

# In the United States Court of Federal Claims

No. 01-56 C  
(Filed: April 19, 2005)

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JOHN W. BULL, ET AL.,  
Plaintiffs,  
v.  
THE UNITED STATES,  
Defendant.

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## ORDER

By Order dated March 15, 2005, the court granted Plaintiffs' Motion for Leave to File Deposition Transcript Testimony and Motion to File Transcript Testimony (Pls.' Depo. Tr. Mot.). In their motion, plaintiffs identified twenty-two depositions for testimonial use at trial and represented that fourteen of the depositions are of government-designated witnesses pursuant to Rule 30(b)(6) of the Court of Federal Claims (RCFC) and eight of the depositions are of plaintiffs who were not designated as trial plaintiffs for the May 2005 trial and who live more than 100 miles from the place of trial in Washington, D.C. See id. at 8. The court granted the requested relief pursuant to RCFC Appendix A, section 15(b) based on the plaintiffs' representations that the "interest of justice" would best be served by allowing the use of deposition testimony for the eight distant plaintiffs (non-test plaintiffs). See 3/15/05 Order.

Defendant moved for reconsideration of the court's Order on the ground that it was not afforded an opportunity to file its opposition to plaintiffs' motion.<sup>1</sup> The court granted

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<sup>1</sup>In its motion for reconsideration, defendant noted that plaintiffs submitted their motion for leave to file deposition transcripts on February 23, 2005. Defendant's Motion for Reconsideration (Def.'s Mot. for Reconsid.) at 1. By Order dated February 25, 2005, the Clerk  
(continued...)

defendant's motion for reconsideration and now considers Defendant's Opposition to Plaintiffs['] Motion to File Deposition Transcript Testimony and Motion to File Transcript Testimony (Def.'s Opp.) together with Plaintiffs' Motion for Leave to File Deposition Transcript Testimony and Motion to File Transcript Testimony.

1. Testimony of Eight Non-Test Plaintiffs<sup>2</sup>

Defendant argues that the proposed deposition transcript testimony for the eight plaintiffs is not admissible under the two subsections of Rule 32(a)(3) of the Court of Federal Claims (RCFC) on which plaintiffs rely, specifically subsections (E) and (F).<sup>3</sup>

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<sup>1</sup>(...continued)

of the Court returned that document to plaintiffs for correction of procedural deficiencies. See 2/25/05 Order. Plaintiffs resubmitted the motion for filing on March 17, 2005. See Plaintiffs' Motion for Leave to File Deposition Transcript Testimony and Motion to File Transcript Testimony at 1; Def.'s Mot. for Reconsid. at 2. The Clerk's Office docketed the plaintiffs' motion and set the date for defendant's response as April 1, 2005. See Def.'s Mot. for Reconsid. at 2. Defendant states that the docketed due date "may have been in error." Id. Defendant explains that, "[b]ecause plaintiffs' motion was submitted as part of its pre-trial filings, [its] response could have been included as part of its pre-trial filings[, which were not due until April 6, 2005]." Id. at 2-3 (citing Rules of the Court of Federal Claims, Appendix A ¶ 14(c) and Transcript of November 15, 2005 Status Conference at 87). Compounding the uncertainty regarding the deadline for filing a response to plaintiffs' motion, defendant notes that the court's Order of March 15, 2005 granting plaintiffs' motion predated the actual filing date of plaintiffs' motion. Id. at 2 n.1. Defendant moved for reconsideration of that Order. Id. at 1.

<sup>2</sup>The eight non-test plaintiffs are: (1) Ms. Stefany Currey, CEO in Detroit, Michigan; (2) Mr. Michael Dugan, CEO in Buffalo, New York; (3) Mr. George Nadeau, CEO in Washington, D.C. (Mr. Nadeau worked in Miami, Florida during claim period); (4) Mr. Tommy Ramirez, CEO in Detroit, Michigan; (5) Mr. Michael Sklarsky, CEO in Miami, Florida; (6) Mr. Marvin Slocum, CEO in Chicago, Illinois; (7) Mr. John Wayman, CEO in Washington, D.C. (Mr. Wayman worked in El Paso, Texas during claim period); and (8) Mr. David Wentworth, CEO in El Paso, Texas.

<sup>3</sup>Rule 32(a)(3) allows, at trial, the use of any part or all of a deposition of a witness, whether or not a party, "so far as [the deposition is] admissible under the rules of evidence applied as though the witness were then present and testifying, . . . against any party who was present or represented at the taking of the deposition or who had reasonable notice thereof, . . . for any purpose if the court finds:

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(E) upon application and notice, that the witness is at a greater distance than 100

(continued...)

Def.'s Opp. at 5. Defendant contends that the proposed testimony “would not be admissible if the ‘witness w[ere] then present and testifying’” because the proposed transcript designations are “hearsay, not subject to any exception, . . . not relevant . . . [and] cumulative.” Id. at 6 (quoting RCFC 32(a)(3) (applying the rules of evidence to deposition testimony “as though the witness were then present and testifying”)).

Defendant argues that the deposition transcript testimony of the eight non-test plaintiffs could not be offered into evidence if the non-test plaintiffs “were called to testify in person” because the transcripts would then constitute inadmissible hearsay. Def.'s Opp. at 6. In support of its argument, defendant cites Angelo v. Armstrong World Indus., Inc., 11 F.3d 957 (10th Cir. 1993), id., in which the Tenth Circuit found no abuse of discretion in the trial court’s refusal to admit the deposition testimony of an “extremely busy” witness whose “office was close to the courthouse.” Angelo, 11 F.3d at 963. Based on plaintiffs’ “apparent lack of diligence in getting [the witness] to appear,” the Tenth Circuit concluded that “the district court did not abuse its discretion in ruling that [plaintiffs] had not proved that they were unable to procure [the witness’s] appearance by subpoena or other reasonable means.” Id.; see also FRE 804(a)(5) (A hearsay exception exists when a witness is deemed unavailable because the declarant “is absent from the hearing and the proponent of a statement has been unable to procure the declarant’s attendance . . . by process or other reasonable means.”). Defendant contends that the deposition testimony of the non-test plaintiffs cannot be admitted under FRE 804(b)(1), which provides a hearsay exception for the former testimony of an unavailable declarant, because plaintiffs have not shown that the eight non-test plaintiffs are “unavailable” as contemplated by Federal Rule of Evidence (FRE) 804(a). Id. n.4. Rather, defendant posits, the eight non-test plaintiffs “prefer not to testify in person for their personal convenience.” Id. at 9.

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<sup>3</sup>(...continued)

miles from the place of trial or hearing, unless the court also finds (i) that the absence of the witness was procured by the party offering the deposition or (ii) that it is not in the interests of justice, with due regard to the importance of presenting the testimony of witnesses orally in open court, to allow the deposition to be used; or

(F) upon application and notice, that such exceptional circumstances exist as to make it desirable, in the interest of justice and with due regard to the importance of presenting the testimony of witnesses orally in open court, to allow the deposition to be used.

RCFC 32(a)(E)&(F).

Defendant also challenges the admissibility of the non-test plaintiffs testimony by deposition transcript on the grounds that the testimony of the non-test plaintiffs is irrelevant to the claims of the designated plaintiffs, Def.'s Opp. at 6-7, and that the use of the non-plaintiffs testimony to bolster the testimony of the designated plaintiffs is cumulative, id. Based on these grounds, defendant argues that "there is no reason for [a non-test plaintiff] to testify in any capacity - by deposition or in person." Id.

Citing Ryan-Walsh, Inc. v. United States, 39 Fed. Cl. 305 (1997), defendant argues that "'cost and trial efficiency' [are] not the exceptional circumstances that would justify the submission of deposition testimony as substantive evidence." Def.'s Opp. at 8. In Ryan-Walsh, this court concluded that plaintiff failed to show that it was "in the interest of justice" to permit, in lieu of live testimony at trial in Washington, D.C., the deposition testimony of the former contracting officer in a contract matter who lived in the Washington, D.C. area but whom plaintiff had not added to the witness list. 39 Fed. Cl. at 306. The court finds the facts in Ryan-Walsh distinguishable from the facts in this case at least to non-test plaintiffs--Currey, Dugan, Ramirez, Sklarsky, Slocum and Wentworth. Here, plaintiffs seek to introduce the deposition testimony of eight non-test plaintiffs whose claims are not being adjudicated at trial because most of these non-test plaintiffs are at a distance from the trial location and remain "on duty" at various ports. See Pls.' Depo Tr. Mot. at 3, 5; Def.'s Opp. at 2, 7 n.5.

"[W]ith due regard to the importance of presenting the testimony of witnesses orally in open court," the court is persuaded that allowing the use of deposition transcript testimony for six of the eight non-test plaintiffs is consistent with "the interests of justice." RCFC 32(a)(3)(F). However, because plaintiffs have not established the unavailability of Messrs. George Nadeau and John Wayman, both of whom have duty stations in Washington, D.C., see Pls.' Depo. Tr. Mot. at 5, Def.'s Opp. at 9 n.6, the court will not permit the use of deposition transcript testimony for these two non-test plaintiffs. The court DENIES plaintiffs' motion to use the deposition transcript testimony of Mr. George Nadeau and Mr. John Wayman.

The court GRANTS plaintiffs' motion to use the portions of the deposition transcript testimony of Ms. Stefany Currey, Mr. Michael Dugan, Mr. Tommy Ramirez, Mr. Michael Sklarsky, Mr. Marvin Slocum, and Mr. David Wentworth that plaintiffs have designated for use at trial. Consistent with this ruling, the court also GRANTS defendant the use of the portions of the deposition transcript testimony of Ms. Stefany Currey, Mr. Michael Dugan, Mr. Tommy Ramirez, Mr. Michael Sklarsky, Mr. Marvin Slocum, and Mr. David Wentworth that defendant has counter-designated for use at trial.

## 2. Testimony of Government's RCFC 30(b)(6) Witnesses <sup>4</sup>

Defendant challenges as overbroad plaintiffs' characterization of all fourteen of the proposed government witnesses as "[RCFC] 30(b)(6) designees." Def.'s Opp. at 11. Defendant's point is well-taken. "As the deposition notices show, [eight of the government officials] "were deposed individually, not as Government-designated people."<sup>5</sup> Id.

Defendant also contends that its officials should "appear in person" to testify, consistent with the preference in RCFC 32(a) and in the case law for live testimony and absent a showing that the witness is unavailable for live trial testimony. Id. at 12-13 (citations omitted). Defendant asserts that "[t]he availability of [these eight government witnesses] to testify at trial in person greatly outweighs the potential benefits to using their deposition testimony." Id. at 14.

The court agrees with defendant that, absent a showing of unavailability, the deposition testimony of Messrs. Newcombe and Titus, who are both located in Washington, D.C., is inadmissible. The court DENIES plaintiffs' motion to use the

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<sup>4</sup>The government witnesses are: (1) Mr. Christopher Anaya, Primary Firearms Instructor in Detroit, Michigan; (2) Mr. George Anton, Canine Enforcement Officer (CEO) Supervisor in El Paso, Texas; (3) Mr. Roderick Blanchard, CEO Supervisor in Detroit Michigan; (4) Mr. John Kruczek, Borders Security Coordinator in Detroit, Michigan; (5) Mr. Armando Johnson, CEO Supervisor in Miami, Florida; (6) Mr. Frederick Luby, CEO Supervisor in El Paso, Texas; (7) Mr. Carl Newcombe, Canine Enforcement Program Manager, Washington D.C.; (8) Mr. John Rader, CEO Supervisor in Chicago, Illinois; (9) Mr. Dwight Raleigh, CEO Supervisor in Miami, Florida; (10) Mr. Guillermo Rivas, Chief Inspector in El Paso, Texas; (11) Mr. Richard Rowley, CEO Supervisor in Detroit, Michigan; (12) Ms. Angela Smith, CEO Supervisor in Miami, Florida; (13) Mr. Lee Titus, Director of Canine Enforcement Program, Washington, D.C.; and (14) Mr. Joseph Wood, CEO Supervisor in El Paso, Texas.

<sup>5</sup>As evidenced by the deposition notices attached to defendant's motion, eight of the government witnesses were deposed individually and not as Government-designated witnesses, specifically: (1) Mr. George Anton, Canine Enforcement Officer (CEO) Supervisor in El Paso, Texas; (2) Mr. Armando Johnson, CEO Supervisor in Miami, Florida; (3) Mr. Frederick Luby, CEO Supervisor in El Paso, Texas; (4) Mr. Carl Newcombe, Canine Enforcement Program Manager, Washington D.C.; (5) Mr. Dwight Raleigh, CEO Supervisor in Miami, Florida; (6) Ms. Angela Smith, CEO Supervisor in Miami, Florida; (7) Mr. Lee Titus, Director of Canine Enforcement Program, Washington, D.C.; and (8) Mr. Joseph Wood, CEO Supervisor in El Paso, Texas. See Appendix to Defendant's Opposition to Plaintiffs['] Motion to File Deposition Transcript Testimony and Motion to File Transcript Testimony (Def.'s Opp. App.) at 8-23.

deposition transcript testimony of Mr. Newcombe and Mr. Titus. However, “with due regard to the importance of presenting the testimony of witnesses orally in open court,” the court is not persuaded that use of deposition transcript testimony for the six government witnesses who were deposed individually rather than as government-designated witnesses and who are unavailable for trial is inconsistent with “the interests of justice.” RCFC 32(a)(3)(F). Accordingly, the court GRANTS plaintiff’s motion to admit the portions of the deposition testimony that plaintiffs have designated for use at trial of Mr. Anton, Mr. Johnson, Mr. Luby, Mr. Raleigh, Ms. Smith, and Mr. Wood.<sup>6</sup> Consistent with this ruling, the court also GRANTS defendant the use of the portions of the deposition transcript testimony of these six government witnesses that defendant has counter-designated for use at trial.

As to the RCFC 30(b)(6) witnesses, defendant does not object to the introduction of the depositions of Mr. Blanchard, CEO Supervisor in Detroit, Michigan; Mr. Kruczek, Borders Security Coordinator in Detroit, Michigan; Mr. Rader, CEO Supervisor in Chicago, Illinois; and Mr. Rowley, CEO Supervisor, Detroit, Michigan. See id. at 11 n.7. However, defendant does object to the introduction of the 30(b)(6) depositions of Mr. Guillermo Rivas and Mr. Christopher Anaya. Id.

Defendant argues that the testimony of Mr. Rivas, Chief Inspector in El Paso, Texas, is irrelevant. Id. Defendant states that “[t]he United States . . . designated Mr. Rivas, [the Chief Inspector for the Port of Presidio from 1996 until December 1999,] to testify . . . [as a] RCFC 30(b)(6) [witness] . . . regarding Customs’s policies and procedures for the Port of Presidio.” Id. at 15. Because none of the six designated trial plaintiffs worked in Presidio, defendant asserts that “Mr. Rivas’ testimony . . . concern[ing] customs and practices in Presidio[] is not relevant to events in El Paso.” Id. at 16. Although defendant acknowledges that, after December 1999, Mr. Rivas supervised CEOs in El Paso, defendant contends that, because Mr. Rivas supervised CEOs in El Paso “only when they worked in his area,” he “possesses little (i[f] any) knowledge about the [CEOs] in El Paso.” Id.

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<sup>6</sup>The court’s allowance of the use of deposition transcript testimony at trial is premised upon the unavailability of the witnesses to testify in person at trial. Accordingly, should a witness become available for trial, the use of deposition transcript testimony, other than for impeachment purposes, is prohibited.

Moreover, in preparing the trial schedule templates, the parties should allow one hour of cross-examination for every two hours of direct testimony.

The court examines the deposition testimony of Mr. Rivas for relevance. Mr. Rivas indicates that he is not involved with the canine training program. See Appendix to Defendant's Opposition to Plaintiffs['] Motion to File Deposition Transcript Testimony and Motion to File Transcript Testimony (Def.'s Opp. App.) at 33 (line 25 of Transcript of June 17, 2004 Deposition of Guillermo Rivas). Mr. Rivas explains that, as chief inspector in El Paso, he is "only responsible for the canines that . . . are on duty" in his area. Id. (lines 19-22 of Transcript of June 17, 2004 Deposition of Guillermo Rivas). Asked by plaintiffs' counsel if he "directly supervise[s] CEOs," Mr. Rivas stated, "No, I don't." Id. (lines 6-8 of Transcript of June 17, 2004 Deposition of Guillermo Rivas). As alleged in Count XI of the Second Amended Complaint in this action, however, plaintiffs' claims are not limited to compensation for unpaid work related to the training of the drug-sniffing dogs, but also include claims for "other time worked by them without compensation while 'off the clock.'" See Second Amended Complaint Count XI. While it is true that Mr. Rivas lacks supervisory responsibility for plaintiffs, his knowledge, even if limited, about overtime practices and policies at El Paso may be helpful in the consideration of plaintiffs' claims. Accordingly, the court GRANTS plaintiffs' motion with respect to the use of the portions of Mr. Rivas' deposition transcript testimony that plaintiffs have designated for use at trial. Consistent with this ruling, the court also GRANTS defendant the use of the portions of the deposition transcript testimony of Mr. Rivas that defendant has counter-designated for use at trial.

Defendant also argues that the testimony of Mr. Anaya, Primary Firearms Instructor in Detroit, Michigan, contains material outside the scope of his designation. Id. Defendant requested that the court reserve ruling on the use of the deposition testimony of Mr. Anaya until the court has ruled on Plaintiffs' Motion to Designate Mr. Anaya as an Expert Witness. See Def.'s Opp. at 16. By separate Order of even date, the court has granted plaintiffs' motion to designate Mr. Anaya as an expert witness, and for the reasons set forth in that Order, the court permits the use of the portions of the deposition transcript testimony of Mr. Anaya that plaintiffs have designated for use at trial. Consistent with this ruling, the court also GRANTS defendant the use of the portions of the deposition transcript testimony of Mr. Anaya that defendant has counter-designated for use at trial.

IT IS SO ORDERED.

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EMILY C. HEWITT  
Judge