IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

XIN WANG, *Plaintiff,* v. INJECTIVE LABS INC. and ZHONGHAN "ERIC" CHEN, *Defendants*.	§ § § § § § § § § §	No. 22-943 **FILED UNDER SEAL**

MEMORANDUM OPINION AND ORDER

The deadline for fact discovery in this case was October 11, 2024. Shortly after the deadline passed, plaintiff Xin Wang moved to extend the discovery deadline by 30 days so that Mr. Wang could depose defendant Zhonghan "Eric" Chen in his individual capacity under Federal Rule of Civil Procedure 30(b)(1). Dkt. No. 92. In the same filing, Mr. Wang asked that I impose sanctions on Injective Labs Inc. ("Injective") and Mr. Chen based on Mr. Chen's alleged failure to prepare for his deposition as Injective's corporate representative under Federal Rule of Civil Procedure 30(b)(6). *Id.*; Dkt. No. 92-1. Injective and Mr. Chen have filed oppositions to Mr. Wang's motion to extend the discovery deadline, Dkt. No. 94, and to Mr. Wang's motion for sanctions, Dkt. No. 101. Mr. Wang has filed a reply memorandum in support of his motion to extend the time for discovery. Dkt. No. 95. Injective and Mr. Chen have filed a motion for leave to file a surreply in opposition to Mr. Wang's motion for an extension of the time for discovery, and have attached a proposed surreply to that motion. Dkt. No. 96. Wang has filed a reply memorandum in support of his motion for sanctions. Dkt. No. 104.

As if all that were not enough, Injective and Mr. Chen have filed a motion to continue the deposition of Mr. Wang and to impose sanctions on Mr. Wang. Dkt. No. 102. That motion will be dealt with in a separate order after the briefing on that motion is complete.

For the reasons set forth below, Mr. Wang's motion to extend the time for discovery and to impose sanctions on the defendants is DENIED. Although I find Injective's surreply unnecessary to the resolution of the issues raised by Mr. Wang's motion, Injective's motion to file a surreply is GRANTED in the interest of a complete record on which to base this opinion.

1. This action was filed on July 18, 2022. The court's scheduling order provided that all fact discovery in the case was to be completed on or before July 11, 2023. Dkt. No. 19 at 2. Pursuant to stipulations between the parties, the deadline for fact discovery was extended on several occasions. On July 11, 2023, the deadline was extended until November 20, 2023. Dkt. No. 50. On October 24, 2023, the deadline was extended until March 15, 2024. Dkt. No. 57. On January 31, 2024, the deadline was extended until June 14, 2024. Dkt. No. 60. And on June 17, 2024, the deadline was extended to October 11, 2024. Dkt. No. 84. No further requests for extension of the discovery deadline were submitted prior to the October 11, 2024, deadline.

On September 10, 2024, Injective noticed the deposition of Mr. Wang. Dkt. No. 86. On October 1, 2024, Mr. Wang noticed the deposition of Injective pursuant to Rule 30(b)(6). Dkt. No. 87. No other depositions were noticed prior to the expiration of the period for discovery.

The Rule 30(b)(6) deposition notice for Injective included a list of topics for examination. The notice listed 27 topics, eight of which contained sub-topics. Dkt. No. 87. Many of the topics and sub-topics were exceedingly broad. *E.g.*, *id.* at Topic 26 ("All DOCUMENTS provided by DEFENDANTS to PLAINTIFF."). On October 2, 2024, Injective served objections to the notice. Dkt. No. 88.

On October 10, 2024, the day before the discovery cutoff deadline, counsel for Mr. Wang took the deposition of Mr. Chen, who testified as Injective's Rule 30(b)(6) corporate representative. That evening, counsel for Mr. Wang mentioned the prospect of deposing Mr. Chen in his personal capacity. *See* Dkt. No. 94-9 at 6. The following day—i.e., the cutoff deadline for fact discovery—counsel for Mr. Wang emailed counsel for Mr. Chen, asking when Mr. Chen's counsel would be "available for Eric Chen's depo." *Id.* at 7. On October 15, 2024, counsel for Mr. Wang requested by email that counsel for Mr. Chen "respond with proposed dates for Eric Chen's 30(b)(1) depo." *Id.* at 6. Counsel for Mr. Chen responded that the request to depose Mr. Chen was untimely and that the defendants would not agree to another extension of the discovery deadline. *Id*. Mr. Wang did not at that point notice a deposition of Mr. Chen. Rather, on October 21, 2024, he filed the present motion seeking an additional thirty days of discovery. Dkt. No. 92.

Mr. Wang argues his "counsel repeatedly made clear the need to also schedule [Mr.] Chen's deposition . . . as a party witness under FRCP Rule 30(b)(1)." Dkt. No. 92-1 at 4. In Mr. Wang's view, "it was understood amongst counsel that a further extension of the October 11, 2024 discovery deadline would be necessary . . . [g]iven that Defendants did not produce their first witness until October 10, 2024." *Id*. Injective disagrees with that characterization, arguing that "[n]o such common understanding existed nor is it reflected in any contemporaneous communications between the parties . . . [n]or is there any golden rule that Rule 30(b)(6) depositions must occur before Rule 30(b)(1) depositions." Dkt. No. 94 at 2.

Rule 30(b)(1) states that "[a] party who wants to depose a person by oral questions must give reasonable written notice to every other party." The Rule further requires that "[t]he notice must state the time and place of the deposition and, if known, the deponent's name and address." Delaware Local Rule 5.4(b) instructs that a party requesting discovery, including requesting an oral deposition,

"shall file with the Court a 'Notice of Service.'" Regardless of any understanding between the parties that Mr. Wang thought existed, both the Federal Rules and the Delaware Local Rules make clear that Mr. Wang needed to serve a notice a deposition for Mr. Chen. Mr. Wang failed to do that prior to the close of discovery of October 11, 2024.

Instead, Mr. Wang has requested that the court modify the scheduling order to provide for an additional 30 days of discovery in which to take the deposition of Mr. Chen. To support a motion to modify a scheduling order, a party must meet the good cause standard of Federal Rule of Civil Procedure 16(b)(4). A "good cause standard under Rule 16(b) hinges on the diligence of the movant, and not on prejudice to the non-moving party." *Xcoal Energy & Res. v. Bluestone Energy Sales Corp.*, No. CV 18-819, 2020 WL 5369109, at *6 (D. Del. Sept. 8, 2020) (citing *Cornell Univ. v. Illumina, Inc.*, 2017 WL 89165, at *3 (D. Del. Jan. 10, 2017)).

Mr. Wang has not made a sufficient showing of diligence. As he admits, "the parties have consistently identified only three fact witnesses requiring depositions — Plaintiff Wang, Defendant Chen, and the [corporate] representative for Defendant Injective." Dkt. No. 92-1 at 4. Yet despite the very limited universe of potential deponents, Mr. Wang has never noticed the Rule 30(b)(1) deposition of Mr. Chen. Mr. Wang attempts to shift the blame for that failure to Injective, suggesting that Injective delayed making various document productions and scheduling the deposition of its corporate representative. But Injective points out that its document production was substantially complete by June 4, 2024. And in any event Mr. Wang does not explain why any delay in Injective's production of documents prevented him from noticing a deposition for Mr. Chen. Because Mr. Wang offers no explanation for his failure to notice a deposition during the discovery period, he has not made a showing of good cause. *See McGoveran v. Amazon Web Servs., Inc.*, No. 1:20-CV-01399, 2024 WL 4533598, at *4 (D. Del. Oct. 18, 2024) (refusing to reopen discovery when plaintiffs did

not notice the late requested depositions during fact discovery); *Kassa v. BP W. Coast Prod., LLC.*, No. C08-02725, 2010 WL 726791, at *2 (N.D. Cal. Mar. 1, 2010) (denying motion to reopen discovery to take additional depositions when "[t]here is no suggestion that the witnesses that plaintiffs wish to depose are new, or their knowledge of relevant evidence was unknown to plaintiffs until recently").

To the extent Mr. Wang believes his counsel's October 11, 2024, email asking about counsel's availability for a Rule 30(b)(1) deposition of Mr. Chen should be considered a notice of deposition, the court rejects any such suggestion. The email did not constitute notice within the meaning of the Federal Rules and Delaware Local Rules, as it did not "state the time and place of the deposition and, if known, the deponent's name and address"; it did not "state in the notice the method for recording the testimony"; and it was not filed with the court. *See* Fed. R. Civ. P. 30(b); Delaware Local Rule 5.4.

Moreover, counsel's October 11, 2024, email failed to provide the reasonable written notice required by Federal Rule of Civil Procedure 30(b)(1) because the email was sent on the last day of discovery. *See Sight Scis., Inc. v. Ivantis, Inc.*, No. CV 21-1317, 2023 WL 7458354, at *4 (D. Del. July 3, 2023) (finding a notice of deposition served two weeks before the fact discovery cutoff to be untimely). Under Delaware Local Rule 30.1, reasonable notice for taking of depositions is "not less than 10 days." Thus, Mr. Wang needed to serve the notice at least ten days before the close of discovery.

2. Mr. Wang's second request is for the court to impose sanctions on Injective for its failure to adequately prepare Mr. Chen to testify as Injective's corporate representative. Specifically, Mr. Wang asks for an award of costs and expenses associated with the deposition and for Injective to be prohibited from introducing testimony or evidence in further proceedings in this case regarding

the subject matter of Topic 4 and Topic 5 of the topics Mr. Wang designated for Injective's Rule 30(b)(6) deposition.

Mr. Wang identifies various points in the deposition at which Mr. Chen testified that he did not know or did not remember the answer to a question. Mr. Wang then asserts that those questions were directed to topics identified in his deposition notice, and that Mr. Chen therefore needed to be prepared to testify about them. Injective responds that it served objections to the deposition notice in which it narrowed certain topics for examination and offered to meet and confer regarding other topics, but that Mr. Wang ignored its request to meet and confer. The parties have not filed copies of those objections with the court, but notice of service of Injective's objections was docketed. Dkt. No. 88. Mr. Wang's counsel does not dispute Injective's assertion that counsel did not accept Injective's offer to meet and confer regarding the deposition topics.

Federal Rule of Civil Procedure 30(b)(6) instructs that the noticing party "must describe with reasonable particularity the matters for examination." The rule further instructs that the noticing party and the corporation "must confer in good faith about the matters for examination." That requirement was added to address the problem of "inadequately prepared witnesses" by requiring "[c]andid exchanges about the purposes of the deposition" to "enable the organization to designate and to prepare an appropriate witness or witnesses, thereby avoiding later disagreements." Advisory Committee Note to the 2020 amendment to Fed. R. Civ. P. 30(b)(6).

Many of Mr. Wang's topics failed to describe a matter for examination with reasonable particularity. For example, Topic 2 states "INJECTIVE'S COMMUNICATIONS . . ." and the notice defines "COMMUNCIATIONS" as "all oral or written communications, including any writings, emails, or other electronically stored information." Dkt. No. 87. As another example, Topic 7 states "COMMUNICATIONS between PLAINTIFF and INJECTIVE." Topic 9 states

"COMMUNICATIONS CONCERNING any matters at issue in the Complaint between ANY DEFENDANTS and . . . any third party with knowledge of information RELATING TO the facts and allegations in the COMPLAINT." Courts have repeatedly found that topics that broad do not comport with the reasonable particularity requirement of Federal Rule of Civil Procedure 30(b)(6). *See Booker v. P.A.M. Transp., Inc.*, No. 2:23-CV-18, 2024 WL 4444296, at *4–5 (D.N.M. Oct. 8, 2024); *Marti v. Schreiber/Cohen, LLC*, No. 4:18-CV-40164, 2020 WL 3412748, at *3 (D. Mass. Mar. 17, 2020) (collecting cases). Further, despite receiving objections and proposals for narrowing the topics from Injective, Mr. Wang did not engage in the meet and confer process with Injective to reach agreement as to the topics on which Mr. Chen was expected to testify.

Then, despite identifying broad topics for examination, counsel for Mr. Wang proceeded to ask narrow and targeted questions, testing Mr. Chen's memory. For example, Topic 1 states that the Rule 30(b)(6) witness should be prepared to address "INJECTIVE'S business record maintenance and retention policies and practices . . ." Dkt. No. 87. But counsel for Mr. Wang asked, "were the documents that constituted the communications between yourself and Molly, were those collected by these talented vendors and lawyers?" Dkt. No. 92-2 at 217:2–8. Mr. Chen responded, "Again, I do not remember the specifics of what was collected, as there are more than—you know, tens of thousands of records. But it was being done in a diligent process where all the data that could have been collected is collected." *Id.* at 217:8–13.

Given the breadth of that topic, Mr. Chen's inability to speak to the collection of specific documents is understandable. Had Mr. Wang specified the documents in which he was interested, Mr. Chen's inability to recall specifics may have been less excusable.

Additionally, I do not find Mr. Chen's testimony to be as deficient as Mr. Wang asserts. For example, Topic 4.c states "PLAINTIFF'S alleged attempt to resell INJ TOKENS during the

restricted and lockup specified in the SAFTs, which prohibited resale." Regarding that topic, Mr. Wang argues that Mr. Chen "claimed he could 'not remember' who conducted that investigation" into the resale of tokens and "testified that he did 'not remember' to who[m] this supposed investigation determined Mr. Wang may have sold his interest." Dkt. No. 92-1 at 9. But Mr. Chen identified Ms. Xinran as responsible for the investigation. Dkt. No. 92-2 at 197:3–16. And he identified "Xiamomai" and "Hunter" as individuals to whom Mr. Wang sold his interests. *Id.* at 199:14–19. Although Mr. Chen could not remember further details about that subject, his level of knowledge is understandable in view of the number of topics noticed and their broad nature, as explained above.

Rather than justify the breadth of his topics, Mr. Wang faults Injective for failing to seek a protective order regarding the objected-to topics prior to the deposition, citing Federal Rule of Civil Procedure 37(d)(2). Rule 37(d)(2) states that a "failure described in Rule 37(d)(1)(A) [i.e., a failure after having been served with proper notice to appear for a deposition] is not excused on the ground that the discovery sought was objectionable, unless the party failing to act has a pending motion for a protective order under Rule 26(c)." But Rule 37(d)(1)(A) addresses a failure to appear for a deposition, and Injective did not fail to produce a Rule 30(b)(6) witness, nor was Mr. Chen's level of preparation so inadequate as to render his testimony equivalent to a failure to appear for the deposition at all.[1]

[1] Mr. Wang contends that Mr. Chen's Rule 30(b)(6) testimony was so vacuous as to amount to a failure to appear. Examination of the deposition transcript shows that Mr. Wang's characterization of the testimony is overstated. Throughout the deposition, Mr. Chen responded substantively to many of the questions. *See generally* Dkt. No. 92-2. When he stated that he did not recall or did not know particular facts, he was often able to respond substantively to follow-up questions. *E.g.*, *id.* at 287:5–290:23. Finally, although Mr. Chen often stated that he would "defer to counsel" in response to questions that he regarded as raising legal, rather than factual, issues, Injective's counsel in response often stipulated to the answer or counsel for Mr. Wang clarified the

Mr. Wang is correct that courts have found that objecting to a topic does not excuse a party's obligation to produce a witness to testify regarding that topic, and that in that situation the party should move for a protective order rather than failing to produce the witness to be deposed. In this case, however, Injective was not required to seek a protective order when Mr. Wang failed to respond to Injective's objection to the scope of the deposition topics and its offer to meet and confer on that subject. Rule 26(c)(1) of the Federal Rules of Civil Procedure requires a party to confer with the opposing party in good faith, or attempt to confer, before seeking a protective order from the court. Similarly, Rule 30(b)(6) requires that the parties confer in good faith about the matters for examination either before or after the notice is served.

It is undisputed that Injective did not move a protective order regarding Mr. Wang's Rule 30(b)(6) notice. But Injective has represented, and Mr. Wang has not disputed, that Injective provided its objections and proposed narrowing of the topics to Mr. Wang's counsel with a request to meet and confer, and that Mr. Wang neither accepted nor explicitly rejected the request to negotiate over the scope of the topics. Under those circumstances, it was reasonable for Injective to believe that a protective order either was not necessary (if Mr. Wang was willing to accept Injective's proposal regarding narrowing the topics for the Rule 30(b)(6) deposition) or premature under at least Rule 26(c)(1) and Rule 30(b)(6) of the Federal Rules of Civil Procedure (given that the parties had not conferred about any disputes regarding the topics). The rules sensibly discourage parties from running to the court over every dispute during discovery. Instead, the parties are required to work in

question as seeking factual information, at which point Mr. Chen provided a substantive response. *E.g.*, *id.* at 29:19–30:12 (stipulation), 49:13–17 (same), 32:5–36:12 (substantive response to clarifying questions), 61:9–62:10 (same).

good faith to attempt to resolve disputes, or at least narrow and distill disputes, before raising them with the court.

To be sure, it would have been prudent for Injective to further engage with Mr. Wang's counsel when Injective did not hear back from counsel about Injective's proposed narrowing of the deposition topics. Doing so might have enabled Injective to determine whether there was a need to move for a protective order. But the blame does not fall principally on Injective's shoulders. If Mr. Wang was unsatisfied with Injective's proposed narrowing of the deposition topics, he had an obligation under Rule 30(b)(6) to confer with Injective and attempt to reach agreement. Given the sequence of events here, I decline to impose sanctions under Rule 37 based on Injective's failure to seek a protective order. *See ChriMar Sys. Inc. v. Cisco Sys. Inc*, 312 F.R.D. 560, 563 (N.D. Cal. 2016) (objecting party was not entirely at fault when "[t]here [was] no indication [that the noticing party] followed up on [the deponent's] meet and confer offer"); *cf. Mowell v. City of Milton, Georgia*, No. 1:18-CV-00605, 2018 WL 11670316, at *2 (N.D. Ga. Nov. 1, 2018) (explaining that *after* "discussions took place—and failed—the city, as the objecting party, had the choice to either seek a protective order or provide the requested testimony").

In short, based on the topics as noticed, the series of events prior to the deposition, and a review of the transcript, I do not find Mr. Chen's preparation in general, or with respect to Topics 4 and 5 in particular, was so inadequate as to warrant awarding costs and expenses or to justify the exclusion or preclusion of evidence at trial.[2] Although Mr. Wang may make use of the fact that Mr.

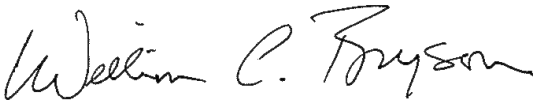
[2] When corporate representatives are inadequately prepared, courts often allow the corporation to be redeposed once its witness is better educated. *E.g.*, *Calzaturficio S.C.A.R.P.A. s.p.a. v. Fabiano Shoe Co.*, 201 F.R.D. 33, 41 (D. Mass. 2001). Here, however, Mr. Wang has specifically requested that Injective not be given a chance to produce a more prepared witness to testify regarding these topics.

Chen did not recall certain facts—for example, if Mr. Chen should testify at trial—the circumstances do not justify the imposition of sanctions based on his lack of adequate preparation for the deposition. Accordingly, I will deny the request for sanctions.

Although it is not apparent that anything in this order reveals confidential information, this order has been filed under seal because the parties' briefs and exhibits pertaining to the present motions were filed under seal. Within three business days of the issuance of this order, the parties are directed to advise the court by letter whether they wish any portions of the order to remain under seal. Any request that portions of the order should remain under seal must be supported by a particularized showing of need to limit public access to those portions of the order.

IT IS SO ORDERED.

SIGNED this 12th day of November, 2024.



WILLIAM C. BRYSON
UNITED STATES CIRCUIT JUDGE