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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

SULEIMAN ABDULLAH SALIM, et al.,	}	
Plaintiffs,	}	No. CV-15-0286-JLQ
vs.	}	ORDER RE: MOTION TO COMPEL
	}	MEDICAL EXAMS AND
	}	DEPOSITIONS
JAMES E. MITCHELL and JOHN JESSEN,	}	
Defendants.	}	

BEFORE THE COURT are Defendants' Motion to Compel IME's and Depositions (ECF No. 97) and Defendants' Motion to Seal (ECF No. 117). The Motion to Compel is fully briefed. Oral argument was not requested.

I. Introduction

The Complaint in this matter alleges Plaintiffs Suleiman Abdullah Salim ("Salim"), Mohamed Ahmed Ben Soud ("Soud"), and Obaid Ullah ("Ullah")(collectively herein "Plaintiffs") were subjected to psychological and physical torture as part of the Central Intelligence Agency's enhanced interrogation program. Plaintiffs are foreign citizens. Salim resides in Tanzania and Soud in Libya. Plaintiffs allege Defendants, James Mitchell and John Jessen, "are psychologists who designed, implemented, and personally administered an experimental torture program" for the CIA. (Complaint, ¶ 1).

Particularly relevant to the instant Motion to Compel, are the allegations concerning Plaintiffs' injuries. Salim alleges he continues to suffer repercussions from the torture: debilitating pain in his jaw and teeth; pain in his back, shoulders, and legs;

1 frequent nightmares/flashbacks; and other symptoms of post-traumatic stress disorder
2 (PTSD). (*Id.* at ¶ 115-116). Soud alleges he was given meager meals of poor nutritional
3 quality and during his detention his weight fell from 187 to 139 pounds. (*Id.* at ¶ 129).
4 He additionally claims to have been subjected to prolonged sleep deprivation which
5 “drove him close to madness”. (*Id.* at ¶ 131). Mr. Soud alleges he “continues to suffer
6 both physically and psychologically from the tortures he endured” while in the custody
7 of the U.S. Government. (*Id.* at ¶ 154). Rahman died while being detained. The
8 Complaint states his autopsy report listed the likely cause of death as hypothermia, with
9 contributing factors of dehydration, lack of food, and “immobility due to short chaining.”
10 (*Id.* at ¶ 164).

11 Defendants’ Motion to Compel seeks to have the court order all three Plaintiffs to
12 appear for deposition in the United States prior to January 17, 2016, and Plaintiffs Salim
13 and Soud to undergo medical examinations in the United States. (See Defendants’
14 Proposed Order at ECF No. 97-1). Plaintiffs Salim and Soud have made what appears
15 to be all reasonable efforts to obtain permission to enter the United States for their
16 depositions and examinations, but have been denied that permission by the United States
17 government. Plaintiffs oppose the Defendants’ Motion, primarily on two grounds: 1)
18 Plaintiffs contend the court cannot compel the United States to grant their entry into the
19 United States despite their willingness to enter; and 2) Plaintiffs oppose the scope of the
20 proposed medical exams.

21 **II. Discussion**

22 Defendants’ Motion to Compel argues they are entitled to conduct oral depositions
23 and medical examinations of Plaintiffs Salim and Soud in the United States. Defendants
24 oppose taking the depositions and conducting the exams outside of the United States.
25 Defendants also oppose taking video depositions. Defendants contend it would be
26 burdensome and costly for counsel and defense experts to attend depositions outside the
27 United States. However, defense counsel has previously stated the United States

1 government has been reimbursing attorneys fees and costs pursuant to a contractual
2 indemnity provision and may be obligated to indemnify the Defendants for any judgment
3 entered against them herein. Plaintiffs' Opposition Brief (ECF No. 111) sets forth the
4 efforts made by Plaintiffs to obtain entry into the United States. Plaintiff Ullah, the
5 representative of the estate of Gul Rahman, was issued a visa on November 20, 2016, and
6 his "deposition is in the process of being scheduled." (*Id.* at p. 5).

7 Salim has twice applied for a visa, attended two U.S. Consulate interviews, and
8 twice been denied a visa. Plaintiffs' counsel, Steven Watt, traveled to Dar es Salaam in
9 Tanzania to attend the visa interview with Salim. (See Declaration at ECF No. 111-2).
10 Salim first began the visa application process in June 2016, and had his second interview
11 on November 29, 2016. Plaintiff Soud began his visa application process in October
12 2016. He had his first interview at the U.S. Consulate in Turkey on November 23, 2016.
13 Plaintiffs' counsel flew to Istanbul to meet with Soud and prepare him for the visa
14 interview. Soud was denied a visa. Soud applied again, and a second interview was
15 scheduled for December 5, 2016¹. (ECF No. 111-2, ¶ 56). Plaintiffs' counsel consulted
16 with attorneys specializing in immigration law, specifically Jan Pederson of Maggio-
17 Kattar, P.C. Ms. Pederson has opined that Plaintiffs "and their attorneys have provided
18 outstanding and extraordinary documentation" in support of the visa applications. (ECF
19 No. 111-1, ¶ 12). Plaintiffs' counsel also sought assistance from counsel for the
20 Government in this matter, Andrew Warden. (ECF No. 111-2, Ex. D). Mr. Warden stated
21 via email that he had contacted the State Department and "explained to them the litigation
22 reasons for the visa applications." (See email from Andrew Warden to Dror Ladin dated
23 November 16, 2016 at ECF No. 111-2, Ex. D).

24 Federal Rule of Civil Procedure 35 provides a court "may order" a party whose

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26 ¹This interview was pending when Plaintiffs' response was filed on November 30, 2016.
27 However, as Plaintiffs have not supplemented the record, the court assumes Soud was again
28 denied admission.

1 physical or mental condition is "in controversy" to submit to a physical or mental
2 examination. A motion for such an exam requires a showing of "good cause."
3 Fed.R.Civ.P. 35(a)(2)(A). If the court orders such an exam, the order "must specify the
4 time, place, manner, conditions, and scope of the examination." Fed.R.Civ.P. 35(a)(2)(B).
5 The "good cause" and "in controversy" requirements of Rule 35 are not mere formalities.
6 *Schlagenhauf v. Holder*, 379 U.S. 104, 118 (1964). The requirements "are not met by
7 mere conclusory allegations of the pleadings--nor by mere relevance to the case--but
8 require an affirmative showing by the movant that each condition as to which the
9 examination is sought is really and genuinely in controversy and that good cause exists
10 for ordering each particular examination." *Id.*

11 The parties appear to agree a Rule 35 examination is appropriate as to Salim and
12 Soud, but disagree as to the scope. Defendants propose to have Salim and Soud
13 examined by an orthopedic surgeon. (ECF No. 97, p. 6). Defendants further propose to
14 have Salim examined by Joseph Carter, M.D., a rectal surgeon. Defendants lastly seek
15 to have Salim and Soud examined by Dr. Roger Pitman, a psychiatrist, with a focus on
16 evaluating any post-traumatic distress. (*Id.* at p. 7).

17 Defendants propose Dr. Carter "sedate Salim and conduct an endoscopy and
18 anorectal examination." (ECF No. 113-2, p. 9). This proposal strikes the court as
19 inappropriate given the allegations in this suit. Salim claims he suffered prolonged
20 physical and psychological abuse, and Defendants' suggestion he be subjected to these
21 highly invasive tests is not warranted. Plaintiffs state: "Salim does not allege, as noted
22 in his [discovery responses] that Defendants are responsible for his rectal injuries and
23 does not seek damages therefor." (ECF No. 111, p. 9-10). Therefore, those alleged
24 injuries are not at issue. Defendants' request for a highly invasive examination to explore
25 an injury not at issue in the matter *sub judice* has raised the question as to whether that
26 request was made for a proper purpose. Plaintiffs further state they "offered to meet and
27 confer with Defendants to identify the injuries at issue" (ECF No. 11 at n. 4), but

1 Defendants refused. Plaintiffs' counsel advised defense counsel that Salim's alleged rectal
2 injuries were not at issue and offered to meet and confer on November 15, 2016. (ECF
3 No. 113-1). With limited conferring, the Motion to Compel was filed on November 18,
4 2016. In Reply, Defendants state they "remain open to amending the IME's scope to
5 align with an updated list of injuries." (ECF No. 114, p. 5). The time to confer and
6 discuss the scope of the medical exams and alleged injuries was prior to filing the
7 Motion. Local Rule 37.1 states: "A motion made pursuant to Fed.R.Civ.P. 26 to 37
8 inclusive will not be heard unless the parties have conferred and attempted to resolve
9 their differences." It appears the parties exchanged some emails, but did not work
10 diligently to confer. Plaintiffs did clearly state, via email: "Mr. Salim neither alleges that
11 Defendants directly inflicted his rectal injuries, nor that Defendants' design for the torture
12 program involved the systematic infliction of such injuries." (ECF No. 111-2). Despite
13 this assertion, Defendants proceeded with filing the Motion to Compel which sought
14 highly invasive endoscope and rectal examination.

15 The parties shall confer regarding the scope of the medical exams and attempt to
16 agree. It would appear to the court that Dr. Carter will no longer be needed to conduct
17 an exam, which may facilitate the parties reaching agreement.

18 In addition to the scope of the medical exams, the parties disagree as to where the
19 depositions and exams will occur. Defendants are opposed to the depositions occurring
20 outside the United States. Salim and Soud have been unable to enter the United States.
21 Defendants do not challenge that Plaintiffs have made efforts to cause the government
22 to allow them to enter the United States for medical exams and depositions. Defendants
23 oppose video depositions. Defendants have not demonstrated video depositions would
24 be unworkable. Defendants state a video deposition impedes the ability to assess
25 demeanor and "greatly impedes spontaneity." (ECF No. 97 at n. 3). Defendants contend
26 video depositions would be further complicated by the need for a translator. (ECF No.
27 114, p. 3). Defendants concede Fed.R.Civ.P. 28(b)(1) allows for the taking of

1 depositions in foreign countries. Federal Rule of Civil Procedure 30(b)(4) allows for the
2 taking of a deposition "by telephone or other remote means." The Ninth Circuit Court
3 of Appeals has allowed depositions to be taken in Japan, and the video deposition
4 testimony to be presented at trial, in a criminal case over defendant's Constitutional
5 objection and with the defendant's liberty at issue. See *United States v. King*, 552 F.2d
6 833 (9th Cir. 1976). In so doing, the court rejected defendant's argument that "the use of
7 videotape testimony cannot provide an adequate opportunity to observe demeanor." *Id.*
8 at 841. The court acknowledged "photographic or electronic presentation is not a perfect
9 substitute for live testimony" but under the circumstances of the case such testimony was
10 allowable.

11 Here, with the United States government rejecting their request to come to the
12 United States a video deposition of Salim and Soud may be the most reasonable
13 alternative. As detailed *supra*, Plaintiffs have been diligent and have made what appears
14 to be all reasonable efforts in attempting to secure entry into the United States. Plaintiffs'
15 counsel have traveled to Tanzania and Turkey. Salim and Soud have both applied for a
16 United States visa on at least two occasions in recent months, and have been denied.
17 Although the United States Government is not a party, at issue is the CIA's enhanced
18 interrogation program, and one could find the Government has an interest in the outcome.
19 Given the Government's interest, it would be inequitable to allow the Government's
20 decision not to allow Salim and Soud to enter the country to impede this litigation. See
21 *Baraz v. United States*, 181 F.R.D. 449, 453 (C.D. Cal. 1998)("The interests of justice
22 preclude the Government from foreclosing Plaintiff's ability to be deposed with one
23 hand, and then tossing out his lawsuit for an inability to be present at deposition with the
24 other.")

25 In *Baraz*, a citizen of Iran alleged, *inter alia*, he had been assaulted and beaten
26 while in U.S. custody. The court found he had diligently attempted to gain entry into the
27 United States for his deposition and that interests of justice would be best served by

1 allowing a telephonic deposition and/or written interrogatories. 181 F.R.D. at 452.
2 Plaintiffs also cite *Farahmand v. Local Properties, Inc.*, 88 F.R.D. 80 (D. Georgia 1980),
3 where the plaintiff, a citizen of Iran, was unable to enter the United States and the court
4 ordered a videotaped deposition be taken in Germany. Defendants rely on *Almonacid v.*
5 *Cessna Aircraft*, 2012 WL 1059681 (D. Kansas 2012), where the court stated: “As a
6 general rule, a plaintiff must make himself available for examination in the district in
7 which he brought suit.” However, the court also recognized the general rule “is not
8 followed if the plaintiff can show good cause for not being required to come to the district
9 where the action is pending.” *Id.* at *1. In *Almonacid*, the impediment to appearing for
10 deposition was the financial cost of travel, which the court found was not sufficient cause.

11
12 If Plaintiffs were able to appear for deposition in the forum where the suit was
13 brought, the depositions would occur in the Spokane, Washington area. As a practical
14 consideration, nearly all counsel in this case reside on the East Coast, with many located
15 in New York, Philadelphia, and Washington D.C. Therefore a deposition in Spokane
16 would require the time and expense of traveling approximately 2,500 miles. If the
17 Defendants elect to take in-person depositions of the Plaintiffs, the parties shall confer
18 regarding whether there is mutually agreeable alternative location for the depositions and
19 exams outside of the United States in a locale where Salim and Soud may perhaps have
20 better success obtaining entry. For example, a deposition in Toronto, Canada would
21 appear to be more convenient to the parties, as it is much closer to their offices than
22 Spokane. The parties may wish to explore locations in Mexico or the Carribean. For
23 example, a cursory internet search indicates the Grand Cayman Islands allow visitors
24 from Tanzania to enter the country without a visa².

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27 ²<http://www.immigration.gov.ky/portal/page/portal/immhome/visitinghere/visas/visitorsvisas>
28 /visafreecountries (last visited December 15, 2016)

1 **III. Conclusion**

2 The parties have not adequately met and conferred regarding the scope of the
3 proposed medical exams. Defendants' initial proposed scope of exam, including highly
4 invasive endoscopic and rectal exams, was overbroad. The court finds Plaintiffs' efforts
5 to obtain entry to the country have been diligent. The court recognizes, without ruling,
6 the proposed locations of Tanzania and Turkey may not be reasonable sites for defense
7 counsel and their experts to travel for depositions. However, the court may find
8 reasonable a location within 3,000 miles of Washington, D.C., given defense counsel's
9 offices are located approximately 2,500 miles from the forum where the lawsuit is
10 pending. The parties shall confer further as to alternate locations outside the United
11 States and discuss the use of video depositions.

12 **IT IS HEREBY ORDERED:**

13 1. The court **RESERVES** ruling on Defendants' Motion to Compel IME's and
14 Depositions (ECF No. 97).

15 2. Plaintiffs Salim and Soud shall continue in good faith in further efforts to obtain
16 visas to enter the United States.

17 3. On or before **January 5, 2017**, counsel shall meet and confer regarding the
18 scope of the medical exams, alternative acceptable locations outside the United States for
19 the depositions and examinations, and the feasibility of video depositions. The meet and
20 confer session(s) shall occur either in person or via telephone.

21 4. On or before **January 9, 2017**, the parties shall file a joint, or individual, status
22 report(s), which address the outcome of the meet and confer session(s), and the current
23 status of Plaintiffs' visa applications. If the parties have not resolved their differences,
24 the court will hear oral argument at the time currently set for hearing on Defendants'
25 Motion to Dismiss: **January 19, 2017, at 10:00 a.m.** via telephone.

26 5. Defendants' unopposed Motion to Seal (ECF No. 117) pertaining to documents
27 which contain medical information about the Plaintiffs and which the parties agreed to

1 consider “confidential” during discovery is **GRANTED**. The Clerk is directed to file the
2 proposed sealed documents at ECF No. 119 under seal.

3 **IT IS SO ORDERED.** The Clerk shall enter this Order and furnish copies to
4 counsel.

5 Dated this 20th day of December, 2016.

6 s/ Justin L. Quackenbush
7 JUSTIN L. QUACKENBUSH
8 SENIOR UNITED STATES DISTRICT JUDGE
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