SUPERIOR COURT OF THE DISTRICT OF COLUMBIA
CIVIL DIVISION

DEAN MOSTOFI,	:	
	:	
Plaintiff,	:	
	:	**Case No. 2011 CA 161 B**
v.	:	**Calendar 12**
	:	**Judge Brian F. Holeman**
DISCOUNT DRUGS WISCONSIN, INC., T/A RODMAN'S	:	
	:	
Defendant.	:	
	:	
DEAN MOSTOFI,	:	
	:	
Plaintiff,	:	
	:	**Case No. 2011 CA 163 B**
v.	:	**Calendar 12**
	:	**Judge Brian F. Holeman**
MOHTARAM INC., T/A BROOKVILLE SUPERMARKET	:	
	:	
Defendant.	:	
	:	
DEAN MOSTOFI,	:	
	:	
Plaintiff,	:	
	:	**Case No. 2011 CA 367 B**
v.	:	**Calendar 12**
	:	**Judge Brian F. Holeman**
SAFEWAY, INC.,	:	
	:	
Defendant.	:	
	:	
DEAN MOSTOFI,	:	
	:	
Plaintiff,	:	**Case No. 2011 CA 977 B**
	:	**Calendar 12**
v.	:	**Judge Brian F. Holeman**
GIANT FOOD, LLC	:	
	:	
Defendant.	:	

OMNIBUS ORDER

This matter comes before the Court upon consideration of the following: (1) Defendants' Motion to Exclude Nancy Ash's Testimony ("Motion to Exclude Ash"), filed on November 30, 2012, and (2) Defendants' Motion to Strike the Untimely Expert Declarations of Rodney J. Mailer, Abraham Wyner, and Nancy Ash ("Motion to Strike Untimely Declarations"), filed on November 30, 2012. On December 19, 2012, Plaintiff filed the Opposition to the Motion to Exclude Ash and Opposition to the Motion to Strike Untimely Declarations. This Court shall address these Motions in this Omnibus Order because they are largely similar, differing mainly only with respect to the named defendant in each case.

I. INTRODUCTION

On January 7, 2011 and January 14, 2011, Plaintiff filed the *pro se* Complaints, alleging that Defendants misrepresented the quality of extra-virgin olive oil ("EVOO") sold by local merchants, including Defendants, in each of the instant cases. Plaintiff later retained Nancy Ash to convene an ad hoc panel of olive oil tasters to determine whether certain brands of extra virgin olive oil sold by Defendants were actually extra virgin in quality.

Defendants' Motion to Exclude Ash seeks to exclude Nancy Ash's testimony from trial. Plaintiff plans to produce at trial the testimony and results of Ash's experiment. Through her experiment, Ash convened an ad hoc panel of taste testers to judge fourteen different samples of olive oil. Plaintiff seeks to rely on Ash's opinion that nine of the fourteen samples should not have been labeled as extra virgin when sold to consumers. Defendants seek to have Ash's testimony excluded in its entirety by asserting that she is not qualified to either convene the panel or interpret its results, and that her methodology does not satisfy the *Frye* test.

To support the claims of Ash and to rebut Defendants' experts, Plaintiff retained two additional experts, Dr. Abraham Wyner and Dr. Rodney J. Mailer. Defendants now move to strike the declarations of Dr.'s Wyner and Mailer, on grounds that Plaintiff did not reveal the experts' opinions or the factual bases for their opinions in a timely manner. As to Ash, Plaintiff opposes Defendants' argument that Ash's supplemental declaration is outside the scope of her prior report.

II. DEFENDANTS' MOTION TO EXCLUDE THE TESTIMONY OF NANCY ASH

A. ADMISSIBLITY OF EXPERT EVIDENCE

Expert testimony is admissible if it is likely to aid the trier in the search for truth. *Dyas v. United States*, 376 A.2d 827, 831 (D.C. 1977). The determination that an expert has the necessary qualifications is in the trial court's sound discretion. *In re A.B.*, 999 A.2d 36, 40 (D.C. 2010). However, even if a witness is qualified to testify as an expert due to that individual's experience in a particular field, a trial judge is not obligated to find the individual qualified if there are reasons to doubt the person's competency. *Glorious Food v. Georgetown Prospect Place Assocs.*, 648 A.2d 946, 948 (D.C. 1994). Generally, "relevant, unprivileged evidence should be admitted and its weight left to the factfinder, who would have the benefit of cross examination and contrary evidence by the opposing party." *In re Melton*, 597 A.2d 892, 899 (D.C. 1991). The standard for admission of expert testimony in the Superior Court of the District of Columbia is the following:

> (1) The subject matter must be so distinctively related to some science, profession, business or occupation as to be beyond the ken of the average layman;
> (2) The witness must have sufficient skill, knowledge, or experience in that field or calling as to make it appear that his opinion or inference will probably aid the trier in his search for truth; and

(3) Expert testimony is inadmissible if the state of the pertinent art or scientific knowledge does not permit a reasonable opinion to be asserted even by an expert.

Jones v. United States, 990 A.2d 2d 970, 976-77 (D.C. 2010) (citing *Dyas*, 376 A.2d at 832).

1. Distinctively Related

It is undisputed that the attributes of olive oil analyzed by tasters on olive oil panels are distinctively related to the business of the olive oil industry. (*See* Memo. in Support of Mot. to Exclude Ash 3.); (*see also* Opp'n 1-2.) This industry is specialized and the sensory perception of the many recognized attributes of olive oil used to assign it a grade is studied and learned by tasters. The subject matter related to the olive oil business is well beyond the ken of the average layman. *See e.g. In re Melton*, 597 A.2d at 898.

2. Skill, Knowledge, or Experience

The court has broad discretion in determining whether to admit expert testimony. *Jung v. George Washington Univ*., 875 A.2d 95, 104 (D.C. 2005). There is no one requirement that will make an expert's testimony admissible or inadmissible. "Ordinarily, a specialist in a particular branch within a profession is not required." *In re Melton*, 597 A.2d at 897. "Scholarship is not a prerequisite for eligibility to testify as an expert witness; the relevant knowledge may be derived from professional experience." *Jones*, 990 A.2d at 979 (quoting *Karamychev v. District of Columbia*, 772 A.2d 806, 812 (D.C. 2001)). Similarly, "publication is not the *sine qua non* of admissibility; it does not necessarily correlate with reliability." *Daubert v. Merrell Dow Pharms*., 509 U.S. 579 (1993). As such, the determination of qualifications of a challenged expert rests exclusively with the trial court. *Glorious* Food, 648 A.2d at 948.

Ash has developed a career as both a taster and a leader in olive oil tasting panels for over ten years. (Ash Deposition 36.) Defendants contend that Ash convened her ad hoc panel for the

first time in this litigation, which indicates a lack of expertise in the subject matter. (Memo. in Support of Mot. to Exclude Ash 5.) Further, Defendants contend that Ash's publications, which consist of computer presentations and non-scientific, consumer-related articles, are not sufficient to render her as qualified to provide an expert opinion. (*Id*. at 10.) Still further, Defendants contend that Ash took courses on olive oil tasting that did not evaluate her work on taste-testing the oils, rather simply awarded her general knowledge of the olive oil industry and attendance certificates. (*Id*. at 11.)

The evidence demonstrates that Ash was trained as a taster by other well known and respected olive oil tasters. She also works as a leader on one of the panels she serves, where she trains other panel members. (Ash Deposition 49-50.) She was the original trainer of the government taste panel. (*Id*. at 59-60.) Ash has attended olive oil seminars, which included taste-tasting and theoretical discussions. (*Id*. at 34-41.) A one week course she attended in Italy addressed the knowledge needed to supervise a taste-testing panel. (*Id*. at 43-44.)

The fact that this was Ash's first ad hoc panel has no bearing on her overall experience with tasting panels, nor does it render her results unreliable. The United States is not a member of the International Olive Counsel. (Amended Declaration of Dr. Ardrea Giomo 7.) Thus, presumably, there are no IOC-accredited panels present in the United States that Ash could have used. Unlike proffered experts in the cases cited by Defendants, Ash does have experience in the industry at issue, and has been continuously training in olive oil tasting and panel-related work for several years. *See Jung*, 875 A.2d at 105-106 (proffered expert precluded where expert admitted having no experience, *inter alia* with the university standards involved in the case.); *see also Young v. Interstate Hotels & Resorts*, 906 A.2d 857, 865 (D.C. 2006) (proffered expert

testimony precluded where expert found to have no expertise or experience in the policy or procedure for extracting injured persons from a freight elevator.).

Ash does not rely solely on her personal opinion to arrive at and interpret her results. *See Toy v. District of Columbia*, 549 A.2d 1, 7 (D.C. 1988). Ash's testimony would assist the Court in understanding the evidence or determining a fact in issue.

3. Expert Opinion and *Frye*

The third criterion under *Jones* incorporates the *Frye* test, which states that scientific testimony is admissible only if the theory or methodology on which it is based has gained general acceptance in the relevant scientific community. *Jones*, 990 A.2d at 977; *Frye v. United States*, 293 F. 1013, 1014 (D.C. Cir. 1923). Scientific testimony will not pass the *Frye* test if "scientists significant in either number or expertise publicly oppose [a new technique] as unreliable." *United States v. Porter*, 618 A.2d 629, 634 (D.C. 1992) (alteration in original) (citation omitted).

In determining general acceptance, the focus required is "consensus versus controversy over a particular technique, *not its validity*." *Id.* at 634 (emphasis added). While the conditions of the experiment must be "substantially similar to those of the alleged occurrence . . . dissimilarities that are neither material nor misleading do not bar admission of the experimental evidence." *Butts v. United States*, 822 A.2d 407, 414-415 (D.C. 2003). Unanimity within the scientific community is not required. *Id* at 415.

Defendants make substantively similar arguments, most of which go to the validity of Ash's experiment. For example, Defendants assert that Ash failed to adhere to the protocols established by the IOC for convening a panel of tasters and evaluating their results. (Mot. to Exclude Ash 18.) Defendants state that Ash asked panelists to taste fourteen samples of olive oil

in one sitting, where the IOC allows four oils in one sitting or twelve in one day. (*Id*. at 19.) Still further, Defendants assert that Ash does not know how the bottles of oil were stored between purchase and testing, and note that at least two bottles came to her with broken seals. (*Id*. at 20.) Ash concedes that olive oil can develop the recognized negative quality of "rancid" if the seal is broken or the oil mishandled. (*Id*.) Defendants also assert that Ash paid her panelists in contravention of IOC guidelines. (*Id*.)

Defendants argue that Ash did not follow a generally accepted methodology in interpreting the ad-hoc panel's results. Defendants discuss at length Ash's lack of familiarity with the statistical component of the testing, including Coefficient of Variation (CVr) calculations and the third-party prepared spreadsheet used by Ash to calculate her results. (*Id*. at 13-16.) Defendants assert that Ash obtained this spreadsheet from Juan Ramon Izquierdo, a taster that trained Ash and contributed to the creation of the spreadsheet and the IOC sensory assessment. (*Id*.) Defendants assert that Ash possesses only a general understanding of statistics and is thus unqualified to interpret the results of the panel. (*Id*.) Further, Defendants assert that Ash did not understand all of the formulas and the statistical significance of some of the measures underlying the analysis. (*Id*.) As such, she allegedly relied on a statistical spreadsheet prepared by another expert. (*Id*.)

Defendants argue that Ash did not apply the twenty-percent (20%) cut off for the CVr statistic that is used to determine whether an olive oil must be retested. (*Id*. at 21.) Defendants assert that Ash used the incorrect method to determine the CVr values of the oils and thus reached a number below the threshold that requires that the oils be retested. (*Id*. at 22.) Defendants argue that Ash's refusal to follow the IOC's methodology regarding use of the CVrs

in the olive oil testing indicates that her methods are not commonly accepted and her testimony should be excluded. (*Id.* at 22-23.)

Plaintiff contends that Ash was not required to use the IOC methodology to test the oils or interpret her results because she was making only a binary determination whether the oils were extra virgin or not at the time of testing, not determining their classification for sale. (Memo. of Points and Authorities in Support of Opp'n 17.) Further, Plaintiff contends that, contrary to Defendants' assertion, Ash never testified that the IOC methodology is the only methodology for making the binary distinction she sought. (*Id*. at 15.) Still further, Plaintiff contends that Ash's testing methodology borrowed heavily from that of the IOC. (*Id*. at 24-25.) Her panel members are all regular members of established and recognized panels of olive oil tasters including the California Olive Oil Council and/or the UC Davis panels, which are "well-respected and are among the most experienced panels in the nascent United States sensory assessment community." (*Id*.) Each panel member had participated in calibration testing to measure their tasting sensitivity. (*Id*. at 26-27.)

Regarding the number of samples tested by Ash in one sitting, Plaintiff contends that the IOC limits are guidelines, not requirements. (*Id*. at 27.) Similarly, Plaintiff contends that nonpayment of panel members is merely a recommendation and not a requirement; Ash was paid to work for the California Olive Oil Council Panel. (*Id*.) Defendant's speculation that the samples could have degraded over a short shipping time between Ash and Plaintiff is not well founded.

Regarding the CVr scores for the oils, Plaintiff contends that the only reference made to a twenty-percent CVr score in IOC documents is under the section addressing classification of *virgin* olive oil. (*Id*. at 36.) Further, Plaintiff asserts that Defendants' expert incorrectly

calculated related inter-quartile range (IQR) values used in the CVr calculations by using a method other than that specified by IOC. (*Id*.)

Defendants' arguments present questions of degree, which impact the weight of expert testimony, not its admissibility.[1] *Porter*, 618 A.2d at 634; *see Butts*, 822 A.2d at 415 (stating "no event can be perfectly reenacted"). Further, Ash's lack of specialization in statistics and her reliance on a spreadsheet prepared by another expert in her field does not automatically disqualify her. *See e.g. In re A.B.,* 999 A.2d 36, 42 (D.C. 2010) (explaining that a pediatrician's lack of specialization in genetics and her partial reliance on a finding by another expert was not disqualifying). Objections to out-of-court materials relied upon by an expert affect the weight, not the admissibility, of expert evidence. *Id.* at 43.

The apparent dispute regarding the calculation of values used to find the CVr scores for the oils demonstrates a disagreement between the experts involved, and neither view appears facially unsound. The calculation of IQR to be used in CVr valuation has multiple acceptable methods, and Ash's use of one acceptable method over the other is not fundamental and does not render her testimony inadmissible.[2] *Cf. Porter*, 618 A.2d at 636 (D.C. 1992) (explaining the existence of a fundamental disagreement between geneticists concerning statistical significance of a match of DNA patterns, featured in leading scientific journals) (citation omitted). This Court notes that the United States is not a member of the IOC. Further, the IOC makes many nonbinding sampling *recommendations*. Recommendations, like guidelines, are not standards.

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[1] Plaintiff cites *Drevenak v. Abendschein*, 773 A.2d 396 (D.C. 2001) for the proposition that Ash's method was not "novel science" that is evaluated under the *Frye* standard, rather closer to "clinical judgment" based on specialized knowledge. (Memo. of Points and Authorities in Support of Opp'n at 28.) However, in *Drevenak* the Court uses this analogy to discuss the *sufficiency* of expert evidence, whereas in the instant motion, the issue concerns the *admissibility* of the expert testimony. *Drevenak*, 773 A.2d at 418. The *Drevenak* court declined to apply the *Frye* standard to questions of sufficiency. *Id.*

[2] Plaintiff attempts to frame Ash's experiment as a physical comparison, which the Court finds unpersuasive.

The testing method used by Ash to make a binary interpretation is a "generally accepted" practice within the industry. (Memo. of Points and Authorities in Support of Opp'n at 30-32.) In fact, Defendant Safeway used the same method as Ash. (*Id.* at 19.) The major retailer used a private, non-IOC accredited company to evaluate its purported extra virgin olive oils. (*Id*. at 20.) Further, there are few qualified olive oil tasters in the United States (*Id*. 7), and those provide individual non-IOC taste tests such as those conducted for olive oil importers. (*Id.* at 18-30) Defendants produced results of olive oil tests from Innovhub, an olive oil manufacturer that is not an IOC-accredited panel. (Innovhub Aug. 2, 2012 1.) Further, the USDA's tasting panel is not IOC-accredited, and non-industry evaluators such as popular magazines have also used methods like Ash's. (*See id.*at 30-31.) The procedures delineated in IOC documents seem to be, in practice, mere recommendations. Regardless, the Ash panel is not IOC accredited, nor does it claim to be. (*See id*. at 24.)

B. BOLSTERING AND OPPOSING EXPERT TESTIMONY

1. Support of Expert Testimony

Defendants contend that Plaintiff has offered three untimely corroborating expert reports to defend Ash. These reports include: (1) a declaration from Dr. Rodney Mailer, regarding an experiment from Australia on similar brands of olive oil and the UC Davis study; (2) a declaration from Dr. Abraham Wyner, which rebuts Dr. Andrea Giomo's calculations; and (3) a supplemental declaration from Ash about more tests performed in Australia. (*See* Mot. to Exclude Ash 23-24 n.5.) Defendants contend that these reports cannot cure Ash's lack of experience in convening and leading a panel. Further, Defendants contend that even if the experts accept Ash's results, they cannot repair her flawed methodology. Still further,

Defendants contend that Plaintiff cannot use the reports to undo Ash's concession that she deviated from the IOC method.

Both Dr. Mailer and Dr. Wyner support the results of the Ash panel. Plaintiff asserts that he is permitted to bolster Ash through additional expert testimony. Defendant has raised this issue in a contemporaneous Motion to Strike Untimely Declarations, which shall be analyzed separately, *infra*, 12 in this Order.

2. Opposition to Expert Testimony

Plaintiff contends that Defendants rely solely on the argument of counsel to establish that Ash's method was not generally accepted and should be excluded. (Memo. of Points and Authorities in Support of Opp'n at 21.) Plaintiff contends that Ash's non-IOC method for making a binary determination was never challenged or even the subject of comment by Defendants' expert. (*Id*. at 23) Further, Plaintiff contends that Defendants provide no support for the assertion that Ash lacks the appropriate skills to lead an ad hoc panel of tasters. Plaintiff suggests that the challenges to Ash's qualifications and methodology are based upon the speculation of defense counsel and that the Court should disregard it. (*Id*. at 21-24)

The Court is satisfied that Defendants' expert explains in great detail the requirements of the IOC with regard to olive oil taste tests and panels. (*See generally* Am. Decl. of Dr. Andrea Giomo August 12, 2012) Defense counsel merely relies on Defendants' witness to explore and challenge Ash's qualifications.

C. CONCLUSION AS TO NANCY ASH'S EXPERT STATUS

The qualifications and methods Plaintiff cites are sufficient to establish the general acceptance of Ash as an expert in the field. Defendants do not provide sufficient evidence that Ash's experience and expertise are so lacking as to render the results of her experiment entirely

speculative. *See Sponaugle v. Pre-Term, Inc.,* 411 A.2d 366, 367 (D.C. 1980) ("[Expert opinion] is properly received so long as it is not mere guess or conjecture…absolute certainty is not required").

This Court finds that Nancy Ash's expert testimony is admissible. Ash's publications and her experience working as a taster and trainer on recognized panels, combined with related coursework, supply her with sufficient knowledge and experience in the field of olive oil taste-testing. Her training and professional career are sufficiently and directly related to olive oil attributes and tasting to give her a reasonable foundation for her testimony. This Court finds that Ash's methods are generally accepted. Further, Plaintiff may call additional experts to present his theory subject to the Court's anticipated ruling precluding testimony that is unduly cumulative or duplicative. The factfinder shall determine the weight and credibility of expert testimony. *See*, *e.g.*, *Derzavis v. Bepko*, 766 A.2d 514, 524-525 (D.C. 2000).

II. DEFENDANTS' MOTION TO STRIKE THE DECLARATIONS OF PLAINTIFF'S EXPERT WITNESSES

A. EXCLUDING TESTIMONY

The District of Columbia Court of Appeals has stated:

> [I]t would be imposing too great a burden to require a party to describe, in a Rule 26(b)(4) statement, every possible direction his expert's testimony could take. Courts have generally allowed experts to state the natural concomitants of their arguments, including rebuttals of contrary expert testimony, when they have been satisfied that such testimony was of a piece with the original theory.

Weiner v. Kneller, 557 A.2d 1306, 1310 (D.C. 1989).

Further, the Court should consider the following factors in determining whether to permit expert testimony that was improperly excluded from a Rule 26(b)(4) statement:

> (1) [W]hether allowing the evidence would incurably surprise or prejudice the opposite party;
> (2) whether excluding the evidence would incurably prejudice the party seeking to introduce it;
> (3) whether the party seeking to introduce the testimony failed to comply with the evidentiary rules inadvertently or willfully;
> (4) the impact of allowing the proposed testimony on the orderliness and efficiency of the trial; and
> (5) the impact of excluding the proposed testimony on the completeness of information before the court or jury.

Weiner, 557 A.2d at 1311-12. The burden is on the party seeking to introduce the testimony to satisfy a preponderance of these factors. *Id.* "The trial Court has broad discretion to apply discovery sanctions…and [e]xclusion of evidence is a severe sanction." *Id.* at 1309-10. Testimony by one party that addresses newly developed information that could not have been anticipated by the opposing party may be admitted. *George Washington Univ. v. Lawson*, 745 A.2d 323, 327 (D.C. 2000).

Further, in order to protect a party from surprise, the opposing party shall not advance new arguments on rebuttal. *Campbell-Crane & Assocs. v. Stamenkovic*, 44 A.3d 924, 941 (D.C. 2010) (quoting *Shelton v. United States*, 983 A.2d 979, 985 (D.C. 2009). Rather, "rebuttal evidence should be presented to refute, contradict, impeach or disprove the evidence that the adversary has already elicited." *Campbell-Crane & Assocs.*, 44 A.3d at 941. The trial court has discretion to determine whether rebuttal evidence will be allowed. *Id*. The Rules permit a witness to be called for the purpose of impeachment or rebuttal unless the witness was not known by the non-calling party. *See* Super. Ct. Civ. R. 16 (b)(2). If there is no trial date set, the Court may accommodate requests to extend discovery. *See*, *e.g.*, *Daniels v. Beeks*, 532 A.2d 125, 128 (D.C. 1987).

B. APPLICATION TO PLAINTIFF'S EXPERTS

The Court has reviewed Plaintiff's 26(b)(4) Statement of Rebuttal Experts, filed on June 29, 2012. This statement designates Dr. Abraham J. Wyner as a rebuttal expert to Dr. Lawrence Mayer, who Defendants designate to testify "regarding the development and assessment of statistical methodologies, including but not limited to the indicia of methodological unreliability." (Defendant's Rule 26(b)(4) Statement Mar. 9, 2012.) On May 11, 2012, the Court ordered Defendants to clarify Dr. Mayer's testimony. On June 29, 2012, Defendants submitted an Amended Rule 26(b)(4) Statement identifying Dr. Andrea Giomo as an expert. On that same day, the Court reviewed Plaintiff's Amended Rule 26(b)(4) Statement of Rebuttal Experts ("Plaintiff's Amended 26(b)(4)"), filed on June 29, 2012. In Plaintiff's Amended 26(b)(4), Plaintiff designates Dr. Rodney J. Mailer to rebut the testimony and opinions of Dr. Andrea Giomo. On September 17, 2012, Plaintiff filed the final Supplemental Rule 26(b)(4) Statement of Rebuttal Expert, designating Dr. Wyner as a rebuttal expert to Dr. Giomo.

Plaintiff's Rule 26(b)(4) Statements and Supplements are sufficient to avoid the sanction of preclusion. Further, once experts have been designated, an opposing party is entitled to pursue discovery regarding a designated expert's opinion. *See*, *e.g.*, *Lowrey v. Glassman*, 908 A.2d 30, 35 (D.C. 2006).

1. Dr. Mailer's Declaration

In October 2012, Plaintiff served Dr. Rodney J. Mailer's Declaration upon Defendants. In that Declaration, Dr. Mailer discusses his experience in working with olive oil and his conclusions regarding Ash's experiment. Dr. Mailer was one of the authors of the UC Davis report, and supervised a lab in Australia which evaluated olive oils based on IOC methods. Dr. Mailer discusses the results of the UC Davis study and how they corroborate those of the Ash

panel. Further, Dr. Mailer explains why he disagrees with Dr. Giomo's conclusion that IOC accreditation is necessary to distinguish extra virgin olive oil from other types of olive oil. Still further, Dr. Mailer discusses his evaluation of his study commissioned by Plaintiff that was performed by a lab in Australia previously supervised by Dr. Mailer. In that study, Plaintiff's counsel sent six samples of olive oil to the lab that were also tested by the Ash panel. Dr. Mailer found that in five out of the six samples, the Ash results were corroborated by the lab. (Mailer Declaration 12.)

Defendants contend that Plaintiff did not mention the study during any depositions or discovery prior to this declaration. Further, Defendants cite inefficiency and heightened costs of extending discovery in order to gather information regarding the studies referred to by Dr. Mailer. Still further, Defendants contend that the brands in the studies are unrelated to the retailer and brand combinations at issue in this case. (Memo. of Points and Authorities in Support of Mot. to Strike 19-21.)

Defendants attack Ash's credibility as a panel leader, and her experimental methods. Dr. Mailer is an outside expert proffered to rebut the challenge to qualifications and methods. Like Ash, Dr. Mailer is subject to cross-examination at trial on his findings and qualifications, and Defendants are not prejudiced by the Court admitting his testimony. *See supra* ¶ 1, at 12. The separate experiments discussed by Dr. Mailer involve the brands at issue in this litigation. Further, the oils at issue are not limited to the specific bottles Plaintiff purchased. The fact that different bottles may have been tested does not change the chemical composition of those brands. Dr. Mailer's testimony may contribute to the completeness of information presented to the factfinder. Since Dr. Mailer is qualified to and does make an independent determination that Ash's results are valid, his declaration buttresses Ash and is admissible.

2. Dr. Wyner's Declaration

On June 29, 2012, Dr. Abraham Wyner was designated to rebut the testimony of Dr. Mayer. However, in September 2012, Plaintiff designated Dr. Wyner as a rebuttal expert to Dr. Giomo. Dr. Giomo was identified one day prior to the close of discovery. Defendants argue that Dr. Wyner was untimely designated as a rebuttal expert. The argument is unavailing. It was not feasible that Plaintiff designate a different rebuttal expert to counter Dr. Giomo on such short notice prior to the close of discovery. Given that Dr. Wyner is proffered to rebut Dr. Giomo in the same way he is to rebut Dr. Mayer, Defendant is in no way prejudiced by his designation. Conversely, if Dr. Wyner's testimony as to Dr. Giomo's report were stricken, Plaintiff would suffer great prejudice, as Wyner is the only expert to fully explain his statistical interpretation of the Ash results. (*See* Memo. of Points and Authorities in Support of Opp'n to Mot. to Strike 18.)

3. Ash's Supplemental Declaration

In Nancy Ash's Supplemental Declaration, she lists the olive oil brands tested in Australia in an independent test other than the one discussed in the Mailer Declaration. Further, she discusses the result of how that independent test corroborates those of her panel. Ash asserts that the panel used in Australia is IOC-accredited, concluding that her panel was qualified and obtained valid results. (*Id*., Ex. K 1-4) Defendants argue that Ash discusses an irrelevant study in her declaration, which is prejudicial to Defendants and would require substantial additional discovery.

Ash's Supplemental Declaration is an apparent effort to rehabilitate her credibility in response to Defendants' challenges. Ash conducted her experiment by relying on methods used by other U.S. panels and the guidelines of the IOC. In the Supplemental Declaration, Ash does not express an expert opinion, rather makes an effort to validate her results and her method by

examining other material that corroborates her work. Ash is subject to cross-examination on the results of this study and the extent of her involvement. *See supra* ¶ 1, at 12.

C. CONCLUSION AS TO DECLARATIONS

Discovery closed on June 30, 2012, but no trial date has been set. Thus, Defendants are not unduly prejudiced by the late submission of Declarations of Plaintiff's experts. Further, Defendants submitted Dr. Giomo's Declaration after the close of discovery. The Declarations of Ash and Dr. Mailer independently support Ash's credibility, which was questioned by Defendants. The Declaration of Dr. Wyner not only supports Ash's methods, but challenges the validity of Dr. Giomo's statistical conclusions. There is nothing on this record to suggest that Plaintiff willfully refused to comply with the applicable rules of procedure or evidence. In fact, Plaintiff timely designated his experts and properly supplemented the expert information with written declarations. Any additional defense inquiry occasioned by Plaintiff's Supplement may be cured by a limited reopening of discovery.

WHEREFORE, it is this 13th day of November, 2013 hereby

ORDERED, that Defendants' Motion to Exclude Nancy Ash's Testimony is **DENIED**, and it is further

ORDERED, that the Defendants' Motion to Strike the Untimely Expert Declarations of Rodney J. Mailer, Abraham Wyner, and Nancy Ash is **DENIED**, and it is further

ORDERED, that within ten (10) days of the date of entry of this **ORDER**, counsel for Plaintiff shall coordinate a conference call with all counsel to chambers for the purpose of setting a status hearing.

BRIAN F. HOLEMAN
JUDGE

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