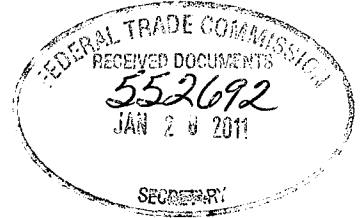


UNITED STATES OF AMERICA
FEDERAL TRADE COMMISSION
OFFICE OF ADMINISTRATIVE LAW JUDGES



In the Matter of)
)
)

The North Carolina Board of)
Dental Examiners,)
Respondent.)

DOCKET NO. 9343

**ORDER DENYING RESPONDENT'S MOTIONS TO STRIKE (IN PART)
EXPERT WITNESS REBUTTAL REPORTS
AND FOR LEAVE TO SUBMIT SURREBUTTAL REPORT**

I.

On January 13, 2011, pursuant to Rule 3.31A(a) of the Commission's Rules of Practice, 16 C.F.R. § 3.31A(a), Respondent filed two motions: (1) a Motion for Leave to Submit a Surrebuttal Expert Witness Report and to Strike (in Part) the Expert Witness Rebuttal Report of Dr. Martin Giniger ("Giniger"), one of Complaint Counsel's designated expert witnesses ("Giniger Motion"); and (2) a Motion to Strike (in Part) the Expert Witness Rebuttal Report of John Kwoka ("Kwoka"), another one of Complaint Counsel's designated expert witnesses ("Kwoka Motion") (collectively, "Motions"). Complaint Counsel filed an opposition to each Motion on January 18, 2011 (collectively, "Oppositions").

Having fully considered the Motions and the Oppositions, and for the reasons set forth below, both Motions are DENIED.

II.

A. Giniger Motion

Respondent contends that certain portions from the Giniger rebuttal report are outside the scope of fair rebuttal, and require relief in the form of striking or leave to file a surrebuttal report, as follows:

- page 1 – entire first paragraph
- page 4 – second full paragraph
- page 5 – first paragraph under heading III

- page 7 – first two full paragraphs and last partial paragraph through page 8 – first partial paragraph
- page 10 – last paragraph through page 13 – first partial paragraph
- page 17 – last full paragraph and last partial paragraph through page 18 – first partial and first full paragraph
- page 21 – last partial paragraph through page 24 – first partial paragraph

B. Kwoka Motion

Respondent’s Kwoka Motion seeks an order striking the following portions from the Kwoka rebuttal report:

- page 1 – all paragraphs under heading I
- page 2 – paragraphs 1 – 3 under heading II
- page 3 – paragraph 2
- page 5 – paragraphs 1 and 2 under heading III
- page 7 – last sentence of paragraph 4 through page 8 – first paragraph

The challenged portions from each rebuttal report, set forth above, will be referred to as the “Challenged Portions.”

C. Contentions of the Parties

In each Motion, Respondent asserts that the Challenged Portions should be stricken because they are outside the scope of fair rebuttal. However, Respondent fails to attach the rebuttal reports at issue, or the reports of any designated expert of Respondent to which the rebuttal reports are offered in response. Moreover, neither the Giniger Motion nor the Kwoka Motion offers any explanation, legal argument, or legal authority supporting a conclusion that the Challenged Portions are outside the scope of fair rebuttal.

Each of Complaint Counsel’s Oppositions argues that, under applicable legal standards, the Challenged Portions are not outside the scope of fair rebuttal. Rather, Complaint Counsel asserts, the Challenged Portions are permissible restatements of arguments from the initial expert report and/or material otherwise within the scope of fair rebuttal. In support of its argument, Complaint Counsel attached to its Opposition to the Giniger Motion the Giniger expert report, the Giniger rebuttal report, and the expert report of Respondent’s designated expert Dr. Van B. Haywood (“Haywood”), to which the Giniger rebuttal report relates. For the Opposition to the Kwoka Motion, Complaint

Counsel attached the Kwoka initial report, the Kwoka rebuttal report, and the initial report of Respondent's designated expert, David L. Baumer, which the Kwoka report seeks to rebut.

III.

Commission Rule 3.31A(a), upon which Respondent relies, states in pertinent part:

a rebuttal report shall be limited to rebuttal of matters set forth in a respondent's expert reports. If material outside the scope of fair rebuttal is presented, a respondent may file a motion . . . seeking appropriate relief with the Administrative Law Judge, including striking all or part of the report, [or] leave to submit a surrebuttal report by respondent's experts . . .

16 C.F.R. § 3.31A(a).

In addition, Commission Rule 3.31A(c) states:

Each report shall be signed by the expert and contain a complete statement of all opinions to be expressed and the basis and reasons therefor; the data, materials, or other information considered by the witness in forming the opinions; any exhibits to be used as a summary of or support for the opinions; the qualifications of the witness, including a list of all publications authored by the witness within the preceding 10 years; the compensation to be paid for the study and testimony; and a listing of any other cases in which the witness has testified as an expert at trial or by deposition within the preceding 4 years.

16 C.F.R. § 3.31A(c).

The Commission, when revising its Rules of Practice in 2009, explained that Rule 3.31A "allows complaint counsel's experts an opportunity to respond to respondents' expert reports." Federal Trade Commission, Interim final rules with request for comment, 74 FR 1804, 1814 (Jan. 13, 2009). In addition, the Scheduling Order clearly contemplates the use of rebuttal reports and provides: "Any such reports are to be limited to rebuttal of matters set forth in Respondent's expert reports. If material outside the scope of fair rebuttal is presented, Respondent will have the right to seek appropriate relief (such as striking Complaint Counsel's rebuttal expert reports or seeking leave to submit surrebuttal expert reports on behalf of Respondent)." Scheduling Order, July 15, 2010 at 2-3.

Although Rule 3.31A(a) does not define the scope of fair rebuttal, a commonly accepted definition of rebuttal evidence is that which is offered to disprove or contradict the evidence presented by an opposing party. *Black's Law Dictionary* 639 (9th ed. 2009). "The function of rebuttal is to explain, repel, counteract or disprove the evidence of the adverse party." *United States v. Finis P. Ernest, Inc.*, 509 F.2d 1256, 1263 (7th Cir. 1975); accord *Crowley v. Chait*, 322 F. Supp. 2d 530, 551 (D.N.J. 2004) (defining proper rebuttal

evidence at trial as that which will explain, repel, counteract or disprove the evidence of the adverse party). Evidence is outside the scope of fair rebuttal where it includes opinions on subjects not mentioned in opposing report or introduces new matters. *E.g., Duff v. Duff*, 2005 U.S. Dist. LEXIS 46111, at *16-17 (E.D. Ky. Nov. 14, 2005).

Respondent has failed to fulfill its burden of demonstrating that any of the Challenged Portions in either the Giniger or the Kwoka report are outside the scope of fair rebuttal. In addition, an examination of each rebuttal report at issue, in the context of each expert's initial report, each opposing expert report, and the foregoing applicable legal standards, indicates that the Challenged Portions are not outside the scope of fair rebuttal. Therefore, there is insufficient basis for granting Respondent any relief under Rule 3.31A(a), including striking the Challenged Portions, as requested in each Motion, or granting Respondent leave to submit a surrebuttal report, as requested in Respondent's Giniger Motion.

An analysis of the Challenged Portions follows.

A. Giniger Report

Page 1 – entire first paragraph

This is an introductory paragraph summarizing the portions of the Haywood report that Giniger disputes and the general nature of the disputes. Thus, it is not outside the scope of fair rebuttal. Rule 3.31A(a). The portion of the paragraph in which Giniger reintroduces himself and his role in the matter, as described in the initial report, is not prohibited by Rule 3.31A.

Page 4 – second full paragraph

This paragraph summarizes Giniger's qualifications, as set forth in the initial report. Although Rule 3.31A(c) states that a rebuttal report need not include any information already included in the initial report of the witness, nothing in Rule 3.31A prohibits a rebuttal report from including or summarizing any information previously included in an initial report, 16 C.F.R. § 3.31A(c). Moreover, Respondent does not assert that this paragraph contains new material or constitutes an improper supplement to Giniger's initial report. *Cf. Cooper Tire & Rubber Co. v. Farese*, 2008 U.S. Dist. LEXIS 96729, at *4 (N.D. Miss. Nov. 26, 2008) (holding that on motion to strike rebuttal report, court must determine whether the report is a rebuttal, an inappropriate attempt to supplement his initial report, or an entirely new opinion); *Duff*, 2005 U.S. Dist. LEXIS 46111, at *16-17 (E.D. Ky. Nov. 14, 2005) (noting that evidence is outside the scope of fair rebuttal where it includes opinions on subjects not mentioned in opposing report or introduces new matters).

Page 5 – first paragraph under heading III

This Challenged Portion states only: "The scope of my work in this matter and my

compensation are as described in my initial Report.” As noted above, although Rule 3.31A(c) excuses a rebuttal report from the general requirement that each expert report set forth the compensation to be paid, nothing in Rule 3.31A prohibits including this summary information.

Page 7 – first two full paragraphs and last partial paragraph, and Page 8 – first partial paragraph

These paragraphs explain, criticize, and/or seek to contradict certain assertions and conclusions in the Haywood report. For example, Giniger asserts that certain of Haywood’s opinions are consistent with Giniger’s; criticizes the bases for Haywood’s assertions concerning the danger of non-dentist teeth whitening, and posits data and reasoning Giniger believes disprove Haywood’s opinions in this regard. Such matters are not outside the scope of fair rebuttal. *Black’s Law Dictionary, supra; Ernest*, 509 F.2d at 1263; *Crowley*, 322 F. Supp. 2d at 551.

Page 10 – last paragraph through page 13 – first partial paragraph

Similar to the Challenged Portions on pages 7 and 8, the Challenged Portions on pages 10-13 also explain, criticize, and/or seek to contradict or disprove various opinions in the Haywood report and articles relied upon by Haywood in his report and, accordingly, these paragraphs are not outside the scope of fair rebuttal. *Black’s Law Dictionary, supra; Ernest*, 509 F.2d at 1263; *Crowley*, 322 F. Supp. 2d at 551. Moreover, Respondent does not assert that any of the information in these Challenged Portions constitutes new opinion or an improper supplement. *Cf. Cooper Tire & Rubber*, 2008 U.S. Dist. LEXIS 96729, at *4; *Duff*, 2005 U.S. Dist. LEXIS 46111, at *16-17.

Page 17 – last full paragraph and last partial paragraph through page 18 – first partial and first full paragraph

Once again, these paragraphs criticize and/or seek to contradict or disprove opinions in the Haywood report. For example, these paragraphs cite various sources Giniger believes are contrary to Haywood’s opinion regarding the danger of non-dentist teeth whitening and attempt to rebut those opinions with Giniger’s own opinions and sources. These matters are not outside the scope of fair rebuttal. *Black’s Law Dictionary, supra; Ernest*, 509 F.2d at 1263; *Crowley*, 322 F. Supp. 2d at 551. Again, Respondent does not assert that any of the information in these Challenged Portions constitutes new opinion or an improper supplement. *Cf. Cooper Tire & Rubber*, 2008 U.S. Dist. LEXIS 96729, at *4; *Duff*, 2005 U.S. Dist. LEXIS 46111, at *16-17.

Page 21 – last partial paragraph through page 24 – first partial paragraph

Finally, these paragraphs also explain, criticize, and/or seek to contradict or disprove opinions in the Haywood report. In general, these paragraphs address Haywood’s opinions concerning consumer confusion in the teeth whitening market and proffer data and opinion in an effort to rebut Haywood’s opinions in this regard. These matters are not

outside the scope of fair rebuttal. *Black's Law Dictionary, supra; Ernest*, 509 F.2d at 1263; *Crowley*, 322 F. Supp. 2d at 551. Moreover, Respondent does not assert that any of the information in these Challenged Portions constitutes new opinion or an improper supplement. *Cf. Cooper Tire & Rubber*, 2008 U.S. Dist. LEXIS 96729, at *4; *Duff*, 2005 U.S. Dist. LEXIS 46111, at *16-17.

B. Kwoka Report

Page 1 – all paragraphs under heading I

These are introductory paragraphs in which Kwoka summarizes the opinions in his initial report and the bases for his critique of the Baumer report. This is not outside the scope of fair rebuttal. Rule 3.31A(a). In addition, although Rule 3.31A(c) states that a rebuttal report need not include any information already included in the initial report of the witness, nothing in Rule 3.31A prohibits a rebuttal report from including or summarizing any information previously included in an initial report. 16 C.F.R. § 3.31A(c).

Page 2 – paragraphs 1 – 3 under heading II, and page 3 – paragraph 2

In these paragraphs, Kwoka first summarizes his opinion set forth in his initial report that Board members have an economic interest in the regulation of teeth whitening services by non-dentists. As noted above, repeating this information to put his opinion in context is not prohibited by Rule 3.31A. In the succeeding paragraphs, Kwoka purports to summarize Baumer's opinions and notes the points upon which it appears to Kwoka that he and Baumer are in agreement. This is not outside the scope of fair rebuttal. *Black's Law Dictionary, supra; Ernest*, 509 F.2d at 1263; *Crowley*, 322 F. Supp. 2d at 551.

Page 5 – paragraphs 1 and 2 under heading III

These paragraphs begin with Kwoka's summary of the opinion in his initial report that there is harm to consumers from the exclusion of non-dentists from the provision of teeth whitening services. This is not improper material for a rebuttal report. Rule 3.31A. Kwoka then purports to summarize Baumer's opinion on the same subject, and contends that Baumer actually agrees with Kwoka. These paragraphs are not outside the scope of fair rebuttal. *Black's Law Dictionary, supra; Ernest*, 509 F.2d at 1263; *Crowley*, 322 F. Supp. 2d at 551.

Page 7 – last sentence of paragraph 4, and page 8 – first paragraph


These Challenged Portions are part of a larger section of the Kwoka rebuttal report in which Kwoka claims that Baumer erroneously charges Kwoka with using a cartel model in analyzing the Board and its actions with regard to non-dentist provided teeth whitening services. These portions appear to be within the scope of fair rebuttal and, moreover, Respondent does not contend that these portions contain new material or constitute an improper supplement to Kwoka's initial report. *Cf. Cooper Tire & Rubber Co. v. Farese*, 2008 U.S. Dist. LEXIS 96729, at *4 (N.D. Miss. Nov. 26, 2008) (holding that on motion to

strike rebuttal report, court must determine whether the report is a rebuttal, an inappropriate attempt to supplement his initial report, or an entirely new opinion); *Duff*, 2005 U.S. Dist. LEXIS 46111, at *16-17 (noting that evidence is outside the scope of fair rebuttal where it includes opinions on subjects not mentioned in opposing report or introduces new matters).

IV.

After full consideration of the Motions and the Oppositions, and for the reasons set forth herein: (1) Respondent's Motion for Leave to Submit a Surrebuttal Expert Witness Report and to Strike (in Part) the Expert Witness Rebuttal Report of Dr. Martin Giniger is DENIED; and (2) Respondent's Motion to Strike (in Part) the Expert Witness Rebuttal Report of John Kwoka is also DENIED.

ORDERED:



D. Michael Chappell
Chief Administrative Law Judge

Date: January 28, 2011