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UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF WASHINGTON

JAMES ELMER MITCHELL and JOHN "BRUCE" JESSEN

Petitioners

v.

UNITED STATES OF AMERICA,

Respondent.

No. 16-MC-0036-JLQ

PLAINTIFFS' BRIEF REGARDING DEFENDANTS' THIRD AND FOURTH MOTIONS TO COMPEL

Motion Hearing:
To Be Scheduled At Court's Discretion

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Related Case:

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.

Related Case: No. CV-15-0286-JLQ

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ARGUMENT

Plaintiffs respectfully submit this brief in an effort to avoid the burdensome and unnecessary adjudication of privilege disputes arising from Defendants' discovery demands. Plaintiffs take no position as to whether the CIA Act, the National Security Act, the deliberative process privilege, attorney-client privilege, attorney work-product protection, or state secrets privilege properly apply to the contested depositions or disputed documents. Rather, Plaintiffs respectfully urge that instead of adjudicating each of the privilege issues raised by Defendants' motions to compel, the Court should deny these motions because the underlying discovery demands are disproportionate.

"The 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 WL 304784, at *1 (W.D. Wash. Jan. 26, 2016) (quoting Fed. R. Civ. P. 26(b)(1)). To determine whether discovery is proportional, courts examine factors including "the importance of the discovery in resolving the issues, and whether the burden or expense of the proposed discovery outweighs its likely benefit." Fed. R. Civ. P. 26(b)(1). Further, Rule 26 requires that discovery be limited where "the discovery sought is unreasonably cumulative or duplicative, or can be obtained from some other source that is more convenient, less burdensome, or less expensive." Fed. R. Civ. P. 26(b)(2)(C)(i).

Defendants' motions to compel fail this test. They seek evidence that is needlessly burdensome and obviously cumulative, in large part because they

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address either an undisputed issue—that Defendants were not personally present for the torture of Mr. Salim and Mr. Ben Soud—or one as to which Defendants already have ample evidence in the form of testimony from senior CIA officials—the bureaucratic approval process for Defendants' torture program.

But cumulativeness aside, the discovery Defendants seek would not aid in resolving the issues before the Court. As Plaintiffs showed a year ago, when Defendants first described their plan for discovery, "Much of the discovery Defendants seek is predicated on the mistaken premises that Defendants' liability turns on (1) whether they personally ordered or were present for Plaintiffs' capture or torture, and (2) the participation and approval of other actors." *Salim v. Mitchell*, 15-286-JLQ, ECF No. 34 at 5–6. This Court has since confirmed that "the proper scope is to focus on the actions of the two Defendants and the detention and interrogation of the three Plaintiffs," ECF No. 31 at 5.

Defendants nonetheless persist in seeking depositions and documents based on the same mistaken premises identified a year ago, arguing that they can avoid liability if they can adduce evidence to confirm (1) "their non-involvement with Plaintiffs," and (2) that Defendants secured approvals from other actors and "followed all of the instructions that they were given." ECF No. 76 at 5. As Plaintiffs set forth below, further discovery as to these questions would be of little, if any, value in resolving this matter, and threatens undue delay. *See also* ECF No. 47 at 3 ("The court will not allow this matter to be unduly delayed while Defendants squabble with the Government over discovery."); *id.* at 5

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(rejecting as disproportionate an attempt by Defendants to expand scope of subpoena). Accordingly, Defendants' motions should be denied.

I. FURTHER DISCOVERY OF DEFENDANTS' PERSONAL PARTICIPATION IN PLAINTIFFS' TORTURE WOULD NOT AID IN RESOLUTION OF THIS CASE.

A. Whether Defendants personally participated in Mr. Salim's and Mr. Ben Soud's torture is not in dispute.

Defendants argue that they require additional depositions and documents to establish that they did not personally participate in Mr. Salim's and Mr. Ben Soud's torture. But this fact is both undisputed and immaterial, *see* Section I.B.

Specifically, Defendants assert that "[w]hile Defendants can testify as to their non-involvement with Plaintiffs Salim and ben Soud . . . without further discovery, Defendants cannot corroborate this testimony." ECF No. 73 at 2. Of course, Defendants do not explain how Mr. Cotsana's or Ms. Haspel's testimony would even address this issue; neither purported witness is claimed to have specific knowledge of Mr. Salim's or Mr. Ben Soud's torture. But more fundamentally, for more than a month Defendants have possessed Plaintiffs' conclusive admissions "that neither Defendant participated in any of [Mr. Salim's and Mr. Ben Soud's] interrogations." *See* Declaration of Dror Ladin, submitted alongside brief ("Ladin Decl."), Exh. A. Accordingly, Defendants need no additional testimony or documents to "prove when they were or were not present at said locations (to establish their noninvolvement with Plaintiffs)." ECF No. 76 at 10. Indeed, Defendants' disingenuous claim that they "cannot corroborate"

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undisputed facts without burdensome adjudication of privilege issues again presents the question, previously raised by the Court, of whether these requests are "for a proper purpose." *See* 15-286-JLQ, ECF No. 124 at 4 ("Defendants' request for a highly invasive examination to explore an injury not at issue in the matter *sub judice* has raised the question as to whether that request was made for a proper purpose.").

B. Whether Defendants personally participated in Mr. Salim's and Mr. Ben Soud's torture is irrelevant to the claims in this case.

Furthermore, Defendants' demand for further discovery of "their non-involvement with Plaintiffs Salim and ben Soud" is not only cumulative, but is also premised on a misunderstanding of the law applicable to the claims at issue in this case. As Plaintiffs described at the outset of this litigation, "Defendants are responsible for Plaintiffs' injuries because they collaborated in the CIA's RDI Program, including by devising and promoting the use of the abusive methods that Plaintiffs and others endured in the Program." 15-286-JLQ, ECF No. 34 at 6. Plaintiffs' fundamental claims include that Defendants aided and abetted Plaintiffs' torture and cruel, inhuman and degrading treatment, *see* 15-286-JLQ, ECF No. 1 ¶ 171, as well as the other violations alleged in the Complaint, *see id.* ¶¶ 177 (human experimentation), 183 (war crimes).

"Customary international law . . . provides the legal standard for aiding and abetting ATS claims." *Doe I v. Nestle USA, Inc.*, 766 F.3d 1013, 1023 (9th Cir. 2014). The Ninth Circuit surveyed sources of customary international law and concluded "there is widespread substantive agreement" that the *actus reus* for

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such claims "is established by assistance that has a substantial effect on the crimes." *Id.* at 1026–27 (quoting *Prosecutor v. Taylor*, Case No. SCSL-03-01-A, ¶ 475 (SCSL Sept. 26, 2013)). In other words, there must be a "causal link between the defendants and the commission of the crime. . . ." *Id.* Thus, "to be guilty of torture as an aider or abettor, the accused must assist in some way which has a substantial effect on the perpetration of the crime and with knowledge that torture is taking place." *Prosecutor v. Furundzija*, Case No. IT–95–17/1/T, Judgment, ¶ 257 (Dec. 10, 1998). Substantial assistance includes providing "the means by which a violation of the law is carried out." *In re S. Afr. Apartheid Litig.*, 617 F. Supp. 2d 228, 259 (S.D.N.Y. 2009). There is no requirement of specific intent; instead a plaintiff need only show that a defendant provided assistance with knowledge or purpose that the assistance would facilitate a violation of customary international law. *See Doe I v. Cisco Sys., Inc.*, 66 F. Supp. 3d 1239, 1248 (N.D. Cal. 2014) (stating that "the Court applies the more lenient standard identified by the Ninth Circuit in *Nestle*, which does not require the allegation of specific intent for *mens rea*").

As the discovery process in this case has conclusively demonstrated, Defendants satisfy the requirements for aiding and abetting liability because they knowingly, intentionally, and substantially assisted in the creation, testing, and implementation of a torture program that was used to reduce CIA prisoners to a state of "learned helplessness." Plaintiffs were subjected to the systemic tortures that Defendants designed, proposed, and refined for the CIA.

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CIA documents describe the centrality of Defendants' role: "Beginning March 2002, Dr.s Mitchell and Jessen were instrumental in the development of the . . . Detention and Interrogation Program." Ladin Decl., Exh. B at 001909.[1] Defendants proposed a series of torture methods in July 2002, *see* Ladin Decl., Exh. C (proposing specific methods). In August 2002, Defendants personally tested their methods on the first CIA prisoner, observing firsthand the severe pain and suffering these abuses inflicted. For example, a CIA cable reports on the results of "Day 16 of the aggressive interrogation phase," of Abu Zubaydah's torture, as designed, advocated for, and personally executed by Defendants:

> Subject continued to cry, and claim ignorance of any additional information. This resulted in a second full-face watering. At the onset of involuntary stomach and leg spasms, subject was again elevated to clear his airway, which was followed by hysterical pleas. Subject was distressed to the level that he was unable to effectively communicate or adequately engage the team.

Ladin Decl., Exh. D at 002380. After nineteen days of torture, Defendants and their collaborators pronounced Defendants' program a success, describing their prisoner as "in a state of complete subjugation and total compliance." Ladin Decl., Exh. E at 002382. Defendants then sought to expand their program.

In December 2002, Defendant Mitchell and others provided feedback to CIA headquarters to aid the use of Defendants' torture program on other CIA

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[1] Defendants assert that the SSCI "Report is inaccurate and misleading." ECF No. 76 at 5. Defendants are wrong, but in any event, Plaintiffs here cite only the discovery record, which amply establishes the facts at issue.

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prisoners. *See* Ladin Decl., Exh. F. By January 2003, Defendants' program—the specific methods that they had proposed—had become standardized as the CIA's so-called "Enhanced Interrogation Techniques" and promulgated to the "black sites" where the CIA held its prisoners. *See, e.g.*, Ladin Decl., Exh. G at 001172 (listing Defendants' methods as "enhanced techniques" to be used on prisoners). It is uncontroverted that Plaintiffs Salim and Ben Soud were among the CIA prisoners subjected to these standardized torture methods. *See, e.g.*, Ladin Decl., Exh. H (CIA record confirming Defendants' methods were used on Plaintiffs Salim and Ben Soud). Meanwhile, Defendants remained involved in the CIA's use of torture throughout the duration of the torture program, and were still devising and refining torture methods for CIA use as late as 2007. *See* Ladin Decl., Exh. I at 001176–77 ("Jessen and Mitchell will work on alternative methods for implementing sleep deprivation EIT and propose courses of action").

Discovery has also confirmed that Defendants were paid several million dollars to provide "on-site guidance," and "consultative support and specialized training" to the CIA in furtherance of torture on prisoners. *See, e.g.*, 15-286-JLQ, ECF No. 84-1 at 55. Indeed, Defendants formed a company to profit from the CIA's torture program, which they admit "was paid approximately $81 million by the CIA." *See* 15-286-JLQ, ECF No. 77 ¶ 68.

Plaintiffs thus contend—and discovery has shown—that Defendants satisfy the elements of aiding and abetting: they "sought to accomplish their own goals by supporting violations of international law"; "obtained a direct benefit from the

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commission of the violation of international law"; and, displayed "a myopic focus on profit over human welfare." *Nestle*, 766 F.3d at 1024, 1026. Specifically, the record establishes that Defendants were the original source of the torture methods that were eventually used on Plaintiffs, demonstrating the necessary "causal link between the defendants and the commission of the crime." *Id.* at 1026; *see also Prosecutor v. Tadic*, Case No. 94–1–T, Opinion and Judgment, ¶ 688 (Trial Chamber, May 7, 1997) (showing required is only that "the criminal act most probably would not have occurred in the same way had not someone acted in the role that the accused in fact assumed"). Defendants provide no indication that the additional discovery they seek here would shed any light on, let alone contradict, the key fact that CIA records already confirm: Plaintiffs were subjected to torture methods proposed and designed by Defendants for use on CIA prisoners. *See Dwoskin v. Bank of Am., N.A.*, No. CV CCB-11-1109, 2016 WL 3955932, at *2 (D. Md. July 22, 2016) (denying further depositions as disproportionate in absence of showing "that additional discovery would contradict the evidence already produced").

C. Whether or not Defendants intended that their torture techniques be used on Plaintiffs is irrelevant.

Defendants argue that additional discovery would show that they intended that only a subset of CIA prisoners be tortured, and did not specifically intend that Plaintiffs be subjected to the systemic torture and abuse that Defendants designed for the CIA. But this argument is predicated on a fundamental

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misconception: Defendants' liability for Plaintiffs' injuries simply does not turn on whether they targeted *these specific* CIA prisoners.

Thus, for example, Defendants maintain that Mr. Cotsana could testify that Defendants "assisted in developing an interrogation approach for use upon specific, High Value Detainees, including Abu Zubaydah, Khalid Sheik Muhammed, and Abdal-Rahim al-Nashiri, but did not 'design', 'implement' or 'administer' any actions" aimed at Plaintiffs. ECF No. 73 at 2. But even if this were true, Defendants are liable because they designed, promoted, and profited from abusive methods that they told the CIA would break prisoners' wills through pain, fear, and degradation; and because the CIA in fact used Defendants' methods on Plaintiffs.

Defendants' theory appears to be that they may avoid liability by asserting that they only sought to torture "high value" victims. But just as a defendant who supplies a weapon intended for shooting gang members is responsible when an innocent bystander is hit, Defendants' claim that they only wished to assist in the torture of "specific, High Value Detainees" does not reduce their liability for others subjected to Defendants' torture program. *See, e.g.*, *Hernandez v. Haws*, No. CV 07-2140 CJC CW, 2011 WL 1898205, at *6 (C.D. Cal. Feb. 9, 2011) (defendant who furnished gun guilty of aiding and abetting murder of non-gang member, notwithstanding evidence that defendant intended to target rival gang members); *State v. Henry*, 253 Conn. 354, 360 (2000) ("We conclude that an accessory who intends to aid a principal in committing murder and who possesses

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the intent to murder a third person is criminally liable for the killing of an unintended third party by the principal."). Especially given that "specific intent" is not required under the "standard identified by the Ninth Circuit in *Nestle*," Defendants' effort to avoid liability for their actions based upon their claim that they did not intend the specific consequences that were visited upon Plaintiffs has no basis in law. *Cisco Sys.*, 66 F. Supp. 3d at 1248.

Courts adjudicating Alien Tort Statute claims agree that aiding and abetting liability does not require that a defendant intend to specifically harm—or even know the identities of—the particular plaintiffs who were ultimately injured. For example, one court found "no authority for Defendants' contention that [Defendant] must have known of specific *identities* of those murdered, and have ordered the deaths of those specific individuals, in order to potentially be held liable for aiding and abetting extrajudicial killings." *Doe v. Drummond Co.*, No. 2:09-CV-01041-RDP, 2010 WL 9450019, at *11 n.24 (N.D. Ala. Apr. 30, 2010); *see also In re Chiquita Brands Int'l, Inc. Alien Tort Statute & S'holder Derivative Litig.*, 792 F. Supp. 2d 1301, 1344 (S.D. Fla. 2011), *rev'd in part on other grounds, Cardona v. Chiquita Brands Int'l, Inc.*, 760 F.3d 1185 (11th Cir. 2014) ("Plaintiffs need not allege that Chiquita specifically intended that the AUC torture or kill the specific individuals alleged in the complaint, i.e., Plaintiffs' relatives specifically."). Indeed, it is "well within the mainstream of aiding and abetting liability" to hold a defendant liable based only on the "general awareness of its role as part of an overall illegal activity, and the

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defendant's knowing and substantial assistance to the principal violation"—regardless of whether a defendant intended to harm or even knew the existence of a specific victim. *Linde v. Arab Bank, PLC*, 384 F. Supp. 2d 571, 584 (E.D.N.Y. 2005); *see,e.g.*, *Halberstam v. Welch*, 705 F.2d 472, 488 (D.C. Cir. 1983) (defendant who intended only to assist in laundering proceeds of "personal property crime[s] at night"—and neither selected, saw or was even aware of any victims—liable for wrongful death when primary tortfeasor committed a murder during a burglary); *Rice v. Paladin Enters., Inc.*, 128 F.3d 233, 255 (4th Cir. 1997) (company that provided instructions "on the techniques of murder and murder for hire" could be liable for "aiding and abetting the commission of these violent crimes" even where company did not know of any victims). Whether, as they claim, "Defendants were entirely unaware of the existence, detention, or interrogation of Plaintiffs Salim and ben Soud," ECF No. 73 at 1, is thus irrelevant and does not warrant further discovery.

Here, Defendants, *inter alia*, supplied the CIA with the torture methods that the CIA's own records reveal it used on Plaintiffs. Defendants therefore substantially assisted the CIA in conducting that torture and demonstrated both intent to further the CIA's use of that torture and knowledge that torture was in fact taking place. *See supra* Section I.B. Plaintiffs were certainly harmed by Defendants' actions. Defendants have not explained how further discovery as to Defendants' *intended* victims would aid resolution of this case. It would not.

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D. Defendants' requested additional discovery of their role in Mr. Rahman's torture would not further establish any defense or resolve any disputed facts.

Defendants argue that additional discovery would allow them to prove that they had only "limited involvement with Plaintiff Rahman," ECF No. 73 at 2. But discovery has already resulted in the release of cables that Defendant Jessen authored about Mr. Rahman, CIA investigatory interviews with Jessen and others, and reports of multiple official investigations—all of which establish that:

(1) Defendant Jessen personally took part in multiple interrogations of Plaintiff Rahman during which Mr. Rahman was kept naked or in a diaper, "in cold conditions with minimal food and sleep," and subjected to physical assault. Ladin Decl., Exh. J at 001076; Exh. K at 001051.

(2) Defendant Jessen advised the CIA that Mr. Rahman displayed a "sophisticated level of resistance training," because he "complained about poor treatment," and said he couldn't think because he was so cold. Ladin Decl., Exh. L at 001073.

(3) After several days during which Mr. Rahman had been kept in a diaper, his hands chained to an overhead bar in perfect accord with Defendants' sleep deprivation method, and 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." Ladin Decl., Exh. M at 001057.

(4) Defendant Jessen advised that "it will be the consistent and persistent

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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 001058.

(5) Defendant Jessen instructed that Mr. Rahman's torturers should view Mr. Rahman's pleas about poor treatment and cold as "'health and welfare' behaviors and complaints," which, according to Defendant Jessen, were evidence of "resistance" to interrogation. Ladin Decl., Exh. J at 001077.

(6) Within days of Defendant Jessen's recommendation that "environmental deprivations" be consistently and persistently inflicted, Mr. Rahman—starved, sleepless, and freezing—died of hypothermia.

(7) After Plaintiff Rahman's death, Defendant Jessen told an investigator:

> if a detainee is strong and resilient, you have to establish control in some way or you're not going to get anywhere. If bound by the Geneva Convention, this person would not break. You have to try different techniques to get him to open up. . . .You want to instill fear and despair. Ladin Decl., Exh. K at 001050–51.

Significantly, Defendants have not explained how any of the documents or depositions they seek bears on any of these facts.

II. ADDITIONAL DISCOVERY OF BUREAUCRATIC APPROVALS WOULD NOT AID IN RESOLVING THIS CASE.

A. Defendants fail to acknowledge available and less burdensome evidence of bureaucratic approvals.

Defendants claim they are "hamstrung" because they lack the testimony of CIA witnesses who "served in high-level positions" and could testify that

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Defendants' actions were approved by superiors and that Defendants followed instructions. ECF No. 64 at 9. As an initial matter, as Plaintiffs stated more than a year ago, "[t]hat Defendants' torture methods were approved by others is a matter of public record," and has never been in dispute. 15-286-JLQ, ECF No. 34 at 6. But even if Defendants needed firsthand testimony from individuals in "high-level positions," the record shows that they do not lack access to it.

For example, Defendants assert that they require testimony from Ms. Haspel, because they claim she "ran the black site at which Abu Zubaydah was detained and interrogated," and "everything Defendants did would have been directed and/or approved by or through her." ECF No.73 at 3; ECF No. 64 at 9. But Defendants already secured substantially similar testimony from Jose Rodriguez, the former head of the CIA's Counterterrorism Center, who has stated that the individual running the black site, who had "operational control over" Defendants, "reported directly to me," and that "[a]s such, I was keenly aware of and approved of all of Drs. Mitchell and Jessen's activities." Ladin Decl., Exh. N ¶¶ 68, 69. Mr. Rodriguez's testimony renders cumulative further testimony that CIA superiors approved of Defendants' torture of Abu Zubaydah. And because Mr. Cotsana apparently reported to Mr. Rodriguez, any testimony Mr. Cotsana could offer regarding CIA approvals would be cumulative of the testimony already available from Mr. Rodriguez. *See id.* ¶¶ 18, 48, 68–70, 78.

Mr. Rodriguez is not the only top CIA decision-maker and torture program witness whose testimony Defendants have already secured. John Rizzo, the

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CIA's top legal officer for much of the duration of the torture program, has testified that he "monitored and oversaw" the program "from its beginning to end" and has provided a declaration and further deposition testimony about the legal approval process related to Defendants' actions. Ladin Decl., Exh. O ¶ 68. At his deposition, Mr. Rizzo provided Defendants with testimony that "every decision about when and how and to whom these techniques were going to be utilized was made by headquarters." Ladin Decl. ¶ 17. Far from being "hamstrung" then, Defendants already have statements from available witnesses with knowledge of the bureaucratic approvals related to their actions. Nonetheless, they now seek additional depositions that raise burdensome issues.

Defendants' approach to discovery in this case is epitomized by their decision to withdraw their uncontested subpoena to Jonathan Fredman without him asking a single question. Defendants identified Mr. Fredman in their witness list, stating that he may testify as to a lengthy list of topics that are substantially identical to those Defendants listed for Mr. Cotsana and Ms. Haspel. *See* 15-286-JLQ, ECF No. 123 at 5–7, 9–10.[2] Defendants subpoenaed Mr. Fredman, who

[2] Defendants listed a single additional potential topic for Mr. Cotsana and Ms. Haspel: "the training and instruction provided to interrogators." Defendants do not mention training in their motions to compel, and their own role in training is established by other discovery. *See*, *e.g.*, 15-286-JLQ, ECF No. 84-1 at 55; Ladin Decl., Exh. B at 001909 (Defendants "established an on-going meticulous and rigorous interrogation training and certification program").

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served in roles including Assistant Deputy Director of National Intelligence for Special Programs, and Special Assistant to the Director of CIA, and this Court authorized his oral deposition on October 4, 2016, *see* ECF No. 31 at 8.

Yet Defendants never even attempted to question Mr. Fredman, although the government confirmed that—unlike other potential witnesses Defendants seek—Mr. Fredman's testimony would not require contentious and burdensome adjudication of CIA Act or state secrets privilege disputes. *See* 15-286-JLQ, ECF No. 73 at 6 (noting that Mr. Fredman's "association with the former detention and interrogation program has previously been declassified"). On January 26, 2017, four days before his scheduled deposition, Defendants announced that they were withdrawing their subpoena and elected not to ask a single question of Mr. Fredman on any of the topics they now assert are essential to their defense. Instead, they choose to pursue a battle over witnesses whose depositions present potentially difficult legal questions.

It was precisely this type of gamesmanship that the Supreme Court condemned in *United States v. Reynolds*, 345 U.S. 1 (1953). There, the requesting party was given "a reasonable opportunity" to "adduce the essential facts as to causation without resort to material touching upon military secrets," including through the deposition of witnesses whom the government had made available. *Id.* at 11. The requestor refused to conduct the depositions of available witnesses, demanding instead a document that the government asserted contained military secrets. The Court found that the requesting party's need for the contested

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document "was greatly minimized by an available alternative, which might have given respondents the evidence to make out their case without forcing a showdown on the claim of privilege." *Id.* Rebuking the party for its refusal to accept the proffered, less burdensome depositions, the Court concluded that "[w]e think that offer should have been accepted." *Id.* The same is true here.

B. Defendants are not eligible for derivative sovereign immunity and cannot establish a "just following orders" defense.

Defendants assert that they need further discovery to establish that "everything Defendants did would have been directed and/or approved" by government officials, ECF No. 64 at 9, and to "confirm that Defendants followed all of the instructions that they were given," ECF No. 76 at 5. But there is no basis for Defendants' theory that bureaucratic approval or adherence to instructions confers immunity for their actions in designing an experimental torture program, and accordingly no basis for further discovery on this issue.

Defendants fundamentally misunderstand the limits of derivative sovereign immunity—as this Court has recognized. They assert that they need additional discovery of governmental approvals of their actions to establish "that they acted within the scope of authority properly delegated to them." ECF No. 54 at 9. But as the Court noted in rejecting Defendants' first motion to dismiss, "Plaintiffs' allegations are not merely that Defendants Mitchell and Jessen acted specifically at the direction of the Government, but rather that they designed and implemented an experimental torture program." 15-286-JLQ, ECF No. 40 at 14.

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Discovery has borne out Plaintiffs' allegations: far from merely acting at the direction of others, Defendants were "instrumental in the development" of the torture program, including by (a) proposing that the CIA use their experimental methods on prisoners, (b) testing their program, (c) continuing to consult on program refinements, and (d) devising alternate techniques. *See supra* Section I.B. Accordingly, Defendants are not eligible for derivative sovereign immunity. *See Cabalce v. Thomas E. Blanchard & Assocs., Inc.*, 797 F.3d 720, 732 (9th Cir. 2015) (holding that defendant contractor "would not benefit" from immunity because it exercised discretion "in devising" tortious plan while immunity "is limited to cases in which a contractor 'had no discretion in the design process'").[3]

Perhaps even more fundamentally, no further discovery of CIA approvals could possibly establish that Defendants acted in accordance with "properly delegated" authority because the CIA has no power to confer a license to commit

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[3] Defendants assert that it is "critically important to Defendants' ability to contest Plaintiffs' claims" that they be permitted to "prove that the redacted content" of a CIA cable "includes discussion of 'contingencies if use of the waterboard is not approved.'" ECF No. 76 at 6. Defendants maintain that "Plaintiffs have repeatedly" relied on the specific allegation that "Defendants described the waterboard as an 'absolutely convincing technique' . . . to argue that Defendants acted outside the scope of their authority." *Id.* at 5. But Plaintiffs have never made this argument and do not make it now. Nor is it clear how the redacted cable would bear on any other available defense.

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war crimes. "Officials of the CIA or any other intelligence agency of the United States do not have the authority to sanction conduct which would violate the Constitution or statutes of the United States." *United States v. Anderson*, 872 F.2d 1508, 1516 (11th Cir. 1989). That is, the CIA cannot authorize a contractor, or its own employees, to torture or commit war crimes. *See* 18 U.S.C. §§ 2340 (criminalizing torture); 2441 (criminalizing grave breaches of the Geneva conventions); *see also generally U.S. ex rel. Ali v. Daniel, Mann, Johnson & Mendenhall*, 355 F.3d 1140, 1146 (9th Cir. 2004) (derivative sovereign immunity applies only to actions that are "tortious when done by private parties but not wrongful when done by the government"). "Put simply, a contractor cannot claim a derivative immunity that exceeds the immunity of the sovereign." *Ruddell v. Triple Canopy, Inc.*, No. 1:15-CV-01331 (LMB/JFA), 2016 WL 4529951, at *5 (E.D. Va. Aug. 29, 2016). Thus where "Congress has prohibited the federal sovereign" from taking specific actions—including by criminalizing torture and war crimes—a government official cannot lawfully authorize a contractor to take the prohibited action in the government's stead. *Id.* at *6.

Finally, Defendants assert that they require additional discovery to "confirm that Defendants followed all of the instructions that they were given." ECF No. 76 at 5. But even if Defendants had no role in program design and merely followed instructions, they would still be liable for their role in torture and other war crimes. That is because "as historical events such as the Holocaust and the My Lai massacre demonstrate, individuals cannot always be held immune

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for the results of their official conduct simply because they were enforcing policies or orders promulgated by those with superior authority." *Grossman v. City of Portland*, 33 F.3d 1200, 1209 (9th Cir. 1994). Thus, "an officer may not raise a Nuremberg Defense and claim that he shot a suspect who posed no threat because he believed his duty required him to follow orders." *Idaho v. Horiuchi*, 253 F.3d 359, 366 n.10 (9th Cir. 2001) (en banc), *vacated as moot*, 266 F.3d 979 (9th Cir. 2001) (en banc). Nor may an agent claim immunity to "torture a kidnapper to reveal the whereabouts of his victim, even though he believes it necessary to perform his job." *Id.* "While executive officers can declare the military reasonableness of conduct amounting to torture, it is beyond the power of even the President to declare such conduct lawful." *Al Shimari v. CACI Premier Tech., Inc.*, 840 F.3d 147, 162 (4th Cir. 2016) (Floyd, J. concurring). Any testimony that Ms. Haspel or Mr. Cotsana would provide—or any information that might exist in the documents Defendants seek—as to bureaucratic approval of Defendants' conduct could not and did not confer immunity on Defendants for their unlawful actions.

CONCLUSION

For the reasons stated above, Defendants' motions to compel should be denied as disproportionate to the needs of the underlying litigation.

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CERTIFICATE OF SERVICE

I hereby certify that on March 27, 2017, I caused to be electronically filed and served the foregoing with the Clerk of the Court using the CM/ECF system, which will send notification of such filing to the following:

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