

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

SUHAIL NAJIM ABDULLAH	.	Civil Action No. 1:08cv827
AL SHIMARI, TAHA YASEEN ARRAQ	.	
RASHID, SA'AD HAMZA HANTOOSH	.	
AL-ZUBA'E, AND SALAH HASAN	.	
NUSAIF JASIM AL-EJAILI,	.	
	.	
Plaintiffs,	.	
	.	
vs.	.	Alexandria, Virginia
	.	February 9, 2017
CACI PREMIER TECHNOLOGY, INC.,	.	2:30 p.m.
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Defendant.	.	
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TRANSCRIPT OF TELEPHONE CONFERENCE
BEFORE THE HONORABLE LEONIE M. BRINKEMA
UNITED STATES DISTRICT JUDGE

APPEARANCES: (Telephonically)

FOR THE PLAINTIFFS:	ROBERT P. LoBUE, ESQ. PETER A. NELSON, ESQ. MATTHEW FUNK, ESQ. Patterson Belknap Webb & Tyler LLP 1133 Avenue of the Americas New York, NY 10046
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FOR THE DEFENDANT:	JOHN F. O'CONNOR, ESQ. LINDA C. BAILEY, ESQ. Steptoe & Johnson LLP 1330 Connecticut Avenue, N.W. Washington, D.C. 20036
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<u>ALSO PRESENT:</u>	J. WILLIAM KOEGEL, JR., ESQ.
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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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THE COURT: Hello? Hello, can you hear me?

MR. LoBUE: Yes.

MR. O'CONNOR: Yes, Your Honor.

THE COURT: All right. All right, this is the case of Al Shimari, et al. v. CACI Premier Tech, et al., Civil Action 08cv827. My understanding is that we have Mr. LoBue for the plaintiffs and Mr. O'Connor for the defendant. Is that correct?

MR. LoBUE: That's correct, Your Honor. This is Robert LoBue for the plaintiffs. My colleagues, Peter Nelson and Matthew Funk, are also on the line.

THE COURT: All right. Anybody else, Mr. O'Connor, with you for the defense?

MR. O'CONNOR: Yes, Your Honor. In addition to myself, we have Linda Bailey from Steptoe & Johnson, and also we're joined by Bill Koegel, who is with CACI.

THE COURT: All right. And again, remember the protocol from the last time we had a phone conference. Please, just say your last name first before you speak. We are on the record.

And what I want to do this afternoon is get some things straightened out. Some of these are matters that are raised in the defendant's motion to reconsider, and some of them have to do with the logistics of taking the depositions

1 that are scheduled for next week.

2 I first of all want to tell you that I, obviously,
3 was not sufficiently clear in the last hearing that we had on a
4 phone conference about these depositions. There's no question
5 that my preference would be to have these as de bene esse
6 depositions because of my concern that it is highly unlikely
7 these individuals will be permitted into the United States.
8 The additional factor we have now is that if the executive
9 order were to remain in place or be enforceable, simply by
10 being Iraqis, they would not be able to get into this country,
11 so I think it's highly likely they will not ever be able to
12 come here.

13 However, I have thought very carefully about CACI's
14 position that they've not had the opportunity to depose these
15 plaintiffs, and in the normal way in which civil discovery is
16 done, they would have that right, and so just to make it clear,
17 I want you-all to understand that these would be discovery
18 depositions.

19 Now, that changes in my view the logistics to some
20 degree, which I think gives you-all more flexibility. The
21 Court is never involved in discovery -- pure discovery
22 depositions. That's between the parties. And that means,
23 therefore, there's no reason nor would it be appropriate,
24 frankly, for the courthouse itself to be involved. So I'm
25 going to let you-all decide how you want to work out these

1 depositions, but they would not be taking place at the
2 courthouse. If these were substitutions for their trial
3 testimony, then it would be appropriate to have it done at the
4 courthouse, but that's not what's happening here.

5 So -- and I will also tell you I just finished trying
6 a case where we took live testimony by video, so even if they
7 cannot appear, it might be if the case does go to trial that
8 they could still essentially produce live testimony during the
9 trial by video, but we face that way down the road. We're not
10 anywhere near that point at this point.

11 Are you still having problems in getting the
12 interpreters and the stenographers set up? The last status
13 report that I'd heard was there were some issues with that.

14 MR. O'CONNOR: Your Honor, this is John O'Connor for
15 CACI. Yes and no. There is no issue with the interpreter.
16 We, we have an interpreter. The interpreter was always
17 intended to be here in Alexandria, so he will be wherever we
18 are, whether it's Washington, D.C., or Alexandria, for the
19 depositions.

20 The court reporter is, simply, there are no court
21 reporters in Beirut, so what we -- what all parties had asked
22 in our status conference was that the Court permit the court
23 reporter to be present in, it would have been the courthouse,
24 but now it will be wherever we're going to be in D.C. or
25 Alexandria.

1 THE COURT: Okay.

2 MR. O'CONNOR: Given the Court's ruling about we're
3 not going to be at the courthouse anymore, I assume this is an
4 issue that we can work out among the parties, who both want the
5 same thing.

6 THE COURT: Right. Now, the other thing I'm going to
7 do to make it a little easier on you is I am going to give you
8 an overall extension if you're not able to rearrange these
9 logistics because of the new location. As I recall, the last
10 time we spoke, I extended the time to complete discovery of
11 Mr. Rashid by 60 days, and I think on these other two
12 depositions, if you are unable to have them next week, as long
13 as you get all of the plaintiffs' depositions done by April 17,
14 that will satisfy the Court. All right?

15 MR. O'CONNOR: All right. Understood, Your Honor.

16 THE COURT: All right.

17 MR. O'CONNOR: This is John O'Connor.

18 THE COURT: All right. Now, Mr. LoBue, since these
19 will be discovery depositions, I'm going to permit, as they
20 would normally be, CACI goes first in asking questions, but you
21 are certainly free after that, and frankly, I think it gives
22 you some advantage because you can see what CACI's asking and
23 you can try to clarify it right there on the spot. All right?

24 MR. LoBUE: I appreciate -- I appreciate that, Your
25 Honor. This is Robert LoBue for plaintiffs.

1 Just to be clear, and I infer this from Your Honor's
2 directions, yes, this will be a discovery deposition, but since
3 the rules do not in any formal way distinguish discovery from
4 de bene depositions, we would reserve whatever rights we may
5 have under Rule 32 at the time of trial to admit whatever is
6 admissible under that rule --

7 THE COURT: That's fine.

8 MR. LoBUE: -- if we can't otherwise procure the
9 plaintiffs' attendance.

10 Obviously, the plaintiffs want to tell their story in
11 person, for all the obvious reasons, but if they can't, I think
12 the defendant is on notice that we will exercise whatever
13 rights we have to offer depositions.

14 THE COURT: Then both sides should be judicious about
15 how you ask your questions so that they would be, you know, the
16 questions and the answers would be acceptable in court if that
17 should be the case, all right?

18 Now, the other thing is I do have your pleadings on
19 the applicable law under the alien tort statute, and I'm hoping
20 you will get a ruling on that in the next couple of weeks,
21 possibly even before you take those depositions, preferably
22 before you take those depositions, but we have a couple of
23 other things on our calendar right now that are slowing things
24 down a bit.

25 The other thing is -- and I don't think I've ever had

1 this discussion with you-all, and I don't know whether Judge
2 Lee ever had this discussion, but I do this in all civil cases,
3 and this case is no different from any other civil case, and
4 that is, have you sat down and given any serious thought to
5 possibly resolving this case through a settlement?

6 And I understand from CACI's standpoint that, you
7 know, there are issues of principle and precedent perhaps that
8 you're worried about, but, you know, this case -- I understand
9 there's another one out there and, I don't know, maybe there
10 are others -- we have four distinct plaintiffs, and I don't
11 know, Mr. LoBue, whether you and they have ever talked about,
12 you know, what it is they're trying to get from this case, as
13 just a plaintiff in a civil suit, what they need to be made
14 whole, and I don't know whether you've ever had any kind of
15 discussion along these lines with counsel for CACI.

16 Have there been any efforts to try to work this case
17 out?

18 MR. LOBUE: Your Honor, Robert LoBue. I was not on
19 this case from the very outset, so I may know less than defense
20 counsel. My understanding is that there have not been any such
21 discussions in recent memory, and my, my understanding was that
22 the defendants were not interested in an out-of-court
23 resolution.

24 We -- I think we would entertain such a discussion if
25 the defendants were willing.

1 THE COURT: Mr. O'Connor? Have you ever thought
2 about approaching this litigation and possibly, frankly -- I
3 mean, the *Abbass* case is different, they're different
4 plaintiffs, and we don't have to address that yet, but have you
5 given any thought to that?

6 And the only reason I suggest that is, you know,
7 you've been up to the Fourth Circuit now three times or maybe
8 four times, and each time, it's come back. That may or may not
9 be sending a certain amount of signal. This is not a pleasant
10 topic, and, you know, it's obviously costing CACI resources and
11 distraction.

12 So I don't know whether there is any interest in
13 that. If there were, we have, you know, some very astute
14 magistrate judges here who have done very sensitive settlement
15 conferences in the past, and, you know, I could refer you to
16 one, or you could always, you know, think about private
17 mediation.

18 Is that something that you've ever considered,
19 Mr. O'Connor?

20 MR. O'CONNOR: Your Honor, John O'Connor. Obviously,
21 over the -- I mean, these cases have been going on for 12
22 years, not this case itself, but we've been dealing with these
23 for 12 years, and we've certainly thought internally about the
24 issue. I would say that there has not been any serious
25 discussion between the parties as to settlement.

1 I think it would behoove me to confer with my client
2 before --

3 THE COURT: Obviously, I'm not asking you to make any
4 kind of a commitment, but Mr. Koegel is there, correct, from
5 CACI?

6 MR. O'CONNOR: He's on the line, Your Honor.

7 THE COURT: Yeah, all right.

8 The other thing is unless you're uncomfortable -- and
9 I take no offense if you decide you don't want to say it --
10 other than the *Abbass* case, are there any other cases pending
11 against CACI in the country?

12 MR. O'CONNOR: John O'Connor. No, Your Honor, these
13 are the last two.

14 THE COURT: These are the last two.

15 And remind me, I know that the ATS has a fairly long
16 statute of limitations. Is it ten years or twenty years?

17 MR. O'CONNOR: Your Honor, John O'Connor. There's
18 case law suggesting that ten years is the appropriate
19 statute --

20 THE COURT: That's what I thought. You know, even
21 with the *Abbass* case, I don't think the universe of plaintiffs
22 is more than 40 or 50 between the two cases. I mean, I could
23 be wrong as to how many are in the *Abbass* case.

24 MR. O'CONNOR: Your Honor, I believe it's a little
25 higher, but you're in the ballpark.

1 THE COURT: All right. You know, it would not be
2 unwise to just give some serious thought at this point because
3 there's a lot of litigation ahead of you. There's constant
4 expense. There's still public relations issues. There could
5 be appropriate, appropriate ways of handling this, and you-all
6 think about it.

7 I mean, if you are interested, I see that Judge
8 Anderson is a -- who is a very excellent mediator, probably has
9 a 95 percent success rate, is the judge assigned to this case,
10 and if you were -- if you thought there was some merit to
11 making an effort, I mean, from the plaintiffs' standpoint, I
12 recognize that your first obligation is to your individual
13 clients, and if they are in need of finances for medical issues
14 or other types of problems that they feel are connected to
15 what's happened to them, it would certainly in my view be your
16 responsibility to do what you could to, you know, get some
17 resolution, because we're talking even if we move this case
18 quickly, several months before resolution at this level, and
19 you-all know whatever I do, it's going to get appealed. So
20 we're talking a couple more years of this ongoing litigation,
21 and from CACI's standpoint, the *Abbass* case is still hanging
22 out there.

23 So I think, you know, both sides might want to give
24 some serious consideration to whether or not there is a way to
25 resolve the dispute. If not, I've given you some extra time to

1 work on the depositions.

2 Now, there were a couple of other minor issues -- not
3 minor but issues raised in the motion to reconsider.

4 Mr. O'Connor, I must tell you so that you can put your efforts
5 in different direction, I'm not going to entertain a 12(b)(6)
6 motion at this point. I'm satisfied that this complaint, read
7 as you read it with a great deal of deference to the pleading,
8 is sufficient to withstand that, and it's been enough of those
9 preliminary types of motions.

10 And in terms of discovery from the United States,
11 again, I think that's premature, and so at this point, while
12 I'm not, you know, putting an absolute kibosh on it, I'm not
13 going to open that up at this point. Let's focus on what these
14 plaintiffs have to say, focus on the, me getting you my ruling
15 on the alien tort statute, and then you-all give some serious
16 thought to whether you can resolve this case, all right?

17 MR. O'CONNOR: Your Honor, John O'Connor. Do I
18 understand that on the 12(b)(6) issue, that functionally, the
19 Court is just denying a 12(b)(6) motion? Not denying us the
20 opportunity to file one at this time but saying we're not doing
21 12(b)(6) motions in this case?

22 THE COURT: You've had so many shots at --
23 preliminary shots at this pleading for various reasons, we're
24 not going to have another one at this point as to the adequacy
25 of the allegations in the complaint. Yeah, that's right.

1 MR. O'CONNOR: Your Honor, we won the last one that
2 we had on the second amended complaint, and this complaint has
3 never been tested on 12(b)(6) because Judge Lee entered
4 judgment on other drafts.

5 MR. LoBUE: Your Honor, Robert LoBue. If I may, I
6 would just point out that earlier in this case, Judge Lee
7 sustained the sufficiency of an earlier complaint that was less
8 detailed on the, on the allegations of conspiracy than the one
9 that is now offered.

10 THE COURT: Yeah.

11 MR. LoBUE: So I -- that's all I really have to say.

12 THE COURT: Yeah, I think, Mr. O'Connor, that CACI
13 has had sufficient opportunities to test at the pleading
14 stage -- at the pleading stage, there's enough. The Fourth
15 Circuit wants this case addressed on more of the merits, the
16 legal merits, not the pleading merits per se. We're going to
17 get the depositions done, and let's see where we go from there.
18 But this case does have to move one way or the other, and there
19 aren't going to be any more interlocutory interruptions. We
20 need to get it done.

21 So that's my ruling. Hopefully, you'll be able to
22 work these depositions out as expeditiously as possible, and I
23 think you should give serious thought to seeing if you can
24 resolve this litigation, but if not, we'll see you down the
25 road. All right?

1 MR. LOBUE: Thank you, Your Honor. I take it the
2 calendar is off for tomorrow then?

3 THE COURT: Correct, yes.

4 MR. LOBUE: Thank you.

5 THE COURT: Nobody needs to appear tomorrow, all
6 right?

7 MR. LOBUE: All right.

8 THE COURT: Okay. Thank you. Good-bye.

9 MR. LOBUE: Thank you, Your Honor.

10 THE COURT: Bye-bye.

11 MR. LOBUE: Bye.

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

14

15 CERTIFICATE OF THE REPORTER

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

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19

20

/s/

Anneliese J. Thomson

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