

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

BLUE FLAME MEDICAL LLC,

Plaintiff,

v.

CHAIN BRIDGE BANK, N.A., JOHN J.
BROUGH, and DAVID M. EVINGER,

Defendants.

Civil Action No. 1:20-cv-00658

CHAIN BRIDGE BANK, N.A.,

Third-Party Plaintiff,

v.

JPMORGAN CHASE BANK, N.A.,

Third-Party Defendant.

**DEFENDANTS' RESPONSE TO BLUE FLAME MEDICAL LLC'S
MOTION FOR LEAVE TO FILE SUPPLEMENTAL AUTHORITIES**

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& UNTEREINER LLP**

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August 12, 2021

Defendants Chain Bridge Bank, N.A. (Chain Bridge), John J. Brough, and David M. Evinger submit this memorandum in response to the Motion for Leave to File Supplemental Authorities (Dkt. No. 170) filed by Plaintiff Blue Flame Medical LLC (Blue Flame).

Blue Flame styles its motion as a request to submit supplemental authorities, but the document is in substance a post-argument sur-reply that implores the Court to consider Henry Huang's eleventh-hour declaration. As an initial matter, Blue Flame's timing is improper. The cases Blue Flame attaches are not actually "recent district court decisions" (Dkt. No. 171 (Memo.), at 3); rather, each of them was decided well before the close of summary judgment briefing. And although Blue Flame insists (Memo. 2) that its submission is necessary to respond to arguments pressed by Defendants at the July 28, 2021 hearing, Defendants made these same arguments in their reply brief filed on May 27, 2021. *See* Dkt. No. 155, at 5-7. If Blue Flame had thought further argument was warranted, it should have sought leave to file a sur-reply promptly thereafter (and before the hearing).

That said, Defendants do not oppose the Court's consideration of these cases. None of them, however, supports Plaintiff's assertion that the Huang declaration is cognizable evidence at the Rule 56 stage, much less does the declaration save Blue Flame's meritless claims from summary judgment.

1. Basic fairness precludes consideration of evidence from a witness, like Huang, who has refused to be deposed. *See* Dkt. No. 155, at 5-6. Huang accepted service of Defendants' deposition subpoena in December 2020, but declined to appear, citing restrictions imposed by Chinese law. *See* Dkt. No. 157-2 (Defs.' Ex. 114).¹ Towards the close of discovery, Defendants learned that

¹ At the hearing on the parties' summary judgment motions, Blue Flame's counsel incorrectly asserted that Huang was "never served with a, with a subpoena of any kind" and that Defendants "attempted to locate him and then abandoned their effort to communicate with him further."

Huang had been in contact with Blue Flame’s John Thomas—his “very good friend[,]” Dkt. No. 157-3 (Defs.’ Ex. 115), at 214—and was considering traveling outside of China to give deposition testimony at Blue Flame’s request, Dkt. No. 157-2 (Defs.’ Ex. 114), at 3. Defendants then asked to be included in any discussions regarding Huang’s deposition, pursuant to Defendants’ outstanding deposition subpoena, but Huang advised that he was “currently still in China and will be for the near future.” *Id.* at 1. Defendants heard nothing further from Huang until well after the close of discovery, when Blue Flame unveiled Huang’s made-for-summary-judgment declaration. Under these circumstances, it would be profoundly inequitable to consider Huang’s declaration. That is particularly so given Huang’s evident partisanship, and the fertile grounds for cross-examination had Defendants been able to depose him. *See, e.g.*, Dkt. No. 131-18 (Defs.’ Ex. 83) (Huang’s contemporaneous email to Blue Flame explaining that such a large order would be “impossible to fulfill”). Permitting Huang to “give unchallenged affidavit testimony . . . would clearly violate the purpose of discovery.” *McKellar v. State Farm Fire & Cas. Co.*, No. 14-cv-13730, 2016 WL 304759, at *8 (E.D. Mich. Jan. 26, 2016).

Blue Flame’s belatedly identified cases do not undermine that conclusion. In the first case, the district court denied a motion to strike summary judgment declarations submitted by China-based witnesses, but the court did not consider an argument that the declaration was improper because the declarants had refused to be deposed. *See Zhizheng Wang v. Hull*, No. C18-1220RSL, 2020 WL 3315990, at *2-4 (W.D. Wash. June 18, 2020), *reconsideration denied*, 2020 WL 8839776 (W.D. Wash. July 6, 2020). Instead, the court considered (and rejected) arguments that the declarations were improper because they had been executed in violation of Chinese law (*id.* at

7/28/2021 Tr. 18. In fact, Huang agreed to accept service of Defendants’ deposition subpoena. Dkt. No. 157-2 (Defs.’ Ex. 114), at 4-6.

*2-3) and because the declarants stated that they did not intend to submit to the court's jurisdiction (*id.* at *3-4). In a subsequent decision, the district court made clear that the plaintiff would "not be permitted to refuse to be deposed while offering his declarations as evidence when it suits him." *Zhizheng Wang v. Hull*, No. C18-1220RSL, 2020 WL 4734930, at *2 (W.D. Wash. June 22, 2020). The court therefore granted a motion to compel the plaintiff's deposition and stayed the case until the deposition could take place. *Id.* Here, Blue Flame does not seek such relief. Rather, Blue Flame wants to overcome summary judgment by relying on Huang's unchallenged declaration. The *Zhizheng Wang* decisions offer no authority for that result.

Blue Flame's two other cases are even further afield. Both *Squires v. Toyota Motor Corp.*, No. 4:18-CV-00138, 2021 WL 1837540 (E.D. Tex. May 7, 2021), and *Jacobs v. Floorco Enterprises, LLC*, No. 3:17-CV-90-RGJ-CHL, 2020 WL 1290607 (W.D. Ky. Mar. 18, 2020), addressed highly context-specific disputes about whether witnesses located abroad would be required to travel to be deposed. In *Squires*, the court declined to order immediate depositions of witnesses located in Japan, because of the public-health conditions that prevailed at the time and the possibility that the plaintiffs could explore the same information through other sources. 2021 WL 1837540, at *4-5. And in *Jacobs*, the court *granted* a motion to compel the deposition of a witness located in China, but decided not to "impose a deadline" for the deposition. 2020 WL 1290607, at *16. Neither decision remotely suggests that a party can overcome summary judgment by submitting an unchallenged declaration from a witness who has refused to be deposed. Nor do these decisions suggest that Huang's refusal to be deposed was anything other than a choice, based on (as Huang's declaration tells it) the quarantine restrictions that Huang would have encountered upon returning to China. *See* Dkt. No. 155, at 6. To the contrary, as another district court in the Fourth Circuit recently observed, the "travel restrictions in mainland China related to the COVID-

19 pandemic” are “inconveniences,” but they are “not impossibilities.” *Estate of Boyles v. Gree USA, Inc.*, No. 1:20-CV-276, 2021 WL 3292727, at *7 (M.D.N.C. Aug. 2, 2021). Blue Flame’s assertion (Memo. 3) that Huang “could not comply” with Defendants’ deposition subpoena is not correct.

Blue Flame’s effort (Memo. 4 n.2) to distinguish the cases cited in Defendants’ summary-judgment reply is likewise unavailing. There is no logical distinction between a declarant who has “intentionally avoided formal service” or “failed to appear at a scheduled deposition” (*id.*) and one like Huang, who accepted service but then simply refused to be deposed. Nor is there any requirement that the absent declarant be formally controlled by the party seeking to offer his declaration. In *Henry v. Outback Steakhouse of Florida, LLC*, No. 15-cv-10755, 2017 WL 1382292 (E.D. Mich. Apr. 18, 2017), for example, the court observed that the plaintiff “had some control” over the non-party witnesses whose declarations he sought to offer, and it held that “where one party has been in continued contact with non-party affiants but the other party has been denied the ability to question their statements, . . . the affidavits should be stricken.” *Id.* at *2. That is precisely what occurred here. Finally, Blue Flame’s speculation that Huang might one day make himself available to testify makes no difference. There is no telling when the Chinese government might loosen its quarantine restrictions or when Huang’s responsibilities might change in a way that would lead him to choose to leave China and submit to cross-examination. *See* Dkt. No. 155, at 6 n.8.

2. Huang’s declaration is not cognizable at summary judgment for the independent reason that it does not “set out *facts* that would be admissible in evidence.” Fed. R. Civ. P. 56(c)(4) (emphasis added); *see* Dkt. No. 155, at 7. “[S]ummary judgment affidavits cannot be conclusory,” *Evans v. Technologies Applications & Serv. Co.*, 80 F.3d 954, 962 (4th Cir. 1996), and Blue

Flame's strained efforts to portray Huang's declaration as sufficiently substantive are unpersuasive. Blue Flame cites (Memo. 2 n.1) Huang's general descriptions of market conditions in China, his fleeting reference to "actual production lines," and his supposition that his outfit might have used a large prepaid purchasing commitment to secure supply for California. But what is conspicuously absent from Huang's declaration is *any* concrete explanation of how he could have secured 100 million N95 masks—there is no information at all on sources of supply, or any plans for the massive increase in production that would have been required to fill California's order. *See* Dkt. No. 155, at 7.

The sole case Blue Flame cites on this point, *Redmond v. Yachting Solutions, LLC*, 435 F. Supp. 3d 257 (D. Me. 2019), does not help Blue Flame. There, the court held that a declarant was competent to offer estimates of the time that would be required to complete certain tasks, based on his own experience completing those tasks as an employee. *See id.* at 261. Here, by contrast, Huang does not assert that he ever delivered a single N95 mask to anyone. Huang's unsupported assertions that he could have provided *100 million* masks in short order are not entitled to any weight.²

3. In any event, even if Huang's declaration were cognizable it would still do nothing to rescue Blue Flame from summary judgment for failure of proof of causation and damages. As we have explained, Blue Flame's damages case fails—even before considering Blue Flame's inability to fulfill California's order—because California exercised an unfettered right to terminate the

² The principle that "summary judgment affidavits cannot be conclusory," *Evans*, 80 F.3d at 962, is not a mere drafting rule, as Blue Flame appears to suggest. *See* Memo. 2 n.1. A declarant's unsupported and conclusory assertions are not transformed into admissible evidence simply because they are not prefaced with the phrase "I believe" or "in my opinion." Rather, the declarant must offer some "*objective* corroboration," *Evans*, 80 F.3d at 962 (emphasis added), which is wholly lacking here.

transaction as soon as it learned the true facts about Blue Flame that its principals had concealed. All of that happened well before there was any conceivable basis for Blue Flame to insist that California's funds had to be released. *See* Dkt. No. 119, at 22-24; Dkt. No. 140, at 22-23; Dkt. No. 155, at 1-2.³ Because any injury Blue Flame suffered was a result of California's decision not to proceed, Blue Flame cannot demonstrate "damages resulting from [Chain Bridge's] refusal to pay." UCC § 4A-404(a). Thus, the Court may resolve the issues of causation and damages in Defendants' favor on that independent ground without reaching the question of Blue Flame's inability to perform.

Date: August 12, 2021

Respectfully submitted,

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³ As a new customer, Blue Flame was subject to Chain Bridge's Funds Availability Disclosure providing that "[f]unds from wire[] transfers . . . will be available on the first business day *after* the day of your deposit." Dkt. No. 157-1 (Defs.' Ex. 113), at 2610 (emphasis added). Here, that was March 27, 2020—the day after California and JPMorgan cancelled California's wire transfer.

CERTIFICATE OF SERVICE

I hereby certify that on August 12, 2021, I will electronically file the foregoing with the Clerk of Court using the CM/ECF system, which will then send a notification of such filing to the following:

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