

CAUSE NO. D-1-GN-11-003130

THE TEXAS TAXPAYER & STUDENT § IN THE DISTRICT COURT  
FAIRNESS COALITION, et al; §  
CALHOUN COUNTY ISD, et al; §  
EDGEWOOD ISD, et al; §  
FORT BEND ISD, et al; §  
TEXAS CHARTER SCHOOL §  
ASSOCIATION, et al. §  
Plaintiffs §  
§  
§  
§  
§  
JOYCE COLEMAN, et al §  
Intervenors §  
§  
§  
vs. § 200th JUDICIAL DISTRICT  
§  
MICHAEL WILLIAMS, COMMISSIONER §  
OF EDUCATION, IN HIS OFFICIAL §  
CAPACITY; SUSAN COMBS, §  
TEXAS COMPTROLLER OF PUBLIC §  
ACCOUNTS, IN HER OFFICIAL §  
CAPACITY; TEXAS STATE BOARD §  
OF EDUCATION, §  
Defendants. § TRAVIS COUNTY, TEXAS

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**DEFENDANTS' CORRECTED RESPONSE TO PLAINTIFFS' JOINT MOTION FOR  
LEAVE TO OFFER SUPPLEMENTAL EXPERT REPORT AND TO RE-CALL DR.  
WILLIAM DUNCOMBE**

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To the Honorable John K. Dietz, Judge Presiding

Defendants file this corrected response to the Plaintiffs' motion to untimely supplement Dr. William Duncombe's report and to re-call him to testify in this matter. Because (1) the Plaintiffs have failed to show good cause for the relief they seek, and (2) Defendants will be unduly prejudiced should the Court grant this motion, Defendants request that the Court deny the motion. Because (3) there was a typographical error on original motion.

## STANDARD

Texas Rule of Civil Procedure 193.6 permits untimely supplementation of discovery if the offering party shows there is good cause for its failure to timely supplement or where the untimely supplementation will not cause unfair surprise or unfair prejudice to the opposing party. Rule 270 allows the Court to re-open evidence at any time to allow a party to offer additional evidence, but it does not override the requirement that any evidence offered have been timely disclosed to the opposing party.

In some instances, a change to an expert's opinion does not require supplementation. For example, an expert may refine calculations or perfect a report up until the time of trial. *Exxon Corp. v. West Tex. Gathering Co.*, 868 S.W.2d 299, 304 (Tex. 1993). Or an expert may change an opinion without supplementation if the opinion is an "expansion of an already disclosed subject." *Navistar Int'l Transp. Corp. v. Crim Truck & Tractor Co.*, 883 S.W.2d 687, 691 (Tex. App.-Texarkana 1994, writ denied). However, a party may not present a material alteration of an expert's opinion at trial that would constitute a surprise attack. *Norfolk S. Ry. Co. v. Bailey*, 92 S.W.3d 577, 581 (Tex. App.—Austin 2002, no pet.) (citing *Exxon Corp. v. West Tex. Gathering Co.*, 868 S.W.2d 299, 304–05 (Tex.1993)). The purpose of requiring timely disclosure of a material change in an expert's opinion is to give the other party an opportunity to prepare a rebuttal. *West Tex. Gathering*, 868 S.W.2d at 305.

## ARGUMENT

Plaintiffs have failed to show good cause to allow Dr. Duncombe to submit a new report in the middle of this trial after having been cross examined by the State. Indeed, Plaintiffs appear to lay the blame for Dr. Duncombe's troubles on the State. There is, however, no

requirement, nor is there any legal support proffered by Plaintiffs, for the proposition that an opposing party must advise an expert in deposition that his methodology is incompetent.

Nor do the Plaintiffs cite any authority for the proposition that the exclusion of an expert witness's opinion as unreliable under Texas Rule of Evidence 702 constitutes good cause for late disclosure of a new expert report. Indeed, the Dallas Court of Appeals recently held that a trial court did not abuse its discretion when it held that exclusion of an experts' opinion as unreliable was not good cause to allow the offering party to present new expert testimony to cure the unreliable opinion. *PopCap Games, Inc. v. MumboJumbo, LLC*, 30 S.W.3d 699, 718 (Tex. App.—Dallas 2011, pet. denied, motion for rehearing pending).

Plaintiffs' request, like that in *PopCap Games*, is unsupported by good cause. That Dr. Duncombe's analysis has been shown to be unreliable during his cross examination is patently insufficient to establish good cause to untimely supplement his report. This lawsuit has been on file for over a year. Plaintiffs have had the data upon which Dr. Duncombe relied for months. The multitude of errors revealed in his cross examination trace back to mistakes he made in the district-only model that was the basis of his original report, filed on August 20<sup>th</sup>. Those errors simply carried forward into this September supplemental report (in which he advised that he had caught certain *other* errors in his district model), and thereby infected both his district and his student-level models. Along the way, Plaintiffs had ample time to check and double-check the analysis to ensure its accuracy. In fact, Plaintiffs have untimely supplemented several expert reports including Dr. Duncombe's already (most recently, a slightly revised analysis for Dr. Odden, who is to testify on Monday, was provided on Friday, November 16<sup>th</sup>, correcting a mistake in his calculations). Thus they are hard pressed to show how either counsel or Dr.

Duncombe were prohibited from doing their due diligence to ensure that the analysis and report were accurate before trial.

Plaintiffs contend that Defendants will not be surprised by this latest version of Dr. Duncombe's report, suggesting that his "basic methodology has not changed" and it is merely a "refined" version of his previous report. However, based on a very cursory review of the new report, it clearly contains new variables and new results that are manufactured to support the Plaintiffs' position in this case. The "new" report is not a mere refinement or "expansion" of the unreliable one, but is in fact an entirely new model.

Moreover, despite Plaintiffs' contention to the contrary, Defendants will be prejudiced should the Court permit them to supplement, yet again, Dr. Duncombe's report. Specifically, Defendants (1) will necessarily incur additional consulting expert fees to test this new report, (2) will incur additional testifying expert fees as the State's testifying experts will need to review the new model and prepare testimony in response to it, and (3) will have the services of trial counsel taken away from the ongoing trial to ready witnesses to realign their testimony to meet this new opinion head on.

Finally, Defendants submit that it is manifestly unfair to allow Plaintiffs to come up with a newly specified model after the witness has already testified. At some point this trial must come to an end. To grant Plaintiffs' motion will necessarily prolong the trial, as it opens up the possibility that any party can supplement its reports and recall its experts for a 'do over' on the witness stand. Defendants submit that such a prolongation of this trial would be burdensome to the Texas Education Agency, as well as its employees. It would doubtless be burdensome to the Court as well.

## CONCLUSION

For the foregoing reasons, Defendants respectfully request the Court to deny Plaintiffs' motion for leave to allow Dr. Duncombe to untimely supplement his expert report.

Respectfully submitted,

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CERTIFICATE OF SERVICE

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