UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

MICHAEL J. QUILLING, Receiver for ABC VIATICALS, INC., and Related Entities, **Plaintiff,** **v.** **ERWIN & JOHNSON, LLP, and CHRISTOPHER R. ERWIN,** **Defendants and Third-Party Plaintiffs,** **v.** **MILLS, POTOCZAK & COMPANY,** **Third-Party Defendant.**	§ § § § § § § § § § § § § § §	**Civil Action No. 3:07-CV-1153-P** **ECF**

DEFENDANTS' EXPEDITED MOTION TO QUASH, MOTION FOR PROTECTIVE ORDER, AND BRIEF IN SUPPORT

Defendant Christopher R. Erwin and Erwin & Johnson, LLP, ("Defendants") file this expedited motion to quash the Notice of Deposition for Christopher R. Erwin and request a protective order preventing such deposition for the following reasons.

I. SUMMARY

Plaintiff Michael J. Quilling ("Plaintiff") emailed the Notice of Deposition of Christopher R. Erwin to counsel for Defendants on Friday, May 22, 2009.[1] The notice requests the deposition of Mr. Erwin in his individual capacity and "as a partner at Defendant Erwin & Johnson, LLP" in Dallas, Texas. Defendants object to the notice and request a protective order for several reasons. First, the date and the location were unilaterally selected by Plaintiff. No arrangement has been made for Mr. Erwin to travel from California, where he resides and works, to Dallas on June 1, 2009. Moreover, as a defendant, his deposition, both in his individual and

[1] *See* Notice of Deposition of Christopher R. Erwin, attached hereto as Exhibit A.

representative capacities, should occur in the district where he resides: the Central District of California.

Second, Plaintiff advised that he noticed the deposition for a date of his choosing because he seeks to depose Mr. Erwin, C. Keith LaMonda, and William Potoczak in time to comply with his July 30, 2009 expert report deadline. In an attempt to accommodate Plaintiff's intent, Defendants' counsel suggested deposing Mr. LaMonda and Mr. Potoczak before deposing Mr. Erwin. The principal reason for this suggestion being that Defendants have moved to join DMH Stallard and Christopher John William Stenning as third-party defendants. If joined, these third-party defendants will also want to depose Mr. Erwin. Defendants explained that it would be judicially economical to await the Court's ruling on joinder before deposing Mr. Erwin, so that the parties can avoid any unnecessary expense and time in duplicating Mr. Erwin's deposition. Defendants further proposed mutually requesting extensions of their respective expert report deadlines. Plaintiff refused to agree.

Third, Plaintiff unilaterally selected Mr. Erwin as the organizational representative for defendant Erwin & Johnson, LLP ("E&J"). Plaintiff fails to offer any subject(s) upon which organizational testimony will be elicited. Defendants are thus prevented from determining whether Mr. Erwin will be the appropriate organizational representative for E&J. For these reasons, as more fully explained below, Defendants request that the Court grant this motion, quash the deposition notice, and enter a protective order preventing Mr. Erwin from having to comply with Plaintiff's deposition notice. Given the short timeframe between Plaintiff's service of the notice and the purported deposition date, Defendants request that this motion be given expedited consideration.

II. BACKGROUND

Earlier in May, Plaintiff requested dates of availability for Mr. Erwin's deposition. Because DMH Stallard and Mr. Stenning will also want to depose Mr. Erwin, Defendants proposed that Plaintiff withdraw his opposition to the joinder motion so that service could be expediently completed and these new parties could have an opportunity to participate in the deposition. Plaintiff refused to agree. On the afternoon of Friday, May 22, 2009, with no prior warning, Plaintiff noticed Mr. Erwin's deposition to take place in Dallas on June 1, 2009.

In the email transmitting the deposition notice, Plaintiff expressed concern that Mr. Erwin's deposition needed to occur before his expert reports are due on July 30, 2009.[2] Shortly thereafter, Defendants advised Plaintiff that June 1, 2009 was inconvenient for Mr. Erwin's deposition and inappropriate in light of the pending joinder motion. Given that Plaintiff was concerned about getting discovery completed in time to make his expert report deadline, Defendants proposed to jointly agree to extend the expert report deadlines. Plaintiff refused to agree, suggesting that Defendants should simply note Plaintiff as opposed in the certificate of conference on any motion challenging the notice. It was also proposed that Mr. LaMonda and Mr. Potoczak could be deposed first – given that DMH Stallard and Mr. Stenning will not likely seek to depose them. Receiver has not agreed with that proposal. With all efforts aimed at resolving the matter being rejected by Plaintiff, Defendants have no choice but to request the Court's intervention prior to the June 1, 2009 deposition.

[2] Receiver also took issue with the vacation of one of Defendants' counsel, apparently considering it to be an impediment to Mr. Erwin's deposition. As Receiver is aware, there are three counsel representing Mr. Erwin; the other two attorneys will be available during that period.

III.
ARGUMENTS & AUTHORITIES

A. Legal Standard

Federal Rule of Civil Procedure 26(c) authorizes the court, for good cause shown, to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense. FED. R. CIV. P. 26(c). A party seeking a protective order to prevent a deposition must show good cause and the specific need for protection. *Williams ex rel. Williams v. Greenlee*, 210 F.R.D. 577, 579 (N.D. Tex. 2002).

B. Inappropriate Time and Place

Plaintiff did not inquire as to whether Mr. Erwin would be available for deposition on June 1, 2009 in Dallas, Texas. Instead, he unilaterally noticed his deposition for that date and location, both in his individual capacity and as an organizational representative of E&J. Mr. Erwin resides in the Central District of California and E&J's principal place of business is also located there.

Under the general rule in the Fifth Circuit, the deposition of a FED. R. CIV. P. 30(B)(6) witness should be taken at a corporation's principal place of business. *See Salter v. Upjohn Co.*, 593 F.2d 649, 651-52 (5th Cir. 1979) (holding that "[i]t is well settled that '(t)he deposition of a corporation by its agents and officers should ordinarily be taken at its principal place of business,' especially when, as in this case, the corporation is the defendant") (citation omitted). This conclusion has been extended to include the depositions of individual defendants. *See, e.g., Mill-Run Tours, Inc. v. Khashoggi*, 124 F.R.D. 547, 550 (S.D.N.Y. 1989) (noting that a defendant's deposition will be held in the district of his residence); *Federal Deposit Insurance Co. v. La Antillana, S.A.*, No. 88 Civ. 2670, 1990 WL 155727, at *1 (S.D.N.Y. Oct. 5, 1990) (same).

A court may depart from this general rule only where the plaintiff shows "peculiar" circumstances or "compelling" reasons for such a departure. *See Tailift USA, Inc. v. Tailift Co., Ltd.*, 2004 WL 722244, at *2-4 (N.D. Tex. March 26, 2004) (Ramirez, J.) (citing the five factors from *Resolution Trust Corp. v. Worldwide Ins. Mgmt. Corp.*, 147 F.R.D. 125, 127 (N.D. Tex. 1992)). In this district, the five factors are:

1. Counsel for the parties are located in the forum district;
2. The deposing party is seeking to depose only one corporate representative;
3. The corporation chose a corporate representative that resides outside the location of the principal place of business and the forum district;
4. Significant discovery disputes may arise and there is an anticipated necessity of the resolution by the forum court; and
5. The claim's nature and the parties' relationship is such that 'an appropriate adjustment of the equities favors a deposition site in the forum district.'

Resolution Trust Corp., 147 F.R.D. at 127. Plaintiff bears the burden to show sufficient circumstances to overcome the presumption that a defendant's corporate representative should be deposed at its principal place of business. *See Tailift USA, Inc.*, 2004 WL 722244, at *2 (citing *Salter*, 593 F.2d at 652 (finding that plaintiff did not show peculiar circumstances to overcome the presumption); *and Six West Retail Acquisition, Inc. v. Sony Theatre Mgmt. Corp.*, 203 F.R.D. 98, 107 (S.D.N.Y. 2001) (same); *Payton v. Sears, Roebuck & Co.*, 148 F.R.D. 667, 669 (N.D.Ga. 1993) (finding that plaintiffs produced no compelling reason to depart from the general rule)). Plaintiff fails to carry his burden here.

While counsel for the parties are located in the forum district, that factor is "less compelling" than any hardship to Mr. Erwin. *See id.* ("the convenience of counsel is less compelling than any hardship to the witnesses."). Indeed, "it is the plaintiff who is generally

required to bear any reasonable burdens of inconvenience that the action represents." *Morin v. Nationwide Fed. Credit Union*, 229 F.R.D. 362, 363 (D. Conn. 2005). "Courts have held that plaintiffs normally cannot complain if they must take discovery at great distances from the forum." *Tailift USA, Inc.*, 2004 WL 722244, at *2. And although Plaintiff is seeking to depose only one organizational representative, his unilateral selection of Mr. Erwin as E&J's representative is inappropriate, and thus does not favor of conducting his deposition in Dallas.

Defendants do not anticipate that significant discovery disputes will arise which will require resolution by the Court. The mere possibility of such disputes does not necessarily weigh in favor of conducting the deposition in the forum district. *See id.* at *3 (citing *Rapoca Energy Co., L.P. v. Amci Export Corp.*, 199 F.R.D. 191, at 193 (W.D.Va. 2001) (finding that this factor did not weigh against the presumption because the court had "no reason to anticipate the likelihood of additional discovery disputes which would necessitate the court's intervention.")).

Finally, there is nothing unique about the nature of this lawsuit or the parties' relationship that warrants the deposition occurring in Dallas rather than in the Central District of California. Plaintiff will thus be unable to show that "peculiar" circumstances or "compelling" reasons exist for deposing Mr. Erwin in Dallas, either individually or in a representative capacity. The Court should quash the notice and issue a protective order protecting Mr. Erwin from appearing for the as-noticed deposition.

C. Potentially Duplicative and Uneconomical Depositions of Mr. Erwin

At a minimum, Plaintiff should await the Court's ruling on Defendants' pending joinder motion before proceeding with Mr. Erwin's deposition. Mr. Erwin's deposition is only one of ***three*** depositions that Plaintiff deems necessary to his expert's report. He also wants to depose Mr. LaMonda and Mr. Potoczak. Plaintiff is certainly capable of deposing those individuals

during the next few weeks in preparation for his expert's report. Proceeding with the other depositions should not be affected by the joinder of DMH Stallard and Mr. Stenning, as there appears to be little reason for them to depose those witnesses. Accordingly, the most judicially economical course would be to proceed with the depositions of other witnesses and avoid the unnecessary waste of resources and the burden that would be incurred by the parties should the Court permit the joinder of DMH Stallard and Mr. Stenning after Mr. Erwin's deposition. The Court should grant the motion and issue a protective order for this reason, as well.

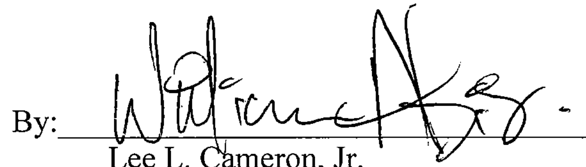
D. Unilateral Choice of Mr. Erwin as E&J's Organizational Representative

Plaintiff unilaterally selected Mr. Erwin as E&J's organizational representative, apparently in an attempt to avoid complying with Rule 30(b)(6)'s requirement of designating matters "with reasonable particularity" upon which the representative is expected to testify. *See* FED. R. CIV. P. 30(b)(6). Rule 30(b)(6) is designed "to avoid the possibility that several officers and managing agents might be deposed in turn, with each disclaiming personal knowledge of facts that are clearly known to persons within the organization and thus to the organization itself." *Brazos River Authority v. GE Ionics, Inc.*, 469 F.3d 416, 432-33 (5th Cir. 2006) (quoting 8A Charles A. Wright, Arthur R. Miller & Richard L. Marcus, Federal Practice and Procedure § 2103, at 33 (2d ed. 1994)). Without guidance as to the topics upon which E&J's organizational representative is be expected to testify, it is possible that Mr. Erwin may ***not*** be E&J's representative. Accordingly, Plaintiff may be creating the exact situation that Rule 30(b)(6) is intended to avoid. The Court should quash the notice and issue a protective order for this additional reason.

WHEREFORE, PREMISES CONSIDERED, Christopher R. Erwin and Erwin & Johnson, LLP request that the Court consider this motion on an expedited basis, grant it, quash the deposition notice, issue a protective order, and award any other and further relief to which these defendants are entitled.

Respectfully submitted,

WILSON, ELSER, MOSKOWITZ, EDELMAN & DICKER LLP



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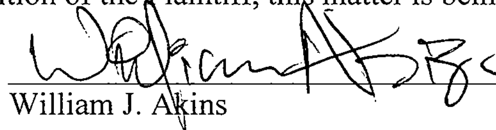
ATTORNEYS FOR DEFENDANTS/ THIRD-PARTY PLAINTIFFS CHRISTOPHER ERWIN and ERWIN & JOHNSON, LLP

CERTIFICATE OF CONFERENCE

The undersigned counsel certifies that, on May 26, 2009, Brent Rodine, one of the attorneys for Plaintiff rejected an offer of compromise by e-mail and advised that for certificate of conference purposes, the Plaintiff should be noted as opposed to any Motion to Quash. As Plaintiff is opposed to the relief requested in this Motion, it is submitted to the Court.

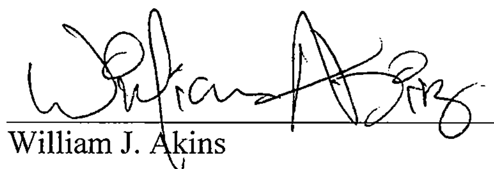
The undersigned attorney further certifies that on May 27, 2009 attempts were made by e-mail and telephone to reach Christopher Trowbridge, the attorney for the Third Party Defendant to find out if he opposed this motion. Because of the urgent nature of the relief requested and because, without regard to his response, the matter would have to be submitted to the court for consideration, due to the opposition of the Plaintiff, this matter is being submitted.



William J. Akins

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing document has been served on this [27th] day of May, 2009, to all known counsel of record as required by the Federal Rules of Civil Procedure.



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