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UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF WASHINGTON
AT SPOKANE

SULEIMAN ABDULLAH SALIM, et al. Plaintiffs, v. JAMES ELMER MITCHELL and JOHN "BRUCE" JESSEN, Defendants.	NO. 2:15-cv-286-JLQ **DEFENDANTS' MOTION FOR SUMMARY JUDGMENT** Oral Argument Requested Note on Motion Calendar: July 28, 2017, 9:30 a.m., at Spokane Washington

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INTRODUCTION

Defendants James Elmer Mitchell and John "Bruce" Jessen ("Defendants"), respectfully submit that this dispute does not belong in this Court. Plaintiffs Suleiman Abdulla Salim, Mohamed Ahmed Ben Soud and Obaid Ullah, as personal representative of Gul Rahman ("Plaintiffs")—all foreign citizens—bring this action under the Alien Tort Statute ("ATS"), 28 U.S.C. § 1350, claiming Defendants violated the "law of nations." As explained below, this Court lacks jurisdiction to hear Plaintiffs' claims and, in any event, the discovery record establishes that Defendants are entitled to summary judgment on all such claims.

Plaintiffs allege Defendants designed, implemented and applied certain U.S. government-approved "enhanced interrogation techniques" ("EITs") on individuals—including Plaintiffs—detained abroad in facilities controlled by the U.S. government. Plaintiffs seek relief under the ATS contending that Defendants allegedly engaged in: (1) torture and other cruel, inhuman, and degrading treatment; (2) non-consensual human experimentation; and (3) war crimes. But the factual record developed in this case refutes all of Plaintiffs' allegations.

As detailed in Defendants' *Statement of Undisputed Facts* ("SUF"), Defendants never interacted with Plaintiffs Salim or Ben Soud—or even heard of them until this suit. Defendants also had very limited contact with Plaintiff Rahman, which was utterly unrelated to his death. Rather, in July 2002, the CIA asked Mitchell and others to suggest coercive interrogation techniques for potential use on Abu Zubaydah ("Zubaydah"), a detainee the CIA classified as "High Value" ("HVD"). In turn, Mitchell suggested the CIA consider using techniques

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utilized for decades at the U.S. Air Force's Survival, Evasion, Resistance, and Escape ("SERE") School. The CIA then asked for more details about the specific techniques, which later came to be known as EITs. The EITs were discussed for use only on Zubaydah—the CIA's first HVD—and the CIA and Department of Justice ("DOJ") specifically analyzed and approved using these EITs on Zubaydah. The CIA then informed Defendants of the DOJ's approval, and assured Defendants of the EITs' legality (initially for use only on Zubaydah, and later on other HVDs).

Following confirmation of the EITs' legality, CIA Headquarters ("HQS") separately assessed and, as appropriate, preapproved the use of each EIT as part of an interrogation plan. The CIA, and specifically HQS, exercised operational control over Defendants at all times. During discovery, Defendants and high-ranking CIA representatives expressly described how Defendants both: (1) lacked decision-making authority—either in terms of approving the EITs initially, approving an HVD's interrogation plan, and/or deciding to employ an approved EIT on a detainee; and (2) never acted beyond the scope of their CIA contracts.

Defendants are thus entitled to summary judgment for multiple, independently-sufficient reasons. First, the Political Question Doctrine removes consideration of Plaintiffs' claims from this Court, as such claims are inherently entangled with (and predicated upon) decisions reserved for the political branches. Second, Defendants are immune to Plaintiffs' claims under the doctrine of Derivative Sovereign Immunity. Third, this Court lacks jurisdiction over such claims because Plaintiffs fail to overcome the presumption against applying the ATS to conduct that allegedly occurred abroad. Fourth, and finally, Defendants

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are also neither directly liable nor subject to liability for aiding and abetting the CIA's treatment of Plaintiffs—or for conspiring with the CIA to abuse Plaintiffs.

LEGAL STANDARD

Summary judgment should be entered if the pleadings, discovery and disclosure materials, and any affidavits show there is no genuine issue as to any material fact, and the movant is entitled to judgment as a matter of law. FED. R. CIV. P. 56. The court must only consider admissible evidence. *Orr v. Bank of Am.*, 285 F.3d 764, 773 (9th Cir. 2002). The moving party is entitled to judgment when the nonmoving party fails to make a sufficient showing on an essential element on which the nonmoving party has the burden of proof. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). There exists no genuine issue of fact where the record, as a whole, could not lead a rational trier of fact to find for the nonmoving party. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986). "The mere existence of a scintilla of evidence in support of the plaintiff's position will be insufficient; there must be evidence on which the jury could reasonably find for the plaintiff." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 252 (1986).

I. THE POLITICAL QUESTION DOCTRINE DIVESTS THE COURT OF JURISDICTION.

A. The Two-Part Political Question Test Set Forth in *Taylor* Applies.

The Supreme Court identified six overlapping "formulations" to determine whether a non-justiciable political question exists. *Baker v. Carr* 369 U.S. 186, 217 (1962); *Alperin v. Vatican Bank*, 410 F.3d 532, 544 (9th Cir. 2005). The Fourth Circuit distilled these formulations into a two-part test used to determine

the existence of subject matter jurisdiction where a government contractor has been sued. *Taylor v. Kellogg Brown & Root Servs., Inc.*, 658 F.3d 402 (4th Cir. 2011).

Under *Taylor*, the Court considers whether: (1) the contractor was under the "direct" control of the government; and (2) "national defense interests were closely intertwined with the [government's] decisions" governing the contractor's conduct, such that a decision on the claim's merits "would require the judiciary to question actual, sensitive judgments" made by the government. 658 F.3d at 411. An "affirmative response" to *either* factor "generally triggers" the doctrine. *See Al Shimari v. CACI Premier Tech.*, 119 F. Supp. 3d 434 (E.D. Va. 2015), *vacated and remanded for further discovery by* 840 F.3d 147 (4th Cir. 2016) ("*Al Shimari IV*"). Here, Defendants' alleged conduct falls within at least the first prong of *Taylor*.[1]

The first prong of the *Taylor* test is satisfied by a showing the government exercised "formal" and "actual" control over interrogations. *Al Shimari IV*, 840 F.3d at 157. But, because the government "cannot lawfully exercise its authority by directing a contractor to engage in unlawful activity," a contractor's acts are shielded from judicial review under *Taylor* only to the extent they "*were not unlawful*"—*i.e.*, the conduct was not in violation of "*settled international law*," or "criminal law *then applicable*." *Id.* at 157-59 (emphasis added). Moreover:

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[1] This case is also non-justiciable in that adjudication would "impinge" on the government's "authority to select interrogation strategies and rules of engagement" by requiring the Court to decide if using "certain extreme interrogation measures in the theatre of war was appropriate or justified." *Al Shimari IV*, 840 F.3d at 158.

> The absence of clear norms of international law or applicable criminal law regarding the lawfulness of a particular mode of treatment will render that 'grey area' conduct non-justiciable under the political question doctrine, as long as the conduct was committed under the actual control of the military or implicated sensitive military judgments.

Id. at 159-60. Defendants' conduct was not unlawful under either body of law.

B. The CIA Alone Controlled the Interrogations of All Detainees.

The CIA, through HQS, its Counterterrorism Center ("CTC"), and the Chief of Base ("COB") for site GREEN, maintained *complete operational control* over Defendants before/during Zubaydah's interrogation. SUF ¶¶ 40-44, 71, 76-79, 97-105, 107, 112-27, 132-39, 145-47, 160-62, 167-70, 176-86, 189-207. It also had full control over Defendants as to *other* detainees. *Id.* ¶¶ 216-24, 227-30, 232-42.

The record establishes Defendants did not "design and implement" an experimental torture program, as Plaintiffs allege. ECF No. 1 ¶ 20. In the months after 9/11, at a meeting at HQS discussing ways to get Zubaydah to provide information about threats to the U.S., Mitchell mentioned 12 potential interrogation techniques that had been used for years in SERE programs "to prepare U.S. servicemen for … interrogation in hostile areas." SUF ¶¶ 19, 84, 102-05. Mitchell did not "create" or "design" the techniques, and, at the time, was unaware the CIA would later ask him to apply them on detainees. SUF ¶¶ 105, 107, 127. Following Mitchell's mention of the SERE techniques, he was asked for a written list with more details; Defendants then gave the CIA "a memo with 12 *suggested*" EITs "solely for the purpose of interrogating Zubaydah" ("July 2002 Memo"). SUF ¶¶

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125-27 (emphasis added). Jose Rodriguez ("Rodriguez")[2] confirmed this was the full extent of Defendants' so-called "design" of the HVD Program. SUF ¶ 127.

Defendants had no input into who would be detained as part of the HVD Program, which was intended only for HVDs. SUF ¶¶ 130, 209-10, 333-34. Nor did Defendants decide which detainees would be interrogated with EITs. SUF ¶ 216.[3] Rather,

> Prior to an interrogation team using EITs, the Site Manager, in coordination with the interrogation team, formulate[d] an interrogation plan, submit[ted] the plan to HQS for approval by the [Director], and approval authority must be submitted to the Site prior to any methods being used. A detailed interrogation after action report [was] submitted at the conclusion of each interrogation session.

SUF ¶ 239.

CTC was "[c]learly … in charge of the operation," and was also "providing the legal oversight." SUF ¶ 242. Interrogation decisions were made by the "interrogation team," which itself was required to "consult closely with CTC/LGL as to the specific means and methods envisioned" to "ensur[e] the fullest possible acquisition of critical intelligence and the full legal protection of our officers."

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[2] Rodriguez was CTC's Chief Operating Officer from September 2001-May 2002, when he became Director of CTC. SUF ¶ 45.

[3] Defendants were unaware the CIA apparently authorized use of some EITs on low- and medium-value detainees at other sites. SUF ¶¶ 245-48. The EITs in the July 2002 Memo were only to be used on HVDs. SUF ¶¶ 209-10.

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SUF ¶ 240. The process entailed an ongoing "discussion," with CIA cables refining the proposed plan and "request[ing] HQS concurrence." SUF ¶ 241.

Psychologists (like Defendants)[4] "shape[d] compliance" with HVDs "prior to debriefing by substantive experts," SUF ¶ 208, and unless EITs were specifically approved by HQS for a particular detainee, they were not used. SUF ¶ 217. Defendants also did not control how a given interrogation would proceed; for instance, Mitchell was not involved in "the decision" concerning Zubaydah, he merely made "recommendations."[5] SUF ¶¶ 130, 235. Defendants had to follow pre-approved CIA interrogation plans. SUF ¶ 238.

Lastly, the CIA did not deploy Defendants to assist in any capacity with Plaintiffs Salim or Ben Soud, nor did it deploy Mitchell to assist in any capacity with Rahman. SUF ¶¶ 272, 281, 305. And when Jessen applied an "insult slap" (the least coercive technique) on Rahman to assess his resistance posture, this was done with the authorization of COBALT's COB. SUF ¶¶ 289-94.

C. Defendants' Conduct Was Not Unlawful.

The U.S. statute implementing the United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment, 18 U.S.C. § 2340A, prohibits a person acting "under the color of law" from committing an act

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[4] Critically, the CIA consulted with SERE psychologists and interrogators *other than Defendants* regarding interrogations. SUF ¶¶ 69, 76, 146, 175.

[5] Indeed, when Defendants wanted to stop waterboarding Zubaydah, they had to secure HQS approval to do so—which was denied. SUF ¶¶ 190-205.

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"*specifically intended to inflict severe physical or mental pain or suffering* … upon another person within his custody or physical control." *Id.* § 2340(1) (emphasis added). The EITs in the July 2002 Memo could not have violated the prohibition against torture because: (1) they were not intended to inflict "severe physical or mental pain or suffering"; (2) the absence of intent was a product of good faith reliance on legal advice; and (3) the relevant law at the time was not settled.

1. Defendants' Proposed EITs Were Not Intended to Cause Severe Physical or Mental Pain or Suffering.

The stated intent of the techniques Defendants proposed was to "elicit compliance by motivating [the subject] to provide the required information, *while avoiding permanent physical harm or profound and pervasive personality change*." SUF ¶ 128 (emphasis added). This overarching objective is underscored by: (1) the descriptions of the techniques proposed by Defendants and their purpose, SUF ¶ 133; (2) the assessment conducted by HQS via multiple, *independent* sources that the EITs would not cause severe mental pain or suffering, such as long-term psychological effects, SUF ¶ 105, 168; and (3) once EITs were approved for Zubaydah by HQS, the interrogations were monitored by medical personnel who could stop the interrogations. SUF ¶ 170.[6]

[6] Notwithstanding Plaintiffs' theory that Defendants aided and abetted the government's unlawful conduct, Defendants cannot be held directly liable for any alleged misconduct as none of the detainees (including Plaintiffs) were in Defendants' "*custody or control*"—a prerequisite under 18 U.S.C. § 2340.

2. Defendants Relied in Good Faith on the Advice of Counsel that the Proposed EITs did Not Violate the Law.

Where, as here, a statute requires a showing of specific intent, good faith reliance on the advice of counsel can *negate intent*. *United States v. Sarno*, 73 F.3d 1470, 1487 (9th Cir. 1995). This principle is echoed in the Detainee Treatment Act—which provides good faith reliance on advice of counsel "should be an important factor" in determining a defense. *See* 42 U.S.C. § 2000dd.

On August 1, 2002, DOJ Office of Legal Counsel ("OLC") Assistant Attorney General Jay S. Bybee issued a classified memorandum (the "Bybee Memo") to Acting General Counsel of the CIA John Rizzo ("Rizzo") advising that ten (10) of the proposed EITs *would not violate* Section 2340A. SUF ¶ 165. Defendants were told of the Bybee Memo's conclusion before EITs were applied to Zubaydah, and relied in good faith thereon. SUF ¶¶ 71-73, 181, 184, 201. The CIA incorporated the EITs into Zubaydah's interrogation plan. SUF ¶¶ 185-88.

3. The Law Was Unsettled When Defendants Proposed EITs.

The Supreme Court in *Sosa v. Alvarez-Machain* established that an ATS cause of action may be viable only when it implicates international law norms that are "specific, universal, and obligatory." 542 U.S. 692, 748 (2004). Plaintiffs cannot demonstrate that the general rule against torture applies *specifically* to Defendants' proposed EITs precisely because there were *no clear international norms* concerning these techniques when they were being considered and applied. On the contrary, as the Ninth Circuit has held, from 2001-03 there was "considerable debate" over the definition of torture "as applied to specific interrogation techniques." *Padilla v. Yoo*, 678 F.3d 748, 767 (9th Cir. 2012).

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"In light of that debate," the Ninth Circuit held that "any reasonable official in 2001-2003" would *not* have "known that the specific interrogation techniques allegedly employed against [a detainee] necessarily amounted to torture." *Id.* And, Plaintiffs have no evidence that any interrogation techniques not addressed in *Yoo* were specifically prohibited by the general norm against torture. In the absence of rules explicitly and uncontroversially applying to the proposed EITs, such techniques, *at a minimum*, fall within the "grey area" of non-justiciable conduct per the Political Question Doctrine. *Al Shimari IV*, 840 F.3d at 159-60.

4. There is No Clear Norm of International Law Prohibiting "Non-Consensual Human Experimentation."

Defendants similarly could not have engaged in unlawful "non-consensual human experimentation," as there is no applicable international norm prohibiting such conduct. The conflict between the U.S. and al-Qa'ida has been characterized as a "*non-international armed conflict*" ("NIAC") governed by Common Article 3 to the Geneva Conventions of August 12, 1949. *Hamdan v. Rumsfeld*, 548 U.S. 557, 630 (2006). But neither Common Article 3, nor the U.S. implementing statute, 18 U.S.C. § 2441, contained any prohibition on human experimentation during Defendants' alleged conduct. 18 U.S.C. § 2441 (1997); SUF ¶¶ 338-40. And a majority of nation states have *not* enacted laws prohibiting human experimentation in NIACs. SUF ¶ 340. Thus, there is no international human experimentation norm applicable to Defendants' conduct that also satisfies *Sosa*.

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II. DEFENDANTS ARE ENTITLED TO DERIVATIVE SOVEREIGN IMMUNITY.

A. The Doctrine of Derivative Sovereign Immunity.

A sovereign is immune absent an immunity waiver and consent to suit. *See, e.g., United States v. Mitchell*, 445 U.S. 535, 538 (1980). Government employees and contractors performing government work likewise may be immune from suit based upon *derivative* sovereign immunity. *See Filarsky v. Delia*, 566 U.S. 377 (2012); *Westfall v. Erwin*, 484 U.S. 292 (1988); *Boyle v. United Techn. Corp.*, 487 U.S. 500 (1988); *Barr v. Matteo*, 360 U.S. 564 (1959); *Yearsley v. W.A. Ross Constr. Co.*, 309 U.S. 18 (1940). Such immunity arises where, as here, "the government has directed a contractor to do the very thing that is the subject of the claim." *See Corr. Servs. Corp. v. Malesko*, 534 U.S. 61, 74 n.6 (2001). Here, Defendants followed the government's valid instructions (*Yearsley*), and would be immune were they employees performing the same job function (*Filarsky*).

B. Defendants Are Entitled to *Yearsley*-Based Immunity.

The Supreme Court has repeatedly recognized government contractors share the U.S.'s immunity when they act: (1) pursuant to authority "validly conferred" by the government; and (2) within the scope of their contracts. *Campbell-Ewald Co. v. Gomez*, 136 S. Ct. 663, 673 (2016) (citing *Yearsley*, 309 U.S. at 21); *see also Agredano v. U.S. Customs Serv.*, 223 F. App'x 558, 559 (9th Cir. 2007) (company contracting with the U.S. cannot be liable for third-party injuries arising from the contract's execution where company did not breach contract's terms) (citing *Myers v. United States*, 323 F.2d 580, 583 (9th Cir. 1963)); *Metzgar v. KBR, Inc.*, 744 F.3d

326, 345 (4th Cir. 2014); *Kuwait Pearls Catering Co., WLL v. Kellogg Brown & Root Servs.*, 853 F.3d 173, 185 (5th Cir. 2017) ("contractor may not be liable for harm resulting from its strict execution of a constitutionally authorized government order."). Extending immunity to contractors avoids "imped[ing] the significant governmental interest in the completion of its work." *Butters v. Vance Int'l, Inc.*, 225 F.3d 462, 466 (4th Cir. 2000); *Mangold v. Analytic Servs., Inc.*, 77 F.3d 1442, 1447-48 (4th Cir. 1996) ("it is a small step to protect [a government] function when delegated to private contractors"); *Ackerson v. Bean Dredging LLC*, 589 F.3d 196, 204 (5th Cir. 2009); *Adkisson v. Jacobs Eng'g Grp., Inc.*, 790 F.3d 641, 646 (6th Cir. 2015). Here, Defendants did not exceed the scope of the authority "validly conferred" on them by the U.S. government for national security purposes.

1. The Authority Granted to Defendants Was "Validly Conferred."

"After al Qaeda killed over three thousand people in its September 11, 2001 attacks on the United States, Congress empowered the President to use his warmaking authority to defeat this terrorist threat to our nation." *Lebron v. Rumsfeld*, 670 F.3d 540, 544 (4th Cir. 2012) (citing Authorization for Use of Military Force, Pub. L. No. 107-40, 115 Stat. 224 (2001)); War Powers Resolution, Pub. L. No. 93-148, 87 Stat. 555 (1973), *codified at* 50 U.S.C. §§ 1541-1548.[7] The President, in turn, had authority to delegate national security matters to the CIA.

[7] The OLC conducted an extensive analysis of the President's authority to use "[f]orce" to "both retaliate for [the September 11] attacks, and to prevent and deter future assaults on the Nation." SUF ¶ 5.

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Winter v. NRDC, Inc. 555 U.S. 7, 24, 26 (2008); National Security Act of 1947, *as amended*, 50 U.S.C. §§ 3035, 3036(c), (d)(1)-(4) (2005). Pursuant to the September 17, 2001, Presidential Memorandum of Notification ("MON"), the Director of the CIA ("DCI") was specifically empowered to (and did) direct the CTC to "capture, detain, and interrogate the highest-value al-Qa'ida operatives to obtain critical threat and actionable intelligence," SUF ¶ 7, and to conduct operations "designed to capture and detain persons who pose a continuing, serious threat of violence or death to U.S. persons and interests or who are planning terrorist activities." SUF ¶ 6. Finally, the CIA had authority to contract with Defendants to perform such services. Exec. Order 12333, 46 Fed. Reg. 59941, 59951 § 2.7 (Dec. 4, 1981), *amended by*, Exec. Order 13470, 73 Fed. Reg. 45325, 45339 (July 30, 2008); *In re Am. Boiler Works*, 220 F.2d 319, 321 (3d Cir. 1955).

In re Oil Spill by the Oil Rig "Deepwater Horizon," 2016 U.S. Dist. LEXIS 18248, at *32 (E.D. La. Feb. 16, 2016), involved a similar delegation of authority. There, the court held the Clean Water Act gave the President authority to designate a Federal On-Site Coordinator to direct all oil spill response efforts—including actions undertaken by private parties—to address the Deepwater Horizon disaster. Because the government "directed and led" the response in "the exercise of its legitimate authority[,] the government validly conferred authority upon [private contractors] to carry out various oil spill response activities." *Id.* The contractors were thus "immunized under the [Clean Water Act] for any damages resulting from their actions or omissions … so long as they adhered to, and acted within the scope of, the federal government's directives." *Id.*; *In re Oil Spill by the Oil Rig*

"*Deepwater Horizon,*" 2016 U.S. Dist. LEXIS 101175, at *36 (E.D. La. Aug. 2, 2016) (derivative sovereign immunity applied to additional private contractors).

Here, as in *In re Oil Spill*: (1) the authority to respond to the "terrorist threat to our nation" originated with Congress; (2) Congress empowered the President to use all necessary "force" to "prevent and deter future assaults on the Nation"; (3) the President directed CTC to "establish a program to capture, detain, and interrogate the highest-value al-Qa'ida operatives"; and (4) the CIA contracted with Defendants to assist in the interrogations of HVDs. Thus, the requisite authority for *Yearsley*-based immunity was "validly conferred" by the government.

Plaintiffs argue a contractor cannot claim an immunity that "exceeds" that of the sovereign, and that the CIA could not authorize contractors to commit "torture" or similar acts. 2:16-mc-00036, ECF No. 79. But this argument is backwards. Because the CIA *had* authority to interrogate suspected terrorists, and because the propriety of using EITs was subject to "considerable debate" in 2001-03—and thus was *not* clearly "torture"—the CIA had authority to direct Defendants to use EITs.

In *Yoo*, the Ninth Circuit recognized that "[i]n several influential judicial decisions in existence [in 2001-03], courts had declined to define certain severe interrogation techniques as torture." 678 F.3d at 764. The court then "assume[d] without deciding that Padilla's alleged treatment rose to the level of torture," *id.* at 768, but noted whether "it *was* torture was not, however, 'beyond debate' in 2001-03." *Id.* (emphasis in original). As such, John Yoo—the author and/or facilitator of the OLC memos authorizing the EITs considered by the Ninth Circuit, including

the Bybee Memo, *id.* at 753—was granted "qualified immunity" "regardless of the legality of Padilla's detention and the wisdom of [Yoo's] judgments." *Id.* at 769.

Thus, contrary to Plaintiffs' claim, using EITs on suspected terrorists in 2001-03 was *not* clearly "wrongful when done by the government." The U.S.'s immunity therefore extends to Defendants "regardless of the wisdom of [the CIA's] judgments" since, at that time, EITs were *not* considered "torture." Nor was Yoo's authority to provide legal advice on EITs invalidated because such advice was later found to be improper. Likewise, the authority conferred by Congress, the President, the DOJ and the CIA to Defendants also remained "valid" despite the EITs' later discontinuance. If Defendants—psychologists, with no legal training—could not reasonably rely upon the U.S.'s *own assessment* of the EITs' legality, then to whom should they have looked for such guidance?[8]

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[8] As Attorney General Eric Holder explained in an April, 16, 2009, press release, "[i]t would be unfair to prosecute dedicated men and women working to protect America for conduct that was sanctioned in advance by the Justice Department." SUF ¶ 174. And according to Rizzo, this protection should further extend to "contractors retained by the [CIA] to help carry out the terrorist interrogation program described in the OLC opinions in question." *Id.*; *see, e.g., Bednarski v. Potestivo & Assocs., P.C.*, 2017 U.S. Dist. LEXIS 32522, at *3-4 (N.D. Ill. Mar. 7, 2017) ("*Yearsley* teaches that, where the sovereign has agreed to accept responsibility for the actions of a contractor that has acted within the scope of its authority, the proper defendant is the United States[.]").

2. Defendants Did Not Exceed the Scope of Their Authority.

Plaintiffs concede that Defendants acted as federal contractors "pursuant to contracts … with the CIA." ECF No. 28 at 14. And, the record is bereft of any evidence Defendants exceeded their contractually-afforded authority.

In assessing conformance with a contract, a court may look to its "appended task orders, and any laws and regulations that the contract incorporates." *Metzgar*, 744 F.3d at 345. On August 8, 2001, Mitchell contracted to conduct research and draft applied psychological papers for the CIA. SUF ¶¶ 2, 13. On December 21, 2001, his contract was expanded to "provide consultation and research for counterterrorism and special ops." SUF ¶¶ 11, 21. On April 3, 2002, Mitchell signed a modification to provide foreign, on-site "psychological consultation to CTC in debriefing and interrogation operations," SUF ¶ 35, thereby enabling him to be "part of the interrogation team that as a whole provided … recommendations to the [COB]." SUF ¶¶ 32, 42-43, 237. By June 13, 2002, his contract was again expanded for him to serve as a "consultant to CTC special programs." SUF ¶ 14.

Jessen was hired to work with Mitchell to conduct CIA interrogations and provide "advice" to the Zubaydah interrogation team. SUF ¶ 115-118, 120, 211, 237. On July 22, 2002, Jessen signed a CIA contract to "provide consultations and recommendations" for "applying research methodology," and, by January 1, 2003, Jessen was serving as a "consultant to CTC special programs." SUF ¶¶ 120-121.

Defendants are entitled to immunity because there is no evidence they "exceed[ed] or disobey[ed] the authority conferred" by the CIA. *In re Oil Spill*, 2016 U.S. Dist. LEXIS 18248, at *32-33 (granting summary judgment where

defendants' evidence "demonstrate[d] that they did not exceed or disobey the authority conferred by the federal government"). Jessen is also immune for any conduct while employed by the Department of Defense. SUF ¶¶ 18, 117-20. And, as detailed above, not only did the CIA alone determine who would be subject to the HVD Program, it also possessed the "ultimate authority" to "determine which, if any, of Defendants' recommendations and advice to follow or implement." *Chesney v. TVA*, 782 F. Supp. 2d 570, 586 (E.D. Tenn. 2011); SUF ¶ 235; *Gomez*, 136 S. Ct. at 673 n.7 (Court "disagree[d]" with Ninth Circuit's "narrow" reading of *Yearsley*; "[c]ritical in *Yearsley* was the … contractor's performance *in compliance with all federal directions*.") (emphasis added); *Chesney*, 782 F. Supp. 2d at 586 ("under *Yearsley*, if [the TVA] would not be liable for the challenged conduct/and or decisions, [defendants] cannot be held liable for their conduct in regard to the same challenged conduct or decisions."); *Elsmore v. Cty. of Riverside*, 2016 U.S. Dist. LEXIS 62564, at *9 n.3 (C.D. Cal. Mar. 31, 2016); *Bartell v. Lohiser*, 215 F.3d 550, 557 (6th Cir. 2000) (granting summary judgment based on immunity where the state agency closely supervised the private agency, including appointing a caseworker to monitor and approve foster-care plans for child). This is the end of the analysis—even if the conduct at issue involved detaining and interrogating enemy aliens. *See, e.g.*, *Ali v. Rumsfeld*, 649 F.3d 762, 765 (D.C. Cir. 2011).

3. The Record Is Sufficient to Make an Immunity Determination.

The Court previously noted in connection with Defendants' Motion to Dismiss that, without discovery, it was "too early … to make a qualified immunity

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determination." ECF No. 40 at 13-14. But, any such impediment no longer exists, as the record is now well-established and supports Defendants' entitlement to immunity. For instance, the record shows Defendants did not "propose the 'pseudoscientific theory' of 'learned helplessness.'" ECF No. 1 ¶¶ 25-26, 29-30, 38, 57-59.] This was not Defendants' "paradigm"—it was Dr. Martin Seligman's—and it was psychologists *other* than Defendants who discussed this theory during the planning phases of Zubaydah's interrogation in April 2002. SUF ¶¶ 54, 64. Defendants did not advocate for the use of "learned helplessness." SUF ¶ 55-56, 109. Rather, they told the CIA multiple times "learned helplessness" was *not* a desired state in detainees, advised that it be avoided, and even corrected the CIA whenever the term was "used inappropriately." SUF ¶¶ 54, 57-58, 109-110.

Likewise, Defendants did not "help convince" DOJ lawyers to authorize specific techniques, nor did they "argue" to the Attorney General to use waterboarding. ECF No. 1 ¶¶ 43-44. On the contrary, the CIA and DOJ sought and obtained their *own review* of the EITs' legality, whether employed singularly or in some combination, under both domestic and international law. SUF ¶¶ 59-66, 86, 113, 139-152, 157-171, 217-218, 222-24.

Additionally, according to Rodriguez, Defendants' evaluation of the EITs' effectiveness was "not problematic" because the CIA "also played a role in assessing their effectiveness." SUF ¶ 214. And the results Defendants obtained were "incredible"—providing the CIA with "intelligence … that [it] didn't have before." SUF ¶ 212. Mitchell's performance was also described as "Exceptional." SUF ¶ 213. Finally, Defendants were not personally paid $81 million. ECF No. 1

¶ 68. Rather, *Mitchell, Jessen & Associates* ("MJA")—a company Defendants formed in March 2005 to provide "qualified interrogators, detainee security officers for CIA detention sites, and curriculum development and training services for the" CIA—was paid approximately $72 million from 2005-09.[9] SUF ¶ 336.

C. Defendants are Entitled to *Filarsky*-Based Immunity.

In *Filarsky*, the Supreme Court held government contractors should not be left "holding the bag—facing full liability for actions taken in conjunction with government employees who enjoy immunity for the same activity." 566 U.S. at 391. Yet Plaintiffs propose Defendants suffer precisely this fate. ECF No. 27 at 12-13. But, if the government's *own lawyers* were held immune from liability in *Yoo*, 678 F.3d at 768, contractors like Defendants should not be liable for engaging in "the same activity" as CIA medical staff officers, guards, site managers, operational psychologists, analysts, the COB at COBALT, and the other members of the interrogation team. Such an unfair result would vitiate *Filarsky* immunity.

Filarsky did not establish a bright-line test; rather, it "considered" if the contractor's claim for immunity was: (1) "historically grounded in common law"; and (2) did not "violate[e]" "clearly established rights." *Gomez*, 136 S. Ct. at 673.

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[9] According to Mitchell, his profit percentage from MJA was in the "small single digits." SUF ¶ 337. Moreover, the daily rate Mitchell negotiated with the CIA was also less than other deployed psychologists were paid to do behavioral consultation on detainee interrogations at places like Gitmo. SUF ¶ 15.

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The proper focus under the first prong of *Filarsky* is on the government "function" being delegated—not the position or title. 566 U.S. at 382-92; *see also Butters*, 225 F.3d at 466. What mattered in *Filarsky* was not that the defendant was a private attorney; it was that he was performing an investigatory function for the local government. 566 U.S. at 392. Likewise, what matters here is not that Defendants are psychologists; it is that they were performing national security support functions for the U.S. In such situations, military contractors have consistently been deemed immune. *See, e.g., Saleh v. Titan Corp.*, 580 F.3d 1, 2 (D.C. Cir. 2009) (private military contractors providing interpretation/interrogation services to the U.S. in Iraq immune); *McKay v. Rockwell Int'l Corp.*, 704 F.2d 444, 448-49 (9th Cir. 1983) (collecting cases).

Psychologists performing similar reporting/advising "function[s]" for the government have been held immune under the common law. Indeed, Washington courts have consistently recognized that "[w]hen psychiatrists or mental health providers are appointed by the court and render an advisory opinion … on a criminal defendant's mental condition, they are acting as an arm of the court and are protected from suit by absolute judicial immunity." *Bader v. State*, 43 Wn. App. 223, 226, 716 P.2d 925 (1986) (citations omitted); *Reddy v. Karr*, 102 Wn. App. 742, 748-50, 9 P.3d 927 (2000). Washington law also offers qualified immunity for mental health professionals involved in involuntary commitments. RCW 71.05.120; *Von Staich v. Atwood*, 2011 U.S. Dist. LEXIS 83705, at *8 (C.D. Cal. Feb. 22, 2011) ("the Ninth Circuit has held that a court-appointed psychologist has quasi-judicial immunity [for] preparing and submitting medical reports[.]").

Here, the CIA retained Defendants to prepare a list of SERE techniques for potential use on Zubaydah. Defendants were thus acting as an "arm" of the government in assisting in deciding appropriate treatment for potentially dangerous individuals, much like the above psychologists and mental health professionals.

As to the second *Filarsky* prong, Plaintiffs argue Defendants "remain liable" because they "violated well-established prohibitions" against torture, cruel, inhuman, or degrading treatment, nonconsensual experimentation, and war crimes. *See* ECF No. 28 at 17. But, even if this could theoretically bar immunity, such "prohibitions" regarding these techniques were simply not "well-established." *Padilla*, 678 F.3d at 768; *see also* Section I.C.3, *supra*. This case falls squarely within the grant of immunity recognized by the Supreme Court in *Filarsky*.

III. PLAINTIFFS' CLAIMS DO NOT DISPLACE THE PRESUMPTION AGAINST EXTRATERRITORIAL APPLICATION OF THE ATS.

Because the ATS does not apply extraterritorially, *Kiobel v. Royal Petroleum Co.*, 133 S. Ct. 1659, 1669 (2013), the Court lacks jurisdiction to adjudicate Plaintiffs' claims where, as here, they do not involve a permissible domestic application of the statute. *See RJR Nabisco v. European Cmty.*, 136 S. Ct. 2090, 2101 (2016). Under the "focus" test articulated in *RJR Nabisco*:

> If the conduct relevant to the statute's focus occurred in the United States, then the case involves a permissible domestic application … but if the conduct relevant to the focus occurred in a foreign country, then the case involves an impermissible extraterritorial application regardless of any other conduct that occurred in U.S. territory.

Id. (citing *Morrison v. Nat'l Austl. Bank Ltd.*, 130 S.Ct. 2869, 2883-88 (2010)). Where *some* relevant conduct occurred in the U.S., it must "touch and concern" the

U.S. with "sufficient force to displace the presumption against extraterritoriality." *Doe v. Nestle*, 2:05-cv-5133, ECF No. 249, at *5 (C.D. Cal., Mar. 2, 2017) ("*Doe III*") (citing *Kiobel*, 133 S.Ct. at 1669; *Mujica v. AirScan Inc.*, 771 F.3d 580, 591 (9th Cir. 2014); *Mustafa v. Chevron Corp.*, 770 F.3d 170, 185-86 (2d Cir. 2014)).[10]

The "focus" of the ATS is "the conduct of the defendant which is alleged … to be either a direct violation of the law of nations [or] aiding and abetting another's violation." *Doe III*, at *4 (citing *Mustafa*, 770 F.3d at 186). Here, all three Plaintiffs were held in a U.S.-operated facility *abroad*; Defendants' limited contact with Rahman occurred entirely overseas; and Defendants never saw Plaintiffs Salim or Ben Soud. SUF ¶¶ 268, 272-73, 277-78, 281, 284, 286-87, 291-93, 308, 311-12, 321. The record is devoid of evidence that any alleged conduct resulting in a "direct" ATS violation occurred in the U.S. SUF ¶¶ 215, 254, 272.

The alleged conduct relevant to Plaintiffs' "aiding and abetting" claim also does not sufficiently "touch and concern" the U.S. To do so would require Plaintiffs to prove—which they do not—that Defendants engaged in more than "ordinary business conduct" or in "independently illegal activity" in the U.S. *Doe III*, at *7, n.7. Specifically, Plaintiffs contend Defendants' actions "touch and

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[10] In adopting the "focus" test despite it being in "irreconcilable conflict" with *Doe I v. Nestle USA, Inc.*, 766 F.3d 1013, 1028-29 (9th Cir. 2014), *Doe III* held it was obligated to follow the law as set forth in the Supreme Court's intervening *RJR Nabisco* opinion. *Doe III*, at *2, n.4. The Ninth Circuit has applied the "focus" test in a non-ATS case. *Trader Joe's Co. v. Hallatt*, 835 F.3d 960 (9th Cir. 2016).

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concern" the U.S. because: (1) Defendants are U.S. citizens and are domiciled in the U.S.; (2) Defendants' contracts were executed in the U.S.; and (3) Defendants "devised" and "supervised" the "implementation" of the CIA's purportedly unlawful coercive interrogations of detainees in the U.S. ECF No. 1 ¶ 18. Neither of these first two considerations overcome the presumption against the ATS's extraterritorial application. *See Doe III*, at *6 ("activities that ordinary international businesses engage in … do not 'touch and concern' the [U.S.] with any more force than Defendants' mere citizen status"). Defendants also did not "devise[]," "supervise[]," or "implement[]" Plaintiffs' treatment in the U.S. or abroad; rather, their conduct was limited to providing recommendations for the CIA to consider as to Zubaydah. SUF ¶¶ 43, 154, 191, 235, 296-97. Defendants had no knowledge EITs were later used on non-HVDs (like Plaintiffs), nor were they involved in the development of any MVD/LVD program. SUF ¶¶ 210, 231, 246-248. Such conduct hardly invokes cases where "more than ordinary business conduct" occurred. *Sexual Minorities Uganda v. Lively*, 960 F. Supp. 2d 304, 322 (D. Mass. 2013) ("more than ordinary business conduct" where a "campaign of repression" against LGBTI individuals in Uganda was orchestrated "to a substantial degree within the [U.S.], over many years, with only infrequent actual visits to Uganda"); *but see Adhikari v. Kellogg Brown & Root, Inc.*, 845 F.3d 184, 198-99 (5th Cir. 2017) (presumption intact where only U.S. connection involved domestic money transfers); *Doe v. Drummond Co.*, 782 F.3d 576, 598 (11th Cir. 2015) (presumption not overcome where business decisions made domestically, but decisions to conduct unlawful activities made abroad). Nor did Defendants'

recommendation to use EITs on Zubaydah "independently" violate the law. *Cf. Licci v. Lebanese Can. Bank, SAL*, 834 F.3d 201, 215 (2d Cir. 2016) (direct financial contributions to Hezbollah through New York banks were unlawful).

IV. DEFENDANTS ARE NOT DIRECTLY LIABLE TO PLAINTIFFS FOR VIOLATING THE LAW OF NATIONS.

As Plaintiffs concede, neither Defendant personally interrogated Plaintiffs Ben Soud or Salim, nor were they present for any of their interrogations at COBALT. SUF ¶¶ 272, 281. Mitchell also did not personally interrogate Rahman, and only witnessed one "custodial debriefing" at COBALT. SUF ¶ 308.[11]

As to Jessen, all of his interactions with Rahman were lawful. SUF ¶¶ 286, 289-90, 293-94. The single facial slap Jessen administered to Rahman was authorized by the COB to assess his resistance posture; it was not used as an EIT to elicit information, and cannot be termed "torture." SUF ¶ 289, 291-92. In fact, Jessen expressly recommended *against* using EITs on Rahman *on at least two occasions*, SUF ¶¶ 295-96, 309, and advised the COB *not* to use unauthorized techniques. SUF ¶¶ 299-300, 303. The record is clear: there is no evidence anything Defendants did, or failed to do, could possibly have resulted in Rahman's death.[12] If implemented, Jessen's recommendations as to Rahman's freezing condition might well have prevented his death. SUF ¶¶ 304, 314-20, 322-31.

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[11] Again, Defendants cannot be directly liable under section 2340 for any alleged abuse as Plaintiffs were not in their "custody or control." *See* footnote 6, *supra*.

[12] Plaintiffs have not presented a claim under the Washington survival statute.

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V. DEFENDANTS ARE NOT LIABLE FOR AIDING AND ABETTING.

Plaintiffs must establish that Defendants had the requisite mental state (*mens rea*) *and* provided "substantial" support (*actus reus*) in the commission of each alleged ATS violation for aiding and abetting liability. Plaintiffs can show neither.

A. Defendants Lack the *Mens Rea* for Aiding and Abetting Liability.

"Customary international law—not domestic law—provides the legal standard for aiding and abetting ATS claims." *Nestle*, 766 F.3d at 1023. "When choosing between competing legal standards, [courts] consider which one best reflects a consensus of the well-developed democracies of the world." *Id.* (citing *Sosa*, 542 U.S. at 732.) In *Nestle*, the Ninth Circuit declined to decide whether a "purpose or knowledge standard applies to aiding and abetting ATS claims"—instead holding that "[a]ll international authorities agree that '*at least* purposive action … constitutes aiding and abetting[.]'" *Id.* at 1024 (emphasis in original). This "purpose" must relate to "facilitating the criminal act." *Id.* In performing its analysis, the *Nestle* court looked to decisions of two other Circuits to observe that international law appears to "reject[] a knowledge standard and requires the heightened *mens rea* of purpose, suggesting that a knowledge standard lacks the universal acceptance that *Sosa* demands." *Id*. (citing *Aziz v. Alcolac, Inc.*, 658 F.3d 388 (4th Cir. 2011); *Presbyterian Church of Sudan v. Talisman Energy, Inc.*, 582 F.3d 244 (2d Cir. 2009)).[13] Courts within the Ninth Circuit have since held that

[13] Notably, Judge Rawlinson, the third panel member, wrote she "would definitely and unequivocally decide that the purpose standard applies[.] In other words, [p]laintiffs … must allege … defendants acted with the purpose of causing the

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Nestle "points strongly toward purpose as the governing *mens rea* standard." *Brill v. Chevron Corp.*, 2017 U.S. Dist. LEXIS 4132, at *24 (N.D. Cal. Jan. 9, 2017). Ultimately, while the Court should apply the "purpose" standard to Plaintiffs' aiding and abetting claims, the record shows Plaintiffs cannot meet either standard.

1. Defendants Lacked The Purpose to Aid and Abet Any Alleged ATS Violations by the CIA.

Nestle was an ATS case commenced by former child slaves forced to harvest cocoa in the Ivory Coast. 766 F.3d at 1016. The *Nestle* plaintiffs alleged that defendants aided and abetted child slavery by giving "financial assistance" and "technical farming assistance"—*i.e.*, equipment and training—to Ivorian farmers using child labor. *Id.* at 1017. The defendants were allegedly "well aware" of the child slavery problem "firsthand from visits to Ivorian farms" and "reports issued by domestic and international organizations"; they also lobbied *against* congressional efforts to curb the use of child slave labor. *Id.* Nevertheless, the defendants "operate[d] in the Ivory Coast with the unilateral goal of finding the cheapest sources of cocoa." *Id.* Based on these allegations, the court held a claim for aiding and abetting had been stated in that the defendants had obtained a "direct benefit from the commission of the violation of international law." *Id.* at 1024. Conversely, the court noted that in *Talisman* and *Aziz*—ATS cases where the "purpose" standard was not met—the defendants "had nothing to gain from the

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injuries suffered by the [p]laintiffs." *Id.* at 1029 (concurring in part, dissenting in part). Such a "purpose" is interchangeable with "specific intent." *Id.* at 1030 n.1.

violations of international law," which "actually ran counter to the[ir] interest." *Id.* In further discussing the applicable *mens rea* standard, the *Nestle* court observed:

> This is not to say that the purpose standard is satisfied merely because the defendants intended to profit by doing business in the Ivory Coast. *Doing business with child slave owners, however morally reprehensible that may be, does not by itself demonstrate a purpose to support child slavery.*

Id. at 1025 (emphasis added).

This Court previously observed "no one would ever be convicted of aiding and abetting by setting forth, here's options that you can utilize" if they were not also deciding who would be subjected to the program. SUF ¶ 341-42. Discovery has borne out that this is all Defendants did. As detailed above, Defendants merely "recommended" the CIA consider using certain long-used SERE techniques on Zubaydah. Defendants did *not* decide who EITs would be used on, or which techniques would be applied as part of a given interrogation plan. SUF ¶¶ 216, 235. Regardless of what the CIA later did with Defendants' July 2002 Memo—especially as applied to *unknown* detainees (like Plaintiffs), at *unknown* sites, in *unknown* programs separate from the HVD Program—Defendants did not "benefit" from such unintended use.

In *Talisman*, the Second Circuit observed "evidence that senior Talisman officials protested to the Government and that security reports shared with senior Talisman officials expressed concern about the military's use of GNPOC airstrips" "cuts against Talisman's liability." 582 F.3d at 262. So too here, Defendants "protested" to the CIA regarding the continued use of the waterboard on Zubaydah,

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as the interrogation team did not want to "risk going beyond legal authorities." SUF ¶ 192. Thus, rather than "lobb[y] against" efforts to "curb" potential detainee abuse, *Nestle*, 766 F.3d at 1017, Defendants actually *advocated* to the CIA to ensure that interrogations were effective, but complied with legal limits, with respect to detainees they interacted with and/or interrogated.

Defendants' advocacy also encompassed Rahman, as Jessen "expressed concern" with his treatment at COBALT, including how often water was supplied; how loud the noise in his cell was; and the facility's temperature. SUF ¶¶ 314, 317-19. Jessen also advised *against* using EITs on Rahman, concluding they were "not the first or best option to yield positive results." SUF ¶¶ 296-97, 309. This advice to refrain from using EITs on Rahman served to *decrease* the overall use of EITs on detainees—thus preventing an expansion of Defendants' role outside the HVD Program. *Brill*, 2017 U.S. Dist. LEXIS 4132, at *24-25 (finding no "alignment of interest" between "pursuit of profits" and encouraging ATS violations where conduct did not result in financial incentives). Indeed, even after departing COBALT, Jessen told the most senior CTC person of his concerns for Rahman. SUF ¶ 320. Thus, while Defendants "did business" with the CIA for profit—and the CIA has been accused of approving and engaging in "morally reprehensible" behavior—this does "not by itself demonstrate a purpose to support" torture or similar abuses *by Defendants*. *See Nestle*, 766 F.3d at 1025; SUF ¶¶ 35, 42, 106-07, 314. As the record discloses, Defendants testified they lacked any intent to harm detainees; started with the "least intrusive" EITs; and obtained specific approval for any EIT used in the HVD Program. SUF ¶¶ 128,

133, 167-68, 220, 243, 293. Defendants also did not believe the EITs constituted "torture or other abuses" based on the OLC memos, CTC's legal oversight, and the constant assurances provided by HQS in the form of daily approvals of detainee interrogation plans. SUF ¶¶ 59-80, 67, 77-79, 99, 120-23, 133, 139-173, 189, 205, 217; *United States v. Smith*, 7 F. App'x 772, 775 (9th Cir. 2001) (noting "[a]dvice of counsel is a partial defense offered to disprove a *mens rea* element of a crime").

2. Defendants Lacked Knowledge Their Conduct Could Have Facilitated ATS Violations Against Non-HVDs.

Assuming *arguendo* that the "knowledge" *mens rea* standard applies, Plaintiffs' claims nevertheless fail. The record demonstrates, unequivocally, that Defendants did not "know" the SERE-based "physical pressures"—recommended *specifically* for use *exclusively* on Zubaydah, then expanded for use on other HVDs, SUF ¶¶ 209-11, 245-48, 336—were being used on non-HVDs (like Plaintiffs) as part of a separate CIA-run program at locations like COBALT. SUF ¶¶ 210, 248. Defendants were not involved in the development of the MVD or LVD program; did not give recommendations for interrogations; and did not even know the term "MVD" existed until arriving at COBALT. SUF ¶¶ 246-48. Even after Defendants learned COBALT existed, they had no reason to believe EITs were being used on *non-HVD* detainees at *other* sites—much less that they were being used in a way that could violate the ATS. SUF ¶¶ 247-48; 270:2-4. *See Brill*, 2017 U.S. Dist. LEXIS 4132, at *24-25 ("at most … Chevron knew that it was paying premiums; [not] that … those premiums were going into the hands of Saddam Hussein, much less that they were then being used to finance terrorism,

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crimes against humanity and extrajudicial killings."); *Vance v. Rumsfeld*, 701 F.3d 193, 204-05 (7th Cir. 2012) (detainees in Iraq could not assert claims against Secretary of Defense for "having authorized harsh interrogation tactics" in 2002-03 because "knowledge of subordinates' misconduct is not enough for liability").

Plaintiffs' claim that "Defendants are responsible for Plaintiffs' injuries because they collaborated in the CIA's RDI Program, including by devising and promoting the use of abusive methods that Plaintiffs and others endured," ECF No. 34 at 6, is incorrect. Even if Defendants "devis[ed]" and "promot[ed]" the EITs recommended in July 2002—which they did not—there can be no liability without knowledge that they were employed against individuals such as Plaintiffs.

Doe v. Cisco Sys., 66 F. Supp. 3d 1239 (N.D. Cal. 2014), *reconsideration denied*, 2015 U.S. Dist. LEXIS 115681 (N.D. Cal. Aug. 31, 2015), is instructive. In *Cisco*, the plaintiffs, U.S. and Chinese citizens and practitioners of Falun Gong, claimed Cisco and its CEO knew of and assisted in the facilitation of human rights abuses against the plaintiffs by Chinese actors in China. 66 F. Supp. 3d at 1240-41. According to the plaintiffs, Cisco provided the Chinese Communist Party with substantial assistance through the creation of a customized security system—called "Golden Shield"—knowing and intending it would use such assistance in the commission of human rights abuses against Falun Gong members. *Id.* at 1241-42. The plaintiffs further contended that "without the Golden Shield, Chinese officers would not have been able to coordinate large-scale investigations, obtain sensitive information, locate, track, apprehend, interrogate, torture and persecute Falun

Gong members from anywhere in China. [T]he Golden Shield provided the means by which all the Plaintiffs were tracked, detained, and tortured." *Id.* at 1243.

Such allegations notwithstanding, the court, applying the "more lenient" "knowledge" standard, dismissed the plaintiffs' ATS aiding and abetting claims:

> Even if Defendants knew that the Golden Shield was used by Chinese authorities to apprehend individuals, including Plaintiffs, there is no showing that Defendants also knew that Plaintiffs might then be tortured or forcibly converted. The customization, marketing, design, testing, and implementation of the Golden Shield system is not enough to support an inference of knowledge . . . that torture or other human rights abuses would be committed against Plaintiffs. The product produced by Defendants—even as specifically customized—can be used for many crime-control purposes in China without permitting torture or other human rights abuses.

Id. at 1248. Here, as in *Cisco*, even if Defendants knew EITs were being used by other interrogators on non-HVDs (which they did not), this is "not enough to support an inference of knowledge" that "torture or other human rights abuses would be committed against Plaintiffs." Defendants repeatedly explained they did only what they were "authorized" to do, SUF ¶¶ 173, 238, 253, 294, and instructed others to use only "authorized" techniques. SUF ¶ 300. Thus, as in *Cisco*, even if Defendants provided the "means" by which Plaintiffs were "detained, and tortured" (and they did not), this is not enough to impose liability where there is no "showing that Defendants also knew that Plaintiffs might then be tortured." And even if Defendants "specifically customized" the techniques for use with Zubaydah (and the HVD Program), this too is inadequate for aiding and abetting under *Cisco*. Nor did Defendants visit COBALT while Plaintiffs Salim and Ben Soud were

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detained—such that they would have "knowledge" as to the techniques applied. SUF ¶ 272, 281. As for Rahman, Jessen did not observe EITs being used, and observed the application of only *non*-EITs ("hard takedown" and cold shower) for which he recommended the COB get approval before using. SUF ¶ 299-300, 304.

Finally, Defendants gained nothing if the SERE-based techniques were used by CIA employees in interrogations for which Defendants played no role. This is true even if Defendants somehow "knew" the CIA was going to use the EITs "unlawfully"—which, again, they did not. *Corrie v. Caterpillar, Inc.*, 403 F. Supp. 2d 1019 (W.D. Wash. 2005), *aff'd on other grounds*, 503 F.3d 947 (9th Cir. 2007) ("One who merely sells goods to a buyer is not an aider and abettor of crimes that the buyer might commit, even if the seller knows that the buyer is likely to use the goods unlawfully, because the seller does not share the specific intent to further the buyer's venture."). Accordingly, Defendants cannot be held liable for aiding and abetting the CIA's use of EITs on non-HVDs under either *mens rea* standard.

B. Defendants Did Not Provide "Substantial" Assistance in the Commission of a Crime.

"The *actus reus* of aiding and abetting is providing assistance or other forms of support to the commission of a crime." *Nestle*, 766 F.3d at 1026. International law requires this assistance be "substantial." *Id.* The Ninth Circuit has observed a dispute exists as to "whether international law imposes the additional requirement that the assistance must be specifically directed towards the commission of the crime." *Id.*; *Cisco*, 66 F. Supp. 3d at 1248 (noting *actus reus* requires a defendant "carried out acts that had a substantial effect on the perpetration of a specific

crime"). "What appears to have emerged is that there is less focus on specific direction and more of an emphasis on the existence of a causal link between the defendants and the commission of the crime." *Nestle*, 766 F.3d at 1026.

As detailed above, there is a break in the "causal link" between Defendants supplying the CIA with recommendations for SERE-based EITs and Plaintiffs' alleged "torture" occurring outside the HVD Program while detained at COBALT.

In *Cisco*, the court held the plaintiffs' allegations did not show defendants' conduct "had a substantial effect on the perpetration of alleged violations against Plaintiffs nor that they knew that their product would be used beyond its security purpose . . . to commit the alleged violations of torture and forced conversion." 66 F. Supp. 3d at 1248. Here, Defendants also did not know their recommendations were being used "beyond [their] … purpose" to interrogate Zubaydah (and other HVDs) to commit alleged ATS violations on *non*-HVDs at other sites. SUF ¶ 245-48; *see Estate of Alvarez v. Johns Hopkins Univ.*, 2016 U.S. Dist. LEXIS 121650, at *36-37 (D. Md. Sep. 7, 2016) (holding that conclusory allegations individuals and research institutions purposefully designed and/or implemented experiments as a continuation of their existing research into venereal disease failed to present plausible ATS claims for aiding and abetting the U.S. Public Health Service in conducting nonconsensual medical experiments).

As further proof of this causal disconnect, and according to Salim and Ben Soud, as well as the CIA's records, both Plaintiffs were allegedly exposed to techniques outside the July 2002 Memo, such as "nudity"; "dietary" manipulation; "abdominal slap"; and "water dousing"—*none* of which Defendants recommended.

SUF ¶¶ 127-29, 131, 270-71, 279-80. Rahman was subjected to a single "insult slap" for assessment purposes and then died of "hypothermia" due to exposure (not an EIT). SUF ¶¶ 289, 291-93, 319, 327-30, 322; 329. Plaintiffs Salim and Ben Soud also both assert they were placed in a "confinement box." ECF No. 1 ¶ 74, 86, 92-93, 121, 141. But there is no evidence this technique was proposed or adopted for use *at COBALT* because of Defendants. The operation at COBALT (which included Plaintiffs) evolved separately from the HVD Program without Defendants' knowledge. SUF ¶¶ 246-48; 200:10-24; 267:21-268:6.[14] Defendants thus did not give "substantial" assistance to "support the commission of a crime."

VI. DEFENDANTS ARE NOT LIABLE FOR CONSPIRING OR ENTERING INTO A JOINT CRIMINAL ENTERPRISE WITH THE U.S. GOVERNMENT.

After *Sosa*, courts disagree as to whether the federal common law "conspiracy" or the international law "joint criminal enterprise" standard applies to vicarious liability claims under the ATS. *Compare Cabello v. Fernandez-Larios*, 402 F.3d 1148, 1159 (11th Cir. 2005), *with Talisman*, 582 F.3d at 260 n.11; *see*

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[14] From mid-2002 to November 2002, guidance on interrogations at COBALT was based solely on a cable by a senior operations officer listing darkness, sleep deprivation, solitary confinement, and noise. SUF ¶ 261. Further, the evidence suggests Plaintiffs' interrogations would have occurred using SERE techniques even if Defendants had *not* recommended EITs, as the COB at COBALT had attended a four-day SERE course. SUF ¶ 260.

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also Anna Sanders, *New Frontiers in the ATS: Conspiracy and Joint Criminal Enterprise Liability after* Sosa, 29 BERKELEY J. OF INT'L LAW 2, 619 (2010).

But regardless of the standard employed, Plaintiffs' claims fail. There is no evidence Defendants entered into an agreement to commit torture, cruel and inhuman treatment, war crimes, and/or human experimentation—which is critical to establishing a conspiracy. *Cabello*, 402 F.3d at 1159. Similarly, there is no evidence Defendants possessed "a criminal intention to participate in a common criminal design"—which is an essential element of a joint criminal enterprise. *Talisman*, 582 F.3d at 260 (quoting *Prosecutor v. Tadic*, Case No. IT–94–1–A, Appeal Judgment, ¶ 206 (July 15, 1999)). Defendants proposed a list of techniques for use *on Zubaydah*, which were used at SERE for many years. SUF ¶¶ 104-05, 124, 127, 137, 142, 158, 161, 210. Defendants did not intend such techniques to be applied to any individual unless they were lawful, and did *not* intend for them to be applied to MVDs/LVDs under any circumstances. SUF ¶¶ 61, 75, 141, 158, 245-48. To hold Defendants liable under conspiracy or joint criminal enterprise liability would extend the ATS beyond a "narrow class of international norms," which is exactly what the Court in *Sosa* cautioned against. 542 U.S. at 725-29.

CONCLUSION

For the above reasons, this Court should grant Defendants' Motion for Summary Judgment.

DATED this 22nd day of May, 2017.

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CERTIFICATE OF SERVICE

I hereby certify that on the 22nd day of May, 2017, 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:

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