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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

LAURA ALEXIS,

Plaintiff,

v.

JAMES B. ROGERS, et al.,

Defendants.

Case No.: 15cv691-CAB (BLM)

ORDER:

- (1) GRANTING IN PART AND DENYING IN PART DEFENDANTS' MOTION FOR MONETARY SANCTIONS BASED ON PLAINTIFF LAURA ALEXIS' AND/OR PLAINTIFF'S COUNSEL'S WILLFUL VIOLATION OF THE OCTOBER 21, 2016 COURT ORDER [ECF No. 59];**
- (2) DENYING DEFENDANTS' MOTION FOR MONETARY SANCTIONS BASED ON PLAINTIFF'S FRAUD ON THE COURT [ECF No. 61];**
- (3) GRANTING IN PART AND DENYING IN PART DEFENDANTS' MOTION FOR MONETARY AND/OR EVIDENTIARY SANCTIONS BASED ON PLAINTIFFS' CONTINUED WITHHOLDING OF CRITICAL DOCUMENTS [ECF No. 60].**

1 On November 11 and 12, 2016, Defendants filed three separate motions seeking an array
2 of sanctions based upon a variety of allegedly wrongful conduct. ECF Nos. 59–61. On
3 November 28, 2016, Plaintiff opposed each motion. ECF Nos. 62–64. On December 2, 2016,
4 Defendants replied reiterating their outrage at Plaintiff’s alleged conduct. ECF Nos. 65–67.
5 Having considered the briefing submitted by the parties and having reviewed all of the
6 supporting exhibits, the Court **GRANTS IN PART AND DENIES IN PART** Defendants’ motion
7 for monetary and evidentiary sanctions based on Plaintiff Laura Alexis’ and/or Plaintiff’s counsel’s
8 violation of the Court’s October 21, 2016 order and Defendants’ motion for monetary and/or
9 evidentiary sanctions based on Plaintiff’s withholding of critical documents, and **DENIES**
10 Defendants’ motion for monetary sanctions based on Plaintiff’s fraud on the court.

11 **FACTUAL AND PROCEDURAL BACKGROUND**

12 The facts underlying the current litigation are well-known to the parties and mostly
13 irrelevant to the instant motions so the Court will not recite them. On October 21, 2016, the
14 Court issued an order denying Plaintiff’s motion to compel Defendant Rogers’ deposition in Los
15 Angeles, California, and denying without prejudice Plaintiff’s motion to compel the deposition of
16 Defendant Rogers’ wife, Paige Parker. ECF No. 57. With regard to the deposition of Mr. Rogers,
17 the Court accepted the parties’ agreed-upon date of November 9, 2016, determined that the
18 proper venue was Singapore, and ordered the deposition to occur in Singapore on November 9,
19 2016. Id.

20 **LEGAL STANDARD**

21 Federal courts may impose sanctions on parties failing to comply with court orders under
22 both the Federal Rules of Civil Procedure (“FRCP”) and the Local Rules. For example, FRCP 26
23

1 provides for sanctions against individual attorneys who are remiss in complying with their
2 discovery obligations:

3 By signing [a discovery request, response, or objection], an attorney or party
4 certifies that to the best of the person's knowledge, information, and belief formed
5 after a reasonable inquiry . . . [the] discovery request, response, or objection, []
6 is:

7 . . .
8 (ii) not interposed for any improper purpose, such as to harass, cause
9 unnecessary delay, or needlessly increase the cost of litigation; and

10 (iii) neither unreasonable nor unduly burdensome or expensive, considering
11 the needs of the case, prior discovery in the case, the amount in controversy, and
12 the importance of the issues at stake in the action.

13 Fed. R. Civ. P. 26(g)(1)(B). If an attorney makes an incorrect certification without substantial
14 justification, the court must sanction the attorney, party, or both and the sanction may include
15 an award of reasonable attorney's fees. Fed. R. Civ. P. 26(g)(3).

16 Furthermore, pursuant to FRCP 30(d)(2), the court "may impose an appropriate
17 sanction—including the reasonable expenses and attorney's fees incurred by any party—on a
18 person who impedes, delays, or frustrates the fair examination of the deponent." Fed. R. Civ.
19 P. 30(d)(2). A party who, "expecting a deposition to be taken, attends in person or by an
20 attorney" may recover "reasonable expenses for attending the deposition, including attorney's
21 fees, "if the noticing party failed to . . . attend and proceed with the deposition." Fed. R. Civ.
22 P. 30(g).

23 Additionally, FRCP 37(b)(2) provides that "[i]f a party . . . fails to obey an order to provide
or permit discovery . . . the court in which the action is pending may issue further just orders."
Fed. R. Civ. P. 37(b)(2). Granting considerable but not unlimited discretion in federal courts to
fashion appropriate penalties, FRCP 37 permits orders "striking in whole or in part pleadings,"
see Fed. R. Civ. P. 37(b)(2)(A)(iii), and mandating payment of the other party's expenses,

1 “unless the failure was substantially justified or other circumstances make an award of expenses
2 unjust.” Fed. R. Civ. P. 37(b)(2)(C). Further, when a court denies a motion to compel, the court
3 “must, after giving an opportunity to be heard, require the movant, the attorney filing the
4 motion, or both to pay the party or deponent who opposed the motion its reasonable expenses
5 incurred in opposing the motion, including attorney’s fees.” Fed. R. Civ. P. 37(a)(5). However,
6 “the court must not order this payment if the motion was substantially justified or other
7 circumstances make an award of expenses unjust.” Id.; see also Brown v. Hain Celestial Group,
8 Inc., 2013 WL 5800566, at *5 (N.D. Cal. Oct. 28, 2013) (“[t]he party that loses the motion to
9 compel bears the affirmative burden of demonstrating that its position was substantially
10 justified”) (internal citations omitted).

11 Notably, FRCP 11 does “not apply to disclosures and discovery requests, responses,
12 objections, and motions under Rules 26 through 37.” Fed. R. Civ. P. 11(d). “Rule 11 . . . was
13 not intended to, and does not, reach discovery conduct, even if sanctionable. The proper way
14 to sanction discovery misconduct is through the procedures provided under Fed. R. Civ. P. 37,
15 not under Rule 11.” Sneller v. City of Bainbridge Island, 606 F.3d 636, 640 n.4 (9th Cir. 2010).

16 Finally, Civil Local Rule 83.1 provides that “[f]ailure of counsel or of any party to comply
17 with these rules . . . or with any order of the court may be grounds for imposition by the court
18 of any and all sanctions authorized by statute or rule or within the inherent power of the court,
19 including, without limitation, dismissal of any actions, entry of default, finding of contempt,
20 imposition of monetary sanctions or attorneys’ fees and costs, and other lesser sanctions.” CivLR
21 83.1(a).

22 In addition to these rule-based authorities, all “federal courts are vested with inherent
23 powers enabling them to manage their cases and courtrooms effectively and to ensure

1 obedience to their orders As a function of this power, courts can dismiss cases in their
2 entirety, bar witnesses, award attorney’s fees and assess fines.” Aloe Vera of Am., Inc. v. United
3 States, 376 F.3d 960, 964-65 (9th Cir. 2004) (citing F.J. Hanshaw Enters., Inc. v. Emerald River
4 Dev., Inc., 244 F.3d 1128, 1136 (9th Cir. 2001)). Federal courts have “inherent power to impose
5 sanctions against attorneys and parties for bad faith conduct in litigation.” Oliver v. In-N-Out
6 Burgers, 945 F. Supp. 2d. 1126, 1129 (S.D. Cal. 2013) (citing Chambers v. NASCO, 501 U.S. 32,
7 43 (1991)). “Before a court may award sanctions under its inherent powers, the court must
8 make an explicit finding that counsel’s conduct constituted or was tantamount to bad faith.” Id.
9 (citing Mendez v. County of San Bernardino, 540 F.3d 1109, 1131 (9th Cir. 2008)). “[T]he bad-
10 faith requirement sets a ‘high threshold,’ which may be met by willful misconduct, . . . or
11 recklessness that is coupled with an improper purpose.” Lofton v. Verizon Wireless (VAW) LLC,
12 308 F.R.D. 276, 285 (N.D. Cal. 2015) (quoting Primus Auto. Fin. Servs., Inc. v. Batarse, 115
13 F.3d 644, 649 (9th Cir. 1997)). The burden is on the moving party to demonstrate that the
14 opposing party acted with the necessary bad faith or improper purpose. Id. When a court order
15 is violated, a district court must also consider the risk of prejudice to the complying party and
16 the availability of less drastic sanctions. See Commodity Futures Trading Comm’n v. Noble
17 Metals Int.’l Inc., 67 F.3d 766, 771 (9th Cir. 1995), *cert. denied*, 519 U.S. 815 (1996) (referencing
18 Adriana Int’l Corp. v. Thoeren, 913 F.2d 1406, 1412 (9th Cir. 1990), *cert. denied*, 498 U.S. 1109
19 (1991)).

20 Preclusion of evidence is among the most severe sanctions that a court may select. In
21 fact, under certain circumstances, the imposition of preclusive sanctions is tantamount to
22 dismissal or default judgment. See United States v. Sumitomo Marine & Fire Ins. Co., 617 F.2d
23 1365, 1369 (9th Cir. 1980) (citing Fed. R. Civ. P. 37). Under those circumstances, negligent

1 conduct is insufficient to impose exclusionary sanctions; a showing of bad faith is required. Id.
2 at 1369-70. In addition, “[e]xclusion sanctions based on alleged discovery violations are
3 generally improper absent undue prejudice to the opposing side.” Amersham Pharmacia
4 Biotech, Inc. v. Parkin-Elmer Corp., 190 F.R.D. 644, 648 (N.D. Cal. 2000) (citing Wendt v. Host
5 Int’l, Inc., 125 F.3d 806, 814 (9th Cir. 1997)). The moving party bears the burden of presenting
6 evidence of such prejudice. See Amersham, 190 F.R.D. at 648. The prejudice inquiry is focused
7 on whether a discovery violation “threaten[s] to interfere with the rightful decision of the case”
8 or “impair[s] the moving party’s ability to go to trial.” See Adriana Int.’s Corp., 913 F.2d at
9 1412. Delayed production of documents is rarely sufficient to meet this standard. See id.

10 **DISCUSSION**

11 **I. Defendants’ Motion for Monetary and Evidentiary Sanctions Based on** 12 **Plaintiff Laura Alexis’ and/or Plaintiff’s Counsel’s Willful Violation of the October 21,** 13 **2016 Court Order**

14 Defendants’ first motion seeks evidentiary and monetary sanctions for Plaintiff’s failure to
15 depose Defendant Rogers on November 9, 2016 in Singapore as ordered by the Court. ECF
16 No. 59-2. Defendants assert that Plaintiff’s counsel advised defense counsel that she had made
17 the necessary arrangements to depose Mr. Rogers in Singapore and then “abruptly announced
18 that she was not proceeding with the Court Order” because Defendants had failed to produce
19 unspecified documents. Id. at 2-3, 7; ECF No. 59-1, Declaration of Olaf J. Muller (“Muller
20 Decl. I”) at 2, 4. Defendants explain that Plaintiff unilaterally cancelled the deposition after
21 defense counsel already had departed for Singapore. ECF No. 59-2 at 8; Muller Decl. I at 5.
22 Defendants complain that subsequent investigation revealed that Plaintiff had not made the
23 necessary arrangements to depose Defendant Rogers in Singapore and intentionally violated

1 this Court's order and caused harm to Defendant Rogers and defense counsel. ECF No. 59-2 at
2 8-9; Muller Decl. I at 6. Defendants seek reimbursement for the costs incurred in travelling to
3 Singapore for the deposition, as well as reimbursement for the costs of filing the instant motion,
4 and evidentiary sanctions in the form of prohibiting Plaintiff from deposing Defendant Rogers.
5 ECF No. 59-2 at 14-18.

6 Plaintiff disagrees with the facts asserted by Defendants and opposes the sanction
7 requests. ECF No. 62. Plaintiff emphasizes that Defendants failed to produce all of the
8 requested documents, including Plaintiff's termination letter, and failed to meet and confer with
9 Plaintiff's counsel regarding the deficient document production until November 4, 2016. Id. at
10 6; ECF No. 62-1, Declaration of Amber L. Eck ("Eck Decl. I ") at 2-3. Plaintiff claims that as a
11 result, on November 3, 2016, Plaintiff's counsel called and emailed defense counsel and advised
12 them that the deposition would not be going forward on November 9, 2016. ECF No. 62 at 6-
13 7; Eck Decl. I at 3. Plaintiff argues that there is no evidence that counsel was on a plane to
14 Singapore at 2:00 p.m. on November 3, 2016, when she gave notice that the deposition was
15 not going to proceed on November 9, 2016, and that a six day notice is reasonable. ECF No. 62
16 at 6-8; Eck Decl. I at 3. Plaintiff's counsel declares that she did make preliminary arrangements
17 for the deposition to occur in Singapore but did not finalize them because she cancelled the
18 deposition. Eck Decl. I at 4-5. Plaintiff concludes that the sanctions requested by Defendants
19 are excessive, not supported by evidence, and not justified by the cited Federal Rules of Civil
20 Procedure. See ECF No. 62 at 9-19. Finally, Plaintiff seeks permission to depose Defendant
21 Rogers by videoconference on a date to be determined. Id. at 19-21.

22 In their reply, Defendants reiterate their arguments that Plaintiff intentionally violated
23 this Court's order and should be severely sanctioned for her conduct. See ECF No. 67.

1 Defendants also provide a supplemental declaration from attorney Keith Fink establishing that
2 Mr. Fink actually travelled to Singapore on the dates previously represented. Id. at 14-17; ECF
3 No. 67-1, Declaration of Keith A. Fink ("Fink Decl.") at 3-4; id., Exhs. 6 & 7. Defendants also
4 object to Plaintiff's request to depose Mr. Rogers via videoconference. ECF No. 67 at 20-22.

5 This motion, opposition, and reply, as well as the pleadings addressing the other sanction
6 motions, highlight the complete lack of professionalism and civility utilized by counsel on both
7 sides in handling this case. The Court is dismayed to see that counsel apparently are unable or
8 unwilling to speak directly to each other, to engage in normal and productive meet and confer
9 efforts, and to resolve even the most basic discovery issues, such as the date and time of a
10 deposition. During the discussions preceding the motion and the briefing of the motion to
11 compel Mr. Rogers' deposition to occur in California, defense counsel repeatedly stated that the
12 only day this year that Mr. Rogers was available to be deposed was November 9th, and counsel
13 for Plaintiff repeatedly indicated that she wanted to depose Mr. Rogers this year. See ECF
14 Nos. 49 & 51. As a result, both parties accepted November 9, 2016 as the appropriate date for
15 Mr. Rogers' deposition and the Court's order clearly focused on the *location* of the deposition,
16 not the *date*. See ECF Nos. 49-1 at 7; 51 at 6-7; 57. As a result, when Plaintiff's attorney
17 contacted the Court about moving the date of the Rogers' deposition, the Court indicated it
18 would be willing to allow the deposition to be moved, if the parties agreed on a date. The Court
19 believed that counsel would communicate with each other and resolve the issue in a way that
20 worked for all parties and counsel, and then file an appropriate joint motion to move the
21 deposition date, if necessary. The Court never imagined that Plaintiff's counsel would attempt
22 to move it without agreement from defense counsel, nor that defense counsel would be unwilling
23 to work with Plaintiff's counsel to find a date next year for Mr. Rogers' deposition. Given

1 counsels' unprofessional conduct, the Court will rule on the pending motions, but counsel for
2 both parties are advised that (1) all future meet and confer efforts must include in-person or
3 direct telephonic discussions, (2) no attorney may call the Court without having opposing counsel
4 also on the phone, and (3) all future motions must include a detailed description of the meet
5 and confer efforts.

6 The Court issued its order on October 21, 2016. ECF No. 57. According to the evidence
7 presented to the Court, Plaintiff's counsel began making arrangements to depose Mr. Rogers in
8 Singapore on October 24, 2016. See Eck Decl. I at 4-5; id., Exh. 8 at 44-42. On October 25,
9 2016, Plaintiff's counsel served an amended deposition notice scheduling Mr. Rogers' deposition
10 to occur on November 9, 2016 via "videotape." Muller Decl. I, Exh. 2 at 15-17. On October 29,
11 2016, Ms. Eck emailed Mr. Muller and Mr. Fink with several date/time suggestions to
12 accommodate the time difference between San Diego and Singapore. Eck Decl. I, Exh. 6 at 37.
13 On November 2, 2016, Mr. Muller wrote a letter to Ms. Eck objecting to Mr. Rogers' deposition
14 being taken remotely by teleconference. Muller Decl. I, Exh. 4 at 22-29.

15 On October 25, 2016, Ms. Eck also notified Mr. Muller and Mr. Fink that she believed
16 Defendants' discovery responses were inadequate and requested a time to meet and confer.
17 Eck Decl. I, Exhs. 1 at 11-12; 4 at 21-24; Muller Decl. I, Exh. 1 at 10-13. Ms. Eck did not state
18 that the Rogers' deposition would not occur on November 9, 2016 unless the documents were
19 produced. See id. Mr. Fink responded that he was available on October 31st, and Ms. Eck
20 confirmed October 31st at 2:00 p.m. Eck Decl. I, Exh. 1 at 11. On October 31, 2016 at 3:29 p.m.
21 and November 2, 2016 at 8:19 p.m., Ms. Eck emailed defense counsel and asked about
22 discussing the discovery issues. Id. at 10. On November 3, 2016, Mr. Muller responded to Ms.
23

1 Eck's email, stating that he was available at 1:00 p.m. on November 4th to discuss the discovery
2 issues and the Rogers' deposition. Id. at 9.

3 At 4:16 p.m. on November 3, 2016, Ms. Eck sent an email to Mr. Muller and Mr. Fink
4 stating that she has not been able to talk with either defense attorney and that she hasn't
5 received the necessary discovery, and that "[a]t this point, there is insufficient time to get and
6 review these documents before a deposition next week. Accordingly, I intend to move Rogers'
7 deposition to January 11, but am also available Jan. 12 or 13; let me know what you prefer."
8 Id.; see also Muller Decl. I, Exh. 5 at 36-37 (containing Plaintiff's counsel's letter dated
9 November 3, 2016). On November 4, 2016, Ms. Eck emailed a letter addressed to Mr. Fink and
10 Mr. Muller clarifying "the Rogers deposition is not going forward on November 9, 2016." Eck
11 Decl. I, Exh. 3 at 19. On the same day, Mr. Muller emailed Ms. Eck stating that "Judge Major
12 advises that the order is the order and we can change it only if we so agree. We will not so
13 agree." Muller Decl. I, Exh. 5 at 38. In an email dated November 4, 2016 at 2:40 p.m., Mr.
14 Muller objected to the cancellation of Mr. Rogers' deposition and advised Ms. Eck that "[Mr. Fink]
15 has already left for Singapore. He should be arriving there at some point today. Again, we
16 suggest that you make travel arrangements immediately and leave sooner rather than later."
17 Id. at 41. Mr. Muller states that he told Ms. Eck that Mr. Fink already was on his way to Singapore
18 and that Ms. Eck responded that the Court "had granted her the unilateral right to violate its
19 prior Order" and that she had provided sufficient notice. Muller Decl. I at 5. Ms. Eck counters
20 that defense counsel refused to respond to her correspondence or engage in meet and confer
21 efforts regarding Defendants' discovery responses until November 7, 2016, and asserts that
22 Defendants still have not produced numerous responsive documents. Eck Decl. I at 4. For the
23 next several days, counsel on both sides engaged in on-going, unproductive, and unpleasant

1 written exchanges, rehashing what happened, who was to blame, and what motions were going
2 to be filed. See Eck Decl. I, Exhs. 2-3, 9; Muller Decl. I, Exh. 5 at 41-72.

3 As previously discussed, the evidence establishes fault on both sides. Plaintiff's counsel
4 apparently waited until three days after the Court's order to investigate the costs and difficulties
5 associated with a deposition in Singapore. Based upon what she discovered, counsel apparently
6 decided to conduct the deposition via teleconferencing but failed to comply with FRCP 30(b)(4),
7 which requires her to obtain either Defendants' stipulation or court approval. Instead of filing
8 an appropriate motion in late October, counsel served an amended deposition notice regarding
9 a "videotaped" deposition. Had Plaintiff complied with FRCP 30(b)(4), the instant dispute likely
10 would not have occurred. Moreover, while Plaintiff's counsel advised defense counsel on
11 October 25, 2016 that Defendants' document production and discovery responses were
12 insufficient, Plaintiff's counsel waited until November 3, 2016 to advise defense counsel that
13 Defendant Rogers' deposition would not go forward due to the alleged failure to provide
14 discovery. Again, the instant conflict could have been avoided if Ms. Eck had clearly advised
15 defense counsel in late October that the discovery responses were so deficient that she could
16 not depose Mr. Rogers until the documents were produced.

17 On the other hand, defense counsel knew in late October that Mr. Rogers' deposition was
18 scheduled for November 9, 2016, that Plaintiff's counsel needed additional discovery to
19 competently depose Mr. Rogers, and that Mr. Fink would be leaving for Singapore on
20 November 3, 2016. Despite this knowledge, neither attorney made time to meet with Plaintiff's
21 counsel to resolve the discovery issues. If they had, perhaps Plaintiff's counsel would have been
22 able to proceed forward with the deposition on November 9, 2016, or perhaps the attorneys
23 could have agreed to continue the deposition until after the discovery issues were resolved. In

1 addition, neither Mr. Muller nor Mr. Fink clearly advised Plaintiff's counsel that Mr. Fink would
2 be leaving for Singapore in the morning on November 3, 2016.¹ Finally, defense counsel
3 repeatedly state that Mr. Fink was on his way to Singapore when Ms. Eck cancelled the
4 deposition, however, their supporting evidence is vague and conclusory. It is unclear exactly
5 where Mr. Fink was when he or Mr. Muller first learned that Ms. Eck intended to cancel the
6 deposition. Mr. Fink does not state what efforts, if any, he made to avoid traveling to Singapore,
7 nor whether he had other reasons, such as other business in Asia, that necessitated this trip.
8 As a result, defense counsel bear some responsibility for the instant dispute and degree of harm.

9 The Court concludes that the majority of the blame for the late cancellation lies with
10 Plaintiff. While Ms. Eck obviously hoped to depose Mr. Rogers in person in California, she should
11 have considered the options available to her if the Court ruled against Plaintiff. Had she done
12 that, she would have known the costs and logistics associated with the deposition and could
13 have filed a timely motion to depose Mr. Rogers via videoconferencing or to move the deposition
14 to a later date (assuming, of course, that counsel could not reach an agreement on either
15 option). Ms. Eck failed to do so and instead issued a deficient videoconference deposition notice,
16 attempted to obtain permission from the Court via ex parte verbal communications, and never
17 filed an appropriate motion. Second, if Ms. Eck truly believed that she could not competently
18 depose Mr. Rogers without the missing documents, Ms. Eck should have clearly notified defense
19 counsel that the deposition would not proceed if she did not receive the documents by a specific
20

21 ¹ In his declaration attached to Defendants' reply, Mr. Fink states that during Plaintiff's
22 deposition on November 1, 2016, he told Ms. Eck that he "would be traveling to Singapore within
23 two days for the Rogers deposition." Fink Decl. at 2-3. This general statement is insufficient to
establish that Mr. Fink adequately advised Ms. Eck that cancelling the deposition at 4:00 p.m.
on November 3, 2016 would cause the harm Defendants are claiming.

1 date. Again, she failed to do so. Third, the Court disagrees with Ms. Eck's contention that she
2 provided reasonable notice of the cancellation. The evidence presented to the Court shows that
3 Ms. Eck repeatedly indicated that the deposition was going to proceed on November 9, 2016 via
4 videoconference and there is no evidence that Ms. Eck advised defense counsel that she may
5 want to move the deposition to another day. Finally, the Court is extremely troubled by the
6 allegation that Ms. Eck advised Mr. Muller that the Court had authorized her to unilaterally move
7 Mr. Rogers' deposition. The Court's law clerk advised Ms. Eck (and later, Mr. Muller) that the
8 parties could move the deposition, if both sides agree. Neither the Court nor the Court's law
9 clerk authorized Ms. Eck to unilaterally cancel the deposition. Ms. Eck is an experienced lawyer
10 and she surely knows that while the Court may indicate it would be willing to allow parties to
11 modify provisions of a discovery order, the actual order is not modified without filing a joint
12 stipulation or ex parte motion and obtaining Court approval. The Court finds that the evidence
13 indicates that Ms. Eck did not fully investigate the logistics and costs associated with a deposition
14 in Singapore prior to filing the original motion and receiving the Court's order, was surprised by
15 and unprepared for the costs and logistics when she finally attempted to arrange the deposition,
16 was unable to make the proper arrangements before November 9, 2016, and as a result
17 cancelled the deposition on November 3, 2016.² Because Ms. Eck unilaterally cancelled the
18 deposition without prior warning or sufficient notice and after Mr. Fink apparently had left for
19 Singapore, the Court finds it appropriate to impose monetary sanctions against Plaintiff and Ms.

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21 _____
22 ² The Court also accepts that Ms. Eck was concerned about the missing discovery, but the Court
23 does not believe this is the main reason Ms. Eck cancelled the deposition on November 3, 2016.
If discovery was the only issue, Ms. Eck could have obtained the additional discovery in time to
review it during the remaining 5 days.

1 Eck. However, Defendants have not established that Ms. Eck or Plaintiff acted in bad faith or
2 with an improper purpose and the Court therefore declines to impose evidentiary sanctions.

3 Defendants seek monetary sanctions to reimburse them for the following expenses
4 allegedly incurred as a result of Plaintiff's late cancellation of Mr. Rogers' deposition: (1) \$5,293
5 in flight costs, (2) \$2,340.42 in lodging expenses in Singapore, (3) \$26,180 in attorney's fees
6 consisting of the 44 hours that Mr. Fink spent traveling to and from Singapore at a rate of
7 \$595/hour, and (4) \$6,604.50 in attorney's fees incurred preparing the instant motion. ECF
8 No. 59-2 at 14-16; Muller Decl. I at 7-8. To support these costs, Defendants provide declarations
9 from Mr. Muller and Mr. Fink containing conclusory statements, a hotel receipt from Expedia,
10 and a copy of a portion of Mr. Fink's boarding pass. ECF No. 59-2 at 7-8; Muller Decl. I, Exh. 6;
11 Fink Decl. at 3-4; *id.*, Exh. 6-1. They do not provide a receipt for the incurred airline costs,
12 although Mr. Fink's boarding pass indicates that he travelled in First Class. Fink Decl. at 6-
13 1. With regard to the actual costs, Plaintiff argues that the requested costs are excessive. *Oppo.*
14 at 18-19. Plaintiff highlights the fact that Defendants did not provide a receipt for the flight
15 showing the actual amount paid, that Mr. Fink did not need to go to, or stay six nights, in
16 Singapore after Ms. Eck cancelled the deposition, and that Plaintiff should not have to pay for
17 attorneys' fees for the 44 hours of travel time because that expense could have been prevented
18 if defense counsel had properly met and conferred regarding Defendants' discovery. *Id.*

19 Although the Court is concerned about the unsubstantiated nature of Mr. Fink's flight
20 expenses, the Court finds it appropriate to require Plaintiff and Ms. Eck to reimburse Defendants
21 for the costs of Mr. Fink's flight and hotel. With regard to the flight expense, Mr. Fink is ordered
22 to provide Ms. Eck with a copy of his flight or credit card receipt establishing the actual amount
23 paid for the plane ticket by **December 30, 2016**, and Ms. Eck or Plaintiff must pay that amount

1 to defense counsel by **January 13, 2017**. With regard to the hotel, the Court orders Ms. Eck
2 or Plaintiff to pay the full amount, **\$2,340.42**, to defense counsel by **January 13, 2017**, as
3 the Court finds that it was reasonable for Mr. Fink to be in Singapore from November 5, 2016
4 to November 11, 2016, due to the date and time difference between San Diego and Singapore
5 and to prepare his client for the deposition. The Court declines to include the requested attorney
6 fees for the 44 hours spent traveling to and from Singapore and the costs of preparing this
7 motion. As previously stated, defense counsel contributed to these expenses and the
8 subsequent need to file this motion by failing to engage in timely and productive discussions to
9 resolve the discovery issues and by failing to clearly notify Ms. Eck that Mr. Fink was leaving for
10 Singapore in the morning on November 3, 2016. Defendants also have not clearly established
11 that the trip was unavoidable or that it was undertaken solely to defend Mr. Rogers at his
12 deposition.

13 Finally, the Court **DENIES WITHOUT PREJUDICE** Plaintiff's request to depose Mr.
14 Rogers by videoconference. As noted, FRCP 30(b)(4) permits deposition by videoconference
15 but it requires agreement by the parties or court authorization. In opposing Plaintiff's request,
16 Defendants raise a number of important factual and legal issues related to depositing Mr. Rogers
17 via videoconference while Mr. Rogers is in Singapore. See ECF No. 66 at 9-10. If Plaintiff wants
18 to depose Mr. Rogers via videoconference, Ms. Eck must meet and confer with defense counsel
19 and work out the necessary legal and factual issues of taking a foreign deposition via
20 videoconference. If counsel are unable to agree, Plaintiff may file an appropriate motion.

21 ///

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1 **II. Defendants’ Motion for Monetary Sanctions Based on Plaintiff’s Fraud on**
2 **the Court**

3 In their second motion, Defendants allege that Plaintiff and her lawyer committed a fraud
4 on the Court and ask the Court to impose significant monetary sanctions against Plaintiff and
5 her counsel for the costs Defendants incurred in opposing Plaintiff’s motion to compel Defendant
6 Rogers’ deposition and in filing the instant motion for sanctions. ECF No. 61-2. Defendants
7 argue that Plaintiff committed fraud on the Court and made material misrepresentations in her
8 motion to compel Mr. Rogers’ deposition because she clearly indicated that she intended to take
9 the deposition in person on November 9, 2016, and yet she subsequently did not do so. Id. at
10 13-14; see also ECF No. 61 at 2. Defendants object to the fact that Plaintiff never indicated in
11 her briefing that Plaintiff may elect to depose Mr. Rogers remotely rather than travel to
12 Singapore if her motion was denied. Id. Defendants also object to the fact that Plaintiff noticed
13 Mr. Rogers’ deposition for 10:00 a.m. Pacific Standard Time on November 9, 2016, because that
14 was 1:00 a.m. in Singapore on November 10, 2016. ECF No. 61-1, Declaration of Olaf J. Muller
15 (“Muller Decl. II”) at 3-4; id., Exh. 1. In summary, Defendants argue that Plaintiff’s motion to
16 compel Mr. Rogers’ deposition in California was fraudulent because Plaintiff never intended to
17 depose Mr. Rogers on November 9, 2016, and never intended to travel to Singapore for the
18 deposition. See ECF No. 61-2 at 4, 13-15.

19 Plaintiff objects to Defendants’ characterizations of her motion and intentions. ECF
20 No. 64. Plaintiff explains that she wanted to depose Mr. Rogers in person in Los Angeles and
21 had a good faith basis for noticing the deposition in Los Angeles. Id. at 3-4; ECF No. 61-1,
22 Declaration of Amber L. Eck (“Eck Decl. II”) at 2. Plaintiff’s counsel states that she has never
23 deposed a party via videoconference and that neither side discussed such a possibility in this

1 case. ECF No. 64 at 4; Eck Decl. II at 2. Plaintiff's counsel further declares that there are no
2 misrepresentations in her pleadings. ECF No. 64 at 5; Eck Decl. II at 3-4. Plaintiff explains that
3 after the Court denied her motion, she verified the costs associated with a deposition in
4 Singapore and explored other options. ECF No. 64 at 4; Eck Decl. II at 2-3. Plaintiff also clarifies
5 that the date of November 9, 2016 was chosen by Defendant Rogers because it was the only
6 date this year available in his busy schedule. ECF No. 64 at 5; Eck Decl. II at 3. In conclusion,
7 Plaintiff argues that sanctions are not appropriate under FRCP 11, and are not warranted under
8 FRCP 37, 26 & 41 and Civil Local Rule 83.1(a). ECF No. 64 at 5-9.

9 In their reply, Defendants reiterate their previous positions. See ECF No. 66. Defendants
10 further contend that they offered to conduct Mr. Rogers' deposition via videoconference from
11 Singapore, state that Plaintiff's counsel refused the offer, and challenge Plaintiff's counsel's claim
12 that she never deposed a party via videoconference and that neither side discussed such a
13 possibility. Id. at 6-8, 11-12; ECF No. 66-1, Supplemental Declaration of Olaf J. Muller ("Suppl.
14 Muller Decl. II") at 2-3; id., Exh. 5. Defendants also acknowledge that sanctions under FRCP 11
15 referenced in their motion are not appropriate in this case, but assert that the requested
16 sanctions are warranted under FRCP 26 and 37, and the Court's "inherent plenary powers." ECF
17 No. 66 at 12-13.

18 The Court agrees with Plaintiff. Defendants have not established that Plaintiff or her
19 lawyer made material misrepresentations or committed a fraud on the court. Rather, Plaintiff
20 made appropriate arguments in support of her request to depose Defendant Rogers and his
21 wife, Paige Parker, in California. The fact the Plaintiff attempted to depose Defendant by
22 videoconference after the Court denied her motion to compel the depositions in Los Angeles
23 does not make the motion fraudulent nor the representations false. In fact, the Court finds that

1 Plaintiff's motion to compel deposition in Los Angeles was substantially justified and declines to
2 impose monetary sanctions against Plaintiff or her counsel for filing the motion. The Court
3 therefore **DENIES** Defendants' motion for monetary sanctions based on Plaintiff's alleged fraud
4 on the court.

5 **III. Defendants' Motion for Monetary and/or Evidentiary Sanctions Based on**
6 **Plaintiff's Continued Withholding of Critical Documents**

7 In their final motion, Defendants allege that Plaintiff and her lawyer "intentionally
8 withheld from production thousands of pages of email communications that eviscerate Plaintiff's
9 claims." ECF No. 60-2 at 5 (emphasis omitted). Defendants argue that this conduct was
10 particularly detrimental to them because they were unable to question Plaintiff during her
11 deposition about all of the email communications between Plaintiff and Defendant Rogers. See
12 id. at 16, 22. Interestingly, Defendants' motion is not to compel the production of the emails
13 but for evidentiary sanctions in the form of an adverse jury instruction, an order requiring
14 Plaintiff to produce the emails without objection, and an opportunity to redepose Plaintiff, and
15 a monetary sanction based on the cost of preparing the instant motion for sanctions. Id. at 15-
16 21.

17 Plaintiff acknowledges that she did not produce all of the relevant emails prior to her
18 deposition. ECF No. 63 at 6-8. However, Plaintiff explains that in her counsel's October 5, 2016
19 letter accompanying Plaintiff's initial document production, Plaintiff stated that she "will produce
20 additional documents on a rolling basis." Id. at 6; ECF No. 63-1, Declaration of Amber L. Eck
21 ("Eck Decl. III") at 2; id., Exh. 2. Plaintiff states that she produced two disks containing more
22 than 6,000 emails on November 19 and 21, 2016. ECF No. 63 at 8-9; Eck Decl. III at 5; id.,
23 Exh. 4. Plaintiff explains what caused the delay in production, clarifies that Defendants

1 possessed most, if not all of the relevant emails and were able to use them during her deposition,
2 but reasonably offers to permit Defendants to redepose Plaintiff. ECF No. 63 at 7-9, 16-17.
3 Plaintiff objects to the imposition of any other sanctions and emphasizes that Defendants could
4 have avoided the costs of filing this motion by properly meeting and conferring. Id. at 12-16.

5 In their reply, Defendants reallege their arguments from the underlying motion [see ECF
6 No. 65], and claim that the parties properly met and conferred, and that ten days after their
7 motion was filed, Plaintiff produced 6,510 pages of responsive documents. Id. at 5-7, 14; ECF
8 No. 65-1, Supplemental Declaration of Olaf J. Muller ("Suppl. Muller Decl. III). Defendants
9 acknowledge that sanctions under FRCP 11 are not appropriate in this case, but assert that
10 sanctions are warranted under FRCP 26 and 37, and the Court's "inherent plenary powers," and
11 ask the Court to sanction Plaintiff for her withholding of documents, as well as her "disingenuous
12 excuses for the same represented in her Opposition papers." ECF No. 65 at 18-19.

13 The Court agrees with Plaintiff that Defendants have not established that Plaintiff acted
14 in bad faith. Rather, the evidence establishes that Plaintiff did not produce all of the relevant
15 responsive emails prior to her deposition but notified Defendants that the production was
16 incomplete and would be forthcoming, and then did, in fact, produce the responsive emails. As
17 such, the Court finds that neither Plaintiff nor her counsel engaged in bad faith or misconduct
18 warranting the imposition of evidentiary sanctions. The Court also finds that defense counsel
19 could have avoided filing the instant motion by cooperating with Plaintiff's counsel, as she agreed
20 to produce the emails and permit Plaintiff to be redeposed, and therefore declines to impose
21 monetary sanctions. Because Plaintiff produced new emails and documents after her deposition,
22 the Court **GRANTS** Defendants' request to redepose Plaintiff. Defendant may depose Plaintiff
23 for no more than three hours and must limit the questions to the newly produced emails.

1 **SUMMARY AND CONCLUSION**

2 For the foregoing reasons, the Court:

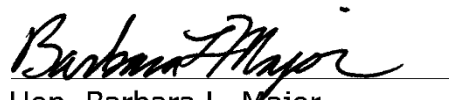
3 (1) **GRANTS IN PART AND DENIES IN PART** Defendants' motion for monetary and
4 evidentiary sanctions based on Plaintiff Laura Alexis' and/or Plaintiff's counsel's alleged willful
5 violation of the October 21, 2016 Court Order. Mr. Fink is ordered to provide to Ms. Eck by
6 **December 30, 2016** a copy of his flight of credit card receipt showing the actual amount paid
7 for his plane ticket. Plaintiff and Ms. Eck are ordered to pay that amount to Defendants by
8 **January 13, 2017**. Plaintiff and Ms. Eck also are ordered to pay Defendants the amount of
9 **\$2,340.42** on or before **January 13, 2017**. Plaintiff's counsel, Ms. Eck, is ordered to file a
10 declaration verifying said payments no later than **January 20, 2017**. Failure to comply with
11 this order may result in the imposition of additional sanctions. The Court **DENIES WITHOUT**
12 **PREJUDICE** Plaintiff's request to depose Mr. Rogers by videoconference;

13 (2) **GRANTS IN PART AND DENIES IN PART** Defendants' motion for monetary and/or
14 evidentiary sanctions based on Plaintiff's continued withholding of critical documents.
15 Defendants may redepose Plaintiff for no more than three hours; and

16 (3) **DENIES** Defendants' motion for monetary sanctions based on Plaintiff's alleged fraud
17 on the court.

18 **IT IS SO ORDERED.**

19 Dated: 12/16/2016

20 
21 Hon. Barbara L. Major
22 United States Magistrate Judge
23