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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' FURTHER OBJECTIONS TO EVIDENCE SUBMITTED BY DEFENDANTS IN OPPOSITION TO PLAINTIFFS' MOTION FOR PARTIAL SUMMARY JUDGMENT

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

Plaintiffs hereby make the following objections to evidence presented by Defendants in opposition to Plaintiffs' motion for partial summary judgment, dated May 3, 2010.

I. SUPPLEMENTAL DECLARATION OF CHRISTOPHER ARLEDGE

A. Paragraph 2

In paragraph 2 of his supplemental declaration, Christopher Arledge, Defendants' counsel, testifies that Defendants added a disclaimer to their Tax Video "at [his] direction for tactical, litigation reasons." (Supplemental Declaration of Christopher Arledge ("Arledge Supp. Decl.") ¶ 2.) By proffering this statement, Defendants appear to be raising an advice of counsel defense, which was not raised earlier in the litigation. At the deposition of Charles DeVore, DeVore was asked about the reasons for Defendants' addition of the disclaimer. DeVore asserted that this information was privileged. (Declaration of Jacqueline Charlesworth ("Ch. Decl."), Ex. 15 at 352-53 (Deposition of Charles DeVore at 288:12-289:12).) Accordingly, Defendants are precluded from now offering testimony on this issue – especially from Defendants' counsel. *See Columbia Pictures Indus., Inc. v. Krypton Broad. of Birmingham, Inc.*, 259 F.3d 1186, 1196 (9th Cir. 2001) (precluding a party from asserting evidence of reliance on advice of counsel where the party refused to answer questions about it at deposition).

B. Paragraph 3

In paragraph 3 of his supplemental declaration, Arledge testifies, purportedly based on personal knowledge, regarding the meaning of an alleged video that he located on the Internet, which he claims is "Henley's music video for 'All She Wants to Do Is Dance.'" He testifies that "[t]he most reasonable interpretation" of the images in the video is that "the allegedly unknown location" in the video "is actually a location in Latin America," and that "the uniforms worn by soldiers in the video are consistent with the uniforms used by the Nicaraguan Contras." (Arledge Supp. Decl. ¶ 3.) He concludes that, based on his interpretation of the video, "a reasonable interpretation of 'All She Wants to Do Is Dance' is that the song was a criticism of American foreign policy and

the apathy of the American people to that policy[.]" (*Id.*) Through this testimony, Defendants' counsel has become a fact and/or opinion witness. The settled law in the Ninth Circuit is that an attorney is prohibited from appearing as both a witness and an advocate in the same litigation. *United States v. Prantil*, 764 F.2d 548, 552-53 (9th Cir. 1985); *see also Kalina v. Fletcher*, 522 U.S. 118, 130 (1997) (admonishing counsel from participating as an advocate and witness in the same proceeding). More than merely offering the video into evidence (which, as discussed below, would also be improper), Arledge provides testimony regarding what he believes to be a "reasonable interpretation" of the video's contents and Plaintiffs' song. This testimony should be excluded.

In addition, despite Plaintiffs' requests for "[a]ll documents . . . upon which [Defendants] intend to rely to support the affirmative defenses" and "[a]ll documents concerning the allegations . . . that '[Plaintiffs' claims] are barred by the doctrine of copyright fair use,'" the video to which Arledge testifies was never identified or produced by Defendants during discovery, or authenticated by anyone. (Second Supplemental Declaration of Jacqueline Charlesworth ("Ch. 2d Supp. Decl."), Ex. F at 64-65 (Plaintiffs' Requests for Production, dated July 29, 2009, Nos. 43, 51.) Although Arledge calls it "Henley's video," he provides no basis for the assumption that Henley was responsible for the conception or production of the video. Plaintiffs had no opportunity to review the video with DeVore, Hart (or Arledge) during discovery. Plaintiffs would have been interested to know, for example, why DeVore (and Arledge) believe that the brown uniforms depicted in the video "are consistent" with Nicaraguan Contra uniforms, when Plaintiffs' cursory research suggests that Nicaraguan Contras wore green camouflage. Thus, the court should strike Arledge's testimony and the proffering of the video. *See* Fed. R. Civ. P. 37(c)(1).

II. DECLARATION AND EXPERT REPORT OF SUZANNE B. SHU

A. Paragraphs 2 through 14 and Exhibit 1

Defendants have submitted the declaration and accompanying expert report of Dr. Suzanne B. Shu in an effort to rebut the survey and expert report of Hal Poret. Shu, however, is not qualified to provide the relevant analysis of Poret's survey. Under Federal Rule of Evidence 702, an expert witness must be qualified "by knowledge, skill, experience, training, or education" to provide an opinion based on "scientific, technical, or other specialized knowledge." Fed. R. Evid. 702; *see also Prado Alvarez v. R.J. Reynolds Tobacco Co.*, 405 F.3d 36, 40 (1st Cir. 2005) (an expert witness "should have achieved a meaningful threshold of expertise" in the relevant area); *Rivera v. Bio Engineered Supplements & Nutrition, Inc.*, No. SACV07-1306 JVS, 2008 U.S. Dist. LEXIS 95083, at *41 (C.D. Cal. Nov. 13, 2008) ("The question is whether the [expert] witness is 'qualified in the *specific* subject for which the testimony is offered.'") (citation omitted) (emphasis in original).

Shu is an assistant professor of marketing at the Anderson Graduate School of Management of the University of California, Los Angeles. (Declaration of Suzanne B. Shu ("Shu Decl.") ¶ 1.) Shu has never before been retained as an expert witness. (Ch. 2d Supp. Decl., Ex. E at 54 (Deposition of Suzanne Shu ("Shu Dep.") at 12:20-22).) She has no background in creating or analyzing Lanham Act likelihood of confusion surveys, and in fact has never conducted or reviewed any survey dealing with issues related to false endorsement. (*Id.*, Ex. E at 55, 57 (Shu Dep. at 17:10-24, 21:14-20).) Moreover, at the time of her deposition, she was not even aware of the *Eveready* survey format that was used as the foundation for Poret's survey. (*Id.*, Ex. E at 56 (Shu Dep. at 20:1-3); Supplemental Declaration of Hal Poret ¶¶ 3-4.) *See also* 5 J. MCCARTHY, MCCARTHY ON TRADEMARKS AND UNFAIR COMPETITION § 32:174 (4th ed. 2010) (*Eveready* format is "a now-standard survey format"); § 32:173.50 (*Eveready* test as the "gold standard") (citation omitted). Simply put, Shu is not an expert on Lanham Act likelihood of confusion surveys, which is the specific subject for which her testimony is being offered.

Her testimony and report therefore should be excluded. *See United States v. Chang*, 207 F.3d 1169, 1171-73 (9th Cir. 2000) (exclusion of proffered expert testimony was proper where the witness did not possess the relevant expertise).

Even if Shu were considered an expert in this area, her critique of Poret's survey does not meet the requisite test for reliability. *See Van Der Valk v. Shell Oil Co.*, No. SACV03-565 JVS, 2004 U.S. Dist. LEXIS 30692, at *4 (C.D. Cal. Nov. 15, 2004) (recognizing that a party offering expert testimony "must show it to be both reliable and relevant") (citing *Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 147 (1999) and *Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 579, 590-91 (1993)). Specifically, Shu *did not even watch the videos* that were being tested in the survey. (Ch. 2d Supp. Decl., Ex. E at 60 (Shu Dep. at 40:23-24).) There is no way that Shu could competently and reliably critique a survey concerning Defendants' videos when she has no knowledge of the content of these videos. Shu practically admitted as much at her deposition: "If I were conducting a survey of my own to understand whether consumers were – whether individuals were confused about those videos, then I would definitely watch the videos at that point." (*Id.*, Ex. E at 61 (Shu Dep. at 41:18-21).)

A fundamental test for reliability and relevance of expert testimony is whether the expert "employs in the courtroom the same level of intellectual rigor that characterizes the practice of an expert in the relevant field." *Kumho Tire*, 526 U.S. at 152. Failing to employ even the "the same level of intellectual rigor" that she would have employed in creating her own survey, Shu's critique of Poret's survey lacks appropriate reliability. *See, e.g.*, *Cooper v. Smith & Nephew, Inc.*, 259 F.3d 194, 203 (4th Cir. 2001) (doctor who did not conduct a physical examination of plaintiff or speak with any of plaintiff's treating physicians "did not employ in the courtroom the same methods that he employs in his own practice" and was properly excluded).

B. Paragraphs 2 through 13

Further, Shu's testimony in paragraphs 2 through 13 of her declaration should be excluded because those opinions were not previously disclosed in her report. Shu opines

that "Mr. Poret's [sic] draws untenable conclusions from the date [sic] he collected," which conclusions are "patently and provably inaccurate." (Shu Decl. ¶¶ 2-3.) She then allegedly proceeds to examine the data in Poret's survey, and states that "[b]ased on the data collected in Poret's survey," Poret's conclusion that confusion is likely "is impossible." (*Id*. ¶ 13.) This analysis, however, does not exist in her report. Instead, Shu's report is entirely focused on the purported "methodological errors that tainted the data" in Poret's survey, and does not contain any analysis of the data itself. (Shu Decl. ¶ 14, Ex. 1.) In fact, according to Shu, she was unable conclude in her report that viewers of the videos were not confused, because, based on the alleged unreliability of the survey, one could not "conclusively decide one way or another whether people are confused." (Ch. 2d Supp. Decl., Ex. E at 58-59 (Shu Dep. at 38:25-39:5).). She further testified that all of her conclusions in this case were included in her report. (*Id.*, Ex. E at 58 (Shu Dep. at 38:8-14).)

Shu cannot now abandon the conclusions in her report and proffer entirely new conclusions based on an analysis of the data from Poret's survey. An expert report must contain "a complete statement of all opinions the witness will express and the basis and reasons for them." Fed. R. Civ. P. 26(a)(2)(B)(i). Further, "[a] party must make these disclosures at the times and in the sequence that the court orders," which the Court in this case ordered to be made by February 26, 2010. Fed. R. Civ. P. 26(a)(2)(C); (Feb. 16, 2010 Order Regarding Expert Discovery Deadlines (Docket No. 45)). As this Court has recognized, when a party fails to make the disclosures required under Rule 26(a), "the self-executing sanction of exclusion under Rule 37(c)(1) of the Federal Rules of Civil Procedure . . . is required unless the failure to comply is substantially justified or harmless." *C.N. v. Wolf*, No. SACV 05-868 JVS, 2006 U.S. Dist. LEXIS 97121, at *5, 9-10 (C.D. Cal. Nov. 13, 2006) (citing Fed. R. Civ. P. 37(c)(1)) (granting motion to exclude late disclosed experts).

There is no justification for Shu's failure to disclose the opinions that she now espouses in her declaration – they are based on the same Poret report that was the subject

of her rebuttal report, and she testified at her deposition that she had no further conclusions to disclose. And the failure to disclose these new opinions is certainly not harmless. By disclosing these opinions for the first time in Defendants' opposition brief, Plaintiffs were precluded from questioning Shu as to their basis and reliability. Therefore, Rule 37(c)(1) requires that such opinions be excluded. *See, e.g.*, *Yeti By Molly, Ltd. v. Deckers Outdoor Corp.*, 259 F.3d 1101, 1105-07 (9th Cir. 2001) (upholding the exclusion of expert testimony for failure to comply with discovery deadlines); *Baker v. Indian Prairie Cmty. Unit, Sch. Dist. No. 204*, No. 96 C 3927, 1999 U.S. Dist. LEXIS 17221, at *9-15 (N.D. Ill. Oct. 26, 1999) (striking testimony in expert affidavits filed in opposition to summary judgment where such testimony was not disclosed in the experts' reports).

III. DECLARATION AND EXPERT REPORT OF MARTIN ZEILINGER

Defendants submit the declaration and expert report of Dr. Martin Zeilinger allegedly to rebut the testimony of Dr. Mark Rose, and at the same time assert that his testimony is inadmissible. (*See* Defendants opposition brief at 6 n.1.) Plaintiffs agree with Defendants that Zeilinger's testimony is inadmissible, but for different reasons.

To be admissible, expert testimony must be relevant and reliable. The expert testimony must "assist the trier of fact to understand the evidence" and rest on a "reliable foundation." *See Daubert*, 509 U.S. at 597; Fed. R. Evid. 702. Zeilinger's opinion on whether Defendants' videos parody Plaintiffs' underlying works neither assists the trier of fact nor rests on a reliable foundation because he applies no fixed definition of parody to the facts, let alone the definition espoused by the Supreme Court. (*See generally* Zeilinger Decl., Ex. A; *see also* Ch. 2d Supp. Decl., Ex. D at 45-48 (Zeilinger Dep. at 102:22-105:21) (Zeilinger "can't seem to find" *Campbell*'s definition of parody in his report.).) Rather, he relies on multiple, open-ended characterizations of parody drawn from a variety of sources that do not conform to the Supreme Court's standard.

(Zeilinger Decl., Ex. A at 8, 11-15.) Such an approach renders his analysis irrelevant and unreliable.

Dated: May 17, 2010

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