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UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

DON HENLEY, MIKE CAMPBELL, and DANNY KORTCHMAR Plaintiffs, v. CHARLES S. DEVORE and JUSTIN HART, Defendants.	Case No. SACV09-0481 JVS (RNBx) **DEFENDANTS' OPPOSITION (of sorts) TO PLAINTIFFS' MOTION IN LIMINE NO. 1**
AND RELATED COUNTERCLAIMS	

Plaintiffs ask this Court to preclude Defendants from "testifying on subjects as to which they lack personal knowledge." That sounds reasonable. Defendants would like Plaintiffs' witnesses also to be excluded from testifying on matters to which they lack personal knowledge, not to mention matters that are irrelevant, and even matters that are extremely prejudicial and have little probative value. Defendants share Plaintiffs' view that the Federal Rules of Evidence should apply at trial.

But Defendants don't believe a motion in limine is necessary to establish this general rule. The Federal Rules of Evidence have beaten the parties and the Court to the punch.

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And the Court can apply the general rule in the ordinary way: by seeing whether a witness is able to lay a foundation for a statement at trial and, if not, by sustaining an objection to the testimony at that time. It is unnecessary and counterproductive for the Court to speculate at this time, devoid of any necessary context, whether a witness can lay a foundation for a hypothetical, future statement. There may be rare occasions when potential evidence is so damaging, and any attempt to unring the bell so futile, that a motion like this is justified. But Plaintiffs have offered no reason to believe this is such a case.

In addition, Defendants disagree with the examples Plaintiffs provide in their motion. Plaintiffs want to preclude Defendants from testifying, in essence, as to Henley's connection to Democratic politics. If the issue at trial were Henley's political activism, the motion might make sense (even if it would still be premature). But the issue in this trial is Defendants' mental state: Did they know their videos were unjustified infringements, or did they believe the fair use doctrine protected their works? Thus, what Defendants believed at the time they made and posted their videos is the critical inquiry; whether those underlying beliefs were based on personal knowledge sufficient to establish a traditional foundation in a federal court is not.

Indeed, Plaintiffs' argument contradicts an important point in the Court's summary judgment order. Defendants argue that they were, at least in part, poking fun at Don Henley because of his outspoken liberalism and connection to (indeed, embodiment of) the liberal, entertainment elite that has a tight connection to the Democratic Party. Plaintiffs have fought against this characterization. But the Court noted that the merit of Defendants' argument did not depend on the "truth" of their premise. In other words, if Defendants believe Henley is a member of the liberal, entertainment elite, they can lawfully assume the premise and comment on Henley through their parodies. The First Amendment does not require Defendants to first prove the "truth" about Henley's politics. *See* Order at 13.

The same logic applies here. Defendants are entitled to testify that they believed they could create and display the videos because they commented, at least in part, on Don

Henley as a member of the liberal, entertainment elite. They are not required to prove that their view of Henley is accurate, and they need not lay a technical, legal foundation for the facts supporting their view. Plaintiffs, of course, are free to challenge the legitimacy of Defendants' beliefs through cross-examination or otherwise. But they cannot preclude Defendants from testifying as to the reason they believed the parodies were appropriate and lawful.

Dated: July 2, 2010

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