United States District Court, Northern District of Illinois

Name of Assigned Judge or Magistrate Judge	Ronald A. Guzman	Sitting Judge if Other than Assigned Judge	Nan R. Nolan
CASE NUMBER	02 C 5893	**DATE**	1/31/2008
CASE TITLE	Lawrence E Jaffe vs. Household International Inc, et al		

DOCKET ENTRY TEXT

On December 10, 2007, Defendants submitted a Notice Concerning Expert Testimony that identified 23 witnesses who may give testimony "as to matters as to which they have specialized knowledge and whose testimony may, at least in part, fall within the purview of the Court's ruling in *Sunstar, Inc. v. Alberto-Culver Co.*, No. 01 C 736, 2006 U.S. Dist. LEXIS 85678 (N.D. Ill. Nov. 16, 2006)." *Sunstar* involved a dispute over the use of a modified Alberto VO5 trademark in Japan. The parties disagreed, *in limine*, whether Dorothy Spencer, a former employee of a firm ("DGA") that Defendant commissioned to research Japanese consumer attitudes towards the licensed marks, could testify as a lay witness. (*Sunstar, Inc. v. Alberto-Culver Co.*, No. 01 C 736, Minute Order of 8/22/06, Doc. 322, at 3.)

■[For further details see text below.]

Notices mailed by Judicial staff.

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This court determined that

> Spencer's testimony regarding DGA's recommendations "on how to best maximize VO5's opportunity in the Japanese marketplace" . . . may not be admitted as lay opinion testimony under Rule 701.

(*Id*. at 4). In reaching this conclusion, the court observed that Spencer and the other DGA personnel "did not rely on their own personal knowledge of and day-to-day participation in Sunstar's affairs to prepare their opinions and recommendations. Rather, the conclusions reached by DGA with respect to the VO5 brand were based on market research and their specific knowledge, training, and experience as a brand identity design consulting firm." (*Id*. at 4-5.) Judge Guzman affirmed this court's ruling, summarizing that Defendant "want[ed] to offer Spencer's testimony about the conclusions DGA drew from the research and recommendations it made to Sunstar as a result." *Sunstar*, 2006 U.S. Dist. LEXIS 85678. The court agreed that "[t]hose are not subjects about which an untrained layman could opine." *Id.*

Unlike third-party employee Spencer, the 23 witnesses at issue in this case are all current and former Household employees – some are named Defendants – with extensive personal knowledge of Household's policies and practices. In addition, Defendants represent that they have no intention of eliciting any expert opinions or testimony from these individuals. Nevertheless, Defendants have now identified the witnesses in a notice concerning expert testimony in the belief that they may be deemed non-retained experts under *Sunstar*. Plaintiffs reacted by demanding that Defendants provide them with the opinions these witnesses may give, and the bases for those opinions. Plaintiffs also object that during depositions, Defendants refused to allow several

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of these witnesses to respond to questions calling for their "expert" opinions.

As a preliminary matter, it is not obvious to the court that, under *Sunstar*, the 23 witnesses even qualify as non-retained "experts." As noted, Defendants themselves represent that they do not intend to elicit any expert opinions from these individuals. Defendants, then, appear to be hedging their bets; i.e., they have generically identified the 23 witnesses as non-retained "experts" just in case they later decide to elicit expert opinions from them after hearing Plaintiffs' case-in-chief. There is nothing inherently wrong in this cautious approach. *See Osterhouse v. Grover*, No. 3:04-cv-93-MJR, 2006 WL 1388841, at *5 (S.D. Ill. May 17, 2006) ("While the plaintiffs perhaps have been overly-cautious in naming these persons as experts, the defendants have cited to no law that would prevent the plaintiffs from doing so.") In addition, the court agrees with Defendants that Rule 23(a)(2)(B) does not require expert reports from these non-retained experts. *See, e.g., Zurba v. United States*, 202 F.R.D. 590, 591 (N.D. Ill. 2001) ("The requirement of a written report in Rule 26(a)(2) applies only to experts retained or specially employed to provide such testimony.")

The problem in this case is the timing of the expert disclosures. Rule 26(b)(4)(A) allows parties to depose non-retained experts. Here, however, Plaintiffs conducted extensive depositions of all but one of the 23 witnesses *before* Defendants disclosed the individuals as potential non-retained experts. Moreover, Defendants on a number of occasions interposed objections to questions seeking to elicit expert opinions, creating an explicit understanding that the witnesses would *not* be providing any expert testimony.

If, as Defendants represent, they have no intention of eliciting expert testimony from the 23 individuals, then they should not be identified on their expert disclosure notice. If, on the other hand, Defendants do want the option of eliciting expert testimony from these witnesses at trial, they must provide Plaintiffs with the substance of such expert opinions, and the bases for those opinions. Defendants' generic disclosures to date are not sufficient. *See, e.g., Hoover v. United States*, No. 01 C 2372, 2002 WL 1949734, at *4 (N.D. Ill. Aug. 22, 2002) (Rule 26(a)(2)(A) defines "experts" "in terms of the testimony they seek to offer.")

Defendants have until February 7, 2008 to (1) submit a revised expert disclosure notice identifying only individuals who may provide expert testimony at trial; and (2) provide a detailed statement of the specific opinions any non-retained experts may offer at trial, and the bases for those opinions.

Status hearing remains set for February 7, 2008 at 1:00 p.m. CST.