

Not Reported in F.Supp., 1998 WL 182785 (D.Kan.)  
(Cite as: 1998 WL 182785 (D.Kan.))

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United States District Court, D. Kansas.  
**SITHON MARITIME COMPANY**, Plaintiff,  
v.  
**HOLIDAY MANSION**, et al., Defendants.  
No. Civ.A. 96-2262-KHV.

Feb. 8, 1999.

[Lee M. Smithyman](#), **Smithyman & Zakoura**, Overland Park, KS, [Michael G Chalos](#), [Richard M Ziccardi](#), [George J Tsimis](#), Chalos & Brown, New York City, for **Sithon Maritime** Company, plaintiff.

[Norman R. Kelly](#), Norton, Wasserman, Jones & Kelly, Salina, KS, for **Holiday Mansion**, a Division of Mohawk, Inc., defendant.

[Heather Suzanne Woodson](#), Stinson, Mag & Fizzell, P.C., Overland Park, KS, [John C. Aisenbrey](#), Stinson, Mag & Fizzell, P.C., Kansas City, MO, [Alex B Marconi](#), [Patrick X Fowler](#), Snell & Wilmer L.L.P., Phoenix, AZ, for Mercury Marine, a Division of Brunswick Corporation, defendant.

[Heather Suzanne Woodson](#), Stinson, Mag & Fizzell, P.C., Overland Park, KS, [John C. Aisenbrey](#), Stinson, Mag & Fizzell, P.C., Kansas City, MO, [Alex B Marconi](#), [Patrick X Fowler](#), Snell & Wilmer L.L.P., Phoenix, AZ, for Mercury Marine, cross-claimant.

[Norman R. Kelly](#), Norton, Wasserman, Jones & Kelly, Salina, KS, for **Holiday Mansion**, cross-defendant.

[Heather Suzanne Woodson](#), Stinson, Mag & Fizzell, P.C., Overland Park, KS, [John C. Aisenbrey](#), Stinson, Mag & Fizzell, P.C., Kansas City, MO, [Alex B Marconi](#), [Patrick X Fowler](#), Snell & Wilmer L.L.P., Phoenix, AZ, for Mercury Marine, counter-claimant.

[Lee M. Smithyman](#), **Smithyman & Zakoura**, Chtd., Overland Park, KS, [Michael G Chalos](#), [Richard M Ziccardi](#), [George J Tsimis](#), Chalos & Brown, New York City, for **Sithon Maritime** Company, counter-defendant.

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Kelly, Salina, KS, for **Holiday Mansion**, cross-claimant.

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[Lee M. Smithyman](#), **Smithyman & Zakoura**, **Chtd.**, Overland Park, KS, [Michael G Chalos](#), [Richard M Ziccardi](#), [George J Tsimis](#), Chalos & Brown, New York City, for **Sithon Maritime** Company, counter-defendant.

#### MEMORANDUM AND ORDER

[RUSHFELT](#), Magistrate J.

\*1 The court has under consideration Plaintiff-**Sithon Maritime** Company's Motion for Protective Order (doc. 259). Pursuant to [Fed.R.Civ.P. 26\(c\)](#), plaintiff seeks an order to quash three deposition notices, issued by defendant Mercury Marine (Mercury). The depositions would proceed in Greece and Belgium. Plaintiff further seeks sanctions against Mercury. Mercury opposes the motion.

Whether to enter a protective order addresses the sound discretion of the court. [Thomas v. IBM](#), 48 F.3d 478, 482 (10th Cir.1995). [Fed.R.Civ.P. 26\(c\)](#) provides that the court, upon a showing of good cause, "may make any order which justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense." The party seeking a protective order has the burden to show good cause for it. [Sentry Ins. v. Shivers](#), 164 F.R.D. 255, 256 (D.Kan.1996). To establish good cause, that party must submit "a particular and specific demonstration of fact, as distinguished from stereotyped and conclusory statements." [Gulf Oil Co. v. Bernard](#), 452 U.S. 89, 102 n. 16 (1981).

Mercury seeks to depose Alex Zeis, Patrick LeClerre,

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and an individual identified only as Mr. Kanakaris. Plaintiff contends the proposed depositions violate the Revised Scheduling Order, which set July 1, 1998, as the deadline for depositions of fact witnesses. It asserts that Mercury has shown no good cause to alter that deadline. It suggests, furthermore, that Mercury has not carried its burden to show the depositions are for purposes of trial, rather than discovery. It also contends that, regardless of their purpose, Mercury has failed to exercise due diligence in pursuing them. It suggests that Mercury has demonstrated no adequate reason why it could not have scheduled the depositions prior to the deadline. It further asserts that it will incur prejudice and undue burden, if the court allows the depositions at this late date.

A party may demonstrate good cause, within the meaning of [Fed.R.Civ.P. 26\(c\)](#), to prohibit a deposition by showing it would violate the deadline for discovery. Unless the deposing party can show good cause, within the meaning of [Fed.R.Civ.P. 16\(b\)](#), to extend the deadline, the court will generally grant a protective order against the deposition. Mercury concedes that it scheduled the depositions after the deadline. It submits that it seeks them not for discovery, however, but to preserve testimony for trial. It asserts that the deadline is thus inapplicable.

The Revised Scheduling Order (doc. 218) provides that “[a]ll depositions of fact witnesses shall be completed by *July 1, 1998*.” Contrary to the assertion of Mercury, this deadline applies to the proposed depositions. The Federal Rules of Civil Procedure do not recognize a distinction between trial and discovery depositions. *Clay v. Board of Trustees of Neosho County Community College*, No. Civ.A. 94-2282-EEQ, 1995 WL 646817, at \*1 (D.Kan. Sept. 26, 1995). “The rules lack any clear distinction between those two functions, probably because most depositions by their very nature may serve both purposes.” *Dixon v. Certainteed Corp.*, No. Civ.A. 94-23 10-GTV, 1996 WL 63578 1, at \*1 (D.Kan. Oct. 29, 1996). [D.Kan.Rule 30.3](#), furthermore, supports the application of the deadline to all depositions, regardless of their proposed purpose. It states the general rule that “[t]he deposition of a material witness not subject to subpoena should ordinarily be taken during the discovery period.”

\*2 Although “[t]he order and the timetable established by the order are binding,” [Pfeiffer v. Eagle Mfg. Co.](#), 137 F.R.D. 352, 355 (D.Kan.1991), the court may also find that rigid adherence to the scheduling order is not appropriate in some circumstances, [SIL-FLO, Inc. v. SFHC, Inc.](#), 917 F.2d 1507, 1519 (10th Cir.1990). Parties have several permissible choices when they deem it inadvisable to adhere to an established deadline. They may move for an appropriate extension. They may enter into a written stipulation, pursuant to [Fed.R.Civ.P. 29](#). They may seek leave to proceed beyond the applicable deadline. In this instance Mercury did none of these things. It merely noticed the depositions five months after the deadline for such discovery. It made no attempt to seek leave of court or to show an adequate reason for them, other than in response to the motion.

Mercury has not moved to alter the scheduling order. In its responsive arguments it seeks to justify the proposed depositions over five months after the applicable deadline. The court finds no sufficient showing of good cause, nevertheless, for altering the scheduling order and re-opening the deadline. Good cause, within the meaning of [Fed.R.Civ.P. 16\(b\)](#), primarily considers the diligence of the party seeking to alter the existing schedule. [Deghand v. Wal-Mart Stores, Inc.](#), 904 F.Supp. 1218, 1221 (D.Kan.1995). The party seeking relief from the schedule must show that it could not have reasonably met the deadline despite its diligence. [Pfeiffer](#), 137 F.R.D. at 355. The absence of prejudice to the opposing party does not constitute an affirmative showing of “good cause” to alter the schedule ordered by the court. [Deghand](#), 904 F.Supp. at 1221. “The party seeking an extension is normally expected to show good faith on its part and some reasonable basis for not meeting the deadline.” *Id.*

[D.Kan.Rule 30.3](#) establishes one ground of presumptive good cause for altering a deadline on depositions. It states that “the deposition of a material witness who agrees to appear at trial, but who later becomes unable or refuses to attend, may be taken at any time prior to trial.” A party can generally show good cause to modify a scheduling order, furthermore, when it is “necessary to depose a potential witness whose testimony may not otherwise be obtainable for trial.” See *Dixon v. Certainteed Corp.*, No. Civ.A. 94-2310-GTV, 1996 WL 635781, at \*1 (D.Kan. Oct. 29, 1996).

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Mercury has not sufficiently shown good cause for the late deposition of Mr. Kanakaris. It states that he has never agreed to voluntarily appear at trial. A presumptive good cause does not arise under [D.Kan.Rule 30.3](#), unless the witness has agreed to appear for trial and then later becomes unable or refuses to attend. Without the prerequisite agreement to appear, the presumption does not arise. Mercury has not shown, furthermore, why it could not have taken his deposition prior to the expiration of the established deadline. It knew the name of his company no later than June 6, 1997. At that time plaintiff produced a copy of a Bill of Sale (in English) and a contract (in Greek) which show the purchase by his company of one of the passenger boats at issue. This Bill of Sale should have provided enough information to enable Mercury to ascertain or further discover his identity long before the July 1, 1998, deadline for depositions.

**\*3** As justification for the late deposition of Mr. Kanakaris, Mercury points to plaintiff's failure to answer in May 1998 an interrogatory asking for the identities of the current owners of the boats. That argument fails to explain why defendant failed to pursue the matter and identify Kanakaris during the interval of 11 months between June 6, 1997 and May 1998. Defendant also suggests that it could not identify him until plaintiff provided documents after the deadline of July 1, 1998, from which it could discover the current owners. The court finds this suggestion unconvincing. Mercury had information from which it could ascertain or discover his identity in 1997.

Had Mercury exercised due diligence, it could have readily met the deadline of July 1, 1998, without difficulty. It has provided no reasonable basis for its untimeliness. Under the facts presented, it had no such basis. It could have reasonably utilized the Bill of Sale produced in 1997 to discover the identity of Mr. Kanakaris. It states in response to the motion that, "based on the information [in untranslated Greek bill of sale documents produced after the July 1, 1998, discovery deadline], Mercury was able to track down the current owners of the boats in Santorini, Greece, and its [sic] representative, Mr. Kanakaris." If Mercury could track down Mr. Kanakaris through the Greek documents produced

after the deadline, the court sees no reason why it could not have done so from the earlier Bill of Sale which is in English.

Mercury has also shown no good cause, within the meaning of [Fed.R.Civ.P. 16\(b\)](#) and the Revised Scheduling Order, to modify the schedule to allow the late depositions of Messrs. Zeis and LeClerre. It explains that, although they are willing to attend trial, they cannot guarantee time off from their work. It further explains that, "[g]iven the uncertainty of whether the case will proceed to trial on March 1, 1999 due to Judge O'Connor's unfortunate death, [it] is unsure whether Mr. LeClerre and Mr. Zeis will continue to be willing to hold their schedules to be available for trial." The court has already provided assurance that the case will proceed to trial on March 1, 1999. The court sees no good cause for depositions of Messrs. Zeis and LeClerre at this late date. Mercury has known of Messrs. Zeis and LeClerre from the outset of this litigation. With due diligence it could have deposed them prior to the deadline in the Revised Scheduling Order. They have indicated a willingness to appear in person for trial. It appears they have obtained time off work to be available for trial in early March. The court finds no necessity or good cause to depose these individuals at this late date.

In this instance Mercury has demonstrated the applicability of [Fed.R.Civ.P. 32\(a\)\(3\)](#), but little else. That Rule provides that

[t]he deposition of a witness, whether or not a party, may be used by any party for any purpose if the court finds ... (B) that the witness is at a greater distance than 100 miles from the place of trial or hearing, or is out of the United States, unless it appears that the absence of the witness was procured by the party offering the deposition; or ... (D) that the party offering the deposition has been unable to procure the attendance of the witness by subpoena.

**\*4** It appears uncontested that the proposed deponents have knowledge of relevant facts about this litigation. None of them work for Mercury. Presumably they all reside outside the United States and more than 100 miles from the place of trial. They are beyond the subpoena power of the court. Mercury cannot compel their attendance at trial.

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[Rule 32\(a\)\(3\)](#), however, addresses the use of a deposition at trial. The Rule does not serve to list grounds for taking untimely depositions, particularly so late after the applicable deadline has passed and with no showing of any material change in circumstances. Mercury must show more than mere satisfaction of [Fed.R.Civ.P. 32\(a\)\(3\)](#) to establish good cause within the meaning of [Fed.R.Civ.P. 16\(b\)](#). [Rule 32\(a\)\(3\)](#) governs the use of depositions, not the circumstances under which they may be taken.

In summary, Mercury has shown no good cause to alter the deadline established by the Revised Scheduling Order for depositions of fact witnesses. Plaintiff has shown good cause for prohibiting the untimely depositions as oppressive within the meaning of [Rule 26\(c\)](#). Plaintiff has demonstrated sufficient prejudice, furthermore, to preclude the proposed depositions. Trial will proceed on March 1, 1999. To permit three international depositions so close to trial would unreasonably interfere with trial preparation. Plaintiff suggests, furthermore, that the depositions would necessitate its expert to review and analyze any testimony and perhaps travel to observe the business of Mr. Kanakaris in his current use and operation of the four boats at issue.

For the foregoing reasons, the court sustains Plaintiff-**Sithon Maritime** Company's Motion for Protective Order (doc. 259). Defendant Mercury Marine may not depose Alex Zeis, Patrick LeClerre, or Mr. Kanakaris at this late date. The deadline for their depositions has passed. Mercury has shown no good cause to alter the schedule set in prior orders of the court. Plaintiff would incur prejudice, furthermore, were the depositions to proceed. Each party shall bear its own costs and expenses incurred on the motion and subsequent briefing. The death of the District Judge to whom the case was initially assigned presented legitimate concern about the scheduled trial date and availability of witnesses for trial.

IT IS SO ORDERED.

D.Kan.,1999.  
Sithon Maritime Co. v. Holiday Mansion  
Not Reported in F.R.D., 1999 WL 66216 (D.Kan.)