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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 GRACIE GINN

Plaintiff Chanel, Inc. ("Chanel") moves to exclude the testimony of Defendant WGACA, LLC's ("WGACA") belatedly disclosed, purported expert witness Gracie Ginn. To allow Ms. Ginn 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

Prior to the commencement of trial , WGACA never identified Gracie Ginn as a percipient witness or expert witness in its Fed. R. Civ. P. 26 disclosures or its list of trial witnesses. Ms. Ginn has not been deposed nor did she submit any expert report in this case as is required by Fed. R. Civ. P. 26. In fact, Ms. Ginn's name was never mentioned by any of WGACA's employees in deposition or in WGACA's written discovery responses. The first time that Plaintiff Chanel, Inc. ("Chanel") heard of Ms. Ginn was in chambers on January 17, 2024 – **nine days after trial started**. WGACA asked the Court to allow Ms. Ginn to sit in the courtroom during other witnesses' testimony even though they were planning on calling her as an expert witness to rebut Joseph Bravo's testimony, on behalf of Chanel, concerning the physical inspection of certain of WGACA's bags. WGACA did not disclose the identity of Ms. Ginn in chambers until expressly asked by Chanel's counsel. WGACA did not disclose who Ms. Ginn worked for during that in-chambers meeting, nor at any time afterward. Chanel learned through its own investigation afterwards that Ms. Ginn works for WGACA. Based on her LinkedIn profile,[1] Ms. Ginn has apparently been employed on and off by WGACA for more than **five** years.

At any time during this case's five year existence, much less by the expert disclosure deadlines in this case, WGACA could have revealed its intent to potentially call Ms. Ginn as an

[1] *See* https://www.linkedin.com/in/gracieginn (Last Accessed January 23, 2024). A true and correct copy of Ms. Ginn's LinkedIn profile is attached hereto as **Exhibit A**.

"expert." Yet WGACA waited until January 17, 2024 – nine days after this trial was well underway – to disclose her.

II. MS. GINN'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 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." Likewise, Fed. R. Civ. P. 26(a)(2)(A) requires a party to disclose "the identity of any witness it may use at trial to present evidence under Federal Rule of Evidence 702, 703, or 705." Absent other deadlines set by the Court, Fed. R. Civ. P. 26(a)(1)(C) and 26(a)(2)(D), respectively, govern the deadlines to make these disclosures, and 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). Moreover, Rule 26(a)(2)(A) specifically provides with regard to expert testimony that "Pursuant to Fed. R. Civ. P. 37(c)(1), "[i]f a party fails to provide information or identify a witness as required by Rule 26(a) … **the party is not allowed to use that information or witness to supply evidence on a motion, at a hearing, or at a trial**, unless the failure was substantially justified or is harmless." *Id.* (emphasis added). "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 Ms. Ginn as an expert 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). Here, all four factors weigh in favor of exclusion.

First, WGACA's explanation that it has now identified Ms. Ginn as a new expert witness because Mr. Bravo – who was twice deposed by WGACA in discovery – conducted an "in-court examination" of the bags sold by WGACA, is baseless and fails to justify the late disclosure. (Trial Tr., 551:11-555:7.) WGACA has long known of Mr. Bravo's testimony concerning certain infringing and counterfeit handbags sold by WGACA. Indeed, Mr. Bravo examined bags sold by WGACA at his 30(b)(6) deposition on February 11, 2021, using photographs because WGACA did not make any items available for inspection *at that time*[2]. *See*, e.g., Bravo 30(b)(6) Deposition Tr., 53:10-19 (Bravo noting "I didn't have the opportunity to have the product in hand, but based on -- on the photos that I've seen and the serial number, my conclusion is that the bag is not an authentic one.").

Despite the fact that Ms. Ginn was employed by WGACA during the discovery phase of this case, WGACA wholly failed to identify Ms. Ginn as a potential expert or witness in any of its discovery disclosures or responses or submissions to the Court leading up to trial. Because

[2] WGACA's offer to allow physical inspection of the bags in late 2020 did not allow for Mr. Bravo to physically inspect them because he resides in France, which was still subject to strict COVID lockdowns at that time.

WGACA does not provide any valid reason for the extremely delayed disclosure, the first factor weighs against allowing Ms. Ginn 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).

Second, although WGACA has not precisely explained what Ms. Ginn intends to opine on and/or the scope of her purported opinions, her testimony is likely to be unnecessarily cumulative and duplicative of WGACA's other defense witnesses. For example, WGACA's Supplemental Response To Claims By Chanel, Inc. As To Items Identified By Chanel Pursuant To Orders Of May 5, 2020, June 16, 2020 And August 21, 2020 identified "Frank Bober, Seth Weisser, Ambria Mische, Devyn Shaughnessy and Sun Li" as the witnesses who might support its defenses regarding the authenticity of certain Chanel-branded items in this action. Notably, WGACA disclosed each of those witnesses during discovery, each has been deposed by Chanel, and each has testified or is scheduled to testify at trial. To date, WGACA has not made any showing that Ms. Ginn's testimony is critical to its defense or somehow different from the testimony of its five other witnesses. *Williams v. Cty. of Orange*, No. 03 Civ. 5182, 2005 U.S. Dist. LEXIS 46051, at *18 (S.D.N.Y. Dec. 13, 2005) (barring testimony of expert witness disclosed six weeks before trial pursuant to Fed. R. Civ. P. 37 and finding that precluding the testimony would not render a "fatal blow" to the defendants' case). Hence, exclusion of Ms. Ginn's testimony would not deprive WGACA of its ability to put forward witnesses to support its defense. WGACA already has five other witnesses to discuss the authenticity issue. Therefore, this factor weighs against allowing Ms. Ginn to testify.

Third, WGACA's disclosure of Ms. Ginn – in the middle of trial – as a purported expert witness 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 Ms. Ginn until more than a week *after the trial had begun*. This late disclosure is both unfair and extremely prejudicial to Chanel because it has never had the opportunity to request documents of Ms. Ginn, review any expert report setting forth Ms. Ginn's purported opinions, retain a rebuttal expert, submit a rebuttal expert report, or depose her. The third factor weighs heavily against WGACA.

Finally, for these same reasons, the fourth factor also weighs against allowing Ms. Ginn 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 Ms. Ginn's testimony pursuant to Fed. R. Civ. P. 37.

III. THE COURT SHOULD ALSO EXCLUDE MS. GINN'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 Ms. Ginn's testimony in this case for *two* primary reasons.

First, Ms. Ginn's surprise "expert" testimony will be unfairly prejudicial to Chanel. WGACA has never previously made any effort to identify Ms. Ginn's opinions or the foundations underlying them. Consequently, Chanel would learn of Ms. Ginn's "expert" opinions, as well as her expert qualifications and basis for her opinions, for the first time during her trial testimony, leaving Chanel with little to no time or opportunity to prepare a rebuttal. This late disclosure is particularly prejudicial to Chanel because WGACA is presenting Ms. Ginn as an "expert" to the jury, who is likely to give undue weight to her "expert" opinions, as well as undue weight to any failure on Chanel's part to adequately rebut her opinions. *Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 579, 595 (1993) ("Expert evidence can be both powerful and quite misleading because of the difficulty in evaluating it. Because of this risk, the judge in weighing possible prejudice against probative force under Rule 403 of the present rules exercises more control over experts than over lay witnesses."). This is particularly the case here where Chanel has had no prior opportunity to examine Ms. Ginn on the scope of her opinions, her qualifications as an expert, and/or the methods underlying her purported evaluations.

Second, as discussed above, the testimony of Ms. Ginn is likely to be needlessly cumulative of the other defense witnesses who were actually subject to discovery. Specifically, WGACA has already identified five other witnesses – Frank Bober, Seth Weisser, Ambria Mische, Devyn Shaughnessy, and Sun Li – as witnesses who it intends to use in support of its defense. Chanel has

had the opportunity to depose each of these witnesses and each has testified or is scheduled to testify at trial. WGACA has presented no justification for the addition of a sixth witness on these issues and has not explained how Ms. Ginn's testimony will not simply duplicate the testimony of WGACA's other witnesses, who have already testified, or are all likely to testify, as to the purported authenticity of the CHANEL-branded products sold by WGACA.

There is no legitimate reason for WGACA's last minute disclosure of a tenured WGACA employee to testify as a purported expert on the authenticity of the bags that WGACA has sold. The prejudice to Chanel is palpable, in addition to the potentially cumulative nature of Ms. Ginn's testimony, which will needlessly waste time and delay the completion of this trial even more.

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

Respectfully submitted,

Dated: January 24, 2024

By: */s/ Theodore C. Max*

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