

United States District Court
For the Northern District of California

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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN JOSE DIVISION

DENIZ BOLBOL and JOSEPH CUVIELLO,)	Case No.: C 11-5539 PSG
INDIVIDUALLY,)	
)	ORDER RE MOTIONS IN LIMINE
Plaintiffs,)	
v.)	(Re: Docket Nos. 148, 149, 150, 151, 152,
)	153, 154, 155, 156, 162, 170)
FELD ENTERTAINMENT, INC. (dba)	
RINGLING BROS. and BARNUM & BAILEY)	
CIRCUS); JAMES DENNIS; MATTHEW)	
GILLET; and DOES 1-10,)	
)	
Defendants.)	

Before the court are the parties' in limine motions. Plaintiffs Denise Bolbol ("Bolbol") and Joseph CuvIELlo ("CuvIELlo") (collectively "Plaintiffs") brings six motions and Defendant Feld Entertainment, Inc. ("Feld") brings nine motions. The parties appeared for oral argument on these motions on January 31, 2013. Having reviewed the papers and considered the parties' arguments,

IT IS HEREBY ORDERED that Feld's request to exclude non-party witnesses from the courtroom while other witnesses are testifying and the request to exclude non-party witnesses during opening statements is GRANTED.¹

Fed. R. Evid. 615 provides that "[a]t a party's request, the court must order witnesses excluded so they cannot hear other witnesses' testimony." In light of Feld's request, the court must order non-party witnesses excluded during other witnesses' testimony. Feld also requests that non-

¹ See Docket No. 148.

1 party witnesses be excluded during opening statements. Exclusion of witnesses during opening
2 statements is not within the purview of Rule 615 and lies instead in the court's discretion.² Feld
3 argues that exclusion is proper to ensure that witnesses' recollection of the events in question are
4 not influenced. Because this case relies heavily on eyewitnesses accounts, the court finds
5 excluding non-party witnesses during the opening statements is warranted.³

6 IT IS FURTHER ORDERED that Feld's request to exclude evidence of its financial
7 condition unless and until liability for punitive damages has been established is DENIED.⁴

8 "If a prima facie case of oppression, fraud, or malice is established, then it [is] proper to
9 submit evidence of the defendant's net worth to the jury."⁵ "Otherwise presentation to the jury of
10 such evidence [is] distracting and prejudicial."⁶ Feld contends that until Plaintiffs have proven
11 entitlement to punitive damages, its financial condition should be excluded. But Plaintiffs have
12 established a prima facie case for oppression and malice involving Feld's restriction of their
13 exercise of rights protected under Article I, Section 2 of the California Constitution.⁷

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² See *U.S. v. West*, 607 F.2d 300, 306 (9th Cir. 1979).

20 ³ The court also notes that Plaintiffs do not appear to object to this in limine motion.

21 ⁴ See Docket No. 149.

22 ⁵ *999 v. CIT Corp.*, 776 F.2d 866, 872 (9th Cir. 1985).

23 ⁶ *Id.*

24 ⁷ See Cal. Civ. Code § 3294(c) (defining malice as "conduct which is intended by the
25 defendant to cause injury to the plaintiff or despicable conduct which is carried on by the defendant
26 with a willful and conscious disregard of the person's rights or safety of others" and oppression as
27 "despicable conduct that subjects a person to cruel and unjust hardship in conscious disregard of
28 that person's rights"); see also Docket No. 147 (explaining how Plaintiffs have alleged and
established a triable issue of fact for violations of California Civil Code Sections 51.7 and 52.1).

1 IT IS FURTHER ORDERED that Feld's request to prevent Plaintiffs or their counsel from
2 identifying Feld or its employees as "harassers," identifying Plaintiffs as "harassed," or describing
3 the actions at issue as "interfering" with or "intimidating" Plaintiffs is DENIED.⁸

4 As Feld correctly asserts, whether the actions at issue in fact were interference or
5 intimidation is a determination for the jury.⁹ But as Plaintiffs point out, an inability to use the
6 terms of the statute as part of their evidence and arguments would unfairly limit them. To the
7 extent that a particular use of the terms during trial may be unfairly prejudicial or misleading, Feld
8 may bring an objection at that time and the court will consider the merits of the argument.
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10 IT IS FURTHER ORDERED that Feld's motion to exclude evidence of alleged harm
11 suffered by third parties to the case is DENIED.¹⁰

12 Although Fed. R. Evid. 404(b)(1) provides that evidence of "a crime, wrong, or other act is
13 not admissible to prove a person's character in order to show that on a particular occasion the
14 person acted in accordance with the character," Fed. R. Evid. 404(b)(2) allows that type of
15 evidence to show "motive, opportunity, intent, preparation, plan, knowledge, identity, absence of
16 mistake, or lack of accident." As the court noted in its June 4, 2012 order, Plaintiffs only have
17 standing for alleged actions taken against them. And as it noted in its November 15, 2012 order,
18 third-party Shannon Campbell ("Campbell"), to which Plaintiffs refer in their Third Amended
19 Complaint ("TAC"), has interests parallel to but not overlapping with Plaintiffs' interests in this
20 case. But Plaintiffs seek to use the instances with Campbell to show that Feld's employees did not
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26 ⁸ See Docket No. 150.

27 ⁹ See *Venegas v. Cnty. of Los Angeles*, 153 Cal. App. 4th 1230, 1247 (2007).

28 ¹⁰ See Docket No. 151.

1 act accidentally and that their behavior was within the custom and practice of their employment.¹¹

2 Plaintiffs may use evidence of actions taken against non-parties in this limited capacity.

3 IT IS FURTHER ORDERED that Feld's request to exclude evidence of the treatment of
4 animals in the circus is GRANTED.¹²

5 Pursuant to Fed. R. Evid. 401, evidence is relevant – and thereby admissible¹³ – if “it has
6 any tendency to make a fact more or less probable than it would be without the evidence” and “the
7 fact is of consequence in determining the action.” Feld argues that the treatment of animals
8 performing in the circus is not relevant to this case. Plaintiffs' viable claims arise out of
9 interference with their constitutional rights under Article I, Section 2 and intimidation because of
10 their political affiliations.¹⁴ Although Plaintiffs argue that evidence of animal mistreatment is the
11 motivating factor underlying Feld’s actions, they have not shown how the actual treatment of the
12 animals is relevant. What is relevant is Plaintiffs’ protest of Feld’s treatment of its animals.

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14 Fed. R. Evid. 403 also supports excluding this evidence. Rule 403 provides that exclusion
15 of evidence is permissible if “its probative value is substantially outweighed by a danger of . . .
16 unfair prejudice.” Here, evidence regarding the treatment of the animals could be inflammatory
17 and in light of the fact that the treatment has little bearing on the disposition of the issues, the court
18 finds the unfair prejudice substantially outweighs the probative value.

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20 IT IS FURTHER ORDERED that Feld's request to exclude evidence regarding the permits
21 to walk animals on the sidewalk is DENIED.¹⁵

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25 ¹¹ See Docket No. 193.

26 ¹² See Docket No. 152.

27 ¹³ See Fed. R. Evid. 402 (“Irrelevant evidence is not admissible.”).

28 ¹⁴ See Docket No. 147.

¹⁵ See Docket No. 153.

1 At issue in this case is the interference with Plaintiffs' free speech rights and threats and
2 intimidation because of their political affiliation. Plaintiffs argue that evidence of the permits and
3 Feld's violations of the permits support their contentions that Feld violated California Civil Code
4 Sections 51.7 and 52.1 by showing that they acted unreasonably and unsafely during the animal
5 walk.¹⁶ Plaintiffs are limited, however, to the permits granted for the animal walks at issue in this
6 case – specifically in Oakland, Sacramento, and San Jose for the dates indicated in the court's
7 summary judgment order.¹⁷ They may not introduce evidence of any other permits.

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9 IT IS FURTHER ORDERED that Feld's request to exclude evidence of confrontations or
10 encounters between the parties prior to August 2008 is DENIED.¹⁸

11 As this court noted in its June 4 order, the statute of limitations is two years for the personal
12 injury claims and three years for the statutory claims.¹⁹ Feld points to that order to suggest that
13 Plaintiffs cannot bring evidence of encounters from before August 2008. Although those actions
14 cannot now give rise to liability, as Plaintiffs highlight, the earlier encounters are relevant to
15 showing that Feld's employees' actions were not the result of accidents or mistakes.²⁰ The
16 evidence also may support that Feld's employees' actions fell within the custom and practice of
17 their employment.

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19 The court also must consider whether the evidence should be excluded pursuant to Fed. R.
20 Evid. 403. Feld argues that the past evidence could confuse the jury because a “pattern and
21 practice” is not part of Plaintiffs' claims.²¹ But as noted above, the evidence is relevant to whether
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23 ¹⁶ See Docket No. 186.

24 ¹⁷ See Docket No. 147.

25 ¹⁸ See Docket No. 154.

26 ¹⁹ See Docket No. 42.

27 ²⁰ See Fed. R. Evid. 404(b)(2).
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1 Feld's employees' actions create respondeat superior liability for Feld. Because Plaintiffs have
2 conceded that they will introduce very limited evidence of previous events,²² the court will hold
3 Plaintiffs to that concession and permit only limited evidence to avoid unfair prejudice that
4 substantially outweighs the probative value of this evidence.²³

5 IT IS FURTHER ORDERED that Feld's request to exclude evidence not previously
6 disclosed by Plaintiffs is DENIED.

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8 According to Feld's motion, they seek only to prevent Plaintiffs from introducing evidence
9 and witnesses at trial that were neither disclosed during initial disclosures or provided during
10 pretrial disclosures.²⁴ In their response, Plaintiffs assert that they have disclosed all of the evidence
11 they intend to introduce save for seven examples.²⁵ If a party fails to disclose evidence in
12 compliance with Fed. R. Civ. P. 26(a) and 26(e), "the party is not allowed to use that information
13 or witness to supply evidence on a motion, at a hearing, or at a trial, unless the failure was
14 substantially justified or is harmless."²⁶ Plaintiffs assert that the seven pieces of evidence they
15 intend to use but failed earlier to disclose are documents originating from Feld, documents
16 provided to Feld in parallel litigation, and a recently published article.²⁷

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18 Because Feld has access to these documents, the court finds Plaintiffs' introduction of this
19 limited evidence is harmless and on these grounds, exclusion is not warranted. The court makes no
20 ruling on whether the documents could survive other challenges. The court also will not allow
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22 ²¹ See Docket No. 154.

23 ²² See Docket No. 190.

24 ²³ See Fed. R. Evid. 403.

25 ²⁴ See Fed. R. Civ. P. 26(a).

26 ²⁵ See Docket No. 187.

27 ²⁶ See Fed. R. Civ. P. 37(c).

28 ²⁷ See Docket No. 187.

1 Plaintiffs to introduce any other undisclosed evidence absent a showing that the introduction would
2 be harmless or substantially justified.

3 IT IS FURTHER ORDERED that Feld’s request to consider injunctive relief after the trial
4 phase is GRANTED.

5 The court notes that Plaintiffs did not provide a timely objection to Feld’s request. The
6 court also finds good cause for delaying consideration of injunctive relief until after the jury has
7 rendered its verdict on Plaintiffs’ claims. As Feld points out, the parties have several injunctions
8 against each other in various jurisdictions – one of which has played an important role in this
9 case.²⁸ In light of the complexity of drafting any potential injunction, the court finds that
10 determining the appropriateness and scope of any injunctive relief should be delayed until after
11 trial and evidence regarding injunctive relief should be excluded.

12 Having addressed Feld’s motions, the court turns now to Plaintiffs’ requests.

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14 IT IS FURTHER ORDERED that Plaintiffs’ requests to exclude evidence not disclosed in
15 initial or supplemental disclosures²⁹ and to exclude Mike Stuart (“Stuart”)³⁰ as a witness are
16 GRANTED-IN-PART.
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18 Fed. R. Civ. P. 37(c) mandates that a party may not use evidence not previously disclosed
19 as required by Fed. R. Civ. P. 26(a) and 26(e) unless the court finds the failure to disclose was
20 substantially justified or harmless. Feld argues that its pre-trial exchange pursuant to Fed. R. Civ.
21 P. 26(a)(3) suffices for Rule 37(c)’s disclosure requirement.³¹ Feld misunderstands Rule 26(a).
22 Rule 26(a)(1) mandates initial disclosures, Rule 26(e) mandates supplemental disclosures, and Rule
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25 ²⁸ See Docket Nos. 42, 147.

26 ²⁹ See Docket No. 162. Unless otherwise noted, the court draws Plaintiffs’ argument from its
consolidated motion in limine at Docket No. 162.

27 ³⁰ See Docket No. 170.

28 ³¹ See Docket No. 171.

1 26(a)(3) mandates disclosure during the pre-trial exchange. Each of these requirements provides to
2 parties notice of the evidence potentially to be presented at trial. Only evidence or witnesses
3 disclosed at all three stages – in the initial disclosures, with supplementation if necessary, and in
4 the pre-trial exchange – may be admitted at trial.³² Failure to meet Rule 26(a)'s disclosure
5 requirements triggers Rule 37(c), which provides that undisclosed evidence may not be used unless
6 the failure to disclose is substantially justified or if introduction of the evidence would be harmless.

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8 Here, Feld listed four witnesses that it intends to call at trial – Jay Terrado (“Terrado”),
9 Officer G. Vega (“Vega”), Mike Stuart (“Stuart”), and David Bailey (“Bailey”) – and three
10 witnesses it may call – Matthew Gillet (“Gillet”), Aryn Bryant (“Bryant”), and Jessica Hyman
11 (“Hyman”).³³ Of those seven potential witnesses, Feld disclosed only three in its initial disclosure:
12 Gillet, Terrado, and Vega.³⁴ For the remaining four witnesses, Rule 37(c) applies, and they must
13 be excluded unless the court determines that Feld's failure to disclose them earlier is substantially
14 justified or that allowing Feld to introduce them would be harmless to Plaintiffs.

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16 As an initial matter, the court notes that Feld did not provide reasons in its papers for its
17 failure to disclose these witnesses earlier.³⁵ Counsel suggested at the hearing that Feld decided to
18 call these witnesses in part because they appeared in video clips submitted by Plaintiffs with their
19 motion for summary judgment, and counsel had not seen the clips earlier. But counsel never
20 requested to see video that Plaintiffs mentioned in their initial disclosures and in fact appear to
21 have never requested any discovery at all. The failure to conduct discovery is not a substantial
22 justification for failing to identify potential witnesses under Rule 26(a).

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24 ³² See Fed. R. Civ. P. 26(a)(3) (“*In addition to the disclosures required by Rule 26(a)(1) and (2), a*
25 *party must provide to the other parties and promptly file the following information about the*
26 *evidence that it may present at trial other than solely for impeachment: (i) the name and, if not*
27 *previously provided, the address and telephone number of each witness.”)*

28 ³³ See Docket No. 163-3.

³⁴ See Docket No. 163-1.

³⁵ See Docket No. 171.

1 Citing to *In re First Alliance Mortg. Co.*,³⁶ Feld argues that Plaintiffs had independent
2 knowledge of the identities of the Stuart, Bryant, and Bailey, failed to depose them, and “cannot
3 now argue unfair surprise and undue prejudice.”³⁷ In *First Alliance*, the plaintiffs introduced
4 “undisclosed” witnesses pursuant to their Rule 26(a)(3) disclosures and after the official close of
5 discovery, and the defendant challenged the district court’s decision to admit those witnesses.³⁸
6 The Rule 26(a)(3) disclosure took place more than 60 days before the commencement of trial, and
7 the parties continued to engage in discovery well into the trial itself.³⁹ The Ninth Circuit found
8 introduction of the witnesses was not error in part because the defendant had “ample time
9 remaining under Rule 26(a)(3)” and the defendant had prior knowledge of the witnesses’
10 identities.⁴⁰ The court emphasized that “there [was] nothing to suggest that [the defendant] was
11 significantly hampered in its ability to prepare for trial or to examine these witnesses.”⁴¹

12 The facts here differ substantially from *First Alliance*. Feld gave notice of its witness list to
13 Plaintiffs less than two weeks before trial will begin⁴² and several months after the close of
14 discovery.⁴³ Plaintiffs thus have little or no time to depose the witnesses and may be hampered at
15 trial. To the extent that Feld asserts Plaintiffs know the witnesses, that knowledge is not enough to
16 overcome the potential harm. Plaintiffs probably know a lot of Feld’s employees; they have
17 engaged in disputes and confrontations with them for years. That Plaintiffs happen to have met or
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21 ³⁶ 471 F.3d 977 (9th Cir. 2006).

22 ³⁷ See Docket No. 171.

23 ³⁸ See 471 F.3d at 1000.

24 ³⁹ See *id.*

25 ⁴⁰ See *id.*

26 ⁴¹ See *id.*

27 ⁴² See Docket No. 163-3.

28 ⁴³ See Docket No. 15.

1 encountered the potential witnesses does not substitute for notice that the witnesses will be called
2 at trial.

3 On the other hand, as to Stuart and Bailey, Feld has indicated that Plaintiffs have had an
4 opportunity to examine these witnesses in other litigation.⁴⁴ According to Feld, both Stuart and
5 Bailey testified in a case between the parties in Santa Clara County Superior Court regarding the
6 circus's procedures for its animal walks and interactions between Plaintiffs and circus employees.⁴⁵
7 If Plaintiffs have had an opportunity to examine these witnesses earlier such that they have notice
8 of what Stuart and Bailey are likely to testify about, the court finds their introduction in this case is
9 harmless. But to ensure no unfair prejudice, Feld shall submit to the court transcripts from the
10 superior court trial and shall limit its examination of Stuart and Bailey to subjects it covered in the
11 earlier dispute.

12 As to Bryant and Hyman, Plaintiffs have not had an opportunity to examine these potential
13 witnesses. Feld's identification of Bryant is particularly problematic given that when CuvIELLO
14 sought to contact her in a related case between the two parties in Oakland, Feld's counsel indicated
15 that she had no contact information for Bryant.⁴⁶ Calling Bryant now, after Feld's counsel's earlier
16 statement regarding the inability to contact her, is prejudicial to Plaintiffs because they had no way
17 to depose her and in fact may have been misled about her availability as a witness. As to Hyman,
18 prior to Feld's pretrial disclosures she was never identified as a witness and was named only in the
19 event that Stuart was unavailable. Feld even concedes that Plaintiffs had no prior knowledge of
20 Hyman.
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22 Because Feld failed to identify Hyman or Bryant in its initial disclosures and has failed to
23 provide either substantial justification or to show harmlessness from introducing these witnesses,
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26 ⁴⁴ See Docket No. 171.

27 ⁴⁵ See Docket No. 171.

28 ⁴⁶ See Docket No. 199.

1 the court finds excluding Hyman and Bryant from testifying is appropriate. Because Feld has
2 indicated that Plaintiffs have had an opportunity to examine Stuart and Bailey in previous
3 proceedings, testimony from them that is limited to subjects on which they testified in the earlier
4 matter is harmless to Plaintiffs. Stuart and Bailey therefore may testify but only on the same
5 subject matter as they testified in the superior court proceedings. Feld shall submit to the court and
6 to Plaintiffs transcripts of their previous testimony no later than 5:00 p.m. on Monday, February 4,
7 2013.

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9 IT IS FURTHER ORDERED that Plaintiffs' request to exclude undisclosed witnesses Feld
10 wrongly identifies as rebuttal or impeachment witness is GRANTED-IN-PART.

11 The court must admit its confusion at this motion. Pursuant to Fed. R. Civ. P. 26(a)(3),
12 Feld is under no obligation to disclose witnesses it intends to use for impeachment.⁴⁷ That
13 exception does not extend to rebuttal witnesses, and so rebuttal witnesses that have not been
14 identified pursuant to Rule 26(a) or 26(e) may not testify absent a showing by Feld that the failure
15 to disclose was substantially justified or that introduction is harmless.⁴⁸ But Plaintiffs have not
16 pointed to a witness that may be improperly identified. To the extent that Feld mischaracterizes its
17 impeachment witnesses in an effort to circumvent the Federal Rules or the court's Standing Order,
18 Plaintiffs may object and the court will consider the merit of the argument.

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20 IT IS FURTHER ORDERED that Plaintiffs' request to exclude Feld's witnesses as experts
21 is DENIED.

22 Plaintiff argues that several of Feld's witnesses are being offered as experts regarding
23 animal welfare and safety habits. Feld counters that it is not offering these witnesses as experts but
24 rather as percipient witnesses to the actions Plaintiffs allege occurred and to discuss the training
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27 ⁴⁷ See Fed. R. Civ. P. 26(a)(3) (stating that no disclosure is required for impeachment witnesses).

28 ⁴⁸ See Fed. R. Civ. P. 37(c).

1 provided to Feld's employees.⁴⁹ Because Feld is not offering these witnesses as experts, the court
2 will not exclude them on the grounds that Feld failed to comply with the rules governing expert
3 witness disclosures.⁵⁰ To the extent that these witnesses attempt to offer testimony that is outside
4 of their roles as lay witnesses, Plaintiffs may object, and the court will consider the merit of the
5 argument.

6 IT IS FURTHER ORDERED that Plaintiffs' request to exclude evidence of Feld's privacy
7 interests within the animal compound at the San Jose forum is DENIED.

8 The court notes as a preliminary matter that Feld conflates the "non-public forum" holding
9 in the 2006 permanent injunction⁵¹ with giving Feld a privacy interest in the area. The two
10 inquiries are distinct.⁵² Feld asserts that because of a privacy interest in the area, actions taken by
11 its employees are not in violation of California Civil Code Sections 52.1 and 51.7.⁵³ Plaintiffs
12 counter that having to establish the legality of their videotaping before the jury could find Feld
13 violated Sections 52.1 and 51.7 would be distracting and misleading to the jury. Plaintiffs assert
14 that the evidence is inadmissible under Fed. R. Evid. 402 and 403.

15 Whether Feld's employees believed Plaintiffs were violating their privacy by videotaping
16 into the animal compound is relevant to the question of the motive for the employees' alleged
17 actions. Section 51.7 requires that threats be because of Plaintiffs' political affiliation. Evidence
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21 ⁴⁹ See Docket No. 173.

22 ⁵⁰ See Fed. R. Civ. P. 26(a)(2).

23 ⁵¹ See Docket No. 42 (explaining the history of the injunction).

24 ⁵² Compare *Center for Bio-Ethical Reform Inc. v. City and Cnty. of Honolulu*, 455 F.3d 910, 919
25 (9th Cir. 2006) ("Areas not traditionally or explicitly opened to expressive activity are deemed
26 nonpublic fora.") with *Leonel v. Am. Airlines, Inc.* 400 F.3d 702, 712 (9th Cir. 2005) ("To prove a
27 claim under the California right to privacy, a plaintiff must first demonstrate three elements: (1) a
28 legally protected privacy interest; (2) a reasonable expectation of privacy under the circumstances;
and (3) conduct by the defendant that amounts to a serious invasion of the protected privacy
interest.").

⁵³ See Docket No. 174.

1 that the employees felt their privacy was being violated is relevant to whether they had the requisite
2 motive under Section 51.7. The court finds any prejudice to Plaintiffs does not substantially
3 outweigh the evidence's probative value.

4 IT IS FURTHER ORDERED that Plaintiffs' request to exclude evidence of prior "bad
5 acts," including a recent injunction issued against Bolbol by the Santa Clara Superior Court, is
6 DENIED.

7 Although Fed. R. Evid. 404(b)(1) prohibits prohibits the use of evidence of "a crime,
8 wrong, or other act is not admissible to prove a person's character in order to show that on a
9 particular occasion the person acted in accordance with the character," Fed. R. Evid. 404(b)(2)
10 allows admissibility of that type of evidence to show "motive, opportunity, intent, preparation,
11 plan, knowledge, identity, absence of mistake, or lack of accident."

12 Feld argues that the evidence is relevant to showing Bolbol's motives or intent and as
13 impeachment evidence.⁵⁴ Plaintiffs argue that it is unfairly prejudicial, misleading, and a waste of
14 time. The court finds that evidence of the issuance of the injunction would be unfairly prejudicial
15 and would substantially outweigh its probative value regarding Bolbol's motives or intent. The
16 state court's decision sheds little new light on Bolbol's motivations or intent because it is a legal
17 determination of the various parties' rights in a parallel case. As to impeachment, Feld has not
18 explained how evidence of the injunction reflects on Bolbol's tendency towards honesty and would
19 thus be admissible on those grounds.⁵⁵

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22 **IT IS SO ORDERED.**

23 Dated: February 1, 2013

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25 PAUL S. GREWAL
26 United States Magistrate Judge

27 ⁵⁴ See Docket No. 175.

28 ⁵⁵ See Fed. R. Evid. 608(b).

United States District Court
For the Northern District of California

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