IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

NATCHITOCHES PARISH HOSPITAL SERVICE DISTRICT and JM SMITH CORPORATION d/b/a SMITH DRUG COMPANY, on behalf of themselves and all others similarly situated,	:	**Civil Action No. 05-12024 (PBS)**
Plaintiffs,	:	
v.	:	
TYCO INTERNATIONAL, LTD.; and TYCO INTERNATIONAL (U.S.), INC.; TYCO HEALTHCARE GROUP, L.P. THE KENDALL HEALTHCARE PRODUCTS COMPANY,	:	
Defendants.	:	

PLAINTIFFS' MEMORANDUM OF LAW IN SUPPORT OF THE MOTION TO STRIKE THE EXPERT DECLARATION OF DANIEL L. MCFADDEN PURSUANT TO RULE 37(c) FOR FAILURE TO TIMELY DISCLOSE AND FOR REASONABLE EXPENSES AND ATTORNEYS' FEES

I. INTRODUCTION

Pursuant to Fed. R. Civ. P. 37, Plaintiffs hereby move to strike the Declaration of Daniel L. McFadden, dated October 17, 2008 (the "McFadden Declaration").[1] Tyco has improperly filed the McFadden Declaration nearly nine months after the Court's January 31, 2008 deadline for submission of Defendants' expert reports. Rather than seek leave of Court to demonstrate, as it must, that the late disclosure of Dr. McFadden is substantially justified or harmless, Tyco tried an end-run around this Court's order by appending the McFadden Declaration to its *Daubert* motion, as though Dr. McFadden were already an expert in the case. Try as Tyco might to quietly bring in Dr. McFadden nearly nine months late, under the Federal Rules and First Circuit precedent, Tyco's unexcused late disclosure of Dr. McFadden renders the McFadden Declaration a nullity. Plaintiffs respectfully request that the Court strike the McFadden Declaration, instruct the clerk to remove it from the docket, and order Tyco to refile its *Daubert* motion with deletion of all references to (and arguments from) the McFadden Declaration.

II. ARGUMENT

A. The McFadden Declaration Must Be Stricken Since Tyco Failed To Disclose Its Expert In a Timely Fashion

The Court, by order dated November 27, 2007, determined that Tyco was required to submit its expert reports by January 31, 2008 and that expert discovery was to be completed by March 28, 2008. It is undisputed that Tyco never submitted an expert report from Dr. McFadden by January 31, 2008, nor disclosed that he would appear as an expert for Tyco prior to expiration

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[1] Under Rule 37(c)(1)(A), Plaintiffs also seek payment of the reasonable expenses, including attorneys' fees, caused by Tyco's defective filing. Besides attorneys' fees, the reasonable expenses include the time Prof. Elhauge and his staff took to respond to the McFadden Declaration.

of the expert discovery period.[2] As a result, Tyco has indisputably failed to properly disclose Dr. McFadden and to submit the McFadden Declaration within the time allowed under Court order.

When a party, fails to make disclosure of its experts, Rule 37 applies to the non-disclosure. Rule 37(c)(1) provides in pertinent part:

> If a party fails to provide information or identify a witness as required by Rule 26(a) or (e), the party is not allowed to use that information or witness to supply evidence on a motion, at a hearing, or at a trial, unless that failure was substantially justified or is harmless.

As the First Circuit has instructed, "[t]he expert disclosure requirements are not merely aspirational, and courts must deal decisively with a party's failure to adhere to them." *Lohnes v. Level 3 Communications, Inc.*, 272 F.3d 49, 60 (1st Cir. 2002). The First Circuit has recognized that "the required sanction in the ordinary case [for a late disclosure in violation of Rule 37] is mandatory preclusion." *Lohnes*, 272 F.3d at 60 (quoting *Klonski v. Mahlab*, 156 F.3d 255, 269 (1st Cir. 1998)); *Coastal Fuels of Puerto Rico v. Caribbean Petroleum*, 79 F.3d 182, 203 (1st Cir. 1996). The First Circuit has further determined that the baseline rule of preclusion applies even where, unlike here, the expert is central and critical to the late disclosing party's claim or defense. *Santiago-Diaz v. Laboratoria Clinico*, 456 F.3d 272, 277 (1st Cir. 2006) (affirming preclusion order even though the precluded testimony was vital to plaintiff's claim); *Primus v. United States*, 389 F.3d 231, 236 (1st Cir. 2004); *LaPlace-Bayard v. Batlle*, 295 F.3d 157, 161-62 (1st Cir. 2002); *See also, O2 Micro Int'l Ltd. v. Monolithic Power Sys., Inc.*, 467 F.3d 1355, 1368-69 (Fed. Cir. 2006) (rejecting argument that court's exclusion order was an abuse of

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[2] By Order dated December 6, 2007, the Court set February 15, 2008 as the deadline for submission of Plaintiff's Reply Expert Reports. To the extent that Tyco asserts that the McFadden Declaration is simply rebuttal to Elhauge's Reply, it still failed to submit the Declaration within the 30 day window allowed under Rule 26 for submission of rebuttal reports.

discretion even where exclusion was tantamount to dismissal).

Moreover, preclusion for late disclosure is the rule regardless of whether the late-disclosed expert is to be used, as here in support of a motion or at a hearing, or at trial. Thus, to the extent Tyco tries to argue that Dr. McFadden did not have to be disclosed since Tyco will not use him at trial, the plain language of Rule 37 indicates that preclusion of the expert is not only for purposes of trial, but such late-disclosed expert's opinion also cannot be used in support of a motion or at a hearing. Indeed, the First Circuit has specifically determined that Rule 37 applies with equal force to preclude late-disclosed experts in support of motions as it would such expert's opinion at trial. *Lohnes*, 272 F.3d at 60; *see also*, *Trost v. Trek Bicycle Corp.*, 162 F.3d 1004, 1007-09 (8th Cir. 1998); *Sutra v. Iceland Express*, 2008 U.S. Dist. Lexis 52849 at *14-16 (D. Mass. July 10, 2008, Woodlock, D.J.) (excluding expert report because "its unjustifiably late disclosure after the discovery period had ended and just 8 days before summary judgment motions were due cannot be said to be harmless."). Nothing in the Federal Rules, this Court's orders or First Circuit precedent permits what Tyco has done here, which is to conceal Dr. McFadden until the filing of its *Daubert* motions.

Indeed, Dr. McFadden is now the **fourth** expert witness retained by Tyco for purposes of contravening the testimony of Plaintiffs' expert, Prof. Elhauge. The only potential harm to Tyco from preclusion of Dr. McFadden is that it will have to rely on the opinions of the other three experts that Tyco disclosed by the deadline established by the Court. However, allowing Tyco to upend the orderly flow of this action so that it can pile on an additional expert to train his eyes on Prof. Elhauge has no basis in either law, fact or equity, and the McFadden Declaration must be stricken.

B. Tyco's Failure To Timely Disclose The McFadden Declaration Is Neither Substantially Justified Nor Harmless

Since Tyco ignored the January 31, 2008 deadline to disclose Dr. McFadden and his opinions, it is incumbent upon Tyco to demonstrate that its failure to disclose was substantially justified or harmless.[3] Yet, Tyco's filing of the McFadden Declaration was accompanied by neither recognition of, nor attempt to address, this burden. Tyco is, in fact, unable to meet its burden here because there is no substantial justification for exempting Tyco from following this Court's orders and the Federal Rules. Certainly Tyco cannot claim that they were unable to file the McFadden Declaration sooner because of some non-disclosure by Plaintiffs; and the McFadden Declaration clearly contains nothing that Tyco could not have written at the time its expert reports were due. Nor can Tyco's belief in the propriety of its filing constitute substantial justification. To find otherwise would allow Tyco, rather than the Court and the Federal Rules, to control this litigation.

Tyco's failure to properly disclose Dr. McFadden is also not harmless and will prejudice Plaintiffs. By springing Dr. McFadden on Plaintiffs as part of the very motion for which Tyco seeks to use his opinion, and thereby not subjecting him to the same scrutiny to which all of the other properly disclosed experts are subjected, Tyco has denied Plaintiffs the opportunity to engage in discovery of Dr. McFadden and consider his opinions in the course of the expert schedule in this action. Instead, when they should be dealing with the other attacks levied by Tyco's three other experts on Plaintiffs' experts, Plaintiffs have to waste their time and resources

[3] Rule 37 specifically establishes the required standard of showing that the failure to disclose was "substantially justified or is harmless." *See e.g. Santiago-Diaz*, 456 F.3d at 276-77 (discussing exceptions but finding that preclusion proper).

responding, and once again engaging Prof. Elhauge to respond to an opinion that is not even properly before the Court in the first instance. Moreover, because of the way that Tyco is using Dr. McFadden, he has not been made to tie his opinions to the facts of the case, as *Daubert* standards require; instead, he merely gets to throw his opinion into the pool of expert testimony. The late disclosure of the expert and the untimely nature of the declaration also causes harm to Plaintiffs and the process in that it allows Dr. McFadden to escape scrutiny under the *Daubert* standards. As Plaintiffs and Prof. Elhauge will address in their response to Tyco's *Daubert* motion, Prof. McFadden's opinions in this case are hopelessly flawed and unhelpful, in large part due to his late arrival on the scene and a lack of knowledge of the facts of the case and failure to understand the basics of Plaintiffs' claims. Permitting Dr. McFadden to maintain an elevated perch from which he can make untethered pronouncements about the purported errors of Prof. Elhauge's methods provides him with the role of super-expert, not subject to discovery or *Daubert* motions, and rewards Tyco (and future litigants) with the ability to shield certain experts from the disclosure requirements.

Finally, to the extent that Tyco claims that any prejudice can be cured by cross examination of Dr. McFadden at deposition or hearing, such an argument overlooks the very purpose of the rule.[4] Tyco's refusal to disclose Dr. McFadden prevents the orderly process of expert discovery, submission of expert reports, and provides no proper rule for parties to follow.

[4] During the meet and confer process on this motion, Tyco, rather than providing substantial legal or factual justification for its failure to timely disclose Dr. McFadden, suggested instead that it was Plaintiffs' obligation to notice a deposition of Dr. McFadden upon receiving his declaration. Plaintiffs do not believe that returning Tyco's disregard of the rules with our own disregard of this Court's orders (which ordered that discovery closed over 6 months ago) would be appropriate, curative or fair.

Rather, it provides Tyco (and future litigants) with tremendous incentives to withhold experts, so that after the battle of the experts has occurred, Tyco (and future litigants) can belatedly introduce an unscathed expert for maximum impact.[5] Although this process would allow Tyco to have its fourth crack at Prof. Elhauge, Tyco offers no justification for doing so, and there is indeed no basis to upend the First Circuit's rule that late disclosure of an expert, in all but the most extreme instance, leads to the preclusion of the late disclosed expert.

III. CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request that the Court strike the McFadden Declaration, instruct the clerk to remove it from the docket, order Tyco to refile its *Daubert* motion with deletion of all references to (and arguments from) the McFadden Declaration and order that Tyco pay the reasonable expenses, including attorney's fees, caused by its failure to disclose.

Dated: November 6, 2008

Respectfully submitted,

/s/ Archana Tamoshunas
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[5] Irrespective of his late-disclosure, Dr. McFadden would not deserve any heightened impact. Indeed, although such showing is not necessary to this motion, Dr. McFadden's analyses have been repeatedly subject to significant criticism or outright rejection. *See, e.g. Cook v. Rockwell Int'l*, 2006 U.S.Dist. Lexis 89121 at * 118-25 (D. Colo. Dec. 7, 2006) (criticizing Dr. McFadden for, among other things failing to understand Plaintiffs' theory of damages, and finding that his criticisms were more a result of Dr. McFadden's "redefinition of the question to be answered" as opposed to a correction of any real errors.). *See also, In re Pharmaceutical Ind. Average Wholesale Price Litig.*, 491 F.Supp.2d 20, 89-92 (D. Mass. 2007); *Shannon v. Crowley*, 538 F.Supp. 476, 482 (N.D. Cal. 1981).

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CERTIFICATE OF SERVICE

I hereby certify that this document(s) filed through the ECF system will be sent electronically to the registered participants as identified on the Notice of Electronic Filing (NEF) and paper copies will be sent to those indicated as non registered participants on November 6, 2008.

/s/ Archana Tamoshunas
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CERTIFICATION PURSUANT TO LOCAL RULE 7.1(A)(2)

I hereby certify that the parties' counsel have conferred in good faith in an attempt to resolve the issues raised in this Motion. The parties were unable to reach agreement, and Defendants are opposed to Plaintiffs' requested relief.

Dated: November 6, 2008

/s/ Brett Cebulash
Brett Cebulash