be characterized as willful where the party-witness and attorney recived proper notice of the deposition but they did not attend because they concluded that appearance would be futile because the party-witness was not then represented by local counsel.

In Fjelstad v. American Honda Motor Co., 762 F.2d 1334, 1341 (9th Cir. 1985), willful failure to provide discovery justifying entry of default judgment was defined to include "disobedient conduct not shown to be outside the control of the litigant." Robison v. Transamerica Insurance Co., 368 F.2d 37 (10th Cir. 1966), a case cited by Degrelle in his appeal brief, makes clear that "to be 'wilful' the failure [to provide discovery] need not necessarily be accompanied by wrongful intent. It is sufficient if it is conscious or intentional, not accidental or involuntary."

There can be no question that Degrelle's failure to appear at his depositions was willful and was his own fault. Degrelle acknowledged that he received all of the deposition notices. Degrelle does not argue that he was unaware of any of the depositions. Degrelle's failure to appear at the third deposition, even after being ordered by the District Court to appear and after being specifically warned that failure to appear would result in dismissal, clearly demonstrates willfulness and fault. See G-K Properties v. Redevelopment Agency, 577 F.2d 645, 648 (9th Cir. 1978). The Magistrate's determination that Degrelle had failed to establish that his physical condition prevented travel to Los Angeles or an oral deposition (see Section IV.C.2.b infra) establishes that

Degrelle's failure to attend the depositions constituted "disobedient conduct not shown to be outside the control of the litigant." Fjelstad v. American Honda Motor Co., supra, 762 F.2d at 1341.

5. Lesser Sanctions Were Not Adequate To Assure Degrelle's Appearance At His Deposition.

This Court has held that prior to dismissing a case for failure to provide discovery, the district court should consider lesser sanctions. United Artists Corp. v. La Cage Aux Folles, Inc., 771 F.2d 1265, 1270 (9th Cir. 1985).

This Court and other Courts of Appeals have made clear that where a party has failed to appear for his deposition, the issuance of an order that the party appear for the deposition with a warning that failure to do so will result in dismissal of the party's lawsuit or entry of default against the party, is an appropriate lesser sanction. See Hall v. Johnston, supra, 758 F.2d at 424; Kabbe v. Rotan Mosle, Inc., supra, 752 F.2d 1083, 1084; Collins v. Wayland, supra, 139 F.2d at 678; Founding Church of Scientology of Washington, D.C., Inc. v. Webster, supra, 802 F.2d at 1450 (D.C. Cir. 1986).

In the instant case, the District Court complied with the requirement that it consider lesser sanctions, in exactly the same manner approved by this Court in the cases cited above. When Degrelle failed to appear for his first two depositions, the Simon Wiesenthal Center moved to dismiss the lawsuit pursuant to Federal Rule of Civil Procedure 37(d). Although the District Court could have dismissed the case at that point

pursuant to Rule 37(d), the District Court resorted to the lesser sanction of ordering Degrelle to appear for his deposition, and warning him that the lawsuit would be dismissed unless he appeared for the deposition or obtained a protective order. When Degrelle's protective order was denied, the warning regarding dismissal was repeated by the Magistrate. However, that sanction was not adequate; Degrelle did not attend the court ordered deposition.

Failure by this Court to uphold the sanction imposed by the District Court in this case, after the District Court specifically warned Degrelle that the case would be dismissed if he didn't comply, would surely "undermin[e] the authority of our district judges to prevent further proliferation of discovery abuses." Davis v. Fendler, 650 F.2d 1154, 1161 (9th Cir. 1981). See also National Hockey League v. Metropolitan Hockey Club, Inc., supra, 427 U.S. at 642-643, 96 S.Ct. at 2780-2781.

C. THE MAGISTRATE DID NOT ABUSE HIS DISCRETION BY DENYING DEGRELLE'S MOTION FOR PROTECTIVE ORDER.

It is clear that the Magistrate did not abuse his discretion by denying the protective order. The Magistrate carefully considered all of the factors relevant to Degrelle's request for a protective order and denied the protective order in three well reasoned opinions.

Degrelle moved for a protective order deferring the taking of his deposition until ten days before trial or, alternatively,

providing that his deposition be taken upon written interrogatories in Spain.

1. Denial of Degrelle's Request That His Deposition Be Deferred Until Ten Days Before Trial Did Not Constitute An Abuse of Discretion.

The Magistrate did not abuse his discretion in denying Degrelle's request that his deposition be deferred until ten days before trial. Requiring the defendant to wait until ten days before trial to depose the plaintiff would have been extremely prejudicial. If it had to wait until ten days before trial to take Degrelle's deposition, the Simon Wiesenthal Center would have been deprived of the opportunity to obtain Degrelle's testimony far enough in advance of trial to be able to use that testimony as a basis for further discovery. The Simon Wiesenthal Center would not have had enough time to make a summary judgment motion based on Degrelle's testimony, because such a motion has to be made on 21 days' notice. (Local Rule 7.4) Furthermore, local rules require that all discovery be completed at least 20 days before the pre-trial conference. (See Defendant's Opposition To Plaintiff's Motion For Protective Order Re Taking of Plaintiff's Deposition, CR 17, p. 3.; Magistrate's Order dated March 20, 1987, CR 20, AER p. 72.)

For the above reasons, it is clear that the Magistrate did not abuse his discretion when he denied Degrelle's request that his deposition be deferred until ten days before trial.

2. Denial of Degrelle's Request That His Deposition Be Taken Upon Written Interrogatories In Spain Did Not Constitute An Abuse of Discretion.

The Magistrate did not abuse his discretion in denying Degrelle's request that his deposition be taken upon written interrogatories in Spain.

a. The Magistrate's Determination that an Oral Deposition Would Be A Superior Method of Discovery In This Case, Because Degrelle's Testimony Was Crucial to the Determination of Factual Issues and Degrelle Was Likely To Be A Witness At Trial, Was Not Clearly Erroneous.

The Magistrate held that "oral deposition is a superior method of discovery, especially where, as here, the deponent's testimony is crucial to the determination of factual issues and the deponent is likely to be a witness at trial." (Order Regarding Plaintiff's Motion For Protective Order filed March 20, 1987, CR 20, pp. 3-4, AER pp. 72-73.)

It is well settled that "the party seeking discovery is entitled to choose the method by which it is to be had." Wright & Miller, Federal Practice and Procedure 2039 at 281 (1970). The Simon Wiesenthal Center chose to take an oral deposition of Degrelle. It is clear that a defendant is entitled to cross-examine a plaintiff face-to-face before trial, in order to observe plaintiff's demeanor, to conduct a spontaneous exchange of questions and answers, and to pursue those answers requiring further inquiry. See Founding Church of Scientology v. Webster,

802 F.2d 1448, 1451 (D.C. Cir. 1986). None of these advantages of oral examination can be accomplished by written examination. As Justice Whitaker stated while he was a district judge:

> "From my long experience at the Bar, I can readily agree that the device of taking a depostion upon written interrogatories under Rule 31, except for the proof of formal matters, is a tool of discovery very inferior to oral examination."

Perry v. Edwards, 16 F.R.D. 131, 133 (D. Mo. 1954). See also National Life Insurance Co. v. Hartford Acc. & Indem. Co., 615 F.2d 595, 500-600 and n.5 (3d Cir. 1980) ("[Fed.R.Civ.P. 30] gives the party, not the witness, the option of conducting a deposition by written questions. . . . Indeed, there are strong reasons why a party will select to proceed by oral deposition rather than alternate means, most significantly the spontaneity of the responses."); Alliance to End Repression v. Rochford, 75 F. R. D. 429 (N. D. Ill. 1976) (Mayor Daley of Chicago ordered to appear for oral depostion; request that discovery be conducted on written interrogatories denied because oral deposition is preferable to written interrogatories when dealing with recalcitrant or hostile witness).

Degrelle, a former Waffen SS General, had made serious allegations against the Simon Wiesenthal Center. Many of those allegations depended entirely on Degrelle's testimony for proof. The Simon Wiesenthal Center was entitled to an early opportunity to conduct an oral deposition of Degrelle, if his testimony was to be obtained and used in any meaningful way prior to trial.

It was especially important to be able to conduct an early oral examination of Degrelle regarding his wartime activities and whereabouts, since further discovery on those matters would have required cooperation of foreign governments and taken a long time.

For these reasons, the Magistrate's factual determinations that oral deposition would be a superior method of discovery in this case, because Degrelle's testimony was crucial to the determination of factual issues and Degrelle was likely to be a witness at trial, were not clearly erroneous. 3/

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3. The possibility of requiring Degrelle to respond to written interrogatories to be followed by an oral deposition a few weeks prior to trial was also considered by the Magistrate and rejected. Even assuming that the oral deposition would take place sufficiently far enough in advance of trial to permit defendant to use the deposition to engage in additional discovery, to make a motion for summary judgment, or for other purposes, the proposed procedure would still be unfair to defendant because it would deprive defendant of its right to conduct an oral deposition in the first instance. See 8 Wright & Miller, Federal Practice and Procedure 2039 at 281 (1970). If the Simon Wiesenthal Center had been required first to send interrogatories to plaintiff, and then only later been allowed to depose him, Degrelle would have the advantage of previewing defendant's lines of inquiry far in advance of his actual deposition, while the Simon Wiesenthal Center would be deprived of the right to spontaneous cross examination. Moreover, if Degrelle chose not to answer the interrogatories, or objected to them, the Simon Wiesenthal Center would have discovered nothing, would have revealed its discovery plan, and would have been forced to engage in time consuming motion practice.

b. The Magistrate's Factual Determination That Degrelle Failed To Establish That His Physical Condition Prevented Travel To Los Angeles or An Oral Deposition Was Not Clearly Erroneous.

Degrelle claimed that he should be questioned by written interrogatores rather than oral deposition in Los Angeles because of his poor health. (Motion For Protective Order, CR 19, AER p. 69.) The Magistrate ruled that Degrelle had not established that his health prevented an oral deposition in Los Angeles. (Order dated March 20, 1987, CR 20, AER p. 74; Order dated June 5, 1987, CR 36, AER pp. 77-78; Order dated August 4, 1987, CR 41, AER pp. 92-94.)

The party moving for a protective order has the burden of showing good cause for the order. Rule 26(c) of the Federal Rules of Civil Procedure; Slade v. Transatlantic Financing Corp., 21 F.R.D. 146 (S.D.N.Y. 1957); Clem v. Allied Van Lines International Corp., 102 F.R.D. 938 (S.D.N.Y. 1984); Seuthe v. Renwal Products, Inc., 38 F.R.D. 323, 325 (S.D.N.Y. 1965). Degrelle therefore had the burden of establishing that his physical condition prevented a deposition in Los Angeles.

The Magistrate's factual determination that Degrelle's health did not preclude his deposition in Los Angeles was not clearly erroneous because:

1) Degrelle admitted he was capable of coming to Los Angeles for trial;

2) Degrelle failed to submit any admissible evidence to show that his health precluded his attendance at a deposition in Los Angeles; and

3) The Magistrate's designated medical expert concluded that Degrelle was capable of attending a deposition in Los Angeles, based on the reports of Degrelle's physician.

Degrelle's motion for protective order indicated that he planned to appear in Los Angeles for trial. In fact, Degrelle offered to submit himself for oral deposition in Los Angeles ten days prior to trial. (Supporting Affidavit to Motion For Protective Order, CR 19, AER p. 69.) Degrelle did not make any attempt to explain why he would be able to travel to Los Angeles for trial and a deposition ten days prior to trial, but was physically unable to come to Los Angeles for his noticed depositions. Furthermore, Degrelle would be subjected to at least as much pressure and stress during his trial testimoney as he would be during his deposition testimony.

In his first order, the Magistrate concluded that "Plaintiff's allegations that his health prevents his traveling for deposition in Los Angeles and that he is somehow in danger from defendant in traveling here are not credible in view of his offer to appear for deposition here ten days before trial." (Order Regarding Plaintiff's Motion For Protective Order filed March 20, 1987, CR 20, p. 4, AER p. 73.) Clearly, if Degrelle was physically able to make the trip for trial, it was not clearly erroneous for the Magistrate to conclude that Degrelle was physically able to make the trip for his deposition.

Degrelle failed to meet his burden of establishing to the trial court that his medical condition prevented either his travel to Los Angeles or an oral deposition. Degrelle did not

submit any admissible evidence of his medical condition. In his first order, the Magistrate gave Degrelle the opportunity to "submit to the Court ... his physician's sworn declaration as to any medical treatment not presently required by plaintiff that plaintiff will need solely as a result of travel to Los Angeles." (Order Regarding Plaintiff's Motion For Protective Order filed March 20, 1987, CR 20 p. 5, AER p. 74.)

Degrelle never submitted such a declaration. The Magistrate therefore concluded in his second order that "Insufficient evidence has been submitted to justify a protective order on medical grounds. No reason has been advanced why, if plaintiff can journey to Los Angeles for trial, he cannot make an earlier trip to give his deposition." (Magistrate's Order filed June 5, 1987, CR 36, pp. 1-2, AER pp. 77-78.)

On July 30, 1987, Degrelle filed a Motion For Rehearing Re Protective Order. A May 12, 1987 letter from Degrelle's doctor was submitted in support of the motion. (AER pp. 90-91.) The Magistrate denied the motion. Even though Degrelle did not meet the requirements for a motion for reconsideration, the Magistrate considered the motion on the merits. Even though the letter from Degrelle's doctor was not under oath, and therefore was not admissible evidence, the Magistrate considered it. Furthermore, the Magistrate went so far as to consult an independent medical expert regarding Degrelle's alleged condition and the information set forth in Degrelle's doctor's letter. The Magistrate held as follows:

> "[T]he Magistrate has consulted a Court-designated medical expert regarding Dr. Manzanares' report and

what it reflects regarding plaintiff's medical condition and consequent restrictions on his activities. The expert indicated that, based upon the entire report and particularly the medications cited therein, plaintiff's cardiac condition is stable. The expert concluded that none of the medical problems described would preclude plaintiff from air travel from Spain to Los Angeles to appear for deposition."

(Magistrate's Order filed August 4, 1987, CR 41, p. 3, AER p. 94.)

In Montgomery v. Sheldon, 16 F.R.D. 34 (S.D.N.Y. 1954), the court ordered the plaintiff, a resident of Washington State, to appear for his oral deposition in New York, the forum in which he filed his lawsuit. Although there was some evidence that an oral deposition might subject the plaintiff to stress and possible impairment of his health, the Court rejected this as an excuse for ordering that the deposition be conducted on written questions:

"The general rule is that a plaintiff, having chosen the forum, must submit to oral examination within the district that he has chosen ... [Plaintiff's doctor] considers it important for him to avoid nervous tension and that mental stress or strenuous excitement . . . might be expected to produce serious impairment of his health. The administration of justice in such fashion as to avoid mental strain is beyond human wisdom. Plaintiff would

have to subject himself to nervous tension at the time of trial even if he were shielded from it now." 16 F. R. D. at 35 (emphasis added).

For the reasons set forth above, the Magistrate's factual determination that Degrelle had failed to establish that he was too ill to travel to Los Angeles or too ill to be deposed on oral examination was not clearly erroneous. It is therefore clear that the Magistrate did not abuse his discretion by denying Degrelle's request that he be deposed on written interrogatories in Spain. 4/

3. The Magistrate Considered, Sua Sponte, Other Alternatives To Oral Deposition In Los Angeles, But Determined That Those Other Alternatives Were Not Feasible.

Rather than simply denying the two alternatives requested by Degrelle in his motion for protective order, the Magistrate sua sponte considered other possibilities that would have allowed the Simon Wiesenthal Center to depose Degrelle orally, but would not have required Degrelle to travel to Los Angeles for his

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4. The letter from Dr. Manzanares dated September 2, 1987, which Degrelle attached to the Brief For Appellant, was not under oath and was not a part of the record below. Therefore, this Court may not consider the letter. Rainbow Pioneer No. 44-18-04A v. Hawaii-Nevada Investment Corp., 711 F.2d 902, 906 (9th Cir. 1983) (On defendants' appeal from district court order imposing sanction of default, Court of Appeals held that "our action on appeal can properly be based only upon a record considered by the trial court. It would be inappropriate for us to reverse the trial court on the basis of facts not incorporated in the record which the trial court considered at the time of its decision.") In any case, the information contained in the September 2, 1987 letter is similar to the information contained in earlier letters submitted by Degrelle to the Magistrate.

deposition. The Magistrate, sua sponte, considered the possibility of deposing Degrelle in Spain, even though Degrelle did not raise this alternative. In his March 20, 1987 Order, the Magistrate requested briefing on "the issue of whether oral deposition is possible in Spain ... specifically addressing whether the parties themselves may put questions to the dependent and the time involved." (Order Regarding Plaintiff's Motion For Protective Order filed March 20, 1987, CR 20 p. 5, AER p. 74.) This demonstrates that the Magistrate was careful to protect Degrelle's rights.

After considering United States law, the law of Spain, and treaties between the United States and Spain, the Magistrate concluded that Degrelle's deposition should be held in Los Angeles rather than Spain, with the Simon Wiesenthal Center paying for Degrelle's travel costs. As explained below, the Magistrate's decision not to order that the deposition take place in Spain was not an abuse of discretion because:

1. The general rule is that a plaintiff is required to submit to deposition in the district in which the lawsuit was filed, unless the plaintiff is able to demonstrate unreasonable hardship or special circumstances.

2. Degrelle failed to demonstrate sufficient hardship or special circumstances to warrant the taking of his deposition in Spain; and

3. The Magistrate determined that an oral deposition in Spain was not feasible.

a. The General Rule Is That a Plaintiff Is Required to Submit To Deposition In The District In Which the Lawsuit Was Filed, Unless the Plaintiff Is Able to Demonstrate Unreasonable Hardship Or Special Circumstances.

The general rule is that a plaintiff's deposition may be taken in the district in which the lawsuit was filed, unless the plaintiff is able to demonstrate unreasonable hardship or special circumstances. "[T]he plaintiff will not be heard to complain about having to appear in the forum-district for the taking of its deposition, since it selected that forum in the first instance." Dollar Systems, Inc. v. Tomlin, 102 F.R.D. 93, 94 (M. D. Tenn). While federal courts generally require that a defendant be deposed at the place of his residence or at his place of business or employment, "[t]he above statement does not apply to plaintiffs, however, who selected the forum and may therefore be called upon to present themselves at that place for the taking of their depositions, despite any inconvenience this may cause to them." Continental Federal S. & L. Ass'n v. Delta Corp., 71 F. R. D. 697, 699 (W. D. Okla. 1976), quoting Grey v. Continental Marketing Associates, Inc., 315 F. Supp. 826, 832 n.16 (N. D. Ga. 1970).

In Clem v. Allied Van Lines International Corp., 102 F.R.D. 938 (S.D.N.Y. 1984), plaintiff, who resided in the United Arab Emirates, was ordered to attend a deposition in New York, rather than have his deposition conducted long-distance by telephone. The Court stated:

"[T]his Court has long enunciated the policy of requiring a non-resident plaintiff who chooses this district as his forum to appear for deposition in this forum absent compelling circumstances. [Citations omitted.]" 102 F. R. D. at 939.

See also Carter-Wallace, Inc. v. Hartz Mountain Industries, 553 F. Supp. 45, 51-52 (S. D. N. Y. 1983) (Deposition of 87-year old founder of plaintiff corporation ordered to proceed as noticed at date, time and place of defendant's choosing; motion for protective order denied).

The plaintiff can be excused from having his deposition taken at the situs of the action only by demonstrating unreasonable hardship or special circumstances. Slade v. Transatlantic Financing Corp., 21 F. R. D. 146 (S.D.N.Y. 1957). The party moving for the protective order has the burden of establishing unreasonable hardship or special circumstances. Federal Rule of Civil Procedure 26(c). Even if plaintiff can demonstrate hardship or special circumstances, the burdens on him must be weighed against the burdens on defendant in not being able to take the deposition at the situs of the action. See Slade, supra, 21 F.R.D. at 147 (Whatever hardship might result to the plaintiff in having to travel from London to New York for his deposition has to be weighed against the defendant's needs for an oral deposition of the plaintiff).

b. Degrelle Failed to Demonstrate Sufficient Hardship Or Special Circumstances To Warrant the Taking of His Deposition In Spain. The Magistrate's

Order Alleviated Degrelle's Alleged Financial Hardship By Requiring the Simon Wiesenthal Center To Provide Degrelle With A Round Trip Airline Ticket To Los Angeles.

As discussed above, the Magistrate determined that Degrelle had failed to establish that his physical condition prevented travel to Los Angeles for his deposition.

The other form of hardship or special circumstance which Degrelle claimed was the lack of financial resources to travel to Los Angeles at his own expense at the time of the deposition. (Supporting Affidavit to Motion For Protective Order, CR 19, AER p. 69.) However, the Magistrate's order that the Simon Wiesenthal Center provide Degrelle with a round trip airplane ticket alleviated this alleged hardship. 5/

Degrelle now argues on appeal that the Magistrate should have also ordered the Simon Wiesenthal Center to pay for the travel costs of a medical attendant for Degrelle. However, the Simon Wiesenthal Center is a charitable, non-profit institution. It depends entirely on contributions for its existence. (Declaration of Susan Burden, CR 17, p. 15, AER p. 76.) The Magistrate did not abuse his discretion by balancing the hardships, and requiring the Simon Wiesenthal Center to pay Degrelle's travel costs but requiring Degrelle to pay the travel costs for an attendant should he desire one.

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5. It should be noted that the general rule is that the plaintiff has to pay his own travel costs to attend his deposition in the district in which he filed the lawsuit. Detweiler Brothers, Inc. v. John Graham & Co., 412 F.Supp. 416, 422 (E.D.Wa. 1976).

c. The Magistrate's Determination That An Oral Deposition In Spain Was Not Feasible Was Not Clearly Erroneous.

The Magistrate considered the possibility of conducting Degrelle's deposition in Spain, but determined that this procedure was not feasible. Letters rogatory to depose a Spanish citizen are provided for by Spanish law. Code of Civil Procedure of Spain, article 300. However, under this procedure, the questions are posed by a Spanish judge from the list of questions sent with the letters regatory. Code of Civil Procedure of Spain, articles 647-652. The American attorneys are not allowed to conduct the examination. (See Defendant's Supplemental Opposition To Plaintiff's Motion For Protective Order and attached declarations and treatises, CR 34.)

The only possible procedure by which the parties themselves could put the questions to the deponent in Spain is by a deposition through a U.S. Consular Official. However, a requirement of such a consular deposition is that the witness appear for the deposition voluntarily. There is no procedure in Spain for compelling a witness who is not an American citizen to appear at a consular deposition or compelling the witness to answer questions. 6/ (See Defendant's Supplemental Opposition

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6. The Treaty of Friendship and General Relations between the United States and Spain, signed at Madrid on July 3, 1902, entered into force on April 14, 1903, 33 Stat. 2105, TS 422, 11 Bevans 628, Article XXII, provides that Consular Agents shall have the power to take at their offices, their private residence, at the residence of the parties concerned or on board ship, the depositions of any citizen or subject of their own country. No such provision is made for taking the deposition of

(footnote continued)

To Plaintiff's Motion For Protective Order and attached declarations and treatises, CR 34.) Furthermore, depending on availability of consular personnel, availability of space, and other considerations, the consulate may not be able to schedule a deposition for several months, and may in fact even refuse to conduct the deposition. (Id.)

Conducting the deposition in Spain would have made it extremely difficult for the Magistrate to rule by telephone on objections and refusals to answer questions. Conducting the deposition in Spain, if the U.S. consulate could have scheduled it, would have been extremely burdensome, time consuming and costly. It probably would have been necessary to bring a court reporter from the United States to Spain.

After carefully considering all of the above, the Magistrate concluded as follows:

> "[O]ral deposition is a superior method of discovery, especially where, as here, the deponent's testimony is crucial to the determination of factual issues and the deponent is likely to be a witness at trial. Interrogatories to plaintiff will not suffice, and it is uncertain at best and very complicated and expensive at worst, to attempt to depose plaintiff in Spain." (Magistrate's Order filed June 5, 1987, pp. 2-3, AER pp. 78-79.)

(footnote 6 continued)

citizens of the host country. See Bruno Ristau, International Judical Assistance (Civil and Commercial), Volume 1, P. C1-189, a copy of which is attached as Exhibit B to Defendant's Supplemental Opposition To Plaintiff's Motion For Protective Order, CR 34.

The Magistrate did not abuse his discretion by determining that the deposition should take place in Los Angeles rather than in Spain. Once again, it should be noted that Degrelle did not even request that the oral deposition be taken in Spain; this alternative was considered sua sponte by the Magistrate.

V. CONCLUSION

For the reasons set forth above, this Court should dismiss the appeal because Degrelle waived his right to appeal the District Court order dismissing this lawsuit by failing to object to the Magistrate's denial of his protective order and then failing to oppose the motion to dismiss.

If this Court does not dismiss the appeal, it should determine that the Magistrate did not abuse his discretion by denying Degrelle's motion for a protective order. Furthermore, the District Court did not abuse its discretion when it dismissed Degrelle's action after Degrelle failed to appear at his own properly noticed deposition on two occasions, and then failed to appear for his own court ordered deposition on a third occasion. The District Court's order dismissing the lawsuit should therefore be affirmed.

Dated: December 17, 1988

Respectfully submitted,

BERMAN, BLANCHARD, MAUSNER & KINDEM

By: Jeffrey N. Mausner

JEFFREY N. MAUSNER, attorneys
for Defendant-Appellee The
Simon Wiesenthal Center

PROOF OF SERVICE

STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

I am employed in the county of Los Angeles, State of California.

I am over the age of 18 and am not a party to the within action; my business address is: 4727 Wilshire Boulevard, Suite 500, Los Angeles, California 90010.

On December 19, 1988, I served the foregoing document(s) described as follows:

Brief Of Defendant Appellee
Appellee's Excerpts Of Record

on the interested party(ies) in this action by placing a true copy thereof enclosed in a sealed envelope addressed as follows:

Please See Attached Service List

XXX (BY MAIL) I placed such envelope with postage thereon fully prepaid in the United States mail at Los Angeles, California.

_____ (BY PERSONAL SERVICE) I delivered such envelope by hand to the addressee(s) or to the office of the addressee(s).

_____ (STATE) I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

XXX (FEDERAL) I declare that I am employed in the office of a member of the bar of this court at whose direction the service was made. I declare, under penalty of perjury, that the foregoing is true and correct.

Executed on December 19, 1988, at Los Angeles, California.

Christopher J. Abreu
Type or Print Name

Christopher J. Abreu
Signature

Service List

1) Via Federal Express on
General Leon Degrelle
37 Santa Engracia
Madrid, 10, Spain

Two (2) Brief's Of Defendant Appellee
One (1) Appellee's Excerpts of Record

2) Via United States Mail on
Robert A. Von Esch, Jr. & Assoc.
Mark F. Von Esch
535 Commonwealth Avenue
Fullerton, Ca. 92632

Two (2) Brief's Of Defendant Appellee
One (1) Appellee's Excerpts of Record

3) Honorable Robert M. Takasugi
United States District Court
312 North Spring Street
Los Angeles, Ca. 90012

One (1) Brief Of Defendant Appellee

4) Honorable Volney V. Brown
United States Magistrates
312 North Spring Street
Los Angeles, Ca. 90012

One (1) Brief Of Defendant Appellee

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH JUDICIAL CIRCUIT

COURT OF APPEALS NO. 87-6486

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA
Honorable Robert M. Takasugi, Judge

GENERAL LEON DEGRELLE,

Plaintiff-Appellant,

vs.

SIMON WIESENTHAL CENTER,

Defendant-Appellee.

STATEMENT OF RELATED CASES
AS REQUIRED BY CIRCUIT RULE 28-2.6

The undersigned counsel of record for the Simon Wiesenthal Center, Defendant-Appellee, certifies that there are no related cases pending in this Court.

Dated: December 17, 1988

BERMAN, BLANCHARD, MAUSNER & KINDEM

By: Jeffrey N. Mausner

JEFFREY N. MAUSNER
Attorneys for Defendant-Appellee
the Simon Wiesenthal Center