Schneider et al v. Chipotle Mexican Grill, Inc. Doc. 70

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

MARTIN SCHNEIDER, et al.,
Plaintiffs,
v.
CHIPOTLE MEXICAN GRILL, INC.,
Defendant.

Case No. 16-cv-02200-HSG (KAW)

ORDER REGARDING JOINT DISCOVERY LETTER

Re: Dkt. No. 66

Plaintiffs Sarah Deigert, Martin Schneider, and Nadia Parikka were deposed regarding consumer protection claims brought against Defendant Chipotle Mexican Grill. Defendant then subpoenaed non-parties Paul Primozich, Kevin Cosgrove, and Sandra Coller for the stated purpose of corroborating testimony given by the above-mentioned Plaintiffs. (Joint Letter, Dkt. No. 66.)

On June 26, 2017, the parties filed a joint letter regarding the depositions of the three non-parties. The court deems the matter suitable for disposition without a hearing pursuant to Civil Local Rule 7-1(b). Having considered the papers filed by the parties, and for the reasons set forth below, the Court GRANTS Plaintiffs' request to quash the subpoena concerning Paul Primozich and DENIES the request to quash the subpoena concerning Kevin Cosgrove. The Court also DENIES the request to quash the subpoena for Ms. Coller, but GRANTS a protective order limiting Defendant to taking the deposition within twenty (20) miles of Ms. Coller's residence at Defendant's expense.

I. BACKGROUND

On April 27, 2015, Defendant began its advertising campaign, "G-M-Over It." (Compl. ¶ 1.) In this campaign, Defendant represented that it was becoming the first fast food chain in the United States to have a "GMO free menu that uses 'only non-GMO ingredients.'" (Id.) Defendant

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produced ads stating, for example, that "'all' of [Defendant's] food is now non-GMO," and that its foods have "No GMO" and were "made with no-GMO ingredients." (Compl. ¶¶ 35-36.) Defendant also advertised on its store fronts, stating "A Farewell to GMOs" and that "When it comes to our food, genetically modified ingredients don't make the cut;" similarly, Defendant's in-store signs stated: "Only non-GMO ingredients." (Compl. ¶¶ 37-38.)

Plaintiffs allege that this campaign is misleading because Defendant: "(1) serves protein products such as beef, chicken, and pork from poultry and livestock that have been raised on GMO feed; (2) serves dairy products such as cheese and sour cream derived from cows raised on GMO feed; and (3) sells beverages such as Coca-Cola and Sprite that are loaded with corn-syrup derived from GMO corn." (Compl. ¶ 2; see also Compl. ¶¶ 41-43.) Plaintiffs now seek to represent four classes, made up of "All persons residing in California[, Maryland, Florida, and New York], during the period April 27, 2015 to the present, who purchased and/or paid for Chipotle Food Products." (Compl. ¶¶ 56-59.)

On November 30, 2016, the case was assigned to the undersigned for discovery purposes. (Dkt. No. 39.) The parties have now submitted a joint discovery letter concerning Defendant's deposition subpoenas to non-parties.

II. LEGAL STANDARD

Under Rule 26, in a civil action, a party may obtain discovery "regarding any non-privileged matter that is relevant to any party's claim or defense and proportional to the needs of the case considering the importance of the issues at stake in the action, the amount in controversy, the parties' relative access to relevant information, the parties' resources, the importance of the discovery in resolving the issues, and whether the burden or expense of the proposed discovery outweighs its likely benefit." Fed. R. Civ. P. 26(b)(1). Additionally, the court must limit the frequency or extent of discovery if it determines that: "(i) the discovery sought is unreasonably cumulative or duplicative, or can be obtained from some other source that is more convenient, less burdensome, or less expensive; (ii) the party seeking discovery has had ample opportunity to obtain the information by discovery in the action; or (iii) the proposed discovery is outside the scope permitted by Rule 26(b)(1)." Fed. R. Civ. P. 26(b)(2)(C). Rule 45 also specifically

provides that "the court for the district where compliance is required must quash or modify a subpoena that: (i) fails to allow a reasonable time to comply; (ii) requires a person to comply beyond the geographical limits specified in Rule 45(c); (iii) requires disclosure of privileged or other protected matter, if no exception or waiver applies; or (iv) subjects a person to undue burden." Fed. R. Civ. P. 45(d)(3)(A).

Federal Rule of Civil Procedure 45 governs discovery of non-parties by subpoena. Rule 45 provides, among other things, that a party may command a non-party to testify at a deposition. Fed. R. Civ. P. 45(a)(1)(A)(iii). The scope of discovery through a Rule 45 subpoena is the same as the scope of discovery permitted under Rule 26(b). Beaver Cty. Employers Ret. Fund v. Tile Shop Holdings, Inc., No. 3:16-mc-80062-JSC, 2016 WL 3162218, at *2 (N.D. Cal. June 7, 2016) (citing Fed. R. Civ. P. 45 Advisory Comm.'s Note (1970); Fed. R. Civ. P. 34(a)).

"The Ninth Circuit has long held that nonparties subject to discovery requests deserve extra protection from the courts." Lemberg Law LLC v. Hussin, No. 3:16-mc-80066- JCS, 2016 WL 3231300, at *5 (N.D. Cal. June 13, 2016) (quotation omitted); see United States v. C.B.S., Inc., 666 F.2d 364, 371-72 (9th Cir. 1982) ("Nonparty witnesses are powerless to control the scope of litigation and discovery, and should not be forced to subsidize an unreasonable share of the costs of a litigation to which they are not a party"). Courts in this district have consequently held that "[o]n a motion to quash a subpoena, the moving party has the burden of persuasion . . . , but the party issuing the subpoena must demonstrate that the discovery sought is relevant." Chevron Corp. v. Donziger, No. 3:12-mc-80237-CRB, 2013 WL 4536808, at *4 (N.D. Cal. Aug. 22, 2013) (citation omitted); see also Optimize Tech. Solutions, LLC v. Staples, Inc., No. 5:14-mc-80095-LHK, 2014 WL 1477651, at *2 (N.D. Cal. Apr. 14, 2014) ("The party issuing the subpoena must demonstrate that the information sought is relevant and material to the allegations and claims at issue in the proceedings." (quotation omitted)).

III. DISCUSSION

A. Paul Primozich

Paul Primozich is a friend and former co-worker of Plaintiff Deigert. He is also the domestic partner of Plaintiffs' counsel, Matthew George. Defendant claims that the "primary

thrust" of its reasoning for wanting to depose Mr. Primozich is that "he is a key percipient witness with respect to various aspects of Ms. Deigert's claims." (Joint Letter at 5.) The Court disagrees.

First, Defendant argues that Mr. Primozich is a "direct percipient witness[] who can either substantiate or refute Plaintiff[] [Deigert's] alleged Chipotle purchases." (Joint Letter at 3-4.) Plaintiff Deigert testified that she had been eating at Chipotle for about 25 years. (Joint Letter, Ex. 1 ("Deigert Dep.") at 75:5-20.) Plaintiff Deigert testified further that Mr. Primozich, over the period of their friendship, joined her at Chipotle on "a couple" of occasions, "probably half a dozen." (Deigert Dep. at 73:6-9, 95:8-10.) Considering the long history Plaintiff Deigert has of patronizing Chipotle, "a couple" or "half a dozen" occasions where Mr. Primozich accompanied her cannot substantially establish or contradict purchases made over such a span of time. (Id.) Additionally, Plaintiff provided Defendant with purchase documentation, which corroborates Plaintiff Deigert's statements about her visits to Chipotle. (Joint Letter at 2.)

Second, Defendant argues that Mr. Primozich is the only person "with corroborating, non-privileged information regarding Plaintiff[] [Deigert's] understanding of the allegedly false advertising." (Joint Letter at 4.) Plaintiff Deigert testified that aside from her lawyer, she had not talked to anyone else regarding Chipotle's alleged use of GMO products. (Deigert Dep. at 73:22-25-74:1-2.) While Mr. Primozich is a friend and former co-worker of Plaintiff Deigert, her testimony belies Defendant's assertion that Mr. Primozich's testimony is essential to resolving her understanding of the advertisements at issue here. Though Plaintiff Deigert did have a conversation with Mr. Primozich about Chipotle's alleged use of GMO products, she characterized their exchange as "mostly my side conversation," not recalling whether he substantially engaged in a conversation with her on the topic at all. (Deigert Dep. at 73:12-16.) It is not clear what benefit would be gained from deposing Mr. Primozich based on a cursory, one-sided conversation between himself and Plaintiff Deigert.

Third, Defendant claims that since the class has not yet been certified, there is still a chance that Mr. Primozich could be a putative class member. (Joint Letter at 5.) The operative complaint specifies that "counsel for Plaintiffs" and their "successors" or "assigns" are excluded from class membership. (Compl. at ¶ 60.) As the beneficiary of Attorney George's will, Mr.

Primozich is expressly excluded from the class. (See Joint Letter at 2.) Furthermore, Defendant was assured in writing from Plaintiffs that Mr. Primozich would not be included in the class. (Joint Letter at 2.) Thus, Defendant's argument that Mr. Primozich could be a class member is unavailing.

Defendant also argues that Plaintiff Deigert's preexisting relationship with class counsel, Attorney George, through Mr. Primozich should support his deposition, as this may impact adequacy of the class representation. Defendant cites Serna as support for the argument that a preexisting relationship with class counsel might preclude a plaintiff from acting as representative for the class. Serna v. Big A Drug Stores, Inc., No. SACV 070276 (CJC), 2007 WL 7665762, at *2-3 (C.D. Cal. Oct. 9, 2007). In Serna, the plaintiff had been employed for 30 years as an "administrative agent" for class counsel, reporting directly to named partners of the firm. (Id. at *2.) The court in Serna found that the relationship between the employee and class counsel presented issues of conflicting interests which could have prevented Serna, as a class representative, from protecting the interests of absent class members over the attorneys for whom she worked. (Id.) Plaintiff Deigert's relationship with counsel, Attorney George, is readily distinguishable from that in Serna. Here, Plaintiff Deigert testified that between spring 2013 (when she and Attorney George first met) and October 2015, she saw Attorney George "maybe once every four--three to four months" in the course of meeting up with Mr. Primozich for a "dinner meeting" or "movie". (Deigert Dep. at 230:11-20.) She also testified that Attorney George never treated her to dinner or a movie, though Mr. Primozich had. (Deigert Dep. at 230:21-24.) Plaintiff Deigert's strongest tie, therefore, appears to be with Mr. Primozich, not class counsel. Her occasional meetings with Attorney George are readily distinguishable from the ongoing, 30-year employment relationship between class counsel and the rejected class representative in Serna. Importantly, the relationship here also lacks the inherently persuasive and authoritative nature of a relationship between an employer and their employee. Defendant cites no authority to support the proposition that the relationship at issue here would create a conflict of interest or otherwise impact the adequacy of class representation. As such, Defendant has not adequately demonstrated that Mr. Primozich's testimony concerns discoverable information, and

therefore the Court GRANTS Plaintiffs' request to quash the subpoena.

B. Kevin Cosgrove

Kevin Cosgrove is an investigator for Plaintiff counsel's law firm and a long-time family friend of Plaintiff Nadia Parikka. Mrs. Parikka testified that she knew nothing of Chipotle's alleged use of GMO products until she was informed of it at a gathering by Mr. Cosgrove. (Joint Letter, Ex. 3 ("Parikka Dep.") 109:15-22, 111:3-7, 112:7-9, 130:17-25.) Mrs. Parikka testified to two conversations about Chipotle's alleged GMO product use between her and Mr. Cosgrove. During the first conversation Mr. Cosgrove, in teasing Mrs. Parikka about her health conscience eating habits, told her about Chipotle's alleged use of GMO products. (Parikka Dep. at 143:11-17.) The second conversation was approximately a week later and arose from Mrs. Parikka's further questioning about Chipotle's advertisements. (Parikka Dep. at 144:4-15.) She testified that this conversation was brief. (Id. at 144:16-20.)

As an initial matter, Plaintiff claims that the conversations Mr. Cosgrove had with Mrs. Parikka are privileged under the doctrines of work product and attorney-client privilege. (Joint Letter at 3.) Plaintiff's deposition does not indicate that Mr. Cosgrove was acting in any sort of investigative role or at the behest of an attorney; it appeared to be a conversation between two friends. (See Parikka Dep. at 109:15-22; 112:17-25-113:1-2; 142:20-25-144.) It also appears from Plaintiff's deposition that she did not seek to retain Kaplan Fox until after her second conversation with Mr. Cosgrove; thus, Plaintiff's claims of privilege under the aforementioned doctrines are without merit.

Defendant argues that Mr. Cosgrove being Plaintiff Parikka's "only source of non-privileged information regarding the claims at issue," compounded by the fact that Plaintiff Parikka had some difficulty recalling the contents of the conversation between she and Mr. Cosgrove, support the upholding of the subpoena. (Joint Letter at 5.) The Court agrees. When questioned about her knowledge concerning which ingredients she thought to include GMO content, Plaintiff Parikka was unable to answer. (Parikka Dep. at 129:13-25-130:1-15.) Because

her understanding of the GMO inclusion is at issue[1], her conversations with Mr. Cosgrove may be relevant in gaining a better understanding of how she obtained her knowledge.

Defendant also argues that because Mr. Cosgrove referred Plaintiff Parikka to his employer Kaplan Fox, Mr. Cosgrove has "knowledge concerning [Plaintiff Parikka's] adequacy as [a] class counsel [representative]." (Joint Letter at 5.) In Hanlon, the Ninth Circuit stated that in order to resolve the issue of adequacy of class representation, two inquiries must be addressed: "1) do the named plaintiffs and their counsel have any conflicts of interest with other class members and 2) will the named plaintiffs and their counsel prosecute the action vigorously on behalf of the class?" Hanlon v. Chrysler Corp., 150 F.3d 1011, 1020 (9th Cir. 1998). The fact that Mr. Cosgrove, an employee of Kaplan Fox, was Plaintiff Parikka's primary source of information forming the basis of her claims in this action may present a conflict of interest. Here, Mr. Cosgrove has apparently provided information to Plaintiff Parikka that led her to seek representation from his employer. If Mr. Cosgrove is cultivating Plaintiff Parikka to be a class representative for purposes of certification, and ultimately out of loyalty to his employer, the interests of the absent class members to have their case vigorously prosecuted may be impacted. Further, as an employee of Kaplan Fox, Mr. Cosgrove may be forwarding his personal interests over those of the absent class members by bringing in Plaintiff Parikka as a class representative. The Court therefore concludes that the deposition of Mr. Cosgrove may proceed.

C. Sandra Coller

Sandra Coller is the girlfriend and state-appointed caretaker of Plaintiff Martin Schneider. Defendant claims that Ms. Coller is a "direct percipient witness[] who can either substantiate or refute Plaintiff[] [Schneider's] alleged Chipotle purchases." (Joint Letter at 3-4.) Defendant also claims that Ms. Coller is the only person not excluded by privilege doctrines who is able to speak to Plaintiff Schneider's "understanding of the allegedly false advertising." (Joint Letter at 4.) Ms. Coller responds that her attending a deposition would risk the health of Plaintiff Schneider since it

[1] In the joint letter, Defendant specifically alleges that Mr. Primozich and Ms. Coller are able to speak to the Plaintiffs' "understanding of the allegedly false advertisements," but is unclear about whether it is alleging that Mr. Cosgrove could resolve that issue as well. (Joint Letter at 4.)

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would "creat[e] an undue burden to find [a] temporary replacement [and] potentially threaten[] his health if there is another emergency such as the recent one he suffered." (Joint Letter at 1.) At 75 years old, Ms. Coller also claims that a deposition would place her own health in jeopardy as she has "medical problems" that might be exacerbated by the stress of a deposition. (Joint Letter at 1; Ex. 4.)

First, the court finds that Ms. Coller has relevant information that would not merely duplicate Plaintiff Schneider's testimony, as Plaintiffs claim. Plaintiff Schneider testified that he and Ms. Coller were virtually inseparable for the last "three and a half, four years." (Joint Letter, Ex. 2 ("Schneider Dep.") at 94:11-21, 99:3-8.) During his deposition Plaintiff Schneider was able to recall that he started eating at Chipotle more than a year prior and provided an approximate amount of money he and Ms. Coller spent each time. (Schneider Dep. at 143:5-25-144:1-5.) He was not able to recall with clarity how much he spent monthly at Chipotle or whether he or Ms. Coller paid for their meals on a given occasion. (Schneider Dep. at 144:14-25-146:1-5.) Furthermore, unlike Plaintiff Deigert, Plaintiff Schneider has no tangible evidence that he ever ate at Chipotle since he only uses cash and does not keep receipts. (See Schneider Dep. at 141:12-25.) Thus, to corroborate Plaintiff Schneider's statements about his prior purchases, Ms. Coller's testimony is relevant.

Second, the Court finds that the asserted hardship does not warrant excusing Ms. Coller from deposition. Ms. Coller claims that she is prevented from deposition by her own health. She provided a letter from her doctor that stated that due to her "multiple medical problems . . . a deposition would be too stressful for her and harmful to her health." (Ex. 4) The instant situation is comparable to NuCal Foods, where the defendants moved for a protective order to excuse a corporate executive from deposition because his "health remain[ed] poor." NuCal Foods, Inc. v. Quality Egg LLC, No. CIV S103105 (KJM), 2012 WL 6629573, at *3 (E.D. Cal. Dec. 19, 2012). The defendant also provided a letter from his doctor stating that his "current health issues make his participation in a deposition impossible." (Id.) The court upheld the subpoena because the letter did not indicate the physician had any knowledge of the particular circumstances of the deposition. The fact that the letter was not in the form of a sworn testimony or affidavit also weighed in favor

of upholding the subpoena. (Id.) Additionally, in balancing the competing interests, the court in NuCal Foods also considered the importance of defendant's testimony since he was the only person who could speak to certain aspects of plaintiff's case. (Id. at *4.) Similarly here, Ms. Coller's doctor's short letter does not indicate that he was privy to what the deposition would entail, such that he could properly and specifically explain how it would harm or exacerbate Ms. Coller's health problems, while being Plaintiff Schneider's caretaker would not. Like the physician in NuCal Foods, Ms. Coller's doctor did not provide testimony or an affidavit stating the contentions contained in the letter, which the court in NuCal Foods agreed "weaken[ed] its import." (Id. at *3.) Further, given Ms. Coller's dual role as both companion and professional caretaker, added to the fact that she and Plaintiff Schneider are rarely separated, gives her a unique ability to speak to the issues at stake, especially considering the lack of other corroborating evidence.

Plaintiffs' own description of the work Ms. Coller performs as a caretaker for Plaintiff Schneider also discounts her assertions of inability to participate in a deposition. The court in NuCal Foods found the fact that defendant went to work "several times a week for a few hours at a time" also weighed in favor of upholding the subpoena. According to Plaintiffs, Ms. Coller "ensures that Plaintiff Schneider takes his medication, monitors and ensures that his oxygen tanks are full, bathes him, and takes him to the doctor due to his medical problems and disabilities that render him unable to stand for any significant length of time." (Joint Letter at 1.) Given the rigor and physical capacity required by some of these activities, Ms. Coller's limitations should allow her to be deposed since it requires minimal physical exertion.

Finally, regarding the concern that it will be unduly burdensome to find a replacement caretaker for Plaintiff Schneider, the court in Caesar Entertainment found that "[a] mere showing that the discovery may involve some inconvenience or expense does not suffice to establish good cause under Rule 26(c)." E.E.O.C. v. Caesar Entertainment, Inc., 237 F.R.D. 428, 432 (D. Nev. 2006). This Court agrees and finds this reason alone is insufficient to excuse Ms. Coller from deposition.

The Court will, however, require that the deposition be taken within twenty miles of Ms.

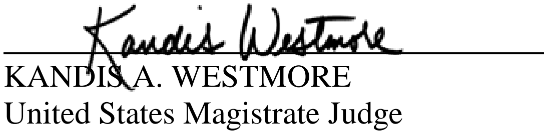
Coller's residence at Defendant's expense. Under Rule 45(c) and also Rule 26(c) the Court, in order to protect against "undue burden or expense," may specify terms of discovery, "including time and place or the allocation of expenses, for the disclosure or discovery." Fed. R. Civ. P. 26(c)(1)(B). Considering Ms. Coller's advanced age, health limitations, and obligation to Plaintiff Schneider, the court finds that this requirement is appropriate.

IV. CONCLUSION

For the reasons set forth above, the Court GRANTS Plaintiffs' request to quash the subpoena concerning Paul Primozich and DENIES the request to quash the subpoena concerning Kevin Cosgrove. The Court also DENIES the request to quash the subpoena for Ms. Coller, but GRANTS a protective order limiting Defendant to taking the deposition within twenty miles of Ms. Coller's residence at Defendant's expense.

IT IS SO ORDERED.

Dated: July 24, 2017



KANDIS A. WESTMORE
United States Magistrate Judge

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