

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 FOR VOLUNTARY  
DISMISSAL WITHOUT PREJUDICE ON TERMS AND CONDITIONS**

**INTRODUCTION**

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

## **BACKGROUND**

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

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

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

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

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

## **ARGUMENT**

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Therefore, this factor weighs in plaintiffs' favor.

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

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

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

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

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

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

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

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



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

**C. Terms and Conditions Appropriate for Dismissal Without Prejudice**

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

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

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

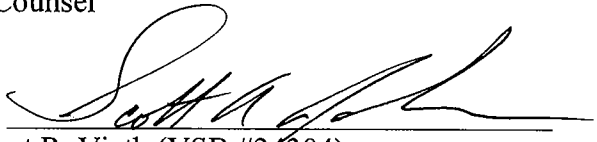
These terms and conditions are equitable and will remove any prejudice defendant may allegedly suffer as a result of the voluntary dismissal without prejudice.

### CONCLUSION

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

Dated: April 25, 2005

JANE DOE and  
JOHN DOE  
By Counsel

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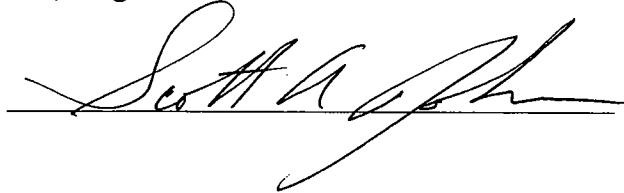
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**CERTIFICATE OF SERVICE**

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

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

A handwritten signature in cursive script, appearing to read "Scott A. Phelan", is written over a horizontal line.

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## **EXHIBIT 1**

COPY

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

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

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

APPEARANCES:

For the Plaintiff: ROBERT VIETH, ESQ.

For the Defendant: JOSEPH P. DRENNAN, ESQ.

\* \* \*  
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## P-R-O-C-E-E-D-I-N-G-S

1  
2 THE DEPUTY CLERK: Civil Action 04-1361, Jane Doe, et  
3 al., vs. Yusuf Abdi Ali. Will counsel please note your  
4 appearances for the record.

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

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

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

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

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

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

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

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

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

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

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

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

25 THE COURT: You have a problem, because the discovery

1 deadline presently scheduled is April 15th.

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

5 THE COURT: All right.

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

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

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

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

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



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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

8           THE COURT: All right. Mr. Drennan.

9           MR. DRENNAN: Yes, Your Honor. With all due respect to  
10 the plaintiffs' position, presented ably before the Court by Mr.  
11 Vieth, we respectfully disagree with the notion that the  
12 Magistrate Judge erred. As the Court indicated, the Magistrate  
13 Judge performed a balancing test here with regard to the  
14 contention of the extraordinary circumstances contemplated by Rule  
15 30(a).

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

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

1 It was not filed during that period.

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

6 THE COURT: From the plaintiffs.

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

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

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

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



1 originated does not constitute a basis for equitable tolling.

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

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

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

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

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

1 Tanzania in 1998.

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

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

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

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

1 recognized Government for Somalia.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

