

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES - GENERAL

Case No. 8:18-cv-02201-JLS (JDEx) Date October 29, 2020

Title Am. River Nutrition, LLC v. Beijing Gingko Grp. Biological Tech. Co., Ltd., et al.

Present: The Honorable John D. Early, United States Magistrate Judge

Maria Barr

n/a

Deputy Clerk

Court Reporter / Recorder

Attorneys Present for Plaintiff(s):

Attorneys Present for Defendant(s):

n/a

n/a

Proceedings: Order Denying Plaintiff's Ex Parte Application [Dkt. 103]

I.

PROCEDURAL HISTORY

On October 26, 2020, Plaintiff American River Nutrition, LLC ("Plaintiff") filed an Ex Parte Application to Compel (Dkt. 103, "Application") depositions of Mr. Chunhua Li and Dr. Yanmei Li, individually and as Rule 30(b)(6) designees of Defendants Beijing Gingko Group Biological Technology Co., Ltd. ("BGG China") and Jinke Group USA Inc. ("BGG North America") "in accordance with one of the six proposals detailed" in its supporting memorandum (Dkt. 103-1, "App. Mem."). Plaintiff asserts it brought this discovery dispute on an ex parte basis because of its "inability to reach an agreement with counsel for Defendants on a start time and end time for the depositions" at issue, which were noticed for consecutive days on November 2, 2020 through November 5, 2020 with witnesses participating via remote means from Macau. Plaintiff noticed the depositions to start at 5:00 a.m. EST (5:00 p.m. local time in Macau), "for the purposes of allowing single day, ten (10) hour depositions." Although each deposition was originally noticed for a single day, Plaintiff requests that each deposition be conducted over two to three days, or alternatively, be conducted in the United States once travel restrictions allow.

On October 27, 2020, as authorized by Paragraph 3 of the assigned Magistrate Judge's Procedures and Schedules Page on the Court's website, Defendants BGG China, BGG North America, and Jiangsu Xixin Vitamin Co., Ltd. (collectively, "Defendants") filed an Opposition to the Application (Dkt. 104, "Opposition"), arguing Plaintiff seeks "to compel depositions that Defendants have already agreed to, for witnesses who are prepared to testify on the previously agreed-upon dates and location." Defendants contend that the parties "always" contemplated a total of four days for the depositions, reflecting a

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES - GENERAL

Case No. 8:18-cv-02201-JLS (JDEx)

Date October 29, 2020

Title Am. River Nutrition, LLC v. Beijing Gingko Grp. Biological Tech. Co., Ltd., et al.

compromise of fourteen hours for each witness, and Plaintiff's demand for twenty hours with each witness is unreasonable. Opposition at 1-2. Defendants maintain that they "are prepared to present these witnesses on the agreed-upon dates at a reasonable start time and a reasonable end time each day." *Id.* at 5. Defendants further claim that the Application is procedurally deficient as *ex parte* applications are inappropriate for resolving discovery disputes such as this one and Plaintiff failed to provide sufficient notice of the Application as required by the Local Rules. *Id.* at 7-10.

On October 28, 2020, at 4:56 p.m., without authorization from the Court, Plaintiff filed a Reply in support of the Application (Dkt. 105, "Reply") purportedly pursuant to Local Rule 7-19, although the rule does not authorize the filing of such a reply. Plaintiff argues that Mr. Li, as a "green card" holder, is a lawful permanent resident who "is free to return to the United States" without regard to travel restrictions. Reply at 1-2. Plaintiff argues Mr. Li and BGG China should be ordered to appear for deposition in the United States within the next 45 days and Dr. Li and BGG China should be ordered to appear for five hours of testimony per day from November 3-6, 2020 in Macau. *Id.* at 3-4. Plaintiff also disputes that it was required to proceed under Local Rule 37 because such compliance would be impossible and asserts it provided proper notice. *Id.* at 4-6.

II.

STANDARD FOR EX PARTE APPLICATIONS

Ex parte applications, by which moving parties seek "to go to the head of the line in front of all other litigants and receive special treatment," are "rarely justified." Mission Power Eng'g Co. v. Cont'l Cas. Co., 883 F. Supp. 488, 490, 492 (C.D. Cal. 1995). To justify such rare, special relief, the moving party must, at a minimum, show: (1) its "cause will be irreparably prejudiced if the underlying motion is heard according to regular noticed motion procedures"; and (2) "the moving party is without fault in creating the crisis that requires *ex parte* relief, or that the crisis occurred as a result of excusable neglect." *Id.* at 492; see also Local Rule 37-3 (for a discovery motion to be heard on an *ex parte* basis, the moving party must show "irreparable injury or prejudice not attributable to the lack of diligence of the moving party"). These requirements are necessary because *ex parte* applications "are inherently unfair" as the parties' opportunities to prepare "are grossly unbalanced." Mission Power, 883 F. Supp. at 490.

III.

DISCUSSION

Here, Plaintiff has not shown that the "crisis" upon which it seeks to "go to the head of the line" by way of an *ex parte* application, rather than a noticed motion, is not a crisis of

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES - GENERAL

Case No. 8:18-cv-02201-JLS (JDEx)

Date October 29, 2020

Title Am. River Nutrition, LLC v. Beijing Gingko Grp. Biological Tech. Co., Ltd., et al.

its own making. Plaintiff initiated this action in December 2018. Dkt. 1. These depositions of senior executives and Rule 30(b)(6) representatives of the Defendants could have and should have been scheduled before travel restrictions were imposed in 2020. Further, even after travel restrictions were imposed in January 2020, Plaintiff has had nearly nine months to attempt to arrange a final, enforceable procedure for such depositions or seek Court intervention on a non-ex parte basis. The Scheduling Order in this action already has been modified three times, most recently on September 18, 2020, in part, to extend the deadline for the depositions at issue. Dkt. 102. In granting, in part, one such modification, the Honorable Josephine L. Staton, United States District Judge, noted: “Plaintiff failed to show good cause for the lengthy continuance request, as the parties’ papers reflect that Plaintiff did not wisely use all of the pre-pandemic discovery period.” Dkt. 96 at 2 (emphasis added). Thus, Plaintiff had several months before the travel restrictions and nine months since the imposition of those restrictions to make enforceable, final arrangements for the depositions of these two individuals. Despite those many months, and despite a prior finding that it had not wisely used its discovery time, Plaintiff now demands the Court intervene, on an immediate basis, to fix a “crisis” that Plaintiff partly caused. The Court declines to do so because Plaintiff has not shown that it is not at fault in creating the “crisis” of which it complains.

Further, the relief Plaintiff seeks by way of the Application, with its six proposals, differs from the relief Plaintiff seeks in the Reply, which differs from the deposition notices that Plaintiff served in September 22 and 23, 2020. It is surprising that it does not appear from the exhibits served with the Application, see Dkt. 103-3, that any of the six counsel of record for Plaintiff at three law firms located in four cities in California and Florida, ever, at least recently, picked up a telephone to call any of the five counsel of record for Defendants, located in three cities in California and the District of Columbia, to try to work out these not-insurmountable scheduling issues. After an exchange of emails in which counsel spoke past each other rather than with each other, Plaintiff filed the Application and Reply, asking the Court to issue an order regarding start time, end time, location, and length of four depositions currently noticed to proceed in Macau in three business days, in a case that has been pending for 22 months, for witnesses who have already made international travel arrangements. Plaintiff has not shown ex parte relief is warranted here.

Although the Court finds ex parte relief is not warranted, should any future discovery dispute be filed, the Court will carefully consider the future conduct of the parties. For example, the parties represented in the Rule 26(f) Joint Report filed in April 2019, that they had stipulated that “as to any witnesses that require translation, Rule 30’s seven-hour rule can be expanded to approximately ten hours and that such deposition can

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES - GENERAL

Case No. 8:18-cv-02201-JLS (JDEx)

Date October 29, 2020

Title Am. River Nutrition, LLC v. Beijing Gingko Grp. Biological Tech. Co., Ltd., et al.

take place over multiple days.” Dkt. 56 at 9. That “stipulation” was apparently not reduced to an order of the Court. The Court declines, on an ex parte basis and without a further evidentiary showing, to rule on time limitations in advance of the depositions. However, the Court expects officers of the Court to honor their agreements. Nothing in this Order precludes Plaintiff or Defendants from seeking any appropriate relief after the depositions are taken, and the Court will examine the conduct of the parties and counsel leading up to and during the depositions in ruling on any such potential future motion, including in assessing potential remedies under Rule 37 or other authorities.

Similarly, despite multiple email exchanges regarding the dates and location of these depositions, Plaintiff apparently unilaterally (see Application, Exh. A at 14) scheduled the times for 5:00 a.m. eastern standard time and 5:00 p.m. in Macau,¹ thereby requiring the witnesses to sit for their depositions into the middle of the night. Unsurprisingly, Defendants objected to the start time. App. Mem. at 3; Opposition at 3. Surprisingly, Defendants did not proceed under Local Rule 37 to seek a protective order upon service of those deposition notices more than a month ago. See Pederssen v. United States, 2018 WL 9649985, at *2 (C.D. Cal. Dec. 13, 2018) (“Where a party has been served with a notice of deposition but refuses to attend the deposition, the burden is on that party to seek and obtain a protective order excusing the party’s appearance at the noticed date and time.”). Defendants represent that they remain willing to present the witnesses starting on November 3, 2020, at a reasonable start time and with a reasonable end time each day. Opposition at 5.² For the reasons set forth above, the Court declines to intercede, on an ex parte basis three business days before the scheduled start dates, to address start and end times for the depositions. The Court reiterates that should there be any future dispute, it will carefully consider the reasonableness of the parties’ actions and positions, taking into account that some or all parties and counsel may face some level of inconvenience in this situation. For example, if the noticing party insists on proceeding late into the evening at the location where the witness is sitting and the deponent, after reasonable efforts to reach an accord, elects to halt the deposition in order to seek a protective order, the noticing party will be at risk that no further questioning will be permitted. Alternatively, if the deponent unreasonably refuses to sit or remain for a deposition, understanding that some level of inconvenience is unavoidable, and does not act reasonably or in good faith to comply with prior agreements regarding the length of the deposition and/or refuses to reasonably return

¹ Because of the November 1, 2020 time change in the United States, the 5:00 a.m. start time is a 6:00 p.m. start time in Macau. App. Mem. at 2 n.5.

² Defendants indicate that the witnesses have already made travel arrangements, applied for travel visas, and cleared their work schedules for the dates noticed. Opposition at 4.

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES - GENERAL

Case No. 8:18-cv-02201-JLS (JDEx)

Date October 29, 2020

Title Am. River Nutrition, LLC v. Beijing Gingko Grp. Biological Tech. Co., Ltd., et al.

to complete the deposition within the time agreed to, upon a motion to compel, the deponent may be ordered to sit for further questioning at a just time and place. In any such future dispute, the touchstone will be the applicable Rules and the reasonableness of the parties. The parties are placed on notice that missteps or overreaching in scheduling or appearing/not appearing at the depositions could result in a panoply of potential sanctions, including monetary sanctions, an order denying further deposition questioning of a witness, an order compelling further questioning of a witness under such terms as may be just, or a recommendation of evidentiary or issue sanctions in the appropriate circumstance.

Counsel should have an “acute sense of responsibility” they have as officers of the Court and further their efforts “to be cooperative, practical and sensible” in resolving this discovery dispute among themselves. See Tierno v. Rite Aid Corp., 2008 WL 3876131, at *2 (N.D. Cal. Aug. 19, 2008) (quoting In re Convergent Tech. Sec. Litig., 108 F.R.D. 328, 331 (N.D. Cal. 1985)).

**IV.
CONCLUSION**

For the foregoing reasons, the Application (Dkt. 103) is DENIED.

Initials of Clerk:

mba