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UNITED STATES DISTRICT COURT
DISTRICT OF OREGON
EUGENE DIVISION

Kelsey Cascadia Rose Juliana, *et al.*,	Case No.: 6:15-cv-01517-AA
Plaintiffs,	
v.	**DEFENDANTS' REPLY IN SUPPORT OF THEIR MOTION *IN LIMINE* TO STRIKE THE IMPROPER REBUTTAL REPORT AND EXCLUDE THE TESTIMONY OF DR. AKILAH JEFFERSON**
The United States of America, *et al.*,	
Defendants.	

Introduction

Plaintiffs' "rebuttal" expert Dr. Akilah Jefferson should be excluded on the grounds that (1) she offers new expert opinions on four individual Plaintiffs' medical conditions; (2) her remaining opinions are offered solely to buttress the opinions of Plaintiffs' opening medical experts, Drs. Pacheco and Paulson; and (3) Plaintiffs' failure to previously disclose Dr. Jefferson's new opinions on the four individual Plaintiffs' medical conditions was neither substantially justified nor harmless.

Plaintiffs erroneously suggest that Dr. Jefferson's new medical opinions about four specific plaintiffs should be allowed, because they are "based on evidence [i.e., Plaintiff medical records] that is and has been available to Defendants." Pls.' Resp. in Opp'n to Defs.' Mot. in Limine to Strike the Rebuttal Report & Exclude the Testimony of Dr. Akilah Jefferson 1, ECF No. 407 ("Pls.' Resp."). But that is not the test for proper rebuttal testimony. Rule 26(a)(2)(D)(ii) defines proper rebuttal testimony as that "intended solely to contradict or rebut evidence on the same subject matter identified by" the other side's experts. Dr. Jefferson's analysis of the Plaintiffs' medical records cannot be offered to contradict or rebut the opinions of Defendants' medical experts, because they – like Plaintiffs' opening experts to whom they were responding – never looked at them. Dr. Jefferson's opinions that merely buttress the opening reports of Drs. Paulson and Pacheco are likewise not offered "solely to contradict or rebut evidence" presented by Defendants' experts. Fed. R. Civ. P. 26(a)(2)(D)(ii). *All* of Dr. Jefferson's opinions are therefore improper rebuttal, and this Court can and must exclude them under Rule 37(c).[1]

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[1] Plaintiffs cite *United States v. Flores*, 901 F.3d 1150, 1165 (9th Cir. 2018) for the proposition that "motions *in limine* to exclude testimony prior to trial are generally not needed in a bench

I. LEGAL STANDARD

The Parties agree on the applicable legal standards. Under Rule 26, rebuttal expert testimony is restricted to subjects that are "intended solely to contradict or rebut evidence on the same subject matter identified by another party . . . ." Fed. R. Civ. P. 26(a)(2)(D)(ii); Pls.' Resp. 1. District courts in the Ninth Circuit have interpreted these limitations to mean that "[r]ebuttal testimony cannot be used to advance *new* arguments or *new* evidence." *Columbia Grain, Inc. v. Hinrichs Trading, LLC*, No. 3:14-CV-115-BLW, 2015 WL 6675538, at *2 (D. Idaho Oct. 30, 2015) (emphasis added) (citing *Century Indem. Co. v. Marine Grp., LLC*, No. 3:08-cv-1375-AC, 2015 WL 5521986, at *3 (D. Or. Sept. 16, 2015)); Pls.' Resp. 1-2. Whether something is "new" depends on "whether a rebuttal attempts to put forward new theories outside the scope of the report it claims to rebut." *Fed. Trade Comm'n v. Amazon.com, Inc.*, No. C14-1038-JCC, 2016 U.S. Dist. LEXIS 144445, at *5 (W.D. Wash. Feb. 9, 2016); Pls.' Resp. 2. "An opinion needed to prove an element of plaintiff's case-in-chief is generally not proper rebuttal evidence." *Nat'l R.R. Passenger Corp. v. Young's Commercial Transfer, Inc.*, No. 1:13-cv-01506-DAD-EPG, 2016 WL 1573262, at *3 (E.D. Cal. Apr. 19, 2016) (citing *Wong v. Regents of the Univ. of Cal.*, 410 F.3d 1052, 1061-62 (9th Cir. 2005)); *Daly v. Far E. Shipping Co. PLC*, 238 F. Supp. 2d 1231, 1238 (W.D. Wash. 2003) (excluding testimony because it "related to issues that were the subject of plaintiff's case-in-chief and therefore was not proper rebuttal"), *aff'd*, 108 F. App'x 476 (9th Cir. 2004).

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trial." Pls. Resp. 1. *Flores*, which upheld the trial court's discretion in a bench trial to admit potentially unreliable expert testimony over a *Daubert* objection subject to the trial court's ability to later disregard it, is inapplicable here. Plaintiffs are not asking the court to admit Dr. Jefferson's testimony over Defendants' *Daubert* objection, but in spite of the fact that her opinions fail to meet the definition of "rebuttal" testimony under Rule 26 and Rule 37 precludes her from testifying.

Rule 37(c)(1) expressly forbids the use at trial of any information required to be disclosed by Rule 26(a) that is not properly disclosed unless the late disclosure "is substantially justified or is harmless." Fed. R. Civ. P. 37(c)(1). The party facing the sanction – in this case the Plaintiffs – carries the burden of demonstrating that its failure to comply with rules concerning expert testimony is substantially justified or harmless. *Torres v. City of Los Angeles*, 548 F.3d 1197, 1213 (9th Cir. 2008). Plaintiffs have not met their burden.

II. ARGUMENT

a. Dr. Jefferson's New Opinions and Analyses on "Plaintiff Experiences" Are Improper Rebuttal Testimony.

Dr. Jefferson's opinions that four specific named Plaintiffs have asthma and allergies that are "being exacerbated by climate change" and "will worsen as climate change worsens," Defs.' Mot. in Limine to Strike the Improper Rebuttal Report & Exclude the Testimony of Dr. Akilah Jefferson; Mem. of P. & A. in Supp. Thereof , ECF No. 372 ("Defs.' Mot. to Strike Jefferson") Ex. 5 at 5-6 (Jefferson Report), fail the analysis set forth in *R&O Construction Co. v. Rox Pro International Group, LTD*, No. 2:09-cv-01749-LRH-LRL, 2011 WL 2923703 (D. Nev. July 18, 2011), adopted by this federal district court in *Century Indemnity Co. v. Marine Group, LLC*, No. 3:08-cv-1375-AC, 2015 WL 5521986 (D. Or. Sept. 16, 2015). The court in *R&O* stated as follows:

> Rebuttal expert reports necessitate a showing of facts supporting the opposite conclusion of those at which the opposing party's experts arrived in their responsive reports. Rebuttal expert reports are proper if they contradict or rebut the subject matter of the affirmative expert report. They are not, however, the proper place for presenting new arguments. If the purpose of expert testimony is to contradict an expected and anticipated portion of the other party's case-in-chief, then the witness is not a rebuttal witness or anything analogous to one. Rather, rebuttal expert testimony is limited to new unforeseen facts brought out in the other side's case.

R&O, 2011 WL 2923703, at *2 (internal citations and quotation marks omitted).

Jefferson's opinions on "Plaintiff Experiences" do not "support[] the opposite conclusion" of Dr. Klein. *See id*. First, Dr. Klein did not opine that Plaintiffs' allergies or asthma were *not* being exacerbated by climate change, but rather that a doctor could not arrive at that conclusion without an evaluation of the individual patient. Second, Dr. Klein did not – indeed he could not – opine on the health of individual Plaintiffs. Dr. Jefferson's opinions on "Plaintiff Experiences" constitute "new arguments" concerning the cause of individual Plaintiffs' asthma and allergies; far from being offered "solely to contradict or rebut evidence on the same subject matter identified by another party" they are intended to "contradict an expected and anticipated portion" of Defendants' case, namely, that Plaintiffs have not met their burden to prove an injury, e.g., asthma or allergies, caused by Defendants. *See id.*

Plaintiffs make three arguments in response. None has merit. Plaintiffs first argue that Dr. Jefferson's opinions are offered to contradict Dr. Klein's opinions that a clinical evaluation is needed to conclude that the Plaintiffs' medical conditions are being exacerbated by climate change.[2] *See* Pls.' Resp. 2. Dr. Jefferson may permissibly rebut Dr. Klein's testimony by opining that a clinical evaluation is not needed (*see id.* at 3), but her "rebuttal" did not stop there. Dr. Jefferson went on to conduct a quasi-clinical evaluation of her own that included a review of certain Plaintiffs' medical records and offered definitive opinions concerning the cause of certain

[2] Plaintiffs mischaracterize and oversimplify Dr. Klein's opinions, the crux of which is that Plaintiffs' experts failed to examine any "objective documentation" of Plaintiffs' alleged medical conditions (e.g., "medical reports, test results, ER or hospital visits") in addition to the Complaint and Plaintiffs' declarations and focused "only on a single possible trigger for the asthma and allergy symptoms," i.e., climate change, to the exclusion of any other potential contributing factors. *See* Mot. to Strike Jefferson Ex. 2 at 4 (Klein Report).

Plaintiffs' medical conditions. In doing so, Dr. Jefferson stepped outside the bounds of permissible rebuttal, because none of Defendants' experts offered any opinion concerning the cause of any specific Plaintiff's medical condition(s).

Next, Plaintiffs suggest that they were surprised by Defendants' argument that "a medical diagnosis or a full medical examination was required to show that [Plaintiffs] had a particular health-related injury" and therefore had no reason to provide their opening medical experts with Plaintiff-specific information, because "a diagnosis or full examination is required to show injury related to a medical condition." *Id.* at 3. Plaintiffs made a choice at the outset not to provide Plaintiffs' medical records to their opening medical experts, because they believed this information was not necessary to meet their burden of proof. Defendants predictably criticized Drs. Pacheco and Paulson for offering medical opinions not based on any objective personal medical information, but even if Plaintiffs were in fact "surprised" by that criticism, Plaintiffs were allowed to rebut Defendants' arguments with the opinion that a review of objective medical information is not necessary. Dr. Jefferson's opinions far exceed the scope of that proper rebuttal testimony.

Finally, Plaintiffs argue that their opening medical experts did not review the Plaintiffs' medical records because providing "specific diagnoses for individual Plaintiffs . . . is not Plaintiffs' standing burden in this case and is not necessary to show a physical injury in a constitutional rights case." *Id.* at 4. The only relevant point here is that Plaintiffs' opening medical experts *did not* review the Plaintiffs' medical records. Defendants' experts opined that their failure to do exposed a serious flaw in Plaintiffs' experts' methodology. Plaintiffs are free to rebut that opinion, but not by changing their methodology to incorporate a review of the

medical records and offering new opinions about what caused certain specific Plaintiffs' medical conditions. Doing so exceeds the limits of proper rebuttal under Rule 26.

For all of these reasons, the section of Dr. Jefferson's report entitled "Plaintiff Experiences" should be stricken as improper rebuttal testimony and Dr. Jefferson precluded from offering those opinions at trial.

b. Dr. Jefferson's Remaining Opinions Also Constitute Improper Rebuttal.

Dr. Jefferson's remaining opinions are also improper rebuttal, because they are offered merely to bolster the original experts' opinions, and are therefore *not* "intended solely to contradict or rebut evidence on the same subject matter identified by another party" under Rule 26(a)(2)(D)(ii). *See, e.g.*, *Titus v. Progressive Cas. Ins. Co.*, No. CIV-10-2377-PHX-TL, 2011 WL 13233430, at *1 (D. Ariz. Dec. 13, 2011); *Brutsche v. City of Fed. Way*, 300 F. App'x 552, 553 (9th Cir. 2008) ("[R]ebuttal evidence may not be offered merely to bolster the plaintiff's case-in-chief.").

Dr. Jefferson's discussion of the medical literature on climate change and respiratory health – although couched in terms of a "rebuttal" to Dr. Klein – is really just a condensed summary of the more extensive literature review performed by Drs. Pacheco and Paulson and includes some of the same references. *Compare* Defs.' Mot. to Strike Jefferson Ex. 5 at 3, *with* Defs.' Mot. to Strike Jefferson Ex. 1 at 15-16, 18-24 (Pacheco and Paulson Report).

Plaintiffs argue that Dr. Jefferson must reference "the relevant literature that Dr. Klein had ignored" in order to rebut Dr. Klein's methodology, specifically Dr. Klein's "ignorance of the relevant medical literature that establishes how climate change is a serious threat to respiratory health." Pls.' Resp. 6. But Dr. Jefferson is not rebutting Dr. Klein by citing literature on climate change and respiratory health, because Dr. Klein does not dispute

environmental factors can contribute to allergies and asthma, but instead opines that factors other than climate change, e.g., genetics and viruses, can also contribute to allergies or asthma. *See* Defs.' Mot. to Strike Jefferson Ex. 2 at 3-5. Plaintiffs' medical experts—Dr. Jefferson included—do not dispute that there is more than one contributing factor to allergies and asthma. Dr. Jefferson also does not rebut Dr. Klein's methodology, which consists of assessing whether Plaintiffs' medical experts followed established standards of care for determining a medical condition exists and ascertaining the possible cause(s). *Id.* at 3.

Dr. Jefferson's remaining opinions re-plough the same ground as Drs. Pacheco and Paulson and Plaintiffs do not dispute that there is overlap. In particular, Dr. Jefferson's opinions that "[c]hildren are more susceptible to the respiratory or immunological health effects of climate change" (Defs.' Mot. to Strike Jefferson Ex. 5 at 3) are entirely duplicative of the opinions offered by Drs. Pacheco and Paulson on the same topic. Indeed, Drs. Pacheco and Paulson devote an entire section of their report (*see* Defs.' Mot. to Strike Jefferson Ex. 1 at 6-10) to the disproportionate impact of climate change on children. Dr. Jefferson's opinions that children are smaller, more immature, and breath in more air than adults (*see* Defs.' Mot. to Strike Jefferson Ex. 5 at 3) add nothing to the very same opinions offered by Drs. Pacheco and Paulson. *See* Defs.' at 6-8.

Dr. Jefferson's opinions on "climate change effects on allergies and asthma" are also duplicative of opinions offered by Drs. Pacheco and Paulson on the potential adverse health effects of environmental factors associated with climate change, including increased (or more allergenic) pollen, ozone, particular matter, air pollution, severe weather events, and wildfires. *See id.* at 11-26. Drs. Pacheco and Paulson even cite many of the same papers as Dr. Jefferson, as well as many others.

Plaintiffs' assurances that they "will ensure that the testimony of Dr. Jefferson does reiterate or duplicate the testimony of Drs. Pacheco or Paulson and Defendants can object if at any point they believe the testimony is cumulative" (Pls.' Resp. 6) misses the point. Even if Dr. Jefferson's report did contain *some* proper rebuttal (and Defendants aver it does not), Dr. Jefferson is not allowed to offer any other testimony that does not contradict or rebut Defendants' experts. *See Theoharis v. Rongen*, No. C13-1345RAJ, 2014 U.S. Dist. LEXIS 98086, *7 (W.D. Wash. July 18, 2014) ("[A] rebuttal expert cannot offer evidence that does not contradict or rebut another expert's disclosure merely because she also has also offered some proper rebuttal.").

c. Allowing Dr. Jefferson To Testify Would Be Prejudicial to the United States.

Rule 37(c)(1) states that a failure to disclose information required by Rule 26(a) *shall* result in a party's inability to rely upon such evidence "unless the failure was substantially justified or is harmless." Fed. R. Civ. P. 37(c)(1). Plaintiffs' failure to disclose Dr. Jefferson's opinions before September 19, 2018 was neither substantially justified nor harmless. There is no substantial justification for Plaintiffs' failure to put the medical records of some or all of the Plaintiffs in front of Drs. Pacheco and Paulson and to arrange for telephone calls if Plaintiffs intended to offer expert medical testimony concerning specific Plaintiffs' medical injuries as part of their case-in-chief. Deposing Dr. Jefferson cannot remedy the harm caused by Dr. Jefferson's late disclosure because any "rebuttal" to Dr. Jefferson would come from Defendants' attorneys and not an expert.

Try as they might, Plaintiffs cannot use Defendants' decision to forego a further report by Dr. Klein to turn their improper submission harmless. Plaintiffs do not dispute that they conditioned proceeding with Dr. Klein's planned deposition on September 27, 2018 on

Defendants *not* providing any further expert reports by Dr. Klein. *See* Pls.' Resp. 7-8. Nor can Plaintiffs dispute that they gave Defendants only a few business days to decide whether to pull the plug on Dr. Klein's September 27 deposition and do a rebuttal report or to proceed with the deposition and move to strike Dr. Jefferson's improper rebuttal opinions. *See id.* Plaintiffs cannot credibly assert in this context that Defendants' harm is self-inflicted.

Conclusion

Defendants respectfully move the Court for an order *in limine* striking the improper rebuttal report of Dr. Jefferson and precluding Dr. Jefferson from testifying at trial.

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Respectfully submitted,

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