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UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF CALIFORNIA

RONALD MOORE,

Plaintiff,

v.

CHASE, INC., d/b/a SLATER SHELL,

Defendant.

Case No. 1:14-cv-01178-SKO

**ORDER GRANTING IN PART AND
DENYING IN PART DEFENDANT'S
EX PARTE APPLICATION FOR
PROTECTIVE ORDER**

**ORDER GRANTING IN PART AND
DENYING IN PART DEFENDANT'S
EX PARTE MOTION TO MODIFY
SCHEDULING ORDER**

(Docs. 49; 50)

I. INTRODUCTION

On July 28, 2015, Defendant Chase, Inc., d/b/a Slater Shell ("Defendant") filed an "ex parte application for protective order along with a declaration by Defendant's counsel Ty Kharazi ("Kharazi"). (Doc. 42.) On July 29, 2015, Plaintiff Ronald Moore ("Plaintiff") filed his oppositions, along with a declaration by Plaintiff's counsel Tanya Moore ("Moore"). (Docs. 44; 45; 46.) On July 30, 2015, Defendant filed replies to Plaintiffs oppositions. (Docs. 53; 54.)

II. BACKGROUND

A. Factual Background

On January 19, 2015, a Scheduling Conference was held before the undersigned. (Doc. 21.) Plaintiff's Counsel Tanya Moore and Defendant's counsel Ty Kharazi were telephonically present. (Doc. 21.) On February 12, 2015, the Court issued a Scheduling Order

1 setting forth all relevant discovery dates and deadlines, as well as setting forth a Settlement
2 Conference and a trial date. (Doc. 22.) The dates were scheduled as follows:

3 Initial Disclosures: February 5, 2015
4 Non Expert Discovery: August 14, 2015
5 Settlement Conference: August 24, 2015
6 Expert Disclosures: September 14, 2015
7 Sup. Expert Disclosures: October 6, 2015
8 Expert Discovery: November 10, 2015

9 (See Doc. 22.) These dates were set based on the parties' agreement, after meeting and conferring,
10 as set forth in their Joint Scheduling Report. (Doc. 18.)

11 On June 18, 2015, Plaintiff served deposition notices and subpoenas for Defendant's
12 witnesses. The first notice was served on Defendant Chase, to "designate and produce a person or
13 persons to testify on behalf of Defendant most knowledgeable," for a deposition set for August 10,
14 2015, at 10:00 a.m. (Doc. 51-2.) The second notice was served on Soheila Darci, for a deposition
15 scheduled August 10, 2015, at 2:00 p.m. (Doc. 50-1.) On July 14, 2015, Defendant's counsel sent
16 a letter to Plaintiff's counsel along with Defendant's Fourth Supplemental Initial Disclosures.
17 (See Doc. 51, fn.1.) In the letter, Defendant identified Bob Shiralian in place of Soheila Darci, "as
18 Ms. Darci knows nothing about the operation of this site. Mr. Shiralian [] is the president of the
19 Chase [and] will be able to testify about Chase's involvement with the site. I know you have
20 issued a Notice of Deposition for Ms. Darci and I am willing to produce Mr. Shiralian [pursuant
21 to] the same notice." (Doc. 51-2.)

22 On July 16, 2015, Plaintiff served Defendant with an "Amended Notice of Taking of
23 Deposition of Soheila Darcy and Substituting Deponent Bob Shiralian," set for August 10, 2015,
24 at 2:00 p.m. (Doc. 50-2.) On July 22, 2015, Mr. Shiralian informed Defense counsel for the first
25 time that he will be out of the country from August 7 - September 7, 2015, "a trip which had been
26 planned prior to the setting of the deposition." (Doc. 50, p. 5, Decl. of H. Ty Kharazi.) There is
27 no declaration from Mr. Shiralian himself. (See generally Docket.)

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1 After learning Mr. Shiralian would not be available, Plaintiff's counsel offered an
2 alternative deposition date of July 28, 2015. (Docs. 50-3; 50-4.) Defense counsel declined to
3 change the deposition date to July 28, 2015, because he was in trial. (Docs. 50, Decl. of H. Ty
4 Kharazi; 50-3; 50-4.) Defense counsel offered to stipulate to extend the discovery schedule to
5 accommodate Plaintiff's counsel's concerns about the impending close of fact discovery, and
6 Plaintiff's counsel refused. (Docs. 50, Decl. of H. Ty Kharazi; 50-3; 50-4.)

7 **B. Procedural Background**

8 On July 28, 2015, Defendant filed an Ex Parte Application for Protective Order to prevent
9 Plaintiff from enforcing the subpoena, and an Ex Parte Motion to Modify the Scheduling Order to
10 allow Mr. Shiralian's deposition to take place once he returns from his trip out of the country.
11 (Docs. 49; 50.)

12 Plaintiff opposed both ex parte motions on the grounds that they are procedurally defective
13 and should have been brought as regular motions, with an ex parte application to shorten the time
14 before they are heard, pursuant to the Local Rules, and because Defendant has not shown good
15 cause for why relief should be granted. (Docs. 51; 52.)

16 Defendant filed a reply offering to stipulate to modify the schedule to give Plaintiff
17 sufficient time to finish discovery after Mr. Shiralian's deposition is taken, because there is
18 sufficient time before the trial date to accommodate such modification. (Docs. 53; 54.)
19 Defendant also states it has shown good cause because "the trip was planned several months in
20 advance and changing plans is not as easy as Plaintiff imagines." (Doc. 53, p. 1.)

21 **III. LEGAL STANDARDS FOR EX PARTE APPLICATIONS**

22 The "opportunities for legitimate ex parte applications are extremely limited." In re
23 Intermagnetics America, Inc., 101 B.R. 191, 193 (C.D. Cal. 1989); see also *Mission Power Eng'g*
24 *Co. v. Cont'l Cas. Co.*, 883 F. Supp. 488, 489 (C.D. Cal. 1995) (to be proper, an ex parte
25 application must demonstrate good cause to allow the moving party to "go to the head of the line
26 in front of all other litigants and receive special treatment").

27 The use of such a procedure is justified only when (1) there is a threat of immediate or
28 irreparable injury; (2) there is danger that notice to the other party may result in the destruction of

1 evidence or the party's flight; or (3) the party seeks a routine procedural order that cannot be
2 obtained through a regularly noticed motion (i.e., to file an overlong brief or shorten the time
3 within which a motion may be brought). *Horne v. Wells Fargo Bank, N.A.*, 969 F. Supp. 2d 1203,
4 1205 (C.D. Cal. 2013) (citing *Mission Power Eng'g Co.*, 883 F. Supp. at 490). When
5 unwarranted, however, ex parte applications disregard procedural "[s]afeguards that have evolved
6 over many decades [and have been] built into the Federal Rules of Civil Procedure and the Local
7 Rules of this court. The rules contemplate that regular noticed motions are most likely to produce
8 a just result. This is because they give the adversary an opportunity to prepare a thorough
9 opposition (and, if needed, an opportunity for oral argument) according to a predesigned,
10 consistent timetable." *Id.* at 491. As noted by our sister district, the Central District of California:

11 Timetables for the submission of responding papers and for the setting of hearings
12 are intended to provide a framework for the fair, orderly, and efficient resolution
13 of disputes. Ex parte applications throw the system out of whack. They impose
14 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.

15 *In re Intermagnetics America, Inc.*, 101 B.R. at 193.

16 Finally, "[e]x parte applications are not intended to save the day for parties who have failed
17 to present requests when they should have" *Id.* at 193. "Ex parte applications are a form of
18 emergency relief that will only be granted upon an adequate showing of good cause or irreparable
19 injury to the party seeking relief." *Clark v. Time Warner Cable*, No. CV-07-1797-VBF(RCx),
20 2007 WL 1334965 (C.D. Cal. May 3, 2007) (citing *Mission Power Eng'g Co.*, 883 F. Supp. at
21 492). The moving party must be "without fault" in creating the need for ex parte relief or establish
22 that the "crisis [necessitating the ex parte application] occurred as a result of excusable neglect."
23 *Id.* An ex parte application seeks to bypass the regular noticed motion procedure; consequently,
24 the party requesting ex parte relief must establish a basis for giving the application preference.
25 See *id.*

26 IV. DISCUSSION

27 A. The "Ex Parte Application" Is Procedurally Defective and Must Be Denied

28 Defendant is referred to the Court's order dated July 17, 2015, denying Plaintiff's "ex parte

1 application for protective order requiring Defendant to deliver Plaintiff’s private medical records
2 obtained against Plaintiff’s objection.” (See Doc. 47.) The July 17, 2015, order provided the
3 parties with the legal standard for ex parte applications. This “application” is similarly
4 procedurally defective.

5 Defendant states that it was necessary to bring the applications ex parte because
6 “Defendant will suffer irreparable injury if the deposition goes forward and the deponent is out of
7 town, including potential monetary and discovery sanctions.” (Doc. 50, p. 5, Decl. of Ty
8 Kharazi.) However, the proper procedure for accomplishing Defendant’s goal was to serve
9 written objections on Plaintiff, Fed. R. Civ. P. 45(d)(2)(B), or file a regularly noticed motion to
10 quash or modify the subpoena under Rule 45(d)(3) or motion for protective order under Rule 26(c)
11 and then file an ex parte application to shorten the time for the motion to be brought. See Horne,
12 969 F. Supp. 2d at 1205 (citing Mission Power, 883 F. Supp. at 490) (ex parte applications
13 permissible where the party seeks a routine procedural order that cannot be obtained through a
14 regularly noticed motion, i.e., to shorten the time within which a motion may be brought).
15 Instead, Defendant has filed ex parte applications for a protective order to prevent Plaintiff from
16 enforcing his deposition subpoena and for an order unilaterally modifying the Scheduling Order.
17 (See Docs. 49; 50.) These motion are subject to the regular notice requirements of the Federal
18 Rules of Civil Procedure and Local Rule 251. As a hearing on Defendant’s ex parte applications
19 was not properly noticed, the filing is procedurally defective and must be denied on its face.

20 **B. The Ex Parte Applications Fail to Demonstrate Ex Parte Relief in the Form of a**
21 **Protective Order Is Warranted**

22 Even if Defendant had filed a proper ex parte motion, Defendant has not demonstrated it is
23 entitled to ex parte relief. Ex parte relief is provided when (1) there is a threat of immediate or
24 irreparable injury; (2) there is danger that notice to the other party may result in the destruction of
25 evidence or the party’s flight; or (3) the party seeks a routine procedural order that cannot be
26 obtained through a regularly noticed motion (i.e., to file an overlong brief or shorten the time
27 within which a motion may be brought). Horne, 969 F. Supp. 2d at 1205.

1 Here, defense counsel has represented that Mr. Shiralian will be out of the country from
2 August 7 – September 7, 2015, and is therefore unable to attend the deposition on August 10,
3 2015. (Doc. 50, p. 5, Decl. of Ty Kharazi.) Defense counsel further represents that this trip was
4 planned prior to the setting of the deposition date. (Doc. 50, p. 5, Decl. of Ty Kharazi.) However,
5 this is a date on which Defendant agreed to produce Mr. Shiralian. (Doc. 51-2, Exh. A.) There is
6 no declaration from Mr. Shiralian indicating why, as president of Chase, Inc., a party to this case,
7 he planned a trip out of the country on a date when his personal appearance was required at the
8 settlement conference -- a requirement of which Mr. Shiralian has been aware since the January
9 29, 2015, scheduling conference. (See Docs. 22, Scheduling Order; 49; 50; 53; 54.)

10 There is no threat of immediate or irreparable injury because Defendant has not
11 demonstrated that Mr. Shiralian will be negatively impacted by altering his travel plans to comply
12 with the subpoena date to which defense counsel specifically agreed. A mere showing that the
13 discovery may involve some inconvenience or expense does not suffice to establish good cause
14 under Rule 26(c). *Turner Broadcasting System, Inc. v. Tracinda Corp.*, 175 F.R.D. 554, 556
15 (D. Nev. 1997); *U.S. ex rel. Harris v. Alan Ritchey, Inc.*, No. C00-2191, 2008 WL 859458, at *1
16 (W.D. Wash. Feb. 27, 2008) (“Mere ‘naked assertions’ of hardship do not suffice to establish good
17 cause for a protective order under Rule 26(c).”).

18 Here, Defendant has provided no affidavit to support its claim of hardship. Absent such a
19 declaration from Mr. Shiralian, the Court is unable to determine any factual basis for Defendant’s
20 motion for protective order. Rule 26(c) requires more than “broad allegations of harm,
21 unsubstantiated by specific examples or articulated reasoning.” *U.S. E.E.O.C. v. Caesars Entm’t,*
22 *Inc.*, 237 F.R.D. 428, 432 (D. Nev. 2006) (internal quotation and citation omitted). “The party
23 seeking the order must point to specific facts that support the request, ‘as opposed to conclusory or
24 speculative statements about the need for a protective order and the harm which will be suffered
25 without one.’” *Id.* (internal citation omitted).

26 Significantly, this is not the type of requested relief that could not have been brought in a
27 regularly noticed motion. At any time subsequent to receiving Plaintiff’s deposition subpoena,
28 Defendant could have served written objections on Plaintiff or filed a regularly noticed motion to

1 quash the subpoena or motion for protective order. Defendant's failure to do so does not entitle it
2 to ex parte relief now -- eleven days before the close of fact discovery on August 14, 2015.

3 **C. The "Ex Parte Application" Fails to Demonstrate Good Cause that the**
4 **Requested Relief Should Be Granted**

5 As discussed in the Court's July 17, 2015 order and as set forth above, ex parte
6 applications are a form of emergency relief. **Ex parte applications are not eleventh hour**
7 **motions "intended to save the day for parties who have failed to present requests when they**
8 **should have"** In re Intermagnetics America, Inc., 101 B.R. at 193 (emphasis added). A
9 moving party requesting ex parte relief must be either "without fault" in creating the need for such
10 relief or bears the burden of establishing the crisis necessitating the ex parte application occurred
11 as a result of excusable neglect. See *Mission Power Eng'g Co.*, 883 F. Supp. at 492.

12 It is undisputed that on January 29, 2015, the parties were present for a scheduling
13 conference where they agreed to a Settlement Conference on August 24, 2015. (Docs. 21; 22.)
14 The parties were aware that "the parties and the person . . . having full authority to negotiate and
15 settle the case on any terms" must be present at the conference. (Doc. 22, p. 6.) It is further
16 undisputed that defense counsel agreed to produce Mr. Shiralian for a deposition on August 10,
17 2015, in place of Ms. Darci. (Doc. 51-2, Exh. A.) Once defense counsel informed Plaintiff that it
18 would not produce Mr. Shiralian on August 10, 2015, Plaintiff's counsel offered to conduct the
19 deposition on an alternative date. (Docs. 50; 51; 52.) Defendant declined due a trial conflict;
20 however, there is no declaration by defense counsel stating whether or not he sought substitute
21 counsel to attend the alternative deposition date. (See Docket.) Defendant is not without fault in
22 creating the need for this motion for last-minute relief, and the application is not the result of
23 excusable neglect. See In re Intermagnetics America, Inc., 101 B.R. at 193; *Mission Power Eng'g*
24 *Co.*, 883 F. Supp, at 492.)

25 It is also unclear whether defense counsel notified Mr. Shiralian – the president of
26 defendant Chase, Inc. – that he would not be able to travel out of the country at a time when his
27 presence is necessary at the settlement conference and he may be deposed. There is no affidavit
28 from Mr. Shiralian explaining the need for a trip out of the county in the midst of looming
deadlines in this litigation. Regardless, Defendant waited until July 28, 2015, to file its ex parte

1 applications for a protective order and for a modification of the Scheduling Order. Non-expert
2 discovery closes on August 14, 2015. This sort of last-minute attempt to excuse Mr. Shiralian's
3 non-compliance with the deposition subpoena is not the sort of emergency relief ex parte
4 applications are intended to provide to parties litigating in the federal courts. See *In re*
5 *Intermagnetics America, Inc.*, 101 B.R. at 193.

6 Defendant has an obligation to produce Mr. Shiralian, the person most knowledgeable for
7 defendant Chase, Inc., for a deposition. However, Plaintiff's counsel is unavailable the week of
8 August 3, 2015, to take Mr. Shiralian's deposition.¹ Due to the unavailability of Plaintiff's
9 counsel to take Mr. Shiralian's deposition this week, the Court will extend the fact discovery
10 cutoff to September 11, 2015, for the limited purpose of deposing Mr. Shiralian.

11 Within seven (7) days of this order, the parties shall agree to a date for Defendant to
12 produce Mr. Shiralian to testify as defendant Chase, Inc.'s person most knowledgeable. The
13 parties shall meet and confer in good faith to reset the deposition to a new date on or before
14 September 11, 2015.

15 V. CONCLUSION AND ORDER

16 Accordingly, IT IS ORDERED that:

17 1. Defendant's ex parte application for a protective order is GRANTED in part and
18 DENIED in part;

19 2. Defendant's ex parte motion to modify the Scheduling Order is GRANTED in part
20 and DENIED in part;

21 3. The non-expert discovery deadline is extended to September 11, 2015, for the
22 limited purpose of taking the deposition of Bob Shiralian, the person most knowledgeable for
23 Defendant; and

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28 ¹ The Court is not drawing any adverse inference from counsel for Plaintiff's unavailability as Plaintiff did not cause this delay and even offered to conduct Mr. Shiralian's deposition on an alternative date to accommodate his travel plans.

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4. Within seven (7) days of this order, the parties will agree to a date for Defendant to produce Mr. Shiralian for a deposition.

IT IS SO ORDERED.

Dated: August 3, 2015

/s/ Sheila K. Oberto
UNITED STATES MAGISTRATE JUDGE