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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

MICHAEL RODMAN,
Plaintiff,
v.
SAFEWAY, INC.,
Defendant.

Case No. 11-cv-03003-JST

**ORDER GRANTING SAFEWAY'S
MOTION IN LIMINE NO. 3 TO
EXCLUDE THE TESTIMONY OF ERIC
FALSKEN**

Re: Dkt. No. 335

Now before the Court is Defendant Safeway, Inc.'s motion in limine to exclude the testimony of witness Eric Falsken. ECF No. 335. The Court will grant the motion.

I. BACKGROUND

This is a consumer class action about Safeway's online grocery delivery business, which operates through the Safeway.com website. ECF No. 1. The case concerns Safeway's online grocery delivery business, which operates through the Safeway.com website. Plaintiff alleges in his complaint that Safeway promised Safeway.com customers that they would pay the same prices online that Safeway charged in its physical stores, but that in fact Safeway marked up its online prices without telling its online customers. Plaintiff filed his lawsuit on June 17, 2011.

The parties' allegations and defenses are set forth in several other prior Court orders. In those orders, the Court certified a class of Safeway.com customers; entered summary judgment in favor of Plaintiff and the class regarding liability with regard to class members who registered with Safeway.com on or after January 1, 2006; and entered summary judgment in Plaintiff's favor regarding damages during the same period. The Court denied summary judgment to Plaintiff with regard to class members who registered prior to January 1, 2006, finding that disputes of material fact remained concerning whether "class members who registered prior to 2006 ever assented to

1 [the] Special Terms” promising price parity between the online and physical stores. ECF No. 331
2 at 28. Trial with regard to Safeway’s liability, if any, for the pre-2006 period is scheduled to begin
3 on October 7, 2015.

4 Of relevance to this motion, prior to 2006, Safeway participated in a joint venture called
5 GroceryWorks that operated the online portion of Safeway’s business. Safeway owned part of
6 GroceryWorks, but it was a separate entity from Safeway. ECF No. 273 at 4:8-10.

7 On August 20, 2015, Plaintiff submitted a declaration from Eric Falsken in support of
8 Plaintiff’s motion for summary judgment as to the period before 2006. ECF No. 325. The
9 declaration was filed late, coming almost three weeks after the Court had taken the motion under
10 submission after hearing. In it, Falsken stated that he was employed by GroceryWorks from
11 November 2001 to September 2002 as a software engineer, and that he wrote code related to the
12 user registration process for Safeway.com. ECF No. 325-2. He further stated that the code as
13 written required Safeway.com registrants to agree to certain “Terms and Conditions” before being
14 accepted by Safeway. Id. His declaration does not address whether registrants were required to
15 agree to the “Special Terms” at issue in this case, or whether the “Terms and Conditions” to which
16 he refers were the same as those “Special Terms.”

17 Falsken is not alleged ever to have worked directly for Safeway. In its motion to exclude
18 Falsken’s testimony, and in its prior opposition to Plaintiff’s motion to permit the late filing of
19 Falsken’s declaration in connection with the pending summary judgment motions,¹ Safeway states
20 without contradiction that it has no record of Falsken or his work, and that the Plaintiff’s
21 submission of Falsken’s declaration was the first time Safeway became aware of Falsken’s
22 existence. The only justification Plaintiff gave for his delay in providing this evidence was that
23 Plaintiff’s counsel did not “intensif[y] preparations for possible trial . . . including internet search
24 for potential rebuttal and/or impeachment evidence with respect all currently-unresolved issues”
25 until after the summary judgment hearing. ECF No. 325 at 2. It appears that Plaintiff located
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27 ¹ The Court denied Plaintiff’s motion to submit Falsken’s untimely declaration in support of its
28 summary judgment motion, but left for another day whether Falsken would be permitted to testify
at trial. ECF No. 331 at 29 n.14.

1 Falsken by using an online search engine that he could have used at any time. ECF 344 at 2:4-7
2 (“In preparing for a trial concerning pre-2006 issues, including seeking to identify potential
3 rebuttal and/or impeachment evidence available online, Plaintiff’s counsel located the LinkedIn
4 webpage of Eric Falsken, which listed him as a former Software Engineer for GroceryWorks from
5 November 2001 through September 2002.”).

6 The discovery deadline for summary judgment related discovery passed on June 23, 2014.
7 ECF No. 169 at 2.

8 **II. ANALYSIS**

9 Federal Rule of Civil Procedure 26(a)(1) requires a party to identify, without waiting for a
10 discovery request, the identity of all potential witnesses and the purposes for which they may be
11 called. Rule 26(e)(1) further provides that a party has a duty to supplement its earlier disclosures
12 when they are incorrect or incomplete. When a party “fails to provide information or identify a
13 witness as required by Rule 26(a) or (e), the party is not allowed to use that information or
14 witness . . . at trial, unless the failure was substantially justified or is harmless.” Fed. R. Civ. Proc.
15 37(c)(1).

16 “Among the factors that may properly guide a district court in determining whether a
17 violation of a discovery deadline is justified or harmless are: (1) prejudice or surprise to the party
18 against whom the evidence is offered; (2) the ability of that party to cure the prejudice; (3) the
19 likelihood of disruption of the trial; and (4) bad faith or willfulness involved in not timely
20 disclosing the evidence.” Lanard Toys Ltd. v. Novelty, Inc., 375 F. App’x 705, 713 (9th Cir.
21 2010). The burden to prove harmlessness is on the party facing sanctions. Yeti by Molly, Ltd. v.
22 Deckers Outdoor Corp., 259 F.3d 1101, 1107 (9th Cir. 2001).

23 The Court finds that Plaintiff’s late disclosure was not substantially justified. “Substantial
24 justification is justification to a degree that could satisfy a reasonable person that parties could
25 differ as to whether the party was required to comply with the disclosure request.” Hewitt v.
26 Liberty Mut. Grp., Inc., 268 F.R.D. 681, 682 (M.D. Fla. 2010) (internal quotation marks omitted).
27 Here, no one suggests that there was a legitimate dispute concerning Plaintiff’s discovery
28 obligations, Liew v. Breen, 640 F.2d 1046, 1050 (9th Cir. 1981), or any other impediment to

1 Plaintiff's having disclosed Felsken earlier, had Plaintiff timely searched for the information. The
2 case has been pending for four years.

3 The Court next turns to the question of whether the late disclosure was harmless. First, the
4 Court concludes that there will be "prejudice or surprise" to Safeway if Felsken is allowed to
5 testify. Discovery is closed; the parties' pretrial disclosures have all been filed; and trial is
6 scheduled to begin in a few weeks. Safeway has been deprived of the opportunity to prepare for
7 trial by deposing Falsken, evaluating his testimony, gathering responsive evidence, and filing
8 motions concerning Falsken's testimony. That prejudices Safeway. Garcia v. Qwest Corp., No.
9 CV-07-999-PHX-LOA, 2008 WL 4531657, at *5 (D. Ariz. Oct. 3, 2008); Elliott v. United Parcel
10 Serv., Inc., No. C07-05453 RBL, 2009 WL 213004, at *2 (W.D. Wash. Jan. 28, 2009); Jones v.
11 Frazesn, No. 2:07-CV-02758 RCT, 2009 WL 3254905, at *2 (E.D. Cal. Oct. 8, 2009).

12 Next, the Court concludes that Plaintiff cannot cure that prejudice. Plaintiff argues that
13 there is still enough time for Safeway to take Falsken's deposition, but that is unlikely to be the
14 end of Safeway's need to respond. If the deposition goes forward, Safeway will likely ask to take
15 other formal and informal discovery to respond to Falsken's testimony. It is very unlikely that this
16 work could be completed and incorporated into the parties' pretrial preparations quickly enough to
17 begin trial on October 7, 2015, as currently scheduled.

18 For similar reasons, the Court also concludes that the likelihood of disruption of the trial, if
19 the Court were to allow Falsken's testimony, is high. Safeway has stated its intention to seek not
20 only the right to fully investigate the new evidence, but to meet it with additional evidence. ECF
21 No. 335 at 3. This will disrupt the trial schedule to the prejudice of both Defendant and the
22 Court. "Disruption to the schedule of the court and other parties in that manner is not harmless.
23 Courts set such schedules to permit the court and the parties to deal with cases in a thorough and
24 orderly manner, and they must be allowed to enforce them, unless there are good reasons not to."
25 Wong v. Regents of Univ. of California, 410 F.3d 1052, 1062 (9th Cir. 2005).

26 Lastly, the Court concludes that Plaintiff's conduct was willful. The Ninth Circuit "has
27 stated that 'disobedient conduct not shown to be outside the control of the litigant' is all that is
28 required to demonstrate willfulness, bad faith, or fault." Henry v. Gill Indus., Inc., 983 F.2d 943,

1 948 (9th Cir. 1993) (quoting Fjelstad v. American Honda Motor Co., 762 F.2d 1334, 1341 (9th
2 Cir. 1985)). Plaintiff may argue that its failure to discover Falsken’s identity earlier was the result
3 of simple negligence, not a calculated attempt to deprive Safeway of relevant evidence, but
4 “[i]nadvertent mistakes and unintentional oversights are not substantial justifications for delay.”
5 Baltodano v. Wal-Mart Stores, Inc., No. 2:10-CV-2062-JCM-RJJ, 2011 WL 3859724, at *2 (D.
6 Nev. Aug. 31, 2011).

7 In Baltodano, Plaintiff’s counsel failed to provide a complete and accurate estimate of the
8 future medical damages suffered by Plaintiff until after the expert disclosure deadline had passed.
9 Id. at *3. There was no evidence that counsel had affirmatively intended to frustrate defendant,
10 merely that “while he had intended to [provide a complete estimate] at the outset of discovery,” he
11 failed to do so “despite having had nearly the entire discovery period within which to gather such
12 evidence.” Id. at *4. The court concluded that counsel’s failure was willful. Id. Here, the
13 evidence concerning Falsken was available to Plaintiff at any time he chose to look for it. It was
14 available before the Rule 26 disclosure deadline; indeed, it was available before Plaintiff filed his
15 complaint. Plaintiff simply did not look in time. The Court concludes that the failure to disclose
16 Falsken was willful.

17 The Court recognizes that Falsken’s testimony is important, perhaps even central, to
18 Plaintiff’s claim that Safeway required assent to the Special Terms prior to January 1, 2006, and
19 that exclusion of this evidence will have a serious negative impact on Plaintiff’s claim.
20 Nonetheless, where late discovery has seriously prejudiced the Court and parties without
21 substantial justification, “discovery sanctions can be appropriate even where they preclude ‘a
22 litigant’s entire cause of action or defense.’” Jarritos, Inc. v. Reyes, 345 F. App’x 215, 217 (9th
23 Cir. 2009) (quoting Yeti, 259 F.3d at 1106).

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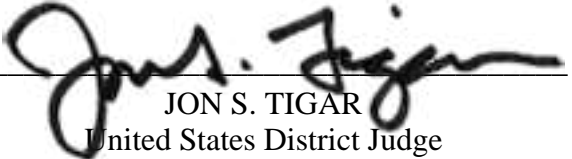
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1 **CONCLUSION**

2 For all the foregoing reasons, the Court concludes that Plaintiff's failure timely to disclose
3 Eric Falsken was neither substantially justified nor harmless. Safeway's motion in limine to
4 exclude Falsken's testimony is granted.

5 IT IS SO ORDERED.

6 Dated: September 11, 2015

7 
8 JON S. TIGAR
9 United States District Judge