

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO**

Civil Case 14-cv-03420-PAB-NYW

ESMERALDO VILLANUEVA ECHON JR;
MARIBEL ECHON;
and JUSTIN ECHON

Plaintiffs,
v.

WILLIAM SACKETT and
LEONIDA SACKETT

Defendants.

**PLAINTIFFS' MOTION IN LIMINE NO. 3 – DEFENDANTS' CHARACTER
WITNESSES**

Plaintiffs request an order from the Court excluding from trial the witnesses Defendants have listed for the sole purpose of providing character evidence in violation of Federal Rules of Evidence 404(a)(1) and 608(a).¹

RELEVANT BACKGROUND

Defendants disclosed a number of witnesses to Plaintiffs during discovery but did not describe the testimony those witnesses would provide. *See* Ex. A (Defs.' Apr. 16, 2015 Initial Disclosures); Defs.' Proposed Scheduling Order at 14-15, ECF No. 20. At Defendants' depositions, Plaintiffs asked Defendants about the content of those witnesses' testimony and the witnesses' relationships with Defendants. *See* W. Sackett Dep. Tr. at 38:24 – 50:23, ECF No.

¹ Counsel for Plaintiffs conferred with Defendants, and Defendants will oppose this motion.

104-21; L. Sackett Dep. Tr. at 24:4 – 53:10, ECF No. 104-22. At that time, Defendant William Sackett described the purpose of the witnesses’ testimony as providing character references for Defendants. *See, e.g.*, W. Sackett Dep. Tr. 40:4 -5 (describing Don Penner as “a good reference. He’s a good character person.”), ECF No. 104-21. At her deposition, Defendant Leonida Sackett said that she did not know why Defendants listed the people they listed other than because they are close friends who will “witness about [Ms. Sackett], the Sackett family.” L. Sackett Dep. Tr. 38:8 – 39:8, 40:18-23, ECF No. 104-22. When asked if the witnesses would say anything at trial about Plaintiffs, Defendant Leonida Sackett said, “I don’t know.” *Id.* 41:10-16.

Defendants have now listed several of those individuals as witnesses for trial. *See* Second Am. Final Pretrial Order at 23-24, EFC No. 146. Specifically, Defendants have listed the following individuals who will be called to testify about Defendants’ character: Don Penner, Sandra Penner, Shelly Moore, Wilma O’Reilly, and Timothy O’Reilly. *Id.*

STANDARD

Aside from in the case of narrow exceptions, “[e]vidence of a person’s character or character trait is not admissible to prove that on a particular occasion the person acted in accordance with the character or trait.” Fed. R. Evid. 404(a)(1). Likewise, “evidence of truthful character is admissible only after the witness’s character for truthfulness has been attacked.” Fed. R. Evid. 608(a). The Court “may exclude relevant evidence if its probative value is substantially outweighed by a danger of” unfair prejudice, misleading the jury, and wasting time. Fed. R. Evid. 403.

As discussed at length in Plaintiffs’ Motion *In Limine* No. 2, filed at the same time as this motion, the Court has prohibited Defendants from offering evidence they did not disclose during

discovery. Federal Rule of Civil Procedure 26(a)(1)(A)(i) requires each party to include in its initial disclosures “the name . . . 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.” Each party has a continuing duty to timely supplement its disclosures if it learns they are incomplete. Fed. R. Civ. P. 26(e). Even if a witness is disclosed, failure to “identify the subjects of the discoverable information that the putative witness may provide” violates Rule 26(a)(1). *Aldrich v. Indus. Cooling Sols.*, No. 14-CV-03206-CMA-KMT, 2016 U.S. Dist. LEXIS 29503, at *4 (D. Colo. Mar. 7, 2016) (quotation and alteration omitted); *see also Poitra v. Sch. Dist. No. 1*, 311 F.R.D. 659, 666 (D. Colo. 2015) (“Rule 26(a)(1)(A)(i) requires more than simply a laundry list of potentially knowledgeable individuals. Rather, a party is duty-bound to . . . identify the subjects of the discoverable information that the putative witness may provide.” (quotation omitted)). “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). If the failure to disclose is neither substantially justified nor harmless, the appropriate remedy is to strike the violative testimony. *Auraria Student Hous. at the Regency, LLC v. Campus Vill. Apartments, LLC*, No. 10-CV-02516-WJM-KLM, 2014 WL 2933189, at *6 (D. Colo. June 30, 2014).

ARGUMENT

Defendants have not disclosed—and Plaintiffs cannot imagine—any arguably relevant or admissible subject matter for the testimony of any of the following witnesses: Don Penner, Sandra Penner, Shelly Moore, Wilma O’Reilly, and Timothy O’Reilly. For that reason, in

accordance with Rules 404(a)(1) and 608(a) and to avoid unfair prejudice, waste of time,² and juror confusion under Rule 403, these witnesses should be excluded from trial. Any new subjects Defendants disclose now or at trial should not be allowed pursuant to Rule 37(c)(1), the Court's sanctions orders, and the need to avoid "trial by ambush." *See Gallegos v. Swift & Co.*, No. 04-cv-01295-LTB-CBS, 2007 U.S. Dist. LEXIS 5440, at *5 (D. Colo. Jan. 25, 2007) ("A key policy goal of requiring parties to keep their disclosures current is to avoid trial by ambush." (quotation omitted)). While this Court's practice standards discourage motions *in limine* "when the motion cannot be resolved," P.A.B. Practice Standards III.E., in this case it is either clear the witness would offer prohibited testimony and cannot testify to any other subject matter.

until evidence is presented at trial

I. DON PENNER

Defendant William Sackett stated at his deposition, in response to a question about why Defendants listed Mr. Penner as a witness, that Mr. Penner is "a good reference. He's a good character person." W. Sackett Dep. Tr. 40:4 -5, ECF No. 104-21. Mr. Sackett went on to state that "[Mr. Penner] knows that I don't lie, I don't cheat, and I don't steal, you know. So I don't know of a much better reference you can get than that." *Id.* 40:10 – 40:12. Ms. Sackett explained that Mr. Penner is Defendants' preacher and friend and that he occasionally visits Defendants' market.³ L. Sackett Dep. Tr. 24:4 – 25:20, ECF No. 104-22. In the Final Pretrial Order,

² Plaintiffs note that this case is set for a *three-day* jury trial, and Defendants have identified no less than five character witnesses.

³ While Mr. Penner and several other of Defendants' witnesses may have visited the market, they are apparently not being called to discuss Plaintiffs' activities at the market because Defendant Leonida Sackett is not sure if Mr. Penner—or any other of Defendants' witnesses—ever saw Plaintiffs at the market. L. Sackett Dep. Tr. 42:2-4, ECF No. 104-22.

Defendants only stated that Mr. Penner would “testify on Defendants’ behalf.” Second Am. Final Pretrial Order at 23, ECF No. 146.

Defendants have not listed any subject of discoverable information for Mr. Penner or any subjects of his testimony other than to provide character evidence for Defendants. If, as it appears, his testimony at trial is to suggest that Defendants did not do the things of which they are accused by invoking Mr. Penner’s knowledge of their character, that testimony would be a textbook violation of Rule 404(a)(1). Or, on the other hand, if his testimony is meant to support Mr. Sackett’s character for truthfulness, which Plaintiffs do not plan to attack, that is a violation of Rule 608(a). Even if it were not a violation of these two rules, Mr. Penner’s testimony would be highly prejudicial to the jury and a waste of time in violation of Rule 403, since Defendants’ character is simply not at issue in this case. Further, any amendments Defendants now offer to his testimony would violate Fed. R. Civ. P. 26(a) and 37 and the Court’s orders on sanctions prohibiting Defendants from relying on any evidence they did not disclose during discovery.⁴ For those reasons, he should not be permitted to testify at trial.

II. SANDRA “SANDY” PENNER

Defendants have failed to provide any information about the content of Ms. Penner’s testimony at trial. Ms. Penner is the wife of Don Penner and is a close friend of Defendants. W. Sackett Dep. Tr. 50:13-19, ECF No. 104-21. Ms. Sackett explained that Ms. Penner is a friend who occasionally visits the market.⁵ L. Sackett Dep. Tr. 25:21 – 26:14, ECF No. 104-22.

⁴ See Pls. Mot. *In Limine* No. 2, filed contemporaneously with this motion, for a discussion of the Rule 37 standard and the Court’s sanctions orders. For all the same reasons Defendants’ late-disclosed exhibits violate that rule, any late-disclosed subjects of testimony or areas of knowledge of their witnesses does too.

⁵ See *supra* n.3.

Defendants have provided no other information about her testimony other than that she would testify for Defendants. Second Am. Final Pretrial Order at 24, ECF No. 146.

Defendants never have disclosed any information about Ms. Penner's discoverable areas of knowledge or testimony, as required. For that reason alone, her testimony should not be allowed. *See Aldrich*, 2016 U.S. Dist. LEXIS, at *4. It is probably safe to assume, given the nature of Ms. Penner's relationship with Defendants, that she is offered to prove that Defendants acted in conformity with their character in violation of Fed. R. Evid. 404(a)(1). If not that, she is likely to testify to Defendants' character for truthfulness in violation of Fed. R. Evid. 608(a) since, again, Plaintiffs do not plan to attack Defendants' general character for truthfulness. As with Mr. Penner, that sort of testimony would also violate Rule 403 since character is not at issue in this case, and testimony about the Defendants' good character or character for truthfulness would merely serve to mislead the jury about the issues in this case. Further, additions to the subject matter of her testimony would violate Rule 37 and the Court's sanctions orders and should not be permitted.

III. SHELLY MOORE

Defendants offer Ms. Moore as another character witness. When questioned at his deposition about Ms. Moore's testimony, Defendant William Sackett said that Defendants listed her because "she might be a pretty good person to say that I don't steal and lie and cheat." W. Sackett Dep. Tr. 45:3-4, ECF No. 104-21. Defendant Leonida Sackett explained that Ms. Moore is a friend who sometimes visits the market.⁶ L. Sackett Dep. Tr. 33:17 – 35:13, ECF No. 104-22. Defendants have not listed any content or basis for Ms. Moore's testimony, and it appears

⁶ See *supra* n.3.

from Defendant William Sackett's deposition testimony that she is simply meant to provide evidence of Defendants' character. Defendants' character for stealing, lying, and cheating is simply not an issue in this case, nor will their character for truthfulness be attacked—Ms. Moore's testimony would be a clear violation of Rules 404(a)(1) and 608(a). For all the same reasons as the other witnesses, her testimony would also violate Rule 403, and any amendments to the subject matter of her testimony would violate Rule 37 and the Court's sanctions orders and should not be permitted.

IV. WILMA O'REILLY

Defendants have not provided any of the content of Ms. O'Reilly's testimony or knowledge relevant to this case as required. *See Aldrich*, 2016 U.S. Dist. LEXIS, at *4. For that reason, she should not be permitted to testify. All Plaintiffs know, even after asking both Defendants about her at their depositions, is that she is a friend of Defendant Leonida Sackett. L. Sackett Dep. Tr. 29:11-30:21, ECF No. 104-22. It is unclear what testimony, other than character evidence, Ms. O'Reilly could provide at trial. For that reason, and the reasons stated as to the other witnesses, Ms. O'Reilly should not be permitted to testify.

V. TIMOTHY O'REILLY

Defendants failed to disclose Mr. O'Reilly at any time until the Final Pretrial Order. *See* Ex. A (Defs.' Apr. 16, 2015 Initial Disclosures) (Mr. O'Reilly not listed); Defs.' Proposed Scheduling Order at 14-15, ECF No. 20 (same). Plaintiffs questioned Defendants at their depositions about each witness Defendants had listed to learn about the nature of any relevant knowledge and the witnesses' relationships with Defendants. Defendants' failure to disclose Mr. O'Reilly deprived Plaintiffs of that opportunity. Defendants have not stated what the subject

matter of Mr. O'Reilly's testimony will be and have not given any excuse for their late disclosure of Mr. O'Reilly. Pursuant to Fed. R. Civ. P. 37(c)(1), Mr. O'Reilly should not be permitted to testify. To the extent his testimony would be solely to serve as another "character reference" for Defendants, he should not be permitted to testify pursuant to Fed. R. Evid. 404(a)(1) and 608(a).

CONCLUSION

For all these reasons, Plaintiffs request that the Court prohibit Defendants' character witnesses—Don Penner, Sandra Penner, Shelly Moore, Wilma O'Reilly, and Timothy O'Reilly—from testifying at trial.

Respectfully submitted this 12th day of January, 2018.

s/ Matthew R. Baca

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CERTIFICATE OF SERVICE

I hereby certify that on the 12th day of January, 2018, I served the foregoing Plaintiffs' Motion in Limine No. 1 with the Clerk of Court using the CM/ECF system, in addition to sending a hard copy directly to Defendants via US Mail at the following address:

William Sackett
20370 HWY 50 E
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s/ Matthew R. Baca
Matthew R. Baca