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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
MISSOULA DIVISION

MICHAEL E. SPREADBURY, Plaintiff, v. BITTERROOT PUBLIC LIBRARY, CITY OF HAMILTON, LEE ENTERPRISES, INC., and BOONE KARLBERG P.C., Defendants.	Cause No. CV-11-064-M-DWM DEFENDANT LEE ENTERPRISES, INC.'S BRIEF IN SUPPORT OF MOTIONS IN LIMINE

Defendant, Lee Enterprises, Inc. ("Lee Enterprises" or "Lee"), through its counsel, Garlington, Lohn & Robinson, PLLP, respectfully submits this Brief in Support of its Motions in Limine.

The Federal Rules of Evidence specifically prohibit the introduction of evidence that is irrelevant or more prejudicial than probative. *See* Fed. R. Evid.

401-403. The authority to grant or deny a motion in limine rests in the Court's inherent power to take such precautions as are necessary to afford a fair trial for all parties. *Luce v. U.S.*, 469 U.S. 38, 41 n. 4 (1984). The trial court is required to be the "gatekeeper," allowing the jury to hear only admissible evidence, and evidence which is more likely to assist than to mislead. Fed. R. Evid. 104(a).

The purpose of a motion in limine is to prevent the jury from hearing inadmissible evidence. *Casares v. Bernal*, 790 F. Supp. 2d 769, 775 (N.D. Ill. 2011). The motion allows the Court to rule on admissibility and relevance of forecasted evidence before it is offered at trial. *Wechsler v. Hunt Health Sys., Ltd.*, 381 F. Supp. 2d 135, 140 (S.D.N.Y 2003). Lee's motions are intended to remove irrelevant and prejudicial matters from the trial so that the jury can focus on the material disputed issues.

Lee respectfully requests that the Court's order specify that it applies not only to the trial, but also to the voir dire examination of the jury panel, and that Plaintiff be instructed that the order applies equally to Plaintiff's witnesses. The intent of the motions is to restrain Plaintiff and any witness he may call from arguing, making mention or interrogation, directly or indirectly, in any manner whatsoever, of the matters set forth in Lee's Motions in Limine, without first approaching the bench and obtaining a ruling from the Court, outside the presence and hearing of the prospective jurors, or jurors ultimately selected.

Motion No. 1 – Portrayal of Lee Enterprises and Appeal to Local Bias

Lee seeks an order in limine to prevent any questioning, evidence, argument, innuendo, or reference to its corporate status, size, assets, net worth or financial condition. Only relevant evidence is admissible at trial. *See* Fed. R. Evid. 402. The Court may even exclude relevant evidence if its probative value is substantially outweighed by unfair prejudice, confusion of the issues, or misleading the jury. *See* Fed. R. Evid. 403. Generally, it is considered as unfairly prejudicial to discuss a defendant's net worth, revenues, profits, and financial condition. *Adams Laboratories, Inc. v. Jacobs Engr. Co., Inc.*, 761 F.2d 1218, 1226 (7th Cir. 1985); *Draper v. Airco, Inc.*, 580 F.2d 91 (3d Cir. 1978); *Edwards v. Sears, Roebuck & Co.*, 512 F.2d 276 (5th Cir. 1975); *Carr v. City of Florence, Ala.*, 729 F. Supp. 783, 786 (N.D. Ala. 1990) (defendant's wealth or lack thereof is highly prejudicial and inadmissible).

For the same reasons, Plaintiff should be prohibited from making any argument referencing Lee's status as an out-of-state corporation or appealing to local bias. *Kuhnke v. Fisher*, 210 Mont. 114, 122, 683 P.2d 916, 921 (1984). Such arguments are designed to appeal to the passion and prejudice of the jury and should be prohibited.

Motion No. 2 – Failure to Call Witnesses

Lee Enterprises seeks an order prohibiting Plaintiff from making any argument, statement, or question that Lee has failed to call any particular witness who would be available equally to either Plaintiff or Lee through the subpoena process. Such evidence is irrelevant in that it does not have a tendency to make the existence of any fact of consequence in this case more probable or less probable than it would be without such evidence. *See* Fed. R. Evid. 401. Even if Plaintiff can show some relevance in such evidence, any probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, misleading of the jury, and undue waste of time. *See* Fed. R. Evid. 403. Such evidence is appropriately excluded.

Motion No. 3 – Conduct of Discovery

Lee moves that Plaintiff be prohibited from making any argument or statement that Lee Enterprises, or its counsel, objected to discovery requests or failed to provide any information to Plaintiff during the course of discovery. Plaintiff previously moved to compel answers and these matters have been considered and properly dealt with by the Court. Dkt. 254. Evidence of such discovery issues is irrelevant in that it does not have a tendency to make the existence of any fact of consequence in this case more probable or less probable than it would be without such evidence. *See* Fed. R. Evid. 401. Irrelevant

evidence is not admissible. *See* Fed. R. Evid. 402.

Motion No. 4 – Golden Rule Argument

Lee moves that Plaintiff be prohibited from asking jurors to apply the "Golden Rule" by putting themselves or their loved ones in Plaintiff's position, and giving Plaintiff what they would want if they or their loved ones were similarly damaged.

The "Golden Rule" is a suggestion to the jury by a party that the jurors should do unto others, normally the party, as they would have others do unto them. Such "Golden Rule" arguments are improper in that they interfere with the jury's objectivity. *Clausell v. State*, 2005 MT 33, 326 Mont. 63, 106 P.3d 1175 (citing *Boyington v. State*, 738 S.W.2d 704, 708-710 (Tex. App.- Hous. (1 Dist.) 1985); *McGuire v. State*, 677 P.2d 1060, 1064 (Nev. 1984)).

Motion No. 5 – Exclusion of Comments on Pretrial Motions

Lee moves that Plaintiff be prohibited from making any questions, comments or references to any pretrial motion. Specifically, Plaintiff should be prohibited from making any comments as to the original Foundational Affidavit (Dkt. 111) filed by Lee's counsel, which attached the August 9, 2010 *Ravalli Republic* newspaper article taken from the *Ravalli Republic*'s website, rather than attaching the original article published in the newspaper. Nor should Plaintiff be allowed to offer evidence or argument regarding his motion for Leave to File Sanctions in

regard to the Foundational Affidavit (Dkt. 114).

Once notified of the mistake, Lee promptly remedied the situation by filing an Amended Foundational Affidavit (Dkt. 124) explaining the August 9, 2010, article attached to the original Affidavit was taken from the *Ravalli Republic's* website and attaching the original August 9, 2010, article published in the *Ravalli Republic*. Such evidence is irrelevant in that it does not have a tendency to make the existence of any fact of consequence in this case more probable or less probable than it would be without such evidence. *See* Fed. R. Evid. 401. Irrelevant evidence is not admissible. *See* Fed. R. Evid. 402. Even if Plaintiff can show some relevance in such evidence, any probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, misleading of the jury, and undue waste of time. *See* Fed. R. Evid. 403. Such evidence is appropriately excluded.

Similarly, Plaintiff should be precluded from arguing Lee Enterprises and other Defendants violated his right to privacy by obtaining medical information through City Defendant subpoenas. The Court has already determined this information is relevant to Lee Enterprises defending Plaintiff's claims, and is not privileged or otherwise protected by federal law. *See* Dkts. 189, 244. Plaintiff should be prohibited from making these arguments to the jury as the matter has already been decided by the Court. Moreover, it is irrelevant and any probative

value is substantially outweighed by the danger of unfair prejudice, confusion, misleading to the jury, and a waste of time. *See* Fed. R. Evid. 402-403.

Evidence, questions, or argument in front of the jury about any pretrial motions is prejudicial and should be precluded.

Motion No. 6 – Plaintiff's Closing Argument

Lee seeks an order prohibiting Plaintiff from reserving or taking more time for rebuttal in his closing argument than used in his opening argument, and from raising new information during rebuttal that was not raised in his opening argument.

The purpose of rebuttal is to respond to arguments by a defendant. Introduction of new material is prejudicial and unfair because it leaves a defendant no opportunity to respond. *Misch v. C. B. Contracting Co.*, 394 S.W.2d 98, 103 (Mo. App. 1965). Likewise, any "sandbagging" to use more time after a defendant's closing argument is over is simply inequitable. Accordingly, the Court should prohibit such conduct.

Motion No. 7 – Order of Witnesses

Lee seeks an order requiring all parties to advise opposing parties by 5:00 p.m. on the last business day before trial begins, and at the close of each trial day, the identities of witnesses counsel expects to call the following day.

Knowing which witnesses will be called the following day will permit the

Court, parties, counsel, and the witnesses to more efficiently plan for timely arrival and departure of the witnesses and for breaks. It will also assist the parties in preparing for the next day of trial, which will result in more efficient use of the trial day. This motion would not prohibit the parties from being reasonably flexible in adjusting their plans based on unexpected events during trial. However, it is reasonable to expect counsel to know, at the end of each day, which witnesses are scheduled to testify the following day.

Motion No. 8 – Statements Made By Unavailable Witnesses

Lee seeks an order prohibiting Plaintiff from asking questions, or making any direct or indirect reference or argument related to statements made by witnesses not available to testify at trial. Hearsay is not admissible. *See* Fed. R. Evid. 802. There are numerous exceptions to the hearsay rule. *See* Fed. R. Evid. 803-804. However, unless an exception applies, any direct or indirect references to statements made by unavailable witnesses are inadmissible as hearsay and should be excluded as such.

Motion No. 9 – Liability Insurance

Lee seeks an order prohibiting any direct or indirect reference to the fact that Lee may have liability insurance that may cover all or part of any verdict or claimed losses, or is providing a defense to this action. Federal Rule of Evidence 411 specifically prohibits reference to liability insurance with certain defined

exceptions, none of which apply in this case. The Montana Supreme Court has said, "[t]he primary reasons for exclusion of evidence of insurance are its irrelevance, prejudicial effect, and potential misuse by the jury." *Jenks v. Bertelsen*, 2004 MT 50, ¶ 22, 320 Mont. 139, 86 P.3d 24 (citation and internal quotations omitted). Further, Montana courts follow the rule that "[o]rdinarily injection of the fact that the defendant is protected by liability insurance into such a case, directly or indirectly, by evidence, arguments, or remarks constitutes reversible error." *Jenks*, ¶ 22 (citation and internal quotations omitted). Since no exception to Rule 411 exists in this matter, Lee respectfully requests an order precluding any reference or inference of the presence of liability insurance in this matter.

Motion No. 10 – Matters Already Decided

Lee Enterprises seeks an order prohibiting Plaintiff from presenting any questions, evidence, argument or reference to matters already decided by the Court. Many of Plaintiff's claims against Lee have been dismissed by the Court. The only remaining claims against Lee are defamation per se, negligence, and tortious interference with prospect economic advantage based on the August 9, 2010, *Ravalli Republic* article. (Dkt. 249). Nevertheless, Plaintiff continues to argue the merits of his dismissed claims in pleadings and discovery. Plaintiff should be prohibited from presenting evidence or argument on claims already

dismissed by the Court. Such evidence is irrelevant in that it does not have a tendency to make the existence of any fact of consequence in this case more probable or less probable than it would be without such evidence. *See* Fed. R. Evid. 401. Even if Plaintiff can show some relevance in such evidence, any probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, misleading of the jury, and undue waste of time. *See* Fed. R. Evid. 403. Such evidence is appropriately excluded.

Motion No. 11 – Other Articles Not At Issue

Plaintiff should be prohibited from presenting any evidence or argument that he was injured by any articles published by newspapers affiliated with Lee Enterprises, other than the August 9, 2010, article published by the *Ravalli Republic*. Plaintiff's claims regarding other articles have properly been dismissed. (Dkt. 249). Such evidence is irrelevant in that it does not have a tendency to make the existence of any fact of consequence in this case more probable or less probable than it would be without such evidence. *See* Fed. R. Evid. 401. Even if Plaintiff can show some relevance in such evidence, any probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, misleading of the jury, and undue waste of time. Fed. R. Evid. 403. Such evidence is appropriately excluded.

Motion No. 12 – Plaintiff's Opinion Testimony

Plaintiff should be precluded from testifying as an expert at trial and from giving legal conclusions. A witness, including an expert witness, may not "give an opinion as to [his or]her legal conclusion, i.e., an opinion on an ultimate issue of law." *Nationwide Transport Fin. v. Cass Info. Sys., Inc.*, 523 F.3d 1051, 1058 (9th Cir. 2008) (quoting *Hangarter v. Provident Life & Accident Ins. Co.*, 373 F.3d 998, 1016 (9th Cir. 2004)). Throughout the pretrial proceedings, Plaintiff has repeatedly testified on the record that Lee defamed him, acted with malice, was negligent, and tortiously interfered with his prospective business opportunities. As a witness at trial, Plaintiff should limit his testimony to facts and should be precluded from offering legal conclusions or his opinion on the ultimate issues for jury decision.

Further, Plaintiff should be precluded from testifying as an expert at trial. Pretrial, Plaintiff has offered not only legal conclusions, but his opinions on matters of medical diagnosis, publishing standards, government conduct, and other areas of special expertise. Plaintiff is not qualified by his knowledge, skill, training or education to express expert opinions and should be precluded from doing so. *See* Fed. R. Evid. 702.

Motion No. 13 – Speculative Statements Unsupported By Evidence

Plaintiff lost his bid for Mayor of the City of Hamilton on November 3, 2009. In numerous motions filed in this matter, Plaintiff has implied he lost the election due to the action of Defendants. However, he has presented no evidence to support this allegation. Therefore, it is purely speculative and should be excluded.

Further, the probative value of such evidence is substantially outweighed by the danger of unfair prejudice, confusion of the issues, misleading the jury, and undue waste of time. *See* Fed. R. Evid. 403.

Similarly, Plaintiff has alleged he has been ostracized in Hamilton, Montana, because of the actions of Defendants. However, this too, is pure speculation, lacking in any supporting evidence, and should be excluded from trial.

Motion No. 14 – Unrelated Complaints and Character Attacks

Plaintiff has repeatedly used this litigation as a forum to air various complaints and opinions about other persons and entities, which have no relation to whether the *Ravalli Republic* article at issue was defamatory or caused him damages. Questions, evidence, and argument of other causes and issues should be limited to whether Plaintiff was a private or a public figure. Similarly, in pretrial practice and in public, on-line, Plaintiff has repeatedly insulted and made personal attacks on the character and intelligence of Lee personnel, and its counsel; for example, calling editor Perry Backus "evil" and a "coward" and "scum," and

ridiculing the quality of the law schools attended by counsel. Such attacks are irrelevant, prejudicial, and have no place in a courtroom.

Motion No. 15 – Expert Testimony

Plaintiff failed to disclose any liability and damage experts, in accordance with the Court's Scheduling Order and, therefore, should be precluded from offering any testimony from witnesses in the form of such expert opinion.

Expert testimony is appropriate when scientific, technical, or other specialized knowledge will assist the trier of fact in understanding the evidence or determining a fact at issue. *See* Fed. R. Evid. 702. Expert testimony must be disclosed prior to trial. While Lee properly disclosed experts who will assist the trier of fact in understanding damages and liability issues, Plaintiff did not disclose any experts and, therefore, should be precluded from eliciting undisclosed expert testimony during the trial.

For the foregoing reasons, Lee respectfully requests the Court grant Lee Enterprises' Motions in Limine.

DATED this 11th day of April, 2012.

/s/ Jeffrey B. Smith
Attorneys for Defendant, Lee Enterprises, Inc.

CERTIFICATE OF COMPLIANCE

Pursuant to L.R. 7.1(d)(2)(E), I certify that this *Defendant Lee Enterprises, Inc.'s Brief in Support of Motions in Limine* is printed with proportionately spaced Times New Roman text typeface of 14 points; is double-spaced; and the word count, calculated by Microsoft Office Word 2007, is 2715 words long, excluding Caption, Certificate of Service and Certificate of Compliance.

/s/ Jeffrey B. Smith
Attorneys for Defendant, Lee Enterprises, Inc.

CERTIFICATE OF SERVICE

I hereby certify that on the 11th day of April, 2012, a copy of the foregoing document was served on the following persons by the following means:

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