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28UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIAANTHONY BOOKHAMER,
Plaintiff(s),
v.
SUNBEAM PRODUCTS INC.,
Defendant(s).

No. C 09-6027 EMC (DMR)

**ORDER RE JOINT DISCOVERY
LETTER [DOCKET NO. 76]**

The parties in this wrongful death and personal injury action filed a joint discovery letter. [Docket No. 76.] Defendant Sunbeam Products, Inc. asks the court pursuant to Federal Rule of Civil Procedure 37(c)(1) to exclude the testimony of five of Plaintiffs' witnesses, whom Plaintiffs disclosed after the August 24, 2012 deadline for completion of non-expert discovery. The court held a discovery hearing on September 27, 2012. This order memorializes the rulings made at the hearing.

Background

This case arises out of a fire, which led to the death of Victoria DiSilvestro. One of her sons, Plaintiff Anthony Bookhamer, was severely injured in the incident. Because Anthony Bookhamer is a minor, Plaintiff Lena J. Tryon, his maternal grandmother and mother of the decedent, represents him as his guardian *ad litem*. She also serves as the personal representative of Victoria DiSilvestro's estate. Plaintiffs Charles T. Martin, Jr. and Carl DiSilvestro are successors in

1 interest to Victoria DiSilvestro's estate. On December 23, 2009, Plaintiffs filed this suit against
2 Defendant, alleging multiple causes of action based upon the assertion that Defendant's allegedly
3 defective electric mattress pad ignited the lethal fire. [See Docket Nos. 1, 32.]

4 On August 28, 2012, Plaintiffs served Defendant with a document that identified several new
5 potential witnesses, including John Tryon, the brother of Lena Tryon; Debbie Wakefield, a
6 firefighter; and Shirin Ghaheri, M.D., and Jessica Kurtz, Plaintiff Anthony Bookhamer's mental
7 healthcare providers. On September 7, 2012, Plaintiffs served an additional supplemental
8 disclosure, which identified Vernon Tryon, another brother of Lena Tryon, as a person who may
9 have information relevant to the issues in this case, including the subject electric product.

10 Plaintiffs argue that the court should not exclude John and Vernon Tryon's testimony because
11 Plaintiffs were not aware that they had discoverable information prior to the discovery cut-off.
12 Plaintiffs also assert that Defendant knew of Debbie Wakefield, Dr. Shirin Ghaheri, and Jessica
13 Kurtz before the discovery cut-off, obviating Plaintiffs' need to include these witnesses in their
14 supplemental disclosures. Specifically, Plaintiffs insist that Defendant was aware of these witnesses
15 because Debbie Wakefield's name arose during a deposition on August 21, 2012, and because
16 Defendant knew that Anthony Bookhamer had received mental healthcare from the institution where
17 Dr. Ghaheri and Ms. Kurtz work. Plaintiffs propose that the court extend the non-expert discovery
18 cut-off date to allow Defendant to depose all of these witnesses.

19 **Applicable Law**

20 Pursuant to Rule 26(a) of the Federal Rules of Civil Procedure, a party's initial disclosures
21 must identify witnesses "likely to have discoverable information . . . that the disclosing party may
22 use to support its claims or defenses." Fed. R. Civ. P. 26(a). This duty encompasses an affirmative
23 obligation to supplement the disclosures "in a timely manner if the party learns that in some material
24 respect the disclosure or response is incomplete or incorrect, and if the additional or corrective
25 information has not otherwise been made known to the other parties during the discovery process or
26 in writing." *Apple, Inc. v. Samsung Elecs. Co.*, No. 11-1846 LHK, 2012 WL 3155574, at *4 (N.D.
27 Cal. Aug. 2, 2012) (ellipses in original) (quoting Fed. R. Civ. P. 26(e)(1)(A)). "[I]ncidental
28 discovery, particularly during a deposition, of information ordinarily subject to supplementation

1 evidence weighs against excluding their testimony from the case. On the other hand, Debbie
2 Wakefield's information about community support and fund-raising will implicate only the damages
3 phase of the case, and, as Plaintiffs conceded during the hearing, to only a minor degree. This factor
4 weighs toward excluding her testimony.

5 The fifth factor weighs strongly toward excluding all three potential witnesses' testimony.
6 John and Vernon Tryon are clients of Plaintiffs' counsel, so counsel has long known of their
7 existence and had access to them. During the discovery hearing, Plaintiffs' counsel conceded that
8 John and Vernon previously had been interviewed, but that counsel had neglected to make sure that
9 they were asked questions that would elicit the evidence for which counsel now wish to use them.
10 With respect to Debbie Wakefield, Plaintiffs contend that the parties learned about her on August
11 21, 2012 during the deposition of Cathleen Woodward. However, Plaintiffs have made no showing
12 that the deposition revealed Debbie Wakefield to have any relevant knowledge that would have
13 placed Defendant on notice of her becoming a witness. Moreover, Plaintiffs inexplicably waited
14 until August 28, 2012 to inform Defendant that she had material evidence.

15 Taking these factors together, the court concludes that they weigh in favor of excluding the
16 testimony of John and Vernon Tryon, as well as Debbie Wakefield, and that Plaintiffs have not meet
17 their burden of establishing that their late disclosures were harmless or substantially justified.

18 The court also denies Plaintiffs' request to set a new discovery cut-off date. That power lies
19 with the presiding judge. *See Nuance Commn'cs, Inc.*, 2012 WL 2838431, at * 1.

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IT IS SO ORDERED.

Dated: October 1, 2012

