

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

SUHAIL NAJIM)	
ABDULLAH AL SHIMARI <i>et al.</i> ,)	
)	
Plaintiffs,)	
)	C.A. NO. 08-cv-827 GBL-JFA
v.)	
)	
CACI PREMIER TECHNOLOGY, INC.)	
)	
Defendant)	
)	

**PLAINTIFFS’ OPPOSITION TO DEFENDANT’S SUPPLEMENTAL MEMORANDUM
IN SUPPORT OF DEFENDANT’S MOTION FOR SANCTIONS AGAINST
PLAINTIFFS AL SHIMARI, RASHID, AND AL ZUBA’E**

Defendant’s supplemental memorandum provides no support for its motion for sanctions against Plaintiffs Al Shimari, Rashid, and Al Zuba’e (“Baghdad Plaintiffs”) for their inability to appear in this district for depositions. It mischaracterizes communications between Plaintiffs’ counsel and their coordinator in Iraq between July and December 2012, a time period irrelevant to Defendant’s present motion for sanctions. This Court has already reviewed the conduct of the Baghdad Plaintiffs and their counsel before the submission of their visa applications in December 2012 and correctly concluded at a hearing on April 12 that because the Baghdad Plaintiffs had visas and boarding passes in March 2013, well within the discovery period, there was “no evidence here of bad faith” that would warrant dismissal under Fed. R. Civ. P. 37. Apr. 12, 2013 Hr’g Tr. at 51:12-13. The additional microscopic review Defendant attempts to conduct of Plaintiffs’ efforts to obtain visas before March 2013 is of no consequence. Significantly, Defendant’s supplemental memorandum contains no criticism of anything the Baghdad Plaintiffs did *after* the Court’s April 12th decision in relation to their efforts to travel to

the U.S. Indeed, since then, the Baghdad Plaintiffs have been stymied in their efforts to determine the reasons for their inability to travel to the U.S. (and to work to resolve any obstacles) by the lack of disclosure by the U.S. government and Defendant.

BACKGROUND

As Plaintiffs have explained in numerous filings to this Court already, by February 25, 2013, all four Plaintiffs' applications for visas to the United States were granted. *See* Declaration of Baher Azmy, Esq., dated May 6, 2013, dkt. 430, ¶ 24 & Ex. 9. Plaintiff Al-Ejaili appeared, without incident, in the United States for a medical examination and deposition in this litigation during the week of March 4, 2013. *Id.* ¶ 25. Plaintiffs' counsel worked with Defendant's counsel to schedule the Baghdad Plaintiffs' depositions and medical examinations during the week of March 18, 2013. *Id.* ¶ 26. The Baghdad Plaintiffs made all efforts necessary to fly to the United States that week – they purchased tickets, notified agents of the U.S. Transportation Security Administration (TSA) of their travel plans, secured boarding passes, and proceeded to their gate to board their flight. *Id.* ¶¶ 29-32. After they were denied boarding *without any explanation*, the Baghdad Plaintiffs and their counsel have made every effort to ascertain the reasons for their inability to travel to the U.S. *See* dkt.430 and accompanying exhibits. On April 12, the Court heard and denied Defendant's first motion for sanctions against the Baghdad Plaintiffs, dkt. 307, after finding that because "at the time [the Baghdad Plaintiffs] boarded the plane or about to board the plane, they had visas in time to appear for the deposition within the discovery period," there was neither "bad faith" nor "unreasonable delay" here to "support a dismissal for lack of prosecution," Apr. 12, 2013 Hr'g Tr. at 52:4-9, 13-18.

On February 25, 2013 – the same day the last of the Plaintiffs was notified that his visa had been granted – Defendant served discovery requests on Plaintiffs seeking "[a]ll visa

applications submitted by Plaintiffs or submitted by any person on their behalf to the United States or any agency thereof from 2008 to the present,” and “[a]ll documents related to [those] visa applications.” Declaration of Shereef Akeel, Esq., dated May 24, 2013 (“Akeel Decl.”)

Ex. 1. Plaintiffs timely objected to those requests on the grounds that they were not relevant to any claims or defenses asserted in this litigation and to the extent they sought privileged documents or communications. Akeel Decl. Ex. 2. On April 19, 2013, Defendant moved to compel a broader set of documents than requested in its document requests: “documents relating to their efforts to obtain approval for travel to the United States for depositions in this action.” Dkt. 346 at 2. Defendant additionally sought documents that were “otherwise privileged/fact work product documents” reflecting “communications [that] occurred between Plaintiffs’ counsel and Plaintiffs or their coordinator” related to their efforts to travel to the U.S. *Id.* at 7-8. The Court granted Defendant’s motion without a hearing or opinion. Dkt. 379. Because the Court had not provided guidance on how to address otherwise privileged communications, Plaintiffs’ counsel requested clarification of the Court’s order at a hearing on May 10, 2013. May 10, 2013 Hr’g Tr. at 54:12-20. The Court explained that the Plaintiffs should produce a privilege log. *Id.* at 54:24-55:2.

In accordance with the Court’s order, Plaintiffs produced non-privileged communications related to the Baghdad Plaintiffs’ efforts to travel to the U.S. on May 14, 2013, within 11 days of the issuance of the Court’s order as required by Local Rule 37(C). Plaintiffs originally planned on producing a privilege log to Defendant for the remainder of the communications subject to the Court’s order; however, upon consideration, Plaintiffs decided to simply produce the privileged communications between Plaintiffs’ counsel and their Iraqi coordinator rather than document

them on a log.¹ Three days later, on May 17, 2013, Plaintiffs produced these documents. As Plaintiffs' counsel explained to Defendant's counsel during a meet-and-confer prior to the Defendant's filing of its supplemental memorandum, the communications between Plaintiffs' counsel and their Iraqi coordinator produced on May 17th contained redactions of substantive communications on one of the following grounds: the material was non-responsive to the subject matter of Defendant's request or the material reflected purely attorney opinion work product. Akeel Decl. ¶ 4. On May 24, Plaintiffs also produced a log describing the basis for the individual redactions made on documents in Plaintiffs' May 17th production. Akeel Decl. ¶ 5.

ARGUMENT

In its supplemental memorandum, Defendant solely relies on communications between Plaintiffs' counsel and their Iraqi coordinator before the submission of the Plaintiffs' visa applications in December 2012. Those visa applications were granted in February 2013, following vigorous efforts by Plaintiffs' counsel for the expedited processing of those applications, including communications with the U.S. Embassy in Baghdad and officials at the U.S. State Department. Akeel Decl. Exs. 3-9. Any stumbles that occurred between July 2012 (when, as Plaintiffs have previously noted, it would have been premature to re-apply for Plaintiffs' time-limited visas since discovery had not yet recommenced² and Defendant

¹ As Plaintiffs explained to Defendant, there have been no written communications between Plaintiffs' legal team and the Baghdad Plaintiffs; all communications took place by phone or in person. Akeel Decl. ¶ 2. Similarly, many, if not most, of the communications between Plaintiffs' counsel and their Iraqi coordinator have been over the phone. *Id.* ¶ 3. As a result, the documents cannot reflect the full extent of Plaintiffs' efforts to travel to the U.S.

² This was also the reason Plaintiffs stopped work on their 2008 visa applications following Defendant's premature appeal of the Court's denial of its motion to dismiss Plaintiffs' claims that resulted in an over three-year delay in the proceedings. *See Al Shimari v. CACI Int'l, Inc.*, 679 F.3d 205 (4th Cir. 2012) (en banc). Had those visa applications been granted in 2009, they would have expired by the time discovery recommenced in November 2012.

indicated that it was planning on filing a petition for a writ of certiorari in the Supreme Court) and the actual filing of their visa applications in December are irrelevant. *See* Apr. 12, 2013 Hr'g Tr. at 51:16-18 (the Court explaining that "bad faith" is found where there is "complete disregard for the Court's order," applying *Wilson v. Volkswagon of America, Inc.*, 561 F.2d 494 (4th Cir. 1977)). As this Court has already ruled, there has been "no evidence here of bad faith" that would warrant dismissal under Fed. R. Civ. P. 37. Apr. 12, 2013 Hr'g Tr. at 51:12-13. Defendant can point to no piece of evidence suggesting Plaintiffs' or their counsel's complete disregard of their discovery obligations that would call on the Court to revisit its prior holding, which was based on this record and an application of governing legal precedent. *See Jones v. Sears Roebuck & Co.*, 301 Fed. App'x. 276, 285 (4th Cir. 2008); *Sejman v. Warner-Lambert Co., Inc.*, 845 F.2d 66, 69 (4th Cir. 1988).

The only documents of relevance here are those showing the Baghdad Plaintiffs' persistent efforts to ascertain the reason for their denial of boarding on March 15th and their continuing attempts to secure permission from the government to travel to the U.S., including:

- Communications with TSA officials, Akeel Decl. Ex. 10;
- Communications with State Department officials, Akeel Decl. Exs. 11-28;
- Administrative applications to the Department of Homeland Security's (DHS) Traveler Redress Inquiry Program, dkt. 430 Ex. 18;
- A subpoena and *Touhy* request on the DHS, seeking information about whether Plaintiffs were on a "no fly list"; and whether Defendant had any communications with DHS about Plaintiffs prior to their travel to the U.S., followed by a motion to compel this information following the DHS's objection to the request, dkt. 380;
- Plaintiffs' notice to Defendant's 30(b)(6) witness to answer questions about any communications Defendant may have had with the DHS regarding Plaintiffs' travel, which was flagrantly disregarded by Defendant, followed by a motion to

compel Defendant to produce a witness with sufficient knowledge on this topic, dkt. 392.³

Indeed, rather than demonstrating dilatory conduct by the Baghdad Plaintiffs or their counsel, the record shows that they have explored every available channel to determine why the Baghdad Plaintiffs have not been able to travel to the U.S. despite being in possession of visas and boarding passes. However, their investigation has been stymied by the lack of disclosure by the U.S. government and Defendant. *See* dkt. 380, 392.

CONCLUSION

For the foregoing reasons, as well as those explained in Plaintiffs' Memorandum in Opposition to Defendant's Motion for Sanctions, dkt. 415, the Court should deny Defendant's Motion for Sanctions Against Plaintiffs Al Shimari, Rashid, and Al Zuba'e.

Date: May 24, 2013

/s/ George Brent Mickum

George Brent Mickum IV (VA Bar # 24385)
Law Firm of George Brent Mickum IV
5800 Wiltshire Drive
Bethesda, MD 20816
Telephone: (202) 281-8662
gbmickum@gmail.com

Baher Azmy, *Admitted pro hac vice*
Katherine Gallagher, *Admitted pro hac vice*
CENTER FOR CONSTITUTIONAL RIGHTS
666 Broadway, 7th Floor
New York, NY 10012

³ It is still a mystery to Plaintiffs as to who made the call from the United States to the Baghdad airport directing airport agents to stop the Baghdad Plaintiffs from boarding their flight, as explained in the Declaration of Baher Azmy, Esq., dated May 6, 2013, dkt. 430, ¶ 32. The timing of this call is particularly curious given that the Baghdad Plaintiffs had already received boarding passes (undermining Defendant's notion that the Baghdad Plaintiffs are on a No Fly List since according to Defendant's own expert, it is atypical for individuals who are on a No Fly Lists to actually receive boarding passes, *see* dkt. 370 at ¶ 12).

Robert P. LoBue, *Admitted pro hac vice*
PATTERSON BELKNAP WEBB & TYLER LLP
1133 Avenue of the Americas
New York, New York 10036

Shereef Hadi Akeel, *Admitted pro hac vice*
AKEEL & VALENTINE, P.C.
888 West Big Beaver Road
Troy, MI 48084-4736

Attorneys for Plaintiffs

CERTIFICATE OF SERVICE

I hereby certify that on May 24, 2013, I served the foregoing Plaintiffs' OPPOSITION TO DEFENDANT'S SUPPLEMENTAL MEMORANDUM IN SUPPORT OF DEFENDANT'S MOTION FOR SANCTIONS AGAINST PLAINTIFFS AL SHIMARI, RASHID, AND AL ZUBA'E using the CM/ECF system, which will then send a notification to:

J. William Koegel, Jr.
Virginia Bar No. 38243
John F. O'Connor
STEPTOE & JOHNSON LLP
1330 Connecticut Avenue, N.W.
Washington, D.C. 20036
(202) 429-3000 – telephone
(202) 429-3902 – facsimile
wkoegel@steptoe.com
joconnor@steptoe.com

/s/ George Brent Mickum
George Brent Mickum IV (VA Bar # 24385)