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

SULEIMAN ABDULLAH SALIM, et al.,

Plaintiffs,

v.

JAMES E. MITCHELL and JOHN JESSEN,

Defendants.

NO. 2:15-cv-286-JLQ

DEFENDANTS' REPLY STATEMENT OF UNDISPUTED FACTS

Note on Motion Calendar:
July 28, 2017, 9:30 a.m., at Spokane, Washington

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Defendants James Elmer Mitchell and John "Bruce" Jessen ("Defendants"), pursuant to Rule 56 of the Federal Rules of Civil Procedure and Rules 7.1 and 56.1 of the Local Rules for the United States District Court, Eastern District of Washington, file this Reply Statement of Facts in support of their Motion for Summary Judgment ("Defendants' Motion").

Because they cannot dispute the facts central to Defendants' Motion, Plaintiffs have advanced additional paragraphs that echo the narrative from their erroneous Motion for Partial Summary Judgment. Defendants disagree with many of these asserted facts. However, in order to avoid inadvertently creating an issue of fact given that many of the asserted facts are not relevant to Defendants' Motion, Defendants do not contest for purposes of Defendants' Motion any fact set forth below to which no response is made. Defendants do, however, note where Plaintiffs mischaracterize the underlying citation or advance inadmissible evidence that cannot be considered on summary judgment.

DEFENDANTS' RESPONSE TO PLAINTIFFS' FACTS IN OPPOSITION

1. When the CIA captured its first prisoner, Abu Zubaydah, the CIA Counterterrorism Center had no experience or expertise on interrogation. Deposition of Jose Rodriguez 46:23-48:4 (Watt Decl., Exh. A, cited hereinafter as "Rodriguez Dep.").
2. Defendant Mitchell initially joined a three-person "behavioral team" which recommended that Abu Zubaydah be kept naked in a cell lit by halogen lamps for 24 hours per day, while being subjected constantly to

rock music or other noise. Am. Answer, ECF No. 77 ¶ 38; ECF No. 182-4 at U.S. Bates 001826-28; ECF No. 182-6 at U.S. Bates 002000.

3. Defendant Mitchell described to CIA officials at Langley that, in his assessment, Abu Zubaydah was still using "resistance to interrogation ploys," and "wasn't going to provide the information that they were looking for using rapport-based approaches," at least not in a timely fashion. Deposition of James Elmer Mitchell 252:6-256:11 (Watt Decl., Exh. B, cited hereinafter as "Mitchell Dep.").

4. Jose Rodriguez, at the time, the head of the CIA's Counterterrorism Center, believed that Defendant Mitchell had "a good vision for what needed to be done," which was "the recommendation from him to use enhanced interrogation techniques." Rodriguez believed Defendant Mitchell had "tremendous expertise" from his SERE experience. Watt Decl., Exh. A (Rodriguez Dep.) 37:3-38:13.

Defendants' Response: Plaintiffs misstate Rodriguez's testimony, which was actually as follows:

> Q: When you said "he had a good vision for what needed to be done," what was that good vision?
>
> A: That good vision was the use of enhanced interrogations to get Abu Zubaydah to cooperate with us.

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ECF 195-1, Watt Decl., Exh. A (Rodriguez Dep.) at 37:3-38:13.

5. Mr. Rodriguez "asked Dr. Mitchell if he would take charge of creating and implementing a program." Watt Decl., Exh. A (Rodriguez Dep.) 58:3-9.

6. Defendant Mitchell agreed that, with Defendant Jessen's assistance, he would "put together a psychologically based interrogation program" which he decided "would need to be based on what is called 'Pavlovian Classical Conditioning.'" Watt Decl., Exh. C (Mitchell Manuscript) at MJ00022632.

7. On July 1, Defendant Mitchell participated in a meeting memorialized in a CIA cable that laid out CIA lawyers' guidance as to the legal authorization process. CIA lawyers "emphasized" that no "method of interrogation whatsoever" should be dismissed, "so long as the interrogation team believes it will be effective." The lawyers explained that, "of course, HQS will need to document in advance the legal analysis for such methods, to ensure that our officers are protected." The cable summarized, "In short, rule out nothing whatsoever that you believe may be effective; rather, come on back and we will get you the approvals." ECF No. 176-24 at U.S. Bates 1160.

8. Mr. Rodriguez described Defendant Mitchell as "the architect of the CIA interrogation program." Watt Decl., Exh. A (Rodriguez Dep.) 53:19-21. John Rizzo, who was the top lawyer overseeing the CIA program described Defendants as "the original architects" of the

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1 program. When Secretary of State Condoleezza Rice requested a direct
2 briefing in 2007 from the CIA program's architects, Defendants were
3 the ones to meet with her in that role. Deposition of John Rizzo 68:14–
4 69:24 (Watt Decl., Exh. D, cited hereinafter as "Rizzo Dep.").
5
6 9. Defendants' program was based in part on their proposal that prisoners
7 be subjected to coercive methods until they reached a state of "learned
8 helplessness." *See* Watt Decl., Exh. E at U.S. Bates 001618 (Mitchell's
9 qualifications noting that sometimes the appropriate mental state for a
10 detainee is "learned helplessness"); Background Paper on CIA's
11 Combined Use of Interrogation Techniques, ECF No. 177-29 at 2 ("The
12 goal of interrogation is to create a state of learned helplessness . . . . .");
13 ECF No. 182-4 at U.S. Bates 001825-28 (noting that one of the
14 psychological states the interrogation process aimed to induce was
15 "learned helplessness."); ECF No. 182-13 at U.S. Bates 002020 (noting
16 that "psychological and physical pressures have been applied to induce
17 complete helplessness, compliance and cooperation from [Abu
18 Zubaydah]."); Watt Decl., Exh. D (Rizzo Dep.) 128:08-129:8;
19 Rodriguez Decl., ECF No. 175 ¶ 38 ("in working to achieve this goal,
20 the [use of EITs] could produce a range of mental states in the subject,
21 including, but not limited to, fear, learned helplessness, compliancy, or
22 false hope.").
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10. Defendants "designed a program for the CIA to get prisoners to talk" and the CIA "would decide which prisoners to apply it to." Watt Decl., Exh. A (Rodriguez Dep.) 244:9-12.

Defendants' Response: Plaintiffs mischaracterize the cited testimony. While they accurately state Rodriguez's testimony at 244:9-12, they omit Rodriguez's later clarification of his testimony and statement that the enhanced interrogation techniques that were part of the July 2002 Memo were not intended to be used on low-value or medium-value detainees and that "the program" he spoke of was "the enhanced interrogation techniques for high-value detainees." ECF 176-3, Tompkins Decl., Exh. 3 (Rodriguez Dep.) at 183:22-184:25; 186:17-20; Rosenthal Decl., Exh. 2 at 222:14-21.

11. Defendants drew up a proposal that identified specific methods designed to "instill fear and despair," including methods aimed at manipulating a prisoner's being "very sensitive to situations that reflect a loss of status or are potentially humiliating." ECF No. 182-8 at U.S. Bates 001110-11; SOF X; *see also* Deposition of John Bruce Jessen 114:20-115:11 (Watt Decl., Exh. F, cited hereinafter as "Jessen Dep."); Watt Decl., Exh. B (Mitchell Dep.) 262:5-21.

Defendants' Response: Plaintiffs misstate the language in the July 2002 Memo (ECF No. 182-8, Ladin Decl., Exh. H at U.S. Bates 001110-11), which stated,

1 The aim of using these techniques is to dislocate the subject's
2 expectations concerning how he is apt to be treated and instill fear and
3 despair. The intent is to elicit compliance by motivating him to provide
4 the required information, while avoiding permanent physical harm or
5 profound and pervasive personality change.
6
7 . . .
8 Use of Diapers. [Zubaydah] appears to be very fastidious. He spends
9 much time cleaning himself and seems to go out of his way to avoid
10 circumstances likely to bring him in contact with potentially unclean
11 objects or material. He is very sensitive to situations that reflect a loss
12 of status or are potentially humiliating. One way to leverage his
13 concerns, while helping ensure his wound doesn't become infected with
14 human waste when in cramped confinement is to place him in an adult
15 diaper.
16
17
18 ECF No. 182-8, Ladin Decl., Exh. H at U.S. Bates 001110-11.
19
20 12. Defendants based their list of coercive methods on techniques used in
21 training in the Department of Defense's Survival, Evasion, Resistance,
22 and Escape ("SERE") program. Watt Decl., Exh. B (Mitchell Dep.)
23 186:1-187:3.
24 13. "The techniques used in SERE school, based, in part, on Chinese
25 Communist techniques used during the Korean War to elicit false
26

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1 confessions, include stripping students of their clothing, placing them in
2 stress positions, putting hoods over their heads, disrupting their sleep,
3 treating them like animals, subjecting them to loud music and flashing
4 lights, and exposing them to extreme temperatures." S. Comm. on
5 Armed Servs., 110th Cong., 2d Sess., Report on Inquiry into the
6 Treatment of Detainees in U.S. Custody (Comm. Print 2008), ECF
7 No. 182-9 ("SASC Report") at xiii, xxvi.
8
9
10 **Defendants' Response:** Defendants object to this "fact" as inadmissible
11 hearsay (Fed. R. Evid. 802). *See* Defendants' Motion to Exclude the SSCI
12 Report filed June 26, 2017, ECF No. 198.
13 14. Defendant Jessen admitted that techniques used in SERE training were
14 based in part on coercive interrogation methods inflicted by enemies on
15 American soldiers in the Korean War. He testified that he didn't "know
16 who determines what's legal and illegal, but the techniques were to
17 represent what we thought our enemy might do if they weren't adhering
18 to the Geneva Conventions." Watt Decl., Exh. F (Jessen Dep.) 57:3-14;
19 65:10-23.
20
21 **Defendants' Response**: Defendants dispute that Dr. Jessen "admitted"
22 that the SERE techniques were based on interrogation methods used on
23 American soldiers during the Korean War. In response to the question
24 "Did you ever have an understanding that the SERE techniques were based
25 in part on Chinese Communist techniques from the Korean War?", Dr.
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Jessen said "I think I do remember that." Jessen Dep. 57:3-14. Defendants do not dispute for purposes of Plaintiffs' Motion that Dr. Jessen's testimony is otherwise accurately quoted.

15. SERE training differed from Defendants' proposal: Techniques were used on volunteers, not on prisoners with serious injuries and open wounds. Watt Decl., Exh. F (Jessen Dep.) 134:21-135:20. SERE volunteers knew the start and end date of their training, and could end it at any time, while prisoners were made to believe that their interrogation could last for the rest of their natural lives. ECF No. 182-9, SASC Report at 31; ECF No. 182-10 at U.S. Bates 001957-58.

Defendants' Response: Defendants object to the reference to and reliance upon the SASC Report, which is inadmissible hearsay (Fed. R. Evid. 802). *See* Defendants' Motion to Exclude the SSCI Report filed June 26, 2017, ECF No. 198.

16. Waterboarding as carried out by Defendants was different from the technique used in SERE training: it involved much larger volumes of water, and Defendant Jessen or Defendant Mitchell acknowledged that Defendants' method was "different because it is 'for real' and is more poignant and convincing." ECF No. 176-25 at U.S. Bates 001376.

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17. Coercive methods were also used on detainees in the CIA program with a higher frequency than permitted in the SERE program. Watt Decl., Exh. F (Jessen Dep.) 156:14-24.

Defendants' Response: Plaintiffs misrepresent Dr. Jessen's cited testimony. Dr. Jessen testified that the SERE pressures were applied to detainees "the same as they were applied in the SMU training, but their frequency was more in the CIA Program." Dr. Jessen does not state that the pressures were applied more "than permitted in the SERE program" and Plaintiffs present no evidence to support this statement. ECF 182-3, Ladin Decl., Exh. C, (Jessen Dep.) 156:14-24.

18. Defendants knew the effect of their proposed methods might be different for prisoners than for volunteers. Watt Decl., Exh. F (Jessen Dep.) 127:11-24. But when Defendant Mitchell presented his proposal to the Director of the CIA and the head of CTC, he did not mention that fact. Watt Decl., Exh. B (Mitchell Dep.) 281:4-16. Nor did Defendants bring this critical difference to the attention of Mr. Rizzo. Watt Decl., Exh. D (Rizzo Dep.) 151:15-154:18.

Defendants' Response: Plaintiffs have admitted for purposes of Defendants' Motion that Defendants told the CIA that "any physical pressures applied to extremes can cause severe mental pain or suffering . . . The safety of any technique lies primarily in how it is applied and monitored." Defs.' Reply SUF ¶ 156.

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In addition, Plaintiffs mischaracterize Dr. Jessen's cited testimony. When asked, "In your mind, is there a difference between having these things pressures done to you by a hostile government versus in training?", Dr. Jessen responded, "In terms of how they're employed, no; in terms of where you're at emotionally, I think it is different . . . I think you'd have more concern about the outcome." ECF 182-3, Ladin Decl., Exh. C, (Jessen Dep.) 127:11-24.

Plaintiffs also mischaracterize Dr. Mitchell's cited testimony. Dr. Mitchell testified that in one specific meeting with the Director of the CIA and Jose Rodriguez, he did not mention that "the application of SERE techniques, which had been able to be used for many years without producing problems, might nonetheless produce problems in a different setting where the subject is not there voluntarily." The cited testimony does not indicate that Dr. Mitchell was "presenting" a "proposal" nor that this issue was not discussed at some other time – as Plaintiffs have admitted was the case. Defs.' Reply SUF ¶ 156. ECF 176-1, Tompkins Decl., Exh. 1, (Mitchell Dep.) 277:11-281:16.

19. Mr. Rizzo testified that CIA documents show that Defendants "made a representation about whether these techniques could cause severe mental or physical pain or suffering," indicating that Defendants "did provide information that OLC considered in assessing the legality of the techniques." Watt Decl., Exh. D (Rizzo Dep.) 44:7-47:3.

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Defendants' Response: Plaintiffs mischaracterize the citation to the deposition of John Rizzo as testimony when it was, in fact, part of a question posed by Plaintiffs' attorney. Rizzo did not adopt or agree with the characterizations. Rather, Rizzo testified that the document from which Plaintiffs' counsel was reading made the statement Plaintiffs' counsel read by stating "Appears to be the case, yes." Watt Decl., Exh. D (Rizzo Dep.) 44:7-47:3.

20. When the CIA "sought and obtained legal authorization" for the "enhanced interrogation technique program," the approval "was based upon what [Mr. Rodriguez] had learned from Drs. Mitchell and Jessen with regard to the SERE program." Watt Decl., Exh. A (Rodriguez Dep.) 97:14-23.

Defendants' Response: Defendants do not dispute the stated fact, but clarify that the CIA engaged in an extensive "back and forth" with the OLC, during which time the CIA provided OLC with information from different sources, including JPRA, OTS, and Defendants. Defs.' Reply SUF ¶¶ 113, 140-48, 150-51, 155-61,165.

21. Defendants admit that on July 23, 2002, they provided to CIA lawyers their view of the necessity for and safety of their methods. A cable transmitted on that date discloses that certain CIA employees were concerned that the experience of SERE volunteer trainees might not be analogous to "a man forced through these processes and who will be

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made to believe this is the future course of the remainder of his life." However, the CIA employees noted that that they "defer to experts"—i.e. Defendants. ECF No. 182-25 at CIA # 01771 (reprocessed). In response to this concern, Defendants wrote that Abu Zubaydah's "demonstrated abilities" to resist interrogation, combined with "his current level of confidence, and his reluctance to provide threat information" supported their recommendation to use "absolutely convincing" methods as part of a strategy with "a high probability of overwhelming subject's ability to resist." Defendants wrote that their "plan hinges on the use of an absolutely convincing technique. The waterboard meets this need." Defs.' Statement of Undisputed Facts ("SOF"), ECF No. 170 at ¶¶ 154-57; see also Watt Decl., Exh. G at U.S. Bates 001839-40 ("The waterboard technique remains the IC SERE psychologists' recommended, absolutely convincing technique for the aggressive phase.") Defendants did not acknowledge any difference between SERE volunteers and the use of their methods on prisoners.

Defendants' Response: In citing to Watt Decl., Exh. G at U.S. Bates 001839-40, Plaintiffs cite to an outdated version of the document that was heavily redacted. The CIA reprocessed this document on June 9, 2017 with additional information that stated: "The waterboard technique remains the IC SERE psychologists' recommended, absolutely convincing technique for the aggressive phase. If it is disapproved, however, recommend

relooking at the interrogation plan as currently envisioned." Rosenthal Decl. Exh. 10, US Bates 001840 (reprocessed June 9, 2017).

22. In the same cable, Defendants, serving as "experts" as to the necessity and safety of their methods, referred CIA headquarters only to training data, and did not mention any studies on the use of coercion on prisoners rather than volunteers. They further asserted that the "fact that the waterboard overwhelms most people's ability to resist is precisely why IC SERE psychologists think this procedure would be effective against the resistance strategies successfully employed by subject to date." ECF No. 182-25 at U.S. Bates 001770-71.

23. Defendants' representations were provided to CIA lawyers, who "then provided information to the" Justice Department Office of Legal Counsel ("OLC"). SOF ¶ 157.

24. Subsequently, at the end of July, OLC lawyer John Yoo provided a memo and a briefing on Defendants' methods to Attorney General John Ashcroft, who concluded that "[w]ith respect to waterboarding . . . Yoo's position was aggressive, but defensible." ECF No. 176-11 (OPR Report) at U.S. Bates 000647. By August 2, 2002, the Attorney General approved the use of waterboarding. SOF ¶ 166.

25. On August 3, 2002 Mr. Rizzo had a CIA cable transmitted to the interrogation team, including Defendants, which confirmed that the approval of Defendants' methods was based on, *inter alia*, a representation by "the SERE psychologists on the interrogation team that the procedures described above should not produce severe mental physical pain or suffering . . . nor would they be expected to produce prolonged mental harm continuing for a period of months or years (such as the creation of persistent posttraumatic stress disorder), given the experience with these procedures and the subject's resilience to date." SOF ¶ 168. Mr. Rizzo testified that Defendants were the "SERE psychologists on the interrogation team" whose representations as to safety formed a basis for the Department of Justice approval. Watt Decl., Ex. D (Rizzo Dep.) 44:15-45:3.

Defendants' Response: Plaintiffs do not fully quote the relevant language. US Bates 001763 states "We understand from OTS [REDACTED], OMS, and the SERE psychologists on the interrogation team . . . ." Defs.' Reply SUF ¶ 168, quoting Rizzo Decl., Exh. J at US Bates 001763.

26. Over the course of a nineteen-day "aggressive phase," Defendants observed firsthand as Abu Zubaydah, vomited, "appeared despondent," cried, "was visibly trembling," displayed "despair and helplessness," was "trembling and shaking," "frantically pleaded" that "he had given everything he knew," suffered "involuntary body (leg, chest, and arm)

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spasms, "continue to cry," suffered "involuntary stomach and leg spasms," became "distressed to the level that he was unable to effectively communicate," "cried, begged, and pleaded; finally becoming hysterical." ECF No. 183-11 at U.S. Bates 001758; ECF No. 182-15 at U.S. Bates 001801; ECF No. 182-16 at U.S. Bates 001804-1805; ECF No. 182-23 at U.S. Bates 001807-08; ECF No. 182-17 at U.S. Bates 001943-44; ECF No. 182-18 at U.S. Bates 001947; ECF No. 182-10 at U.S. Bates 001955-57; ECF No. 182-20 at U.S. Bates 001957-59; ECF No. 182-13 at U.S. Bates 002022; ECF No. 182-22 at U.S. Bates 002364; ECF No. 177-24 at U.S. Bates 002380.

27. Defendant Mitchell testified that when he heard Abu Zubaydah cry during Defendants' infliction of their methods on him, "you know what I hear when someone is making a noise like that? I hear a clear airway, which is what we're supposed to really monitor, because what, mattered is whether or not he can breathe in the—in the moment. Do you know what I mean? Long-term there were some things that matter. But we've got a psychologist and a physician and other people out there monitoring these things to be sure that they don't go too far." Watt Decl., Exh. B (Mitchell Dep.) 300:11-24.

28. After seventeen days of the "aggressive phase," the interrogation team, which included Defendants, wrote to CIA headquarters that "the

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aggressive phase" of Abu Zubaydah's interrogation "should be used as a template for future interrogation of high value captives." ECF No. 182-13 at U.S. Bates 002023.

Defendants' Response: US Bates 002019-23 cannot be attributed to the "interrogation team" or "Defendants." Other documents indicate that a team from HQS was at GREEN with the interrogation team at this time, and the HQS team reported back to HQS. Ladin Decl., Exh. K at U.S. Bates 001423–24 ("A team of senior CTC officers traveled from Headquarters to [REDACTED] to assess Abu Zubaydah's compliance and witnessed the final waterboard session, after which, they reported back to Headquarters that the EITs were no longer needed on Abu Zubaydah."). The sender is redacted in US Bates 002019-23 and not otherwise identified. ECF 182-13, Ladin Decl., Exh. M at U.S. Bates 002019-23. All cables went through the COB without review from Defendants and Defendants were unable to draft cables during this time period. Jessen Dep. 143:2-13; Defs.' Reply SUF ¶ 298. Thus, it cannot be inferred that the interrogation team or Defendants drafted and sent this cable.

29. After nineteen days of the "aggressive phase" Defendants and the rest of the interrogation team issued the assessment that "...we have successfully broken subject's willingness to withhold threat and intelligence information. He is presently in a state of complete

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subjugation and total compliance." ECF No. 182-12 at U.S. Bates 002382-83.

Defendants' Response: The quoted language in US Bates 002382-83 cannot be attributed to Defendants. The sender is redacted and the interrogation team included many individuals. Defs.' Reply SUF ¶ 168. Furthermore, all cables went through the COB without review from Defendants and Defendants were unable to draft cables during this time period. ECF 176-2, Tompkins Decl., Exh. 2, Jessen Dep. 143:2-13; Defs.' Reply SUF ¶ 298.

30. Defendants' methods became the basis for the CIA's enhanced interrogation program. Watt Decl., Exh. A (Rodriguez Dep.) 59:19–60:25, 63:6-10.

Defendants' Response: Plaintiffs mischaracterize the cited testimony. While they accurately state Rodriguez's testimony at 60:25 and 63:6-10, they omit Rodriguez's later clarification of his testimony and statement that the enhanced interrogation techniques that were part of the July 2002 Memo were not intended to be used on low-value or medium-value detainees and that "the program" he spoke of was "the enhanced interrogation techniques for high-value detainees." ECF 176-3, Tompkins Decl., Exh. 3, Rodriguez Dep. at 183:22-184:25; 186:17-20, Rosenthal Decl, Exh. 2 at 222:14-21.

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31. Defendants participated in the program's initial expansion, opining on potential lessons from Abu Zubaydah's interrogation for future interrogations. Watt Decl., Exh. H at U.S. Bates 001611; Watt Decl., Exh. I at U.S. Bates 001891-92. Defendants' contracts expanded after Abu Zubaydah's interrogation as well. For example, less than two months after Abu Zubaydah's interrogation, the value of Defendant Jessen's contract had doubled. Watt Decl., Exh. J at U.S. Bates 000086, 000092, 000094.

Defendants' Response: Plaintiffs mischaracterize the underlying documents. Contrary to Plaintiffs' statement, the documents do not indicate that Defendants participated in "the program's" initial expansion. Rather, US Bates 001611 indicates that all those involved in Zubaydah's interrogation, including CTC Legal, the incoming and outgoing Chief of Base, the Usama Bin Laden taskforce, the Office of Technical Services, IC SERE psychologists, and additional personnel, were asked for observations,. Similarly, US Bates 001891-92 indicates that in December 2002, after the CIA had already designed and operated a training for "High-Value Target" interrogation techniques, Defs.' Reply SUF ¶ 226, Dr. Mitchell, as "one data point", was asked for feedback from Zubaydah's interrogation. ECF 182-30, Ladin Decl., Exh. DD at U.S. Bates 001891–92. As stated at US Bates 001891, CTC was "[c]learly . . . in charge of the operation" and thus the CIA determined how to use the information it

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requested from Defendants and had complete control over any "expansion." Plaintiffs' also present no evidence to support the statement that Dr. Mitchell's contract value increased.

32. Defendants "continued to consult on the EITs for years after Abu Zubaydah." Watt Decl., Exh. A (Rodriguez Dep.) 244:9-24.

33. By January 2003, the methods that Defendants had proposed and used on Abu Zubaydah were standardized as the official "Enhanced Interrogation Techniques" in the "enhanced interrogation program" used on CIA prisoners, including the CIA prisoners at COBALT. ECF No. 182-25 at U.S. Bates 001170-72; Watt Decl., Exh. D (Rizzo Dep.) 64:8-23.

Defendants' Response: Plaintiffs misrepresent the record. Rizzo did not testify that "the methods that Defendants had proposed and used on Zubaydah were standardized as the official 'Enhanced Interrogation Techniques.'" Rather, Rizzo testified that US Bates 001170-72 represented instructions as to how interrogations were to be conducted within the legal authorization and stated that the techniques developed for Zubaydah "served as a template for the enhanced interrogation techniques that were used on a number of subsequent high value detainees." ECF 182-31, Ladin Decl., Exh. EE, Rizzo Dep. 64:8–65:15.

Additionally, US Bates 00170-72 does not reflect "methods Defendants

had proposed and used on Abu Zubaydah," but includes interrogation techniques not contained in the July 2002 Memo. Specifically, it includes the use of isolation, reduced caloric intake, deprivation of reading material, use of loud music or white noise (non-harmful), and the abdominal slap. ECF 182-32, Ladin Decl., Exh. FF at U.S. Bates 001170–72.

34. With the exception of the "abdominal slap" technique, the standardized "Enhanced Techniques" are the methods Defendants proposed in July 2002. ECF No. 182-8 at U.S. Bates 001110-11. The "abdominal slap" was a technique that Defendants used on Abu Zubaydah in an interrogation that they claimed was successful. ECF No. 77 ¶ 49.

Defendants' Response: Defendants' Answer at ¶ 77 does not state the abdominal slap was used "in an interrogation that they claimed was successful" and this assertion is unsupported by admissible evidence. ECF 77 ¶ 49.

35. Defendants were aware of a phenomenon called "abusive drift" in which, once coercion was employed, interrogators would tend to exceed approved limits, resulting in even more severe abuse of prisoners. Watt Decl., Exh. F (Jessen Dep.) 35:24-36:17; Watt Decl., Exh. C (Mitchell Manuscript) at MJ00022633, MJ00022857.

Defendants' Response: Plaintiffs mischaracterize the record. Defendants admit they were aware of the concept of abusive drift. However, Plaintiffs'

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1 statement that "once coercion was employed, interrogators would tend to
2 exceed any approved limits, resulting in even more severe abuse of
3 prisoners" is unsupported by the record and contrary to Dr. Jessen's
4 testimony explaining that abusive drift occurs when there is not proper
5 oversight. ECF 182-3, Ladin Decl., Exh. C (Jessen Dep.) at 35:24-36:17
6
7 36. "As initially proposed, sleep deprivation was to be induced by shackling
8 the subject in a standing position, with his feet chained to a ring in the
9 floor and his arms attached to a bar at head level, with very little room
10 for movement." ECF No. 176-11 (OPR Report) at U.S. Bates 000643.
11 "[D]etainees were typically shackled in a standing position, naked
12 except for a diaper." *Id.* at U.S. Bates 000733; Watt Decl., Exh. F
13 (Jessen Dep.) 228:20-229:2.
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16 37. Defendant Jessen was involved in using diapers, the "insult slap," and
17 sleep deprivation—by chaining a detainee to an overhead bar while
18 nude or in a diaper—on Mr. Rahman at COBALT. According to
19 Defendant Jessen, Mr. Rahman was subjected to consistent sleep
20 deprivation for days, with Mr. Rahman "chained to the overhead bar in
21 his cell," to induce "sleep deprivation right from the beginning." ECF
22 No. 182-36 at U.S. Bates 001049, 001051. Defendant Jessen used an
23 "insult slap" on Mr. Rahman. Watt Decl., Exh. F (Jessen Dep.) 238:22-
24 241:15, 211:7-15. During the weeks Mr. Rahman spent in the CIA
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prison before his death, he was mostly naked or wearing a diaper. Ladin Decl., Exh. S at U.S. Bates 001291. Defendant Jessen admitted that Mr. Rahman's diaper and clothes were removed at the interrogators' direction. *Id.* Defendant Mitchell was also present at an interrogation of Mr. Rahman at COBALT. *Id.* at U.S. Bates 001290.

38. Defendant Jessen observed other interrogators and guards using a "hard takedown" on Mr. Rahman: a renditions team dragged Mr. Rahman out of his cell, cut his clothes off, taped him, and put a hood over his head. ECF No. 182-36 at U.S. Bates 1051. They slapped him and punched him as they ran him up and down the long corridor adjacent to his cell. *Id.* When Mr. Rahman stumbled, the team dragged him along the ground. Afterwards, Mr. Rahman had abrasions on his head and leg and "crusty contusions on his face, leg, and hands." *Id.* Defendant Jessen told a CIA interrogator at COBALT that he had not used the technique, but it was worth trying. *Id.* Defendant Jessen suggested to the CIA interrogator that if you do a hard takedown, you should "leverage that in some way." Watt Decl., Exh. F (Jessen Dep.) 197:12-198:7. Defendant Jessen said an interrogator should speak to the prisoner afterwards, to "give them something to think about." ECF No. 176-22 at U.S. Bates 001133.

39. Defendant Jessen said the hard takedown was a "good technique, but these kinds of things need to be written down and codified with a stamp of approval or you're going to be liable." ECF No. 182-36 at U.S. Bates 001049.

40. Days after Defendant Jessen observed that Mr. Rahman displayed early signs of hypothermia, Defendant Jessen recommended that the CIA "continue the environmental deprivations [Mr. Rahman] is experiencing." ECF No. 182-36 at U.S. Bates 001050; ECF No. 182-40 at U.S. Bates 001057. Defendant Jessen provided an assessment that Mr. Rahman was impervious to most of Defendants' methods, and that "it will be the consistent and persistent application of deprivations (sleep loss and fatigue) and seemingly constant interrogations which will be most effective in wearing down this subject's resistance posture." *Id.* at U.S. Bates 001057-58.

41. Defendant Jessen believed that "the pressures that had been exerted on [Mr. Rahman]" had succeeded in an "interrogation breakthrough, but Rahman had not broken down" prior to his death. ECF No. 182-36 at U.S. Bates 1053. According to Defendant Jessen, "Rahman appeared to be healthy, fatigued, cold, and he knew how to use physical problems or duress as a resistance tool." *Id.*

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42. Four days after Defendant Jessen left COBALT, an interrogator conducted only a brief question session with Mr. Rahman "based on Jessen's recommendation that Rahman be left alone and environmental deprivations continued." ECF No. 176-25 (OIG Report) at U.S. Bates 001312. Two days later, Mr. Rahman—deprived of food, sleep, clothing, and warmth—died of hypothermia. *Id.* at U.S. Bates 001272-73.

43. Defendants "taught other interrogators how to use their techniques," by "train[ing] other CIA interrogators in the program." Rizzo Dep. 67:11-17. Defendants admit they were "instrumental in training and mentoring other CIA interrogators." Watt Decl., Exh. L at U.S. Bates 001585-86. Defendant Mitchell was tasked with "supervising] the activity of medical and security elements" during the initial phase of Abu Zubaydah's interrogation. ECF No. 177-39 at U.S. Bates 1642.

Defendants' Response: Plaintiffs misrepresent the record. The CIA conducted training in "High-Value Target" interrogation techniques in late 2002, before Plaintiffs Salim and Ben Soud's interrogations. The training was designed, developed, and conducted by individuals from CTC other than Drs. Mitchell and Jessen, and Drs. Mitchell and Jessen played no role in the interrogation training. Individuals from JPRA were instructors at this training. Defs.' Reply SUF ¶ 226. Dr. Mitchell testified that he was

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1 not involved in training or mentoring until after 2005, after the time when
2 Plaintiffs complain of their interrogations. ECF 191, Paszamant Decl.,
3 Exh. 2, Mitchell Dep. 343:6-344:11.
4
5 44. After the program was investigated by the Senate Select Committee on
6 Intelligence, the CIA agreed with the Committee's conclusion that the
7 Agency "allowed a conflict of interest to exist wherein the contractors
8 who helped design and employ the enhanced interrogation techniques
9 also were involved in assessing the fitness of detainees to be subjected
10 to such techniques and the effectiveness of those same techniques."
11 Watt Decl., Exh. M (CIA Response) at 3.
12
13 **Defendants' Response**: Plaintiffs misrepresent the record. The CIA did
14 not "agree" with the Committee's conclusion. Rather the CIA responded to
15 the Committee's conclusion by stating, that the Committee's Report
16 "correctly points out that the propriety of the multiple roles performed by
17 contracted psychologists—particularly their involvement in performing
18 interrogations as well as assessing the detainees' fitness and the
19 effectiveness of the very techniques they had devised—raised concerns and
20 prompted deliberation within CIA, but it fails to note that at least some of
21 these concerns were addressed" in early 2003. ECF 183-14, Ladin Decl.,
22 Exh. BBB (CIA Response) at 10. Finally, the CIA Response is
23 inadmissible hearsay (Fed. R. Evid. 802).
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45. Defendants suggest that their conflict of interest was "not problematic," but the CIA's official assessment is that "we agree that CIA should have done more from the beginning of the program to ensure there was no conflict of interest-real or potential-with regard to the contractor psychologists who designed and executed the techniques while also playing a role in evaluating their effectiveness, as well as other closely-related tasks." The CIA stated that it "has since taken steps to ensure that our contracts do not have similar clauses with the contractors grading their own work. Watt Decl., Exh. M (CIA Response) at 10-11, 25; Watt Decl., Exh. D (Rizzo Dep.) 117:15-23.

Defendants' Response: Plaintiffs misrepresent the record. Rizzo does not testify to the information cited by Plaintiffs, but simply stated

> Q: So, you would agree that the CIA should have done more to ensure that there was no conflict of interest when the contractor psychologists evaluated their own techniques?
> A: "I think that is a fair, a fair suggestion".

ECF 195-4, Watt Decl., Exh. D (Rizzo Dep.) 117:15-23. Finally, the CIA Response is inadmissible hearsay (Fed. R. Evid. 802).

46. Mitchell, Jessen, and Associates received $81 million in taxpayer money. ECF No. 77 ¶ 68; Watt Decl., Exh. M (CIA Response) at 49. The contract was a "sole source contract" ECF No. 183-9 at U.S.

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Bates 001629. Defendants formed the company to meet the CIA program's "growing demand for expert consultation, operational interrogation and exploitation capabilities." Watt Decl., Exh. L at U.S. Bates 001586.

Defendants' Response: The CIA Response is inadmissible hearsay (Fed. R. Evid. 802).

47. Defendants' contracts were executed in the United States before they traveled to a CIA black site. Watt Decl., Exh. C (Mitchell Manuscript) at MJ00022597; Watt Decl., Exh. F (Jessen Dep.) 105:19-109:2.

48. Defendants' personal contracts specifically included work on the CIA program performed in the United States, which was designated as "consultation and recommendation for applying methodology/CONUS," with "CONUS" meaning within the "Continental United States." *See, e.g.*, Watts Decl., Exh. N at U.S. Bates 000056; Watt Decl., Exh. A (Rodriguez Dep.) 34:10-12. Defendants' company likewise specified its own facility, located in Spokane, Washington, as a location where "[w]ork under this effort shall be performed." Watt Decl., Exh. O at U.S. Bates 001607.

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Defendants' Response: Defendants clarify that their company was not formed until 2005, after Plaintiffs were released from CIA custody. ECF 195-15, Watt Decl., Exh. O at U.S. Bates 001607.

49. It was at CIA headquarters in Langley that Defendants "put together the list of techniques" that would serve as the basis of the CIA program. Watt Decl., Exh. F (Jessen Dep.) 129:3-10.

50. Defendants' own invoices reflect that they regularly billed the United States government for "consultation" work on the CIA program that they performed from the United States. *See, e.g.*, Ladin Decl., Exh. P (redacted invoices) at MJ00023539, MJ00023543-63.

Defendants' Response: Plaintiffs misrepresent the record. The underlying documents do not indicate that Defendants' "regularly" billed for work in the United States. The documents show that in 2002, Dr. Mitchell billed for 1 day of work done within the United States (ECF 195-16, Watt Decl., Exh. P at MJ00023543), that in 2003, Dr. Mitchell billed for 6 days of work done within the United States (*id.* at MJ00023539; MJ00023545), and that from January 1, 2004 –August 22, 2004 (the date by which all Plaintiffs were released from CIA custody Defs.' Reply SUF ¶¶ 273, 282, 324), Dr. Mitchell billed for 17 days of work done within the United States (ECF 195-16, Watt Decl., Exh. P at MJ00023548; MJ00023550). The documents show that in 2002, Dr. Jessen billed for 2

days of work done within the United States (*id.* at MJ00023558; MJ00023562), that in 2003, Dr. Jessen billed for 4 days of work done within the United States (*id.* at MJ00023563), and that from January 1, 2004 –August 22, 2004, Dr. Jessen billed for 0 days of work done within the United States (*id.* at MJ00023558-63).

51. Defendants met at Langley to evaluate which of their torture methods they thought "were required for the conditioning process" and which methods Defendants "now believed were completely unnecessary." Watt Decl., Exh. C (Mitchell Manuscript) at MJ00022862.

Defendants' Response: Defendants clarify that this meeting occurred in 2006, well after Plaintiffs were no longer in CIA custody. ECF 195-3, Watt Decl., Exh. C (Mitchell Manuscript) at MJ00022862.

52. In 2007, Secretary of State Condoleezza Rice wanted a personal briefing on the program from its original architects. Defendants, accompanied by John Rizzo, met with the Secretary in the United States. Watt Decl., Exh. D (Rizzo Dep.) 68:14-69:8. During the discussion of sleep deprivation, the Secretary of State expressed concern that Defendants' method—which involved shackling a prisoner's hands to an overhead tether—evoked an image similar to the prisoner abuse scandal that had taken place at Abu Ghraib. ECF No. 183-11 at U.S. Bates 001175-76. Defendants "indicated the possibility of devising alternative methods to deprive sleep," and resolved to "work on

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alternative methods for implementing sleep deprivation EIT and propose courses of action." *Id*. at U.S. Bates 001176-77.

Defendants' Response: Defendants clarify that this meeting occurred in June 2007, well after Plaintiffs were no longer in CIA custody. ECF No. 183-11, Ladin Decl., Exh. K at U.S. Bates 001175-76.

53. Defendants played additional leading roles in the program from the United States, including "provid[ing] high-level briefings to the 7th floor," i.e., to CIA's top management, as well as the production of papers evaluating and justifying the use of "coercive physical pressures" as part of interrogation. Watt Decl., Exh. Q at U.S. Bates 001909; Watt Decl., Exh. R at U.S. Bates 002285-2291.

Defendants' Response: Defendants clarify that all the meetings and communications Plaintiffs reference occurred in 2005, well after Plaintiffs were no longer in CIA custody. ECF 195-17, Watt Decl., Exh. Q at U.S. Bates 001909; ECF 195-18, Watt Decl., Exh. R at U.S. Bates 002285-2291.

54. Defendant Jessen testified that "HVDs were only the highest valued people, like KSM, and Zubaydah and Nashiri and Gul Rahman." Watt Decl., Exh. F (Jessen Dep.) 201:1-13. Defendant Jessen admitted that, at COBALT, 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. ECF No. 175-18 at U.S. Bates 001057; Ladin Decl., Exh. S at U.S. Bates 001289.

55. The CIA transferred numerous "high value detainees" from its own custody to "military custody." Ladin Decl., Exh. C (Mitchell Manuscript) at MJ00022862.

Defendants' Response: Plaintiffs misrepresent the record. The document indicates that on September 6, 2006, President Bush announced that all the existing CIA detainees had been moved into military custody at GTMO. ECF 182-5, Ladin Decl., Exh. E (Mitchell Manuscript) at MJ00022862.

56. In response to a letter from John Rizzo, the Office of Legal Counsel provided advice to the CIA based on the CIA's representation that "once the CIA assesses that a detainee no longer possesses significant intelligence value, the CIA seeks to move the detainee into alternative detention arrangements." ECF No. 176-9 at U.S. Bates 000289.

57. While at COBALT, 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" to a prisoner held there. Ladin Decl., Exh. S at U.S. Bates 001287.

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58. Defendant Jessen also used "enhanced interrogation techniques" and "rough stuff" on another CIA detainee who was classified as a "medium value detainee." A contemporaneous CIA report states that "Several medium value detainees have been detained and interrogated at COBALT. For example . . . Ammar al-Baluchi . . . . Although these individuals were not planners, they had access to information of particular interest, and the Agency used interrogation techniques at COBALT to seek to obtain this information." ECF No. 176-25 at U.S. Bates 11392-11393. Defendant Jessen was "involved in Ammar al-Baluchi's enhanced interrogations." After "[t]he rough stuff was over," Defendant Mitchell "help[ed] debriefers elicit his cooperation." Ladin Decl., Exh. C (Mitchell Manuscript) at MJ00022811. Many years later, Defendant Mitchell wrote that al-Baluchi was a "high value detainee." *Id.* at MJ00022822.

59. There was no separate "enhanced interrogation techniques" program apart from the methods that Defendants initially recommended for use on Abu Zubaydah, which were later standardized throughout the CIA program. Watt Decl., Exh. D (Rizzo Dep.) 64:8-23; 101:20-102:15; ECF No. 182-32 at U.S. Bates 001170-72.

Defendants' Response: Plaintiffs misrepresent the record. Rizzo did not

testify that "the methods that Defendants had proposed and used on Zubaydah were standardized as the official 'Enhanced Interrogation Techniques.'" Rather, Mr. Rizzo testified that US Bates 001170-72 represented instructions as to how interrogations were to be conducted within the legal authorization and stated that the techniques developed for Zubaydah "served as a template for the enhanced interrogation techniques that were used on a number of subsequent high value detainees." ECF 182-31, Ladin Decl., Exh. EE, Rizzo Dep. 64:8–65:15. Additionally, US Bates 00170-72 does not reflect "methods Defendants had proposed and used on Abu Zubaydah," but includes interrogation techniques not contained in the July 2002 Memo. Specifically, it includes the use of isolation, reduced caloric intake, deprivation of reading material, use of loud music or white noise (non-harmful), and the abdominal slap. ECF 182-32, Ladin Decl., Exh. FF at U.S. Bates 001170–72.

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Defendants James Elmer Mitchell and John "Bruce" Jessen, by their undersigned attorneys, pursuant to Local Rule 56.1(a), submit this Reply Statement of Undisputed Facts in Support of their Motion for Summary Judgment. Although Defendants do not address all of Plaintiffs' responses, Defendants reproduce the entire Statement of Facts to provide the Court with one operative document that contains all the parties' positions with respect to each statement.

I. DR. MITCHELL CONTRACTS WITH THE GOVERNMENT

1. Drs. James Elmer Mitchell ("Dr. Mitchell") and John "Bruce" Jessen ("Dr. Jessen") are psychologists. (Tompkins Decl. Exh. 1, Deposition of Dr. James Elmer Mitchell ("Mitchell Tr.") at 23:5-9; Exh. 2, Deposition of Dr. John Bruce Jessen ("Jessen Tr.") at 18:1-6.)

Undisputed.

2. On August 8, 2001, the United States Government ("U.S." or the "Government") contracted with Dr. Mitchell as an independent contractor to "identify reliable and valid methods of conducting cross-cultural psychological assessments." (*Id.*, Exh. 7 at US Bates 000025.)[1]

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[1] The parties have stipulated that all documents produced by the U.S. are authentic and meet the admissibility requirements of Federal Rule of Evidence

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Undisputed.

3. The contract's term was September 1, 2001 until August 31, 2002. (*Id.*, Exh. 7 at US Bates 000027.)

Undisputed.

4. On September 11, 2001, Al-Qaida attacked the United States resulting in the death of thousands of innocent American civilians. *See* Defendants' Motion to Take Judicial Notice filed May 22, 2017, ECF No. 165.

Plaintiffs do not dispute the truth of the facts contained in paragraph 4. However, in accordance with the Court's Order on Defendants' Motion to Take Judicial Notice, Plaintiffs reserve the right to contest the admissibility of these facts at trial. *See* ECF No. 189 ("[T]he question of if, and in what manner [the 9/11 facts] would be presented to a jury is a more complicated question which would require Federal Rule of Evidence 403 balancing and other considerations.").

5. In response, the Department of Justice's ("DOJ") Office of Legal Counsel ("OLC") conducted an extensive analysis of President George W. Bush's authority to use "[f]orce" to "both retaliate for [the September 11] attacks, and to

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803(6). Tompkins Decl. Exh. 3, Deposition of Jose Rodriguez ("Rodriguez Tr.") at 79:6-21, 118:12-119:9.)

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prevent and deter future assaults on the Nation." (Tompkins Decl., Exh. 10 at US Bates 000560.)

Plaintiffs do not dispute that the referenced document, U.S Bates 000560, contains the quotations in paragraph 5. However, Plaintiffs object to Defendants' characterization of the cited document as "extensive" as subjective and argumentative.

6. On September 17, 2001, President Bush signed a Memorandum of Notification that expressly authorized the Central Intelligence Agency ("CIA") "to capture and detain individuals who pose a continuing, serious threat of violence or death to U.S. persons and interests or who are planning terrorist activities" ("MON"). (*Id.*, Exh. 9 at US Bates 000289; Declaration of John Rizzo ("Rizzo Decl.") ¶ 4.)

Undisputed, except that Plaintiffs object to the extent that the cited document constitutes hearsay.

Defendants' Reply: The parties have stipulated that all documents produced by the U.S. are authentic and meet the admissibility requirements of Federal Rule of Evidence 803(6). Tompkins Decl. Exh. 3, Deposition of Jose Rodriguez ("Rodriguez Tr.") at 79:6-21, 118:12-119:9. Additionally the Public Records exception applies (Fed. R. Evid. 803(8)).

7. Pursuant to the MON, the Director of the CIA directed the CIA's Counterterrorism Center ("CTC") to establish a program "to capture, detain, and

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interrogate the highest-value al-Qa'ida operatives to obtain critical threat and actionable intelligence." (Tompkins Decl., Exh. 34 at US Bates 001631.)

Undisputed, except that contrary to Defendants' Fact #7 asserting that the program was "pursuant to the MON," the MON does not include the word "interrogate."

Defendants' Reply: Plaintiffs concede that the President authorized the CIA to "capture and detain" individuals pursuant to the unreleased MON. The Office of Inspector General also 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.)

8. One purpose of the program was to collect threat and actionable intelligence. (*Id.*)

Undisputed.

9. CTC is the organization within the CIA that carries out covert action, foreign intelligence operations, and counter-terrorism analysis. (Tompkins Decl., Exh. 3, Rodriguez Tr. at 20:12-17.)

Undisputed.

10. The CIA, as part of this program, began building secret detention facilities referred to as "black-sites." (Rizzo Decl. at ¶¶ 5-6.)

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Undisputed.

11. On December 21, 2001, the U.S., specifically the CIA's Office of Technical Service ("OTS"), entered into another contract with Dr. Mitchell, this time for him to provide "consultation and research on counterterrorism and special ops." (Declaration of Jose Rodriguez ("Rodriguez Decl."), Exh. A at US Bates 000037; Tompkins Decl., Exh. 3, Rodriguez Tr. at 23:19-24.)

Undisputed.

12. This contract's term was January 1, 2002 until December 31, 2002. (Rodriguez Decl., Exh. A at US Bates 000039.)

Undisputed.

13. The contract indicates that Dr. Mitchell was eligible for this contract because he was "an expert in conducting applied research in high-risk operational settings to provide consultation and research in the area of counter-terrorism and covert action/covert influence operations." (*Id.*, Exh. A at US Bates 000042.)

Undisputed.

14. By June 13, 2002, Dr. Mitchell's contract was again expanded for him to serve as a "consultant to CTC special programs." (Tompkins Decl., Exh. 8 at US Bates 000061-64).

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Undisputed, except that contrary to Defendants' Fact #14, the contract is dated June 13, 2003, not 2002.

15. The daily rate Mitchell negotiated with the CIA was less than other deployed psychologists were paid to do behavioral consultation on interrogations at places like Gitmo. (Tompkins Decl., Exh. 1, Mitchell Tr. at 218:12-220:8.)

Contrary to Defendants' Fact # 15, which is supported only by Defendant Mitchell's uncorroborated, self-serving, apparently hearsay-based testimony, evidence in the record establishes that the rate Defendants were paid was higher than others. The Senate Intelligence Committee Report states that the $1800/day that Defendants were paid was "four times" what other interrogators—who were not authorized to use Defendants' methods—were paid. Watt Decl., Exh. T (SSCI Report) at 66.

Defendants' Reply: The SSCI Report is inadmissible hearsay (Fed. R. Evid. 802) and the Public Records Exception to the hearsay rule does not apply (Fed. R. Evid. 803(8). *See* Defendants' Motion to Exclude the SSCI Report filed June 26, 2017, ECF No. 198.

16. At the time, Dr. Mitchell had 13 years of experience in the U.S. Air Force's ("USAF") Survival, Evasion, Resistance, and Escape ("<u>SERE</u>") training program. (Tompkins Decl., Exh. 25 at US Bates 001352.)

Undisputed.

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17. Dr. Mitchell was the SERE Psychologist for the USAF Survival School from 1989 until 1996. In addition, for over six years, Dr. Mitchell was part of a counterterrorism unit which relied on SERE training to protect classified information. In both assignments, he was responsible for becoming familiar with different ways that foreign and domestic enemy organizations approached interrogations. (*Id.*, Exh. 1, Mitchell Tr. at 46:2-14; 58:19-20; 59:16-20; 129:2-3.)

Undisputed.

18. Dr. Mitchell often collaborated with Dr. Jessen, who was at the time employed by the Department of Defense ("DoD") and who had 19 years of SERE experience. (Tompkins Decl., Exh. 25 at US Bates 001352.)

Undisputed.

19. The SERE training program falls under the DoD Joint Personnel Recovery Agency ("JPRA"). JPRA is responsible for SERE training, which is offered by the U.S. Army, Navy, and Air Force to personnel who face the greatest risk of being captured during military operations. SERE students are taught how to survive in various terrain, evade and endure captivity, resist interrogation in "hostile" areas, and conduct themselves to prevent harm to themselves and fellow prisoners of war. (*Id.*, Exh. 25 at US Bates 001352; Exh. 34 at US Bates 001633; Exh. 2, Jessen Tr. at 62:22-63:2; Exh. 1, Mitchell Tr. at 58:5-13.)

Undisputed.

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20. At SERE, Dr. Jessen monitored students for problems experienced while going through the program. He also helped design advanced courses that specifically prepared trainees for capture by terrorist groups. To create these advanced courses, Dr. Jessen was required to know and understand the techniques, tactics, and procedures of the various terrorist groups. (*Id.*, Exh. 2, Jessen Tr. at 30:5-21, 34:3-35:11, 71:22-73:6.)

Undisputed.

21. Pursuant to the December 21, 2001 contract, Dr. Mitchell was commissioned to review the "Manchester Manual" and other Al-Qa'ida documents. The Manchester Manual had been stolen from the Army Special Operations School at Fort Bragg and contained instructions for resistance to interrogation. (*Id.*, Exh. 2, Jessen Tr. at 68:18-69:16, 76:14-24; Exh. 1, Mitchell Tr. at 163:22-164:6; Exh. 20 at US Bates 001099.)

Undisputed, except for the clarification that the Manchester Manual was found by U.K. police in Manchester, England, and Defendants themselves describe the document as "captured Al Qaeda training manuals." ECF No. 176-23 (U.S. Bates #001149)

22. Dr. Mitchell asked if Dr. Jessen could help in this review, which the CIA permitted. (Tompkins Decl. Exh. 2, Jessen Tr. at 68:18-69:16, 76:14-24.)

Undisputed.

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23. After conducting the review, Drs. Mitchell and Jessen drafted a paper on Al-Qa'ida's resistance to interrogation techniques, titled "Recognizing and Developing Countermeasures to Al-Qa'ida Resistance to Interrogation Techniques: A Resistance Training Perspective" (the "Resistance Training Perspective Paper"). (*Id.*, Exh. 25 at US Bates 001352; Exh. 23 at US Bates 001148-57; Exh. 2, Jessen Tr. at 69:17-23.)

Undisputed.

24. In the Resistance Training Perspective Paper, Drs. Mitchell and Jessen identified ways to identify whether a subject was using the resistance techniques articulated in the Manchester Manual during interrogations, and identified countermeasures the interrogator could use to combat such resistance techniques. None of the countermeasures consisted of coercive pressures—physical or otherwise. (*Id.*, Exh. 2, Jessen Tr. at 77:16-78:12; Exh. 23 at US Bates 001148-57; Exh. 20 at US Bates 001099.)

Undisputed, except that the truth of the analysis and conclusions of the Paper is contradicted by evidence in the record that Defendants could not reliably identify resistance techniques or countermeasures. For example, Defendants assessed Abu Zubaydah as possibly resistant, but the record shows that he did not in fact resist providing threat information because he did not have any. ECF No. 182-13 (U.S. Bates #002020) (pronouncing the aggressive phase a success because they "confidently assess[ed] that he [did] not possess undisclosed threat information, or intelligence that could prevent a terrorist event.").

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II. ABU ZUBAYDAH IS CAPTURED

A. Zubaydah Is Captured and Hospitalized.

25. Abu Zubaydah ("Zubaydah") was captured by the U.S. on March 27, 2002. (*Id.*, Exh. 25 at US Bates 001351.)

Undisputed.

26. Zubaydah was the first so-called High-Value Detainee ("HVD") to be captured. (Rodriguez Decl. ¶ 15; Rizzo Decl. ¶ 7; Tompkins Decl., Exh. 4, Deposition of John Rizzo ("Rizzo Tr.") at 18:21-25, 19:1; Exh. 3, Rodriguez Tr. at 146:15-24.)

Disputed to the extent that at the time Abu Zubaydah was captured, the term "HVD" did not exist. Watt Decl., Exh. F (Jessen Dep.) 200:10–13.

27. HVD has a very specific meaning. An HVD is defined as an enemy of the United States, in particular, someone who is believed to have intelligence involving threats to the United States, its people, or its interests overseas. (Tompkins Decl., Exh. 3, Rodriguez Tr. at 145:1-13, 145:5-9.)

Contrary to Defendants' Fact #27, facts in the record establish that there was not a specific or consistent meaning of HVD in the CIA program. At times, the CIA told the Justice Department's Office of Legal Counsel that to qualify as an HVD, and thereby be eligible for application of "enhanced interrogation techniques," a prisoner had to be a "senior member" of al-Qa'ida or an associated

terrorist group with "knowledge of imminent terrorist threats" or "direct involvement in planning and preparing" terrorist actions." Watt Decl., Exh. T (SSCI Report) 425. On the other hand, other purported HVDs were never suspected of having information on, or a role in, terrorist plotting. *Id.*

Defendants' Reply: The SSCI Report is inadmissible hearsay (Fed. R. Evid. 802) and the Public Records Exception to the hearsay rule does not apply (Fed. R. Evid. 803(8). *See* Defendants' Motion to Exclude the SSCI Report filed June 26, 2017, ECF No. 198. Furthermore, the SSCI Report relies entirely on a fax to Acting Assistant Attorney General Levin from [REDACTED] dated January 4, 2005, which is well after Plaintiffs were in CIA custody, and is therefore irrelevant.

28. Zubaydah was injured during his capture; a number of bullets caused a large leg wound. As a result, Zubaydah was provided with medical care. (Rizzo Decl., Exh. L at US Bates 001850; Tompkins Decl., Exh. 25 at US Bates 001352.)

Undisputed.

B. Dr. Mitchell Is Contacted.

29. In anticipation of Zubaydah's release from the hospital, the CIA and Federal Bureau of Investigation ("FBI") assembled a team that would formally interrogate Zubaydah at a different site. (Tompkins Decl., Exh. 25 at US Bates 001352; Exh. 20 at US Bates 001099.)

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Undisputed.

30. A CTC attorney recommended that Dr. Mitchell be made part of the interrogation team. (*Id.*, Exh. 20 at US Bates 001099.)

Undisputed.

31. OTS had previously recommended Dr. Mitchell to CTC/LGL.[2] CTC decided to hire him to provide psychological consultation to CTC to support its efforts to debrief and interrogate Zubaydah. (Rodriguez Decl. ¶¶ 12, 14; Tompkins Decl., Exh. 3, Rodriguez Tr. at 26:3-10, 32:18-20, 36:25-37:2.)

Undisputed.

32. The CIA thereafter asked Dr. Mitchell if he would deploy with the interrogation team to observe Zubaydah's interrogations and help the CIA psychologist that was tasked to develop countermeasures to Zubaydah's resistance. Dr. Mitchell agreed to be part of the interrogation team. (Tompkins Decl., Exh. 1, Mitchell Tr. at 214:2-11; 217:14-21.)

Undisputed.

33. Simply stated, the CIA determined it needed to do something different from what had been done. (*Id.*, Exh. 3, Rodriguez Tr. at 37:3-23.)

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[2] The abbreviation "CTC/LGL" refers to CTC's legal department. (Declaration of James Elmer Mitchell ("Mitchell Decl.") ¶ 8.)

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Undisputed except to the extent that this statement purports to present a uniform view within the CIA. The record shows that, to the contrary, CIA officers were "concerned that future public revelation of the CTC Program is inevitable and will seriously damage Agency officers' personal reputations as well as the reputation and effectiveness of the Agency itself." ECF No. 176-25 (U.S. Bates #001441).

34. On April 1, 2002, a cable was sent from CIA Headquarters ("HQS") to the black-site where Zubaydah was being held, GREEN. The cable transmitted the paper Drs. Mitchell and Jessen had drafted entitled Recognizing and Developing Countermeasures to Al-Qa'ida Resistance to Interrogation Techniques: A Resistance Training Perspective. The information was sent "at the request of CTC/OPS and ALEC[3] . . . for ______[4] use with the interrogation of Abu Zubaydah." (*Id.*, Exh. 49 at US Bates 002006-14; Exh. 3, Rodriguez Tr. at 182:15-21.)

Undisputed.

35. On April 3, 2002, Dr. Mitchell signed a proposed contract modification to provide on-site "psychological consultation to CTC in debriefing

[3] ALEC was a CIA station dedicated exclusively to finding Osama Bin Ladin. (Tompkins Decl., Exh. 3, Rodriguez Tr. at 208:23-209:3.)

[4] Blanks such as this indicate a redaction in the underlying document.

and interrogation operations for Quick Response Tasking." (*Id.*, Exh. 21 at US Bates 001101.)

Undisputed.

36. On April 3, 2002, CTC met with several senior operational and security individuals to develop an interrogation strategy for Zubaydah. The strategy was then communicated to GREEN via cable. (Tompkins Decl., Exh. 45 at US Bates 001923-25.)

Undisputed.

37. The cable stated that an "operational psychologist, _________ office of security, ___________ and an OTS/OAD ______ contract psychologist Mitchell who has extensive military background in interrogation" would travel to GREEN to assist in planning Zubaydah's interrogation. (*Id.*, Exh. 45 at US Bates 001923-25.)

Undisputed.

38. The cable also indicated that the CIA expected the interrogation to be difficult because Zubaydah had likely received counter-interrogation training. (*Id.*, Exh. 45 at US Bates 001923-25; Rizzo Decl., Exh. D at US Bates 001608.)

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39. On April 4, 2002, Dr. Mitchell's December 21, 2001, contract with the CIA was modified to reflect CTC's hiring him to provide additional services. (Rodriguez Decl., Exh. B at US Bates 000047.)

Undisputed, except for clarification that the referenced contract indicates that the purpose of the modification was to increase the contract value from $10,000 to $101,600.

III. PLANNING FOR ZUBAYDAH'S INTERROGATION – APRIL 2002

40. From the outset, the CIA established that the CIA's Station Representative was responsible for all activities at GREEN. (*Id.*, Exh. C at US Bates 001779-82.)

Undisputed, except that the cited cable also indicates that various individuals would assume a variety of roles in relation to Abu Zubaydah's interrogation at GREEN.

41. At GREEN, the Chief of Base reported to the Station Representative, who reported to the Chief of Station, who reported back to personnel at CIA Headquarters. (Mitchell Decl. ¶ 6.)

Undisputed.

42. In April 2002, Dr. Mitchell became part of the psychological team monitoring Zubaydah's interrogation. This team was led by a full-time CIA officer who was a psychologist. (Rodriguez Decl. at ¶¶ 17, 22; Tompkins Decl.,

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Exh. 41 at US Bates 001777-78; Exh. 3, Rodriguez Tr. at 149:19-23; Exh. 1, Mitchell Tr. at 214:2-11, 217:14-21, 232:4-233:16.)

Undisputed.

43. Dr. Mitchell's role was to observe the interrogation conducted by the CIA and make recommendations to CTC as to how Zubaydah's resistance to interrogation could be overcome. (Rodriguez Decl. at ¶¶ 17, 22; Tompkins Decl., Exh. 41 at US Bates 001777-78; Exh. 3, Rodriguez Tr. at 149:19-23; Exh. 1, Mitchell Tr. at 214:2-11, 217:14-21, 232:4-233:16.)

Undisputed.

44. While in this role, Dr. Mitchell reported directly to HQS and Jose Rodriguez ("Rodriguez"), who was aware of Mitchell's activities. (Rodriguez Decl. ¶ 18)

Undisputed.

45. Rodriguez was CTC's Chief Operating Officer from September 2001 – May 2002, when he became the Director of CTC. In these roles he had a reporting channel to the Director of the CIA. (Rodriguez Decl. ¶ 4; Tompkins Decl., Exh. 3, Rodriguez Tr. at 19:4-7, 20:6-11, 21:10-14.)

Undisputed.

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46. On April 7, 2002, the three-member behavior interrogation team (including Dr. Mitchell) viewed the holding compound and interrogation room where Zubaydah would be transferred after he was released from the hospital. They suggested several environmental modifications to create an atmosphere that enhances the strategic interrogation process. (Tompkins Decl., Exh. 48 at US Bates 001999-2000; Rizzo Decl., Exh. A at US Bates 001825-28.)

Undisputed, except that the terms "enhances" and "strategic" are subjective opinion, not fact. The referenced cable speaks for itself: "deliberate manipulation of the environment is intended to cause psychological disorientation, and reduced psychological wherewithal for the interrogation, the deliberate establishment of psychological dependence upon the interrogator as well as an increased sense of learned helplessness," and Defendant Mitchell "recommended that Zubaydah not be provided with any amenities, his sleep be disrupted and that noise be fed into Zubaydah's cell." Am. Answer, ECF No. 77 ¶ 34.

47. The CIA psychologist was in charge of the behavioral side of the interrogation. (Tompkins Decl., Exh. 41 at US Bates 001777-78; Exh. 1, Mitchell Tr. at 236:11-18.)

Undisputed, except to clarify that while the cited document states that "one officer . . . is leading the psychological team assigned to the interrogation," it also states that "another psychologist, Dr. James E. Mitchell, a contractor with

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extensive experience in interrogation techniques and resistance to these techniques was also included on the team."

48. The recommended modifications included painting the room white, installing halogen lights in both the holding cell and the interrogation room, installing a white curtain to partition off the holding cell from the interrogation room, building a vestibule to provide added control of potential orientation cues, the placement of short nap carpeting on the walls of the interrogation room and the sanding of the holding cell bars. (Tompkins Decl., Exh. 48 at US Bates 001999-2000.)

Undisputed.

49. Around the same time, while Zubaydah was still in the hospital, he was strategically permitted to establish a relationship of respect and tolerance with his then interrogators so that he would be more willing to disclose information that would be shameful or difficult. Despite these efforts, Zubaydah provided only what was regarded as "disposable information" that confirmed historical events and activities. (Rizzo Decl., Exh. A at US Bates 001825-28.)

Contrary to Defendants' Fact #49, Defendant Mitchell's assessment (joined by others on the CIA team) that Abu Zubaydah was providing only "disposable information," is disputed because the record establishes that Abu Zubaydah had already provided information on Jose Padilla and Khalid Sheikh Mohamed. Watt Decl., Exh. A (Rodriguez Dep.) 246:13–247:4; ECF No. 176-11 (U.S. Bates

1 #000640). FBI agents involved in Abu Zubaydah's interrogation likewise noted
2 that the CIA's assessment (in which Defendant Mitchell was involved) that Abu
3 Zubaydah "is offering 'throw away information' and holding back from providing
4 threat information" was contradicted by the fact that FBI agents had successfully
5 elicited "critical information" from Abu Zubaydah without resorting to torture.
6 Watt Decl., Exh. T (SSCI Report) 27. As was revealed once the CIA took
7 control of the interrogation and it came to an end, Defendant Mitchell's
8 assessment (joined by others in the CIA) that Abu Zubaydah was withholding
9 threat information was erroneous. *Id.* Cables during the aggressive phase of Abu
10 Zubaydah's interrogation repeatedly confirm that he had no threat information.
11 ECF No. 182-13 (U.S Bates #002020) (pronouncing the aggressive phase a
12 success because Defendants and the CIA team "confidently assess[ed] that he
13 [did] not possess undisclosed threat information, or intelligence that could prevent
14 a terrorist event.").
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17 **Defendants' Reply**: Plaintiffs' response is not germane to the stated fact,
18 which is that "Zubaydah provided only what *was regarded as* 'disposable
19 information' that confirmed historical events and activities" – not that Zubaydah
20 actually provided only "disposable information." Whether or not Zubaydah had
21 threat information is irrelevant to the CIA's categorization of the information
22 provided by Zubaydah.
23
24 Plaintiffs also misrepresent the record. Dr. Mitchell did not assess the
25 quality of the information provided by Zubaydah—CIA intelligence officers
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made that determination. Rizzo Decl., Exh. A at US Bates 001825 (The overall collection of information "appears to be information that is likely believed to be disposable and form [REDACTED] point of view already known"). Also, Plaintiffs ignore the undisputed fact that that after Zubaydah provided information about Jose Padilla and Khalid Sheikh Mohamed early on, his health improved and "once he regained his strength, he stopped talking" in the late spring/early summer of 2002, which is when the CIA began to think about other interrogation techniques. Rodriguez Tr. 150:23-153:23. Thus, Zubaydah's initial cooperation is irrelevant.

In addition, the SSCI Report is inadmissible hearsay (Fed. R. Evid. 802) and the Public Records Exception to the hearsay rule does not apply (Fed. R. Evid. 803(8)). *See* Defendants' Motion to Exclude the SSCI Report filed June 26, 2017, ECF No. 198.

50. As a result, CTC further developed the details of the contemplated next stage of Zubaydah's interrogation. According to Zubaydah's then-existing interrogation plan, he would be transported from the hospital to the interrogation room at detention site GREEN in a state of pharmaceutical unconsciousness to decrease security concerns and disorient him when he awakened. (*Id.*, Exh. A at US Bates 001825-28; Tompkins Decl., Exh. 1, Mitchell Tr. at 223:11-224:17.)

Undisputed.

51. The physical environment in the interrogation room was meant to further disorient Zubaydah and remove his ability to control the environment. This was done through the use of bright (not physically harmful) lights in an all-white environment, white noise produced by sound "masking equipment" (not physically harmful), no natural light, and no routine schedule. Additionally, Zubaydah was to be kept awake for one-two days, and interrogators were not to respond to his requests or demands. (Tompkins Decl., Exh. 55 at US Bates 002169-72; Rizzo Decl. ¶ 10; Rodriguez Decl. ¶ 21.)

Contrary to Defendants' Fact #51, the evidence cited does not establish whether the methods described were or were not actually physically (let alone psychologically) harmful, regardless of the description in the cable.

52. The goal of this stage of interrogation was to develop three psychological conditions, one of them being helplessness, to enhance Zubaydah's cooperation and willingness to discuss vital intelligence. The purpose was to reduce Zubaydah's "sense of hope that his well-honed counter-measure interrogation skills will help him from disclosing important intelligence" by making it difficult for him to concentrate, plan or resist the interrogation process. (Tompkins Decl., Exh. 55 at US Bates 002169-72; Rodriguez Decl. ¶ 20.)

Contrary to Defendants' Fact #52, the record shows that the stated goal of this stage of interrogation was the development of "learned helplessness" and not some other type of "helplessness." ECF No. 182-4 (US Bates #001826).

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IV. HELPLESSNESS AND LEARNED HELPLESSNESS

53. "Helplessness" as used by psychologists has two different meanings. One meaning is the feeling of helplessness that occurs when people are placed in a situation that they feel they cannot escape. When experiencing helplessness, people often have a difficult time organizing and executing a course of action. The goal of SERE training is to induce a feeling of helplessness so that the trainee can learn how to continue to search for a way out despite the helpless feeling. (Tompkins Decl., Exh. 1, Mitchell Tr. at 76:3-77:20, 103:18-22.)

Contrary to Defendants' Fact #53, the record does not establish that "helplessness" has two different meanings except from Defendant Mitchell's self-serving and unsubstantiated testimony. The record establishes that the goal of Defendants' methods was "learned helplessness" and not the type of "helplessness" described in asserted Fact #53. Watt Decl., Exh. E (U.S Bates #001618) (Mitchell's qualifications noting that sometimes the appropriate mental state for a detainee is "learned helplessness"); ECF No. 177-29 (Background Paper on CIA's Combined Use of Interrogation Techniques, ACLU-RDI 4586) at p.2 ("The goal of interrogation is to create a state of learned helplessness . . . . ."); ECF No. 182-4 (US Bates #001826) (one of the psychological states the methods aimed to induce was "learned helplessness."); ECF No. 182-13 (U.S Bates #002020) (noting that "psychological and physical pressures have been applied to induce complete helplessness, compliance and cooperation from [Abu Zubaydah].").

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54. The other meaning is "learned helplessness" as discussed by Dr. Martin Seligman ("Dr. Seligman"). This is a profound level of helplessness that leads to a feeling of depression, passivity, and withdrawal. This level of helplessness would be catastrophic in SERE training because the trainee would no longer seek a solution. (Tompkins Decl., Exh. 1, Mitchell Tr. at 77:6-20, 273:23-274:6, 247:10-277:10.)

Undisputed, except that contrary to Defendants' Fact #54, and for the reasons stated in response to Fact #53, the record does not establish that "helplessness" has two different meanings.

55. Dr. Mitchell explained that the Army Field Manual used by the U.S. today contains guidance about placing an interrogation subject into a "temporary" situation they "perceive[] to be helpless," and then giving them a way out of the situation by answering questions. Drs. Mitchell and Jessen explained helplessness in the same way to the CIA. (Tompkins Decl., Exh. 1, Mitchell Tr. at 274:10-276:16; Tompkins Decl., Exh. 2, Jessen Tr. at 160:19-161:2.)

Defendants' Fact #55 is disputed, because it relies upon their inaccurate characterization of the Army Field Manual ("AFM") rather than the AFM itself. In fact, the AFM operative in 2002-2003 describes and prohibits Defendants' methods, including sleep deprivation, denial of food, imprisonment in extremely confined spaces, and forcing individuals to maintain stress positions as torture. Watt Decl., Exh. T at 1-8 to 1-9.

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Defendants' Reply: Plaintiffs' response does not address how Drs. Mitchell and Jessen explained the Army Field Manual and helplessness to the CIA. In fact, the current AFM corroborates their testimony by stating, "In the motional-futility approach, the HUMINT collector convinces the source that resistance to questioning is futile. This engenders a feeling of hopelessness and helplessness on part of the sources. Again, as with other emotional approaches, the HUMINT collector gives the source a 'way out' of the helpless situation." Rosenthal Decl. Exh. 3, FM 2-22.3, September 2006 at 8-13 to 8-14.

56. Drs. Mitchell and Jessen did not advocate for the use of "learned helplessness." (Tompkins Decl., Exh. 1, Mitchell Tr. at 76:3-79:5; 87:17-88:16; 97:6-100:24.)

Contrary to Defendants' Fact #56, the record is clear that Defendants advocated for the use of "learned helplessness." Watt Decl., Exh. E (U.S Bates #001618) (Mitchell's qualifications noting that sometimes the appropriate mental state for a detainee is "learned helplessness"); ECF No. 177-29 (Background Paper on CIA's Combined Use of Interrogation Techniques, ACLU-RDI 4586) at p.2. ("The goal of interrogation is to create a state of learned helplessness . . . . ."); ECF No. 182-4 (US Bates #001826) (one of the psychological states Defendants' methods aimed to induce was "learned helplessness."). At the end of the program applied to Abu Zubaydah, in which Defendants personally applied their methods, a cable noted that "psychological and physical pressures have been

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applied to induce complete helplessness, compliance and cooperation from the subject." ECF No. 182-13 (U.S Bates #002020).

Defendants' Reply: Plaintiffs' response does not support their statement that Defendants advocated for the use of learned helplessness. None of the following documents were drafted by Defendants or otherwise identify Defendants: ECF No. 177-29, Tompkins Decl. Exh. 69; ECF 182-4, Ladin Decl., Exh. D at US Bates 001826; ECF 182-13, Ladin Decl., Exh. M at US Bates 002020. These documents merely contain the term "learned helplessness," or in the case of US Bates 002020, simply "helplessness." *Id.* Even more, US Bates 001825 is dated April 12, 2002, which is before Dr. Jessen was even involved with the CIA. Ladin Decl., Exh. D at US Bates 001826. Therefore, these documents do not support the implication that Defendants advocated for learned helplessness.

57. CIA officers often misused the term "learned helplessness" in documents because they did not understand the distinction between helplessness to induce cooperation—as is utilized in SERE—and "learned helplessness," as described by Dr. Seligman, which would inhibit cooperation. (Tompkins Decl., Exh. 2, Jessen Tr. at 161:20-164:9

Contrary to Defendants' Fact #57, the record shows that CIA officers used the term "learned helplessness" in the sense that Defendants contemporaneously used it. Both Mr. Rizzo and Mr. Rodriguez recalled Defendants describing "learned helplessness" as a goal of the Abu Zubaydah interrogation. Watt Decl.,

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Exh. D (Rizzo Tr.) 128:08–129:8; Watt Decl., Exh. V (Rodriguez Decl.) ¶ 38 ("in working to achieve this goal, the [use of Defendants' methods] could produce a range of mental states in the subject, including, but not limited to, fear, learned helplessness, compliancy, or false hope.") This strategy was ultimately adopted by the CIA. ECF No. 177-29 (Background Paper on CIA's Combined Use of Interrogation Techniques, ACLU-RDI 4586) at p.2. ("The goal of interrogation is to create a state of learned helplessness . . . . .").

Defendants' Reply: Plaintiffs' response does not contradict Defendants' asserted fact or create an issue of fact. The cited documents do not address whether the CIA understood the distinctions in helplessness.

58. Drs. Mitchell and Jessen would correct the CIA whenever the term "learned helplessness" was "used inappropriately." (Tompkins Decl., Exh. 1, Mitchell Tr. at 103:13-104:12; 108:1-20; 274:10-277:10; Tompkins Decl., Exh. 2, Jessen Tr. at 160:13-163:22; 163:23-164:23; 166:21-167:11; 168:10:169:24.)

Contrary to Defendants' Fact #58, the record establishes that Defendants supported the use of "learned helplessness" in the CIA program. In describing his qualifications, Dr. Mitchell noted that "learned helplessness" is one of the psychological states that interrogators should seek to induce in a detainee. Watt Decl., Exh. E (U.S Bates #001618) (Mitchell's qualifications noting that sometimes the appropriate mental state for a detainee is "learned helplessness"). Both Mr. Rizzo and Mr. Rodriguez recalled Defendants describing "learned helplessness" as a goal of the program applied to Abu Zubaydah. Watt Decl.,

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Exh. D (Rizzo Tr.) 128:08–129:8; Watt Decl., Exh. V (Rodriguez Decl.) ¶ 38 ("in working to achieve this goal, the [use of Defendants' methods] could produce a range of mental states in the subject, including, but not limited to, fear, learned helplessness, compliancy, or false hope.") This strategy was ultimately adopted by the CIA. ECF No. 177-29 (Background Paper on CIA's Combined Use of Interrogation Techniques, ACLU-RDI 4586) at p.2. ("The goal of interrogation is to create a state of learned helplessness . . . . .").

Defendants' Reply: Plaintiffs' response does not dispute that the CIA misused the term "learned helplessness" and that Defendants corrected them. A document cited by Plaintiffs further supports that Defendants had to repeatedly explain helplessness that would induce cooperation vs. helplessness that would inhibit cooperation. Exhibit AAA to the Ladin Declaration is a Paper drafted by Defendants in February 2005 entitled Interrogation and Coercive Physical Pressures: A Quick Overview that states, "Moreover, when titrated improperly and administered in an unpredictable relationship, coercive interrogation techniques may induce a severe sense of hopelessness, *conditioned neurosis* or disturbance in brain functioning that can undermine efforts to obtain intelligence. . . . The effect can also be produced by 1) repeated, random application of inescapable aversive stimuli progressive, . . . in our view, carrying procedures to such lengths, *even if it were legal to do so*, is inappropriate and counterproductive since the goal is to gather information, rather than leave the subject broken and non-functional, and such activities may directly interfere with obtaining accurate

intelligence." Ladin Decl. (ECF No. 183) at Exh. AAA at 002289-91 (emphasis in original).

Finally, Plaintiffs' response does not support their statement that Defendants supported the use of learned helplessness, as fully explained in Defendants' Reply SUF ¶ 56.

V. INITIAL LEGAL APPROVAL OF NONTRADITIONAL INTERROGATION TECHNIQUES

59. In or around early April 2002, attorneys and other personnel from CTC met with John Rizzo ("Rizzo"), who was then the CIA's Chief Legal Officer, to provide a briefing. During the briefing, CTC personnel told Rizzo that CTC had "devised an interrogation plan for Zubaydah that contemplated the use of certain nontraditional interrogation techniques." Following this meeting, Rizzo assumed responsibility for determining the legality of the proposed techniques and answering legal questions posed by Rodriguez and other CIA personnel. (Rizzo Decl. ¶¶ 9, 11; Tompkins Decl., Exh. 4, Rizzo Tr. at 18:18-25, 19:1-5; 170:10-15.)

Undisputed.

60. Rizzo subsequently instructed CTC attorneys (referred to herein as "CTC/LGL") to research whether the contemplated proposed non-traditional interrogation techniques were legal. (Rizzo Decl. ¶ 12; Tompkins Decl., Exh. 4, Rizzo Tr. at 30:21-25, 31:5.)

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Undisputed.

61. CTC/LGL preliminarily concluded that the techniques proposed by CTC appeared to be lawful; however Rizzo also wanted to confer with the DOJ to secure a written opinion regarding the techniques' legality. (Rizzo Decl. ¶¶ 12-14; Tompkins Decl., Exh. 4, Rizzo Tr. at 28:23-25, 29:1, 31:8-10, 47:4-19, 49:16-25, 182:18-23.)

Contrary to Defendants' Fact #61, (1) it was the interrogation team at GREEN, including Defendant Mitchell, not CTC, that proposed to subject Abu Zubaydah to Defendants' methods. ECF No. 182-6 (U.S Bates #001999-2000); ECF No. 182-4 (U.S Bates #001825-28); Am. Answer, ECF No. 77 ¶ 34; and (2) the portions of the Rizzo transcript cited do not support Mr. Rizzo having conferred with the Justice Department regarding these methods. They refer instead to Mr. Rizzo's later discussions with the Justice Department regarding the legality of Defendants' "enhanced interrogation techniques."

62. CTC/LGL sent a cable to GREEN in April 2002. The cable stated: "At this time, none of the interrogation methods described by ______ [not Drs. Mitchell or Jessen] nor any of the methods discussed at headquarters with the interrogation team, would appear to violate these [legal] prohibitions; nor would they appear to violate any of the additional provisions of the U.S. Federal (or state) law that apply to the conduct of interrogations by USG personnel." The legal provisions at issue included the Geneva Conventions and 18 U.S.C. §§ 2340-2340B of the U.S. Code. But, the cable also stated that "a more detailed

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response with any necessary legal fine-tuning" would be provided "next week," and advised that, going forward, the interrogation team should consult closely with CTC/LGL regarding Zubaydah's interrogation. (Rizzo Decl. ¶ 12; Tompkins Decl., Exh. 55 at US Bates 002169-72; Exh. 4, Rizzo Tr. at 31:13-17.)

Contrary to Defendants' Fact #62, the Rizzo declaration (¶ 12) states: "I had my staff research whether these techniques were legal, and we concluded that *most of them* were lawful." (emphasis added). Moreover, the cited cable does not state that the methods complied with the Geneva Conventions; instead, it made the claim that the "very restrictive provisions" of the Geneva Convention did not apply.

Defendants' Reply: Plaintiffs do not dispute that the cable is accurately quoted, and the cited portion of the Rizzo declaration does not dispute the accuracy of the cable.

63. On April 16, 2002, Rizzo met with the National Security Council's ("NSC") Legal Advisor, John Bellinger ("Bellinger"), OLC Deputy Assistant Attorney General John Yoo ("Yoo"), and two CTC attorneys. During the meeting, Rizzo explained that the CIA had developed a strategy for Zubaydah's interrogation and he described the then-current strategy. (Rizzo Decl. ¶ 16-17; Tompkins Decl., Exh. 4, Rizzo Tr. at 199:7-24.)

Undisputed.

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64. CTC attorneys in attendance also outlined the effects of the interrogation strategy. Specifically, CTC attorneys outlined the effects of learned helplessness, citing the psychologist who had developed the theory for them, who was not Drs. Mitchell or Jessen. (Rizzo Decl. ¶ 18; Tompkins Decl., Exh. 4, Rizzo Tr. at 200:1-12; Exh. 11 at US Bates 000648-49.)

Contrary to Defendants' Fact #64, the record indicates that "[a]t the [April 16, 2002] meeting, the CIA attorneys explained that the plan developed by CIA psychologists relied on the theory of 'learned helplessness'… To bring about this condition, the CIA planned to disorient Abu Zubaydah …"). ECF No. 176-11 (OPR Report) at U.S. Bates 000647-48; Am. Answer, ECF No. 77 ¶ 34.

Defendants' Reply: Plaintiffs response does not dispute Fact 64 or any aspect of it.

65. Rizzo asked that the OLC assess the legality of the interrogation strategy and issue a memorandum opinion. (Rizzo Decl. ¶ 19.)

Undisputed.

66. The CIA did not have a role in the OLC's internal deliberations about the legality of the interrogation strategy, except to respond to requests for additional information. Rizzo's office did provide the OLC with requested information on a number of occasions. (Rizzo Decl. ¶ 21; Tompkins Decl., Exh. 4, Rizzo Tr. at 31:18-22, 33:10-14 (referencing a "back and forth" between OLC and the CIA); Tompkins Decl., Exh. 34 at US Bates 001631.)

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Contrary to Defendants' Fact #66, then-National Security Council Legal Adviser John Bellinger, stated that "there was 'pressure' from the CIA from the outset to approve the program. . . . Bellinger believed that this kind of presentation by the CIA 'boxed in' both the White House and the Department [of Justice] by making it impossible to reject the CIA's recommendations. Bellinger concluded that [OLC attorney John] Yoo was 'under pretty significant pressure to come up with an answer that would justify [the program]' and that, over time, there was significant pressure on the Department to conclude that the program was legal and could be continued . . . ." ECF No. 176-11 (OPR Report) at U.S. Bates #00645–646.

Defendants' Reply: Plaintiffs' response relies upon and contains inadmissible hearsay. Although the OPR Report is a public record, the statements made by Bellinger constitute hearsay within hearsay, as they are not factual findings by the OPR, but rather statements made to OPR staff during an interview that were subsequently included in the OPR Report. *See* ECF 176-11, Tompkins Decl., Exh. 11 (OPR Report) at US Bates 00645–646. Accordingly, Plaintiffs may not permissibly rely upon and quote from Bellinger's statements. *See* 5-803 *Weinstein's Federal Evidence* § 803.10, Lexis (database updated 2017) ("Statements by third persons that are recorded in an investigative report are hearsay within hearsay" and are thus "inadmissible unless they qualify for their own exclusion or exception from the rule against hearsay . . . ."); *see also United States v. Taylor*, 462 F.3d 1023, 1026 (8th Cir. 2006) (recitation of citizen's

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statement to police officer contained within police report was "double hearsay"); *United States v. Mackey*, 117 F.3d 24, 28-29 (1st Cir. 1997) (upholding district court's finding that witness statement recorded in FBI report was "hearsay within hearsay" and not admissible simply because it appeared in public record); *Sussel v. Wynne*, Civ. No. 05-00444, 2006 U.S. Dist. LEXIS 72774, at *6 (D. Haw. Oct. 4, 2006). Furthermore, Plaintiffs' response does not dispute Fact # 66.

VI. IMPLEMENTING THE INITIAL PHASE OF ZUBAYDAH'S INTERROGATION IN APRIL 2002

67. In April 2002, the Zubaydah interrogation team followed the interrogation plan that had been approved. (Tompkins Decl., Exh. 53 at US Bates 002144.)

Undisputed.

68. The interrogation team was ultimately made up of two FBI Special Agents, an interrogator from the CIA's Office of Security, CIA psychologists, substantive and reports officers, and medical personnel. (Tompkins Decl., Exh. 54 at US Bates 002167.)

Undisputed.

69. Dr. Mitchell was one of two SERE psychologists on the interrogation team. Dr. Jessen was not the other SERE psychologist. (Tompkins

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Decl., Exh. 29 at US Bates 001590; Exh. 2, Jessen Tr. at 102:22-103:4; Mitchell Decl. ¶ 3.)

Undisputed.

70. In fact, at the time, Dr. Mitchell's contract was expanded to "serve as both a consultant to CTC special programs as well as conduct specialized training as required." (Tompkins Decl., Exh. 8 at US Bates 000061-64.)

Plaintiffs do not dispute that Dr. Mitchell's role with CTC was expanded at the time Abu Zubaydah was subjected to Defendants' methods, but the cited contract lists an effective date of June 13, 2003, a year after that time.

Defendants' Reply: Plaintiffs correctly point out that the quoted language is from a contract effective June 13, 2003, and is not applicable to the April 2002 timeframe, before EITs had been proposed.

71. CTC's primary interrogator was in charge of and responsible for all aspects of Zubaydah's interrogation. He or she was the leader of the interrogation team and "in some respects the de facto chief of the CIA base ["COB"]" where Zubaydah was being held, GREEN. (Rodriguez Decl., ¶ 19; Exh. C at US Bates 001779-82; Tompkins Decl., Exh. 54 at US Bates 002167.)

Contrary to Defendants' Fact # 71, to the extent the first sentence refers to "all aspects," the record shows that the CIA recognized the process and roles and responsibilities in it as "fluid." ECF No. 177-39 (U.S. Bates #001644). At one

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point in June 2002, there was no COB ("HQS will identify an individual to serve as chief of base") and Defendant Mitchell supervised staff and orchestrated the isolation phase of Abu Zubaydah's interrogation. *Id.* at #001642

Defendants' Reply: Plaintiffs' response misstates the record. US Bates 001642 does not support the inference that at one point in June 2002 there was no COB. Rather, the cable lays out plans for future action and in discussing activities that will take place in July 2002, it indicates that the Post-Isolation Phase will begin on or about July [REDACTED] and that HQS approves "the careful introduction of the interrogation [REDACTED] HQS will identify an individual to serve as Chief of Base [REDACTED] the COB will be responsible for all aspect of the [REDACTED] and equipped to make immediate decision in response to the fluid nature of the interrogation." This cable supports the inference that on this date in July, a COB for the Post-Isolation Phase of Zubaydah's interrogation had not yet been named, but would be named so that the individual could oversee the interrogation. ECF No. 177-39, Tompkins Decl., Exh. 79 at US Bates 001643-44). In fact, EITs were not applied to Zubaydah until August 2002. Defs.' Reply SUF ¶¶ 187-88.

Furthermore, the cable indicates that Dr. Mitchell would "assist in orchestrating the isolation" of Zubaydah and "will remain behind to monitor the situation and carefully supervise the activity of medical and security elements. He will be assisted by another individual." *Id.* at US Bates 001642.

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72. HQS provided all members of the interrogation team with legal and policy guidance. (Tompkins Decl., Exh. 54 at US Bates 002167.).

Undisputed.

73. The interrogation team was specifically told that they were not "limited to the use of traditional law enforcement methods" because Zubaydah was "not entitled to the legal protections of the Geneva Conventions." (*Id.*)

Undisputed.

74. This phase of Zubaydah's interrogation began on or around April 17, 2002. (*Id.*, Exh. 53 at US Bates 002144.)

Undisputed.

75. "Based upon the collective judgment of the expert personnel engaged in [the] interrogation," the team employed "lawful" interrogation methods to "maximize the psychological pressure upon [] Zubaydah (as validated by the training methods employed for U.S. Special Forces)." (Tompkins Decl., Exh. 54 at US Bates 002167.).

Contrary to Defendants' Fact #75, whether the methods used were "lawful" is a legal question that is inappropriate in a statement of facts and is not established by the cited cable.

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76. Dr. Mitchell and the other SERE trained psychologist (not Dr. Jessen) assisted the team in identifying Zubaydah's resistance methods and strategies, assessing the impact of these methods and strategies on the interrogators, and designing effective countermeasures. They also assessed, targeted, and monitored Zubaydah's psychological status, tendencies, and vulnerabilities. (*Id.*, Exh. 29 at US Bates 001590; Exh. 2, Jessen Tr. at 102:22-103:4; Mitchell Decl. ¶ 3.)

Undisputed.

77. Each interrogation session was carefully planned in advance. Before each interrogation session, the entire team met as a group to develop the strategy for each particular interrogation. During the meetings, the team would prepare the requirements for the particular sessions; read and prepare reports concerning Zubaydah, the interrogation process and the intelligence product; and address any other matters that may have arisen. After each interrogation session, the team reviewed the results of the session and began planning the next session. (Tompkins Decl., Exh. 54 at US Bates 002168.)

Undisputed.

78. The interrogation team constantly updated HQS on the status of Zubaydah's interrogation to ensure that the team was "always within both our legal and moral requirements." (Rodriguez Decl. ¶ 24; Exh. E at US Bates 002001-05.)

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Plaintiffs object to Defendants' Fact #78 as the phrase "constantly" is subjective and argumentative, as is the phrase "within both our legal and moral requirements." Rodriguez Decl. ¶ 24; Exh. E at US Bates 002004.

Defendants' Reply: The language to which Plaintiffs object is a direct quote from the source document.

79. In fact, after each interrogation, the interrogator would prepare a formal interrogation report for HQS that set forth any intelligence produced during the session. The interrogation team also prepared twice-daily situation reports to HQS, and the FBI representatives provided a separate daily situation report to FBI headquarters. (Tompkins Decl., Exh. 54 at US Bates 002168.)

Undisputed.

80. By the end of April 2002, the CIA officers involved in Zubaydah's interrogation were requesting approval from HQS to potentially employ additional interrogation tactics "to move Abu Zubaydah, subject, into more forthcoming posture in regard to future terrorist attacks in [the Continental US]". (*Id.*, Exh. 42 at US Bates 001821.)

Undisputed.

VII. MAY 2002 ADJUSTMENT TO ZUBAYDAH'S INTERROGATION

81. On May 8, 2002, the interrogation team held an all-hands meeting to review the strategy for Zubaydah's interrogation process and to make adjustments

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as necessary based on Zubaydah's emerging resistance posture as well as comments and input from both CIA and FBI Headquarters on potential modifications to the proposed plan. (*Id.*, Exh. 47 at US Bates 001931.)

Contrary to Defendants' Fact #81, the record does not support that Abu Zubaydah had an "emerging resistance posture" or that "adjustments" were necessary. The record shows that Abu Zubaydah had already provided information on Jose Padilla and Khalid Sheikh Mohamed. Watt Decl., Exh. A (Rodriguez Dep.) 246:13–247:4; ECF No. 176-11 (OPR Report) at U.S. Bates #000640. An FBI agent involved in Abu Zubaydah's interrogation noted that the CIA's assessment (which Defendant Mitchell was involved in) that Abu Zubaydah "is offering 'throw away information' and holding back from providing threat information" was contradicted the fact that FBI agents had successfully elicited "critical information" from Abu Zubaydah without resorting to torture. Watt Decl., Exh. T (SSCI Report) at 27. As was revealed once the CIA took control of the interrogation, Defendant Mitchell's assessment (joined by others in the CIA) that Abu Zubaydah was withholding threat information was erroneous. Cables during the aggressive phase of Abu Zubaydah's interrogation repeatedly confirm that he had no threat information. ECF No. 182-13 (U.S. Bates #002020) (pronouncing the aggressive phase a success because they "confidently assess[ed] that he [did] not possess undisclosed threat information, or intelligence that could prevent a terrorist event.").

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Defendants' Reply: Plaintiffs' response is not germane to the stated fact, which is that on May 8, 2002, the interrogation team held an all-hands meeting to review the strategy for Zubaydah's interrogation process and to make adjustments based on resistance postures. Whether or not Zubaydah provided information at an earlier date is irrelevant to whether Zubaydah afterwards used a resistance postures or whether the CIA met to discuss the details of Zubaydah's interrogation.

Plaintiffs also misrepresent the record. Plaintiffs ignore the undisputed fact that after Zubaydah provided information about Jose Padilla and Khalid Sheikh Mohamed early on, his health improved and "once he regained his strength, he stopped talking" in the late spring/early summer of 2002, which is when the CIA began to think about other interrogation techniques. Rodriguez Tr. 150:23-153:23. Thus, Zubaydah's initial cooperation is irrelevant.

The SSCI Report is inadmissible hearsay (Fed. R. Evid. 802) and the Public Records Exception to the hearsay rule does not apply (Fed. R. Evid. 803(8)). *See* Defendants' Motion to Exclude the SSCI Report filed June 26, 2017, ECF No. 198.

82. As a result, the team reviewed Zubaydah's day-to-day treatment and his environment to assess what, if anything, could be adjusted further to lower his resistance posture. "The team decided that the most important issue is to interfere with subject's sleep in order to degrade his ability to maintain his full mental capacities. The more we can tire him out, the more we can disrupt his ability to

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predict what will happen to him and to think clearly." (*Id.*, Exh. 47 at US Bates 001934.)

Contrary to Defendants' Fact #82, the record does not support that "the team" took steps "as a result of" Abu Zubaydah's "resistance posture." As set forth in Plaintiffs' response to Defendants' Fact # 81 above, Defendant Mitchell and others on the CIA erroneously assessed whether Abu Zubaydah was in fact resistant.

Defendants' Reply: Plaintiffs again argue the correctness of the CIA's conclusions about Zubaydah, rather than the correctness of Defendants' asserted fact. In addition, the SSCI Report is inadmissible hearsay (Fed. R. Evid. 802) and the Public Records Exception to the hearsay rule does not apply (Fed. R. Evid. 803(8)). *See* Defendants' Motion to Exclude the SSCI Report filed June 26, 2017, ECF No. 198.

83. The team also reiterated its commitment to "keep headquarters fully informed on every step of the interrogation." (Tompkins Decl., Exh. 47 at US Bates 001934.)

Undisputed.

84. Also in May 2002, HQS ordered the Zubaydah interrogation team "to . . . press [Zubaydah] for threat related information." (*Id.*, Exh. 50 at US Bates 002016.)

Undisputed.

85. HQS recognized that this required "an increase in the pressure of the interrogations." HQS then proposed and approved certain techniques to increase the pressure on Zubaydah. One such technique was the use of the confinement box, which HQS noted had been discussed, but additional details were still being worked on regarding the specifics of how the confinement box should be implemented. (*Id.*)

Undisputed.

86. A follow-up cable from HQS provided detailed guidance regarding the application of the confinement box. HQS indicated that "consultation with OTS ____ (psychological), OMS (medical), and CTC/UBL (operational) have determined that from a medical and psychological perspective, use of the box with Abu Zubaydah is allowable." Specifically, OMS and OTS concluded that "the box under the criteria outlined below will not inflict severe physical or mental pain and suffering as defined under the U.S. criminal law." CTC/LGL also concurred that the confinement box could be used. (*Id.*, Exh. 39 at US Bates 001767.)

Contrary to the second sentence of Defendants' Fact #86, the CIA's, Office of Medical Services ("OMS") does not appear to have concluded anything as to whether Defendants' methods, including the box, in fact caused "severe physical or mental pain and suffering." The record shows that in April 2005, OMS

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personnel wrote that "[s]imply put, OMS is not in the business of saying what is acceptable in causing discomfort to other human beings, and will not take on that burden. . . . OMS did not review or vet these techniques prior to their introduction, but rather came into this program with the understanding of your office and DOJ that they were already determined as legal, permitted and safe." Watt Decl., Exh. T (SSCI Report) at 420 n.2361. In addition, the assertion that the confinement box would not inflict severe mental or physical pain and suffering is subjective and an impermissible legal conclusion.

Defendants' Reply: Plaintiffs have not disputed the accuracy of the quotation or the fact asserted by the cable. Furthermore, the SSCI Report is inadmissible hearsay (Fed. R. Evid. 802) and the Public Records Exception to the hearsay rule does not apply (Fed. R. Evid. 803(8)). *See* Defendants' Motion to Exclude the SSCI Report filed June 26, 2017, ECF No. 198.

87. The specific restrictions imposed were the same as used in the SERE program: the box could be used a maximum of 19 total hours in any 24 hour period, with a maximum of 8 continuous hours at any one time. (Tompkins Decl., Exh. 39 at US Bates 001767.)

Contrary to Defendants' Fact #87, the total time cited in the cable is 18 hours. Moreover, the implication that the "confinement box" method used on Abu Zubaydah was identical the method used on volunteer members of the U.S. military during SERE training is grossly misleading. SASC xxvi; ECF No. 176-11 (OPR Report) U.S. Bates #000641-42.

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Defendants' Reply: Plaintiffs' citation to the SASC Report is not responsive, as the cited page does not specifically reference the "confinement box," but rather generally describes techniques used during SERE training and the purpose and use of such techniques.

88. HQS noted that in SERE, 5,000-6,000 U.S. Military personnel undergo this training each year. And of those few that are unable to complete the box training, it is usually because they have a preexisting condition that is aggravated by the box. HQS also noted that "clearly, unlike the participants in SERE training, AZ will not have provided his consent for the use of this—or any other—technique." Still, HQS concluded that the use of the box was permissible. (*Id.*)

Plaintiffs clarify Defendants' Fact #88, because the comparison of the "confinement box" method authorized by HQS for use on Abu Zubaydah to the use of the SERE "cramped confinement" technique is misleading. SASC xxvi; ECF No. 176-11 (OPR Report) at U.S. Bates 000641-42. Moreover, in addition to not consenting, Abu Zubaydah had a still healing gun-shot wound to the leg. ECF No. 177-39 (U.S. Bates #001646 (reprocessed April 11, 2017) (as at June 2002 Abu Zubaydah's leg wound had another 6-8 weeks to heal). Defendant Jessen testified that no SERE recruit would be permitted to participate in SERE training if they were wounded. Watt Decl., Exh. F (Jessen Tr.) 134:21-135:4 ("Q. Well, let me ask you: When you – when you were overseeing or monitoring or involved in some way in the SERE program, did you ever see a SERE trainee who was

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being subjected to interrogation pressures while they had an open wound? A. No, I don't think so.").

Defendants' Reply: Plaintiffs misrepresent Dr. Jessen's testimony, which does not support the implication that no SERE recruit would be permitted to participate in SERE training if they were wounded. In addition, Plaintiffs' citation to the SASC Report is not responsive for the same reason stated in Defendants' Reply SUF ¶ 87.

VIII. JUNE 2002 PLANNING FOR THE NEXT PHASE OF ZUBAYDAH'S INTERROGATION

89. In early June 2002, HQS held a meeting to discuss the next phase of Zubaydah's interrogation. The meeting was attended by CTC, CTC/UBL, CTC/LGL, Security Officers, Dr. Mitchell, and representatives from OTS. (Rodriguez Decl., Exh. F at US Bates 001642; Tompkins Decl., Exh. 24 at US Bates 001159.)

Undisputed.

90. At the meeting, "all parties were in agreement that AZ is withholding critical information, particularly on direct threats against U.S. interests both domestically and overseas." (Rodriguez Decl. ¶ 26; Exh. F at US Bates 001642; Tompkins Decl., Exh. 24 at US Bates 001159.)

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Plaintiffs do not dispute that the cable states this, but dispute that Abu Zubaydah was actually withholding this information. FBI interrogators before departing GREEN had expressed the same opinion. ECF No. 176-11 (OPR Report) U.S. Bates #000640.

91. HQS believed that "the interrogations need[ed] to take a harder line and move away from the current status, which resembles more of a debriefing." (Rodriguez Decl., Exh. F at US Bates 001642.)

Undisputed.

92. Rodriguez and others within CTC began considering whether other potential interrogation techniques existed that could be used on Zubaydah to secure the critical desired information. They knew they needed to "do something different." (Rodriguez Decl. ¶ 29; Tompkins Decl., Exh. 3, Rodriguez Tr. at 153:10-24.)

Contrary to the second sentence of Defendants' Fact # 92, Mr. Rodriguez's belief that CTC "needed to 'do something different' does not establish that CTC "knew" it needed to do something different. In fact, Mr. Rodriguez and Defendant Mitchell were wrong in assessing that they needed to "do something different" to extract threat information from Abu Zubaydah. Their assessment that Abu Zubaydah was withholding threat information was erroneous. Cables during the aggressive phase of Abu Zubaydah's interrogation repeatedly confirm that he had no threat information. ECF No. 182-13 (U.S Bates #002020) (pronouncing the

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aggressive phase a success because they "confidently assess[ed] that he [did] not possess undisclosed threat information, or intelligence that could prevent a terrorist event.").

Defendants' Reply: Plaintiffs' response does not contradict Defendants' asserted fact or create an issue of fact. Plaintiffs admit that at the time of this statement, Mr. Rodriguez was CTC's Chief Operating Officer, which meant he was in a position to speak on behalf of CTC. Defs.' Reply SUF ¶ 45. Additionally, Mr. Rodriguez's Declaration states "Still believing that Zubaydah possessed useful knowledge concerning al Qa'ida plans for imminent attacks upon targets within the United States or United States interests abroad, I and others within the CTC began considering whether other potential interrogation techniques existed that could be used upon Zubaydah to secure this critical desired information—if the interrogation phase was unsuccessful." (Rodriguez Decl. ¶ 29; Tompkins Decl., Exh. 3, Rodriguez Tr. at 150:14-22.) This fully establishes that CTC was looking for alternative interrogation techniques. Furthermore, whether Rodriguez's and CTC's assessment was accurate at the time is not relevant; the fact of their assessment is what is germane to Defendants' Motion.

93. A variety of interrogation plans were shortly thereafter presented and discussed. For example, an individual other than Defendants proposed an "isolation option" that called for Zubaydah to be placed in pseudo-isolation for three weeks with limited visits from medical and security personnel. (Rodriguez

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Decl. ¶ 27; Exh. F at US Bates 001642; Tompkins Decl., Exh. 1, Mitchell Tr. at 249:4-9; Ex. 70 at US Bates 001642 (reprocessed to indicate "not Drs. Mitchell and Jessen").)

Undisputed, with the clarification that Defendant Mitchell was responsible for fleshing out the details ("fill[ing] in any holes left by this cable") and assisting in "orchestrating the isolation." There was no COB and other members of the team departed GREEN, leaving Mitchell behind to "monitor the situation and carefully supervise the activity of medical and security elements." ECF No. 177-39 (U.S. Bates #001642–44).

Defendants' Reply: Plaintiffs' response is not supported by the record. US Bates 001642 does not support the inference that at one point in June 2002 there was no COB. Rather, the cable lays out plans for future action and in discussing activities that will take place in July 2002, it indicates that the Post-Isolation Phase will begin on or about July [REDACTED] and that HQS approves "the careful introduction of the interrogation [REDACTED] HQS will identify an individual to serve as Chief of Base [REDACTED] the COB will be responsible for all aspect of the [REDACTED] and equipped to make immediate decision in response to the fluid nature of the interrogation." This cable supports the inference that on this date in July, a COB for the Post-Isolation Phase of Zubaydah's interrogation had not yet been named, but would be named so that the individual could oversee the interrogation. ECF No. 177-39 (U.S. Bates #001643-44). Additionally, Dr. Mitchell was not responsible for "fleshing out the

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details" but was responsible for filling in any holes left by the cable because, as indicated in US Bates 001642, Dr. Mitchell was present at the meeting where the details of the isolation phase were discussed.

94. HQS subsequently approved the isolation option. HQS also approved the careful introduction of interrogation post-isolation. Specifically, after the isolation phase, interrogators would be reintroduced into the scenario to press Zubaydah "hard on direct threat information against U.S. interests and return the situation to a full-fledged interrogation." (Rodriguez Decl., Exh. F at US Bates 001642-43; Tompkins Decl., Ex. 79 at US Bates 001642-43 (reprocessed).)

Undisputed, with the clarification that the interrogators referenced in the cable are Defendants Mitchell and Jessen. ECF No. 177-39 (U.S. Bates #001642 (re-processed: April 11, 2017) ("the post-isolation phase will likely incorporate the roll (sic.) of the 'bad guy' which has been played by Mitchell and facilitated AZ's 'revelation' on 19 May."). In July 2002, Jessen replaced Mitchell. ECF No. 176-24 (U.S. Bates #001160.)

Defendants' Reply: Plaintiffs' response is not supported by the record. In June 2002, when this cable was sent, Dr. Jessen was still employed by the DOD and Dr. Mitchell had not yet proposed that Dr. Jessen be involved. Defs.' SOF ¶¶ 115-19.

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95. The COB where Zubaydah was being detained was responsible for all aspects of the interrogation, including making immediate decisions in response to the fluid nature of the interrogation. (*Id.*, Exh. F at US Bates 001644; Tompkins Decl., Ex. 79 at US Bates 001644 (reprocessed).)

Contrary to Defendants' Fact #95, in June/July 2002, Mitchell assisted in orchestrating this phase and supervised medical and security staff at GREEN when "HQS [was] identify[ing] an individual to serve as chief of base." ECF No. 177-39 (U.S. Bates #001642–44). Further, Plaintiffs object to the term "responsible" to the extent it means "legal responsibility."

Defendants' Reply: Plaintiffs' response is not supported by the record as set out in Reply 93. Additionally, Zubaydah was not interrogated during the isolation phase. Rosenthal Decl. Exh. 9, US Bates 001656.

96. Zubaydah's isolation began on June 18, 2002. (Tompkins Decl., Exh. 38 at US Bates 001668.)

Undisputed.

97. Also in late June, Rodriguez asked Mitchell to consult with CTC to consider what other potential interrogation techniques could be used upon Zubaydah to overcome his resistance and secure the desired information. At the time, Rodriguez was convinced that only the CIA—and not the FBI—could effectively interrogate Zubaydah given the critical information sought to be obtained. (Rodriguez Decl. ¶ 32-33.)

Undisputed.

IX. JULY 2002 MEETINGS AT CIA HQS

98. After Zubaydah's isolation began, the interrogation team, including Mitchell, returned to CIA HQS for a meeting to "further refine tactics if subject does not make significant progress during this period." (Tompkins Decl., Exh. 37 at US Bates 001665; Ex. 79 at US Bates 001643 (reprocessed); Rodriguez Decl., Exh. F at US Bates 001643.)

Undisputed, with the clarification that Defendant Mitchell did not depart GREEN with the full interrogation team. He remained behind to assist in orchestrating the isolation phase. ECF No. 177-39 (U.S. Bates #001642).

99. The meeting occurred during the first week of July. Those present included, CTC, CTC/COPS, CTC/UBL, CTC/LGL, AZ Interrogation Team (including Mitchell), FBI Special Agents, FBI Officers, OTS/OAD, OMS, and the Office of Security. (Tompkins Decl., Exh. 24 at US Bates 001158-59; Rizzo Decl. ¶ 24.)

Undisputed.

100. All parties in attendance at the meeting agreed that Zubaydah was "withholding critical information, particularly on direct threats against U.S. interests both domestically and overseas and information about Al-Qa'ida presence in the U.S." (Tompkins Decl., Exh. 24 at US Bates 001158-59.)

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Undisputed, with the clarification that the assessment that Abu Zubaydah was withholding information on threats against the U.S. and its interests domestically and overseas and information on Al-Qaida presence in the U.S. was refuted by FBI interrogators and proven incorrect by Abu Zubaydah's subsequent interrogation. ECF No. 176-11 (OPR Report) at U.S. Bates #000640; ECF No. 182-13 (U.S. Bates #002020) (confirming that the interrogation team "confidently assess[ed] that [Zubaydah] does not possess undisclosed threat information, or intelligence that could prevent a terrorist threat.").

Defendants' Reply: Plaintiffs do not dispute that ECF 176-24, Tompkins Decl., Exh. 24 at US Bates 001158-59 is accurately quoted. Furthermore, Plaintiffs' response is not germane to the stated fact, which whether the parties at the meeting believed and agreed that Zubaydah was withholding critical information—not whether such a belief was proven to be accurate.

101. The major focus of the meeting was to consider the next phase of Zubaydah's interrogation, which "would be the last hard push in the interrogations" and would concentrate on "pending terrorist attacks planned against the United States or our interests overseas". (Tompkins Decl., Exh. 24 at US Bates 001159; Exh. 1, Mitchell Tr. at 251:6-253:4.)

Undisputed.

102. The CIA was looking to "change the dynamics of the interrogations[.]" It believed that pressure upon Zubaydah must be increased,

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was intent upon increasing such pressure to secure the desired information, and was interested in learning what types of such pressure might be applied. (Rodriguez Decl. ¶ 36.)

Undisputed, with the clarification that it was Defendant Mitchell who described to CIA officials at Langley that, in his assessment, Abu Zubaydah was still using "resistance to interrogation ploys," and "wasn't going to provide the information that they were looking for using rapport-based approaches," in a timely fashion. Watt Decl., Exh. B (Mitchell Dep.) 252:6–256:11.

103. During this meeting attendees suggested a variety of coercive approaches. (Tomkins Decl., Exh. 20 at US Bates 001099.)

Undisputed.

104. Dr. Mitchell mentioned the potential use of various techniques that had been used for years on trainees at SERE. These techniques included only: (1) attention grasp; (2) walling; (3) facial hold; (4) facial slap/insult slap; (5) cramped confinement; (6) wall standing; (7) stress positions; (8) sleep deprivation; (9) water board; (10) use of diapers; (11) insects; and (12) mock burial. (Rodriguez Decl. ¶ 37; Tompkins Decl., Exh. 3, Rodriguez Tr. at 41:3-6; Exh. 1, Mitchell Tr. at 402:11-15.)

Contrary to Defendants' Fact #104, diapers and insects were not "used for years on trainees at SERE." Watt Decl., Exh. W (U.S. Bates #001163). Plaintiffs further clarify that the program Defendants designed and implemented

for the CIA differed from SERE in critical ways, as described elsewhere in the Statement of Facts. See Pls.' Resp. to Defs.' Fact #127.

105. Mitchell mentioned these techniques because he understood that the CIA had already decided to use coercive pressures on Zubaydah, and believed that the CIA should consider using coercive techniques that had been shown over the last 50 years to not cause the effects the CIA wanted to avoid—such as severe pain and suffering. (Tompkins Decl., Exh. 1, Mitchell Tr. at 188:20-189:7, 189:16-22, 192:6-18, 192:24-193:7.)

Contrary to Defendants' Fact #105, there was no evidence that the methods Defendants proposed would not cause prisoners "severe pain and suffering." Defendants knew the effect of their proposed methods might be different when used on prisoners rather than on volunteers. Watt Decl., Exh. F (Jessen Dep.) 127:11–24. Defendants knew they were stripping away the core protections against traumatization in SERE. See SERE Psychology Handbook ("The training must include specific, practical actions to change the threatening or horrifying situation for the better. Without such positive action learning," even "simulated terrifying or horrifying situations and stimuli can include feelings of helplessness that make the training itself traumatizing.") There is no "positive action learning" component in a real-world interrogation. Defendants could not have considered the long-term effects of SERE, because no such studies existed. Watt Decl., Exh. C (Morgan Dep.) 217:18-21 ("[T]o my knowledge, there is no long-term outcome

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assessment with respect to SERE and its impact on people."); *id.* at 58:9-59:2 (citing the SERE portion); 234:20-236:5 (discussing positive action learning).

Defendants' Reply: Plaintiffs' response does not contradict Defendants' asserted fact or create an issue of fact. Defendants' stated fact references Dr. Mitchell's belief, not the actual long-term effects of the use of SERE techniques. Plaintiffs present no evidence that contradicts Dr. Mitchell's stated belief at the time. In addition, Plaintiffs mischaracterize Dr. Jessen's cited testimony. When asked, "In your mind, is there a difference between having these things pressures done to you by a hostile government versus in training?", Dr. Jessen responded, "In terms of how they're employed, no; in terms of where you're at emotionally, I think it is different . . . I think you'd have more concern about the outcome." ECF 182-3, Ladin Decl., Exh. C, (Jessen Dep.) 127:11-24.

106. Dr. Mitchell thought when he proposed these techniques that they could be applied safely. (Tompkins Decl., Exh. 1, Mitchell Tr. at 291:14-17.)

Contrary to Defendants' Fact # 106, the record shows that no reasonable professional psychologist would believe that Defendants' methods could be applied safely to prisoners subjected to those methods for weeks without any control or indication as to when the abuse would stop. Watt Decl., Ex. X (Morgan Tr.) 267:4-7 ("[T]he nature of the stress and the historic literature at the time in 2002 would have any reasonable person in the science community going these kinds of things could really cause psychological injury and harm to a

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person."); *Id.* (Morgan Tr.) 130:14-134:3 (discussing application of SERE techniques in real world interrogations)

Defendants' Reply: Plaintiffs' response does not contradict Defendants' asserted fact.

107. At this time Dr. Mitchell had no belief that he would become the interrogator. (Id., Exh. 1, Mitchell Tr. at 205:3-20, 258:1-7, 267:12-16, 278:2-279:7; Exh. 2, Jessen Tr. at 113:23-114:19.)

Undisputed.

108. Mitchell explained that the particular goal of these techniques would be to dislocate Zubaydah's expectations and overcome his resistance and thereby motivate him to provide the information the CIA was seeking. Mitchell further explained that in working to achieve this goal, the interrogation could produce a range of mental states in Zubaydah, including, but not limited to, fear, helplessness, compliancy, or false hope. Mitchell explained that the mental state that a particular subject might experience would vary based on a number of factors, such as the circumstances of the interrogation and the subject's abilities and past experiences. (Rodriguez Decl. ¶ 38.)

Undisputed, except that contrary to Defendants' Fact #108, Paragraph 38 of the Rodriguez Declaration lists "learned helplessness," not "helplessness" as the mental state that could result from Defendants' methods. In their memorandum proposing their methods, Defendants Mitchell and Jessen explained that the goal

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of their program is to "instill fear and despair" in the detainee. ECF No. 182-8 (U.S. Bates #001110).

Defendants' Reply: Plaintiffs misstate the language in the July 2002 Memo (ECF No. 182-8, Ladin Decl., Exh. H at U.S. Bates 001110-11), which stated;

> The aim of using these techniques is to dislocate the subject's expectations concerning how he is apt to be treated and instill fear and despair. The intent is to elicit compliance by motivating him to provide the required information, while avoiding permanent physical harm or profound and pervasive personality change.

ECF No. 182-8, Ladin Decl., Exh. H at U.S. Bates 001110-11.

109. Dr. Mitchell warned the CIA that it did not want to create learned helplessness, as described by Dr. Seligman, in the detainee because it would impair the ability of a person to provide intelligence. (Tompkins Decl., Exh. 1, Mitchell Tr. at 76:3-77:21, 108:1-20.)

Contrary to Defendants' Fact #109, Defendants advocated for learned helplessness. According to Jose Rodriguez, "Dr. Mitchell further explained that in working to achieve this goal, the interrogation could produce a range of mental states in the subject, including, but not limited to, fear, learned helplessness, compliancy, or false hope." Watt Decl., Exh. V (Rodriguez Decl.) ¶ 38. In

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describing his qualifications, Dr. Mitchell stated that "learned helplessness" is one of the psychological states that interrogators should seek to induce in a detainee. Watt Decl., Exh. E (U.S Bates #001618). Mr. Rizzo also recalled Defendants describing "learned helplessness" as a goal of the Abu Zubaydah interrogation. Watt Decl., Exh. D (Rizzo Tr.) 128:08–129:8. This goal was ultimately adopted by the CIA. ECF Doc. 177-29 at 2 ("The goal of interrogation is to create a state of learned helplessness . . . . "). At the conclusion of Abu Zubaydah's interrogation, the interrogation team reported that Defendants had induced "complete helplessness." ECF No. 182-13 (U.S. Bates #002020) ("psychological and physical pressures have been applied to induce complete helplessness, compliance and cooperation from [Abu Zubaydah].").

110. Dr. Mitchell explained that to avoid learned helplessness, the techniques could not be overused. He explained that once Zubaydah displays a sense of helplessness he must be given a way out by answering a question. If Zubaydah was not given a way out, then the learned helplessness as described by Dr. Seligman could occur—in which case Zubaydah might be psychologically unable to answer the question. (Tompkins Decl., Exh. 1, Mitchell Tr. at 274:10-277:10.)

Contrary to Defendants' Fact #110, the record shows Defendant Mitchell advocated learned helplessness as described above in response to Defendants' Fact #109. In addition, Defendants did not give Abu Zubaydah "a way out," because they continued to torture him even when he was cooperative so as to

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assure themselves that they had induced "complete helplessness." ECF No. 182-13 (U.S. Bates #002020). Defendant Mitchell wrote in response to a question as to why Defendants had waterboarded Abu Zubaydah so many times: "As for our buddy, he capitulated the frist [sic] time. We chose to expose him over and over until we had a high degree of confidence he wouldn't hold back. He said we [sic] was ready to talk during the first exposure." ECF No. 182-27 (U.S. Bates #002581) (emphasis in original).

Defendants' Reply: Plaintiffs incorrectly imply that Defendants chose to continue to "torture" Zubaydah after he was cooperative as if it was Defendants' decision. On the contrary, Plaintiffs admit that after days of using EITs on Zubaydah, Defendants recommended they stop using EITs on Zubaydah, but the CIA ordered Defendants to continue. Defs.' Reply SUF ¶¶ 190-207. Defendants were not permitted to stop using EITs until after "[a] team of senior CTC officers traveled from Headquarters to [REDACTED] to assess Abu Zubaydah's compliance and witnessed the final waterboard session, after which, they reported back to Headquarters that the EITs were no longer needed on Abu Zubaydah." ECF 182-11, Ladin Decl., Exh. K at U.S. Bates 001423–24; Defs.' Reply SUF ¶ 207.

111. The purpose of the proposed interrogation techniques was to get Zubaydah to answer the question and move him into a position where he would cooperate so that the CIA could use social influence techniques to get more

details and information. (*Id.*, Exh. 1, Mitchell Tr. at 271:21-272:7; 274:10-277:10.)

Contrary to Defendants' Fact #111, Defendants stated their purpose: "the objective of this operation is to achieve a high degree of confidence that subject is not holding back." ECF No. 182-25 (U.S. Bates #001771). Accordingly, Defendants personally applied their techniques to "induce complete helplessness," and to "confidently assess" that Abu Zubaydah had no new details or information. ECF No. 182-13 (U.S Bates #002020).

112. At the time, CTC/LGL emphasized that the CIA "should not rule out any method of interrogation whatsoever, so long as the interrogation team believes it will be effective." The interrogation team was specifically told to "rule out nothing whatsoever that you believe may be effective; rather, come back and we will get you the approvals." (*Id.*, Exh. 24 at US Bates 001160.)

Undisputed.

113. Dr. Mitchell understood that the CIA was going to conduct its own due diligence on the proposed techniques and make a determination about whether they could be legally applied to Zubaydah. (*Id.*, Exh. 1, Mitchell Tr. at 190:2-10, 196:2-17.)

Undisputed, with the clarification that the CIA's "due diligence" process involved and relied on information Defendants Mitchell and Jessen provided. When the CIA "sought and obtained legal authorization" for the "enhanced

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interrogation technique program," the approval "was based upon what [Mr. Rodriguez] had learned from Drs. Mitchell and Jessen with regard to the SERE program." Watt Decl., Exh. A (Rodriguez Dep.) 97:14–24; Watt Decl., Exh. V (Rodriguez Decl.) ¶ 38; Watt Decl., Exh. D (Rizzo Tr.) 177:1-7 (Defendants were the only two SERE psychologists who provided the CIA legal staff with information on the techniques).

Defendants' Reply: Plaintiffs misrepresent the record to imply that the CIA and CTC legal did not obtain information from any other SERE psychologists because Rizzo did not personally know of other SERE psychologists. In fact, Plaintiffs admit that the CIA consulted with SERE psychologists other than Defendants. Defs.' Reply SUF ¶ 175. Furthermore, the CIA engaged in an extensive "back and forth" with the OLC, during which time the CIA provided OLC with information from different sources, including JPRA, OTS, and Defendants. Defs.' Reply SUF ¶¶ 113, 140-48, 150-51, 155-61,165.

114. At the conclusion of this meeting that occurred the first week of July, Rodriguez, on behalf of CTC, asked Mitchell to consider working with the CIA to use some or all of the techniques he had mentioned to interrogate Zubaydah. (Rodriguez Decl. ¶ 39; Tompkins Decl., Exh. 3, Rodriguez Tr. at 55:6-56:1.)

Undisputed.

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115. Dr. Mitchell requested that CTC hire Dr. Jessen to assist him with CTC's specific request to interrogate Zubaydah. (Rodriguez Decl. ¶ 40; Tompkins Decl., Exh. 3, Rodriguez Tr. at 159:10-22.)

Undisputed, with the clarification that Defendant Mitchell agreed that, with Defendant Jessen's assistance, he would "put together a psychologically based interrogation program" which he decided "would need to be based on what is called 'Pavlovian Classical Conditioning.'" Watt Decl., Exh. C (Mitchell Manuscript) MJ00022632.

116. Rodriguez approved Dr. Mitchell's request to hire Dr. Jessen. (Rodriguez Decl. ¶ 41.)

Undisputed.

117. At the time, Dr. Jessen was working for the DoD. He received a call from the CIA asking if he could come to CIA HQS. (Tompkins Decl., Exh. 2, Jessen Tr. at 105:19-106:23; Exh. 25 at US Bates 001352.)

Undisputed.

118. Once Dr. Jessen received permission from his commander, he met Dr. Mitchell and CIA officers at CIA HQS. Dr. Jessen was advised that Dr. Mitchell had already been asked to help interrogate the detainee using techniques from the SERE school. Dr. Jessen was then asked if he would assist. (*Id.*, Exh. 2, Jessen Tr. at 105:19-106:23.)

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1 Undisputed.
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3 **119.** Once Dr. Jessen agreed to assist, he was heavily briefed by CIA
4 analysts about Zubaydah. (*Id*., Exh. 2, Jessen Tr. at 110:11-111:12.)
5
6 Undisputed.
7
7 **120.** Dr. Jessen resigned from the DoD and was hired as an independent
8 contractor, effective July 22, 2002. Dr. Jessen's contract with the CIA obligated
9 him to "provide consultations and recommendations" for "applying research
10 methodology" and "advice" to the Zubaydah interrogation team. (Rodriguez
11 Decl. ¶ 41; Exh. H at US Bates 000086-95; Tompkins Decl., Exh. 2, Jessen Tr.
12 at 102:22-103:4, 108:14-20; Exh. 30 at US Bates 001592; Declaration of John
13 "Bruce" Jessen ("Jessen Decl.") ¶ 3.)
14
15 Undisputed.
16
17 **121.** By January 1, 2003, Dr. Jessen was serving as a "consultant to CTC
18 special programs." (Tompkins Decl., Exh. 75, at US Bates 000110-17.)
19
20 Undisputed, with the clarification that Defendant Jessen served as a special
21 consultant to CTC and also conducted "specialized training." ECF No. 177-35
22 (U.S. Bates #000116).
23
24 **Defendants' Reply**: Plaintiffs admit the 2002 "High-Value Target"
25 interrogation training was designed, developed, and conducted by individuals
26

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other than Drs. Mitchell and Jessen and Drs. Mitchell and Jessen played no role in the interrogation training. Defs.' Reply SOF ¶ 226.

122. In the week that followed, Dr. Mitchell and Rodriguez had many discussions at CIA HQS about the proposed interrogation techniques' usage and efficacy. (Rodriguez Decl. ¶ 43.)

Undisputed.

123. On July 8, 2002, another meeting was held at CIA HQS to discuss further Zubaydah's interrogation. In attendance were representatives from the CIA's ALEC Station, OTS, OMS, CTC/LGL, an FBI Official, and the FBI interrogators that had interrogated Zubaydah. Both Drs. Mitchell and Jessen, as well as Rodriguez and Rizzo, were present at the meeting. (Rodriguez Decl. ¶ 44; Exh. I at US Bates 001656; Rizzo Decl. ¶ 24; Tompkins Decl., Exh. 4, Rizzo Tr. at 181:10-13; Exh. 1, Mitchell Tr. at 402:11-403:10.)

Undisputed.

124. During this meeting, "a series of approaches/methods that would be employed [upon Zubaydah] in an 'increased pressure phase' were presented." The interrogation techniques previously mentioned by Dr. Mitchell were also further discussed. (Rodriguez Decl., Exh. J at US Bates 001110; Exh. I at US Bates 001657.)

Undisputed.

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125. After the meeting, Rodriguez requested Drs. Mitchell and Jessen provide him with a written list identifying the potential interrogation techniques for the CIA to consider, describing how they could be implemented, and identifying their intended effects upon Zubaydah. (Rodriguez Decl. ¶ 46; Tompkins Decl., Exh. 3, Rodriguez Tr. at 59:1-10; Exh. 1, Mitchell Tr. at 266:12-17.)

Undisputed.

126. Rodriguez asked Dr. Mitchell to prepare this document because the CIA was searching for a "new way of doing things, and this seemed like the appropriate way to go," but explained that the CIA needed more specific information about the interrogation techniques Dr. Mitchell had mentioned. (Tompkins Decl., Exh. 3, Rodriguez Tr. at 155:20-156:12.)

Undisputed.

127. Drs. Mitchell and Jessen drafted a list of certain techniques utilized at the SERE school (the "July 2002 Memo"). The techniques had existed and had been used at the SERE school for many years. Drs. Mitchell and Jessen did not create or design the techniques, but simply transferred their knowledge of the techniques used at SERE onto the list and provided it to Rodriguez. This was the extent of Drs. Mitchell and Jessen's involvement in the "design" or "architecture" of the CIA's program. (Tompkins Decl., Exh. 2, Jessen Tr. at 114:20-115:11, 117:14-118:9, 143:17-24; 154:4-8, 276:3-21; Exh. 1, Mitchell Tr. at 185:11-

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186:19, 278:2-279:7, 317:10-19, 325:14-24, 326:19-327:14; Exh. 3, Rodriguez Tr. at 183:22-184:17.)

Contrary to Defendants' Fact #127, Defendants' program was not "simply" a "transfer" of the SERE training experience and the methods and process Defendants proposed were not the same as the SERE training program. Unlike the purpose of SERE, Defendants claimed that their "psychologically based program" could be used to instill "fear and despair" in prisoners that would render them compliant to an interrogator's demands for information. Watt Decl., Exh. C (Mitchell Manuscript) at MJ00022632; ECF No. 182-8 (US Bates #001109-10); Watt Decl., Exh. V (Rodriguez Decl.) ¶ 38; Watt Decl., Exh. A (Rodriguez Tr.) 55: 19-56:1. Some of Defendants' methods had never been used in the SERE program. Watt Decl., Exh. W (U.S. Bates Stamp #001163) (use of diapers and insects); Watt Decl., Exh. D (Rizzo Tr.) 63:3-6 ("bug in a box" was "tailored" for Abu Zubaydah). Defendants also designed a methodology for applying the methods that differed from SERE. ECF No. 182-25 (U.S. Bates #001771) (recommend using an escalating strategy that has a high probability of overwhelming subject's ability to resist").

Defendants' Reply: Plaintiffs do not dispute that the drafting of the July 2002 Memo was the extent of Dr. Mitchell and Jessen's involvement in the "design" or "architecture" of the CIA's program.

128. A reproduction of that list was sent in an email on July 9, 2002 bearing the subject "Description of Physical Pressures." In the list, Mitchell

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reiterated that [t]he aim of using these techniques is to dislocate the subject's expectations concerning how he is apt to be treated and instill fear and despair. The intent is to elicit compliance by motivating him to provide the required information, while avoiding permanent physical harm or profound and pervasive personality change. (Rodriguez Decl. ¶ 47; Exh. J at US Bates 001109-10; Tompkins Decl., Exh. 3, Rodriguez Tr. at 156:24-157:3.)

Contrary to Defendants' Fact #128, it was not only Defendant Mitchell who wrote the list, but both Defendants working together. Watt Decl., Exh. F (Jessen Dep.) 114:20–115:11; Watt Decl., Exh. B (Mitchell Dep.) 262:5–21.

129. The list contained a description of the proposed techniques and their contemplated use. (Rodriguez Decl., Exh. J at US Bates 001109-10.)

Undisputed.

130. Dr. Mitchell provided this "suggested" list and the techniques described therein solely for potential use during Zubaydah's interrogation. (Tompkins Decl., Exh. 3, Rodriguez Tr. at 159:3-6, 175:15-19; Exh. 1, Mitchell Tr. at 191:15-192:5, 265:20-266:3.)

Contrary to Defendants' Fact #130, Mr. Rodriguez asked Defendant Mitchell to help the CIA to create an entire interrogation program using Defendants' methods, not just to interrogate Abu Zubaydah. Watt Decl., Exh. A (Rodriguez Tr.) 53:19-21; 55:19-56:1. Defendant Mitchell writes in his book that he was aware of and involved in broader interrogation plans prior to the

1 conclusion of Zubaydah's interrogation. Watt Decl., Exh. C (Mitchell
2 Manuscript) at MJ00022626 ("I understood that because of this they were
3 considering using coercive physical pressure on high value detainees withholding
4 information . . . ."); *Id.* at MJ00022631 ("A day or so later Rodriguez asked me if
5 I would help put together an interrogation program using EITs. I told him I
6 would . . . .").
7
8 **Defendants' Reply**: Plaintiffs' response does not support the inference
9 that Dr. Mitchell was asked to create an entire interrogation program to be used
10 on detainees other than Zubaydah. The sources cited by Plaintiffs all discuss a
11 "program" in the context of interrogating only Zubaydah. The quote from
12 MJ00022631 appears in the context of discussing interrogation techniques for
13 Zubaydah. Rosenthal Decl. Exh. 4, Mitchell Manuscript at MJ00022625-31.
14 Similarly, the testimony by Rodriguez discusses this same section of Dr.
15 Mitchell's draft manuscript that was all about Zubaydah's interrogation. ECF
16 195-1, Watt Decl., Exh. A (Rodriguez Tr.) 53:19-21; 55:19-56:1.
17
18 **131.** The techniques, which have later been referred to as Enhanced
19 Interrogation Techniques ("EITs") were exclusively: (1) attention grasp; (2)
20 walling; (3) facial hold; (4) facial slap/insult slap; (5) cramped confinement; (6)
21 wall standing; (7) stress positions; (8) sleep deprivation; (9) water board; (10) use
22 of diapers; (11) insects; and (12) mock burial. (Rodriguez Decl., Exh. I at US
23 Bates 001657-59; *Rizzo* Decl. ¶ 40; Exh. D at US Bates 001595.)
24
25 Undisputed.
26

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132. The CIA thereafter sent out a cable, the date of which is redacted, discussing the "Next Phase of the Abu Zubaydah Interrogation" that explained that the increased pressure was "intended to press Abu Zubaydah on two areas for which we are certain he is withholding information: 1) terrorist support networks within the United States and 2) plans to conduct attacks within the United States or against our interest overseas." (*Id.* at US Bates 001656-57.

Undisputed, except that the cable speaks for itself.

133. The cable further explained that "the 'increased pressure phase' will follow a general strategy involving a menu of pre-approved techniques," and that the techniques were "designed to not/not cause severe physical harm." It also explained that a "medical expert with SERE experience will be present throughout their implementation." (*Id.* at US Bates 001657.)

Undisputed.

134. The cable also contained descriptions of the EITs consistent with Dr. Mitchell's July 2002 Memo. (*Id.* at US Bates 001657-59; Tompkins Decl., Exh. 3, Rodriguez Tr. at 59:19-60:2.)

Undisputed, with the clarification that the cable's description of the techniques is identical to the description in Defendant Mitchell's July 2002 Memo.

135. And the cable indicated that, according to CTC/LGL, only two of the techniques—water board and mock burial—required Attorney General approval because "[t]he remaining can be approved by CIA's legal staff." (Rodriguez Decl., Exh. I at US Bates 001657-59.)

Undisputed.

136. After this cable, the CIA held an additional meeting with the Zubaydah interrogation team, including Drs. Mitchell and Jessen. At the meeting, the various facets of the next phase of Zubaydah's interrogation were discussed. The "team emphasized current HQS thinking re: this phase in light of the absolute need to gain critical threat information re: possible imminent terrorist operations being planned against U.S. interests. In this connection the team outlined the specific interrogation techniques to be implemented consistent with the established legal guidance/parameters as discussed during 8 July HQS meeting." (Tompkins Decl., Exh. 43 at US Bates 001846.)

Undisputed.

137. The CIA—not Drs. Mitchell or Jessen—determined which of the proposed methods of interrogation would be used on Zubaydah. (Rodriguez Decl. ¶ 48.)

Contrary to Defendants' Fact #137, Defendants were given discretion "on the type and frequency of pressures used against Abu Zubaydah." ECF No. 177-21 (U.S. Bates #002357). Defendants also participated in the decision as to

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which of Defendants' methods would be used against Abu Zubaydah, ECF No. 175-9 (U.S. Bates #001657), and "led each interrogation of Abu Zubaydah . . . where EITs were used." ECF 176-25 (OIG) at U.S. Bates #001374

Defendants' Reply: Plaintiffs' response does not contradict Defendants' asserted fact or create an issue of fact. Plaintiffs admit that the OLC, after review by the Attorney General and National Security Advisor, approved some of the EITs for use on Zubaydah—not Defendants. Defs.' Reply SUF ¶¶ 152, 158, 165. Plaintiffs also admit that after days of using EITs on Zubaydah, Defendants recommended they stop using EITs on Zubaydah, but the CIA ordered Defendants to continue. Defs.' Reply SUF ¶¶ 190-207.

138. At this time, the Zubaydah interrogation team was "look[ing] forward to receipt of the cable which details the techniques and the concurrent authorities which CTC/LGL is working to obtain." The "implementation of the Post-Isolation phase [would] commence once we received HQS authorization." (Tompkins Decl., Exh. 43 at US Bates 001847.)

Undisputed.

X. DOJ LEGAL APPROVAL TO USE EITS ON HVD ZUBAYDAH

139. The CIA, not Drs. Mitchell or Jessen, determined what approvals from other parts of the United States Government were required before one or more of the EITs could be applied to Zubaydah. (Rizzo Decl. ¶ 30; Tompkins Decl., Exh. 4, Rizzo Tr. at 170:3-6.)

Undisputed.

140. On July 13, 2002, Rizzo met with Yoo, Bellinger, Bellinger's deputy Bryan Cunningham, Assistant Attorney General for the Criminal Division Michael Chertoff, OLC Acting Assistant Attorney General Daniel Levin, and a CTC attorney from his office. (Rizzo Decl. ¶ 28; Exh. J at US Bates 1760-65.)

Undisputed.

141. During this meeting, Rizzo provided a full briefing about the various EITs with particular emphasis on the water board and mock burial process. Rizzo and his attorneys specifically indicated the following:

- The CIA and FBI staff employees engaged in the interrogation of [] Zubaydah are complemented by expert personnel who possess extensive experience, gained within the Department of Defense, on the psychological and physical methods of interrogation and the resistance techniques employed as countermeasures to such interrogation.

- Although the interrogation process has produced a limited amount of success to date, [] Zubaydah remains adroit at applying a host of resistance techniques. He is the author of a seminal Al-Qa'ida manual on resistance to interrogation methods, and that the Agency assesses he continues to withhold critical, actionable information about the identities of

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Al-Qa'ida personnel dispatched to the United States and about planned Al-Qa'ida terrorist attacks. Simply stated, countless more Americans may die unless we can persuade [Zubaydah] to tell us what he knows.

- The interrogation process previously had been briefed to the Office of Legal Counsel (who subsequently briefed the Assistant Attorney General for the Criminal Division), as well as to the Assistant to the President for National Security Affairs, the Legal Advisor to the National Security Council, and the White House Counsel. The process had been thoroughly reviewed as well by CIA's Acting General Counsel and by the Chief Legal Advisor to the Counterterrorist Center, and the interrogation team remains authorized to employ all methods lawfully permitted.

- Nonetheless, the interrogation team now had concluded that the use of more aggressive methods is required to persuade [] Zubaydah to provide the critical information needed to safeguard the lives of innumerable innocent men, women, and children within the United States and abroad. In light of the exceptionally grave, lethal, and imminent risks to the citizens of the United States, and the Agency's assessment that [] Zubaydah continues to withhold critical information that

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would permit the United States to avert those risks, CIA had reviewed the team's proposals and wished to secure concurrence from the NSC and the Department of Justice. We also wished to present the proposals to the FBI Chief of Staff so that the FBI could determine whether to participate in the next phase as well.

- We emphasized that clearly it is not our intent to permit [] Zubaydah to die in the course of such activities, and that we would have appropriately trained medical personnel on-site to ensure the availability to emergency response should he suffer a potentially lethal consequence. Nonetheless, we noted that the risk is ever-present that [] Zubaydah may suffer a heart attack, stroke or other adverse event regardless of the conditions of his detention and questioning; indeed, that potential is always present whenever an individual is under detention.

(Rizzo Decl., Exh. J at US Bates 001761-62.)

Undisputed.

142. The CIA lawyers explained that the techniques were based upon the SERE program. (Tompkins Decl., Exh. 3, Rodriguez Tr. at 96:21-25; Exh. 4, Rizzo Tr. at 151:9-22.)

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Undisputed.

143. Furthermore, during the meeting, Yoo expressed that he "was most interested in the long term impact of each of the techniques CIA is proposing to apply to AZ." Yoo also "[i]nformally . . . agree[d] that the [proposed] techniques . . . with the exception of the water board and mock burial, do not cause prolonged mental harm and are not controversial." (Rizzo Decl., Exh. G at US Bates 001913.)

Undisputed.

144. As for the water board and mock burial, Yoo did not rule out the techniques, but requested additional information. (*Id.*)

Undisputed.

145. Rizzo thereafter worked to provide OLC with more information and to get all questions about the EITs answered. Specifically, HQS, at Rizzo's direction, requested that SERE psychologists "comment on the short and long term psychological effects of the water board and mock burial and, if available, statistics on what long term mental health issues resulted from using these techniques in SERE training." (Rizzo Decl. ¶ 41; Exh. G at US Bates 001913; Exh. L at US Bates 001852; Tompkins Decl., Exh. 4, Rizzo Tr. at 173:10-11, 174:9-25.)

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Undisputed, with the clarification that Mr. Rizzo testified that the only "SERE psychologists he consulted with in the approval process were Defendants Mitchell and Jessen. Watt Decl., Exh. D (Rizzo Tr.) 177:1-7 (Q. Do you recall if there were SERE psychologists, other than Mitchell and Jessen, who provided opinions to the CIA relating to these enhanced interrogation techniques? A. No, to the best of my recollection the only SERE psychologists I knew that were providing advice were Drs. Mitchell and Jessen.).

Defendants' Reply: Plaintiffs misrepresent the record to imply that the CIA and CTC legal did not obtain information from any other SERE psychologists because Rizzo did not personally know of other SERE psychologists. In fact, Plaintiffs admit that the CIA consulted with SERE psychologists other than Defendants. Defs.' Reply SUF ¶ 175.

146. During this time, other medical professionals familiar with the SERE program were at GREEN, including at times a third SERE psychologist. Some of these individuals had undergone SERE training that was conducted by the CIA when the CIA had its own SERE program, which had been discontinued before Dr. Mitchell began working for the CIA. (Mitchell Decl. ¶¶ 4-5.)

Undisputed.

147. This information was needed so that Rizzo could provide it to OLC to enable the CIA to "obtain the needed approvals." (Rizzo Decl. ¶ 41; Exh. G at US Bates 001913.)

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Undisputed.

148. At the same time, HQS was conferring with JPRA—the governmental agency within the DoD entrusted with overseeing and ensuring the safety of all SERE programs—about the EITs. JPRA indicated that "the water board and mock burial are no longer being used because they are extremely effective, preventing the student from learning the fundamentals of resistance in a measured way." HQS was also conducting its own research on the subject. (Rizzo Decl. ¶ 40; Exh. G at US Bates 001913-14; Tompkins Decl., Exh. 40 at US Bates 001771.)

Undisputed.

149. JPRA concluded that no long-term psychological effects resulted from use of the EITs. (Rizzo Decl. ¶ 40; Exh. D at US Bates 001595; Tompkins Decl., Exh. 4, Rizzo Tr. at 172:8-24.)

Contrary to Defendants' Fact #149, JPRA conducted no assessment of the long-term psychological effects resulting from the use of the methods on prisoners. The JPRA SERE psychologist tasked with researching the issue addressed only the long-term psychological impact of SERE training techniques on SERE students, not the use of torture methods on prisoners:

> Dr. Ogrisseg said that he was surprised when he found out later that Lt Col. Baumgartner had forwarded his memo to the General Counsel's office along with a list of the physical and psychological

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> techniques used in SERE school. Dr. Ogrisseg said that his analysis was produced with students in mind, not detainees. He stated that the conclusions in his memo were not applicable to the offensive use of SERE techniques against real world detainees and he would not stand by the conclusions in his memo if they were applied to the use of SERE resistance training techniques on detainees.
>
> Watt Decl., Exh. Y (SASC Report) at 30.

Defendants' Reply: Plaintiffs' response relies upon and contains inadmissible hearsay. Although the SASC Report is a public record, the statements made by Dr. Osrisseg constitute hearsay within hearsay, as they are not factual findings by the SASC, but rather statements made to SASC staff during an interview that were subsequently included in the SASC Report. *See* SASC Report at 30 n.219. Accordingly, Plaintiffs may not permissibly rely upon and quote from Dr. Osrisseg's statements. *See* 5-803 *Weinstein's Federal Evidence* § 803.10, Lexis (database updated 2017) ("Statements by third persons that are recorded in an investigative report are hearsay within hearsay" and are thus "inadmissible unless they qualify for their own exclusion or exception from the rule against hearsay . . . ."); *see also United States v. Taylor*, 462 F.3d 1023, 1026 (8th Cir. 2006) (recitation of citizen's statement to police officer contained within police report was "double hearsay"); *United States v. Mackey*, 117 F.3d 24, 28-29 (1st Cir. 1997) (upholding district court's finding that witness statement recorded in FBI report was "hearsay within hearsay" and not admissible simply because it

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appeared in public record); *Sussel v. Wynne*, Civ. No. 05-00444, 2006 U.S. Dist. LEXIS 72774, at *6 (D. Haw. Oct. 4, 2006).

150. During the EIT assessment and approval process, Rizzo ensured that a memorandum prepared by OTS titled "Psychological Terms Employed in the Statutory Prohibition on Torture" was provided to the OLC. The OTS Memo discussed the proposed EITs and explained that the EITs may impact detainees differently than they impact volunteers in the SERE school, stating:

> However, while the interrogation techniques mentioned above (attention grasp, walking, facial hold, facial slap (insult slap), cramped confinement, wall standing, stress positions, sleep deprivation, waterboard, and mock burial) are administered to student volunteers in the U.S. in a harmless way, with no measurable impact on the psyche of the volunteer, we do not believe we can assure the same here for a man forced through these processes and who will be made to believe this is the future course of the remainder of his life. While CIA will make every effort possible to ensure that the subject is not permanently physically or mentally harmed, some level of risk still exists. The intent of the process is to make the subject very disturbed, but with the presumption that he will recover.

(Rizzo Decl. ¶ 38; Tompkins Decl., Exh. 11 at US Bates 000661-62.)

Undisputed.

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151. Rizzo wanted to ensure that the CIA was not overselling the significance of the EITs use during SERE training and to clarify that the experience of Zubaydah exposed to the proposed EITs might not be identical to the experience of SERE trainees. (Rizzo Decl. ¶ 39; Tompkins Decl., Exh., 4, Rizzo at Tr. 33:1-14; Exh. 11 at US Bates 000661-62.)

Undisputed.

152. On July 17, 2002, Rodriguez and Rizzo were informed that National Security Advisor Condoleezza Rice had approved use of the EITs upon Zubaydah pending DOJ approval of the techniques. (Rizzo Decl. ¶ 33; Exh. J at US Bates 001761; Rodriguez Decl. ¶ 51.)

Undisputed.

153. On July 23, 2002, a cable was sent to HQS with additional information stating:

> A bottom line in considering the new measures proposed for use at ____ is that subject is being held in solitary confinement, against his will, without legal representation, as an enemy of our country, our society and our people. Therefore, while the techniques described in HQS meetings and below are administered to student volunteers in the U.S. in a harmless way, with no measurable impact on the psyche of the volunteer, we do not believe we can assure the same here for a man forced through these processes and who will be made to believe

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> this is the future course of the remainder of his life. Station, ____COB and ______ Personnel will make every effort possible to insure [sic] that subject is not permanently physically or mentally harmed but we should not say at the outset of this process that there is no risk.

(Tompkins Decl., Exh. 40 at US Bates 001770-71.)

Undisputed.

154. The cable went on to provide comments from the Zubaydah interrogation team members to help HQS. The comments were:

> IC SERE Psychologists Feedback: Our assumption is the objective of this operation is to achieve a high degree of confidence that subject is not holding back actionable information concerning threats to the United States beyond that which subject has already provided. Given his demonstrated abilities, his current level of confidence, and his reluctance to provide threat information – again beyond that which he has already provided – IC SERE psychologists recommend using an escalating interrogation strategy that has a high probability of overwhelming subject's ability to resist. To accomplish this, the escalation must culminate with pressure which is absolutely convincing. We propose to employ the pressures/techniques identified at HQS (minus the mock burial . . .) in concerted fashion

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> to overwhelm subject's ability to resist by leading him to believe that he cannot predict or control what happens to him. The plan is to rapidly overwhelm subject, while still allowing him the option to choose to cooperate at any stage as the pressure is being ratcheted up. The plan hinges on the use of an absolutely convincing technique. The waterboard meets this need. Without the waterboard, the remaining pressures would constitute a 50 percent solution and their effectiveness would dissipate progressively over time as subject figures out that he will not be physically beaten and as he adapts to cramped confinement.

(Tompkins Decl., Exh. 40 at US Bates 001771.)

Undisputed.

155. The IC SERE psychologists—in this case Drs. Mitchell and Jessen—were not aware of specific statistics regarding long term mental health outcomes or consequences from use of the water board in training, but knew that the Navy and JPRA had not reported any significant long term mental health consequences from its use. They suggested that additional information could be obtained from two specific individuals: a JPRA SERE psychologist and a West Coast Navy SERE school psychologist. (*Id.* at US Bates 001771-72.)

Defendants' Fact #155 is misleading, because Defendants knew the effect of their proposed methods might be different for prisoners than for volunteers.

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Watt Decl., Exh. F (Jessen Dep.) 127:11–24. But when Defendant Mitchell presented his proposal to the Director of the CIA and the head of CTC, he did not mention that fact. Watt Decl., Exh. B (Mitchell Dep.) 281:4–16. Nor did Defendants bring this difference to the attention of Mr. Rizzo. Watt Decl., Exh. D (Rizzo Dep.) 151:15–154:18. Further, the comment that "JPRA had not reported any significant long term mental health consequences" ignores the fact that no long term studies had been conducted. Watt Decl., Exh. X (Morgan Dep.) 217:18-21 ("[T]o my knowledge, there is no long-term outcome assessment with respect to SERE and its impact on people.").

Defendants' Reply: Plaintiffs do not dispute that ECF 176-40, Tompkins Decl., Exh. 40 at US Bates 001771-72 is accurately cited. Furthermore, Plaintiffs admit that Defendants told the CIA that "any physical pressures applied to extremes can cause severe mental pain or suffering . . . The safety of any technique lies primarily in how it is applied and monitored." Defs.' Reply SUF ¶ 156.

In addition, Plaintiffs mischaracterize Dr. Jessen's cited testimony. When asked, "In your mind, is there a difference between having these things pressures done to you by a hostile government versus in training?", Dr. Jessen responded, "In terms of how they're employed, no; in terms of where you're at emotionally, I think it is different . . . I think you'd have more concern about the outcome." ECF 182-3, Ladin Decl., Exh. C, (Jessen Dep.) 127:11-24.

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And Plaintiffs mischaracterize Dr. Mitchell's cited testimony. Dr. Mitchell testified that in one specific meeting with the Director of the CIA and Jose Rodriguez, he did not mention that "the application of SERE techniques, which had been able to be used for many years without producing problems, might nonetheless produce problems in a different setting where the subject is not there voluntarily." The cited testimony does not indicate that Dr. Mitchell was "presenting" a "proposal" nor that this issue was not discussed at some other time – as Plaintiffs have admitted was the case. Defs.' Reply SUF ¶ 156. ECF 176-1, Tompkins Decl., Exh. 1, (Mitchell Dep.) 277:11-281:16.

156. Still, the IC SERE psychologists—again Drs. Mitchell and Jessen—noted that "any physical pressure applied to extremes can cause severe mental pain or suffering. Hooding, the use of loud music, sleep deprivation, controlling darkness and light, slapping, walling, or the use of stress positions taken to extreme can have the same outcome. The safety of any technique lies primarily in how it is applied and monitored." (*Id.* at US Bates 001772.)

Undisputed.

157. The information provided by Drs. Mitchell and Jessen and others about the EITs was provided to CIA lawyers. The CIA lawyers then provided information to the OLC in an iterative process that went "back and forth." Drs. Mitchell and Jessen had no direct contact with the OLC. (Tompkins Decl., Exh. 4, Rizzo Tr. at 35:22-38:25.)

Undisputed.

158. On July 24, 2002, Yoo called Rizzo and advised that United States Attorney General John Ashcroft had authorized him to inform Rizzo that the first six EITs (attention grasp, walling, facial hold, facial slap, cramped confinement, and wall standing) were lawful and could be used on Zubaydah. (Rizzo Decl. ¶ 34; Tompkins Decl., Exh. 11 at US Bates 000660.)

Undisputed.

159. On July 25, 2002, Rizzo had word of such approval sent by cable to the facility where Zubaydah was being held, GREEN. (Rizzo Decl. ¶ 35; Rodriguez Decl. ¶ 53; Exh. K at US Bates 001162-66, Tompkins Decl., Exh. 11 at US Bates 000660.)

Undisputed.

160. The approval cable stated, "this cable provides formal authorization to proceed with portions of the next phase of the interrogation of Abu Zubaydah." It further explained that "it was not intended, however, that Abu Zubaydah actually suffer severe physical or mental pain" from the interrogation techniques. (Rodriguez Decl., Exh. K at US Bates 001162-63.)

Undisputed.

161. The cable explained the approval as follows:

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> We have secured formal approval from the acting General Counsel to employ the confinement box, as described in ref, in the course of the interrogation of Abu Zubaydah. We also have secured formal approval from the Attorney General to employ the following techniques, . . . the attention grasp, walling, facial hold, facial slap (insult slap), cramped confinement, wall standing, stress positions, sleep deprivation, use of diapers, and use of harmless insects. We note that these techniques are used on U.S. military personnel during SERE training (with the exception of diapers and real insects . . .).

(*Id*. at US Bates 001163-64.)

Undisputed.

162. The cable further specified that "a medical expert with SERE experience will be present throughout the implementation" of the techniques. And it provided instructions on how each approved interrogation technique was to be applied. (Rodriguez Decl., Exh. K at US Bates 001164; Rizzo Decl. ¶ 36.)

Contrary to the second sentence in Defendants' Fact #162, the cable did not "provide[] instructions on how each" method would be applied; instead it reproduced Defendants' description of the methods and their application from Defendants' July 9, 2002 Memo, "Description of Physical Pressure." ECF No. 182-8 (U.S. Bates #1109).

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163. At this time, the CIA was still waiting for "final justice department approval for the use of the water board and/or the use of mock burial as part of a threat and rescue scenario." The CIA "defer[red] to ______ as to whether to await that approval before commencing the next phase of the interrogation." (Rodriguez Decl., Exh. K at US Bates 001164.)

Undisputed.

164. Around this time, the OLC advised the CIA that approval of the remaining EITs would be delayed if the "mock burial" technique remained part of the EITs. As a result, the CIA withdrew its request for approval of the "mock burial" technique. (Rizzo Decl. ¶ 37; Rodriguez Decl. ¶ 55; Tompkins Decl., Exh. 4, Rizzo Tr. at 55:12-22, 56:4-25, 57:1-2; Exh. 3, Rodriguez Tr. at 69:18-24.)

Undisputed.

165. On August 1, 2002, Rizzo received a formal, confidential memorandum from OLC Assistant Attorney General Jay S. Bybee (the "Bybee Memo"). The memorandum concluded that ten of the EITs that the CIA had proposed (attention grasp, walling, facial hold, facial slap, cramped confinement, wall standing, stress positions, sleep deprivation, insects placed in a confinement box, and the water board) did not violate the prohibition against torture established by 18 U.S.C. § 2340A. (Rizzo Decl. ¶ 42; Exh. I at US Bates 000178-95.)

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1 Undisputed.
2
3 **166.** By August 2, 2002, the Zubaydah interrogation team learned that the
4 Attorney General had approved all of the remaining EITs (as mock burial had
5 been abandoned), including the water board, "but that final approval is in the
6 hands of the policy makers." (Tompkins Decl., Exh. 36 at US Bates, 001653-54.)
7
8 Undisputed.
9
10 **167.** On August 3, 2002, Rizzo had the August 1, 2002 Bybee Memo
11 converted into a cable that was sent to GREEN, the black-site where Zubaydah
12 was being detained, authorizing the EITs. The cable, explained that
13 > the legal conclusions are predicated upon the determinations by the
14 > interrogation team that 'Abu Zubaydah continues to withhold critical
15 > threat information,' including the identities of Al-Qa'ida operatives in
16 > the United States, that in 'order to persuade him to provide' those
17 > identities, the use of more aggressive techniques is required, and that
18 > the use of those techniques will not engender lasting and severe
19 > mental or physical harm.
20
21 (Rizzo Decl. ¶ 44; Exh. J at US Bates 001761; Tompkins Decl., Exh. 4, Rizzo
22 Tr. at 44:1-3; Exh. 11 at US Bates 000672-73.)
23
24 Undisputed, with the clarification that Mr. Rizzo did not convert the
25 August 1, 2002 classified Bybee Memo into a cable and send it to GREEN.
26

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1 Instead, Mr. Rizzo authored the cable and in part "quoted verbatim the language
2 from Yoo's July 13, 2002 letter to Rizzo in which he advised the CIA that
3 specific intent to cause severe mental pain and suffering would be negated by a
4 showing of good faith, and that due diligence to meet the good faith standard
5 'might include such actions as surveying professional literature, consulting with
6 experts, or evidence gained from past experience.'" The cable listed other factors,
7 paraphrasing the classified Bybee Memo, not quoting it verbatim. ECF No. 176-
8 11 (OPR Report) at U.S. Bates #000673.
9
10 **168.** The legal conclusion further turned on the following factors:
11
12 - The absence of any specific intent to inflict severe physical or
13 mental pain or suffering. In a letter dated 13 July 2002, OLC
14 advised CIA that 'specific intent can be negated by a showing
15 of good faith . . . . if, for example, efforts were made to
16 determine what long-term impact, if any, specific conduct
17 would have and it was learned that the conduct would not
18 result in prolonged mental harm, any actions taken relying on
19 that advice would have to undertake [sic] in good faith. Due
20 diligence to meet this standard might include such actions as
21 surveying professional literature, consulting with experts, or
22 evidence gained from past experience.
23
24 - We understand from OTS ____, OMS, and the SERE
25 psychologists on the interrogation team that the procedures
26

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> described above should not rpt not produce severe mental physical pain or suffering; for example, no severe physical injury (such as the loss of a limb or organ) or death should result from the procedures; nor would they be expected to produce prolonged mental harm continuing for a period of months or years (such as the creation of persistent posttraumatic stress disorder), given the experience with these procedures and the subject's resilience to date.

(Rizzo Decl., Exh. J at US Bates 001763-64.)

Undisputed, except that Defendants' Fact #168 is misleading without the clarification that the legal conclusions in the Bybee Memo, including with regard to specific intent, were criticized by the Justice Department's Office of Professional Responsibility as seriously flawed. ECF No. 176-11 (OPR Report) at U.S. Bates 000766 – 000833.

Moreover, the OLC's conclusion on the severity of physical injuries and the prolonged mental harm resulting from application of the Defendants' methods was predicated on misleading advice provided by Defendants. Defendants knew the effect of their proposed methods might be different for prisoners than for volunteers. Watt Decl., Exh. F (Jessen Dep.) 127:11–24. But when Defendant Mitchell presented his proposal to the Director of the CIA and the head of CTC, he did not mention that fact. Watt Decl., Exh. B (Mitchell Dep.) 281:4–16. Nor did Defendants bring this difference to the attention of Mr. Rizzo. Watt Decl.,

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Exh. D (Rizzo Dep.) 151:15–154:18. Instead, they suggested that CIA look only to data collected about volunteers. As the Senate Armed Services Committee found, using SERE volunteer data was misleading and dangerous:

> The use of techniques in interrogations derived from SERE resistance training created a serious risk of physical and psychological harm to detainees. The SERE schools employ strict controls to reduce the risk of physical and psychological harm to students during training. Those controls include medical and psychological screening for students, interventions by trained psychologists during training, and code words to ensure that students can stop the application of a technique at any time should the need arise. Those same controls are not present in real world interrogations."

Watt Decl., Exh. Y (SASC Report) at xxvi.

Defendants' Reply: Plaintiffs do not dispute that the cable is accurately quoted. The remaining information provided by Plaintiffs is irrelevant and misstates the record. The legal conclusions in the Bybee Memo were made in August 2003 and were relied upon. It is irrelevant that a July 29, 2009 review of the Bybee Memo (the OPR Report) criticized those legal conclusions. Furthermore, Plaintiffs mischaracterize Dr. Jessen's and Dr. Mitchell's cited testimony, as fully explained in Defendants' Reply to ¶ 155. Finally, Plaintiffs

also mischaracterize the quoted conclusion from the SASC Report, which speaks for itself.

169. The cable contained detailed guidance concerning the approved usage of the water board. (Rizzo Decl. ¶ 44; Exh. J at US Bates 001763-64.)

Undisputed.

170. The cable confirmed that should any member of the team interrogating Zubaydah (including appropriately trained medical personnel) or any on-site personnel request that Zubaydah's interrogation be halted, all members of the interrogation team as well as CIA HQS would be consulted. It also confirmed that the final decision to halt or recommence EIT use would lie exclusively with HQS, or if HQS was unavailable, the CIA's Chief of Base (at GREEN) and Senior CTC Officer. (Rizzo Decl. ¶ 46; Exh. J at US Bates 001764; Tompkins Decl., Exh. 4, Rizzo Tr. at 60:10-25; Rodriguez Decl. ¶¶ 58-61.)

Undisputed.

171. The DOJ's determination of the EITs' legality and the related (modified and approved) Zubaydah interrogation plan was promptly conveyed to Drs. Mitchell and Jessen verbally by the COB at GREEN. (Rodriguez Decl. ¶ 62; Tompkins Decl., Exh. 2, Jessen Tr. at 150:2-14.)

Undisputed.

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172. The COB explained to Drs. Mitchell and Jessen the upper and lower limits of what the DOJ had determined was permissible. (Tompkins Decl., Exh. 2, Jessen Tr. at 149:19-150:14.)

Undisputed.

173. Drs. Mitchell and Jessen relied upon the DOJ's legality assessment. (Tompkins Decl., Exh. 2, Jessen Tr. at 148:6-149:7, 181:3-6, 184:1-7, 212:10-11, 215:21-216:8, 251:10-252:6; Tompkins Decl., Exh. 46 at US Bates 001927.)

Defendants' Fact #173 is misleading and requires clarification to the extent that it does not account for Defendants' knowledge that the DOJ's legality assessment was biased and based on their own misleading advice. Defendants were aware that the CIA lawyers' guidance was that they should "rule out nothing whatsoever that you believe may be effective; rather, come on back and we will get you the approvals." ECF No. 176-24 (U.S. Bates #001160). Defendants knew that the process was documented in advance "to ensure that our officers are protected," *Id.* Moreover, Defendants were aware that OLC was relying on Defendants' own omissions. They knew the effect of their proposed methods might be different for prisoners than for volunteers. Watt Decl., Exh. F (Jessen Dep.) 127:11–24. But when Defendant Mitchell presented his proposal to the Director of the CIA and the head of CTC, he did not mention that fact. Watt Decl., Exh. B (Mitchell Dep.) 281:4–16. Nor did Defendants bring this critical difference to the attention of Mr. Rizzo. Watt Decl., Exh. D (Rizzo Dep.)151:15–154:18. Instead, they suggested that CIA look only to data

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1 collected about volunteers.
2
3 **Defendants' Reply**: Plaintiffs do not rebut Defendants' factual statement.
4 Plaintiffs quote a July 1, 2002 cable that HQS—not OLC—sent before EITs had
5 been proposed, about a meeting Jessen did not attend. ECF No. 176-24,
6 Tompkins Decl., Exh. 24 at U.S. Bates 001160. This cable does not create a
7 factual dispute where Plaintiffs admit that after the July 2002 Memo the CIA
8 conducted its own due diligence and engaged in an extensive "back and forth"
9 with the OLC, during which time the CIA provided OLC with information from
10 different sources, including JPRA, OTS, and Defendants. Defs.' Reply SUF ¶¶
11 113, 140-48, 150-51, 155-61,165. And OLC did not approve all of the techniques
12 proposed in the July 2002 Memo. Defs.' Reply SUF ¶ 165. Furthermore,
13 Plaintiffs mischaracterize Dr. Jessen's and Dr. Mitchell's cited testimony, as fully
14 explained in Defendants' Reply to ¶ 155.
15
16 **174.** As Attorney General Eric Holder explained in an April, 16, 2009,
17 press release, "[i]t would be unfair to prosecute dedicated men and women
18 working to protect America for conduct that was sanctioned in advance by the
19 Justice Department." And according to Rizzo, this protection should further
20 extend to "contractors retained by the [CIA] to help carry out the terrorist
21 interrogation program described in the OLC opinions in question." (Tompkins
22 Decl., Exh. 68 at MJ00023566-68.)
23
24 Plaintiffs object to Defendants' Fact # 174 because it contains hearsay and
25 opinions, not any fact.
26

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Defendants' Reply: These public statements from Attorney General Eric Holder and Senior Deputy General Counsel John A. Rizzo are not hearsay in that in they are not being used by Defendants to prove the truth of the matter asserted—*i.e.*, whether conduct by "contractors retained by the [CIA] to help carry out the terrorist interrogation program described in the OLC opinions" was sanctioned in advance by the Justice Department. Rather, it establishes the fact that the government has, on two separate occasions, publicly taken the position it would be "unfair" to prosecute individuals once the Justice Department has "sanctioned" such conduct in advance.

175. The CIA consulted with SERE psychologists and interrogators other than Defendants regarding detainee interrogations. (Tompkins Decl., Exh. 30 at US 001591-93; Mitchell Decl. ¶¶ 3-5.)

Undisputed, except with the clarification that Mr. Rizzo testified that the only SERE psychologists that he consulted about "enhanced interrogation techniques" were Defendants Mitchell and Jessen. Watt Decl., Exh. D (Rizzo Tr.) 177:1-7.

XI. APPLICATION OF THE EITS TO ZUBAYDAH

176. The CIA determined what was done to Zubaydah, how it would be done, and when it would be done. (Tompkins Decl., Exh. 3, Rodriguez Tr. at 174:24-175:3, 175:21-25.)

Contrary to Defendants' Fact #176, Defendants determined what was to be

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1 done to Abu Zubaydah, how it would be done, and when it would be done, and
2 secured CIA approval for their plan. It was Defendants who drew up a proposal
3 that identified specific methods designed to "instill fear and despair," including
4 methods aimed at manipulating prisoners who were "very sensitive to situations
5 that reflect a loss of status or are potentially humiliating." ECF No. 182-8 (U.S.
6 Bates 1110–1111); Watt Decl., Exh. F (Jessen Dep.) 114:20–115:11; Watt Decl.,
7 Exh. B (Mitchell Dep.) 262:5–21. It was Defendants who implemented the
8 methods they had selected over nineteen days, as described in CIA cables. ECF
9 No. 182-15 (U.S. Bates #001801), ECF No. 182-16 (U.S. Bates #001804–1805),
10 ECF No. 182-23 (U.S. Bates #001807–08), ECF No. 182-17 (U.S. Bates
11 #001943–44), ECF No. 182-18 (U.S. Bates #001947), ECF No. 182-10 (U.S.
12 Bates #001955–59), ECF No. 182-20 (U.S. Bates #001957–59), ECF No. 182- 13
13 (U.S. Bates #002022), ECF No. 182-22 (U.S. Bates #002364), ECF No. 177- 24
14 (U.S. Bates #002380). Defendants exercised their own judgment and applied
15 personal standards as to what techniques should be used on Abu Zubaydah and
16 how they should be used. See, e.g., Watt Decl., Exh. C (Mitchell Manuscript) at
17 MJ00022659-MJ00022661; *See also* ECF No. 177-21 (U.S. Bates #002357)
18 (affording discretion to interrogation team "on the type and frequency of
19 pressures used against Abu Zubaydah.").
20
21 **Defendants' Reply**: Plaintiffs' response does not create a factual dispute.
22 Plaintiffs admit Defendants provided the proposal at the request of the CIA and
23 that the proposal had multiple stated goals beyond imposing fear and despair—
24
25
26

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including to elicit compliance. Defs.' Reply SUF ¶ 125-26, 128. And the portion of the proposal quoted by Plaintiffs was stated to be specific to the "subject" who was Zubaydah. ECF No. 182-8, Ladin Decl., Exh. H at U.S. Bates 001111. Furthermore, Plaintiffs admit that the OLC, after review by the Attorney General and National Security Advisor, approved some of the EITs for use on Zubaydah—not Defendants. Defs.' Reply SUF ¶¶ 152, 158, 165. Plaintiffs also admit that the CIA asked Defendants to apply the EITs and that Defendants' actions were controlled by the CIA. Defs.' Reply SUF ¶¶ 114, 178-81. Specifically, Plaintiffs admit that after days of using EITs on Zubaydah, Defendants recommended they stop using EITs on Zubaydah, but the CIA ordered Defendants to continue. Defs.' Reply SUF ¶¶ 190-207.

177. The CIA, through HQS, the CTC and the COB of GREEN, maintained complete operational control over Drs. Mitchell and Jessen while they interrogated Zubaydah, whether using EITs or otherwise. (Rodriguez Decl. ¶ 68; Exh. Q at US Bates 001891; Exh. P at US Bates 001916; Tompkins Exh. 31 at US Bates 001594.)

Contrary to Defendants' Fact # 177, and for the reasons set forth in opposition to Defendants' Fact #176, Defendants determined what was to be done to Abu Zubaydah, how it would be done, when it would be done, and secured CIA approval for their plan.

Defendants' Reply: Plaintiffs' response does not create a factual dispute, as explained fully in Defendants' Reply SUF ¶ 176.

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178. Drs. Mitchell and Jessen reported directly to GREEN's COB. (*Id.*)

Undisputed.

179. GREEN's COB, in turn, reported to Rodriguez, who was keenly aware of, and approved of, all of Drs. Mitchell and Jessen's activities. (Rodriguez Decl. ¶ 69.)

Undisputed.

180. GREEN's COB was responsible for ensuring that all on-site staff and support, including Drs. Mitchell and Jessen, complied with all applicable regulations, guidelines, standard operating procedures and the applicable, approved interrogation plan. (Rodriguez Decl. ¶ 69; Exh. P at US Bates 001921; Tompkins Decl., Exh. 32 at US Bates 001625.)

Undisputed.

181. The Zubaydah interrogation team did not apply any EITs to Zubaydah until it received express HQS approval. Rather, they stood ready to initiate the next phase of the interrogation process if they "received the appropriate approvals/authorities and related ____ cables outlining the specific techniques to be used during upcoming phase." (Tompkins Decl., Exh. 46 at US Bates 001927; Exh. 4, Rizzo Tr. at 60:10-25.)

Undisputed.

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182. The Zubaydah interrogation team prepared for Zubaydah's forthcoming interrogation and developed "protocols for [a] large confinement box and [wound] dressing changes during the next phase of interrogation." (Tompkins Decl., Exh. 56 at US Bates 002215-16.)

Defendants' Fact #182 is not supported by the document cited.

Defendants' Reply: Defendants apologize for any confusion arising from their mis-cite. Defendants meant to cite to Tompkins Decl., Exh. 50 at US Bates 002015-16 from where this language is quoted.

183. The Zubaydah interrogation team also talked through the interrogation strategy and then conducted multiple walk-throughs with security staff and OMS, during which they choreographed using the large and small confinement boxes, the water board, and emergency medical procedures. (Tompkins Decl., Exh. 35 at US Bates 001651-52; Exh. 36 at US Bates 001653-54.)

Undisputed, except that Defendants' Fact #183 is misleading without the clarification that it was Defendants Mitchell and Jessen who led the process and conducted the walk through rehearsal with security staff, while other members of the team observed. ECF No. 176-35 (U.S. Bates #001652).

184. On August 4, 2002, all members of the Zubaydah interrogation team "read and reviewed HQS ['s] formal approval cable to proceed with the next

phase of interrogations." (Rizzo Decl. ¶ 47; Exh. K at US Bates 001755-56; Rodriguez Decl. ¶ 63.)

Undisputed.

185. Then, before commencing Zubaydah's interrogation, in accordance with the new plan, the team again reviewed the procedural steps of the interrogation to ensure that everyone understood their respective roles and did not have any concerns. (Rizzo Decl., Exh. K at US Bates 001755-56.)

Undisputed.

186. Zubaydah's subsequent interrogation using EITs was conducted entirely at the behest of, and within the control of, HQS and CTC. (Rodriguez Decl. ¶ 65.)

Undisputed, except to the use of "entirely," which is misleading without the clarification that Defendants Mitchell and Jessen personally conducted Abu Zubaydah's interrogation using the methods that they had designed, proposed and developed. *See, e.g.*, ECF No. 174-11 (U.S. Bates #001755-001759) (describing Defendants' involvement in the initial cycle of Abu Zubaydah's interrogation). Defendants applied their techniques in accordance with their "psychologically-based" theory of interrogation and exercised their own judgment and applied personal standards as to what techniques should be used with Abu Zubaydah and how they should be used. See, e.g., Watt Decl., Exh. C (Mitchell Manuscript) at MJ00022659-MJ00022661; ECF No. 177-21 (U.S. Bates #002357) (affording

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discretion to interrogation team "on the type and frequency of pressures used against Abu Zubaydah.")

Defendants' Reply: ECF No. 174-11, Rizzo Decl., Exh. K at U.S. Bates 001755-001759 does not support the inference that Defendants "designed, proposed and developed" the interrogation methods. Rather, the cable provides a summary of the first day of the aggressive phase of Zubaydah's interrogation. *Id.* Plaintiffs' response also does not create a factual dispute because Plaintiffs admit that the CIA asked Defendants to apply the EITs and that Defendants' actions were controlled by the CIA. Defs.' Reply SUF ¶¶ 114, 178-81. Specifically, Plaintiffs admit that after days of using EITs on Zubaydah, Defendants recommended they

stop using EITs on Zubaydah, but the CIA ordered Defendants to continue. Defs.' Reply SUF ¶¶ 190-207.

187. The first session of the so-called Aggressive Phase commenced on August 4, 2002 at 11:50 Hours. The session "went exactly as expected and discussed/scripted" during the team meetings. (Rizzo Decl., Exh. K at US Bates 001755-56.)

Undisputed.

188. EITs were applied to Zubaydah in varying combinations on the first day and then the days thereafter. (Tompkins Decl., Exh. 51 at US Bates 002020-21.)

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Undisputed, except that Defendants' Fact #188 is misleading without the clarification that it was Defendants who used their methods on Abu Zubaydah. *See* Pls.' Resp. to Defs.' Fact #176.

189. GREEN's COB provided HQS, and specifically Rodriguez, with detailed correspondence regarding interrogations on both a daily and as needed basis. (Rodrigues Decl. ¶ 71.)

Undisputed

XII. HQS CONTINUES EITS AFTER DRS. MITCHELL AND JESSEN WANT TO STOP

190. After six days of applying EITs to Zubaydah, on August 11, 2002, the interrogation team sent HQS an update indicating that the team collectively thought it was highly unlikely Zubaydah had actionable new information about current threats to the United States. On the other hand, the team thought that Zubaydah was withholding information about his involvement in past operations. (Tompkins Decl., Exh. 57 at US Bates 002341.)

Undisputed

191. In a matter of days, Drs. Mitchell and Jessen specifically recommended that EITs, including the water board not be used on Zubaydah anymore. Rodriguez was aware of this recommendation. (Rodriguez Decl. ¶ 72;

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Tompkins Decl., Exh. 3, Rodriguez Tr. at 113:6-13; Exh. 2, Jessen Tr. at 147:18-148:5; Exh. 1, Mitchell Tr. at 294:16-22, 295:11-296:10.)

Undisputed.

192. In a cable, Zubaydah's interrogation team specifically indicated that they did not recommend escalating the pressure on Zubaydah because they did not want to risk "going beyond legal authorities." (Tompkins Decl., Exh. 57 at US Bates 002341.)

Undisputed.

193. The interrogation team also requested that HQS send someone to observe the interrogations during the week of August 12, 2002, so that the HQS team could obtain an 'on-the-ground appreciation for the tactics/techniques being used as a way of assuring HQS that techniques are being applied to the letter/intent of the law, allow HQS team the opportunity to discuss team concerns regarding positive/negative impact of increased psychological pressure to achieve our goals re: actionable threat information, and reinforce team request for clarification of the end game strategy re: subject.' (Tompkins Decl., Exh. 57 at US Bates 002341.)

Undisputed.

194. HQS nevertheless demanded that Drs. Mitchell and Jessen continue to apply the water board to Zubaydah. (*Id.*, Exh. 2, Jessen Tr. at 147:18-148:5.)

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Undisputed, with the clarifications that (1) the word "demand" is Defendants' self-serving characterization, and (2) it was Defendants who had previously claimed Abu Zubaydah was a skilled resistor, ECF No. 182-25 (U. S. Bates #001771); Watt Decl., Exh. B (Mitchell Dep.) 252:24–253:21—and CIA Headquarters thought Abu Zubaydah might still be withholding information and Defendants' previously advocated methods might extract new information from Abu Zubaydah. Watt Decl., Exh. C (Mitchell Manuscript) at MJ00022666.

195. In a cable, HQS ordered:

> 1. Action Required: Please stay the course, medical situation permitting, and be certain you have our support.
>
> 2. Much appreciate ref detailed, timely reporting of your work at ______. We read carefully the week's interrogation results, and your recently submitted preliminary analysis of the interrogation situation. We see this point as still early in the phase two process, and while the work is difficult, we see some positive trends. You are succeeding in placing effective interrogation stress on Abu Zubaydah in keeping with the interrogation guidelines. Abu Zubaydah is feeling the increased pressure. Most importantly, he has begun to share disseminable information – at the end of the week. While the value of this information is modest, it is verifiable and can be used as the basis for future interrogations. It may clear the way for more significant progress. The bottom line, in our view is that ref

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developments are encouraging and more than justify staying the course. Our assessment remains that Abu Zubaydah is in possession of critical information.

3. Because of this, we believe that the aggressive phase must continue.

4. We know this is a very difficult assignment. Your task is unique, stressful on the participants, as well as terribly important and sensitive. You are doing this work far from home and your colleagues. Don't let this distance lead you to think that you have anything but our complete support.

(Tompkins Decl., Exh. 58 at US Bates 002344.)

Undisputed, except with respect to Defendants' characterization of a cable that asks them to "[p]lease stay the course" as an "order." The cable speaks for itself.

196. HQS further remarked that the interrogation team's reporting was "excellent" and scheduled a videoconference to view the application of EITs to Zubaydah on August 13, 2002. (Tompkins Decl., Exh. 58 at US Bates 002344.)

Undisputed.

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197. On August 11, 2002, the interrogation team again told HQS that they did not think Zubaydah possessed any further information about new or current threats against the United States. (*Id*., Exh. 59 at US Bates 002346.)

Undisputed.

198. On August 13, 2002, HQS acknowledged that the interrogation team believed that Zubaydah had no additional information on current threats. Still, HQS ordered that the interrogation continue and provided additional information for use in the ongoing interrogation. (*Id*., Exh. 60 at US Bates 002351.)

Contrary to the second sentence of Defendants' Fact #198, the cited cable does not contain any "order."

199. After watching a videoconference during which EITs were applied to Zubaydah on August 13, 2002, HQS directed the interrogation team to "continue with the aggressive interrogation strategy for the next 2-3 weeks." At the time, "the HQS consensus" was that Zubaydah possessed additional information that was "critical to saving American lives." (*Id*., Exh. 61 at US Bates 002356.)

Undisputed.

200. In particular, CTC analysts remained concerned that Zubaydah was not "compliant" because when Zubaydah was captured, the CIA had discovered tapes that Zubaydah had pre-recorded to celebrate another major attack on the U.S. CTC feared that another attack had been planned and Zubaydah was not

providing the information about that planned attack. (*Id*., Exh. 3, Rodriguez Tr. at 114:19-115:1, 176:14-177:3.)

Defendants' Fact #200 is misleading and requires clarification that Defendant Mitchell explained that a key reason CTC remained concerned that Abu Zubaydah was not "compliant" was because Defendant Mitchell had told Jose Rodriguez that it would take 30 days of the use of Defendants' methods before Defendant Mitchell would "believe a person subjected to EITs 'either didn't have the information or was going to take it to the grave with them.'" Watt Decl., Exh. C (Mitchell Manuscript) at MJ00022666. Defendant Mitchell added that his representation about a 30-day timeline had now "come back to haunt us." *Id.*

Defendants' Reply: Plaintiffs do not create a factual dispute with their misrepresentation of the record. Rodriguez specifically testified that the CIA did not order the continued waterboarding of Zubaydah because Dr. Mitchell had previously referenced the 30-day timeline. ECF 176-3, Tompkins Decl. Exh. 3, Rodriguez Dep. 113:6-18 ("Q: Let's talk about Abu Zubaydah for a second. Even after he began to comply, he was still waterboarded, right? A: Yes. Q: And even though Drs. Mitchell and Jessen recommended that he not be waterboarded anymore, it continued, right? A: Correct. Q: And that was because it was still within that 30-day period, right? A: No."); ECF 176-3, Tompkins Decl. Exh. 3, Rodriguez Dep. 116:23-117:4 ("Q: My questions is: Is Dr. Mitchell correct, that the reason he was ordered to continue waterboarding

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was because it was still within the 30-day period? A: No. Q: He's wrong about that? A: Yes."). To the contrary, Rodriguez specifically testified that he ordered Zubaydah to continue to be waterboarded because "Well, I was the head of it, and my analysts were concerned that perhaps he was not compliant." ECF 176-3, Tompkins Decl. Exh. 3, Rodriguez Dep. 114:19-115:1. Based on this testimony, Plaintiffs cannot support an inference that Mitchell's mention of the 30-day timeline was a reason or "key reason" for the continued ordering of Zubaydah's waterboarding.

201. HQS directed the interrogation team to continue water boarding Zubaydah and apply all the "pressures we have the legal authorities to bring to bear" and reassured them: "rest assured that every action the ____ team has taken with Abu Zubaydah falls well within these legal parameters." (Tompkins Decl., Exh. 61 at US Bates 002357; Exh. 3, Rodriguez Tr. at 176:6-13; Tompkins Decl., Ex. 2, Jessen Tr. at 147:18-148:5.)

Undisputed, with the clarification that the cited cable does not mention waterboarding, and states: "As has been the case since the start of the process, the [] team may use its discretion on the type and frequency of the pressures used against Abu Zubaydah --- As long as the stress remains on him to be compliant and to produce actionable intelligence." ECF No. 177-21 (U.S Bates #002357).

202. HQS ordered the interrogation team to continue to use "pressures … against Abu Zubaydah" so that "stress remains on him to be compliant and to produce actionable information." (*Id.*, Exh. 61 at US Bates 002357.)

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1 Undisputed, except for the characterization of the cable as an "order;" that
2 the cable speaks for itself: "As has been the case since the start of the process, the
3 [] team may use its discretion on the type and frequency of the pressures used
4 against Abu Zubaydah --- As long as the stress remains on him to be compliant
5 and to produce actionable intelligence."
6
7 **203.** Drs. Mitchell and Jessen were "responsible for ensuring that Abu
8 Zubaydah remain[ed] compliant through the pressures while _____ [] head[ed] up
9 the substantive interrogations." Meanwhile, the CIA's ALEC station supported
10 the interrogation through focused requirements and immediate feedback on
11 Zubaydah's disclosures. There was also someone present from the CIA at
12 Zubaydah's interrogations to provide legal and operational guidance. (*Id.*)
13
14 Undisputed.
15
16 **204.** On August 16, 2002, in response to the interrogation team's request
17 that HQS view the interrogations on-the-ground, a HQS team arrived at GREEN
18 to discuss the general strategy for the current phase of Zubaydah's interrogation.
19 (*Id.*, Exh. 62 at US Bates 002367.)
20
21 Undisputed.
22
23 **205.** The HQS team participated in the daily strategy meeting about
24 Zubaydah's interrogations and then became actively involved in Zubaydah's
25 interrogation. (Tompkins Decl., Exh. 62 at US Bates 002367; Exh. 63 at US
26 Bates 002373; Rodriguez Decl. ¶ 73.)

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Undisputed, except for the characterization of the "HQS" team's participation as "active." Mr. Rodriguez state: "arrangements were made to enable … representative of HQS and the CTC, to observe the use of EITs, including the water board, upon Abu Zubaydah." Watt Decl., Exh. V (Rodriguez Decl.) ¶ 73. It was Defendants who continued to apply their methods on Abu Zubaydah. ECF No. 177-23 (U.S Bates #002377-78).

Defendants' Reply: ECF 177-22, Tompkins Decl., Exh. 62 at US Bates 002367-68 indisputably indicates that after the arrival of the HQS team, Zubaydah was interrogated by a female interrogator, which implies HQS team was actively involved in the interrogation.

206. On August 19, 2002, the water board was applied to Zubaydah while CTC/LGL and GREEN's COB observed. During the technique, Zubaydah was instructed that "revealing the requested information would stop the procedure." (Tompkins Decl., Exh. 64 at US Bates 002380; Exh. 1, Mitchell Tr. at 296:13-297:9.)

Undisputed, with the clarification that it was Defendants who applied the waterboard. ECF No. 177-24 (U.S. Bates #002380).

207. The aggressive phase of Zubaydah's interrogation ended on August 23, 2002—after 19 days of interrogation using EITs—because HQS viewed Zubaydah as being "in a state of complete subjugation and total compliance." (Tompkins Decl., Exh. 65 at US Bates 002382; Rodriguez Decl. ¶ 74.)

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Contrary to Defendants' Fact #207, it was the interrogation team that viewed Abu Zubaydah as being "in a state of complete subjugation and total compliance." The cable that Defendants cite was sent "for HQS review," from the interrogation team that included Defendants, and was not sent from HQS.

Defendants' Reply: The quoted language in US Bates 002382-83 cannot be attributed to Defendants. The sender is redacted and the interrogation team included many individuals. Defs.' Reply SUF ¶ 168. Furthermore, all cables went through the COB without review from Defendants and Defendants were unable to draft cables during this time period. ECF 176-2, Tompkins Decl. Exh. 2, Jessen Dep. 143:2-13; Defs.' Reply SUF ¶ 298.

208. HQS indicated that "the aggressive phase at ______ should be used as a template for future interrogation of High Value Captives. Psychologists familiar with interrogation, exploitation and resistance to interrogation should shape compliance of high value captives prior to debriefing by substantive experts." (Tompkins Decl., Exh. 51 at US Bates 002023.)

Contrary to Defendants' Fact #208, it was Defendants, not HQS, who wrote that the aggressive phase "should be used as a template." The cable Defendants cite was sent to HQS from the interrogation team at GREEN, and Defendants Mitchell and Jessen are its authors. ECF No. 182-13 (U.S. Bates #002019, 002023 (re-processed: April 11, 2017)); Watt Decl., Exh. T (SSCI Report) at 46.

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Defendants' Reply: US Bates 002019-23 cannot be attributed to the "interrogation team" or "Defendants". Other documents indicate that a team from HQS was at GREEN with the interrogation team at this time, and the HQS team reported back to HQS. Ladin Decl., Exh. K at U.S. Bates 001423–24 ("A team of senior CTC officers traveled from Headquarters to [REDACTED] to assess Abu Zubaydah's compliance and witnessed the final waterboard session, after which, they reported back to Headquarters that the EITs were no longer needed on Abu Zubaydah."). The sender is redacted in US Bates 002019-23 and not otherwise identified. ECF 182-13, Ladin Decl., Exh. M at U.S. Bates 002019-23. All cables went through the COB without review from Defendants and Defendants were unable to draft cables during this time period. Jessen Dep. 143:2-13; Defs.' Reply SUF ¶ 298. Thus, it cannot be inferred that the interrogation team or Defendants drafted and sent this cable. In addition, the SSCI Report is inadmissible hearsay (Fed. R. Evid. 802) and the Public Records Exception to the hearsay rule does not apply (Fed. R. Evid. 803(8)). *See* Defendants' Motion to Exclude the SSCI Report filed June 26, 2017, ECF No. 198.

XIII. EITS ARE EXPANDED FOR USE ON OTHER HVDS

209. Within a few months of the August 1, 2002 Bybee Memo, the OLC confirmed that EITs could be used on other HVDs. (Rizzo Decl. ¶ 50; Tompkins Decl., Exh. 4, Rizzo Tr. at 62:9-12; Rodriguez Decl. ¶ 76.)

Undisputed.

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210. EITs—the specific techniques Dr. Mitchell listed in the July 2002 Memo—were contemplated for use only on HVDs. (Tompkins Decl., Exh. 3, Rodriguez Tr. at 76:20-77:1, 165:7-20, 184:19-25, 186:17-20; Exh. 4, Rizzo Tr. at 62:13-25, 63:17, 65:5-15.)

Contrary to Defendants' Fact #210, the contemporaneous record does not support that Defendants' methods were contemplated for use only on "HVDs." Defendant Jessen testified that "The term HVD, you know, that didn't exist when we started." Watt Decl., Exh. F (Jessen Dep.) 200:11–13. The guidelines standardizing the use of Defendants' methods make no mention of a restriction for use only on "HVDs." ECF 182-13 (U.S. Bates #001170-74) (Guidelines on Interrogations, January 2003). 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" to a prisoner at COBALT. Watt Decl., Exh. S (U.S. Bates #001287).

Defendants' Reply: Plaintiffs' response does contradict the asserted fact. Whether the term HVD was used in July 2002 does not denote the contemplated use for EITs, which were initially formulated for use only on Zubaydah and later on only a limited number of particularly important detainees, ultimately referred to as HVDs. In July 2002, Defendants knew of only one such detainee: Zubaydah. Defs.' Reply SUF ¶ 125. Similarly, the lack of reference to HVDs in the January Guidelines does not impact or otherwise speak to the contemplated

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use for EITs in July 2002 when Defendants proposed the EITs, which under the Guidelines and otherwise required specific HQS approval prior to application upon any detainee. Defs.' Reply SUF ¶229. In addition, Plaintiffs admit that Defendants were not at all involved with the creation or circulation of those Guidelines. Defs.' Reply SUF ¶ 227. They further admit that Defendants were not aware that the Guidelines were sent to COBALT in January 2003. Defs.' Reply SUF ¶ 231. Furthermore, Plaintiffs do not identify when Defendants—independent contractors—became aware of the January 2003 Guidelines.

211. Drs. Mitchell and Jessen were contracted to support the CTC with regard to HVDs. (Tompkins Decl. Exh., 3, Rodriguez Tr. at 182:2-7; DDO Death Investigation, Exh. 22 at US Bates 001124 (describing Jessen as "involved in the use of enhanced interrogation techniques with high value targets")).

Contrary to Defendants' Fact #211, Defendant Jessen "stated that his duties at CIA have involved the interrogation of high and medium value terrorist targets." ECF No. 181-36 (U.S. Bates #001047–48). Defendants' contracts and their job descriptions do not indicate a role limited only to "HVDs." See, e.g., Watt Decl., Exh. N (U.S. Bates #000047, 000061-64); Watt Decl., Exh. J (U.S. Bates # 00086; 000092; 000094); U.S Bates 001592 (job description). The record establishes that Defendants were contracted to help design, test, and implement an interrogation program for the CIA using their methods. ECF 176-25 (OIG) at U.S. Bates #001352 (Mitchell and Jessen "developed a list of new and more aggressive EITs that they recommended for use in interrogations.")

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Defendants' Reply: Plaintiffs' response does not create an issue of fact, whereby Plaintiffs admit that Defendants interacted with MVDs only during their brief time at COBALT in November 2002. Defs.' Reply SOF ¶ 321. Plaintiffs' response also improperly relies on an interpretation of Defendants' contracts by the Office of Inspector General, not the contracts themselves. Further, Plaintiffs mischaracterize Defendants' contracts—which speak for themselves—and which do not indicate that Defendants were hired to "design, test, and implement an interrogation program." Rosenthal Decl. Exh. 6, at U.S. Bates 000025-85 (Mitchell contracts), and Exh. 7 at U.S. Bates 000086-127 (Jessen contracts). Rather, as Plaintiffs concede, Defs.' Reply SOF ¶ 127, the drafting of the July 2002 Memo was the extent of Dr. Mitchell and Jessen's involvement in the "design" or "architecture" of the CIA's program.

212. Rodriguez described the results Drs. Mitchell and Jessen achieved as "incredible"—providing the CIA with "intelligence … that we didn't have before." (Tompkins Decl., Exh. 3, Rodriguez Tr. at 134:2-10.)

Contrary to Defendants' Fact #212, Rodriguez's subjective opinion of Defendants' results is undercut by the CIA's own assessment that:

We do want to add, however, that in hindsight, we believe that assertions the Agency made to the effect that the information it acquired could not have been obtained some other way were sincerely believed but were also inherently speculative. Although it is indeed impossible for us to imagine how the same counterterrorism results could have been achieved without any information from

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detainees, we also believe-as we note above-that it is unknowable whether, without enhanced techniques, CIA or non--CIA interrogators could have acquired the same information from those detainees.

Watt Decl., Exh. M (CIA Response) at 15 (Recommendations).

Defendants' Reply: The information provided by Plaintiffs does not dispute Rodriguez's assessment of Defendants' results. Furthermore, the CIA Response is inadmissible hearsay (Fed. R. Evid. 802).

213. According to Dr. Mitchell's "Contract Performance Report" for the period January 1, 2003, to December 31, 2003, Dr. Mitchell's performance was "Exceptional," and he "consistently met the highest standards of professionalism and competence." (Tompkins Decl., Exh. 78 at US Bates 001911.)

Undisputed.

214. Rodriguez also testified that Defendants' evaluation of the EITs' effectiveness was "not problematic" because the CIA "also played a role in assessing their effectiveness." (Tompkins Decl., Exh. 3, Rodriguez Tr. at 132:2-9.)

Contrary to Defendants' Fact # 214, the CIA's own assessment was that:

> CIA should have done more from the beginning of the program to ensure there was no conflict of interest-real or potential-with regard to the contractor psychologists who designed and executed the

techniques while also playing a role in evaluating their effectiveness, as well as other closely-related tasks.

Watt Decl., Exh. M (CIA Response) at 25 (Findings and Conclusions).

The CIA stated that it "has since taken steps to ensure that our contracts do not have similar clauses with the contractors grading their own work." Id. at 10–11 (Recommendations). Mr. Rizzo agrees with this criticism.

Watt Decl., Exh. D (Rizzo Dep.) 117:15–23.

Defendants' Reply: The CIA Response is inadmissible hearsay (Fed. R. Evid. 802).

215. During their time working for the CIA in 2002 through January 2003, Drs. Mitchell and Jessen spent at least 80% of their time deployed outside the U.S. In fact, during this timeframe, Dr. Jessen spent 98% of his time deployed outside the U.S. (Mitchell Decl. ¶ 9; Jessen Decl. ¶ 4.)

Plaintiffs have no basis to dispute or not dispute these calculations because Defendants have not produced any documents that would confirm their estimates in 2017 of time spent in 2002.

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XIV. APPROVAL PROCESS FOR EITS

216. Dr. Mitchell and Jessen did not decide to whom (*i.e.*, which HVDs) the EITs would be applied. (Tompkins Decl., Exh. 3, Rodriguez Tr. at 125:23-126:3, 174:6-10; Tompkins Decl., Exh. 34 at US Bates 001631-32.)

Plaintiffs object to Defendants' Fact #216 to the extent it claims that "HVDs" were the only prisoners to whom their methods would be applied. The guidelines standardizing the use of those methods make no mention of a restriction to use only on "HVDs." ECF No. 182-32 (U.S. Bates #001170-74) (Guidelines on Interrogations, January 2003). 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" to a prisoner at COBALT. Watt Decl., Exh. S (U.S. Bates #001287).

Defendants' Reply: Plaintiffs' response does not create an issue of fact. Plaintiffs claim that Dr. Jessen "requested permission," which implies that he did not decide to whom the EITs would be applied. Additionally, the January Guidelines do not support Plaintiffs' response, for the reasons explained in Defs.' Reply SOF ¶ 211.

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217. Before EITs could be applied to any detainee, the CIA had to grant specific legal approval. (*Id*., Exh. 3, Rodriguez Tr. at 167:15-19, 169:4-8; Exh. 4, Rizzo Tr. at 60:10-25, 85:1-12, 187:2-25, 188:1-7.)

Contrary to Defendants' Fact #217, Defendant Jessen himself applied an "EIT" to Mr. Rahman without "specific legal approval" from the CIA. As part of his assessment of Mr. Rahman, Defendant Jessen used one of the methods that Defendants had proposed for use on Abu Zubaydah—a facial slap—"to determine how he would respond." Defendant Jessen concluded that Mr. Rahman "was impervious to it," and assessed that Mr. Rahman would not be "profoundly and permanently affected" by the use of any of the methods Defendants had proposed for use on Abu Zubaydah. Watt Decl., Exh. F (Jessen Dep.) 238:22–241:15, 211:7–15.

Defendants' Reply: Plaintiffs do not create a factual dispute. Plaintiffs do not dispute that Dr. Jessen was authorized by COABLT's COB to apply the facial slap to determine if Rahman would respond to EITs. Defs.' Reply SUF ¶ 294.

218. The CIA advised Drs. Mitchell and Jessen, and all other CIA officers involved in the EIT Program (*i.e.*, the program wherein EITs were applied to Zubaydah and other HVDs), that EITs were not authorized for use without specific and prior HQS approval. (*Id*., Exh. 30 at US Bates 001593.)

Contrary to Defendants' Fact #218, the CIA program was not limited to HVDs, and was not applied "without specific and prior HQS approval" for, inter

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alia, the reasons stated in Plaintiffs' objection to Defendants' Fact #217.

219. It was important to "fully document in advance any decision to employ any [EITs]" and the criteria that were employed in making those decisions. (*Id.*, Exh. 52 at US Bates 002030.)

Undisputed.

220. The use of specific EITs would be authorized only where, "in light of the specific interrogator's experience with those procedures and the specific detainee's own characteristics", the techniques would not cause severe physical injury, death, or prolonged mental harm continuing for a period of months or years. (Tompkins Decl., Exh. 52 at US Bates 002029; Tompkins Decl., Exh. 1, Mitchell Tr. at 158:17-159:1; 409:21-410:3.)

Contrary to Defendants' Fact #220, the CIA had no way of authorizing "specific EITs" on the basis that they "would not cause . . . prolonged mental harm continuing for a period of months or years." The CIA itself acknowledged that:

> While it would "make every effort possible to ensure that subject is not permanently physically or mentally harmed but we should not say at the outset of this process that there is no risk."

ECF No. 182-25 (U.S. Bates #001771). The CIA's "presumption" that prisoners would recover was based in part on studies proposed by Defendants for CIA

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consideration of members of the U.S. military who had volunteered to undergo SERE training - though Defendants knew the effect of their methods might be different for prisoners than for volunteers. Watt Decl., Exh. F (Jessen Dep.) 127:11–24.

Defendants' Reply: Plaintiffs do not dispute that ECF 177-12, Tompkins Decl., Exh. 52 at US Bates 002029 is accurately quoted. Furthermore, Plaintiffs' response is not germane to the stated fact, which is when specific EITs were authorized—not whether there was any risk that Zubaydah could be harmed by the use of EITs, which is what ECF 182-25, Ladin Decl., Exh. Y at US Bates 001771 discusses. Additionally, Plaintiffs misrepresent Dr. Jessen's testimony as fully explained in Defendants' Reply to ¶ 105.

221. All cables from a black-site were reviewed by the Chief of Base prior to being sent to HQS. (Id., Exh. 2, Jessen Tr. at 143:5-13.)

Undisputed.

222. Rodriguez explained that cables requesting approval for the application of EITs would go to multiple people in the chain of command at CIA HQS, including Rodriguez, who had to approve any such requests. (*Id*., Exh. 3, Rodriguez Tr. at 167:16-19, 167:20-168:3.)

Undisputed.

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223. For certain techniques, specifically water boarding, the Director of the CIA would also have to approve, in advance, usage of the technique. (*Id*., Exh. 3, Rodriguez Tr. at 166:17-167:7.)

Undisputed.

224. The CIA put this detailed approval process in place because the CIA considered EITs serious and did not want them applied without approval of the "highest levels of the agency." (*Id*., Exh. 3, Rodriguez Tr. at 167:7-14.)

Undisputed.

225. Drs. Mitchell and Jessen understood that they were the only individuals authorized to administer EITs until around November-December 2002. (Mitchell Decl. ¶ 10; Jessen Decl. ¶ 5.)

Undisputed.

226. The CIA conducted training in "High-Value Target" interrogation techniques in late 2002. The training was designed, developed, and conducted by individuals other than Drs. Mitchell and Jessen from CTC, and Drs. Mitchell and Jessen played no role in the interrogation training. Individuals from JPRA were instructors at this training. (Tompkins Decl., Exh. 66 at US Bates 002595-663; Exh. 67 at US Bates at 2667.)

Undisputed.

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227. Although this approval process was in place starting in 2002, on January 31, 2003, CIA Director Tenet, upon the advice of the CIA's then-General Counsel Scott Muller, sent formalized guidelines for interrogations of detainees held pursuant to the MON to all CIA black-sites ("Guidelines"). The CTC/LGL Department drafted these guidelines. (Rizzo Decl. ¶ 51; Exh. L at US Bates 001856; Exh. N at US Bates 001170-74; Tompkins Decl., Exh. 4, Rizzo Tr. at 63:18-22, 81:4-19, 186:4-21; Exh. 3, Rodriguez Tr. at 170:17-171:9)

Undisputed.

228. The Guidelines distinguished between "Standard Techniques" and "Enhanced Techniques." Standard Techniques were determined by HQS and included isolation, sleep deprivation (up to 72 hours), reduced diet, loud music, and the use of diapers. Whenever feasible, Standard Techniques required advanced approval, and "required _______ in cable traffic." (Rizzo Decl., Exh. N at US Bates 001171-72; Tompkins Decl., Exh. 4, Rizzo Tr. at 189:6-24.)

Undisputed.

229. "Enhanced Techniques" also were determined by HQS and included the attention grasp, walling, facial hold, facial slap, abdominal slap, cramped confinement, wall standing, stress positions, sleep deprivation (beyond 72 hours), use of diapers for prolonged periods, use of harmless insects, and the water board. "Enhanced Techniques" required advanced approval. They also could only be used "with appropriate medical and psychological participation[.]" And the

1 participating medical personnel was selected by HQS. (Rizzo Decl., Exh. N at
2 US Bates 001170-74; Tompkins Decl., Exh. 4, Rizzo Tr. at 190:13-25, 191:1-21;
3 Exh. 3, Rodriguez Tr. at 80:15-20.)
4
5 Undisputed.
6
7 **230.** The Guidelines were sent to all CIA locations, including COBALT,
8 and all CIA personnel involved in interrogations or detentions was required to
9 review and acknowledge them. (Rizzo Decl. ¶ 56; Exh. L at US Bates 001856.)
10
11 Undisputed.
12
13 **231.** Drs. Mitchell and Jessen were not aware that the Guidelines were
14 sent to COBALT in January 2003. (Mitchell Decl. ¶ 12; Jessen Decl. ¶ 8.)
15
16 Undisputed.
17
XV. PROCEDURE FOR APPLICATION OF EITS
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19 **232.** Drs. Mitchell and Jessen were under the direct operational
20 supervision of the Chief and Deputy Chief of the CIA's Rendition, Detention and
21 Interrogation Group ("RDI"), who determined how, when, where, for how long,
22 and in what capacity, Drs. Mitchell and Jessen were deployed. (Tompkins Decl.,
23 Exh. 31 at US Bates 001594.)
24
25 Undisputed.
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233. The COB at each black-site was responsible for the overall management and supervisory duties of an interrogation team, including Drs. Mitchell and Jessen, and for the specific interrogation plan. (Rodriguez Decl. ¶ 77-78; Tompkins Decl., Exh. 33 at US Bates 001628.)

Undisputed.

234. Drs. Mitchell and Jessen reported to the COB. All communications between the field and HQS flowed through the COB up the chain to the Chief of Station, then to CTC, and then to the Director of the CIA. (Tompkins Decl., Exh. 2, Jessen Tr. at 151:12-23.)

Undisputed.

235. As independent contractors, Drs. Mitchell and Jessen did not make decisions. The CIA hires independent contractors who are subject matter experts. Drs. Mitchell and Jessen gave the CIA knowledge that it did not possess and made recommendations, but the ultimate decision makers were always the CIA staff and CTC leadership.

> Q: Were they – did you tell them that they were not, that they were not the ones to decide who the enhanced interrogation techniques would be used on? A: They were contractors, independent contractors. Everybody knows that independent contractors don't make decisions, that the staff people are the ones making decisions.

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(Tompkins Decl., Exh. 3, Rodriguez Tr. at 126:6-17, 160:15-19; Tompkins Decl., Exh. 1, Mitchell Tr. at 248:21-23, 253:22-257:19.)

Undisputed.

236. Rodriguez testified that Drs. Mitchell and Jessen acted under the direction of the CIA. (*Id.*, Exh. 3, Rodriguez Tr. at 181:19-25, 250:5-19; Exh. 33 at US Bates 001628.)

Undisputed.

237. More specifically, Drs. Mitchell's and Jessen's responsibilities included only the following:

a. Conduct psychological interrogation assessment of a detainee and report the findings of the assessment to HQS;
b. Assist the interrogation team in developing an interrogation plan based upon the PIA;
c. Monitor the psychological progress of the detainee during the interrogation process;
d. Assist the team interrogation with planning the transition of a detainee towards debriefing;
e. Act as a member of the interrogation team providing psychological advice to the interrogators and the team leader; and
f. Act as an active member of the interrogation team with "hands-on" the detainee during the interrogation process.

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1 (Tompkins Decl., Exh. 30 at US Bates 001592.)
2
3 Contrary to Defendants' Fact #237, the record shows that Defendants' role
4 was far broader: "Drs. Mitchell and Jessen played a significant and formative role
5 in the development of CTC's detention and interrogation program." ECF No.
6 183-9 (U.S. Bates #001629). Defendants were involved in training other
7 interrogators in how to use their methods. Watt Decl., Exh. D (Rizzo Dep.)
8 67:11–17. Defendants were also involved in developing and refining the program
9 at various times, including personally advising and recommending specific
10 coercion methods to CIA Director George Tenet Secretary of State Rice. Watt
11 Decl., Exh. C (Mitchell Manuscript) at MJ00022637 ("Less than a week later
12 after CTC had decided to move ahead with efforts to incorporate SERE
13 interrogation techniques into the CIA's interrogation program, Jose asked me to
14 accompany him to go see CIA Direct, George Tenet."); ECF No. 183-11 (U.S.
15 Bates #001175-77) (memorializing June 6, 2007 meeting between Defendants,
16 Rizzo and Secretary of State Rice concerning the interrogation program and
17 Defendants' sleep deprivation method).
18
19
20 **Defendants' Reply**: Plaintiffs' response misrepresents the record.
21 Plaintiffs admit that in 2002, the CIA conducted training that was designed,
22 developed, and conducted by individuals from CTC other than Drs. Mitchell and
23 Jessen, and that Drs. Mitchell and Jessen played no role in the interrogation
24 training. Defs.' Reply SUF ¶ 226. Also, Dr. Mitchell testified that he was not
25 involved in training or mentoring until later, after 2005. ECF 191, Paszamant
26

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Decl. Exh. 2, Mitchell Dep. 343:6-344:11. Defendants further object to Dr. Mitchell's meeting with Director Tenet as "refining the program" when EITs had not yet been approved or used and object to the use of Defendants' 2007 meeting with Secretary Rice as irrelevant to the resolution of the issues presented in Defendants' Motion (Fed. R. Evid. 401, 402) because as of August 2004, Plaintiffs were not in CIA custody. Defs.' Reply SUF ¶¶ 273, 277-78, 324.

238. Interrogation plans, or changes to an interrogation plan, were approved by the COB and then approved by all of his or her superiors. (Id., Exh. 2, Jessen Tr. at 151:12-23; Tompkins Decl., Exh. 3, Rodriguez Tr. at 246:2-12 (stating the CIA "were the ones that provided [Drs. Mitchell and Jessen] the plan. We were the ones that told them, look, we can use these interrogation techniques on these [specific] individuals"); Tompkins Decl., Exh. 73 at MJ000022623.)

Undisputed.

239. "Prior to an interrogation team using EITs, the Site Manager, in coordination with the interrogation team, formulate[d] an interrogation plan, submit[ed] the plan to HQS for approval by the [Director], and approval authority must be submitted to the Site prior to any methods being used. A detailed interrogation after action report [was] submitted at the conclusion of each interrogation session." (Tompkins Decl., Exh. 34 at US Bates 001635.)

Undisputed.

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240. Interrogation decisions were made by the "interrogation team," which itself was required to "consult closely with CTC/LGL as to the specific means and methods envisioned" to "ensur[e] the fullest possible acquisition of critical intelligence and the full legal protection of our officers." (Tompkins Decl., Exh. 55 at US Bates 002171.)

Undisputed.

241. The interrogation process entailed an ongoing "discussion," with CIA cables refining the proposed interrogation plan and "request[ing] HQS concurrence." (Tompkins Decl., Exh. 50 at US Bates 002018; Tompkins Decl., Exh. 40 at US Bates 001770-72, Tompkins Decl., Exh. 51 at US Bates 002019; Tompkins Decl., Exh. 1, Mitchell Tr. at 248:14-17.)

Undisputed.

242. The CIA maintained control over whether any EIT was used upon an HVD, including Zubaydah, and under what circumstances. Indeed, CTC was "[c]learly … in charge of the operation," and was also "providing the legal oversight." (Tompkins Decl., Exh. 30 at US Bates 001593; Exh. 31 at US Bates 001594; Exh. 3, Rodriguez Tr. at 181:4-13; Exh. 4, Rizzo Tr. at 192:23-25, 193:1-17; Exh. 69, Exhibit 20 to the Mitchell Tr.; Rodriguez Decl. ¶ 78; Exh. Q at US Bates 001891; Tompkins Decl., Exh. 34 at US Bates 001635-36.)

Contrary to Defendants' fact #242, the CIA recognized that the interrogation process was "fluid" (U.S. Bates 001644) and that interrogators had

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"discretion on the type and frequency" of the methods used on detainees. ECF No. 177-21 (U.S. Bates #002357).

Defendants' Reply: Plaintiffs do not contest that Defendants accurately quoted ECF 175-17, Rodriguez Decl., Exh. Q at 001891. Plaintiffs also misrepresent the record. ECF 177-39, Tompkins Decl. Exh. 79, US Bates 001644 discusses Zubaydah's upcoming interrogation and states that "the COB will be responsible for all aspect of [REDACTED] and equipped to make immediate decisions in response to the fluid nature of the interrogations." This does not conflict with the CIA maintaining control over the use of EITs on HVDs and Zubaydah. Furthermore Plaintiffs admit that the CIA had control of Defendants: the CIA asked Defendants to apply the EITs and Defendants' actions were controlled by the CIA. Defs.' Reply SUF ¶¶ 114, 178-81. Specifically, Plaintiffs admit that after days of using EITs on Zubaydah, Defendants recommended they stop using EITs on Zubaydah, but the CIA ordered Defendants to continue. Defs.' Reply SUF ¶¶ 190-207.

243. The purpose of the EITs was to get the detainee to cooperate and talk. They were applied starting with the least intrusive, and throughout the interrogation, the detainee was constantly asked if they would cooperate. (Tompkins Decl., Exh. 2, Jessen Tr. at 122:14-123:16, 124:1-11, 126:10-14.)

Contrary to Defendants' Fact #243, Defendants contemporaneously stated that the purpose of their methods was "to instill fear and despair" in order to obtain information. ECF No. 182-8 (U.S. Bates #001110).

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Defendants' Reply: Plaintiffs do not create an issue of fact where they admit that the July 2002 Memo stated the "[t]he aim of using these techniques is to dislocate the subject's expectations concerning how he is apt to be treated and instill fear and despair. *The intent is to elicit compliance by motivating him to provide the required information*, while avoiding permanent physical harm or profound and pervasive personality change." Defs.' Reply SUF ¶ 128 (emphasis added).

244. During the HVD interrogations, the CIA required a medical doctor be present in the room when any EITs were being used to make sure that no harm came to the detainee and that if there was a medical emergency, there would be someone that could treat it. (*Id.*, Exh. 3, Rodriguez Tr. at 170:6-16.)

Defendants' Fact #244 is incorrect and misleading without the clarification that there is no evidence that a medical doctor had any way of discerning, while Defendants' methods were being used, whether any long-term mental harm, such as post-traumatic stress disorder (PTSD), might result from the infliction of Defendants' methods. Watt Decl., Exh. X (Morgan Dep.) 26:5-22 (PTSD only diagnosable 30-day after a Criterion-A traumatic event).

Defendants' Reply: Plaintiffs' response does not contradict Defendants' asserted fact or create an issue of fact—specifically that a medical doctor had to be present in the room when EITs were being used. Plaintiffs' response is also misleading. The cited testimony from Dr. Charles A. Morgan does not discuss whether a medical doctor had any way of discerning if Defendants' methods

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might result in PTSD. Rather, Dr. Morgan was merely describing "another set of symptoms" called "hyper arousal" that may also indicate the presence PTSD. Dr. Morgan testified that "a physician will assess those kinds of symptoms and then assess whether those symptoms have been around for a sufficient period of time, at least 30 days." Even after that time has passed, there still has to be "some assessment of whether or not those symptoms have made a significant impact on the person's life … to have a diagnosis" of PTSD. ECF 195-23, Watt Decl., Exh. X (Morgan Dep.) 26:5-22.

XVI. MVD/LVD PROGRAM IS DEVELOPED SEPARATELY

245. Drs. Mitchell and Jessen were initially contracted for Zubaydah's interrogation. Only after Zubaydah's interrogation did they learn that the CIA had interrogation efforts at other locations. (Tompkins Decl., Exh. 2, Jessen Tr. at 138:1-11, 139:14-22; Exh. 4, Rizzo Tr. at 180:1-2.)

Contrary to Defendants' Fact #245, during Abu Zubaydah's interrogation Defendants advocated for their methods to be used as a "template" for other interrogations. ECF No. 182-13 (U.S. Bates #002023) ("The aggressive phase [] should be used as a template for future interrogation of high value captives.") From the outset, Defendant Mitchell agreed to "help put together an interrogation program using EITs."); Watt Decl., Exh. C (Mitchell Manuscript) at MJ00022631 (Defendant Mitchell: "A day or so later Rodriguez asked me if I would help put together an interrogation program using EITs. I told him I would .

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. . ."); Watt Decl., Exh. A (Rodriguez Tr.) 53:19-21 ("Q. So you agree that Dr. Mitchell was the architect of the CIA interrogation program? A. Yes.").

Defendants' Reply. As fully explained in Defendants' Reply SUF ¶ 208, Plaintiffs' statement that Defendants advocated for their methods to be used as a "template" is not supported by the record. Similarly, the sources cited by Plaintiffs all discuss a "program" in the context of interrogating only Zubaydah. Defs.' Reply SUF ¶ 130. And Plaintiffs' response does not create a factual dispute as to when Defendants learned that the CIA had interrogation efforts at other locations.

246. In fact, they did not find out that interrogations were going on at other locations until they arrived at those locations. (*Id.*, Exh. 2, Jessen Tr. at 267:21-268:6; 269:12-13; 270:2-4; Exh. 4, Rizzo Tr. at 204:3-10; Rodriguez Decl. ¶¶ 95-96.)

Defendants' Fact #246 is misleading to the extent it implies that Defendants were unaware that other interrogations were part of the CIA program, even if they were unaware of specific other locations. *See*, January 2003 interrogation Guidelines sent by the Director of the CIA governed interrogations of all CIA prisoners and were and directed to "all agency personnel who are engaged in these activities." ECF No. 182-32 (U.S. Bates #001170-71). During Abu Zubaydah's torture, Defendants urged that it be used as a template, and immediately afterwards consulted on expansion of the program. ECF No. 182-13 (U.S. Bates #002023).

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Defendants' Reply. As fully explained in Defendants' Reply SUF ¶ 208, Plaintiffs' statement that Defendants advocated for their methods to be used as a "template" is not supported by the record. Additionally, Plaintiffs' citation to the undisputed content of the January 2003 Guidelines does not support an inference that Defendants knew other interrogations were occurring. Plaintiffs admit that Defendants were not at all involved with the creation or circulation of those Guidelines. Defs.' Reply SUF ¶ 227. And, Plaintiffs admit that Defendants were not aware that the Guidelines were sent to COBALT in January 2003. Defs.' Reply SUF ¶ 231. Furthermore, Plaintiffs do not identify when Defendants—independent contractors—became aware of the January 2003 Guidelines.

247. Drs. Mitchell and Jessen were not involved in developing any interrogation program used at other locations and they did not provide suggestions for any such program. (Tompkins Decl., Exh. 2, Jessen Tr. at 267:21-268:6; Exh. 4, Rizzo Tr. at 203:20-204:10; Rodriguez Decl. ¶¶ 95-96.)

Defendants' Fact #247 is misleading to the extent it suggests that there were separate interrogation programs used at different CIA black-site locations. There was no separate program apart from the methods that Defendants had initially recommended for Abu Zubaydah and which were later standardized throughout the CIA program. Watt Decl., Exh. D (Rizzo Dep.) 101:20–102:15; ECF No. 182-32 (U.S. Bates #001170–72); Watt Decl., Exh. D (Rizzo Dep.) 64:8–23. The CIA Guidelines were sent to COBALT. ECF No. 182-32 (U.S. Bates #001170–74); ECF No. 176-25 (OIG) at U.S. Bates# 001394 ("The Site

Manager [Cobalt] received a copy of the DCI's Interrogation Guidelines in January 2003 and certified that he had read them."); ECF No. 183-9 (U.S. Bates #001629) ("Drs. Mitchell and Jessen played a significant and formative role in the development of CTC's detention and interrogation program").

Defendants' Reply: Plaintiffs' response is not supported by the record. Plaintiffs admit that the interrogation methods used at COBALT were different from the EITs proposed by Defendants. Defs.' Reply SUF ¶ 265. Furthermore, the interrogation techniques used on Plaintiffs—some of which occurred after the January 2003 Guidelines—were different from the EITs proposed by Defendants. ECF 192, Defs.' Resp. to Pls.' SUMF ¶¶ 92-94, 97-98, 114-19. And, Plaintiffs admit that Defendants were not aware that the Guidelines were sent to COBALT in January 2003. Defs.' Reply SUF ¶ 231. Furthermore, Plaintiffs do not identify when Defendants—independent contractors—became aware of the January 2003 Guidelines.

248. The interrogation program was compartmentalized and Drs. Mitchell and Jessen did not have access to information outside their assignments. They did not know what the CIA was doing elsewhere or to whom the CIA was doing it. (Tompkins Decl., Exh. 2, Jessen Tr. at 200:10-24, 267:21-268:6, 278:1-7.)

Contrary to Defendants' Fact #248, Defendants were sent the same standardized guidelines that were sent to all interrogators at all CIA prisons. Those guidelines made clear that Defendants' program had been standardized throughout CIA prisons. *See* ECF No. 182-32 (U.S. Bates #001170-74)

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1 (addressing "the conduct of interrogations of persons who are detained" using
2 Defendants' methods, with no mention of different programs). Defendants were
3 involved in training other interrogators in using their methods, Watt Decl., Exh.
4 D (Rizzo Decl.) 67:11–17. Defendants were also involved in developing and
5 refining the program at various times, including personally advising on and
6 recommending their coercive methods to CIA Director George Tenet and
7 Secretary of State Rice. Watt Decl., Exh. C (Mitchell Manuscript) at
8 MJ00022637 ("Less than a week later after CTC had decided to move ahead with
9 efforts to incorporate SERE interrogation techniques into the CIA's interrogation
10 program, Jose asked me to accompany him to go see CIA Direct, George
11 Tenet."); ECF No. 183-11 (U.S. Bates #001175-77) (memorializing June 6, 2007
12 meeting between Defendants, Rizzo and Secretary of State Rice).
13
14
15 The record also specifically refutes the second sentence of Defendants'
16 Fact #248. For example, Defendant Jessen was sent to COBALT on an
17 assignment to evaluate a different detainee (who he describes as a "medium value
18 detainee"), when he came in contact with Mr. Rahman. Watt Decl., Exh. F
19 (Jessen Dep.) 200:19-24 ("[A]nd in fact, they did use that term because the
20 individual they had sent me there to talk to, not Gul Rahman, but another person,
21 they – when I got there, they identified him as a MVD."). Around the same time,
22 Defendant Mitchell also participated in Mr. Rahman's interrogation at COBALT.
23 See Watt Decl., Exh. C (Mitchell Manuscript) MJ00022683-84.
24
25 **Defendants' Reply**: Plaintiffs' response is not germane to the fact
26

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asserted: that Defendants did not have access to information outside their assignments. The January 2003 Guidelines do not establish that Defendants knew what was occurring at black-sites where they were not present or did not know existed, especially when Plaintiffs admit that Defendants were not at all involved with the creation or circulation of those Guidelines. Defs.' Reply SUF ¶ 227. Similarly, Dr. Jessen's presence at COBALT for an assignment in November 2002 does not establish, or support an inference, that he later received any information about what occurred at COBALT or other CIA detention facilities when Defendants were not present, as Plaintiff admit he never returned to COBALT. Defs.' Reply SUF ¶ 287, 312. Furthermore, Plaintiffs do not identify when Defendants—independent contractors—became aware of the January 2003 Guidelines.

Defendants were also not involved in training while Plaintiffs were in CIA custody or involved in "refining the program" as explained in Defendants' Reply to ¶ 237.

249. A medium-value detainee ("MVD") is defined as an enemy of the U.S.: someone involved in war against the U. S. but who may not have the level of intelligence that represents an immediate threat to our country. (*Id.*, Exh. 3, Rodriguez Tr. at 145:14-21, 145:5-9.)

Undisputed.

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250. A low-value detainee ("LVD") is also defined as an enemy of the U. S., but is a lesser combatant, a facilitator person who is not as dangerous as a MVD. (*Id*., Exh. 3, Rodriguez Tr. at 145:25-146:4, 145:5-9.)

Undisputed.

251. The CIA started classifying detainees as HVD, MVD, and LVD after Zubaydah—the first HVD—was captured. (*Id*., Exh. 3, Rodriguez Tr. at 146:15-23.)

Undisputed.

252. A detainee was categorized upon capture. (Tompkins Decl., Exh. 3, Rodriguez Tr. at 164:6-15.)

Contrary to Defendants' Fact #252, detainees' categorizations could change after capture and also after interrogation. For example, a contemporaneous CIA report states that:

> Several medium value detainees have been detained and interrogated at COBALT. For example . . . Ammar al-Baluchi. . . . Although these individuals were not planners, they had access to information of particular interest, and the Agency used interrogation techniques at COBALT to seek to obtain this information."

ECF 176-25 (OIG) at U.S. Bates #001392-93 (Re-processed: Apr. 11, 2017).

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Defendant Jessen was "involved in Ammar al-Baluchi's enhanced interrogations." After "[t]he rough stuff was over," Defendant Mitchell "help[ed] debriefers elicit his cooperation." Watt Decl., Exh. C (Mitchell Manuscript) at MJ00022811. Years later, Defendant Mitchell wrote that al-Baluchi was a "high value detainee." Id. at MJ00022822.

Defendants' Reply: Plaintiffs' response does not dispute the fact that detainees were categorized upon capture.

XVII. COBALT

253. CTC approved the funding to establish a detention facility known as COBALT in June 2002. COBALT was not designed to house HVDs. (Rodriguez Decl., Exh. S at US Bates 001275; Tompkins Decl., Exh. 4, Rizzo Tr. at 85:16-22.)

Contrary to Defendants' Fact #253, a contemporaneous CIA report states that "COBALT functions as a detention, debriefing, and interrogation facility for high and medium value targets." ECF No. 176-25 (OIG) at U.S Bates #001343 (Re-processed: April 11, 2017) U.S. Bates 001343. COBALT was also described as "designed to hold 12 high-profile detainees, with the capacity of holding up to 20. The Station viewed the proposed facility as a way to maximize its efforts to exploit priority targets for intelligence and imminent threat information." Id. At U.S Bates #001387.

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254. COBALT was not in the United States. (Tompkins Decl., Exh. 25 at US Bates 001372.)

Undisputed.

255. CIA Staff Officer (also known as the COB) was sent to COBALT in approximately August 2002, about one month before it was operational. (Tompkins Decl., Exh. 22 at US Bates 001113, 001116, 001123; Rodriguez Decl., Exh. S at US Bates 001276; Jessen Decl. ¶ 7.)

Undisputed.

256. COBALT's COB was responsible for the final construction details of COBALT. (Tompkins Decl., Exh. 22 at US Bates 001123.)

Undisputed.

257. The COB also was the COBALT "site manager" responsible for detainee affairs, including coordinating interrogations and renditions at COBALT and devising the operational procedures for COBALT. (Tompkins Decl., Exh. 22 at US Bates 001123-24.)

Undisputed.

258. When detainees arrived at COBALT, it was the COB's responsibility to interrogate them. (Rodriguez Decl., Exh. S at US Bates 001289, 001282.)

Undisputed.

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259. Before his deployment, the COB had been briefed on the CIA's prohibition against torture, being vigilant to ensure there is no torture, and the fact that it was permissible to use certain tactics in debriefing that cannot injure, threaten with death, or induce lasting physical damage to the detainees. (Rodriguez Decl., Exh. S at US Bates 001283.)

Undisputed.

260. Yet, COB had no formal instruction relating to interrogations until April 2003, although he had spent four days as a trainee during SERE training. The SERE training provided the COB with some understanding as to how prisoners would react to various handling, treatment, and interrogation methods. (Rodriguez Decl., Exh. S at US Bates 001282; Tompkins Decl., Exh. 22 at US Bates 001114.)

Undisputed, with the clarification that in January 2003, the COB at COBALT acknowledged that he had received and read the Interrogation Guidelines, which contained Defendants' methods. ECF No. 176-25 (OIG) at U.S. Bates #001394 ("The Site Manager [COBALT] received a copy of the DCI's Interrogation Guidelines in January 2003 and certified that he had read them.")

261. From Mid-2002 through November 2002, COBALT's guidance on what could be done during interrogations was based entirely on a cable drafted by a CTC officer in July 2002 while interrogating a particularly obstinate detainee. That officer proposed the use of darkness, sleep deprivation, solitary confinement,

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and noise. CIA HQS approved that proposal because no permanent harm would result from any of the proposed measures. (Tompkins Decl., Exh. 25 at US Bates 001391; Rodriguez Decl., Exh. S at US Bates 001284-85.)

Contrary to Defendants' Fact #261, Defendant Jessen himself offered guidance on and proposed the use of Defendants' methods at COBALT. While at COBALT, 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" to a prisoner held there. Watt Decl., Exh. S (U.S. Bates #001287). In addition, Plaintiffs object to Defendants' Fact #261 to the extent that Defendants claim the CIA accurately determined that "no permanent harm would result from any of the proposed measures." No evidence supports the accuracy of any such determination.

Defendants' Reply: Plaintiffs' response does not contradict Defendants' asserted fact or create an issue of fact. Plaintiffs admit that Dr. Jessen did not arrive at COBALT until November 2002 and thus Dr. Jessen's actions at COBALT have no bearing on how interrogations were conducted at COBALT before his arrival.

262. The COB decided that the detainees in COBALT would remain in darkness because there was only one light switch for all the lights in the cell area. "Faced with the choice to keep them on all the time or off all the time, he chose

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the latter." (Tompkins Decl., Exh. 19 at US Bates 001082; Exh. 22 at US Bates 001126.)

Undisputed.

263. The COB also decided to play loud music at COBALT. When he arrived at COBALT, the COB determined that detainees could be heard from adjoining cells, so noise masking was necessary. The COB purchased the stereo. (Tompkins Decl., Exh. 19 at US Bates 001082-83; Exh. 22 at US Bates 001114, 001126.)

Undisputed.

264. The individuals managing COBALT, including the COB, reported to the CIA every other day or when issues arose. Someone from Station management visited COBALT about once a month. (Rodriguez Decl., Exh. S at US Bates 001283.)

Undisputed.

265. The interrogation methods used at COBALT were different than the EITs:

a. When detainees first arrived at COBALT, the COB suggested and participated in a "mock execution" in an attempt to shake up the detainees. The COB also discharged a firearm while an officer lay on the floor and chicken blood

was splattered on the wall. (Rodriguez Decl., Exh. S at US Bates 001324-25.)

b. A technique referred to as "water dousing" was utilized in which the detainee is laid down on a plastic sheet or towel and water is poured on the detainee from a container while the interrogator questions the detainee. Water is applied so as not to enter the nose or mouth and interrogators were not supposed to cover the detainee's face with a cloth. Water dousing was proposed by someone other than Drs. Mitchell and Jessen in March 2003. (Tompkins Decl., Exh. 70 at MJ00008347.)

Contrary to Defendants' assertion in Fact #265 that the methods used at COBALT were "different than the EITs," the record establishes that the methods initially included both "EITs" and other methods. At COBALT, in January 2003, the CIA included all of Defendants' methods in the Interrogation Guidelines. ECF No. 182-32 (U.S. Bates #001170-74); ECF No. 176-25 (OIG) at U.S. Bates #001394. CIA records confirm that interrogators subjected Plaintiffs to Defendants' methods at COBALT. ECF No. 183-2 (U.S. Bates #001567 (Salim), 001577 (Gul Rahman), 001580 (Ben Soud)).

Defendants' Reply: Plaintiffs' response is not supported by the record. The interrogation techniques used on Plaintiffs were different from the EITs proposed by Defendants. ECF 192, Defs.' Resp. to Pls.' SUMF ¶¶ 92-94, 97-98,

114-19.

XVIII. SULEIMAN ABDULLAH SALIM

266. In or around 1994, Suleiman Abdullah Salim ("Salim") traveled to a training camp in Afghanistan that was operated by an organization known as Harkati Hansar, which the U.S. government considered a terrorist training camp. (Tompkins Decl., Exh. 5, Deposition of Suleiman Abdullah Salim ("Salim Tr.") at 114:3-4, 114:19-20, 116:3-24 120:10-11; Exh. 26 at US Bates 1534.)

Plaintiffs object to Defendants' Fact #266 on the grounds of relevance, undue prejudice, hearsay (US Bates #1534 paraphrases "custodial debriefing sessions"), and as information elicited under torture (US Bates #1534 contains information elicited during a period in which Mr. Salim was repeatedly tortured). Watt Decl., Exh. Z (Salim Tr.) 154:5 – 159:1, 163:15 – 165:13, 165:21 - 168:12, 170:24 – 171:10; ECF No. 183-3 (U.S Bates #1609).

Without waiving those objections, Plaintiffs object that Defendants' Fact #266 is misleading without clarification: Mr. Salim testified that he was present in Harkati Ansar camp "between 1993 or 1994," as a result of a misapprehension. At the time, Mr. Salim had a severe drug problem, and had been lead to believe that he could attend a mosque in Pakistan where he would receive education and assistance through prayer to help him stop using drugs. When Mr. Salim arrived in Pakistan, he was told that he would have to travel to Afghanistan instead. Once at the camp, Mr. Salim received one-day of "training" in firing a rifle. He

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1 refused to participate in any further training, but had to remain in the camp until
2 he was provided with a ticket home. Watt Decl., Exh. Z (Salim Tr.) at 24:13-17,
3 43:7-10, 114:21 - 115:23, 118:23 – 119:1, 125:17 – 126:5, 126:15 – 128:14,
4 139:20 – 141:1.
5
6 **267.** Salim was at the Harkati Hansar camp with Fahid Mohamed Ally
7 Msalam. Msalam was considered by the U.S. government to be a 1998 East
8 African embassy bombing fugitive. (*Id*., Exh. 5, Salim Tr. at 120:10-11, 142:24-
9 143; Exh. 26 at US Bates 1534-1535.)
10
11 Plaintiffs object to Defendants' Fact #267 on the grounds of relevance,
12 undue prejudice, hearsay (US Bates 1534-35 paraphrases "custodial debriefing
13 sessions") and as information elicited under torture (US Bates 1534 contains
14 contains information elicited during a period in which Mr. Salim was repeatedly
15 tortured (Watt Decl., Exh. Z (Salim Tr.) 154:5 – 159:1, 163:15 – 165:13, 165:21
16 - 168:12, 170:24 – 171:10; ECF No. 183-3 (U.S Bates #1609)).
17
18 Without waiving those objections, Plaintiffs further object that Defendants'
19 Fact #266 is misleading without clarification: Mr. Salim knew Mr. Msalam as
20 "Fahid Mohamed" and was not aware of Mr. Mohamed's purported affiliation
21 with any al Qaeda activities. Mr. Salim did not travel to the camp in Afghanistan
22 with Mr. Mohamed; Mr. Mohamed was already there when Mr. Salim arrived.
23 Mr. Salim only saw Mr. Mohamed on a few occasions while he was at the camp.
24 They spoke only about Mr. Salim's desire to return home. (Salim Tr. 43:7-10,
25 41:9-11, 128:6-14, 140:15 – 142:3.)
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268. In 2003, Salim was arrested in Mogadishu, Somalia. He was taken to COBALT shortly after his arrest. Salim was detained at COBALT for approximately two months. (*Id.*, Exh. 5, Salim Tr. at 65:10-16; 93:19-94:10; 95:22-96:1.)

Undisputed.

269. At COBALT, Salim was interrogated by CIA agents. Salim alleges that CIA agents beat him in connection with the interrogation sessions, including punching and kicking. (*Id.*, Exh. 5, Salim Tr. at 153:5-9, 153:22, 154:5-8, 158:22-24, 165:6-14.)

Undisputed, with the clarification that CIA interrogators punched and kicked Mr. Salim as part of Defendants' "walling" method. Watt Decl., Exh. Z (Salim Tr.) 158:22-159:1, 165:6-166:9. ("tying a cloth around my neck and, then, they were punching me on the wall."); ("they tied a cloth on my neck and they were punching me[,]"("they were putting me down and kicking me).

Defendants' Reply: Plaintiffs' response is not supported by the record. Defendants' proposal for "walling" does not include being punched or kicked. Rosenthal Decl. Exh. 8, US Bates 001109-1111.

270. Salim asserts that he underwent the following interrogation techniques during his detention at COBALT: being put in a box; being stripped naked and having a light shined in his face; being put on the ground in a plastic bag while water was poured on him; having his rectal area knocked with a plastic

water jug; being tied to a table and spun around; being placed in boxes—one vertically oriented and one horizontally oriented; being tied or handcuffed to a wall; being handcuffed while naked; receiving an injection that rendered him unconscious, and having a cloth tied around his neck being punched while against a wall, and being hung from a pipe. He was not water-boarded. (Tompkins Decl., Exh. 5, Salim Tr. at 157:15-159:1, 166:20-168:12, 170:24-171:10; Rizzo Decl., Exh. O at US Bates 001609.)

Undisputed, with the clarification that CIA records confirm Mr. Salim was subjected to the following of Defendants' methods: sleep deprivation, water dousing, cramped confinement, facial slap, attention grasp, belly slap, and walling. ECF No. 183-2 (U.S. Bates #001567). Mr. Salim was also subjected to interrogation techniques that approximated Defendants' waterboarding technique, ECF 181 (Salim Decl.) ¶¶ 10, 14, and their sleep deprivation method, Watt Decl., Exh. Z (Salim Tr.) 166:20-24; Watt Decl., Exh. F (Jessen Dep.) 228:20–229:2; ECF No. 176-11 (OPR Report) at 126, 36 n.35.

Defendants' Reply: Plaintiffs' response is not supported by the record. The interrogation techniques used on Salim differed from the EITs proposed by Defendants. ECF 192, Defs.' Resp. to Pls.' SUMF ¶¶ 92-94, 97-98. Also, Plaintiffs admit water dousing was not proposed by Defendants. Defs.' Reply SUF ¶ 265; ECF 191, Paszamant Decl. Exh. 2, Mitchell Dep. 374:19-375:2. And there is no evidentiary support for Plaintiffs' assertion that "water dousing" was similar to the "water board." The July 2002 Memo describes the water board as

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follows: "individuals are bound securely to an inclined bench. Initially a cloth is placed over the subject's forehead and eyes. As water is applied in a controlled manner, the cloth is slowly lowered until it also covers the mouth and nose. Once the cloth is saturated and completely covering the mouth and nose, subject would be exposed to 20 to 40 seconds of restricted airflow. Water is applied to keep the cloth saturated. After the 20 to 40 seconds of restricted airflow, the cloth is removed and the subject is allowed to breach unimpeded. After 3 or 4 full breaths, the procedure may be repeated. Water is usually applied from a canteen cup or small watering can with a spout." Rosenthal Decl. Exh. 8, US Bates 001110-11. "Water dousing" on the other hand, as described by Mr. Salim, involved laying a detainee on a plastic sheet and pouring gallons of icy water on the detainee while being subject to physical assault. ECF 192, Defs.' Resp. to Pls.' SUMF ¶ 97.

271. Documents produced by the CIA indicate that the interrogation techniques to which Salim was subjected included sleep deprivation, nudity, attention grasp, abdominal slap, facial slap, cramped confinement, water dousing, and walling. (Rizzo Decl., Exh. O at US Bates 001609.)

Undisputed.

272. Salim does not know Defendants and was never in the same room as Defendants. (Tompkins Decl., Exh. 5, Salim Tr. at 173:10-18; 241:12-242:7; Exh. 72, Salim Interrogatories, Rog. 1.)

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Undisputed.

273. In or around March 2004, Salim was transferred from CIA custody to DOD custody at Bagram Air Force Base in Afghanistan. This transfer was made at the CIA's request. The CIA would only have relinquished custody in this way for MVDs. (Tompkins Decl., Exh. 5, Salim Tr. at 96:2 -97:3; Exh. 3, Rodriguez Tr. at 188:18-189:14; Exh. 27 at US Bates 001542-44.)

Contrary to the third sentence of Fact #273, the CIA transferred numerous "high value detainees" from its own custody to military custody. Watt Decl., Exh. C (Mitchell Manuscript) at MJ00022862. XIX. MOHAMED AHMED BEN SOUD.

Defendants' Reply: Plaintiffs misrepresent the record. The document cited by Plaintiffs indicates that on September 6, 2006, President Bush announced that all the existing CIA detainees had been moved into military custody at GTMO. ECF 182-5, Ladin Decl., Exh. E (Mitchell Manuscript) at MJ00022862. This does not support the inference that in March 2004 HVDs were being transferred to DOD custody at Bagram Air Force Base as Salim was transferred.

XIX. MOHAMED AHMED BEN SOUD

274. Mohamed Ahmed Ben Soud ("Ben Soud") was part of the Libyan Islamic Fighting Group ("LIFG"). (Tompkins Decl., Exh. 6, Deposition of Mohamed Ahmed Ben Soud ("Soud Tr.") at 22:17-22, 24:8-23, 43:5-12.)

1 Undisputed.
2
3 **275.** Through his dealings with LIFG, Soud had meetings with Abu Faraj
4 al-Libi, who Ben Soud knew was a member of Al-Qa'ida. (Tompkins Decl., Exh.
5 6, Soud Tr. at 100:20-103:8.)
6
7 Plaintiffs object to Defendants' Fact #275 on the grounds of relevance and
8 undue prejudice.
9
10 Without waiving those objections, Plaintiffs further object that Defendants'
11 Fact #275 is misleading without clarification: Mr. Ben Soud knew of Mr. al-Libi
12 as a Libyan also in Afghanistan. They interacted on a small number of occasions
13 when they met at a location known for socializing among Libyan nationals living
14 abroad. On occasions when they spoke, Mr. Ben Soud specifically told Mr. al-
15 Libi of Mr. Ben Soud's opposition to al Qaeda, which had a different mission
16 from LIFG. Watt Decl., Exh. AA (Ben Soud Dep.) 102:5 – 104:18.
17
18 **276.** After September 11, 2001, members of LIFG started cooperating
19 with Al-Qa'ida. (*Id.*, Exh. 6, Soud Tr. at 116:19-117:13.)
20
21 Plaintiffs object to Defendants' Fact #276 because it is misleading,
22 irrelevant, and unduly prejudicial. Mr. Ben Soud testified that in 2002, he
23 became aware that four members of LIFG began cooperating with al-Qaeda after
24 September 11, 2001. Watt Decl., Exh. AA (Ben Soud Dep.) 116:19 – 117:23,
25 118:23 – 119:3. The actions of these four individuals say nothing about Mr. Ben
26 Soud.

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1 **277.** Ben Soud was captured in Pakistan on April 3, 2003. (*Id.*, Exh. 6,
2 Soud Tr. at 97:6-9, 122:9-124:4, 132:6-12, 134:15-135:13, 156:11-18.)
3
4 Undisputed.
5
6 **278.** Ben Soud was transferred to CIA custody about two weeks after his
7 capture and taken to COBALT, where he remained a little over one year. (*Id.*,
8 Exh. 6, Soud Tr. at 161:21-162:16, 184:16-24.)
9
10 Undisputed.
11 **279.** In the first weeks of his detention at COBALT, Ben Soud was kept
12 in darkness, with loud music playing. He also claims to have undergone the
13 following: being shackled to a chained ring in the wall, being thrown against a
14 wall, being deprived of food, having ice water poured on him, being slammed and
15 punched, having his jaw forcibly held, being forced to walk on his broken leg,
16 and being hung by his hands. He was not water-boarded. (*Id.*, Exh. 6, Soud Tr.
17 at 214:22-215:21.)
18
19 Undisputed, except that contrary to the last sentence of Defendants' Fact
20 #279, Mr. Ben Soud was subjected to cramped confinement, as well as abuse that
21 approximated Defendants' waterboarding method, ECF 180 (Ben Soud Decl.) ¶
22 13. In addition, the hanging by the hands was part of Defendants' "sleep
23 deprivation" method. OPR, U.S Bates 00643) ("As initially proposed, sleep
24 deprivation was to be induced by shackling the subject in a standing position,
25 with his feet chained to a ring in the floor and his arms attached to a bar at head
26

1 level, with very little room for movement.”).
2
3 **Defendants’ Reply**: Plaintiffs’ response is not supported by the record.
4 There is no evidentiary support for Plaintiffs’ assertion that “water dousing” was
5 similar to the “waterboard”. Plaintiffs admit water dousing was not proposed by
6 Defendants. Defs.’ Reply SUF ¶ 265; ECF 191, Paszamant Decl. Exh. 2,
7 Mitchell Dep. 374:19-375:2. And Defendants’ July 2002 Memo describes the
8 water board as follows: “individuals are bound securely to an inclined bench.
9 Initially a cloth is placed over the subject’s forehead and eyes. As water is
10 applied in a controlled manner, the cloth is slowly lowered until it also covers the
11 mouth and nose. Once the cloth is saturated and completely covering the mouth
12 and nose, subject would be exposed to 20 to 40 seconds of restricted airflow.
13 Water is applied to keep the cloth saturated. After the 20 to 40 seconds of
14 restricted airflow, the cloth is removed and the subject is allowed to breach
15 unimpeded. After 3 or 4 full breaths, the procedure may be repeated. Water is
16 usually applied from a canteen cup or small watering can with a spout.”
17 Rosenthal Decl. Exh. 8, US Bates 001110-11. “Water dousing” on the other
18 hand, as described by Mr. Ben Soud, was when a detainee is laid down on a
19 plastic sheet and buckets of cold water are poured on the detainee until he is
20 partially submerged. ECF 192, Defs.’ Resp. to Pls.’ SUMF ¶ 117.
21
22
23 **280.** Document produced by the CIA state that the interrogation
24 techniques to which Ben Soud experienced included sleep deprivation, nudity,
25 dietary manipulation, facial hold, attention grasp, abdominal slap, facial slap,
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stress positions, cramped confinement, water dousing, and walling. (Rizzo Decl., Exh. D at U.S. Bates 1609.)

Undisputed.

281. Drs. Mitchell and Jessen did not interact with Ben Soud—in interrogations or otherwise—at COBALT. (Tompkins Decl., Exh. 6, Soud Tr. at 298:16-299:15; Exh. 72, Soud Interrogatory Answer 1.)

Undisputed.

282. Ben Soud was released to Libyan officials on August 22, 2004. (*Id.*, Exh. 6, Soud Tr. at 97:6-9, 122:9-124:4.)

Undisputed.

XX. PLAINTIFF GUL RAHMAN'S CAPTURE AND INTERROGATION

283. Gul Rahman ("Rahman") was a suspected Afghan extremist associated with the Hezbi Islami Gulbuddin organization and identified by CTC as being close with individuals who were members of Al-Qa'ida. Rahman was considered an Al Qa'ida facilitator and during his captivity admitted to fighting in the jihad. (Rodriguez Decl., Exh. S at US Bates 001271, 001277, 001279; Tompkins Decl., Exh. 3, Rodriguez Tr. at 196:7-24; Exh. 17 at US Bates 001076.)

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Plaintiffs object to Defendants' Fact #283 on the grounds of relevance, undue prejudice, hearsay, and as information elicited under torture. For example, with regard to Rahman's alleged admission, set forth in Fact #283, the report Defendants cite in support of their purported fact, ECF 182-35 (U.S. Bates #001076) states that:

> Rahman spent the days since his last session with station officers in cold conditions with minimal food and sleep. Rahman appeared somewhat incoherent for portions of this session … Rahman made several admissions and statements during the [] November session that are worthy of note. However, it must be taken into consideration that Rahman was somewhat confused due to fatigue and dehydration for portions of this interview.

Further, contrary to Fact #283, Mr. ObaidUllah testified that Mr. Rahman had nothing to do with al Qa'ida and that the information that the CIA had on Mr. Rahman was so flawed the agency even had his home province wrong. Watt Decl., Exh. BB (ObaidUllah Dep.) at 118:4-122:18.

Defendants' Reply: Plaintiffs misrepresent the testimony of Mr. Obaid Ullah, who conceded that he had no basis to know whether Rahman was associated with al-Qa'ida. Rosenthal Decl. Exh. 5, Ullah Dep. at 129:14-21 (A: I accept he was working. I can't accept that he was working with Al Qaeda. Q: But you have no idea, one way or the other, sitting her today, do you? . . . A: No, I don't.").

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284. Rahman was captured in Pakistan during an early morning raid in October 2002. (Rodriguez Decl., Exh. S at US Bates 001271, 1277.)

Undisputed.

285. A fellow-detainee where Rahman was originally detained identified Rahman. This precipitated Rahman's transfer to COBALT so that "HVTI interrogators can quickly outline and implement an interrogation plan." The CIA thought Rahman had a high level of information and Secretary of Defense Donald Rumsfeld asked for frequent updates. (Rodriguez Decl., Exh. S at US Bates 001278; Tompkins Decl., Exh. 2, Jessen Tr. at 205:1-7; Exh. 13 at US Bates 001055.)

Undisputed, with the clarification that Watt Decl., Exh. S (U.S. Bates 001278), which Defendants cite in support states that "Secretary of Defense Donald Rumsfeld had requested an update" with regard to Rahman, not "frequent" updates.

286. Dr. Jessen arrived at COBALT in early November 2002 to conduct an evaluation of a specific detainee to determine if EITs should be considered. The specific detainee was not Rahman. (Tompkins Decl., Exh. 22 US Bates 001124; Exh. 12 at US Bates 001048; Exh. 4, Rizzo Tr. at 103:24-25, 104:1-5; Rodriguez Decl., Exh. S at US Bates 001289.)

Undisputed.

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287. While Dr. Jessen was there, Rahman arrived at COBALT. (Tompkins Decl., Exh. 18 at US Bates 001087.)

Undisputed.

288. It was the COB's responsibility to monitor COBALT. Dr. Jessen was "not in charge." (Tompkins Decl., Exh. 2, Jessen Tr. at 184:16-185:2; Exh. 18 at US Bates 001082 (CIA Staff Officer (also known as COB) states, "he was placed in charge of detainee affairs"); Rodriguez Decl., Exh. S at US Bates 001285.)

Undisputed, except that Defendants' Fact #288 is misleading without the clarifications that Defendant Jessen was sent to COBALT to evaluate prisoners for the application of Defendants' methods. At COBALT, Defendant Jessen conducted such evaluations of prisoners, observed and participated in interrogations, made recommendations to COBALT staff regarding the use of specific methods and the running of the facility generally, and drew up interrogation plans for specific detainees, which he sent to CIA headquarters. The COBALT COB specifically asked Defendant Jessen for suggestions on the use of Defendants' methods; Defendant Jessen stated that he made such suggestions as "the guy with all the tricks." Watt Decl., Exh. S (U.S Bates #001289); ECF No. 181-36 (U.S Bates #1051-52), ECF No. 181-24 (U.S Bates #1124).

Defendants' Response: Plaintiffs misrepresent the record. ECF No. 182-

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1 36, Ladin Decl., Exh. JJ at US Bates 001052 indicates that during an interview
2 about his time at COBALT, Jessen referred to CIA Staff Officer as "the guy with
3 all the tricks." It does not indicate that Dr. Jessen was the "guy with all the
4 tricks." Nor is that description mentioned at all in the context of Dr. Jessen
5 making suggestions on the use of EITs. *Id.* In fact the documents cited by
6 Plaintiffs do not support their statement that the COB asked for suggestions on
7 the use of EITs or that Dr. Jessen provided such suggestions. Rather, the
8 documents indicate that Dr. Jessen indicated that COBALT needed to establish
9 operational procedures regarding "how often [detainees] get water, the
10 temperature of the facility, [and] how loud the noise will be." ECF No. 182-36,
11 Ladin Decl., Exh. JJ at US Bates 001052; ECF No. 182-34, Ladin Decl. at US
12 Bates 001124. Finally, Defendants note that Plaintiffs erroneously cited to Mr.
13 Salim's declaration. ECF 181, Salim Decl.
14
15
16 **289.** COBALT's COB asked Dr. Jessen to help assess how the COB
17 could interrogate Rahman to get him to provide information. (Rodriguez Decl.,
18 Exh. S at US Bates 001289; Tompkins Decl., Exh. 2, Jessen Tr. at 184:16-185:2,
19 207:1-7, 209:17-23, 240:16-241:10.)
20
21 Undisputed, with the clarification that Defendant Jessen's consultation with
22 the COBALT COB regarding Mr. Rahman began at the outset of Mr. Rahman's
23 detention there—Defendant Jessen stated that he may have been present to
24 observe Rahman's first interrogation session and consulted with the COB about
25 "approaches" before and after. ECF No. 181-36 (U.S. Bates #001048).
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290. It was the COB's responsibility to propose interrogation techniques to CTC for pre-approval. (Rodriguez Decl., Exh. S at US Bates 001331.)

Disputed to the extent that Defendants' Fact #290 is misleading without the clarifications included in Plaintiffs' responses to Defendants' Fact #s 288, 289, and 291. In addition, it was Defendant Jessen who 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" to a prisoner held there. Watt Decl., Exh. S (U.S. Bates #001287). Moreover, with respect to Mr. Rahman, cable traffic in the record does not show Defendant Jessen or COB proposing any methods to CTC before they were both involved in using a range of Defendants' methods on Mr. Rahman, including: the use of diapers, the "insult slap," and Defendants' sleep deprivation method—chaining a detainee to an overhead bar while nude or in a diaper. *Id.* at U.S. Bates 001291. According to Defendant Jessen, Mr. Rahman was subjected to consistent sleep deprivation for days, "chained to the overhead bar in his cell," to induce "sleep deprivation right from the beginning." ECF No. 181-36 (U.S. Bates #001049, 001051).

Defendants' Reply: Plaintiffs' response is not germane to the stated fact, which is that "It was the COB's responsibility to propose interrogation techniques to CTC for pre-approval"—not whether or not COB properly sought such pre-approval. Additionally, the absence of cables from the COB, or others at the

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CIA, proposing interrogation techniques in the record cannot be used to infer that such cables did not exist. As per this Court's ruling, the United States produced only those cables that mentioned Plaintiffs and Drs. Mitchell or Jessen. ECF 31 (16-mc-00036).

291. Dr. Jessen observed the CIA interrogating Rahman twice and consulted about the interrogations. COBALT's COB told Dr. Jessen that the CIA wanted Dr. Jessen to assess whether EITs should be used on Rahman. (Tompkins Decl., Exh. 2, Jessen Tr. at 184:16-185:2, 207:1-7, 240:16-241:10; Exh. 12 at US Bates 001048.)

Plaintiffs do not dispute that Defendant Jessen consulted about the interrogation of Mr. Rahman, or was asked to assess whether Defendants' methods should be used on Mr. Rahman, as clarified in Plaintiffs' Responses to Defendants' Fact #s 288, 289, 290. Plaintiffs dispute that the cited records support the contention that Defendant Jessen only observed the CIA interrogating Rahman twice. The document ECF No. 181-36, U.S Bates 001048 states: "Jessen stated that he may have been there from the start of Rahman's interrogations, but he didn't begin interrogating until later because he was working with the other prisoners." Jessen admitted to personally interrogating Mr. Rahman between two and four times, and "[a] cable reported that Jessen was involved in six interrogation sessions with Rahman." Watt Decl., Exh. S (U.S. Bates #001293).

292. Dr. Jessen and the COB then interrogated Rahman over a 48-hour period, during which they assessed Rahman's resistance techniques, and

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concluded psychological and physiological pressures were unlikely to make Rahman divulge information. (Rodriguez Decl., Exh. S at US Bates 001297-98; Tompkins Decl., Exh. 16 at US Bates 001072-74; Exh. 12 at US Bates 001049.)

Undisputed, with the clarification that it was Defendant Jessen who assessed Mr. Rahman, and made recommendations as to how interrogations of Mr. Rahman should proceed. It was Defendant Jessen who concluded that the CIA should focus on "physical and psychological deprivation to wear him down." ECF No. 181-36 (U.S Bates #001049). Defendant Jessen stated "Hitting him isn't going to do any good. You have to wear him down physically and psychologically." (Id.). Defendant Jessen authored a cable to CIA Headquarters from COBALT recommending that Mr. Rahman be subjected to continuing "environmental deprivations" and interrogations to last 18 out of 24 hours per day. Watt Decl., Exh. S (U.S. Bates 001299).

293. During one of the sessions, to assess Rahman's resistance posture, Dr. Jessen used the least intrusive EIT, the facial slap, to see how Rahman would respond. (Tompkins Decl., Exh. 2, Jessen Tr. at 211:7-13, 214:15-215:2; Exh. 12 at US Bates 001049.)

Undisputed.

294. Dr. Jessen was authorized by COBALT's COB to apply the facial slap because it was the only way Dr. Jessen could determine if Rahman would

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1 respond to EITs. (*Id*., Exh. 2, Jessen Tr. at 211:7-13, 212:10-11, 214:15-215:2;
2 215:20-216:8.)
3
4 Contrary to Defendants' Fact #294, the record evidence does not specify
5 that COBALT's COB provided any authorization specifically for Jessen to use
6 the facial slap, or that Jessen believed his authorization was limited to the facial
7 slap of Mr. Rahman, as opposed to a general authorization to apply Defendants'
8 methods. Defendant Jessen testified that other methods should also be used. ECF
9 No. 181-36 (U.S Bates #001051) ("someone like Rahman . . . if you want to see if
10 it's going to work you're going to have to use a considerable amount controlled
11 threat [sic], the inducement of psychological threat, not just physical pain. This is
12 done by screaming and yelling, making threats, slapping, walling, and hard
13 takedowns.").
14
15 **Defendants' Reply**: Dr. Jessen's testimony indicates that he was
16 authorized to apply the facial slap on Rahman. ECF 176-2, Tompkins Decl., Exh.
17 2, (Jessen Tr.) at 214:15-215:2 ("I was asked by the CIA to assess him for their
18 use. The only reasonable way to determine that would be to pick the least
19 intrusive one, see how he responded"). Plaintiffs present no evidence that
20 disputes this fact, as it is irrelevant whether other methods should also have been
21 used.
22
23 **295.** Dr. Jessen determined that Rahman was an excellent resister. He
24 was strong, centered, and focused. (*Id*., Jessen Tr. at 204:5-24.)
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1 Undisputed.
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3 **296.** According to Dr. Jessen, the use of physical pressures on a man like
4 Rahman would only irritate him or push him further away from cooperating. As
5 such, Dr. Jessen recommended that EITs not be used on Rahman. (*Id*., Exh. 2,
6 Jessen Tr. at 205:1-7, 215:20-216:8, 242:18-22.)
7
8 Contrary to Defendants' Fact #296, Defendant Jessen recommended
9 "deprivations" which included Defendants' sleep deprivation method, and Mr.
10 Rahman was chained by the arms to an overhead bar in his cell for this purpose.
11 Watt Decl., Exh. F (Jessen Tr.) at 242:23 – 243:6; ECF No. 181-36 (U.S Bates
12 #1051). Mr. Rahman was also subjected to Defendants' other methods and
13 subjected to nudity and the use of diapers. Watt Decl., Exh. S (U.S Bates
14 #1297); ECF No. 182-8 (U.S. Bates 1110-1111), ECF 175-9 (U.S. Bates 1658-
15 59).
16
17 **Defendants' Reply**: Plaintiffs' response is not germane to the stated fact,
18 which relates to Dr. Jessen not recommending EITs be used on Rahman.
19 Furthermore, nudity was not an interrogation technique that was included in the
20 July 2002 Memo. ECF 182-8, Ladin Decl., Exh. H at US Bates 001110-111.
21
22 **297.** Dr. Jessen recommended to COBALT's COB that he should
23 continue to interrogate Rahman very frequently to keep him off balance and that
24 he should continue with authorized deprivations. (*Id*., Exh. 2, Jessen Tr. at
25 242:23-243:6.)
26

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Undisputed, with the clarification that Defendant Jessen recommended that Mr. Rahman be interrogated 18 hours out of each day and that he be subjected to continuing "environmental deprivations." Watt Decl., Exh. S (U.S. Bates #001299). Defendant Jessen was aware that Rahman had been deprived of sleep and clothing. ECF No. 181-36 (U.S. Bates #001051). Defendant Jessen was aware that Rahman was cold, that COBALT was cold, and that the temperature was worse at night and when a detainee was rendered immobile. *Id.* at U.S. Bates 001053.

Defendants' Reply: Plaintiffs misrepresent the record. Dr. Jessen was aware COBALT was cold and that Rahman had, at times, been deprived of clothing. But, he did not state that the "temperature was worse" when "a detainee was rendered immobile." Rather Dr. Jessen stated that "there were heaters present in the housing area when he was working on Rahman . . . [and] prior to [his] departure it froze at night a couple of times. The prison was always a little cool because it was dark. When you are not moving it is worse." ECF 182-36, Ladin Decl., Exh. JJ at US Bates 001053. The documents cited by Plaintiffs also do not support the implication that cold was part of the "authorized deprivations" because Plaintiffs admit that Dr. Jessen asked guards to give Rahman a blanket. Defs.' Reply SUF ¶ 304. Finally, Plaintiffs erroneously cite to ECF 181, which is Mr. Salim's Declaration and does not support their statements.

298. COBALT's COB relayed much of the information Dr. Jessen had told him to HQS in a cable. The COB wrote all such cables and Dr. Jessen did

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not review them prior to their issuance. (Tompkins Decl., Exh. 16 at US Bates 001072-74; Exh. 2, Jessen Tr. at 206:21-24, 233:6-12.)

Contrary to Defendants' Fact #298, the COB did not author every cable sent from COBALT. Defendant Jessen authored at least one cable to CIA Headquarters from COBALT regarding Mr. Rahman and setting out a proposed interrogation plan for pre-approval. Watt Decl., Exh. S (U.S. Bates #001299). In addition, *id*. at U.S. Bates 001288 states that a CIA staff officer at COBALT said that Defendant Jessen drafted all cables detailing Mr. Rahman's interrogation.

Defendants' Reply: Plaintiffs' response is not supported by the record because Defendants were unable to draft cables during this time period. ECF 176-2, Tompkins Decl. Exh. 2, Jessen Dep. 143:2-13.

299. The cables to HQS also indicated that two unauthorized techniques had been used on Rahman: the cold shower and rough treatment (or hard takedown). (Tompkins Decl., Exh. 16 at US Bates 001072-74; Rodriguez Decl., Exh. S at US Bates 001272.)

Undisputed.

300. Dr. Jessen observed use of these techniques and advised COBALT's COB that he should not use unauthorized techniques—but Dr. Jessen had no power at that time to make the COB stop using those techniques. As soon as Jessen was able to raise the issue to CTC, he did. (Tompkins Decl., Exh. 2,

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Jessen Tr. at 184:1-185:2; 193:10-14; 242:9-243:25; Exh. 12 at US Bates 001050-51; Rodriguez Decl. ¶ 114.)

Contrary to Defendants' Fact #300, Defendant Jessen in fact encouraged the use of unauthorized techniques (e.g., the hard takedown) on Mr. Rahman. Defendant Jessen stated that the hard takedown was the sort of "controlled threat" necessary to apply to a "tough" detainee to determine what interrogation techniques might yield compliance. ECF No. 181-36 (U.S. Bates #001051). Defendant Jessen provided advice to COBALT personnel on how to make the technique more effective, suggesting that "after something like this is done, interrogators should speak to the prisoner to 'give them something to think about.'" ECF No. 181-24 (U.S. Bates #001133).

Defendants' Reply: Plaintiffs have not created a factual issue. Whether Dr. Jessen provided advice about interrogation techniques does not dispute that Dr. Jessen advised COBALT's COB that he should not use unauthorized techniques, or whether Dr. Jessen had the authority to stop COB from using unauthorized techniques, or raised the use of unauthorized techniques to CTC. Also, Plaintiffs again erroneously cite only to Mr. Salim's declaration, which does not support their response. ECF 181, Salim Decl.

301. COBALT's COB used the hard takedown often in interrogations at COBALT as "part of the atmospherics." (Rodriguez Decl., Exh. S at US Bates 001308.)

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Undisputed, with the clarification that the cited record, states that the hard takedown was performed for "shock and psychological impact" and that Defendant Jessen considered it a useful way to make a detainee "uncomfortable and experience a lack of control."

Defendants' Reply: Plaintiffs provide no citations to the record to support their response and thus should be disregarded. Local Rule 56.1(b).

302. COBALT's COB ordered the hard takedown on Rahman so that Rahman would think he was being brought to a different cell. (*Id.*)

Undisputed.

303. Dr. Jessen specifically told COBALT's COB that he did not use the hard takedown and that even if it was effective at dislocating Rahman's expectations, for that to be useful, Rahman would have to be interviewed after it was implemented instead of being placed back in his cell alone, which is what COBALT's COB did with Rahman. (Tompkins Decl., Exh. 2, Jessen Tr. at 197:12-198:7, 217:17-218:9; Exh. 12 at US Bates 001050-51.)

Contrary to Defendants' Fact #303, Defendant Jessen did not discourage the use of the hard takedown method, but instead stated he saw "value" in it "in order to make Rahman uncomfortable and experience a lack of control." Watt Decl., Ex. S at U.S. Bates #1308. The record does not indicate that Defendant Jessen said that a prisoner should then be "interviewed," but shows that Defendant Jessen advised COBALT staff to speak with Mr. Rahman after using

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1 the hard takedown on him, to "give him something to think about." ECF No.
2 181-24 (U.S. Bates #001133).
3
4 **Defendants' Reply**: Plaintiffs' response does not dispute the fact that Dr.
5 Jessen specifically told COBALT's COB that he did not use the hard takedown.
6 176-12, Tompkins Decl. Exh. 12 at US Bates 001051.
7
8 **304.** Dr. Jessen also did not participate in Rahman's cold showers, which
9 were ordered by COBALT's COB. Moreover, on one instance, Dr. Jessen asked
10 the guards to give Rahman a blanket after a cold-shower. (Tompkins Decl., Exh.
11 12 at US Bates 001050-51; Exh. 2, Jessen Tr. at 212:4-14; Exh. 22 at US Bates
12 001132; Rodriguez Decl., Exh. S at US Bates 001305.)
13
14 Contrary to the first sentence in Defendants' Fact #304, the record citations
15 do not support that the COBALT COB ordered Mr. Rahman's cold shower. The
16 record shows that Defendant Jessen observed Mr. Rahman's cold shower and did
17 not intervene, despite knowing that the cold shower method had not been
18 authorized. Watt Decl., Exh. S (U.S Bates #1305); ECF No. 176-11 (US Bates
19 #001132); Watt Decl., Exh. F (Jessen Dep.) 243:10-12.
20
21 **Defendants' Reply**: Plaintiffs' response is not supported by the record.
22 Plaintiffs cite to ECF 195-19, Watt Decl., Exh. S at US Bates 001305, which
23 states, "CIA Staff Officer asked Rahman his identity, and when he did not
24 respond with his true name, Rahman was placed back under the cold water by the
25 guards at CIA Staff Officer's direction"—and thus shows that the cold shower
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1 was ordered by COBALT's COB. Furthermore, none of the documents cited by
2 Plaintiffs indicate that Dr. Jessen participated in the cold shower, rather, they all
3 show that Dr. Jessen knew the cold shower occurred and asked the guards to give
4 Rahman a blanket after it. *Id.*; ECF No. 176-11, Tompkins Decl., Exh. 11 at US
5 Bates 001132; ECF 195-6. Dr. Jessen's testimony also establishes that he "knew
6 that [the COB] had used cold showers; I told him he shouldn't do that." ECF
7 195-6, Watt Decl., Exh. F (Jessen Dep.) 243:10-12. Plaintiffs have cited nothing
8 that disputes Defendants' stated facts.
9
10
11 **305.** Dr. Mitchell arrived at COBALT with another HVD while in route
12 to a different black-site for another operation. (Tompkins Decl., Exh. 15 at US
13 Bates 001067; Exh. 28 at US Bates 001548; Rodriguez Decl. ¶ 105.)
14
15 Undisputed.
16
17 **306.** After COBALT's COB reported on the status of Rahman's
18 interrogations, HQS asked Drs. Mitchell or Jessen to "administer a mental health
19 status exam and provide an assessment on interrogation measures required to
20 render [Rahman] compliant" before they departed COBALT. (Tompkins Decl.,
21 Exh. 15 at US Bates 001066.)
22
23 Undisputed.
24
25 **307.** HQS directed Drs. Mitchell or Jessen to "send your evaluation to
26 HQS where determination of courses of action will be made." (*Id.*, Exh. 15 at US
Bates 001067.)

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1 Undisputed.
2
3 **308.** Dr. Mitchell did not interrogate Rahman or observe the application
4 of any EITs on Rahman, although Dr. Mitchell did observe one custodial
5 debriefing of Rahman. (*Id.*, Exh. 1, Mitchell Tr. at 318:21-319:14.)
6
7 Contrary to Defendants' Fact # 308, Defendant Mitchell himself stated he
8 observed an interrogation, not a custodial debriefing. Watt Decl., Exh. S (U.S.
9 Bates #001290). This characterization was reinforced by others at COBALT. *Id.*
10 at U.S. Bates #001293 ("The only other person ___ remembered being present
11 during one of Rahman's interrogations was Mitchell.").
12
13 **309.** Dr. Jessen conducted the HQS-requested mental status examination
14 and recommended a continued interrogation plan for Rahman. The result of the
15 examination was sent to HQS in a cable that stated:
16
17 Because of his remarkable physical and psychological resilience and
18 determination to persist in his effective resistance posture employing
19 enhanced measures is not the first or best option to yield positive
20 interrogation results. In fact, with such individuals, increasing
21 physical pressures often bolsters their resistance. The most effective
22 interrogation plan for Gul Rahman is to continue the environmental
23 deprivations he is experiencing and institute a concentrated
24 interrogation exposure regimen. This regimen would ideally consist
25 of repeated and seemingly constant interrogations (18 coordinated
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> out of 24 hours per day). These interrogation sessions should be coordinated and present with same set of key subject areas. . . . It will be important to manage the deprivations so as to allow the subject adequate rest and nourishment so he remains coherent and capable of providing accurate information. The station physician should collaborate with the interrogation team to achieve this optimum balance.
>
> (Rodriguez Decl., Exh. R at US Bates 001057-58; Exh. S at US Bates 001299.)

Undisputed, with the clarification that ECF No. 175-18, U.S. Bates 001057 also states:

> Interrogators should have the flexibility and insight to deviate with the subject when he begins to move in a desired direction. It will be the consistent and persistent application of deprivations (sleep loss and fatigue) and seemingly constant interrogations which will be most effective in wearing downb [sic] this subject's resistance.

310. Others at the CIA concurred with Dr. Jessen's assessment. (Tompkins Decl., Exh. 44 at US Bates 001865-70.)

Undisputed.

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311. After Jessen conducted Rahman's mental status examination of Rahman, Drs. Mitchell and Jessen departed COBALT. (Tompkins Decl., Exh. 28 at US Bates 001548; Rodriguez Decl. ¶ 116.)

Undisputed.

312. Neither Drs. Mitchell nor Jessen ever returned to COBALT. (Tompkins Decl., Exh, 1, Mitchell Tr. at 319:18-22; Exh. 2, Jessen Tr. at 201:14-21.)

Undisputed.

313. At the time of their departure, Rahman had been detained for 10 days. (Rodriguez Decl., Exh. S at US Bates 001307.)

Undisputed.

314. Before departing, both Drs. Mitchell and Jessen tried to secure medical attention for Rahman. They each asked for a doctor to examine Rahman multiple times, but their request was refused. (Tompkins Decl., Exh. 2, Jessen Tr. at 213:23-214:10, 236:22-237:1; Rodriguez Decl. ¶ 106.)

Contrary to Defendants' Fact #314, COBALT's Physician's Assistant told CIA Inspector General Investigators that "no one ever requested that he examine Rahman, his hands, or any other detainee." Watt Decl., Exh. X (U.S. Bates #001290). The record shows that after leaving COBALT, Defendant "Jessen said the atmosphere of the facility was excellent for the type of prisoners kept there –

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'nasty, but safe'" and that "he did not see any 'hiccups' in security or prisoner safety.'" ECF No. 182-34 (U.S. Bates #001124).

Defendants' Reply: Plaintiffs' response is not germane to the asserted fact, which is whether Defendants tried to secure medical attention for Rahman—not whether or not the Physician's Assistant was specifically asked to examine Rahman. Additionally, Plaintiffs erroneously cite the Watt Decl., Exh. X, which does not contain US Bates 001290.

315. Additionally, the physician's assistant at COBALT did not attend to Rahman in the same manner and with the same standard of care as other detainees. (Rodriguez Decl., Exh. S at US Bates 001274-75, 001332.)

Undisputed.

316. During his time at COBALT, Dr. Jessen did not deny Rahman clothing. But he did witness the COB use clothing to try to manipulate and motivate Rahman. (Tompkins Decl., Exh. 2, Jessen Tr. at 212:4-14; Exh. 12 at US Bates 001050.)

Contrary to Defendants' Fact #316, Defendant Jessen admitted that "Rahman would have lost his clothes and diaper at our direction," referring to himself and Mr. Rahman's other interrogators, and added that "The guards were not doing things on their own." ECF No. 181-36 (U.S. Bates #001052).

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317. On two occasions, Dr. Jessen requested additional clothing for Rahman because he was cold. (*Id.*, Exh. 2, Jessen Tr. at 218:13-19.)

Plaintiffs do not dispute that Defendant Jessen testified to this fact.

318. Before departing, Dr. Jessen also told COBALT's COB that he needed to establish written operational procedures for COBALT regarding how often detainees get water, the temperature of the facility, and how loud the noise will be. (*Id.*, Exh. 12 at US Bates 001052.)

Undisputed.

319. Dr. Jessen also told COBALT's COB he was concerned Rahman was cold and shivering, could be "hypothermic," and told the guards to get him blankets and insulation. (*Id.*, Exh. 2, Jessen Tr. at 195:11-197:11.)

Undisputed.

320. After leaving COBALT, Dr. Jessen advised the most senior person in the CTC about his concerns with COBALT and Rahman. (Tompkins Decl., Exh. 2, Jessen Tr. at 193:10-14; Rodriguez Decl. ¶ 114.)

Undisputed that this was the deposition testimony of Defendant Jessen. Plaintiffs object to Rodriguez Decl. ¶ 114 as hearsay, as it suggests the basis of Mr. Rodriguez' knowledge is the statements of others ("It is also my understanding that. . .").

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321. Besides this brief time at COBALT, Dr. Jessen or Dr. Mitchell never interacted with any other MVDs, including Plaintiffs. (Tompkins Decl., Exh. 2, Jessen Tr. at 201:14-21; Mitchell Decl. ¶ 11.)

Contrary to Defendants' Fact #321, there is no evidence that Plaintiffs were classified as MVDs, and the evidence cited in Fact #321 says nothing about Plaintiffs' status. In addition, Defendant Jessen also used "enhanced interrogation techniques" and "rough stuff" on another CIA detainee who was contemporaneously classified as a "medium value detainee." ECF No. 176-25 (U.S. Bates #001392-001393); Watt Decl., Exh. C (Mitchell Manuscript) at MJ00022811. Defendant Jessen admitted that "his duties at CIA have involved the interrogation of high and medium value terrorist targets." ECF No. 181-36 (U.S. Bates #001047-001048).

Defendants' Reply: Plaintiffs' response is not supported by the record. Mr. Salim and Ben Soud were MVDs. Defs.' Reply SUF ¶¶ 170, 210 (Rodriguez testified "these individuals were not high value targets"); ECF No. 175, Rodriguez Decl. at ¶ 93. Additionally, the other MVD referenced in the documents cited by Plaintiffs was Ammar al-Balucchi. ECF No. 176-25, Tompkins Decl. at US Bates 001392-001393 ("Ammar al-Baluchi, w[as] detained at COBALT"); ECF 195-3, Watt Decl., Exh. C (Mitchell Manuscript) at MJ00022811 (explaining Dr. Jessen was more involved with al-Baluchi's interrogation). The CIA specifically sent Dr. Jessen to COBALT in November 2002 to interrogate al-Balucchi. Rosenthal Decl. Exh. 1, Jessen Dep. 229:15-24.

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Thus, Plaintiffs have not disputed the fact that besides Defendants' brief time at COBALT, they did not have any further

interaction with MVDs. And Plaintiffs admit that Mr. Salim and Ben Soud never interacted with Defendants. Defs.' Reply SUF ¶¶ 268, 272, 277-78, 281.

XXI. GUL RAHMAN'S DEATH

322. Several days after Drs. Mitchell and Jessen left COBALT, Rahman allegedly threatened the guards and threw his food and waste bucket at the guards. As a result, COBALT's COB approved or directed the guards to shackle Rahman's hands and feet and connect the shackles with a short-chain. This position forced Rahman to sit bare-bottomed on the concrete floor of his cell. (Rodriguez Decl., Exh. S at US Bates 001273, 001299, 001315, 001331; Tompkins Decl., Exh. 14 at US Bates 001062-63.)

Undisputed.

323. The temperature in COBALT at the time was near freezing. (Rodriguez Decl., Exh. S at US Bates 001274.)

Undisputed.

324. On a late November morning, Rahman was found dead in his cell. (Rodriguez Decl., Exh. S at US Bates 001299; Tompkins Decl., Exh. 14 at US Bates 001062.)

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Undisputed.

325. At the time, Rahman was wearing only a sweatshirt, sitting bare-bottomed on the concrete floor of his cell. (Rodriguez Decl., Exh. S at US Bates 001273, 001299-1300.)

Undisputed.

326. After Rahman's death, the CIA's Office of the Inspector General ("OIG") conducted an investigation into the cause of Rahman's death. (Rizzo Decl. ¶ 72; Rodriguez Decl., Exh. S at US Bates 001271, 001320.)

Undisputed.

327. The OIG conducted interviews and the pathologist performed an autopsy of Rahman, which indicated that his death was caused by hypothermia. (Rodriguez Decl., Exh. S at US Bates 001273, 001323.)

Undisputed.

328. The OIG concluded that HQS would not have approved several of the interrogation techniques employed by COBALT's COB, including cold showers, cold conditions, hard takedowns, and the short chain position. (Rodriguez Decl., Exh. S at US Bates 001331.)

Undisputed.

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329. Rodriguez, head of CTC, never authorized EITs to be used on Rahman. (Tompkins Decl., Exh. 3, Rodriguez Tr. at 172:14-22.)

Undisputed.

330. The OIG investigation concluded that Rahman died of hypothermia because COBALT's COB ordered Rahman to be short chained such that he was compelled to sit on the concrete floor of his cell clothed in only a sweatshirt. (Rizzo Decl. ¶ 73; Rodriguez Decl., Exh. S at US Bates 001267-1334 at ¶ 173.)

Undisputed.

331. The OIG investigation further found that an individual other than Drs. Mitchell or Jessen was responsible for not providing adequate supervision of COBALT's COB and the activities at COBALT. (Rizzo Decl. ¶ 74; Rodriguez Decl., Exh. S at US Bates 001267-1334 at ¶ 180.)

Undisputed.

332. The DOJ was apprised of the circumstances surrounding Rahman's death. And, in 2005, the DOJ declined to prosecute anyone in connection with Rahman's death. Then, in 2012, after a year-long special criminal investigation into Rahman's death was conducted by Assistant United States Attorney John Durham, the DOJ again declined to prosecute anyone in connection with Rahman's death. (Rizzo Decl. ¶ 75; Rodriguez Decl., Exh. S at US Bates 001273-74.)

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Undisputed.

XXII. RENDITION

333. Drs. Mitchell and Jessen were not asked to provide any recommendations relating to the capture or rendition of any CIA detainee, including Zubaydah, nor did they. (Rodriguez Decl. ¶ 82.)

Undisputed.

334. Likewise, Drs. Mitchell and Jessen did not participate in the capture or rendition of any CIA detainee—including Plaintiffs. (Rodriguez Decl. ¶ 83; Tompkins Decl., Exh. 3, Rodriguez Tr. at 214:8-11.)

Undisputed.

335. The CIA's capture and rendition program methodology was based on detainee handling procedures used by the U.S. military and the U.S. Marshals Service. (Tompkins Decl., Exh. 34 at US Bates 001633.)

Undisputed.

XXIII. MITCHELL, JESSEN & ASSOCIATES

336. In March of 2005, Drs. Mitchell and Jessen formed *Mitchell, Jessen & Associates* ("MJA") to provide "qualified interrogators, detainee security officers for CIA detention sites, and curriculum development and training services for the RDI program." From 2005 through 2009, MJA was paid

approximately $72 million. (Tompkins Decl., Exh. 76 at US Bates 001906; Tompkins Decl., Exh. 77 at US Bates 001908-10.)

Undisputed except that contrary to the second sentence of Defendants' Fact # 336, Mitchell, Jessen, and Associates received $81 million in taxpayer money, as Defendants admitted. ECF No. 77 (Defs.' Amended Answer) ¶ 68; Watt Decl., Exh. M (CIA Response) at 49.

Defendants' Reply: The CIA Response is inadmissible hearsay (Fed. R. Evid. 802).

337. Dr. Mitchell's profit percentage from MJA was in the "small single digits." (Tompkins Decl., Exh. 73 at MJ00022930.)

Undisputed.

XXIV. FACTS RELATED TO INTERNATIONAL LAW

338. The U.S. is engaged in a "non-international armed conflict" with Al-Qaida, and it is that conflict in which the Defendants' alleged conduct occurred. (Declaration of Professor Julian G. Ku ("Ku Decl."), Exh. 2 at p. 5.)

Plaintiffs dispute Defendants' Fact # 338 as irrelevant and overly broad, but do not dispute that the U.S. was engaged in a non-international armed conflict in Afghanistan at the time of Defendants' alleged conduct.

339. Common Article 3 to the Geneva Conventions of August 12, 1949 applies to non-international armed conflicts. (Ku Decl., Exh. 2 at p. 5.)

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Undisputed.

340. A majority of nation states have not enacted laws prohibiting human experimentation in non-international armed conflicts. (Ku Decl., Exh. 3 at p. 7.)

Defendants' Fact # 340 is misleading to the extent it suggests that states must enact specific laws prohibiting human experimentation in non-international armed conflicts for the prohibition to be an international law norm. A majority of states have ratified the four Geneva Conventions. Article 3 common to all four Conventions is part of customary international law, and, prohibits human experimentation in non-international armed conflicts. Heller Decl., Exh. B at pp. 7-9.

Defendants' Reply: Plaintiffs mischaracterize the language of Common Article 3. Moreover, any international law norm prohibiting human experimentation is limited, at most, to a prohibition against "biological experiments" and does not apply more generally to any or all other forms of human experimentation.

XXV. RELEVANT PROCEDURAL HISTORY.

341. On April 22, 2016, the Court held oral argument on Defendants' Motion to Dismiss, ECF No. 27, in Spokane, Washington.

Undisputed.

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342. During that oral argument, the Court and counsel for the parties discussed Plaintiffs' allegations concerning aiding and abetting liability; specifically, the Court observed that "no one would ever be convicted of aiding and abetting by setting forth, here's options that you can utilize" if they were not also deciding who would be subjected to the program. (Tompkins Decl., Exh. 74 April 22, 2016, Tr. at 60:9-62:24.)

Undisputed.

DATED this 26 day of June, 2017.

s/ Christopher W. Tompkins
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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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