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BRYAN PRINGLE

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

SOUTHERN DIVISION

BRYAN PRINGLE, an individual,

Plaintiff,

v.

WILLIAM ADAMS, JR.; STACY FERGUSON; ALLAN PINEDA; and JAIME GOMEZ, all individually and collectively as the music group The Black Eyed Peas, *et al.*,

Defendants.

Case No. SACV 10-1656 JST(RZx)

PLAINTIFF'S RESPONSE TO EX *PARTE* APPLICATION FOR PROTECTIVE ORDER TO POSTPONE THE DEPOSITIONS OF THE BLACK EYED PEAS MEMBERS

Defendants, William Adams, Stacy Ferguson, Allan Pineda, and Jaime Gomez (collectively "The Black Eyed Peas Defendants"), seek a protective order postponing their respective depositions in this matter. They have failed to submit the required materials for their *ex parte* request, however, and have nonetheless fallen woefully short of establishing that they are entitled to *ex parte* relief. Plaintiff's counsel therefore opposes Defendants' request and asks this Honorable Court to sanction the Black Eyed Peas Defendants for their objectionable but unfortunately predictable conduct.

BACKGROUND

The Black Eyed Peas Defendants seek an untimely, improper and bad faith *ex parte* protective order to disrupt their confirmed depositions in this matter. Defendants do so for no other purpose than to derail Plaintiffs' Motion to Compel 7-hour depositions of the Black Eyed Peas Defendants in the unrelated *Batts v. William Adams, et al.*, CV 10-8123 JFW (RZx) matter ("*Batts* case"). *See* a true and accurate copy of Plaintiffs' Motion to Compel in the *Batts* case attached hereto as Exhibit A.

The Black Eyed Peas Defendants' *ex parte* request contains numerous misrepresentations and simply makes no sense. On June 3, 2011, the Black Eyes Peas Defendants were confirmed as being available for their depositions on July 22, 25, 26 and 27. Those deposition dates were confirmed on June 13, 2011 **in this matter**. This was only after months of dilatory and obstructionist maneuvering on their counsels' part.

Plaintiffs first requested the depositions of the Black Eyed Peas Defendants in this matter in January, subsequently noticed those depositions to proceed in May, and were only provided in June the four now-confirmed dates within which to proceed with their depositions in *both* the *Batts* and *Pringle* cases. The Black Eyed Peas Defendants unilaterally imposed the additional requirement that these depositions would be limited to one 7-hour deposition for each individual on one day for both

cases. The Plaintiffs in the *Batts* case thereafter filed a motion to compel 7-hour depositions of those individuals.

Plaintiffs' counsel in both the *Batts* and *Pringle* cases have unequivocally and repeatedly stated that the depositions of the Black Eyed Peas Defendants will not be proceeding in the *Batts* matter on any previously noticed dates pending ruling on the aforementioned motion to compel in that matter. There exist no conflicting depositions of the Black Eyed Peas Defendants between the *Pringle* and *Batts* cases despite Defendants' representations to the contrary. Defendants have waited until the 11th hour to move *ex parte* for a protective order to prevent the depositions from proceeding in this matter on the dates that they already confirmed. Their request falls far short of the requirements for *ex parte* relief and their continued efforts to obstruct discovery are sanctionable. Plaintiff therefore requests that Defendants' *ex parte* application be denied and that sanctions be awarded against Defendants for the fees, costs and expenses incurred by Plaintiffs in responding to this improper application.

FACTS PERTINENT TO PLAINTIFF'S RESPONSE

Plaintiff has been requesting the Black Eyed Peas Defendants' availability for seven hour depositions since January 28, 2011. Declaration of Dean A. Dickie in Support of Plaintiff's Motion ("Dickie Decl.") at ¶ 2 & Exh. A. After the Black Eyed Peas Defendants failed to provide such availability, on March 21, 2011 Plaintiff served notices setting the depositions of the Black Eyed Peas Defendants for May 18, 20, 24 and 26, 2011. *Id.* at ¶ 3 & Exh. B. Plaintiff's counsel served the notices under cover of a letter stating Plaintiff's willingness to move the depositions if other dates worked better for the schedules of the deponents and counsel. *Id.*

Over the following several weeks, the Black Eyed Peas Defendants repeatedly objected to the depositions as noticed, but failed to provide alternative dates of availability for the depositions. *Id.* at ¶¶ 4–12 & Exhs. C–K. Among other objections and unilaterally-dictated conditions, the Black Eyed Peas Defendants

demanded that each of their depositions be *limited to two hours*, that each of their depositions be combined with their respective depositions in the unrelated *Batts* case, and that all of the depositions take place on the same day. *Id.* at ¶ 8 & Exh. G.

On April 5, 2011, the Black Eyed Peas Defendants agreed to make themselves available for depositions in July 2011, but they did not provide specific dates of availability and conditioned further dialogue on Plaintiff agreeing to reduce the time allowed for the depositions under Rule 30. *Id.* at ¶ 13 & Exh. L. Plaintiff continued to insist it be allowed, as is its right, to take seven hour depositions of each of the Black Eyed Peas Defendants. The parties met and conferred extensively regarding this dispute in April of 2011 without reaching a resolution. *Id.* at ¶¶ 14–21 & Exhs. M–T.

The Black Eyed Peas Defendants thereafter informed Plaintiff that they would make themselves available for deposition only during a single week in July 2011, which they initially dictated to be the week of July 18-22, then changed to July 25 to 29. *Id.* at ¶¶ 22–26 & Exhs. U–W. The Black Eyed Peas Defendants further informed Plaintiffs that Plaintiff in the instant action *and the plaintiffs in the Batts case* would have to take the Black Eyed Peas Defendants' depositions during that one week. *Id.*

The Plaintiffs in the *Batts* case thereafter filed a motion to compel the 7 hour depositions of the Black Eyed Peas Defendants. *Id*. at ¶ 29. This motion is set for hearing on July 25, 2011, which was the earliest date that the motion could be heard. Defendants objected to proceeding with the hearing on that date, but when Plaintiffs offered August 1 as an alternate date, Defendants objected to that date as well.

ARGUMENT

I. DEFENDANTS' *EX PARTE* APPLICATION MUST BE DENIED BECAUSE THEY HAVE FAILED TO SUBMIT THE REQUIRED PLEADINGS AND BECAUSE THEY HAVE FAILED TO MAKE ANY SHOWING THAT THEY ARE ENTITLED TO *EX PARTE* RELIEF

Defendants' *ex parte* request is nothing more than an unwarranted and sanctionable attempt to further burden Plaintiff's counsel. As discussed above, their cited grounds for this relief (i.e., the need to remedy a supposed conflict) are entirely baseless. They already agreed to appear for depositions in this case and only now seek this extraordinary relief in order to undermine a motion that has been filed against them in an unrelated case. Their request falls far short of meeting the established requirements for *ex parte* relief.

In *In re Intermagnetics Am, Inc.*, 101 B.R. 191 (C.D. Cal 1989), the court noted that "*ex parte* applications have reached epidemic proportions in the Central District" and that "the opportunities for legitimate *ex parte* applications are extremely limited." *Id*. at 191-92. The court explained that *ex parte* applications run contrary to established procedural law and eviscerate the adversarial process:

> … *ex parte* applications contravene the structure and spirit of the Federal Rules of Civil Procedure and the Local Rules of this court. Both contemplate that *noticed* motions should be the rule and not the exception. Timetables for the submission of responding papers and for the setting of hearings are intended to provide a framework for the fair, orderly, and efficient resolution of disputes. Ex parte applications throw the system out of whack. They impose an unnecessary administrative burden on the court and an unnecessary adversarial burden on opposing counsel who are required to make a hurried response under pressure, usually for no good reason.

Id. at 191, 193.

In *Mission Power Engr. Co. v. Contl. Cas. Co.*, 883 F. Supp. 488 (C.D. Cal. 1995), the court discussed the debilitating impact that improperly filed *ex parte* motions have on the adversary system:

> Though the adversary does have a chance to be heard, the parties' opportunities to prepare are grossly unbalanced. Often, the moving party's papers reflect days, even weeks, of investigation and preparation; the opposing party has perhaps a day or two. This is due primarily to gamesmanship. The opposing party is usually told by telephone when the moving party has completed all preparation of the papers and has a messenger on the way to court with them. The goal often appears to be to surprise opposing counsel or at least to force him or her to drop all other work to respond on short notice.

Id. at 491.

As such, a movant must meet certain requirements in order to establish that it is entitled to *ex parte* relief. In *Mission Power, supra*, the court stressed that an *ex parte* request must consist of two parts:

> an *ex parte* motion should never be submitted by itself. It must always be accompanied by a separate proposed motion for the ultimate relief the party is seeking. Properly designed *ex parte* motion papers thus contain two distinct motions or parts. The first part should address only why the regular noticed motion procedures must be bypassed. The second part consists of papers identical to those that would be filed to initiate a regular noticed motion (except that they are denominated as a "proposed" motion and they show no hearing date.) ***These are separate distinct elements for presenting an ex parte motion and should never be combined. The parts should be separated physically and submitted as separate documents.***

Id. at 492. (Emphasis in original)

Both the *Mission Power* and *In re Intermagnetics* courts discussed the high standard that must be met in order to sustain a request for *ex parte* relief. In *In re Intermagnetics*, the court noted the following requirements:

> First, where there is some genuine urgency such that "immediate and irreparable injury, loss, or damage will result to the applicant before the adverse party or his attorney can be heard in opposition." *See* Fed.R.Civ.P. 65(b) (temporary restraining order);
>
> Second, *ex parte* proceedings are appropriate where there is a danger that notice to an opposing party will result in that party's flight,

> destruction of evidence… or secretion of assets, *see, e.g.,* Cal.Code Civ.Proc. § 485.010 et seq. (*ex parte* hearing procedure for obtaining writ of attachment);
>
> Third, what I have termed "hybrid *ex parte* applications" (*i.e.,* where the other side actually is served) may be necessary when a party seeks a routine order (*e.g.,* to file an overlong brief or to shorten the time within which a motion may be brought).

Id. at 193. The *Mission Power* court similarly ruled:

> First, the evidence must show that the moving party's cause will be irreparably prejudiced if the underlying motion is heard according to regular noticed motion procedures;
>
> Second, it must be established that 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.

Defendants don't come close to meeting the required standard. As a starting point, they have not submitted a separate proposed motion for the ultimate relief that they are seeking. This defect alone is fatal to their request. *Mission Power*, *supra*, 883 F. Supp at 492.

Their request must fail for several substantive reasons as well. First, Defendants have failed to establish any immediate or irreparable injury or prejudice. Plaintiff requested deposition dates for the Black Eyed Peas Defendants in January. After refusing to provide dates and then refusing to appear for offered dates in May, the Black Eyed Peas Defendants confirmed their availability for the depositions in this case on June 3, 2011. Dickie Decl. at ¶¶ 27-28. Their unwarranted demand that Plaintiffs take depositions in both cases on the same day and for only two hours for each case forced the Plaintiff to re-notice their depositions in this case and the Plaintiffs in the *Batts* case to file a motion to compel. *Id*. at ¶29.

Since that time, Plaintiff's counsel has reiterated both in writing and verbally the intention to proceed with the depositions of the Black Eyed Peas Defendants in this matter while awaiting the outcome of the ruling on *Batts* motion to compel. *Id*. at ¶30. As such, the dates for those depositions will be determined when that court rules on Plaintiffs' motion to compel. The Defendants are wrong to suggest that there is some current conflict on those dates. It is the Defendants that have manufactured the conflict here and this alleged conflict falls woefully short of the immediate and irreparable showing required to obtain a temporary restraining order. *In re Intermagnetics, supra*, 101 B.R. at 193.

Second, Defendants have failed to establish (and may not attempt to establish) that there is any danger "that notice to an opposing party will result in that parties' flight, destruction of evidence or secretion of assets." *Id*

Finally, there is no evidence that the moving party is without fault in creating the "crisis" that they allege entitles them to *ex parte* relief. In fact, as discussed above, their own dilatory and obstructionist tactics have created this "crisis" and prejudiced Plaintiff's ability to obtain discovery in this case.

There is simply no justification for Defendants' *ex parte* request. It is nothing more than an attempt to place an "unnecessary adversarial burden" on Plaintiff by requiring a 24 hour response on an issue that Defendants agreed to abide by more than 2 weeks ago. Their conduct in this regard is sanctionable. *See, e.g., Chambers v. NASCO, Inc.*, 501 U.S. 32, 45-46, 111 S.Ct 2123 (1991).

II. DEFENDANTS' *EX PARTE* APPLICATION INCLUDES BAD FAITH MISREPRESENTATIONS REGARDING CONFLICTING DEPOSITIONS

Defendants further argue in bad faith to this Court that Plaintiff has scheduled conflicting depositions "during the same week, in two different locations, 50 miles apart, causing conflicts for witnesses and their counsel." [Dckt. 141., p. i.] Defendants know those representations to be false and Plaintiff requests that Defendants immediately withdraw those misrepresentations from their application.

To the contrary, Defendants have repeatedly been informed in both the *Batts* and *Pringle* cases that only the *Pringle* Black Eyed Peas Defendants' depositions will be proceeding on July 22, 25, 26 and 27. Declaration of Katharine Dunn in Support of Plaintiffs' Motion ("Dunn Decl.") at ¶ 3.

Indeed, during the recent meet and confer between the parties on June 22, 2011, Ms. Dunn reiterated to Ms. Kara Cenar, counsel for Defendants, that the only depositions proceeding on those July dates were the depositions of the Black Eyed Peas Defendants in the *Pringle* case and that any conflicting dates previously noticed in the *Batts* case were not proceeding. Dunn Decl. at ¶8. Despite Ms. Dunn's confirmation that the *Batts* depositions would not be proceeding, Ms. Cenar continued to make statements that she intended to raise Plaintiffs' "conflicting scheduling of depositions" with the Court. *Id.* at ¶7. Ms. Dunn further urged that Ms. Cenar avoid making any such representation to this Court, as it would be false. *Id.* at ¶8. Ms. Cenar stated that she did not understand Ms. Dunn. Id. at ¶9. Ms. Dunn further requested during the same call that Mr. Justin Righettini, also counsel for the Black Eyed Peas Defendants, acknowledge that he understood Ms. Dunn's statements that the depositions in the *Batts* case would not be proceeding on the previously noticed dates and therefore there existed no conflicting dates. *Id.* at ¶10. Mr. Righettini responded in the affirmative. *Id.*

Ms. Dunn re-iterated this position in a June 23, 2011 email:

> Kara, Our position now remains as it was before and during the call yesterday. The depositions are going forward in the Pringle case. *Id.* at ¶11.

Ms. Cenar acknowledged that this was Plaintiff's position in her follow up email:

> So you confirming [sic] that you are not taking the deposition of Adams, Pineda, Gomez, and Ferguson on July 22,-27 in the Batts case notwithstanding our making them available on that date and notwithstanding our informing you that they are not available on any

other dates prior to the Summary Judgment Briefing schedule. *Id.* at ¶12.

Mr. Pink, Ms. Cenar's law partner, makes statements in his declaration that can be described, at best, as "bad faith," when he states that there are "outstanding and conflicting deposition notices" in both cases. Plaintiffs have made clear that the Black Eyed Peas Defendants will be deposed in the Pringle case from July 22-27 and that the *Batts* depositions will not proceed at that time. This *ex parte* request was therefore filed in bad faith and conduct of Defendants and their counsel is sanctionable.

CONCLUSION

For each of the reasons identified in this Memorandum, Plaintiff Bryan Pringle requests that the Court deny Defendants' *Ex Parte* Application for a Protective Order Postponing the Black Eyed Peas Defendants' depositions.

Dated: July 6, 2011

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