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UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF VIRGINIA  
ALEXANDRIA DIVISION

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SUHAIL NAJIM ABDULLAH AL      :   Civil Action No.:
SHIMARI, et al.,             :   1:08-cv-827
      Plaintiffs,             :
versus                        :   Friday, December 1, 2023
                                :   Alexandria, Virginia
TIMOTHY DUGAN, et al.,       :
                                :   Pages 1-19
      Defendants.           :
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The above-entitled motions hearing was heard before the Honorable Leonie M. Brinkema, United States District Judge. This proceeding commenced at 10:11 a.m.

A P P E A R A N C E S:

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COMPUTERIZED TRANSCRIPTION OF STENOGRAPHIC NOTES



1 today?

2 MR. BUCHANAN: A few people.

3 THE COURT: All right. Very good. Nice to see  
4 you all.

5 MR. O'CONNOR: Good morning, Your Honor.  
6 John O'Connor, Steptoe & Johnson, for CACI. I'm joined by  
7 my colleague, Linda Bailey, who was admitted pro hac  
8 probably a decade ago. She's going to address anything  
9 relating to Dr. Fadel today; I will do the remainder. I'm  
10 also joined by the newest member of our team, Nina Ginsberg,  
11 of DiMuroGinsberg, who entered her appearance in the last 60  
12 days.

13 THE COURT: All right. We are getting close to  
14 the end, I hope, of this case. We've got a trial date, and  
15 we're getting down to the last few minutes of it.

16 All right. I want to ask the plaintiffs if you  
17 can give me more detail as to what Dr. Rejali's situation  
18 is. Because I was trying to figure out how old he is.

19 He's, what, late 60s? Who's dealt with him, I guess?

20 Counsel, because there's so many of you so my  
21 court reporter gets the right name, reintroduce yourself  
22 again.

23 MR. AZMY: Yes. Of course. Baher Azmy again,  
24 A-Z-M-Y.

25 Yes, Your Honor. I've been sort of the primary

1 liaison with him for the past ten years since he filed his  
2 last report. And he's in ill health and has declined all  
3 sorts of commitments, including a contract with Harvard  
4 University Press, and is just trying to recuperate and is  
5 just completely unavailable.

6 THE COURT: Well, I mean, one of the things the  
7 defense does point out is -- you know, I understand the  
8 sensitivity of these types of things. You could file  
9 something under seal, but I think for the record we need to  
10 know just how disabled he is. Because this is creating a  
11 problem in this case. I mean, he is an important witness,  
12 and there's a real problem with the substitution you've  
13 proposed. And as I said, this case has got to go to trial  
14 in April. There has to be a point -- if no other reason,  
15 your clients are getting older, things could change there.  
16 You know, everybody needs to get this case resolved, at  
17 least at the trial level. All right. And so I am concerned  
18 about this.

19 So I'm trying to to find out more specifically,  
20 you know, what his true situation is, whether or not, you  
21 know, a video -- a de bene esse deposition or a video --  
22 because I'm going to limit the scope of what he would be  
23 able to testify to anyway -- would be possible. And I can't  
24 tell that because of the record that I've got in front of  
25 me.

1 MR. AZMY: Your Honor, the -- what he's  
2 communicated to me is he is emotionally and physically  
3 unable to engage in sort of any kind of lengthy intellectual  
4 discourse. That he's depleted, that he has very serious  
5 emotional issues that he's dealing with -- and I'm speaking  
6 somewhat generally to protect his privacy -- and that he's  
7 physically and emotionally diminished, such that he is  
8 checking out completely from all sorts of professional  
9 commitments, and describes himself as exhausted.

10 And we did file a supplemental affidavit in  
11 connection with our reply from Mr. Rejali. That goes into a  
12 little bit more detail. You know, we didn't want to  
13 necessarily produce medical records and all of that, but  
14 his -- and I've had a number of conversations with him, even  
15 years ago when this was in process and he was declining all  
16 sorts of kind of professional commitments. And as of last  
17 year sometime, he completely -- he retired, he canceled all  
18 his prestigious job possibilities and is just focused  
19 completely on recuperation.

20 THE COURT: When did you give notice to CACI that  
21 there might be a problem with this witness?

22 MR. AZMY: Michael, do you want to ...

23 MR. FISHER: Thank you, Your Honor. Michael  
24 Fisher from Patterson Belknap.

25 We gave notice to CACI in August of this year when

1 we began preparing for trial, and he informed us that he  
2 would be unavailable and unable to be an expert witness.

3 THE COURT: Yeah, but your co-counsel began -- he  
4 just said that he -- if I heard him correctly, it was maybe  
5 a year ago when he began having concerns about declination  
6 of this witness.

7 I mean, one of the problems here is, you know,  
8 whether adequate notice was given to CACI so that CACI could  
9 potentially, you know, request a reopening of discovery to  
10 make sure that whatever new expert you were bringing in  
11 would be appropriate.

12 I mean, the problem I have here is, I've looked at  
13 the -- at the substitute report that you want to put in, and  
14 it's very different from Dr. Rejali's. I totally agree with  
15 CACI that that's not a proper substitution. You can't work  
16 it that way. And now I'm becoming more concerned that you  
17 all were -- did not adequately advise the defense that there  
18 was this looming problem. And in this kind of a case, you  
19 know, which has been so hotly litigated, that's a problem  
20 for me.

21 That's why I was asking whether there was any  
22 degree to which Dr. Rejali could be available, either, as I  
23 said, through a de bene esse deposition or through -- we've  
24 got the cameras in the courtroom. I don't know if he is  
25 overseas now or still in the United States. But, you know,

1 it would be short, because I don't think a lot of -- and  
2 you've actually agreed that all that discussion of the  
3 history of torture would not be appropriate in this case  
4 anyway. So it would be a relatively short amount of his  
5 testimony. But I think you've got a problem in this  
6 respect.

7 I normally have one attorney per issue. I've  
8 already allowed a second one on this. So what do you want  
9 to say in response to that?

10 MR. FISHER: Your Honor, we understand your  
11 concerns. I assure you that as soon as we became aware of  
12 his unavailability, we told CACI over a meet-and-confer.  
13 And we also agreed with CACI, in order to minimize any  
14 prejudice, that we would first give them the name of our  
15 substituted expert in August before his expert report was  
16 disclosed. And in connection with the motion to substitute,  
17 we would attach the proposed report.

18 This was all designed to minimize the prejudice to  
19 CACI because we, of course, understand that there is some  
20 inevitable prejudice here, but we do believe that there is  
21 plenty of time before trial for them to depose Dr. Modvig.  
22 This evidence has -- these theories are not completely new  
23 theories.

24 And with respect to Dr. Rejali specifically,  
25 again, we really did only become aware of his unavailability

1 in August as we began to prepare for trial.

2 THE COURT: All right. Let me shift the question,  
3 and it may have to go back to other counsel, Mr. Azmy in  
4 particular.

5 The plaintiffs have all been deposed; correct?

6 MR. FISHER: That's right, Your Honor.

7 THE COURT: All right. In those depositions, were  
8 they not questioned about what was done to them and how it  
9 affected them?

10 MR. FISHER: That's right, Your Honor.

11 THE COURT: All right. And there was a doctor  
12 who -- and all of them had been examined by at least one  
13 doctor; is that correct? Is that Dr. Xenakis?

14 MR. FISHER: Dr. Xenakis, yes.

15 THE COURT: Now, that's a plaintiffs' doctor or  
16 defense doctor?

17 MR. FISHER: That is plaintiffs' doctor, Your  
18 Honor.

19 THE COURT: All right.

20 MR. FISHER: And he's submitted expert reports in  
21 connection with these.

22 THE COURT: Right. All right. And in CACI's  
23 cross-examination during those depositions -- because I  
24 assume CACI asked questions?

25 MR. FISHER: That's right, Your Honor.

1 THE COURT: Did they also -- did CACI probe what  
2 was done to the plaintiffs and how they reacted to it, you  
3 know, what their -- whether they felt pain, whether they are  
4 having nightmares? I mean, were those types of questions  
5 asked?

6 MR. FISHER: I believe so, Your Honor. And  
7 Dr. Modvig actually relies on those depositions in his  
8 expert report. So CACI was able to and did have the  
9 opportunity to question plaintiffs on these issues.

10 THE COURT: My question, though, is, why do you  
11 need an expert?

12 MR. FISHER: Excuse me, Your Honor?

13 THE COURT: Why do you need an expert? I mean,  
14 you're going to have these people either in the witness box  
15 or on video testifying about how they were in a stressed  
16 position for 12 hours, they may have urinated on themselves,  
17 you know, they were achingly -- they were in great pain and  
18 discomfort. You're going to have a doctor who's examined  
19 them, who's going to talk about any long-term effects of  
20 that.

21 Why does a jury need anything more?

22 MR. FISHER: Your Honor, I think it's especially  
23 important here where CACI -- CACI admits and has had  
24 repeated attempts to downplay the severity of what  
25 plaintiffs suffered. For example, they -- in their 2018

1 motion to dismiss, they isolate each of the types of torture  
2 that plaintiffs suffered. For example, they refer to the  
3 systematic beatings as simple assaults, and being left in a  
4 cold shower until plaintiff was unable to stand as forced  
5 hygiene.

6 THE COURT: Wait. Let me stop you on that.

7 Those are motions that the Court has to resolve.  
8 I would be shocked that any wise trial attorney would make  
9 that as the tactical defense. The defense in this case, I  
10 suspect, will be whether there's sufficient evidence to link  
11 CACI to any of that behavior.

12 In fact, I'm not so sure, if I were the defense  
13 counsel, if I wouldn't stipulate that, you know, stressed  
14 positions is considered torture. The issue for this  
15 defendant is whether or not any of the defendants' employees  
16 were part of that conduct, and if they weren't, that ends  
17 it. And so that's why I'm surprised we're even getting into  
18 this sort of rabbit hole.

19 But, in any case, I understand that the one issue  
20 that was in -- that is significant, and I think would need  
21 to be allowed in, would be to have an expert, someone who is  
22 qualified, testify as to what the general international  
23 norms are in terms of cruel, inhumane and degrading  
24 treatment. Because CIDT is an issue in this case and what  
25 is considered torture in the international field. Okay.

1 Because that's come up through several of these motions to  
2 dismiss.

3 But, other than that, the actual impact or effect  
4 on these individual plaintiffs, I think you've already got  
5 that in the record, and having an expert opine about that is  
6 not going to help the jury in any respect.

7 MR. FISHER: Your Honor, I guess one thing on  
8 that. I do understand that that was in connection with a  
9 2018 motion to dismiss, but in their reply -- in their  
10 motion in limine reply to Dr. Rejali -- which I believe was  
11 filed about a month ago -- CACI admits that it continues to  
12 disagree that most or all plaintiffs' allegations, even if  
13 true, would amount to torture or CIDT. So I believe that  
14 this issue is still very much in play, and I don't believe  
15 that it's a rabbit hole. CACI has continually made an issue  
16 of whether or not plaintiffs' allegations, if true, would  
17 amount to the severe pain and suffering that would --

18 THE COURT: But, you know, that's a very dangerous  
19 position when any attorney, whether plaintiff or defendant,  
20 takes a -- what I would consider a fairly extreme position.  
21 They may have other legitimate issues that get lost. They  
22 lose the credibility of the fact-finder if they're making  
23 arguments that really don't make good sense. And our juries  
24 are pretty smart here; they can see through that.

25 Again, I don't know -- you know, what lawyers say

1 in pretrial motions when you're addressing them to the Court  
2 and you're working off of, you know, legal principles is one  
3 thing, but when you get before a group of citizens who are  
4 going to be making the decisions, the tactics often are much  
5 different. I mean, you all know that; you're experienced  
6 trial lawyers yourselves.

7 But, in any case, I am concerned that the  
8 substitute expert is way different, in my view. I agree  
9 with CACI. That if he were allowed to testify, as he has  
10 along the lines of his expert report in most respects, you  
11 would open up all kinds of problems in this case, and CACI  
12 would have a right to reopen discovery. As I said, I don't  
13 want to continue this case, and so I'm not comfortable  
14 allowing that witness to testify. You're going to have to  
15 figure out what you can do with Dr. Rejali at this point.

16 MR. FISHER: Your Honor, one clarification.

17 So you spoke -- you mentioned that the jury would  
18 need to have expert testimony on the international  
19 standards, especially with respect to CIDT.

20 Dr. Modvig can address those international  
21 standards. He has been on the Committee -- the UN Committee  
22 of Torture, he was the chairperson from 2016 to 2021. And  
23 if Your Honor deems it appropriate, we can, of course,  
24 narrow his opinion to opine on that specific issue.

25 THE COURT: What I'll let you do is, I will let

1 you produce a revised expert statement from him to that very  
2 narrow issue, and then I'll take a look at it and let the  
3 defense have a chance to see whether they want to still  
4 pursue a motion to strike that; all right?

5 MR. FISHER: Thank you, Your Honor.

6 THE COURT: Okay. So I think that pretty much  
7 resolved the motions that are on the docket.

8 Was there anything you wanted to add?

9 MS. BAILEY: Yes, Your Honor. There's still  
10 the --

11 THE COURT: Wait. Change positions.

12 Oh, yes. I'm sorry. There's the other,  
13 Dr. Fadel.

14 MS. BAILEY: Yes, Your Honor. Linda Bailey for  
15 CACI.

16 So we have the motion in limine to exclude  
17 Dr. Fadel's testimony.

18 THE COURT: Right.

19 MS. BAILEY: I think the most important thing for  
20 the Court to understand about Dr. Fadel's testimony is how  
21 very narrow it is. He considers two types of allegations,  
22 nudity, particularly -- forced nudity, particularly in the  
23 presence of someone of the opposite sex --

24 THE COURT: Right.

25 MS. BAILEY: -- and unwanted sexual contact. So

1 those are the two things he considers.

2 With respect to nudity, he gives a general history  
3 going all the way back to Adam and Eve of Muslim teachings  
4 with respect to nudity, and concludes that having an Arab  
5 man disrobe in front of someone of the opposite sex, and  
6 even disrobe generally, would be substantially embarrassing.

7 With respect to sexual contact, he basically says  
8 that, you know, sexual intimacy outside heterosexual  
9 marriage is prohibited, and that based on the Prophet  
10 Muhammad's reported sexual modesty, it's a very high value.  
11 It's a very important thing in Muslim culture to maintain  
12 sexual modesty.

13 The fact is, Your Honor, this is not information  
14 the jury needs to hear from an expert. As Your Honor  
15 pointed out, the plaintiffs themselves are undoubtedly going  
16 to testify about how those allegations -- their allegations  
17 of forced nudity and sexual conduct made them feel. They'll  
18 undoubtedly talk about how it affected their Muslim  
19 culture -- or Muslim culture affected how they felt, how  
20 prescriptions in their religion, you know, impacted their  
21 entire situation. So it's highly unlikely that an expert is  
22 going to be able to add anything to the mix there. And it's  
23 frankly just well known, Your Honor. You know, we can walk  
24 down the street and we see women and hijabs. People  
25 understand that the Muslim culture highly values modesty and

1 has strict prohibitions about nudity and sexual immodesty.  
2 So it's simply unnecessary.

3           In addition, there are other better sources. As I  
4 said, the plaintiffs are going to testify, we have  
5 Dr. Xenakis. If he's permitted to testify, he has comments  
6 in his reports about things that are taboo in Muslim  
7 culture. If he's permitted to testify, he can certainly  
8 talk about that. And all of this is plenty of fodder to  
9 give counsel the ability to argue that -- you know, their  
10 position that this exacerbated the severity of these  
11 allegations, you know, of things plaintiffs experienced.

12           To be clear, there are some cases, maybe many  
13 cases, in which aspects of the Muslim faith or aspects of  
14 Muslim culture are important and require specialized  
15 knowledge to explain to the jury what -- something that they  
16 wouldn't know about that culture. You know, that's why it  
17 made good sense for Your Honor to appoint Dr. Patterson in  
18 the *Moussaoui* case because cultural sensitivity was quite  
19 important to his understanding of Mr. Moussaoui.

20           Even Dr. Fadel. Dr. Fadel testified in *United*  
21 *States v. Subasic*. And, in that case, understanding how  
22 specific Arab language was used in certain contexts was  
23 exceptionally important to the defense, albeit it was an  
24 unsuccessful defense.

25           So there are Muslim teachings that require expert

1 knowledge, but nudity and sexual modesty aren't two of them.

2 THE COURT: All right. Who wants to respond to  
3 that?

4 MS. ROBINSON: Bonita Robinson for plaintiffs.

5 You know, I think that there might be some general  
6 awareness for the average juror about sexual modesty in the  
7 Muslim faith, particularly as it pertains to women. But the  
8 question of forced nudity with respect to men, which  
9 includes forced nudity in front of other men, not just in  
10 front of members of the opposite sex, is not something that  
11 CACI even claimed in its brief is something that's familiar  
12 to the average juror.

13 And even if a juror has some conception of taboos  
14 and norms about nudity or about sexual modesty in general,  
15 the question here is the extent of those harms to plaintiff,  
16 and I think Dr. Fadel's testimony would shed a great deal of  
17 light on that.

18 THE COURT: I'm going to allow him to testify, but  
19 it's a very narrow. I can't imagine that's more than, like,  
20 10 or 15 minutes of testimony. The whole history of Muslim  
21 culture is not appropriate; it's way beyond what's  
22 necessary.

23 MS. ROBINSON: Yeah. It's a short report, and we  
24 anticipate that his testimony would be short as well.

25 THE COURT: All right. So I'm going to deny the

1 motion in limine in that respect. All right.

2 So I think that takes care of -- yes,  
3 Mr. O'Connor.

4 MR. O'CONNOR: I think I agree with what Your  
5 Honor was about to say, that resolves the motion. I was  
6 going to raise a housekeeping question.

7 THE COURT: Go ahead. We have a few extra  
8 minutes. Yes.

9 MR. O'CONNOR: It's a quick one.

10 Yesterday, the parties met and conferred. We've  
11 got a number of motions in limine that need to get resolved.  
12 We -- between the parties, we agreed to notice three of them  
13 for the 15th.

14 THE COURT: Of December?

15 MR. O'CONNOR: Of December, which we noticed  
16 yesterday. Some of those motions involve briefs that were,  
17 you know, written four years ago. And would it be helpful  
18 to the Court -- I was inclined, for the two that we noticed,  
19 to send over a binder that has all of the pleadings.  
20 Because some of them are four years old; I doubt they're  
21 sitting on a table somewhere.

22 THE COURT: We have not held this case in our  
23 chambers. Yes, that's fine, if you would do that.

24 MR. O'CONNOR: I'll send the two that we've  
25 noticed.

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THE COURT: That's fine.

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

THE COURT: Anything further? If not, we'll  
recess court for the day.

Thank you.

(Proceedings adjourned at 10:32 a.m.)

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I certify that the foregoing is a true and accurate  
transcription of my stenographic notes.

Stephanie Austin

Stephanie M. Austin, RPR, CRR