

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF OHIO  
EASTERN DIVISION

IN RE: DAVOL, INC./C.R. BARD,  
INC., POLYPROPYLENE HERNIA  
MESH PRODUCTS LIABILITY  
LITIGATION

Case No. 2:18-md-2846

JUDGE EDMUND A. SARGUS, JR.  
Magistrate Judge Kimberly A. Jolson

This document relates to:  
*Johns v. CR Bard et al*,  
Case No. 2:18-cv-01509

**EVIDENTIARY MOTIONS ORDER NO. 2-A**

**Bard's Request for Clarification of Evidentiary Motions Order No. 2**

This matter is before the Court on Defendants Davol Inc. and C.R. Bard, Inc.'s (collectively "Bard") Request for Clarification of Evidentiary Motions Order No. 2 ("EMO 2") regarding Bard's Motion to Strike Plaintiff's Expert Ahmed El-Ghannam, Ph.D.'s supplemental reports and reliance lists (ECF No. 118). Both sides have briefed Bard's request (ECF No. 166, 167). For the reasons set forth below, the Court **DENIES** Bard's request.

On March 10, 2020, this Court issued EMO 2, granting in part and denying in part Bard's Motion to Strike Dr. El-Ghannam's supplemental reports and reliance lists. The Court found Dr. El-Ghannam's February 6, 2020 supplemental report and reliance list was not a proper supplementation under Federal Rule of Civil Procedure 26 and granted Bard's motion with respect to that report, except for certain pages containing data and other materials Bard had repeatedly requested Dr. El-Ghannam produce. (*Id.* at 10-13.)

The Court, however, denied Bard's motion with respect to Dr. El-Ghannam's February 10, 2020 rebuttal report and reliance list, holding that the report was timely under the "default deadline" for rebuttal reports in Rule 26. (*Id.* at 14-15.) During the Court's May 21, 2020 status

conference, Bard requested the Court clarify EMO 2 and strike portions of Dr. El-Ghannam's February 10 rebuttal report, which Plaintiff opposes. Per the Court's order, the parties submitted simultaneous briefing on their positions on Dr. El-Ghannam's rebuttal report.

Bard contends that approximately 70 pages of Dr. El-Ghannam's rebuttal report "contain the same opinions presented in and struck from Dr. El-Ghannam's supplemental report and include large sections with identical language cut and pasted into the 'rebuttal' report." (Bard's Request for Clarification at 1, ECF No. 167.) According to Bard, the opinions set forth in Dr. El-Ghannam's February 10 report are not "real rebuttal" because they are "late-disclosed affirmative opinions that attempt to support Plaintiff's case-in-chief" that the Court struck from Dr. El-Ghannam's February 6 report, and "are not in rebuttal to any specific affirmative opinion set forth by Dr. Reitman." (*Id.* at 3-5.) Plaintiff contends Dr. El-Ghannam's report is proper under Rule 26 and "is specifically offered to rebut the opinions, conclusions, and data presented by Dr. Reitman." (Pl.'s Opp. at 2, ECF No. 166.) This Court agrees.

Rule 26 requires expert witnesses to provide a written report that contains, among other things, "a complete statement of all opinions the witness will express and the basis and reasons for them" and "the facts or data considered by the witness in forming them." Fed. R. Civ. P. 26(a)(2)(A)-(B). Rule 26 also allows for experts whose "evidence is intended solely to contradict or rebut evidence on the same subject matter identified by another party" to be disclosed within 30 days of the other party's disclosure. Fed. R. Civ. P. 26(a)(2)(D)(ii).

"Rebuttal reports may not advance new arguments or new evidence outside the scope of the opposing party's expert's testimony." *Ohio A. Philip Randolph Institute v. Smith*, No. 18-cv-357, 2019 WL 428371, at \*2 (S.D. Ohio Feb. 4, 2019) (citing *Bentley v. Highlands Hosp. Corp.*, No. 15-cv-97, 2016 WL 5867496, at \*5 (E.D. Ky. Oct. 6, 2016)) (quotations omitted). "But a

rebuttal expert may cite new evidence and data so long as the new evidence and data is offered to directly contradict or rebut the opposing party's expert." *Id.* (citing *Glass Dimensions, Inc. ex rel. Glass Dimensions, Inc. Profit Sharing Plan & Tr. v. State Street Bank & Tr. Co.*, 290 F.R.D. 11, 16 (D. Mass. 2013)); *see also Express Energy Servs. Operating, L.P. v. Hall Drilling, LLC*, No. 14-cv-204, 2015 WL 3743795, at \*3 (S.D. Ohio Jun. 15, 2015) (holding rebuttal experts can properly "respond[] to the content of [the opposing party's] expert witness' report and opinions," but they "cannot exceed the scope of simply responding" to the opposing party's expert). The Court "must look past labels and conclusions to determine whether the report is truly provided in rebuttal." *Ohio A. Philip Randolph Institute*, 2019 WL 428371, at \*2 (citing *Bentley*, 2016 WL 5867496, at \*5).

Plaintiff contends Dr. El-Ghannam's rebuttal report "directly contradict[s] or rebut[s] evidence presented by Dr. Reitman. (Pl.'s Opp. at 3.) Specifically, Plaintiff argues the rebuttal report "contains scientific evidence that challenges Defendants' unanticipated theories and rebuts certain propositions and criticisms contained in Dr. Reitman's report" and that "[a]ny new evidence included in Dr. El-Ghannam's rebuttal report, such as the molecular weight evidence, is offered to directly contradict or rebut the evidence and conclusions presented by Dr. Reitman." (*Id.* at 4.)

The Court has reviewed both experts' reports and agrees with Plaintiff that Dr. El-Ghannam's February 10 report is a proper rebuttal report within the scope of Rule 26 because it contradicts and rebuts the opinions and criticisms in Dr. Reitman's report. For example, Dr. Reitman criticizes Dr. El-Ghannam's use of diffuse reflectance FTIR (DRIFTS) to analyze Bard's hernia mesh devices, and opines that his analysis is unreliable. (*See* Reitman Rep. at 104-114, ECF No. 29-5.) Dr. El-Ghannam's rebuttal report responds to that criticism, directly citing

to specific critiques and explaining why they are invalid. (*See* El-Ghannam Rebuttal Rep. at 1-18, ECF No. 40-5.) While his report may rely on “new” data and literature—including an article Dr. Reitman herself analyses—it does so to rebut Dr. Reitman’s specific criticisms and conclusions and is limited to the same subject matter. Bard’s position that the portions of Dr. El-Ghannam’s rebuttal report relating to DRIFTS-FTIR are improper because they do not rebut “any affirmative opinion by Dr. Reitman,” (*see* Bard’s Request at 4), reads Rule 26 too narrowly, for this Court has held it is proper for a rebuttal report to “rebut certain propositions and criticisms” by the opposing party’s expert. *See Ohio A. Philip Randolph Institute*, 2019 WL 428371, at \*3 (emphasis added).

Similarly, Dr. Reitman criticizes Dr. El-Ghannam’s use of SEM, claiming it “has no scientific basis.” (Reitman Rep. at 123.) Dr. El-Ghannam responds directly to this criticism with additional evidence and data, stating:

Dr. Reitman criticized my use of SEM to show erosion degradation of the fibers of the Bard’s meshes and stated that it is not scientifically plausible to show erosion degradation of the surface or to “distinguish amorphous and crystalline domains.” Dr. Reitman fails to provide any scientific evidence to support her argument, and instead simply states that “SEM is used to look at physical appearance and does not give information regarding the chemical stability or biocompatibility[.]” However, as an experienced biomedical engineer for over 30 years who reviews SEM images of all types of materials, including polymers, on a weekly basis, outside of the context of litigation, I fervently disagree with Dr. Reitman’s superficial and limited understanding of biomaterials and bioengineering. A detailed examination of the imaging below along with my analysis will refute Dr. Reitman’s erroneous conclusion.

(*See* El-Ghannam Rebuttal Rep. at 69-72, ECF No. 40-5) (internal citations omitted).<sup>1</sup>

Additionally, Dr. Reitman offers opinions regarding Exponent’s own thermal analysis via DSC, including findings regarding molecular weight, (*see* Reitman Rep. at 80-89) in addition to

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<sup>1</sup> Dr. El-Ghannam’s rebuttal report responds to other specific criticisms by Dr. Reitman regarding swelling and tissue integration. (*See* El-Ghannam Rebuttal Rep. at 59-68 (citing Reitman Rep. at 80, 119-121).)

criticizing Dr. El-Ghannam’s DSC analysis as unreliable, (*see* Reitman Rep. at 114-117), to which Dr. El-Ghannam responds. (*See* El-Ghannam Rebuttal Rep. at 128-148). Dr. Reitman also offers opinions in response to Plaintiffs’ experts generally, as well as “ultimate conclusions” regarding polypropylene degradation and its biocompatibility, (*see* Reitman Rep. at 92-97, 142-144), to which Dr. El-Ghannam purports to contradict with additional data and literature. (*See* El-Ghannam Rebuttal Rep. at 29-41, 45-59.)

As a final note, this Court disagrees with Bard’s assertion that portions of Dr. El-Ghannam’s rebuttal report must also be stricken simply because they overlap with sections of the supplemental report struck by EMO 2. In EMO 2, this Court found that Dr. El-Ghannam’s supplemental report was not proper under the standard in Rule 26(a)(2)(E) governing supplemental reports. Here, the Court has analyzed Dr. El-Ghannam’s report under the standard in Rule 26(a)(2)(D)(ii) for rebuttal reports in conjunction with Dr. Reitman’s report, and finds it is proper rebuttal report under that standard.<sup>2</sup>

For the reasons set forth above, the Court **DENIES** Bard’s Request for Clarification.

**IT IS SO ORDERED.**

7/16/2020  
DATE

s/Edmund A. Sargus, Jr.  
EDMUND A. SARGUS, JR.  
UNITED STATES DISTRICT JUDGE

7/16/2020  
DATE

s/Kimberly A. Jolson  
KIMBERLY A. JOLSON  
UNITED STATES MAGISTRATE JUDGE

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<sup>2</sup> As this Court held in EMO 2, Bard is permitted to take a second deposition of Dr. El-Ghannam, where Bard may cross-examine Dr. El-Ghannam on the information disclosed in his rebuttal report. (*See* EMO 2 at 15.)