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June 17, 2014

VIA EMAIL
The Honorable Thomas O. Rice
U.S. District Court for the Eastern District of Washington
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Spokane, WA 99210
riceorders@waed.uscourts.gov

Re: Telephonic discovery hearing set for 11:00 A.M. on June 18, 2014
Montes, et al. v. City of Yakima, et al., No. 12-CV-3108-TOR

Dear Judge Rice:

Thank you for considering this matter. We represent Defendants in this action. Defendants respectfully request that this Court exercise its broad discretion under Fed. R. Civ. P. 37(c)(1) to strike two of Plaintiffs' potential fact witnesses who were belatedly disclosed with a mere 12 days before the discovery cutoff in this large and complex case. Defendants are reluctant to raise this issue, as the parties have worked effectively to resolve previous discovery disputes without involving this Court. However, the parties have reached an impasse regarding this particular matter.

A. Background

Filed in August 2012, this action is the first vote dilution case brought under Section 2 of the Voting Rights Act in Washington state. Discovery commenced in October 2012 following the parties' Fed. R. Civ. P. 26(f) conference. The discovery cutoff has been continued three times, allowing the parties approximately 20 months to conduct discovery. *See* ECF Nos. 45, 51, 54, 55. The final discovery cutoff was June 10, 2014. During this period, Defendants produced over 340,000 pages of documents in response to Plaintiffs' discovery requests. Plaintiffs produced more than 60,000. Both sides have identified numerous potential fact witnesses: Defendants have disclosed 21 and, prior to the untimely disclosure that prompted this dispute, Plaintiffs had identified 23.

In the late afternoon of Thursday, May 29—with only 12 days left before the discovery cutoff—Plaintiffs served a supplemental disclosure that identified two potential fact witnesses. The first was Michael Morales, a Hispanic resident of Yakima and former City employee who served in various positions over the course of 15 years, including as Assistant and Interim City Manager in 2011 and 2012. Plaintiffs identified Mr. Morales as a potential fact witness with discoverable information regarding "his experience living and working in the City of Yakima and his experience as an Interim City Manager." The second potential fact witness was Daniel Sheehan, a photographer who "will testify to the authenticity of certain documents and photographs." Also on May 29, Defendants received a supplemental document production from Plaintiffs consisting of 627 undated and unlabeled photographs that Mr. Sheehan apparently took of City parks and recreation facilities.

The following day—Friday, May 30—Plaintiffs noted five depositions of Defendants' potential fact witnesses for June 4, June 9, and June 10. Among these five depositions were three continuation depositions, the scheduling of which was not previously discussed by the parties. Although both sides had agreed in principle to certain continuation depositions, Defendants had no advance notice of whether Plaintiffs would in fact request them before the cutoff. This arrangement effectively left only a handful of days for Defendants to conduct the considerable preparation necessary to adequately depose Mr. Morales and Mr. Sheehan on or before June 10. Holding depositions after the discovery cutoff was an unacceptable alternative to Defendants, as it would hinder their ability to meet other pretrial deadlines. Furthermore, Plaintiffs' timing was inexcusable because discovery had been ongoing for nearly 20 months. The delay of Mr. Morales' disclosure was especially unjustified because he is a well-known figure within the City whom Plaintiffs certainly were aware of since at least the inception of this case.

On May 30, Defendants requested a Fed. R. Civ. P. 37(a) conference to raise their objections to Plaintiffs' supplemental disclosure. The parties held a telephonic conference on June 4 but were unable to resolve their disagreement. Defendants advised that they would seek relief from this Court. Both sides agreed to dispense with formal motion practice. During a subsequent exchange on June 5, Plaintiffs advised Defendants that Mr. Sheehan's only remaining date of availability before the cutoff was the following day, June 6. The parties then requested a telephonic discovery hearing with this Court. Defendants have not deposed either Mr. Morales or Mr. Sheehan because Plaintiffs stated that they would agree to depositions after the cutoff, should this Court allow them to remain in this case. Defendants now respectfully submit that there is an ample basis under Fed. R. Civ. P. 37(c)(1) for this Court to exclude Mr. Morales and Mr. Sheehan as potential fact witnesses for Plaintiffs.

B. Argument

Fed. R. Civ. P. 26(e)(1)(A) requires that a party supplement its Fed. R. Civ. P. 26(a)(1)(A) disclosures "in a timely manner." Fed. R. Civ. P. 37(c)(1) provides that "[i]f a party fails to . . . identify a witness as required by Rule 26(a) or (e) [*i.e.*, in a timely manner], the party is not allowed to use that witness to supply evidence on a motion, at a hearing, or at a trial, unless the failure was substantially justified or harmless." The party facing exclusion bears the burden of proving that its untimely disclosure was substantially justified or harmless. *R & R*

Sails, Inc. v. Insurance Co. of the State of Pennsylvania, 673 F.3d 1240, 1247 (9th Cir. 2012). This Court has "wide latitude" under Fed. R. Civ. P. 37(c)(1). *Yeti by Molly, Ltd. v. Deckers Outdoor Corp.*, 259 F.3d 1101, 1106 (9th Cir. 2001)

In this Circuit, courts may exclude late-disclosed witnesses or evidence "even absent a showing in the record of bad faith or willfulness," provided that the exclusion does not amount to dismissal. *Yeti by Molly*, 259 F.3d at 1106; *R & R Sails*, 673 F.3d at 1247. Here, the exclusion of Mr. Morales and Mr. Sheehan would not be equivalent to dismissal, so no finding of bad faith or willfulness is required. Moreover, foreclosing their participation in this action would not "render it difficult or impossible for [Plaintiffs] to prove [their] case," as Plaintiffs have identified 23 other potential fact witnesses. *Affiliated FM Insurance Co. v. LTK Consulting Services*, No. C06-1750JLR, 2014 U.S. Dist. LEXIS 53211, at *39 (W.D. Wash. April 16, 2014) (citing *Yeti by Molly*, 259 F.3d at 1106). Inversely, allowing Mr. Morales and Mr. Sheehan to participate in this case despite their untimely and unjustified identification would prejudice Defendants as described below. Accordingly, exclusion is warranted under Fed. R. Civ. P. 37(c)(1).

1. Plaintiffs' Disclosure Was Untimely and Unjustified

Fed. R. Civ. P. 26(e)(1)(A) calls for a party to supplement its disclosures "in a timely manner." Plaintiffs' identification of Mr. Morales and Mr. Sheehan failed to comply with this requirement. Despite having almost two years to conduct discovery, Plaintiffs waited until less than two weeks remained before the cutoff to identify Mr. Morales and Mr. Sheehan.

Plaintiffs may argue that their disclosure is unobjectionable because it was made prior to the cutoff. But simply identifying potential fact witnesses sometime before the cutoff does not establish timeliness: If Plaintiffs had served their disclosure on the day before the cutoff, then the disclosure would undoubtedly be considered untimely. Plaintiffs' disclosure in this action is just as tardy given the size and complexity of this litigation and the amount of time the parties have had to conduct discovery.

Furthermore, Plaintiffs' disclosure is belated because Plaintiffs have not offered a "substantial[] justifi[cation]" for their delay. Fed. R. Civ. P. 37(c)(1). Plaintiffs have certainly been aware of Mr. Morales since at least the commencement of this case: He is a Hispanic resident of Yakima and was a City employee for more than 15 years, which included tenures as Assistant and Interim City Manager in 2011 and 2012. Moreover, Plaintiffs' representatives interviewed former Councilmember and Mayor Dave Edler on September 17, 2012, and the transcript of the interview shows Plaintiffs' representatives advising Mr. Edler that they wanted to speak with Mr. Morales and asking Mr. Edler to "pass on [Plaintiffs' representatives'] contact information to him." That was nearly two years ago. Moreover, Plaintiffs recently produced text messages from April and June 2013 that Mr. Morales apparently exchanged with Plaintiffs' counsel La Rond Baker regarding a meeting in Yakima. Given Plaintiffs' knowledge of and contact with Mr. Morales, the timing of Plaintiffs' disclosure is not defensible.

Plaintiffs may argue that their disclosure of Mr. Morales was delayed by their review of over 300,000 pages of emails produced by Defendants on a rolling basis over the course of 18 days from March 31 to April 18, 2014, and that their decision to identify Mr. Morales was triggered only when Plaintiffs came across emails that included or related to him. But this is not a convincing justification for his belated disclosure. Plaintiffs have been aware of Mr. Morales for some time, and have been communicating with him for at least a year prior to his disclosure. As such, Plaintiffs could have recognized whether Mr. Morales was "likely to have discoverable information" to support Plaintiffs' claims before obtaining the emails from Defendants, which were produced between five to eight weeks before Mr. Morales was disclosed. Fed. R. Civ. P. 26(a)(1)(A)(i). Accordingly, the process of reviewing the discoverable emails produced by Defendants is not a "substantial[] justifi[cation]" for the belated disclosure of Mr. Morales. Fed. R. Civ. P. 37(c)(1).

Plaintiffs also may assert that Mr. Morales initially refused to serve as a potential fact witness, but changed his mind at the last minute. Even if this were true, it is not does redeem his untimely disclosure. As described below, the belated identification of Mr. Morales was substantially prejudicial, and Defendants should not suffer the detrimental effects of Mr. Morales' untimely disclosure simply because he was reluctant to get involved.

Although Mr. Sheehan's role in this case is limited to taking photographs of City parks and facilities, his disclosure was also untimely. Plaintiffs produced Mr. Sheehan's photographs on the same day that he was identified. Although Plaintiffs provided these photographs in a timely manner because they were part of a supplemental document production made before the discovery cutoff, Plaintiffs' disclosure of Mr. Sheehan was untimely because it did not allow adequate time to prepare for and to take his deposition—especially given that Plaintiffs notified Defendants on June 5 that Mr. Sheehan's only availability before the cutoff was June 6. Moreover, Plaintiffs have not explained why they could not have disclosed Mr. Sheehan and his photographs at an earlier reasonable time. In fact, Plaintiffs recently produced emails exchanged between Plaintiffs' counsel and Mr. Sheehan showing that Plaintiffs retained Mr. Sheehan's services in September 2013. In sum, Plaintiffs' decision to identify Mr. Morales and Mr. Sheehan at the eleventh hour cannot be "substantially justified." Fed. R. Civ. P. Rule 37(c)(1).

2. Plaintiffs' Untimely Disclosure is Prejudicial

In addition to being untimely and unjustified, Plaintiffs' disclosure is substantially prejudicial. As noted, the timing of Plaintiffs' disclosure allowed Defendants only a handful of days to prepare for and to note the depositions of Mr. Morales and Mr. Sheehan. The preparation required to properly depose Mr. Morales would be far-reaching and in-depth, as he is a Hispanic resident of Yakima, a longtime former City employee, and former Assistant and Interim City Manager in 2011 and 2012. Furthermore, Defendants would be required to research and to prepare for an examination of Mr. Morales' potential bias against the City: Plaintiffs recently disclosed an email from him to Ms. Baker dated May 20, 2014, stating that he believes he has "been ignored twice for seeking employment with the city of Yakima, in positions that were below [his] prior grade." The preparation for Mr. Sheehan's deposition would also require

considerable work, including the review of more than 600 undated and unlabeled photographs of City parks and facilities.

The prejudicial effect of Plaintiffs' untimely disclosure was exacerbated by the noting of depositions for five of Defendants' potential fact witnesses during the handful of days before the discovery cutoff, including three continuation depositions on the day of the discovery cutoff, the scheduling of which had not specifically been discussed. Finally, preparing for and taking the depositions of Mr. Morales and Mr. Sheehan at a late hour before the cutoff would have impaired Defendants' ability to produce all remaining discoverable documents in a timely manner.

Plaintiffs may assert that their disclosure was harmless because they were willing to conduct the depositions of Mr. Morales and Mr. Sheehan after the discovery cutoff. But this does not cure the prejudice: Holding depositions after the cutoff would impede Defendants' capacity to meet other pretrial deadlines, including filing of dispositive motions by July 1 (which Defendants have indicated they intend to file, *see* ECF No. 57) and filing the witness and exhibit lists by August 19 in a case with more than 400,000 pages of documents and over 40 potential fact witnesses. Moreover, Plaintiffs' attempt to cure prejudice by offering to conduct depositions after the discovery cutoff would "render Rule 37(c)(1) toothless." *Northwest Pipeline Corp. v. Ross*, No. C05-1605RSL, 2008 U.S. Dist. LEXIS 32984, at *34 (W.D. Wash. April 11, 2008).

C. Conclusion

Once again, Defendants are reluctant to raise this issue with the Court. The parties have maintained a cordial and effective working relationship throughout this case, and Defendants believe this relationship will continue. However, the parties have been unable to resolve their disagreement on this particular issue. For the reasons stated above, Defendants respectfully request that this Court strike Mr. Morales and Mr. Sheehan as potential fact witnesses for Plaintiffs. Thank you again for considering this matter.

FLOYD, PFLUEGER & RINGER, P.S.,

s/ John A. Safarli

John A. Safarli
Counsel for Defendants

JAS/yb
cc: All Counsel