UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

SHANGHAI WEIYI INTERNATIONAL TRADE CO., LTD.,

Plaintiff,

-against-

FOCUS 2000 CORP., et al.,

Defendants.

15-CV-3533 (CM) (BCM)

MEMORANDUM AND ORDER

BARBARA MOSES, United States Magistrate Judge.

Before me are two motions for discovery-related sanctions. The first motion, filed by defendants Focus 2000 Corp. (Focus 2000), W.R. 9000 Corp. (W.R. 9000), and Sunny Lam (collectively, the Lam Defendants) on September 6, 2016 (Dkt. No. 136),[1] seeks sanctions against plaintiff Shanghai Weiyi International Trade Co., Ltd. (Shanghai Weiyi) for its failure to produce five categories of documents no later than July 28, 2016, as directed by this Court's Order dated June 29, 2016 (the June 29 Order). (Dkt. No. 110.) The documents were never produced. The second motion, filed by plaintiff on October 14, 2016 (Dkt. No. 154), seeks sanctions against defendant Eaglemen Corp. (Eaglemen) for its failure to produce its principal Yang Zhao (Zhao) for deposition by September 16, 2016, as directed by this Court's Order dated August 16, 2016 (the August 16 Order). (Dkt. No. 123.) Zhao, who claims to have been undergoing treatment in China for an eye injury, has never testified.

For the reasons that follow both motions are GRANTED to the extent that: (1) plaintiff is precluded from offering or relying on any of its documents described in the June 29 Order;

[1] The Lam Defendants first filed their motion papers on September 6, 2016 at Dkt. No. 126. Due to an error in their original ECF submission, they refiled the same papers on September 22, 2016, at Dkt. Nos. 136-138.

(2) plaintiff and its counsel must pay the reasonable expenses, including attorney's fees, incurred by the Lam Defendants in making their sanctions motion; (3) Zhao is precluded from testifying in this action; and, (4) Eaglemen and its counsel must pay the sum of $1,000 to plaintiff.

FACTS

I. BACKGROUND[2]

Plaintiff Shanghai Weiyi is a state-owned garment factory in Shanghai, People's Republic of China (PRC). In its First Amended Complaint (FAC), filed on June 30, 2015 (Dkt. No. 29), plaintiff alleged that it sold over $1.65 million in clothing to "what it believed was a reputable company known as Waitex International. Instead, the sale was made to the allegedly disreputable Defendant Sunny Lam and/or one or more companies he controlled." *Shanghai Weiyi*, 2015 WL 6125526, at *1. Plaintiff claimed that between March and August of 2014 it delivered the goods to the United States, where they were signed for by defendant Lam, a New York resident, on behalf of "Waitex Group," Eaglemen, and Focus 2000, but that plaintiff was never paid for the goods and was unable to reclaim them because Lam sold them through defendant W.R. 9000. *Id*. Eaglemen, Focus 2000, and W.R. 9000 are headquartered in New York, *see* FAC ¶¶ 2-4; "Waitex Group," according to plaintiff, was "a fictional, non-existent entity." *Id*. ¶ 12.

The Lam Defendants answered and counterclaimed, alleging that they paid plaintiff approximately $1.24 million against invoices totaling approximately $1.9 million, plus $91,000 in

[2] The Court assumes familiarity with the factual background and procedural history of this action, described in more detail in Judge McMahon's October 16, 2015 Order dismissing portions of the First Amended Complaint, *see Shanghai Weiyi Int'l Trade Co. v. Focus 2000 Corp.*, 2015 WL 6125526, at *1 (S.D.N.Y. Oct. 16, 2015), and in my September 14, 2016 Report and Recommendation regarding motions to dismiss all or part of the Second Amended Complaint, *see Shanghai Weiyi Int'l Trade Co. Ltd. v. Focus 2000 Corp.*, 2016 WL 5817009, at *1-2 (S.D.N.Y. Sept. 14, 2016), *report and recommendation adopted*, Order, Sept. 30, 2016 (Dkt. No. 145).

air freight costs "occasioned by the late delivery of the Plaintiff," but that a "substantial amount" of the goods ordered were never delivered, while other shipments contained "defective, non-conforming, [and] non-ordered" goods, causing W.R. 9000 and Focus 2000 to lose business and profits. Lam Defs. Ans., filed August 3, 2015 (Dkt. No. 36), ¶¶ 47-53, 57-60. As a result, the Lam Defendants allege, Shanghai Weiyi owes them over $275,000. *Id*. ¶¶ 61-62.

After the Court dismissed portions of the FAC, *see Shanghai Weiyi*, 2015 WL 6125526, plaintiff filed its Second Amended Complaint (SAC) on November 5, 2015 (Dkt. No. 79), which was met with a second round of motions to dismiss or strike. (Dkt. Nos. 81, 86.) Plaintiff then voluntarily dismissed its fraud claims, which arose primarily out of Lam's use of the "Waitex" name, as well as its claim to "pierce the corporate veil" and render Lam personally liable for the acts of defendants Focus 2000, W.R. 9000, and Eaglemen. *See* SAC ¶¶ 96-115; Knapp Ltr. dated June 29, 2016 (Dkt. No. 111); *Shanghai Weiyi*, 2016 WL 5817009, at *3.

The remaining claims and counterclaims in this action are relatively straightforward. Plaintiff alleges that it was not paid for the goods it shipped and is owed $1.65 million plus interest. SAC ¶¶ 71-96; 116-19. The Lam Defendants – who are apparently still relying on their answer to the FAC – claim that they did not get everything they ordered; that they were overcharged for the late, non-conforming, or defective goods they did receive; and that Shanghai Weiyi owes them more than $275,000. Lam Defs. Ans. ¶¶ 47-53, 57-62.[3] Defendant Eaglemen, which is separately represented, answered the SAC (Dkt. No. 151), but did not file any counterclaims.

One unusual issue is particularly relevant to the Lam Defendants' sanctions motion. Although the parties agree that Jason Lee, a Chinese national residing in Shanghai, played a central

[3] The record does not contain any answer by the Lam Defendants to the SAC. However, plaintiff has taken no steps towards defaulting them.

role in the negotiations and transactions at issue, they strongly dispute which party he represented. Plaintiff asserts that Jason Lee was defendant Lam's "partner, authorized agent . . . designated representative, close friend and alter ego." SAC ¶¶ 9, 11. The Lam Defendants assert that, to the contrary, Jason Lee "at all times was acting as the *agent of Plaintiff*," Lam Defs. Ans. ¶ 42 (emphasis in the original), and in that capacity "solicited and obtained" the relevant purchase orders from defendants in late 2013, received the Lam Defendants' objections that the goods were defective, non-conforming, and late, and agreed to modify plaintiff's invoices "to substantially reduce the amounts stated thereupon" – a promise that, according to the Lam Defendants, plaintiff failed to honor. *Id*. ¶¶ 42, 58, 59.[4]

Although this is otherwise a "straightforward goods sold and delivered case," *Shanghai Weiyi*, 2015 WL 6125526, at *1, discovery has been difficult and protracted. The discovery deadline was extended multiple times – the last time, until September 16, 2016, for the limited purpose of conducting the deposition of Eaglemen's principal, Zhao. (*See, e.g.*, Dkt. Nos. 103, 110, 123.) The Lam Defendants filed their sanctions motions on September 6, 2016, shortly before the end of the discovery period. Plaintiff filed its motion on October 14, 2016, after the last discovery deadline expired and Zhao had still not testified. I heard oral argument on the motions on December 15, 2016. *See* Tr. of Dec. 15, 2016 Hrg. (Dkt. No. 171.) Thereafter, I scheduled a settlement conference for June 14, 2017. (Dkt. No. 163.) On June 8, 2017, I adjourned that conference *sine die* after it became apparent that neither plaintiff nor Zhao would appear on the

[4] I refer to Jason Lee by his full English name so as not to confuse him with Classic Li (sometimes also rendered Lee), a former employee of plaintiff whose testimony plays a key role in the Lam Defendants' sanctions motion.

scheduled date,[5] and that I would be unable to convene an in-person conference in the foreseeable future. (Dkt. No. 166.) On June 13, 2017, Eaglemen's attorney James Montgomery moved to withdraw, stating, "I cannot get satisfactory answers from Mr. Zhao regarding his medical condition and furthermore I cannot assure the Court that he will ever appear in person in this case." Montgomery Decl. dated June 13, 2017 (Dkt. No. 167), ¶ 9.

II. DISCOVERY

A. Deficiencies in Plaintiff's Document Production

The Lam Defendants served plaintiff with requests for production of documents on December 20, 2015. (Dkt. No. 138-8.) Plaintiff responded to the requests on January 21, 2016 (Dkt. Nos. 105-2 to 105-4), but did not produce any documents beyond those previously attached to its pleadings or exchanged pursuant to the automatic disclosure provisions of Fed. R. Civ. P. 26(a)(1)(A). *See* Rapaport Ltr. dated June 8, 2016 (Dkt. No. 105), at 1 ("The Plaintiff's Response appended no documents whatsoever.").

1. The Deposition of Song "Classic" Li

On April 25 and 26, 2016, defendants took the deposition of Song "Classic" Li (Classic Li), plaintiff's Rule 30(b)(6) deponent, in New York. *See* Classic Li Dep. Tr. (Dkt. Nos. 138-9 to 138-18.) Classic Li testified (through a Mandarin translator) that he worked as a "consultant and manager" for Shanghai Weiyi for approximately two years, from 2013 until September of 2015, at which point he lost his job "because of this particular lawsuit" and because his contract expired. Classic Li Dep. Tr. 11:2-24, 17:6-9, 65:25, 85:13-86:23, 229:24-25. Classic Li said he prepared for his deposition by reviewing documents at his home in Shanghai, but that he brought no

[5] Plaintiff's counsel asserted that plaintiff's settlement representative could not obtain a visa in a timely manner. Eaglemen's counsel asserted that Zhao was still medically unfit to travel as a result of the same eye injury that rendered him unable to appear for deposition last year.

documents with him to the United States. *Id.* 13:14-14:11. In fact, he disclosed, as of September 2015 – seven months prior to his deposition – he was prohibited from going to plaintiff's office, reviewing its books or records, or accessing his former computer. *Id.* 13:14-15:7, 83:2-84:24, 172:15-21. The originals of the documents he reviewed at home were still in the possession of plaintiff and/or its Shanghai-based attorney, Jia Chang, who – according to Classic Li – had been "authorized" by plaintiff "to handle everything." *Id.* 13:14-15:7, 80:16-24, 81:15-16.

Classic Li then testified in some detail about the existence and location of various documents pertinent to the parties' dispute. He explained that plaintiff kept a ledger of its transactions "[i]n paper form" in its office, showing how incoming payments were applied; that its accounting personnel also recorded all payments received in a computer; and that his (Classic Li's) former assistants at Shanghai Weiyi prepared "exporting paperwork," including purchase orders and invoices, for Shanghai Weiyi's clothing export business. *Id.* 57:15-59:3, 67:16-71:20, 74:12-17, 177:14-178:5, 234:17-239:15, 246:4-22. During his employment at Shanghai Weiyi, Classic Li was also in possession of bills of lading corresponding to shipments at issue in this action, which Sunny Lam requested in 2015, but which Classic Li apparently did not provide. *Id.* 180:5-24. Classic Li further testified that Sinosure, a state-owned insurer, had issued Shanghai Weiyi a certificate of insurance for the goods at issue here, and that, before he left Shanghai Weiyi in September of 2015, one of his subordinates filed a claim with Sinosure – at his direction – for over $1 million. *Id.* 239:23-241:11, 243:15-245:12. If Sinosure paid that claim, it would substantially mitigate plaintiff's loss and thereby reduce defendant's liability. *See* Tr. of Dec. 15, 2016 Hrg. at 15:5-16:4.

Classic Li also testified that he had numerous communications with Jason Lee, including multiple telephone calls, from 2013 up until the week before the deposition in 2016. Classic Li's

most recent call to Jason Lee took place "about a week" prior to the deposition and was made to "notify him that I was coming today." Classic Li Dep. Tr. 25:4-26:23. The two men also exchanged messages through WeChat, a social media platform, from approximately 2014 through the week preceding the deposition. *Id.* 48:9-51:7, 53:3-6. In addition, they communicated by e-mail from 2013 until this action commenced in 2015. *Id.* 57:10-17. The communications between Classic Li and Jason Lee in 2013-14 were about "the products that [defendants] in this case already had received," the specifications for those goods, and delivery to the United States. *Id.* 54:9-14, 56:7-57:8. Classic Li had two direct subordinates, Dong Mei Ren and Li Rui Jie, whose responsibilities included "handling of documents and supervising of productions," and who also communicated with Jason Lee, "at least once a week," by telephone, WeChat, and e-mail. *Id.* 57:15-59:3. According to Classic Li, Dong Mei Ren inspected the packaging on the goods bound for defendants before they were shipped, *id.* 186:10-25, while Jason Lee was responsible for inspection of the goods themselves on behalf of defendant Lam. *Id.* 95:22-24, 97:19-21, 187:9-16.

2. The June 29, 2016 Order

On June 9, 2016, the Lam Defendants filed a letter-motion seeking an order, pursuant to Fed. R. Civ. P. 37(a), compelling plaintiff to produce additional documents and precluding plaintiff from relying on any documents it had failed to produce. Rapaport Ltr. dated June 8, 2016, at 1-6. The Lam Defendants noted that plaintiff's Rule 30(b)(6) deponent, Classic Li, testified repeatedly that he could not answer defendants' questions without first reviewing documents – including those discussed in the testimony summarized above – that were or had once been kept on his work computer, or elsewhere in plaintiff's Shanghai office, and that were responsive to the Lam Defendants' previously-served discovery requests but had never been produced. *Id.* at 2-5.

Plaintiff did not deny that additional responsive documents existed and had yet to be produced. Instead, in its responding letter, plaintiff suggested that the parties "resolve the case" by sitting down to review the unpaid invoices and any documents relating to defendants' "rejection or cover" of the goods, at which point "this matter becomes one of simple addition." Knapp Ltr. dated June 10, 2016 (Dkt. No. 106), at 1-2. The Lam Defendants replied that the case was too complex to be resolved through a simple invoice review, and that they could not prepare and present their defense, or properly pursue their counterclaims, without the production of the additional documents they sought. Rapaport Ltr. dated June 15, 2016 (Dkt. No. 107), at 1-2.

After a June 28, 2016 discovery conference, I granted the Lam Defendants' motion to compel. My June 29 Order directed plaintiff to produce five categories of documents no later than July 28, 2016:

> (a) Books and ledgers reflecting receipt of funds from defendants and/or application of any such funds;
>
> (b) All bills of lading with respect to the goods at issue;
>
> (c) All e-mails, WeChat messages, text messages, and other communications sent between plaintiff's representatives (including Classic Li and his assistants Dong Mei Ren and Li Rui Ji)[6] and defendants' representatives (including Jason Lee and Sunny Lam) regarding the transactions and goods at issue in this action, their conformity or nonconformity with defendants' specifications and their delivery or non-delivery;[7]
>
> (d) Any documents or correspondence submitted to or received from insurance provider Sinosure regarding the transactions, parties, or goods at issue in the action; and
>
> (e) Any inspection reports created by Classic Li or his assistants regarding the goods being manufactured for defendants.

[6] These names are rendered as they were presented to the Court, with last names first.

[7] I also ordered plaintiff to serve third-party subpoenas or take other measures reasonably necessary to obtain the e-mails, text messages and other electronic communications between Jason Lee and Classic Li if they were no longer within plaintiff's direct control. *Id*. ¶ 3(c).

June 29 Order ¶ 3(a)-(e). The June 29 Order also directed plaintiff to serve a supplemental computation of its damages, in compliance with Fed. R. Civ. P. 26(a)(1)(A)(iii) and 26(e), and to produce all documents upon which its computation was based. *Id*. ¶ 2.[8]

3. Plaintiff's Failure to Comply

On August 3, 2016, the Lam Defendants reported that plaintiff had not produced "a single document" required by ¶ 3 of the June 29 Order and requested preclusion sanctions. Rapaport Ltr. dated Aug. 3, 2016, at 1. Following another discovery conference on August 15, 2016, I set a briefing schedule for the Lam Defendants' sanctions motion. In that motion they seek "an order of preclusion preventing Plaintiff from introducing . . . the documents it failed to produce" in violation of the June 29 Order, together with "an instruction allowing for an inference in favor of said

[8] Plaintiff did provide a supplemental damages computation, which differed in several respects from its original Rule 26(a)(1)(A)(iii) computation and included new claims for "financial charges" and "consequential damages." However, plaintiff did not specify the amount of the financial charges or consequential damages, and did not identify the documents on which the computation was based. *See* Rapaport Ltr. dated July 12, 2016 (Dkt. No. 112), at 1, 2. On July 20, 2016, I directed plaintiff to produce, by July 28, 2016, a second "supplemental computation of its damages" in "full compliance with Fed. R. Civ. P. 26(a)(1)(A)(iii) and 26(e)." Order dated July 20, 2016 (Dkt. No. 116), at 1. Plaintiff was ordered, among other things, to "provide sufficient detail to explain its calculations for each category of damages claimed," to "identify the documents or other evidentiary materials that provided the bases for the calculations," to produce those documents, if not already produced, and to "tie each step of [its] calculation to the specific documents or other evidentiary materials that support it." *Id.* The July 20 Order warned: "Noncompliance with any part of this order may result in preclusion sanctions." *Id.* Once again, plaintiffs provided a supplemental computation, which concluded that defendants owed it $1,297,001.50 for goods sold and delivered (approximately $250,000 less than plaintiff claimed in the SAC), and included copies of 40 different invoices. (Dkt. No. 138-6.) However, plaintiff still failed to quantify (or support) its claims for "financial charges" and "consequential damages." *Id.* The Lam Defendants requested preclusion sanctions. Rapaport Ltr. dated Aug. 3, 2016 (Dkt. No. 120). On August 16, 2016, I granted that request, ruling that since plaintiff "failed to provide a computation of its alleged financing charges or other consequential damages in accordance with Fed. R. Civ. P. 26(a)(1)(A)(iii), plaintiff may not seek damages above or beyond the amount reflected in its July 28, 2016 supplemental damages computation letter plus interest at the applicable statutory rate if otherwise warranted." Aug. 16 Order ¶ 4.

Defendants with respect to all issues upon which the relevant documents which Plaintiff failed to produce would have had a bearing," and their "costs incurred in the making of the instant motion." Notice of Mtn. dated Sept. 6, 2016 (Dkt. No. 136), at 1.

B. Eaglemen's Failure to Produce Yang Zhao for Deposition

1. The Eye Injury

The original deadline to complete all discovery in this action was April 29, 2016. (Dkt. No. 67.) On April 13, 2016, Eaglemen filed a letter-motion seeking a two-month extension of that deadline on the ground that its principal, Yang Zhao, "was involved in a serious accident in China on April 3, 2016 which required him to have surgery on both his eyes at a hospital in Beijing." Montgomery Ltr. dated Apr. 13, 2016 (Dkt. No. 102), at 1. Counsel for Eaglemen stated, "as I understand it, both Mr. Zhao's corneas were damaged and had to be stitched," and represented that he (counsel) had "shared original and translated documents detailing the eye surgery" with counsel for plaintiff. *Id.* at 1-2. Eaglemen sought the extension "to allow Mr. Zhao to recover and attend his deposition." *Id.* at 2. Judge McMahon granted the request on April 19, 2016, but cautioned counsel that she would not grant any further extensions. (Dkt. No. 103.)

Three months passed, during which Zhao remained in the PRC and did not appear for deposition. On July 27, 2016, plaintiff filed a letter-application requesting, among other things, that the Court order Eaglemen to produce Zhao by a date certain. Knapp Ltr. dated July 27, 2016 (Dkt. No. 117), at 3. Eaglemen's counsel, Montgomery, responded by letter dated August 3, 2016 (Dkt. No. 118), stating: "On information and belief, there has been no great change in my client's condition and he awaits further surgery for his sight." Counsel stated that he awaited a "comprehensive updated medical report," and would submit a translated version of the report to the Court upon receipt. *Id.* No such report was submitted.

A week later, after their counsel met and conferred, plaintiff and Eaglemen filed a joint letter in which plaintiff reiterated its request to depose Zhao, either in person or "via Skype or some equivalent video mechanism." Jnt. Ltr. dated Aug. 10, 2016 (Dkt. No. 122), at 3-4. Plaintiff noted Eaglemen's offer to have Zhao provide written answers to plaintiff's questions, but rejected that arrangement as an "inadequate alternative" to a real-time deposition. *Id*. Eaglemen's counsel, for his part, stated that he did not have "sufficient information available to state whether a deposition by 'Skype' or similar is a viable alternative, given [Zhao's] reported condition, hospital admission, etc." *Id*. at 4. Counsel assured the Court that a "further, recent hospital report" would be provided once it was translated." *Id.* Once again, no such report was provided.

2. The August 16, 2016 Order

On August 15, 2016, during a discovery conference, Eaglemen's counsel advised that Zhao had been released from the hospital but remained in or near Beijing, receiving outpatient treatment following surgery, and that air travel was inadvisable due to the nature of Zhao's injuries. Counsel suggested that Zhao be questioned via videoconference so that he would not have to fly to New York. Counsel also confirmed that Zhao was Eaglemen's only principal. I directed Eaglemen to make Zhao available for deposition, either in person or by videoconference, no later than September 16, 2016. One day later, on August 16, 2017, I issued a written order to the same effect, specifying that the examination was to take place either in the Southern District of New York or (at Eaglemen's option) in another location, closer to the PRC, where a deposition could lawfully proceed without advance government permission. Aug. 16 Order ¶¶ 5(a)-(b).[9] I further specified:

[9] As noted in my August 16 Order, depositions in mainland China require advance permission from the PRC's Central Authority under the Hague Convention. Absent official such permission, participating in a deposition (even voluntarily) could subject the witness to penalties under local law. *See* U.S. Dept. of State, Bureau of Consular Affairs, Legal Considerations – China, *available at*: https://travel.state.gov/content/travel/en/legal-considerations/judicial/country/china.html.

> c. If the deposition is taken outside of this District, Eaglemen shall arrange and bear the cost of a suitable location for Mr. [Zhao's] appearance. Eaglemen shall also make and bear the cost of all travel and other logistical arrangements necessary to ensure that Mr. [Zhao] appears promptly at that location and is supplied with any necessary technical equipment for the deposition (*e.g.*, assuming the parties use Skype, a laptop with a high-speed internet connection, a camera, a microphone, and a Skype account). In addition, Eaglemen shall arrange for and bear the cost of engaging a person authorized by Fed. R. Civ. P. 28(b)(1)(C) to administer the oath to the witness, unless the parties stipulate that the oath may be administered via Skype (or other videoconferencing technology) from this District.
>
> d. Plaintiff shall make and bear the cost of all other arrangements for the deposition, including the court reporter, a translator, and any necessary technical equipment for the use of plaintiff's counsel in this District.
>
> e. Any request to modify, extend, or reconsider the provisions of this Order governing the deposition of Mr. [Zhao] based in whole or in part on medical considerations must be supported by admissible evidence in the form of a declaration or other sworn statement by Mr. [Zhao's] treating physician, accompanied (if not in English) by a certified translation.

Aug. 16 Order ¶¶ 5(c)-(e).

3. Eaglemen's Failure to Comply

Eaglemen did not make Zhao available for deposition as directed. Instead, on September 14, 2016 (two days before the deadline), attorney Montgomery submitted a letter asserting that an unidentified "friend of [Zhao's] in China" had informed counsel that Zhao underwent "further retinal surgery during the first week of September" and had been ordered "to lie face down . . . all day every day, for some weeks to come." Montgomery Ltr. dated Sept. 14, 2016 (Dkt. No. 128), at 1. Counsel explained that on September 13 (three days before the deadline) he had offered to make Zhao "available for deposition via Skype" on September 15 and 16 – but only for two hours each day, and apparently while the witness remained in the PRC. *Id.*[10] Counsel did not submit any medical report, any affidavit, or any other admissible evidence concerning Zhao's condition. Nor

[10] It was not clear from counsel's letter whether Zhao would remain "face down" during the two-hour deposition sessions.

did he indicate that Eaglemen had made any of the other arrangements required by my August 16 Order, such as engaging a person authorized to administer oaths. On September 15, 2016, plaintiff confirmed that it was unwilling to proceed under the conditions offered by Eaglemen, and requested sanctions. Rizzuto Ltr. dated Sept. 15, 2016 (Dkt. No. 130), at 1-2.

4. The September 16, 2016 Order

By Order dated September 16, 2016 (Dkt. No. 131), I summarized the Zhao saga to date and noted that these events "raise questions that go beyond deposition scheduling." I directed Eaglemen to submit affidavits from Zhao, Zhao's treating physician, and Eaglemen's counsel, attesting to Zhao's medical treatment, his current condition, and Eaglemen's efforts, if any, to arrange his deposition in compliance with my August 16 Order. *Id*. at 4.

On September 30, 2016, Eaglemen filed a declaration signed by its counsel (Dkt. No. 143-1); a declaration signed by Zhao, in Chinese, accompanied by an English translation (Dkt. No. 143-3); and a declaration signed by Shen Litai, identified as Deputy Director and Associate Chief Physician of the Opthalmology Department in Baoding No. 1 Central Hospital (Dkt. No. 143-5). The submission also included two Certificates of Diagnosis, in Chinese, with English translations. One certificate was dated September 29, 2016, and bore the name of Shen Litai. (Dkt. No. 143-7.) The other was dated September 28, 2016, and bore the name of Jie Weiru. (Dkt. No. 143-4.) The translator, LinLin Huang, also submitted a declaration, stating that she is fluent in both Chinese and English and that she had translated the documents "to the best of my skill and understanding." (Dkt. No. 143-2.)

i. James Montgomery

Attorney Montgomery's declaration raised as many questions as it answered. Counsel attested that, after he sent multiple letters and e-mails to Zhao regarding the "absolute necessity" of making himself available for deposition, Zhao responded via e-mail on September 9, 2016,

"sending me pictures, showing himself in what appeared to be a hospital." Montgomery Decl. ¶¶ 3-6. The pictures are not in evidence. Counsel then requested proof of Zhao's medical condition, but instead was contacted on September 13, 2016, "by a man who called himself Robert Lo" and said he was an associate of Zhao's. *Id*. ¶ 8. Lo, who spoke "good English," told Montgomery that Zhao "was still unwell," that he had to "remain face down on medical advice," and therefore that he could not appear for more than two hours a day, for two days, via Skype, from mainland China. *Id*. ¶ 8-10. It was on this basis that Montgomery offered those terms to opposing counsel. *Id*.

Counsel further attested that after receiving my September 16 Order he e-mailed Zhao again, and on September 28, 2016, he "obtained evidence from [Zhao's] treating physicians," which he undertook to have translated into English. Montgomery Decl. ¶ 12. Counsel did not communicate directly with the physicians. *Id*. ¶ 13. He did not explain how or by what route he received their evidence.

ii. Yang Zhao

Zhao's declaration, as translated, began by admitting that Sunny Lam – not Yang Zhao – was managing Eaglemen during the time period relevant to this action:

> In the year 2010, I registered and founded [Eaglemen] in the United States, and ran the clothing import business, due to family reasons, I was long-term staying in China since 2013 and I was not able to take care of my company, therefore, the company did not carry out business anymore, and I entrusted Mr. Sunny Lam to administer the company on my behalf.

Zhao Decl. at 1.

The rest of Zhao's declaration concerned his medical difficulties, which began when he injured his "left eyeball" and "left eye socket" after a fall on April 2, 2016. Zhao Decl. at 1. Zhao attested that he had surgery immediately, followed by a second operation on April 25, 2016, and a third on August 31, 2016. *Id.* at 1-3. He was discharged from the hospital on September 6, 2016, but was told not to work for one month, not to tire his eyes, and not to take public transportation.

Id. at 3. According to Zhao, he "might need to take two to three more surgeries." *Id*. at 4. He concluded, "Due to my health condition is not clear so far and might be possible to take surgery any time, therefore, I am not able to participate in any activities or works for the future 3 to 6 months." *Id.*

iii. The Certificates of Diagnosis

Dr. Shen's declaration stated only that the "contents of the single page I have produced is a medical record for YANG ZHAO and the statements made in the record are true and correct." Shen Decl. at 1. Dr. Shen did not attest to Zhao's "current medical condition and treatment," nor did he "describe any medical restrictions on his ability to provide deposition testimony since April 2016," as required by my September 16 Order.

As noted above, Eaglemen submitted two Certificates of Diagnosis, from two different hospitals. The one signed by Dr. Shen (which is presumably the certificate he intended to authenticate) was dated September 29, 2016, on the letterhead of Baoding No. 1 Central Hospital, and (as translated) stated that Zhao suffered a "Trauma on Left Eye," noted that he underwent "surgery for detection of left retina," and listed five "[r]ecommendations," including "Complete Rest" and "Prone Position." However, the Shen certificate did not state when the surgery took place, how long Zhao was required to follow the listed recommendations, or what restrictions, in any, prevented him from giving deposition testimony prior to that surgery.

The second Certificate of Diagnosis, signed by Jie Weiru and dated September 28, 2016, was from the Baoding Yinghua Eye Hospital. It stated (as translated) that Zhao suffered an "Injury on Left eye socket by hitting," and underwent a procedure involving "Left eye vitreous body cutting + Removal of Crystals + Deuterium Oxide + Gas-Liquid Exchange + Injection of Silicone Oil." Dr. Jie's "[r]ecommendations for [t]reatment" included, "Left eye ball should be closed during whole time," and "lie flat on the stomach." Like the Shen certificate, the Jie certificate did

not state when the surgery took place, how long Zhao was required to follow the listed recommendations, or what restrictions, if any, prevented him from giving deposition testimony prior to that surgery or after the recovery period.

After a telephone conference with counsel on October 7, 2016, I set a briefing schedule for plaintiff's sanctions motion against Eaglemen. (Dkt. No. 154.) Plaintiff now seeks an order striking Eaglemen's answer, arguing that its disobedience was willful and that it has "shown a resounding bravado for non-compliance," such that no lesser sanctions will do. Pl. Mem. dated Oct. 14, 2016 (Dkt. No. 157), at 6. Plaintiff does not contend, however, that Zhao invented his injury, nor that his surgeries were fiction. Instead, plaintiff complains about the many extensions to the discovery schedule, the imprecision of the information provided to the Court (in particular, counsel's original report that Zhao injured both eyes, when in fact it was only the left eye), the failure to submit detailed medical evidence on a timely basis, and the "self-serving" nature of that evidence once it was filed. *Id.* at 4-6.

5. Eaglemen Continues to Report that Zhao Cannot Testify

On December 15, 2016, during the sanctions hearing, attorney Montgomery informed the Court that it was his "understanding" that Zhao had "further surgery" after September 16, 2016, adding that "it would appear that there would be a possibility that [Zhao] might be fit sometime in January." Tr. of Dec. 15, 2016 Hrg. at 69:25-70:6, 71:25-72:2. Counsel suggested, as an alternative to sanctions, that Eaglemen be directed to produce a different Rule 30(b)(6) deponent – perhaps Robert Lo – or that the Court issue an order "directed at Eaglemen, giving Eaglemen's principal a definite specified period of time within which to submit himself to deposition." *Id.* at 76:10-16.

Six months later, on June 7, 2017, the question of Zhao's medical condition arose again in the context of the Court's efforts to schedule a settlement conference. This time, attorney

Montgomery reported that it was Zhao's "position" that he could only appear for settlement by telephone, because he was still undergoing medical treatment for his eye and had further surgery scheduled for "early July." Counsel added, "whether it's true or not, I don't know."

On June 13, 2017, Montgomery moved to withdraw as counsel for Eaglemen, on the ground that he could not "get satisfactory answers from [Zhao] regarding his medical condition," and could not "assure the Court that [Zhao] will ever appear in person in this case." Montgomery Decl. dated June 13, 2017, ¶ 9.

DISCUSSION

I. STANDARDS

A. Rule 72 and 18 U.S.C. § 636(b)(1)

Where, as here, the district judge has broadly referred pretrial management to a magistrate judge,[11] the scope of that magistrate judge's authority depends on the nature of the motion before her. Pretrial matters "not dispositive of a party's claim or defense" may be heard and determined by the magistrate judge, subject to review by the district judge on a "clearly erroneous" or "contrary to law" standard. Fed. R. Civ. P. 72(a); *see also* 28 U.S.C. § 636(b)(1)(A); *Pippins v. KPMG LLP*, 279 F.R.D. 245, 253 (S.D.N.Y. 2012) (McMahon, J.) ("A magistrate judge's resolution of discovery disputes deserves substantial deference."). Motions for dispositive relief may be referred to a magistrate judge for report and recommendation, subject to *de novo* review by the district judge. Fed. R. Civ. P. 72(b); *see also* 28 U.S.C. § 636(b)(1)(B); *Aponte v. Atl. Exp. Transp.*, 2008 WL 2388256, at *3 (E.D.N.Y. June 11, 2008) (adopting magistrate judge's report and recommendation to dismiss action as a sanction for repeated discovery misconduct).

[11] *See* Dkt. Nos. 98, 108, 113, 115, 144, 147.

Motions seeking Rule 37(b) discovery sanctions "are ordinarily considered non-dispositive, and therefore fall within the grant of Rule 72(a), 'unless the sanction employed disposes of a claim.'" *Seena Int'l Inc. v. One Step Up, Ltd.*, 2016 WL 2865350, at *10 (S.D.N.Y. May 11, 2016) (Moses, M.J.) (quoting *Lan v. Time Warner, Inc.*, 2016 WL 928731, at *1 (S.D.N.Y. Feb. 9, 2016)). "The critical issue . . . is what sanction the magistrate judge actually imposes," not what sanction the moving party seeks. 12 C. Wright, A. Miller & R. Marcus, *Federal Practice and Procedure* § 3068.2, at 383 (Thomson Reuters 2014) (hereafter *Fed. Practice & Proc.*). Thus, "If a moving party requests a dispositive sanction, but the magistrate judge declines to impose it, the judge's decision is governed by Rule 72(a)," and may be modified or set aside only if "clearly erroneous or contrary to law." *Steele v. Costco Wholesale Corp.*, 2005 WL 1068137, at *2 (E.D.N.Y. May 6, 2005).

Accordingly, "[m]onetary sanctions pursuant to Rule 37 for noncompliance with discovery orders usually are committed to the discretion of the magistrate [judge]." *Thomas E. Hoar, Inc. v. Sara Lee Corp*., 900 F.2d 522, 525 (2d Cir. 1990). An order precluding the introduction of certain evidence or barring certain contentions "may also be properly characterized as non-dispositive . . . [a]s long as the order does not wholly dispose of a party's claim or defense." *Seena Int'l Inc.*, 2016 WL 2865350, at *10 (citing, *inter alia*, *Update Art, Inc. v. Modiin Publ'g, Ltd*., 843 F.2d 67, 71 (2d Cir. 1988)); *see also Magee v. Paul Revere Life Ins*, 178 F.R.D. 33, 37 (E.D.N.Y. 1998) (magistrate judge's order precluding expert witness testimony as a sanction for plaintiff's discovery misconduct was non-dispositive); *UBS Int'l Inc. v. Itete Brasil Instalacoes Telefonicas Ltd*., 2011 WL 1453797, at *1 & n.2 (S.D.N.Y. Apr. 11, 2011) (magistrate judge "has the authority" to preclude disobedient parties from "advancing certain arguments"). Similarly, orders directing that designated facts be taken as established may or may not be within the magistrate

judge's discretion, depending on whether the facts so designated have the effect of "finally resolv[ing] a party's claim or defense." *Burns v. Imagine Films Entm't, Inc.*, 164 F.R.D. 594, 597, 600 (W.D.N.Y. 1996) (magistrate judge did not exceed his authority under Rule 72(a) by resolving issue of "prior access" in favor of copyright plaintiffs as a discovery sanction, because plaintiffs were still required to "affirmatively prove each element of [their] copyright claim").

Magistrate judges may recommend – but do not have authority to impose – discovery sanctions that dismiss a claim, preclude an entire defense, or otherwise "terminate" the action by, for example, striking a pleading entirely or entering a default judgment. *See Mason Tenders Dist. Council Welfare Fund v. Precise Brick, Inc.,* 2009 WL 1675399, at *1 (S.D.N.Y. June 15, 2009); *Aponte*, 2008 WL 2388256, at *3; *UBS Int'l Inc.*, 2011 WL 1453797, at *1 n.2 ("If dismissal were the appropriate sanction, it would be necessary for me to submit a report and recommendation pursuant to 28 U.S.C. § 636(b)(1)(B).").

The Lam Defendants do not seek terminating sanctions. Their counsel so confirmed at oral argument. *See* Tr. of Dec. 15, 2016 Hrg. at 23:13-16 ("We are not asking for terminating sanctions."). Plaintiff does seek terminating sanctions against Eaglemen, in the form of an order striking Eaglemen's answer. Notice of Mtn. dated Oct. 14, 2016, at 1; Pl. Mem. dated Oct. 14, 2016, at 2-8. However, for the reasons that follow I have determined that lesser sanctions are more appropriate. Because those sanctions do not dispose of any party's claim or defense, I have the authority to impose them pursuant to Rule 72(a) and § 636(b)(1)(A). *See Seena Int'l Inc.*, 2016 WL 2865350, at *10.[12]

[12] In the event that Chief Judge McMahon disagrees with my analysis on this point, and believes that this Memorandum and Order prescribes dispositive sanctions, I respectfully recommend, pursuant to Rule 72(b) and § 646(b)(1)(B), that she impose those sanctions to the same extent set forth herein. *See generally Dorchester Fin. Holdings Corp. v. Banco BRJ S.A.*, 304 F.R.D. 178, 180 (S.D.N.Y. 2014) (where magistrate judge's memorandum and order imposing preclusion sanctions arguably barred plaintiff from presenting its "prima facie case," district judge

B. Rule 37(b)

Fed. R. Civ. P. 37 "governs the district court's procedures for enforcing discovery orders and imposing sanctions for misconduct." *World Wide Polymers, Inc. v. Shinkong Synthetic Fibers Corp.*, 694 F.3d 155, 158 (2d Cir. 2012). Pursuant to Rule 37(a), a party may "move for an order compelling . . . discovery." Fed. R. Civ. P. 37(a)(1). Rule 37(a)(3)(B) specifies that such an order may be issued where, *inter alia*, a party fails to produce documents requested pursuant to Rule 34 or fails to designate a deponent to testify pursuant to Rule 30(b)(6).

Rule 37(b) "provides comprehensively for sanctions for failure to obey discovery orders." 8B *Fed. Practice & Proc.* § 2289, at 531. Pursuant to Rule 37(b)(2)(A), the court in which an action is pending may impose "just" sanctions on a party who "fails to obey an order to provide or permit discovery." Fed. R. Civ. P. 37(b)(2). A predicate court order directing compliance with discovery requests, and non-compliance with that order, are required. *See, e.g., Salahuddin v. Harris*, 782 F.2d 1127, 1131 (2d Cir. 1986) ("The plain language of Rule 37(b) requires that a court order be in effect before sanctions are imposed."). However, the order disobeyed can take a variety of forms, and need not even be written. *JSC Foreign Econ. Ass'n Technostroyexport v. Int'l Dev. & Trade Servs., Inc.*, 2005 WL 1958361, at *14 n.10 (S.D.N.Y. Aug. 16, 2005); *see also* 8B *Fed. Practice & Proc.* § 2289, at 531-32 (Rule 37(b) refers to any "order to provide or permit discovery" and "thus makes these sanctions available to orders against a party having this effect regardless of what rule they were made under"); *Daval Steel Prods. V. M/V Fakredine*, 951 F.2d 1357, 1364 (2d Cir. 1991) (citing *Salahuddin*, 782 F.2d at 1131) ("Although the order compelling

---

determined, "[i]n an abundance of caution," to treat decision as a recommendation and review it *de novo*).

discovery need not issue pursuant to Rule 37(a), there must be a valid court order in force before sanctions may be imposed pursuant to Rule 37(b)(2).").

Once it is determined that a party has disobeyed a discovery order, "District courts have a range of sanctions from which to choose." *Mohawk Indus., Inc. v. Carpenter*, 558 U.S. 100, 111 (2009). Rule 37(b)(2)(A) sets forth a "non-exclusive list of sanctions" that may be imposed when a party fails to obey a predicate discovery order. *Hurley v. Tozzer, Ltd*., 2017 WL 1318005, at *2 (S.D.N.Y. Feb. 10, 2017), *report and recommendation adopted*, 2017 WL 1064712 (S.D.N.Y. Mar. 21, 2017) (quoting *Salahuddin*, 782 F.2d at 1131). The list includes:

> (i) directing that the matters embraced in the order or other designated facts be taken as established for purposes of the action, as the prevailing party claims;
>
> (ii) prohibiting the disobedient party from supporting or opposing designated claims or defenses, or from introducing designated matters in evidence;
>
> (iii) striking pleadings in whole or in part;
>
> (iv) staying further proceedings under the order is obeyed;
>
> (v) dismissing the action or proceeding in whole or in part;
>
> (vi) rendering default judgment against the disobedient party; or
>
> (vii) treating as a contempt of court the failure to obey any order except an order to submit to a physical or mental examination.

Fed. R. Civ. P. 37(b)(2)(A). "Instead of or in addition" to sanctions set forth in Rule 37(b), "the court must order the disobedient party, the attorney advising that party, or both to pay the reasonable expenses, including attorney's fees, caused by the failure, unless the failure was substantially justified or other circumstances make an award of expenses unjust." Fed. R. Civ. P. 37(b)(2)(C).

"Discovery sanctions serve a three-fold purpose: (1) to ensure that a party will not benefit from its failure to comply; (2) to obtain compliance with the Court's orders; and (3) to deter

noncompliance, both in the particular case and in litigation in general." *Royal Park Invs. SA/NV v. U.S. Bank Nat'l Ass'n*, 2016 WL 6705773, at *3 (S.D.N.Y. Nov. 9, 2016) (Moses, M.J.) (citing *Cine 42nd St. Theatre Corp. v. Allied Artists Pictures Corp.*, 602 F.2d 1062, 1066 (2d Cir. 1979)); *accord Grammar v. Sharinn & Lipshie, P.C.*, 2016 WL 525478, at *2 (S.D.N.Y. Feb. 8, 2016). "There are two basic limitations upon a district court's discretion in imposing sanctions pursuant to Rule 37(b)(2). The rule expressly requires that the sanctions must be 'just'; and the sanction must relate to the particular claim to which the discovery order was addressed." *Daval Steel Prods.*, 951 F.2d at 1366 (citing *Ins. Corp. of Ir. v. Compagnie des Bauxites*, 456 U.S. 694, 707 (1982)).

The "mildest" sanction for discovery misconduct "is an order to reimburse the opposing party for expenses caused by the failure to cooperate." *Seena Int'l Inc.*, 2016 WL 2865350, at *11 (quoting *Cine 42nd St. Theatre Corp.*, 602 F.2d at 1066). "Monetary sanctions are the norm, not the exception, when a party is required to engage in motion practice in order to obtain the discovery to which it is entitled." *Id.*

"If monetary sanctions are not sufficient, '[m]ore stringent' orders may be issued," including adverse inference orders, preclusion orders "prohibiting the introduction of evidence on particular points," and orders "deeming disputed issues determined adversely to the position of the disobedient party." *Seena Int'l, Inc.*, 2016 WL 2865350, at *12 (quoting *Cine 42nd St. Theatre Corp.*, 602 F.2d at 1066). "Before [granting] the extreme sanction of preclusion," the court "should inquire more fully into the actual difficulties which the violation causes, and must consider less drastic responses." *Outley v. New York,* 837 F.2d 587, 591 (2d Cir. 1988). However, preclusion orders are entirely appropriate where the disobedient party has violated a court order to produce the evidence necessary to resolve the issue as to which preclusion is sought. For example, in *Funnekotter v. Agric. Dev. Bank of Zim.*, 2015 WL 3526661, at *4-6 (S.D.N.Y. June 3, 2015)

(McMahon, J.), where the "non-ZB Bank Defendants" denied that they were alter egos of the Government of Zimbabwe but "offered not the slightest justification" for their failure to produce the board minutes and other documents relevant to that issue, the court concluded that a "strong sanction" was required, including "preclusion from relying on withheld documents and an adverse inference about the contents of those documents." Adverse inference instructions need not be predicated on a finding of spoliation; they may also be warranted where a party fails to produce evidence within its control. *Residential Funding Corp. v. DeGeorge Fin. Corp.*, 306 F.3d 99, 106 (2d Cir. 2002); *see also Dorchester Fin. Holdings Corp.,* 304 F.R.D. 178 (issuing preclusion order, adverse inference instruction, and monetary sanctions for negligent spoliation of evidence stored on computer); *Funnekotter*, 2015 WL 3526661, at *4-6.

Where the discovery misconduct has deprived the opposing party of key evidence needed to litigate a contested issue, an order prohibiting the disobedient party from contesting that issue – or simply directing that the matter be taken as established – is also appropriate. *See, e.g.*, *Adrian Shipholding Inc. v. Lawndale Grp. S.A.*, 2012 WL 104939, at *6 (S.D.N.Y. Jan. 13, 2012), *report and recommendation adopted*, 2012 WL 407475 (S.D.N.Y. Feb. 9, 2012) (existence of personal jurisdiction over Lawnsdale would be taken as established where Lawnsdale "disobeyed the Court's order to supply a competent Rule 30(b)(6) witness, thus completely hamstringing plaintiffs in their efforts to counter Lawnsdale's claims of lack of personal jurisdiction"); *Knox v. Palestine Liberation Org.,* 229 F.R.D. 65, 71 (S.D.N.Y. 2005) ("establishing as a sanction facts sufficient to permit the exercise of personal jurisdiction over defendants").

Striking pleadings and imposing a default judgment are "the most severe sanction[s]" that Rule 37(b) provides "because [they] terminate" the action. *Mason Tenders Dist. Council Welfare Fund v. Precise Brick, Inc.*, 2009 WL 1675399, at *1 (S.D.N.Y. June 15, 2009). While the Second

Circuit has "expressed a preference for resolving disputes on the merits rather than by default," it has also "consistently recognized that Rule 37 sanctions are applicable in 'extreme circumstances,' where 'a party fails to comply with the court's discovery orders willfully, in bad faith, or through fault.'" *Robertson v. Dowbenko*, 443 F. App'x 659, 660 (2d Cir. 2011) (quoting *John B. Hull, Inc. v. Waterbury Petroleum Prods., Inc.*, 845 F.2d 1172, 1176 (2d Cir. 1988)). "Although entry of a default judgment is an extreme measure, discovery orders are meant to be followed" and "[a] party who flouts such orders does so at his peril." *Bambu Sales, Inc. v. Ozak Trading Inc.*, 58 F.3d 849, 853 (2d Cir. 1995) (quoting *Update Art, Inc.*, 843 F.2d at 73). *See also Rana v. Islam*, 2016 WL 2758290, at *4 (S.D.N.Y. May 12, 2016) (striking answer where defendants failed to provide initial disclosures, respond to interrogatories, produce documents, or appear for deposition over the course of more than a year, despite explicit warnings from the court that sanctions for noncompliance could include a default judgment).

The Court has wide discretion to apportion Rule 37 monetary sanctions between a party and its counsel. *See, e.g.*, *AAIpharma Inc. v. Kremers Urban Dev. Co.*, 2006 WL 3096026, at *6 (S.D.N.Y. Oct. 31, 2006) (whether to hold "the party or its counsel, or both" liable for monetary sanctions under Rule 37(a) is a decision that "lies within the Court's discretion"). Joint and several sanctions against parties and their attorneys "are available when the court finds both to be equally at fault," *Hunt v. Enzo Biochem, Inc.*, 2011 WL 4840713, at *7 (S.D.N.Y. Oct. 12, 2011) (internal citations omitted), and are clearly appropriate where "the sanctionable conduct is a 'coordinated effort' of counsel and party." *Metropolitan Opera Ass'n v. Local 100, Hotel Emps. & Rest. Emps. Int'l Union*, 2004 WL 1943099, at *25 (S.D.N.Y. Aug. 27, 2004) (quoting *Estate of Calloway v. Marvel Entm't Grp.*, 9 F.3d 237, 239-40 (2d Cir. 1993)).

C. Factors

When exercising their discretion to impose the appropriate sanction under Rule 37, courts in this Circuit are "guided by the following factors: '(1) the willfulness of the non-compliant party or the reason for noncompliance; (2) the efficacy of lesser sanctions; (3) the duration of the period of noncompliance; and (4) whether the non-compliant party had been warned of the consequences of . . . noncompliance.'" *Local Union No. 40 of the Int'l Ass'n of Bridge v. Car-Wi Constr.*, 88 F. Supp. 3d 250, 262 (S.D.N.Y. 2015) (quoting *World Wide Polymers, Inc.*, 694 F.3d at 159). "Prejudice to the moving party may also be a significant consideration, though not an absolute prerequisite in all circumstances." *Royal Park Invs. SA/NV*, 2016 WL 6705773, at *3 (citing *S. New Engl. Tel. Co. v. Glob. NAPs Inc.*, 624 F.3d 123, 147 (2d Cir. 2010)); *see also Grammar*, 2016 WL 525478, at *3 (prejudice to the moving party is "relevant, although the Second Circuit has emphasized that the absence of prejudice should not be accorded significant weight") (citing *S. New Engl. Tel. Co.*624 F.3d at 148-49). No single factor is dispositive. *World Wide Polymers*, 694 F.3d at 159; *Grammar*, 2016 WL 525478, at *3.

1. Willfulness of Noncompliance

"Noncompliance with discovery orders is considered willful when the court's orders have been clear, when the party has understood them, and when the party's noncompliance is not due to factors beyond the party's control." *Thompson v. Jam. Hosp. Med. Ctr.*, 2015 WL 7430806, at *3 (S.D.N.Y. Nov. 20, 2015) (internal citation omitted); *accord Davis v. Artuz*, 2001 WL 50887, at *3 (S.D.N.Y. Jan. 19, 2001) (citing *Baba v. Japan Travel Bureau Int'l, Inc.*, 165 F.R.D. 398, 402-03 (S.D.N.Y. 1996)). "Willful non-compliance is routinely found, for instance, where a party has 'repeatedly failed to . . . produce documents . . . in violation of the district court's orders.'" *Farmer v. Hyde Your Eyes Optical, Inc.*, 2015 WL 2250592, at *7 (S.D.N.Y. May 13, 2015)

(quoting *Doe v. Delta Airlines,* 2015 WL 798031, at *8 (S.D.N.Y. Feb. 25, 2015)) (finding willfulness where plaintiff failed to comply with two court orders compelling him to produce documents, failed to appear for his deposition, and failed to appear at a pre-motion conference); *accord Grammar*, 2016 WL 525478, at *3 (failure to comply with two orders, without an explanation for the delinquency, was a sufficient basis for a finding of willfulness "given the clarity and simplicity of the Court's orders and the absence of any indication that defendant's noncompliance is the result of factors beyond its control").

2. Efficacy of Lesser Sanctions

"[T]he severity of sanction must be commensurate with the non-compliance." *Shcherbakovskiy v. Da Capo Al Fine, Ltd.*, 490 F.3d 130, 140 (2d Cir. 2007). Thus, "[a] court should always seek to impose the least harsh sanction that will remedy the discovery violation and deter such conduct in the future." *Grammar*, 2016 WL 525478, at *3 (citing *Hawley v. Mphasis Corp.*, 302 F.R.D. 37, 46 (S.D.N.Y. 2014)). However, a "district court is not required to exhaust possible lesser sanctions before imposing dismissal or default if such a sanction is appropriate on the overall record." *Shcherbakovskiy v. Seitz*, 450 F. App'x 87, 88 (2d Cir. 2011).

3. Duration of Noncompliance

Courts "have found noncompliance for a period of several months sufficient to warrant dismissal or default." *Urbont v. Sony Music Entm't*, 2014 WL 6433347, at *3 (S.D.N.Y. Nov. 6, 2014) (granting default sanctions where defendant failed to participate in discovery for over a year, and had made no contact with counsel or the court for over six months). Lesser sanctions may be imposed after a "relatively short" period of noncompliance. *See*, *e.g.*, *3801 Beach Channel, Inc. v. Shvartzman*, 2007 WL 879668, at *6 (E.D.N.Y. Mar. 21, 2007).

4. Notice

"Courts are generally hesitant to impose terminating sanctions before warning the offending litigant." *Grammar*, 2016 WL 525478, at *4 (citing *Johnson v. Strive E. Harlem Emp't Grp.*, 990 F. Supp. 2d 435, 455 (S.D.N.Y. 2014)). "Severe sanctions like dismissal or default should be imposed only if the party has been warned that such a sanction will follow from continued non-compliance and has nevertheless refused to comply." *Urbont*, 2014 WL 6433347, at *3; *accord Agiwal v. Mid Island Mortg. Corp.*, 555 F.3d 298, 303 (2d Cir. 2009) (dismissal was appropriate where magistrate judge's discovery orders "warned of the possibility of sanctions, including dismissal," notwithstanding plaintiff's "alleged health problems and the fact that English is his second language").

However, parties have no "absolute entitlement to be 'warned' that they disobey court orders at their peril," *Daval Steel Prods.*, 951 F.2d at 1366, and even terminating sanctions may be imposed with no warning beyond the sanctions motion itself. *See Grammar*, 2016 WL 525478, at *4 (defendant "could not argue that it lacked notice that it faced the possibility of terminating sanctions, as such notice was provided on the face of the plaintiff's motion").

II. THE LAM DEFENDANTS ARE ENTITLED TO SANCTIONS AGAINST PLANTIFF

This Court's June 29 Order required plaintiff Shanghai Weiyi to produce five categories of documents by July 28, 2016. It is undisputed that plaintiff did not produce a single additional document by that deadline. *See* Rapaport Decl. dated Sept. 6, 2016 (Dkt. No. 138), ¶ 5. Nor did it produce any documents thereafter, even in the face of the pending sanctions motion. *See* Tr. of Dec. 15, 2016 Hrg. at 7:20-25, 24:13-25. Moreover, there is no evidence that plaintiff conducted

any search or undertook any other effort to comply with the June 29 Order. The only question for this Court, therefore, is what sanctions should be imposed.[13]

A. Plaintiff's Conduct Has Prejudiced the Lam Defendants

Shanghai Weiyi concedes that "it should have handled its response to Defendants [sic] discovery demands differently," and admits that it "failed to abide properly by the requirements of federal discovery," but argues that no sanctions are warranted "because the non-production of these documents cannot have prejudiced these Defendants in any way." Pl. Opp. Mem. dated Sept. 16, 2016 (Dkt. No. 142), at 1, 9. For example, plaintiff explains, its non-production of the Jason Lee-Classic Li e-mails and other correspondence did not prejudice the Lam Defendants because "the evidence has long since established that Jason [Lee] was acting on Defendants' behalf not Plaintiff's." *Id*. at 6. As for the Sinosure documents, plaintiff argues that the Lam Defendants do not need them because "the Weiyi claim with Sinosure has been withdrawn." *Id*. at 9; *see also* Chang Decl. ¶¶ 13-14 ("The claim was withdrawn."). Plaintiff does not discuss willfulness, notice, or any of the other *World Wide Polymers* factors.

[13] Plaintiff's opposition papers include a declaration signed by Jia Chang, "Domestic Attorney for Plaintiff," who suggests that some of the documents described in the June 29 Order may have been produced earlier in the case. *See* Chang Decl. dated Sept. 6, 2016 (Dkt. No. 140), ¶ 3 ("We believe that the relevant documents either have already been provided or are confirmed to be in Defendants' possession."). However, Chang does not claim to have been involved in the plaintiff's only prior document production, made pursuant to the "automatic disclosure" provisions of Fed. R. Civ. P. 26(b)(1)(A), and concedes that he has no personal knowledge of the facts necessary to support his vague and conclusory statement. *See id*. ¶ 1 ("The basis of my knowledge is either through the interviews with the management or from a review of the file maintained in my office."). In any event, Chang does not specify a single required document that has been "confirmed," by anyone in a position to do so, "to be in Defendants' possession." Nor could plaintiff's counsel do so during oral argument. *See*, *e.g*., Tr. of Dec. 15, 2016 Hrg. at 26:21-27:7, 28:5-12 (when asked to identify previously-produced bills of lading, counsel could not do so); *id*. at 31:18-32:24 (when asked for the basis of his statement that all relevant e-mails between Classic Li and Jason Lee were previously produced, counsel did not have "anything to rely on with that").

Plaintiff's prejudice argument largely misses the point. Prejudice to the moving party is not a "prerequisite" to sanctions. *Royal Park Invs.*, 2016 WL 6705773, at *3. "[W]e, along with the Supreme Court, have consistently rejected the 'no harm, no foul' standard for evaluating discovery sanctions." *S. New Eng. Tel. Co. v. Glob. NAPs Inc.*, 624 F.3d 123 at 148. Moreover, plaintiff's "no harm, no foul" argument is entirely circular. Plaintiff begins by asserting that the missing documents would favor (or at least would not disfavor) the party that has thus far refused to produce them, and on that premise concludes that its continued refusal to produce them (for which it offers no other justification) has not harmed its opponent. This remarkable bit of sophistry flies in the face of both common sense – which teaches that the more stubbornly a party resists production of a document, the more likely that document is to favor its opponent – and well-established precedent putting common sense into practice. *See*, *e.g.*, *Funnekotter*, 2015 WL 3526661, at *6 (where defendants refused to produce the documents that supposedly supported their own position, court drew the inference "that had they been produced they would have supported Plaintiffs' argument").

In this case plaintiff's only prior document production was made pursuant to the automatic disclosure rule, which requires each party to disclose documents that it "may use to *support* its claims or defenses." Fed. R. Civ. P. 26(a)(1)(A)(ii) (emphasis added). At the automatic disclosure stage, "a party is not required to disclose material that will solely aid its opponent." 8A *Fed. Practice & Proc.* § 2053, at 366. Since then, plaintiff has not produced a single page, meaning that the pool of Shanghai Weiyi documents now available to defendants "includes only the documents most favorable to [plaintiff's] claims." *Dorchester Fin. Holdings Corp.*, 304 F.R.D. at 184-85 (finding "extreme" prejudice to defendant where plaintiff's in-house attorney printed out copies of "beneficial" documents from his computer before it crashed, leaving the presumptively less

beneficial documents beyond the reach of discovery). Thus, although a showing of prejudice is not required as a predicate for Rule 37(b) sanctions, in this case I find that plaintiff's intransigence has prejudiced the Lam Defendants by depriving them of evidence that is not only relevant but likely more helpful to them than the documents plaintiff chose to produce under Rule 26(a)(1)(A)(ii).

B. Preclusion and Monetary Sanctions Are Warranted

The remaining *World Wide Polymers* factors, 694 F.3d at 159, also support significant sanctions. Plaintiff's noncompliance with the June 29 Order was willful, sustained, and consistent with a broader pattern of discovery noncompliance, including its failure to produce a fully-informed Rule 30(b)(6) witness or a compliant Rule 26(a)(1)(A)(iii) damages computation. Moreover, plaintiff did not even make a pretense of attempting compliance with the June 29 Order, apparently believing that its own view of relevance should take precedence over an order issued by the forum in which it chose to file its case.[14] "In my book, that demonstrates the willfulness needed to impose a strong sanction." *Funnekotter*, 2015 WL 3526661, at *5. Plaintiff's disdain for this Court's authority was on full display during oral argument:

[14] Nor did plaintiff argue that the documents sought were non-existent or unavailable, except for the Jason Lee-Classic Li WeChat communications, which – according to attorney Chang – were "wiped out automatically by the system" when Classic Li switched cellphones. Chang Decl. ¶ 12. "For this reason," Chang continued, "he claims he is not able to provide [WeChat] records." *Id*. Plaintiff does not reveal what steps it took to comply with its obligation to preserve these and other records in anticipation of and during this lawsuit. Given that Classic Li was intimately involved in the transactions underlying this action, remained in plaintiff's employ until September 2015, and served as plaintiff's designated Rule 30(b)(6) in April 2016, plaintiff was required to preserve his relevant communications with Jason Lee throughout this period, including e-mail, text, and WeChat messages. *See*, *e.g.*, *Passlogix, Inc. v. 2FA Tech., LLC*, 708 F. Supp. 2d 378, 416 (S.D.N.Y. 2010) (sanctioning defendant Salyards for failing to preserve relevant communications with plaintiff's employee Collier, including e-mails, text messages, and Skype messages).

THE COURT: What about the Sinosure documents, have those been produced?

MR. RIZZUTO: The Sinosure documents were not produced because they're not relevant because no claim was ever made.

THE COURT: All right, we're past that. You do understand that?

MR. RIZZUTO: Yes, I understand.

THE COURT: Your client lost a motion to compel which would've been the last chance to argue that the documents were not relevant. Having lost the motion to compel, your clients are now obligated to produce the documents. So the question isn't whether they're relevant; the question is were they produced.

MR. RIZZUTO: Well, whether they were produced or not, I think the issue is whether the defendants were prejudiced by the lack of the documents.

THE COURT: Well, and your argument on that is that they weren't prejudiced because the Court should accept your client's Chinese counsel's representation[,] unsupported by any documents[,] that the claim was withdrawn and that no payment was made, correct?

MR. RIZZUTO: Yes, Judge.

THE COURT: Okay, where are the documents that show that the claim was withdrawn? If the claim was withdrawn, there will be documents that show that.

MR. RIZZUTO: Well, I don't have those documents, Judge.

THE COURT: And they weren't produced, correct?

MR. RIZZUTO: No, they – I don't believe they were.

Tr. of Dec. 15, 2016 Hrg. at 28:13-29:19.

This is not the first time plaintiff has faced discovery sanctions for disobeying an order of this Court. The same June 29 Order underlying the instant motion also directed plaintiff to supplement its damages computation pursuant to Fed. R. Civ. P. 26(a)(1)(A)(iii). When plaintiff failed to do so, the Lam Defendants requested preclusion sanctions, and I granted that request on

August 16, 2016 – the same day I set a briefing schedule for the motion now at bar. (Dkt. No. 123.) Plaintiff was thus amply on notice of the risks it ran by continuing to ignore its document production obligations. However, it made no effort to meet those obligations during the three weeks between my first preclusion order and the filing of the Lam Defendants' motion on September 6, 2016 – nor at any time since. Indeed, plaintiff's papers in opposition to the Lam Defendants' motion conspicuously fail to seek more time, or another chance, to comply with its discovery obligations.

While "[a] court should always seek to impose the least harsh sanction that will remedy the discovery violation and deter such conduct in the future," *Grammar*, 2016 WL 525478, at *3, nothing in plaintiff's conduct to date suggests that a sanction any milder than preclusion would be effective. Having refused to comply with my June 29 Order for almost a full year – with sanctions hanging over its head – plaintiff is not likely to have a change of heart if I issue another order directing it to do that which it should have done last year.

The Lam Defendants' request that plaintiff be prevented from "introducing all of the documents it failed to produce" in response to the June 29 Order is "commensurate" with plaintiff's noncompliance, *see Shcherbakovskiy*, 490 F.3d at 140, and appropriate under Rule 37(b). By refusing to produce its documents to defendants, plaintiff has forfeited its own right to introduce them in this case, to testify as to their contents, or otherwise to rely on them. *Funnekotter*, 2015 WL 3526661, at *6. It has also forfeited the right to introduce or rely on whatever subset of the enumerated documents it previously produced pursuant to Rule 26(a)(1)(A)(ii). Where, as here, a party has made a partial production, disclosing only the items that "support" its claims and defenses, precluding it from using the documents it *declined* to disclose – without more – would be an inadequate sanction. The disobedient party would continue to benefit from its misconduct,

which in turn would undercut the deterrent value of the judicially-imposed remedy. *See Cine 42nd St. Theatre Corp.*, 602 F.2d at 1066 (purpose of discovery sanctions includes "ensur[ing] that a party will not be able to profit from its own failure to comply"). Therefore, plaintiff will be precluded from introducing or relying upon any of its documents – previously produced or not – that fall within the five categories specified in the June 29 Order.

For similar reasons, and because this Court must issue monetary sanctions – unless the failure to comply was "substantially justified" or "other circumstances make an award of expenses unjust," Fed. R. Civ. P. 37(b)(2)(C) – the Lam Defendants will be awarded their expenses, including reasonable attorney's fees, incurred in making their sanctions motion, which I set at $15,000.[15] That sum is owed jointly and severally by plaintiff and by Wu & Kao, PLLC, its New York counsel, and must be paid within 30 days of today's date – unless, within ten days of today's date, the Lam Defendants object to the Court's estimate and submit admissible evidence, including copies of their underlying time and expense records, to support a different figure.

The Lam Defendants reach too far, however, when they ask for an adverse inference instruction "with respect to all issues upon which the relevant documents which plaintiff failed to produce would have a bearing." Notice of Mtn. dated Sept. 6, 2016, at 1. Discovery sanctions must

[15] As evidenced by the Declaration of Karen F. Neuwirth, dated Sept. 6, 2016 (Dkt. No. 138-24), the Lam Defendants incurred $12,741.25 in legal fees to file their sanctions motion, and estimated that their additional fees incurred in filing reply papers and attending oral argument would push that figure to somewhere "in excess of $13,000." Neuwirth Decl. at 4-5. The Lam Defendants did file a reply declaration (Dkt. No. 139), and attorney Martin S. Rapaport presented oral argument on December 15, 2016. Using the same hourly fees set forth in the Neuwirth Declaration, I estimate the additional cost of the reply papers and the court appearance as approximately $2,500, and I therefore conclude that $15,000 would be a reasonable sanction. *See, e.g.*, *UBS Int'l Inc.*, 2011 WL 1453797, at *4 (Concluding that "a reasonable fee is $10,000.00" under Rule 37(b), because "counsel's tasks were somewhat more modest" than those associated with a previous sanctions motion in the same action, for which the district judge had fixed the reasonable attorney's fees at $15,000.)

be specifically related to the claims at issue in the order that was disobeyed. *Ins. Corp. of Ir.*, 456 U.S. at 707. Although the June 29 Order required production of fairly narrow categories of documents, those documents are potentially relevant to a wide range of liability and damages issues. For this reason, the broad adverse inference instruction sought by the Lam Defendants would, in effect, require the trier of fact to assume that as to almost every issue in dispute between the parties there are unproduced documents that would be favorable to the Lam Defendants and unfavorable to plaintiff. Although the misconduct here was significant, such a sanction would be excessive.

III. PLAINTIFF IS ENTITLED TO SANCTIONS AGAINST EAGLEMEN

A. Eaglemen Violated the August 16, 2016 Order

Unlike Shanghai Weiyi – which did not dispute its noncompliance with the June 29 Order – Eaglemen contends that it substantially complied with the August 16 Order by offering two hours of Zhao's testimony on each of two days, via Skype, from mainland China. *See* Eaglemen Opp. Mem. dated Oct. 21, 2016 (Dkt. No. 158), ¶ 11 (arguing that, "[w]hile this was not complete compliance by defendant, it falls very short of the willful and contumacious conduct" required for terminating sanctions, "particularly when one reminds oneself that Yang Zhao is not in good health"). In its telling, however, Eaglemen ignores both the context and the extent of its noncompliance.

By the time plaintiff made its sanctions motion, Zhao's deposition had been delayed for at least five months. When attorney Montgomery first reported Zhao's eye injury, on April 13, 2016, he sought and obtained a two-month discovery extension to accommodate the witness's medical needs. Montgomery Ltr. dated Apr. 13, 2016. After the extended deadline came and went, counsel reported that there was "no great change in my client's condition" and suggested that Zhao answer

written questions in lieu of providing real-time testimony. Montgomery Ltr. dated Aug. 3, 2016, at 1-2. A week later, counsel refused to commit to a videoconference deposition, stating that he did not "have sufficient information" to state whether that was a "viable alternative" given Zhang's "reported condition." Jnt. Ltr. dated Aug. 10, 2016, at 4. Throughout this period Eaglemen repeatedly promised, but never submitted, medical reports evidencing Zhao's condition.

On August 15, 2016, counsel informed the Court that Zhao was out of the hospital but still under treatment following a new surgery, and that air travel was inadvisable. Counsel now embraced the videoconference option and suggested that Zhao be questioned via Skype so that he would not have to fly. *See* August 16 Order ¶ 5. Once again, no medical reports were submitted.

On August 16, 2016 – more than four months after Zhao injured his eye – the Court directed Eaglemen to make its principal available on or before September 16, either in New York or – at Eaglemen's option – by videoconference, so long as the deposition did not take place in the PRC, where it would violate local law. August 16 Order ¶ 5(a).[16] The Court carefully allocated responsibility for the videoconferencing option, directing Eaglemen to arrange a suitable location for the witness, to procure the necessary equipment, and to engage a person authorized to administer oaths. *Id*. ¶ 5(c). Perhaps most importantly, in light of the already-lengthy delays (and the second- or third-hand nature of the medical information provided thus far), the Court specified that any request to "modify, extend, or reconsider" any aspect of the Zhao deposition "based in whole or in part on medical considerations" be "supported by admissible evidence in the form of a declaration or other sworn statement by [Zhao's] treating physician." *Id*. ¶ 5(e).

[16] In an effort to be helpful to Eaglemen and its counsel, the August 16 Order noted that it is possible to travel from Beijing to Hong Kong (where depositions are permitted) by train, thus avoiding both air travel and legal risk. *Id*.

Although the August 16 Order gave Eaglemen a month to make the necessary arrangements – or obtain the necessary medical evidence if further modifications were needed – its counsel did not contact plaintiff until September 13, at which point he reported (apparently without speaking directly to his client, and without the benefit of any medical evidence) that Zhao "has been ordered to lie face down (so I am told) for medical reasons, all day every day, for some weeks to come." Montgomery Ltr. dated Sept. 14, 2016, at 1; *see also* Montgomery Decl. dated Sept. 30, 2016, ¶¶ 3-6. On this basis, Eaglemen proposed that Zhao give a video deposition *from mainland China* – in violation of ¶¶ 5 and 5(a) of August 16 Order – and that it be limited to two hours a day on each of two days. *Cf*. Fed. R. Civ. P. 30(d)(1) (absent a stipulation or court order, depositions are limited to "one day of [seven] hours"). Moreover, Eaglemen made no effort, insofar as the record discloses, to retain a person authorized to administer the oath or make the other arrangements required by ¶ 5(c) of the August 16 Order. Although Eaglemen's counsel wrote to the Court on September 14, 2016 – complaining about plaintiff's failure to accept the non-conforming arrangements – he did not submit any admissible evidence concerning Zhao's medical condition, as required by ¶ 5(e), until this Court issued yet another order, on September 16, 2016, directing him to do so. Even then, the evidence submitted fell short of the Court's directions in that (among other things) neither of the physicians who provided certificates attested to the dates of Zhao's surgeries, and neither provided facts from which it could be determined whether and for what portion of the past five months he had been – as reported to this Court – wholly unable to provide deposition testimony.

What Eaglemen characterizes as "not complete compliance," therefore, the Court views as a more significant failure to comply with several clear provisions of the August 16 Order.

B. Terminating Sanctions Are Not Warranted

Notwithstanding Eaglemen's disobedience, the "extreme" sanction requested by plaintiff is not warranted here. Plaintiff has presented no evidence that the injury to Zhao's eye was fabricated or that he made material misrepresentations concerning the course of his treatment. Although I have expressed some skepticism as to the seemingly unending sequence of inconveniently-timed medical procedures that have prevented Zhao from testifying, I cannot, on the basis of skepticism alone, find Eaglemen's misconduct sufficiently "willful" to justify the ultimate penalty. *See Grammar*, 2016 WL 525478, at *3 (quoting *Baba*, 165 F.R.D. at 402-03) ("willful" noncompliance is "not due to factors beyond the party's control"). Moreover, although Eaglemen's response to the August 16 Order was both tardy and insufficient, it did make some effort to provide the required discovery. *Cf. id.* at *2 (answer struck where defendant failed to provide any discovery, completely ignored a prior order to compel, failed to pay the fees assessed in connection with the prior order, and failed to respond to the sanctions motion); *MCI Worldcom Commc'ns, Inc. v. Gamma Comm'ns Grp., Inc.*, 204 F.R.D. 259, 262 (S.D.N.Y. 2001) (answer struck where defendant "failed to respond in any way to this court's orders or discovery requests"). Moreover, the Court cannot help but note that Eaglemen's response to the August 16 Order, however anemic, compares favorably to plaintiff's utter disregard of the June 29 Order.

Finally, although a showing of prejudice is not required before terminating sanctions can be assessed, *see Grammar*, 2016 WL 525478, at *5, plaintiff's discussion of this issue suggests that it misunderstands the nature of its own claims. According to plaintiff, the prejudice to it "should be obvious" because "Mr. Zhao is the only deponent who can shed any light as to why his company was used as a front for all the other named defendants. His failure to be deposed will never answer fully the complicity of Eaglemen as a 'shell' and 'front' for the remaining defendants

and for what nefarious purposes." Pl. Mem. dated Oct. 14, 2016, at 8. Three months earlier, however, plaintiff "formally withdrew with prejudice the Fifth Cause of Action (Fraud) and the Sixth Cause of Action (Piercing the Corporate Veil), the latter being a remedy not a cause of action." Knapp Ltr. dated June 29, 2016. Plaintiff's remaining claims against Eaglemen seek damages for goods sold and delivered, promissory estoppel, and equitable estoppel. SAC ¶¶ 71-75, 83-95. The question of which defendant was a "front" for which other defendant does not appear to be relevant to any of those claims.[17]

C. Non-Terminating Sanctions Are Warranted

In considering what sanction is appropriate here, the Court cannot accept Eaglemen's suggestion that the Court simply set a date certain for the Zhao deposition. *See*, *e.g.*, Tr. of Dec. 15, 2016 Hrg., at 76:10-16. Although I remain skeptical of the continuing reports of Zhao's medical disability, it would in all likelihood be an exercise in futility for this Court to order him to appear. Eaglemen's own attorney concedes that he cannot "get satisfactory answers" from the witness regarding his medical condition, and has moved to withdraw on that basis. Montgomery Decl. dated June 13, 2017, ¶ 9. I conclude, therefore, that Zhao is either (i) genuinely indisposed and unable to travel to a jurisdiction where he can be lawfully deposed, or (ii) misrepresenting his circumstances to the Court, in which case he is both unlikely to appear in response to a further judicial summons and undeserving of another opportunity to do so.

[17] Even before plaintiff dismissed its fraud and veil-piercing claims, it alleged only that Eaglemen was a "front" for Sunny Lam, *see* SAC ¶ 25, which Zhao has seemingly now admitted. *See* Zhao Decl. dated Sept. 30, 2016, at 1 (When Zhao returned to China in 2013, "I was not able to take care of my company, therefore, the company did not carry out business anymore, and I entrusted Mr. Sunny Lam to administer the company on my behalf."). The SAC did not allege that Eaglemen was a front for Focus 2000 or W.R. 9000.

Given these alternatives, I have concluded that the appropriate sanction is to preclude Zhao's future testimony in this action as to any issue of liability or damages. Plaintiff may make such use of his existing declaration as is consistent with the applicable rules of civil procedure and evidence – including his admission as to who was managing Eaglemen during the relevant time period – but Zhao may not present any new testimony to defend against plaintiff's claims. *See, e.g.*, *Reilly v. Natwest Markets Grp. Inc.*, 181 F.3d 253, 268-69 (2d Cir. 1999) (Where defendant failed to produce two witnesses for deposition in violation of Fed. R. Civ. P. 30(b)(6) and a district court order, "we have little difficulty in concluding that barring [those witnesses] from testifying [at trial] was proper.") If – as Zhao claims – he gave over the management of Eaglemen to Sunny Lam sometime in 2013, *see* Zhao Decl. at 1, the preclusion of his testimony will have little effect on the outcome of this action. It will, however, protect plaintiff from any unfair surprise hereafter.

Ordinarily, the Court would also order the disobedient party to "pay the reasonable expenses, including attorney's fees, caused by the failure" to comply with the August 16 Order. Fed. R. Civ. P. 37(b)(2)(C). In this case, however, "other circumstances" make a full award of expenses unjust. *Id*. Those "other circumstances" include plaintiff's insistence that only terminating sanctions would suffice against Eaglemen, *see* Pl. Mem. dated Oct. 14, 2016, at 8 (Zhao "knew what was required of him but maintained a cavalier attitude as to his compliance as he saw fit"), while plaintiff itself persisted in a knowing, willful, and continuing refusal to comply with the June 29 Order. Since plaintiff also "knew what was required of [it] but maintained a cavalier attitude as to [its] compliance as [it] saw fit," it would be unjust – and would undermine the deterrence function of discovery sanctions – to require Eaglemen to finance the discovery sanction that plaintiff owes to the Lam Defendants. Consequently, the Court will not require Eaglemen to pay the full cost of plaintiff's motion (as to which no documentation has yet been

presented), but will require Eaglemen and its counsel to pay the sum of $1,000 to plaintiff within 30 days after plaintiff has made its sanctions payment to the Lam Defendants and has provided proof of that payment to Eaglemen.[18]

CONCLUSION

It is hereby ORDERED that the Lam Defendants' motion for sanctions pursuant to Fed. R. Civ. P. 37(b) is GRANTED to the extent that plaintiff is precluded from offering or relying on any of its documents described in paragraphs 3(a)-(e) of this Court's June 29, 2016 Order, whether or not previously produced. In addition, plaintiff and its counsel, Wu & Kao, PLLC, must pay the sum of $15,000 to the Lam Defendants within 30 days of today's date, unless within 10 days of today's date the Lam Defendants object to the amount of the sanction and submit admissible evidence, including copies of their underlying time and expense records, to support a different figure.

It is further ORDERED that plaintiff's motion for sanctions pursuant to Fed. R. Civ. P. 37(b) is GRANTED to the extent that Zhao is precluded from testifying in this action in defense of plaintiff's claims. In addition, Eaglemen and its counsel, James Montgomery, Esq., PLLC, must pay the sum of $1000 to plaintiff within 30 days after plaintiff has made its sanctions payment to the Lam Defendants and has provided proof of that payment to Eaglemen.

[18] Although attorney Montgomery faced difficult circumstances, including an overseas client and a language barrier, he accepted those risks when he took on the representation. Moreover, it is quintessentially the province of counsel to attend to matters such as engaging persons authorized to administer oaths, obtaining admissible evidence concerning specified factual matters, and submitting that evidence to the Court in a timely manner. Having failed in each of these particulars, in violation of the clear terms of the June 29 Order, counsel bears at least some responsibility for Eaglemen's discovery misconduct.

It is further ORDERED that the parties' proposed joint pretrial order and related pretrial submissions, prepared in accordance with the Individual Practices and Procedures of Chief Judge McMahon, are due no later than **July 27, 2017**.

The Clerk is respectfully directed to close Dkt. Nos. 136 and 154.

Dated: New York, New York
June 27, 2017

SO ORDERED.

BARBARA MOSES
United States Magistrate Judge