BETTS, PATTERSON & MINES P.S.
Christopher W. Tompkins (WSBA #11686)
CTompkins@bpmlaw.com
701 Pike Street, Suite 1400
Seattle, WA 98101-3927

BLANK ROME LLP
Henry F. Schuelke III (admitted *pro hac vice*)
HSchuelke@blankrome.com
1825 Eye St. NW
Washington, DC 20006

James T. Smith (admitted *pro hac vice*)
Smith-jt@blankrome.com
Brian S. Paszamant (admitted *pro hac vice*)
Paszamant@blankrome.com
Jeffrey N. Rosenthal (admitted *pro hac vice*)
Rosenthal-j@blankrome.com
One Logan Square, 130 N. 18th Street
Philadelphia, PA 19103

Attorneys for Defendants Mitchell and Jessen

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' PROPOSED JURY INSTRUCTIONS**

Betts
Patterson
Mines
One Convention Place
Suite 1400
701 Pike Street
Seattle, Washington 98101-3927
(206) 292-9988

Pursuant to this Court's *Order re: Pretrial Filings and Extending Deadlines*, ECF 187, and Local Rule 51.1, Defendants James Elmer Mitchell and John "Bruce" Jessen ("Defendants"), hereby submit the following set of proposed jury instructions for use at trial. Defendants reserve the right to withdraw, amend, modify and/or add to these instructions at any time before closing argument. Moreover, Defendants further reserve the right to object to the proposed jury instructions provided by Plaintiffs Suleiman Abdullah Salim, Mohamed Ahmed Ben Soud and Obaid Ullah, as personal representative of Gul Rahman. Defendants also intend to discuss these jury instructions in their forthcoming Trial Brief.

DATED this 8th day of August, 2017.

BETTS, PATTERSON & MINES, P.S.
By: *s/ Christopher W. Tompkins*
Christopher W. Tompkins, WSBA #11686
ctompkins@bpmlaw.com
Betts, Patterson & Mines, P.S.
701 Pike St, Suite 1400
Seattle, WA 98101

BLANK ROME LLP
Henry F. Schuelke III, admitted *pro hac vice*
hschuelke@blankrome.com
1825 Eye St. NW
Washington, DC 20006

James T. Smith, admitted *pro hac vice*
smith-jt@blankrome.com
Brian S. Paszamant, admitted *pro hac vice*
paszamant@blankrome.com
Jeffrey N. Rosenthal, admitted *pro hac vice*
rosenthal-j@blankrome.com
130 N 18th Street
Philadelphia, PA 19103

Attorneys for Defendants Mitchell and Jessen

TABLE OF CONTENTS

1. INSTRUCTIONS ON THE TRIAL PROCESS

Instruction

INSTRUCTION NO. __

1.1 – DUTY OF JURY
(Court Reads and Provides Written Instructions at the Beginning of Trial)

Members of the jury: You are now the jury in this case. It is my duty to instruct you on the law.

These instructions are preliminary instructions to help you understand the principles that apply to civil trials and to help you understand the evidence as you listen to it. You will be allowed to keep this set of instructions to refer to throughout the trial. These instructions are not to be taken home and must remain in the jury room when you leave in the evenings. At the end of the trial, these instructions will be collected and I will give you a final set of instructions. It is the final set of instructions that will govern your deliberations.

It is your duty to find the facts from all the evidence in the case. To those facts you will apply the law as I give it to you. You must follow the law as I give it to you whether you agree with it or not. And you must not be influenced by any personal likes or dislikes, opinions, prejudices or sympathy. That means that you must decide the case solely on the evidence before you. You will recall that you took an oath to do so.

Please do not read into these instructions or anything I may say or do that I have an opinion regarding the evidence or what your verdict should be.[1]

Authorities:

Ninth Circuit Model Civil Jury Instructions, § 1.1 (2007 ed., updated June 2017) (unmodified)

[1] The Comment to the Ninth Circuit Model Jury Instructions states: "This instruction may be used as a preliminary instruction if the court decides to provide a written set of preliminary instructions at the beginning of the trial that the jurors are permitted to keep with them. In the final set of instructions, the court should substitute Instruction 1.3."

INSTRUCTION NO. __

1.2 – ALTERNATE: DUTY OF JURY
(Court Reads Instructions at the Beginning of Trial But Does Not Provide Written Copies)

Members of the jury: You are now the jury in this case. It is my duty to instruct you on the law.

It is your duty to find the facts from all the evidence in the case. To those facts you will apply the law as I give it to you. You must follow the law as I give it to you whether you agree with it or not. And you must not be influenced by any personal likes or dislikes, opinions, prejudices or sympathy. That means that you must decide the case solely on the evidence before you. You will recall that you took an oath to do so.

At the end of the trial I will give you final instructions. It is the final instructions that will govern your duties.

Please do not read into these instructions, or anything I may say or do, that I have an opinion regarding the evidence or what your verdict should be.[2]

Authorities:

Ninth Circuit Model Civil Jury Instructions, § 1.2 (2007 ed., updated June 2017) (unmodified)

[2] The Comment to the Ninth Circuit Model Jury Instructions states: "This instruction may be used as an oral instruction if the court elects to read its preliminary instructions to the jury but not to provide the jury with a copy of the instructions."

INSTRUCTION NO. __

1.3 – ALTERNATE: DUTY OF JURY
(Court Reads and Provides Written Instructions at End of Case)

Members of the Jury: Now that you have heard all of the evidence [and the arguments of the attorneys], it is my duty to instruct you on the law that applies to this case.

[Each of you has received a copy of these instructions that you may take with you to the jury room to consult during your deliberations.]

or

[A copy of these instructions will be sent to the jury room for you to consult during your deliberations.]

It is your duty to find the facts from all the evidence in the case. To those facts you will apply the law as I give it to you. You must follow the law as I give it to you whether you agree with it or not. And you must not be influenced by any personal likes or dislikes, opinions, prejudices, or sympathy. That means that you must decide the case solely on the evidence before you. You will recall that you took an oath to do so.

Please do not read into these instructions or anything that I may say or do or have said or done that I have an opinion regarding the evidence or what your verdict should be.[3]

Authorities:

Ninth Circuit Model Civil Jury Instructions, § 1.3 (2007 ed., updated June 2017) (unmodified)

[3] The Comment to the Ninth Circuit Model Jury Instructions states: "This instruction should be used with the written final set of the instructions to be sent to the jury. Bracketed material should be selected to cover whether single or multiple sets of written instructions are provided."

INSTRUCTION NO. __

1.4 – CLAIMS AND DEFENSES

To help you follow the evidence, I will give you a brief summary of the positions of the parties:

Plaintiffs assert that Defendants are directly and indirectly liable for violations of the Alien Tort Statute ("ATS"). They claim that one or both Defendants are directly liable because they allegedly *personally* engaged in Torture and Other Cruel, Inhuman, and Degrading Treatment, Non-Consensual Human Experimentation, and War Crimes *directly* against Plaintiffs.

The Plaintiffs also assert that Defendants are indirectly liable for violations of the ATS. They offer several alternative theories of liability. Thus, even if you determine that Plaintiffs do not meet their burden of proving that one or both Defendants personally engaged in *Torture and Other Cruel, Inhuman, and Degrading Treatment, Non-Consensual Human Experimentation,* or *War Crimes*, you may still find that one or both Defendants are nevertheless responsible for such actions having been done to Plaintiffs by the United States Central Intelligence Agency ("CIA") under one or more of the following additional theories of liability, each of which is explained below: (1) aiding and abetting; (2) joint criminal enterprise; and (3) conspiracy.

Plaintiffs bear the burden of proving that one or both Defendants are directly or indirectly liable for the alleged violations of the ATS. I will explain below what Plaintiffs need to show to prove that one or both Defendants are liable for these alleged violations; however, it is important to remember that each of Plaintiffs' claims is a separate theory of liability. You must consider them individually. Likewise, each Defendants' liability, if any, is separate. You must consider each Defendants' liability, if any, separately. If you find that Plaintiffs have not carried the required burden of proof on any one theory of liability with regard to one or both Defendants, that finding does not affect your finding on any other theory of liability.

Defendants deny all of Plaintiffs' claims and contend that they are not directly or indirectly liable under the ATS. The Defendants also contend that all of their actions were legal and authorized, that they believed all of their actions were legal and authorized, and that Plaintiffs' injuries and damages, if any, were caused by parties other than Defendants, over whom Defendants had no control. The Defendants have the burden of proof with regard to each of these affirmative defenses.

Authorities:

Plaintiffs' *Complaint*, 15-cv-286, ECF No. 1, ¶¶ 168-185; Defendants' *Amended Answer and Affirmative Defenses*, 15-cv-286, ECF No. 77, ¶¶ 1-15; Ninth Circuit Model Civil Jury Instructions, § 1.4 (2007 ed., updated June 2017) (modified to discuss claims and defenses in instant case)

INSTRUCTION NO. __

1.5 - BURDEN OF PROOF—PREPONDERANCE OF THE EVIDENCE

When a party has the burden of proving any claim or affirmative defense by a preponderance of the evidence, it means you must be persuaded by the evidence that the claim or affirmative defense is more probably true than not true.

You should base your decision on all of the evidence, regardless of which party presented it.

Authorities:

Ninth Circuit Model Civil Jury Instructions, § 1.6 (2007 ed., updated June 2017) (unmodified)

INSTRUCTION NO. __

1.6 – BURDEN OF PROOF—CLEAR AND CONVINCING EVIDENCE

When a party has the burden of proving any claim or defense by clear and convincing evidence, it means that the party must present evidence that leaves you with a firm belief or conviction that it is highly probable that the factual contentions of the claim or defense are true. This is a higher standard of proof than proof by a preponderance of the evidence, but it does not require proof beyond a reasonable doubt.

Authorities:

Ninth Circuit Model Civil Jury Instructions, § 1.7 (2007 ed., updated June 2017) (unmodified) (citing *Colorado v. New Mexico*, 467 U.S. 310, 316 (1984) (defining clear and convincing evidence); *Sophanthavong v. Palmateer*, 378 F.3d 859, 866 (9th Cir. 2004))

INSTRUCTION NO. __

1.7 – TWO OR MORE PARTIES—DIFFERENT LEGAL RIGHTS

You should decide the case as to each Plaintiff and Defendant separately. Unless otherwise stated, the instructions apply to all parties.

Authorities:

Ninth Circuit Model Civil Jury Instructions, § 1.8 (2007 ed., updated June 2017) (unmodified)

INSTRUCTION NO. __

1.8 – WHAT IS EVIDENCE

The evidence you are to consider in deciding what the facts are consists of:

1. the sworn testimony of any witness;

2. the exhibits that are admitted into evidence;

3. any facts to which the lawyers have agreed; and

4. any facts that I [may instruct] [have instructed] you to accept as proved.

Authorities:

Ninth Circuit Model Civil Jury Instructions, § 1.9 (2007 ed., updated June 2017) (unmodified)

INSTRUCTION NO. __

1.9 - WHAT IS NOT EVIDENCE

In reaching your verdict, you may consider only the testimony and exhibits received into evidence. Certain things are not evidence, and you may not consider them in deciding what the facts are. I will list them for you:

(1) Arguments and statements by lawyers are not evidence. The lawyers are not witnesses. What they [may say] [have said] in their opening statements, closing arguments and at other times is intended to help you interpret the evidence, but it is not evidence. If the facts as you remember them differ from the way the lawyers have stated them, your memory of them controls.

(2) Questions and objections by lawyers are not evidence. Attorneys have a duty to their clients to object when they believe a question is improper under the rules of evidence. You should not be influenced by the objection or by the court's ruling on it.

(3) Testimony that is excluded or stricken, or that you [are] [have been] instructed to disregard, is not evidence and must not be considered. In addition some evidence [may be] [was] received only for a limited purpose; when I [instruct] [have instructed] you to consider certain evidence only for a limited purpose, you must do so and you may not consider that evidence for any other purpose.[4]

(4) Anything you may [see or hear] [have seen or heard] when the court was not in session is not evidence. You are to decide the case solely on the evidence received at the trial.

Authorities:

Ninth Circuit Model Civil Jury Instructions, § 1.10 (2007 ed., updated June 2017) (unmodified)

[4] The Comment to the Ninth Circuit Model Jury Instructions states: "With regard to the bracketed material in paragraph 3, select the appropriate bracket depending on whether the instruction is given at the beginning or at the end of the case."

INSTRUCTION NO. __

1.10 – EVIDENCE FOR LIMITED PURPOSE

Some evidence may be admitted only for a limited purpose.

When I instruct you that an item of evidence has been admitted only for a limited purpose, you must consider it only for that limited purpose and not for any other purpose.

[The testimony [you are about to hear] [you have just heard] may be considered only for the limited purpose of [*describe purpose*] and not for any other purpose.][5]

Authorities:

Ninth Circuit Model Civil Jury Instructions, § 1.11 (2007 ed., updated June 2017) (unmodified)

[5] The Comment to the Ninth Circuit Model Jury Instructions states: "As a rule, limiting instructions need only be given when requested and need not be given *sua sponte* by the court." (citing *United States v. McLennan*, 563 F.2d 943, 947-48 (9th Cir. 1977); *United States v. Marsh*, 144 F.3d 1229, 1238 (9th Cir. 1998) (when trial court fails to instruct jury in its final instructions regarding receipt of evidence for limited purpose, Ninth Circuit examines trial court's preliminary instructions to determine if court instructed jury on this issue)).

INSTRUCTION NO. __

1.11 – DIRECT AND CIRCUMSTANTIAL EVIDENCE

There are two kinds of evidence: direct and circumstantial. Direct evidence is direct proof of a fact, such as testimony of an eyewitness. Circumstantial evidence is indirect evidence, that is proof of a chain of facts from which you could find that another fact exists, even though it has not been proven directly. You are entitled to consider both kinds of evidence. The law permits you to give equal weight to both, but it is for you to decide how much weight to give to any evidence.

It is for you to decide whether a fact has been proved by circumstantial evidence. In making that decision, you must consider all the evidence in the light of reason, common sense, and experience.

[It may be helpful to include an illustrative example in the instruction:

By way of example, if you wake up in the morning and see that the sidewalk is wet, you may find from that fact that it rained during the night. However, other evidence, such as a turned on garden hose, may provide a different explanation for the presence of water on the sidewalk. Therefore, before you decide that a fact has been proved by circumstantial evidence, you must consider all the evidence in the light of reason, experience and common sense.]

Authorities:

Hon. Justin L. Quackenbush Stock Instructions (transmitted by Chambers July 31, 2017) (unmodified); Ninth Circuit Model Civil Jury Instructions, § 1.12 (2007 ed., updated June 2017) *and* Comment (unmodified illustrative example)

INSTRUCTION NO. __

1.12 – RULING ON OBJECTIONS

There are rules of evidence that control what can be received into evidence. When a lawyer asks a question or offers an exhibit into evidence and a lawyer on the other side thinks that it is not permitted by the rules of evidence, that lawyer may object. If I overrule the objection, the question may be answered or the exhibit received. If I sustain the objection, the question cannot be answered, and the exhibit cannot be received. Whenever I sustain an objection to a question, you must ignore the question and must not guess what the answer might have been.

Sometimes I may order that evidence be stricken from the record and that you disregard or ignore that evidence. That means when you are deciding the case, you must not consider the stricken evidence for any purpose.

Authorities:

Ninth Circuit Model Civil Jury Instructions, § 1.13 (2007 ed., updated June 2017) (unmodified)

INSTRUCTION NO. __

1.13 – CREDIBILITY OF WITNESSES

In deciding the facts in this case, you may have to decide which testimony to believe and which testimony not to believe. You may believe everything a witness says, or part of it, or none of it.

In considering the testimony of any witness, you may take into account:

(1) the opportunity and ability of the witness to see or hear or know the things testified to;

(2) the witness's memory;

(3) the witness's manner while testifying;

(4) the witness's interest in the outcome of the case, if any;

(5) the witness's bias or prejudice, if any;

(6) whether other evidence contradicted the witness's testimony;

(7) the reasonableness of the witness's testimony in light of all the evidence; and

(8) any other factors that bear on believability.

Sometimes a witness may say something that is not consistent with something else he or she said. Sometimes different witnesses will give different versions of what happened. People often forget things or make mistakes in what they remember. Also, two people may see the same event but remember it differently. You may consider these differences, but do not decide that testimony is untrue just because it differs from other testimony.

However, if you decide that a witness has deliberately testified untruthfully about something important, you may choose not to believe anything that witness said. On the other hand, if you think the witness testified untruthfully about some things but told the truth about others, you may accept the part you think is true and ignore the rest.

The weight of the evidence as to a fact does not necessarily depend on the number of witnesses who testify. What is important is how believable the witnesses were, and how much weight you think their testimony deserves.

Authorities:

Ninth Circuit Model Civil Jury Instructions, § 1.14 (2007 ed., updated June 2017) (unmodified)

INSTRUCTION NO. __

1.14 – CONDUCT OF THE JURY

I will now say a few words about your conduct as jurors.

First, keep an open mind throughout the trial, and do not decide what the verdict should be until you and your fellow jurors have completed your deliberations at the end of the case.

Second, because you must decide this case based only on the evidence received in the case and on my instructions as to the law that applies, you must not be exposed to any other information about the case or to the issues it involves during the course of your jury duty. Thus, until the end of the case or unless I tell you otherwise:

> Do not communicate with anyone in any way and do not let anyone else communicate with you in any way about the merits of the case or anything to do with it. This includes discussing the case in person, in writing, by phone or electronic means, via email, text messaging, or any internet chat room, blog, website or application, including but not limited to Facebook, YouTube, Twitter, Instagram, LinkedIn, Snapchat, or any other forms of social media. This applies to communicating with your fellow jurors until I give you the case for deliberation, and it applies to communicating with everyone else including your family members, your employer, the media or press, and the people involved in the trial, although you may notify your family and your employer that you have been seated as a juror in the case, and how long you expect the trial to last. But, if you are asked or approached in any way about your jury service or anything about this case, you must respond that you have been ordered not to discuss the matter and report the contact to the court.
>
> Because you will receive all the evidence and legal instruction you properly may consider to return a verdict: do not read, watch or listen to any news or media accounts or commentary about the case or anything to do with it; do not do any research, such as consulting dictionaries, searching the Internet, or using other reference materials; and do not make any investigation or in any other way try to learn about the case on your own. Do not visit or view any place discussed in this case, and do not use Internet programs or other devices to search for or view any place discussed during the trial. Also, do not

> do any research about this case, the law, or the people involved—including the parties, the witnesses or the lawyers—until you have been excused as jurors. If you happen to read or hear anything touching on this case in the media, turn away and report it to me as soon as possible.

These rules protect each party's right to have this case decided only on evidence that has been presented here in court. Witnesses here in court take an oath to tell the truth, and the accuracy of their testimony is tested through the trial process. If you do any research or investigation outside the courtroom, or gain any information through improper communications, then your verdict may be influenced by inaccurate, incomplete or misleading information that has not been tested by the trial process. Each of the parties is entitled to a fair trial by an impartial jury, and if you decide the case based on information not presented in court, you will have denied the parties a fair trial. Remember, you have taken an oath to follow the rules, and it is very important that you follow these rules.

A juror who violates these restrictions jeopardizes the fairness of these proceedings, and a mistrial could result that would require the entire trial process to start over. If any juror is exposed to any outside information, please notify the court immediately.

Authorities:

Ninth Circuit Model Civil Jury Instructions, § 1.15 (2007 ed., updated June 2017) (modified to discuss news stories regarding instant case)

INSTRUCTION NO. __

1.15 – PUBLICITY DURING TRIAL

If there is any news media account or commentary about the case or anything to do with it, you must ignore it. You must not read, watch or listen to any news media account or commentary about the case or anything to do with it. The case must be decided by you solely and exclusively on the evidence that will be received in the case and on my instructions as to the law that applies. If any juror is exposed to any outside information, please notify me immediately.

Authorities:

Ninth Circuit Model Civil Jury Instructions, § 1.16 (2007 ed., updated June 2017) (unmodified)

INSTRUCTION NO. __

1.16 – NO TRANSCRIPT AVAILABLE TO JURY

I urge you to pay close attention to the trial testimony as it is given. During deliberations you will not have a transcript of the trial testimony.

Authorities:

Ninth Circuit Model Civil Jury Instructions, § 1.17 (2007 ed., updated June 2017) (unmodified)

INSTRUCTION NO. __

1.17 – TAKING NOTES

If you wish, you may take notes to help you remember the evidence. If you do take notes, please keep them to yourself until you go to the jury room to decide the case. Do not let notetaking distract you. When you leave, your notes should be left in the [courtroom] [jury room] [envelope in the jury room]. No one will read your notes.

Whether or not you take notes, you should rely on your own memory of the evidence. Notes are only to assist your memory. You should not be overly influenced by your notes or those of other jurors.

Authorities:

Ninth Circuit Model Civil Jury Instructions, § 1.18 (2007 ed., updated June 2017) (unmodified)

INSTRUCTION NO. __

1.18 – QUESTIONS TO WITNESSES BY JURORS

[If a judge decides to allow questions, the following instruction and procedures may be helpful.]

INSTRUCTION

You will be allowed to propose written questions to witnesses after the lawyers have completed their questioning of each witness. You may propose questions in order to clarify the testimony, but you are not to express any opinion about the testimony or argue with a witness. If you propose any questions, remember that your role is that of a neutral fact finder, not an advocate.

Before I excuse each witness, I will offer you the opportunity to write out a question on a form provided by the court. Do not sign the question. I will review the question with the attorneys to determine if it is legally proper.

There are some proposed questions that I will not permit, or will not ask in the wording submitted by the juror. This might happen either due to the rules of evidence or other legal reasons, or because the question is expected to be answered later in the case. If I do not ask a proposed question, or if I rephrase it, do not speculate as to the reasons. Do not give undue weight to questions you or other jurors propose. You should evaluate the answers to those questions in the same manner you evaluate all of the other evidence.

By giving you the opportunity to propose questions, I am not requesting or suggesting that you do so. It will often be the case that a lawyer has not asked a question because it is legally objectionable or because a later witness may be addressing that subject.

PROCEDURES

In the event the judge allows jurors to submit questions for witnesses, the judge may consider may consider taking the following precautions and using the following procedures:

1. The preliminary instructions should describe the court's policy on juror-submitted questions, including an explanation of why

some questions may not be asked. All juror-submitted questions should be retained by the clerk as part of the court record whether or not the questions are asked.

2. At the conclusion of each witness's testimony, if a juror has a written question it is brought to the judge.

3 Outside the presence of the jury, counsel are given the opportunity to make objections to the question or to suggest modifications to the question, by passing the written question between counsel and the court during a side-bar conference or by excusing jurors to the jury room.

4. Counsel or the judge asks the question of the witness.

5. Counsel are permitted to ask appropriate follow-up questions.

6. The written questions are made part of the record.

Authorities:

Ninth Circuit Model Civil Jury Instructions, § 1.19 (2007 ed., updated June 2017) (unmodified)

INSTRUCTION NO. __

1.19 – BENCH CONFERENCES AND RECESSES

From time to time during the trial, it [may become] [became] necessary for me to talk with the attorneys out of the hearing of the jury, either by having a conference at the bench when the jury [is] [was] present in the courtroom, or by calling a recess. Please understand that while you [are] [were] waiting, we [are] [were] working. The purpose of these conferences is not to keep relevant information from you, but to decide how certain evidence is to be treated under the rules of evidence and to avoid confusion and error.

Of course, we [will do] [have done] what we [can] [could] to keep the number and length of these conferences to a minimum. I [may] [did] not always grant an attorney's request for a conference. Do not consider my granting or denying a request for a conference as any indication of my opinion of the case or of what your verdict should be.

Authorities:

Ninth Circuit Model Civil Jury Instructions, § 1.20 (2007 ed., updated June 2017) (unmodified)

INSTRUCTION NO. __

1.20 – OUTLINE OF TRIAL

Trials proceed in the following way: First, each side may make an opening statement. An opening statement is not evidence. It is simply an outline to help you understand what that party expects the evidence will show. A party is not required to make an opening statement.

The Plaintiffs will then present evidence, and counsel for the Defendants may cross-examine. Then the Defendants may present evidence, and counsel for the Plaintiffs may cross-examine.

After the evidence has been presented, I will instruct you on the law that applies to the case and the attorneys will make closing arguments.

After that, you will go to the jury room to deliberate on your verdict.

Authorities:

Ninth Circuit Model Civil Jury Instructions, § 1.21 (2007 ed., updated June 2017) (unmodified)

2. INSTRUCTION ON TYPES OF EVIDENCE

Instruction

INSTRUCTION NO. __

2.1 – STIPULATIONS OF FACT

The parties have agreed to certain facts [to be placed in evidence as Exhibit __] [that will be read to you]. You must therefore treat these facts as having been proved.

During the course of this case, Defendants requested that Plaintiff Salim and Plaintiff Ben Soud submit to MRIs and neurological testing to assess the extent of their claimed injuries. Specifically, Plaintiff Salim claims: (A) musculoskeletal pain of the lumbosacral spine with sciatica down the right leg; and (B) musculoskeletal pain and swelling of the right knee. Likewise, Plaintiff Ben Soud claims: (A) musculoskeletal pain of the lumbosacral spine resulting in degenerative joint disease; and (B) musculoskeletal pain in both knees resulting in degenerative joint disease and arthritis.

The Parties have agreed that: (A) were Plaintiffs Salim and Ben Soud to submit to MRIs for the aforementioned injuries, such MRIs would not reveal the existence of the specific injuries; and (B) were Plaintiff Salim to undergo neurological testing to assess his claimed right leg sciatica, such testing would not reveal the existence of such injury and/or condition.

Authorities:

Ninth Circuit Model Civil Jury Instructions, § 2.2 (2007 ed., updated June 2017) (unmodified) (citing *United States v. Mikaelian*, 168 F.3d 380, 389 (9th Cir. 1999); *United States v. Houston*, 547 F.2d 104, 107 (9th Cir. 1976), *amended by* 180 F.3d 1091 (9th Cir. 1999)); *Joint Status Report Per 12/20/16 Order (Dkt. No. 124)*, ECF 131 ¶ 4 (1/09/2017) (describing stipulation for anticipated MRI and neurological testing results regarding Plaintiffs Salim and Ben Soud's aforementioned injuries).

INSTRUCTION NO. __

2.2 – JUDICIAL NOTICE

The court has decided to accept as proved the fact that [*state fact*]. You must accept this fact as true.[6]

Authorities:

Ninth Circuit Model Civil Jury Instructions, § 2.3 (2007 ed., updated June 2017) (unmodified)

[6] The Comment to the Ninth Circuit Model Jury Instructions states: "An instruction regarding judicial notice should be given at the time notice is taken. In a civil case, the Federal Rules of Evidence permit the judge to determine that a fact is sufficiently undisputed to be judicially noticed and requires that the jury be instructed that it is required to accept that fact. Fed. R. Evid. 201(f)."

INSTRUCTION NO. __

2.3 – DEPOSITION IN LIEU OF LIVE TESTIMONY

A deposition is the sworn testimony of a witness taken before trial. The witness is placed under oath to tell the truth and lawyers for each party may ask questions. The questions and answers are recorded. When a person is unavailable to testify at trial, the deposition of that person may be used at the trial.

The deposition of Plaintiff Mohamed Ahmed Ben Soud was taken on January 31, February 1, 2017 and August 11, 2017.

The deposition of Plaintiff Suleiman Abdullah Salim was taken on March 14 and 15, 2017.

The deposition of Plaintiff Obaid Ullah, as personal representative of the estate of Gul Rahman, was taken on January 31, 2017.

The deposition of Jose Rodriguez was taken on March 7, 2017.

The deposition of John Rizzo was taken on March 20, 2017.

The deposition of [*name of witness*] was taken on [*date*].

Insofar as possible, you should consider deposition testimony, presented to you in court in lieu of live testimony, in the same way as if the witness had been present to testify.[7]

Authorities:

Ninth Circuit Model Civil Jury Instructions, § 2.4 (2007 ed., updated June 2017) (modified to include deponents' names and dates and remove tone of voice of reader based on use of video depositions)

[7] The Comment to the Ninth Circuit Model Jury Instructions states: "This instruction should be used only when testimony by deposition is used in lieu of live testimony. The Committee recommends that it be given immediately before a deposition is to be read. It need not be repeated if more than one deposition is read. If the judge prefers to include the instruction as a part of his or her instructions before evidence, it should be modified appropriately."

INSTRUCTION NO. __

2.4 – FOREIGN LANGUAGE TESTIMONY

You [are about to hear] [have heard] testimony of a witness who [will be testifying] [testified] in the [*specify foreign language*] language. Witnesses who do not speak English or are more proficient in another language testify through an official court interpreter. Although some of you may know the [*specify foreign language*] language, it is important that all jurors consider the same evidence. Therefore, you must accept the interpreter's translation of the witness's testimony. You must disregard any different meaning.

You must not make any assumptions about a witness or a party based solely on the use of an interpreter to assist that witness or party.[8]

Authorities:

Ninth Circuit Model Civil Jury Instructions, § 2.8 (2007 ed., updated June 2017) (unmodified)

[8] The Comment to the Ninth Circuit Model Jury Instructions states: "As to the use of interpreters, *see generally* 28 U.S.C. § 1827. *See United States v. Franco*, 136 F.3d 622, 626 (9th Cir. 1998) (holding that district court properly instructed jury that it must accept translation of foreign language tape-recording when accuracy of translation is not in issue); *United States v. Rrapi*, 175 F.3d 742, 746 (9th Cir. 1999); *United States v. Fuentes–Montijo*, 68 F.3d 352, 355-56 (9th Cir. 1995); JURY INSTRUCTIONS COMMITTEE OF THE NINTH CIRCUIT, A MANUAL ON JURY TRIAL PROCEDURES § 3.11.B (2013)."

INSTRUCTION NO. __

2.5 – IMPEACHMENT EVIDENCE—WITNESS

The evidence that a witness [*e.g.*, has been convicted of a crime, lied under oath on a prior occasion, *etc.*] may be considered, along with all other evidence, in deciding whether or not to believe the witness and how much weight to give to the testimony of the witness and for no other purpose.[9]

Authorities:

Ninth Circuit Model Civil Jury Instructions, § 2.9 (2007 ed., updated June 2017) (unmodified) (citing FED. R. EVID. 608–09; *United States v. Hankey*, 203 F.3d 1160, 1173 (9th Cir. 2000) (finding that district court properly admitted impeachment evidence following limiting instruction to jury)).

[9] The Comment to the Ninth Circuit Model Jury Instructions states: "If this instruction is given during the trial, the Committee recommends giving the second sentence in numbered paragraph 3 of Instruction 1.10 (What Is Not Evidence) with the concluding instructions. *See also* Instruction 1.11 (Evidence for Limited Purpose)."

INSTRUCTION NO. __

2.6 – USE OF INTERROGATORIES

Evidence [will now be] [was] presented to you in the form of answers of one of the parties to written interrogatories submitted by the other side. These answers were given in writing and under oath before the trial in response to questions that were submitted under established court procedures. You should consider the answers, insofar as possible, in the same way as if they were made from the witness stand.[10]

Authorities:

Ninth Circuit Model Civil Jury Instructions, § 2.11 (2007 ed., updated June 2017) (unmodified)

[10] The Comment to the Ninth Circuit Model Jury Instructions states: "Use this oral instruction before interrogatories and answers are read to the jury; it may also be included in the concluding written instructions to the jury. The attorney should warn the judge ahead of time and give the judge an opportunity to give this oral instruction. This oral instruction is not appropriate if answers to interrogatories are being used for impeachment only. Do not use this instruction for requests for admission under Fed. R. Civ. P. 36. The effect of requests for admission under the rule is not the same as the introduction of evidence through interrogatories. *See* Instruction 2.12 (Use of Requests for Admission)."

INSTRUCTION NO. __

2.7 – USE OF REQUESTS FOR ADMISSION

Evidence [will now be] [was] presented to you in the form of admissions to the truth of certain facts. These admissions were given in writing before the trial, in response to requests that were submitted under established court procedures. You must treat these facts as having been proved.[11]

Authorities:

Ninth Circuit Model Civil Jury Instructions, § 2.12 (2007 ed., updated June 2017) (unmodified) (citing FED. R. CIV. P. 36 ("A matter admitted under this rule is conclusively established unless the court, on motion, permits the admission to be withdrawn or amended."); *999 v. C.I.T. Corp.*, 776 F.2d 866, 869 (9th Cir. 1985) (court may properly exclude evidence at trial that is inconsistent with a Rule 36 admission)).

[11] The Comment to the Ninth Circuit Model Jury Instructions states: "Use this oral instruction before admissions are read to the jury; it may also be included in the concluding written instructions to the jury. The attorney should warn the judge ahead of time and give the judge an opportunity to give this oral instruction. Do not use this instruction for the use of interrogatories. The effect of requests for admission is not the same as the introduction of evidence through interrogatories. *See* Instruction 2.11 (Use of Interrogatories)."

INSTRUCTION NO. __

2.8 – EXPERT OPINION

You [have heard] [are about to hear] testimony from [*name*] who [testified] [will testify] to opinions and the reasons for [his] [her] opinions. This opinion testimony is allowed, because of the education or experience of this witness.

Such opinion testimony should be judged like any other testimony. You may accept it or reject it, and give it as much weight as you think it deserves, considering the witness's education and experience, the reasons given for the opinion, and all the other evidence in the case.[12]

Authorities:

Ninth Circuit Model Civil Jury Instructions, § 2.13 (2007 ed., updated June 2017) (unmodified) (citing FED. R. EVID. 702-05)

---

[12] The Comment to the Ninth Circuit Model Jury Instructions states: "According to Federal Rule of Evidence 702, '[t]he purpose of expert testimony is to 'assist the trier of fact to understand the evidence or to determine a fact in issue' by providing opinions on 'scientific, technical, or other specialized knowledge.'' *Wagner v. County of Maricopa*, 701 F.3d 583, 589 (9th Cir. 2012) (quoting Fed. R. Evid. 702). Under Federal Rule of Evidence 703, an expert's opinion must be based on facts or data in the case that the expert has been made aware of or personally observed. Fed. R. Evid. 703. The facts and data need not be admissible so long as experts in the particular field would reasonably rely on such facts and data. *Id*.

This instruction avoids labeling the witness as an 'expert.' If the court refrains from designating the witness as an 'expert,' this will "ensure[] that trial courts do not inadvertently put their stamp of authority' on a witness's opinion and will protect against the jury's being "overwhelmed by the so-called 'experts.'' *See* FED. R. EVID. 702 advisory committee's note (2000) (quoting Hon. Charles Richey, *Proposals to Eliminate the Prejudicial Effect of the Use of the Word "Expert" Under the Federal Rules of Evidence in Criminal and Civil Jury Trials*, 154 F.R.D. 537, 559 (1994). In addition, Fed. R. Evid. 703 (as amended in 2000) provides that facts or data that are the basis for an expert's opinion but are otherwise inadmissible may nonetheless be disclosed to the jury if the court determines that their probative value in assisting the jury to evaluate the expert's opinion substantially outweighs their prejudicial effect."

INSTRUCTION NO. __

2.9 – CHARTS AND SUMMARIES NOT RECEIVED IN EVIDENCE

Certain charts and summaries not admitted into evidence [may be] [have been] shown to you in order to help explain the contents of books, records, documents, or other evidence in the case. Charts and summaries are only as good as the underlying evidence that supports them. You should, therefore, give them only such weight as you think the underlying evidence deserves.[13]

Authorities:

Ninth Circuit Model Civil Jury Instructions, § 2.14 (2007 ed., updated June 2017) (unmodified)

[13] The Comment to the Ninth Circuit Model Jury Instructions states: "This instruction applies only when the charts and summaries are not admitted into evidence and are used for demonstrative purposes. Demonstrative materials used only as testimonial aids should not be permitted in the jury room or otherwise used by the jury during deliberations. *See United States v. Wood*, 943 F.2d 1048, 1053-54 (9th Cir. 1991) (citing *United States v. Soulard*, 730 F.2d 1292, 1300 (9th Cir. 1984)); *see also* JURY INSTRUCTIONS COMMITTEE OF THE NINTH CIRCUIT, A MANUAL ON JURY TRIAL PROCEDURES § 3.10.A (2013)."

INSTRUCTION NO. __

2.10 – CHARTS AND SUMMARIES RECEIVED IN EVIDENCE

Certain charts and summaries [may be] [have been] admitted into evidence to illustrate information brought out in the trial. Charts and summaries are only as good as the testimony or other admitted evidence that supports them. You should, therefore, give them only such weight as you think the underlying evidence deserves.[14]

Authorities:

Ninth Circuit Model Civil Jury Instructions, § 2.15 (2007 ed., updated June 2017) (unmodified)

[14] The Comment to the Ninth Circuit Model Jury Instructions states: "This instruction applies when the charts and summaries are received into evidence. *See United States v. Anekwu*, 695 F.3d 967, 981 (9th Cir. 2012) ("[T]he proponent of a summary must demonstrate the admissibility of the underlying writings or records summarized, as a condition precedent to introduction of the summary into evidence under [Fed. R. Evid. Evid.] 1006.") (quoting *United States v. Johnson*, 594 F.2d 1253, 1257 (9th Cir. 1979)); *United States v. Rizk*, 660 F.3d 1125, 1130-31 (9th Cir. 2011); *see also* Fed. R. Evid. 1006; JURY INSTRUCTIONS COMMITTEE OF THE NINTH CIRCUIT, A MANUAL ON JURY TRIAL PROCEDURES § 3.10.A (2013). This instruction may be unnecessary if there is no dispute as to the accuracy of the chart or summary."

INSTRUCTION NO. __

2.11 – EVIDENCE IN ELECTRONIC FORMAT

Those exhibits received in evidence that are capable of being displayed electronically will be provided to you in that form, and you will be able to view them in the jury room. A computer, projector, printer and accessory equipment will be available to you in the jury room.

A court technician will show you how to operate the computer and other equipment; how to locate and view the exhibits on the computer; and how to print the exhibits. You will also be provided with a paper list of all exhibits received in evidence. You may request a paper copy of any exhibit received in evidence by sending a note through the [clerk] [bailiff].) If you need additional equipment or supplies or if you have questions about how to operate the computer or other equipment, you may send a note to the [clerk] [bailiff], signed by your foreperson or by one or more members of the jury. Do not refer to or discuss any exhibit you were attempting to view.

If a technical problem or question requires hands-on maintenance or instruction, a court technician may enter the jury room with [the clerk] [the bailiff] present for the sole purpose of assuring that the only matter that is discussed is the technical problem. When the court technician or any non juror is in the jury room, the jury shall not deliberate. No juror may say anything to the court technician or any non juror other than to describe the technical problem or to seek information about operation of the equipment. Do not discuss any exhibit or any aspect of the case.

The sole purpose of providing the computer in the jury room is to enable jurors to view the exhibits received in evidence in this case. You may not use the computer for any other purpose. At my direction, technicians have taken steps to ensure that the computer does not permit access to the Internet or to any "outside" website, database, directory, game, or other material. Do not attempt to alter the computer to obtain access to such materials. If you discover that the computer provides or allows access to such materials, you must inform the court immediately and refrain from viewing such materials. Do not remove the computer or any electronic data [disk] from the jury room, and do not copy any such data.

Authorities:

Ninth Circuit Model Civil Jury Instructions, § 2.16 (2007 ed., updated June 2017) (unmodified)

3. INSTRUCTIONS CONCERNING DELIBERATIONS

Instruction

INSTRUCTION NO. __

3.1 – DUTY TO DELIBERATE

Before you begin your deliberations, elect one member of the jury as your presiding juror. The presiding juror will preside over the deliberations and serve as the spokesperson for the jury in court.

You shall diligently strive to reach agreement with all of the other jurors if you can do so. Your verdict must be unanimous.

Each of you must decide the case for yourself, but you should do so only after you have considered all of the evidence, discussed it fully with the other jurors, and listened to their views.

It is important that you attempt to reach a unanimous verdict but, of course, only if each of you can do so after having made your own conscientious decision. Do not be unwilling to change your opinion if the discussion persuades you that you should. But do not come to a decision simply because other jurors think it is right, or change an honest belief about the weight and effect of the evidence simply to reach a verdict.[15]

Authorities:

Ninth Circuit Model Civil Jury Instructions, § 3.1 (2007 ed., updated June 2017) (unmodified)

[15] The Comment to the Ninth Circuit Model Jury Instructions states: "A jury verdict in a federal civil case must be unanimous, unless the parties stipulate otherwise. *Murray v. Laborers Union Local No. 324*, 55 F.3d 1445, 1451 (9th Cir. 1995) (citing *Johnson v. Louisiana*, 406 U.S. 356, 369-70 n.5 (1972)); *see also* Fed. R. Civ. P. 48(b). A federal civil jury must also unanimously reject any affirmative defenses before it may find a defendant liable and proceed to determine damages. *Jazzabi v. Allstate Ins. Co.*, 278 F.3d 979, 985 (9th Cir. 2002)."

INSTRUCTION NO. __

3.2 – CONSIDERATION OF EVIDENCE—CONDUCT OF THE JURY

Because you must base your verdict only on the evidence received in the case and on these instructions, I remind you that you must not be exposed to any other information about the case or to the issues it involves. Except for discussing the case with your fellow jurors during your deliberations:

> Do not communicate with anyone in any way and do not let anyone else communicate with you in any way about the merits of the case or anything to do with it. This includes discussing the case in person, in writing, by phone or electronic means, via email, via text messaging, or any Internet chat room, blog, website or application, including but not limited to Facebook, YouTube, Twitter, Instagram, LinkedIn, Snapchat, or any other forms of social media. This applies to communicating with your family members, your employer, the media or press, and the people involved in the trial. If you are asked or approached in any way about your jury service or anything about this case, you must respond that you have been ordered not to discuss the matter and to report the contact to the court.
>
> Do not read, watch, or listen to any news or media accounts or commentary about the case or anything to do with it; do not do any research, such as consulting dictionaries, searching the Internet, or using other reference materials; and do not make any investigation or in any other way try to learn about the case on your own. Do not visit or view any place discussed in this case, and do not use Internet programs or other devices to search for or view any place discussed during the trial. Also, do not do any research about this case, the law, or the people involved—including the parties, the witnesses or the lawyers—until you have been excused as jurors. If you happen to read or hear anything touching on this case in the media, turn away and report it to me as soon as possible.

These rules protect each party's right to have this case decided only on evidence that has been presented here in court. Witnesses here in court take an oath to tell the truth, and the accuracy of their testimony is tested through the trial process. If you do any research or investigation outside the courtroom, or gain any information through improper communications, then your verdict may be influenced by inaccurate, incomplete or misleading information that has not been

tested by the trial process. Each of the parties is entitled to a fair trial by an impartial jury, and if you decide the case based on information not presented in court, you will have denied the parties a fair trial. Remember, you have taken an oath to follow the rules, and it is very important that you follow these rules.

A juror who violates these restrictions jeopardizes the fairness of these proceedings, and a mistrial could result that would require the entire trial process to start over. If any juror is exposed to any outside information, please notify the court immediately.

Authorities:

Ninth Circuit Model Civil Jury Instructions, § 3.2 (2007 ed., updated June 2017) (modified to discuss news stories regarding instant case)

INSTRUCTION NO. __

3.3 – COMMUNICATION WITH COURT

If it becomes necessary during your deliberations to communicate with me, you may send a note through the [clerk] [bailiff], signed by any one or more of you. No member of the jury should ever attempt to communicate with me except by a signed writing. I will not communicate with any member of the jury on anything concerning the case except in writing or here in open court. If you send out a question, I will consult with the lawyers before answering it, which may take some time. You may continue your deliberations while waiting for the answer to any question. Remember that you are not to tell anyone—including the court—how the jury stands, whether in terms of vote count or otherwise, until after you have reached a unanimous verdict or have been discharged.

Authorities:

Ninth Circuit Model Civil Jury Instructions, § 3.3 (2007 ed., updated June 2017) (unmodified)

INSTRUCTION NO. __

3.4 – READBACK OR PLAYBACK

Because a request has been made for a [readback] [playback] of the testimony of [*witness's name*] it is being provided to you, but you are cautioned that all [readbacks] [playbacks] run the risk of distorting the trial because of overemphasis of one portion of the testimony. [Therefore, you will be required to hear all the witness's testimony on direct and cross-examination, to avoid the risk that you might miss a portion bearing on your judgment of what testimony to accept as credible.] [Because of the length of the testimony of this witness, excerpts will be [read] [played].] The [readback] [playback] could contain errors. The [readback] [playback] cannot reflect matters of demeanor [, tone of voice,] and other aspects of the live testimony. Your recollection and understanding of the testimony controls. Finally, in your exercise of judgment, the testimony [read] [played] cannot be considered in isolation, but must be considered in the context of all the evidence presented.[16]

Authorities:

Ninth Circuit Model Civil Jury Instructions, § 3.4 (2007 ed., updated June 2017) and Comment (unmodified)

---

[16] The Comment to the Ninth Circuit Model Jury Instructions states: "If during jury deliberations a request is made by the jury or by one or more jurors for a readback of a portion or all of a witness's testimony, and the court in exercising its discretion determines after consultation with the lawyers that a readback should be allowed, the Committee recommends the [above] admonition be given in open court with both sides present[.] Although a court has broad discretion to read back excerpts or the entire testimony of a witness when requested by a deliberating jury, precautionary steps should be taken. Absent the parties' stipulation to a different procedure, the jury should be required to hear the readback in open court, with counsel for both sides present, and after giving the admonition set out above. *See United States v. Newhoff*, 627 F.3d 1163, 1167 (9th Cir. 2010); *see also* JURY INSTRUCTIONS COMMITTEE OF THE NINTH CIRCUIT, A MANUAL ON JURY TRIAL PROCEDURES § 5.1.C (2013)."

INSTRUCTION NO. __

3.5 – RETURN OF VERDICT

A verdict form has been prepared for you. [*Explain verdict form as needed.*] After you have reached unanimous agreement on a verdict, your [presiding juror] [foreperson] should complete the verdict form according to your deliberations, sign and date it, and advise the [clerk] [bailiff] that you are ready to return to the courtroom.

Authorities:

Ninth Circuit Model Civil Jury Instructions, § 3.5 (2007 ed., updated June 2017) and Comment (unmodified)

INSTRUCTION NO. __

3.6 – ADDITIONAL INSTRUCTIONS OF LAW

At this point I will give you an additional instruction. By giving an additional instruction at this time, I do not mean to emphasize this instruction over any other instruction.

You are not to attach undue importance to the fact that this instruction was read separately to you. You must consider this instruction together with all of the other instructions that were given to you.

[*Insert text of new instruction.*]

You will now retire to the jury room and continue your deliberations.[17]

Authorities:

Ninth Circuit Model Civil Jury Instructions, § 3.6 (2007 ed., updated June 2017) and Comment (unmodified)

[17] The Comment to the Ninth Circuit Model Jury Instructions states: "Use this instruction for giving an additional instruction to a jury while it is deliberating. If the jury has a copy of the instructions, send the additional instruction to the jury room. Unless the additional instruction is by consent of both parties, both sides must be given an opportunity to take exception or object to it. If this instruction is used, it should be made a part of the record. The judge and attorneys should make a full record of the proceedings. *See* JURY INSTRUCTIONS COMMITTEE OF THE NINTH CIRCUIT, A MANUAL ON JURY TRIAL PROCEDURES § 5.1.B (2013)."

INSTRUCTION NO. __

3.7 – DEADLOCKED JURY

Members of the jury, you have advised that you have been unable to agree upon a verdict in this case. I have decided to suggest a few thoughts to you.

As jurors, you have a duty to discuss the case with one another and to deliberate in an effort to reach a unanimous verdict if each of you can do so without violating your individual judgment and conscience. Each of you must decide the case for yourself, but only after you consider the evidence impartially with the other jurors. During your deliberations, you should not be unwilling to reexamine your own views and change your opinion if you become persuaded that it is wrong. However, you should not change an honest belief as to the weight or effect of the evidence solely because of the opinions of the other jurors or for the mere purpose of returning a verdict.

All of you are equally honest and conscientious jurors who have heard the same evidence. All of you share an equal desire to arrive at a verdict. Each of you should ask yourself whether you should question the correctness of your present position.

I remind you that in your deliberations you are to consider the instructions I have given you as a whole. You should not single out any part of any instruction, including this one, and ignore others. They are all equally important.

You may now return to the jury room and continue your deliberations.[18]

Authorities:

Ninth Circuit Model Civil Jury Instructions, § 3.7 (2007 ed., updated June 2017) and Comment (unmodified)

---

[18] The Comment to the Ninth Circuit Model Jury Instructions states: "Before giving any supplemental jury instruction to a deadlocked jury, the Committee recommends the court review JURY INSTRUCTIONS COMMITTEE OF THE NINTH CIRCUIT, A MANUAL ON JURY TRIAL PROCEDURES § 5.5 (2013); *see also Warfield v. Alaniz*, 569 F.3d 1015, 1029 (9th Cir. 2009) (finding no error in standard *Allen* charge issued to deadlocked jury)."

INSTRUCTION NO. __

3.8 – CONTINUING DELIBERATIONS AFTER JUROR IS DISCHARGED

[One] [some] of your fellow jurors [has] [have] been excused from service and will not participate further in your deliberations. You should not speculate about the reason the [juror is] [jurors are] no longer present.

You should continue your deliberations with the remaining jurors. Do not consider the opinions of the excused [juror] [jurors] as you continue deliberating. All the previous instructions given to you still apply, including the requirement that all the remaining jurors unanimously agree on a verdict.[19]

Authorities:

Ninth Circuit Model Civil Jury Instructions, § 3.8 (2007 ed., updated June 2017) and Comment (unmodified)

[19] The Comment to the Ninth Circuit Model Jury Instructions states: "A court may not seat a jury of fewer than six nor more than twelve jurors. *See* Fed. R. Civ. P. 48. The selection of alternate jurors in civil trials has been discontinued. *See* Advisory Committee Note, Fed. R. Civ. P. 47(b) (1991)."

4. AGENCY

Instruction

INSTRUCTION NO. __

4.1 – AGENT AND PRINCIPAL—DEFINITION

An agent is a person who performs services for another person under an express or implied agreement and who is subject to the other's control or right to control the manner and means of performing the services. The other person is called a principal.

Authorities:

Ninth Circuit Model Civil Jury Instructions, § 4.4 (2007 ed., updated June 2017) and Comment (modified to remove additional bracketed material)

INSTRUCTION NO. __

4.2 – AGENT—SCOPE OF AUTHORITY DEFINED

An agent is acting within the scope of authority if the agent is engaged in the performance of duties which were expressly or impliedly assigned to the agent by the principal.

Authorities:

Ninth Circuit Model Civil Jury Instructions, § 4.5 (2007 ed., updated June 2017) and Comment (unmodified)

INSTRUCTION NO. __

4.3 – ACT OF AGENT IS ACT OF PRINCIPAL—SCOPE OF AUTHORITY NOT IN ISSUE

Any act or omission of an agent within the scope of authority is the act or omission of the principal.

Authorities:

Ninth Circuit Model Civil Jury Instructions, § 4.8 (2007 ed., updated June 2017) and Comment (unmodified)

5. DAMAGES

Instruction

INSTRUCTION NO. __

5.1 – DAMAGES—PROOF

It is the duty of the Court to instruct you about the measure of damages. By instructing you on damages, the Court does not mean to suggest for which party your verdict should be rendered.

If you find for one or more of the Plaintiffs on a Plaintiff's ATS claim, you must determine the amount of that Plaintiff's damages, if any. Plaintiffs have the burden of proving damages by a preponderance of the evidence. Damages means the amount of money that will reasonably and fairly compensate a Plaintiff for any injury you find was caused by one or both Defendants. You should consider the following:

Compensatory damages; and

Punitive damages.

It is for you to determine what damages, if any, have been proved.

Your award must be based upon evidence and not upon speculation, guesswork or conjecture.

Authorities:

Ninth Circuit Model Civil Jury Instructions, § 5.1 (2007 ed., updated June 2017) *and* Comment (modified)

INSTRUCTION NO. __

5.2 – MEASURES OF TYPES OF DAMAGES

In determining the measure of damages, you should consider:

The nature and extent of the injuries, if any;

The disability, disfigurement, loss of enjoyment of life experienced and that with reasonable probability will be experienced in the future, if any; and

The mental, physical, emotional pain and suffering experienced and that with reasonable probability will be experienced in the future, if any.

Authorities:

Ninth Circuit Model Civil Jury Instructions, § 5.2 (2007 ed., updated June 2017) and Comment (modified)

INSTRUCTION NO. __

5.3 – DAMAGES—MITIGATION

Each Plaintiff has a duty to use reasonable efforts to mitigate his damages. To mitigate means to avoid or reduce damages.

The Defendants have the burden of proving by a preponderance of the evidence:

1. That a Plaintiff failed to use reasonable efforts to mitigate damages; and

2. The amount by which damages would have been mitigated.

Authorities:

Ninth Circuit Model Civil Jury Instructions, § 5.3 (2007 ed., updated June 2017) and Comment (modified)

INSTRUCTION NO. __

5.4 – PUNITIVE DAMAGES

If you find for a Plaintiff, you may, but are not required to, award punitive damages. The purposes of punitive damages are to punish a Defendant and to deter similar acts in the future. Punitive damages may not be awarded to compensate a Plaintiff.

Each Plaintiff has the burden of proving by clear and convincing evidence that punitive damages should be awarded and, if so, the amount of any such damages.

You may award punitive damages only if you find that a Defendant's conduct that harmed the Plaintiff was malicious, oppressive or in reckless disregard of that Plaintiff's rights. Conduct is malicious if it is accompanied by ill will, or spite, or if it is for the purpose of injuring the Plaintiff. Conduct is in reckless disregard of a Plaintiff's rights if, under the circumstances, it reflects complete indifference to the Plaintiff's safety or rights, or if the Defendant acts in the face of a perceived risk that its actions will violate the Plaintiff's rights under federal law. An act or omission is oppressive if the Defendant injures or damages or otherwise violates the rights of the Plaintiff with unnecessary harshness or severity, such as by misusing or abusing authority or power or by taking advantage of some weakness or disability or misfortune of the Plaintiff.

If you find that punitive damages are appropriate, you must use reason in setting the amount. Punitive damages, if any, should be in an amount sufficient to fulfill their purposes but should not reflect bias, prejudice or sympathy toward any party. In considering the amount of any punitive damages, consider the degree of reprehensibility of the Defendant or Defendants' conduct, including whether the conduct that harmed the Plaintiff or Plaintiffs was particularly reprehensible because it also caused actual harm or posed a substantial risk of harm to people who are not parties to this case. You may not, however, set the amount of any punitive damages in order to punish the Defendant or Defendants for harm to anyone other than the Plaintiffs in this case.

In addition, you may consider the relationship of any award of punitive damages to any actual harm inflicted on the Plaintiff.

You may impose punitive damages against one or both of the Defendants, and may award different amounts against each Defendant.[20]

Authorities:

Ninth Circuit Model Civil Jury Instructions, § 5.5 (2007 ed., updated June 2017) and Comment (modified for multiple parties); *Bowoto v. Chevron Corp.*, Case No. 99-02506 (N.D. Cal.), ECF No. 2252, Instructions to Jury (Final as Amended – 11/25/08) at 9, *aff'd on other grounds*, 621 F.3d 1116 (9th Cir. 2010)

[20] The Comment to the Ninth Circuit Model Jury Instructions states: "If punitive damages are available and evidence of defendant's financial condition is offered in support of such damages, a limiting instruction may be appropriate."

6. PARTIES

Instruction

_____

INSTRUCTION NO. __

6.1 – PARTIES

The parties to this case are the Plaintiffs and the Defendants.

The Plaintiffs are:

- Suleiman Abdullah Salim;
- Mohamed Ahmed Ben Soud (formerly Mohamed Shoroeiya, Abd al-Karim); and
- The estate of Gul Rahman, who is deceased. Obaid Ullah is the personal representative of the estate of Gul Rahman.

The Defendants are:

- Dr. James Elmer Mitchell
- Dr. John "Bruce" Jessen

Authorities:

Plaintiffs' *Complaint*, 15-cv-286, ECF No. 1, ¶¶ 9-13.

INSTRUCTION NO. __

6.2 – NON-PARTIES

In addition to the aforementioned parties, there are also individuals and entities involved in this case that are not parties. For purposes of these instructions, I will refer to them as the non-parties.

The non-parties are:

- The United States Government;
- The United States Central Intelligence Agency;
- The United States Department of Justice;
- President George W. Bush;
- Secretary of State Condoleezza Rice;
- Attorney General John Ashcroft
- Jose Rodriguez;
- John Rizzo; and
- Mitchell, Jessen & Associates.

Plaintiffs have not sued any of the non-parties, and are not seeking damages from the non-parties. You should assess the liability of the Defendants, if any, separate from any wrongdoing you believe was caused by the non-parties. If you determine that any of the non-parties are solely responsible for the injuries alleged by the Plaintiffs, you may not hold the Defendants directly liable for such conduct as a proxy based upon an inability to punish the non-parties.

Authorities:

Plaintiffs' *Complaint*, 15-cv-286, ECF No. 1, ¶¶ 66-67; *Statement of Interest of the United States*, 15-cv-286, ECF No. 33 at 2 ("Neither the United States Government nor the CIA is a defendant in this case").

7. INSTRUCTIONS UNDER ALIEN TORT STATUTE

Instruction

INSTRUCTION NO. __

7.1 – ALIEN TORT STATUTE

Plaintiffs' claims for torture, cruel, inhuman or degrading treatment, non-consensual human experimentation, and war crimes are brought under a law known as the Alien Tort Statute or the ATS, a U.S. law that governs the application of international law in the United States.

International law prohibits torture, cruel, inhuman or degrading treatment, non-consensual human experimentation, and war crimes. A person who is injured by any of these international law violations may sue in a United States court under the ATS. This is true even if the international law violations occur in another country.

Plaintiffs allege that Defendants violated their rights under the ATS to be free from torture, cruel, inhuman or degrading treatment, non-consensual human experimentation, and war crimes. If you find that one or more Plaintiffs have established that their rights protected by the ATS were violated, and if you find that one or both Defendants are liable under any one of the theories of liability presented in this case, then each such Defendant is liable for the ATS violation. If you find that Plaintiffs' rights were not violated, or that Defendants are not responsible for any violation that may have occurred, then Defendants are not liable.

Authorities:

Torture Victim Protection Act of 1991, 28 U.S.C. §1350, note; *Sosa v. Alvarez-Machain*, 542 U.S. 692, 732-33 (2004); *Hilao v. Estate of Marcos*, 25 F.3d 1467, 1475-76 (9th Cir. 1994); *Bowoto v. Chevron Corp.*, Case No. 99-02506 (N.D. Cal.), ECF No. 2252, Instructions to Jury (Final as Amended – 11/25/08) at 9, *aff'd on other grounds*, 621 F.3d 1116 (9th Cir. 2010).

INSTRUCTION NO. __

7.2 – TORTURE – DIRECT LIABILITY – DEFENDANTS

On their claim for torture against Defendants, Plaintiffs have the burden of proving each of the following elements by a preponderance of the evidence as to each individual Plaintiff:

1. Defendant or Defendants intentionally inflicted severe pain or suffering, whether physical or mental, on the Plaintiff (or Gul Rahman); or actively participated in the intentional infliction of severe pain or suffering whether physical or mental, on the Plaintiff (or Gul Rahman);

2. Plaintiff (or Gul Rahman) was in such Defendant or Defendants' custody or physical control;

3. The intentional infliction of severe pain or suffering on the Plaintiff (or Gul Rahman) was done while Defendant or Defendants was or were acting under actual or apparent authority, or color of law;

4. The severe pain or suffering was inflicted for the purpose of intimidation, punishment or any discriminatory purpose.

A private individual acts under color of law when he acts together with state officials or with significant state aid. [[The parties have stipulated] [I instruct you] that the Defendants acted under color of state law.]

The expression "severe pain or suffering" requires that only acts of substantial gravity may be considered to be torture; therefore, neither interrogation by itself, nor minor contempt for the physical integrity of the victim, satisfies this requirement.

Torture may include mental pain and suffering. In order to constitute torture, mental pain or suffering must be prolonged mental harm caused by or resulting from the intentional infliction or threatened infliction of severe physical pain or suffering, or the threat of imminent death.

Authorities:

Cabello v. Fernandez-Larios, Case No. 99-cv-528 (S.D. Fla.), ECF No. 308, Court's Instructions to the Jury at 13, 16, *aff'd*, 402 F.3d 1148 (11th Cir. 2005); *Torture Victim Protection Act of 1991*, 28 U.S.C. § 1350, note; *Prosecutor v. Blas/de*, Case No. IT-94-14-T, ¶ 295, Judgement (ICTY Trial Chamber, May 21, 1999); *Prosecutor v. Tadic,* Case No. IT-94-1-A, ¶ 220 (ICTY Appeals Chamber, July 15, 1999); *Kadic v. Karadzic*, 70 F.3d 232, 243-44 (2d Cir. 1995); *Doe v. Constant*, 354 F. App'x 543, 545 (2d Cir. 2009); *Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 937 (1982)

INSTRUCTION NO. __

7.3 – TORTURE – CIA

Plaintiffs contend that Plaintiff Suleiman Abdullah Salim, Plaintiff Mohamed Ahmed Ben Soud and Gul Rahman suffered torture in violation of international law by the CIA. This claim must be proved separately as to each individual Plaintiff. To establish this claim, Plaintiffs must prove, as to each individual:

1. The CIA intentionally inflicted severe pain or suffering, whether physical or mental, on the Plaintiff (or Gul Rahman); or actively participated in the intentional infliction of severe pain or suffering whether physical or mental, on the Plaintiff (or Gul Rahman);

2. Plaintiff (or Gul Rahman) was in the CIA's custody or physical control;

3. The intentional infliction of severe pain or suffering on the Plaintiff (or Gul Rahman) was done under actual or apparent authority, or color of law;

4. The severe pain or suffering was inflicted for the purpose of intimidation, punishment or any discriminatory purpose.

In this context, employees of the CIA are considered public officials.

Plaintiffs must prove torture as to each individual Plaintiff (or Gul Rahman) by a preponderance of the evidence.

If you find that one or more of the Plaintiffs (or Gul Rahman) suffered torture at the hands of the CIA, you will have to decide whether one or more of the Defendants are liable under any one of the theories of indirect liability presented in the case—*i.e.*, Aiding & Abetting, Conspiracy, and Joint Criminal Enterprise—as those theories will be explained later in these instructions.

Authorities:

Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Dec. 10, 1984, art. 1, G.A. Res. 39/46, 39 U.N. GAOR, Supp. No. 51, at 197, U.N. Doc. A/39/51 (1984), 23 I.L.M. 1027 and 24 I.L.M 535 (ratified by the United States Oct. 21, 1994); *Hilao v. Estate of Marcos*, 25 F.3d 1467, 1475 (9th Cir. 1994); *Torture Victim Protection Act of 1991*, 28 U.S.C. §1350, note; *Bowoto v. Chevron Corp.*, Case No. 99-02506 (N.D. Cal.), ECF No. 2252, Instructions to Jury (Final as Amended – 11/25/08) at 10, *aff'd on other grounds*, 621 F.3d 1116 (9th Cir. 2010); *Prosecutor v. Simić et al.*, Case No. IT-95-9-T, ¶ 80 Judgment (ICTY Oct. 17, 2003); *Prosecutor v. Milorad Krnojelac*, Case No. IT-97-25-T, ¶ 181, Judgment, (ICTY Trial Chamber, Mar. 15, 2002).

INSTRUCTION NO. __

7.4 – CRUEL, INHUMAN, OR DEGRADING TREATMENT – DIRECT LIABILITY – DEFENDANTS

Plaintiffs contend that Plaintiff Suleiman Abdullah Salim, Plaintiff Mohamed Ahmed Ben Soud and Gul Rahman suffered cruel, inhuman, and degrading treatment in violation of international law by one or both Defendants. This claim must be proved separately as to each individual Plaintiff. To establish this claim, Plaintiffs must prove, as to each individual Plaintiff (and/or Gul Rahman):

1. That he was subjected to mental or physical suffering, anguish, humiliation, fear or debasement;

2. That this suffering, anguish, humiliation, fear or debasement was inflicted on him by, or with the consent of, a public official or other person acting in an official capacity; and

3. That this suffering, anguish, humiliation, fear or debasement was either cruel, inhuman, or degrading.

A private individual acts under color of law when he acts together with state officials or with significant state aid. In this context, employees of the CIA are considered public officials. [[The parties have stipulated] [I instruct you] that the Defendants acted under color of state law.]

Cruel, inhuman or degrading treatment includes acts that fall short of torture. Plaintiffs contend that their treatment and the use of force by one or both Defendants against them (or Gul Rahman) was cruel, inhuman, or degrading. In order to be cruel, inhuman, or degrading, these acts must meet the three numbered criteria listed above, and must also:

a) Cause serious mental or physical suffering or injury or constitute a serious attack on human dignity;

b) Be deliberate; and

c) Be objectively unreasonable under all of the circumstances.

You must consider the totality of the circumstances in determining whether any individual Plaintiff (or Gul Rahman) was subjected to cruel or inhuman or

degrading treatment which caused lasting psychological harm. Whether treatment is cruel, inhuman, or degrading depends upon an assessment of all the particularities of the evidence before you, including the specific conditions at issue, the duration of the measures imposed, the objectives pursued by the perpetrators, and the physical or mental effects on the person(s) involved.

Plaintiffs must prove cruel, inhuman or degrading treatment as to each Plaintiff (or Gul Rahman) by a preponderance of the evidence.

Authorities:

Cabello v. Fernandez-Larios, Case No. 99-cv-528 (S.D. Fla.), ECF No. 308, Court's Instructions to the Jury at 14, 16, *aff'd*, 402 F.3d 1148 (11th Cir. 2005)

INSTRUCTION NO. __

7.5 – CRUEL, INHUMAN, OR DEGRADING TREATMENT – CIA

Plaintiffs contend that Plaintiff Suleiman Abdullah Salim, Plaintiff Mohamed Ahmed Ben Soud and Gul Rahman suffered cruel, inhuman, and degrading treatment in violation of international law by the CIA. This claim must be proved separately as to each individual Plaintiff (and Gul Rahman). To establish this claim, Plaintiffs must prove, as to each individual Plaintiff (or Gul Rahman):

1. That he was subjected to mental or physical suffering, anguish, humiliation, fear or debasement;

2. That this suffering, anguish, humiliation, fear or debasement was inflicted on him by, or with the consent of, a public official or other person acting in an official capacity; and

3. That this suffering, anguish, humiliation, fear or debasement was either cruel, inhuman, or degrading.

In this context, employees of the CIA are considered public officials.

Cruel, inhuman or degrading treatment includes acts that fall short of torture. Plaintiffs contend that their treatment and the use of force by the CIA against them defwas cruel, inhuman or degrading. In order to be cruel or inhuman or degrading, these acts must meet the three numbered criteria listed above, and must also:

a) Cause serious mental or physical suffering or injury or constitute a serious attack on human dignity;

b) Be deliberate; and

c) Be objectively unreasonable under all of the circumstances.

You must consider the totality of the circumstances in determining whether any individual Plaintiff (or Gul Rahman) was subjected to cruel or inhuman or degrading treatment which caused lasting psychological harm. Whether treatment is cruel, inhuman, or degrading depends upon an assessment of all the particularities of the evidence before you, including the specific conditions at issue, the duration of the measures imposed, the objectives pursued by the perpetrators, and the physical or mental effects on the person(s) involved.

Plaintiffs must prove cruel, inhuman or degrading treatment as to each Plaintiff (or Gul Rahman) by a preponderance of the evidence.

If you find that any of the Plaintiffs (or Gul Rahman) suffered cruel, inhuman, or degrading treatment at the hands of the CIA, you will have to decide whether one or both of the Defendants are liable under any one of the theories of liability presented in the case—*i.e.*, Aiding & Abetting, Conspiracy, and Joint Criminal Enterprise—as those theories will be explained later in these instructions.

Authorities:

Bowoto v. Chevron Corp., Case No. 99-02506 (N.D. Cal.), ECF No. 2252, Instructions to Jury (Final as Amended – 11/25/08) at 11-12, *aff'd on other grounds*, 621 F.3d 1116 (9th Cir. 2010)

INSTRUCTION NO. __

7.6 – NON-CONSENSUAL HUMAN EXPERIMENTATION – DIRECT LIABILITY – DEFENDANTS

[Defendants assert that there is not a sufficiently well-defined norm prohibiting Non-Consensual Human Experimentation for purposes of the Alien Tort Statute, *see Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004); *see also* 18 U.S. § 2441 (1997). Accordingly, Defendants respectfully submit that no instruction should be given, and object to any instruction proposed by Plaintiffs' addressing Non-Consensual Human Experimentation. Defendants' reserve the right to address this issue in their Trial Brief. Should the Court choose to instruct the jury on Plaintiffs' claim for Non-Consensual Human Experimentation, the below instruction has been provided.]

Plaintiffs claim that non-consensual experiments were conducted upon them (or Gul Rahman) in violation of international law by one or both Defendants. This claim must be proved separately as to each individual Plaintiff, namely Plaintiff Suleiman Abdullah Salim, Plaintiff Mohamed Ahmed Ben Soud, and Gul Rahman.

To establish a claim of non-consensual human experimentation, Plaintiffs must prove by a preponderance of the evidence, as to each individual Plaintiff (or Gul Rahman):

1. One or both Defendants subjected Plaintiff (or Gul Rahman) to a medical or scientific experiment;

2. The experiment endangered Plaintiff's (or Gul Rahman's) physical or mental health; and

3. One or both Defendants experimented upon Plaintiff (or Gul Rahman) while acting under color of law.

A medical or scientific experiment is an action taken with the primary purpose of learning about the medical or scientific effects of that action on humans.

A private individual acts under color of law when he acts together with state officials or with significant state aid. In this context, employees of the CIA are considered state officials. [[The parties have stipulated] [I instruct you] that the Defendants acted under color of state law.]]

Authorities:

See Torture Victim Protection Act of 1991, 28 U.S.C. §1350, note; Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), Article 5(2)(e), June 8, 1977; *Abdullahi v. Pfizer*, 562 F.3d 163, 188 (2d Cir. 2009) (requiring state action to establish an ATS claim based on non-consensual drug trials on Nigerian children, but applying customary international law applicable in peacetime rather than non-international armed conflicts); *United States v. Brandt (The Medical Case)*, 2 Trials of War Criminals Before the Nuremberg Military Tribunals Under Control Council Law No. 10, pp. 181-82 (1949) (relying upon the Nuremberg Code (1947)); *cf.* 18 U.S.C. § 2441(d)(1)(C).

INSTRUCTION NO. __

7.7 – NON-CONSENSUAL HUMAN EXPERIMENTATION – CIA

[Defendants assert that there is not a sufficiently well-defined norm prohibiting Non-Consensual Human Experimentation for purposes of the Alien Tort Statute, *see Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004); *see also* 18 U.S. § 2441 (1997). Accordingly, Defendants respectfully submit that no instruction should be given, and object to any instruction proposed by Plaintiffs' addressing Non-Consensual Human Experimentation. Defendants' reserve the right to address this issue in their Trial Brief. Should the Court choose to instruct the jury on Plaintiffs' claim for Non-Consensual Human Experimentation, the below instruction has been provided.]

Plaintiffs claim that non-consensual experiments were conducted upon them (or Gul Rahman) in violation of international law by the CIA. This claim must be proved separately as to each individual Plaintiff, namely Plaintiff Suleiman Abdullah Salim, Plaintiff Mohamed Ahmed Ben Soud, and Gul Rahman.

To establish a claim of non-consensual human experimentation, Plaintiffs must prove by a preponderance of the evidence, as to each individual Plaintiff (or Gul Rahman):

1. The CIA subjected Plaintiff (or Gul Rahman) to a medical or scientific experiment;

2. The experiment endangered Plaintiff's (or Gul Rahman's) physical or mental health; and

3. The CIA experimented upon Plaintiff (or Gul Rahman) while acting under color of law.

A medical or scientific experiment is an action taken with the primary purpose of learning about the medical or scientific effects of that action on humans.

In this context, employees of the CIA are considered state officials.

If you find that any of the individual Plaintiffs (or Gul Rahman) suffered non-consensual experimentation at the hands of the CIA, you will have to decide whether one or more of the Defendants is liable under any one of the theories of

indirect liability presented in the case—*i.e.*, Aiding & Abetting, Conspiracy, and Joint Criminal Enterprise—as those theories will be explained later in these instructions.

Authorities:

See Torture Victim Protection Act of 1991, 28 U.S.C. §1350, note; Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), Article 5(2)(e), June 8, 1977; *Abdullahi v. Pfizer*, 562 F.3d 163, 188 (2d Cir. 2009) (requiring state action to establish an ATS claim based on non-consensual drug trials on Nigerian children, but applying customary international law applicable in peacetime rather than non-international armed conflicts); *United States v. Brandt (The Medical Case)*, 2 Trials of War Criminals Before the Nuremberg Military Tribunals Under Control Council Law No. 10, pp. 181-82 (1949) (relying upon the Nuremberg Code (1947)); *cf.* 18 U.S.C. § 2441(d)(1)(C).

INSTRUCTION NO. __

7.8 – WAR CRIMES

[Defendants assert that because Plaintiffs' claim for War Crimes encompasses their causes of action for *Torture and Other Cruel, Inhuman or Degrading Treatment* and *Non-Consensual Human Experimentation*, that no instruction should be given. Defendants hereby reserve the right to discuss this issue in their forthcoming Trial Brief, and object to any instruction proposed by Plaintiffs discussing war crimes.]

Authorities:

Plaintiffs' *Complaint*, 15-cv-286, ECF No. 1, ¶¶ 180-85.

INSTRUCTION NO. __

7.9 – INTENT

Intent ordinarily may not be proved directly, because there is no way of fathoming or scrutinizing the operations of the human mind. You may, but are not required to, infer a person's intent from the surrounding circumstances. You may consider any statement made or done or omitted by that person, and all other facts and circumstances in evidence which indicate his or her state of mind.

An act is done "intentionally" if done voluntarily and willfully, and with a specific intent to do something the law forbids; that is to say, with bad purpose either to disobey or disregard the law.

Authorities:

Hon. Justin L. Quackenbush Stock Instructions (transmitted by Chambers July 31, 2017) (modified to define the term "intentionally—as opposed to the term "willfully," using the same language"—to be consistent with the foregoing ATS instructions)

INSTRUCTION NO. __

7.10 – GOOD FAITH RELIANCE

Defendants have introduced evidence that the Department of Justice's Office of Legal Counsel expressed a legal opinion in the form of an official agency memorandum that the use of Enhanced Interrogation Techniques on detainees, such as the Plaintiffs (or Gul Rahman), would not violate the prohibition against torture under domestic and international law. Defendants have also introduced evidence that this legal opinion was communicated to them in August 2002, before any of the Plaintiffs (or Gul Rahman) were detained or interrogated by the CIA.

If, after consideration of all the evidence, you find it is more likely than not that the existence of the official memorandum, and its communication to Defendants, negates Defendants' required mental state of [purpose or knowledge] for aiding and abetting or joint criminal enterprise liability, then you must find for the Defendants.

Authorities:

United States v. Sarno, 73 F.3d 1470, 1487 (9th Cir. 1995); *United States v. Scarmazzo*, 554 F. Supp. 2d 1102, 1110 (E.D. Cal. 2008) ("Advice of counsel is … circumstantial evidence of good faith intent to comply with the law."); *United States v. Anshen*, 1993 WL 164 164657, at *4 (9th Cir. June 9, 1993); *United States v. Ibarra-Alcarez*, 830 F.2d 968, 974 (9th Cir. 1987) (citing *United States v. Musgrave*, 444 F.2d 755, 764-65 (5th Cir. 1971) ("a trial judge must instruct the jury on the effect of good faith reliance even if the evidence presented by the defense was "fragile, weak[,] insufficient, inconsistent or of doubtful credibility.")

INSTRUCTION NO. __

7.11 – LIABILITY OF DEFENDANTS FOR ACTS OF THE CIA – AIDING & ABETTING (*PURPOSE STANDARD*)

Plaintiffs contend that each Defendant is responsible for the CIA's conduct because Defendants aided and abetted that conduct. Defendants deny that they aided and abetted the CIA's conduct.

To show that one or both Defendants are responsible for aiding and abetting the CIA's conduct, each Plaintiff must individually prove:

1. That one or more of the wrongful acts that comprise a Plaintiff's claim was committed;

2. That the Defendant or Defendants provided substantial assistance or encouragement to the CIA;

3. That this assistance had a practical and substantial effect on the perpetration of the wrongful acts; and

4. That, when the Defendant or Defendants provided the assistance, the Defendant or Defendants had the purpose of facilitating the wrongful acts as against that Plaintiff or Gul Rahman.

To constitute aiding and abetting, there must a causal link between a Defendant or Defendants and the commission of the wrongful act. If a Defendant or Defendants' contribution to the causal stream leading to the commission of the wrongful act was insignificant or insubstantial, his or their acts and conduct cannot have had a substantial effect.

The purpose standard is not satisfied merely because the Defendant or Defendants intended to profit by doing business with the CIA.

Simply doing business with a state or individual who violates the law of nations is insufficient to create liability under customary international law. Aiding a criminal is not the same thing as aiding and abetting his or her alleged human rights abuses.

You must separately consider whether each Defendant aided and abetted the CIA's conduct with regard to each Plaintiff (or Gul Rahman).

Each theory of liability is independent, such that if you reject aiding and abetting for either Defendant, you must also consider whether any other theory of indirect liability—*i.e.*, Conspiracy or Joint Criminal Enterprise—may apply to that Defendant.

Authorities:

Doe I v. Nestle USA, Inc., 766 F.3d 1013, 1026 (9th Cir. 2014); *Brill v. Chevron Corp.*, 2017 U.S. Dist. LEXIS 4132, at *24 (N.D. Cal. Jan. 9, 2017); *Presbyterian Church of Sudan v. Talisman Energy, Inc.*, 582 F.3d 244, 258 (2d Cir. 2009); *Aziz v. Alcolac, Inc.*, 658 F.3d 388 (4th Cir. 2011); *Doe v. Exxon Mobil Corp.*, 2015 U.S. Dist. LEXIS 91107, at *28-29 (D.D.C. July 6, 2015); *In re Chiquita Brands Int'l, Inc.*, 792 F. Supp. 2d 1301, 1350 (S.D. Fla. 2011); *S. African Apartheid Litig. v. Daimler AG*, 617 F. Supp. 2d 257, 257 (S.D.N.Y. 2009); *Bowoto v. Chevron Corp.*, Case No. 99-02506 (N.D. Cal.), ECF No. 2252, Instructions to Jury (Final as Amended – 11/25/08) at 33-34, *aff'd on other grounds*, 621 F.3d 1116 (9th Cir. 2010); *Corrie v. Caterpillar, Inc.*, 403 F. Supp. 2d 1019, 1027 (W.D. Wash. 2005), *aff'd on other grounds*, 503 F.3d 947 (9th Cir. 2007); *Doe v. Cisco Sys.*, 66 F. Supp. 3d 1239, 1248 (N.D. Cal. 2014); *Prosecutor v. Taylor*, Case No. SCSL-03-01-A, ¶ 391 (Sept. 26, 2013); *Prosecutor v. Fofana and Kondewa*, Case No, SCSL-04-14-A, Judgment, ¶¶ 97, 99, 102 (May 28, 2008); *Prosecutor v. Tadic*, Case No. IT-94- 1-T, Opinion & Judgment, ¶ 692 (May 7, 1997) (accused only "responsible for all that naturally results from the commission of the act in question").

INSTRUCTION NO. __

7.12 – ALTERNATE: LIABILITY OF DEFENDANTS FOR ACTS OF THE CIA – AIDING & ABETTING (*KNOWLEDGE STANDARD*)

[Defendants assert that the proper *mens rea* standard is "purpose"; reserve the right to address this issue in their Trial Brief; and object to any instruction discussing a "knowledge" standard. Should the Court choose to instruct the jury on "knowledge," the below instruction has been provided.]

Plaintiffs contend that each Defendant is responsible for the CIA's conduct because Defendants aided and abetted that conduct. Defendants deny that they aided and abetted the CIA's conduct.

To show that one or both Defendants are responsible for aiding and abetting the CIA's conduct, each Plaintiff must individually prove:

1. That one or more of the wrongful acts that comprise a Plaintiff's claim was committed by the CIA;

2. That the Defendant or Defendants provided substantial assistance or encouragement to the CIA;

3. That this assistance had a practical and substantial effect on the perpetration of the wrongful acts; and

4. That, when the Defendant or Defendants provided the assistance, they knew that the wrongful acts would be committed or had been committed as against that Plaintiff or Gul Rahman.

To constitute aiding and abetting, there must a causal link between a Defendant or Defendants and the commission of the wrongful act. If a Defendant or Defendants' contribution to the causal stream leading to the commission of the wrongful act was insignificant or insubstantial, his or their acts and conduct cannot have had a substantial effect.

Simply doing business with a state or individual who violates the law of nations is insufficient to create liability under customary international law. Aiding a criminal is not the same thing as aiding and abetting his or her alleged human rights abuses.

Knowledge can be inferred from the circumstances. Mere knowledge that a harm was going to be inflicted on a Plaintiff and the failure to prevent it do not constitute aiding and abetting.

You must separately consider whether each Defendant aided and abetted the CIA's conduct with regard to each Plaintiff.

Each theory of liability is independent, such that if you reject aiding and abetting for any Defendant, you must also consider whether any other theory of indirect liability—*i.e.*, Conspiracy or Joint Criminal Enterprise—applies to that Defendant.

Authorities:

Doe I v. Nestle USA, Inc., 766 F.3d 1013, 1026 (9th Cir. 2014); *Presbyterian Church of Sudan v. Talisman Energy, Inc.*, 582 F.3d 244, 258 (2d Cir. 2009); *Aziz v. Alcolac, Inc.*, 658 F.3d 388 (4th Cir. 2011); *Doe v. Exxon Mobil Corp.*, 2015 U.S. Dist. LEXIS 91107, at *28-29 (D.D.C. July 6, 2015); *In re Chiquita Brands Int'l, Inc.*, 792 F. Supp. 2d 1301, 1350 (S.D. Fla. 2011); *S. African Apartheid Litig. v. Daimler AG*, 617 F. Supp. 2d 257, 257 (S.D.N.Y. 2009); *Bowoto v. Chevron Corp.*, Case No. 99-02506 (N.D. Cal.), ECF No. 2252, Instructions to Jury (Final as Amended – 11/25/08) at 33-34, *aff'd on other grounds*, 621 F.3d 1116 (9th Cir. 2010); *Corrie v. Caterpillar, Inc.*, 403 F. Supp. 2d 1019, 1027 (W.D. Wash. 2005), *aff'd on other grounds*, 503 F.3d 947 (9th Cir. 2007); *Doe v. Cisco Sys.*, 66 F. Supp. 3d 1239, 1248 (N.D. Cal. 2014); *Cabello v. Fernandez-Larios*, 402 F.3d 1148, 1158 (11th Cir. 2005) ("The district court instructed the jury that to find Fernandez indirectly liable for aiding and abetting, the Cabello survivors needed to prove 'active participation' by preponderance of the evidence. In assessing 'active participation,' the jury was instructed to consider if (1) one or more of the wrongful acts that comprise the claim were committed, (2) Fernandez substantially assisted some person or persons who personally committed or caused one or more of the wrongful acts that comprise the claim, and (3) Fernandez knew that his actions would assist in the illegal or wrongful activity at the time he provided the assistance."); *Prosecutor v. Taylor*, Case No. SCSL-03-01-A, ¶ 391 (Sept. 26, 2013); *Prosecutor v. Fofana and Kondewa*, Case No, SCSL-04-14-A, Judgment, ¶¶ 97, 99, 102 (May 28, 2008); *Prosecutor v. Tadic*, Case No. IT-94- 1-T, Opinion & Judgment, ¶ 692 (May 7, 1997) (accused only "responsible for all that naturally results from the commission of the act in question").

INSTRUCTION NO. __

7.13 – JOINT CRIMINAL ENTERPRISE LIABILITY

Plaintiffs contend that each Defendant acted together in a joint criminal enterprise with the CIA. Defendants deny that they were engaged in such a joint criminal enterprise.

A joint criminal enterprise exists when two or more individuals act together to further a common plan or purpose to commit a wrongful act. As explained below, members of a joint criminal enterprise may be held liable for acts committed by other members of the enterprise, but there are different burdens of proof depending on whether the act was part of the common plan or purpose, or whether the act fell outside of the common plan or purpose.

To establish a joint criminal enterprise, Plaintiffs must prove the following elements by a preponderance of the evidence:

1. There was a common plan or purpose between one or both Defendants and the CIA to commit a wrongful act;

2. One or both Defendants committed an act that either directly or indirectly contributed to the execution of this common plan or purpose;

3. One or both Defendants committed this act with the intention to participate in and further the common plan or purpose; and

4. Wrongful acts committed in the execution of this common plan or purpose resulted in the commission of *Torture and Other Cruel, Inhuman, and Degrading Treatment*, *Non-Consensual Human Experimentation*, or *War Crimes* against Plaintiffs (or Gul Rahman).

Although each Defendant need not have personally participated in any of the wrongful acts committed as part of the common plan or purpose, a Defendant may only be held liable if his acts significantly contributed to the commission of *Torture and Other Cruel, Inhuman, and Degrading Treatment*, *Non-Consensual Human Experimentatio*n, or *War Crimes* against Plaintiffs.

In deciding whether a Defendant's actions "significantly contributed" to the alleged mistreatment of a Plaintiff or Gul Rahman, you may consider the size of the criminal enterprise and the function(s) performed by one or both Defendants.

The standard for determining intent to participate in and further the common plan or purpose is the same standard of intent required for Aiding & Abetting, discussed earlier in these instructions.

For either Defendant to be held liable for a wrongful act committed by a member of the joint criminal enterprise that was ***not part of*** the common plan or purpose, you must find a Plaintiff has proved, by a preponderance of the evidence, that:

a) The wrongful act was a natural and foreseeable consequence of the execution of the joint criminal enterprise;

b) Such Defendant was aware that the wrongful act was a possible consequence of the joint criminal enterprise; and

c) Even with that awareness, such Defendant continued to participate in the enterprise.

Authorities:

Presbyterian Church of Sudan v. Talisman Energy, Inc., 582 F.3d 244, 260 (2d Cir. 2009); *Lizarbe v. Rondon*, 642 F. Supp. 2d 473, 490-91 (D. Md. 2009); *Prosecutor v. Karadzic*, Case No. IT-95-5/18-T, Judgment, Vol. I, ¶¶ 560-70 (Mar. 24, 2016) (public redacted version); *Prosecutor v. Tadic*, Case No. IT-94-1-A, Judgment, ¶¶ 196, 204, 220, 226-28 (July 15, 1999); *see generally Prosecutor v. Simic*, Case No. IT-95-9-A, Judgment (Nov. 28, 2006) (appeal based on sufficiency of indictment charging joint criminal enterprise liability); *see also Jara v. Nunez*, No. 13-cv-1426, 2015 WL 8659954, at *3 (M.D. Fla. Dec. 14, 2015) (discussing conspiracy in TVPA context); *Jara v. Nunez*, No. 13-cv-1426 (M.D. Fla. June 28, 2016), ECF No. 184, Court's Instructions to the Jury at 23-25, (conspiracy in TVPA case).

INSTRUCTION NO. __

7.14 – CONSPIRACY

[Defendants assert no instruction on Conspiracy should be given because Joint Criminal Enterprise is the international analog to Conspiracy. *See Presbyterian Church of Sudan v. Talisman Energy, Inc.*, 453 F. Supp. 2d 633, 665 (S.D.N.Y. 2006), *aff'd*, 582 F.3d 244 (2d Cir. 2009) (declining to follow *Cabello,* and applying international law standard of joint criminal enterprise liability). However, if the Court decides an instruction on Conspiracy is needed, Defendants have provided the below language.]

Plaintiffs contend that Defendants are liable for the CIA's conduct because they conspired together with the CIA to commit that conduct. Defendants deny that they conspired with the CIA.

A conspiracy is an agreement by two or more persons to commit one or more wrongful acts.

For one or both Defendants to be liable for the conduct of the CIA on the basis of conspiracy, you must find that a Plaintiff has proved by a preponderance of the evidence that:

1. The CIA had a plan to commit at least one wrongful act;

2. The Defendant or Defendants were aware of the CIA's plan;

3. The Defendant or Defendants agreed with the CIA and intended to help accomplish the wrongful act(s);

4. One or more of the wrongful acts was committed by someone who was a member of the conspiracy and acted in furtherance of the conspiracy.

Mere knowledge of the wrongful conduct without an agreement that it be committed is not enough to establish a conspiracy.

Each member of the conspiracy is liable for the actions of the other conspirators performed during the course and in furtherance of the conspiracy.

Authorities

Cabello v. Fernandez-Larios, 402 F.3d 1148, 1159 (11th Cir. 2005) (*per curiam*); Court's Instructions to the Jury at 19, *Cabello v. Fernandez-Larios*, No. 99-0528 (S.D. Fla. Oct. 20, 2003), ECF No. 308; Instructions to Jury (Final As Amended – 11/25/08) at 34, *Bowoto v. Chevron Texaco Corp.*, No. C 99-02506 (N.D. Cal. Nov. 24, 2008), ECF No. 2252, *aff'd on other grounds*, 621 F.3d 1116 (9th Cir. 2010); *Jara v. Nunez*, No. 13-cv-1426, 2015 WL 8659954, at *3 (M.D. Fla. Dec. 14, 2015) (discussing conspiracy in TPVA context); Court's Instructions to the Jury, *Jara v. Nunez*, No. 13-cv-1426 (M.D. Fla. June 28, 2016), ECF No. 184, at 19-21 (conspiracy in TVPA case).

CERTIFICATE OF SERVICE

I hereby certify that on the 8th 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:

Emily Chiang echiang@aclu-wa.org ACLU of Washington Foundation 901 Fifth Ave, Suite 630 Seattle, WA 98164	Paul Hoffman hoffpaul@aol.com Schonbrun Seplow Harris & Hoffman, LLP 723 Ocean Front Walk, Suite 100 Venice, CA 90291
Andrew I. Warden Andrew.Warden@usdoj.gov Senior Trial Counsel Timothy A. Johnson Timothy.Johnson4@usdoj.gov Trial Attorney United States Department of Justice Civil Division, Federal Programs Branch 20 Massachusetts Ave NW Washington, DC 20530	Steven M. Watt, admitted *pro hac vice* swatt@aclu.org Dror Ladin, admitted *pro hac vice* dladin@aclu.org Hina Shamsi, admitted *pro hac vice* hshamsi@aclu.org ACLU Foundation 125 Broad Street, 18th Floor New York, NY 10007
Avram D. Frey, admitted *pro hac vice* afrey@gibbonslaw.com Daniel J. McGrady, admitted *pro hac vice* dmcgrady@gibbonslaw.com Kate E. Janukowicz, admitted *pro hac vice* kjanukowicz@gibbonslaw.com Lawrence S. Lustberg, admitted *pro hac vice* llustberg@gibbonslaw.com	Anthony DiCaprio, admitted *pro hac vice* ad@humanrightslawyers.com Law Office of Anthony DiCaprio 64 Purchase Street Rye, NY 10580 Jeffry Keith Finer, admitted *pro hac vice* jeffry@finerwinn.com Center for Justice

Gibbons PC One Gateway Center Newark, NJ 07102	35 W. Main, Suite 300 Spokane, WA 99201

By *s/ Karen L. Pritchard*
Karen L. Pritchard
kpritchard@bpmlaw.com
Betts, Patterson & Mines, P.S.