UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES - GENERAL

Case No.	CV 09-6588 CAS (RZx)	Date	January 26, 2012
Title	*STEVEN C. BRUCE; ET AL. v. HARLEY-DAVIDSON MOTOR COMPANY, INC.*		

Present: The Honorable	CHRISTINA A. SNYDER	
Staci J. Momii	Laura Elias	N/A
Deputy Clerk	Court Reporter / Recorder	Tape No.

Attorneys Present for Plaintiffs:	Attorneys Present for Defendants:
James Shah Rose Luzon Robert Starr	Mark Kircher Jeffrey Rosenfeld Matthew Caplan

Proceedings: **(In Chambers:) PLAINTIFFS' MOTION FOR CLASS CERTIFICATION** (filed 09/01/11)

DEFENDANT'S MOTION TO EXCLUDE THE EXPERT REPORT AND TESTIMONY OF DR. DAVID JOHN NOEL LIMEBEER (filed 09/30/11)

PLAINTIFFS' MOTION TO EXCLUDE THE TESTIMONY OF DAVID H. WEIR (filed 09/01/11)

I. INTRODUCTION

On September 10, 2009, plaintiffs Steven C. Bruce ("Bruce") and Norman T. Wesley, Jr. ("Wesley") filed the instant class action against Harley-Davidson, Inc. and Harley-Davidson Motor Company, Inc. (collectively "Harley-Davidson"). On November 9, 2009, plaintiffs filed a first amended complaint ("FAC") alleging claims for (1) violation of the California Consumers Legal Remedies Act, Cal. Civ. Code § 1750 *et seq.* ("CLRA"); (2) violation of the Unfair Competition Law, Cal. Bus. & Prof. Code § 17200 *et seq.* ("UCL"); (3) fraud by omission; (4) breach of the implied warranty, pursuant to Song-Beverly Consumer Warranty Act, Cal. Civ. Code §§ 1791.1 and 1792 *et seq.* ("Song-Beverly Act"); and (5) unjust enrichment. On January 15, 2010,

the Court granted in part and denied in part Harley-Davidson's motion to dismiss.[1]

On February 4, 2010, plaintiffs filed their second amended complaint ("SAC") alleging claims for (1) violation of the CLRA; (2) violation of the UCL; (3) fraud by omission; (4) breach of the implied warranty, pursuant to the Song-Beverly Act; (5) breach of various states' implied warranty statutes; and (6) violation of various states' express warranty statutes.

On April 19, 2010, the Court granted defendant's motion to dismiss plaintiffs' fifth and sixth claims of the SAC for violation of various states' implied and express warranties laws without prejudice. The Court denied defendant's motion to dismiss plaintiffs' first, second, and third claims of the SAC for violation of the CLRA, UCL, and fraud by omission.

On June 10, 2010, plaintiffs filed their operative third amended complaint ("TAC") with leave of the Court. The TAC alleges claims for violation of the CLRA, violation of the UCL, fraud by omission, and breach of various states' implied and express warranty statutes.

On September 1, 2011, plaintiffs filed a motion for class certification. Harley-Davidson opposed the motion on September 30, 2011.[2] On October 27, 2011, plaintiffs

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[1] Specifically, the Court dismissed without prejudice plaintiffs' claims grounded in fraud, and thus plaintiffs' claims under the CLRA and the fraudulent conduct prong of the UCL, and their claim for fraud by omission. The Court dismissed with prejudice plaintiffs' claim for unjust enrichment. The Court denied defendant's motion to dismiss plaintiffs' claim for breach of implied warranty and the UCL claim insofar as it was based on that statute's unlawful conduct prong.

[2] Contemporaneously with its opposition to plaintiffs' motion for class certification, Harley-Davidson filed evidentiary objections. Plaintiffs filed their own evidentiary objections in conjunction with their reply. The Court has considered and rules on the objections to the testimony of Dr. David Limebeer for the reasons set forth below. To the extent the Court relies on other evidence to which the parties have objected, as reflected in this order, those objections are overruled. All remaining

filed a reply in support of their motion for class certification. On September 1, 2011, plaintiffs filed a motion to exclude the testimony of Harley-Davidson's expert, Dr. David H. Weir. Harley-Davidson opposed the motion on September 30, 2011. Plaintiffs replied on October 27, 2011. On September 30, 2011, Harley-Davidson filed a motion to exclude the expert report and testimony of plaintiffs' expert, Dr. David Limebeer. Plaintiffs' opposed the motion on October 19, 2011. Harley-Davidson replied on October 24, 2011. A hearing was held on January 23, 2012. After carefully considering the parites' arguments, the Court finds and concludes as follows.

II. BACKGROUND AND PROPOSED CLASSES

A. Factual Background

Plaintiffs Bruce and Wesley, citizens of California, are owners of Harley-Davidson motorcycles.[3] TAC ¶¶ 16, 23. According to plaintiffs, beginning in or before 2002, Harley-Davidson manufactured and sold touring motorcycles ("Class Vehicles") that had an alleged design defect in the form of an excessively flexible chassis. Id. ¶ 1. According to plaintiffs, the alleged defect causes "severe wobbling, weaving and/or instability," especially occurring when riders make sweeping turns, and travel at speeds above 55 miles per hour. Id. Plaintiffs contend that this instability causes "serious drivability problems," which are "noticeable, severe and unsafe." Id. ¶¶ 6, 13. Plaintiffs allege that had they and other class members known of the defective nature of the Class Vehicles, they would not have purchased or leased their motorcycles, or at least would have reduced the amount they were willing to pay for them. Id. ¶ 14.

According to plaintiffs, customer complaints, internal testing, and personal injury lawsuits have made Harley-Davidson aware of the alleged defect. Id. ¶¶ 55, 61. Plaintiffs allege that Harley-Davidson has "actively concealed and failed to disclose" to consumers the nature of the defect, and has not issued a recall in order to remedy the defect. Id. ¶¶ 5, 12, 55. Plaintiffs assert that several aftermarket safety kits have been created by third parties, and that these are available to consumers at a price of

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objections are overruled as moot.

[3] Bruce owns a 2008 Harley-Davidson Ultra Classic and Wesley owns a 2008 Harley-Davidson FLHT. TAC ¶¶ 16, 23.

approximately $400. Id. ¶¶ 10. However, plaintiffs aver that Harley-Davidson discourages owners and lessees from adding the safety kits to their vehicles by voiding the manufacturer's express warranty if they do so. Id. ¶¶ 20, 50.

B. Proposed Classes

Plaintiffs seek the certification of the following Classes and Subclasses:

Class I: All persons and entities residing in the State of California who purchased or leased any Class Vehicle.

Sub-Class: All members of Class I who are "consumers" within the meaning of Cal. Civ. Code § 1761(d) (the "CLRA Sub-Class").

Sub-Class: All members of Class I who purchased or leased their motorcycles in California ("The California Implied Warranty Sub-Class")

Class II: All persons and entities residing in and/or who purchased or leased any Class Vehicle in the State of Alaska, Colorado, Delaware, Hawaii, Louisiana, Nebraska, Nevada, New Jersey, Oklahoma, Pennsylvania, South Carolina, West Virginia, and the District of Columbia (the "Implied Warranty Class")

Class III: All persons and entities residing in California, Colorado, Delaware, Florida, Hawaii, Idaho, Kansas, Massachusetts, Missouri, Nevada, New Jersey, North Carolina, Vermont, Virginia, Washington, West Virginia, Wisconsin, and the District of Columbia, who purchased or leased any Class Vehicle (the "Express Warranty Class").

Mot. at 13.

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III. LEGAL STANDARD

A. Class Certification

"Class actions have two primary purposes: (1) to accomplish judicial economy by avoiding multiple suits, and (2) to protect rights of persons who might not be able to present claims on an individual basis." Haley v. Medtronic, Inc., 169 F.R.D. 643, 647 (C.D. Cal. 1996) (citing Crown, Cork & Seal Co. v. Parker, 462 U.S. 345 (1983)). Fed. R. Civ. P. 23 governs class actions. A class action "may be certified if the trial court is satisfied after a rigorous analysis, that the prerequisites of Rule 23(a) have been satisfied." Gen. Tel. Co. of the Sw. v. Falcon, 457 U.S. 147, 161 (1982).

To certify a class action, plaintiffs must set forth facts that provide prima facie support for the four requirements of Rule 23(a): (1) numerosity; (2) commonality; (3) typicality; and (4) adequacy of representation. Dunleavy v. Nadler (In re Mego Fir. Corp. Sec. Litig.), 213 F.3d 454, 462 (9th Cir. 2000) (internal quotations omitted). These requirements effectively "limit the class claims to those fairly encompassed by the named plaintiff's claims." Falcon, 457 U.S. at 155 (quoting Califano v. Yamasaki, 442, U.S. 682, 701 (1979)). In addition to meeting these requirements, plaintiff must also show that the lawsuit qualifies for class action status under one of the three alternatives set forth in Rule 23(b). Wal-Mart Stores, Inc. v. Dukes, 564 U.S. ---, ---, 131 S.Ct. 2541, 2548 (2011).

Rule 23(b)(3) requires a finding by the court "that questions of law or fact common to class members predominate over any questions affecting only individual members, and that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy." Fed. R. Civ. P. 23(b)(3). More than a pleading standard, Rule 23 requires the party seeking class certification to "affirmatively demonstrate . . . compliance with the rule–that is he must be prepared to prove that there are in fact sufficiently numerous parties, common questions of law or fact, etc." Dukes, 131 S.Ct. at 2551. This requires a district court to conduct "rigorous analysis" that frequently "will entail some overlap with the merits of the plaintiff's underlying claim." Id.

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B. Expert Testimony

Under Rule 702 of the Federal Rules of Evidence,

> If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise, if (1) the testimony is based upon sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case.

Fed. R. Evid. 702.

Prior to admitting expert testimony, the trial court must make "a preliminary assessment of whether the reasoning or methodology underlying the testimony is scientifically valid and of whether that reasoning or methodology properly can be applied to the facts in issue." Daubert v. Merrell Dow Pharms., Inc., 509 U.S. 579, 592-93 (1993). When considering expert testimony offered pursuant to Rule 702, the trial court acts as a "gatekeeper" by making a preliminary determination of whether the expert's proposed testimony is reliable. Elsayed Mukhtar v. Cal. State Univ., Hayward, 299 F.3d 1053, 1063 (9th Cir. 2002), amended by 319 F.3d 1073 (9th Cir. 2003). While the court has broad discretion in deciding whether this standard has been met, the court cannot shirk its gatekeeping duties. See General Elec. Co. v. Joiner, 522 U.S. 136, 142, 146 (1997); DSU Medical Corp. v. JMS Co., Ltd., 296 F. Supp. 2d 1140, 1146-48 (N.D. Cal. 2003). The trial court's role under Rule 702 applies "not only to testimony based on 'scientific' knowledge, but also to testimony based on 'technical' and 'other specialized knowledge.'" Kumho Tire Co., Ltd. v. Carmichael, 526 U.S. 137, 149 (1999).

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IV. DISCUSSION

A. Admissibility of Dr. Limebeer's Opinions

Plaintiffs' expert, Dr. Limebeer,[4] opines that a rider of a properly-designed motorcycle should not experience a weave-mode instability event when riding within the range of expected speeds.[5] Dr. Limebeer asserts that the Class Vehicles share a common design defect in the form of an "excessively flexible" chassis. Dr. Limebeer asserts that as a result of this excessive flexibility, the Class Vehicles fail to "damp out," or reduce, weave-mode oscillations to one half of their original amplitude within the time frame necessary to prevent them from becoming perceptible to the riders.[6] Dr. Limebeer opines that this defect can be remedied by adding a third tie-link in the vicinity of the swing arm pivot of the chassis.

Before deciding the admissibility of Dr. Limebeer's testimony, the Court must first determine the proper standard to apply at this stage of the proceedings.

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[4] Dr. Limebeer is a Professor of Control Engineering at the University of Oxford. He is the former head of the Control and Power Group and the former Head of the Department of Electrical and Engineering at Imperial College London. Dr. Limebeer has worked on motorcycle dynamics for approximately twenty years and has co-authored numerous articles on subject. Declaration of Dr. David Limebeer in Support of Plaintiffs' Opposition to Harley-Davidson's Mot. to Exclude Dr. Limebeer ¶¶ 2–4.

[5] All two-wheeled motorcycles exhibit three modes of inherent lateral instability: capsize (falling over when stationary unless supported); wobble (a motion of the steering assembly similar to the flutter of a grocery cart wheel); and weave (a combination of yaw (moving from left or right) and roll (tilting side to side)).

[6] Specifically, Dr. Limebeer asserts that a properly designed motorcycle should damp out oscillations to one half their original amplitude within two seconds across its operational capacity.

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1. Standard for Evaluating Expert Opinions at Class Certification Stage

Harley-Davidson contends that Rule 702 and Daubert apply with "full force" at the class certification stage. Mot. to Exclude Dr. Limebeer at 7 n. 5. In support of this position, Harley-Davidson relies primarily on Dukes and Am. Honda Motor Co. v. Allen, 600 F.3d 813, 815–16 (7th Cir. 2010) (per curiam). While it did not decide the issue, in Dukes, the Supreme Court noted that it "doubt[ed]" that Daubert did not apply at the certification stage of class-action proceedings. 131 S. Ct. at 2554. In American Honda, the Seventh Circuit held that where an expert's report or testimony is critical to class certification, "a district court must conclusively rule on any challenge to the expert's qualifications or submissions prior to ruling on the class certification motion." 600 F.3d at 815–16. Earlier this month, the Seventh Circuit reaffirmed its holding in American Honda, ruling that it was error for a district court to decline to rule on a Daubert motion at the class certification stage. Messner v. Northshore Univ. Healthsystem, No. 10-2514, 2012 U.S. App. LEXIS 731, *17 (7th Cir. Jan. 13, 2012).

Plaintiffs argue that a full Daubert inquiry into the reliability of Dr. Limebeer's opinions is not required or appropriate at the class certification stage. Opp'n to Mot. to Exclude Dr. Limebeer at 5. In support of this argument, plaintiffs assert that both the Eighth Circuit and the Third Circuit have recently reached precisely this determination. In In re Zurn Pex Plumbing Prods. Liability Litig., the Eighth Circuit reasoned that an "exhaustive and conclusive Daubert inquiry before the completion of merits discovery" is not appropriate due to the "inherently preliminary nature of pretrial evidentiary and class certification rulings." 644 F.3d 604, 613 (8th Cir. 2011). In Behrend v. Comcast Corp., the Third Circuit noted that "although the Supreme Court hinted that Daubert may apply for evaluating expert testimony at the class certification stage, it need not turn class certification into a mini-trial." 655 F. 3d 182, 204 n. 13 (3d Cir. 2011). The court added that it understood "the Court's observation [in Dukes] to require a district court to evaluate whether an expert is presenting a model which could evolve to become admissible evidence, and not requiring a district court to determine if a model is perfect at the certification stage." Id.

The Court believes that the approach adopted by the district court and affirmed by the Eighth Circuit in In re Zurn is the appropriate application of Daubert at the class

certification stage.[7] In that case, the district court applied a "tailored" or "focused" inquiry by which it assessed whether the experts' opinions, based on their areas of expertise and the reliability of their analysis of the available evidence, should be considered in deciding the issues relating to class certification. After conducting this inquiry, the district court denied the defendant's motion to strike the reports and testimony of plaintiffs' experts, but made clear that its rulings were not final and that its view of the issues might change as discovery continued and additional evidence was produced. In re Zurn, 267 F.R.D. 549, 556–67 (D. Minn. 2010). As noted above, in affirming the district court's use of this approach, the Eighth Circuit highlighted the preliminary nature of class certification proceedings. In re Zurn, 644 F. 3d at 613. The court explained that especially where discovery has been bifurcated into a class phase and a merits phase, an expert's analysis may have to adapt as gaps in the available evidence are filled in by merits discovery. Id. As in that case, here the Court granted defendants' request for bifurcated discovery. Accordingly, the opinions of Dr. Limebeer must be assessed in light of the evidence currently available. To the extent gaps in Dr. Limebeer's analysis can be filled using evidence obtained in merits discovery, the Court will consider at a later stage of this case whether his opinions are admissible.

2. Application of the "Focused" Inquiry to Dr. Limebeer's Testimony

Although the Court agrees with plaintiffs that a full Daubert inquiry that would be appropriate after discovery has been completed is not required at this stage, the Court nevertheless finds that Dr. Limebeer's testimony must be excluded.

In reaching this conclusion, the Court finds that Dr. Limebeer has not adequately explained the scientific basis for his proposed standard, which has not been accepted in the field of motorcycle dynamics. In this regard, the Court finds unavailing plaintiffs' contention that Harley-Davidson itself considers weave-mode damping when designing its motorcycles, and that other experts have highlighted the importance of oscillation

[7] The Court notes that the Ninth Circuit has not definitively resolved this issue. In Ellis v. Costco Wholesale Corp., 657 F. 3d 970, 982 (9th Cir. 2011), the Ninth Circuit observed that in deciding to admit plaintiffs' experts, the district court had "correctly applied the evidentiary standard" set forth in Daubert. However, the Ellis court did not hold that a full Daubert inquiry is required at the class certification stage.

reduction times for motorcycle stability.[8] Although this evidence supports that the damping out of weave-mode oscillations may be an important factor for motorcycle stability, it does not establish that Dr. Limebeer's rule requiring the reduction of weave-mode oscillations to one half of their original amplitude within two seconds is scientifically valid.[9]

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[8] While Dr. Limebeer opines that a properly designed motorcycle should damp out weave-mode oscillations to one half of their original amplitude within two seconds, Harley-Davidson's engineers apply a four-second standard when designing motorcycles, and the authors Dr. Limebeer cites evaluated the time to 1/e amplitude (1/2.78) rather than the time to one-half amplitude and opined that "[i]t is very difficult to establish an absolute standard of 'acceptable' . . . decay times," . . . "[m]ore than 2 seconds . . . could present a control problem to anyone other than an experienced rider" and " [a] 1 second decay time would be excellent." See Report of Dr. Limebeer ¶ 117 (quoting 1989 SAE paper of Roe and Thorpe on The Influence of Frame Structure on the Dynamics of Motorcycle Stability).

[9] The Court recognizes that Dr. Limebeer has previously offered similar testimony in state court against Harley-Davidson without objection. However, this fact does not compel the admission of his testimony in federal court. See United States v. Prime, 431 F.3d 1147, 1152 (9th Cir. 2005) ("The broad discretion and flexibility given to trial judges to determine how and to what degree the [Kumho Tire] factors should be used to evaluate the reliability of expert testimony dictate a case-by-case review.").

Further, that Dr. Limebeer formed his opinions exclusively for the purposes of litigation and has not published his "guidance rule" for peer review provide further support for his exclusion. See Daubert v. Merrell Dow Pharmaceuticals, Inc., 43 F.3d 1311, 1317 (9th Cir. 1995) ("Daubert II") (emphasizing the importance of "independent research" in evaluating the reliability of an expert's methodology and counseling courts to consider whether the expert's testimony relates to "matters growing naturally and directly out of research they have conducted independent of litigation, or whether they have developed their opinions expressly for the purposes testifying"); Daubert, 509 U.S. at 593 (noting that peer review creates an increased "likelihood that substantive flaws in methodology will be detected" and that the theory is "taken seriously by other[s].")

Additionally, the Court believes that Dr. Limebeer has not sufficiently accounted for other potential causes of the Class Vehicles' alleged instability. Dr. Limebeer cannot reliably opine that an excessively flexible chassis is the cause of the instability without considering and testing for other possible causes including the use of non-specified tires and leaky shocks. This failure provides an independent basis for excluding Dr. Limebeer's testimony. See, e.g., Clausen v. M/V NEW CARISSA, 339 F. 3d 1049, 1058 (9th Cir. 2003) ("The expert must provide reasons for rejecting alternative hypotheses 'using scientific methods and procedures' and elimination of those hypotheses must be founded on more than 'subjective beliefs or unsupported speculation.'") (citations omitted).

B. Commonality and Predominance

"Commonality requires the plaintiff to demonstrate that the class members have suffered the same injury . . . [and] [t]heir claims must depend upon a common contention . . . of such nature that it is capable of classwide resolution—which means that determination of its truth or falsity will resolve an issue that is central to the validity of each one of the claims in one stroke." Dukes, 131 S. Ct. at 2551 (citations and quotations omitted).

As noted above, Rule 23(b)(3) requires "that questions of law or fact common to class members predominate over any questions affecting only individual members." Fed. R. Civ. P. 23(b)(3). "Implicit in the satisfaction of the predominance test is the notion that the adjudication of common issues will help achieve judicial economy." See Valentino v. Carter-Wallace, Inc., 97 F.3d 1227, 1234 (9th Cir. 1996). Thus, the Court must determine whether common issues constitute such a significant aspect of the action that "there is a clear justification for handling the dispute on a representative rather than on an individual basis." 7A Charles Alan Wright, Arthur R. Miller, and Mary Kay Kane, Federal Practice & Procedure § 1778 (3d ed. 2005). For the proponent to satisfy the predominance inquiry, it is not enough to establish that common questions of law or fact exist, as it is under Rule 23(a)(2)'s commonality requirement -- the predominance inquiry under Rule 23(b) is more rigorous. Amchem Prods., Inc. v. Windsor, 521 U.S. 591, 624 (1997). The predominance question "tests whether proposed classes are sufficiently cohesive to warrant adjudication by representation." Id. at 623. The Court, therefore, must balance concerns regarding the litigation of issues common to the class

as a whole with questions affecting individual class members. In re Northern District of California, Dalkon Shield IUD Products Liability Litig., 693 F.2d 847, 856 (9th Cir. 1982).

The Court finds that plaintiffs have failed to establish that common questions of law and fact predominate over individual inquiries. This is so because once Dr. Limebeer's opinions have been excluded, as the Court has determined they must be, plaintiffs have failed to show that they have the ability to use common evidence by which they can demonstrate the defective nature of the Class Vehicles. See, e.g., Am. Honda Motor Co., 600 F. 3d at 815 (vacating certification of class where excluded expert formed the exclusive basis for plaintiffs' theory of defect). Plaintiffs' argument that class certification is required because Harley-Davidson concedes that the chassis is the same for each Class Vehicle ignores the failure to show that common evidence will ultimately be admissible to prove that the Class Vehicles share a common defect, and also is unavailing because it overlooks the Supreme Court's admonition that a "rigorous analysis" will often "entail some overlap with the merits of the plaintiff's underlying claim." Dukes, 131 S. Ct. 2551.[10]

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[10] Wolin v. Jaguar Land Rover N. Am., 617 F.3d 1168, 1173 (9th Cir. 2010), upon which plaintiffs rely, does not compel a contrary result. While it is true that in that case the Ninth Circuit recognized that claims asserting the existence of a common vehicle defect are well-suited for class certification, this case is fundamentally distinguishable from Wolin. The defendant in Wolin instituted an ad hoc response to warranty claims, which implied that the defendant acknowledged that there was in fact some defect causing premature tire wear. Id. at 1770–71. Here, by contrast, Harley-Davidson denies that there is any defect in the proposed Class Vehicles.

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V. CONCLUSION

In accordance with the foregoing, the Court hereby GRANTS defendants' motion to exclude the report and testimony of Dr. Limebeer without prejudice. The Court DENIES plaintiffs' motion for class certification without prejudice. Because Dr. Weir's opinions do not affect the Court's analysis, the Court DENIES plaintiffs' motion to exclude the report and testimony of Dr. Weir as moot.

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