ROBBINS GELLER RUDMAN
& DOWD LLP
PATRICK J. COUGHLIN (111070)
patc@rgrdlaw.com
X. JAY ALVAREZ (134781)
jaya@rgrdlaw.com
JASON A. FORGE (181542)
jforge@rgrdlaw.com
RACHEL L. JENSEN (211456)
rjensen@rgrdlaw.com
DANIEL J. PFEFFERBAUM (248631)
dpfefferbaum@rgrdlaw.com
BRIAN E. COCHRAN (286202)
bcochran@rgrdlaw.com
JEFFREY J. STEIN (265268)
jstein@rgrdlaw.com
655 West Broadway, Suite 1900
San Diego, CA 92101
Telephone: 619/231-1058
619/231-7423 (fax)

ZELDES HAEGGQUIST & ECK, LLP
AMBER L. ECK (177882)
ambere@zhlaw.com
AARON M. OLSEN (259923)
aarono@zhlaw.com
225 Broadway, Suite 2050
San Diego, CA 92101
Telephone: 619/342-8000
619/342-7878 (fax)

Class Counsel

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

ART COHEN, Individually and on Behalf of All Others Similarly Situated, Plaintiff, vs. DONALD J. TRUMP, Defendant.	No. 3:13-cv-02519-GPC-WVG CLASS ACTION PLAINTIFF'S OPPOSITION TO DEFENDANT'S *EX PARTE* APPLICATION FOR LEAVE TO OBJECT TO EVIDENCE FILED IN SUPPORT OF PLAINTIFF'S REPLY TO MOTION TO EXCLUDE THE TESTIMONY OF DR. JOEL STECKEL, Ph.D. DATE: *Ex Parte* TIME: *Ex Parte* CTRM: 2D JUDGE: Hon. Gonzalo P. Curiel

I. INTRODUCTION

Defendant's entire *ex parte* application is built around the false premise that the exhibits about which he complains constitute "new evidence." Dkt. Nos. 243-1, 256 at 1. In reality, none of these exhibits is "new" – plaintiff cited each of these documents in his opening papers. *See* Dkt. No. 189-1 ("Motion to Exclude"). Specifically, plaintiff cited these documents in his opening brief to demonstrate why defendant's rebuttal expert, Joel H. Steckel, Ph.D. ("Steckel") cannot reliably criticize the factual support for the opinions of plaintiff's expert, Michael A. Kamins, Ph.D. ("Kamins"). That is because these documents are among the 95% of documents that Kamins considered – but Steckel failed to review. Defendant's response in his opposition brief was that Steckel chose to review the "key" documents considered by Kamins, even though Steckel obviously could not determine the relative importance of any one document without reviewing all the others for comparison. *See* Dkt. No. 218 at 10. To refute defendant's argument, plaintiff's reply included a sampling of the previously-cited documents considered by Kamins (but not by Steckel) for the Court to independently assess defendant's argument that Steckel had a sufficient basis for his opinions because he reviewed the "key" Kamins documents. *See* Dkt. No. 243-1.

In addition to being wrong on the facts, defendant's requested remedy of striking these exhibits is also improper. Even if defendant was correct that the documents constitute "new" evidence or facts, which he is not, the answer is not to then "strike" it, but to give him an opportunity to respond. Here, however, defendant is also undeserving of a sur-reply because the evidence of which he complains is ***not*** new. Moreover, defendant failed to attach his proposed sur-reply and thus effectively seeks a blank check to get in the last word on a motion for which plaintiff carries the burden. This is not the first time defendants have taken this track: Trump's attorneys from three law firms ago attempted to get in the last word on class certification in the related *Low* case, protracting the litigation and wasting many reams of paper. The Court should deny defendant's *ex parte* application.

II. ARGUMENT

A. Plaintiffs' Exhibits Are Not "New" Evidence

Plaintiff's motion was narrowly tailored under Federal Rule of Evidence 702 and *Daubert v. Merrell Dow Pharms.*, 509 U.S. 579 (1993), to exclude certain opinions of Steckel, including his unfounded assertions that the opinions of Kamins lacked sufficient factual basis. *See* Motion to Exclude at 5-7 (*e.g.*, "[An] examination of the materials that Dr. Kamins reviewed reveals a narrow and selective review of the evidence in this case.").[1] In his opening brief, plaintiff argued that Steckel lacked the necessary foundation (or really ***any*** foundation) to offer such opinions because he had only reviewed fewer than 10 of the 175 documents included in the list of documents that Kamins considered in his expert report. *Id.* at 5 (citing the Kamins report Ex. 3, listing all documents considered by Kamins) & n.4 (listing eight documents that appear on both Kamins' and Steckel's respective lists of documents considered).

In his opposition, defendant did not contest plaintiff's assertion that Steckel reviewed only eight of the identified Kamins documents. Dkt. No. 218. Instead, defendant argued that Steckel's opinions were adequately supported because those eight documents that he reviewed were "the key documents reviewed by Kamins." *Id.* at 10. This was news to plaintiff. This rationale did not appear in Steckel's rebuttal expert report, Steckel did not testify as such when asked about the bases of his opinion at his deposition, nor did Steckel submit any declaration that would support such a representation to the Court. For example, when asked why he did not review the Trump University advertisements considered by Kamins in formulating his expert opinions, Steckel stated simply: "I didn't need to." *See* Dkt. No. 218 at 14.

Of course, Steckel cannot credibly assert that he reviewed the "key" documents considered by Kamins because he reviewed just 8 of those 175 documents and thus lacks any basis to make such a claim. So as to further demonstrate the fallacy of

[1] Here, and throughout, unless otherwise noted, internal quotation marks and citations are omitted, and emphasis is added.

defendant's newfound argument, plaintiff provided the Court on reply a sampling of the evidence cited by Kamins to support his Opinion No. 2 – an opinion of Kamins that Steckel suggested lacked sufficient evidentiary support in his rebuttal expert report. *See* Dkt. No. 184-2 (Cochran Decl.), Ex. 6, Steckel Rpt., ¶51. These documents undermine defendant's assertion that Steckel reviewed the "key" documents in this section of his rebuttal expert report and show that, had he bothered to do so, they would have directly undermined his rebuttal opinion. *See* Dkt. No. 243 at 3-4; Dkt. No. 243-1 (Exhibits 4-42).

Given this backdrop, it seems that the only party trying to sandbag is defendant, who is using this excuse to get the last word on plaintiff's Motion to Exclude. *See* Dkt. No. 256 at 1. As pointed out above, each of the 39 exhibits filed with plaintiff's reply were cited in his opening papers and, even before that, they were referenced in the Kamins expert report, which was served on defendants months ago, on January 29, 2016. In his opposition to plaintiff's Motion to Exclude, defendant could have gone through each and every one of the 167 documents that were considered by Kamins but foregone by Steckel and explained why these documents were irrelevant to Steckel's analysis or otherwise unnecessary to review in forming Steckel's opinions. Defendant chose to simply ignore them. Defendant's 'head in the sand' approach to his opposition does not justify granting him leave for a do-over now.

B. Striking Plaintiff's Exhibits Is Not the Answer

Defendant's requested relief – striking plaintiff's exhibits and argument – is improper as it effectively asks the Court to ignore relevant evidence (*i.e.*, documents referenced in the Kamins expert report) that was previously cited in plaintiff's opening papers. Dkt. No. 256 at 1. None of the cases relied upon by defendant suggest that evidence cited in the opening motion and then filed with the court on reply constitutes "new" evidence. And even in cases cited by defendant where the court found the evidence at issue to be "new," the courts did not strike it. For example, in *Lewis v. Gotham Ins. Co.*, No. 09cv252 L (POR), 2009 U.S. Dist. LEXIS 103044 (S.D. Cal.

Nov. 5, 2009), the court did not even consider striking the new evidence to be a viable option: "[T]he Court may cho[o]se to not consider that evidence, provide oral argument to the non-moving party, or allow the non-moving party to file a sur-reply." *Id.* at *3. Accordingly, even if the evidence was "new," which it is not, the answer is not to strike it.

C. Defendant Should Not Get the Last Word

Nor should the Court grant defendant's alternative request to file a sur-reply. In addition to the fact that defendant's request is not justified because the evidence is not new, defendant's proposed objection and motion to strike are meritless. *See United States v. Murphy*, No. 15-10053-02-EFM, 2016 U.S. Dist. LEXIS 61515, at *4 (D. Kan. May 9, 2016) (denying leave to file motion to dismiss where meritless); *In re Motor Fuel Temperature Sales Practices Litig.*, No. 07-1840-KHV, 2012 U.S. Dist. LEXIS 100493, at *53 n.1 (D. Kan. July 18, 2012) (denying leave to file reply brief asserting meritless arguments).

Here, defendant's proposed argument is meritless because Steckel cannot credibly justify his failure to review over 95% of the documents considered by Kamins on a hunch that he chose the "key" ones, given that he did not bother looking at the other documents in order to make such an assessment. On this basis alone, the Court should deny defendant leave to file a sur-reply. *See Murphy*, 2016 U.S. Dist. LEXIS 61515, at *4; *Motor Fuel Temperatures*, 2012 U.S. Dist. LEXIS 100493, at *53 n.1.

Moreover, in the cases cited by defendant, the party seeking leave to file a sur-reply attached the proposed pleading, thereby allowing the court to be a gatekeeper and confine the scope of additional briefing to the new evidence or facts. *See Benchmark Young Adult Sch., Inc. v. Launchworks Life Servs., LLC*, No. 12-cv-02953-BAS(BGS), 2015 U.S. Dist. LEXIS 56970, at *7 (S.D. Cal. Apr. 30, 2015) (granting request to file a ***portion*** of the attached proposed sur-reply). Defendant's

failure to attach his proposed sur-reply (or even describe what it would contain) is tantamount to asking this Court for a blank check to file another opposition brief.

This is not the first time that defendant has directed his attorneys to take this tack in the related class action litigation. His attorneys from three law firms ago attempted to have the last word multiple times on class certification in the related *Low* case, needlessly protracting the litigation with multiple briefs and further delay. *See, e.g.*, *Low* Dkt. No. 211. Plaintiff carries the burden on his Motion to Exclude and thus was afforded a reply brief. Defendant should not be permitted to upend the rules in order to get in the last word.

III. CONCLUSION

Plaintiff respectfully requests that the Court deny defendant's *ex parte* application in its entirety.

DATED: July 1, 2016

Respectfully submitted,

ROBBINS GELLER RUDMAN
& DOWD LLP
PATRICK J. COUGHLIN
X. JAY ALVAREZ
JASON A. FORGE
RACHEL L. JENSEN
DANIEL J. PFEFFERBAUM
BRIAN E. COCHRAN
JEFFREY J. STEIN

s/ Daniel J. Pfefferbaum
DANIEL J. PFEFFERBAUM

655 West Broadway, Suite 1900
San Diego, CA 92101
Telephone: 619/231-1058
619/231-7423 (fax)

ZELDES HAEGGQUIST & ECK, LLP
AMBER L. ECK
AARON M. OLSEN
225 Broadway, Suite 2050
San Diego, CA 92101
Telephone: 619/342-8000
619/342-7878 (fax)

Class Counsel

CERTIFICATE OF SERVICE

I hereby certify that on July 1, 2016, I authorized the electronic filing of the foregoing with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the e-mail addresses denoted on the attached Electronic Mail Notice List, and I hereby certify that I caused to be mailed the foregoing document or paper via the United States Postal Service to the non-CM/ECF participants indicated on the attached Manual Notice List.

I certify under penalty of perjury under the laws of the United States of America that the foregoing is true and correct. Executed on July 1, 2016.

s/ Daniel J. Pfefferbaum
DANIEL J. PFEFFERBAUM

ROBBINS GELLER RUDMAN
& DOWD LLP
655 West Broadway, Suite 1900
San Diego, CA 92101-8498
Telephone: 619/231-1058
619/231-7423 (fax)

E-mail: dpfefferbaum@rgrdlaw.com

Mailing Information for a Case 3:13-cv-02519-GPC-WVG Cohen v. Trump

Electronic Mail Notice List

The following are those who are currently on the list to receive e-mail notices for this case.

- **Xavier Jay Alvarez**
  jaya@rgrdlaw.com,e_file_sd@rgrdlaw.com
- **Brian E. Cochran**
  bcochran@rgrdlaw.com,e_file_sd@rgrdlaw.com
- **Patrick J Coughlin**
  patc@rgrdlaw.com,e_file_sd@rgrdlaw.com,susanm@rgrdlaw.com
- **Amber Lee Eck**
  ambere@zhlaw.com,winkyc@zhlaw.com,nadiak@zhlaw.com
- **Jason A Forge**
  jforge@rgrdlaw.com,llendzion@rgrdlaw.com,tholindrake@rgrdlaw.com,mbacci@rgrdlaw.com,e_file_sd@rgrdlaw.com
- **Jeffrey L. Goldman**
  jgoldman@bbwg.com
- **Alreen Haeggquist**
  alreenh@zhlaw.com,winkyc@zhlaw.com,nadiak@zhlaw.com
- **Rachel L Jensen**
  rjensen@rgrdlaw.com,hbrown@rgrdlaw.com,e_file_sd@rgrdlaw.com,JayA@rgrdlaw.com,KLavelle@rgrdlaw.com,lmix@rgrdlaw.com
- **David Lee Kirman**
  dkirman@omm.com,iyanniello@omm.com,sbrown@omm.com
- **Matthew R. Maron**
  mmaron@trumporg.com,carce@trumporg.com
- **Jill Ann Martin**
  jmartin@trumpnational.com,lvincent@trumpnational.com
- **Maureen E. Mueller**
  mmueller@rgrdlaw.com,e_file_sd@rgrdlaw.com
- **Aaron M. Olsen**
  aarono@zhlaw.com,winkyc@zhlaw.com
- **Daniel M. Petrocelli**
  dpetrocelli@omm.com
- **Daniel Jacob Pfefferbaum**
  dpfefferbaum@rgrdlaw.com
- **Kelli L. Sager**
  kellisager@dwt.com,VickyIsensee@dwt.com
- **Jeffrey J. Stein**
  JStein@rgrdlaw.com
- **WP Company LLC d/b/a The Washington Post**
  danlaidman@dwt.com
- **Alonzo Wickers , IV**
  alonzowickers@dwt.com,carolinasolano@dwt.com,ellenduncan@dwt.com,danlaidman@dwt.com
- **Helen Irene Zeldes**
  helenz@zhlaw.com,winkyc@zhlaw.com

Manual Notice List

The following is the list of attorneys who are **not** on the list to receive e-mail notices for this case (who therefore require manual noticing). You may wish to use your mouse to select and copy this list into your word processing program in order to create notices or labels for these recipients.

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