

DON H. MARMADUKE

DIRECT DIAL 503.802.2003  
DIRECT FAX 503.972.3703  
don.marmaduke@tonkon.com

December 31, 2008

**FILED VIA CM/ECF;  
COPY TO JUDGE VIA HAND DELIVERY**

The Honorable Owen M. Parmer  
Senior U.S. District Judge  
U.S. District Court for the District of Oregon  
James A. Redden U.S. Courthouse  
310 West Sixth, Room 201  
Medford, OR 97501

Re: *The Church a/the Holy Light a/the Queen, et al. v. Mukasey, et al.*,  
Civil Case No. 08-03095-PA

Dear Judge Parmer:

We wish to respond to what we believe is defendants' misguided argument that international law prevents Dr. MacCrae from voluntarily agreeing to give his testimony by video or phone deposition from his home or office in Brazil. There is no reason to believe that these laws were made to interfere with this sort of voluntary testimony. These sorts of treaties are to protect nationals of one country from being subjected to the laws or processes of another country.

Defendants have not cited to any case on point or to a case that suggests that the cited statutes were meant to be applied in this type of situation.

The Plaintiffs' request that testimony be given by two-way "contemporaneous transmission from a different location" is clearly contemplated in the language of Fed. R. Civ. P. 43(a). The rule states "for good cause in compelling circumstances and with appropriate safeguards, the court may permit testimony in open court by contemporaneous transmission from a different location." Fed. R. Civ. P. 43(a). In *EI-Hadad v. United Arab Emirates*, 496 F.3d 658 (2007), the plaintiffs testimony from Egypt by Internet video did not violate the Federal Rule of Civil Procedure governing the taking of testimony, which requires "good

cause" and "appropriate safeguards" before a witness is permitted to testify "by contemporaneous transmission from a different location." *Id.* at 668. This case demonstrates that the availability of contemporaneous transmission of testimony is in the discretion of the court, if the court determines that the appropriate safeguards are in place.

The Defendants argue in opposition by citing *Obery v. England*, 215 Fed. Appx. 621,624 (9th Cir. 2006). However the full context of the court's remark makes it irrelevant to this case because the court was dealing directly with the unique procedural history of that case:

"Our decision in *Obrey I* did not authorize the district court to use written submissions in lieu of live testimony. To the contrary, our statement that the jury "naturally has to determine the credibility of witness testimony" indicates that we contemplated live testimony. *Obrey I*, 400 F.3d at 698. In any event Fed. R. Civ. P. 43(a) which expresses our strong preference for oral testimony in open court forecloses the district court's unorthodox procedure." *Obery v. England*, 215 Fed. Appx. 621, 624 (9th Cir. 2006)

Because the court was addressing the unusual procedure of the lower court accepting written testimony in lieu of available live testimony, its reference to Fed. R. Civ. P. 43(a) should only be considered in that limited context and not as a case on point here. With respect to the circular regarding Brazil offered by the Defendants, it is important to note the disclaimer that prefaces the section relied upon by the Defendants has the effect of rendering the circular irrelevant to this case. The disclaimer reads as follows:

"The information in this circular relating to the legal requirements of specific foreign countries is provided for general information only and may not be totally accurate in a particular case. Questions involving interpretation of specific foreign laws should be addressed to foreign counsel. This circular seeks only to provide information; it is not an opinion on any aspect of U.S., foreign, or international law. The U.S. Department of State does not intend by the contents of this circular to take a position on any aspect of any pending litigation."

([http://travel.state.gov/law/info/judicial/judicial\\_672.html#depositions](http://travel.state.gov/law/info/judicial/judicial_672.html#depositions))

Without clear guidance on the international ramifications of allowing an expert to provide evidence from Brazil, the court should adhere to the plain language of Fed. R. Civ. P. 43(a) that clearly allows the court to accept testimony in open court by way of "contemporaneous transmission of testimony" when it determines that appropriate safeguards are in place and the circumstances are sufficiently compelling.

Based on a reading of the trial transcript and checking with one of the trial lawyers, it is our understanding that the deposition of the UDV physician, Dr. Brita, was taken by the DOJ trial team from Washington with UDV lawyer Hollander hooked up from her office in New Mexico and Dr. Brita hooked up by phone from Brazil with a court reporter employed by DOJ on line in the United States. We believe that the DOJ did this also with regard to Dr Olivera in Brazil. Mr. Beane reported that he was unable to confirm or deny the foregoing as he was not an attorney of record for the DOJ at the time.

We respectfully urge the Court to permit Dr. MacRae's testimony to be taken by electronic hookup with Dr. MacRae in Brazil.

Respectfully yours,



Don H. Marmaduke

DHM:cp

copy: Eric Joseph Beane (via email: eric.beane@usdoj.gov)

034557\00001\1341110 VOOI