UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES--GENERAL

Case No. MDL 1394 -GAF(RCx) Date: October 23, 2002
ALL RELATED CASES

Title: In Re Air Crash at Taipei, Taiwan on October 31, 2000

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DOCKET ENTRY

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HON. ROSALYN M. CHAPMAN, UNITED STATES MAGISTRATE JUDGE

Debra Taylor Deputy Clerk	None Court Reporter
ATTORNEYS PRESENT FOR PLAINTIFFS: Brian J. Panish Charles M. Finkel	ATTORNEYS PRESENT FOR DEFENDANTS: Rod D. Margo Stephen R. Ginger Will S. Skinner Scott D. Cunningham

PROCEEDINGS: (1) PLAINTIFF'S MOTION FOR RULE 37(b)(2) and (d) ISSUE SANCTIONS; AND (2) DEFENDANT'S MOTION FOR PROTECTIVE ORDER REQUESTING RELIEF FROM THE COURT'S ORDER REGARDING THE DEPOSITION OF CAPTAIN FOONG CHEE KONG AND REQUEST FOR THE COURT TO ISSUE A LETTER OF REQUEST TO THE GOVERNMENT OF SINGAPORE

On September 16, 2002, plaintiffs filed a notice of motion and motion for Rule 37(b)(2) and (d) issue sanctions and joint stipulation, and on September 18, 2002, filed supporting exhibits A-J. On September 16, 2002, defendant filed the opposing declarations of Debby L. Zajac, Stephen R. Ginger and exhibits, Matthew Samuel, Foo Kim Boon and exhibits, and David Bruce Johnston and exhibits, and on September 18, 2002, defendant filed the amended opposing declarations of Debby L. Zajac and Stephen R. Ginger. On October 2, 2002, the parties filed supplemental memoranda and defendant filed the supplemental declaration of Mr.

Ginger and exhibit.[1] On October 3, 2002, plaintiffs filed the supporting declaration of Juanita A. Madole.[2]

On September 23, 2002, defendant filed a notice of motion and motion for protective order requesting relief from the Court's Order regarding the deposition of Captain Foong Chee Kong and request for the Court to issue a letter of request, or letter rogatory, to the Government of Singapore and joint stipulation, with the supporting declarations of Stephen R. Ginger and exhibits, Matthew Samuel, Foo Kim Boon and exhibits, David Bruce Johnston and exhibits, and Rod Margo and exhibits. On October 2, 2002, the parties filed supplemental memoranda.

These matters were consolidated for hearing, and oral argument took place before Magistrate Judge Rosalyn M. Chapman on October 23, 2002. Plaintiffs were represented by Brian J. Panish, an attorney-at-law with the law firm Greene, Broillet, Panish & Wheeler, and Charles M. Finkel, an attorney-at-law with the law firm of Magaña, Cathcart & McCarthy. Defendant was represented by Rod D. Margo, Stephen R. Ginger, Will S. Skinner and Scott D. Cunningham, attorneys-at-law with the firm Condon & Forsyth.

BACKGROUND

I

On November 26, 2001, this Court ruled, inter alia, that Captain Foong Chee Kong, the pilot of Singapore Airlines flight SQ006, which crashed upon takeoff in Taipei, The Republic of China, on October 31, 2000, is a managing agent of defendant Singapore Airlines ("SIA") and ordered his deposition to commence no later than January 18, 2002, in Singapore. Defendant SIA moved for reconsideration of the Order, and, on January 10, 2002, District Judge Gary A. Feess affirmed the Order as it pertained to Capt. Foong. Defendant SIA again moved for reconsideration of the Order, and, on January 28, 2002, Judge Feess again affirmed the Order as it pertained to Capt. Foong; however, Judge Feess granted a 14-day stay to allow defendant SIA to petition the

[1] Rule 37-2.3 does not provide for declarations; thus, this declaration is stricken.

[2] This declaration is also stricken under Rule 37-2.3.

Ninth Circuit Court of Appeals for a writ of mandamus. On February 12, 2002, defendant filed a petition for a writ of mandamus in the Ninth Circuit, and moved to stay Judge Feess' Order of January 10, 2002; however the Ninth Circuit denied the petition on March 19, 2002. Joint Stip., Exh. G.

Meanwhile, on December 11, 2001, plaintiffs served by e-mail on defendant SIA a second amended notice of deposition setting Capt. Foong's deposition for January 16, 2002, in Singapore.[3] Joint Stip., Exh. E; Margo Decl., ¶¶ 10-11, Exhs. H-I. On December 28, 2001, defendant SIA advised plaintiffs: "[W]e have no control over the pilots who are being represented by separate counsel," and "there is a high probability that if they show up at all, they will be asserting their right against self-incrimination." Ginger Decl., ¶ 7, Exh. 5. Plaintiffs then, in turn, contacted Capt. Foong's attorneys to determine whether Capt. Foong would attend his scheduled deposition, and whether he would assert a privilege against self-incrimination, and, on January 12, 2002, Capt. Foong advised that "the government of Taiwan has initiated a criminal investigation into the cause of the accident. . . . [I] face[] possible imprisonment from a criminal prosecution. . . . Under the circumstances, [I] respectfully decline[] to **voluntarily appear** at the deposition that the plaintiffs designated . . . for [me] in Singapore on January 16, 2002." Ginger Decl., ¶¶ 8, 12, Exhs. 6, 10 (emphasis added); Margo Decl., ¶ 13, Exh. K. On January 17, 2002, SIA's management advised Capt. Foong that "it is the company's position that we require you to attend and testify at your deposition which we understand has been scheduled to take place in Singapore." Foo Kim Boon Decl., ¶ 8, Exh. C. However, neither plaintiffs' counsel nor Capt. Foong appeared on January 18, 2002, at the time and place noticed by plaintiffs for Capt. Foong's deposition.

On April 2, 2002, defendant SIA advised Capt. Foong that he was "now technically in violation of the court order and in contempt of court for failing to [appear] for deposition in Singapore[,]" and again asked Capt. Foong to appear to be deposed. Declaration of David Bruce Johnston, ¶ 5, Exh. B. Similarly, on June 14, 2002, defendant SIA advised Capt. Foong:

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[3] This deposition was apparently rescheduled to January 18, 2002. Ginger Decl., ¶ 24, Exh. 21.

"[W]e remain under considerable pressure and threat of sanctions in the US [sic] proceedings due to [your] failure to make [your]self available for deposition. Not only are financial sanctions likely to be imposed, but it is possible that the Court will refuse to allow [us] to pursue any of the defences pleaded in the proceedings." Id., ¶ 6, Exh. C. On June 20, 2002, Capt. Foong responded, stating that the Taiwanese prosecutor has made a preliminary decision **not** to criminally prosecute him and, thus, he "is amenable to being deposed in the US proceedings subject to the finalization of the order confirming that he would not be prosecuted in Taiwan." Id., ¶ 7, Exh. D.

On July 1, 2002, plaintiffs contacted defendant SIA to "reschedul[e] the deposition of Captain Foong" for August 2, 2002, in Santa Monica, California, Joint Stip., Exh. H; Margo Decl., ¶ 22, Exh. T; however, on July 2, 2002, defendant SIA refused, noting "the Court's order currently requires [Captain Foong's] production for deposition in Singapore." Ginger Decl., ¶ 17, Exh. 15; Margo Decl., ¶ 24, Exh. U. On July 19, 2002, Capt. Foong informed defendant SIA that he was still considering whether to appear at his deposition because "there is a criminal charge raised against [him] by the next-of-kin of one of the accident victim[s]." Johnston Decl., ¶ 13, Exh. J.[4]

On or about July 24, 2002, defendant SIA learned that criminal charges against Capt. Foong would be suspended on "certain terms and conditions." Declaration of Mathew Samuel, ¶ 6. Approximately two days later, defendant SIA terminated Capt. Foong's employment "to protect SIA's reputation for maintaining the highest safety standards. . . . It was noted at the time the decision was taken to terminate Captain Foong, that he had persistently refused to give a deposition in the U.S. proceedings despite being instructed and advised by the Company to do so." Samuel Decl., ¶¶ 7-8. Plaintiffs did not properly notice Capt. Foong's deposition on August 2, 2002, and Capt. Foong did not appear for his deposition on that date. Joint Stip, Exh. I at 12:7-17; Margo Decl., ¶ 26, Exh. W at 12:7-17.

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[4] This response by Capt. Foong appears to have been anticipated, if not encouraged, by SIA. See Johnston Decl., ¶ 8, Exh. E ("We note your concerns over the possibility of a further criminal prosecution in Taiwan following the allegations of abandonment brought by or on behalf of a passenger who was on board the aircraft.").

II

These motions arise out of the failure of defendant SIA to produce Capt. Foong for his deposition. Plaintiffs move for the following issue and evidentiary sanctions against defendant: (1) barring defendant from making any claims or defenses, or from producing any evidence, that any party other than itself caused the crash; (2) barring defendant from contending or presenting any evidence that it did not commit willful and reckless misconduct and ruling that defendant did not engage in willful and reckless misconduct; (3) barring defendant from introducing any evidence, or disputing the plaintiffs' contentions in any way, regarding the passengers' experiences after the plane impacted the construction equipment; and (4) assessing defendant with the expenses, including attorney's fees, incurred by plaintiffs in their attempts to depose Capt. Foong. Motion for Sanctions at 1:24-2:6. On the other hand, defendant SIA seeks a protective order: (1) excusing it from producing Capt. Foong for deposition on the ground it is impossible to comply with the Court's Order due to conduct or circumstances not within defendant's control; and (2) requesting a Letter of Request (Rogatory) to the Government of Singapore compelling Capt. Foong's appearance at deposition.

DISCUSSION

III

Rule 37(d) of the Federal Rules of Civil Procedure provides that if a party, or an officer, director, or managing agent of a party, fails to appear at a duly noticed deposition, the court in which the action is pending:

> may take any action authorized under subparagraphs (A), (B), and (C) of subdivision (b)(2) of this rule. . . . In lieu of any order or in addition thereto, the court shall require the party failing to act or the attorney advising that party or both to pay the reasonable expenses, including attorney's fees, caused by the failure unless the court finds that the failure was substantially justified or that other circumstances make an award of expenses unjust. [¶] The failure to act described in this subdivision may not be excused on the ground that the discovery sought is objectionable unless the party failing to act has a pending motion for a protective order as provided by Rule 26(c).

Fed. R. Civ. P. 37(d). Rule 37(b)(2) further provides that:

> the court . . . may make such orders in regard to the failure [to appear for deposition] as are just, and among others the following:
>
> (A) An order that the matters regarding which the order was made or any other designated facts shall be taken to be established for the purposes of the action in accordance with the claim of the party obtaining the order;
>
> B) An order refusing to allow the disobedient party to support or oppose designated claims or defenses, or prohibiting that party from introducing designated matters in evidence;
>
> [and]
>
> (C) An order striking out pleadings or parts thereof, or staying further proceedings until the order is obeyed, or dismissing the action or proceeding or any part thereof, or rendering a judgment by default against the disobedient party. . . .

Fed. R. Civ. P. 37(b)(2).

As the Supreme Court has noted in discussing Rule 37(d), "the most severe in the spectrum of sanctions provided by statute or rule must be available to the district court in appropriate cases, not merely to penalize those whose conduct may be deemed to warrant such a sanction, but to deter those who might be tempted to such conduct in the absence of such a deterrent." National Hockey League v. Metropolitan Hockey Club, Inc., 427 U.S. 639, 643, 96 S.Ct. 2778, 2781, 49 L.Ed. 2d 747 (1976) (per curiam). "A district court has the discretion to impose the extreme sanction of dismissal if there has been `flagrant, bad faith disregard of discovery duties.'" Porter v. Martinez, 941 F.2d 732, 733 (9th Cir. 1991) (per curiam) (citing Wanderer v. Johnston, 910 F.2d 652, 655-56 (9th Cir. 1990)). "'[D]isobedient conduct not shown to be outside the control of the litigant' is all that is required to demonstrate wilfulness, bad faith, or fault." Henry v. Gill Indus., Inc., 983 F.2d 943, 948 (9th Cir. 1993).

Here, plaintiffs seek certain issue and evidentiary sanctions based on defendant SIA's failure to produce Capt. Foong for deposition on January 18, 2002, and again on August 2, 2002. The Court's Order of November 26, 2001, required defendant SIA to produce Capt. Foong in Singapore for deposition no later than January 18, 2002; thus, plaintiffs duly noticed Capt. Foong's deposition in Singapore for January 16, 2002 (later changed to January 18, 2002). Rule 3.3.1 of the Local Rules Governing Duties of Magistrate Judges provides that a party may, within ten days of service upon him of notice of the ruling, seek reconsideration before the district judge to whom the case is assigned of a nondispositive ruling on a pretrial matter, such as discovery; however, Local Rule 3.3.2 specifically provides that, in such circumstances, "the Magistrate Judge's ruling shall remain in full force and effect unless and until the ruling is stayed or modified by the Magistrate Judge or the District Judge." As one court has noted:

> The rationale for such rules is sound: "Such an interpretation is more consistent with the Magistrate's Act's goals of facilitating the quick and final resolution of referred pretrial matters. If an objection operates as a stay of the order, not only is the losing litigant given an artificial incentive to object, but the magistrate's decision-making ability is eroded. It should be remembered that the magistrate is empowered to 'determine' nondispositive pretrial matters. A magistrate's order will not determine anything if it can be automatically stayed by filing an objection. Indeed, such an interpretation would essentially reduce the magistrate's order to the status of a recommendation where an objection is raised." 7(Part 2) James W. Moore et al., Moore's Federal Practice ¶ 72.03[6.-12] at 72-53 to -54 (2d ed. 1991). This reasoning comports with the principle that a party is not entitled to disobey court orders even if later proven erroneous.

Williams v. Texaco, Inc., 165 B.R. 662, 673 (D. N.M. 1994) (citation omitted); White v. Burt Enterprises, 200 F.R.D. 641, 642-43 (D. Col. 2000). As another court noted, "allowing the automatic stay of [a] magistrate [judge]'s orders would not only encourage the filing of frivolous appeals, but would grind the magistrate [judge] system to [a] halt." Litton Industries, Inc.

v. Lehman Brothers Kuhn Loeb Inc., 124 F.R.D. 75, 79 (S.D. N.Y. 1989); White, 200 F.R.D. at 643. Thus, the Court's Order of November 26, 2001, remained in effect until it was stayed by Judge Feess on January 28, 2002.

Nevertheless, the deposition of Capt. Foong did not take place on January 18, 2002. The correspondence between plaintiffs and defendant SIA shows defendant SIA advised plaintiffs that Capt. Foong would not appear, and plaintiffs apparently chose not to go to Singapore and place Capt. Foong's failure to appear at deposition on the record. Indeed, neither party appears to have seriously viewed Capt. Foong's deposition as proceeding on January 18, 2002; rather, the parties appear to have reached an informal agreement that Capt. Foong's deposition would not proceed while defendant SIA pursued legal remedies to overturn this Court's Order. Under such circumstances, it cannot be said that defendant SIA's conduct was wilful.

The Ninth "[C]ircuit has strictly construed the language of Rule 37(d)." Estrada v. Rowland, 69 F.3d 405, 406 (9th Cir. 1995) (per curiam)(citing Pennwalt Corp. v. Durand-Wayland, Inc., 708 F.2d 492, 494 n.4 (9th Cir. 1983)). Here, plaintiffs have presented no evidence showing Capt. Foong actually failed "to appear before the officer who [wa]s to take [his] deposition," as required by Fed. R. Civ. P. 37(d). See also Gee v. City of Chicago Public Schools, 2002 WL 1559704, *2 (N.D. Ill.) (A party's declaration of its future intent not to appear for deposition is, by itself, insufficient to warrant imposition of Rule 37(d) sanctions). In Gee,

> Defendant served plaintiff with a notice of deposition scheduled for May 15, 2002. On May 9, 2002, Plaintiff told Defendant that [she] would not appear for a deposition on May 15 . . . [and] Defendant offered to provide Plaintiff with time to determine the propriety of the deposition. Plaintiff, however, answered that she would not appear at any time[, and Defendant sought sanctions without renoticing Plaintiff's deposition or making a record of Plaintiff's failure to appear.]

Gee, 2002 WL 1559704 at *1. On these facts, the district court declined to impose Rule 37(d) sanctions, stating "it is not clear that Plaintiff has 'failed to appear for a deposition pursuant to Rule 37(d)." Id. at *2. This Court finds the reasoning of the district court in Gee to be sound. Therefore, plaintiffs' motion

for issue and evidentiary sanctions based on Capt. Foong's purported failure to appear for deposition on January 18, 2002, should be denied.

Nor can Capt. Foong's purported failure to appear at deposition on August 2, 2002, in Santa Monica, California, serve as a basis to sanction defendant SIA since plaintiffs have presented absolutely no evidence showing they served a proper deposition notice on defendant SIA for Capt. Foong's deposition on that date.[5] El Salto, S.A. v. PSG Co., 444 F.2d 477, 484 (9th Cir.), cert. denied, 404 U.S. 940 (1971). Moreover, this Court specifically ordered Capt. Foong's deposition to take place in Singapore, and the parties did not agree to any change of location. For these reasons, plaintiffs' motion for sanctions should be denied without prejudice, at this time.

IV

Federal Rule of Civil Procedure 26(c) governs the granting of a protective order. A protective order should be granted when the moving party establishes "good cause" for the order and "justice requires [a protective order] to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense. . . ." Fed. R. Civ. P. 26(c). "For good cause to exist, the party seeking protection bears the burden of showing specific prejudice or harm will result if no protective order is granted." Phillips v. General Motors Corp., 289 F.3d 1117, 1121 (9th Cir. 2002); Beckman Industries, Inc. v. International Insurance Co., 966 F.2d 470, 47614 (9th Cir.), cert. denied, 506 U.S. 868 (1992). "Broad allegations of harm, unsubstantiated by specific examples or articulated reasoning, do not satisfy the Rule 26(c) test." Beckman Industries, 966 F.2d at 476 (internal quotations marks omitted).

Here, defendant SIA argues there is good cause for a protective order excusing it from producing Capt. Foong because Capt. Foong has refused to appear at his deposition due to his assertion of a privilege against self-incrimination under Taiwan law. Capt. Foong's assertion of the privilege against self-incrimination was initially based on a criminal investigation into the air crash conducted by the Taiwan government. However, Taiwan prosecutors have now recommended that criminal charges

[5] The only evidence plaintiffs present is their July 1, 2002, letter which merely "suggests" August 2, 2002, as an appropriate date to depose Capt. Foong.

against Capt. Foong be suspended. Yet, Capt. Foong appears to continue to claim a privilege against self-incrimination, now vaguely based on a criminal charge raised by a relative of one of the accident victims, although it is not clear whether there is any legal basis under Taiwanese law for a claim of privilege against self-incrimination in these circumstances.

To support its motion, defendant SIA cites Societé Internationale Pour Participations Industreilles et Commerciales, S.A. v. Rogers, 357 U.S. 197, 78 S.Ct. 1087, 2 L.Ed.2d 1255 (1958), which held that dismissal of plaintiff's complaint for failure to comply with a discovery order was not justified when the plaintiff, despite making a good-faith effort to do so, was unable to comply with the discovery order because to do so would subject it to possible criminal prosecution for violating Swiss banking laws. Id. at 211-12, 78 S.Ct. at 1095-96. However, this decision in inapposite because defendant SIA has not identified any foreign law it would be violating by producing Capt. Foong for deposition. See United States v. Vetco, Inc., 691 F.2d 1281, 1287 (9th Cir.) (*Societé Internationale* not controlling when no finding responding to discovery would violate foreign sovereign's laws), cert. denied, 454 U.S. 1098 (1981). Moreover, the Supreme Court in Societé Internationale expressly distinguished the situation in which the act of responding to discovery violated a foreign jurisdiction's criminal laws from our situation, wherein the responses to discovery may lead to evidence of a criminal violation:

> It is hardly debatable that fear of criminal prosecution constitutes a weighty excuse for nonproduction, and this excuse is not weakened because the laws preventing compliance are those of a foreign sovereign. Of course this situation should be distinguished from one where a party claims that compliance with a court's order will reveal facts which may provide the basis for criminal prosecution of that party under the penal laws of a foreign sovereign thereby shown to have been violated.

Id. at 211, 78 S.Ct. at 1095. For the same reason, defendant's reliance on Richmark Corp. v. Timber Falling Consultants, 959 F.2d 1468 (9th Cir.), cert. dismissed, 506 U.S. 948 (1992), is likewise inapposite.

More broadly, defendant SIA argues it has made "every possible effort to comply with the Court's order and produce Captain Foong for his deposition." Joint Stip. at 18:8-9. The Court is not convinced. Although defendant has written several letters to Capt. Foong requesting his attendance at deposition,[6] defendant has taken no further steps to secure Capt. Foong's testimony, such as utilizing available legal procedures in Singapore. See, e.g., Cochran Consulting, Inc. v. UWATEC USA, Inc., 102 F.3d 1224, 1226 (Fed. Cir. 1996) (foreign citizen "made appropriate efforts to comply with the discovery demand" when it brought suit against nonparty "for the purpose of obtaining and producing" the requested information). Nor, for that matter, has defendant SIA presented any competent evidence showing the continued existence of any criminal investigation or proceedings against Capt. Foong or explaining the legal significance of actions taken by a family member of a victim of the Taiwan crash. In short, defendant SIA has not, at this time, met its burden of demonstrating good cause for a protective order, and its motion should be denied without prejudice.

V

The Court sees no reason why the deposition of Capt. Foong should not proceed on all fronts at the same time, or why a letter rogatory cannot be requested while Capt. Foong's subpoena under Rule 30 is pursued.

ORDER

1. Plaintiffs' motion for sanctions under Fed. R. Civ. P. 37 is denied without prejudice.

2. Defendant Singapore Airlines, Ltd.'s motion for a protective order is denied without prejudice.

Initials of Deputy Clerk____

[6] The correspondence with Capt. Foong suggests he views his appearance at deposition as a "voluntary" matter, rather than an appearance required by court order. See, e.g., Margo Decl., ¶ 13, Exh. K.