

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA, et al.,

*Plaintiffs,*

v.

FIRST DATA CORPORATION,

and

CONCORD EFS, INC.,

*Defendants.*

CASE NUMBER: 1:03CV02169 (RMC)

**MEMORANDUM IN SUPPORT OF PLAINTIFFS' MOTION  
TO EXCLUDE STEWART C. MYERS AS A WITNESS  
AND TO STRIKE THE EXPERT REPORT OF STEWART C. MYERS**

**I. Introduction**

On December 3, 2003, at roughly 7:00 p.m. EST, Defendants served the Expert Report of Stewart C. Myers on Plaintiffs and indicated that they intended to call Stewart C. Myers as a witness at trial, in violation of the Court's Scheduling and Case Management Order. Prof. Myers' report also indicates that he may offer additional opinions not disclosed in his December 3 report, perhaps in the form of a surrebuttal report not contemplated by the Court's Scheduling Order.<sup>1</sup>

Plaintiffs' motion should be granted for at least the following reasons:

- This Court specifically rejected defendants' request for a staggered exchange of expert reports. Defendants' failure to identify Prof. Myers and exchange his report on November 19 is nothing more than a thinly disguised attempt to circumvent that order.

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<sup>1</sup>Report of Stewart C. Myers at ¶ 17 and n.2 (Dec. 3, 2003).

- Defendants had numerous opportunities to disclose the existence of Prof. Myers to plaintiffs and the Court and instead waited until December 3 to do so, far too late for the disclosure to be meaningful in the context of the compressed schedule applicable to this case.
- Defendants will not be unduly prejudiced by the relief requested by Plaintiffs. Defendants have already identified Jerry A. Hausman as their expert on efficiencies and Prof. Hausman has filed a report setting forth his expert opinion on efficiencies. They do not need two, particularly in light of the prejudice to plaintiffs that will result if Prof. Myers is not excluded.

The Scheduling Order, as clarified on November 24, 2003, required parties to exchange preliminary and revised witness lists on November 10 and 21 and to exchange expert reports on November 19 and December 1 (or 3). Defendants have failed to comply with this schedule. Given the very short amount of time remaining before trial, defendants' failure to disclose Prof. Myers in a manner consistent with this Court's Scheduling Order has significantly prejudiced Plaintiffs and should not be countenanced by the Court. Plaintiffs therefore move to exclude Prof. Myers as a witness and to strike his expert report, and request an order barring any reliance on Prof. Myers by defendants or their experts.

## **II. Analysis**

During the scheduling hearing, defendants argued for staggered production of expert reports and took the position "that the party with the burden of proof on a particular issue should present the initial report and then have rebuttal reports."<sup>2</sup> The Court rejected their position, stating: "We don't have time to play games on he goes first, I go second. There's just not enough time for that."<sup>3</sup> By failing to disclose Prof. Myers until December 3, defendants have

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<sup>2</sup>10/29/03 Tr. at 37:6-9 (Steve Patton, counsel for Concord) (Attachment A).

<sup>3</sup>10/29/03 Tr. at 47:13-15 (Collyer, J.) (Attachment B).

effectively unilaterally adopted the expert report procedure that they proposed and that the Court rejected. Defendants' conduct here is particularly problematic in that Prof. Myers' opinion relates solely to an affirmative defense as to which defendants concede they carry the burden.<sup>4</sup> Indeed, parts of Prof. Myers' report appear simply to buttress their affirmative defense of efficiencies<sup>5</sup> and should thus clearly have been disclosed on November 19.

Defendants admit that they interpreted the Court's Scheduling Order to require them to file an initial expert report on November 19 and to disclose all experts well before December 3. Defendants also concede that any failure to disclose an expert in a timely manner would be prejudicial. Indeed, it was on these bases that defendants filed a motion to compel an initial report from plaintiff's rebuttal expert, Prof. Mark Zmijewski: "This Court ordered the parties to exchange expert reports on November 19, as plaintiffs insisted, simultaneously and *without regard for burdens of proof*."<sup>6</sup> Geraldine Alexis, counsel for First Data, stated in the hearing granting the motion: "We cannot prepare accurately getting that [Prof. Zmijewski's Expert Report] at the last minute."<sup>7</sup> As defendants observed in their motion, "[t]his Court's Order of

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<sup>4</sup>Defendants' Motion and Memorandum of Points and Authorities in Support of Motion to Clarify Scheduling Order and to Require Service of Expert Report of Dr. Mark A. Zmijewski by November 26, *United States v. First Data Corp. and Concord EFS, Inc.*, No. 1:03CV02169 (RMC), at 2 (D.D.C. filed Nov. 24, 2003) [hereinafter November 24 Motion] ("Plaintiffs bear the burden of proof (on all but the efficiencies defense) . . ."). A true and correct copy of the November 24 Motion is Attachment C hereto.

<sup>5</sup>Myers Report, at ¶¶ 12, 14-16.

<sup>6</sup>November 24 Motion at 1 (emphasis added) (Attachment C); *see also id.* ("Plaintiffs' failure to disclose Dr. Zmijewski or submit a report disclosing his opinions is contrary to this Court's Order.").

<sup>7</sup>11/24/03 Tr. at 8:18-19 (Attachment D); *see also* November 24 Motion at 2 ("Plaintiffs' violation of the Order they argued for is prejudicial.") (Attachment C).

simultaneous exchange . . . was intended to prevent such late disclosure of critical information.”<sup>8</sup>

Notably, at no time either during the hearing on the motion to compel or in the briefing that preceded it did defendants disclose that they had an additional efficiencies expert that they intended to disclose at the last minute.

Ultimately, the Court agreed with defendants’ interpretation of the Scheduling Order, while noting that the Scheduling Order was not clear on the issue. The Court stated: “[T]he intention was to have *all* experts issue at least a preliminary expert report based on the information that they had available to them as of October 23, so that all parties could properly or at least hopefully properly prepare for trial to the best of their abilities.”<sup>9</sup> Defendants, having obtained this clarification of the Court’s intention, failed to honor it. Defendants instead waited until the evening of December 3 to disclose the existence of Prof. Myers.

Defendants had multiple opportunities to make the required disclosure, including:

- November 21: Exchange of revised witness lists — Plaintiffs’ revised witness list included Prof. Zmijewski. Defendants did not include Prof. Myers.
- November 24: Defendants filed a motion with the Court to compel an initial report from Prof. Zmijewski. The Court ordered Plaintiffs to produce a report four days later on November 28. Defendants remained silent on the existence of, or their desire to add, an additional expert.
- November 26: Weekly telephonic Status Conference with the Court — Defendants remained silent on the existence of, or their desire to add, an additional expert.
- December 3: Weekly telephonic Status Conference with the Court — Defendants remained silent on the existence of, or their desire to add, an additional expert.

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<sup>8</sup>November 24 Motion at 2 (Attachment C).

<sup>9</sup>11/24/03 Tr. at 10:23 to 11:2 (Attachment D)(emphasis added).

Finally, defendants will not be unduly prejudiced by the relief requested by Plaintiffs. Defendants already have an expert who will offer an opinion on efficiencies: Jerry A. Hausman. Defendants proffered Prof. Hausman on November 19 as their sole expert witness on efficiencies, and then, ignoring the Court's Order rejecting a staggered exchange of initial and rebuttal reports, sprang Prof. Myers on plaintiffs at the last minute. Defendants carry the burden on their efficiencies affirmative defense and presumably understood when they asserted the defense on October 31 what they would need to do to carry that burden. Whatever it is that defendants believe they forgot to cover on efficiencies with Prof. Hausman, adding Prof. Myers at this late date in order to cure that deficiency simply cannot be the appropriate answer.

Moreover, defendants' actions – unilaterally giving themselves another round of expert witness identification and, apparently, reports – are an admission that the trial schedule is inadequate and unworkable for them. If it is unworkable for defendants, it is even more unworkable – and prejudicial – for plaintiffs, who bear the ultimate burden.

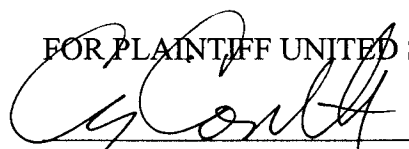
Defendants' disclosure of Prof. Myers at the end of the day on December 3, a mere twelve days before trial, is prejudicial and does not provide an adequate opportunity under this case's extremely compressed schedule for plaintiffs to understand and test the basis of this expert testimony. Only two days remained in the period for fact discovery, and many other events must occur between now and the start of trial. There is simply no time for discovery related to Prof. Myers and his opinions, for defendants to file an additional expert report (*in addition* to his untimely December 3 report), as apparently contemplated by Prof. Myers, and to prepare for and depose Prof. Myers prior to trial.

Under Rule 37 of the Federal Rules of Civil Procedure, the Court may impose a sanction


for both failing to follow a Court's discovery order and for a failure to disclose information required by Rule 26(a), which relates to expert discovery. Rule 37 specifically contemplates such a sanction and courts have regularly excluded expert witnesses whose disclosure, or lack thereof, violated a discovery order or was so late as to render effective discovery relating to the expert impossible.<sup>10</sup> Prof. Myers' expert report should be stricken and defendants should be precluded from calling Prof. Myers as a witness in this trial and from relying upon him in any manner. Given the short amount of time remaining before trial, plaintiffs respectfully request expedited treatment of this motion.

Respectfully submitted,

FOR PLAINTIFF UNITED STATES:

  
Craig W. Conrath, Esq.  
Antitrust Division  
U.S. Department of Justice  
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FOR PLAINTIFF STATES:

  
Rebecca Fisher, Esq.  
Assistant Attorney General  
P.O. Box 12548  
Austin, TX 78711-2548

Dated: December 6, 2003

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<sup>10</sup>See, e.g., *Konstantopoulos v. Westvaco Corp.*, 112 F.3d 710 (3d Cir. 1997) (counsel flagrantly disregarded the pretrial order); *Barrett v. Atlantic Richfield Co.*, 95 F.3d 375 (5th Cir. 1996) (finding no abuse of discretion in striking expert witnesses as a sanction for failure to identifying witnesses by a certain date, as required by the court's order); *Emmpresa Cubana Del Tabaco v. Culbro Corp.*, 213 F.R.D. 151 (S.D.N.Y. 2003) (finding of bad faith is not required to warrant exclusion of testimony from witness who was not timely disclosed; delay resulting from neglect is sufficient for preclusion); *Smith v. Union Pacific R. Co.*, 168 F.R.D. 626 (N.D. Ill.1996) (expert report delivered so late that plaintiff's lawyers could not have deposed witness without violating discovery rules and standing order warranted sanction of exclusion of expert's testimony).

# ATTACHMENT A

UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA

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UNITED STATES OF AMERICA, :  
et al., :  
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Plaintiffs, :  
:  
v. : CA 03-2169  
:  
FIRST DATA, et al., :  
:  
Defendants. :  
:  
- - - - - x

Washington, D.C.  
October 29, 2003  
4:40 p.m.

Transcript of Motions Hearing  
Before the Honorable Rosemary M. Collyer  
United States District Judge

APPEARANCES:

For the Plaintiff  
United States: CRAIG CONRATH, ESQ.  
SCOTT SCHEELE, ESQ.  
RENATA HESSE, ESQ.  
JOSHUA SOVEN, ESQ.

For the Plaintiff  
District of Columbia: DON A. RESNIKOFF, ESQ.  
ANIKI COOPER, ESQ.  
(by telephone)

For the Plaintiff  
States: STEVEN M. RUTSTEIN, ESQ.  
(by telephone)  
LIVIA WEST, ESQ.  
(by telephone)  
RICHARD GRIMM, ESQ.  
(by telephone)  
BENJAMIN L. COX, ESQ.  
(by telephone)  
REBECCA FISHER, ESQ.  
(by telephone)  
EVAN RUDINICKI, ESQ.  
(by telephone)



## APPEARANCES: (cont.)

## For Defendant First Data:

CHRISTOPHER HOCKETT, ESQ.  
(by telephone)  
GERALDINE ALEXIS, ESQ.  
(by telephone)

## For Defendant CONCORD:

STEPHEN R. PATTON, ESQ.

## Court Reporter:

ELIZABETH L. WASSERMAN  
Miller Reporting Company  
735 8th Street, S.E.  
Washington, D.C. 20003  
(202) 546-6666

1 MR. PATTON: And I think the state of play  
2 right now is, there are two issues. Without  
3 addressing them on the merits, if I may frame the  
4 issues, one is, the Government proposes that there  
5 be simultaneous exchanges of initial expert reports  
6 and rebuttal expert reports, and Defendants'  
7 position is that the party with the burden of proof  
8 on a particular issue should present the initial  
9 report and then have rebuttal reports, so that  
10 we're not ships passing in the night.

11 The second issue is one of timing. Our  
12 position is that the initial report should be due  
13 on November 14th, with the rebuttal reports due a  
14 little bit more than two weeks thereafter on  
15 December 3rd--almost three weeks. Their position  
16 is that the initial report should be due on  
17 December 1st and that the rebuttal reports be due  
18 just a week later.

19 THE COURT: December 7th, are we talking?

20 MR. PATTON: Or December 8th, yes.

21 THE COURT: December 8th. That would make  
22 the hearing on the 7th difficult, right? I was  
23 thinking about the Dalbert hearing.

24 MR. PATTON: The Dalbert hearing, yes. We  
25 wouldn't know exactly what--

# ATTACHMENT B

UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA

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:  
UNITED STATES OF AMERICA, :  
et al., :  
:  
Plaintiffs, :  
:  
v. : CA 03-2169  
:  
FIRST DATA, et al., :  
:  
Defendants. :  
:  
- - - - - x

Washington, D.C.  
October 29, 2003  
4:40 p.m.

Transcript of Motions Hearing  
Before the Honorable Rosemary M. Collyer  
United States District Judge

APPEARANCES:

For the Plaintiff  
United States: CRAIG CONRATH, ESQ.  
SCOTT SCHEELE, ESQ.  
RENATA HESSE, ESQ.  
JOSHUA SOVEN, ESQ.

For the Plaintiff  
District of Columbia: DON A. RESNIKOFF, ESQ.  
ANIKI COOPER, ESQ.  
(by telephone)

For the Plaintiff  
States: STEVEN M. RUTSTEIN, ESQ.  
(by telephone)  
LIVIA WEST, ESQ.  
(by telephone)  
RICHARD GRIMM, ESQ.  
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BENJAMIN L. COX, ESQ.  
(by telephone)  
REBECCA FISHER, ESQ.  
(by telephone)  
EVAN RUDINICKI, ESQ.  
(by telephone)

## APPEARANCES: (cont.)

## For Defendant First Data:

CHRISTOPHER HOCKETT, ESQ.  
(by telephone)  
GERALDINE ALEXIS, ESQ.  
(by telephone)

## For Defendant CONCORD:

STEPHEN R. PATTON, ESQ.

## Court Reporter:

ELIZABETH L. WASSERMAN  
Miller Reporting Company  
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Washington, D.C. 20003  
(202) 546-6666

1 the Court said in there, obviously a report turned  
2 in on the 24th can't reflect data received until  
3 the 24th, so data received within a reasonable time  
4 in advance of it.

5 MR. HOCKETT: Your Honor, it's Chris  
6 Hockett.

7 THE COURT: Yes, sir?

8 MR. HOCKETT: The scope of the reports to  
9 be exchanged on November 24th, would that be the  
10 expert opinion that's being offered in support of  
11 all issues, or the issues on which the party  
12 offering it bears the burden?

13 THE COURT: On all issues. We don't have  
14 time to play games on he goes first, I go second.  
15 There's just not enough time for that.

16 MR. HOCKETT: Is it then possible to move  
17 it up a little bit more, earlier in the month, so  
18 that we have adequate notice of what their expert  
19 opinion is? I note that although it is true that  
20 they have hinted that their expert is going to be  
21 Don Ordover, we have not seen him in the last  
22 meetings. He has not been part of the dialogue  
23 that we have had in the last few months, and he has  
24 not expressed his opinion to us orally or in  
25 writing.

# ATTACHMENT C

**IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA**

UNITED STATES OF AMERICA, et al.

Plaintiffs,

v.

FIRST DATA CORPORATION and CONCORD  
EFS, INC.,

Defendants.

Civil Action No. 1:03CV02169 (RMC)

Filed: October 23, 2003

**DEFENDANTS' MOTION AND MEMORANDUM OF POINTS AND AUTHORITIES IN  
SUPPORT OF MOTION TO CLARIFY SCHEDULING ORDER AND TO REQUIRE  
SERVICE OF EXPERT REPORT OF DR. MARK A. ZMIJEWSKI BY NOVEMBER 26**

This Court ordered the parties to exchange expert reports on November 19, as plaintiffs had insisted, simultaneously and without regard for burdens of proof. Defendants had argued that reports should be staged, based on the parties' respective burdens of proof. The Court clarified that the simultaneous reports "shall contain all opinions held by the expert as of November 19, 2003 but need be based only on information in the possession of the respective party(ies) on or before October 23, 2003." Defendants complied with that Order, submitting three expert reports. Plaintiffs submitted one, from Dr. Janusz Ordovery. Then, on November 21, plaintiffs served an Amended Witness List naming, for the first time, Dr. Mark A. Zmijewski, an expert accountant. This morning, plaintiffs disclosed that Dr. Zmijewski would testify regarding "efficiencies," purportedly in rebuttal.

Plaintiffs' failure to disclose Dr. Zmijewski or submit a report disclosing his opinions is contrary to this Court's Order. Plaintiffs had extensive information regarding efficiencies in their possession on or before October 23. Prior to October 23, Defendants presented the



government with expert opinions and factual analyses concerning the merger's expected efficiencies, provided backup documentation, voluntarily updated that information, and produced documents from the merger "integration team." Accordingly, this Court ordered them to disclose Dr. Zmijewski's opinions based on that information on and as of November 19. Plaintiffs' apparent position that Dr. Zmijewski's opinion is rebuttal misses the point and is contrary to their earlier arguments for simultaneous exchange. Plaintiffs bear the burden of proof (on all but the efficiencies defense), but defendants submitted extensive reports from two economists and an industry expert addressing the issues in plaintiffs' affirmative case. We could imagine the response had defendants claimed that Drs. Katz and Hausman could withhold their reports (on all but efficiencies) until December 1 because they would merely "rebut" Dr. Ordovery.

Plaintiffs' violation of the Order they argued for is prejudicial. Its upshot would be that defendants would have no opportunity to discover the basis for Dr. Zmijewski's testimony until December 3.<sup>1</sup> This Court's Order of simultaneous exchange, we submit, was intended to prevent such late disclosure of critical information. Plaintiffs argued for that rule and should be held to it. Defendants respectfully request that plaintiffs be ordered to submit an expert report of Dr.

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<sup>1</sup> Defendants voluntarily agreed to extend that date from December 1, due to the inadvertent late production of certain efficiency-related documents. Pursuant to this Court's direction, First Data spent some 250 hours of attorney time to identify and present to plaintiffs a complete table reconciling those late-produced documents with other, timely produced ones. More than 2/3 of the late-produced documents were duplicates of the previously produced documents.

Zmijewski disclosing his opinions as of today, based on information in plaintiffs' possession on October 23, by November 26.

Dated: November 24, 2003

FIRST DATA CORPORATION,

/s/

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Geraldine M. Alexis, *pro hac vice*  
Christopher B. Hockett, *pro hac vice*  
Frank M. Hinman, *pro hac vice*  
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Dated: November 24, 2003

CONCORD EFS., INC.,

/s/

---

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# ATTACHMENT D

UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA, et. al.,:

Plaintiffs,

vs.

FIRST DATA CORPORATION and  
CONCORD EFS, INC.,

Defendants.

Docket No. CA 03-2169

Washington, D.C.  
Monday, November 24, 2003  
4:40 p.m.

TRANSCRIPT OF TELECONFERENCE  
BEFORE THE HONORABLE ROSEMARY M. COLLYER  
UNITED STATES DISTRICT JUDGE

APPEARANCES:

For Plaintiff  
United States:

Craig W. Conrath, Esquire  
Richard Cook, Esquire  
Scott Scheele, Esquire  
Matthew Hammond, Esquire  
UNITED STATES DEPARTMENT  
OF JUSTICE  
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State of Texas:  
(and as coordinating  
State)

Rebecca Fisher, Esquire  
Assistant Attorney General

State of New York:

Richard Grimm, Esquire  
Assistant Attorney General

Appearances continued:

For Defendant First  
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Christopher B. Hockett, Esquire  
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Court Reporter:

Crystal M. Pilgrim, RPR  
United States District Court  
District of Columbia  
333 Constitution Avenue, N.W.  
Room 4608-A  
Washington, DC 20001

Proceedings recorded by machine shorthand, transcript produced  
by computer-aided transcription.

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1 MR. CONRATH: Your Honor, this is Craig Conrath for  
2 the United States, with me is Scott Scheele, Richard Cook and  
3 Matthew Hammond.

4 MS. FISHER: This is Rebecca Fisher on behalf the  
5 state of Texas and on behalf of the plaintiffs states  
6 generally.

7 MR. GRIMM: This is Dick Grimm, Richard Grimm on  
8 behalf of the state of New York.

9 MS. ALEXIS: This is Gerri Alexis on behalf of First  
10 Data Corporation and I have with me Chris Hockett, Frank Hinman

7 Justice Department on September 22nd. So there is at least  
8 that much information before the Justice Department that they  
9 could have their expert opine and we went ahead and had our  
10 experts opine even though for most of their opinions they are  
11 pure rebuttal to what the government expert said and we did  
12 that because this Court said that we should submit the expert  
13 reports on all issues and then supplement on December 1st and  
14 give further rebuttal if necessary.

15 And that's the course we're following and here we are in  
16 the situation where the Government said we will not get this  
17 gentleman's report until October, I mean until December 3rd and  
18 that's just unacceptable, Your Honor. We cannot prepare  
19 accurately getting that at the last minute.

20 MR. PATTON: Your Honor, could I just briefly raise  
21 two points.

22 We have made great headway working together on scheduling  
23 issues, but when we went to Your Honor on the 29th the second  
24 of the two days where we had that back to back, one of the  
25 principal issues was experts.

9

1 We had two issues, one was timing but the other one was  
2 sequencing. And the defendants had proposed Your Honor it's  
3 the party who bears the burden of proof who should go first and  
4 then the other party should go second.

5 And the Government was adamantly opposed to that. They  
6 insisted on a simultaneous exchange of expert reports and on  
7 that issue Your Honor I agreed with them.

8 Now as Ms. Alexis just mentioned the bulk of this stuff  
9 and probably 90 some odd percent of what our experts have  
10 opined on in the reports that they filed last Wednesday we are  
11 responding the Government has at least the ultimate burden of  
12 proof and the initial burden of persuasion.

13       And you know we thought that we had to put all of the, the  
14 order could be clear for all opinions we have albeit based on  
15 information available to you at the time the complaint was  
16 filed. And there was a plethora of material on efficiencies  
17 and so forth that had been produced to them, available to them.  
18 I think that the amounts have not changed. The claimed  
19 efficiencies have not changed. All of that's happening in the  
20 interim there's been implementation towards realizing those  
21 efficiencies, but they have been on the table and before the  
22 Department of Justice before they were claimed.

23       The second point is this, in trying to accommodate them  
24 and quite frankly we should have checked with Your Honor first  
25 but tried to work out with them and respond to their concern

□

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1 and they kind of I may be using too strong a word, but we agree  
2 to try to avoid having a dispute raised to Your Honor to  
3 further delay their efficiencies expert report from the 1st to  
4 the 3rd and all of a sudden we don't, we find out Friday night  
5 that they've got a new expert found out today as we expected  
6 Friday night an efficiencies expert and they're going to try to  
7 wait for the 3rd for the first time to let us know what their  
8 opinions are on efficiencies.

9       THE COURT: Okay, and I appreciate everybody's  
10 position. I have now reviewed the language of the specific  
11 scheduling in case management order.

12       I agree with the defendants as to the intention of the  
13 Court that everybody was suppose to put out an initial or  
14 preliminary whatever you want to call it expert report for  
15 information as of before October 23, but the language of the  
16 Court's order certainly provides a basis for Mr. Conrath to  
17 have reached a conclusion he did which is that he didn't need

18 to serve his rebuttal expert report in until December 1.

19 And so I understand the basis for his believing that and  
20 I find no error in his believing that since it was my language  
21 that was perhaps less specific than it might have been under  
22 the circumstances.

23 However, the intention was to have all experts issue at  
24 least a preliminary expert report based on the information that  
25 they had available to them as of October 23, so that all

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1 parties could properly or at least hopefully properly prepare  
2 for trial to the best of their abilities.

3 Therefore, Mr. Conrath, it will be necessary for your  
4 expert on efficiencies Dr. Zmijewski, I think I said that wrong  
5 forgive me doctor, to prepare an expert report based, at least  
6 a preliminary expert report, based on the information that he  
7 had available to him or more specifically that the Government  
8 had available to it as of October 23rd, given the fact that  
9 that, I don't know what the status of that report might be and  
10 whether or not he has been working on such an animal or not.

11 The request of the motion is that it be filed by  
12 November 26th, that would be a good date if it could be filed  
13 by November 26th, but the Court would give him until  
14 November 28th, which is Friday of this week if it were  
15 necessary for him to take that additional time since this order  
16 is only being issued Monday afternoon, and experts are  
17 particularly persnickety at times.

18 But I think that given the purpose of the Court's  
19 scheduling order that that's the best way to resolve the issue  
20 and the ambiguity in a sense that's in it. So again the Court  
21 finds no, nothing wrong in the Government's position because I  
22 can find a reason for it in the order, but it is inconsistent  
23 with the concept behind the order so Dr. Zmijewski will have to