The Honorable Justin L. Quackenbush

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

SULEIMAN ABDULLAH SALIM, MOHAMED AHMED BEN SOUD, OBAID ULLAH (as personal representative of GUL RAHMAN), Plaintiffs, vs. JAMES ELMER MITCHELL and JOHN "BRUCE" JESSEN, Defendants.	NO. 2:15-CV-286-JLQ DEFENDANTS' PROPOSED DISCOVERY PLAN AND SCHEDULING PLAN

Pursuant to the Court's Order Directing Filing of Discovery Plan and Proposed Schedule (Dkt. 30), the Parties conducted a Rule 26(f) conference on March 23, 2016. The Parties agree that the stay on Discovery to which the Parties

stipulated, and which the Court approved in its initial scheduling order (ECF No. 22) should remain in place until Defendants' Motion to Dismiss (ECF No. 27) is resolved.

The Parties' position is supported by abundant authority. The Supreme Court has repeatedly held that a District Court should stay discovery until the threshold question of qualified immunity is settled. *See, Crawford-El v. Britton*, 523 U.S. 574, 598 (1998); *Anderson v. Creighton*, 483 U.S. 635, 646 n .6 (1987); *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). The Court's rationale is that "[q]ualified immunity is 'an entitlement not to stand trial or face the other burdens of litigation.'" *Saucier v. Katz*, 533 U.S. 194, 200 (2001) (quoting *Mitchell v. Forsyth*, 472 U.S. 511, 526 (1985)). The privilege is "an immunity from suit rather than a mere defense to liability." *Mitchell*, 472 U.S. at 526. Qualified immunity is meant to protect public officials [including individuals in Defendants' position] from the broad-ranging discovery that can be peculiarly disruptive of effective government. *Harlow*, 457 U.S.at 817. In order to minimize the costs incurred by an immune defendant, the Supreme Court has emphasized that a court must resolve qualified immunity questions at the earliest possible stage in litigation. *Saucier*, 533 U.S. at 200-01 (citing *Hunter v. Bryant*, 502 U .S. 224, 227 (1991)). Accordingly, where defendants have filed motions to

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dismiss based on qualified immunity, a court should stay discovery until that threshold question is settled. *Crawford-El*, 523 U.S. at 598 ("[i]f the defendant does plead qualified immunity, the court should resolve that threshold question before permitting discovery"); see also *Mosley v. Beasley*, 49 Fed. Appx. 166, 167 (9th Cir. 2002) ("it would be premature to permit discovery in view of the pending motion to dismiss on immunity grounds"). The rationale for staying discovery until a question of qualified immunity is adjudicated is surely equally applicable when derivative immunity is at issue. *See Campbell-Ewald v. Gomez*, 136 S. Ct. 663, 673 (2016) (in ruling on the application of derivative qualified immunity to a government contractor, Court looked to the rationale behind its decision to award qualified immunity to a private party) (citing *Filarsky v. Delia*, 132 S. Ct. 1657 (2012)).

Further, the Parties also agree that if discovery is required to resolve any aspect of Defendants' Motion to Dismiss, the Court should initially limit discovery to that necessary to resolve such issues.

Finally, the Court ordered that the Parties provide a Proposed Discovery Plan and a Proposed Scheduling Plan. The Parties do not agree as to significant aspects of the elements of the requested Discovery and Scheduling Plans, and Defendants submit their Proposed Discovery Plan and Proposed Scheduling Plan.

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I. DEFENDANTS' PROPOSED DISCOVERY PLAN

(A) What changes should be made in the timing, form, or requirement for disclosures under Rule 26(a), including a statement of when initial disclosures were made or will be made.

Initial Disclosures shall be made no later than April 8, 2016.

(B) (1) The subjects on which discovery may be needed.

Plaintiffs seek to recover from Defendants for alleged treatment while Plaintiffs were detained by the CIA following the events of September 11, 2001. Plaintiffs allege that Defendants designed, implemented and applied certain U.S. government-approved "enhanced interrogation techniques" on individuals—including Plaintiffs—detained abroad in facilities controlled by the U.S. government. Plaintiffs' claims will necessarily require revisiting nearly 15-year-old foreign policy decisions made by the Executive Branch, including the military and the CIA, on issues which were debated within the Executive Branch about what interrogation techniques were permissible and justified by military necessity.

In addition, a major focus of Defendants' defense will be that they did not do what Plaintiffs allege they did. They did not create or establish the CIA enhanced interrogation program; they did not make decisions about Plaintiffs'

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capture, treatment, confinement conditions, and interrogations; and they did not perform, supervise or control Plaintiffs' interrogations.

Proving those assertions, and disproving Plaintiffs' assertions, will require discovery into at least the following issues:

1. The Defendants' role, if any, in the development and/or approval of the Central Intelligence Agency ("CIA") Rendition, Detention, and Interrogation Program ("RDI) and/or the use of enhanced interrogation techniques ("EIT").
2. The treatment and interrogation of Plaintiffs during their rendition and/or detention, including the use of EIT in their interrogation and whether the treatment and interrogation of Plaintiffs was consistent with the EIT plan and required approvals.
3. Defendants' role, if any, in determining or participating in the treatment and/or interrogation of Plaintiffs during their rendition and/or detention.
4. Legal opinions provided or known to Defendants regarding the RDI or the use of EIT prior to or during Plaintiffs' detention.
5. Plaintiffs' alleged injuries and damages.

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More specifically, discovery into these topics will include:

a. Written materials or communications between the CIA and Defendants regarding development of the EIT program, including any plan, proposal or similar document prepared by Defendants and all drafts, comments, or communications related thereto.

b. Contracts between Defendants and the CIA related to the RDI or enhanced interrogation program through the conclusion of Plaintiffs' detention.

c. The identity of persons who made decisions about Plaintiffs' treatment, confinement conditions, and interrogation, including authorization for their interrogation, authorization for the use of EIT during their interrogation, and the chain of command for those decisions to permit Defendants to negate the assertion that Defendants are liable for such actions.

d. Reports of activities, instructions, permissions and approvals of proposed actions concerning Plaintiffs' rendition and/or interrogation and/or the use of EIT with Plaintiffs.

e. All communications between Defendants and the CIA, and internal communications within the CIA, related to Plaintiffs' rendition

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and/or interrogation including, but not limited to, reports of activities, instructions, permissions and approvals of proposed actions concerning the rendition and/or interrogations of Plaintiffs.

f. Those portions of Volume 3 of the Senate Select Committee on Intelligence Report, which discuss the treatment, rendition and/or interrogation of individual detainees, which relate to Plaintiffs, and all documents supporting or related to those portions of Volume 3.

g. Contemporaneous analyses of the legality of the EIT or proposed interrogation techniques by the Office of Legal Counsel in the Department of Justice, the CIA Office of General Counsel, and other agencies or entities.

h. The criteria employed to identify "high value detainees" within the RDI and to determine the level(s) or methodologies of interrogation or EIT to which Plaintiffs were subjected.

i. Information about the Plaintiffs personally, including all documents available to Plaintiffs related to their capture, detention, rendition, interrogation, and/or release; work and education histories; family background and information, and citizenship.

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(2) When discovery should be completed.

Discovery in this case will be difficult, unusual and lengthy. Instead of setting a discovery cut-off at this time, Defendants urge the Court, for the reasons discussed below, to require the Parties to begin discussions with the Department of Justice about procedures and protections for access to classified information, to require a status report as to the progress of such discussions, and to conduct a series of Rule 16(b) conferences as phases of this litigation are completed, with incremental schedules or deadlines to be set at each such conference.

Defendants understand that certain information regarding the RDI program has been declassified, but other information – including information necessary for Defendants to disprove the allegations against them – remains classified. Briefing by the Government in the Military Commissions Trial Judiciary in Guantanamo Bay, Cuba, attached as Exhibit A hereto, indicates that as of February 5, 2016, the following information is no longer classified:

> The fact that the former RDI Program was a covert action program authorized by the President. The fact that the former RDI Program was authorized by the 17 September 2001 Memorandum of Notification (MON).
>
> General allegations of torture by HVDs (high value detainees) unless such allegations reveal the identities (e.g., names, physical descriptions, or other identifying information) of CIA personnel or

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> contractors; the locations of detention sites (including the name of any country in which the detention site was allegedly located); or any foreign intelligence service involvement in the HVDs' capture, rendition, detention, or interrogation.
>
> The names and descriptions of the thirteen Enhanced Interrogation Techniques (EITs) that were approved for use, and the specified parameters within which the EITs could be applied.
>
> EITs as applied to the 119 individuals mentioned in Appendix 2 of the SSCI (Senate Select Committee on Intelligence) Executive Summary acknowledged to have been in CIA custody.
>
> Information regarding the conditions of confinement as applied to the 119 individuals mentioned in Appendix 2 of the SSCI Executive Summary acknowledged to have been in CIA custody.
>
> Information regarding the treatment of the 119 individuals mentioned in Appendix 2 of the SSCI Executive Summary acknowledged to have been in CIA custody, including the application of standard interrogation techniques.
>
> Information regarding the conditions of confinement or treatment during the transfer ("rendition") of the 119 individuals mentioned in Appendix 2 of the SSCI Executive Summary acknowledged to have been in CIA custody.

Ex. A, p. 5.

This list reflects that a substantial amount of the information Defendants will need to defend against Plaintiffs' claims remains classified. As set forth in I(B)(1) above, Defendants will seek discovery into the identities of persons who made the decisions as to the treatment of Plaintiffs and who were involved in interrogations of Plaintiffs, and will seek discovery into the locations where such

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interrogations occurred in order to prove their non-involvement – information which is still classified. Defendants will also seek discovery into the creation of the RDI Program, and the approval of EIT by the Office of Legal Counsel in order to disprove their alleged involvement – information as to which Defendants are not clear as to its classification status. In addition to document discovery, Defendants will seek depositions of current or former Executive Branch and Military personnel on these issues.

Defendants' computers and files, other than invoices or similar documents related to financial aspects of their relationship with the CIA, were taken into the possession of the CIA, and Defendants will be required to seek such materials in discovery from the Government. Invoices in Defendants' possession, as well as materials in the Government's possession, contain classified information, including information about the locations of sites at which interrogations were conducted.

Defendants have discussed discovery issues raised by this case with representatives of the Department of Justice, and have advised the DOJ of the outlines of the issues into which Defendants will seek discovery. While Defendants understand that the Classified Information Procedures Act, 18 U.S.C App. III. Sections 1-16 ("CIPA") applies only to criminal cases by its terms, they

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will propose that it be applied, by analogy, to discovery in this case in order to permit Defendants access to the information needed to establish their defense. If that is to occur, whether by agreement or by Order of the Court, it will require time to reach such agreement or for motion practice, and additional time to establish security clearances and secure compartmented information facilities for the review of classified information, as well as time to reach agreement as to the parameters and limitations on the use of such information and on procedures for depositions involving classified information.

The DOJ advised in that discussion that it might seek input into discovery procedures in this matter. Defendants received a document titled United States' Proposed Discovery Procedures for *Salim et al., v. Mitchell et al.* (E.D. Wash.) on Wednesday, April 6, 2016. The DOJ also advised in a covering email that it intends to file a Statement of Interest addressing discovery matters in this case. Defendants have not had time to analyze the DOJ proposal on discovery procedures in detail prior to filing this Discovery Plan and Scheduling Plan. In the absence of agreement with the United States, the Court will need to resolve issues as to the necessary and permitted scope of discovery and the Parties' access to information which remains classified. Ancillary litigation in other Districts

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may also ensue as to limits or prohibitions on depositions of individuals with knowledge important to Defendants' defenses.

In light of these issues, and the uncertainty they create, Defendants cannot predict when discovery should (or even could) be completed. Defendants therefore request that the Court not set an expert disclosure schedule, discovery deadline, deadline for filing dispositive motions, or trial date at this time. Instead, as referenced above, Defendants ask the Court to maintain oversight of the discovery process – either itself or with the assistance of a Magistrate Judge. Defendants further ask the Court to set deadlines for individual segments of the requisite discovery activities, beginning with establishing the procedures under which classified materials will be provided, and to require periodic status reports and to hold periodic Rule 16(b) conferences with the Parties to track the progress of this matter, with incremental deadlines or schedules to be established at each such conference.

(3) Whether discovery should be conducted in phases or be limited to or focused on particular issues.

To the extent that Defendants' pending Motion to Dismiss is denied based on the need for discovery on one or more topics, the Parties agree that discovery should be phased and limited to the identified legal and factual issues necessary to

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resolve the Motion to Dismiss, and that discovery into other areas should proceed, if at all, only after the Motion to Dismiss has been fully resolved. In addition, Defendants believe that the need for the Court to resolve issues over access to classified information, the necessary and permitted scope of discovery, and potential ancillary litigation over access to documents in the possession of third parties and depositions requested by Defendants, will require that these issues be addressed by the Court in turn. Defendants will initially seek production of Volume 3 of the Senate Select Committee on Intelligence Report as related to Plaintiffs, and the underlying documents supporting to it, which Defendants understand contains detailed information as to the treatment and/or interrogations of Plaintiffs, and then determine how to prioritize additional discovery.

(C) Any issues about disclosure, discovery, or preservation of electronically stored information, including the form or forms in which it should be produced.

Defendants do not possess ESI which is likely to be relevant to the claims and defenses in this case. However, discovery from the Executive Branch (Department of Justice, CIA, and the military) and Congress is likely to include ESI which is classified, and there are likely to be significant issues as to control of and security for such materials, including at least when, how, and by whom they may be reviewed or accessed.

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(D) Any issues about claims of privilege or of protection as trial-preparation materials, including—if the parties agree on a procedure to assert these claims after production—whether to ask the court to include their agreement in an order under Federal Rule of Evidence 502.

Defendants will assert attorney client privilege and/or work product protection as to their representation by current counsel in other contexts. In connection with such assertion, Defendants will assert that they are not required to provide a privilege log with regard to documents and communications related to such representation because of the privileged information, such as the timing of communications, or the number of communications, that such a log may reflect. Defendants do not anticipate that Plaintiffs will challenge these assertions of privilege.

Except as to such prior representation, Defendants do not anticipate issues with claims of privilege or work product protection as to materials in their possession or control. Defendants do anticipate that such issues will arise as to materials sought in discovery from third parties. Defendants will agree to a procedure to assert and address claims of privilege after production if requested by Plaintiffs or a third party.

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(E) What changes should be made in the limitations on discovery imposed under these rules or by local rule, and what other limitations should be imposed; and

Defendants will require substantially more than 10 depositions, including substantive depositions of individuals connected with the RDI program and who have knowledge concerning Plaintiffs' interrogations, and depositions directed to document custodians or seeking access to documents from third parties. As noted in B (3) above, to the extent Defendants' Motion to Dismiss is denied because of a need for discovery, discovery should be limited to the factual information necessary to permit resolution of the Motion to Dismiss.

(F) Any other orders that the court should issue under Rule 26(c) or under Rule 16(b) and (c).

Defendants anticipate the need for a Protective Order pursuant to Rule 26(c), but the specifics of that Order are not yet identifiable. Potential issues include treatment of classified information, including establishment of one or more secure compartmented information facilities; prohibition of or limitations on certain issues or areas of discovery; limitations on persons who may be present for certain issues or areas of discovery; and requirements that discovery be sealed, or held as confidential or Attorney Eyes Only. In addition, the representatives of the DOJ with whom Defendants spoke referenced potential protective orders

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related to Government interests impacted by this case. An order, either by stipulation or following motion practice, may be required with regard to access to classified documents and information.

Defendants request that the Court issue a Scheduling Order, pursuant to Rule 16(b), which establishes dates for the joinder of other parties and to amend the pleadings. Otherwise, as referenced above, Defendants request that, instead of setting an expert disclosure schedule, discovery deadline, deadline for filing dispositive motions, or trial date at this time, the Court issue a Scheduling Order instructing the Parties to commence discussions with the United States about the establishment of discovery procedures and protections related to classified information. The Order should contain a deadline for agreement on such issues or for either Party to file a motion addressing such procedures and protections. The Court should set a Rule 16(b) conference following the deadline to address the status of such agreements or motions. The Order should also provide that the Court will set additional deadlines or schedule an additional conference at that time. The Order may also, if the Court deems it advisable, direct that a Magistrate Judge shall exercise ongoing oversight over the discovery issues in this matter.

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The Court should further Order that it will require periodic status reports from the Parties, and will schedule future deadlines for segments of the requisite discovery activities and hold periodic Rule 16(b) conferences with the Parties to track the progress of this matter and to set incremental deadlines and schedule additional conferences at each such conference.

II. JOINT PROPOSED SCHEDULING PLAN

a) The anticipated time needed for discovery.

For the reasons stated above, Defendants are not able to predict how long it will take to complete discovery, and request that the Court not set an expert disclosure schedule, discovery deadline, deadline for filing dispositive motions, or trial date at this time.

b) Dispositive motions deadline.

See II (a) above.

c) Any need for special procedures, bifurcation, etc.

The Proposed Discovery Plan set forth above proposes that the Court adopt a number of unusual procedures, including limitation of discovery to issues required to resolve Defendants' pending Motion to Dismiss, and proceeding through a series of interim discovery deadlines, status reports and Rule 16(b)

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conferences. The need for bifurcation cannot be determined at this time, but Defendants may propose bifurcation of issues if the matter proceeds to trial.

d) Any issues as to service of process, jurisdiction, or venue (other than as presented in the Motion to Dismiss).

Defendants are not aware of any such issues at this time.

e) Whether the parties are amenable to mediation and prospects of settlement.

Defendants anticipate that there is no meaningful potential for resolution of this case without a dispositive motion or trial. Defendants are amenable to mediation should Plaintiffs provide information which suggests that Defendants are mistaken on that issue.

f) Proposed final pretrial conference date.

For the reasons expressed above, Defendants do not believe it is practical to set a final pretrial conference date at this time and request that the Court not do so.

g) Trial dates.

For the reasons expressed above, Defendants do not believe it is practical to set a trial date at this time and request that the Court not do so.

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h) Anticipated length of trial.

Defendants are not able to estimate the length of a trial in this case, in light of the uncertainties regarding Plaintiffs' claims and the issues surrounding them.

DATED this 8th day of April, 2016.

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CERTIFICATE OF SERVICE

I hereby certify that on the 8th of April, 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, in such case as they are not registered service will be accomplished via email:

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