

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

ALEXANDRIA DIVISION

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

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

Plaintiffs, by the under signed counsel, submit this Memorandum in support of their motion to compel production of all documents and things responsive to Plaintiffs' First Set of Document Requests.

Jane Doe and John Doe (collectively, "Plaintiffs") have instituted this action 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, against Defendant Yusuf Abdi Ali ("Ali"), who served as a commander in the Somali National Army in the 1980s. Plaintiffs allege that Ali is liable to Plaintiffs for acts of attempted extrajudicial killing; torture; crimes against humanity; war crimes; cruel, inhuman or degrading treatment or punishment; and arbitrary detention.

**FACTS**

On January 5, 2005, Plaintiffs served by hand delivery Plaintiffs' First Set of Interrogatories to Defendant Yusuf Abdi Ali and Plaintiffs' First Set of Document Requests to Defendant Yusuf Abdi Ali. Copies are attached hereto as Exhibits A and B. Defendant's responses to these discovery requests were due on February 4, 2005. On February 15, 2005,

counsel for the parties met and conferred telephonically to discuss, among other things, Ali's responses to Plaintiffs' written discovery. During this conversation, counsel for Ali agreed to serve responses by Monday, February 21, 2005. This agreed date was confirmed via electronic mail communications between counsel for the parties exchanged on February 15 and 16. Copies are attached as Exhibit A.

The February 21<sup>st</sup> response date having come and gone, on February 22, 2005, counsel for defendant said that the responses would be delivered by noon on Friday, February 25, 2005. *See* Exhibit B. However, on February 25 no such responses were forthcoming. Plaintiffs moved to compel responses and the matter was heard by Magistrate Judge Poretz. On March 17, 2005, Magistrate Judge Poretz ordered defendant to respond fully by April 5, 2005. *See* Exhibit C.

In numerous e-mails and conversations between March 17 and April 5, 2005, plaintiffs' counsel reminded defendant's counsel of the April 5, 2005 response deadline. On April 6, 2005, plaintiffs' counsel, having received no responses or documents, drafted a letter and forwarded it to defendant's counsel, demanding responses by no later than noon on April 7, 2005. *See* Exhibit D.

No responses having been received, defendant's counsel prepared this motion to be filed on April 8, 2005.<sup>1</sup>

## **ARGUMENT**

Defendant simply has delayed, evaded, and promised, but has *not* fully responded to plaintiffs' discovery requests. The deadline for responses and documents was two months ago, but Plaintiffs have yet to receive any documents. Plaintiffs have been prejudiced by this

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<sup>1</sup> The undersigned received limited responses to the discovery requests while this motion was being finalized on April 8, 2005. As of filing, no documents have been received.

unexcused delay. First, expert reports are due Monday, April 11, 2005, and those reports have been prepared without the benefit of any discovery responses from the defendant. Also, defendant's deposition is scheduled for April 20 and 21, and plaintiffs still do not have documents from the defendants.

Federal Rule of Civil Procedure 37 provides that a party may apply for an order compelling disclosure and for appropriate sanctions when a responding party has failed to respond. The rule treats incomplete responses as a failure to respond. Fed. R. Civ. P. 37 (a). In this case, defendant has blithely failed to comply with an order of the court requiring full responses by April 5, 2005. Section (c) of Rule 37 further provides that a party who fails to disclose discovery information without substantial justification shall be subject to sanctions. Appropriate sanctions under Rule 37 include the award of reasonable expenses and attorney's fees incurred in making the motion. *Id.*

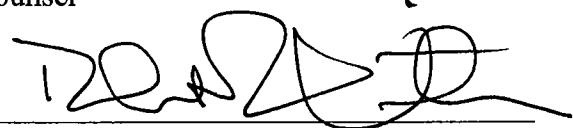
### CONCLUSION

For these reasons, plaintiffs request that the Court direct the defendant to provide complete responses to outstanding discovery, including required privilege logs, forthwith, and that the Court award Plaintiffs their costs and expenses, including attorney's fees, that they incurred in connection with this Motion.

Dated: April 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  
One Freedom Square  
11951 Freedom Drive  
Reston, Virginia 20190-5656  
(703) 456-8000

Matthew Eisenbrandt  
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870 Market Street, Suite 684  
San Francisco, California 94102  
(415) 544-0444

Deval Zaveri  
Welly Tantonio  
Cooley Godward LLP  
4401 Eastgate Mall  
San Diego, California 92121  
(858) 550-6000

#### CERTIFICATE OF SERVICE

I hereby certify, this 8<sup>th</sup> day of April, 2005, that a true copy of the foregoing was transmitted by electronic mail and U.S. mail to the following counsel of record:

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



# EXHIBIT A

## Williams, Sharon

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**From:** Joseph Peter Drennan [joseph@josephpeterdrennan.com]  
**Int:** Wednesday, February 16, 2005 2:59 AM  
**To:** Vieth, Bob  
**Cc:** Williams, Sharon; Johnson, Scott; Helene Silverberg  
**Subject:** [FS#3372973] Re: today's call

**Follow Up Flag:** Filed to FileSurf on 2/16/2005 12:25:57 PM, Doc# 3372973  
**Flag Status:** Flagged

Dear Bob:

Regarding your putative summarization of our telephone conversation of yesterday afternoon, set forth in your follow up e-mail, I should emphasize that at no point did I waive or withdraw any of the objections to discovery that have been interposed by defendant Ali. To reiterate what I stated in our said conversation in such regard, the only contemplated limited waiver that defendant Ali has considered relates to the provisions of 8 C.F.R., Sec. 208.6, which pertains to the immigration proceedings involving Mr. Ali, in consideration of the Protective Order in respect of the subject action that has been agreed. With such proviso in mind, the balance of your summary of the items discussed in our said conversation essentially reflects the matters that we discussed.

Sincerely,

Joseph

On Tue, 2005-02-15 at 15:32 -0500, Vieth, Bob wrote:

> Dear Joseph --

>

> I write to confirm some items we discussed during our telephone call today.

>

> You agreed to get us your client's discovery responses (documents and interrogatory answers) by Monday February 21. You also stated that notwithstanding the objections you interposed, you do not intend to withhold any documents in your client's possession or control except those that are covered by the attorney-client privilege or the work product doctrine. As to those withheld documents, you will prepare a privilege log.

>

> We also discussed (again) the situs of the depositions of the plaintiffs. As I told you, we have been in contact for weeks with the U.S. Embassy in Kenya regarding visas for entry into the U.S. for purposes of depositions. We very much wish to be able to bring our plaintiffs to the U.S. for depositions, but if it appears that we will be unable to bring them here due to the unavailability of visas, we intend to bring the matter promptly to the court's attention. I understand that you may wish to object to depositions outside of the U.S. and that you preserve any such objections. I also understand that you may serve notices of the plaintiffs' depositions for late March. I'll let you know once we have a better picture from the Embassy, which we hope will be very soon.

> Thanks.

>

> -- Bob

>  
> Robert R. Vieth  
> Partner  
> Cooley Godward LLP \* One Freedom Square \* Reston Town Center \* 11951 Freedom Drive  
> Reston, VA 20190-5656  
> Direct: 703-456-8082 \* Fax: 703-456-8100 \* Cell: 240-281-5362  
> Bio: [www.cooley.com/rvieth](http://www.cooley.com/rvieth) \* Practice Group: [www.cooley.com/litigation](http://www.cooley.com/litigation)

> =====  
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>  
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# **EXHIBIT B**



## Williams, Sharon

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**From:** Joseph Peter Drennan [joseph@josephpeterdrennan.com]  
**Sent:** Tuesday, February 22, 2005 10:06 AM  
**To:** Vieth, Bob  
**Cc:** Helene Silverberg; Williams, Sharon; Lee, Tara; Johnson, Scott  
**Subject:** [FS#3389614] Jane Doe, et alii, v. Yusuf Abdi Ali, Civil Action No. 04-1361, before the United States District Court for the Eastern District of Virginia (Alexandria Division)

**Follow Up Flag:** Filed to FileSurf on 2/23/2005 9:14:59 AM, Doc# 3389614  
**Flag Status:** Flagged

Dear Bob:

I am sorry that I was not in to receive your calls on Friday afternoon, and yesterday. I will call you today, as soon as I finish a midday meeting in Washington. I understand from your latter message that you requested that I call you before 2:00, today, and I will oblige.

I also thank you for clarifying your position as regards the subpoena that was served upon Thomas A. Elliot, Esquire, of Washington, D.C., who represented Mr. Ali in his removal proceedings before the INS in the late 1990s. The essence of your position with respect to the subpoena is that, upon my certification that I have assumed custody of all of Mr. Elliot's files pertaining to Mr. Ali and that my forthcoming document production and privilege log encompasses all of Mr. Elliot's files as well as all of the defendant's other repositories of files and records, the aforesaid subpoena would be withdrawn.

As regards the discovery due from the defendant, please be advised that a large volume of Mr. Elliot's files and records are presently being copied off site in order to facilitate my review of same and compilation of a complete privilege log. Because the defendant's review of such files and records is essential to his execution of Interrogatory Answers and his Responses to the subject Requests for Production, I respectfully request your continued indulgence until noon Friday, 25 February 2005, to furnish such outstanding discovery.

I look forward to discussing these matters with you later today, as I beg to remain,

Sincerely,

Joseph

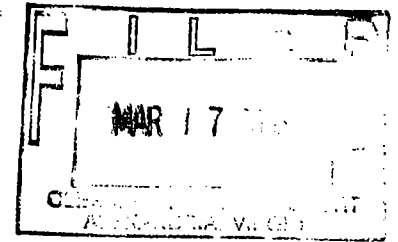
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# **EXHIBIT C**

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



Jane Doe, *et al.*, )  
 )  
 Plaintiffs, )  
 )  
 v. )  
 )  
 Yusuf Abdi Ali, )  
 )  
 Defendant. )

CIVIL ACTION NO: 1:04cv1361


ORDER

Before the Court are Plaintiff's Motion to Compel (Dkt. no. 39), Plaintiff's Motion for Entry of Protective Order (Dkt. no. 43), and Defendant's Oppositions thereto (Dkt. nos. 42, 46). For the reasons stated from the Bench, it is

**ORDERED,**

- (1) Plaintiff's Motion to Compel (Dkt. no. 39) is **GRANTED**;
- (2) Plaintiff's Motion for Entry of Protective Order (Dkt. no. 43) is **DENIED**;
- (3) Defendant must respond fully to Plaintiff's discovery relative to Plaintiff's Motion to Compel (Dkt. no. 39) by April 5, 2005; and
- (4) Defendant's March 21, 2005 and March 22, 2005 noticed depositions of Plaintiffs are stayed until April 5, 2005.

Entered this 17<sup>th</sup> day of March 2005.

  
\_\_\_\_\_  
Barry R. Poretz  
United States Magistrate Judge

Alexandria, Virginia

# **EXHIBIT D**

## Williams, Sharon

---

**From:** Vieth, Bob  
**Sent:** Monday, April 04, 2005 6:01 PM  
**To:** joseph@josephpeterdrennan.com  
**Cc:** hsilverberg@cja.org; Williams, Sharon  
**Subject:** [FS#3664492] depositions

**Follow Up Flag:** Filed to FileSurf on 4/5/2005 2:37:51 PM, Doc# 3664492  
**Flag Status:** Flagged

Joseph --

I received the notices of deposition that you served today, without consulting us about our availability. I note, however, that we have not yet received any response to our repeated requests to schedule the defendant's deposition. We are also looking forward to receiving your client's documents and interrogatory answers tomorrow. Please let me know about your client's availability for a deposition on April 19, 20 and/or 21.

-- Bob

**Robert R. Vieth**

Partner

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SCOTT A. JOHNSON  
(703) 456-8117  
scottjohnson@cooley.com

April 6, 2005

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

**Re: Jane Doe, et al. v. Yusuf Abdi Ali,  
Civil Action No. 1:04 CV 1361 (LMB/BRP)**

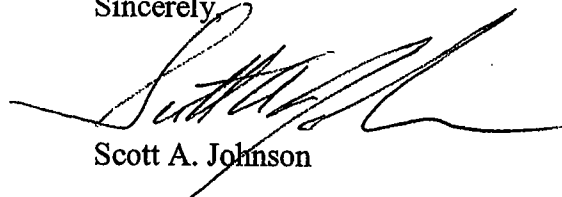
Dear Mr. Drennan:

Enclosed please find our Amended Notice of Deposition for the deposition of your client April 20-21.

Moreover, we are in receipt of your request for extension of time to answer interrogatories and respond to document requests. As you know, Judge Poretz's Order of March 17 required your responses by April 5, 2005.

We expect your discovery responses by noon Thursday, April 7, 2005, or we will file an appropriate motion by Friday the 8th. We simply cannot continue to wait. The plaintiffs served by hand their written discovery on January 5, 2005. Responses were due February 4, 2005. On February 15 you told us we would receive your responses by February 21. Again on February 22, we were told that we would receive responses by February 25. No responses were forthcoming, and on March 4 we were forced to file our motion to compel. At the hearing on our motion to compel on March 17, Judge Poretz granted you nearly three additional weeks to provide responses, and yet we still do not have them. As such, we must insist that you provide your responses no later than noon tomorrow.

Sincerely,



Scott A. Johnson

Enclosure

238830 v1/RE