UNITED STATES DISTRICT COURT

DISTRICT OF MASSACHUSETTS

CAPITOL RECORDS, INC., et al., Plaintiffs, v. NOOR ALAUJAN, Defendant.	Civ. Act. No. 03-cv-11661-NG (LEAD DOCKET NUMBER)
SONY BMG MUSIC ENTERTAINMENT, et al., Plaintiffs, v. JOEL TENENBAUM, Defendant.	Civ. Act. No. 07-cv-11446-NG (ORIGINAL DOCKET NUMBER)

PLAINTIFFS' RENEWED MOTION TO EXCLUDE JOHN PERRY BARLOW AS A RULE 26(a)(2) WITNESS AND REQUEST FOR EXPEDITED RULING

Plaintiffs respectfully move under Rule 37(c)(1) to exclude John Perry Barlow from testifying on behalf of Defendant for failure to provide an expert report which complies with Rule 26(a)(2) by the Court's strict deadline. Specifically, Defendant failed to supplement Mr. Barlow's report on or before June 22, 2009, as required by the Court's June 16, 2009 Order. The Court has already found that the failure to supplement by June 22 severely prejudices Plaintiffs. Accordingly, Mr. Barlow's testimony should not be allowed and his report should be stricken.

Because the court has set a July 3, 2009 deadline for the completion of expert discovery, Plaintiffs respectfully request an expedited ruling on this motion.

BACKGROUND

On February 23, 2009, the Court issued a revised Scheduling Order setting a March 30, 2009 deadline for expert disclosures under Rule 26(a)(2). Doc. 759. Plaintiffs disclosed their expert on October 7, 2008 and provided a complete expert report at that time. The Court also ordered Plaintiffs to disclose rebuttal experts on or before May 1, 2009, and ordered that all discovery, including expert discovery, be completed by May 30, 2009. *Id.;* Doc. 833. On April 10, 2009, ten days after the deadline for Defendant to disclose expert witnesses had passed, Defendant purported to disclose John Perry Barlow as an expert witness. A copy of Barlow's report is attached as Exhibit A. On May 29, 2009, Defendant's counsel served an amended, unsigned Declaration, amending Mr. Barlow's report by adding a few lines. A copy of the amended report is attached as Exhibit B.

On June 5, 2009, Plaintiffs moved to exclude Barlow, as well as Defendant's other proposed expert witnesses, on grounds that, as to Barlow, his expert reports were untimely and failed to satisfy Rule 26(a)(2)(B). *See* Doc. 841. On June 16, 2009, the Court ordered Defendant to supplement his expert reports and warned Defendant's counsel that it would "consider excluding Defendant's proposed experts if written reports satisfying the requirements of Fed. R. Civ. R. 26(a)(2)(B) are not provided for each expert by June 22, 2009." *See* Doc. 850 at 3. In its June 16, 2009 Order, the Court also set July 3, 2009 as the close of expert discovery and July 10, 2009 as the deadline for rebuttal experts. The Court further held that "the failure to provide complete and specific materials describing the experts' opinions and the basis for those opinions by [June 22, 2009] and no later, will work a substantial prejudice on the Plaintiffs – one which the Court will not allow." Doc. 850 at 3.

Despite the Court's strict deadline, Defendant failed to supplement the Barlow report. Barlow's previously disclosed reports fail to meet the standards of Rule 26(a)(2), which requires, among other things, "a complete statement of all opinions to be expressed and the basis and reasons therefor" as well as a listing of "the data or other information considered by the witness in forming them." *See* Fed. R. Civ. P. 26(a)(2). The Barlow report fails to identify any *basis* for his opinions and fails to identify *the data* relied on to form such opinions, both of which must be identified under Rule 26(a)(2)(B). *See* Exhibit B at 2-3.

The Court has repeatedly warned Defendant's counsel that he is expected to follow the Rules and that "[t]he Court will not hesitate to impose appropriate sanctions," if he continues to flout them. (March 9, 2009 Minute Order); *see also* Feb 23, 2009 Order (Doc. 759) ("familiarity with both the Federal Rules and the Local Rules of the District of Massachusetts is presumed and expected"). In its June 16, 2009 Order, the Court issued a final warning to Defendant's counsel: "[Defendant's Counsel] is cautioned that failure to meet the requirements and the time limits set in this Order may cause him to forfeit crucial elements of his case." *See* Doc. 850 at 2.

For these and other reasons set forth more fully below, Plaintiffs respectfully move under Rule 37(c)(1) for an order excluding Defendant's expert witness, John Perry Barlow, at trial.

ARGUMENT

I. The Court Should Exclude John Perry Barlow As An Expert For Failing To Comply With Rule 26(a)(2) And This Court's Order.

The identification of any expert who is retained or specially employed to provide expert testimony must be accompanied by a written report prepared and signed by the witness. Fed. R. Civ. P. 26(a)(2)(B). Among other things, the report must contain the following:

(i) a complete statement of all opinions the witness will express and the basis and reasons for them;
(ii) the data or other information considered by the witness in forming them;

> . . .
> (iv) the witness's qualifications, including a list of all publications authored in the previous 10 years;
> (v) a list of all other cases in which, during the previous 4 years, the witness testified as an expert at trial or by deposition. . . .

Id.; *see also Santiago-Diaz v. Laboratorio Clinico y de Referencia del Este*, 456 F.3d 272, 275 (1st Cir. 2006) (listing Rule 26(a)(2)(B) requirements and affirming district court order precluding party from presenting expert testimony for failure to make timely expert disclosures). An incomplete disclosure is considered equivalent to a failure to disclose. Fed. R. Civ. P. 37(a)(3).

The purpose of these disclosures is to give opposing parties a reasonable opportunity to prepare an effective cross-examination of the designating parties' expert witnesses and, if necessary, arrange for testimony from other experts. *See* Fed. R. Civ. P. 26(a)(2) advisory committee's note (1993). Courts require disclosing parties to produce detailed and complete reports so as to avoid unfair surprise to opposing parties and to conserve resources. *See, e.g.*, *Krischel v. Hennessy*, 533 F. Supp. 2d 790, 798 (N.D. Ill. 2008) (quoting advisory committee note's language, court found that expert report containing only "sketchy and vague" disclosure of substance of expert's direct examination, and nothing about reasons for expert's opinions, was inadequate); *Giladi v. Strauch*, 2001 U.S. Dist. LEXIS 4645, at * 14-15 (S.D.N.Y. Apr. 13, 2001) (striking expert report which contained a brief statement of ultimate conclusions with no explanation of the bases and reasons therefore, no statement of how the medical records support the conclusion and no explanation of the methodology he utilized to draw his conclusions from the data available to him); *Minn. Mining & Mfg. Co. v. Signtech USA, Ltd.*, 177 F.R.D. 459, 460 (D. Minn. 1998) (acknowledging that the report requirement serves to eliminate unfair surprise to the opposing party and to conserve resources); *Reed v. Binder*, 165 F.R.D. 424, 429 (D.N.J. 1996) ("the test of a report is whether it was sufficiently complete, detailed, and in compliance

with the Rules so that surprise is eliminated, unnecessary depositions are avoided, and costs are reduced").

F.R.C.P. 37(c)(1) provides that a 'party that without substantial justification fails to disclose information required by Rule 26(a) . . . is not, unless such failure is harmless, permitted to use as evidence at trial . . . any witness or information not so disclosed.' As the First Circuit explained in *Lohnes v. Level 3 Communs., Inc.*, 272 F.3d 49, 60 (1st Cir. Mass. 2001):

> The expert disclosure requirements are not merely aspirational, and courts must deal decisively with a party's failure to adhere to them. The Civil Rules provide in pertinent part that a party who "without substantial justification fails to disclose information required by Rule 26(a) . . . is not, unless such failure is harmless, permitted to use as evidence . . . any witness or information not so disclosed." Fed. R. Civ. P. 37(c)(1); see also D. Mass. R. 26.4(b)(1) (providing for preclusion of expert witnesses not seasonably identified). We have explained before that Rule 37(c)(1) "clearly contemplates stricter adherence to discovery requirements, and harsher sanctions for breaches of this rule, and the required sanction in the ordinary case is mandatory preclusion." *Klonoski v. Mahlab*, 156 F.3d 255, 269 (1st Cir. 1998).

Moreover, "[t]he First Circuit has said repeatedly that the focus must be on the question whether the party that has failed to meet its Rule 26 obligations has shown substantial justification for that failure." *Peterson v. Scotia Prince Cruises, Ltd*., 222 F.R.D. 216, 217 (D. Me. 2004). "The day has long passed when we can indulge lawyers the luxury of conducting lawsuits in a manner and at a pace that best suits their convenience. The processing of cases must proceed expeditiously if trials are to be held at all." *Damiani v. Rhode Island Hosp.*, 704 F.2d 12, 16 (1st Cir. 1983)

Recognizing the inadequacies in the proposed experts' reports, the Court ordered Defendant to produce experts reports that satisfy Rule 26(a)(2)(B) by June 22, 2009. *Id.* Notwithstanding this deadline, Defendant did not supplement the Barlow report, and has stated that he does not intend to do so. *See* June 23, 2009 email from Charles Nesson to Eve Burton, Exhibit C.

The Barlow report served on April 10, 2009, and amended on May 29, 2009, fails to satisfy the requirements of Rule 26(a)(2)(B)(i), (ii), or (iv). If allowed, Barlow claims he would testify that (a) the Internet and peer-to-peer technology "allow us to do that which we, as humans, fundamentally need to do: share art," (b) "the music industry will never be endangered," and (c) "the recording industry must evolve." *See* Exhibit B at 2-3. His report, however, fails to offer any *basis* or reason for these opinions other than his "personal experiences" and his "position as a public intellectual," (*id.* at 1-2), fails to identify a single source of data or other information considered, and fails to list Barlow's purported qualifications, all of which are required by Rule 26(a)(2). Similarly, the **only** additions to Barlow's amended report are bald statements that his "positions and experiences qualify [him] to speak about the fairness of peer-to-peer file sharing in the context of the recording industry and the technological environment in which such actions occur" (Exhibit B at ¶ 1) and that he has no publication that must be disclosed. (Exhibit B at ¶ 9). As explained above, this report does not comply with the requirements of Rule 26(a)(2)(B) because it does not contain a complete statement of all opinions to be expressed, the reasons therefore, or the data or other supporting information considered by the witness in forming the opinion.

Plaintiffs are substantially prejudiced by Defendant's failure to provide complete expert reports. First, "[n]othing causes greater prejudice that to have to guess how and why an adversarial expert reached his or her conclusion." *Reed v. Binder*, 165 F.R.D. 424, 430 (D.N.J. 1996). Second, without complete reports from Defendant's proposed witness, it is not possible for Plaintiffs to prepare to depose this witness or cross-examine him at trial. Nor is it possible for Plaintiffs to identify and disclose rebuttal experts, to determine whether rebuttal experts are even necessary, or to complete expert discovery. *See Pena-Crespo*, 408 F.3d at 13 (reiterating

that "[t]he failure to provide an expert report that satisfies the specific requirements of Rule 26(a)(2)(B) undermines opposing counsel's ability to prepare for trial") (citation omitted). Finally, Defendant's continued delay and failure to comply with clear rules and Court Orders forces Plaintiffs to expend time and money briefing these issues and unnecessarily complicates these proceedings.

In its June 16, 2009 order, the Court noted that "the failure to provide complete and specific materials describing the experts' opinions and the basis for those opinions by [June 22, 2009] and no later, will work a substantial prejudice on the Plaintiffs – one which the Court will not allow." Doc. 850 at 3. With only six days before the close of expert discovery, seventeen days before the deadline for rebuttal experts, and six weeks before trial, the prejudice Plaintiffs will suffer if the Court allows Barlow to testify, despite this completely inadequate report, is undeniable.

Defendant has no justification for his delay that would warrant a lesser sanction in this case. Nor can Defendant establish that the error was harmless. This case has been ongoing since August 2007. Defendant's counsel entered his appearance in September 2008, and, at that time, told the Court he wanted "a trial date at the earliest convenience, ideally before the end of October [2008]." (Transcript of September 23, 2009 hearing, p. 13) Defendant disclosed this purported this expert witness over seven months ago and had more than sufficient time to complete an expert report. Almost three months after the deadline to serve reports, a month after Defendant's counsel agreed to supplement the report, and after the passing of the Court's latest deadline, Defendant has still failed to provide an adequate report for Mr. Barlow. There is no justification for this failure and Mr. Barlow's testimony should be precluded and his reports stricken.

II. Defendant, His Counsel, Or Both, Should Be Compelled To Pay Plaintiffs' Expenses, Including Reasonable Attorneys' Fees, Incurred In Bringing This Motion.

Rule 37 requires, except in limited circumstances, that the Court "**must**, after giving an opportunity to be heard, require the party . . . whose conduct necessitated the motion, the . . . attorney advising that conduct, or both to pay the movant's reasonable expenses incurred in making the motion, including attorney's fees." Fed. R. Civ. P. 37(a)(5)(A) (emphasis added). Absent finding that opposing party's position was substantially justified, award of expenses is mandatory. *See Notice v. DuBois*, 187 F.R.D. 19, 20 (D. Mass. 1999).

Here, as explained above, Defendant's failure to provide timely and complete expert disclosures for Mr. Barlow is not substantially justified. Indeed, Defendant's refusal to follow the Rules, which has resulted and continues to result in severe prejudice to Plaintiffs, should not be permitted. Therefore, in addition to an order precluding Defendant from calling Mr. Barlow as a purported expert witnesses, Defendant, his counsel, or both, should be compelled to reimburse Plaintiffs' costs, including reasonable attorneys' fees, incurred in bringing this motion.

III. Certification Of Conference Under Federal Rule 37 And Local Rules 7.1 And 37.1.

Undersigned counsel hereby certifies under Federal Rule 37(a)(1) and Local Rules 7.1(a) and 37.1(a) that Plaintiffs have attempted in good faith to resolve or narrow the issues presented in this motion. Specifically, and as explained above, Plaintiffs' counsel Eve Burton contacted Defendant's counsel by email on June 23, 2009 to discuss the issues presented in this motion, requested Defendant's counsel withdraw Barlow as an expert. *See* email, Exhibit C. Defendant's counsel refused and stated that Defendant opposes the present Motion. *Id.*

CONCLUSION

WHEREFORE, Plaintiffs respectfully request entry of an Order precluding Defendant's proposed expert, John Perry Barlow, from testifying at trial and precluding Defendant from using

his insufficient expert report in these proceedings. Plaintiffs also request entry of an Order compelling Defendant, his counsel, or both to reimburse Plaintiffs' costs, including reasonable attorneys' fees, incurred in bringing this motion, and for such other and further relief as the Court deems appropriate.

Because the Court has set a July 3, 2009 deadline for the completion of expert discovery, Plaintiffs respectfully request an expedited ruling on this motion.

Respectfully submitted this 24th day of June, 2009.

SONY BMG MUSIC ENTERTAINMENT; WARNER BROS. RECORDS INC.; ATLANTIC RECORDING CORPORATION; ARISTA RECORDS LLC; and UMG RECORDINGS, INC.

By their attorneys,

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CERTIFICATE OF SERVICE

I hereby certify that this document 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 June 24, 2009.

s/ Eve G. Burton