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UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF WASHINGTON

SULEIMAN ABDULLAH SALIM, MOHAMED AHMED BEN SOUD, OBAIDULLAH (AS PERSONAL REPRESENTATIVE OF GUL RAHMAN),

Plaintiffs,

v.

JAMES ELMER MITCHELL and JOHN "BRUCE" JESSEN

Defendants.

No. 15-cv-0286 (JLQ)

PLAINTIFFS' MOTIONS IN LIMINE

Motion Hearing:
Pretrial Conference
August 21, 2017 at 10:00am
Spokane, Washington

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INTRODUCTION

Evidence is relevant and therefore generally admissible under Federal Rule of Evidence 402 if it 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. The Court may, however, exclude otherwise relevant evidence "if its probative value is substantially outweighed by the danger of unfair prejudice." Fed. R. Evid. 403. Further, evidence may be excluded when there is a significant danger that the jury might base its decision on emotion, or when non-party events would distract reasonable jurors from the real issues in the case. *Tennison v. Circus Circus Enterprises, Inc.,* 244 F.3d 684, 690 (9th Cir. 2001). With this in mind, "motion[s] in limine allow[] the parties to resolve evidentiary disputes before trial and avoid[] potentially prejudicial evidence being presented in front of the jury, thereby relieving the trial judge from the formidable task of neutralizing the taint of prejudicial evidence." *Brodit v. Cambra,* 350 F.3d 985, 1004-05 (9th Cir. 2003).

Plaintiffs respectfully submit this memorandum of law in support of their motions *in limine* seeking to preclude Defendants from introducing certain evidence at trial that is either irrelevant to the claims at issue or that would improperly taint the jury.

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I. Defendants Should Be Precluded From Introducing Any Statements Made By Plaintiffs Under Coercion

To the extent that evidence of Plaintiffs' activities, or anything else in the case, is derived from statements that Plaintiffs made under coercion, they must be excluded from trial. Plaintiffs were detained incommunicado at a secret CIA-run facility and coercively interrogated. ECF Nos. 183-2 at U.S. Bates 001567, 001577, 001580; ECF 183-3 at 001609. The CIA created records summarizing these coerced interrogations. ECF No. 176-26 at U.S. Bates 001534-1536 (summarizing information allegedly provided by Mr. Salim during "custodial debriefing sessions"); Declaration of Daniel J. McGrady ("McGrady Decl."), Ex. A at U.S. Bates 001546 (summarizing information allegedly obtained from Mr. Ben Soud); ECF No. 182-35 at U.S. Bates 001076 (summarizing information allegedly provided by Mr. Rahman). This derogatory information was later repeated in other CIA documents. ECF No. 183-2 at U.S. Bates 001567 (Salim); *id.* at U.S. Bates 001580-81 (Ben Soud). And it is these documents which Defendants seek to introduce or otherwise use in order to impugn Plaintiffs. As set forth below, *see* Section IV, *infra*, this type of information is irrelevant and should not be admitted under Federal Rules of Evidence 401 and 403. Aside from relevance, however, Plaintiffs' statements under coercion should also be excluded because coerced statements are inherently unreliable, further reducing their probative value.

As this Court has made very clear, coerced statements are not probative because they are "inherently untrustworthy." *Pirtle v. Lambert*, 150 F. Supp. 2d 1078, 1088 (E.D. Wash. 2001) (Quackenbush, J.) (collecting cases) *rev'd on*

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other grounds sub nom. Pirtle v. Morgan, 313 F.3d 1160 (9th Cir. 2002); *see also Crowe v. Cty. of San Diego*, 608 F.3d 406, 433 (9th Cir. 2010) (coerced statements are "unreliable"). The courts have long excluded coerced statements as "false evidence." *Lisenba v. People of State of California*, 314 U.S. 219, 236 (1941); *Stein v. People of State of N.Y.*, 346 U.S. 156, 192 (1953) (same); *Douglas v. Woodford*, 316 F.3d 1079, 1092 (9th Cir. 2003) ("[I]llegally obtained confessions may be less reliable than voluntary ones, and thus using a coerced confession [even another's]. . . can violate due process." (citation omitted)). The prohibition on use of coerced statements extends broadly, and is not limited to criminal trials. *See, e.g.*, *Santos v. Thomas*, 830 F.3d 987, 1004 n.6 (9th Cir. 2016) (en banc) (holding, in extradition proceeding, that "the Due Process Clause prohibits the use of coerced statements"); *Navia-Duran v. INS*, 568 F.2d 803, 810 (1st Cir. 1977) (use of coerced statements to establish deportability in civil immigration proceeding violates due process).

There is no dispute that Plaintiffs were subjected to coercion in the course of their incommunicado detention and interrogation in the CIA program; any statements purportedly procured in the course of that coercive detention and interrogation are therefore inherently untrustworthy. *See Mohammed v. Obama*, 689 F. Supp. 2d 38, 64-66 (D.D.C. 2009) (excluding as involuntary and unreliable statements made by prisoner detained and interrogated under similar conditions to Plaintiffs). Nor is there any dispute that the CIA's use of coerced statements led to untrustworthy conclusions about these specific Plaintiffs. Thus, for example, the CIA's suspicions that Mr. Salim was involved in al-Qaeda

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operations were concretely refuted when the Department of Defense determined that Mr. Salim had never been involved in any "operations." ECF No. 106-9, at p. 2–3. Contrary to the CIA's initial conclusion—which was based on coerced statements—Mr. Salim was released because he was "determined to pose no threat to the United States Armed Forces or its interests in Afghanistan." ECF No. 121-1. Likewise, the CIA never charged Mr. Ben Soud with any crime against the United States or referred him for prosecution in any court; it simply released him, albeit into the hands of the Gaddafi dictatorship in Libya. With respect to Mr. Rahman, "the senior interrogator" in the CIA's Counterterrorism Center doubted that Mr. Rahman was properly detained and interrogated, writing: "one of the guys they have in mind is Gul Rahman, who is an Afghan, and I do not think he is truly a [High Value Target] or [a Medium Value Target.]" ECF No. 106-11 at 24 n.41. Yet, the interrogations continued and Mr. Rahman died as a result.

But beyond the unreliability of coerced statements, principles of basic fairness and commitment to the rule of law also require their exclusion. As the Ninth Circuit has emphasized, "[w]e recognize that 'important human values are sacrificed where an agency of the government . . . wrings a confession out of an accused against his will." United *States v. Preston*, 751 F.3d 1008, 1018 (9th Cir. 2014) (quoting *Blackburn v. Alabama*, 361 U.S. 199, 206–07 (1960)). "The use of coerced confessions, whether true or false, is forbidden because the method used to extract them offends constitutional principles." *Lego v. Twomey*, 404 U.S. 477, 485 (1972). Because of these considerations, the question whether

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a confession was voluntary is "to be answered with complete disregard of whether or not [the confessor] in fact spoke the truth." *Preston*, 751 F.3d at 1018 (quoting *Rogers v. Richmond*, 365 U.S. 534, 544 (1961)). This principle is reflected in Congressional enactments as well. *See, e.g.*, 10 U.S.C. § 948r(a) ("No statement obtained by the use of torture or by cruel, inhuman, or degrading treatment [] shall be admissible in a military commission.").

In sum, the statements obtained by coercion are inherently unreliable, and unfair. They are also prejudicial: the CIA records describing such statements cast inaccurate information about terrorist activities as fact, thereby "combin[ing] the persuasiveness of apparent conclusiveness with what judicial experience shows to be illusory and deceptive evidence." *Stein*, 346 U.S. at 192. Indeed, as the Supreme Court has explained, this is precisely the danger that requires the exclusion of coerced statements. *Id.* Because coerced statements are so unreliable, even if there were only a slight risk of prejudice, these records would still have to be excluded. *See United States v. Hitt*, 981 F.2d 422, 424 (9th Cir. 1992) ("Where the evidence is of very slight (if any) probative value, it's an abuse of discretion to admit it if there's even a modest likelihood" or "small risk" of prejudice."). Here, the untrustworthy evidence carries a very high risk of prejudice, and the Court should exclude it from trial.

II. The Court Should Exclude Evidence and Argument about Purported Reliance on Executive Branch Legal Analyses or Bureaucratic Authorizations.

Defendants have argued that they cannot be liable for their own actions in developing the CIA torture program because (1) they purportedly relied on

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memoranda produced by CIA lawyers and the Justice Department's Office of Legal Counsel (OLC); and (2) they secured authorization and followed instructions from others in the CIA. *See, e.g.*, ECF No. 169 at 9; ECF No. 190 at 5. As described below, neither of these premises—even if true—would establish a valid defense. Accordingly, evidence and argument on these points should be excluded.

Courts have consistently held that where a defense is unavailable as a matter of law, "any evidence to support such a defense [i]s properly excluded." *United States v. Gregg*, No. 13-CR-0024-TOR, 2015 WL 1757832, at *4 (E.D. Wash. Apr. 17, 2015) (citation omitted); *see also, e.g.*, *United States v. Sarno*, 73 F.3d 1470, 1488-89 (9th Cir. 1995) (upholding exclusion of evidence relating to unavailable defense because it "might well have (as the district court here concluded) induced confusion in the minds of the jury and distracted them from the true issue"); *United States v. Lindsey*, 850 F.3d 1009, 1016 (9th Cir. 2017) ("[D]isregard of relevant information is not a defense to wire fraud and thus evidence of such disregard is not admissible as a defense to mortgage fraud.").

Here, Defendants are ineligible for a "reliance on counsel" defense and should not therefore be permitted to introduce evidence of executive branch legal analyses that purported to find their methods lawful, such as discredited and withdrawn OLC memoranda. *See, e.g.*, ECF No. 174-9 (withdrawn OLC memo submitted in support of Defendants' summary judgment motion). As Plaintiffs have shown, *see* ECF No. 193 at 6–8, 29, ignorance of the law is not a defense to the claims in this case, both because the prohibitions on torture and

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war crimes are not "highly technical" or "arcane," and because "willfulness" is not an element of the crimes. *See generally United States v. Stacy*, 734 F. Supp. 2d 1074, 1083 (S.D. Cal. 2010) (holding that "advice-of-counsel defense is not available" to defendant because offense did not have "willfulness as an element"). Thus, for crimes like those here, where the "only intent necessary was that the defendants intended the natural consequences of their acts," courts consistently reject any argument by defendants that "bad information as to what the law is constitute[s] an excuse for them." *Finn v. United States*, 219 F.2d 894, 899–900 (9th Cir. 1955).

Defendants are also not entitled to a statutory "good faith" defense under the Detainee Treatment Act–that they "did not know that the practices were unlawful and a person of ordinary sense and understanding would not know the practices were unlawful"–because Congress excluded non-agents from its terms, *see* 42 U.S.C. § 2000dd-1(a) (limiting good faith defense to an "officer, employee, member of the Armed Forces, or other agent of the United States."). Here, of course, the Court has already held that Defendants were not agents. *See* ECF No. 135 at 13. They may not, therefore, present this defense.

Moreover, the OLC memos upon which the Defendants purportedly relied are particularly irrelevant to any defense, because the evidence shows that the legal approval process was deeply compromised by Defendants' own misrepresentations. Defendants, who were told to "rule out nothing whatsoever that you believe may be effective; rather, come on back and we will get you the approvals," ECF No. 176-24 at 1160, were themselves responsible for supplying

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the OLC with flawed information that underpinned its legal analysis. Thus, the CIA's top lawyer, John Rizzo, testified (consistent with CIA documents) that Defendants provided "information that OLC considered in assessing the legality of the techniques," including specifically "whether these techniques could cause severe mental or physical pain or suffering." ECF No. 205-1 (Rizzo Dep.) at 44:7–47:3. And a cable sent to Defendants confirmed that they knew that the legal analysis of their methods was based on *inter alia*, their own representation "that the procedures described above should not produce severe mental physical pain or suffering." ECF No. 174–10 at 001763–64. The Defendants also knew the effect of their proposed methods might be different for prisoners than for volunteers, ECF No. 204-4 (Jessen Dep.) 127:11–24, but suggested that CIA look only to data collected about volunteers. As the Senate Armed Services Committee found, using SERE volunteer data was misleading and dangerous. ECF No. 195-25 at xxvi. The executive branch legal process was, then, both outcome-oriented and reliant on Defendants' own misrepresentations and omissions; it is hardly surprising that the Office of Professional Responsibility determined that the memoranda OLC produced were gravely flawed. *See* ECF No. 176-11 (OPR Report) at U.S. Bates 000766–00083. Defendants may not rely upon advice that they knew was so compromised by their own misstatements. *See United States v. Crooks*, 804 F.2d 1441, 1450 (9th Cir. 1986), *as amended,* 826 F.2d 4 (9th Cir. 1987) (even where a defendant is eligible for an advice of counsel defense, "Counsel must, however, have been fully informed of all relevant facts, unbiased, and competent"); *United States v.*

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Manning, 509 F.2d 1230, 1234 (9th Cir. 1974) (rejecting defense of legal advice where "it appears from the evidence that they did not treat [counsel] as an independent, unbiased legal advisor").

Second, because neither bureaucratic approvals nor "superior orders" establishes any defense to claims of torture and war crimes, Defendants should be precluded from presenting argument or evidence as to these theories. "Since World War II, the 'just following orders' defense has not occupied a respected position in our jurisprudence." *O'Rourke v. Hayes,* 378 F.3d 1201, 1210 n. 5 (11th Cir. 2004) (quoting *Brent v. Ashley,* 247 F.3d 1294, 1306 (11th Cir. 2001)); *see also Grossman v. City of Portland*, 33 F.3d 1200, 1209 (9th Cir. 1994) ("[A]s historical events such as the Holocaust and the My Lai massacre demonstrate, individuals cannot always be held immune for the results of their official conduct simply because they were enforcing policies or orders promulgated by those with superior authority."). 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). International law is equally clear: *Trial of Wilhelm List and Others* (*The Hostages Case*) (1948), *reprinted in* 8 Law Reports of Trials of War Criminals 52 (eds. United Nations War Crimes Commission 1949) holds that "[S]uperior order is not a defence to an International Law crime." Particularly relevant here, the Ninth Circuit has emphasized that an agent may not claim immunity to "torture a kidnapper to reveal the whereabouts of his

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victim, even though he believes it necessary to perform his job" because torture is never lawful. *Horiuchi*, 253 F.3d at 366 n.10; *see also* UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment art. 2(3), Apr. 18, 1988, 108 Stat. 382, 1465 U.N.T.S. 85 ("An order from a superior officer or a public authority may not be invoked as a justification for torture."). Here too, regardless of whether Defendants believed their unlawful methods were necessary, and even if they managed to convince the CIA to authorize them, executive branch authorizations do not and cannot create a defense to any of Plaintiffs' claims.

III. Defendants Should Be Precluded From Introducing Evidence And Argument Regarding the 9/11 Attacks And Specifically Barred From Presenting Videos Or Images Depicting Or Related To Them.

Defendants' previously sought judicial notice of three facts: that (1) the United States was attacked on September 11, 2011 ("9/11"); (2) al-Qaeda was responsible for those attacks; and (3) 2,996 people died and 5,000 people were injured in those attacks. ECF No. 165. In deciding to consider those facts solely for the purpose of the pending Motions for Summary Judgment, this Court noted that while those facts may have "some minimal relevance . . . at least as background context . . . the question of if, and in what manner they would be presented to a jury is a more complicated question which would require Federal Rule of Evidence 403 balancing and other considerations." ECF No. 189 at 2.

Therefore, Plaintiffs now respectfully move to preclude all evidence and argument regarding 9/11; in particular, Plaintiffs seek to bar the admission of a video titled "Flashback 9/11: As It Happened,"

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http://video.foxnews.com/v/1151859712001/?#sp=show-clips, which the Defendants subpoenaed from the Custodian of Record for Fox News (Defs.' Exh. 678), or similar evidence – including, but not limited to, the "9/11 Newspaper Clippings" Defendants marked as Exhibit 679. "Flashback 9/11: As It Happened" is approximately nineteen minutes long, and shows footage of the 9/11 attacks starting immediately after United Flight 11 hit the North Tower. In addition to featuring the attacks on the World Trade Center, the Pentagon, and the crash of United Flight 93, the video shows the horrific scenes as people ran out of the buildings covered in ash, plays audio of victims calling from the top floors of the Tower describing the chaos inside and shows devastating images of victims jumping to their death. Similarly, the 9/11 Newspaper Clippings that Defendants have marked for trial are a collection of "Newspaper front pages from September 12, 2001," all of which depict horrific images of the devastation that resulted from the attacks. For the reasons described below, Plaintiffs seek to exclude this video and newspaper clippings, or other exhibits like them, along with evidence and argument related to the 9/11 attacks. In so moving, Plaintiffs again do not deny the horrific events that occurred on September 11th, but maintain that those facts are simply not relevant to the issues raised in this case because they do not bear upon any issue in dispute, and, even if relevant should be excluded under Rule 403 as they are unduly prejudicial.

As this Court has admonished, this is not a political trial—that is true whether the issue is 9/11, or actions taken in response to those attacks. This trial is about whether Plaintiffs were subjected to torture and cruel, inhuman, or

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degrading treatment ("CIDT"), and whether Defendants aided and abetted Plaintiffs' abuse. Not only did Plaintiffs have absolutely nothing to do with the 9/11 attacks—as this Court has already acknowledged, ECF No. 135 at 14– but the tragedy of 9/11, as profound as it is, simply does not provide any legal justification or defense to the torture and other abuse that Plaintiffs suffered as a result of Defendants' conduct. Indeed, courts have warned about the dangers of allowing emotions surrounding 9/11 to blind us in the application of our country's basic principles of law:

> Understandably, the infamous, dastardly and tragic deeds and events of September 11, 2001 have caused a maelstrom of human emotions to be not only released but to also create a human reservoir of strong emotional feelings such as fear, anxiety and hatred as well as a feeling of paranoia in many of the hearts and minds of the inhabitants of this great nation. These are strong emotions of a negative nature which, if not appropriately checked, cause the ability of one to properly reason to be impeded or to be blinded in applying our basic principles of law. . . . We must never adopt an "end justifies the means" philosophy by claiming that our Constitutional and democratic principles must be temporarily furloughed or put on hold in cases involving alleged terrorism in order to preserve our democracy. To do so, would result in victory for the terrorists.

United States v. Goba, 220 F. Supp. 2d 182, 184 (W.D.N.Y. 2002); *see also United States v. Koubriti*, 336 F.Supp.2d 676, 680 (E.D. Mich. 2004) ("Those of us in the justice system . . . must be ever vigilant to insure that neither the heinousness of the terrorists' mission nor the intense public emotion, fear and revulsion that their grizzly work produces, diminishes in the least the core protections provided . . . by our Constitution"). Despite this mandate and the fundamental truth that 9/11 has no tie to the Plaintiffs, their claims, or the

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defenses advanced in this case, the very invocation of 9/11 and the devastation visited upon the United States and so many innocent victims may invite the jury to make improper assumptions regarding the relevance of the attacks on the issues presented.

Applying the Rule 403 balancing test, the Ninth Circuit has made clear that "[w]here evidence is of very slight (if any) probative value, it's an abuse of discretion to admit it if there's even a modest likelihood" or "small risk" of prejudice. *Hitt*, 981 F.2d at 424. Notably, "[t]here is a marked difference between describing evidence as relevant and describing it as having probative value significant enough to outweigh any unfair prejudicial effect." *United States v. LeMay,* 260 F.3d 1018, 1033 (9th Cir. 2001). "The probative value of evidence is determined by considering the strength of and the need for that relevant evidence." *Id.*

While reference to 9/11 as background context for how Defendants came to work on the CIA's RDI program may, as the Court has said, be marginally pertinent, ECF No. 189 at 2, judicial notice of—or repeated references to—al Qaeda's responsibility for those attacks and the fact that thousands of people were killed and injured in those attacks should be precluded as those facts are neither relevant nor probative. Conversely, the prejudicial effect of this evidence is profound. Indeed, it is hard to envision evidence that would evoke more emotion in the minds of the jurors than the worst terrorist attack in U.S. history. For this precise reason, other courts have held that references to al-Qaeda or the 9/11 attacks are unduly prejudicial and should be excluded under Rule 403. *See,*

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e.g., Zubulake v. UBS Warburg, 382 F. Supp. 2d 536, 548 (S.D.N.Y. 2005) (excluding references to the 9/11 attacks due to "the danger of unfair prejudice given the emotions associated with the attacks."); *United States v. Royer,* 549 F. 3d 886, 903 (2d Cir. 2008) (commending the district court for "engag[ing] in precisely the sort of 'conscientious assessment' . . . precedents requires" by "carefully weigh[ing] the probative value of the 9/11-related evidence the Government wished to offer, exclud[ing] that evidence that was more potentially prejudicial than probative (such as references to Al Qaeda)"); *United States v. Elfgeeh*, 515 F.3d 100, 127 (2d Cir. 2008) ("There can be little doubt that in the wake of the events of September 11, 2001, evidence linking a [litigant] to terrorism in a trial in which he is not charged with terrorism is likely to cause undue prejudice."); *Brincko v. Rio Props. (In re Nat'l Consumer Mortg., LLC,* 2013 U.S. Dist. LEXIS 5986, at *14 (D. Nev. Jan. 14, 2013) (allowing party to indicate that particular regulations chronologically went into effect after September 11, 2001 but precluding that party from referencing any connection to the terrorist attacks because the probative value was substantially outweighed by potential prejudice); *United States v. Amawi*, 541 F.Supp.2d 945, 951 (N.D. Ohio 2008) ("Few terms have a greater inherent risk of prejudgment than terrorism, terrorist, jihad, and Al-Qaeda.").

A similar result should be reached here. It is undeniable that the events of 9/11 understandably provoke the kind of strong emotions that can overwhelm rational assessment of the law and facts at issue. As previously noted, that danger is particularly pronounced when trial is scheduled to start one week

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before the 9/11 anniversary and will include that date, and where Plaintiffs are Muslim and come from majority-Muslim regions. *See, e.g., United States v. Moore,* 375 F.3d 259, 264 (3d Cir. 2004) (reversing conviction, where "on the eve of the one year anniversary of the September 11th terrorist attacks, the prosecutor called [the defendant] a terrorist"); *Shelton v. Bledsoe,* 2017 U.S. Dist. LEXIS 104669, at *24-25 (M.D. Pa. July 7, 2017) (precluding Defendants from presenting evidence that Plaintiff was Muslim after Plaintiff argued that "given the anti-Muslim political climate that has emerged since September 11, 2001, and the attacks carried out by terrorist groups such as ISIS, there is a substantial risk that reference to Plaintiff's Muslim religious beliefs may lead to unfair prejudice with members of the jury").

In particular, Defendants should be specifically precluded from showing the 18:34 minute-long video titled "Flashback 9/11: As It Happened," which they have subpoenaed from Fox News (or, for that matter, any similar materials). The horrifying images depicted in that video make no material fact less or more probable, and would inevitably appeal to the jury's sympathies, arouse its sense of horror and provoke its instinct to punish—precisely the response Rule 403 is meant to avoid. *See, e.g., Carter v. Hewitt,* 617 F.2d 961, 972 (3d Cir. 1980) (quoting 1 J. Weinstein & M. Berger, *Weinstein's Evidence,* § 403[04], at 403-15 to 403-17 (1978)) (explaining that evidence "is unfairly prejudicial [under 403] if it 'appeals to the jury's sympathies, arouses its sense of horror, provokes its instinct to punish,' or otherwise 'may cause a jury to base its decision on something other than the established proposition in the case.'");

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United States v. Layton, 767 F.2d 549, 556 (9th Cir. 1985) (affirming the exclusion of a tape that included horrific screams of victims dying and explaining that the district judge acted within his discretion in finding that "it is unlikely that a jury instruction could not effectively mitigate the emotional impact and distracting effect of the Tape."); *see also United States v. Whittemore,* 2013 U.S. Dist. LEXIS 67636, at *7 (D. Nev. May 10, 2013) (explaining that evidence should be excluded when "there is a significant danger that the jury might base its decision on emotion or when non-party events would distract reasonable jurors from the real issues in the case").

That the footage would inflame the jury and prejudice it against Plaintiffs is made clear by Defendant Mitchell's description in his book of watching precisely this footage:

> My heart sank. I felt a tremendous sadness for the loss of life. I watched people jump to their death rather than burn alive. I heard comments about the number of people falling out of the sky. I watched as the building collapsed and people fled the dust cloud, covered with ash . . . I vacillated between profound sadness for the suffering of the victims of the attacks and a blood-fever that made me want to get up right then, find the coward who ordered this, and fix it so they could never do it again.

Mitchell Manuscript at 26-27. Dr. Mitchell's reaction of horror and sadness is understandable and his "blood-fever" desire to find those responsible and "fix it" may also be shared by others. But because this reaction cannot and does not provide any sort of defense to his or Defendant Jessen's actions here, provoking this reaction in the courtroom runs afoul of Rule 403 by inappropriately playing to the fears and emotions of the jury. Likewise, the Court should preclude Defendants from showing the jury Exhibit 679 "9/11 Newspaper Clippings," a

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compilation of newspaper covers from the day after 9/11 which contain obviously disturbing photographic images and headlines of the terrorist attacks of that day, but with absolutely no substance, let alone fact that bear upon this matter. McGrady Decl., Ex. B. Accordingly, the Court should preclude the evidence and argument that Defendants seek to introduce regarding 9/11, including the admission of "Flashback 9/11: As It Happened" and the "9/11 Newspaper Clippings."

IV. Defendants Should Be Precluded From Introducing Evidence And Argument Regarding Plaintiffs' Purported Ties To Various Organizations

Plaintiffs move to exclude any presentation by the Defendants regarding Plaintiffs' purported affiliations with terrorism, including but not limited to materials cited in Defendants' Statement of Undisputed Facts. ECF No. 170 at ¶¶ 266-67, 275-76, 283, 285 (citations omitted). Simply put, this case is not about those affiliations, and exclusion is necessary under Federal Rules of Evidence 401 and 403.

Like the content of the 9/11 video discussed above, Plaintiffs' purported affiliations are not a "fact [] of consequence in determining the action." Fed. R. Evid. 401. This case is about Plaintiffs' subjection to torture, CIDT and nonconsensual human experimentation, as a result of which Messrs. Salim and Ben Soud suffered profound injuries and Mr. Rahman was killed. ECF No. 1 at ¶¶ 168-85. And Defendants are liable because they designed, tested, advocated, and profited from the program to which Plaintiffs were subjected. *Id.* No portion of these claims turns on whether Plaintiffs were or were not affiliated with

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terrorist groups. Nor does this evidence have even "minimal relevance" to this case "at least as background context," ECF No. 189 at 2: allegations that the Plaintiffs were involved with terrorism have absolutely no "tendency in reason to prove any material fact" and should be excluded under Rule 401. *United States v. Amaral*, 488 F.2d 1148, 1152 (9th Cir. 1973); s*ee Plascencia v. Alameida*, 467 F.3d 1190, 1201 (9th Cir. 2006) ("background information" held "not significant enough" to require admission where "of minimal additional probative value, if any").

Nor are Plaintiffs' purported affiliations implicated by any possible defense. The law prohibiting torture, CIDT, and human experimentation does not permit of any defense based on a victim's conduct or affiliations, or based on any purported interest in obtaining information from the victim. *See Siderman de Blake v. Republic of Argentina*, 965 F.2d 699, 717 (9th Cir. 1992) ("[T]he right to be free from official torture is fundamental and universal."); U.N. Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, art. 2(2), Dec. 10, 1984, 1465 U.N.T.S. 85, *implemented at* 8 C.F.R. § 208.18 ("No exceptional circumstances whatsoever . . . may be invoked as a justification of torture."); Geneva Convention Relative to the Treatment of Prisoners of War art. 3, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135 (Common Article 3 bars torture and cruel treatment of all prisoners, regardless of status); *Hamdan v. Rumsfeld*, 548 U.S. 557, 630-31, 631 n.63 (2006) (Common Article 3 requires that "'nobody in enemy hands can be outside the law'") (citation omitted); *see also*, *e.g.*, *Selmouni v. France*, 29 Eur.

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H.R. Rep. 403 (1999) ("Even in the most difficult circumstances, such as the fight against terrorism . . . , the Convention prohibits in absolute terms torture or inhuman or degrading treatment or punishment.").

But even if the allegations that the Plaintiffs were involved in terrorism were somehow relevant, such allegations must be excluded under Rule 403 because the probative value, if any, of such information is vastly outweighed by unfair prejudice and confusion of the issues. Any probative value to such allegations is minimal: first, as described above, these facts do not speak to any material issue; and second, they also do not bear upon Plaintiffs' credibility sufficiently for impeachment purposes to outweigh their prejudicial impact. In fact, Plaintiffs' credibility is not really at issue. Mr. Rahman is deceased and will offer no proof; nor, in any event, are the facts regarding the treatment that resulted in his death even disputed. ECF No. 170 (Defs' Statement of Undisputed Facts) ¶¶ 291-293, 299, 301-302, 315, 322-327. Similarly, Messrs. Salim and Ben Soud will be testifying to matters that are fundamentally undisputed—that each was subjected to particular, coercive interrogation methods and suffers harms stemming from his treatment in CIA custody. Defendants fundamentally concede both of these sets of facts. *See id.* at ¶ 271 (acknowledging CIA documents indicate Mr. Salim subjected to Defendants' methods); *id.* at ¶ 280 (same for Mr. Ben Soud); *see* Defs' Response to Plfs' Statement of Undisputed Facts, ECF No. 192 at ¶¶ 87, 92-94 (Mr. Salim's subjection to nudity, diapers, sleep deprivation, stress positions, being hurled into walls, being forced into boxes, being slapped in the face, and water dousing

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all undisputed); *id.* at ¶¶ 109-110, 114-115, 117 (same for Mr. Ben Soud); McGrady Decl., Ex. C (Pitman Report on Salim) at 11 ("I did not sense any evidence of symptom fabrication or exaggeration"); *id.* at 18 (diagnosing post-traumatic stress disorder (PTSD) and major depression); McGrady Decl., Ex. D (Pitman Report on Ben Soud) at 9 ("Mr. Ben Soud appeared to be a reasonably good historian. . . . I did not sense any evidence of symptom fabrication or exaggeration."); *id.* at 16 (diagnosing PTSD, major depression, and brief psychotic disorder or delirium). Accordingly, allegations of terrorist affiliations could only serve to impugn Plaintiffs' credibility as a general matter so as to turn the jury against them, but would have no probative value as a matter of law. *Mathison v. Hillhaven Corp.*, 895 F.2d 1417 (Table), 1990 WL 11865 (9th Cir. Feb. 13, 1990) (impeachment of little probative value where it "could only serve to impugn [] credibility generally").

In any event, Rule 403 requires that this minimal probative value be weighed against the danger of unfair prejudice and it is difficult to fathom evidence or argument more prejudicial than allegations of terrorist ties. *See United States v. Sedaghaty*, 728 F.3d 885, 918 (9th Cir. 2013) ("evidence that would cast [tax fraud defendant] in the role of a terrorist based on appeals to fear and guilt by association" would "unduly prejudice the proceedings"); *see also supra* at 5-6 (citing *Elfgeeh,* 515 F.3d at 127 and *Amawi*, 541 F.Supp.2d at 951). Branding Plaintiffs as suspected terrorists presents the very significant risk of improperly signaling that they deserved the harms they suffered. *See*, *e.g.*, *Cummings v. Malone*, 995 F.2d 817, 824 (8th Cir. 1993) (in excessive force

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case, evidence that inmate attempted to rape guard held unduly prejudicial because it "could lead the jury to conclude that [plaintiff] 'deserved what he got.'"); *Provencio v. Stark*, 2013 WL 173416, at *2 (D. Colo. Jan. 16, 2013) (excluding plaintiff's past misconduct lest jury conclude he "simply deserved what unfolded") (citation omitted). Evidence pertaining to terrorism is thus precisely the sort that creates "'an undue tendency to suggest decision on an improper basis,'" *Old Chief v. United States*, 519 U.S. 172, 180 (1997); it is for that reason that courts routinely exclude it under Rule 403. *See*, *e.g.*, *Hosseini v. Chowdry*, 1992 WL 16746, at *3 (9th Cir. 1992) (upholding exclusion of terrorist allegations proffered to impeach plaintiff); *United States v. Odeh*, 2014 WL 5473042, at *9 (E.D. Mich. Oct. 27, 2014) (in prosecution for unlawful procurement of naturalization, excluding evidence of past membership in a terrorist organization). Because evidence "of very slight (if any) probative value" cannot be admitted "if there's even a modest likelihood of unfair prejudice," the extreme prejudice that would here result here requires exclusion. *Hitt*, 981 F.2d at 424.

Finally, Plaintiffs' alleged ties to terrorism are strongly contested, *see* McGrady Decl., Ex. E (Salim Tr.) at 101:17-144:4; *Id.*, Ex. F (Ben Soud Tr.) at 100:20-121:15, particularly given that much of the evidence underlying Defendants' contentions was adduced by torture. *See* Point I, *supra*. If Defendants are permitted to present such allegations, then Plaintiffs will be required to respond with detailed evidence including significant background about Plaintiffs' personal histories, social ties, and socio-political events in East

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and North Africa and the Middle East.[1] As just one example, Mr. Ben Soud would be required to explain the history and nature of his involvement with the Libyan Islamic Fighting Group, a group committed to overthrow of the Gaddafi dictatorship in Libya. *See generally* McGrady Decl., Exh. F (Ben Soud Tr.) at 22:7–122:1. Likewise, Mr. Salim will have to explain that he had never knowingly associated with persons suspected of terrorism and that his involvement with a training camp in 1993 was unwitting and the result of his drug addiction at the time. *See* McGrady Decl., Exh. E (Salim Tr.) at 101:17-144:4. Of course, the litigation of such matters, so far afield from the real issues before the jury, will only confuse the matter, creating time-consuming and collateral "mini trials" and with them "a significant danger that the jury would base its assessment of liability on remote events." *Tennison*, 244 F.3d at 690. Rule 403 requires that the evidence be precluded for this reason, as well. Fed. R. Evid. 403 ("evidence may be excluded if its probative value is substantially outweighed by the danger of . . . confusion of the issues, or misleading the jury, or by considerations of . . . wasted time"); *City of Long Beach v. Standard Oil*

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[1] The depositions of Plaintiffs Salim, Ben Soud, and next representative for Gul Rahman, ObaidUllah, which focused to a great extent on these issues, demonstrate precisely how time-consuming full litigation on these side-show points would be. *See* McGrady Decl., Ex. E (Salim Tr.) at 101:17-144:4; *Id.*, Ex. F (Ben Soud Tr.) at 100:20-121:15l *Id.*, Ex. G (ObaidUllah Tr.) at 111:3 - 132:15, 200:17 – 204:20.

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Co. of California, 46 F.3d 929, 938 (9th Cir. 1995) (upholding trial court's exclusion of evidence under Rule 403 that "went to a 'collateral issue' and 'would be complicated, confusing, . . . [and] would virtually amount to a second trial'") (citation omitted).

V. The Court Should Admit Specific Factual Findings From The SSCI Report.

In accordance with the Court's instructions during the course of proceedings on July 28, 2017, Plaintiffs move to admit into evidence a number of specific factual findings from the Senate Select Committee on Intelligence Study of the CIA's Detention, and Interrogation Program (the "SSCI Report"). Specifically , in addition to the five conclusions from the SSCI Report identified in Plaintiffs' response to Defendants' Motion to Exclude, *see* ECF No. 206 at 3-4,[2] Plaintiffs seek to admit the following factual findings (collectively, "the SSCI findings"):

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[2] Those findings, previously briefed, are: (1) FBI agents successfully elicited "critical information" from Abu Zubaydah without resorting to torture; (2) Defendants' rate of $1,800 per day was "four times" what other interrogators were paid; (3) there was not a consistent definition of the term "HVD" in the CIA program; (4) the CIA's Office of Medical Services (OMS) did not opine as to whether Defendants' methods would cause suffering; and (5) that Defendants authored a CIA cable recommending that the aggressive phase of Zubaydah's interrogation be used as a "template."

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- "[Mitchell], who had never conducted an actual interrogation, encouraged the CIA to focus on developing 'learned helplessness' in CIA detainees." *See* McGrady Decl. Ex. H at 463-464.

- "Prior to [Jessen's] departure from the detention site on November [ ], 2002, [a few days before the death of Gul Rahman], [Jessen] proposed the use of the CIA's enhanced interrogation techniques on other detainees and offered suggestions to [ ] [CIA OFFICER 1], the site manager, on the use of such techniques." *Id.* at 54.

- "After the use of the CIA's enhanced interrogation techniques ended, CIA personnel at the detention site concluded that Abu Zubaydah had been truthful and that he did not possess any new terrorist threat information." *Id.* at 45.

- "[N]umerous individuals had been detained and subjected to the CIA's enhanced interrogation techniques, despite doubts and questions surrounding their knowledge of terrorist threats and the location of senior al-Qa'ida leadership." *Id.* at 465.

- "In May 2003, a senior CIA interrogator would tell personnel from the CIA's Office of Inspector General that [Mitchell] and [Jessen's] SERE school model was based on resisting North Vietnamese 'physical torture' and was designed to extract 'confessions for propaganda purposes' from U.S. airmen 'who possessed little actionable intelligence.'" *Id.* at 33.

All these factual findings are relevant under Rule 401 and, as discussed in Plaintiffs' prior briefing, *see* ECF No. 206, admissible under Rule 803(8)(A)(iii). For example, these findings show how Plaintiffs meet the standard for aiding and abetting liability, by, for example, demonstrating Defendants' focus on learned helplessness and thus their knowledge that their methods would and did cause severe psychological harm; it also establishes the difference between the SERE program and the Defendants' techniques, showing the irrationality of Defendants' reliance on the former. The SSCI excerpts are

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also relevant to Defendants' *mens rea*—including that they show how the Defendants sought to profit from their activities in developing, implementing, testing and advocating for their methods, even after the FBI had already elicited the critical information using non-coercive means. And, perhaps most significantly, these factual findings go directly to Defendants' knowledge that their methods were to be used on other detainees, including their proposal to use Abu Zubaydah's interrogation as a "template," and thus directly negate the defense that the Defendants' program was not meant by them to apply to other prisoners, including Plaintiffs. For the same reason as was set forth in Plaintiffs' Response to Defendants' Motion to Exclude, *see* ECF No. 206, the factual findings of the SSCI report should, then, be admitted into evidence, for whatever weight the jury gives them. *See Daniel v. Cook County*, 833 F.3d 728, 742 (7th Cir. 2016) (holding that, although it was "not conclusive," the Report "deserve[d] considerable weight"); *Barry v. (Iron Workers) Pension Plan*, 467 F. Supp. 2d 91, 97 (D.D.C. 2006) ("Doubts about the completeness or accuracy of the report go to 'the weight of the evidence and not its admissibility.'" (internal citation omitted)).

CONCLUSION

For the foregoing reasons, Plaintiffs' Motions in Limine should be granted.

DATED: August 2, 2017

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CERTIFICATE OF SERVICE

I hereby certify that on August 2, 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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