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**UNITED STATES DISTRICT COURT
DISTRICT OF ARIZONA**

Jack Kimm,

Plaintiff,

vs.

Martin Brannan, et al.,

Defendants.

2:14-cv-1966 JWS

ORDER AND OPINION

**[Re: Motions at Dockets 92, 97, 98,
and 103]**

I. MOTIONS PRESENTED

Before the court are four related motions filed by plaintiff Jack Kimm (“Kimm”). First, at docket 92 Kimm moves for an extension of the February 6, 2017 fact discovery deadline to April 21, 2017, and the dispositive motions and motions *in limine* deadline from March 24, 2017 to June 23, 2017. Defendants Martin Brannan (“Brannan”), Samuel Verderman (“Verderman”), Frank Haws (“Haws”), Thomas Jones (“Jones”), and La Paz County (collectively, “the La Paz Defendants”) oppose the motion at docket 100.

The next two motions are motions to strike. At docket 97 Kimm moves to strike defendant Rayburn Evans’ (“Evans”) objections at docket 88 to the deposition notice of Steven Suskin (“Suskin”). Evans opposes the motion at docket 104. At docket 98 Kimm moves to strike Evans’ objections at docket 89 to the deposition notice of John Churchill (“Churchill”). Evans opposes the motion at docket 105. Kimm’s combined reply in support of both of these motions is at docket 107.

1 Finally, at docket 103 Kimm moves to compel Suskin's and Churchill's
2 depositions, supported at docket 109 by a declaration of counsel. Evans opposes the
3 motion at docket 106. Kimm replies at docket 108, supported by a declaration of
4 counsel at docket 110. At docket 111 Kimm filed a notice of errata with a corrected
5 Exhibit 3 to his reply.

6 Oral argument was not requested and would not assist the court.

7 II. BACKGROUND

8 The background to this case set out in the court's order at docket 47 need not be
9 repeated here. Suffice it to say for present purposes that the court's scheduling and
10 planning order established a fact discovery deadline of October 7, 2016, and a
11 dispositive motion and motion *in limine* deadline of March 24, 2017.¹ In October
12 Kimm's counsel, Joy Bertrand ("Bertrand"), attempted to schedule the defendants'
13 depositions for November or December.² Counsel for the La Paz Defendants
14 responded by stating that Haws would be made available for a deposition in Phoenix
15 and requesting that the remaining defendants' depositions take place in La Paz
16 County.³

17 At docket 72 Kimm moved to extend the fact discovery deadline until February 6,
18 2017. Kimm stated that he had taken Evans' deposition but, due to scheduling issues,
19 not the La Paz Defendants'.⁴ Kimm estimated that the remaining depositions would be
20 complete by the end of January. On December 12, 2016, the court granted the motion
21 over Evans' objection.⁵

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24 ¹Doc. 54 at 5, 7.

25 ²Doc. 77-1 at 2-3.

26 ³*Id.* at 1

27 ⁴Doc. 72 at 2.

28 ⁵Doc. 78.

1 On December 19 Bertrand emailed opposing counsel requesting dates for
2 Suskin's and Churchill's depositions.⁶ Suskin and Churchill represented Evans in the
3 case that Kimm filed against Evans in state court,⁷ and they currently represent Evans
4 in this action. Churchill responded to Bertrand's email by stating that he preferred to
5 have his deposition taken in Parker and instructed Bertrand to contact his staff to
6 identify a suitable deposition date.⁸ Suskin responded to Bertrand also, stating that he
7 was available to be deposed on several dates in January.⁹

8 About one month before the discovery deadline, Bertrand emailed Michael
9 Warzynski ("Warzynski"), the La Paz Defendants' counsel, requesting his availability for
10 Suskin's and Churchill's depositions.¹⁰ Warzynski's paralegal responded by stating that
11 Warzynski was in trial from January 17 to February 13 and providing nine dates after
12 the trial ended that Warzynski was available for depositions.¹¹ Bertrand then reached
13 out to Suskin and Churchill on January 10 to see if they were available on the dates
14 listed by Warzynski's paralegal.¹² Suskin and Churchill did not respond. On January 17
15 Bertrand emailed Warzynski to see if his trial went forward as scheduled and, if not, if
16 they could schedule depositions.¹³ Warzynski did not respond.

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20 ⁶Doc. 92-2 at 2.

21 ⁷Doc. 48 at 6 ¶ 37; doc. 106 at 5.

22 ⁸Doc. 92-2 at 3.

23 ⁹*Id.*

24 ¹⁰*Id.* at 4.

25 ¹¹*Id.* at 2.

26 ¹²Doc. 92-3 at 3-4.

27 ¹³Doc. 92-5 at 2.

1 In late January Kimm filed deposition notices for Suskin (February 8),¹⁴ Haws
2 (February 21),¹⁵ and Churchill (March 3).¹⁶ Bertrand emailed opposing counsel
3 regarding Suskin's, Churchill's,¹⁷ and Haws' depositions¹⁸ on February 1. In her email
4 Bertrand informed opposing counsel that she intended to notice the depositions of the
5 remaining defendants (Brannan, Verderman, Jones, and La Paz County) for mid-
6 March.¹⁹ To date, Kimm has not noticed any of these depositions.

7 On February 2 Evans filed objections to Suskin's and Churchill's deposition
8 notices, asserting that the depositions (1) were untimely because they were scheduled
9 for after the discovery deadline; (2) seek documents and information protected from
10 disclosure by the attorney-client privilege and work-product doctrines; (3) were not
11 adequately noticed; and (4) would be burdensome, oppressive, and harassing to
12 Evans, Suskin, and Churchill.²⁰ Warzynski responded to Bertrand's email by stating
13 that he would have been inclined to arrange for Haws' deposition if Kimm had only
14 requested that one deposition, but because Kimm now seemed "intent to attempt a
15 discovery extravaganza after the close of discovery," Warzynski would object to the
16 deposition notices for all La Paz Defendants.²¹

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20 ¹⁴Doc. 86.

21 ¹⁵Doc. 85.

22 ¹⁶Doc. 87.

23 ¹⁷Doc. 92-4 at 6-7.

24 ¹⁸*Id.* at 8.

25 ¹⁹*Id.*

26 ²⁰Doc. 88, 89.

27 ²¹Doc. 92-4 at 9-10.

1 **III. STANDARDS OF REVIEW**

2 Rule 6(b)(1)(A) provides that the district court may “for good cause” grant a
3 request for an extension of time. “[Rule 6(b)(1)], like all the Federal Rules of Civil
4 Procedure, [is] to be liberally construed to effectuate the general purpose of seeing that
5 cases are tried on the merits.”²² The decision to grant or deny a Rule 6(b)(1) motion is
6 committed to the district court’s discretion.²³

7 Local Rule of Civil Procedure (“Local Rule”) 7.2(m) governs motions to strike. It
8 provides in pertinent part that a motion to strike may be filed “if it seeks to strike any
9 part of a filing or submission on the ground that it is prohibited (or not authorized) by a
10 statute, rule, or court order.”²⁴ The decision to grant or deny a motion to strike is within
11 the court’s discretion.²⁵

12 If a party fails to make disclosures or cooperate in discovery, the requesting
13 party may move to compel.²⁶ “The party who resists discovery has the burden to show
14 that discovery should not be allowed, and has the burden of clarifying, explaining, and
15 supporting its objections.”²⁷

21 ²²*Ahanchian v. Xenon Pictures, Inc.*, 624 F.3d 1253, 1258–59 (9th Cir. 2010) (quoting
22 *Rodgers v. Watt*, 722 F.2d 456, 459 (9th Cir.1983)).

23 ²³*Id.* at 1258.

24 ²⁴LRCiv 7.2(m)(1).

25 ²⁵*Spencer v. Stapler*, No. 04-1532 PHX SMM, 2006 WL 2052704, at *2 (D. Ariz. July 21,
26 2006).

27 ²⁶Fed. R. Civ. P. 37(a).

28 ²⁷*DIRECTV, Inc. v. Trone*, 209 F.R.D. 455, 458 (C.D. Cal. 2002).

1 **IV. DISCUSSION**

2 **A. The Motion to Compel**

3 Evans testified at his deposition that Suskin referred Kimm to the La Paz County
4 Attorney’s Office for prosecution.²⁸ The circumstances surrounding this referral are
5 central to Kimm’s complaint.²⁹ Kimm seeks an order compelling Suskin’s and
6 Churchill’s depositions.

7 Kimm’s motion is a discovery motion to which Local Rule 7.2(j)³⁰ and
8 Rule 37(a)(1)³¹ apply. The motion runs afoul of these rules because Bertrand did not
9 attach to the motion a statement certifying that she personally consulted Evans’ counsel
10 and made sincere efforts to resolve their objections. Based on this deficiency, the court
11 may not consider the motion.³² Kimm’s motion will be denied without prejudice.

12 The court notes that Evans raises nine arguments in opposition to Kimm’s
13 motion. The court expects that most, if not all, of these objections will be resolved
14 without court intervention after counsel confers with one another. For example, the
15 parties should be able to stipulate to extending the deadline for discovery motions
16 considering that the conduct underlying Kimm’s current motion occurred after the
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20 ²⁸Doc. 103-1 at 3 p. 28:6–16.

21 ²⁹See, e.g., doc. 48 at 13 ¶ 80 (alleging that Evans and others abused their power “by
22 investigating, arresting and prosecuting Mr. Kimm without probable cause for improper,
unlawful and selfish purposes.”).

23 ³⁰LRCiv 7.2(j) (“No discovery motion will be considered or decided unless a statement of
24 moving counsel is attached thereto certifying that after personal consultation and sincere efforts
to do so, counsel have been unable to satisfactorily resolve the matter.”).

25 ³¹Fed. R. Civ. P. 37(a)(1) (“The motion must include a certification that the movant has
26 in good faith conferred or attempted to confer with the person or party failing to make disclosure
or discovery in an effort to obtain it without court action.”).

27 ³²See *Sandpiper Resorts Dev. Corp. v. Glob. Realty Investments, LLC*, No.
28 2:08-CV-01360 JWS, 2012 WL 2009965, at *1 (D. Ariz. June 5, 2012).

1 deadline,³³ and Evans cannot refuse to comply with a discovery request based on his
2 opinion that Kimm’s case should be dismissed.³⁴ Finally, the court notes that although
3 deposing opposing counsel is generally disfavored, this disfavor “is not a talisman for
4 the resolution of all controversies of this nature.”³⁵ Once the parties confer regarding
5 persuasive cases on this topic,³⁶ they may well be able to agree to allow the depositions
6 to proceed. Evans’ abstract concern about the attorney-client privilege, by itself, is not
7 sufficient to bar the depositions outright.³⁷

8 **B. The Motion for an Extension of Time**

9 Kimm seeks an extension of various deadlines in order to allow him to depose
10 Haws, Suskin, Churchill, Brannan, Verderman, Jones, and La Paz County. Because
11 Kimm made this request before the applicable deadlines have passed, his request must
12 satisfy the “non-rigorous” “good cause” standard.³⁸ Under this standard, a request for
13 an extension of time is normally “granted in the absence of bad faith on the part of the
14 party seeking relief or prejudice to the adverse party.”³⁹

17 ³³See *Lizotte v. Praxair, Inc.*, No. C07-1868RSL, 2009 WL 159249, at *1 n.1 (W.D.
18 Wash. Jan. 22, 2009) (“Plaintiff filed his motion on December 21, 2008, which was after the
19 deadline for filing motions related to discovery. However, the Court finds that plaintiff had good
20 cause to file the motion after the deadline because the conduct underlying this motion occurred
21 after the deadline. For that reason, plaintiff could not have filed this motion sooner.”).

22 ³⁴Doc. 106 at 6–7.

23 ³⁵*In re Subpoena Issued to Dennis Friedman*, 350 F.3d 65, 71 (2d Cir. 2003).

24 ³⁶See, e.g., *In re Allergan, Inc.*, No. 14-cv-02004 DOC(KES), 2016 WL 5922717 (C.D.
25 Cal. Sept. 23, 2016); *Textron Fin. Corp. v. Gallegos*, No. 15-cv-1678 LAB(DHB), 2016 WL
26 4169128 (S.D. Cal. Aug. 5, 2016); *ATS Prod., Inc v. Champion Fiberglass, Inc.*, 309 F.R.D.
27 527, 529 (N.D. Cal. 2015).

28 ³⁷See *Gallegos*, 2016 WL 4169128 at *4.

³⁸*Ahanchian v. Xenon Pictures, Inc.*, 624 F.3d 1253, 1259 (9th Cir. 2010).

³⁹*Id.* (quoting 4B Charles Alan Wright & Arthur R. Miller, FEDERAL PRACTICE AND
PROCEDURE § 1165 (3d ed. 2004)).

1 The La Paz Defendants oppose Kimm's request, arguing that Kimm was dilatory
2 in requesting the depositions of Brannan, Verderman, Jones, and La Paz County five
3 days before the fact discovery deadline.⁴⁰ The La Paz Defendants do not identify any
4 prejudice they would suffer if the extension is granted, but they do argue that Kimm did
5 not act in good faith by waiting until the last minute to request these four depositions.
6 The court agrees. After informing the court in November that he expected to complete
7 the depositions of Brannan, Verderman, Jones, and La Paz County by the end of
8 January,⁴¹ it appears that Kimm took no actions to accomplish this goal until five days
9 before the February 6 fact discovery deadline. Kimm offers no good faith explanation
10 for why he waited so long. He has not demonstrated good cause to again extend the
11 discovery deadline to allow him to conduct these depositions.

12 The same cannot be said for the depositions of Haws, Suskin, and Churchill.
13 Kimm requested those depositions long before the discovery cut-off. The court will
14 grant Kimm's requested extensions of time with respect to these three depositions only.

15 **C. The Motions to Strike**

16 Kimm moves to strike Evans' objections to Suskin's and Churchill's deposition
17 notices on the ground that Evans failed to comply with Local Rule 7.2(j). Kimm's
18 motions confuse a motion with an objection. Local Rule 7.2(j) applies only to discovery
19 motions. It does not apply to Evans' objections. Kimm's motions to strike will be
20 denied.

21 **V. CONCLUSION**

22 For the reasons set forth above, the motion at docket 92 is granted in part and
23 denied in part as follows: the fact discovery deadline is extended to April 21, 2017,
24 solely for conducting the depositions of Haws, Suskin, and Churchill. No other
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27 ⁴⁰Doc. 100 at 3.

28 ⁴¹Doc. 72 at 2.

1 discovery may be conducted. The dispositive motions and motions *in limine* deadline is
2 extended to June 23, 2017. The motions at dockets 97, 98, and 103 are denied.

3 DATED this 27th day of March 2017.

4 /s/ JOHN W. SEDWICK
5 SENIOR JUDGE, UNITED STATES DISTRICT COURT
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