

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

| | | |
|-------------------------------------|---|--------------------------------|
| YASSIN MUHIDDIN AREF, <i>et al.</i> |) | |
| |) | |
| Plaintiffs, |) | |
| |) | |
| v. |) | Civil Action No. 10-0539 (BJR) |
| |) | |
| ERIC HOLDER, <i>et al.</i> |) | |
| |) | |
| Defendants. |) | |
| |) | |

DEFENDANTS’ RESPONSE TO PLAINTIFFS’ STATEMENT OF UNDISPUTED MATERIAL FACTS IN SUPPORT OF THEIR MOTION FOR SUMMARY JUDGMENT

Defendants object to Plaintiffs’ Statement of Undisputed Material Facts (“Statement”), filed in support of its Motion for Summary Judgment (ECF No. 138), for failure to identify “facts” that are “material” to its motion. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986) (explaining that a fact is “material” only if it “might affect the outcome of the suit under the governing law”). Rather than providing only material facts, Plaintiffs offer, instead, seventy-six pages of factual assertions, including general background information and matters otherwise immaterial to this case.

Subject to that objection, pursuant to Rule 7(h)(1) of the Local Rules of the United States District Court for the District of Columbia, Defendants, by undersigned counsel, respectfully submit the following response to Plaintiffs’ Statement. This response is designed solely to respond to the Plaintiffs’ Statement by identifying which of the factual grounds for Plaintiffs’ motion are disputed. These disputes relate only to facts Plaintiffs proffer, and have no bearing on Defendants’ Motion for Summary Judgment or the factual support for that Motion.

Defendants maintain that there are no genuine issues of material fact with respect to the grounds entitling Defendants to summary judgment.

The paragraph numbers for these Responses refer to the corresponding numbers in Plaintiffs' Statement:

2. Undisputed, subject to clarification. Inmates in non-Communication Management Unit ("CMU") general population units in Bureau of Prisons ("BOP") generally have access to visitation, programming, education, religious programming, food service, indoor and outdoor recreation, a law library, and a leisure library, but some of these services may be limited under certain circumstances. *See, e.g.*, Pls. Ex. 5 at 2 (limiting visitation when the visiting area becomes overcrowded).

6. Disputed in part. The degree to which inmates at the Administrative Maximum Facility ("ADX") are confined to their cells varies depends on the unit to which they are assigned. Pls. Ex. 6 at 3-5.

7. Undisputed that ADX inmates are generally allowed five non-contact visits per month, each of which may last up to seven hours, but disputed to the extent that Plaintiffs suggest ADX inmates typically received 35 hours of visitation per month. ECF No. 131 ¶ 58.

10. Disputed. This paragraph contains an incomplete paraphrase of BOP policy as stated in Plaintiffs' Exhibit 8, BOP Program Statement 5212.07 (Control Unit Programs), omitting a number of significant details. Defendants respectfully refer the Court to this exhibit for a full description of policy.

13. Undisputed, subject to clarification. Inmates are expected to be re-designated from Special Management Units after 18-24 months if they comply with behavioral expectations. Pls. Ex. 9 at 7-10.

14. Disputed. This paragraph contains an incomplete paraphrase of BOP policy as stated in Plaintiffs' Exhibit 9, BOP Program Statement P5217.01 (Special Management Programs), omitting a number of significant details. Defendants respectfully refer the Court to this exhibit for a full description of policy.

17. Disputed. Although there is no "expected duration" for CMU placement, inmates in the CMU are subject to periodic review and only retained in CMU so long as is necessary. Pls. Ex. 12 at 100.

18. Undisputed that Attorney General Eric Holder stated that the BOP houses inmates "who have a history of or nexus to international terrorism" in ADX, CMUs, and "other facilities." Pls. Ex. 13 at 2-3.

29. Disputed in that the Proposed Rule states its purpose as to "authorize[] and define[] the [BOP's] authority to operate, and designate inmates to [CMUs]." Pls. Ex. 15, P3266.

30. Disputed to the extent Plaintiffs' characterization of the testimony differs from its actual content, which speaks for itself. Pls. Ex. 3, 35-36.

31. Defendants do not dispute that Plaintiffs' Exhibit 31 is a true and correct copy of a BOP proposed rule. Defendants respectfully refer the Court to Plaintiffs' Exhibit 31 for a complete and accurate statement of its contents.

33. The first sentence is undisputed. The second sentence is disputed on the ground that it is based on, or constitutes, hearsay inadmissible for the truth of the matter asserted.

35. With regard to the first and third sentences, undisputed that Aref made those statements. The second sentence is disputed on the ground that it is based on, or constitutes, hearsay inadmissible for the truth of the matter asserted.

36. Disputed on the ground that this statement is based on, or constitutes, hearsay inadmissible for the truth of the matter asserted.

41. Undisputed, subject to clarification. All inmates placed in administrative detention at FCI Terre Haute and USP Marion receive one fifteen-minute social call every month (provided the inmate has not been restricted from telephone use as the result of a specific disciplinary sanction). They may receive additional time for a verifiable emergency.

42. Undisputed, subject to clarification. Inmates in administrative detention at FCI Terre Haute were routinely allotted seven visits during a calendar month, and there was no set limit on the duration of the visit provided it occurred within visiting hours and visiting conditions permitted (*e.g.*, the visiting room was not overcrowded or disruptive).

45. Disputed. Plaintiffs' characterization of the cited testimony conflicts with that testimony, which speaks for itself.

46. Undisputed, subject to clarification. BOP wardens generally have discretion to make exceptions to normal visiting limitations for inmates in administrative segregation in case of emergencies or other special circumstances. *See, e.g.*, Pls. Ex. 12 at 10; 28 CFR § 540.43 (“Exceptions may be made to any local guideline [regarding frequency of visits and number of visitors] when indicated by special circumstances, such as distance the visitor must travel, frequency of the inmate’s visits, or health problems of the inmate or visitor”).

47. Disputed in part. BOP inmates in administrative segregation may be denied exercise periods if it is determined that their use of exercise privileges threatens the safety, security, and orderly operation of a correctional facility, or public safety. Pls. Ex. 21 at 9.

56. The first sentence is undisputed. The second sentence is disputed as speculation, not a material fact or proper expert opinion.

57. Disputed. This paragraph is speculation, not a material fact or proper expert opinion.

61. Undisputed that the BOP was unable to provide comparable data regarding prisoners in administrative segregation in BOP facilities between January 1, 2007 and June 20, 2011.

62. Disputed. This paragraph is vague and ambiguous.

63. Disputed. This paragraph contains characterizations and legal conclusions, not material assertions of fact or proper expert opinion.

73. Disputed to the extent this characterization conflicts with the cited document, which speaks for itself. Pls. Ex. 27, # 35.

83. Disputed as mischaracterization of Dr. Beveridge's report. Defendants respectfully refer the Court to that report, Plaintiffs' Exhibit 25.

85. Undisputed, subject to clarification. The BOP did not have any formal written policy explicitly describing the criteria for designation to the CMU or the process for such designation before the CMU was established. Pls. Ex. 36 at 37-39.

86. Disputed as mischaracterization of Leslie Smith's statements. Defendants respectfully refer the Court to the transcript of his cited statements in Plaintiffs' Exhibit 25.

87. Disputed to the extent that Plaintiffs' characterization conflicts with the cited testimony, which speaks for itself.

88. Undisputed, subject to clarification. During this period, the BOP did not have any formal written policy explicitly describing the criteria for designation. Pls. Ex. 12 at 25, 70-71.

89. Undisputed that, during this period, the BOP did not have any formal written policy explicitly describing the criteria for designation to the CMU.

91. Disputed in part. The CMU designation process itself had been established by this point. Pls. Ex. 12 at 70-71.

93. Disputed. Plaintiffs mischaracterize the 2008 email from Joyce Conley that they cite. In the email, Conley states the following: “The CMU designation process is not outlined in a Program Statement or national policy; however the BOP has clearly articulated the process through documents provided to BOP staff.” *See* Pls. Ex. 38 at 1. Conley does not specifically identify the “documents at issue,” and nothing in the email indicates she is referring to the memo submitted by Plaintiffs as Exhibit 39. When Plaintiffs requested that Defendants identify to documents to which Conley was referring, Defendants responded that “the BOP believes the documents referenced were other memoranda or similar documents providing guidance on the CMUs. Pls. Ex. 40, #9. Defendants respectfully refer the Court to these exhibits.

95. Undisputed that various refinements have been made to the CMU designation process over time and may be made in the future. Many fundamental aspects of it, however, have remained constant. *See, e.g.*, Pls. Ex. 12 at 70 (stating that the process for designating inmates to the CMU through packets has been in place since early 2007).

96. Disputed. The CMU designation process is documented in the Dodrill memo. *See* Pls. Ex. 46.

98. Disputed as vague. Although the BOP does not have any formal written policy fully and explicitly describing the details of the current process for CMU designation, various aspects of the process are documented in a variety of fashions, and thus cannot be characterized as “unwritten.” CMU referrals can come from a variety of sources, but not literally “any source.” Pls. Ex. 36 at 53.

101. Disputed to the extent Plaintiffs' characterization of the cited testimony differs from its actual content, which speaks for itself.

102. Undisputed that, in some instances, such as those involving sensitive law enforcement information, information summarized in the referral memo is not itself included in the documents sent by the BOP Counter Terrorism Unit ("CTU"). Pls. Ex. 12 at 203-05.

103. Undisputed, subject to clarification. In some instances, the CTU has relied on information that it considers reliable but that has not been proven in a court of law when making recommendations regarding CMU placement. Pls. Ex. 12 at 207, 210-11.

108. Undisputed, subject to clarification. These forms have been captioned both "CMU Review" and "CMU Referral." *See, e.g.*, Pls. Ex. 79, BOP CMU 60914 ("CMU Review"); Pls. Ex. 83, BOP CMU 60910 ("CMU Referral").

111. Disputed as vague. The Regional Director can, for instance, consider privileged law enforcement information that might not be contained in the packet circulated within the North Central Regional Office itself.

113. Disputed as vague. Michael Nalley, the Regional Director at the time of plaintiffs' placement decisions, reviewed the inmate's Notices of Transfer to ensure that they adequately summarized the reason for the inmate's placement. *See* Nalley Decl. (Ex. 3) ¶ 9.

114. Disputed. *See supra* ¶ 113.

115. Disputed. *See supra* ¶ 113.

116. Disputed, mischaracterization. David Schiavone, Leslie Smith, and Michael Nalley stated they lacked knowledge of the details of the CMU review process they were not directly involved in, but that does not indicate that they or the entire staffs of the CTU or BOP

North Central Regional Office (“NCRO”) lack knowledge of the process. Defendants respectfully refer the Court to the cited deposition transcripts for their actual statements.

117. Disputed, mischaracterization. Although certain BOP facility staff may not know the complete details of aspects of the CMU designation process in which they are not involved, this does not indicate that they lack “any understanding” of the process or the CMU’s purpose. Defendants respectfully refer the Court to the cited depositions transcripts for their actual statements.

118. Undisputed that BOP policy does not require BOP staff to provide inmates with notice prior to their transfer to a CMU.

120. Disputed as vague. Inmates’ placement in the CMU is regularly reviewed during “program reviews,” in which an inmate meets with his unit team and can provide comments and information that support his transfer out of the unit. *See* Pls. Ex. 46.

121. Disputed. The Dodrill memo describes the criteria and predates the proposed rule. *See* Pls. Ex. 46.

123. Disputed. The Dodrill memo sets forth the criteria for CMU designation. Schiavone Decl. (Ex. 1) ¶ 17.

124. Undisputed that the Dodrill memo is the only formal, currently binding BOP policy document listing the five CMU criteria and directing their use, although these criteria do appear in a number of documents.

125. Undisputed, subject to clarification. The factors listed in the Dodrill memo are used in the CMU designation process, Pls. Ex. 36 at 60.

127. Undisputed that the types of referrals sent to the CTU in its early existence affected the development of the criteria used for CMU placement, though disputed that this was

the sole or primary basis of the criteria. Conviction of terrorist offenses, for instance, has been a criterion for placement since the beginning. *See* Pls. Ex. 16 at 45.

128. Disputed. *See* Schiavone Decl (Ex. 1) ¶ 18.

131. Disputed. *See* Pls. Ex. 39.

133. Undisputed that Berna Potts, a member of the staff of the North Central Regional Office, used the document designated as Plaintiffs' Exhibit 49 to inform her recommendations to the Regional Director regarding CMU placement. Disputed to the extent plaintiffs suggest that any criteria other than those set forth in the Dodrill memo apply to CMU designations.

134. Undisputed that Berna Potts, a member of the staff of the North Central Regional Office, used the document designated Plaintiffs' Exhibit 49 to inform her recommendations to the Regional Director regarding CMU placement. *See supra* ¶ 133.

135. Undisputed that this is a correct quotation of Plaintiffs' Exhibit 49.

136. Disputed as a mischaracterization of a statement of Berna Potts. Defendants respectfully refer the Court to her deposition transcript for a correct account of her response to Plaintiffs' hypothetical question. *See* Pls. Ex. 48 at 58-59.

137. Undisputed that Plaintiffs' Exhibit 49 was not created for use in the designation process, but for a briefing summary. Disputed to the extent plaintiffs suggest that any criteria other than those set forth in the Dodrill memo apply to CMU designations

138. Undisputed that Plaintiffs' Exhibit 49 was not created for use in the designation process, otherwise disputed as a mischaracterization of statements of Leslie Smith and David Schiavone. Defendants respectfully refer the Court to their deposition transcripts, Pls. Exs. 16, 36, for an accurate record of their statements.

139. Disputed to the extent Plaintiffs suggest Plaintiffs' Exhibit 49 served as alternative criteria for CMU placement or was used by North Central Regional Office staff besides Potts.

140. Undisputed that certain deposed North Central Regional Office staff testified that they did not use any detailed written criteria when making recommendations regarding CMU placement.

141. Disputed. Plaintiffs mischaracterize certain aspects of Janet George's testimony. Defendants respectfully refer the Court to her deposition transcript, Pls. Ex. 50, for an accurate record of her statements.

142. Disputed. Plaintiffs mischaracterize certain aspects of Janet George's testimony. Defendants respectfully refer the Court to her deposition transcript, Pls. Ex. 50, for an accurate record of her statements.

143. Disputed. Plaintiffs mischaracterize certain aspects of Janet George's testimony. Defendants respectfully refer the Court to her deposition transcript, Pls. Ex. 50, for an accurate record of her statements.

144. Undisputed, subject to clarification. The Notice lists some but not necessarily all of the reasons an inmate was placed in a CMU.

145. Undisputed, subject to clarification. The CTU draft Notice is intended as a summary of the reasons supporting the inmate's placement in the CMU.

146. Disputed. Although the Regional Director does not originally draft or issue the Notice, he reviews it before it is issued and contacts CTU if he believes it fails to explain why an inmate is being designated to the CMU or if he has any other concerns about its contents. Nalley Tr. (Ex. 12), at 75:5-77:18.

147. Undisputed that the Notice provides an inmate with information that supports an inmate's placement in the CMU. Disputed to the degree Plaintiffs suggest that this information bears no relationship to the reasons relied on by the Regional Director in deciding that an inmate should be designated to the CMU. Although the Regional Director does not originally draft or issue the Notice, he reviews it before it is issued and contacts CTU if he believes it fails to explain why an inmate is being designated to the CMU or if he has any other concerns about its contents. *See id.* (explaining that, as the decision-maker, he reviewed the notices to ensure that they gave an inmate enough information to understand why they were being placed in the CMU).

148. Disputed to the extent Plaintiffs' characterization of the cited testimony conflicts with its actual content, which speaks for itself.

153. Disputed. The cited exhibit does not support this statement. When an inmate appeals his placement in the CMU via an administrative remedy, the Regional Office considers evidence offered by the inmate to determine whether placement is appropriate. Pottios Tr. (Ex. 13), at 51:1-52:3; Nalley Tr. (Ex. 12) at 127:5-28:8. The Regional Director has the authority to grant the remedy and order the inmate's release from a CMU. Nalley Decl. (Ex. 3) ¶ 15.

154. Disputed, as ambiguous. The North Central Regional Office creates a CMU referral form when a prisoner is recommended for re-designation to or from a CMU.

156. Disputed. Plaintiffs mischaracterize certain aspects of Lee Albright's testimony. Defendants respectfully refer the Court to his deposition transcript, Pls. Ex. 54, for an accurate record of his statements. Michael Nalley, the Regional Director at the time of Plaintiffs' placement, stated that he had the authority as the final decision-maker with respect to CMU placement to order the inmate's release from a CMU. Nalley Decl. (Ex. 3) ¶ 15.

157. Disputed. Plaintiffs mischaracterize certain aspects of Michael Nalley's testimony. Defendants respectfully refer the Court to his deposition transcript, Pls. Ex. 3, for an accurate record of his statements.

163. Disputed. Plaintiffs mischaracterize certain aspects of Michael Nalley's testimony. Nalley describes Aref's communications with what Aref believed to be JeM as one of several factors he considered. Defendants respectfully refer the Court to his deposition transcript, Pls. Ex. 3, for an accurate record of his statements.

165. Disputed to the extent Plaintiffs' characterization differs from the cited deposition testimony, which speaks for itself.

168. Undisputed that BOP officials relied in part on Aref's Presentence Report when recommending that he be designated to the CMU, and that the Presentence Report discusses his links to terrorism, but Defendants dispute Plaintiffs' characterization of the Presentence Report and respectfully refer the Court to the document for an accurate record of its content.

169. Disputed to the extent Plaintiffs' characterization differs from the cited deposition testimony, which speaks for itself.

170. Defendants dispute Plaintiffs' characterization of Aref's Presentence Report and respectfully refer the Court to the document for an accurate record of its content.

171. Disputed as vague as to the meaning of "relied." While the Regional Director reviewed all information in the Aref's Presentence Report, he has explained that Aref's Notice of Transfer summarized the reasons for his placement in the unit. The Notice referenced Aref's offense conduct, which was set forth in his Presentence Report, in which Aref was in contact with an individual he believed was a member of a terrorist organization attempting to purchase a missile for use in the United States. *See* Nalley Decl. (Ex. 3) ¶¶ 10-11.

172. Disputed as mischaracterization. Aref's Notice to Inmate of Transfer accurately summarized the reasons for his placement in the unit. Defendants respectfully refer the Court to the Notice of Transfer and Nalley's deposition transcript, Pls. Ex. 3, for an accurate record of their contents.

175. Disputed as mischaracterization. Aref's Notice to Inmate of Transfer accurately summarized the reasons for his placement in the unit. Defendants respectfully refer the Court to the Notice for an accurate record of its contents. Pls. Ex. 56.

178. Undisputed subject to clarification. Jayyousi's convictions, offense conduct, and the supporting information in his Presentence Report were major factors in the CTU's decision to recommend Jayyousi for CMU designation, though all the information in the "designation packet" was considered. *See* Pls. Ex. 59; Pls. Ex. 12 at 280-81.

180. Disputed as vague. The Regional Director testified that he reviews an inmate's Notice of Transfer to ensure that it accurately summarizes the reasons for placement. Nalley Decl. (Ex. 3) ¶ 8. He has explained that Jayyousi's Notice of Transfer accurately summarized the basis for his placement.

181. Undisputed subject to clarification. Jayyousi's Notice to Inmate of Transfer indicated that his convictions and offense conduct were reasons for his transfer. Pls. Ex. 60. Defendants respectfully refer the Court to Plaintiffs' Exhibit 60 for an accurate copy of Jayyousi's Notice to Inmate of Transfer.

182. Disputed, insofar as Plaintiffs mischaracterize certain aspects of Jayyousi's Notice to Inmate of Transfer. Defendants respectfully refer the Court to Plaintiffs' Exhibit 60 for an accurate copy of Jayyousi's Notice to Inmate of Transfer.

183. Undisputed that Jayyousi challenged his designation to the CMU and that, in so doing, he stated that he have not been convicted of “ties to terrorist organizations,” “any communication, association, and assistance to al-Qaeda,” or “recruiting anyone.” Defendants respectfully refer the Court to Plaintiffs’ Exhibit 61, BOP CMU 75916, 75918, for an accurate copy of Jayyousi’s administrative remedy filing.

184. Disputed, in that Jayyousi’s administrative remedy filing made certain claims but did not state “specific questions.” *See* Pls. Ex. 61, BOP CMU 75916, 75918. Plaintiffs’ characterization of BOP’s response is also disputed. Defendants respectfully refer the Court to Plaintiffs’ Exhibit 61, BOP CMU 75914, 75917, for an accurate copy of Jayyousi’s administrative remedy filing.

193. Undisputed that McGowan’s first Notice of Transfer does not reference his communications while incarcerated. The rest of this statement is disputed as vague and to the extent it conflicts with the cited testimony, which speaks for itself.

194. Denied that this was reason for McGowan’s placement. *See* Nalley Tr. (Ex. 12) 204:25-205:4.

195. Disputed to the extent Plaintiffs’ characterization differs from the cited document, which speaks for itself.

197. Disputed to the extent Plaintiffs’ characterization differs from the cited document, which speaks for itself.

198. Disputed to the extent Plaintiffs’ characterization differs from the cited document, which speaks for itself.

204. Undisputed that the BOP’s responses to McGowan’s grievances contain some of the same information as that contained in his Notice of Transfer, though the documents are not

identical. Defendants respectfully refer the Court to Plaintiffs' Exhibits 65 and 67 for accurate copies of these documents.

205. Undisputed that McGowan claimed in submissions to the BOP Administrative Remedy process that some of the factual information in his Notice of Transfer was false. Pls. Ex. 68.

206. Disputed to the extent Plaintiffs' characterization differs from the cited document, which speaks for itself.

207. Disputed to the extent Plaintiffs' characterization differs from the cited document, which speaks for itself.

208. Undisputed that Thomas Albright made the quoted statement as part of a larger discussion. Defendants respectfully refer the Court to Plaintiffs' Exhibit 54, at 119-20, for an accurate transcript of Albright's statements.

209. Undisputed that that one of BOP's responses to McGowan stated: "If you are seeking information pertaining to Federal Bureau of Prisons records relation to your placement in the CMU, you may file a request under the Freedom of Information Act." Pls. Ex. 68 at P593.

219. Disputed to the extent Plaintiffs' characterization differs from the cited document, which speaks for itself.

221. Undisputed that, while Twitty was subject to inmate discipline, he was never disciplined for "recruitment and radicalization."

227. Disputed. *See supra* ¶ 113.

229. Disputed as a mischaracterization of the testimony. Defendants respectfully refer the Court to the cited transcript for a correct account of this testimony. Pls. Ex. 77 at 173-76.

235. Disputed as a mischaracterization of the testimony. Defendants respectfully refer the Court to the cited transcript for a correct account of this testimony. Pls. Ex. 50 at 45-51.

236. Disputed. *See supra* ¶ 113.

239. Disputed. *See supra* ¶ 113.

242. Undisputed, subject to clarification. The facts referenced by Plaintiffs are among those discussed in the CTU referral memo, but are not the only facts so discussed. Pls. Ex. 80, BOP CMU 76121-22. Defendants respectfully refer the Court to this exhibit itself, which speaks for itself.

243. Disputed to the extent Plaintiffs' characterization differs from the actual content of this memo, which speaks for itself.

244. Disputed as a mischaracterization of the testimony. Defendants respectfully refer the Court to the cited transcript for a correct account of this testimony. Pls. Ex. 48 at 51-54.

245. Disputed. *See supra* ¶ 113.

250. Disputed. *See supra* ¶ 113.

251. Undisputed, subject to clarification. The Notice describes his possession and use of the cell phone over several months while in a secure facility, which the Notice characterizes as "substantial phone abuse." Pls. Ex. 88, BOP CMU 60088. Defendants respectfully refer the Court to the Notice, which speaks for itself.

254. Undisputed that the CTU does not independently track which inmates have been caught using cell phones. Also undisputed that CTU staff would have to learn that an inmate was using a cell phone before they could evaluate whether to recommend his transfer to the CMU on that basis. This statement is otherwise disputed, both because it is ambiguous and

because the CTU could potentially learn of an inmate's cell phone use even if he was not referred for CMU placement by his institution.

256. Disputed to the extent Plaintiffs' characterization of the memo differs from its actual content, which speaks for itself.

257. Disputed. *See supra* ¶ 113.

260. Undisputed, subject to clarification. The facts referenced by Plaintiffs are among those discussed in the CTU referral memo, but the memo does not state that all of these necessarily formed the basis of CTU's recommendation of CMU placement. Pls. Ex. 83, BOP CMU 67400-03. Defendants respectfully refer the Court to the memo, which speaks for itself.

261. Disputed. *See supra* ¶ 113.

262. Undisputed, subject to clarification. The inmate's offense conduct, and his attempts to meet with other extremists were noted as bases for his CMU designation, but his offense of conviction and other details of his conduct were discussed as well. Pls. Ex. 83, BOP CMU 60135. Defendants respectfully refer the Court to the Notice, which speaks for itself.

263. Disputed in part as a mischaracterization. Smith testified that the inmate's offense conduct was probably the primary basis for his designation to the CMU, but that his radicalized religious beliefs and interests were a secondary consideration. As to why this was not included on the Notice, Smith noted that there was only "limited space" on the form, but also emphasized the primacy of the offense conduct. Defendants respectfully refer the Court to the cited transcript for a correct account of this testimony. Pls. Ex. 16 at 322-26.

265. Undisputed, subject to clarification. The facts referenced by Plaintiffs are among those discussed in the CTU referral memo and NCRO review form, but are not the only facts so discussed. Pls. Ex. 84, BOP CMU 67404-08.

266. Disputed. *See supra* ¶ 113.

267. Undisputed, subject to clarification. The Notice also discusses other, related details of his conduct. Pls. Ex. 84, BOP CMU 60104.

269. Undisputed, subject to clarification. The facts referenced by Plaintiffs are among those discussed in the CTU referral memo and NCRO review form, but are not the only facts so discussed. Pls. Ex. 85, BOP CMU 67458-63, 60771-72. Defendants respectfully refer the Court to the cited exhibit, which speaks for itself.

270. Disputed. *See supra* ¶ 113.

271. Undisputed, subject to clarification. The Notice also discusses other, related details of his conduct. Pls. Ex.85, BOP CMU 60048. Defendants respectfully refer the Court to the Notice, which speaks for itself.

275. Undisputed that, although inmates in the CMU are subject to periodic review and only retained in CMU so long as is necessary, there is no expected duration for CMU placement. Pls. Ex. 12 at 100.

279. Disputed, insofar as Plaintiffs suggest that statements of this nature were routinely made to inmates in the CMU. It is undisputed that Plaintiffs' Exhibit 57 was given to Yassin Aref while he was housed in the CMU. Defendants respectfully refer the Court to this exhibit, which speaks for itself.

281. Disputed to the extent Plaintiffs' characterization conflicts with cited documents, which speak for themselves, and to which the Court is respectfully referred.

294. Disputed as a mischaracterization of David Schiavone's testimony to the extent this suggests that Mr. Schiavone testified that re-designation out of a CMU requires 18 months of

clear conduct. The Court is respectfully referred to Mr. Schiavone's transcript for an accurate record of his statements. Pls. Ex. 12.

295. Disputed. Although the process for designating inmates out of the CMU was not formalized until late 2009, elements of the process were already in place before this time. Pls. Ex. 12 at 142-43.

297. Undisputed, subject to clarification. One of the purposes of the Dodrill memo was to notify staff that CMU inmates were to be reviewed for continued CMU designation at every program review. Pls. Ex. 12 at 142-43.

298. Undisputed, subject to clarification. The review process described in the July 24, 2009 memo was not implemented at the time. Given that it describes the same process as the subsequent Dodrill memo, it was later implemented when the Dodrill memo was issued.

300. Disputed to the extent Plaintiffs' characterization differs from the cited document, which speaks for itself.

301. Undisputed that BOP policy does not require an inmate to spend a minimum time period in the CMU before being reviewed for transfer. Otherwise, the court is respectfully referred to the Institution Supplement for an accurate description of its contents. *See* Pls. Ex. 12 at 147-49.

304. Undisputed that BOP policy does not require an inmate to spend a minimum time period in the CMU before being reviewed for transfer. Otherwise, the court is respectfully referred to the Institution Supplement for an accurate description of its contents. Pls. Ex. 12 at 179-81; Pls. Ex. 100.

305. Undisputed that the May 31, 2012 FCI Terre Haute Institution Supplement misstates BOP policy to the degree it suggests that CMU inmates must remain in the CMU for a

particular period of time before they are eligible to be considered for transfer out of the CMU. Otherwise, the court is respectfully referred to the Institution Supplement for an accurate description of its contents . Pls. Ex. 12 at 183-85; Pls. Ex. 1.

306. Undisputed that the current FCI Terre Haute Institution Supplement states that “[r]eviews for an inmate to be considered for transfer out of a CMU will take place during regularly scheduled Unit Team meetings and after the Unit Team has had ample time to monitor the inmate’s institutional adjustment.” Pls. Ex. 101. Also undisputed that this language differs in some respects from the Dodrill memo.

307. Undisputed that in past CMU staff generally followed the policy guidance contained in the Dodrill memo. Pls. Ex. 12, at 150.

308. Disputed to the extent Plaintiffs’ characterization of the cited testimony differs from its content, which speaks for itself.

309. Disputed to the extent Plaintiffs’ characterization of the cited testimony differs from its content, which speaks for itself.

310. Disputed to the extent Plaintiffs’ characterization of the cited testimony differs from its content, which speaks for itself.

312. Disputed to the extent Plaintiffs’ characterization of the cited testimony differs from its content, which speaks for itself.

314. Undisputed that Plaintiffs’ Exhibit 105 is a legitimate BOP document and that Plaintiffs correctly quote it. Undisputed that this document was created after 2008. Disputed to the degree Plaintiffs suggest that this document necessarily was not created until after the Dodrill memo or that no aspects of the CMU review process had been formulated before the Dodrill memo was issued in 2009. Pls. Ex. 40 #2.

319. Undisputed that Warden Jett did not personally provide CMU unit teams with guidance regarding how they should review prisoners for potential re-designation out of the CMU. Disputed to the extent Plaintiffs suggest unit teams received no guidance whatsoever.

320. Undisputed that Warden Hollingsworth did not personally provide CMU unit teams with guidance regarding how they should review prisoners for potential re-designation out of the CMU. Disputed to the extent Plaintiffs suggest unit teams received no guidance whatsoever.

321. Undisputed that CMU unit teams were not provided with specific time frames regarding how long an inmate should refrain from activities that led to his CMU designation before re-designation was appropriate; such determinations were to be made on a case-by-case basis using sound correctional judgment. Pls. Ex. 12 at 171-74.

322. Disputed to the extent Plaintiffs' characterization of the cited testimony differs from its content, which speaks for itself.

323. Undisputed that Paul Kelly testified that the unit team made decisions regarding CMU re-designation based on the "information that we had," which may not always have included all details regarding why the inmate had originally been placed in the CMU. Pls. Ex. 89 at 79. Disputed to the extent Plaintiffs suggest this necessarily prevented unit teams from determining whether the reasons for an inmate's CMU placement still existed. *Id.*

324. Disputed to the extent Plaintiffs' characterization of the cited testimony differs from its content, which speaks for itself.

325. Disputed. Plaintiffs mischaracterize Henry Rivas's statement. Defendants respectfully refer the Court to Rivas's actual statements in the deposition transcript in Plaintiffs' Exhibit 107.

331. Undisputed that BOP began using a new form to document reviews of CMU designations in 2013. Disputed that Plaintiffs' Exhibit 43 – a CMU review form dated 2007 – is such a form.

332. Disputed to the extent Plaintiffs' characterization of the cited testimony differs from its content, which speaks for itself.

337. Disputed to the extent Plaintiffs' characterization of the cited testimony differs from its content, which speaks for itself.

339. Disputed insofar as this is as an opinion or legal conclusion, not a statement of material fact.

340. Undisputed that BOP informs inmates of transfer denials in writing but Plaintiffs' characterization of all such written denials as failing to provide reasons for the denial is disputed. The Court is respectfully referred to the documents for an accurate description of their contents.

342. Disputed to the extent Plaintiffs' characterization conflicts with the actual content of the cited testimony, which speaks for itself.

344. Undisputed, subject to clarification. The BOP's documentation of the May 2007 program review does not indicate whether or not Aref was considered for transfer from the CMU at that time.

347. Undisputed, subject to clarification. The BOP's documentation of the October 2007 program review does not indicate whether or not Aref was considered for transfer from the CMU at that time.

351. Disputed on the ground that this statement is based on, or constitutes, hearsay inadmissible for the truth of the matter asserted.

352. Disputed to the extent Plaintiffs' characterization of the cited memo differs from its content, which speaks for itself.

356. Undisputed, subject to clarification. The BOP's documentation of the April 2009 program review does not indicate whether or not Aref was considered for transfer from the CMU at that time.

362. Undisputed, subject to clarification. The BOP's documentation of the March 2010 program review does not indicate whether or not Aref was considered for transfer from the CMU at that time.

370. Undisputed that Aref's NCRO referral form stated that had been "in constant contact with terrorist sympathies [sic]." It did not, however, indicate whether this was as part of his offense conduct or in some other capacity. Pls. Ex. 120. Defendants respectfully refer the Court to the cited exhibit, which is the best evidence of its content.

377. Disputed to the extent Plaintiffs' characterization of the cited documents differs from their content, which speaks for itself.

383. Disputed. *See supra* ¶ 113.

387. Disputed to the extent Plaintiffs' characterization of the cited testimony differs from its content, which speaks for itself.

391. Disputed to the extent Plaintiffs' characterization of the cited testimony differs from its content, which speaks for itself.

392. Disputed to the extent Plaintiffs' characterization of the cited document differs from its content, which speaks for itself.

400. Undisputed that the transfer was not made because of any negative behavior by Jayyousi.

403. Disputed as mischaracterization. The documents at issue contain a discussion of a speech Jayyousi made while serving as a Jumah prayer leader, but the speech was not itself a “prayer.” Pls. Ex. 137.

404. Undisputed, subject to clarification. The hearing officer concluded that Jayyousi had not committed the charged act because no “other inmates acted on the sermon which caused a disruption in the unit or at the meeting.” Pls. Ex. 138.

405. Disputed as mischaracterization. The CTU considered the content of the speech Jayyousi made to his fellow inmates while serving as a prayer leader, but this speech itself was not a “prayer.” *See, e.g.*, Pls. Ex. 137.

407. Disputed. *See supra* ¶ 113.

409. Disputed to the extent Plaintiffs’ characterization of the cited documents differs from their content, which speaks for itself.

411. Disputed to the extent Plaintiffs’ characterization of the cited documents differs from their content, which speaks for itself.

415. Disputed on the ground that this statement is based on, or constitutes, hearsay inadmissible for the truth of the matter asserted.

422. Disputed. *See supra* ¶ 113.

426. Disputed on the ground that this statement is based on, or constitutes, hearsay inadmissible for the truth of the matter asserted.

427. Disputed. Assumes facts not supported by the cited evidence – namely, that this was a requirement for McGowan to be released from a CMU.

428. Disputed. Assumes facts not supported by the cited evidence – namely, that this was a requirement for McGowan to be released from a CMU.

429. Undisputed, subject to clarification. The BOP's documentation of this program review does not indicate whether or not McGowan was considered for transfer from the CMU. Pls. Ex. 145.

432. Disputed on the ground that this statement is based on, or constitutes, hearsay inadmissible for the truth of the matter asserted.

435. Disputed on the ground that this statement is based on, or constitutes, hearsay inadmissible for the truth of the matter asserted.

436. Undisputed, subject to clarification. The BOP's documentation of this program review does not indicate whether or not McGowan was considered for transfer from the CMU. Pls. Ex. 147.

441. Undisputed that McGowan's communications while incarcerated were a reason that the CTU recommended against McGowan's transfer out of the CMU. Pls. Ex. 150.

445. Undisputed that, according to David Schiavone of the CTU, ALF and ELF considered themselves leaderless, but that specific actions carried out by the groups had leaders. Pls. Ex. 36 at 158-59.

446. Disputed to the extent Plaintiffs' characterization of the cited testimony differs from its content, which speaks for itself.

447. Disputed to the extent Plaintiffs' characterization of the cited testimony differs from its content, which speaks for itself.

449. Disputed. *See supra* ¶ 113.

451. Disputed to the extent Plaintiffs' characterization conflicts with the actual content of the cited documents, which speaks for itself.

452. Disputed, assumes facts not supported by the cited evidence – namely, that McGowan’s requested transfer out of the CMU was denied because of his communications.

455. Disputed to the extent Plaintiffs’ characterization of the cited documents differs from their content, which speaks for itself.

459. Undisputed, subject to clarification. McGowan’s communications were one of the reasons cited by the CTU for recommending against McGowan’s transfer from the CMU. Pls. Ex. 157. Defendants respectfully refer the Court to the cited document, which speaks for itself.

461. Disputed. *See supra* ¶ 113.

464. Undisputed that McGowan’s prison communications and his attempts to circumvent mail monitoring were reasons that the CTU recommended that McGowan be transferred back to the CMU. Pls. Ex. 159.

465. Disputed to the extent Plaintiffs’ characterization of the cited documents differs from their content, which speaks for itself.

467. Disputed. *See supra* ¶ 113.

470. This statement contains a legal conclusion and thus is not a proper assertion of fact.

473. Undisputed that McGowan filed an Administrative Remedy Request on March 8, 2011 seeking additional information about the reason for his re-designation to the CMU. Disputed to the extent Plaintiffs suggest that his Notice of Transfer was vague.

474. Disputed to the extent Plaintiffs’ characterization of the cited documents differs from their content, which speaks for itself.

477. Disputed on the ground that this statement is based on, or constitutes, hearsay inadmissible for the truth of the matter asserted.

478. Undisputed that Prisoner M was told he would have to spend 18 months with clear conduct before he would be considered for a “nearer release” transfer. Pls. Ex. 87, at P001930.

480. Disputed. *See supra* ¶ 113.

484. Undisputed, subject to clarification. The fact that Prisoner J had “expressed in his communications and interaction with staff that he had been at odds with the inmate Muslim community” was one of many facts noted in the CTU’s recommendation that Prisoner J be transferred out of the CMU. Pls. Ex. 166, BOP CMU 076131-32.

485. Undisputed that the summary on Prisoner J’s NCRO CMU Referral form noted, among many other facts, that Prisoner J “has maintained clear conduct, established good rapport with staff, and has distanced himself from the Muslim community.” Pls. Ex. 166, at BOP CMU 060851.

487. Disputed. *See supra* ¶ 113.

491. Disputed. *See supra* ¶ 113.

492. Disputed. Pottios made the recommendation in question as acting Correctional Program Administrator, but his position is senior correctional program specialist. Pls. Ex. 168; Pottios Tr. (Ex. 13) at 8:16-20, 36:17-20.

493. Undisputed, subject to clarification. Pottios made the quoted statement as part of a larger answer in which he also stated that “I don’t think a person would have to change their beliefs” to be eligible for transfer out of the CMU. Pls. Ex. 51 at 133. Defendants respectfully refer the Court to Plaintiffs Exhibit 51 for his complete answer in context.

496. Disputed to the degree this statement contains a legal conclusion and thus is not a proper assertion of fact.

498. Disputed. Pls. Ex. 36, 97-99; Smith Tr. (Ex. 11) 160:4-25 (indicating adding additional procedures would raise security concerns).

500. Disputed. Vague. Not a factual assertion or a proper expert opinion.

501. Disputed. Vague. Not a factual assertion or a proper expert opinion.

502. Disputed. Vague. Not a factual assertion or a proper expert opinion.

503. Disputed. Vague. Not a factual assertion or a proper expert opinion.

504. Undisputed subject to clarification. Jayyousi's security level was temporarily increased to medium before he was placed in the step down process at USP Marion because USP Marion is a medium security facility. See Miller Tr. (Ex. 43) at 24:13-22; Miller Decl. (Ex. 5) ¶ 18. Jayyousi's current security level is not due to his past placement in a CMU, but is due to the fact that his convictions and offense conduct are associated with international terrorism. *Id.* His past CMU placement has no impact on his housing assignment or current conditions of confinement. *Id.*

507. Disputed. This statement is based on, or constitutes, hearsay inadmissible for the truth of the matter asserted.

508. Disputed. Vague.

Dated: May 21, 2014

Respectfully submitted,

STUART F. DELERY
Assistant Attorney General

RONALD C. MACHEN JR.
United States Attorney

ANTHONY J. COPPOLINO
Deputy Branch Director

/s/

NICHOLAS CARTIER
(D.C. Bar # 495850)
NATHAN M. SWINTON
(N.Y. Bar)
TIMOTHY A. JOHNSON
(D.C. Bar # 986295)
Trial Attorneys
U.S. Department of Justice
Civil Division/Federal Programs
Mail: P.O. Box 883
Washington, D.C. 20044
Street: 20 Massachusetts Ave., N.W.
Ph: (202) 616-8351
Fax: (202) 616-8470
Email: nicholas.cartier@usdoj.gov

Attorneys for Defendants