

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
Miami Division

CASE NO. 97-3924-CIV-SIMONTON

JERRY GREENBERG, individually,
and IDAZ GREENBERG, individually,

Plaintiffs,

vs.

NATIONAL GEOGRAPHIC
SOCIETY, a District of Columbia
corporation, NATIONAL GEOGRAPHIC
ENTERPRISES, INC., a corporation,
and MINDSCAPE, INC., a
California corporation,

Defendants.

**PLAINTIFFS' MEMORANDUM IN OPPOSITION TO DEFENDANTS'
MOTION IN LIMINE TO PRECLUDE PLAINTIFFS FROM PRESENTING
IDAZ GREENBERG AND MICHAEL GREENBERG'S TESTIMONY AT TRIAL**

Plaintiffs, JERRY GREENBERG and IDAZ GREENBERG (together "Greenberg"),
submit this memorandum in opposition to Defendants' Motion in Limine to Preclude Plaintiffs
from Presenting Idaz Greenberg and Michael Greenberg's Testimony at Trial, served by
Defendants, NATIONAL GEOGRAPHIC SOCIETY, NATIONAL GEOGRAPHIC
ENTERPRISES, INC., and MINDSCAPE, INC. (together "the Society").

I. There is No Lawful Basis to Preclude Idaz Greenberg's Testimony

The Society has moved to preclude Idaz Greenberg from testifying at the upcoming trial on statutory damages claiming that her testimony is cumulative and/or irrelevant and/or prejudicial. The Society, however, has offered the Court nothing with which to preclude Idaz Greenberg's testimony by way of factual or legal support for their motion. They cite not a single case for the remarkable position they take here. Instead, relying on their fear that her testimony will prove to be either redundant or irrelevant, the Society appears to believe this Court would exercise the power to strike a Plaintiff's witnesses simply based upon the whim of the defendant's counsel. If it only were that easy trials would be far less time-consuming than they are. But that is not the way the Rules of Evidence work.

To begin with, it is important to understand that the Society is asking the Court to boldly strike 2/3 of the live witnesses Greenberg intended to call at trial. The Society seeks to preclude Idaz Greenberg and Michael Greenberg from testifying, leaving Greenberg with only himself as a witness to face the parade of witnesses the Society apparently believes it will have. As it turns out, Greenberg does not intend to call Michael Greenberg in his case-in-chief, leaving him only as a rebuttal witness if necessary. Thus, to the extent the Society's motion seeks to preclude Michael Greenberg from testifying in Greenberg's case-in-chief, Greenberg will not oppose that part of the motion.

Greenberg would thus be left with only his testimony and that of his wife of forty years, Idaz, with which to present his case for statutory and exemplary damages. The Society, therefore, would still seek to strip away 50 percent of the testimony Greenberg intends to and has a right to present at trial. With that context, we can turn to the specific arguments the Society makes in support of this sweeping motion.

A. Idaz Greenberg's Testimony is Not Cumulative and is Relevant

The Society claims that Idaz's testimony is cumulative of Jerry Greenberg's because he can testify about his lost revenues and about his claim of willful infringement. Thus, the Society believes, there is no need for an additional witness to provide similar testimony. Yet, the Society relies on no case authority for the proposition that, even if that were true, that would allow them to dictate which one of Jerry Greenberg's *two witnesses* should testify about certain aspects of his case. Nor is there any support for the idea that a party is not entitled to introduce corroborative testimony to support the testimony of an earlier witness who the Society could attempt to impeach through cross-examination. In short, this argument the Society makes is novel, unsupported, and without foundation.

Idaz Greenberg's testimony is also very relevant for the jury to consider in assessing what amount of damages to assess against the Society. First, as Jerry Greenberg's wife and partner for such a long time, including the period when the infringed photographs were taken, Idaz can and will testify about the work that went into producing the photographs, what the life of a photographer entails, and what he and she did to contribute to their family's photography business. This is all background information for the jury to consider in fixing an amount of statutory damages that adequately values the photographs in question.

Second, Idaz will also testify, based upon her personal knowledge, as to what an end-user of the Society's Complete National Geographic can do with the CD collection. Specifically, as the Society knows full well from having taken Idaz's deposition, she has extensive knowledge as to the means by which another infringer can manipulate, copy, print, and download the photographs in the collection to commit even further infringements, to the extent that it is almost

incalculable to determine how many infringements have resulted from the misuse of Jerry's Greenberg's photographs.

As she testified in her deposition, Idaz has done extensive comparisons between the quality of a copy of a photograph printed from the CD-ROM version of the magazine with the quality of a copy printed from the paper version. (Idaz Greenberg Depo at 45-46). She personally observed the types of quality pictures that can be produced from the CD collection as compared with a copy from the magazine. (Depo at 46). This is also made much easier in the CD-ROM version based upon the easy search capabilities available with the product that are obviously not available in the magazine collection. (Depo at 48).

Moreover, she will testify as to the many other methods by which the Society has made it ridiculously easy to further infringe upon Jerry Greenberg's photographs. Because of the method by which the pictures in question are stored in the CD collection, Idaz will demonstrate how easy it is to explore the files included in the CD, locate an actual "JPEG" image of an infringed photograph from the CD, download that image onto a hard drive or any other type of media storage, and then infringe on the copyright at will. JPEG images are capable of being forwarded all over the world by email, can be inserted and "pasted" onto other documents or publications, and can be manipulated and reproduced in many different ways. The jury is entitled to see a demonstration from an end-user of the product, like Idaz Greenberg, to understand the extent of the damage that has been and will continue to be incurred. This testimony is indeed highly relevant and quite material to the Plaintiffs' case.

Finally, Idaz Greenberg can also testify as to the difficulties involved in detecting infringements of the photographs based upon this produce, plus the economic realities in the marketplace for a professional photographer or author, and so forth. (Depo at 41).

**B. Idaz Greenberg's Testimony May be Compelling,
But it is Not Unduly Prejudicial Under Rule 403**

The Society then claims that even if relevant, which it is, Idaz Greenberg's testimony is unduly prejudicial and should be excluded. This is apparently the case because the jury "might" be confused that Idaz is a party in the case and has suffered damages in addition to Jerry Greenberg, thus duplicating any damages award the jury might render. That argument is also fatally flawed.

First, in response to the Society's motion to drop Idaz Greenberg as a party plaintiff, the Plaintiffs have decided not to oppose such a motion. Thus, the Court can decide to drop Idaz Greenberg as a party. By accomplishing this goal, however, the Society cannot now claim that the jury "might" be confused by her testimony. The Court will undoubtedly properly instruct the jury as to the nature of the action and the type of damages that may be awarded to only the named plaintiff, Jerry Greenberg. Thus, the first basis for the Society's argument in this motion, that seeks a draconian remedy like excluding a fact witness from ever testifying, falls by the wayside.

Second, the Society's remaining arguments are silly. Having one additional witness who has personal knowledge relevant to the case will hardly create a spike in the sympathy factor in favor of Jerry Greenberg. Moreover, this is not a sympathy case in any event. This case is rightly about a photographer being compensated for the damages he is entitled to receive under federal law. And, finally, even if it were a sympathy-laden case, the Society has offered no principle of law or authority for the proposition that a defendant can isolate itself from that possibility by striking all of the plaintiffs' witnesses. That is truly a unique argument to say the least.

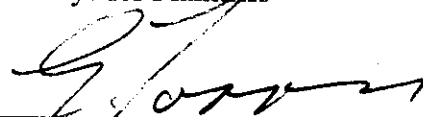
It is undoubtedly true that the Society, for its part, will try to portray itself as a noble institution that has contributed greatly to education and learning. Many a witness on the witness list will be asked about the Society's work and the Society's importance. Surely, the Society would thus oppose an argument from Jerry Greenberg that all such testimony is "irrelevant" or intended to play solely to the sympathy of the jurors. The Society thus cannot have it both ways.

The final argument made by the Society is equally shallow. Never in the annals of American jurisprudence, before now, has a party argued that having *two witnesses*, even if somewhat overlapping, results in an undue delay in a trial. The fact that in this case the Society would make such an argument is indeed telling.

Conclusion

The defendants' proposal that the Court foreclose the testimony of Idaz Greenberg should be summarily denied. The testimony of Michael Greenberg would only be introduced, if necessary, on rebuttal. Thus, Greenberg takes no position with respect to the remaining part of the Society's motion.

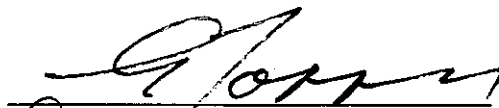
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Certificate of Service

I hereby certify that a copy of the foregoing memorandum was served by mail on Edward Soto, Esq., Weil, Gotshal & Manges LLP, 701 Brickell Avenue, Suite 2100, Miami, FL 33131; on Stephen N. Zack, Boies, Schiller & Flexner LLP, 2800 Bank of America Tower, 100 Southeast Second Street, Miami, FL 33131; and on Jennifer G. Altman, Esq., Boies, Schiller & Flexner LLP, 2800 Bank of America Tower, 100 Southeast Second Street, Miami, FL 33131; and by facsimile and mail on Robert G. Sugarman, Esq., Weil, Gotshal & Manges LLP, 767 Fifth Avenue, New York NY 10153 this 10th day of January, 2003.


Norman Davis