

STATE OF NORTH CAROLINA
COUNTY OF DURHAM

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
09 CVS 7838

BENTLEY CHEATHAM and BARRY HENDERSON,
Plaintiffs
v.
RIBONOMICS, INC., MEDICAL & BIOLOGICAL LABORATORIES CO., LTD., MBL INTERNATIONAL CORPORATION, BION ENTERPRISES, LTD., JACK D. KEENE, KATSUHIKO NISHIDA, SACHIKO SUNO, SHINOBU KITAMURA and DENNIS WALCZEWSKI,
Defendants

ORDER

THIS CAUSE, coming before the court upon the Plaintiffs' Motion to Allow for the Taking of Katsuhiko Nishida's Deposition Via Video Teleconference (the "Motion"); and

THE COURT, after reviewing the Motion, submissions in support of and opposition to the Motion, appropriate matters of record and the ends of justice, FINDS and CONCLUDES as follows:

1. Plaintiffs Barry Steven Henderson and Richard Bentley Cheatham are citizens and residents of Orange County, North Carolina.
2. Defendant Ribonomics, Inc. ("Ribonomics") is a Delaware corporation with its principal office located in Durham County, North Carolina.
3. Defendant Medical & Biological Laboratories Co., Ltd. ("MBL") is a Japanese company based in Nagoya, Japan. MBL was an initial investor in Ribonomics and loaned money to Ribonomics after Ribonomics' formation.

4. MBL's President and CEO, Katsuhiko Nishida, is a citizen and resident of Japan. Mr. Nishida has personally loaned money to Ribonomics.

5. Mr. Nishida has travelled to the United States, and to North Carolina, in the course of his business. However, his trips to the United States are infrequent.

6. Defendant MBL International Corporation ("MBLI") is a Massachusetts corporation wholly owned and controlled by MBL.

7. Defendant Bion Enterprises is wholly owned by MBLI.

8. Pursuant to the court's Case Management Order dated August 17, 2010, the parties had until January 31, 2011, to complete fact discovery. Upon the parties' joint Motion for Extension of Fact Discovery filed January 26, 2011, the court extended the period for fact discovery until March 31, 2011.

9. On March 17, 2011, Plaintiffs filed a Motion for Extension of the Discovery Period for Completing Depositions of Fact Witnesses. On March 24, 2011, the court entered an order denying Plaintiffs' request for an extension except as to the deposition of Mr. Nishida, which the court ordered shall be completed on or before April 15, 2011.

10. Also on March 17, 2011, Plaintiffs filed the instant Motion in which they ask the court to order Mr. Nishida to give his deposition testimony by video teleconference. Plaintiffs argue that traveling to Japan is expensive and time-consuming, and given the currently-unsettled nuclear environment in Japan, travel to and from that country is not prudent.

11. Defendants respond that Japanese law prohibits the taking of depositions by video teleconference and that taking Mr. Nishida's deposition by video

teleconference will be impracticable, given the fact that Mr. Nishida does not speak fluent English.

12. The parties have experienced several discovery related disputes. In addition to the above mentioned motions, there exist other motions filed by both parties regarding discovery. The court will address them at a later time.

13. The issue before the court is how may Plaintiffs proceed in taking the deposition of Mr. Nishida, either individually or as a witness for MBL pursuant to Rule 30(b)(6) of the North Carolina Rules of Civil Procedure ("Rule(s)").

14. The Rules permit the discovery of "any matter, not privileged, which is relevant to the subject matter involved in the pending action" Rule 26(b)(1).

15. As an initial matter, the ability of this court to compel a Japanese citizen to participate in a video teleconference deposition raises jurisdictional concerns and implicates notions of international comity. "International comity refers to the spirit of cooperation in which a domestic tribunal decides cases touching on the interest of other sovereign states." *In re Honda Am. Motor Co., Inc. Dealership Relations Litigation*, 168 F.R.D. 535, 537 (Md. 1996).

16. The Hague Convention on the Taking of Evidence Abroad in Civil or Commercial Matters (the "Hague Convention") protects the "territorial sovereignty of foreign signatory States and therefore is applicable when depositions of party witnesses are sought to be taken within the geographic boundaries of a foreign signatory State" *Belmont Textile Mach. Co. v. Superba, S.A.*, 48 F. Supp. 2d 521, 523 (M.D.N.C. 1999). However, the "Hague Convention does not deprive a district court of jurisdiction to order a foreign national party before it to produce evidence under the Federal Rules

of Civil Procedure." *Id.* Potential implications of foreign sovereignty and comity arise when a court compels discovery on foreign soil. *In re Honda*, 168 F.R.D. at 537.

"[W]hen depositions of foreign nationals are taken on American or neutral soil, courts have concluded that comity concerns are not implicated." *Id.*

17. Based upon notions of international comity and foreign sovereignty, the court CONCLUDES that it would be improper for it to compel Mr. Nishida to testify in Japan by video teleconference. However, under the circumstances of this civil action, the court is not without power to compel Mr. Nishida to appear on American soil for his deposition.

18. On the other hand, when Plaintiffs initiated this civil action, they were charged with knowledge that one or more relevant witnesses whose testimony might be sought were not residents of the United States, and that pragmatic issues might arise with regard to securing live discovery testimony from such persons.

19. "The general presumption is that the deposition of a corporation through its agents should be taken at the corporation's principal place of business." *Custom Form Mfg., Inc. v. Omron Corp.*, 196 F.R.D. 333, 335 (N.D. Ind. 2000). Nonetheless, the court has "substantial discretion to specify the time and place of any deposition." *Id.* "When a foreign corporation is doing business in the United States, is subject to the court's jurisdiction, and has freely taken advantage of our federal rules of discovery, exceptions to the general rule on the location of depositions is often made." *Id.* Courts frequently compel agents of foreign corporations to appear for depositions on American soil. *See Id.*; *In re Honda*, 168 F.R.D. at 541-42 (requiring agents of a Japanese corporate defendant to be deposed in Maryland); *M & C Corp. v. Erwin Behr GMBH &*

Co., 165 F.R.D. 65, 68 (E.D.Mich. 1996); *Roberts v Heim*, 130 F.R.D. 430, 439-40 (N.D.Cal. 1990) (compelling a Swiss defendant for depositions in California). While the court is unaware of any North Carolina case law directly on point, the above cited federal cases are instructive.

20. The question of whether the court can compel Mr. Nishida to appear in the United States to give deposition testimony depends on whether MBL, and Mr. Nishida as MBL's 30(b)(6) witness, is subject to the in personam jurisdiction of this court.

21. "Two considerations determine whether a state court's exercise of *in personam* jurisdiction over a foreign defendant is proper: (1) whether the legislature has granted to the courts . . . statutory authority to exercise its jurisdiction over the defendant, and (2) whether . . . the exercise of jurisdiction comports with the due process limitations" *Mabry v. Fuller-Shuwayer Co.*, 50 N.C. App. 245, 248 (1981). The North Carolina General Assembly has granted courts statutory authority to exercise jurisdiction over foreign corporations engaged in business in this State. G.S. 1-75.4(1)(d) grants jurisdiction over any defendant who, at the time of service of process upon him, "[i]s engaged in substantial activity within this State, whether such activity is wholly interstate, intrastate, or otherwise." With regard to the second consideration, whether the exercise or jurisdiction comports with the due process limitations, the United States Supreme Court has defined the due process limitations on the states' exercise of in personam jurisdiction. In *International Shoe Co. v. Washington*, 326 U.S. 310 (1945), the Supreme Court concluded that before a state court may exercise personal jurisdiction over a non-resident defendant, certain "minimum contacts" with the forum state must be established so that maintenance of the suit would not "offend

traditional notions of fair play and substantial justice." *Id.* A non-resident defendant must "purposefully avail" itself of the privilege of conducting activities within the forum state to be subject to personal jurisdiction in that state. *Hanson v. Denckla*, 357 U.S. 235 (1958).

22. MBL maintains an important and controlling interest in Ribonomics. MBL stated in a 2009 press release that Ribonomics is an "affiliate subsidiary of [MBL]."¹ MBL and Mr. Nishida provided Ribonomics with initial and ongoing funding.²

23. The court CONCLUDES that MBL, through its relationship with Ribonomics, is engaged in substantial activity within this State for purposes of G.S. 1-75.4(1)(d). Accordingly, MBL and Mr. Nishida are subject to the in personam jurisdiction of this court.

24. The court further CONCLUDES that because MBL is subject to the in personam jurisdiction of this court, it can be compelled under Rule 30(b)(6) to produce its officers, directors or managing agents (including Mr. Nishida) in the United States to give deposition testimony. *See Custom Form*, 196 F.R.D. at 335.

25. The District Court for the District of Maryland faced similar discovery issues regarding Japanese deponents in *In Re Honda*. 168 F.R.D. 535. In that case, plaintiffs served notices of deposition on Honda Motor Company pursuant to Federal Rule of Civil Procedure 30(b)(6), naming four Japanese citizens as deponents. *Id.* at 537. Honda moved to quash the notices based in part on its assertion that any depositions of the named deponents should be conducted in Japan pursuant to Japanese procedural rules. *Id.* Honda argued that Japan "generally disdains the

¹ Ans. 3.

² Compl. ¶ 8.

United States' system of open discovery and compulsory depositions." *Id.* The district court in rejecting Honda's assertion concluded that when depositions of foreign nationals are taken on American or neutral soil international comity and foreign sovereignty concerns are not implicated. *Id.* The district court noted that compulsory depositions in the United States are not as intrusive as other discovery mechanisms such as the inspection of buildings, the collecting of documents or the taking of depositions on Japanese soil. *Id.* at 538. The court agrees with the District Court's conclusion that "it would be patently unfair to constrain plaintiffs' ability to discover facts necessary to make their case by allowing Honda Japan's managing agents to be deposed in Japan pursuant to Japanese rules." *Id.* at 539. However, the court also concludes it would be unfair to require Mr. Nishida to make an unscheduled trip to North Carolina for the sole purpose of being deposed with regard to this matter.

NOW THEREFORE, based upon the foregoing FINDINGS and CONCLUSIONS, it is ORDERED that:

1. Plaintiffs' Motion to Allow for the Taking of Katsuhiko Nishida's Deposition Via Video Teleconference is DENIED.

2. On or before May 20, 2011, Defendants shall make Mr. Nishida available in person for deposition in any one of the States of the United States, other than Hawaii and Alaska. If Plaintiffs wish to depose Mr. Nishida, they shall do so in such State. Counsel for the respective parties shall cooperate with a view toward reaching agreement on the time, place, date and mechanics of any such deposition. Each party shall bear its own costs as to such deposition.

This the 5th day of April, 2011.

/s/ John R. Jolly, Jr.
John R. Jolly, Jr.
Chief Special Superior Court Judge
for Complex Business Cases