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UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF CALIFORNIA

MARSHA WRIGHT,  
  
Plaintiff,  
  
v.  
  
OLD GRINGO, INC., et al.,  
  
Defendants.

Case No.: 17cv1996-BAS (MSB)

**ORDER DENYING OLD GRINGO S.A. DE  
C.V.'S EX PARTE MOTION FOR LEAVE IF  
COURT TO TAKE THE DEPOSITION OF  
C.J. WRIGHT**

**[ECF NO. 203]**

On December 3, 2019, Defendant Old Gringo S.A. de C.V. (“OGS”) filed its “Ex Parte Motion for Leave of Court to Take the Deposition of C.J. Wright.” (ECF No. 203.) Plaintiff filed her Opposition on December 4, 2019. (ECF No. 204.) For the reasons discussed in this order, the Court **DENIES** OGS’s motion.

**I. RELEVANT FACTUAL AND PROCEDURAL BACKGROUND**

Plaintiff, a former designer for Defendants Old Gringo, Inc. (“OGI”) and Old Gringo, S.A. de C.V. (“OGS”) (a Western wear manufacturer and distributor and its Mexican sister company, together the “Old Gringo Companies”) alleges that the principles and officers of the Old Gringo Companies, Defendants Ernest Tarut (“Tarut”) and Yan Ferry (“Ferry”), told her in January 2013 that they were giving her a 5% ownership interest in the Old Gringo Companies, but in fact, no such interest was

1 conveyed. (See ECF No. 1.) This basic allegation underlies all of the remaining causes of  
2 action in this case.

3 This case was filed on September 28, 2017. (ECF No. 1.) The first scheduling  
4 order was issued on March 2, 2018 by Magistrate Judge Stormes, who was then the  
5 magistrate judge handling this case. (ECF No. 18.) Judge Stormes then set the fact and  
6 expert discovery deadline for October 15, 2018. (Id. at 2.) Judge Stormes issued a First  
7 Amended Scheduling Order on September 27, 2018, wherein she continued the  
8 deadline for the completion of the depositions identified by the parties to December 14,  
9 2019. (ECF No. 33 at 3.)

10 OGS did not file its answer and make a general appearance in this case until June  
11 17, 2019. (See ECF No. 116, docket.) The Court then held telephonic case management  
12 conferences on September 11 and 17, 2019. (ECF Nos. 174, 177.) Prior to those  
13 conferences, the parties submitted a Joint Discovery Plan setting forth their respective  
14 positions regarding whether additional discovery was needed in this case in light of  
15 OGS's appearance after the close of discovery. (ECF No. 172.) OGS did not request any  
16 discovery in the Joint Discovery Plan or during the two case management conferences.  
17 In the Joint Discovery Plan, Defendants requested "that the Court set the earliest  
18 possible trial date in this case. Defendants have been ready to go to trial since the close  
19 of fact discovery in this case, October 15, 2018, almost a year ago." (Id. at 37.) On  
20 September 19, 2019, after consideration of the parties' requests, the Court issued a  
21 Second Amended Scheduling Order, which permitted Plaintiff to conduct discovery into  
22 OGS only, and did not permit OGS to take any discovery. (ECF No. 179 at 4-5 & n.1.)

23 Now, two and a half months after the Court issued the Second Amended  
24 Scheduling Order, and with just over one month before the close of all discovery, OGS  
25 has filed the instant motion to depose Plaintiff's son, C.J. Wright. (See ECF No. 204.)  
26 Plaintiff opposes the motion, on both procedural and substantive grounds, and requests  
27 an award of attorney's fees. (Id.)  
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1 that she would call him that afternoon (Wednesday, November 20) at 4:00 p.m. (Id. at  
2 3, 13.) Defendants' counsel's called Plaintiff's counsel as she had planned at 4:00 p.m.,  
3 but her call went to voicemail and she left a message. (Id. at 3.) Defendants' counsel  
4 also sent a follow up email. (Id.) Defendants' counsel then drafted OGS's portion of a  
5 joint motion to address its request to take C.J. Wright's deposition and sent it to  
6 Plaintiff's counsel via email at approximately 5:48 p.m. on the evening of November 20,  
7 2019, "and indicated to Plaintiff that Defendant intended to file this joint motion on  
8 November 27, 2019, thus affording Plaintiff five business days to participate in the joint  
9 motion process and to add Plaintiff's contributions to this joint motion." (Id. at 3, 15-25,  
10 37.) Plaintiff's counsel called Defendant's counsel to meet and confer on November 21,  
11 2019. (Id. at 3.)

12 Six days later, at 10:40 p.m. on the night before Defendant intended to submit the  
13 joint motion, Plaintiff's counsel responded via email. (Id. at 3, 27-28.) He stated that  
14 OGS had not used the "format prescribed by the Magistrate Judge's Civil Chambers  
15 Rules," specifically because "[t]here is no place for each party's viewpoint to be inserted  
16 or any other formatting required for a Joint Motion for Determination of Discovery  
17 Dispute ("JMDDD") to be submitted to the Magistrate Judge." (Id.) Plaintiff's counsel  
18 suggested that Defendants' counsel refer to Plaintiff's prior joint discovery motions for  
19 reference and insisted that Defendants' counsel reformat the document and resubmit it  
20 to Plaintiff, at which point he would "respond within the time period permitted by  
21 Chambers Rules with Plaintiff's contribution and participation to the joint motion." (Id.  
22 at 27.) Defendants' counsel responded the following day via email, stating that she  
23 believed OGS's draft motion complied with the Court's requirements, but nevertheless,  
24 she added the heading Plaintiff's counsel had requested and asked him to submit his  
25 portions by 6:00 p.m. the same night. (Id. at 4, 30.) That afternoon, Plaintiff's counsel  
26 sent an email to Defendants' counsel indicating that he believed the new draft was a  
27 revision, and he would provide Plaintiff's contributions within five business days of  
28 November 27, 2019. (Id. at 4, 32.) Counsel exchanged some additional emails prior to

1 OGS filing the instant ex parte motion, during which OGS gave Plaintiff what it  
2 understood to be an extension to December 2, 2019 at 10:00 a.m. to provide Plaintiff's  
3 contributions to the motion, and Plaintiff's counsel indicated that OGS did not have  
4 Plaintiff or her attorney's permission to file a joint motion. (Id. at 5, 34-36.) When  
5 Plaintiff's counsel emailed Defendants' counsel on December 2, 2019, stating that he  
6 would provide Plaintiff's contributions at an unspecified future date, Defendants'  
7 counsel restyled OGS's motion as an ex parte motion, which OGS filed on December 3,  
8 2019. (ECF No. 203.)

9 At the outset, the Court questions whether the instant motion should be  
10 considered a discovery motion or a motion to amend the scheduling order. On the one  
11 hand, it pertains to OGS's request to take a deposition, but on the other hand, the  
12 Court's permission is sought because the deposition is otherwise not allowed by the  
13 scheduling order in this case. In light of the fact that both parties appear to have felt  
14 that this motion should be treated as a discovery motion, the Court will consider  
15 whether OGS adequately complied with Chambers Rules regarding discovery disputes  
16 when bringing this motion. (See ECF No. 203-3 at 15-20 (OGS's draft joint motion titled  
17 "Joint Motion for Determination of Discovery Dispute No. 7 Re: [OGS's] Request for  
18 Leave to Take the Deposition of C.J. Wright"), 27 (Plaintiff's email discussing whether  
19 the draft satisfied the requirements of "a Joint Motion for Determination of Discovery  
20 Dispute").)

21 Section IV.E. of this Court's Civil Chambers Rules explains what must be included  
22 in a "Joint Motion for Determination of Discovery Dispute." The first through fourth  
23 elements apply specifically to disputes about written discovery or deposition questions.  
24 The Fourth requirement is that the joint motion be supported by (1) a declaration that  
25 the moving party's counsel complied with the meet and confer requirement, and (2)  
26 points and authorities of up to five pages per side. Finally, the parties are advised not to  
27 attach copies of counsel's correspondence with one another except in certain  
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1 circumstances. Section IV.D. describes the process by which a moving party must give  
2 the opposing party an opportunity to participate in the joint motion:

3 **F. Opportunity to Participate.** A party seeking to bring a discovery  
4 dispute before the Court must provide the opposing party a reasonable  
5 opportunity to contribute to the joint motion. An ex parte motion or  
6 application to compel is only appropriate under circumstances where the  
7 opposing party refuses to participate in contributing to a joint motion after  
8 a reasonable opportunity has been provided, or if the motion to compel is  
9 directed to a non-party. This Court considers a **minimum of five (5) business**  
10 **days** prior to the anticipated filing date of the joint motion to be a reasonable  
11 time period for a party to participate meaningfully in the preparation of a  
12 joint motion. This means that the party initiating a joint motion to resolve a  
13 discovery dispute must provide opposing counsel with a complete draft of  
14 the joint motion and any exhibits or supporting declarations **at least five (5)**  
15 **business days** prior to the anticipated filing date. Ex parte motions or  
16 applications to compel discovery that do not contain a declaration stating  
17 the opposing party has been given a meaningful opportunity to participate  
18 in a joint motion will be rejected by the Court.

14 The Court finds that OGS gave Plaintiff more than five business days to participate  
15 in the drafting of a joint discovery motion by attempting to meet and confer before  
16 drafting the motion; sending a draft on November 20, 2019; and then having a meet and  
17 confer call on November 21, 2019. The draft provided to Plaintiff on November 20,  
18 2019 complied with the Court's Civil Chambers Rules. When OGS added a two-word  
19 heading at Plaintiff's counsel's request, that did not restart the five-day reasonable  
20 period under the Court's Civil Chambers Rules as Plaintiff insisted. When Plaintiff  
21 unilaterally refused to provide her portions of the joint motion within five business days,  
22 OGS was permitted to file an ex parte motion without meeting and conferring or  
23 providing notice a second time.

24 In these circumstances, the rule provides that the ex parte motion must  
25 include "a declaration stating that the opposing party has been given a  
26 meaningful opportunity to participate in a joint motion." OGS's counsel's  
27 declaration, about which Plaintiff complains in this case did exactly that. (See ECF  
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1 No. 204 at 2 (“This is all frankly very silly and beneath the Court and the  
2 parties.”).) In fact, OGS’s briefing and declaration on this issue was necessitated  
3 by Plaintiff’s unreasonable refusal to participate in the joint motion process.  
4 Therefore, the form and the procedure of this motion are not a barrier to this  
5 Court ruling on the merits.

6 **B. OGS Has Not Shown Good Cause to Amend the Scheduling Order**

7 A scheduling order “may be modified only for good cause and with the judge’s  
8 consent.” Fed. R. Civ. P. 16(b)(4). This good cause standard “primarily considers the  
9 diligence of the party seeking the amendment. The district court may modify the  
10 pretrial schedule ‘if it cannot reasonably be met despite the diligence of the party  
11 seeking the extension.’” Johnson v. Mammoth Recreations, Inc., 975 F.2d 604, 609 (9th  
12 Cir. 1992) (citing Fed. R. Civ. P. 16 advisory committee’s notes (1983 amendment) and  
13 collecting cases). “If that party was not diligent, the inquiry should end.” Id.; (see also  
14 ECF No. 203-1 at 6 (OGS citing same authority and standard), ECF No. 204 at 4 (Plaintiff  
15 citing same standard and authority).)

16 In support of its request to modify the scheduling order to permit OGS to take the  
17 deposition of C.J. Wright, OGS argues that “new facts arose after the Joint Discovery  
18 Plan and the telephone CMCs in September 2019, which facts establish that [OGS]  
19 should be allowed to take Mr. Wright’s deposition to fully develop its defense in this  
20 case and in the interests of a complete record.” (ECF No. 203-1 at 6.) The “new  
21 information” OGS relies upon is described in full in a single sentence in the declaration  
22 of Ernest Tarut, another Defendant in this case for whom discovery has already closed.  
23 (See ECF No. 203-2.) Mr. Tarut states “[w]hile visiting the [OGS] factory in early  
24 November 2019, I heard that C.J. Wright had been talking about his mother’s litigation.”  
25 (Id. at 2.) OGS does not even bother to summon an argument about why this “new  
26 information” is revelatory, relevant, or reliable, or any other reason that this vague  
27 rumor should justify OGS’s request for an additional deposition.

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1           Statements in the record demonstrate that Defendants, who share management  
2 and counsel, were aware of C.J. Wright and his value as a witness before the initial close  
3 of fact discovery. According to OGS's own papers, OGI noticed C.J. Wright's deposition  
4 in Texas during the earlier discovery period, but elected not to move to compel his  
5 deposition when he failed to appear. (ECF No. 203-1 at 6.) Plaintiff listed C.J. Wright as  
6 a witness on her Pretrial Disclosures filed with the Court on April 15, 2019. (ECF No. 97  
7 at 3.) Despite having previously wanted to depose C.J. Wright, OGS, through Tarut and  
8 Ferry, did not act diligently to secure his deposition, either after he failed to appear at  
9 his deposition, or during the case management conferences after OGS made its official  
10 appearance in this case. The new information now proffered does nothing to change  
11 that equation. First, there is no indication of the source or reliability of this information.  
12 Second, there is no indication when Mr. Wright "had been talking about his mother's  
13 litigation," or what he was saying about it. One would expect that if the source of the  
14 rumor had been reliable and its content helpful to OGS's position, OGS would have  
15 presented those facts in support of its request.

16           Finding no good cause, the Court **DENIES** OGS's request for leave to depose C.J.  
17 Wright.

18 **C. Circumstances Make the Award of Attorney's Fees to Plaintiff Unjust**

19           Plaintiff has requested an award of attorney's fees for having to oppose this  
20 motion. (ECF No. 204 at 5.) Federal Rule of Civil Procedure 37(a)(5)(B) states that  
21 where a discovery motion is denied, the Court "must, after giving an opportunity to be  
22 heard, require the movant, the attorney filing the motion, or both to pay the party or  
23 deponent who opposed the motion its reasonable expenses incurred in opposing the  
24 motion, including attorney's fees. But the court must not order this payment if the  
25 motion was substantially justified or other circumstances make an award of expenses  
26 unjust." Here, the Court has denied OGS's request and unless OGS's motion was  
27 substantially justified or the circumstances make an award of attorneys' fees unjust, the  
28 Court should order the cost of opposing the motion.



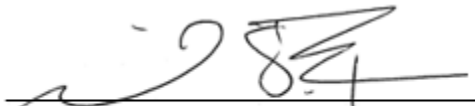
1 In this regard, the Court notes Plaintiff's lack of availability to meet and confer,  
2 and refusal to participate in the joint motion process because Plaintiff's counsel did not  
3 like the way that OGS had prepared its portion of the joint motion, discussed in greater  
4 detail in Section II.A., supra. Plaintiff's counsel could easily have added the headings for  
5 Plaintiff's sections and inserted her points and authorities into the joint motion.  
6 Instead, Plaintiff's counsel condescendingly rejected the draft because it was different  
7 from how he had chosen to prepare his own motions previously. Plaintiff's refusal to  
8 participate required OGS to draft counsel's declaration and many pages of argument to  
9 justify filing an ex parte motion. In these circumstances, the Court does not believe that  
10 an award of attorney's fees to Plaintiff would be just. Each of the party's have wasted  
11 the other's resources and time, and neither party should be compensated.

### 12 III. CONCLUSION

13 For the foregoing reasons, the Court **DENIES** in full OGS's request for leave to  
14 depose C.J. Wright and **DENIES** Plaintiff's request for attorney's fees.

15 **IT IS SO ORDERED.**

16 Dated: December 10, 2019

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19 Honorable Michael S. Berg  
20 United States Magistrate Judge  
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