



to two lengthy stays.<sup>1</sup> After a stay from July 2018 to March 2019, Respondent's deposition of Dr. Dutta was scheduled to take place by August 15, 2019. However, this administrative proceeding was again stayed on July 29, 2019 and that deposition did not take place.

On February 27, 2020, Dr. Dutta informed Complaint Counsel that she was leaving the FTC to take a position in the private sector, and that she would be unable to serve as an expert witness for Complaint Counsel after April 24, 2020. Shortly thereafter, Complaint Counsel notified Respondent of this development.

These proceedings recommenced on February 12, 2021, with an order from the Commission lifting the stay and setting trial for a date nine weeks thereafter, April 20, 2021. The Fifth Revised Scheduling Order, issued upon the joint request of the parties on February 19, 2021, set March 19, 2021 as the deadline for conducting expert depositions.

On February 23, 2021, Complaint Counsel disclosed to Respondent the identity of its substitute economic expert, Dr. David Osinski, and provided a copy of his report ("Osinski Report"). Respondent informed Complaint Counsel that it consented to the substitution of Dr. Osinski for Dr. Dutta, to the extent Dr. Osinski would be adopting Dr. Dutta's expert reports, but that Respondent opposed the introduction of additional analyses from Dr. Osinski at this point in the trial schedule.

### III.

Respondent acknowledges in its Opposition that Complaint Counsel has good cause to substitute the identity of its economic expert and does not object to paragraphs 1-12 of the Osinski Report. Opposition at 1, 7. Paragraphs 1 through 9 of the Osinski Report address Dr. Osinski's qualifications and other introductory points. In paragraphs 10 through 12, Dr. Osinski summarizes his conclusion that Dr. Dutta's opinions are "economically sound"; expresses his agreement with Dr. Dutta's opinions as expressed in Dr. Dutta's opening and rebuttal reports; and adopts both the Dutta Report and the Dutta Rebuttal Report in full. Motion Ex. D (Osinski Report) at 5.

Respondent objects to the remainder of the Osinski Report (paragraphs 13-14 of section II, and sections III-V in their entirety). In paragraph 13, Dr. Osinski discloses that he conducted certain "econometric analyses utilizing the data considered by Drs. Dutta and Langefeld." Paragraph 14 summarizes Dr. Osinski's conclusions based on those analyses and how they rebut the opinions and conclusions of Respondent's expert, Dr. Langefeld. Osinski Report at 6. Sections III through V consist of 14 pages, including 4 tables, detailing Dr. Osinski's econometric analyses and describing how these analyses refute Dr. Langefeld. Osinski Report at 7-20. *E.g.*, section III (analyzing data using different "alternative" benchmark than that used by Dr. Dutta in order to rebut Dr. Langefeld's criticisms of Dr. Dutta's appraisal fee analysis); section IV (identifying error in Dr. Langefeld's correlation analysis of fees charged by appraisal management companies ("AMCs") vs. non-AMC's, and running "corrected" alternative

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<sup>1</sup> The administrative proceeding was stayed from July 2017 through November 2017, July 2018 through March 2019, and July 2019 through February 2021.

analysis); section V (describing Dr. Osinski's quantitative analysis allegedly rebutting Dr. Langenfeld's conclusion that higher appraisal fees signify higher quality appraisals).

Because Respondent agrees there is good cause and consents to the substitution of Dr. Osinski for Dr. Dutta as Complaint Counsel's economic expert witness, it is unnecessary to analyze whether there is good cause for the substitution. *See* 16 C.F.R. § 3.31A(f) ("The Administrative Law Judge may, upon a finding of good cause, alter the pre-hearing schedule" for expert discovery). *See also* 16 C.F.R. § 3.21(c)(2) ("The Administrative Law Judge may, upon a showing of good cause, grant a motion to extend any deadline or time specified in th[e] scheduling order other than the date of the evidentiary hearing.").

"Even if a substitution is allowed, however, courts generally limit the scope of the testimony that may be given by the substitute expert." *Lincoln Nat'l Life Ins. Co. v. Transamerica Fin. Life Ins. Co.*, No. 1:04-CV-396, 2010 U.S. Dist. LEXIS 103744, at \*6 (N.D. Ind. Sep. 30, 2010) (collecting cases).<sup>2</sup> As a general matter, the substitute expert is limited "to the subject matter and theories already espoused by the former expert . . . 'without meaningful changes.'" *Id.* at \*6-7. (quoting *Morel v. Daimler-Chrysler Corp.*, 259 F.R.D. 17, 22 (D.P.R. 2009)). The substitute expert need not be limited to simply adopting the prior expert's conclusions "verbatim." *Lincoln Nat'l*, 2010 U.S. Dist. LEXIS 103744, at \*8. The substitute expert may "express his opinions in his own language after reviewing the evidence and performing whatever tests prior experts on both sides were allowed to perform." *Morel*, 259 F.R.D. at 22. Ultimately, the purpose is to put litigants "in as good a position as they would have held" had the prior expert performed as expected; substitution is not intended to allow litigants to obtain a better position with respect to expert testimony. *Adams v. Cooper Indus.*, No. 03-476, 2007 U.S. Dist. LEXIS 99057, at \*8 (E.D. Ky. Apr. 5, 2007). *Accord U.S. ex rel. Agate Steel, Inc. v. Jaynes Corp.*, No. 2:13-CV-01907-APG-NJK, 2015 U.S. Dist. LEXIS 45379, at \*5-6 (D. Nev. Apr. 6, 2015) ("The purpose of allowing substitution of an expert is to put the movant in the same position it would have been in but for the need to change experts; it is not an opportunity to designate a better expert."); *Synygy, Inc. v. ZS Assocs.*, No. CIV.A. 07-3536, 2015 U.S. Dist. LEXIS 99362, at \*8 (E.D. Pa. July 30, 2015).

Respondent argues that the challenged portions of the Osinski Report reflect analyses and opinions that go beyond the permissible scope of substitution, and that through Dr. Osinski's report, Complaint Counsel seeks to supplement Dr. Dutta's rebuttal report. In support, Respondent highlights that the Osinski Report includes 3 new econometric analyses – including at least 14 new regressions or correlations and additional challenges to the opinions of

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<sup>2</sup> FTC Rules regarding expert disclosures in Rule 3.31A are similar to those provided under the Federal Rules of Civil Procedure 26(e). *Compare* 16 C.F.R. § 3.31A(c) (requiring expert report to include among other things "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; [and] any exhibits to be used as a summary of or support for the opinions; . . .") with Fed. R. Civ. P. 26(a)(2)(B)(i)-(iii) (providing that expert report "must contain" a complete statement of all opinions the witness will express and the basis and reasons for them; the facts or data considered by the witness in forming them; any exhibits that will be used to summarize or support them). *See also* Fifth Revised Scheduling Order, Additional Provision 18(d) ("Each expert report shall include a complete statement of all opinions to be expressed and the basis and reasons therefor; the data or other information considered by the expert in forming the opinions; [and] any exhibits to be used as a summary of or support for the opinions. . ."). Accordingly, federal cases are relevant. *In re LabMD, Inc.*, 2014 FTC LEXIS 2, \*5 n.3 (Jan. 16, 2014).

Respondent's expert, Dr. Langenfeld – and results in 20 pages of new analyses. Respondent further argues that allowing such supplementation would be prejudicial, noting that Complaint Counsel provided the Osinski Report on February 23, 2021, a little over three weeks before the March 19, 2021 deadline set in this case for completion of expert depositions, and asserts that countering Dr. Osinski's work in preparation for deposition and trial will require substantial effort and cost, including additional expert fees and attorney fees.

According to Complaint Counsel, sections III through V of Dr. Osinski's report reflect Dr. Osinski's independent evaluation and analyses of Dr. Dutta's rebuttal report and critiques of Dr. Langenfeld, and are permissible because these analyses involve the same subject matter as that addressed by Dr. Dutta and do not express any opinions contrary to Dr. Dutta. Complaint Counsel further asserts that the time period remaining until the expert deposition deadline and the evidentiary hearing gives Respondent ample time to prepare, and therefore allowing Dr. Osinski to testify as set forth in his report will not prejudice Respondent.

#### IV.

Having reviewed and considered the Osinski Report, applicable authorities, and the assertions and arguments of the parties, Complaint Counsel will be permitted to substitute Dr. Osinski for Dr. Dutta as its economic expert witness. However, Complaint Counsel's argument that the opinions and analyses identified in paragraphs 13 and 14 and sections III through V of the Osinski Report should be permitted because they merely "present[] and support[]" Dr. Dutta's opinions is unpersuasive. Rather, Dr. Osinski's additional analyses appear to supplement and enhance Dr. Dutta's analyses, which would require Respondent to invest time and resources in order to respond. This potential prejudice to Respondent is compounded by the facts that both the March 19, 2021 expert discovery deadline and the April 20, 2021 trial date are quickly approaching. Extending these dates in order to mitigate the prejudice is not an appropriate alternative, given the already lengthy delays that have affected this case.

Accordingly, the Motion is GRANTED IN PART, and it is hereby ORDERED that Complaint Counsel may substitute Dr. David Osinski as its economic expert witness and may replace its prior expert disclosures with the amended witness list designating Dr. Osinski, as requested by Complaint Counsel. Except as set forth herein, Complaint Counsel's Motion, including without limitation the request to amend its expert disclosures to include paragraphs 13 and 14, and sections III through V of the Osinski Report, is DENIED.

ORDERED:



D. Michael Chappell  
Chief Administrative Law Judge

Date: March 8, 2021