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

| | |
|---|---|
| SULEIMAN ABDULLAH SALIM, et al.<br><br>Plaintiffs,<br><br>v.<br><br>JAMES ELMER MITCHELL and JOHN "BRUCE" JESSEN,<br><br>Defendants. | NO. 2:15-cv-286-JLQ<br><br>**DEFENDANTS' RESPONSE TO PLAINTIFFS' MOTION FOR PARTIAL SUMMARY JUDGMENT**<br><br>Oral Argument Requested<br><br>Note on Motion Calendar:<br>July 28, 2017, 9:30 a.m., at Spokane Washington |

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## INTRODUCTION

Plaintiffs' *Motion for Partial Summary Judgment* ("Motion") (ECF 178) is fundamentally flawed. Plaintiffs incorrectly assert that "no genuine dispute of material fact" prevents this Court from ruling: (1) Defendants "aided and abetted" Plaintiffs' alleged "torture" and cruel, inhuman, and degrading treatment ("CIDT"); and (2) the CIA subjected Plaintiffs to "torture" and CIDT. As shown, Plaintiffs' Motion fails because Plaintiffs lack evidence necessary to prove the act and intent elements required to impose such sweeping "aiding and abetting" liability; instead, Defendants' *Motion for Summary Judgment* (ECF 169) should be granted as to both Plaintiffs' "aiding and abetting" claims and additional claims.

Plaintiffs' *Statement of Undisputed Material Facts* ("SUMF") (ECF 179) mischaracterizes almost every aspect of the record. For instance, Plaintiffs improperly: (a) ignore the existence of parallel, CIA-run detainee programs operating at multiple detention sites—as well as the fact that Defendants participated in only *one such program*, which did *not* include Plaintiffs; (b) attribute actions to Defendants in which they had no part; (c) omit critical evidence regarding the CIA's command and control of every aspect of the detainee program, including over Defendants; (d) ascribe decisional responsibility solely to Defendants based on documents referencing "the interrogation team"; (e) misrepresent the timeline of events; and finally, (f) fail to address contrary testimony from Defendants (and supporting evidence) regarding a salient lack of intent to cause the specific harm alleged and a break in the causal chain by which Plaintiffs claim to have been harmed. Conversely, Defendants' *Statement of*



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*Undisputed Facts* ("SUF") (ECF 170) presents the full factual record as it actually exists, and demonstrates Defendants' entitlement to summary judgment.

First, Plaintiffs erroneously accuse Defendants of providing the "means" (*actus reus*) by which they were allegedly tortured and/or subjected to CIDT. But the customary international law upon which Plaintiffs rely holds that merely providing the "means" is "not sufficient" where, as here, the accused's contribution to the causal stream leading to the crime was either "insignificant or insubstantial."

The undisputed record reveals that due to the CIA's operational "compartmentaliz[ation]," parallel, CIA-run detainee programs operated at multiple detention sites, including COBALT where Plaintiffs were held. Defendants, however, participated only in the CIA's high-value detainee ("HVD") Program—not the separate detainee program for low- and medium-value detainees, like Plaintiffs. Nor did Defendants' alleged "assistance" have a "substantial" effect on the perpetration of any crime *against Plaintiffs*, as non-HVDs.

Undisputed testimony from Jose Rodriguez ("Rodriguez") of the CIA's Counterterrorism Center ("CTC") establishes that Defendants' so-called "design" of the HVD Program began and ended in July 2002 with the provision of a list of "suggested" "enhanced interrogation techniques" ("EITs") for the CIA's consideration for use on Abu Zubaydah ("Zubaydah"), which were later expanded by the CIA to other HVDs. There is no connection between the EITs proposed by Defendants and those allegedly applied to Plaintiffs. And the EITs proposed by Defendants do not mirror the techniques actually applied to Plaintiffs. Accordingly, there is a clear break in the necessary causal chain.



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Nor did Defendants decide which detainees would be part of the HVD Program and/or subjected to EITs. The record also reveals that EITs were not intended for use on non-HVDs, like Plaintiffs. So while Plaintiffs take issue with *the CIA's* decision to use EITs, they fail to appreciate that "simply doing business" with a state that allegedly violates the law of nations is insufficient to create liability *as to Defendants* under customary international law. Plaintiffs also overlook the distinction noted in the cases they cite about how "aiding a criminal is not the same thing as aiding and abetting [his or her] alleged human rights abuses." The undisputed record reveals Defendants did *not* aid and abet the CIA's treatment of Plaintiffs—with two of whom Defendants never even came into contact.

Second, the record reveals that Defendants lacked the requisite mental state (*mens rea*) for "aiding and abetting." This too is fatal to Plaintiffs' claims.

Plaintiffs' remaining argument, that no genuine dispute of material fact exists regarding the CIA subjecting them to "torture" and CIDT, does not change the result. Regardless of whether Plaintiffs were subjected to "torture" and CIDT—which Defendants do not admit—this Court need not decide the issue to deny Plaintiffs' Motion (or to grant Defendants' *Motion for Summary Judgment*). Rather, as the Ninth Circuit did in *Padilla v. Yoo*, 678 F.3d 748 (9th Cir. 2012), this Court can "assume without deciding" that Plaintiffs were subjected to "torture" and CIDT, so as to focus on what really matters for aiding and abetting liability: Defendants' lack of "substantial" assistance (*actus reus*) and intent (*mens rea*). This practical approach is especially appropriate here, given that the Ninth Circuit



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also held that from 2001-03 there was "considerable debate" over the definition of torture "as applied to specific interrogation techniques." *Id.* at 767.

Alternatively, if the Court chooses to analyze whether Plaintiffs were, in fact, subjected to "torture" and/or CIDT, it is worth noting that: (a) the techniques to which Plaintiffs were allegedly subjected were *not* all on Defendants' list of suggested techniques and were not applied in accordance with Defendants' proposal; (b) Defendants did *not* decide EITs would be used on Plaintiffs Salim and Ben Soud; (c) Jessen only applied a single "insult slap" in a *non*-EIT context to Rahman under the authority of the Chief of Base ("COB") for COBALT; and (d) the manner of Plaintiff Rahman's death—which likely would have been prevented had Jessen's suggestions for his treatment been implemented—had *nothing* to do with the application of EITs. Further, Plaintiffs misrepresent their cited authority.

At bottom, Plaintiffs have not and cannot substantiate a claim for "aiding and abetting" liability. The Motion should be denied in its entirety, and summary judgment granted *for Defendants* as to Plaintiffs' "aiding and abetting" claim.

## I. PLAINTIFFS' RECITATION OF THE FACTUAL BACKGROUND OVERREACHES AND MISCHARACTERIZES THE RECORD.

Defendants detail Plaintiffs' numerous misrepresentations and unsupported assertions in their *Response to Plaintiffs' Statement of Undisputed Material Facts* ("Resp. SOF"). But some of the most egregious misrepresentations must be pointed out here as well, as the Motion seeks to stretch these "facts" to weave a narrative that is simply wrong on many critical points.



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- *Statements within cables that were drafted and sent by the CIA cannot be attributed to Defendants*. The sender and recipient of almost every CIA cable are redacted under the State Secrets Privilege. Resp. SOF ¶¶ 31, 32, 35, 38-41, 43, 44, 46, 50, 53. Defendants testified it was the COB at each black-site—not Defendants—who sent the cables. SUF ¶ 298. Defendants did not review cables before or after they were sent, and, in 2002, were not authorized to even access the system on which cables were drafted. *Id.* For example, the record does not support attributing statements such as "the aggressive phase … should be used as a template for future interrogation of high value captives" to Defendants. Mot. at 7. Almost every statement Plaintiffs attribute to Defendants comes from such a misuse of CIA cables; proper attribution of these cables to the CIA author would further support how Defendants acted at the CIA's direction. SUF ¶¶ 40-44.

- *Defendants did not determine when to stop the use of EITs on Zubaydah*. After applying EITs on Zubaydah for about a week, Defendants specifically recommended they stop. SUF ¶¶ 190-92. The cable traffic shows the interrogation team thought it was "highly unlikely [Zubaydah] has actionably new information about current threats to the United States." Resp. SOF ¶ 35. Nevertheless, in cables, CIA Headquarters ("HQS") ordered Defendants to continue to apply EITs. SUF ¶¶ 194-95. HQS indicated that the "subject [Zubaydah] is withholding important details, in our view, on operational activity in the United States." SUF ¶ 194; Tomkins Decl., Exh. 60, ECF 177-20, at US Bates 002351; *see also* SUF ¶ 200 (CTC analysts remain concerned Zubaydah was not "compliant" because when he was captured, the CIA discovered pre-recorded tapes



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to celebrate another major U.S. attack). Defendants were not permitted to stop using EITs until HQS—not Defendants—determined Zubaydah was cooperating. SUF ¶ 207. Plaintiffs' inaccurate assertions that Defendants desired to "continu[e] to torture" Zubaydah, and that Defendants were in control of when or how long the EITs would be applied, are not supported by the factual record. Mot. at 6.

- *The goal of EITs was not to induce "learned helplessness" as defined by Dr. Martin Seligman, which leads to a feeling of depression, passivity, and withdrawal*. Plaintiffs erroneously repeat claims that Defendants applied EITs with the goal of inducing "complete helplessness" without support in the record. Mot. at 5-6. Defendants have time and again explained that the purpose of the EITs was to induce a feeling of helplessness similar to that experienced by a SERE trainee, so that a detainee would look for a way out and be willing to reliably answer the questions posed by specialists. SUF ¶¶ 53-56. Defendants specifically warned *against* inducing the type of "learned helplessness" described by Dr. Seligman because it would inhibit such intelligence-gathering efforts. SUF ¶¶ 54, 109; Resp. SOF ¶ 128. Further, Jessen testified that CIA officers did not always understand the nuances between helplessness to induce cooperation and "learned helplessness," which led them to use such terms incorrectly. SUF ¶¶ 57-58.

- *Jessen did not conclude Rahman was a sophisticated resister because he "complained about poor treatment" and the cold, nor did Jessen instruct COBALT interrogators to view Rahman's statements as "resistance" tactics*. Jessen directly contradicted these statements. Jessen testified that, to his knowledge, Rahman did not complain about poor treatment or use health and



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welfare behaviors—such as saying "I'm cold"—as a resistance technique. Resp. SOF ¶¶ 68, 79, 81. Rather, Jessen asked the guards at COBALT to give Rahman a blanket, and tried repeatedly to get him medical attention. Resp. SOF ¶ 79; SUF ¶ 314. Had Rahman used being "cold" as a resistance technique, Jessen testified that he would have had a medical doctor determine if it was, in fact, "too cold" before determining this to be a "resistance technique." Resp. SOF ¶ 79.

- *Plaintiffs cannot disclaim their ties to terrorist activities.* The record does not indicate that the Department of Defense ("DoD") examined the evidence against Salim and determined it had "erred." Mot. at 13. Salim admitted attending the Harkati Hansar camp with Fahid Mohamed Ally Msalam, who was considered by the U.S. to be a 1998 East African embassy bombing fugitive. SUF ¶ 267. The DoD released Salim with a document that stated only he "has been determined to pose no threat to the United States Armed Forces or its interests in Afghanistan." *Id.* Similarly, Ben Soud, in his dealings with the Libyan Islamic Fighting Group ("LIFG"), had meetings with Abu Faraj al-Libi, who Ben Soud knew was a member of al-Qa'ida. SUF ¶¶ 275-76. And Ben Soud also knew that after September 11, 2001, members of LIFG started cooperating with al-Qa'ida. *Id.* Lastly, Rahman was a suspected Afghan extremist associated with the Hezbi Islami Gulbuddin organization and identified by CTC as being close with individuals who were members of al-Qa'ida. SUF ¶ 283. Rahman was also considered an al-Qa'ida facilitator and, during his captivity, admitted to fighting in the jihad. *Id.*



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## II. THE RECORD UNDERCUTS PLAINTIFFS' CLAIM THAT DEFENDANTS ARE LIABLE FOR AIDING AND ABETTING.

Plaintiffs assert that the interrogation methods applied to them were "part of a standardized program of systematic abuse that Defendants designed, tested, implemented, and promoted, and from which they handsomely profited." Mot. at 1. As discussed in turn below, no part of this unfounded allegation is accurate.

As an initial matter, Defendants were *only* involved in the HVD Program, and Plaintiffs were not HVDs. SUF ¶ 245-52. The CIA's HVD Program had nothing to do with Plaintiffs' interrogation. SUF ¶¶ 245-48, 253, 269-73, 278-282, 285. The undisputed evidence negates Plaintiffs' assertion that their interrogation was impacted by anything done by Defendants.

Second, the CIA's program for HVDs was not "standardized." Rather, the CIA created *customized* interrogation plans for *particular* HVD detainees on a daily basis. SUF ¶ 217, 239. These interrogation plans required both before and after-the-fact oversight, as well as CTC and HQS pre-approval before EITs were applied. SUF ¶ 233, 238-42. And, in fact, the treatment each Plaintiff received diverged from the list of EITs Defendants provided the CIA on July 8, 2002, ("July 2002 Memo"), and also varied among the Plaintiffs—despite the fact they were interrogated at COBALT around the same time. SUF ¶¶ 129-31, 270, 280, 303-04.

Third, the CIA's HVD Program was purposefully designed *not* to cause "systematic abuse"—a vague term Plaintiffs do not even attempt to define. SUF ¶¶ 105, 168. To the extent Plaintiffs refer to the type of "serve pain and suffering" required to meet the legal definition of "torture" or CIDT, this too was not the intention of the HVD Program. Before the first EIT was applied to Zubaydah, the



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CIA and the Department of Justice ("DOJ") *independently* assessed the legality of each EIT (individually, and in combination), as applied to detainees—as opposed to students at the Survival, Evasion, Resistance, and Escape ("SERE") School—and determined the EITs were legal under both domestic and international law. SUF ¶¶ 59-66, 104-05, 113, 139-52. This specific approval was communicated to Defendants, who relied on it in good faith. SUF ¶¶ 159, 173. Moreover, every detainee's mental and physical state was continually assessed by a diverse *team* of CIA physicians and psychologists—not limited to Defendants—to ensure that the detainee's health was not threatened, and that he had the capacity to provide reliable intelligence. SUF ¶ 170.

Fourth, Defendants did not "design" the HVD Program, let alone any "program" under which Plaintiffs were interrogated, for the CIA. SUF ¶¶ 127, 130, 216, 235, 257. In fact, as this Court observed, former CIA General Counsel John Rizzo described himself as "one of the key legal architects of the CIA's EIT Program, which [he] monitored and oversaw from its beginning to end." (ECF 188 at 19; ECF 80-15, ¶ 68.) Conversely, Defendants' involvement was limited to suggesting potential EITs for Zubaydah, and then providing a detailed list of techniques that had been used at SERE for fifty years. SUF ¶¶ 127, 130.

Fifth, Defendants did not "test" the EITs for use on detainees. For instance, while the Zubaydah interrogation plan may have changed based on his idiosyncratic resistance and/or the effectiveness of the techniques, Plaintiffs offer no evidence Defendants proposed that other *non*-HVD detainees be similarly interrogated, or that Defendants proposed individuals other than Defendants (who,



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at the time, believed that they were the only ones authorized to use EITs) should apply EITs to detainees. SUF ¶¶ 137, 209-10, 223. Nor is there any evidence Defendants decided which EITs to "test." As this Court has observed, the declaration of Rodriguez, Chief Operating Officer of CTC, firmly asserts that "the CIA and not Mitchell and Jessen, determined which of the proposed methods of interrogation would be used on a subject." (ECF 188 at 19; ECF 80-14). Defendants cannot be held liable if the CIA chose to use the Zubaydah interrogation as a "template" for the mid- or low-value detainee program without their knowledge/involvement. Resp. SOF ¶¶ 31, 32, 35, 38-41, 43, 44, 46, 50, 53.

Sixth, Defendants did not "implement" the use of EITs on Plaintiffs. Neither Defendant ever saw Plaintiffs Salim and Ben Soud—or even knew they existed before this suit. SUF ¶¶ 272, 281. As for Rahman, Mitchell did not "implement" the use of EITs on him, and only observed Rahman once in a non-coercive custodial questioning session at COBALT. SUF ¶ 308. Jessen also did not "implement" the use of EITs on Rahman; on the contrary, after administering a single "insult slap" for assessment purposes under the authority of the COB at COBALT, Jessen repeatedly advised that EITs should *not* be applied, as they were "not . . . the first or best option to yield positive results." SUF ¶¶ 296-97, 309.

Seventh, Defendants did not "promote" the use of EITs. Notably, after the September 11, 2001, attacks, the CIA approached Mitchell to draft a paper on terrorists' potential resistance to interrogation after the *Manchester Manual* was stolen, and believed to have fallen into the hands of known terrorist organization al-Qa'ida. SUF ¶¶ 21-24. Following the completion of this task, Mitchell was


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asked for suggestions on how to combat an increased resistance posture—to which Mitchell said that the CIA should consider looking to the techniques used at SERE. SUF ¶¶ 102-05. But even then, while discussing what would become the EITs, Mitchell did not believe he would be the one to apply the techniques. SUF ¶ 106.

Rather, it was a request by the CIA, and Mitchell's desire to prevent another catastrophic attack on the United States, that convinced him to agree to serve as the interrogator. SUF ¶ 114; Paszamant Decl., Ex. 2, Deposition of Dr. James Elmer Mitchell ("Mitchell Tr.") at 219:19-220:8; Ex. 1, Deposition of Dr. John Bruce Jessen ("Jessen Tr.") at 106:4-23. And it was only then that Mitchell suggested the CIA should consider reaching out to Jessen, who had even more experience with SERE. SUF ¶ 115-16. Further, Defendants were also not involved in the CIA or DOJ's Office of Legal Counsel ("OLC") legal review, analysis, or ultimate approval of the EITs. SUF ¶ 66. Once the use of EITs were underway, Rodriguez testified the CIA was fully capable of conducting its own assessment of their effectiveness—which Rodriguez described as "incredible." SUF ¶¶ 212, 214.

Eighth, and finally, Plaintiffs' assertion that Defendants "handsomely profited" from the use of EITs is inaccurate. Defendants were paid a reasonable rate for their services commensurate with their task. SUF ¶¶ 336; Tompkins Decl., ECF 177-36, Exh. 76. As Mitchell testified, his compensation was *less* than other deployed psychologists received at places like Guantanamo. SUF ¶ 15. And, as with every CIA contract, any adjustment was vetted and approved by the contracting department. Paszamant Decl., Ex. 1, Jessen Tr. at 106:4-23; *id.* Ex. 2, Mitchell Tr. at 164:8-17. In short, Defendants were paid a competitive rate for



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their time performing complex, potentially-lifesaving work which, according to Rodriguez, Defendants were uniquely qualified to perform. SUF ¶¶ 29-34. There is no evidence Defendants were paid more if the CIA ordered other interrogators to apply EITs to detainees (or at other locations) with whom Defendants had no involvement. And while Defendants later formed *Mitchell, Jessen & Associates* ("MJA") to meet the CIA's additional staffing needs, this was in 2005—well *after* Plaintiffs were released from CIA custody—and is thus irrelevant. SUF ¶ 336.

## III. PLAINTIFFS OFFER NO EVIDENCE THAT DEFENDANTS AIDED AND ABETTED THE CIA IN THE COMMISSION OF A CRIME.

Plaintiffs must prove that Defendants provided "substantial" support (*actus reus*) and had the requisite mental state (*mens rea*) in the commission of each alleged ATS violation for aiding and abetting liability. Plaintiffs can show neither.

### A. Defendants Did Not Provide "Substantial" Assistance in the Commission of a Crime.

The parties agree that the "*actus reus* of aiding and abetting is providing assistance or other forms of support to the commission of a crime." *Doe I v. Nestle USA, Inc.*, 766 F.3d 1013, 1026 (9th Cir. 2014). International law further requires that this assistance be "substantial."[1] *Id.* Here, the alleged "assistance"

[1] *Nestle* held that three sources of customary international law were "recognized as authoritative" for ATS claims: decisions from the post-World War II International Military Tribunal at Nuremberg; decisions from the International Criminal Tribunals for Rwanda and the former Yugoslavia (ICTR and ICTY, respectively); and decisions from the Special Court for Sierra Leone (SCSL). *Id.* at 1020.



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Defendants provided to the CIA in the form of the July 2002 Memo was not "substantial" as to Plaintiffs' flawed allegations of "torture" and/or CIDT.

**1. Plaintiffs' Domestic ATS Authority is Not Persuasive.**

In discussing the type of assistance considered "substantial," Plaintiffs rely on *S. African Apartheid Litig. v. Daimler AG*, 617 F. Supp. 2d 257 (S.D.N.Y. 2009). Mot. at 16-17. *S. African Apartheid* is not persuasive; it is an out-of-circuit district court opinion that pre-dates, and is undercut by, the Second Circuit's ruling in *Presbyterian Church of Sudan v. Talisman Energy, Inc.*, 582 F.3d 244 (2d Cir. 2009). Specifically, *Talisman* held that, "to be actionable, assistance must be both '*practical' and* have a 'substantial effect on the perpetration of the crime.'"[2] *Id.* at 258 (emphasis added).

Notably, the court in *S. African Apartheid* held both that "simply doing business" with a state that violates the law of nations is insufficient to impose "aiding and abetting" liability, and that not all "aid" should be treated equally:

> It is (or should be) undisputed that simply doing business with a state or individual who violates the law of nations is insufficient to create liability under customary international law. International law does not impose liability for declining to boycott a pariah state or to shun a war criminal. *Aiding a criminal 'is not the same thing as aiding and abetting [his or her] alleged human rights abuses*.'

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[2] The Ninth Circuit favorably cited *Talisman* in *Nestle*, 766 F.3d at 1023-24. A separate panel of the Second Circuit has also held that an ATS plaintiff's "reliance" on *S. African Apartheid* was "unavailing" after *Talisman*. *See Liu Bo Shan v. China Constr. Bank Corp.*, 421 Fed. Appx. 89, 94-95 (2d Cir. 2011).



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*Id.* at 257 (emphasis added). Other courts agree. *See 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) (merely providing financing as part of an ordinary commercial transaction does not satisfy the *actus reus* requirement); *see also Liu Bo Shan*, 421 Fed. Appx. at 94-95 (allegations that a bank contacted the police and provided false evidence to induce Liu's arrest did not constitute "substantial assistance" to the police in "perpetuating the alleged cruel treatment, or prolonged arbitrary detention" that Liu suffered).

Here too, Defendants "simply [did] business" with the CIA per their contracts by providing a list of options for the Zubaydah interrogation (and other HVDs). SUF ¶¶ 32, 40-43, 211. At no time did Defendants decide who would be part of the HVD Program, nor play a role in deciding how Plaintiffs Salim and Ben Soud would be interrogated. SUF ¶¶ 130, 216. And as this Court previously observed, "no one would ever be convicted of aiding and abetting by setting forth, here's options that you can utilize" if they were not also deciding who would be subjected to the program. SUF ¶ 341-42. Providing the July 2002 Memo—which, again, was the full extent of Defendants' "design" of the HVD Program—can "hardly be said to be a crime." *S. African Apartheid*, 617 F. Supp. 2d at 258 (citing *United States v. Von Weizsacker ("The Ministries Case")*, *in* 14 *Trials of War Criminals Before the Nuremberg Military Tribunals*, at 621-22 (1950)).

Plaintiffs confuse aiding the CIA in deciding how to interrogate Zubaydah with aiding the CIA's "alleged human rights abuses" as to the treatment of all detainees. But if abusive treatment occurred at *other* sites unknown to Defendants,



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in connection with detainees for which Defendants either had no contact (Salim and Ben Soud) or such minimal contact that it cannot be plausibly considered "torture" or CIDT (Rahman), it was not caused by Defendants' acts. As in *Talisman*, there is no "practical" connection between Defendants' July 2002 Memo and Plaintiffs' alleged injuries. This is true even if Defendants' recommendations were being used "beyond [their] … purpose" without Defendants' knowledge. *See Doe v. Cisco Sys.*, 66 F. Supp. 3d 1239, 1248 (N.D. Cal. 2014); SUF ¶ 245-48.

Plaintiffs further rely on *S. African Apartheid* to argue that the "provision of the means by which a violation of the law is carried out is sufficient to meet the *actus reus* requirement … under customary international law." Mot. at 17. But *Prosecutor v. Taylor*, cited by both *Nestle* and Plaintiffs, rejected the theory that "merely providing the means" was sufficient. Mot. at 16. As *Taylor* explained:

> *Merely providing the means to commit a crime is not sufficient to establish that an accused's conduct was criminal…. Similarly[,] an accused's contribution to the causal stream leading to the commission of the crime may be insignificant or insubstantial, precluding a finding that his acts and conduct had a substantial effect on the crimes*. In terms of the effect of an accused's acts and conduct on the commission of the crime through his assistance to a group or organisation [sic], there is a readily apparent difference between an isolated crime and a crime committed in furtherance of a widespread and systematic attack on the civilian population.

Case No. SCSL-03-01-A, ¶ 391 (Sept. 26, 2013) (emphasis added).

Here, as in *Taylor*, Defendants' "contribution to the causal stream" (*i.e.*, the provision of the July 2002 Memo) leading to "the commission of the crime" (*i.e.*, the alleged torture and CIDT of Plaintiffs at COBALT outside the HVD Program)



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is similarly "insignificant or insubstantial." This is especially true as Defendants' assistance was provided to an "organisation [sic]"—the CIA—that was making all decisions on detainees. Plaintiffs' "provision of the means" theory is unsupported by customary international law, and should be rejected. *Id.* ¶ 390 & n.1231 ("The jurisprudence is replete with examples of acts that may have had some effect on the commission of the crime, but which were found not to have a sufficient effect on the crime for individual criminal liability to attach.") (collecting cases); *Prosecutor v. Fofana and Kondewa*, Case No, SCSL-04-14-A, Judgment, ¶¶ 97, 99, 102 (May 28, 2008) (that the accused provided arms, ammunition and a vehicle to support a military attack was not sufficient to eliminate all reasonable doubt as to whether their acts had a substantial effect on later committed crimes).

Lastly, Plaintiffs incorrectly assert that "[i]t does not matter that Defendants did not personally torture all three Plaintiffs or even know who they were—aider and abettor liability does not require any such direct action." Mot. at 19. In support, Plaintiffs rely exclusively on a *footnote* in a district court opinion on a motion to dismiss, *Doe v. Drummond Co.*, 2010 U.S. Dist. LEXIS 145386, at *39 n.24 (N.D. Ala. Apr. 30, 2010), stating the court could not "find authority" for the contention that the defendant "must have known the identities of those murdered, and have ordered the deaths of those specific individuals." The *Drummond* footnote was discussing the *mens rea*—not *actus reus*—element for aiding and abetting. *Id.* at *38-39. But, even setting that aside, the plaintiff's contention was that "Drummond purposefully participated in murders *along its rail lines*"—providing a causal, geographic limitation, even if the "identities" of the alleged



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victims were unknown. *Id.* at *39 (emphasis added).[3] Likewise, under "authoritative" customary international law, that an individual did *not* "personally" interrogate a detainee does, in fact, "matter" for *actus reus*. *See* Section III.A.2, *infra*. *Drummond* is thus unhelpful to Plaintiffs.

**2. Authoritative Customary International Law Demonstrates a Lack of *Actus Reus* to Support Human Rights Abuses.**

Examples culled from "authoritative" customary international law cases further illustrate Defendants' lack of "substantial assistance" to aid torture/CIDT.

In *The Ministries Case*, the Nuremberg Tribunal found Karl Rasche, a banker who had facilitated large loans to a fund at the personal disposal of Heinrich Himmler—head of the S.S.—not guilty. 14 *Trials of War Criminals Before the Nuremberg Military Tribunals*, at 621-22. The Tribunal analogized the provision of the loan to one who offers "supplies or raw materials" to a "builder of a house that the seller knows will be used for an unlawful purpose." *Id.* at 621.

Here, by providing a list of pre-existing SERE techniques to the CIA—which had already decided to use an approach on Zubaydah "different" from the FBI's—Defendants, at most, provided the "raw materials." SUF ¶ 33. The CIA's later use of those "raw materials" *outside* the HVD Program as part of a separate program for *non*-HVDs, including Plaintiffs, falls outside the "natural[] result" of Defendants' acts. SUF ¶¶ 216, 245, 248; *see Prosecutor v. Tadic*, Case No. IT-94-

[3] *Drummond* also notes that allegations about defendants' intent to participate in the "course of hostilities" may not be sufficient to "clear the hurdle of a motion for summary judgment"—but that this was a "question for the future." *Id.* at *51.



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1-T, Opinion & Judgment, ¶ 692 (May 7, 1997) (accused only "responsible for all that naturally results from the commission of the act in question").

*Prosecutor v. Simić et al.*, Case No. IT-95-9-T, Judgment (Oct. 17, 2003), is instructive, as it discusses the *actus reus* requirement in the context of detainee interrogations. In *Simić*, the Trial Chamber was "not satisfied that Simo Zarić aided and abetted the joint criminal enterprise to commit acts of unlawful arrest or detention as persecution." *Id.* ¶ 1000. Specifically, the *Simić* court held:

> In his position as Assistant Commander for Intelligence, Reconnaissance, Morale and Information [Zarić] was responsible for conducting interrogations of some detainees at the SUP and in Brčko. The Trial Chamber does not find that these acts gave substantial assistance to the commission of acts of unlawful arrest, detention and confinement of non-Serbs, committed by the joint criminal enterprise. The Trial Chamber does not place any weight on his appointment as Chief of National Security, and finds that he did not conduct any interrogations of detainees during the brief period of this appointment. Simo Zarić took steps to obtain the release of detainees, advocating the release of … members of the 4th Detachment.
>
> In his role of conducting interrogations of detainees, Simo Zarić was frequently present at the detention facilities … where he saw detainees and the conditions that they were held in. He could see how the police, paramilitaries and JNA soldiers were unlawfully arresting and detaining people[.] Although Simo Zarić had knowledge of the unlawful arrest and detention of non-Serbs …, his acts, that included conducting interrogations of detainees, did not give substantial assistance to the joint criminal enterprise committing these crimes.

*Id.* ¶¶ 1000, 1002.

Here, as in *Simić*, while Defendants interrogated Zubaydah and other HVDs, they did *not* interrogate Plaintiffs Salim and Ben Soud. Nor did Mitchell ever



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apply EITs to Rahman. As for Jessen, his single "insult slap" for assessment purposes on Rahman cannot plausibly be considered "torture" or CIDT. In fact, in much the same way that Zarić took steps to obtain the release of detainees, Jessen advised that EITs *not* be used on Rahman, and "advocate[ed]" to improve the conditions of his detention—which would have likely prevented his death. SUF ¶ 319. Thus, Defendants' actions did not aid the CIA's alleged abuses *of Plaintiffs*.

Next, in *Prosecutor v. Furundžija*, Case No. IT-95-17/1/T, Judgment (Dec. 10, 1998), also cited by Plaintiffs, Mot. at 17, the court looked to two cases in the Nuremberg trials to delineate the bounds of the required *actus reus*:

> The cases of Ruehl [an officer] and Graf [a non-commissioned officer] … help[] delineate the *actus reus* of the offence. The Tribunal held that both had the requisite knowledge of the criminal activities of the organisations [sic] of which they were a part. Ruehl's position, however, was not such as to 'control, prevent, or modify' those activities. His low rank failed to 'place him automatically into a position where his lack of objection in any way contributed to the success of any executive operation.' He was found not guilty.

*Id.* ¶ 219 (citing *Trial of Otto Ohlendorf and Others (Einsatzgruppen)*, in *Trials of War Criminals Before the Nuremberg Military Tribunals under Control Council Law No. 10*, Vol. IV, p.581). As to Graf, the court held that since there was no evidence in the record he "was at any time in a position to protest against the illegal actions of the others, he cannot be found guilty as an accessory under counts one and two [war crimes and crimes against humanity] of the indictment." *Id.* 220.

*Furundžija* also discussed the British case of *Zyklon B* involving poison gas used in the extermination of allied nationals interned in concentration camps. *Id.* ¶



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222 (citing *Trial of Bruno Tesch and Two Others*, British Military Court, Hamburg, 1-8 March 1946, Vol. I, Law Reports, p. 93). In *Zyklon B*, the "owner and second-in-command of the firm were found guilty; Drosihn, the firm's first gassing technician, was acquitted." *Id.* Explaining this result, the court noted:

> The functions performed by Drosihn in his employment as a gassing technician were an integral part of the supply and use of the poison gas, but this alone could not render him liable for its criminal use even if he was aware that his functions played such an important role in the transfer of gas. Without influence over this supply, he was not guilty.

*Id.* ¶ 222-223.

Here, it is undisputed that, as independent contractors serving on a larger interrogation team, Defendants lacked authority to "control, prevent, or modify" the CIA's decision to use EITs on detainees. As Rodriguez testified, "[e]verybody knows that independent contractors [like Defendants] don't make decisions, that the staff people are the ones making decisions." SUF ¶ 235. It is also undisputed that interrogation recommendations were made by the "interrogation team," which itself was required to "consult closely with CTC/LGL as to the specific means and methods envisioned." SUF ¶ 240. For instance, even when Defendants wanted to stop waterboarding Zubaydah, they had to obtain HQS approval to do so—which was denied. SUF ¶¶ 190-205. And like Ruehl and Graf in the Nuremberg trials, and Drosihn in *Zyklon B*, even if Defendants' played an "integral part of the supply and use of the" EITs (which they did not) this too could not render them labile for the CIA's alleged "criminal use" *on Plaintiffs*, as Defendants had no "influence" over the application of EITs on such unknown detainees selected by the CIA.



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### 3. There is a Break in the Casual Chain Between the EITs Defendants Suggested the CIA Use on Zubaydah and Other HVDs and the Techniques Allegedly Applied to Plaintiffs.

Plaintiffs Salim and Ben Soud's claim that they were "subjected to a systematic program based directly on Defendants' design (and relying on the precise methods they promoted and tested)," Mot. at 18, is contrary to the record. Neither Plaintiff was in the HVD Program. SUF ¶¶ 27, 269, 279, 321. Nor were they subjected to the "precise methods" suggested by Defendants for HVDs. SUF ¶¶ 270-71, 279-80. Salim and Ben Soud were allegedly exposed to techniques outside the July 2002 Memo, such as "nudity"; "dietary" manipulation; "abdominal slap"; and "water dousing"—*none* of which Defendants recommended. SUF ¶¶ 127-29, 131, 270-71, 279-80. Rahman was subjected to a single "insult slap" for assessment purposes and then died of "hypothermia" due to exposure (not an EIT). SUF ¶¶ 289, 291-93, 319, 327-30, 322; 329. Salim and Ben Soud also assert they were placed in a "confinement box." (ECF No. 1 ¶¶ 74, 86, 92-93, 121, 141.) But even the use of this "confinement box" differed from the July 2002 Memo. *See* Resp. SOF ¶¶ 94, 115. To the extent the CIA provided COBALT with guidance as to interrogation methods in January of 2003, Mot. at 7-8, Defendants were not aware of it. SUF ¶¶ 227-31, 261. The operation at COBALT evolved separately from the HVD Program and without Defendants' knowledge. SUF ¶¶ 246-48. There is a clear break in the causal chain required for *actus reus*.

## B. Defendants Lack the *Mens Rea* for Aiding and Abetting Liability.

Plaintiffs have also failed to prove Defendants had the *mens rea* required to aid and abet "torture" or CIDT. Defendants' *Motion for Summary Judgment*



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explains how, given the vagaries in the Ninth Circuit's *Nestle* opinion[4], decisions from sister circuits, and subsequent in-circuit district court opinions, the *mens rea* standard requires a "purpose" to "facilitate[e] the criminal act." (ECF 169 at 25-26.) Defendants' Motion also demonstrates how, even under a lower "knowledge" standard, Plaintiffs' "aiding and abetting" claim fails. (*Id.* at 29-32.)

Plaintiffs do not identify a *mens rea* standard. Instead, they argue it is sufficient if Defendants "sought to accomplish their own goals" by "purposefully supporting" international law violations, and that it is "relevant" if Defendants "obtained a direct benefit" from the commission of the violation. Mot. at 17. Even if the Court adopted this formulation, Plaintiffs cannot satisfy their own test.

Plaintiffs claim, with no support in the record, that Defendants "unquestionably intended to provide assistance in the extreme abuse of prisoners." Mot. at 19. But, as the record reveals, Defendants believed the EITs were legal and appropriate based on the OLC memos, CTC's legal oversight, and the constant assurances provided by HQS in the form of daily approvals of detainee interrogation plans. SUF ¶¶ 59-80, 67, 77-79, 99, 120-23, 133, 139-173, 189, 205, 217; *United States v. Smith*, 7 F. App'x 772, 775 (9th Cir. 2001). Defendants repeatedly testified they *lacked* any intent to harm detainees; started with the "least

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[4] Specifically, the Ninth Circuit in *Nestle* declined to decide whether a "purpose or knowledge standard applies to aiding and abetting ATS claims"—instead holding that "[a]ll international authorities agree that '*at least* purposive action … constitutes aiding and abetting[.]'" 766 F.3d at 1024 (emphasis in original).


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intrusive" EITs; and obtained specific approval for any EIT used in the HVD Program. SUF ¶¶ 128, 133, 167-68, 220, 243, 293. Assuming *arguendo* Defendants had an overarching "purpose," it was to supply the CIA with a "safe,"[5] alternative approach to the Zubaydah interrogation that was "different" from the ineffectual techniques used by the FBI. SUF ¶ 33. Moreover, their "purpose" was not to rely on or research Dr. Seligman's "learned helplessness" paradigm—which Defendants repeatedly explained to the CIA was not a desired condition in detainees. SUF ¶¶ 54, 109. Nor was their "purpose" to facilitate "international law violations" in connection with interrogations of *unknown* detainees (like Plaintiffs), in an *unknown* CIA-run program for low- and medium-value detainees, at *unknown* detention sites (like COBALT) conducted by *unknown* interrogators. *See Tadic*, Case No. IT-94-1-T, Opinion & Judgment, ¶ 688 ("an individual who provides some type of assistance to another individual without knowing that this assistance will facilitate the commission of a crime would not be held accountable").

Plaintiffs' additional contention that Defendants "assisted and encouraged the expansion of their program to additional prisoners" after Zubaydah is also incorrect. Mot. at 20. Defendants did not decide (or "assist" the CIA in deciding) whether to expand the HVD Program to "additional prisoners." SUF ¶¶ 216, 222-24. Rather, *the CIA* decided how to classify detainees, as well as which detainees

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[5] Mitchell testified the EITs proposed for Zubaydah were safer than they might have been had they not been guided by SERE techniques. (Paszamant Decl., Exh. 2, Mitchell Tr. at 280:12-281:3.)



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to interrogate using EITs. SUF ¶¶ 27, 217-18, 252. Tellingly, when given the chance to "expan[d]" the HVD Program to include Rahman, Jessen advised EITs should *not* be applied. SUF ¶ 296.

Next, Plaintiffs' reference to Defendants' awareness of "abusive drift" in interrogations—as supporting an inference that Defendants were aware "prisoners *could* endure" "pain and suffering"—is equally unavailing, and taken entirely out-of-context. Mot. at 20 (emphasis added). Defendants described how they "monitored" and "intervened" in sessions at SERE so as to *prevent* "abusive drift" to maintain the integrity of the process and ensure compliance with legal limitations. Resp. SOF 56; *see also* Paszamant Decl., Exh. 2, Mitchell Tr. at 44:2-14; 54:7-55:7; Exh. 1, Jessen Tr. at 35:24-36:7. And when discussing the operation at COBALT, Jessen further explained that "parameters of what you can and cannot do" were required to *prevent* "drift." Tompkins Decl., Exh. 12, ECF 176-12, at US Bates 1049.

Plaintiffs also emphasize the "benefit" Defendants received from their role in the HVD Program. Mot. at 20-21. But the Ninth Circuit has clarified that merely "intending to profit" does not by itself demonstrate a "purpose" to engage in human rights abuses. *Nestle*, 766 F.3d at 1025 (the "purpose standard is [not] satisfied merely because the defendants intended to profit by doing business in the Ivory Coast. Doing business with child slave owners, however morally reprehensible that may be, does not by itself demonstrate a purpose to support child slavery."). Every independent contractor (and government employee) works "for profit." This is why courts have properly disregarded such a factor in



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determining whether an individual possesses the *mens rea* for "aiding and abetting." Plaintiffs' attempt to imply a nefarious intent from the amount Defendants were paid by the CIA is baseless, as the third panel member in *Nestle* observed. *Id.* at 1033-34 (Rawlinson, J., concurring in part and dissenting in part) (noting "profit-seeking is the reason most corporations exist. To equate a profit-making motive with the *mens rea* required for ATS aiding and abetting liability would completely negate the constrained concept of ATS liability contemplated by the Supreme Court in *Sosa*.").[6] Plaintiffs fail to prove how Defendants "benefited" from their participation aside from any legitimate intent to profit thereby.[7]

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[6] In a later opinion regarding the denial of a petition for a panel rehearing and a petition for rehearing *en banc* in *Nestle*, eight circuit judges, led by Judge Bea, dissented from the majority's decision to deny both petitions. *See Doe v. Nestle USA, Inc.*, 788 F.3d 946, 947 (9th Cir. June 10, 2015). As part of their reasoning, this bloc of judges described the slippery slope of implying an illegal purpose from mere business activities when they explained how: "the panel majority concludes that defendant corporations, who engaged in the Ivory Coast cocoa trade, did so with the purpose that plaintiffs be enslaved, hence aiding and abetting the slavers and plantation owners. *By this metric, buyers of Soviet gold had the purpose of facilitating gulag prison slavery*." 788 F.3d at 946-47 (emphasis added).

[7] Plaintiffs' reference to the "sole source" MJA contract is equally misleading. Mot. at 21. In actually, the CTC approached *Defendants* for expanded services in 2005, not the other way around. (Paszamant Decl., Exh. 7, at US Bates 001630.)



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Lastly, Plaintiffs challenge the assertion that a "belief by an aider and abettor that the criminal conduct he abets is officially authorized does not negate *mens rea*" because "official authorization is an *element* of the offense." Mot. at 18 (emphasis in original). This is mistaken. Indeed, Plaintiffs conflate a pleading requirement to extend ATS liability to "private actors" (like Defendants)[8] with their "good faith" reliance upon advice of counsel intended to negate *mens rea*. *Smith*, 7 F. App'x at 775. The concept of *acting* "under color of official authority"—*i.e.*, operating as an extension of the sovereign—does not necessarily mean the private actor separately *believed* their actions were legal under domestic and international law based on an assessment communicated to them by the sovereign. Authority to act, and a belief an action is "legal," are separate concepts.

As support, Plaintiffs cite to *Siderman de Blake v. Republic of Argentina*, 965 F.2d 699 (9th Cir. 1992). Mot. at 18. But *Siderman* merely referenced the Second Circuit's *Filartiga v. Pena-Irala*, 630 F.2d 876 (2d Cir. 1980), decision for the proposition that "Dr. Filartiga claimed that the defendants' torture of his son,

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[8] *See, e.g., In re Estate of Ferdinand E Marcos Human Rights Litig.*, 978 F.2d 493, 501-02 (9th Cir. 1992) ("only individuals who have acted under official authority or under color of such authority may violate international law"); *Saleh v. Titan Corp.*, 580 F.3d 1, 15 (D.C. Cir. 2009) ("Although torture committed by a state is recognized as a violation of a settled international norm, that cannot be said of private actors."); *Aldana v. Del Monte Fresh Produce, N.A., Inc.*, 416 F.3d 1242, 1247 (11th Cir. 2005); *Doe v. Saravia*, 348 F. Supp. 2d 1112, 1145 (E.D. Cal. 2004).



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perpetrated under color of official authority, violated a norm of customary international law." 965 F.2d at 716. In *Filartiga*, Dr. Filartiga and his daughter Dolly, both citizens of Paraguay living in the U.S., brought an action against the former Inspector General of Police of Paraguay for allegedly torturing Dolly's brother to death in retaliation for Dr. Filartiga's political activities in Paraguay. *Id.* at 878. To maintain jurisdiction over this foreign national, the Second Circuit held "deliberate torture *perpetrated under color of official authority* violates universally accepted norms of the international law . . ., regardless of the nationality of the parties." *Id.* (emphasis added). *Siderman* thus provides no support to Plaintiffs.

## IV. THIS COURT NEED NOT DECIDE WHETHER PLAINTIFFS WERE SUBJECTED TO TORTURE AND CIDT TO DETERMINE THAT DEFENDANTS DID NOT AID AND ABET SUCH CONDUCT.

### A. Whether Plaintiffs Were Subjected To Torture by the CIA Is Irrelevant Where No Aiding and Abetting Liability Exists.

The Supreme Court in *Sosa v. Alvarez-Machain* established that an ATS cause of action may be viable only when it implicates international law norms that are "specific, universal, and obligatory." 542 U.S. 692, 748 (2004). Plaintiffs cannot demonstrate that the general rule against torture applies *specifically* to Defendants' proposed EITs precisely because there were *no clear international norms* concerning these techniques when they were being considered and applied. On the contrary, as the Ninth Circuit has held, from 2001-03 there was "considerable debate" over the definition of torture "as applied to specific interrogation techniques"—including some at issue here. *Yoo*, 678 F.3d at 767.



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"Torture" under the ATS has been interpreted as the intentional infliction of severe pain or suffering, whether physical or mental. *See Aldana,* 416 F.3d at 1251; *Presbyterian Church of Sudan v. Talisman Energy, Inc.,* 244 F. Supp. 2d 289, 326 (S.D.N.Y. 2003); *Chavez v. Carranza*, 413 F. Supp. 2d 891, 899-900 (W.D. Tenn. 2005). But the exact meaning of "severe pain or suffering" is unclear—and was especially uncertain during the relevant time period. *Yoo*, 678 F.3d at 763-64. Likewise, "[t]here does not appear to be a specific standard for determining what constitutes [CIDT]. International law merely provides that 'cruel, inhumane, or degrading treatment' encompasses acts falling short of torture." *Doe I v. Liu Qi*, 349 F. Supp. 2d 1258, 1321 (N.D. Cal. 2004) (citing *Mehinovic v. Vuckovic*, 198 F. Supp. 2d 1322, 1348 (N.D. Ga. 2002)).

Plaintiffs argue there is "no genuine dispute" the treatment they allegedly suffered at the hands of the CIA constitutes "torture" and CIDT. Mot. at 21-30. But this Court need not determine if said techniques constitute torture or CIDT.

In *Yoo*, the Ninth Circuit recognized that "[i]n several influential judicial decisions in existence [in 2001-03], courts had declined to define certain severe interrogation techniques as torture." 678 F.3d at 764. "The court then "assume[d] without deciding that Padilla's alleged treatment rose to the level of torture," *id.* at 768, but noted that whether "it *was* torture was not, however, 'beyond debate' in 2001-03." *Id.* (emphasis in original). "In light of that debate," the Ninth Circuit further held that "any reasonable official in 2001-2003" would *not* have "known that the specific interrogation techniques allegedly employed against [a detainee] necessarily amounted to torture." *Id.* Accordingly, John Yoo—the author and/or



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facilitator of the OLC memos authorizing the EITs considered by the Ninth Circuit—was granted "qualified immunity" "*regardless of the legality* of Padilla's detention and the wisdom of his judgments." *Id.* at 753, 769 (emphasis added).

Here, this Court can follow the example set forth in *Yoo*, and similarly "assume without deciding" that Plaintiffs Salim and Ben Soud's alleged treatment by the CIA rose to the level of "torture" or CIDT because Plaintiffs have otherwise failed to support any element required to impose "aiding and abetting" liability on Defendants. As for Rahman, this Court can either make a similar assumption, or otherwise rule that the single "insult slap" Jessen applied is not and cannot qualify as "torture" or CIDT as a matter of law. There is no "specific, universal, and obligatory" international law norm under *Sosa*, 542 U.S. at 748, that holds a single facial slap can qualify as "torture" or CIDT—and Plaintiffs do not cite to any.

**B. <u>The Legal Basis for Plaintiffs' Torture and CIDT Argument Fails.</u>**

Were this Court to evaluate the techniques supposedly applied to Plaintiffs as part of their claim they were "indisputably" subjected to torture and CIDT, the legal basis for their argument falls flat.

First, *none* of the cases Plaintiffs cite, Mot. at 22, 24, expressly adopt a "totality of treatment" standard to determinate whether certain conduct constitutes "torture" or CIDT. Case authority cited by Plaintiffs is also inapposite. For example, *Prosecutor v. Akayesu*, Case No. ICTR-96-4-A, Judgment, ¶ 523 (Sept. 2, 1998), relates to violations of the Genocide Convention, and has no bearing on claims of "torture." Likewise, in *Abebe-Jira v. Negewo*, 72 F.3d 844 (11th Cir.



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1996), the court did not make any specific finding that the conduct at issue violated a specific *legal* prohibition against "torture."

Second, Plaintiffs wrongly rely upon cases to prove certain techniques have been held to previously constitute either "torture" or CIDT. For instance, *Ashcraft v. Tennessee*, 322 U.S. 143 (1944), does not address whether "forced sleep deprivation" violates a *legal* prohibition against "torture." And the report that described sleep deprivation as "torture" in that case, *id.* at 154 n.6, was published before the enactment of the Geneva Conventions and Convention Against Torture. Plaintiffs also mischaracterize *Yoo*, 678 F.3d at 765. Specifically, Plaintiffs claim that under *Yoo* "the Ninth Circuit has recognized" that "international courts have for decades concluded" that certain techniques amount to CIDT. Mot. at 28-29. This is patently incorrect. Notably, the two international court opinions Plaintiffs reference, and that are cited in *Yoo—i.e.*, *Ireland v. United Kingdom*, 25 Eur. Ct. H.R. (ser. A) (1978), and *HCJ 5100/94 Public Committee Against Torture in Israel v. Israel* 53(4) PD 817 [1999] (Isr.), *reprinted in* 38 I.L.M. 1471—were used by the Ninth Circuit to demonstrate how other courts had *declined* to consider certain techniques as "torture"; the Ninth Circuit thus did not weigh in *at all* as to whether these same techniques were properly held to constitute CIDT. Finally, *Public Committee Against Torture* similarly did not conclude that the techniques at issue amounted to CIDT. *See Public Committee Against Torture*, 38 I.L.M. at 1482-85.

## CONCLUSION

For the above reasons, this Court should deny Plaintiffs' Partial Motion for Summary Judgment, and instead award summary judgment to Defendants.



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DATED this 12th day of June, 2017.

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## CERTIFICATE OF SERVICE

I hereby certify that on the 12th day of June, 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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