

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION**

Scientific Drilling International, Inc.,	§	
<i>Plaintiff,</i>	§	
	§	
vs.	§	Civil Action H-06-1634
	§	
Pathfinder Energy Services, <i>et al.</i> ,	§	
<i>Defendants.</i>	§	

MEMORANDUM AND ORDER

Defendants Pathfinder Energy Services, *et al.* have filed a motion to strike plaintiff’s expert reports pursuant to Rule 37(b)(2)(B). (Dkt. 88). Plaintiff Scientific Drilling International, Inc. (“SDI”) has submitted a report from technical expert Gary R. Wooley, a report from damages expert Keith Fairchild, and three reports from computer forensics expert Timothy D. Hanners. Pathfinder argues that these reports, labeled “preliminary,” do not provide underlying data or the reasons for the experts’ conclusions, preventing it from meaningfully evaluating and testing any of the proffered expert opinions. On this basis, Pathfinder asserts that the reports should be stricken as not containing a complete statement of all opinions as required by Rule 26(a)(2). Pathfinder’s motion to strike is denied in part and granted in part.

Rule 16(b) authorizes federal courts to manage the discovery process through a scheduling order, and the Fifth Circuit grants the trial court broad discretion to enforce that order. *Barrett v. Atlantic Richfield Co.*, 95 F.3d 375, 380 (5th Cir. 1996). Here, the applicable scheduling order required the plaintiff to designate its experts and file expert

reports by November 1, 2006. Rule 26(a)(2)(B) sets out the requirements for such an expert report:

The report shall contain a complete statement of all opinions to be expressed and the basis and reasons therefore; the data or other information considered by the witness in forming the opinions; any exhibits to be used as a summary of or support for the opinions; the qualifications of the witness, including a list of all publications authored by the witness within the preceding ten years; the compensation to be paid for the study and testimony; and a listing of any other cases in which the witness has testified as an expert at trial or by deposition within the preceding four years. (emphasis added).

The Advisory Committee Notes to Rule 26 declare that such reports must be “detailed and complete” as opposed to the “sketchy and vague” expert information which earlier versions of the rule had elicited. *Sierra Club Lone Star Chapter v. Cedar Point Oil Co.*, 73 F.3d 546, 571 (5th Cir.), *cert. denied*, 519 U.S. 811 (1996). A district court also has wide latitude in determining whether a disclosure is detailed and complete. *Michaels v. Avitech, Inc.*, 202 F.3d 746, 750 (5th Cir. 2000).

Exclusion of evidence is an available sanction for violation of a discovery order under Rule 37(b)(2)(B). *Barrett*, 95 F.3d at 380. In considering whether to strike expert testimony as a sanction, four factors are considered: (1) the explanation, if any, for the party's failure to comply with the discovery order; (2) the prejudice to the opposing party of allowing the witnesses to testify; (3) the possibility of curing such prejudice by granting a continuance; and (4) the importance of the witnesses' testimony. *Texas A & M Res. Found. v. Magna Transp., Inc.*, 338 F.3d 394, 402 (5th Cir. 2003).

The reports from two of plaintiffs' experts, namely computer forensics expert Timothy

Hanners and damages expert Keith Fairchild, are not sufficiently defective to warrant sanctions. SDI attacks both experts' opinions on grounds of relevancy and methodology, but these objections go to issues of evidentiary weight or admissibility under *Daubert* rather than compliance with Rule 26. Regarding the damages expert, SDI justifiably notes that in response to an order to compel, Pathfinder produced on January 24, 2007 over 12,500 pages of additional documents including sales records and bid data related to lost profits. In fairness SDI should be allowed to supplement Fairchild's report after reviewing this information. Regarding the forensics expert, it is true that Hanners' report does not contain a statement of qualifications, a list of publications, compensation, and a list of other cases in which Hanners has testified as an expert, contrary to the express requirements of Rule 26(a)(2)(B). However, these defects can be readily cured by supplementation. Accordingly, Pathfinder's motion to strike expert reports of Fairchild and Hanners is denied on condition that SDI supplements these reports within the time limits set by this order.

Technical expert Gary Wooley's "report" is a different story, however. His one and a half page letter does not come close to the expert report required by the scheduling order and Rule 26. Wooley was designated to give opinions "concerning SDI's reputation in the oil and gas industry, the nature of SDI's trade secrets and the effect of misuse of these trade secrets and/or confidential information by the Defendants, SDI's market share within the industry, and the effect of misuse of its trade secrets and/or confidential information upon its total market share." Motion to Strike Plaintiff's Expert Reports, Ex. A, Expert Report of

Mr. Gary R. Wooley. On its face, however, Wooley's letter¹ offers no opinion whatever regarding SDI's reputation in the industry, the nature of SDI's trade secrets, SDI's market share, or the effect of misuse of its trade secrets on SDI's total market share.

The first two numbered "opinions" are so generalized as to be meaningless. Almost any aspect of the petroleum industry "involves much technology, specialized equipment and trained personnel." Expert testimony is not necessary to belabor this obvious point to a Texas jury. Likewise it is commonplace that any company's technology, equipment, and training may "contain confidential information and/or trade secrets that are critical to

¹ Wooley's letter (Dkt. 88, Ex.A) contains seven conclusions and opinions:

"1. The directional drilling business involves much technology, specialized equipment and trained personnel.

2. For each company competing in the directional drilling market, the technology, equipment and training contain confidential information and/or trade secrets that are critical to maintaining a competitive advantage.

3. Pathfinder has hired from SDI numerous employees that had access to SDI's confidential information and/or trade secrets and had signed with SDI a conflict of interest agreement and covenant relating to inventions and confidential information.

4. Former SDI employees now working with Pathfinder have used SDI's confidential information and/or trade secrets to enhance their careers and Pathfinder's business to SDI's detriment as described in opinion 7 below.

5. Pathfinder misappropriated SDI's confidential information and/or trade secrets by acquiring them by improper means through former SDI employees that violated conflict of interest agreements and covenants relating to inventions and confidential information, of which Pathfinder was aware.

6. Shortly after leaving SDI to join Pathfinder, one or more of the individual defendants in this case participated in the bidding process for Pathfinder to customers for which they had also participated in the bidding process while employed at SDI. Pathfinder was aware that these individual defendants participated in SDI's bidding process, yet encouraged their participation on behalf of Pathfinder to compete with SDI.

7. As a result of this misuse of confidential information and/or trade secrets by former SDI employees now with Pathfinder, SDI has lost bids on drilling projects, has lost market share, has lost profits and profit margins, has had its reputation damaged, has lost potential future sales and other opportunities."

maintaining a competitive advantage.” It is also unclear what relevance this conclusion has to this case, because directional drilling technology, equipment, or training are not among the trade secrets specifically listed in SDI’s complaint. *See* Second Amended Complaint (Dkt. 74), at ¶¶ 45,46 (“confidential customer lists, names of SDI existing and prospective customers, customer bid data, software files, non-public financial information, and other trade secrets”).

The next four opinions (numbered 3-6) are more properly described as assertions of historical fact: that Pathfinder hired numerous SDI employees who had access to SDI trade secrets, that these employees used SDI’s trade secrets to enhance their own careers and Pathfinder’s business, that through these employees Pathfinder acquired SDI trade secrets by improper means, and that one or more of the individual Pathfinder defendants worked on bids for the same customers they had targeted while at SDI. Wooley’s letter does not assert that his own scientific, technical, or other specialized knowledge helped him arrive at these factual conclusions. Presumably, given that Wooley was not an eyewitness to these events, these conclusions must have been based upon the deposition testimony and documents he reviewed. In reality, these conclusions are not expert “opinion” at all, but rather factual predicates which might be used to support some other proposition.

Wooley’s final conclusion (item 7) states that as a result of defendants’ misuse of unspecified trade secrets, SDI has lost bids on drilling projects, lost market share and profits, and suffered damage to its reputation. No specifics are offered to support these vague

generalizations. The letter does not state what SDI's alleged trade secrets are and which ones have been misappropriated. The letter also does not explain which customer bids and profits SDI has lost, nor how SDI's reputation has been damaged. Pathfinder correctly observes that this letter fails to satisfy the Rule 26(a)(2)(B) requirement that the expert report "shall contain a complete statement of all opinions to be expressed and the basis and reasons therefor."

SDI seeks to excuse these defects on several grounds. First, SDI blames the scheduling order, which did not specify that the reports had to be *final*. Neither does Rule 26. Both the order and Rule 26 contemplate that expert reports may be supplemented when required. But as the Fifth Circuit has noted, the possibility of supplementation does not negate the requirement that the initial expert disclosures must be detailed and complete:

Although Cedar Point later reinforced these statements with rebuttal and supplementary disclosures, the discovery order and Rule 26(a) clearly require that the initial disclosures must be complete and detailed. The purpose of rebuttal and supplementary disclosures is just that— to rebut and to supplement. These disclosures are not intended to provide an extension of the deadline by which a party must deliver the lion's share of its expert information.

Sierra Club Lone Star Chapter v. Cedar Point Oil Co., 73 F.3d 546, 571 (5th Cir.), *cert. denied*, 519 U.S. 811 (1996). Like the one and a half page outline of testimony held insufficient in *Cedar Point*, Wooley's letter falls well short of providing the "lion's share" of expert information demanded by Rule 26.

SDI also argues that discovery was continuing beyond the expert report deadline, and cites this court's recent order compelling discovery of certain Pathfinder sales records and

bid data. As previously noted, this point is well taken with respect to SDI's damages expert, Dr. Fairchild. However, Wooley was not designated as a damages expert, nor was he asked to calculate the amount of lost profit damages. Instead, he was offered to testify about SDI's own trade secrets, market share, and business reputation, *not* Pathfinder's. SDI does not explain why such information was not already in the hands of SDI and readily available to Wooley long before the November 1, 2006 deadline. SDI's reasons for failing to comply with this discovery order are simply not persuasive.

Moreover, based on the record before the court, Wooley's proposed expert testimony cannot be regarded as very important. Four of his numbered conclusions (items 3-6) are not opinions at all, but factual predicates derived from other documents and testimony. Two of his three opinions merely restate what is obvious and undisputed, while the third (item 7 relating to damages) is conclusory, unsupported, and the subject of another expert's testimony.

Pathfinder would certainly be prejudiced by having to prepare an expert rebuttal to such a perfunctory and uninformative report. The scheduling order was intended to establish an orderly framework by which the parties would join issue on matters requiring expert testimony. SDI's failure to comply with its expert report obligations has jeopardized this framework. To this date SDI has yet to supplement Wooley's report in any respect, and the resulting delay of over three months is likely to prejudice Pathfinder's trial preparations. *See Cedar Point*, 73 F.3d at 573 (finding prejudice where supplemental reports were submitted

one month late). Finally, a continuance is not an adequate remedy under these circumstances, because it “would neither punish [SDI] for its conduct nor deter similar behavior in the future.” *Bradley v. United States*, 866 F.2d 120, 126 (5th Cir. 1989).

For these reasons, defendants’ motion to strike the expert report and preclude the related testimony of Dr. Gary Wooley at trial is GRANTED. The motion is DENIED in all other respects, provided that SDI supplements the reports of Mr. Hanners and Dr. Fairchild by March 5, 2007.

Signed at Houston, Texas on February 20, 2007.



Stephen Wm Smith
United States Magistrate Judge