IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

In re: WATTS COORDINATED PRETRIAL PROCEEDINGS	)	Master Docket Case No. 19-cv-01717
	)	Judge Franklin U. Valderrama
	)	Magistrate Judge Sheila M. Finnegan

MOTION TO BAR OR LIMIT THE TESTIMONY OF DEFENDANTS' EXPERT WITNESSES MICHAEL FITZGERALD AND JOHN HENEGHAN

Plaintiffs Ben Baker and Clarissa Glenn move, pursuant to Rule 702 of the Federal Rules of Evidence and *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579, 589 (1993) to bar the proposed expert testimony of Michael Fitzgerald and John Heneghan. In support thereof, Plaintiffs state as follows:

INTRODUCTION

Defendants have disclosed a current Chicago Police lieutenant, Michael Fitzgerald, and an evidence technician, John Heneghan, as non-retained experts in these cases. Ex. 1 (Defendant City's Rule 26(a)(2) Disclosures, May 13, 2024); Ex. 2 (Defendant Officers' Rule 26(a)(2) Disclosures, May 13, 2024). Prior to expert disclosures, Defendant City named Lieutenant Fitzgerald as its Rule 30(b)(6) representative for certain topics relating to CPD policies and procedures in effect from 1999-2011. And Defendant City disclosed Mr. Heneghan as the state-law equivalent of a Rule 30(b)(6) witness in *Waddy v. City of Chicago et al.* The parties subsequently agreed to designate a portion of Heneghan's testimony as Rule 30(b)(6) testimony in the *Watts* Coordinated Proceedings.

The Court should strike Defendants' disclosure of Heneghan and Fitzgerald because they do not state any opinions, let alone provide the factual basis for those opinions. Instead,

Defendants provided a laundry list of topics on which Heneghan and Fitzgerald might testify, which essentially repeated the topics from their depositions.

BACKGROUND

Defendants identified Michael Fitzgerald and John Heneghan as non-retained experts under Rule 26(a)(2)(C). Defendants' disclosure states that:

> **Lt. Michael Fitzgerald** (can be contacted through counsel for Defendant City) - To the extent considered opinion testimony, the subject matter on which Lt. Fitzgerald may provide evidence under Federal Rule of Evidence 702, 703, or 705, as well as a summary of the facts and opinions to which he is expected to testify, will be consistent with his March 6, 2024 Rule 30(b)(6) deposition testimony in *In re: Watts Coordinated Proceedings*, Case No. 19 C 1717. Specifically, Lt. Fitzgerald may testify concerning the following: the preparation and approval of arrest reports, vice case reports, and inventory reports, including who should be listed in the reports, who should sign the reports, and the use of quotation marks and/or abbreviations in the reports, and the Chicago Police Department's training in that regard; rules, policies, and orders applicable to the preparation of Chicago Police Department reports; completion of a Complaint for Preliminary Examination; qualifications to become a member of a tactical team in the Chicago Police Department, including the process for selecting members; the day to day responsibilities of tactical teams in the Chicago Police Department, including pre-planned narcotics enforcement missions; Department rules, policies, procedures, and orders applicable to tactical teams in the 1999 to 2011 time frame; the day to day responsibilities of sergeants overseeing tactical teams in the Chicago Police Department; and, the process for collecting, inventorying, and requesting testing of suspected narcotics evidence, and the collection and inventorying of money, including the process and paperwork for maintaining the chain of custody under CPD policy and in this case.
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> **Evidence Technician John Heneghan** (can be contacted through counsel for Defendant City) - To the extent considered opinion testimony, the subject matter on which Evidence Technician Heneghan may provide evidence under Federal Rule of Evidence 702, 703, or 705, as well as a summary of the facts and opinions to which he is expected to testify, will be consistent with his November 7, 2023 City representative deposition in *Waddy v. City, et al.,* 19 L 10035. Specifically, Evidence Technician Heneghan may testify concerning the following: the Chicago Police Department's policies and practices at all times relevant to this case regarding fingerprinting of evidence in narcotics cases, including but not limited to fingerprinting packages and or baggies that contain alleged narcotics.

Ex. 1 (City's Rule 26(a)(2) Discl.) at 1-2; Ex. 2, (Defendant Officers' Rule 26(a)(2) Discl.) at 1-2.

These disclosures fail to provide notice to Plaintiffs as to what expert testimony Defendants seek to elicit from these two witnesses.

LEGAL STANDARD

Federal Rules of Evidence 702 and 703 govern the admissibility of expert witness testimony. Fed. R. Evid. 702. This standard requires that the expert's "specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue," and then only if the testimony is "based on sufficient facts or data" and "the product of reliable principles and methods," which the expert has "reliably applied." *See* Fed. R. Evid. 702. The expert's opinion must be based on "knowledge," not merely "subjective belief or unsupported speculation." *Daubert*, 509 U.S. at 590; *Brown v. Burlington N. Santa Fe Ry. Co.*, 765 F.3d 765, 772 (7th Cir. 2014).

The trial judge occupies a "gatekeeping role" and must scrutinize proffered expert testimony to ensure it satisfies each requirement of Rule 702. *Daubert*, 509 U.S. at 592-93, 597. The proponent of the expert evidence bears the burden of establishing, by a preponderance of the evidence, that the requirements set forth in Rule 702 and *Daubert* have been satisfied. *Lewis v. CITGO Petroleum Corp.*, 561 F.3d 698, 705 (7th Cir. 2009). This rule applies not only to scientific testimony but to all expert testimony. *Kumho Tire Co., Ltd. v. Carmichael*, 526 U.S. 137, 147 (1999). A *Daubert* inquiry ultimately requires a two-step analysis: first, a determination of the expert's reliability, and second, whether the proposed expert testimony is relevant and aids the trier-of-fact. *Cummins v. Lyle Industries*, 93 F.2d 362, 367-68 (7th Cir. 1996). A trial court should exclude expert testimony that is not pertinent to a disputed issue in the case even if the methodology underlying the testimony is sound. *Smith v. Ford Motor Co.*, 215 F.3d 713, 719 (7th Cir. 2000).

Non-retained experts need not submit a report, but the Rule 26(a)(2) disclosure must still state (i) the subject matter on which the witness is expected to present evidence under Rules 702, 703, or 705, and (ii) a summary of the facts and opinions to which the witness is expected to testify. Fed. R. Civ. P. 26(a)(2)(C). Disclosures for non-retained experts "do not have to be nearly as detailed as (a)(2)(B) retained expert reports, but summaries still must, not surprisingly, summarize the 'facts and opinions to which the witness is expected to testify.'" *Browar v. Unum Life Ins. Co. of Am.*, 2018 WL 11184648, at *3 (N.D. Ill. Dec. 12, 2018) (quoting Rule 26(a)(2)(C)).

To comply with Rule 26(a)(2)(c), the disclosure must include "a brief account of the [expert's] main opinions," including the expert's "view or judgment regarding a matter that affects the outcome of the case," and a brief account in summary form of the main facts directly related to the disclosed opinions. *Sec. & Exch. Comm'n*, No. 09 C 1775, 2017 WL 4925503, at *3 (citing *Little Hocking Water Ass'n, Inc. v. E.I. DuPont de Nemours & Co.*, 2015 WL 1105840, at *9 (S.D. Ohio Mar. 11, 2015)).

ARGUMENT

Fitzgerald and Heneghan should be precluded from opining as experts in this litigation because Defendants' Rule 26(a)(2) disclosures are inadequate and legally insufficient. The disclosures are merely a list of topics that the Defendants want the witnesses to testify about. There are no facts listed, and no opinions given. As the Rule itself states, and case law confirms, expert disclosures must provide the opinions that the experts intend to testify about. "Stating a witness has an opinion is not the same as stating an opinion." *DeLeon-Reyes*, 2023 WL 358834, at *4. *DeLeon-Reyes* is instructive on this point. In that case, the plaintiffs disclosed their former criminal defense attorneys as non-retained experts to provide in part: "[their] opinion regarding

the prosecution's decision to offer immunity to Defendant Guevara, and the impact of the offer of immunity on the post-conviction proceedings and its eventual outcome." No. 1:18-CV-01028, 2023 WL 358834, at *3 (N.D. Ill. Jan. 23, 2023). The court found that this disclosure did not satisfy the requirements of Rule 26(a)(2)(C) because the plaintiffs did not actually advise what those opinions were. *Id.* at *4 ("What is the witness's opinion? The Court does not know.").

Martinez v. Garcia is also instructive. No. 08 C 2601, 2012 WL 12878716 (N.D. Ill. Nov. 5, 2012). In that case, two medical treater-defendants disclosed themselves as experts "to provide opinions regarding their own medical care and that what they did was reasonable and appropriate." *Id*. at *1. The disclosure further indicated that the two would provide testimony "consistent with their deposition testimony." *Id*. The court in *Martinez* found that disclosure was "totally unsatisfactory." *Id*. at *2. "It defeats the entire purpose of witness disclosure" as it "require[s] an adversary to engage in guesswork rather than particularizing the witness's proposed testimony." *Id*. As a result of the failure to comply with Rule 26, the court in *Martinez* barred the two medical treater-defendants from testifying as experts. *Id.*

The same conclusion should be reached here. In their disclosure of Fitzgerald and Heneghan, Defendants provide a list of potential topics and then use the same language—that the testimony will be "consistent with [their] deposition"— that *Martinez* found "totally unsatisfactory." *Id*. Simply citing to deposition testimony, however, falls below the necessary threshold for disclosures under Rule 26(a)(2)(C). *Id*.; *see also Sec. & Exch. Comm'n*, No. 09 C 1775, 2017 WL 4925503, at *3; *Martinez*, No. 08 C 2601, 2012 WL 12878716, at *2.

In short, Defendants only listed generic topics that Fitzgerald and Heneghan may testify about without offering what their opinions are on those topics. For example, Defendants do not say what expert opinions Fitzgerald will offer about "the preparation and approval of arrest

reports, vice case reports, and inventory reports." Ex. 1 (City's Rule 26(a)(2) Discl.) at 2. Listing that "topic," without more, does not fulfill the requirements of Rule 26. The same reasoning applies to Heneghan, who has been disclosed to testify about the Chicago Police Department's policies and practices regarding fingerprinting of evidence in narcotics cases. Without more, Plaintiffs can only speculate about what these witnesses' opinions may be. This is precisely the type of "guesswork" that the *Martinez* Court condemned. Defendants' failure to specify the "facts and opinions" that they seek to elicit from these experts is fatal to their reliance on either witness.

The Court should strike Defendants' disclosure of Fitzgerald and Heneghan as expert witnesses in this case.

CONCLUSION

For all the reasons stated above, Lt. Michael Fitzgerald and John Heneghan should be barred from testifying as experts.

Respectfully submitted,

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