

3. The DynCorp defendants' April 3, 2009 motion for sanctions alleging violation of the Court order requiring expert causation statements, which plaintiffs have opposed; and
4. The plaintiffs' April 3, 2009 motion to compel production of documents and for sanctions, which defendants have opposed.

In addition, at the April 7, 2009 hearing, Magistrate Judge Robinson requested that the parties advise the Court of their position about which (or how much) of the pending matters the parties would agree that the Magistrate Judge should hear at the next scheduled hearing in these cases on May 5, 2009. The parties provide their views on this subject in their separate sections of this joint report set out below.

Meet and Confer

The parties held a telephonic "meet and confer" on April 17, 2009, to discuss the four above-identified subjects as well as additional document production and discovery issues. During this discussion, plaintiffs indicated that in response to correspondence provided by defendants identifying the categories of documents contained in defendants' production, plaintiffs will hold in abeyance that portion of their motion dealing with the form of defendants' production until the production is substantially completed and they can assess whether it has been produced in an acceptable form. The parties did not reach any other agreements that affect the four pending and contested matters set out above.

THE PLAINTIFFS' POSITION ON THE CONTESTED MATTERS

As a preliminary matter, Plaintiffs feel it is imperative to address two overarching issues as to why the case is stalled in discovery. The solution to the problem cannot be designed without an accurate diagnosis of the problem. First, as Plaintiffs have objectively demonstrated

in the context of their opposition to Defendants' motion for sanctions (which Defendants filed by surprise and never held a meet and confer), as well as Plaintiffs' prior opposition to Defendants' motion to compel responses to the Questionnaires (in which Defendants treated the Plaintiffs as fungible categories but have yet to meet with Plaintiffs to discuss whether *specific Plaintiffs'* Questionnaires were answered *to the best of their ability as opposed to Defendants' subjective satisfaction*), Defendants have yet to meet and confer in good faith on anything in this case. The parties are not making progress because the Defendants have flaunted the rules without consequence.

Most recently, as directed by the Court at the April 7 status conference, Plaintiffs sought on April 17, 2009 to meet and confer on the selection of test Plaintiffs. In preparing for this meeting, Plaintiffs did extensive work to review the Questionnaire responses in order to attempt to get Defendants to move from their position of insisting that every single Plaintiff had to have completed every single question to Defendants' satisfaction in order for that Plaintiff to be considered by Defendants as a test Plaintiff. In the meet and confer, Plaintiffs' provided Defendants with one concrete example, Questionnaire No. 49, to show that Defendants' rejection of that Plaintiff because he did not check his location on a map was not reasonable because he did provide his full address. Defendants refused to budge on this or any other approach and continue to insist that the test Plaintiffs must be selected from the very small group of 169 Plaintiffs (out of an original total of 3,292 Plaintiffs, 2,463 of whom submitted a Questionnaire) that have satisfied DynCorp's subjective standard for completeness. Not only is Defendants' approach contrary to Judge Roberts' clear agreement with Plaintiffs that they could only respond with what they knew and were *not* subject to dismissal if their responses did not "satisfy" DynCorp, but it is not workable as a practical matter. Defendants' utter refusal to offer any

alternatives except “our way or the highway” is the opposite of the conciliatory approach that is demanded of a good faith meet and confer process. *See, e.g., Campbell v. Microsoft Corp.*, No. Civ.A.04-2060, 2006 WL 463263, at *2-3 (D.D.C. Feb. 24, 2006) (Roberts, J.).

The second major impediment to progress is that Defendants appear to believe that the rules apply at a heightened level to Plaintiffs, but not at all to DynCorp. Defendants spent an enormous amount of time and resources of the parties and the Court to force Plaintiffs to submit 2,463 Questionnaires with an extremely tight deadline. Plaintiffs did in fact complete this process despite challenges of having thousands of illiterate or barely literate clients who live in a remote part of the rainforest of Ecuador that is now dangerous due to an influx of armed thugs from the Colombian civil conflict. Rather than acknowledge that, as a practical matter, it is beyond reasonable to expect that some or even many of the Questionnaires would not have every question answered completely given these challenges, and that Plaintiffs can only respond to the best of their ability based on personal knowledge, Defendants have instead sought to hold these Plaintiffs to an unreasonable, mechanical and subjective test of whether every question was answered to DynCorp’s satisfaction, not whether DynCorp has sufficient information to defend the allegations.

At the same time that Defendants seek to apply the highest possible standard to Plaintiffs’ responses to discovery, DynCorp takes the position that it is not bound to the discovery rules and need not even comply with deadlines for producing documents, the subject of Plaintiffs’ pending Motion to Compel. DynCorp is similarly entrenched in other obstructive discovery positions, such as refusing to agree to any schedule at all for the production of documents; refusing to identify certain fact witnesses (*e.g.*, pilots) absent a showing of need by Plaintiffs and consent by the Department of State; and refusing to participate in any depositions in Ecuador unless

Plaintiffs can show that the deponents are entirely unable to travel to the United States.

Indeed, if in the extra four months that Defendants have unilaterally extended their deadline to produce documents under Fed. R. Civ. P. 34, with no end in sight as to when that initial production will be completed, Defendants had met and conferred in good faith with Plaintiffs on specific concerns with specific Questionnaires, Plaintiffs could have addressed any legitimate issues and supplemented their responses to the Questionnaires. Instead, the parties remain at loggerheads with DynCorp refusing to work with Plaintiffs on a process to move forward and then causing additional delay by asserting that DynCorp has no deadlines in the discovery process. DynCorp has so far accomplished its clear objective – delay and prevent a trial.

Plaintiffs' Specific Position on the Pending Motions.

The solution to moving the case forward is for the Magistrate Judge to hear argument at the scheduled May 5 hearing and rule on the two pending discovery-related motions: Plaintiffs' Motion to Compel Production of Documents and for Sanctions and Defendants' Motion for Sanctions. Under Local Civil Rule 72.2 (a), the Magistrate Judge is empowered to resolve these pretrial discovery issues.

As Plaintiffs demonstrate in their briefing on these discovery issues, their objective with respect to these two motions is to require DynCorp to participate in the discovery process in good faith. The legal contortion of DynCorp refusing to meet and confer in good faith to address issues of Plaintiffs' responses to discovery, but then asserting that DynCorp is not bound by the discovery rules at all, must stop for this case to proceed on a reasonable schedule.

As to the other two pending issues, selection of test Plaintiffs and the joint dismissal motion, it is the test Plaintiff issue that is urgent and that is preventing movement of the case.

Once the test Plaintiffs are selected, the case can be prepared for trial, and the claims of the remaining plaintiffs can be stayed pending the results of the first trial. Plaintiffs urge the Magistrate Judge to require DynCorp to meet and confer in good faith to agree on the test Plaintiffs. Further, the Magistrate Judge should make clear that DynCorp's failure to offer any new proposals or solutions besides their original intractable position that the test Plaintiffs must come from DynCorp's list of 169 Plaintiffs who completed the Questionnaire to DynCorp's "satisfaction" will result in sanctions, including that Plaintiffs' proffered 20 test Plaintiffs will be selected as the test group. The parties are in the best position to select the test Plaintiffs, and could have done so long ago if DynCorp felt in any way compelled to meet and confer in good faith as the rules require.

With respect to the pending issue of dismissals, as Plaintiffs urged in their initial submission to the Joint Motion, the issue is not ripe for consideration absent a person-by-person discussion of whether, taken as a whole, a specific Plaintiff's Questionnaire response is adequate because that Plaintiff responded as fully as possible based on her personal knowledge. In the event that a specific Questionnaire does not meet this standard, that Plaintiff must be given the opportunity to supplement. Again, as these Plaintiffs will not be part of the first trial group, this process could be conducted on a parallel track without effecting completion of discovery and trial for the first test group.

Plaintiffs' Statement of Other Pending Discovery Issues.

At the April 17 meet and confer, Plaintiffs informed DynCorp that they will notice five third-party witnesses for depositions in Quito, Ecuador, and sought to coordinate scheduling. Defendants stated that the depositions must be taken in the United States. They indicated that they would consider Quito depositions only upon proof that a specific deponent could not get a

U.S. visa, and even then they might object. Plaintiffs' position is that Fed. R. Civ. P. 28 (b) specifically allows depositions in a foreign country. Most of the third party witnesses, not to mention the Plaintiffs, do not have passports, and will never get a visa to the U.S., so it would cause unnecessary delay and expense to get everyone passports, apply for visas, and six months from now (with a discovery deadline looming) get a rejection. Further, it is cost-effective for a few lawyers to go to Quito to depose numerous witnesses, rather than bringing all the witnesses to the U.S. (even if we could). The cost issue is a significant factor when, as here, Plaintiffs are essentially indigent. *See Timblo v. Rhode Island Ins. Co.*, 16 F.R.D. 563, 565 (S.D.N.Y. 1954).

Finally, there are other options for Defendants if counsel do not wish to travel to Quito, including video depositions. *See Fed. R. Civ. P. 30 (b)(4)*. Indeed, Courts routinely allow or order video depositions. *See Connell v. City of New York*, 230 F. Supp. 2d 432, 436 (S.D.N.Y. 2002); *Abdullah v. Sheridan Square Press, Inc.*, 154 F.R.D. 591, 592 (S.D.N.Y. 1994); *Dalmady v. Price Waterhouse & Co.*, 62 F.R.D. 157, 158 (D. P.R. 1973); *Leist v. Union Oil Company of California*, 82 F.R.D. 203, 204 (E.D. Wis. 1979).

Plaintiffs intend to notice these depositions in Quito. It is likely that Defendants will object and seek a protective order. It would be helpful to get some preliminary guidance from the Magistrate Judge. Defendants' refusal to work with Plaintiffs on a reasonable solution to taking depositions in a case in which most of the witnesses reside in Ecuador is just one more example of their refusal to conduct discovery in good faith. As the Ninth Circuit wisely noted in *Hauser v. Farrell*, "[o]bstructive refusal to make reasonable [discovery] accommodation . . . not only impairs the civility of our profession and the pleasures of the practice of law, but also needlessly increases litigation expense to clients." 14 F.3d 1338, 1344 (9th Cir. 1994), *rev'd on other grounds*, *U.S. SEC. v. Fehn*, 97 F.3d 1276 (9th Cir. 1996).

THE DYNACORP DEFENDANTS' POSITION ON THE CONTESTED ISSUES

The DynCorp defendants request that the Magistrate Judge hear argument on all four of the pending contested matters at the hearing scheduled for May 5, 2009. For Item 1 (how many plaintiffs should be dismissed based on deficient Questionnaire responses) and Item 3 (the defendants' dispositive motion for sanctions based on plaintiffs' violation of the Court's order for expert causation statements), the defendants request that the Magistrate Judge hear the argument in order to make a "report and recommendation" to District Judge Roberts (as those terms as used in LCvR 72.3 and with the understanding that this would be done at the request of the District Judge). For Items 2 (the procedure for selection of the "first phase trial group") and Item 4 (the plaintiffs' motion to compel discovery), the defendants request that the Magistrate Judge rule on these matters pursuant to LCvR 72.2 (with the parties' right to later object to such rulings in accordance with that Rule).

As the Court recognized during the April 7, 2009 status conference, the issues raised in the four pending motions are inextricably intertwined, so that resolution of any one motion turns at least in part on consideration of the other motions. For example, the Court's consideration of the parties' proposals regarding the selection of test plaintiffs necessarily requires the Court to address defendants' arguments for sanctions and for dismissals of the individual plaintiffs due to their persistent violations of the Court's orders issued over the last 17 months, requiring that plaintiffs provide the *prima facie* basis for their claims. Resolution of plaintiffs' motion to compel, likewise, requires the Court to determine whether plaintiffs' should be allowed, through their contumacious conduct, to secure a *de facto* reversal of the Court's express directive that plaintiffs provide the *prima facie* bases for their claims prior to discovery and not after a fishing expedition through the U.S. State Department's "Plan Colombia" records. Unless and until the

four pending motions are addressed in their entirety, this litigation cannot proceed, if it is to proceed at all, along the path the Court ordered back in November of 2007.

In their section of this Joint Status Report, the plaintiffs raise a new issue about their stated desire to notice third-party depositions in Ecuador. When this subject was discussed at the April 17, 2009 “meet and confer,” the plaintiffs refused to identify the names of the third-party witnesses they wish to depose, making difficult any further discussion about such proposed witnesses. There is no pending motion about such possible depositions in Ecuador and defendants are unable to brief or otherwise address this issue at this time.

In contrast, the four pending matters described above are fully briefed and two are dispositive in nature. There is no need for the defendants to summarize here the legal arguments and factual realities set out in those motions and briefs. The DynCorp defendants respectfully recommend that all four matters be heard by the Court at the May 5th hearing.

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Respectfully Submitted:

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