Emily Chiang, WSBA No. 50517
echiang@aclu-wa.org
AMERICAN CIVIL LIBERTIES UNION
OF WASHINGTON FOUNDATION
901 Fifth Avenue, Suite 630
Seattle, WA 98164
Phone: 206-624-2184

Dror Ladin (admitted *pro hac vice*)
Steven M. Watt (admitted *pro hac vice*)
Hina Shamsi (admitted *pro hac vice*)
AMERICAN CIVIL LIBERTIES UNION FOUNDATION

Lawrence S. Lustberg (admitted *pro hac vice*)
GIBBONS P.C.

Attorneys for Plaintiffs

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF WASHINGTON

SULEIMAN ABDULLAH SALIM, MOHAMED AHMED BEN SOUD, OBAID ULLAH (AS PERSONAL REPRESENTATIVE OF GUL RAHMAN), Plaintiffs, v. JAMES ELMER MITCHELL and JOHN "BRUCE" JESSEN Defendants.	16-MC-0036-JLQ PLAINTIFFS' BRIEF REGARDING MOTION TO COMPEL AND CROSS-MOTION TO QUASH OR MODIFY DOCUMENT SUBPOENAS Motion Hearing: September 29, 2016 at 1:30 p.m. Spokane, Washington (Telephonic) Related Case: No. CV-15-0286-JLQ

AMERICAN CIVIL LIBERTIES
UNION OF WASHINGTON
FOUNDATION
901 Fifth Ave, Suite 630
Seattle, WA 98164
(206) 624-2184

In accordance with the September 7, 2016 Order of the Court, ECF No. 13, Plaintiffs here provide their position with respect to the pending discovery dispute between Defendants and the government. As before, Plaintiffs' views derive from the specific matters at issue in this case, which challenges war crimes committed against Plaintiffs by Defendants, who designed, promoted, administered, and refined an experimental torture program aimed at psychologically destroying CIA prisoners. Although government officials were complicit in aspects of the torture program, this case turns on Defendants' actions as independent contractors in designing the program and reaping profits from it, and on the injuries Plaintiffs suffered as a result of those actions.

It has therefore been Plaintiffs' consistent position that discovery in this case should be targeted, expeditious, and focused on "the actions of Defendants and the injuries suffered by Plaintiffs." *See Salim et al. v.Mitchell et al.*, 15-286-JLQ, ECF No. 34 at 4. Third party discovery is of course often entirely appropriate, and Plaintiffs do not suggest or advocate otherwise as a general matter. Limiting the expansive third-party discovery Defendants seek here is appropriate, however, under the particular circumstances of this case. Defendants' broad inquiry into the actions of other individuals is not only largely irrelevant to questions regarding Defendants' liability and Plaintiffs'

AMERICAN CIVIL LIBERTIES
UNION OF WASHINGTON
FOUNDATION
901 Fifth Ave, Suite 630
Seattle, WA 98164
(206) 624-2184

damages, *see id.* at 5–6, it is also unnecessary because the structure of the torture program and the roles played by government officials have been exhaustively documented in public records. *See id.* at 3–4 (listing sources).

Defendants, by contrast, have urged that discovery must be "lengthy," *Salim*, 15-286-JLQ, ECF No. 31 at 8, and that no deadlines should be imposed because it is unclear "when discovery should (or even could) be completed," *id.* at 12. Plaintiffs, and the government, have opposed Defendants' proposals because they seek a prolonged and "exhaustive inquiry into the entire chain of command decisionmaking in the CIA's RDI Program and Plaintiffs' detention and torture, virtually none of which is necessary to resolve the issues" in this case. *Salim*, 15-286-JLQ, ECF No. 34 at 5. To accommodate Defendants' interests, Plaintiffs have proposed that "[i]f Defendants plan to argue that they did not devise and promote the torture methods Plaintiffs endured, carefully limited discovery of Defendants' roles in designing the torture program may be relevant." *Id.* at 4. Now, although the Court rejected Defendants' open-ended timelines, *see Salim*, 15-286-JLQ, ECF No. 59, Defendants have refused to budge from their original, sweeping discovery proposal and have issued third-party subpoenas that largely fail to match the needs of this case.

AMERICAN CIVIL LIBERTIES
UNION OF WASHINGTON
FOUNDATION
901 Fifth Ave, Suite 630
Seattle, WA 98164
(206) 624-2184

Plaintiffs' views with regard to this issue are informed by Federal Rule of Civil Procedure 26, which both takes a "broad view of what is . . . discoverable," *Perez v. Blue Mt. Farms*, No. 13-5081-RMP, 2015 U.S. Dist. LEXIS 180096, at *5 (E.D. Wash. Sept. 28, 2015), but at the same time, makes clear that "[t]he Court … must limit discovery where it is 'not proportional to the needs of the case.'" *Fox v. State Farm Ins. Co.*, No. C15-535RAJ, 2016 U.S. Dist. LEXIS 9056, at *2–3 (W.D. Wash. Jan. 26, 2016) (quoting Fed. R. Civ. P. 26(b)(1)). "To be 'proportional to the needs of the case,' the court examines the requested information in light of six factors: '[1] the importance of the issues at stake in the action, [2] the amount in controversy, [3] the parties' relative access to relevant information, [4] the parties' resources, [5] the importance of the discovery in resolving the issues, and [6] whether the burden or expense of the proposed discovery outweighs its likely benefits.'" *Turner v. Paul Revere Life Ins. Co.*, No. 14-1205-JCM-VCF, 2015 U.S. Dist. LEXIS 116285, at *3 (D. Nev. Aug. 28, 2015) (quoting Advisory Comm. Notes (2015) to Fed. R. Civ. P. 26 (b)(1)). In this particular case, the government's effort to limit discovery is generally consistent with these guiding principles though, as set forth below, Plaintiffs propose certain modifications to the government's specific proposals.

AMERICAN CIVIL LIBERTIES
UNION OF WASHINGTON
FOUNDATION
901 Fifth Ave, Suite 630
Seattle, WA 98164
(206) 624-2184

The Defendants' motion, on the other hand, ignores these principles, and, in particular, elides the now accepted touchstone of proportionality.

The government has proposed steps to either narrow Defendants' subpoenas, *see* ECF No. 19 at 24–26, or to comply with them through alternative means, *see id.* at 12. Plaintiffs address these proposals below, in turn.[1]

I. PROPOSED MODIFICATION OF THE SUBPOENAS

1. Plaintiffs view the government's proposal that the document requests initially be limited to documents cited in the footnotes to the SSCI Executive Summary Report, *see* ECF No. 19 at 24, as a reasonable one. The SSCI Executive Summary details the origins and development of the torture program, including Defendants' roles, and contains 2,725 footnotes. As the government suggests, production of documents cited in these footnotes may eliminate or narrow the need for more expansive, time-consuming searches, without precluding them should they be genuinely necessary.

[1] Plaintiffs do not here address the proper scope of discovery between the parties, which is not before the Court, except to say (as set forth below) that the government's obligations should not turn on the timing of any potential stipulations between Plaintiffs and Defendants.

AMERICAN CIVIL LIBERTIES
UNION OF WASHINGTON
FOUNDATION
901 Fifth Ave, Suite 630
Seattle, WA 98164
(206) 624-2184

2. Defendants request over two dozen categories of documents produced over a 15-year period, from September 11, 2001, to present. In response, the government proposes a combination of time and category limits. As to time limits, the government proposes that the subpoenas be limited to documents produced during "(1) the time period surrounding the date of each Plaintiff's capture and release by the CIA; and (2) March-August 2002, when the CIA developed and authorized the interrogation techniques it later utilized on detainees in the program." ECF No. 19 at 24. As to category limits, the government proposes that discovery be limited to "(1) the conditions, treatment, or interrogations of Plaintiffs; (2) Defendants' involvement in the development of the enhanced interrogation techniques used in the program; and (3) Defendants' involvement, if any, in any interrogator training courses." *Id.* at 25.

Plaintiffs believe that a more nuanced approach is necessary, one that focuses on the specific categories of documents bearing upon the claims and defenses in the case, and the time frames associated with those documents. Indeed, the government itself acknowledges that "comprehensive CIA reports" produced outside the date ranges it otherwise proposes may also bear on the claims in the case, and should be produced. *Id.* at 24. Plaintiffs agree, and

AMERICAN CIVIL LIBERTIES
UNION OF WASHINGTON
FOUNDATION
901 Fifth Ave, Suite 630
Seattle, WA 98164
(206) 624-2184

respectfully submit that this same rationale holds for additional categories of documents:

- ***First***, as the government recognizes, documents concerning Defendants' initial design of the program, or proposals to the government to implement or approve it, are certainly relevant and proportional. Discovery should include such documents even if created prior to the government's proposed March 2002 cutoff date.
- ***Second,*** the government proposes that there be "no discovery of the conditions, treatment, or interrogations of detainees other than the Plaintiffs," even though it recognizes that discovery must address "Defendants' involvement in the development of the enhanced interrogation techniques used in the program." ECF No. 19 at 25. Plaintiffs' view is that, as a general matter, this case does not call for discovery into what each CIA prisoner endured in the program. But because Plaintiffs specifically allege that Defendants initially tested their torture program on Abu Zubaydah, his "conditions, treatment, or interrogations" are central to any account of or defense against Defendants' development of the torture program, and records should be produced. *See Salim*, 15-286-JLQ, ECF No. 1 at 16–26. The

AMERICAN CIVIL LIBERTIES UNION OF WASHINGTON FOUNDATION
901 Fifth Ave, Suite 630
Seattle, WA 98164
(206) 624-2184

government's proposal should be modified accordingly.

- ***Third***, documents relating to Defendants' ongoing assessment and refinement of their experimental methodology bear on a central claim in this case. Such documents will clearly be relevant and their discovery is proportional, even though those documents may have been created in a period that falls outside the date range identified by the government.
- ***Fourth***, documents concerning Plaintiffs' allegations that Defendants had an ongoing financial stake in continuing the torture program should be discoverable, even if beyond the government's date range, so that both parties can address the issue raised in Plaintiffs' Complaint, *see Salim*, 15-286-JLQ, ECF No. 1 at 30–31, which Defendants should have the opportunity to explore and contest.

3. The government also proposes to limit document searches to the RDINet database. *See* ECF No. 19 at 25. Plaintiffs are not currently in a position to assess the CIA's record-keeping infrastructure. Based on the government's representations as to the comprehensiveness of the RDINet database, however, it appears reasonable to limit searches to that database unless there are identifiable documents or categories of documents not present in

AMERICAN CIVIL LIBERTIES
UNION OF WASHINGTON
FOUNDATION
901 Fifth Ave, Suite 630
Seattle, WA 98164
(206) 624-2184

RDINet which would aid in the resolution of this matter. Defendants may know of clearly relevant and proportional documents that would not be present in RDINet (perhaps, as just one example, documents not included in the database that describe efforts by Defendants to secure approval for the program from senior government officials). If so, Plaintiffs respectfully submit that such documents should be produced regardless of whether they are included in RDINet. But in the absence of a clear and concrete description of such documents or categories of documents, the limitation proposed by the government seems reasonable.

4. Plaintiffs agree that the documents identified by the government concerning Plaintiff Gul Rahman provide the Parties with the key information relating to his claims. *See* ECF No. 19 at 26.

5. With respect to the DOJ subpoena, the government has represented that DOJ officials would not have directly communicated with Defendants, *see id.* at 12, and proposes that document requests to DOJ be limited to "final legal advice that DOJ provided about the former detention and interrogation program." *Id.* at 26. Plaintiffs' view is that the government's modification is reasonable, with one caveat: to the extent that Defendants intend to rely on evidence of legal advice, discovery would properly include Defendants' role in shaping any such advice,

AMERICAN CIVIL LIBERTIES
UNION OF WASHINGTON
FOUNDATION
901 Fifth Ave, Suite 630
Seattle, WA 98164
(206) 624-2184

such as representations made to DOJ concerning Defendants' theories and claims as to the purported safety of and necessity for the program.

II. PROPOSED ALTERNATIVES TO COMPLIANCE

1. The government has proposed that an anonymous CIA witness could testify under Federal Rule of Civil Procedure 30(b)(6) about facts relevant to this case. *See* ECF No. 19 at 12. Under the circumstances of this case and in the interests of moving this case forward to trial, as the Court has directed, Plaintiffs do not object in principle to the use of an anonymous 30(b)(6) witness to narrow or eliminate the need for document discovery pursuant to Defendants' subpoenas, so long as Plaintiffs are able to establish that the witness has sufficient knowledge of relevant topics to provide a basis for the testimony and that Plaintiffs may, depending upon the testimony of the witness, follow up with relevant supplemental discovery requests on topics raised by the witness.

2. The government has also proposed that "the Court should require the parties to confer on these issues and narrow the areas of actual dispute before requiring the Government to engage in lengthy and burdensome document discovery that may ultimately add minimal or no value to the case." ECF No. 19 at 22. Plaintiffs are willing to engage in such a meet-and-confer process with Defendants, and agree that the parties might be able to stipulate to particular

AMERICAN CIVIL LIBERTIES
UNION OF WASHINGTON
FOUNDATION
901 Fifth Ave, Suite 630
Seattle, WA 98164
(206) 624-2184

facts that could reduce the burden imposed by Defendants' subpoenas. In light of the timeframes for search and review described by the government and the upcoming discovery deadlines, however, Plaintiffs do not believe that discovery on all matters, and especially on issues that will clearly be in dispute, should be held in abeyance while the Parties explore the extent to which they can narrow factual disputes through stipulations or otherwise.

Respectfully submitted,

/s Dror Ladin

Emily Chiang, WSBA No. 50517
echiang@aclu-wa.org
AMERICAN CIVIL LIBERTIES UNION OF WASHINGTON FOUNDATION
901 Fifth Avenue, Suite 630
Seattle, WA 98164

Dror Ladin, admitted *pro hac vice*
dladin@aclu.org
Steven M. Watt, admitted *pro hac vice*
swatt@aclu.org
Hina Shamsi, admitted *pro hac vice*
hshamsi@aclu.org
ACLU Foundation
125 Broad Street, 18th Floor
New York, NY 10007

Lawrence S. Lustberg, admitted *pro hac vice*
llustberg@gibbonslaw.com
GIBBONS P.C.
One Gateway Center
Newark, New Jersey 07102

DATED: September 22, 2016

AMERICAN CIVIL LIBERTIES UNION OF WASHINGTON FOUNDATION
901 Fifth Ave, Suite 630
Seattle, WA 98164
(206) 624-2184

CERTIFICATE OF SERVICE

I hereby certify that on September 22, 2016, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system, which will send notification of such filing to the following:

Andrew I. Warden
andrew.warden@usdoj.gov

Attorney for the United States of America

Brian S. Paszamant:
Paszamant@blankrome.com

Henry F. Schuelke, III:
Hschuelke@blankrome.com

James T. Smith:
Smith-Jt@blankrome.com

Christopher W. Tompkins:
Ctompkins@bpmlaw.com

Attorneys for Defendants

s/ Dror Ladin
dladin@aclu.org
AMERICAN CIVIL LIBERTIES UNION FOUNDATION

AMERICAN CIVIL LIBERTIES UNION OF WASHINGTON FOUNDATION
901 Fifth Ave, Suite 630
Seattle, WA 98164
(206) 624-2184