

# **EXHIBIT A**



**Transcribed from audio recording provided by the clerk.**

**Clerk:** Jane Doe and John Doe v. Yusuf Abdi Ali, Case No. 04-1361A.

**Judge:** Could everybody kindly identify themselves and who they represent please?

**SJ:** Yes, Your Honor, good morning, Scott Johnson of Cooley Godward representing the plaintiffs.

**Judge:** Yes sir.

**JD:** And good morning, your Honor, Joseph Peter Drennan on behalf of the Defendant.

**Judge:** Yes sir. This is before the court on two motions, it is my understanding that some of these motions have been resolved, is that correct?

**JD:** Well, Your Honor, as I pleaded to the court yesterday from my discussions with Mr. Vieth yesterday, or the other day, we believe that we've narrowed our, whatever difference of views or whatever seems to be unresolved here, to the following two items.

Namely, this issue of the privileged law which I'm still working on Your Honor, I can amplify why that's taking so long in due course, and the difference in views between the parties on the matter of the discoverability, if you like, of the asylum proceedings and the documents that, and submissions that were made in respect of the asylum proceedings.

I should also mention to the court in that regard that there were two sets of proceedings before what used to be known as the INS that my client was involved in. They emanated out of an asylum petition that was filed in 1992, and I, if need be, can go somewhat into the course of the.

**JUDGE:** This was briefed and it's before me at this time, is it not? I'm prepared to rule on this asylum issue.

**JD:** All right, your honor, I'll address my argument with regard to the asylum issue and the non, what we respectfully submit is the non-discoverability of those documents.

**JUDGE:** All right, I'll hear from you briefly, but I have reviewed all of the submissions and I'm aware of the issue.

**JD:** I, I understand, Your Honor.

Your Honor, this provision was enacted in 1990 when Richard Thornburg was attorney general and my understanding is that the reason for this confidentiality provision was that during the 1980's, there were a number of asylum seekers from El Salvador, a government that we happened to have supported at the time, and there was a lot of concern among attorneys representing those asylum seekers about information that was submitted to the INS in support of the asylum application finding its way back to El Salvador. That was the reason for the enactment of that provision which we would respectfully submit is a very strong public policy against information submitted in confidence in support of an asylum petition getting back to the country from which the person claims that they'd be subjected to persecution if they were returned there. In this case, Your Honor, we have to look at this I believe in the broadest possible perspective. This is to be sure a civil case, but there are quasi-criminal accusations of the most severe nature being made against my client. We respectfully submit, that with all due respect to counsel whom we believe is pursuing this case earnestly on behalf of their clients, that their clients come from an area of regime that we do not recognize and that there's a political agenda here. This suit was filed one month to the day after the formation of the transitional government that is trying to return to Mogadishu to assert a government, a governmental writ over all of Somalia. Your Honor, my client, were he to lose this case, in all likelihood would be deported to Somalia, and that undermines -- the release of that information would undermine the *raison d'etre* of that provision. With, to be sure, the recent protective order that was entered -- that protective order, Your Honor, was entered into by the defendant and the plaintiffs here, at

least from the defendants' perspective in contemplation of the plaintiffs receiving documents from our government pursuant to third-party subpoenas that were issued prior to the discussion of the need for a protective order. There were subpoenas issued to the FBI, the CIA, a number of constituent agencies or departments of the Pentagon, etc., all of which presumably, all of which contain personal information that certainly should be covered by a protective order. But what the plaintiffs want to do Your Honor, is mount a collateral attack on asylum proceedings that were had before this government. They want to get these documents and relitigate this case. They don't like the result, they don't like the fact that my client is here. They have publicized this lawsuit.

**JUDGE:** Well we need not get into these collateral matters.

**JD:** I hear

**JUDGE:** Let me ask you this. Let me ask you this. Did you file a timely objection asserting any asylum basis for the objection?

**JD:** Your Honor, to be perfectly candid with the court, at the time that the objections were due, 15 days under the local rule after the discovery was served upon me, I had not seen any of these documents. They had been archived, they were

**JUDGE:** I'm not questioning that. My only question is did you file an objection on the basis of asylum within the time in which you should file an objection?

**JD:** No I did not Your Honor.

**JUDGE:** Ok.

**JD:** No I did not Your Honor but I respectfully submit to the court that the public policy reasons for having that confidentiality provision are so strong and weighty that this should not be treated as a catch-penny contrivance and something that's waived because it wasn't filed.

**JUDGE:** Did you file, did you file a motion for an extension of time in which to file objections.

**JD:** No I did not Your Honor. I see where the court's going with this. I would respectfully

**JUDGE:** You may not see where I'm going. I'm just asking questions.

**JD:** No I know, but, I, I, I understand the court's concern, and, and I would respectfully submit Your Honor that perhaps one possible resolution of this, that, would give due consideration to the strong public policy considerations would be if the actual asylum claim itself, and my clients designation of individuals over there that, that may be supportive of this claim that those be submitted in camera for review before being disclosed under the protective order. In addition, Your Honor, because the protective order did not contemplate, at least from our perspective, the asylum documents, we respectfully submit that any documents relating to the asylum proceeding that are disclosed pursuant to the protective order be disclosed to the eyes of counsel only and not their clients unless receiving further permission from the court or the consent of the defendant. We respectfully, we don't have any doubts that the information will be safe with counsel for the plaintiffs in this case, with whom I have a pretty good working relationship, but my client is extremely troubled that all the information that he delivered wholesale to the. delivered to the INS, in support of his, his, his claim for asylum would go back to the country, the land that he would wind in if conceivably if he were to be deported. And there was a Supreme Court case about 3 months ago that upheld the prerogative of the government to deport a Somalian to Somalia even though, from Somalia, even though there's no government there. So, those are very serious concerns Your Honor and I

**JUDGE:** Let me ask you this before I hear from opposing counsel. I have before me two motions. One is plaintiffs' Motion to Compel Court Ordered Discovery. You represent that that matter is resolved amongst the parties other than the, what I would call the asylum issue.

Is that correct?

**JD;** Yes, with one small proviso, the privileged log.

**JUDGE:** Other than the asylum and privilege law, all other matters are resolved, right?

**JD:** Yes, Your Honor, that's correct.

**JUDGE:** Now that resolution, are you in a position to make a proffer as to how it's resolved, or another way would be for you and opposing counsel to submit to the court by Tuesday of next week an order setting forth with particularity those matters which are resolved in plaintiffs' pending Motion to Compel, other than the asylum and privilege issue. Why, don't we do it that way. By next Tuesday, you submit to the court an order indicating what is resolved. You can stand up counsel. Is there any reason we can't do that?

**SJ:** No, I'm not sure I understand. The two issues that were raised in our Motion to Compel on Friday were one, the failure of defendant to produce the privilege log. Despite the court's order, you know, and I want to reargue

**JUDGE:** Well has that been produced yet?

**JD:** No, it hasn't Your Honor.

**SJ:** We've got depositions of defendant coming up on the 20<sup>th</sup> and 21<sup>st</sup>.

**JUDGE:** So when do you want the logs by?

**SJ:** I understood that we'd get the logs this morning.

**JUDGE:** Mr. Drennan?

**JD:** Your Honor, I had hoped to have them done this morning. I could have them done by Monday by 12:00 o'clock Monday.

**JUDGE:** They are ordered to be produced Monday 12 o'clock in counsel's hands.

**JD:** Okay.

**Judge:** I'll take the date you submit. Therefore, on the motion to compel, as to the timing of the production of those logs, I grant that. What else is outstanding other than the asylum issue?

**SJ:** The only other outstanding issue is the asylum issue. I think it's been briefed before the court. I shouldn't say the asylum issue -- the production of those asylum documents.

**JUDGE:** I'm prepared to rule on that. I'm prepared to rule, I overrule defendant's assertion of non-production based on the asylum. I've looked at the CFR, which is quoted on rulings on protective order. They shall be produced and they shall be produced by Monday 12 o'clock also.

**JD:** All right, your Honor. One last point of clarification in that regard. Might it, might the court entertain with regard to the asylum issue, a slight modification to the standing protective order that would have.

**JUDGE:** I'll do it if you all agree to it. But I'm not prepared to rule on it at that time.

If you all agree to modification, then if it's reasonable, I will enter that amended, if you would, supplemental protective order, but other than that, it's not before me and they will be produced subject to any protective order which is in place right now. If you all want to work it out, you work it out. But it's not before me. Does that take care of all matters on plaintiffs' motion to compel?

**SJ:** If I could just ask two points of clarification Your Honor.

**JUDGE:** Yes.

**SJ:** Thank you Your Honor, First, in terms of the protective order, we're certainly more than happy to entertain discussions with Mr. Drennan about the scope of that. However, as I understand the court, if we're unable to reach agreement, they still do need to be produced.

**JUDGE:** Yes sir.

**SJ:** Okay, thank you Your Honor. And second, the issue of the asylum documents, we haven't specifically identified to the court what those documents are. I know that they are

**JUDGE:** They are bates stamped are they not?

**SJ:** Yes, they are bates stamped.

**JUDGE:** There are certain numbers.

**SJ:** Yes Your Honor. I just wanted to point, or get some guidance from the court to make sure we're in agreement there and one of our exhibits, I believe it's Exhibit C to our Opposition, there's an email which lists the different documents of.

**JUDGE:** I believe it's bates stamped numbers 823 to 1606. Am I incorrect on that?

**SJ:** I believe that's correct, I'd have to take a quick look Your Honor.

**JUDGE:** To the extent, 823 to 1606. In fact, those are the ones that do relate to the asylum proceedings that is set forth in Exhibit C which is appended to a pleading which is styled Opposition to Defendant's Motion for Limited Enlargement of the Ambit of Time in which to Answer Interrogatories and Requests for Production of Documents. Attached hereto is Exhibit C

**SJ:** Yes Your Honor that's correct.

**JUDGE:** Exhibit C is a copy of some correspondence from Mr. Drennan. It was sent on April 8<sup>th</sup>, 2005 at 9:53 a.m. to Bob Vieth, copies to others and on that is set forth the categories or parameters of withheld documents. It appears to the court that 823 to 1606 relate to the asylum proceedings. So to the extent counsel that you've requested them, I think it's appropriate

the court to state with particularity what asylum documents. I so state it is in that Exhibit. It is those bate numbered documents.

**SJ:** Thank you Your Honor. The only other point I just raised very briefly is that we would like to reserve our right to address any other issues that arise once we receive the protective order

**JUDGE:** You can always file a motion. So therefore, I'm want to be clear then. I have plaintiff

s motion to compel court ordered discovery. Part of these matters have been resolved?

**SJ:** I believe Your Honor that this does in fact resolve our Motion to Compel.

**JUDGE:** Which is just on the asylum issue?

**SJ:** The motion to compel is on the privileged log and the asylum issue and I believe this resolves both of those issues.

**JUDGE:** Then therefore, for the reasons I stated and with the guidance I've given, I grant the motion. The privilege log will be produced on the date counsel that you suggest and the court ordered. The asylum is overruled. Your objection will likewise be produced at that time.

**JD:** Yes Your Honor

**JUDGE:** If you all can work out the protective order, I urge you to do that. So that's Plaintiff's Motion to Compel.

On a collateral issue, that is, if there be further objections as to either, what I'll call the asylum documents or to documents which would be reflected in the privileged log, those documents not being produced but were only in the privilege log index, the court will entertain a motion if appropriate at a later time. That's not before me. I'm not ruling on the discreet assertion of privilege which may be set forth in the log. What I do urge you to do, and having not seen the log, the log should be self-sufficient in itself that as to fairly apprise the opposing party as to the

reason for the privilege so that they can respond. To the extent counsel you have a professional disagreement, which sometimes happens, I urge you to discuss as much as you can, that disagreement. Ultimately, the Court could, but is not desirous of reviewing 1,000 pages of privileged documents. It seems to me a good faith proffer by counsel may and perhaps should be accepted by opposing counsel, and sometimes, sometimes it's no more than showing one document, with an understanding it will go no further, to say, look this is what I'm objecting to, This is why I'm asserting privilege, do you really want this. And often times, when you do that, it kind of goes away, so I'm urging you to talk to each other because maybe that would go away. Because I'm not inclined to look at, in camera, a thousand pages of privilege.

Okay?

**SJ:** Yes Your Honor.

**JUDGE:** So Plaintiffs' Motion to Compel Court Appointed Discovery for the reasons I stated is granted. I have before me the Defendant's Motion for a Limited Enlargement of the Ambit of Time With Which to Answer Interrogatories and Request for Production of Documents. Is that mooted or

**JD:** He executed the answers a week ago.

**JUDGE:** A week ago?

**JD:** And that, your Honor gave us 20 days from March 16<sup>th</sup> or 17<sup>th</sup>, I believe within which to furnish this discovery. Then there were other proceedings in this case before Judge Brinkema, and then when we were coming down to the wire on the 20<sup>th</sup> day, I saw, I saw that we weren't ready, I asked for three more days and I had my client execute the answers last Friday and they've been served on the Plaintiffs.

**JUDGE:** So it's mooted then?

**JD:** Essentially

**JUDGE:** Everything has been produced?

**JD:** Yeah.

**JUDGE:** All right. Defendant's motion, based on the representation of defense counsel that the answers to interrogatories and request for production of documents had in fact been produced and hearing no objection otherwise by Plaintiffs' counsel, that Motion is denied as moot. It is produced. Okay?

**JD:** All right.

**JUDGE:** So I think what I have, I've resolved the two motions before me. Now, anticipating that you all may come back on another Friday and as hesitant as I am to inquire that there is something else that perhaps I can give you some guidance on. Since you are the only ones here, I will throw the chum on the water right now, and inquire is there any guidance that perhaps I can give you as to other matters which may be outstanding and maybe I won't rule on them now, but I can give you a little guidance. Counsel?

**SJ:** Your Honor, as far as we're concerned, I think things are moving along well in our case. We certainly appreciate the court's offer, but I don't think we have any particular issues at this time.

**JD:** Your Honor, respectfully, I see it from somewhat a different perspective. I have a distinct feeling that we're going to be before your Honor again next Friday.

**JUDGE:** That's on the depositions?

**JD:** No, I don't anticipate any problems with the depositions

**JUDGE:** Well what issues taken before me on Friday?

**JD:** Well, in my discussions with Mr. Vieth, he had indicated to me that today the plaintiffs plan on moving the court for leave to have the plaintiffs give their depositions in Abbas Aba, Ethiopia.

**JUDGE:** It's not before me. I'm going to give you some guidance. And I kind of indicated this last time. Clearly I am not ruling on a motion which is not before me now. But I think last time this issue was before the court either directly or indirectly, and may have been directly on plaintiffs motion for protective order that the depositions not be held here. I think I clearly indicated that the local rules envision that the deposition of the plaintiffs would be held in this district. I think I indicated that the court saw no good reason, no valid reason and would not be inclined to order the depositions to be taken in a foreign country. I think it was because of that, and I'm not ruling, I'm not ruling, I think it was because of that logistical issue and because there was an issue as to Mr. Drennan getting the documents from Mr. Elliott, Elliott clearly has a significant health issue. I indicated at that time that perhaps this case was not prime or mature to progress and I sort of urged you all to talk about a stipulation of dismissal with conditions. I still am of that opinion. I am still of that opinion and I don't know or need to know right now whether that was raised before Judge Brinkema. So, I do not have before me a motion by the plaintiff that depositions be had elsewhere. I would not be inclined to favorably rule on that. I most likely, to the extent it is filed, I most likely will rule on the pleadings if that's the motion. What else do I have?

**SJ:** Your Honor, if I may, just to give the court a little bit of flavor here, and I apologize

**JUDGE:** That's all right. And again I'm not ruling. Let's be clear on this. I'm not ruling.

**SJ:** Yes sir, I understand, I just want to raise for the court, our earlier motion for protective order that we were before the court several weeks ago, had to, you know, we specifically

requested an extension of time and perhaps it was our fault, requesting an unending extension of time in discovery as we worked through visa application issues and alternatively trying to locate a different alternative site where we could bring our plaintiffs and all the other parties could go, counsel could go and conduct the depositions. Since that time, we've worked diligently both to try to secure the visa application and that in fact is moving forward. Unfortunately, the time line imposed by the court's rules made that difficult. We have gotten an extension of time from you and Judge Brinkema as well.

**JUDGE:** And Judge Brinkema for discovery.

**SJ:** Yes Your Honor. And she has extended that discovery in part as we seek an alternate location in which to have the depositions of the plaintiffs held. Since that time we've also worked diligently to locate a different location, we've looked at a number of different countries. We've just recently been able to nail down that we have authority to have the plaintiffs come to Ethiopia. We have the work of local counsel in Abbas Aba to make sure that there is no problem with the depositions being held there in Ethiopia,

**JUDGE:** Let me ask you this, just on a walk through, on a walk through. Let's assume for the sake of discussion that we find a country in which the depositions can be held. Let's assume it's Ethiopia or whatever. Okay? Are you, that is your client, prepared to pay the expenses of opposing counsel to go stay and do the depositions in that country as envisioned under the local rule?

**SJ:** Your Honor, I certainly think if that's the court's direction, then that's what we'd be willing to do. I can't really speak at this point, but I think that's indeed something we'd consider and be willing to do. And believe me we'd love to have our clients here without question, and we've been trying to do that, but because we've been able to secure Ethiopia as a location, if the

court's direction that we have to pay the costs of Mr. Drennan to travel there and while he's there, then certainly we'll be willing to do that.

**JUDGE:** Well, I think the rule probably envisions that that must be done. I'm not ruling that that is the way I'm inclined to go. In fact I'm indicating fairly strongly just the opposite that the rules envisioned that if you filed suit here, this is where it's going to be. It's not at the inconvenience of the defendant or the defendant's clients at all. It brings me back full circle. That is I do not believe this case is so postured at this time or in the immediate future that it is matured to go to trial even with the extensions granted by this court. And that's why I again urge you to talk about a stipulation of dismissal with conditions, and if that's done, I see no great prejudice, because I don't see the rush at this time to have this case tried in two months or three months. It just may not be ready for reasons and conditions which good counsel cannot control.

**SJ:** Your Honor part of our concern, and certainly as Mr. Drennan mentioning, we are going to be filing today seeking the court's permission depositions in Ethiopia, and we think we've got strong support in the law for special circumstances.

**JUDGE:** (inaudible)

**SJ:** And I appreciate that, I'm sure that it will be thoroughly reviewed and considered and we do appreciate that. One of our primary concerns, although there were several, in the possibility of a voluntary dismissal on terms, was any sort of requirement that our plaintiffs be brought here for deposition. Certainly we would like to do that. We have no guarantee at this time that we'll be able to do that and so our concern is that even, well, it's two-fold, one is that we may never be able to bring them here for their deposition. We hope that's not the case, we diligently are seeking to make sure that they can get here. But to possibly never be able to bring this case

again simply because we can't bring our plaintiffs here, that to me, that to us was something that would be too difficult to bear in terms of considering a voluntary dismissal.

**JUDGE:** Well, the alternative may be unpalatable though. That is if there's notice of the deposition and your client does not appear at the deposition, the next step I would think would be a motion by the defendant for terminating sanctions for failure to appear at a deposition or to make discovery and if you walk that through and if the court granted that relief, then that option very well could be more unpalatable than a dismissal on conditions.

**SJ:** Indeed Your Honor and I don't disagree although again, a dismissal purely because the plaintiffs aren't able to be here which as a result of government restrictions on their travel we would believe would be a special circumstance that would allow us to avoid that dismissal. But I can't disagree that a dismissal with prejudice would be much more unfavorable.

**JUDGE:** I want to take this opportunity as I say to see if I can have a colloquy with counsel about where it's going. I'm clearly indicating to you this court's thinking on how this case is going to progress and issues that may become before me.

Good lawyers like you should be able hopefully to lawyer this case so that maybe it comes back again, is postured at the right time without real prejudice to either side. Because both of you are in positions where quite frankly I'm holding both your feet to the fire. That's what I've done consistently. I've ruled against Mr. Drennan on his well imposed objections. I'm saying you're producing these documents. I know he's under the gun. I understand that. I gave an extension to try to accommodate, but I'm saying you're going to deliver. But I'm going to do the same thing with the plaintiff on this case and that's why I'm trying to get you together to see if good lawyers like you can resolve the matters in controversy if there's another way to do it. I defer to you. So, if there's a motion before me, and I'm not saying that there shouldn't be a motion

before me next Friday, I will rule on the motion. If it's a motion about the depositions because I have embraced that issue and we now have this discussion about the issue, most likely I will do that on the pleadings.

**JD:** Yes Your Honor

**JUDGE:** And if there's something else on the privilege logs, again, I urge you to talk about that so this court does not have to have an in camera review of all those documents. I think part of the assertion of the privilege was I think I sort of trial notebook or trial matters or whatever. I don't think there's any real argument as to privilege on that. You can make a brief proffer as to what it is that counsel is going to exceed but that's attorney client privilege. You all work that out.

**JD:** Sure;

**JUDGE:** Did I take care of all matters?

**SJ:** I think so. My only other thought is certainly, we always enjoy the opportunity to appear before the court and

**JUDGE:** You make good points when you say that.

**SJ:** We would, I would imagine we would enjoy the opportunity to argue our motion next Friday but we would certainly defer to the court's direction in terms of how you would like to have that

**JD:** Your Honor, one further point in that regard, and this was a matter that was averred to in an early hearing. We plan on bringing on, and we'll probably bring it on now, for next Friday. The motion to direct that the plaintiffs produce themselves for INE. So, both plaintiffs were claiming they were physically injured in a rather severe way.

**JUDGE:** I can't recall if that was before me.

**JD:** No it was not. It was not.

**JUDGE:** I'm aware of it and the issue is. I'm not ruling on it. The issue is have the plaintiffs injected into their claim an issue for which an INE is appropriate. And they very well may have. And if they may have, just like depositions, they're subject to being examined independently on that claim. It's not before me right now. It's just one of those things that go with this case and you may not be in a position to move this case along. We've gone full circle on it. That's why you all talk to each other.

**SJ:** Yes Your Honor, and I certainly understand it. Although I will represent to the court that with depositions of the defendant next week, depositions of the plaintiffs and their Somalia witnesses, hopefully with the court's permission, at least with regard to the plaintiffs in Ethiopia in early May, we do have a May 13 discovery cutoff and with that, I do feel like the case is proceeding well, and we will achieve the depositions that we, or at least the majority of the depositions that we seek by that time. So I just represent to the court, that I understand and will definitely take to heart, the court's admonition to consider a voluntary dismissal. We are proceeding with this matter.

**JUDGE:** And I can tell you this also again for the umteenth time. I'm not ruling on anything, but to the extent there was a motion before me for an extension of the discovery cutoff, that is the, Judge Brinkema's order extended, I would be, as Judge \_\_\_\_\_ would say, disinclined to grant such a motion.

**SJ:** Yes Your Honor.

**JUDGE:** Okay? Take care of all matters? Have a nice weekend counsel.

**SJ:** Thank you very much Your Honor

**JD:** Thank you Your Honor

All rise.