UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

DORIS SHENWICK, et al.,
Plaintiffs,

v.

TWITTER, INC., et al.,
Defendants.

Case No. 16-cv-05314-JST

ORDER RE: MOTIONS IN LIMINE

Re: ECF Nos. 497, 498, 527

The Court, having considered the pending motions *in limine* submitted by Plaintiffs and Defendants, hereby orders as follows:

I. PLAINTIFFS' MOTIONS IN LIMINE (ECF NOS. 497 & 527)

A. Motion In Limine No. 1: To Exclude Testimony of Witnesses Not Timely Disclosed by Twitter

By this motion, Plaintiffs seek to exclude witnesses falling into three categories: (1) four current or former Twitter employees or directors not disclosed during discovery, namely Peter Fenton, Todd Jackson, Amir Movafaghi, Jenni Romanek; (2) Twitter's Custodian of Records witness; and (3) Michael Nierenberg, a former member of Twitter's sales team, whose testimony was the subject of a prior motion to exclude.

Federal Rule of Civil Procedure 26(a) requires parties to provide to each other "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." Fed. R. Civ. P. 26(a)(1)(A)(i); *Ollier v. Sweetwater Union High School Dist.*, 768 F.3d 843, 861 (9th Cir. 2014). A party who has made a disclosure under Rule 26(a) "must supplement or correct its disclosure . . . in a timely manner if the party learns that in some material respect the disclosure . . . is incomplete or incorrect, and if the additional or corrective information has not otherwise been made known to the other parties during the discovery process or in writing." Fed. R. Civ. P. 26(e).

"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). This exclusion sanction is "'intended to put teeth into the mandatory . . . disclosure requirements' of Rule 26(a) and (e)." *Ollier*, 768 F.3d at 861 (quoting 8B Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure* § 2289.1 (3d ed. 2014)). The Ninth Circuit "give[s] particularly wide latitude to the [district court's] discretion to issue sanctions under Rule 37(c)(1)." *Yeti by Molly, Ltd. v. Deckers Outdoor Corp.*, 259 F.3d 1101, 1106 (9th Cir. 2001).

"Among the factors that may properly guide a district court in determining whether a violation of a discovery deadline is justified or harmless are: (1) prejudice or surprise to the party against whom the evidence is offered; (2) the ability of that party to cure the prejudice; (3) the likelihood of disruption of the trial; and (4) bad faith or willfulness involved in not timely disclosing the evidence." *Lanard Toys Ltd. v. Novelty, Inc.*, 375 F. App'x 705, 713 (9th Cir. 2010). The burden to prove harmlessness is on the party facing sanctions. *Yeti by Molly*, 259 F.3d at 1107.

1. Witnesses Fenton, Jackson, Movafaghi, and Romanek

With regard to the first category of witnesses – Peter Fenton, Todd Jackson, Amir Movafaghi, and Jenni Romanek – Twitter argues that its late disclosure was harmless.[1] ECF No. 521 at 11. They note that Plaintiffs identified each of these four witnesses in their own initial disclosures, *id.* at 8, and that these witnesses' names came up repeatedly during the course of the litigation, *id.* at 10.

The Court is not persuaded by this argument. "The obvious purpose of [Rule 26] is to enable the opposing party to prepare to deal with the individual's evidence in the case." *Arizona*

[1] Twitter does not argue that the late disclosure was substantially justified.

Libertarian Party v. Reagan, No. CV-16-01019-PHX-DGC, 2017 WL 2929459, at *3 (D. Ariz. July 10, 2017), *aff'd sub nom. Arizona Libertarian Party v. Hobbs*, 925 F.3d 1085 (9th Cir. 2019); *see also Ollier*, 768 F.3d at 862 ("After disclosures of witnesses are made, a party can conduct discovery of what those witnesses would say on relevant issues, which in turn informs the party's judgment about which witnesses it may want to call at trial, either to controvert testimony or to put it in context."). By the Court's count, Plaintiffs identified 170 individuals (and 65 entities) as being "likely to have discoverable information" in their Rule 26 disclosures. ECF No. 521-3. To now hold that Plaintiffs were supposed to know which of these potential witnesses might be valuable to Defendants, and therefore deserving of Plaintiffs' discovery resources, would both penalize Plaintiffs for their efforts to provide an inclusive disclosure and disregard the purpose behind Rule 26. Plaintiffs should not have to guess which of these potential witnesses to focus their energies on when Defendants know which ones are material. That Twitter disclosed some of the persons from Plaintiffs' Rule 26 disclosure in its own Rule 26 disclosure, but not the witnesses who are the subject of this motion, made it even less likely that Plaintiffs would conclude that the omitted witnesses were material. This further undermines Twitter's ability to rely on Plaintiffs' disclosure to relieve it of its own disclosure burden. *See Baird v. Blackrock Institutional Tr. Co., N.A.*, 330 F.R.D. 241, 244 (N.D. Cal. 2019) ("Under these circumstances, where BlackRock specifically identified [other] individuals who were already 'incorporated' from Plaintiffs initial disclosures, BlackRock cannot rely on the incorporation of Plaintiffs' initial disclosures to satisfy its Rule 26 disclosure obligations.").

Twitter also argues that Plaintiffs knew how important these witnesses were because their names appeared in deposition testimony or in Twitter's discovery responses. "To satisfy the 'made known' requirement, a party's collateral disclosure of the information that would normally be contained in a supplemental discovery response must [be] in such a form and of such specificity as to be the functional equivalent of a supplemental discovery response; merely pointing to places in the discovery where the information was mentioned in passing is not sufficient." *L-3 Commc'ns Corp. v. Jaxon Eng'g & Maint., Inc.*, 125 F. Supp. 3d 1155, 1168-69 (D. Colo. 2015). Thus, courts have excused a failure to supplement where a "witness was discussed in detail during

[the] plaintiff's deposition," *Hoffman v. County of Los Angeles*, No. CV 15-3724 FMO (ASX), 2017 WL 3476772, at *2 (C.D. Cal. Feb. 18, 2017), or where a witness has previously been designated as a 30(b)(6) witness and been deposed, *United States ex rel. Landis v. Tailwind Sports Corp.*, 234 F. Supp. 3d 180, 192-93 (D.D.C. 2017). By a contrast, the fact that a witness's name has appeared during the course of discovery is generally not a substitute for supplementing a Rule 26 disclosure. *See, e.g.*, *Crafton v. Blaine Larsen Farms, Inc.*, No. CV-04-383-E-BLW, 2006 WL 908061, at *2 (D. Idaho Apr. 7, 2006) (excluding witnesses even though prior deposition testimony identified "some, but not the full extent, of" their potential testimony); *Ollier*, 768 F.3d at 862 (holding that "the mere mention of a name in a deposition [was] insufficient" to notify plaintiffs that defendant "intend[ed] to present that person at trial"). The Court has reviewed the discovery materials provided by Twitter regarding witnesses Fenton, Jackson, Movafaghi, and Romanek, and finds that they are not an adequate substitute for Rule 26 disclosure.

Twitter also has not met its burden of proving harmlessness. Fact discovery closed May 3, 2019, and these witnesses were not disclosed until January 31, 2020. Trial would actually now be underway – or completed – were it not for the COVID-19 pandemic. To reopen discovery now would unreasonably burden Plaintiffs and potentially disrupt the parties' and the Court's schedule. *See Ollier*, 768 F.3d at 862. Plaintiffs' motion to exclude is granted as to witnesses Fenton, Jackson, Movafaghi, and Romanek.

2. Custodian of Records

The Court will hold a hearing prior to trial to determine whether this witness should be excluded. If the sole purpose of the witness's testimony is to authenticate documents, the motion will be denied. *See Lam v. City & Cnty. of S.F.*, 565 F. App'x 641, 643 (9th Cir. 2014).

3. Witness Nierenberg

For the reasons stated in the Court's prior order striking Michael Nierenberg's declaration, ECF No. 438 at 5, Plaintiffs' motion to exclude him as a trial witness is granted.

B. Motion In Limine No. 2: To Exclude Testimony of Witnesses Not Timely Disclosed by Twitter

By this motion, Plaintiffs seek "to preclude testimony from three non-party witnesses not disclosed by Defendants during discovery: Arvind Bhatia, Heath Terry, and Tony Wible." ECF No. 497 at 20. "All three are securities analysts who covered Twitter during the Class Period." *Id.*

Because Twitter no longer intends to call these witnesses, ECF No. 521 at 18, this motion is granted without opposition.

C. Motion In Limine No. 3: To Exclude Evidence or Argument Regarding the Aggregate Damages Suffered by the Class or the Potential Impact That Entering a Judgment in Plaintiffs' Favor Would Have on Twitter, the Individual Defendants, or Current Twitter Shareholders

By this motion, Plaintiffs seek to exclude evidence or argument "regarding the aggregate damages suffered by the Class or the potential impact that entering a judgment in Plaintiffs' favor would have on Twitter, the individual defendants, or current Twitter shareholders." ECF No. 497 at 23.

Defendants do not oppose the portion of the motion that seeks to preclude evidence or argument concerning the effect of a judgment on Twitter, the individual defendants, or Twitter's current shareholders, ECF No. 521 at 20-21, and that portion of the motion is therefore granted.

With regard to the remainder of the motion, Defendants disclaim any desire to introduce an aggregate damages figure and state that they "seek only to contextualize the per-share recovery Plaintiffs will emphasize by eliciting testimony concerning how total damages are awarded in the class action context." ECF No. 521 at 20. They argue that "Plaintiffs should not be permitted to tout their expert's per share damages calculation, while also preventing Defendants from referencing the fact that any total damages figure will necessarily be tens of millions times higher." *Id.*

The Court will grant Plaintiffs' motion for two reasons. First, although "[t]he small body of case law the parties cite as dealing with this issue is far from dispositive," *In re Broadcom Corp. Sec. Litig.* ("*Broadcom II*"), No. SACV01275GLTMLGX, 2005 WL 1403756, at *1 (C.D. Cal. June 3, 2005), the better-reasoned cases exclude evidence of aggregate damages models when challenged, given the "potential for error and questionable accuracy" of such models, *In re Homestore.com, Inc.*, No. CV 01-11115 RSWL CWX, 2011 WL 291176, at *8 (C.D. Cal. Jan. 25, 2011); *Broadcom II*, 2005 WL 1403756, at *3.

Second, Defendants do not explain why this evidence has any probative value. *See* Fed. R. Evid. 401 ("Evidence is relevant if: (a) it has any tendency to make a fact more or less probable than it would be without the evidence; and (b) the fact is of consequence in determining the action."). That a per-share damages figure multiplied by the number of shares yield a much larger number does not make any particular damages figure more or less likely to be true. Rather, the purpose of this evidence seems to be to dissuade a jury from awarding an otherwise correct amount of damages out of a concern that the figure is, for reasons unrelated to the harm suffered by shareholders, too large. That is a not a proper purpose. Accordingly, this portion of Plaintiffs' motion is also granted.

D. Motion In Limine No. 4: Exclusion of Evidence or Argument Regarding Any Good Faith Reliance on the Advice of Counsel or the Purported Role of Lawyer in Reviewing or Approving Twitter's Disclosures

By this motion, Plaintiffs seek an order "excluding evidence or argument at trial regarding any good faith reliance on counsel by Defendants or the purported role of lawyers in reviewing or approving Twitter's public disclosures, including (i) that they received, considered, or relied on the advice of counsel; and (ii) that counsel prepared, reviewed, or approved the alleged misstatements or omissions at issue in this case (including evidence or argument concerning the role of lawyers in Twitter's disclosure process)." ECF No. 497 at 27. They argue that "Defendants did not assert a good faith reliance on counsel defense in their Answers" and that Defendants "have withheld thousands of relevant documents and prevented deposition testimony as purportedly attorney-client privileged or work product protected" such that it would be unfair to allow them to introduce evidence of the role lawyers played in the creation or approval of Defendants' public statements. *Id.*

Defendants oppose the motion. ECF No. 521 at 21. They agree not to present a defense of reliance on advice of counsel, but wish to present "complete and accurate evidence about the robust disclosure processes [Defendants] used to determine which metrics should be included in the Company's SEC filings." *Id.* Defendants argue that a determination of whether they acted in good faith rests, not on "any reliance on legal advice," but instead on whether "there were processes in place and internal efforts made in order to define, calculate and disclose the correct metrics." *Id.*

Defendants rely chiefly on *Smilovits v. First Solar, Inc.*, No. CV12-0555-PHX-DGC, 2019 WL 6698199 (D. Ariz. Dec. 9, 2019). The court in that case, presented with arguments that are virtually identical to those made here, ruled that (1) defendants could not present at trial any attorney-client communication they refused to disclose during discovery on privilege grounds; (2) defendants could not present an advice-of-counsel defense through argument or instruction; but that (3) the court could not conclude that "Defendants' refusal to disclose the contents of specific communications should preclude them from making any reference to counsel in their evidence and arguments at trial." *Id.* at *2. The court reasoned as follows:

> The Court must draw precise lines during trial, but its current view is that Defendants may present evidence that counsel reviewed corporate disclosures and stock-sale plans or attended meetings, but may not present evidence that counsel approved the disclosures or plans or that Defendants relied on what the lawyers said about the disclosures or plans. Presenting evidence of lawyer approval or Defendant reliance while withholding the actual communications that constituted the approval or resulted in the reliance would be unfair to Plaintiffs. It would leave the impression that the lawyers provided unqualified approval of all that Defendants did, without actually disclosing what the lawyers said or did not say and without affording Plaintiffs the opportunity to know, test, or address the actual communications. Plaintiffs' MIL 4 is granted in part and denied in part as set forth above.

Id. Because the *Smilovits* order does not identify the specific evidence considered by that court, this Court cannot know the purpose for which that court allowed evidence that "counsel reviewed corporate disclosures and stock-sale plans or attended meetings" even as it acknowledged the danger that the jury would conclude "that the lawyers provided unqualified approval of all that Defendants did."

In this case, however, try as it might, the Court cannot discern how what Defendants propose differs from presentation of an advice of counsel defense. Defendants state that they wish to present "complete" evidence about their "robust disclosure processes," but the only reasonable inference is that the processes were "robust" because they included receiving advice from lawyers. If there is another purpose or inference, Defendants do not say what that is. "A reliance on counsel privilege waiver does not require a party's direct statement that counsel was relied upon. It may also arise from more indirect evidence where a party affirmatively raises an inference of reliance on counsel for the party's own benefit." *In re Broadcom Corp. Sec. Litig.* ("*Broadcom I*"), No. SA CV 01275GLTMLGX, 2005 WL 1403516, at *1 (C.D. Cal. Feb. 10, 2005). Having withheld documents on the subjects of its public statements on the grounds of privilege, fairness dictates that Defendants not be able to introduce evidence implying that its lawyers passed on the adequacy of Defendants' communications. *See Mattel, Inc. v. MGA Ent., Inc.*, No. CV 04-9049 DOC RNBX, 2010 WL 3705902, at *5 (C.D. Cal. Sept. 22, 2010); *Chabot v. Walgreens Boots All., Inc.*, No. 1:18-CV-2118, 2020 WL 3410638, at *6 (M.D. Pa. June 11, 2020) ("Rather than simply deny scienter, defendants assert good faith based on an expectation the lawyers would tell them if anything illegal was happening. Defendants have injected an issue that requires examination of the attorneys' communications with defendants to see if defendants are corroborated." (quoting *Broadcom I*, 2005 WL 1403516 at *2)); *Falise v. Am. Tobacco Co.*, 193 F.R.D. 73, 84 (E.D.N.Y. 2000) ("Fairness considerations may also come into play where the party asserting the privilege makes factual assertions, the truthfulness of which may be assessed only by an examination of the privileged communications or documents." (citations omitted)). Accordingly, Plaintiffs' motion is granted.[2]

E. Motion In Limine No. 5: Exclusion of Evidence or Argument Regarding Confidential Witnesses

By this motion, Plaintiffs seek an order "excluding evidence or argument at trial regarding confidential witnesses and specifically precluding Defendants from (i) seeking testimony or presenting evidence or argument regarding confidential witness allegations used in the Consolidated Amended Complaint . . . , including asserting that any witness has recanted the allegations or that witnesses cited in the Complaint have failed to appear for trial; (ii) identifying any witness as a confidential witness who provided information to Plaintiffs during Plaintiffs' pre-

[2] The Court recognizes that the granting of this motion may require redaction or other modification of the parties' evidence, but is confident that the parties can work collaboratively to address such concerns. *See* ECF No. 497 at 31 n.8.

filing investigation, including asserting that any witness breached a confidentiality, severance or employment agreement with Twitter; and[] (iii) introducing into evidence correspondence between the confidential witnesses (or their counsel) and Plaintiffs' counsel or their investigators and Plaintiffs' discovery responses regarding the confidential witnesses." ECF No. 497 at 33. Plaintiffs' proposed order says simply, "Evidence or argument regarding confidential witness allegations set forth in the Consolidated Amended Complaint (ECF No. 81) is excluded at trial." ECF No. 497-2 at 2.

Plaintiffs' motion sweeps too broadly and it is not possible for the Court to draw the firm line around the confidential witnesses' testimony that Plaintiffs request. Accordingly, the Court will rule on certain aspects of Plaintiffs' motion now and revisit other aspects at the pretrial conference or at trial.

The Court first observes that while Plaintiffs are concerned that the confidential witnesses will be "outed" at trial, ECF No. 497 at 37, there is nothing unusual about such an occurrence. Courts are split on whether the identity of confidential witnesses must be disclosed prior to trial.[3] *See* Gideon Mark, *Confidential Witnesses in Securities Litigation*, 36 J. Corp. L. 551, 555 (2011); *In re Cooper Companies Inc. Sec. Litig.*, No. SACV060169CJCRNBX, 2008 WL 11339612, at *1 (C.D. Cal. Oct. 1, 2008) ("Neither side contends that there is any binding Supreme Court or Ninth Circuit authority on point. Rather, there is a split of district court authority on the question of whether the identities of confidential witnesses specifically referenced in a securities class action complaint are discoverable."). The Court is aware of no authority, however, that would shield their identities at trial.

Next, the parties agree, and the Court orders, that there will be no reference to the complaint. The Court also rules that no confidential witness may be called to testify regarding that witness's participation in the Plaintiffs' pre-filing investigation, as opposed to facts that witness observed at Twitter that are relevant to liability, except insofar as the evidence meets the criteria for impeachment or constitutes evidence of bias or motive. Mere participation in the Plaintiffs'

[3] The cases within this district of which the Court is aware of compel such disclosure. *See, e.g.*, *In re Harmonic, Inc. Securities Litigation*, 245 F.R.D. 424, 427 (N.D. Cal. 2007).

pre-filing investigation, by itself, does not constitute evidence of bias or motive; something more, such as a biased statement made during the investigation, must be present. Before seeking to introduce such evidence, Defendants must provide reasonable notice to the Court and the parties and, if the issue is contested, obtain a ruling from the Court.

The responses to requests for admission concerning whether and when each of the confidential witnesses was provided with a copy of the operative complaint, and one response to an interrogatory seeking the name, address, and dates of all communications for each confidential witness, are not relevant and will not be introduced into evidence.

The parties dispute whether Defendants may inquire about whether confidential witnesses improperly shared Twitter's trade secrets with Plaintiffs or otherwise violated agreements they signed with Twitter. Defendants argue that they should be entitled to ask witnesses about whether they have complied with their confidentiality obligations to Twitter, but relegate the argument to a footnote and provide no authority. ECF No. 521 at 29 n.8. Because any such examination would necessarily devolve into a sideshow regarding the bounds of Twitter's non-disclosure agreements, the Court concludes that the minimal probative value of this testimony is outweighed by the undue consumption of time, Fed. R. Evid. 403, and grants Plaintiffs' motion to preclude such examination.

Beyond these general guidelines, the Court cannot rule in advance on each possible basis Defendants may have for impeaching the confidential witnesses or using their testimony at trial. The Court therefore grants the motion in the foregoing respects but declines to address the parties' remaining arguments. The Court and the parties can revisit these issues at the pretrial conference and at trial.

F. Motion In Limine No. 6: Exclusion of Evidence or Argument Regarding the Content of Pleadings or Court Orders on Those Pleadings

By this motion, Plaintiffs seek an order "excluding evidence or argument at trial that the Court dismissed any of Plaintiffs' claims or that Plaintiffs amended or did not bring other claims." ECF No. 497 at 40. "Defendants do not oppose Plaintiffs' motion to the extent it seeks merely to preclude the parties from presenting evidence or argument in support of claims that have already been dismissed from the case. In addition, the parties have already agreed that neither side shall introduce any pleading or Court order regarding any pleading as a trial exhibit." ECF No. 521 at 32. Beyond that, however, Defendants oppose Plaintiffs' motion as overbroad.

Although Plaintiffs' motion is directed to legal claims Plaintiffs did not bring or were not allowed to bring, Defendants worry that the Court's ruling will extend much further. For example, they are concerned that Plaintiffs will tell "the jury that a particular alleged misstatement forms a basis for imposing liability – even though that statement was never pled and has never been part of the case." *Id.* at 33. In that instance, Defendants wish to inform the jury "that Plaintiffs do not seek to hold Defendants liable for that allegedly misleading statement." *Id.* Similarly, Defendants are concerned that "if Plaintiffs were to introduce documents and/or testimony about the stock sales of the Individual Defendants and nondefendant Twitter employees, Defendants [should] be entitled to inform the jury that this case does not, in fact, involve allegations of insider trading." *Id.*

Defendants have the better argument. The Court will grant Plaintiffs' motion insofar as it seeks to preclude the parties from presenting evidence or argument in support of claims that have already been dismissed or from referring to the fact of a claim having been amended or dismissed. In all other respects the motion is denied without prejudice to objection at trial.

G. Motion In Limine No. 7: Exclusion of Evidence or Argument Regarding the Charitable Contributions or Philanthropic Work of the Parties or Witnesses

By this motion, Plaintiffs seek to exclude evidence or argument at trial regarding charitable contributions, philanthropy, or non-profit work by or on behalf of Twitter, the Individual Defendants, or any witness. The motion is granted. Evidence of good acts is irrelevant to the question of whether the Twitter Defendants violated the securities laws or to the credibility of any witness. *See United States ex rel. Kiro v. Jiaherb, Inc.*, No. CV 14-2484-RSWL-PLAX, 2019 WL 2869186, at *4 (C.D. Cal. July 3, 2019).

Defendants argue that such evidence may be relevant as background information concerning a witness or to rehabilitate a witness's credibility after that witness's character for truthfulness has been attacked. *See* ECF No. 521 at 35-36 (citing Fed. R. Evid. 608(a) on the latter point). If Defendants have such evidence – and they do not identify any in their opposition – they may either seek a stipulation from Plaintiffs to introduce it at trial, or move outside the jury's presence for an exception to this order.

H. Motion In Limine No. 8: Exclusion of Evidence or Argument Regarding the Personal Life, Political or Socioeconomic Views, and Related Social Media Activity of Plaintiffs' Expert, Professor M. Todd Henderson

By this motion, Plaintiffs seek to exclude evidence or argument at trial concerning the personal life, socioeconomic or political views, or related social media activity of Professor M. Todd Henderson. ECF No. 497 at 48. In 2018, Henderson posted some content on Twitter containing political and social views that were controversial or offensive to other users of that platform, and he received a great number of "angry tweets" in response. *See* ECF 521-25 at 3. He then took down his Twitter account in response to this criticism. *Id.*

Defendants have already agreed not to introduce the substance of Henderson's tweet, and have agreed not to question him about the contents of the tweets or the political views or personal subjects they contain. They state, however, that they wish to "generally explore Prof. Henderson's negative experiences with the Twitter platform as a potential source of his bias against the Company." ECF No. 521 at 37.

The Court concludes that this evidence has very little probative value. The basis of Henderson's negative experience, if in fact it was negative, was the tweets by other users, not any action Twitter took. Thus, the evidence sheds little light on the question of Henderson's bias. Moreover, any probative value of the evidence would be outweighed by juror confusion or the undue consumption of time. Fed. R. Evid. 403. As Plaintiffs persuasively argue, even if Defendants present a sanitized version in which Henderson recounts his experience without revealing the content of his tweets, "[t]he jury would be left to speculate about the mysterious cause of Henderson's negative social media experience, no doubt understanding it must be bad if opposing counsel raised it." ECF No. 497 at 49. Defendants do not respond to this point.

For the foregoing reasons, Plaintiffs' motion is granted.

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I. Motion In Limine No. 9: To Enforce the Court's May 8, 2020 and April 20, 2020 Orders and Preclude Evidence and Argument Regarding Any SEC Investigation

By this motion, Plaintiffs seek to exclude "evidence and argument regarding any SEC investigation of Defendants, or lack thereof, including correspondence between the SEC and Twitter in 2013 and 2015." ECF No. 527 at 4. Specifically, Plaintiffs seek to exclude six letters that Twitter exchanged with the SEC's Division of Corporate Finance ("CorpFin"), three from 2013 (prior to the Class Period) and three from 2015 (during the Class Period). *See* ECF No. 527-1 at 2-3 (listing letters). Plaintiffs argue that this evidence should be excluded pursuant to the parties' Stipulation Concerning Trial Procedures and Evidentiary Issues, entered as an Order on May 8, 2020. ECF No. 499. They further argue that exclusion is supported by 15 U.S.C. § 78z and by the Court's prior order excluding expert witness Jason Flemmons' testimony regarding "SEC customs and practices" on relevance grounds. *See* ECF No. 482 at 14.

Section 78z provides as follows:

> No action or failure to act by the Commission or the Board of Governors of the Federal Reserve System, in the administration of this chapter shall be construed to mean that the particular authority has in any way passed upon the merits of, or given approval to, any security or any transaction or transactions therein, nor shall such action or failure to act with regard to any statement or report filed with or examined by such authority pursuant to this chapter or rules and regulations thereunder, be deemed a finding by such authority that such statement or report is true and accurate on its face or that it is not false or misleading.

As applied here, the gist of this section is that inaction by the SEC in response to any statement or filing by a corporation shall not be interpreted that the filing or statement is not false or misleading. Similarly, in its prior order, the Court excluded Flemmons's testimony because it was offered in response to Defendants' proposed evidence that "Defendants' 'open and frank discussion' with the SEC and the SEC's decision not to prosecute Defendants in connection with Twitter's Regulation S-K disclosures show that Defendants did not act with scienter." ECF No. 482 at 14. The Court rejected this reasoning, holding that "the fact that the SEC chose not to prosecute Twitter or its executives in connection with Twitter's Regulation S-K disclosures does not prove the absence of scienter." ECF No. 482 at 15.

Defendants oppose the motion[4] on the grounds that the evidence is not precluded by the parties' stipulation and that they will not offer this evidence to show absence of scienter, but rather to "demonstrate that, during the Class Period and in the years leading up to it, Twitter viewed ad engagement as an important measure of user engagement." ECF No. 535 at 4.

The Court first addresses the parties' arguments concerning their stipulation. "A stipulation is akin to a contract; therefore, the interpretation and the enforceability of the stipulation here are governed by the basic principles of contract law." *Fred Hutchinson Cancer Rsch. Ctr. v. United of Omaha Life Ins. Co.*, 821 F. Supp. 644, 647 (D. Or. 1993) (citations omitted); *see also* Robert E. Larsen, Navigating the Federal Trial § 1:11 (2020 ed.) ("A dispute between or among parties over the meaning of a stipulation will be resolved by the courts using contract law."). The parties' stipulation precludes the introduction of "evidence or argument regarding other litigation or external investigations involving any of Defendants or Plaintiffs" as well as "evidence or argument regarding the lack of any other litigation or such investigation involving any of Defendants or Plaintiffs." ECF No. 499 at 4-5. The evidence Defendants wish to introduce does not breach this stipulation because the CorpFin correspondence concerns a review of Defendants' SEC filings but not an "investigation." *See Lapiner v. Camtek, Ltd.*, No. C 08-01327 MMC, 2011 WL 3861840, at *3 (N.D. Cal. Aug. 31, 2011) (finding that "contrary to plaintiff's assertion, the SEC letters do not represent an 'investigation' into Camtek, but instead a 'review' by the SEC's Division of Corporate Finance, as opposed to the SEC's Division of Enforcement, and which review's purpose was 'to assist [Camtek] in [Camtek's] compliance with the applicable disclosure requirements and to enhance the overall disclosure in [Camtek's] filing.'").

For similar reasons, the Court finds that admission of this evidence is not precluded by either Section 78z or the Court's prior expert exclusion order because Twitter will not introduce this evidence for the purpose of showing, and will not argue, that any action or inaction on the

[4] Defendants do not oppose exclusion of the August 21, 2013 correspondence from Twitter to CorpFin or the June 17, 2015 correspondence from CorpFin to Twitter. *See* ECF Nos. 527-3, 527-8. Pls' Exs. 1 & 6. Those communications are therefore excluded and this order is directed to the remaining four communications.

SEC's part meant that Defendants did not have scienter or that their statements were not false or misleading. Rather, Defendants wish to show that "during the Class Period and in the years leading up to it, Twitter viewed ad engagement as an important measure of user engagement." ECF No. 535 at 5. This is a proper purpose of this evidence.

Accordingly, Plaintiffs' motion is denied.

II. DEFENDANTS' MOTIONS IN LIMINE (ECF NO. 498)

A. Motion In Limine No. 1: To Exclude Nick Bilton's Vanity Fair Article and His Testimony As a Witness

By this motion, Defendants seek to prevent Plaintiffs from introducing a 2016 Vanity Fair article titled "Twitter is Betting Everything on Jack Dorsey. Will It Work?" as well as the testimony of Nick Bilton, who wrote the article. ECF No. 498 at 11.

The article is hearsay and Defendants' motion to exclude it is granted. Plaintiffs point to statements in the article, ECF No. 523 at 16-18, such as the ones attributed to Gabriel Stricker, Twitter's Director of Communications, that "[w]e have zero credibility with Wall Street right now" and Twitter "has to come clean" about the company's stagnant growth numbers and argue that they should be admitted as corporate admissions. ECF No. 498-2 at 6. It is clear from the article's context, however, that these statements, and others like them, were not precise quotes made directly to Bilton and that he is reporting them second-hand. *Id.* Thus, the statements do not qualify as the statements of a party opponent. Nor is the Court persuaded that Twitter's limited participation in the preparation makes the entire article an adopted admission, as Plaintiffs argue.[5] ECF No. 523 at 16. This is not a case in which Twitter reprinted the Vanity Fair article and distributed it to persons or entities with which it was doing business, such as *Wagstaff v. Protective Apparel Corp. of Am.*, 760 F.2d 1074, 1078 (10th Cir. 1985), cited by Plaintiffs.

[5] The Court used the phrase "adopted admission" to track the language of the parties' briefs. Since 2011, however, "[s]tatements falling under the hearsay exclusion provided by Rule 801(d)(2) are no longer referred to as 'admissions' in the title to the subdivision." Fed. R. Evid. 801 advisory committee's note. The language of the rule is that the statement "is one the party manifested that it adopted or believed to be true." Fed. R. Evid. 801(d)(2)(B). By deleting the title, the Advisory Committee intended no change to the application of the exclusion to the hearsay rule. Fed. R. Evid. 801 advisory committee's note.

Finally, the article is not admissible pursuant to the residual exception under Federal Rule of Evidence 807. The Court notes that the author of the article is able and willing to testify; Plaintiffs have not offered evidence from independent sources corroborating the information in the article; and Plaintiffs have not shown that Defendants do not dispute the statements attributed to them in the article. Under similar circumstances, courts in this circuit have found the residual exception does not apply. *See Green v. Baca*, 226 F.R.D. 624, 639 (C.D. Cal. 2005), *order clarified*, No. CV 02-204744MMMMANX, 2005 WL 283361 (C.D. Cal. Jan. 31, 2005). The out-of-circuit district court cases cited by Plaintiffs are distinguishable and do not apply the same standards as applied by courts in this circuit.

For all these reasons, the motion to exclude the Vanity Fair article is granted.

The motion to exclude Nick Bilton's testimony, on the other hand, is denied. Because Bilton was apparently never deposed, Defendants are forced to speculate as to the content of his testimony. *See* ECF No. 498 at 17 ("His testimony will *undoubtedly consist* almost entirely of (a) improper lay witness testimony and (b) inadmissible hearsay." (emphasis added)). The Court cannot exclude testimony unless the Court knows what it will contain. This part of Defendant's motion is therefore denied.

B. Motion In Limine No. 2: To Exclude Evidence and Argument Regarding Twitter's Post-Class Period Disclosure of, or Statements Concerning, DAU, mDAU, and Other DAU-Related User Metrics

By this motion, Defendants seek to exclude exhibits "created after the end of the Class Period in this action (July 28, 2015)" other than those that "pertain to the Class Period or reflect Class Period data." ECF No. 498 at 19. For example, Twitter seeks to exclude "multiple documents concerning Twitter's post-Class Period disclosure of DAU [Daily Active Users] or DAU-related user metrics . . . that have nothing to do with the Company's decision-making process regarding whether to disclose DAU during the Class Period." *Id.* In opposition, Plaintiffs point out that "Defendants fail to identify what specific post-Class Period evidence they would exclude." ECF No. 523 at 21. They also argue that post-Class Period disclosures are relevant to Plaintiffs' claims and Defendants' defenses concerning, among other things, whether DAU metrics were material to investors, whether DAU metrics measured user engagement, and the impact of DAU on Twitter's revenue. *Id.*

Plaintiffs are correct that, with some exceptions, Defendants fail to identify precisely which exhibits should be excluded. Therefore, the Court denies the motion as to any exhibits other than those identified in it. *See Ream v. United States*, No. 2:17-cv-114-RAJ, 2019 WL 2578600, at *4 (W.D. Wash. June 24, 2019) (where a party "fails to specify particular evidence at issue, the Court declines to make the *in limine* ruling in a vacuum"). Giving examples within certain categories is not sufficient.

With regard to the remaining exhibits, Plaintiffs have already agreed to withdraw their Exhibits 16-19. With two exceptions described below, the remaining exhibits are admissible. First, some of them do discuss events that transpired during the Class Period. *See, e.g.*, ECF No. 498-16 at 4 (analyst asking about the July 18, 2015 corrective disclosures). These documents are clearly relevant.

Second, even documents that fall outside the class period are relevant to Twitter's understanding of how DAU impacts or impacted its revenue model. This is not a question of "internal reforms," *see Metzler Inv. GMBH v. Corinthian Colls., Inc.*, 540 F.3d 1049, 1068 n.12 (9th Cir. 2008) (post-class period documents listing "internal reforms" were insufficient to allege scienter, in part because plaintiffs did not allege any corroborating details to indicate that the defendants "were aware of the fraud during the Class Period"), but rather a question of whether executives within Twitter viewed daily user engagement as a relevant indicator of the company's financial health.

Defendants argue that because of a "fundamental change in Twitter's strategic focus under the leadership of [Jack] Dorsey, post-Class Period statements regarding the usefulness of DAU (and the utility of disclosing DAU), should not be admissible under Federal Rules of Evidence 402 and 403." ECF No. 498 at 21. But whether there was such a "fundamental change" is itself disputed. If DAU was not, in fact, a relevant engagement metric earlier in Twitter's history, Twitter can present evidence to that effect at trial. But the Court cannot conclude that evidence that post-dates the Class Period is irrelevant to Twitter's Class Period understanding. "While statements made before or after the class period are not themselves actionable, they may be relevant in that they shed light on the 'truth or falsity of Class Period statements.'" *Shenwick v. Twitter, Inc.*, 282 F. Supp. 3d 1115, 1134 (N.D. Cal. 2017) (quoting *In re Invision Tech., Inc. Sec. Litig.*, No. C04-03181 MJJ, 2006 WL 538752, at *2 (N.D. Cal. Jan. 24, 2006)).

Defendants appear to recognize this eventuality when they indicate that they will present "evidence regarding changes to the Company's corporate strategy and leadership, as well as the measurement, usefulness, and relative importance of DAU during the Class Period, including that DAU was considered 'problematic,' lacked 'the same quality controls as MAUs,' and required challenging 'coordination across [the] company' in order to implement and disclose." ECF No. 498 at 24. The jury will determine what weight to give this evidence and what conclusions to draw from it. Thus, this portion of Defendants' motion is denied.

There are two exceptions to this ruling: the video of securities analyst Robert Peck appearing on CNBC on August 3, 2015, ECF No. 498-22, and the December 2017 Motley Fool article entitled "One-Third of Twitter Users Abandon It Every Year," ECF No. 498-21. These items are hearsay. It is possible that the exhibits may be admissible under Federal Rule of Evidence 703, which permits "hearsay, or other inadmissible evidence, upon which an expert properly relies, to be admitted to explain the basis of the expert's opinion." *Paddack v. Dave Christensen, Inc.*, 745 F.2d 1254, 1261-62 (9th Cir. 1984). Before they can be admitted, however, the Court must determine that "their probative value in helping the jury evaluate the [expert's] opinion substantially outweighs their prejudicial effect." Fed. R. Evid. 703. The Court cannot perform that task on the current record because Plaintiffs raised this argument in their opposition brief and Defendants have not been able to respond. The Court will reserve a ruling on this question until trial.

C. Motion In Limine No. 3: To Exclude Evidence and Argument Concerning Post-Class Period Third Party Metrics

By this motion, Defendants seek to exclude evidence and argument concerning post-Class Period third party metrics on the grounds that they are irrelevant. ECF No. 498 at 26. Documents in this category include SEC filings by third party companies and news articles about third party companies. As with other of their motions, Defendants do not identify all the exhibits they seek to exclude.

The Court denies the motion because these documents are plainly relevant. Indeed, Twitter's own documents demonstrate their relevance of these materials. Twitter expert witness Michele Madansky opines, based on "having reviewed sales presentations from dozens of digital publishers between 2014 and 2015, [that] daily metrics like DAUs were not standard for digital publishers to use in their sales materials or talking points." ECF No. 434-4 at 27. To reach this opinion, she examined six other social media platforms: Facebook, Foursquare, Instagram, LinkedIn, Pinterest, and Tumblr. *Id.* If Dr. Madansky can use evidence from third party companies to testify that "metrics like DAUs were *not* standard for digital publishers to use," *id.* (emphasis added), Plaintiffs should be able to admit third party evidence to show that such metrics *were* standard.

D. Motion in Limine No. 4: To Exclude Evidence or Argument Concerning the Company's Current Financial Condition, Cash on Hand, Liability Insurance, or Ability to Pay Large Judgments

By this motion, Defendants seek to exclude evidence or argument concerning Twitter's "current financial condition, cash on hand, liability insurance, or ability to pay large judgments." ECF No. 498 at 30. Plaintiffs state they declined to stipulate to this motion only because Defendants refused to stipulate to Plaintiffs' motion to exclude evidence of aggregate damages. ECF No. 523 at 34. Because the Court granted the former motion, it grants this motion as well.

E. Motion in Limine No. 5: To Exclude Evidence or Argument Concerning the Individual Defendants' Financial Condition, Net Worth, Including Ownership of Twitter Stock, Compensation, Ability to Pay, Liability Insurance, or Indemnification

By this motion, Defendants seek to exclude "evidence or argument concerning the individual defendants' financial condition, net worth, including ownership of Twitter stock, compensation, ability to pay, liability insurance, or indemnification." ECF No. 498 at 33. Plaintiffs do not oppose the motion to the extent it concerns "evidence about the [individual] Defendants' current financial condition[,] . . . ability to satisfy a judgment[,] . . . net worth, ability to pay a judgment, or insurance coverage." ECF No. 523 at 36. Thus, that portion of Defendants' motion is granted without opposition.

Plaintiffs do, however, seek to introduce evidence of the individual defendants' compensation and ownership of Twitter stock during 2014 and 2015. *Id.* The Court denies the motion as to these categories of evidence. Defendants' compensation is relevant to motive and scienter. *See In re Homestore.com, Inc.*, No. CV 01-11115 RSWL CWX, 2011 WL 291176, at *11 (C.D. Cal. Jan. 25, 2011) (finding that "the amount of stock Defendant held during the Class Period . . . is relevant to the issue of Defendant's motive and scienter during the Class Period"); *Sec. & Exch. Comm'n v. Goldstone*, No. CIV 12-0257 JB/GBW, 2016 WL 3654273, at *8, *16-17 (D.N.M. June 13, 2016) (citing *SEC v. Delphi Corp.*, 508 Fed. App'x 527, 532 (6th Cir. 2012)); *SEC v. McCabe*, No. 2:13-cv-161-TS-PMW, 2014 WL 7405518, at *4-5 (D. Utah Dec. 30, 2014).

F. Motion in Limine No. 6: To Preclude Plaintiffs From Presenting Evidence and Argument Concerning Theories of Liability That the Court Rejected in Its Ruling on Defendants' Motion to Dismiss

By this motion, Defendants seek to exclude "evidence and argument concerning theories of liability or claims that this Court rejected in its October 16, 2017 Order" on Defendants' motion to dismiss. ECF No. 498 at 34. They argue that "[s]uch theories or claims . . . are not relevant to the narrowed case going to trial and any conceivable probative value would be 'substantially outweighed by a danger of . . . unfair prejudice, confusing the issues, misleading the jury, undue delay, [or] wasting time.'" *Id.* (quoting Fed. R. Evid. 403).

"A motion in limine is a procedural mechanism to limit in advance testimony or evidence in a particular area." *United States v. Heller*, 551 F.3d 1108, 1111 (9th Cir. 2009). "Motions *in limine* must identify the evidence at issue and state with specificity why such evidence is inadmissible." *In re: Cathode Ray Tube (CRT) Antitrust*, No. C-07-5944 JST, 2016 WL 5871243, at *7 (N.D. Cal. Oct. 7, 2016) (quoting *Colton Crane Co. v. Terex Cranes Wilmington, Inc.*, No. CV 08-8525, 2010 WL 2035800, at *1 (C.D. Cal. May 19, 2010)). The "failure to specify the evidence" that a motion in limine "seek[s] to exclude constitutes a sufficient basis upon which to deny th[e] motion." *Bullard v. Wastequip Mfg. Co. LLC*, No. 14-CV-01309-MMM (SSx), 2015 WL 13757143, at *7 (C.D. Cal. May 4, 2015).

In this case, Defendants do not identify the evidence that would be excluded if the motion were granted. Accordingly, the motion is denied without prejudice to the Defendants raising their objections at trial.

G. Motion in Limine No. 7: To Preclude the Imputation of the State of Mind of Any Non-Defendant Witnesses to the Company

In this motion, Defendants complain that "Plaintiffs may elicit testimony from certain non-defendant witnesses regarding their knowledge about the challenged statements and may attempt to argue or suggest to the jury that the state of mind of *any* senior controlling officer at Twitter can be imputed to the Company for the purpose of establishing the Company's scienter." ECF No. 498 at 38. The motion does not identify any deposition testimony, documentary evidence, or other evidence to be excluded. Instead, Defendants use the motion to lodge a complaint about "Plaintiffs' proposed jury instructions," which state that Twitter "acted knowingly if either of the individual defendants *or any senior controlling officer of Twitter* acted knowingly and within their scope of authority." *Id.* (emphasis added by Defendants). Defendants argue that Plaintiffs' jury instructions misstate the law, because "[u]nder *Janus Capital Group, Inc. v. First Derivative Traders*, '[f]or purposes of Rule 10b-5, the maker of a statement is the person or entity with ultimate authority over the statement, including its content and whether and how to communicate it.' 564 U.S. 135, 142 (2011)." *Id.* Plaintiffs respond that "*Janus* does not address scienter." ECF No. 523 at 48 (quoting *Sec. & Exch. Comm'n v. City of Victorville*, No. ED CV-13-00776-JAK (DTBx), 2018 WL 3201676, at *3 (C.D. Cal. Jan. 24, 2018)). They urge the Court to adopt the Sixth Circuit's view that "the state of mind of '[a]ny individual agent who authorized, requested, commanded, furnished information for, prepared . . . reviewed, or approved the statement in which the misrepresentation was made before its utterance or issuance' could be attributed to a corporation for determining whether it had sufficient scienter under Section 10(b)." *Id.* at 50 (citing *Victorville*, 2018 WL 3201676 at *3 (quoting *In re Omnicare, Inc. Securities Litigation*, 769 F.3d 455, 476 (6th Cir. 2014))).

The Court concludes that the issue is not yet ripe for decision. While the Court is tentatively persuaded by Judge Kronstadt's reasoning in *Victorville*, the Court will decide the question more finally at the pretrial conference in connection with its rulings on the jury instructions. At that time, if appropriate, the Defendants should identify the evidence to which this jury instruction would apply.

H. Motion in Limine No. 8: To Exclude Evidence and Argument Concerning Pre-Class Period Stock Sales by the Individual Defendants and Stock Sales by and Compensation of Non-Defendant Twitter Executives at Any Time

By this motion, Defendants seek to exclude evidence "concerning the pre-Class Period stock sales of the Individual Defendants, as well as the pre-, during, and post-Class Period stock sales and compensation of non-defendant Twitter employees," which they argue is irrelevant, "unduly prejudicial, cumbersome, and likely to confuse the jury." ECF No. 498 at 41-42.

Defendants first move to exclude stock sales by Defendants before the Class Period on grounds of relevance. Generally, the sale of stock by executives before a class period is relevant when such sales are lower than those during the class period, because that evidence may suggest the executives' awareness of fraud. Where such sales are lower during the class period, however, there is no such inference. *See, e.g., In re Apple Computer Sec. Litig.*, 886 F.2d 1109, 1117 (9th Cir. 1989) ("[T]the pattern of stock trading by Apple's insiders is insufficient to raise an issue for the jury. The defendants collectively sold a slightly greater number of shares during an equal period of time just before the class period than they did during the class period."); *Metzler Inv. GMBH*, 540 F.3d at 1067 ("Many of the sales alleged to demonstrate scienter took place in October 2003 before the DOE began its investigation at the Bryman campus. There is therefore nothing particularly suspicious about the timing of these sales[.]" (internal quotation marks and alteration omitted)). In this case, Defendants made no sales during the Class Period. Thus, evidence of their pre-Class Period sales is not relevant to prove scienter and Defendants' motion is granted to this extent.

Defendants also move to exclude evidence of Twitter sales by non-defendant Twitter executives. The motion is denied as to any Twitter executive who will be a witness at trial, because – as the Court notes above – evidence of compensation received from Twitter and sales of company stock are relevant to questions of motive and bias. Plaintiffs offer no similarly compelling rationale as to sales by non-witnesses, and the motion is granted as to sales by those persons.

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I. Motion in Limine No. 9: To Preclude Plaintiffs' Proferred Expert Jan Dawson From Testifying As a Fact Witness

By this motion, Defendants seek to prevent Plaintiffs' expert witness Jan Dawson, the Founder of Jackdaw Research, from also testifying as a fact witness. ECF No. 498 at 45. Twitter does not dispute that Dawson has information to provide both as a percipient witness and as an expert. Rather, it contends that "[p]ermitting Mr. Dawson to testify as both a fact witness and an expert witness regarding the identical or nearly identical subject matter would cause needless confusion and unfair prejudice, as it would imbue his fact witness testimony with 'unmerited credibility.'" *Id.* (quoting *United States v. Freeman*, 498 F.3d 893, 903 (9th Cir. 2007)).

The Court finds no risk of confusion or undue prejudice. There is no categorical prohibition on the same witness giving both lay and expert testimony. *Freeman*, 498 F.3d at 904. To alleviate the risk of confusion, Plaintiffs should "carefully differentiate between the types of testimony while the witness testifies, preferably by providing a clear break between the lay and expert testimony." *United States v. Casher*, No. CR 19-65-BLG-SPW, 2020 WL 2557849, at *5 n.4 (D. Mont. May 20, 2020). The Court can also give an instruction to explain the witness's dual roles to the jury. *Id.*

Defendants' motion is denied. The parties are ordered to meet and confer regarding an appropriate jury instruction and to include the same, or competing proposals for the same, in their pretrial conference statement.

J. Motion in Limine No. 10: To Preclude Plaintiffs From Calling Krista Bessinger to Testify Live Regarding Rule 30(b)(6) Topics

By this motion, Defendants seek to prevent Plaintiffs from calling Krista Bessinger, Twitter's Senior Director of Investor Relations during the Class Period, from testifying live at trial. ECF No. 498 at 47. Bessinger testified at deposition as a Rule 30(b)(6) witness. *Id.* Twitter argues that "courts have limited corporate designees to testifying to matters within their personal knowledge, and not the broader knowledge of the corporation," *id.*, although it also acknowledges that "the case authority is split on the issue of whether a corporate designee may testify concerning matters outside of his or her personal knowledge at trial," and there is "no authoritative ruling from the Ninth Circuit on this issue." *Id.* at 47 n.13 (quoting *Lister v. Hyatt Corp.*, No. C18-

0961JLR, 2020 WL 419454, at *2 (W.D. Wash. Jan. 24, 2020)).

The Court has examined the authorities cited by the parties and agrees with those courts that see no prejudice in allowing a 30(b)(6) witness to testify live at trial. Such a witness "should not be able to refuse to testify to matters as to which he testified at the deposition on grounds that he had only corporate knowledge of the issues, not personal knowledge." *Brazos River Auth. v. GE Ionics, Inc.*, 469 F.3d 416, 434 (5th Cir. 2006). At least two other courts in this district, following *Brazos*, have come to the same conclusion. *See Corcoran v. CVS Pharmacy, Inc.*, No. 15-cv-03504-YGR, 2021 WL 633809, at *7 (N.D. Cal. Feb. 18, 2021) ("It is this Court's view that persons who have been designated to testify on behalf of the corporation may be examined on specifically articulated topics whether the representative obtained the information by personal experience or upon investigation in their corporate capacity."); *Fed. Trade Comm'n v. Qualcomm Inc.*, No. 17-cv-00220-LHK (N.D. Cal. Jan. 8, 2019), ECF No. 1196 at 2 ("Johnson should be allowed to testify as to the matters to which he testified in his Rule 30(b)(6) deposition.").

"When it comes to using Rule 30(b)(6) depositions at trial, strictly imposing the personal knowledge requirement would only recreate the problems that Rule 30(b)(6) was created to solve." *Sara Lee Corp. v. Kraft Foods Inc.*, 276 F.R.D. 500, 503 (N.D. Ill. 2011). It would also relegate corporate designee testimony to second-class status, given the obvious advantages of live testimony:

> In the conduct of the trial itself, any jury would prefer to see and hear important witnesses in person. In this way, the jury can better assess demeanor and credibility. And, live testimony is easier to follow and comprehend than deposition read-ins or video clips . . . . Live testimony, therefore, always is to be preferred over deposition excerpts.

In re Funeral Consumers Antitrust Litig., No. C 05-01804 WHA, 2005 WL 2334362, at *5 (N.D. Cal. Sept. 23, 2005).

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Accordingly, the Court will not preclude Plaintiffs from calling Bessinger live. Defendants' motion is denied.

IT IS SO ORDERED.

Dated: March 31, 2021

JON S. TIGAR
United States District Judge