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6 **IN THE UNITED STATES DISTRICT COURT**
7 **FOR THE DISTRICT OF ARIZONA**
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9 Pacesetter Consulting LLC,
10 Plaintiff,
11 v.
12 Herbert A Kapreilian, et al.,
13 Defendants.
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No. CV-19-00388-PHX-DWL
ORDER

15 This case has involved extensive litigation over whether Edward Daniel Duda, Jr.
16 (“Duda”) is a proper defendant. (*See generally* Doc. 160.) Now pending before the Court
17 are the latest two motions related to this topic: (1) Plaintiff Pacesetter Consulting LLC’s
18 (“Pacesetter”) “motion for remedies” concerning Duda (Doc. 204); and (2) Pacesetter’s
19 motion for an extension of time to respond to the other defendants’ summary judgment
20 motions (Doc. 221). For the following reasons, the former is denied and the latter is granted
21 in part and denied in part.

22 **RELEVANT BACKGROUND**

23 On February 28, 2019, Duda filed a motion to be dismissed from the first amended
24 complaint (“FAC”) due to a lack of personal jurisdiction. (Doc. 22.) This motion was
25 accompanied by a declaration in which Duda avowed that he “did not have any
26 communications with the other defendants in this action concerning the subjects of this
27 action.” (Doc. 22-1 ¶ 7.) Although this declaration was originally submitted without
28 Duda’s signature, Duda later submitted a signed version. (Doc. 28-1.)

1 On April 15, 2019, the Court granted Duda’s dismissal motion. (Doc. 57.)

2 On December 23, 2019, Pacesetter filed a third amended complaint (“TAC”) in
3 which Duda was again named as a defendant. (Doc. 129.)

4 On March 20, 2020, Pacesetter filed a “motion for partial summary judgment”
5 against Duda. (Doc. 139.) This motion alleged that Duda had violated several state and
6 federal perjury statutes when he claimed, in the declaration filed in support of his motion
7 to dismiss the FAC, to have no knowledge of the events underlying this case. (*Id.* at 1-6.)
8 As a sanction for these alleged violations, Pacesetter asked that “the Court reinstate Duda
9 fully as a Defendant in this litigation and to impose on him” several sanctions, including
10 default judgment and attorneys’ fees. (*Id.* at 15-16.)

11 On March 24, 2020, the Court issued a text-only docket entry addressing
12 Pacesetter’s motion. (Doc. 140.) Although the entry noted that “allegations of perjury
13 always must be taken seriously,” the Court was concerned that Plaintiff had moved for
14 “partial summary judgment” on “claims . . . that do not appear in the complaint” and thus
15 questioned the “propriety of the procedural vehicle Plaintiff has chosen.” (*Id.*) To “avoid
16 potentially unnecessary motions (and sanctions) practice,” the Court ordered defendants to
17 refrain from filing a response while the Court more fully grappled with the motion. (*Id.*)

18 On April 1, 2020, rather than wait for further direction from the Court, Pacesetter
19 filed a “motion for telephonic hearing and for Rule 60 relief.” (Doc. 141.) In it, Pacesetter
20 sought “a telephonic hearing to discuss if this Court believes that a hearing possibly leading
21 to civil remedies is proper in a situation where a party who has made a so-called limited or
22 special appearance arguably commits perjury to obtain dismissal from a civil lawsuit.” (*Id.*
23 at 3.) In the alternative, Pacesetter sought Rule 60 relief to reinstate Duda as a defendant.
24 (*Id.* at 4-8.)

25 Later that day, the Court issued another order. (Doc. 142.) The Court noted that
26 Pacesetter’s motion for Rule 60 relief “appear[ed] to be an attempt to incorporate by
27 reference the arguments contained in Plaintiff’s earlier “summary judgment” motion (Doc.
28 139) and reframe them as a request for relief under Rule 60,” and the Court “construe[d] it

1 as such.” (*Id.*) Accordingly, the Court denied the earlier motion as moot and gave Duda
2 14 days to file a response to the latter motion. (*Id.*)

3 On June 24, 2020, while Pacesetter’s Rule 60 motion was pending, Duda filed a
4 motion to dismiss the TAC for insufficient service of process. (Doc. 150.)

5 On July 2, 2020, after full briefing, the Court denied Pacesetter’s Rule 60 motion as
6 moot. (Doc. 152.) Because the allegations against Duda in the FAC were nearly identical
7 to those in the TAC, it was “abundantly clear that Mr. Duda [was] now in the same position
8 in this case as he was before he was dismissed from the FAC.” (*Id.* at 7-8.) Thus, there
9 was “no need for the Court to grant Rule 60 relief to reinstate Mr. Duda”—after the TAC
10 was filed, Duda was, once again, part of this case. (*Id.* at 8.)

11 On July 30, 2020, the Court granted Duda’s motion to dismiss for insufficient
12 service of process. (Doc. 160.) The Court concluded:

13 [D]ismissal is the appropriate remedy here. Pacesetter continues to take a
14 shotgun approach to this litigation while disregarding key procedural steps.
15 This has caused its adversaries to expend considerable time and resources in
16 fights over sideshow issues not connected to the merits of the case.
17 Additionally, the Court has serious concerns about whether Mr. Duda is even
18 subject to personal jurisdiction, given that the TAC appears to repeat, in near
19 verbatim fashion, the allegations against Mr. Duda that appeared in the FAC
20 (which the Court previously deemed insufficient). Finally, the fact this
action has now been pending for more than 18 months underscores why it
would be improper to afford yet another opportunity to Pacesetter to
complete service. Only one month remains until the discovery deadline
(which has already been extended) will expire. It would be tremendously
disruptive at this juncture to allow Pacesetter to essentially start from scratch
with Defendants.

21 (*Id.* at 12-13.)

22 On August 10, 2020, Pacesetter filed a notice stating that it had served deposition
23 subpoenas on a number of non-parties, including Duda. (Doc. 161.)

24 On August 27, 2020, Pacesetter filed a motion for leave to conduct more than 10
25 depositions. (Doc. 165.) Among other things, Pacesetter argued that an expansion was
26 necessary because Duda and two other members of the Duda family “have vital information
27 about the remaining defendants in this matter.” (*Id.* at 2.)

28 On August 31, 2020, the Court issued an order denying Pacesetter’s motion for leave
to conduct more than 10 depositions. (Doc. 170.)

1 On or about September 2, 2020, Duda filed a motion in the United States District
2 Court for the Middle District of Florida (which is where he resides) to quash the deposition
3 subpoena that Pacesetter had served on him. (Doc. 217-1 at 37-45.) A few days later,
4 Duda filed a supporting declaration. (Doc. 217-1 at 23-25.) In this declaration, Duda
5 avowed that he “had no involvement in the sale of the limited partnership interests to the
6 assignor of [Pacesetter], which is the subject of the Plaintiff’s claims in the lawsuit . . .
7 pending in the United States District Court for the District of Arizona.” (*Id.* ¶ 4.)

8 On September 29, 2020, a magistrate judge in the Middle District of Florida denied
9 Duda’s motion to quash. (Doc. 178 at 5, 12-13.)

10 On October 7, 2020, Pacesetter filed a motion to extend the deadline for fact
11 discovery, which was October 15, 2020, so that it could complete Duda’s deposition. (Doc.
12 178.)

13 On October 8, 2020, the Court granted Pacesetter’s motion. (Doc. 179.)

14 On November 20, 2020, Duda’s deposition took place. (Doc. 217-1 at 50-75.)

15 On December 7, 2020, various defendants filed motions for summary judgment.
16 (Docs. 201, 202, 203.) Under LRCiv 56.1(d), Pacesetter has 30 days—or until January 6,
17 2020—to respond to those motions.

18 On December 7, 2020, Pacesetter filed its “motion for remedies” concerning Duda.
19 (Doc. 204.) The motion became fully briefed on December 28, 2020. (Docs. 217, 220.)

20 On December 30, 2020, Pacesetter filed a motion for an extension of time to respond
21 to the summary judgment motions. (Doc. 221.)

22 On January 5, 2021, Defendant Mark Bassetti filed an opposition to Pacesetter’s
23 extension request. (Doc. 222.) On January 6, 2021, Defendants Agricare Incorporated and
24 Tom Avenelis filed an opposition. (Doc. 223.)

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1 **DISCUSSION**

2 I. Motion For Remedies

3 A. **The Parties' Arguments**

4 In its “motion for remedies,” Pacesetter argues that Duda engaged in misconduct
5 during his deposition by refusing to answer certain questions about whether (and under
6 what circumstances) he signed the declaration he filed in this action in March 2019 and the
7 separate declaration he filed in the Florida litigation in September 2020. (Doc. 204 at 6-
8 13.) Pacesetter identifies various reasons why, in its view, these questions were relevant
9 and argues that, even if Duda viewed the questions as irrelevant, a relevance objection is
10 not a valid basis for refusing to answer questions during a deposition. (*Id.*) Pacesetter
11 further contends that “a suitable remedy for [Duda’s] intentional wrongdoing as a
12 deponent” would be for the Court to reinstate Duda as a defendant in the TAC. (*Id.* at 13.)

13 Duda opposes Pacesetter’s motion. (Doc. 217.) Duda argues that he testified at
14 length during his deposition, that “numerous questions were asked about the subjects
15 contained in the Declarations,” and that “[n]o advice or instruction not to answer was given
16 to those questions about facts.” (*Id.* at 7.) As for the disputed questions about whether and
17 how he signed his declarations, Duda argues that he properly refused to answer those
18 questions because they “would only waste time and cost Mr. Bassetti and Mr. Duda more
19 in attorneys’ fees for having counsel sit through completely irrelevant questioning.” (*Id.*
20 at 8.) In Duda’s view, the real purpose of those questions was “not for substantive issues
21 in the case” but to serve as a backdoor tactic for challenging the Court’s earlier orders
22 concerning personal jurisdiction and alleged perjury. (*Id.* at 8-9.) Finally, Duda notes that
23 Pacesetter has filed a similar motion for sanctions in the Middle District of Florida,
24 premised on the same conduct, and asks this Court to “enjoin” Pacesetter and its counsel
25 from pursuing that motion. (*Id.* at 13-14.)

26 In reply, Pacesetter argues that its proposed questions concerning the declarations
27 are relevant and appropriate because it wishes “to test [Duda’s] knowledge and veracity
28 using the declaration as the reference point and starting point.” (Doc. 220 at 1.) Pacesetter

1 also reiterates its earlier argument that a deponent can't refuse to answer questions based
2 on relevance objections. (*Id.* at 3-4.) Next, Pacesetter argues that its request for
3 reinstatement is a “proper and simple” and “proportionate” remedy for Duda’s
4 contemptuous conduct. (*Id.* at 5-6.) Finally, Pacesetter asks the Court to clarify that, if it
5 prevails on its parallel motion in Florida to reopen the Duda deposition, the continued
6 deposition will be deemed timely under this Court’s discovery schedule. (*Id.* at 5-6.)

7 **B. Discussion**

8 Pacesetter’s “motion for remedies” is denied. Even assuming that Duda acted
9 improperly by refusing, on relevance grounds, to answer questions concerning whether and
10 under what circumstances he signed the declarations, the proper remedy would not be to
11 reinstate Duda as a party defendant. Instead, the proper remedy would be to reopen Duda’s
12 deposition (at Duda’s expense) so he may answer the disputed questions. But Pacesetter
13 has not asked for that targeted remedy. Its request for reinstatement represents obvious,
14 and unwarranted, overreach.

15 The Court takes no position on whether the Middle District of Florida is the proper
16 forum for deciding whether to reopen Duda’s deposition (which is where Pacesetter chose
17 to pursue such relief). Nevertheless, if the Middle District of Florida determines that the
18 question is properly before it and then resolves the question in Pacesetter’s favor, this Court
19 will deem the final portion of Duda’s deposition to be timely under the scheduling order in
20 this case. Duda’s request to “enjoin” Pacesetter from pursuing relief in Florida is denied
21 because there is no risk of contradiction between this ruling and whatever ruling may issue
22 in Florida.

23 **II. Motion For Extension**

24 As noted, three sets of defendants filed summary judgment motions on December
25 7, 2020. Pacesetter’s deadline for responding those motions is today, January 6, 2021.

26 A few days before the deadline, Pacesetter filed an extension request. (Doc. 221.)
27 It argues its response deadline should be extended to “one week . . . after Mr. Duda’s
28 deposition is retaken” because “[s]hould the Court determine that Plaintiff may retake the

1 deposition of Daniel Duda’s deposition, he may provide crucial testimony as to Plaintiff’s
2 claims and relevant to Plaintiff responding to Defendants’ Motions for Summary
3 Judgment.” (*Id.* at 2-3.)

4 Although some defendants do not oppose Plaintiff’s extension request (Doc. 221-
5 2), others do. (Docs. 221-3, 221-4, 222, 223.) Those defendants argue, among other things,
6 that the discovery deadline has already expired; that Pacesetter’s motion in Florida is
7 directed to the wrong court; and that the proper way to seek an extension of time to conduct
8 more discovery before responding to a summary judgment motion is to file a motion under
9 Rule 56(d), but that rule requires a detailed declaration from counsel that is missing here.
10 (*Id.*)

11 Pacesetter’s extension request is granted in part and denied in part. Pacesetter has
12 not explained, with any specificity, why it needs additional testimony from Duda before it
13 can respond to the pending summary judgment motions. This case is already nearly two
14 years old and has been marred by repeated delays caused by Pacesetter’s litigation tactics.
15 Under these circumstances, the Court is unwilling to authorize an open-ended extension of
16 the summary judgment briefing schedule—which could, conceivably, result in months and
17 months of additional delay—simply because another court might issue an order that might
18 lead to a reopened deposition that might theoretically result in helpful testimony.

19 Instead, Pacesetter is granted an extension of two weeks to respond to the pending
20 summary judgment motions. Its responses must be filed by January 20, 2021. And the
21 moving defendants will have 15 days from that date, until February 4, 2021, to file their
22 optional replies. Finally, if the Duda deposition ends up (for whatever reason) being
23 reopened, Pacesetter may file a motion after the deposition is completed seeking leave to
24 supplement its summary judgment responses with any relevant testimony that was obtained
25 during the reopened deposition.

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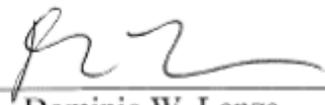
Accordingly,

IT IS ORDERED that:

(1) Pacesetter’s “motion for remedies” (Doc. 204) is **denied**.

(2) Pacesetter’s extension request (Doc. 221) is **granted in part and denied in part**. Pacesetter must respond to the pending summary judgment motions (Docs. 201, 202, 203) by January 20, 2021, and the moving defendants must file their optional replies by February 4, 2021.

Dated this 6th day of January, 2021.



Dominic W. Lanza
United States District Judge