

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF LOUISIANA  
SHREVEPORT DIVISION

TONY FERGUSON

CIVIL ACTION NO. 17-cv-1570

VERSUS

CHIEF JUDGE HICKS

SWIFT TRANSPORTATION CO OF  
ARIZONA ET AL

MAGISTRATE JUDGE HORNSBY

**MEMORANDUM ORDER**

Plaintiff's Motion to Compel Information from IME and Motion for Extension to File Rebuttal Expert Report (Doc. 130) is granted in part and denied in part as follows. The request for IME information (raw data) is denied as moot, as Defendants produced the information on November 30, 2020. Plaintiff's motion to extend the Daubert motion deadline and request to file a rebuttal expert report by Dr. Tiffany Jennings is more troublesome. It is true that this court recently continued all jury trials through the end of March 2021 due to an alarming surge in Covid-19 cases in this region. That does not necessarily mean that the court will provide a new Daubert motion deadline. However, if a rebuttal expert is allowed, then a new Daubert motion would be required.

Most of the cases in this division do not require rebuttal experts, so a typical scheduling order does not automatically provide a deadline for rebuttal expert reports. In more complex cases, counsel will usually request deadlines for rebuttal experts during the initial scheduling conference. That did not happen here, and no rebuttal deadline was set.

Defendants argue that the absence of a deadline under the court's scheduling order forecloses the possibility of a rebuttal expert altogether. That argument is not persuasive.

There have been many cases when the need for a rebuttal expert was not known until much later in the proceeding. And when a party has made a sufficient showing of the need for a rebuttal expert, the court has allowed it in the absence of actual prejudice.

Under the federal rules, rebuttal expert reports are defined as written expert opinions “intended to contradict or rebut evidence on the same subject matter” as the other party’s expert. Fed. R. Civ. P. 26(a)(2)(D)(ii). For example, an expert report is a rebuttal report when it criticizes certain approaches used by the opponent’s expert but does not rely on new information to support those criticisms. Gibson Brands v. Armadillo Distribution Enterprises, Inc., 2020 WL 6581868, \*2 (E.D. Tex. 2020) (Mazzant, J.). Whether Dr. Jennings’ report will truly rebut Dr. Staats’ report is unknown, as counsel and the court have not yet seen the report.

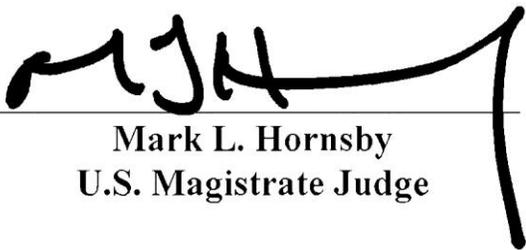
In light of the recent continuance, the court finds that the best exercise of its discretion is to allow Plaintiff to retain Dr. Jennings to issue a rebuttal expert report. Dr. Jennings’ report is limited to rebutting or criticizing the methodology and conclusions in Dr. Staats’ report. Dr. Jennings may not do any additional testing or provide any new information in her rebuttal report.

Dr. Jennings’ rebuttal report shall be tendered to Defendants no later than **January 29, 2021**. Defendants, if they wish, may depose Dr. Jennings on a date and time convenient to her and to all counsel but not later than **February 19, 2021**. The parties are encouraged to take the deposition by Zoom. Plaintiff’s deadline to file a Daubert motion regarding Dr. Staats is extended to **January 22, 2021**. Defendants’ deadline to file any Daubert motion related to Dr. Jennings is **March 12, 2021**.

A new trial date and pretrial conference date will be set at the status conference scheduled for **January 11, 2021 at 10:00 a.m.** As specified in Doc. 135, trial counsel for each party must participate.

All other requests in connection with the motion to compel, including all requests for fees, expenses, or sanctions, are denied.

THUS DONE AND SIGNED in Shreveport, Louisiana, this 6th day of January, 2021.



Mark L. Hornsby  
U.S. Magistrate Judge