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

SULEIMAN ABDULLAH SALIM, et al.,

Plaintiffs,

v.

JAMES ELMER MITCHELL and JOHN "BRUCE" JESSEN,

Defendants.

NO. 2:15-cv-286-JLQ

DEFENDANTS' REPLY IN SUPPORT OF 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

Plaintiffs' *Memorandum in Opposition to Defendants' Motion for Summary Judgment* (ECF 193) ("Opposition") seeks to distract this Court from the dispositive admissions contained in their *Response to Defendants' Statement of Undisputed Facts in Support of Defendants' Motion for Summary Judgment* (ECF 194). Defendants submit this Reply in support of their *Motion for Summary Judgment* (ECF 169) to address the Opposition's errors, and to focus this Court on the undisputed material facts which support entry of summary judgment for Defendants.

I. ZUBAYDAH IS NOT RELEVANT TO PLAINTIFFS' ATS CLAIMS.

Plaintiffs seek to support their Alien Tort Statute ("ATS") claims by focusing on Abu Zubaydah's ("Zubaydah") treatment and the CIA's creation of a larger detainee program. Opp. at 6, 11, 16, 17. But, Zubaydah is not a party to this action, and the enhanced interrogation techniques ("EITs") Defendants suggested were intended only for Zubaydah. *See* Def.s' Reply Statement of Undisputed Facts ("RSUF") ¶¶ 32, 43, 125-27. Plaintiffs must prove their ATS claims based on *their own treatment* by the CIA, and the limited to no interaction *they had* with Defendants. *Doe I v. Nestle USA, Inc.*, 766 F.3d 1013, 1029 (9th Cir. 2014) (Rawlinson, J., concurring in part, dissenting in part) (plaintiffs must show "defendants acted with the purpose of causing the injuries *suffered by the [p]laintiffs*.") (emphasis added). So constrained, Plaintiffs' claims cannot succeed.

II. THIS CASES INVOLVES A NON-JUSTICIABLE QUESTION.

Plaintiffs incorrectly assert that Defendants "abandon entirely the factors set forth in *Baker v. Carr*, 369 U.S. 186 (1962)." Opp. at 2. Defendants urged this

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1 Court to apply a two-part test that "distilled" *Baker*'s six overlapping formulations.
2 *Al Shimari v. CACI Premier Tech., Inc.* (*"Al Shimari III"*), 758 F.3d 516, 533 (4th
3 Cir. 2016) (citing *Taylor v. Kellogg Brown & Root Servs., Inc.*, 658 F.3d 402, 411
4 (4th Cir. 2011)). That this case involves CIA (as opposed to military) contractors is
5 also of no moment. Opp. at 3. The CIA's program was undertaken per the
6 President's broad "warmaking authority" following the 9/11 attacks. RSUF ¶¶ 5-8.
7 Plaintiffs also argue the Court should apply the "binding cases" it "already
8 identified," Opp. at 3, rather than *Taylor*. Yet, Plaintiffs identify only a *single* case—
9 *Koohi v. United States*, 976 F.2d 1328 (9th Cir. 1992), which involved a negligence
10 claim. *Taylor* directly applies to ATS claims. *Al Shimari v. CACI Premier Tech.,*
11 *Inc.* (*"Al Shimari IV"*), 840 F.3d 147, 155-56 (4th Cir. 2016).[1] And even if *Taylor*
12 was limited to negligence cases (it is not), Plaintiffs cannot have it both ways: if the
13 justiciability of negligence claims is inapplicable, then *Koohi* has no bearing here.
14 Plaintiffs next claim Defendants cannot rely in good faith upon advice from
15 purportedly biased "CIA lawyers" as to the EITs' legality. Opp. at 8. But even
16 assuming *arguendo* the CIA was not "neutral," Defendants *also* relied upon the
17 advice of the DOJ's Office of Legal Counsel ("OLC"). RSUF ¶ 165. That the Bybee
18 Memo considered multiple sources of information, and approved only a *portion* of
19 the proposed techniques, reflects a lack of bias. *Id.* ¶¶ 140-48, 150-51, 155-61.
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[1] Plaintiffs erroneously assert *Al Shimari IV* "reversed" the district court for failing to recognize *Taylor* applies only to negligence actions, not intentional torts. Opp. at 4. But *Al Shimari IV vacated* and *remanded* to allow further discovery to determine if Plaintiffs' ATS claims were nonjusticiable under *Taylor*. 840 F.3d at 157-58.

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Defendants do not argue the Bybee Memo can "determine the lawfulness" of the alleged conduct, Opp. at 8; rather, they explain that the now *undisputed* fact that Defendants relied upon the OLC's advice negates intent. RSUF ¶¶ 166-73, 184.

Next, Plaintiffs fail to address the standard for determining the viability of an ATS claim under *Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004). Instead, they recycle an argument made in opposition to Defendants' *Motion to Dismiss* (ECF 27)—but irrelevant now—that *Padilla v. Yoo*, 678 F.3d 748 (9th Cir. 2012), renders their "torture" claim justiciable. Opp. at 9. But, *Sosa* requires the general international law norm against "torture" apply *specifically* to Defendants' proposed EITs. 542 U.S. at 748. *Yoo* does not help meet this standard, and Plaintiffs cite no authority that these techniques constituted "torture" when they were proposed.[2]

Additionally, Plaintiffs misrepresent the record to contend the CIA did not exercise operational control. Opp. at 3-4. The CIA oversaw all of Defendants' activities, and "chose how to carry out these tasks." *Al Shimari III*, 758 F.3d at 534. Indeed, the CIA: (a) requested the July 2002 Memo, RSUF ¶¶ 123-25, 140-48, 150-51, 157-61, 165; (b) controlled the implementation and approval of EITs[3], *id.* ¶¶ 172,

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[2] Plaintiffs' claim for "human experimentation" also does not satisfy *Sosa*, as they fail to address: (a) the absence of a prohibition in 18 U.S.C. § 2441 (1997) during Plaintiffs' detention; and (b) that a majority of nation states have not enacted laws prohibiting experimentation in non-international armed conflicts. RSUF ¶¶ 338-40.

[3] Defendants' explanation of the purpose behind the proposed EITs, including to "dislocate" Zubaydah's "expectations," RSUF ¶ 128, has no bearing on the CIA's

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180-81; (c) required Defendants to continue applying EITs on Zubaydah over their objection, *id.* ¶¶ 190-206; and (d) unilaterally decided to whom, how and when, to apply EITs to particular detainees, *id.* ¶¶ 209-31.

III. DEFENDANTS ARE ENTITLED TO *YEARSLEY* IMMUNITY.

Plaintiffs argue the "denial of contractor immunity" has been "established … beyond any dispute." Opp. at 11. Plaintiffs are wrong. The allegations advanced by Plaintiffs are either wholly irrelevant to immunity, or unsupported by the record.

For instance, it is undisputed Defendants provided a list of "suggested" techniques to the CIA. RSUF ¶¶ 127-29. After the OLC approved the use of some—but not all—of the techniques, *the CIA* directed Defendants to apply them to Zubaydah. *Id.* ¶¶ 181, 188, 190-206. *The CIA* then approved the use of such techniques on other High Value Detainees ("HVDs"), and sent out formalized guidance to separate black-sites without Defendants' knowledge. *Id.* ¶¶ 209, 227-31. Plaintiffs' mislabeling of Defendants' actions as "design" or "implementation" does not change the underlying fact *the CIA* ultimately "designed" and "implemented" what its interrogation program would consist of beyond Defendants' "suggestions." *Id.* ¶¶ 127, 130. Critically, Plaintiffs concede that, as mere "independent contractors," *id.* ¶¶ 235-36, Defendants could not make such decisions.

Moreover, Defendants—along with the Joint Personnel Recovery Agency ("JPRA") and Office of Technical Services ("OTS")—provided information to the

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exercise of control; the CIA determined if each EIT was consistent with the interrogation objectives for Zubaydah. *Id.* ¶¶ 113, 124, 132-34, 136-37.

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CIA about the techniques and SERE. RSUF ¶¶ 113, 140-48, 150-51, 155-61, 165. This does not support an inference Defendants helped "convince" the OLC to "authorize" EITs. Defendants had no direct contact with the OLC, and the cable describing waterboarding as an "absolutely convincing technique" noted that it may not be approved. *See* Rosenthal Decl., Ex. 11 at US Bates 001840.

A. *Yearsley* Applies to Non-Agent Independent Contractors.

Plaintiffs erroneously argue that Defendants are "categorically ineligible" for immunity under *Yearsley v. W.A. Ross Constr. Co.*, 309 U.S. 18 (1940), because they are not "agents." Opp. at 13. But this purported "agency" requirement is not supported by Supreme Court precedent, and the Ninth Circuit has likewise granted *Yearsley* immunity to contractors without any discussion of the need for such an agency relationship. *Myers v. United States*, 323 F.2d 580, 581 (9th Cir. 1963); *Agredano v. U.S. Customs Serv.*, 223 F. Appx. 558, 558 (9th Cir. 2007).

In *Ackerson v. Bean Dredging LLC*, 589 F.3d 196 (5th Cir. 2009), following an extensive analysis of both *Yearsley* and Ninth Circuit precedent, the Fifth Circuit expressly rejected the plaintiffs' argument that a federal contractor must demonstrate it was an "agent" of the government before invoking its immunity:

> *Yearsley* does not require a … contractor defendant to establish a traditional agency relationship with the government. *Yearsley* does use the word 'agent' but also uses 'contractor' and 'representative.' Most notably, the *Yearsley* court did not examine the relationship between the contractor defendant and the government to determine whether [it] was in fact acting as an agent or whether the contractor acted within the scope of any agency relationship[.]

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> [I]n *Myers v. United States*, the Ninth Circuit affirmed a judgment that a private defendant who had constructed a road pursuant to a [government] contract … was not liable for alleged waste and trespass resulting from the construction…. [*Myers*] did not discuss whether the contractor defendant was the government's agent or whether the defendant exceeded the scope of an agency relationship. A subsequent Ninth Circuit opinion citing *Meyers* has likewise applied this rule without any discussion of an agency relationship.

Id. at 205-06 (citing *Myers*, 323 F.2d at 581; *Agredano*, 223 F. Appx. at 558).[4]

Plaintiffs rely on *In re Hanford Nuclear Reservation Litig.*, 534 F.3d 986, 1001 (9th Cir. 2008), and *McCrossin v. IMO Indus., Inc.*, 2015 U.S. Dist. LEXIS 16819, at *20-21 (W.D. Wash. Feb. 11, 2015), for the proposition that *Yearsley* "limited the applicability of the defense to principal-agent relationships." Opp. at 12. But, as *Yearsley*, *Myers*, and *Agredano*, as well as the above passages from *Ackerson*, make clear, *Yearsley* never injected such a principal-agency requirement.

In re Hanford also discussed the distinct "government contractor defense" under *Boyle v. United Techn. Corp.*, 487 U.S. 500 (1988). Nor was *In re Hanford* trying to delineate if "agency" was required for immunity; the question was limited to "whether the [Price-Anderson Act] preempts the government contractor defense." 534 F.3d at 1001. The court's superfluous "agency" discussion was thus *dicta*. *Id.*

Lastly, it is worth noting *In re Hanford* cited the Fifth Circuit's *Bynum v. FMC Corp.*, 770 F.2d 556 (5th Cir. 1985), decision to assert that "other circuits" have held "*Yearsley* was clearly limited to principal-agent relationships." 534 F.3d at 1001. But, the Fifth Circuit in *Ackerson* expressly rebuffed reliance on *Bynum*:

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[4] Other circuits agree. *See Metzgar v. KBR, Inc.*, 744 F.3d 326, 343 (4th Cir. 2014).

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> [*Bynum*] acknowledged that *Yearsley* only contains an '*apparent* requirement that the contractor possess an actual agency relationship with the government' and that 'federal courts certainly have not always required such a relationship.' Additionally, this statement is dicta, and we have never held that *Yearsley* requires a common-law agency relationship between the government and a contractor.

589 F.3d at 204 (emphasis in original). Because *Yearsley* "has direct application," it controls. *Rodriguez de Quijas v. Shearson/Am. Express, Inc.*, 490 U.S. 477, 484 (1989). Where the Supreme Court provides the rule, it should be looked to instead of lower appellate decisions, thereby "leaving [the Supreme] Court the prerogative of overruling its own decisions." *Id.*; *Bosse v. Oklahoma*, 137 S. Ct. 1, 2 (2016). "The Supreme Court has not abrogated or overturned *Yearsley*." *Ackerson*, 589 F.3d at 206. Plaintiffs thus seek to impose a requirement unsupported by binding precedent. This Court should adhere to *Yearsley*—rather than inapplicable *dicta* from in *In re Hanford*—and hold that Defendants need not be "agents" for immunity.

B. Defendants Have Satisfied the *Yearsley* Test for Immunity.

Yearsley immunity requires only that a contractor act: (1) pursuant to authority "validly conferred" by the government; and (2) within the scope of her contracts.[5] (ECF 169 at 11.) Plaintiffs misrepresent Ninth Circuit law in trying to impose a requirement the contractor must have acted "pursuant to a government plan [they]

[5] Plaintiffs tacitly concede that Defendants satisfy the second *Yearsley* immunity prong, as there is no evidence they "exceed[ed]" the scope of their CIA contracts. (ECF 169 at 16-17); *Campbell-Ewald Co. v. Gomez*, 136 S. Ct. 663, 673 (2016).

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had no discretion in devising." Opp. at 13. But, as Defendants have explained, this "principle [is] not … based on Supreme Court jurisprudence." (ECF 29 at 10 n.5.)

Plaintiffs rely solely on *Cabalce v. Thomas E. Blanchard & Assocs. Inc.*, 797 F.3d 720 (9th Cir. 2015), to inject this "discretion" requirement. Opp. at 13. *Cabalce* was a federal removal case involving state wrongful death and negligence claims against private contractors, as well as an indemnity claim against the U.S. under the Federal Tort Claims Act. 797 F.3d at. at 724-25. In discussing immunity, *Cabalce* cited *In re Hanford*—which, again, dealt with the distinct "government contractor defense," and which relied on Justice Brennan's *dissent* in *Boyle*. *Id.* at 732. The *Boyle* majority also noted "Justice Brennan's dissent misreads our discussion," and that the issue of contractor immunity was "not before us." 487 U.S. at 505 n.1.

Cabalce is also factually distinguishable. There, the Ninth Circuit observed that "[e]ven if we applied *Yearsley*, VSE would not benefit" as "it was undisputed that [defendants] designed the [fireworks] destruction plan *without government control or supervision*." *Id.* at 732 (emphasis added). Here, unlike *Cabalce*, multiple governmental agencies had "control" over the approval and use of EITs. RSUF ¶¶ 113, 139-48, 150-52, 155-61, 165. And CIA Headquarters ("HQS"), the Counterterrorism Center ("CTC"), and the Chief of Base ("COB") "supervis[ed]" Defendants—and the entire interrogation team—on a daily basis. *Id.* ¶¶ 233-42.

In claiming Defendants exercised "discretion," Plaintiffs also ignore the undisputed facts. HQS held meetings attended by CTC, the FBI, and others about the next phase of Zubaydah's interrogation. RSUF ¶¶ 89, 98-99, 123. Various individuals proposed differing techniques. *Id.* ¶¶ 90-93, 100-03, 124. Mitchell

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proposed SERE-based techniques. *Id.* ¶ 104. Defendants then provided the July 2002 Memo at Jose Rodriguez's specific request, noting the multiple aims. *Id.* ¶¶ 123-25, 128-29. After a review by the Attorney General and National Security Advisor, the OLC approved *some* techniques for Zubaydah. *Id.* ¶¶ 152, 158, 165.

Defendants' contribution was but one proposal—among many—the CIA reviewed and ultimately adopted in part. *Id.* ¶¶ 123-24. Broad statements by Rodriguez about asking Defendants to "take charge" do not undercut these facts; Defendants were far removed from decisions made at the highest levels to utilize EITs. *Id.* ¶¶ 113, 139-48, 150-52, 157-61, 165. Further, that Defendants could only provide "recommendations" to the CIA, *id.* ¶¶ 235-36, defeats any notion of "discretion" in this process. *Chesney v. TVA*, 782 F. Supp. 2d 570, 586 (E.D. Tenn. 2011) (contractors hired to provide engineering consulting services were immune where the governmental entity "had the ultimate authority to determine which, if any, of defendants' advice and recommendations to follow or implement").[6] And even after a program was created, Defendants were *still* not involved in decisions about its evolution whilst Plaintiffs were detained. RSUF ¶¶ 209, 218, 222-31, 248.

Next, asserting that the unbroken chain of authority Defendants traced back to Congress (ECF 169 at 12-15) was not "validly conferred," Plaintiffs argue the CIA cannot "authorize a contractor … to torture or commit war crimes." Opp. at

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[6] *Richardson v. McKnight*, 521 U.S. 399 (1997), Opp. at 10, similarly affords no basis to deny immunity; its "self-consciously" "narrow" holding does not apply to those who, like Defendants, "act[ed] under close official supervision." *Id.* at 413.

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14. But *Campbell-Ewald* held authority is considered "validly conferred" if "what was done was within the constitutional power of Congress." 136 S. Ct. at 673. Here, Congress could—and did—constitutionally "empower[] the President to use his warmaking authority to defeat [the] terrorist threat to our nation."[7] (ECF 169 at 12.) Defendants should not be required to determine if DOJ-sanctioned conduct is illegal; Attorney General Holder described this situation as "unfair." (ECF 169 at 15 n.8.) And even if *the CIA* lacked authority to apply EITs (it did not), this is of no help to *Plaintiffs* as Defendants never interrogated Salim and Ben Soud, and Jessen's application of an insult slap to Rahman cannot qualify as "torture" or a "war crime."

Plaintiffs' cited authority is also deficient. In *United States v. Anderson*, 872 F.2d 1508, 1510 (11th Cir. 1989), there was "no serious contention" a "CIA agent possessed actual authority to approve exceptions to the law relating to possession, registration and transfer of high explosives …, or to legally authorize theft of military property for the use of foreign factions." *Id.* at 1516. Here, the record demonstrates, unequivocally, the CIA had "actual authority" to detain and interrogate "terrorist[s]." (ECF 169 at 12.) This reality is bolstered by the OLC/CIA

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[7] Plaintiffs concede that the President authorized the CIA to "capture and detain" individuals pursuant to the unreleased Memorandum of Notification—but claim it does not include the word "interrogate." (ECF 194 ¶¶ 6-8.) This is misleading; the Office of Inspector General determined detainee interrogations are "justified as part of the CIA's general authority and responsibility to collect intelligence." Tompkins Decl., ECF 176, Exh. 25 at US Bates 001350; Exh. 34 at US Bates 001631.

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1 findings as to the EITs' legality, RSUF ¶¶ 59-66, 113, 139-52, and the Ninth Circuit
2 *declining* to hold that certain EITs qualified as "torture." *Yoo*, 678 F.3d at 768-69.
3 Defendants thus did not "exceed[] the immunity of the sovereign." *Cf. Ruddell v.*
4 *Triple Canopy Inc.*, 2016 WL 4529951 (E.D. Va. Aug. 29, 2016). Lastly, in *Larson*
5 *v. Domestic & Foreign Commerce Corp.*, 337 U.S. 682, 695 (1949), the respondent
6 sought to enjoin the War Assets Administrator from selling coal to anyone else. The
7 Court dismissed because this was relief against the sovereign; the discussion of
8 liability for "individual" action beyond statutory limitations was *dicta*.
9
10 **IV. DEFENDANTS ARE ENTITLED TO *FILARSKY* IMMUNITY.**
11 There are two fundamental problems with Plaintiffs' assertion that Defendants
12 cannot identify support for the type of "historical, common law immunity" allegedly
13 required by *Filarsky v. Delia*, 566 U.S. 377 (2012). Opp. at 20. First, Defendants
14 *have* provided historical support for psychologists being granted immunity while
15 performing "reporting/advising" functions in the context of contractors retained by
16 the judiciary. (ECF 169 at 20-21.) Second, the lack of a "common law tradition" is
17 not dispositive of immunity where, as here, "policy" concerns play a critical role.
18 Plaintiffs cite *McCullum v. Tepe*, 693 F.3d 696 (6th Cir. 2012), as an example
19 where immunity was denied to "contractor psychologists" based on a "lack of
20 common law tradition." Opp. at 19. In discussing *Filarsky*, *McCullum* held "the
21 Supreme Court has not specified whether policy and history form a conjunctive or
22 disjunctive test, instead leaving their roles uncertain." *Id.* at 700 n.7 (citation and
23 internal quotations omitted). *McCullum* further noted that in *Richardson*, 521 U.S.
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at 407-12, the Court "analyzed policy concerns, even after concluding that 'history [did] not provide significant support for the [defendants'] immunity claim.'" *Id.*

Plaintiffs unfairly criticize Defendants for not "identify[ing] a "decision supporting historical, common law immunity for … CIA contractors." Opp. at 20. But a lack of historical common law immunity for "CIA contractors" is not surprising—given that the CIA was only established in 1947, and its authority to "enter into contracts" with "private" entities was formalized in 1981. (ECF 169 at 12-13.) In a comparable situation, an executive director of a private high school athletics association was entitled to qualified immunity despite the lack of any "firmly rooted history" because the particular organization had "only recently grown in importance and stature, and litigation involving such associations has been relatively rare." *Brentwood Acad. v. Tenn. Secondary Sch. Athletic Ass'n*, 442 F.3d 410, 439 (6th Cir. 2006), *rev'd on other grounds by*, 551 U.S. 291 (2007); *Kauffman v. Pa. Soc'y for the Prevention of Cruelty to Animals*, 766 F. Supp. 2d 555, 564-65 (E.D. Pa. 2011) (lack of historical immunity prior to 1871 was "not surprising," given that defendant "only came into being in 1868 and … other such societies were not established until after 1871."). The lack of historical immunity is not dispositive.

Even setting that aside, strong "policy" considerations compel extending immunity to private contractors, like Defendants, who worked alongside CIA officers, psychologists, interrogators, analysts, and physicians. The Supreme Court has acknowledged that immunity applies, in part, to ensure "talented individuals" with "specialized knowledge or expertise" are willing to accept public engagements. *Filarsky*, 566 U.S. at 378. The need for immunity is heightened where, as here, the

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"specialized" work concerns perilous matters of "national security." *Mitchell v. Forsyth*, 472 U.S. 511, 541-42 (1985) (Stevens, J., concurring) ("Persons of wisdom and honor will hesitate to answer the President's call to serve … if they fear that vexatious and politically motivated litigation … will squander their time and reputation, and sap their personal financial resources[.]"); *Turkmen v. Hasty*, 789 F.3d 218, 281 (2d Cir. 2015) (Raggi, J., dissenting) ("It is difficult to imagine a public good more demanding of decisiveness or more tolerant of reasonable, even if mistaken, judgments than the protection of this nation and its people from further terrorist attacks in the immediate aftermath of the horrific events of 9/11"), *reversed in part and vacated and remanded in part sub nom. Ziglar v. Abbasi*, 2017 U.S. LEXIS 3874, at *55 (June 19, 2017) (granting immunity, and holding that "[w]ere those discussions, and the resulting [detention] policies, to be the basis for private suits seeking damages …, the result would be to chill the interchange and discourse that is necessary for the adoption and implementation of governmental policies."). Denying Defendants immunity, thus leaving them "holding the bag—facing full liability for actions taken in conjunction with government employees who enjoy immunity for the same activity," *Filarsky* 566 U.S. at 391, will cause private contractors to "hesitate"—if not refuse—to perform "national security" functions.

V. PLAINTIFFS CANNOT OVERCOME EXTRATERRITORIALITY.

Plaintiffs get *both* the law *and* the facts wrong regarding the lack of jurisdiction over their claims due to the presumption against extraterritoriality. Opp. 21-23. Plaintiffs seemingly argue that the Supreme Court's *RJR Nabisco v. European Cmty.*, 136 S. Ct. 2090 (2016), ruling does not apply in the Ninth Circuit,

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Opp. at 21, and completely ignore a sister court's proper application of this precedent. *Doe v. Nestle*, 2:05-cv-5133, ECF No. 249 (C.D. Cal. Mar. 2, 2017).

Plaintiffs also fail to appreciate that their claims may *only* overcome the presumption against extraterritoriality based on conduct relevant to *their own treatment*—not the so-called "torture program" at large. *Nestle*, 766 F.3d at 1029. Defendants' alleged conduct in this regard does not sufficiently "touch and concern" the U.S. Neither Defendant performed any work domestically during Salim and Rahman's detention; during Ben Soud's year-long detention, Defendants spent a mere *six combined days* in the U.S. (Watt Decl., ECF 195-16, Ex. 9 at MJ00023545; MJ00023563). Nor can Plaintiffs show Defendants' work over these six days was related to Ben Soud. Thus, the "facts" related to Defendants' "domestic conduct in support of the [CIA] program" bear no relation to Plaintiffs' treatment. Opp. at 22.

VI. PLAINTIFFS CANNOT PROVE AIDING & ABETTING LIABILITY.

Defendants established in their *Response to Plaintiffs' Motion for Partial Summary Judgment* that Plaintiffs' aiding and abetting claim fails. (ECF 190.) Defendants will now address only the Opposition's most notable factual/legal errors.

Contrary to their claim, the undisputed record *does* establish Plaintiffs Salim and Ben Soud's status as *non*-HVDs. Pls.' SOF ¶ 54; RSUF ¶¶ 210, 242, 249-52. Rodriguez testified that Salim and Ben Soud "were not high value targets." (ECF No. 175 ¶ 93). But Defendants' entitlement to summary judgment does not hinge solely upon Plaintiffs' classification; the undisputed facts prove Defendants did not "aid and abet" the CIA in its treatment of Salim/Ben Soud, or in Rahman's death.

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COBALT, where Plaintiffs were held, was set up by "CIA Staff Officer" who decided to keep the black-site dark and constantly play loud music. RSUF ¶¶ 255-56, 262-63. He had undergone SERE training, and Plaintiffs admit that he alone was "responsible" for interrogations. *Id.* ¶¶ 257-60. Before Defendants arrived at COBALT—or even knew of it—sleep deprivation, solitary confinement, and mock executions were used. *Id.* ¶¶ 248, 261, 265, 286, 305. And the one time Defendants were at COBALT, they had limited contact with Rahman—but those details are now *irrelevant*, given Plaintiffs' admission that *none* of this contact led to or caused Rahman's death (which was CIA Staff Officer's fault). *Id.* ¶¶ 322-32. The same is true for Salim and Ben Soud, who were not at COBALT until 2003, and who also admitted that they never interacted with Defendants. *Id.* ¶¶ 268, 272, 277-78, 281.

In trying to connect Defendants to Salim and Ben Soud, Plaintiffs rely exclusively on the 2003 Guidelines the Director of the CIA sent to all black-sites. *Id.* ¶¶ 227-31. But, these Guidelines were drafted by CTC Legal; Defendants had no knowledge they were being sent to COBALT. *Id.* Still, Plaintiffs claim the Guidelines indicate a link between Defendants' July 2002 Memo and the actions the CIA took against Salim and Ben Soud. Specifically, Plaintiffs claim that because the Guidelines contain descriptions of the techniques Defendants originally proposed to legally increase the pressure on Zubaydah, Defendants apparently "aided and abetted" abuses by the CIA. Opp. at 26. To achieve this herculean leap, Plaintiffs overlook all of the undisputed, intervening events that render this theory impossible, including: (a) the OLC's approval based upon JPRA and OTS input, *id.* ¶¶ 113, 139-48, 150-52, 155-61, 165; (b) the CIA's control over interrogations,

including whom to interrogate and when to stop, *id.* ¶¶ 190-206, 216; (ECF 194 ¶ 10); (c) the CIA having to approve EITs for a particular detainee, *id.* ¶¶ 217-24; and (d) Defendants non-involvement with the CIA's 2002 "HVT" interrogation training. *Id.* ¶ 226. Plaintiffs also ignore that the CIA used techniques against Salim/Ben Soud that were not in *either* the July 2002 Memo *or* the Guidelines, like "water dousing" and beatings. (ECF 192 ¶¶ 92-94, 97-98, 114-19).

Plaintiffs also wrongly claim there is "no requirement" an aider and abettor have "decisionmaking authority as to victims." Opp. at 28. Defendants debunked this notion in their separate *Response* (ECF 190 at 19-20), and demonstrated how their lack of "authority" to "control, prevent or modify" the CIA's decision to use EITs does, in fact, bar such sweeping aiding and abetting liability under "authoritative" international law. Plaintiffs are thus reduced to relying on irrelevant domestic state law cases like *State v. Henry*, 752 A.2d 40 (Conn. 2000), and non-ATS cases like *Rice v. Paladin Enters.*, 128 F.3d 233 (4th Cir. 1997). Opp. at 30-31. But, as the Ninth Circuit has made crystal clear, courts look to "[c]ustomary international law—*not domestic law*—[for] aiding and abetting ATS claims." *Nestle*, 766 F.3d at 1023 (emphasis added).

Next, Plaintiffs' attempt to impugn the OLC and CIA for providing "unreasonable advice" on the EITs' legality is equally spurious. Opp. at 29. Plaintiffs' citation to *United States v. Sprong*, 287 F.3d 663 (7th Cir. 2002), is inapposite, as that case involved the advice of a single "Michigan lawyer" counseling his clients that they could lawfully destroy domestic U.S. Navy property because—in his opinion—the Navy's system "violate[d] international law." *Id.* at

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1 664. Here, the EITs were assessed/approved by the highest levels of government
2 following a rigorous vetting process. RSUF ¶¶ 113, 139-48, 150-52, 155-61, 165.
3 Similarly misguided is Plaintiffs' reliance on *Linde v. Arab Bank, PLC*, 384
4 F. Supp. 2d 571 (E.D.N.Y. 2005). Opp. at 30. In *Linde*, a bank was sued under the
5 Anti-Terrorism Act—*not* the ATS—based on allegations it aided and abetted known
6 terrorist organizations by administering a "death and dismemberment benefit plan"
7 that rewarded suicide bombers. *Id.* at 575-77. Unlike *Linde*, here, Defendants did
8 not have a "general awareness" of their "role as part of an overall illegal activity,"
9 *id.* at 584; rather, Defendants were repeatedly assured EITs were *not* illegal, and
10 were unaware of the separate program involving Plaintiffs. RSUF ¶¶ 159-68, 248.
11 Finally, Plaintiffs fail to distinguish *Doe v. Cisco*, 66 F. Supp. 3d 1239 (N.D.
12 Cal. 2014). Opp. at 31-32. Rather than a "program of torture," Defendants' so-
13 called "product" was a list of SERE techniques the CIA could consider using *on*
14 *Zubaydah* that was "different" from the ineffectual techniques used by the FBI—but
15 still "safe." RSUF ¶¶ 33, 106, 125-27, 130; (ECF 190 at 23 n.5); *Corrie v.*
16 *Caterpillar, Inc.*, 403 F. Supp. 2d 1019, 1027 (W.D. Wash. 2005) (selling goods to
17 a buyer is not aiding and abetting, even if the seller "knows" the buyer "is likely to
18 use the goods unlawfully"). Plaintiffs' inapposite example of selling a "killing
19 agent" like "poison gas"—as discussed in *S. African Apartheid Litig. v. Daimler AG*,
20 617 F. Supp. 2d 228 (S.D.N.Y. 2009)—also fails. Opp. at 32. Defendants lacked
21 the *mens rea*, and believed the July 2002 Memo had a legitimate purpose. *Id.* at 259
22 n.157 (employees who sold poison gas to the S.S. "believing it would be used for
23 delousing" were acquitted). The July 2002 Memo was *not* part of a pitch to form an
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interrogation program beyond Zubaydah, or for Defendants to design said program. RSUF ¶ 127.

VII. THERE IS NO DIRECT AND/OR JOINT CRIMINAL LIABILITY.

Plaintiffs' direct liability argument, Opp. at 34, fails on two grounds. First, it incorrectly assumes Defendants' techniques constituted "violation[s] of customary international law" when there were no clear international norms at the time EITs were proposed/applied. (ECF 190 at 27-29.) Second, it overlooks that an individual is only liable for "planning" if he has an "awareness of the substantial likelihood that a crime will be committed in the execution of that plan[.]" *Prosecutor v. Kordic*, Case No. IT-95-14/2-A, Judgment, ¶¶ 31, 738-40 (Dec. 17, 2004). Defendants had no such awareness; Jessen recommended *against* applying EITs to Rahman, and advised others not to use unauthorized techniques. RSUF ¶¶ 245-48, 296, 299-309.

Finally, the facts also do not "clearly establish" that Defendants had the intent required for joint criminal enterprise liability. Opp. at 35. Because such claims "require the same proof of *mens rea* as … aiding and abetting," *Presbyterian Church of Sudan v. Talisman Energy Inc.*, 582 F.3d 244, 260 (2d Cir. 2009), Plaintiffs' argument fails for the same reasons. (ECF 190 at 21-27.) And the contention that EITs being applied to Plaintiffs was a "natural and foreseeable consequence" of a "common plan" between Defendants and the CIA, Opp. at 35, is baseless. Defendants could not foresee the CIA would use EITs on non-HVDs, like Plaintiffs, and Defendants suggested techniques for use in interrogating Zubaydah (and other HVDs), but had no involvement in "design[ing]" the program. (ECF 190 at 14-15.)

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CONCLUSION

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

DATED this 26th day of June, 2017.

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CERTIFICATE OF SERVICE

I hereby certify that on the 26th day of June, 2017, I electronically filed the foregoing document with the Clerk of Court using the CM/ECF system which will send notification of such filing to the following:

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