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

SULEIMAN ABDULLAH SALIM, et al. Plaintiffs, v. JAMES ELMER MITCHELL and JOHN "BRUCE" JESSEN, Defendants.	NO. 2:15-cv-286-JLQ **DEFENDANTS' RESPONSE IN OPPOSITION TO PLAINTIFFS' MOTIONS *IN LIMINE*** Note on Motion Calendar: August 21, 10:00 a.m., at Spokane Washington

I. INTRODUCTION.

Defendants James Elmer Mitchell and John "Bruce" Jessen ("Defendants") submit this Response in Opposition to Plaintiffs' August 2, 2017, consolidated Motion *in Limine* (ECF 234) (the "Motion"). The Motion seeks to preclude Defendants from presenting four categories of evidence at trial, *id.* at 2-23, and seeks to admit into evidence 10 purported factual findings contained within the Senate Select Committee on Intelligence's Study of the CIA's Detention and Interrogation Program ("SSCI Summary Report"), (*id.*at 23-25) (referring to ECF 199 at Ex. A). As discussed below, Plaintiffs' Motion should be denied in its entirety.

In arguing that certain evidence should be excluded at trial as either irrelevant or prejudicial, Plaintiffs overlook that "Rules 401 and 402 [of the Federal Rules of Evidence] establish the broad principle that relevant evidence—evidence that makes the existence of any fact [that is of consequence] more or less probable—is admissible *unless the Rules provide otherwise*." *Huddleston v. United States*, 485 U.S. 681, 687 (1988) (emphasis added). And, each category of evidence Plaintiffs seek to bar Defendants from using is relevant to a key element in the case and, thus, should not be excluded. Plaintiffs' arguments regarding "prejudice" are similarly unfounded. "Relevant evidence is inherently prejudicial; but it is only unfair prejudice, substantially outweighing probative value, which permits exclusion of relevant matter under Rule 403." *See United States v. Hankey*, 203 F.3d 1160, 1172 (9th Cir. 2000) (citation omitted). Because none of

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the evidence identified by Plaintiffs is *unfairly* prejudicial, Rule 403 does not bar Defendants from using it.

Plaintiffs' arguments as to the admissibility of ten identified "findings" from the SSCI Summary Report are flawed for several reasons. First, none of the statements Plaintiffs seek to admit are factual findings within the scope of the public records exception in Federal Rule of Evidence 803(8)(A)(iii). Second, even if the Court were to determine the statements should be considered "findings", they are nonetheless inadmissible because they are irrelevant, improper double-hearsay, and/or otherwise unreliable.

II. ARGUMENT.

A. Defendants Should Not be Precluded from Introducing Evidence Allegedly Reflecting Statements Made by Plaintiffs While in CIA Custody.

Plaintiffs seek to exclude "evidence [purportedly] derived from statements that Plaintiffs made under coercion," contending that such "coerced" statements are largely unreliable and prejudicial. (Mot. at 2-5.) But it is unclear from the Motion whether Plaintiffs seek to exclude only the specific documents referenced as "summarizing" Plaintiffs' interrogations, *id.* at 2, or some other unspecified body of documents that *might potentially* contain Plaintiff-provided information. Given this lack of specificity, Defendants address the particular documents referenced in the Motion. And to the extent Plaintiffs claim these documents should be excluded for a separate reason, *i.e.* because they refer to Plaintiffs'

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alleged ties to terrorist organizations, the fallacy of Plaintiffs' position is addressed in Section II(D), *infra*.

Plaintiffs' request to exclude documents containing information derived from statements purportedly made during their custodial interrogations should be denied because Plaintiffs have failed to demonstrate that any information contained therein was obtained through coercion, or should be excluded as inherently unreliable and prejudicial. In particular: (1) certain documents do not indicate the information was obtained from a Plaintiff; and (2) even where it appears that information within a document was obtained from a Plaintiff, some of it was later elicited as deposition testimony, thereby independently establishing its reliability and the absence of unfair prejudice. And, to the extent that there are discrepancies between the information contained in the documents and statements made during Plaintiffs' depositions, such discrepancies go to weight—*i.e.*, they should be considered by the jury in assessing the witness's credibility.

Each identified document is addressed in turn below.[1]

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[1] Plaintiffs cite (ECF 183-3 at 001609) as support; however, that document does not reflect any information purportedly provided by Plaintiffs. Rather, it merely indicates which Enhanced Interrogation Techniques ("EITs") were used on two of the Plaintiffs. Thus, it cannot be excluded on the grounds identified in the Motion.

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- Mr. Ben Soud
    - *ECF 235 at Ex. A (U.S. Bates 001546)*

This is a CIA memorandum containing information as to Mr. Ben Soud's affiliation with the Libyan Islamic Fighting Group ("LIFG") and information regarding his purported associates and activities. Notably, the document does not indicate that this information was obtained from Mr. Ben Soud, or even when, or from whom, it was obtained. And Mr. Ben Soud admitted nearly all of the facts in this document during his deposition. *See* Decl. of Jeffrey N. Rosenthal ("Rosenthal Decl.") (filed and served herewith), Ex. A, Dep. of Mohamed Ahmed Ben Soud ("Ben Soud Dep.") at 44:12-21; 55:17-22; 56:17-57:3; 70:2-6; 100:20-103:8, 111:3-114:16, 116:19-23.

- *ECF 183-2 (U.S. Bates 001580)*

This CIA memorandum contains information that overlaps with the information in U.S. Bates 001546 (discussed above), nearly all of which Mr. Ben Soud admitted at his deposition. *See* Ben Soud Dep. at 44:12-21; 55:17-22; 56:17-57:3; 70:2-6; 100:20-103:8, 111:3-114:16, 116:19-23. Moreover, the document does not indicate that this information was obtained from Mr. Ben Soud, or even when, or from whom, it was obtained. And while the document indicates Mr. Ben Soud was transferred into CIA custody in April 2003, and specifies the EITs applied to him while in custody, it does not specify whether he made any statements in connection with his interrogation, whether before or after EIT application.

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- Mr. Salim
    - *ECF 176-26 (U.S. Bates 001534-1536)*

This is a CIA memorandum containing information obtained during a "custodial debriefing session" of Mr. Salim, *see* U.S. Bates 001534-1536 ¶ 4, as well as some background information about Mr. Salim previously known to the CIA, *id.* ¶ 3. But, it is unknown whether Mr. Salim provided the background information in paragraph 3. Moreover, with respect to the information derived from Mr. Salim's "custodial debriefing session," Plaintiffs have not shown, nor is there any indication on the document's face, *when* Mr. Salim's statements were made—*i.e.*, prior to, or following, the application of any EITs. Additionally, Mr. Salim admitted a substantial amount of the same information contained within paragraph 4 during his un-coerced deposition. *See* Rosenthal Decl. Ex. B, Dep. of Suleiman Abdullah Salim, ("Salim Dep.") at 21:11-22:16; 23:23-24:23; 26:21-27:4; 31:14-16; 38:9-39:9; 40:24-41:21; 43:7-44:3; 104:4-11; 113:23-116:24; 119-13-21; 120:10-13; 126:1-5; 130:9-131:24; 132:16-23; 134:6-18; 135:19-34.

- *ECF 183-2 (U.S. Bates 001567)*

This CIA memorandum contains information that overlaps with the information in U.S. Bates 001534-1536 ¶ 3 (discussed above). Moreover, while the document indicates Mr. Salim was transferred into U.S. military custody in June 2004, and specifies the EITs used on him, it does not indicate if he made any statements in connection with his interrogation and, if so, the nature of those statements.

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- Mr. Rahman
  - *ECF 182-35 (U.S. Bates 001076)*

This is a CIA memorandum containing information as to Mr. Rahman. Certain portions of the document reflect statements made by Mr. Rahman while in the CIA's custody—namely personal background information, affiliation with certain individuals, and employment history. *See* U.S. Bates 001076 ¶ 3. Although it appears these statements may have been made following the application of certain EITs, some of the information contained in the statements is corroborated by Mr. Obaid Ullah's deposition testimony, and is thus independently admissible. *See* Rosenthal Dec. Ex. C, Dep. of Obaid Ullah at 99:14-16; 102:4-17; 104:3-7; 105:3-21; 130:15-131:7.

  - *ECF 183-2 (U.S. Bates 001577)*

This CIA memorandum contains information pertaining to Mr. Rahman, none of which was obtained through statements made during or after coercive interrogation sessions. Rather, this document indicates when Mr. Rahman was rendered into CIA custody, and also describes the EITs to which he was subjected and the circumstances surrounding his death.

B. Evidence and Argument Regarding Defendants' Reliance on Legal Advice and Authorizations Received from Executive Branch Attorneys and Officers Should Not Be Excluded.

Plaintiffs seek to preclude Defendants from introducing relevant evidence of "executive branch legal analyses"—such as memoranda from the Department of Justice's Office of Legal Counsel ("OLC")—and "bureaucratic authorizations" received from the CIA. (Mot. at 6-10.) As explained below, Plaintiffs' arguments

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are flawed: there is no basis to restrict Defendants' ability to present evidence of legal or other authorizations received from government officials.

1. Defendants Are Entitled to Present a "Good Faith Reliance on Counsel" Defense.

Plaintiffs' contention that Defendants are "ineligible for a 'reliance on counsel' defense" is unfounded. Where, as here, a claim requires a showing of specific intent, a good faith reliance on counsel defense is available to negate such intent. *See, e.g.*, *United States v. Crooks*, 804 F.2d 1441, 1450 (9th Cir. 1986) ("Reliance on advice of counsel is not an absolute defense, but it is a factor to be considered in assessing good faith and intent."); *United States v. Anshen*, 993 F.2d 884, 1993 WL 164 164657, at *4 (9th Cir. June 9, 1993) (unpublished table decision) (district court's refusal to give requested instruction on reliance on counsel was reversible error because "some evidence" was produced to support the theory). Yet, Plaintiffs' argument glosses over that the Court could determine a *mens rea* of purpose (or even specific intent) is required to establish aiding and abetting liability, *see, e.g.*, *Doe I v. Nestle USA, Inc.*, 766 F.3d 1013, 1030-31 (9th Cir. 2014) (Rawlinson, J. concurring in part and dissenting in part)). Thus, at a minimum, Defendants should be permitted to introduce evidence relating to their reliance on the OLC memoranda and/or other executive branch legal analyses for the purpose of demonstrating that they lacked the intent required to be found liable for aiding and abetting. (*See* ECF 190 at 21-27.) And even if the Court determines Plaintiffs need only show the *mens rea* of knowledge for aiding and abetting,

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evidence of Defendants' reliance on this evidence remains relevant for other purposes, as set forth below.

2. Plaintiffs' Contention that Defendants "Compromised" the Executive Branch Legal Approval Process Is Misguided, and Does Not Justify the Exclusion of Evidence Relating to OLC's Legal Advice.

Plaintiffs contend that the OLC memoranda on which Defendants relied is irrelevant to "any defense"—purportedly because the "executive branch legal process was . . . outcome-oriented and reliant on Defendants' own misrepresentations and omissions." (Mot. at 7-9.) They further claim Defendants should be precluded from relying on the OLC memoranda because the legal advice Defendants received was biased in that: (1) Defendants themselves provided information to the OLC regarding whether EITs caused "pain and suffering"; (2) that information was allegedly misleading as it was based on data from volunteers in the Department of Defense's Survival, Evasion, Resistance, and Escape ("SERE") program, not detainees; and (3) Defendants knew the OLC's assessment of the EIT's legality was based, in part, on their own representations. *Id.* at 8. But, Plaintiffs' argument rests on inapt case law and is contradicted by the facts.

The cases upon which Plaintiffs rely are inapposite. (*Id.* at 8-9.) Although the cited cases indicate the reliance on counsel defense only applies if counsel was "fully informed of all relevant facts, unbiased, and competent," *id.* (citing *United States v.* Crooks, 804 F.2d 1441, 1450 (9th Cir. 1986)), they *do not* stand for the proposition that legal advice is biased simply because the person seeking advice provided the underlying facts to counsel, or had an interest in receiving a favorable

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analysis. This is, of course, not surprising. Were that the case, *every* legal opinion letter issued would be unreliable.

Plaintiffs' cited decisions are also distinguishable on the facts, *and* show that reliance on counsel is an issue for the jury to assess. For example, in *Crooks*, the Ninth Circuit held that the district court properly instructed the jury on the defendant's claim he relied on an expert to structure a tax shelter and, thus, the jury could have concluded "reliance upon [the expert's advice] did not establish good faith or lack of intent." 804 F.2d at 1450. Similarly, in *United States v. Manning*, the court upheld a jury verdict finding *inter alia*, the defendant did not treat counsel as an "independent, unbiased legal advisor" because counsel was involved in the same fraudulent scheme for which the defendant was prosecuted. 509 F.2d 1230, 1232, 1234 (9th Cir. 1974). Put simply, Plaintiffs' cited decisions do not support exclusion of the OLC memoranda, but rather, demonstrate that *the jury* should be permitted to consider evidence relating to Defendants' reliance upon Executive branch legal advice.

Next, Plaintiffs' factual narrative about Defendants "compromising" the government's legal process is misleading, and ignores key facts. Contrary to Plaintiffs' assertions, Defendants did not "grade their own paper." Rather, the evidence shows: (1) Defendants had no direct contact with the OLC; instead, they provided information to the CIA and the CIA, in turn, provided that information to the OLC; and (2) the CIA obtained information about detainee interrogations and EITs from sources other than the Defendants—including consultations with the U.S. Department of Defense's Joint Personnel Recovery Agency and other SERE

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psychologists and interrogators, as well as independent research—and subsequently provided that information to OLC for its consideration in the legal approval process. (ECF 201 ¶¶148, 150, 157, 175) (and sources cited therein). And, with respect to Plaintiffs' contention that Defendants' provided misleading information about whether EITs caused "pain and suffering," (Mot. at 8), there is record evidence Defendants did, in fact, inform the CIA that "any physical pressure applied to extremes can cause severe mental pain or suffering . . ." and that "[t]he safety of any technique lies primarily in how it is applied." *Id.* ¶ 156. Accordingly, Plaintiffs' claim that the OLC memoranda are irrelevant, and should be excluded on that basis, is meritless.

3. Evidence Relating to Legal Advice and CIA Authorizations Is Highly Relevant to Plaintiffs' Liability and Damages Claims.

Throughout this litigation, Plaintiffs repeatedly have asserted that Defendants "designed, implemented, and . . . administered" a purportedly systematic "torture program." (*See generally* ECF 1 ¶¶ 1-30; ECF 178 at 1-14; ECF 193 at 1-26.) Plaintiffs also have alleged Defendants' actions were so egregious as to entitle Plaintiffs to punitive damages. (ECF 1 ¶¶ 173, 179, 185.) Yet, Plaintiffs now seek to *prevent* Defendants from introducing evidence that: (1) directly explains the operational structure of the alleged CIA interrogation program and Defendants' limited roles within it; and (2) concerns Defendants' (limited to no) involvement in Plaintiffs' detention and custodial interrogation, including Defendants' states of mind. Because evidence concerning the legal advice and authorizations that Defendants obtained from the OLC and the CIA are relevant to

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Plaintiffs' direct and indirect liability claims—and particularly aiding and abetting claims—as well as their claim for punitive damages, Plaintiffs' attempt to prevent Defendants from presenting this evidence to the jury should be rejected.

As reflected in the parties' summary judgment briefing, evidence concerning the extent of the CIA's operational control over Defendants, and Defendants' reliance on executive branch legal authorizations, is directly relevant to each of Plaintiffs' liability claims.[2] For example, the structure of the CIA's detainee programs, and Defendants' roles within them, speak directly to the question of causation required for assessing aiding and abetting liability and whether Defendants "substantially assisted" the CIA in violating the law, *i.e. actus reus*. (*See* ECF 239 at 32-34) (describing the elements of aiding and abetting); *see also* (ECF 169 at 32-34; ECF 190 at 21.) Evidence of legal and operational oversight from the CIA and OLC, and Defendants' reliance thereon, is likewise relevant to Defendants' states of mind, and, thus, to whether they possessed the requisite intent to be found liable for torture—*i.e.*, the *intentional* infliction of severe pain or suffering. (ECF 245 at 64-67) (and sources cited therein).[3] Such evidence also is

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[2] For the reasons set forth herein, Plaintiffs' assertion that Defendants should be precluded from using evidence to support a so-called "Superior Orders" or "Nuremburg Defense," (Mot. at 10-11), is a distraction and should be disregarded.

[3] Evidence concerning government authorizations is also directly relevant to whether Defendants' actions were made "under the color of law"—*i.e.*, together

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relevant to a determination of Defendants' liability for "cruel, inhuman, or degrading treatment"—which requires jurors to consider, *inter alia*, the "totality of the circumstances" regarding Plaintiffs' treatment. (*Id.* at 68-71) (and sources cited therein).

Even setting the foregoing aside, evidence relating to these issues is relevant to Plaintiffs' claim for punitive damages. For instance, assuming the jury were to find Defendants' liable, it would then have to consider whether Defendants' conduct was "malicious, oppressive or in reckless disregard of the plaintiff's rights" so as to justify punitive damages. *See, e.g.*, Ninth Circuit Model Civil Jury Instructions, § 5.5 (2007 ed., updated June 2017) *and* Comment. Because this assessment would require an analysis of Defendants' intent, the fact that Defendants had been advised their actions were legal would be directly relevant.

Given their centrality to key issues in this case, evidence of the "executive branch legal analyses or bureaucratic authorizations" upon which Defendants relied should not be excluded; the jury should be allowed to consider this evidence.

C. Defendants Should Be Permitted to Introduce Evidence and Argument Regarding the 9/11 Attacks.

Plaintiffs seek to "preclude *all* evidence and argument regarding 9/11," arguing that the facts surrounding the attacks are not relevant, and, alternatively, that if they are relevant, they should be excluded under Rule 403. (Mot. at 10-17.) This argument fails on both counts.

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with state officials or with significant state aid—which is an element of several of Plaintiffs' claims for which they bear the burden of proof. (ECF 245 at 64-71.)

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First, as detailed in Defendants' consolidated Motion *in Limine* and Request for Judicial Notice, (ECF 231), much of the evidence concerning the 9/11 attacks is undisputed and meets the test for judicial notice set forth in Rule 201(a)-(b). Indeed, numerous courts have accepted as undisputed the very facts that Plaintiffs now seek to exclude. *See, e.g., Turkmen v. Hasty*, 789 F.3d 218, 224 (2d Cir. 2015) ("On September 11, 2001, '19 Arab Muslim hijackers who counted themselves members in good standing of al Qaeda" hijacked four airplanes and killed over 3,000 people on American soil.'") (citing *Ashcroft v. Iqbal*, 556 U.S. 662, 682 (2009)), *rev'd on other grounds by Ziglar v. Abbasi*, 137 S. Ct. 1843 (2017)).

Second, information regarding the 9/11 attacks is relevant, and provides crucial context and background information that will aid in the jurors' understanding of the case. As detailed in Defendants' Motion, (ECF 231), Defendants should be permitted to introduce evidence and argument relating to the 9/11 attacks for the following non-exhaustive reasons:

- Explaining *why* and *under what circumstances* the CIA's High-Value Detainee Program ("HVD Program") came into existence: Evidence concerning the 9/11 attacks will explain the basis for the Memorandum of Notification ("MON"), which authorized to CIA to establish a program to capture, detain, and interrogate al-Qaeda operatives, as well as how the issuance of the MON led to the creation of the HVD Program and Defendants' involvement in that program. (ECF 231 at 4) (citing ECF 170 ¶¶ 6, 7 25-27, 80, 90-91, 102, 104, 141, 158, 165, 209-210)); and

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- Explaining the CIA's focus on alleged al-Qaeda operatives: Disclosure of facts relating to the 9/11 attacks is relevant to explain: (1) why the CIA focused on detaining and interrogating individuals believed to be affiliated with al-Qaeda; and, particularly, (2) the CIA's specific interest in detaining/interrogating these particular Plaintiffs and Gul Rahman. (ECF 231 at 5.)

Third, the probative value of evidence relating to the 9/11 attacks, particularly when offered for the limited purposes stated above, is not *substantially outweighed* by the risk of undue prejudice. *Hankey*, 203 F.3d at 1172. Plaintiffs offer a litany of impassioned quotes from and citations to cases that excluded references to 9/11,[4] and caution that the evidence Defendants seek to introduce would invoke in jurors an emotional response and "instinct to punish." (Mot. at 12-17.) But, they overlook that evidence is not unfairly prejudicial simply because it *might* invoke an emotional response. Quite the contrary. In fact:

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[4] Many of the cited cases are completely inapposite in that they involved parties and facts with no relation to the 9/11 attacks. (*See* Mot. at 14) (citing *Zubulake v. UBS Warburg*, 382 F. Supp. 2d 536, 548 (S.D.N.Y. 2005) (gender discrimination case excluding reference to 9/11 in connection with allegation that harasser required victim to attend a meeting just after the attack); *Brinko v. Rio Props.*, 2013 U.S. Dist. LEXIS 5986, at *14 (D. Nev. Jan. 14, 2013) (Ponzi scheme case excluding explanation that money laundering regulations were promulgated in response to 9/11)).

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> Unless trials are to be conducted as scenarios, or unreal facts tailored and sanitized for the occasion, the application of Rule 403 must be cautious and sparing. Its major function is limited to excluding matter of scant or cumulative probative force, dragged in by the heels for the sake of its prejudicial effect.

Hankey, 203 F.3d at 1172 (quoting *Mills*, 704 F.2d at 1559).

Here, Defendants do not intend to introduce evidence or argument regarding 9/11 for an improper purpose. Nor is information regarding the 9/11 attacks of "scant or cumulative probative force." Rather, evidence and argument concerning the 9/11 attacks will: (1) explain the framework for the HVD Program; (2) counter Plaintiffs' description of it as a "torture program"; and (3) explain why, and under what authority, Plaintiffs were detained. That jurors could have an emotional response to such evidence, even when offered for these limited purposes, does not justify their wholesale exclusion. Rather, any risk of such a response can be mitigated with a curative instruction.[5]

D. Defendants Should Not Be Precluded from Presenting Evidence Concerning Plaintiffs' Affiliations with Terrorist Organizations.

In their Motion, Plaintiffs argue that Mr. Salim's affiliation with Harkati Hansar, Mr. Ben Soud's affiliation with LIFG, and Mr. Rahman's affiliation with the Hezbi Islami Gulbuddin, and collectively, Plaintiffs' connections to al-Qaeda, are not "fact[s] of consequence in determining [this] action" and that evidence

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[5] As noted in Defendant's Motion, (ECF 231 at 6 n.1), Defendants are willing to edit the video clip entitled "Flashback 9/11: As It Happened" to whatever extent the Court deems appropriate.

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concerning those affiliations is irrelevant and inadmissible. (Mot. at 17-18.) Alternatively, Plaintiffs contend that, even if relevant, evidence of their involvement in terrorism should be excluded under Rule 403. (*Id.* at 19-23.) Plaintiffs' herculean effort to exclude "any presentation" by Defendants regarding Plaintiffs' affiliation with terrorist organizations should be denied, as such information is necessary to present a coherent story to the jury, and Plaintiffs' activities with terrorist organizations also relate directly to their damages claims.

First, evidence concerning Plaintiffs' believed ties to terrorist organizations is more than "minimally relevant" as background or contextual evidence. Similar to the discussion above regarding the 9/11 attacks, some explanation of Plaintiffs' activities prior to their detention by the CIA is necessary to explain who Plaintiffs are, and how they came to be detained by the U.S. government. Rule 404(b)(2) provides that "other act" evidence is admissible for purposes other than to demonstrate a witness's propensity to engage in that "other act." And, courts commonly admit "evidence that is necessary . . . to offer a coherent and comprehensible story" regarding the underlying facts in a case. *See, e.g.*, *United States v. Anderson*, 741 F.3d 938, 949 (9th Cir. 2013); *United States v. Slade*, 2015 WL 4208634, at *2 (D. Ak. July 10, 2015). "This is because '[t]he jury cannot be expected to make its decision in a void—without knowledge of the time, place, *and circumstances of the acts* which form the basis of the [case].'" *Anderson*, 741 F.3d at 949 (citation omitted). Indeed, "other act" evidence may be "admitted if it contributes to an understanding of the event in question, even if it reveals [acts other than those specifically at issue in the case], because exclusion under those

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circumstances would render the testimony incomplete and confusing." *See* 2-404 Weinstein's Federal Evidence § 404.20[c]; *see also, e.g., SEC v. Teo*, 746 F.3d 90, 96 (3d Cir. 2014) (evidence of allocution in criminal case was admissible in civil enforcement action because it was relevant to "what [defendant] knew, what [defendant] did, and when he did it").

Here, evidence regarding Plaintiffs' affiliations with the above-listed organizations falls squarely within evidence considered admissible under Rule 404(b). Plaintiffs' links to these organizations largely contributed to their detention in the first instance, and certainly would have influenced the CIA's decisions with respect to their classification—*e.g.*, high, medium, or low-value detainee—and the structure of their interrogation plans. (*See* ECF 201 ¶¶ 27, 239, 249-52.) Moreover, although Plaintiffs contend that evidence concerning their affiliations is irrelevant because their credibility is not at issue, *id.* at 19-20, the fact remains that Plaintiffs have claimed they are "innocent," and ultimately were released without being prosecuted as terrorists.[6] Thus, as noted in Defendants' Motion *in Limine*, (ECF 231 at 5), evidence relating to the CIA's beliefs about Plaintiffs' involvement in terrorist organizations is relevant counter-evidence.

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[6] Indeed, counsel for Plaintiffs recently notified defense counsel that they intend to use photographs depicting Mr. Ben Soud as a doting father during his upcoming deposition. Defendants should rightly be permitted to introduce evidence that accurately contradicts Plaintiffs' self-serving narrative.

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Second, Plaintiffs' purported membership in terrorist organizations is relevant to their damages claim. The allegations in the Complaint relate to the alleged injuries Plaintiffs sustained as a result of their treatment and interrogation during the time spent in CIA custody. (ECF 1 ¶¶ 3-4, 9-11, 73-110, 121-151, 158-164, 168-185.) Although Plaintiffs may only recover for injuries caused by Defendants, the record shows that Plaintiffs had negative experiences and/or sustained injuries as a direct result of their affiliation with terrorist organizations. For example, in 1993, Mr. Ben Soud was working for the LIFG and severely injured his right hand when he attempted to detonate a bomb during combat in Jalalabad, Afghanistan. *See* Ben Soud. Dep. 43:5-49:17. Comparably, Mr. Salim was kidnapped, severely beaten, and raped during his rendition as a suspected al-Qaeda affiliate. *See* Salim Dep. 65:10-71:20, 84:4-84:19, 87:19-88:16, 91:9-93:21; 210:18-214:7; *see also* (ECF 201 ¶¶ 333-34) (conceding that Defendants did not make any recommendations about or participate in Plaintiffs' capture or rendition). While Plaintiffs offer a cautionary tale about diving too deeply into their "personal histories, social ties, and socio-political events in East and North Africa and the Middle East," (Mot. at 21-22), they conspicuously overlook that evidence of injuries sustained *before* the events in question is highly relevant to the cause of alleged psychological injuries, including post-traumatic stress disorder. *See*, *e.g.*, *Campbell v. Garcia*, 2016 WL 4769728, at *9 (D. Nev. Sept. 9, 2016) (declining to exclude evidence of prior car accidents because such accidents were relevant to the cause of plaintiff's alleged PTSD and "driving phobia").

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Finally, there is no basis for Plaintiffs' assertion that the probative value of evidence showing their connections to terrorist organizations is outweighed by the risk of unfair prejudice and confusion of the issues. (Mot. at 19.) Plaintiffs allege that evidence of their affiliations is prejudicial because it is intended to impugn them. *Id*. at 20-21. But this case is decidedly unlike *United States v. Sedaghaty*, 728 F.3d 885, 918 (9th Cir. 2013), wherein a tax-fraud case was "transformed into a trial on terrorism based on inappropriate "appeals to fear and guilt by association." (Mot. at 20). At its core, this case is about the way Plaintiffs were treated while in the CIA's custody. Thus, Plaintiffs' detention and interrogation as suspected affiliates of terrorist groups goes to the very foundation of their claims. And the probative value of evidence as to their affiliations is thus not substantially outweighed by the potential risk of prejudice. *See Hankey*, 203 F.3d at 1172.

E. The Purported Factual Findings from the SSCI Report Identified by Plaintiffs Are Not Admissible.

In accordance with the Court's instructions at the July 28, 2017, hearing, Plaintiffs have identified and seek admission of ten purported factual findings from the SSCI Summary Report. (Mot. at 23-25; *see also* ECF 199 at Ex. A.) Five of these "findings" were previously briefed, and five are newly identified by Plaintiffs. Plaintiffs contend that these isolated facts are admissible because they fall within the "public records" exception to the hearsay rule, Fed. R. Evid. 803(8)(A)(iii), and are relevant. (Mot. at 24-25.) But, Plaintiffs have failed to demonstrate that the identified "findings" are actually within the exception in Rule

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803(8)(A)(iii). And, even if the Court determines that they are, Plaintiffs' identified "findings" are either irrelevant or objectionable for other reasons.

Rule 803(8)(A)(iii) provides that "a record or statement of a public office" is not excluded by the rule against hearsay if it sets out "factual findings from a legally authorized investigation." As held in *Beech Aircraft Corp. v. Rainey*, 488 U.S. 153, 170 (1988), portions of an investigatory report that state a conclusion or opinion that is "based on a factual investigation and satisfies the [requisite] trustworthiness requirement" fall within the scope of this exception. However, Rule 803(8)(A)(iii) neither addresses nor cures any double hearsay issues that exist with regard to the underlying documents cited in the public record. Indeed, while public officials may rely on hearsay in the preparation of an investigatory report, the hearsay statements upon which they rely are not necessarily admissible. *See, e.g.*, Fed. R. Evid. 805; *United States v. Taylor*, 462 F.3d 1023, 1026 (8th Cir. 2006) (recitation of citizen's statement to police officer contained within police report was "double hearsay"); *United States v. Mackey*, 117 F.3d 24, 28-29 (1st Cir. 1997) (upholding district court's finding that witness statement recorded in FBI report was "hearsay within hearsay," and not admissible simply because it appeared in public record); *United States v. Moore*, 27 F.3d 969, 975 (4th Cir. 1994); *Parsons v. Honeywell, Inc.*, 929 F.2d 901, 907 (2d Cir. 1991); *Beechwood Restorative Care Ctr. v. Leeds*, 856 F. Supp. 2d 580, 588-89 (W.D.N.Y. 2012).

Here, the "findings" Plaintiffs seek to admit are not factual findings within the meaning of Rule 803(8)(A)(iii). As explained in Defendants' Motion to Exclude, the SSCI Summary Report is really three separate documents: a Forward,

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a set of Findings and Conclusions, and an Executive Summary. (ECF 198 at 2.) *None* of Plaintiffs' identified "findings" are contained within the "Findings and Conclusions" section. Instead, they all appear in the Executive Summary, "a lengthy editorial that reads part-historical narrative, part-critical analysis, and part-indictment," (*id.* at 5), and which does *not* constitute the factual findings determined as a result of the SSCI's investigation.[7] Therefore, none of the identified "findings" properly fall within the scope of Rule 803(8)(A)(iii).

But even if the Court were to find Plaintiffs have identified "factual findings" or conclusions based on such "findings," they are not admissible because they lack trustworthiness for the reasons stated in Defendant's Motion to Exclude, (ECF 198 at 6-10). Moreover, nearly every identified "finding" is either double hearsay or objectionable on relevance grounds, or both. The identified "findings" can be grouped into three general (but somewhat overlapping) categories: (1) irrelevant because they relate specifically to the treatment of Abu Zubaydah; (2) irrelevant because they relate specifically to Defendants' compensation from the CIA; and (3) cumulative/available from other sources and/or unfairly prejudicial due to indeterminate sources.

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[7] The Executive Summary is available at (ECF 199 at Ex. A) and portions of it have been provided at (ECF 235 at Ex. H). It is cited to hereafter as "Exec. Summary."

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- Facts Related to the Treatment of Zubaydah

Plaintiffs ask the Court to admit three "findings" relating to Zubaydah, the first prisoner captured by the CIA, namely: (1) FBI agents successfully elicited "critical information" from Zubaydah without resorting to torture; (2) "Defendants authored a CIA cable recommending that the aggressive phase of Zubaydah's interrogation be used as a "template."; and (3) "After the use of the CIA's [EITs] ended, CIA personnel at the detention site concluded that Abu Zubaydah had been truthful and that he did not possess any new terrorist threat information." (Mot. at 34 at 23 n.2, 24) (citing Exec. Summary at 27 n.99, 46 n.217, and 45 n.214). This evidence is not relevant, and should not be admitted because Zubaydah is *not* a plaintiff in this case and evidence concerning his interrogation has no bearing on the treatment allegedly endured by Plaintiffs. Nor does it bear on the injuries Plaintiffs allegedly sustained while in CIA custody. (*See also* ECF 231 at 9-12.)

Exclusion of these excerpts also is justified on other grounds. The first "finding" is inadmissible double-hearsay because it is an excerpt of a quotation from unspecified "[FBI] documents pertaining 'to the interrogation of detainee [Zubaydah] and provided to the [SSCI] by cover letter dated July 20, 2010." *See* (Exec. Summary at 27, n.99.) The second "finding" is inadmissible double hearsay because it is a direct quotation from a cable purportedly authored by Defendants. *See* (*id.* at 46 n.217.) And the third "finding" is both double hearsay *and* prejudicial because the source of the assertion not only is redacted, but also repeats out of court statements relating to the interrogation of Zubaydah. *See* (*id.* at 45 n.214.)

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- Facts Related to Defendants' Compensation

Plaintiffs seek to admit a quotation suggesting that "Defendants' rate of $1,800 per day was 'four times' what other interrogators were paid." (Mot. at 23 n.2) (citing Exec. Summary at 66). As discussed in Defendants' Motion *in Limine*, evidence concerning how much Defendants were paid is irrelevant to Plaintiffs' claims and therefore inadmissible. (ECF 231 at 7-9.) This "finding" is also inadmissible double hearsay, as it is a portion of a quotation from a draft memorandum from an unknown author at the Office of Medical Services ("OMS") to the Inspector General repeating what was "reported" to him. *See* (Exec. Summary at 66 n.331.)

- Facts that are Cumulative and/or Prejudicial

The remainder of the selections proffered by Plaintiffs are inadmissible:

  - *There was not a consistent definition of the term "HVD" in the CIA program. See* (Mot. at 23 n.2) (citing Exec. Summary at 425).

This "fact" summarizes information recited elsewhere in the SSCI Summary Report concerning the "shifting" definition of the HVD Program. It is not a factual finding. Moreover, it is cumulative, as Plaintiffs admit that the same information is "apparent from other admissible evidence in the record, including Defendants' own testimony," (*see* ECF 206 at 3), and Plaintiffs can elicit testimony on this topic directly from Defendants at trial.

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- *The CIA's Office of Medical Services (OMS) did not opine as to whether Defendants' methods would cause suffering. See* (Mot. at 23 n.2) (citing Exec. Summary at 420 n.2361).

This excerpt is inadmissible double hearsay and prejudicial, as it summarizes a quotation from an OMS memorandum that appeared in an email cited in the SSCI Summary Report, from which all sender and recipient information has been redacted. Moreover, it is also cumulative, as Plaintiffs admit that the same information is "supported by other evidence in the record." (ECF 206 at 4.)

- *"[Mitchell], who had never conducted an actual interrogation, encouraged the CIA to focus on developing 'learned helplessness' in CIA detainees." See* (Mot. at 24) (citing Exec. Summary at 463-64).

This assertion is inadmissible double hearsay and prejudicial, as it summarizes information from "Volume I" of an unidentified source and an email from which both the sender and recipient information has been redacted. Moreover, it is cumulative, as Plaintiffs can elicit testimony on this topic directly from Defendant Mitchell at trial.

- *"Prior to [Jessen's] departure from the detention site on November [], 2002, [a few days before the death of Gul Rahman], [Jessen] proposed the use of the CIA's enhanced interrogation techniques on other detainees and offered suggestions to [ ] [CIA OFFICER 1], the site manager, on the use of such techniques."* (Mot. at 24) (citing Exec. Summary at 54).

This "finding" is inadmissible double hearsay and prejudicial, as the cited source is nearly entirely redacted. Moreover, it is cumulative, as Plaintiffs can elicit testimony on this topic directly from Defendant Jessen at trial.

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- *"[N]umerous individuals had been detained and subjected to the CIA's enhanced interrogation techniques, despite doubts and questions surrounding their knowledge of terrorist threats and the location of senior al-Qa'ida leadership."* (Mot. at 24) (citing Exec. Summary at 465).

This selection is inherently unreliable, as even the SSCI Summary Report does not provide a supporting source, but rather, indicates the same information is "detailed elsewhere." Therefore, because Defendants cannot test the veracity of this fact, it should be excluded.

- *"In May 2003, a senior CIA interrogator would tell personnel from the CIA's Office of Inspector General that [Mitchell] and [Jessen's] SERE school model was based on resisting North Vietnamese 'physical torture' and was designed to extract 'confessions for propaganda purposes' from U.S. airmen 'who possessed little actionable intelligence.'"* (Mot. at 24) (citing Exec. Summary at 33).

Lastly, this passage is inadmissible double hearsay and prejudicial, as it summarizes statements made during an interview of a redacted source, wherein the source relayed statements made by an unidentified "senior CIA interrogator."

III. CONCLUSION

For the reasons stated above, Defendants respectfully request that the Court deny Plaintiffs' consolidated Motion *in Limine* in their entirety.

DATED this 10th day of August, 2017.

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CERTIFICATE OF SERVICE

I hereby certify that on the 10th day of August, 2017, I electronically filed the foregoing document with the Clerk of Court using the CM/ECF system which will send notification of such filing to the following:

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