

United States District Court, S.D. New York.

98 Civ. 9116 (CSH) (S.D.N.Y. Jul 18, 2001)

Decided July 18, 2001

INTERTEC CONTRACTING v. TURNER STEINER INTERNATIONAL

INTERTEC CONTRACTING A/S INTERTEC (GIBRALTARA) LTD., and INTERTEC OVERSEAS LIMITED, Plaintiffs, against TURNER STEINER INTERNATIONAL, S.A.; TURNER STEINER EAST ASIA LIMITED; AND THE TURNER CORPORATION, Defendants.

- 98 Civ. 9116 (CSH)
- United States District Court, S.D. New York.
- July 18, 2001

MEMORANDUM OPINION AND ORDER

HAIGHT. Senior District Judge:

This case is before the Court on motions by the plaintiffs (1) for an order remanding the case to the state court for trial on the merits, and (2) for an award of costs and expenses, including attorney's fees, incurred as the result of (a) the defendants' removal of the case to this Court and (b) the resolution of a discovery dispute during the time the litigation was pending here.

Both parties agree that a remand to the Supreme Court of the State of New York, New York County, is now required. Part III of this Opinion will include an Order to the Clerk directing a remand. This Court retains jurisdiction for the sole purpose of adjudicating plaintiffs' second motion for costs and attorney's fees, an issue which does not implicate in any way the trial on the merits of plaintiffs' claims against defendants, to be resolved in state court.

This Court's Order dated April 25, 2001, bifurcated the plaintiffs' claim for costs and expenses, including attorney's fees. The Court will first decide whether, under governing law, plaintiffs are entitled to any award. If that question is answered in the affirmative, the Court will then determine the amount.

## I. BACKGROUND

The factual background of this case was discussed at length in a prior opinion of this Court, familiarity with which is assumed. Intertec Contracting A/S. et al. v. Turner Steiner International. S.A., et al., 98 Civ. 9116, 2000 WL 709004 (S.D.N.Y. May 31, 2000). The

following recitation of the relevant facts, and subsequent developments, will suffice for purposes of deciding this motion.

This case originated in a commercial contract to construct office towers in Colombo, Sri Lanka. The developer, Overseas Realty (Ceylon) Ltd. ("ORCL"), entered into a contract with the above-captioned defendants (collectively referred to as "Turner"), providing, in part, that Turner would supply labor, materials and services to construct the towers. This contract is referred to as the "General Contract."

Turner then subcontracted to the plaintiffs (collectively referred to as "Intertec") portions of the General Contract for construction of the towers. This contract is referred to as "the Subcontract."

After the project encountered difficulties, Intertec brought an action against Turner in New York State Supreme Court, New York County, claiming that Turner had not paid monies owed to Intertec under the terms of the Subcontract. Turner removed Intertec's action to this Court, citing as the basis for removal the Convention on the Recognition and Enforcement of Foreign Arbitral Awards ("Convention"). The Convention was enacted into domestic legislation by Chapter 2 of the Federal Arbitration Act ("FAA"), 9 U.S.C. § 201 et. seq. 9 U.S.C. § 205 provides that "[w]here the subject matter of an action or proceeding pending in a State court relates to an arbitration agreement or award falling, under the Convention, the defendant or defendants may, at any time before the trial thereof, remove such action or proceeding to the district court of the United States. . . ."

The basis for Turner's removal was its mistaken belief that Intertec was bound by the Subcontract to arbitrate its dispute with Turner since the Subcontract incorporated by reference an arbitration agreement found in the General Contract between ORCL and Turner.

This Court concluded that "Turner's sole factual predicate for its removal of Intertec's state court action, the existence of an arbitration agreement binding upon Intertec, is not well founded," and ruled for the plaintiff by denying the defendants' motion to compel arbitration. Intertec Contracting A/S, 2000 WL 709004 at \* 12. While "[o]rdinarily this would result in an order remanding the case to the state court," I deferred the question of remand to allow the defendants an opportunity to appeal the Court's denial of its petition to compel arbitration. *Id.*

Turner then appealed to the Second Circuit where this Court's ruling was affirmed. Intertec Contracting A/S. et. al. v. Turner Steiner, No. 00-7796, 2001 WL 266997 at \*1 (2d Cir. 2001) (affirmed by Summary Order).

Intertec now asks the Court for an award of its costs and expenses, including attorney's fees, incurred as a result of the defendants' removal of the case to this Court.

While litigation on the Second Circuit appeal was continuing, a dispute broke out with respect to an exchange of documents between the parties. That dispute, over which this Court presided under the circumstances related *infra*, lasted from September until December of 2000. At the core of the dispute was an agreement by which Turner committed, *inter alia*, to turn over various documents, located at that time in Sri Lanka, to Intertec. These documents are referred to as the "Turner project documents." As discussed in greater detail *infra*, though it was originally believed by both parties that the documents would arrive months earlier, Intertec did not receive the documents until December of 2000, due to a series of delays in

their production, each of which was promptly and vehemently brought to the Court's attention.

In addition to the costs incurred as a result of the removal, Intertec additionally seeks an award for its costs and expenses, including attorney's fees, incurred as a result of this delay in document production.

## II. DISCUSSION

### A. Removal

As noted, Turner based its removal of the action from state court on the Convention. The Convention permits removal to a federal district court of a state court action which "relates to an arbitration agreement or award falling under the Convention," 9 U.S.C. § 905. The case at bar turned upon the question whether the pertinent contracts contained an arbitration agreement "falling under the Convention" between Intertec and Turner.

In its removal action, Turner argued that while the Subcontract did not contain a provision requiring Intertec to arbitrate any dispute with Turner, it believed that a provision in the Subcontract incorporated by reference an arbitration agreement found in the General Contract between Turner and ORCL, thereby binding Intertec to arbitrate with Turner its claims against Turner

Without reproducing here the analysis the Court made of Turner's claims, which can be found in the opinion reported at 2000 WL 709004 at \*\* 2-12, the Court found Turner's logic unavailing. The arbitration provisions of the General Contract were not incorporated by reference in the Subcontract, as the pre-arbitration provisions in the General Contract were a condition precedent for the use of arbitration proceedings, and those provisions were clearly inapplicable to Intertec. As stated supra, this conclusion was affirmed by the Second Circuit.

Intertec now seeks costs and expenses, including attorney's fees, pursuant to 28 U.S.C. § 1447(c), for the period of time between Turner's removal of the case and the present. § 1447(c) provides:

A motion to remand the case on the basis of any defect in removal procedure must be made within 30 days after the filing of the notice of removal under section 1446(a). If at any time before final judgment it appears that the district court lacks subject matter jurisdiction, the case shall be remanded. An order remanding the case may require payment of just costs and any actual expenses, including attorney fees, incurred as a result of the removal. A certified copy of the order of remand shall be mailed by the clerk to the clerk of the State court. The State court may thereupon proceed with such case.

Turner argues, first, that § 1447(c) is inapplicable to this case, since it was removed under 9 U.S.C. § 201 et. seq., rather than under the general removal provisions of 28 U.S.C. § 1441 et. seq., and alternatively, that even if § 1447(c) were applicable to this case, no award under that statute would be appropriate.

Turner's first argument, that 28 U.S.C. § 1447(c) does not apply because the case was removed pursuant to 9 U.S.C. § 205, is unconvincing. Turner argues that § 205 does not incorporate provisions of the general removal statute such as § 1447(c). Unfortunately for Turner, the Second Circuit has specifically held to the contrary.

In *LaFarge Coppee v. Venezolana De Cementos, S.A.C.A.*, 31 F.3d 70 (2d Cir. 1994), the court of appeals addressed the appealability of an order by the district court remanding to state court an action removed pursuant to 9 U.S.C. § 205. The court decided that it lacked appellate jurisdiction to consider the remand ordered under 28 U.S.C. § 1447(c), as it was unappealable under § 1447(d).<sup>1</sup> In considering a removal pursuant to § 205, the court held, "Section 205 expressly provides, with an exception not relevant to this case, that '[t]he procedure for removal of causes otherwise provided by law shall apply. . . .' This language renders applicable the removal provisions of 28 U.S.C. § 1447(c), (d) (1988)." *Id.* at 71. As the *LaFarge* court made mention, other circuits have agreed with this interpretation. See *In re Ocean Marine Mutual Protection and Indemnity Ass'n*, 3 F.3d 353, 355-56 (11th Cir. 1993); *In re Amoco Petroleum Additives Co.*, 964 F.2d 706, 712 (7th Cir. 1992). To this list I add the following subsequently decided cases: *Transit Casualty Co. v. Certain Underwriters at Lloyd's of London*, 119 F.3d 619, 623 (8th Cir. 1997). and *Severonickel v. Gaston Reymenants*, 155 F.3d 265, 266 (4th Cir. 1997). While *LaFarge* considered the appealability provisions of the general removal statute, no principled reason exists for reaching a different conclusion with respect to the statute's provisions for costs and fees.

1.

"An order remanding a case to the State court from which it was removed is not reviewable on appeal or otherwise. . . .," except in circumstances not relevant here. 28 U.S.C. § 1447(d).

Turner cites no authority to the contrary. Instead, Turner relies solely on *Hill v. Citicorp*, 804 F. Supp. 514 (S.D.N.Y. 1992), a case which is easily distinguished. In *Hill* the court considered the applicability of the 30-day time period requirement of § 1446(b) to a case removed under 12 U.S.C. § 632. Under § 1446(b) a 30-day time period exists within which removal petitions must be filed, but under § 632 removal of matters involving international banking can be removed "at any time before the trial thereof." The court determined, in an instance where the two statutes were in explicit disagreement on the time period rule, that § 1446(b) had not been "projected into the removal provisions of section 632." *Id.* at 517. Such reasoning is not analogous here. Not only was the court in *Hill* considering a statute altogether different from 9 U.S.C. § 205 (despite some similarities in the language of the laws), the court found a direct conflict between the time period requirements of § 632 and § 1446(b). There is no such contradiction in the language of § 205 and § 1447(c). More importantly, *Hill* was decided prior to the Second Circuit holding in *LaFarge* that the general removal provisions apply to removals under § 205. It is the latter decision which binds this Court, and I follow its clear holding.

Turner's next argument is that 28 U.S.C. § 1447(c) is inapplicable because this Court did not lack subject matter jurisdiction over this case, and it was not remanded for procedural defect.

Though the language of § 1447(c) does not clearly restrict the bases upon which a remand might allow for the non-removing party to recover costs and expenses, including attorney's fees, the statute refers explicitly to "defect[s]" in the removal and lack of "subject matter

jurisdiction" as possible bases for removal under subsection (c), dealing with costs and expenses. At least one court in this circuit has held that such language "allows a court discretion to grant costs and fees in two circumstances: where subject matter is lacking and where there is a defect in the removal." *In re Lawrence*, 233 B.R. 248, 253 (N.D.N.Y. 1999), citing *LaMotte v. Roundy's Inc.*, 27 F.3d 314, 316 (7th Cir. 1994). Without deciding whether other bases might be appropriate under § 1447(c) for a recovery of costs and expenses, the Court believes it is beyond doubt that the case at bar must be remanded for lack of subject matter jurisdiction.

In arguing that the Court has maintained a general subject matter jurisdiction in this case, Turner loses sight of the fact that the Court exercised a limited subject matter jurisdiction under 9 U.S.C. § 205 for the sole purpose of deciding whether an arbitration provision bound Intertec so that the Court could further exercise its subject matter jurisdiction to compel arbitration. In other words, the Court had subject matter jurisdiction to decide whether it had subject matter jurisdiction. In deciding that no such arbitration provision applied to Intertec, the Court concluded that it did not have subject matter jurisdiction in the general sense under § 205, because the necessary condition precedent for the exercise of such jurisdiction, an "arbitration agreement" falling under the Convention, did not exist. As provided for in the statute itself "[i]f at any time before final judgment it appears that the district court lacks subject matter jurisdiction, the case shall be remanded." § 1447(c). I decided the court lacked subject matter jurisdiction, and would have remanded the case at that time but for my intent to allow Turner to file an appeal.

The cases support this analysis. In *Transit Casualty Co.*, the plaintiff filed an action in Missouri state court against certain underwriters at Lloyd's of London for alleged failure to pay reinsurance recoveries and interference with its liquidation. Lloyd's removed the case to federal district court pursuant to 9 U.S.C. § 205. Transit by that time in receivership, the receivership filed a motion to remand, which the Court granted. The district court held that the Convention did not apply because the contract at issue was "preclud[ed]" by state law and because a "service-of-suit clause waived the underwriters' right to remove." 119 F.3d at 622. Seeking review of the remand order, Lloyd's urged that the district court did not find that it lacked subject matter jurisdiction (as that would foreclose review by the court of appeals under § 1447(d)) in making its decision. The circuit court disagreed, holding "[w]e disagree with the underwriters's characterization of the district court's remand order and interpret the order as holding that it lacked subject matter jurisdiction and remanding on that basis." *Id.* at 623. In language equally applicable to the case at bar, the court found that "[because] the parties' reinsurance agreements must fall under the Convention in order for the underwriters to remove under 9 U.S.C. § 205, the district court's finding that the Convention does not apply to this cause of action resulted in a lack of removal jurisdiction and necessitated remand." *Id.* at 623-24.

The Second Circuit recently articulated this principle in *Smith/Enron Cogeneration Ltd. v. Smith Cogeneration Int'l*, 198 F.3d 88 (2d Cir. 1999). The petitioners there removed the case pursuant to the Convention, seeking to compel the respondents to arbitrate a contract dispute. In that case, as in the case at bar, Chapter 2 of the FAA provided the "only basis for federal jurisdiction." *Id.* at 92. The district court in *Smith/Enron* proceeded in the same fashion as I did. "In considering whether 'a particular dispute is arbitrable,' a court must first decide 'whether the parties agreed to arbitrate.'" *Id.* at 95, citing *Chelsea Square Textiles, Inc. v. Bombay Dyeing Mfg. Co.*, 189 F.3d 289, 294 (2d Cir. 1999).<sup>2</sup>

2.

Unlike the case at bar, the court in Smith/Enron found that the Convention did apply to the dispute.

Having examined the two bases offered by Turner for finding § 1447(c) inapplicable to this matter, I find both of them unconvincing.

The Court must now determine whether Intertec has made a showing sufficient to justify the imposition of costs and expenses, including attorney's fees, upon Turner pursuant to § 1447(c). The Court determines that it has not.

28 U.S.C. § 1447(c) provides in part that "[a]n order remanding the case may require payment of just costs and any actual expenses, including attorney fees, incurred as a result of the removal." The seminal case in this circuit interpreting this provision is *Morgan Guaranty Trust Co. v. Republic of Palau*, 971 F.2d 917 (2d Cir. 1992). In *Morgan* the Court addressed the "lack of clarity in the case law" by clarifying, somewhat, the standard to apply in determining the appropriateness of attorney's fees. *Id.* at 923. The court held that a district court is afforded "a great deal of discretion and flexibility" in "fashioning awards of costs and fees," and it is now clear that a finding of "bad faith" by the removing party is not a necessary condition for granting such an award. *Id.* at 924. After Congress deleted from the language of § 1447(c) the requirement that the case be "removed improvidently," courts have interpreted that change to mean that something less than bad faith justifies the imposition of costs and fees. *Id.* at 923.

Though the Court has broad discretion to award such costs and expenses, district courts typically do not make such awards "unless the removal appears to have been frivolous and not plausibly supported by some existing case law." *Hayman-Chaffey v. Landy*, 96 Civ. 1900, 1996 WL 282051, at \* 3 (S.D.N.Y. May 28, 1996), citing *Forum Insurance Co. v. Texarkoma Crude Gas Co.*, 92 Civ. 8602, 1993 WL 228023 at \* 3 (S.D.N.Y. June 22, 1993).

Despite Intertec's insistence that the decision to award attorney's fees is "completely within the district court's discretion, without regard to bad faith, frivolousness, colorability or the like," a careful examination of comparable cases in this circuit demonstrates that in exercising its discretion, a district court typically looks to precisely those descriptions Intertec denigrates, to wit, colorability, frivolousness or bad faith. Intertec's Reply Memorandum in Support of its Motion to Remand and for Costs and Expenses, at 3. See, e.g. *Natoli v. First Reliance Standard Life Insurance Co.*, 00 Civ. 5914, 2001 WL 15673 at \*5 (S.D.N.Y. Jan. 5, 2001) ("[i]n exercising their discretion, district courts look to whether the grounds for removal were . . . colorable, even if ultimately unpersuasive"), quoting *Sullivan v. American Int'l Group. Inc.*, 00 Civ. 6403, 2000 WL 1738413 at \* 5 (S.D.N.Y. Nov. 21, 2000) (denying award where basis for removal was "colorable"); *Agapov v. Negodaeva*, 93 F. Supp.2d 481, 484 (S.D.N.Y. 2000) (denying motion for attorney's fees where "no evidence" existed that the removing party "acted in bad faith in seeking removal, or that her removal application was frivolous or plainly unreasonable"); *Wallace v. Wiedenbeck*, 985 F. Supp. 288, 291 (N.D.N.Y. 1998) (awarding fees where the "removal basis" was "contrary to overwhelming authority on each of the stated grounds"); *Forum Insurance*, 1993 WL 228023, at \* 3 (denying attorney's fees where the arguments for removal were "not frivolous and plausibly supported by some existing case law").

Intertec admits that "Turner's removal . . . was not frivolous or in bad faith, but was merely weak and not well founded." Intertec's Reply Memorandum at 4. Indeed, Turner's arguments were not well founded in the sense that they were ultimately unpersuasive. But lack of persuasiveness cannot be determinative, for that logic would establish a per se rule that all instances of remand for removals made in error must result in the imposition of costs and expenses against the removing party.

Though the Court believed that Turner unduly stretched the language of the Subcontract when it argued that the arbitration provisions of the General Contract applied as well to Intertec, Turner's argument, however flawed, was the result of a reasoning more complex than a simple misreading of a statute or a patently obvious ignoring of clearly applicable Second Circuit authority. As is the case with most contentious litigation, without evidence of bad faith, the parties appear to have done little more than zealously defend their clients' respective positions, using existing case law in good faith disagreement. In that regard, and as this Court's prior opinion demonstrates, the Second Circuit has been required to decide upon a number of occasions whether an arbitration clause contained in one of several related contracts should be regarded as incorporated in the others. That issue can be complex, and was so in the case at bar.

Judging by the standards of "overall fairness given the nature of the case, the circumstances of the remand, and the effect on the parties," I will not exercise my discretion to award costs and expenses in this case on the basis of Turner's removal. *Frontier Insurance Co. v. MTN Owner Trust*, 111 F. Supp.2d 376, 381, citing *Morgan*, 971 F.2d at 923-24. The Court believes that Turner's argument for removal was colorable, that is, plausibly supported by existing case law, "although ultimately incorrect." *Natoli*, 2001 WL 15673 at \* 5. For that reason, the Court denies the plaintiffs request for costs and expenses, including attorney's fees, incurred as a result of Turner's removal.

#### B. The "Turner Project Documents"

Rule 37(b)(2), Fed.R.Civ.P., provides that a district court may impose sanctions, among them the imposition of expenses including attorney's fees, where a party fails to comply with an order of the Court directing such party to "provide or permit discovery."<sup>3</sup> Intertec asks the Court to award it costs and expenses, including attorneys' fees, for Turner's failure to comply with Orders of this Court to provide documentary discovery.

3.

"[T]he court shall require the party failing to obey the order or the attorney advising that party or both to pay the reasonable expenses, including attorney's fees, caused by the failure, unless the court finds that the failure was substantially justified or that other circumstances make an award of expenses unjust." Rule 37(b).

The history surrounding these orders must be examined at some length.

As is the general practice of district courts, a stay of discovery was imposed in this case while the motion to compel arbitration was pending before the Court. In the Court's May 30, 2000 opinion, denying Turner's motion to compel arbitration, I vacated the stay of pretrial discovery. *Intertec*, 2000 WL 709004 at \* 12. Turner then filed a motion of appeal with the Second Circuit.

After doing so, Turner moved this Court for a reimposition of the stay of discovery, on the grounds that the district court was divested of jurisdiction pending appeal. Oral argument was heard on that motion on October 23, 2000. Prior to the filing of this motion, however, an agreement was reached between the parties, though never filed with the Court, for a mutual exchange of documents, including the Turner project documents located at that time in Sri Lanka. At the hearing, Turner principally relied on *Bradford-Scott Data v. Physician Computer*, 128 F.3d 504 (7th Cir. 1997), in arguing that the district court was divested of jurisdiction in this case pending its appeal, pursuant to 9 U.S.C. § 16(a)(1)(B) (C) (allowing direct appeal from an order denying a petition to order arbitration). In giving my ruling from the bench, I announced my determination that *In re Salomon*, 68 F.3d 554 (2d Cir. 1995), the authoritative case in the Second Circuit, despite its "Delphic overtones," gives the district courts some discretion in continuing to supervise discovery pending an appeal under § 16(a).4 Transcript of Oral Argument, Oct. 23, 2000 ("Transcript") at 44. While I declined to "leave the Turner interests subject to [the] full panoply of federal discovery," I exercised my "discretion to retain jurisdiction over that aspect of the case for the purpose of the agreement for a mutual exchange of documents, which is clearly reflected in the correspondence," and which both parties agreed they had accepted. Transcript at 46-47, 50-51. To that end, the Court granted Turner's motion to reimpose the stay, "provided, however, that this Court retains jurisdiction and does not include within the stay of further proceedings any disputes, complaints, or demands for relief which may arise out of, and require the resolution of . . . the mutual agreement for disclosure of documents." Transcript at 51.

4.

A detailed examination of the case law in this area is not necessary to decide this motion. It is sufficient to say that both of the other courts in the Southern District of New York that have dealt with the question of how to interpret *In re Salomon* have concluded that it does not absolutely prohibit district courts from taking any action on a case pending an appeal on the question of arbitrability. See *Cendant Corp. v. Forbes*, 72 F. Supp.2d 341, 343 (S.D.N.Y. 1999) (holding that a denial of a stay may be granted "in at least" cases where the appeal is frivolous or improper, adding "there may be still other bases for denying the stay here sought . . .") (emphasis in original); *Satcom v. Orbcomm*, 55 F. Supp.2d 231, 235-236 (S.D.N.Y. 1999) (holding that *In re Salomon* "does not provide a clear answer" to the question, and deciding the issue under the approach taken in the Seventh Circuit's *Bradford* opinion). I conclude that *In re Salomon* grants the district court discretion to take action during the pendency of the appeal, so long as it is "very carefully exercised and in a distinctly limited fashion." Transcript at 44.

Though I expressed my hope that the "increasingly shrill" nature of the exchange of correspondence in this case would become "more calm," Transcript at 50, those hopes were dashed by the subsequent deluge of papers seamlessly faxed to Chambers through the fall and winter of 2000, while conflicts surrounding production of the Turner project documents metastasized.

At least as early as September 25, 2000 a conflict surfaced with regard to the Turner project documents. On that date Intertec asked the Court to direct Turner to send the documents from Sri Lanka by air and not by sea. Letter to the Court dated September 25, 2000. In response Turner acknowledged that it had been trying to obtain the documents since at least July 2000, and noted that it had advised Intertec that the documents would not likely arrive in the United



States until "the end of August or the beginning of September." Turner's Letter to the Court dated September 27, 2000. Turner expressed its understanding that the documents would be placed aboard a vessel and "arrive in New York within 30 days thereafter." *Id.* at 1-2. As would be repeated again and again in the months to come, Turner emphasized its lack of "control over the actions of the Sri Lankan authorities," allegedly responsible for the delay. *Id.* at 2.

In response, the Court issued an Order, dated September 27, 2000, directing Turner to send the documents by "the first commercial aircraft available" if it could not confirm, by October 3, that the documents were "laden on board a vessel that has commenced her ocean voyage with an E.T.A. New York within 30 days of the date of sailing."

Turner responded that while it had not "technically compl[ie]d with the Court's Order," the documents were destined to leave on October 5, 2000 aboard the "Kamakura" to arrive in New York on October 27, 2000. Letter to the Court dated October 2, 2000. Intertec offered to recognize this transport arrangement as "within the spirit of Your Honor's order," so long as Turner provided documentation that the documents were laden on board as alleged. Intertec Letter to Court dated October 2, 2000.

In response, I ordered Turner to furnish Intertec with a bill of lading "as soon as it is available." Order dated October 4, 2000.

On October 17, 2000 Turner notified the Court that, to its surprise, the documents were not loaded upon the Kamakura "due to a work slowdown at the port." Turner Letter to the Court dated October 17, 2000. A second letter that day informed the Court that the documents were loaded instead upon "the ship identified as the `Singapore Bay,'" set to leave Sri Lanka on October 17, 2000 and arrive in New York November 7, 2000.

Intertec wrote the Court to express its dissatisfaction with Turner's explanation. Intertec Letter to the Court dated October 17, 2000. It accused Turner of violating the Court's September Order by not sending the documents by air after learning they, were not aboard the Kamakura. Turner's response to Intertec's allegation was that sending the documents by air would have taken longer than placing them aboard the second ship, as they had already cleared customs. Letter to the Court dated October 20, 2000.

The Court held a hearing, on October 23, 2000, on Turner's motion to stay discovery. At that time I made no rulings on the question of whether Turner had violated any orders of the court. It was at that hearing that I expressed my hope for a cease fire. After some days of peace, the battle resumed.

On November 10, 2001, Turner learned that the documents were not aboard the Singapore Bay and decided, it claimed, to send the documents by air to New York, "anticipating that the documents will arrive by airfreight, via London, in New York by Tuesday, November 21, 2000." Turner's Letter to Intertec dated November 13, 2000, sent to the Court November 13, 2000. Despite prior assurances from counsel at the October hearing that it was so "absolutely remote" as to be a "farflung possibility" that the documents would not arrive on the Singapore Bay, that is precisely what happened. Transcript at 31, 33.

In response to these developments, and a request by Intertec for a conditional order of dismissal if the documents were not delivered by November 22, 2000, the Court issued

another order dated November 15, 2000. Intertec Letter to the Court dated November 14, 2000. The Court ordered Turner "to make the project documents available to counsel for Intertec not later than November 27, 2000," with the additional order that failure to comply would result in a \$1000 fine holding Turner in contempt, with the fine doubling each succeeding business day. The Court rejected Intertec's application for a conditional default order.

On November 21, 2000, Turner wrote to the Court requesting a one week extension until December 4, 2000, to produce the documents. Letter to the Court dated November 21, 2000. This time, the delay was attributed to holiday closings of the U.S. Customs offices at JFK airport in New York. After initial reluctance, Intertec conceded, in a letter dated November 21, 2000, to the December 4, 2000 date for exchange. The Court then granted the extension of time to not later than December 4, 2000, by Order dated November 22, 2000.

The documents began to be exchanged on December 4, 2000, as confirmed by a telephone conference the Court held with the parties on that date. Though, predictably, disputes continued on matters ranging from the proper method of Bates-stamping to document privilege and competing drafts of a confidentiality agreement, each of which were dutifully brought to the Court's attention, those matters are not relevant to deciding this motion.

As a critical component of the Court's continued jurisdiction with respect to this discrete area of discovery, the Court retains the authority to impose Rule 37(b)(2) sanctions for violations of Court orders which manifest that continued supervision. See *Britton v. Co-op Banking Group*, 916 F.2d 1405, 1410-1412 (9th Cir. 1990).<sup>5</sup>

5.

Turner is simply incorrect, and cites no authority for the proposition, that the Court may not now invoke the Federal Rule of Civil Procedure, at Rule 37 or otherwise, to award expenses including attorneys fees. While the Court denied Intertec the benefits of the full panoply of tools available to parties under those Rules, the Court explicitly retained its supervisory authority with respect to the discovery of these items. Transcript at 46-51.

In order to decide whether an award is appropriate, the Court must decide, in accordance with Rule 37(b)(2), whether Turner violated a Court order without substantial justification. To do so, the Court must revisit these orders.

In the Court's September 27, 2000 Order I stated that the plan articulated in Turner's letter to the Court, announcing that the documents would be placed aboard a vessel "this week" (meaning the week of September 24 through September 30, 2000) for shipment to New York, was acceptable "if it is followed." The Court instructed, however, that if "by October 3, 2000 [the following Tuesday] counsel for Turner cannot confirm and represent to the Court that the documents are in fact laden on board a vessel that has commenced her ocean voyage with an E.T.A. New York within 30 days of the date of sailing, the Turner interests are directed to cancel plans for ocean shipment of the documents and arrange for their transportation by the first commercial aircraft available through the exercise of due diligence."

On October 2, 2000 Turner informed the Court that it had not "technically compl[ie]d with the Court's Order," insofar as it allowed the documents, at that time, to be laden aboard the Kamakura scheduled to depart three days later, on October 5. Indeed, as Turner conceded,

this was a violation of the Order, which required that Turner send the documents by air if it learned that the documents were not, by October 3, "laden on board a vessel that has commenced her ocean voyage." (emphasis added). As the Kamakura had not yet commenced her voyage, Turner ought to have sent the documents by air, as instructed. Turner's explanation for the violation, given ex post, is unavailing. Though in different circumstances a few days delay in sending the documents might be tolerable, in the context of many months delay, alleged by Turner to have been caused by transport problems beyond its control, the necessity of strict compliance with the letter of the Court's remedial Order of September 27, 2000 should have been obvious to Turner. It was not Turner's call to make in deciding to place the documents aboard ship once it was clear that they were not sailing by October 3, 2000. The Court should have been notified immediately, as required, that the documents were not aboard a vessel by October 3.

The Court's next Order, dated October 4, 2000, instructed Turner to furnish Intertec with a bill of lading as soon as possible. Instead of doing so, Turner wrote to inform that the documents would not appear on a bill of lading, because the documents were not placed aboard the Kamakura, but would instead be placed upon the Singapore Bay. Placing the documents aboard a second ship clearly violated the nature of the Court's September 27, 2000 Order. In no uncertain terms, the Court required delivery by air if the documents were not en route to New York via sea by October 3. Additionally, to the Court's knowledge, no bills of lading were ever sent with respect to either attempted shipment, which comes as no surprise in retrospect because Turner failed to arrange for their delivery aboard any ship.

The Court's November 15, 2000 Order required Turner, who decided at that point to send the documents by air after learning that they were in fact not placed on the second vessel either, to make the documents available to Intertec not later than November 27, 2000. The Court subsequently, on November 22, 2000, granted a one week extension until December 4, 2000 to exchange the documents.

Having reviewed the sequence of orders issued in this case, it is clear to the Court that Turner violated the September 27, 2000 Order. That violation was fundamental and material rather than technical and nonprejudicial. Turner's proffered excuse, that shipping by air would have generated further customs delays, was belatedly expressed and has the tiny ring of an afterthought.<sup>6</sup>

6.

I think it only fair to note at this point that, for all that appears from the record, the events described in text were controlled by the Turner personnel in Sri Lanka, rather than by Turner's counsel in New York, who perforce had to rely upon what their clients were telling them.

Though the Court accepts, having before it no evidence to conclude otherwise, that "unforeseen communication and transportation problems caused a delay in the exchange," rather than the delay being caused by any improper motives, the fact remains that Turner was obliged under Court order to send the documents by mail if they were not laden upon a ship by October 3, 2000. The documents were not so laden, Turner was made aware of such, and made the decision, nonetheless, to try placing the documents aboard two successive ships rather than send them by air as required. Even assuming those decisions were made with the best of intentions, they were made in error, and Turner had no right to make them, as it was

obliged by the Court to act otherwise. There is no "substantial justification" for its failure to comply with the Court's Order of September 27, 2000. Turner's failure to provide a bill of lading is further evidence of its blase attitude toward the orders of this Court. As subsequent events made clear, the documents would have been produced much earlier had they been placed upon a commercial air flight after learning that they were not aboard a vessel that had set sail by October 3. That was the purpose of the Court's September 27, 2000 Order.

In view of the foregoing, the Court awards the plaintiff its costs and expenses, including attorney's fees, incurred as a result of the violation of the Court's order to send the documents by air in the circumstances that developed.

Sanctions under Rule 37(b)(2) are available "after the court has ordered compliance and the party ordered has nonetheless failed" to comply with a discovery demand. *Nabisco. Inc. v. PF Brands. Inc.*, 191 F.3d 208, 225 (2d Cir. 1999). The decision to award reasonable expenses, including attorneys' fees, pursuant to Rule 37, is reviewed for an abuse of discretion, and the court's factual findings will not be disturbed unless they are shown to be "clearly erroneous." *Thomas Hoar. Inc. v. Sara Lee Corp.*, 882 F.2d 682, 687 (2d dir. 1989), citing *Inwood Laboratories v. Ives Laboratories*, 456 U.S. 844, 855(1982). As the court in *Thomas Hoar* correctly noted, "discovery was designed to proceed at the initiative of the parties with a minimum of court intervention. The rulemakers framed Rule 37 in recognition of the potential for abuse during the discovery process." *Id.* at 687. For that reason, failure to comply with discovery orders justly allows the court to impose costs upon the failing party. See, e.g. *Selletti v. Carey*, 173 F.3d 104, 110 (2d Cir. 1999) (upholding imposition of a monetary sanction pursuant to Rule 37(b)(2) where party failed to comply with discovery requirement). The Second Circuit has repeatedly stated the importance of following discovery orders of the Court, warning that "[a] party who flouts such orders does so at his peril." *Sieck v. Russo*, 869 F.2d 131, 134 (2d Cir. 1989) (internal citations omitted).

Intertec must now document the expenses and fees claimed, supported by time records in the form required by Second Circuit law, *New York State Ass'n for Retarded Children Inc. v. Carey*, 706 F.2d 956 (2d Cir. 1983), and must demonstrate to the Court that those expenses were a direct result of Turner's violation. The Court makes no ruling at this time on whether any recoverable fees or expenses were in fact incurred by Intertec.

### III. CONCLUSION

For the foregoing reasons, plaintiffs' request for costs and expenses, including attorney's fees, as a result of Turner's removal of this case is denied.

Plaintiffs' request for costs and expenses, including attorney's fees, incurred as a result of the delayed exchange of the Turner project documents is granted.

In these circumstances, Intertec is directed to file and serve its papers in support of a claim for fees and expenses consistent with this Opinion, on or before August 3, 2001. Turner is directed to file and serve opposing papers on or before August 17, 2001. If so advised, Intertec may file and serve reply papers on or before August 24, 2001. After considering these submissions, the Court will determine the necessity of an evidentiary hearing.

It is SO ORDERED.