

IN THE UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF VIRGINIA
Alexandria Division

SUHAIL NAJIM ABDULLAH AL SHIMARI, Et al.,)	
)	
Plaintiffs,)	Civil No. 08-cv-827
)	
VS.)	April 12, 2013
)	
CACI INTERNATIONAL, INC., et al.,)	
)	
Defendants.)	

MOTIONS HEARING

BEFORE: THE HONORABLE GERALD BRUCE LEE
UNITED STATES DISTRICT JUDGE

APPEARANCES:

FOR THE PLAINTIFF: CENTER FOR CONSTITUTIONAL RIGHTS
 BY: BAHER AZMY, ESQ.
 KELLER & HECKMAN LLP
 BY: GEORGE BRENT MICKUM, IV, ESQ.
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 PATTERSON BELKNAP WEBB & TYLER, LLP
 BY: ROBERT PAUL LOBUE, ESQ.

FOR THE DEFENDANT: STEPTOE & JOHNSON
 BY: JOSEPH W. KOEGEL, JR., ESQ.

DEPARTMENT OF JUSTICE
 BY: JOSEPH SHER, ESQ.
 ERIC J. SOSKIN, ESQ.
 SCOTT LEVIN, ESQ.

 OFFICIAL COURT REPORTER: RENECIA A. SMITH-WILSON, RMR, CRR
 U.S. District Court
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1 (Thereupon, the following was heard in open
2 court at 9:28 a.m.)

3 THE CLERK: 1:08 civil 827, Al Shimari, et al
4 versus CACI Premiere Technology, et al.

5 Would counsel please note your appearances
6 for the record.

7 MR. KOEGEL: Bill Koegel, Your Honor, for
8 CACI Premiere Technology.

9 THE COURT: Good morning.

10 MR. AZMY: Good morning, Your Honor. Baher
11 Azmy, A-Z-M-Y for plaintiffs, along with Shareef Akeel,
12 A-K-E-E-L and Brent Mickum, M-I-C-K-U-M, and we have one
13 additional counsel who is on route, Bob LoBue, L-O-B-U-E.

14 THE COURT: Good morning.

15 MR. SHER: Good morning, Your Honor. Joseph
16 Sher for the Department of Defense. With me is Mr. Eric
17 Soskin and Mr. Scott Levin of the Department of Justice
18 Civil Division.

19 With respect -- with the permission of the
20 Court, Mr. Soskin will present the Department's position.

21 THE COURT: Fine.

22 Mr. Koegel, you're first.

23 MR. KOEGEL: Your Honor, we have two motions
24 before the Court today. Does the Court have a preference
25 for the order in which they're presented?

1 THE COURT: I guess we should probably take
2 up the government's motion first and then take your
3 motion for sanctions. How about that?

4 MR. KOEGEL: Fine, Your Honor.

5 Our motion to compel deposition testimony
6 from three retired generals and one retired admiral
7 presents what we believe is a fairly straightforward
8 matter for the Court.

9 There's no dispute that the reports authored
10 by the four -- I'll just use generals to refer to all
11 four individuals, address detainee abuse at Abu Ghraib
12 Prison from different perspectives. We're in the fairly
13 unique position of having government reports, the focus
14 of which was the very subject matter of the civil action
15 before the Court, the very subject of this case.

16 The United States has consistently taken the
17 position that there should be a full and public
18 exposition of what happened at Abu Ghraib. The President
19 of the United States, the Secretary of the Defense and
20 every government official on down has repeatedly,
21 consistently and unequivocally taken that position.

22 THE COURT: And there have been public
23 hearings. There's been investigations. There's a very
24 lengthy report, several reports; is that right?

25 MR. KOEGEL: That's correct, Your Honor.

1 There's probably ten reports on the subject, four of
2 which --

3 THE COURT: Then what do you expect to get
4 from testimony that's not already in the reports?

5 MR. KOEGEL: Your Honor, we seek the
6 depositions for several purposes, principally, to assess
7 the trustworthiness and reliability of these reports.
8 The only way we can do that is by examination of the
9 authors.

10 THE COURT: So, your goal is
11 cross-examination of the expert authors, the reports'
12 authors to determine their credibility --

13 MR. KOEGEL: That's correct.

14 THE COURT: -- reliability of their
15 testimony --

16 MR. KOEGEL: And I'll give you an example.
17 The initial report authored by General Taguba expressed
18 his suspicion that there were four individuals with some
19 significant responsibility for detainee abuses at Abu
20 Ghraib. The subsequent Fay report exonerated one of
21 those individuals.

22 The second individual was prosecuted in a
23 court marshal and acquitted of all charges. The third
24 individual was never prosecuted and court marshalled and
25 the fourth individual was never charged at all.

1 Two of those four people were officers in the
2 military. Two were civilians. General Taguba couldn't
3 even get correct who the civilians worked for, one of
4 whom was employed by CACI Premiere Technology.

5 How it is that one report assigned principal
6 responsibility to these four individuals and a second
7 subsequent government report exonerated one of them and
8 reached quite different conclusions with respect to the
9 other three goes directly to the reliability and
10 trustworthiness of the initial report.

11 THE COURT: Well, let's focus for a second.
12 So, the Abu Ghraib scandal produced a number of
13 investigations initiated by military officials and
14 others. There are thousands of pages of reports that
15 have been written, and there is inconsistency in the
16 reports with respect to identification of individuals,
17 some of whom may be associated with CACI PT; is that
18 right?

19 MR. KOEGEL: That's correct, Your Honor.

20 THE COURT: And, are the individuals that you
21 refer to, the four individuals who may have been accused
22 and one not charged and one cleared, are they available
23 for testimony?

24 MR. KOEGEL: That's unclear, Your Honor,
25 because two of them were former government officials.

1 For them to appear would require permission from
2 Department of Defense at trial.

3 We seek to take their depositions for
4 purposes of determining, of course, the reliability and
5 trustworthiness of their reports and what their testimony
6 would be at trial.

7 THE COURT: Well, I'm focused now on the four
8 individuals that you point to that you think from the
9 standpoint of inconsistency with the findings of the
10 reports may bear on the actual responsibility of
11 individuals associated with CACI. And if those
12 individuals are available and you have the report, then
13 aren't you able to do this without bringing in these
14 generals to testify?

15 MR. KOEGEL: No, Your Honor, we're not. It's
16 clear that the plaintiffs are going to attempt to
17 introduce these reports into evidence. There will
18 clearly be a challenge to the admission of those evidence
19 under Federal Rule of Evidence 8038.

20 We need to be able to demonstrate that those
21 reports, the Taguba and Fay reports in some important
22 respects are not reliable, are not trustworthy, don't
23 meet the test, the standard for admission.

24 And in that respect, we're presented with a
25 fairly unique situation. The plaintiffs acknowledge that

1 the hearsay imbedded in those reports would not be
2 admissible.

3 The government takes the position that those
4 reports contain nothing but hearsay, that the authors
5 have no personal knowledge, that everything they learned,
6 they learned in the course of conducting their
7 investigations and is based upon what other others told
8 them or told their staff.

9 We're in a position where the plaintiffs have
10 featured the Taguba and Fay reports prominently in their
11 third amended complaint. They have expressly announced
12 their intent to try to move those reports in their
13 entirety as they're available into evidence.

14 THE COURT: Well, I expect that we're going
15 to have to cross that bridge of admissibility at some
16 point. But, today let's focus on the Administrative
17 Procedure Act standard and whether here the government
18 has come forward with reasons --

19 MR. KOEGEL: Certainly, Your Honor.

20 THE COURT: -- that are arbitrary and
21 capricious concerning the denial of access to these
22 individuals.

23 MR. KOEGEL: We start with the policy
24 expressed in the Department of Defense *Touhy* regulations
25 which is to make information publicly available.

1 The Court should take into account the
2 position taken by the United States and the Fourth
3 Circuit during the en banc appeal in this case which was
4 to dismiss the appeal and remand for discovery.

5 The reports address a subject -- the very
6 subject of this litigation. There's no -- no real
7 dispute over their relevance to what's at issue in this
8 case.

9 And finally, there's no unreasonable burden
10 imposed on four retired military officers. They've
11 testified before.

12 As we pointed out, General Taguba, in fact,
13 sat for multiple interviews with the journalist Seymour
14 Hersh which were featured in an article published in the
15 New Yorker.

16 The generals involved here have spoken very
17 publicly of their work. It's indisputably relevant. The
18 principal objection served up by the government with
19 respect to producing the generals is burden. And under
20 these circumstances, it's an imminently reasonable burden
21 to impose upon the government.

22 The government has absolutely no persuasive
23 or compelling reason for withholding the testimony from
24 these generals. And as we pointed out in our reply
25 brief, the government was willing to produce them under

1 certain circumstances, circumstances that we found to be
2 unacceptable because they tied at least one hand, perhaps
3 one and a half hands behind our back. They presented
4 terms and conditions that simply would not allow us to
5 pursue these reports in a satisfactory way.

6 THE COURT: Are there questions about whether
7 the deponent's testimony would pose a risk for
8 disclosure, inadvertent or otherwise, of classified
9 information?

10 MR. KOEGEL: As a practical matter, no, Your
11 Honor. There have been a number of depositions taken in
12 this case so far. At each of those depositions, the
13 government has had three attorneys present. And at each
14 of those depositions, the government attorneys have,
15 whenever they deemed it appropriate, directed a witness
16 not to answer questions on grounds that the answer might
17 disclose classified information.

18 The government's got a well-established
19 procedure for dealing with this issue. And it would be
20 no different in the depositions of these individuals.

21 In fact, perhaps even less so because these
22 individuals have authored reports. Three of the four
23 reports have been produced in redacted form. The fourth
24 report is available in its entirety.

25 We have a motion scheduled for next Friday,

1 Your Honor, that addresses production of the unredacted,
2 or pardon me, the redacted portions of those reports.

3 But, for deposition purposes, the United
4 States is perfectly equipped to deal with any question
5 that in its view might call for the disclosure of
6 classified information. They've done it in this case so
7 far. They can certainly do it with these generals.

8 THE COURT: All right. I've asked you the
9 questions I have. Is there something you want to say
10 that you've not been given a chance to say?

11 MR. KOEGEL: No, Your Honor. I've covered
12 everything.

13 Thank you.

14 MR. SOSKIN: Your Honor, CACI's motion
15 presents, as you've recognized, a very straightforward
16 question. Did the Army and the Navy act reasonably and
17 in accordance with their regulations when they denied
18 CACI's *Touhy* request to produce three retired generals
19 and one retired vice admiral for depositions.

20 The Army and the Navy reached the conclusion
21 that their depositions should be rejected on the grounds
22 that their testimony would be duplicative of the
23 testimony -- of the evidence contained in their reports,
24 on the grounds that producing them and preparing them for
25 depositions would be unduly burdensome, and because much

1 of the testimony sought by CACI would be protected in any
2 event by the deliberative process privilege and could not
3 be released.

4 THE COURT: Focus if you will on the issue of
5 burden here. I infer that a lot of time has already been
6 spent investigating, meeting with witnesses and
7 ultimately preparing the report. So, the data is already
8 there.

9 So what is the burden on -- burden here with
10 respect to preparing somebody for a deposition?

11 MR. SOSKIN: Your Honor, here because in
12 contrast to the numerous fact witnesses that the
13 government has authorized to testify in this matter,
14 these senior officers had a vast access to classified
15 information. They considered classified information that
16 came from sources worldwide in preparing their reports.
17 They integrated that information into their reports and
18 then they produced those reports, seven or eight years
19 ago.

20 Subsequently, these officers retired, and so
21 the information, and what information is classified and
22 not classified, is no longer fresh in their mind. As a
23 result, the burden is much higher on the government. But
24 because of their vast knowledge and because of the way
25 they drew classified information from multiple sources

1 together to assemble their reports, the burden on the
2 United States is much higher to prepare them in advance.

3 Mr. Koege1 pointed out --

4 THE COURT: They're not generals who are
5 sitting on the battlefield any more. They've retired and
6 moved on with life; is that right?

7 MR. SOSKIN: That's correct. These are
8 retired generals and a retired admiral. If anything,
9 however, that makes the burden more difficult because
10 they're not accustomed to dealing with the classified
11 matters in the course of their daily business any more.
12 And so they will need a more extensive refresher on what
13 matter needs to be protected and what information does
14 not need to be protected.

15 THE COURT: You started out by saying the
16 evidence would be duplicate of evidence that is in the
17 report. So the government's already made a judgment the
18 reports are admissible and that they don't need
19 witnesses; is that right?

20 MR. SOSKIN: Your Honor, it's really a
21 question of the APA decision here that the Army and the
22 Navy made and whether it was reasonable for them to
23 conclude that anything -- that anything the generals or
24 the admiral could testify to would effectively be the
25 same information that's in their reports. That's not a

1 decision that was made about the admissibility of the
2 reports but rather a question of -- a question of whether
3 that decision was reasonable.

4 However, I would submit to the Court that
5 whether the testimony of these officers is admissible or
6 the reports themselves are admissible will essentially be
7 the same question to the Court later on because the
8 reports and the generals' or admiral's testimony about
9 information which they lack firsthand knowledge will be
10 the same in either respect.

11 They received their information from whatever
12 sources they received it from. They set it out in a
13 report. Either way, the Court will have to determine
14 whether that information is admissible, given it's
15 removed from firsthand sources.

16 THE COURT: Well, I don't want to probe too
17 deeply here, but Mr. Koegel said that there was a time
18 when there was discussion of allowing these individuals
19 to be produced, and that mediation or that did not work
20 out.

21 So, it means to me that the government has
22 the capacity to produce them, but they've decided not to
23 here. What's happened?

24 MR. SOSKIN: Well, Your Honor, as the
25 controlling case in the matter, *COMSAT* makes clear, the

1 question of what kind of burden is on the government of
2 producing witnesses is essentially a policy decision
3 about how best to deploy the agency's resources.

4 Here, with CACI promising to file two
5 separate motions to compel in a short period of time and
6 with effectively the same agency resources being required
7 to address those motions to compel or some of the same
8 agency resources being required to address those motions
9 as to prepare the generals and the admiral for a
10 deposition, the agency reasonably concluded that it might
11 be more productive to spare the Court the necessity of
12 this argument, provide one of the parties in this action
13 some testimony and avoid the burden of litigating these
14 motions to compel.

15 However, we'd also like to observe that
16 CACI's introduction of the negotiations on that point
17 before the Court in their reply brief is at the least
18 improper. It undercuts the very purpose of the meet and
19 confer rule to say that any offer that you make to
20 attempt to compromise a matter is immediately going to be
21 thrown back in your face and suggested that this should
22 be the starting point for an analysis in the burdens or
23 not.

24 What's important to look at here is at the
25 time that the Army and the Navy made their decisions

1 under the APA, was there assessment of the burden
2 reasonable?

3 And given that CACI promised to introduce
4 other burdens, certainly later on, it cannot be said that
5 it was unreasonable for the Army to look to exchange one
6 burden for another.

7 THE COURT: With respect to arbitrary and
8 capricious, one of the arguments you make is that what
9 defense counsel wants to probe is the mental processes of
10 the generals in terms of what they decide to conclude in
11 the report. Expand on that, if you would.

12 MR. SOSKIN: Yes, Your Honor. I think it's a
13 well-established principle that in making -- in the --
14 that courts will not generally probe into the mental
15 processes of senior government officials who have made
16 decisions.

17 Here particularly in the case of General
18 Mikolashek whose report goes to recommendations for the
19 Army as to how to improve their detainee-related
20 processes, anything beyond what's set out in his report
21 would clearly be his mental impression.

22 But CACI goes further. When they attempt to
23 explain why it is they need this testimony, they
24 consistently cite to, we want to probe behind the reports
25 to the officer's thinking at the time they did these

1 reports.

2 That's improper for a couple of reasons.
3 One, is that that is deliberative material. It is mental
4 processes material of the type that it's well established
5 we don't look into in the judicial process, absence, you
6 know, some credible allegation of misconduct by the
7 deciding official.

8 And second, as the Army and the Navy's *Touhy*
9 regulations make clear, these generals and the admiral
10 will not be authorized to testify about opinion matters,
11 will not be authorized to testify as experts. That's
12 just simply not a possibility in litigation in which the
13 United States is not a party, except in extraordinary and
14 special circumstances.

15 And so, as a result, the type of testimony
16 probing beyond the reports that CACI is seeking to obtain
17 would be opinion and expert testimony that the officers
18 simply can't give.

19 THE COURT: All right. I've asked you the
20 questions I have. Is there something more you want to
21 say that you were not given a chance to say?

22 MR. SOSKIN: Your Honor, I appreciate the
23 opportunity to share the position of the United States.
24 Thank you.

25 THE COURT: Thank you.

1 MR. AZMY: Your Honor, may I be heard very
2 briefly on this motion?

3 THE COURT: Sure.

4 MR. AZMY: So as we set out in the short
5 brief on this question, we take no position on the
6 motion. And if the Court orders the generals deposed, we
7 will appear and ask them questions. We just wish to make
8 two very brief points.

9 First, the reports themselves are relevant
10 and probative and -- probative in our claims and are
11 substantive, and we believe the jury is well positioned
12 to give them whatever weight, and counsel for the defense
13 is able to argue that they should be given less weight
14 and us more weight at trial.

15 And second, we just want to make sure we're
16 not waiving our defense that the reports would in fact be
17 admissible under 8903(a) as government investigative
18 reports.

19 THE COURT: Well, you're not waiving that.
20 And I'm trying to make clear from my questions to
21 Mr. Koegel, I'm not making a judgment today about the
22 admissibility of those items. I suspect that I'll see
23 that briefed up, and I'll hear that some other day.

24 MR. AZMY: That's right, Your Honor.

25 Thank you.

1 THE COURT: Uh-huh.

2 MR. AZMY: Sorry.

3 MR. KOEGEL: Mr. Soskin first asserts that
4 the passage of time has left the generals with perhaps a
5 less than perfect recollection as to what is classified
6 and what is not classified.

7 The simple solution to that is that there are
8 three government lawyers in the room to direct the
9 witness when to decline to answer a question on grounds
10 that call for the discussion of classified information.
11 That's no obstacle at all, and I'm not aware of any
12 precedent under the APA that approves of a government
13 position that it would be burdensome because the passage
14 of time has clouded a witness's recollection with respect
15 to what is or is not classified. And as a result it
16 would take a little more effort to bring them up to speed
17 in preparation for a deposition.

18 Second, Mr. Soskin asserts that the
19 government has to pick and choose among CACI's various
20 requests, trading off one burden for another.

21 The fact of the matter is, with respect to
22 these reports, the government has not conceded anything.
23 We'll be here next week on a motion calling for
24 production of the provisions of the reports that have
25 been withheld.

1 And I should, for purposes of being complete,
2 Your Honor, I should mention that the day after we filed
3 that motion, we did receive 500 pages from the government
4 relating to these reports.

5 And so, our reply memorandum will bring the
6 situation current. The production to date has not solved
7 the problems that are of principal concern to us.

8 But I can't say that the government has taken
9 from Peter in order to pay Paul. They haven't really
10 addressed our concerns on any of our motions.

11 Third, Mr. Soskin says, well, the government
12 generals can't appear as experts or provide opinions.

13 In no way do I seek to attempt to use them
14 directly or indirectly as experts. That's clearly not
15 available. And as for opinions, I'm not interested in
16 their opinions. I'm interested in assessing the
17 reliability and trustworthiness of their reports and
18 again, the government --

19 THE COURT: I thought you said you were
20 concerned about the judgment made by General Taguba about
21 who was responsible and who was not and that one of the
22 things you wanted to probe was the reliability of his
23 determination. Isn't that what you wanted to do?

24 MR. KOEGEL: I want to establish the
25 reliability of some of his conclusions, but that's

1 different from asking his opinion on a subject that's not
2 addressed in his report.

3 This is his report. He stood by it. He's
4 testified before Congress about it. He sat down to give
5 interviews to a journalist about it. And I'm not aware
6 of any government objection to General Taguba's holding
7 forth with the journalist on the substance of his report.
8 They can't really now come into court and object to a
9 deposition about that report when it's indisputably
10 relevant.

11 And, of course, government counsel is well
12 equipped to police the questioning and direct one of the
13 retired generals or the retired admiral not to answer a
14 question if they believe it crosses a line. They'll
15 clearly be on duty for that with respect to classified
16 information.

17 But, that is the simple solution to the
18 problems that Mr. Soskin has presented to the Court.

19 THE COURT: Thank you.

20 Let the record reflect this matter is before
21 the Court on the defendant's motion to compel deposition
22 discovery from the government, specifically the defendant
23 here CACI PT seeks to move to compel the testimony of
24 three United States Army generals, Taguba, that's
25 T-A-G-U-B-A, Fay, F-A-Y and Mikolashek,

1 M-I-K-O-L-A-S-H-E-K and one United States Navy Vice
2 Admiral Church, each of whom authored investigative
3 reports related to the Abu Ghraib incident which is the
4 subject matter of this litigation.

5 CACI presents three arguments in support of
6 its argument. First it argues that due process requires
7 these military personnel be made available because their
8 findings that are set forth in the reports are likely to
9 be introduced in evidence. I'm sure they're going to
10 fight that very hard. We'll see about that.

11 And also, CACI wants to test the basis for
12 their findings, the methodology of the reports and to
13 assess the judgments made by the individuals.

14 The government here has set forth first of
15 all, that the standard of review now has to do with the
16 Administrative Procedures Act. And the test is whether
17 "an agency's denial of the request for depositions must
18 be upheld unless the government refused production in
19 arbitrary, capricious or otherwise unlawful matter and
20 rendered its review of the administrative record before
21 the agency at the time the decision was made". And so,
22 it's a deferential consideration.

23 And, here, there -- the key question is
24 whether the government's judgment was arbitrary and
25 capricious.

1 First, it is clear that the reports
2 themselves are quite exhaustive. They're the result of
3 thousands of hours of interviews, testimony, and evidence
4 gathering. And these individuals who as a part of their
5 duties were responsible for preparing these reports, and
6 as counsel points out, they've testified before Congress
7 and one has been interviewed by a journalist, but that's
8 not the test. It's whether or not they could be
9 available. The question is whether the government here
10 exercised its discretion in an arbitrary and capricious
11 manner.

12 I will deny the motion for three reasons.
13 First, it seems to me that the decision to deny the
14 request for depositions was not arbitrary, not
15 capricious. The testimony of the generals here may be
16 duplicate of factual material already in the reports.
17 There is, it seems to me, an attempt here to determine
18 the mental processes of the generals in terms of their
19 conclusions in the report, the basis for their judgments.

20 And the due process challenge here would have
21 to be denied in part because the argument of due process
22 for fundamental fairness was not explicitly presented to
23 the government at the time of the *Touhy* request. And of
24 course, the *Touhy* request must be specific and set forth
25 the reasons that the party seeks to have the witness

1 testify.

2 The *Touhy* regulations requires the agency to
3 consider the nature and relevance of the information
4 sought, whether the request is unduly burdensome and
5 whether disclosure would threaten confidentiality, or
6 four, interfere with military command -- mission or
7 command".

8 It seems to me that the government's brief
9 outlines its reasons. The issue of burden is several
10 fold. First of all, this is eight or nine years ago.
11 Everything these generals know is based on information
12 they gathered from others. What is in the report is in
13 the report. And I guess what defendants seeks is to
14 identify statements that might be inconsistent with the
15 report to attack the credibility of it. And of course,
16 there are many ways to attack the credibility of the
17 report. And here, it seems to me that top executive
18 officials in this particular situation, should not be
19 called to testify for the reasons concerning their
20 official actions under the *Symplex* case.

21 And additionally, I've got to be very careful
22 about discovery involving military personnel. The Fourth
23 Circuit when they sent the case back, specifically
24 directed that the District Court be involved in the
25 discovery process in a way that we're normally not. And

1 I've been very involved in this one.

2 And I want to say that I have the impression
3 from everything that's been submitted to me that counsel
4 here are working together and cooperating in producing a
5 lot of the information and witnesses as well. And this
6 is just one of those instances where it could not be
7 resolved. For those reasons, I'm going to deny the
8 motion to compel.

9 Let's take up the next motion.

10 MR. KOEGEL: Thank you, Your Honor.

11 THE COURT: Thank you.

12 You are excused. If you'd like to stay,
13 you're welcome to stay, but you're excused.

14 MR. SOSKIN: Thank you. We will move to the
15 back.

16 THE COURT: You don't have to leave the
17 courtroom. We're not throwing you out, just made a
18 judgment.

19 MR. SOSKIN: Thank you.

20 THE COURT: Uh-huh.

21 MR. KOEGEL: Your Honor, we're approaching
22 the 5-year anniversary of this case. Over the life of
23 the case, there's been a considerable expenditure of
24 expense by the parties and substantial judicial resources
25 devoted to this.

1 We're here because the plaintiffs have failed
2 to appear for their depositions and their medical
3 examinations, and at this point in time --

4 THE COURT: Not all of them; is that right?

5 MR. KOEGEL: That's right. This motion
6 concerns the three plaintiffs resident in Iraq that we
7 refer to as the absentee plaintiffs.

8 Now, the Court's already considered and
9 rejected the plaintiff's proposition to effectively open
10 the Baghdad division of the Eastern District of Virginia.

11 And as a result today we're here to address
12 the two reasons that the plaintiffs -- are probably
13 responsible for the plaintiffs not appearing for their
14 depositions.

15 First, the dilatory conduct and second, the
16 anti-American activity referenced in their detainee
17 records.

18 Now, the second or the first reason is
19 certainly true on this record. That is, there is
20 compelling evidence of dilatory conduct. The second
21 reason is likely true on this record. But either one
22 would by itself be sufficient to disqualify them from
23 proceeding with their claims.

24 THE COURT: Well, let's be focused. The
25 dilatory conduct you're referring to, is that -- when the

1 case came back, July 2012, we knew ultimately, the
2 plaintiffs would have to be produced for deposition.

3 It appears that when discovery opened in
4 November, that no action was taken until December 26th to
5 even pursue visas a second time. Is that right?

6 MR. KOEGEL: That's correct, Your Honor, but
7 it's worse than that.

8 THE COURT: I'm listening.

9 MR. KOEGEL: It's worse than that because the
10 plaintiffs assert that they applied for visas in 2008.

11 The first time they made any effort to
12 determine what had happened to those visa applications
13 was more than four years later in December 2012.

14 We learned in Mr. Azmy's declaration filed on
15 Wednesday that those visa applications were closed in
16 2009. It's the first time that information has come into
17 the record.

18 Back in February, they told the Court that
19 the applications had been closed, but they didn't specify
20 when they had been closed.

21 There's no information in the record
22 reflecting any effort by the plaintiffs or their counsel
23 to pursue the 2008 visa applications for more than
24 four years.

25 This Court received this case in the summer

1 of 2012 on remand from the Fourth Circuit. And at that
2 point in time, we had a discussion with plaintiff's lead
3 counsel at the time, Ms. Burke, and we have in multiple
4 motions now presented this, and there's no dispute that
5 the plaintiff's counsel took the position the plaintiffs
6 would appear in this district and steps were being taken
7 to facilitate that.

8 Well, neither one of those representations
9 has proved to be true. We know that in October, two
10 things happened, October of 2012, before the Court had
11 lifted the stay of discovery.

12 First, the plaintiffs in the joint discovery
13 plan represented to the Court that there would be no
14 impediments with proceeding with discovery in this case.

15 Second, on October 12th, plaintiff's counsel
16 wrote to presumably their coordinator in Iraq. This is
17 an exhibit to the declaration of Susan Burke filed with
18 plaintiff's opposition.

19 That October 12th memo to the plaintiff's
20 Iraqi coordinator says we need to move quickly. Why?
21 Because the Court moves, they said, very, very quickly,
22 and that visa applications need to be submitted by
23 October 22nd. That's what plaintiff's counsel told the
24 plaintiffs in the first half of October 2012.

25 That didn't happen. In fact, visa

1 applications as Your Honor noted, weren't submitted until
2 December 31, 2012.

3 THE COURT: Well, December 26th.

4 MR. KOEGEL: December -- I believe it was
5 December 31st, Your Honor. The third amended complaint
6 was filed on December 26th.

7 THE COURT: You're right, okay.

8 MR. KOEGEL: This is not the activity of a
9 party making every reasonable effort to comply with both
10 the rules and the Court's expectations.

11 The plaintiffs submitted their visa
12 applications only after in the middle of December, we
13 asked for dates for their depositions.

14 This was not diligent effort to obtain
15 permission to enter the United States, permission which
16 their October 2012 memo to their clients indicated might
17 take some time. That's a profound statement of the
18 obvious given the records that these individuals had
19 while detained in Iraq by the United States military.

20 Plaintiff, Al Shimari, is the most egregious
21 example. He was detained for five years, including four
22 and a half years after the latest version of the
23 conspiracy is alleged to have ended.

24 And plaintiff, Al Shimari, notwithstanding
25 the protestations that he's an innocent Iraqi who was

1 just in the wrong place at the wrong time, was detained
2 when the military found IEDs, bombs, RPGs, machine guns,
3 ammunition, night vision goggles in and around his home
4 and even after he was released which happened in 2008.

5 THE COURT: Well, that brings me to a point
6 that is not clear from the briefs and that is we know
7 that at some point this year that plaintiffs had plane
8 tickets. They showed up. They were in line. They were
9 about to board the plane when they were stopped. And it
10 appeared the plaintiff counsel had already made
11 arrangements with the State Department and TSA for them
12 to board the plane.

13 And so there's a suggestion in the briefs
14 that the three individuals are on the so-called no fly
15 list. And I couldn't tell from the pleadings whether
16 that is true or not. I understand the things you cited
17 in your brief about the arrest and detention of the
18 individuals, but I want to know, does anyone know if
19 they're on the no fly list? That's question one.

20 MR. KOEGEL: I don't.

21 THE COURT: Okay.

22 MR. KOEGEL: The government does not share
23 that information with -- defense counsel.

24 THE COURT: Maybe I shouldn't have let them
25 go so fast then.

1 MR. KOEGEL: I had asked Mr. Soskin, in
2 fact --

3 THE COURT: All right.

4 MR. KOEGEL: -- if he knew, and he said he
5 didn't. Somebody in the United States knows. But, I
6 can't tell you who would be the source of that
7 information.

8 THE COURT: Well, let's focus then. So, an
9 effort was made late but -- within the discovery period
10 for the plaintiffs to appear for their depositions and
11 for the medical reviews?

12 MR. KOEGEL: Yes, sir.

13 THE COURT: Correct?

14 What are we to do now where there have been
15 two orders to issued at plaintiff's request directing
16 them to appear, which is supposed to aid their obtaining
17 visas and they're still not here?

18 What am I to do now, and is this a
19 circumstance where the plaintiffs are and should be held
20 responsible for their failure to appear? Because, as I
21 said and I'm very clear about this, we're not going to
22 have any video tape trial. This is going to be trial.
23 Plaintiff is going to appear in court, and they're going
24 to have a chance to take the witness stand, and the
25 defense is going to have a chance to cross-examine. I'm

1 very clear about that. What am I to do?

2 MR. KOEGEL: Your Honor, if I could address
3 your question about responsibility. First, they're
4 responsible for this. I think the evidence clearly is
5 yes. Not only were they dilatory in attempting to take
6 the first step which was to obtain visas, and I don't
7 think there's any reasonable doubt about that.

8 Second, they never sought judicial
9 assistance. They never came to this Court at any point
10 in time and asked the Court to intervene in any way to
11 facilitate their arrival.

12 The only reason that happened is because I
13 filed a motion to compel their depositions and you issued
14 an order and told Mr. Azmy, take that to the State
15 Department.

16 Third, we've identified the administrative
17 procedure that is available to an individual who is
18 denied boarding. It's called the Traveler Redress
19 Inquiry Program administered by the Department of
20 Homeland Security.

21 It is an administrative process available to
22 an individual in the three plaintiffs' position who's
23 been denied boarding. There is nothing in this record
24 that indicates they have availed themselves of that
25 remedy.

1 And, we've also argued that this disability
2 is self induced by virtue of their -- their activity in
3 Iraq that led them to be detained in the first place.
4 That no one in their position could reasonably expect
5 that they'd receive permission to travel to the United
6 States without, at a minimum, a time-consuming thorough
7 exhaustive review.

8 THE COURT: You're referring to the things
9 you were saying earlier about reports that have been
10 disclosed in the discovery indicating the possession of
11 IEDs, weapons and other things that you think may be a
12 factor in the judgment of TSA not to let them board?

13 MR. KOEGEL: That's correct, Your Honor.
14 That's correct.

15 Because I believe that the National Terrorist
16 Database, given what's publicly available information
17 about it, would include information relating to people in
18 the plaintiff's position, people that had been detained
19 at Abu Ghraib for the reasons these plaintiffs were
20 detained there.

21 I can't prove that they are on the terrorist
22 watch list, one component of which is the no fly list,
23 because that's not information available to us.

24 However, when you eliminate all other
25 possible reasons, the only plausible explanation for

1 their being denied boarding is that they appear on the no
2 fly list.

3 And, at this point in time, it appears the
4 plaintiffs hold out no hope that they're ever going to be
5 able to appear for these depositions.

6 THE COURT: Well, they offer to appear in
7 Turkey and by video tape. What about that?

8 MR. KOEGEL: Your Honor, as we -- we
9 addressed this in connection with our motion to compel,
10 explaining that Turkey represented an unsafe environment.

11 We also have medical examinations that need
12 to be conducted. And, as I said, we viewed -- you know,
13 when you read their papers, you'd never know we had a
14 hearing on February 14th, and the Court issued an order
15 compelling their depositions. You'd never know that
16 happened. But, we've already gone through that option.

17 Their predicament by any standard is their
18 fault. We do agree with them on the test that's set
19 forth by the Supreme Court in the *Société Internationale*
20 case.

21 If they can prove, and it's their burden to
22 prove -- it's a factual impossibility to appear, and they
23 have no responsibility for that, then dismissal is
24 probably not appropriate.

25 However, if their conduct is such that they

1 bear some responsibility, some fault for their plight,
2 their predicament, then dismissal is appropriate.

3 In this court of all courts, it has been
4 clear from day one that there was an expectation, that
5 they would appear in this district for depositions.
6 Because of this concern, we raised in July 2012, with
7 plaintiff's counsel and were told, that will happen.

8 We --

9 THE COURT: I think I understand your
10 position. I think the prejudice to defendant is self
11 evident. I'm not sure how you can effectively focus your
12 discovery without knowing what the plaintiff's actual
13 claims are and to hear their testimony about what
14 occurred and also this new -- seemingly new revelation
15 that now the plaintiffs know that the person or persons
16 who interacted with them were from CACI PT. And I think
17 that that certainly would have to be probed. And you'd
18 have to know more about the case in order to complete
19 discovery.

20 And discovery deadline is April 26th. We're
21 only a few weeks away from that. And so I think I
22 understand your position.

23 MR. KOEGEL: Thank you, Your Honor.

24 MR. AZMY: Good morning, Your Honor.

25 THE COURT: Good morning.

1 MR. AZMY: So, we'll start by saying
2 plaintiffs disagree, as I think you know, most
3 vociferously with what we regard are grotesque and
4 inflammatory accusations about the plaintiffs.

5 And as we detail in pages 9 to 13 of our
6 briefs, they are not enemy combatants. They were
7 innocent civilians, like thousands in Iraq subject to the
8 occupation, swept up, detained, and unfortunately,
9 brutalized in Abu Ghraib.

10 THE COURT: Well, I asked the question at the
11 outset if defense counsel had any information about the
12 no fly list. Let me ask you then. I can't tell from the
13 briefs.

14 Is there any indication you have that the
15 plaintiffs are on that so-called no fly list?

16 MR. AZMY: We don't know, Your Honor. We do
17 know in being granted visas, the agencies are supposed
18 to, obviously, and you would hope, conduct background
19 checks on individuals who are about to travel to the
20 United States. And they were, in fact, granted visas.
21 And as you know, they purchased tickets. They committed
22 a week away from work and family to travel here. They
23 had boarding passes and were on line, and all they were
24 told was that someone from the United States called and
25 pulled them off line.

1 And our State Department contact expressed
2 this week, suggested in our declaration, considerable
3 surprise and frustration as a result of that.

4 And since then, we, you know, defendant's
5 counsel suggest that we should be following a no fly list
6 procedure. We're following another procedure along with
7 the -- based on the State Department's recommendation to
8 try and reinitiate their visa process. And they
9 reappeared for interviews. And as Your Honor knows by
10 our application for additional time, we do still hope
11 that they can appear in person by April -- by the close
12 of discovery.

13 And, the question, though, ultimately is I
14 think a fairly narrow one which is in light of the --
15 what the Supreme Court and the Fourth Circuit have held
16 to be a party's constitutional interest to have their day
17 in court. Rule 37 only authorizes dismissal in quote,
18 "extreme cases", and quote, "never", according to the
19 *Wilson* case, "where a fault is due to inability of the
20 plaintiffs", that is, something out of their control.

21 And all of the cases defendants cite in
22 support of their motion for dismissal, all of them
23 involve individuals who were able to appear and simply
24 refused.

25 Our case is the exact opposite. They wish

1 desperately to appear, but through no fault of their own
2 cannot. And so this case looks exactly likely like the
3 *Baraz* case. It's on all fours from California.

4 In that case, an individual was deported and
5 sued INS for not deportational related issues, but for
6 conditions of detention.

7 THE COURT: He had a visa from Iran and
8 wanted to come back.

9 MR. AZMY: Exactly, and he was denied a visa.
10 And the District Court reversed the magistrate's ruling
11 dismissing under Rule 37 and ordered alternate forms of
12 discovery which *Société Internationale* and *Wilson* say are
13 constitutionally compelled short of --

14 THE COURT: Well, let me focus you on several
15 things that concern me.

16 First of all, as Mr. Koegel pointed out, this
17 case has been going on five years. I don't think I have
18 had a case in my career that's gone on five years. The
19 appeals would all be over by now. Five years, it should
20 be done.

21 So, the litigation here requires the
22 plaintiff's personal appearance. It always has. And,
23 Mr. Koegel referred to a visa applied for in 2008. Was
24 it granted or denied?

25 MR. AZMY: Your Honor, so -- so, the case is

1 in fact five years old. But four years of that was taken
2 up by the defendant's meritless appeal to the Fourth
3 Circuit.

4 So plaintiffs did apply as far as I know. I
5 wasn't involved in the case at that time, for visas in
6 2008. There was a motion to dismiss before Your Honor
7 which was denied and --

8 THE COURT: If you could focus on my
9 question, it would be very helpful. My question was
10 whether the visa was granted or denied?

11 MR. AZMY: No, it was not granted. And the
12 reason for this is important. The reason plaintiffs
13 didn't pursue it is visas are typically for one year.
14 There was a stay of discovery, and ultimately, the case
15 was going on for four years. So I don't understand how
16 defendant's counsel can suggest that was dilatory. What
17 would have been the point --

18 THE COURT: I want to just focus for one
19 second on the 2008 visa. Mr. Koegel says that in 2009 it
20 was denied. Is that true?

21 MR. AZMY: No, it was administratively
22 closed. It was due to inaction. And part of the reason
23 for the delay in 2012, Your Honor, when I started getting
24 involved is, there are -- a lot of time had passed and we
25 were not sure about the status of the 2008 visa. We were

1 trying to reconstruct our memory. So we knew one had
2 been, in fact, applied for. And we had to be very
3 careful about how to apply for new visas because with one
4 already on the record, we didn't want to apply for a
5 duplicate one and look like we're trying to game the
6 system. We only were able to confirm and it did take
7 more time that we wanted, but that's not bad faith we
8 would respectfully submit.

9 THE COURT: Well, there is an argument here
10 about whether after the case came back in July, whether
11 efforts were made to move forward with the visa
12 applications.

13 And, it seems to me, there's something else
14 going on here beyond reason. I think it's fairly obvious
15 that we need to figure out what that is. And by that I
16 mean, if the individual plaintiffs are on the no fly list
17 or some agency had made a judgment they cannot appear,
18 then I'm not sure that applying for a visa is going to
19 solve the problem in any event, and that you -- while I
20 can't give you guidance about what you ought to do,
21 defense counsel has identified that there needs to be
22 some action taken by the plaintiff to ascertain whether
23 they're on the no fly list, whether there's some agency
24 that's holding them back, because what's going to happen
25 the next time they go to the airport is they'll be pulled

1 off the plane.

2 MR. AZMY: So, Your Honor, if I can address
3 that.

4 So, we don't know if they're on a no fly
5 list. We were told by our State Department contact that
6 the way to resolve this is not through, and I'm familiar
7 with the administrative procedure Mr. Koegel refers to.
8 It can take a year and to try and identify whether or not
9 someone is on the no fly list. And I would also add
10 incidentally, that list is rife with inaccuracies and
11 mistakes. But nevertheless --

12 THE COURT: It sure has been. But, if that's
13 stopping them from getting on the plane, this case is not
14 going to be sitting around here another three years. I
15 promise you that.

16 MR. AZMY: I understand that.

17 THE COURT: If they can't get here, and it's
18 of no fault of their own, that's one thing. But you have
19 to make a record on that.

20 MR. AZMY: Okay.

21 THE COURT: I want to make sure you
22 understand what I'm saying to you now is I'm not
23 persuaded that merely applying for a visa and going to
24 the interview will be sufficient to meet their burden to
25 demonstrate diligence concerning ability to get on the

1 plane.

2 Do you understand what I'm saying to you?

3 MR. AZMY: I understand, Your Honor. If I
4 could briefly address the reason why we reapplied for
5 visas it's what we were advised to do by the State
6 Department and that happened very quickly.

7 And I also want to say I disagree with
8 Mr. Koegel here. It's not our burden to show diligence,
9 although we've tried to do so in our voluminous filing.
10 It's their burden to show that the bad faith here is, as
11 according to the Fourth Circuit, flagrant and not due to
12 circumstances out of the plaintiff's control where it is
13 constitutionally required that you would do something
14 short of a deposition in this district which we really
15 wish to do.

16 And I believe the local rule even
17 contemplates that --

18 THE COURT: Well, let me -- I appreciate your
19 making that argument and I think I've said many times
20 here that we're not going to have a video tape or a video
21 conference trial. We're not going to have a trial in
22 Ankara, Turkey or Istanbul, Turkey. As much as I like to
23 go there, we not going to have a trial there.

24 This is the Eastern District of Virginia.
25 This case is being litigated in federal court, and it

1 seems to me that a plaintiff who is pursuing a claim has
2 to appear. It just has to be. I'm not familiar with a
3 case where the Court can try a case in absentia, are you?

4 MR. AZMY: I am, Your Honor.

5 THE COURT: Where did that happen? Was that
6 in California? A trial without a plaintiff? Tell me
7 about. Where was that case?

8 MR. AZMY: Your Honor asked me in October if
9 we're aware of any tort statute cases that had gone to
10 trial. There was, the *Kadic versus Karadzic*' case in the
11 Southern District and some testimony were taken by video.
12 And a number of ATS cases are undertaken with video
13 depositions, if not necessarily live testimony. Those
14 cases often settle.

15 And we do -- it would not be in our best
16 interest because we believe in our plaintiffs and want
17 the jury to see them. We don't want them to be on a
18 video screen. Believe me, Your Honor. We want them here
19 in three dimensions. And --

20 THE COURT: That's not going to happen. I
21 assure you of that. That's not going to happen.

22 MR. AZMY: Okay, okay.

23 THE COURT: Your position is that, one, the
24 motion should not be granted because there's not been a
25 showing of bad faith and that efforts have been made to

1 produce the plaintiffs. And I guess the question and
2 concern I have is am I required to set a firm deadline
3 for which the plaintiffs must appear and also give
4 plaintiff notice that if the plaintiffs are not here by
5 that deadline, that I'm going to dismiss the case under
6 Fourth Circuit case law before I make a judgment about
7 sanctions? Can you answer that question?

8 MR. AZMY: Our position is reading Fourth
9 Circuit case law, Your Honor, even if you were to set a
10 deadline and they were not to appear live for
11 depositions, dismissal would be in the -- an abuse of
12 discretion where there are alternative mechanisms to
13 collect testimony such as a video deposition. That's
14 what we believe *Société Internationale* and *Wilson* suggest
15 and the *Baraz* case, because in the *Baraz* case, he simply
16 couldn't come. And he was not going to be able to come,
17 and the -- I don't know what happened after --

18 THE COURT: Well, that's the next question.
19 What happened after that?

20 MR. AZMY: I don't really know, Your Honor.

21 THE COURT: Probably still on that judge's
22 3-year list, huh? That case is probably still on that
23 judge's 3-year list of pending cases.

24 MR. AZMY: Well, it's an 88-case, so maybe
25 it's even longer.

1 THE COURT: Okay, all right, thank you.

2 Mr. Koegel, if I grant the motion to dismiss,
3 would I get reversed?

4 MR. KOEGEL: No, Your Honor, you wouldn't get
5 reversed and here's why. Bad faith is not the only
6 standard that the Supreme Court identified as a possible
7 grounds for dismissal.

8 The Supreme Court's language said if there's
9 an inability to comply with the court order -- and we
10 think the Fourth Circuit precedent is clear that we cited
11 that it's their burden. If they want to claim, we are
12 currently -- we are presently unable to comply with the
13 court order, it's incumbent upon them to explain why that
14 is and demonstrate it to the satisfaction of the Court.
15 It's not our burden.

16 The Supreme Court said if there is
17 willfulness, bad faith or fault of the plaintiff, those
18 are the terms used in the Court's decision. Any of those
19 would be sufficient to support dismissal.

20 And we think there's ample evidence of the
21 plaintiff's fault here. And perhaps some of the most
22 compelling evidence comes out of the plaintiff's own
23 papers.

24 Now, Your Honor, asked about those 2008 visa
25 applications, and Mr. Azmy says, well, they were

1 administratively closed rather than denied. I can't
2 explain that distinction to the Court. But, what's
3 important is when this case -- when did the plaintiffs
4 learn that in 2009 the State Department had
5 administratively closed their 2008 visa applications?
6 They learned in December 2012.

7 Based upon the plaintiff's own papers there
8 had been no inquiry, no questions by plaintiffs or
9 plaintiff's counsel to find out what happened with our
10 2008 visa applications. They had done nothing.

11 And, they didn't -- in fact, it's kind of --
12 it's impossible to understand why they did nothing given
13 the clear understanding they had of the need to appear in
14 this court.

15 As I referenced, Exhibit A to Ms. Burke's
16 declaration is the October 12th memo to the plaintiff's
17 Iraqi coordinator emphasizing the need to get visa
18 applications on file by October 22nd given the schedule
19 in the court in the speed with which the court processes
20 cases.

21 THE COURT: All right.

22 MR. KOEGEL: They didn't do that. It was
23 more than two months later before they bothered to submit
24 visa applications. This is not diligent activity by the
25 plaintiffs.

1 THE COURT: Well --

2 MR. KOEGEL: On this record, Your Honor,
3 in -- it's also important to keep in mind, Your Honor,
4 that at the February 14th hearing, you were crystal clear
5 that if they didn't show up for their depositions, they
6 were not going to proceed with their claims.

7 I think fair warning has already been
8 provided to these plaintiffs. And, we're now well past
9 the second deadline set by the Court, actually the third
10 set by the Court for the plaintiffs to appear for their
11 depositions.

12 An ample --

13 THE COURT: I think I understand your
14 position.

15 MR. KOEGEL: An ample record to dismiss their
16 claims at this point in time, particularly because
17 there's absolutely nothing in the report that indicates
18 there's any prospect they're ever going to appear for
19 depositions in this case, in this district.

20 THE COURT: Thank you.

21 Let the record reflect, this matter is before
22 the Court on the defendant's motion for sanctions and the
23 plaintiff's motion for extension of time to produce --
24 plaintiffs for discovery.

25 And the question presented under Rule 37 is

1 whether as a sanction the Court ought to dismiss the case
2 because the plaintiffs were dilatory in filing their
3 initial visa application to travel to the United States.

4 The plaintiffs secured visas in February but
5 were denied access to air travel, we're told, because
6 government officials pulled them off the plane or did not
7 allow them to board the plane.

8 And third, the plaintiffs are now attempting
9 to seek additional travel authorization and visas from
10 the State Department.

11 This case has been pending for nearly
12 five years now, and it has consumed -- the allegations
13 are very, very serious. And, if the acts alleged here of
14 these individuals were subjected to the conduct they have
15 described, and the defendant vigorously denies that they
16 were responsible for such conduct, this is a matter that
17 needs to be resolved with a trial.

18 But, the record reflects that from the outset
19 of the case, there was a scheduling order entered
20 directing a time for discovery to be closed.

21 Defendant did appeal and that appeal delayed
22 the case for two years, and that appeal ultimately was
23 sent back to us for discovery purposes and to go forward.

24 We talked about this issue in July, what was
25 necessary to start discovery again and when should it be

1 reinitiated. And, everyone here knows that the
2 plaintiffs would have to appear for discovery. There's
3 no way for the defendants to really defend the case
4 without having an opportunity to interview under oath
5 these individual plaintiffs and to ascertain the
6 substance of their claim and to be able to gather
7 evidence to support the claim.

8 So, I have a circumstance where we --
9 actually we must have the evidence. And the
10 February 8th, 2013, motion to compel resulted in the
11 order compelling the plaintiffs' depositions and directed
12 that since the discovery plan had been in place since
13 July 2012 and plaintiffs knew they had to come to the
14 United States, that they take all efforts to get here
15 promptly.

16 The order to compel directed the parties --
17 the plaintiffs to appear for deposition within 30 days.
18 That's the February 14, 2013, order.

19 And, Mr. Ejaili, E-J-A-I-L-I, did appear for
20 his deposition and medical examination on March 4th.

21 An oral motion was made on March 8th in open
22 Court for the absentee plaintiffs' deposition to be taken
23 the week of March 18th. And due to delays, plaintiffs
24 argue that the visas could not be approved in time, and I
25 modified the Court's previous order of February 14, 2013.

1 On March 22, plaintiffs filed another
2 extension of time to complete depositions arguing
3 although that the plaintiffs have secured visas and
4 attempted to board the planes for travel, they were not
5 permitted to travel by government officials.

6 It is unclear on this record why they were
7 not allowed to board the plane. I have no evidence
8 before me that they were on the so-called no fly list.
9 And all I do know from what has been told and presented
10 is that they had visas and plane tickets and there's
11 evidence before the Court of that.

12 And, additionally, plaintiffs sought an
13 additional motion extending the time for depositions, and
14 I granted an order on April 5, granting them additional
15 time. They have not appeared, and the question presented
16 is whether to dismiss here as a sanction under Rule 37.

17 Of course, the Court does not start out with
18 the idea that the first sanction that should be imposed
19 is dismissal. The *Wilson* case sets forth several factors
20 that I must take into consideration under Rule 37, which
21 may permit -- Rule 37 permits the Court to dismiss an
22 action in whole or in part for failure to abide by a
23 discovery order, and the sanctions vary in degree based
24 on severity.

25 And the factors the Court has to consider

1 include whether or not the noncompliant party acted in
2 bad faith; second, the amount of prejudice the
3 noncompliance caused the adversary; third, the need for
4 deterrence for a particular sort of noncompliance; and
5 four, whether less drastic sanctions have been effective
6 under the *Kiobel* case from the Fourth Circuit.

7 And the discretion has to be discreetly
8 observed. And in this case, I think there are four
9 factors that weigh against dismissal.

10 First, while there is certainly reason to
11 question the diligence of plaintiff with respect to
12 pursuing visas as early as October 2012, there's been no
13 evidence here of bad faith.

14 *Wilson* requires the Court to consider whether
15 a failure to comply results in the noncompliant's party
16 bad faith. And bad faith encompasses deliberate
17 disregard, haphazard compliance or willful conduct --
18 demonstrating complete disregard for the Court's order
19 under *Mutual Savings* case from the Fourth Circuit.

20 Courts have declined to find bad faith where
21 a party is unable to appear due to immigration
22 constrains, despite their willingness to travel. And the
23 *Baraz, B-A-R-A-Z* case is a case where the Court
24 determined that plaintiff demonstrated diligent efforts
25 to travel to the United States, was nonetheless unable to

1 travel due to immigration restrictions, and the Court did
2 not find willfulness or bad faith under those
3 circumstances.

4 I think that case is analogous to this case,
5 in that we had plaintiffs who secured visas who were
6 boarding a plane and were turned back, and they would
7 have been able to appear within the discovery period for
8 depositions and medical examinations. And so there's not
9 bad faith here.

10 And with respect to the argument of willful
11 disregard of the order, the plaintiffs did wait until
12 December 26th to apply for their visas. But the fact
13 remains at the time they boarded the plane or about to
14 board the plane, they had visas in time to appear for the
15 deposition within the discovery period.

16 And generally only unreasonable delay will
17 support a dismissal for lack of prosecution. I don't
18 have that here.

19 And, it seems to me the cases do not support
20 a judgment to dismiss. However, this is a case where it
21 seems.

22 To me that I have to be crystal clear from
23 the standpoint of the second factor and that is the
24 prejudice to the defendants.

25 The prejudice to the defendants is apparent.

1 It may not be able to try this case without discovery. A
2 video tape deposition is insufficient for many reasons
3 from the standpoint of being able to question them, to
4 fully explore the medical examination which is required,
5 and to be able to assess their credibility in person.

6 And we're not going to have a trial here by
7 video tape deposition. I'm unaware that I have the
8 discretion to do that. In this case, it seems to me that
9 given the gravity of the allegations in the complaint and
10 the denial that all parties here need to have a jury, be
11 able to see the witness, plaintiffs and make a judgment
12 about their credibility.

13 I don't think deterrence is necessary, but I
14 do think that I'm going to enter an order later today
15 that will crystal clear set forth that as required by
16 Fourth Circuit case law, that the next sanction that
17 may -- or sanction that may be imposed for noncompliance
18 with appearing for depositions may be dismissal. And I'm
19 going to put that in the order and refer to the *Camper*
20 case from the District of Maryland, that this drastic
21 consequence may be what occurs if the plaintiffs cannot
22 appear and are unable to make a showing that all efforts
23 have been exhausted to appear.

24 And, I'm not persuaded it's just merely
25 applying for another visa is going to cut the -- is going

1 to satisfy the requirements here because it seems to me
2 there's something more going on. And the State
3 Department's suggestion of only going for a visa
4 application does not seem sufficient to me, where it may
5 be that there are other agencies that are involved.

6 There's some reason why this is taking place,
7 and plaintiffs need to pursue that with the government,
8 and I mean more than just calling the U.S. Attorney to
9 find out what they're doing. You need to do more
10 concerning why these plaintiffs are not being allowed to
11 travel here. And it may be that the things set forth in
12 the discovery have nothing to do with it. But I need to
13 have a record on that.

14 So, to be clear about the plaintiff's motion
15 for extension of time, I will grant it until April 26th.
16 April 26th is what you requested. That's the date I'm
17 granting. That's within the scheduling order. And I
18 think that is more than sufficient time under the
19 circumstances to go forward.

20 And the order will reflect that if they do
21 not appear on April 26th, that I will make a judgment
22 then what to do with respect to whether or not the case
23 will be dismissed or not.

24 We spent too much time, too many lawyers, too
25 many judges have committed resources to this case. And

1 everyone here has an interest in seeing it go forward, so
2 that the Court or the jury can make a judgment about the
3 merits of these claims. And I'm unwilling to do it in a
4 bifurcated fashion or abbreviated fashion. It has to be
5 full and fair for both sides.

6 So to be clear, the motion for sanctions is
7 denied. The motion for extension of time is granted.
8 Thank you. You all are excused.

9 I'm going to take a 15-minute recess and come
10 back and start the next case.

11 (Proceedings concluded at 11:09 a.m.)

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CERTIFICATE OF REPORTER

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3 I, Renecia Wilson, an official court
4 reporter for the United State District Court of Virginia,
5 Alexandria Division, do hereby certify that I reported by
6 machine shorthand, in my official capacity, the
7 proceedings had upon the motions in the case of Al
8 Shimari, et al vs. CACI Premier Technology, et al.

9 I further certify that I was authorized and
10 did report by stenotype the proceedings and evidence in
11 said motions, and that the foregoing pages, numbered 1 to
12 55, inclusive, constitute the official transcript of said
13 proceedings as taken from my shorthand notes.

14 IN WITNESS WHEREOF, I have hereto subscribed
15 my name this 23rd day of April, 2013.

16
17 /s/
18 _____
19 Renecia Wilson, RMR, CRR
20 Official Court Reporter
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