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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)

PLAINTIFFS' OBJECTIONS TO EVIDENCE SUBMITTED BY DEFENDANTS IN SUPPORT OF DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

Date: June 1, 2010
Time: 10:00 A.M.
Ctrm: Hon. James V. Selna

In ruling on a motion for summary judgment, the court may consider evidence only if the content would be admissible at trial. *See, e.g., Beyene v. Coleman Sec. Servs., Inc.*, 854 F.2d 1179, 1181 (9th Cir. 1988). Plaintiffs hereby make the following objections to evidence presented by Defendants in support of their Motion for Summary Judgment, dated April 9, 2010.

I. EXHIBIT 3 TO THE DECLARATION OF CHRISTOPHER ARLEDGE

Plaintiffs object to the admission of Exhibit 3 to the Declaration of Christopher Arledge ("Arledge Declaration"). In particular, the exhibit – claimed by Mr. Arledge to be "a true and correct copy of an interview of Don Henley published by Rolling Stone Magazine" (Arledge Decl. ¶ 5) – is hearsay pursuant to Federal Rules of Evidence 801 and 802, and cannot be considered in support of Defendants' motion. *See* Fed. R. Civ. P. 56(e) (requiring affidavits in support of summary judgment motions to "set out facts that would be admissible in evidence"); *see also Beyene*, 854 F.2d at 1181-82 (inadmissible hearsay may not be considered on motion for summary judgment).

Magazine and newspaper articles are "classic, inadmissible hearsay." *See Anderson v. Dallas County, Texas*, No. 3:05-CV-1248-G, 2007 U.S. Dist. LEXIS 28702, at *17 (N.D. Tex. Apr. 18, 2007) (quoting *Roberts v. City of Shreveport*, 397 F.3d 287, 295 (5th Cir. 2005)). Here, Defendants are purporting to use an article written by a *Rolling Stone* reporter as evidence that Henley made certain statements that are included in the article. In *Larez v. City of Los Angeles*, 946 F.2d 630 (9th Cir. 1991), the Ninth Circuit addressed this issue, and held that a party's out-of-court statements reported in newspaper articles constituted inadmissible hearsay because the *reporter's transcriptions* were hearsay. *Id.* at 641-42 (recognizing that because "the reporters never testified nor were subjected to cross-examination, their transcriptions of [defendant's] statements involve a serious hearsay problem").

Accordingly, the article attached as Exhibit 3 to the Arledge Declaration is inadmissible hearsay. *See id.*; *Green v. Baca*, 226 F.R.D. 624, 637-39 (C.D. Cal.

2005) (granting motion *in limine* to exclude newspaper articles as inadmissible hearsay).

II. DECLARATION OF CHARLES S. DEVORE

Plaintiffs also object to the admission of certain testimony from the Declaration of Charles S. DeVore ("DeVore Declaration"), for the reasons set forth below. *See* Fed. R. Civ. P. 56(e) ("A supporting or opposing affidavit must be made on *personal knowledge*, set out facts that would be *admissible in evidence*, and show that the affiant is *competent to testify* on the matters stated.") (emphasis added).

A. Exhibit A to the DeVore Declaration.

Exhibit A – described in paragraph 3 of the DeVore Declaration as "disclosure reports showing Mr. Henley's political donations" – is inadmissible, because the attached document is unauthenticated and is hearsay that is not within any relevant exception. *See* Fed. R. Evid. 801-803, 901 (requiring "as a condition precedent to admissibility" that a document is authenticated by "evidence sufficient to support a finding that the matter in question is what its proponent claims"). In fact, the information contained in the document attached as Exhibit A – a printout from the Internet website "Open Secrets" – is demonstrably inaccurate and incomplete. For example, Henley made multiple campaign donations to Republican Senator Kay Bailey Hutchison that are not included in the printouts. (Supplemental Declaration of Don Henley ¶ 10, Ex. 1.)

Further, DeVore's description of this list simply as a "disclosure report" provides no basis to allow for its admissibility, as the underlying source and accuracy of this information is unknown. Notably, Defendants never questioned Henley about these alleged donations at his deposition in an effort to verify them. As it stands, the information contained in the document attached as Exhibit A is both unauthenticated and hearsay, without any of the "indicia of reliability" that would allow it to fall within one of the hearsay exceptions. *See*, *e.g.*, *Conoco Inc. v. Dep't of Energy*, 99 F.3d 387, 392-93 (Fed. Cir. 1996) ("purchase schedules" summarizing crude oil purchases

submitted in support of summary judgment were inadmissible hearsay that did not fall within any exception because they lacked sufficient "indicia of reliability").

B. Paragraph 2 of the DeVore Declaration.

DeVore's Statement: "*As my supporters recognize … I am necessarily challenging the Hollywood and entertainment elite, which with only a handful of exceptions has been outspoken and financially generous in its support of liberal issues and Democratic politicians, like Ms. Boxer. … [F]rom the perspective of my supporters, the entertainment establishment is squarely behind the current Democratic administration and Ms. Boxer, and it will go to great lengths to defeat a conservative like me.*"

Plaintiffs' Objection:

1. DeVore provides no evidentiary support to demonstrate that he has personal knowledge that a group he deems "the Hollywood and entertainment elite" either exists or is "outspoken and financially generous in its support of liberal issues and Democratic politicians, like Ms. Boxer," and, accordingly, this testimony is inadmissible. *See* Fed. R. Evid. 602 ("A witness may not testify to a matter unless evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter."); *Block v. City of Los Angeles*, 253 F.3d 410, 419 (9th Cir. 2001) (finding it an abuse of discretion to consider information in an affidavit submitted under Rule 56(e) that was not made on personal knowledge). There is simply no evidence in the record or in Mr. DeVore's declaration that would allow such a sweeping, over-generalized statement to be considered as an admissible fact. *See Shakur v. Schriro*, 514 F.3d 878, 890 (9th Cir. 2008) ("Conclusory affidavits that do not affirmatively show personal knowledge of specific facts are insufficient.") (citation omitted).

2. DeVore's testimony regarding the thoughts and impressions of his "supporters," without evidentiary basis, is speculative and lacks evidentiary basis to establish that it is made on personal knowledge, and is therefore inadmissible. *See*

Fed. R. Evid. 602; *Davis v. United States*, No. 07-0481-VAP (OPx), 2010 U.S. Dist. LEXIS 7036, at *9-10 (C.D. Cal. Jan. 28, 2010) (declaration based on thoughts of others, without foundation, is inappropriate under Rule 56(e)).

C. Paragraph 3 of the DeVore Declaration.

DeVore's Statement: "*Don Henley, while not the only entertainment celebrity to vocally support Ms. Boxer and other liberal politicians and causes, is one of the more prominent.*"

Plaintiffs' Objection: DeVore's testimony contains no evidentiary support to demonstrate any personal knowledge that Henley is "one of the more prominent" celebrities who "vocally support Ms. Boxer and other liberal politicians and causes." In fact, DeVore fails to cite any evidence that Henley has ever vocally supported Ms. Boxer or any other individual whom DeVore might characterize as a "liberal politician." *See* Fed. R. Evid. 602; *Bell v. Santa Ana City Jail*, No. SA CV 07-1218-ODW (PLA), 2010 WL 582543, at *1 n.2 (C.D. Cal. Feb. 16, 2010) (refusing to consider statements in a declaration that were speculative and beyond declarant's personal knowledge); *Block*, 253 F.3d at 419 (affidavit "did not set forth facts that would be admissible in evidence").

DeVore's Statement: "*[Henley] is a well-known Democrat who has given a lot of money to Democratic politicians over the years—over $750,000 to liberal candidates, to be exact, including $9,000 to Barbara Boxer*."

Plaintiffs' Objection: DeVore cites to Exhibit A to support his statement that Henley has donated "over $750,000 to liberal candidates." In addition to the fact that Exhibit A is hearsay, as discussed above, the document attached to Exhibit A, on its face, does not reflect $750,000 worth of donations by Henley, or indicate which donation recipients qualify as "liberal candidates." Thus, DeVore's statement regarding Henley's donations lacks evidentiary support and is made without personal knowledge. *See* Fed. R. Evid. 602.

DeVore's Statement: "*[I]n a well-publicized incident a few years ago, an Orange County audience booed Henley for making liberal political statements during a concert*."

Plaintiffs' Objection: There is no support that DeVore has any personal knowledge about this allegedly "well-publicized incident" regarding a concert held by Henley in Orange County. Instead, DeVore's statement about the Orange County incident, offered for its truth, is based entirely on inadmissible hearsay from, according to DeVore, the Orange County Register. *See* Fed. R. Evid. 801, 802; *Block*, 253 F.3d at 419 (affidavit under Rule 56(e) was inadequate where it was based on inadmissible hearsay). Even if DeVore had included a copy of the alleged article – which he did not – that article would still be "classic, inadmissible hearsay." *Anderson*, 2007 U.S. Dist. LEXIS 28702, at *17; *see also Green*, 226 F.R.D. at 637.

DeVore's Statement: "*Don Henley is, for me and other politically active conservatives, inseparable from the Democratic political establishment*."

Plaintiffs' Objection: DeVore's testimony regarding the thoughts of "other politically active conservatives" is inadmissible because it lacks foundation, is speculative, and is not based on personal knowledge. *See* Fed. R. Evid. 602; *Davis*, 2010 U.S. Dist. LEXIS 7036, at *9-10.

DeVore's Statement: "*[Henley] and his friends in the entertainment industry have spent huge sums of money and used the powerful platform that fame and celebrity have given them in order to help elect Democratic politicians, including President Obama and Senator Boxer*."

Plaintiffs' Objection: DeVore's testimony that Henley's unidentified "friends in the entertainment industry" have "used the powerful platform that fame and celebrity have given them in order to help elect Democratic politicians" lacks foundation, is speculative, and is made without any evidence of personal knowledge, and accordingly is inadmissible. *See*, *e.g.*, Fed. R. Evid. 602; *Davis*, 2010 U.S. Dist. LEXIS 7036, at *9-10; *Bell*, 2010 WL 582543, at *1 n.2.

C. Paragraph 5 of the DeVore Declaration.

DeVore's Statement: "*We carefully selected Don Henley because of his status as a liberal, entertainment icon.*"

Plaintiffs' Objection: DeVore's testimony regarding Henley's alleged "status as a liberal, entertainment icon" is wholly speculative and conclusory and contains no evidentiary foundation to establish that it is based on personal knowledge. *See, e.g.*, Fed. R. Evid. 602; *Shakur*, 514 F.3d at 890; *Bell*, 2010 WL 582543, at *1 n.2.

DeVore's Statement: "*As Henley says, the second verse of the song—the one with the famous line about seeing 'a Dead Head sticker on a Cadillac'—was about the essential failure of Sixties' politics: 'I don't think we changed a damn thing, frankly…. After all our marching and shouting and screaming didn't work, we withdrew and became yuppies and got into the Me Decade.'*"

Plaintiffs' Objection: DeVore purports to quote Henley regarding what DeVore describes as being a statement "about the essential failure of Sixties' politics." In addition to DeVore's failure to provide support for this alleged statement, it is taken from the article attached as Exhibit 3 to the Arledge Declaration, which, as discussed above, is inadmissible hearsay. DeVore's statement therefore lacks foundation and is based on inadmissible hearsay, not personal knowledge. *See* Fed. R. Evid. 602, 802; *Block*, 253 F.3d at 419.

D. Paragraph 6 of the DeVore Declaration.

DeVore's Statement: "*… Henley and the other celebrities who fought so hard to get Mr. Obama elected.*"

Plaintiffs' Objection: In the same manner as his prior conclusory statements to this effect, DeVore's testimony regarding "Henley and the other celebrities who fought so hard to get Mr. Obama elected" lacks evidentiary foundation, is speculative, and is made without personal knowledge. DeVore cites no evidence to demonstrate personal knowledge of any efforts by Henley (or other unnamed celebrities) to get Mr. Obama

elected. *See* Fed. R. Evid. 602; *Block*, 253 F.3d at 419; *Shakur*, 514 F.3d at 890; *Davis*, 2010 U.S. Dist. LEXIS 7036, at *9-10.

E. Paragraph 7 of the DeVore Declaration.

DeVore's Statement: "*'All She Wants To Do Is Dance' is about Americans' indifference to what Plaintiffs perceive to be the misconduct of the American government in a foreign, apparently Latin American, locale*."

Plaintiffs' Objection: DeVore's attempt to testify as to "what Plaintiffs perceive to be the misconduct of the American government" is speculative and without personal knowledge. *See* Fed. R. Evid. 602; *Davis*, 2010 U.S. Dist. LEXIS 7036, at *9-10.

DeVore's Statement: "*Indeed, soldiers in the video were dressed like Nicaraguan Contras. I was and am familiar with the Contras uniforms from my days working as an intelligence officer in the Reagan administration*."

Plaintiffs' Objection:

1. DeVore's reference to an alleged "video" lacks foundation. There is no identification in the DeVore Declaration – and, indeed, no evidence in the record – of any such video associated with All She Wants to Do Is Dance (other than All She Wants to Do Is Tax, which does not appear to be what DeVore is referring to here). Any reference to the contents of this unidentified video is inadmissible. *See* Fed. R. Evid. 1002; *see also Beijing Tong Ren Tang (USA) Corp. v. TRT USA Corp*., 676 F. Supp. 2d 857, 861 (N.D. Cal. 2009) (testimony in affidavit lacked foundation and was therefore inadmissible because, *inter alia*, no supporting documents were provided).

2. DeVore's opinion that the soldiers in the video "were dressed like Nicaraguan Contras," allegedly based on his specialized knowledge obtained from his "days working as an intelligence officer in the Reagan administration," is inadmissible lay witness opinion testimony. *See* Fed. R. Evid. 701 ("If the witness is not testifying as an expert, the witness' testimony in the form of opinions or inferences is limited to those opinions or inferences which are … not based on scientific, technical or *other specialized knowledge* within the scope of Rule 702."); *see also* Fed. R. Evid. 701

Advisory Committee Notes (2000 Amendment) (warning against the "proffering an expert in lay witness clothing").

F. Paragraph 8 of the DeVore Declaration.

DeVore's Statement: "… *Plaintiffs' not-so-subtle attack on the U.S. government's policies.…*"

Plaintiffs' Objection: DeVore's attempt to testify as to what he claims is "Plaintiffs' not-so-subtle attack on the U.S. government's policies" is again speculative and without personal knowledge. DeVore has no personal knowledge of Plaintiffs' intent, and his testimony in this regard is thus inadmissible. *See* Fed. R. Evid. 602; *Davis*, 2010 U.S. Dist. LEXIS 7036, at *9-10; *Bell*, 2010 WL 582543, at *1 n.2.

G. Paragraph 9 of the DeVore Declaration.

DeVore's Statement: "*[T]he problem is that the American government, through Barbara Boxer and her colleagues in Washington – and with the support of the liberal, entertainment elite (of which Henley is proudly a member) – are inserting themselves into the American economy and enriching the government and certain special interests through immoral tax policies that are causing a decrease in the American standard of living*."

Plaintiffs' Objection: DeVore's testimony regarding the "support of the liberal, entertainment elite (of which Henley is proudly a member)" for "Barbara Boxer and her colleagues in Washington … inserting themselves into the American economy and enriching the government and certain special interests through immoral tax policies that are causing a decrease in the American standard of living" is based on pure speculation and not personal knowledge. *See* Fed. R. Evid. 602; *Shakur*, 514 F.3d at 890 ("Conclusory affidavits that do not affirmatively show personal knowledge of specific facts are insufficient."); *Block*, 253 F.3d at 419; *Davis*, 2010 U.S. Dist. LEXIS 7036, at *9-10.

H. Paragraph 10 of the DeVore Declaration.

DeVore's Statement: "*By taking Mr. Henley's original songs—which were infused with political meaning—and giving them a very different political meaning, all while attacking the very politicians and policies that Mr. Henley is publicly identified with and has so vocally supported, our parody songs clearly transform the original works into something different*."

Plaintiffs' Objection:

1. DeVore's testimony regarding "the very politicians and policies that Mr. Henley is publicly identified with and has so vocally supported" lacks evidentiary foundation to demonstrate personal knowledge that Henley has vocally supported or is publicly identified with any particular politicians to whom DeVore may be referring. *See* Fed. R. Evid. 602; *Block*, 253 F.3d at 419; *Shakur*, 514 F.3d at 890; *Bell*, 2010 WL 582543, at *1 n.2.

2. DeVore's testimony that the videos are "parody songs" that "clearly transform the original works" is an inadmissible legal argument and conclusion that is "not appropriate for a declaration." *Silver v. Executive Car Leasing Long-Term Disability Plan*, 466 F.3d 727, 732 n.2 (9th Cir. 2006); *accord Davis*, 2010 U.S. Dist. LEXIS 7036, at *10.

DeVore's Statement: "*Henley is of a group of celebrities who are associated in the public eye with Ms. Boxer, Mr. Obama and other prominent liberal politicians*."

Plaintiffs' Objection: DeVore's attempt to speak on behalf of the general public by stating that "Henley is of a group of celebrities who are associated in the public eye with Ms. Boxer, Mr. Obama and other prominent liberal politicians" is speculative and is not based on personal knowledge, and is therefore inadmissible. *See* Fed. R. Evid. 602; *Davis*, 2010 U.S. Dist. LEXIS 7036, at *9-10 (declaration based on thoughts of others, without foundation, is inappropriate under Rule 56(e)).

I. Paragraph 11 of the DeVore Declaration.

DeVore's Statement: "*It is also important to understand that our parody videos were core political speech.*"

Plaintiffs' Objection: DeVore's statements that Defendants' videos were "parody videos" and "core political speech" are impermissible legal conclusions. *See, e.g.*, *Davis*, 2010 U.S. Dist. LEXIS 7036, at *9-10 (declaration containing statements of legal argument and legal conclusion inappropriate under Rule 56(e)); *Silver*, 466 F.3d at 732 n.2.

J. Paragraph 12 of the DeVore Declaration.

DeVore's Statement: "… *Mr. Henley and his political allies.…*"

Plaintiffs' Objection: DeVore's testimony regarding Henley's alleged "political allies" is wholly speculative and lacks evidentiary foundation sufficient to demonstrate personal knowledge, and is therefore inadmissible. *See, e.g.*, Fed. R. Evid. 602; *Bell*, 2010 WL 582543, at *1 n.2.

Dated: May 3, 2010

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