

UNITED STATES DISTRICT COURT  
MIDDLE DISTRICT OF TENNESSEE  
NASHVILLE DIVISION

|  |   |                                   |
|--|---|-----------------------------------|
| JACKSON COUNTY EMPLOYEES’                | ) | Civil Action No. 3:18-cv-01368    |
| RETIREMENT SYSTEM, Individually and on   | ) |                                   |
| Behalf of All Others Similarly Situated, | ) | <u>CLASS ACTION</u>               |
|  | ) |                                   |
| Plaintiff,                               | ) | Hon. William L. Campbell, Jr.     |
|  | ) | Magistrate Judge Alistair Newbern |
| vs.                                      | ) |                                   |
|  | ) | PLAINTIFFS’ RESPONSE TO NOTICE    |
| CARLOS GHOSN, et al.,                    | ) | AND SUPPLEMENTAL DECLARATION      |
|  | ) | OF AUDRA J. SOLOWAY               |
| Defendants.                              | ) |                                   |
|  | ) |                                   |
| _____                                    | ) |                                   |

Plaintiffs Jackson County Employees' Retirement System and Providence Employees Retirement System (collectively, "Plaintiffs") write in response to the Notice of Filing and "supplemental" declaration of Audra J. Soloway, counsel for defendant Carlos Ghosn ("Ghosn"). *See* ECF Nos. 112 ("Notice"), 113 ("Supp. Soloway Decl."). These filings are incomplete and fail to advise the Court of Mr. Ghosn's current status as an international fugitive from justice.

On December 30, 2019, Ghosn jumped bail and fled Japan for Lebanon. Media reports have revealed that, with the assistance of an ex-convict who specializes in exfiltration, Ghosn stuffed himself into a large black-wheeled container designed to transport audio equipment and smuggled himself out of the country aboard an illegally chartered Bombardier Global Express business jet from Kansai airport in Osaka, Japan.<sup>1</sup> Twelve hours later, Ghosn and his music box arrived in Istanbul, Turkey, after which he quickly transferred to yet another private jet that delivered him to Beirut, Lebanon.<sup>2</sup> Despite the fact that his three passports (Lebanese, French and Brazilian) were locked away as a condition of his bail in Tokyo, Ghosn was able to enter Lebanon using a duplicate French passport and Lebanese identity card.<sup>3</sup>

Japan has not entered into a bilateral extradition treaty with Lebanon,<sup>4</sup> and Lebanese law precludes the extradition of its own citizens.<sup>5</sup> Ghosn also reportedly has allies among Lebanon's

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<sup>1</sup> *See* Ex. 1. In planning his escape, Ghosn chose Kansai because that airport did not X-ray large bags. *See* Ex. 2. All exhibits referenced herein are attached to the Declaration of Christopher M. Wood in Support of Plaintiffs' Response to Notice and Supplemental Declaration of Audra J. Soloway, filed concurrently herewith.

<sup>2</sup> According to Turkish authorities, Ghosn's name did not appear on the official documentation filed for either flight. *See* Ex. 3.

<sup>3</sup> *See* Ex. 2 ("Mr. Ghosn used the French passport and a Lebanese identity card to enter the country, according to people familiar with the matter.").

<sup>4</sup> Japan's only two bilateral extradition treaties are with the United States and South Korea. *See* Ex. 4.

political elite, making his deportation even less likely.<sup>6</sup> Nevertheless, Japan has issued a “Red Notice” for Carlos Ghosn to fellow members of the International Criminal Police Organization (“INTERPOL”), including Lebanon.<sup>7</sup> Accordingly, on January 9, 2020, *Reuters* reported that Lebanon issued a travel ban on Ghosn.<sup>8</sup> But Lebanon’s interim Justice Minister, Albert Serhan, has publicly stated that if Japanese prosecutors do not send their Ghosn investigation file to Lebanon within 40 days, the ban will be lifted.<sup>9</sup> If Ghosn remains outside of Japan’s reach, however, he will no longer be a criminal defendant alongside Nissan Motor Co., Ltd. (“Nissan”) and Greg Kelly because Ghosn cannot be tried *in absentia* in Tokyo.<sup>10</sup>

Ghosn’s alarming and lawless conduct materially impacts the Court’s analysis of the pending motions to dismiss filed by Ghosn and Nissan. First, Ghosn no longer has any basis to claim that it

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<sup>5</sup> See Legislative Decree 340 of 1 Mar. 1943 (Lebanese Criminal Code), arts. 20 & 32, *translated in Selected Articles of the Lebanese Criminal Code*, Special Tribunal for Lebanon, at 5-6 (Sept. 2015) [https://www.stl-tsl.org/sites/default/files/documents/legal-documents/relevant-lebanese-law/CHATC-150903-2\\_OAR\\_T\\_EN.pdf](https://www.stl-tsl.org/sites/default/files/documents/legal-documents/relevant-lebanese-law/CHATC-150903-2_OAR_T_EN.pdf) (attached hereto as Ex. 5); see also *Laws on Extradition of Citizens*, The Library of Congress, <https://www.loc.gov/law/help/extradition-of-citizens/chart.php> (last updated July 9, 2019) (noting that Lebanon denies requests for extradition of its citizens).

<sup>6</sup> See Ex. 6.

<sup>7</sup> See Ex. 7 (official INTERPOL Red Notice for Carlos Ghosn stating that he is “Wanted by Japan” for charges under the “Violation of Companies Act Article 960(1) and (iii), Violation of Financial Instruments and Exchange Act Article 24(1) and (i) Article 197(1)” and “Violation of Companies Act Article 960(1) and(iii)”). According to INTERPOL, a Red Notice is issued by the member country “[t]o seek the location and arrest of wanted persons wanted for prosecution or to serve a sentence.” *About Notices*, International Criminal Police Organization, <https://www.interpol.int/en/How-we-work/Notices/About-Notices> (last visited Jan. 29, 2020).

<sup>8</sup> See Ex. 8.

<sup>9</sup> See Ex. 9 (“Serhan said that the departure ban will be lifted unless such materials reach Lebanese authorities within 40 days.”).

<sup>10</sup> See Law No. 131 of 1948, art. 286 (Japanese Code of Criminal Procedure), *translated in Japanese Law Translation Database System*, Ministry of Justice (Japan), <http://www.japaneselawtranslation.go.jp/law/detail/?id=3364&vm=02&re=02&new=1> (trial may not be convened when the accused does not appear on the trial date) (attached hereto as Ex. 10).

is unreasonable for this Court to exercise personal jurisdiction over him. Second, Nissan's forum non conveniens arguments are now further weakened because a Japanese court adjudicating a Financial Instruments and Exchange Act of Japan ("FIEA") claim against Nissan could not compel Ghosn to testify if he remains outside of Japan.

## I. GHOSN'S REASONABLENESS ARGUMENTS NO LONGER EXIST

In contesting this Court's personal jurisdiction, Ghosn made numerous arguments based entirely on his pre-trial bail conditions and upcoming criminal trial in Tokyo:

- "Defending this action in the United States would pose a substantial and unique burden upon Mr. Ghosn given his ongoing defense of criminal charges in Japan. Subjecting a foreigner to suit in the United States is burdensome under ordinary circumstances, but here the burdens are much higher since Mr. Ghosn at present cannot even leave Japan by order of the Japanese authorities, is subject to constant surveillance, and is barred from interacting with witnesses in his case (among other limitations). (Soloway Decl. ¶3.) The criminal claims against Mr. Ghosn are anticipated to be tried in Japanese court beginning in 2020 and lasting months, or even years, and his attention and resources will thus be devoted to defending himself against those charges for the foreseeable future. (*Id.* ¶4.) These facts strongly counsel against the reasonableness of asserting personal jurisdiction against Mr. Ghosn in this Court, and are even more compelling than the facts presented in *Bridgestone*." ECF No. 78 at 12-13 ("Ghosn MTD").
- "Moreover, none [of Plaintiffs' arguments] are pertinent to the reasonableness prong because these past U.S. contacts are irrelevant to the *current* burden arising from Mr. Ghosn's ongoing defense of criminal charges in Japan or the fact that Mr. Ghosn at present cannot even leave Japan by order of the Japanese authorities, is subject to constant surveillance, and is barred from interacting with witnesses in his case (among other limitations)." ECF No. 108 at 8 ("Ghosn Reply") (emphasis in original).
- "Plaintiff's attempt to address these points merely amounts to pointing out that Mr. Ghosn has access to counsel outside of Japan and that he is not currently jailed. (*See* Opp. Br. at 64–65.) These arguments do not rebut the fact that there are severe restrictions placed on Mr. Ghosn that hinder his ability to defend the claims asserted by Plaintiff against him." Ghosn Reply at 8 n.4.

Disturbingly, at the same time he made these representations to the Court, Ghosn knew that he had no intention of standing trial in Japan, and was in fact already planning his escape. As the *Wall Street Journal* reported:

*[W]ork on a detailed plan to extract Mr. Ghosn started months beforehand, according to people familiar with the matter. The planning involved a team of between 10 and 15 people of different nationalities, one of these people said. In all, the team took more than 20 trips to Japan and visited at least 10 Japanese airports before selecting the Osaka airport as a weak link, this person said. . . . The escape plan cost in the millions of dollars, according to the person familiar with the matter.*<sup>11</sup>

Thus, all while claiming to this Court that he could not fairly defend himself in this action due to his bail conditions, Ghosn knew that such restrictions would be short-lived.

Now that Ghosn is on the lam, the circumstances he has so heavily relied upon no longer exist. Ghosn is clearly no longer preparing for trial in Japan,<sup>12</sup> and his entire Japanese legal defense team has reportedly resigned in the wake of his escape.<sup>13</sup> By absconding, Ghosn has successfully freed himself of every restriction he had complained of. Ghosn has proven he can: (1) “leave Japan” notwithstanding an “order of the Japanese authorities;” (2) evade “constant surveillance;” and (3) “interact[] with witnesses in his case” if he so chooses. *See* Ghosn MTD at 12-13; Ghosn Reply at 8.

Ghosn now casually attempts to substitute the burden arguments above, suggesting that it is now the temporary travel ban by *Lebanon* that would make the Court’s exercise of personal jurisdiction unreasonable.<sup>14</sup> Ignoring, for a moment, Ghosn’s pattern of deception with this Court and his stated willingness “to stand trial anywhere where I think I can have a fair trial,” that is

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<sup>11</sup> *See* Ex. 11. All citations and footnotes are omitted and emphasis is added unless otherwise noted.

<sup>12</sup> *See* Ex. 12 (Ghosn explaining that he fled Japan to avoid the country’s high conviction rate, further stating that “*I would be ready to stand trial anywhere where I think I can have a fair trial*”).

<sup>13</sup> *See* Ex. 13.

<sup>14</sup> *See* Notice at 1 (“Mr. Ghosn no longer maintains that he is subject to restrictions imposed by Japanese authorities. . . . He is now subject to a travel ban issued by the government of Lebanon. *These changes do not impact any of the other arguments in support of Mr. Ghosn’s Motion to Dismiss.*”).

preposterous. Ghosn himself told one hundred members of the international media in a press conference he held in Beirut days after his escape that he perceived no burden whatsoever with respect to his new-found residence in Lebanon:

There is a red notice that the Japanese government has sent through Interpol. My lawyers say we can fight the red notice. ***I don't consider myself as a prisoner in Lebanon.*** I prefer this prison to the one where I was before. ***I am with my family. My kids can come visit me. I can use the phone and the internet. I don't have "followers" (keeping an eye on me).*** The only followers I have now are people who want to talk to me. ***I don't feel at all unhappy in Lebanon.***<sup>15</sup>

In other words, Ghosn has no restrictions on his ability to communicate, no surveillance by the state, and therefore no meaningful burden on his ability to defend himself in this action.

Even if Ghosn were permanently unable (or unwilling) to leave Lebanon, that fact would not preclude federal discovery, including Ghosn's deposition as a party subject to Rule 30 of the Federal Rules of Civil Procedure. *See, e.g., Wye Oak Tech., Inc. v. Republic of Iraq*, 2018 WL 4901075, at \*2 (D.D.C. Oct. 9, 2018) (noting completed deposition of expert witness in Beirut); *Linde v. Arab Bank, PLC*, 2007 WL 812918, at \*1 (E.D.N.Y. Mar. 14, 2007) (affirming magistrate judge's ruling that "plaintiffs' deposition of Arab Bank pursuant to Rule 30(b)(6) relating to the Beirut Account shall be conducted in Beirut").

After delivering remarks at his press conference in Beirut, Ghosn also told reporters that "***I am prepared to present all documents to you besides what I showed you today.*** The documents today were only samples. There are many other documents I can provide. . . . ***If you contact my lawyers, they can show you the documents.***"<sup>16</sup> Ghosn's willingness to disclose probative materials when it suits him further demonstrates that he is fully capable of doing so in this action. Given that there is a presumption of reasonableness where the first two prongs of specific personal jurisdiction

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<sup>15</sup> See Ex. 12.

<sup>16</sup> See Ex. 12.

are met (*see* ECF No. 86 at 59 (citing *MAG IAS Holdings, Inc. v. Schmückle*, 854 F.3d 894, 903-04 (6th Cir. 2017))), Ghosn’s ever-shrinking evidence of “burden” fails to overcome that presumption.

## II. GHOSN’S FLIGHT FURTHER ERODES NISSAN’S VENUE ARGUMENT

Nissan has argued that Plaintiffs’ FIEA claims should be heard in Japan under the doctrine of forum non conveniens, emphasizing both that: (1) Japan is an adequate alternative forum; and (2) key witnesses are located in Japan. ECF No. 69 at 12-15; ECF No. 105 at 11-12. Ghosn’s recent escape from Japan to Lebanon, however, undermines these arguments and significantly alters the Court’s analysis of forum non conveniens.

Courts have “emphasized the significance of ‘the barriers to obtaining access to essential sources of proof in the foreign forum,’ noting that they may be ‘so severe as to render that forum (practically speaking) an inadequate alternative.’” *Lony v. E.I. Du Pont de Nemours & Co.*, 935 F.2d 604, 611 (3d Cir. 1991) (reversing and remanding forum non conveniens dismissal). Ghosn’s flight raises precisely such barriers for effective relief in Japanese courts for an FIEA claim against Nissan. Nissan has not shown that a Japanese court could compel a non-party witness overseas to provide testimony.<sup>17</sup> As a result, any FIEA claim in Japan would likely be stymied by lack of testimony from Ghosn, a material witness. In contrast, in this action, Ghosn is also an Exchange Act defendant over whom the Court will have the power to compel. *See* Fed. R. Civ. P. 30; Fed. R. Civ. P. 37. And, as discussed above, federal courts have ordered depositions in Beirut, Lebanon. *See, e.g., Linde*, 2007 WL 812918, at \*1.

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<sup>17</sup> If Ghosn failed to appear to testify in Japan in a civil FIEA action against Nissan, which is likely given his fugitive status, the most that a Japanese court could do is fine him ¥100,000, which is equivalent to less than \$1,000 at the time of filing. *See* Act No. 109 of 1996, art. 192 (Japan Code of Civil Procedure), *translated in Japanese Law Translation Database System*, Ministry of Justice (Japan), <http://www.japaneselawtranslation.go.jp/law/detail/?id=2834&vm=02&re=02&new=1> (attached hereto as Ex. 14).

### III. CONCLUSION

For the reasons set forth above, as well as those in Plaintiffs' Omnibus Opposition to Defendants' Motions to Dismiss (ECF No. 86), the Court should deny Defendants' motions to dismiss in their entirety.

DATED: February 11, 2020

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I hereby certify under penalty of perjury that on February 11, 2020, I authorized the electronic filing of the foregoing with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the e-mail addresses on the attached Electronic Mail Notice List, and I hereby certify that I caused the mailing of the foregoing via the United States Postal Service to the non-CM/ECF participants indicated on the attached Manual Notice List.

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