IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

FEDERAL TRADE COMMISSION, Plaintiff, v. U.S. ANESTHESIA PARTNERS, INC., Defendant.	**REDACTED** Case No.: 4:23-CV-03560-KH **ORAL ARGUMENT REQUESTED**

DEFENDANT U.S. ANESTHESIA PARTNERS, INC.'S OPPOSITION TO PLAINTIFF FEDERAL TRADE COMMISSION'S MOTION TO EXCLUDE EXPERT OPINIONS AND ANALYSES NOT CONTAINED IN EXPERT REPORTS

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INTRODUCTION

During the FTC's depositions of USAP's experts—Dr. Lona Fowdur, Dr. Zeev Kain, and Mr. David Fix—the FTC invited each to respond to criticisms that the FTC's experts raised for the first time in their reply reports. Each witness answered the FTC's questions, explaining why they disagreed with those critiques and, where appropriate, clarifying any confusion that may have lingered surrounding their opinions and methodologies. This is exactly what the Federal Rules promote, as it "eliminate[s] [any] unfair surprise" and "prejudice" the FTC might have otherwise faced had it heard those responses for the first time during trial. *SEC v. Life Partners Holdings, Inc.*, 2013 WL 12076934, at *3 (W.D. Tex. Nov. 8, 2013) (citation omitted).

The FTC apparently regrets eliciting that deposition testimony and asks the Court to erase the testimony it now wishes had never come out. The FTC may not like that USAP's experts have disagreed with their experts' opinions, but that is what the adversarial system protects and encourages; and the FTC "cannot [] complain" about testimony it elicited. *See Vital v. Varco*, 2015 WL 7736637, at *5 (S.D. Tex. Nov. 30, 2015). The FTC complains nonetheless, distorting the law and USAP's experts' sworn testimony. USAP's experts testified consistent with their obligations under Rule 26. This Court should therefore deny the FTC's motion.

NATURE AND STAGE OF THE PROCEEDINGS

The FTC sued USAP in September 2023. Fact and expert discovery are now complete. USAP has moved for summary judgment. *See* Dkt. No. 303.

ISSUES TO BE DECIDED BY THE COURT

1. Whether Federal Rule of Civil Procedure 26 requires an expert witness to refuse an opposing party's invitation during a deposition to respond to criticisms of their opinions and methods that the opposing party's expert raised for the first time in a reply report;

2. Whether an expert may clarify their opinions and underlying methodology in response to questioning during a deposition, particularly when the opposing party's questions reveal confusion regarding the bounds of their opinions or the methods the expert employed in reaching those opinions; and

3. If the Court determines that some of USAP's expert deposition testimony was untimely under Rule 26, then whether the FTC has shown it has incurred such substantial prejudice to its ability to prepare for trial that the Court must either (i) strike the deposition testimony that the FTC elicited, or (ii) reopen expert discovery.

BACKGROUND

1. Consistent with the then-operative Second Amended Scheduling Order (Dkt. No. 266), on July 25, 2025, the FTC disclosed written reports from its two expert witnesses, Drs. Cory Capps and Marc Philip T. Pimentel. *See* Dkt. No. 296-2 ¶ 3; Fed. R. Civ. P. 26(a)(2)(B). Because that Scheduling Order only required the parties to disclose expert reports on issues for which they "bear[ ] a burden," USAP disclosed no expert witnesses. Dkt. No. 266 ¶ (g).

Dr. Cory Capps. Across his nearly 141-page report, Dr. Capps offers his views about nearly every aspect of the FTC's case, including on issues related to the relevant product and geographic markets and USAP's alleged monopoly power in those markets. *See* Dkt. No. 302-6 §§ III-VI. Dr. Capps [redacted]. *See id.* ¶¶ 266-72; *see also* Ex. 1 (Capps Dep. Tr. 216:20-217:15) ([redacted]).

Dr. Marc Philip T. Pimentel. Dr. Pimentel opines about USAP's quality of care. To do so, [redacted]

[redacted]. *See* Ex. 2 (Pimentel Rep. ¶¶ 52-55).

2. Eight weeks later, on September 19, USAP timely disclosed its rebuttal experts and their written reports. *See* Dkt. No. 266 ¶ (g); Fed. R. Civ. P. 26(a)(2)(D)(ii) (parties may disclose experts whose opinions are "intended solely to contradict or rebut evidence on the same subject matter identified by another party under Rule 26(a)(2)(B) or (C)").

Dr. Lona Fowdur. Dr. Fowdur focused on Dr. Capps's opinions and supporting analyses. After reviewing scores of documents and dozens of terabytes of claims data produced by both USAP and nonparties, Dr. Fowdur determined that [redacted]. She demonstrated through her own analyses of the same documents and data available to Dr. Capps that [redacted]. Dr. Fowdur lastly countered Dr. Capps's [redacted].

Dr. Zeev Kain. Dr. Kain focused on the quality of USAP's clinical anesthesia services. He explained how [redacted]. Dr. Kain, after reliably applying [redacted], concluded that [redacted].

Mr. David Fix. Mr. Fix also focused on USAP's quality, but from a non-clinical perspective. Relevant here, Mr. Fix's rebuttal report covered three topics. *First*, he opined that [redacted] *Second*, he opined that [redacted]. *Third*, Mr. Fix [redacted].

3. The FTC served its reply reports in December 2025. *See* Dkt. No. 292-1 ¶ (g); Dkt. No. 292 at 2. Dr. Capps submitted a 125-page report filled with critiques of Dr. Fowdur's opinions and the methods she relied upon, citing some new analyses he undertook to bolster the positions he took in his opening report. During her January 13, 2026, deposition, Dr. Fowdur—in response to questioning from the FTC's counsel—responded to a few of those critiques.[1] The FTC now wants to strike those responses from the record it created. Dr. Fowdur's testimony, and the FTC's arguments for striking it, are addressed in Argument Section I.B.1, *infra*.

Dr. Pimentel first offered his own critiques of Dr. Kain's application of [redacted]. Dr. Kain reviewed those responses before his January 9 deposition and, in answering the FTC's questions [redacted], elaborated on his methodology and how Dr. Pimentel had misunderstood it. Dr. Kain also told the FTC he had additional critiques of how Dr. Pimentel [redacted] in his reply report, *see* Ex. 4 (Kain Dep. Tr. 59:20-60:24), which he later elaborated on during the FTC's examination. Now, the FTC appears to ask the Court (at 9-

[1] Before her deposition, Dr. Fowdur served a corrected rebuttal report that fixed some inadvertent data errors in the September 19 version of her report that Dr. Capps identified and discussed in his reply report. Ex. 3 (Fowdur Dep. Tr. 17:6-18:5). The FTC questioned her about those changes, *see, e.g., id.*, but does not now allege that they are objectionable or must be stricken.

11) to preclude Dr. Kain from offering testimony about his methodology and his responses to Dr. Pimentel's critiques at trial. These issues are discussed in Argument Section I.B.2, *infra*.

Dr. Pimentel also responded to one of Mr. Fix's opinions [redacted]. He asserted that Mr. Fix's analysis was flawed because [redacted]. The FTC's counsel thoroughly cross-examined Mr. Fix about [redacted], and it wants to keep that testimony in the record. But the FTC wants to excise one question from USAP's redirect examination intended to clarify some factual points during the FTC's questioning [redacted]. This exchange is analyzed in Argument Section I.B.3, *infra*.

ARGUMENT

USAP's rebuttal experts' deposition testimony complied with Federal Rule of Civil Procedure 26. Those exchanges are "analogous to responding to questions posed during cross-examination" during trial "and do not [even] implicate Rule 26(a)." *Davis v. Adam*, 2025 WL 1782565, at *3 (N.D. Okla. May 16, 2025). Regardless, Rule 26 empowered Dr. Fowdur, Dr. Kain, and Mr. Fix to respond during their depositions to criticisms first raised by Drs. Capps and Pimentel in their reply reports. Such responses are not, as the FTC claims (at 5-6), "supplement[ary]" material under Rule 26(e).

Even if the FTC could show some piece of USAP's experts' testimony deviated from Rule 26 (it cannot), any such deviation would be substantially justified and harmless. The deposition testimonies the FTC elicited were "natural, logical, and wholly predictable outgrowth[s]" of USAP's experts' September 19 rebuttal reports; any argument that the FTC "w[as] 'sandbagged' . . . is risible, and the notion that [it] w[as] unfairly surprised strains credulity." *Life*

Partners, 2013 WL 12076934, at *3; *see also Mike Hooks Dredging Co. v. Eckstein Marine Serv.*, 2011 WL 3270855, at *2-3 (E.D. La. Aug. 1, 2011) (no Rule 37 sanctions warranted if a supplemental report fails to "raise new issues," "cover wholly uncharted territory," or "contain any shocking revelations" leaving the opposing party unable to "adequately prepare to defend against [the] opinions before trial" (cleaned up)).

This Court should deny the FTC's motion and reject its efforts to reopen expert discovery.

I. Consistent with Rule 26, USAP's Experts Responded During their Depositions to Criticisms that Dr. Capps and Dr. Pimentel First Raised in Their Reply Reports

The FTC concedes that the opinions in USAP's experts' written reports were proper under Rule 26. *See* Fed. R. Civ. P. 26(a)(2)(D)(ii) (authorizing rebuttal testimony "to contradict" the evidence "on the same subject matter identified by" an adversary). It nevertheless asks the Court to strike certain deposition testimony in which USAP's experts addressed opinions that the FTC's experts had disclosed for the first time on reply. That request is founded on a distorted view of both the law and the facts. Either flaw is sufficient to deny the motion in its entirety.

The FTC first distorts Rule 26 by asserting (at 5-8) that anytime an expert utters a word during her deposition that is not found in her report, the expert is improperly "supplementing" her report. When an opposing party cross examines an expert, the expert may defend her opinions by, among other things, rebutting opposing counsel's and opposing experts' critiques—especially ones that she did not receive before she submitted her written report. *See Life Partners*, 2013 WL 12076934, at *3 (Rule 26 "does not limit an expert's testimony simply to reading his report" during a deposition (quoting *Thompson v. Doane Pet Care Co.*, 470 F.3d 1201, 1203 (6th Cir. 2006))).

The FTC then applies its distorted view of the law to a distorted picture of the facts. Without providing any context, the FTC (at 8-12) alleges that three of USAP's experts have offered a panoply of "new opinions" and other alleged supplementations of their written reports. There is

not a shred of evidentiary support for those claims. The FTC solicited USAP's experts' views about the criticisms that the FTC's experts expressed in their reply reports, which were all served on USAP after its experts disclosed their rebuttal opinions. USAP's experts answered those questions. The FTC can't move to strike answers it doesn't like.

The Court should therefore deny the FTC's motion in its entirety.

A. The Law Allows Expert Witnesses To Respond To the Opposing Party's Experts' Criticisms When Examined About Them During Their Deposition

USAP's experts were within their rights to respond, at the FTC's prompting, to the criticisms that Drs. Capps and Pimentel raised for the first time in their reply reports. Accepting the FTC's contrary view would require adopting a rule that does not exist.

During a deposition (and at trial), Rule 26 "does not limit an expert's testimony simply to reading his report." *Life Partners*, 2013 WL 12076934, at *3 (quoting *Thompson*, 470 F.3d at 1203). The requirement that an expert report contain "a complete statement of all opinions" to be expressed at trial, Fed. R. Civ. P. 26(a)(2)(B)(i), is intended "to eliminate 'unfair surprise to the opposing party,'" *Life Partners*, 2013 WL 12076934, at *3 (quoting *Sylla-Sawdon v. Uniroyal Goodrich Tire Co.*, 47 F.3d 277, 284 (8th Cir. 1995)). It does not require an expert to "replicate every word that [he or she] might say on the stand." *Walsh v. Chez*, 583 F.3d 990, 994 (7th Cir. 2009); *see also*, *e.g.*, *Power Integrations, Inc. v. Fairchild Semiconductor Int'l, Inc.*, 585 F. Supp. 2d 568, 581 (D. Del. 2008) (an expert's trial testimony need not exhibit "verbatim consistency with the report"; the testimony need only be "consistent with the report" and "a reasonable synthesis and/or elaboration of the opinions contained in the [] report").

Accordingly, when an expert is being cross-examined by opposing counsel during a deposition, Rule 26(a) does not prevent the expert from responding. *See Davis*, 2025 WL 1782565, at *3 (hostile expert depositions "do not implicate Rule 26(a)"). Courts here in Texas and across

the country expect that an expert, during cross examination at a deposition, "will supplement, elaborate upon, and explain his report in his oral testimony."[2] *Life Partners*, 2013 WL 12076934, at *3 (cleaned up) (quoting *Thompson*, 470 F.3d at 1203); *accord Muldrow ex rel. Est. of Muldrow v. Re-Direct, Inc.*, 493 F.3d 160, 167 (D.C. Cir. 2007) (same) (quoting *Thompson*, 470 F.3d at 1203); *Gay v. Stonebridge Life Ins. Co.*, 660 F.3d 58, 64 (1st Cir. 2011) (expert testimony complied with Rule 26 because "it was a reasonable elaboration of the opinion disclosed in the report," even though it "use[d] different words than the expert report").

That is especially true when it comes to criticisms that an opposing expert raises in a later report. "The practical reality is that experts often will not be in a position to predict every challenge or critique of their analysis at the time of the original report." *Massachusetts Mut. Life Ins. Co. v. DB Structured Prods., Inc.*, 2015 WL 12990692, at *3 (D. Mass. Mar. 31, 2015); *see also Stored Value Sols., Inc. v. Card Activation Techs., Inc.*, 2010 WL 3834457, at *2 (D. Del. Sept. 27, 2010) (same).

Thus, during a deposition, an expert may testify about her responses to criticisms of her opinions and methods that are "raised for the first time in [the opposing party's] expert report[s]." *Cioffi v. Google, Inc.*, 2017 WL 90756, at *1 (E.D. Tex. Jan. 10, 2017); *accord Sportspower Ltd. v. Crowntec Fitness Mfg. Ltd.*, 2020 WL 7347860, at *3 (C.D. Cal. Nov. 18, 2020) (experts may

[2] This expectation continues beyond the deposition. Courts routinely permit experts to submit declarations to fend off critiques of their methods that are raised in *Daubert* or summary judgment motions. *See*, *e.g.*, *Holcombe v. United States*, 516 F. Supp. 3d 660, 671 (W.D. Tex. 2021) (refusing to strike portion of expert declaration that was "a logical extension and clarification of" the expert's written report); *Allen v. Ford Motor Co.*, 2010 WL 3791037, at *4 (E.D. Tex. Sept. 23, 2010) (experts may submit affidavits after the close of expert discovery "to clarify confusion stemming from [their] deposition testimony"); *Garg v. VHS Acquisition Subsidiary No. 7*, 675 F. Supp. 3d 1, 14-15 (D. Mass. 2023) (post-expert discovery declaration proper "as long as it is consistent with the overall opinion or methodology in the original report and merely provides additional subsidiary details, support, or elaboration" (citation omitted)).

testify "not only about the subject matter of their initial reports but also about their responses to any critiques of their opinions presented by other experts in rebuttal reports" (citation omitted)). An expert may also conduct, and describe during her deposition, analyses she conducted to develop her responses to those criticisms. *See Cioffi*, 2017 WL 90756, at *3. As one court explained, such analyses are not "new opinion[s]"; they are "permissible true rebuttal to criticism." *Asetek Danmark A/S v. CoolIT Sys. Inc.*, 2022 WL 21306657, at *18 (N.D. Cal. Oct. 4, 2022).

Here, the FTC asked USAP's experts to explain their views of the criticisms that Drs. Capps and Pimentel raised in their reply reports, and for clarifications about their methods.[3] In responding to those questions, USAP's experts made clear that they stood by the opinions they disclosed in their September 2025 rebuttal reports. *See* Ex. 3 (Fowdur Dep. Tr. 279:13-280:1 ([redacted])); Ex. 4 (Kain Dep. Tr. 64:15-66:7 ([redacted])); Ex. 5 (Fix Dep. Tr. 23:4-7 ([redacted])). They simply explained why the criticisms their opinions and methods received were wrong. The Federal Rules clearly permit that. *See*, *e.g.*, *Life Partners*, 2013 WL 12076934, at *3; *see also Cioffi*, 2017 WL 90756, at *1. Any other rule would give a bizarre and unfair advantage to the expert who gets the last word in written reports, precluding their opponents from commenting on them.

[3] *See, e.g.*, Ex. 3 (Fowdur Dep. Tr. 280:16-19 ("[redacted]")); *id.* 281:13-16 ("[redacted]"); Ex. 4 (Kain Dep. Tr. 72:23-73:4 ([redacted]")); Ex. 5 (Fix Dep. Tr. 81:7-15 ("[redacted])).

The FTC's cases (*e.g.*, at 5-8) stand for an entirely unrelated proposition: experts may not, after the disclosure deadline, offer opinions or analyses that they could have included in their initial written submission.[4] Other cases the FTC cites are irrelevant. *See UWorld LLC v. USMLE Galaxy LLC*, 2025 WL 1246434, at *2, *5 (N.D. Tex. Apr. 28, 2025) (striking the plaintiff's expert reply reports because the court had not authorized replies); *Diaz v. Con-Way Truckload, Inc.*, 279 F.R.D. 412, 420-21 (S.D. Tex. 2012) (denying request for Rule 35 medical examination); *Doyle v. Allstate Texas Lloyd's*, 2023 WL 2789313, at *2-5 (S.D. Tex. Apr. 5, 2023) (analyzing whether an expert's report completely disclosed all opinions, methods, and facts under Rule 26(a)(2)).

By contrast, here, USAP's experts did not offer any new opinions during their depositions. And, as explained in greater detail below (*see* Section I.B.1, *infra*,) Dr. Fowdur did not perform any "additive" analyses that could or should have been in her original report. *Contra Wal-Mart Stores*, 2017 WL 9480314, at *2-3. Rather, Dr. Fowdur performed analyses in "direct response to [Dr. Capps's] criticisms" of her methodology—criticisms she "could not have anticipated" before submitting her report. *Asetek*, 2022 WL 21306657, at *18 (later-disclosed exhibit that "direct[ly] respon[ded]" to opposing expert's criticism that there was "no corroborating evidence" to support the expert's theory was not "a new opinion but a permissible true rebuttal to criticism").

[4] *See*, *e.g.*, *Koenig v. Beekmans*, 2018 WL 297616, at *4-5 (W.D. Tex. Jan. 4, 2018) (striking opinions and diagrams offered during deposition that were "well outside the scope of [the expert's] original" report); *Wal-Mart Stores, Inc. v. Texas Alcoholic Beverage Comm'n*, 2017 WL 9480314, at *2-3 (W.D. Tex. May 22, 2017) (striking supplemental report that was "replete with wholly new arguments, analyses and opinions" that were "additive, not supplemental" to the original reports); *BCC Merch. Sols., Inc. v. JetPay, LLC*, 2016 WL 3264283, at *4 (N.D. Tex. Feb. 19, 2016) (parties cannot use Rule 26(e) to "bolster weaknesses" in an earlier report); *Cutler v. Louisville Ladder, Inc.*, 2012 WL 2994271, at *4-5 (S.D. Tex. July 20, 2012) (striking portion of supplemental report disclosing testing that could have been done before the original expert disclosure deadline); *see also Familias Unidas Por La Educación v. El Paso Indep. Sch. Dist.*, 2022 WL 2906505, at *4-5 (W.D. Tex. July 22, 2022) (striking portion of defendant's reply report that contained a new analysis that was not responsive to the plaintiff's rebuttal report).

B. USAP's Experts Appropriately Answered the FTC's Questions With Responses To Criticisms First Raised in the FTC's Reply Reports

1. Dr. Fowdur's Responses to Criticisms that Dr. Capps First Raised In His Reply Report Are Not "New Opinions"

None of Dr. Fowdur's challenged deposition testimony violated Rule 26. In each instance, Dr. Fowdur either (i) disclosed her responses to criticisms that Dr. Capps raised for the first time in his reply report, or (ii) elaborated on or clarified opinions already disclosed in her rebuttal report.

The FTC's analysis (at 8) starts by mischaracterizing Dr. Fowdur's answers to questioning at the beginning of her deposition, in which she explained that [redacted]:

[redacted]

Ex. 3 (Fowdur Dep. Tr. 15:9-19).[5] From the very start of the examination, the FTC thus knew that Dr. Fowdur had responses to Dr. Capps's reply report. The FTC accordingly spent nearly the last full *hour* of her deposition asking her to identify and elaborate on each of them without objection. *See* Ex. 3 (Fowdur Dep. Tr. 279:8-297:5). That fact alone is fatal to the FTC's motion. *See Davis*,

[5] The FTC tries (at 4, 8) to make much Dr. Fowdur's use of the word "opinion." Even if Dr. Fowdur were using that word in a legal sense (she was not), she later clarified: "[redacted] Ex. 3 (Fowdur Dep. Tr. 279:13-280:1).

2025 WL 1782565, at *3 (deposition testimony elicited by the opposing party "do[es] not implicate Rule 26(a)"). But even on the merits, none of the FTC's claims withstands scrutiny.[6]

[redacted] (Ex. 3 (Fowdur Dep. Tr. 167:2-22)). The FTC claims (at 8) that Dr. Fowdur impermissibly discussed a new analysis [redacted] Here, too, Dr. Fowdur did not disclose any new "opinion," but instead properly responded to [redacted]. Dr. Fowdur [redacted]. In essence, then, the FTC seeks permission to mislead the factfinder at trial; [redacted].

In her report, Dr. Fowdur explained [redacted] Ex. 6 (Fowdur Rep. ¶ 115). To support this, she [redacted]. *Id.* ¶ 115 & Ex. 31. In his reply report, Dr. Capps [redacted]

[6] The FTC's (at 9) speculation that Dr Fowdur might have "even more analyses" to offer based on her ongoing review of the record through trial is legally irrelevant. "It is not unusual for experts to make changes in their opinions and revise their analyses and reports frequently in preparation for, and sometimes even during, a trial." *Newell Puerto Rico, Ltd. v. Rubbermaid Inc.*, 20 F.3d 15, 22 (1st Cir. 1994). The FTC also cites (at 9) two instances in which Dr. Fowdur [redacted]. *See* Ex. 3 (Fowdur Dep. Tr. 120:9-23 ([redacted]); *id.* 157:5-19 ([redacted]). Neither instance establishes, however, that Dr. Fowdur performed a "new" analysis forbidden by Rule 26.

[redacted] Ex. 7 (Capps Reply Rep. ¶ 69 n.82). But Dr. Capps did not [redacted].

See id. ¶ 69 and fig. 5.

Dr. Fowdur did. She explained that [redacted]:

[redacted]

Ex. 3 (Fowdur Dep. Tr. 167:2-19). The factfinder is entitled to this kind of rebuttal testimony.

[redacted] (Ex. 3 (Fowdur Dep. Tr. 63:20-64:13)). The FTC's second challenged exchange is not a new analysis at all. [redacted] of Dr. Fowdur's rebuttal report [redacted] Ex. 6 (Fowdur Rep. ¶ 46).

The FTC asked Dr. Fowdur [redacted] Ex. 3 (Fowdur Dep. Tr. 62:8-11). Dr. Fowdur clarified that [redacted]

[redacted] *Id.* 63:15-64:4. That clarification did not violate Rule 26. [redacted] (Ex. 3 (Fowdur Dep. Tr. 287:25-289:3)). Dr. Capps's reply report [redacted]. *See* Ex. 7 (Capps Reply Rep. ¶ 69 & fig. 5). Dr. Capps concluded [redacted]. *Id.* ¶ 69.

The FTC's counsel asked Dr. Fowdur [redacted] Ex. 3 (Fowdur Dep. Tr. 287:25-288:3). Dr. Fowdur explained that [redacted] *Id.* 288:7-289:3. That is, Dr. Fowdur [redacted] *Id.* She found that doing so [redacted] Ex. 7 (Capps Reply Rep. ¶ 69). This direct response to Dr. Capps's criticism is not a "new opinion," either.

Allegedly "New" [redacted] (Ex. 3 (Fowdur Dep. Tr. 294:9-295:24)). Dr. Capps and Dr. Fowdur offered dueling perspectives regarding [redacted]. To bolster the support for his [redacted],

Dr. Capps included in his reply report [redacted]. *See* Ex. 7 (Capps Reply Rep. ¶¶ 147-48 & figs. 15-17). At her deposition, Dr. Fowdur noted that [redacted]. *See* Ex. 3 (Fowdur Dep. Tr. 294:2-295:24). The only expert who offered "new" [redacted] is Dr. Capps; Dr. Fowdur, again, merely rebutted those new analyses, confirming the opinion that she had previously presented in her report.

Allegedly "New" [redacted] (Ex. 3 (Fowdur Dep. Tr. 284:24-287:24)). In her rebuttal report, Dr. Fowdur presented her [redacted]. Ex. 6 (Fowdur Rep. ¶¶ 49-51 & Ex. 11). Dr. Capps criticized that analysis in his reply report, [redacted] Ex. 7 (Capps Reply Rep. ¶¶ 121-28 & figs. 12-13). During her deposition, Dr. Fowdur testified that [redacted]. *See* Ex. 3 (Fowdur Dep. Tr. 285:18-286:8 ([redacted])). That is, again, well within the bounds of acceptable expert testimony. *See Cioffi*, 2017 WL 90756, at *1; *Sportspower*, 2020 WL 7347860, at *3; *Asetek*, 2022 WL 21306657, at *18.

2. Dr. Kain's Clarifications of His Methodology Are Not "New Opinions"

Dr. Kain went to great lengths during his deposition to clarify the FTC's and Dr. Pimentel's apparent confusion about the methodology Dr. Kain relied upon in offering the opinions set forth in his rebuttal report. Nothing about those efforts violated Rule 26. *See Life Partners*, 2013 WL 12076934, at *3 (Rule 26 allows an expert to "elaborate upon[] and explain his report in his oral

testimony," especially when those elaborations are "a natural, logical, and wholly predictable outgrowth" of the written report (cleaned up)); *Maney v. Oregon*, 2024 WL 1695083, at *11, *14 & n.16 (D. Or. Apr. 19, 2024) (allowing declarations addressing mischaracterizations of deposition testimony); *Dow Chem. Co. v. Nova Chems. Corp.*, 2010 WL 2044931, at *2 (D. Del. May 20, 2010) (allowing declaration that "reiterated [the expert's] opinion and elaborated on how he reached that opinion by providing greater detail" on what was already in the report).

Preliminarily, the Court should deny the FTC's challenges to Dr. Kain's deposition testimony as procedurally deficient. It is the FTC's duty—not USAP's or the Court's—to identify "the specific evidence [it] wishes to have stricken" and "the specific grounds upon which each piece of evidence should be stricken." *Tucker v. SAS Inst., Inc.*, 462 F. Supp. 2d 715, 722 (N.D. Tex. 2006). But the FTC never articulates (at 9-10) exactly what Dr. Kain should not be allowed to say at trial and why; it simply asks (at 17) the Court to "preclude[]" USAP's experts "from using expert opinions not contained in the written reports." *See also* Dkt. No. 296-1 at 1 (Proposed Order #1) (similar). That kind of "loosely formulated and imprecise objection will not preserve error." *Tucker*, 462 F. Supp. 2d at 722 (citation omitted).

On the merits, the FTC's claim fares no better. The testimony the FTC challenges relates to the ongoing battle between Drs. Pimentel and Kain [redacted]. Both experts agree [redacted] Ex. 8 (Kain Rep. ¶ 19). Both experts [redacted]. They disagree over [redacted].

Dr. Kain wrote in his rebuttal report [redacted]," because "[redacted]" *Id.* ¶ 14. Relevant here, he criticized Dr. Pimentel's differing view. Dr. Pimentel [redacted]

[redacted] *Id.* ¶¶ 19-20. In Dr. Kain's view, "[redacted]" *Id.* For example:

> [redacted]

Id. ¶ 21 (footnotes omitted); *see also id.* ¶ 75 ([redacted]). The [redacted], Dr. Kain concluded, [redacted] *Id.* ¶ 75 (emphasis added).

Dr. Kain elaborated upon those sentiments during his deposition. He explained that [redacted]. *See* Ex. 4 (Kain Dep. Tr. 20:1-14). But [redacted]: [redacted]. *Id.* 20:15-21:9. And Dr. Kain repeatedly made clear, in response to questioning from the FTC's counsel, that [redacted]:

> [redacted]
>
> [redacted]

[redacted]

Id. 78:23-80:4; *see also*, *e.g.*, *id.* 83:2-84:8, 84:24-85:12 ([redacted]); *id.* 332:12-333:3 ([redacted]). These are the exact kinds of clarifications that Rule 26 envisions an expert offering during his deposition. *See Maney*, 2024 WL 1695083, at *11, *14 & n.16; *Dow Chem.*, 2010 WL 2044931, at *2.

The only contrary authority the FTC cites (at 11) is inapposite. In *General Electric*, the district court rejected the defendants' effort to submit an amended expert report on the issue of damages that asserted entirely new opinions based on evidence that was already available to them at the original expert report deadline. *See Gen. Elec. Bus. Asset Funding Corp. v. S.A.S.E. Mil. Ltd.*, 2004 WL 5495589, at *1-2 (W.D. Tex. Oct. 8, 2004). Here, by contrast, Dr. Kain expressly disclaimed offering any new opinions, *see* Ex. 4 (Kain Dep. Tr. 333:4-334:8), and "elaborated on how he reached [those] opinion[s] by providing greater detail on the processes he had mentioned" in his rebuttal report. *Dow Chem.*, 2010 WL 2044931, at *2 ("[S]uch an elaboration on his prior [report] [is] appropriate.")

Nor can the FTC (at 10-11) manufacture a Rule 26 violation through Dr. Kain's reference to [redacted]. *See* Ex. 4 (Kain Dep. Tr. 59:17-64:6). First, Dr. Kain [redacted]. *See*, *e.g.*, Ex. 8 (Kain Rep. ¶ 21 nn.3-4). As for the others, Dr. Kain [redacted]. Ex. 4 (Kain Dep. Tr. 59:20-60:7, 60:14-24). Dr. Kain "[redacted]

[redacted]," so Dr. Kain [redacted]. *Id.* 335:12-337:9. Rule 26 permits such targeted rebuttals to new positions taken in a reply report. *See*, *e.g.*, *Sportspower*, 2020 WL 7347860, at *3 (endorsing expert's reliance on "materials outside of his report" for rebuttal purposes and were "consistent with his [previously disclosed] opinions"). The Court should therefore deny the FTC's motion relating to Dr. Kain.[7]

3. Mr. Fix Offered No "New" Expert Analyses [redacted] During His Deposition

Finally, the only portion of Mr. Fix's deposition testimony that the FTC challenges relates to [redacted]. Dr. Capps [redacted], and Mr. Fix [redacted]. On reply, Dr. Pimentel—not Dr. Capps—[redacted] to criticize Mr. Fix. (The FTC has never tried to explain why Dr. Pimentel [redacted], or why Dr. Capps [redacted].) Mr. Fix then testified at deposition about why the criticism was unfounded. Rule 26 empowered Mr. Fix to do exactly that.

[redacted]. The FTC was aware of it before submitting Dr. Pimentel's opening report: as it readily acknowledges (at 11-12), [redacted]. USAP's document productions [redacted],

[7] During the parties' truncated meet and confer process, the FTC only gave USAP a list of "examples" of USAP's experts allegedly offering untimely disclosures, without any elaboration or supporting caselaw. *See* Dkt. No. 295-8 at 1. Now having the benefit of the FTC's full position for the first time in its motion, USAP can confirm that all of Dr. Kain's "substantive responses" to Dr. Pimentel's reply report were discussed during his deposition. *Contra* Dkt. No. 295 at 11.

too. Still, neither of the FTC's experts [redacted]. Unsurprisingly, then, Mr. Fix did not discuss it in his rebuttal report. *See* Dkt. No. 295-6 (Fix Dep. Tr. 49:4-5).

In his reply report, Dr. Pimentel [redacted] offers a [redacted] critique of Mr. Fix's [redacted]. Ex. 9 (Pimentel Reply Rep. ¶ 85). Dr. Capps also took issue with Mr. Fix's [redacted]. *See* Ex. 7 (Capps Reply Rep. ¶¶ 289-97).

Before his deposition, Mr. Fix [redacted]. *See* Ex. 5 (Fix Dep. Tr. 47:14-48:21). Sure enough, the FTC spent considerable time quizzing Mr. Fix [redacted]. *See id.* 77:18-92:9, 206:18-207:7.[8] The FTC does not ask for any of that testimony to be stricken from the record as "untimely."

Instead, the FTC (at 12) only asks the Court to strike the final exchange between Mr. Fix and USAP's counsel during redirect because Mr. Fix "provided new opinions about [redacted]." In the

[8] For a few representative examples, *see* Ex. 5 (Fix Dep. Tr. 81:7-15 ("[redacted]"); *id.* 83:11-15 ("[redacted]"); *id.* 84:2-7 ([redacted]); *id.* 85:15-17 ("[redacted]").

subject exchange, USAP's counsel asked Mr. Fix one question to clarify, as a factual matter, [redacted]:

[redacted]

Dkt. No. 295-6 (Fix Dep. Tr. 234:25-235:16).

This exchange reveals no "late" expert disclosure. Mr. Fix confirmed that none of the opinions in his rebuttal report had changed after reviewing Dr. Pimentel's reply, *see* Ex. 5 (Fix Dep. Tr. 23:4-7), and the challenged evidence was directly responsive to a critique that Dr. Pimentel raised for the first time in his reply report. The only case that the FTC relies on for the contrary assertion, *Diaz*, 279 F.R.D. at 420-21, is irrelevant. The defendant there wanted to bolster its experts' previously disclosed reports with new evidence that it hoped to develop through a Rule 35 medical examination of the plaintiff. *See id.* at 414-15. The court rejected that effort because the defendants failed to request that examination before its expert disclosure deadline. *See id.* at 420-21. Here, by contrast, USAP's counsel simply elicited facts to repel Dr. Pimentel's new criticism [redacted]. That is the kind of deposition testimony Rule 26 condones and encourages.

II. Any "Untimely" Disclosures Would Be Substantially Justified, and Harmless, Invited Errors

Even if the Court were to find that some exchange between the FTC and USAP's experts during their depositions were "untimely" disclosures under Rule 26, the FTC still would not be entitled to the relief it seeks. Typically, courts will analyze four factors (the *Sierra Club* factors) to determine whether an expert's untimely disclosure is substantially justified and harmless. *See* Fed. R. Civ. P. 37(c)(1); *see also Guidry v. Cont'l Oil Co.*, 640 F.2d 523, 533 (5th Cir. 1981) ("Rule 37 only requires the sanctions the Court imposes hold the scales of justice even." (cleaned up)). But the Court need not undertake that analysis here, at least for Drs. Fowdur and Kain, because the FTC elicited the deposition testimony it now moves to strike; it "cannot now complain about an error [it] introduced." *Vital*, 2015 WL 7736637, at *5. In any event, all four *Sierra Club* factors weigh against striking USAP's experts' deposition testimony. *See Sierra Club, Lone Star Chapter v. Cedar Point Oil Co.*, 73 F.3d 546, 572 (5th Cir. 1996).

The FTC Has Suffered No Prejudice. The Court must first consider what, if any, prejudice the FTC will incur if USAP's experts were allowed to testify at trial to everything disclosed during their depositions. For at least three reasons, the FTC will incur no prejudice at all.

First, the FTC now has the full scope of testimony that USAP's experts at present intend to offer at trial. It exhaustively asked each expert about the responses they had to Drs. Capps's and Pimentel's reply reports; each expert gave expansive responses. There is simply "no mystery" about the scope of USAP's experts' trial testimony. *Nalder v. W. Park Hosp.*, 254 F.3d 1168, 1178 (10th Cir. 2001) (holding that the plaintiffs "failed to demonstrate significant surprise or prejudice" from the defendants' expert offering testimony at trial that she disclosed during her deposition, because there was "no mystery about a central aspect of her critique" of the plaintiffs' expert); *see also Smith v. Tenet Healthsystem SL, Inc.*, 436 F.3d 879, 889 (8th Cir. 2006) (finding no prejudice

where the plaintiff received notice through the defendant's expert's deposition that the expert intended to rely on evidence at trial that was not disclosed in her written report).

Second, none of the underlying opinions that USAP's experts disclosed in their September 2025 rebuttal reports changed because of the at-issue deposition testimony. On the contrary, each USAP expert offered testimony that was "a natural, logical, and wholly predictable outgrowth" of their rebuttal reports; "[the FTC's] argument that [it] w[as] 'sandbagged' . . . is risible, and the notion that [it] w[as] unfairly surprised strains credulity." *Life Partners*, 2013 WL 12076934, at *3; *see also Jones v. Harley-Davidson, Inc.*, 2016 WL 5395952, at *2 (E.D. Tex. Sept. 27, 2016) ("Because Mr. Lovett's opinions haven't changed at all, and also because any additional testing only bolsters the position the Joneses held throughout the litigation, . . . Harley-Davidson cannot assert prejudice or surprise [from] Mr. Lovett's supplemental report."); *Mike Hooks Dredging*, 2011 WL 3270855, at *2 (no prejudice where the late supplemental report did not "raise new issues or cover wholly unchartered territory" (citation omitted)); *Holcombe*, 516 F. Supp. 3d at 672 ("The Government cannot claim surprise because Dr. Webster's expert opinion did not change."). And the FTC never moved for summary judgment, so it cannot claim any prejudice that regard.

This Court's ruling in *United States v. St. Luke's Episcopal Hospital*—the only case the FTC cites to argue that it suffered any prejudice—considered a deficient expert disclosure that was fundamentally different than that which is alleged here. 2008 WL 11407300 (S.D. Tex. May 20, 2008). There, the expert's initial disclosure failed to set forth all the opinions she intended to offer at trial, the reasons for those opinions, or even the methodology she used. *See id*. at *3-4. Here, by contrast, USAP's experts stand by every opinion set forth in their written reports. They just elaborate on those opinions and respond to new criticisms Drs. Capps and Pimentel first raised in their reply reports. Those extensions of their written disclosures "contain [no] shocking

revelations to the extent that [the FTC] cannot adequately prepare to defend against [USAP's experts'] opinions before trial." *Mike Hooks Dredging*, 2011 WL 3270855, at *2 (cleaned up).

Third, the FTC has now received the full scope of USAP's expert testimony many months before any conceivable trial date in this case. The FTC has more than sufficient time to prepare for trial. *See*, *e.g.*, *Holcombe*, 516 F. Supp. 3d at 672 (no prejudice where the offending expert declaration was disclosed "nearly six months before" the exchange of pretrial disclosures under Rule 26(a)(3)); *Mike Hooks Dredging*, 2011 WL 3270855, at *3 (no prejudice where the defendant received the offending expert declaration two months before trial).

The Importance of the Witness' Testimony. The testimony that each witness has to offer is important. USAP's experts cover key issues related to [redacted]. Striking their clarifying testimony and responses to the FTC's experts' newly-raised critiques would deprive the Court of helpful context for why [redacted]. *See Jones*, 2016 WL 5395952, at *2 (challenged expert testimony important because it bore on causation). The FTC grapples with none of these points, instead arguing (at 13-14) that USAP's experts' testimony is unimportant because it was disclosed "late." It cites *Bentley v. Highlands Hospital Corp.* for that argument, but the district judge in that case (Judge Thapar) recognized that the supplementary testimony—though disclosed late—was important to the disclosing party's case. *See* 2016 WL 5867496, at *10 (E.D. Ky. Oct. 6, 2016).

USAP Has Legitimate Reasons for the Timing of Its Disclosures. As explained, each of USAP's experts' deposition testimony could not have been offered sooner. Despite the FTC's

conclusory insistence to the contrary, USAP's experts could not have, in their rebuttal reports, (i) responded to points that the FTC's experts first raised in their reply reports, or (ii) predicted how the FTC would misconstrue their methodology. *See*, *e.g.*, *Stored Value Sols.*, 2010 WL 3834457, at *2 ("the specifics of one expert's response to another expert's critique of the first expert's initial report cannot be anticipated with precision prior to receipt of the second expert's critiquing report"); *Holcombe*, 516 F. Supp. 3d at 671 (because the expert was deposed before the deadline for supplementing reports under Rule 26(e), "he could not have anticipated or addressed [at his deposition] the Government's alleged misperceptions about his report, data, and testimony").

A Continuance Is Unnecessary to Abate Any Prejudice to the FTC. Finally, the FTC has not shown how a continuance—here, reopening discovery for additional depositions and sur-reply reports for the FTC's experts—is necessary to abate any prejudice it might incur. The FTC's lead argument (at 14-16) is for no continuance at all, largely based on the irrelevant and biased perspective the FTC has offered about the progression of discovery. The only time the FTC so much as hints that a continuance would be helpful (at 16-17) is if this Court agrees that USAP's expert testimony complied with Rule 26. But the FTC never actually explains what testimony it needs to develop from USAP's experts, or what additional sur-reply it needs its experts to draft, to cure any prejudice. The Court should therefore refuse to reopen expert discovery and continue this case on track to trial.

CONCLUSION

The Court should deny the FTC's motion to exclude.

Dated: February 20, 2026

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on February 20, 2026, I filed the foregoing document with the Court and served it on opposing counsel through the Court's CM/ECF system. All counsel of record are registered ECF users.

Respectfully submitted,

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