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UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

BENNION & DEVILLE FINE HOMES, INC., a California corporation, BENNION & DEVILLE FINE HOMES SOCAL, INC., a California corporation, WINDERMERE SERVICES SOUTHERN CALIFORNIA, INC., a California corporation,

Plaintiffs,

v.

WINDERMERE REAL ESTATE SERVICES COMPANY, a Washington corporation; and DOES 1-10

Defendant.

AND RELATED COUNTERCLAIMS

Case No. 5:15-CV-01921 R (KKx)

Hon. Manual L. Real

THE B&D PARTIES' OPPOSITION TO WINDERMERE REAL ESTATE SERVICES COMPANY'S MOTION IN *LIMINE* TO EXCLUDE GARY KRUGER FROM TESTIFYING AT TRIAL

Date: August 7, 2017
Time: 10:00 a.m.
Courtroom: 880

Action Filed: September 17, 2015
Trial: None Set

TABLE OF CONTENTS

Plaintiffs/Counter-Defendants Bennion & Deville Fine Homes, Inc., Bennion & Deville Fine Homes SoCal, Inc., Windermere Services Southern California, Inc., and Counter-Defendants Robert L. Bennion and Joseph R. Deville (collectively, the "B&D Parties") submit this Opposition to Defendant/Counter-Plaintiff Windermere Real Estate Services Company's ("WSC") Motion *in Limine* to Exclude Gary Kruger from Testifying at Trial.

I. INTRODUCTION

This case is, in large part, about Gary Kruger ("Kruger"), his Windermere Watch negative marketing campaign, and WSC's failure to make "commercially reasonable" efforts to combat Windermere Watch. WSC concedes that "Kruger and his negative marketing campaign have been a subject of this lawsuit since its inception." [Dkt. No. 142-1, p. 5:8-10.] In fact, Kruger and his website, windermerewatch.com, have been referenced in nearly every Court filing in this action. [*See e.g.*, Dkt. No. 1, 11, 16, 31, 57-1, 73, 80, 130-1.] This includes WSC's own identification of Kruger, by name, ten times in its Counterclaim [Dkt. No. 11 ¶¶ 70, 71, 73, 76, 78], and ten more times in its Amended Counterclaim. [Dkt. No. 16, ¶¶ 70, 71, 73, 76, 78.] Likewise, Kruger was named more than thirty times in the B&D Parties' Complaint, and thirty additional times in the First Amended Complaint. [Dkt. No. 1, ¶¶ 51, 52, 92, 95; Dkt. No. 31, ¶¶ 3, 45, 46, 47, 48, 49, 51, 57, 76, 77, 79.] Despite this, WSC now argues that "Kruger must be precluded from testifying at trial" because he was not properly disclosed to WSC and because "his testimony is irrelevant." [Dkt. No. 142-1, pp. 2, 6.] WSC's arguments are not made in good faith and its motion *in limine* should be denied.

WSC's attempt to preclude Kruger from testifying at trial because he allegedly was not disclosed pursuant to Rule 26 of the Federal Rules of Civil Procedure is in error. [Dkt. No. 142-1, pp. 3-6.] As reflected above, Kruger was identified in numerous pleadings as an "individual likely to have discoverable information." Fed. R. Civ. P. 26 (a)(1)(A)(i). These pleadings clearly satisfy Rule 26. Moreover, Rule 26(e) does not

require the B&D Parties to formally supplement their Initial Disclosures because Kruger has "otherwise been made known to [WSC] during the discovery process or in writing." Fed. R. Civ. P 26(e)(1)(A). Because Kruger was identified in the pleadings and discovery of this case, Rule 26 has been satisfied. WSC cannot avoid Kruger's testimony now.

Alternatively, WSC seeks to avoid Kruger's trial testimony by arguing that the testimony is not relevant to this action or is otherwise unfairly prejudicial. [Dkt. No. 142-1, pp. 6-7.] These arguments too ignore the facts of the case and the significance of Kruger and Windermere Watch to this action. It is well established that WSC was contractually obligated to take "commercially reasonable" efforts to combat Kruger and his Windermere Watch negative marketing campaign. [*See e.g.*, Dkt. No. 80, p. 2:12.] WSC's failure to take this required action resulted in harm to the B&D Parties and breach of the parties' Modification Agreement. Kruger is expected to testify that WSC made no efforts to contact him or stop Windermere Watch after the parties entered into the Modification Agreement. Kruger is also expected to identify those efforts that WSC could have taken to avoid the Windermere Watch marketing campaign altogether. Because WSC did none of this, it has breached a material term of the Modification Agreement at issue in this lawsuit. Kruger's anticipated testimony on the subject is highly relevant here.

Kruger's anticipated testimony is also relevant to this dispute as he is expected to lay the background and foundation for several key pieces of evidence, including the windermerewatch.com website and various Windermere Watch mailers that are central to this dispute. Plainly, Kruger's anticipated testimony is highly relevant to this action. The only prejudice to WSC that can result from Kruger's anticipated testimony is the harm that will befall WSC's defense and counterclaims in the case. Of course, this is not the type of substantial, unfair prejudice that WSC must show to exclude evidence under Rule 403. Accordingly, WSC's motion must be denied.

WSC's motion also must be denied to the extent that Kruger will be used as an

impeachment witness at trial. WSC seeks a blanket order precluding Kruger from testifying at trial, in any capacity. [Dkt. No. 142-1, p. 1.] This cannot be allowed. Rule 26(a)(1)(A)(i) and Local Rule 16-2.4 do not require the parties to disclose impeachment witnesses. As discussed below, employees of WSC made several false statements in the case that the B&D Parties expect Kruger to contradict at trial. WSC cannot avoid this. Accordingly, WSC's motion must be denied.

Finally, WSC's motion *in limine* should be denied on procedural grounds because WSC failed to identify the anticipated motion in the [Proposed] Amended Final Pretrial Conference Order ("AFPCO") as required by Local Rule 16-7. Instead of identifying its intent to file a motion to Kruger from testifying at trial, WSC represented in its portion of the AFPCO that it had "no other" "law and motion matters and motions *in limine*" to raise with the Court. [Dkt. No. 130-1, pp. 39-40.] Because WSC failed to identify its current motion in the AFPCO, it should be precluded from brining it now.

WSC's motion *in limine* should be appreciated for what it is: a desperate attempt to keep the jury ignorant of Kruger's testimony that is central to this case. WSC has not advanced a legitimate basis to exclude Kruger from trial. It has known of Kruger, his relevance to this action, and his contact information since the onset of this case. Clearly, there has been no "trial by ambush" as WSC now claims. [Dkt. No. 142-1, p. 3.] For these reasons, set forth in detail below, WSC's *in limine* motion should be denied.

II. THE PARTES' IDENTIFICATION OF KRUGER IN THE PLEADINGS SATISFY THE INITIAL DISCLOSURE OBLIGATION UNDER RULE 26(a)

Rule 26(a) requires parties to a civil action to disclose "the name and, if known, the address and telephone number of each individual likely to have discoverable information – along with the subjects of that information." FRCP 26(a)(1)(A)(i). The parties' extensive disclosures of and references to Kruger throughout the course of this action satisfy Rule 26(a). Thus, WSC's motion to exclude Kruger from testifying at trial should be denied.

From the onset of this action, Kruger has been identified by all parties – *including WSC* – as a person likely to have discoverable information. WSC concedes this point by acknowledging that it knew (i) that Kruger was a person with relevant information from the beginning of this case, and (ii) the subject matter of Kruger's potential testimony. [*See* Dkt. No. 142-1, at 4 ("Kruger and his negative marketing campaign have been a subject of this lawsuit since its inception."); *id*., at 7 ("For the past 15 years, Kruger has continually executed a negative marketing campaign [Windermere Watch] directed at WSC owners, agents, and clients."); *id*., at 5 ("WSC was aware that Kruger operated a negative marketing campaign that impacted the relationship between WSC and [the B&D Parties]."); *id*., at 5 ("WSC's mere awareness of Kruger and his negative marketing campaign does not relieve [the B&D Parties] of their duty to disclose all witnesses with potential relevant information").] In so doing, WSC undercuts its own argument of surprise and resulting harm.

Moreover, Kruger's name and relevance to this matter repeatedly came up during written discovery and the depositions in this case. [Declaration of Kevin A. Adams ("Adams Decl."), ¶ 12, Exs. A-C; Dkt. No. 72-6, Declaration of Paul Drayna ("Drayna Decl."), Ex. H.] This includes, WSC's produced documents showing that it (i) knows of Kruger's whereabouts, (ii) had previously contacted Kruger, and (iii) had utilized a private investigator to track Kruger, potentially on more than one occasion. (Adams Decl., Ex. C.) Because Kruger's name, contact information, and the subject of his anticipated testimony were not only disclosed in this action, but were already known to WSC, WSC's attempt to muzzle Kruger's trial testimony under Rule 26(a) should be denied.

In support of its position, WSC cites to a single case: *Neurovision Medical Products, Inc. v. NuVasive, Inc.* ("*Neurovision*"), No. 09-6988, 2013 WL 12112578 (C.D. Cal. Apr. 29, 2013). However, *Neurovision* is inapposite here. In *Neurovision*, the court excluded witnesses whose ***identities were first disclosed*** "the business day prior to the deadline to file motions in limine, and slightly less than three months prior to the

date set for trial. 2013 WL 12112578, at *1. Moreover, the witnesses were disclosed after the Ninth Circuit remanded the case for a new trial, almost three years after discovery closed. Pl. Neurovision Med. Prod., Inc.'s Mot *in Limine* No. 4, *Neurovision*, No. 09-CV-6988, Dkt. No. 273, at 2. Here, all parties have known of Krueger *since the inception of this action*. Kruger was identified and discussed extensively in both parties' initial pleadings. [Dkt. No. 1, ¶¶ 51, 52, 92, 95; Dkt. No. 11 ¶¶ 70, 71, 73, 76, 78; Dkt. No. 16, ¶¶ 70, 71, 73, 76, 78; Dkt. No. 31, ¶¶ 3, 45, 46, 47, 48, 49, 51, 57, 76, 77, 79.] It is clear from the pleadings that all parties have considered Kruger as a person with potentially relevant information since this action's inception. WSC's claim of "trial by ambush" is disingenuous and should be rejected.

III. EVEN IF KRUGER WAS NOT DISCLOSED CONSISTENT WITH RULE 26(a), THE INITIAL DISCLOSURES WERE PROPERLY SUPPLEMENTED TO INCLUDE KRUGER DURING DISCOVERY IN THE CASE

WSC's attempt to exclude Kruger from testifying at trial under Rule 26(e) is also without merit. The B&D Parties were not required to formally supplement their Initial Disclosures to include Kruger. Rule 26(e)(1) requires a party to supplement its Initial Disclosures only "*if the additional or corrective information has not otherwise been made known to the other parties during the discovery process or in writing*." Fed. R. Civ. P 26(e)(1)(A) (emphasis added); *see also* Fed. R. Civ. P. 26 (Adv. Comm. Notes on 1993 Amendments) ("There is, however, no obligation to provide supplemental or corrective information that has been otherwise made known to the parties in writing or during the discovery process, as when a witness not previously disclosed is identified during the taking of a deposition . . ."). Even without the extensive pleadings identifying Kruger, his relevance to this action was clearly made known to WSC during written discovery and depositions in this case.

Courts have long held that, so long as all parties are made aware of the identity and subject matter of a potential witness' testimony during discovery, the supplemental

disclosure requirement of Rule 26(e) is satisfied. *See Zosma Ventures, Inc. v. Nazari*, No. CV 12-1404 RSWL, 2013 WL 12138679, at *1 (C.D. Cal. July 8, 2013) (denying motion to exclude witnesses because both parties "were always aware" of the witnesses' identities and discovery on their knowledge and relevance was conducted even without depositions); *McKesson Info. Sols., Inc. v. Bridge Med., Inc.*, 434 F. Supp. 2d 810, 812–13 (E.D. Cal. 2006) (denying motion to exclude witnesses where "witnesses were identified in documents produced by [both parties]" and were "discussed in depositions taken of other witnesses" then denying request to reopen discovery so that depositions could be completed); *Rodriguez-Candelario v. MVM Sec. Inc.*, No. CV 15-1850 (GAG), 2017 WL 807645, at *8 (D.P.R. Mar. 1, 2017) (denying motion to exclude witnesses based, in part, on the fact that witnesses "were identified by name by the [p]laintiff in the [c]omplaint"); *Estate of Miller v. Miller*, No. 4:14CV00312 JLH, 2015 WL 10434870, at *1 (E.D. Ark. Feb. 2, 2015) (denying motion to exclude expert witness, noting that witness was "identified by name in the complaint"); *Lake Union Drydock Co. v. United States*, No. C05-2146RSL, 2007 WL 2572291, at *2 (W.D. Wash. Sept. 4, 2007) (denying motion to exclude witnesses because, although the witnesses were not disclosed in Rule 26(a)(1) initial disclosures, the identities were disclosed in response to interrogatories six months before the discovery deadline).

IV. ANY FAILURE TO DISCLOSE KRUGER WAS HARMLESS

Even if the Court finds that the B&D Parties did not disclose Kruger consistent with Rule 26, this failure was harmless given both parties' extensive and detailed knowledge of Kruger and his potential testimony. Thus, WSC's request for an automatic sanction of exclusion of Kruger from trial should be denied.

As set forth in the Advisory Committee notes to Rule 37 of the Federal Rules of Civil Procedure:

> Limiting the automatic sanction to violations "without substantial justification," coupled with the exception for violations that are "harmless," is needed to avoid unduly harsh penalties in a variety of situations: *e.g.*, *the*

> *inadvertent omission from a Rule 26(a)(1)(A) disclosure of the name of a potential witness known to all parties . . .*

Fed. R. Civ. P. 37 (Adv. Comm. Notes on 1993 Amendments) (emphasis added). Because both parties possessed detailed knowledge of Kruger, his relevance to this action, and potential testimony, WSC's requested relief should be denied. *See Zosma Ventures, Inc*., 2013 WL 12138679, at *1 (quoting *Stolarczyk ex rel. Estate of Stolarczyk v. Senator Int'l Freight Forwarding, LLC*, 376 F. Supp. 2d 834, 843 (N.D. Ill. 2005)) ("In particular, harmlessness may be proved by a showing that a witness was disclosed during discovery.")

V. KRUGER'S ANTICIPATED TESTIMONY IS HIGHLY RELEVANT TO THIS ACTION AND WOULD NOT UNFAIRLY PREJUDICE WSC

One of the central issues in this case is whether WSC breached the Modification Agreement by failing to make a "commercially reasonable" effort to combat Windermere Watch.[1] [Dkt. No. 72-6, Drayna Decl., Ex. H.] This included WSC express obligation to "curtail the impact of the activities of Kruger and/or windermerewatch." (*Id*.) Kruger's anticipated testimony is key to this issue. Kruger is expected to testify that WSC made no efforts to contact him or stop Windermere Watch following the parties' entry into the Modification Agreement. Kruger is also expected to identify those efforts that WSC could have taken to avoid or mitigate the Windermere Watch marketing campaign altogether. Because WSC did none of this, it has breached a material term of the Modification Agreement at issue in this lawsuit. Kruger's anticipated testimony on the subject is highly relevant here.

Moreover, Kruger is expected to lay the foundation for various significant exhibits, including the windermerewatch.com website and mailers that were sent to potential clients and agents. These are all important components of this case. WSC's argument that

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[1] According to the Modification Agreement, WSC agreed to "make commercially reasonable efforts to actively pursue counter-marketing, and other methods seeking to curtail the anti-marketing activities undertaken by Gary Kruger, his Associates,

Kruger's testimony is not relevant is in stark contrast to the actual facts of this case. In fact, the significance of both Kruger and his Windermere Watch campaign to WSC's breach of the Modification Agreement have already been recognized by this Court. [*See e.g.*, Dkt. No. 80, p. 5 ("[I]t is apparent based solely on the deposition testimony of WSC's own employees and officers that [WSC] did not make a 'commercially reasonable effort' to combat Windermere Watch.").] Nonetheless, WSC now seeks to exclude this testimony highly relevant to one of the central issues in this case. WSC's attempt to keep crucial testimony from the jury because of an alleged "trial by ambush" should be denied.

Moreover, WSC's attempt to exclude Kruger from trial due to "bias" is not a valid legal basis to exclude evidence from trial. Bias is not listed as a basis to exclude the testimony of a witness in Federal Rule of Evidence ("FRE 403"). Instead, partiality and bias are for the jury to weigh and can be a challenge to credibility. *United States v. Moore*, 580 F.2d 360, 364 (9th Cir. 1978) (holding that any possible bias of the witness went to the weight of the testimony, not its admissibility, and that "whether [a witness] was convincing was for the jury to decide"). *C.f. Lang v. Cullen*, 725 F. Supp. 2d 925, 954 (C.D. Cal. 2010) ("An expert witness's bias goes to the weight, not the admissibility of the testimony, and should be brought out on cross-examination." (quoting *United States v. Kelley*, 6 F.Supp.2d 1168, 1183 (D. Kan. 1998)). WSC's attempt to exclude Kruger's testimony because he is expected to impeach WSC's employees should be summarily rejected. Under WSC's rationale, only witnesses that are impartial or friendly to WSC would be allowed to testify at trial. Of course, this argument is contrary to the rules of evidence and fails as a practical matter. Accordingly, WSC's request to exclude Kruger from testifying at trial is without basis and should be denied.

VI. WSC CANNOT PRECLUDE KRUGER FROM TESTIFYING AS AN IMPEACHMENT WITNESS

WSC's requested relief is overbroad and improperly seeks to exclude Kruger from testifying at trial altogether. Under both FRCP 26(a)(1)(A)(i) and Local Rule 16-2.4, he is

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Windermere Watch and/or the agents of the foregoing persons." [Drayna Decl., Ex. H.]

still permitted to testify as an impeachment witness at trial. Rule 26 requires each party to an action to disclose the identity of each individual with relevant information, "*unless the use would be solely for impeachment*." Fed. R. Civ. P. 26(a)(1)(A). Local Rule 16-2.4 contains similar language. As a result, even if the Court grants WSC's motion to exclude Kruger's testimony as a fact witness, Kruger should still be allowed to testify as an impeachment witness.

VII. WSC'S REQUEST FOR THE NOTES OF THE B&D PARTIES' ATTORNEY IS NOT SUPPORTED BY LAW

Without setting forth any support or argument whatsoever, WSC requests that the Court order the B&D Parties to turn over their counsels' notes from conversations with Kruger. This request must be denied. An attorney's notes of witness interviews are protected by the work product doctrine. *See Upjohn Company v. United States*, 449 U.S. 383, 399, 101 S.Ct. 677, 66 L.Ed.2d 584 (1981) ("[f]orcing an attorney to disclose notes and memoranda of witnesses' oral statements is particularly disfavored because it tends to reveal the attorney's mental processes"); *see also* Fed. R. Civ. P. 26(b)(3)(A)(ii). "Protection of such notes is warranted in that the notes 'reveal an attorney's legal conclusions because, when taking notes, an attorney often focuses on those facts that she deems legally significant.'" *U.S. S.E.C. v. Talbot*, No. CV044556MMM(PLAX), 2005 WL 1213797, at *1 (C.D. Cal. Apr. 21, 2005) (quoting *Baker v. General Motors Corp.*,209 F.3d 1051, 1054 (8th Cir. 2000)). There is simply no legal support for WSC's requested relief. Accordingly, it should be denied.

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VIII. CONCLUSION

WSC, in its motion, unquestionably concedes that it knew the identity and the subject matter of the expected testimony of Kruger at trial. In reality, WSC's concern is that Kruger will discredit its witnesses and expose the fact that WSC did not undertake any commercially reasonable efforts to combat Windermere Watch. WSC should not be allowed to keep this crucial information from the jury. Accordingly, the B&D Parties respectfully request that the Court deny WSC's motion to exclude Kruger from testifying at trial.

Dated: July 17, 2017

MULCAHY LLP

By: /s/ Kevin A. Adams
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