

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Alexandria Division**

BLUE FLAME MEDICAL LLC

Civil Action No. 1:20-cv-00658

**MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFF’S
MOTION FOR LEAVE TO FILE SUPPLEMENTAL AUTHORITIES**

Plaintiff Blue Flame Medical LLC (“Plaintiff”) respectfully submits this memorandum of law in support of its motion, pursuant to Local Civil Rule 7(F)(1), for leave to file supplemental authorities in connection with the Court’s consideration of Blue Flame Medical’s Motion for Partial Summary Judgment (ECF No. 127) and Defendants Chain Bridge Bank, N.A., John J. Brough, and David M. Evinger’s (“Defendants”) Motion for Summary Judgment (ECF No. 118). Specifically, Plaintiff seeks leave following the July 28, 2021 hearing regarding the parties’ summary judgment motions (the “Hearing”) to identify authorities supporting the Court’s

consideration of the Declaration of Henry Huang (ECF No. 150-11) (the “Huang Declaration”). Huang is not a party to this action and is the Chief Executive Officer of Great Health Companion Group (“GHC”), Plaintiff’s primary supplier for its sale of 100 million N95 masks to the State of California, and has personal knowledge of GHC’s ability to supply those masks. Plaintiff submitted the Huang Declaration as an exhibit to the Affirmation of Peter H. White in Opposition to Defendants’ Motion for Summary Judgment (ECF No. 150), which was submitted in support of Plaintiff’s Opposition to Defendants’ Motion for Summary Judgment (ECF No. 149).

Plaintiff’s submission of supplemental authorities supporting consideration of the Huang Declaration is necessary in order to respond to certain arguments and representations Defendants made regarding the Huang Declaration at the Hearing. Specifically, Defendants’ counsel argued at the Hearing that considering the Huang Declaration in connection with the parties’ summary judgment motions would be unfair because Defendants did not have an opportunity to depose Huang and because Huang did not respond to Defendants’ purported document subpoenas, for which Defendants did not attempt to make effective service.¹ *See* Fed. R. Civ. P. 45(b)(3); 28

¹ Defendants’ counsel also argued during the Hearing that the Huang Declaration should not be considered because it is too conclusory and speculative. It is not. Huang explains how GHC would have obtained the N95 masks for Blue Flame, including listing three manufacturers from which GHC would have procured the masks (Huang Decl. at ¶ 22-23), indicating knowledge of “the actual production lines” of those manufactures (*id.* at ¶ 32), noting that production capacity was increasing in China by late March 2020 (*id.* at ¶ 25), and explaining that GHC would have used a large purchasing commitment and advance payment to secure production capacity (*see id.* at ¶¶ 18, 20, 24-26, 28-32, 38). *See Redmond v. Yachting Sols., LLC*, 435 F. Supp. 3d 257, 261 (D. Me. 2019) (admitting into evidence employees’ estimates of how much time it would take to complete certain tasks performed in capacity as employee). Huang also lists examples of PPE that GHC successfully provided to Blue Flame customers. Huang Decl. at ¶ 17. In contrast, the cases identified in Defendants’ Reply (ECF No. 155) involved statements centered on opinion. *See Crouse v. Wal-Mart Stores East, Inc.*, No. 1:01CV00079, 2002 WL 1046714, at *4 (W.D. Va. May 23, 2002) (emphasis added) (affidavit stating “I *believe* that Wal-Mart could have accommodated [me]” was merely opinion statement); *Evans v. Techs. Applications & Serv. Co.*, 80 F.3d 954, 962 (4th Cir. 1996) (striking certain statements in plaintiff’s own affidavit containing “self-serving opinions” about her qualifications for a job and the abilities of her colleagues).

U.S.C. § 1783 (governing service of a subpoena to a U.S. national who is in a foreign country). As Plaintiff's counsel noted during the Hearing and as Huang explains in his Declaration, Huang could not comply with either Defendants' or Plaintiff's efforts to take his deposition because he was (and remains) in China and therefore could not be deposed without violating Chinese law. Huang Decl. at ¶¶ 10-11; *see also Chen v. Hunan Manor Enter.*, No. 17 Civ. 802, 2020 U.S. Dist. LEXIS 19452, at *3-4 (S.D.N.Y. Feb. 3, 2020) (“[T]he Court's review of relevant case law shows that it is improper to order that a video deposition take place in China because such depositions violate Chinese domestic law.”). Huang could not leave China to sit for a deposition, either, due to China's travel restrictions related to the COVID-19 pandemic, which remained too stringent for him to travel internationally while performing his duties as CEO of GHC and Hakim Unique Group. *See* Huang Decl. at ¶¶ 5, 10-12. In short, Defendants and Blue Flame both sought to depose Huang given his role as a key witness in this litigation, and both were unsuccessful due to Chinese law and the COVID-19 pandemic.

Defendants' argument that the Huang Declaration should not be considered because Huang has not been deposed—again, due to Chinese law and the extreme travel restrictions caused by the pandemic—is inconsistent with several recent decisions that Plaintiff has identified since the parties' summary judgment motions were fully submitted. In particular, Plaintiff wishes to bring three recent district court decisions to the Court's attention that are relevant to these issues. These decisions make clear that the theoretical possibility of international travel during the COVID-19 pandemic does not supply grounds to compel a witness residing abroad to travel to another country for a deposition, and should not disqualify the declaration of such a witness offered in connection with summary judgment motions. Plaintiff believes that consideration of these authorities may be

helpful to the Court, particularly given the novel and practical challenges presented by the pandemic for parties conducting discovery of non-party witnesses located abroad.

At least one federal court has considered similar declarations offered under similar circumstances, where the witnesses were located in China and could not be deposed due to Chinese law and COVID-19 travel restrictions. In *Zhizheng Wang v. Hull*, the court denied a motion to strike multiple declarations submitted by Chinese declarants in support of the plaintiff's summary judgment motion. No. C18-1220, 2020 WL 3315990, at *4 (W.D. Wash. June 18, 2020), *reconsideration denied*, 2020 WL 8839776 (W.D. Wash. July 6, 2020). A copy of that decision is attached hereto as **Exhibit A**. In a subsequent decision, the court noted that “[w]ith regards to the current health crisis caused by the novel coronavirus, defendant is not demanding, and the Court will not require, that plaintiff [one of the Chinese declarants] board a flight for Seattle, Hong Kong, Macau, Seoul, or Taipei immediately” for purposes of a remote deposition. *Zhizheng Wang v. Hull*, No. C18-1220, 2020 WL 4734930, at *2 (W.D. Wash. June 22, 2020). Accordingly, the court stayed the case until the plaintiff could travel to another country to be deposed. *Id.* A copy of that subsequent decision is attached hereto as **Exhibit B**.²

² None of the cases cited in Defendants' Reply address this situation, since they all involve declarants who—unlike Huang—were controlled by a party, intentionally avoided formal service of a subpoena, failed to appear at a scheduled deposition, or gave no indication they would testify at trial. See *Dedvukaj v. Equilon Enters., L.L.C.*, 301 F. Supp. 2d 664, 668 (E.D. Mich. 2004) (officer of corporate plaintiff failed to appear at deposition scheduled by defendant and there was “no indication he will be available for trial”); *Henry v. Outback Steakhouse of Fla., LLC*, No. 15-cv-10755, 2017 WL 1382292, at *2 (E.D. Mich. Apr. 18, 2017) (party relying on affidavits “had some control over” witnesses who failed to appear for scheduled depositions or evaded service); *McKellar v. State Farm Fire & Cas. Co.*, No. 14-cv-13730, 2016 WL 304759, at *8 (E.D. Mich. Jan. 26, 2016) (declarant deliberately made himself unavailable and evaded service eight times, then, after court-ordered alternative service, failed to appear); *Cambridge Literary Props., Ltd. v. W. Goebel Porzellanfabrik G.m.b.H. & Co. Kg.*, No. CV 00-10343, 2006 WL 8458370, at *1 (D. Mass. Mar. 14, 2006) (foreign declarants resided abroad and were “unlikely to be available for trial”); *Bumpas v. Ryan*, No. 3:07-cv-0766, 2013 WL 2418258, at *2 (M.D. Tenn. June 3, 2013) (declarant failed to appear at noticed deposition and there was no indication he would be available

Similarly, at least two district courts have refused to order witnesses residing abroad to sit for a remote deposition prohibited by home-country law or travel internationally for a remote or in-person deposition while pandemic-related travel restrictions remain in place. *See Squires v. Toyota Motor Corp.*, No. 4:18-CV-00138, 2021 WL 1837540, at *2-5 (E.D. Tex. May 7, 2021) (where Japanese law required that depositions for use in U.S. court proceedings be taken in U.S. consulate or embassy, which were closed due to COVID-19 pandemic, court refused to compel Japanese non-party fact witnesses to travel internationally to sit for remote depositions, finding that “[d]elaying the depositions of the specific Deponents while the pandemic is still rampant, and escalating, is both prudent and necessary”); *Jacobs v. Floorco Enters., LLC*, No. 3:17-CV-90, 2020 WL 1290607, at *14-16 (W.D. Ky. Mar. 18, 2020) (noting that “a remote deposition appears unlawful” in China, court granted motion to compel Chinese witness to appear for deposition in U.S., but refused to impose deadline for such deposition in light of COVID-19 travel restrictions and witness’s declaration that he was willing to be deposed but could not travel outside of China at that time). Copies of those decisions are attached as **Exhibits C and D** hereto, respectively. *Squires* and *Jacobs* suggest that it would have been inappropriate for the parties to insist that Huang travel to another country in order to be deposed prior to the Court’s April 12, 2021 discovery deadline (ECF No. 80), particularly given that the Federal Rules of Civil Procedure do not require that a declarant be deposed in order for the Court to consider his declaration on summary judgment.³

at trial); *Lucas v. Jolin*, No. 1:15-cv-108, 2016 WL 2853576, at *8-9 (S.D. Ohio May 16, 2016) (declarant resided abroad and was unlikely to give testimony at a deposition or trial).

³ Rule 56 of the Federal Rules of Civil Procedure expressly contemplates the use of declarations to support or oppose summary judgment motions. *See* Fed. R. Civ. P. 56(c); *United States v. Rocky Mt. Holdings, Inc.*, 782 F.Supp.2d 106, 114 (E.D. Pa. 2011) (rejecting argument to strike declarations based on personal knowledge on the grounds that “Plaintiff’s submission of them in

Given the undisputed relevance of the Huang Declaration to key issues in this case, including Plaintiff's proof of its damages—an issue the Court highlighted at the Hearing—Plaintiff's supplemental authorities may bear on the Court's rulings on the parties' competing summary judgment motions. Accordingly, Plaintiff respectfully moves the Court for leave to submit the above authorities for the Court's consideration in adjudicating the parties' motions for summary judgment.

Dated : Washington, D.C.
August 3, 2021

Respectfully submitted,

/s/ Peter H. White

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lieu of [a deposition] was improper” because “[n]othing in the Federal Rules of Civil Procedure requires Plaintiff to depose [declarant]”).

CERTIFICATE OF SERVICE

I hereby certify that on this 3rd day of August, 2021, I caused the foregoing document to be filed and served electronically using the Court's CM/ECF system, which automatically sent a notice of electronic filing to all counsel of record.

Dated: August 3, 2021

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