

1 **BETTS, PATTERSON & MINES P.S.**
2 Christopher W. Tompkins (WSBA #11686)
3 CTompkins@bpmlaw.com
4 701 Pike Street, Suite 1400
Seattle, WA 98101-3927

5 **BLANK ROME LLP**
6 Henry F. Schuelke III (admitted *pro hac vice*)
7 HSchuelke@blankrome.com
8 600 New Hampshire Ave NW
9 Washington, DC 20037

10 James T. Smith (admitted *pro hac vice*)
11 Smith-jt@blankrome.com
12 Brian S. Paszamant (admitted *pro hac vice*)
13 Paszamant@blankrome.com
14 One Logan Square, 130 N. 18th Street
15 Philadelphia, PA 19103

16 Attorneys for Defendants Mitchell and Jessen

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

20 SULEIMAN ABDULLAH SALIM,
21 et al.,

22 Plaintiffs,

23 vs.

24 JAMES E. MITCHELL and JOHN
25 JESSEN,

Defendants.

NO. 2:15-cv-286-JLQ

**DEFENDANTS' REPLY IN
SUPPORT OF MOTION TO
COMPEL IMES, DEPOSITIONS,
AND FOR RELIEF FOR
RELATED DEADLINES
[ECF No. 97]**

Without Oral Argument
December 16, 2016

REPLY IN SUPPORT OF MOTION TO
COMPEL [ECF No. 97]
NO. 15-CV-286-JLQ

139114.00602/104248258v.1

Betts Patterson Mines
One Convention Place
701 Pike Street, Suite 1400
Seattle, Washington 98101-3927
(206) 292-9988

1 Defendants submit this Reply in further support of their Motion to Compel.

2 **I. THIS COURT HAS THE AUTHORITY TO GRANT THE MOTION.**

3 Defendants do not ask the Court to “order the issuance of visas.” Opp. at 1.
4 Rather, Defendants ask this Court to order that Plaintiffs’ depositions and IMEs are
5 to be conducted in the U.S.—*i.e.*, the forum *Plaintiffs* unilaterally selected.

6 Plaintiffs should not find it surprising that securing visas for foreign
7 individuals captured, detained and identified as “enemy combatants” by the U.S.
8 has been challenging. But the cost of Plaintiffs’ decision not to start the process
9 until eight and twelve months, respectively, after filing suit in October 2015 should
10 not be imposed on *Defendants*. The Watt Declaration concedes that: (1) Soud’s
11 visa process was not begun until October 27, 2016, ECF 111-2 ¶ 41; and (2)
12 Salim’s visa process was not begun until June 2016, and Plaintiffs did not schedule
13 his interview until November, *id.* ¶¶ 15-16, despite concerns his visa would be
14 difficult to obtain. Opp. at 4 n.2. Notably, counsel only fully divulged the status
15 of Salim and Soud’s visas on November 29—weeks *after* the Motion to Compel.

16 Plaintiffs also admit there is a general rule requiring plaintiffs to travel to the
17 forum in which they chose to sue, *id.* at 7, and continue to seek visas for Soud and
18 Salim. *Id.* at 5. This Court thus has the authority to grant the Motion to Compel;
19 indeed, the *Al Shimari v. CACI Premier Tech* court granted very similar relief. *See*
20 Case No. 1:08-cv-827, ECF No. 205 (E.D. Va. Feb. 14, 2013). Plaintiffs made the
21 choice to file suit in the U.S. and not to pursue a valid way to enter the country;
22 Plaintiffs should bear any costs, including delay, attendant to that decision.

1 **II. PLAINTIFFS’ PROPOSED ALTERNATIVE LOCATIONS FOR**
 2 **DEPOSITIONS AND/OR IMES ARE UNDULY PREJUDICIAL.**

3 Plaintiffs’ proposed international IME locations are unacceptable from a
 4 safety, cost and/or logistical standpoint. Turkey is currently under a travel warning
 5 from the U.S. State Department due to increased threats from terrorist groups. *See*
 6 ECF 97 at 4; [https://travel.state.gov/content/passports/en/alertswarnings/turkey-](https://travel.state.gov/content/passports/en/alertswarnings/turkey-travelwarning.html)
 7 [travelwarning.html](https://travel.state.gov/content/passports/en/alertswarnings/turkey-travelwarning.html). The threat is even greater here—given that Defendants are
 8 accused of torturing multiple foreign detainees labeled by the U.S. as “enemy
 9 combatants,” ECF 105 at 2-4, and the other travelers would be attorneys or doctors
 10 working on Defendants’ behalf. *See* [http://time.com/4508921/turkey-syria-isis-](http://time.com/4508921/turkey-syria-isis-terrorism)
 11 [terrorism](http://time.com/4508921/turkey-syria-isis-terrorism) (U.S. Consulate warns of terror threats against American hotels); *see also*
 12 [http://fox13now.com/2016/10/29/turkey-us-orders-istanbul-consulate-staff-](http://fox13now.com/2016/10/29/turkey-us-orders-istanbul-consulate-staff-families-to-leave-due-to-terrorism-threats/)
 13 [families-to-leave-due-to-terrorism-threats/](http://fox13now.com/2016/10/29/turkey-us-orders-istanbul-consulate-staff-families-to-leave-due-to-terrorism-threats/) (U.S. orders Istanbul consulate staff
 14 families to leave the country due to terrorism threats).

15 What is more, Defendants’ experts are all practicing doctors and experts in
 16 their respective fields. Sworn statements regarding their perceived difficulty in
 17 obtaining licensing/access to appropriate facilities to conduct IMEs in other
 18 countries is more than sufficient to elucidate these issues for the Court.¹ ECF 97 at
 19 9. Tellingly, Plaintiffs offer nothing more than generic, contrarian statements
 20 about the purported efficacy of using foreign facilities. *Opp.* at 8-9. But in so
 21 doing, Plaintiffs try to turn this issue on its head. It is not Defendants’ burden to

22 ¹ Although such sworn statements are alone sufficient, Dr. Pitman also contacted a
 23 colleague in the UK regarding conducting IMEs there, and was informed that it
 24 was a near impossibility. Reply Declaration of Roger Pitman M.D., ¶¶ 6-8. He
 25 also attempted to reach a doctor in Istanbul, but received no response. *Id.* ¶¶ 9-10.

1 prove that there are adequate facilities/personnel in the locations Plaintiffs propose;
2 rather, *Plaintiffs* must prove such alternative locations outside their selected forum
3 are appropriate to overcome the demonstrated prejudice/difficulty in forcing
4 Defendants—and, more importantly, *their experts*—to suspend their practices to
5 travel to unsafe locales; not to mention the time/expense needed to find adequate
6 medical equipment/personnel. Plaintiffs have not and cannot make this showing.

7 Separately, the unique challenges of this case further favor holding
8 depositions in the U.S. First, Defendants merely seek to notice Plaintiffs’
9 depositions for the same time period each would be in the U.S. for IMEs. Second,
10 in addition to the issues raised above, Defendants have explained how
11 videoconference depositions are inadequate, and thus, unduly prejudicial.² Indeed,
12 Plaintiffs seek substantial physical/emotional damages, making their depositions
13 “critical.” Simply put, it “is doubtful that these critical depositions, central to the
14 case, can be effectively and efficiently taken by video conference in light of the
15 probable length of the depositions, the need for exhibits, and the burden of
16 deposing Plaintiffs’ through a translator.” *Almonacid v. Cessna Aircraft Co.*, 2012
17 WL 1059681, at *1 (D. Kan. Mar. 28, 2012). Third, Plaintiffs claim Salim suffers
18 from “severe-traumatic stress disorder, including high anxiety interview situations

19 _____
20 ² While F.R.C.P 28(b)(1) permits foreign depositions, meeting the requirements of
21 a deposition in a foreign location can create unique hardships due to additional
22 concerns over treaty issues, blocking statutes, and challenges obtaining someone to
23 administer the oath. See Craig Allely, KEY STEPS TO SUCCESSFUL FOREIGN
24 DEPOSITIONS (Dec. 1, 2016), available at [https://apps.americanbar.org/litigation](https://apps.americanbar.org/litigation/litigationnews/trial_skills/032712-tips-successful-depositions.html)
25 [/litigationnews/trial_skills/032712-tips-successful-depositions.html](https://apps.americanbar.org/litigationnews/trial_skills/032712-tips-successful-depositions.html).

1 (because they resemble interrogations).” Opp. at 4 n.2. If true, this only bolsters
2 Defendants’ need for an in-person deposition so as to observe his demeanor.³

3 III. THE SCOPE OF DEFENDANTS’ PROPOSED IMES IS PROPER.

4 Plaintiffs’ Complaint alleges a significant list of injuries. ECF 97 at 2. And
5 according to Plaintiffs’ own expert report from [REDACTED FILED UNDER SEAL]
6 (submitted *after* the Motion to Compel), Plaintiffs acknowledge that Salim needs
7 *inter alia*, “[REDACTED FILED UNDER SEAL]
8 [REDACTED FILED UNDER SEAL]

9 [REDACTED FILED UNDER SEAL]” Declaration of Jeffery Rosenthal
10 (“Rosenthal Decl.”), Ex. AA at 24, 26. Nor are Plaintiffs in a position to nit-pick
11 at the type of medical testing contemplated by Defendants’ experts. Opp. at 10.

12 Plaintiffs also claim Defendants have failed to confer on the scope of IMEs.
13 Opp. at 10 n. 4. This is disingenuous.⁴ When given an opportunity to limit and/or
14 amend the claimed injuries in their recent discovery responses, Plaintiffs removed
15 only *one allegation*—*i.e.*, Salim’s rectal injury—after admitting to being “unaware
16 of any facts that would establish the Defendants’ responsibility” for said injury.

17
18
19
20
21 ³ Courts routinely compel parties to attend depositions in the forum. *See P.Y.M.T.*
22 *v. City of Fresno*, 2016 WL 2930539, at *2 (E.D. Cal. May 19, 2016); *Jack v.*
23 *Trans World Airlines, Inc.*, 1994 WL 90107, at *1 (N.D. Cal. Mar. 4, 1994).

24 ⁴ Defendants sought clarity *before* filing the Motion, ECF 111-2, Ex. A at 3-4, and
25 [REDACTED FILED] continues to opine thereabout. Rosenthal Decl., Ex. AA at 19, 21, 26.

1 Opp. at 9; ECF 111-2, Ex. B.⁵ Given this key concession, the question becomes:
2 Where do Plaintiffs draw the line as to which alleged injuries they seek to hold
3 Defendants responsible? Soud alleges he was shot in the foot during his capture.
4 ECF 1 ¶ 118. But Defendants were not responsible or involved in Soud's capture
5 or detention. Plaintiffs should first reassess their alleged injuries under this rubric,
6 and advise Defendants what injuries in their Complaint or expert report(s) are now
7 "off the table." Defendants remain open to amending the IMEs' scope to align
8 with an updated list of injuries—should Plaintiff remove other injuries for which
9 Defendants are "not responsible." But until then, the scope of the IMEs are proper.

10 **IV. CONCLUSION.**

11 The Motion to Compel should be granted, and this Court should enter an
12 Order: (1) requiring Plaintiffs to appear for IMEs/depositions in the U.S.; and (2)
13 advising Plaintiffs failure to attend said IMEs/depositions could lead to sanctions.

14 DATED this 7th day of December, 2016.

15 BLANK ROME LLP

16
17 By: s/ Brian S. Paszament
18 James T. Smith, admitted *pro hac vice*
smith-jt@blankrome.com
19 Brian S. Paszament, admitted *pro hac vice*
paszament@blankrome.com
20 Blank Rome LLP
21 130 N 18th Street
Philadelphia, PA 19103

22 _____
23 ⁵ While Defendants will forego a rectal exam in light of this concession, it puts in
24 question the relevancy of the act allegedly resulting in such injuries; Plaintiffs have
25 not stated if they intend to present such evidence at trial. ECF 111-2, Ex. A at 4.

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

Henry F. Schuelke III, admitted *pro hac vice*
hschuelke@blankrome.com
Blank Rome LLP
600 New Hampshire Ave NW
Washington, DC 20037

Christopher W. Tompkins, WSBA #11686
ctompkins@bpmlaw.com
Betts, Patterson & Mines, P.S.
701 Pike St, Suite 1400
Seattle, WA 98101

Attorneys for Defendants Mitchell and Jessen

CERTIFICATE OF SERVICE

I hereby certify that on the 7th day of December, 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:

Emily Chiang echiang@aclu-wa.org ACLU of Washington Foundation 901 Fifth Ave, Suite 630 Seattle, WA 98164	Paul Hoffman hoffpaul@aol.com Schonbrun Seplow Harris & Hoffman, LLP 723 Ocean Front Walk, Suite 100 Venice, CA 90291
Andrew I. Warden Andrew.Warden@usdoj.gov Senior Trial Counsel Timothy A. Johnson Timothy.Johnson4@usdoj.gov Trial Attorney United States Department of Justice Civil Division, Federal Programs Branch 20 Massachusetts Ave NW Washington, DC 20530	Steven M. Watt, admitted <i>pro hac vice</i> swatt@aclu.org Dror Ladin, admitted <i>pro hac vice</i> dladin@aclu.org Hina Shamsi, admitted <i>pro hac vice</i> hshamsi@aclu.org ACLU Foundation 125 Broad Street, 18th Floor New York, NY 10007
Avram D. Frey, admitted <i>pro hac vice</i> afrey@gibbonslaw.com Daniel J. McGrady, admitted <i>pro hac vice</i> dmcgrady@gibbonslaw.com Kate E. Janukowicz, admitted <i>pro hac vice</i> kjanukowicz@gibbonslaw.com Lawrence S. Lustberg, admitted <i>pro hac vice</i> llustberg@gibbonslaw.com Gibbons PC One Gateway Center Newark, NJ 07102	

By s/ Karen L. Pritchard
Karen L. Pritchard
kpritchard@bpmlaw.com
Betts, Patterson & Mines, P.S.