

UNITED STATES OF AMERICA
 BEFORE THE FEDERAL TRADE COMMISSION
 OFFICE OF THE ADMINISTRATIVE LAW JUDGES



In the Matter of

BENCO DENTAL SUPPLY CO.,
 a corporation,

HENRY SCHEIN, INC.,
 a corporation, and

PATTERSON COMPANIES, INC.
 a corporation,

Respondents.

Docket No. 9379

**COMPLAINT COUNSEL’S MOTION *IN LIMINE* TO EXCLUDE CERTAIN LATE
 PRODUCED EXHIBITS TO DR. LAWRENCE WU’S EXPERT REPORT¹**

At 9:26 pm on October 8, 2018—less than 12 hours before Dr. Lawrence Wu’s scheduled deposition in this matter—Respondent Patterson provided Complaint Counsel with seven new and previously undisclosed exhibits to Dr. Wu’s September 5, 2018 Expert Report (the “New Exhibits”).² Although purporting to be “amendments” to Dr. Wu’s report, three of these New Exhibits contain new analyses, and constitute a last-minute attempt by Patterson to respond to the rebuttal report of Complaint Counsel’s expert, Dr. Robert Marshall, via an untimely *de facto* sur-reply. This gambit stands in direct contravention of the Scheduling Order issued by the Court in this case. But this is more than a technical violation—Complaint Counsel is prejudiced by Patterson’s late submission in that Dr. Marshall will not have an opportunity to respond to the

¹ Complaint Counsel recognizes that motions *in limine* are generally disfavored by the Court. However, this motion relates to a serious procedural violation of the Scheduling Order, not necessarily the content of Dr. Wu’s belated analyses.

² The New Exhibits were provided without the related backup materials, which were only produced on Oct. 10, 2018 at the request of Complaint Counsel.

new analyses, and in that Complaint Counsel lacked adequate time to meaningfully consider the belated submission in its deposition of Dr. Wu. Therefore, Complaint Counsel respectfully requests that the Court exclude those New Exhibits containing substantive changes to the original analyses and calculations in Dr. Wu's Report, as detailed below.

Background

As required by the Scheduling Order, Complaint Counsel served Dr. Marshall's Report on August 10, 2018. Patterson served the Wu Report on September 5, 2018. Complaint Counsel served a rebuttal report by Dr. Marshall on September 25, 2018. The parties agreed to October 9, 2018 for Dr. Wu's deposition. Neither Patterson nor any other Respondent has moved the Court for leave to file an expert sur-reply.

On the evening of October 8, 2018 at 9:26 pm, just hours before Dr. Wu's deposition, Patterson disclosed the New Exhibits.³ Patterson did not provide a copy of the backup materials underlying these exhibits.⁴ The New Exhibits purport to be "amendments" to Exhibits 4, 5A, 5B, 5C, 12B, 13A, and 13B to the Wu Report. At his deposition, Dr. Wu testified that the New Exhibits reflect changes to his original calculations and data inputs, changes in the vendor relationships studied and reported, changes to the time periods analyzed, and the addition of new

³ See Exhibit 1 (email from Patterson's counsel Kristen Lloyd on October 8, 2018 at 9:26 PM Eastern Standard Time, disclosing the New Exhibits.)

⁴ See Section 19(f) of the Scheduling Order (requiring parties to produce "a copy of all data sets used by the expert, in native file format and processed data file format" and "all customized computer programs used by the expert in the preparation of the report or necessary to replicate the findings on which the expert report is based."). The backup materials, which Dr. Wu admitted at his deposition were readily available, were provided on the morning of Oct. 10, 2018.

data overlays.⁵ Dr. Wu also testified that he prepared the New Exhibits partially in response to the Marshall Rebuttal Report.⁶

On October 9, Complaint Counsel requested that Patterson provide the backup materials to the New Exhibits. Counsel for Patterson provided a copy of the backup materials to Complaint Counsel on the morning of October 10, 2018. Complaint Counsel is in the process of reviewing these materials.

Argument

Section 20 of the Scheduling Order states: “An expert witness’s testimony is limited to opinions contained in the expert report that has been previously and properly provided to opposing counsel.” Patterson has not complied with this rule, as Patterson did not properly or timely disclose the New Exhibits to Complaint Counsel. Instead, Patterson disclosed these exhibits the night before Dr. Wu’s deposition, and without any of the underlying data sets or programs. Without sufficient time or the underlying backup materials in hand, Complaint Counsel had no opportunity to sufficiently review the New Exhibits, let alone a fair opportunity to fully and fairly depose Dr. Wu regarding these new materials specifically and, more broadly, their impact on Dr. Wu’s overall opinions. Moreover, the New Exhibits contain previously undisclosed analyses that Complaint Counsel’s expert had no opportunity to consider in the Marshall Rebuttal Report because these analyses appeared for the first time just hours before Dr. Wu’s deposition. Calling these new analyses “supplements” ignores their contents: As one court noted “[c]ourts distinguish true supplementation (e.g. correcting inadvertent errors or omissions) from gamesmanship” and rejected “new and improved expert reports.” *Collinge v. Intelliquick*

⁵ See e.g., Exhibit 2 (CX8044); 48:2-25 (New Exhibit 5B); 50:1-25 (New Exhibit 13A); 50:23-51:22 (New Exhibit 13B).

⁶ Exhibit 2, at 42:16-21.

Delivery, Inc., No. 2:12-cv-00824 JWS, 2017 U.S. Dist. LEXIS 145164 at *5 (D. Ariz. Sept. 26, 2017).

The difference between the exhibits in Dr. Wu’s initial report and the New Exhibits is stark: in the New Exhibits, Dr. Wu uses different data sources and different time periods for his new analyses, analyses inconsistent with the exhibits in his report. The following chart illustrates the magnitude of the changes:

Exhibit Name	Original Analysis	New Analysis
5B	Time period: Jan. 2009-Jan. 2012 Firms Involved: Schein, Patterson	Time period: Jan. 2010-Dec. 2016 Firms Involved: Burkhart, Patterson
13B	Time period: Jan. 2009-Jan. 2012 Firms Involved: Schein	Time period: Feb. 2012-Dec. 2016 Firms Involved: Burkhart, Patterson
13A	Firms Involved: Burkhart	Firms Involved: Burkhart, Patterson

Practically speaking, the New Exhibits amount to an improper sur-rebuttal which Patterson has not sought leave to file. Even if Patterson had sought leave to file a sur-reply expert report, the Scheduling Order is clear that such leave should not be granted. Sur-reply expert reports are expressly limited to circumstances where the rebuttal report is “outside the scope of fair rebuttal.” (Scheduling Order at 3). No such claim has been—or could be—raised here. Courts have disallowed sur-rebuttal reports in similar circumstances. *See e.g., In re TFT-LCD Flat Panel Screens*, No. M-07-1827 SI, 2012 U.S. Dist. LEXIS 139156 at *78 (N.D. Cal. Sept. 26, 2012).

The Scheduling Order provides for advance disclosure of expert materials in order to avoid unfair surprise and allow the opportunity for a party to understand and analyze the expert’s

opinion prior to a deposition. Patterson has not acted in accordance with the clear commands of the Scheduling Order, and should be precluded from introducing Dr. Wu's last-minute new analyses.

Conclusion

Therefore, Complaint Counsel seeks to exclude Amended Exhibits 5B, 13A, and 13B, which contain substantive changes to Dr. Wu's original calculations, inputs, and analyses.⁷

Dated: October 12, 2018

Respectfully submitted,

/s/ Lin W. Kahn

Lin W. Kahn

Federal Trade Commission

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⁷ Complaint Counsel does not seek to exclude Exhibits 4, 5A, 5C, and 12B in the New Exhibits, which do not appear to contain substantive changes.

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PROPOSED ORDER

On October 10, 2018, Complaint Counsel filed a Motion *in Limine* to Exclude Certain Late Produced Exhibits to Dr. Lawrence Wu's Expert Report. Upon consideration of this Motion, and Respondent's Opposition to the Motion, this Court GRANTS Complaint Counsel's Motion.

ORDERED:

_____, 2018

D. Michael Chappell
Administrative Law Judge

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COMPLAINT COUNSEL'S MEET AND CONFER STATEMENT

Pursuant to Paragraph 4 of the Scheduling Order, Complaint Counsel met and conferred with counsel for Respondent Patterson Companies, Inc. on October 10, 2018 in a good-faith effort to resolve by agreement the issues raised by this Motion, and has been unable to reach such agreement.

Dated: October 10, 2018

Respectfully submitted,

/s/ Lin W. Kahn

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DECLARATION OF THOMAS DILLICKRATH IN SUPPORT OF COMPLAINT
COUNSEL'S MOTION *IN LIMINE* TO EXCLUDE CERTAIN LATE PRODUCED
EXHIBITS TO DR. LAWRENCE WU'S EXPERT REPORT

I, Thomas Dillickrath, declare as follows:

1. I am an attorney at the Federal Trade Commission, Complaint Counsel in this matter, and I have entered an appearance as Complaint Counsel in this matter.
2. I submit this Declaration in Support of Complaint Counsel's Motion *in Limine* to Exclude Certain Late Produced Exhibits to Dr. Lawrence Wu's Expert Report. I have personal knowledge of the facts stated in this declaration and, if called as a witness, could competently testify about them.
3. **Exhibit 1** is a true and correct copy of an email I received from Patterson's counsel Kristen Lloyd on October 8, 2018 at 9:26 PM Eastern Standard Time, disclosing the New Exhibits.

4. **Exhibit 2** is a true and correct copy of excerpts from the transcript of Dr. Lawrence Wu's Deposition in this matter, taken on October 9, 2018 in Washington, D.C.

Executed on October 10, 2018 in Washington, D.C.

Respectfully submitted,

/s/ Thomas Dillickrath

Thomas Dillickrath

EXHIBIT 1

From: Kristen.Lloyd@BakerBotts.com
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Subject: FTC Docket No. 9379: Amended Exhibits to Dr. Wu's Expert Report
Date: Monday, October 08, 2018 9:26:58 PM
Attachments: [image001.png](#)
[image002.png](#)
[image003.png](#)
[image004.png](#)
[image005.png](#)
[image006.png](#)
[image007.png](#)
[Amended Exhibits to Dr. Wu's Expert Report.pdf](#)

Counsel,

Attached please find a document containing amended exhibits to Dr. Lawrence Wu's expert report. Copies of the amended exhibits will be available tomorrow at Dr. Wu's deposition.

Thanks,

Kristen

Kristen Lloyd

Associate*

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*Admitted only in Maryland. Not admitted in the District of Columbia. Practicing under the supervision of principals in the firm who are members of the District of Columbia bar.

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EXHIBIT 2

Redacted in Entirety

CERTIFICATE OF SERVICE

I hereby certify that on October 12, 2018, I filed the foregoing document electronically using the FTC's E-Filing System, which will send notification of such filing to:

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The Honorable D. Michael Chappell
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I further certify that I delivered via electronic mail a copy of the foregoing document to:

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Counsel For Respondent Patterson Companies, Inc.

October 12, 2018

By: /s/ Lin W. Kahn
Attorney

CERTIFICATE OF ELECTRONIC FILING

I certify that the electronic copy sent to the Secretary of the Commission is a true and correct copy of the paper original and that I possess a paper original of the signed documents that is available for review by the parties and the adjudicator.

October 12, 2018

By: /s/ Lin W. Kahn
Attorney