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December 12, 2008

VIA ECF FILING

The Honorable Owen M. Panner
U.S. District Judge
U.S. District Court for the District of Oregon
310 West Sixth Street, Room 201
Medford, OR 97501

Re: CHLQ v. Mukasey, 08-3095 (D. Or.)

Dear Judge Panner:

I write in response to the Court's December 8, 2008 Order regarding the trial schedule and witness testimony in this action.

It is now apparent that commencing trial on January 27th presents no conflict for Plaintiffs' witnesses. Dr. MacRae is fully available during that week, and Dr. Winkelman is available for at least the first two days of the trial. Defendants will entertain the possibility of taking witnesses out of order should it be necessary to accommodate whatever other scheduling difficulties may arise.

Regarding Plaintiffs' suggestion that testimony be made by phone, video, or Skype, Defendants firmly oppose any such suggestion. The Federal Rules of Civil Procedure require testimony in open court unless "compelling circumstances" require the use of alternate modes of testimony. Fed. R. Civ. P. 43(a). With respect to Plaintiffs' preferences, their situation falls well short of compelling a deviation from the settled practice of open, live court proceedings. The Advisory Committee Notes to the most recent substantive amendments to Rule 43 succinctly articulate the numerous reasons why live testimony is favored. These Notes also set forth the limited circumstances – not implicated here – in which remote testimony may be given:

> Contemporaneous transmission of testimony from a different location is permitted only on showing good cause in compelling circumstances. The importance of presenting live testimony in court cannot be forgotten. The very ceremony of trial and the presence of the factfinder may exert a powerful force for truthtelling. The opportunity to judge the demeanor of a witness face-to-face is accorded great value in our tradition. Transmission cannot be justified merely by showing that it is inconvenient for the witness to attend the trial.

> The most persuasive showings of good cause and compelling circumstances are likely to arise when a witness is unable to attend trial for unexpected reasons, such as accident or illness, but remains able to testify from a different place.

Fed. R. Civ. P. 43(a) Advisory Comm. Notes to 1996 Amendments (emphasis added).

Here, the only justification Plaintiffs offer – and it is only implied – is that Dr. MacRae lives in Brazil, which is far away from Oregon (Dr. Winkelman is available to testify in court, as Mr. Marmaduke's letter now makes apparent). Mere distance is an insufficient basis for depriving Defendants of the opportunity to confront each of Plaintiffs' witnesses, particularly in light of the fact that expert depositions are not being conducted prior to trial. Moreover, Defendants anticipate the use of many exhibits at trial, which use would be rendered significantly more difficult were a witness to appear remotely. This is all to say nothing of the technical and procedural difficulties that would arise if the Court were to indulge Plaintiffs' suggestion that the Court simply download a third-party application to its computer system.

Of much greater import, it is our understanding that the taking of testimony in Brazil for purposes of United States legal proceedings is prohibited by Brazilian law. In considering Plaintiffs' suggestions, counsel for Defendants have made inquiries into the matter and have learned that the U.S. Department of State maintains a series of circulars relating to the legal requirements of specific countries regarding U.S. judicial proceedings. The circular regarding Brazil (http://travel.state.gov/law/info/judicial/judicial_672.html) states:

> **Brazil is not a party** to the Hague Convention on the Taking of Evidence Abroad in Civil and Commercial Matters. **The United States is not a party to the evidence provisions of the Inter-American Convention on Letters Rogatory**. Brazilian authorities do not permit persons, such as American attorneys, to take depositions for use in a court in the United States before a U.S. consular officer, with the assistance of a Brazilian attorney, or in any other manner. Brazilian law views the taking of depositions for use in foreign courts as an act that may be undertaken in Brazil only by Brazilian judicial authorities. The Government of Brazil asserts that, under Brazilian Constitutional Law, only Brazilian judicial authorities are competent to perform acts of a judicial nature in Brazil. Brazil has advised it would deem taking depositions in Brazil by foreign persons to be a violation of Brazil's judicial sovereignty. Such action potentially could result in the arrest, detention, expulsion, or deportation of the American attorney or other American participants. The United States recognizes the right of judicial sovereignty of foreign governments based on customary international law and practice; See , e.g., the Restatement (Third) of Foreign Relations Law (1987). It is the State Department's understanding that the Brazilian prohibition on taking depositions by foreign persons extends to telephone or video teleconference depositions initiated from the United States of a witness in Brazil. The U.S. Embassy or Consulates in Brazil could in no way participate in, or otherwise sanction, such a proceeding.

Because the Government of Brazil asserts that only Brazilian judicial authorities are competent to perform any acts of a judicial nature in Brazil, the discussion above applies as much, if not with more force, to the taking of trial testimony as it does to depositions. For the Court's convenience, please see the attached documents from the Department of State's website. These

documents articulate in greater detail the difficulties of obtaining foreign testimony in Brazil for use in U.S. court proceedings.

While, sitting thousands of miles away in Washington, we are empathetic to the sentiment that long-distance travel is an inconvenience, live testimony is a foundational aspect of the judicial system and should not be discarded on that basis alone, especially in light of the above information provided by the Department of State. *See Obrey v. England*, 215 Fed. Appx. 621, 624, 99 Fair Empl. Prac. Cas. (BNA) 1064 (9th Cir. 2006) (in an unpublished decision, observing that Fed. R. Civ. P. 43(a) "expresses our strong preference for oral testimony in open court"); *El Hadad v. United Arab Emirates*, 496 F.3d 658, 668-69 (D.C. Cir. 2007) (affirming allowance of civil testimony-by-Internet where district court "insisted" that witness in Egypt "prove he had pursued and repeatedly been denied a visa to the United States" to testify). Defendants should be granted the opportunity to cross-examine, in court, as many of Plaintiffs' witnesses as are necessary to present the government's case. Should either Dr. Winkelman or Dr. MacRae be unavailable to testify due to their inability to travel to the United States from Brazil, their testimony should be excluded in its entirety from admission into evidence.

Respectfully submitted,

s/ Brigham J. Bowen
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(202) 514-6289
Counsel for Defendants

encl: U.S. Department of State materials:

http://travel.state.gov/law/info/judicial/judicial_672.html
http://www.state.gov/s/l/16146.htm
http://www.state.gov/s/l/16147.htm

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