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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN JOSE DIVISION

BLADEROOM GROUP LIMITED, et al.,
Plaintiffs,
v.
FACEBOOK, INC., et al.,
Defendants.

Case No. [5:15-cv-01370-EJD](#)

**ORDER DENYING PLAINTIFF'S
ADMINISTRATIVE MOTION FOR
LEAVE TO TAKE ADDITIONAL
DEPOSITIONS**

Re: Dkt. No. 295

Presently before the court is administrative motion filed by Plaintiffs Bladeroom Group Limited and Bripco (UK) Limited (collectively, "Plaintiffs") through which they seek the following relief: (1) an order increasing the number of deposition Plaintiffs may take from 20 to 24, (2) an order extending the deadline to complete any additional depositions from June 30th to July 28, 2017, and (3) an order precluding Defendants Emerson Electric Co., Emerson Network Power Solutions, Inc., and Liebert Corporation (collectively, "Emerson") from presenting the testimony of any witnesses at trial who have not yet been disclosed in response to interrogatories as knowledgeable about particular issues. Dkt. No. 295. Defendant Facebook, Inc. ("Facebook") and Emerson have filed written opposition to the motion.

Having reviewed the relevant pleadings, the court finds, concludes and orders as follows:

1. Plaintiffs' three requests are governed by three different standards. Taking them in order, analysis of the request for additional depositions starts by observing that parties may generally take up to ten depositions without leave of court. Fed. R. Civ. P. 30(a). Federal Rule of Civil Procedure 26(b)(2)(A) permits upward alteration of this limit if the requesting party makes a

1 “‘particularized showing’ of the need for the additional depositions.” Century Aluminum Co. v.
2 AGCS Marine Ins. Co., No. 11-cv-02514 YGR (NC), 2012 WL 2357446, at *2 (N.D. Cal. June
3 14, 2012). But at the same time, the court must limit the frequency or extent of discovery if: (1)
4 the information sought is “unreasonably cumulative or duplicative, or can be obtained from some
5 other source that is more convenient, less burdensome, or less expensive; (2) “the party seeking
6 discovery has had ample opportunity to obtain the information by discovery in the action; or (3)
7 “the proposed discovery is outside the scope permitted by Rule 26(b)(1).” Fed. R. Civ. P.
8 26(b)(2)(C).

9 2. Plaintiffs’ second request to modify the deadline for completion of fact discovery
10 requires them to demonstrate sufficient “good cause” for the relief. Fed. R. Civ. Proc. 16(b)(4)
11 (“A schedule may be modified only for good cause and with the judge’s consent.”); Johnson v.
12 Mammoth Recreations Inc., 975 F.2d 604, 607-608 (1992).

13 3. The third request to exclude trial witnesses appears to be governed by Federal
14 Rules of Civil Procedure 26(e)(1) and 37(c)(1), given Plaintiffs’ reliance on Elion v. Jackson, 544
15 F. Supp. 2d 1 (D.D.C. 2008). Rule 26(e)(1) requires parties to “supplement or correct” disclosures
16 and discovery responses “in a timely manner if the party learns that in some material respect the
17 disclosure or response is incomplete or incorrect, and if the additional or corrective information
18 has not otherwise been made known to the other parties during the discovery process or in
19 writing.” Parties who fail in that duty become subject to Rule 37(c)(1), which states: “If a party
20 fails to provide information or identify a witness as required by Rule 26(a) or (e), the party is not
21 allowed to use that information or witness to supply evidence on a motion, at a hearing, or at a
22 trial, unless the failure was substantially justified or is harmless.”

23 4. Consistent with the “particularized showing” standard that applies to a request for
24 additional depositions, this court required any such motion to “detail who Plaintiffs propose to
25 depose, explain why the depositions are necessary, and estimate when the depositions can be
26 completed.” Dkt. No. 278. Plaintiffs have complied with the first requirement by identifying the
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1 witnesses they seek to depose: individual employees of Facebook (Jay Parikh, T.S. Khurana, Ilker
2 Esener, Joel Kjellgren and Bill Jia), and a third-party company, Alfatech. They have also
3 complied with the third requirement by estimating the depositions can be completed by July 28,
4 2017.

5 5. Plaintiffs have not, however, made the showing necessary to comply with the
6 second requirement. They provide some information in a footnote explaining topics on which
7 Parikh, Khurana and Alfatech may have information. Plaintiffs also claim that Esener and
8 Kjellgren possess knowledge concerning Facebook data center construction and design, and that
9 Jia has knowledge about OpenCompute. But their motion also reveals that Plaintiffs have deposed
10 or have noticed the depositions of no less than eight other individual Facebook employees, and
11 Facebook’s opposition demonstrates that Plaintiffs have received significant discovery involving
12 Parikh, Khurana, Esener, Kjellgren and Alfatech. Under these circumstances - where the court has
13 doubled the deposition limit, a significant number of one party’s witnesses have or will be
14 deposed under the current cap, and the requesting party has received extensive discovery - Plaintiffs
15 must do more than merely identify witnesses with potentially relevant information. Indeed, the
16 legal standard requires Plaintiffs to explain why the depositions of these additional witnesses
17 would not be cumulative or duplicative, why the information could not have been otherwise
18 obtained from another witness or through a different discovery method, and why the depositions
19 are permissible under Rule 26(b)(1). This explanation is missing.

20 6. Nor is the court convinced that potential surprise is a valid reason to increase the
21 deposition limit, at least at this time. Plaintiffs want to avoid “the possibility that Defendants
22 bring witnesses to trial to offer surprise testimony.” That “possibility” is not the sort of
23 “particularized showing” justifying additional depositions. And in any event, there are still other
24 mechanisms to account for “surprise” witnesses as trial approaches and the presentation of
25 evidence becomes more concrete, which could include leave to take additional depositions of
26 specific witnesses disclosed in the parties’ materials prior to trial.

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7. Furthermore, Plaintiffs invite misuse of Rules 26(e)(1) and 37(c)(1) through their premature request to limit Emerson’s witness presentation. Plaintiffs complain that Emerson listed too many witnesses in initial disclosures but identified too few knowledgeable ones in response to interrogatories. But without knowing who Emerson intends to call as trial witnesses - which information need not be provided at this stage of the litigation - the court cannot assess whether Plaintiffs have made the precursor showing required for a Rule 37 sanction. Instead, Plaintiffs can renew this request in limine since by then all of the information necessary to the analysis will be available.

In sum, Plaintiffs’ motion fails to demonstrate either a need for additional depositions or a valid reason to limit Emerson’s trial evidence. Consequently, all of the requested relief is DENIED.

IT IS SO ORDERED.

Dated: June 12, 2017


EDWARD J. DAVILA
United States District Judge