

**UNITED STATES OF AMERICA
FEDERAL TRADE COMMISSION
OFFICE OF ADMINISTRATIVE LAW JUDGES**

In the Matter of

Illumina, Inc.,
a corporation

and

GRAIL, Inc.,
a corporation,

Respondents.

Docket No. 9401

**COMPLAINT COUNSEL’S OPPOSITION TO RESPONDENTS’ MOTION TO
EXCLUDE EVIDENCE**

This Court excluded the Report and Declaration of Mr. Serafin the day before trial. (Final Pretrial Hearing Tr. at 51-52). Respondents seek to weaponize this Court’s order by requesting voluminous redactions from two rebuttal expert reports that relate to topics addressed by Mr. Serafin. Because Respondents’ requested redactions are unnecessary and prejudicial to Complaint Counsel, Complaint Counsel respectfully requests that this Court deny Respondents’ motion.

I. BACKGROUND

Respondents’ eight expert reports include the reports of Mr. George Serafin, Dr. Patricia Deverka, and Dr. Dennis Carlton. Drs. Deverka and Carlton relied on the opinions of Mr. Serafin to support portions of their reports. Complaint Counsel subsequently served the rebuttal reports of Dr. Dov Rothman and Dr. Amol Navathe that respond collectively to all three expert reports.

Complaint Counsel moved to exclude Mr. Serafin's expert report and deposition from the record. (Mot. In Limine re: George J. Serafin, Aug. 5, 2021). The Court granted Complaint Counsel's motion to exclude Mr. Serafin's testimony and admitted the unredacted version of the reports for Drs. Deverka, Carlton, Navathe, and Rothman as part of JX2. (Order Memorializing Bench Rulings, Aug. 25, 2021; Tr. at 5-6).

As part of an attempt to reach a compromise, Complaint Counsel agreed to exchange proposed redactions of its expert reports to account for the exclusion of Mr. Serafin's report on the condition that Respondents simultaneously submit proposed redactions to their expert reports. (Ex. C at 1). Both sides reserved the right to adjust their redactions after receiving the other side's redacted reports. (Ex. D at 1; Ex. E. at 1). After providing proposed redactions, Respondents notified Complaint Counsel that they found Complaint Counsel's redactions to be insufficient. (Ex. F at 1). Complaint Counsel responded that it did not intend to make further redactions given Respondents' limited proposed redactions. (Ex. G at 1). In response, Respondents filed this Motion seeking to exclude portions of Complaint Counsel's expert reports. To date, neither Complaint Counsel nor Respondents have agreed to replace any expert report in evidence with a redacted version.

II. ARGUMENT

To achieve what they could not by agreement, Respondents now ask the Court to engage in a burdensome, legally unnecessary, point-by-point determination of redactions involving multiple cross-referencing expert reports that have already been admitted into evidence. The Court should decline Respondents' invitation as unnecessary, improper, and untimely. This Court is capable of assigning the appropriate weight to portions of the expert reports at issue without requiring the guidance of redactions, rendering such redactions unnecessary. Respondents' request is improper because Respondents seek to remove from evidence portions

of Complaint Counsel's reports that respond to experts other than Mr. Serafin. Respondents' request is untimely because Respondents only move this Court for relief after the completion of the live hearing and all related expert trial discovery. Complaint Counsel formed its trial strategy according to these rulings at the pretrial conference. Thus, even if Respondents' request had merit, granting it now would significantly prejudice Complaint Counsel.

A. Respondents' Requested Redactions Are Supported by Neither Fact Nor Law

1. This Court Is Capable of Assessing the Weight of the Evidence Without Redactions

The case at bar involves a bench trial. As this Court recognized at the pretrial conference, in a bench trial, the need for gatekeeping is lessened, as the judge is presumed to be capable of assigning the appropriate weight to the evidence. (Final Pretrial Hearing Tr. at 24, 43-44). In their Motion, Respondents cite not a single case wherein a judge in a bench trial granted a motion to strike a rebuttal expert report based on the exclusion of another expert's opinions. *See, e.g., Barry v. Medtronic, Inc.*, No. 1:14-CV-104, 2016 WL 11731493, at *1 (E.D. Tex. Sept. 21, 2016) (excluding rebuttal patent law expert in part because "[rebuttal expert's] opinions will not be helpful to the jury[.]"). To the extent any party cites material that relies upon or responds to Mr. Serafin's excluded declaration in post-trial findings of fact, the other side is capable of noting the issue in reply findings so that the Court can determine what weight, if any, to accord to each assertion as the issue arises. *See Syneron Med. Ltd. v. Invasix, Inc.*, 8:16-cv-00143-DOC-KES, 2018 WL 4696969, at *15 (C.D. Cal. Aug. 27, 2018) (after affirmative expert report was excluded, denying as moot motion to strike responsive rebuttal report), *adopted* (C.D. Cal. Sept. 28, 2018).

2. Dr. Navathe and Dr. Rothman’s Expert Reports Respond to the [REDACTED] in Multiple Expert Reports

Respondents suggest a bright-line rule dictating that any time an expert report is excluded from evidence, all rebuttal testimony must also be stricken from the record. The cases Respondents cite all provide the same justification for exclusion of the evidence—exclusion of the underlying report rendered the rebuttal report moot. (Motion at 4-5) (citations omitted). That logic does not apply when, as here, the rebuttal reports respond not only to a stricken report but to other claims that remain in the record. *See, e.g., Duff v. Duff*, No. 04-345-FSF, 2005 WL 6011250, at *5 (E.D. Ky. Nov. 14, 2005) (refusing to redact an expert report that properly responded to evidence in the record). Here, Drs. Navathe and Rothman respond not only to the stricken Serafin report but also to the reports of Drs. Deverka and Carlton.

Respondents mischaracterize Dr. Navathe’s and Dr. Rothman’s [REDACTED] as pertaining only to rebuttal of Mr. Serafin’s declaration. (*See, e.g.,* Motion at 5-6). In doing so, Respondents ignore the plain text of Dr. Navathe’s and Dr. Rothman’s reports, which explicitly incorporate [REDACTED] into rebuttal of Dr. Deverka’s and Dr. Carlton’s opinions.

a) Dr. Navathe responds to Dr. Deverka’s and Dr. Carlton’s assertions relating to [REDACTED] in his report

While Dr. Navathe addresses [REDACTED] first in his rebuttal to the Serafin declaration, Dr. Navathe explicitly incorporates his [REDACTED] into his rebuttal of Dr. Deverka’s and Dr. Carlton’s opinions as well. As illustrated below, Dr. Navathe’s [REDACTED] remains “within the scope of fair rebuttal” of Dr. Deverka’s and Dr. Carlton’s reports, thus satisfying the requirements of 16 C.F.R. § 3.31A(a).

In her report, Dr. Deverka writes: [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] }² Respondents brazenly mischaracterize Dr. Navathe’s rebuttal to this point by writing that Dr. Navathe “merely states that Dr. Deverka was relying on Mr. Serafin’s declaration for that opinion.” (Motion at 7). To the contrary, after noting that Dr. Deverka relies heavily on Mr. Serafin’s flawed assertions, Dr. Navathe incorporates by reference his previously stated opinions relating to [REDACTED], writing, among other things: [REDACTED]

[REDACTED]
[REDACTED] } (Navathe Report³ at ¶ 71 n.184).

In her report, Dr. Deverka [REDACTED]

[REDACTED]
[REDACTED] } In rebutting Dr. Deverka’s criticism on this point, Dr. Navathe writes of [REDACTED]

[REDACTED] } (Navathe Report at ¶ 38). Dr. Navathe incorporates by reference other paragraphs in his report on the topic of [REDACTED] [REDACTED] } which Respondents seek to exclude as purportedly relevant only to Mr. Serafin’s declaration. (Navathe Report at ¶ 38 & n.89).

Similarly, in rebutting Dr. Carlton’s opinions, Dr. Navathe takes issue with Dr. Carlton’s

[REDACTED] } (See

¹ Ex. A (Deverka Report containing Respondents’ proposed redactions).

² [REDACTED]

³ Ex. J.

Carlton Report⁴ at ¶ 118). In attacking Dr. Carlton’s assumption as lacking support, Dr. Navathe incorporates his prior criticisms of Mr. Serafin’s and Dr. Deverka’s { [REDACTED] }
[REDACTED]
[REDACTED]
[REDACTED] }

(Navathe Report at ¶ 84).

b) Dr. Rothman responds to Dr. Deverka’s and Dr. Carlton’s assertions regarding { [REDACTED] } in addition to Mr. Serafin’s

As part of his assignment, Dr. Rothman reviewed the opinions offered by Dr. Carlton, Dr. Deverka, and Mr. Serafin. (Rothman Report at ¶ 5). Dr. Rothman concludes in his report that, collectively, { [REDACTED] }
[REDACTED] } (Rothman Report at ¶ 44). Dr. Rothman goes on to discuss why he considers { [REDACTED] } efficiency to be unsubstantiated and non-specific to the merger in the context of responding to all three experts.

For example, Dr. Carlton { [REDACTED] }
[REDACTED]
[REDACTED] } (Carlton Report at ¶¶ 13, 115; Ex. H at 1 (acknowledging that Mr. Serafin is one of the experts relied upon by Dr. Carlton and Dr. Deverka)). Based on Dr. Deverka’s and Mr. Serafin’s conclusions, Dr. Carlton { [REDACTED] }
[REDACTED] }
(Carlton Report at ¶ 119). Dr. Rothman addresses these calculations in rebuttal, criticizing the

⁴ Ex. B (Carlton Report containing Respondents’ proposed redactions).

{ [REDACTED] } assumption relied upon by Dr. Carlton as unsubstantiated. (Rothman Report at ¶¶ 27 n.48, 28, 49).

Dr. Rothman also responds to the opinions of Dr. Deverka and Dr. Carlton regarding the merger specificity of the { [REDACTED] } efficiency. (Rothman Report at ¶¶ 28, 31, 68-84). For example, Dr. Rothman criticizes Dr. Deverka's assertion that { [REDACTED] }
[REDACTED]
[REDACTED] }
(Rothman Report at ¶ 71).

B. Respondents' Claim That the Serafin Declaration Has Been Excised From the Record Is Inaccurate

In their Motion, Respondents contend that Dr. Navathe's and Dr. Rothman's rebuttal to the Serafin declaration should be redacted because the Serafin declaration has been excised from the record. (Motion at 8). This is inaccurate. { [REDACTED]

[REDACTED]

[REDACTED]

{ [REDACTED] } Though Respondents have proposed partial redactions to Dr. Deverka's references to the Serafin declaration (*see* Ex. H at 1),⁵ no redactions of references to the Serafin declaration have been made to Dr. Deverka's report on the record nor did Respondents propose to excise their entire discussion of { [REDACTED]

[REDACTED] } Moreover, both Dr. Deverka's and Dr. Carlton's report { [REDACTED]

[REDACTED] }

⁵ As discussed, it is Complaint Counsel's position that Respondents' proposed redactions to Dr. Deverka's report are wholly inadequate and would result in prejudice to Complaint Counsel.

In the Motion, Respondents complain that Complaint Counsel has “redact[ed] the direct references and sections [in the Rothman Report] responding to Mr. Serafin while attempting to leave summary opinions relating to [REDACTED] unredacted.” (Motion at 6). Remarkably, this is precisely the approach Respondents have taken in their proposed redactions to the Deverka Report. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] } Respondents’ disingenuous redaction proposal, coupled with their attempt to leverage a Court order to excise portions of Complaint Counsel’s reports that rebut opinions of Dr. Deverka and Dr. Carlton, reveals Respondents’ inconsistent position for what it is: a cynical attempt to gain unfair advantage after the close of expert discovery. As long as portions of Dr. Deverka’s report continue to incorporate the Serafin declaration and both Drs. Deverka and Carlton continue to address [REDACTED] } Dr. Navathe’s and Dr. Rothman’s critiques of Mr. Serafin’s [REDACTED] } opinions remain squarely within the scope of fair rebuttal of Respondents’ expert reports. *See* 16 C.F.R. § 3.31A(a).

C. Respondents’ Request Is Prejudicial to Complaint Counsel

Granting Respondents’ untimely motion would be prejudicial to Complaint Counsel. Respondents seek to excise broad swaths of rebuttal opinions offered by Complaint Counsel’s experts that were admitted into evidence prior to the commencement of trial, while preserving

the opinions of Respondents' own experts on the same topic. Had Respondents sought to excise portions of Complaint Counsel's expert reports prior to trial, Complaint Counsel would have adjusted its trial strategy and witness examinations accordingly to elicit evidence related to the topics Respondents seek to exclude. By instead filing their motion after the completion of the live trial, Respondents seek to selectively preclude Complaint Counsel from relying upon evidence that it justifiably believed would be part of the record when it made various strategic trial decisions.

III. CONCLUSION

Respondents' motion misrepresents the contents of the reports and testimony offered by the experts. Drs. Carlton and Deverka each extensively discuss { [REDACTED] } in their reports and depositions. Complaint Counsel's rebuttal experts respond to these opinions in compliance with Rule 3.31A. Complaint Counsel respectfully requests this Court deny Respondents' motion.

Date: November 9, 2021

Respectfully submitted,

/s/ Samuel C. Fulliton

Samuel C. Fulliton
Federal Trade Commission
Bureau of Competition
600 Pennsylvania Ave., NW
Washington, DC 20580
Telephone: (202) 326-3206
Email: sfulliton@ftc.gov

Counsel Supporting the Complaint

**UNITED STATES OF AMERICA
FEDERAL TRADE COMMISSION
OFFICE OF ADMINISTRATIVE LAW JUDGES**

In the Matter of

Illumina, Inc.,
a corporation

and

GRAIL, Inc.,
a corporation,

Respondents.

Docket No. 9401

[PROPOSED] ORDER

Upon Respondents' Motion to Exclude Portions of Complaint Counsel's Rebuttal Experts' Reports, it is hereby:

ORDERED that Respondents' motion is DENIED.

ORDERED:

D. Michael Chappell
Chief Administrative Law Judge

Date: November ____, 2021

CERTIFICATE OF SERVICE

I hereby certify that on November 9, 2021, I filed the foregoing document electronically using the FTC’s E-Filing System, which will send notification of such filing to:

April Tabor
Secretary
Federal Trade Commission
600 Pennsylvania Ave., NW, Rm. H-113
Washington, DC 20580
ElectronicFilings@ftc.gov

The Honorable D. Michael Chappell
Administrative Law Judge
Federal Trade Commission
600 Pennsylvania Ave., NW, Rn. H-110
Washington, DC 20580

I also certify that I caused the foregoing document to be served via email to:

<p>David Marriott Christine A. Varney Sharonmoyee Goswami Michael J. Zaken Cravath, Swaine & Moore LLP 825 Eighth Avenue New York NY 10019 (212) 474-1140 dmarriott@cravath.com cvarney@cravath.com sgoswami@cravath.com mzaken@cravath.com</p> <p><i>Counsel for Illumina, Inc.</i></p>	<p>Al Pfeiffer Michael G. Egge Marguerite M. Sullivan Anna M. Rathbun Latham & Watkins LLP 555 Eleventh Street, NW Washington, DC 20004 (202) 637-2285 al.pfeiffer@lw.com michael.egge@lw.com marguerite.sullivan@lw.com anna.rathbun@lw.com</p> <p><i>Counsel for GRAIL, Inc.</i></p>
--	--

/s/ Samuel C. Fulliton
Samuel C. Fulliton
Counsel Supporting the Complaint

Exhibit A

(CONFIDENTIAL – REDACTED IN ENTIRETY)

Exhibit B

(CONFIDENTIAL – REDACTED IN ENTIRETY)

Exhibit C

(CONFIDENTIAL – REDACTED IN ENTIRETY)

Exhibit D

(CONFIDENTIAL – REDACTED IN ENTIRETY)

Exhibit E

(CONFIDENTIAL – REDACTED IN ENTIRETY)

Exhibit F

(CONFIDENTIAL – REDACTED IN ENTIRETY)

Exhibit G

(CONFIDENTIAL – REDACTED IN ENTIRETY)

Exhibit H

(CONFIDENTIAL – REDACTED IN ENTIRETY)

Exhibit I

(CONFIDENTIAL – REDACTED IN ENTIRETY)

Exhibit J

(CONFIDENTIAL – REDACTED IN ENTIRETY)