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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

VICTORIA LUND, individually)	Case No. CV 13-02776 DDP (VBKx)
and as successor-in-interest)	
to WILLIAM LUND, deceased;)	ORDER GRANTING IN PART AND
DAVID LUND, an individual;)	DENYING IN PART MOTION FOR
and SHEILA LUND, an)	TERMINATING SANCTIONS
individual, as legal heirs)	
of WILLIAM LUND, Deceased,)	[Dkt. 867]
)	
Plaintiff,)	
)	
v.)	
)	
3M COMPANY a/k/a MINNESOTA)	
MINING & MANUFACTURING)	
COMPANY, et al.,)	
)	
Defendants.)	
)	
_____)	

Presently before the court is Plaintiffs Victoria Lund, individually and as successor-in-interest to William Lund, deceased, David Lund, and Shelia Lund's Motion for Terminating Sanctions Against Defendant General Dynamics Corporation. (Dkt. 867.) Having reviewed the parties arguments, the court GRANTS the Motion in part and adopts the following Order.

I. BACKGROUND

1 The court assumes the parties' familiarity with the general
2 background of this case, which has been set forth more fully in
3 previous Orders. (See Dkts. 845, 864.) Briefly, this action arises
4 out of the injuries and eventual death of William Lund, allegedly
5 in connection with his employment as a Navy machinist mate
6 responsible for servicing ships containing asbestos. (See Compl.)
7 According to Plaintiffs, at least some of Mr. Lund's exposure to
8 asbestos took place while working on Navy warships serviced at the
9 shipyards of Defendant General Dynamics and its former division
10 Electric Boat. (Id.) This particular motion relates to Plaintiffs'
11 attempts to depose a Rule 30(b)(6) corporate representative from
12 Defendant General Dynamics.

13 In discovery responses, General Dynamics has represented that
14 what is now Electric Boat Corporation operated as a division of
15 General Dynamics from 1952 to 1995. (Exhibit A, attached to General
16 Dynamics Mot. Summ. J., at 1.) In 1995, the former Electric Boat
17 division registered as a separate corporate entity, the Electric
18 Boat Corporation, and assumed all the assets and liabilities of the
19 former division. (Id.) As Mr. Lund's injuries arose prior to 1995,
20 Plaintiffs sought to depose a 30(b)(6) from both Defendant Electric
21 Boat Corporation and Defendant General Dynamics. As to the latter
22 party, Plaintiffs were particularly concerned with understanding
23 the specific activities of General Dynamics during the time period
24 at issue and the relationship between the company and its former
25 division. (Mot. Terminating Sanctions 2-3.)

26 Plaintiffs first noticed the deposition of General Dynamics'
27 30(b)(6) representative in August 2014. (Ex. B, attached to Decl.
28 Tyler Stock in Support of Mot. Terminating Sanctions) According to

1 the notice, Plaintiffs sought testimony and documents regarding,
2 among other things, General Dynamics' corporate structure. (Id.)
3 Defendants objected to this notice and failed to appear for the
4 depositions. (Id.; Mot. Terminating Sanctions 4.) On October 1,
5 2014, Plaintiffs filed a Motion to Compel Defendant General
6 Dynamics' 30(b)(6) witness. (Dkt. 516.) On December 19, 2014, the
7 district court judge handling this case for pre-trial purposes
8 issued an order that "[t]he deposition of an appropriate Rule
9 30(b)(6) witness shall be taken within 30 day of the date of this
10 order." (Dkt. 580.) The parties then engaged in negotiations
11 regarding the terms of the deposition, which ultimately led to
12 Plaintiffs filing a Motion for Evidentiary and Monetary Sanctions
13 against Defendant General Dynamics. (Dkt. 590.)

14 On February 27, 2015, the court issued another order requiring
15 that "defendants General Dynamics and Electric Boat shall produce
16 their 30(b)(6) witnesses within 30 days of the date of this order
17 or be deemed liable in this action." (Dkt. 693.) In response to
18 that Order, Defendant General Dynamics wrote to Plaintiffs' counsel
19 on March 5, 2015, stating: "Pursuant to the Court's order, we will
20 produce Mr. Bradford Heil for deposition on March 27, 2015 at 9:00
21 a.m. EST at the Mystic Marriott Hotel in Groton, CT." (Ex. E.,
22 attached to Stock Decl.) Plaintiffs agreed to the deposition.

23 As noted in General Dynamics March 5 letter, and confirmed in
24 subsequent representations to the court, Mr. Heil was being offered
25 as the 30(b)(6) corporate representative for both General Dynamics
26 and Electric Boat Corporation. (Ex E; Dkt. 767 at 1 ("Mr. Heil was
27 appearing on behalf of General Dynamics as well as Electric Boat
28 Corporation").) Because Mr. Heil was produced on behalf of

1 two separate corporate entities, Plaintiffs' counsel bifurcated
2 questioning and first questioned Mr. Heil as "General Dynamics'
3 person most qualified under 30(b)(6)." (Ex. G (Deposition of Mr.
4 Bradford Heil), attached to Stock Decl. at 181:13-15.) Plaintiffs'
5 counsel opened by asking Mr. Heil whether he understood that he had
6 "been designated and identified as defendant, General Dynamics
7 Corporation's person most qualified under Rule 30(b)(6) in this
8 case." (Heil Depo. at 183:14-17.) Defendants' counsel objected and
9 clarified that he was "being produced as a witness for the former
10 Electric Boat Division of General Dynamics." (Id. at 183:18-20.)
11 Despite numerous alternative formulations of the question,
12 Defendants' counsel refused to concede that Mr. Heil was being
13 produced to testify as General Dynamics corporate representative or
14 allow Mr. Heil to testify to that fact. (Id. at 197:20-198:2 ("We
15 are producing Mr. Heil as a representative of Electric Boat, former
16 division of General Dynamics and Electric Boat Corporation. To the
17 extent that you believe you are entitled to a separate deposition
18 of General Dynamics, I'm not agreeing that you are, but . . . it
19 will have to be addressed with the Court.")) Plaintiffs' counsel
20 ultimately suspended the deposition as to General Dynamics and
21 instead proceeded to depose Mr. Heil as Electric Boat Corporation's
22 30(b)(6) representative. This time, Mr. Heil acknowledged that he
23 was designated to testify on behalf of Electric Boat Corporation.
24 (Ex. L, attached to Stock Decl. at 258:2-5.)

25 Plaintiffs subsequently filed a Motion for Terminating
26 Sanctions against Defendant General Dynamics for failure to produce
27 a 30(b)(6) witness on April 6, 2015. (Dkt. 761.) Defendant General
28 Dynamics responded to the motion by explaining that the failure of

1 counsel to simply concede that Mr. Heil was being produced as
2 General Dynamics 30(b)(6) witness was an "error" that arose from a
3 "misunderstanding . . . over semantics." (Id. at 2.) General
4 Dynamics also offered to make the totality of Mr. Heil's remaining
5 March 27, 2015 testimony binding on General Dynamics and to make
6 Mr. Heil available to Plaintiffs' for a new deposition within ten
7 days of hearing the termination motion. (Id.)

8 On March 1, 2016, the court issued an order denying
9 Plaintiffs' Motion for Terminating Sanctions. (Dkt. 829.) On July
10 5, 2016, Plaintiffs sent a letter to General Dynamics requesting a
11 new date to depose General Dynamics corporate representative.
12 Defendant General Dynamics' responded that it would no longer agree
13 to make Mr. Heil available for a new deposition. (Ex. K, attached
14 to Stock Decl.) Plaintiffs have now filed a new motion for
15 terminating sanctions for Defendant General Dynamics' failure to
16 produce a 30(b)(6) corporate representative.

17 **II. LEGAL STANDARD**

18 Where a party fails to appear for his properly noticed
19 deposition, Federal Rule of Civil Procedure 37(b) authorizes
20 sanctions. Fed. R. Civ. P. 37(d). Those sanctions "may include any
21 of the orders listed in Rule 37(b)(2)(A)(i)-(vi)." Id. 37(d)(3).
22 Rule 37(b)(2)(A)(i)-(vi) authorizes sanctions directing certain
23 facts be established, prohibiting a party from supporting or
24 opposing certain claims or defenses, striking pleadings, staying
25 further proceedings until the party complies, rendering default
26 judgment against the disobedient party, or "dismissing the action
27 or proceeding in whole or in part." Fed. R. Civ. P. 37(b)(2)(A)(i)-
28 (vi). Additionally, "[i]nstead of or in addition to these

1 sanctions, the court must require the party failing to act . . . to
2 pay the reasonable expenses, including attorney's fees, caused by
3 the failure, unless the failure was substantially justified or
4 other circumstances make an award of expenses unjust. Id.
5 37(b)(2)(C).

6 **III. DISCUSSION**

7 Based on Defendant General Dynamics' repeated failure to make
8 available a 30(b)(6) corporate representative, Plaintiffs seek
9 terminating sanctions. Defendant General Dynamics responds that
10 sanctions are not merited in the present case. First, Defendant
11 notes that Plaintiffs have already raised this precise issue in
12 their prior motion for terminating sanctions. (Opp'n Mot.
13 Terminating Sanctions 10-11.) Because that motion was denied,
14 Defendant argues that Plaintiffs should not be allowed relitigate
15 their claims here. (Id.) Defendant also notes that it has acted in
16 good faith to comply with all relevant discovery requirements,
17 including offering to make Mr. Heil's testimony binding on General
18 Dynamics. (Id. at 2, 14.) Defendant further explains that, in its
19 opposition to the prior sanctions motion, Defendant had offered to
20 make Mr. Heil available for a second deposition within ten days of
21 any hearing on that motion. In Defendant's view, the fact that
22 Plaintiffs did not take up this offer and instead waited for more
23 than a year to raise this deposition issue counsels against
24 affording relief now. (Id. at 4.)

25 Having reviewed the record evidence and the procedural history
26 of this deposition dispute, the court concludes that sanctions are
27 warranted. Plaintiffs have attempted on numerous occasions to
28 depose a 30(b)(6) representative from General Dynamics who is

1 qualified to testify about the company's activities and its
2 relationship with its former Electric Boat division. These issues
3 are within the scope of this litigation and pertain to Plaintiffs'
4 theory of liability. Despite numerous court orders directing
5 Defendants to produce a 30(b)(6) witness, Plaintiffs have yet to be
6 able to depose a General Dynamics corporate representative.

7 Defendant cannot cure that failure by offering to make Mr.
8 Heil's testimony as Electric Boat Corporation's 30(b)(6) witness
9 binding on General Dynamics after the fact. Plaintiffs' deposition
10 of Mr. Heil proceeded, understandably, on the assumption that he
11 would only testify in his capacity as Electric Boat Corporation's
12 representative. It would prejudice Plaintiffs to equate that with
13 an opportunity to depose General Dynamics' corporate
14 representative. Likewise, the fact that Plaintiffs did not take up
15 Defendant's offer to re-depose Mr. Heil is also inapposite. As an
16 initial matter, Defendant offered to make Mr. Heil available within
17 ten days of any hearing on the prior terminating sanctions motion-a
18 motion that never had a hearing because it was taken under
19 submission by the court. Moreover, the offer only came after
20 Plaintiffs had filed a sanctions motion. Under these circumstances,
21 Plaintiffs were entitled to wait until a court ruling on their
22 motion before deciding whether to attempt to conduct any further
23 deposition.

24 While the court recognizes that a previous Order denied a
25 nearly identical motion, that ruling was presumably issued on the
26 assumption that, as Defendants represented in their previous
27 filings, the failure to offer a 30(b)(6) witness was a mistake and
28 Plaintiffs would eventually have an opportunity to properly depose

1 General Dynamics' corporate representative. Having not been
2 afforded that opportunity, the court now finds that sanctions are
3 merited. See Great American Ins. Co. of New York v. Vegas Const.
4 Co. Inc., 251 F.R.D. 534, 540-41 (D. Nev. 2008) (holding that
5 plaintiffs are "entitled to the knowledge of the corporation and
6 the corporation's position on matters clearly relevant and
7 discoverable in this case" and noting the duty defendants have "to
8 present a Rule 30(b)(6) witness to . . . address the noticed
9 topics, provide the corporation's position, and provide answers to
10 bind the corporation").

11 Given that sanctions are merited, the only question is whether
12 terminating sanctions are justified. Dismissal "is authorized only
13 in extreme circumstances and only where the violation is due to
14 willfulness, bad faith, or fault of the party." In re Exxon Valdez,
15 102 F.3d 429, 432 (9th Cir. 1996)(internal quotation marks
16 omitted). To establish that a party's conduct rises to the level of
17 willfulness, bad faith, or fault, "all that is required" is
18 "disobedient conduct not shown to be outside the control of the
19 litigant." Henry v. Gill Indus., Inc., 983 F.2d 943, 948 (9th Cir.
20 1993) (quoting Fjelstad v. Am. Honda Motor Co., Inc., 762 F.2d
21 1334, 1341 (9th Cir. 1985))(internal quotation marks omitted).
22 Even where a party's failure to comply is willful, in determining
23 whether the circumstances warrant dismissal, the Court must
24 consider five factors: (1) the public's interest in expeditious
25 resolution of litigation; (2) the court's need to manage its
26 docket; (3) the risk of prejudice to the defendants; (4) the public
27 policy favoring disposition of cases on their merits; and (5) the
28 availability of less drastic sanctions. Id. at 433. The first and

1 second factors almost always weigh in favor of dismissal, while the
2 fourth factor almost always weighs against it. See Computer Task
3 Group, Inc. v. Brotby, 364 F.3d 1112, 1115 (9th Cir. 2004).

4 Here, the court concludes that dismissal is not warranted and
5 lesser sanctions would adequately remedy the prejudice suffered by
6 Plaintiffs. Accordingly, the court orders Defendant General
7 Dynamics to make either Mr. Heil or another appropriate 30(b)(6)
8 corporate representative available for deposition within fourteen
9 days of the date of this Order. The deposition shall take place at
10 a location of Plaintiffs' choosing. Further the parties are
11 reminded of their obligation not to make bad faith objections that
12 would impede the orderly taking of the deposition. Given that this
13 court has already issued two other orders requiring General
14 Dynamics to produce a 30(b)(6) representative, willful failure to
15 comply with this Order shall result in a finding of liability in
16 this action against Defendant General Dynamics and may also lead to
17 a contempt proceeding. See Lew v. Kona Hosp., 754 F.2d 1420, 1426
18 (9th Cir. 1985) (collecting cases where the Ninth Circuit has
19 affirmed "a sanction as severe as dismissal for failure to comply
20 with discovery orders").

21 Additionally, Rule 37(b)(2)(C) authorizes the court to order
22 the "disobedient party . . . to pay the reasonable expenses,
23 including attorney's fees, caused by the failure, unless the
24 failure was substantially justified or other circumstances make an
25 award of expenses unjust." Here, Plaintiffs claim that they have
26 incurred \$23,000 in expenses as a result of Defendant's failure to
27 make a 30(b)(6) corporate representative available for deposition.
28 Specifically, Plaintiffs state that they spent 30 hours preparing

1 the instant motion at a rate of \$350.00 per hour for a total cost
2 of \$10,500. (Stock Decl. ¶ 21.) Plaintiffs also state that their
3 trial attorney, whose rate of compensation is \$500.00 per hour,
4 spent 25 hours meeting and conferring with Defendant's counsel and
5 preparing for a deposition that did not occur for a total sum of
6 \$12,500. (Id.)

7 General Dynamics responds that an award of expenses is not
8 justified in this case because the company did not violate any
9 court order. Specifically, General Dynamics explains that it could
10 not comply with directives to produce a 30(b)(6) representative
11 prior to February 17, 2015 because there were pending disputes over
12 a protective order that the court had to resolve. Moreover,
13 Defendant notes that, approximately two weeks after the court
14 resolved that dispute, Defendant offered Mr. Heil as a corporate
15 representative.

16 Even crediting Defendant's concerns about the protective
17 order, the court unambiguously ordered General Dynamics to produce
18 a 30(b)(6) representative on February 27, 2015. (Dkt. 693.) While
19 Defendant produced Mr. Heil in response to that order, Defendant's
20 objections to allow Mr. Heil to state he was General Dynamics'
21 30(b)(6) representative prevented Plaintiffs from conducting a
22 meaningful deposition. Moreover, Defendant has not demonstrated
23 that it was substantially justified in making its objections.
24 Accordingly the court finds that an award of expenses is justified
25 under Rule 37. See Lew, 754 F.2d at 1420 (noting that attorneys'
26 fees and costs can be awarded when the other party fails to appear
27 for deposition, as well as when the party appears but fails to
28

1 answer any questions) (citing Weigel v. Shapiro, 608 F.2d 268, 272
2 (7th Cir. 1979)).

3 Turning to the specific expenses requested by Plaintiffs, the
4 court finds that the rates requested are reasonable. The court
5 further finds that the full 30 hours spent on preparing this motion
6 were reasonably expended given the lengthy procedural history that
7 had to be catalogued. Accordingly, the court finds the request for
8 \$10,500 in connection with filing the instant motion reasonable.
9 Further, the court finds that Plaintiffs' counsel reasonably
10 expended 25 hours preparing for the deposition of Defendant's
11 30(b)(6) representative given the lengthy history of this
12 litigation and the complexity of the record. See, e.g., Compass
13 Bank v. Morris Cerullo World Evangelism, No. 13-CV-0654-BAS WVG,
14 2015 WL 3442030, at *9 (S.D. Cal. May 28, 2015) (awarding fees for
15 time spent preparing for a deposition where deponent did not
16 appear). However, because Plaintiffs' counsel would have had to
17 prepare for this deposition regardless of Defendant's conduct, and
18 will not need to duplicate the entirety of their prior effort in
19 preparing for the newly-ordered deposition, the court finds that it
20 would be unjust to award Plaintiffs the full preparation expenses
21 they request. Instead, the court will award Plaintiffs' counsel
22 eight hours of preparation expenses, which amounts to \$4,000.

23 **III. CONCLUSION**

24 For the foregoing reasons, the Court GRANTS Plaintiffs' Motion
25 for Terminating Sanctions in part. Defendant General Dynamics shall
26 make available Mr. Bradford Heil or another appropriate 30(b)(6)
27 corporate representative qualified to testify on behalf of General
28 Dynamics within fourteen days of this Order. Defendant General

1 Dynamics shall also pay the expenses associated with this motion in
2 the amount of \$14,500 within fourteen days.

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4 IT IS SO ORDERED.

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7 Dated: October 24, 2016



DEAN D. PREGERSON
United States District Judge

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