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

SULEIMAN ABDULLAH SALIM, et al. Plaintiffs, v. JAMES ELMER MITCHELL and JOHN "BRUCE" JESSEN, Defendants.	NO. 2:15-cv-286-JLQ **DEFENDANTS' MOTIONS IN LIMINE AND REQUEST FOR JUDICIAL NOTICE** Oral Argument Requested Note on Motion Calendar: August 21, 9:30 a.m., at Spokane Washington

I. INTRODUCTION

Defendants James Elmer Mitchell and John "Bruce" Jessen ("Defendants"), respectfully (1) ask the Court to take judicial notice of the 9/11 statistics and permit the use of 9/11 video during opening statements and at trial, and (2) seek an order prohibiting Plaintiffs, their attorneys, and their witnesses from directly or indirectly mentioning, referring to, interrogating concerning, or attempting to convey to the jury in any manner any of the facts or allegations indicated below, and further instructing Plaintiffs' attorneys to warn and caution each of their witnesses to strictly follow any order entered by the Court with respect to these motions:

1. Exclude evidence and argument about events and activities of Defendants after August 22, 2004.

2. Exclude evidence and argument regarding payments to Defendants or their company.

3. Exclude evidence and argument about the treatment of Abu Zubaydah and/or other CIA detainees (besides Plaintiffs), including:

   (a) Zubaydah's interrogation was research or that he was a "test case."

   (b) Interrogation of Zubaydah or other detainees, including waterboarding.

   (c) The existence or destruction of videotapes of the Zubaydah interrogations.

4. Exclude the Physicians for Human Rights report.

5. Emotional Distress:

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(a) Exclude evidence and argument regarding emotional distress of non-Plaintiffs.

(b) Exclude argument seeking recovery for Plaintiffs for emotional distress not related to the interrogation program that Defendants are alleged to have designed.

6. Exclude evidence and questioning regarding legal conclusions and/or definitions, including "torture," "CIDT," "nonconsensual human experimentation," and "war crimes".

7. Limitations on the testimony of experts:

(a) Limit the testimony of Plaintiffs' experts about Plaintiffs' interrogations to the experiences to which Plaintiffs testify.

(b) Limit expert testimony regarding background or "assumptions" about the CIA's interrogations of detainees and Defendants' involvement with the CIA.

8. Exclude evidence and argument regarding the efficacy of the EITs.

9. Exclude newspaper articles, reports and/or videos (except with respect to the 9/11 video as identified above and discussed below).

10. Exclude hearsay within a public record.

II. TAKE JUDICIAL NOTICE OF 9/11 STATISTICS AND PERMIT THE USE OF 9/11 VIDEO DURING OPENING STATEMENTS AND AT TRIAL.

Defendants previously moved pursuant to Fed. R. Evid. 201 for an Order taking judicial notice of the fact that (1) a terrorist attack occurred on September 11, 2001 at the World Trade Center in New York City, New York, the Pentagon in Arlington, Virginia and on Flight 93, which crashed near Shanksville, Pennsylvania (the "9/11 Attacks"); (2) the 9/11 Attacks were planned and carried out by the terrorist group al-Qaeda; and (3) 2,996 people were killed and over

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5,000 people were injured as a result of the 9/11 Attacks (the "9/11 Facts"). ECF No. 165. The Court took judicial notice of the facts for purposes of the Motions for Summary Judgment, but reserved ruling on whether it would be appropriate to take judicial notice and instruct on the three facts at trial. ECF No. 189.

The events of 9/11 are well-documented and not subject to reasonable dispute. Although many bore personal witness to the 9/11 Attacks, few can attest to the details of three separate attacks, the parties responsible for the attacks, or the devastating human toll that resulted. As such, Defendants again ask that the Court take judicial notice thereof, including that the attacks occurred, that al-Qaeda was responsible for those attacks and that 2,996 died and over 5,000 people were injured as a result of the 9/11 Attacks.

A Court may take judicial notice of adjudicative facts that are not subject to reasonable dispute where (1) they are generally known within the Court's territorial jurisdiction; or (2) they can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned. *See* Fed. R. Evid 201(a)-(b). The facts surrounding the 9/11 Attacks, including those about which Defendants seek judicial notice, meet the test enunciated in Rule of Evidence 201. *See In re Sept. 11 Litig.*, 751 F.3d 86, 90 (2d Cir. 2014) (taking judicial notice of the attacks of September 11, 2001 because they are "not subject to reasonable dispute," are "generally known within the trial court's territorial jurisdiction," and "can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned [here, the 9/11 Commission Report]."); *see also* ECF No. 165.

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Plaintiffs concede the 9/11 Facts are "generally known," and thus, are appropriate for judicial notice. ECF 184 at 2. Still, Plaintiffs previously objected on the basis that these facts are "irrelevant" and "unduly prejudicial."

Courts routinely admit evidence that "provides context for the activities at issue." *See, 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 claims and defenses in this action.

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. 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.

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Further, the 9/11 Facts afford context for the CIA's interest in detaining and interrogating Plaintiffs. Specifically, Plaintiffs assert that 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.

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). 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. And here, any prejudice does not substantially outweigh the probative value of the 9/11 Facts. To the extent there is concern about prejudice, the Court can provide appropriate cautionary instructions to the jury.

For the same reasons, the Court should allow the use of a brief video clip from 9/11. The video clip is titled "Flashback 9/11: As It Happened" and was produced by Fox News following a subpoena from Defendants. Declaration of Christopher Tompkins ("Tompkins Decl.") at ¶¶ 3-5. 16 years later, it is likely

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some members of the jury were too young at the time to personally remember 9/11 or fully appreciate its impact. A brief video of the events of that day will inform or remind the jury of the events of that day, and of their importance in shaping the events that followed. The facts and video of the events of 9/11 are not offered as justification—but as crucial context for why many people believed it was so important to prevent similar events from taking place.[1]

III. MOTIONS IN LIMINE

1. Exclude evidence and argument about events and activities of Defendants after August 22, 2004.

Plaintiffs' claims all relate to alleged injuries sustained as a result of their treatment and interrogation in CIA custody. ECF No. 1 at ¶¶ 3-4, 9-11, 73-110, 121-151, 158-164, 168-185. Plaintiffs Salim and Ben Soud acknowledge that they were released from CIA custody no later than August 22, 2004. ECF No. 1 at ¶¶ 111, 152; ECF No. 170 at ¶¶ 273, 277-78. Plaintiffs' briefing on summary judgment makes clear that they intend to present evidence regarding events that took place after August 22, 2004, including evidence related to Defendants' company, Mitchell, Jessen & Associates ("MJA"), which was not formed until 2005, how much Defendants and MJA were paid in the years following Plaintiffs' release, and Defendants' continued involvement with the CIA, among other facts. *See, e.g.*, ECF No. 204 at ¶¶ 125-129, 131. Such evidence is not relevant, and is also unduly prejudicial, and should be excluded.

[1] Defendants are willing to edit the video clip as the Court deems appropriate.

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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. Evidence and argument regarding Defendants' activities or continued involvement with the CIA after Plaintiffs' release is irrelevant to Plaintiffs' claims and therefore inadmissible. Fed. R. Evid. 402. To the extent such evidence has any relevance to Plaintiffs' claims, the probative value of such evidence is substantially outweighed by the danger of unfair prejudice to Defendants, the potential for such evidence to confuse or mislead the jury, and by the amount of time that would be wasted presenting evidence and argument about events that occurred after the relevant time period. Fed. R. Evid. 403.

2. Exclude evidence and argument regarding payments to Defendants or their company.

Throughout this case Plaintiffs have repeatedly referenced in misleading and inaccurate statements the amount of money that Defendants were paid by the CIA in an effort to create an inference that because the total amount of money that Defendants and their company were paid is large, Defendants should be held liable. ECF No. 1 at ¶¶ 66-68; ECF No. 28 at 11; ECF No. 178 at 3, 21; ECF No. 193 at 11; ECF No. 194 at ¶ 46; ECF No. 204 at ¶ 129 ("Defendants were personally paid millions of dollars by the CIA as independent contractors for 'research and development as well as operational services.'"), ¶ 131 ("Mitchell, Jessen, and Associates received $81 million in taxpayer money.").

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How much Defendants were paid, and that they were paid with taxpayer money, is irrelevant to Plaintiffs' claims and therefore inadmissible. Fed. R. Evid. 401, 402. Plaintiffs claim that "whether Defendants' company was paid $72 or $81 million, the fact that it earned such a large amount is relevant to show both Defendants' central role in the CIA program as well as their intent and motivation to promote, advance, and justify their methods and the resulting CIA program." ECF No. 204 at 140. But, there is no evidence that Defendants' pay was linked to the use of any particular method of interrogation or that Defendants were paid more if additional detainees were interrogated. And, as discussed above, the amount that Defendants' company, MJA, was paid is particularly irrelevant given that it was not formed until 2005, after Plaintiffs were released from CIA custody, and the fact that MJA did much more than interrogate detainees—it was formed to provide "qualified interrogators, detainee security officers for CIA detention sites, and curriculum development and training services for the RDI program." ECF No. 170 at ¶¶ 273, 277-78, 324, 336.

In addition, such facts are highly prejudicial and should be excluded from consideration under Fed. R. Evid. 403. The amount Defendants and their company were paid is extremely misleading when argued to show "Defendants' central role in the CIA program," ECF No. 204 at 140, because it lacks context. Unless Plaintiffs intend to present evidence on precisely what Defendants or their company did, how much other CIA contractors and employees were paid for similar services, and how much money the CIA spent on detainees and interrogations over the relevant time period, the jury would lack any frame of

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reference against which to determine whether the amounts Defendants were paid shows they had a "central role" – or supports any other facts.

Further, all government employees and contractors are paid with taxpayer money for the services that they provide. Plaintiffs have no reason to mention that Defendants were paid with taxpayer money other than to inflame the jurors with the notion that their taxpayer dollars paid for something of which they may not personally approve.

It is also irrelevant and improper to suggest that because of such compensation Defendants may be able to pay Plaintiffs' alleged damages or should be subject to a large verdict, and highly prejudicial to use such misleading numbers to imply that Defendants have deep pockets. Fed. R. Evid. 401, 402, & 403. And any such implication by Plaintiffs—based on gross payments to Defendants or their company—would require Defendants to respond showing the breadth of services provided and the costs of doing so, thereby wasting time for the jury and this Court.

3. Exclude evidence and argument about the treatment of Abu Zubaydah and other CIA detainees (besides Plaintiffs).

(a) Evidence and argument that Zubaydah's interrogation was research or that he was a "test case."

Plaintiffs' claims all relate to the alleged injuries they sustained as a result of their treatment and interrogation during the time they spent in CIA custody. ECF No. 1 at ¶¶ 3-4, 9-11, 73-110, 121-151, 158-164, 168-185. Thus, in order to be admissible, evidence must be relevant to Plaintiffs' treatment and interrogation by

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the CIA. Fed. R. Evid. 401. Zubaydah, the first prisoner captured by the CIA, is not a plaintiff. Yet, many of the facts and arguments that Plaintiffs intend to present at trial involve detailed descriptions of the capture, treatment, interrogation, or responses to interrogation of Zubaydah.

Such evidence and argument is irrelevant to Plaintiffs' claims. Plaintiffs have no evidence that Zubaydah was a "test case" for the EITs generally, or that his interrogation was experimental research prior to use on Plaintiffs themselves. There is no evidence that Defendants instructed those who interrogated Plaintiffs on how to implement interrogation techniques – and, in particular, there is no evidence that Defendants used information learned in the interrogation of Zubaydah to inform the interrogations of Plaintiffs. In the absence of evidence that any "research" was employed as to Plaintiffs, such suggestions are highly misleading and prejudicial, and should be excluded under Fed. R. Evid. 403 as well as 401.

(b) Evidence and argument regarding the interrogation of Zubaydah or other detainees, including waterboarding.

Waterboarding is the most controversial, and emotion-laden, of the EITs employed post 9/11. Evidence and argument regarding the waterboarding of Zubaydah (or other detainees), including the impact that the waterboarding had on Zubaydah, is irrelevant to Plaintiffs' claims because Plaintiffs admit that they were not waterboarded. *See* ECF No. 204 at ¶¶ 91, 97-98, 113, 117-118. In addition, such evidence is highly prejudicial.

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Plaintiffs Salim and Ben Soud allege that they were subject to "Water dousing" which, as described by Mr. Salim, involved laying a detainee on a plastic sheet or towel and pouring water on the detainee from a container while the interrogator questions the detainee. Water is applied so as not to enter the nose or mouth and interrogators were not supposed to cover the detainee's face with a cloth. Water dousing was proposed by someone other than Defendants in March 2003. ECF No. 170 at ¶ 265; ECF No. 204 at ¶¶ 91, 97-98, 113, 117-118.

There is no evidentiary support for Plaintiffs' argument that "water dousing" was similar to the "water board." The July 2002 Memo describes the water board as follows: "individuals are bound securely to an inclined bench. Initially a cloth is placed over the subject's forehead and eyes. As water is applied in a controlled manner, the cloth is slowly lowered until it also covers the mouth and nose. Once the cloth is saturated and completely covering the mouth and nose, subject would be exposed to 20 to 40 seconds of restricted airflow. Water is applied to keep the cloth saturated. After the 20 to 40 seconds of restricted airflow, the cloth is removed and the subject is allowed to breathe unimpeded. After 3 or 4 full breaths, the procedure may be repeated. Water is usually applied from a canteen cup or small watering can with a spout." ECF No. 192 at ¶ 97.

Plaintiffs may offer evidence regarding their own treatment, including their allegation that they were threatened by someone other than Defendants with waterboarding, ECF No. 204 at ¶¶ 98, 118, but the fact that Zubaydah or other detainees were waterboarded, or the reaction to being waterboarded, are not relevant. Fed. R. Evid. 401. And, due to the media attention that has been given to

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waterboarding and the controversy surrounding it, evidence related to waterboarding is likely to inflame and mislead the jury, and is therefore more prejudicial than probative in light of the fact that Plaintiffs were not waterboarded, and should also be excluded from consideration under Fed. R. Evid. 403.

(c) Evidence and argument regarding the existence or destruction of videotapes of the Zubaydah interrogations.

Evidence regarding the destruction of videotapes of the interrogations of Zubaydah and argument that the "conclusion of the Chief of the CIA Counterterrorism Center that the videotapes of Defendants applying their methods to Abu Zubaydah would make the CIA look bad and could destroy the CIA clandestine service," ECF No. 204 at 60, is irrelevant.

There is no evidence that Defendants played any role in the destruction of the videotapes. *See* ECF No. 204 at ¶ 49(c) ("On Rodriguez's orders, the CIA destroyed the tapes."). Moreover, whether Defendants "thought [the tapes] should be destroyed," is not relevant to any issue. *See id.* at ¶ 49(a)(Defendants' response). Permitting Plaintiffs to suggest that Defendants were responsible for the destruction of the videotapes, or to speculate regarding the content of the videotapes and the reason for their destruction, would be akin to an unwarranted sanction for spoliation. Evidence and argument regarding the videotaping of the interrogation of a detainee other than Plaintiffs, or the destruction of those videotapes on the orders of someone other than Defendants, is irrelevant to Plaintiffs' claims, and would be unfairly prejudicial and should be excluded. Fed. R. Evid. 401, 402 & 403.

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4. Exclude the Physicians for Human Rights report.

In June of this year the non-profit organization Physicians for Human Rights issued a report titled "Nuremberg Betrayed: Human Experimentation and the CIA Torture Program." http://physiciansforhumanrights.org/assets/multimedia/phr_humanexperimentation_report.pdf (last visited July 27, 2017). The content of the report addresses many issues and individuals involved in this case, and Plaintiffs may seek to offer it into evidence. The report is inadmissible hearsay and no exception applies. Fed. R. Evid. 802.

5. Emotional Distress

(a) Exclude evidence and argument regarding emotional distress of non-plaintiffs.

Plaintiffs likely intend to present evidence and argument regarding the emotional distress of non-plaintiffs, including the family members of Plaintiffs, due to Plaintiffs' detention and the death of Plaintiff Rahman. Such evidence and argument is irrelevant to Plaintiffs' claims because the emotional distress of non-plaintiffs is not recoverable, nor does Plaintiffs' Complaint make a claim for such damages. Fed. R. Evid. 401, 402. For example, while Mr. Obaid Ullah can testify on behalf of Mr. Rahman's estate, his emotional distress and that of his family is not recoverable. *Al-Aulaqi v. Obama*, 727 F. Supp. 2d 1, 37 (D.D.C. 2010) (intentional infliction of emotional distress do not rise to the level of international torts that are "sufficiently definite and accepted 'among civilized nations' to qualify for the ATS jurisdictional grant.") (citing *Ali Shafi v. Palestinian Auth.*, 686 F. Supp. 2d 23, 29 (D.D.C. 2010), *aff'd*, 642 F.3d 1088 (D.C. Cir. 2011)

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(quoting *Sosa v. Alvarez-Machain*, 542 U.S. 692, 732 (2004)); *Mujica v. Occidental Petroleum Corp*., 381 F. Supp. 2d 1164, 1183 (C.D. Cal. 2005), *aff'd sub nom. Mujica v. AirScan Inc*., 771 F.3d 580 (9th Cir. 2014)).

In additional to being irrelevant to Plaintiffs' claims, evidence and argument regarding the emotional distress of Plaintiffs' family and friends while they were detained is also highly prejudicial. Fed. R. Evid. 403. The only purpose to offer such evidence would for its emotional impact on the jury, and it should be excluded.

(b) Exclude argument seeking recovery by Plaintiffs for emotional distress not related to the interrogation program that Defendants are alleged to have designed.

Plaintiffs' claims all relate to the alleged injuries they sustained as a result of their treatment and interrogation during the time they spent in CIA custody. ECF No. 1 at ¶¶ 3-4, 9-11, 73-110, 121-151, 158-164, 168-185. In addition, Plaintiffs had negative personal experiences before, during, and after their time in CIA custody which are not related to Defendants' alleged interrogation program. Evidence of those negative experiences is admissible, but Plaintiffs may only recover for injuries caused by Defendants. Plaintiffs should be precluded from arguing that they are entitled to recover damages for emotional distress related to events that took place before or after their time in CIA custody, or for events while they were in CIA custody which cannot be connected to Defendants. Such arguments would be misleading and likely confuse the issues for the jury. Fed. R. Evid. 403.

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6. Exclude evidence and questioning regarding legal conclusions and/or definitions, including "torture," "CIDT," "nonconsensual human experimentation," and "war crimes".

The Parties have agreed not to present expert testimony on the law applicable to this case or the definitions of "torture", "cruel, inhuman, or degrading treatment" ("CIDT"), "unauthorized human experimentation" or "war crimes", or similar terms, except outside of the presence of the jury and for the benefit of the Court. Tompkins Decl. at ¶ 6. Defendants ask that the Court also exclude questioning and evidence, including expert testimony, dependent on or incorporating such legal conclusions and definitions. These terms, to the extent they are relevant, are subject to specific, technical legal definitions in both U.S. and international law that will be the subject of instruction by the Court. However, these terms are frequently used in everyday interaction in ways that are not consistent with those legal definitions. Questions or testimony using the words "torture", or "war crimes" consistent with such everyday use – suggesting that such terms are applicable to plaintiffs – would be highly prejudicial in light of the fact that the applicability of such terms under the technical legal definitions in both U.S. and international law is precisely what the jury will be required to determine in deliberation.

Further, "[A]n expert witness cannot give an opinion as to her *legal conclusion,* i.e., an opinion on an ultimate issue of law. Similarly, instructing the jury as to the applicable law is the distinct and exclusive province of the court." *Nationwide Transp. Fin. v. Cass Info. Sys., Inc.*, 523 F.3d 1051, 1058 (9th Cir. 2008) (emphasis in original) (citing *Hangarter v. Provident Life & Accident*

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Ins. Co., 373 F.3d 998, 1016 (9th Cir. 2004); *see also* Fed. R. Evid. 702 (requiring that expert opinion evidence "assist the trier of fact to understand the evidence or to determine a fact in issue"). "In general, '[t]estimony that simply tells the jury how to decide is not considered 'helpful' as lay opinion.'" *Nationwide*, 523 F.3d at 1059-60 (quoting *Fireman's Fund Ins. Cos. v. Alaskan Pride P'ship*, 106 F.3d 1465, 1468 n. 3 (9th Cir. 1997) (citing Fed. R. Evid. 701)).

The Court should prohibit questioning of and testimony by both experts and lay witnesses using such legal terms or legal definitions with respect to Plaintiffs.[2] Testimony or questioning about whether Plaintiffs were tortured, or subjected to CIDT, or whether certain conduct amounts to nonconsensual human experimentation or war crimes, in a way that does not comport with the specific, technical legal definition would be inaccurate, unfairly prejudicial, and likely to confuse the jury. Fed. R. Evid. 403.

7. <u>Limitations on the testimony of experts.</u>

(a) Limit the testimony of Plaintiffs' experts about Plaintiffs' interrogations to the experiences to which Plaintiffs testify.

Plaintiffs' experts should not be permitted to testify about treatment of Plaintiffs beyond or different from the experiences to which Plaintiffs actually testify at trial. Because the testimony of Plaintiffs Salim and Ben Soud will be presented by deposition video, the extent of their testimony is known. Tompkins

[2] This motion does not extend to the use of such legal terms with respect to an expert's description of her qualifications or background.

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Decl. at ¶ 7; ECF No. 225 (Ben Soud Trial Deposition Stipulation). The expert reports of Dr. Crosby and Dr. Chisholm contain descriptions of events allegedly reported to them by Plaintiffs Salim and Ben Soud which are significantly more detailed than or different from the testimony given by Plaintiffs Salim and Ben Soud. For example, Salim, whose testimony will be portions of his deposition, did not testify to the events described in paragraph 49 of Dr. Crosby's report.[3] Tompkins Decl. at ¶ 8; ECF No. 212.

Plaintiffs' previous statements to their experts are hearsay on their face and cannot be admitted unless an exception applies. Fed. R. Evid. 802. While Fed. R. Evid. 703 allows an expert to rely on facts or data which are not otherwise admissible "[i]f experts in the particular field would reasonably rely on those kinds of facts or data," it does not render such hearsay substantively admissible. Rather, the facts or data may be disclosed to the jury "only if their probative value in helping the jury evaluate the opinion substantially outweighs their prejudicial effect." The net result is:

> The amendment provides a presumption against disclosure to the jury of information used as the basis of an expert's opinion and not admissible for any substantive purpose, when that information is offered by the proponent of the expert.

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[3] The reports of Drs. Crosby and Chisholm are subject to the parties' Confidentiality Agreement, and are not quoted here. Defendants submitted the reports in connection with their pending Unopposed Motion to Seal, ECF No. 212, in support of their Daubert motion. ECF No. 210.

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Advisory Committee Comment to 2000 Amendments to Fed. R. Evid. 703.

Allowing Plaintiffs' experts to expand Plaintiffs' testimony about alleged events and injuries that Plaintiffs themselves have not testified about would be to allow Plaintiffs' experts to testify for them. Defendants have no ability to cross-examine such statements, and Plaintiffs' experts can express their opinions without presenting the alleged events to the jury. Such testimony is inadmissible as hearsay, and would be unfairly prejudicial. Fed. R. Evid. 403.

(b) Limit expert testimony regarding background or "assumptions" about the CIA's interrogations of detainees and Defendants' involvement with the CIA.

Dr. Crosby's report, beginning on page 4, illustrates the focus of this motion, but this motion applies equally to all testifying experts. Dr. Crosby's report recites numerous "assumptions" as the "factual bases for opinion" that purport to detail historical facts about the CIA's creation of secret prisons, allegations from the Complaint regarding the history of "learned helplessness," and Defendants' involvement with various interrogation methods.[4] Dr. Crosby is a medical doctor opining on Salim's alleged injuries, not a historian recounting Defendants' involvement with the CIA since 9/11 or an attorney pulling together disparate facts in closing.

As discussed above, while an expert may rely on facts or data that are not otherwise admissible, "[i]f experts in the particular field would reasonably rely on

[4] Submitted under seal in connection with Defendants' Unopposed Motion to Seal, ECF No. 212.

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those kinds of facts or data," Fed. R. Evid. 703, there is a presumption against disclosure to the jury of those facts. Dr. Crosby, and other experts, should be prohibited from acting as historian narrators of the story of this case, or from summing up the evidence, under the guise of presenting "assumptions" or "facts" underlying their opinions. While it is possible that the "assumptions" of Dr. Crosby would be reasonably relied on by an expert in her particular field, it would be highly prejudicial for the jury to hear testimony from an expert in the form of a narrative addressing the very issues the jury will decide. Such a narrative may be appropriate from counsel during closing arguments, but not from an expert.

The same applies to documents that an expert may have reviewed or relied on—any testimony or questioning about what Defendants or the author of a document knew, thought or intended about a document, or what any document "means," should be excluded under Fed. R. Evid. 602, 702, and 703. Plaintiffs have agreed not to question witnesses or offer evidence regarding the intention of the author of a document that was not created by the testifying witness in the absence of a foundation therefore. Tompkins Decl. at ¶ 9. Dr. Crosby, and other experts, should not be permitted to provide a narrative of this case by purporting to interpret or summarize documents they did not draft. *See West v. Cavalry Portfolio Services, LLC*, C13-244 RAJ, 2014 WL 1744329 at *2 (W.D. Wash. Apr. 30, 2014) (while declarant had personal knowledge sufficient to authenticate certain documents, she cannot offer testimony purporting "to interpret and summarize the contents of various documents").

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8. Exclude evidence and argument regarding the efficacy of the EITs.

The parties should not be permitted to offer evidence or to argue that the EITs were, or were not, effective. The efficacy of the EITs is irrelevant to the issues in this case. Fed. R. Evid. 401. Any remote relevance is substantially outweighed by the time-consuming and misleading presentation of evidence and argument that would follow if this subject is allowed—if Plaintiffs present evidence to argue that the EITs were not effective or that Defendants should have known that they would not be effective—Defendants will be forced to present evidence to the contrary. Such evidence and argument would waste time for the jury and the Court. Fed. R. Evid. 403.

9. Exclude newspaper articles, reports and/or videos.

Numerous newspaper articles and videos have been published regarding the subject matter of this case. Such articles, reports and/or videos are inadmissible hearsay unless an exception applies. Fed. R. Evid. 802. Defendants ask that the Court exclude newspaper articles, reports and/or videos with the exception of any direct quote from a Plaintiff, Defendant or witness contained therein, or to the extent that it is sought to be admitted for knowledge, notice or otherwise not for the truth of the matters asserted and is relevant, within the meaning of Fed. R. Evid. 401.

10. Exclude hearsay within a public record.

While Fed. R. Evid. 803(8) provides an exception to the rule against hearsay for factual findings from legally authorized government investigations, it does not

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allow for the admission of the entire record or investigation report. "[A]lthough an official's reliance on hearsay in preparing a report does not necessarily preclude the admission of the officials' conclusions contained in the report, [] that does not necessarily mean that the hearsay statements themselves can come into evidence." *Beechwood Restorative Care Ctr. v. Leeds*, 856 F. Supp. 2d 580, 588–89 (W.D.N.Y. 2012) (citing *Union Pacific R.R. Co. v. Kirby Inland Marine, Inc. of Mississippi*, 296 F.3d 671, 679 (8th Cir.2002); *United States v. Mackey*, 117 F.3d 24, 28 (1st Cir. 1997) ("decisions in this and other circuits squarely hold that hearsay statements by third persons . . . are not admissible under this exception merely because they appear within public records"); *United States v. Moore*, 27 F.3d 969, 975 (4th Cir. 1994) (same); *Parsons v. Honeywell, Inc*., 929 F.2d 901, 907 (2d Cir. 1991)). To the extent that an investigation report includes statements or narrative discussion that is not a "factual finding," such statements are inadmissible hearsay.

IV. CONCLUSION

For the reasons stated above, Defendants respectfully request that the Court grant their request for judicial notice and motions *in limine*.

A proposed order is submitted herewith.

DATED this 2nd day of August, 2017.

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CERTIFICATE OF SERVICE

I hereby certify that on the 2nd day of August, 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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