

Tentative Minute Order re Motions *in Limine*

Plaintiffs David Hakim, San Julian Discount Mart, Inc., and Mybecca, Inc. (collectively “Plaintiffs”) and defendants Murano, Inc. *et al.* (“Murano Parties”) move the Court for relief by way of Motions *in Limine*. The Court now enters its rulings.

I. Plaintiffs’ Motions *in Limine*.

A. Motion *in Limine* No. 1: *Partnership Agreement*.

Plaintiffs seek an order to exclude evidence of a written partnership agreement between the parties. (Docket No. 117.) The Murano parties have filed an opposition (Docket No. 125), and Plaintiffs have replied (Docket No. 128).

The Murano Parties have asserted the existence of a written partnership between the parties. (Docket No. 40, ¶ 32; Docket No. 53, ¶ 33; Docket No. 53, ¶ 33; Docket No. 81, ¶ 42.) They took similar positions in responses to interrogatories and requests for admission. However, no written partnership agreement has been produced during the course of discovery despite appropriate discovery requests.

Rule 37(c)(1) of the Federal Rules of Civil Procedure establishes a self-executing sanction for failing to make required disclosures: “If a party fails to provide information or identify a witness as required by Rule 26(a) or (e), 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.” Fed. R. Civ. P. 37(c)(1); Yetti by Molly, Ltd. v. Deckers Outdoor Corp., 259 F.3d 1101, 1105-06 (9th Cir. 2001). The Rule also provides for alternate sanctions:

In addition to or instead of this sanction, the court, on motion and after giving an opportunity to be heard:

(A) may order payment of the reasonable expenses, including

attorney's fees, caused by the failure;

(B) may inform the jury of the party's failure; and

(C) may impose other appropriate sanctions, including any of the orders listed in Rule 37(b)(2)(A)(i)-(vi).

Plaintiffs' Request for Production Nos. 1-3 call for production of any agreement and related documents, "any offers, counter-offers, terms and/or proposals of any proposed partnership." . (Sherman Decl., Ex. C, pp. 3-4.) The Murano parties assert that "[n]o responsive documents exist." (Id.) However, the Murano Parties offer an explanation in their response to the motion: Plaintiff David Hakim ("Hakim") caused the relevant files to be destroyed. (San Julian Discount Mart, Inc. Corporate Depo., p. 198.) The Court bars the Murano Parties from offering a written partnership agreement and related documentary materials at trial: Either because they were not produced or because they were destroyed.

However, the Plaintiffs' motion goes farther and seeks to exclude testimony on the same topic. (Motion, p. 1.) The Court does not have a sufficient record to make a determination of whether to adopt such an exclusion. Given the alleged spoliation on the part of Hakim, there may be a basis to admit testimony with regard to such documents. This portion of the motion is denied without prejudice to specific objections at trial.

The motion is granted in part and denied in part.

B. Motion in Limine No. 2: Contradictory Evidence

Plaintiffs seek an order to exclude evidence contrary to the testimony of the Murano Parties' Rule 30(b)(6) designee, Joshua Dadbin ("Dadbin"). (Docket No. 117.) The Murano Parties have filed an opposition (Docket No. 126), and Plaintiffs have replied (Docket No. 129).

Rule 30(b)(6) of the Federal Rules of Civil Procedure requires an organization upon request to designate a representative to testify on its behalf on specified topics. "The persons designated must testify about information known or reasonably available to the organization." (Fed. R. Civ. P. 30(b)(6).) "[T]he

corporate deponent has an affirmative duty to make available such number of persons as will be able to give complete, knowledgeable and binding answers on its behalf.” Reilly v. Natwest Markets Group, Inc., 181 F.3d 253, 268 (2d Cir. 1999) (internal quotation marks omitted).

At his Rule 30(b)(6) deposition, Dadbin testified to the effect that he did not know, did not remember, or could not recollect information more than ninety time. (Sherman, Decl., ¶ 17.) Plaintiffs seek to bar the Murano Parties from offering evidence to the contrary.

The testimony of a corporate designee binds the corporation, but it does not act as a judicial admission barring the sponsoring party from offering contradictory evidence. State Farm Mutual Auto Ins. Co. v. New Horizon, Inc. 250 F.R.D. 203, 212 (E.D. Pa.2008); United States v. Taylor, 166 F.R.D. 356, 362 n.2 (M.D.N.C. 1996); see A.I. Credit Corp. v. Legion Ins. Co. 265 F.3d 630, 637 (7th Cir. 2001). (testimony of Rule 30(b)(6) designee does not bind corporation in sense of judicial admission). “[T]estimony given at a Rule 30(b)(6) deposition is evidence which, like any other deposition testimony, can be contradicted and used for impeachment purposes.” A.I. Credit Corp., 265 F.3d at 637 (internal quotation marks omitted).

While he did not offer comprehensive testimony, the Court finds that Dadbin was adequately prepared on the topics which Plaintiffs identified. In any event, preclusion is the not proper remedy where a witness is adequately prepared. As noted above, the examiner is free to impeach other witnesses on the basis of the corporate deponents’ testimony.

There is a further problem in that the examination of Dadbin went beyond the designated topics, and according to the Murano Parties, no examination was conducted on eight of the thirteen topics. (Opposition, pp. 8-9.) As the parties both concede, the examiner at a 30(b)(6) deposition is free to cover topics other than those designated. (Motion, pp. 3-5, citing King v. Pratt & Whitney, 161 F.R.D. 475, 476 (S.D. Fla. 1995); FCC v. Mizuho Medy Co., Ltd., 257 F.R.D. 679, 682 (S.D. Ca. 2009); Reply, p. 1, citing Detoy v. City and County of San Francisco, 196 F.R.D. 362, 366-67 (N.D. Cal. 2000).) However, when he examiner goes beyond the Rule 30(b)(6) topics, the deposition becomes one of the individual under Rule 30(b)(1), and does not bind the corporation. Detoy, 196

F.R.D. at 367; FCC, 257 F.R.D. at 682.

Without a full transcript, the Court cannot determine which questions fall within the designated topics and which do not. The parties are ordered to meet and confer, and submit seven days prior to trial a list of questions, identified by pages and line, which fall outside the deposition topics. If a party contends that a question is within the topics, it shall identify the relevant topic(s). Where there is disagreement, it shall be noted, and the Court will rule on any disputes.

At trial the Court will instruct the jury on the nature a Rule 30(b)(6) deposition and the significance of the Rule 30(b)(6) testimony.

Except as noted, the motion is denied.

C. Motion in Limine No. 3: Documents Not Produced.

Plaintiffs seek an order to exclude documents not produced during the course of discovery. The Murano Parties have not filed an opposition.

While acknowledging the exclusionary sanction under Rule 37(c)(1) of the Federal Rules of Civil Procedure, the Court finds that the present motion is too amorphous to rule without a further record. At trial, if Plaintiffs object to a particular document on the basis of no prior production, the Plaintiffs should be prepared to cite the specific request for production or other obligation to make production during the course of discovery.<sup>1</sup>

The motion is denied without prejudice.

D. Motion in Limine No. 4: Damages Evidence.

Plaintiffs seeks an order to exclude all evidence of the Murano Parties' damages. (Docket No. 120.) The Murano Parties have filed an opposition (Docket No. 127), and Plaintiffs have replied (Docket No. 130).

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<sup>1</sup>Plaintiffs are free to renew this motion is advance of trial with respect to any specific documents which the Murano Parties identify in the parties' joint exhibit list.

As part of each party's initial disclosures, the party must provide "a computation of each category of damages claimed by the disclosing party--who must also make available for inspection and copying as under Rule 34 the documents or other evidentiary material, unless privileged or protected from disclosure, on which each computation is based, including materials bearing on the nature and extent of injuries suffered." (Fed. R. Civ. P. 26(a)(iii); emphasis supplied.) A party also has a obligation to update or correct its initial disclosures. (Fed. R. Civ. P. 26(e)(1).)

The Murano Parties' initial disclosures listed categories of damages, but did not provide a computation. (Sherman Decl., Ex. A, p. 6.) The disclosure did state that Dadbin has damages "not less than \$1,500,000." (Id.) The Murano Parties never supplemented their initial disclosure, nor did they otherwise provide a calculation of their damages. (Id., ¶ 6.)

The Murano Parties failed to comply with Rule 26's damage disclosure requirement, and are thus subject to the exclusionary sanction under Rule 37(c)(1). A list of categories of damages is no substitute because a mere list fails to provide the opposing fair notice of the damages claimed. City and County of San Francisco v. Tudor-Saliba Corp., 218 F.R.D. 219, 221 (N.D. Cal. 2003) ("the 'computation' of damages required by Rule 26(a)(1)(C) contemplates some analysis; for instance, in a claim for lost wages, there should be some information relating to hours worked and pay rate").

The Murano Parties offer two defenses. Neither is sufficient.

First, the Murano Parties argue the Plaintiffs' damage disclosure are insufficient. (Opposition, p. 1.) That matter is not before the Court, and any deficiency on the Plaintiffs' side will not cure the flaws in the Murano Parties's disclosures.

Second, the Murano Parties point to their damages prayer and set it forth in full. (Opposition, pp. 3-4.) The prayer is not a computation. There is a list of categories, but no statement of the Murano Parties' "bottom line" and how to get there.

Third, the Murano Parties point to their responses to interrogatories,

and contend that they amount to substantial compliance. (Opposition, pp. 4-8.) The Court agrees that later disclosures through interrogatory responses may cure the shortcoming in an initial damage disclosure (Opposition, p. 3, citing commentary to 1993 revision to Rule 26(e)), but the responses here do not lead the required computation. At most, the interrogatory answers show:

- The parties agreed to split profits 50/50. But of what number?
- Murano and Hakim were entitled to take monthly draws. But did they fail to do so, and what is the short fall if any.
- The balance sheets show a 90/10 split of some items and a 50/50 split of others. But what items and what amounts?
- Hakim set up a PayPal account linked to the Murano Home Furnishing account. But this sheds no light on the quantum of damages.

The simple fact of the matter is that none of the interrogatories was addressed to damages, and not surprisingly, the responses do not deal with damages or any form of computation of damages. (Spellerberg Decl., Ex. A, *passim*.)

The Court finds that the Murano Parties failure to provide a computation is neither justified or harmless. (Fed. R. Civ. P. 37(c)(1).)

The motion is granted: All evidence of the Murano Parties' damages is excluded.

## II. Murano Parties' Motions *in Limine*.

The Court previously ordered the Murano Parties' motions *in limine* off calendar for failure to comply with the meet-and-confer requirements in Local Rule 7-3. (Docket No. 123.) This is the second time the Murano Parties have disregarded the meet-and-confer obligations with regard to motions *in limine*. (Docket No. 113.)

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**Counsel are ordered to advise the parties and all witnesses of the Court's rulings so that there are no inadvertent violations of this Order.**

A. Murano Parties' Motion in Limine No. 1:

Murano Parties seeks an order to exclude

B. Murano Parties' Motion in Limine No. 2:

Murano Parties seeks an order to exclude