

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

In the Matter of)	
)	
Illumina, Inc.,)	
a corporation,)	Docket No. 9401
)	
and)	
)	
GRAIL, Inc.,)	
a corporation,)	
)	
Respondents.)	

**ORDER GRANTING RESPONDENTS’ MOTION FOR
LEAVE TO SUBSTITUTE A REPLACEMENT EXPERT WITNESS**

I.

On September 28, 2021, Respondents Illumina, Inc. (“Illumina”) and GRAIL, Inc. (“GRAIL”) (collectively, “Respondents”) filed a Motion for Leave to Substitute a Replacement Expert Witness for Dr. Robert D. Willig (“Motion”). On October 5, 2021, Federal Trade Commission (“FTC”) Complaint Counsel filed an opposition to the Motion (“Opposition”).

On October 7, 2021, Respondents filed a motion for leave to file a reply to the Opposition, together with a proposed reply (“Motion for Leave”). The Motion for Leave is DENIED.¹

Respondents’ Motion is GRANTED, as explained below.

II.

The evidentiary hearing in this matter commenced on August 24, 2021. The evidentiary hearing was recessed on September 24, 2021 to enable completion of certain trial depositions

¹ Pursuant to FTC Rule 3.22(d), a reply “shall be permitted only in circumstances where the parties wish to draw the Administrative Law Judge’s . . . attention to recent important developments or controlling authority that could not have been raised earlier in the party’s principal brief.” 16 C.F.R § 3.22(d). Respondents’ proposed reply does not meet this standard.

and resolution of a discovery dispute with a nonparty. The issue addressed by this Motion was raised in court on September 17, 2021 and the Motion was filed shortly thereafter.

Respondents retained Dr. Willig to serve as an expert witness in this matter in the spring of 2021. Dr. Willig submitted an expert witness report on July 16, 2021. Dr. Willig provided a discovery deposition on August 21, 2021. By stipulation of the parties, Dr. Willig's expert witness report and deposition transcript are in evidence. Complaint Counsel's expert witness, Dr. Fiona Scott Morton, submitted an expert witness report on July 2, 2021 and a rebuttal expert witness report on July 26, 2021, and provided a trial deposition on September 16, 2021.

For the reasons that have been provided by Respondents, Dr. Willig is not able to testify at trial or to provide a trial deposition in lieu of a live appearance at trial. Respondents, therefore, seek leave to designate a substitute expert witness for Dr. Willig. Respondents propose that the substitute expert witness will provide a brief expert witness report, containing his credentials, disclosing his rate, attaching his *curriculum vitae*, and stating that he adopts the opinions of Dr. Willig; and that the substitute expert witness will also provide a discovery deposition followed by a trial deposition, limited to the testimony that Dr. Willig would have been permitted to give.

Although Respondents represent, on the one hand, that the substitute expert witness will be limited to the opinions of Dr. Willig, Respondents also assert that the substitute expert witness will respond to the trial deposition testimony and rebuttal expert witness report of Dr. Scott Morton, both of which were completed after Dr. Willig submitted his expert witness report.

Complaint Counsel asserts that Dr. Willig's opinions have already been admitted into evidence in the form of his expert witness report and that if Dr. Willig had testified at trial via trial deposition, his trial testimony would have been limited to the contents of his expert witness report and the basis for those opinions contained therein. Complaint Counsel further argues that Respondents seek to have the new expert witness testify on the basis of someone else's expert witness report for the stated purpose of soliciting surrebuttal testimony.

III.

Based on the reasons provided for Dr. Willig's substitution, and Respondents' diligence in seeking leave to substitute, Respondents have demonstrated good cause to permit Respondents to designate a new expert witness to provide trial testimony as a substitute for Dr. Willig. Regarding the permissible scope of testimony, however, the substitute expert witness stands in the shoes of Dr. Willig and the substitute expert's testimony is limited in same manner as Dr. Willig's would be.

FTC Rules require an expert to disclose, through an expert witness report, "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;" 16 C.F.R. § 3.31A(c). *See also* 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 relied

on by the expert in forming the opinions; [and] any exhibits to be used as a summary of or support for the opinions . . .”); Fed. R. Civ. P. 26(a)(2)(B)(i)-(iii) (providing that an expert witness report “must contain” a complete statement of all opinions the expert 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). To avoid prejudicial surprise, therefore, an expert’s testimony is limited to the opinions and bases disclosed in the expert witness report.

Where, as here, substitution is allowed, “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).² As explained in *In re Louisiana Real Estate Appraisers Board*, 2021 FTC LEXIS 12, at *5-6 (Mar. 8, 2021):

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.”); *Syngy, Inc. v. ZS Assocs.*, No. CIV.A. 07-3536, 2015 U.S. Dist. LEXIS 99362, at *8 (E.D. Pa. July 30, 2015).

FTC rules do not permit a respondent to submit an expert surrebuttal witness report, except upon leave in limited circumstances. *See* 16 C.F.R. § 3.31A(a) (“If material outside the scope of fair rebuttal is presented, a respondent may file a motion not later than 5 days after the deadline for service of complaint counsel’s rebuttal reports, seeking appropriate relief with the Administrative Law Judge, including . . . leave to submit a surrebuttal report by respondent’s experts, or leave to call a surrebuttal witness and to submit a surrebuttal report by that witness.”). In the instant case, Respondents have not filed any motion for leave to provide an expert witness surrebuttal opinion. In addition, Respondents’ Motion does not identify any material from Dr. Scott Morton’s trial deposition testimony or rebuttal witness report that might justify allowing the substitute expert witness to expand beyond Dr. Willig’s opinions, or otherwise

² The provisions regarding expert disclosures in FTC Rule 3.31A are similar to those provided under Federal Rule of Civil Procedure 26(e). *Compare* 16 C.F.R. § 3.31A(c), *supra*, with Fed. R. Civ. P. 26(a)(2)(B)(i)-(iii), *supra*. Accordingly, federal cases are relevant. *In re LabMD, Inc.*, 2014 FTC LEXIS 2, *5 n.3 (Jan. 16, 2014).

support a need for surrebuttal. However, as required by the Rules, just as Respondents are limited to the expert witness report of Dr. Willig, Complaint Counsel is also limited to the expert witness reports of Dr. Scott Morton. Thus, to the extent Complaint Counsel has presented new information or new opinions of Dr. Scott Morton that were not included in Dr. Scott Morton's previously submitted expert witness report and expert witness rebuttal report, Respondents may object to the use of such new information or opinions in post-trial briefing.

IV.

For all the foregoing reasons, Respondents' Motion for leave to designate a substitute expert witness is GRANTED and it is hereby ORDERED:

1. Within 5 days of the date of this Order, Respondents may designate a substitute expert witness and shall also provide Complaint Counsel with the substitute expert witness' written report, which shall be limited to setting forth the expert's credentials, disclosing the expert's rate, attaching the expert's *curriculum vitae*, and adopting the opinions provided by Dr. Willig.
2. The substitute expert witness shall be made available for a discovery deposition prior to any trial deposition.
3. The substitute expert witness' trial testimony shall be limited to the opinions, bases or reasons therefor, and the data or other information considered or relied upon by Dr. Willig, as set forth in Dr. Willig's expert witness report.

ORDERED:



D. Michael Chappell
Chief Administrative Law Judge

Date: October 12, 2021