

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 .
NUSAIIF JASIM AL-EJAILI, .

Plaintiffs, .

vs. . Alexandria, Virginia
. October 25, 2018
CACI PREMIER TECHNOLOGY, INC., . 10:19 a.m.

Defendant. .

-----X
CACI PREMIER TECHNOLOGY, INC., .

Third-Party Plaintiff, .

vs. .

UNITED STATES OF AMERICA, and .
JOHN DOES 1-60, .

Third-Party Defendants. .

. X

TRANSCRIPT OF FINAL PRETRIAL CONFERENCE
BEFORE THE HONORABLE LEONIE M. BRINKEMA
UNITED STATES DISTRICT JUDGE

APPEARANCES:

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(APPEARANCES CONT'D. ON PAGE 2)

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COMPUTERIZED TRANSCRIPTION OF STENOGRAPHIC NOTES

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P R O C E E D I N G S

1
2 THE CLERK: Civil Action 08-827, Suhail Najim
3 Abdullah Al Shimari, et al. v. CACI Premier Technology, Inc.
4 Would counsel please note their appearances for the record.

5 MR. LOBUE: For the plaintiff, Robert LoBue, together
6 with my colleagues, Terra Hittson, Baher Azmy, and John
7 Zwerling, Katherine Gallagher.

8 THE COURT: Good morning.

9 MR. O'CONNOR: Good morning, Your Honor. John
10 O'Connor and Bill Dolan for defendant/third-party plaintiff,
11 CACI Premier Technology, Inc.

12 THE COURT: Good morning.

13 MS. WETZLER: Good morning, Your Honor. Lauren
14 Wetzler, Elliott Davis, and Daniel Mauler for the United
15 States.

16 THE COURT: Good morning.

17 All right, this matter comes on for the final
18 pretrial. I recognize that we have not yet ruled on the
19 pending motion to dismiss. It's in the works, and it shouldn't
20 be too much longer before we get that out.

21 But as we've all recognized, at some point, all good
22 things come to an end. I've brought my 2019 calendar to the
23 bench today, and we're going to go ahead and set a trial date
24 so that at least we know where the final line is going to be,
25 and then we can back up from that date the motions dates and

1 that sort of thing.

2 So have you-all met and conferred to talk about a
3 possible trial date? I would assume you have given some
4 thought to that.

5 MR. O'CONNOR: We've certainly given thought to it.
6 We've not spoken to plaintiffs. The United States sent some
7 good dates/bad dates around yesterday for the United States.
8 We basically don't have bad dates. I mean, it might be dates
9 that are too early or dates that are too late --

10 THE COURT: All right.

11 MR. O'CONNOR: -- but none that we just can't do.

12 THE COURT: Well, my understanding, given the
13 potentially logistical problems of these plaintiffs trying to
14 get access to the United States, and if it's ultimately
15 determined that they cannot physically ever enter the United
16 States, and then the need to make the logistical alternate
17 arrangements is going to take a couple of months, I'm assuming,
18 and so that's why I said I brought the 2019 book. I'm not
19 going to give you a December trial date on this case, all
20 right?

21 So let me find out then from the plaintiff what
22 you're requesting because I think you've got the more difficult
23 job on your end.

24 MR. LoBUE: Yes, Your Honor, thank you. We also have
25 no bad dates. We'll be here when the Court wants us here for

1 trial.

2 As we have said in prior papers, our intention is as
3 soon as we get a trial date, to apply for special parole for
4 the three of the plaintiffs who had difficulty entering the
5 country in the past. All we know from published reports is
6 that that typically takes three months to process such an
7 application, although it can be expedited and we will request
8 expedition. We just need a date to make that happen.

9 And as the Court correctly observes, if that request
10 is not successful, we will have to go to Plan B, which will
11 involve a, finding a suitable location that the plaintiffs can
12 be present at and swear an oath and give their testimony by
13 video.

14 There's -- the fourth plaintiff entered the country
15 successfully for his deposition five years ago. He has his
16 travel papers, and we anticipate he will be here, irrespective
17 of what happens to the other three.

18 THE COURT: Now, I know it's difficult at this point
19 to even begin to think about the length of the trial, but
20 approximately how long do you think it would take just for the
21 plaintiff to put the plaintiff's case on?

22 MR. LoBUE: Your Honor, we have given some thought to
23 that, and, of course, it is difficult to project, but the one
24 thing we should all be mindful of, I think, is that for the
25 four plaintiffs, there will be interpretation necessary, so

1 that essentially doubles the time.

2 Just thinking of putting on the direct case and not
3 counting cross-examination, we estimate between 26 and 30 hours
4 of trial time for the plaintiffs, and that, that includes
5 essentially doubling the direct testimony of the plaintiffs.

6 THE COURT: All right. So that's four to five days,
7 and then I'm assuming that there would be at least two or three
8 days of additional evidence from CACI?

9 MR. O'CONNOR: Likely more, Your Honor. We've taken
10 ten pseudonymous depositions of personnel who participated in
11 interrogation of these plaintiffs, and in some form or fashion,
12 we anticipate evidence -- testimony from every one of those
13 witnesses.

14 THE COURT: All right.

15 MR. O'CONNOR: So it might be a week.

16 THE COURT: The reason I'm asking this is looking at
17 the spring calendar, we have to, I think, realistically try to
18 avoid the Easter season, the Passover season, and spring
19 vacation. I'm thinking about how you get a jury that's going
20 to sit for two weeks, so I'm trying to figure out how we weave
21 a two-week, approximately two-week trial in given those spring
22 parameters.

23 So I think we may be looking at May, the very early
24 part of May. I don't -- again, I mean, I'm thinking from past
25 experience. I mean, of course, we have juries 12 months of the

1 year, but I like to avoid long trials if we can in the
2 summertime again because of the concept of summer vacations.
3 It just means we have to bring bigger jury pools in. It's more
4 expensive and more time consuming.

5 So let me just make sure that my calendar is up to
6 date here. I'm looking at -- Easter occurs on April 21. I
7 know some of the schools around here are on vacation,
8 unless any -- do any of you have kids in the Northern Virginia
9 school system?

10 MR. O'CONNOR: I have two high school seniors --

11 THE COURT: Great.

12 MR. O'CONNOR: -- in Catholic school in Alexandria.

13 THE COURT: So they would be closed Holy Week,
14 wouldn't they?

15 MR. O'CONNOR: They're generally right around Easter,
16 Your Honor.

17 THE COURT: And when is Passover? Mr. Zwerling, do
18 you know when Passover -- oh, it begins April 19. Okay.
19 That's April 19, so that sort of overlaps with the week after
20 Easter.

21 MR. LoBUE: Your Honor?

22 THE COURT: Yeah.

23 MR. LoBUE: I'm sorry, if I might intrude for a
24 moment?

25 THE COURT: Yeah.

1 MR. LOBUE: The four plaintiffs are of the Muslim
2 faith, and Ramadan starts on May 5 and ends on June 4, and I --
3 I'm looking to my colleagues, but I'm assuming that that's
4 going to make it difficult for them.

5 THE COURT: You're shaking your head no. It's not
6 difficult or it will be?

7 MS. GALLAGHER: It will be difficult.

8 THE COURT: It starts May 5? Yes, it does. Okay.

9 Well, if we started the trial on Tuesday, April 23,
10 that clears Passover and Easter and Holy Week. It may bump
11 into some of the local jurisdictions' spring vacation, but
12 we'll simply -- the jury, when they bring in jurors, will have
13 actually cleared that problem because the jurors would have
14 told them in advance if they can't be here that week.

15 And I've started on Tuesday just to make sure that
16 we've cleared the Easter, you know, that takes care of Easter
17 Monday being off, and that being the case, there would be two
18 full weeks before Ramadan starts, and then if there's just one
19 or two days of Ramadan left, that's not going to be a disaster.

20 I recognize, you know, folks have to fast and all
21 that, but there's no reason why that would be an interference.

22 And you're assuming, optimistically, these plaintiffs
23 are going to be here physically. They may very well not be.
24 Plus, in a civil case, the plaintiffs don't have to be in the
25 courtroom. It's not like a criminal case, where the defendant

1 has to be present.

2 So the fact that we may bump a day or two into
3 Ramadan, in my view, should not be a problem. Most of the
4 trial -- and cases in this court move a lot faster than lawyers
5 anticipate. We run long trials.

6 So unless there's an objection because of your
7 calendars, I can't see any reason why we can't start this case
8 on the 23rd of April.

9 This is the United States having a problem?

10 MR. O'CONNOR: I guess he might preempt what I'm
11 going to say. Go on.

12 THE COURT: All right, go ahead.

13 MR. DAVIS: Your Honor, we're fine with the trial
14 starting on April 23. I just have a conflict on April 26.
15 It's the second-to-last day of Passover that I will be
16 observing, but apart from that day, starting trial on April 23
17 is fine for the United States.

18 THE COURT: Oh, so we still have a Passover issue.

19 MR. DAVIS: But just for one day, Your Honor.

20 THE COURT: But it's Friday the 26th?

21 MR. DAVIS: Correct.

22 THE COURT: Well, you know, Fridays with us anyway
23 are going to be a half day probably if I have a docket that
24 morning, so -- but you have cocounsel on the case, right?

25 MR. DAVIS: Correct.

1 THE COURT: So you would be okay with that?

2 MR. DAVIS: I think for -- if it's for half a day,
3 yes, Your Honor.

4 THE COURT: All right. All right, that's fine. Then
5 we're going to set it for -- Mr. Zwerling, did you have any
6 issue at all?

7 MR. ZWERLING: No.

8 THE COURT: No.

9 MR. O'CONNOR: And I was going to say we don't have a
10 calendar issue with that, Your Honor.

11 THE COURT: All right. So it's set to start at 10:00
12 with a jury on April 23. Now, given the length of the trial
13 and the time of year, I'm going to sit -- it's a civil case.
14 I'm going to sit ten jurors, all right? Six is the minimum
15 necessary. That gives us some alternates in case issues come
16 up, but basically, nobody's an alternate. It's a ten-person
17 jury, all right?

18 Given the nature of the issues, I'm going to give
19 each side one additional peremptory. The rules only require
20 that I give you three, but since I'm going to have a couple
21 extra jurors there, I'll give each side one additional strike.

22 And that, I think, should take care of, of the jury
23 situation, all right? That's looking way down the road.

24 In terms of motions, I'm going to let you-all decide,
25 you know, when you want to organize motions, but you should

1 start thinking about that. I recognize that CACI in their
2 status report -- and I appreciate the report -- has indicated
3 that some of the motions will be dependent upon what the Court
4 does with the motion to dismiss. As I said, that's in the
5 works, and it shouldn't be too much longer until that gets out.
6 That will perhaps gel certain things for you-all.

7 I understand there's still some discovery -- small
8 discovery issues going on with Judge Anderson, and I don't know
9 whether that's going to be an issue or not, but knowing what
10 your trial date is now, you need to start working back from
11 that.

12 This courtroom is one of the tech courtrooms that can
13 handle live video so that if these plaintiffs cannot be
14 physically present at -- in the courtroom, at least their
15 testimony can be done live, so that it's not going to be
16 putting the defendant at a disadvantage of not being able to
17 have the individuals questioned in front of the jury, so to
18 speak.

19 But it will -- the burden will be on the plaintiff to
20 make sure that all the necessary and appropriate logistics are
21 set up. And given -- I'm going to assume now that the
22 technology has improved. The last time, I believe, from this
23 courtroom we did a live, same-time video, it was with an
24 individual who was in Jakarta, Indonesia, in custody, and at
25 that point, the way the satellites hooked up, you had to stop

1 every 20 or 30 minutes, they had to readjust because of the
2 earth's rotation and all that kind of stuff.

3 I'm not sure now if the technology still has those
4 problems, whether this will be via satellite signal or by fiber
5 optic cables, whatever it is, but you'd better make sure you've
6 talked with my -- our courtroom technology people. I'm almost
7 positive what they will tell you is in order to do it live,
8 whatever -- wherever these people go has to be in sync. It
9 might be the U.S. Embassy, for example, and so that needs to be
10 thought through.

11 Now, in terms of their ability to watch the
12 proceedings, I'm not sure if that's going to be possible.
13 Again, you'll need to talk with Lance Bachman quite quickly
14 about that.

15 And, you know, the translation issue will be
16 interesting. You're going to have to figure out where the
17 translator is going to be, whether that person is going to be
18 in this courtroom or you may have to have them on both ends,
19 but there are going to be some unique logistical problems given
20 the nature of the plaintiffs, and I put the burden on counsel
21 to work it out, but I will tell you that once we impanel a
22 jury, my first priority is not to waste their time, and so the
23 technology has to work. If it's not working, then there's a
24 problem, all right? So the plaintiff needs to make sure you
25 have backups, like, depositions or whatever should the

1 testimony -- the live testimony fall through.

2 Is there anything else we need to address?

3 Obviously, with the trial so far down the road, I'm not
4 requiring that you file your witness and exhibit lists yet. I
5 think we can address that as we get closer to the trial date.

6 MR. O'CONNOR: We all filed them yesterday, Your
7 Honor.

8 THE COURT: You did anyway. All right, that's fine.

9 MR. O'CONNOR: We did.

10 THE COURT: Obviously, I would assume the exhibits
11 might change over time because you're still getting some
12 discovery, right?

13 MR. O'CONNOR: That's right. And we reserved our
14 right to supplement it.

15 THE COURT: That's fine.

16 MR. O'CONNOR: Your Honor, can I ask two logistical
17 questions?

18 THE COURT: Sure.

19 MR. O'CONNOR: We will meet and confer among all
20 three parties about briefing schedule for dispositive motions,
21 and I guess the one thing I'd like to know, if we can, how much
22 time should we leave for Your Honor between a hearing date on
23 such motions and -- how much time does Your Honor want before
24 you rule?

25 THE COURT: Obviously, I mean, the motions in this

1 case are somewhat unique.

2 MR. O'CONNOR: They are.

3 THE COURT: And the law is complex, so I think -- do
4 you have a sense as to when the first what I'll call meaty
5 motions are going to be coming in?

6 MR. O'CONNOR: Well, Your Honor, sort of working from
7 our status report, we think there are two pieces of discovery
8 that I think need to get worked out. One is the deposition of
9 Interrogator G, which I don't think is going to take too long
10 to occur.

11 THE COURT: And he's your employee.

12 MR. O'CONNOR: That's what they tell us. That's
13 right, and he's sort of important because of that.

14 I would, I would imagine that he will be deposed in
15 the next 30 days. There's a lot of variables there, but that's
16 what I would guess.

17 THE COURT: All right.

18 MR. O'CONNOR: The motion to compel documents is
19 being heard November 30 before Magistrate Judge Anderson,
20 likely to involve a state secrets assertion, likely whoever is
21 aggrieved may --

22 THE COURT: Appeal.

23 MR. O'CONNOR: -- object at least for the purpose of
24 preserving their appellate rights, so that probably will get
25 sorted out --

1 THE COURT: In December.

2 MR. O'CONNOR: -- in mid or late December, depending
3 on, you know, how fast we can get before Your Honor.

4 And then, you know, I would imagine that shortly
5 after that, we would, we would be in a position -- I don't
6 think there's anything more other than writing, but we can be
7 writing leaving holes for the things that might get worked out
8 in December.

9 THE COURT: Well, I can tell you, I mean, one of the
10 quiet periods is going to be the holiday season. In some
11 respects, that's an ideal time to get the pleadings to me
12 before then because I don't have trials and a whole lot of
13 things distracting. On the other hand, staff is a little thin.

14 MR. O'CONNOR: Right.

15 THE COURT: But, I mean, I don't mind having, you
16 know -- when I have two or three quiet days to just read stuff,
17 that's ideal. So I would think you'd want to get some of those
18 motions scheduled for argument maybe in late January and get me
19 the paperwork at least a week or two -- the final reply brief,
20 frankly, often gets things for the Court, and in a complex
21 case, getting the reply brief a good week before the hearing
22 date really is wise.

23 So if that helps you in terms of backing things up,
24 that is what I would like to see ideally. You know, if it's
25 something like a motion in limine or some of those more mundane

1 motions, I don't need as much time from the reply brief, okay?

2 MR. O'CONNOR: Your Honor, the -- I mean, the one
3 issue with late December, and we'd love to do that, is with the
4 documents that we believe at least for some of them the United
5 States is going to assert state secrets privilege, we're not in
6 front of Magistrate Judge Anderson until November 30, and so we
7 can't get a ruling until, you know --

8 THE COURT: All right.

9 MR. O'CONNOR: Mid-December, you know, if somebody --

10 THE COURT: Well, then it's -- so be it.

11 MR. O'CONNOR: January.

12 THE COURT: The main thing is for the complex
13 motions, at least a full week before the -- the reply briefs
14 should be in at least a full week before oral argument, all
15 right?

16 MR. O'CONNOR: Understood.

17 THE COURT: And I'm not going to be shy if we get a
18 huge amount of writing and we're not ready, I'm going to let
19 you know, we'll continue oral argument another week or two, all
20 right?

21 MR. O'CONNOR: Sure.

22 THE COURT: And it may be, depending upon again where
23 these things get done, because I really want to hold to that
24 April trial date, June becomes problematic for me, and then
25 that pushes the case into July, and July is a terrible month

1 because of vacations. We can still get a jury, but it just
2 will take longer.

3 But the, the important thing is to get things to me
4 as quickly as you can, all right?

5 MR. O'CONNOR: Understood.

6 THE COURT: Yeah.

7 MR. O'CONNOR: Thank you, Your Honor.

8 THE COURT: Yes, sir.

9 MR. LOBUE: Your Honor, if I may, my only request as
10 regards the motions schedule, which we will work out among
11 counsel, is that if the defendant is going to file some kind of
12 dispositive motion, let's do it once with whatever issues he
13 may have, and, you know, perhaps it's several motions in
14 parallel.

15 The problem we face is that they tend to dribble
16 these motions out, and we keep coming back here. They filed, I
17 think, 12 or 13 motions to dismiss in this case, something like
18 39 motions all told. So I would very much prefer not to have
19 to litigate one motion in January, another in February, and so
20 forth.

21 THE COURT: Well, I mean, I would think at this
22 point, we're getting close to summary judgment rather than a
23 motion to dismiss. I mean, that's the whole point. Now,
24 there's been pretty much, as much discovery as probably you're
25 ever going to be able to get in this case, and then from there

1 on, we'll see what happens.

2 But it is true that the Court does not favor motions
3 seriatim, and I think at this point, we've reached the point
4 where this will be -- we may have to give you an extension of
5 the page limit. I'm not, I'm not inviting that.

6 And you don't in your motions need to rehash the
7 whole history of this case. I mean, we know that very well,
8 all right? So, I mean, I want you to just get to where we are
9 today.

10 And obviously, I mean, the Fourth Circuit's prior
11 rulings, to the extent that there are legal principles
12 established in those cases, you can obviously cite those, but I
13 don't -- don't waste your pages, don't waste my eyes having to
14 read, you know, five/six/ten pages of introductory or
15 historical stuff that we know. Just let's get right to the
16 issues that have to be resolved, all right?

17 MR. LOBUE: Thank you, Your Honor.

18 THE COURT: All right.

19 MR. LOBUE: And one last housekeeping matter, if I
20 may? You mentioned in limine motions. I suspect there will be
21 some in advance of trial. Does the Court have a preference as
22 to how far in advance of the trial date would you like to
23 receive the in limines?

24 THE COURT: Well, you know, I've also mentioned in
25 the past and I'll always mention to any lawyers involved in a

1 trial where I think there is potential for settlement, and I
2 recognize the problems that CACI has with that, but
3 nevertheless, you know, many times motions in limine help the
4 parties understand the parameters of the trial and gives them,
5 you know, sort of a final look at the potential and the
6 realities of settlement as an alternative to going to trial, so
7 it makes some sense in my view to have motions in limine
8 resolved at least, you know, two or three weeks before the
9 trial.

10 Certainly, again, if there are going to be motions in
11 limine, the one tricky thing is if a motion in limine basically
12 affects how a summary judgment motion might be resolved. But I
13 don't want motions in limine dribbling in. I mean, basically,
14 both sides need to think those issues through carefully, and I
15 expect, you know, one set of motions so that we can get them
16 resolved at one time, all right?

17 MR. LoBUE: Thank you, Your Honor.

18 THE COURT: Does the plaintiff expect to file any
19 dispositive motions, or are you mostly being -- would be
20 reacting to the defendants?

21 MR. LoBUE: No, we -- as presently advised, we have
22 no intention of filing a dispositive.

23 THE COURT: All right. And how about the United
24 States? I mean, if you stay in the case, I assume there'll be
25 some motions on your part?

1 MR. DAVIS: That's correct, Your Honor.

2 THE COURT: Okay. I would urge you as much as you
3 can to really think through this state secrets issue. I mean,
4 I haven't looked at what you're doing with Judge Anderson
5 because I may have to look at it in the appellate posture, but,
6 you know, this case needs to get resolved one way or the other,
7 and it would be better to have as much information available as
8 possible so it can be a dispositive ruling, all right?

9 Anything further on this case?

10 MR. O'CONNOR: Your Honor, I said I wanted to ask two
11 additional questions.

12 THE COURT: All right.

13 MR. O'CONNOR: I only asked one.

14 THE COURT: That's right.

15 MR. O'CONNOR: My understanding -- this case, if it
16 goes to trial, could -- will involve reading in some
17 depositions because -- at least might be a few, might be a lot,
18 depending on how the Court rules on some things, and my
19 understanding is that -- I think I understood Judge Anderson
20 said that Your Honor's preference is to have court personnel be
21 the witness.

22 THE COURT: Correct. I --

23 MR. O'CONNOR: That just helps us to logistically
24 plan.

25 THE COURT: Sure. My law clerk sits in the witness

1 box and will read the answers, and then the attorney who asked
2 the question, so we try to mirror it as much as we can with
3 direct testimony, so to the extent that you-all ask questions
4 of the witness during the deposition, you or Mr. Dolan would
5 read the question, my law clerk would read the answer. If it
6 was an issue that came up on cross, then we would have opposing
7 counsel read, all right? We do it that way.

8 MR. O'CONNOR: (Nodding head.)

9 THE COURT: And therefore, it's really important, and
10 this does need to be done well ahead of trial, you need to
11 provide the designated portions of the deposition that you're
12 going to be using to opposing counsel first of all to see if
13 there are going to be objections because we're not going to
14 have fights about what goes in and what doesn't go in once the
15 trial gets started, and then also, the defense gets to counter-
16 designate then those portions of the deposition.

17 Hopefully, you've all agreed on that so I don't have
18 to get involved, but if there are disputes as to what should or
19 shouldn't be coming in, then you need to get that to us,
20 obviously, ahead of time.

21 MR. O'CONNOR: And plaintiffs and CACI, we've
22 exchanged deposition designations.

23 THE COURT: All right, that's fine. That's already
24 been done then?

25 MR. O'CONNOR: We did it last night.

1 THE COURT: All right. Are there many disputes?

2 MR. O'CONNOR: Well, too early to tell, Your Honor.

3 THE COURT: All right.

4 MR. O'CONNOR: Our designations are 22 pages long,
5 but we filed them.

6 THE COURT: All right, that's fine.

7 MR. LOBUE: Your Honor?

8 THE COURT: Yes, sir.

9 MR. LOBUE: To that very point, I noticed that Your
10 Honor's order in this case provides for objections to
11 designations to be filed ten days after today's conference.
12 Given the relative extensiveness of the designations and the
13 fact the trial is months off, I'm wondering if it wouldn't be
14 sensible, with the Court's permission, if we could defer
15 that -- the date to submit objections for a reasonable amount.

16 MR. O'CONNOR: Your Honor, I don't read Your Honor's
17 orders requiring objections to designations within ten days. I
18 read it as requiring objections to exhibits.

19 THE COURT: Yeah. I think --

20 MR. O'CONNOR: I mean, we have 31 exhibits; they have
21 180. We certainly can object -- we can do our objections
22 within ten days, and I assume for exhibits, I mean, I didn't
23 understand that we have that obligation for designation --

24 THE COURT: The standard scheduling order I don't
25 believe addresses this issue, all right? But I would think,

1 what, 30 days to file your objections --

2 MR. LoBUE: I think that would make good sense.

3 THE COURT: -- to the depositions?

4 MR. O'CONNOR: That's fine.

5 THE COURT: That's fine. And that would work for
6 both sides.

7 MR. O'CONNOR: That's fine.

8 THE COURT: So you've got -- and I'm just going to do
9 that -- I'm not going to do an order. It's in the minutes. So
10 you have 30 days, all sides, to file any objections to the
11 designation of the depositions, all right?

12 MR. O'CONNOR: That's fine, Your Honor. Thank you.

13 THE COURT: Yes, sir.

14 MR. DAVIS: Your Honor, the United States did not
15 read Your Honor's scheduling order as requiring deposition
16 designations at this time, so the United States has not yet put
17 those in and has not put those together. Could we have 30 days
18 to put in our deposition designations and also to make
19 objections to the parties' exhibits?

20 THE COURT: I think that's reasonable.

21 MR. DAVIS: Okay.

22 MR. O'CONNOR: We have no objection, Your Honor.

23 THE COURT: That's fine. All right?

24 MR. DAVIS: Thank you, Your Honor.

25 THE COURT: Good. Mr. Dolan?

1 MR. DOLAN: Just one thing. I don't meant to -- that
2 I hope to clarify.

3 THE COURT: Yes.

4 MR. DOLAN: The motion in limine in this case is
5 going to be far more than the normal, mundane motion in limine.
6 The Court made a reference to the motion in limine and its
7 relationship to the summary judgment. I wonder if we might
8 clarify that just a little bit.

9 THE COURT: Sure.

10 MR. DOLAN: Would it make sense for the motion in
11 limine to be linked and filed and argued prior to the summary
12 judgment?

13 THE COURT: Let me give you an example of where this
14 comes up. I've often had situations in patent infringement
15 cases where the motion for summary judgment relies extensively
16 on representations that an expert has made.

17 MR. DOLAN: Right.

18 THE COURT: And the other side actually files a
19 motion in limine to strike some of what the expert has said or
20 what is being used because, for example, the expert didn't,
21 didn't reveal that during discovery, all right? So that's a
22 motion in limine attacking an issue that's relevant to the
23 motion for summary judgment.

24 MR. DOLAN: Right.

25 THE COURT: And you think that some of that may be

1 occurring in this case?

2 MR. DOLAN: I do. I think the motion in limine in
3 this case from a pure trial point of view is going to be very
4 significant.

5 THE COURT: Are you willing to tip your hand at this
6 point or not so I have an idea of what we're talking about?

7 MR. DOLAN: Well --

8 THE COURT: Yeah.

9 MR. DOLAN: -- just for instance, the plaintiff has
10 made clear that they intend to rely extensively on government
11 reports in, pretty much in their entirety that came from
12 investigations or quasi-investigations.

13 We will include that in our motion in limine, but
14 there will also be other issues --

15 THE COURT: In other words, possibly arguing that
16 that report could not come into evidence because it's hearsay
17 or there's some other defects in it?

18 MR. DOLAN: Right. Or portions of the report were
19 flawed and therefore shouldn't pass a reliability test. And we
20 would want to air that in time to give you an opportunity to
21 consider that rather than the normal I'm here the day before,
22 we're worrying about a jury --

23 THE COURT: All right. So --

24 MR. DOLAN: -- and then I stand up with a motion in
25 limine and nobody wants to hear that.

1 THE COURT: So what I think I hear you saying,
2 Mr. Dolan, is that plaintiff files, what -- you file your
3 motion for summary judgment, the defendant opposes it and in
4 their opposition relies as a source of their argument that a
5 fact is contested, right, they refer to this report, and what
6 you want the Court to be able to evaluate in the context,
7 frankly, of summary judgment is the unreliability or the
8 inadmissibility of that report so that it's not something that
9 would come in at trial.

10 MR. DOLAN: Yes.

11 THE COURT: What that tells me then is that there
12 ought to be a longer time period. In other words, you file
13 your motion for summary judgment; defense -- plaintiff files
14 their opposition. If there are appropriate motions in limine
15 that address some of the factual evidentiary issues that are in
16 that opposition, you'd file those, and all that means is we
17 just -- now you're talking maybe a longer period -- and then,
18 of course, the plaintiff would have a right to respond to that.

19 That just tells me then that we extend the time
20 period before we have oral argument, and I'd hear the motions
21 in limine probably first because, obviously, if I strike some
22 of the key evidence that the plaintiff is relying upon, that
23 changes the context of the summary judgment analysis.

24 MR. DOLAN: Precisely.

25 THE COURT: All right. So I think you-all as good

1 lawyers can work out the scheduling of that, but I agree with
2 you that to the extent motions in limine are directly related
3 to the issues in the summary judgment, they have to be heard
4 first. Then closer to the trial date, there might have to be a
5 second series of more mundane or more limited motions in
6 limine.

7 In complex cases, in patent cases, I think this
8 happens in my experience all the time. All right?

9 MR. DOLAN: Fine.

10 THE COURT: Did that answer your question?

11 MR. DOLAN: It does. Thank you.

12 THE COURT: Anything further? Mr. Zwerling? I'm
13 going to give you a chance to speak. Yes, sir.

14 MR. ZWERLING: Your Honor --

15 THE COURT: And you're local counsel?

16 MR. ZWERLING: I am local counsel, and I've checked
17 with counsel for the defendant/the third-party plaintiff and
18 the government, and they don't object. In light of all of the
19 court hearings that are coming up and have come up and the fact
20 that we are a two-person law firm with other cases --

21 THE COURT: Would you like to have your appearance
22 waived a bit?

23 MR. ZWERLING: Yes, I would, pretrial at least. We
24 know we're invited and encouraged to come --

25 THE COURT: Yeah.

1 MR. ZWERLING: -- but if we have problems, we don't
2 like to have to come to the court each time.

3 THE COURT: I think given, frankly, the number of
4 times plaintiffs' counsel have been in court and the fact that
5 at motions hearings, there's really no problem with court
6 practices, etc., I'm prepared to waive your appearance at
7 everything but the trial, and once we get the trial started,
8 I'd like, definitely want local counsel for the voir dire, but
9 we can -- I'll take another look at your request if you want to
10 be excused from the trial itself.

11 I mean, there are times during the trial that I think
12 local counsel is invaluable to avoid any problems, but we can
13 take it at that point.

14 MR. ZWERLING: And scheduling allowing, we plan to be
15 here for the trial --

16 THE COURT: All right, that's fine.

17 MR. ZWERLING: -- but we appreciate avoiding the
18 pretrial back-and-forth.

19 THE COURT: I'm going to grant that request, all
20 right?

21 MR. ZWERLING: Thank you, Your Honor.

22 THE COURT: I guess I will issue an order then so we
23 have things on the record for some of these rulings, all right?
24 There was one other thing or not? No?

25 MR. O'CONNOR: Nothing from CACI, Your Honor.

1 MR. LOBUE: Nothing further, Your Honor.

2 THE COURT: All right, very good. Then we'll recess
3 court for the day. Thank you.

4 (Which were all the proceedings
5 had at this time.)

6

7 CERTIFICATE OF THE REPORTER

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

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/s/

Anneliese J. Thomson

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