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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' REPLY IN SUPPORT OF MOTION TO TAKE JUDICIAL NOTICE Without Oral Argument Expedited Hearing Requested

Plaintiffs concede the facts Defendants ask this Court to take judicial notice of regarding the September 11, 2001, terrorist attacks on our nation (the "9/11 Facts") are "generally known," and thus, are appropriate for judicial notice. ECF 184 at 2. Still, Plaintiffs object on the basis these facts are "irrelevant" and "unduly prejudicial." This position is unfounded. The factfinder needs to understand the context underlying Plaintiffs' claims and Defendants' defenses—both of which originate with the September 11 attacks. Further, the significant probative value of the 9/11 Facts outweigh any claimed prejudice. Plaintiffs' refusal to recognize the relevance and admissibility of the 9/11 Facts is myopic and futile. For instance, the occurrence of September 11 and the 9/11 Facts are referenced in numerous documents that lie at the core of this matter, and will be offered as evidence at trial. It would thus be impractical—if not impossible—to sanitize the record of the 9/11 Facts in the manner Plaintiffs propose. For this reason, judicially-noticing the relevant 9/11 Facts in connection with Defendants' *Motion for Summary Judgment*, ECF No. 169, is the most practical outcome, as it will not cause undue prejudice, and any potential remaining prejudice can easily be cured by a limiting instruction.

I. THE 9/11 FACTS ARE RELEVANT.

Evidence is relevant if has any "tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." FED. R. EVID. 401. Courts routinely admit evidence that "provides context for the activities at issue." *See*,

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e.g., *U.S. v. Slade*, 2015 WL 4208634, at *2 (D. Alaska July 10, 2015); *Boecken v. Gallo Glass Co.*, 2008 WL 4470867, at *1 (E.D. Cal. Sept. 30, 2008) (evidence admissible to "provide context and background").

Here, the 9/11 Facts provide critical context for all the governmental activities following September 11, including those that form the basis for the instant claims/defenses. Specifically, Plaintiffs' claims are premised on the dual contention that: (1) Defendants were the "architects" of the CIA's enhanced interrogation program; and (2) Plaintiffs were innocent victims caught in the CIA's overzealous War on Terror. But, were it not for the September 11 attacks, the President would not have issued the September 17, 2001, Memorandum of Notification ("MON") directing the CIA to establish a program to capture, detain, and interrogate al-Qaeda operatives to obtain critical intelligence to fight the War on Terror. ECF No. 170 ¶¶ 6, 7 (citing US Bates 001631). And were it not for the MON, the CIA's High-Value Detainee Program ("HVD Program"), designed to prevent further "imminent attacks," and for which Defendants provided recommendations, would never have been created. *Id.* ¶¶ 25-27, 80, 90-91, 102, 104, 141, 158, 165, 209-210. Indeed, but for the authority afforded by the MON and the creation of the HVD Program, "enhanced interrogation techniques" ("EITs") presumably would not have been used on Abu Zubaydah—a central figure in Plaintiffs' claims, whom they contend served as the testing ground for techniques later used on them. It is simply illogical Zubaydah's treatment could be relevant to Plaintiffs' claims, while the very reason Zubaydah was interrogated

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is not. In short, the factfinder needs to be apprised *why* Defendants became involved in the HVD Program, as well as why there even was an HVD Program in the first place.

Further, the 9/11 Facts afford context for the CIA's interest in detaining and interrogating Plaintiffs. Specifically, Plaintiffs assert they were "innocent" and ultimately released without being prosecuted as terrorists. ECF No. 178 at 13, ECF No. 179, ¶ 106. If so, counter-evidence regarding the CIA's belief as to Plaintiffs' involvement in various terrorist organizations, ECF No. 170, ¶¶ 266-268 (Salim's believed terrorist connections); ¶¶ 274-276 (Ben Soud's believed terrorist/al-Qaeda connections); ¶ 283 (Rahman's believed terrorist/al-Qaeda connections), would likewise be relevant. So too would the reason *why* the CIA was focused on detaining and interrogating those individuals believed to be affiliated with al-Qaeda also be relevant. This requires disclosure of the 9/11 Facts—the most appropriate vehicle being judicial notice of these uncontested and "generally known" facts.[1]

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[1] Plaintiffs claim that since the 9/11 Facts do not feature prominently in Defendants' *Motion for Summary Judgment*, they must be irrelevant. ECF No. 184 at 4-5. On the contrary, the 9/11 Facts form the underpinning for the arguments advanced in Defendants' motion—including, among other things, the issuance of the MON, creation of the HVD Program, and Defendants' hiring by the CIA to participate in detainee interrogations. ECF No. 169 at 12; ECF No. 170 at 1-8.

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II. RULE 403 DOES NOT WARRANT PRECLUSION.

Relevant evidence may be excluded only where its probative value is *substantially outweighed* by one or more of the articulated dangers or considerations. *U.S. v. Hankey*, 203 F.3d 1160, 1172 (9th Cir. 2000). Stripped of its rhetoric, Plaintiffs' sole consideration is their suggestion the September 11 attacks could stir the jurors' emotions, and thus be prejudicial. ECF No. 184 at 9-10.[2] But the mere fact evidence may provoke an emotional response does not alone render it *unduly* prejudicial. *See, e.g., Hankey*, 203 F.3d at 1772.[3] And here, any prejudice does not substantially outweigh the probative value of the 9/11 Facts.

The 9/11 Facts are the impetus for that which occurred afterward, and which form the basis for Plaintiffs' claims. Their introduction is sought for legitimate, highly probative reasons; they are not "dragged in by the heels for the

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[2] There is no credible support for Plaintiffs' suggestion that the trial's proximity to the anniversary of 9/11 makes the prejudice of this evidence "particularly pronounced." ECF No. 184 at 10. Plaintiffs also provide no support for their bold assertion that the "prevailing environment of prejudice against people who, like Plaintiffs, are identified as Muslim or from majority-Muslim countries" could not receive a fair trial in this jurisdiction.

[3] Ironically, Plaintiffs intend to present evidence aimed at eliciting an emotional response, *i.e.*, facts intended to show the "horror" and "pain" they allege they endured. *See, e.g.*, ECF 179, ¶¶ 22, 30-43, 62, 66, 67, 74, 76, 78, 86-99, 108-119.

sale of [their] prejudicial effect." *U.S. v. Plascencia-Orozco*, 852 F.3d 910, 926 (9th Cir. 2017).

The cases cited by Plaintiffs are also inapposite. ECF No. 184 at 9. In *Zubulake v. UBS Warburg*, 382 F. Supp. 2d 536 (S.D.N.Y. 2005), the "emotions" dredged up by mention of the September 11 attacks were collateral to the Title VII discrimination claims advanced; thus, the scant probative value of such evidence was outweighed by its prejudice. In *U.S. v. Moore*, 375 F.3d 259 (3d Cir. 2004), the court did not overturn the conviction because of the prosecutor's mere comparison of defendant to a "terrorist"; rather, it held this evidence "compounded" the effect of the prior bad acts evidence already improperly introduced. *Id*. at 264.[4] In the end, it is inconceivable that the 9/11 Facts proffered by Defendants would "cause [the] jury to base its decision on something other than the established proposition in the case." ECF No. 184 at 8.

[4] Plaintiffs also misstate the holding in *U.S. v. Royer*, 549 F.3d 886 (2d Cir. 2008), a securities fraud case. There, the court refused to overturn defendant's conviction because evidence relating to 9/11 was presented to the jury, finding that the lower court had properly provided "timely cautionary instructions … [to] reduce[] the potential for prejudice." *Id*. at 901. The Court can do the same here, if warranted.

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CERTIFICATE OF SERVICE

I hereby certify that on the 25th day of May, 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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