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10 **UNITED STATES DISTRICT COURT**
 11 **NORTHERN DISTRICT OF CALIFORNIA**
 12 **SAN JOSE DIVISION**

14 IN RE HIGH-TECH EMPLOYEE
 ANTITRUST LITIGATION
 15 THIS DOCUMENT RELATES TO:
 16 ALL ACTIONS

Master Docket No. 11-CV-2509 LHK

**DEFENDANTS' JOINT NOTICE OF
 MOTION AND MOTION TO STRIKE
 THE IMPROPER REBUTTAL
 TESTIMONY IN DR. LEAMER'S
 REPLY EXPERT REPORT OR, IN
 THE ALTERNATIVE, FOR LEAVE TO
 SUBMIT A REPLY REPORT OF
 DR. STIROH; MEMORANDUM OF
 POINTS AND AUTHORITIES IN
 SUPPORT THEREOF**

Date: March 20, 2014 and
 March 27, 2014
 Time: 1:30 p.m.
 Courtroom: 8, 4th Floor
 Judge: The Honorable Lucy H. Koh

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MEMORANDUM OF POINTS AND AUTHORITIES**I. INTRODUCTION**

After submitting a 21-page opening merits report, Plaintiffs' impact and damages expert, Edward E. Leamer, Ph.D., submitted a 78-page "reply" report, nearly four times as long as his opening report. It contains new arguments, analyses, and exhibits never seen in his five prior expert reports. This new material relates to issues that have been in this case since the outset and on which Plaintiffs bear the burden of proof. Dr. Leamer's reply report does not comply with the Federal Rules governing expert reports or with the parties' agreement and this Court's direction that reply reports must be "limited to true rebuttal and should be very brief." Dr. Leamer's new opinions should be stricken and he should be precluded from testifying to them at trial.

Dr. Leamer's reply report contains several areas that do not constitute true rebuttal. First, throughout this case, Dr. Leamer has reported and discussed his results using traditional thresholds of statistical significance. For example, he previously evaluated results at standard statistical significance thresholds of 1%, 5%, and 10%, meaning that the results are deemed statistically significant if they had a one, five, or ten percent probability (or less) of occurring by chance. In his reply report, however, Dr. Leamer proposes for the first time that his regression model be evaluated under a new *50% threshold* of statistical significance, meaning that the model's results are deemed statistically significant even if they have a 50% probability of occurring by chance (*i.e.*, including where the result is wrong). To justify this startling new test for statistical significance, he offers for the first time in this case an analysis of "Type I" and "Type II" statistical errors. Dr. Leamer's attempt to present and justify a new significance threshold in his reply report is improper and deprives Defendants of a fair opportunity to respond.

Second, Dr. Leamer includes new arguments in support of his model's "total new hires" variable. Dr. Leamer included this control variable, on which his impact and damages results depend, in every version of his regression model since his first report. By waiting until his reply to address this critical variable, Dr. Leamer seeks to foreclose any response by Defendants.

Third, Dr. Leamer introduces new arguments to justify his use of real compensation rather than nominal compensation, which is a major component of his damages estimation. All of

1 this new material should have been included in Dr. Leamer's opening report.

2 Plaintiffs cannot salvage this new material by contending that Dr. Leamer's reply report
3 merely responds to Defendants' expert Dr. Stiroh's rebuttal expert report. The new analysis and
4 arguments in Dr. Leamer's reply are in no way "intended solely to contradict or rebut evidence on
5 the same subject matter identified by" Defendants' experts. Fed. R. Civ. P. 26(a)(2)(D)(ii).
6 Dr. Stiroh applied the same standards of statistical significance relied on in Dr. Leamer's prior
7 reports, and Dr. Stiroh never mentioned Type I and Type II statistical errors. Likewise, Dr.
8 Leamer's new justifications for his new hires variable and nominal compensation metric
9 "constitute[] an improper attempt to correct the weaknesses and improprieties of his original
10 reports." *Baker v. Chevron USA, Inc.*, 680 F. Supp. 2d 865, 879 (S.D. Ohio 2010); *see Home*
11 *Design Servs., Inc. v. Hibiscus Homes of Fla., Inc.*, No. 603CV1860, 2005 WL 2465020, at *5
12 (M.D. Fla. Oct. 6, 2005) (excluding expert testimony as untimely disclosed and not falling into
13 exception for rebuttal testimony where it merely "casts doubt on an opposing expert's report").

14 The Federal Rules are clear that Plaintiffs cannot sandbag Defendants with new
15 information and analysis that should have been included in Dr. Leamer's opening report. *Oracle*
16 *Am., Inc. v. Google Inc.*, No. C 10-03561, 2011 WL 5572835, at *3 (N.D. Cal. Nov. 15, 2011)
17 (noting expert disclosure schedule "was designed to forestall 'sandbagging' by a party with the
18 burden of proof who wishes to save its best points for reply, when it will have the last word, a
19 common litigation tactic"); *In re Ready-Mixed Concrete Antitrust Litig.*, 261 F.R.D. 154, 159
20 (S.D. Ind. 2009) (noting that the Rules "do[] not give license to sandbag one's opponent with
21 claims and issues which should have been included in the expert witness' report"). Dr. Leamer
22 was bound to include in his opening report every opinion he would offer at trial, as well as all
23 facts and data supporting his opinions and all exhibits summarizing them. Fed. R. Civ. P.
24 26(a)(2)(B)(i)-(iii). He did not. Therefore, his new arguments and analyses should be struck. *In*
25 *re Ready-Mixed Concrete Antitrust Litig.*, 261 F.R.D. at 160. Alternatively, the Court should
26 grant Defendants leave to submit a reply expert report from Dr. Stiroh addressing these points.

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1 **II. BACKGROUND**

2 On May 15, 2013, this Court issued a Case Management Order (Dkt. 421) that, *inter alia*,
3 set the deadlines for the parties to submit their expert reports. Under that Order, initial merits
4 expert reports were due October 28, 2013, rebuttal expert reports were due November 25, 2013,
5 and reply expert reports were due December 11, 2013. (*Id.*) The Order does not provide for
6 expert surreply reports. The parties agreed that Plaintiffs would submit the initial reports,
7 Defendants the rebuttal reports, and Plaintiffs any reply reports. (Declaration of Christina Brown
8 (“Brown Decl.”), Ex. 1 (Mar. 13, 2013 e-mail).) The parties further agreed and the Court ordered
9 that reply expert reports would be limited to “true rebuttal and should be very brief” and that they
10 “should not add new material that should have been placed in the opening report.” (*Id.*) This
11 agreement is consistent with the Court’s direction, in the context of class certification, that any
12 expert reply “really needs to be true rebuttal, and not introducing brand new theories that should
13 have been raised in the opening.” (*Id.* Ex. 2 (Apr. 8, 2013 Hr. Tr. at 19:6-9).) Dr. Leamer
14 previously filed four expert reports at the class certification stage, on October 1, 2012,
15 December 10, 2012, May 10, 2013, and July 12, 2013. (Brown Decl. ¶ 2.)

16 On October 28, 2013, Plaintiffs submitted Dr. Leamer’s 21-page Initial Merits Expert
17 Report. (*Id.* Ex. 6 (Leamer Initial Report).) On November 25, 2013, Defendants submitted the
18 Rebuttal Expert Report of Lauren Stiroh, Ph.D. (“Dr. Stiroh”), which addressed the issues of
19 impact and damages. (*Id.* Ex. 7 (Stiroh Rebuttal Report).) A little over two weeks later, on
20 December 11, 2013, Plaintiffs submitted Dr. Leamer’s Reply Report. (*Id.* Ex. 8 (Leamer Reply
21 Report).) It is seventy-eight pages long—nearly four times as long as his Initial Report. The
22 Report includes twenty (20) figures, eleven (11) tables, eleven (11) exhibits, and complex and
23 extensive analyses and regression results. Dr. Leamer’s Reply Report also contains a number of
24 new arguments, analyses, and exhibits on issues that have been in this case since the outset and on
25 which Plaintiffs bear the burden of proof.

26 First, Dr. Leamer’s Reply Report contains an analysis of the statistical significance of his
27 results that is completely new and contradicts his earlier analyses and statements. (*Id.* ¶¶ 75-90 &
28 Figs. 15-16.) In each of his prior reports, Dr. Leamer has consistently analyzed statistical

1 significance at the standard 1%, 5% and 10% thresholds. Dr. Stiroh similarly addressed statistical
2 significance only at the 1%, 5%, and 10% thresholds in her rebuttal report, and made no
3 suggestion that these thresholds were inappropriate. But in his Reply Report, Dr. Leamer for the
4 first time introduces a 50% threshold for determining the statistical significance of his models and
5 uses it to conduct entirely new statistical analyses.¹ (*Id.* ¶¶ 80-90 & Figs. 15-16.) As explained in
6 Defendants’ *Daubert* motion, this 50% threshold is dramatically different from the ones
7 Dr. Leamer previously relied on.

8 Having introduced a new threshold of statistical significance that has no support in his
9 prior work (or in the statistical literature), he attempts in his Reply Report to justify the threshold
10 by identifying “Type I” and “Type II” statistical errors— terms and concepts never previously
11 used in his reports. (*Id.* ¶ 83.) A Type I error in this case would be a finding of class-wide
12 impact and damages when there were none. A Type II error in this case would be a finding of no
13 class-wide impact and damages when in fact there was class-wide impact or damage. Dr. Leamer
14 then offers an extensive, new analysis of the relationship between these types of errors in an
15 attempt to defend his newly adopted 50% level of statistical significance. (*Id.* ¶¶ 84-90 & Figs.
16 15-16.) Although he had consistently reported statistical significance at the standard thresholds
17 and had previously acknowledged that his results were not statistically significant at those
18 thresholds, he did not even offer, and attempt to defend, his new threshold until his Reply Report.

19 This is hardly a new issue for Dr. Leamer. Its genesis was Dr. Murphy’s criticism at class
20 certification that Dr. Leamer failed to “cluster” the standard errors in his regression model, and
21 that when they were clustered the results were not statistically significant. Dr. Leamer at first
22 dismissed that criticism, but has now conceded it “has validity.” (Brown Decl. Ex. 1 (Leamer
23 Initial Report) at 12.) Back in April, the Court “encouraged” Dr. Leamer to take steps to address
24 the clustering, and resulting significance, problem. April 5, 2013 Class Cert. Order (Dkt.
25 No. 382) at 42-43 n.15. Dr. Leamer subsequently submitted two more class reports and an

26 _____
27 ¹ As explained in Defendants’ *Daubert* motion to strike Dr. Leamer’s testimony filed
28 concurrently herewith, Joint Motion to Exclude the Expert Testimony of Edward E. Leamer,
Ph.D., at 4-11, a significance level of 50% means there is a 50% probability of finding class-wide
impact and damages when there were none, which amounts to a statistical coin flip.

1 opening merits report. He did nothing about the clustering and significance problem until his
2 most recent Reply Report.

3 Second, Dr. Leamer for the first time offers new arguments and analyses in support of his
4 “total new hires” variable, including the assertion that it should be included in the model because
5 it is the “most statistically significant variable” and omitting it would “wreak havoc” on the other
6 coefficients in his model. (Brown Decl. Ex. 8 (Leamer Reply Report) ¶¶ 115-120 & Figs. 17-18.)
7 Dr. Leamer has never stated this opinion in any of his prior reports, even though he has used the
8 total new hires variable in his model since his very first report at the class certification stage on
9 October 1, 2012. Finally, Dr. Leamer’s Reply Report introduces for the first time a justification
10 for using real compensation as a metric in his model instead of nominal compensation. (*Id.*
11 ¶¶ 108-110.)

12 Defendants sent Plaintiffs a letter by e-mail on December 23, 2013, explaining why
13 portions of Dr. Leamer’s Reply Report constituted improper rebuttal and seeking Plaintiffs’
14 agreement to allow Dr. Stiroh to respond to Dr. Leamer’s arguments at trial and submit a reply
15 report addressing the new issues raised in Dr. Leamer’s Reply. (Brown Decl. ¶ 3.) The parties
16 met and conferred by telephone on December 26, 2013. (*Id.* ¶ 4.) At Plaintiffs’ request, on
17 December 28, 2013, Defendants sent Plaintiffs a proposed draft of Dr. Stiroh’s reply report
18 responding to Dr. Leamer’s reply report. (*Id.* ¶ 5.) On January 3, 2014, Plaintiffs informed
19 Defendants that they would not agree to permit Dr. Stiroh to submit a reply report addressing the
20 new issues raised by Dr. Leamer. (*Id.* ¶ 6.) Although Defendants deposed Dr. Leamer on
21 December 19, 2013 and questioned him regarding his opinions, Defendants are unable to serve a
22 reply responding to these opinions under the existing Case Management Order.

23 **III. LEGAL STANDARD**

24 Federal Rule of Civil Procedure 26 sets forth specific requirements for expert disclosures,
25 in order to eliminate “any vestiges of the ‘sporting’ or ‘fox-hunt’ theory of litigation.” *Aircraft*
26 *Gear Corp. v. Kaman Aerospace Corp.*, No. 93 C 1220, 1995 WL 571431, at *1 (N.D. Ill.
27 Sept. 25, 1995). Rule 26(a)(2)(B) provides that an expert witness’s opening report must contain
28 “a complete statement of all opinions the witness will express and the basis and reasons for them”

1 together with “the facts or data considered by the witness in forming them” and “any exhibits that
 2 will be used to summarize or support them.” Fed. R. Civ. P. 26(a)(2)(B)(i)-(iii). Rebuttal
 3 disclosures of expert testimony must be “intended solely to contradict or rebut evidence on the
 4 same subject matter identified by another party” in its expert disclosures. Fed. R. Civ. P.
 5 26(a)(2)(D)(ii).

6 “Rule 37(c)(1) gives teeth to these requirements by forbidding the use at trial of any
 7 information required to be disclosed by Rule 26(a) that is not properly disclosed.” *Yeti by Molly,*
 8 *Ltd. v. Deckers Outdoor Corp.*, 259 F.3d 1101, 1106 (9th Cir. 2001). This rule *requires* the
 9 exclusion of untimely expert witness testimony, unless the “part[y]’s] failure to disclose the
 10 required information is substantially justified or harmless.” *Id.* The party facing the sanction
 11 carries the burden of demonstrating that the failure to comply with rules concerning expert
 12 testimony is substantially justified or harmless. *Torres v. City of L.A.*, 548 F.3d 1197, 1213 (9th
 13 Cir. 2008); *see also Yeti by Molly*, 259 F.3d at 1107 (“Implicit in Rule 37(c)(1) is that the burden
 14 is on the party facing sanctions to prove harmlessness.”). Courts may impose additional sanctions
 15 for improper failures of disclosure, including striking the information. Fed. R. Civ. P.
 16 37(b)(2)(A)(iii), (c)(1)(C).

17 **IV. ARGUMENT**

18 **A. The New Opinions and Analyses in Dr. Leamer’s Reply Report Are Improper** 19 **Rebuttal Testimony and Should Be Stricken.**

20 **1. Dr. Leamer Presents an Entirely New Threshold of Statistical** 21 **Significance and Discusses Type I and Type II Statistical Errors for** 22 **the First Time.**

23 Section V.D. of Dr. Leamer’s reply report should be stricken in its entirety as untimely
 24 and improperly disclosed. In Section V.D., Dr. Leamer introduces for the first time his 50%
 25 threshold for determining statistical significance. This marks a fundamental change in his
 26 opinions in this case. In his previous reports, Dr. Leamer reported and analyzed results at the 1%,
 27 5% and 10% significance thresholds. (*See, e.g.,* Brown Decl. Ex. 3 (Oct. 2012 Report) Figs. 20 &
 28 23; Ex. 4 (Dec. 2012 Report) Figs. 12, 14 & 16-19; Ex. 5 (May 2013 Report) Figs. 4-5 & 8; Ex. 6
 (Leamer Initial Report) Figs. 2-6.) He relied on the fact that some of his results were, and some

1 of Defendants' were not, statistically significant at these thresholds. Accordingly, in her Rebuttal
2 Report, Dr. Stiroh used these same thresholds to point out, as Dr. Murphy had nearly a year
3 earlier, that Dr. Leamer's results did not meet them.

4 In his Reply Report, Dr. Leamer breaks with his consistent pattern of reporting and
5 relying on standard thresholds of statistical significance to advance his novel 50% threshold. In
6 an attempt to justify this fundamental change, Dr. Leamer also introduces the concept of Type I
7 and Type II statistical errors and offers new analyses of the relationship of these errors in his
8 model. In none of his previous reports had Dr. Leamer discussed these concepts, even though he
9 consistently reported statistical significance using standard thresholds. That remained true even
10 after the Court "encouraged" Dr. Leamer to provide greater support for his results, given the
11 clustering problem. Plaintiffs cannot sandbag Defendants with these novel opinions for the first
12 time in a reply report, particularly given the intervening three reports in which he chose to remain
13 silent. *Oracle Am., Inc.*, 2011 WL 5572835, at *3.

14 Plaintiffs cannot avoid the prohibition on submitting new material in a reply report by
15 contending that Dr. Leamer is merely rebutting Dr. Stiroh's analysis. Under the plain language of
16 Rule 26, Dr. Leamer's Reply Report must be limited to the subjects addressed by Defendants'
17 expert rebuttal reports. Fed. R. Civ. P. 26(a)(2)(D)(ii) (rebuttal must be "intended solely to
18 contradict or rebut evidence on the same subject matter identified by another party" in its
19 disclosures); *see, e.g., Gilbane Bldg. Co. v. Downers Grove Cmty. High Sch.*, No. 02 C 2260,
20 2005 WL 838679, at *11 (N.D. Ill. Apr. 5, 2005) ("Because the [plaintiffs'] CCL Report goes far
21 beyond rebutting the opinions expressed in [defendant's] expert report, the [plaintiffs'] CCL
22 Report is not a rebuttal report."). And as this Court previously explained, Plaintiffs' rebuttal
23 report "really needs to be true rebuttal, and not introducing brand new theories that should have
24 been raised in the opening." (Brown Decl. Ex. 2 (Apr. 8, 2013 Hearing Tr. at 19:6-9).)

25 Dr. Leamer never mentioned Type I or Type II errors in his prior reports, notwithstanding
26 his notice of this issue and the Court's encouragement to address it, and he concedes that
27 "Dr. Stiroh never mentions Type II error in her report." (Brown Decl. Ex. 8 (Leamer Reply
28 Report) ¶ 85.) Yet Dr. Leamer devotes an entire section of his Reply Report to criticizing this

1 “shortfall” in Dr. Stiroh’s Rebuttal Report and presenting completely new analyses and opinions
2 addressing Type I and Type II errors to justify his 50% significance level. (*Id.* ¶¶ 75-90 & Figs.
3 15-16.) Similarly, Dr. Leamer attacks Dr. Stiroh’s use of a 5% significance level, but
4 Dr. Leamer’s own Initial Report and the four reports he submitted in the class certification
5 proceedings all use a significance level of 5% as well. It would be one thing if Dr. Leamer
6 preferred and used the 10% significance level he has also reported and relied on, but his new
7 50% significance level is a new and dramatic departure, and it is far too late. In Section V.D,
8 Dr. Leamer is not “rebutting” anything that Dr. Stiroh said about his prior analysis. Instead,
9 Dr. Leamer is providing entirely new analysis and opinions. The Federal Rules and this Court’s
10 prior guidance prohibit such gamesmanship.

11 If Section V.D. is allowed to stand, Dr. Leamer’s new opinions would not be subject to a
12 direct response from any opposing expert as expert discovery has now closed. “This immunity,
13 combined with the element of surprise, would be unfair.” *Oracle Am., Inc.*, 2011 WL 5572835, at
14 *3. Section V.D. should accordingly be stricken from Dr. Leamer’s Reply Report and Dr.
15 Leamer should be forbidden from testifying at trial to the opinions expressed therein.

16 **2. Dr. Leamer Presents New Arguments in Support of His “Total New**
17 **Hires” Variable and Use of Real Compensation.**

18 Dr. Leamer also includes for the first time in his Reply Report entirely new arguments and
19 justifications for two aspects of his model. First, Dr. Leamer opines that his total new hires
20 variable is the “most statistically significant variable” and omitting it would “wreak havoc” on the
21 other coefficients in his model. (Brown Decl. Ex. 8 (Leamer Reply Report) ¶¶ 115-117.) He also
22 provides new analyses aimed at justifying the variable’s inclusion in his model. (*Id.* ¶¶ 118-120
23 & Figs. 17-18.) Dr. Leamer has included this total new hires variable, which drives his damages
24 results, in each version of his regression model since his first report in October 2012. Yet he has
25 never, in any of those prior reports, offered his opinion that it is the “most statistically significant”
26 variable or that it is necessary to preserve the coefficients on the other variables in the model. By
27 offering his new justifications and analyses, Dr. Leamer merely provides “a new means to support
28 [his] original opinion” and this analysis is therefore also properly stricken as improper rebuttal.

1 *Daly v. Far E. Shipping Co.*, 238 F. Supp. 2d 1231, 1240-41 (W.D. Wash. 2003), *aff'd*, *Daly v.*
 2 *Fesco Agencies NA Inc.*, 108 F. App'x 476, 479-80 (9th Cir. 2004); *see Home Design*, 2005 WL
 3 2465020, at *5 (expert testimony is not proper rebuttal where it merely “casts doubt on an
 4 opposing expert’s report”).

5 Second, Dr. Leamer’s Reply Report introduces for the first time a justification for using
 6 real compensation as a metric in his model instead of nominal compensation. (Brown Decl. Ex. 8
 7 (Leamer Reply Report) ¶¶ 108-110.) In each of his five prior reports, Dr. Leamer failed to
 8 provide any opinion or explanation as to why he believed real compensation rather than nominal
 9 compensation was the appropriate metric. Now that Dr. Stiroh has called this choice into
 10 question, Dr. Leamer improperly “attempt[s] to correct the weaknesses and improprieties of his
 11 initial report” and state for the first time the reasons underlying his decision. *Baker*, 680 F. Supp.
 12 2d at 879. The time to do so was in his Initial Report, not in a Reply Report.

13 **B. In the Alternative, Defendants Should Be Granted Leave to Submit a Reply**
 14 **Report from Dr. Stiroh Addressing the New Points Raised in Dr. Leamer’s**
 15 **Reply Report.**

16 In the alternative, if the Court is not inclined to strike Dr. Leamer’s Reply Report, the
 17 Court should grant Defendants leave to submit a reply expert report from Dr. Stiroh addressing
 18 the new opinions and analyses in Dr. Leamer’s Reply, and to offer Dr. Stiroh’s testimony on these
 19 issues at trial. As the Court’s Case Management Order did not provide for the exchange of
 20 surreplies (Dkt. 421), Defendants must obtain leave from the Court before so doing. Fed. R. Civ.
 21 P. 26(e)(1)(B). This Court has “broad discretion” to “control the extent and timing of discovery.”
 22 *Fox v. Cnty. of Tulare*, No. 11-CV-520, 2013 WL 5670873, at *6 (E.D. Cal. Oct. 16, 2013)
 23 (citation and internal quotation marks omitted); *see Hoffman v. Tonnemacher*, No. 04-CV-5714,
 24 2006 WL 3457201 (E.D. Cal. Nov. 30, 2006) (exercising its discretion and allowing defendants to
 25 designate an additional rebuttal expert on retrial). To permit the new arguments and analyses in
 26 Dr. Leamer’s Reply Report to stand without providing Defendants’ an opportunity to respond
 27 would be unfair and prejudicial. *See Oracle Am., Inc.*, 2011 WL 5572835, at *3.

28 **V. CONCLUSION**

Dr. Leamer’s Reply Report includes new opinions and analyses that should have been

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ATTESTATION

Pursuant to General Order No. 45 X(B), I hereby attest that concurrence in the filing of this document has been obtained from each of the above-listed signatories.

By: /s/ George A. Riley
George A. Riley