

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF RHODE ISLAND

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| JJI INTERNATIONAL, INC., | : | |
| Plaintiff, | : | |
| | : | |
| v. | : | C.A. No. 11-206ML |
| | : | |
| THE BAZAR GROUP, INC., | : | |
| Defendant. | : | |

MEMORANDUM AND ORDER

This Motion addresses whether raw survey data is required to be included as part of the expert disclosure of the psychologist who designed the survey and relied on some of the resulting data to form his opinion. Plaintiff JJI International, Inc. (“JJI”), and Defendant The Bazar Group, Inc. (“Bazar”), both Rhode Island jewelry manufacturers, are locked in a contentious trademark dispute over whether Defendant’s use of “SPARKLE” on jewelry products creates a likelihood of confusion with Plaintiff’s “SPLASHES & SPARKLES” trademark. On the date set for its expert disclosure pursuant to Rule 26(a)(2), Plaintiff produced a detailed expert report based on an internet marketing survey, which concluded that there is a likelihood of confusion between the two brands, but did not produce all of the raw data from the survey. Frustrated, especially with the deadline for its rebuttal disclosure imminent, Defendant filed an Emergency Motion claiming severe prejudice and seeking preclusion of the expert pursuant to Rule 37(c)(1) as the proper sanction for a violation of Rule 26(a)(2)(B)’s requirement that facts and data considered in forming an expert opinion must automatically be disclosed.

The Motion has been referred to me for determination pursuant to 28 U.S.C. § 636(b)(1)(A) and DRI LR Cv 72(a). Defendant is right that raw survey data should be included as part of the expert disclosure of an opinion based on survey results because they are “facts or

data considered by” the expert who designed the survey, even if the specific data were not relied on in forming the opinion. Fed. R. Civ. P. 26(a)(2)(B). Nevertheless, the cases are mixed regarding whether such data must be disclosed contemporaneously with the expert report. Here, while initially resistant to the proposition that the data were covered by Rule 26(a)(2)(B), Plaintiff produced the missing data, nineteen days after Defendant got its expert report and ten days before the due date for Defendant’s rebuttal report; Plaintiff’s conduct evinces no bad faith or strategic delay. Mindful of this Circuit’s admonishment that “the punishment must approximately fit the crime,” under such circumstances, the potentially fatal sanction of preclusion of the expert is totally unwarranted, as is the imposition of a punitive sanction such as cost shifting. See Esposito v. Home Depot U.S.A., Inc., 90 F.3d 72, 80 (1st Cir. 2009). Rather, a limited extension to permit Defendant to supplement its rebuttal disclosure adequately cabins any harm.

I. Background

Plaintiff JJI sued Defendant Bazar in May 2011 after Bazar launched a line of women’s jewelry products using the designation SPARKLE. JJI had previously registered the trademark SPLASHES & SPARKLES; it alleges that Bazar’s use of SPARKLE constitutes trademark infringement and unfair competition under state and federal law. The parties clashed on various discovery issues prior to the close of fact discovery on January 28, 2013. The case is now in the expert discovery phase, scheduled to end on May 10, 2013. According to the Amended Pretrial Order, the first event in the expert phase was JJI’s expert disclosure, due on February 27, 2013. Bazar’s rebuttal disclosure was due on March 29, 2013, with expert depositions to follow.

On February 27, 2013, Plaintiff timely served by regular mail the report of testifying expert Geoffrey T. Fong, Ph.D. (the “Fong Report”); Bazar received it on March 1, 2013. The

Fong Report is based on an internet survey that showed images of JJI and Bazar's packaging, along with a control image, and asked respondents if the jewelry was sold by the same or affiliated companies, or by different companies. Using the survey results, the Fong Report concludes that there is a likelihood of confusion between JJI's SPLASHES & SPARKLES jewelry and Bazar's SPARKLE jewelry. Dr. Fong designed the survey's methodology, including the questions to be asked by the survey instrument. The implementation of the survey was performed by Applied Marketing Science, Inc. ("AMS"), which coordinated and oversaw the data collection process, and ResearchNow, which identified potential survey respondents.

Dr. Fong used the survey results to prepare his Report, which is detailed and clear, with appendices bringing its total length to sixty-five pages. The Report describes the survey's design and analyzes respondents' open-ended responses on the similarity of the parties' jewelry designation. The Report includes screen shots of the survey instrument presented to respondents, including all of the actual questions asked, together with an explanation of the purpose of each question. However, while it contains detailed information about the answers provided by respondents to certain questions, it does not include answers generated by other questions. The Report has no information about the responses to the questions asking for respondents' gender and whether they had seen Plaintiff's jewelry before. For other questions, the Report has limited information; for example, it indicates only the number of respondents who either declined to answer the question about age or checked "under 18 years old." There is no information about any other "age" responses. The Report was not accompanied by the raw survey data (that is, all of the answers to each question).

Concerned that it would need all of the survey's raw data quickly, with its own expert report due on March 29, 2013, Bazar's counsel e-mailed JJI's counsel on March 7, 2013, and

requested production of the data by the end of the following day. When JJI's counsel did not respond immediately (because both were out of the office), on March 8, 2013, Bazar served AMS, Dr. Fong's data collector, with a subpoena duces tecum not only seeking the raw survey data missing from the Fong Report, but also a plethora of other documents, including a 2011 survey, photographs of JJI and Bazar's products, and contractual documents related to internet marketing surveys. In addition to the subpoena, the request for the missing data was drowned out by what Plaintiff has labeled a drumbeat of other requests from Bazar, including demands for access to samples that had been available over a year, for publicly available information and for information that had already been produced.

On March 12, Defendant refocused on the missing survey data, asking either for the data by the end of the day or for an explanation why it was not being produced. This time, JJI responded: "The Fong report complies with Rule 26. There is no basis to request 'data' from JJI" ECF No. 44-4. Spurned, Bazar redoubled its efforts to get the missing survey data by subpoena from AMS, which promised to produce all of the subpoenaed documents on March 22, 2013, seven days before Bazar's expert disclosure was due. On March 15, Bazar countered with the proposal that AMS immediately provide the raw survey data underlying the Fong Report and a related 2011 survey conducted by Dr. Fong, while the remainder of the requested documents could wait. JJI responded that AMS was working diligently to produce the documents as soon as possible. Unhappy about a March 22 production date with its rebuttal disclosure due March 29, Defendant filed this Motion on March 18, 2013. In the face of a hearing set for March 20, 2013,

Plaintiff opposed the Motion, but also produced all of the subpoenaed information, including the missing survey data, on March 19, 2013.¹

Despite its success in obtaining the missing survey data before its rebuttal report was due, and well before expert depositions, Bazar claims that it has suffered severe harm from its inability to get access to the raw survey data well in advance of the due date of its rebuttal report. Without the raw data, Bazar argues, it had no way of knowing the gender of respondents or which respondents claimed to be familiar with JJI's jewelry, both significant in a case about women's jewelry; this placed it at a disadvantage by forcing it to make choices about the focus of its rebuttal report without the responses to those questions. As a result of receipt of the data on March 19, 2013, with only ten days to digest them and scramble to put together its own expert report, Bazar complains that its rebuttal options were unfairly limited. Bazar also points out that this is not a case where the volume of the data was an impediment; rather, the data file containing the missing responses that it finally received on March 19 was only one megabyte, a size easily transmitted by e-mail.

II. Legal Analysis

Bazar's Motion requires a three-part inquiry. See Fed. R. Civ. P. 37(c)(1). First, the Court must determine whether JJI's mandatory Rule 26(a)(2) disclosure should have included the raw survey data. Fed. R. Civ. P. 26(a)(2)(B). If Rule 26(a) does not require mandatory disclosure, the inquiry is at an end – no sanctions are warranted. If raw survey data should be part of the mandatory expert disclosure of an opinion based on the survey, the Court next must determine whether JJI's omission was either substantially justified or harmless. Fed. R. Civ. P.

¹ For readers interested in keeping score, JJI produced the raw survey data twenty days after its expert disclosure was due, eighteen days after its expert disclosure was received by Bazar and twelve days after Bazar first asked for them.

37(c)(1). If the failure was not substantially justified or resulted in harm to the other party, the Court should consider the appropriate remedy. Id.

A. Rule 26(a)(2)(B) Disclosure

Rule 26(a)(2) creates a mandatory expert disclosure requirement that includes the automatic disclosure of “facts or data considered” by an expert in formulating an expert opinion.² Fed. R. Civ. P. 26(a)(2)(B)(ii); Chevron Corp. v. Shefftz, 754 F. Supp. 2d 254, 263 (D. Mass. 2010). The requirement is self-executing and does not countenance selective disclosure. See TG Plastics Trading Co. v. Toray Plastics (Am.), Inc., No. CA 09-336M, 2013 WL 433118, at *3 (D.R.I. Feb. 1, 2013). Expert disclosure provides notice of the opinion of the expert before expert depositions and affords the opposing party time to prepare cross examination and arrange for a rebuttal opinion. Allstate Ins. Co. v. Electrolux Home Prods., Inc., 840 F. Supp. 2d 1072, 1080 (N.D. Ill. 2012) (quoting Fed. R. Civ. P. 26, advisory committee’s note ¶ 2 (1993 Amendments)). The inclusion of the requirement to produce “facts or data” is broadly interpreted to require disclosure of any material considered by the expert that contains factual ingredients; it is not limited to the facts or data relied on by the expert. Chevron Corp., 754 F. Supp. 2d at 264. Rather, Rule 26(a)(2)(B) requires “any information furnished to a testifying expert that such an expert generates, reviews, reflects upon, reads, and/or uses in connection with the formulation of his opinions, even if such information is ultimately rejected.” Fialkowski v. Perry, Civil Action No. 11-5139, 2012 WL 2527020, at *3 (E.D. Pa. June 29, 2012); see also Allstate Ins. Co., 840 F. Supp. 2d at 1080 (“considered” includes information expert reviews and chooses not to rely on).

² Rule 26(a)(2)(B)(ii) was amended in 2010 to substitute “facts or data” for “data and information” as the descriptor of the material considered by the expert that is required to be produced. The elimination of the amorphous requirement to produce “information” does not affect the Court’s analysis of the issues presented by this Motion because it focuses on the facts and data considered by Dr. Fong. See Fialkowski v. Perry, Civil Action No. 11-5139, 2012 WL 2527020, at *3 (E.D. Pa. June 29, 2012).

Based on this Rule, the cases directly analyzing the specific issue presented here – the production of raw survey data as part of the mandatory discourse of an expert opining on the results of the survey – uniformly hold that the raw survey data must be produced as “data” that was “considered.” See, e.g., Apple Inc. v. Amazon.com, Inc., No. 11-1327 PJH (JSC), 2013 WL 1320760, at *1-4 (N.D. Cal. Apr. 1, 2013) (depositions permitted to explore whether survey results obtained by non-testifying experts made available to testifying expert; if they were, they are discoverable); Alderwoods Miss., Inc. v. Robert Barham Family Funeral Home, LLC, Civil Action No. 4:08cv37, 2009 WL 161825, at *1-2 (S.D. Miss. Jan. 22, 2009) (expert disclosure requires production of survey data; they are necessarily “considered” by expert who designed survey and opines on results; identity of respondents not known to expert and not required to be provided); In re Nitro Leisure Prods., L.L.C., No. 02-14008-CIV, 2003 WL 25669322, at *1 (S.D. Fla. Dec. 16, 2003) (results of survey required to be disclosed as data considered by expert; actual questionnaires themselves not required); United States v. Dentsply Int’l, Inc., No. Civ.A. 99-5 MMS, 2000 WL 654378, at *4-5 & n.8 (D. Del. May 10, 2000) (survey results for survey to be presented by testifying expert must be provided during expert discovery; identity of survey respondents not required); U.S. Surgical Corp. v. Orris, Inc., 983 F. Supp. 963, 965-66, 969 (D. Kan. 2000) (motion to compel underlying survey data granted where survey to be the basis for expert testimony).

Here, the evidence establishes that Dr. Fong designed the survey and his Report states that it is “[b]ased on the results of the survey.” ECF No. 43-2 at 5. The Court finds that Dr. Fong considered the raw survey data;³ accordingly, they were required to be part of JJI’s expert disclosure under Rule 26(a)(2)(B).

³ While Bazar, as the party alleging a violation of Rule 26(a)(2)(B), has the burden to demonstrate that JJI failed to follow Rule 26(a), Genentech, Inc. v. Trs. of Univ. of Pa., No. C 10-2037 LHK (PSG), 2012 WL 899949, at *1

B. Substantial Justification and Harmlessness

The Court has discretion to award sanctions for Rule 26(a)(2)(B) disclosure violations “unless the failure was substantially justified or is harmless.”⁴ Fed. R. Civ. P. 37(c)(1); AVX Corp. v. Cabot Corp., 252 F.R.D. 70, 79 (D. Mass. 2008). Substantial justification “does not mean justified to a high degree, but only justified in substance or in the main – that is, justified to a degree that could satisfy a reasonable person.” AVX Corp., 252 F.R.D. at 79 (quoting Sheppard v. River Valley Fitness One, L.P., 428 F.3d 1, 12 (1st Cir. 2005)). An action is substantially justified if there is a “genuine dispute” or “if reasonable people could differ as to the appropriateness of the contested action.” Pierce v. Underwood, 487 U.S. 552, 565 (1988) (internal quotations and citations omitted); see also Dentsply Int’l, Inc., 2000 WL 654378, at *7 (substantial justification can be based on dearth of case law and the absence of challenge to the party’s position).

The Court finds neither evidence of bad faith nor any attempt to secure a strategic advantage in the timing of JJI’s disclosure. See In re Nitro Leisure Prods., L.L.C., 2003 WL 25669322, at *1 (preclusion inappropriate with no evidence of bad faith or willful disobedience in failure to produce survey questionnaires). While the better practice clearly would have been for JJI to provide the raw survey data contemporaneously with the production of the opinion and other Rule 26(a)(2)(B) information, many cases require the production of the raw survey data after the expert disclosure without imposing any sanction, as long as they are provided in time for adequate preparation of a rebuttal opinion, for expert depositions or trial. See, e.g., Chesney

(N.D. Ca. Mar. 15, 2012), JJI, as the party disclosing the expert report, has the burden to show that a specific set of facts or data was not considered by Dr. Fong. See Carroll Co. v. Sherwin-Williams Co., No. WMN 11-1700, 2012 WL 4846167, at *4 (D. Md. Oct. 10, 2012).

⁴ The party failing to follow Rule 26(a)(2)(B) bears the burden of showing substantial justification or harmlessness. AVX Corp., 252 F.R.D. at 78 (citing Wilson v. Bradlees of New England, Inc., 250 F.3d 10, 21 (1st Cir. 2001)).

v. Tenn. Valley Auth., No. 3:09-CV-09, 2011 WL 7277436, at *2 (E.D. Tenn. June 2, 2011) (raw data input into statistical study should have been provided with expert report; they are ordered produced but no sanction except for additional time for other party to modify its expert disclosure); In re Nitro Leisure Prods., L.L.C., 2003 WL 25669322, at *1 (raw survey data produced upon request after expert disclosure; preclusion of expert report denied); U.S. Surgical Corp., 983 F. Supp. at 965-66, 969 (motion to compel underlying survey data granted after expert disclosure; no sanction imposed).

JJI should have provided the raw survey data with its expert disclosure. Nevertheless, despite a blizzard of requests for much more than the raw survey data, it produced them within less than two weeks of Bazar's request for them. Cf. Ortiz-Lopez v. Sociedad Espanola de Auxilio Mutuo y Beneficiencia de P.R., 248 F.3d 29, 34-35 (1st Cir. 2001) (failure to disclose required information not substantially justified if it persists after opposing counsel makes notice of deficiency). Substantial justification requires nothing more. See Sheppard, 428 F.3d at 12.

While justified, JJI's delay in completing its expert disclosure did create the potential for harm to Bazar. Bazar was adversely impacted because the Court's scheduling order limited Bazar to thirty days to respond to JJI's expert disclosure, and JJI's production of the data on March 19 left Bazar with only ten days to digest the raw data and rebut them with its own expert report. See Apple Inc., 2013 WL 1320760, at *1-4 (facts or data, including initial survey work used by expert, must be produced to test expert opinion); Allstate Ins. Co., 840 F. Supp. 2d at 1080 (each side must have a reasonable opportunity to prepare expert disclosures); Sara Lee Corp. v. Kraft Foods Inc., 273 F.R.D. 416, 421 (N.D. Ill. 2011) (survey data considered by expert necessary to test survey's methodology). While preclusion and punitive sanctions are both totally unwarranted, it would be unfair to leave Bazar without some form of remedy to cure

the harm potentially caused by the delay. See Esposito, 90 F.3d at 80 (“the punishment must approximately fit the crime;” preclusion order amounts to abuse of discretion).

C. The Remedy

Considering the ample time remaining for expert discovery and the lack of impact on the trial schedule, the most appropriate remedy is to put the parties back in the position they would have been in if JJI had disclosed the raw data along with the rest of the Fong Report. An additional nineteen days after its expert disclosure deadline of March 29 to produce a supplemental expert rebuttal report narrowly focused on the survey data from the Fong Report is more than sufficient. See Chesney, 2011 WL 7277436, at *2-3 (no sanction imposed for failure to disclose raw data, but court allowed additional time for receiving party to modify its expert disclosures). The balance of Bazar’s expert disclosure, including all opinions that do not hinge on an analysis of the survey data, remains due on March 29, 2013.

III. Conclusion

Defendant’s Emergency Motion to Preclude Testimony of Geoffrey T. Fong (ECF No. 43) is DENIED in part and GRANTED in part, solely to the extent that Defendant shall have until April 17, 2013, to disclose a supplement expert report that addresses the raw survey data. The balance of Bazar’s expert disclosure, including all opinions that do not hinge on an analysis of the survey data, remains due on March 29, 2013.

So ordered.

ENTER:

/s/ Patricia A. Sullivan
PATRICIA A. SULLIVAN
United States Magistrate Judge
April 8, 2013