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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

CHANEL, INC., Plaintiff, v. WGACA, LLC, WHAT COMES AROUND GOES AROUND LLC d/b/a WHAT GOES AROUND COMES AROUND, MHW PROPERTIES, INC., WGACA WEB, LLC, PINES VINTAGE, INC., VINTAGE DESIGNS LTD., and WCAGA LA, LLC, Defendants.	Civil Action No. 18-cv-2253-LLS

PLAINTIFF'S MOTION TO EXCLUDE DEFENDANT'S PREVIOUSLY UNDISCLOSED WITNESS MASON HOWELL

Plaintiff Chanel, Inc. ("Chanel") moves to exclude the testimony of Defendant WGACA, LLC's ("WGACA") **second**[1] surprise witness Mason Howell, who was first disclosed to Chanel on January 27, 2024 – nearly three weeks into the trial. Mr. Howell was never disclosed pursuant to Fed. R. Civ. P. 26(a), was not listed as a witness on WGACA's witness list and has never been deposed. To allow Mr. Howell to testify at this late stage of this case would result in unfair prejudice and surprise in violation of Fed. R. Evid. 403 and would violate Fed. R. Civ. P. 37.

I. RELEVANT FACTS

Before this trial began, WGACA did not identify Mason Howell as a witness in its Fed. R. Civ. P. 26 disclosures or its list of trial witnesses. Mr. Howell has not been deposed. Nor was Mr. Howell's name ever mentioned in WGACA's written discovery responses. Although Mr. Howell's name appeared on one email relating to Chanel apparel as being auctioned by Christies produced in discovery, Mr. Howell worked for Christies at the time. The first time that Chanel heard that WGACA intended to call Mr. Howell as a witness at trial was on January 27, 2024 -- **eighteen days after trial started**. Chanel learned of the intent to call Mr Howell as a witness in an email sent on January 27th by WGACA's counsel, without any explanation of who Mr. Howell is or what testimony he intends to offer.[2]

II. MR. HOWELL'S TESTIMONY SHOULD BE EXCLUDED UNDER FED. R. CIV. P. 37

Fed. R. Civ. P. 26(a)(1)(A)(i) requires a party to disclose "the name and, if known, the address and telephone number of each individual likely to have discoverable information—along

[1] WGACA's first surprise witness is Gracie Ginn, whose testimony is subject to a motion to exclude filed by Chanel on January 24, 2024. Dkt. 386.

[2] Chanel learned through Mr. Howell's LinkedIn profile, that he has been employed by WGACA since December 2022, and appears to be responsible for facilitating live and e-commerce sales of luxury products at WGACA. A true and correct copy of Mr. Howell's LinkedIn profile is attached hereto as **Exhibit A**.

with the subjects of that information—that the disclosing party may use to support its claims or defenses, unless the use would be solely for impeachment." Fed. R. Civ. P. 26(e)(1) requires timely supplementation of these disclosures.

"Rule 26's disclosure requirement is aimed at apprising a party of the witnesses on whom their opponent intends to rely on to support their claims or defenses, so as to prevent unfair surprise and to give the party the opportunity to respond tactically." *Christians of Cal., Inc. v. Clive Christian N.Y., LLP*, No. 13-cv-275 (KBF), 2014 U.S. Dist. LEXIS 161798, at *14 (S.D.N.Y. Nov. 17, 2014). "The burden to prove substantial justification or harmlessness rests with the dilatory party." *AMEX v. Mopex, Inc.*, 215 F.R.D. 87, 93 (S.D.N.Y. 2002). Here, the burden is on WGACA to prove substantial justification or harmlessness for its abject failure to previously identify Mr. Howell as a witness and to overwise comply with Fed. R. Civ. P. 26.

The Second Circuit has identified four factors relevant to evaluating whether to preclude testimony under Fed. R. Civ. P. 37 for failure to disclose under Fed. R. Civ. P. 26(a): "(1) the party's explanation for the failure to comply with the discovery [obligation]; (2) the importance of the testimony of the precluded witness; (3) the prejudice suffered by the opposing party as a result of having to prepare to meet the new testimony; and (4) the possibility of a continuance." *Chamberlain v. City of White Plains*, 960 F.3d 100, 117 (2d Cir. 2020); *see also Softel, Inc. v. Dragon Med. & Sci. Communs.*, 118 F.3d 955, 961 (2d Cir. 1997) (applying same four factors to exclusion of expert witness). "Rule 37 clearly prohibits . . . for defendants to knowingly fail to disclose percipient witnesses in violation of their obligations under Rule 26(a) and (e)(1), and then seek to have those witnesses testify at trial." *Lopez v. City of New York*, No. 11-CV-2607 CBA RER, 2012 WL 2250713, at *2 (E.D.N.Y. June 15, 2012). Here, all four factors weigh in favor of exclusion.

First, WGACA offers no explanation as to why it has waited until now to identify Mr. Howell as a witness. Mr. Howell has been employed by WGACA for the past thirteen months and one whole year leading up to the trial. Yet, WGACA failed to identify Mr. Howell as a potential witness in any of its submissions to the Court leading up to trial or to Chanel. Because WGACA does not provide any valid reason for the extremely delayed disclosure, the first factor weighs against allowing Mr. Howell to testify. *See Rella v. Westchester BMW, Inc.*, No. 16-cv-916 (AEK), 2022 U.S. Dist. LEXIS 95794, at *3 (S.D.N.Y. May 27, 2022); *Mulholland v. City of New York*, No. 09 CIV. 6329 (AKH), 2013 WL 12085087, at *2 (S.D.N.Y. Aug. 27, 2013), aff'd, 565 F. App'x 35 (2d Cir. 2014).

Second, although WGACA has not explained what Mr. Howell intends to testify on and/or the scope of his purported testimony, his testimony is likely to be unnecessarily cumulative and duplicative of WGACA's other defense witnesses. Based on the information provided on his LinkedIn profile, Mr. Howell appears to be involved in operations of WGACA's sale of accessories and handbags as well as drafting copy for WGACA's show descriptions, website landing page, and relevant product listings. Other witnesses, such as Frank Bober, Shannon Parker, and Devyn Shaughnessy, have already testified about these subjects. To date, WGACA has not made any showing that Mr. Howell's testimony is critical to its defense or somehow different from the testimony of the other witnesses, such as Frank Bober, Shannon Parker, and Devyn Shaughnessy. Hence, the exclusion of Mr. Howell's testimony would not deprive WGACA of its ability to put forward witnesses to support its defense. Therefore, this factor weighs against allowing Mr. Howell to testify.

Third, WGACA's disclosure of Mr. Howell – towards the end of trial – is plainly prejudicial to Chanel. Indeed, courts have routinely excluded witness testimony under Fed. R. Civ.

P. 37 where the witness was disclosed by a party in the month *leading up to trial*. *See EMA Fin., LLC v. Joey N.Y., Inc.*, No. 17-CV-9706 (VSB), 2021 U.S. Dist. LEXIS 108189, at *5 (S.D.N.Y. June 9, 2021) ("the disclosure of a new witness less than a month before trial—whom Plaintiff has not had the ability to depose or seek documents from, including the 'records' at issue here—is plainly prejudicial to Plaintiff, which has already faced a six-month delay for trial in this case."); *Patterson v. Balsamico*, 440 F.3d 104, 118 (2d Cir. 2006) (finding prejudice to the defendant where testimony was identified only ten days before trial and no evidence regarding the witness had been submitted in connection with summary judgment motions); *N. Am. Photon Infotech, Ltd. v. Zoominfo LLC*, No. 20 Civ. 2180 (JPC), 2022 U.S. Dist. LEXIS 163555, at *13 (S.D.N.Y. Aug. 9, 2022) (excluding late-disclosed witness and noting that "failure to disclose a witness until the eve of trial causes obvious prejudice to an adversary preparing its own trial proof, and allowing such testimony would give the offending party an unfair tactical advantage."). Here, even more egregiously, WGACA failed to disclose Mr. Howell until nearly three weeks after this trial had begun. This late disclosure is clearly unfair and extremely prejudicial to Chanel because it has never had the opportunity to depose Mr. Howell. *Pearlman v. Cablevision Sys. Corp.*, No. 10-CV-4992(JS)(GRB), 2015 WL 8481879, at *11 (E.D.N.Y. Dec. 8, 2015) ("the Court finds that the failure to disclose [witness] is not ['']harmless['] based on the prejudice that would inure to Plaintiffs if they were to proceed to trial without a deposition or discovery with respect to a fact witness."). The third factor weighs heavily against WGACA.

Finally, for these same reasons, the fourth factor also weighs against allowing Mr. Howell to testify. Indeed, given that the jury is empaneled, and the trial is already well underway, there is no opportunity for the Court to order a continuance to correct the grave deficiencies in discovery

created by WGACA's late disclosure. The Court should therefore exclude Mr. Howell's testimony pursuant to Fed. R. Civ. P. 37.

III. THE COURT SHOULD ALSO EXCLUDE MR. HOWELL'S TESTIMONY UNDER FED. R. EVID. 403

Fed. R. Evid. 403 provides that "[t]he court may exclude relevant evidence if its probative value is substantially outweighed by a danger of one or more of the following: unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence." "The Rule 403 inquiry is particularly important in the context of expert testimony, 'given the unique weight such evidence may have in a jury's deliberations.'" *Pac. Life Ins. Co. v. Bank of N.Y. Mellon*, 571 F. Supp. 3d 106, 114 (S.D.N.Y. 2021). Fed. R. Evid. 403 counsels for the exclusion of Mr. Howell's testimony in this case for *two* primary reasons.

First, Mr. Howell's surprise testimony will be unfairly prejudicial to Chanel. Chanel was never given the opportunity to conduct discovery relating to Mr. Howell, whether it was document collection or deposition. WGACA has never previously made any effort to identify Mr. Howell or the subject matter of his testimony. Consequently, the first Chanel will learn of the subject matter of Mr. Howell's testimony, will be ***during his trial testimony***.

Second, as discussed above, the testimony of Mr. Howell is likely to be needlessly cumulative of the other defense witnesses who were actually subject to discovery, such as Frank Bober, Shannon Parker, and Devyn Shaughnessy. Chanel has had the opportunity to depose each of these three witnesses and each has already testified at trial. WGACA has not explained how Mr. Howell's testimony will not simply duplicate the testimony of WGACA's other witnesses, who have already testified in connection with WGACA's claims or defenses in this case.

Since WGACA has not provided a legitimate reason for its last minute disclosure of yet another new witness, permitting Mr. Howell to testify at trial is prejudicial to Chanel and will be a waste of time and this Court's resources and will delay the completion of this trial even more.

Accordingly, in addition to excluding Mr. Howell's testimony pursuant to Fed. R. Civ. P. 37, the Court should also exclude Mr. Howell's testimony as unfairly prejudicial and unnecessarily cumulative thereby further delaying the completion of the trial under Fed. R. Evid. 403.

Respectfully submitted,

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By: */s/ Theodore C. Max*

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