

prevent Plaintiffs from being further delayed in their ongoing efforts to take discovery from DynCorp.

I. PLAINTIFFS SUPPORT DYNACORP'S REQUEST FOR AN EXTENSION OF THE OVERALL FACT DISCOVERY DEADLINE BUT REQUEST A DIFFERENT PERIOD FOR THE EXTENSION

The parties agree that an extension of the fact discovery deadline is necessary. *See* Mot. at 20. They disagree, however, on the appropriate length of the extension. *Id.* DynCorp seeks to extend the deadline by four months after the later of DynCorp's document production deadline or the date of the test plaintiff selection. *Id.* Plaintiffs would prefer the Court to extend the deadline by the later of six months from the current July 15 deadline or DynCorp's document production deadline.

Both parties have valid reasons for seeking to extend the overall fact discovery deadline. Plaintiffs cannot conduct certain types of necessary discovery, such as depositions of key DynCorp employees, until they are first able to review all of the documents responsive to their first set of document requests. DynCorp has indicated that Plaintiffs will not even have all of those documents before the current July 15 discovery cut-off (*see* Mot. at Exh. E ¶ 13), so an extension is necessary. Similarly, DynCorp cannot reasonably conduct focused discovery on the test plaintiffs without knowing those plaintiffs' identities. Plaintiffs expect that DynCorp will promptly begin such discovery after the Court rules on the competing test plaintiff proposals, which were filed in March but are still waiting Court action.

Moreover, an extension is appropriate given the procedural history and posture of the case. First, general fact discovery commenced less than a year ago (*see* Mot. at 7), so a moderate extension would not result in an unusually long discovery period. Second, an extension will not

require that dates for expert discovery, dispositive motions, and trial be likewise adjusted, as the Court has not yet set any such dates. *See, e.g.*, Nov. 27, 2007 Scheduling Order; Dec. 2, 2008 Order; *see also* Mot. at 3 (“there are no other Court-ordered deadlines that would be impacted by” an extension).

Plaintiffs feel that an extension of six months from the current July 15 deadline or DynCorp’s document production deadline (whichever is later) is adequate, as “it is well past time to move the case forward.” *See* Exh. 1 (June 8, 2009 letter from Terry Collingsworth to Rosemary Stewart). DynCorp is asking the Court to extend the overall fact discovery deadline by at least eight months from the current deadline. *See* Mot. at 1. In reality, these two proposals are not too far apart, but Plaintiffs’ position on discovery extensions will better move this long-lived case forward as expeditiously as possible.

Accordingly, the Court should extend the overall fact discovery deadline to the later of six months from the current July 15 deadline or six months from DynCorp’s document production deadline.

II. DYNCORP SHOULD NOT BE GIVEN A FOUR-MONTH EXTENSION ON ITS OVERDUE DOCUMENT PRODUCTION

A four-month extension of DynCorp’s deadline for producing documents responsive to Plaintiffs’ first set of document requests is unnecessary and excessive for several reasons. First, DynCorp seeks this lengthy extension of a deadline set by Magistrate Judge Robinson after DynCorp had refused to even provide an estimated date for completing responses to document requests served on December 2, 2008. But a four-month extension is improper, as DynCorp has had more than enough time to respond to Plaintiffs’ very focused requests. Plaintiffs served their “extremely detailed” requests (Mot. at 7) to purposely elicit a useful set of documents rather than

a mountain of irrelevant paper. Nonetheless, DynCorp seeks an additional four-month extension on top of an already lengthy production period in which it ignored deadlines imposed by the Federal Rules. *See, e.g.*, Exh. 2 (excerpts of May 5, 2009 motions hearing transcript) at 66:3-9, 76:16-18. If granted, the Court will give DynCorp a total of ten months to produce responsive documents. Considering the length of time this case has been pending and Plaintiffs' other discovery needs (which are dependent on first receiving DynCorp's documents), ten months is far too long.

Similarly, Plaintiffs have been willing to be flexible with scheduling matters, but have reasonably demanded that DynCorp show the same flexibility. For example, when Plaintiffs offered to consent to a production deadline extension for DynCorp in exchange for a reciprocal extension of the date the Court set for Plaintiffs' *Lone Pine* statements, DynCorp refused. *See* Exh. 1 and Exh. 3 (June 9, 2009 letter from Rosemary Stewart to Terry Collingsworth). DynCorp declined Plaintiffs' proposed "mutual extension" despite the fact that both parties faced the same deadline (July 3, 2009) regarding discovery matters decided on the same day (May 5, 2009). One practical effect of DynCorp's refusal will be to force Plaintiffs to seek an extension from the Court of their July 3 deadline in a separate filing.

In addition, DynCorp has hidden behind the State Department ("DOS") and overblown security concerns for far too long, and it continues to do so here. *See, e.g.*, Mot. at 11-19. Plaintiffs have repeatedly debunked DynCorp's position that DOS, and not DynCorp, has the ultimate say over documents indisputably in DynCorp's possession. *See* Brief in Support of Plaintiffs' Motion to Compel (*Arias* Docket No. 92) ("Motion to Compel") at 8-9 n.1; Reply Brief in Support of Plaintiffs' Motion to Compel (*Arias* Docket No. 98) at 3-5.

In addition, just a little probing reveals the other holes in DynCorp's DOS shield. For example, DynCorp claims that the DOS letters attached as Exhibit F to the Motion "explain that DOS approval will not be granted for DynCorp to release documents in this litigation until various redactions are made to, for example, protect the identity of the spray pilots." Mot. at 12. Yet Plaintiffs' counsel previously explained to DynCorp in writing that the DOS standard in those two letters permits the production of pilot names. *See* Exh. 4 (May 11, 2009 letter from Eric Hager to Rosemary Stewart).¹ In those letters, DOS "stated that only a very limited category of documents should be redacted: documents that are both sensitive *and* irrelevant." *Id.* (emphasis in original). Although its position is more illusion than substance, DynCorp continues to blame DOS as being "the primary reason" its document productions have taken so long. Mot. at 23.

Regarding security, Plaintiffs readily admit that the border between Colombia and Ecuador poses real security risks. But DynCorp's frequent, sensationalistic references to terrorism, violent attacks, and kidnappings (*see, e.g.*, Mot. at 18) ring hollow given conduct that seems to belie any real security concerns. For example, DynCorp attached as an exhibit to its Motion "[e]xamples of the post-redacted documents delivered to plaintiffs . . . reveal[ing] the deletions of sensitive data." Mot. at 14. The public filing of those documents—all plainly marked as "Confidential – Produced Subject to Protective Order"—was a clear violation of the governing protective order. *See* Protective Order (*Arias* Docket Nos. 87 and 94) ¶¶ 2, 8, 13, 15.

¹ Plaintiffs acknowledge that DOS has elsewhere requested that DynCorp redact pilot names. *See* Mot. at Exh. G. With all due respect to the DOS attorneys involved, Plaintiffs should not be the ones prejudiced by DOS' blatant self-contradiction. *See* Mot. at Exh. F and Exh. G (in chronological order, these DOS letters are: first, a January 21, 2009 letter requesting pilots names be redacted; next, letters from January 26, 2009 and February 9, 2009 setting out standard that would allow pilot names to be produced without redactions; and, finally, an April 6, 2009 letter requesting pilots names be redacted). DOS' erratic guidance merely highlights the problem of allowing DynCorp to hide behind it.

The protective order requires, among other things, that persons with “access to Protected Information . . . take all necessary precautions to prevent [its] disclosure” and prohibits the “public disclosure of Protected Information.” *Id.* ¶¶ 8, 13. Indeed, it took an email from Plaintiffs’ counsel for DynCorp to correct this security lapse. *See* Exh. 5 (June 15 and 16 email exchange between Eric Hager and Rosemary Stewart).

Finally, it is unfair to Plaintiffs to grant DynCorp another four months for an already overly-long production period. Plaintiffs have amply demonstrated the need for DynCorp’s documents to move this case forward. *See, e.g.*, Motion to Compel at 5. And it is no answer that Plaintiffs can get information from other sources, as Plaintiffs obviously need and deserve Defendants’ documents and are, in any event, actively conducting third-party discovery. *See, e.g.*, June 8, 2009 Minute Order regarding third-party depositions. Moreover, DynCorp’s claim that Plaintiffs have not sought discovery from third-parties such as the DOS (*see* Mot. at 27) is simply wrong. Plaintiffs took the deposition of Rand Beers, Assistant Secretary of State for International Narcotics & Law Enforcement Affairs, in the presence of Joe Hollingsworth, then and now counsel for DynCorp. *See* Exh. 6 (excerpts of transcript from deposition of Rand Beers).

In summary, DynCorp has not shown that it merits four more months for its document production. Plaintiffs respectfully request that the Court either reaffirm DynCorp’s July 3 production deadline or, at most, grant a shorter extension that would not cause significant delay in moving the case to trial. Plaintiffs would not object to a 30-day extension of the July 3 deadline.

CONCLUSION

For all of the foregoing reasons, the Motion should be granted in part and denied in part. The Motion should be granted to provide for an extension of the overall fact discovery deadline, though that deadline should be extended to the later of six months from (a) the current July 15 deadline or (b) DynCorp's document production deadline. DynCorp's request for a four-month extension of its document production deadline should be denied.

Respectfully submitted,

Dated: June 22, 2009

/s/ Terry Collingsworth

Terry Collingsworth (DC Bar No. 71830)
tc@conradscherer.com
Natacha Thys (DC Bar No. 458143)
nt@conradscherer.com
Conrad & Scherer, LLP
731 8th Street SE
Washington D.C. 20003
Phone: 202-543-4001
Fax: 202-527-7990

Eric J. Hager (DC Bar No. 975861)
Conrad & Scherer, LLP
Avenida República de El Salvador 500
e Irlanda
Edificio Siglo XXI, PH Oficina W
Quito, Ecuador
Phone: (593 2) 2468-575
Fax: (593 2) 2452-961
ehager@conradscherer.com

Counsel for Plaintiffs

CERTIFICATE OF SERVICE

I hereby certify that, on this 22nd day of June 2009, a copy of the foregoing PLAINTIFFS' RESPONSE AND OPPOSITION TO DEFENDANTS' MOTION FOR ENGLARGEMENT OF DISCOVERY DEADLINES with exhibits and a proposed Order filed through the ECF system will be sent electronically to the registered participants as identified on the Notice of Electronic Filing and a copy will be sent by U.S. mail to all non-registered parties.

/s/ Eric J. Hager

Eric J. Hager