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UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF WASHINGTON

SULEIMAN ABDULLAH SALIM, MOHAMED AHMED BEN SOUD, OBAID ULLAH (AS PERSONAL REPRESENTATIVE OF GUL RAHMAN), Plaintiffs, v. JAMES ELMER MITCHELL and JOHN “BRUCE” JESSEN Defendants.	2:15-CV-286-JLQ PLAINTIFFS’ PROPOSED DISCOVERY PLAN AND SCHEDULING PLAN

Pursuant to the Court's Order Directing Filing of Discovery Plan and Proposed Schedule, ECF No. 30, the Parties conducted a Rule 26(f) conference on March 23, 2016 and further consulted by email thereafter. In accordance with the Court's Order, the Parties' stipulated stay of discovery remains in effect at this time. ECF No. 30 at 2. The Parties continue to agree that the stay on additional discovery should remain in place until Defendants' Motion to Dismiss, ECF No. 27, is resolved. The parties further agree that if discovery is required to resolve Defendants' Motion to Dismiss, the Court should initially limit discovery to that necessary to resolve the Motion.

Plaintiffs' continuing agreement to the discovery stay is based on the interests of efficiency and avoidance of unnecessary expense. Plaintiffs disagree with Defendants that a stay is required based on Defendants' eligibility for immunity. Although qualified immunity provides public officials with "an immunity from suit" that must be determined at the threshold, *Mitchell v. Forsyth*, 472 U.S. 511, 526 (1985), Defendants are private individuals and have failed to demonstrate any eligibility for immunity. *See* Plaintiffs' Memorandum in Opposition to Defendants' Motion to Dismiss, ECF No. 28, at 16–17; *see generally Al Shimari v. CACI Int'l, Inc*., 679 F.3d 205, 219 (4th Cir. 2012) (private contractor not entitled to threshold resolution of contractor defense

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1 because, *inter alia*, in contrast to suits against the government, "[w]hen properly
2 conducted, suits against private contractors pose minimal risk that military
3 personnel will be improperly haled into court or their depositions taken"). In any
4 event, the parties' dispute regarding immunity is separately before the Court for
5 adjudication.

6 The Parties are in substantial disagreement as to the appropriate scope and
7 timeline for discovery. Therefore, in accordance with the Court's Order, ECF
8 No. 30 at 2, Plaintiffs respectfully submit the following individual report of their
9 Proposed Discovery Plan and Proposed Scheduling Plan.

10 **I. PLAINTIFFS' PROPOSED DISCOVERY PLAN**

11 a. Timing, form, and requirement for disclosures under Rule 26(a)

12 Plaintiffs made their initial disclosures pursuant to Rule 26(a) to
13 Defendants on April 6, 2016.

14 b. The subjects on which discovery may be needed

15 The facts necessary to adjudicate this matter are available in the public
16 record. Plaintiffs' mistreatment as part of the CIA's Rendition Detention and
17 Interrogation (RDI), and the details of Defendants' participation in the Program
18 are publicly available. *See* Cmpl. ¶¶ 20–21, ECF No. 1 at 10–11 (listing sources).
19 To the extent that Defendants seek to raise defenses relating to government

1 officials' approval of Defendants' torture methods, the role and actions of those
2 officials—including the Office of Legal Counsel—have been exhaustively
3 detailed in public government records and reports. *See, e.g.*, Department of
4 Justice's Office of Professional Responsibility Investigation into the Office of
5 Legal Counsel's Memoranda Concerning Issues Relating to the Central
6 Intelligence Agency's Use of "Enhanced Interrogation Techniques" on Suspected
7 Terrorists (July 2009).

8 Limited discovery, although unnecessary in light of the public record, may
9 be relevant as to two discrete topics: the actions of Defendants and the injuries
10 suffered by Plaintiffs. If Defendants plan to argue that they did not devise and
11 promote the torture methods Plaintiffs endured, carefully limited discovery of
12 Defendants' roles in designing their torture program may be relevant. And the
13 surviving Plaintiffs are available to testify as to the torture and abuse they
14 endured in accordance with Defendants' methods, as are the medical
15 professionals who examined and treated Plaintiffs. These discrete topics do not
16 require the extensive discovery Defendants propose.

17 Plaintiffs disagree with Defendants' proposed plan because Defendants
18 seek overbroad, protracted, and unduly burdensome third-party discovery that
19 would not advance the needs of the case. Federal Rule of Civil Procedure 26

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1 authorizes relevant discovery provided that it is "proportional to the needs of the
2 case, considering the . . . importance of the discovery in resolving the issues, and
3 whether the burden or expense of the proposed discovery outweighs its likely
4 benefits." *See* Fed. R. Civ. P. 26(b)(1) (effective December 1, 2015); *see also*
5 Fed. R. Civ. P. 1 (the purpose of the Federal Rules of Civil Procedure is "to
6 secure the just, speedy, and inexpensive determination of every action").

7 Defendants' plan is disproportionate to the needs of the litigation. They
8 propose to undertake an exhaustive inquiry into the entire chain of command and
9 decisionmaking in the CIA's RDI Program and Plaintiffs' detention and torture,
10 virtually none of which is necessary to resolve the issues before the court.
11 Defendants' plan includes seeking the identities and communications of
12 numerous individuals involved in the RDI Program who are not relevant to the
13 claims here; voluminous internal CIA communications relating to the Program;
14 and discovery from Congress. The information Defendants seek will not benefit
15 this litigation, but will inevitably prove contentious, time-consuming, and
16 expensive to resolve.

17 Much of the discovery Defendants seek is predicated on the mistaken
18 premises that Defendants' liability turns on (1) whether they personally ordered
19 or were present for Plaintiffs' capture or torture, and (2) the participation and

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1 approval of other actors. But Plaintiffs' complaint alleges that Defendants are
2 responsible for Plaintiffs' injuries because they collaborated in the CIA's RDI
3 Program, including by devising and promoting the use of the abusive methods
4 that Plaintiffs and others endured in the Program. Defendants' own acts are
5 sufficient to establish liability. *See* Cmpl., ECF No. 1 at 73–78 (Defendants are
6 liable for planning, aiding and abetting, and conspiring in violations of customary
7 international law). Plaintiffs have not alleged that Defendants made decisions as
8 to which individuals the CIA would subject to the RDI Program, nor that
9 Defendants had final decisionmaking authority as to the RDI Program itself. That
10 Defendants' torture methods were approved by others is a matter of public record,
11 and cannot justify the unbounded fishing expedition into third party actions and
12 communications that Defendants propose. The actions of others are also
13 irrelevant to damages, because Defendants are jointly and severally liable for
14 injuries inflicted as part of their collaboration with the CIA

15 Defendants' proposed plan would replace the proportional discovery Rule
16 26 requires with an expansive license to investigate the U.S. government on
17 issues unnecessary to the disposition of this action. Plaintiffs do not oppose third-
18 party discovery as a general matter, and understand that the Department of Justice
19 plans to propose a set of procedures that will likely allow for limited and

1 proportional discovery of information in the government's possession. But
2 Defendants should not be permitted to turn the discovery process in this case into
3 a far-flung and irrelevant inquiry that will guarantee unnecessary expense and
4 delay. *See* Fed. R. Civ. P. 26(b)(1); 45(d)(1) (limiting unduly burdensome third-
5 party subpoenas).

6 c. When discovery should be completed

7 Plaintiffs propose that the court set a reasonable deadline for discovery:
8 180 days from the lifting of the stay for fact discovery, with a further 45 days of
9 expert discovery. This case involves a small number of parties and a discrete set
10 of issues relevant to Plaintiffs' three legal claims. Plaintiffs disagree with
11 Defendants' proposal that no discovery deadlines be set. For the reasons set forth
12 above, information in the public record is all that is necessary to resolve this case.
13 Even if there were some relevant information to be obtained from the government
14 in accordance with Rule 26's proportionality requirement that could not be more
15 easily obtained from public sources, the Department of Justice plans to propose
16 procedures that will likely allow information to be acquired in an orderly fashion.
17 Should the Parties disagree with the Justice Department's proposals, or encounter
18 obstacles that threaten to delay discovery beyond the scheduled deadline, Rule 16
19 provides for pretrial conferences through which the parties may, for good cause

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1 shown, seek to alter the discovery schedule. Speculation about potential obstacles
2 should not preemptively derail the orderly progress of this action.

3 d. Whether discovery should be conducted in phases or be limited to or focused on particular issues
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5 The Parties agree that if discovery proves necessary to resolve Defendants' Motion to Dismiss, it should initially be limited to facts necessary to resolve the Motion. For the reasons stated in Section I.b above, Plaintiffs believe that any subsequent discovery should be focused on issues that would aid in resolution of the litigation: specifically on Defendants' role in designing and promoting torture methods and on Plaintiffs' injuries. Should there be a need to conduct further discovery after this phase, such discovery should be limited to discrete, identified areas of necessary information, rather than Defendants' proposed plan for overbroad, unnecessary, and burdensome inquiry.
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13 e. Any issues about disclosure, discovery, or preservation of electronically stored information, including the form or forms in which it should be produced
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16 Plaintiffs do not possess electronically stored information that is likely to be relevant to the claims and defenses in this case. To the extent Defendants intend to seek such information from third parties, they must comply with Rule 45's prohibition on unduly burdensome third-party subpoenas. Defendants'
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1 proposed plan to seek vast amounts of the CIA's internal communications and to
2 subpoena years of Congressional testimony will present substantial burden issues.

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

6 Plaintiffs do not anticipate issues with claims of privilege or work product
7 protection to materials in their possession or control. Plaintiffs will agree to a
8 procedure to assert and address claims of privilege after production if requested
9 by Defendants or a third party.

10 g. What changes should be made in the limitations on discovery
11 imposed under these rules or by local rule, and what other limitations should be imposed

12 Plaintiffs do not seek a modification of the general limitation on 10
13 depositions provided for in the Federal Rules. *See* Fed. R. Civ. P. 30. This is an
14 action involving a small number of parties, arising from a common nucleus of
15 fact. Plaintiffs disagree with Defendants that this Court should not impose a limit
16 on depositions at this time. To the extent the Court grants a change of the Rule
17 30 limit, Plaintiffs suggest that the Court impose a reasonable limit rather than
18 grant Defendants' proposal.
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h. Any other orders that the court should issue under Rule 26(c) or under Rule 16(b) and (c)

The Department of Justice has indicated to the Parties that it will seek a protective order to restrict disclosure of certain information in this action. Plaintiffs expect that it will be possible to come to agreement with the Department of Justice on the scope of discovery that may be sought from the government, and procedures that will allow that discovery to take place. Entry of an agreed-upon protective order would advance the interest of an orderly discovery process, and may help to limit the overbroad inquiries that Defendants propose to make.

II. PLAINTIFFS' PROPOSED SCHEDULING PLAN

a) Limit on joinder and amendment of pleadings

Plaintiffs propose that deadlines for joinder and amendment of pleadings be set for 60 days prior to the discovery cut-off.

b) The anticipated time needed for discovery

For the reasons stated above, Plaintiffs propose that the Court set a schedule allowing 180 days from the lifting of the stay for fact discovery, with a further 45 days of expert discovery. Should the Parties encounter obstacles that threaten to delay discovery beyond the scheduled deadline, Rule 16 provides for pretrial

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conferences through which the parties may, for good cause shown, seek to alter the discovery schedule.

c) Dispositive motions deadline

Plaintiffs propose that dispositive motions be set for 45 days after the discovery cutoff.

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

Plaintiffs believe that orders requiring special procedures or bifurcation would be premature at this time.

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

Plaintiffs are not aware of any such issues.

f) Whether the parties are amendable to mediation and prospects of settlement

Plaintiffs are amenable to mediation and exploring settlement, but recognize that Defendants do not anticipate a realistic possibility of settlement at least until resolution of their Motion to Dismiss.

g) Proposed final pretrial conference date

Plaintiffs propose the Court set a final preconference date for 10 days after the resolution of any summary judgment motions.

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1 h) Trial dates

2 Plaintiffs propose that trial be set for 45 days after the resolution of any

3 summary judgment motions.

4 i) Anticipated length of trial

5 Plaintiffs estimate that trial will take between one and two weeks due to the

6 anticipated need for language interpreters during plaintiffs' testimony.

7 DATED this 8th day of April, 2016.

8 By *s/ LaRond Baker*

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1 **CERTIFICATE OF SERVICE**

2 I hereby certify that on the 8th day of April, 2016, I electronically filed the
3 foregoing document with the Clerk of Court using the CM/ECF system, which
4 will send notification of such filing to the following:

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