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THE HONORABLE EDWARD F. SHEA

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF WASHINGTON

SARAH BRADBURN, PEARL  
CHERRINGTON, CHARLES  
HEINLEN, and the SECOND  
AMENDMENT FOUNDATION,

Plaintiffs,

v.

NORTH CENTRAL REGIONAL  
LIBRARY DISTRICT,

Defendant

No. CV-06-327-EFS

**PLAINTIFFS' RESPONSE TO  
DEFENDANT'S OBJECTIONS  
TO DESIGNATED DEPOSITION  
TESTIMONY**

Defendant North Central Regional Library ("NCRL") filed an objection to Plaintiffs' designated deposition testimony. Specifically, NCRL "objects to the use of any designated deposition testimony by Plaintiffs of any witness to support

PLAINTIFFS' RESPONSE TO DEFENDANT'S OBJECTIONS  
TO DESIGNATED DEPOSITION TESTIMONY -- 1

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1 their case in chief when such witness is available to testify in person.” NCRL’s  
2 Br. at 2.

3 NCRL does not direct its objection toward the use of deposition testimony  
4 from any particular witness. Plaintiffs will therefore rebut the objection as to each  
5 witness. Plaintiffs designated deposition testimony from five witnesses: Liam  
6 Chasteen, Dean Marney, Dan Howard, Barbara Walters, and Paul Resnick. All of  
7 the testimony Plaintiffs designated is admissible.  
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9

### 10 Chasteen

11 Liam Chasteen provided deposition testimony on behalf of Fortinet, Inc.  
12 Fortinet supplies NCRL’s filtering product. The deposition was taken pursuant to  
13 NCRL’s 30(b)(6) subpoena. Fortinet is located in Sunnyvale, California.  
14

15 Chasteen’s testimony is admissible under Federal Rule of Civil Procedure  
16 32(a)(4)(B). The Rule states:

17  
18 A party may use for any purpose the deposition of a witness, whether  
19 or not a party, if the court finds . . . that the witness is more than 100  
20 miles from the place of hearing or trial or is outside the United States,  
21 unless it appears that the witness’s absence was procured by the party  
offering the deposition.

22 Fed. R. Civ. P. 32(a)(4)(B). See also Hangarter v. Provident Life and Acc. Ins.  
23 Co., 373 F.3d 998, 1019 (9<sup>th</sup> Cir. 2004) (explaining that a witness’s “residence in  
24 Alabama placed him outside of the court’s subpoena power under Fed. R. Civ. P.  
25 45, and he was thus unavailable pursuant to Fed. R. Civ. P. 32(a)(3), which  
26

1 permits deposition testimony where ‘the witness is at a greater distance than 100  
2 miles from the place of trial or hearing.’”).

3 Chasteen, who works in California, is clearly more than 100 miles from the  
4 place of trial. No one has suggested that Plaintiffs have procured his absence.  
5 NCRL has not indicated that it intends to make Chasteen available to testify at  
6 trial during Plaintiffs’ case-in-chief. Plaintiffs are therefore entitled to rely on  
7 excerpts of his deposition in lieu of live testimony.  
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9

10 **Marney, Howard, and Walters**

11 Plaintiffs also designated deposition testimony given by Dean Marney, Dan  
12 Howard, and Barbara Walters. The depositions of these witnesses are admissible  
13 in Plaintiffs’ case-in-chief under Federal Rule of Civil Procedure 32(a)(3). The  
14 Rule provides, “An adverse party may use for any purpose the depositions of a  
15 party or anyone who, when deposed, was the party’s officer, director, managing  
16 agent, or designee under Rule 30(b)(6) or 31(a)(4).” Fed. R. Civ. P. 32(a)(3).  
17 These individuals are all managing agents. Dean Marney is the Director of NCRL.  
18 Dan Howard is the Public Services Director for NCRL. Barbara Walters is the IT  
19 Manager for NCRL.  
20  
21

22 There is no exception to Rule 32(a)(3) admissibility where a party opponent  
23 is available to provide live trial testimony. As the Tenth Circuit has explained,  
24 “Rule 32 allows a party to introduce ‘as a part of his substantive proof, the  
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1 deposition of his adversary, and it is quite immaterial that the adversary is  
2 available to testify at the trial or has testified there.” Coletti v. Cudd Pressure  
3 Control, 165 F.3d 767, 773 (10th Cir. 1999) (quoting King & King Enters. v.  
4 Champlin Petroleum Co., 657 F.2d 1147, 1163-64 (10th Cir.1981)).

6 **Resnick**

7 Paul Resnick is a professor at the University of Michigan School of  
8 Information. He was retained by NCRL to serve as an expert. Plaintiffs are  
9 entitled to offer Resnick’s deposition testimony in their case-in-chief under  
10 Federal Rule of Civil Procedure 32(a)(4)(B), because Resnick is “more than 100  
11 miles from the place of hearing or trial.” No one has suggested that Plaintiffs  
12 caused Resnick’s unavailability, and NCRL has not agreed to make Resnick  
13 available during Plaintiffs’ case-in-chief.  
14  
15

17 DATED this 18th day of April, 2008.

19 AMERICAN CIVIL LIBERTIES UNION  
20 OF WASHINGTON FOUNDATION

21  
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**CERTIFICATE OF SERVICE**

I hereby certify that on April 18, 2008, I electronically filed the foregoing document with the Clerk of Court using the CM/ECF system, which will send notification of such filing to the persons listed below:

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Attorneys for Defendant

DATED this 18<sup>th</sup> day of April, 2008.

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