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7 UNITED STATES DISTRICT COURT  
8 SOUTHERN DISTRICT OF CALIFORNIA  
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10 9826 LFRCA, LLC,

11 Plaintiff,

12 v.

13 RORBERT A. HURWITZ, et al.,

14 Defendants.

Case No.: 3:13-cv-01042-L-JMA

**ORDER GRANTING IN PART AND  
DENYING IN PART MOTIONS  
[Docs. 118-122] IN LIMINE**

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16 Pending before the Court are two joint motions *in limine* and three opposed  
17 motions *in limine*. By way of background, this case arises out of a dispute between a real  
18 estate purchaser and a selling real estate agent. Donald A. Burns (“Burns”) purchased a  
19 property offered for sale by real estate agent Robert A. Hurwitz (“Defendant”). After  
20 executing the purchase contract, Burns assigned the contract to 9826 LFRCA, LLC  
21 (“Plaintiff”), an LLC whose sole member is a trust for which Burns is settlor and trustee.  
22 Plaintiff alleges that when Burns executed the purchase he reasonably relied on  
23 Defendant’s representations that the property featured private beach access. After the  
24 contingency period ended and the contract became fully executed, Plaintiff alleges it  
25 discovered that these representations were false and that, in reliance upon them, Plaintiff  
26 overpaid for the property. Accordingly, Plaintiff filed a complaint alleging intentional  
27 misrepresentation, negligent misrepresentation, fraudulent concealment, and negligence.  
28 Defendant denies liability, arguing he did not misrepresent the true nature of the beach

1 access and that, even if he did, Plaintiff should have no recovery because Burns’ alleged  
2 reliance was unreasonable, Defendant owed no fiduciary duty to Plaintiff, Plaintiff  
3 suffered no damages, and Plaintiff failed to mitigate its damages.  
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5 **I. SEXUAL ORIENTATION**

6 The parties jointly move to exclude at trial any evidence of the sexual orientation  
7 of any party, participant, or witness. (Doc. 118.) The parties contend that such evidence  
8 is not relevant to the issues at trial and that its introduction would be invasive to  
9 individual privacy and potentially trigger juror bias or prejudice. The Court agrees, and  
10 therefore excludes such evidence pursuant to Fed. R. Evid. 403 and 402.  
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12 **II. MR. CASTELLANOS**

13 Rafael Castellanos is a real estate attorney retained by Burns for the subject  
14 transaction. By way of joint motion, the parties request that the Court order Mr.  
15 Castellanos “be precluded from offering any opinion testimony on standard of care,  
16 causation or damages.” (Doc. 122.) The parties’ joint request is granted.  
17

18 **III. FBI EXTORTION INVESTIGATION**

19 [REDACTED]  
20 [REDACTED]  
21 [REDACTED]  
22 [REDACTED]  
23 [REDACTED]  
24 [REDACTED]  
25 [REDACTED]  
26 [REDACTED]  
27 [REDACTED]  
28 [REDACTED]

1 [REDACTED]  
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3 [REDACTED]  
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16 [REDACTED]  
17 [REDACTED]  
18 [REDACTED]  
19 [REDACTED]

21 **IV. PRE-SALE APPRAISAL AND UNACCEPTED PURCHASE OFFER AMOUNTS**

22 Plaintiff seeks to exclude three appraisals of the subject property that predate the  
23 transaction as well as an unaccepted purchase offer made by Burns. The three appraisals  
24 and the unaccepted purchase price are all higher than the \$14,097,000 price at which  
25 Plaintiff ultimately purchased the property. The main issue at trial for which the prior  
26 appraisals and rejected purchase offer could be of relevance is the issue of damages. To  
27 determine damages, if any, the jury will have to decide how much value private beach  
28

1 access, in a form the jury finds Plaintiff reasonably believed to exist, would add to the  
2 property.

3 Plaintiff contends that outdated appraisals and the purchase offer for the entire  
4 property carry little or no probative value as to how much private beach access is  
5 specifically worth. Plaintiff further contends that higher appraisals and purchase offers  
6 could have an unfair prejudicial effect of misleading the jury into believing that Plaintiff  
7 suffered no damages because it purchased the property at a price significantly below  
8 market.

9 The Court agrees that old appraisals of this property are not probative of the value  
10 of the beach access Plaintiff believed came with the property. Indeed, because beach  
11 access in the form Plaintiff expected does not actually exist, it is hard to see how its value  
12 would be incorporated in an appraisal of this property. The Court also agrees that this  
13 evidence could create juror bias by misleading the jury into thinking Plaintiff suffered no  
14 damages because he paid below market price for the property.

15 That said, these prior appraisal amounts could be relevant for purposes of  
16 comparative valuation of the property. To illustrate, if a comparable property that  
17 featured the type of beach access Plaintiff expected sold in the same timeframe as one of  
18 the appraisals of the subject property, comparing the purchase price of such a property to  
19 the appraisal price of the subject property could be probative of the marginal value added  
20 by the beach access. Accompanied by a cautionary instruction that a prior appraisal does  
21 not accurately reflect the value of the property at time purchased because of market  
22 fluctuations, this relevant evidence would not offend Fed. R. Evid. 403. Accordingly, the  
23 Court orders that evidence of appraisal amounts is admissible only in the context that it is  
24 relevant to a comparative valuation of the subject property to another comparable  
25 property sold on a date near the appraisal date.

26 As to the unaccepted purchase offer Burns made in March 2011, the Court finds  
27 the amount of that offer is not relevant to the issue of comparative valuation because  
28 Burns is not a certified appraiser making an objective valuation. Further, the fact that the

1 property sat on the market for about nine months after Burns' initial offer then sold for  
2 significantly less suggests the initial offer was high. That Burns did make an offer in  
3 March of 2011, by contrast, is relevant. It shows Burns' ongoing familiarity with the  
4 property and thus goes to the issue of reliance. Accordingly, the Court orders that  
5 evidence of Burns March 2011 purchase offer is admissible only if there is no reference  
6 to the offer's amount or to the fact that it was greater than the ultimate purchase price.  
7

8 **V. SITE VISIT**

9 Defendant requests to take the jury on a site visit to the subject property to view  
10 the property grounds and the beach access path. Defendant contends that, as to the issue  
11 of reliance, it is critical that the jury see with their own eyes what Burns could have seen  
12 during his pre-purchase site visits. Plaintiff opposes, arguing that, given the number of  
13 images and exhibits depicting the property, the marginal probative value of a site visit is  
14 minimal. Plaintiff further contends that this marginal probative value is substantially  
15 outweighed by the logistical difficulties of a site visit and the risk that the jury, after  
16 seeing the upscale property and surroundings, will develop bias against Plaintiff on  
17 account of his wealth.<sup>1</sup> The Court will therefore defer resolution of this issue until after  
18 the close of evidence, at which time I will ask the jury whether they believe a site visit  
19 would be helpful.  
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24 <sup>1</sup> Plaintiff also argues that if the jury sees the subject property they should also get to see similar  
25 properties for purposes of comparative valuation as relevant to the issue of damages. Because it would  
26 clearly be an undue burden to visit other properties in addition to the subject property, Plaintiff argues  
27 the jury should visit no properties at all. This "slippery slope" argument is unpersuasive because a visit  
28 to the subject property does not trigger the alleged need to visit other properties. Rather, to the extent  
there is a need to visit other properties for comparative valuation (there is not), it exists regardless of  
whether the jury does or does not visit the subject property to see whether Burns should have noticed the  
lack of private beach access.

1 **VI. CONCLUSION & ORDER**

2 The Court **GRANTS IN PART** and **DENIES IN PART** the parties' motions *in*  
3 *limine* as follows:

- 4 • The parties shall not present any evidence of the sexual orientation of any  
5 party, participant, or witness at trial.  
6 • Mr. Castellanos shall not offer any opinion testimony on standard of care,  
7 causation, or damages.

- 8 • [REDACTED]  
9 [REDACTED]  
10 [REDACTED]

11 [REDACTED] The Court further orders that the  
12 Clerk of Court shall seal the unredacted version of this order and Defendant's  
13 opposition [Doc. 126] to Plaintiff's second motion in limine. Plaintiff's *ex*  
14 *parte* motion [Doc. 128] to file a reply to Defendant's opposition is denied as  
15 moot.

- 16 • Evidence of appraisal amounts is admissible only in the context that it is  
17 relevant to a comparative valuation of the subject property to another  
18 comparable property sold on a date near the appraisal date.  
19 • The parties shall make no reference to (1) the amount of Burns' March 2011  
20 purchase offer or (2) the fact that it was greater than the ultimate purchase  
21 price.  
22 • The Court defers decision on the issue of a jury site visit until close of  
23 evidence, at which time I will ask the jury if they believe a site visit would be  
24 helpful.  
25 • The hearing on motions *in limine* set for Thursday, March 22, 2018 at 10:00  
26 a.m. is vacated.

27 **IT IS SO ORDERED.**

1 Dated: February 16, 2018

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3 Hon. M. James Lorenz  
4 United States District Judge  
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