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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

NISSAN FIRE AND MARINE INSURANCE
COMPANY LTD.; HITACHI DATA
SYSTEMS CORP.,

No. C 02-2516 JSW

Plaintiffs,

**ORDER ON CROSS-MOTIONS
REGARDING DAMAGES AND
ATTORNEY'S FEES**

v.

BAX GLOBAL INC.; CATHAY PACIFIC
AIRWAYS, LTD.,

Defendants.

Now before the Court are the cross-motions regarding damages and attorney's fees filed by plaintiffs Hitachi Data Systems Corporation and Nissan Fire and Marine Insurance Co., Ltd. ("Plaintiffs") and defendant Bax Global Inc. ("BAX"). The Court finds that this matter is appropriate for disposition without oral argument and it is hereby deemed submitted. *See* N.D. Civ. L.R. 7-1(b). Accordingly, the hearing set for May 15, 2009 is HEREBY VACATED. As the parties are familiar with the facts and procedural history of this case, there is no need to recite them here, except where useful in reaching the disposition.

This matter is currently before the Court on remand from the Ninth Circuit. On appeal, the Ninth Circuit held that the Warsaw Convention as modified by the Hague Protocol governs the issue of damages and that California choice of law rules determine the substantive law governing the issue of attorney's fees. The Ninth Circuit remanded this matter to the Court to make the following two determinations: (1) whether, under the Hague Protocol, Hitachi is entitled to recovery, if so, the amount of the recovery; and (2) whether, under the relevant

1 substantive law dictated by California choice of law, paragraph 16 of the waybill entitled either
2 party to attorney's fees. The Court will address each issue in turn.

3 **A. Damages.**

4 Under the Hague Protocol, Plaintiffs' damages are limited to twenty dollars per
5 kilogram. When the damaged portion of the shipment affects the value and usability of the
6 other parts of the shipment, the damages are calculated based on the weight of all affected items
7 in the shipment. *Motorola, Inc. v. Federal Express Corp.*, 308 F.3d 995, 1001 (9th Cir. 2002).
8 The parties dispute what items within the shipment were affected by the damage to the disk
9 controller unit.

10 Hitachi shipped 18 cartons of cargo on BAX air waybill No. CHG17066781 dated April
11 5, 2001 from Plainfield, Indiana to Hong Kong. (Stipulated Facts ("Stip. Fact"), No. 1; Trial
12 Ex. 1.) The weight of the damaged carton and contents was 481 kilograms. (Stip. Fact, No.
13 12.) The damaged package contained a disk controller unit. (*Id.*, No. 13.) The weight of a
14 single Hitachi Data Systems 9960 is at most 1,062 kilograms when fully assembled. (*Id.*, No.
15 14.) The weight of two Hitachi Data Systems 9960 Disk Subsystems is at most 2,124
16 kilograms. (*Id.*, No. 15.) The entire shipment weighed 4,440 kilograms. (Trial Ex. 1.)

17 Plaintiffs' witnesses testified that the 18 pieces of the shipment were built, configured,
18 and tested to perform a single operating function for the customer in Hong Kong – to serve as
19 the customer's principal storage and remote backup storage of computerized data. These pieces
20 were designed to operate together and could not operate for their designed function without all
21 four disk controllers in proper operating condition. (Stipulated Testimony of Robert Shaffer, ¶¶
22 1(a), 1(b); *see also* Stipulated Testimony of Kai Wah (Edwin) Chan, ¶¶ 2(a), 2(c).) The damage
23 to the one disk controller prevented Hitachi from proceeding with the assembly of the parts in
24 the 18 cartons into the storage and backup storage units. The damaged unit was returned, and
25 the pieces in the other 17 cartons remained at the BAX Global facility at Hong Kong
26 International Airport until a replacement for the damaged unit was received. (Chan's Stipulated
27 Testimony, ¶ 3(c).) BAX did not submit any evidence to contradict the evidence proffered by
28 Plaintiffs' witnesses, or otherwise contradict Plaintiffs' showing that the other 17 cartons

1 remained at BAX’s facility and could not have been assembled until the replacement disc
2 controller was received. Therefore, the Court finds that the damage to the disk controller
3 affected the value and usability of the other 17 cartons in the shipment. Accordingly, the Court
4 will calculate the damages based on the weight of all affected items, which is 4,440 kilograms.
5 BAX shall pay Plaintiffs \$88,800 in damages.

6 **B. Attorney’s Fees.**

7 The parties concur that, under California law, Plaintiffs are entitled to attorney’s fees if
8 they are the “prevailing party.” At issue is whether Plaintiffs qualify as the prevailing party.

9 Under California law,

10 in deciding whether there is a “party prevailing on the contract,” the trial court is
11 to compare the relief awarded on the contract claim or claims with the parties’
12 demands on those same claims and their litigation objectives as disclosed by the
13 pleadings, trial briefs, opening statements, and similar sources. The prevailing
party determination is to be made only upon final resolution of the contract claims
and only by “a comparison of the extent to which each party ha[s] succeeded and
failed to succeed in its contentions.”

14 *Hsu v. Abbara*, 9 Cal. 4th 863, 876 (1995) (citation omitted). Moreover, in determining the
15 degree of litigation success, “courts should respect substance rather than form, and to this extent
16 should be guided by “equitable considerations.” *Id.* at 877. To illustrate, the court provided the
17 following example: “a party who is denied direct relief on a claim may nonetheless be found to
18 be a prevailing party if it is clear that the party has otherwise achieved its main litigation
19 objective.” *Id.*

20 The Court finds in comparing the relative success of the parties on the contract claim,
21 that Plaintiffs are the prevailing party. BAX seeks to limit the Court’s determination of whether
22 Plaintiffs are the prevailing party to the issues litigated at the trial, as compared to the litigation
23 of the entire case. The Court notes that BAX had persisted in contesting liability in a case
24 management statement submitted one year after Plaintiffs initiated this action and after
25 discovery had closed. Moreover, at trial, BAX contested where the damage occurred and thus
26 challenged that the case was governed by the Warsaw Convention or the Hague Protocol. BAX
27 eventually conceded liability and lost at trial on the issue of where the damage occurred.
28 Although BAX did succeed in limiting the amount of damages and prejudgment interest

1 allowed under the parties' contract, the Court finds that the degree that Plaintiffs' recovery was
2 reduced does not, in balance, sufficiently undermine Plaintiffs' success on their litigation
3 objectives. Therefore, the Court finds that Plaintiffs are the prevailing party and, thus, are
4 entitled to recover attorney's fees.

5 **C. Set-off.**

6 In the Order setting forth the Court's findings of facts and conclusions of law after the
7 bench trial, the Court held that BAX was entitled to a set-off in the amount of the settlement
8 paid by co-defendant, Cathay Pacific, to Plaintiffs, which was \$15,000. Plaintiffs now argue
9 that the BAX is not entitled to the set-off because Plaintiffs are not being fully compensated
10 based on the Hague Protocol's weight limitations on damages. However, Plaintiffs did not
11 appeal the set-off issue to the Ninth Circuit. Therefore, the "rule of mandate" doctrine
12 precludes the Court from addressing this issue on remand.

13 "The rule of mandate is similar to, but broader than, the law of the case doctrine."
14 *United States v. Cote*, 51 F.3d 178, 181 (9th Cir.1995). Upon receiving the mandate of an
15 appellate court, a district court "cannot vary it or examine it for any other purpose than
16 execution." *Id.* (quoting *In re Sanford Fork & Tool Co.*, 160 U.S. 247, 255 (1895)). Pursuant
17 to the mandate rule, a district court cannot "revisit its already final determinations unless the
18 mandate allowed it." *Id.* The rule of mandate doctrine is jurisdictional. *United States v.*
19 *Thrasher*, 483 F. 3d 977, 982 (9th Cir. 2007). The Ninth Circuit's mandate directed this Court
20 to determine Hitachi's damages under the Hague Protocol and to determine whether either party
21 was entitled to attorney's fees. Therefore, the Court finds that it does not have jurisdiction
22 pursuant to the "mandate rule" to consider the set-off issue.

23 **CONCLUSION**

24 For the foregoing reasons, the Court rules as follows on the parties' cross-motions
25 regarding damages and attorney's fees:

- 26 (1) Plaintiffs are awarded \$88,800 in damages;

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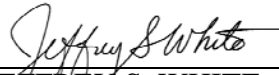
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- (2) Plaintiffs are entitled to their reasonable attorney's fees; and
- (3) the Court does not have jurisdiction to consider the set-off issue.

IT IS SO ORDERED.

Dated: May 12, 2009



JEFFREY S. WHITE
UNITED STATES DISTRICT JUDGE