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**UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF WASHINGTON
AT SPOKANE**

SULEIMAN ABDULLAH SALIM, et
al.,

Plaintiffs,

vs.

JAMES E. MITCHELL and JOHN
JESSEN,

Defendants.

NO. CV-15-0286-JLQ

**MOTION TO COMPEL IMES
AND DEPOSITIONS, AND FOR
RELIEF FROM RELATED
DEADLINES**

Without Oral Argument
December 16, 2016

I. INTRODUCTION

1
2 Plaintiffs Suleiman Abdullah Salim (“Salim”) and Mohamed Ahmed Ben
3 Soud (“Soud”), foreign nationals, allege that they were mistreated while in CIA
4 custody, and also allege numerous physical and psychological injuries resulting
5 therefrom. Given these claims, Salim and Soud acknowledge Defendants Drs.
6 James Mitchell and John Jessen’s (“Defendants”) entitlement to conduct
7 independent medical examinations (“IMEs”), though they disagree with the scope
8 of the examinations contemplated by Defendants. Defendants have retained
9 several prominent U.S.-based specialists to conduct such IMEs.

10 However, Defendants have been advised that Salim and Soud, as well as
11 Plaintiff Obaid Ullah (“Ullah”) (“Plaintiffs”), will not have the necessary visas to
12 enter the United States until at least January 2017. This inability to enter the
13 United States causes great prejudice for Defendants in light of applicable
14 deadlines, specifically Defendants’ December 12, 2016 expert disclosure deadline,
15 as well as potentially the February 17, 2017 discovery deadline. Defendants are
16 willing to wait for Plaintiffs to obtain the ability to enter the United States to
17 conduct such IMEs, as well as Plaintiffs’ depositions, but require protection against
18 potential prejudice because of the situation – a situation over which Defendants
19 have no control.

20 Defendants respectfully request that the Court: (1) compel Salim and Soud
21 to appear for IMEs and depositions in the United States no later than January 17,
22 2017; (2) compel Ullah to appear for a deposition in the United States no later than
23 January 17, 2017; (3) afford Defendants until the latter of two-weeks after an IME
24 or deposition is completed within which to produce a Fed.R.Civ.P. 26(a)(2)(B)
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1 report from each of their experts that conducts an IME; and (4) afford Plaintiffs
2 until two-weeks after service of a report from Defendants to serve a rebuttal report.

3 **II. RELEVANT FACTUAL BACKGROUND**

4 **A. Salim’s and Soud’s Injury Claims**

5 In the Complaint, Salim alleges that he experiences: “debilitating pain in his
6 jaw and teeth”; an impaired sense of taste and smell; “severe pain in his back,
7 shoulder, and legs”; and “chronic pain.” ECF No. 1 ¶115. Salim alleges that he
8 suffers from psychological injuries, including “frequent nightmares and terrifying
9 flashbacks,” and frequent spells of dizziness and confusion during the daytime. *Id.*
10 ¶116. He alleges that Defendants are liable for these injuries. *See, e.g., id.* ¶178.

11 Soud alleges that he experiences: “pain in his left leg in particular and is
12 unable to walk on it for any length of time”; rheumatism in his knees and back;
13 hearing loss in both ears; “a continuous ringing sound” in his ears; and the loss of
14 his ability to smell and taste. *Id.* ¶154. He alleges that “he continues to suffer deep
15 psychological harm.” *Id.* And Soud, like Salim, alleges that Defendants are liable
16 for these injuries. *See, e.g., id.* ¶178.¹

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19 ¹ Salim and Soud allege REDACTED
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22 These Reports are attached
23 as **Exs. B** and **C**, respectively, to the Declaration of Charrise L. Alexander
24 (“Alexander Decl.”) submitted with this Motion. Plaintiffs have designated these
25 Reports “Confidential” pursuant to the parties’ Confidentiality Agreement

B. Efforts to Schedule Plaintiffs' Depositions and Salim's and Soud's IMEs

Defendants' counsel telephoned Plaintiffs' counsel on October 13, 2016, to discuss scheduling Plaintiffs' depositions and IMEs for Salim and Soud. Alexander Decl. ¶3. During that discussion, counsel advised of Defendants' desire to conduct the depositions and IMEs during mid-late November in or around Spokane, but also advised of Defendants' willingness to conduct such activities at a mutually convenient location elsewhere within the United States. *Id.* ¶4. On October 19, Defendants' counsel again contacted Plaintiffs' counsel, this time by e-mail, to inquire about scheduling the depositions and IMEs. *Id.* at **Ex. A.**²

Plaintiffs' counsel responded on October 21, explaining that Plaintiffs had yet to obtain visas to enter the United States and that, as of that time, only one Plaintiff was awaiting a visa interview date. While Plaintiffs' counsel suggested deposition alternatives, i.e., making Plaintiffs available for deposition overseas or by videoconference, he offered no alternatives for making Salim and Soud available for IMEs. *Id.* The same day, Defendants' counsel informed Plaintiffs' counsel that Defendants were not interested in conducting the desired depositions outside of the United States and requested updates on Plaintiffs' visa efforts. *Id.*

On October 24, Plaintiffs' counsel clarified that he "never suggested that there would be any issues with [Plaintiffs'] application for U.S. entry visas," and

("Agreement") requiring that they be filed under seal. The parties are taking the steps necessary to accommodate this treatment. Plaintiffs have identified RE
DA

A to the Alexander Decl.

1 advised that the application process had begun on Plaintiffs' behalf. *Id.* He also
2 suggested that Defendants and their experts conduct Plaintiffs' depositions and
3 IMEs in Tanzania and Turkey. *Id.* The next day, Defendants' counsel again
4 declined Plaintiffs' suggestion that depositions and IMEs be conducted overseas,
5 and explained the unique difficulties of conducting IMEs in foreign countries. *Id.*

6 On October 27, Plaintiffs' counsel responded with a visa update. *Id.* He
7 advised that Plaintiffs had started the visa process in June 2016, some 9 months
8 after Plaintiffs initiated this suit; that visa interviews had been secured for two of
9 the Plaintiffs; and that he was pressing for a November interview for the third
10 Plaintiff. *Id.* Plaintiffs' counsel expressed his confidence that Plaintiffs will be
11 permitted to enter the United States prior to the discovery cutoff. *Id.* Moreover, he
12 expressed Plaintiffs' willingness "to undergo examination at a mutually agreeable
13 location in the United States, once their U.S. entry visas have been approved and
14 they are able to travel here." *Id.* Nevertheless, Plaintiffs remained insistent on a
15 foreign venue or the use of videoconferencing for the requested depositions. *Id.*³

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17 ³ This e-mail suggested that one of Plaintiffs' depositions could be conducted in
18 South Africa. While Plaintiffs have indicated potential pre-January availability for
19 IMEs and depositions in Turkey, Tanzania or South Africa, Defendants do not
20 view these locations as acceptable from a logistical (§ III(B) *infra*) and/or safety
21 standpoint (particularly given the lawsuit's allegations), e.g. Turkey currently has a
22 U.S. State Dept. issued travel warning: [https://travel.state.gov/content/passports/en/
23 alertswarnings/turkey-travel-warning.html](https://travel.state.gov/content/passports/en/alertswarnings/turkey-travel-warning.html). Nor is videoconferencing, in
24 Defendants' view, a viable alternative. It greatly impedes an examiner's ability to
25 assess a deponent's demeanor and those things occurring outside the camera's

1 To date, the parties have been unable to agree on mutually acceptable dates
 2 and locations for the IMEs of Salim and Soud (or on such examinations' scope and
 3 related testing as detailed in § III(B) *infra*), or on mutually acceptable dates and
 4 locations for Plaintiffs' depositions. It appears, based upon the representations of
 5 Plaintiffs' counsel that such depositions and IMEs can occur in the United States
 6 during the first two weeks of January. Defendants are amenable to this timing but
 7 ask for relief, at minimum, from the expert report deadline in light of the situation.
 8 Plaintiffs consent to this relief. Alexander Decl., **Ex. A** at 3.

9 **III. ARGUMENT**

10 **A. Defendants are Entitled to Conduct IMEs on Salim and Soud**

11 Fed.R.Civ.P. 35 permits this Court to order a party to submit to an IME.
 12 Specifically, it provides, in pertinent part, that “[w]hen the mental or physical
 13 condition ... of a party ... is in controversy, the court in which the action is
 14 pending may order the party to submit to a physical or mental examination by a
 15 suitably licensed or certified examiner The order may be made only on motion
 16 for good cause shown and upon notice to the person to be examined.”
 17 Fed.R.Civ.P. 35(a). The Supreme Court has held that where a plaintiff asserts a
 18 mental or physical injury, that plaintiff has placed his mental or physical condition
 19 “in controversy.” *Schlagenhauf v. Holder*, 379 U.S. 104, 117 (1964).

20 It appears, based upon the parties' communications, that they agree that the
 21 physical and mental conditions of Salim and Soud are “in controversy”, although
 22

23 _____
 24 view. Moreover, it greatly impedes spontaneity, particularly in situations like this
 25 where translation services are required.

1 they disagree about the necessary scope of such examinations and associated
2 testing. Alexander Decl. **Ex. A**. But even absent Plaintiffs' agreement, it is clear
3 that Defendants meet Fed.R.Civ.P. 35(a)'s burden. Specifically, before a court will
4 grant a motion to compel an IME, the moving party must establish the existence of
5 the Rule's requirements of "in controversy" and "good cause." *Selvar v. W.*
6 *Towboat Co.*, No. C12-349RSL, 2012 WL 5389135, at *1 (W.D. Wash. Nov. 2,
7 2012). Here, Salim and Soud have placed their physical and mental conditions at
8 the very core of this litigation; both have advanced specific allegations of physical
9 and psychological harm for which they contend Defendants are liable. *See supra* §
10 II(A). Moreover, both allege that they have undergone medical examinations
11 confirming their purported ailments. *See* ECF No. 1 ¶¶116, 154; *see also*
12 Alexander Decl. **Exs. B** and **C**. Thus, the physical and mental conditions of Salim
13 and Soud are "in controversy." *See c.f., Bonner v. Normandy Park*, No. C07-
14 962RSM, 2008 WL 624942, at *1 (W.D. Wash. Feb. 12, 2008).

15 When a defendant shows that a plaintiff's mental and/or physical condition
16 is "in controversy," courts routinely compel IMEs. *See, e.g., Selvar*, 2012 WL
17 5389135, at *2; *Bonner*, 2008 WL 624942, at *3; *Byrne v. Wash. State Univ.*, No.
18 CV-03-246 RHW, 2007 WL 5521246, at *1 (E.D. Wash. July 12, 2007).

19 Defendants currently seek to have Fed.R.Civ.P. 35 IMEs conducted by
20 several specialists to assess Plaintiffs' various purported injuries. First, Defendants
21 desire to have Salim and Soud examined by Joseph Zuckerman, a board registered
22 orthopedic surgeon. Declaration of Joseph Zuckerman, M.D. submitted with this
23 motion ("Zuckerman Decl.") ¶2, **Ex. 1**. Dr. Zuckerman envisions conducting an
24 examination of Salim, focusing on Salim's (a) hand fracture (deformity); (b) back
25

1 and knee pain; [REDACTED] and (d) shoulder problems. *Id.* ¶4.
2 For Soud’s examination, Dr. Zuckerman envisions focusing on Soud’s (a) [REDACTED]
3 [REDACTED] (b) left leg fracture from the
4 alleged gunshot; and [REDACTED]
5 [REDACTED] *Id.* ¶5.⁴

6 Second, Defendants [REDACTED] [REDACTED] [REDACTED] Joseph Carter, [REDACTED]
7 [REDACTED] Declaration of Joseph Carter, M.D. submitted along with this
8 motion (“Carter Decl.”) ¶2, **Ex. 1.** [REDACTED]

9 [REDACTED]
10 [REDACTED] *Id.* ¶4; *see also* Alexander Decl., **Ex. B** at 8.

11 Lastly, Defendants desire to have Salim and Soud examined by Roger
12 Pitman, a licensed psychiatrist. Declaration of Roger Pitman, M.D. submitted
13 along with this motion at ¶ 2, **Ex. 1.** Dr. Pitman envisions conducting
14 psychological examinations on Salim and Soud, focusing on determining the
15 existence of any claimed post-traumatic stress. *Id.* ¶ 5; *see* ECF No. 1 ¶¶116, 154;
16 Alexander Decl., **Ex. B** at 6-8.⁵

17 In light of the foregoing, Defendants propose conducting those IMEs
18 between January 2 and 17, 2017, in the United States.⁶

19 _____
20 ⁴ Some of Dr. Zuckerman’s examinations [REDACTED]
21 [REDACTED] *See* Alexander Decl.,
22 **Ex. B** at 8-9, **Ex. C** at 4.

23 ⁵ Defendants may retain additional professionals to examine Salim and/or Soud.

24 ⁶ Defendants also plan to notice all Plaintiffs’ depositions for this period given
25 Plaintiffs’ anticipated availability in the United States.

B. Salim and Soud Should be Obligated to Attend in The United States

Plaintiffs should be required to appear for IMEs in the United States. It is axiomatic that because a plaintiff is “allowed to select his or her own doctor to testify as to the plaintiff’s physical condition ... fairness dictates that the defendant have a similar right.” 8A Wright & Miller § 2234.2. Requiring Defendants’ experts to conduct IMEs overseas will present serious difficulties, as discussed *infra*. Like all other forms of discovery, the Court has discretion to determine the details of IMEs. *See* 8B Fed. Prac. & Proc. Civ. § 2234.2 (3d ed.). Defendants request that this Court order that the IMEs be conducted within the United States.

Plaintiffs initiated this action in this Court, and it is common for courts to compel plaintiffs to travel for IMEs. *See Page v. Hertz Corp.*, No. CIV 09-5098, 2011 WL 5553489, at *7 (D.S.D. Nov. 15, 2011) (finding it reasonable to require plaintiff to travel from Canada to Colorado for IME); *Wagner v. Apisson*, 2014 WL 5439592, at *2-3 (D. Utah Oct. 24, 2014) (German resident who initiated suit in Utah ordered to attend IME in Utah); *Parks v. Vincent*, No. 5:14-CV-19-TBR-LLK, 2015 WL 1534112, at *5 (W.D. Ky. Apr. 6, 2015) (proposed location of IMEs over 200 miles away was reasonable). And here, the circumstances plainly warrant ordering Salim and Soud to travel to the United States to be examined. Surely, it is unfair for Plaintiffs to avail themselves of the Court, yet burden Defendants with overseas travel to conduct requisite discovery of Plaintiffs.

Moreover, setting aside that Defendants should not be forced to bear the burden and costs associated with sending their experts around the world to conduct the IMEs, Defendants’ experts would be unable to attain licensing and/or the privileges necessary to conduct the desired IMEs outside of the United States

1 (Zuckerman Decl. ¶8; Carter Decl. ¶8), as all of the medical professionals retained
2 by Defendants are subject matter experts located within the United States.

3 In addition, Defendants’ experts believe that it would be difficult and/or
4 impossible to find sufficient facilities outside of the United States that contain the
5 necessary specialized medical equipment, including, *inter alia*: REDACTED

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7 REDACTED Zuckerman Decl. ¶6; Carter Decl. ¶5, 9. What is
8 more, Dr. Carter REDACTED

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10 REDACTED Carter Decl. ¶5-7. And Dr. Zuckerman will REDACTED

11 REDACTED Zuckerman Decl. ¶6. Thus, the
12 intensive nature of the required examinations further underscores the necessity that
13 the IMEs be conducted within the United States.⁷ Indeed, Plaintiffs have failed to
14 provide any medical records, such as x-rays or exam results to substantiate their
15 alleged injuries, therefore necessitating such extensive and invasive procedures by
16 Defendants’ experts.

17 Plaintiffs, for their part, do not resist undergoing IMEs in the United States,
18 although they disagree with the contemplated scope of such IMEs; indeed,
19 Plaintiffs “are willing to undergo examination at a mutually agreeable location in
20 the United States, once their U.S. entry visas have been approved and they are able
21 to travel here.” Alexander Decl. **Ex. A** at 5. Plaintiffs’ counsel has also made
22 assurances that, while when and whether to grant visas to Plaintiffs is within the
23 discretion of the Government, counsel is confident that Plaintiffs will be able to
24

25 ⁷ It is anticipated that other doctors retained will have similar needs and concerns.

1 lawfully enter the United States by early 2017. *Id.* Given this agreement, the
 2 Court should order that the IMEs be conducted within the United States.

3 **C. The Parties Should be Granted Relief from Their Respective Current**
 4 **Expert Discovery Deadlines**

5 Defendants seek relief from the current December 12, 2016 deadline for
 6 Defendants' expert disclosures. ECF No. 59. Specifically, they ask to be afforded
 7 until the latter of two-weeks after an IME or deposition is completed within which
 8 to produce a Fed.R.Civ.P. 26(a)(2)(B) report from each of their experts that
 9 conducts an IME.⁸ Defendants will be prejudiced unfairly if such an extension is
 10 not granted, either by being compelled to forego the IMEs to which they are
 11 entitled; to conduct those IMEs in inadequate or unsafe locations and facilities; or
 12 to conduct those IMEs with different doctors than those selected by Defendants.

13 In contrast, the requested extension does not prejudice Plaintiffs. Indeed,
 14 Plaintiffs consent to this extension, perhaps recognizing that any prejudice to them
 15 arising from the extension is because Plaintiffs waited until June 2016, at the
 16 earliest, to begin applying for U.S. entry visas. Alexander Decl. **Ex. A** at 5.
 17 Plaintiffs, in turn, ask to be afforded until two-weeks after service of an expert
 18 report from Defendants to serve a rebuttal report, and Defendants are amenable to
 19 this request. *Id.* at 3. Respectfully, good cause exists to extend the parties'
 20 respective expert disclosure deadlines as set forth in the attached proposed order.

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 23
 24 ⁸ If Plaintiffs' ability to secure entry into the United States is delayed beyond
 25 January, 2017, relief from additional deadlines may be necessary.

1 DATED this 16th day of November, 2016.

2
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CERTIFICATE OF SERVICE

I hereby certify that on the 16th day of November, 2016, I electronically filed the foregoing document with the Clerk of Court using the CM/ECF system which will send notification of such filing to the following:

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