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UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF WASHINGTON

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

Plaintiffs,

v.

JAMES ELMER MITCHELL and JOHN "BRUCE" JESSEN

Defendants.

No. CV-15-0286-JLQ

PLAINTIFFS' MOTION FOR PARTIAL SUMMARY JUDGMENT

Oral Argument Requested

NOTE ON MOTION CALENDAR:

JULY 28, 2017, 9:30 A.M., AT SPOKANE, WASHINGTON

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INTRODUCTION

Plaintiffs seek summary judgment on their claim that Defendants aided and abetted the torture and other cruel, inhuman, and degrading treatment ("CIDT") that they suffered in the CIA interrogation program. Specifically, Plaintiffs were subjected to systematic and prolonged abuse in CIA custody, including the repeated infliction of physical assault, sleep deprivation (accomplished by forcing Plaintiffs to stand for days in diapers with their arms chained overhead), and confinement in coffin-like boxes. The use of these specific methods on Plaintiffs was not happenstance; it was part of a standardized program of systematic abuse that Defendants designed, tested, implemented, and promoted, and from which they handsomely profited.

Defendants' undisputed actions in this case readily satisfy the standard for aiding and abetting liability for torture and CIDT under the Alien Tort Statute, which derives, under Ninth Circuit precedent, from customary international law. That law is clear with respect to both the act and intent elements that form the basis for aiding and abetting liability. The act element is established when a defendant provides assistance that has a substantial effect on the perpetration of the crime, such that the violation would not otherwise have occurred in the same way. The intent element is established if the defendant supported the violation of international law and obtained a direct benefit from it. The undisputed facts before the Court establish that no genuine issue of material fact exists with respect to either of these elements.

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Defendants, by their own admission, played a "significant and formative role" in developing the CIA program, which they based in part upon their training in Chinese Communist techniques used to coerce false confessions from American prisoners of war during the Korean War. Defendants recommended specific "pressures" for the CIA program—including various physical assaults, stress positions, the use of diapers, prolonged sleep deprivation, cramped confinement, and simulated drowning. Defendants told the CIA that these methods had been selected to "instill fear and despair." The "psychologically based interrogation program" Defendants designed boiled down to a simple premise: Defendants and the CIA would apply the "pressures" to prisoners, and, in Defendant Jessen's words, prisoners would be given "a choice: you can start talking or you can get some more physical pressure."

Defendants not only designed the CIA program; they personally tested it on the first CIA prisoner, Abu Zubaydah. The brutal and repeated abuse they inflicted is plainly documented in the record. Also clearly documented is Defendants' awareness of the harm their methods caused. Defendants observed firsthand as Abu Zubaydah trembled, shook, cried, begged, pleaded, vomited, and became hysterical during the long weeks of his torture.

The record also establishes that Defendants' torture of Abu Zubaydah became the template for the program, and that the methods Defendants used on him were standardized throughout the CIA's secret prisons. There can be no genuine dispute that Defendants' "significant and formative role" in the CIA

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program had a "substantial effect" on the torture of Plaintiffs, nor about the benefit Defendants received in implementing and helping the CIA to expand the program: they were paid millions in taxpayer dollars to do so, and formed a company that was paid $81 million on a no-bid contract.

The record, including CIA documents, confirms that Plaintiffs were subjected to the methods that Defendants devised for the torture program. The abuse Plaintiffs endured as a result caused them severe mental and physical pain and suffering, and constituted torture. Plaintiffs were also subjected to methodical degradation and humiliation, violating the prohibition against CIDT. Because Defendants assisted and profited from the systematic abuse of CIA prisoners, including Plaintiffs, they are liable under the Alien Tort Statute for aiding and abetting torture and CIDT.

FACTUAL BACKGROUND

A. Defendants design methods and test them on the CIA's first prisoner

Defendants "played a significant and formative role" in developing the CIA program, which began in 2002. Statement of Undisputed Material Facts ("SUMF") ¶ 1. At the time, the CIA Counterterrorism Center had no experience in interrogation. SUMF ¶ 2. Neither Defendant had ever interrogated a prisoner before, but Defendant Mitchell asserted that they were qualified to "put together a psychologically based interrogation program," based in part on Defendants' understanding of "Pavlovian Classical Conditioning." SUMF ¶¶ 3, 11–14. Defendants first tested the program on Abu Zubaydah.

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The abusive interrogation of Abu Zubaydah proceeded in distinct phases, beginning in Spring 2002. Initially, Defendant Mitchell recommended that the CIA disrupt Abu Zubaydah's sleep, feed noise into his cell, and deprive him of "amenities"—such as clothing. SUMF ¶¶ 4–7. In addition, Defendant Mitchell and two CIA staff members recommended extreme sensory deprivation, which included total deprivation of natural light and sound. SUMF ¶¶ 6, 7. Together, this "deliberate manipulation of the environment" was "intended to cause psychological disorientation . . . as well as an increased sense of learned helplessness." SUMF ¶ 8.

In July 2002, Defendant Mitchell assessed Abu Zubaydah as insufficiently compliant, and convinced the CIA to contract with his friend, Defendant Jessen, to help "put together an interrogation program" and implement it on Abu Zubaydah. SUMF ¶¶ 13, 19. That month, Defendants drafted and proposed a list of specific techniques, which would become the standardized "enhanced interrogation techniques" used on CIA prisoners. SUMF ¶¶ 20, 60. Defendants called for the use of these coercive methods to "instill fear and despair." SUMF ¶ 20. The prisoner would be faced with "a choice: you can start talking or you can get some more physical pressure." SUMF ¶15. Defendants based their list of methods on techniques used in training in the Department of Defense's Survival, Research, Evasion and Escape ("SERE") program, claiming that a program based on these methods would be safe and effective at extracting information. SUMF ¶¶ 21, 28.

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In fact, the SERE program was based in part on Chinese Communist methods inflicted on American prisoners during the Korean War in order to compel American soldiers to make false confessions, not to tell the truth. SUMF ¶ 22. And in practice, the CIA program was far harsher than SERE training, both in the frequency and intensity of the methods and, critically, because SERE is a voluntary program of very short duration with a known end date; trainees can also stop at any time. SUMF ¶¶ 24–26.

In August 2002, after Abu Zubaydah had been kept in isolation and subjected to a deliberately hopeless and disorienting environment, Defendants embarked on the "aggressive phase" of his interrogation. For weeks, they personally inflicted the abusive methods they had advanced, including slamming Abu Zubaydah into walls ("walling"), physically assaulting him ("facial and abdominal slaps"), depriving him of sleep, waterboarding him, and stuffing him into boxes ("cramped confinement"). SUMF ¶ 29. Defendants repeatedly subjected him to their methods in varying combinations, with the goal of inducing "complete helplessness" and "reach[ing] the stage where we have broken any will or ability of subject to resist." SUMF ¶ 43.

Throughout, Defendants demanded that Abu Zubaydah disclose new information about threats to U.S. interests, and punished him when he did not. SUMF ¶¶ 30–45. Defendants saw with their own eyes that their methods caused Abu Zubaydah to vomit, cry, and beg Defendants to believe that he did not possess the information they demanded. *Id.* By the third day of his torture, the

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CIA interrogation team noted that, "[a]t the risk of stating the obvious," perhaps Abu Zubaydah did not actually possess new threat information. SUMF ¶ 32. Within six days, Defendants assessed that it was "highly unlikely" that Abu Zubaydah was withholding the information they demanded. SUMF ¶ 35. But that did not stop Defendants from continuing to torture Abu Zubaydah as they "develop[ed] and refine[d]" their assessment of whether he was being truthful. *Id.* Defendants continued to inflict their methods on Abu Zubaydah while demanding information they themselves believed it was "highly unlikely" he possessed. SUMF ¶¶ 36–46.

After seventeen days of abusing Abu Zubaydah without acquiring the information they demanded, Defendants were satisfied that they had "induce[d] complete helplessness" and "broken any will or ability of subject to resist or deny providing us information." SUMF ¶ 43. But Defendants had originally claimed Abu Zubaydah was a skilled resistor, and CIA headquarters was not convinced that Defendants had fully broken their prisoner. SUMF ¶ 44. As a result, Defendants requested that CIA witnesses observe as Defendants deployed their methods on Abu Zubaydah yet again. SUMF ¶ 45. Defendant Mitchell wrote of this final demonstration session: "It was ugly and hard to do." *Id.* All involved agreed that it was pointless to abuse Abu Zubaydah further. SUMF ¶ 48.

Defendants' methods were documented on videotapes: CIA cameras contemporaneously recorded as Abu Zubaydah cried, begged, pleaded, vomited, trembled, shook, and became so hysterical he could not communicate. SUMF

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¶¶ 30–45. Defendant Mitchell "had a visceral reaction to the tapes," and "thought they were ugly." SUMF ¶ 49. He "didn't like the fact that the tapes were out there" and recommended they be destroyed. *Id.* A senior CIA official, Jose Rodriguez, agreed: he believed the tapes "would make the CIA look bad," and, if released, would "almost destroy the clandestine service." *Id.* On Rodriguez's orders, the CIA destroyed the tapes. *Id.*

Once the "aggressive phase" was over, the interrogation team assessed that Abu Zubaydah had, in fact, been telling the truth when he consistently told Defendants he did not have the threat information they demanded. SUMF ¶¶ 46–47, 50–51. Nonetheless, Defendants pronounced their program a success. Defendant Mitchell summed up Defendants' interrogation of Abu Zubaydah, writing: "I left feeling good about what we had accomplished." SUMF ¶ 52.

B. Defendants expand and develop the program

While applying Defendants' methods on Abu Zubaydah, the interrogation team, which included Defendants, wrote to CIA headquarters that "the aggressive phase . . . should be used as a template for future interrogation of high value captives." SUMF ¶ 53. Defendants' methods subsequently became the basis for the CIA's "enhanced interrogation" program, and Defendants participated in the program's expansion; their contracts expanding accordingly. SUMF ¶¶ 54–55.

In January 2003, the use of Defendants' methods on CIA prisoners was formalized in instructions sent to COBALT, a secret CIA prison where Plaintiffs were held and tortured. SUMF ¶ 63. The formal instructions sent to COBALT list

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as "standard techniques" several of the methods making up the initial phase of Abu Zubaydah's interrogation, and as "enhanced techniques" the methods that Defendants proposed in July 2002 for the "aggressive phase" (excepting "mock burial," which Defendants were never able to test). SUMF ¶ 60–61. The January 2003 guidance also standardized the use of the "abdominal slap," an "aggressive phase" technique Defendants tested on Abu Zubaydah, but had not listed in their July 2002 proposal. SUMF ¶ 61.

C. Plaintiffs are subjected to the CIA program at COBALT

In accordance with the CIA program, Plaintiffs were subjected both to conditions mirroring the initial phase of Abu Zubaydah's interrogation (*e.g.*, constant noise, deliberate disruption of day and night cycles), as well as to Defendants' "aggressive phase" methods. Thus, Plaintiffs were deprived of any natural light; stripped of "amenities" so that they had nothing in their cells "except a bucket used for human waste" and no clothing with which to cover themselves; subjected to constant noise and loud music; and were dependent on their interrogators to earn "rewards for cooperation," such as lights to cut the endless darkness, earplugs to block out the constant noise, bedding to sleep on, and blankets against the cold. SUMF ¶¶ 64–65. Likewise, "aggressive phase" methods also followed Defendants' design: in accordance with Defendants' proposal that diapers be used to "leverage" a prisoners' sensitivity to humiliation, Plaintiffs and other prisoners at COBALT were kept in diapers "solely to humiliate the prisoner for interrogation purposes." SUMF ¶¶ 66, 73. They were

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subjected to sleep deprivation by being forced to stand for days, their hands shackled to an overhead bar. SUMF ¶ 62. Special walls, a waterboard, and confinement boxes were constructed for the use of Defendants' methods. CIA records confirm Plaintiffs' undisputed testimony: Plaintiffs were subjected to Defendants' methods while at COBALT. SUMF ¶¶ 70, 72–75, 91, 113.

i. Mr. Rahman is subjected to torture and CIDT

Shortly after Defendants declared the use of their methods on Abu Zubaydah a success, Mr. Rahman was kidnapped by the CIA and taken to COBALT. SUMF ¶ 67. Defendants traveled there in November 2002, and personally participated in his interrogations. SUMF ¶¶ 67, 69. Defendant Jessen was in charge of assessing Mr. Rahman's "resistance posture," and tested at least one of Defendants' "enhanced interrogation techniques" on him. SUMF ¶¶ 68, 70–71. Defendant Jessen concluded that Mr. Rahman "was impervious to it," and advised that, rather than using the more active "enhanced interrogation techniques," Mr. Rahman's interrogators should instead focus on "deprivations." *Id.* Mr. Rahman was subjected to Defendants' sleep deprivation method; his hands were shackled overhead as he was kept standing for days at a time. SUMF ¶ 74. Also at his interrogators' direction, Mr. Rahman was stripped naked or kept in a diaper in order to humiliate him. SUMF ¶¶ 72–73. It worked: Mr. Rahman was "particularly concerned with being naked in front of . . . the guards," and consistently "asked to be covered." SUMF ¶ 73. He was deprived of clothing for the brief period that he remained alive. SUMF ¶ 72.

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Defendant Jessen also observed a prolonged physical assault of Mr. Rahman, stating afterwards that Mr. Rahman had abrasions on his head and leg and crusty contusions on his face, leg, and hands. SUMF ¶ 76. Defendant Jessen's reaction to witnessing this assault was to opine that it was worth trying, and he suggested to another interrogator that the interrogator "leverage" the assault "in some way," by speaking to the prisoner afterwards to "give them something to think about." *Id.* Defendant Jessen stated that the assault was a "good technique, but these kinds of things need to be written down and codified with a stamp of approval or you're going to be liable." SUMF ¶ 77.

Defendant Jessen advised the CIA that Mr. Rahman displayed a "sophisticated level of resistance training," because he "complained about poor treatment," and because Mr. Rahman told interrogators that he couldn't think because he was so cold. SUMF ¶ 68. After several days during which Mr. Rahman had been kept in a diaper, his hands chained overhead in accord with Defendants' sleep deprivation method, and after Defendant Jessen observed that Mr. Rahman displayed early signs of hypothermia, Defendant Jessen nonetheless recommended that the CIA "continue the environmental deprivations [Mr. Rahman] is experiencing." SUMF ¶ 78.

Defendant Jessen claims to have at one point asked for Mr. Rahman to be given a blanket; still, he instructed that interrogators should view Mr. Rahman's pleas about poor treatment and cold as strategic "resistance" tactics, rather than as sincere signs of distress. SUMF ¶¶ 68, 79, 81. Four days after Defendant

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Jessen left COBALT, an interrogator had a brief session with Mr. Rahman "based on Jessen's recommendation that Rahman be left alone and environmental deprivations continued." SUMF ¶ 80. Two days later, Mr. Rahman— starved, sleepless, and freezing—died of hypothermia. SUMF ¶ 81.

After Plaintiff Rahman's death, Defendant Jessen told an investigator:

> [I]f a detainee is strong and resilient, you have to establish control in some way or you're not going to get anywhere. If bound by the Geneva Convention, this person would not break. You have to try different techniques to get him to open up. . . .You want to instill fear and despair.

SUMF ¶ 83. He further told the investigator that that the atmosphere at COBALT "was excellent for the type of prisoners kept there—'nasty but safe,'" and that the officer who had ordered in Mr. Rahman's final days that he be chained, pantless, to a freezing concrete floor "was very level headed and acted in a measured manner." SUMF ¶ 84. Defendant Jessen stated he would work with the officer "anytime, anyday." *Id.*

ii. Mr. Salim is subjected to torture and CIDT

Mr. Salim was held at COBALT for about six weeks in spring 2003, after Defendants' methods had been standardized at the prison. SUMF ¶ 85. During that time, many of the methods used in the initial phase of Abu Zubaydah's interrogation were also inflicted upon Mr. Salim: he was subjected to constant ear-splitting noise and music, deprived of adequate food and water, deliberately prevented from knowing whether it was day or night, and kept naked. SUMF ¶¶ 86–88. In addition, Mr. Salim was subjected to many of the methods that

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Defendants had tested on Abu Zubaydah during the "aggressive phase": Mr. Salim was kept in a diaper, slammed into walls, physically assaulted (including facial and abdominal slaps), shackled to an overhead bar in a painful position to deprive him of sleep, and stuffed into boxes. SUMF ¶¶ 87–95. Interrogators interspersed these methods with interrogation sessions. SUMF ¶ 96.

Mr. Salim was also subjected to two additional water-based methods that were closely related to those Defendants had proposed and tested: he was strapped to a waterboard and threatened with having water forced into his mouth, but was instead spun around several times. SUMF ¶¶ 97–98. He was also repeatedly forced onto the center of a large plastic sheet and doused with gallons of icy water. *Id.* At times, a hood was placed over his head and water was poured directly over it. *Id.* The soaked hood would cling to Mr. Salim's face, simulating drowning and approximating the terror produced by waterboarding. *Id.*

As Defendants had claimed, their methods successfully "instill[ed] fear and despair." Like Abu Zubaydah, Mr. Salim vomited, choked, and suffered excruciating pain, terror, and dread. SUMF ¶¶ 90–99. As much as he suffered from each of Defendants' methods individually, their combined use proved too much to endure. Not knowing when or if his torture would end, Mr. Salim reached a point where even death was preferable to any further terrifying, degrading, and painful abuse. SUMF ¶ 101. Mr. Salim began to secretly stockpile painkillers he was given by CIA medical staff, and after weeks of torture, attempted suicide by taking all his pills at once. *Id.*

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After his suicide attempt, the aggressive phase of Mr. Salim's interrogation ended. He was eventually transferred to Department of Defense custody. SUMF ¶¶ 102–103. After five years of imprisonment without charge or trial, the Defense Department examined the evidence and determined that the CIA had erred: Mr. Salim had never been involved in terrorist operations. SUMF ¶ 104. He was released with the certification that he "has been determined to pose no threat to the United States Armed Forces or its interests in Afghanistan." SUMF ¶ 105.

iii. Mr. Ben Soud is subjected to torture and CIDT

Mr. Ben Soud was taken to COBALT in April 2003, after Defendants' methods had been standardized at the prison. SUMF ¶ 107. He was held at COBALT for nearly a year. *Id.* During that time, he was subjected to many of the conditions used on Abu Zubaydah and Mr. Salim. SUMF ¶¶ 108–111. Like Mr. Salim, he was subjected to many of the methods that Defendants had tested on Abu Zubaydah during the "aggressive phase": Mr. Ben Soud was kept naked or in a diaper for approximately two months, slammed into walls, physically assaulted (including facial and abdominal slaps), shackled to an overhead bar to deprive him of sleep, forced to contort his body into painful "stress positions," and stuffed into boxes. SUMF ¶¶ 112–116. The use of these "aggressive" methods was interspersed with repeated interrogation sessions. SUMF ¶ 119. The pain caused by Defendants' methods was exacerbated because Mr. Ben Soud's foot was broken and in a cast during the "aggressive phase" of his interrogation.

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SUMF ¶¶ 112–116. While enduring prolonged standing sleep deprivation, he began to hallucinate and became hysterical. SUMF ¶ 116.

Like Mr. Salim, Mr. Ben Soud was also subjected to two additional water-based methods that were closely related to those Defendants had proposed and tested: he was strapped to a waterboard, spun around, and doused with water while interrogators threatened to force water directly into his mouth. SUMF ¶ 118. In addition, he was repeatedly forced onto the center of a large plastic sheet and doused with gallons of icy water. SUMF ¶ 117. At times, a hood was placed over his head and water was poured directly over the hood. *Id.* When the hood was soaked it would cling to his face, also simulating drowning. *Id.*

As Defendants had claimed, their methods successfully "instill[ed] fear and despair." Mr. Ben Soud was humiliated, degraded, and suffered excruciating pain because of the relentless abuse he endured. SUMF ¶¶ 108–121. After his torture was over, the CIA eventually turned Mr. Ben Soud over to the Quaddafi dictatorship in Libya, which immediately imprisoned him. SUMF ¶ 122. Mr. Ben Soud, who had fought and fled from the Quaddafi regime, never fought against the United States. *Id.* In 2011, the Libyan people overthrew the dictatorship and President Obama announced that "the dark shadow of tyranny has been lifted." SUMF ¶ 123. That year, Mr. Ben Soud was freed. SUMF ¶ 122.

D. Defendants profit from the CIA program

Defendants earned millions of dollars for their lead roles in devising, testing, implementing, and advocating for the interrogation program. SUMF ¶¶

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124–29. In addition to their personal contracts for "research and development" and "operational services," they formed a company that acquired a sole source contract for the program, which included interrogation, training, evaluation of methods, and development of new methods. SUMF ¶ 125, 129. When Secretary of State Condoleezza Rice requested a personal briefing on the CIA program from its "original architects" in 2007, it was Defendants who met with her and tried to allay her concerns with some of their methods. SUMF ¶ 127. Defendants continued to refine the program, eventually concluding that several methods they had called for were "completely unnecessary," while claiming others were essential to the program's effectiveness. SUMF ¶ 126. Defendants continued to profit from the interrogation program until 2009, when the CIA's secret prisons were shuttered. SUMF ¶ 131.

ARGUMENT

The standard for summary judgment is well known to the Court. "The moving party is entitled to summary judgment when, viewing the evidence and the inferences arising therefrom in the light most favorable to the nonmoving party, there are no genuine issues of material fact in dispute." *Travelers Cas. & Sur. Co. v. Washington Tr. Bank*, 86 F. Supp. 3d 1148, 1152 (E.D. Wash. 2015). Once the moving party has made such a showing, the opposing party must do more than identify the "mere existence of a scintilla of evidence" in support of its position, *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 252 (1986), or "show there is some metaphysical doubt as to the material facts." *Travelers Cas.*, 86 F.

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Supp. 3d at 1152. "Rather, the opposing party must come forward with specific facts showing that there is a genuine issue for trial." *Id.*

Plaintiffs are entitled to summary judgment because there is no genuine dispute of material fact that Defendants aided and abetted the CIA's torture program, to which Plaintiffs were subjected, by designing, testing, implementing, advocating for it, and profiting from it.

I. There is no genuine dispute of material fact that Defendants aided and abetted Plaintiffs' torture and CIDT.

Defendants' crucial role in developing, refining, and supporting the CIA's systematic abuse of prisoners is indisputable, as is the profit they made over years from promoting and assisting the abuse. These undisputed facts establish their liability.

The Ninth Circuit makes clear that "[c]ustomary international law . . . provides the legal standard for aiding and abetting ATS claims." *Doe I v. Nestle USA, Inc.*, 766 F.3d 1013, 1023 (9th Cir. 2014). The Circuit's decision in *Nestle* surveys the sources of customary international law, and finds "widespread substantive agreement" that the action element for aiding and abetting claims "is established by assistance that has a substantial effect on the crimes." *Id.* at 1026–27 (quoting *Prosecutor v. Taylor*, Case No. SCSL-03-01-A, ¶ 475 (SCSL Sept. 26, 2013)). Substantial assistance does not require that an aider and abettor actually carry out the violation, or even be a but-for cause of it. Rather, a defendant "may be found liable even if the crimes could have been carried out

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through different means or with the assistance of another." *In re S. African Apartheid Litig.*, 617 F. Supp. 2d 228, 257–58 (S.D.N.Y. 2009); *see also Prosecutor v. Karadzic*, Case No. IT-95-5/18-T, Judgment (Mar. 24, 2016).

Thus, the required "substantial effect" is established where the violation "most probably would not have occurred in the same way [without] someone act[ing] in the role that the [aider and abettor] in fact assumed." *Prosecutor v. Tadic*, Case No. IT-94-1-T, Opinion & Judgment, ¶ 688 (May 7, 1997); *see also Prosecutor v. Furundžija*, Case No. IT-95-17/1/T, Judgment, ¶ 219 (Dec. 10, 1998) (defendant need not have exerted any control over the principal; that the defendant's actions served to "modify" the way in which the act was committed suffices). "[P]rovision of the means by which a violation of the law is carried out is sufficient to meet the *actus reus* requirement of aiding and abetting liability under customary international law." *S. African Apartheid*, 617 F. Supp. 2d at 259.

With regard to intent, the Ninth Circuit has held that "the *mens rea* required of an aiding and abetting claim under either a knowledge or purpose standard" is satisfied if defendants "sought to accomplish their own goals" by "purposefully supporting" violations of international law. *Nestle*, 766 F.3d at 1024–1026. In making this determination, it is relevant if a defendant "obtained a direct benefit from the commission of the violation of international law." *Id.* at 1024. Specific intent is not required. *See Doe I v. Cisco Sys., Inc.*, 66 F. Supp. 3d 1239, 1248 (N.D. Cal. 2014) (applying "standard identified by the Ninth Circuit in *Nestle*, which does not require the allegation of specific intent for *mens rea*").

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An aider and abettor need not share the goals of the primary violator to be held liable. As the Ninth Circuit made clear, a defendant corporation could be liable for aiding and abetting child slavery even where the corporation's only "motive was finding cheap sources of cocoa." *Nestle*, 766 F.3d at 1025. Similarly, a company selling equipment that enabled the apparatus of apartheid need not have shared the regime's racial animus or goals to be liable for aiding and abetting its crimes. *See S. African Apartheid*, 617 F. Supp. 2d at 262. Finally, any belief by an aider and abettor that the criminal conduct he abets is officially authorized does not negate *mens rea*. Indeed, official authorization is an *element* of the offense: "[t]he norm of customary international law prohibiting official torture" specifically bars actions "perpetrated under color of official authority." *Siderman de Blake v. Republic of Argentina*, 965 F.2d 699, 716 (9th Cir. 1992).

Here, there is no genuine dispute of fact that Defendants meet the *actus reus* requirements for aiding and abetting liability. Defendants provided the "means" by which the systematic abuse of CIA prisoners was carried out. *S. African Apartheid*, 617 F. Supp. 2d at 259. They indisputably advocated for, tested, developed, and refined the program, and provided guidance and support for it. SUMF ¶¶ 11-29, 53-61, 124–41. Because Defendants directly participated in and assisted Mr. Rahman's torture and CIDT, and because CIA records confirm that Mr. Salim and Mr. Ben Soud were subjected to a systematic program based directly on Defendants' design (and relying on the precise methods they promoted and tested), SUMF ¶¶ 67–81, 91, 113 there can be no

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question but that Defendants' "assistance" had a "substantial effect" on the ways in which Plaintiffs were abused. *Nestle*, 766 F.3d at 1026.

It does not matter that Defendants did not personally torture all three Plaintiffs or even know who they were—aider and abettor liability does not require any such direct action. *See, e.g.*, *Doe v. Drummond Co.*, No. 2:09-CV-01041-RDP, 2010 WL 9450019, at *11 n.24 (N.D. Ala. Apr. 30, 2010) (finding "no authority" for argument that an aider and abettor in an ATS action "must have known of specific identities" of victims and sought to harm "those specific individuals"). Defendants' arrangement was that they "designed a program for the CIA to get prisoners to talk, but the CIA would decide which prisoners to apply it to." SUMF ¶ 57. This arrangement constitutes aiding and abetting.

There is no genuine dispute of fact that Defendants possessed the culpable *mens rea* for aiding and abetting violations of customary international law. Certainly, they "sought to accomplish their own goals by supporting violations of international law" and "obtained a direct benefit from the commission of the violation of international law." *Nestle*, 766 F.3d at 1024. Defendants unquestionably intended to provide assistance in the extreme abuse of prisoners; indeed, they described instilling "fear and despair" in prisoners as the primary purpose of the methods they recommended. SUMF ¶ 20. And Defendant Jessen admitted that their methods were based on training that reflected "what we thought our enemy might do if they weren't adhering to the Geneva Conventions," which bar torture and CIDT. SUMF ¶ 23; Convention Against

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Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, S. Exec. Rep. 101–30, at 15 (1990) ("[T]he Geneva Conventions, to which the United States and virtually all other countries are Parties, . . . generally reflect customary international law.").

Nor can Defendants claim ignorance of the severe pain and suffering that prisoners could endure in the program. Defendants assisted and encouraged the expansion of their program to additional prisoners even after they observed firsthand that the use of their methods caused Abu Zubaydah to vomit, cry, beg, plead, shake, tremble, whimper, moan, desperately pray, and become so hysterical and distressed he could not communicate. SUMF ¶¶ 29–45. Defendants called this outcome a success, supporting the use of their methods even on apparently cooperative prisoners, simply to establish a "high degree of confidence" that a prisoner "wouldn't hold back." SUMF ¶¶ 50–54. And, brutal as their program was when Defendants personally inflicted it on prisoners, Defendants were also keenly aware of "abusive drift": they knew once coercion was employed, interrogators would tend to exceed approved limits, resulting in even more severe abuse of prisoners. SUMF ¶ 56. It cannot be disputed that Defendants' actions purposefully supported violations of international law.

Defendants indisputably "obtained a direct benefit" from the systematic abuse they assisted. *Nestle*, 766 F.3d at 1024. They were personally paid millions of dollars as independent contractors for "research and development as well as operational services" in support of the interrogation program. SUMF ¶129. By

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2005, Defendants formed Mitchell, Jessen and Associates, which acquired a "sole source contract to support CTC's rendition, detention, and interrogation program." SUMF ¶ 125. The contract included everything from Defendants' "professional services," and a commitment to "continue developing and refining the program" to program evaluation, "training services," and even the provision of security. *Id.* Although the CIA later acknowledged the "conflict of interest," created when "the contractors who helped design and employ the enhanced interrogation techniques were also involved in assessing the fitness of detainees to be subjected to such techniques and the effectiveness of those same techniques," Mitchell, Jessen, and Associates profited to the tune of $81 million in taxpayer money before their contract was terminated. SUMF ¶¶ 130–31.

In sum, Defendants substantially assisted the abuse of CIA prisoners and profited enormously from doing so. There is no genuine dispute of fact that Defendants aided and abetted the use of their abusive methods on CIA prisoners, including Plaintiffs.

II. There is no genuine dispute of material fact that Plaintiffs were subjected to torture and CIDT.

That the prolonged and methodical abuse of Plaintiffs constituted torture and CIDT is also undisputable. Under Ninth Circuit law, torture under the ATS is defined in accordance with Article 1.1 of the Convention Against Torture or Other Cruel, Inhuman, or Degrading Treatment ("CAT"). *See Hilao v. Estate of Marcos*, 103 F.3d 789, 792 (9th Cir. 1996) (approving jury instructions using

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CAT definition). The prohibition against torture extends to "any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person" for purposes including "obtaining from him or a third person information." CAT art. 1.1, Dec. 10, 1984, 23 I.L.M. 1027 (1984).

When evaluating claims of torture, U.S. courts examine the totality of treatment, rather than artificially isolating individual abuses, to determine if it collectively meets the "severe pain" threshold. *See, e.g.*, *Abebe-Jira v. Negewo*, 72 F.3d 844, 845 (11th Cir. 1996) (finding torture where a detainee was forced to undress, had her arms and legs bound, and was subjected to physical assault and threats); *Al-Saher v. INS*, 268 F.3d 1143, 1147 (9th Cir. 2001) (detainee's binding, blindfolding, and severe beating amounted to torture); *Surette v. Islamic Republic of Iran*, 231 F. Supp. 2d 260, 264 (D.D.C. 2002) (torture established by treatment including "cruel, inhumane conditions," "constant and deliberate demoralization," "beating[s]," and denial of medical treatment). Likewise, international criminal tribunals assess torture claims by viewing abuses comprehensively. *See, e.g.*, *Aydin v. Turkey*, No. 23178/94, 25 Eur. H.R. Rep. 251, ¶ 86 (1997) (examining "the accumulation of acts of physical and mental violence inflicted on the applicant"). The International Criminal Tribunal for the former Yugoslavia (ICTY), the decisions of which are cited by the Ninth Circuit and other courts in ATS cases as evidence of customary international law, has explained:

> [T]o the extent that an individual has been mistreated over a prolonged period of time, or that he or she has been subjected to repeated or various

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> forms of mistreatment, the severity of the acts should be assessed as a whole to the extent that it can be shown that this lasting period or the repetition of acts are inter-related, [or] follow a pattern[.]

Prosecutor v. Krnojelac, Case No. IT-97-25-T, Judgment, ¶ 182 (Mar. 15 2002).

It is indisputable that the CIA intentionally subjected Plaintiffs to severe pain and suffering for the purpose of extracting information or admissions, thus constituting torture. *See Prosecutor v. Akayesu*, Case No. ICTR-96-4-A, Judgment, ¶ 523 (Sept. 2, 1998) (intent to inflict torture may be inferred from the facts and circumstances of the abuse); SUMF ¶¶ 67-121; (describing CIA treatment of Plaintiffs); *Aksoy v. Turkey*, No. 21987/93, 1996-VI Eur. Ct. H.R. 2260, ¶ 64 (finding torture when "treatment" of prisoner—hung naked by his arms—"could only have been deliberately inflicted" and was "administered with the aim of obtaining admissions or information").

For its part, "CIDT is the intentional infliction of mental or physical suffering, anguish, humiliation, fear, or debasement against a person in the offender's custody or control that nevertheless falls short of torture. *S. African Apartheid*, 617 F. Supp. 2d at 253 (same). "The difference between torture and cruel, inhuman, or degrading treatment or punishment derives principally from a difference in the intensity of the suffering inflicted." *Id.* (quoting Restatement (Third) of the Foreign Relations Law of the United States § 702).

ATS claims for CIDT turn on whether the conduct is "universally condemned as cruel, inhuman, or degrading." *See Bowoto v. Chevron Corp.*, 557 F. Supp. 2d 1080, 1094 (N.D. Cal. 2008), *aff'd*, 621 F.3d 1116 (9th Cir. 2010).

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International courts have emphasized that "in considering whether a punishment or treatment is 'degrading' . . . the Court will have regard to whether its object is to humiliate and debase." *See. e.g.*, *Raninen v. Finland*, No. 20972/92, 26 Eur. H.R. Rep. 563, ¶ 55 (1997); *Keenan v. United Kingdom*, No. 27229/95, 2001-V Eur. Ct. H.R. 242, ¶ 110. The CIDT prohibition thus turns on whether the treatment "arouse[s] feelings of fear, anguish and inferiority capable of humiliating or debasing the victim and possibly breaking their physical or moral resistance." *Id.*; *see also Van der Ven v. Netherlands*, No. 50901/99, 38 Eur. Ct. H.R. 46, ¶ 48 (2003) (same). Like claims of torture, courts determine whether conduct constitutes CIDT by assessing mistreatment in its totality, not individual abuses in isolation. *See, e.g.*, *Bowoto*, 557 F. Supp. 2d at 1092–1095 (multiple abuses collectively constituted CIDT).

There can be no genuine issue of material fact here: Defendants' methods, even when viewed in isolation, constituted torture, and the CIA inflicted those methods on Plaintiffs. For example, forced sleep deprivation for purposes of interrogation has long been found to constitute torture. In *Ashcraft v. Tennessee*, 322 U.S. 143, 154 n.6 (1944), the Supreme Court quoted a report finding that "deprivation of sleep is the most effective torture and certain to produce any confession desired." International courts are in accord. *See, e.g.*, HCJ 5100/94 *Public Committee Against Torture in Israel v. Israel*, 53(4) PD 817 ¶¶ 14, 23, 31 (1999) (deliberate sleep deprivation violates either international prohibition on torture or CIDT). Similarly, the U.S. State Department's 2004 Human Rights

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Reports criticized sleep deprivation as a method of torture. *See* Country Reports on Human Rights Practices: Tunisia (2004) ("The forms of torture included: . . . sleep deprivation."). And the then-applicable Army Field Manual classifies "abnormal sleep deprivation" as torture. U.S. Dep't of Army, Field Manual 34-52, Intelligence Interrogation (Sept. 28, 1992) ("Army Field Manual 34-52"). Defendants' method for inducing sleep deprivation was particularly brutal, as it called for shackling Plaintiffs in diapers and forcing them to stand for days with their arms chained overhead. SUMF ¶¶ 74, 95,109, 116.

The U.S. judicial and executive branches have also recognized that stress positions can constitute torture. For example, in *Simpson v. Socialist People's Libyan Arab Jamahiriya*, the D.C. Circuit explained that torture includes "tying up or hanging in positions that cause extreme pain." 326 F.3d 230, 234 (D.C. Cir. 2003) (quotation marks omitted). The State Department has consistently recognized stress positions as a form of torture. *See, e.g.*, Country Reports on Human Rights Practices: Iran (2004) (citing "long confinement in contorted positions" as a common method of torture and severe prison abuse), Country Reports on Human Rights Practices: North Korea (2004) (torture methods included "being forced to kneel or sit immobilized for long periods; being hung by one's wrists"). The Army Field Manual defines torture as including "forcing an individual to stand, sit, or kneel in abnormal positions for prolonged periods of time." Army Field Manual 34-52. Plaintiffs indisputably suffered excruciating

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pain when they were chained in contorted, unnatural positions for days at a time. SUMF ¶¶ 87, 94–95, 109, 115–16.

The State Department has also repeatedly condemned as torture and CIDT the humiliation of victims through forced nudity. *See, e.g.*, Country Reports on Human Rights Practices: Syria (2004) ("being stripped naked in front of others" was an example of "various forms of torture and ill-treatment."), Country Reports on Human Rights Practices: North Korea (2004) (same). Defendants themselves eventually came to the conclusion that nudity should not be used to degrade prisoners. SUMF ¶ 126. But it was too late for Plaintiffs, who suffered anguish at the deliberate debasement Defendants had urged. SUMF ¶¶ 73, 89, 111.

In short, even taken individually, Defendants' methods constituted torture. But because the program that Defendants aided and abetted called for their methods to be used repeatedly and in combination for weeks at a time, there can be no question that they met the threshold for severe pain and suffering. The United Nations Committee Against Torture, which monitors the implementation of the CAT, has found that "(1) restraining in very painful conditions, (2) hooding under special conditions, (3) sounding of loud music for prolonged periods, (4) sleep deprivation for prolonged periods, (5) threats, including death threats, (6) violent shaking, and (7) using cold air to chill" constitute torture. Rep. of Comm. Against Torture, 52d Sess., ¶ 257 U.N. Doc. A/52/44 (Sept. 10 1997). The U.N. Special Rapporteur on Torture explained: "Each of these measures on its own may not provoke severe pain or suffering. Together—and they are

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frequently used in combination—they may be expected to induce precisely such pain or suffering, especially if applied on a protracted basis of, say, several hours." Special Rapporteur on Torture, Rep. to the U.N. Commission on Human Rights, ¶ 119, U.N. Doc. E/CN.4/1997/7 (Jan. 10, 1997).

The brutality of the CIA program cannot be seriously disputed, based as it was on the use of many abuses in combination over a prolonged period. Combinations of methods were applied to CIA prisoners not "on a protracted basis of, say, several hours," *cf. id.*, but for *weeks* at a time to instill fear and despair, SUMF ¶¶ 29, 90, 120. The goal was not to force a quick disclosure of some scrap of vital intelligence from prisoners, but to terrorize a prisoner so completely that he would remain obedient indefinitely—after which interrogators would "drain him dry" of intelligence over months or years. SUMF ¶ 47. When a prisoner's "distress level increased the moment [interrogators] entered the cell," this was taken as "a sign that the conditioning strategy was working." SUMF ¶ 33. Further abuse loomed as a threat for as long as a prisoner was in the CIA's hands: even after Abu Zubaydah was assessed to have been reduced to the desired state of "complete subjugation," Defendants committed to "stand by to 'tune him up' as required." SUMF ¶¶ –46–47.

Plaintiffs were tortured. They experienced severe mental and physical pain and suffering as a result of being subjected to the program's combined methods, over and over, for weeks. Plaintiff Salim's terror and suffering were so severe that he attempted to end his life rather than continue to endure the program.

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SUMF ¶¶ 90–101. Plaintiff Ben Soud experienced hallucinations, became hysterical, suffered excruciating pain, and experienced constant fear and complete hopelessness. SUMF ¶¶108–121. And Plaintiff Rahman endured "environmental deprivations" until he died of hypothermia. SUMF ¶¶ 70–82.

Even if the Court were somehow to find that all the abuses that Plaintiffs endured, taken together, did not rise to the level of torture, their combined use nonetheless violated the prohibition on cruel, inhuman, or degrading treatment. This standard has been met in U.S. cases by conduct including beating plaintiffs, holding them in inhuman conditions, and subjecting them to stress positions. *See Bowoto v. Chevron Corp.*, 557 F. Supp. 2d at 1092–1095; *see also Jama v. INS*, 22 F. Supp. 2d 353, 358 (D.N.J. 1998) (CIDT where detainees were forced to sleep under bright lights 24 hours a day and live in filth and constant smell of human waste, packed in rooms with twenty to forty detainees, beaten, deprived of privacy, subjected to degradation and sexual abuse).

And as the Ninth Circuit has recognized, international courts have for decades concluded that the combined use of "stress positions, hooding, subjection to noise, sleep deprivation and deprivation of food and drink . . . . 'undoubtedly amounted to inhuman and degrading treatment' in violation of Article 3 [of the Geneva Conventions]." *Padilla v. Yoo*, 678 F.3d 748, 765 (9th Cir. 2012) (quoting *Ireland v. United Kingdom*, 25 Eur. Ct. H.R. (ser. A) (1978)). The Ninth Circuit has also cited *Public Committee Against Torture in Israel*, which similarly found that "hooding, violent shaking, painful stress

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positions, exposure to loud music and sleep deprivation" *were each illegal*, violating either the prohibition against torture or against CIDT. *Id.* Likewise, in 1988, the U.N. specifically condemned as CIDT conditions that were later made integral to the CIA program: "the holding of a detained or imprisoned person in conditions which deprive him, temporarily or permanently, of the use of any of his natural senses, such as sight or hearing, or of his awareness of place and the passing of time." G.A. Res 43/173, annex, at 6 n.1 (Dec. 9, 1988).

The CIA program was even more cruel and degrading than these cases, incorporating many of the methods above as well as repeated physical assault, cramped confinement, and water torture, and incorporating deliberate humiliation as a key element. There is no genuine issue of material fact that Defendants designed their program specifically to produce results that violate the CIDT prohibition—that is, to "arouse feelings of fear, anguish and inferiority capable of humiliating or debasing the victim and possibly breaking their physical or moral resistance." *Keenan v. United Kingdom*, No. 27229/95, 2001-V Eur. Ct. H.R. 242, ¶ 110. Prisoners subjected to the CIA program, including Plaintiffs, were undisputedly stripped, clad in diapers, and shackled to the ceiling for days at a time. Eventually, Secretary of State Condoleezza Rice expressed concern that Defendants' method of sleep deprivation was similar to the torture and humiliation at Abu Ghraib. SUMF ¶ 127. It cannot be genuinely disputed that the abuse Plaintiffs suffered at COBALT constituted CIDT, or, as set forth above, that Defendants aided and abetted this conduct.

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The record establishes that Plaintiffs were subjected to methodical abuse intended to reduce them to a state of utter subjugation. The goal was to reduce human beings to mere shells: fearful, submissive, and desperate to avoid further suffering. Plaintiffs were bombarded with noise, stripped of their clothing, forced to stand for days wearing a diaper with their hands chained overhead. They were hurled into walls, over and over, while being physically assaulted with hard slaps to their face and stomach. They were deprived of sleep and any way of telling time, doused with icy water, and stuffed into coffin-like boxes. They were systematically brutalized, terrified, and deprived of any shred of control, predictability, or dignity. The prolonged, uncontrollable, and pervasive abuse they endured caused Plaintiffs severe mental and physical pain and suffering, and constituted torture. It also debased and humiliated them, violating the prohibition against CIDT. This treatment was of Defendants' design. Their aiding and abetting liability is not a matter of genuine dispute.

CONCLUSION

For the reasons stated above, Plaintiffs' Motion for Partial Summary Judgment should be granted.

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DATED: May 22, 2017 By: *s/ Dror Ladin*

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I hereby certify that on May 22, 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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