

SUPERIOR COURT OF THE VIRGIN ISLANDS

DIVISION OF ST. THOMAS AND ST. JOHN

CHRISTIAN BROWN, as the lawful	)	
successor of PATRICE HALE BROWN,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	CASE NO. ST-10-CV-692
	)	
LORILLARD TOBACCO COMPANY,	)	
WORLD FRESH MARKET, LLC d/b/a	)	
PUEBLO, BELLOWS INTERNATIONAL, INC.,	)	
And WEST INDIES CORPORATION,	)	
	)	
Defendants.	)	
_____	)	

MEMORANDUM OPINION

Pending before the Court is Plaintiff's motion for a protective order.¹ For the following reasons, Plaintiff's motion will be denied.

FACTUAL AND PROCEDURAL HISTORY

On February 26, 2013, Defendant Lorillard Tobacco Company took the deposition of Ellen Sigman, a friend of decedent Patrice Brown, in San Francisco, California. Plaintiff's stateside counsel, who is based in Boston, Massachusetts, travelled across the country to attend the deposition. Then, on April 1, 2013, Lorillard noticed the deposition of Plaintiff Christian Brown to take place in San Francisco on April 11, 2013. Plaintiff now moves for a protective order pursuant to Federal Rule of Civil Procedure 26(c)(1), seeking to bar Lorillard from taking Brown's deposition, alleging that the deposition could have been taken when Plaintiff's counsel was in San Francisco attending Sigman's deposition and that Lorillard's attempt to take the deposition at a later date is a

¹ Plaintiff filed his motion on April 8, 2013, and Lorillard filed an opposition on April 29, 2013.

tactic to drive up litigation expenses. Alternatively, Plaintiff moves for sanctions under Fed. R. Civ. P. 37 and requests that Lorillard pay all expenses associated with the taking of Brown's deposition.

STANDARDS

For good cause a court may issue an order protecting a party from undue burden or expense.² However, "[c]ourts rarely grant a protective order which totally prohibits the deposition, unless extraordinary circumstances are present."³ In addition, "absent [a] court order, [litigating] parties are free to engage in discovery and [in] any sequence they choose."⁴

"The decision to impose sanctions for discovery violations and any determination as to what sanctions are appropriate are matters generally entrusted to the discretion of the ... court."⁵ The Third Circuit has articulated a four element test to be considered when determining whether to issue the sanction of excluding evidence:

- (1) the prejudice or surprise in fact of the party against whom the excluded witnesses would have testified,
- (2) the ability of that party to cure the prejudice,
- (3) the extent to which waiver of the rule against calling unlisted witnesses would disrupt the orderly and efficient trial of the case or of other cases in the court, and
- (4) bad faith or willfulness....⁶

ANALYSIS

² Federal Rules of Civil Procedure 26(c)(1).

³ *Nicholas v. Sugar Bay Club and Resort Corp.*, 2002 WL 32356631, at *1 (D.V.I. 2002).

⁴ *In re Mann*, 220 B. R. 351, 355 (Bankr. N.D. Ohio 1998) (citing Fed. R. Civ. P. 26(d)).

⁵ *Bowers v. NCAA*, 475 F.3d 524, 538 (3d Cir. 2007).

⁶ *Meyers v. Pennypack Woods Home Ownership Ass'n*, 559 F.2d 894, 904-05 (3d Cir.1977), overruled on other grounds, *Goodman v. Lukens Steel Co.*, 777 F.2d 113 (3d Cir. 1977) aff'd, 482 U.S. 656 (1987).

The cases Plaintiff has cited in support of his motion are inapposite. Lorillard has not engaged in obviously disingenuous behaviour, such as cancelling a deposition extremely close to its scheduled time⁷ or failing to give notice that a deposition is needless because the plaintiff being deposed is dropping the claim against the defense.⁸ Lorillard is also not seeking to take a duplicative deposition,⁹ has not failed to attend a scheduled deposition,¹⁰ and has not improperly terminated a deposition.¹¹

Similarly, the facts in *Lawson v. Mathiasens' Tanker Industries*,¹² a case upon which Plaintiff heavily relies, are distinct from the facts of this case. There, a change in counsel occurred and new counsel demanded more discovery, including depositions, several months after the original counsel demonstrated that the opposing party's answers to interrogatories were sufficient. The court determined that "this change in counsel should not operate to penalize plaintiff by forcing him now at his own expense, [to travel] to attend depositions...."¹³ The Court does not find *Lawson* to be persuasive because that case involved a special circumstance involving a change in counsel and the pursuit of a new litigation strategy, facts of which are not evident here.

The Court notes that there could be any number of legitimate or benign reasons why Lorillard chose not to depose Brown around the time it deposed Sigman. Plaintiff has not produced sufficient evidence to show that Lorillard is acting in bad faith by now

⁷ *Federal Trade Comm. v. Dalbey*, 2011 WL 64133819 (D. Colo. 2011).

⁸ *Hill v. R&L Carriers Shared Servs.*, 2010 WL 4977763 (N.D. Cal. 2002).

⁹ *Donahue v. Unisys Corp.*, 1991 WL 537530 (D.Conn. 1991).

¹⁰ *Zoltek Corp. v. United States*, 2006 WL 5670861 (Fed. Cl. 2006).

¹¹ *Nutmeg Ins. Co. v. Atwell, Vogel & Sterling A Div. of Equifax Servs., Inc.*, 120 F.R.D. 504 (W.D. La. 1988).

¹² 21 F.R.D. 314 (E.D. Pa. 1957).

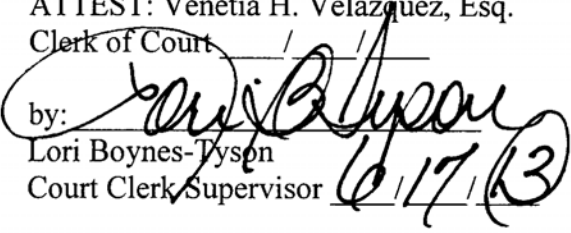
¹³ *Id.*,

seeking to depose Brown. And, according to Lorillard's representations, which Plaintiff has not refuted, Lorillard offered to reschedule the deposition and take it on May 15, 2013, at a location of Plaintiff's choice, either in San Francisco, where Plaintiff resides, on St. Thomas where the case is pending and local counsel resides, in Boston where Plaintiff's stateside counsel is located, or in New York where Lorillard's stateside counsel is located. According to Lorillard, Plaintiff's counsel selected San Francisco as the location for the deposition but continues to seek a protective order. Because there is no demonstration of bad faith or willfulness on the part of Lorillard, or of extraordinary circumstances compelling a protective order or sanctions, the Court will deny Plaintiff's motion.

An Order consistent with this Opinion shall follow.

Dated: June 14, 2013

ATTEST: Venetia H. Velazquez, Esq.
Clerk of Court

by: 
Lori Boynes-Tyson
Court Clerk Supervisor


HON. MICHAEL C. DUNSTON FOR THE
HON. KATHLEEN MACKAY
JUDGE OF THE SUPERIOR COURT
OF THE VIRGIN ISLANDS