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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

WOODY ALLEN,	:	
Plaintiff,	:	08 Civ. 3179 (TPG)(KNF)
-against-	:	
AMERICAN APPAREL, INC.,	:	
Defendant.	:	

MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFF'S MOTION *IN LIMINE* FOR AN ORDER PRECLUDING DEFENDANT FROM INTRODUCING PATENTLY IRRELEVANT EVIDENCE AND TESTIMONY THAT WILL PROLONG TRIAL, UNFAIRLY PREJUDICE PLAINTIFF AND DISTRACT FROM THE ISSUES

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INTRODUCTION AND BACKGROUND

On April 28, 2009, less than 3 weeks before trial, defendant American Apparel, Inc. ("AAI") served a supplemental mandatory disclosure, pursuant to Rule 26(a)(i), identifying a total of thirty-five (35) witnesses it "May . . . Call[] to Testify at Trial" in this action.[1] Various of these witnesses were identified by AAI for the first time as persons having discoverable information in this disclosure.[2] Carbone Decl. at ¶ 4. Defendant's proposed witnesses at trial now include Mr. Allen's wife (Soon-Yi Previn), Mr. Allen's sister, and the parents of AAI's President and CEO, Dov Charney – Morris Charney and Sylvia Safdie. Carbone Decl. ¶ 3, Ex. A. Larry Flynt, the publisher of *Hustler* magazine, as well as Mia Farrow, the respondent in a 1992 custody litigation brought by Mr. Allen, are also named as AAI trial witnesses. Id.

AAI also now lists for the first time as a potential trial witness Adam Levin, Esq., an attorney at the law firm of Mitchell Silberberg & Knupp LLP, which is and was counsel of record in at least two of the three sexual harassment lawsuits brought against AAI and Charney by four present and former AAI employees. See Carbone Decl. ¶ 3. Mr. Levin and his firm were also counsel of record to AAI and Charney in Nelson v. American Apparel, Inc., No. B205937, 2008 Cal. App. Unpub. LEXIS 8663 (Cal. App. 2d Dist. Oct. 28, 2008), petition for

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[1] *See* Second Supplemental Disclosure Response Pursuant to Federal Rule 26(a)(1), dated April 28, 2009, jointly attached with AAI's Supplemental Disclosure Response Pursuant to Federal Rule 26(a)(1), dated April 10, 2009, as Exhibit A to the accompanying Declaration of Christian D. Carbone in Support of Motion *in Limine* Regarding Irrelevant and Prejudicial Witness Testimony and Evidence ("Carbone Decl.").

[2] At a court conference held on August 18, 2008, a discovery cut-off date of February 15, 2009 was set. Plaintiff's attorneys traveled three times to California (in December 2008 and February 2009) to depose the AAI witnesses then identified by AAI as having pertinent knowledge. However, many of the 35 witnesses AAI now identifies as having discoverable information were identified on or after April 10, 2009. See Carbone Decl. ¶¶ 2, 4 and Ex. A.

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review denied, 2009 Cal. LEXIS 609 (Jan. 14, 2009).[3] The need for Mr. Levin as a witness, along with the other aforementioned witnesses, has yet to be set forth by AAI.

Plaintiff Woody Allen respectfully submits this memorandum, in support of the instant motion *in limine*, for an Order (i) precluding AAI from calling as witnesses individuals who lack pertinent, personal knowledge of the facts relevant and material to this right of privacy and Lanham Act lawsuit, and (ii) precluding AAI from introducing or using at trial, in jury selection, opening statements, expert testimony or otherwise, evidence concerning Mr. Allen's personal and family life. Many of the additional witnesses identified by AAI have never been presented as having any information bearing on any of the claims or defenses in this action. To the extent any such showing could possibly be made, AAI's failure to disclose these individuals at the outset of this action should operate to preclude them from calling them now, as their late disclosure would clearly prejudice Mr. Allen.

Similarly, AAI's efforts to inject into this trial patently irrelevant and potentially prejudicial evidence concerning Mr. Allen's 1992 child custody dispute should be precluded. In "supplemental" document productions made by AAI on April 16, 20, 24, and 29, 2009 (see, e.g., AA3330-4356), AAI produced hundreds of pages of materials consisting of newspaper and magazine articles from 1992, photographs of Mr. Allen's children and wife, and pages from biographies of Mr. Allen, as well as various materials dredged off the internet, and has separately indicated its intention to introduce such material under the veil of "expert testimony." See Carbone Decl. ¶ 5.

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[3] In the Nelson decision, the appellate court acknowledged that, in connection with a sexual harassment lawsuit, AAI had attempted to commence a "'questionable' arbitration with foreordained facts and a predetermined award, which was then to be followed by [AAI's] issuance of a misleading press release." 2008 Cal. App. Unpub. LEXIS 8663, *2.

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By these actions, and with trial fast approaching, it now seems clear that AAI has shifted its efforts from avoiding liability to arguing that Mr. Allen is not entitled to compensation for AAI's unauthorized exploitation of his image. AAI and its counsel, notwithstanding the ethical prohibitions on statements to the press that "will have a substantial likelihood of materially prejudicing an adjudicative proceeding," (including, specifically, statements concerning a party's character or reputation and information that the lawyer reasonably should know to be inadmissible, see New York Rules of Professional Conduct, Rule 3.6), have repeatedly attempted to make their case to the media[4] on this issue, based on an assortment of unproven allegations, innuendo and hearsay. AAI's document production, their inclusion of witnesses such as Mr. Allen's wife, and Mia Farrow on their witness list, and the documents sought by them

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[4] Over the past several weeks, AAI and its attorneys commenced a media campaign aimed at disparaging Mr. Allen in the public eye, making statements to local tabloids, and various other media outlets to the effect that Mr. Allen had been involved in multiple "scandals" and that:

(1) "'We believe that Mr. Allen's popularity has decreased significantly, especially in light of the scandals he has been associated with,' American Apparel lawyer Stuart Slotnick told The Post." *Chopping Woody*, New York Post, Apr. 9, 2009;

(2) "'Woody Allen expects $10 million for use of his image on billboards that were up and down in less than one week. I think Woody Allen overestimates the value of his image," [AAI's attorney] [Stuart] Slotnick said. 'Certainly, our belief is that after the various sex scandals that Woody Allen has been associated with, corporate America's desire to have Woody Allen endorse their product is not what he may believe it is.'" *American Apparel Slams Woody Allen's Sex Life*, New York Post, April 15, 2009 (AP Article);

(3) "American Apparel lawyer Stuart Slotnick said the company plans to make Allen's relationships to actress Mia Farrow and her adopted daughter Soon-Yi Previn, whom Allen married, the focus of a trial scheduled to begin in federal court in Manhattan on May 18." *Woody Allen's Sex Life SLAMMED By American Apparel*, Huffington Post, Apr. 15, 2009 (AP Article);

(4) "American Apparel chief Dov Charney claims he'd be 'completely justified' dragging Woody Allen's wife into their court battle, because she badmouthed his company." *Woody Foe Takes Hit at Missus*, New York Post, April 21, 2009

(The above-referenced articles are collectively attached as Exhibit B to the Carbone Decl.).

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(unsuccessfully) in discovery all demonstrate the unmistakable intent to transform this trial into a spectacle, all in the supposed guise of purporting to dispute the fair market value of what AAI misappropriated.

However, the ineluctable facts of this case are that:

- AAI, without Mr. Allen's consent, *chose* to utilize Mr. Allen's image and persona – and did so repeatedly, over a month-long period, on its internet website, its billboards in New York and Los Angeles, atop its retail stores, and emblazoned on large signs affixed to its headquarters building in Los Angeles;

- Mr. Allen's image was used by AAI in conjunction with AAI's own trademarked name and logo, and AAI repeatedly and publicly declared Mr. Allen to be the company's "Spiritual Leader;" and

- AAI's CEO Dov Charney admitted at deposition (excerpts of which are attached as Exhibit C to the Carbone Decl.) that AAI adopted Mr. Allen as its Spiritual Leader as part of AAI's then ongoing campaign to restore and rehabilitate its embattled image, an image it deemed "interchangeable" with that of Charney's.

Now, despite the choice AAI made to exploit Mr. Allen's image and persona for its own benefit, AAI's defense at trial is that the association it compelled with one of the most noted film directors in the world was really valueless. It seeks to establish this proposition through materials AAI's counsel has dredged up off the internet, and similarly unreliable sources, concerning Mr. Allen's 1992 custody dispute, as well as matters relating to his personal and family life. Putting aside the triple hearsay, remoteness and unsubstantiated nature of these materials, it is clear that they are sought to be introduced for one purpose – as part of a brutish attempt to smear and intimidate Mr. Allen.

If one of the damages issues in this case concerns an assessment of the "fair market value" of the rights AAI misappropriated, one may certainly contest, in this regard, the significance of Mr. Allen's pronounced aversion to being associated with advertising campaigns in the United States, the two multi-million dollar deals he has done for broadcast only in Italy, as

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well as the various million dollar-plus advertising deals he has considered in recent years from high-end advertisers and brands. But to sanction AAI's presentation of so called "evidence" in the form of internet reports, newspaper articles and books and extraneous testimony concerning Mr. Allen's personal and family life, compounded with the extraneous testimony of Mr. Charney's parents, lawyers and the publisher of a notorious "skin" magazine, Larry Flynt, would unduly delay the trial and be prejudicial to the administration of justice.

ARGUMENT

I. Evidence From Mr. Charney's Sexual Harassment Attorney and Parents, and Concerning Mr. Allen's Domestic History and Personal Life Has No Bearing On Any Claims or Defenses In This Lawsuit

Evidence is relevant only if it has a "tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Fed. R. Evid. 401; see also Arlio v. Lively, 474 F.3d 46, 53 (2d Cir. 2007) (vacating judgment based on failure to exclude facts that were not relevant to material issues). "Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice . . . ." Fed. R. Evid. 403. "'Unfair prejudice' within its context means an undue tendency to suggest decision on an improper basis, commonly, though not necessarily, an emotional one." Old Chief v. U.S., 519 U.S. 172, 180 (1997), quoting Advisory Committee notes on Fed. R. Evid. 403.

Thus, for example, the events surrounding the 1992 child custody dispute and personal life of Mr. Allen and his family have absolutely no bearing on (1) whether AAI unlawfully used Mr. Allen's image or (2) the nature and extent of Mr. Allen's damages – and are therefore irrelevant and inadmissible. Fed. R. Evid. 402 ("Evidence which is not relevant is not admissible."); see also Arlio, 474 F.3d at 52-53.

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Any argument by AAI that evidence regarding facts of the 1992 custody dispute or the details of the publicity it received is "relevant" to Mr. Allen's measure of damages is a red herring as it is undisputed here that AAI chose and *actually used* Mr. Allen's image on its billboards, corporate headquarters, and commercial website, just as high-end advertisers have done overseas and have offered to do in the United States. Not a whit of evidence been adduced in discovery to show that any remuneration Mr. Allen would have or could have demanded for appearing in AAI's advertisements in 2007 – if he made the choice to do so – was affected by the 1992 custody dispute in which he was engaged seventeen years ago.

Even assuming, *arguendo*, that there were some modicum of relevance to the facts and publicity surrounding the child custody case – which there is not – such evidence nevertheless should be excluded due to the strong likelihood that Mr. Allen will be unfairly prejudiced by its admission. As evidenced by AAI's recent media campaign against Mr. Allen and AAI's counsel's characterization of the custody dispute in Court filings and to the media as "The Sex Scandal," it is clear that the unproven allegations from the custody dispute will be used in a most lurid manner, to incite the jury's emotions and poison the jury against Mr. Allen – all while diverting attention from the real issue of AAI's misconduct. The evidence must therefore be excluded. See Fed. R. Evid. 403; Arlio, 474 F.3d at 52 (vacating judgment due to trial court's admission of prejudicial evidence relating to prior litigation); Loussier v. Universal Music Group, Inc., No. 02 Civ. 2447, 2005 WL 5644421, at *3-4 (S.D.N.Y. Jul. 14, 2005) (in copyright infringement action, excluding as prejudicial evidence of defendant's unrelated criminal conduct); accord Montgomery v. NLR Co., No. 05-Civ-251, 2007 WL 3171961, at *2 (D. Vt. Oct. 26, 2007) (in personal injury case, excluding as unduly prejudicial evidence concerning

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plaintiffs relationship with his family and non-payment of child support, which defendant had contended was relevant to the extent of plaintiffs damages).[5]

The Second Circuit's decision in Kelly v. Lopiccolo, 5 Fed. Appx. 57, 60 (2d Cir. 2001) is particularly instructive with regard to the need to exclude what is at best tangentially relevant, but highly prejudicial, personal matters. In Lopiccolo, the plaintiff sought emotional distress damages for civil rights violations. The defendants contended that any emotional distress to plaintiff was actually caused by her husband, and proffered evidence concerning her husband's sexual and criminal history. The Second Circuit affirmed the trial court's exclusion of such evidence on the ground that the "small probative value was far outweighed by the danger of unfair prejudice ... ." Id. Following Lopiccolo and Fed. R. Evid. 403, this Court should find that any minimal relevance the facts and publicity surrounding the 1992 custody dispute may have on the issue of damage is far outweighed by its likely prejudicial effect.[6]

In addition to being highly prejudicial, introduction of this evidence will necessarily require plaintiff to submit rebuttal evidence, cause undue consumption of time in the litigation of collateral matters, confuse the issues, and mislead the jury – and should be independently excluded on these bases. See Fed. R. Evid. 403; Lopiccolo, 5 Fed. Appx. at 60 (affirming exclusion of evidence on the ground that "such testimony would lead to 'mini-trials' peripheral

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[5] See also Fortier v. State Farm Mut. Auto, Ins. Co., No. Civ. A 99-2136, 2000 WL 1059772, at *2-3 (E.D. La. Jul. 31, 2000) (in insurance dispute, excluding as unduly prejudicial evidence of plaintiff's "bitterly disputed divorce and ongoing child custody fight"); McClain v. Anchor Packing Co., No. 89 C 6226, 1996 WL 164385, at *6 (N.D. Ill. Apr. 3, 1996) (in wrongful death litigation, excluding as unduly prejudicial evidence of plaintiff's living arrangement with her deceased husband's cousin, which defendant had contended was relevant to plaintiff's loss of consortium claim).

[6] At a minimum, should the Court decline to exclude altogether mention of the existence of publicity surrounding the 1992 custody dispute, the admissibility of any such evidence should be closely scrutinized. See L-3 Commc'ns Corp. v. OSI Systems, Inc., No. 02-Civ-9144(PAC), 2006 WL 988143, at *8 (S.D.N.Y. Apr. 13, 2006) (limiting scope of inquiry into witness's "personal information").

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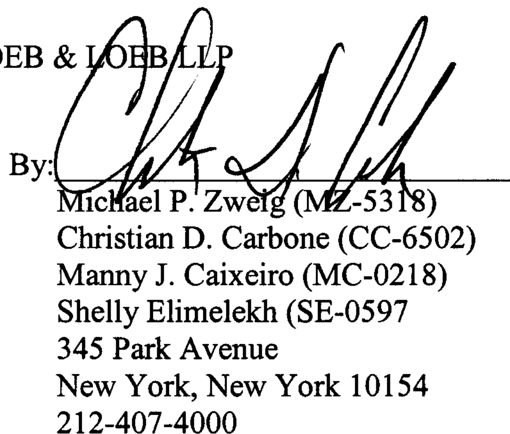
to the issues at hand."); Zubulake v. UBS Warburg LLC, 382 F. Supp. 2d 536, 543 (S.D.N.Y. 2005) (excluding evidence on ground that it would "create a trial within a trial," "confus[e] . . . the jury" and "inevitabl[y] delay . . . the core trial proceedings."; Loussier, 2005 WL 5644421, at *8 (excluding evidence on ground that "it will result in unnecessary digression and delay").

CONCLUSION

For the foregoing reasons, the Court should grant plaintiff's motion to exclude newly disclosed and irrelevant witnesses at trial, and to preclude AAI from introducing or using at trial, in jury selection, opening statements, expert testimony or otherwise, evidence concerning Mr. Allen's personal and family life.

Dated: New York, New York
May 4, 2009



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