THE HONORABLE STEVE ROSEN
Hearing Date: May 22, 2017

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF KING

THERESA BIGLER, individually and as Personal Representative of the Estate of RICHARD BIGLER,

Plaintiff,

v.

OLYMPUS AMERICA INC., a foreign corporation, OLYMPUS CORPORATION OF THE AMERICAS, a foreign corporation; OLYMPUS MEDICAL SYSTEMS CORP., a foreign corporation; and VIRGINIA MASON MEDICAL CENTER,

Defendants.

No.: 15-2-05472-4SEA

OLYMPUS DEFENDANTS' SUPPLEMENTAL BRIEFING ON CR 43(f) AND THE INABILITY OF A STATE COURT TO COMPEL JAPANESE CITIZENS IN JAPAN TO ATTEND TRIAL

INTRODUCTION

As the Court requested, this supplemental brief explains why Japan's treaties with the United States prohibit state courts from compelling Japanese citizens, residing in Japan, to travel to Washington to testify at trial. In short, treaties with Japan set forth the exclusive means of obtaining testimony from Japanese citizens in Japan. The U.S. Constitution makes those treaties the "supreme law of the land" that bind state courts. Moreover, state courts have no authority to rework those treaties because the federal government has exclusive power over affairs with

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Japan. Because Plaintiff's CR 43(f) notice seeks to circumvent the United States' binding agreement with Japan, it should not be enforced.

The treaties entered into by the sovereign governments of Japan and the United States set forth the exclusive means by which evidence can be obtained from Japan, and the exclusive procedures by which a Japanese citizen can be compelled to travel to the United States. Those treaties include:

- The 1963 U.S.-Japan Consular Convention and Protocol, March 22, 1963, U.S.-Japan, 15 U.S.T. 768. That treaty allows the deposition of a ***willing*** witness in Japan, but only under strict procedures that cannot be overruled.
- The Extradition Treaty between the United States and Japan, March 30, 1980, 31 U.S.T. 892. This treaty, in connection with Japan's internal Extradition Act, governs the limited circumstances under which a Japanese citizen (or any other person presently in Japanese territory) can be ordered to travel to the United States for court proceedings.

These treaties occupy the field of what American courts can do to obtain testimony from citizens in Japan. Neither treaty grants American courts the power to compel an unwilling Japanese citizen in Japan to offer testimony in the United States.

Treaties with foreign states are the "supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." U.S. Const. art. VI, § 2. Moreover, a ratified treaty establishes the course of dealing between sovereign nations; absent and outside a treaty, a nation generally has no obligations to cooperate or to enforce or implement the judicial orders of another.

Those treaties between the United States and Japan constrain the application of CR 43(f) through the Supremacy Clause. Whatever CR 43(f) permits for domestic witnesses within the

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United States, it does not and *cannot* authorize a court to change the procedures set by treaty. Because the Consular Convention governs the procedures and limits for taking testimony from Japanese citizens in Japan, CR 43(f) must abide by the same procedures and limits. CR 43(f) likewise must yield to the statutory and treaty standards for extradition.

Even the federal government, which has exclusive responsibility over foreign affairs, treads carefully before attempting to compel foreign nationals to provide testimony in the United States. The Department of Justice recognizes that there are weightier interests at stake than just domestic litigation and that "care must be taken to avoid offending the sovereignty of the foreign country involved." Appendix, Ex. A, U.S. Attorneys' Manual, § 3-19.320, available at https://www.justice.gov/usam/usam-3-19000-witnesses#3-19.320. Plaintiff's CR 43(f) notice, by contrast, asks the Court to extend its power to compel testimony globally without regard to what treaties allow and whose sovereignty is infringed. That request should be denied.

In any event, ordinary CR 26(c) principles require a protective order here. Plaintiff's notice would create an undue burden on Mr. Yabe, Mr. Nishina, and Mr. Moriyama to travel to another country in which they are under criminal investigation simply to invoke their Fifth Amendment rights. Their absence would work no prejudice because their videotaped depositions contain the same repeated invocation of the privilege that they would likely give at trial. Particularly when enforcement would threaten violations of the United States' agreements with a sovereign nation, there is no need for the witnesses' testimony that could justify the resulting burden.

STATEMENT OF ISSUES, EVIDENCE AND AUTHORITY

A. TREATIES WITH JAPAN ARE THE SUPREME LAW OF THE LAND.

The U.S. Constitution itself makes treaties supreme over state law. Article VI states that "The Constitution, and the Laws of the United States which shall be made in Pursuance thereof;

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and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." U.S. Const. art. VI, § 2 (emphasis added). Courts have relied on this provision to affirm that states have no power to avoid the impact of an in-force treaty. *See, e.g., Hines v. Davidowitz*, 312 U.S. 52, 62-63 (1941) ("No state can add to or take from the force and effect of such treaty or statute.").

Moreover, states have limited ability to interact with foreign nations, because the area of foreign affairs itself is "primarily, if not exclusively, [a] federal power." *Von Saher v. Norton Simon Museum of Art*, 592 F.3d 954, 960 (9th Cir. 2010). Under the "foreign affairs doctrine," state laws that conflict with a treaty or other federal foreign affairs prerogatives are disallowed. *Id*; *see also Zschernig v. Miller*, 389 U.S. 429, 443 (1968). "Our system of government is such that the interest of the cities, counties, and states, no less than the interest of the people of the whole nation, imperatively requires that federal power in the field affecting foreign relations be left entirely free from local interference." *Hines*, 312 U.S. at 63. For that reason, a state court is not permitted to issue orders that circumvent or conflict with an established treaty or act in a field governed by such a treaty. *Id.* "Where [state] laws conflict with a treaty, they must bow to the superior federal policy." *Zschernig*, 389 U.S. at 441 ((citing *Kolovrat v. Oregon*, 366 U.S. 187, 190 (1961)).

B. TREATIES WITH JAPAN PROVIDE THE EXCLUSIVE MECHANISM FOR PROCURING TESTIMONY FROM JAPANESE CITIZENS IN JAPAN AND PREEMPT OTHER MEANS OF COMPELLING TESTIMONY.

In this action, Plaintiff seeks to use CR 43(f) and the concomitant power of the Court to force three Japanese citizens residing in Japan to take two actions: (1) leave Japan and travel to Seattle; and (2) testify in court. The Court does not have the inherent power to compel either travel or testimony from such witnesses. *See Fitzgerald v. Westland Marine Corp.*, 369 F.2d

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499, 501 (2d Cir. 1966) (for witnesses living in Japan, "[n]o process to compel their testimony at a trial in New York is available"); U.S. Attorneys' Manual, § 3-19.320 ("Since foreign nationals residing in the foreign countries are not subject to the subpoena power of United States Courts, their attendance can be obtained only on a voluntary basis."). Rather, compelling travel and compelling testimony are the subject of treaties between the United States and Japan that spell out the limits and protocols for such actions. As explained in the previous section, these treaties are the supreme law of the land and take precedence over any state law or rule that would supplant them.

The only means by which a person in Japan – whether or not a citizen of Japan – can be brought to another country is via extradition, which is covered by both statute and a treaty with the United States.[1] The Extradition Treaty limits those eligible for extradition from Japan to the United States to those "sought for prosecution" for certain crimes serious enough to carry a punishment of at least a year. 31 U.S.T. 892 art. I, II. It also requires requests for extradition to "be made through the diplomatic channel," and insists on certain evidence and documents before the person may be compelled to leave. *Id.* art. VIII.

Likewise, the collection of evidence – including testimonial evidence – in U.S. civil proceedings is controlled by a treaty, the 1963 U.S.-Japan Consular Convention and Protocol. The Convention prescribes the ***only*** method of taking testimony from a Japanese citizen. 15 U.S.T. 768 art. 17(1)(e); *see also* Appendix, Ex. B, "Depositions in Japan," U.S. Embassy and

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[1] Extradition deals with criminal matters, but the treaty is applicable here, for two reasons. First the Extradition Treaty sets forth the minimum standards by which a person can be extradited – the crime must be sufficiently severe, there must be evidence of charges or conviction, and so on. It is hard to imagine Japan would erect barriers to the extradition of convicted felons but allow a U.S. court to compel travel, without conditions, of a person not charged with any crime. Second, the Japanese witnesses at issue invoked their Fifth Amendment rights during their depositions in Tokyo: while they have not been charged with any crimes in the United States, they apparently believe they are at some risk of U.S. prosecution.

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Consulates in Japan, available at https://jp.usembassy.gov/u-s-citizen-services/local-resources-of-u-s-citizens/attorneys/depositions-in-japan/#dep ("[D]epositions are controlled by detailed agreements between the United States and the Government of Japan, and procedures cannot be modified or circumvented. Orders by U.S. courts cannot compel the Government of Japan to amend or overlook its judicial regulations and procedures").

These treaties take precedence over every state civil rule or court order. *Kolovrat*, 366 U.S. at 190. Treaties are supreme not just when they expressly conflict with state law, but also when they occupy the field in which state law purports to apply. *Hines*, 312 U.S. at 63. That rule is based in both the law and in logic: First, treaties like the Consular Convention are to be broadly construed, and states are not free to "conflict or interfere with, curtail or complement" them. *Hines*, 312 U.S. at 66. *See also Hillsborough Cty. v. Automated Med. Labs., Inc.*, 471 U.S. 707, 713 (1985) ("Pre-emption of a whole field also will be inferred where the field is one in which 'the federal interest is so dominant that the federal system will be assumed to preclude enforcement of state laws on the same subject.'") (quoting *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947)). The Consular Convention thus leaves no room for state law to supplement its procedures.

Second, the Consular Convention impliedly prohibits more intrusive discovery procedures than are expressly allowed in the treaty. A treaty that restricts the availability of *deposition* testimony *in Japan* does not plausibly allow the far more intrusive step of requiring *trial* testimony *in the United States*. The Consular Convention limits (a) who can be deposed; (b) the time, place, and manner of the deposition; and (c) the procedure by which the party seeking evidence initiates the deposition. 15 U.S.T. 768 art. 17(1)(e). Japan's narrow concession to the needs of United States litigation for purposes of depositions would be turned on its head if parties could replace the tightly controlled deposition process with a simple trial

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testimony notice. Absent a treaty provision authorizing testimony in open court or a willing exercise of comity, there are no grounds for a U.S. state to order a foreign citizen residing abroad to testify anywhere or under any circumstances. *See, e.g., Chubb & Son v. Asiana Airlines*, 214 F.3d 301, 312 (2nd Cir. 1999) (parties to treaty may consent to be bound only to the extent they wish) (citing Restatement (3d) of the Foreign Relations of the United States § 312 cmt. f); *see also U.S. ex rel. Saroop v. Garcia*, 36 V.I. 353 (3rd Cir. 1997) (absent an effective treaty with Trinidad and Tobago, there is no means to force extradition of Trinidadian defendant). Even if there were, Japan has not agreed to any procedures for enforcing an order compelling trial attendance in the United States. *See J.C. Renfroe & Sons, Inc. v. Renfroe Japan Co., Ltd.*, 515 F. Supp. 2d 1258, 1272 (M.D. Fla. 2007) (describing cumbersome process to Japanese court to compel evidence *in Japan*). Because the treaties with Japan make no allowance for compelling attendance at trial either directly or indirectly, CR 43(f) is preempted as applied to this case.

Even if there were some doubt about whether the treaties with Japan left any room for a mechanism like CR 43(f) to compel Japanese citizens to testify in Washington, prudence counsels caution. The federal Department of Justice recognizes that, as a result of treaties like the Consular Convention, obtaining the trial attendance of foreign witnesses is a difficult and sensitive endeavor. DOJ policy states that "[o]btaining testimony from foreign nationals is often a delicate matter," and advises that "care must be taken to avoid offending the sovereignty of the foreign country involved." *Id.* For those reasons, DOJ policy is to consult its Office of International Affairs before attempting to obtain trial attendance in a way that could cause international tensions. Appendix, Ex. C, U.S. Attorneys' Manual, Criminal Resource Manual 276, available at https://www.justice.gov/usam/criminal-resource-manual-276-treaty-requests. Without the benefit of that advice, the Court should avoid mechanisms other than those specifically allowed by treaty.

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C. A PROTECTIVE ORDER SHOULD ISSUE BECAUSE THE WITNESSES' ATTENDANCE WOULD LIKELY PROVIDE NO VALUABLE INFORMATION AND WOULD CREATE AN UNDUE BURDEN.

In any event, the Court should decline to enforce Plaintiff's CR 43(f) notice. Rule 43(f)(1) provides, "For good cause shown in the manner prescribed in rule 26(c), the court may make orders for the protection of the party or managing agent to be examined." There is good cause to quash a CR 43(f) notice where the request is unduly burdensome and where less burdensome alternative methods of testimony, in lieu of live, in-person testimony, are available. *See, e.g., Esparza v. Skyreach Equipment, Inc.*, 103 Wn. App. 916, 15 P.3d 188 (2000) (travel from Canada to Seattle would be burdensome, but alternatives available under CR 39, i.e., testifying by telephone or videotape, were available).

First, if the witnesses were to attend the trial, the burden would be substantial. Each is currently under criminal investigation and would potentially risk their freedom to attend. Both the opportunity costs and actual travel expenses would be "exorbitant." *Fitzgerald*, 369 F.2d at 501 (describing that the cost of bringing witnesses from Japan to testify).

There is no pressing need for the witnesses' testimony that could justify that burden. The witnesses' testimony would likely be of little use to the jury because they would likely respond as they did at their depositions—by invoking the Fifth Amendment privilege in response to nearly every questions. Thus, the jury would receive little or no substantive testimony.

In fact, it would be improper to put the witnesses on the stand simply to extract invocations of the privilege over and over again. Under those circumstances in *United States v. Custer Battles, LLC*, the court recognized the "danger that at some point the jury will become deaf to the substance of the questions asked and unanswered, and as a result, the specific inferences that are appropriately drawn will blur into a single inference that the defendants have committed all the acts alleged." 415 F. Supp. 2d 628, 636 (E.D. Va. 2006). Thus, the court

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limited the plaintiff to three questions "that relate to the heart of the alleged [tort], and which have the most reliable basis." *Id.* Plaintiff should be subject to a similar reasonable limit here, in which case the brief and targeted examination of each witness would not justify their attendance.

Finally, a protective order will cause no prejudice because Plaintiff already has the witnesses' videotaped depositions. To the extent that Plaintiff's trial strategy requires showing the jury that the witnesses invoked the Fifth Amendment, Plaintiff will have ample invocations to choose from. And because the jury is permitted to draw an adverse inference from that refusal to testify, the decision by those individuals not to answer questions has already hurt Olympus' defense.

CONCLUSION

For the reasons stated above, the Olympus Defendants respectfully request this Court grant its initial motion to strike the CR 43(f) notice for Mr. Yabe, Mr. Nishina, or Mr. Moriyama. In the alternative, the Olympus Defendants request a protective order under CR 43(f)(1) and 26(c).

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I certify that this memorandum contains 2645 words, in compliance with the Local Civil Rules.