

IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF WISCONSIN

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RUTHELLE FRANK, et al.,

Plaintiffs,

v.

Case No. 11-CV-1128

GOVERNOR SCOTT WALKER, et al.,

Defendants.

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**DEFENDANTS' CIVIL L.R. 7(h) EXPEDITED NON-DISPOSITIVE  
MOTION TO COMPEL THE PRODUCTION  
OF COMPLETE AND UN-REDACTED SURVEY DATA**

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Defendants, by their undersigned counsel, hereby respectfully move the Court pursuant to Federal Rule of Civil Procedure 37 and Civil Local Rules 7(h) and 37 for an order compelling Plaintiffs to produce the complete and un-redacted survey data that was compiled for the “Expert Report Submitted on Behalf of Plaintiffs in *Frank v. Walker*, Civil Action No. 2:11-cv-01128 (LA),” which is in the Docket, unsigned, at Dkt. #62-10.

Federal Rule of Civil Procedure 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. Fed. R. Civ. P. 26(a)(2)(B)(ii); *Chevron Corp. v. Shefftz*, 754 F. Supp. 2d 254, 263 (D. Mass. 2010). Rule 26(a)(2)(B) requires the disclosure of “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*, 2012 WL 2527020, \*3 (E.D. Pa. June 29, 2012); *see also Allstate Ins. Co. v. Electrolux Home Prods., Inc.*, 840 F. Supp. 2d 1072, 1080

(N.D. Ill. 2012) (“considered” in Rule 26(a)(2)(B)(ii) includes information an expert reviews and chooses not to rely upon).

Plaintiffs’ expert witness, Professor Matt Barreto, completed a survey of Milwaukee County residents in conjunction with his expert report. (Dkt. #62-10 at 3-7, 9-16.) He relied upon and considered the survey data in forming his expert opinions. (*Id.* at 18-33.) When Plaintiffs made Rule 26(a)(2) expert witness disclosures on April 24, 2012, they did not timely produce the survey data to Defendants’ counsel. Fifth Declaration of Clayton P. Kawski (“Fifth Kawski Decl.”), ¶ 3; Ex. A. After being asked by defense counsel why the data was not timely produced, Plaintiffs’ counsel told Defendants’ counsel via e-mail that, “It’s not required to be included in an expert witness report.” *Id.* After Professor Barreto was deposed on April 26, 2012—and only upon defense counsel’s request during Professor Barreto’s deposition—Plaintiffs’ counsel belatedly produced an incomplete and redacted version of the survey data to Defendants. Fifth Kawski Decl., ¶ 3; Ex. A; Ex. B (a disc containing the database file that Plaintiffs produced to Defendants on April 26, 2012).

Plaintiffs now refuse to produce the complete and un-redacted survey data to Defendants, in contravention of the requirement of Rule 26(a)(2)(B)(ii). Rule 26(a)(2)(B)(ii) has no exception for anonymous survey data. The complete and un-redacted data should have been produced over one year ago.

Persuasive case law holds that raw survey data must be produced in conjunction with mandatory expert witness disclosures under Rule 26(a)(2)(B)(ii). “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.’” *JJI Int’l, Inc. v.*

*Bazar Group, Inc.*, 2013 WL 3071299, \*4 (D. R.I. Apr. 8, 2013) (citing cases); *see also In re Google AdWords Litigation*, 2010 WL 5185738, \*2-4 (N.D. Cal. Dec. 8, 2010); *Bray & Gillespie Mgmt. LLC v. Lexington Ins. Co.*, 2009 WL 1043974, \*5 (M.D. Fla. Apr. 17, 2009); *City of Owensboro v. Ky. Utils. Co.*, 2008 WL 4542674, \*2-3 (W.D. Ky. Oct. 8, 2008).

Defendants are prejudiced by Plaintiffs' refusal to produce the complete and un-redacted survey data because Defendants' expert witness, Professor M. V. Hood, III, would like to use the data to analyze whether any of the survey respondents currently have a form of 2011 Wisconsin Act 23 ("Act 23") qualifying identification. The complete and un-redacted data could be compared to current Wisconsin Department of Transportation data regarding who has a Wisconsin state identification card or a Wisconsin driver license to determine whether survey respondents now have one of those two forms of identification. Professor Hood cannot fully analyze the efficacy of Professor Barreto's survey and its results without the complete survey data. Defendants' trial preparation is being prejudiced because their expert cannot complete his analysis of Plaintiffs' expert's opinions without the complete data.

The parties met and conferred on this issue and have reached an impasse. Fifth Kowski Decl., ¶ 6; Ex. C; *see* Civil L.R. 37. On September 16, 2013, Defendants' undersigned counsel raised this issue with the Court during an in-person status conference and was instructed to file a motion. Fifth Kowski Decl., ¶ 7. Plaintiffs continue to refuse to produce the complete and un-redacted survey data, and Defendants continue to be prejudiced in their trial preparation by Plaintiffs' refusal.

Time is of the essence. Defendants are preparing for trial, and their expert witness would like to use the complete and un-redacted survey data to prepare to offer expert testimony at trial

to analyze Professor Barreto's expert opinions and his survey methodology. Accordingly, Defendants respectfully request that the Court:

- (1) Order Plaintiffs to respond to this motion by September 20, 2013; and
- (2) Promptly grant this motion and order Plaintiffs to produce to Defendants the complete and un-redacted survey data.

Dated this 18th day of September, 2013.

Respectfully submitted,

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