

**IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLORADO**

Civil Action No.: 08-CV-00091-WYD-CBS

WAYNE WATSON and  
MARY WATSON

Plaintiffs,

v.

DILLON COMPANIES, INC., d/b/a KING SOOPERS, also d/b/a INTER-AMERICAN  
PRODUCTS, INC., et al.

Defendants.

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**DEFENDANTS' SUPPLEMENTAL BRIEF ON FED. R. EVID. 702 TO EXCLUDE OR LIMIT  
THE SPECIFIC CAUSATION TESTIMONY OF CECILE ROSE, M.D.**

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Defendants, Dillon Companies, Inc., Gilster-Mary Lee Corporation, Inter-American Products, Inc. and The Kroger Co., by and through counsel, GODFREY & LAPUYADE, P.C., hereby submit their Supplemental Brief on Fed. R. Evid. 702 to Exclude or Limit the Specific Causation Testimony of Cecile Rose, M.D.

**I. INTRODUCTION**

At the core of this motion lies the fact that the opinion testimony of Cecile Rose, M.D., whose testimony was heard at a hearing on April 18, 2012, by this Court, lacks sufficient scientific foundation for reasons that were not previously raised in relation to other experts or ruled upon by Judge Miller in his earlier Order (Doc. 652).

More particularly, the testimony of Dr. Rose is, by her own admission, not supported by any scientific testing that would support her opinions and contradicts the findings of a pathologist who objectively analyzed slides from a lung biopsy. A key to this motion is that Dr.

Rose admitted that the otherwise challenged Innova test data, which is the *only* evidence of diacetyl in measurable quantities within Plaintiff's home, played virtually no role in her findings, and that she disregarded the other known chemicals to which Plaintiff was exposed in his occupation as a carpet cleaner.

Dr. Rose admitted that even if Plaintiff suffers from *bronchiolitis obliterans* (hereinafter "B.O."), as opposed to hypersensitivity pneumonitis (hereinafter "H.P.") as originally diagnosed by a number of other health care providers, B.O. can result from a number of other causes besides diacetyl. With virtually no evidence of actual exposure to diacetyl at clinically significant levels and no reason to disregard the carpet cleaning chemicals such as polymethyl methacrylate to which Plaintiff was exposed (which has been linked to H.P.), she makes a non-scientific leap to the conclusion that diacetyl was somehow present and that it caused B.O. in the Plaintiff.

## II. SPECIFIC LEGAL ISSUE

This Court is well acquainted with the general requirements of Fed. R. Evid. 702 and its 4-part test. However, it is often true that scientific "opinions" are legally inadequate when there has not been adequate, or any, testing to validate the opinion. Particularly where test data is generally relied upon to identify a toxin, such as when one of several potential chemical toxins could be the cause of a presenting disease, the arbitrary decision to rely upon flawed and contradicted data, *or in this case no test data*, renders an opinion fundamentally inadmissible.

Ordinarily, a key question to be answered in determining whether a theory or technique is scientific knowledge that will assist the trier of fact will be whether it can be (and has been) tested. "Scientific methodology today is based on generating hypotheses and testing them to see if they can be falsified; indeed, this methodology is what distinguishes science from other fields of human inquiry." *Green* 645. *See also* C. Hempel, *Philosophy of Natural Science* 49 (1966) ("[T]he statements constituting a scientific explanation

must be capable of empirical test”); K. Popper, *Conjectures and Refutations: The Growth of Scientific Knowledge* 37 (5th ed. 1989) (“[T]he criterion of the scientific status of a theory is its falsifiability, or refutability, or testability”) (emphasis deleted).

*Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579, 593 (1993).

There is not only no way to verify or validate the opinion of Dr. Rose, the manifest weight of objective scientific evidence refutes her opinion. She has ignored the fact that the NIOSH – the industry standard – test data (which unlike the Innova test did not involve the use of contaminated instruments) resulted in *no detectible levels* of diacetyl in Plaintiff’s home. Supp. *Daubert* hr’g, 59:11-21, 60:16-22, Apr. 18, 2012.

This motion does not challenge the link between diacetyl and B.O. that was addressed in the plant worker cases or Judge Miller’s earlier Order (Doc. 652); rather, this motion challenges the assertion that B.O. can be attributed to diacetyl without at least some competent evidence of exposure to clinically significant levels of diacetyl. Particularly where exposure to other chemicals is admitted in the Plaintiff’s deposition, and Dr. Rose has admitted that these sensitizing agents can cause the same symptoms complained of by Plaintiff, her opinions are fundamentally in violation of Fed. R. Evid. and *Daubert, supra*.

Under Rule 702, the United States District Court, District of Colorado, stated, "The purpose of the Court's Rule 702 procedure is to quickly and efficiently adjudicate the foundational challenges arising from the particular grounds specified in Rule 702 (i.e. that the witness is qualified to render an opinion, *that the opinion is based on sufficient facts and data* [F.R.E. 702(b)], *that the opinion is the result of the application of reliable principles or methods* [F.R.E. 702(c)], and *that the witness has reliably applied the principles and methods to the facts* [F.R.E. 702(d)],). The procedure has been custom-designed to isolate and focus solely on the

foundational objections cognizable under Rule 702 and to resolve them by presentation of evidence.” *U.S. v. Crabbe*, 2007 WL 1704138, at \*2 (D. Colo. June 11, 2007) (emphasis added). *See also S.E.C. v. Nacchio*, 2008 WL 4587240, at \*4 (D. Colo. Oct. 15, 2008). Under *Nacchio*, Judge Krieger applies the Rule 702 requirement of sufficient facts and data as a “quantitative” test, and not “qualitative” test. *Nacchio*, 2008 WL 4587240 at \*4.

### III. LEGAL ANALYSES

Based on the directive from the Judge Daniel, Defendants will not include argument that has already been presented to the Court, unless necessary for background information or the argument is allowed under law. In addition, Defendants are not attempting to reverse Judge Miller’s orders on the Rule 702 and *Daubert* challenges in his Order on Motion for Summary Judgment and Motions to Exclude Testimony (Doc. 652).

Defendants do present the following legal analyses based on Judge Miller not having the benefit of Dr. Rose’s testimony at the supplemental *Daubert* hearing on April 12, 2012. For example, and notably, Judge Miller was not informed that Dr. Rose did not rely on the test data measured at Mr. Watson’s home, including both the NIOSH 2557 Method and Innova 1312 Monitor data. Supp. *Daubert* hr’g, 56:5-12, 23-25, 57:4-11, Apr. 18, 2012. Since Dr. Rose did not consider these available data in her diagnosis and opinions of Mr. Watson, yet Dr. Rose and the Plaintiffs had portrayed the quantitative similarities as part of their case in chief to link the alleged toxin exposure levels in Mr. Watson’s home to the data in the industrial facilities, Judge Miller was not asked to weigh this absence of dispositive scientific data in Dr. Rose’s opinions in his determinations. *Id.*; *Id.* at 82:14-22; Def. Ex. A-16, NJH-W/00662-669; Exhibit A, Rose Dep. 140:1-141:6, Apr. 7, 2010.

***A. Why Dr. Rose's Exclusion of the Test Data is Dispositive***

Dr. Rose propounded the theory in the governmental agency letters she sent on July 18, 2007 that a plausible connection exists between Mr. Watson's exposures to the diacetyl and worker exposures in the microwave popcorn manufacturing plants. In her deposition, Dr. Rose compared the "specific levels" of measurements from Mr. Watson's home to the mean exposure levels of work areas, including quality control areas, reported by NIOSH. Def. Ex. A-16, NJH-W/00662-669; Exhibit A, Rose Dep. 140:1-141:6, Apr. 7, 2010.

Judge Miller acknowledged Dr. Rose's reference to these measurements in his Order following the initial *Daubert* hearing: "She explains the reasons that she believes his illness was caused by butter flavoring, including . . . the measurement of diacetyl in his home." (Doc. 652, pp. 12-13.)

Judge Miller did not have the benefit of Dr. Rose's dispositive testimony that expressly and admittedly ignored available exposure measurements of the alleged toxin that Plaintiffs' claim caused Mr. Watson's pulmonary condition, when in fact, the Plaintiffs portrayed Dr. Rose's reliance on this physical data as a fundamental reason for her diagnosis and causation opinion. (Doc. 599, pp. 49-50.)

Defendants have separately briefed in detail the contamination issue related to the Innova data and shown the Court that the non-contaminated data produced no significant levels of diacetyl in Plaintiff's home. (Docs. 692 and 713.) It may seem obvious that Dr. Rose *now* claims that she placed no weight whatsoever on the test data, but whether she admits that it is important and is stuck with the contamination problem, or arbitrarily disregards the data to avoid this snare in the evidence, her opinions are inadmissible either way.

***B. Dr. Rose Based Opinion on Insufficient Facts and Data***

Dr. Rose did not rely on the available facts and data to make her diagnosis and determination of causation of Mr. Watson's pulmonary disease.

***1. Dr. Rose requested, then ignored, the testing results of the alleged toxin at Mr. Watson's home.***

First and foremost, Dr. Rose requested her colleague at National Jewish Health, John Martyny, PhD, "to do some testing to see if we could understand what the measurable exposures were with popping microwave popcorn." Supp. *Daubert* hr'g, 66:21-23, Apr. 18, 2012. Dr. Rose stated that she asked Dr. Martyny to take diacetyl measurements at Mr. Watson's home because "[w]e were really just interested in knowing what those levels were. . ." "in the context of popping popcorn in a house." *Id.* at 52:6-7; *see also Id.* at 55:24-25 (referencing "in the context of popping popcorn in a house"). She also said, "we were just doing these measurements in the home and in our little kitchen to see what the levels were." Dr. Rose continued, "we had been looking at levels in these companies; but we . . . didn't know what the levels were in the context of just popping popcorn in a home." *Id.* at 56:22-23.

On the other hand, Plaintiffs portrayed that Dr. Rose requested Dr. Martyny perform these measurements to determine the cause of Mr. Watson's pulmonary condition.

. . . Dr. Martyny's training and decades of experience are in doing exactly what he did at Dr. Rose's behest in this case: He went to Wayne Watson's home, and did testing to help determine what made him sick.

(Doc. 599, p. 46.)

Second and on the contrary, Dr. Rose was emphatic throughout the supplemental *Daubert* hearing that she did not rely on the sample measurements taken by John Martyny, PhD, at the

National Jewish Health Occupational-Medicine kitchen and Mr. Watson's home. When asked by Judge Daniel whether she relied on the sample measurements taken in Mr. Watson's home, Dr. Rose responded in the negative:

5    *THE COURT*: Let me ask you a question.  
 6    I want to pin you down here. You said that you didn't  
 7    rely on the diacetyl readings in Watson's home in any key way.  
 8    I want to make sure I understand what you're saying.  
 9    What are you saying? Tell me yes or no; did you rely  
 10   on the readings to form your opinions that are in this order,  
 11   or didn't you? And if so, why?  
 12   *THE WITNESS*: I did not.

\* \* \*

23   . . . I did not rely  
 24   on those levels to make the diagnosis or to express concern  
 25   about causation in the context of Mr. Watson.

\* \* \*

4    *THE COURT*: As you sit here today, please tell me in  
 5    your own words the extent to which, if at all, you used the  
 6    readings obtained from the testing in Watson's home to support  
 7    the opinions that you're giving in this case.  
 8    *THE WITNESS*: I would say honestly that I used the  
 9    results of testing in the Watsons' home almost not at all to  
 10   make the judgment that his lung disease was probably related to  
 11   his consumption -- his use of microwave buttered popcorn.

Supp. *Daubert* hr'g, 56:5-12, 23-25, 57:4-11, Apr. 18, 2012.

In order to clear up her indecisive statement with "almost not at all," Dr. Rose responded, "In terms of the diagnosis and my concern about the causal link to Mr. Watson's use of butter-flavored microwave popcorn, this data had no role whatsoever." *Id.* at 63:1-3. Moreover, Dr. Rose responded that she "did not" rely upon Dr. Martyny to make the diagnosis or the causation opinion of Wayne Watson. *Id.* at 81:18-24, 90:5-16.

Dr. Rose conveniently ignored the data from actual measurements sampled at Mr. Watson's home using the standard methodology used in the industrial facilities in addition to the real-time analyzer measurements. Dr. Rose admitted that the NIOSH 2557 Method was the standard used for measuring diacetyl in the flavor facilities:

16 THE COURT: When you say NIOSH methodology testing,  
 17 what are you talking about?  
 18 THE WITNESS: At the time that we were doing the  
 19 sampling, there -- NIOSH is the National Institute for  
 20 Occupational Safety and Health. And they had this method, I  
 21 think it was [2557] method that was sort of the standard  
 22 that we used.

Supp. *Daubert* hr'g, 60: 16-22, Apr. 18, 2012.

Dr. Rose stated that "there was some relationship between what the real-time Innova device measured and what the personal breathing samples and the area samples showed using the NIOSH method" with the sample measurements collected in the six flavor manufacturing facilities.<sup>1</sup> *Id.* at 53:7-10; *see also Id.* at 52:8-18. In response to whether she felt a level of comfort to see a correlation for more than one methodology of sampling and testing, Dr. Rose said, "In the context of preparing and publishing our results, yes, it was helpful that there was some comparability between the different methods." *Id.* at 53:11-16.

In comparison, Dr. Rose admitted that the testing performed in Mr. Watson's home with the Innova real-time analyzer data and the NIOSH data did not correlate because the "NIOSH methodology showed below detection levels." *Id.* at 59:11-18.

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<sup>1</sup> Note: Of the more than sixteen assessments performed by National Jewish Health for the flavor companies referenced in the paper co-authored by Drs. Rose, Martyny and Van Dyke, titled "Diacetyl Exposures in the Flavor Manufacturing Industry," pp. 679 and 683, only six flavor facilities were assessed with both the Innova 1312 monitor and the NIOSH 2557 Method; more than ten flavor facilities were assessed with only the NIOSH 2557 Method.



Because the data did not comport with her analysis, Dr. Rose ignored the sample measurements taken by Dr. Martyny with both the Innova 1312 monitor and the NIOSH 2557 Method. Dr. Rose did not incorporate the reliable data collected by the industry standard method used to sample measurements of diacetyl taken in Mr. Watson's home in her analyses.<sup>2</sup>

Therefore, Dr. Rose's opinion is based on insufficient facts and data as a matter of law.

***C. Dr. Rose did not Apply Reliable Principles or Methods***

Dr. Rose's opinion was not the result of applying reliable principles and methods to make her diagnosis and determination of causation of Mr. Watson's pulmonary disease.

***1. Dr. Rose did not apply her own methodology.***

Dr. Rose described her methodology in forming her diagnosis of a patient, however, she violates her own methodology in her diagnosis and causation opinion of Mr. Watson's pulmonary condition.

- 16 Q. You can infer the exposure from the presence of the
- 17 disease, even though there is a long list of alternate causes
- 18 for this disease?
- 19 A. Unfortunately, in the field of occupational lung disease,
- 20 you usually don't have access to quantifiable concentrations or
- 21 exposure levels. You have to take a good occupational or
- 22 environmental exposure history, and then you read the
- 23 literature, you understand as best as you can what the likely
- 24 exposure might be, and you make a diagnosis of a work-related
- 25 or exposure-related lung disease based on a reasonable degree
- 1 of medical probability.

Supp. *Daubert* hr'g, 67:16-68:1, Apr. 18, 2012.

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<sup>2</sup> Defendants do not waive their right to contest the sample measurements taken with the Innova 1312 monitor by not referencing this analytical instrument; the NIOSH 2557 Method was identified as the industry standard for measuring diacetyl in the industrial facilities.

As previously stated, Dr. Rose had “access to quantifiable concentrations or exposure levels” based on the sample measurements collected by Dr. Martyny at Mr. Watson’s home, popping his brand of microwave popcorn—that he saved—in his microwave. Thus, Dr. Rose did not need to “infer the exposure” because she had actual field measurements, including the standard method used in the industrial facilities – NIOSH 2557 Method. Instead, Dr. Rose elected to ignore a key element to the lack of specific causation – no detectable level of the very toxin, diacetyl, measured by her colleague in the home of the Plaintiff using the industry standard and methodology used in the very facilities for which she compares the Plaintiff’s symptoms.

According to her testimony, Dr. Rose incorporated Mr. Watson’s history of popping and consuming microwave popcorn in her methodology, plus “all the rest of the clinical findings, his pulmonary function testing, his -- the rest of his history, findings on high-resolution CT scanning of his chest, and the surgical lung biopsy that he had, as well as the progression of his disease were the factors on which I based my opinion about his condition.” Supp. *Daubert* hr’g, 57:20-58:1, Apr.18, 2012.

To the contrary, Dr. Rose did not review “the rest of the clinical findings” and “the rest of his history” because she did not obtain and review Mr. Watson’s medical records from 2000-2006 immediately leading up to his return to National Jewish Health when he was diagnosed with hypersensitivity pneumonitis. Supp. *Daubert* hr’g, 70:21-71:2, 71:10-11, Apr.18, 2012. Moreover, Dr. Rose stated, “You have to take a good occupational or environmental exposure history.” Supp. *Daubert* hr’g, 67:21-22, Apr. 18, 2012. Although Dr. Rose referenced Dr. Balkissoon’s medical notes regarding Mr. Watson’s exposures to carpet cleaning chemicals

during Mr. Watson's time in that industry, 1998-2000, Dr. Rose did not perform a thorough, or even good, "occupational or environmental history" during the subsequent period of 2000-2006 because she did not review Mr. Watson's medical records during this period. *Id.*; Supp. *Daubert* hr'g, 70:21-71:2, 71:10-11, Apr.18, 2012. Dr. Rose's "good occupational or environmental history" was limited to Mr. Watson's self-report and Dr. Balkissoon's evaluations for the 1998-2000 period. Exhibit A, Rose Dep. 54:19-55:7, Apr. 7, 2010; Supp. *Daubert* hr'g, 68:19-69:4, Apr.18, 2012.

Dr. Rose did not apply reliable principles and methods to make her diagnosis and determination of causation of Mr. Watson's pulmonary disease. Therefore, Dr. Rose's opinion is not reliable.

***2. Dr. Rose arbitrarily rejected other potential causes of B.O. without scientific reasoning.***

Dr. Rose did not consider all of the potential causes of B.O. to which Mr. Watson was exposed.

18 A. . . . bronchiolitis obliterans is a fairly rare condition.  
 19 But there are a number of things that can cause it besides  
 20 diacetyl.  
 21 Q. What are some of those things?  
 22 A. In terms of toxic chemicals that have been associated with  
 23 bronchiolitis obliterans, there is a reasonably long list. And  
 24 it includes ammonia, oxides of nitrogen, oxides of sulfur,  
 25 chlorine, and there were several -- you know, a number of other  
 1 chemicals that are on the list of things that have been  
 2 associated with -- typically in high exposures, where a person  
 3 develops respiratory distress, they recover from that acute  
 4 lung injury, and then they can go on to develop obliterative  
 5 bronchiolitis as a downstream process of the chemical inhalant.

Supp. *Daubert* hr'g, 39:18-40:5, Apr. 18, 2012.

Further, Dr. Rose callously described Mr. Watson's exposure to carpet cleaning chemicals that initially caused his pulmonary degradation as "remote."

- 3 But you knew that by the time he had gotten to you, it had  
 4 been recorded in his medical chart that he had been exposed to  
 5 carpet cleaning chemicals, including the polymethyl  
 6 methacrylate or related compound that you told the Court about  
 7 so far, correct?  
 8 A. I knew that he had been remotely exposed to chemicals in  
 9 he context of the carpet cleaning business, yes.  
 10 Q. When you said remotely, you understood, didn't you, that he  
 11 was rubbing those compounds into the carpet with his own two  
 12 hands without wearing a respirator, right?  
 13 A. At the time that he was in the carpet cleaning business, my  
 14 understanding was that he was doing the carpet cleaning, yes.  
 15 Q. So it wasn't that remote. I mean, it was down on his hands  
 16 and knees, and he's not wearing a respirator, and he's pouring  
 17 the stuff into the carpet, and he's rubbing brushes and  
 18 cleaning out stains with this stuff, right?  
 19 A. I don't remember all of those details, but I do remember  
 20 that he had done the carpet cleaning himself.  
 21 Q. You saw in Dr. Balkissoon's records that he had not worn a  
 22 respirator during that time, did you not?  
 23 A. I believe that's correct, yes.

Supp. *Daubert* hr'g, 73:22-74:23, Apr. 18, 2012.

As another example, Dr. Rose did not objectively investigate whether certain chemicals were associated with B.O., however, she dismissed their potential causative effect due to her belief.

- 19 Q. Can ketones cause a constrictive bronchiolitis?  
 20 A. Well, diacetyl is a diketone, so yes.  
 21 Q. Were some of the chemicals he was exposed to in  
 22 the carpet cleaning business ketones according to  
 23 Dr. Balkissoon's note?  
 24 A. According to Dr. Balkissoon's note -- well,  
 25 there was methyl ethyl ketones. So I've not heard of  
 1 MEK being associated with bronchiolitis, but it is a  
 2 ketone.  
 3 Q. So the potential is there for it to cause a

4 bronchiolitis obliterans, correct?  
 5 MR. CRICK: Object to the form.  
 6 A. I'm not aware of MEK being associated with  
 7 bronchiolitis obliterans.

Exhibit A, Rose Dep. 54:19-55:7, Apr. 7, 2010.

Dr. Rose arbitrarily rejected other potential causes of B.O. without applying reliable principles and methods to make her diagnosis and determination of causation of Mr. Watson's pulmonary disease. Therefore, Dr. Rose's opinion is not reliable.

***D. Dr. Rose did not Reliably Apply Principles and Methods to Case Facts***

Dr. Rose's basis of opinion for her diagnosis and causation of Mr. Watson's pulmonary condition is based on her differential diagnosis. The Tenth Circuit Court of Appeals includes differential diagnosis as a methodology employed by expert witnesses. "'Differential diagnosis' refers to the process by which a physician 'rule[s] in' all scientifically plausible causes of the plaintiffs injury. The physician then 'rules out' the least plausible causes of injury until the most likely cause remains." *Hollander v. Sandoz Pharm. Corp.*, 289 F.3d 1193, 1209 (10th Cir. 2002). Under *Daubert*, an expert opinion "must be supported by appropriate validation—i.e., 'good grounds,' based on what is known." *Daubert*, 509 U.S. at 590.

In cases where a "differential diagnosis has been deemed reliable, the party relying on the diagnosis has offered independently reliable evidence that the allegedly dangerous drug or substance had harmful effects." *Hollander*, 289 F.3d at 1210. Similarly, the party relying on the diagnosis must offer independently reliable evidence to rule out the least plausible causes in order for the differential diagnosis to be reliable.

"Under Rule 702, admissible expert testimony must be based on 'actual knowledge and 'not subjective belief or unsupported speculation.'"" *Squires ex. rel. v. Goodwin*, 10-CV-00309-

CBS-BNB, 2011 WL 5331583, at \*7 (D. Colo. Nov. 7, 2011). Dr. Rose did not “offer independently reliable evidence” or “good grounds” for ruling out the plausible causes of Mr. Watson’s injury. *See* Supp. *Daubert* hr’g, 73:22-74:23, Apr. 18, 2012; *see also* Exhibit A, Rose Dep. 54:19-55:7, Apr. 7, 2010. As an example, Dr. Rose admitted that none of her medical reports mention the studies discussed during her deposition. Supp. *Daubert* hr’g, 85:19-86:1, Apr. 18, 2012. Dr. Rose provided testimony at her deposition and the supplemental *Daubert* hearing, however, she provided opinions that were not validated by “independent reliable evidence.”

Plaintiff cannot bridge that gap merely by offering “the *ipse dixit*” of her own expert. *Cf. GE v. Joiner*, 522 U.S. 136, 146, 118 S.Ct. 512, 139 L.Ed.2d 508 (1997). *See also First Specialty Insurance Corp. v. Ward North America Holding, Inc.*, 2006 WL 6225115, at \*1 (D.Kan.2006) (noting that a trial court's gate-keeping function requires more than simply “taking the expert's word for it”).

*Squires*, 2011 WL 5331583 at \*8.

#### IV. CONCLUSION

The Court is urged to consider this motion in isolation of the legal arguments and prior rulings of Judge Miller in connection with separate arguments made with respect to different witnesses. Standing alone, this witness—Cecil Rose, M.D.—offers testimony that is scientifically unsupported, arbitrary and without a basis. She has no reliable way to attribute diacetyl to any condition in this particular Plaintiff, yet she has chosen to do so, ignoring in the process alternative diagnoses that were objectively verified through pathology slides and ignoring the admitted exposure to other chemicals, known to have been present, which are linked to the originally diagnosed condition.

If there had been a reliable and valid test that proved clinically significant levels of diacetyl in Plaintiff's home, and if there had been no alternative diagnosis or other chemical exposure, then her opinion would not fail in the respects outlined above. In this case, this witness proffers testimony that has these flaws, and it must therefore be excluded under Fed. R. Evid. 702.

WHEREFORE, Defendants move this court to exclude or limit the specific causation testimony of Cecile Rose, M.D., and preclude her from offering any opinions relating Plaintiff's B.O. to diacetyl exposure.

Respectfully submitted this 9th day of May, 2012.

GODFREY & LAPUYADE, P.C.

/s/ Brett M. Godfrey

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**CERTIFICATE OF SERVICE**

I hereby certify that on this 9th day of May, 2012, I electronically filed the foregoing with the Clerk of Court using the CM/ECF system, which will send notification of such filing to the following e-mail addresses:

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## Exhibit A

**AGREN BLANDO COURT REPORTING & VIDEO INC**

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLORADO

Case No. 08-CT-0091 WDM-CBS

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VIDEO DEPOSITION OF CECILE ROSE

April 7, 2010

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WAYNE WATSON, et al.

Plaintiffs,

vs.

DILLON COMPANIES, INC., et al.,

Defendants.

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Companies, Inc., Inter-American

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Glister-Mary Lee Corporation

AGREN BLANDO COURT REPORTING & VIDEO INC

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1 methacrylate which is an irritant and may be a  
2 sensitizer, although on the MSDS at that time it was not  
3 mentioned as a sensitizer.

4           There were other furniture and drapery  
5 compounds that contained solvents that can be irritant.  
6 And so there had been exposure to different, mainly,  
7 solvents but possibly some chemicals with sensitizing  
8 properties.

9           Q. When you say "sensitizing properties," what  
10 does that mean?

11          A. Sensitizing properties of chemicals means that  
12 those are chemicals that can create an immune  
13 reaction -- usually we're referring to the lung -- and  
14 may cause a person to develop asthma or, less likely,  
15 hypersensitivity pneumonitis and they didn't have it  
16 before.

17          Q. Can they cause a constrictive bronchiolitis?

18          A. Sensitizers? Typically not.

19          Q. Can ketones cause a constrictive bronchiolitis?

20          A. Well, diacetyl is a diketone, so yes.

21          Q. Were some of the chemicals he was exposed to in  
22 the carpet cleaning business ketones according to  
23 Dr. Balkissoon's note?

24          A. According to Dr. Balkissoon's note -- well,  
25 there was methyl ethyl ketones. So I've not heard of

AGREN BLANDO COURT REPORTING & VIDEO INC

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1 MEK being associated with bronchiolitis, but it is a  
2 ketone.

3 Q. So the potential is there for it to cause a  
4 bronchiolitis obliterans, correct?

5 MR. CRICK: Object to the form.

6 A. I'm not aware of MEK being associated with  
7 bronchiolitis obliterans.

8 Q. (By Mr. Stephenson) Was any further  
9 investigation done relative to Mr. Watson's consumption  
10 of microwave butter popcorn other than Dr. Martyny's  
11 trip to Mr. Watson's home?

12 A. Any further investigation?

13 Q. Right, to aid you in determining what --

14 A. Well, I think --

15 Q. -- was causing his condition?

16 A. I tried to get a little bit more information  
17 about the frequency and intensity of his use. But he  
18 told me that he had been using it for many -- you know,  
19 several years, and he often ate two or three bags a day  
20 and he enjoyed the odor. He liked the way it smelled.  
21 And tasted, of course. But I don't think other than  
22 that that we did anything else.

23 Q. He returned to see you approximately two months  
24 later. I guess it's about six weeks later in March of  
25 '07, correct?

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1 Q. (By Mr. Crick) Yes, ma'am. In your Paragraph  
2 6, you said that the results were comparable to those  
3 reported in the microwave oven exhaust area and the  
4 quality assurance unit of the popcorn manufacturing  
5 plant where affected workers were initially described.  
6 That would have been the Missouri Gilster-Mary Lee  
7 plant?

8 MR. MELICHAR: Object to form. Foundation.

9 MR. STEPHENSON: Join.

10 A. Yes. It was referring to those specific  
11 levels.

12 Q. (By Mr. Crick) And if you would look at that  
13 document which was marked earlier today --

14 MR. BRANT: Exhibit 3.

15 MR. CRICK: Thank you.

16 Q. (By Mr. Crick) -- at the Table 5 you were  
17 referencing earlier. There's a Table 5, Mean Exposure  
18 Levels by Work Area, November 2000, Missouri popcorn  
19 plant. Then below that is a table, Exposure Work Areas.  
20 And do you see, is there a reference here to quality  
21 control?

22 A. Yes.

23 Q. And do you understand that to be the area where  
24 microwave popcorn was cooked at the Gilster-Mary Lee  
25 plant?

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1 A. Yes, that's my understanding.

2 Q. And they showed a mean parts per million of  
3 0.35?

4 A. That's correct.

5 Q. That's what NIOSH reported?

6 A. (Deponent nods head.)

7 Q. You reported in these letters that you had no  
8 other plausible explanation for Mr. Watson other than  
9 butter flavoring and microwave popcorn, correct?

10 A. Yes, I did.

11 Q. Could you tell us about bronchiolitis  
12 obliterans? What exactly is that disease?

13 A. Bronchiolitis obliterans is an injury to the  
14 small airways or the bronchioles which are the part of  
15 the airway that is -- leads right down into the alveoli  
16 where gas exchange occurs. And in bronchiolitis  
17 obliterans you get a decrease in the diameter of the  
18 small airway either related to the formation of kind of  
19 polypoid plugs of postinflammatory tissue or related to  
20 the extrinsic constriction of the small airways related  
21 to injury.

22 Q. Now, bronchiolitis obliterans is not  
23 reversible, is it?

24 A. There are case reports of people who have  
25 responded to oral corticosteroids who have had