IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TENNESSEE
WESTERN DIVISION

JEFFREY HOUK, et al.,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	03 CV 2487 Ma/P
	)	
THOMAS & BETTS, CORP.,	)	
	)	
Defendant.	)	
	)	

ORDER DENYING PLAINTIFFS' MOTION FOR TELEPHONE DEPOSITIONS

Before the Court is Plaintiffs' Motion for Telephone Depositions, filed on June 14, 2004 (docket entry 22). On June 16, 2004, Defendant filed its response to this motion. The motion was referred to the United States Magistrate Judge for determination. On June 16, 2004, a hearing was held with Plaintiffs' counsel present via telephone and Defendant's counsel appearing in person. For the reasons stated below, Plaintiffs' motion is DENIED.

I. BACKGROUND

This case arises out of a patent licensing agreement between the parties. In 1998, Plaintiffs and Defendant entered an agreement granting Defendant exclusive license and right to make, use, and sell the laterally expandable modular electrical boxes for which Plaintiffs held the patent. In the agreement, Plaintiffs

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were to be paid royalties in a minimum annual amount of $80,000. The agreement gave Defendant the right to terminate the agreement if Defendant had not, for any reason except for its own gross negligence, obtained a listing from Underwriters Laboratories within three years after the date of the agreement. Plaintiffs contend that Defendant attempted to terminate this agreement in 2001 without any valid basis.

In their complaint, Plaintiffs assert several claims. Plaintiffs allege that Defendant breached the agreement by failing to pay royalties to Plaintiffs. Plaintiffs assert that Defendant has been unjustly enriched by preventing Plaintiffs from entering a licensing agreement with another company. Plaintiffs also claim that Defendant was grossly negligent in not attempting to obtain a listing from Underwriters Laboratories. Finally, Plaintiffs contend that Defendant breached its duty of good faith and fair dealing. Accordingly, Plaintiffs seek $1,300,000 in damages.

The matter presently before the Court is a discovery dispute concerning the depositions of the Plaintiffs in this case. On June 3, 2004, Defendant served notices to take the depositions of Plaintiffs David Groene, Michael Groene, Jeffrey Houk, and Michael Simmons on June 17, 2004. These depositions were to take place at the law firm of Defendant's counsel in Memphis, Tennessee. Plaintiffs Michael Groene, David Groene, and Houk reside in Virginia. Plaintiff Simmons resides in Florida. On June 14, 2004,

Plaintiffs' attorney filed a motion requesting an order that these depositions be taken by telephone.

Plaintiffs contend that it would be a hardship to come to Memphis to be deposed. Plaintiffs also suggest that depositions can easily be taken by telephone with a stenographer present at the location of the Plaintiffs for the same cost as a deposition taken by a stenographer in Memphis. Plaintiffs assert that because this case does not involve large numbers of documents, Defendant could reasonably ask Plaintiffs questions regarding any documents over the phone.

Defendant does not dispute that telephone depositions are appropriate under certain circumstances. However, because the depositions sought are of named Plaintiffs - rather than non-party witnesses - Defendant argues telephone depositions are inappropriate. Defendant contends that Plaintiffs should give their deposition in the district in which they have chosen to litigate. In the contract from which their claims stem, Plaintiffs agreed that any litigation resulting from the contract would take place in this forum. They also agreed not to challenge the convenience of this forum. Additionally, Defendant claims that a large number of documents relevant to this case would make telephone depositions ineffective and inefficient. Defendant further argues that its inability to depose the Plaintiffs face-to-face, and thus assess their demeanor and credibility, would

prejudice its side. Finally, Defendant contends that Plaintiffs have not shown the hardship necessary to warrant a court order for telephone depositions.

II. ANALYSIS

Federal Rule of Civil Procedure 30(b)(7) permits the use of telephone depositions. This rule provides:

> The parties may stipulate in writing or the court may upon motion order that a deposition be taken by telephone or other remote electronic means. For the purposes of this rule and Rules 28(a), 37(a)(1), and 37(b)(1), a deposition taken by such means is taken in the district and at the place where the deponent is to answer questions.

Fed.R.Civ.P. 30(b)(7). The courts have adopted a variety of approaches and tests to decide when to require telephone depositions. For example, one court suggests that Rule 30(b)(7) should be construed in conjunction with subsection (b)(4), which together serve the purpose of reducing litigation costs by providing alternatives to traditional stenographic depositions. See Jahr v. IU Int'l Corp., 109 F.R.D. 429, 431 (M.D.N.C. 1986). Several courts have adopted the Jahr approach, and hold that telephone depositions should be permitted in most cases, particularly where the deponent is a non-party. See, e.g., Advani Enters., Inc. v. Underwriters at Lloyds, No. 95 Civ. 4864(CSH), 2000 WL 1568255, at *2 (S.D.N.Y. Oct. 19, 2000)(granting plaintiff's motion to depose two non-party witnesses residing in Egypt by telephone); Cressler v. Neuenschwander, 170 F.R.D. 20, 21

(D. Kan. 1996)(permitting plaintiff to depose non-party doctors by telephone to reduce the costs of taking the depositions); Fireman's Fund Ins. Co. v. Zoufaly, No. 93 Civ. 1890(SWK), 1994 WL 583173, at *1 (S.D.N.Y. Oct. 21, 1994)(allowing plaintiff to depose a non-party witness residing in California by telephone).

Other courts have found situations where telephone depositions are inappropriate. See, e.g., Epling v. UCB Films, Inc., Nos. 98-4226-RDR, 98-4227-RDR, 00-4062-RDR, 2001 WL 584355, at *10 (D. Kan. April 2, 2001)(affirming magistrate judge's order that depositions of two non-party witnesses should not be taken by telephone because of the complexity of the case and the number of documents requested by the plaintiff); Mercado v. Transoceanic Cable Ship Co., Inc., CIV A. No. 88-5335, 1989 WL 83596, at *1 (E.D. Pa. July 25, 1989)(denying defendant's motion to depose his own witness by telephone because highly relevant diagrams and photographs would be discussed in the deposition and thus would create a likelihood of prejudice and confusion).

Regarding the present issue before the Court, a survey of the case law reveals no consensus among the courts on the application of Rule 30(b)(7) when the person being deposed is a party.[1] Compare Clem v. Allied Van Lines Int'l Corp., 102 F.R.D. 938, 940 (S.D. N.Y. 1984)(finding that plaintiff's showing of hardship does

[1]The parties have not cited, and this Court has not found, any reported case factually on point with the present case.

not overcome presumption that the plaintiff should appear for deposition in his chosen forum in denying plaintiff's motion that his deposition be taken by telephone), with Jahr v. IU Int'l Corp., 109 F.R.D. 429, 431 (M.D.N.C. 1986) and Rehau, Inc. v. Colortech, Inc., 145 F.R.D. 444, 446 (S.D.N.Y. 1993)(following the Jahr approach that Rule 30(b)(7) should be construed liberally in granting plaintiff's motion that depositions of corporate officials be taken by telephone).

In Clem, the Court held that "absent extreme hardship, the plaintiff should appear for deposition in his chosen forum." Clem, 102 F.R.D. at 940; see also U.S. v. Rock Springs Vista Dev., 185 F.R.D. 603, 604 (D. Nev. 1999)(denying intervening plaintiffs motion to have their depositions taken by telephone and distinguishing Jahr on the grounds that it dealt with a non-party witness, not a plaintiff seeking damages from the litigation); Daly v. Delta Airlines, No. 90 Civ. 5700(MEL), 1991 WL 33392, at *2 (S.D.N.Y. March 7, 1991)(denying plaintiff's motion for telephone deposition with plaintiff making no showing of substantial hardship).

In Jahr, the defendants, relying on Clem, argued that the plaintiffs must show extraordinary circumstances to take a telephone deposition of a non-party witness. Jahr, 109 F.R.D. at 429. The Court rejected the defendants' argument and offered an alternative interpretation of Rule 30(b)(7). Id. ("Nothing in the

language of Rule 30(b)(7) requires that a telephonic deposition may only be taken upon a showing of necessity, financial inability, or other hardship. Nor do the Advisory Committee Notes give any reason to imply such restrictions were intended as conditions for issuing an order to conduct telephonic depositions.") The Jahr Court believed this rule was intended to reduce the costs and inefficiencies of federal litigation, by encouraging courts to be more amenable to non-traditional methods for conducting depositions, such as by telephone. Id. at 431. Thus, upon giving a legitimate reason for taking a deposition telephonically, the movant need not further show an extraordinary need for taking the deposition by telephone. Id. Rather, the burden is on the opposing party to establish why the deposition should not be conducted telephonically. Id.; see also Normande v. Grippo, No. 01 CIV 7441(JSR)(THK), 2002 WL 59427 (S.D.N.Y. Jan. 16, 2002)(recognizing a growing trend in the case law that telephone depositions are a presumptively valid means of discovery); Anguile v. Gerhart, Civ. A. No. 93-934(HLS), 1993 WL 414665 (D.N.J. Oct. 7, 1993)(viewing Clem as an anomaly in the line of cases addressing Rule 30(b)(7)); Rehau, 145 F.R.D. at 446 (finding the Jahr interpretation of Rule 30(b)(7) consistent with Rule 1, which states that the Federal Rules of Civil Procedure shall be "construed to secure the just, speedy, and inexpensive determination of every action").

Thus, under Clem, the burden is placed on the party-deponent to establish such a level of extreme hardship that the court should not require him to appear in the forum for his deposition. Under Jahr, the burden is placed on the deposing party to prove a high degree of prejudice which overcomes the presumptive validity of telephone depositions. This Court concludes, however, that neither of these contrasting approaches is entirely suitable in this case. Instead, the Court believes it must balance the hardship and prejudice to all parties. See Normande, 2002 WL 59427, at *1 (citing Fed.R.Civ.P. 1)("Rather, courts must strive to achieve a balance between claims of prejudice and those of hardship, always guided by the proposition that the Federal Rules of Civil Procedure 'shall be administered to secure the just, speedy, and inexpensive determination of every action'"); Mercado, 1989 WL 83596, at *1 ("Where a real potential for prejudice can be shown, however, the court must balance the likelihood, nature, and extent of such prejudice against the issues involved in the litigation and the inconvenience and cost of using alternative, more traditional methods of discovery").

The factors this Court considers in balancing the hardship and prejudice to the parties include, but are not limited to, financial hardship, the choice of the forum, the cost savings of a telephone deposition relative to the amount in controversy, whether the deponent is a party or non-party, the location of counsel, the

complexity of the case, the difficulties in taking telephone depositions due to the use of exhibits, and any difficulties in traveling to the forum (such as medical reasons).

In this case, two factors demonstrate hardship upon the party-deponents. Plaintiffs indicate lost pay from missing work and expenses incurred in travel will create a substantial financial hardship, although it is not clear from their affidavits the extent of their harm.[2] Additionally, for Plaintiffs Michael Groene, David Groene, and Houk, a telephone deposition should not pose significant difficulties because their depositions will likely involve only a few exhibits.[3]

The other factors, however, weigh more heavily toward hardship and prejudice being imposed on Defendant. The persons being deposed in this case are named Plaintiffs. Additionally, these Plaintiffs specifically selected this forum by agreeing to the terms of the patent licensing agreement. Plaintiffs' counsel is

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[2]The Court notes that even a telephone deposition would probably require the Plaintiffs to miss work. Additionally, Defendant's counsel has stated to the Court that he is willing to accommodate Plaintiffs' work schedules by scheduling the depositions on a Sunday.

[3]The Court understands from Plaintiffs' counsel that these three Plaintiffs were investors, while Plaintiff Simmons was the inventor of the electrical box. Thus, in deposition, they would likely only be questioned regarding the patent licensing agreement. Plaintiffs' counsel stated at the hearing on the motion that Simmons should be deposed in person in Memphis, since his deposition will involve the use of several complex diagrams and exhibits.

located in Memphis. The costs saved by using telephone depositions are relatively insubstantial compared to the $1,300,000 amount in controversy. Finally, Plaintiffs have no medical reasons or exceptional circumstances keeping them from traveling to this forum for depositions.

On balance, the Court finds that the hardship and prejudice to Defendant outweighs the minimal hardship demonstrated by Plaintiffs. Thus, the Court concludes that using the telephone to depose Plaintiffs would not be appropriate in this case.

III. CONCLUSION

Accordingly, for the above reasons, Plaintiffs' motion for telephone depositions is DENIED.

IT IS SO ORDERED.

TU M. PHAM
United States Magistrate Judge

7/3/04
Date

UNITED STATES DISTRICT COURT - WESTERN DISTRICT OF TENNESSEE

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This notice confirms a copy of the document docketed as number 28 in case 2:03-CV-02487 was distributed by fax, mail, or direct printing on July 7, 2004 to the parties listed.

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