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6 IN THE UNITED STATES DISTRICT COURT
7 FOR THE DISTRICT OF ARIZONA

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9 Larry Whiting, Leroy Whiting and Lorenzo
Garcia,

No. 12-CV-08039-PCT-GMS

10 Plaintiff,

ORDER

11 v.

12 Dana A. Hogan; Clark Moving and Storage
13 of Albany, Inc., and Mayflower Transit,
LLC; et al.

14 Defendants.

15
16 Pending before the Court are Plaintiffs' Motion for Defendants to Show Cause for
17 Not Presenting Deponent Dana A. Hogan at the Noticed Date; Time; and Place for His
18 Deposition, (Doc. 133), Motion to Expedite Briefing (Doc. 140), Defendants' Motion for
19 Protective Order Re: Dana Hogan's Continued Deposition, (Doc. 135), Motion for
20 Sanctions (Doc. 143), and Motion for Consolidate Argument (Doc. 152). For the reasons
21 discussed below, the Court denies Plaintiffs' Motion and grants in part and denies in part
22 Defendants' Motion.¹²

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24 _____
25 ¹ Defendants' request for oral argument is denied because the parties have had an
adequate opportunity to discuss the law and evidence and oral argument will not aid the
26 Court's decision. *See Lake at Las Vegas Investors Group v. Pac. Malibu Dev.*, 933 F.2d
724, 729 (9th Cir. 1991).

27 ² The Parties failed to comply with the Court's instruction in its Case Management
28 Order that they "shall not file discovery motions or motions for sanctions without leave
of the Court." (Doc. 59 ¶ 6(a).) The Court will not entertain further motions that are filed
in contravention of that instruction.

1 **BACKGROUND**

2 This matter involves yet another dispute between the Parties relating to discovery.
3 On March 14, 2013, the Court ordered that Plaintiffs would be afforded the opportunity
4 to re-open and continue the deposition of Defendant Dana Hogan on limited topics for
5 two hours and eighteen minutes to be completed by May 13, 2013. (Doc. 110 at 22–23.)
6 The Court further ordered that “[t]he parties shall agree upon a mutually convenient
7 location and date for the deposition. In the alternative, they may jointly stipulate to take
8 the deposition telephonically or by other remote means, pursuant to Fed. R. Civ. P.
9 30(b)(4).” (*Id.* at 21.)

10 Plaintiffs’ counsel contacted Defendants’ counsel on March 22, 2013, to request
11 dates of availability and suitable locations to continue Hogan’s deposition. (Doc. 133, Ex.
12 1.) On April 4, 2013, Plaintiffs offered to Defendants the dates of April 25, April 29-May
13 1, May 6-10, 13, and 15-17, 2013. (Doc. 137-1, Ex. 3.) On April 11, 2013, Defendants’
14 counsel informed Plaintiffs’ counsel that because Hogan was currently in Dallas, Texas,
15 Hogan could hold the following week open in his trucking schedule to sit there for the
16 deposition, with Defendants’ counsel willing to travel from Phoenix to attend. Plaintiffs’
17 counsel was not available that week due to conflicting commitments but stated “I want to
18 be crystal clear that Plaintiff’s [sic] are prepared to depose Defendant Hogan either in
19 Florida; Canada; or any destination he so designates” provided that Plaintiffs’ counsel
20 received two weeks’ notice. (Doc. 133, Ex. 3.) On April 16, 2013, Plaintiffs’ counsel
21 requested Defendants’ counsel to provide locations that would be convenient for Hogan
22 on the dates of May 6, 9, and 10, 2013. (*Id.*, Ex. 5.) On April 17, 2013, Defendants’
23 counsel suggested the possibility of holding the deposition in Albuquerque, New Mexico,
24 where Plaintiffs’ counsel is located, on one of those dates if Plaintiffs wished to fly
25 Hogan out to Albuquerque. (*Id.*, Ex. 6.) Counsel also suggested the alternative of
26 conducting the deposition remotely. (*Id.*) Plaintiffs’ counsel responded that Plaintiffs
27 would arrange for Hogan’s travel to Albuquerque for the deposition and were available to
28 conduct it on May 6, 2013. (*Id.*, Ex. 7.)

1 On April 18, 2013, Defendants’ counsel notified Plaintiffs’ counsel that Hogan
2 may be able to arrange to drive through Albuquerque on his trucking route and mentioned
3 that although May 6 “may be out,” counsel was “hopeful we can find another day around
4 there” for the deposition. (*Id.*, Ex. 9.) Defendants’ counsel directed Plaintiffs’ counsel to
5 “still hold May 6 for now.” (*Id.*) On April 24, 2013, Defendants’ counsel updated
6 Hogan’s availability and stated that Hogan had “tentatively arranged” to pass through
7 Albuquerque twice on his routes but that the plans and dates were not finalized. (*Id.*, Ex.
8 10.) However, on April 29, 2013, Defendants’ counsel informed Plaintiffs that it was no
9 longer possible for Hogan to appear for the deposition in Albuquerque due to a change in
10 his dispatch orders and suggested conducting the deposition in Phoenix on May 6 or 7,
11 2013, offering the use of Defendants’ counsel’s office. (*Id.*, Ex. 11.) Plaintiffs’ counsel
12 replied on April 30, 2013, that he would arrange for Hogan’s flight from Phoenix to
13 Albuquerque on May 6 so that he could attend the deposition and return to Phoenix the
14 same evening. (*Id.*, Ex. 12.) Plaintiffs’ counsel notified Defendants’ counsel that he had
15 already “setup the court reporter and videographer for May 6th here in reliance on earlier
16 messages about the time, date, and place for Mr. Hogan’s deposition.” (*Id.*) However,
17 Defendants’ counsel informed Plaintiffs’ counsel that the “logistics of this” are not viable
18 and that Plaintiffs’ counsel may instead fly out to conduct the deposition in Phoenix.
19 (Doc. 137-2, Ex. 11.)

20 On May 1, 2013, the day after this exchange, Plaintiffs’ counsel filed a Notice of
21 Deposition of Defendant Dana A. Hogan with the Court, (Doc. 127), to which
22 Defendants’ counsel took objection, (Doc. 137-2, Ex. 12). On May 2, 2013, the court
23 reporter who had been scheduled by Plaintiffs’ counsel to record Hogan’s deposition on
24 May 6 in Albuquerque informed Plaintiffs’ counsel that if the deposition was cancelled,
25 the reporter would levy charges amounting to \$375. (Doc. 133, Ex. 13.) On May 2 and 3,
26 2012, the Parties conferred by telephonic means but were not able to resolve this dispute.
27 (*Id.*, Ex. 14.) Hogan did not appear for the noticed deposition in Albuquerque on May 6,
28 2013.

1 On May 7, 2013, Plaintiffs filed a Motion for Order to Show Cause as to why
2 Hogan did not appear for the deposition. (Doc. 133.) Defendants filed a Motion for
3 Protective Order regarding Hogan's continued deposition on May 9, 2013. (Doc. 135.)
4 Because the two motions address substantially the same issues, the Court will address
5 them together.

6 DISCUSSION

7 I. PROTECTIVE ORDER

8 Defendants move for a protective order to terminate Hogan's deposition or limit it
9 to a telephonic appearance, pursuant to Fed. R. Civ. P. 26(c).³ Rule 26(c) states that
10 "[t]he court may, for good cause, issue an order to protect a party or person from
11 annoyance, embarrassment, oppression, or undue burden or expense" resulting from
12 discovery requests. The burden is upon the movant to prove the necessity of a protective
13 order, "which contemplates a particular and specific demonstration of fact as
14 distinguished from stereotyped and conclusory statements." *United States v. Garrett*, 571
15 F.2d 1323, 1326 n.3 (5th Cir. 1978) (citations omitted). Rule 26(c) lists the following
16 types of protective orders that a Court may issue, among others:

17 (A) forbidding the disclosure or discovery;

18 (B) specifying terms, including time and place, for the disclosure or
19 discovery;

20 (C) prescribing a discovery method other than the one selected by the party
21 seeking discovery.

22 Further, a district court enjoys broad discretion in controlling discovery. *Harper v. Betor*,
23 95 F.3d 1157 (9th Cir. 1996) (internal citation omitted). The Court "has wide discretion
24 to establish the time and place of depositions." *Hyde & Drath v. Baker*, 24 F.3d 1162,
25 1166 (9th Cir. 1994).

26
27 ³ Defendants assert that they do not move for such an order under Fed. R. Civ. P.
28 30(d), which subsection allows for a motion to terminate or limit a deposition if it is
being conducted in bad faith. (Doc. 135 at 9.)

1 In its Order authorizing the re-opening of Hogan’s deposition, the Court noted the
2 fact that “Hogan routinely trucks in Canada and resides in Florida. He would spend
3 significant time and expense to travel to New Mexico for a second deposition of a little
4 over two hours.” (Doc. 110 at 13–14). Consequently, the Court ordered the Parties to
5 “agree to a mutually convenient location for the second deposition. In the alternative,
6 they may jointly stipulate to take the deposition telephonically or by other remote
7 means.” (*Id.* at 14.) It is clear from the record that Defendants did not lead Plaintiffs to
8 believe that Hogan would definitely be able to appear for a deposition in New Mexico on
9 May 6, 2013. Although Defendants’ counsel signaled the possibility that Hogan may able
10 to adjust his trucking route to drive through Albuquerque, there was no hard date agreed
11 upon for such a deposition. Further, Defendants’ counsel informed Plaintiffs as early as
12 April 18, 2013, that a deposition in Albuquerque on May 6 may be not be possible.
13 Defendants did not change their position regarding Hogan’s availability or give the
14 “green light” for such a date and location for his deposition.

15 Plaintiffs’ counsel noticed the deposition on May 1, 2013, when it was evident that
16 Hogan would not be able to appear for it. Plaintiffs’ counsel unreasonably relied upon the
17 slim possibility that Hogan could appear in Albuquerque on May 6 and allegedly incurred
18 expenses from cancellation fees levied by the court reporter and videographer.⁴ Plaintiffs
19 are entirely responsible for bearing those expenses. Further, Defendants’ counsel offered
20 to conduct the deposition at his offices in Phoenix on May 6, 2013, more than one week
21 in advance and assist in obtaining a court reporter and videographer. Plaintiffs’ counsel
22 rejected that offer.

23 Because Hogan’s trucking schedule makes it difficult to conduct the second
24 deposition in a particular geographic location, and, contrary to his representations,
25 Plaintiffs’ counsel seems unwilling to travel to Hogan’s location to conduct it, the Parties
26 shall conduct the deposition telephonically or by other remote means by the date set in

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28 ⁴ Plaintiffs have not submitted evidence that they actually incurred or paid such fees due to the cancellation of the deposition.

1 this Order. *See* Fed. R. Civ. P. 30(b)(4) (“[T]he court may on motion order . . . that a
2 deposition be taken by telephone or other remote means.”) There shall be no further
3 extensions or opportunities to continue Hogan’s deposition. Plaintiffs’ counsel contends
4 that a live deposition is necessary to present certain exhibits to Hogan. However, as
5 Defendants’ counsel points out, Plaintiffs’ counsel does not argue that those exhibits are
6 not “Bates-stamped” or referable; the training documentation about which Hogan would
7 be questioned was disclosed by Defendants Clark and Mayflower. Further, by not
8 working around Hogan’s schedule as the Court ordered, Plaintiffs mishandled their
9 preferred option of taking a live deposition for the remaining time of two hours and
10 eighteen minutes.

11 **II. SANCTIONS**

12 “District courts retain broad discretion to control their dockets and ‘[i]n the
13 exercise of that power they may impose sanctions including, where appropriate, default
14 or dismissal.’” *Adams v. California Dep’t of Health Servs.*, 487 F.3d 684, 688 (9th Cir.
15 2007) (quoting *Thompson v. Hous. Auth. of City of Los Angeles*, 782 F.2d 829, 831 (9th
16 Cir. 1986) (per curiam). The Court has the inherent power to assess sanctions where a
17 party “engaged in bad faith or willful disobedience of a court’s order.” *Chambers v.*
18 *NASCO, Inc.*, 501 U.S. 32, 46–47 (1991).

19 Both Parties request sanctions relating to expenses incurred in litigating this
20 wasteful discovery dispute. As discussed above, the Parties had not agreed to a mutually
21 convenient location for Hogan’s deposition. Taking into account Hogan’s schedule and
22 the brevity of the second deposition, the Court placed the burden on counsel to travel as
23 needed to facilitate the deposition. Nevertheless, Plaintiffs’ counsel noticed the
24 deposition as taking place in Albuquerque on May 6, 2013, after it was clear that Hogan
25 would not be able to adjust his trucking route to accommodate that location. Plaintiffs’
26 counsel then brought this Motion to Show Cause as to why Hogan did not attend the
27 deposition. Such tactics are in contravention of the Court’s Order directing the Parties to
28 agree on a location and if they cannot do so, to conduct the deposition remotely.

1 Consequently, Plaintiffs' counsel shall be sanctioned personally for attorneys' fees and
2 costs incurred by Defendants in responding to the Motion to Show Cause and in bringing
3 the Motion for Protective Order which go to the same issue. Plaintiff's counsel is
4 prohibited from billing his client for the above amount or from, in any way, deducting it
5 from any amount he may recover on behalf of his client. Plaintiffs' counsel is further
6 ordered to provide a copy of this order to his clients and fully explain it to them. The
7 Court denies Plaintiffs' request for sanctions against Defendants for filing the Motion for
8 Protective Order.

9 **IT IS HEREBY ORDERED** that Defendants' Protective Order Re: Dana
10 Hogan's Continued Deposition (Doc. 135) is **granted**, as follows:

11 1. Plaintiffs will continue Hogan's deposition for two hours and eighteen
12 minutes (2:18) on the limited areas of inquiry described in the Court's previous Order
13 (Doc. 110). However, such deposition will be conducted only by telephonic or other
14 remote means pursuant to Fed. R. Civ. P. 30(b)(4).

15 2. The deadline for completing Hogan's second deposition shall be extended,
16 to **July 8, 2013**.

17 **IT IS FURTHER ORDERED** that Defendants' Motion for Sanctions (Doc. 143)
18 is **granted**, as follows:

19 1. Plaintiffs' counsel is ordered to pay Defendants' reasonable attorneys' fees
20 and costs incurred in responding to the Motion to Show Cause (Doc. 133) and in bringing
21 the Motion for Protective Order (Doc. 135) pursuant to Local Rule 7.2(j) and upon
22 Defendants' application in compliance with Local Rule 54.2.

23 **IT IS FURTHER ORDERED** that Plaintiff's Motion for Sanctions (Doc. 133) is
24 **denied**.

25 **IT IS FURTHER ORDERED** denying Plaintiffs' Motion to Expedite (Doc. 140)
26 as being moot.

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