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UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF WASHINGTON

SULEIMAN ABDULLAH SALIM, MOHAMED AHMED BEN SOUD, OBAIDULLAH (AS PERSONAL REPRESENTATIVE OF GUL RAHMAN),

Plaintiffs,

v.

JAMES ELMER MITCHELL and JOHN "BRUCE" JESSEN

Defendants.

No. 15-cv-0286 (JLQ)

PLAINTIFFS' RESPONSE TO DEFENDANTS' MOTIONS IN LIMINE AND REQUEST FOR JUDICIAL NOTICE

Motion Hearing:
Pretrial Conference
August 21, 2017 at 10:00am
Spokane, Washington

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I. JUDICIAL NOTICE IS INAPPROPRIATE BECAUSE 9/11 STATISTICS, VIDEOS AND IMAGES ARE INADMISSIBLE UNDER RULE 401 AND/OR 403.

As Plaintiffs have made clear both in their Response to Defendants' earlier request for judicial notice of the 9/11 statistics (ECF No. 184) and in their motion *in limine* to exclude such references (ECF No. 234), while Plaintiffs do not deny the horrific events of September 11, 2001, those facts are inadmissible. Defendants nonetheless maintain that 9/11 evidence should be judicially noticed and admitted because "the factfinder needs to be apprised *why* Defendants became involved in the HVD Program." ECF No. 231 at 4. But Defendants may elicit testimony that they were contacted after September 11th to design an interrogation program for the CIA without gruesome footage of the attacks and newspaper front pages from the next day. Evidence depicting and detailing the devastation from 9/11 will not help the jury to decide any claim or issue at trial and is, instead, an obvious invitation to return a verdict based upon "emotion, fear and revulsion," ECF No. 234 at 10–17. Accordingly, the Court should not take judicial notice of these facts. *See, e.g.*, *Keyes v. Coley*, 2011 U.S. Dist. LEXIS 59625, at *8–9 (E.D. Cal. June 2, 2011) (denying notice of irrelevant and unduly prejudicial evidence).

Defendants cite two cases in support of their argument that "courts routinely admit evidence that 'provides context for the activities at issue,'" ECF No. 231 at 4, but neither is relevant. In *United States v. Slade*, 2015 WL 4208634, at *2 (D. Alaska July 10, 2015), the court permitted only nonprejudicial evidence of Defendants' prior experience in the mining industry

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—and even then, the court excluded prejudicial background information of prior mining violations or disputes. And *Boecken v. Gallo Glass Co.*, 2008 WL 4470867 (E.D. Cal. Sept. 30, 2008), is simply inapposite: the court addressed summary judgment, which, as this Court has recognized, does not present the same concerns as evidence being presented to a jury. ECF No. 189 at 2. And the *Boecken* court did not even conduct a 403 analysis of the background evidence at issue there (which concerned walks in the park and running errands).

Finally, Defendants' suggestion that the Fox video showing the 9/11 attacks in real time provides "crucial context" for jurors who may not "personally remember 9/11 or full appreciate its impact" is both disingenuous and divorced from the applicable Rules of Evidence. Defendants' use of video and images for "impact" obviously seeks to appeal to the jurors' emotions, and to prejudice the jury against Plaintiffs. *See United States v. Layton*, 767 F.2d 549, 556 (9th Cir. 1985) (affirming exclusion of tape that included horrific screams of victims as "it is unlikely that a jury instruction could effectively mitigate the emotional impact and distracting effect of the Tape").

II. PLAINTIFFS' RESPONSES TO DEFENDANTS' MOTIONS IN LIMINE

1. The Court Should Permit the Jury to Consider Defendants' Pervasive Involvement in the CIA Program.

Defendants argue that their "continued involvement with the CIA after Plaintiffs' release is irrelevant," and that the jury should be precluded from considering Defendants' role in the CIA program after August 22, 2004. But it is well-established "later events reasonably close in time can send inferences

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backward to the event which is asserted to be a crime." *Chin Bick Wah v. United States*, 245 F.2d 274, 278 (9th Cir. 1957); *see also United States v. Ayers*, 924 F.2d 1468, 1473–74 (9th Cir. 1991) (events "reasonably close in time" can include conduct years after the offense). And here, because certain aspects of Defendants' continued involvement with the CIA shed important light on Defendants' central role as the architects of the CIA program, Plaintiffs should be permitted to introduce limited evidence and argument on these grounds.

In their briefs on summary judgment, Defendants repeatedly claimed that their role in the CIA program was extremely limited, and that they therefore could not have provided "substantial" assistance to Plaintiff's torture and abuse in the CIA program. *See, e.g.*, ECF No. 190 at 13. Defendants maintain that their "'design' of the HVD Program began and ended in July 2002 with the provision of a list of 'suggested' 'enhanced interrogation techniques.'" ECF No. 190 at 2.

Plaintiffs intend to counter Defendants' claims of minimal involvement by introducing evidence of the centrality of Defendants' role in the CIA program. Although the vast majority of this evidence concerns Defendants' actions prior to 2004, two limited categories of evidence of Defendants' post-2004 activities are relevant to establishing their central role: the scope of Defendants' continued contracts, and evidence of their ongoing development of the CIA program, which did not cease in 2004—much less end in July 2002.

In fact, Defendants have themselves acknowledged that these two specific categories of post-2004 evidence are "highly relevant" to this matter. Pet'rs' Mot. for Recons., *Mitchell v. USA*, No. 2:16-mc-00036-JLQ, ECF No. 32 at 4, 9.

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First, in seeking to compel the government "to produce its contracts with Defendants postdating 2004," Defendants argued that "[p]lainly, the terms of Defendants' contracts with the Government are highly relevant to establishing what actions the Government expected Defendants to perform." *Id.* at 9; *see also id.* at 10 (arguing "the contracts' plain relevance to the claims advanced"). The contracts indeed establish the centrality of Defendants' role from the program's inception. The proposal Defendants submitted in April 2005 states that the CIA program "has been relying heavily on the services of two independent contractors who have provided consultation and operational interrogation and exploitation capabilities *starting in March 2002*." ECF No. 195-12 at 001585 (emphasis added). It further discloses that Defendants "have been involved in the process *from the program's inception*" including through "selection and development of interrogation and exploitation techniques" and that they "have been instrumental in training and mentoring other CIA interrogators." *Id.* at 001585–86 (emphasis added). These descriptions, written by Defendants themselves less than a year after their proposed August 22, 2004 cutoff date, belie Defendants' argument that they merely proposed a list of methods.

Moreover, the very nature of the post-2004 contracts is probative of Defendants' conduct prior to the date on which those contracts were signed. *See, e.g.*, *United States v. Gibson*, 625 F.2d 887, 888 (9th Cir. 1980) ("[W]hile there is no substantial issue of motive or intent here, the subsequent conduct does tend to present a picture, the whole of which indicates guilt."). Defendants' April 2005 proposal itself explains that "Mitchell, Jessen & Associates was formed by

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the two contractors" to meet the "growing demand for expert consultation, operational interrogation and exploitation capabilities." ECF No. 195-12 at 001586. It shows that Defendants were aware that the program involved numerous prisoners, and that they successfully capitalized on its expansion through a no-bid contract. The size of the contract is itself probative: although Defendants attempted "to minimize their participation," the Court pointed out "[i]t is not credible to argue Defendants were paid $80 million dollars for suggesting some techniques the Air Force SERE program already knew about." ECF No. 239 at 36.

The second category of post-2004 evidence reveals that Defendants' design of the program did not, as they now claim, "begin and end" in July 2002, and is highly probative of Plaintiffs' claims that the program involved continuous experimentation on prisoners. Defendants have themselves described as "highly relevant" a record of their 2007 meeting with Secretary of State Condoleeza Rice that, according to Defendants' own description, included discussion of "Jessen['s] and Mitchell['s] . . . work on alternative methods for implementing sleep deprivation EIT and propose[d] courses of action." Pet'rs' Mot. for Recons. at 4 (alterations in Defendants' brief). Defendants' 2005 proposal likewise discloses that Defendants would "continue developing and refining the program," supporting the inference that they had not ceased developing and refining it in 2002. ECF No. 195-12 at 001585. Similarly, Defendant Mitchell has described how Defendants recommended in 2006 that the CIA discontinue the use of "nudity, slaps, facial holds, dietary manipulation,

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and cramped confinement," because these methods had proved "completely unnecessary" in Defendants' assessment of prisoners subjected to them. ECF No. 182-5 at MJ00022862. The jury should be permitted to consider this evidence.

Finally, Defendants state conclusorily that these relevant facts pose a danger of unfair prejudice, of confusing the jury, and of wasting time. ECF No. 231 at 7. They offer no argument on any of these points, much less a showing that would outweigh introduction of what Defendants have previously admitted is "highly relevant" information. *See United States v. Mende*, 43 F.3d 1298, 1302 (9th Cir. 1995) ("Under the terms of the rule, the danger of prejudice must not merely outweigh the probative value of the evidence, but substantially outweigh it."). Especially given the lack of any identified danger, there is no reason why any specific objection Defendants may have to specific evidence cannot be addressed at trial.

2. The Court Should Permit the Jury to Consider Defendants' Financial Interest in the CIA Program.

It is well-established that courts allow consideration of evidence from which a jury can infer what "motive must have existed" for a defendant to "enter into the hazardous business" of violating the law. *Zamloch v. United States*, 193 F.2d 889, 892 (9th Cir. 1952). As, the Ninth Circuit made clear decades ago, permissible evidence as to this question includes the existence of financial incentives. Thus, the court upheld admission of evidence suggesting that "[t]he gaining and retention of a client capable of paying large fees could have been

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the inducement" for unlawful action. *Id.* Accordingly, courts regularly allow juries to consider evidence of financial benefit resulting from a contested course of conduct. *See, e.g.*, *United States v. Reyes*, 660 F.3d 454, 464 (9th Cir. 2011) (upholding admission at trial of financial "gains," which "permitted the jury to draw a reasonable inference that [the defendant] knew what he was doing, and how the scheme operated to his benefit."); *Cohen v. Trump*, 2015 WL 3966140, at *5 (S.D. Cal. June 30, 2015) (the amount of money made was relevant as "financial evidence showing … motive"); *see also Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308, 325 (2007) ("[M]otive can be a relevant consideration, and personal financial gain may weigh heavily in favor of a scienter inference.").

Most significantly, in the specific context of aiding and abetting ATS claims, the Ninth Circuit has held that it is relevant whether "defendants obtained a direct benefit from the commission of the violation of international law." *Doe I v. Nestle USA, Inc.*, 766 F.3d 1013, 1024 (9th Cir. 2014); *see also* ECF No. 239 at 33 (citing *Nestle* and observing that "[t]he court found important" the allegation that the violation "benefitted the Defendants"). As the Court of Appeals explained, the existence of such a benefit "bolsters" the inference "that the defendants acted with the purpose" of furthering those violations. *Id.* Here, the record is replete with evidence that Defendants' financial interest in continued contracts with the CIA provided a motivation to promote their methods and theories. *See, e.g.*, ECF No. 182-2 at 133:7–20 (Rodriguez's testimony agreeing that Defendants had a "financial interest in

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continued contracts with the CIA," which affected the propriety of their role in "assess[ing] the effectiveness of enhanced techniques"). Indeed, proof that "a myopic focus on profit over human welfare drove the defendants to act with the purpose of . . . facilitating" violations of international law is "sufficient to satisfy the mens rea required of an aiding and abetting claim under either a knowledge or purpose standard." *Nestle*, 766 F.3d at 1026. And, of course, evidence of actual payment is highly relevant to establish such profits.

It is also relevant that the millions of dollars came from American taxpayers. Defendants have repeatedly argued that they should not bear any responsibility for their actions, because in their view CIA employees, not Defendants, should be on trial. But Defendant Mitchell has explicitly written that he did not want to work for the CIA as an employee, but instead "want[ed] to do some contracting," and "to start [his] own business." Ladin Decl., Exh. A at MJ00022600. That taxpayers ended up paying Defendants far more than any government employee could earn is relevant to Defendants' efforts to shift blame onto others for their own actions. *See* ECF No. 239 at 20 ("Defendants can hardly be considered to be left 'holding the bag'. They operated under a profit incentive different than that of Government employees. The Defendants and the company they formed were paid $80 million dollars.").

The reason Defendants seek to exclude evidence of the payments they earned from designing and implementing the CIA program is obvious: a jury could certainly infer that Defendants were motivated to support violations of international law by the millions of dollars in benefits that the Defendants

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received from their role in the CIA program. But this is a factual question for the jury, which must decide whether "defendants obtained a direct benefit from the commission of the violation of international law." *Nestle*, 766 F.3d at 1024. As the Ninth Circuit has repeatedly confirmed, "evidence relevant to a defendant's motive is not rendered inadmissible because it is of a highly prejudicial nature. The best evidence often is." *United States v. Parker*, 549 F.2d 1217, 1222 (9th Cir. 1977) (quotation and alteration marks removed); *see generally United States v. Patterson*, 819 F.2d 1495, 1505 (9th Cir. 1987) (exclusion under Rule 403 is "an extraordinary remedy to be used sparingly").

Finally, to the extent that Defendants are concerned that a jury would improperly base a verdict on their wealth, the proper remedy is a limiting instruction, not wholesale exclusion of evidence. For example, Defendants could request an instruction "that evidence of [their] compensation was to be used for the limited purpose of establishing a motive" and that are not liable "simply because of [their] wealth." *United States v. Quattrone*, 441 F.3d 153, 187 (2d Cir. 2006). But juries are not kept in the dark about financial incentives that exist for defendants to engage in misconduct. Instead such evidence is admitted and its "weight [i]s for the jury." *Zamloch*, 193 F.2d at 892. Defendants are free to argue that the money they earned from the CIA program played no role in their motivation. Indeed, Defendant Mitchell testified that his contract rate "is not a lot of money to a guy like me." ECF No. 176-1 at 219:12–13. It is for the

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jury to determine the weight of that statement, as well as the weight of the payments Defendants and their company received.[1]

3. The Court Should Permit the Jury to Consider Relevant Evidence of Defendants' Actions in Support of the CIA Program, Including Limited Evidence of Defendants' Treatment of Other CIA Prisoners.

Defendants argue that all evidence and argument as to other prisoners in the CIA program is irrelevant and should be excluded. ECF No. 231 at 10–12. While Plaintiffs do not intend to focus on the treatment of other prisoners, certain evidence of Defendants' actions is highly probative and not prejudicial.

A. Defendants' abuse of Abu Zubaydah is relevant to Plaintiffs' claims.

Defendants' personal use of their methods on Abu Zubaydah is an integral part of Defendants' design and implementation of the CIA program and is probative of both (1) the substantial assistance Defendants provided to the CIA program in which Plaintiffs were tortured; and (2) Defendants' knowledge and purpose in supplying that assistance. First, as the Court has held, "[a] jury could

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[1] Defendants are wrong that it is "irrelevant and improper" to consider their compensation with respect to damages. ECF No. 231 at 9. Plaintiffs have sought punitive damages, ECF No. 1 ¶¶ 173, 179, 185, and because "[a] punitive damages award is supposed to sting so as to deter a defendant's reprehensible conduct, [] juries have traditionally been permitted to consider a defendant's assets in determining an award that will carry the right degree of sting." *Bains LLC v. Arco Products Co.*, 405 F.3d 764, 777 (9th Cir. 2005).

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find the Defendants provided 'substantial assistance'" based in part on the fact that Defendants designed specific methods and "subjected Abu Zubaydah to these EITs as a way of testing them." ECF No. 239 at 35. "[T]he jury could find Defendants designed the EITs for use on foreign detainees held by the CIA, they tested the EITs on Abu Zubaydah, and they were aware EITs could be used at COBALT," establishing a "sufficient causal link between the actions of Defendants and the treatment of Salim and Soud." *Id.* at 36.

Second, Defendants' personal implementation of their methods on Abu Zubaydah establishes Defendants' firsthand knowledge of the severe physical and mental pain and suffering their methods caused, which is directly relevant to their *mens rea*. Defendants have testified that their methods are "not painful." *See, e.g.*, Ladin Decl., Exh. B at 291:17 ("I don't know that it's painful"), 361:1–2 ("Oh, it's discombobulating. It's not painful."); ECF No. 176-2 at 162:5–6 ("you know, it's more irritating than painful"). The jury should therefore be able to consider the evidence that Defendants saw firsthand the results of their methods when they inflicted them for weeks on the CIA's first prisoner. It is probative of Defendants' intent that Defendants observed that the use of their methods caused Abu Zubaydah to cry, vomit, beg, suffer uncontrollable spasms, and involuntarily shake when Defendants approached him. *See* ECF No. 178 at 20; *see also People v. Massie*, 142 Cal. App. 4th 365, 372–73 (Cal. Ct. App. 2006) (finding "ample evidence" to support finding of mens rea for torture where "defendant could obviously see the cruel and extreme pain he was inflicting").

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Moreover, as part of the jury's consideration of Defendants' acts, the jury should be permitted to consider Defendant Mitchell's admission that he himself "had a visceral reaction to the tapes" of Defendants' use of their methods on Abu Zubaydah, that he "thought they were ugly," and that he recommended they be destroyed. ECF No. 182-1 at 392:14-17. Defendants argue that Plaintiffs should not be permitted "to speculate regarding the content of the videotapes and the reason for their destruction." ECF No. 231 at 12. But no speculation is necessary: Defendant Mitchell himself called the content of those tapes—which was Defendants' infliction of their methods on Abu Zubaydah—"ugly." Jose Rodriguez likewise testified the tapes "would make the CIA look bad," and, if released, would "almost destroy the clandestine service." ECF No. 182-2 at 92:18–93:5. The jury should be permitted to consider the undisputed fact that Defendant Mitchell and Mr. Rodriguez had these reactions to the best evidence of Defendants' methods, as well as the undisputed fact that both Defendant Mitchell and Mr. Rodriguez wanted the tapes to be destroyed, and that the tapes were, in fact, destroyed. ECF No. 182-1 at 387:21–388:7. These facts are probative of Defendants' knowledge of the nature of their methods and thus go directly to their *mens rea*.

B. Evidence of Defendants' abuse of other prisoners is relevant if Defendants renew their claims of ignorance and non-involvement with non-"High Value Detainees."

If Defendants intend to argue, as they did during summary judgment proceedings, that the program they designed and implemented was limited to "High Value Detainees," the jury should be permitted to consider evidence that

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conclusively rebuts this claim. For example, the jury should be presented with CIA reports revealing that Defendant Jessen identified methods including "sleep deprivation," "stress positions," facial slap," and "body slap," as "[moderate value target] interrogation pressures" to be used "as deemed appropriate by [Jessen]." ECF No. 195-19 at 001287. And the jury should not be kept in the dark about Defendant Jessen's admission that "his duties at CIA have involved the interrogation of high and medium value terrorist targets." ECF No. 182-36 at 001047–48; *see* ECF No. 239 at 34 (finding that "the argument Defendants designed the Program only for use on HVDs is unconvincing" because, *inter alia*, Defendant Jessen "testified he worked with MVDs at COBALT"). None of these facts are prejudicial, let alone unduly prejudicial. *See United States v. Flores*, 802 F.3d 1028, 1047 (9th Cir. 2015) ("[T]he prejudice created by an admission, while severe, is not unfair."); *United States v. Blitz*, 151 F.3d 1002, 1009 (9th Cir. 1998) ("even if that evidence resulted in some prejudice (as all unfavorable evidence about a defendant does), it was not 'unfair prejudice'").

4. The Physicians for Human Rights Report is not an Exhibit.

As Defendants know, Plaintiffs have not listed the Physicians for Human Rights Report as an exhibit. *See* ECF No. 228.

5. Plaintiffs Should be Permitted to Testify about Emotional Damages.

A. Plaintiffs should not be barred from describing damage to their family relationships.

Defendants argue that Plaintiffs may not testify about any suffering endured by Plaintiffs' families. ECF No. 231 at 13. But Defendants cite no law

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suggesting that Plaintiffs should be gagged from describing, for example, the ongoing effects of their Posttraumatic Stress Disorder (PTSD) on the health of their family relationships. Indeed, that Mr. Salim and Mr. Ben Soud have experienced profound disruptions of family life because of the severe trauma they endured is relevant to *their own* claims for damages.

It is also entirely appropriate for Mr. Obaidullah to testify about the effect on his family of losing Mr. Rahman, as he did at length during the deposition Defendants conducted. In cases arising under the Alien Tort Statute, state law informs the types of damages available to a decedent's personal representative. *See Xuncax v. Gramajo*, 886 F. Supp. 162, 189–90 (D. Mass. 1995); *see also Wiwa v. Royal Dutch Petroleum Co.*, 2009 U.S. Dist. LEXIS 14883, at *43 (S.D.N.Y. Feb. 2009) ("Courts evaluating a plaintiff's statutory standing to bring third-party ATS claims look in the first instance to state law."). Under Washington law, personal representatives suing on behalf of a decedent may recover both survivorship and wrongful-death damages for certain of the decedent's relatives. *See* Wash. Rev. Code §§ 4.20.010, 4.20.020, 4.20.046(1), 4.20.060; *Rentz v. Spokane Cty.*, 438 F. Supp. 2d 1252, 1258 (E.D. Wash. 2006); *Davis v. City of Ellensburg*, 651 F. Supp. 1248, 1256–57 (E.D. Wash. 1987). Wrongful-death damages recoverable by "the personal representative of the decedent's estate" are considered "damages of the deceased," and may include "loss of love, affection, care, service, companionship, society, training and consortium that decedent would have provided to the beneficiaries." *Rentz*, 438 F. Supp. 2d at 1258. "Like a survival action, a wrongful-death action also seeks

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to vindicate the . . . rights of a *decedent*." *Id.* at 1260–61 (emphasis added). Washington law thus permits Mr. Rahman's personal representative to recover damages for losses suffered by Mr. Rahman's family following Mr. Rahman's death. Mr. Obaidullah, as personal representative, should be permitted to offer testimony as to the family's losses.

B. The scope of emotional distress caused by Defendants for which Plaintiffs may recover damages will be determined by the jury.

Defendants seek to exclude argument that Plaintiffs "are entitled to recover damages for emotional distress related to events that took place before or after their time in CIA custody, or for events while they were in CIA custody which cannot be connected to Defendants." ECF No. 231 at 14. But Plaintiffs seek damages only for pain and injuries suffered while in CIA custody, the effects of which persist today. ECF No. 1 ¶¶ 168–185. It is fundamentally uncontested that Plaintiffs Salim and Ben Soud suffer from PTSD, and this ongoing PTSD means that Plaintiffs experience emotional distress triggered by present-day events. *See, e.g.*, Report of Dr. Brock Chisholm ¶ 183 (attributing "the majority of Mr. Ben Soud's re-experiencing symptoms [of PTSD]"—precipitated by present-day events—to Defendants' methods), And the law is clear: Plaintiffs may recover for emotional distress of this kind. *See*, *e.g.*, *Mehinovic v. Vuckovic*, 198 F. Supp. 2d 1322, 1359 (N.D. Ga. 2002) (awarding damages based on finding that Plaintiffs suffer ongoing emotional pain "from the injuries they suffered as a result of torture" including "nightmares, difficulty sleeping, flashbacks, anxiety, difficulty relating to others, and feeling

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abnormal"); *see also Licea v. Curacao Drydock Co., Inc.*, 584 F. Supp. 2d 1355, 1365 (S.D. Fla. 2008) ("the extreme brutality of the Defendant's actions resulted in severe psychological damage," causing "ongoing" emotional harms).

With regard to emotional distress related to events while *within* CIA custody, Plaintiffs agree that recovery is limited to pain and injuries for which Defendants are liable. The parties disagree as to the extent of Defendants' liability for Plaintiffs' injuries, but these matters are appropriate for determination by the jury at trial. *Hilao v. Estate of Marcos*, 103 F.3d 767, 773 (9th Cir. 1996) (jury decides extent of ATS liability and damages).

6. Testimony Referencing "Torture," "CIDT," "Nonconsensual Human Experimentation," and "War Crimes" is not Unduly Prejudicial and can be Cured by an Instruction from the Court.

Both sides have agreed not to present testimony on the applicable law or the legal definitions of the terms "torture," "cruel, inhuman, or degrading treatment," "unauthorized human experimentation" or "war crimes" for purposes of the ATS. ECF No. 230 ¶ 9. Those are matters of law, as to which proposed jury instructions, to be provided by the Court, have been filed. ECF Nos. 245 and 247. Plaintiffs will not elicit testimony as to what conduct meets these definitions. ECF No. 231 at 16. But precluding Plaintiffs from even *using* such terms during a trial that is about Plaintiffs' allegations of psychological and physical torture and cruel treatment, would make the trial difficult to administer, for such terms have been routinely used both by lay witnesses and by experts, including in depositions Defendants have designated for trial. *See, e.g.*, ECF No. 176-4 (Rizzo Dep.) at 28:3–11, 30:21–31:4, 49:11–50:1, 55:14–22. To the

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extent that there is concern that these the use of terms like torture will confuse the jury or cause prejudice, this can easily be remedied by a curative instruction to the jury that the Court will define the causes of action, as was envisioned by the parties' stipulation. ECF No. 230 ¶ 9.

7. Plaintiffs' Experts Will Provide Appropriate Opinion Testimony.

A. Plaintiffs' experts may testify to the facts and data underlying their opinions.

Defendants move to preclude Plaintiffs' experts—Drs. Chisholm and Crosby, in particular—from testifying "about treatment of Plaintiffs beyond or different from the experiences to which Plaintiffs actually testify at trial." ECF No. 231 at 16. Defendants cite one example: paragraph 49 of Dr. Crosby's Report, which states, "At times, a cloth was placed around Mr. Salim's neck and he was placed against a wall and slap-punched," ECF No. 231 at 17. Otherwise, Defendants do no more than vaguely and conclusorily assert that the accounts of Drs. Chisholm and Crosby "are significantly more detailed than or different from" those of Plaintiffs Salim and Ben Soud.

Initially, Defendants are wrong about paragraph 49 of Dr. Crosby's Report—Mr. Salim testified to his experience of walling in nearly identical terms. ECF No. 195-26 at 158:22–159:1 ("I remember, also, them putting a cloth around . . . my neck and, then, they were punching me on the wall, punching."). That Mr. Salim was subjected to walling is further corroborated by CIA records. *See* ECF No. 183-2 at 001567; ECF No. 183-3 at 001609. But more generally, as Defendants recognize, Federal Rule of Evidence 703 permits

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experts to testify to "facts or data," even if hearsay, upon which those experts relied, so long as "experts in the particular field would reasonably rely" on such information, and if its probative value "substantially outweighs" any prejudicial effect. Fed. R. Evid. 703; *see* ECF No. 231 at 17. The testimony from Plaintiffs' experts will readily satisfy these requirements.

Specifically, both Drs. Crosby and Chisholm conducted extensive trauma histories of, respectively, Plaintiffs Salim and Ben Soud. *See*, e.g., Sealed Crosby Report, ECF No. 211 ¶ 12 ("assessing Mr. Salim required conducting . . . a 'trauma history,' in which Mr. Salim would provide a detailed account of the traumas he had suffered."). These trauma histories are critical "facts or data" upon which Drs. Crosby and Chisholm relied in opining that Plaintiffs suffered injuries due to Defendants' methods. See *id.* ¶¶ 118–119 (causation supported by absence of alternative causes in Mr. Salim's trauma history). Experts in the field typically rely on precisely this type of data. *See* United Nations "Istanbul Protocol," *Manual on the Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* 52 (2004) ("every effort should be made to document the full history of torture, persecution and other relevant traumatic experiences" and to account for "any history of past trauma"); Scharlette Holdman *et al.*, *The Role of Culture in Guantanamo's Capital Cases*, 42 U. Mem. L. Rev. 935, 959–60 (2012) (Istanbul Protocol for documenting torture "is the gold standard"). Indeed, Defendants' own expert likewise relied on such data. *See* ECF No. 209-1, Exh. A at 3

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(Pitman Report noting interview of Mr. Salim, recording history of trauma, and relying Dr. Crosby's chronology as "useful background to my investigation").

The probative value of any hearsay testimony thus adduced by Drs. Crosby and Chisholm substantially outweighs any prejudice to the Defendants. As noted above, the accounts provided by Plaintiffs undergird Drs. Crosby's and Chisholm's opinions as to the most central issues in the case: whether Plaintiffs suffer from injuries, and whether those injuries are attributable to Defendants. Plaintiffs must be able to demonstrate that these opinions are well-founded:

> [I]f the factfinder were to suspect that the expert relied on factual premises with no support in the record, or that the expert drew an unwarranted inference from the premises on which the expert relied, then the probativeness or credibility of the expert's opinion would be seriously undermined. The purpose of disclosing the facts on which the expert relied is to allay these fears[.]

Williams v. Illinois, 567 U.S. 50, 78 (2012). By contrast, the prejudicial effect of this testimony is nonexistent. Though Defendants claim "significant[]" differences between the reports of Plaintiffs' experts and Plaintiffs' testimony, they point to no such differences. If there are none, then "the underlying data [will] have already been proved through other admissible evidence," and "hear[ing] the inadmissible data from the expert will have no significant consequences." 2 McCormick on Evid. § 324.3 (Brown 7th ed. 2016). And if there are differences, Defendants may use them to cross-examine Plaintiffs and/or their experts. *See City of Pomona v. SQM N. Am. Corp.*, 750 F.3d 1036, 1047 (9th Cir. 2014) (questions as to expert's factual bases "may serve to undermine or impeach the weight that should be afforded" his testimony, but are

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not grounds for exclusion). Finally, the Court can provide an appropriate limiting instruction making clear that it is admitted only to establish the bases for the testimony. *See Paddack v. Dave Christensen, Inc.*, 745 F.2d 1254, 1262 (9th Cir. 1984).

B. Plaintiffs' experts may testify to the factual assumptions underlying their opinions.

Defendants seek to preclude testimony by Plaintiffs' experts as to certain "assumptions" upon which they relied and to bar them from testifying to "what Defendants or the author of a document knew, thought, or intended." ECF No. 231 at 18–19. With regard to the latter, Plaintiffs have agreed and so stipulated. As to the former—the assumptions upon which Plaintiffs' experts rely—Defendants focus on three paragraphs from Dr. Crosby's report that summarize what Dr. Crosby learned about the Defendants' creation of an interrogation program and the specific techniques they devised, and which briefly discuss the "learned helplessness" theory animating those techniques. Crosby Report ¶¶ 18–20. These facts were, however, appropriately considered by Dr. Crosby.

An expert may opine on the basis of factual assumptions that are consistent with other evidence in the record. And under Rule 703, an expert may testify to the same assumptions if part of the "facts or data" upon which she reasonably relied. Here, the record supports that Defendants were instrumental in the design of the CIA's interrogation program and the particular methods at its core. ECF No. 239 at 10–11 ("Defendants drafted a memo (hereafter 'July 2002 Memo') . . . The techniques listed in the July 2002 Memo came to be

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known as Enhanced Interrogation techniques[.]" (citations omitted)). Dr. Crosby reasonably relied on this information in causally attributing Plaintiff Salim's injuries to the methods devised by Defendants, Crosby Report ¶¶ 111–119, and their inclusion in Dr. Crosby's testimony is proper. So, too, may Dr. Crosby testify concerning her understanding of "learned helplessness." As this Court has repeatedly recognized, there is ample record evidence that Defendants' methods were designed to instill a state of "learned helplessness." ECF No. 239 at 22; ("Plaintiffs argue it was Defendants who proposed the 'psuedoscientific theory' of 'learned helplessness.' . . . . Plaintiffs' allegations are largely supported by the factual record."); *see also, e.g.*, ECF No. 177-29 at 2 ("The goal of interrogation is to create a state of learned helplessness . . . ."). "Learned helplessness" is a matter "beyond the ken of the average laymen," and thus an appropriate subject of expert testimony. *United States v. Joyce*, 511 F.2d 1127, 1131 (9th Cir. 1974) (citation omitted). Accordingly, given its relevance to the case, and her expertise, Dr. Crosby will assist the jury by explaining this concept. Should Defendants contest Dr. Crosby's understanding of the concept—or the basis of her or any other expert's opinion—they may do so during their cross-examination of her at trial. *See Humetrix, Inc. v. Gemplus S.C.A.*, 268 F.3d 910, 919 (9th Cir. 2001) (it is for the jury to consider "the reasonableness of the assumptions underlying the experts' [opinion]") (citation and quotation marks omitted).

8. Response to Defendants' Motion to Exclude Evidence and Argument Regarding the Efficacy of Their Methods

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Plaintiffs agree that any evidence that Defendants' methods were effective (or ineffective) in preventing a terrorist attack would be irrelevant and inadmissible. Such evidence is inherently speculative; even the CIA admits it "[f]ailed to perform a comprehensive and independent analysis on the effectiveness of enhanced interrogation techniques." ECF No. 193-13 at 3. And, as Defendants acknowledge, establishing whether terrorist plots unrelated to this case were or were not foiled because of Defendants' methods would be confusing and lead to an unnecessary mini-trial. *See* ECF No. 231 at 20. Therefore, Plaintiffs agree that evidence and argument as to whether Defendants' methods prevented terrorist attacks, *see, e.g.*, ECF No. 227 at Defs.' Exh. No. 632 (noting "Key Captures" and "Major Plots Disrupted" as a result of the program), should not be permitted. Plaintiffs likewise will not present any evidence or argument that Defendants' methods did not, in fact, prevent attacks. *See, e.g.*, ECF No. 199-1 at PLAINTIFF00003603 (report concluding that "[t]he CIA's use of its enhanced interrogation techniques was not an effective means of acquiring intelligence or gaining cooperation from detainees.").

But Defendants' sweeping definition of "efficacy" is too broad, as they also seek to exclude evidence regarding what they "should have known" about the likely effects of their methods when they proposed them. ECF No. 231 at 20. This evidence is probative: if Defendants did not reasonably believe that their methods were in fact likely to obtain intelligence, but nonetheless promoted them in order to secure a substantial profit, that would be highly relevant to establishing their *mens rea*. As this Court has made clear in the instruction it

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provided to the parties, intent is inferred from the facts and circumstances in evidence. *See* Court's Instruction re: Intent (stating the jury may "infer a person's intent" from the surrounding "facts and circumstances in evidence which indicate his or her state of mind.").

Here, those "facts and circumstances" include evidence that contradicts Defendants' stated intent to provide the CIA with a "psychologically based" program that would "condition" detainees to provide accurate intelligence. ECF No. 182-5 at MJ00022632; ECF No. 182-8 ("The intent is to elicit compliance by motivating [the detainee] to provide the required information[.]"); ECF No. 182-3 (Jessen Dep.) at 113:12–22 ("Jim [Mitchell] asserted to [Jose Rodriguez] that these techniques . . . might be something that they could use that would provide more effectiveness and predictable safety."); *see also* Ladin Decl., Exh. A at MJ0022630 (Defendant Mitchell chose the methods he considered "most effective"). Plaintiffs should be permitted to show that Defendants' professed belief in the effectiveness of using SERE methods on prisoners was unreasonable. Therefore, in evaluating the "facts and circumstances," the jury should be permitted to consider that at the time Defendants proposed their methods, they knew they were reverse-engineering a program (SERE) that was based upon teaching American service members to resist Korean War techniques that were used to elicit *false* confessions from American prisoners of war. *See* ECF No. 182-9 at xiii, xxvi. Moreover, as doctoral-level psychologists, Defendants knew that inducing uncontrollable stress through physical coercion would not likely result in the acquisition of accurate intelligence. As the

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testimony of Plaintiffs' expert, Dr. Charles Morgan, who has studied the SERE program extensively, will show, Defendants would have to have been deliberately indifferent to the scientific literature or otherwise ignorant of the state of knowledge in their own field. *See* Report, ECF No. 211-6 at 15. The jury should be able to weigh this evidence and decide Defendants' intent. Thus, the Court should deny Defendants' motion insofar as it seeks to exclude evidence regarding the reasonableness of Defendants' belief that their methods would be effective. Otherwise, both parties agree that neither side should be permitted to adduce evidence as to whether these techniques did in fact work to actually prevent a terrorist attack.

9. Defendants' Motion to Exclude Articles, Reports and/or Videos is Inappropriate

Defendants' sweeping motion to exclude "articles, reports and/or videos," without reference to particular documents, is inappropriate. It is also ironic, for they seek to introduce both a video and a series of articles with regard to 9/11. As set forth at Point 1, *supra*, those items should be excluded. As for other articles, if any, their admissibility should likewise be determined on an exhibit by exhibit basis. For example, certain articles, though hearsay, may be admitted to establish the Defendants' knowledge of relevant facts. *See* Fed. R. Evid. 801(c)(2). But that inquiry requires the identification of specific documents in light of appropriate objections. Defendants here specify no documents and raise no objections. Their blanket motion should be denied.

10. Defendants' Motion to Exclude Hearsay Within a Public Record is Unfounded

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Defendants seek to exclude evidence that Plaintiffs do not intend to introduce: inadmissible hearsay within a public record. Defendants acknowledge, *see* ECF No. 231 at 20, that "factual findings from a legally authorized government investigation" are an exception to the hearsay rule. Fed. R. Evid. 803(8)(A)(iii). And as this Court recognized, the Supreme Court has set forth a "broad approach to admissibility" under the Rule 803(8) exception, in particular with respect to the definition of a factual finding. *See* ECF No. 239 at 42 (citing *Beech Aircraft Corp. v. Rainey*, 488 U.S. 153, 162 (1988)). Thus, in accordance with the Court's instructions, Plaintiffs moved to admit specific factual findings from the SSCI Report in advance of trial. *See* ECF No. 234 at 23–25. Plaintiffs may introduce additional factual findings from other government reports, and Defendants may object to such evidence on grounds they deem appropriate. But Plaintiffs do not intend to introduce inadmissible hearsay.

Nonetheless, it should be noted that Defendants' argument misstates the law. Thus, hearsay statements intertwined with admissible factual findings may be admissible. *See, e.g.*, *Owens v. Philadelphia*, 1998 WL 240526, at *377 n.3 (E.D. Pa. 1998) (hearsay statements "iterated in support of the investigator's conclusion . . . place[d] them under the rubric of 'factual findings'").

CONCLUSION

For the foregoing reasons, Defendants' Motions should be denied.

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DATED: August 10, 2017

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CERTIFICATE OF SERVICE

I hereby certify that on August 10, 2017, 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:

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