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8 **UNITED STATES DISTRICT COURT**
9 **SOUTHERN DISTRICT OF CALIFORNIA**

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11 MILLENNIUM LABORATORIES, INC.,

12 Plaintiff,

13 vs.

14 ALLIED WORLD ASSURANCE
15 COMPANY (U.S.), INC.,

16 Defendant.

CASE NO. 12cv2280-H(KSC)

**ORDER DETERMINING
DISCOVERY DISPUTE**

[Doc. No. 125 (sealed)]

17 Currently pending before the Court is the parties' Joint Motion Regarding
18 AWAC's Request for Leave to Take More Than Ten Depositions. [Doc. No. 125
19 (sealed)] The Joint Motion constitutes the eighth discovery-related dispute brought to
20 the Court by the parties in this action. The eight disputes, including exhibits, have
21 totaled in excess of 1,400 pages of motion practice. [Doc. Nos. 33, 35, 83, 87, 102, 107,
22 108, 114, 120, 125] For purposes of judicial economy and to streamline the discovery
23 process, the Court **ORDERS** as follows:

24 1. As to proposed depositions of: (1) Kelly Nelson; (2) Edward Zicar; (3)
25 Lori Martin; (4) Barney & Barney; (5) Skadden Arps; (6) Ryan Uehling; (7) Martin
26 Price; (8) Charles Root; (9) Joel Bramer, and, (10) Ameritox, AWAC's request to
27 conduct depositions in excess of ten is **GRANTED**. Based upon the arguments
28 contained in the moving papers, the representations made in the Declarations attached

1 thereto, and the case law cited, good cause exists for AWAC to depose the individuals
2 listed above, to the extent that these depositions can be concluded by the close of
3 discovery, January 31, 2014.

4 The Federal Rules of Civil Procedure generally allow for broad discovery,
5 authorizing parties to obtain discovery regarding “any nonprivileged matter that is
6 relevant to any party’s claim or defense.” FED.R.CIV.P.26(b)(1). Relevant information
7 for discovery purposes includes any information “reasonably calculated to lead to the
8 discovery of admissible evidence,” and need not be admissible at trial to be
9 discoverable. *Id.* There is no requirement that the information sought relate directly
10 to a particular issue in the case. Rather, relevance encompasses any matter “that bears
11 on, or that reasonably could lead to other matter that could bear on, any issue that is or
12 may be [presented] in the case.” *Oppenheimer Fund, Inc. v. Sanders*, 437 U.S. 340,
13 350 (1978) (citing *Hickman v. Taylor*, 329 U.S. 495, 501 (1947)). District courts have
14 broad discretion to determine relevancy for discovery purposes. *See Hallett v. Morgan*,
15 296 F.3d 732, 751 (9th Cir. 2002). Similarly, district courts have broad discretion to
16 limit discovery where the discovery sought is “unreasonably cumulative, duplicative,
17 or can be obtained from some other source that is more convenient, less burdensome,
18 or less expensive.” FED.R.CIV.P.26(b)(2)(C).

19 Federal Rule of Civil Procedure 30(a)(2) requires leave of court when “parties
20 have not stipulated to [a] deposition,” and “the deposition would result in more than
21 10 depositions” taken by a party. In considering requests to take in excess of 10
22 depositions, a “court must grant leave to the extent consistent with Rule 26(a)(2),” as
23 outlined above. Specifically, Rule 26(b)(2) provides that a court must limit discovery
24 where, *e.g.*, “the discovery sought is unreasonably cumulative or duplicative,” “the
25 party seeking discovery has had ample opportunity to obtain the information by
26 discovery in the action,” or “the burden or expense of the proposed discovery
27 outweighs its likely benefit, considering the needs of the case, the amount in
28 controversy, the parties’ resources, the importance of the issues at stake in the action,

1 and the importance of the discovery in resolving the issues.” FED.R.CIV.P.26(b)(2)(C).

2 As of the date of filing the Joint Motion [Doc. No. 125 (sealed), p. 7], December
3 20, 2013, AWAC has noticed and taken 5 depositions. This Court has no knowledge
4 regarding whether AWAC has taken 5 additional depositions as of the date of this
5 Order, as permitted under Rule 30 of the Federal Rules of Civil Procedure. As the fact
6 discovery cut-off date of January 31, 2014 has not yet passed [Doc. No. 129 (Second
7 Amended Scheduling Order)], AWAC may conduct 5 of the depositions listed above
8 prior to January 31, 2014 without leave of court. *See* FED.R.CIV.P.30(a)(2)(A).
9 However, given that AWAC’s total requested depositions would exceed the
10 presumptive limit of 10, the Court will address below whether good cause exists for
11 AWAC to notice and take in excess of ten depositions in this case.

12 This Court is satisfied that the putative deponents listed above, namely (1)
13 Nelson, (2) Zicar, (3) Martin, (4) Barney & Barney, (5) Skadden Arps, (6) Uehling, (7)
14 Price, (8) Root, (9) Bramer, and (10) Ameritox all contain sufficiently unique and
15 relevant information to warrant the taking of additional depositions. This finding is
16 premised on the complexity of this lawsuit, and the Rule 26 factors outlined above.
17 Accordingly, the burden and expense of taking additional depositions is justified. As
18 stated in this Court’s December 23, 2013 Second Amended Scheduling Order,
19 however, no further extensions to the pretrial dates will be granted absent *new and*
20 *good cause*. [Doc. No. 129, pp. 7-8] Accordingly, these depositions must be noticed
21 and taken prior to the January 31, 2014 fact discovery cut-off. Given the age of this
22 case, the multiple continuances granted to date, and AWAC’s questionable diligence
23 in scheduling and conducting the depositions to date, this deadline will not be moved
24 again without such showing.¹ Therefore, unless it can notice and conclude these

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26 ¹ Should the parties encounter scheduling issues regarding these depositions and
27 be unable to resolve them after proper meet and confer efforts, they are encouraged to
28 immediately contact the Court by telephone for assistance in resolving such scheduling
issues. Under Rule 30(b)(1), parties noticing depositions must give “reasonable written
notice to every other party.” FED.R.CIV.P. 30(b)(1). Given the continuances granted
to date and the January 31, 2014 fact discovery deadline, this Court construes
reasonable notice to be 5 business days.

1 requested depositions by the close of discovery, and in the absence of any *new and*
2 *good cause*, AWAC is precluded from conducting any of the aforementioned
3 depositions after January 31, 2014.

4 2. This Court has grounds to question AWAC's diligence in pursuing fact
5 discovery in this action. The Court finds AWAC's pursuit of Ameritox discovery as
6 a source of information to be instructive in this regard. AWAC argues that Millennium
7 has publicly alleged that Ameritox, a competitor, instigated the DOJ Investigation at
8 issue in this coverage action and made a presentation to the DOJ regarding Millennium.
9 [Doc. No. 125 (sealed), p. 10] AWAC further explains that it delayed in immediately
10 pursuing this information regarding Ameritox's role in the DOJ investigation as an
11 effort to "avoid duplicative discovery." *Id.* Rather, AWAC states that it first sought
12 the information regarding Ameritox through depositions of Millennium and
13 Millennium's outside counsel (Hogan Lovells and Collora). *Id.* at 10-11. Further,
14 AWAC contends it was not in a position to conduct an effective deposition of
15 Ameritox because Ameritox refused to produce any documents in response to AWAC's
16 document subpoenas, issued in Maryland. *Id.* at 11. Lastly, AWAC argues that it has
17 diligently pursued this information from Ameritox, culminating in AWAC's filing of
18 a Motion to Compel Ameritox's compliance with the subpoenas that is currently
19 pending before the Maryland District Court. *Id.*

20 Millennium contends that AWAC's arguments are unsupported by the timeline
21 of events in this action. As asserted, AWAC served document subpoenas on Ameritox
22 in August and September 2013, but then waited months – until December 2, 2013 – to
23 file a motion to compel Ameritox's compliance with the subpoenas in Maryland. *Id.*
24 at 23. Further, Millennium argues that AWAC failed to schedule the depositions of
25 Millennium's outside counsel until the last two weeks of discovery under the earlier
26 discovery schedule, and noticed the Millennium deposition (through stipulation) for
27 a date following the close of the prior discovery cut-off. *Id.* In sum, Millennium
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1 argues that AWAC gave itself no time to conduct the follow-up discovery it now
2 contends it needs from Ameritox. *Id.* Further, Millennium cites to the potential
3 prejudice if the deposition is permitted to proceed in this action.² *Id.* at fn 10.

4 With respect to the Ameritox issue specifically, considering the Rule 26 factors
5 outlined above, this Court questions whether AWAC, as “the party seeking discovery[,]”
6 ... had ample opportunity to obtain the information by discovery in the action,” but
7 failed to pursue it in a timely fashion. FED.R.CIV.P.26(b)(2)(C). While the Court
8 finds the Ameritox deposition to be relevant, given the questions raised about AWAC’s
9 diligence in noticing depositions of Ameritox and the other 9 putative deponents listed
10 above, the fact discovery deadline will remain in place absent new and good cause.

11 **CONCLUSION**


12 As stated in greater detail above, the Court **ORDERS** as follows:

13 1. AWAC’s request for leave to conduct the depositions of: (1) Nelson;
14 (2) Zicar; (3) Martin; (4) Barney & Barney; (5) Skadden Arps; (6) Uehling; (7)
15 Price; (8) Root; (9) Bramer; and, (10) Ameritox is **GRANTED**. Any such
16 depositions must be concluded by the close of discovery, January 31, 2014.

17 2. The January 31, 2014 fact discovery cut-off date established in this
18 Court’s Second Amended Scheduling Order [Doc. No. 129] will not be further
19 extended absent a showing of new and good cause. Should the parties have a
20 dispute regarding the scheduling of these depositions, and be unable to resolve it
21 after *meaningful* meet and confer efforts, they are to promptly contact the Court by
22 telephone.

23 **IT IS SO ORDERED.**

24 DATE: January 15, 2014


KAREN S. CRAWFORD
United States Magistrate Judge

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28 ² At this time, the Court will not accept any additional briefing or argument on
the issue of the Rule 30(b)(6) deposition of Ameritox.