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

JAMES ELMER MITCHELL and
JOHN "BRUCE" JESSEN,

Petitioners,

vs.

UNITED STATES OF AMERICA,

Respondent.

NO. 16-MC-0036-JLQ

PETITIONERS' REPLY IN
SUPPORT OF MOTION TO
COMPEL DEPOSITIONS OF CIA
WITNESSES GINA HASPEL AND
"JOHN/JANE DOE"

February 24, 2017
Oral Argument to be Scheduled at
Court's Discretion

Related Case:

SULEIMAN ABDULLAH SALIM, et
al.,

Plaintiffs,

NO. CV-15-0286-JLQ

REPLY IN SUPPORT OF MOTION TO
COMPEL
NO. 16-MC-0036-JLQ

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vs.
JAMES E. MITCHELL and JOHN
JESSEN,
Defendants.

REPLY IN SUPPORT OF MOTION TO
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1 Petitioners/Defendants (“Defendants”) reply to the United States’ Response
2 to Defendants’ Motion to Compel Depositions of CIA Witnesses Gina Haspel and
3 “John/Jane Doe”.

4 Plaintiffs in the underlying action, 15-286-JLQ, allege that Defendants
5 “designed, implemented, and personally administered an experimental torture
6 program” under contract with the CIA, pursuant to which Plaintiffs assert that
7 they were subjected to torture. As the Court has recognized, Plaintiffs both bear
8 the burden of proof with respect to their claims and have consistently taken the
9 position that they do not require discovery because “the facts necessary to
10 adjudicate this matter are available in the public record.” (ECF No. 70 in Case
11 No. 16-MC-00360JLQ, p. 2, citing ECF No. 34 in Case No. 15-286-JLQ).

12 During argument on Defendants’ Motion to Compel on February 14, 2017,
13 the Court stated that Defendants “were privy to whatever took place in their
14 dealings with the plaintiffs, the three plaintiffs.”¹ [Transcript, 18/9-10.] In fact,
15 the evidence will be that Defendants were entirely unaware of the existence,
16 detention, or interrogation of Plaintiffs Salim and ben Soud until this action was
17 commenced against them, [Transcript, p. 19/16-21], and had only minimal
18 involvement with Plaintiff Rahman sometime before his death from hypothermia.
19
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21 _____
22 ¹ The Court also expressed the view that Defendants were seeking to
23 confirm what they intended to testify to, in order to avoid impeachment.
24 [Transcript, p. 18/17-20.] However, as the Court was advised during the hearing,
25 Defendants’ depositions have been completed. [Transcript, p. 24/8-15.]
26

1 While Plaintiffs may believe they are prepared to proceed without the
2 requested discovery, Defendants need, and are entitled to, discovery to support
3 their denial of Plaintiffs' claims. As the Court is aware, Defendants assert that
4 they assisted in developing an interrogation approach for use upon *specific, High*
5 *Value Detainees*, including Abu Zubaydah, Khalid Sheik Muhammed, and Abd
6 al-Rahim al-Nashiri, but did not "design", "implement" or "administer" *any*
7 *actions*, let alone an "experimental torture program" as to Plaintiffs. While
8 Defendants can testify as to their non-involvement with Plaintiffs Salim and ben
9 Soud (and their limited involvement with Plaintiff Rahman) without further
10 discovery, Defendants cannot corroborate this testimony absent evidence secured
11 from the CIA.
12

13 Similarly, the suggestion that Defendants are not prejudiced by a lack of
14 discovery because they were involved in the "torture program", and have
15 knowledge of what occurred through their involvement, is simply incorrect.
16 Because Defendants were *not* involved in any way with Plaintiffs Salim and ben
17 Soud, and had only minimal involvement with Plaintiff Rahman some time prior
18 to his death from hypothermia, Defendants lack such knowledge, and are reliant
19 on the discovery sought to demonstrate what did occur during Plaintiffs'
20 detentions and interrogations and Defendants' lack of involvement in those
21 events.
22

23 The depositions of Cotsana, Haspel and Doe are particularly important in
24 that regard, as the Court previously declined to order production of documents
25 related to Plaintiffs Salim and ben Soud's detentions and interrogations unless
26

1 such documents also referred to Defendants. [October 4, 2016 Order re: Motion
2 to Compel; ECF No. 31]. No such documents have been produced. While the
3 absence of such documents logically demonstrates Defendants' lack of
4 involvement with Plaintiffs Salim and ben Soud, the lack of such documents
5 cannot readily be turned into evidence of non-involvement for a jury. The
6 testimony of Cotsana, Haspel, and Doe, in contrast, will support, and strengthen,
7 Defendants' denials of involvement (or minimal involvement with respect to
8 Plaintiff Rahman).

9
10 Cotsana, Haspel and Doe also have direct knowledge of the plenary control
11 exercised by the CIA. Nor is their testimony cumulative, as suggested by
12 Plaintiffs. [Transcript, p. 22/17 - p. 23/12.] Defendants are aware of no rule or
13 legal restriction on developing testimony from more than one witness on an issue,
14 and Cotsana, Haspel and/or Doe will undoubtedly have additional, and different,
15 knowledge from that of Jose Rodriguez and/or John Rizzo.

16 As has been recently reported in the press, Haspel ran the black site at
17 which Abu Zubaydah was detained and interrogated. She would have been
18 personally involved in the communications between CIA Headquarters and
19 Defendants concerning that interrogation. Similarly, Cotsana and Doe were
20 Defendants' direct supervisors during the relevant time periods, with Doe serving
21 as Cotsana's successor. As such, they have direct, first-hand knowledge of the
22 extent of Defendants' involvement in the development of any interrogation efforts
23 and of Defendants' non-involvement with Plaintiffs specifically, or with non-
24 High Value Detainees generally. Among other things, these witnesses are in a
25
26

1 position to confirm that Defendants never engaged in any interrogation activities
2 that had not been previously and specifically approved in advance by the CIA on
3 a case-by-case basis. They would also know and be in a position to identify the
4 interrogation program approved and implemented against High Value Detainees
5 and to confirm that Defendants were involved exclusively with that effort; that
6 Plaintiffs were not classified as High Value Detainees and were not part of the
7 High Value Detainee program; and that Defendants were not involved in
8 developing or authorizing techniques for Plaintiffs' interrogations.
9

10 It is perhaps understandable that Plaintiffs prefer Defendants not obtain
11 such testimony to support their defenses. It may even be understandable that the
12 US is more concerned about protecting its view of classified information than
13 with permitting Defendants to develop the truth about their non-involvement with
14 Plaintiffs Salim and ben Soud and their minimal involvement with Plaintiff
15 Rahman. However, it would neither be understandable, nor appropriate, for the
16 Court to deprive Defendants of such evidence. Accordingly, the Court should
17 compel the depositions of Haspel and Doe.
18

19 Subject to the observations above, Defendants do not object to the U.S.
20 suggestion that consideration in a single, consolidated brief addressing all of the
21 privilege issues is appropriate.

22 DATED this 24th day of February, 2017.

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CERTIFICATE OF SERVICE

I hereby certify that on the 24th day of February, 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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