

**In the United States Court of Federal Claims**

No. 08-286C  
(Filed: February 10, 2012)

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D'ANDREA BROTHERS LLC,	)	
	)	
Plaintiff,	)	
	)	
v.	)	
	)	
THE UNITED STATES,	)	
	)	
Defendant.	)	
	)	
	)	

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**ORDER GRANTING DEFENDANT’S MOTION TO STRIKE AND TO IDENTIFY DR. BRAD REIFF AS ITS SUPPLEMENTAL SURREBUTTAL EXPERT WITNESS AND EXTENDING THE DISCOVERY SCHEDULE**

Pending before the court is defendant the United States’ (“the government”) motion to strike portions of plaintiff’s expert’s report, and its motion to identify Dr. Brad Reiff as its supplemental surrebuttal expert witness. For the reasons discussed below, the government’s motion is **GRANTED**.

**I. Background**

On January 19, 2011, the court entered a discovery scheduling order governing expert discovery on damages. See Order, Jan. 19, 2011, ECF No. 67. This order was modified on August 9, 2011. The court’s August 9, 2011 discovery scheduling order set forth the following deadlines:

1. September 6, 2011 – “The plaintiff shall serve upon the defendant its final damages calculations,” including “all of the documentation necessary for an audit of the plaintiff’s damages claim;”
2. September 16, 2011 – “The defendant shall identify its expert witnesses pursuant to RCFC 26(a)(2)(A);”
3. October 17, 2011 – “The defendant shall serve upon the plaintiff its expert witness reports pursuant to RCFC 26(a)(2)(B);”
4. November 4, 2011 – “The plaintiff shall identify any rebuttal expert witnesses pursuant to RCFC 26(a)(2)(A);”
5. December 5, 2011 – “The plaintiff shall serve upon the defendant any rebuttal expert witness reports pursuant to RCFC 26(a)(2)(B);”
6. January 6, 2012 – “The defendant shall serve upon the plaintiff any surrebuttal expert witness reports pursuant RCFC 26(a)(2)(B).”

Order, Aug. 9, 2011, ECF. No. 79.

Plaintiff initially chose not to engage an expert on damages. Joint Status Report at 1, Aug. 5, 2011, ECF No. 78. Pursuant to the August 9, 2011 order, plaintiff served the government with a one-page summary of its damages calculation on September 6, 2011, apparently based on the plaintiff’s business records. Def.’s Mot. at 3; Def.’s Mot., App. at 18. Plaintiff later provided the government with the native file documents that supported its calculation of damages. Def.’s Mot. at 3. According to plaintiff’s damages summary, plaintiff incurred approximately three million dollars in reliance damages. Def.’s Mot., App. at 18.

On September 16, 2011, the government identified Mr. Joel Lesch as its only expert witness. Pl.’s Resp. at 5. Mr. Lesch is an accountant with experience in the calculation of damages and forensic accounting. See Pl.’s Resp., App. at 4. Mr. Lesch’s report

responded to plaintiff's original damages calculation and supporting documentation, and concluded that plaintiff's damages potentially ranged from \$16,000 to \$1.72 million. Id., App. at 8.

The discovery schedule was again revised on October 13, 2011. In accordance with the revised scheduling order, the government served Mr. Lesch's rebuttal expert report on November 1, 2011. See Order, Oct. 13, 2011, ECF No. 83. On November 21, 2011, the plaintiff identified Dr. Andrew Safir as its rebuttal expert witness, and served Dr. Safir's expert witness report on December 20, 2011. Pl.'s Resp. at 6. Dr. Safir is an economist who specializes in finance, trade, microeconomics and econometrics. Id., App. at 54. Dr. Safir's report included calculations to support his opinion as to plaintiff's damages, and criticized Mr. Lesch's rebuttal report because it lacked an economic foundation. Id., App. at 56.

On January 17, the government filed a motion to strike portions of Dr. Safir's expert report, as well as a motion to identify Dr. Brad Reiff, an economist, as its supplemental surrebuttal expert witness. The court now turns to this motion.

## **II. Some of Dr. Safir's Opinions are Improper Rebuttal and Will Be Excluded**

The government first requests that the court enter an order striking portions of plaintiff's claim for damages that were included in plaintiff's "Expert Rebuttal Report of Dr. Andrew Safir," dated December 20, 2011. Specifically, the government requests that the court strike the following portions of Dr. Safir's expert report:

1. Opinions #3 and #4, which discuss damages D'Andrea Brothers, LLC incurred as a result of lost investment opportunity of the funds invested in reliance on its Cooperative Research and Development Agreement ("CRADA") with the

government, and the lost salaries and alternative investment return on the lost salaries that Mr. Christian D'Andrea, Mr. Mark D'Andrea, and Mr. Paul D'Andrea suffered.

2. Table 1, the last column, #5, labeled Alternative Investment Return, outlining the alternative investment return for D'Andrea Brothers, LLC on the funds invested in reliance on the CRADA.
3. The text of the report that appears on page 5 below Table 1 and continues to the top of page 6, further discussing the alternative investment return for D'Andrea Brothers, LLC.
4. The text of the report which begins with the statements in bold on the top of page 6 through Table 2, discussing and outlining the lost salaries and alternative investment return on the lost salaries of Mr. Christian D'Andrea, Mr. Mark D'Andrea, and Mr. Paul D'Andrea ("the D'Andreas").
5. Conclusions numbered 2, 3, and 4, which deal with the total amount of damages suffered, including the lost salaries and alternative investment returns.

Def.'s Reply at 1; Def.'s Mot., App. at 3-7, 12.

As detailed above, the government's motion to strike certain opinions in Dr. Safir's report revolve around the report's calculation of the foregone return on investment suffered by D'Andrea Brothers, LLC, and the lost salaries and foregone return on investment suffered by the D'Andreas themselves. In support of its motion to strike, the government argues that Dr. Safir's rebuttal report does not comply with the court's scheduling orders. Specifically, the government argues that Dr. Safir has introduced new damage claims past the date when final damages calculations were due. Def.'s Reply at 2-3, 6. The government argues that plaintiff should not be permitted to use its rebuttal report for this purpose after the deadline for submitting final damage calculations had passed and asks the court to strike the portions of Dr. Safir's report, listed supra, that include these new damage calculations. The court agrees.

Rule 26 of the United States Court of Federal Claims (“RCFC”) requires that an expert’s report must include “a complete statement of all opinions the witness will express and the basis and reasons for them.” RCFC 26(a)(2)(B)(i). “A party must” disclose expert testimony “at the times and in the sequences that the court orders.” RCFC 26(a)(2)(D). RCFC 26 also allows a party to submit a rebuttal expert report if it is “intended solely to contradict or rebut evidence on the same subject matter identified by another” expert. RCFC 26(a)(2)(D)(ii).

On August 9, 2011, the court ordered that by September 6, 2011, the “plaintiff shall serve upon the defendant its final damages calculations,” including “all of the documentation necessary for an audit of the plaintiff’s damages claim.” Order, Aug. 9, 2011, ECF No. 79. Pursuant to this order, plaintiff served the government with a one-page summary of its damages calculation on September 6, 2011. Def.’s Mot. at 3; Def.’s Mot., App. at 18. Plaintiff later provided the government with the native file documents that supported its calculation of damages. Id. In accordance with the revised scheduling order of October 13, 2011, the government served its rebuttal expert report upon the plaintiff on November 1, 2011. Id.; see Order, Oct. 13, 2011, ECF No. 83. In this report, the government’s damages expert, Mr. Joel Lesch, addressed only the damages calculations provided by the one-page summary and the underlying documents supplied by plaintiff in September. See Pl.’s Resp., App. at 7-8.

Given these facts, the court agrees with the government that Dr. Safir’s rebuttal report goes beyond the scope of plaintiff’s original damages report and Mr. Lesch’s report to present a new damage theory and calculations. Dr. Safir’s report contains damage

calculations based on foregone investment opportunities and lost salary that are not found within plaintiff's original damages summary. Compare Def.'s Mot., App. at 3, 5-8, 12 (Dr. Safir's damages calculations) with id. at 18 (plaintiff's original damages calculation); Def.'s Reply at 3. Dr. Safir's report also opines that plaintiff's total damages amount is \$3.72 million, Def.'s Mot., App. at 12, while plaintiff's original summary sheet limits damages to approximately \$3 million, id. at 18. At the outset, therefore, the new damages calculations in Dr. Safir's report go beyond this court's discovery order.

Furthermore, the damages calculations in Dr. Safir's report are improper rebuttal. Under Rule 26, rebuttal reports are limited to "the same subject matter" identified in the other party's expert report. RCFC 26(a)(2)(D)(ii); Procter & Gamble v. McNeil-PPC, Inc., No. 08-251, 2009 WL 1351447, at \*4 (W.D. Wisc. May 12, 2009) (under the analogous federal rule, striking paragraphs of expert rebuttal report identified as "Supplementation of My Opinion on Infringement" because "rebuttal reports are limited to responding to the issues raised by the opposing parties' experts"). While a plaintiff's surrebuttal expert is free to support its opinions with evidence not cited in the government's rebuttal report, it must limit those opinions to a rebuttal or contradiction of the same subject matter. Deseret Mgmt. Corp. v. United States, 97 Fed. Cl. 272, 274 (2011) (citations omitted). A "party may not offer testimony under the guise of 'rebuttal' only to provide additional support for his case in chief." Noffsinger v. The Valspar Corp., No. 09-916, 2011 WL 9795, at \*6 (N.D. Ill. Jan. 3, 2011) (citing Peals v. Terre Haute Police Dept., 535 F.3d 621, 630 (7th Cir. 2008)) (discussing the analogous federal

rule and finding that a report “goes beyond the scope of a proper rebuttal witness” where the expert report was a “full scale, substantive report” not limited to addressing the opposing party’s findings); Ebbert v. Nassau Cnty., No. 05-5445, 2008 WL 4443238, at \*13 (E.D.N.Y. Sept. 26, 2008) (noting that “[a] rebuttal expert report is not the proper place for presenting new arguments” and striking new material from a rebuttal expert witness report (internal quotation omitted)). The portions of an expert’s rebuttal that address subjects that were not addressed in the expert report purportedly being rebutted should be excluded. Plumley v. Mockett, No. 04-2868, 2010 WL 8160423, at \*5 (C.D. Cal. May 26, 2010) (citing First Years, Inc. v. Munchkin, Inc., 575 F. Supp. 2d 1002, 1008 (W.D. Wisc. 2008)) (addressing the analogous federal rule and excluding portions of expert report that did not respond to opposing party’s expert report).

Here, Dr. Safir’s report presents entirely new damages calculations. The court agrees with the government that plaintiff’s attempts to tie these new calculations to Mr. Lesch’s report are improper. See Def.’s Reply at 4-6. Mr. Lesch’s report was entirely based on the plaintiff’s original damages calculations, which did not address “foregone” salaries or alternative investment opportunities claims. Although Mr. Lesch’s report does criticize plaintiff’s original salary calculations based on the opinion that “some of the payroll cost is allocable to litigation preparation,” Mr. Lesch does not discuss a calculation of foregone salaries that plaintiffs would have otherwise earned absent entering into the CRADA with the government, because such an assertion was not made in plaintiff’s original “final” damages calculation. See Pl.’s Resp., App. at 27. Nor does the original damages calculation or Mr. Lesch’s report discuss any alternative investment

opportunities damages related to D'Andrea Brothers, LLC or the lost salaries of the D'Andreas. Therefore, the court finds that these new calculations, first introduced in Dr. Safir's rebuttal report, are improper rebuttal testimony. The government's motion to strike the portions of Dr. Safir's report introducing new damages calculations, listed supra, is **GRANTED**. Dr. Safir may testify as a rebuttal witness only.

### **III. Dr. Brad Reiff May Serve as a Supplemental Surrebuttal Expert Witness**

The government further requests that it be permitted to offer a supplemental rebuttal witness, Dr. Brad Reiff, an economist, to present the government's surrebuttal testimony to Dr. Safir. Dr. Reiff would address Dr. Safir's economic criticisms of Mr. Lesch's report. Def.'s Mot. at 2. The plaintiff argues that the government's request to retain Dr. Reiff is prejudicial and untimely. Pl.'s Resp. at 9.

After careful consideration of the parties' arguments, the court **GRANTS** the government's motion to identify Dr. Brad Reiff as a supplemental surrebuttal expert witness. The court agrees with the government that it has not waived its objection to Dr. Safir's report or its ability to request the addition of Dr. Reiff as a supplemental surrebuttal expert. The request was timely given the fact that the government did not receive Dr. Safir's report until late December 2011. The court has also extended the discovery schedule to allow for plaintiff to depose Dr. Reiff if they desire. See infra Part IV. In this connection, Dr. Reiff may serve as a surrebuttal expert witness only to address Dr. Safir's specific objections to Mr. Lesch's opinion. Dr. Reiff may not be substituted as a damages expert in lieu of Mr. Lesch. Dr. Reiff may only rebut Dr. Safir's

economic criticisms of Mr. Lesch's report or support the contention that Mr. Lesh's analysis has economic validity.

#### **IV. Revised Schedule**

Because the court has granted the government's motion, the court **ORDERS** the following extension of the discovery schedule:

1. The government shall serve upon the plaintiff Dr. Reiff's surrebuttal expert witness report pursuant to RCFC 26(a)(2)(B) by **February 24, 2012**.
2. All discovery, including expert depositions, shall conclude by **March 9, 2012**.
3. The parties shall submit a joint status report by **March 16, 2012**, setting forth proposed dates for a pre-trial conference and trial. In the joint status report the parties shall:
  - a. Identify the witnesses and documentary evidence each party is planning to introduce at trial.
  - b. If both parties intend to call the same witnesses, the court will seek the parties' recommendations regarding direct testimony and cross examination of witnesses called by both parties—in particular, whether witnesses should be heard on all matters at one time.
  - c. The parties shall also identify any interest they may have in using an ADR judge from the Court of Federal Claims to assist with settlement discussions.

**IT IS SO ORDERED.**

s/Nancy B. Firestone  
NANCY B. FIRESTONE  
Judge