

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

SUHAIL NAJIM ABDULLAH	.	Civil Action No. 1:08cv827
AL SHIMARI, et al.,	.	
	.	
Plaintiffs,	.	
	.	
vs.	.	Alexandria, Virginia
	.	June 15, 2018
CACI PREMIER TECHNOLOGY, INC.,	.	10:46 a.m.
	.	
Defendant.	.	
	.	
-----X		
CACI PREMIER TECHNOLOGY, INC.,	.	
	.	
Third-Party Plaintiff,	.	
	.	
vs.	.	
	.	
UNITED STATES OF AMERICA, and	.	
JOHN DOES 1-60,	.	
	.	
Third-Party Defendants.	.	
	.	
.	X	

TRANSCRIPT OF MOTION HEARING
BEFORE THE HONORABLE LEONIE M. BRINKEMA
UNITED STATES DISTRICT JUDGE

APPEARANCES:

FOR THE PLAINTIFFS:	BAHER AZMY, ESQ.
	KATHERINE GALLAGHER, ESQ.
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	and
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(Pages 1 - 15)

COMPUTERIZED TRANSCRIPTION OF STENOGRAPHIC NOTES

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P R O C E E D I N G S

1
2 THE CLERK: Civil Action 08-827, Suhail Najim
3 Abdullah Al Shimari, et al. v. CACI Premier Technology, Inc.,
4 et al. Would counsel please note their appearances for the
5 record.

6 MR. O'CONNOR: Good morning, Your Honor. John
7 O'Connor and William Dolan for CACI Premier Technology, Inc.

8 THE COURT: Good morning.

9 MR. AZMY: Good morning, Your Honor. Baher Azmy,
10 Katherine Gallagher, and Cary Citronberg for the plaintiffs.

11 THE COURT: Good morning.

12 MS. WETZLER: Good morning, Your Honor. Lauren
13 Wetzler for the third-party defendant, United States of
14 America. With me are Paul Stern, Adam Kirschner, and Jocelyn
15 Krieger from the Department of Justice.

16 THE COURT: All right. I want to address the appeal
17 of Judge Anderson's order first. Do I understand correctly
18 that there have been one or two depositions now that have been
19 conducted of interrogators?

20 MR. O'CONNOR: That's right, Your Honor. We took one
21 on Wednesday, and we took one yesterday.

22 THE COURT: All right. And my understanding is those
23 were done by phone, is that correct, or were they video, or how
24 were they done?

25 MR. O'CONNOR: They were done by phone, Your Honor,

1 no video. A court reporter, Justice Department, and Army with
2 me in D.C.; plaintiffs by phone from New York; another Justice
3 Department lawyer with the witness in an undisclosed location.

4 THE COURT: All right. And my understanding, were
5 all questions other than the identification of the witness,
6 were all questions that you proposed answered?

7 MR. O'CONNOR: Well, I guess that depends on how you
8 define about identity of the interrogator. Generally speaking,
9 we were limited to -- with respect to the interrogator or any
10 other participant in an interrogation, we were limited to
11 gender, race, status, whether at the time the person was in the
12 Army or a CACI employee or somebody else, and really not
13 anything other than that.

14 So it wasn't just about the witness's identity, but
15 it was the identity of anybody else who was present for the
16 interrogation, because as I think we noted in our reply, the
17 United States has now taken the position that the identities of
18 analysts and linguists are also classified, so it would be
19 basically anyone you would expect to be present for an
20 interrogation.

21 THE COURT: But, I'm sorry, but you said you were
22 able to get the gender?

23 MR. O'CONNOR: They would, they would allow me to
24 state whether -- I could tell the gender of the witness on the
25 phone.

1 THE COURT: Obviously.

2 MR. O'CONNOR: And then the other persons who were
3 present, they would let me know gender, race, affiliation, you
4 know, soldier at the time or a CACI employee or something else,
5 and that's basically it.

6 THE COURT: All right.

7 MR. O'CONNOR: I have, I have a suggestion on our
8 objections, Your Honor.

9 THE COURT: Go ahead.

10 MR. O'CONNOR: I want to say at the outset, these are
11 difficult issues, and, and I hope it came through in our
12 papers, Your Honor, the respect we have for how Magistrate
13 Judge Anderson has, you know, dove into these, and we
14 understand the incremental approach that he's taken, basically
15 do the pseudonymous depositions and then, you know, we'll come
16 back and see.

17 Our objection, I'll confess, we actually felt a
18 little bad filing it because --

19 THE COURT: We don't take it personally.

20 MR. O'CONNOR: But as we, you know, as we tried to
21 make clear in our papers, we're, we're taking -- when the U.S.
22 tells us we've got someone lined up for a pseudonymous
23 deposition, we take it, and -- but in addition to the
24 interrogators, we're, we're now going to have the same issue
25 with linguists and analysts, and we filed a motion on that, and

1 there's a proposal for a briefing schedule that was filed by
2 the United States last night that we hope will get entered by
3 the Court.

4 And I guess our overall thought is it might make
5 sense to instead of trying to assess all these with a little
6 piece of the puzzle, to deal with what's the effect of the
7 things we can't get because they're classified at once, which
8 would include the interrogators, the analysts, the linguists,
9 and documents, which we know that the United States is very
10 likely to have some documents for which they're going to assert
11 the state secrets privilege.

12 So, you know, I'm not sure if the Court has given any
13 thought to whether this objection, which was in large part,
14 because I'm sure we didn't waive anything with respect to our
15 positions on interrogators, it might make sense in some form or
16 fashion to deal with this all at once.

17 THE COURT: So what you're saying then is to not rule
18 on it right now, to allow all of the depositions to go forward,
19 and then when we see the totality of the evidentiary mix, to
20 decide whether or not the Court needs to try to order
21 additional information or at that point you make an argument
22 that you can't defend this case and your motion to dismiss gets
23 raised.

24 Is that what you're arguing?

25 MR. O'CONNOR: That's what we think would make sense,

1 Your Honor. We think it's better than doing this piecemeal,
2 with little pieces of the puzzle.

3 THE COURT: All right, let me hear from the
4 plaintiffs.

5 MR. AZMY: Your Honor, our position now is as it was
6 before Magistrate Anderson, which is we too intended and are
7 participating in these depositions, and we find that -- the
8 government's proposed pseudonymous deposition proposal suitable
9 under the circumstances.

10 Plaintiffs in a way are prejudiced by the
11 pseudonymous stature of these defendants -- of these
12 interrogators as well, but we -- and we can address this now.
13 We addressed it before Judge Anderson. What I think is central
14 from our perspective is whatever -- and we believe it is
15 nominal prejudice that CACI will suffer, could not justify the
16 dismissal of plaintiffs' case under the state secrets doctrine.

17 THE COURT: All right. Well, we're not there yet.

18 MR. AZMY: We're not there yet, yes. As
19 Mr. O'Connor's amended proposal would suggest, we're not there
20 yet. I thought we were as of, you know, last night anyway.

21 THE COURT: All right. Well, what I'm going to do is
22 first of all, I don't find there was any error made by the
23 magistrate judge in deciding the issue as he did, that in
24 reality -- and I think proportionality is actually not an
25 inappropriate word for describing the situation, that he has

1 basically worked out a compromise where, as both sides are able
2 to get substantive information from witnesses lacking certain
3 information.

4 And I will point out to you-all, I mean, I tried a
5 criminal case a year or two ago where there were witnesses who
6 testified in costume, in disguise, without true names being
7 given. So this use of, you know, witnesses under these types
8 of protections in cases involving very sensitive witnesses,
9 covert agents, or whatever, is something this Court has done in
10 criminal cases, where to some degree there's more at stake than
11 there is in a civil case, frankly. Civil cases are just
12 dollars and cents; criminal cases, you know, life.

13 And so I don't see any problem with -- at this point
14 with what's been done. So for the record, I am going to affirm
15 the decision of the magistrate judge. That doesn't change or
16 affect the ability of CACI to come back or, frankly, the
17 plaintiff to come back and make an argument to the Court that
18 you need more information, and so in that respect, that issue
19 has been resolved, all right?

20 MR. AZMY: Thank you.

21 THE COURT: Now, of course, we know that at any time,
22 the Court must address the issues as to whether it has
23 jurisdiction, and the defense has raised this argument based on
24 *Jesner*, which is a fascinating argument, it's an interesting
25 opinion. It's unfortunately another example of the Supreme

1 Court failing to give us lower courts clear guidance on how to
2 handle things.

3 I believe the actual question, the cert petition,
4 actually the question was whether or not corporations can be
5 held liable under the ATS, and that's not the answer that the
6 Court gave. It clearly talked about foreign corporations to
7 begin with, on a very macro, simplistic level.

8 The opinion doesn't even apply to this case, in my
9 view, on the facts because it was focusing on the concept that
10 this was a foreign corporation, happened to have offices in the
11 United States, all the, all the injuries occurred overseas,
12 they were overseas plaintiffs.

13 That's mixing apples with grapefruit. I mean, it's
14 not even close to this case, which involves a U.S. corporation
15 working on behalf of the U.S. government, most likely with a
16 fair number of U.S. citizens. It happens to have occurred in a
17 foreign country, but the foreign policy implications do not
18 exist in this case that existed possibly in, in *Jesner*. It
19 certainly doesn't have the same factual issues of *Kiobel* or
20 *Sosa*. It's just a complete -- factually, it's different.

21 Now, I understand that one can read sort of the legal
22 discussion by the Court as perhaps adopting, and I'm not
23 satisfied that *Sosa* totally supports how *Jesner* came out, but a
24 two-prong test that the Court has to apply. Even if,
25 Mr. O'Connor, you're correct that that is now what the Supreme

1 Court is looking at, we've already satisfied the first element,
2 and the Fourth Circuit gave us clear instructions about what we
3 needed to find on the political question issue. We've already
4 issued an opinion that we do find the first element on *Sosa* is
5 satisfied based on the allegations that the plaintiffs have
6 made in this case.

7 And the second issue I don't have a problem with. I
8 don't think -- as I said, I don't think this case has any
9 problems in light of *Jesner*. We're probably going to issue an
10 opinion on this because it's a very interesting issue, and
11 you've briefed it, but we've spent a fair amount of time
12 looking at this, and I'm satisfied that there's no basis to
13 find that we lack jurisdiction under that case. So I'm denying
14 that motion -- or actually, it wasn't even a motion. I think
15 it was a suggestion, right, suggestion that we don't have
16 jurisdiction. I think we still have jurisdiction, all right?

17 MR. O'CONNOR: Wright & Miller, I think, pointed me
18 toward the nomenclature of a suggestion of lack of jurisdiction
19 because you've already answered.

20 THE COURT: Well, it was a very polite suggestion,
21 and I don't believe that you're successful. And I don't know
22 if there are any more Supreme Court cases in the hopper right
23 now that might be relevant to this case, but I'll certainly
24 entertain suggestions from either side in this case.

25 And I'm going to throw out a suggestion. I think

1 I've said this before, but it's going to be a mantra in this
2 case, and that is, I really hope -- and I guess I'm really
3 addressing the plaintiffs' counsel on this one -- that you
4 continue to give serious thought to whether or not there's any
5 way you can settle this case. I mean, it still is a civil
6 case, and ultimately what's at issue in this case are damages
7 for individuals who allege that they've been harmed by the
8 defendant, and I don't know if there's been any effort in that
9 respect.

10 MR. O'CONNOR: Your Honor?

11 THE COURT: Yeah.

12 MR. O'CONNOR: Plaintiffs did finally send a demand
13 to us several months ago. We did not view that as something
14 that provided any encouragement --

15 THE COURT: All right.

16 MR. O'CONNOR: -- that this case could or should
17 settle.

18 THE COURT: And the only thing, and I'm not going to
19 get into the nitty-gritty of it with you other than to suggest
20 that it's still always worth thinking about, but I still see
21 significant, and I mean significant monetary costs to ongoing
22 litigation in this case. I mean, we're still in the midst of
23 obvious discovery. There's certainly going to be more rounds
24 of motions practice. There's a lot at issue in this case, at
25 stake in this case, and it's expensive.

1 And I don't know, you know, how when lawyers think
2 about, you know, the litigation budget and talk to the client
3 about, you know, it's going to cost X amount of money through
4 summary judgment, X amount of money through trial, you know,
5 how that amount of money relates to the total demands being
6 made by the plaintiffs. That's up to you-all, but, I mean, I
7 just think, you know, this case at some point should be
8 addressed as an ordinary civil case to see whether it can be
9 worked out.

10 Did you want to --

11 MR. AZMY: Yeah, that's right. We forwarded a demand
12 letter, I believe it was either, it was either November or
13 January, and we've reiterated before Judge Anderson and
14 repeatedly with defense counsel that we are open to discussing
15 the terms of the demand letter.

16 From our perspective, it's a quite modest proposal,
17 taking your instructions to heart early on in this case to
18 modulate our proposal given a variety of factors, and certainly
19 it seems to me, I don't work in, you know, a big law firm, but
20 certainly it seems to me if the question is the value of the
21 request versus the value of attorneys' fees, I think that makes
22 our request even especially modest.

23 And this is the first time I've heard from defense
24 counsel the suggestion that the request may be too high. We've
25 just simply heard nothing one way or another, and if the

1 request is too high, it would seem to me an opportunity to get
2 before Judge Anderson and figure out whether or not we can
3 agree to terms or not.

4 THE COURT: Well, again, I would hope that both sides
5 would think about this issue. I mean, I recognize that CACI
6 may have other logistical concerns. There's still the *Abbass*
7 case in the, in the pipeline.

8 MR. O'CONNOR: That's right, Your Honor.

9 THE COURT: But again, to some degree, who knows what
10 the status of that is. No one's been making any noises about
11 it. Have you been in touch at all with plaintiff's counsel
12 from *Abbass* recently?

13 MR. O'CONNOR: Not in several months, Your Honor.

14 THE COURT: And they're not following this case? I
15 mean, as far --

16 MR. O'CONNOR: Whether he's following it or not, Your
17 Honor --

18 THE COURT: All right.

19 MR. O'CONNOR: -- is unknown to me.

20 THE COURT: All right. I mean, that may be part of
21 the problem, the reality of it here, but the same thing is, you
22 know, what the plaintiffs have to worry about to some degree is
23 the degree -- assuming a case gets to trial, is the degree of
24 jury appeal that this case and the plaintiffs themselves,
25 frankly, may have. I mean, it's going to be difficult because

1 likely they will not be physically present in the courthouse.
2 Most likely, they're going to be by video. That's difficult
3 for a jury to develop a rapport with a, with a victim.

4 I certainly know that CACI has throughout many of the
5 pleadings insisted that there were, you know, legitimate
6 grounds for picking these folks up. You know, I don't know how
7 a jury will -- how that will play with a jury. And so,
8 frankly, even if you were to receive a decent judgment, you
9 know, it can be held up for a long time on appeal.

10 I mean, there's no question on this case that, you
11 know, the appeal would not just be to the Fourth Circuit but at
12 least an attempt to get it to the Supreme Court. There are
13 lots of issues in this case now that are probably Supreme Court
14 eligible, but it means a lot of ongoing litigation and cost.

15 So I just recommend strongly that there be continued
16 thinking about that, all right?

17 MR. AZMY: Yes, we appreciate that.

18 THE COURT: All right.

19 MR. AZMY: And have given that consideration as well,
20 Your Honor.

21 THE COURT: Anything further on this case?

22 MR. O'CONNOR: Your Honor?

23 THE COURT: Yeah.

24 MR. O'CONNOR: Given Your Honor's comments, I assume
25 we're not taking oral argument on the *Jesner* issue. I would

1 say that we do believe the separation of powers issues here are
2 serious, and we hope that when Your Honor issues an opinion, if
3 that opinion is to reject the suggestion that the Court
4 contemplates whether 28 U.S.C. 1292(b) certification is
5 appropriate. Thank you.

6 THE COURT: I can already tell you I'm going to save
7 myself some writing on that one. I told you when I first got
8 this case I would do everything I could to keep it from going
9 back to the Fourth Circuit until it's resolved. The way I've
10 read their opinion is my marching orders are resolve this case,
11 whether it means, you know, a dispositive ruling that ends all
12 the issues so we don't have this constant back-and-forth and
13 back-and-forth or it means trying the case, but I'm going to do
14 everything I can to avoid that further delay of getting this
15 case resolved, but I appreciate it.

16 Thank you, Mr. O'Connor.

17 MR. O'CONNOR: Thank you, Your Honor.

18 THE COURT: We'll recess court for the day.

19 (Which were all the proceedings
20 had at this time.)

21 CERTIFICATE OF THE REPORTER

22 I certify that the foregoing is a correct transcript of
23 the record of proceedings in the above-entitled matter.

24
25 /s/

Anneliese J. Thomson