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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

LUCY SULLIVAN, individually,)	
)	No. CIV 05 469 TUC RCC
Plaintiff,)	
)	REPLY TO DEFENDANT
vs.)	GWIN'S OBJECTION TO
)	PLAINTIFF'S AFFIDAVIT
CARL L. CASH and ROBBIE J. CASH,)	REGARDING ATTORNEY'S
husband and wife; et al.,)	FEEES AND COSTS REGARDING
)	DEPOSITIONS
Defendants.)	
_____)	

Plaintiff Lucy Sullivan replies to Defendant Robbi Cash Gwin's Objection to Plaintiff's [Counsel's] Affidavit and hereby requests that this Court grant her the attorney's fees and costs for Defendant Robbie Cash Gwin's failure to appear for her deposition, set for March 5, 2007. Plaintiff requests that this Court require Defendant and/or her counsel to pay all of the reasonable expenses, including attorney's fees, caused by Defendant's failure. These expenses are **mandatory** and there is no justification which excuses them.

Rule 37(d), Federal Rules of Civil Procedure, provides that if a party fails to appear for deposition, the Court may make such orders as are just, and it may take any

action under Rule 37(b)(2)(A), (B), and ©, including entering default. The court **shall** require the party failing to act or the attorney for that party **or both** to pay the expenses and 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. There has been no attempt to justify the failure of the March 5 deposition.

It was only after not hearing back from defense counsel's office after multiple attempts to get a response, that on February 22, 2007, Plaintiff's counsel sent a notice of deposition for Robbi Gwin setting the deposition for March 5, 2007. That notice was electronically delivered via ECF. On February 27, 2007, counsel for Robbi Gwin advised Plaintiff's counsel that Ms. Gwin would be available for deposition in Tucson on March 21, 2007, a date that Plaintiff's counsel had advised defense counsel that she was **not** available. Plaintiff's counsel advised defense counsel by return e-mail that she was not available that week and reminded defense counsel that Plaintiff's counsel could do Ms. Cash Gwin's deposition on March 5, 2007—the date it was noticed—and a list of other dates. On March 1, 2007 Plaintiff's counsel followed up with defense counsel via e-mail about Robbi Cash Gwin's deposition and reminded him that her deposition was noticed for March 5, 2007. Also on March 1, 2007, Plaintiff's counsel spoke with Isabel from defense counsel's office and reminded her that Robbi Cash Gwin's deposition was set for Monday, March 5, 2007 at 2:30 p.m. Isabel assured Plaintiff's counsel that she would stay on top of this matter and advise Plaintiff's counsel if Ms. Cash Gwin would not be attending the March 5 deposition. Plaintiff's counsel did not

hear from defense counsel's office after that call.

Payment of Expenses, Including Attorney's Fees

Defendant claims that Plaintiff's claim for fees and costs is grossly inflated. However, Plaintiff's counsel discounted her claim for time spent that actually was useful to the deposition which finally took place. Plaintiff's counsel claims only time that was necessitated by the need to reschedule the deposition, such as repetition of the preparation since time passed from the time of the first attempted deposition and the actual deposition. Plaintiff's counsel had to refresh her memory as to the subjects she wished to cover in Ms. Gwin's deposition.

Plaintiff's counsel paid for the court reporter at the deposition that finally took place and for the failed deposition. Plaintiff's counsel spent time traveling from her office in the desert south of Tucson near Pima Mine Road and Avenida Kaye to the court reporter's office near Fort Lowell and Campbell. Plaintiff's counsel spent time waiting for Defendant to appear for the deposition and has not been reimbursed for those expenses or the loss of time and inconvenience. Defendant or her counsel have not offered to reimburse for any time or expenses for the failed deposition. Rule 37(d) **mandates** payment of expenses and fees when a party fails to appear for her deposition.

Belated compliance with discovery orders does not preclude the imposition of sanctions. *North Am. Watch Corp. v. Princess Ermine Jewels*, 786 F.2d 1447, 1451 (9th Cir. 1986). Submitting to a deposition does not purge a prior failure to appear for deposition. *Henry v. Gill Indus., Inc.*, 983 F.2d 943, 947 (9th Cir. 1993).

In *National Hockey League v. Metropolitan Hockey Club, Inc.*, 427 U.S. 639, 643, 96 S.Ct. 2778 (1976), the United States Supreme Court explained that sanctions must be available, not merely to penalize, but to deter those who might be tempted to such conduct in the absence of such deterrent.

In the present case, Defendant ignored the deposition notice. The result is unjustified expense, delay and prejudice. This obstruction diverted attention from other matters for counsel and the Court—in this and other cases. The Ninth Circuit has affirmed sanctions against defense counsel for failing to appear at a deposition absent a valid protective order, even though he informed plaintiff that he did not plan to attend. *Telluride Mgmt. Solutions, Inc. v. Telluride Inv. Group*, 55 F.3d 463, 466-67 (9th Cir. 1995).

This Court may give weight to Defendant Robbi Cash Gwin’s lack of cooperation when she evaded service, failed to cooperate with coordination of required deposition dates (including failure to call counsel as promised if the deposition was not going to occur) and failed to appear for a required noticed deposition.

Plaintiff’s counsel hoped to depose Ms. Gwin and was prepared to do so. Defendant claims that it is not reasonable to award time for preparation for a deposition when such preparation would have inured to Plaintiff’s benefit at both depositions. Plaintiff’s counsel spent many hours preparing for Ms. Gwin’s deposition, but claims only time for that preparation both before the “missed” deposition and the deposition that actually occurred. Plaintiff’s counsel claims only the preparation time that was

“wasted” or repeated because of Ms. Gwin’s failure to appear.

Plaintiff’s counsel tried to set the deposition of Robbi Gwin with coordination with defense counsel’s office. That did not work so Plaintiff’s counsel noticed the deposition. No one notified Plaintiff’s counsel, as promised, that Ms. Gwin would not appear for the noticed deposition. Plaintiff’s counsel assumed that defense counsel and defendant would comply with the notice and either appear or let Plaintiff’s counsel know that Ms. Gwin would not be appearing. Defense counsel Henry Jacobs’ assistant promised that she would let Ms. Peterson know if Ms. Gwin would not appear. Plaintiff’s counsel heard nothing else. There is nothing that defense counsel presents that excuses the mandatory imposition of those expenses under Rule 37(d).

“The burden of establishing *substantial* justification is on the party being sanctioned (emphasis added).” *Telluride Mgmt. Solutions, Inc. v. Telluride Inv. Group*, 55 F.3d 463, 466 (9th Cir. 1995). “[S]ubstantially justified” does not mean people could differ as to [the appropriateness of the contested action.]” *Pierce v. Underwood*, 487 U.S. 552, 565, 108 S.Ct. 2541, 2550, 101 L.Ed.2d 490 (1988). Rule 37(d) **requires** the court to order defendant, her attorney, or both, to pay the reasonable expenses, including attorney’s fees, caused by that failure.

Plaintiff’s counsel had to attend the deposition or risk being sanctioned herself for failure to appear if defendant appeared with counsel. In fixing the amount of the sanction, the Court may consider a party’s entire course of conduct during the proceedings. *Commodity Futures Trading Comm’n v. Noble Metals Int’l, Inc.*, 67 F.3d

766, 772 (9th Cir. 1995).

Plaintiff's counsel attended the scheduled deposition. Plaintiff's counsel also had to prepare the motion and reply.

Defendant claims that Plaintiff's mileage estimate is incorrect. Plaintiff's counsel's office is near Pima Mine Road and Avenida Kaye southwest of Tucson. Plaintiff's counsel keeps track of mileage related to business matters at the time of the travel and records that mileage for each case. Plaintiff's counsel double-checked her mileage at MapQuest. According to MapQuest, mileage from Plaintiff's counsel's office to the court reporter's office is 26.4 miles. Therefore, the mileage given for the failed Gwin deposition is slightly understated from the actual mileage.

Defendant claims that where fees or costs incurred in conducting the first deposition proceeding were not duplicated in the second proceeding, such fees and costs should not be awarded as such award would constitute a windfall and would not be remedial in nature. Plaintiff claims only that time and those expenses that were incurred as a result of the failure of Ms. Gwin to appear for her first scheduled deposition. Some preparation had to be repeated in order to refresh Plaintiff's counsel's memory as to details of Ms. Gwin's proposed question areas as did arrangements for the deposition itself.

Defendant claims that the noticed deposition proceeding occurred while Defendant Gwin was out of town. Plaintiff's counsel was never advised before March 5 that Ms. Gwin was out of town or was going to be out of town. Defendant also claims

that Plaintiff did not need to file the motion for sanctions. It took filing the motion for sanctions to get the cooperation that Plaintiff's counsel had sought for months.

Neither Plaintiff nor her counsel are to blame here. Defendant or her counsel seems to miss the point that Plaintiff's counsel followed the rules and more and that Defendant and/or her counsel ignored the notice of deposition. Plaintiff's counsel tried to informally schedule the deposition of Robbi Gwin to meet the schedule of Ms. Gwin and all counsel. When that informal attempt at cooperation was not successful, Plaintiff's counsel followed the rules and set the deposition according to notice. Plaintiff's counsel called and wrote to defense counsel about this deposition setting. Neither Defendant nor her counsel followed the rules. Defense counsel's office promised to advise Plaintiff's counsel if Ms. Gwin could not attend. Plaintiff's counsel cooperated voluntarily and informally more than once regarding resetting Ms. Gwin's deposition and was willing to continue to cooperate in the setting of depositions on mutually agreeable dates, but couldn't get more response regarding this setting. No one filed a motion for protective order to let Plaintiff's counsel know that she shouldn't travel to the court reporter's office. This requested award is required to compensate Plaintiff for the expenses she incurred by having her attorney prepare for and miss deposing Robbi Cash Gwin.

Defendant claims that Plaintiff has attempted to utilize the discovery sanction rules as a sword, rather than as a shield ; "refusing to back down and accept reasonable accommodation for expenses incurred due to Defendant's error." (p. 5, Defendant

Gwin's Objection). Defendant **never** offered any accommodation or offered to pay any expenses for her failure to appear at her properly noticed deposition. Plaintiff and her counsel incurred expenses for the failure to appear and Plaintiff's counsel wasted time trying to set up and actually take the deposition.

Defendant claims that the time for the motion for sanctions should not be awarded. Plaintiff's counsel tried all means available to her other than visiting defense counsel's office in person to try to get the deposition to take place. Letters, e-mails, telephone calls and notices of deposition did not work to accomplish the depositions. It took the motion for sanctions to finally get some cooperation to take a very basic deposition in this case.

Defendant claims that there has to be a good faith attempt to secure disclosure without court intervention pursuant to Rule 37(a)(2)(A), Federal Rules of Civil Procedure. This rule does not apply to this situation. The rule cited by Defendant specifically refers to disclosure required by Rule 26(a). The rule regarding failure to appear for deposition is Rule 37(d)(1). There is no requirement under this rule for a good faith attempt to secure "disclosure" or a rescheduling of the deposition before asking for the Court's intervention. In any event, Plaintiff's counsel made several good faith attempts for months to informally arrange convenient times for Ms. Gwin's deposition before she decided to formally notice the deposition, which is allowed and contemplated by the rules.

Defendant next claims that Rule 34(a)(4)© provides that if the motion is granted

in part and denied in part, the court may apportion the reasonable expenses among the parties and persons in a just manner. However, as mentioned above, this rule does not apply to a party's failure to appear for deposition which is governed by Rule 37(d)(1). Defendant claims somehow that Plaintiff acted unjustifiably in bringing this motion without attempting to resolve the matter without Court intervention. Defendant claims also that Plaintiff was unjustified in seeking the remedies of striking the defendant's answer and entering default judgment. Defendant claims that Plaintiff does not appear before this Court with clean hands. Defendant claims that this should mitigate any award of fees and costs. This is not supported by any law that applies to a party's failure to appear for a deposition.

Plaintiff was not required by the rules to attempt to resolve the matter without Court intervention. Even if it were required, Plaintiff's counsel suspects this would have been futile as had all the prior attempts to set the deposition informally. Rule 37(d) allows a party seeking the deposition to request the striking of the answer and entering default. Just because the Court decided not to grant that request does not mean that Plaintiff came to the Court with "unclean hands." Plaintiff did what she was required to do according to the rules and courtesy to try to set Ms. Gwin's deposition. When she received no cooperation in return, she had no choice but to notice the deposition of Ms. Gwin. When Ms. Gwin did not appear for her deposition, Plaintiff had every right under the rules to seek default and expenses. There is no law applicable to this situation that requires Plaintiff to absorb any fees or costs caused by the failure of

Ms. Gwin to appear. To the contrary, the applicable rule mandates imposition of sanctions against the party or attorney for the party who failed to appear for the deposition.

Defendant claims that the only reason the Motion for Sanctions was litigated was because Plaintiff demanded penalties that were ultimately refused by the Court. The Motion for Sanctions had to be filed to try to move this case toward resolution. Plaintiff's counsel had been trying to depose Ms. Gwin for four months or more. Plaintiff's counsel had not been able to make any progress toward that end. This was after Ms. Gwin evaded service, requiring Plaintiff's counsel to incur expenses to try to server her. Plaintiff's counsel had to seek permission from the Court to obtain service by alternative means. The Court also decided that Plaintiff was entitled to fees and costs for that delay and inconvenience, but has yet to rule on the amount of the fees and costs. The purpose of the Motion for Sanctions, if default was not granted, was to obtain reimbursement of the fees and costs wasted in trying to get Ms. Gwin's deposition and, as explained in *National Hockey League v. Metropolitan Hockey Club, Inc.*, 427 U.S. 639, 643, 96 S.Ct. 2778 (1976), sanctions must be available, 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 deterrent. Plaintiff's counsel hopes that sanctions in this instance will help deter delaying and obstructive tactics in the future in this and other cases.

Defendant claims that she has always been willing to confess \$289.50 (p. 6,

Defendant Gwin's Objection). However, Plaintiff's counsel is not aware that Defendant has been willing to confess to anything in this matter. Further, that amount is not appropriate in of the conduct of Defendant and/or her counsel in this situation and the actual fees and costs incurred because of the failure.

For the reasons set forth above, Plaintiff respectfully requests that this Court enter an order against Defendant Robbi Gwin and/or her counsel that she or he pay the reasonable expenses and attorney's fees for her failure to appear at her deposition.

RESPECTFULLY SUBMITTED THIS 23rd day of July 2007.

DENNEEN L. PETERSON, P.C.

/s Denneen L Peterson
Denneen L. Peterson
Attorney for Plaintiff

Copies of the foregoing
electronically delivered this 23rd day of
July 2007 to:

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