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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

OBESITY RESEARCH
INSTITUTE, LLC,

Plaintiff,

v.

FIBER RESEARCH
INTERNATIONAL, LLC,

Defendant.

Case No. 15-cv-0595-BAS-MDD

**ORDER ON JOINT MOTION TO
DETERMINE DISCOVERY
DISPUTE: PLAINTIFF'S MOTION
TO STRIKE DEFENDANT'S
REBUTTAL EXPERT REPORT OF
DR. GEORGE FAHEY**

[ECF NO. 119]

Before the Court is the Joint Motion to Determine a Discovery Dispute, filed on February 22, 2016, containing Plaintiff's motion to strike the rebuttal expert report of Defendant's expert Dr. George Fahey. (ECF No. 119). Plaintiff asserts that Dr. Fahey's report is improper rebuttal; that it merely buttresses the opinions of Defendant's initial expert, Dr. Wolever, and exceeds the scope of the summary opinions of Plaintiff's non-retained experts. (*Id.* *3-5). Defendant asserts that Dr. Fahey's report is proper rebuttal to the summary opinions of Plaintiff's non-retained experts. (*Id.* *6-10).

1 LEGAL STANDARD

2 Expert rebuttal reports must be “intended solely to contradict or rebut
3 evidence on the same subject matter identified by another party” in their
4 expert disclosures under Rule 26(a)(2)(B) and (C). Rule 26(a)(2)(D)(ii), Fed.
5 R. Civ. P. The court must carefully analyze the initial expert’s proposed
6 testimony and the corresponding expert’s rebuttal testimony to determine the
7 propriety of the rebuttal testimony. *HM Electronics, Inc. v. R.F.*
8 *Technologies, Inc.*, No. 12-cv-2884-BAS-MDD, 2015 WL 1879428 *1 (S.D. Cal.
9 April 17, 2015).

10 ANALYSIS

11 Plaintiff disclosed three non-retained experts, Henny Den Uijl, Jim
12 Ayres and Brian Salerno, pursuant to Rule 26(a)(2)(C). (ECF No. 119-7).
13 The disclosures of the subject matter and summaries of facts and opinions to
14 which each witness is expected to testify are identical for Messrs. Den Uijl
15 and Ayres. Mr. Salerno’s subject matter overlaps with the others but is more
16 limited. Messrs. Den Uijl and Ayres disclose 14 identical summary facts and
17 opinions. Mr. Salerno discloses 10 summary facts and opinions mirroring the
18 first 10 disclosed by the others. (*Id.*).

19 Dr. Fahey’s rebuttal expert report specifically identifies the contentions
20 presented in Plaintiff’s summary expert disclosures to which he is
21 responding. (ECF No. 119-3 *158-160). Of the seven contentions addressed
22 by Dr. Fahey, five were disclosed by all three non-retained experts and two
23 were disclosed only by Messrs. Den Uijl and Ayres. (*Id.*). Dr. Fahey, of
24 necessity, is hamstrung by the fact that Plaintiff, by using non-retained
25 experts, is not required to serve expert reports. *Compare* Fed. R. Civ. P.
26 26(a)(2)(B) *with* Rule 26(a)(2)(C). Plaintiff’s complaint that Dr. Fahey

1 exceeded the scope of the summary disclosures by Plaintiff's non-retained
2 experts is unpersuasive. Dr. Fahey, in response to summary disclosures, is
3 not limited to similarly limited responses. The Court has reviewed carefully,
4 as required, the expert report of Dr. Fahey and finds that it is proper
5 rebuttal, under these circumstances.

6 Plaintiff's assertion that Dr. Fahey's report is a masquerade for a
7 supplemental report of Dr. Wolever is not supported by the review
8 undertaken by the Court. Dr. Fahey's report appears designed to respond to
9 the summary contentions of Plaintiff's non-retained experts. Dr. Fahey does
10 not introduce any novel arguments and does not go beyond the subject matter
11 and opinions of Plaintiff's non-retained experts. *See Presidio Components,*
12 *Inc. v. Am. Tech. Ceramics Corp.*, No. 08-cv-335-IEG-NLS, 2013 WL 4068833
13 *17 (S.D. Cal. August 12, 2013). It is a proper rebuttal expert report.

14 CONCLUSION

15 Plaintiff's motion to strike the rebuttal expert report of Dr. Fahey, as
16 presented in the instant joint motion, is **DENIED**.

17 **IT IS SO ORDERED.**

18 Dated: March 1, 2016

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20 Hon. Mitchell D. Dembin
21 United States Magistrate Judge
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