

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.

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) Civil Action No. 1:05CV701 (LMB/BRP)
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NOTICE OF HEARING

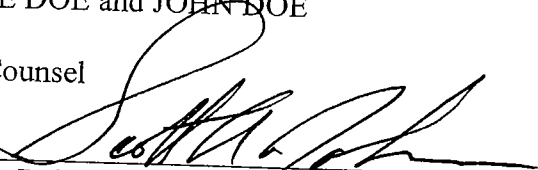
PLEASE TAKE NOTICE that on Friday, July 15, 2005, beginning at 10:00 a.m. or as soon thereafter as counsel may be heard, counsel for the Plaintiffs will present argument on Plaintiffs' Motion for Depositions in Ethiopia, Related Commission, and for Reconsideration.

Dated: July 8, 2005

JANE DOE and JOHN DOE

By Counsel

By:


Robert R. Vieth (VSB #24304)
Scott A. Johnson (VSB #40722)
Tara M. Lee
Cooley Godward LLP
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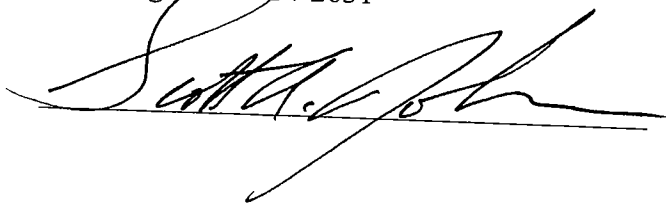
Matthew Eisenbrandt
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(415) 544-0444

Deval Zaveri
Elly Tanton
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San Diego, California 92121
(858) 550-6000

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

A handwritten signature in black ink, appearing to read "Scott A. P. [unclear]", written over a horizontal line.

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

ALEXANDRIA DIVISION

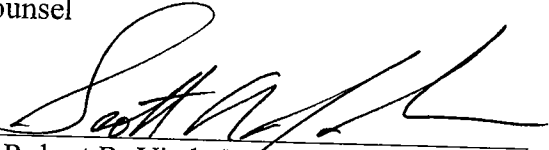
JANE DOE and)
JOHN DOE,)
)
 Plaintiffs,)
)
 v.) Civil Action No. 1:05CV701 (LMB/BRP)
)
 YUSUF ABDI ALI,)
)
 Defendant.)

**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: 

Robert R. Vieth (VSB #24304)
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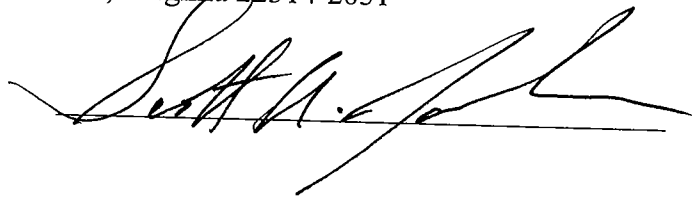
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JANE DOE and
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Civil Action No. 1:05cv701

**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 Mohamed 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.

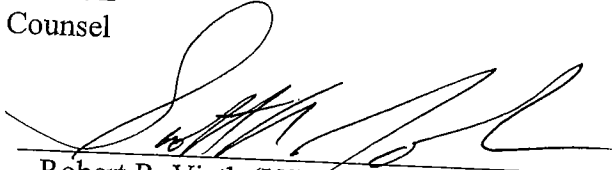
CERTIFICATION

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)
Tara M. Lee
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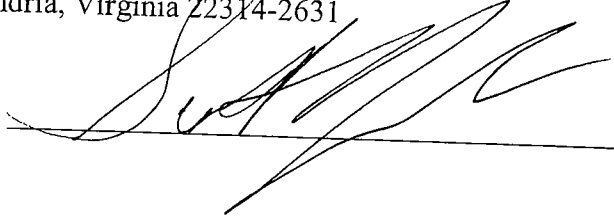
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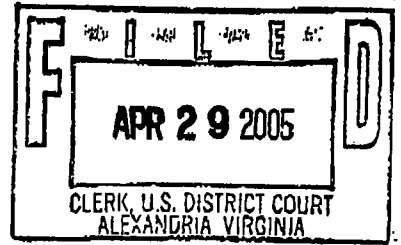
Joseph Peter Drennan, Esq.
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247950 v1/RE

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

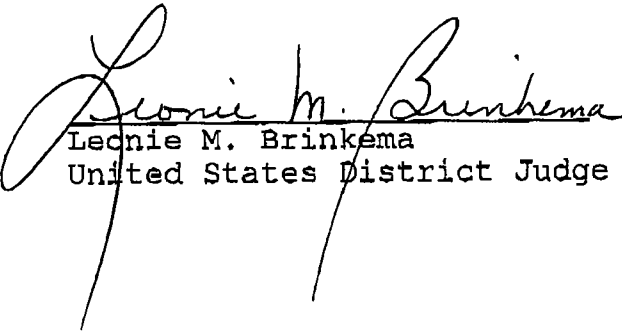
ORDERED that if plaintiff does not meet the preconditions discussed in detail on the record and refile this action within forty-five (45) days, this action will be dismissed with prejudice.

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.


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

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 One Freedom Square 11951 Freedom Drive Reston, VA 20190-5656 |
| 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 401 Courthouse Square Alexandria, VA 22314 (703)299-8595 |
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P R O C E E D I N G S

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

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

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

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

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

23 MR. DRENNAN: That is correct, Your Honor.

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

1 has that now been corrected?

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

12 MR. JOHNSON: Yes, Your Honor.

13 THE COURT: All right.

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

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

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

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

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

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

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

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

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

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

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

