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' OPPOSITION TO DEFENDANT'S MOTION TO ADD RULE 26(a)(2) WITNESS

Plaintiffs respectfully submit this opposition to Defendant's June 29, 2009 motion to add Wayne Marshall, Defense counsel's son in law, as a Rule 26(a)(2) witness (Doc. No. 860).[1] Defendant's Motion should be rejected for at least three reasons.[2] First, Defendant disclosed this purported expert over three months after the deadline to do so and less than a month before trial. Defense counsel's proffered justification for the delay does not even come close to justifying an

[1]Defendant's request to add a new expert witness at this late date was raised and discussed with the Court on June 29, 2009. Given the absence of a ruling by the Court on this issue and out of an abundance of caution, Plaintiffs file this Opposition.

[2] If the Court were to grant Defendant's Motion, Plaintiffs would move to strike Marshall on *Daubert* grounds.

11th hour expert witness. Second, Marshall's report does not come close to satisfying Rule 26(a)(2). Moreover, the substance of Marshall's purported expert report makes clear that he has not reviewed the facts of the case at bar in the slightest and has no insight into whether or not Mr. Tenenbaum engaged in copyright infringement other than a general belief that music should be shared. The fact that Mr. Nesson's son-in-law may have an opinion does not mean that he gets to take the stand and advocate on behalf of Defendant. The witness appears to be offered for the improper purpose of seeking to have the jury ignore existing copyright law. As the Court has already held that philosophical pronouncements, such as Marshall's opinion of music as 'a shared thing,' are not the proper subject of expert testimony, Defendant's Motion should be denied.

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). On June 16, 2009, the Court set June 22, 2009 as the final deadline for Defendant to supplement the reports of his previously disclosed experts. (Doc. 850 at 3). 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." (*Id.*). 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.

Despite the Court's strict deadline, Defendant waited until June 29, 2009 – more than three months after the deadline to disclose experts, one week after the final deadline to supplement expert reports, and less than one month before trial, to seek leave to add Marshall as an expert. In addition to being untimely, Marshall's report falls so far short of Rule 26(a)(2) that Plaintiffs would have no idea on what basis to examine him. While it appears that Marshall

would opine on "songs as shared things," "historicizing the musical commodity," and "listening as a transformative use" - none of these things is of any relevance to this lawsuit nor is it the proper subject of expert testimony.

For these and other reasons set forth more fully below, Plaintiffs respectfully request that the Court deny Defendant's motion to add an additional expert witness.

ARGUMENT

I. The Court Should Deny Defendant's Motion As Untimely.

Rule 26(c) provides that disclosure must be made at the time and in the sequence that the court orders. An expert's complete report is due at a specific time during the discovery period in order to allow opposing counsel to depose the expert, if desired, and to allow the opposing party's expert witness time to respond to the opinions expressed in the report, also within the discovery period, so that the plaintiff's counsel will also have an opportunity to explore those opinions before the end of discovery and the deadline for the filing of dispositive motions. *Griffith v. E. Me. Med. Ctr.*, 599 F. Supp. 2d 59 (D. Me. 2009); *Thibeault v. Square D Co.*, 960 F.2d 239, 244 (1st Cir. 1992) (Rule 26 promotes fair play in discovery and at trial).

Indeed, courts do not hesitate to strike experts for failure to meet the deadline for filing expert reports. *See e.g., Wilson v. Bradlees of New Eng., Inc.*, 250 F.3d 10, 20 (1st Cir. 2001) (Rule 37(c)(1) "requires the near automatic exclusion of Rule 26 information that is not timely disclosed"); *DuFresne v. Microsoft Corp.*, 2006 U.S. Dist. LEXIS 57423 (D. Mass. Apr. 28, 2006) (granting motion to strike untimely supplemental expert reports for failure to comply with scheduling order).

The Court has already established that Plaintiffs would be severely prejudiced by late disclosures. (Doc. 850 at 3). In this instance, Defendant moved to add Marshall as an expert on

June 29, 2009 – three months after the deadline established by the Court in its February 23, 2009 Scheduling Order (Doc. 759) and less than one month before trial. Defendant's proffered justification is that "only recently did Marshall focus on how his expertise would be relevant to the one judging the fairness of Joel's use in relation to the copyright holder." *See* Motion at 2. Said another way, defense counsel didn't think about this until recently. This excuse, of course, does not justify ignoring the deadlines. If it did, counsel could justify ignoring any deadline on the basis that he or she had simply not thought about an issue until after the deadline had passed. Indeed, it is counsel's job to prepare his case and identify relevant experts, and to do so within the limits set by the Rules and the Court's Order. Defendant's unjustified delay mandates denial of his Motion.

II. Defendant's Motion Should Be Denied For Failure To Comply With Rule 26(a)(2).

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").

Marshall's report does not even attempt to comply with the requirements of Rule 26(a)(2)(B). While it is not entirely clear from his proposed report, Marshall appears to claim that he would testify that (a) "songs are shared things;" (b) the history of music as a commodity; and (c) listening to music is a transformative and fair use. Exhibit A at 1-7. His report, however, fails to offer any *basis* or reason for these opinions other than the fact that he

feels this way. There is no study or data that Marshall cites to in support of his belief. *Id.* at 7. Moreover, he fails to explain how these existential concepts have any bearing on Defendant's admitted copyright infringement.

It is not enough for Marshall to state in broad terms that he will testify about music as a 'shared thing;' "an expert must actually disclose the testimony he intends to offer at trial, as completely as possible, and the specific foundation for his opinions." Minute Order dated 6/30/09 (citing *Ciomber v. Cooperative Plus, Inc.*, 527 F.3d 635, 641 (7th Cir. 2008)). As Defendant has not provided Plaintiffs with any basis on which they might examine Marshall, he should not be allowed to testify.

III. Marshall's Philosophical Pronouncements Are Not Proper Expert Testimony.

The Court has already determined that "philosophical pronouncements [. . .] are not within the scope of expert testimony and the court cannot give them the imprimatur of 'expertise' at trial." Minute Order dated 6/30/09. Indeed, the Court recently struck another of Defendant's purported experts, John Perry Barlow, on exactly those grounds. *Id.* Marshall's central argument, that music should be shared, is not relevant to the copyright infringement at issue and is not suited to testimony before a jury. Accordingly, Defendant's Motion should be denied.

CONCLUSION

WHEREFORE, Plaintiffs respectfully request the Court deny Defendant's motion to add an additional expert and enter an order precluding Defendant from using the purported expert report in these proceedings.

Respectfully submitted this 9th day of July 2009

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

By their attorneys,

By: s/ Eve G. Burton

Timothy M. Reynolds (pro hac vice)
Eve G. Burton (pro hac vice)
Laurie J. Rust (pro hac vice)
HOLME ROBERTS & OWEN LLP
1700 Lincoln, Suite 4100
Denver, Colorado 80203
Telephone: (303) 861-7000
Facsimile: (303) 866-0200
Email: timothy.reynolds@hro.com
eve.burton@hro.com
laurie.rust@hro.com

Matthew J. Oppenheim (pro hac vice)
The Oppenheim Group
7304 River Falls Drive
Potomac, MD 20854
Telephone (301) 299-4986
Facsimile: (866) 766-1678
Email: matt@oppenheimgroup.net

Daniel J. Cloherty
DWYER & COLLORA, LLP
600 Atlantic Avenue - 12th Floor
Boston, MA 02210-2211
Telephone: (617) 371-1000
Facsimile: (617) 371-1037
Email: dcloherty@dwyercollora.com

ATTORNEYS FOR PLAINTIFFS

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 July 9, 2009.

s/ Eve G. Burton