UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES - GENERAL

Case No.	CV 20-03332 GW (JEMx)	Date	July 28, 2021
Title	Farid Khan, et al. v. Boohoo.com USA, Inc., et al.		

Present: The Honorable	**JOHN E. MCDERMOTT, UNITED STATES MAGISTRATE JUDGE**

S. Lorenzo	
Deputy Clerk	Court Reporter / Recorder

Proceedings: **(IN CHAMBERS) ORDER RE DEFENDANTS' MOTION FOR PROTECTIVE ORDER (Dkt. 78)**

Before the Court is a Motion For Protective Order ("Motion") to prohibit the deposition of Mahmud Kamani, Executive Chairman of Boohoo Group PLC on the ground that he is an "apex" or high corporate official. (Dkt. 78:2-3.) Defendants Boohoo.com USA, Inc., Boohoo.com UK Limited, PrettyLittleThing.com USA, Inc., PrettyLittleThing.com Limited, NastyGal.com USA. Inc. Nasty Gal Limited and Boohoo Group PLC ("Defendants") filed the Motion on July 7, 2021. (Dkt. 78:2-3.) Plaintiff and class representative Farid Khan[1] and Defendants filed a Joint Stipulation with the Motion. Each of the parties filed a Supplemental Memorandum on July 21, 2021. (Dkt. 86, 87.)

The Court DENIES the Motion and ORDERS the deposition of Mr. Kamani to take place on or before August 15, 2021 by videoconference (due to COVID-19 concerns). The deposition will be limited to four hours and to matters relevant only to class certification, including Kamani's knowledge about Defendants' reference pricing and markdown practices at the three Boohoo Group US websites.

Background

Plaintiffs allege that Defendants have engaged in deceptive marketing practices in violation of California's Unfair Competition Law, Cal. Bus. & Profs. Code § 17200, False Advertising Law, Cal. Bus. & Profs. Code § 17500, Consumer Legal Remedies Act, Cal. Civ. Code § 1750 and fraud, fraudulent concealment and unjust enrichment.

[1] This case has been consolidated with the Haya Hilton and Olivia Lee class actions. (Dkt. 38.)

(Dkt. 14.) More specifically, Plaintiffs allege that Boohoo Group companies advertise fake and inflated comparison reference prices for their clothing, accessories and other items on their U.S. websites to deceive customers into a false belief that the sale price is a deeply discounted bargain price. (Dkt. 14, ¶ 1.) Mahmoud Kamani is the Executive Chairman of Boohoo Group PLC, the parent company of all three clothing brands at issue in the lawsuit. (Dkt. 78-1, ¶¶ 1, 7.) His Declaration states that he is not customarily involved in setting prices for individual items or in advertisement decisions, although he has played a limited role in day-to-day pricing and advertising decisions, on the Boohoo, PrettyLittleThing and NastyGal websites. (Dkt. 78-1, ¶ 7.)

Legal Standards

Defendants seek an order prohibiting Kamani's deposition pursuant to Fed. R. Civ. P. Rule 26(c)(1) which provides that a court "may for good cause, issue an order to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense." Rule 26(c)(1), among other things, authorizes a court to forbid discovery, to specify the terms of discovery or limit discovery to certain matters. Courts can and have exercised their discretion under Rule 26(c)(1) to prohibit or limit the scope of depositions of "apex" high ranking corporate officials who are not likely to have unique personal knowledge of the issues in a case and where the information sought can be better obtained from other sources. See, e.g., Robertson v. McNeil-PPC Inc., 2014 WL 12576817*17 (C.D. Cal.).

The governing legal standard for prohibiting or limiting the scope of apex witness depositions is set forth in Apple, Inc. v. Samsung Elecs. Co., Ltd, 282 F.R.D. 259, 263 (N.D. Cal. 2012):

> In determining whether to allow an apex deposition, courts consider (a) whether the deponent has unique first-hand, non-repetitive knowledge of the facts at issue in the case and (2) whether the party seeking the deposition has exhausted other less intrusive methods.

Nonetheless, under Apple Mr. Kamani's position "does not automatically shield his deposition." Id. at 264. A party seeking to prevent a deposition "carries a heavy burden to show why discovery should be denied." Id. at 263. It is very unusual to prohibit a deposition altogether "absent extraordinary circumstances." Id. "When a witness has

personal knowledge of facts relevant to the lawsuit, even a corporate president or CEO is subject to deposition." Id.

Analysis

Defendants have not met their burden to demonstrate that Mr. Kamani's deposition should be barred. Based on emails obtained in discovery, Plaintiffs have presented evidence that Mr. Kamani has unique personal non-repetitive knowledge of facts relevant to this suit and to class certification:

> Wtf why are we putting baranding [i.e., "branding"] ads out without a massive effort. What chance tmdo [i.e., "do"] we stand ! ! ! ! WE WANT SALES SALES SALES . . . not interested in any other bollocks . . . reduce the cost [i.e., "coat"] to $80 and jacket to $40 then 50 off and free over 50 we need sales . .. wally, Britt only take instruction from me on this I will liaise directly with carol and John . . . . I'm now running this campaign . . I don't care what this is we want sales and we want to put massive efforts on the screen . . 50% off for a limited period only not on your first order only. Britt make the changes accordingly and go to work on this and make it work.

(Dkt. 78-3, Ibrahim Decl., Ex. A.)

In a follow-up mail, Mr. Kamani told his team he was not interested in handling the marketing any other way:

> Don't want any spend in marketing without my authorisation. I want to see and approve every penny . . . I've done this with carol twice before . . . also no you tube and no nonsense. I'm now in charge of all marketing spend in australia . . . we're doing this my way . . . the way that works.

(Id.)

These two email excerpts describe the same false original/reference price scheme in Australia that Plaintiffs contend that Boohoo Group uses in its three clothing lines at

issue in this suit. They also reveal Mr. Kamani is very "hands on" in regard to pricing and advertising, contrary to the statements in his declaration. Defendants argue that the emails about Australia (Ex. A.) are irrelevant because only the US websites are the subject of the lawsuit. Yet Mr. Kamani says he has "done this with carol twice before" (presumably somewhere other than Australia) and does not deny that the same policy applies to US websites. At the least, there is reason to depose Kamani to determine if it does and whether he approved or authored the policy. No subordinate employee can speak to what Mr. Kamani meant by his statements. His knowledge is unique and non-repetitive.

Other emails show similar direct involvement by Mr. Kamani in pricing decisions regarding the clothing lines at issue in this lawsuit. Mr. Kamani emailed his lead buyers, "When you buy at 65 margin and deduct 50% WE LOSE MONEY . . . you guys got to get over 70 plus." (Dkt. 78-3, Ex. B.) In another email, Mr. Kamani writes, "Want this clear and transparent . . . we buy at 65 margin% and sell at 50% off." (Dkt. 78-3, Ex. C.)

Discovery for now is limited to class certification issues. (Dkt. 34 at 13:19-20.) Defendants claim that Mr. Kamani does not have any knowledge that would bear on class certification. The information Plaintiffs seek from Mr. Kamani, however, bears on commonality and whether common issues predominate over individual issues. What Plaintiffs seek to determine from Mr. Kamani is whether the same reference price and markdown practices employed in Australia also apply across all three US websites. Plaintiffs argue that his commands to subordinates on margins bear on classwide damages.

Defendants argue that Plaintiffs have not exhausted other less intrusive discovery sources yet. Apple, 282 F.R.D. at 263. Exhaustion, however, is not "an absolute requirement." Ahlman v. Barnes, 2021 WL 1570838*4 (C.D. Cal.); Finisar Corp. v. Nistica, Inc., 2015 WL 3988132*2 (N.D. Cal.). The cutoff deadline for class certification discovery is August 31, 2021. Plaintiffs did seek discovery through interrogatories and requests for admissions concerning Defendants' reference pricing practices but were met with allegedly boilerplate answers. (Dkt. 78-3, Ex. D.) As to what Mr. Kamani meant by his own statements, there is nothing to exhaust.

The Court DENIES Defendants' Motion to prohibit Mr. Kamani's deposition altogether or limit it to two hours. The Court, however, will exercise its discretion to

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limit the deposition to four hours. The Court also will require the deposition to be conducted by videoconference due to COVID-19 concerns. These restrictions will limit the inconvenience to Mr. Kamani. The Court rejects Defendants' request that the deposition be limited to the three email strings The deposition will be limited to issues relevant to class certification, in particular Defendants' reference pricing and markdown practices. The deposition must occur on or before August 15, 2021.

The hearing on the Motion currently scheduled for August 3, 2021 is hereby vacated.

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