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UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

NUTRITION DISTRIBUTION, LLC,
Plaintiff,
v.
ENHANCED ATHLETE, Inc., et al.,
Defendants.

No. 2:17-cv-01491-TLN-KJN

ORDER

I. INTRODUCTION

Presently pending before the court is plaintiff’s motion to compel the deposition of Anthony Hughes (ECF No. 36); parties’ requests for sanctions (ECF No. 42); defendants’ evidentiary objections (ECF No. 45); and plaintiff’s motion to strike (ECF No. 50).¹ These matters came on regularly for hearing on February 8, 2018, at 10:00 a.m. (ECF No. 54.) Robert Tauler appeared for plaintiff, and Michael Adams and Damon Mircheff appeared telephonically for defendants. After carefully considering the written briefing, the oral arguments of counsel, the court’s record, and the applicable law, the court GRANTS plaintiff’s motion to compel;

¹ Plaintiff filed a second motion to compel that included the declaration of Robert Tauler. (See ECF Nos. 41, 41-1–41-21.) The court considers the declaration and exhibits (ECF Nos. 41-1–41-21) as supporting documents for the original motion to compel (ECF No. 36). However, the second motion to compel (ECF No. 41) is redundant, and was improperly filed.

1 DENIES parties' requests for sanctions without prejudice; DENIES defendants' evidentiary
2 objections without prejudice, and DENIES plaintiff's motion to strike as moot.

3 II. BACKGROUND

4 A. Complaint and First Amended Complaint

5 On July 17, 2017, plaintiff Nutritional Distribution, LLC initiated this action against
6 Enhanced Athlete, Inc., alleging false advertising in violation of Section 43(a)(1)(B) of the
7 Lanham Act. (ECF No. 1.) Nutritional Distribution is a sports supplement manufacturer and
8 marketer, whereas Enhanced Athlete is a nutritional supplement company and direct competitor.
9 (Id. at 5–6.) In the original complaint, plaintiff asserted that Anthony Hughes (a.k.a. Dr. Tony
10 Huge, a.k.a. Charles Anthony Hughes) is a founder of Enhanced Athlete. (Id. at 6.) Yet, plaintiff
11 did not name Hughes as a defendant in the original complaint.

12 On September 13, 2017, Enhanced Athlete answered the complaint, denying plaintiff's
13 claim of false advertising, and raising various affirmative defenses. (See ECF No. 6.)
14 Subsequently, on January 8, 2018, plaintiff filed the first amended complaint, after being granted
15 leave to amend, and named additional defendants, including Charles Anthony Hughes. (See ECF
16 Nos. 33, 34.)

17 B. Notice of Deposition and Motions

18 On January 4, 2018, plaintiff served Enhanced Athlete with a deposition notice for
19 Hughes for January 19, 2018. (See Declaration of Robert Tauler, Ex B, ECF No. 41-3.) On
20 January 12, 2018, Enhanced Athlete rejected the notice of deposition. (See Declaration of Damon
21 Mircheff, Ex 3, ECF No. 44-3 at 2.) The deposition did not occur.

22 On January 18, 2018, plaintiff filed the instant motion to compel the deposition of
23 Hughes. (ECF No. 36.) On February 1, 2018, plaintiff filed a second motion to compel along
24 with the declaration of plaintiff's attorney Robert Tauler, as well as numerous exhibits. (See ECF
25 Nos. 41, 41-1–41-21.) Later that day, parties filed their joint statement (ECF No. 42); defendants
26 filed declarations in opposition (ECF Nos. 43, 44.); and defendants filed evidentiary objections to
27 the declaration of Robert Tauler (ECF No. 45). Plaintiff subsequently responded and moved to
28 strike defendants' evidentiary objections. (ECF Nos. 49, 50.)

1 C. Declaration of Robert Tauler

2 All of the evidence relied on by plaintiff in support of the instant motion to compel is
3 included in the exhibits to Robert Tauler's declaration. (See ECF Nos. 41-1–41-21, 42.) Below
4 are some of the relevant statements found in the exhibits.

5 Through the Facebook page of "EnhancedAthlete.com", Hughes posted the mission
6 statement of Enhanced Athlete, and claimed that he wrote it. (Declaration of Robert Tauler, Ex.
7 D, ECF No. 41-5.) Through that same page, on September 3, 2016, Hughes wrote a diary-like
8 post, detailing his path from lawyer to supplement manufacturing and stated that "I still reinvest
9 all the money in the quality of product and development so that prices can remain the lowest in
10 the industry." (Declaration of Robert Tauler, Ex. E, ECF No. 41-6.)

11 On Hughes' personal Facebook page, he claims that he works at "enhancedathlete.com."
12 (Declaration of Robert Tauler, Ex. F, ECF No. 41-7.) On April 30, 2017, Hughes posted a series
13 of photos on his page and stated, "Last day in Columbia. Set up distribution for
14 www.EnhancedAthlete.com." (Declaration of Rober Tauler, Ex. G, ECF No. 41-8.)

15 Through the Instagram account "enhancedathlete", Hughes posted "Dr. Tony Huge here!
16 ... I have been working my a** off for you guys! Creating so many new supplements,
17 researching, growing and most important answering each and every one of your guys questions
18 [sic]." (Declaration of Robert Tauler, Ex. I, ECF No. 41-10.) Another post from
19 "enhancedathlete" on Instagram on December 29, 2017, stated "We are coming out with a private
20 server where there will be NO censorship as well as loading 10-15 videos a day to the Dr. Tony
21 Huge Channel." (Declaration of Robert Tauler, Ex. Q, ECF No. 41-18.)

22 Instagram user "ifbbdandecker" also posted a picture of Hughes and wrote "Congrats to
23 Dr. Tony Hughes CEO of my sponsor @enhancedathlete." (Declaration of Robert Tauler, Ex. L,
24 ECF No. 41-13.) Instagram user "teamenhancedathlete" shared the same picture and wrote
25 "#motivationmonday goes out to the boss man @enhancedathlete, He won the overall men's
26 bodybuilding this weekend in Culver City 2017 Gran Prix." (Declaration of Robert Tauler, Ex. J,
27 ECF No. 41-11.)

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1 A profile of Enhanced Athlete was posted on “bodybuilderinthailand.com” an states
2 “Enhanced Athlete . . . is a good research company . . . the owner Dr. Tony is a Lawyer in the
3 USA and a stand up guy.” (Declaration of Robert Tauler, Ex. M, ECF No. 41-14.)

4 In response to plaintiff’s special interrogatory No. 2, defendants answered “To the extent
5 Charles Anthony Hughes ‘advertises’ or ‘promotes’ any SARMS PRODUCTS through YouTube
6 videos, he creates that content and controls the videos, which are publically available.”

7 (Declaration of Robert Tauler, Ex. P, ECF No. 41-17 at 5–6.)

8 III. DISCUSSION

9 Plaintiff seeks to compel Enhanced Athlete to produce Anthony Hughes for a deposition,
10 pursuant to Federal Rule of Civil Procedure 30(b)(6). (See ECF Nos. 36, 42.) As an ancillary
11 issue, defendants object to the exhibits included in Mr. Tauler’s declaration in support of the
12 motion, as lacking foundation and as inadmissible hearsay. (See ECF No. 45) Each party also
13 seeks sanctions against the other. (See ECF No. 42.)

14 A. Legal Standards

15 When a corporation is a party to civil litigation, the corporation “may be noticed pursuant
16 to Rule 30(b)(6) of the Federal Rules of Civil Procedure, . . . [and] the party seeking the
17 deposition may identify a specific officer, director, or managing agent to be deposed and notice
18 that person under Rule 30(b)(1).” United States v. Afram Lines (USA), Ltd., 159 F.R.D. 408, 413
19 (S.D.N.Y. 1994)

20 The term “managing agent” in Rule 30(b) “should not be given too literal an interpretation
21 but rather should depend largely on whether the interests of the individual involved are identified
22 with those of his principal and on the nature of his ‘functions, responsibilities and authority . . .
23 respecting the subject matter of the litigation.’ Tomingas v. Douglas Aircraft Co., 45 F.R.D. 94,
24 96 (S.D.N.Y. 1968) (citing Kolb v. A. H. Bull Steamship Co., 31 F.R.D. 252, 254
25 (E.D.N.Y.1962).)

26 The Ninth Circuit has not, apparently, had occasion to address the
27 standards under which a corporate employee will be determined to
28 be a “managing agent.” However, courts around the country take
largely consistent approaches, and consider the following factors:
“(1) whether the individual is invested with general powers

1 allowing him to exercise judgment and discretion in corporate
2 matters; (2) whether the individual can be relied upon to give
3 testimony, at his employer's request, in response to the demand of
4 the examining party; (3) whether any person or persons are
5 employed by the corporate employer in positions of higher
6 authority than the individual designated in the area regarding which
7 information is sought by the examination; (4) the general
responsibilities of the individual respecting the matters involved in
the litigation." . . . [Other factors include], whether the employee
can be depended upon to carry out the employer's directions, and ...
whether the individual can be expected to identify him or herself
with the interests of the corporation as opposed to the interests of
the opposing party."

8 Calderon v. Experian Info. Sols., Inc., 287 F.R.D. 629, 632 (D. Idaho 2012), aff'd, 290 F.R.D. 508
9 (D. Idaho 2013) (internal citations omitted); accord Louis Vuitton Malletier v. Dooney & Bourke,
10 Inc., No. 04 CIV. 5316 RMB MHD, 2006 WL 3476735, at *15 (S.D.N.Y. Nov. 30, 2006); Boss
11 Mfg. Co. v. Hugo Boss AG, No. 97CIV.8495(SHS)(MHD), 1999 WL 20828, at *3 (S.D.N.Y.
12 Jan. 13, 1999); In re Honda Am. Motor Co., Inc. Dealership Relations Litig., 168 F.R.D. 535,
13 540–41 (D. Md. 1996); Tomingas, 45 F.R.D. at 96.

14 Importantly, “whichever variation of the test used, virtually all courts and commentators
15 agree that the question of whether a particular person is a ‘managing agent’ is to be answered
16 pragmatically, on an ad hoc basis, considering the facts of the particular case. Further, at least
17 where the question is whether the deposition should occur, as opposed to whether the corporation
18 may ultimately be bound by the employee’s statements, the . . . witness’s likely ‘identification
19 with the interests of the employer’—is said to be the ‘paramount test.’” Calderon, 287 F.R.D. at
20 632 (citing cases).

21 Moreover, while the burden is on the party seeking the discovery to
22 prove that the potential witness is a managing agent of the
23 corporation, this burden is a modest one, and at least at the
24 discovery stage, all doubts are to be resolved in favor of the party
25 seeking the depositions. . . . Thus, courts have concluded that if
there is at least a “close question” as to the managing agent status of
a potential witness, doubts should be resolved in favor of allowing
the deposition, with the final determination of whether the agent has
the ability to bind the corporation to be left for trial.

26 Calderon, 287 F.R.D. at 632–33 (internal citations omitted); accord Boss Mfg. Co., 1999 WL
27 20828, at *4; Sugarhill Records Ltd. v. Motown Record Corp., 105 F.R.D. 166, 171 (S.D.N.Y.
28 1985); Tomingas, 45 F.R.D. at 97.

1 B. Analysis

2 1. *Exhibits in support of the motion to compel*

3 According to defendants, the exhibits provided by Robert Tauler are inadmissible under
4 the Federal Rules of evidence because they lack foundation and consist of hearsay. (See ECF No.
5 45.) At the same time, during the hearing, defendants confirmed that they do not assert that any
6 of the exhibits were fabricated or otherwise altered by plaintiff.

7 Defendants’ evidentiary objections are unpersuasive. The exhibits relied upon by plaintiff
8 are screenshots of websites, such as Facebook and Instagram—public information, readily
9 available, and not substantively disputed by defendants. (See ECF Nos. 41-1–41-21.) Seeing as
10 the burden to prove whether or not someone is a managing agent is a “modest one,” screenshots
11 from websites that contain Hughes’ own statements are sufficient to carry that burden. See
12 Calderon, 287 F.R.D. at 632–33. Importantly, defendants do not assert that these screenshots are
13 fake or manipulated in anyway, rather they attack them with technical evidentiary objections that
14 are generally reserved for motions in limine. Moreover, as explained, when there is a close call
15 as to whether an individual is a managing agent or not, the court may order the deposition,
16 without answering the question of whether or not such testimony will later bind the corporation at
17 trial. See Calderon, 287 F.R.D. at 632–33.

18 Therefore, the court denies defendants’ evidentiary objections, insofar as they relate to the
19 instant question of whether or not Hughes is a managing partner under Federal Rule of Civil
20 Procedure 30(b)(6). The court does not decide any other issue regarding whether such evidence
21 is admissible for other purposes, as such a question is not before the court.

22 2. *“Managing agent” under Federal Rule of Civil Procedure 30(b)(6)*

23 Plaintiff asserts that the exhibits detailed above “make clear that Mr. Hughes directly
24 manages advertising of Enhanced Athlete products, which is the central issue of this dispute.”
25 (ECF No. 42 at 5.)

26 Defendants counter that Hughes has merely “acted as a ‘brand ambassador’ for Enhanced
27 Athlete, discussing on social media his personal use of Enhanced Athlete products, and in doing
28 so promoting Enhanced Athlete’s brand and products.” (Id. at 11.) They maintain that Hughes is

1 not an employee of Enhanced Athlete; they have no control over his conduct; he may unilaterally
2 stop his role as brand ambassador at any time; and the only compensation he has received is the
3 payment of some travel expenses in exchange for his role as brand ambassador. (See Id. at 11–
4 14.)

5 However, as the exhibits detailed above demonstrate, Hughes and others have made
6 numerous statements that would lead a third party to believe that he has a very prominent role at
7 Enhanced Athlete. Indeed, Hughes holds himself out as working at Enhanced Athlete, and others
8 have called him the owner, CEO, and boss man of the company. (See Declaration of Robert
9 Tauler, Exs. F, J, L, M, ECF Nos. 41-7, 41-11, 41-13, 41-14.)

10 Under the general rules of agency law, “[a]gency ‘can be established either by agreement
11 between the agent and the principal, that is, a true agency [. . .], or it can be founded on ostensible
12 authority, that is, some intentional conduct or neglect on the part of the alleged principal creating
13 a belief in the minds of third persons that an agency exists, and a reasonable reliance thereon by
14 such third persons.’” Goldman v. SunBridge Healthcare, LLC, 220 Cal. App. 4th 1160, 1173
15 (2013) (citations omitted).

16 Instead of disavowing the public statements that Hughes owns and runs the company,
17 Enhanced Athlete has allowed these statements to stand, while speciously claiming before the
18 court that Hughes is only a “brand ambassador” and not an employee or agent of Enhanced
19 Athlete. At minimum, Hughes holds himself out as an agent of Enhanced Athlete. At maximum,
20 Hughes created, owns, and controls the company. Defendants’ acquiescence, and apparent
21 neglect, in allowing Hughes and others to continue to refer to Hughes as the owner, CEO, and
22 boss man of Enhanced Athlete undermines defendants’ assertions that he has no role at the
23 company. Therefore, the record supports a finding that Hughes is, at least, an ostensible agent of
24 Enhanced Athlete, notwithstanding defendants’ declarations before this court that Hughes is not
25 an agent or employee. See Goldman, 220 Cal. App. 4th at 1173.

26 Moreover, “where the question is whether the deposition should occur, as opposed to
27 whether the corporation may ultimately be bound by the employee’s statements, the . . . witness’s
28 likely ‘identification with the interests of the employer’—is said to be the ‘paramount test.’

1 Calderon, 287 F.R.D. at 632 (citing cases). Based upon Hughes' own assertions, it is clear that he
2 identifies himself with the interests of Enhanced Athlete.

3 Additionally, to the extent that Enhanced Athlete concedes that Hughes has any role at
4 Enhanced Athlete, that role involves Hughes creating his own advertising content to promote the
5 company. (See ECF No. 42 at 4.) Even this modest concession supports a finding that Hughes is
6 a managing agent for the purposes of Federal Rule of Civil Procedure 30(b)(6), because it
7 demonstrates that Hughes has a direct role in creating Enhanced Athlete's advertising content, the
8 subject matter of the litigation. See Tomingas, 45 F.R.D. at 96.

9 Importantly, the court need not decide whether Hughes is an agent of Enhanced Athlete
10 for all purposes, as the only question here is whether or not plaintiff may compel Hughes'
11 deposition through Enhanced Athlete. The court finds that the record before it sufficiently
12 demonstrates that Hughes is a managing agent for the purposes of Federal Rule of Civil
13 Procedure 30(b)(6), and Enhanced Athlete must produce Hughes for a deposition.

14 At this juncture, however, the court does not decide whether Hughes is an agent of
15 Enhanced Athlete for all purposes, or whether his statements shall bind Enhanced Athlete at trial.

16 3. *Sanctions*

17 In the joint statement regarding the motion to compel, each party argues that sanctions are
18 appropriate against the other. (See ECF No. 42.) The court finds that these issues are premature.
19 However, parties are advised that their meet and confer efforts here were unsatisfactory. The
20 court expects that parties' future meet and confer efforts will be thorough and conducted with the
21 utmost professionalism.

22 IV. CONCLUSION

23 For the forgoing reasons, IT IS HEREBY ORDERED that:

- 24 1. Plaintiff's motion to compel the deposition of Anthony Hughes (ECF No. 36) is
25 GRANTED.
- 26 2. Enhanced Athlete shall produce Anthony Hughes for a deposition, within 60 days of
27 the date of this order. Parties shall meet and confer and work together in furtherance
28 of this order, including the date and location of that deposition (as well as in-person or

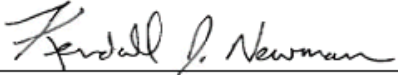
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by video, etc.).

- 3. The court reserves judgement as to whether or not the statements of Anthony Hughes will bind Enhanced Athlete at trial.
- 4. The parties' requests for sanctions (ECF No. 42) are DENIED WITHOUT PREJUDICE.
- 5. Defendants' evidentiary objections to the declaration of Robert Tauler (ECF No. 45) are DENIED WITHOUT PREJUDICE.
- 6. Plaintiff's motion to strike (ECF No. 50) is DENIED AS MOOT.
- 7. This order also disposes of plaintiff's improperly filed and redundant motion to compel (ECF No. 41).

IT IS SO ORDERED.

Dated: February 14, 2018


KENDALL J. NEWMAN
UNITED STATES MAGISTRATE JUDGE

14/17-1491.nutrition distribution.order re PL's MTC