IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF ILLINOIS

IN RE: PARAQUAT PRODUCTS LIABILITY LITIGATION	Case No. 3:21-md-3004-NJR
	MDL No. 3004
This document relates to All Cases	Hon. Judge Nancy J. Rosenstengel

DEFENDANTS' REPLY IN SUPPORT OF MOTION TO STRIKE PLAINTIFFS' SUPPLEMENTAL EXPERT REPORT OF DAVID A. MORTENSEN AND RELATED DEPOSITION TESTIMONY

Nowhere in their Opposition brief do Plaintiffs offer any justification for why they submitted Mortensen's supplemental opinions three months after the deadline and a month after his deposition, nor do Plaintiffs offer any justification for why they never sought consent from Defendants or the Court prior to submitting the supplemental opinions. Rather, Plaintiffs attempt to justify the undeniably out-of-time supplementation by arguing that the supplementation is a logical outgrowth of Mortensen's deposition testimony. But that argument fails for multiple reasons—it misunderstands how the Federal Rules work (which do not allow experts to supplement their disclosed opinions at their depositions), and even if such supplementation-by-deposition were allowed, Plaintiffs shut down any questioning on such opinions by instructing Mortensen to walk out of the deposition rather than being questioned on them. Nor does Plaintiffs' alternative argument—that Mortensen's new opinions are not prejudicial because they effectively rebut Defendants' expert's opinions—hold water, given that Mortensen's supplemental opinions came *before* Defendants disclosed any of their own expert testimony. Finally, Plaintiffs' argument that their supplementation does not prejudice Defendants ignores the plain reality that such a late supplementation—three months late and after the deposition of their expert is complete—would

require another round of depositions and supplementations that are not only inherently prejudicial to Defendants, but would also disrupt an already-tight schedule leading to the October 2023 trial. As set forth in Defendants' opening brief and further below, Defendants' motion should be granted.

ARGUMENT

I. Plaintiffs' Disclosure of Mortensen's Supplemental Opinions Comes Months Too Late

Plaintiffs do not—and cannot—dispute that their supplemental Mortensen report is three months late, that Plaintiffs never reached out to Defendants to seek consent, and never sought (and certainly did not receive) leave of Court to serve it. Instead, Plaintiffs argue that these opinions are a logical outgrowth of Mortensen's deposition. ECF 3571 at 1-2. But that argument is doubly wrong. First, it fundamentally misunderstands Rule 26. The Federal Rules require testifying experts to identify *all* of the opinions they intend to proffer in written expert reports, as well as *all* of their reliance materials. *See* Fed. R. Civ. P. 26(a)(2)(B). Exhibits 3 and 24 were not disclosed in Mortensen's October 14, 2022 expert report. That alone answers the question of whether those materials can legitimately form the basis for Mortensen's opinions: they cannot. *See e.g., Loggerhead Tools, LLC v. Sears Holdings Corp.*, No. 12-CV-9033, 2016 WL 5080034, at *2 (N.D. Ill. Sept. 20, 2016) (excluding documents produced with supplemental expert report as the failure to previously disclose was not justified or harmless). Nor can a party expand an expert's opinions by conducting redirect examination at the deposition on topics that go beyond the expert reports. *See e.g., Beyers v. Consol. Ins. Co.*, No. 1:19-cv-01601-TWP-DLP, 2021 WL 1061210, at *10 (S.D. Ind. Mar. 19, 2021) (excluding deposition testimony outside the scope of expert's report as those opinions "prejudice[ed] Defendants because they did not have the opportunity to prepare to scrutinize these opinions.").

Second, even if an expert could expand his opinions on the fly at his deposition as Plaintiffs suggest, that is not what happened here. In fact, *after* Exhibit 3 was produced by Plaintiffs in the middle of the Mortensen deposition, Mortensen again confirmed that he was *not* offering any Plaintiff-specific opinions. ECF 3571-1 (Mortensen Dep. Tr. at 75:12-14, 74:22-24). It was only on redirect that Plaintiffs first attempted to have Mortensen supplement his opinions to add Plaintiff-specific opinions, and then, when Defendants sought to cross-examine him on those new opinions, Mortensen and Plaintiffs' counsel quite literally walked out of the deposition rather than allowing any examination on any Plaintiff-specific opinion that Mortensen had offered for the first time on redirect. *Id*. at 383:15-386:11.

II. Plaintiffs' Attempt to Submit Mortensen's Supplemental Opinions as Rebuttal Testimony is Improper

Plaintiffs' argument that Mortensen's opinion can properly be considered as rebuttal testimony similarly fails. *See e.g., Africano v. Atrium Med. Corp.*, No. 17 CV 7238, 2019 WL 5085338, at *1 (N.D. Ill. Oct. 10, 2019). Under Rule 26(a)(2)(D)(ii), rebuttal expert reports must be "intended solely to contradict or rebut evidence on the same subject matter identified by another party." Rebuttal reports must address issues raised by the opposition's expert instead of bolstering support for issues for which the party bears the burden of proof. *Stanfield v. Dart*, No. 10 C 6569, 2013 WL 589222, at *3-4 (N.D. Ill. Feb. 14, 2013) (striking the expert's report for failing to address the defendant's expert's conclusions or methodology and instead attempting to bolster the *prima facie* case); *Butler v. Sears Roebuck & Co.*, No. 06 C 7023, 2010 WL 2697601, at *1 (N.D. Ill. July 7, 2010) ("Rebuttal reports should be limited to contradict[ing] or rebut[ting] evidence on the same subject matter identified by another party in its expert disclosures." (internal quotations omitted)). "Evidence that is only offered as additional support of

a party's argument and that does not contradict any evidence introduced by the opposing party is not proper rebuttal." *Africano*, 2019 WL 5085338, at *1.

The most obvious problem with Plaintiffs' argument is the simple and unavoidable fact that Plaintiffs disclosed Mortensen's supplemental report *before* Defendants' agronomy expert, Bryan Young, even submitted his report. Mortensen's supplemental report thus does not *rebut* Young's report; it *preceded* it. Indeed, Mortensen's supplemental report does not contradict, rebut, or even address any of Dr. Young's opinions—as they were not yet disclosed. Plaintiffs have wrongly attempted to "offer testimony under the guise of 'rebuttal' only to provide additional support for [their] case in chief[,]" *id*. at *2, directly contrary to this Court's scheduling orders and to the Federal Rules.

III. Plaintiffs' Disclosure of Mortensen's Supplemental Report is Prejudicial to Defendants

Plaintiffs have failed to demonstrate that Mortensen's supplement is justified or harmless. In weighing whether an untimely expert disclosure is justified or harmless, the court considers the prejudice to the opposing party, the ability to cure such prejudice, and the disclosing party's justification (or lack thereof) for not disclosing the evidence earlier. *Gilbane Bldg. Co. v. Downer's Grove Cmty. High Sch. Dist. No. 99*, No. 02 C 2260, 2005 WL 838679, at *10-11 (N.D. Ill. Apr. 5, 2005) (excluding plaintiff's untimely supplemental expert report disclosure as plaintiff failed to prove late disclosure was justified or harmless). Here, Plaintiffs have offered literally no justification for not timely disclosing the supplemental opinions, nor have they offered any justification whatsoever for failing to seek consent from Defendants or the Court of their intention to supplement Mortensen's report. That alone is grounds to grant Defendants' motion. *Id.* at *10 ("With earlier notice, the court could have dealt with the revised expert opinions and set an expert discovery schedule that was fair to all the parties."). Moreover, Plaintiffs' long and unjustified

delay is plainly prejudicial to Defendants—the supplement came *after* Defendants had already deposed Mortensen, and just 72 hours before Defendants' expert disclosures were due. Permitting this supplementation would require another round of depositions and supplementation and unquestionably require a substantial adjustment of the case schedule. For example, Defendants would be required to re-depose Mortensen, submit a supplemental expert report for Young, and Young would likely need to be deposed again—all of which costs time and money, to say nothing of a disruption of the case schedule, which has tight deadlines leading to a June 26, 2023 *Daubert* hearing and the October 2023 trial. Nor *should* any of it happen, given that Plaintiffs have given no explanation whatsoever for why Mortensen failed to offer any of these opinions the first time around.

Plaintiffs' attempt to discredit Defendants' reliance on *Stuhlmacher* is misguided. Despite Plaintiffs' contentions, *Stuhlmacher* is clearly analogous and instructive here—when a party files a supplemental report that contains new opinions, the submission is neither justified nor harmless where the report was submitted after court-ordered deadlines and where the party did not seek leave to serve the untimely expert report. *Stuhlmacher v. Home Depot USA, Inc.*, No. 2:10 cv 467, 2012 WL 5866297, at *4 (N.D. Ind. Nov. 19, 2012).

CONCLUSION

For the foregoing reasons, Defendants request the Court strike David A. Mortensen's January 16, 2023, supplemental expert report and opinions and related deposition testimony.

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Respectfully submitted,

/s/ Ragan Naresh

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CERTIFICATE OF SERVICE

I certify that on February 23, 2023, I served Defendants' Motion to Strike Supplemental Expert Report of David A. Mortensen on all parties of record through the CM/ECF system.

/s/ Ragan Naresh
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