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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.

No. 15-CV-0286-JLQ

PLAINTIFFS' REPLY IN SUPPORT OF MOTION FOR PARTIAL SUMMARY JUDGMENT

Oral Argument Requested

NOTE ON MOTION CALENDAR:

JULY 28, 2017, 9:30 A.M., AT SPOKANE, WASHINGTON

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INTRODUCTION

Defendants' Opposition fails to rebut any of the material facts that establish their aiding and abetting liability. In particular, Defendants cannot and really do not dispute that: (a) they provided the list of methods used in the CIA torture program; (b) they implemented the methods on the initial prisoner in the program, Abu Zubaydah, and did so even after they concluded that he did not possess the "high value" information they demanded; (c) they saw firsthand the suffering that their methods caused the CIA's first prisoner; (d) the torture of Abu Zubaydah became the template used on other CIA prisoners; (e) they participated in the program's expansion, using their methods on other prisoners, providing feedback on how their methods should be used, and expanding the value of their contracts along with the program; and (f) the CIA's own records confirm that Plaintiffs were subjected to Defendants' methods. Instead of identifying a material dispute with respect to any of these key facts, Defendants try to obscure them with unsupportable contentions and misrepresentations of the record.

Defendants' legal arguments are equally flawed. They argue that designing and implementing a program of torture and CIDT for profit is "simply doing business," and not actionable. They assert that aiding and abetting liability results only when an individual *personally* commits or controls the primary crime. And they claim that they cannot have had the purpose of assisting abuse, because "Defendants believed the EITs were legal and appropriate" and merely sought to profit from them. Defendants' arguments rest on unsupportable premises and should be rejected. Plaintiffs are entitled to partial summary judgment.

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ARGUMENT

I. DEFENDANTS' CLAIMS ABOUT THE RECORD ARE GROUNDLESS.

Defendants wrongly accuse Plaintiffs of "egregious misrepresentations" on "critical points." ECF No. 190 at 4. These efforts to avoid the truth should be rejected. Thus, for example, Defendants' first claim, that "[a]lmost every statement Plaintiffs attribute to Defendants" comes from CIA cables, ECF No. 190 at 5, is simply inaccurate. In fact, almost every statement that Plaintiffs attribute to Defendants comes from a source *other* than a CIA cable, including Defendants' depositions, their Amended Answer, their proposals for interrogation methods and contract expansions, Defendant Mitchell's book, and Defendant Jessen's interview with CIA investigators. *See* Pls.' Statement of Undisputed Material Facts ("SUMF"), ECF No. 179 ¶¶ 1, 3, 4, 11–16, 19–21, 23–24, 26–29, 44–45, 48–49, 52, 56, 61, 68, 70–72, 74–77, 79, 82–84, 124–126, 128, 131.

Likewise, although Defendants contend that "statements within cables that were drafted and sent by the CIA cannot be attributed to Defendants," ECF No. 190 at 5, Defendants themselves admit that statements in CIA cables sent in 2002 are their own. *See, e.g.*, ECF No. 170 ¶ 156 (admitting that, in a 2002 cable, Defendants "noted that 'any physical pressure applied to extremes can cause severe mental pain or suffering'"); ECF No. 192 ¶ 78 (admitting that, in a 2002 cable, "Dr. Jessen recommended to 'continue the environmental deprivations'"). Defendant Jessen similarly admitted to a CIA investigator that, with respect to Gul Rahman, he "put a recommended plan in a cable" in November 2002. ECF No. 176-12 at 1049. And regarding CIA cables that describe the views of the Abu

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Zubaydah interrogation team, Defendants actually agree with Plaintiffs that the statements are appropriately attributed to the team as a whole, of which Defendants were indisputably a part. *Compare, e.g.*, ECF No. 170 ¶ 190 ("the team collectively thought it was highly unlikely Zubaydah had actionable new information") *with* SUMF ¶ 35 ("Defendants and the rest of the interrogation team reached a 'collective preliminary assessment that it is highly unlikely [Abu Zubaydah] has actionable new information'"). Finally, Defendant Jessen seeks to distance himself from the statement that Gul Rahman was a sophisticated "resister" based on complaints about "health and welfare." ECF No. 190 at 6–7. But the record shows that Jessen advised that Mr. Rahman "continues to use 'health and welfare' behaviors and complaints as a major part of his resistance posture," and that Defendant Jessen told a CIA investigator that Mr. Rahman "knew how to use physical problems or duress as a resistance tool." SUMF ¶¶ 79, 82. Moreover, Defendant Jessen himself admitted to a CIA investigator that he was the source of "many of the [assessments] that were used in the cable," ECF No. 176-12 at 1049, before testifying in this matter that he didn't "know" but "could have, in fact, made those observations to the Chief of Base who then incorporated them in his cable." ECF No. 176-2 at 210:18–22, 209:11–16.

Defendants also invent several "egregious misrepresentations" that appear nowhere in Plaintiffs' motion. For example, they argue that "Defendants did not determine when to stop the use of EITs on Zubaydah," ECF No. 190 at 5–6. But, of course, Plaintiffs do not claim that Defendants had final decisionmaking authority as to Abu Zubaydah's abuse or any other aspect of the CIA program.

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Nor, as Plaintiffs have shown, is that authority in any way relevant to Defendants' liability. ECF No. 193 at 27–28; *infra* pp. 11–12. Defendants also argue that the "goal of EITs was not to induce 'learned helplessness.'" ECF No. 190 at 6. But Plaintiffs' motion nowhere states that Defendants' methods were intended to induce "*learned* helplessness." Instead, Plaintiffs accurately quoted the statement of the Abu Zubaydah interrogation team, including Defendants, that "psychological and physical pressures have been applied to induce *complete* helplessness." *Id.* at 5–6 (emphasis added); SUMF ¶ 43. In sum, Defendants seek to conjure up a material dispute by arguing points that Plaintiffs themselves do not make. This manifestly does not provide a basis to deny Plaintiffs' motion.

Finally, Defendants do not even attempt to explain the relevance of alleged "terrorist activities" to the appropriate adjudication of this motion. ECF No. 190 at 7. The "facts" they cite are misleading and irrelevant, *see* ECF No. 194 ¶¶ 266–67, 275–76, 283, and in any event entirely immaterial to any legal issue before the Court.

II. DEFENDANTS MANUFACTURE DISPUTES OF FACT.

Defendants attempt to stave off summary judgment based upon factual claims that are not supported in the record but are instead grounded in speculation or misrepresentation. Those efforts to manufacture a genuine dispute of material fact necessarily fail. "Only disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). A party

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1 opposing summary judgment must therefore come forward with "sufficient
2 probative evidence to permit a finding in favor of the opposing party based on
3 more than mere speculation, conjecture, or fantasy." *O.S.C. Corp. v. Apple*
4 *Computer, Inc.*, 792 F.2d 1464, 1467 (9th Cir. 1986) (quotation marks omitted).
5 "A non-movant's bald assertions or a mere scintilla of evidence in his favor are
6 both insufficient to withstand summary judgment." *F.T.C. v. Stefanchik*, 559 F.3d
7 924, 929 (9th Cir. 2009). Mere "metaphysical doubt" as to the material facts at
8 issue is not enough. *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475
9 U.S. 574, 586 (1986). "In fact, the non-moving party must come forth with
10 evidence from which a jury could reasonably render a verdict in the non-moving
11 party's favor." *In re Oracle Corp. Sec. Litig.*, 627 F.3d 376, 387 (9th Cir. 2010).
12
13 Here, Defendants fail these tests by baselessly asserting that: there were
14 multiple "parallel" CIA programs; "Plaintiffs were not HVDs" and were abused
15 in a "separate detainee program;" and therefore "[t]here is no connection between
16 the EITs proposed by Defendants and those allegedly applied to Plaintiffs." ECF
17 No. 190 at 8, 2. But Defendants offer absolutely no evidence in support of these
18 claims, instead relying solely upon the factual statement they submitted in
19 support of their Motion for Summary Judgment. ECF No. 190 at 8 (citing ECF
20 No. 170 ¶¶ 245–48, 253, 269–73, 278–282, 285). As Plaintiffs showed in their
21 Opposition, Defendants' Statement fails to substantiate any claim that "Plaintiffs
22 were tortured as part of '*unknown* programs separate from the HVD Program.'"
23 ECF No. 193 at 23–26 (emphasis in original).
24
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In fact, Defendants' own witnesses refute Defendants' claims: John Rizzo testified both that there was no separate CIA program in which Defendants' methods were used, and that CIA documents indicate that Mr. Ben Soud was part of the CIA's "EIT program." ECF No. 194 ¶ 59; ECF No. 176-4 at 98:2–8. And although Mr. Rodriguez testified that he lacked any personal knowledge or memory of Plaintiffs, McGrady Decl., Exh. B, 139:6-9 ("I don't remember these individuals, Salim or Soud"), he likewise confirmed that Defendant Mitchell was "the architect of the CIA interrogation program" and did not identify any additional, parallel "enhanced interrogation program." ECF No. 194 at ¶ 8.

In short, Defendants have presented nothing beyond their own unsupported speculation that Plaintiffs were abused in some "parallel" program that—purely coincidentally—employed the identical methods used in Defendants' program. But the Ninth Circuit has made clear that this type of "speculation does not create a factual dispute." *Witherow v. Paff*, 52 F.3d 264, 266 (9th Cir. 1995).

Defendants' claim that the CIA program was never "standardized" is likewise contradicted by the record. In fact, Mr. Rodriguez testified that in January 2003, Defendants' methods were "formalized" and approved for use at COBALT, ECF No. 176-3 at 67:23–68:5, 74:1–12. Defendants themselves admit that "formalized guidelines for interrogations" were sent to "all CIA black-sites," ECF No. 170 ¶ 227; and Mr. Rizzo confirmed that the guidelines "describe the EIT program in 2003," based on "a template" of the methods Defendants used on Abu Zubaydah. ECF No. 176-4 at 64:17–65:15. CIA records confirm that Defendants' "formalized" methods were used on Plaintiffs. SUMF ¶¶ 91, 113.

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Defendants' claim that the CIA program was "purposefully designed *not* to cause 'systematic abuse'" is also belied by the record. ECF No. 190 at 8. The program that Defendants designed consisted of a specific set of methods (such as stuffing prisoners into boxes and dressing them in diapers) that were to be *systematically* inflicted on prisoners until they were deemed broken and compliant by interrogators. SUMF ¶¶ 46–55, 58–63. That stripping a prisoner, smashing him into a wall, and chaining his arms overhead to deprive him of sleep constitutes "abuse" cannot be seriously disputed. Defendants' assertion, based on CIA approvals and deeply compromised legal advice, that torture was "not the intention," ECF 190 at 8, is, as Plaintiffs have shown, legally irrelevant. ECF No. 193 at 5–8, 29; *infra* pp. 13–14.

Defendants further claim, contrary to the record, that their involvement in the CIA program was limited to providing a list of methods in July 2002, and that they neither designed, tested, implemented, or promoted "the use of EITs" on CIA prisoners. ECF No. 190 at 9–11. But as Mr. Rodriguez testified, Defendants "designed a program for the CIA to get prisoners to talk," and Defendant Mitchell was specifically tasked to "take charge of creating and implementing a program." SUMF ¶ 57; ECF No. 194 ¶ 5. After all of their summary judgment briefing, Defendants do not identify any evidence which in any way contradicts that they: (a) proposed methods and a program for applying them that they claimed would "instill fear and despair" based on "Pavlovian Classical Conditioning," SUMF ¶¶ 13–20; (b) told the CIA their methods would be safe and effective, *id.* ¶ 28; (c) personally implemented those methods on the CIA's

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1 first prisoner, Abu Zubaydah, *id.* ¶ 29; (d) opined on the success of the program
2 they had designed and implemented, after which the program was expanded to
3 other CIA prisoners based on the Abu Zubaydah "template," *id.* ¶¶ 50–55, 58–61;
4 (e) proposed refinements as the program expanded, *id.* ¶¶ 124–126; and (f)
5 promoted the use of their methods by claiming they were safe and effective,
6 writing papers that purported to justify the use of coercion, and advocating for
7 their use in meetings with top government officials, *id.* ¶¶ 28, 127–129.
8 Defendants' claim that their "involvement was limited to suggesting potential
9 EITs," is – again – the type of "bald assertion[]" that the Ninth Circuit has held
10 "insufficient to withstand summary judgment." *Stefanchik*, 559 F.3d at 929.
11
12 Finally, Defendants dispute that they "handsomely profited from the use of
13 EITs." ECF No. 190 at 11. But they do not deny that they were personally paid
14 millions of dollars, nor that the company they formed was paid tens of millions
15 more. Defendants' assertion that this was "a reasonable rate for their services"
16 does not create a factual dispute at all, let alone a material one. *Id.*
17
18
19 ## III. THE UNDISPUTED RECORD SHOWS THAT DEFENDANTS SUBSTANTIALLY ASSISTED IN CIA TORTURE AND CIDT.
20
21 In seeking to avoid liability for their substantial assistance in the torture
22 and CIDT of Plaintiffs, Defendants argue that they: (1) "simply did business with
23 the CIA per their contracts," (2) did not personally torture Plaintiffs, (3) did not
24 control CIA decisionmaking, and (4) Plaintiffs' injuries are not the "natural result
25 of Defendants' acts." ECF No. 190 at 12–21 (quotation and alteration marks
26 omitted). Each of these arguments is easily refuted.

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First, Defendants maintain that they "simply did business with the CIA" by "aiding the CIA in deciding how to interrogate Zubaydah." ECF No. 190 at 14 (quotation and alteration marks omitted). They argue that liability for "provision of the means" by which a crime is committed "is unsupported by customary international law" and that "Defendants, at most, provided the 'raw materials,'" and therefore cannot be liable. *Id.* at 16–17. Defendants rely chiefly on *Prosecutor v. Taylor* and *The Ministries Case*, but neither case aids them.

Contrary to Defendants' claim, *Taylor* made clear that providing "the means to commit a crime" *is sufficient*, so long as a defendant's acts had a substantial effect on the crime. *Prosecutor v. Taylor*, Case No. SCSL-03-01-A, Appeal Judgment (SCSL Sept. 26, 2013). The court surveyed the decisions of international tribunals and concluded that the "acts and conduct of those convicted had a substantial effect on the commission of crimes in an infinite variety of ways," including through "providing weapons and ammunition, vehicles and fuel or personnel" and "providing financial support." *Id.* ¶ 369. In fact, the court affirmed a conviction for the provision of means, including "operational support and advice." *Id.* ¶ 395. Here, Defendants provided just such operational support and advice: they admit they "gave the CIA knowledge that it did not possess and made recommendations." ECF No. 170 ¶ 235.

Nor does the fact that Defendants profited from their role in the CIA torture program convert them into ordinary businesspeople. Defendants rely on *The Ministries Case* to argue that they are no different from a banker who provides loans or a seller of "raw materials." ECF No. 190 at 17 (quoting 14

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Trials of War Criminals Before the Nuremberg Military Tribunals at 621–22). But the Nuremberg Tribunal did not suggest that those who assist war crimes are immune so long as they seek profit; it held only that the ordinary action of making loans does not violate international law. *See The Ministries Case* at 622 (ordinary financial "transaction can hardly be said to be a crime"). This principle underlies the key distinction made in the other cases Defendants cite: ordinary commercial transactions with a bad actor are not intrinsically criminal; it is assistance in the commission of crimes that gives rise to liability. *See* ECF No. 190 at 13–14. That is what the Defendants unquestionably provided here: they assisted in the CIA's *abuses*, and not in providing generic, fungible assistance to the agency. Put another way, Defendants did not provide money or raw materials that could be used for any purpose; instead they provided the specific design and implementation of a program of torture and CIDT. *See supra* pp. 7–8.

Second, Defendants assert that "under 'authoritative' customary international law, that an individual did *not* 'personally' interrogate a detainee does, in fact, 'matter' for *actus reus*." ECF No. 190 at 17. But the law is clear: when "one person orders that torture be carried out," "one provides or prepares the tools for executing torture," and "another physically inflicts torture or causes mental suffering . . . international law renders all the aforementioned persons equally accountable." *Prosecutor v. Furundžija*, Case No. IT-95-17/1/T, Judgment ¶¶ 253–254 (Dec. 10 1998); *see also Taylor* ¶ 385 (where "crimes were committed in the implementation of a plan, [or] program . . . the crimes were committed, as a matter of fact, not by the physical actors alone, but by the

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organised participation and contributions of many persons”). Here, Defendants assisted the CIA over numerous years from various locations by providing the “tools for executing torture.” *Furundžija* ¶ 253. Defendants provided the methods, the theory behind their application (“Pavlovian Conditioning”), the first demonstration of their use, and ongoing support. They are thus “accountable.” *Id.* The location of their assistance is irrelevant: “[A]cts of aiding and abetting can be made at a time and place removed from the actual crime.” *Taylor* ¶ 370.

Third, Defendants are wrong that they cannot be liable for aiding and abetting because they “lacked authority” over “the CIA’s decision to use” their methods. ECF No. 190 at 20. Defendants’ argument proves too much: a private contractor virtually never has command authority over government actors, but this does not render private actors immune. Customary international law is clear: “for aiding and abetting liability, it is not necessary as a matter of law to establish whether the accused had any power to control those who committed the offences.” *Taylor* ¶ 370 (quotation and alteration marks omitted). Defendants’ repeated protests that they were not the ultimate decisionmakers, *see* ECF No. 190 at 3, 18–20, 23, ignore this established basis for liability under the law.

Defendants’ error is clearly illustrated by the differing verdicts in the *Zyklon B* case, which Defendants misunderstand. ECF No. 190 at 19–20 (discussing *Trial of Bruno Tesch and Two Others* (“*Zyklon B*”), British Military Court, Hamburg, 1-8 Mar. 1946, Vol. I, Law Reports, p. 93). In the *Zyklon B* case, contractors were charged with supplying poison gas used by the Nazis against prisoners. Both the owner of the firm and the technician were private

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contractors, and had no "authority to 'control, prevent, or modify'" the Nazi government's decision to use poison gas—under Defendants' rule *both* would have been acquitted. *Id.* Instead, the owner of the firm was convicted and sentenced to death. The technician was acquitted—not because he did not control the Nazis' decision to gas prisoners, but because he was in no "position either to influence the transfer of gas to Auschwitz or to prevent it." *Zyklon B* at 102. The owner, by contrast, controlled the provision of assistance. Thus, even though it was solely the Nazis who controlled whether gas would be used on prisoners, and solely the Nazis who decided upon the victims, Bruno Tesch, the owner, was hanged. Like Mr. Tesch, Defendants had control over assistance to the CIA program, both personally and as the owners of Mitchell, Jessen & Associates. As a matter of law, that is more than sufficient.[1]

Finally, Defendants' claim that there is no causal link between their actions and Plaintiffs' injuries is contrary to the record. Defendant Jessen was personally involved in Plaintiff Rahman's abusive interrogations and Defendants were the source of the methods used in the CIA program, which were formalized in

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[1] Defendants' reliance on the prosecution of Simo Zarić is puzzling. *See* ECF No. 190 at 18. Although, unlike Defendants, he "did not take part in the beatings" of prisoners and "did not approve of them," he (like Defendants) gave support "to the perpetrators of the cruel and inhumane treatment of [] prisoners," and was accordingly convicted. *Prosecutor v. Simić et al.*, Case No. IT-95-9-T, Judgment ¶ 1016 (Oct. 17, 2003).

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guidance sent to COBALT and, as CIA records confirm, inflicted on Plaintiffs Ben Soud and Salim. SUMF ¶¶ 67–81, 91, 113. As Plaintiffs have shown, the causal link is not broken if the CIA program included expansions and modifications of Defendants' original methods. ECF No. 193 at 33.

IV. THE UNDISPUTED RECORD SHOWS THAT DEFENDANTS POSSESSED THE REQUISITE INTENT.

As Plaintiffs have shown, Defendants' culpable intent is established by the support they intentionally provided to the CIA, including though methods that they advanced specifically because these techniques would "instill fear and despair." ECF No. 178 at 3–8, 19–21. After Defendants saw firsthand the harm that the use of their methods caused the first CIA prisoner—including that he vomited, cried, begged, shook, and became so hysterical he could not communicate—Defendants did not withdraw their participation. *Id.* Instead, they continued working with the CIA for years, supporting the program and profiting from it until it was finally shut down. *Id.*

Defendants nonetheless claim their intent is negated because of (1) their claimed belief that "EITs were legal and appropriate;" (2) their testimony that they didn't intend "to harm detainees," and "started with the 'least intrusive' EITs;" (3) their professed desire to use their methods only on "high value" prisoners and the CIA's sole authority "to classify detainees;" and (4) Defendants' "legitimate intent to profit." ECF No. 190 at 22–27. These arguments are wrong, and misguided.

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First, even assuming Defendants somehow believed that gross violations of the Geneva Conventions were "legal and appropriate," this incredible belief is, any event, legally irrelevant: as Plaintiffs have shown, Defendants cannot and do not counter the well-established principles that professed ignorance of the law is no excuse and that "reliance on counsel" is not a defense to charges as to which willfulness is not an element. ECF No. 193 at 6–8, 29. As for Defendants' self-serving testimony that they meant no harm or thought their methods were "safe," Plaintiffs have shown that Defendants cannot escape their undisputed firsthand knowledge of the suffering their methods caused. *Id.* at 5–6, 29. That Defendants could have proposed even *more* brutal and dangerous methods does nothing to change this. And, as Plaintiffs have also established, liability does not turn on whether Defendants selected the victims. *Id.* at 28, 30–31.

Finally, Defendants argue again that they merely sought profits, and therefore cannot have had the purpose of furthering prisoner abuse. But a profit motive does not render an aider and abettor immune. Like the owner of the chemical firm in *Zyklon B*, whose "purpose was to sell insecticide to the SS (for profit, that is a lawful goal pursued by lawful means)," Defendants are nonetheless liable because "they knew what the buyer in fact intended to do with the product they were supplying." *Furundžija* ¶ 238.

V. DEFENDANTS FAIL TO REBUT THAT PLAINTIFFS WERE SUBJECTED TO TORTURE AND CIDT.

Defendants can cite no authority to support their argument that the Court should ignore the "totality of treatment" when evaluating claims of torture and

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CIDT. ECF No. 190 at 29. As Plaintiffs have shown, courts do not artificially isolate individual moments of abuse when looking at a course of conduct. ECF No. 178 at 22–23 (collecting cases). Defendants' program consisted of methods intended to be used together; accordingly Plaintiffs and other CIA prisoners were forced to endure the prolonged and combined infliction of Defendants' methods. SUMF ¶¶ 29, 51, 74–75, 91, 99, 113, 121. Both caselaw and common sense are clear: in evaluating the effect of such a course of conduct, the "severity" of "inter-related" abuses that "follow a pattern" must be "assessed as a whole." *Prosecutor v. Krnojelac*, Case No. IT-97-25-T, Judgment, ¶ 182 (Mar. 15 2002).

Defendants' efforts to distinguish the cases condemning their methods are unavailing. They do not explain how "forced sleep deprivation" could be "torture" and yet fail to violate a "*legal* prohibition against 'torture.'" ECF No. 190 at 30 (emphasis in original). Nor do they explain why the Court should ignore the Ninth Circuit's acknowledgement in *Padilla v. Yoo*, 678 F.3d 748, 765 (9th Cir. 2012) that both *Ireland v. United Kingdom*, 25 Eur. Ct. H.R. (ser. A) (1978), and *HCJ 5100/94 Public Committee Against Torture in Israel v. Israel*, 53(4) PD 817 [1999] (Isr.),found that these specific methods constituted CIDT or torture. Defendants' argument that the definition of torture was not "beyond debate," ECF No. 190 at 28, ignores these authorities, along with others Plaintiffs cite, all of which make clear that their methods indisputably were torture and/or CIDT. ECF No. 178 at 24–30 (collecting cases).

CONCLUSION

The Court should grant partial summary judgment to Plaintiffs.

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DATED: June 26, 2017 By: *s/ Dror Ladin*

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CERTIFICATE OF SERVICE

I hereby certify that on June 26, 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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