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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. 2:15-cv-286-JLQ PLAINTIFFS' MEMORANDUM IN OPPOSITION TO 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 seek once again to escape this Court's scrutiny of their actions on the merits, arguing that the political question doctrine deprives the Court of jurisdiction to decide whether they violated the prohibitions against torture, CIDT, and human experimentation. Defendants also claim that they are immune from any liability, even though the record confirms that they profited enormously from designing and implementing an experimental torture program. And although the Court has already held otherwise, Defendants claim that the program they designed and profited from in the United States, pursuant to contracts executed with the CIA in the United States, that the CIA implemented in U.S.-controlled facilities, and that Defendants promoted and advanced from the United States, lacks sufficient connection to the United States for the Court to exercise jurisdiction. But discovery has only strengthened the rationales underpinning the Court's rejection of Defendants' previous Motion to Dismiss on these grounds, and their Motion for Summary Judgment should be rejected as well.

Defendants now also argue that they bear no legal responsibility for the abuse Plaintiffs endured—even though Defendants' own witnesses refer to them as the "architects" of the CIA program, Defendants' methods were standardized and implemented throughout the CIA's secret prisons, and CIA records confirm that Plaintiffs were subjected to those methods while in CIA custody. But these arguments against liability are premised on significant misstatements and distortions of the record, are legally meritless, and should be rejected.

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ARGUMENT

Summary judgment is only appropriate if "there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a).The Court may not grant summary judgment if a "reasonable juror, drawing all inferences in favor of the nonmoving party, could return a verdict in the nonmoving party's favor." *James River Ins. Co. v. Hebert Schenk, P.C.*, 523 F.3d 915, 920 (9th Cir. 2008). As discussed below, Defendants' arguments seeking summary judgment fail as a matter of law and fact.

I. THIS CASE IS JUSTICIABLE.

Defendants raise yet again their political question argument, which the Court previously rejected: that torture and war crimes claims "are inherently entangled with (and predicated upon) decisions reserved for the political branches," and thus are nonjusticiable. ECF No. 169 at 2. Remarkably, Defendants abandon entirely the factors set forth in *Baker v. Carr*, 369 U.S. 186 (1962), which the Court correctly applied in rejecting Defendants' prior motion. *See* ECF No. 40 at 9–13. They ignore Supreme Court and Ninth Circuit precedent, which, as the Court held, readily demonstrates the "fallacy of Defendants' argument that the court must decline jurisdiction because the case falls within the realm of war and foreign policy." *Id*. at 12 (collecting cases). And they disregard the Court's rejection of their argument that this case is nonjusticiable because, according to Defendants, "there is no clear definition of 'torture.'" *Id*. at 10.

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Instead of grappling with the binding cases that the Court has already identified, including *Koohi v. United States*, 976 F.2d 1328, 1331 (9th Cir. 1992), which held that claims against military contractors are justiciable, Defendants urge the Court to look to the justiciability test described by the Fourth Circuit in *Taylor v. Kellogg Brown & Root Services., Inc.*, 658 F.3d 402 (4th Cir. 2011). *Taylor* held that negligence claims against military contractors are nonjusticiable when a contractor acts "under the military's control" and adjudication of the "negligence claim would require the judiciary to question 'actual, sensitive judgments made by the military.'" *Id.* at 411. But *Taylor* does not apply here: Defendants contracted with the CIA, and can make no argument that this case involves *military* control or *military* decisionmaking. Even if *Taylor* were the law of this Circuit, which it is not, and even if Defendants contracted with the military, which they did not, Plaintiffs' claims would still be justiciable.

Defendants' argument that the CIA exercised "operational control," ECF No. 169 at 5, is misdirected, because the record establishes that Defendants designed the torture program rather than merely carrying out a CIA plan. As the Fourth Circuit explained, "the critical issue . . . is not whether the military 'exercised some level of oversight' over a contractor's activities," but "whether the military clearly 'chose *how* to carry out these tasks.'" *Al Shimari v. CACI Premier Tech., Inc.*, 758 F.3d 516, 534 (4th Cir. 2014). Thus, the "control" requirement is *not* met if the "military told [the contractor] what goals to achieve but not how to achieve them," *In re KBR, Inc., Burn Pit Litig.*, 744 F.3d 326, 339 (4th Cir. 2014). Here, the CIA did not tell Defendants "how to achieve" the goal

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of rendering prisoners compliant; instead, that was Defendants' central role. As former senior CIA official Jose Rodriguez explained, he "asked Dr. Mitchell if he would take charge of creating and implementing a program" that would "get prisoners to talk." Plaintiffs' Statement of Facts in Opposition ("SOF") ¶¶ 5, 10. It was Defendants who determined how to carry out these tasks through methods Defendants designed to "instill fear and despair." *Id.* ¶ 11. As Mr. Rodriguez testified, Defendant Mitchell had "a good vision for what needed to be done," which was "to use enhanced interrogation techniques." *Id.* ¶ 4.

Moreover, even if the Defendants could somehow demonstrate the requisite control under *Taylor*, the Fourth Circuit recently clarified that "when a contractor has engaged in unlawful conduct, irrespective of the nature of control exercised by the military, the contractor cannot claim protection under the political question doctrine." *Al Shimari v. CACI Premier Tech., Inc.*, 840 F.3d 147, 157 (4th Cir. 2016) ("*Al Shimari IV*"). As this Court noted, Defendants' previous briefing "rel[ied] heavily on the District Court opinion" in *Al Shimari* that dismissed Iraqi prisoners' claims for torture, CIDT, and war crimes under *Taylor*. ECF No. 40 at 11. But in *Al Shimari IV*, the Fourth Circuit reversed that opinion, explaining that *Taylor* applied to negligence actions, not intentional torts, and that the district court "failed to draw this important distinction." 840 F.3d at 157.

Defendants nonetheless argue that this Court lacks jurisdiction over Plaintiffs' claims for torture and nonconsensual human experimentation because Defendants' actions were either entirely lawful, or at least "fall within the 'grey

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area' of non-justiciable conduct." ECF No. 169 at 10. Defendants maintain that the Court lacks authority over their actions because: (1) their "stated intent" was to inflict their methods in a way they believed would not violate the torture prohibition; (2) they relied upon a classified legal memorandum defining torture so as to exempt Defendants' methods; (3) in 2002, no court had yet evaluated whether Defendants' torture methods were "specifically prohibited by the general norm against torture"; and (4) nonconsensual human experimentation is not actionable if undertaken on prisoners held in a "non-international armed conflict." *Id.* at 8–10. But each of these arguments goes to the merits of Plaintiffs' claims, not their justiciability, and none establishes that this action is barred by the political question doctrine—which is a "narrow exception" to the judiciary's "duty" to decide those cases before it. *Zivotofsky v. Clinton*, 132 S. Ct. 1421, 1427–28 (2012). As discussed below, Defendants' arguments are contradicted by decades of controlling law.

A. Defendants did not lack intent.

First, no case supports Defendants' claim that their methods "could not have violated the prohibition against torture" because their "stated intent" was to use the methods in a way that would avoid "permanent physical harm or profound and pervasive personality change." ECF No. 169 at 8. The legal issue is not Defendants' "stated intent," but rather whether they intentionally attempted to extract information from prisoners using coercive methods, and whether those methods inflicted severe suffering. *See* Oona Hathaway, et al., *Tortured Reasoning: The Intent to Torture Under Int'l and Domestic Law*, 52 Va. J. Int'l

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L. 791 (2012) (collecting cases showing that "it is clear that it is sufficient that the accused intentionally inflict pain or suffering if that pain or suffering is inflicted for a prohibited purpose"). Defendants' intent is established in the record by their undisputed firsthand knowledge of the extreme suffering their own infliction of their methods caused. *See People v. Massie*, 142 Cal. App. 4th 365, 372–73 (Cal. Ct. App. 2006) (finding "ample evidence" to support finding of requisite *mens rea* for torture where "defendant could obviously see the cruel and extreme pain he was inflicting"). Thus, although Defendant Mitchell testified that, to him, the sound of a prisoner crying while Defendants waterboarded him meant merely that the prisoner had a clear airway, it is undisputed that Defendant Mitchell could also see that the prisoner trembled, shook, cried, begged, pleaded, vomited, suffered involuntary spasms, and became hysterical during weeks of abuse specifically intended to "instill fear and despair," SOF ¶¶ 11, 26–27; any reasonable observer would recognize this severe suffering.

Moreover, to the extent that Defendants' argument is that they must specifically intend to violate the torture prohibition to be culpable, those arguments contradict centuries of settled law: "In the usual case, 'I thought it was legal' is no defense." *Commil USA, LLC v. Cisco Sys., Inc.*, 135 S. Ct. 1920, 1930 (2015). "Our law is no stranger to the possibility that an act may be 'intentional' for purposes of civil liability, even if the actor lacked actual knowledge that her conduct violated the law." *Id.* (citation alterations omitted). Thus, ignorance of law does not negate intent when the prohibition at issue is "not 'highly technical' and the mental state is not 'willful.'" *United States v. Hancock*, 231 F.3d 557,

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562 (9th Cir. 2000); *see also United States v. Fierros*, 692 F.2d 1291, 1295 (9th Cir. 1982) (ignorance not a defense where "prohibitions are neither detailed nor arcane"). None of the long-standing prohibitions against torture, CIDT, experimentation on prisoners, or war crimes is "highly technical," "detailed," or "arcane;" none requires a "willful" violation.

B. Defendants' purported reliance on CIA lawyers does not negate intent.

For the same reason, Defendants may not invoke a "reliance on counsel" defense. Although in "certain circumstances, reliance on the advice of counsel may be a defense to a charge of willfulness," *United States v. Nordbrock*, 828 F.2d 1401, 1404 (9th Cir. 1987), the defense is only available if a prohibition has "willfulness as an element." *United States v. Stacy*, 734 F. Supp. 2d 1074, 1083 (S.D. Cal. 2010). Again, the prohibitions at issue in this case do not require willfulness. And while Defendants point to the Detainee Treatment Act as supporting a "reliance on the advice of counsel" defense, *see* ECF No. 169 at 9, Congress excluded non-agents like Defendants from its terms, *see* 42 U.S.C. § 2000dd-1(a) (limiting defense to an "officer, employee, member of the Armed Forces, or other agent of the United States."), and this Court held that Defendants failed to show that they were agents of the United States. ECF No. 135 at 13.

But even if Defendants were eligible for a "reliance on counsel" defense, it would fail. A defendant may not rely on legal analysis where the attorney displays a bias. *See United States v. Crooks*, 804 F.2d 1441, 1449 (9th Cir. 1986), *as amended*, 826 F.2d 4 (9th Cir. 1987); *United States v. Manning*, 509 F.2d

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1230, 1234 (9th Cir. 1974). Here, Defendants and others on the interrogation team were specifically instructed by CIA lawyers that the purpose was "to document in advance the legal analysis for such methods, to ensure that our officers are protected." SOF ¶ 7. There was no pretense of neutral evaluation or analysis; rather, authorization was inevitable: "In short, rule out nothing whatsoever that you believe may be effective; rather, come on back and we will get you the approvals." *Id.* Defendant Jessen later specifically explained his understanding that methods "need to be written down and codified with a stamp of approval or you're going to be liable." *Id.* ¶ 39. This was not good faith reliance, particularly where the advice was based upon Defendants' own assertion that their methods were safe and effective, eliding the distinctions Defendants knew existed between voluntary SERE trainees and actual prisoners. *Id.* ¶¶ 15–25.

Finally, the fact that "Assistant Attorney General Jay S. Bybee issued a classified memorandum" certainly cannot strip this Court of jurisdiction:

> While executive officers can declare the military reasonableness of conduct amounting to torture, it is beyond the power of even the President to declare such conduct lawful. The same is true for any other applicable legal prohibition. The fact that the President—let alone a significantly inferior executive officer—opines that certain conduct is lawful does not determine the actual lawfulness of that conduct. The determination of specific violations of law is constitutionally committed to the courts, even if that law touches military affairs.

Al Shimari IV, 840 F.3d at 162 (Floyd, J. concurring); *see also Marbury v. Madison*, 1 Cranch 137, 177 (1803) ("It is emphatically the province and duty of the judicial department to say what the law is.").

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C. The justiciability of torture claims does not turn on whether the specific abuses have been previously litigated.

Citing the Ninth Circuit's decision in *Padilla v. Yoo*, 678 F.3d 748 (9th Cir. 2012), Defendants argue that courts lack jurisdiction over torture claims unless some court has previously applied the general torture prohibition to the specific methods at issue. ECF No. 169 at 9–10. But, as this Court has already held, the Ninth Circuit in *Padilla* exercised jurisdiction over the plaintiff's claims—directly "contrary to Defendants' argument" that this case is nonjusticiable. ECF No. 40 at 12; *see also Al Shimari IV*, 840 F.3d at 162 ("There is… conduct for which the judiciary has yet to determine the lawfulness: loosely, a grey area," but that "greyness does not render close torture cases nonjusticiable merely because the alleged torturer was part of the executive branch.") (Floyd, J. concurring). No case supports Defendants' claims that abuses that have not been specifically adjudicated are nonjusticiable.

D. Non-consensual human experimentation was prohibited at the time of Defendants' conduct.

Defendants wrongly contend that, at the time of their conduct, non-consensual human experimentation was not prohibited by any international law norm in the context of a non-international armed conflict. ECF No. 169 at 10. In support, Defendants argue that Common Article 3 to the Geneva Conventions does not specifically list "human experimentation" as prohibited conduct. *Id.* But human experimentation is in fact included and barred under Common Article 3's general requirement that all persons "shall in all circumstances be treated humanely." *See, e.g.*, Geneva Convention Relative to the Treatment of Prisoners

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of War, art. 3, Aug. 12, 1949, 75 U.N.T.S. 135 ("Geneva Convention"). Ordinary principles of treaty interpretation and customary international law make clear that human experimentation has long been banned in all armed conflict contexts, and Common Article 3's guarantee of humane treatment includes that ban, such that the Geneva Convention drafters rejected specific enumeration of it as superfluous. *See* Heller Decl., Exh. B at 2–5. As Professor Heller emphasizes, the United States "unequivocally considers" Common Article 3 to prohibit human experimentation, and indeed "specifically deems it a *grave breach* of the Geneva Conventions." *Id.* at 4–5. There is no question that human experimentation was forbidden by a clear international law norm at the time of Defendants' conduct.

II. DEFENDANTS ARE NOT ENTITLED TO IMMUNITY.

A. Discovery confirms Defendants are not entitled to immunity.

As the Court previously held, "Government contractor immunity 'unlike the sovereign's, is not absolute.'" ECF No. 40 at 13 (quoting *Campbell-Ewald Co. v. Gomez*, 136 S. Ct. 663, 672 (2016)). The law treats independent contractors differently in part because, unlike federal employees, they face a different set of incentives and restrictions. Contractors are not subject to civil service laws or administrative discipline, and can reap profits far in excess of any public servant. *See Richardson v. McKnight*, 521 U.S. 399, 411 (1997) (contractors can "offset any increased employee liability risk with higher pay or extra benefits"). The Ninth Circuit has therefore emphasized that contractor "immunity must be extended with the utmost care" because of the great costs it imposes on injured persons and "the basic tenet that individuals be held

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accountable for their wrongful conduct." *Gomez v. Campbell-Ewald Co.*, 768 F.3d 871, 882 (9th Cir. 2014), *aff'd*, 136 S. Ct. 663 (2016).

Before discovery, the Court identified several allegations that supported its denial of contractor immunity. *See* ECF No. 40 at 14. Discovery has established all but one of those allegations beyond any dispute. Specifically, the record now confirms that

- "[Defendants] designed and implemented an experimental torture program." ECF No. 40 at 14; *see* SOF ¶¶ 5–6, 8–34.
- "'Defendants helped convince Justice Department lawyers to authorize specific coercive methods,' and argued to the Attorney General for the use of waterboarding as 'an absolutely convincing technique.'" ECF No. 40 at 14; *see* SOF ¶¶ 19–25.
- "Jessen and Mitchell personally participated in the torture of Abu Zubaydah, including waterboarding." ECF No. 40 at 14; *see* SOF ¶¶ 26–27.
- "Defendants trained and supervised CIA personnel in applying their phased torture program." ECF No. 40 at 14, *see* SOF ¶ 43.
- "Defendants operated under a conflict of interest where Defendants were allowed to judge the effectiveness of the interrogation methods when they had a financial interest in the program continuing." ECF No. 40 at 14, *see* SOF ¶¶ 44–45.
- "Defendants [and their company] ultimately were paid over $80 million for their efforts." ECF No. 40 at 14; *see* SOF ¶ 46. [1]

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[1] Defendants' proposed use of "learned helplessness" remains in dispute. *See* SOF ¶ 9. But that dispute is immaterial, as Defendants designed a "psychologically based interrogation program" based on the use of "Pavlovian Classical Conditioning" to "instill fear and despair." *See id.* ¶¶ 6, 8, 11.

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Having failed to rebut the allegations that this Court found sufficient to foreclose immunity, Defendants nonetheless argue that they are entitled to immunity under the doctrines of *Yearsley v. W.A. Ross Constr. Co.*, 309 U.S. 18 (1940), and *Filarsky v. Delia*, 566 U.S. 377 (2012). Neither applies here.

B. Defendants are not entitled to *Yearsley* immunity.

Defendants cannot claim immunity under the *Yearsley* doctrine, which protects the government's ability to delegate its lawful powers to its agents. *Yearsley*, by its terms, does not apply to non-agent contractors such as Defendants. As the Ninth Circuit recognized, *Yearsley* "limited the applicability of the defense to principal-agent relationships." *In re Hanford Nuclear Reservation Litig.*, 534 F.3d 986, 1001 (9th Cir. 2008); *see also McCrossin v. IMO Indus., Inc.*, No. 3:14-CV-05382, 2015 WL 575155, at *7 (W.D. Wash. Feb. 11, 2015) (noting that "[t]he *Yearsley* Court based this defense on traditional agency principles where the contractor-agent had no discretion in the design process"). Other circuits agree: "[T]o make out a claim of derivative sovereign immunity in this circuit, the entity claiming the immunity must at a bare minimum have been a common law agent of the government at the time of the conduct underlying the lawsuit." *McMahon v. Presidential Airways, Inc.*, 502 F.3d 1331, 1343 (11th Cir. 2007); *see also Adkisson v. Jacobs Eng'g Grp., Inc.*, 790 F.3d 641, 645 (6th Cir. 2015) (*Yearsley* granted immunity "when the contractor was simply an agent acting under its validly conferred authority"); *but see Ackerson v. Bean Dredging LLC*, 589 F.3d 196, 206 (5th Cir. 2009) (finding no agency requirement).

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Because, as this Court has held, Defendants are not agents of the United States, they are categorically ineligible for *Yearsley* immunity. But even if Defendants were eligible, they cannot meet the controlling Ninth Circuit standards, set forth in the series of decisions culminating in *Gomez*. As this Court noted, *Gomez* "was affirmed by the Supreme Court," ECF No. 40 at 13, which made clear that it disagreed with the Ninth Circuit only "to the extent that" the Ninth Circuit had described *Yearsley* as limited to "claims arising out of property damage caused by public works projects." *Campbell-Ewald*, 136 S. Ct. at 673 n.7 (quoting *Gomez*, 768 F.3d at 879). Thus, as this Court recognized, the Ninth Circuit's precedents on derivative sovereign immunity govern this case. *See* ECF No. 40 at 14 (citing *Cabalce v. Thomas E. Blanchard & Assocs. Inc.*, 797 F.3d 720, 732 (9th Cir. 2015)). *Yearsley* immunity is therefore available only for conduct that (1) exercises lawful government authority, *and* (2) is undertaken pursuant to a government plan the contractor had no discretion in devising. Defendants can meet neither requirement.[2]

The Ninth Circuit has made clear that, under the first prong of the *Yearsley* doctrine, immunity extends only to actions that are "tortious when done by

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[2] Defendants again cite *Ali v. Rumsfeld*, 649 F.3d 762 (D.C. Cir. 2011), in support of their claim of immunity. *See* ECF No. 169 at 17. As Plaintiffs previously pointed out, that decision addresses Federal Tort Claims Act immunity, which excludes contractors. *See* ECF No. 28 at 11 n.1. Defendants may not claim immunities that Congress expressly denied them.

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private parties but not wrongful when done by the government." *U.S. ex rel. Ali v. Daniel, Mann, Johnson & Mendenhall*, 355 F.3d 1140, 1146 (9th Cir. 2004). In other words, the government can confer only that authority which it possesses; it cannot "validly confer" authority beyond the government's own. *See Yearsley*, 309 U.S. at 22 (agent was "lawfully acting" on government's behalf); *Larson v. Domestic & Foreign Commerce Corp*., 337 U.S. 682, 689 (1949) (where government's authority to act is "limited by statute, [ ] actions beyond those limitations are considered individual and not sovereign actions"); *see also Al Shimari IV*, 840 F.3d at 157 ("[T]he military cannot lawfully exercise its authority by directing a contractor to engage in unlawful activity.").

Here, Defendants' claim for immunity fails because the CIA cannot authorize contractors to commit war crimes or violate the prohibitions on torture, CIDT, and human experimentation. "Officials of the CIA or any other intelligence agency of the United States do not have the authority to sanction conduct which would violate the Constitution or statutes of the United States." *United States v. Anderson*, 872 F.2d 1508, 1516 (11th Cir. 1989). Thus, the CIA cannot authorize a contractor, or its own employees, to torture or commit war crimes. *See* 18 U.S.C. §§ 2340 (criminalizing torture); 2441 (criminalizing grave breaches of the Geneva conventions); Geneva Convention, art.130 (grave breaches of the Convention include "torture" and "inhuman treatment"); *id.* art. 3 (prohibiting "cruel treatment and torture" and "humiliating and degrading treatment" or prisoners). That is, where "Congress has prohibited the federal sovereign" from taking specific actions—including by criminalizing torture and

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war crimes—a government official cannot lawfully authorize a contractor to take the prohibited action in the government's stead. *Ruddell v. Triple Canopy Inc.*, No. 1:15-cv-01331 (LMB/JFA), 2016 WL 4529951, at *6 (E.D. Va. Aug. 29, 2016); *see also id.* (rejecting contractor's "view of immunity [as it] would create a regime in which federal contractors acting on government instructions would be the only" actors that could violate federal law "with impunity").

Defendants nonetheless argue that they are immune "because the propriety of using EITs was subject to 'considerable debate' in 2001–03." ECF No. 169 at 14. But Defendants' argument confuses the standard for ordinary qualified immunity with the separate question of lawful authority under the *Yearsley* doctrine. Government officials are entitled to qualified immunity unless the question of whether they violated a specific prohibition has been placed "beyond debate." *Padilla*, 678 F.3d at 758. Ordinary qualified immunity thus protects public servants by conferring immunity on "all but the plainly incompetent or those who knowingly violate the law." *Case v. Kitsap Cty. Sheriff's Dep't*, 249 F.3d 921, 926 (9th Cir. 2001). But this broad immunity for public servants does not extend to for-profit contractors, whose liability generally comports with "the basic tenet that individuals be held accountable for their wrongful conduct." *Gomez*, 768 F.3d at 882. Tellingly, Defendants do not cite a single *Yearsley* doctrine decision that examined whether the legality of a contractor's actions was "beyond debate" or "clearly established." Instead, the question of whether a right is "beyond debate" comes into play only with respect to the separate question of *Filarsky* immunity. *See id.*, 768 F.3d at 881 (explaining *Filarsky* immunity). As

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Plaintiffs explain below, Defendants are not eligible for qualified immunity under the *Filarsky* doctrine either.

In any event, Defendants do not even attempt to meet the second prong of *Yearsley*. The Ninth Circuit has held that "derivative sovereign immunity, as discussed in *Yearsley*, is limited to cases in which a contractor had no discretion in the design process and completely followed government specifications." *Cabalce*, 797 F.3d at 732 (quotation marks omitted). As this Court previously explained in rejecting Defendants' claims to derivative sovereign immunity, Plaintiffs did not allege that "Defendants Mitchell and Jessen acted specifically at the direction of the Government, but rather that they designed and implemented an experimental torture program." ECF No. 40 at 14. Discovery has borne that allegation out.

The record makes clear that Defendants did not merely "follow[] government specifications," but instead exercised "discretion in the design process" of the CIA program. *Cabalce*, 797 F.3d at 732. Defendants designed the program for a CIA group that lacked any experience with interrogation, much less the ability to put together government specifications for Defendants to follow. SOF ¶ 1. Accordingly, as Mr. Rodriguez testified, Defendant Mitchell was permitted to "take charge of creating and implementing a program," and Defendants subsequently "designed a program for the CIA to get prisoners to talk." *Id.* ¶¶ 5–6, 10. It was Defendants who decided that the interrogation program should be "psychologically based" and "instill fear and despair." *Id.* ¶ 6, 11. It was Defendants who came up with the specific abuses that would be

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systematically inflicted on prisoners. *Id.* And it was Defendants who told the CIA that their program would be safe and effective, who implemented it, tested it, evaluated it, and pronounced their design a success. *See id.* ¶¶ 18–34.

In short, the design for the torture program came from Defendants, not from preexisting "government specifications." Under controlling Ninth Circuit law, therefore, Defendants cannot escape liability by invoking *Yearsley* immunity. *See Cabalce*, 797 F.3d at 732 (contractor "would not benefit" from immunity because it exercised discretion "in devising" tortious plan while immunity "is limited to cases in which a contractor 'had no discretion in the design process'").

C. Defendants are not entitled to *Filarsky* immunity.

Independent contractors are not automatically eligible for the qualified immunity provided to government officials. Under *Filarsky*, certain contractors may receive qualified immunity only if they can show both (1) that the immunity they seek is historically grounded in common law; and (2) that they violated no clearly established rights. Defendants cannot satisfy either requirement.

In *Filarsky*, the Court "afforded immunity only after tracing two hundred years of precedent" supporting qualified immunity for private attorneys in law enforcement roles. *Gomez*, 768 F.3d at 882. Defendants, by contrast, provide no authority for the proposition that psychologists are entitled to immunity at common law in circumstances remotely comparable to those here. Defendants attempt to paper over this failure by claiming that "military contractors have consistently been deemed immune," and that "psychologists performing similar

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reporting/advising 'function[s]' for the government have been held immune under the common law." ECF No. 169 at 20. Both arguments are wrong, and both are precluded by Ninth Circuit law. Thus, although Defendants do not mention the Ninth Circuit's discussion of *Filarsky* immunity in *Gomez*, the Ninth Circuit's decision was clear: immunity was unavailable to a military contractor who failed to show "decades or centuries of common law recognition of the proffered defense." *Gomez*, 768 F.3d at 882. The same is true here.

Defendants' alternative claim of a history of common law immunity for psychologists in "similar reporting/advising 'function[s]'" is no more persuasive, as it is premised on a fundamental mistake and foreclosed by Ninth Circuit law. Defendants argue that psychologists who advise the government were immune at common law, relying exclusively on cases where mental health professionals "are appointed by the court." ECF No. 169 at 20 (quoting *Bader v. State*, 716 P.2d 925, 927 (Wash. Ct. App. 1986)). But the Ninth Circuit rejected this precise error. In *Jensen v. Lane County*, the Court of Appeals explained that cases conferring immunity on psychologists serving a "court-appointed" role are entirely irrelevant, because any "such immunity was based on the physicians' status as *witnesses*, not as doctors." 222 F.3d 570, 577 n.3 (9th Cir. 2000) (emphasis added); *see also id.* (explaining that "emergency commitment proceedings were considered to be judicial proceedings, and the certifying physicians were held to be entitled to a witness' absolute immunity"). Defendants' citation to a Washington state civil commitment statute, RCW 71.05.120, fares no better: as the Ninth Circuit held in rejecting reliance on a

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similar Oregon statute, enactments of relatively recent provenance cannot "provide the 'firmly rooted tradition' that the Supreme Court requires" in order for *Filarsky* immunity to apply to private contractors. *Jensen*, 222 F.3d at 577. In accord with these principles, courts have consistently denied contractor psychologists and psychiatrists qualified immunity. *See, e.g.*, *id.* at 580 (contractor psychiatrist "not entitled to qualified immunity" where no common law tradition immunized mental health professionals outside of witness function); *McCullum v. Tepe*, 693 F.3d 696, 702 (6th Cir. 2012) (contractor psychiatrist denied *Filarsky* immunity based on lack of common law tradition).

Defendants mischaracterize the only cases to which they point in support of their claim that military contractors have "consistently been deemed immune" under the common law. ECF No. 169 at 20. Neither of the two cases that Defendants cite confers immunity on military contractors; both are based purely on federal preemption. *See Saleh v. Titan Corp.*, 580 F.3d 1, 5 (D.C. Cir. 2009) (concluding that "plaintiffs' D.C. tort law claims are preempted"), and *McKay v. Rockwell Int'l Corp*., 704 F.2d 444, 448 (9th Cir. 1983) (considering whether claims against military manufacturers arising from a "military equipment design defect" should be preempted). As the Supreme Court explained, *McKay* and the cases cited therein concern the limited "displacement" of tort law where it conflicts with federal interests. *See Boyle v. United Techs. Corp.*, 487 U.S. 500, 510 (1988) (citing *McKay*); *see also Koohi v. United States*, 976 F.2d 1328, 1336 (9th Cir. 1992) (describing *McKay* as a preemption decision). Defendants can

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identify no decision supporting historical, common law immunity for military contractors, much less for CIA contractors.

But even if *Filarsky* immunity somehow applied, Defendants would still be ineligible for it because they violated clearly established law. The prohibitions against torture, cruel, inhuman, or degrading treatment, nonconsensual experimentation, and war crimes are not new; for over half a century, U.S. officials have known that this conduct is forbidden under the Geneva Conventions. Defendants mischaracterize *Padilla*, which dealt with a much narrower question: whether it was beyond debate in 2001–03 that "the specific interrogation techniques allegedly employed against Padilla, however appalling, necessarily amounted to torture." *Padilla*, 678 F.3d at 768. Mr. Padilla was held in military detention, and the Ninth Circuit's decision on his claims did not in any way address the type of program that Defendants designed for the CIA. In particular, the Ninth Circuit did not address water torture, shackled standing sleep deprivation, diapers, and confinement boxes, nor the use of these methods in combination with the other abuses employed in the CIA program.

There was absolutely no ambiguity in 2002 that Defendants' abuses, separately or in combination, violated the torture ban, but even if there were, cases cited in *Padilla* demonstrate a consensus at that time that Defendants violated well-established prohibitions on CIDT. As the Ninth Circuit recognized, *Ireland v. United Kingdom*, 25 Eur. Ct. H.R. (ser. A) (1978) made clear that the combined use of stress positions, hooding, subjection to noise, sleep deprivation, and deprivation of food and drink "'undoubtedly amounted to inhuman and

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degrading treatment' in violation of Article 3" of the Geneva Conventions. 678 F.3d at 765. Likewise, HCJ 5100/94 *Public Committee Against Torture in Israel v. Israel*, 53(4) PD 817 (1999) (Isr.), had held that "violent shaking, painful stress positions, exposure to loud music and sleep deprivation" *were each illegal*, violating either the prohibition against torture or CIDT. *Id.* Defendants were therefore on notice that their methods, at a minimum, "undoubtedly amounted to" CIDT. They are not entitled to immunity.

III. THE RECORD CONFIRMS THAT THE COURT HAS JURISDICTION OVER PLAINTIFFS' ATS CLAIMS.

This Court previously found that Plaintiffs' allegations were "sufficient to overcome the presumption against extraterritorial application of the ATS," based upon allegations that Defendants designed the CIA torture program in the United States, ran a company in Spokane that "assist[ed] with the enhanced interrogation program at CIA detention sites," executed contracts with the CIA in the United States, and performed work on the program from the United States. ECF No. 40 at 16. Discovery has confirmed these facts. *See* SOF ¶¶ 47–53.

Defendants nonetheless argue that this Court lacks jurisdiction unless the record establishes that "Defendants engaged in more than ordinary business conduct or in independently illegal activity in the U.S." ECF No. 169 at 22 (quotations omitted). But Defendants' formulation ignores the test that this Court has previously identified, *see* ECF No. 40 at 15–16, and seeks to employ a test that has never been adopted by the Ninth Circuit. In any event, the record establishes that Defendants engaged in far more than "ordinary business conduct"

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in the United States. To the contrary, Defendants engaged in "independently illegal activity" by aiding and abetting torture, CIDT, human experimentation, and war crimes while on U.S. soil.

Defendants' domestic conduct in support of the torture program was pervasive: As Defendant Jessen admitted, it was at the CIA's Langley headquarters that Defendants "put together the list of techniques" that were the foundation of the CIA torture program. SOF ¶ 49. Defendants' own invoices reflect that they regularly billed the United States government for "consultation" work on the torture program that they performed in the United States. *Id.* ¶ 50. Defendants formed a company in Spokane specifically to provide support to all aspects of the torture program. *Id.* ¶ 46. They met at Langley to evaluate which of their torture methods "were required for the conditioning process" and which Defendants "now believed were completely unnecessary." *Id.* ¶ 51. And, as the "architects" of the program, Defendants met in the United States with the Secretary of State and other officials to promote and justify their methods. *Id.* ¶¶ 8, 52–53. This conduct suffices under any standard. *See Mastafa v. Chevron Corp.*, 770 F.3d 170 (2d Cir. 2014) (ATS reaches U.S-based acts of aiding and abetting tortious conduct that caused injury abroad); *Mwani v. Bin Laden*, 947 F. Supp. 2d 1, 5 (D.D.C. 2013) (ATS claims sufficient because "overt acts in furtherance of . . . conspiracy took place in the United States").

Thus, this case bears no resemblance to the decisions upon which Defendants rely. *See Adhikari v. Kellogg Brown & Root, Inc.*, 845 F.3d 184, 198–99 (5th Cir. 2017) (only U.S. connection involved domestic money transfers);

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Doe v. Drummond Co., 782 F.3d 576, 598 (11th Cir. 2015) (all relevant conduct, including "agreements between Defendants and the perpetrators," "planning" of the "war crimes," "collaboration by Defendants' employees," and "the actual" provision of support "all took place in Colombia"); In Chambers Order Granting Mot. to Dismiss at 6, *Doe v. Nestle*, No. 2:05-cv-5133 (C.D. Cal., Mar. 2, 2017), ECF No. 249 (domestic conduct included only ordinary business activities). As this Court correctly held, it has ATS jurisdiction to decide Plaintiffs' claims.

IV. DEFENDANTS ARE LIABLE FOR AIDING AND ABETTING.

Defendants argue that their years-long role in proposing, testing, refining, and profiting from the CIA program in which Plaintiffs were tortured cannot give rise to liability. Defendants' arguments rest on "facts" that are unsupported and even contradicted by the record, and on mischaracterizations of the applicable law. Both the record and the law are clear: Defendants are liable.

A. Defendants misstate the record.

As an initial matter, much of Defendants' argument relies on critical misstatements of the factual record. At the core of Defendants' argument are their claims that (1) Plaintiffs were "Medium Value" or "Low Value" prisoners; (2) Defendants thought their methods would be used only on "High Value" prisoners, would not be used on prisoners who were held at COBALT, and would not be used on prisoners who lacked threat information; and (3) Plaintiffs were tortured as part of "*unknown* programs separate from the HVD Program." *See* ECF No. 169 at 27, 29–34 (emphasis in original). As discussed below, even if

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Defendants could substantiate these claims, they would still be liable for the CIA's use of Defendants' program on Plaintiffs. But Defendants cannot even establish the basic facts on which their flawed argument relies.

Nowhere in Defendants' lengthy Statement of Undisputed Facts do they even offer to show, let alone establish, that the CIA assigned Plaintiffs the status of "low value" or "medium value" when they were tortured. As to Mr. Ben Soud, Defendants do not offer a single fact substantiating their theory that he was not a "High Value Detainee." *See* ECF No. 170 at 274–281. As to Mr. Rahman, Defendant Jessen admits that Mr. Rahman "became the focus" of the "High Value Target cell," and that Defendant Jessen personally evaluated whether "HVT [High Value Target] enhanced measures" should be used on Mr. Rahman. SOF ¶ 54. And Defendant Jessen testified in his deposition that "HVDs were only the highest valued people, like KSM, and Zubaydah and Nashiri and *Gul Rahman*." *Id.* Finally, as to Mr. Salim, Defendants' only claim about his status is that the CIA would not have transferred him to Bagram Air Force Base if it considered him a "high value" prisoner. *See* ECF No. 170 ¶ 273. But this conclusion rests on Mr. Rodriguez's statement that "[t]he fact that we were turning over an individual to the military, to me it means that the value is not one of a high-value detainee," which is directly contradicted by the established fact that the CIA turned over numerous "high value detainees" to the military. *See* SOF ¶ 55. More fundamentally, Mr. Rodriguez's recollection does not establish whether *during* Mr. Salim's torture the CIA considered him "high value," even if it *later* concluded, after using Defendants' methods, he was not—as CIA policy

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was to transfer a prisoner "once the CIA assesses that a detainee no longer possesses significant intelligence value." *Id.* ¶ 56.

Nor does the record support Defendants' claim of ignorance as to the range of CIA prisoners who could be subjected to their methods. Instead, the record conclusively establishes that Defendants were well aware that their methods could be used on (1) prisoners who were not assigned "high value" status; (2) prisoners held at COBALT; and (3) prisoners not actually withholding "high value" information. Thus, CIA documents provided in discovery reveal that Defendant Jessen personally requested permission to apply "the following [moderate value target] interrogation pressures . . . as deemed appropriate by [Jessen], . . . isolation, sleep deprivation, sensory deprivation (sound masking), facial slap, body slap, attention grasp, and stress positions," making clear that Defendant Jessen knew that these methods could be used on "medium value" prisoners. SOF ¶ 57. And Defendant Jessen specifically urged that these methods be used on a "moderate value" prisoner held at COBALT. *Id.* Moreover, Mr. Rahman was also at COBALT when Defendant Jessen was personally involved in using diapers, the "insult slap," and sleep deprivation on him. *Id.* ¶ 37. Defendant Mitchell participated in an interrogation of Mr. Rahman at COBALT as well, belying the claim that Defendants did not know their methods could be used on prisoners at that facility. *Id.* Defendant Jessen was also involved in using Defendants' methods against another prisoner CIA records describe as a "medium value detainee," and Defendant Mitchell conceded that he questioned that same prisoner after Defendant Jessen had finished using "the rough stuff."

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Id. ¶ 58. Defendants were also well aware that their methods could be used on prisoners who did not have threat information, ostensibly a prerequisite for "high value detainee" status: as the record shows, during most of the time that they tortured Abu Zubaydah, Defendants did not believe that he was withholding the threat information they demanded. ECF No. 170 ¶¶ 190–207.

Finally, Defendants' assertion that Plaintiffs were tortured in some other CIA program "separate from the HVD program" is entirely belied by the record. John Rizzo, who was the CIA's top lawyer, testified that there was no program separate from the program Defendants designed. *See* SOF ¶ 59. CIA documents, without exception, describe a single "rendition, detention, and interrogation program." Defendants' own witnesses describe Defendants as the "architects" of "the" CIA program, and do not suggest there was more than one program. *See id.* ¶ 8. Perhaps most significantly, Defendants' assertion that "[t]he operation at COBALT (which included Plaintiffs) evolved separately from the HVD Program," is contradicted by their own admission that guidelines standardizing Defendants' methods—"were sent to all CIA locations, including COBALT." ECF No. 170 ¶¶ 227–30. Defendants further concede that CIA records confirm that when Mr. Salim and Mr. Ben Soud were tortured at COBALT, they were subjected to Defendants' standardized methods. *Id.* ¶¶ 271, 280.

In short, the record refutes Defendants' argument that it is somehow coincidence that the methods they proposed, tested, implemented, and advocated for use on CIA prisoners were, in fact, used on CIA prisoners—including Plaintiffs. The record is conclusive: Defendants were entirely aware that the CIA

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program would involve use of their methods on "prisoners such as Plaintiffs," and CIA records confirm that their methods were in fact used on Plaintiffs.

B. The record establishes that Defendants had culpable *mens rea* under either the purpose or knowledge standards.

Defendants maintain that they cannot have had the purpose of facilitating the abuse of prisoners in the CIA program because (1) they did not decide which prisoners would be subjected to their methods; (2) at times they "protested" that their methods should not be used on prisoners who were already compliant; (3) they "did not believe the EITs constituted 'torture or other abuses'"; and (4) Defendant Jessen recommended that Mr. Rahman be subjected to "consistent and persistent application of deprivations" instead of other methods after determining that Mr. Rahman would not be broken by physical assault. ECF No. 169 at 26–29, SOF ¶ 40. Defendants misunderstand the purpose standard.

As the Ninth Circuit explained, the purpose standard is met if defendants "plan to benefit from" facilitating a violation of customary international law. *Doe I v. Nestle USA, Inc.*, 766 F.3d 1013, 1024 (9th Cir. 2014). Here, Defendants benefitted to the tune of tens of millions of dollars by facilitating the torture of CIA prisoners. SOF ¶ 46. Their stated purpose was to destroy prisoners' wills by instilling "fear and despair" through systematic abuses. *Id.* ¶ 11. They implemented their own design, observing firsthand the suffering their methods inflicted on their first test subject. *Id.* ¶ 26. Defendants then pronounced their program a success, and consulted on the expansion of the CIA program to additional prisoners, eventually forming a company to take advantage of a no-bid

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contract to privatize and profit from the program. *Id.*¶¶ 28–34. These facts bear no resemblance to the hypothetical posed by the Court, on which Defendants rely, in which a person merely suggests "here's options you can utilize." ECF No. 169 at 27. Instead, the record conclusively establishes Defendants' sustained and purposeful acts in support of the CIA torture program.

Defendants' arguments to the contrary miss the mark. There is no requirement under international law that an aider and abettor must have decisionmaking authority as to victims. Indeed, the Ninth Circuit's decision in *Nestle* makes this plain: There was no allegation that the defendant there *directed* that any Ivory Coast farm use child slavery, much less that the defendant had any involvement in selecting the three victims who brought the lawsuit. *See Nestle*, 766 F.3d at 1018–19. Nonetheless, the Ninth Circuit held the purpose standard met, because the defendant "placed increased revenues before basic human welfare, and intended to pursue all options available to reduce their cost for purchasing cocoa." *Id.* at 1024. Here too, Defendants placed profits and the subjugation of prisoners before basic human welfare, pursuing options that blatantly violated international law, including the Geneva Conventions. Defendants need not have *ordered* that CIA prisoners be tortured and degraded; it is sufficient that they took steps to support these abuses, as they most certainly did. *See Doe v. Drummond Co.*, No. 2:09-CV-01041-RDP, 2010 WL 9450019, at *11 n.24 (N.D. Ala. Apr. 30, 2010) ("no authority for Defendants' contention that" they must "have ordered the deaths of those specific individuals, in order to potentially be held liable for aiding and abetting extrajudicial killings").

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Defendants' remaining arguments are equally unavailing. Whether Defendants occasionally "protested" the use of their methods on prisoners who were already compliant is irrelevant, especially given that they themselves tortured Abu Zubaydah even after they believed he was compliant, and then characterized this torture as a success. *See* SOF ¶¶ 26–29. Nor does it matter whether Defendants "did not believe the EITs constituted 'torture or other abuses'" even assuming that this could be true after they saw firsthand the severe suffering they inflicted. ECF No. 169 at 29. Assuming the incredible—that Defendants were ignorant of whether they could lawfully "instill fear and despair" in prisoners by, for example, forcing them to stand for days wearing a diaper with their hands chained overhead, hurling them into walls, or stuffing them into coffin-like boxes—that would not negate intent. *See* Section I.A–B, *supra*; *see also United States v. Urfer*, 287 F.3d 663, 665 (7th Cir. 2002) ("If unreasonable advice of counsel could automatically excuse criminal behavior, criminals would have a straight and sure path to immunity.").

Finally, Defendant Jessen's assessment that certain methods would not be effective on Mr. Rahman, SOF ¶ 40, does nothing to establish that Defendants lacked the purpose of supporting the abuse and degradation of prisoners. To the contrary, Defendant Jessen's recommendation that Mr. Rahman be subjected instead to other deprivations, including Defendants' sleep deprivation method—chained to an overhead bar, naked or in a diaper—until he broke, sufficiently establishes purposeful support. *Id.* ¶¶ 40–42.

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Because Defendants are liable under the more stringent purpose standard, the Court need not decide whether knowledge is the standard for ATS claims. Plaintiffs note, however, that the Ninth Circuit found that "this knowledge standard dates back to the Nuremberg tribunals," and "has also been embraced by contemporary international criminal tribunals." *Nestle*, 766 F.3d at 1023. And Defendants clearly knew that they were facilitating the abuse of prisoners; indeed, they inflicted the abuse and saw its effects firsthand. SOF ¶ 26.

Defendants nevertheless profess that they lacked knowledge they were facilitating the abuse of "individuals such as Plaintiffs," rather than the prisoners Defendants intended be abused. ECF No. 169 at 30. This claim is refuted by the record, which shows that Defendants' program certainly encompassed "individuals such as Plaintiffs." *See supra* Section IV.A. But even if it were true, Defendants would still be liable. *See Drummond*, 2010 WL 9450019, at *11 n.24 (finding "no authority for Defendants' contention that [Defendant] must have known of specific *identities* of those murdered . . . to potentially be held liable for aiding and abetting extrajudicial killings"). That is, it is "well within the mainstream of aiding and abetting liability" to hold a defendant liable based only on the "general awareness of [his] role as part of an overall illegal activity, and the defendant's knowing and substantial assistance to the principal violation"—regardless of whether a defendant even knew the existence of a specific victim. *Linde v. Arab Bank, PLC*, 384 F. Supp. 2d 571, 584 (E.D.N.Y. 2005); *see also, e.g.*, *Rice v. Paladin Enters. Inc.*, 128 F.3d 233, 255 (4th Cir. 1997) (company that provided instructions "on the techniques of murder and murder for hire"

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could be liable for "aiding and abetting the commission of these violent crimes" even where company did not know victims). Just as a defendant who supplies a weapon intended for shooting gang members is responsible when an innocent bystander is hit, Defendants' claim that they wished to assist in the torture of a specific type of CIA prisoner does not negate their liability for harm to others subjected to the CIA program. *See, e.g.*, *State v. Henry*, 253 Conn. 354, 360 (2000) ("[A]n accessory who intends to aid a principal in committing murder and who possesses the intent to murder a person is criminally liable for the killing of an unintended third party by the principal.").

Defendants also argue that they "gained nothing if the SERE-based techniques were used by CIA employees in interrogations for which Defendants played no role." ECF No. 169 at 29–32. But this is not a requirement for aiding and abetting liability, nor even true: Defendants profited from "consulting" on their methods even when not personally inflicting them. *See* SOF ¶¶ 46, 50.

Finally, Defendants' reliance on the district court's decision in *Doe v. Cisco* is misplaced. There, the court found that the defendant's sale of a computer security system did not meet the "knowledge" standard because "the product" the defendant produced "can be used for many crime-control purposes in China without permitting torture or other human rights abuses." 66 F. Supp. 3d 1239, 1248 (N.D. Cal. 2014). By contrast "the product" produced by Defendants *was* a program of torture and other human rights abuses. The CIA used Defendants' methods for precisely the purpose Defendants intended them: to instill fear, despair, and humiliation, all of which Defendants specifically identified as the

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goals of their methods. *See* SOF ¶ 11; *see also In re S. African Apartheid Litig.*, 617 F. Supp. 2d 228, 258 (S.D.N.Y. 2009) (law treats differently "[t]he provision of goods specifically designed to kill, to inflict pain, or to cause other injuries resulting from violations of customary international law").

C. Defendants had a "substantial effect" on Plaintiffs' torture and CIDT.

Defendants' argument that they did not have a "substantial effect" on the abuse of Plaintiffs is also contradicted by the record. Defendants assert that "there is no evidence" that the methods used on Plaintiffs at COBALT were "adopted for use *at COBALT* because of Defendants." ECF No. 169 at 34 (emphasis in original). But it is undisputed that Defendants' methods were standardized in the CIA's secret prisons, including at COBALT, after Defendants joined in recommending Abu Zubaydah's torture as a template. SOF ¶¶ 28–34.

Defendants seek to avoid the obvious fact that their efforts had a substantial effect on Plaintiffs by speculating that "Plaintiffs' interrogations would have occurred using SERE techniques even if Defendants had not recommended EITs" because a different CIA officer "had attended a four-day SERE course." ECF No. 169 at 34. This rank speculation has no force. Defendants sold their decades of SERE experience as the very reason for the CIA to adopt *their* methods. As Mr. Rodriguez testified, it was Defendant Mitchell's "tremendous expertise" in SERE and his "vision for what needed to be done," that led the CIA to adopt Defendants' specifically-proposed methods to instill fear and despair. SOF ¶ 4. Defendants offer no support for their theory that a

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trainee with four days of experience would have come up with Defendants' "psychologically based program"—much less that the CIA would have adopted it without Defendants' assurances (however misleading) that it was safe and effective. And in any event, "substantial assistance" does not require a showing of but-for causation. Rather, a defendant "may be found liable even if the crimes could have been carried out through different means or with the assistance of another." *S. African Apartheid.*, 617 F. Supp. 2d at 257–58.

Nor, as Defendants argue, is the causal link broken by the fact that interrogations in the CIA program included expansions or even modifications of the methods on Defendants' list. First, Defendants themselves used nudity and the abdominal slap on Abu Zubaydah, which were, then, part of their program even though those were not methods they proposed in their July 8 memo. SOF ¶¶ 2, 34. And critically, as Defendants knew, "abusive drift" was likely to occur once their program was authorized, resulting in even more severe abuse of prisoners. *Id.* ¶ 35. That Plaintiffs and others in the CIA program were subjected to additional or refined abuses is an entirely foreseeable result of Defendants' actions in facilitating the use of torture on CIA prisoners. As Plaintiffs demonstrated in their Motion for Partial Summary Judgment, ECF No. 178, judgment should be entered against Defendants for aiding and abetting torture and CIDT. Certainly, Defendants' Motion is without basis.

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V. DISPUTES OF MATERIAL FACT PRECLUDE SUMMARY JUDGMENT FOR DEFENDANTS ON THEIR DIRECT AND JOINT CRIMINAL ENTERPRISE LIABILITY.

Defendants contend that they are not directly liable for abusing Plaintiffs because they either were not present during Plaintiffs' interrogations or, in the case of Mr. Rahman, acted lawfully. ECF No. 169 at 24. But Defendants' argument ignores that under international law direct liability arises when an individual plans or designs a violation of customary international law that is subsequently carried out. *See e.g.*, Updated Statute of the International Criminal Tribunal for the Former Yugoslavia, art. 7(1) (Sept. 2009); Statute of the International Criminal Tribunal for Rwanda, art. 6(1) (Jan. 31, 2010) ("A person who planned . . . shall be individually responsible for the crime."); *Prosecutor v. Kordić, et al.*, Case No. IT-95-14/2-A, Judgment, ¶¶ 26, 29 (Int'l Crim. Trib. for the Former Yugoslavia Dec. 17, 2004).

Defendants are directly liable for Plaintiffs' torture and abuse because they planned a program designed to abuse CIA prisoners, and that program in fact resulted in abuse. Moreover, as discussed above, Defendant Jessen specifically planned that Mr. Rahman be subjected to "consistent and persistent application of deprivations" to "wear[] down" his "resistance posture." *See* SOF ¶ 40. To the extent that Defendants dispute their role in planning, designing, and implementing the CIA program, this dispute precludes summary judgment.

Finally, Defendants' assertion that they are not liable for conspiring or entering into a joint criminal enterprise with the U.S. government to abuse CIA prisoners is belied by both the record and the law. Defendants first allege that

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Plaintiffs' conspiracy claims fail because there is "no evidence" that they entered into an agreement with the government to commit torture and CIDT, and to experiment on prisoners. ECF No. 169 at 35. But this argument ignores that proof of a tacit, as opposed to explicit, understanding between co-conspirators to advance the overall objective of the conspiracy is sufficient to establish civil liability. 16 Am. Jur. 2d *Conspiracy* § 68 (1979). Here, of course, Defendants expressly contracted with the CIA to create the program that resulted in the systematic abuse of Plaintiffs, *see* SOF ¶¶ 46–50. Additionally, Defendants claim that "there is no evidence Defendants possessed 'a criminal intention to participate in a common criminal design.'" ECF No. 169 at 35. But as set forth above, see *supra* Sections I.A–B, the facts clearly establish Defendants' intent with respect to the torture program they designed, implemented, and promoted. . And courts and tribunals have found joint criminal enterprise liability for crimes that are the "natural and foreseeable consequence[s]" of a common plan. *See, e.g.*, *Prosecutor v. Tadić,* Case No. IT-94-1-A, Judgment, ¶ 204 (Int'l Crim. Trib. For the Former Yugoslavia July 15, 1999). Here, the common plan and agreement was that Defendants "designed a program for the CIA to get prisoners to talk" and the CIA "would decide which prisoners to apply it to." SOF ¶ 10. Plaintiffs' abuse was the natural and foreseeable consequence.

CONCLUSION

For the reasons stated above, Defendants' Motion for Summary Judgment should be denied in its entirety.

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DATED: June 12, 2017

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I hereby certify that on June 12, 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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