

1 Emily Chiang, WSBA No. 50517
2 echiang@aclu-wa.org
3 AMERICAN CIVIL LIBERTIES UNION
4 OF WASHINGTON FOUNDATION
5 901 Fifth Avenue, Suite 630
6 Seattle, WA 98164
7 Phone: 206-624-2184

8 Dror Ladin (admitted *pro hac vice*)
9 Steven M. Watt (admitted *pro hac vice*)
10 Hina Shamsi (admitted *pro hac vice*)
11 AMERICAN CIVIL LIBERTIES UNION FOUNDATION

12 Lawrence S. Lustberg (admitted *pro hac vice*)
13 Kate E. Janukowicz (admitted *pro hac vice*)
14 Daniel J. McGrady (admitted *pro hac vice*)
15 Avram D. Frey (admitted *pro hac vice*)
16 GIBBONS P.C.

17 *Attorneys for Plaintiffs*

18 UNITED STATES DISTRICT COURT
19 FOR THE EASTERN DISTRICT OF WASHINGTON

20 SULEIMAN ABDULLAH SALIM,
21 MOHAMED AHMED BEN SOUD, OBAID
22 ULLAH (AS PERSONAL
23 REPRESENTATIVE OF GUL RAHMAN),

24 Plaintiffs,

25 v.

26 JAMES ELMER MITCHELL and JOHN
"BRUCE" JESSEN

Defendants.

No. 2:15-cv-286-JLQ

**PLAINTIFFS'
OPPOSITION TO
DEFENDANTS' MOTION
TO COMPEL IMES AND
DEPOSITIONS**

1 Plaintiffs Suleiman Abdullah Salim, Mohamed Ahmed Ben Soud, and
2 ObaidUllah respectfully submit this brief in opposition to Defendants’ Motion to
3 Compel IMEs and Depositions, ECF No. 97. Defendants’ motion should be
4 denied because it asks this Court for relief that it is powerless to enforce:
5 compelling the entry of Plaintiffs Salim and Ben Soud into the United States for
6 depositions and IMEs “no later than January 17, 2017.” ECF No. 97 at 1.
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9 Plaintiffs do not contest that Defendants are entitled to conduct
10 depositions and IMEs—although Plaintiffs have objections as to scope,
11 discussed below—but to date, despite diligent efforts, Plaintiffs have been
12 unable to secure visas for Messrs. Salim and Ben Soud, and the Court lacks
13 authority to direct the issuance of visas. But whether the government will grant
14 Plaintiffs entry, and whether it will do so by January 17, 2017, as Defendants
15 demand, is beyond Plaintiffs’ control.
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19 Meanwhile, Plaintiffs have apprised Defendants of the situation and
20 proposed alternative arrangements that do not require Plaintiffs’ entry into the
21 United States. Defendants have flatly refused; their lack of justification and
22 obstinacy on this point reflects a transparent attempt to make a discovery
23 problem insoluble to avoid a trial on the merits. For these reasons, and because
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1 Plaintiffs take issue with the scope of Defendants’ proposed IMEs, Plaintiffs
 2 object to Defendants’ motion to compel.¹
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4 LEGAL ARGUMENT

5 **A. The Court Cannot Order the Issuance of Visas and So Cannot** 6 **Grant the Relief Defendants Seek.**

7 Plaintiffs have sought—and, so far, been denied—temporary visas for
 8 Messrs. Salim and Ben Soud to enter the United States under 8 U.S.C. §§
 9 1101(a)(15)(B), 1184(b). *See* Pedersen Dec. at 3-5 (Exhibit 1). Although an
 10 applicant denied a visa may re-apply as many times as he can afford, the
 11 decisions of consular officers are insulated from judicial review or direction. *Id.*;
 12 *see also Kleindienst v. Mandel*, 408 U.S. 753, 766 (1972) (“The power of
 13 congress to exclude aliens altogether from the United States . . . and to have its
 14 declared policy in that regard enforced exclusively through executive officers,
 15 without judicial intervention, is settled by our previous adjudications.”); *Wan*
 16 *Shih Hsieh v. Kiley*, 569 F.2d 1179, 1181 (2d Cir. 1978) (“It is well settled that
 17 the judiciary will not interfere with the visa-issuing process.”).
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 23 ¹ Defendants’ motion does not concern trial. Even if Plaintiffs cannot gain entry
 24 to the U.S. before the close of discovery, they may yet acquire visas before trial,
 25 as occurred in *Al Shimari v. CACI Premier Tech*, 840 F.3d 147 (4th Cir. 2016).
 26

1 Because it is the government that solely controls Plaintiffs' entry to the
2 United States, this Court cannot grant Defendants' motion because it "should not
3 issue an order that it cannot enforce." *SI Handling Systems, Inc. v. Heisley*, 753
4 F.2d 1244, 1266 (3d Cir. 1985); Wright, Miller, & Kane, Fed. Practice &
5 Procedure Civil 2d § 2945 (3d ed. 2016) (courts abstain from "futile gesture" of
6 issuing unenforceable order); accord *In re Estate of Ferdinand Marcos Human*
7 *Rights Litig.*, 94 F.3d 539, 545 (9th Cir. 1996) ("A court should not issue an
8 unenforceable injunction[.]"); *Cronkhite v. Kemp*, 741 F. Supp. 822, 827 (E.D.
9 Wa. 1989) (Quackenbush, J.) (refusing to impose relief that would "render[] [its]
10 decision an empty gesture"). Indeed, Article III of the Constitution prohibits
11 issuance of an unenforceable order since "an unenforceable order is no order at
12 all," *Dupuy v. Samuels*, 465 F.3d 757, 759 (7th Cir. 2006) (Posner, J.) (internal
13 quotation marks omitted), and is thus "tantamount to an advisory opinion." *City*
14 *of L.A. v. Lyons*, 461 U.S. 95, 129 n.20 (1983) (Marshall, J., dissenting); accord
15 *N.L.R.B. v. Globe Sec. Servs., Inc.*, 548 F.2d 1115, 1118 (3d Cir. 1977) (same).
16 In sum, this Court simply cannot grant the relief that Defendants seek.
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23 **B. Despite Diligent Efforts, Plaintiffs Cannot Assure Admission of**
24 **Messrs. Salim and Ben Soud.**

25 Plaintiffs have made extraordinary efforts to secure visas for all three
26 Plaintiffs. Plaintiffs filed a visa application and paid the fee for Mr. Salim on

1 June 18, 2016, even before this Court issued its Scheduling Order of July 8, ECF
2 No. 59.² *See* Watt Dec. at 5 (Exhibit 2). Plaintiffs then filed applications and
3 submitted fees for Messrs. Ben Soud and ObaidUllah on October 27, 2016,
4 shortly after receiving notice from Defendants' counsel of requests for IMEs and
5 depositions. *See* Watt Dec. at 10, 14.
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8 For all three Plaintiffs, counsel (1) retained specialized attorneys from the
9 office of Maggio + Kattar to assist them in the effort to obtain visas; (2)
10 prepared and provided letters to consular offices explaining Plaintiffs' purpose
11 in seeking admission to the United States; (3) made copies of the Scheduling
12 Order in this case, ECF No. 59, available to consular officers in interviews; (4)
13 sought assistance from the government (through its counsel Andrew Warden and
14 State Department officials); and (5) travelled to Dar es Salaam, Tanzania, and
15 Istanbul, Turkey to prepare Plaintiffs and personally escort Mr. Salim to his
16 interview. Watt Dec. at 5-15.
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22 ² Plaintiffs filed first for Mr. Salim out of concern that he might have the most
23 difficulty obtaining a visa because of his country of origin and issues stemming
24 from his severe post-traumatic stress disorder, including his anxiety in interview
25 situations (because they resemble interrogations). *See* Watt Dec. at 5.
26

1 In the case of Mr. ObaidUllah, these efforts were successful; he was
2 issued a visa on November 20, 2016, and his deposition is in the process of
3 being scheduled. *See* Watt Dec. at 15. In the cases of Messrs. Salim and Ben
4 Soud, initial interviews resulted in visa denials, and counsel for Plaintiffs
5 responded in both cases by (1) immediately re-applying and re-submitting the
6 necessary fees; (2) seeking, through Maggio + Kattar, an explanation of the
7 basis for denial; (3) providing additional letters describing the purpose of
8 Plaintiffs' travel to the consulates; and (4) arranging travel for Plaintiffs to
9 attend second interviews. Watt Dec. at 7-10, 13. Mr. Salim's second interview
10 resulted in a second denial on November 29, 2016, of which Plaintiffs promptly
11 advised Defendants. Mr. Ben Soud's second interview is scheduled for
12 December 5, 2016.³ Counsel will continue to seek visas for both Plaintiffs while
13 also actively pursuing other options, including, for example, parole requests to
14 participate in civil legal proceedings. *Id.* at 13.

15 Whether the government will grant Plaintiffs entry, and whether it will do
16 so by January 17, 2017, as Defendants demand, is uncertain and beyond
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23 ³ In light of these recent denials, Plaintiffs do not oppose that portion of
24 Defendants' motion extending the time for filing pertinent expert report, and
25 replies thereto.
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1 Plaintiffs’ control. Counsel’s significant efforts to gain visas remain ongoing
2 and may yet bear fruit, but as Plaintiffs have consistently stated to Defendants, it
3 is necessary to consider alternative arrangements for IMEs and depositions.
4

5 **C. Defendants Have Not Demonstrated that Plaintiffs’ Proposed**
6 **Alternatives Would Be Prejudicial.**

7 Plaintiffs have repeatedly proposed to Defendants the alternatives of
8 conducting depositions by videoconference or overseas, and of conducting IMEs
9 overseas—in Johannesburg, South Africa for Mr. Salim, and in Istanbul,
10 Turkey, for Mr. Ben Soud. Watt Dec. at 4. These alternatives are entirely proper.
11

12 Federal Rule of Civil Procedure 30(b)(4) empowers Courts to order
13 depositions “by telephone or other remote means,” and courts of the Ninth
14 Circuit have recognized that videoconference depositions “tend to be . . .
15 effective and efficient[.]” *Lopez v. CIT Bank, N.A.*, 2015 WL 10374104, at *2
16 (N.D. Cal. Dec. 18, 2015). Accordingly, a request to conduct a deposition by
17 remote means “should be granted absent a showing of prejudice to another
18 party.” *Clinton v. Cal. Dep’t of Corr.*, 2009 WL 210459, at *4 (E.D. Cal. Jan.
19 20, 2009). And courts have specifically found videoconference depositions
20 appropriate where the plaintiffs were denied visas to enter the United States. *See*
21 *Lainez v. City of Salinas*, No. 14-04311, 2016 U.S. Dist. LEXIS 57622 (N.D.
22 Cal. Apr. 29, 2016) (finding it appropriate “to excuse Plaintiffs from attending
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1 depositions in this district [where] Plaintiffs could not legally attend any such
2 depositions at this time and it is plausible, if not certain, that future visa
3 applications would be rejected.”); *Farahmand v. Local Properties, Inc.*, 88
4 F.R.D. 80, 83-84 (N.D. Ga. 1980) (ordering overseas deposition of plaintiff
5 whose was denied a U.S. visa). *See also Baraz v. United States*, 181 F.R.D. 449,
6 452 (C.D. Cal. 1998) (foreign plaintiffs “are usually deposed where they
7 reside—i.e., courts rarely require them to return to the United States to have
8 their depositions taken”).
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12 IMEs are governed by Rule 35, which “[c]ourts have interpreted . . . as
13 giving the court broad discretion regarding the terms and conditions of the
14 physical examination.” *Mansel v. Celebrity Coaches of Am., Inc.*, 2013 WL
15 6844720, at *1 (D. Nev. Dec. 20, 2013) (citation and quotation marks omitted);
16 *see also* 8B Fed. Prac. & Proc. Civ. § 2234 (3d ed.) (“The trial court has
17 extensive discretion in determining the details of the examination.”). Although
18 the general rule is that plaintiffs travel to the forum in which they chose to bring
19 suit, a plaintiff can overcome this rule through “specific evidence demonstrating
20 an inability to travel.” *Mansel*, 2013 WL 6844720, at *2; *see also Prado v.*
21 *County of Siskiyou*, 2009 WL 1657537, at *2 (E.D. Cal. June 12, 2009)
22 (assessing proof of inability to travel in determining proper location of IME).
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1 Here, Plaintiffs have provided specific facts demonstrating an inability to
2 travel for IMEs; indeed, Defendants do not and could not contest that Messrs.
3 Salim and Ben Soud, in spite of their extraordinary efforts, are presently unable
4 to enter the United States. *See Feng Wang v. A & W Travel, Inc.*, 130 A.D.3d
5 974 (N.Y. App. Div. 2d Dep't. 2015) (holding court erred in ruling against
6 plaintiff who demonstrated that traveling to the United States for IME would
7 cause undue hardship, given that his application for a visa had been denied).
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10 Defendants argue that they will be prejudiced by videoconference
11 depositions because they “impede[] an examiner’s ability to assess a deponent’s
12 demeanor and greatly impede[] spontaneity.” ECF No. 97 at 4 n.3. Such
13 vague assertions, unsupported by authority, do nothing to undermine the
14 reasoned decisions holding deposition by videoconference an effective
15 substitute. Nor do Defendants offer any response to Plaintiffs’ suggestion of
16 conducting depositions abroad, ECF No. 97 at 4 n.3, for which, as the Court
17 knows, they would be fully indemnified.
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21 As to IMEs, Defendants rely principally on the declarations of Drs.
22 Joseph Zuckerman and Joseph Carter, ECF No. 97 at 9, who assert that their
23 IMEs cannot be conducted abroad because of the equipment required and the
24 inability to obtain licensing or privileges at international hospitals. Zuckerman
25 Dec. at 2; Carter Dec. at 2. These assertions are baseless. The equipment
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1 required is of a garden-variety: x-ray, CT scans, MRI machines, and the like.
2 Zuckerman Dec. at 1-2; Carter Dec. at 1-2. Both Istanbul and Johannesburg are
3 major cities with world class hospitals. *See* Watt Dec. at 16-18. Defendants have
4 made no showing that facilities with the requisite equipment do not exist in
5 either city, nor does either physician offers any basis for their assertions that
6 they cannot obtain admitting privileges abroad or partner with a local physician
7 to conduct the IMEs. Zuckerman Dec. at 2; Carter Dec. at 2.

10 **D. Defendants' Proposed IMEs Are Disproportionate in Scope.**

11 As is the case with discovery generally, IMEs may be prohibited if they
12 are deemed “not proportional to the needs of the case, considering, among other
13 things, whether the burden or expense of the proposed discovery outweighs the
14 likely benefit.” 7-35 Moore’s Federal Practice–Civil § 35.04 (2016); *Fox v. State*
15 *Farm Ins. Co.*, 2016 WL 304784, at *1 (W.D. Wash. Jan. 26, 2016) (courts
16 “must limit discovery where it is ‘not proportional to the needs of the case.’”) (quoting Fed. R. Civ. P. 26(b)(1)). The testing sought by Defendants violates
17 this general principle in at least two respects.

18 First, Dr. Carter’s proposed examination, focusing on Mr. Salim’s rectal
19 injuries, is disproportionate. Mr. Salim does not allege, as noted in his
20 Objections and Responses to Defendants’ Interrogatories, Watt Dec. Exh. B, that
21 Defendants are responsible for his rectal injuries and does not seek damages

1 therefor. The burden of a highly invasive rectal examination—especially one
2 that will revisit the torture inflicted upon him—is thus unjustified.
3

4 Second, Dr. Zuckerman asserts that he intends to examine
5 thrombophlebitis (blood clot) in the leg of Mr. Ben Soud, and requires an
6 ultrasound examination and a qualified technician for the purpose. Zuckerman
7 Dec. at 1-2. But Mr. Ben Soud has neither suffered blood clotting in his legs nor
8 alleged that he has,⁴ nor has any Plaintiff claimed damages for this type of
9 injury.
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11

12 CONCLUSION

13 Plaintiffs have filed suit in the United States, but cannot guarantee their
14 admission by any set date—a circumstance common when claims are brought
15 under the Alien Tort Statute. Defendants would nonetheless have this Court
16 order Plaintiffs to appear by a particular date and, presumably, order sanctions
17 if—as expected—they are unable to do so through no fault of their own.
18 Plaintiffs have made good faith efforts to uphold their discovery obligations, and
19 Defendants should be required to do the same.
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23 ⁴ Plaintiffs offered to meet and confer with Defendants to identify the injuries at
24 issue, but Defendants refused and proceeded to file this motion. *See* Alexander
25 Dec. Exh. A at 1.
26

1 Emily Chiang, WSBA No. 50517
2 echiang@aclu-wa.org
3 AMERICAN CIVIL LIBERTIES
4 UNION OF WASHINGTON
5 FOUNDATION
6 901 Fifth Avenue, Suite 630
7 Seattle, WA 98164

/s Lawrence S. Lustberg
Lawrence S. Lustberg, admitted *pro hac*
vice
llustberg@gibbonslaw.com
GIBBONS P.C.
One Gateway Center
Newark, NJ 07102

6 Dror Ladin (admitted pro hac vice)
7 dladin@aclu.org

8 Steven M. Watt (admitted pro hac
9 vice)

9 swatt@aclu.org;

10 Hina Shamsi (admitted pro hac vice)

11 hshamsi@aclu.org

11 AMERICAN CIVIL LIBERTIES

12 UNION FOUNDATION

12 125 Broad Street, 18th Floor

13 New York, New York 10004

14 Phone: 212-519-7870

15 *Attorneys for Plaintiffs*

17 DATED: November 30, 2016

CERTIFICATE OF SERVICE

I hereby certify that on November 30, 2016, I caused to be electronically filed and served the foregoing with the Clerk of the Court using the CM/ECF system, which will send notification of such filing to the following:

Andrew I. Warden
andrew.warden@usdoj.gov

Attorney for the United States of America

Brian S. Paszamant:
Paszamant@blankrome.com

Henry F. Schuelke, III:
Hschuelke@blankrome.com

James T. Smith:
Smith-Jt@blankrome.com

Christopher W. Tompkins:
Ctompkins@bpmlaw.com

Attorneys for Defendants

/s Lawrence S. Lustberg
Lawrence S. Lustberg,
admitted *pro hac vice*
llustberg@gibbonslaw.com