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UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF WASHINGTON

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

Plaintiffs,

v.

JAMES ELMER MITCHELL and JOHN "BRUCE" JESSEN

Defendants.

No. CV-15-0286 (JLQ)

PLAINTIFFS' BRIEF IN OPPOSITION TO DEFENDANTS' MOTION TO TAKE JUDICIAL NOTICE

Motion Hearing:
To Be Scheduled At Court's Discretion

Plaintiffs respectfully submit this short opposition to Defendants' request that the Court take judicial notice of the fact that (1) the United States was attacked in a number of discrete locations on September 11, 2001 ("9/11"), (2) al-Qaeda is responsible for those attacks, and (3) 2,996 people died and 5,000 people were injured in those attacks. ECF 165. Plaintiffs wish their position to be perfectly clear: they do not seek to deny the truth of these horrific facts, but those facts are not relevant to the issues raised in this case and are not admissible. As Defendants know, Plaintiffs had absolutely nothing to do with the 9/11 crimes; indeed, this Court has already determined that the Plaintiffs were not even determined to be "enemy combatants." ECF 135 at 14. And Plaintiffs' torture cannot be legally justified by reference to the tragedy.

Indeed, Defendants do not seek to introduce the evidence at issue because it in any way bears upon a claim or defense in this case. Defendants' motion for summary judgment makes this plain, as it never even cites those facts. Rather, Defendants' sole purpose is to inflame the jury and prejudice it against the Plaintiffs. It was for this reason that Plaintiffs would not consent to Defendants' motion. As Plaintiffs said then, and for the reasons stated in detail below, Defendants' motion should be denied because the facts at issue are inadmissible under Federal Rules of Evidence Rule 401 and 403.

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ARGUMENT

I. JUDICIAL NOTICE IS INAPPROPRIATE WHEN THE SUBMITTED MATERIAL IS INADMISSIBLE UNDER EITHER RULE 401 OR 403.

Defendants' proffered evidence does not meet the requirements of the Federal Rules of Evidence. Of course, the asserted facts are "generally known" and thus satisfy Federal Rule of Evidence 201(b)(1). And as set forth above, Plaintiffs by no means deny the truth of the statements at issue. However, the rule allowing judicial notice requires that the fact at issue also be "an adjudicative fact," Fed. R. Evid. 201(a), and, based upon this requirement, courts require that such facts satisfy the evidentiary rules regarding relevance as well. *See Blye v. Cal. Supreme Court*, No. 11-5046, 2014 U.S. Dist. LEXIS 7329, *3 (N.D. Cal. Jan. 21, 2014) ("[A]n irrelevant fact is one not of consequence in determining the action, *see* Fed. R. Evid. 401(b), and therefore cannot be classified as an adjudicative fact."); *La Spina v. Wucherer*, No. 96-1359, 1996 U.S. Dist. LEXIS 16095 (S.D. Cal. Oct. 9, 1996) (explaining that judicial notice is used to establish "relevant" facts).

Despite having been informed by Plaintiffs that relevance was the basis of their opposition to this motion, however, Defendants ignored that courts in this Circuit (and elsewhere) consistently deny requests to take judicial notice of irrelevant facts, especially in the context of summary judgment, where courts "consider only alleged facts that would be admissible in evidence." *Rosa v. TASER Int'l*, 684 F.3d 941, 948 (9th Cir. 2012); *Cuellar v. Joyce*, 596 F.3d 505,

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512 (9th Cir. 2010) (denying judicial notice because materials submitted were "not relevant to the disposition of this appeal"); *Donastorg v. Riverside County Sheriff's Dep't*, No. 12-1654, 2014 U.S. Dist. LEXIS 91169, *6-7 (C.D. Cal. May 7, 2014) (denying judicial notice where evidence irrelevant to summary judgment motion); *Chyna v. Bayview Loan Servicing, LLC*, No. 14-cv-01415, 2016 U.S. Dist. LEXIS 133849, *9 n.3 (S.D. Cal. Sept. 27, 2016) (same).[1]

Defendants' motion also fails to address—again, despite advance notice of Plaintiffs' position that the proffered facts fall afoul of Federal Rule of Evidence 403—the many decisions within and outside the Ninth Circuit denying requests for judicial notice on the grounds of undue prejudice. *See, e.g., Keyes v. Coley*, No. 09-1297, 2011 U.S. Dist. LEXIS 59625, *8-9 (E.D. Cal. June 2, 2011) (sustaining objection to request for judicial notice on the basis that the evidence was irrelevant, unduly prejudicial, and hearsay); *Cooper v. Redding*, No. 8:15CV441, 2017 U.S. Dist. LEXIS 10942, *2 (D. Neb. Jan. 26, 2017) (denying judicial notice request under Fed. R. Evid. 201(b) because "taking judicial notice of such matters could unduly prejudice Defendant.").

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[1] Defendants point to *In re September 11 Litig.*, 751 F.3d 86, 90 (2d Cir. 2014), as a case in which a court took judicial notice of the 9/11 attacks, but that case was one in which there was no dispute that those attacks were relevant to CERCLA's "act of war" affirmative defense. Thus, the case stands for the unremarkable proposition that the September 11, 2001 attacks may be judicially noticed in a case in which they actually are relevant.

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As set forth in greater detail below, the 9/11 facts fail the evidentiary tests for relevance set forth in Federal Rules of Evidence 401 and 403. Therefore, despite Defendants' arguments that the attacks satisfy Rule 201 simply because they are "undisputed" and "generally known," the Court should deny Defendants' request to judicially notice them.

II. DEFENDANTS' REQUEST FAILS UNDER FED. R. EVID. 401.

Under Federal Rule of Evidence 401, evidence is deemed relevant if: "(a) it has any tendency to make a fact more or less probable than it would be without the evidence, and (b) the fact is of consequence in determining the action." Accordingly, "only facts having rational probative value are admissible," *i.e.*, only where it is "[e]vidence which has any tendency in reason to prove any material fact[.]" *United States v. Amaral*, 488 F.2d 1148, 1152 (9th Cir. 1973). The requirement of materiality is unqualified—the proposed evidence must go to "a matter properly provable in the case" and must be "of consequence in the determination of the action." Fed. R. Evid. 401 advisory committee's notes to 1972 Proposed Rules.

The tragic events of 9/11 are not probative of any fact "of consequence in determining the action" as Defendants' now-pending Motion for Summary Judgment makes clear. Critically, Defendant's Motion never cites the specific facts for which they now seek judicial notice, which are identified at ¶ 4 of their Statement of Facts. ECF 170 ¶4. Indeed, Defendants motion only mentions 9/11

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in two contexts, neither of which requires judicial notice of the specific facts Defendants now assert are "adjudicative." ECF 169 at 2-3. First, in discussing the political question defense, Defendants state, "In the months after 9/11, at a meeting at HQS discussing ways to get Zubaydah to provide information about threats to the U.S., Mitchell mentioned 12 potential interrogation techniques . . . ." ECF 169 at 5 (internal citation omitted). Notably, this reference, which only places the events at issue in time, does not reference any of the facts (the parties responsible, the locations of the attack, and the number of casualties) as to which Defendants seek judicial notice. Nor should it—such facts are not material to that defense.

Second, Defendants refer to 9/11 in, once again, seeking derivative sovereign immunity, specifically arguing that the government "validly conferred" authority for Defendants' actions, and that the government itself had authority to respond to al Qaeda as a consequence of 9/11. ECF 169 at 12–14. *id.* at 14 ("the authority to respond to the 'terrorist threat to our nation' originated with Congress"). But whether Congress conferred authority to inflict torture and cruel, inhuman, or degrading treatment on prisoners is neither made more nor less likely by Defendants' proffered facts. For this reason, Defendants never cite them in their statement of facts. More fundamentally, 9/11 has no bearing on the immunity question; instead, as Defendants recognize, ECF 169 at 14, the question is whether the government could have itself lawfully performed the specific acts here alleged of Defendants. *See United States ex rel. Ali v.*

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2 *Daniel, Mann, Johnson & Mendenhall*, 355 F.3d 1140, 1146 (9th Cir. 2004)
3 (immunity extends to contractors only if, first, the conduct is "not wrongful
4 when done by the government"). Because the government cannot lawfully
5 commit acts of torture; cruel, inhuman, and degrading treatment, human
6 experimentation, and war crimes, *see* ECF 28 at 14-15, it cannot confer on
7 contractors the authority to do so in its stead. And while Defendants counter that
8 "the propriety of using EITs was subject to considerable debate in 2001-03," *see*
9 ECF 169 at 14, the events of 9/11 are in no way probative of the fact of that
10 debate. Thus, Defendants' own pleadings make it obvious: the events of 9/11 are
11 simply not relevant to whether Defendants are liable for the brutal treatment that
12 Plaintiffs suffered.
13
14 Nor, for that matter, are the events of 9/11 material to Plaintiffs' claims
15 for torture, cruel, inhuman, and degrading treatment, human experimentation, or
16 war crimes. ECF 1 at 73-81. Those events do not, in the words of Rule 401,
17 make it more or less probable that Defendants committed these acts by
18 designing, testing, advocating for, and profiting from, the program of torture and
19 abuse to which Plaintiffs were subjected. Nor do the facts regarding 9/11 in any
20 way bear upon whether the Defendants had the requisite intent to aid and abet
21 these ATS violations, *i.e.*, whether their purpose was that their actions would
22 provide assistance in the abuse of CIA prisoners, or knew that it was. Indeed, it
23 is extremely significant that in arguing that they did not aid or abet, Defendants
24 make no mention whatsoever of the facts that they proffer. *See* ECF 169 at 25-
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34. The reason is clear: those facts are not relevant to the claims, and judicial notice is therefore both inappropriate and unnecessary.

III. DEFENDANTS' REQUEST FAILS UNDER FED. R. EVID. 403.

Even assuming for the sake of argument that the Court considers the events of 9/11 to somehow be relevant background information in this lawsuit, the Court should nonetheless refuse to take judicial notice of them. That is because Defendants' use of that evidence fails the well-established test of Federal Rule of Evidence 403: the minimal probative value that it might have is far outweighed by the prejudice that would result from its introduction, inviting the jury to ignore the facts in favor of an emotional appeal, as is no doubt Defendants' intent. For that reason, the excessive prejudice of these precise facts has led the courts to specifically exclude them.

This Court well understands that Rule 403 provides for the exclusion of evidence "if its probative value is substantially outweighed by a danger of one or more of the following: unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence." *See, e.g.,Cmty. Ass'n for Restoration of the Env't v. Cow Palace, LLC,* 80 F. Supp. 3d 1180, 1216 (E.D. Wash. 2015). In particular, the Ninth Circuit and this Court have repeatedly recognized that "Rule 403 is concerned with unfairly prejudicial evidence," that is, evidence that "has an undue tendency to suggest a decision on an improper basis such as emotion or character rather than evidence

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presented." *United States v. Shields,* 2016 U.S. App. LEXIS, at *4 (9th Cir. Dec. 21, 2016) (quoting *United States v. Joetzki,* 952 F.2d 1090, 1094 (9th Cir. 1991)); *see also United States v. Henrikson,* 2015 U.S. Dist. LEXIS 170829, *9-11 (E.D. Wash. Dec. 22, 2015) (citing *United States v. Anderson*, 741 F.3d 938, 950 (9th Cir. 2013)) ("Unfair prejudice is the undue tendency to suggest decision on an improper basis, commonly, though not necessarily, an emotional one."). Thus, the Ninth Circuit has emphasized that Rule 403 requires that evidence be excluded as irrelevant where it has "scant or cumulative probative force, [which is] dragged in by the heels for the sake of its prejudicial effect." *United States v. Plascencia-Orozco,* 852 F.3d 910, 926 (9th Cir. 2017); *see also Wetmore v. Gardner,* 735 F. Supp. 974, 983 (E.D. Wash. 1990) (citing *United States v. Hankey*, 203 F.3d 1160, 1172 (9th Cir. 2000)) (same). Specifically, evidence should be excluded when "there is a significant danger that the jury might base its decision on emotion or when non-party events would distract reasonable jurors from the real issues in a case." *United States v. Whittemore,* 2013 U.S. Dist. LEXIS 67636, at *7 (D. Nev. May 10, 2013) (citing *Tennison v. Circus Circus Enterprises, Inc.*, 244 F.3d 684, 690 (9th Cir. 2001), and *United States v. Layton*, 767 F.2d 549, 556 (9th Cir. 1985)).

The evidence here proffered by the Defendants is of just this character: it "'appeals to the jury's sympathies, arouses its sense of horror, provokes its instinct to punish,' or otherwise 'may cause a jury to base its decision on something other than the established proposition in the case.'" *Carter v. Hewitt,*

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617 F.2d 961, 972 (3d Cir. 1980) (quoting 1 J. Weinstein & M. Berger, Weinstein's Evidence, § 403[03], at 403-15 to 403-17 (1978)). Indeed, it is hard to envision evidence that would evoke more emotion in the minds of the jurors than the largest terrorist attack ever committed on U.S. soil–particularly given the timing of this trial, scheduled to commence one week before the anniversary of 9/11, and the currently prevailing environment of prejudice against people who, like Plaintiffs, are identified as Muslim or from majority-Muslim countries. As a result, other courts have held that the precise references at issue here should be excluded as irrelevant under Rule 403. Thus, for example, in *Zubulake v. UBS Warburg*, 382 F. Supp. 2d 536, 548 (S.D.N.Y. 2005), the court excluded references to the 9/11 attacks due to "the danger of unfair prejudice given the emotions associated with the attacks." *See also United States v. Royer,* 549 F.3d 886, 903 (2d Cir. 2008) (affirming the district court's exclusion of 9/11-related, including excluding evidence under Rule 403 including "references to Al Qaeda," and holding that "evidence linking a [party] to terrorism in a trial in which he is not charged with terrorism is likely to cause undue prejudice" (citing *United States v. Elfgeeh*, 5151 F.3d 100, 127 (2d Cir,. 2008)); *cf. United States v. Moore*, 375 F.3d 259, 264 (3d Cir, 2004) (reversing conviction, where "on the eve of the one year anniversary of the September 11th terrorist attacks, the prosecutor called [the defendant] a terrorist").

That should occur here, as well. There can be no question that, even 16 years later, the events of 9/11 understandably provoke the kind of strong

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emotions that can overwhelm rational assessment of the actual law and facts at issue. That danger is particularly pronounced given the timing of this trial and the existing atmosphere of prejudice against individuals, who, like Plaintiffs, are Muslim and come from majority-Muslim countries. Under the law, the tragedy of 9/11 could not in any way justify torture and abuse, but the facts proffered by the defense raise an unacceptable risk of just such a response. They thus fail the test of relevance established by the Rule of Evidence under Ninth Circuit law. *See, e.g., United States v. Gonzalez-Flores,* 418 F.3d 1093, 1098-99 (9th Cir. 2005) (evidence presenting even a "modest likelihood of unfair prejudice" is "high enough to outweigh the . . . probative value" of marginally relevant evidence); *United States v. Hitt,* 981 F.2d 422, 424 (9th Cir. 1992) ("Where the evidence is of very slight (if any) probative value, it's an abuse of discretion to admit it if there's even a modest likelihood of unfair prejudice or a small risk of misleading the jury."). Accordingly, these facts are not properly the subject of judicial notice.[2]

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[2] Plaintiffs understand that Defendants have subpoenaed a Fox News video regarding the events of 9/11, presumably for use at trial; Plaintiffs reserve the right to file an appropriate *in limine* motion as to that and any other related prejudicial and irrelevant evidence should it remain necessary to do so after the Court's ruling on this application.

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CONCLUSION

For the reasons stated above, Defendants' motion should be denied.

DATED: May 24, 2017

By: *s/ Lawrence S. Lustberg*

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CERTIFICATE OF SERVICE

I hereby certify that on May 24, 2017, I caused to be electronically filed and served the foregoing with the Clerk of the Court using the CM/ECF system, which will send notification of such filing to the following:

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