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

ALEXANDRIA DIVISION

JANE DOE and JOHN DOE, Plaintiffs, v. YUSUF ABDI ALI, Defendant.	)	Civil Action No. 1:04 CV 1361 (LMB/BRP)

MEMORANDUM IN SUPPORT OF PLAINTIFFS' MOTION FOR VOLUNTARY DISMISSAL WITHOUT PREJUDICE ON TERMS AND CONDITIONS

INTRODUCTION

This is an action filed by two residents of northern Somalia against the defendant, Yusuf Abdi Ali ("Ali"), a current resident of Alexandria, Virginia, for human rights abuses committed in Somalia. As the Court is aware, residents of Somalia may not easily travel to other countries, particularly including the United States. As a result of the difficulties plaintiffs have faced in coming to the U.S. for discovery and trial purposes, and at the suggestion of the Court, plaintiffs seek entry of a voluntary dismissal without prejudice on terms and conditions pursuant to Rule 41(a)(2) of the Federal Rules of Civil Procedure. The terms and conditions suggested herein by plaintiffs will permit plaintiffs to refile the action within 90 days upon certifying the dates and locations for which plaintiffs will be available for deposition, and will not cause any prejudice to the defendant.

BACKGROUND

Throughout the course of these proceedings, plaintiffs have diligently sought to arrange for their travel to the U.S. for discovery and trial. Unfortunately, despite all of the efforts exerted by plaintiffs and their counsel, which include a very considerable investment of time and expense, it now appears that only one of the plaintiffs, Jane Doe, is likely to receive a U.S. visa to travel here. Even so, before she can do so she must still obtain a passport waiver from the Department of Homeland Security. If Jane Doe receives such permission, she will not be able to come to the U.S. before the close of discovery on May 13, 2005. John Doe, on the other hand, was denied a visa, and in all probability will not be able to travel to the U.S. at all.

Plaintiffs have also worked hard to locate suitable alternate locations for their depositions. Plaintiffs examined a number of countries, including Ethiopia, Djibouti, Kenya, Somalia, and the United Kingdom. Plaintiffs retained local counsel in four foreign countries and investigated plaintiffs' ability to travel to those countries. Counsel for plaintiffs communicated with U.S. consular and embassy officials and coordinated with service providers in order to secure interpreters, reporters, videographers, and videoconferencing providers. It has been a comprehensive, time-consuming, and costly undertaking.

Throughout these proceedings, plaintiffs' counsel have kept Ali's counsel informed of the status of their efforts to bring plaintiffs to the U.S. for their depositions or to secure an alternate location. Plaintiffs have also informed the Court of the status of their efforts and have sought appropriate relief from the Court. Ultimately, counsel for plaintiffs arranged to take depositions of several witnesses, and of the plaintiffs themselves, in Ethiopia. Counsel for plaintiffs secured the permission of the Ethiopian government, ensured that the depositions would not violate local law, received the support of U.S. consular officials, confirmed the ability of plaintiffs to travel to

Ethiopia, and assured themselves of the availability of appropriate facilities and service providers (a court reporter, a videographer and an interpreter) to support the depositions. Based on discussions with defendant's counsel, plaintiffs noticed the depositions in Ethiopia beginning on May 2, and filed an appropriate motion pursuant to Rules 26(c) and 28(b) of the Federal Rules of Civil Procedure.

Last week Judge Poretz took that motion under advisement. Judge Poretz emphasized the appropriateness of voluntary dismissal on terms, suggested that the parties confer to discuss a voluntary dismissal without prejudice on terms and conditions to allow sufficient time to arrange for plaintiffs depositions and other discovery issues, and directed the plaintiffs file the present motion by Monday, April 25, so that it may be heard on Friday, April 29.[1] (Plaintiffs have requested a Transcript of the April 22, 2005 hearing before Judge Poretz, and will submit a copy once it is available). Because Judge Poretz has the motion regarding foreign depositions under advisement, it is no longer possible to arrange the depositions before the close of discovery due to the unavailability of counsel for Ali the week of May 9, 2005.

ARGUMENT

I. THE COURT SHOULD ENTER DISMISSAL WITHOUT PREJUDICE ON TERMS AND CONDITIONS

A. Standard for Dismissal Under Rule 41(a)(2)

Under Rule 41(a)(2) of the Federal Rules of Civil Procedure, a court can dismiss a case on terms and conditions at the plaintiff's request. Fed. R. Civ. P. 41(a)(2). A dismissal under

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[1] Similarly, Judge Brinkema previously suggested that the parties consider how to dismiss this case without giving up the ability to refile in the near future. (Transcript of April 1, 2005 hearing before the Honorable Leonie M. Brinkema, hereinafter "April 1 Transcript," at 20, attached as Exhibit 1). Dismissal may also allow the State Department to consider the defendant's defenses based on an asserted reconciliation effort by the Transitional Federal Government in the Somali Republic. (See April 1 Transcript at 20.) Finally, plaintiffs note that both parties have retained experts on Canadian law, which may facilitate consideration of defendant's statute of limitations argument upon refiling, before the great expenditures of time, effort and money associated with several foreign depositions in this case.

Rule 41(a)(2) is generally without prejudice unless so specified by the court. *Id.* The purpose of Rule 41(a)(2) is to freely allow voluntary dismissals unless the parties will be unfairly prejudiced. *Davis v. USX Corp.*, 819 F.2d 1270, 1273 (4th Cir. 1987). Rule 41(a)(2) motions are submitted to the sound discretion of the court and typically will be granted unless there is "substantial prejudice" or "plain legal prejudice" to the defendant. *Teck Gen. Partnership v. Crown Central Petroleum Corp.*, 28 F. Supp. 2d 989, 991 (E.D. Va. 1998); *see Gross v. Spies*, 133 F.3d 914, 1998 WL 8006, at *5 (4th Cir. Jan. 13, 1998) (unpublished) ("The primary purpose of the rule is to freely permit voluntary dismissal while protecting the nonmovant from unfair treatment"). The court should "weigh the equities and do justice to all parties in the case." 8 *Moore's Federal Practice*, § 41.40[5][a] (Mathew Bender 3d ed.). Importantly, to the extent there is prejudice to the defendant, the court may impose conditions on the dismissal to obviate any such prejudice to the defendant. *Davis*, 819 F.2d at 1273.

In considering prejudice, the Fourth Circuit has identified several factors to consider when ruling on a motion for a Rule 41(a)(2) dismissal: "(1) the opposing party's effort and expense in preparing for trial; (2) excessive delay or lack of diligence on the part of the moveant; (3) insufficient explanation of the need for a dismissal; and (4) the present stage of the litigation, *i.e.*, whether a motion for summary judgment is pending." *Gross*, 1998 WL 8006, at *5. This Court has adopted these considerations in ruling on Rule 41(a)(2) motions. *See, e.g., Teck*, 28 F. Supp. 2d at 991 (citing *Gross*). These factors are not exclusive, and other relevant factors should be considered depending on the circumstances. *Id.*

Defendants are to receive protection from legal prejudice – not from mere inconvenience or tactical disadvantage. *RMD Concessions, L.L.C. v. Westfield Corp, Inc.*, 194 F.R.D. 241, 243 E.D. Va. 2000). Prejudice does not arise from, among other things, the prospect of a second

lawsuit or plaintiff's tactical advantage in future litigation. *Id.* at 243 n.5. In the present case, voluntary dismissal without prejudice on terms and conditions will not prejudice defendant, and should be granted.

B. Defendant Will Not Be Unfairly Prejudiced By A Rule 41(a)(2) Dismissal with Terms and Conditions

1. Defendant Will Not Suffer Prejudice as a Result of his Efforts and Expenses to Date.

Defendant will suffer no prejudice with regard to his efforts and expenses in defending this action to date. First, extensive discovery has not yet occurred – only one deposition has so far been conducted, and defendant has only had to respond to one set of written discovery and an abbreviated follow-on set. Indeed, the discovery cut-off is weeks away. Nor has defendant filed any motion for summary judgment. The case is far from the stage at which the parties have begun any significant preparations for trial. No trial date has been set, and the pretrial conference is almost a month away. This is far from the situation where a motion for voluntary dismissal is brought on the eve of trial.

Judge Poretz recently issued a Memorandum Opinion and Order granting a plaintiff's motion for voluntary dismissal without prejudice under certain terms and conditions, and his opinion is instructive in the present case. (*Brooks v. National Railroad Passenger Corp.*, Civ. Action No. 1:03CV1488, Memorandum Opinion and Order, entered Nov. 3, 2004, attached as Exhibit 2). In *Brooks*, the defendant had (1) removed the action to federal court; (2) filed an answer; (3) attended scheduling conferences; (4) filed and opposed several pretrial motions; (5) propounded and responded to discovery requests; (6) filed a motion for summary judgment; and (7) filed an opposition to the plaintiff's motion for voluntary dismissal. *Brooks*, Memorandum Opinion and Order, at 6. Despite these steps, the court determined that the expense and effort undertaken by defendant did not weigh in favor of denial of the voluntary

dismissal, but rather favored dismissal. *Id.* In the present case, defendant has not undertaken efforts as extensive as had the defendant in *Brooks*. Thus, prejudice would not arise to defendant should voluntary dismissal without prejudice be granted.

Moreover, any alleged prejudice is easily remedied by dismissal on appropriate terms and conditions. The court may impose conditions on voluntary dismissal to obviate any prejudice to the defendant. *Davis*, 819 F.2d at 1273. One of the terms and conditions suggested by Magistrate Judge Poretz, and proposed hereby by the plaintiffs, is that all discovery in the present action be permitted to be used in any subsequent action. Judge Poretz and the plaintiffs both likewise suggest that an additional term and condition be that any discovery in the subsequent action not be duplicative or repetitive. Thus, defendant would not bear any additional effort or expense if this matter is dismissed without prejudice on such terms and is subsequently refiled. Even had extensive discovery occurred, dismissal would not be prejudicial to defendant when such discovery may be used in the subsequent action. *See, e.g., Davis*, 819 F.2d at 1276 (finding that granting voluntary dismissal after a defendant has expended costs on discovery is not prejudicial if that discovery may be used in a subsequent action); *Tyco Laboratories Inc. v. Koppers Co.*, 627 F2d 54, 56 (7th Cir. 1980) (finding no prejudice where discovery in present action could be used in subsequent action).

2. There has Been no Excessive Delay or Lack of Diligence on Plaintiffs' Part

As described more fully above and in previous motions, plaintiffs have undertaken significant, prolonged, and costly steps to attempt to arrange for their depositions in the U.S. and to arrange for their depositions in an appropriate alternative forum. Plaintiffs have retained no less than four different law firms around the world in an effort to arrange for depositions outside

of the U.S.[2] They have communicated with three different U.S. Embassies in Africa, and indeed, plaintiffs themselves flew by air from their homes in Somalia to Nairobi, Kenya, for personal interviews at the U.S. embassy there in connection with their visa applications. At the same time, plaintiffs' other efforts in the prosecution of this matter have likewise proceeded with all dispatch. Plaintiffs have expeditiously proceeded with this case – they have responded to discovery in a timely manner, they have designated 5 expert witnesses, and they have properly objected to and sought protective orders with regard to the plaintiffs' depositions. Simply put, defendant cannot claim any lack of diligence or excessive delay on the part of plaintiffs. Therefore, this factor weighs in plaintiffs' favor.

3. Plaintiff's Need for Dismissal is Well-Justified

As discussed above, plaintiffs have borne significant burdens in arranging for their travel here to the U.S. for depositions and in arranging for an alternate location for their depositions. It now appears that one plaintiff will not be able to obtain permission to travel to the U.S. at all, while the other may obtain such permission but will not be able to travel here prior to the close of discovery. Plaintiffs have spent the last four months diligently pursuing plaintiffs' depositions here and abroad. Despite plaintiffs Herculean efforts, the impending close of discovery in the next three weeks raises significant concern regarding the ability to bring plaintiffs here or to another appropriate location and to complete their depositions in time to allow sufficient follow-up discovery by both parties.[3]

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[2] Plaintiffs have also attempted to arrange for the deposition of the plaintiffs in Somalia by videoconference, a measure suggested by the Court but objected to by defense counsel.

[3] In light of the plaintiffs' location in Somalia, and the potential for difficulty or delay in bringing the plaintiffs here for discovery purposes, the court-approved Joint Discovery Plan provided that if the plaintiffs cannot be available for deposition until late in the discovery period, such as a result of logistical difficulties in travel between Somalia and the United States, the parties may need to extend discovery deadlines to permit Ali to conduct follow-up discovery. Joint Discovery Plan, at 2.

Moreover, as further justification for its motion for voluntary dismissal without prejudice on terms and conditions, plaintiffs note that the Court has urged such very motion in light of the logistical difficulties plaintiffs have faced with regard to their depositions. Such guidance and direction by the Court provides ample justification for this motion. Indeed, that plaintiffs' motion for depositions in Ethiopia starting May 2 remains under advisement, in conjunction with defense counsel's unavailability for foreign depositions the following week, render it logistically impossible to conduct the foreign depositions before the May 13 discovery cutoff.

Plaintiffs note that this motion is not brought to avoid any adverse determination on the merits or any other unfavorable ruling. Indeed, the Court has made no rulings on the merits of this case, and plaintiffs have suffered no significant adverse rulings otherwise. Nor is it sought to avoid any negative consequences arising from plaintiffs' lack of diligence. Plaintiffs have acted with all dispatch in the prosecution of their claims.

4. The Present Stage of the Litigation Does Not Warrant Denial of the Present Motion

This case is not in its advanced stages. No trial date has been set, the pretrial conference is weeks away, and discovery has not closed. Nor has defendant moved for summary judgment – the focus of the inquiry regarding the present stage of the litigation. *See Gross*, 1998 WL 8006, at *5. No summary judgment motion appears imminent. Regardless, even when discovery is closed and summary judgment filed, courts are willing to grant motions to dismiss without prejudice. *See Brooks*, Memorandum Opinion and Order, at 1-2, 11-13 (granting motion to dismiss without prejudice on terms despite close of discovery and pendency of summary judgment motion to which plaintiff had failed to file an opposition). In the present case, defendant will suffer no prejudice in light of the present stage of this litigation.

In sum, defendant will not suffer substantial prejudice or plain legal prejudice as a result of a voluntary dismissal without prejudice on terms and conditions.

C. Terms and Conditions Appropriate for Dismissal Without Prejudice

Plaintiffs propose the following terms and conditions for this voluntary dismissal with prejudice:

1) The case will be dismissed without prejudice;

2) Any discovery developed in this action may be used in any new action;

3) No discovery in the new action may be duplicative or cumulative of the discovery already developed in this action;

4) The statute of limitations will be tolled during the entire period between the date of filing the present action and the timely refiling of any new action;

5) The new action may not be brought until plaintiffs can certify the dates and locations for which plaintiffs will be available for deposition;

6) Defendant will reserve all rights to object to plaintiffs' depositions outside of this district under Local Rule 30(A)[4];

7) In the new action, the parties will respond to any discovery requests outstanding in this original action within forty-five (45) days of service of the new complaint; and

8) Any new action must be filed within ninety (90) days of the date of the entry of dismissal.

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[4] Defendant has insisted that plaintiffs must appear in this district for their depositions. Under the circumstances of this case plaintiffs do not believe their appearance in this district is required, particularly for John Doe, who was denied a visa. *See, e.g., Hyam v. American Export Lines, Inc.*, 213 F.2d 221, 223 (2d Cir. 1954); *Connell v. City of New York*, 230 F. Supp. 2d 432, 436-37 (S.D.N.Y. 2002). In any event, under plaintiffs' proposal defendant will not be prejudiced because he retains the right to object to depositions outside the forum.

These terms and conditions are equitable and will remove any prejudice defendant may allegedly suffer as a result of the voluntary dismissal without prejudice.

CONCLUSION

For these reasons, plaintiffs request that the Court dismiss this action without prejudice on the following terms and conditions: (1) The case will be dismissed without prejudice; (2) Any discovery developed in this action may be used in any new action; (3) No discovery in the new action may be duplicative or cumulative of the discovery already developed in this action; (4) The statute of limitations will be tolled during the entire period between the date of filing the present action and the timely refiling of any new action; (5) The new action may not be brought until plaintiffs can certify the dates and locations for which plaintiffs will be available for deposition; (6) Defendant will reserve all rights to object to plaintiffs' depositions outside of this district under Local Rule 30(A); (7) In the new action, the parties will respond to any discovery requests outstanding in this original action within forty-five (45) days of service of the new complaint; and (8) Any new action must be filed within ninety (90) days of the date of the entry of dismissal.

Dated: April 25, 2005

JANE DOE and
JOHN DOE
By Counsel

By: _____

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CERTIFICATE OF SERVICE

I hereby certify, this 25th day of April, 2005, that a true copy of the foregoing was transmitted by electronic mail and U.S. mail to the following counsel of record:

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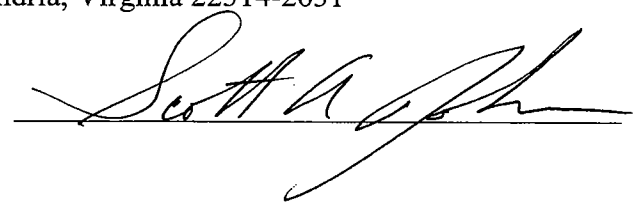

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EXHIBIT 1

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

JANE DOE, et al.,	:	
	:	
Plaintiffs,	:	CIVIL ACTION
	:	NO. 04-1361
v.	:	
	:	April 1, 2005
YUSUF ABDI ALI,	:	
	:	
Defendant.	:	

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

APPEARANCES:

For the Plaintiff: ROBERT VIETH, ESQ.

For the Defendant: JOSEPH P. DRENNAN, ESQ.

* * *

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P-R-O-C-E-E-D-I-N-G-S

THE DEPUTY CLERK: Civil Action 04-1361, Jane Doe, et al., vs. Yusuf Abdi Ali. Will counsel please note your appearances for the record.

THE COURT: Good morning. Mr. Vieth, you are here for the plaintiff?

MR. VIETH: I am, Your Honor. Good morning. Robert Vieth of Cooley Godward here for the plaintiffs.

THE COURT: All right. Mr. Drennan, you are here for the defendant?

MR. DRENNAN: Yes, Your Honor, Joseph Peter Drennan on behalf of the defendant, who is also present.

THE COURT: All right. Now, this matter is before the Court on the plaintiffs' objection to the Magistrate Judge's denial of the plaintiff's motion for entry of the protective order.

Mr. Vieth, as you know, the Court, we review a Magistrate Judge's decision for in this case clear error. The Magistrate Judge has, as you know, balanced the various interests here between the rights of the plaintiffs to pursue a litigation in this jurisdiction and the right of the defendant to be able to defend himself against those allegations.

It has become a complicated balancing act in this particular case, because, as I understand this case, all of the plaintiffs are presently residing in Somalia. As you know, the

issue is where the discovery is going to take place in this case and how it is going to take place.

The Magistrate Judge has denied your request to require the defendant to go, as I understand it, to Somalia to depose or get evidence from the plaintiffs, and I don't think that's an unreasonable decision. So I want to hear from you if there's anything in addition to what you filed that you want to bring to the Court's attention.

MR. VIETH: Your Honor, candidly, it's a little unclear whether Magistrate Judge Poretz actually denied our request that the plaintiff have to go to Somaliland or elsewhere to take the plaintiffs' depostions, because the request as framed was essentially we don't know if we are going to be able to produce them for depositions here. We knew we could not produce them here within the timeframe as noticed by the defendant.

And, as I stand here today, I certainly can assure the Court I cannot do that. So it is really unclear to me exactly if that was Judge Poretz's ruling. However, he did deny in large part our motion for protective order.

He ordered that the depositions take place on April 5 or April 6. They haven't been renoticed, as we said in our papers. I'm not certain those are fixed dates or just dates after which they are allowed to take place. But, in any event, that simply cannot be done.

THE COURT: You have a problem, because the discovery

deadline presently scheduled is April 15th.

MR. VIETH: That's correct, Your Honor. Well, that actually is not correct, because Judge Poretz has extended that deadline by 21 days.

THE COURT: All right.

MR. VIETH: And that order did not appear in our papers, because it wasn't entered until after we filed our papers, because Judge Poretz was out last week, so I apologize for that, but that was entered either Monday or Tuesday of this week.

However, Your Honor's point is well taken. I don't think that 21 days cures the problem, but I just wanted to correct the record to that extent.

Your Honor, I do think to the extent Judge Poretz said, we have to bring our clients here, and we have to do so by X date, I do think that is error, and I think that is error because of the reasons we put in our papers.

There is a considerable body of case law on this that makes it quite clear that there is -- of course, there's discretion within the Court, but the Court's discretion is not unbounded, and if the result of the Court's ruling is going to be that the plaintiffs really cannot be present and therefore are going to be in default of a Court order and possibly even lead to dismissal, that is error. The Court's discretion does not reach that far.

The cases we have cited are really quite clear on this,

and frankly that is the effect of the order here. Really, the issue before the Court is whether we have shown extraordinary circumstances to justify relief from the local rule that does call for the plaintiffs to appear here, and, of course, there are timing considerations also implicated by this.

Your Honor, if this case doesn't present extraordinary circumstances, I just don't know what does.

THE COURT: Well, again, it was a balancing act, because the alternative from the defendant's standpoint is extraordinarily onerous as well.

Now, one of the things, have you talked about trying to find neutral territory, for example?

MR. VIETH: We have, Your Honor, and I have proposed Somaliland, but we are not sticking to that. We are investigating, and frankly right now the most promising venue is Djibouti, which unfortunately Djibouti is having a presidential election a week from today.

I have talked with the U.S. Consul in Djibouti. We have engaged a lawyer in Djibouti. We have been advised by both that we should seek the permission of the Government. Our lawyer has told us he thinks that will be forthcoming, but it will not happen and should not even be requested until after the election, which, as I say, is scheduled for April 8th, one week from today. Really, that's emblematic of the type of practical problems beyond our control, completely beyond our control, that prohibit us from

-- well, it shows you the practical problems we are facing. We are not insisting that the plaintiffs -- excuse me -- that the defendant have to travel to Somaliland. We proposed that as an alternative, and frankly this week we received permission from the Government of Somaliland to do just that. So we could offer that as an alternative.

I realize that's somewhat objectionable to the defendant, and I can't stand here and say that he's got to go there; but we are looking into alternative arrangements. Our first preference is to bring the plaintiffs here, although there are some developments on that frankly this week that make it very impractical to be able to bring them here both for deposition and for trial, very impractical, probably impossible.

Your Honor, I can only essentially throw myself on the mercy of the Court, because we are dealing with a situation where there is no U.S. Embassy in Somalia where our plaintiffs reside. That is extraordinary. We have been referred to the Embassy in Nairobi. The Embassy in Nairobi is frankly not terribly familiar with these procedures, and we have put all these e-mails before the Court.

We have been diligently -- diligently -- pursuing trying to get visas. We now have an interview date scheduled of April 19. The visa interview is part of the process. We have been told by the embassy that on April 19, we will know if a visa will be issued for our plaintiffs. The visa will not be issued that day,

however, because there is a separate review process before the Department of Homeland Security.

Since Somali passports are not recognized by the U.S. Government, we need passport waivers that the Department of Homeland Security is in charge of. We have been advised by the Embassy in Nairobi that that takes three to four weeks. There is also a separate State Department clearance that takes place during the same timeframe.

So we will know as of April 19 whether a visa will be issued. We will not know as of that date whether we will obtain a passport waiver. But if the visa is issued, it's good for three months, and it's only good for one-time entry. We learned that this week as well, Your Honor, so that would put us into mid-July. We would be glad to schedule a trial in mid-July. Just today, we received word from the Embassy that, given these limitations, that they just advised us about this week, they frankly recommend that we set a trial date before we come in for the interviews.

Now I know that poses some difficulty with the Court's normal process, but I think Your Honor can appreciate the type of practical difficulties we are facing here, and it is significant that we have absolutely no choice of forum.

We are in a court that moves very quickly, but we could not have filed this suit anywhere else. This defendant resides in this district. He resides nowhere else. We could not have obtained jurisdiction over him anywhere else. And the case law

makes clear that that is an important consideration to take into account.

Your Honor, I just don't know exactly what we can do except propose to the Court that we will do our best to make our plaintiffs available. We would love to bring them here, although we think now it is more likely a deposition will have to take place abroad, and we are working hard to arrange that.

I think, Your Honor, it is clear that if the Court dismisses the case under the circumstances, it is error, and candidly I think it's reversible error based on the case law we have presented to the Court.

THE COURT: There's no motion to dismiss pending before the Court. The only issue is whether or not the Magistrate Judge was clearly erroneous in denying the motion for protective order. That's all that's at issue at this point.

MR. VIETH: To be sure, that's clear, but the cases also acknowledge as I think -- certainly, I can see it coming. It will place us in a procedural default. We cannot live with the deadlines we have been given.

THE COURT: Well, but you chose -- the plaintiffs chose to initiate the litigation. You know one of the principles upon which this Court operates is a plaintiff who comes into this court to litigate should know before they ever file a complaint that there will be requirements to meet certain time requirements, and therefore that pre-filing investigation and pre-filing preparation

should all be done ahead of time so that there aren't unnecessary delays.

Now, the issues as to the ability to come to the United States, the obviousness of needing to make the plaintiffs available for discovery, that's not a surprise. You all knew that when you were putting this case together, and you chose to file when you did. So I would have thought some of these matters would have been lined up.

MR. VIETH: Well, Your Honor, they were not overlooked, but I will say the extraordinary delays that we have faced, and, Your Honor, the series of e-mails is before the Court that start on, I believe the date is January 12, but there were some telephone arrangements made before then.

I will say we recognize that it's typically our burden to bring people here, and I can assure you, we would like to do that. We do not want to have to play a videotape deposition for the jury, which is quite possibly what we may have to do. I'm sure the Court can appreciate we would like to have our client sitting right here in this courtroom before a jury. We have been diligently pursuing it.

The extraordinary circumstances that we face here, frankly, were not fully anticipated. I will be candid with the Court about that. We knew what we would have to undertake to get them here. We knew it wouldn't be easy, but this has been remarkable, and, Your Honor, I'm not sure our diligence really has

been questioned by anyone, including Judge Poretz. Frankly, I think Judge Poretz was largely sympathetic with our plight. We have described the proposal that he proposed, did not order, perhaps could not order, but proposed, which was a means of getting relief from some of these deadlines because they are hitting us through no fault of our own; however, the conditions on which he proposed that we be allowed to refile this suit, I think, are something we cannot live with.

He proposed that we certify that our plaintiffs can be available for deposition in this District upon refiling, and he proposed other conditions as well, all of which were acceptable. That was the only one that we cannot live with. If the proposal were, upon refiling, we certify at least the status and perhaps an alternative arrangement for depositions, that is the type of thing that perhaps is doable. It's certainly not my preferred route, because I can tell the Court that the pendency of the lawsuit and the pendency of the deadlines is really what's getting us any action on these visas in the first place.

Your Honor, I can't tell the Court how useful it is to be able to tell the Embassy or others that we have got deadlines. We have got to report to the Court by Friday as to our status. That has prompted some limited response. Otherwise, there is very little that we can do in this case to force people who are not answerable to the Court to assist us with this difficult, difficult visa process.

So, Your Honor, all I can do is lay out the facts and explain to the Court that I think that as a matter of law, we have extraordinary circumstances here under the terms of the local rule that entitle us to some relief from these deadlines or from the requirement that we be here for a deposition, and I think to the extent the Magistrate ruled otherwise, I think the Magistrate Judge erred.

THE COURT: All right. Mr. Drennan.

MR. DRENNAN: Yes, Your Honor. With all due respect to the plaintiffs' position, presented ably before the Court by Mr. Vieth, we respectfully disagree with the notion that the Magistrate Judge erred. As the Court indicated, the Magistrate Judge performed a balancing test here with regard to the contention of the extraordinary circumstances contemplated by Rule 30(a).

Our position here, and the record seems to reflect this, is that the putative, extraordinary circumstances were of the plaintiff's own making. They elected the timing of the suit. They elected the forum.

Mr. Vieth posited that the suit could not have been filed anywhere else. We beg to disagree with that. We have just commissioned and filed with the Court our Rule 26 report from Gerald Chipper, an esteemed barrister in Canada, who has opined that this suit could well have been filed during the 1991-'92 period when my client, Mr. Ali, lived openly in Toronto, Ontario.

It was not filed during that period.

In our moving papers before the Court, we have provided the Court with the discovery that we have adduced or obtained thus far from the defendants in the form of their executed answers to interrogatories.

THE COURT: From the plaintiffs.

MR. DRENNAN: The plaintiffs. I misspoke. I always want to be careful not to use the names of the plaintiffs because of Your Honor's order here. There are two telling revelations in the virtually identical responses supplied by each plaintiff.

One is that at the time of the fall of the regime of Siadberi (phonetic), and the Court can take judicial notice of when that occurred. That occurred in January of 1991. Each plaintiff was living in a refugee camp in Ethiopia. It's not clear whether they were in the same camp or not, but they were in refugee camps outside of Somalia.

At that time Mr. Ali lived in Canada. The plaintiffs at that time could have elected to make efforts to pursue their claims. The Arcea (phonetic) decision, which we put before the Court in our moving papers, a recent 11th Circuit decision, entered I believe on the 28th of February of this year, dealt with very similar circumstances arising out of the Salvadorian conflict in the 1980s.

The Court in that case ruled essentially that the mere occurrence of turmoil in the land in which the cause of action has

originated does not constitute a basis for equitable tolling.

The Court indicated in that case the importance of the statute of limitations, the sound, salutory effect of the statute of limitations. And in this case the statute of limitations allowed was very generous. The Congress allotted ten years for these plaintiffs to bring their action.

Instead, they waited well over a decade and a half in some respects with regard to some of their underlying causes of action, but certainly at least 14 years, and now we are confronted with the situation in which the plaintiffs can't get here.

The plaintiffs presumably engaged counsel well before the complaint was filed. I had a meeting with counsel, face-to-face meeting, on the 7th of January of this year. My very first question of counsel was, I assume that your clients have travel documents, and I expect them to come here to give their deposition.

And the response was that we are going to look into this. And, indeed, all of the documents that have been adduced before the Court reflect that the efforts, the manifestation of the efforts to initiate the quest for documents occurred after that meeting.

Your Honor, it's been said that 9-11 changed everything, especially insofar as immigration law is concerned, but with regard to the peculiar circumstances in Somalia, what changed everything was the bombing of our Embassies in Kenya and in

Tanzania in 1998.

The investigation of those efforts revealed that the perpetrators of those acts, members of the Al Qaeda organization, used Somalia as a staging ground for that operation. Now, plaintiffs propose that we go to Somalia to depose them.

Your Honor, I'm not a person who is afraid to go to places that are troubled. I had a case before Your Honor in 1997, in which, per agreement of the parties we went to Adena (phonetic), Turkey, in eastern Turkey to take depositions at the U.S. Consulate there at a time when there was a State Department advisory cautioning Americans against travel to eastern Turkey. We went there because I felt that the risk was a reasonable one to take under the circumstances.

The risk here, even of conducting these depositions in abutting countries, is a manifestly unreasonable risk, especially when one considers what is going on today in that troubled region. The transitional government that was just formed last autumn, literally one month, almost one month to the day, before this suit was filed, Your Honor, one month to the day before this suit was filed, the transitional Government has been making efforts to move to Somalia. Our Government, upon information and belief, is watching those efforts.

Our Government, we believe, once that transitional government is in place, and makes an effort to establish its writ, may very well recognize that Government. Presently, there is no

recognized Government for Somalia.

As I understand it, the efforts to move to Mogadishu have been stymied because the security situation in Mogadishu is such that no one dare go there from the new government. So, instead, there are now being efforts to site the capital in Vidoa, a city in the interior of the southern region of the country.

Our government does not recognize Somaliland, and as we pointed out in our moving papers, any effort or any directive from this court that these depositions proceed from Hargasa (phonetic), Somaliland, could be construed as some sort of backhanded recognition of Somaliland by the United States.

With regard to the third-country proposals, Djibouti, Ethiopia, or even Kenya, because of these difficulties securitywise in moving the transitional Government to Somalia, an effort that all of the surrounding countries want to see happen, the new president of Somalia has requested that each of these countries provide peacekeepers to assist in the process.

Your Honor, elements within Somalia that resist this effort have threatened jihad against the peacekeepers and against the countries sending them. These are the very countries in which the plaintiffs propose as alternative venues for deposition.

THE COURT: What if a venue such as England were arranged, because the immigration issues might be different for England, or for France, than they are for the United States, would you and your client be willing to go to such a location?

MR. DRENNAN: Certainly we would not have the security issues with regard to England. There is no question about that. I have conducted depositions in England as recently as 18 months ago. I have no problem with England securitywise. I do have a problem with the onerous effect of our having to go there otherwise, because for one thing, my client is a legal, permanent resident of the United States. The only passport that my client holds is a Somali passport. Somali passports aren't recognized anywhere.

If the Court were to be inclined to allow England as a forum, my client would be confronted with sort of an ironic twist on the same sort of logistical problems that the plaintiffs are encountering presently with regard to coming here. He would have to obtain special travel documents from the foreign office in England, and then there would be the question of his reentry into the United States and such.

THE COURT: What about video depositions where you-all just stay here and the witnesses are available videowise -- you could see and hear them, and you can question them from here? It's a very expensive technology. The burden would be on the plaintiff to pay for all that, but there are ways in which one can conduct overseas depositions without leaving the United States.

MR. DRENNAN: I'm well aware of that, Your Honor, and I can explain to the Court why, respectfully, I believe that that is not a feasible solution in this particular case. For one thing,

the officer administering the oath or the official administering the oath would still have to travel to the venue in which the plaintiffs were to testify. The oath could not be administered over the telephone, and we would strongly object to any effort in such regard.

The Court might note in terms of the answers to the interrogatories, I didn't believe I would have to address in this hearing, but among other things we requested all identity documents relative to each plaintiff. No documents have been produced.

The answer in each case, if I recall correctly, was that they were searching diligently for their documents. How is one to verify who John Doe is? How is one to verify who Jane Doe is? And with regard to the requirement of the presence of a commissioner of oaths or a notary public or some other judicial officer to administer the oath, Your Honor, I think that the plaintiffs would not be susceptible of being sworn by anyone competent that could pass muster under the Federal Rules of Civil procedure.

I reiterate, we have no Embassy in Somalia. We have no Embassy in what the State Department characterizes as the so-called Republic of Somaliland, and any recognition or -- strike that -- any effort on the part of the plaintiffs to be sworn by some self-styled judicial officer from Somaliland would be construed as a recognition that that is a valid, lawful act, being

executed by an official who has authority under a government that we recognize.

There again, Your Honor, I don't think that the video deposition alternative would be feasible unless the plaintiffs were to be deposed in, as Your Honor quite neatly characterized it as a neutral third country, and if it were a neutral third country, a truly neutral third country where there were no security concerns, I would certainly want to be present face to face to conduct that deposition, and I don't believe that a video format would be necessary.

But still, Your Honor, I again reiterate our position earlier that the Magistrate did not err here, because the various considerations were counterbalanced, obviously, and at this late stage of the game the plaintiff is essentially on notice, and I think the circumstances certainly suggest, that the timing of the filing of the suit essentially created the extraordinary circumstances; so, in that sense, the limitations that were earlier advanced, I believe, is something that is of some relevance here.

THE COURT: All right, sir. I'm going to rule on this. I have had a chance to consider the briefs and hear your arguments. The Magistrate Judge has not committed any error in ruling as he did. The plaintiffs, to proceed with this litigation, are simply going to have to make themselves reasonably available for proper discovery.

I understand the unique facts of this particular case, however, it is absolutely clear the plaintiffs chose where and when to litigate, and as said earlier, experienced counsel of this jurisdiction was clearly on notice how we operate here. There's already been some obvious flexibility, in giving the extension that the Magistrate Judge did.

So I am not going to grant the plaintiff's motion, nor am I going to grant per se the plaintiff's motion for entry of a protective order. The only thing I am going to do for a couple of reasons, one of which I am also aware that the State Department may or may not want to weigh in on this case. They have not yet.

I am extremely concerned frankly about the letter that was attached to the defendant's pleadings, the March 2005 letter from the Ministry of the State for Foreign Affairs for the transitional Government of the Somali Republic, that in that agency in the Ministry states that this litigation creates significant problems for efforts to a Somali reconciliation, and I am concerned, because I'm not sure whether it's been raised in both cases, but I think it has been, and the danger there may be political motivation behind this litigation. Certainly, I don't think it's proper for a Federal Court to be involved in that in any respect.

But trying to weigh all the issues in this case, what I am going to do is basically give the plaintiff a little bit more breathing room, and that is all I am going to do. I'm going to --

we currently have the final pretrial conference set for April 21 in this case. I'm not holding that conference on that day. I'm going to extend the pretrial conference into May, and the May conference would be on May 19.

Essentially, I am going to give the plaintiff a little bit more time to see if you can work this out in the sense of getting a location where everybody can go to get this discovery and to consider how to dismiss this case without giving up the plaintiffs' ability to refile in the near future if that were more appropriate, and it also gives the Department of State, as well as the Ministry that is trying to put the transitional government together a bit more breathing space to determine what if anything it's going to do in this respect.

So what I am going to do is simply continue the discovery deadline to May 13, set the final pretrial for May 19th, and we will see what evolves in that timeframe.

I want to caution the plaintiff, however, that I think that the plaintiffs may be bumping into issues about liability for attorneys' fees and expenses for the defendant if this whole thing peters out, and there has been a great deal of cost to the defendant.

I don't know whether these particular statutes have a fee-shifting aspect or not. I'm not sure, but that's something that both sides should be sensitive to. All right, so that's my ruling. I am not overruling the Magistrate Judge. He is right on

the merits of that ruling. All I'm doing is giving the plaintiff a little bit more breathing space to see if they can comply with it.

All right, thank you. Recess court until 11:00 o'clock.

(Whereupon, at 10:45 o'clock a.m., the hearing in the above-captioned matter was concluded, and court stood in recess.)

CERTIFICATE OF OFFICIAL REPORTER

COMMONWEALTH OF VIRGINIA)
) ss.
CITY OF ALEXANDRIA)

I, EDWARD DONOVAN McCOY, Registered Professional & Merit Reporter, and Official Court Reporter for the United States District Court for the Eastern District of Virginia, appointed pursuant to the provisions of Title 28, United States Code, Section 753, do hereby certify that I was authorized to report, and did so report by computerized Stenograph machine the foregoing proceedings;

THEREAFTER, my Stenograph notes were reduced to printed form by computer-aided transcription under my supervision; and I further certify that the pages herein numbered contain a true and correct transcription of my Stenograph notes taken herein.

DONE and signed, this _____ day of _____, 2005, in the City of Alexandria, Commonwealth of Virginia.

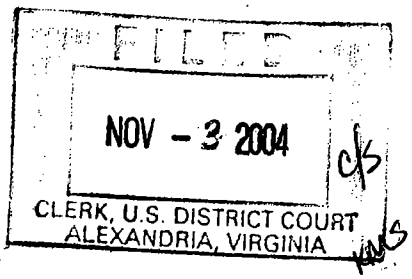
_____
EDWARD DONOVAN McCOY, RMR
Official Court Reporter

(Virginia Court Reporters Association Certification No. 0313168)

* * *

EXHIBIT 2

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



TERRENCE E. BROOKS,	)	
	)	
Plaintiff,	)	
	)	
v.	)	CIVIL ACTION NO. 1:03cv1488
	)	
NATIONAL RAILROAD PASSENGER CORP.,	)	
	)	
	)	
Defendant.	)	

MEMORANDUM OPINION & ORDER

Before the Court are the Plaintiff's Motion for a Voluntary Dismissal under Rule 41(a)(2) of the Federal Rules of Civil Procedure and the Defendant's Motion for Summary Judgment. For the reasons set forth herein, Plaintiff's Motion is granted and this action is dismissed without prejudice. Defendant's Motion is necessarily denied without prejudice.

I. Background

On November 3, 2003, Terrence E. Brooks, a *pro se* litigant, filed a motion for judgment in the Circuit Court for Fairfax County in the Commonwealth of Virginia alleging, *inter alia*, that his former employer, National Railroad Passenger Corporation d/b/a Amtrak, violated his civil rights pursuant to Title VII of the Civil Rights Act of 1964. Amtrak timely removed this action to the United States District Court for the Eastern District of Virginia on December 1, 2003. Mr. Brooks and Amtrak consented per Title 28 U.S.C. Section 636 to the jurisdiction of a United States Magistrate Judge on June 17, 2004.

After the close of discovery, Amtrak filed a Motion for Summary Judgment on August 6,

2004. Shortly thereafter, Mr. Brooks decided that an attorney would better represent his interests in this action. On August 23, 2004, Mr. Brooks filed several motions before the Court to seek the following relief: (i) a withdrawal of his status a *pro se* litigant, (ii) leave to obtain legal counsel, and (iii) a brief extension of time to allow new counsel to prepare the case. The next day, Amtrak filed an opposition supporting Mr. Brooks' motion to withdraw as a *pro se* litigant if the Court interpreted it as a motion to dismiss without prejudice.

Although these motions were scheduled for a hearing on September 3, 2004, the Parties were before the Court on Amtrak's motion to quash a subpoena and Mr. Brooks' motion for a jury trial on August 27, 2004. At this hearing, Mr. Brooks declined the Court's invitation to hear all pending motions at one time because he was unprepared to argue in favor of his other motions scheduled for hearing on September 3, 2004. Mr. Brooks told the Court, however, that he did not intend for his pending motion to withdraw as a *pro se* litigant to be interpreted as a motion to dismiss. Additionally, Amtrak did not voice to the Court any change in its earlier position--that it favored a dismissal of the action if the Court interpreted Mr. Brooks' motion to withdraw as a *pro se* litigant as a motion to dismiss without prejudice.

Upon Mr. Brooks' request, the Court granted him until August 31, 2004 to file a reply to Amtrak's opposition regarding his pending motions (i) to withdraw as a *pro se* litigant, (ii) for leave to obtain new counsel, and (iii) for a brief extension of time. Thereafter, Mr. Brooks filed a reply on August 27, 2004. Mr. Brooks, however, did not file an opposition to Amtrak's Motion for Summary Judgment by the required response date, August 30, 2004.

On September 1, 2004, the Court denied without prejudice Mr. Brook's motion to withdraw as a *pro se* litigant and informed Mr. Brooks that if he simply chose to retain counsel, he would by

his very own conduct, withdraw his *pro se* status in the action. The Court also granted Mr. Brooks' motion for leave to obtain counsel, but denied his motion for a brief extension of time to allow new counsel to prepare the case.

Coincidentally, on September 1, 2004, Mr. Brooks filed a Motion to Withdraw Complaint Without Prejudice [sic]. Mr. Brooks claims that a voluntary dismissal is appropriate because both Parties consent to a dismissal. Amtrak, however, filed an opposition also on September 1, 2004. In its thirty-line opposition, Amtrak argues that it no longer favors a voluntary dismissal because "Amtrak has spent time and resources preparing for the argument on its Motion for Summary Judgment." (Def. Opp. to Mot. to Dismiss Without Prejudice, Dkt. no. 42, pg. 2, (Sept. 1, 2004)). Amtrak also attached to its opposition a copy of a revocation letter Amtrak sent to Mr. Brooks by first-class mail on August 27, 2004 "withdraw[ing] its consent to a motion to dismiss without prejudice." (Def. Opp. to Mot. to Dismiss Without Prejudice, Dkt. no. 42, ex. 1 (Sept. 1, 2004)). Amtrak's counsel further alerted the Court to a conversation between Mr. Brooks and Amtrak's counsel in which Mr. Brooks claimed not to have received Amtrak's revocation letter prior to filing his September 1, 2004 Motion to Withdraw Complaint Without Prejudice.

Based on the above-recitation of facts, the Parties are now so situated: within a five-day period, where the Plaintiff originally opposed a dismissal, he now favors a dismissal; conversely, where the Defendant originally favored a dismissal, it now opposes a dismissal. Because Mr. Brooks is a *pro se* litigant, the Court construes his Motion to Withdraw Complaint Without Prejudice liberally, and entertains it as a Motion for a Voluntary Dismissal under Rule 41(a)(2) of the Federal Rules of Civil Procedure. *See Miller v. Barnhart*, No. 02-2394, *et seq.*, 64 Fed.Appx, 858, *859, 2003 WL 1908920, at *1 (4th Cir. Apr. 22, 2003) (unpublished op.) ("a pro se litigant is . . . entitled

to a liberal construction of her pleadings") (citing *Haines v. Kerner*, 404 U.S. 519, 520-21 (1972)).

II. Analysis

Under Rule 41(a)(1)(i), a plaintiff may voluntarily dismiss an action any time before the defendant either first answers or files a motion for summary judgment. Fed. R. Civ. Pro. 41(a)(1)(i). The parties may also dismiss an action by filing a joint stipulation with the court. Fed. R. Civ. Pro. 41(a)(1)(ii). Otherwise, "[a]n action shall not be dismissed at the plaintiff's instance save upon order of the court and *upon such terms and conditions as the court deems proper.*" Fed. R. Civ. Pro. 41(a)(2) (emphasis added). A dismissal under Rule 41(a)(2) is generally without prejudice unless otherwise specified in the court's order. *Id.*

Rule 41(a)(2) motions are committed to the sound discretion of the district court. *Shabazz v. PYA Monarch, LLC*, 271 F. Supp. 2d 797, 799 (E.D. Va. 2003); *Teck Gen. P'ship v. Crown Cent. Petroleum Corp.*, 28 F. Supp. 2d 989, 991 (E.D. Va. 1998). The primary purpose of Rule 41(a)(2) is to allow voluntary dismissals freely absent substantial prejudice or plain legal prejudice to the defendant. *S.A. Andes v. Versant Corp.*, 788 F.2d 1033, 1036 (4th Cir. 1986); *Davis v. USX Corp.*, 819 F.2d 1270, 1273 (4th Cir. 1987) ("freely to allow voluntary dismissals unless the parties will be unfairly prejudiced"); *Teck Gen. P'ship v. Crown Cent. Petroleum Corp.*, 28 F. Supp. 2d 989, 991 (E.D. Va. 1998) ("Typically, such a motion is granted unless there is "substantial prejudice" or "plain legal prejudice" to the defendant."); *Gross v. Spies*, Nos. 96-2146, *et seq.*, 133 F.3d 914, 1998 WL 8006 at *5 (4th Cir. Jan. 13, 1998) (unpublished op.) ("primary purpose of the rule is to freely permit voluntary dismissals while protecting the nonmovant from unfair treatment"). In fulfilling this purpose, a court must focus on protecting the interests of the defendant. *Davis*, 819 F.2d at 1273. However, a court may obviate any unfair prejudice to the defendant by imposing conditions on the

grant of voluntary dismissal. *Id.*

In an unpublished opinion, the U.S. Court of Appeals for the Fourth Circuit adopted other circuit precedent concerning the general factors a district court should consider when ruling on a motion for a voluntary dismissal under Rule 41(a)(2) of the Federal Rules of Civil Procedure: "(1) the opposing party's effort and expense in preparing for trial; (2) excessive delay or lack of diligence on the part of the movant; (3) insufficient explanation of the need for dismissal; and (4) the present stage of the litigation, *i.e.*, whether a motion for summary judgment is pending." *Gross*, 133 F.3d 914, 1998 WL 8006 at *5. This Court has fully embraced the factors set forth in *Gross*. *Teck,* 28 F. Supp. 2d at 991; *Shabazz*, 271 F. Supp. 2d at 799-800. These factors, however, are not exclusive and a district court is free to consider any other relevant factors depending on the circumstances of the case. *Teck*, 28 F. Supp. 2d at 991.

Within the specific confines of this case, the applications of the factors, coupled with the imposition of certain conditions on the grant of a voluntary dismissal, support a voluntary dismissal without prejudice.

A. Application of the Factors under Rule 41(a)(2)

In deciding whether to grant a voluntary dismissal under Rule 41(a)(2), Factor 1 provides that a court may consider "the opposing party's effort and expense in preparing for trial." *Teck,* 28 F. Supp. 2d at 991; *Shabazz*, 271 F. Supp. 2d at 800. As noted, Rule 41(a)(2) motions are committed to the sound discretion of the court. *Teck*, 28 F. Supp. 2d. at 991; *Shabazz*, 271 F. Supp. 2d at 799. For this reason, courts applying Factor 1 have reached different conclusions based on similar facts.

For instance, the *Shabazz* court weighed Factor 1 in favor of the defendant where the defendant had spent a considerable amount of time and expenses through its actions in (i) removing

the case to federal court, (ii) responding to discovery requests, (iii) making initial disclosures, (iv) interviewing witnesses, (v) performing legal research, (vi) attending scheduling conferences, (vii) preparing and responding to discovery requests, (viii) filing motions to compel discovery and for summary judgment, and (ix) responding to the pending motion for voluntary dismissal. 271 F. Supp. 2d at 800. Like *Shabazz*, the *Gross* court similarly found that the defendants had incurred significant expenses in obtaining discovery and preparing for trial. *Gross*, 133 F.3d 914, 1998 WL 8006 at *7 ("particularly since much of the discovery [defendants] sought was located in Texas"). However, the *Gross* court held that the defendants' efforts and expenses did not, in conjunction with the other factors, "rise to the level of legal prejudice required" to deny the motion for voluntary dismissal. *Id.* The different results in these cases highlight the paramount discretion a district court holds in considering a motion for a voluntary dismissal under Rule 41(a)(2).

This Court certainly finds that Amtrak has expended effort and resources in this action. Amtrak, *inter alia*, (i) removed the action to federal court, (ii) filed an answer, (iii) attended scheduling conferences, (iv) filed and opposed several pretrial motions, (v) propounded and responded to various discovery requests, (vi) filed a motion for summary judgment, and (vii) filed a written opposition to the instant motion for a voluntary dismissal under Rule 41(a)(2). Although Amtrak fails to alert the Court in its written opposition to Mr. Brooks' instant Motion to any case law or critical facts to support a denial under Rule 41(a)(2), Amtrak argues principally that a voluntary dismissal is inappropriate because "Amtrak has spent time and resources preparing for the argument on its Motion for Summary Judgment." (Def. Opp. to Mot. to Dismiss Without Prejudice, Dkt. no. 42, pg. 2, (Sept. 1, 2004)). Although Amtrak has expended effort and resources, the Court nonetheless balances Factor 1 in favor of Mr. Brooks.

First, Amtrak's own rationale in opposing Mr. Brooks' Motion for Voluntary Dismissal based on its preparation of the Motion for Summary Judgment is deficient. It is apparent from the very terms of Rule 41 that the only way a plaintiff, like Mr. Brooks, may obtain a voluntary dismissal after a defendant has filed a motion for summary judgment is "upon order of the court" under Rule 41(a)(2). *S.A. Andes*, 788 F.2d at 1037, n. 4 ("Since Rule 41(a)(2) only applies when an answer or motion for summary judgment has been filed by defendants, the mere filing of an answer or motion for summary judgment could not, without more, be the basis for refusing to dismiss without prejudice."). Moreover, a motion for summary judgment is "normally marked by extensive preparation." *Paturzo v. Home Life Ins. Co.*, 503 F.2d 333, 335 (4th Cir. 1974) ("Once the defendant has filed an answer or a motion for summary judgment, which is normally marked by extensive preparation, granting dismissal without prejudice becomes discretionary with the court."). Because a plaintiff is fully entitled to seek an order of a voluntary dismissal under Rule 41(a)(2) after a defendant has filed a motion for summary judgment, extensive summary judgment preparation cannot be the sole grounds for weighing Factor 1 in favor of Amtrak.

Second, Amtrak's own conduct suggests that it began to suffer prejudice only after August 27, 2004. Although not articulated by Amtrak in its opposition, the Court recognizes that Amtrak has clearly expended effort and resources in other pretrial matters, like its removal filing, discovery actions, pretrial motions practice, *etc.* As a discretionary matter, however, the Court must consider Amtrak's wavering positions regarding a voluntary dismissal in context.

On August 24, 2004, Amtrak, in its opposition to Mr. Brook's motion, wrote in four different instances that it favored a voluntary dismissal if the Court construed Mr. Brooks' earlier-filed motion

to withdraw as a *pro se* litigant as a motion to dismiss.[1] Despite having the opportunity at oral argument on August 27, 2004, Amtrak failed to alert Mr. Brooks and the Court on the record that it had changed its position to oppose a voluntary dismissal. While Amtrak did reverse its position later that day after the oral argument in a first-class letter to Mr. Brooks, he did not receive the letter before he filed the instant Motion for a Voluntary Dismissal under Rule 41(a)(2).

Because Amtrak favored a dismissal until August 27, 2004, Amtrak (arguably) would have waived any right to assert prejudice based on its expended efforts and resources from the removal date of November 3, 2003 to August 27, 2004. Considering then, Amtrak's time and expenses incurred from August 27th to its September 1, 2004 written opposition to Mr. Brooks' instant motion, there is no evidence before the Court that Amtrak expended efforts and resources sufficient to weigh Factor 1 in its favor.

Although Amtrak has expended efforts in this action, this Court tips the balance on Factor 1 in favor of Mr. Brooks because the mere filing of a motion for summary judgment does not amount to prejudice, and Amtrak has otherwise waived its opportunity to assert prejudice based on any efforts or resources expended prior to August 27, 2004.

Factor 2 requires an inquiry into any "excessive delay or lack of diligence on the part of the movant." *Teck,* 28 F. Supp. 2d at 991; *Shabazz*, 271 F. Supp. 2d at 800. In *Shabazz*, the plaintiff

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[1] In its opposition, Amtrak wrote (1) "Amtrak would not oppose Brooks' request if he is seeking to dismiss his complaint without prejudice;" (2) "Amtrak does not believe the case can continue if Brooks withdraws. Thus, if Brooks is seeking to dismiss his complaint without prejudice, Amtrak does not oppose this Motion;" (3) "If Brook's Motions are interpreted as a request for dismissal without prejudice . . . Amtrak would not oppose such a request;" and (4) "Amtrak requests that the Court either deny Brooks' request for an extension of time . . . or dismiss the Complaint without prejudice." (Def. Opp. to Mot. to Withdraw as a Pro Se Litigant, *et al.*, Dkt. no. 38, pg. 1, 2, and 4 (Aug. 24, 2004)).

exhibited a lack of diligence, *inter alia,* by failing to: (i) adhere to discovery deadlines, (ii) respond to written discovery, (iii) proceed timely with certain depositions, and (iv) follow local rules by not filing a memorandum of law in support of a motion, rebutting a cross-motion, or replying to a rebuttal. *Shabazz*, 271 F. Supp. 2d at 800. Likewise, the *Teck* court found that the plaintiff demonstrated a lack of diligence by disregarding the strictures of pretrial order. *Teck*, 28 F. Supp. 2d at 992. There, the plaintiff sought a voluntary dismissal under Rule 41(a)(2) as a means of circumventing an earlier order striking his expert witness based on a tardy expert disclosure. *Id.* Construing Factor 2 in favor of the defendant, the *Teck* court held that this circuit has long recognized that a party may not obtain a voluntary dismissal under Rule 41(a)(2) simply to circumvent adverse rulings. *Id.* (citing *Patzuro*, 503 F.2d at 336).

In this case, Amtrak does not argue in its opposition to the instant Motion that Mr. Brooks exhibited excessive delay or a lack of diligence. Amtrak does not point the Court to any evidence suggesting that Mr. Brooks' instant Motion is simply a way to circumvent an adverse ruling. Without more, the Court cannot find that Mr. Brooks demonstrated a lack of diligence or excessive delay in this action. Therefore, Factor 2 also weighs in favor of Mr. Brooks.

To apply Factor 3, this Court must examine whether Mr. Brooks insufficiently explained his need for a dismissal. *Teck,* 28 F. Supp. 2d at 991; *Shabazz*, 271 F. Supp. 2d at 800. In *Teck*, the plaintiff filed a late expert disclosure statement which properly resulted in an order striking the testimony of this expert witness at trial. 28 F. Supp. 2d. at 990. Instead of appealing that court order, plaintiff Teck moved for a voluntary dismissal in part to circumvent the court's order and also because it could not comply with this Court's "expedited discovery schedule." *Teck*, 28 F. Supp. 2d at 990-91. The *Teck* court ruled that the plaintiff's explanation was wholly unsatisfactory. *Id.*

at 992 ("Plaintiff's attempt to use a Rule 41(a) non-prejudicial dismissal to avoid the consequences of an adverse ruling resulting from its lack of diligence in discovery is a decisive factor weighing against non-prejudicial dismissal.").

Plaintiff's explanation in *Shabazz* similarly lacked merit. 271 F. Supp. 2d at 800-801. There, the plaintiff sought a voluntary dismissal so that it could re-file the action to add a new party and restate its claim. *Id.* The court determined that the plaintiff could best achieve its objective by simply filing a motion for leave to amend the complaint, as opposed to the procedurally cumbersome process of a voluntary dismissal coupled with a later resurrection of the action. *Id.*

Here, Mr. Brooks, as a *pro se* litigant, seeks a voluntary dismissal to hire a lawyer because he believes his *pro se* status is significantly injuring his interest in the current action. In its opposition, Amtrak does not argue that Mr. Brooks' explanation is insufficient as a matter of law.

Balancing Factor 3 in this case is a close call. Like the plaintiff in *Shabazz*, Mr. Brooks may otherwise satisfy his objective through a procedurally authorized means without terminating the action, like simply hiring a lawyer. This Court recognizes, however, that *pro se* litigants may be afforded some deference. *See generally, Saudi v. Northrop Grumman Corp.* 221 F.R.D. 452, 455 (E.D. Va. 2004) (*"Pro se* litigants are entitled to some deference from the courts."). Nonetheless, this degree of deference must be carefully considered within the specific boundaries of each case.

The record reflects that this Court has repeatedly advised Mr. Brooks that he should hire counsel to better serve his own interests. On this mere fact alone, it would appear that Mr. Brooks' explanation is insufficient. Yet, there is another factor to consider. Mr. Brooks moved for a voluntary dismissal on the sole assumption that Amtrak, based on its earlier representations, also consented to a dismissal. Amtrak candidly acknowledges that Mr. Brooks claimed to have no

knowledge of Amtrak's letter revoking its consent to a dismissal at the time he filed his Motion for a Voluntary Dismissal. Amtrak's later position disfavoring a voluntary dismissal naturally counters Mr. Brooks' explanation. Yet, this Court is mindful that some deference should be afforded to Mr. Brooks and holds that his explanation of the need for a dismissal is appropriate because it was based on his uncontradicted belief, at the time he filed his Motion, that Amtrak had consented to a voluntary dismissal.

Under Factor 4, this Court must consider "the present stage of the litigation, *i.e.*, whether a motion for summary judgment is pending." *Teck,* 28 F. Supp. 2d at 991; *Shabazz*, 271 F. Supp. 2d at 800. There has not been much published discussion on the application of Factor 4 in this district. The *Teck* court did not discuss Factor 4, and the *Shabazz* court briefly mentioned it. *Teck*, 28 F. Supp. 2d 989; *Shabazz*, 271 F. Supp. at 801 ("While the plaintiff did file his Motion to Dismiss prior to the filing of the Motion for Summary Judgment, this does not outweigh the fact that the defendant will suffer substantial prejudice if the case is dismissed without prejudice.").

In an unpublished opinion, *Smith v. Alice Amanda, Inc.*, this district did find Factor 4 satisfied where adverse summary judgment was imminent. No. 97-185, 1997 WL 896612, at *1 (E.D.Va. July 30, 1997) (unpublished op.). There, the plaintiff failed to respond timely to the defendant's request for admissions. *Id.* at *1. Because the requests for admissions were deemed admitted as a matter of law under Rule 36(a) of the Federal Rules of Civil Procedure, the defendant moved for summary judgment. *Id.* To avoid summary judgment, the plaintiff moved for a voluntary dismissal. *Id.* The *Smith* court held that "the Fourth Circuit made it clear that a request for voluntary dismissal should be denied when adverse summary judgment is imminent." *Id.* at *2 (citing *Davis*, 819 F.2d at 1274)). Although the *Davis* court did not discuss the specific question of whether a

voluntary dismissal is appropriate where adverse summary judgment is imminent, granting a voluntary dismissal when adverse summary judgment is pending and imminent may certainly be prejudicial to the defendant. But this is not the case here.

Amtrak does not argue that granting a voluntary dismissal at this stage in the litigation would be clearly prejudicial to Amtrak's interest. Like defendant Alice Amanda, Inc. in *Smith*, Amtrak has certainly filed a Motion for Summary Judgment; but as noted, the mere filing of a motion for summary judgment, without more, cannot serve as the basis for denying a motion for a voluntary dismissal under Rule 41(a)(2). *S.A. Andes*, 788 F.2d at 1037, n. 4. ("Since Rule 41(a)(2) only applies when an answer or motion for summary judgment has been filed by the defendants, the mere filing of an answer or a motion for summary judgment could not, without more, be the basis for refusing to dismiss without prejudice.").

Here, Mr. Brooks did fail to file a timely opposition to Amtrak's Motion for Summary Judgment by August 30, 2004. In accordance with Local Civil Rule 56(B), therefore, those material statements in Amtrak's brief in support are uncontroverted. E.D. Va. Local Civ. R. 56(B) ("In determining a motion for summary judgment, the Court may assume that facts identified by the moving party in its listing of material facts are admitted, unless such a fact is controverted in the statement of genuine issues filed in opposition to the motion.").

Smith is easily distinguishable from this case because there is no reasonable basis to conclude that a failure to follow the dictates of Local Civil Rule 56(B) will automatically result in an adverse judgment. The *Smith* court could construe that the motion for summary judgment would be adverse as a matter of law because of the plaintiff's deemed admissions. To construe a material listing of

facts as undisputed, this Court would have to delve deeply into Amtrak's brief in support of its Motion for Summary Judgment. This Court has made no finding on the merits of Amtrak's Motion for Summary Judgment. Consequently, while this Court fully agrees with the reasoning and result in *Smith*, the failure to refute a material listing of facts for a pending motion for summary judgment under Local Civil Rule 56(B) does not make adverse summary judgment imminent.

Most importantly, it is entirely likely that Mr. Brooks failed to file a timely opposition to the Motion for Summary Judgment by August 30, 2004 because from August 24, 2004 to his September 1, 2004 filing date for the Motion for a Voluntary Dismissal, he properly believed that Amtrak had consented to the voluntary dismissal. For the reasons proffered, therefore, this Court finds no substantial prejudice in granting a voluntary dismissal at the present state of the litigation under Factor 4.

B. Conditions

In ordering a voluntary dismissal, this Court may impose "such terms and conditions as the court deems proper." Fed. R. Civ. Pro. 41(a)(2). To the extent that a defendant has suffered any prejudice through a dismissal, a court may obviate that prejudice through the imposition of ameliorative conditions. *Davis*, 819 F.2d at 1273 ("Rule 41(a)(2) requires a court order as a prerequisite to dismissal and permits the district court to impose conditions on voluntary dismissal to obviate any prejudice to the defendants which may otherwise result from dismissal without prejudice."). For instance, granting a voluntary dismissal after a defendant has expended costs and resources on discovery is not prejudicial where "the evidence discovered may be used in a subsequent action." *Id.* at 1276.

As applied, the Fourth Circuit has upheld conditions (i) requiring the plaintiff to pay a reasonable portion of defendant's costs and (ii) permitting the use of prior-developed discovery material in a subsequent action. *Id.* ("Such conditions should be imposed as a matter of course in most cases."). The Fourth Circuit, however, has declined to condition the grant of a voluntary dismissal on the plaintiff's payment of a reasonable portion of defendant's attorney's fees because "the work and resources expended" in the action could "easily" be carried over to a subsequent proceeding. *Id.*

This Court recognizes that Amtrak has been inconvenienced in this action. Amtrak's inconvenience, however, does not rise to the level of clear legal prejudice under Rule 41(a)(2). To the extent Amtrak has suffered any prejudice in this action, this Court will impose ameliorative conditions to protect its interests.

III. Order and Conditions

For the reasons set forth in this memorandum, it is **ORDERED** that Plaintiff's Motion for a Voluntary Dismissal under Rule 41(a)(2) of the Federal Rules of Civil Procedure is **GRANTED**. This action is **DISMISSED WITHOUT PREJUDICE.** In granting this Motion, the Court imposes the following **CONDITIONS**:

(1) To renew his cause of action, Mr. Brooks may only file a Complaint in the United States District Court for the Eastern District of Virginia, Alexandria Division within ninety (90) days of this Court's order. Defendant, within ten (10) days of this Order, shall submit a proposed Bill of Costs incurred herein. The payment by Plaintiff of costs taxed by this Court must be made prior to the re-initiation of this litigation;[2]

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[2] Consistent with *Davis*, this Court declines to impose an award of attorney's fees in favor of Amtrak as a condition of this voluntary dismissal. 819 F.2d at 1276.

(2) If Mr. Brooks files a new Complaint, any discovery developed in this action (1:03cv1488) may be used in the new action; and

(3) If Mr. Brooks files a new Complaint, no discovery in the renewed action may be duplicitous or cumulative of the discovery developed in this action (1:03cv1488).

It is **FURTHER ORDERED** Defendant's Motion for Summary Judgment is **DENIED WITHOUT PREJUDICE.**

The Clerk is **DIRECTED** to forward copies of this **Memorandum Opinion and Order** to the Parties.

Entered this 3rd day, November 2004.

Barry R. Poretz
United States Magistrate Judge

Alexandria, Virginia