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

ALEXANDRIA DIVISION

JANE DOE and JOHN DOE,	)	
Plaintiffs,	)	
v.	)	Civil Action No. 1:05CV701 (LMB/BRP)
YUSUF ABDI ALI,	)	
Defendant.	)	

NOTICE OF HEARING

PLEASE TAKE NOTICE that on Friday, July 15, 2005, beginning at 10:00 a.m. or as soon thereafter as counsel may be heard, counsel for the Plaintiffs will present argument on Plaintiffs' Motion for Depositions in Ethiopia, Related Commission, and for Reconsideration.

Dated: July 8, 2005

JANE DOE and JOHN DOE

By Counsel

By: _____

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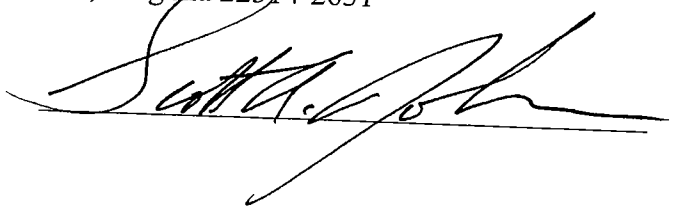
CERTIFICATE OF SERVICE

I hereby certify, this 8th day of July, 2005, that a true copy of the foregoing was sent by electronic mail and U.S. mail, to the following counsel of record:

Joseph Peter Drennan, Esq.
218 North Lee Street, Third Floor
Alexandria, Virginia 22314-2631



248032 v1/RE

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. 1:05CV701 (LMB/BRP)

PLAINTIFFS' MOTION FOR DEPOSITIONS IN ETHIOPIA, RELATED COMMISSION, AND FOR RECONSIDERATION

Plaintiffs Jane Doe and John Doe ("Plaintiffs") respectfully move the Court for reconsideration of the portion of its June 27, 2005 Order directing Plaintiffs to contact the United States Department of State and report to the Court regarding the Department's position on whether the Court is authorized to participate in Hargeisa-based videoconference depositions, as Plaintiffs now seek to conduct the depositions of plaintiffs and their non-party witnesses located in Somalia in Addis Ababa, Ethiopia. Simultaneously, Plaintiffs respectfully request that the Court issue an order allowing the depositions of Plaintiffs and of non-party witnesses who are residents of Somaliland to be taken while located in Ethiopia via videoconference. The Court has already ordered that Plaintiffs' depositions may be taken by videoconference, without providing any restrictions as to location. Plaintiffs also request that, pursuant to Rule 28(b), the Court issue a commission to the videographer who will be in attendance at these depositions to administer oaths and take testimony. In support of this motion Plaintiffs incorporate their memorandum filed this date.

Dated: July 8, 2005

JANE DOE and
JOHN DOE
By Counsel

By: _____

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_____

247956 v1/RE

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

JANE DOE and JOHN DOE,	)	
Plaintiffs,	)	
v.	)	Civil Action No. 1:05cv701
YUSUF ABDI ALI,	)	
Defendant.	)	

PLAINTIFFS' MEMORANDUM IN SUPPORT OF MOTION FOR DEPOSITIONS IN ETHIOPIA, RELATED COMMISSION, AND FOR RECONSIDERATION

INTRODUCTION

Plaintiffs Jane Doe and John Doe (the "Plaintiffs") have filed this action against the defendant Yusuf Abdi Ali ("Ali") for human rights abuses committed in Somalia. The Plaintiffs reside in Somaliland, that northern portion of the former Somalia which comprises the former British protectorate of Somaliland.

Pursuant to the Court's order of April 29, 2005, Plaintiffs arranged for their videoconference depositions to be conducted from Hargesia, Somaliland during the week of July 25, 2005. However, on June 27, 2005, the Court ordered Plaintiffs' counsel to contact the U.S. State Department and report to the Court within thirty days regarding the Government's position on whether the Court is authorized to participate in such depositions. Rather than delay the discovery process, Plaintiffs now seek to conduct depositions in Addis Ababa, Ethiopia rather than Somaliland. The Court has already ordered that Plaintiffs' depositions may be taken by videoconference, without providing any restrictions as to location. As such, the Court's

Order canceling Plaintiffs' depositions and directing Plaintiffs to seek the State Department's position on depositions in Hargesia is no longer necessary.[1]

Plaintiffs now seek to depose both Plaintiffs and several non-party witnesses who reside in Somaliland for purposes of obtaining their testimony for trial. In accordance with the Court's Order of April 29, 2004, Plaintiffs seek to have their own videoconference depositions held in Addis Ababa, Ethiopia. In addition, pursuant to Rule 30(b)(7) of the Federal Rules of Civil Procedure, Plaintiffs seek an order of the Court that the depositions of their non-party witnesses who reside in Somaliland take place in Ethiopia, also by videoconference. Plaintiffs further request that the Court issue a commission to the appropriate officer to administer oaths for the videoconference depositions of the Plaintiffs and the depositions of the non-party witnesses who live in Somaliland.

BACKGROUND

A. The Case

The Plaintiffs reside in Somaliland. They are victims of human rights abuses committed by the defendant, who served as a commander in the Somali National Army in the 1980s, or by

[1] Consequently, Plaintiffs seek reconsideration of that portion of the June 27 Order that required Plaintiffs to contact the State Department and report to the Court the Government's position on whether the Court is authorized to participate in depositions in Hargesia. Although depositions in Ethiopia provide an efficient alternative to proceed with this case, Plaintiffs note that depositions in Hargesia would not constitute a recognition of the Somaliland government, nor do Plaintiffs have any intention of using this suit as a vehicle to promote the independence or recognition of Somaliland. Although prudence dictated that Plaintiffs obtain permission of the Somaliland government to avoid any local disturbance, Plaintiffs made no attempt to suggest to the Court that it must recognize the legitimacy of that government. Indeed, such recognition is unnecessary. The Restatement (Third) of Foreign Relations Law of the United States, § 205(3) states that U.S. courts "ordinarily give effect to acts of a regime representing an entity not recognized as a state, or of a regime not recognized as the government of a state, if those acts apply to territory under the control of that regime and relate to domestic matters only." Reporter's Note 3 to the Restatement Section further notes that courts will give effect to acts of unrecognized governments dealing with private, local and domestic matters. Moreover, we are not aware of a single case in which the State Department has suggested that court participation in or authorization of depositions by videoconference implicates a question of foreign policy.

those under his direct command. This action is brought under the Alien Tort Claims Act ("ATCA"), 28 U.S.C. § 1350, and the Torture Victim Protection Act ("TVPA"), 28 U.S.C. § 1350 note.

Plaintiffs initially filed their case against Ali in November 2004. However, they quickly ran into serious difficulty in arranging for their travel to the U.S. to participate in the litigation. Despite significant efforts and considerable cost, Plaintiffs initially were unable to obtain travel visas and other appropriate documentation to travel to the U.S. Although upon reconsideration on the denial of her visa Jane Doe was deemed eligible to receive a travel visa, she was unable to satisfy the other requirements to travel to the U.S. before the close of discovery.

As a result of the difficulties Plaintiffs faced in coming to the U.S. for discovery and trial purposes, and at the suggestion of the Court, Plaintiffs sought and the Court granted a voluntary dismissal without prejudice on terms and conditions. In its ruling, the Court directed that Plaintiffs arrange for their depositions via videoconference, thus overcoming the dual problems of the Plaintiffs' inability to travel to the U.S. and Ali's alleged inability to travel outside of the U.S. A copy of Judge Brinkema's April 29, 2005, Order and a transcript of the hearing before Judge Brinkema of that same date are attached as Exhibit A.

Plaintiffs then filed the present case, complying with the terms and conditions of the Court's Order. The Court, upon receipt of Plaintiffs' certification that arrangements for their videoconference depositions in Hargesia, Somaliland, entered an Order that deemed Plaintiffs' certification acceptable and directed that the depositions be held for four days beginning July 25, 2005.

After receipt of Plaintiffs' motion for non-party witnesses depositions in Hargesia and defendant's motion seeking, among other things, to preclude Plaintiff's depositions in

Somaliland, the Court canceled the depositions scheduled to begin July 25, 2005. In its Order of June 27, 2005 (attached as Exhibit B), the Court referenced defendant's argument that enabling the depositions of Plaintiffs from Hargesia may improperly intrude on the prerogative of the Executive Branch, which does not recognize either the Republic of Somaliland or the Transitional Federal Government of the Somali Republic. The Court, acknowledging its sensitivity to the issue of separation of powers and its desire to avoid interference in foreign policy, ordered that "plaintiffs counsel contact the United States Department of State and report to the Court within thirty (30) days regarding the Government's position on whether the Court is authorized to participate in such depositions."

In order to avoid undue delay in the prosecution of this case entailed by seeking the State Department's position, Plaintiffs now seek to conduct their depositions – and the depositions of their Somaliland-based witnesses – in Ethiopia. The possibility of a delayed response from the State Department is real. In a related case before this Court, *Yousuf v. Samantar*, Civil Action No. 1:04 CV 1360, the Court directed counsel for defendant Samantar to seek the position of the State Department on his claim of head of state immunity on January 7, 2005 -- over six months ago. To date, the State Department has provided no response.

B. Depositions in Ethiopia

As directed by the Court before refiling, Plaintiffs made the necessary arrangements for their depositions to be conducted by videoconference. Plaintiffs originally set up their depositions to link the city of Hargesia in Somaliland with the Federal Courthouse in Alexandria, Virginia. Plaintiffs now seek to be present in Addis Ababa, Ethiopia for their depositions.

In the prior case, Plaintiffs had arranged to conduct depositions in Ethiopia. Counsel for plaintiffs consulted Ethiopian counsel in Addis Ababa, Ethiopia, regarding taking depositions in that country. The attorney, Mr. Teshome Gabre-Mariam Bokan, indicated that there is nothing in

Ethiopian law that would preclude these depositions. Moreover, the government of Ethiopia provided a written statement that it has no objection to the taking of the depositions in Ethiopia. (Letter from Harka Haroyb, Minister of Justice, the Federal Democratic Republic of Ethiopia, attached as Exhibit C.) In communications with Mr. Bokan, both the Ethiopian Minister of Justice and the Ethiopian Minister of Foreign Affairs gave their support to the taking of depositions in Ethiopia.[2] Unlike Somaliland, Ethiopia's government is recognized by the United States and the rest of the international community of states. Addis Ababa has suitable facilities for the deposition. In addition, according to consular officials and other sources, Plaintiffs and other Somali witnesses should be able to travel from Somali to Ethiopia for the depositions. The Plaintiffs have engaged a videoconference consultant, Mr. John Harrington of StandByVideo.Com, Inc., who has arranged for the videoconference link to Ethiopia. Mr. Harrington has also worked closely with the Court's Technology Administrator, Mr. Lance Bachman, to make arrangements for videoconference depositions.

C. Non-Party Witnesses

In addition to their own trial testimony, Plaintiffs have identified several witnesses located in Somaliland whom they need to depose for purposes of presenting their testimony at trial, rather than for discovery purposes. Accordingly, the Plaintiffs wish to take the depositions of the following individuals in Ethiopia, all of whom reside in Somaliland:

- Mohamed Guleed Riirash. Mr. Riirash served as the vice-mayor of Gebiley from 1984 until 1988, and can testify that the defendant was present in Gebiley in the mid-1980's, an allegation which defendant has denied.

[2] When previously seeking to arrange for Plaintiffs' depositions in Ethiopia, counsel for Plaintiffs also contacted the consular service at the U.S. Embassy in Ethiopia regarding depositions there. The consular office indicated that it was willing to participate in the deposition process and to administer the oath and take other related actions necessary to facilitate the depositions.

- Hassan Haji Mohamoud Dagaal Dhinbill. Mr. Dhinbill served as the defendant's personal assistant and bodyguard until 1988.

- Hussein Ismael Haji Sheil. Mr. Sheil served in the army in Gebiley from 1984 until 1988.

- Mohamed Aareeye Ali. Mr. Ali served in the army in Gebiley from approximately 1977 until 1988.

- Omar Aw Mohumed Dhinbiil. Mr. Dhinbill is one of the men detained with Jane Doe and her husband.

- Two of Jane Doe's sisters.

In addition, Plaintiffs anticipate the possibility that additional witnesses who are residents in Somaliland will be identified, and that Plaintiffs will seek their depositions in Ethiopia as well. Plaintiffs have not yet noticed these depositions in light of the time constraints imposed by Rules 26(d) and 30(a) regarding the start of discovery. Plaintiffs and the non-party witnesses are all witnesses are willing to attend their depositions voluntarily, so no subpoenas are necessary.

The Plaintiffs seek to conduct the depositions of the Somaliland witnesses promptly following the Plaintiffs' depositions, which Plaintiffs anticipate will occur sometime in September or October of 2005.[3] As the necessary arrangements (including travel, equipment and personnel) for the Plaintiffs' depositions will be in place, depositions of these non-party witnesses immediately following the Plaintiffs' depositions would be both practical and efficient.

[3] In light of the Court's cancellation of the July 25, 2005 depositions, new dates will have to be arranged with the Court and counsel.

ARGUMENT

I. PLAINTIFFS' VIDEOCONFERENCE DEPOSITIONS SHOULD BE HELD IN ETHIOPIA

The Court has already ordered that the Plaintiffs' depositions be held by videoconference. Plaintiffs originally prepared for their depositions to be linked by videoconference from Hargesia, Somaliland. They now seek to be deposed by videoconference from Addis Ababa, Ethiopia.

The Court placed no limitations on the location from which the Plaintiffs' videoconference depositions could be held. However, in light of issues raised by the U.S. Government's non-recognition of any government over the former Somalia, the Court directed Plaintiffs to seek State Department input as to the conduct of depositions from Hargesia.

To avoid unnecessary delay which would likely occur if the State Department's position is sought, and in light of Plaintiffs' earlier success in making arrangements for their depositions in Ethiopia, Plaintiffs now seek to conduct their videoconference depositions from Ethiopia. Ethiopian depositions would not raise any of the potential issues raised by Hargesia depositions. Indeed, depositions in Ethiopia wholly resolve the sensitivities the Court earlier voiced about the Hargesia depositions -- separation of powers and interference with foreign policy. Accordingly, Plaintiffs request that the Court approve their depositions in Ethiopia and withdraw its directive that Plaintiffs contact the State Department for its position on Hargesia depositions.

II. NON-PARTY SOMALILAND WITNESSES SHOULD BE DEPOSED IN ETHIOPIA

Furthermore, to avoid further concern regarding depositions of the non-party witnesses in Hargesia, Plaintiffs seek to likewise take their depositions in Ethiopia.

Pursuant to Rule 30(b)(7), the Court may order that a deposition be taken by videoconference. *See* Fed. R. Civ. P. 30(b)(7); *In re Central Gulf Lines, Inc. & Waterman Steamship Corp.*, No. CIV.A 97-3829, 1999 WL 1124789 at *1-2 (E.D. La. Dec. 3, 1999)

(permitting videoconference depositions of party deponents located in Hong Kong) (attached as Exhibit D); *Cacciavillano v. Ruscello, Inc.*, No. CIV.A. 95-5754, 1996 WL 745291 at *3 (E.D. Pa. Dec. 23, 1996) (allowing plaintiff to take deposition of Arizona witness by videoconference) (attached as Exhibit D). Authorization of a videoconference deposition does not require a showing of hardship; rather, so long as an objecting party is not likely to be prejudiced and the method used would reasonably ensure accuracy and trustworthiness, permission should be granted. *Cacciavillano*, 1996 WL 745291, at *3. Indeed, this Court already has ordered the Plaintiffs' own depositions be conducted via videoconference.

Plaintiffs may choose the location of non-party witness depositions as they wish. Fed. R. Civ. P. 30(b)(1); *Riley v. Murdock*, 156 F.R.D. 130, 132 (E.D.N.C. 1994). Plaintiffs would be within their rights to simply notice the non-party witness depositions where the deponents reside – Somaliland. *See, e.g., Zakre v. Norddeutsche Landesbank Girozentrale*, No. 03 Civ. 257, 2003 WL 22208364 at *2 (S.D.N.Y. Sept. 23 2003) (noting presumption favoring deposition at location of third-party's residence) (attached as Exhibit D). Moreover, the non-party witnesses would face the same bars to travel to the U.S. as did the Plaintiffs. They are beyond the subpoena power of the Court and would not necessarily be either willing or able to travel to the U.S. for a deposition or to give testimony at trial here. *See RLS Associates, LLC v. United Bank of Kuwait*, No. 01 Civ. 1290, 2005 WL 578917 (S.D.N.Y. March 11, 2005) (granting leave to conduct videoconference deposition of witness located in Dubai for later use as trial testimony in light of distance to Dubai and time difference between Dubai and courthouse) (attached as Exhibit D). Thus, depositions of the non-party witnesses in Ethiopia would be appropriate.

Plaintiffs are willing to provide a videoconference link in order for both Ali and his counsel to remain in the U.S. and participate in the depositions. This would allow Ali to be

present – he would allegedly not be able to travel outside the U.S. to participate in person. In addition, because of the significant distance from the U.S. to Ethiopia and the difficulties of traveling there, a deposition by videoconference would be less expensive than transporting all counsel to Ethiopia. Deposition by videoconference will be the most cost efficient and time-saving approach for all parties and their counsel. "The Rules of Civil Procedure favor the use of our technological benefits in order to promote flexibility, simplify the pretrial and trial procedure and reduce expense to parties." *Cacciavillano*, 1996 WL 745291, * 3.

Defendant will suffer no prejudice if these depositions are conducted by videoconference. The deponents will be seen and heard live, allowing defense counsel to directly observe their testimony. Ali could attend these videoconference depositions, whereas he would not be able to attend depositions in Ethiopia absent a video link. Thus, deposition by videoconference would erase any prejudice to defendant. Moreover, the methods used to record the testimony would reasonably ensure accuracy and trustworthiness. In addition to the videographer located with the deponent, Plaintiffs would also be using a court reporter to record the testimony stenographically. This dual procedure will provide a high degree of assurance of an accurate and reliable transcript. *Id.* at *3 (finding that stenographic transcription should adequately protect the reliability).

III. THE COURT SHOULD ISSUE AN APPROPRIATE COMMISSION FOR DEPOSITIONS

Depositions may be taken in a foreign country before a person commissioned by the court. Fed. R. Civ. P. 28(b). By virtue of the commission, such person shall have the power to administer the oath and take testimony. *Id.* Rule 28(b) does not require that the party seeking a commission show that the taking of the deposition in any other manner is impracticable or inconvenient – indeed, the Rule merely provides that a commission shall be issued on application and notice. *Id.*

In support of the depositions, the Court should issue an order commissioning the videographer arranged to videotape the depositions for the purpose of administering the oath and obtaining the testimony of the witnesses in Ethiopia. The witnesses are willing to appear for depositions in Ethiopia for the purpose of giving deposition testimony for use in this case, and a commission providing for such should be issued. As such, Plaintiffs request a commission be issued to the videographer provided by EuroAmerican Video Services, Ltd. and any other videographer used for the above referenced depositions.[4]

In light of defense counsel's stated concerns regarding the administration of the oath to deponents overseas, Plaintiffs further request that the commission to the videographer extend to the administration of the oath and taking testimony of the Plaintiffs' videoconference depositions. Although the Court has stated that it will administer the oath to Plaintiffs in their videoconference depositions, Plaintiffs seek to extend the commission to cover the Plaintiffs' depositions out of an abundance of caution.

CONCLUSION

Plaintiffs respectfully request an Order that the Plaintiffs' depositions be conducted by videoconference from Ethiopia and that the Court's withdraw its directive that the Plaintiffs seek the State Department's position on depositions in Somaliland. Plaintiffs also request that the Court order that the depositions of the Somaliland-based witnesses be held in Ethiopia via videoconference. Further, Plaintiffs request that a commission to take testimony and administer the oath, pursuant to Rule 28(b), be issued to the videographer who will be in attendance at these depositions, and award such other relief as is necessary to permit these depositions to proceed in Ethiopia.

---

[4] Plaintiffs are working with Mr. Stephen Faigenbaum of EuroAmerican Video Services Ltd. to provide videographer services for both Plaintiffs' depositions and the depositions of the other non-party witnesses.

CERTIFICATION

Counsel for Plaintiffs have made a good faith effort to resolve the discovery matters at issue.

Dated: July 8, 2005

JANE DOE and
JOHN DOE
By Counsel

By: _____

Robert R. Vieth (VSB #24304)
Scott A. Johnson (VSB #40722)
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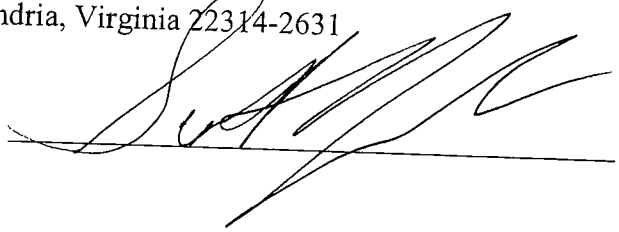

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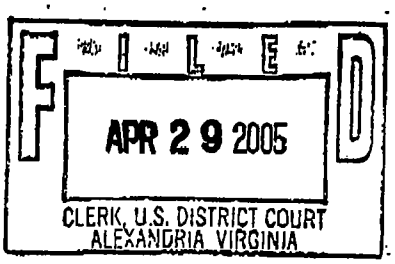
EXHIBIT A

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



JANE DOE, ET AL.,

Plaintiffs,

v.

YUSUF ALI ABDI,

Defendant.

No. 1:04cv1361

ORDER

For the reasons stated on open court, Plaintiffs' Motion For Voluntary Dismissal Without Prejudice On Terms And Conditions is GRANTED in accordance with the conditions imposed by the Court; and it is hereby

ORDERED that this civil action be and is DISMISSED WITHOUT PREJUDICE; and it is further

ORDERED that if plaintiff does not meet the preconditions discussed in detail on the record and refile this action within forty-five (45) days, this action will be dismissed with prejudice.

Of particular importance, plaintiffs must within thirty (30) days comply fully with all outstanding discovery requests directed to them by defendant, most notably providing defendant with any existing documentation of plaintiffs' identities. In addition, plaintiffs must within forty-five (45) days have in place all arrangements for video depositions of plaintiffs on a

date certain, over which a judicial officer of this court will preside and the costs of which plaintiffs will bear. Provided the conditions discussed on the record are met, the statute of limitations in this action will be stayed for forty-five (45) days.

The Clerk is directed to forward copies of this Order to counsel of record.

Entered this 29th day of April, 2005.

Leonie M. Brinkema
United States District Judge

Alexandria, Virginia

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

JANE DOE and JOHN DOE, Plaintiffs, vs. YUSUF ABDI ALI, Defendant.	Civil Action No. 1:04cv1361 Alexandria, Virginia April 29, 2005 10:00 a.m.

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

APPEARANCES:

FOR THE PLAINTIFFS:
SCOTT A. JOHNSON, ESQ.
Cooley Godward LLP
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FOR THE DEFENDANT:
JOSEPH PETER DRENNAN, ESQ.
218 North Lee Street, Third Floor
Alexandria, VA 22314-2631

ALSO PRESENT:
YUSUF ABDI ALI

OFFICIAL COURT REPORTER:
ANNELIESE J. THOMSON, RDR, CRR
U.S. District Court, Fifth Floor
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(703)299-8595

(Pages 1 - 30)

COMPUTERIZED TRANSCRIPTION OF STENOGRAPHIC NOTES

PROCEEDINGS

THE CLERK: Civil Action 2004-1361, Jane Doe, et al. v. Yusuf Abdi Ali. Will counsel please note their appearance for the record.

THE COURT: All right, counsel, you need to put your names on the record.

MR. JOHNSON: Good morning, Your Honor. Scott Johnson of Cooley Godward for the plaintiffs.

THE COURT: All right, Mr. Johnson.

MR. DRENNAN: Good morning, Your Honor. Joseph Peter Drennan for the defendant, who is present.

THE COURT: All right. Now, the matter that's before the Court today is the plaintiffs' motion for a voluntary dismissal without prejudice on terms and conditions, and I understand, Mr. Drennan, that you're not opposed in principle to the concept of a voluntary dismissal. You would like to see it probably with prejudice, but I think you recognize that the unique facts of this case do suggest that there has to be some leniency in this respect.

I think the real issue today that we need to decide are the specific conditions under which such a dismissal will be granted by the Court. I am concerned about the status of this case for many reasons, Mr. Johnson. One, of course, is the logistical problems associated with the ability to get discovery in this case. It is certainly the normal practice that a person

who's going to sue in a court be able and willing to come into that jurisdiction to prosecute the case.

Now, I recognize the realities of certain types of litigation, of which this is one, that that may not always be possible. At the same time, it is absolutely unreasonable to require a defense attorney to have to travel to areas of the world where there are definitely issues of risk to his safety and health in defending a case, and so I have to balance these interests.

It is also a problem in that this particular defendant, I had the clear impression from the papers I've seen, is not able to go most likely out of the country without jeopardizing his status in the United States, and he has a right to be present certainly at the deposition of the plaintiffs who have brought this lawsuit.

So in thinking about this issue, which I know Judge Poretz also has under consideration, and we touched on this once before but I don't think in the level of detail that I anticipate, on this issue about where discovery or where the depositions of the plaintiffs would occur, I think we can resolve that issue in a moment, depending upon some other factors, but what I want to understand right now is, Mr. Drennan, you have already issued interrogatories to the plaintiffs, correct?

MR. DRENNAN: That is correct, Your Honor.

THE COURT: And my understanding is that you are still extremely dissatisfied with the specificity of the responses, or

has that now been corrected?

MR. DRENNAN: Well, I am indeed, Your Honor, particularly with regard to the issue of documentation of who these people are. I have yet to see a single document that corroborates the -- or vets the identity, the true identity of the people involved.

I understand from one of their interrogatory responses, they each -- actually, the same array was sent to each party, and each, each party in response to the pertinent interrogatory indicated that he or she, as the case may be, was present outside of Somalia at the -- sometime in 1990 in one of these refugee camps that were, that were administered at that time, and I know from my knowledge of the region that all refugees get IDs, and I haven't seen any sort of identification.

I understand further that the, that the plaintiffs traveled to Nairobi for interviews at the U.S. Embassy there on, I believe it was, the 19th of this month, just last week, and I have yet to see any documents evidencing, you know, how they identified themselves when they presented themselves at the embassy.

That's among others -- I have not brought on any sort of motion to compel because I've been quite busy dealing with other aspects of the case. We've been here almost every Friday for the last couple of months.

THE COURT: All right. What I'm going to do in this case is I am going to grant the plaintiffs' motion for the

voluntary dismissal without prejudice on specific terms and conditions, and if those terms and conditions are not satisfied, then this dismissal will result in a dismissal with prejudice.

First of all, the plaintiffs must within 30 days provide full and complete responses to the discovery that is outstanding, both the documentary evidence that's been requested and the interrogatory answers, and satisfactorily satisfying that discovery obligation is a precondition to this case being refiled.

If there have been proper responses, then that suggests to the Court that there's a real case to go forward, and it gives you the right to file the case again.

But my concern is there are serious allegations that we've not totally addressed at this point about an extraordinarily -- about this case being beyond the statute of limitations. There is a very serious allegation that's still unresolved in this case that the plaintiffs are actually being used by political forces to not so much file a genuine individual lawsuit on their own behalf but to raise -- or to try to use some political leverage out of a case out of this Court that could have an impact on a foreign sovereign's efforts to develop a program of reconciliation and reunification.

We all know that the U.S. State Department may yet weigh in on this case. There are all sorts of concerns that this Court has about whether this is appropriate litigation and appropriate in this jurisdiction, and so I want to make sure that if this case

is going to go forward, it goes forward as a legitimate civil litigation and not something else.

The plaintiffs should be able with all the time that's passed and apparently all the resources that are behind this litigation to be able to answer what do not appear to the Court to be unreasonable discovery requests. So the discovery that is outstanding as to the plaintiffs, that is, the interrogatories and the document requests, must be satisfactorily resolved within 30 days.

Now, I can tell from your body language, Mr. Johnson, this is giving you concern, so why don't you tell me why that's a problem at this point.

MR. JOHNSON: May it please the Court, Your Honor, I don't believe it's a problem that we respond. In fact, I believe we have responded. I was surprised in that really in this case, the reason we've been before Judge Poretz on a couple of occasions is not as a result of any discovery delay or lack of diligence on the part of the plaintiffs; rather, it's been the difficulty in getting any kind of responses at all out of the defendant.

We had served discovery in January. It was due in February. We only received the written responses and the privilege log a few weeks ago.

And so I want to make sure I understand -- I don't believe that there's been any particular issues raised by Mr. Drennan other than perhaps --

THE COURT: He's telling me he doesn't know who the plaintiffs are in this case or he has no confidence in the identity of the plaintiffs.

MR. JOHNSON: Your Honor, certainly if we have that documentation, you know, we're more than happy to provide it, and we will seek that documentation without question. I just wanted to make sure that there wasn't perhaps a misunderstanding, that I believe the plaintiffs have been very diligent in responding to all discovery issues that have been raised.

THE COURT: Then you won't have a problem with this. But what I'm saying is within 30 days -- if I dismiss your case today, you've got to make sure within 30 days that you have complete, full answers to the currently outstanding -- when I say "outstanding," that is, that discovery that has been filed by Mr. Drennan as to the plaintiffs. If there are third parties or others, I'm not as concerned about that. It has to be fully answered.

Now, Mr. Drennan has identified one issue that he's dissatisfied with, which is a clear identification of who the plaintiffs are in this case. I also thought as I read through things that at least in the deposition answers, there was a great deal of unclarity about dates and where things happened, but did I misread that, Mr. Drennan, or are you satisfied with the rest of the information?

MR. DRENNAN: Your Honor, this is something that, that

has recently come up where upon the defendant's having filed the declaration first and then having given his deposition, at some point in some of the pleadings that were coming back from the other side, I noticed that there was some equivocation about when certain events took place based on the, on the defendant's answers.

Well, the plaintiffs are bringing this lawsuit, and they make very, very serious allegations concerning occurrences in the mid-1980s, and we were just a little troubled about that. And I mention that in my most recent memorandum to the Court simply because in our view, respectfully, it's illustrative of what appears to have been an inadequate, palpably inadequate pre-suit investigation.

But the, the answers are -- the sworn answers are what they are, and I was just planning on -- and that's why we're so anxious to take the depositions of these plaintiffs, so that we can get the appropriate amplification of what these specific allegations are.

THE COURT: All right. Then other than the identity of the plaintiffs, you're not dissatisfied substantively at this point with any of the discovery you've gotten from the plaintiffs?

MR. DRENNAN: I think that that's a correct statement, Your Honor.

THE COURT: All right. That's going to be a very easy precondition then for the plaintiff.

MR. JOHNSON: Your Honor, if I may just seek clarification, so I understand, if we do not have any written documentation identifying the plaintiffs, and I don't know that that's the case at this point, it seems to me that our honest and truthful answers to the interrogatory requests or any document discovery would, in fact, be that it doesn't exist or we don't have it. To me, that would satisfy any duty that we have to respond to those requests.

THE COURT: Well, I'm not going to give you an advisory opinion. You have to do what you have to do, and we'll see where we go from there.

MR. JOHNSON: Yes, Your Honor.

THE COURT: All right.

MR. JOHNSON: Your Honor, if I may just briefly address the issue of -- I know Your Honor has raised a question about an alleged political motivation for this case. I'm concerned that it's simply a red herring that's been raised by the defendants in this case -- the defendant in this case.

There really is no political motivation in this case whatever. This is simply the situation where we're trying to represent two plaintiffs that have suffered some very serious wrongs, and I just want to go on the record to clarify our position on that. Thank you.

THE COURT: All right. Now, the single largest issue is where these depositions are going to occur, and here's how I think

we solve all problems: First of all, as I thought about this issue, there are two levels of problem here. First are the broad discovery depositions, which obviously in most civil cases, there'd be a round of discovery depositions of parties, and then, of course, if the case survives pretrial motions, when it goes to trial, the parties are present in court to testify, and that creates issues in this case as well.

I think the best way of handling this concern is to do a video deposition run from this courthouse to whatever location the plaintiffs are. That allows the plaintiffs the flexibility of anywhere in the world they want to be. It allows the defendant to be present throughout the deposition because he would be able to see and hear the individuals as they're being questioned.

It allows -- the technology exists now that would allow counsel to be right here in the United States and to question the people over the video link. It enables this Court to administer the affirmation so that if there is any false statements, those individuals could be prosecuted by this United States Attorney's Office for committing perjury because it would be a crime made in the presence of the Court.

The technology exists. It is expensive, and in my view, the plaintiffs would have to bear the entire cost of that. That would allow, I think, everything to go forward.

Now, in addition, my recommendation, although I'm not wedded to this, is it seems to the Court that the deposition

should be more in the line of a de bene esse deposition than a discovery deposition; that is, the likelihood of these plaintiffs being able to come to this courthouse if the case gets to that point and appear in the courtroom is probably problematic, and therefore, rather than expending counsel's time twice, we ought to be able to do that questioning in such a way that there is basically substitution for actual trial testimony, and to ensure that that goes smoothly, the Court is willing to make itself or one of the magistrate judges, or I guess we need Judge Poretz, available to actually preside over that questioning so that objections that were raised similar to what would be raised during a trial can be ruled upon by the Court and a clean videotape can be constructed.

I think that solves the problem of trying to figure out where the depositions occur, avoids almost all the logistical issues that have been raised in the various motions that are before Judge Poretz. I think it gets around all the concerns, Mr. Drennan, that you've had about oath administration and the ability to have your client confront his accusers.

And the issue, of course, is the logistics. The Court itself I do not believe has that kind of technology. We have some technology, but when we've had overseas interactive depositions, we've had outside agencies provide the technology for that. I know it exists in the private sector, and the burden would be on the plaintiffs, who seem to have great financial resources

available to them, to be able to work that out.

If that can't be worked out, then the only alternative would be -- and I see it's a very unsatisfactory one because it denies the defendant his right to be present at those depositions, and so I really think this is the only way you can go and accommodate all of those issues.

Now, Mr. Drennan, let me hear you because I know you originally when we talked about a video deposition had some concerns.

MR. DRENNAN: Your Honor, I have some, I have some concerns about this. I understand the Court's ruling, and, and I do think that to an extent, it accommodates the, the issue of the presence of the defendant.

Your Honor --

THE COURT: And it avoids your having to travel outside of Virginia, frankly.

MR. DRENNAN: Well, well, Your Honor, that's -- I'll tell you that's never really been the issue. I mean, as I mentioned to the Court before, I've been to the Middle East. I've been to areas where there have been travel advisories.

I, I had some profound concerns about travel to Somaliland. I think that I would be at serious personal risk, and indeed, especially in view of who I represent, and the State Department advisory reflects that all American citizens are well advised not to go to anywhere in Somalia at the present time,

including the --

THE COURT: It's off the table. I'm not --

MR. DRENNAN: I understand that, but if Your Honor is inclined to allow video depositions, here -- of course, noting our exception to that, to that ruling, I want to see these people, and I want to see them right across the table from me, and if that means that my client has to be present by a video link but that I'll be there, be it in Ethiopia or Djibouti or, or any other country, I'll do it that way, but I don't believe that I should be constrained to be delimited to seeing these people on a video.

I want to be there, and also, there's a latent issue, Your Honor, we haven't raised because it's been quite apparent to me for quite some time that the case has been coming to this, but these people are claiming physical injuries, and I have in my discussions with counsel, have broached the issue of IMEs, and the response was, well, you shouldn't be entitled to IMEs.

We didn't bring the matter on formally by way of motion, but Judge Poretz obiter dictum has indicated that he believes that the plaintiffs should be required to give IMEs if the defendant asks for them, and that's another issue that needs to be accommodated.

And I've stated to the, to the plaintiffs' counsel that if, if the plaintiffs withdraw any claim that they sustained physical injuries and are not asking for any damages premised on any physical harm that they claim to have suffered, I'll withdraw

my request for IMEs.

These people are making very serious claims against my client. My client is dubious about the validity of the claims, and that's a latent issue that upon a refiling of the case, that would need to be addressed.

THE COURT: What's the nature of the physical injuries alleged in this case?

MR. DRENNAN: Well -- and, of course, Mr. Johnson will correct me if I'm inaccurate in any regard -- but generally speaking, the allegation with regard to the female is that she sustained a beating that was so severe that it caused her to sustain a miscarriage. Now, that's -- I'm not asking for an IME to verify whether she had a miscarriage. I'm not --

THE COURT: Twenty years ago, that would be almost impossible.

MR. DRENNAN: No, no, no, no. But the other gentleman has -- tells a tale of receiving a number of gunshots and being left for dead, and even though those allegations are considerably remote in time as well, that -- the credibility of those allegations is rather suspect, and we respectfully submit that an IME would be appropriate with regard to John Doe.

THE COURT: All right.

MR. DRENNAN: In addition, Your Honor, with regard to the issue of a video link, the, the posture of the case before this motion was brought on had your plaintiffs requesting the

issuance of commissions for the taking of a number of nonparty depositions in Ethiopia.

It's invariable that if the case goes forward, there will need to be certainly from the plaintiffs' standpoint, unless they're not going to put on any other evidence aside from the, the ipse dixit testimony of the plaintiffs, that there will be other depositions taking place involving people from that part of the world that presumably would not be able to travel here, and the question arises as to whether those would be depositions that would be video link depositions so that the defendant has an opportunity to be present as well.

THE COURT: All right, Mr. Johnson?

MR. JOHNSON: Your Honor, if I may, to address the -- well, first off, to address the video conference issue, I know we had raised it earlier, and in fact, the Court had raised it earlier, and we understood from Mr. Drennan that was not something he was interested in, and therefore, we did not pursue that option. That does sound like a good option.

I will note that the -- this is a pro bono matter that we are helping to support. Indeed, the resources of the plaintiffs are not abundant by any stretch, and the plaintiffs themselves are certainly by our standards here in the United States not very well off.

I would like to, to raise two points: One, the issue of the IME. We have not denied -- rejected any claim for an IME. We

have not seen any motion or request before the Court with regard to an IME, and it doesn't seem appropriate at this time for that issue to be addressed by the Court.

Second, in terms of the issue of other nonparty witnesses, it doesn't seem to me that it's our burden to provide a video link for the defendant in order to sit in and watch those depositions and that there's no issue with regard to local rule 30A that those other witnesses be brought here. So I don't believe that's a burden that the plaintiff should have to bear in this situation. Thank you.

THE COURT: Well, I'm not quite sure how the due process rights of a civil litigant extend to third-party depositions. Certainly in order for the defendant and defense counsel to be able to meaningfully address those third-party depositions, they have to be able to interact to some degree either before or after the deposition or during the deposition. I mean, often parties are not present with third-party depositions. I think we'll face that issue when we come to it.

But what I'm going to do, as I said, is I'm going to grant plaintiffs' motion for the voluntary dismissal, and as I said, the conditions that I'm going to impose are first of all, as I said earlier, that there has to be a response to the identity questions and document requests that have been -- that are outstanding.

There cannot be any duplicative discovery in any newly

filed action. Now, that does mean that if there has been outstanding discovery by either side and that side has not been satisfied by the quality of the response, I will permit a motion to compel or renewed request for that discovery, but to the extent that something has already been resolved or answered, there's not to be any duplication in the newly filed action.

I'm very concerned about the statute of limitations because I think, frankly, this case is already way beyond any reasonable time period, and I think that's ultimately going to be a very serious issue in this case, but because I'm only going to give the plaintiffs 45 days in which to refile a new action, I will stay the statute of limitations only for that 45-day period but no further.

The new action cannot be brought unless the plaintiffs and the defendant can work out this video deposition. I'm going to go with my instinct on that, but the plaintiff has to make all the arrangements in terms of the equipment, in terms of the payments for it, everything. You'll need to clear with my chambers time when we can do it, and I will see whether we're going to use the 7th floor courtroom that does have some technology in it or whether we need to do it here.

Now, will those depositions be in English, or will a translator be necessary?

MR. JOHNSON: Your Honor, I believe the translator will be necessary.

THE COURT: All right. You're going to have to make all the logistical arrangements for the translator and, as I said, the videographer, everything, and then clear it with the Court, and I want a time estimate as to how long you think these depositions will last, all right, in other words, whether we're going to be in court for a day or two days.

Now, since I'm going to be -- I or Judge Poretz will be presiding, there isn't going to be a lot -- that's one of the other reasons why I wanted to do this. I've read too many deposition transcripts where there's all sorts of objections and back-and-forth among lawyers. It's not going to happen this way. I may give you a little leeway since this is going to be a combined discovery and potential trial deposition, but this may very well be the plaintiffs' only time to testify in this case.

And frankly, if the testimony is not solid, it may lead to a very early motion by the defense. I expect this to be a real case, as I said, with real litigants, and not some sort of thing made out of the ether, and so the plaintiffs have got to be able to respond appropriately to the questions that are being asked of them.

So the two of you need to consult with your calendars, with your best estimate as to the time that's going to be needed.

Now, the other thing in terms of time, what's the time difference between wherever this -- and the plaintiffs don't have to be in Somalia or any other place. You decide where they should

be, but remember, there's a time gap, and I'm not coming to court at 5:00 in the morning to accommodate their schedule. So you're going to be working off of -- I'm willing to start 8:30-ish here, not much earlier than that.

And the other thing is I don't want to tie up my court reporter on this process. Although I'll be in session, the record, the official record -- and I'll check with Ms. Thomson and make sure we can do it this way -- is going to be that video record. So whoever the videographer is, I'll swear them in as official court reporter, but I think that's it, because it's not technically a trial, it's a pretrial matter, but I don't think I should have to use court resources for it. I think that will be sufficient, and then if the videotape is played at trial, we would capture that as part of the trial record. So I think we can work it that way.

In terms of any third-party depositions, Mr. Drennan, I'll let you brief that issue. I'm not sure how that's going to work at this point, but let's get the plaintiffs' depositions taken care of first.

And I think that pretty much covers the issues that you were concerned about in terms of the prefiling conditions. The defendant's not giving up any of the defendant's rights to object to any of these depositions, including the video deposition. I don't really think in a civil case you're going to have a legitimate argument that your inability to be in the same room

with the people is prejudicing your client.

But I also do agree, although there's not a formal motion on the floor, that certainly as to John Doe, because gunshot wounds would be even 15 or 20 years later able to be, I think, medically confirmed, that the IME is a reasonable request given the nature of the allegations.

Now, again, if those change in the complaint, in the new complaint, then, of course, it may not be necessary, but in thinking through the prefiling decisions, you need to recognize that if you're still alleging physical damage to John Doe from gunshot wounds or other sort of physical items that could be detected with an examination, that he will have to -- if it's a reasonable request, that he would have to sit for an IME, and then working that out is something you'll have to figure on. Okay?

All right, are there any other conditions, first of all, Mr. Johnson, that you're concerned about? Again, 45 days is your time limit, so you're going to have to work with your technology people. If they need to come over here and look at the courtroom to see how it would be set up, talk to Ms. Travers, my courtroom deputy, about making those arrangements. All right?

MR. JOHNSON: Thank you, Your Honor. I do have one point. Do I understand the Court's discussion of the IME at this stage is simply a suggestion that the parties work together to try to make arrangements for that IME if a motion is filed?

THE COURT: I'm basically alerting you that one of the

things you have to be thinking about if you refile this case for these two plaintiffs is that John Doe, if he's still claiming physical injuries of the sort that was described in court, that is, gunshot wounds, is going to likely have to be examined for -- sit for an IME. That's out there. It's just something to consider in your evaluation about whether there should be another filing in this case.

MR. JOHNSON: Thank you, Your Honor.

THE COURT: All right?

MR. JOHNSON: Thank you, Your Honor. The other issue, again, I would just note my objection with regard to having to actually provide any identification documents or otherwise. We will certainly within, as I understand it --

THE COURT: How could these people travel to Ethiopia? Is Ethiopia allowing foreign nationals inside its country without there being some paper?

MR. JOHNSON: Your Honor, as I understand it, they did, in fact, receive some sort of visa or pass to travel to, to Nairobi. So they have not yet traveled to Ethiopia. It was travel to Nairobi to get their -- or to apply for their U.S. visa, their nonimmigrant visa.

So I just can't -- I can't represent to the Court right now what actual document they received. It just occurred on the 19th. We actually had a difficult time even reaching our plaintiffs because of a -- some confusion in the U.S. Embassy.

Their passports -- or the -- presumably, I guess, Your Honor, the visa materials they received to travel were inadvertently locked up in the office, and they had four or five days spent in Nairobi until they could get another plane back to Somalia.

So it may very well be there are documents we can provide, and certainly if we have them and they're responsive, we will provide them. My only concern and noting the objection was if we don't have anything, I would not want that to be preclusive of us refiling the suit.

THE COURT: We'll have to work that out when we get there.

MR. JOHNSON: Okay. Thank you, Your Honor.

THE COURT: All right? Mr. Drennan, anything you wanted to add?

MR. DRENNAN: Just one thing, Your Honor, and I don't want to repeat myself, and I won't, but with regard to the terms and conditions respecting the video deposition, all we would ask is that there be at this point -- because I could see this as being a potential stumbling block in conferral with counsel -- that there be an explicit provision regarding the depositions going forward in a place where there is, is some infrastructure and where there is not a State Department advisory of potential death to an American citizen, because I want to have the option of being there present physically to see these people face to face.

THE COURT: You understand --

MR. DRENNAN: Your Honor --

THE COURT: Wait, wait. You understand then I'm not going to require the plaintiff to pay those costs.

MR. DRENNAN: I understand that, Your Honor, and -- but the plaintiffs have already represented to the Court in their earlier filings that they could get their, get plaintiffs to Addis Ababa. If there is to be a video deposition, let it be Addis Ababa rather than Somaliland, which is a place that is essentially beyond the pale for any American to go, particularly this American, who represents Colonel Ali in this case.

MR. JOHNSON: Your Honor --

THE COURT: Unless, Mr. Drennan, you've got some case law that says that it's a clear violation of due process or other rights that your client and you have for you to be physically present during this deposition, I think putting that additional burden on the plaintiffs is unreasonable.

Now, again, the video has got to be good. If it's -- and so there's a lot of burden already on the plaintiffs to get a really decent company, and obviously, if the plaintiffs are in Somalia, whoever they hire as their videographer folks have got to be able to go into that country with their equipment. There has to be a location.

So it may very well be that it isn't going to happen there anyway because the logistics for whoever the company is that does this may be that they don't want to or can't get into the

country, and so it may take care of itself in that manner. All right?

But unless you can show me -- and I'll give you a few days to see if you can come up with some case law that says definitively that I'd be committing, you know, reversible error to say to you, no, you're going to have to live with these video depositions under these circumstances or make the decision to go where they are, but -- in other words, I'm forcing the plaintiffs to bear the cost of the entire video program. To add the additional costs that they must travel to a certain location for the video matter to go forward simply because you might want to be present I don't think is reasonable.

Now, again, the reality is that they may have to travel anyway, and if that is the case, Mr. Johnson, you need to give Mr. Drennan clear notice of that. In other words, if your company says, "We're not going to go there to take these depositions," then you're going to have to still make arrangements for your clients to travel.

And then, Mr. Drennan, at your own cost, if you decide you want to be present in the room when they're being questioned, that's your option.

MR. DRENNAN: Your Honor, one, one, one further consideration that we believe is appropriately aired here is the fact that our government does not recognize the self-proclaimed republic of Somaliland, and to have a deposition go forward from

that territory could very well present some very touchy diplomatic issues.

We recognize the government of Ethiopia. We recognize the government of Djibouti. We do not recognize the self-proclaimed republic of Somaliland.

And au contraire, there's actually every indication that, that I have from my sources that, that our government is watching very carefully the, the efforts of the transitional government to set up shop, so to speak, in Mogadishu or in some other capital city, and this -- allowing this exercise to go forward could, could have some very profound and unpleasant reverberations in that region.

THE COURT: Well, I'm not ordering the deposition to occur anyplace. I'm just saying wherever it occurs, it occurs.

And the State Department has had a lot of time to weigh in officially on this case, and we still don't have their position. If you want to contact your people over there and get an advisory opinion, clearly, if the State Department indicates that the United States government believes it would be against our national interests to allow this deposition to occur there, I'll cancel that location and require the plaintiffs to travel elsewhere, but I don't have that in this record.

And I'm not ordering that it occur there. I'm just saying the plaintiffs will be deposed by a video deposition because no matter what their situation is, it's pretty clear

Mr. Ali cannot leave the United States and be able to -- he'll have a problem, I suspect, coming back here. That's the logistical problem he's got.

MR. DRENNAN: Yeah.

THE COURT: And I want to make sure that he has the right to be present at that deposition. That's how I'm balancing this. So that's the parameters of it.

MR. DRENNAN: All right. Your Honor, there is one final point, and that relates to the issue of costs. Your Honor related to us in, I believe, a hearing that was held on the 1st of April or thereabouts that this, this problem of the plaintiffs coming here should -- I believe Your Honor used the term should have come as no great surprise to the plaintiffs.

We have been to court on -- to be sure, some of these trips to court have been with regard to discovery issues regarding the defendant, but an identifiable portion of my considerable efforts on behalf of my client in this litigation have been in dealing with this very issue that was eminently predictable from the outset, and the plaintiffs now are being essentially given an indulgence to refile, and we believe that in addition to the -- and again, I understand the position of the Court, but with regard to the limitations issue, we believe that, that we, we've suffered and continue to suffer prejudice.

We've also suffered a rather not inconsiderable incurment of costs in the way of attorneys' fees of having to deal

with proceedings that relate to these issues that we're talking about now.

THE COURT: Well, I'm not awarding fees, but I think it is fair to put counsel on notice -- and it sounds as though this is a case that perhaps is more driven by counsel or others than the litigants themselves -- but Rule 11 might very well result in the award of fees and expenses on -- in terms of the second case, if it gets filed and there's not a good faith reason to believe that, for example, the statute of limitations defense will not be successful and that this case can properly go forward with two genuine plaintiffs whose identity is known and who are going to be able to comply with the requirements of any litigant who comes into federal court, that is, to be available for the necessary discovery, etc.

I'll face that issue when it comes, but, Mr. Johnson, you're just on a general notice that as an officer of this Court, you've got to be sure that if this case proceeds and you continue to, you know, increase the costs for the defendant, that there's a genuine basis to let it go forward.

Again, there are lots of legal issues floating around in the periphery of this case that haven't really been addressed yet. And you also, both sides, I think, have a genuine interest in making sure that the State Department moves on the questions that are before it concerning this case, and, Mr. Johnson, your firm is involved in the other case as well, and I think the same issue

applies there.

I mean, the defendants are in a different position, but the overall concerns, if they are real, as to the status of Somaliland and what's going on there and any effect this litigation might have on that I would expect the State Department will let us know.

But in any case, I've granted your motion. Hopefully, you understand the restrictions. We'll put some of them in an order, but the fullest explanation will be in the transcript.

All right, anything further?

MR. JOHNSON: Your Honor, can I just briefly, I would like to note an objection to the video depositions just to the extent that if we do find some sort of problem in having the video deposition arranged, certainly that sounds as though that's something that it's up to us get arranged, and we will, you know, move quickly forward to try to secure that and the details and logistics of that kind of deposition, in terms of, in terms of costs, I would just note at this point that certainly any costs that have been incurred so far in this matter would be reasonably covered by -- and because our discovery would continue forward into a subsequent case, that costs really shouldn't be an issue.

And I understand the Court's admonition with regard to making sure we have a valid case and valid plaintiffs, and certainly we take that to heart and without question will uphold our responsibility to make sure that we have a valid case with our

plaintiffs. It's our position that indeed we do.

THE COURT: Have you met your clients?

MR. JOHNSON: I have not, Your Honor.

THE COURT: Has anyone in your firm met your clients?

MR. JOHNSON: Yes, they have, Your Honor.

THE COURT: That's good. That's a good start. All right.

In any case, that's the ruling of the Court. Now, again, you've got 45 days to get this all worked out. The deposition doesn't have to occur within that time, but, you know, that's a prefiling condition, that we're all set to go.

MR. JOHNSON: Just so I understand then --

THE COURT: You've got 45 days in which to respond to the defendant, that shouldn't be that difficult, and to get all the logistics set up and in place for the video deposition.

MR. JOHNSON: So that's 45 days in which to refile a new complaint and to have arrangements for video depositions in place.

THE COURT: Right.

MR. JOHNSON: It doesn't have to occur by then.

THE COURT: Correct, but it has to be set up so you know who the company is, you should know who the interpreters are going to be, you should know where it's going to occur, you should have a time frame. You will have talked to my chambers and gotten the dates to do it, in other words, it's ready to go.

Now, it may not be able to go as soon as you file the

complaint, but it obviously has to go relatively quickly because among other things, you're going to get a scheduling order in this case if you refile, and it's going to be probably a slightly shorter scheduling order since you've had a chance to do discovery, and we'll see where it goes from there.

MR. JOHNSON: Yes, Your Honor.

THE COURT: All right? Thank you.

MR. DRENNAN: Thank you, Your Honor.

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

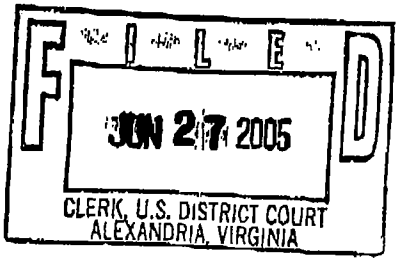
CERTIFICATE OF THE REPORTER

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

Anneliese J. Thomson

EXHIBIT B

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



JANE DOE, ET AL.,

Plaintiffs,

v.

YUSUF ALI ABDI,

Defendant.

No. 1:05cv701

ORDER

Before the Court are defendant's Praecipe And Notice Of Motions And Motions By Yusuf Abdi Ali For Reconsideration Of 29 April 2005 Order, Inter Alia, Directing Plaintiffs' Depositions To Take Place In Historic Somalia and 28 January 2005 Order, Inter Alia, Authorizing Plaintiffs To Proceed Anonymously, And Motion For Protective Order To Bar Plaintiffs From Taking Witness Depositions In Historic Somalia, And Contingent Motion By Yusuf Abdi Ali For Certification Of Question(s) For Interlocutory Appellate Review, And For The Issuance Of A Stay Of Proceedings Pending Appellate Review ("Motion For Reconsideration") and plaintiffs' Motion For Non-Party Videoconference Depositions And Issuance Of Commission ("Motion For Video Depositions"). Both Motions are noticed for Friday, July 1, 2005.

Among many other issues, defendant's Motion For Reconsideration argues that by enabling the depositions of

plaintiffs by videoconference from Hargesia, the Court would intrude improperly on the prerogative of the Executive Branch of the United States, which does not recognize the Republic of Somaliland or the Transitional Federal Government of the Somali Republic. Because the Court is extremely sensitive to the separation of powers and to avoid any possibility of interfering in matters of foreign policy, defendant's Motion For Reconsideration is GRANTED with regard to his request that plaintiffs' depositions not be taken via videoconference from Hargesia during the week of July 25, 2005; and it is hereby

ORDERED that the depositions of plaintiffs via videoconference from Hargesia that are scheduled for the week of July 25, 2005, be and are CANCELLED; and it is further

ORDERED that plaintiffs' counsel contact the United States Department of State and report to the Court within thirty (30) days regarding the Department's position on whether the Court is authorized to participate in such depositions.

The cancellation of plaintiffs' depositions in Hargesia renders moot defendant's other requests. Accordingly, his Motion For Reconsideration is DENIED WITHOUT PREJUDICE in all other respects.

The Court's ruling also renders moot plaintiffs' request that the Court commission a videographer to administer the oath and thus enable plaintiffs to conduct and broadcast the

depositions of non-parties in Hargesia following plaintiffs' own depositions. Accordingly, plaintiffs' Motion For Video Depositions also is DENIED; and it is hereby

ORDERED that defendant's Motion For Reconsideration and Plaintiffs' Motion For Video Depositions be removed from the docket for Friday, July 1, 2005.

The Clerk is directed to forward copies of this Order to counsel of record.

Entered this 27th day of June, 2005.

Leonie M. Brinkema
United States District Judge

Alexandria, Virginia

EXHIBIT C

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The Federal Democratic Republic of Ethiopia
Ministry of Justice

ቁጥር: 01/002-41/12
Ref. No.
ቀን April 14, 2005
Date

Ms. Helene Silverberg
Staff Attorney
Center for Justice & Accountability
870 Market St.; Suite 684
Sanfrancisco, CA 94102
U.S.A.

Subject: **Doe vs Ali, Civil Action No.1:04 CV1361**

Dear Ms. Silverberg,

Thank you for your communication of 12 April 2005, reference the above case, presently pending in the United States District Court for the Eastern District of Virginia, against Colonel Yusuf Abdi Ali, a former Officer in the Somali National Army who currently resides in Virginia.

I Understand you want to take depositions in Ethiopia, over a period of a week, from plaintiffs and witnesses currently living in Somaliland.

In this connection, I am pleased to confirm that my government has no objection in any testimony being taken in Ethiopia, on a private basis without involving Ethiopian courts, in relation with the above case, provided the plaintiffs, witnesses and attorneys and support staff are lawful visitors of Ethiopia.

Sincerely Yours,

HARKA HAROYE
Minister

ቴሌ. ቁጥር FAX ——— ፖ.ሳ.ቁ. P.O.Box 1370 ስልክ Tel. 51-50-99 አዲስ አበባ - ኢትዮጵያ Addis Ababa - Ethiopia

EXHIBIT D

1999 WL 1124789 (E.D.La.)

Motions, Pleadings and Filings

Only the Westlaw citation is currently available.

United States District Court, E.D. Louisiana.
IN RE CENTRAL GULF LINES, INC. and WATERMAN STEAMSHIP CORP.
No. CIV. A. 97-3829, CIV. A. 99-1888.
Dec. 3, 1999.

ROBY, Magistrate J.

***1** Waterman Steamship Corporation and Central Gulf Lines, Inc. ("Waterman") has filed a Second Motion to Compel Discovery (doc. 105) against Boto Company, Royal & Sun Alliance Insurance (Hong Kong), National Mutual Insurance Company (Bermuda), Union Success Metal Limited, Mingtai Fire & Marine Insurance Company and Chin Ling Steel Company ("Insurance Companies").

In its motion, Waterman seeks to compel the Insurance Companies' 30(b)(6) representatives to appear in the Eastern District of Louisiana for their depositions and the production of documents relevant to the depositions. The Insurance Companies agree to make the deponents available, but given the expense of traveling from Hong Kong to the United States, request that the depositions be taken through a video conference.

"The court may upon motion order that a deposition be taken by telephone or other remote electronic means." FED.R.CIV.P. 30(b)(7). However, there is no Fifth Circuit law addressing whether a deposition should proceed by way of a video conference when one of the parties disagrees. The Court notes that the Civil Justice Reform Act contemplates a decrease in the expense of litigation. Further, FED.R.CIV.P. 1 states that the rules, "shall be construed and administered to secure the just, speedy, and inexpensive determination of every action." FED.R.CIV.P. 1.

There is no dispute that the video conference would be less expensive, and would aid in the administration of justice. Further, while Waterman cites to several cases that hold the parties must be deposed in the district where they choose to file suit, these cases were all decided before the advent of video conferencing and contemplate an inability to secure real-time testimony. In video conferencing, the deponent can be heard and observed live in the district, albeit through technological advances.

Waterman also argues that the Court should compel the physical presence of the deponents in the Eastern District of Louisiana because multiple documents must be reviewed in the course of the deposition. Further, Waterman asserts that they are in need of the documents in advance of the deposition.

Accordingly, the parties are ordered to conduct the depositions of the Insurance Companies' 30(b)(6) deponents through a video conference. The Court is of the opinion that this ruling blends the considerations raised by Rule 1 of the Federal Rules of Civil Procedure and the case law requiring an appearance in the district.

The Court is sympathetic to Waterman's concerns, and therefore the Insurance Companies are ordered to produce the documents twenty (20) days prior to the deposition. If during the course of the deposition, it appears that documents were not forwarded to Waterman, they are to be immediately transferred electronically so as to permit the deposition to continue in a speedy and inexpensive fashion.

Accordingly,

IT IS ORDERED that Waterman's Second Motion to Compel Discovery (doc. 105) is hereby GRANTED IN PART AND DENIED IN PART, as follows:

***2** 1. The depositions of the Insurance Companies' 30(b)(6) deponents will be conducted by way of video conference;

2. The Insurance Companies are ordered to produce the relevant documents twenty (20) days prior to the deposition.

E.D.La.,1999.

In re Central Gulf Lines, Inc.
1999 WL 1124789 (E.D.La.)

Motions, Pleadings and Filings (Back to top)

- 2:97CV03829 (Docket) (Dec. 10, 1997)

END OF DOCUMENT

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Not Reported in F.Supp.

1996 WL 745291 (E.D.Pa.)

(Cite as: 1996 WL 745291 (E.D.Pa.))

H

Motions, Pleadings and Filings

Only the Westlaw citation is currently available.

United States District Court, E.D. Pennsylvania.
ANNE MARIE CACCIAVILLANO, PLAINTIFF,
v.
RUSCELLO, INC., t/a LUIGI'S Restorante Italiano, Amed Abdelmonesif,
Individually and as President and Chief Executive Officer, Ruscello, Inc.,
a/k/a Emed Abdelmnisis, Defendants.
No. CIV. A. 95-5754.

Dec. 23, 1996.

MEMORANDUM AND ORDER

HUYETT, J.

*1 Plaintiff Anne Marie Cacciavillano ("Plaintiff") has filed a Motion for a Protective Order and a Motion for a Videotaped Trial Deposition.

By Order of December 17, 1996, this Court denied a Motion for Protective Order ("original motion") filed by plaintiff, Anne Marie Cacciavillano ("Plaintiff") without prejudice for failing to comply with the good faith requirement of Fed.R.Civ.P. 26(c). The December 17, 1996 Order stated that Plaintiff could refile the motion after making a good faith effort to resolve the dispute.

Although Plaintiff did not refile a complete Motion, Plaintiff has filed a certification of good faith effort and an affidavit attempting to address the Court's concern that "Plaintiff's blanket assertion of intimidation is not sufficient to justify prevention of Defendant Amed Abdelmonesif from attending the deposition." (Dec. 17, 1996 Order p. 3). Thus the Court will assume that the submission supplements and renews Plaintiff's original motion. The Court will consider Defendants' response to Plaintiff's original motion and Defendant does not need to file further response. The issues have been briefed in full. The only point that Plaintiff's supplement successfully adds to Plaintiff's original motion is the affidavit of good faith effort.

Plaintiff, in her original motion and supplement, offers three reasons why a protective order should be granted (1) a deposition in Arizona would be unduly burdensome in time and expense; (2) another witness, Eric Tranter, is available only on December 20, 1996 and January 2, 1997. Counsel for Plaintiff cannot attend on December 20, 1996 so January 2, 1997 is the only date available for Eric Tranter's deposition; and (3) Plaintiff believes that if a face-to-face deposition of the witness--attended by Defendant Amed Abdelmonesif--occurs, Abdelmonesif will attempt to intimidate or influence the witness.

(1) *Plaintiff's claim that a deposition in Arizona would be unduly burdensome in time and expense:* In its December 17, 1996 Order, the Court noted:

> Both parties wish to depose the witness. Plaintiff has not explained why it would be unduly burdensome or expensive to attend the deposition in Arizona, but not to use teleconferencing equipment. The Court also notes that Plaintiff had noticed a deposition of the same witness to occur in Arizona, and by Order of October 24, 1996, Defendants were granted a protective order, suggesting that the costs of attending a deposition in Arizona are not unduly burdensome for Plaintiff.

Plaintiff has failed to address this issue in her supplement. However, the defendants are insisting on taking the deposition face-to-face at this time, and it is Plaintiff who objects to this out-of-state deposition and is willing to provide and use an alternate means of deposing the witness. Thus, if

the defendants insist on taking the deposition in Arizona, they must pay the expenses to Plaintiff and Plaintiff's counsel of attending a deposition in Arizona.

*2 (2) *Plaintiff's claim that Attending a Deposition on January 2, 1997 would prevent her from deposing Eric Tranter on the same day.* In its December 17, 1996 Order the Court noted:

> Plaintiff has failed to show why December 2, 1996 is the only day that Eric Tranter's deposition can be taken. Plaintiff states that she is unavailable on December 20, 1996, the only other date Eric Tranter is available, but does not state why. Additionally, Plaintiff does not explain why no other attorney from Plaintiff's office can attend one of the depositions while she is at the other.

Plaintiff has not addressed this in her supplemental affidavit and the Court does not accept this as a justification for granting the protective order.

(3) *Plaintiff's claim that Defendant Amed Abdelmonesif will attempt to intimidate or influence the witness at a face-to-face deposition.* The supplemental affidavit of Plaintiff's counsel states that she "learned" that a Ms. Blau told Jennifer Keyes that after the first trial, defendant Amed Abdelmonesif went to a restaurant where Ms. Blau works, left her a "huge" tip, and stated "[t]hanks for not testifying against me." Plaintiff's attorney stated that she "later learned" that "Ms. Blau told Ms. Keyes" that it was after she had lunch at Luigi's and spoke to Amed Abdelmonesif that Ms. Blau had decided not to testify.

Counsel for Plaintiff states that she "believe[s]" the witness in Arizona "received compensation for not testifying in this case" and that "Mr. Abdelmonesif will persuade [her], or attempt to persuade [her], to testify favorably to him in his case, or to withhold truthful testimony favorable to Anne Marie Cacciavillano." Counsel for Plaintiff bases this belief on what she has "learned" Ms. Blau told Ms. Keyes about Ms. Blau's experiences with defendant Abdelmonesif.

Counsel for Plaintiff has not provided grounds to prevent defendant Abdelmonesif from being present at a live deposition. Courts have excluded a party from a deposition in extraordinary circumstances. Wright, Miller & Marcus, Federal Practice and Procedure § 2041 (1994). Plaintiff has failed to offer anything more than facts which exist in most civil litigation. Often witnesses do not wish to be helpful in a trial. Plaintiff states that Mr. Abdelmonesif gave a large tip and thanked Ms. Blau for not testifying. This is not sufficient to prevent Mr. Abdelmonesif from attending Ms. DiFrancesco's deposition. However, the Court will limit the contact that the parties may have with the witness. No party, party's counsel or party's agents will be permitted to have contact with the witness Gina DiFrancesco--before or after the deposition--until the trial is completed with one exception. Each party, through its counsel will be permitted to write the witness one letter stating the subject of the deposition and any other necessary information counsel needs to impart.

II. Plaintiff's motion for a videotaped trial deposition

*3 Plaintiff has moved for the Court to order a videotaped trial deposition by telephonic and stenographic recording of the witness. Federal Rule of Civil Procedure 30(b)(7) authorizes depositions by remote electronic means. "[S]uch permission should be granted unless an objecting party will likely be prejudiced or the method employed 'would not reasonably ensure accuracy and trustworthiness.' " *Fireman's Fund Ins. Co. v. Zoufaly,* 1994 WL 583173, No. 93 CV 1890 (S.D.N.Y.1994) (citing *Rehau v. Colortech, Inc.,* 145 F.R.D. 444, 446 (W.D.Mich.1993)). Thus, authorization of an electronic deposition does not depend upon a showing of hardship by the applicant. *Id.*

Plaintiff states that the witness will "appear on videoconference and [be] deposed telephonically, so that all persons can see and hear one another, and will be stenographically recorded, at a videoconference facility in Phoenix, Arizona, near the witness' place of residence." Plaintiff states that the technology available today will allow for interactive video-conferencing, videotape,

telephonic testimony, and stenographic recording ..." Plaintiff has represented to the Court that counsel will be able to view the witness as she testifies, while at the same time, the witness is being videotaped for the jury. Defendants respond that this deposition would be by "extraordinary and awkward means" and that it is unreliable and confusing. The stenographic transcription should adequately protect the reliability of the proceedings, and the fact that the technology is new does not necessarily mean that it is confusing. As Judge Newcomer noted in *Davis v. Sedco Forex,* Civ. A. No. 86- 2611 (E.D.Pa.1986) 1986 WL 13301, "[t]he Rules of Civil Procedure favor the use of our technological benefits in order to promote flexibility, simplify the pretrial and trial procedure and reduce expense to parties." The Court assumes that the videotaped deposition would be in lieu of a live deposition. Thus, Plaintiff will be permitted to conduct a videotaped deposition if Defendant elects not to pay Plaintiff's and Plaintiff's counsels expenses for traveling to Arizona.

An appropriate order follows.

ORDER

It is ORDERED that Plaintiff's Motion for a Protective Order is GRANTED IN PART and Plaintiff's motion for the Court to order a videotaped trial deposition by telephonic and stenographic recording of the witness is GRANTED IN PART:

A. By Monday, December 23, 1996 at 5:00 p.m., Defendants shall elect whether (1) to pay for the expenses of Plaintiff and Plaintiff's counsel for travelling to Arizona for the deposition of Gina DiFrancesco on January 2, 1997 or (2) whether to attend the videotaped deposition scheduled by Plaintiff on December 27, 1996.

B. No party, party's counsel or party's agents shall have contact with the witness Gina DiFrancesco--before or after the deposition is taken--until the second trial is completed with one exception. Each party, through its counsel may write the witness one letter stating the subject of the deposition and any other necessary information counsel needs to impart.

*4 C. Plaintiff may take the videotaped deposition on December 27, 1996 if Defendants opt not to pay for her and her counsel's costs to travel to Arizona.

D. As there is no reason to have oral argument on a simple discovery motion, Defendants' request for oral argument on the videotaped deposition is DENIED.

IT IS SO ORDERED.

1996 WL 745291 (E.D.Pa.)

Motions, Pleadings and Filings (Back to top)

- 2:95CV05754 (Docket) (Sep. 12, 1995)

END OF DOCUMENT

Westlaw.

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Page 1

2005 WL 578917 (S.D.N.Y.), 66 Fed. R. Evid. Serv. 924

(Cite as: 2005 WL 578917 (S.D.N.Y.))

H

Motions, Pleadings and Filings

United States District Court,
S.D. New York.
RLS ASSOCIATES, LLC, Plaintiff,
v.
THE UNITED BANK OF KUWAIT PLC,
Defendant.
No. 01 Civ. 1290(CSH).

March 11, 2005.

MEMORANDUM OPINION AND ORDER

HAIGHT, Senior J.

*1 RLS Associates, LLC ("RLS") brings suit against United Bank of Kuwait PLC ("UBK" or "the Bank") for breach of a contractual agreement to pay a post-termination fee and for unjust enrichment. Presently before me are two motions, both by the Bank. The first is for an order requiring RLS to file an original bond to secure costs and attorneys' fees, pursuant to Local Civil Rule 54.2. I consider that motion in Part I of this opinion. The Bank's second motion is a request to depose Bruno Martorano by videoconference for the purpose of securing his testimony for trial. This motion is considered in Part II. For reasons stated below, defendant's first motion is denied, and its second motion is granted.

I

UBK seeks an order from this court directing RLS to post a bond to secure the costs of the Bank. In this district, such orders are governed by Local Civil Rule 54.2, which provides:

> The court, on motion or on its own initiative, may order any party to file an original bond for costs or additional security for costs in such an amount and so conditioned as it may designate. For failure to comply with the order the court may make such orders in regard to non-compliance as are just, and among others the following: an order striking out pleadings or staying further proceedings until the bond is filed or dismissing the action or rendering a judgment by default against the non-complying party.

While there are no set guidelines for applying Rule 54.2, courts generally consider the following factors in determining whether to require a party to file a bond in pursuant to the rule: "(1) the financial condition and ability to pay of the party who would post the bond; (2) whether that party is a non-resident or foreign corporation; (3) the merits of the underlying claims; (4) the extent and scope of discovery; (5) the legal costs expected to be incurred; and (6) compliance with past court orders." *Pfizer, Inc. v. Y2K Shipping & Trading, Inc.,* 207 F.R.D. 23, 24 (E.D.N.Y.2001), *citing Johnson v. Kassovitz,* No. 97 Civ. 5789, 1998 WL 655534, *1 (S.D.N.Y. Sept. 24, 1998); *see also Selletti v. Carey,* 173 F.R.D. 96, 100-101 (S.D.N.Y.1997); *Bressler v. Liebman,* No. 96 Civ. 9310, 1997 WL 466553, at *3 (S.D.N.Y. Aug. 14, 1997); *Livnat v. Lavi,* No. 96 Civ. 4967, 1997 WL 563799, at *3 (S.D.N.Y. Sept. 9, 1997); *Beverly Hills Design Studio v. Morris,* 126 F.R.D. 33, 36 (S.D.N.Y.1989).

At the outset, three of these factors appear to militate *against* requiring a bond. Plaintiff is not a non-resident or foreign corporation, there is no history of noncompliance with prior orders, and the extent and scope of discovery in this case, while perhaps extensive, is not particularly unusual in its magnitude. The Bank does not dispute any of these factors. I now consider what remains.

A. Plaintiff's ability to pay

According to defendant's counsel, Loren F.

Selznick, Esq., during a telephone exchange with plaintiff's counsel, Michael H. Smith, Esq ., Smith represented that he could "see no downside" for his client to continue this litigation. Allegedly, Smith informed Selznick that if UBK ultimately prevailed in this case, and consequently moved for attorneys' fees and costs (which UBK alleges to be substantial), UBK would never be able to recover due to RLS's lack of funds. [FN1]

> FN1. A partial exchange outlined in Selznick's declaration reads as follows:
> Smith: You will never recover any amount from RLS.
> Selznick: Why?
> Smith: Doesn't have it. Your recovery against him is worthless.
> Declaration of Loren F. Selznick, Oct. 26, 2004, at ¶ 4.

***2** Attorneys' fees are of particular concern in this case, since both parties agree that the Consultancy Agreements which form the subject matter of this action contain a choice of law provision that they "shall be governed by and construed in accordance with the laws of England," an incorporation which includes the general rule under English law "that fees are awarded to the prevailing party." *See RLS Assocs., LLC v. The United Bank of Kuwait PLC,* No. 01 Civ. 1290(CSH), 2003 WL 22801918, at *1 (S.D.N.Y. Nov. 24, 2003). I shall revisit this issue in Part I.C of this opinion, *infra,* and assume for now that attorneys' fees must play a role in the bond analysis.

Concern arising from this telephone conversation led Selznick to commission two firms, Dun & Bradstreet and C.F. Anderson, to investigate the financial condition of RLS. Both firms reported an inability to locate any assets belonging to RLS. *See* Declaration of Loren F. Selznick, Oct. 26, 2004, Exs. 2 & 3.

Smith denies making the statements Selznick attributes to him. According to Smith, when told that UBK's legal fees at the time were approximately $450,000, he answered, "RLS' fees did not come close to that," and that plaintiff "does not have that kind of money." Affidavit of Michael H. Smith, Nov. 19, 2004, at ¶ 25. He also disputes Selznick's claim that UBK could recover attorneys' fees connected to its appellate litigation and its motion for summary judgment. *Id.* Finally, Smith submits that Selznick's disclosure of their telephone exchange was improper based on Fed.R.Evid. Rule 408, which makes inadmissible, in certain contexts, evidence of settlement negotiations.

I do not find that Rule 408 makes Selznick's disclosure improper. Rule 408 makes evidence of settlement negotiations inadmissible "to prove liability for or invalidity of the claim or its amount." However, the rule does not exclude evidence offered "for another purpose, such as proving bias or prejudice of a witness," etc. Though it is true that demonstrating inability to pay "does not appear on the short list of permissible other purposes within Rule 408, that list is merely suggestive, and is not intended to be exclusive." *EMI Catalogue P'ship v. CBS/Fox Co.,* No. 86 Civ. 1149(PLK), 1996 U.S. Dist. Lexis 7240, at *6 (S.D.N.Y. May 24, 1996). I find Selznick's admission of her conversation with Smith to be within the confines of acceptable "other purposes" in Rule 408. And even accepting Smith's version of what had been said, he did assert, when faced with potential legal costs of $450,000, that his client "does not have that kind of money."

Moreover, it is telling that RLS offers nothing to refute the findings of UBK's two investigatory firms, which reported that RLS has no assets that could be located.

In light of these circumstances, I find that UBK has an understandable concern regarding RLS's real ability to pay any eventual attorneys' fees or costs, should UBK prevail in this case. [FN2] In the ordinary instance, this weighs in favor of an order for a bond. *See e.g., Atlanta Shipping Corp., Inc. v. Chemical Bank,* 818 F.2d 240, 251 (2d Cir.1987) (upholding lower court bond order based, in part, on plaintiff's status as "debtor in bankruptcy" and a perceived "high risk" that plaintiff would be "unable to pay the defendant's costs should defendant prevail"); *Selletti v. Carey,* 173 F.R.D. 96, 101 (S.D.N.Y.1997), *aff'd,* 173 F.3d 104 (2d

Cir.1999) (holding, based in part upon a finding that plaintiff's "only identifiable asset is a small parcel of land valued at $500," that "there is a serious risk that [plaintiff] will be unable to pay the reasonable costs to which the defendants may be entitled should they prevail"); *Bressler,* 1997 WL 466553, at *4 (ordering bond upon assertion of plaintiff's counsel that plaintiff "didn't have a dime," an assertion "whether flippant or serious," which justified "the imposition of a bond requirement against Marino as well as Bressler on the basis of his professed inability to satisfy any sanctions that might be ordered").

> FN2. However, I also note that nothing in this opinion should be construed as an indication of my ultimate opinion on the merits of underlying case itself. *See* Part I.B, *infra.*

B. Merits claims

*3 RLS opposes UBK's request for a bond order on the grounds that UBK has not shown that RLS's claims are of "dubious merit." *Pfizer, Inc.,* 207 F.R.D. at 25. Indeed, UBK did not attempt a merits-based argument in its initial memorandum in support of a bond order, and its terse argument in its reply brief is inconclusive. There are substantive issues in the underlying action that have not yet been resolved, and to which I currently intimate no opinion. For instance, on the issue of whether RLS's principal, Richard Swomley, made statements which the Bank reasonably believed were prejudicial to its interests, I reiterate my prior holding that "this issue is a fact-intensive question appropriate for jury resolution." *RLS Assocs., LLC v. The United Bank of Kuwait PLC,* No. 01 Civ. 1290(CSH), 2003 WL 22251332, at *7 (S.D.N.Y. Sept. 30, 2003). Defendant has not established that plaintiff's claims are of dubious merit. This weighs against a bond order.

C. Legal Costs Expected to be Incurred

Finally, the parties dispute the amount of the bond RLS would be required to post. In its notice of motion, UBK requests the amount be set at $569,000, based upon the $489,000 it has already expended, and $80,000 more it expects it will cost to bring the case to trial.

RLS makes several arguments in opposition. It contends, first, that attorneys' fees under UK law should not be considered part of "costs" under Rule 54.2, and second, that UBK's failure to break down or analyze its attorneys' fee claims in any fashion requires the Court to make premature findings in a complex area of UK law. *See generally, Bensen v. Am. Ultramar Ltd.,* No. 92 Civ. 4420, 1997 WL 317343 (S.D.N.Y. June 12, 1997). Third, RLS asserts that most of the amount UBK has already expended in this case is attributable to UBK's own "scorched earth" litigation tactics.

While Rule 54.2 speaks only of "costs," costs in this context may include attorneys' fees when recoverable by a statute. *See, e.g., Selletti,* 173 F.3d at 106 (holding that defendants' costs and attorneys' fees are potentially recoverable under the Copyright Act). Underlying the question whether Rule 54.2 allows recovery of attorneys' fees based on UK law is whether the English rule is of any moment at all in an American court--a question which I chose not to address in my most recent opinion. *See* 2003 WL 22801918, at *2 ("[A]ssuming without deciding that defendant's contentions about the applicability and effect of English law are correct ...").

Other courts have ruled in circumstances similar to the present case, that under New York choice of law principles, English laws allowing recovery of attorneys' fees by the prevailing party are applicable. *See Katz v. Berisford Int'l PLC,* No. 96 Civ. 8695(JGK), 2000 WL 959721 (S.D.N.Y. July 10, 2000); *Csaky v. Meyer,* No. 94 Civ. 8117, 1995 WL 494574 (S.D.N.Y. Aug. 18, 1994); *Browne v. Prentice Dry Goods, Inc.,* No. 84 Civ. 8081(PKL), 1986 WL 6496 (S.D.N.Y. June 5, 1986), at *3 ("While it is true that under the so-called 'American Rule' attorneys' fees are not awarded to the successful litigant, this does not mean that an award of attorneys' fees under the 'English Rule,' followed by Argentina, is repugnant to the policy of New York State.").

*4 Having found that the English rule on attorneys' fees is consistent with New York choice of law principles and prior precedent, I see no reason why the English rule cannot be applied under Local Rule 54.2. *Accord J. Barbour & Sons, Ltd. v. Taftco, Inc.*, Civ. A. No. 87-2609, 1989 WL 49518 (E.D.Pa. May 8, 1989).

On the other hand, RLS is correct to point out that it would be much too simplistic to assume that UBK is entitled to all of its attorneys' fees as a matter of UK law. Regardless of the final outcome of this case, attorneys fees will have to be carefully determined in accordance with British law.

A balancing of the relevant factors persuades the Court that in this case, UBK has shown that in principle it is entitled to the protection of a bond to be posted by RLS. As noted, on the present record UBK has a justified concern about RLS's financial ability to pay UBK's costs if UBK prevails after trial. Moreover, since the English Rule applies, attorney's fees are included in the recoverable costs, and so the amount involved is potentially significant. Nor can it be said that UBK's denials of contractual liability to RLS are frivolous.

Contrary to RLS's argument, there is authority for the proposition that a party's apparent financial inability to pay prospective costs is sufficient in and of itself to justify an order requiring the posting of a cost bond under Rule 54.2. Judge Leisure reached that conclusion in *Knight v. H.E. Yerkes and Assocs., Inc.*, 675 F.Supp. 139 (S.D.N.Y.1987), the first case UBK's brief cites on the point, which RLS's brief does not criticize or distinguish. In *Knight,* the record demonstrated that the ability of a plaintiff resident in Thailand to pay the defendant's anticipated recoverable costs in taking depositions abroad was problematic. Without discussing the merits of the case or any other factor, Judge Leisure ordered that the plaintiff post a cost bond under Local Rule 39, the precursor to Rule 54.2, stating succinctly that "[a]gainst this background, the Court believes that there is a substantial risk that plaintiff would be unable to pay defendant's costs should defendant prevail, and that plaintiff should therefore be required to file a bond for costs." *Id.* at 142. I reach the same conclusion in this case.

While UBK's entitlement in principle to a cost bond is thus established, it remains to consider what the amount should be in practice. UBK prays for a bond in the amount of $569,000, that being the total of $489,000 in legal fees and expenses UBK says has been incurred in the litigation to date, plus "at least $80,000" to cover the anticipated expenses of the trial. But I am not prepared to accept this amount automatically as the amount that would be recoverable as costs under the English Rule, and consequently determinative of the amount of the cost bond.

Judge Buchwald's thoughtful and thorough discussion of the English Rule in *Bensen,* 1997 WL 317343, at *7, is instructive. Citing and quoting several law journal articles, Judge Buchwald observed that

> *5 the rule is not just a simple fee-shifting provision.... While the English rule is typically described as a "loser pays" system, the application of the cost-shifting principle is much more complicated than the simple phrase "loser pays" implies.... [E]ven if the losing party has the wherewithal to pay, there is a significant difference between the costs incurred and the recovery assessed by the "taxing master." The loser should not be expected to pay more than the minimum expenses necessarily incurred by the winner, whereas the prevailing counsel can charge his client the maximum fee.

(citations and internal quotation marks omitted). This discussion quite strongly suggests that the invoices for legal services and expenses rendered by its counsel to UBK might not be, indeed probably would not be, assessed in their full amounts against RLS by an English "taxing master" (a title with Dickensian resonance), unless the taxing master was satisfied that those charges constituted "the minimum expenses necessarily incurred by" UBK, the prospective winner.

In these circumstances, if UBK wishes to press its application for a cost bond, it must demonstrate that under the contractually governing United Kingdom law and practice, an English taxing master (or other

competent authority) would probably award UBK as the prevailing party its attorney's fees and expenses in the amount specified in the cost bond to be posted in this Court. Neither this Court not American counsel for the parties are competent to express a view on that subject. UBK must support its suggested bond amount by an affidavit or affidavits from English solicitors or barristers. If such submissions are filed and served, RLS will be given a reasonable opportunity to file and serve opposing affidavits by English experts, if so advised.

It follows that UBK's motion for an order pursuant to Local Rule 54.2 is denied on the present record, without prejudice to renewal upon presentation of the further proof described *infra*. [FN3]

> FN3. I note in passing that there is apparently an alternative basis upon which UBK could have sought a cost bond. In *J. Barbour & Sons, Ltd. v. Taftco, Inc.*, No. Civ.A. 87-2609, 1989 WL 49518 (E.D .Pa. May 8, 1989), the clothing distribution contract between the parties provided that the contract would be governed by English law. The court granted plaintiff's motion for an order directing the financially stressed defendant to post a cost bond because "[a]n English statute provides that a plaintiff or counterclaiming defendant should post a security bond when it appears that the party would be unable to pay the other party's costs (including attorney's fees)." *Id.*, at *3. In the case at bar, RLS and UBK having contractually selected UK law as the governing law, it would seem that UBK could have relied upon the English statute to which the district court referred in *Barbour*. But I need not pursue that possibility further because Local Rule 54.2 is equally available to UBK and is not in derogation of UK law.

II

Defendant's second motion concerns the testimony of Bruno Martorano, formerly a senior officer of Ahli United Bank B.S.C., the parent company of UBK, and a Director of the IIBU Fund II PLC. Defendant alleges that as the former Deputy Chief Officer of the Bank, Martorano was witness to key information concerning plaintiff's cause of action, and therefore would be a critical witness in its defense. Martorano is no longer employed by the bank or its parent company. He now works and resides in Dubai, United Arab Emirates. According to UBK, Martorano is unwilling to travel to New York in order to provide live testimony under oath. However, he has agreed to be deposed by way of videoconference in order to secure his trial testimony.

During the October telephone conference, it became clear that prior to taking Martorano's video testimony, the Bank would have to establish by what authority under the rules I could direct such deposition to take place. That authority, as the Bank notes in its motion papers, is found in Fed.R.Civ.P. 32, which states in pertinent part:

> ***6** (a) Use of Depositions. At the trial or upon the hearing of a motion or an interlocutory proceeding, any part or all of a deposition, so far as admissible under the rules of evidence applied as though the witness were then present and testifying, may be used against any party who was present or represented at the taking of the deposition or who had reasonable notice thereof, in accordance with any of the following provisions:
> (3) The deposition of a witness, whether or not a party, may be used by any party for any purpose if the court finds:
> ...
> (B) that the witness is at a greater distance than 100 miles from the place of trial or hearing, or is out of the United States, unless it appears that the absence of the witness was procured by the party offering the deposition; or
> ...
> (D) that the party offering the deposition has been unable to procure the attendance of the witness by subpoena; or
> (E) upon application and notice, that such exceptional circumstances exist as to make it desirable, in the interest of justice and with due regard to the importance of presenting the

testimony of witnesses orally in open court, to allow the deposition to be used.

Ostensibly, Rule 32 is a discovery rule, which has its roots in Fed.R.Civ.P. 26(d). *See United States v. Int'l Bus. Machs. Corp .*, 90 F.R.D. 377, 381 n. 7 (S.D.N.Y.1981). One could argue, therefore, that UBK's requested deposition is barred by the expiration of the discovery deadline. Indeed, some courts have held as much. *See e.g., Henkel v. XIM Products, Inc.,* 133 F.R.D. 556 (D.Minn.1991); and *Integra Lifesciences I, Ltd. v. Merck KGaA,* 190 F.R.D. 556 (S.D.Cal.1999). However, the majority of courts considering this issue have made what can only be described as a federal common law distinction between "discovery depositions" and "trial depositions" (or alternatively, "preservation depositions"), and have held the latter category permissible even after the discovery deadline had passed.

For instance, in *Estenfelder v. Gates Corp.,* 199 F.R.D. 351 (D.Colo.2001), a highly instructive and useful opinion on this subject, defendant sought to take preservation depositions of four of its former employees who resided in Europe. Like Martorano in the present case, each of the would-be deponents in that case no longer worked at the defendant corporation, each resided in a foreign continent, and none could be compelled through subpoena to attend trial. Like the present case, the deadline for discovery had passed by the time defendant made its motion. Noting that "courts cannot ignore a party's need to *preserve* testimony for trial, as opposed to the need to *discover* evidence, simply because the period for discovery has expired," *id.* at 355 (emphasis in original), the court granted defendant's motion. It even went so far as to note, "some discovery may occur during a deposition which is conducted for purposes of preserving the testimony of a witness, but if the primary purpose of the deposition is to preserve testimony for trial, the deposition should not be disallowed simply because of that potential eventuality." *Id.*

*7 There is also precedent in this circuit for the taking of preservation depositions. In *Manley v. Ambase Corp.,* 337 F.3d 237, 247 (2d Cir.2003), the Second Circuit permitted parties to depose defendant's former chairman "once as part of the discovery process and again pursuant to a *de bene esse* proceeding ordered by the court when it appeared that the eighty-year old California resident would not travel to New York for trial," the latter deposition being one taken "in anticipation of a future need." *See* Black's Law Dictionary 408 (7th ed.1999).

In this case, it is clear that defendant's proposed deposition of Martorano would serve the purpose of testimony preservation rather than discovery. Martorano was in senior management at UBK's parent company prior to his departure. While he was still an employee, there was no reason for the Bank to depose Martorano, as it knew the substance of his testimony, and intended to present him as a live witness at trial. Defendant attests that Martorano has key information regarding the circumstances of plaintiff's case, and remains a critical witness. The only reason it seeks to depose him is that he has now left the Bank and works in Dubai, and is unwilling to travel to New York for live in-court testimony.

Plaintiff's position is that Rule 32 has been, in effect, superceded by a 1996 amendment to Fed.R.Civ.P. Rule 43(a) which provides that "[t]he court may, for good cause shown in compelling circumstances and upon appropriate safeguards, permit presentation of testimony in open court by contemporaneous transmission from a different location." [FN1] Prior to 1996, the rules did not provide for a witness to testify via live video.

> FN1. More accurately, RLS's position is that Martorano should *only* testify by personal appearance a trial. However, plaintiffs' further position is that should the Court allow Martorano to testify by anything other than personal appearance, it should only be by way of live video testimony.

Certainly, there are policy reasons why live, in court testimony would be preferred over prerecorded testimony. *See Int'l Bus. Machs. Corp.,*

90 F.R.D. at 381 ("There is a strong preference for live testimony being recognized by the courts, as it provides the trier of fact the opportunity to observe the demeanor of the witness ."). However, it is clear that Rules 43(a) and 32(a) are meant to compliment each other; and depending on the nature of the case and the circumstances involved, one procedure may be preferred over another. In fact, the Advisory Committee Notes to the 1996 Amendment of Rule 43(a) states that "[o]rdinarily depositions, including video depositions, *provide a superior means of securing the testimony of a witness* who is beyond the reach of a trial subpoena" (emphasis added); superior, that is, to a contemporaneous transmission of a witness's testimony.

In the present case, a contemporaneous transmission of Martorano's testimony would be highly inconvenient, due to the large time difference between New York and Dubai. The greater distance between court and witness also leads to a greater likelihood of technical problems arising, which would interfere with the flow of the trial and cause unnecessary delays--problems which might better be handled in a deposition rather than during trial.

***8** Under these circumstances, I grant defendant's motion to obtain the deposition testimony of Martorano by way of videoconference. Counsel for both parties are directed to confer with each other and make arrangements with regard to an appropriate time and place within which to conduct the deposition, as well as proper administration and procedure by which the deposition shall ensue. I do not doubt that they will make such arrangements in good faith.

Counsel are directed to advise the Court by letter, not later than April 15, 2005, with respect to the present status of the case, with particular emphasis on its readiness for trial.

It is SO ORDERED.

2005 WL 578917 (S.D.N.Y.), 66 Fed. R. Evid. Serv. 924

Motions, Pleadings and Filings (Back to top)

- 2003 WL 23671533 (Trial Motion, Memorandum and Affidavit) Memorandum in Support of Application for Attorneys Fees (Oct. 20, 2003)

- 2003 WL 23671531 (Trial Motion, Memorandum and Affidavit) Plaintiff's Memorandum in Opposition to Defendant's Motion for Summary Judgment (Jul. 02, 2003)

- 2003 WL 23671530 (Trial Motion, Memorandum and Affidavit) Memorandum in Support of Motion for Summary Judgment (May. 16, 2003)

- 2003 WL 23671532 (Trial Motion, Memorandum and Affidavit) Plaintiff's Memorandum of Law in Support of Motion for Summary Judgment as to Liability (May. 16, 2003)

- 2002 WL 32595510 (Trial Motion, Memorandum and Affidavit) Plaintiff's Memorandum of Law in Opposition to Motion to Reargue (Aug. 14, 2002)

- 2002 WL 32595508 (Trial Motion, Memorandum and Affidavit) Memorandum in Support of Motion for Reconsideration and Partial Stay (Jul. 31, 2002)

- 2002 WL 32595506 (Trial Motion, Memorandum and Affidavit) Memorandum in Opposition to Application for Fees and Costs (Mar. 26, 2002)

- 2001 WL 34611464 (Trial Motion, Memorandum and Affidavit) Plaintiff's Memorandum of Law in Opposition to Motion to Vacate Default Judgment (Aug. 03, 2001)

- 2001 WL 34611462 (Trial Motion, Memorandum and Affidavit) Memorandum in Support of Motion for Relief from Default and Stay of Inquest (Jul. 20, 2001)

- 1:01CV01290 (Docket)

(Feb. 21, 2001)

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