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Pro Se

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

DONGXIAO YUE,

Plaintiff,

vs.

CHUN-HUI MIAO, BIAN-WANG.COM

Defendants

Case No.: C18-1074-DMR

DEFENDANT'S SUPPLEMENTAL
DECLARATION IN REPLY TO
PLAINTIFF'S OPPOSITION TO
DEFENDANT'S AMENDED MOTION TO
DISMISS, PURSUANT TO FED. R. CIV. P.
12(b)(2), OR IN THE ALTERNATIVE, TO
TRANSFER VENUE PURSUANT TO 28
U.S.C. § 1404(a).

Hearing Date: May 10, 2018

Time: 11:00 a.m.

Courtroom: 4 - 3rd Floor, Oakland Courthouse

Judge: The Honorable Donna M. Ryu

I, Chun-Hui Miao, declare:

1. I am the defendant of this lawsuit. I have personal knowledge of the matters stated herein, and if called upon to do so, I could and would competently so testify as to those matters.
2. I submit this supplemental declaration in reply to Plaintiff Yue ("Yue")'s opposition to motion to dismiss and, in the alternative, to transfer venue to South Carolina.
3. I am proficient in Chinese and English languages. In the following, the English translations of original Chinese text are made by me and are accurate and faithful.

1 4. I am an individual who has been a resident of the state of South Carolina since 2005.

2 Furthermore, I have not:

- 3 • Owned or leased real or personal property in the State of California;
- 4 • Owed or been required to pay taxes in the State of California;
- 5 • Maintained an office in the State of California;
- 6 • Maintained a registered agent for service in the State of California; or
- 7 • Conducted print, radio, television, Internet, or any other advertising that was
- 8 directed to California residents.
- 9

10 5. I am the sole owner of Bian-wang.com, a website that hosts an online discussion forum

11 for a wide range of topics. While other anonymous netizens have contributed useful ideas,

12 I am the only one legally responsible for the website.

13

14 6. Users of Bian-wang interact via blogs and comments. I have not met in person any named

15 parties or third parties, nor have I ever talked to anyone by telephone. All the interactions

16 took place on the Internet.

17

18 7. Bian-wang does not advertise, does not sell any products, nor does it charge a

19 membership fee. I do not receive any income from my ownership of Bian-wang.

20

21 8. Bian-wang does not require users to offer identification credentials such as their legal

22 names or residential addresses to sign up for an account. There are no Terms and

23 Conditions for the use of Bian-wang.com. When users register, they do not have to

24 consent to anything.

25 9. Bian-wang does not restrict readership or participation based on geographical locations.

26 Anyone with Internet access, regardless of residence or citizenship, can access and

27 participate in the site.

28

- 1 10. On February 2, 2014, I published a blog article “The Past, Present and Future of Bian-
2 wang” (Chinese: 彼岸网的前世、今生和未来) on both Bian-wang.com and
3 Sinovision.net (a New York-based website many Bian-wang users previously frequented).
4 The article outlines the history and mission of Bian-wang. To summarize (translated from
5 Chinese), “Bian-wang was created out of frustration with the editorial policy of
6 Sinovision.net. While Bian-wang intends to provide a forum for Chinese Americans to
7 discuss legal issues, it will not seek to limit the scope or topics. Bian-wang will offer
8 participants the complete freedom to discuss whatever they wish.” Nowhere in this article
9 was California ever mentioned. Attached Exhibit A is a true copy of the article.
10
11 11. Bian-wang has 131 registered users. On information and belief, most registered users are
12 from New York, Pennsylvania, Virginia, and China.
13
14 12. Through the end of year 2017, over 1500 blog articles and over 8000 comments had been
15 published on Bian-wang. Of these, less than 10 percent were California specific.
16
17 13. I myself, under the username “忆江南”, have published 103 blog articles, of which 6 are
18 related to California issues. Other articles have been about Chinese politics, sports,
19 website hosting, and wine tasting, etc.
20
21 14. On Bian-wang.com, from year 2014 to 2015, Yue actively participated in discussions of
22 the South China Sea disputes, the lawsuit of *Lan v. Time Warner, Inc.*, 2015 WL 480378
23 (S.D.N.Y. 2015), and the Indian Removal Act, none of which was a local California issue.
24 Attached Exhibit B is a true copy of a selection of Yue’s posts, some of which are written
25 in English.
26
27
28

1 15. On December 15, 2016, Yue posted a blog article to demand the deletion of all blog
2 articles and comments containing his name within 12 hours. Given the severe burden
3 imposed by Yue's demand, I added a footnote to Rule.No.2 to state "reporting of
4 offensive contents must take place within a year after they are published; in order to
5 reduce the web host's burden, one must submit a table of contents when reporting." (Yue
6 Decl. ¶ 13 and Exhibit 3 within.) I did not promise or refuse to delete. I simply referred
7 Yue to the supplemental rule. Yue promptly threatened legal action.
8

9 16. The fore-mentioned interaction between Yue and I took place on the Internet (Bian-
10 wang.com). I had no knowledge about Yue's physical location at the time of the
11 interaction.
12

13
14 I declare under penalty of perjury that the foregoing is true and correct and that this declaration is
15 executed on the 22nd day of March 2018 in Columbia, South Carolina.
16

17 _____/s/_____.
18 Chun-Hui Miao
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EXHIBIT A

忆江南的个人空间

<http://www.bian-wang.com/discuz/?10003> [收藏] [复制] [分享] [RSS]

"To reach a port we must sail, sometimes with the wind, and sometimes against it."

空间首页

动态

记录

博文

评论

相册

主题

分享

留言板

个人资料

日志

彼岸网的前世、今生和未来

热度 5 已有 2560 次阅读2014-2-2 09:10 AM | 系统分类:社交网理论与实践 | 彼岸

彼岸网开通约有一年，但它的历史要追溯到2011年夏天。当时出于对海明的义愤，我曾表示愿意为桑兰写文书。因此收到网友来信，希望我能提供法律上的协助。我并不是法律人士，所以就写了一个[给岳东晓先生的倡议](#)，希望他办一个为广大在美华人作法律咨询的网站，但岳先生并没有作出回应。出乎我意料的是，LAO立即表达了他的支持，并承诺在网站启动后提供相关法律问题解答。之后LAO与我通过电子邮件更进一步讨论了建立网站的设想。由于我们当时还没有明确的构思，再加上我不从事IT行业，从未开发过网站，所以也就不了了之。

几个月后，围绕桑兰案的讨论仍然在美中网如火如荼，当时有些网友指责mgzww999的言论导致了LAO离开美中网。在得知这一情况后，LAO通过我发了一个[简短声明](#)以澄清事实。mgzww999让我转告他给LAO的感谢和祝福，以及一首诗歌。cindy197233网友一直是LAO坚定的支持者，也让我转告对LAO的问候。LAO收到这些问候后，建立了一个邮件群，包括了上述网友和Lovebirds，对桑兰案的发展进行了一些交流。这种联系断断续续直到2013年初。

当时美国乒协发起了一份要求联邦政府[把乒乓球列入体育课程的请愿](#)，为此我重返美中网发了一个呼吁。令我失望的是，这篇博文也没有得到推荐。上不了推荐榜并不稀奇，我的博文里只有一篇[恶作剧](#)得到过网编的青睐。但这次我还是抱了一线希望的，以为上述请愿会得到他们的支持。失望之余，我重新拾起了另起炉灶的念头。恰在此时，LAO也询问我们是否有更好的博客网站供法律问题的探讨，这可谓是不谋而合。

而在此期间也就是2012年，海外华人网络还发生了几件大事，即珍珠湾、汉纳网和页页城的先后成立。有意思的是，它们和美中网一样都[基于Discuz系统](#)。这就给我们的网站设想解决了一个大问题：如果采用Discuz的话，网友们将很容易适应新网站。而且安装Discuz并不难，哪怕是对我这样一个外行。记得当时仅在logo制作上卡了壳，后在Lovebirds的帮助下顺利完成。在基本调试后，我向邮件群里的网友们发出了邀请：

“前些日子看到你们在“破庙”关于如何建设博客网站的评论，而且LAO也早就有过设立法律咨询网站的想法，所以我动手建了个新网站，彼岸网。试验之后，发现很多设置可以修改。我们作为网站的建设者，有充分的自由实现我们所希望的功能。我自己的设想是，克服现有中文社区的局限，把它设置成一个网友们能完全平等自由并容易参与的平台。”

很快我就收到了好友们的积极回应。

Lovebirds：谢谢师弟！我已注册了！我在等你们！

mgzww999：我已经注册。这是一个非常有意义的事业，首先它是一个惠及海外华人的公益事业，其次它也是一个了解和学习美国法律的地方。谢谢！

LAO：Lined on, BW. I also noticed 999, LB and HQ have already registered themselves there.（BW是Bian-wang的缩写，HQ是本人的网名。）

当时尚处于我们对博客系统的摸索阶段，所以这个网站并没有对外公开。期间也没有发表博文，除了Lovebirds[呼唤友人](#)的一篇。这个样子大致持续了一个月，直到去年三月初。当时我在美中网看到一些网友为了《李光耀：大师论中美和世界》一书大作文章，甚至起了争执，所以[转载了原文](#)。没想到就这样一篇普通转载，竟没有通过审核，被网编封杀。彼岸网就是在这样的情形下推出的。

虽然网站和大家见了面，但对网站的建设并没有停止。我们首先希望[和美中网有所区分](#)：

1. 对内容不作限制；
2. 博文及热点由网友自行取舍，不作人工干预。

其次我们也希望增添一些新的功能，以方便网友获取信息。这方面我力不从心，但天香公主利用自己的专长为彼岸网开发了一系列独有的新功能：

1. [在主页显示最新评论](#)；
2. [N岸N地热点导读](#)；

3. 网站博文汇总；
4. 让允许表态成为一个博文选项。

即便如此，彼岸网的讨论还是显得过分单一，缺少情趣。这时候，乌龟和蜗牛适时地来到了彼岸，和Lovebirds一起，带来了不同的情调。当和尚们外出时，也是她们为彼岸网维持了宝贵的人气。[乌龟导读](#)还为我们铺设了一条赏读其它网站佳作的捷径。

之所以要写这么一段彼岸网的由来和成长经历，是想告诉大家：

第一，彼岸网不是LAO和HQ的网站，它是一个素昧平生、未曾谋面通话的网友们，为了呼吸清新自由的空气走到一起建立的网站，它属于所有参与的新老网友；

第二，彼岸网成立的宗旨不是单纯的休闲娱乐，也不是自命清高的修身养性，而是为了分享个人所学，给网友提供知识信息、技术手段、互补的视角和观点。并通过与网友的互动交流来提升自己，在一个学习探讨的氛围中寻找乐趣。

罗马不是一天建成的。彼岸网虽然已经成立近一年了，但是依然人气不旺，以至于[有位美中网著名女将把彼岸网描述为“自怜自乐”](#)，想来她心中的这个自是顾影自怜的自。但我想也可以把这个自理解为自由自在的自，意味着在彼岸网上我们可以自由地怜，自由地乐，而不必由网管来告诉我们什么博文值得一读，什么话题可以讨论，什么发言允许存在。我们中的许多人已经离开故国多年，为什么选择留在异国他乡？对我来说，答案很简单：因为当年来到大洋彼岸，追寻的就是自由。有朝一日，我们也要把自由带回彼岸的故国。

朋友们，欢迎来到自由的彼岸！

[举报](#) [邀请](#) [分享](#) [收藏](#)

评论 (12 个评论)

[发表评论](#)

[作者的其他最新日志](#)

[全部](#)



忆江南 2016-5-3 10:42 PM

lovebirds: 这篇博文我怎么没有见过？

一直是在主页上啊 🤔 《关于彼岸》 - 《由来》

[回复](#)

- [The greatest comeback in football history](#)
- [绕口令：规则的公平与合理](#)
- [历史上的今天](#)
- [我看6/4](#)
- [儿童节看电影](#)
- [我参加过的两次游行](#)



lovebirds 2016-5-3 08:55 AM

这篇博文我怎么没有见过？

[回复](#)



carry0987 2016-4-29 11:56 AM

哈，這裡是各種知識與技術交流的平台，總不能搞成像我的網站這麼花俏吧（而且我的網站的網址 (fucknehs.com) 還被江南前輩形容“叛逆”，這點我非常高興，因為本來就是年輕人，叛逆就是爽啊～）

[回复](#)



lawandorder 2014-2-4 10:45 PM

Bian999: 我注册mgzww999主要是为了占个地盘，不然被别人注上，容易引起混乱。我一直用bian999，只有登录错误时才用mgzww999。 ...

等待老弟的博文处女作

[回复](#)



lawandorder 2014-2-4 10:43 PM

忆江南: Well said, thanks, my LAO brother.

Hush, just between us, we know that we blog with the gene-modified snail and blog about deep-frying it.



[回复](#)



忆江南 2014-2-4 12:14 AM

Bian999: 我注册mgzww999主要是为了占个地盘，不然被别人注上，容易引起混乱。我一直用bian999，只有登录错误时才用mgzww999。 ...

我只是看到你换了件马甲再发言，以为有什么讲究。你说的占地盘我觉得也是，好比方枪枪、ImYoona都是要收费的 I D，当然还有今大师的。

[回复](#)



Bian999 2014-2-4 12:07 AM

我注册mgzww999主要是为了占个地盘，不然被别人注上，容易引起混乱。我一直用bian999，只有登录错误时才用mgzww999。

[回复](#)

忆江南 2014-2-4 12:04 AM

[回复](#)



Bian999: 我请你回LAO表示感谢和祝福这事我记得，当时还写诗了？我怎么记不得了。老弟不是搞IT的，这出乎我的意料。彼岸网近一个月发展势头很好，有小老头加盟，期待能带 ...

今天你穿了两件马甲是为什么 🤔

关于第一点，文中有链接。

前有非律师，后有伪网管，就是指本人了。

前段时间DNS设置有误，导致国内无法连接，好在小老头没有忘记我们，现在发的文果然令人耳目一新。

不过头号新闻还是你透露出的开博想法，N岸N地万众瞩目。。。枪枪的曲只应彼岸有，你的文自然也一样。

当然，不论你是开博还是点评，都会成为网友翘首彼岸的理由。再说，你也不能撇下我一个人在这学取经吧。



Bian999 2014-2-3 11:52 PM

[回复](#)

我请你回LAO表示感谢和祝福这事我记得，当时还写诗了？我怎么记不得了。老弟不是搞IT的，这出乎我的意料。彼岸网近一个月发展势头很好，有小老头加盟，期待能带来有质量的文章。我仍然没有开博的准备，但是如果将来开博，一定在这里开，而且只在这里开。



忆江南 2014-2-2 09:08 PM

[回复](#)

转基因蜗牛:

哪里偷来的锤子？



忆江南 2014-2-2 08:37 PM

[回复](#)

lawandorder: Thank you for the commemorate piece, brother, and your hard work. It is not simply where to blog; it is also who to blog with and what to blog about.

Well said, thanks, my LAO brother.

Hush, just between us, we know that we blog with the gene-modified snail and blog about deep-frying it.



lawandorder 2014-2-2 08:30 PM

[回复](#)

Thank you for the commemorate piece, brother, and your hard work. It is not simply where to blog; it is also who to blog with and what to blog about.

👤 涂鸦板

您需要登录后才可以评论 [登录](#) | [立即注册](#)

评论



EXHIBIT B

岳东晓的个人空间

<http://www.bian-wang.com/discuz/?10370> [收藏] [复制] [分享] [RSS]

空间首页

动态

记录

日志

评论

相册

主题

分享

留言板

个人资料

评论



岳东晓 2015-2-10 04:21 PM 读《中国政府拒绝参与国际海洋仲裁后果分析》的看法（方枪枪）

[回复](#)

lawandorder: 这是我昨天晚上想到的以原文证明的第一套原文。多谢提出。

第二套原文，是我直接回复方博士的原文：

lawandorder 2015-1-16 12:36 AM
(E) "另外，即使菲律宾 ...

LAO君对方枪枪发言的理解是 【[仲裁庭宣判9断线非法之后] 撞船（方博士设定撞船的时间）】。

请问为什么必须是仲裁失败之后才能撞，不参与仲裁、仲裁期间或者仲裁胜利就不能撞？

我从方枪枪原文中得不出这个解读，我对方枪枪的理解是，只要菲律宾蠢动，中国就可以撞船。因此我请你证明给出你的解读的逻辑链。



岳东晓 2015-2-10 04:12 PM 徐晓冰律师搬起石头砸自己的脚（老刘）

[回复](#)

lawandorder: In my opinion, the total amount of final award depends on whethre Judge Francis will allow fees incurred in preparing for the deposition (not in your ...

Well, as in the case I cited below, an attorney can certainly advocate for an amount larger than what is allowed by the established law. However, unless Mo can present some legal precedent or some colorable legal argument to override the plain meaning of the FRCP, asking for an exorbitant amount not caused by the opponent's failure is imprudent, IMHO.

The Magistrate allowed expenses [incurred by the defendants in scheduling and preparing for the plaintiff's deposition.] Attorney Mo can certainly ask for the cost for the motion for the 37(d) sanction, but it was obviously out of the scope of the Magistrate's order.



岳东晓 2015-2-10 04:02 PM 【岳东晓】-《美国真正的可怕之处在哪儿？》的中国式误区（彼岸网）

[回复](#)

lawandorder: 1830 年代美国最高法院和迁移印地安部落的案例只有两个。

第一个，1831年案例。在这个1831年案件中，切诺基部落起诉乔治亚州政府，指控乔治亚州的法律违反她的 ...

1. The Cherokee Nation v. The State of Georgia 最高法虽然称没有管辖权，但其宣布的法律原则对切诺基有利。法院没有管辖权不等于原告大败。

2. Worcester v. Georgia 你对相关历史可能不清楚，不知道历史背景及诉讼目的。Worcester 实际是一个进入切诺基支持印第安人权利的活动家，乔治亚的法律是专门为他及另外几个人制订的。Worcester 的律师也是切诺基雇佣的。这是切诺基绕过管辖权问题的一招。果然，最高法利用这个案子就印第安人的地位问题作出了对印第安人有利的裁决。【The Cherokee nation, then, is a distinct community occupying its own territory, with boundaries accurately described, in which the laws of Georgia can have no force, and which the citizens of Georgia have no right to enter, but with the assent of the Cherokees themselves, or in conformity with treaties, and with the acts of congress.】

3. PBS的介绍非常清楚：“both Georgia and Jackson simply ignored the decision.”如上所述，相关的decision 不仅是Worcester，而是包括印第安人领地主权的问题。

4. Indian Removal Act: [The Indian Removal Act was signed into law by Andrew Jackson on May 28, 1830, authorizing the president to grant unsettled lands west of the Mississippi in exchange for Indian lands within existing state borders. A few tribes went peacefully, but many resisted the relocation policy. During the fall and winter of 1838 and 1839, the Cherokees were forcibly moved west by the United States government. Approximately 4,000 Cherokees died on this forced march, which became known as the "Trail of Tears."]

<http://www.loc.gov/rr/program/bib/ourdocs/Indian.html>



岳东晓 2015-2-10 02:10 PM 读《中国政府拒绝参与国际海洋仲裁后果分析》的看法（方枪枪）

[回复](#)

忆江南: 这是原文：（黑体是我加注的）

2015-1-15 07:55 PM

第三，你说如果菲律宾仲裁获胜并自行执法，中国攻击菲律宾，则菲律宾可以启动《美菲安保条约》。...

这里面有N句话，第一句话是转述 L A O 的，LAO认为如果菲律宾仲裁获胜并自行执法会如何；过了N句话之后，有【即使菲律宾试图单方面执法】，中国也可以撞船而不是开枪。你与 L A O 都把这理解成【即使菲律宾（在仲裁获胜之后）试图单方面执法】，也就是在中间插入【仲裁获胜】的大前提。这是一种可能的理解，但不是最符合逻辑与语法的理解。

下面我把方枪枪回应的后面一段拷贝于下（这样联系上下文是否好点？）

【你既然说“《公约》对仲裁决定缺少相应的强制执行能力”，那么就on应该认识到中国参与仲裁没有任何好处，而风险很大。。。如果上法院中国赢了，中国没有得到任何实质的东西 --- 菲律宾小国还可以继续耍赖不认账，但中国参与仲裁输了而不认账国际声誉损失就大多了。】

可见，菲律宾单方面执法并不需要是在仲裁获胜之后。菲律宾完全可能在仲裁期间、甚至仲裁失败之后选择单方面执法。在黄岩岛海域，之前菲律宾就射杀中国渔民并大量逮捕中国渔船。

因此，我认为方枪枪这一段讲的是在菲律宾单方面执法时中国的强力对策，与菲律宾是否仲裁获胜无关。方枪枪认为，如果菲律宾仲裁失败，【菲律宾小国还可以继续耍赖不认账】。因此，仲裁失败后，它完全可能拒绝接受仲裁结果坚持执法（美国也没有加入海洋公约），这种情况下，中国如果武力攻击菲律宾，按LAO的想法同样可以导致美菲条约启动，中国采用方枪枪提出的撞船方案，同样可以不开第一枪而强力对抗菲律宾。



岳东晓 2015-2-10 06:02 AM 读《中国政府拒绝参与国际海洋仲裁后果分析》的看法（方枪枪）

回复

lawandorder: 方括号里的 [指非国仲裁获胜之后]是 L A O君自己添加的。请问，增加这个的理由是什么？你如何从方枪枪的原文逻辑地推导出 [指非国仲裁获胜之后]？

-- 解铃还 ...



LAO君好像有点不爽啊。我以前跟方枪枪争论的口气比现在跟你交流要生硬多了。

这个问题似乎有点老了，大家似乎有点开始重复，就此结束吧。



岳东晓 2015-2-10 05:15 AM 【岳东晓】-《美国真正的可怕之处在哪儿？》的中国式误区（彼岸网）

回复

lawandorder: "切诺基于是在美国法院起诉，结果美国最高法院还判他们赢了（1832年）。" -- 起诉人不是切诺基人，是住在切诺基部落（nation）白人传教士，起因是他 ...

The Cherokee Nation v. The State of Georgia: [The Indian territory is admitted to compose a part of the United States. In all our maps, geographical treatises, histories, and laws, it is so considered. In all our intercourse with foreign nations, in our commercial regulations, in any attempt at intercourse between Indians and foreign nations, they are considered as within the jurisdictional limits of the United States, subject to many of those restraints which are imposed upon our own citizens. They acknowledge themselves in their treaties to be under the protection of the United States; they admit that the United States shall have the sole and exclusive right of regulating the trade with them, and managing all their affairs as they think proper; and the Cherokees in particular were allowed by the treaty of Hopewell, which preceded the constitution, "to send a deputy of their choice, whenever they think fit, to congress."]

Worcester v. Georgia : 'The treaties and laws of the United States contemplate the Indian territory as completely separated from that of the states; and provide that all intercourse with them shall be carried on exclusively by the government of the union.'

<http://www.pbs.org/wnet/supremecourt/antebellum/history2.html>

in the Cherokee Indians case, Worcester v. Georgia (1832), Marshall infuriated Jackson by insisting that Georgia laws that purported to seize Cherokee lands on which gold had been found violated federal treaties. Jackson is famous for having responded: "John Marshall has made his decision, now let him enforce it." Although the comment is probably apocryphal, both Georgia and Jackson simply ignored the decision.



岳东晓 2015-2-10 01:11 AM 读《中国政府拒绝参与国际海洋仲裁后果分析》的看法（方枪枪）

回复

lawandorder: 我用曾经反驳过方博士的内容来重复反驳你前两点，用我2月7日对你的反驳反驳你的第三点。如果你认为这种“捉迷藏”游戏还有意义玩下去，很抱歉你可能要自己玩了 ...

先只讲一个问题。LAO 君引用方枪枪写的是“另外，即使菲律宾试图单方面执法 [指非国仲裁获胜之后]，中国也不一定要对菲律宾开第一枪，中国用万吨大船撞击菲律宾的小艇即可。如果菲律宾在争议海域开第一枪，中国的还击就是自卫。”

方括号里的 [指非国仲裁获胜之后]是 L A O君自己添加的。请问，增加这个的理由是什么？你如何从方枪枪的原文逻辑地推导出 [指非国仲裁获胜之后]？



岳东晓 2015-2-10 01:06 AM 徐晓冰律师搬起石头砸自己的脚（老刘）

回复

lawandorder: I am surprised that you could have failed to understand my points entirely, particularly considering the litigation experience you have had before. T ...

A court ruling contrary to established law or the plain text of a statute is by definition an abuse of discretion.

As to the causality between the failure to appear and the resulting expense, it is plainly required by 37(d), enacted by the Congress. Let me quote one court in a very similar situation.

[Pursuant to Rule 37(d), the moving party may recover from a party who fails to attend a properly noticed deposition the reasonable expenses, including attorney's fees, "caused by the failure." Fed. R. Civ. P. 37(d)(3).... Defendants' request for fees includes time spent reviewing pleadings, initial disclosures, and other discovery in preparation to take the deposition. Defendants also request fees for time expended preparing the notice of deposition and for scheduling the deposition. These events predate Plaintiffs' failure to attend the deposition and thus cannot logically be caused by the failure. Such costs are not properly compensable according to the plain meaning of 37(d)(3).]



岳东晓 2015-2-9 10:10 PM 徐晓冰律师搬起石头砸自己的脚（老刘）

回复

lawandorder: 这个贴提出了很多另人深思的问题，我想就让每个读者自己考虑吧。法官最后判定赔偿金额的法令里一定会远远超出三个 reasonable。



...

根据我对条款的分析，因未能出席deposition而需要赔偿被告的费用估计在几百到几千美金左右。Attorney Mo will have a hard time coming up with a higher figure that can be proven to be causally connected to the Plaintiff's failure to attend the deposition. Defendants will have to try something else if they want to be vindicated without being vindictive. Rule 11 is certainly an option, but the amount of fees can be imposed on the opponent from even a successful Rule 11 motion is also quite limited. There has already been one round of Rule 11, even if Attorney Mo has the stomach for another round of Rule 11, the law of the case prevents defendants from re-litigating many of the issues in a Rule 11 context.



岳东晓 2015-2-9 09:46 PM 读《中国政府拒绝参与国际海洋仲裁后果分析》的看法（方枪枪）

[回复](#)

lawandorder: 两个错误前提：

不仲裁（你方）= 不参与仲裁（我呼吁政府参与）

[刚看到新闻]撞船（你方）= [仲裁庭宣判9断线非法之后] 撞船（方博士设定撞船的时间）

...

方枪枪的撞船方案与仲裁结果显然不存在条件关系。她的观点是不参与仲裁，仲裁根本不是决策因素。从她的原文中根本得不出要等仲裁失败才撞船。她建议的撞船是说怎样对非使用强制力但不开第一枪。撞船与否与仲裁结果毫无关系。LAO君似乎未能逻辑理解枪枪的论点。

你讲中国发表立场书等同于参与仲裁是个概念混淆，之前的讨论也明确了这一点。参与仲裁是接受仲裁法庭的管辖，正式对阵。中国根本没有参与仲裁。

撞船地点是在菲律宾认为100%主权的黄岩岛海域，而且是菲律宾直到2012年还实际控制、对中国渔民开枪、抓捕的海域。你认为撞船地点不在九段线、不在菲律宾主张的EEZ完全没有依据。这一点我已经引用菲律宾政府的申明进行了反驳。



岳东晓 2015-2-8 12:48 PM 徐晓冰律师搬起石头砸自己的脚（老刘）

[回复](#)

lawandorder: I agree with your interpretation of the textual meaning of Rule 37(d). However, in light of the district court's "wide discretion" in contr ...

Let me confirm your points：

(1) you agree with me on the point that the costs of reviewing the documents and drafting questions are NOT caused by plaintiff's failure to attend the deposition;

(2) but you believe that the Magistrate nevertheless has the discretion to award such costs that are NOT causally connected to the failure to attend.

Did I understand you correctly? If not, please elaborate.



岳东晓 2015-2-8 03:31 AM 读《中国政府拒绝参与国际海洋仲裁后果分析》的看法（方枪枪）

[回复](#)

lawandorder: 撞船和安保条约这个单行道关系，是岳博士设计的为方博士提出中国在重叠海域撞船鲁莽游戏的烟幕弹（标准的straw man 逻辑错误），它遮盖不住我的辩论点和立场。我 ...

我方（荣幸地被方枪枪授权）的观点是：不仲裁+撞船。

你的观点是：仲裁，并且反对我方的“不仲裁+撞船”。

显然，我方的决策里根本没有仲裁一个因素。

现在，中国的行动完全符合我方的方略，不仲裁+撞船了。

对此，你是否继续以美军干预为由反对？



岳东晓 2015-2-8 12:26 AM 徐晓冰律师搬起石头砸自己的脚（老刘）

[回复](#)

lawandorder: "A judge has no discretion awarding expenses not caused by an offending party's failure" -- Well, the Rule only says the court must require ..., ...

IMO, the phrase [preparing for the plaintiff's deposition] in the Magistrate's order should be construed narrowly to mean the preparation for the deposition EVENT and not the whole nine yards. For instance, if defendants ordered video conferencing service, then the nonrefundable portion of the cost is caused by the failure. However, the cost of reviewing documents is clearly NOT caused by the failure to appear, and is not awardable under 37(d).



岳东晓 2015-2-7 11:52 PM 读《中国政府拒绝参与国际海洋仲裁后果分析》的看法（方枪枪）

[回复](#)

lawandorder: 岳博士无论是有意或者是无意识混淆问题，我认为都不合适也不应该。首先混淆领海和EEZ的概念，同时混淆菲请求外国出兵保护主权和启动安保条约的概念，现在是 ...

我的问题非常清楚。黄岩岛中国宣称有100%主权，菲方也称有100%主权，2012年前是菲律宾在黄岩岛附近海域枪击中国渔船，现在是中国毅然撞击菲船，菲律宾抗议。这个撞船策略，方枪枪之前提出了。

我的问题是，中国已经撞了菲船，美菲安保条约如何运用？

目前还没有看到LAO君对这个问题作出一个完整的陈述。

岳东晓 2015-2-7 11:20 PM 徐晓冰律师搬起石头砸自己的脚（老刘）

[回复](#)



lawandorder: 岳博士介绍美国法院民事诉讼程序，简明扼要，深入浅出，核心问题阐述准确。这点我早就注意到了。在Rule 37 的环境下，causation 的应用没有理科思维的严格 [em: ...]

谢谢LAO君美言。

我的文中举了一个假想例子，一律师为了准备证词录取花了1000小时（如查阅证据、资料、法律、制定讯问策略、设计质询问题等）不是caused by 对方的不出席，不知LAO君有无不同见解。如果有，依据是什么？IMO，Causation, both in fact and proximate, is required under the plain language of Rule 37(d) for a fee award. A judge has no discretion awarding expenses not caused by an offending party's failure, rather, his discretion lies in finding unreasonableness in a fee request.



岳东晓 2015-2-7 02:27 PM **徐晓冰律师搬起石头砸自己的脚（老刘）**

[回复](#)

lawandorder: 读了天香列出的216号文件，我之前介绍的后续程序有错误，作了改正。因为这是法律允许助理法官单独判决的法律问题（取证相关的问题），因此助理法官不需要报告给 ...

我对FRCP 37 (d)，进行了简单的分析

<http://www.zhenzhubay.com/home.php?mod=space&uid=2&do=blog&id=28147>

While a party prevailed in a Rule 37(d) motion is naturally inclined to piggyback as much fees as possible, there is a strict causality requirement between the opponent's failure and the awardable expense, which is often overlooked.



岳东晓 2015-2-7 04:36 AM **读《中国政府拒绝参与国际海洋仲裁后果分析》的看法（方枪枪）**

[回复](#)

lawandorder: 如果仲裁法庭宣判9断线违反海洋公约（不能忘记这个前提），那么，中国的9断线内的部分海域将和菲国200海里EEZ主权海域相重叠，那么，菲国将有权力在这个和中国 ...

再怨再下不明，菲律宾政府对撞船事件的声明是【Philippine fishing vessels have been routinely, continuously, peacefully and sustainably fishing in the Philippines' Bajo de Masinloc ... The Philippines strongly protested China's continuing actions to harass and prevent Filipino fishermen from legitimately pursuing their livelihood in that area】。

中国称黄岩岛，菲律宾说是自己的Bajo de Masinloc 100%主权属于菲律宾 <http://www.gov.ph/2012/04/18/philippine-position-on-bajo-de-masinloc-and-the-waters-within-its-vicinity/>。可见这是100%争议区。菲律宾如果自主“维权”，并不需要仲裁结果，从菲律宾角度，这是其主权范围之内的事。1999年，菲律宾在黄岩岛附件对中国渔船机枪扫射。。。直到2012年，菲律宾在这个海域是经常抓捕中国渔民的。

中国从2012年开始对黄岩岛海域进行控制，是否这个两年的控制之后，撞击菲船，美国就可以不管了？以此类推，九段线其他海域，可否如法炮制？

附件：【The Philippines exercises full sovereignty and jurisdiction over the rocks of Bajo de Masinloc, and sovereign rights over the waters and continental shelf where the said rock features of Bajo de Masinloc are situated.

The basis of Philippine sovereignty and jurisdiction over the rock features of Bajo de Masinloc is distinct from that of its sovereign rights over the larger body of water and continental shelf.

A. The rock features of Bajo de Masinloc: Basis of Philippine sovereignty under Public International Law

The rock features of Bajo de Masinloc are Philippine territories.】



岳东晓 2015-2-7 02:56 AM **读《中国政府拒绝参与国际海洋仲裁后果分析》的看法（方枪枪）**

[回复](#)

lawandorder: 是不是管辖权存在争议的地方发生冲突就不在美菲条约涵盖范围？

-- [island territories under its jurisdiction]

是不是撞船不算ARMED attack，

-- Do you t ...

怨在下不明，还请LAO拨冗做完整陈述。之前枪枪提出在南海（九段线内）以【万吨大船撞击菲律宾的小艇】，LAO君认为这种撞船游戏可能将面对美海军包括陆战队。现在中国武装海警（Chinese coast guard ship）在九段线内撞击三艘菲船，美国可能会怎样解读条约？



岳东晓 2015-2-7 02:28 AM **读《中国政府拒绝参与国际海洋仲裁后果分析》的看法（方枪枪）**

[回复](#)

lawandorder: [an armed attack]

[an armed attack in the Pacific Area]

[the metropolitan territory of either of the Parties]

[island territories under its jurisdict ...]

LAO 君列举了一系列points，这些我们应该都是知道的，但观点是什么呢？

比如说，是不是管辖权存在争议的地方发生冲突就不在美菲条约涵盖范围？是不是撞船不算ARMED attack，必须使用热武器才算？是不是attack渔船不算？请明示。



岳东晓 2015-2-6 02:10 PM **转载 - 习近平博士论文《中国农村市场化研究》（彼岸网）**

[回复](#)

lawandorder: "LAO友是否可以从法律角度分析一下?" -- 诽谤法律理论和习的博士学位论文都分析过了。如果老刘代替习近平起诉你诽谤，我代替你起诉来要求法院取消他的 ...

习在很多方面是很不错的，比如这个对日本军国主义的态度，我看要得，其对日观点讲话跟我近20年前写的基本一致。。。习的博士论文我没有读，有机会再看看。

看到南海问题上LAO与方枪枪就管辖权进行了相当有趣的争论，但如果LAO君起诉习来要求法院取消他的博士学位，首先要克服的困难是你的standing 等 Justiciability 问题，而不是管辖权。如果你不能说明 standing，人家都不用动 😏

