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IN THE UNITED STATES DISTRICT COURT
DISTRICT OF OREGON

**THE CHURCH OF THE HOLY LIGHT
OF THE QUEEN**, a/k/a The Santo Daimé
Church, an Oregon religious corporation, on
its own behalf and on behalf of all of its
members, **JONATHAN GOLDMAN**,
individually and as Spiritual Leader of the
"Santo Daimé Church," **JACQUELYN
PRESTIDGE**, **MARY ROW, M.D.**,
MIRIAM RAMSEY, **ALEXANDRA
BLISS YEAGER** and **SCOTT
FERGUSON**, members of the Santo Daimé
Church,

Plaintiffs,

v.

Civil No. 08-cv-03095-PA

**PLAINTIFFS' OPPOSITION TO
DEFENDANTS' MOTION TO
STRIKE, AND *IN LIMINE*,
PLAINTIFFS' WITNESS
STATEMENT OF GHISELIN
AND REBUTTAL
STATEMENTS OF COZZI,
HALPERN, MACRAE,
GURULÉ, AND GOLDMAN**

MICHAEL B. MUKASEY, Attorney General of the United States; **KARIN J. IMMERGUT**, United States Attorney, District of Oregon; **HENRY M. PAULSON**, Secretary of the U.S. Department of the Treasury,

Defendants.

Defendants filed eight expert reports during the second week in December, 2008, barely five weeks ago, consisting of approximately 200 pages of text and citations. In addition, defendants filed Motions in Limine against plaintiffs' experts and plaintiffs prepared their Motion to Strike Cumulative Defense Expert Reports.¹ Plaintiffs filed their expert rebuttal reports several days ago, a bit past 30 days after receiving the defendants' expert reports. While plaintiffs acknowledge that they are late by a few days, they urge the Court to consider that the defendants have had plaintiffs' expert reports since the case was filed in September. And as we note, defendants should have been required to file their *prima facie* affirmative defense expert reports first.

The defendants have moved to exclude entirely the rebuttal testimony of five of the plaintiffs' witnesses who filed rebuttal reports in accordance with Rule 26. Their Motion is based upon the fundamentally erroneous premise that the plaintiffs' rebuttal reports "consist solely of rebuttal testimony which Plaintiffs failed adequately to establish in their initial statements." Motion at 1. The defendants' position is entirely unfounded.

¹ Plaintiffs made a tactical error in not opposing the pretrial schedule which required plaintiffs to submit their expert statements first. Defendants should have been required to establish their *prima facie* affirmative defense through their experts and then if they established a *prima facie* case, it would be proper for plaintiffs to file rebuttal reports. Now plaintiffs' rebuttal reports are to the defendants' rebuttal reports. Plaintiffs assume responsibility for not arguing this to the Court earlier. But, nevertheless, there is no prejudice to defendants.

In *Benedict v. United States*, 822 F.2d 1426 (6th Cir. 1987), the plaintiffs argued they should be allowed to present an expert on rebuttal because the trial testimony of defendant's expert contradicted his earlier 1980 opinion. The defendant argued that the plaintiffs should somehow have been on notice, previously, that the expert's opinion had changed. The district court ruled that the rebuttal testimony would not be allowed because it logically belonged in the plaintiffs' case-in-chief. In evaluating the propriety of the district court's ruling, the Court explained:

A trial judge's determinations regarding the order of proof and scope of rebuttal testimony will not be disturbed absent an abuse of discretion In the exercise of sound discretion, the district court may limit the scope of rebuttal testimony, to that which is directed to rebut new evidence or new theories proffered in the defendant's case-in-chief. However, "where . . . [the] evidence is real rebuttal evidence, the fact that it might have been offered in chief does not preclude its admission in rebuttal. Furthermore, with respect to 'real rebuttal evidence,' the plaintiff has no duty to anticipate or to negate a defense theory in plaintiff's case-in-chief."

Id. at 1428 (emphasis supplied).

Plaintiffs' experts are not soothsayers and thus were unable to anticipate the content of the defense experts' Statements until they were filed in December. Of course, Rule 26 contemplates rebuttal evidence.

The defendants seek to exclude the testimony of five of plaintiffs' experts,² who submitted rebuttal reports in response to the defendants' own rebuttal expert reports. All eight of the defendants' rebuttal reports produced in December were new experts first appearing then. All of the plaintiffs' rebuttal reports at issue in this motion fall well within the bounds of proper rebuttal and directly respond to the defendants' rebuttal expert reports. Because the plaintiffs' experts contain useful and important opinions on

² Ghiselin, Halpern, Cozzi, MacRae and Gurulé.

crucial matters raised by the defendants' newly designated experts, the defendants' motion should be denied. In *Cates v. Sears Roebuck & Co.*, 928 F.2d 679, 685 (5th Cir. 1991), the Court noted:

As opposed to a case-in-chief expert witness, a rebuttal expert witness is an expert used to refute the disclosed opinions of an opposing party's expert witness. The function of rebuttal testimony is to explain, counteract, or disprove evidence of the adverse party. Rebuttal evidence may be used to challenge the evidence or theory of an opponent, but it is not intended to establish a case-in-chief. The primary objective of rebuttal evidence is to permit a litigant to counter new, unforeseen facts brought out in the opposing party's case, but not to be used as a continuation of the case-in-chief.

Id.

The expert rebuttal reports submitted "counter the defendants' criticism and, as proper rebuttal, 'explain, repel, contradict or disprove' the defendants' expert opinions" related to medical and pharmacological statements. *United States v. Sebaggala*, 256 F.3d 59, 66 (1st Cir. 2001); *see also United States v. Laboy*, 909 F.2d 581, 588 (1st Cir. 1990); *Center v. W.R. Grace & Co.*, 853 F. Supp. 564, 574 (D.N.H. 1994) ("[e]vidence may be introduced on rebuttal only to refute new facts brought out during the defendant's case-in-chief."); *Crowley v. Chait*, 322 F. Supp. 2d 530, 551 (D.N.J. 2004).

Defendants argue that plaintiffs should not be permitted to file rebuttal expert reports because that was not mentioned in any of the courts pretrial orders. In *Corp. v. Procter & Gamble Co.*, 2001 WL 1894431, *1 (W.D. Mich. 2001), for example, the court concluded that where "[t]he case management order did not address rebuttal reports,"

Rule 26(a)(2)(C) applies.³

In the normal course of litigation, true rebuttal statements are routinely permitted and serve the Court well in evaluating the evidence. This is particularly true in evaluating scientific evidence. The only possible reason to deny plaintiffs the right to rebut would be if plaintiffs were holding off to surprise or ambush the defendants at the last minute. The rebuttal testimony could have been withheld until plaintiffs' witnesses took the witness stand if surprise had been a goal, but it wasn't, and the complexity of the testimony made written statements more useful to both Court and counsel. Any suggestion of ambush is belied by the relatively short time between receiving the eight defense expert statements and the filing several days ago. It took plaintiffs' experts that long to sift through the large volume of cumulative Witness statements, subsequently stricken by the Court. The rebuttal reports would have been completed much sooner had there been only two scientific reports to counter. But it took several weeks to provide the court with the comparisons to illustrate how cumulative they were. And plaintiffs' experts could not forgo the in-depth analysis they conducted on all of the defense expert's statements in the hope they would be stricken as cumulative.

Plaintiffs' Rebuttal Statements Are Admissible

Defendants' Motion argues why each rebuttal Statement should be rejected. The Court has the defense experts' proposed Statements and the plaintiffs' experts' proposed rebuttal statements. Plaintiffs contend that those rebuttal reports speak

³ (ii) [I]f the evidence is intended solely to contradict or rebut evidence on the same subject matter identified by another party under Rule 26(a)(2)(B), within 30 days after the other party's disclosure.

for themselves and the Court is fully capable without further argument from plaintiffs to decide if these Statements constitute "real rebuttal."

With that in mind, we make a brief comment about Dr. Ghiselin who is a new expert. There is nothing improper under the federal rules in bringing in a new expert for rebuttal provided that the expert is engaged in actual rebuttal, and not filing a statement that should have been part of the case in chief. There is no question when reading Ghiselin's statement, that it rebuts the defense experts' attack on plaintiffs' experts and establishes that the defense experts' reports are inadmissible under *Daubert*.

Defendants level the same attack on Dr. Ghiselin that they have done regarding Professor Gurulé, *i.e.*, that they both are giving legal opinions. Dr. Ghiselin is an epistemologist whose professional expertise is in opining on the scientific method. He is renowned for his expertise in this area.⁴ Regarding "reliability" and "fit" in science, there is no one more qualified to advise the Court regarding the ways in which the rhetoric, logic, premises, arguments and opinions of the defendants do not comport with the scientific method. Dr. Ghiselin possesses the depth of knowledge to illuminate to the Court how superficial premises, arguments and opinions of the defendants' expert, when parsed, are simply not reliable or are irrelevant to the scientific issues before the Court. It is the job of the lawyers and their experts to advise the court in its gatekeeping function even when there is a non-jury trial, and this is exactly what Dr. Ghiselin's proposed testimony does.

⁴ Defendants continuously confuse fact and law in their attacks on Ghiselin and Gurulé.

Conclusion

Plaintiffs respectfully contend that the rebuttal testimony of their experts is valid rebuttal and should be admitted into evidence. Plaintiffs seek leave of the Court to accept these filings a few days past the 30 days period for rebuttal as plaintiffs have acted diligently.

DATED this 14th day of January, 2009.

Respectfully submitted,



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