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IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

LARY FEEZOR,)	
)	2:09-cv-03324-GEB-CMK
Plaintiff,)	
)	
v.)	<u>ORDER ON MOTIONS IN LIMINE</u>
)	
GOLDEN BEAR RESTAURANT GROUP,)	
INC. dba ARBY'S; A & R)	
INVESTMENT COMPANY; CARISCH,)	
INC. dba ARBY'S; CARISCH)	
BROTHERS, L.P. dba ARBY'S,)	
)	
Defendants.)	
_____)	
)	
AND RELATED CROSS-CLAIM)	
_____)	

Plaintiff and Defendant/Cross-Claimant A & R Investment Company ("A & R") move in limine for an order seeking to preclude the admission of certain evidence at trial. The parties' motions are addressed below.

A. Plaintiff's Motions in Limine
Motion in Limine No. 1

Plaintiff seeks to prevent defense counsel "from making disparaging remarks against the plaintiff, his counsel, their motives, or ADA litigation in general in the presence of the jury." (Pl.'s Mot. in Limine ("MIL") No. 1, 4:6-9.)

Since it is unclear what evidence is involved in this motion, it is DENIED. See United States v. Perry, No. CR-06-0098-EFS, 2007 WL 655507, at *4 (E.D. Wash. Feb. 27, 2007) (denying motion in limine which

1 concerned "misleading" evidence as "too vague"); see also Weiss v. La
2 Suisse, Society D'Assurances Sur La Vie, 293 F. Supp. 2d 397, 407-08
3 (S.D.N.Y. 2003) (denying motion to exclude evidence for a "lack[] of
4 specificity[,] " stating "[n]o particular documents or testimony have
5 been identified in the motion").

6 **Motion in Limine No. 2**

7 Plaintiff seeks to exclude "testimony or evidence regarding
8 [Plaintiff's past Americans with Disabilities Act ("ADA")] lawsuits and
9 prior settlements," arguing such evidence "is not relevant to any claim
10 or contention in the present case." (Pl.'s MIL No. 2, 2:18-20, 3:3-4.)
11 Plaintiff also argues such evidence should be excluded under Federal
12 Rule of Evidence ("FRE") 403 because of its prejudicial nature and the
13 consumption of time that would be necessitated by Plaintiff having to
14 "discuss the validity and merits of each of those lawsuits." Id. at
15 4:15-19, 8:2-13.

16 A & R rejoins that "Plaintiff's motion seeks to prevent
17 Defendant A & R from negating one of the elements that Plaintiff must
18 prove in order to prevail on his claim[,] " i.e. that he was
19 discriminated "on the basis of disability in the full and equal
20 enjoyment of the goods, services, . . . or accommodations of any place
21 of public accommodation[.]" (Opp'n to Pl.'s MIL No. 2, 2:7-10 (internal
22 quotation marks omitted).) A & R argues, "Plaintiff Lary Feezor is a
23 vexatious litigant. He cannot prove he intended to use and 'enjoy' the
24 goods and services at Arby's on the day in question, which is part of
25 the essential elements of his case in chief." Id. at 3:19-21. A & R
26 further counters that Plaintiff's "litigiousness is admissible because
27 it is relevant to [his] state of mind[,] . . . as well as his
28

1 credibility and modus operandi (i.e. [he] makes a living suing
2 businesses under the ADA).” Id. at 4:16-24.

3 “As a general matter, unless . . . prior lawsuits have been
4 shown to be fraudulent, the probative value of evidence pertaining to a
5 plaintiff’s litigation history is substantially outweighed by the danger
6 of jury bias.” Henderson v. Peterson, No. C 07-2838 SBA (PR), 2011 WL
7 2838169, at *5 (N.D. Cal. July 15, 2011); see also Moleski v. M.J.
8 Cable, Inc., 481 F.3d 724, 728 n.3 (9th Cir. 2007) (commenting on the
9 trial court’s admission of the plaintiff’s ADA litigation history and
10 stating that such evidence “appear[s] to be irrelevant or at least far
11 more prejudicial than probative”).

12 “The charge of litigiousness is a serious one,
13 likely to result in undue prejudice against the
14 party charged, unless the previous claims made by
15 the party are shown to have been fraudulent[. A]
16 plaintiff’s litigiousness may have some slight
probative value, but that value is outweighed by
the substantial danger of jury bias against the
chronic litigant. The trial court has a duty to
prevent exploitation of this prejudice[.]”

17 Seals v. Mitchell, No. CV 04-3764 NJV, 2011 WL 1399245, at *5 (N.D. Cal.
18 Apr. 13, 2011) (quoting Outley v. City of New York, 837 F.2d 587, 592 (2d
19 Cir. 1988)) (internal quotation marks, ellipses and brackets omitted).

20 In light of these FRE 403 considerations, and since A & R has
21 not shown that any of Plaintiff’s past ADA lawsuits were fraudulent, the
22 motion is GRANTED.

23 **Motion in Limine No. 3**

24 Plaintiff seeks to exclude “evidence regarding the amount of
25 statutory . . . damages he will receive if [Defendants] are found liable
26 for violating state and federal disabled access standards[.]” (Pl.’s MIL
27 No. 3, 2:3-6.) Plaintiff states “[he] is seeking the statutory *minimum*
28 amount of damages he is entitled to receive under California law for

1 each occasion that his rights were violated[, which] . . . is not a
2 question of fact but, rather, a conclusion of well-established law." Id.
3 at 2:11-14. Plaintiff argues "[t]he jury's only function is to determine
4 the number of occasions that [Plaintiff] was denied public accommodation
5 on the basis of disability[.]" Id. at 2:16-19. Once that is determined,
6 Plaintiff argues "the amount of statutory damages [Plaintiff] receives
7 becomes a simple question of multiplication." Id. at 2:22-24. Plaintiff
8 further argues that if the jury knows the amount of minimum statutory
9 damages he will automatically receive per occasion, "the risk of jurors
10 impermissibly focusing on the amount of damages [he] will receive -
11 instead of the number [of] occasions he was discriminated against -
12 increases dramatically." Id. at 2:25-3:2.

13 A & R rejoins that Plaintiff provides no authority to support
14 his position, and that his "motive is transparent[; h]e simply wants to
15 maximize the damages for his client." (Opp'n to Pl.'s MIL No. 3, 2:3-4,
16 2:7.) A & R further argues that "[i]t is . . . counterintuitive that a
17 jury cannot assess damages" since they "perform that function all the
18 time." Id. at 2:11-12.

19 Although Plaintiff states in this in limine motion that he is
20 seeking the statutory minimum amount of damages he is entitled to
21 recover under California law, the parties' proposed Joint Statement of
22 the Case, which was filed after Plaintiff filed this in limine motion,
23 indicates that Plaintiff is seeking damages for "an actual injury
24 (emotional distress)[.]" (ECF No. 88, 2:16-19.)

25 Since it is unclear whether Plaintiff is seeking to recover
26 actual damages greater than the statutory minimum permitted under state
27 law, the Court does not reach the merits of Plaintiff's arguments.
28 Therefore, the motion is DENIED.

1 **Motion in Limine No. 4**

2 Plaintiff seeks to prevent "Arby's . . . from presenting any
3 evidence that relates to any defense that should be pled as an
4 affirmative defense, but for which they failed to plead." (Pl.'s MIL No.
5 4, 3:15.)

6 It is unclear against which defendants this in limine motion
7 is directed. Further, the motion is vague and overbroad; no particular
8 testimony or documents are sought to be excluded. Therefore, the motion
9 is DENIED.

10 **Motion in Limine No. 5**

11 Plaintiff requests "an Order preventing testimony or evidence
12 regarding [potential court-awarded] attorney fees[.]" (Pl.'s MIL No. 5,
13 2:12-17.) Plaintiff argues such evidence is irrelevant "to any claim or
14 contention in the present case[,]" should be precluded under Rule 403,
15 and is "improper for attorney[] . . . comment" under Ninth Circuit law,
16 Brooks v. Cook, 938 F.2d 1048, 1051 (9th Cir. 1991). Id. at 2:19-26,
17 4:3-7.

18 A & R counters that "[t]he jury should be informed of the
19 consequences of its decision . . . [to] help them make an informed
20 decision." (Opp'n to Pl.'s MIL No. 5, 2:3-4.) A & R further argues that
21 it "should be able to mention attorney's fees to the jurors" since
22 "Courts recognize that the ADA is often used as a scheme to extort quick
23 settlements and provide plaintiff's attorneys exorbitant fees[.]" Id. at
24 3:4-6.

25 As stated by the Ninth Circuit in the context of a § 1983
26 civil rights action, "[t]he award of attorneys' fees is a matter of law
27 for the judge, not the jury." Brooks, 938 F.2d at 1051.

1 The jury's role is to determine liability and the
2 amount of damages. These determinations are
3 distinct from the awarding of fees. By informing
4 the jury of the plaintiff's right to seek
5 attorneys' fees . . . , the court invite[s] the
6 jury to factor in a subsequent step-the court's
7 calculation of the ultimate judgment-that ha[s] no
8 relevance to the jury's determination of liability
9 and damages.

6 Furthermore, . . . informing the jury of the
7 possibility of fees could result in prejudice to
8 the plaintiff[.]

8 Id.; see also Redwood Christian Schools v. Cnty. of Alameda, No. C-01-
9 4282 SC, 2007 WL 214317, at *2 (N.D. Cal. Jan. 26, 2007) (granting motion
10 in limine to exclude evidence of availability of attorneys fees, stating
11 “[such] evidence is irrelevant and . . . unfairly prejudicial”).

12 For the stated reasons, the motion is GRANTED.

13 **B. A & R's Motions in Limine**

14 **Motion in Limine No. 1**

15 A & R seeks to “forbid[] Cross-Defendants Carisch, Inc., DBA
16 Arby's[;] Carisch Brothers L.P., DBA Arby's[;] and Golden Bear
17 Restaurant Group, Inc. [(“Cross-Defendants”)] from offering evidence,
18 . . . which was withheld from [A & R] during discovery[,]” arguing
19 “evidence wrongfully withheld . . . during discovery cannot be used
20 against A & R at trial.” (A & R's MIL No. 1, 2:2-6.)

21 This motion is over-broad and vague, and is therefore DENIED.
22 See Colton Crane Co., LLC v. Terex Cranes Wilmington, Inc., No. CV 08-
23 8525 PSG (PJWx), 2010 WL 2035800, at *1 (C.D. Cal. May 19,
24 2010) (“[M]otions *in limine* should rarely seek to exclude broad
25 categories of evidence, as the court is almost always better situated to
26 rule on evidentiary issues in their factual context during trial.”); see
27 also Lego v. Stratos Intern., Inc., No. C 02-03743 JW, 2004 WL 5518162,
28 at *1 (N.D. Cal. Nov. 4, 2004) (denying motion in limine to preclude

1 opinion testimony by any person who was not properly disclosed as an
2 expert as "too vague").

3 **Motions in Limine Nos. 2 & 3**

4 A & R seeks to exclude Plaintiff and Cross-Defendants' expert
5 witness Joe Card under Federal Rule of Civil Procedure ("FRCP") 37,
6 arguing the parties did not "disclose[] [Mr.] Card as a potential
7 witness . . . until May 14, 2012, when [they] served [their] pretrial
8 disclosures[,] " after discovery had closed. (A & R's MIL No. 2, 3:14-19;
9 A & R's MIL No. 3, 3:14-21.)

10 Plaintiff rejoins that "he was not required to [include]" Mr.
11 Card in his initial disclosures since FRCP 26(a)(2)(A)(B)(i)[-](iv)
12 governs the "[d]isclosure of expert testimony and witnesses," and
13 Plaintiff "properly disclosed [Mr. Card]" pursuant to these rules.
14 (Pl.'s Opp'n to A & R's MIL No. 2, 2:22-24, 3:21-27, 4:4-6.) Cross-
15 Defendants counter that Mr. "Card's Expert report was served on A & R's
16 counsel on September 8, 2011." (Cross-Defs.' Opp'n to A & R's MIL No. 3,
17 2:4-5.)

18 In its reply briefs, A & R argues "[w]hile it is true that
19 there is a procedure for listing expert witnesses, this does not negate
20 [the parties'] obligation to list all known witnesses in their initial
21 disclosures." (A & R's Reply Brief in Supp. of MIL No. 2, 2:2-3; A & R's
22 Reply Brief in Supp. of MIL No. 3, 2:3-4.) Concerning Cross-Defendants'
23 disclosure, A & R further argues that the September 8, 2011 disclosure
24 of Mr. Card's expert report was made solely by Plaintiff; "Cross-
25 Defendants never served anything." (A & R's Reply Brief in Supp. of MIL
26 No. 3, 2:4-8.)

27 "[FRCP] 26 requires parties to disclose the identity of any
28 expert witness 'accompanied by a written report' detailing the opinions

1 the expert will express and the data on which he or she will rely, 'at
2 the times and in the sequence that the court orders.'" Jarritos, Inc. v.
3 Reyes, 345 Fed. Appx. 215, 217 (9th Cir. 2009) (quoting FRCP 26(a)(2)).
4 In this case, the deadline to exchange initial expert disclosures was
5 September 8, 2011. See Stipulation and Order to Am. the Scheduling Order
6 to Extend Time to Disclose Expert Test., ECF No. 31.

7 A & R has not shown that Plaintiff did not timely disclose Mr.
8 Card as an expert witness. Further, no party submitted Mr. Card's expert
9 disclosure for the Court's consideration. Therefore, the Court cannot
10 determine whether Cross-Defendants properly disclosed Mr. Card as an
11 expert witness. For the stated reasons, the motion is DENIED.

12 **Motion in Limine No. 4**

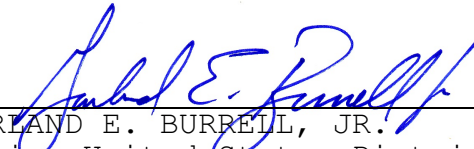
13 A & R seeks to exclude "any testimony, evidence and argument
14 regarding architectural features that are unrelated to Plaintiff's
15 disability[,]" arguing "Plaintiff lacks standing to seek relief based on
16 alleged ADA violations unrelated to his disability." (A & R's MIL No. 4,
17 2:2-4, 3:9-10.)

18 Plaintiff counters that "A & R simply fails to go beyond their
19 blanket assertion to allege which specific barriers they contend to be
20 unrelated to Feezor's disability and why." (Opp'n to A & R's MIL No. 4,
21 2:10-12.) Plaintiff further rejoins, "[r]egardless, A & R . . . ha[s]
22 overlooked the fact that [Plaintiff] nonetheless has standing under the
23 pled state law claims to remove even those barriers which are unrelated
24 to his disability." Id. at 2:12-15.

25 This in limine motion involves law and motion issues filed
26 after the prescribed last hearing date for such matters. Further, it is
27 unclear what evidence is involved in this motion, since A & R does not
28 identify the alleged architectural barriers at issue or how they are

1 unrelated to Plaintiff's disability. For the stated reasons, the motion
2 is DENIED.

3 Dated: July 11, 2012

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6 GARLAND E. BURRELL, JR.
7 Senior United States District Judge
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