employees sufficiently similar. All *Mt. Clemens* decided was that the lack of precise data about the amount of time each employee worked was not fatal to their case. 328 U. S., at 686–687. The Court then remanded the case, leaving the lower courts to "draw whatever reasonable inferences can be drawn from the employees' evidence," if any. *Id.*, at 693–694.[4] *Mt. Clemens* therefore does not support the majority's conclusion that representative evidence can prove thousands of employees' FLSA claims if they share a facility, job functions, and pay policies. See *ante,* at 14.

By focusing on similarities irrelevant to whether employees spend variable times on the task for which they are allegedly undercompensated, the majority would allow representative evidence to establish classwide liability even where much of the class might not have overtime claims at all. Whether employees work in one plant or many, have similar job functions, or are paid at the same rate has nothing to do with how fast they walk, don, or doff—the key variables here for FLSA liability.

The majority suggests that *Mt. Clemens*' evidentiary rule is limited to cases where the employer breaches its obligation to keep records of employees' compensable work. See *ante,* at 11–12. But that limitation is illusory. FLSA cases often involve allegations that a particular activity is uncompensated work. Just last Term, we re-

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[4] If anything, *Mt. Clemens* suggests that the representative evidence here is impermissible. The Court affirmed that the District Court's proposed "formula of compensation," calculated based on estimated average times it derived from employees' representative testimony, was impermissible. 328 U. S., at 689; see 149 F. 2d, at 465 ("It does not suffice for the employee to base his right to recover on a mere estimated average of overtime worked.").

jected class-action plaintiffs' theory that waiting in an antitheft security screening line constitutes work. See *Integrity Staffing Solutions, Inc.*, 574 U. S. at ___ (slip op., at 1). The majority thus puts employers to an untenable choice. They must either track any time that might be the subject of an innovative lawsuit, or they must defend class actions against representative evidence that unfairly homogenizes an individual issue. Either way, the majority's misinterpretation of *Mt. Clemens* will profoundly affect future FLSA-based class actions—which have already increased dramatically in recent years. Erichson, CAFA's Impact On Class Action Lawyers, 156 U. Pa. L. Rev. 1593, 1617 (2008).

C

The majority makes several other arguments why Mericle's study was adequate common proof of all class members' experiences. None has merit.

First, the majority contends that, because Tyson's trial defense—that Mericle's study was unrepresentative or inaccurate—was "itself common," Tyson was "not deprive[d] . . . of its ability to litigate individual defenses." *Ante,* at 12. But looking to what defenses remained available is an unsound way to gauge whether the class-action device prevented the defendant from mounting individualized defenses. That Tyson was able to mount only a *common* defense confirms its disadvantage. Testifying class members attested to spending less time on donning and doffing than Mericle's averages would suggest. Had Tyson been able to cross-examine more than four of them, it may have incurred far less liability. See *supra*, at 9–10.

Second, the majority argues that Tyson's failure to challenge Mericle's testimony under *Daubert* v. *Merrell Dow Pharmaceuticals, Inc.*, 509 U. S. 579 (1993), left to the jury any remaining questions about the value of this evidence. *Ante,* at 14–15. But *Comcast* rejected this

argument. Failing to challenge evidence under *Daubert* precludes defendants from "argu[ing] that [the] testimony was not admissible," but it does not preclude defendants from "argu[ing] that the evidence failed to show that the case is susceptible to awarding damages on a class-wide basis." *Comcast,* 569 U. S., at ___, n. 4 (slip op., at 5, n. 4) (internal quotation marks omitted).

Finally, the majority's attempts to distinguish this case from *Wal-Mart* are unavailing. See *ante,* at 13–14. *Wal-Mart* involved a nationwide Title VII class action alleging that Wal-Mart's policy of delegating employment decisions to individual store managers let managers exercise their discretion in a discriminatory manner. See 564 U. S., at 342. We held that discretionary decisionmaking could not be a common policy uniting all class members' claims because managers presumptively exercise their discretion in an individualized manner. See *id.*, at 355–356. Some may rely on performance-based criteria; others may use tests; yet others might intentionally discriminate. *Ibid.* Because of this variability, "demonstrating the invalidity of one manager's use of discretion will do nothing to demonstrate the invalidity of another's." *Ibid.*

Moreover, the *Wal-Mart* plaintiffs' representative evidence—120 employee anecdotes—did not make this individualized issue susceptible to common proof. *Id.,* at 358. Using 120 anecdotes to represent the experiences of 1.5 million class members was too far below the 1:8 ratio of anecdotes to class members that our prior cases accepted. *Ibid.* Thus, this representative evidence was "too weak to raise any inference that all the individual, discretionary personnel decisions are discriminatory." *Ibid.*

The plaintiffs' reliance on Mericle's study fails for the same reasons. Just as individual managers inherently make discretionary decisions differently, so too do individual employees inherently spend different amounts of time donning and doffing. And, just as 120 employee anecdotes

could not establish that all 1.5 million class members faced discrimination, neither can Mericle's study establish that all 3,344 class members spent the same amount of time donning and doffing. Like the 120 Wal-Mart anecdotes, Mericle's study—which used about 57 employees per activity to extrapolate times for 3,344—falls short of the 1:8 ratio this Court deems "significant" to the probative value of representative evidence. See *id.,* at 358.

III

I agree with the majority's conclusion in Part II–B that we should not address whether a class action can be maintained if a class contains uninjured members. Given that conclusion, however, I am perplexed by the majority's readiness to suggest, in dicta, that Tyson's opposition to bifurcating the proceedings might be invited error. *Ante*, at 17. I see no reason to opine on this issue.

* * *

I respectfully dissent.

10:40-11:20 Panel 3: Civil Law – Products Liability

Moderator: Dan Hodes

Panelists: Wes Shumate (Davis, Bethune & Jones); Mark Anstoetter (Shook Hardy & Bacon)

Discussion outline:

1. Introduction
2. Why is scientific/expert evidence important specifically in products liability cases? Why are products cases different in this regard from general civil litigation? How has scientific/expert evidence made or broken a recent case for you?
3. Talk about venue considerations when filing or deciding whether to remove. What considerations do you emphasize in federal court products cases (vs. state court)? How does *Daubert* vs. state rules play into that decision?
4. Talk about planning and scheduling issues in federal court. What do you consider in terms of when expert deadlines should be placed (both in respect to fact discovery deadline and trial)? Note differences with state court. How do you plan from the outset for scientific issues?
5. When you talk about expert reports, what has been your experience as to experts testifying outside the bounds of their reports in federal court? Can it be stopped? Pretrial ways to assure you are not surprised?
6. Talk about demonstratives. What makes them particularly effective in products cases (5 senses, types)? What concerns can be raised about demonstratives (surprise, trying to get things into evidence that are not otherwise, use in opening)? What policies do you have for exchange? "Simple, but not so simple as to not survive a foundational challenge."

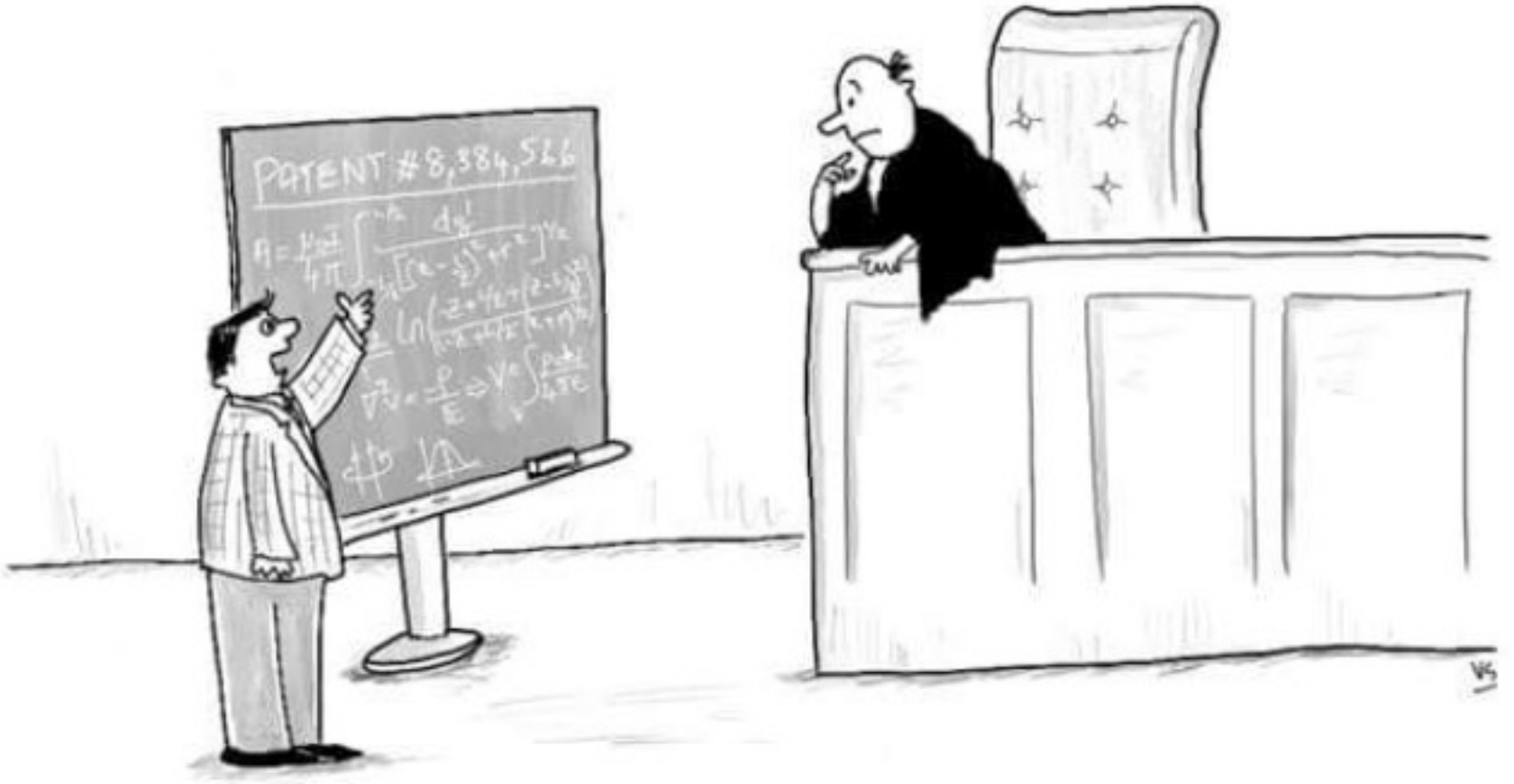
Dan Hodes is a shareholder at German May PC. Mr. Hodes specializes in complex civil litigation matters, with emphasis on contract, tort, antitrust, and intellectual property matters. Mr. Hodes represents plaintiffs and defendants in federal and state courts in Missouri, Kansas, and nationally, as well as in arbitration. Mr. Hodes graduated from the University of California-Berkeley School of Law in 2004, and worked at a large firm in New York City for four years before joining German May.

Wes Shumate is a partner with Davis, Bethune & Jones, L.L.C. in Kansas City, Missouri. His practice includes automobile and trucking collisions, railroad crossing collisions, products liability, and FELA litigation. Mr. Shumate and the attorneys of Davis, Bethune & Jones, focus their practice solely on representing individuals who have been seriously injured and families who have suffered the death of a loved one. He received his B.S. from Murray State University and his J.D. from the University of Missouri- Kansas City.
Mr. Shumate is licensed to practice in Missouri, Kansas and Tennessee. He is admitted to practice before the United States District Court for the Western District of Missouri and the District of Kansas. Recently, Mr. Shumate has been chosen for membership in The National Trial Lawyers: Top 40 Under 40 for 2012 - 2016 and the Top 100 for 2013 - 2016. He has also been recognized as a "Rising Star" and , more recently as a "Super Lawyer" by the Missouri and

Kansas Super Lawyer Magazine. In addition, he has been included in the Kansas City Business Journal's "Best of the Bar" and is rated by Martindale-Hubbell at "AV Preeminent" for 2016.

Mark Anstoetter is a partner at Shook Hardy & Bacon. Mark has more than 25 years of experience establishing effective legal strategies that position companies to anticipate and defend against environmental, toxic tort, agribusiness/food safety and crisis-related claims. As chair of the firm's *Chambers*-recognized Toxic Tort Practice and co-chair of the Agribusiness and Food Safety Practice, he leads litigation at the state and federal level in addition to handling high-stakes enforcement matters and client counseling that require complex issues management.


My theories aren't generally accepted yet.
It's okay if your peers don't respect you, as long as the judge and jury do.
stus.com



"So you see your honor, it's obvious."

11:30-12:20 Panel 4: View from the Bench

Moderator: John Shaw

Panelists: Judge Beth Phillips (W.D. Mo.); Magistrate Judge John Maughmer (W.D. Mo.); Magistrate Judge Waxse (D. Kan.); Chief Magistrate Judge James O'Hara (D. Kan.)

Discussion outlines:

1. Introduction
2. Judge Waxse's intro
3. Discussion

John W. Shaw is a partner in the Kansas City, Missouri firm of Berkowitz Oliver . He received his B.A., M.A. and J.D. degrees from the University of Missouri-Columbia. John has served as lead trial and appellate counsel in a variety of commercial, product liability and securities matters. He's also been selected as national or regional counsel by both product manufacturers and securities broker dealers. He has handled securities disputes before FINRA, AAA and CFTC as well as regulatory matters before the SEC, FINRA and state securities commissions. He has been named as a "Super Lawyer" in Securities Litigation, designated in The Best Lawyers in America®, and listed in Ingram's "Best Lawyers in Kansas City." John is President-Elect of the Federal Bar Association Chapter for the Districts of Kansas and Western District of Missouri.

Judge Beth Phillips is a United States District Court Judge for the District of Western Missouri. Judge Phillips was nominated by President Obama and was sworn in on March 23, 2012. Before taking the bench, she was a Jackson County Assistant Prosecutor from 1997-2001, was in private practice in Kansas City, Missouri from 2001-2008, was an Assistant United States Attorney in the Western District of Missouri from 2008-2009 and then the United States Attorney for W.D. Mo. from 2009-2012.

Judge John Maughmer has been a United States Magistrate Judge in the Western District of Missouri since 1988. Before taking the bench he clerked for the Honorable Elmo B. Hunter from 1980-1982 and practiced at Lathrop & Gage from 1982 to 1988.

Magistrate Judge James P. O'Hara was born in Detroit, Michigan, but was raised mainly in Utah and Nebraska. He earned a Bachelor of Arts degree from the University of Nebraska in 1977. He attended the Creighton University School of Law, where he was elected to the Moot Court Board and served on the Editorial Staff of the *Creighton Law Review*. He earned his juris doctorate degree, with honors, in 1980.
Following law school, O'Hara served a two-year judicial clerkship with U.S. District Judges Robert V. Denney and C. Arlen Beam in the District of Nebraska. From 1982 until his appointment to the federal bench in 2000, O'Hara was in private practice with the Kansas City-based law firm of Shughart, Thomson & Kilroy, P.C., for the first five years as an associate and then as a partner. He primarily represented clients in commercial litigation cases in federal and

state courts in Kansas and Missouri. He was appointed U.S. Magistrate Judge in 2000, initially serving in Topeka and, since 2003, in Kansas City. At the time of O'Hara's appointment to the bench, he was serving on his law firm's executive committee and as managing partner of its office in Overland Park, Kansas.

While in private practice, O'Hara served on the Ethics and Grievance Committee of the Johnson County Bar Association, on the Kansas Board for Discipline of Attorneys, on the Bench-Bar Committee of the U.S. District Court for the District of Kansas, and on the boards of civic and church organizations.

Since joining the bench, Judge O'Hara has remained active in several bar and continuing legal education endeavors, including the Earl E. O'Connor American Inn of Court, the Board of Editors of the *Journal of the Kansas Bar Association*, and teaching Trial Advocacy as a member of the adjunct faculty at the University of Kansas School of Law.

Born in Oswego, Kansas, Magistrate Judge David J. Waxse earned his B.A. degree from the University of Kansas and his juris doctorate degree from Columbia University. Prior to his appointment as a Magistrate Judge in 1999, he was a partner at Shook, Hardy & Bacon. From 1992-1999, Judge Waxse was a member, and one time chair, of the Kansas Commission on Judicial Qualifications, the state judicial discipline organization. He was also a member of the Civil Justice Reform Act Advisory Committee and the Mediation Panel for the United States District Court for the District of Kansas. In addition, he served on the Kansas Justice Commission, established by the Kansas Supreme Court to implement the Citizens' Justice Initiative review of the state justice system.

Judge Waxse is a Past-President of the Kansas Bar Association and, as a KBA delegate to the American Bar Association House of Delegates, was a member of the Board of Governors of the KBA for twelve years. He also has served on the Professionalism Committee of the ABA and on the board of editors of the Professional Lawyer, an ABA publication. He is past chair of the National Conference of Federal Trial Judges of the ABA and a member of the Ethics Committee of the Judicial Division of the ABA. He is a member of the Earl E. O'Connor Inn of Court and was President of the Inn in 2003-2004. He is also a member of the American Bar Association, the Johnson County Bar Association, the Kansas City Metropolitan Bar Association, the Wyandotte County Bar Association, and the Federal Magistrate Judge's Association. He is also a fellow of the Kansas Bar Foundation and the American Bar Foundation. Prior to becoming a judge, he was a member of the national boards of the American Civil Liberties Union, the Lawyer's Committee for Civil Rights Under Law, and the American Judicature Society. He is a member of the Judicial Conduct Advisory Committee of AJS. He has been a lecturer in law at the University of Kansas School of Law and has made presentations on e-discovery nationally and internationally.

LOUIS SIMPSON

Working Late

A light is on in my father's study.
"Still up?" he says, and we are silent,
looking at the harbor lights,
listening to the surf
and the creak of coconut boughs.

He is working late on cases.
No impassioned speech! He argues from evidence,
actually pacing out and measuring,
while the fans revolving on the ceiling
winnow the true from the false.

Once he passed a brass curtain rod
through a head made out of plaster
and showed the jury the angle of fire—
where the murderer must have stood.
For years, all through my childhood,
if I opened a closet . . . bang!
There would be the dead man's head
with a black hole in the forehead.

All the arguing in the world
will not stay the moon.
She has come all the way from Russia
to gaze for a while in a mango tree
and light the wall of a veranda,
before resuming her interrupted journey
beyond the harbor and the lighthouse
at Port Royal, turning away
from land to the open sea.

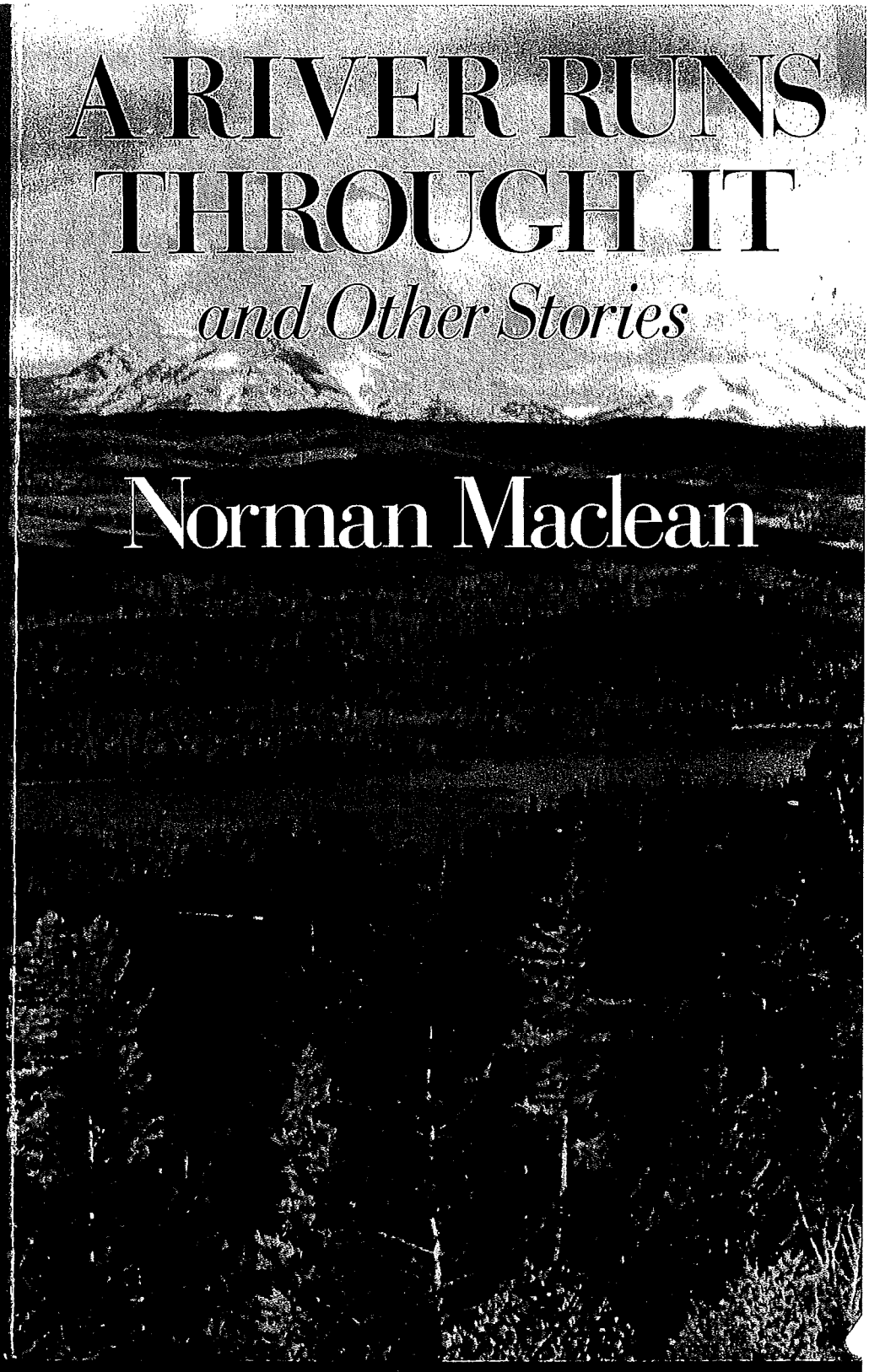
Yet, nothing in nature changes, from that day to this,
she is still the mother of us all.
I can see the drifting offshore lights,
black posts where the pelicans brood.

And the light that used to shine
at night in my father's study
now shines as late in mine.

A RIVER RUNS THROUGH IT

and Other Stories

Norman Maclean



do, is that nearly half the time I still don't have the right one.

"No," I admitted across the water, and water keeps repeating your admissions.

"I'll be there," he called back and waded upstream.

"No," I yelled after him, meaning don't stop fishing on my account. You can't convey an implied meaning across a river, or, if you can, it is easy to ignore. My brother walked to the lower end of the first hole where the water was shallow and waded across.

By the time he got to me, I had recovered most of the pieces he must have used to figure out what the fish were biting. From the moment he had started fishing upstream his rod was at such a slant and there was so much slack in his line that he must have been fishing with a wet fly and letting it sink. In fact, the slack was such that he must have been letting the fly sink five or six inches. So when I was fishing this hole as I did the last one—with a cork-body fly that rides on top of the water—I was fighting the last war. "No. 2" hook told me of course it was a hell of a big insect, but "yellow" could mean a lot of things. My big question by the time he got to me was, "Are they biting on some aquatic insect in a larval or nymph stage or are they biting on a drowned fly?"

He gave me a pat on the back and one of George's No. 2 Yellow Hackles with a feather wing. He said, "They are feeding on drowned yellow stone flies."

I asked him, "How did you think that out?"

He thought back on what had happened like a reporter. He started to answer, shook his head when he found he was wrong, and then started out again. "All there is to thinking," he said, "is seeing something noticeable which makes you see something you weren't noticing which makes you see something that isn't even visible."

I said to my brother, "Give me a cigarette and say what you mean."

"Well," he said, "the first thing I noticed about this hole was that my brother wasn't catching any. There's nothing more noticeable to a fisherman than that his partner isn't catching any.

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Forensic Science in the Courts

June 10, 2016

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What is the role of the court in an age of developing science?

To make determinations in a manner that will promote public trust and confidence in the judicial system.

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Today we are going to discuss both the current problems with science in the courts and how to make decisions on issues of science in a manner that promotes public trust and confidence..

How will we do that?

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The National Academy of Sciences Report on Forensic Sciences: What it Means for the Bench and Bar

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The National Academy of Sciences created a committee to conduct this study.

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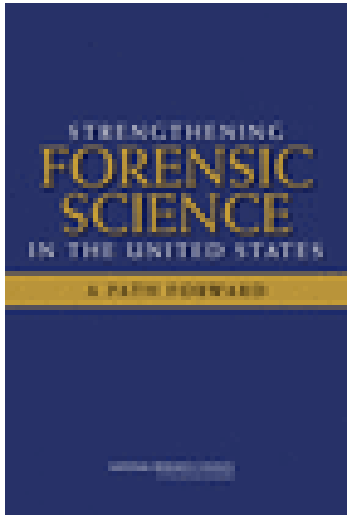
The Committee was Chaired by Judge Harry T. Edwards of the D. C. Circuit and Constantine Gatsonis of Brown University.

"Strengthening Forensic Science in the United States: A Path Forward" (2009)



REPORT'S AUTHORS?

- ***Committee of National Academy of Sciences***.
  - interdisciplinary panel of distinguished scholars, scientists, and practitioners,
    - Including forensic scientists
  - days of testimony from leading forensic science professionals, researchers, and others knowledgeable in the field.

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How did the committee function?

How long did the process take?

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The Committee on February 18, 2009, after more than two years of work, issued its report which is available at:

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http://www.nap.edu/catalog/12589/strengthening-forensic-science-in-the-united-states-a-path-forward

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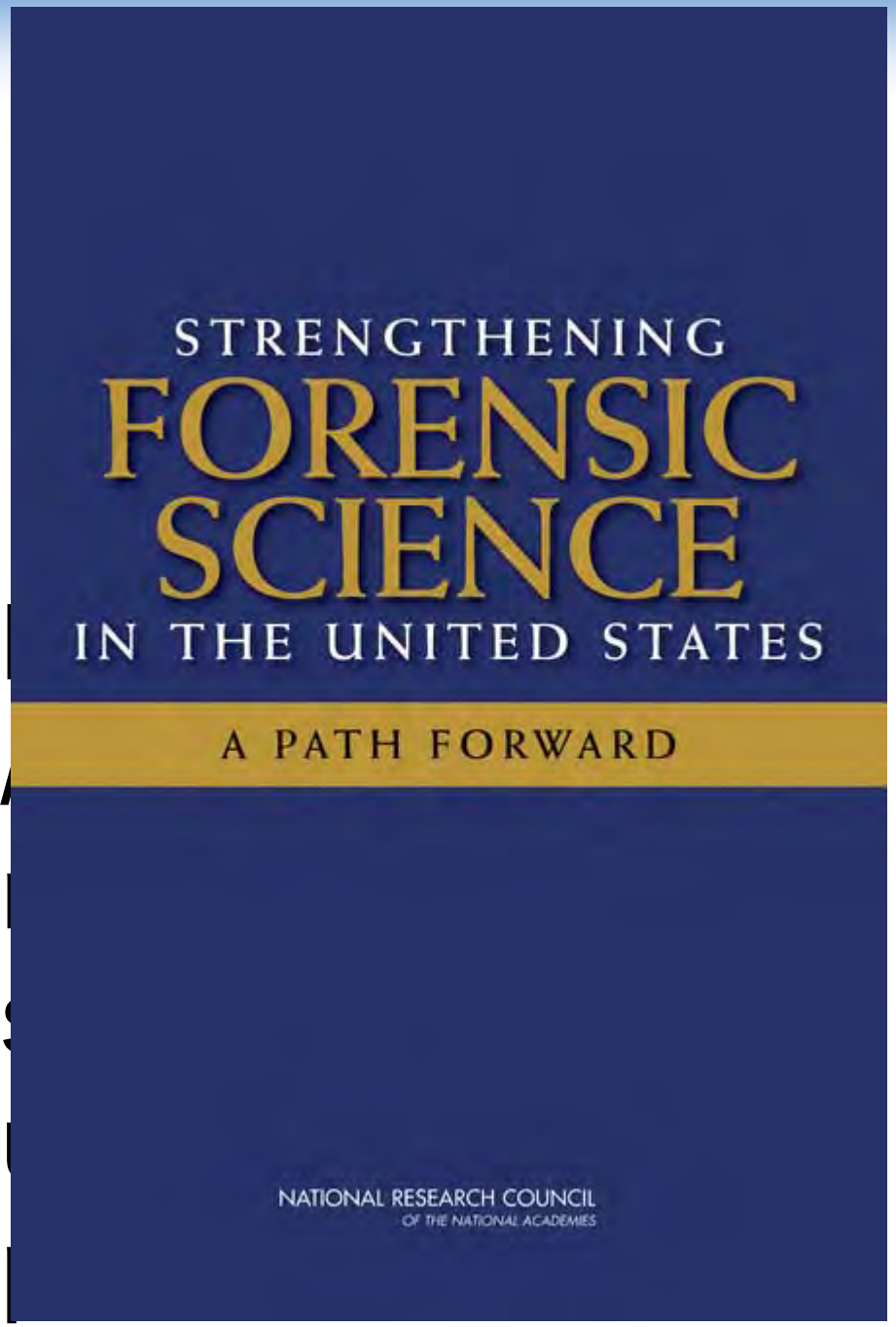

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What did the committee determine about the reliability of forensic science?

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The report's conclusion is shocking and has not been meaningfully refuted. The conclusion is:

“with the exception of nuclear DNA analysis, . . . no forensic method has been rigorously shown to have the capacity to consistently, and with a high degree of certainty, demonstrate a connection between evidence and a specific individual or source

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What did the committee determine were the reasons for the unreliability of most forensic science?

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Reasons for the unreliability of forensic science.

The paucity of scientific research to confirm the validity and reliability of forensic disciplines.

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Reasons for the unreliability of forensic science.

The paucity of research programs on human observer bias and sources of human error in forensic examinations;

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Reasons for the unreliability of forensic science.

The absence of scientific and applied research focused on new technology and innovation;

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Reasons for the unreliability of forensic science.

The absence of rigorous, mandatory certification requirements for practitioners;

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Reasons for the unreliability of forensic science.

The failure of forensic experts to use standard terminology in reporting on and

testifying about the results of forensic science investigations;

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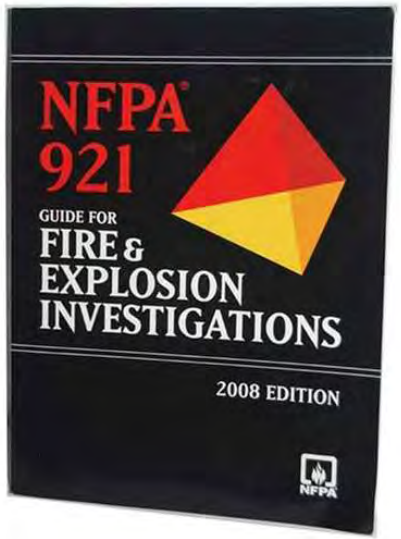
How Bad Is the Situation? Exonerations provide some understanding.

Post-mortems of DNA Exonerations

Invalid Forensic Science



Voiceprints
(1979)

Bullet Lead
(2004)

Arson Indicators
(Recent Decades)

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Bitemarks: Ray Krone

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According to the Innocence Project, Bite mark analysis is particularly troubling because of the almost complete absence of validated rules, regulations, or processes for accreditation that establish standards for experts or the testimony they provide.

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Last year, the American Academy of Forensic Sciences conducted a study of forensic odontologists and concluded that the analysis could not even accurately determine which marks were bite marks

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Washington, D.C.
April 20, 2015

FBI Testimony on Microscopic Hair Analysis Contained Errors in at Least 90 Percent of Cases in Ongoing Review

26 of 28 FBI Analysts Provided Testimony or Reports with Errors

The United States Department of Justice (DOJ), the Federal Bureau of Investigation (FBI), the Innocence Project, and the National Association of Criminal Defense Lawyers (NACDL) reported today that the FBI has concluded that the examiners' testimony in at least 90 percent of trial transcripts the Bureau analyzed as part of its Microscopic Hair Comparison Analysis Review contained erroneous statements.

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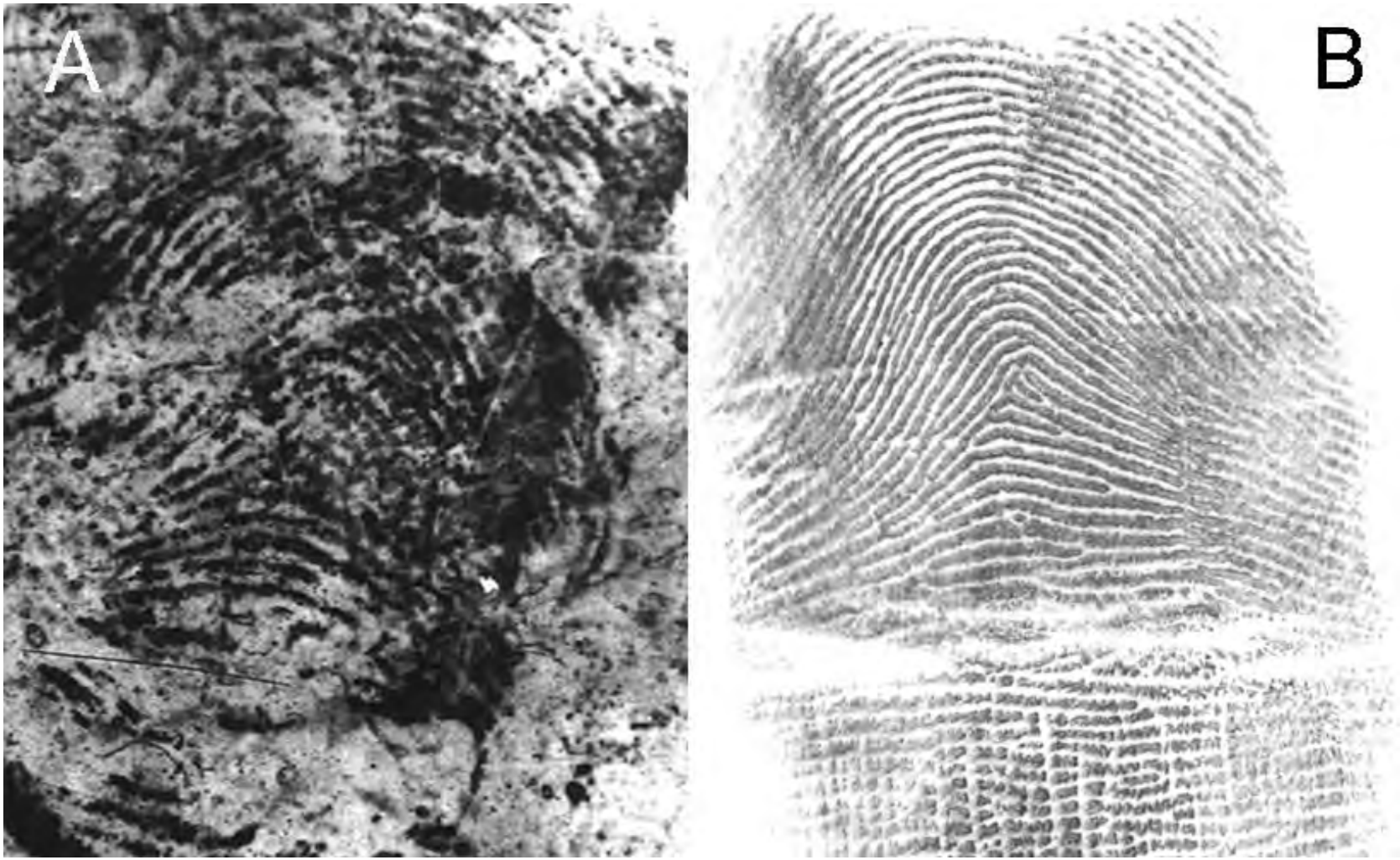

Fingerprints: Brandon Mayfield

Commonwealth v. Melendez-Diaz

557 U.S. 305

June 25, 2009

- “Serious deficiencies have been found in the forensic evidence used in criminal trials.”
- “Forensic evidence is not uniquely immune from the risk of manipulation.”

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The Court added: “The forensic science system, encompassing both research and practice, has serious problems that can only be addressed by a national commitment to overhaul the current structure that supports the forensic science community in this country.”

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Harvard Professor Nancy Gertner , formerly a Federal Judge in Boston, discussed the report in her Procedural Order: Trace Evidence entered in 08-cr-10104-NG on March 8, 2010.
She stated:

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While the [NAS] report does not speak to admissibility or inadmissibility in a given case, it raised profound questions that need to be carefully examined in every case prior to trial:

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Question“(1) the extent to which a particular forensic discipline is founded on a reliable scientific methodology that gives it the capacity to accurately analyze evidence and report findings and

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Question (2) the extent to which practitioners in a particular forensic discipline rely on human interpretation that could be tainted by error, the threat of bias, or the absence of sound operational procedures and robust performance standards."

Judge Gertner continued by saying:
The Report noted that these fundamental questions have not been "satisfactorily dealt with in judicial decisions pertaining to the admissibility" of evidence.

. . .

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"In the past, the admissibility of this kind of evidence was effectively presumed, largely because of its pedigree – the fact that it had been admitted for decades."

She concluded: "The NAS report suggests a different calculus – that admissibility of such evidence ought not to be presumed; that it has to be carefully examined in each case, and tested in the light of the NAS concerns, the concerns of Daubert/Kumho case law, and Rule 702 of the Federal Rules of Evidence."

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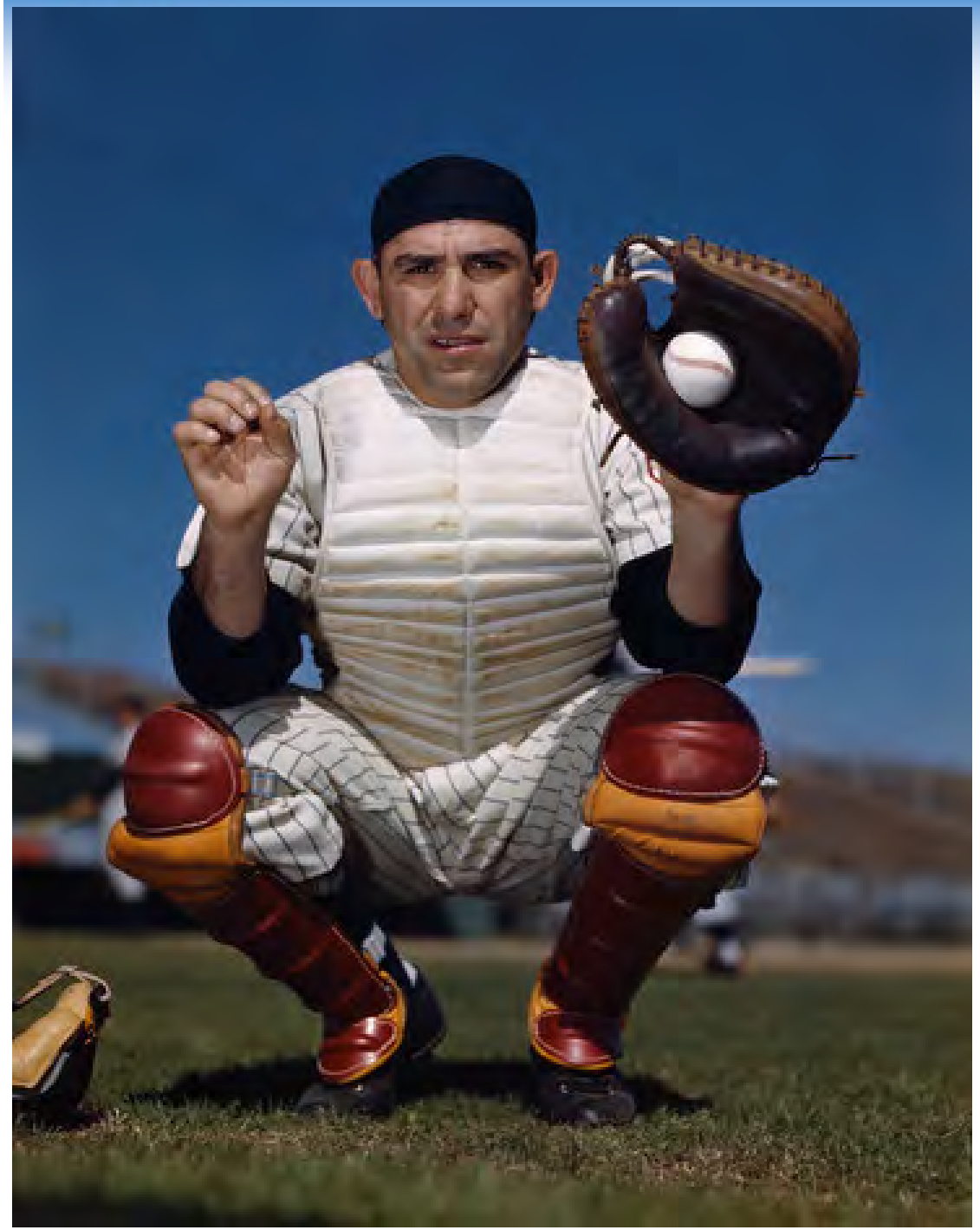
What Can We Do to Improve?

- Admission depends upon satisfaction of 702 and the Daubert Trilogy (or state variants)
- Apply the law
  - "Everything old is new again"
  - "Though… the Daubert factors are not holy writ, in a particular case the failure to apply one or another of them may be unreasonable, and hence an abuse of discretion." (Scalia concurrence)
- Forensic science fields will improve to the extent courts require them to



"Are you gonna get any better, or is this it?"

IS THE FAILURE TO CHALLENGE FORENSICS INEFFECTIVE ASSISTANCE OF COUNSEL?

- Required to be familiar with the NAS report raised.
- The best cross-examiner, may not be up to par when complex forensic evidence is involved.
  - But see Harrington v. Richter, 121 S. Ct. 770 (2011); Cullen v. Pinholster, 131 S. Ct. 1388 (2011).)

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WHETHER OR NOT IT IS CONSTITUTIONALLY INEFFECTIVE ASSISTANCE OF COUNSEL

- IT IS THE RIGHT THING TO DO!

2015 WL 7776876
Only the Westlaw citation is currently available.
United States District Court,
D. Kansas.

United States of America, Plaintiff,
v.
Michelle Reulet (3), Terrie Adams (6),
and Craig Broombaugh (10), Defendants.

Case No. 14-40005-DDC
|
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Attorneys and Law Firms

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MEMORANDUM AND ORDER

Daniel D. Crabtree, United States District Judge

***1** On October 23, 2015, the Court held a hearing on three motions by defendants: (1) Motion to Exclude Government's Expert, I.T. and Law Enforcement Testimony (Doc. 478); (2) Motion to Exclude and/or Limit Expert Testimony (Doc. 479); and (3) Amended Motion to Exclude Government's Analogue Expert Testimony (Doc. 484). The government filed its Response in Opposition to these motions on October 1, 2015 (Doc. 493). The Court previously ruled on defendants' arguments to exclude law enforcement testimony (Doc. 525). This Order rules on the remaining motions to exclude.

I. Background

Defendants are charged with conspiring to traffic in controlled substances and controlled substance analogues and mail fraud. Ms. Reulet is charged with selling and dispensing counterfeit drugs, money laundering, and related crimes. The government has identified a number of expert witnesses it intends to call at trial. This order addresses defendants' objections to two information technology ("IT") experts, two pharmaceutical representative experts, a financial expert, a Food and Drug Administration ("FDA") expert, and three analogue drug experts. *See generally* Docs. 291, 456 (Government's Fed. R. Crim. P. 16 disclosures).

II. Analysis

A. Legal Standard for Admissibility of Expert Testimony

The Court has a "gatekeeping obligation" to determine the admissibility of expert testimony. *Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 147 (1999) (citing *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579, 589 (1993)). The Court must perform its gatekeeping role for all expert testimony, not just scientific expert testimony. *See United States v. Garza*, 566 F.3d 1194, 1199 (10th Cir. 2009). And, the Court has broad discretion when deciding whether to admit or exclude expert testimony. *Kieffer v. Weston Land, Inc.*, 90 F.3d 1496, 1498 (10th Cir. 1996) (quoting *Orth v. Emerson Elec. Co.*, 980 F.2d 632, 637 (10th Cir. 1992)).

The admissibility of expert testimony is governed by Federal Rule of Evidence 702, which provides:

> A witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise if:
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> (a) the expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue;
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> (b) the testimony is based on sufficient facts or data;
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> (c) the testimony is the product of reliable principles and methods; and
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> (d) the expert has reliably applied the principles and methods to the facts of the case.

Fed. R. Evid. 702. The Court must apply a two-part test to determine admissibility under this rule. *Conroy v. Vilsack*, 707 F.3d 1163, 1168 (10th Cir. 2013).

First, it must decide "whether the expert is qualified 'by knowledge, skill, experience, training, or education' to render an opinion." *Id.* (quoting *United States v. Nacchio*, 555 F.3d 1234, 1241 (10th Cir. 2009) (quoting Fed. R. Evid. 702)). Second, the Court " 'must satisfy itself that the proposed

expert testimony is both reliable and relevant, in that it will assist the trier of fact, before permitting a jury to assess such testimony.' " *Id.* (quoting *United States v. Rodriguez-Felix*, 450 F.3d 1117, 1122 (10th Cir. 2006) (further citations omitted)).

***2** To qualify as an expert, a witness must possess "such skill, experience or knowledge in that particular field as to make it appear that his opinion would rest on substantial foundation and would tend to aid the trier of fact in [its] search for truth." *LifeWise Master Funding v. Telebank*, 374 F.3d 917, 928 (10th Cir. 2004) (internal quotation and citation omitted). And, to determine whether the expert's testimony is reliable, the Court must assess "whether the reasoning or methodology underlying the testimony is scientifically valid and ... whether that reasoning or methodology properly can be applied to the facts in issue." *Daubert*, 509 U.S. at 592-93.

In *Daubert*, the Supreme Court identified a non-exhaustive list of factors that trial courts may consider when determining whether proffered expert testimony is reliable under Fed. R. Evid. 702. These factors include: (1) whether the theory used can be and has been tested; (2) whether it has been subjected to peer review and publication; (3) the known or potential rate of error; and (4) the theory's general acceptance in the scientific community. *Id.* at 593-94. The Supreme Court has emphasized, however, that these four factors are not a "definitive checklist or test" and a court's gatekeeping inquiry into reliability must be "tied to the facts of a particular case." *Kumho Tire*, 526 U.S. at 150. In some cases, "the relevant reliability concerns may focus upon personal knowledge or experience," instead of the *Daubert* factors and scientific foundation. *Id.* A district court should apply this traditional Rule 702 analysis when opinion testimony is based solely on experience or training, not a scientific methodology or technique. *Kinser v. Gehl Co.*, 989 F. Supp. 1144, 1146 (D. Kan. 1997). The Rule 702 analysis "is a flexible one" and its focus "must be solely on principles and methodology, not the conclusions that they generate." *Daubert*, 509 U.S. at 594-95.

"The proponent of expert testimony bears the burden of showing that the testimony is admissible." *Conroy*, 707 F.3d at 1168 (citing *Nacchio*, 555 F.3d at 1241). But, "rejection of expert testimony is the exception rather than the rule." Fed. R. Evid. 702 advisory committee's note to 2000 amendments. While *Daubert* requires the Court to act as a gatekeeper for the admission of expert testimony, "[v]igorous cross-examination, presentation of contrary evidence, and careful instruction on the burden of proof" remain "the traditional and appropriate means of attacking shaky but admissible evidence." *Daubert*, 509 U.S. at 596 (citation omitted).

Here, defendants argue that the Court should exercise its gatekeeping obligation and find some of the government's proposed expert testimony inadmissible under Rule 702. Defendants also assert that the government provided insufficient notice for some of the experts' testimony. A Federal Rule of Criminal Procedure 16 notice should provide "a written summary of [the] testimony that the government intends to use under Rules 702, 703, or 705 of the Federal Rules of Evidence." Fed. R. Crim. P. 16(a)(1)(G). Under Rule 16 the notice "must describe the witness's opinions, the bases and reasons for those opinions, and the witness's qualifications." *Id.*

The Court addresses the arguments for each expert, in turn, below.

B. IT Experts

The government's Rule 16 disclosure notice identifies two IT experts, Lyndell Griffin and Lee Roediger. Doc. 291 at 15-16. The notice provides that these experts will testify about their "forensic examination of the seized computers and phones, and about [their] recovery of various e-mails from the computers and texts from the phones." *Id.* at 16. Their testimony "will be based on [their] examination of the seized computers and phones, and [their] education, training, and experience." *Id.* Defendants do not object to this testimony if it is "limited to how the computers and phones were analyzed in order to extract the contents." Doc. 478 at 2. But, "[i]f the government contemplates testimony beyond this," defendants argue that the Rule 16 notice is insufficient. *Id.* The government responds that the IT experts' testimony will be limited to just that—how they analyzed the computers seized and how the contents were extracted. Doc. 493 at 26. Thus, defendants' argument is moot.

***3** Defendants also argue that the bases for the experts' testimony cannot be their education, training, and experience. Doc. 478 at 3. They argue that education, training, and experience provide bases for qualifying an expert, but do not provide bases for opinions. The Court disagrees. As discussed in this Court's previous order, Doc. 525 at 9-11, training and experience can supply the requisite bases and reasons for an expert's testimony. *See, e.g.*, *Garza*, 566 F.3d at 1200 (allowing police officer's opinion testimony based on experience); *United States v. Markum*, 4 F.3d 891, 896 (10th Cir. 1993) (permitting firefighter's opinion

testimony based on observations from his years of training and experience); *United States v. Jensen*, No. 1:12-CR-83 TS, 2014 WL 28998, at *2 (D. Utah Jan. 2, 2014) (finding a Rule 16 notice sufficient where "the bases and reasons are based on the experts' experiences as police officers"); *see also* Fed. R. Evid. 702 advisory committee's note to 2000 amendments (stating that "[i]n certain fields, experience is the predominant, if not sole, basis for a great deal of reliable expert testimony" and explaining that a witness relying only on experience should "explain why that experience is a sufficient basis for the opinion").

The Court rejects defendants' objections to the content of the IT experts' testimony and concludes that the Rule 16 disclosures for the IT experts are sufficient. The Court thus denies defendants' motion to exclude their testimony.

C. Pharmaceutical Representatives

Defendants argue that the Court must limit the testimony of two pharmaceutical representatives, Brian Donnelly and Mark Seitz. Doc. 479 at 2. The government's Rule 16 notice provides that these experts will "explain to the jury why" the Viagra and Cialis "distributed by the defendants [are] [ ] counterfeit product[s]." Doc. 291 at 14-15. Defendants assert that such testimony will violate Federal Rule of Evidence 704 because witnesses are not permitted to draw legal conclusions. Doc. 479 at 2. They contend that the Pfizer and Eli Lilly representatives "may provide evidence about Viagra and Cialis that allows the jury to compare those drugs to the products allegedly offered for sale or distribution .... But they may not properly conclude for the jury that the products are 'counterfeit' ...." *Id.* at 2-3. The government argues that testimony opining that drugs are "counterfeit" is a factual conclusion, not a legal conclusion, and is permissible under the Federal Rules of Evidence. Doc. 493 at 23.

Federal Rule of Evidence 704 permits opinion testimony embracing an "ultimate issue" if the opinion is not otherwise objectionable. Fed. R. Evid. 704(a); *Okland Oil Co. v. Conoco Inc.*, 144 F.3d 1308, 1328 (10th Cir. 1998) (citations omitted) (holding that an "expert may testify in the form of an opinion or inference as to ultimate issues to be decided by the trier of fact if the testimony is not otherwise objectionable"). But, " '[g]enerally, an expert may not state his or her opinion as to legal standards nor may he or she state legal conclusions drawn by applying law to the facts.' " *Christiansen v. City of Tulsa*, 332 F.3d 1270, 1283 (10th Cir. 2003) (quoting *Okland Oil Co.*, 144 F.3d at 1328) (concluding that whether defendants acted "recklessly" was a legal conclusion and thus properly excluded). The Tenth Circuit has explained that

> While testimony on ultimate facts is authorized under Rule 704, the [advisory] committee's comments [to Rule 704] emphasize that testimony on ultimate questions of law is not favored. The basis for this distinction is that testimony on the ultimate factual questions aids the jury in reaching a verdict; testimony which articulates and applies the relevant law, however, circumvents the jury's decision-making function by telling it how to decide the case.

Specht v. Jensen, 853 F.2d 805, 808 (10th Cir. 1988).

The Court must determine whether testimony that a drug is "counterfeit" is testimony about an ultimate fact, or inadmissible testimony on an ultimate question of law, or an inadmissible legal conclusion drawn by applying the law to the facts. If the testimony "articulates ultimate principles of law" and directs a verdict, it is impermissible. *Specht*, 853 F.2d at 808. But if the testimony merely assists "the jury's understanding and weighing of the evidence," it is permissible. *Id.*

***4** Many courts have admitted testimony that an item is "counterfeit." *See, e.g.*, *United States v. Garrison*, 380 Fed.Appx. 423, 426 (5th Cir. 2010) (allowing testimony from a counterfeit specialist that "every shirt seized ... was in fact counterfeit"); *United States v. Garcia*, 718 F.2d 1528, 1534 (11th Cir. 1983) (allowing agent to testify "as an expert that the note seized ... was, in fact, counterfeit"); *United States v. Love*, No. 09-cr-00526-MSK, 2010 WL 1931021, at *3 n.10 (D. Colo. May 13, 2010) (finding that a Rule 16 disclosure "will provide the [d]efendants with all of the information necessary to respond to any proffered opinion testimony that the products were counterfeit"); *United States v. Singleton*, No. 1:09-CR-546-RWS-GGB, 2010 WL 3723912, at *1-2 (N.D. Ga. Aug. 2, 2010) (internal citations omitted) (finding expert opinion testimony that gold certificates were counterfeit admissible because expert's experience alone was a sufficient foundation for the expert testimony, and the testimony would be helpful to the jury); *Motorola, Inc. v. Abeckaser*, No. 07-cv-3963 (CPS) (SMG), 2009 WL 962809, at *5-6 (E.D.N.Y. Apr. 8, 2009) (allowing expert testimony that goods were counterfeit because the

expert was qualified to testify based on knowledge and experience, and his method of assessing the authenticity of the products was reliable and based on observable facts). And, whether an item is counterfeit often is considered a factual issue for the jury to decide. *See United States v. Chong Lam*, 677 F.3d 190, 193 n.3, 198 n.7 (4th Cir. 2012) (instructing the jury that, despite U.S. Customs and Border Protection's opinion that the goods were counterfeit, it was their responsibility to decide the factual issue of whether a mark used met the statutory definition of counterfeit); *United States v. Bruning*, 30 F.3d 142, 1994 WL 363549, at *1 (10th Cir. July 13, 1994) (unpublished table opinion) (stating that "[t]he issue of whether or not counterfeit bills were obviously counterfeit and unlikely to be accepted if passed is a factual issue"); *United States v. Guy*, 456 F.2d 1157, 1166 (8th Cir. 1972) (referring to the issue "whether the notes ... were in fact counterfeit" as a "factual issue" and noting that several witnesses testified that the notes were counterfeit).

But, the Court recognizes that attempting to distinguish between factual and legal conclusions is not an exact science:

> [I]t is often impossible ... to draw a sound distinction between "fact" and "law" since many opinions mix aspects of both. ... [Rule 704(a) was designed] to avoid the odd verbal circumlocutions in which courts engaged when attempting to draw the distinction between legal conclusions and opinions as to ultimate facts. ... [I]n applying Rule 704(a) to opinions that may involve conclusions of law, focus should be on the provision's requirement that those opinions must be otherwise admissible. ... In cases involving expert opinion, admissibility under Rule 702 depends on whether the opinion will assist the trier of fact to understand the evidence or determine a fact in issue. ... Thus the admissibility of opinion testimony that may involve legal conclusions ultimately rests upon whether that testimony helps the jury resolve the fact issues in the case.

29 Charles A. Wright & Victor J. Gold, *Federal Practice & Procedure* § 6284 (1997) (internal quotation marks and citations omitted).

Here, the pharmaceutical representatives' testimony concluding that the drugs in issue are "counterfeit" arguably presents a mixed question of law and fact. Defendant Michelle Reulet is charged with violating 18 U.S.C. § 331(i)(3), which prohibits "the sale or dispensing, or the holding for sale or dispensing, of a counterfeit drug." 18 U.S.C. § 331(i)(3). And "counterfeit drug" statutorily is defined as:

> a drug which, or the container or labeling of which, without authorization, bears the trademark, trade name, or other identifying mark, imprint, or device, or any likeness thereof, of a drug manufacturer, processor, packer, or distributor other than the person or persons who in fact manufactured, processed, packed, or distributed such drug and which thereby falsely purports or is represented to be the product of, or to have been packed or distributed by, such other drug manufacturer, processor, packer, or distributor.

21 U.S.C. § 321(g)(2). Thus, "counterfeit" is not a purely factual issue here, because the jury must apply the legal definition, as instructed by the Court, to determine if the drugs were "counterfeit drugs." But while the statute defines "counterfeit drug," expert opinion testimony that the drugs examined are "counterfeit" does not tell the jury how to decide the ultimate question of law—*i.e.* whether Ms. Reulet sold or dispensed a counterfeit drug. The Court determines if the testimony is otherwise admissible by looking at whether it will help the jury understand the evidence or resolve a fact in issue.

***5** The Court should exclude opinions phrased "in terms of inadequately explored legal criteria." *See* Fed. R. Evid. 704 advisory committee's notes (1972). For example, the Court should exclude a question asking if a person had "capacity to make a will." *Id.* But, if the question is worded in terms of whether the person "had sufficient mental capacity to know the nature and extent of his property," the Court should allow the question. *Id.* If a witness uses language that does not have a specific legal meaning, the witness' opinion would not be excluded because he did not phrase his opinion "in terms of inadequately explored legal criteria." 29 Charles A. Wright & Victor J. Gold, *Federal Practice & Procedure* § 6284 (1997). And, "[e]ven where a witness uses language that has a legal

meaning and that meaning is not explained, the courts still may admit the witness' opinion. This may be proper where the language also has a meaning understandable to laypeople and the lay meaning is the same as the legal meaning or the witness clearly intended to employ the lay meaning." *Id.*

Here, "counterfeit" has both a legal meaning under § 321(g)(2) and a meaning that laypeople commonly understand. If the pharmaceutical representatives conclude that the drugs examined are "counterfeit," the jury is capable of understanding what this assertion means, and the lay meaning is, in essence, the same as the legal meaning. Moreover, the witnesses likely will employ the lay meaning of "counterfeit." And, the experts here are not "merely stating an opinion on an ultimate issue without adequately exploring the criteria upon which [their] opinions are based." *United States v. Simpson*, 7 F.3d 186, 188 (10th Cir. 1993). The disclosure explains that the experts will describe in detail how they reached their conclusions that the drugs are counterfeit—the testimony will describe the pills and packaging of their companies' products compared to the pills in issue. This will give the jury "independent means by which it can reach its own conclusion or give proper weight to the expert testimony." *See id.* at 188-89.

The opinion testimony here will not merely tell the jury what result to reach. *See* Fed. R. Evid. 704 advisory committee's note (1972) (stating that the evidentiary rules like Rule 702 provide "ample assurances against the admission of opinions which would merely tell the jury what result to reach"). The pharmaceutical representatives' testimony will assist the jury—who likely will lack experience sufficient to understand the intricacies of drug manufacturing, design, and packaging—in understanding the evidence and determining whether the drugs in issue are "counterfeit drugs." *See Singleton*, 2010 WL 3723912, at *1-2 (internal citations omitted) (finding expert opinion testimony that gold certificates were counterfeit admissible because the testimony would be helpful to the jury); *Motorola, Inc.*, 2009 WL 962809, at *5-6 (allowing job quality manager, who compared the alleged counterfeit products to the genuine products and analyzed the differences, to give expert opinion testimony that the goods were counterfeit because "there is no question that [the expert's] opinion concerning the authenticity of defendants' goods would assist the trier of fact in determining whether the goods at issue are counterfeit"). Ms. Reulet is free to cross-examine the witnesses and present contrary evidence. The Court will instruct the jury that they are free to accept or reject the experts' conclusions, and that they must apply the legal definition of "counterfeit drug" to make their ultimate decision of guilt or innocence.

In sum, the Court concludes that testimony that the drugs examined are "counterfeit" is properly admissible under Rules 702 and 704. The Court thus denies defendants' motion to exclude the pharmaceutical representatives' testimony. The pharmaceutical representatives may make comparisons between the drugs sold by their companies and the alleged counterfeit drugs. They may also opine that the drugs examined are "counterfeit" versions of the drugs sold by their companies. However, the experts are not allowed to testify that Ms. Reulet engaged in the sale of counterfeit drugs because that merely would tell the jury what result to reach and such a conclusion is impermissible.

D. Financial Expert

1. Reliability of Financial Analysis Testimony

***6** Defendants argue that the Court should exclude testimony from the government's financial expert, Allen Spiece, under Rule 702 because it is not reliable. Doc. 479 at 3. The government's Rule 16 disclosure provides, "Mr. Spiece will testify about his financial analysis of the defendants' banking and other financial records, to include the amount of money the defendants obtained from their sales of controlled substances and controlled substance analogues." Doc. 291 at 16. The bases and reasons for his opinions are "his examination of the defendants' banking and other financial records, his education, training, and experience." *Id.* at 17. Defendants argue that the government needs to identify which banking records form the basis for his opinions, which principles or methodologies he has applied to the underlying data to reach his conclusions, and how he applied those principles or methodologies. Doc. 470 at 4. Without this information, defendants argue, the government has not provided enough information to meet its burden for admissibility under Rule 702. *Id.* In its response, the government explains that Mr. Spiece's testimony about defendants' finances is "merely a factual recitation of key information in the defendants' banking records" and his review was simple reading and math, no particular principles and methodologies. Doc. 493 at 24. The government argues that Mr. Spiece will testify as a factual or summary witness, and thus this testimony is admissible. *Id.* The Court agrees. Mr. Spiece's proposed factual testimony does not fall within the purview of Rule 702.

And, to the extent Mr. Spiece may provide expert testimony, he may base his opinions "on facts or data in the case that the expert has been made aware of or personally observed." Fed. R. Evid. 703. But at this stage, the government need not identify for defendants which particular records form the bases of the opinions or his principles and methodologies. As discussed in the Court's previous order on law enforcement testimony, the criminal procedure discovery rules do not require the extensive disclosures required under the civil rules. Doc. 525 at 6-9 (noting that a Rule 16 notice is "not required ... to provide all of the data or other information considered to form the opinions" and "need not describe the witness's methodology" (citations omitted)). Moreover, the Court finds that utilizing math to analyze financial records appears to be a reliable method, which can be reliably applied to the facts under Rule 702. If opinion testimony proffered at trial uses principles/methods in an unreliable fashion, defendants may reassert their objection.

The Court denies defendants' motion to exclude this testimony.

2. Legal Conclusions Testimony

Next, defendants argue that the Court must prohibit Mr. Spiece from drawing legal conclusions for the jury. Doc. 479 at 5. In particular, defendants assert that the Court should prohibit Mr. Spiece from testifying that "certain financial transactions constituted money laundering and structuring" or that "the transactions he has analyzed relate to 'criminally derived property.' " *Id.* Defendants argue that the jury alone should make these determinations. *Id.* The government's Rule 16 disclosure explains that Mr. Spiece will testify about structuring and money laundering and "why the transactions listed ... constitute" structuring and money laundering. Doc. 291 at 16. The government argues that the jury's job is to determine factual issues, not legal issues. Doc. 493 at 24. And it asserts that "Mr. Spiece is well-qualified to testify to the ultimate issue of fact that the transactions ... constitute money laundering." *Id.*

As discussed above, Rule 704 permits testimony on ultimate issues if not otherwise objectionable, but experts should refrain from stating their opinions about legal standards or legal conclusions drawn by applying law to the facts. *See* Fed. R. Evid. 704(a); *Christiansen*, 332 F.3d at 1283; *Okland Oil Co.*, 144 F.3d at 1328. And under Rule 702, expert testimony is admissible where it "will help the trier of fact to understand the evidence or determine a fact in issue." Fed. R. Evid. 702. "In assessing whether testimony will assist the trier of fact, district courts consider several factors, including whether the testimony 'is within the juror's common knowledge and experience' ...." *United States v. Garcia*, 635 F.3d 472, 476-77 (10th Cir. 2011) (quoting *Rodriguez-Felix*, 450 F.3d at 1123). If the jury can understand the evidence without needing the expert's specialized knowledge, the expert testimony is inadmissible. *See id.* at 477 (citing *United States v. Becker*, 230 F.3d 1224, 1231 (10th Cir. 2000)). And, "[w]hen an expert undertakes to tell the jury what result to reach, this does not aid the jury in making a decision, but rather attempts to substitute the expert's judgment for the jury's. When this occurs, the expert acts outside of his limited role of providing the groundwork in the form of an opinion to enable the jury to make its own informed determination." *United States v. Bates*, No. 1:11-cr-00123-BLW, 2012 WL 1579590, at *1 (D. Idaho May 4, 2012). Thus, an expert can testify to the extent it is helpful to the jury, but "should avoid legal conclusions, which usurp[ ] the jury's role." *Id.* (citing *Aguilar v. Int'l Longshoremen's Union Local No. 10*, 966 F.2d 443, 447 (9th Cir. 1992)); *see also United States v. Rich*, 145 Fed.Appx. 486, 488 (5th Cir. 2005) (explaining that expert testimony stating legal conclusions about ultimate issues is inadmissible).

***7** Methods of money laundering and structuring are not within the common knowledge of the jury. *Id.* And, "expert testimony on these topics will assist the jurors in understanding the evidence." *Id.* But, determining guilt or innocence is solely for the jury, and thus the Court cannot allow an expert to testify "that the conduct underlying the money-laundering counts was ... money laundering." *Rich*, 145 Fed.Appx. at 488. When an expert testifies that a defendant's conduct constitutes money laundering under the federal statute this is an impermissible legal conclusion. *Id.*; *see also United States v. Pemberton*, 121 F.3d 1157, 1166 (8th Cir. 1997) (finding that any prejudice from IRS agent's testimony that a transaction constituted money laundering was cured by district court's instruction to disregard the testimony).

Here, Mr. Spiece could testify about the methods of money laundering and structuring. For example, he may explain what money laundering is and speak generally about the aspects of money laundering. *See Bates*, 2012 WL 1579590, at *1. He may also use alternative language to express his opinion on the transactions in question. *See Simpson*, 7 F.3d at 189

(noting that the district court properly prohibited testimony on whether the transactions constituted misapplication or concealment after the court discussed alternative means by which the expert could express his opinions). But, he cannot opine on an ultimate legal conclusion—*i.e.*, that what Ms. Reulet did constituted money laundering or structuring. *See* *Bates*, 2012 WL 1579590, at *1 (allowing testimony on the theory and processes of money laundering but prohibiting the expert from expressing "an opinion on ultimate conclusions of law or fact—such as whether the case amounts to money laundering or not, and whether certain behavior at issue in this case would be a typical money laundering activity"); *see also* *Rich*, 145 Fed.Appx. at 488 (finding plain error where IRS agent was permitted to testify that defendant's conduct constituted money laundering). The Court will instruct the jury on the law of money laundering and structuring, and the government may argue that Ms. Reulet's conduct falls within the Court's definition. But, ultimately the jury must apply the law to the facts and conclude whether Ms. Reulet is guilty of money laundering or structuring.

Mr. Spiece also could express his opinion about where the money in the accounts came from. However, he may not testify that "the transactions he has analyzed relate to 'criminally derived property.' " The Court notes that the government's Rule 16 disclosure does not state explicitly that Mr. Spiece would provide such testimony. *See* Doc. 291 at 16-17. But, because defendants have raised the issue of potential testimony of this nature, the Court addresses it now. "Criminally derived property" statutorily is defined as "property constituting, or derived from, proceeds obtained from a criminal offense." 18 U.S.C. § 1957(f)(2). The definition presupposes the commission of a criminal offense. Because the jury must first determine if a criminal offense was committed before determining guilt under 18 U.S.C. § 1957, testimony about "criminally derived property" in a way usurps the jury's role by telling the jury what legal conclusion to reach. *See* *Simpson*, 7 F.3d at 188 (noting that expert testimony that "states a legal conclusion, usurps the function of the jury in deciding the facts, or interferes with the function of the judge in instructing the jury on the law" often is excluded). And, unlike "counterfeit," "criminally derived property" has no lay meaning understandable to the jury. The Court therefore cautions that testimony that transactions relate to "criminally derived property" is inadmissible.

***8** The Court thus grants in part and denies in part defendants' motion to exclude Mr. Spiece's testimony.

E. FDA Expert

Defendants next object to the testimony of the government's FDA expert, Dr. Charles E. Lee. Doc. 479 at 6. The government's Rule 16 disclosure states that Dr. Lee will testify that the FDA has never approved the drugs in this case. Doc. 291 at 11. Dr. Lee also "will discuss what [the] FDA generally expects to see on the label of an FDA-compliant drug" and opine "that the products the defendants sold were misbranded drugs." *Id.* at 11-12. Defendants claim that this testimony is irrelevant because the Second Superseding Indictment contains no misbranding charges, and without any such charges, the testimony is not helpful to the jury under Rule 702. The government responds that Dr. Lee's testimony is still relevant to the conspiracy to commit mail fraud charges. Doc. 493 at 25. After reviewing the remaining charges in the Second Superseding Indictment, the Court declines to deem Dr. Lee's testimony irrelevant at this time. The Court thus denies defendants' motion to exclude Dr. Lee's testimony.

F. Detective Farkes

Defendants object to Detective Farkes' testimony as an analogue expert. Doc. 484 at 15. They contend that he is not qualified to testify about the chemical structures or pharmacological effects of non-controlled substances, and thus the Court should exclude his testimony under Rule 702. *Id.* Defendants assert that his curriculum vitae lacks a basis for his expertise in chemistry or pharmacology, and argue that the government's Rule 16 notice is insufficient because it only states his "education, training, and experience" as the bases and reasons for the opinions. *Id.* The government responds that Detective Farkes will not offer any opinions about chemical structure or pharmacological effects. Doc. 493 at 22. And it claims that its notice "cannot be read to indicate anything of the sort." *Id.* Instead, the government says he will testify about what he did and observed, and will educate the jury about the synthetic drug industry from a law enforcement perspective. *Id.* at 22-23.

Again, the Court directs the parties that training and experience are sufficient bases for *certain* opinions. But, contrary to the government's assertion, the Court reads the government's Rule 16 notice to include testimony about chemical structure and pharmacological effects, which likely exceed the bounds of Detective Farkes' experience and training as a law enforcement officer. For example, the notice states that he may testify that "individuals produce and distribute substances which have a slightly different

chemical structure than a common and known illegal drug, but, when ingested will produce the same pharmacological effect on the human body as the common and known illegal drug." Doc. 291 at 8. And he will also testify about the ingredients commonly used to make the synthetic products, including a "synthetic compound pharmacologically similar to THC" and "a substituted cathinone pharmacologically similar to Methcathinone." *Id.* at 8-9. He also will explain that smokable synthetic cannabinoids and substituted cathinones "are considered hallucinogens" and affect the human body in a similar way to scheduled drugs, like THC. *Id.* From this notice, the Court is not convinced that Detective Farkes' experience as a law enforcement officer provides a sufficient basis for his proposed testimony. The proposed testimony appears to exceed the bounds of factual testimony to possibly unqualified opinion testimony. The government must provide defendants a notice sufficiently describing the bases for any opinion testimony from Detective Farkes involving the chemical structure or pharmacological effects of synthetic drugs.

***9** While the Court does not exclude Detective Farkes' proffered testimony at this time, the Court is wary of parts of his testimony because it appears he is not qualified to offer them or because they are irrelevant. The parties may raise remaining relevance and reliability concerns at trial. And the Court will determine the admissibility of his testimony then.

G. DEA Chemists

Finally, defendants argue that the Court should exclude the proposed expert testimony of Dr. Willenbring, DEA chemist, and Dr. Trecki, DEA pharmacologist, for a number of reasons. These two experts will testify about controlled substance analogues. A controlled substance analogue is a substance:

> (i) the chemical structure of which is substantially similar to the chemical structure of a controlled substance in schedule I or II;
>
> (ii) which has a stimulant, depressant, or hallucinogenic effect on the central nervous system that is substantially similar to or greater than the stimulant, depressant, or hallucinogenic effect on the central nervous system of a controlled substance in schedule I or II; or
>
> (iii) with respect to a particular person, which such person represents or intends to have a stimulant, depressant, or hallucinogenic effect on the central nervous system that is substantially similar to or greater than the stimulant, depressant, or hallucinogenic effect on the central nervous system of a controlled substance in schedule I or II.

21 U.S.C. § 802(32).

First, defendants contend that allowing these experts to testify that a substance is "substantially similar" is testimony about "an ultimate legal question that should be reserved for the jurors." Doc. 484 at 9. The Court disagrees. As discussed above, expert testimony should not usurp the role of the jury in applying the law to the facts. *See, e.g.*, *Garcia*, 635 F.3d at 476-77; *Bates*, 2012 WL 1579590, at *1; *Rich*, 145 Fed.Appx. at 488. But, expert testimony that helps the jury understand the evidence or determine a fact in issue is admissible. *See* Fed. R. Evid. 702. While "substantially similar" is part of the statutory definition of controlled substance analogue, the government correctly points out that "[w]hether a particular substance qualifies as a controlled substance analogue is a question of fact." *United States v. Klecker*, 348 F.3d 69, 72 (4th Cir. 2003) (citing *United States v. Fisher*, 289 F.3d 1329, 1333 (11th Cir. 2002), *cert. denied*, 537 U.S. 1112 (2003)). And, the testimony here will help the jury understand complex chemical structures and ultimately determine whether the drugs qualify as controlled substance analogues. *See United States v. Lawton*, 84 F. Supp. 3d 331, 339 (D. Vt. 2015) (internal citations and quotations omitted). As explained below, such testimony will not usurp the role of the jury.

Congress did not define "substantially similar" and "there is no indication that Congress intended the words 'substantially similar' to have a specialized or scientific meaning." *United States v. Lawton*, 84 F. Supp. 3d 331, 335 (D. Vt. 2015) (internal citations and quotations omitted). Thus, "substantially similar" should be given its ordinary, lay meaning. *Id.*; *see also United States v. Brown*, 279 F. Supp. 2d 1238, 1240 (S.D. Ala. 2003), *aff'd* 415 F. 3d 1257 (11th Cir. 2005) ("Since the Analogue Act does not indicate that the term 'substantially similar' is to be defined as it is used scientifically, the court will interpret those words as they are used in everyday language."). And, "expert conclusions [about] substantial similarity will not usurp the role of ... the jury," because the jurors are capable of understanding that lay meaning and can weigh the testimony and ultimately draw their own conclusion whether the substances in issue are "substantially similar" to scheduled controlled substances. *Id.* The Court's instructions will instruct the jurors to draw their own conclusions. Moreover, the Court notes that a number

of courts have permitted experts to testify that a drug is "substantially similar" to a controlled substance. *See, e.g.*, *Lawton*, 84 F. Supp. 3d at 339; *United States v. Bays*, No. 3:13-CR-0357-B, 2014 WL 3764876, at *6-8, 11-12 (N.D. Tex. July 31, 2014); *United States v. Forbes*, 806 F. Supp. 232, 233-34 (D. Colo. 1992).

***10** These experts can help the jury understand what similarities in chemical structure and pharmacological effect exist, if any, between the drugs in issue and scheduled controlled substances. Defendants plan to put on their own experts about these matters, and will have an opportunity to cross-examine the government's witnesses. To aid the jury, the experts may testify that the drugs are "substantially similar," just as defendants' experts can testify that they are not. The Court thus concludes that testimony that the drugs examined are "substantially similar" to scheduled controlled substances is admissible, and denies defendants' motion to exclude such testimony.

Second, defendants argue that permitting the DEA agents to testify about substantial similarity is unfairly prejudicial because the jury may give false weight to a government agent's testimony. Doc. 484 at 9. The Court, however, rejects this argument. Defendants have provided no direct evidence that these experts' opinions are compromised in any way. They do not contest that these experts are well-qualified with extensive credentials and experience in their fields. Inherent in all government employee testimony is the potential for bias or prejudice, and defendants may address any such bias or prejudice through cross-examination. *See Abeyta v. United States*, 368 F.2d 544, 545 (10th Cir. 1966) (noting that cross-examination may be used to show bias or prejudice).

Third, defendants argue that the government's amended expert notice is insufficient under Rule 16(a)(1)(G) because it does not give a summary of these experts' opinions or the bases and reasons for those opinions. Doc. 484 at 20. Specifically, defendants argue that the government must expand on their statement that Dr. Willenbring and Dr. Trecki will "testify about the recent increase in analogue drugs in the United States, the potential dangers of analogue drugs, and the DEA's efforts to temporarily and permanently schedule drugs that pose an imminent threat to public safety." Doc. 456 at 2. The government points out that the amended notice does not offer additional opinions, just topics for factual testimony. Doc. 493 at 21-22. The Court agrees with the government and finds that the Rule 16 notices provided to defendants for these experts suffice.

Finally, defendants argue that the analogue expert testimony is unreliable under *Daubert* and Rule 702. The Court addresses their general attacks to admissibility, and then addresses defendants' specific objections to each expert individually, below. Defendants assert that when the *Daubert* factors are applied to these experts' opinions, their principles and methods are unreliable because they "are not subject to peer review, no operational standards are in place that allow for rate of error to be measured, no outside peer review or accessible publications are provided, and general acceptance in the relevant scientific community has not been established." *See* Doc. 484 at 17-18.

The Court disagrees. The *Daubert* and Rule 702 analysis is flexible, and testimony need not conform to all of the factors listed in *Daubert* to be admissible. *See Kumho Tire*, 526 U.S. at 150; *Daubert*, 509 U.S. at 594-95; *see also United States v. Brown*, 415 F.3d 1257, 1267-68 (11th Cir. 2005) (finding admissible expert testimony that met only one of the four *Daubert* factors—it was not quantitative, testable, or peer-reviewed, but was generally accepted). In analogue drug cases, "there is no one avenue that an expert must take to determine whether two chemical compounds are substantially similar." *United States v. Bays*, No. 3:13-CR-0357-B, 2014 WL 3764876, at *7 (N.D. Tex. July 31, 2014). Lack of peer-reviewed materials goes to weight, not admissibility. *Lawton*, 84 F. Supp. 3d at 339; *Bays*, 2014 WL 3764876, at *9 (citing *Viterbo v. Dow Chem. Co.*, 826 F.2d 420, 422 (5th Cir. 1987)). And publication "does not necessarily correlate with reliability." *Daubert*, 509 U.S. at 593. While experts may disagree about substantial similarity, expert opinions such as these are " 'widely accepted by courts' in Analogue Act cases" as relevant and reliable under *Daubert* and Rule 702. *Id.* (quoting *Bays*, 2014 WL 3764876, at *9 (further citations omitted)). The Court rejects defendants' blanket argument that the *Daubert* factors require exclusion of these experts' testimony.

1. Dr. Willenbring

***11** Specifically, defendants argue that the Court should prohibit Dr. Willenbring from testifying that two substances are substantially similar in chemical structure because his use of two-dimensional diagrams is unreliable. Doc. 484 at 9-10. Defendants contend that two-dimensional models are "rudimentary" and do not account for a variety of factors that also contribute to chemical structure. Doc. 484 at 9-10. The

government argues that Dr. Willenbring's report shows he used two-dimensional and three-dimensional models, among other resources, in reaching his conclusion that the drugs in issue are substantially similar to controlled substances. Doc. 493 at 13-14, 17. And, the government asserts that his methods are reliable and many courts have admitted them. *Id.* at 14, 17-18, 20.

The Court finds Dr. Willenbring's testimony admissible under Rule 702. "[T]wo-dimensional modeling is a reliable method of comparing the chemical structure of two chemical compounds." *Bays*, 2014 WL 3764876, at *8; *see also Lawton*, 84 F. Supp. 3d at 335 (where government's expert emphasized two-dimensional similarity in chemical structure, while defense expert testified about three-dimensional differences); *United States v. Fedida*, 942 F. Supp. 2d 1270, 1279 (M.D. Fla. 2013) (finding that "a reasonable person who examines the two-dimensional drawings of the chemical structures ... could plausibly conclude that such substances are substantially similar"). And, Dr. Willenbring does not rely solely on two-dimensional models. This Court, as many others have done, will allow Dr. Willenbring's testimony.

2. Dr. Trecki

Defendants object to Dr. Trecki's opinion that the drugs in issue are substantially similar in pharmacologic effect to controlled substances. Doc. 484 at 10-15. In particular, they assert that his use of preclinical data is speculative and unreliable. *Id.* at 10. Defendants argue that no clinical studies exist showing the pharmacological effects of the substances on humans, and animal studies cannot indicate accurately effects on humans. *Id.* at 10-14. Instead, Dr. Trecki relies on Structure Activity Relationship (SARs) Analyses, *in vitro* studies, and *in vivo* studies, which are all preclinical. *Id.* Defendants' basic assertion is that these methods cannot prove the effect on humans with enough certainty for the Court to find them reliable. *See* Doc. 484 at 10-15. The government argues that Dr. Trecki's methods are commonly used and reliable. Doc. 493 at 14-16, 18-19. It points to a number of cases where district courts have allowed him to testify about the substantial similarity of the pharmacological effects of synthetic drugs to scheduled drugs. *Id.* at 20. And it contends that defendants are free to have their expert testify that effects of these drugs are not supported by human clinical trials, and may cross examine Dr. Trecki about the limitations of preclinical data. But, the government contends these limitations go to weight not admissibility. *Id.* at 15, 18. The government also argues that the FDA would not permit human trials of such substances because they have no therapeutic or medical use. *Id.* at 15-16.

The Court denies defendants' motion to exclude Dr. Trecki's testimony. The Court does not find Dr. Trecki's methodologies unreliable under *Daubert* and Rule 702. Because "the research and study of controlled substance analogues is unique," the use of animal studies is permissible. *Bays*, 2014 WL 3764876, at *14. Defendants' concerns about Dr. Trecki's reliance on animal studies and preclinical data go to the weight of the evidence and not admissibility. *See Lawton*, 84 F. Supp. 3d at 339. And courts frequently admit preclinical studies like those utilized by Dr. Trecki in controlled substance analogue cases. *Bays*, 2014 WL 3764876, at *14 (citations omitted). This Court, like many others, will allow Dr. Trecki's testimony.

***12** The Court concludes that the proposed testimony of Dr. Willenbring and Dr. Trecki is admissible, and thus denies defendants' motion. If, during trial, defendants believe the testimony of either expert is not helpful to the jury, defendants may renew their objections to such testimony.

III. Conclusion

The Court denies defendants' motion to exclude testimony from the IT experts, pharmaceutical representatives, and FDA expert. The Court also denies defendants' motion to exclude testimony from the analogue drug experts, but directs the government to review Detective Farkes' proposed testimony and provide sufficient notice if necessary. The Court grants in part and denies in part defendants' motion to exclude the financial expert's testimony.

IT IS THEREFORE ORDERED BY THE COURT THAT defendants' Motion to Exclude Government's Expert, I.T. and Law Enforcement Testimony (Doc. 478) is denied in part. This Motion was granted in part by the Court's previous order (Doc. 525).

IT IS FURTHER ORDERED THAT defendants' Motion to Exclude and/or Limit Expert Testimony (Doc. 479) is granted in part and denied in part.

IT IS FURTHER ORDERED THAT defendants' Amended Motion to Exclude Government's Analogue Expert Testimony (Doc. 484) is denied.

IT IS SO ORDERED.

All Citations

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Only the Westlaw citation is currently available.
United States District Court,
W.D. **Missouri**.

Bill KERSTING and Helen Kersting, Plaintiffs,
v.
BUCKHORN, INC., Defendant.

No. 05–0898–CV–W–ODS.
|
Aug. 27, 2007.

Expert Witness(es): Virgil J. Flanigan, Tonya L. Smith–Jackson.

Attorneys and Law Firms

Andrew H. McCue, Martin M. Meyers, Meyers Law Firm, Kansas City, MO, Gayle Elaine McVay, Kirk Rahm, Rahm Rahm & McVay PC, Warrensburg, MO, for Plaintiffs.

Charles A. Getto, McAnany, Van Cleave & Phillips, PA, Kansas City, KS, for Defendant.

ORDER (1) GRANTING IN PART AND DENYING IN PART PARTIES' MOTIONS TO STRIKE OR LIMIT EXPERT TESTIMONY (2) DENYING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT AND (3) DENYING PLAINTIFFS' MOTION FOR JUDGMENT ON THE PLEADINGS

ORTRIE D. SMITH, District Judge.

***1** Pending are the parties' Motions to Strike or Limit Expert Testimony (Docs. # 103, # 104, # 106 and # 111), Motion for Judgment on the Pleadings (Doc. # 105) Defendant's Motion for Summary Judgment (Doc. # 109). For the following reasons, the Motions are Granted in part and Denied in Part.

I. BACKGROUND

On June 10, 2003, Plaintiff was injured while working at Miller Seed Company. Plaintiff was riding on the tines of a forklift, gripping the edge of a Center Flow SeedBox manufactured by Defendant Buckhorn, when the latches on the SeedBox disconnected causing the top and bottom portions of the SeedBox to separate. Plaintiff and the top of the SeedBox fell to the ground, while the base of the SeedBox remained on the forklift. Plaintiff filed the instant action, alleging strict liability, negligence and loss of consortium claims.

II. DISCUSSION

A. Expert Testimony

When expert testimony is proffered, the trial court must determine "whether the expert is proposing to testify to (1) scientific knowledge that (2) will assist the trier of fact to understand or determine a fact in issue." *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 592 (1993). According to *Daubert,* in "its attempt to determine whether proffered **scientific** **evidence** is scientifically valid, a trial court should ordinarily consider, among other factors, the following: (1) whether the underlying theory or technique can be or has been tested; (2) whether the theory or technique has been subjected to peer review and publication; (3) whether the technique has a known or knowable rate of error; (4) whether the theory or technique is generally accepted in the relevant community." *Jaurequi v. Carter Mfg. Co.*, 173 F.3d 1076, 1082 (8th Cir.1999). "This list of factors is not exclusive, and the trial court is left with great flexibility in adapting its analysis to fit the facts of each case." *Id.* In some cases one or more of the factors may be of little to no value in assessing the reliability of the expert's testimony; *Daubert* requires consideration of those factors that are relevant in light of the nature of the opinion, the field of expertise, and the circumstances of the case at bar. *Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 150 (1999); *Jaurequi*, 173 F.3d at 1083.

1. ***Virgil J. Flanigan***

Flanigan is a Emeritus Professor at the University of Missouri–Rolla and has taught Mechanical Engineering for forty years. He received three degrees in Mechanical Engineering and has also taught in the areas of design, energy and controls. He will be permitted to discuss his findings and conclusions based upon his examination and his attempted "fix" as described on page 6 of his Expert Report and discussed in Paragraph 2 of his Conclusions

on page 8. These matters are within his knowledge and arguments Defendant has raised address the weight of his testimony, not its admissibility. However, Flanigan will not be permitted to discuss his opinions regarding forseeability, reasonableness and causation as discussed in Paragraphs 1, 3 and 4 on page 8 of his Expert Report as these do not fall within his area of expertise.

2. ***Christopher W. Ramsay***
***2** Ramsay is a Metallurgic Engineer and Associate Professor of Materials Science and Engineering at the University of Missouri–Rolla. He will not be permitted to discuss any "reasonably anticipated" usage of riding fork tines or using SeedBoxes, inadequacy of the design or "unreasonably dangerous" design as discussed in Paragraphs 2, 5, 6, 9, 10, 11, 12, and 13 of his Expert Report, as this is not related to his area of expertise.

3. ***Tonya Smith–Jackson***
Smith–Jackson is an Associate Professor of Industrial and Systems Engineering and Director of the Human Factors Engineering and Ergonomics Center. Her specialty is Human Factors Engineering. She will be permitted to testify regarding the adequacy of the warning. However, she will not be permitted to testify to a predicted use or misuse of a product. Testimony about what people will do is speculative and will not aid the jury.

4. ***John Johnson***
Johnson is a Mechanical Engineer with thirty years of experience in the field of lift truck safety and design. He will be permitted to testify to the improper use of forklifts and the efficacy of the forklift warnings as these topics are related to his area of expertise. Moore will not be permitted to testify that ladders could have been used to reach the SeedBox as such opinions are unnecessary to aid the jury.

5. ***David Moore***
Moore has a worked as a Metallurgical and Mechanical Engineer, and has a degree in engineering from the University of Illinois at Urbana–Champaign. Plaintiffs do not challenge paragraph 8 of Moore's Expert Report, therefore Moore may offer the opinions contained therein. However, Moore will be prohibited from testifying to the remaining opinions held in his Expert Report in paragraphs 1–7, including ladder-use theories, adequacy of warnings, forklift safety rules, regulations, standards, and what Plaintiff and his co-workers knew about such rules, regulations and standards, as they do not fall within his areas of expertise and would not assist the jury.

6. ***David Curry***
Curry received his Bachelor of Science in behavioral science from the United States Air Force Academy, a Masters in experimental/human factors psychology from the University of Dayton in Ohio, a Masters Degree in industrial/operations engineering from the University of Michigan and a PhD in psychology from the University of Michigan. Curry purports to be an expert in ergonomics, human factors and warnings, driver-vehicle interfaces, person/machine interaction, human perception and performance. Curry will be permitted to testify regarding the adequacy of the warnings, but cannot testify as to what Plaintiff would or might have done as a result of such warnings, as such opinions are speculative and will not assist the jury.

B. Summary Judgment
A moving party is entitled to summary judgment on a claim only if there is a showing 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." *See generally Williams v. City of St. Louis,* 783 F.2d 114, 115 (8th Cir.1986). "[W]hile the materiality determination rests on the substantive law, it is the substantive law's identification of which facts are critical and which facts are irrelevant that governs." *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 248 (1986); *see also Get Away Club, Inc. v. Coleman,* 969 F.2d 664 (8th Cir.1992). In applying this standard, the Court must view the evidence in the light most favorable to the nonmoving party, giving that party the benefit of all inferences that may be reasonably drawn from the evidence. *Matsushita Electric Indus. Co. v. Zenith Radio Corp.,* 475 U.S. 574, 588–89 (1986); *Tyler v.. Harper,* 744 F.2d 653, 655 (8th Cir.1984), *cert. denied,* 470 U . S. 1057 (1985). However, a party opposing a motion for summary judgment "may not rest upon the mere allegations or denials of the ... pleadings, but ... by affidavits or as otherwise provided in [Rule 56], must set forth specific facts showing that there is a genuine issue for trial." Fed.R.Civ.P. 56(e).

***3** Defendant first argues it is entitled to Summary Judgment in the absence of admissible expert testimony. However, Plaintiffs' experts will be permitted to testify to the topics stated above. Further, after examining the record, the Court concludes that disputed issues of

material fact exists whether Plaintiff's use of the SeedBox was a foreseeable misuse, whether the SeedBox's design was defective or unreasonably dangerous, and the adequacy of the warnings regarding the SeedBox. Therefore, Defendant's motion for summary judgment is denied.

C. Comparative Fault

Defendant seems to have a better argument, stating fault is only to be apportioned among those at trial. *Fahy v. Dresser Industries, Inc.*, 740 S.W.2d 635, 641 (Mo. banc 1987). However, the Court does not believe the parties have sufficiently addressed the issue of comparative fault and is not prepared to rule on Plaintiff's Motion for Judgment on the Pleadings. The issue can be resolved prior to submission as a result of the parties' Pretrial Briefs or in ruling upon the parties' proposed jury instructions.

III. Conclusion

For the foregoing reasons, the parties' Motions to Limit Expert Testimony are granted in part and denied in part, Defendant's Motion for Summary Judgment is denied, and Plaintiff's Motion for Judgment on the Pleadings is denied.

IT IS SO ORDERED.

All Citations

Not Reported in F.Supp.2d, 2007 WL 4986244

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Scientific Evidence in Federal Litigation

Federal Bar Association Chapter for the Districts of Kansas and Western Missouri

Bob Dole Federal Courthouse, Kansas City, Kansas
Ceremonial Courtroom 655

12:20-12:30 Annual Meeting

1. Bylaw amendments

2. Officer elections

   The nominees for officers are:

   President - John Shaw
   President Elect - Jere Sellers
   Vice President - Judge Stephen R. Bough
   Treasurer - Kate Marples
   Secretary - Jon Simpson
   National Delegate - Judge Eric F. Melgren

12:30-1:30 Reception & Lunch 6th Floor Hall

By-Laws for ~~Kansas Chapter of the~~ The Federal Bar Association Chapter for the Districts of Kansas and Western Missouri

ARTICLE I. Name and Nature of Organization

The name of this organization is ~~the Kansas Chapter of the~~The Federal Bar Association Chapter for the Districts of Kansas and Western Missouri (hereinafter, "Chapter"). The Chapter is chartered by the Federal Bar Association (hereinafter, "Association") as approved by the Board of Directors; as such the Chapter shall at all times comply with the requirements of the Association's Constitution and By- laws. The Chapter's geographic area is same geographical area as the Kansas and Western Missouri federal ~~district~~districts.

ARTICLE II. Mission Statement and General Objectives

Section 1. Mission Statement. The mission of the Chapter shall be to advance the science of jurisprudence and to promote the welfare, interests, education, and the professional growth and development of the members of the federal legal profession.

Section 2. General Objectives. The general objectives of the Chapter, consistent with those of the Association, not listed in any particular order of priority, include:

(a) ~~to~~To serve as the representative of the federal legal profession in the Chapter's chartered territory.

(b) ~~to~~To promote the sound administration of justice.

(c) ~~to~~To enhance the professional growth and development of members of the federal legal profession.

(d) ~~to~~To promote high standards of professional competence and ethical conduct in the federal legal profession.

(e) ~~to~~To promote the welfare of attorneys and judges employed by the Government of the United States.

(f) ~~to~~To provide meaningful services for the welfare and benefit of the members of the Chapter.

(g) ~~to~~To provide quality educational programs to the federal legal profession and public.

(h) ~~to~~To keep members informed of developments in their respective fields.

(i) ~~to~~To keep members informed of the affairs of the Association and chapter, to encourage their involvement in their activities, and to provide members opportunities to assume leadership roles.

(j) To promote professional and social interaction among members of the federal legal profession.

~~federal legal profession.~~

ARTICLE- III. Membership and Dues

Section 1. Membership. Any person who is eligible for and maintains active membership in the Association and who is employed, resides in or practices in the Districts of Kansas or Western Missouri, or who designates membership in this Chapter to the Association shall -be a member of- the Chapter.

Section 2. Honorary Membership. Any person eligible for honorary membership as provided for in Article IV, Section 23 of the Constitution of the Association who is employed, resides in or practices in the Districts of Kansas or Western Missouri may be elected to honorary membership in the Association by two-thirds' vote of the Chapter members present at any regularly called meeting and, when applicable under Article IV of the Association's Constitution, by vote of the Board of Directors. Honorary members shall be exempt from payment of the admission fees and annual Association [and Chapter] dues. Federal Judges in the Districts of Kansas or Western Missouri shall automatically be entitled to honorary membership.

Section 3. Application for Membership. Application for membership in this Chapter shall be made on a form approved by the Board of Directors of the Association. Each application must be accompanied by the dues and admission fees required by the ~~Constitution and By-Laws of the~~ Association ~~[~~and ~~the By-Laws of~~ the Chapter~~]~~.

Section 4. Associates. Any person who is eligible for and maintains active Associate status in the Association and who is employed, resides in or practices in the Districts of Kansas or Western Missouri, or who designates Associate status in this Chapter to the- Association shall be an Associate of this Chapter.

Section 5. Dues. Annual dues owing to the Association will be paid individually to the Association Headquarters by each member upon receipt of a statement.

ARTICLE IV. Fiscal Year

The fiscal year of the Chapter shall commence on October 1 and end on September 30 of the following year.

ARTICLE V. Officers.

Section 1. Elected Officers. The officers shall be elected from the membership of this Chapter and shall be as follows and in the order named:

1. President
2. President-Elect
3. Vice President
4. Secretary
5. Treasurer
6. National Delegate

Each officer elected shall assume the duties of office on October 1 and shall hold office for one year, or until a successor shall be duly elected. No member serving in the capacity of President, President-Elect or Vice President shall be eligible to succeed to that same office. The outgoing President shall remain a member of the Executive Committee for period of one year following the expiration of the term as President. The office of National Delegate may be filled by a member who holds another Chapter office, other than President. Whenever the National Delegate is unable to attend National Council Meeting, the President may temporarily appoint an acting National Delegate to fulfill that obligation.

Section 2. Executive Committee. The Executive Committee shall consist of the elected officers, the immediate past President of the Chapter and other positions as designated by the President. The Executive Committee shall meet on the call of the President or any two of its members. A quorum shall consist of a majority of the Executive Committee members. The Executive Committee may perform such Chapter business, not requiting a vote of the membership, as shall be in the best interests of the Association and the Chapter.

Section 3. Duties of Officers.

(a) President. The President shall be the chief executive officer of this Chapter and shall perform such duties as may be required by the Constitution and By-laws of the Association and these by-laws and shall appoint standing or special committees as necessary and appropriate to the Chapter business and the Association committee structure, including, but not necessarily limited to a Budget and Finance Committee, Program Committee, Continuing Legal Education Committee, Nominations and Elections Committee, Membership Committee and Publicity and Public Relations Committee.

(b) President-Elect. The President-Elect shall perform such duties as are delegated by the President. In the event of the absence or inability to act of the President, the President- Elect shall perform the duties of the President. The President-Elect shall automatically succeed to the office of the President upon the expiration of the incumbent's term.

(c) Vice President. The Vice President shall perform the duties of the President in the event of the absence or inability of the President and President-Elect to discharge the duties pertaining to that office, and shall perform such duties as may be required by the President.

(d) Secretary. The Secretary shall furnish notice of election results to the Association and to the Circuit officers; conduct the general correspondence of this Chapter and keep Circuit officers informed; give notice of all meeting as may be required by Article VI hereto, including notice to Circuit officers; keep a record of the proceedings of the meeting of this Chapter; keep a roster of the membership to which will be added names of the incumbent Circuit officers; act as

parliamentarian; and perform such other duties as properly pertain to this office.

(e) Treasurer. The Treasurer shall collect and receive all monies due

to the Chapter; maintain Chapter deposits in such bank or banks as may be designated by it; make disbursements therefrom only as authorized by two officers of the Chapter or a majority vote of the active members present at any Chapter meeting; and keep the Secretary informed of the financial standing of each member of this Chapter. The Treasurer shall keep an itemized record of all monies received and disbursed by or to whom paid and for what purpose, and shall submit to the Chapter membership, when requested and at the end of the fiscal year, a report in writing itemizing the receipts and disbursements for the year. The Treasurer shall keep all books, vouchers and records available for audit and he shall perform such other duties as properly pertain to the office.

(f) National Delegate. The National Delegate shall represent the Chapter at all National Council meetings and in the absence of the President, President-Elect, and Vice President, at other bar association meetings.

Section 4. Nominations. The Nominations and Elections Committee shall be appointed by the President and shall nominate at least one candidate for each upcoming vacant office and present such slate of candidates in writing to the general membership at least thirty days in advance of the ~~regular meeting at~~date on which the election of officers will occur. Additionally, nomination of candidates for the elective offices of this Chapter may be made ~~by any member at the meeting at which the election will be held under Section 4~~as set forth in Section 5 of this Article.

Section 5. Elections. The election of officers for all elective offices shall be by secret ballot or by voice vote if there is no objection~~.~~ at a meeting of the Chapter membership, or in absence of such a meeting, by electronic mail ballot each year prior to September 1. The ~~election~~Executive Committee shall present a slate of officers. Other nominations may be ~~held during the regular meeting on or about June.~~made by the joint nomination of any five members. The officers elected shall commence their term of office on October 1 of each year, and shall hold office for one year ending the following September 30.

Section 6. Removal From Office. An officer may be removed from office for delinquency in attendance, inefficiency, neglect of duty, or for other causes only upon three fourths vote of members voting at a meeting called for such purpose by the Executive Committee.

Section 7. Vacancies of Office. In case of death, resignation or removal of the President, the President-Elect shall succeed to office. In cases of the death, resignation or removal of any other officer, the vacancy will be filled by election by the general membership.

ARTICLE VI. Meetings.

Section 1. Meetings. There shall be ~~at least two~~ meetings of the Chapter

membership ~~each year~~ at such day, hour and place as the President may designate~~ Kansas~~. Special meetings shall be held as called by the President ~~or a number~~ by ten percent of members ~~equal to a quorum, as provided by Article III, Section 6, hereof~~ at a time and place designated by the calling party. At least one membership meeting shall be held each year.

Section 2. Notice of Meetings. Notice of the time, date and place of all business meetings shall be ~~mailed or otherwise~~ given by the Secretary to each member in good standing at least ~~five~~ten days prior to such meeting, ~~unless the nature of the meeting is such that shorter notice cannot be avoided.~~by mail or electronic notification. If a special meeting, the notice shall specify the nature of the business to be presented and no other business shall be conducted.

Section 3. Expulsion. Any member or Associate whose dues are paid for the current fiscal year and who otherwise is in good standing shall be expelled from the Chapter when such member or Associate is expelled from the Association.

Section ~~4. Quorum. Ten percent of the members in good standing shall constitute a quorum for the transaction of the business of this Chapter.~~

~~Section 5.~~4. Rules of Order. The rules of order shall consist of (in the order stated):

(a) ~~the~~The Constitution and By-Laws of the Association and this Chapter;

(b) Standing Resolutions passed by this Chapter's membership; and

(c) The most current available edition of Robert's Rules of Order, Revised.

ARTICLE VII. ~~Public Position Taken by the Chapter~~.

The Chapter, in the name of the Association, may issue reports, make public announcements, and publicly advocate positions on issues of concern to the Chapter only with prior approval of the Association's Board of Directors. Without such prior approval, the Chapter may make such a public position but the position statement must include a disclaimer that indicates that the position is that of the Chapter only. In any event, when the Chapter takes such action in its own name and not in that of the Association, the Chapter shall report that action immediately to the Executive Committee of the Board of Directors.

ARTICLE VIII. Amendment.

These By-Laws may be altered, amended or repealed and new By-laws adopted by two- thirds of the members of this Chapter present at a regular meeting if ten days' prior written notice of the purpose has been given to all members, or at a ~~quorum is present and~~special meeting upon same condition.
~~ten days' prior written notice of the purpose has been given to all members or at a special meeting upon same condition.~~

CERTIFIED as duly adopted on _____ at _____

_____
Secretary

ATTESTED:

_____
President

_____
Chairman, By-Laws Committee

By-Laws for The Federal Bar Association Chapter for the Districts of Kansas and Western Missouri

ARTICLE I. Name and Nature of Organization

The name of this organization is The Federal Bar Association Chapter for the Districts of Kansas and Western Missouri (hereinafter, "Chapter"). The Chapter is chartered by the Federal Bar Association (hereinafter, "Association") as approved by the Board of Directors; as such the Chapter shall at all times comply with the requirements of the Association's Constitution and By- laws. The Chapter's geographic area is same geographical area as the Kansas and Western Missouri federal districts.

ARTICLE II. Mission Statement and General Objectives

Section 1. Mission Statement. The mission of the Chapter shall be to advance the science of jurisprudence and to promote the welfare, interests, education, and the professional growth and development of the members of the federal legal profession.

Section 2. General Objectives. The general objectives of the Chapter, consistent with those of the Association, not listed in any particular order of priority, include:

(a) To serve as the representative of the federal legal profession in the Chapter's chartered territory.

(b) To promote the sound administration of justice.

(c) To enhance the professional growth and development of members of the federal legal profession.

(d) To promote high standards of professional competence and ethical conduct in the federal legal profession.

(e) To promote the welfare of attorneys and judges employed by the Government of the United States.

(f) To provide meaningful services for the welfare and benefit of the members of the Chapter.

(g) To provide quality educational programs to the federal legal profession and public.

(h) To keep members informed of developments in their respective fields.

(i) To keep members informed of the affairs of the Association and chapter, to encourage their involvement in their activities, and to provide members opportunities to assume leadership roles.

(j) To promote professional and social interaction among members of the federal legal profession.

ARTICLE III. Membership and Dues

Section 1. Membership. Any person who is eligible for and maintains active membership in the Association and who is employed, resides in or practices in the Districts of Kansas or Western Missouri, or who designates membership in this Chapter to the Association shall be a member of the Chapter.

Section 2. Honorary Membership. Any person eligible for honorary membership as provided for in Article IV, Section 23 of the Constitution of the Association who is employed, resides in or practices in the Districts of Kansas or Western Missouri may be elected to honorary membership in the Association by two-thirds' vote of the Chapter members present at any regularly called meeting and, when applicable under Article IV of the Association's Constitution, by vote of the Board of Directors. Honorary members shall be exempt from payment of the admission fees and annual Association [and Chapter] dues. Federal Judges in the Districts of Kansas or Western Missouri shall automatically be entitled to honorary membership.

Section 3. Application for Membership. Application for membership in this Chapter shall be made on a form approved by the Board of Directors of the Association. Each application must be accompanied by the dues and admission fees required by the Association and the Chapter.

Section 4. Associates. Any person who is eligible for and maintains active Associate status in the Association and who is employed, resides in or practices in the Districts of Kansas or Western Missouri, or who designates Associate status in this Chapter to the Association shall be an Associate of this Chapter.

Section 5. Dues. Annual dues owing to the Association will be paid individually to the Association Headquarters by each member upon receipt of a statement.

ARTICLE IV. Fiscal Year

The fiscal year of the Chapter shall commence on October 1 and end on September 30 of the following year.

ARTICLE V. Officers.

Section 1. Elected Officers. The officers shall be elected from the membership of this Chapter and shall be as follows and in the order named:

1. President
2. President-Elect
3. Vice President
4. Secretary
5. Treasurer
6. National Delegate

Each officer elected shall assume the duties of office on October 1 and shall hold office for one year, or until a successor shall be duly elected. No member serving in the capacity of President, President-Elect or Vice President shall be eligible to succeed to that same office. The outgoing President shall remain a member of the Executive Committee for period of one year following the expiration of the term as President. The office of National Delegate may be filled by a member who holds another Chapter office, other than President. Whenever the National Delegate is unable to attend National Council Meeting, the President may temporarily appoint an acting National Delegate to fulfill that obligation.

Section 2. Executive Committee. The Executive Committee shall consist of the elected officers, the immediate past President of the Chapter and other positions as designated by the President. The Executive Committee shall meet on the call of the President or any two of its members. A quorum shall consist of a majority of the Executive Committee members. The Executive Committee may perform such Chapter business, not requiting a vote of the membership, as shall be in the best interests of the Association and the Chapter.

Section 3. Duties of Officers.

(a) President. The President shall be the chief executive officer of this Chapter and shall perform such duties as may be required by the Constitution and By-laws of the Association and these by-laws and shall appoint standing or special committees as necessary and appropriate to the Chapter business and the Association committee structure, including, but not necessarily limited to a Budget and Finance Committee, Program Committee, Continuing Legal Education Committee, Nominations and Elections Committee, Membership Committee and Publicity and Public Relations Committee.

(b) President-Elect. The President-Elect shall perform such duties as are delegated by the President. In the event of the absence or inability to act of the President, the President- Elect shall perform the duties of the President. The President-Elect shall automatically succeed to the office of the President upon the expiration of the incumbent's term.

(c) Vice President. The Vice President shall perform the duties of the President in the event of the absence or inability of the President and President-Elect to discharge the duties pertaining to that office, and shall perform such duties as may be required by the President.

(d) Secretary. The Secretary shall furnish notice of election results to the Association and to the Circuit officers; conduct the general correspondence of this Chapter and keep Circuit officers informed; give notice of all meeting as may be required by Article VI hereto, including notice to Circuit officers; keep a record of the proceedings

of the meeting of this Chapter; keep a roster of the membership to which will be added names of the incumbent Circuit officers; act as parliamentarian; and perform such other duties as properly pertain to this office.

(e) Treasurer. The Treasurer shall collect and receive all monies due to the Chapter; maintain Chapter deposits in such bank or banks as may be designated by it; make disbursements therefrom only as authorized by two officers of the Chapter or a majority vote of the active members present at any Chapter meeting; and keep the Secretary informed of the financial standing of each member of this Chapter. The Treasurer shall keep an itemized record of all monies received and disbursed by or to whom paid and for what purpose, and shall submit to the Chapter membership, when requested and at the end of the fiscal year, a report in writing itemizing the receipts and disbursements for the year. The Treasurer shall keep all books, vouchers and records available for audit and he shall perform such other duties as properly pertain to the office.

(f) National Delegate. The National Delegate shall represent the Chapter at all National Council meetings and in the absence of the President, President-Elect, and Vice President, at other bar association meetings.

Section 4. Nominations. The Nominations and Elections Committee shall be appointed by the President and shall nominate at least one candidate for each upcoming vacant office and present such slate of candidates in writing to the general membership at least thirty days in advance of the date on which the election of officers will occur. Additionally, nomination of candidates for the elective offices of this Chapter may be made as set forth in Section 5 of this Article.

Section 5. Elections. The election of officers for all elective offices shall be by secret ballot or by voice vote if there is no objection at a meeting of the Chapter membership, or in absence of such a meeting, by electronic mail ballot each year prior to September 1. The Executive Committee shall present a slate of officers. Other nominations may be made by the joint nomination of any five members. The officers elected shall commence their term of office on October 1 of each year, and shall hold office for one year ending the following September 30.

Section 6. Removal From Office. An officer may be removed from office for delinquency in attendance, inefficiency, neglect of duty, or for other causes only upon three fourths vote of members voting at a meeting called for such purpose by the Executive Committee.

Section 7. Vacancies of Office. In case of death, resignation or removal of the President, the President-Elect shall succeed to office. In cases of the death, resignation or removal of any other officer, the vacancy will be filled by election by

the general membership.

ARTICLE VI. Meetings.

Section 1. Meetings. There shall be meetings of the Chapter membership at such day, hour and place as the President may designate. Special meetings shall be held as called by the President or by ten percent of members at a time and place designated by the calling party. At least one membership meeting shall be held each year.

Section 2. Notice of Meetings. Notice of the time, date and place of all business meetings shall be given by the Secretary to each member in good standing at least ten days prior to such meeting, by mail or electronic notification. If a special meeting, the notice shall specify the nature of the business to be presented and no other business shall be conducted.

Section 3. Expulsion. Any member or Associate whose dues are paid for the current fiscal year and who otherwise is in good standing shall be expelled from the Chapter when such member or Associate is expelled from the Association.

Section 4. Rules of Order. The rules of order shall consist of (in the order stated):

(a) The Constitution and By-Laws of the Association and this Chapter;

(b) Standing Resolutions passed by this Chapter's membership; and

(c) The most current available edition of Robert's Rules of Order, Revised.

ARTICLE VII. Public Position Taken by the Chapter.

The Chapter, in the name of the Association, may issue reports, make public announcements, and publicly advocate positions on issues of concern to the Chapter only with prior approval of the Association's Board of Directors. Without such prior approval, the Chapter may make such a public position but the position statement must include a disclaimer that indicates that the position is that of the Chapter only. In any event, when the Chapter takes such action in its own name and not in that of the Association, the Chapter shall report that action immediately to the Executive Committee of the Board of Directors.

ARTICLE VIII. Amendment.

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