

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

SUHAIL NAJIM ABDULLAH)	
AL SHIMARI, et al.,)	
)	
Plaintiffs,)	Case No. 1:08-CV-00827-GBL-JFA
)	
v.)	
)	
CACI INTERNATIONAL INC, et ano,)	
)	
Defendants.)	
)	

**MEMORANDUM IN SUPPORT OF DEFENDANTS'
MOTION TO COMPEL DEPOSITIONS OF PLAINTIFFS**

I. INTRODUCTION

The Plaintiffs refused to appear for properly noticed depositions. The Plaintiffs have also refused to commit to any dates for their depositions in this District. Their conduct brazenly flouts the rules regarding discovery and makes it impossible for the CACI Defendants to adequately prepare a defense. Plaintiffs and their counsel are quite skilled at generating world-wide publicity for their claims, but when it comes to the most basic participation in discovery about those claims, they are intransigent. The Court should not countenance their misconduct and should order them to appear in this District for depositions within thirty days.

During a July 2012 meeting to plan discovery in this case, Plaintiffs' counsel represented that her clients would, in accordance with Local Rule 30, appear for deposition in this District and that Plaintiffs' counsel had already been taking steps necessary to ensure Plaintiffs' ability to enter the United States for their depositions. When the CACI Defendants

made a request in December 2012 for dates on which Plaintiffs could be deposed during January 2013, Plaintiffs' counsel stated that Plaintiffs could not appear for depositions in January. Worse yet, Plaintiffs' counsel represented that Plaintiffs were unable to commit to appearing for deposition in this country at all, and that if Plaintiffs did appear it might not even be within the existing discovery period.

Notably, while Plaintiffs represented seven months ago that they had already put the wheels in motion to obtain approval for travel to the United States for depositions, Plaintiffs' counsel now refuses to disclose what efforts, if any, were actually made prior to January 2013. Based on Plaintiffs' unwillingness to divulge clearly non-privileged information, the only reasonable inference is that Plaintiffs made no efforts to arrange for approval to travel to the United States. But the story gets worse. Although Plaintiffs' counsel promised that they "will inform [the CACI Defendants' counsel] as soon as we know whether their visas have been granted,"¹ the CACI Defendants were not advised until today's date (February 8, 2013) that Plaintiff Al-Ejaili had his visa approved and was fully cleared for travel to the United States by on or about January 15, 2013, more than two weeks before the noticed deposition at which he failed to appear.²

Moreover, the four Plaintiffs collectively produced a grand total of thirteen pages of documents in response to the CACI Defendants' discovery requests, one of which is a document in which Plaintiffs Al Shimari expressly denied having been mistreated while in United States custody. Suffice to say, the CACI Defendants have a lot of questions they want to ask Plaintiffs.

¹ O'Connor Decl., Ex. 8.

² O'Connor Decl. ¶ 4.

Discovery is scheduled to close in this action on April 26, 2013. The CACI Defendants' expert disclosures are due on March 4, 2013. While Plaintiffs state a willingness to agree to a short extension of the discovery deadline to accommodate Plaintiffs' depositions, the effect of Plaintiffs' position would be to place any real discovery from the Plaintiffs at the end of the discovery window, when reasonable discovery in this case should *start* with discovery from the Plaintiffs. Plaintiffs' position also makes it impossible to have the CACI Defendants' experts take into account Plaintiffs' deposition testimony, or allow the CACI Defendants to take discovery to follow up on matters disclosed during Plaintiffs' depositions. For these reasons, the Court should direct Plaintiffs to appear for depositions in the United States within the next thirty days. If Plaintiffs do not comply with that order, or claim an inability to comply, the Court should assess the appropriate remedy at that time.³

II. BACKGROUND

Plaintiffs are Iraqi nationals who allege they were mistreated while in United States custody at Abu Ghraib prison. Three of the Plaintiffs live in Iraq, while Plaintiff Al-Ejaili lives in Qatar. While Plaintiffs do not allege that they had actual contact with any employee of CACI

³ Plaintiffs have indicated that they may be available for deposition in Iraq or Turkey. The CACI Defendants do not view these locations as acceptable from either a safety or logistical standpoint. Iraq remains a war zone. *See, e.g., Iraq Bombs Kill 31 as Sunnis Stage Protest Rallies* (Feb. 8, 2013), available at <http://www.usatoday.com/story/news/world/2013/02/08/iraq-baghdad-bomb-shiite/1901215/>. Indeed, the State Department website has a current travel warning for Iraq that recommends Americans avoid travel to Iraq because of "protracted conditions that make [Iraq] dangerous or unstable." O'Connor Decl., Ex. 11. Turkey is problematic for different but related reasons. *See* David Ariosto, *Leftist Terror Group Claims Responsibility for U.S. Embassy Bombing* (Feb. 4, 2013), available at <http://www.cnn.com/2013/02/02/world/turkey-embassy-bombing>; Carol Morello, *Civil War in Syria Puts Turkey on Edge* (Dec. 3, 2012), available at http://articles.washingtonpost.com/2012-12-03/world/35623328_1_syrian-president-bashar-al-assad-syrian-town-turkish-officials. Indeed, the State Department warns that "there is a continuing threat of terrorist actions and violence against U.S. citizens and interests throughout Turkey." O'Connor Decl., Ex. 12 at 5.

PT,⁴ they seek to hold the CACI Defendants liable for any injuries they suffered on a co-conspirator theory. Plaintiff Al Shimari initially asserted his claims against the CACI Defendants as a single-plaintiff in the United States District Court for the Southern District of Ohio. His suit was later transferred to this Court by consent. The other three Plaintiffs – Plaintiffs Rashid, Al-Ejaili, and Al Zuba’e – asserted claims only in this Court.

This case was remanded from the Fourth Circuit on June 29, 2012. Recognizing that the remand would require the parties to conduct discovery, Plaintiffs’ counsel and Defendants’ counsel had a meeting to discuss discovery and case management issues on July 18, 2012. At that meeting, Plaintiffs’ counsel confirmed that her clients would appear for deposition in this District and that she was already taking the steps necessary to secure approval for their travel to the United States. O’Connor Decl. ¶ 2. The Court lifted the stay on discovery on November 6, 2012. [Dkt. #160]. The Court issued a scheduling order that called for all discovery to be completed by April 26, 2013.

On December 17, 2012, the CACI Defendants’ counsel sent an email to Plaintiffs’ counsel asking for dates in January 2013 to take the Plaintiffs’ depositions in this District. O’Connor Decl., Ex. 1. Plaintiffs’ counsel responded on December 18, 2012, and stated that Plaintiffs’ counsel was “working on” obtaining visas for the Plaintiffs but that Plaintiffs likely would not be able to travel to the United States “before March, and possibly later.” *Id.*, Ex. 2. The CACI Defendants’ counsel responded, noting Plaintiffs’ counsel’s prior representation in July 2012 that the steps were already in motion to secure authorization for Plaintiffs’ travel to the United States, and asked what efforts had been made to secure Plaintiffs’ ability to appear in the United States for deposition. *Id.*, Ex. 3. Plaintiffs’ counsel refused to provide this information.

⁴ “CACI PT” refers to Defendant CACI Premier Technology. CACI PT is the CACI entity that actually provided personnel in support of the military mission at Abu Ghraib prison.

Id., Ex. 3. Dissatisfied with Plaintiffs' position, the CACI Defendants served deposition notices on Plaintiffs calling for depositions on January 29, 30, 31, and February 1, 2013. *Id.*, Exs. 4-7. Plaintiffs objected to these notices and did not appear. *Id.*, Ex. 8.

Plaintiffs' counsel's January 9, 2013 letter to CACI Defendants; counsel stated as follows:

As of this date, all Plaintiffs are scheduled to complete interviews by U.S. officials at their respective U.S. Embassy by January 24, 2013 – a date too close to the proposed depositions to ensure their availability. *We will inform you as soon as we know whether their visas have been granted, and will work to schedule depositions in the Eastern District of Virginia in a time frame reasonably thereafter.*

Id. (emphasis added).

Plaintiffs did not live up to their promise. During a final meet and confer session regarding this motion on February 8, 2013, Plaintiffs' counsel told the CACI Defendants' counsel that Plaintiff Al-Ejaili had actually had his interview with the United States Embassy in Qatar much earlier than the January 24, 2013 date quoted in Plaintiffs' counsel's letter. In particular, Plaintiffs' counsel advised that Plaintiff Al-Ejaili had his embassy interview on about January 13, 2013, *and that his visa was approved just a day or two after that.* O'Connor Decl. ¶ 4. Thus, Plaintiff Al-Ejaili had been fully cleared for travel to the United States more than two weeks before the date of his noticed deposition (O'Connor Decl., Ex. 6) and he simply declined to appear.

Concurrent with their efforts to obtain deposition discovery from Plaintiffs, the CACI Defendants also sought document discovery from Plaintiffs. In response, the four Plaintiffs produced a grand total of thirteen pages of documents relating to their case. *Id.* ¶ 3. One of these documents is a Multinational Force – 1 Form 134-4 completed by Plaintiff Al Shimari upon his release from United States custody. In that document, Plaintiff Al Shimari represented

as follows: “I was not mistreated during my detention.” *Id.*, Ex. 9. Moreover, although Plaintiffs have alleged that they suffered severe physical and emotional injuries while in United States custody, Plaintiffs’ document production did not include a single record of treatment by a medical professional in the several years after their release from United States custody. Indeed, there is no indication that Plaintiffs saw any medical professional other than their January 2013 visit with Plaintiffs’ litigation medical expert. In other words, Plaintiffs waited periods of between four-and-one-half years and nine years after their release from United States custody before seeking any medical attention for the injuries they allegedly sustained while incarcerated at Abu Ghraib.

III. ANALYSIS

A. Plaintiff Al-Ejaili Simply Failed to Appear for a Deposition He Was Perfectly Able to Attend

Plaintiff Al-Ejaili is somewhat differently situated than the other three Plaintiffs because, as the CACI Defendants only learned from Plaintiffs’ counsel on February 8, 2013, Plaintiff Al-Ejaili had been fully cleared for travel to the United States well in advance of his noticed deposition date and simply declined to appear. O’Connor Decl. ¶ 4. While the other three Plaintiffs claim an inability to appear on the date specified, a contention the Court should not credit for the reasons stated in Section III.B, *infra*, Plaintiff Al-Ejaili does not even plausibly have that argument. On January 9, 2013, Plaintiffs’ counsel sent the CACI Defendants’ counsel an objection to the noticed depositions of Plaintiffs that is at best carefully worded to avoid disclosing the timing of Plaintiff Al-Ejaili’s embassy interview, stating that all Plaintiffs’ embassy interviews would be completed by January 24, 2013 when Plaintiff Al-Ejaili’s interview was actually much earlier. O’Connor Decl., Ex. 8.

Plaintiffs' counsel's January 9, 2013 letter did, however, pledge to keep the CACI Defendants apprised as soon as Plaintiffs were cleared for travel to the United States, a pledge Plaintiffs did not keep with respect to Plaintiff Al-Ejaili. Instead, it was not until February 8, 2013, that Plaintiffs' counsel advised that Plaintiff Al-Ejaili's visa had been approved by the United States within a day or two of his January 13, 2013 interview, more than two weeks before the date of his noticed deposition. Plaintiffs have no excuse for not advising the CACI Defendants of the approval of Plaintiff Al-Ejaili's visa, or for Plaintiff Al-Ejaili's failure to appear for his deposition.

Federal Rule of Civil Procedure 37(d) takes a dim view of parties failing to appear for properly noticed depositions. Fed. R. Civ. P. 37(d)(1)(a) (permitting sanctions for a party's failure to appear at his deposition). Indeed, the rule is clear that it is an unacceptable excuse for a party to fail to appear even if the discovery sought was objectionable *unless* the party moved for a protective order. Fed. R. Civ. P. 37(d)(2). Plaintiff Al-Ejaili, of course, had no basis for moving for a protective order because he was fully cleared for travel to the United States for his deposition. Accordingly, the Court should order Plaintiff Al-Ejaili to appear for deposition, award the CACI Defendants the attorneys' fees and costs associated with moving to compel Plaintiff Al-Ejaili's deposition, and order any other sanction or remedy the Court deems appropriate. *See* Fed. R. Civ. P. 37(d)(3).

B. The Court Should Order Plaintiffs Al Shimari, Rashid, and Al Zuba'e to Appear for Deposition in this District Within the Next 30 Days, as Plaintiffs Were Responsible for Taking Timely Steps to Secure Authorization to Enter the United States

The Federal Rules of Civil Procedure largely allow a party to proceed in discovery in the order it sees fit. *See* Fed. R. Civ. P. 26(d)(2)(A) (permitting parties to use discovery methods in any sequence); *see also Carman v. Bayer Corp.*, No. 5:08-CV-148, 2009 WL 1919049, at *2

(N.D. W. Va. July 1, 2009) (granting motion to compel that permitted the defendants to take a deposition at the time they chose in the discovery process). In order to fairly prepare this case for summary judgment and any potential trial, the CACI Defendants should be permitted to *start* discovery with depositions of the Plaintiffs and not be required to *end* discovery with Plaintiffs' depositions. There are several reasons why the CACI Defendants desire to proceed in this manner.

First, the CACI Defendants do not know anything about Plaintiffs' capture and detention other than what is set forth in the thirteen pages of documents produced by Plaintiffs (and one of those documents is an express disavowal of having been mistreated while in custody). Plaintiffs' testimony during depositions likely will have a significant impact on how the CACI Defendants frame the other discovery they take in this action. For example, Plaintiffs' initial disclosures list over 150 persons who Plaintiffs contend may have testimony to support Plaintiffs' claims. Their interrogatory responses list 39 persons who may be part of the "torture conspiracy" on which Plaintiffs' claims are premised. O'Connor Decl., Ex. 10. Learning through the give-and-take of deposition testimony what Plaintiffs can say about each of these supposed conspirators likely will impact the course of discovery taken by the CACI Defendants. Moreover, while the CACI Defendants have served document subpoenas on the United States, the United States expects to need considerable time to search for documents and, in any event, it is appropriate for Plaintiffs' depositions to precede production of documents from the United States. The CACI Defendants want the Plaintiffs' depositions to reflect Plaintiffs' own story and not to bear the risk that Plaintiffs will tailor their stories around what is provable from the United States' detention records. This is not a theoretical risk. The lead plaintiff in *Saleh v. Titan Corp.*, 580 F.3d 1 (D.C. Cir. 2009), who was represented by many of the same counsel here, submitted an

administrative claim asserting various claims of detainee abuse. It turned out from the Army's review of its records that Mr. Saleh's rendition of the facts was simply not true. *See id.* at 2-3. In fact, the Army's investigation determined that Saleh was never interrogated, was never housed at the site at Abu Ghraib where abuse occurred, and there was absolutely no corroboration for any of his claims of abuse. For the same reason that fact witnesses generally are sequestered at a trial, the CACI Defendants would like to hear Plaintiffs' testimony in depositions without them (or even the CACI Defendants) knowing what the United States' records actually show.

Second, placing Plaintiffs' depositions at the end of discovery means that the CACI Defendants' experts will not be able to incorporate the Plaintiffs' testimony into their reports, as the deadline for expert disclosures will have passed before Plaintiffs appear for deposition. Moreover, Plaintiffs have disclosed expert reports from a doctor who had the benefit of actually seeing Plaintiffs. The CACI Defendants are contemplating having Plaintiffs examined by an American doctor on the same trip in which Plaintiffs appear for depositions. That would be impossible if Plaintiffs appear after the expert disclosure deadline unless the CACI Defendants are provided some form of relief from that deadline.

At bottom, it is no surprise that there are logistical issues involved in obtaining visas from the State Department for Iraqis to travel to the United States, particularly Iraqis captured and detained for a number of years by the United States. The Plaintiffs' counsel are acutely aware of those issues. That is why the CACI Defendants expressly raised this issue with Plaintiffs' counsel in **July 2012**, and were assured at that time that the steps were already in motion to secure government approval. Now, Plaintiffs' counsel advise that there are, *at best*, significant delays in getting Plaintiffs Al Shimari, Al-Ejaili, and Al Zuba'e into the United States but Plaintiffs refuse to divulge what, if anything, they did along the way to make arrangements for

approval of Plaintiffs' travel. Plaintiffs' unwillingness to provide this information suggests that the steps taken by Plaintiffs and their counsel were either nonexistent or unsuccessful, with Plaintiffs contending that the CACI Defendants should suffer the brunt of the prejudice from Plaintiffs' delays. Plaintiffs and their counsel chose to file suit in the United States, and it was incumbent on them to take responsible steps to ensure that Plaintiffs could be full participants in discovery. It is fundamentally unfair and in violation of the rules governing discovery for Plaintiffs to avail themselves of United States courts, but place the burdens of their decision entirely on Defendants.

IV. CONCLUSION

For the foregoing reasons, the Court should grant Defendants' motion and compel Plaintiffs to appear for depositions in the Eastern District of Virginia within 30 days. In the event that Plaintiffs are unable to comply, or their compliance nevertheless prejudices the CACI Defendants' discovery efforts, the Court should order other appropriate relief as necessary. The Court also should award the CACI Defendants their attorneys' fees and costs associated with this motion.

Respectfully submitted,

/s/ J. William Koegel, Jr.

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CERTIFICATE OF SERVICE

I hereby certify that on the 8th day of February, 2013, I will electronically file the foregoing with the Clerk of Court using the CM/ECF system, which will then send a notification of such filing (NEF) to the following:

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