

UNITED STATES TAX COURT  
WASHINGTON, DC 20217

CAYLOR LAND & DEVELOPMENT, INC., ET )	)		
AL., )	)		
	)		
Petitioner(s), )	)		
	)		
v. )	)	Docket No. 17204-13,	17205-13,
	)	17223-13,	19238-13,
COMMISSIONER OF INTERNAL REVENUE, )	)	23921-13,	23922-13,
	)	23931-13,	11348-14,
Respondent )	)	17919-14,	17920-14,
	)	17921-14,	17922-14.
	)		
	)		
	)		

**ORDER**

These cases were on the Court’s September 22, 2014 trial calendar for Phoenix, Arizona, but are now set for trial at a special session to start on May 2, 2016. On March 22, 2016 respondent filed three motions *in limine*, and petitioners have filed their responses. The parties also spoke with the Court on April 18, 2016 regarding petitioners’ plans to call an expert witness in rebuttal.

**Respondent’s Motion to Exclude the Expert Witness Report of Stanley J. Feldman**

Respondent moved to exclude petitioners’ expert Stanley Feldman for lack of qualification. The gist of respondent’s position is that Feldman is a specialist in valuation but he’ll be testifying about whether petitioners’ captive-insurance arrangement is “insurance” as that term is commonly understood. Petitioners reply by arguing that Feldman’s valuation experience includes a focus on the analysis of risk on business. Risk -- its identification and management -- is relevant to the Court’s analysis of whether what petitioners were buying was insurance. The standard is whether Feldman’s knowledge and testimony “will help the trier of fact.” Fed. R. Evid. 702(a). At least at the threshold of trial, the Court concludes it will. (Or *may* -- cross-examination hasn’t yet occurred, of course.) *Daubert’s*

“‘gatekeeper’ function in excluding evidence that is not reliable” certainly applies in Tax Court proceedings, *see Boltar, LLC v. Commissioner*, 136 T.C. 326, 334 (2011); but it is less urgent in a bench trial, *see Id.; Volk v. United States*, 57 F. Supp. 2d 888, 896 n.5 (N.D. Cal. 1999).

We will deny respondent’s motion.

### **Respondent’s Motion to Exclude Expert Testimony of James Rech**

Respondent also moved to exclude James Rech as an expert. Petitioners don’t object -- they seem to be using Rech as a consulting expert at most. They are concerned that respondent’s motion might be a stalking horse for the exclusion of rebuttal expert testimony. The Court has since spoken to the parties and said that we don’t (or won’t) read it that way.

We will grant this motion.

### **Respondent’s Motion to Exclude the Expert Report of Stanley Feldman For Reliance Upon . . . Documents Inappropriately Withheld**

Respondent also moved to exclude at least parts of the Feldman expert-witness report because it relies on documents and information that respondent was required to exchange during discovery. Our analysis has to begin by noting that not all information on which an expert relies has to be produced in discovery: “If experts in the particular field would reasonably rely on those kinds of fact and data in forming an opinion on the subject, they need not be admissible for the opinion to be admitted.” Fed. R. Evid. 703. And this becomes more obviously true if one thinks of all the course-work, reading, and life experience that go into making a good expert.

What a court must be sensitive to is the introduction through an expert’s testimony of discoverable evidence that a party has asked for and which his adversary has concealed. But we don’t think that’s a problem here: All the cases tried in our Court are bench trials, and our judges take care to decide them on the basis of evidence in the record, which includes expert’s opinions but not all the possible hearsay and inadmissible evidence which may go into the formation of those opinions. We also note that there seem to be very few discoverable yet unproduced documents -- petitioners say that there were a grand total of eight, out of the hundreds and hundreds of documents that they did turn over. We are

prepared to think this non-disclosure was inadvertent and cured in reasonably short order; we see little evidence of prejudice to respondent.

We will deny this motion.

### **Rebuttal Expert Witness**

Respondent orally objected to petitioners' calling any rebuttal expert witness during a phone call on April 18, 2016. He naturally wishes to avoid surprise, but our Rules do contemplate the use of rebuttal testimony. Such testimony is by its nature dependent on what respondent's case in chief looks like, which can't be predicted with precision before trial. Respondent is substantially protected from surprise by the nature of rebuttal testimony (i.e., it's limited to attacking the opinions of respondent's experts, not introducing new opinions in support of petitioners' own case in chief). That's a major reason that Rule 143(g)(3) doesn't require a written rebuttal expert-witness report. The Court's pretrial order in this case, however, did require the identification of all witnesses, and the Court will require petitioners to supplement their previous identification of witnesses to enable respondent to prepare for cross-examination if petitioners put on a rebuttal expert.

It is

ORDERED that respondent's March 22, 2016 motion to exclude Dr. Feldman's report is denied. It is also

ORDERED that respondent's March 22, 2016 to exclude James Rech as a testifying expert is granted. It is also

ORDERED that respondent's March 22, 2016 motion to exclude Dr. Feldman's report for reliance upon information and documents inappropriately withheld is denied. It is also

ORDERED that or before April 22, 2016 petitioners shall identify for respondent all expert witnesses whom they will call in rebuttal of respondent's

case by name, address, qualifications (including a copy of any such witness's current resume), and a brief summary of his expected testimony.

**(Signed) Mark V. Holmes  
Judge**

Dated: Washington, D.C.  
April 26, 2016