UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
ALEXANDRIA DIVISION

SUHAIL NAJIM ABDULLAH AL SHIMARI *et al*.,	)	
Plaintiffs,	)	
v.	)	C.A. No. 08-cv-0827 GBL-JFA
CACI PREMIER TECHNOLOGY, INC.,	)	PUBLIC REDACTED VERSION
Defendant.	)	

PLAINTIFFS' MEMORANDUM IN OPPOSITION TO DEFENDANT'S MOTION FOR SANCTIONS

George Brent Mickum IV (VA Bar # 24385)
Law Firm of George Brent Mickum IV
5800 Wiltshire Drive
Bethesda, MD 20816
Telephone: (202) 281-8662
gbmickum@gmail.com

Baher Azmy, *Admitted pro hac vice*
Katherine Gallagher, *Admitted pro hac vice*
CENTER FOR CONSTITUTIONAL RIGHTS
666 Broadway, 7th Floor
New York, NY 10012

Robert P. LoBue, *Admitted pro hac vice*
PATTERSON BELKNAP WEBB & TYLER LLP
1133 Avenue of the Americas
New York, NY 10046

Shereef Hadi Akeel, *Admitted pro hac vice*
AKEEL & VALENTINE, P.C.
888 West Big Beaver Road
Troy, MI 48084-4736

Attorneys for Plaintiffs

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PRELIMINARY STATEMENT

Defendant CACI Premier Technology, Inc. ("CACI") has filed a second motion seeking to dismiss all claims of Plaintiffs Al Shimari, Rashid, and Al-Zuba'e (the "Baghdad Plaintiffs") under Fed. R. Civ. P. 37, on account of their inability to appear for depositions in this District. The motion is incoherent. On the one hand, CACI argues that Plaintiffs were dilatory in attempting to secure visas to travel to the United States in a manner that somehow constitutes bad faith – an argument that was rejected by this Court in its April 12, 2013 ruling denying CACI's first motion for sanctions. Dkt. 307. Yet, at the same time, CACI argues (in reckless and inflammatory terms) that the Baghdad Plaintiffs are "terrorists" who would *never*, regardless of Plaintiffs' efforts, be allowed to appear here – an argument that is as factually dishonest as it is legally irrelevant to the standards governing discovery sanctions under Rule 37.

CACI's motion is further larded with suspicion and innuendo about an imagined cover-up and wrongdoing, all of which is belied on its face by the fact that the Baghdad Plaintiffs were actually granted visas by the U.S. government under a process that would deny a visa to anyone suspected of having terrorist associations. *See* INA § 212 (a)(3)(B). Equally confounding is CACI's repeated suggestion that Plaintiffs' counsel actually know – but are withholding from the Court – that the Baghdad Plaintiffs are in the terrorist screening database, Def. Br. 8-9; CACI makes this completely unfounded accusation at the same time it submits an expert declaration stating that U.S. government policy prohibits informing individuals (such as Plaintiffs' counsel) about who is on such a database or are on a No Fly List, Def. Br. 15, and despite its awareness that the Department of Homeland Security has refused to answer a subpoena from Plaintiffs seeking this very information. CACI's expert declaration is perhaps an attempt to quell suspicion that CACI's long-standing relationship with the Department of Homeland Security and connections to Iraq had something to do with the peculiar circumstances surrounding Plaintiffs'

inability to travel;[1] yet, CACI's expert declaration has little other utility except to confirm Plaintiffs' contention that it is highly unusual for individuals on a No Fly List to ever receive boarding passes, as Plaintiffs did before being denied permission to board their flight. *See* Declaration of Baher Azmy, Esq., dated May 6, 2013 ("Azmy Decl.") ¶ 32 & Ex. 13.

In sum, CACI's motion offers no basis to revisit this Court's prior conclusion that Defendant has failed to demonstrate the "willfulness" or "flagrant bad faith" necessary to authorize the sanction of dismissal under Rule 37. The motion should be denied, and the Baghdad Plaintiffs' depositions should be ordered to be taken by video. First, pursuant to Local Rule 30(A), "special circumstances" exist to permit the Baghdad Plaintiffs' depositions to occur outside this district. This Rule embodies a long-standing constitutional principle obligating courts to accommodate a party's constitutional right to a day in court through alternative discovery mechanisms, such as video depositions. Plaintiffs demonstrate "special circumstances" because they have made every effort to appear in this District – including obtaining visas, purchasing tickets and obtaining boarding passes – but have been prevented from appearing by forces outside of their control. As described below, courts routinely order video depositions and video trial testimony.

Second, this Court has already reviewed Defendant's arguments to dismiss the Baghdad Plaintiffs under Fed. Rule Civ. P. 37, and has concluded that Defendant failed to meet its burden of demonstrating that Plaintiffs have exercised "flagrant bad faith" or "willfully" refused to appear for depositions in this District – especially given the efforts they undertook to get themselves to the United States. *See* dkt. 307; April 12, 2013 Hr'g Tr. 52:4-9, 13-18. There is no reason for this Court to reconsider its prior holding. Since the Court's ruling, Plaintiffs have undertaken additional efforts to ascertain why Plaintiffs have been unable to travel, including additional demands of the State Department, a subpoena (and motion to compel) to DHS, and

[1] Plaintiffs have filed a motion to compel DHS to produce documents to address this issue, dkt. 380, and have filed a motion to compel properly informed testimony under Rule 30(b)(6) addressing this issue, dkt. 392.

following the DHS administrative process related to No Fly Lists. Given the alternative available mechanisms for depositions, dismissal on these facts would constitute an abuse of discretion.

Finally, Defendant continues to press willful falsehoods about the Plaintiffs' supposed "terrorist" activities or associations – allegations that are either asserted without citation to evidence or are conclusively refuted by the very documents Defendant bothers to reference. The assertions are no way relevant to the question presented before the Court or to Plaintiffs' entitlement to a remedy for their mistreatment, which is what makes the charges particularly odious. Still, the Baghdad Plaintiffs, just like Plaintiff Al-Ejaili, are not "terrorists" or "enemy combatants"; they were designated civilian internees and mistakenly rounded up – and brutalized – like hundreds of other Iraqi citizens subject to a sometimes chaotic military occupation. They have suffered a great ordeal. They deserve to have their claims heard by this Court.

FACTUAL BACKGROUND

A. Plaintiffs' 2008 Visa Applications and Defendant's Delay in this Litigation

The Baghdad Plaintiffs in this case first applied for visas via then lead counsel, Susan Burke, Esq., to travel to the United States for the purposes of this litigation in 2008, soon after filing suit in this Court. Azmy Decl. ¶ 5. Defendant moved to dismiss Plaintiffs' complaint and, in October 2008, obtained a stay of discovery. Dkt 64. After Defendant's motion to dismiss was denied in March 2009, Defendant's pursuit of a baseless interlocutory appeal, *see Al Shimari v. CACI Int'l, Inc.*, 679 F.3d 205 (4th Cir. 2012) (en banc), produced an over three-year delay until re-commencement of discovery in November 2012. Litigation visas typically only last one year. Thus, given the discovery stay and extensive proceedings in the Court of Appeals, Plaintiffs naturally did not move forward with their 2008 visa applications; in 2009, they were administratively closed due to inaction. Azmy Decl. ¶ 11.

Soon after Defendant's appeal was dismissed, but during the 90-day period in which Defendant could have sought certiorari review, as it had stated its intentions were,[2] counsel for Defendant and Plaintiffs' then-lead counsel (who in early December 2012 withdrew from Plaintiffs' representation[3]), Susan Burke, Esq., discussed Plaintiffs' appearance for depositions whenever the order staying discovery in this litigation was lifted. Declaration of Susan Burke, Esq., dated April 10, 2013 ("Burke Decl."), dkt. 290, at ¶¶ 2-4. At that time, Ms. Burke suggested to counsel for Defendant that Plaintiffs' depositions be scheduled at the end of discovery, or alternatively, to avoid delaying access to Plaintiffs, that Defendants conduct depositions of Plaintiffs in Istanbul, Turkey. Burke Decl. ¶¶ 3-4. Ms. Burke also alerted Defendant's counsel that she could not predict how long it would take to obtain the necessary permissions for Plaintiffs' entry into the United States, and that Defendants' interests would be better served by taking earlier depositions in Istanbul. Burke Decl. ¶ 4. In addition, Plaintiffs' counsel understood that given the typical one-year duration of a litigation visa, it could have been premature to actually obtain visas prior to the entry of a discovery order, without more certainty about the scheduling of discovery and a potential trial. Azmy Decl. ¶¶ 6, 11.

B. Plaintiffs' Good Faith Efforts to Obtain Visas to Enter the United States Since the Re-Commencement of Discovery

On October 12, 2012, this Court held a status conference, dkt. 149, soon after which Ms. Burke engaged with Plaintiffs to obtain visas for their entry, Azmy. Decl. ¶ 6. The Court

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[2] After its appeal was finally dismissed, *see Al Shimari v. CACI Int'l, Inc.*, 679 F.3d 205 (4th Cir. 2012) (en banc), Defendant moved to stay the Court of Appeals' mandate on the grounds that it intended to file a petition for certiorari to the United States Supreme Court. *See* Appellants' Mot. Stay Mandate, *Al Shimari v. CACI Int'l, Inc.*, No. 09-1335 (4th Cir. May 31, 2012), ECF No. 179. That Motion was denied. Dkt. 141. Still, Defendant had 90 days to seek certiorari review in the Supreme Court, from the date of the Fourth Circuit's judgment, and yet another opportunity to seek a stay of discovery in this Court. Despite Defendant's representations to the Court of Appeals and Plaintiffs' counsel, it did not ultimately seek certiorari review.

[3] On December 3, 2012, Susan Burke, Esq., who had served as lead counsel in this case, informed CACI and Plaintiffs' counsel of her intention to withdraw from the case and cease working on it. Azmy Decl. ¶ 8.

subsequently lifted the stay of discovery on November 6, 2012, dkt. 160, and almost immediately following the entry of the Court's November 6th Order lifting the discovery stay in this case, Dkt. 160, Plaintiffs' counsel planned a trip to Istanbul to meet with Plaintiffs to discuss the status of the case. Azmy Decl. ¶ 7. Plaintiffs' counsel also knew they had to press the visa application process, which had been complicated somewhat by uncertainty about the status of prior visa applications that Plaintiffs had submitted in 2008 at the U.S. Embassy in Ankara, Turkey (apparently, the U.S. Embassy in Baghdad was not then able to process visas) in anticipation for appearing in this litigation. *Id*. Those applications had lain dormant during the stay of discovery imposed as a result of CACI's appeal to the Fourth Circuit, and were administratively closed. Azmy Decl. ¶ 11. Counsel reasonably believed it imprudent to file new or duplicative applications, without obtaining certainty about the status of the prior applications, as multiple filings of visa applications risked causing significant processing delay of their visas or leading to outright denial. Azmy Decl. ¶¶ 7, 9-10.

After postponing a planned trip to Istanbul during the week of November 26, 2012 due to scheduling difficulties, counsel for Plaintiffs met with all four Plaintiffs in Istanbul during the week of December 10, 2012. Azmy Decl. ¶ 9. During that trip, Plaintiffs' counsel confirmed that the Baghdad Plaintiffs had previously submitted visa applications in Ankara in 2008 (which were subsequently administratively closed). Azmy Decl. ¶ 9 & Ex. 1. Immediately after returning to the United States, on December 17, 2012, Plaintiffs' counsel sought to confirm the status of the 2008 applications and obtained instructions on how to file new applications in U.S. embassies in Baghdad and Doha and continued collecting information for renewed visa applications. Azmy Decl. ¶¶ 10-11.

On December 25, 2012, Mr. Al-Ejaili's visa application to the U.S. Embassy in Doha was completed. Azmy Decl. ¶ 14 & Ex. 3. Days later, on December 31, 2012, visa applications for the Baghdad Plaintiffs were completed and submitted to the U.S. Embassy in Baghdad, Iraq, along with letters from Plaintiffs' counsel requesting expedited processing. Azmy Decl. ¶¶ 17-18

& Exh. 5.[4] The U.S. Embassy in Doha scheduled an interview of Mr. Al-Ejaili on January 9, 2013. The U.S. Embassy in Baghdad scheduled and conducted interviews of the Baghdad Plaintiffs as well as Plaintiffs' bi-lingual Iraqi coordinator (who Plaintiffs hoped would be able to escort the Plaintiffs on their first trip to the United States) on January 23, 2013. Azmy Decl. ¶ 19.

On February 8, 2013, Defendant moved to compel the depositions of Plaintiffs. Dkt. 196. By that time Plaintiffs had already informed Defendant that they were willing to appear for depositions and that they were making efforts to appear in this District, and had also offered alternative venues for their depositions to take place in an expeditious manner. *See* Dkt. 202 at ¶ 10. Following the Court's Order granting Defendant's motion to compel Plaintiffs' depositions in February, dkt. 205, Plaintiffs' counsel worked diligently with State Department officials in Washington, D.C., in the Office of the Legal Advisor and the in the Office of Democracy, Human Rights and Labor, to expedite the processing of the Baghdad Plaintiffs' visas. Azmy Decl. ¶ 23 & Ex. 8.

By February 25, 2013, all four Plaintiffs' applications for visas to enter the United States had been approved and visas were granted by the United States Department of State. Azmy Decl. ¶ 24 & Ex. 9. Counsel proceeded to work together to schedule depositions in accordance with the Order. Azmy Decl. ¶ 26. Plaintiff Salah Hasan Al-Ejaili, who currently resides in Doha, Qatar, appeared in the United States for deposition and medical examinations during the week of March 4, 2013. Azmy Decl. ¶ 25. He left the United States to return to Qatar on March 6, 2013. *Id.*

[4] On December 17, 2012, Defendant's counsel informed Plaintiffs' counsel of its desire to schedule Plaintiffs' depositions in January, 2013 and sought information on their availability during that time period. Azmy Decl. ¶ 12. The next day, Plaintiffs' counsel informed Defendants' counsel that as Plaintiffs' had not yet been granted visas to travel to the United States, they would likely not be able to travel to the District before March but that depositions could be arranged in Istanbul, Turkey at an earlier date if Defendant's counsel wished to move more quickly. *Id.* Contrary to representations to this Court by Defendant's counsel, Plaintiffs' counsel did not suggest at that time that their depositions might have to occur after the scheduled conclusion of discovery in this case.

The Baghdad Plaintiffs were scheduled to appear for depositions in the Eastern District of Virginia during the week of March 18, 2013, in accordance with the Court's Order, *see* Dkt. 214,[5] and had taken all steps necessary to so appear. Azmy Decl. ¶¶ 28-32. Round-trip airline tickets were purchased for the Baghdad Plaintiffs to travel from Baghdad to the United States on Friday, March 15, 2013, on Turkish Airlines, at a cost of approximately $2,191.00 per ticket. Azmy Decl. ¶ 29 & Ex. 10. A ticket was also purchased for counsel's Iraqi legal-team member, who was to escort the Baghdad Plaintiffs to their connection in Istanbul, Turkey and assist them with their connection to the United States. *Id.* (The Iraqi team member is not a plaintiff in the case, and was not scheduled to be deposed.). Counsel also coordinated the logistics of the Baghdad Plaintiffs' travel with an official from the Department of Homeland Security Transportation Security Administration (TSA) to assist the Baghdad Plaintiffs upon arrival in the United States because none of them speaks English and they have extremely limited experience with international travel. Azmy Decl. ¶ 30 & Ex. 11.[6] To that end, counsel also provided the Baghdad Plaintiffs with a letter explaining the nature of their travel to show to any airlines or airport agents or U.S. government officials in the case of any confusion as to their destination or purpose of their trip. Azmy Decl. ¶ 30 & Ex. 12.

On March 15, 2013, Plaintiffs arrived at the Baghdad airport, with a travel itinerary that would take them to the United States, via Istanbul, Turkey. Azmy Decl. ¶ 31 & Ex. 13. Through no fault of the Plaintiffs or counsel and due to unexplained reasons, the Baghdad Plaintiffs were not permitted to travel to the United States as planned on March 15th. Azmy Decl. ¶ 32. After they had already received their boarding passes and proceeded to the gate to board their plane,

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[5] In opposing Defendant's motion to compel Plaintiffs' appearance for depositions, Plaintiffs once again suggested that they may make themselves available in Istanbul, Turkey, given that their visa applications to enter the United States were still pending at the time and they had already been able to travel to Istanbul without any issues. Dkt. 202 at 2.

[6] Because Plaintiff Al-Ejaili has more experience traveling internationally, Plaintiffs' counsel did not need to take the step of coordinating logistical assistance with the TSA for his travel.

the Baghdad Plaintiffs were taken for questioning by airport agents, and subsequently informed that the airport agents had received a call from the United States directing them to not allow the Baghdad Plaintiffs to board the plane and that the Baghdad Plaintiffs would have to resolve the problem in the United States. *Id*.

Since that date, the Baghdad Plaintiffs and their counsel have taken numerous measures to ensure their arrival in the United States as quickly as possible. Azmy Decl. ¶¶ 33-39, 42-45. On March 28th, the State Department Office that had assisted with expediting the granting of the Baghdad Plaintiffs' visas, advised Plaintiffs' counsel to schedule another itinerary for the Baghdad Plaintiffs to travel to the United States three weeks in the future and to send the updated itinerary to the State Department to facilitate the resolution of issues related to the Baghdad Plaintiffs' travel. Azmy Decl. ¶¶ 43-44. Upon this State Department guidance, Plaintiffs' counsel scheduled the itinerary so the Plaintiffs would arrive in Washington, D.C. three weeks from that date, i.e., on April 19, 2013, and leave the United States on April 27, 2013. Azmy Decl. ¶ 44.

C. The Court's Denial of Defendant's First Motion for Sanctions Against the Baghdad Plaintiffs[7]

On April 5, 2013, Defendant moved for sanctions against the Baghdad Plaintiffs, asserting that their inability to appear for depositions in this District should be cause for dismissal of their claims. *See* dkt. 258. The Court heard and denied Defendant's motion on April 12, 2013, dkt. 307, finding that because "at the time [the Baghdad Plaintiffs] boarded the plane or about to board the plane, they had visas in time to appear for the deposition within the discovery period," there was neither "bad faith" nor "unreasonable delay" here to "support a dismissal for lack of prosecution." Apr. 12, 2013 Hr'g Tr. 52:4-9, 13-18.

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[7] CACI's pejoratively refers to these Plaintiffs as "absentee plaintiffs," to imply what they cannot actually prove – that the Baghdad Plaintiffs willfully refuse to appear for their depositions. This Court already concluded this is not the case. The designation also makes no sense insofar as the "absentee plaintiffs" CACI vilifies were similarly situated to the Plaintiff who successfully traveled here: they had every plan and intention to sit for their depositions but, unlike Mr. Al-Ejaili, were prevented from doing so by forces outside of their control.

Since the April 12th Hearing, Plaintiffs' counsel have continued to seek assistance from various high-level officials at the State Department. Amy Decl. ¶ 48 & Ex. 17. Further, in an effort to determine what agencies or actors have prevented the Baghdad Plaintiffs from flying to the United States and whether the Baghdad Plaintiffs are on any type of list preventing them from flying to the United States, in accordance with the Court's concerns, *see* Apr. 12, 2013 Hr'g Tr. 54:2-11, Plaintiffs undertook numerous steps: (1) Plaintiffs served a subpoena and *Touhy* request on the DHS, seeking information about whether Plaintiffs were on a "no fly list" and if so, why; and also whether Defendant had any communications with DHS about Plaintiffs prior to their travel to the United States. Azmy Decl. ¶ 47. (2) When the DHS objected to the requests, Plaintiffs filed a motion to compel this information. Dkt. 380. (3) Plaintiffs also filed administrative applications through the DHS's Traveler Redress Inquiry Program to determine why Plaintiffs were unable to fly on March 15th. Azmy Decl. ¶ 49. (4) Plaintiffs properly noticed and questioned Defendant's 30(b)(6) witness about any communications Defendant may have had with the DHS regarding Plaintiffs' travel. Azmy Decl. Ex. 15. (5) When Defendant's witness was not prepared to respond to questions on this topic, Plaintiffs filed a motion to compel Defendant to produce a witness with sufficient knowledge to answer whether Defendant communicated with the government regarding Plaintiffs' travel. Dkt. 392.[8]

Plaintiffs' counsel is currently waiting for a response from the State Department as to whether the Baghdad Plaintiffs will be permitted to travel to the United States, and has still not received any information as to whether Plaintiffs are on a no-fly list. Azmy Decl. ¶¶ 53, 55. The Baghdad Plaintiffs continue to be available for video depositions at any time. Azmy Decl. ¶ 56.

[8] Defendant erroneously asserts that "an adverse inference" may be drawn from the Baghdad Plaintiffs' objections to producing documents related to their travel based on their lack of relevance to the claims or defenses asserted in this case (and due to the detailed accounting of Plaintiffs' efforts already submitted in filings to the Court). The authority upon which Defendant relies addresses the question of whether evidence central to a claim asserted in the litigation had been *willfully destroyed* by a party; not objections by a party to produce documents due to their lack of relevance. *See* Def. Br. 18 (*citing Vulcan Materials Co. v. Massiah*, 645 F.3d 249, 260 (4th Cir. 2011) (concluding that "the loss or destruction of evidence was not the result" of the party's willful conduct).

ARGUMENT

A. Plaintiffs Have Demonstrated Special Circumstances Warranting Depositions Outside the District

1. Local Rule 30(A) Contemplates a Plaintiff's Deposition Outside The District Upon Showing of "Special Circumstances"

The District's local rules expressly provide for an exception to its own rule requiring plaintiffs to submit to a deposition within the division: "when the party, or representative of a party, is of such age or physical condition, or *special circumstances exist*, as may reasonably interfere with the orderly taking of a deposition at a place within the division." Local Civ. R. 30(A) (emphasis added). *See also* Charles Alan Wright, Arthur R. Miller & Mary Kay Kane, Federal Practice and Procedure § 2112 (3d ed. 2009) (noting that general rule that plaintiff's deposition is to take place within the forum "is at best a general rule, and is not adhered to if plaintiff can show good cause for not being required to come to the district where the action is pending"). In other words, depositions of a party may be taken elsewhere when the party is unable to appear due to circumstances beyond his control.

As guidance for interpreting the special circumstances exception to Local Civil Rule 30(A), the Court may look to case law interpreting Fed. R. Civ. P. 43(a), which allows for video testimony during trial "[f]or good cause in compelling circumstances and with appropriate safeguards." Fed. R.Civ.P. 43(a). Courts have found "compelling circumstances" in cases where geographical distance and costs posed a burden, *see, e.g.*, *Scott Timber, Inc. v. U.S.*, 93 Fed.Cl. 498, 500 (Fed Cl. 2010); *Beltran–Tirado v. INS*, 213 F.3d 1179, 1186 (9th Cir. 2000); *F.T.C. v. Swedish Match North America, Inc*., 197 F.R.D. 1, 2 (D.D.C. 2000); *Lopez v. NTI, LLC*, 748 F.Supp.2d 471, 480 (D. Md. 2010), and foreign plaintiffs faced barriers traveling to the United States, *see*, *e.g.*, *Matovski v. Matovski*, 06 Civ. 4259 (PKC), 2007 U.S. Dist. LEXIS 65519, at *2 (S.D.N.Y. 2007) ("As authorized by Rule 43(a), Fed.R.Civ.P., petitioner, who had been denied an entry visa into the U.S., testified via a live video link from Australia."); *El-Hadad v. United Arab Emirates*, 496 F.3d 658, 668-69, 378 U.S. App. D.C. 67 (D.C. Cir. 2007) (finding

videoconference testimony from Egypt appropriate where the witness could not obtain a visa to enter the United States).

As the Court previously noted when it found that Plaintiffs' efforts to travel to the U.S. have not been in bad faith, *Baraz v. United States*, 181 F.R.D. 449 (C.D. Cal. 1998) "is analogous to this case." Apr. 12, 2013 Hr'g Tr. 51:20-52:9. In *Baraz*, an Iranian foreign national sued the United States and INS agents for alleged abuse he sustained while in INS custody prior to his deportation. *Id.* at 450-51. He was unable to return to the United States for his deposition because neither Iran nor the United States would allow him to travel between the two countries. *Id.* at 451. Like Defendant does here, the United States moved to dismiss under Federal Rules of Civil Procedure 41 and 37. *Id.* Pointing to plaintiff's efforts to enter the country for his deposition, the court in *Baraz* held that the defendants failed to meet their burden of showing that the plaintiff's failure to attend his deposition was the result of plaintiff's willfulness, bad faith, or fault. *Id.* at 452 (*citing Societe Nationale v.U.S. District Court for the Southern District of Iowa*, 482 U.S. 522 (1987)). The court recognized that "foreign nationals or U.S. citizens living abroad who are parties to an action are subject to this Court's personal jurisdiction and may be deposed wherever the Court directs." *Id.* Furthermore, it acknowledged that "such parties are usually deposed where they reside – i.e., courts rarely require them to return to the United States to have their deposition taken." *Id.* Therefore, "in the interests of justice" the Court ordered that the plaintiff's deposition be taken telephonically and/or by written interrogatories. *Id.*

Like the plaintiff in *Baraz*, the Baghdad Plaintiffs have been physically prevented from appearing in the United States for their depositions. 181 F.R.D. at 451. The Baghdad Plaintiffs made every effort to travel to the United States and appear for a deposition in this division. They applied for visas, appeared for interviews, obtained their visas, and purchased plane tickets. Azmy Decl. ¶¶ 17, 19, 24, 29. They also made plans for support throughout their travel to ensure that they were able to travel to the U.S. without any problems: (1) their legal team's Iraqi coordinator purchased a plane ticket to accompany them from Baghdad to Istanbul, where they

had a layover before traveling to the U.S, Azmy Decl. ¶¶ 29; (2) to ensure there were no issues on their flight from Istanbul to the U.S., Plaintiffs' counsel notified officials at the TSA about their plans to travel, Azmy Decl. ¶ 30 & Ex. 11, and Plaintiffs carried letters on their persons explaining the purpose of their trip should any airline or airport agent question them, Azmy Decl. ¶ 30 & Ex. 12; and (3) upon arriving in the U.S., their counsel had planned to meet them and accompany them to their depositions. Azmy Decl. ¶ 31.

Finally, the Baghdad Plaintiffs arrived at the Baghdad airport on the day of their departure, checked in for their flight, secured boarding passes, and proceeded to their gate, before they were asked to leave the line by an airport agent and told they could not board the plane. Azmy Decl. ¶ 31-32. Pursuant to guidance from a U.S. State Department official, the Baghdad Plaintiffs reapplied for visas immediately, have been persistently checking on the status of their visa applications, and created a new itinerary for travel to the U.S. for the State Department's approval. Azmy Decl. ¶¶ 35-36, 43-45 & Ex. 14. Their counsel has also made every effort to determine the reasons for the denial and resolve any obstacles to their travel. Azmy Decl. ¶¶ 33, 34, 37, 39, 42-49, 51.

There are no further efforts Plaintiffs could have made to ensure their travel to the District for depositions. *Compare E.I. DuPont de Nemours & Co. v. Kolon Indus.*, Civil Action No. 3:09cv58, 2011 U.S. Dist. LEXIS 106767 (E.D. Va. Sept. 20, 2011) (where counterclaim plaintiff argued that he merited the special circumstances exception under Local Rule 30(A) because he was the subject of a grand jury investigation in Korea, court ordered his deposition in the U.S. because the United States Attorney guaranteed him "safe passage" to the U.S.).

It is hard to imagine a clearer case of "special circumstances" than this, where the Baghdad Plaintiffs have thus far not been permitted to enter the division, the district, or the country.

2. Local Civil Rule 30(A) Embodies Constitutional Principles Prohibiting a Court from Dismissing Plaintiffs Based on Their Inability to Comply with a Discovery Order

The law is clear that where a plaintiff is *unable* to comply with discovery order,

constitutional principles prohibit dismissal as a sanction. *See Societe Internationale pour Participations Industrielles et Commerciales, S. A. v. Rogers*, 357 U. S. 197, 209-212 (1958). A court's "range of discretion is more narrow" when dismissing a complaint or entering default judgment as a discovery sanction because this threatens a party's constitutional right to due process. *Wilson v. Volkswagen of Am., Inc.*, 561 F.2d 494, 503 (4th Cir. 1977); *see also Rogers*, 357 U.S. at 209-12 ("The provisions of Rule 37 . . . must be read in light of the provisions of the Fifth Amendment that no person shall be deprived of property without due process of law . . . ."); *Mut. Fed. Sav. & Loan v. Richards & Assocs.*, 872 F.2d 88, 92 (4th Cir. 1989) ("When the sanction involved is judgment by default, the district court's range of discretion is more narrow because the district court's desire to enforce its discovery orders is confronted head-on by the party's rights to a trial by jury and a fair day in court.") (citation and internal quotation marks omitted).

In *Rogers*, a Swiss company sued to recover assets seized by the United States during World War II. 357 U.S. at 198-99. As part of its defense, the United States sought and received an order from the district court requiring the Swiss company to produce records from the Swiss bank. *Id.* at 200. The Swiss government determined that disclosure of the banking records would violate Swiss penal and banking laws and confiscated the records from the company. *Id.* at 200-01. Despite the Swiss company's efforts to comply with the court's discovery order, the district court dismissed the action. *Id.* at 202-03.

The Supreme Court reversed the district court's judgment of dismissal. The Court emphasized that its precedents established that "there are constitutional limitations upon the power of the courts, even in aid of their own valid processes, to dismiss an action without affording a party the opportunity for a hearing on the merits of his cause." *Id.* (citing *Hovey v. Elliott*, 167 U.S. 409 (1897); *Hammond Packing Co. v. Arkansas*, 212 U.S. 322 (1909)). The Court highlighted that "substantial constitutional questions" are raised by "the striking of a complaint because of a plaintiff's *inability, despite good-faith efforts,* to comply with a pretrial production order." *Id.* at 210 (emphasis added). These serious constitutional questions, coupled

with the Swiss company's efforts to comply with the court's order, led the Court to conclude:

> Rule 37 should not be construed to authorize dismissal of this complaint because of petitioner's noncompliance with a pretrial production order when it has been established that failure to comply has been due to ***inability***, and not to willfulness, bad faith, or any fault of petitioner.

Id. at 212 (emphasis added).

This District's Local Rule 30(A) appears to incorporate this constitutional limitation on the court's authority to dismiss an action, as it expressly contemplates a plaintiff's deposition outside the jurisdiction upon showing of "special circumstances" as opposed to outright dismissal.

3. The Alternatives Plaintiffs Seek Are Routinely Permitted by Courts

Under the Federal Rules, the court may order that a deposition be taken by telephone or other remote means. Fed. R. Civ. P. 30(b)(4). *See also* Charles Alan Wright, Arthur R. Miller & Mary Kay Kane, Federal Practice and Procedure § 2112 (3d ed. 2009). Because they have not yet been permitted to travel to the United States, the Baghdad Plaintiffs have offered to sit for a deposition by video-conference – a reasonable alternative when "in the interests of justice." *Baraz*, 181 F.R.D. at 452 (ordering that where plaintiff could not travel to the U.S., the plaintiff's deposition be taken telephonically and/or by written interrogatories). While the law prefers live testimony, courts have accepted the use of video recording because it preserves the demeanor of the witness and thus will not produce substantial prejudice to a defendant. *See Morangelli v. Chemed Corp.*, 10 Civ. 0876 (BMC), 2010 U.S. Dist. LEXIS 139138 (E.D.N.Y. Nov. 10, 2010) ("The marginal difference between a live deposition and a video deposition in defendants' ability to judge the credibility of each witness is too insubstantial to warrant the enormous expense of flying lawyers or witnesses all over the country."). *See also Thornton v. Snyder*, 428 F.3d 690, 698-99 (7th Cir. 2005) (finding appropriate safeguards for video testimony where the jury was "able to see and hear" the testifying witness); *United States v. Cabrera-Ruiz*, CR. NO. C-09-8, 2009 U.S. Dist. LEXIS 25923, *7 (S.D. Texas Mar. 27, 2009) ("The sentencing court can make credibility findings based upon video depositions."); *Neidhardt v. D.H. Holmes Co.*, 21 Fair

Empl. Prac. Cas. (BNA) 452, 38 (E.D. La. 1979) (determining that the witness was "forthright, candid, clear, and convincing" by viewing his video deposition).

Indeed, many courts have permitted plaintiffs' depositions *and even trial testimony* to be taken abroad or via conference call when the plaintiff could not enter the country. *See McGee v. Hanger Prosthetics & Orthotics, Inc.*, 2:12-cv-00535-PMP-VCF, 2013 U.S. Dist. LEXIS 55563 (D. Nev. Apr. 18, 2013) (finding that risk to plaintiff of "compromising his citizenship to Canada (where his wife and child live) outweighs any possible inconvenience upon defendants in conducting the deposition via video conference or traveling to Canada"); *Garcia v. Bana*, No. C 11-02047 LB, 2012 U.S. Dist. LEXIS 87727, at *8-9 (N.D. Cal. Jun. 25, 2012) (finding good cause to allow plaintiff to testify at trial and deposition via video-conferencing from Chile because he had been deported); *Luna v. Del Monte Fresh Produce (Southeast), Inc.*, 1:06-CV-2000-JEC, 2007 U.S. Dist. LEXIS 36893, at *8-10 (N.D. Ga. May 18, 2007) (ordering plaintiffs' deposition to be taken in Mexico because the financial and immigration difficulties plaintiffs faced in coming to the United States far outweighed defendants simple preference to conduct the depositions in the forum); *cf. Santacruz v. French Connection Bakery, Inc.*, No. C07-01118 PVT, No. C08-00996 PVT, 2009 U.S. Dist. LEXIS 132017, at *2 (N.D. Cal. July 27, 2009) (finding good cause for plaintiff to testify at trial via video-conference because he had been deported from the United States).[9]

[9] *See also Vanmoor v. University Surety Corp.*, 08-21384, 2010 U.S. Dist. LEXIS 144772, at *5 (S.D. Fla. Jun. 9, 2010) ("[N]otwithstanding the general rule that a plaintiff must be made available for oral deposition in the district in which the action was filed [court held that] the most appropriate remedy in this particular case would be to allow Plaintiff to appear for deposition at a mutually agreeable foreign location…"); *EEOC v. Denny's, Inc.*, Civ. No. WDQ-06-2527, 2009 U.S. Dist. LEXIS 91707, at *4 (D. Md. Oct. 2, 2009) ("Under some circumstances, plaintiffs remote from the litigation forum may also elect to be deposed near their residences."); *Palma v. Safe Hurrican Shutters, Inc.*, 07-22913-CIV, 2009 U.S. Dist. LEXIS 22704, at *10-14 (S.D. Fla. Mar. 12, 2009) (permitting plaintiffs to be deposed telephonically because they had moved out of the district to find employment and travel to the district would subject them to undue expense); *Abdullah v. Sheridan Square Press, Inc.*, 154 F.R.D. 591 (S.D.N.Y. 1994) (where plaintiff in libel action could not have sued defendants in England and where he could not leave England without losing his right to pursue asylum application, deposition could be taken in England).

Video depositions are not unusual in litigations brought under the Alien Tort Statute, where plaintiffs often reside abroad. *See Adhikari v. Daoud & Partners*, Case no. 4:09-cv-01237, Order, Dkt. 470, (S.D. Tx. Jan. 31, 2013) (denying defendants motion to compel depositions in Houston for plaintiffs in Nepal). *See also Bowoto v. Chevron Corp.*, Case No. C-99-2506, Letter Br., Dkt. 2006 (N.D. Cal. Oct. 16, 2008) (in case where violations occurred in Nigeria, "both plaintiffs and defendants videotaped several depositions"); *Quinteros v. Dyncorp*, 1:07-cv-01042-RWR, Minute Order (D.D.C. June 8, 2009) (permitting video depositions of witnesses in Ecuador).

B. Defendants Have Failed to Meet the Extremely High Standard of Demonstrating the "Flagrant Bad Faith" or Willfulness on the Part of Plaintiffs

1. Plaintiffs' Failure to Appear is Due to Inability, Not Bad Faith

a. The Sanction of Dismissal Under Rule 37 Is Permitted Only Where a Party Exhibits "Flagrant Bad Faith"

Although Federal Rule of Civil Procedure 37 gives trial courts discretion to impose sanctions for violating discovery orders, the rule does not permit courts to enter judgment against a litigant for violating a discovery order "when it has been established that failure to comply has been due to *inability, and not to willfulness, bad faith, or any fault of [the non-complying party]*." *Rogers*, 357 U. S. at 212 (emphasis added); *see also Wilson*, 561 F.2d at 503 (Rule 37 discretion must be exercised "discreetly and never 'when it has been established that failure to comply has been due to inability, and not to willfulness, bad faith, or any fault of [the non-complying party].'" (quoting *Rogers*, 357 U. S. at 212).

The sanction of dismissal under Rule 37 is reserved for "that rare case" where a party exhibits "flagrant bad faith and callous disregard of the party's obligations under the Rules." *Wilson*, 561 F.3d at 504 (citation and internal quotation marks omitted); *see also Choice Hotels Int'l, Inc. v. Goodwin & Boone*, 11 F.3d 469, 472 (4th Cir. 1993) (dismissal appropriate "only in the extreme cases") (quoting *McCargo v. Hedrick*, 545 F.2d 393, 396 (4th Cir. 1976)); *Mut. Fed.*, 872 F.2d at 92 (noting that "the extreme sanction of dismissal or judgment by default" is

reserved for "only the most flagrant case"). This Circuit has found dismissal may be warranted "when a party deceives a court or abuses the process at a level that is utterly inconsistent with the orderly administration of justice or undermines the integrity of the process." *United States v. Shaffer Equip. Co.*, 11 F.3d 450, 462 (4th Cir. 1993). Even in a case involving fraudulent altering or spoliation of documentary evidence (the original version of which "eventually came to light") – conduct described as "misconduct that was certainly egregious and burdened an already stretched court with months of needless litigation" – the Court found that the "integrity of the judicial process was not so greatly frustrated as to warrant the 'particularly severe sanction' of dismissal." *Suntrust Mortgage, Inc., v. United Guaranty Residential Ins. Co.*, Nos. 11-1956, 11-2086, 2013 U.S. App. LEXIS 2349, at *29-30 (4th Cir. Feb. 1, 2013); *see also Shaffer Equip.*, 11 F.3d at 463 (in reversing dismissal, finding insufficient consideration given to "broad policies of deciding cases on merits" when "integrity of the process had not been permanently frustrated"). This high standard comports with "the sound public policy of deciding cases on their merits and not depriving parties of their fair day in court." *Choice Hotels*, 11 F.3d at 472 (4th Cir. 1993) (citations and internal quotation marks omitted).

Even where a discovery failure causes prejudice to the movant, dismissal is a sanction of last resort, not first. A proper sanction is one that is "no more severe . . . than is necessary to prevent prejudice to the movant." *Wilson*, 561 F.2d at 504 (quoting *Diaz v. S. Drilling Corp.*, 427 F.2d 1118, 1127 (5th Cir. 1970)). Thus, the Fourth Circuit Court of Appeals has reversed district court decisions to enter judgment as a discovery sanction when less drastic remedies might have sufficed. *Compare Hathcock v. Navistar Int'l Transp. Corp.*, 53 F.3d 36, 41 (4th Cir. 1995) (finding abuse of discretion in default sanction where "the district court imposed no lesser sanction as a preliminary deterrent"), *and Lolatchy v. Arthur Murray, Inc.*, 816 F.2d 951, 953 (4th Cir. 1987) (finding abuse of discretion in default sanction where there was nothing in the record to suggest that less extreme sanctions "would not have promptly cured" defendant's discovery deficiencies) *with Mut. Fed.*, 872 F.2d at 93 (default judgment deemed appropriate

sanction when lesser sanctions earlier in the discovery process had little, if any impact on the defendants).

The cases Defendant cites where dismissal or default was deemed an appropriate sanction (Def. Br. 20-21) present the opposite circumstances from this case. Unlike this case where Plaintiffs are willing, but unable to appear, the cases Defendant cites involve parties who were able to appear but simply unwilling to do so. *See* Def. Br. 20-21 citing *Rowley v. City of North Myrtle Beach*, 356 F. App'x 657 (4th Cir. 2009), *aff'g* Nos. 4:06-cv-01873-TLW-TER; 4:07-cv-01636-TLW-TER, 2009 U.S. Dist. LEXIS 74513, at *7 (D.S.C. Aug. 21, 2009) (dismissing plaintiff's claims where she failed to produce documents, engaged in frivolous litigation tactics, failed to appear for depositions on numerous occasions, and provided "no persuasive reasons for her abject failure to properly prosecute the case"); *United States v. Wright*, No. 98-70793, 1999 U.S. App. LEXIS 16749 at *9, 11 (4th Cir. 2009) (entering default judgment when defendant failed to appear multiple times for deposition "[w]ithout explanation" and "provid[ing] no legitimate excuse"); *Robinson v. Morgan*, 160 F.R.D. 665, 666 (E.D.N.C. 1995) (finding plaintiff "engaged in a pattern of delay and obstruction" and refused to answer questions at his rescheduled deposition). The court in *Robinson v. Yellow Freight Sys.* found the plaintiff acted in bad faith when he "willfully failed to appear" at his deposition without giving proper notice to defendant on multiple occasions, including after the court had directed that the deposition be held in the plaintiff's home state, thirteen miles from his home. 132 F.R.D. 424, 427-28 (W.D.N.C. 1990).[10]

[10] *Stewart v. VCU Health Sys. Auth.* is likewise inapposite. The court found bad faith in that case due to a pattern of non-compliance with discovery orders, failing to provide requested documents, and failure to attend his continued deposition after unilaterally terminating his deposition without providing any reason for non-attendance, result ting in a "conscious disregard of the rules and orders of the Court." Civil Action No. 3:09CV738-HEH, 2012 U.S. Dist. LEXIS 17777, at *24 (E.D. Va. Feb. 13, 2012).

b. There Is No Basis to Revisit the Court's Prior Ruling on This Question

This Court has already ruled, on this record, that there has been "no evidence here of bad faith" that would warrant dismissal under Fed. R. Civ. P. 37. Apr. 12, 2013 Hr'g Tr. at 51:12-13. The Court explained that "bad faith encompasses deliberate disregard, haphazard compliance or willful conduct – demonstrating complete disregard for the Court's order." *Id*., at 51:16-18 (applying *Wilson v. Volkswagen of America, Inc.*, 561 F.2d 494 (4th Cir. 1977)). Analogizing this case to the *Baraz* case, the Court found that the Baghdad Plaintiffs took the reasonable and necessary steps to appear for their depositions and comply with the Court's order "in that we had plaintiffs who secured visas who were boarding a plane and were turned back, and they would have been able to appear within the discovery period for depositions and medical examinations. And so there's not bad faith here." *Id*. at 52; *see also id*. ("[G]enerally only unreasonable delay will support a dismissal for lack of prosecution. I don't have that here.").

Under the doctrine of law of the case, "a court should not reopen issues decided in earlier stages of the same litigation." *Jones v. Sears Roebuck & Co.*, 301 Fed. Appx. 276, 285 (4th Cir. 2008) (quoting *Agostini v. Felton*, 521 U.S. 203, 236 (1997)); *Sejman v. Warner-Lambert Co., Inc*., 845 F.2d 66, 69 (4th Cir. 1988) ("Clearly, courts could not perform their duties 'satisfactorily and efficiently . . . if a question once considered and decided . . . were to be litigated anew in the same case"). Defendant has offered no reason why this Court should revisit its prior holding, which was based on this record and an application of governing legal precedent. Accordingly, the sanction of dismissal is inappropriate.

c. Defendant Cannot Establish That the Baghdad Plaintiffs Acted in Bad Faith

In its latest brief, Defendant recycles many of the same arguments that the Court already rejected in its April 12 ruling, and adds none that warrant reconsideration.[11] As detailed above, the Baghdad Plaintiffs have made extensive efforts to comply with the Court's order: Plaintiffs

[11] Defendant has the burden of showing that the Baghdad Plaintiffs acted in bad faith. *See Baraz*, 181 F.R.D. at 452.

secured visas to enter the United States, purchased tickets to travel to the United States, and checked in at the airport in Baghdad to travel to the United States and attempted to coordinate with TSA officials to ensure their safe arrival to the U.S. That the Baghdad Plaintiffs made such efforts but were unable to travel to the U.S. is sufficient to rebut a charge of bad faith. *See Baraz*, 181 F.R.D. at 452 (finding plaintiff had diligently attempted to gain entry into the United States to attend his deposition and thus had not exhibited bad faith); *Kakuwa v. Sanchez*, 498 F.2d 1223, 1226 (9th Cir. 1974) (inability to attend deposition contrasted with bad faith noncompliance). Unlike the cases upon which CACI relies, which involved acts of obstructionism, in circumstances presented here, courts do not dismiss a party's claims; they seek ways to ensure that the testimony is given by another means. *See, e.g.*, *Baraz*, 181 F.R.D. at 452; *Garcia*, 2012 U.S. Dist. LEXIS 87727, at *8-9.

Defendant suggests that Plaintiffs should have pursued the 2008 visas, even while discovery was stayed and Defendant pursued a meritless appeal for three years and that Plaintiffs' failure to do so constitutes bad faith. Yet, as previously explained, Plaintiffs' counsel understood that given the typical one-year duration of a litigation visa, it could well have been premature to actually obtain visas prior to the entry of a discovery order, without more certainty about the scheduling of discovery and a potential trial. Azmy Decl. ¶¶ 6, 11. Similarly, while the 2012 applications may have been submitted slightly later than Plaintiffs had initially planned, the reasons for filing in December rather than October are not attributable to bad faith, but to the postponement of a trip to meet Plaintiffs in Istanbul necessary to ascertain further information about the filing and status of Plaintiffs' 2008 visa applications. Far from taking a "haphazard and dilatory approach" to securing Plaintiffs' visas, Def. Br. 19 (which notably does not equate to "bad faith"), Plaintiffs' counsel believed the utmost caution was necessary in processing these visas, lest a mistaken filing cause significant processing delay or lead to outright denial, and therefore sought to secure all relevant information before applying; this required trading some efficiency for accuracy.

Since the events of March 15th, the Baghdad Plaintiffs and their counsel have continued to act in good faith to take make all reasonable efforts to comply with the Court's order and appear for depositions in the District. As set forth above and detailed in the Azmy Declaration, Plaintiffs have followed every recommendation of officials from the Department of State to resolve what State Department officials described to be an inter-agency miscommunication. In addition, Plaintiffs have served a subpoena and *Touhy* request on DHS, seeking *inter alia* information about whether the Baghdad Plaintiffs were on a "no fly list" and if so, why, and filed a motion to compel this information. Plaintiffs also filed administrative applications through the DHS's Traveler Redress Inquiry Program to determine why Plaintiffs were unable to fly on March 15th.

2. Defendant's Inflammatory Characterizations of Baghdad Plaintiffs are Dishonest and Irrelevant

Throughout its brief, Defendant makes unsubstantiated, inflammatory claims about the Baghdad Plaintiffs. Defendant claims, without citations, that the Baghdad Plaintiffs are "known or suspected terrorists" responsible for "activity hostile to U.S. forces in Iraq," which placed them on the "Terrorist Watchlist." Def. Br. 1. Indeed, Defendant falsely claims that the Baghdad Plaintiffs "have fought" in Iraq and "tried to kill American troops." Def. Br. 2.[12] This effort to vilify the Plaintiffs, without a shred of support, is all the more incredible because Defendant itself bemoans the "prejudice" it suffers by having nothing but the factual record produced in this case (which conclusively refutes Defendant's charges). *See* Def. Br. 27.

As Plaintiff's counsel informed the Court at the April 12th hearing, at no time during numerous communications with State Department officials has Plaintiffs' counsel been informed that the Baghdad Plaintiffs are on a watch-list or any database that would cause them to be denied entry into the United States. Azmy Decl. ¶ 53. This remains the case today. Indeed, Defendant's *own submission* makes clear that, despite its reckless assertions that the Baghdad

[12] Defendant's analogy of the Baghdad Plaintiffs, who were brutalized in Abu Ghraib after having been wrongfully detained, to "the child who kills his parents and then seeks mercy from the court because he is an orphan," is beyond the pale. Def. Br. 5.

Plaintiffs are on a watchlist, or it's accusation that Plaintiffs' counsel are hiding something, neither Defendant nor Plaintiffs' counsel would have been told such information by the U.S. government. Def. Br. 15. As Defendant is well aware, the Department of Homeland Security has refused to answer Plaintiffs' subpoena demanding information about whether or why Plaintiffs are on any kind of watchlist, which has since necessitated Plaintiffs' motion to compel that information in this Court.

Likewise, Defendant's assertion that receiving a visa to the United States is somehow disconnected from the process of approving persons for entry to the U.S. is obviously false. Def. Br. 10-11. The visa process includes screening individuals for engagement in "Terrorist Activities." *See* INA § 212 (a)(3)(B). This law specifically provides that a consular officer who "knows, or has reasonable ground to believe" that a person who is *inter alia* engaged in terrorist activity shall declare that person inadmissible. Upon applying for a visa, a person who is a known or suspected terrorist is informed that the U.S. "is unable to issue a visa" and must be informed of the reason (including, specifically, INA § 212 (a)(3)(B)) at the time of refusal. *See* Dep't of State, Form-OF-194. Azmy Decl. Ex. 26. *See also* U.S. Dep't of State Foreign Affairs Manual, Vol. 9- Visas, Azmy Decl. Ex. 25.[13] Additionally, Defendant's expert declaration explains that it is atypical for individuals who are on No Fly Lists to actually receive boarding passes, in the manner Plaintiffs did. *See* dkt. 370 at ¶ 12. Thus, Defendant's continued insistence that Plaintiffs were on a No Fly List (and that Plaintiffs' counsel somehow knows this) is flatly rebutted by their own submission. *See also* dkt. 370 at ¶ 16(c) (observing that the U.S. government does not ordinarily inform individuals that they are on a No Fly List).

In making the dishonest charge that Plaintiffs "tried to kill American troops," Def. Br. 4, Defendant fails to disclose to the Court that the United States did not find any basis for such a claim. All four Plaintiffs were released without charge. Defendant continues to mischaracterize

[13] Despite its queries to State Department officials, Plaintiffs' counsel has never been informed of the name of the government agency with which the inter-agency coordination supposedly had failed to occur. Azmy Decl. ¶ 54.

the documents concerning the Baghdad Plaintiffs' arrest and detention produced by the Department of Defense.

Plaintiff Al Shimari: Defendant's selective rendition of the contents of Plaintiff Al Shimari's file, Def. Br. at 5, fails to advise the Court: (1) that the "Enemy Combatant Determination" for Plaintiff Al Shimari resulted in him being found *not* to be "an international terrorist or member of an international terrorist organization who poses a threat to the United States or U.S. interests" and that "the detainee ***is not*** an Enemy Combatant in the Global War on Terror" (emphasis in original), Azmy Decl. Ex. 20 at DOD-00215, DOD-00218; (2) [redacted]; and (3) [redacted][14]

Plaintiff Rashid: Regarding Plaintiff Rashid, Defendant asserts that he made and placed Improvised Explosive Devices ("IEDs"). Def. Br. at 5. (Plaintiff Rashid "was captured when one of his IEDs exploded near a coalition convoy."). Initial reports in Plaintiff Rashid's file are utterly equivocal: "was seen in the vicinity of an IED explosion. He appeared to be signaling to detonate the IED and was possibly the trigger man. […] He may have been holding something in his left hand." Azmy Decl. Ex. 21 at DOD-00041. Plaintiff Rashid consistently asserted his innocence. [redacted] On March 14, 2004, Plaintiff Rashid's case was reviewed and the

[14] Those documents further reveal: (4) that on June 18, 2004, Plaintiff Al Shimari's case was designated as "No Prosecution," with the written comment "no connection between detainee and truck where weapons were found," Azmy Decl. Ex. 20 at DOD-00308; and (5) [redacted]. *See* also id. at [redacted]. Plaintiff Al Shimari was released without charge on March 27, 2008.

conclusion was: "No Prosecution- Case file lacks sufficient information to warrant a prosecution." *Id*. at DOD-00061.

Plaintiff Al Zuba'e--Plaintiff Al Zuba'e's file's is not extensive, [redacted].

In sum, while the Court would never know this from reading Defendant's fiction, the Baghdad Plaintiffs were all released without charge from Abu Ghraib, and the documents clearly show that the government found no credible information to prosecute them or to keep them for intelligence purposes. Plaintiffs were among the thousands of Iraqis indiscriminately rounded up by military sweeps early in the war.[15] None of the Plaintiffs was engaged in armed conflict with the United States forces; in short, none was an "enemy combatant".[16] To the contrary, all Plaintiffs were civilian security detainees. Azmy Decl. Ex. 20 at DOD-00200 (describing Plaintiff Al Shimari as a "civilian internee"); Ex. 21 at DOD-00016 (identifying Plaintiff Rashid as a "civilian internee"); Azmy Decl. ¶ 60 (explaining that for Al-Zuba'e, there are no documents produced by the Department of Defense in this litigation describing or listing him as an "enemy

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[15] *See Independent Panel To Review DoD Detention Operations*, Honorable James R. Schlesinger (August 24, 2004), at 29, finding the military, lacking sufficient resources, "reverted to rounding up any and all suspicious-looking persons – all too often including women and children. The flood of incoming detainees contrasted sharply with the trickle of released individuals."

[16] In an earlier, 2008 response filed to correct the very same sort of mis-representations by Defendant, the Plaintiffs set forth the circumstances of their arrests: "Messrs. Al-Shimari and Al-Zubae were taken from their homes. Mr. Rashid was leaving a local store on his way home from the market when a roadside bomb exploded. Mr. Rashid and others who were near the explosion were rounded up and detained. Mr. Al-Ejaili was a reporter covering a story for an international news organization at the time of his arrest. After learning that there had been an explosion, Mr. Al-Ejaili headed to the scene and began videotaping the area and those who had been injured. He was detained despite showing his press credentials." Dkt # 66 (Pl Mem. Rebutting CACI's Factual Misrepresentations, Oct. 27, 2008) at 2, n. 2. Plaintiffs have not brought claims challenging their arrest and detention, and have no intention to inject such claims into this lawsuit.

combatant" or "terrorist"). *See also* Azmy Decl. Ex. 24 (expert opinion of Professor Geoffrey Corn explaining that civilians subject to an occupation who are detained are typically considered "civilian internees" under international law and owed a duty of care).

Defendant makes reference to Plaintiffs' names being placed on the "NGIC Biometric Watch list," to insinuate that they are somehow dangerous, but this also distorts the truth. As Plaintiffs have explained, this watch list was used by the U.S. military in Iraq to, among other things, vet Iraqi Army and Police recruits, not as a national security designation.[17] According to documents produced by the Department of Defense in this litigation, the alert values of the three Baghdad Plaintiffs were listed as "**low**." Azmy Decl. Ex. 21 at DOD-00004-005 (Plaintiff Rashid); Ex. 22 at DOD 00107-108 (Plaintiff Al-Zuba'e); Ex. 20 at DOD-00149-150(Plaintiff Al Shimari). Indeed, all *four* Plaintiffs were placed on the NGIC list, including Plaintiff Al-Ejaili, who was placed on the list on September 29, 2010 and nonetheless traveled to the United States without incident for his deposition last month. *See id.*, Azmy Decl. Ex. 23 at DOD-00130.

C. The Baghdad Plaintiffs Have a Right to a Remedy

These Plaintiffs have a right to seek a remedy for the breach of the right to be free from torture and other cruel, inhuman and degrading treatment. This case is precisely about that breach of law, and not Defendant's unilateral and unfounded characterization of Plaintiffs and proposition that those it deems "bad people" (with or without evidence) are not worthy of justice. The Supreme Court has recognized that the Alien Tort Statute, 28 U.S.C. § 1350, under which Plaintiffs bring their claims of war crimes, torture, and cruel, inhuman and degrading treatment, is a remedy that should be open to all aliens. *See Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004).

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[17] The key was the alert value. A "medium" or "high" alert value would signal that the U.S. government believed the individual needed to be detained. *See* LTC Brian Hunt, U.S. Army Biometrics –From HQDA to the Soldier and Back in 420 Seconds, Biometrics Task Force, Biometrics Consortium Conference, Sept. 23, 2008, at 6, *available at* http://biometrics.org/bc2008/presentations/204.pdf. By contrast, a "low" alert value was used to signal only that the U.S. government identified the individual as disqualified for hiring at or access to a U.S. military base and for Iraqi police or army training. *Id*. Tens of thousands of Iraqis were given a "low" designation. *See*, *e.g.*, *id*.

In *Rasul v. Bush*, 542 U.S. 466 (2004), the Supreme Court ruled even *current* detention did not deprive an alien of standing to litigate in U.S. courts. *See Rasul,* 542 U.S. at 484-485. It is because this case advances the federal government's interest in promoting anti-torture and abuse norms that the United States government submitted an *amicus curiae* brief to the Fourth Circuit Court of Appeals urging that the court permit Plaintiffs' case to proceed to the merits on their claims of torture against Defendant. *See* Br. United States as Am. Cur., *Al-Shimari v. CACI Int'l Inc., et al.*, No. 09-1335, at 22-25.

As described, Plaintiffs' entitlement to pursue a remedy is grounded in due process, *see Rogers*, 357 U.S. at 209, as well as in federal statutory law, *see* Alien Tort Statute, 28 U.S.C. § 1350. But Plaintiffs' entitlement to a remedy for the serious human rights abuses alleged here – including torture and other mistreatment while in custody – is also supported by fundamental principles of international human rights law. This right, enshrined in international treaties and customary international law (including in Articles 13 and 14 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, and in Articles 2(3)(a) and 9(5) of the International Covenant on Civil and Political Rights ("ICCPR")) counsels extreme caution when this Court is asked to deprive victims of human rights violations of an opportunity to present their claims.[18]

[18] Through statutes such as the Alien Tort Statute and the 1992 Torture Victim Protection Act (TVPA), the United States has demonstrated its commitment to providing redress to victims of torture. The preamble to the TVPA explains that its purpose is to carry out "obligations of the United States under the United Nations Charter and other international agreements pertaining to the protection of human rights by establishing a civil action for recovery of damages from an individual who engages in torture or extrajudicial killing." *See* Pub. L. 102-256, 106 Stat. 73 (1992). In addition, Article 8 of the Universal Declaration of Human Rights states that "[e]veryone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the constitution or by law." G.A. Res. No 217A, art. 5, UN GAOR, 3rd. Sess., 1st plen. Mtg., U.N. Doc A/810 (Dec. 12, 1948). The obligation to provide a remedy for a treaty violation is non-derogable, even in times of national emergency. *See* Human Rights Committee, General Comment No. 29, at ¶ 14, U.N. Doc. CPR/C/21/Rev.1/Add.11 (Aug. 31, 2001).

The Human Rights Committee, the supervisory mechanism of the ICCPR, has indicated that "Article 2, paragraph 3, requires that States Parties make reparation to individuals whose Covenant rights have been violated. Without reparation to individuals whose Covenant rights have been violated, the obligation to provide an effective remedy, which is central to the efficacy of article 2, paragraph 3, is not discharged." Human Rights Committee, General Comment No.31, at ¶ 16, U.N. Doc. CCPR/C/21/Rev.1/Add.13 (Mar. 29, 2004). The Geneva Conventions also recognize various private rights and contemplate compensation in courts of law.[19]

The United States has consistently reaffirmed its commitment to providing redress to persons who suffer human rights violations, including by military contractors. Dismissing Plaintiffs claims because they have thus far been blocked from complying with the Court's discovery order undermines this principle as well as our nation's obligations under international law.

CONCLUSION

For the foregoing reasons, Defendant's Motion for Sanctions Against Plaintiffs Al Shimari, Rashid, and Al Zuba'e should be denied.

Date: May 6, 2013

/s/ George Brent Mickum

George Brent Mickum IV (VA Bar # 24385)
Law Firm of George Brent Mickum IV
5800 Wiltshire Drive
Bethesda, MD 20816
Telephone: (202) 281-8662
gbmickum@gmail.com

Baher Azmy, *Admitted pro hac vice*
Katherine Gallagher, *Admitted pro hac vice*
CENTER FOR CONSTITUTIONAL RIGHTS
666 Broadway, 7th Floor
New York, NY 10012

[19] *See, e.g.*, Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 75 U.N.T.S. 287, art. 5.

Robert P. LoBue, *Admitted pro hac vice*
PATTERSON BELKNAP WEBB & TYLER LLP
1133 Avenue of the Americas
New York, New York 10036

Shereef Hadi Akeel, *Admitted pro hac vice*
AKEEL & VALENTINE, P.C.
888 West Big Beaver Road
Troy, MI 48084-4736

Attorneys for Plaintiffs

CERTIFICATE OF SERVICE

I hereby certify that on May 6, 2013, I caused the foregoing Plaintiffs' OPPOSITION TO DEFENDANT'S MOTION FOR SANCTIONS to be sent via email to:

J. William Koegel, Jr.
Virginia Bar No. 38243
John F. O'Connor
STEPTOE & JOHNSON LLP
1330 Connecticut Avenue, N.W.
Washington, D.C. 20036
(202) 429-3000 – telephone
(202) 429-3902 – facsimile
wkoegel@steptoe.com
joconnor@steptoe.com

/s/ George Brent Mickum
George Brent Mickum IV (VA Bar # 24385)