

Alexandria Division

Third-Party Defendant.

The Honorable Leonie Brinkema

MOTION FOR LEAVE TO FILE SUPPLEMENTAL AUTHORITIES

¹ Capitalized terms not defined herein shall have the meanings assigned to them in Plaintiff's Memorandum of Law in Support of its Motion for Leave to File Supplemental Authorities (ECF No. 171).

and Blue Flame's damages claim, in general. The Court should reject Defendants' distorted interpretations of the supplemental authorities identified in the Motion and, consistent with those authorities, consider the Huang Declaration in connection with the parties' pending motions for summary judgment.

Defendants' attempt to distinguish the four District Court decisions attached to Blue Flame's Motion falls flat. Defendants urge that the court in *Zhizheng Wang v. Hull* "did not consider an argument that the declaration was improper because the declarants had refused to be deposed" (Response at 2), but then immediately reveal the opposite to be true by quoting (*id.* at 3) the court's statement that the plaintiff would "not be permitted to refuse to be deposed while offering his declarations as evidence when it suits him." No. C18-1220, 2020 WL 4734930, at *2 (W.D. Wash. June 22, 2020). Clearly, the court was sensitive to the fact that the declarants had not been deposed when it considered their declarations on summary judgment and denied the motion to strike them. *See* No. C18-1220, 2020 WL 3315990, at *1-4 (W.D. Wash. June 18, 2020), *reconsideration denied*, 2020 WL 8839776 (W.D. Wash. July 6, 2020).

Defendants also insist that neither *Squires v. Toyota Motor Corp.*, No. 4:18-CV-00138, 2021 WL 1837540 (E.D. Tex. May 7, 2021), nor *Jacobs v. Floorco Enters., LLC*, No. 3:17-CV-90, 2020 WL 1290607 (W.D. Ky. Mar. 18, 2020), "suggest[s] that Huang's refusal to be deposed was anything other than a choice" Response at 3. By casting Huang's inability to sit for a deposition as a "choice," Defendants attempt to substitute their own apparent risk appetite for that of a non-party fact witness confronting Chinese law, a global pandemic, and the most stringent international travel restrictions in living memory. Both decisions plainly support that witnesses in Huang's position should not be forced to travel to another country to sit for a deposition even if they could make a "choice" to do so. *See Squires v. Toyota Motor Corp.*, 2021 WL 1837540, at

*4 (“Deponents will have to travel to either a non-U.S. country or Hawaii” and “will then have to travel back to Japan following conclusion of the depositions”; refusing to compel non-party fact witnesses to travel internationally for remote depositions); *Jacobs v. Floorco Enters., LLC*, 2020 WL 1290607, at *16 (citing “the current restrictions imposed by the United States and other countries on travel in light of COVID-19” as a reason for not imposing deadline as to when witness must appear for deposition).²

As at the Hearing, Defendants argue in their Response that “[b]asic fairness precludes consideration” of the Huang Declaration. Response at 1. But Defendants continue to ignore that Rule 56 of the Federal Rules of Civil Procedure expressly contemplates the use of declarations to support or oppose summary judgment motions, and does not require that a declarant be deposed in order to submit a declaration. *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 that “Plaintiff’s submission of [declarations] in lieu of [a deposition] was improper” because “[n]othing in the Federal Rules of Civil Procedure requires Plaintiff to depose [declarant]”). Moreover, the facts on which Defendants’ fairness argument relies demonstrate nothing more than Huang’s inability to be deposed—by either party. *See* Response at 2 (“Huang advised that he was ‘currently still in China and will be for the near future.’”). Nothing prevented Defendants from seeking a declaration from Huang as Blue Flame did. Their failure to do so does not result in any unfairness.

Recognizing that neither the law nor the facts support their fairness argument, Defendants again attack the substance of the Huang Declaration in their Response. They suggest that Huang’s

² *Estate of Boyles v. Gree USA, Inc.*, No. 1:20-CV-276, 2021 WL 3292727 (M.D.N.C. Aug. 2, 2021), cited in Defendants’ Response, involved circumstances far different than those presented here. *See* Response at 4. There, the court granted a motion for sanctions against three Chinese corporate defendants that failed to make witnesses available for 30(b)(6) depositions despite three discovery extensions and multiple court orders to appear for the depositions. *Id.* at *2-5.

statement that GHC could have supplied the N95 masks for California's order—as Huang had agreed GHC would do at the time Blue Flame entered its contract with California—is contradicted by a “contemporaneous” email he sent to Blue Flame. *See* Response at 2. However, the cited email (ECF No. 131-18 (Defs.' Ex. 83)), was not “contemporaneous” with GHC's agreement to supply the masks for California's order. Rather, it was sent on April 7, 2020, twelve days after Defendants thwarted Blue Flame's transaction with California, which prevented Blue Flame from making its contractual up-front payment to GHC. Twelve days was an eternity in the extremely volatile N95 mask market of Spring 2020,³ and more than enough time for other buyers to claim the production capacity GHC had planned to obtain with California's prepayment. As Huang explains in his declaration, not only had market conditions changed since March 26, but GHC's market standing had been damaged by its inability to fulfill the commitments it had made to mask manufacturers for California's order—a direct result of Defendants' tortious interference and illegal return of California's prepayment. Huang Decl. at ¶ 38. Indeed, Huang's email shows that by April 7 Blue Flame had been relegated to the spot market, which did not have the capacity to reliably supply very large orders. *See* ECF No. 131-18 (“Ordering on demand will be a big unpredictable challenge for the n95s as the only way to ensure securing timely inventory is locking down dedicated daily production capacity”). Thus, Huang's April 7 email addresses a world that was already much different than it would have been absent Defendants' wrongful actions.

Defendants also attack Blue Flame's damages claim with the same circular causation argument advanced in their summary judgment briefing and at the Hearing: that because California chose not proceed with the transaction after Defendants interfered, California would

³ The volatility in the N95 mask market in Spring 2020 is undisputed and, in any event, supported by a wealth of record evidence, including Huang's April 7 email. *See, e.g.*, ECF No. 150-33 (Pls.' Ex. 117) (Expert report of Marc A. Prisament).

have chosen not to proceed even if Defendants had not interfered. *See* Response at 5-6. Simply put, California's possession of a right to terminate its contract with Blue Flame does not absolve Defendants of their responsibility for causing California to terminate the contract. In any event, California never invoked that contractual right, which would have required a Department of General Services official to "deliver[] to [Blue Flame] a Notice of Termination specifying the extent of termination and the effective date thereof." ECF No. 131-14 (Defs.' Ex. 79) at § 23. It is undisputed that Blue Flame never received such a notice from California. Given that California did not invoke the termination for convenience provision even after Defendants interfered, there is absolutely no basis to think the State would have done so if Defendants had *not* interfered. After all, it is undisputed that California did not express any discomfort with the transaction after sending its prepayment and before being contacted by Defendants. *See* ECF No. 149 at 13-14; ECF No. 159 at 19. The record could not be clearer that the actions Defendants took in response to receiving California's prepayment caused California to abandon its transaction with Blue Flame.⁴ *See, e.g.*, ECF No. 149 at 12-13; ECF No. 150-8 (Pls.' Ex. 92) at 132:9-133:1, 133:17-21, 135:10-20.

For the foregoing reasons, the Court should grant Blue Flame's Motion for Leave to File Supplemental Authorities.

⁴ Defendants' full-court press against the Huang Declaration and Blue Flame's damages claim, in general, distracts from the fact that Blue Flame's damages are not an all-or-nothing proposition. Even if a jury found that Blue Flame would have delivered only some of the masks California had ordered (despite its suppliers' commitments to provide enough masks for the entire order), Blue Flame still would be entitled to damages in the amount of the lost profit from any partial performance. Similarly, even if there were delays in Blue Flame's delivery of the masks California purchased, California's dealings with its eventual N95 mask supplier, a Chinese company called BYD, suggest that the State would have granted Blue Flame more time to perform rather than terminate the contract. *See* ECF No. 150-33 (Pls.' Ex. 117) at ¶ 22. Because there is ample evidence in the record that Blue Flame would have delivered some number masks to California, Defendants fail to sustain their burden on summary judgment to show that Blue Flame cannot prove any damages.

Dated : Washington, D.C.
August 16, 2021

Respectfully submitted,

/s/ Peter H. White

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CERTIFICATE OF SERVICE

I hereby certify that on this 16th 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 16, 2021

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