UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES - GENERAL

Case No.	ED CV 15-01921-DFM	Date	April 11, 2018
Title	Bennion & Deville Fine Homes Inc. v. Windermere Real Estate Servs. Co.		

Present: The Honorable	Douglas F. McCormick	
Denise Vo		n/a
Deputy Clerk		Court Reporter / Recorder
Attorneys Present for Plaintiffs:		Attorneys Present for Defendants:
n/a		n/a

Proceedings: (In Chambers) Order re: Motions in Limine

At issue are Plaintiffs' motions in limine, Defendant's objections to Plaintiffs' amended witness list, and Defendant's remaining motions in limine.[1] The Court rules as follows.

Plaintiffs' motion in limine #1 (Dkt. 85)

Plaintiffs move to prohibit Defendant from introducing evidence that it terminated the Area Representation Agreement ("ARA") with Windermere Services Southern California, Inc. ("WS SoCal") for any reason other than the grounds in Defendant's February 26, 2015 termination letter—i.e., that WS SoCal failed to collect fees from licensees. Dkt. 85. Plaintiffs' motion in limine #1 is **DENIED**.

The ARA contemplates several methods of termination, including (1) under § 4.1(b), on 180 days' written notice—i.e., without stated cause—and (2) under § 4.1(c), on 90 days' written notice of material breach described in that notice that is not cured within 90 days—i.e., with stated cause. See Dkt. 85-1, Ex. A § 4. If a party terminates without stated cause under § 4.1(b), then the other party receives a sum of money under § 4.2 (the "Termination Obligation"). Id. § 4.2. Section 4.2 also provides that no Termination Obligation is owed "if the termination by the Terminating Party is made in good faith upon the material breach of the obligations of the Terminated Party under this Agreement continuing after reasonable notice and opportunity to cure." Id.

Plaintiffs seek to recover the Termination Obligation from Defendant. See Dkt. 31 (First Amended Complaint) at 41-42. Defendant makes at least two arguments in response. First, Defendant argues that its February 2015 termination letter was a stated-cause termination letter, and § 4.1(c) stated-cause terminations do not trigger the Termination Obligation of § 4.2. See Dkt.

[1] Judge Real denied Defendant's motion in limine #1 to exclude Plaintiffs' expert Peter Wrobel's proposed testimony (see Dkt. 141), after which Defendant filed its fifth motion in limine.

90 at 5. Second, Defendant argues that it gave Plaintiffs reasonable notice of various material breaches that, under § 4.2, absolved Defendant of the Termination Obligation that normally accompanies a § 4.1(b) termination. See Dkt. 90 at 5-6. Under this second argument, Plaintiffs' alleged material breaches are relevant—regardless of whether they were set out in the February 26, 2015 letter—as long as Defendant gave Plaintiffs reasonable notice and a chance to cure those breaches. The Court disagrees with Plaintiffs that § 4.2 is ambiguous; the contract says "written" where it means "written." Plaintiffs may, however, argue at trial that "reasonable" notice should involve written notice.

Plaintiffs argue that because Defendant's January 2015 letter was a without-stated-cause termination, the letter "negated" any notice that Plaintiffs had been given of various material breaches, making evidence of those breaches irrelevant. See Dkt. 96. This reasoning contradicts the ARA. Defendant's January 2015 letter implicated § 4.2, which permits a terminating party to send a without-stated-cause termination letter but avoid the Termination Obligation if the underlying reason for the termination was material breach continuing after reasonable notice and opportunity to cure. Thus, the alleged material breaches are relevant to the Termination Obligation, which is at issue in this case.

Plaintiffs argue in the alternative that evidence of other breaches would confuse the jury into thinking that Defendant terminated the ARA "for cause." Dkt. 85 at 6-7. The Court does not agree with Plaintiffs' construction of the ARA. A without-stated-cause termination under § 4.1(b) can still be "with cause," absolving the terminating party of the Termination Obligation, as evidenced by § 4.2.

Plaintiffs' motion in limine #2 (Dkt. 86)

Plaintiffs seek to exclude evidence relating to loans issued to Robert Bennion and Joseph Deville by entities owned by Defendant's owners or principals. Dkt. 86. Defendant argues that this evidence is relevant because (1) the loans give context to the relationship between the parties and (2) renegotiation of one of these loans bears on a "central issue" in this case. Dkt. 91 at 2-3. Plaintiffs' motion in limine #2 is **DENIED**.

Between January 2009 and June 2011, entities owned by Defendant's owners and/or principals loaned Bennion and Deville over $1.25 million. See Dkt. 91 at 2, 4; see also Dkt. 97 at 2 (Plaintiffs stating that existence and amount of loans is not in dispute).

Plaintiffs concede that one of the loans is relevant. See Dkt. 97 at 4. In January 2009, Bennion and Deville received a $501,000 loan to be paid by March 1, 2014. See Dkt. 91 at 3; see also Dkt. 86-1, Ex. B (loan agreement). In December 2012, Defendant and Plaintiffs entered an Agreement Modifying Windermere Real Estate Franchise License Agreements ("Modification Agreement"): in exchange for Bennion & Deville Fine Homes, Inc. ("B&D Fine Homes"), and

Bennion & Deville Fine Homes SoCal., Inc. ("B&D SoCal") (collectively, "B&D Franchisees"), remaining Windermere franchisees until December 2017, Defendant waived certain unpaid fees and agreed to make commercially reasonable efforts to address a negative marketing campaign called Windermere Watch. See Dkt. 91 at 4; see also Dkt. 91-1, Ex. D (Modification Agreement). Defendant argues that in June 2014, in exchange for Defendant's extending the January 2009 loan repayment deadline, Bennion and Deville agreed that Defendant had taken these efforts and was relieved of any further efforts. See Dkt. 91 at 5; see also Dkt. 91-1, Ex. E (June 2014 letter from Defendant setting out this position). Defendant contends that it would not have extended the loan term without this concession. See Dkt. 91 at 4.

Defendant brings a counterclaim for breach of the Modification Agreement due to the B&D Franchisees terminating their franchise agreements before December 2017. See Dkt. 16 at 31-32. As a defense, Plaintiffs apparently intend to argue that Defendant failed to take commercially reasonable efforts to combat Windermere Watch. See Dkt. 91 at 6 (Defendant's assertion, which Plaintiffs do not contest). Without learning about the January 2009 loan and its purpose, the jury would not understand why Bennion and Deville might have made the concession alleged by Defendant regarding its Windermere Watch efforts. The existence and purpose of the January 2009 loan is admissible.

The other loans at issue are a $500,000 loan in February 2011 and a $250,000 loan in June 2011. See Dkt. 91 at 3-4 (citing declaration). While these loans are less probative than the January 2009 loan due to the latter's connection to the Modification Agreement, the 2011 loans are still probative of the history of the relationship between these parties. The Court sees minimal prejudice that would result from the jury hear about them. See Fed. R. Evid. 403.

Plaintiffs' motion in limine #3 (Dkt. 87)

Plaintiffs ask that Defendant be prohibited from introducing evidence of Bennion or Deville's wealth. Dkt. 87. Defendant concedes that references to their "net worth" are irrelevant, but argues that evidence of "the millions of dollars in wages and personal expenditures . . . extracted from their related entities" should not be excluded. Dkt. 92. Plaintiffs' motion in limine #3 is **GRANTED**.

Bennion and Deville own B&D Franchisees and WS SoCal. See Dkt. 92 at 2. Under the ARA, WS SoCal was Defendant's area representative responsible for collecting and remitting franchise fees from the B&D Franchisees. See Dkt. 85-1, Ex. A, § 3. Between July 2014 and September 2015, neither B&D Franchisee paid its fees to Defendant, fees that totaled nearly $1,000,000. See Dkt. 92 at 3-4 (citing Patrick Robinson deposition). Bennion suggested during his deposition that the B&D Franchisees were struggling financially and unable to meet these obligations. See id. at 4 (citing Bennion deposition). In response, Defendant contends that the B&D Franchisees in 2014 paid Bennion and Deville salaries of $695,000 as well as "personal,

non-business expenditures" of over $300,000. Id. Plaintiffs argue that no fees were owed due to Defendant's breach of the franchising agreements. Dkt. 98 at 3.

The Court agrees with Plaintiffs that evidence of Bennion's and Deville's salaries or payment of non-business expenditures is irrelevant to the issue of whether the B&D Franchisees had an obligation to continue to pay license fees from July 2014 onward. Thus, so long as Plaintiffs do not contend that they were unable to pay those license fees due to some action taken by Defendant, evidence of salaries and non-business expenditures will be excluded. However, if Plaintiffs suggest or argue that Defendant's conduct left them unable to afford those license fees, or that Plaintiffs were unable to pay the license fees because of financial constraints, then Defendant is entitled to rebut those claims by showing that the B&D Franchisees were able to pay the salaries and non-business expenditures at issue.

Plaintiffs' motion in limine #4 (Dkt. 99)

Plaintiffs seek to preclude Defendant from introducing evidence regarding B&D Fine Homes's obligation under its franchise agreement to "transfer . . . the Windermere mark" on terminating its franchise agreement, and evidence of expenses associated with retrieving certain domain names. Dkt. 99. Plaintiffs' motion in limine #4 is **GRANTED**.

In November 2015, Judge Real ruled that, as a matter of law, B&D Fine Homes had no obligation under its franchise agreement to transfer the domain names at issue to Defendant. See Dkt. 27. Thus, any evidence of such an obligation, or expenses incurred by Defendant to retrieve these domain names, is irrelevant.

Plaintiffs' motion in limine #5 (Dkt. 100)

Plaintiffs seek to preclude Defendant from introducing evidence of "work that was performed on the Sundberg Report" before October 2013. Dkt. 100 at 3. Plaintiffs' motion in limine #5 is **DENIED**.

After the parties entered into the Modification Agreement, Defendant asked York Baur, the head of its technology division, to address the Windermere Watch problem. Dkt. 107 at 4 (citing Baur deposition). Baur retained Greg Sundberg, an expert on search engine optimization, to advise Plaintiffs on improving search engine visibility. Id. (citing deposition). Sundberg prepared a report with his analysis and research. Id. (citing deposition). Plaintiffs received the report on October 17, 2013. See Dkt. 100 at 4.

Neither party disputes the relevance of when Sundberg began working on the Windermere Watch project. Plaintiffs argue that Defendant should not be allowed to introduce evidence that was not produced in discovery. Id. Relying on Baur's deposition testimony, Plaintiffs claim that

Defendant presented no evidence that any work was done on the Sundberg report before September 2013.

But Baur never testified that work on the Sundberg report began in September 2013. The record shows that Baur answered the question, "You just don't recall, correct?" with, "I suspect it was before [September 2013,] but, yeah, I don't recall the exact engagement date." Dkt. 107-1 at 13. Months before Baur's deposition, Defendant produced an April 2013 email from Sundberg to Baur attaching a draft "proposal" about a three-phase "plan." See Dkt. 107-1, Ex. B, C. There is no indication that Defendant "buried" this e-mail, as Plaintiffs assert in their reply. See Dkt. 116 at 2. Plaintiffs could have asked Baur about this e-mail at his deposition. Defendant may introduce this e-mail, and other evidence about the timing of Sundberg's retention, at trial.[2]

Plaintiffs' motion in limine #6 (Dkt. 101)

Plaintiffs seek to preclude Defendant from introducing evidence about why Defendant did not respond to three e-mailed requests for updates about the Windermere Watch efforts. Dkt. 101. Plaintiffs' motion in limine #6 is **DENIED**.

Between March and June 2013, Deville sent three emails to Defendant about Windermere Watch: (1) a March 29, 2013 e-mail to Paul Drayna, Defendant's general counsel, and to Geoff Wood,[3] Defendant's President; (2) an April 20, 2013 e-mail to Drayna and Wood; and (3) a June 12, 2013 e-mail to Drayna only. Dkt. 101-1, Exs. B-D. Apparently, neither Drayna nor Wood responded to the e-mails. See Dkt. 101 at 4.

During his deposition, Drayna declined to answer four questions about these e-mails, invoking attorney-client privilege:

- "Who was tasked with getting back to [Deville's March 29, 2013] email?"
- "[D]o you have any reason to believe anyone responded [to Deville's March 29, 2013 e-mail] before April 20th?"
- "[W]ere you just ignoring those emails?"

[2] Plaintiffs point out that Defendant did not produce the attachment to the April 2013 email. Defendant's failure to produce an attachment to this e-mail does not warrant the relief sought by Plaintiffs' motion.

[3] There was some confusion at the hearing over the correct spelling of Defendant's President's name. The documents currently before the Court reflect that the spelling is, "Geoff Wood." See Dkt. 101-1 at 21 (e-mail address listing name as "Wood"); see also Dkt. 108-1 at 12 (deposition cover page listing name as "Wood").

- "Why [did you] not [respond to Deville's June 12, 2013 e-mail]?"

Dkt. 101-1 at 13-14; Dkt. 108-1 at 8-9. Drayna did testify that he was not tasked with responding to Deville's March e-mail, and that he did not remember the March e-mail or whether there was a response to it. Dkt. 108-1 at 5-6.

Plaintiffs also deposed Wood several days later. Wood received the first two e-mails. He testified that he did not instruct Defendant's employees to not respond to the March e-mail, nor did he hear anyone else so instruct, and he did not recall why he did not respond. Dkt. 108-1 at 15. He also testified that he did not know why no one responded to Deville between March 29 and April 20. Id. at 17. It does not appear that Plaintiffs asked Wood whether he knew why no one had responded to the June 2013 e-mail to Drayna. Wood did not invoke the attorney-client privilege.

In diversity actions like this one, state law privileges apply to the extent that state law provides the rule of decision. See Fed. R. Evid. 501. Under California law, the client "has a privilege to refuse to disclose, and to prevent another from disclosing, a confidential communication between client and lawyer," if the privilege is claimed by the holder of the privilege or the person who was the lawyer at the time of the confidential communication. Cal. Evid. Code § 954. However, "[t]he Federal Rules of Evidence govern the scope of waiver even if state law provides the rule of decision." Century Aluminum Co. v. AGCS Marine Ins. Co., 285 F.R.D. 468, 471 n.2 (N.D. Cal. 2012); see also Fed. R. Evid. 502(f). Subject matter waiver is governed by Federal Rule of Evidence 502, which provides that a waiver of the attorney-client privilege "extends to an undisclosed communication or information in a federal . . . . proceeding only if: (1) the waiver is intentional; (2) the disclosed and undisclosed communications or information concern the same subject matter; and (3) they ought in fairness to be considered together." Fed. R. Evid. 502(a).

"Where a party claiming privilege during discovery wants to testify at the time of trial, the court may ban that party from testifying on the matters claimed to be privileged." Columbia Pictures Television, Inc. v. Krypton Broadcasting of Birmingham, Inc., 259 F.3d 1186, 1196 (9th Cir. 2001) (quoting William A. Schwarzer, et al., Federal Civil Procedure Before Trial, ¶ 11:37 at 11-29 (2000) (emphasis added)). Neither party cites a Ninth Circuit case explaining when or if in-house counsel can waive the attorney-client privilege on behalf of the client, or as the client. But see Velsicol Chemical Corp. v. Parsons, 561 F.2d 671, 675 (7th Cir. 1977) (holding that in-house counsel for the corporation under investigation waived, in his grand jury testimony, corporation's attorney-client privilege as to conversations with outside counsel even though corporation had not authorized him to do so).

Here, Plaintiffs deposed Drayna and Wood. Drayna asserted the privilege when asked why Defendant did not respond to the e-mails. Later, Wood did not invoke the privilege but did not clearly waive it. Plaintiffs did not pursue all of the questions asked of Drayna with Wood at

Wood's deposition. Plaintiffs did not bring a motion to compel after Drayna's deposition or contest during the deposition his invocation of privilege. Both Drayna and Wood are listed on Plaintiffs' amended witness list. See Dkt. 128. It is not clear what questions Plaintiffs intend to ask of Drayna and Wood at trial, nor is it clear what their responses will be. It is also unclear whether the testimony at issue would be privileged in the first place.

Given these circumstances, the Court cannot rule in the abstract on this motion in limine and denies it without prejudice. If Drayna and Wood testify or invoke privilege consistent with their depositions, the Court would be inclined to let their testimony or invocation stand (given that Plaintiffs have not, even now, contested the privilege invocation itself). If they do not, and if Plaintiffs believe that they have been unfairly surprised by the testimony, Plaintiffs can renew their motion at trial or impeach the witnesses with their deposition testimony.

Plaintiffs' motion in limine #7 (Dkt. 102)

Plaintiffs seek to prohibit Defendant from referring to B&D Fine Homes, B&D SoCal, and WS SoCal "collectively." Dkt. 102. Plaintiffs cite Defendant's expert's report, which states that "B&D Fine Homes and B&D SoCal were struggling financially," and then states that the "Bennion & Deville Entities" (which included WS SoCal) "were paying millions of dollars of personal, non-business expenditures." Id. at 3 (citing report). Plaintiffs' motion in limine #7 is **DENIED**.

Defendant's argument, reflected in the report, is that WS SoCal was complicit in the allegedly improper payments to Bennion and Deville, which was part of why Defendant terminated the ARA. The parties can, and should, refer to the appropriate party when discussing obligations under their respective contracts with Defendant.

Defendant's motion in limine #2 (Dkt. 104)

Defendant moves to exclude portions of Plaintiffs' rebuttal expert, Marvin Storm's, report as beyond the scope of a "rebuttal." Dkt. 104-1. After the hearing, Plaintiffs informed the Court that they do not intend to call Storm as a witness. Defendant's motion is accordingly **DENIED** without prejudice.

Defendant's motion in limine #3 (Dkt. 105)

Defendant seeks to prohibit Plaintiffs from admitting 23 annual Financial Disclosure Documents ("FDDs") for years other than 2014.[4] Defendant's motion in limine #3 is **GRANTED IN PART** and **DENIED IN PART**.

[4] The Court reads the parties' briefing as withdrawing their arguments and objections to all but the 23 FDDs—i.e., Exs. 20, 21, 22, 23, 24, 25, 27, 33, 44, 59, 61, 62, 63, 72, 76, 78, 93, 108, 248,

Plaintiffs argue that the FDD exhibits are relevant because Defendant "will argue that [WS SoCal] was late in providing its audited financials to [Defendant], and that [WS SoCal's] audited financials were needed in April 2014 for [Defendant] to register its FDD." Dkt. 113 at 4. The exhibits at issue contradict this argument, showing that, "through the years," Defendant and WS SoCal "always prepared and finalized their audited financials and FDD filings well after the annual April deadline." Id. at 7. But Defendant represents that it has no intention of making this argument at trial. See Dkt. 121 at 2-4. Given that Plaintiffs offer no other reason why these exhibits are relevant, the Court agrees that these exhibits should be excluded—with the exception of exhibits that Plaintiffs represent relate to the 2015 FDD filing (Exhibits 248, 277, and 384), which the Court deems relevant.

Defendant's motion in limine #4 (Dkt. 106)

Defendant seeks to preclude Plaintiffs from offering evidence regarding an offer made by Defendant's principals to purchase Plaintiffs for about $13 million in mid-2015, as set forth in Plaintiffs' proposed exhibits 249 and 250. Dkt. 106-1. Defendant's motion in limine #4 is **GRANTED**.

The ARA states that the Termination Obligation is equal to "the fair market value of the Terminated Party's interest in the Agreement (the 'Termination Obligation'), in accordance with the provisions of this agreement." Dkt. 85-1, Ex. A, § 4.2. The Termination Obligation would be determined by mutual agreement or by each party selecting an appraiser and the two appraisers selecting a third appraiser. Id. The Termination Obligation would not consider future, speculative revenue, but it would consider gross revenues during the past twelve months from licensees retained by the terminating party; the median appraisal of the three appraisers would determine price. Id.

Plaintiffs claim that the offer was, effectively, an "appraisal" of WS SoCal under the ARA. Dkt. 111 at 3. But the offer was not an "appraisal," and it did not reflect an offer price for WS SoCal—it was an offer for WS SoCal, the B&D Franchisees, and related entities. See Dkt. 111-1, Exs. A, B (offer letters). More fundamentally, the Termination Obligation says nothing about appraising WS SoCal's net worth. The Termination Obligation is "the fair market value of the Terminated Party's interest" in the ARA, in accordance with the ARA's guidelines.[5] As explained in this Court's ruling on Defendant's most recent motion for partial summary judgment, those are very different things. The Court was not persuaded by Plaintiffs' argument at the hearing that this offer is relevant to any other measure of damages that Plaintiffs seek. Defendant's 2015 offer is irrelevant to this suit.

277, 384, 404, 408. See Dkt. 121 at 5.

[5] Defendant points out that the offer was made by Defendant's four owners, not Defendant. See Dkt. 122 at 3. The Court does not find this material.

Defendant's objections to Plaintiffs' proposed amended witness list (Dkt. 131)

In December 2015, Judge Real ordered that the parties should file witness lists before August 29, 2016, which was also the discovery cut-off. See Dkt. 35. The parties so filed their witness lists. See Dkt. 50, 53. On May 22, 2017, without leave from the Court, Plaintiffs filed an amended witness list with two additional witnesses: Fred Schuster and Gary Kruger (incorrectly spelled "Krueger").[6] See Dkt. 128 at 2.

Defendant objects to both new witnesses. With respect to Schuster, the Court **OVERRULES** Defendant's objections. Defendant listed Schuster on its own original witness list (see Dkt. 53 at 3) and does not explain how it is prejudiced by Plaintiffs' adding Schuster to their own. With respect to Kruger, the Court **SUSTAINS** Defendant's objections for the reasons outlined below regarding Defendant's motion in limine #5.[7]

Defendant's motion in limine #5 (Dkt. 142)

Defendant moves to prevent Plaintiffs from calling Gary Kruger, creator and operator of Windermere Watch, as a witness at trial.[8] Dkt. 142. Defendant's motion in limine #5 is **GRANTED**.

Rule 37(c)(1) of the Federal Rules of Civil Procedure states, "[a] party that without substantial justification fails to disclose information required by Rule 26(a) [initial disclosures] or 26(e)(1) [requirement to supplement initial disclosures] . . . is not, unless such failure is harmless, permitted to use as evidence at a trial . . . any witness or information not so disclosed."

[6] Defendant argues that Richard King, while included on Plaintiffs' original witness list, was not disclosed in Plaintiffs' Rule 26 initial disclosures and should be struck from the witness list. See Dkt. 131 at 2. Defendant cites but does not attach Plaintiffs' initial disclosures. See id. Defendant did not object to Plaintiffs' original witness list. The Court therefore overrules Defendant's objection as to King.

[7] Defendant interprets Plaintiffs' opposition to Defendant's motion in limine #5 as bringing separate objections to York Baur, Cass Herring, and Kendra Vita's inclusion on Defendant's witness list. See Dkt. 146 at 4 (citing Dkt. 144-1 at 4). The Court does not interpret Plaintiffs' opposition as such.

[8] Plaintiffs filed evidentiary objections to Defendant's fifth motion in limine. See Dkt. 144-2. The objected-to portions of the motion were not material to the Court's ruling.

The Court first addresses whether Plaintiffs should have disclosed Kruger as a potential witness earlier. They should have. No one contests that the first time that any party listed Kruger as a potential witness was on May 22, 2017, in Plaintiffs' and Counter-Defendants' amended witness list, long after the close of discovery. See Dkt. 128 at 2.

Plaintiffs do not point to any substantial justification for failing to comply with Rule 26. Instead, Plaintiffs essentially argue that the error was harmless, because Kruger's appearance on the witness list presents no surprise to Defendant. See Dkt. 144 at 3 (citing Defendant's counterclaims, which reference Kruger). The Court disagrees. Knowing "about" someone and having reason to believe that they will be called to testify are not the same.[9] Defendant had no reason to believe that Plaintiffs would call Kruger to testify, because his testimony has no apparent relevance to this suit. Plaintiffs themselves have not explained how Kruger's testimony would be relevant, except to say that he will (1) "lay the background and foundation" for Windermere Watch testimony and exhibits, (2) testify that no one at Defendant contacted him after the Modification Agreement was signed, and (3) testify about what efforts Defendant could have taken to prevent the Windermere Watch campaign. See Dkt. 144 at 4, 9. The first category is unnecessary and not particularly relevant to the suit; other witnesses could explain, based on personal knowledge, what Windermere Watch is. The second category is irrelevant, because Defendant "does not allege that it made efforts to contact Kruger after the Modification Agreement." See Dkt. 146 at 6. The third category is both irrelevant to the suit and speculative.

Plaintiffs' omission would not be harmless. Kruger is, to put it mildly, not a fan of Windermere, and Windermere has not had an opportunity to depose him. Rule 37(c)(1) therefore automatically excludes Kruger from trial. See Neurovision Med. Prod., Inc. v. Nu Vasive, Inc., No. 09-6988, 2013 WL 12112578, at *1 (C.D. Cal. Apr. 29, 2013) (granting motion in limine to exclude witness who was not disclosed in initial disclosures or in supplements thereto, and describing Rule 37 exclusion as "automatic"). If Plaintiffs believe that Kruger could impeach testimony given other witnesses (see Dkt. 144 at 5), Plaintiffs can make an offer of proof at trial.

_____ : _____

Initials of Clerk: DV

[9] Plaintiffs also argue that Defendant should have identified this motion in limine in the May 23, 2017 proposed Amended Final Pretrial Conference Order, as required by Local Rule 16-7. See Dkt. 144 at 5; see also Dkt. 130-1 at 39-40. Given that Plaintiffs filed the amended witness list only a day earlier (see Dkt. 128), the omission was understandable. Furthermore, the omission has not prejudiced Plaintiffs.