

would not know about such matters, and even if he did, it would not change what Bafana will say during his testimony.

Moussaoui also claims that Abu Zubaydah and Bin al-Shibh will be able to explain why the defendant was in Malaysia, but this does not merit any delay of the deposition. First, the defendant is the person who is in the best position to know why he went to Malaysia, and he will have the opportunity to use that knowledge when he cross-examines the witness. Second, even if Abu Zubaydah and/or Bin al-Shibh knew about Moussaoui's motives for traveling to Malaysia, which again is pure speculation, there is no reason this changes what Bafana would say at his deposition, particularly since Bafana will be testifying primarily to what the defendant said and did while he was in Malaysia, not to what motivated him to go to there.²

Finally, the defendant contends that because, he asserts, the Government's case is circumstantial, Abu Zubaydah and Bin al-Shibh must be interviewed before the Bafana deposition so he can develop his defense to prove that he is "not linked to 9/11." This utterly fails to justify the requested delay because the defendant's ability to develop his defense that he is "not 9/11" is something that he can do independent of the deposition of Bafana, and, in fact, something he can do at trial when he has the opportunity to present his own witnesses.

Standby counsel, who filed their motion only after the defendant filed his motion, claim

² On this score, it is important to emphasize that Bafana is not alleged to have been a part of the plot that resulted in the attack on September 11, and we do not believe that Bafana will testify that he knew or ever met Abu Zubaydah or Bin al-Shibh. In fact, as noted in the FBI 302s of the Bafana interviews that were provided to the defendant and standby counsel, Bafana did not identify photographs of either Abu Zubaydah or Bin al-Shibh.

that they need to review the discovery (including classified discovery)³ for any reference to Mr. Bafana (Mem. at 1).⁴ Thus, they suggest, because the Court has continued the trial until June 2003, there is no reason not to delay the deposition. As noted in the *ex parte* submission, there is a valid reason to avoid delay of the deposition. Beyond this, standby counsel's claim for time to review the discovery does not justify a delay of four months in the deposition. When the Government filed its motion to depose Bafana on September 17, 2002, it provided the defendant and standby counsel copies of the FBI 302s that detail the information that Bafana has provided to the United States Government. While important to this case, the information provided by Mr. Bafana about the defendant is not complicated or voluminous. Moreover, because these reports were provided nearly two months before the deposition was to take place, both the defendant and standby counsel were provided with the Jencks Act materials,⁵ far before they would have received them had Bafana been a live witness at the trial.⁶ Thus, the defendant and standby counsel have had more than ample time to review the discovery (including the classified

³ The classified discovery issues, some of which were raised yesterday, will be addressed in a separate, classified filing.

⁴ Because we expect the defendant to be conducting the cross-examination, it is unclear how much preparation time standby counsel require.

⁵ The FBI 302s, of course, are not Jencks Act materials, because they are statements of the agent and not of Bafana. Nevertheless, we have provided them and before even Jencks Act materials would have been produced.

⁶ The Government also provided the documents it had in its possession that have been obtained from ██████████, thus providing sufficient time for standby counsel to review these materials and conduct any investigation it wishes.

discovery) for information regarding Mr. Bafana.⁷ Therefore, the motions should be denied, and the deposition should take place on October 30, or as soon thereafter as the technical arrangements can be made.⁸

Further, based on some of the difficulties that the parties experienced during the videotaped deposition of [REDACTED], we respectfully request that the Court preside over the deposition of Bafana. As the Court may recall, the Government, the defendant, and standby counsel were compelled to engage in several conference calls with the Court to resolve conflicts that threatened to end the [REDACTED] deposition. Given that history, and the importance of the Bafana deposition, we respectfully propose that the [REDACTED] of Mr. Bafana's testimony be made to the defendant and the Court in a courtroom, with appropriate U.S. Marshals security personnel present. Such an arrangement would permit the Court quickly to resolve any objections or conflicts that arise during the deposition and it would provide an appropriate and technically feasible venue from which the defendant could participate in the deposition.⁹

⁷ Because the trial has been delayed for six months, the defendant and standby counsel can delay review of other discovery materials unrelated to Mr. Bafana and focus their efforts to prepare for the deposition.

⁸ At the request of standby counsel, we already had agreed to delay the deposition until the first week of November (November 4), which also allowed time for the technical experts to make the necessary arrangements for the live video feed for the defendant.

⁹ Moreover, a contemporaneous ruling on the Government's objections is important to prevent Moussaoui from forcing Bafana to answer improper questions that might require answers that would jeopardize other security concerns. [REDACTED]

As with the ██████████ deposition, the Government anticipates that the defendant, acting *pro se*, will conduct the cross examination of the witness. Should standby counsel anticipate that, due to their access to classified discovery in this case, their participation in cross examination is required (as they apparently suggest in their latest pleading on the Bafana deposition), then they should file notice under CIPA. We see no relevant classified information that would be revealed in cross examining Mr. Bafana.¹⁰ Any potential use of classified information can be litigated under CIPA before the deposition is scheduled to occur.

Respectfully Submitted,

Paul J. McNulty
United States Attorney

By:

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Robert A. Spencer
Kenneth M. Karas
David J. Novak
Assistant United States Attorneys

¹⁰ As noted, standby counsel's claim to the contrary will be addressed in a separate pleading.

CERTIFICATE OF SERVICE

I certify that on October 23, 2002, a copy of the foregoing Government's Response (but not the accompanying *ex parte* submission) provided to defendant Zacarias Moussaoui through the U.S. Marshals Service and faxed and mailed to the following:

Frank W. Dunham, Jr., Esquire
Judy Clarke, Esquire
Public Defender's Office
Eastern District of Virginia
1650 King Street
Alexandria, Virginia 22314
Fax: (703) 600-0880

Edward B. MacMahon, Jr., Esquire
107 East Washington Street
P.O. Box 903
Middleburg, Virginia 20118
Fax: (540) 687-6366

Gerald Zerkin, Esquire
Assistant Public Defender
One Capital Square
Eleventh Floor
830 East Main Street
Richmond, Virginia 23219
Fax: (804) 648-5033

Alan H. Yamamoto, Esquire
108 N. Alfred Street
Alexandria, Virginia 22314
(703) 684-4700
Fax: (703) 684-9700

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Kenneth M. Karas
Assistant U.S. Attorney