

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF LOUISIANA

MDL No. 2328

IN RE: POOL PRODUCTS  
DISTRIBUTION MARKET ANTITRUST  
LITIGATION

SECTION: R(2)

JUDGE VANCE  
MAG. JUDGE  
WILKINSON

**THIS DOCUMENT RELATES TO ALL CASES**

**PRETRIAL ORDER NO. 35**

The Court is in receipt of the Direct Purchaser Plaintiffs' (DPPs) "Motion to Strike the 75-Page So-Called 'Synthesis' of Dr. John H. Johnson, IV Submitted as an Affidavit in Support of the Pool Defendants' Motions for Summary Judgement"<sup>1</sup> and defendants' Opposition to the Motion.<sup>2</sup> For the following reasons, the Court GRANTS the motion.

In support of their motion to strike Dr. Johnson's affidavit, DPPs argue that the affidavit violates Pretrial Order No. 30, in which the Court placed strict limits on the use of supplemental affidavits or declarations in connection with summary judgment, class certification, and *Daubert* briefing.<sup>3</sup>

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<sup>1</sup> R. Doc. 533.

<sup>2</sup> R. Doc. 531.

<sup>3</sup> R. Doc. 472.

Pretrial Order No. 30 banned all parties from submitting any new expert reports. Specifically, it provided:

DPPs will not be permitted to submit any additional report or other analysis or calculation beyond what is contained in Dr. Rausser's reports submitted to date . . . . Defendants will not be permitted to submit any additional reports or other analyses or calculations beyond what are contained in the reports of defendants' experts submitted to date and their critiques provided for in paragraph 2(b) of Pretrial Order No. 29. Furthermore, no party shall be permitted to submit any analysis from any expert who has not previously submitted an expert report in accordance with Pretrial Order No. 20.

Pretrial Order No. 30 provided a limited exception for affidavits submitted in support of or in opposition to a *Daubert* motion, or in response to an attack on an expert's previously expressed opinions. Specifically, the order provided:

Any experts who have previously submitted expert reports in accordance with Pretrial Order No. 20 are permitted to submit a supplemental affidavit or declaration of no more than 20 pages: (a) in opposition to a *Daubert* motion seeking to disqualify that expert or to exclude any portion of that particular expert's testimony, provided that the affidavit or declaration shall be responsive to the arguments made in the motion; (b) to defend an opinion previously expressed by that particular expert in his or her report(s) or deposition testimony in response to an opposing party's argument(s) in a motion for class certification or for summary judgment; or (c) in support of a *Daubert* motion, provided that the scope of any such affidavit or declaration shall be based on the opinions expressed by that expert in a prior report or deposition testimony and shall not contain any new opinions, analyses, theories, or conclusions.

Thus, Pretrial Order No. 30 made no provision for the submission of affidavits or declarations in support of summary judgment motions. Nevertheless, defendants and their expert Dr. Johnson

apparently understood Pretrial Order No. 30 to permit affidavits in support of summary judgment, so long as such affidavits did not include any new "analyses or calculations beyond what are contained in the reports of defendants' experts submitted to date." Consistent with this understanding, defendants submitted a 75-page affidavit by Dr. Johnson, which purports to excerpt and synthesize the limited portions of his voluminous reports relevant to defendants' motions.

While the Court does not doubt defendants' good faith, defendants have nevertheless misread Pretrial Order No. 30. The order did not permit the creation and submission of *any* new documents expressing expert opinions, with the exception of the *Daubert* and rebuttal affidavits expressly permitted by the order. Unfortunately, for all practical purposes, Dr. Johnson's "affidavit" summarizing his conclusions from his earlier reports is simply a new report by another name. Because the Court intends to consult and cite the original reports in rendering its judgments on the motions, defendants' decision to submit the affidavit in lieu of the original reports, and to cite to the affidavit throughout their motions rather than to the relevant sections of the original reports, creates make-work for the Court. It would be burdensome and a waste of the Court's time to attempt to match up the content of the affidavit with the content of the reports and to attempt to confirm that the 75 pages of

affidavit are consistent with the 400 pages of underlying reports. Further, if defendants are permitted to file such an affidavit, DPPs want the same opportunity, which undoubtedly will create another fight about whether the affidavit goes beyond the report. Since the reports are the operative documents, defendants need to key their arguments and evidence to the reports and to cite the relevant sections of the reports in their motions. If the reports need synthesizing, excerpting, or explaining, it is the attorneys' job to do so in their briefing.

For the forgoing reasons, the Court strikes Dr. Johnson's affidavit in support of defendants' motions for summary judgment. Defendants have fourteen days from the date of this order to resubmit their motions for summary judgment and supporting documents with all citations, arguments, and evidence keyed to Dr. Johnson's underlying reports.

New Orleans, Louisiana, this 2nd day of January, 2015.



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SARAH S. VANCE  
UNITED STATES DISTRICT JUDGE