IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Yassin Muhiddin AREF, et al.,	)	
Plaintiffs,	)	
-v-	)	Case No. 1:10-cv-00539-BJR
Eric HOLDER, et al.,	)	
Defendants.	)	

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

Pursuant to Rule 7(h)(1) of the Local Rules of the United States District Court for the District of Columbia, Plaintiffs, by and through undersigned counsel, respectfully submit the following response to Defendants' Statement of Undisputed Material Facts in Support of their Motion for Summary Judgment (Dkt. #145-1). For ease of reference, Plaintiffs use the following citations in this document:

SUF __: Plaintiffs' Statement of Undisputed Material Facts in Support of their Motion for Summary Judgment.

SMF __: Defendants' Statement of Undisputed Material Facts in Support of their Motion for Summary Judgment.

R-SUF __: Defendants' Response to Plaintiffs' Statement of Undisputed Material Facts in Support of their Motion for Summary Judgment.

P. Ex. __: exhibits accompanying Plaintiffs' Motion for Summary Judgment.

Def. Ex. __: exhibits accompanying Defendants' Motion for Summary Judgment and Opposition to Plaintiffs' Cross-Motion for Summary Judgment.

P. Opp. Ex. __: exhibits accompanying Plaintiffs' Memorandum of Law in Opposition to Defendants' Motion for Summary Judgment and in Further Support of Plaintiffs' Motion for Summary Judgment.

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SMF 7: Disputed. While the BOP publicly refers to the CMUs as general population units, CMU prisoners experience restrictions that are not imposed on general population prisoners, and internal BOP documents acknowledge that the CMUs are a "form[] of housing restricted from the general population" SUF 3-5, 20-28, 37, 38, 39.

SMF 9: Disputed in part. *See supra* ¶ 7.

SMF 10: Disputed in part as unsupported. The cited exhibits do not establish that the CMUs currently house about 50 prisoners.

SMF 12: Undisputed, subject to clarification. While CMU inmates have access to common areas, those areas are very small and limited in comparison to the common areas found in general population units. P. Opp. Ex. 28 (McGowan Dep.) 135:17-136:10.

SMF 13: Disputed in part. CMU prisoners' access to much of what is listed in this paragraph is limited in comparison to that enjoyed by general population prisoners. P. Opp. Ex. 28 (McGowan Dep.) 146:2-146:15.

SMF 15: Undisputed, subject to clarification to the extent that CMU designation functions as a substitute for discipline. *See* SUF 126, 214, 219-21, 404, 405, 464, 468, 471, 472.

SMF 16: Disputed as vague. CMU inmates have only 120 minutes of social telephone calls per month, while general population inmates have 300. *See* SMF 18, 20. CMU inmates

have only eight hours of social visitation per month, while general population inmates at, for example, FCI Terre Haute and USP Marion, have up to 49 and 42 hours of social visitation per month respectively. *See* SMF 21, SUF 4, 5.

SMF 19: Undisputed, subject to clarification. Calls must be made between 8:00 a.m. and 8:00 p.m. on Monday through Friday, and between 8:00 a.m. and 2:30 p.m. on Sunday. *See* Def. Ex. 1 (Schiavone Decl. Ex. B) BOPCMU064113.

SMF 22: Undisputed, subject to clarification. Visits must occur between 8:30 a.m. and 2:30 p.m. *See* Def. Ex. 1 (Schiavone Decl. Ex. B) BOPCMU064114.

SMF 24: Disputed. Non-contact visits make it "easier" for BOP personnel to monitor conversations, rather than "permit" monitoring. *See* SMF 26.

SMF 29: Disputed. Unlike under the BOP's normal rules and procedures, the Counter Terrorism Unit (CTU) reviews and screens all incoming social correspondence to CMU inmates, including magazines and other reading materials. *See* Def. Ex. 1 (Schiavone Decl.) ¶ 14.

SMF 33: Disputed in part. *See supra* ¶ 29.

SMF 37: Disputed, mischaracterization. The exhibits referenced indicate that inmates in administrative detention receive the opportunity to exercise for five hours per week, ordinarily on different days in one-hour periods, rather than for one hour every five days. *See* Def. Ex. 6 (Lara Decl.) ¶ 19.

SMF 38: Disputed, mischaracterization. The exhibits referenced indicate that inmates in administrative detention at FCI Terre Haute and USP Marion receive the opportunity to exercise for five hours per week, ordinarily on different days in one-hour periods, rather than for one hour every five days. *See* Def. Ex. 6 (Lara Decl.) ¶ 19.

SMF 49: Disputed. According to Defendants' 30(b)(6) witness Frank Lara, it is possible that more telephone access could be provided to a prisoner in administrative segregation absent extenuating circumstances. *See* P. Ex. 10 (Lara 30(b)(6) Dep.) 49:7-49:23.

SMF 50: Undisputed, subject to clarification. Until March 1, 2013, prisoners in administrative segregation at FCI Terre Haute received social contact visits. SUF 42, R-SUF 42 (undisputed, clarifying).

SMF 52: Undisputed, subject to clarification. Inmates in administrative detention at USP Marion are allowed "a *minimum* of four hours of non-contact social visiting time per month and may receive more upon request." *See* Def. Ex. 6 (Lara Decl.) ¶ 15 (emphasis added).

SMF 57: Disputed as hearsay, inadmissible for the truth of the matter asserted.

SMF 64: Undisputed, subject to clarification. About 24% of inmates in administrative segregation at USP Marion and FCI Terre Haute spent more than a month there between February 1, 2012 and August 2, 2013; about 76% spent one month or less. *See* P. Opp. Ex. 13 (Beveridge Decl.) ¶ 7, Table 1.

SMF 65: Disputed. The Batchelder declaration includes different statistics than those that appear in SMF 65. According to the Batchelder declaration, 51.2% (not 37%) of low and medium security inmates spent four to less than ten weeks in administrative detention between February 1, 2012 and August 2, 2013; 33.16% (not 24.21%) spent 10 to 20 weeks in administrative detention; 10.08% (not 7%) spent 20 to 30 weeks in administrative detention; and 3.63% (not 2.52%) spent 30 to 40 weeks in administrative detention. *Compare* SMF 65 *with* Def. Ex. 7 (Batchelder Decl.) ¶ 4. Moreover, Defendants' statistical analysis is incorrect. In fact, looking at prisoners in administrative segregation at low and medium security BOP facilities nationally between February 1, 2012 and August 2, 2013, 53.2% spent less than four weeks in

administrative detention; 23.58% spent four to less than ten weeks there; 15.38% spent 10 to less than 20 weeks there; 5.01% spent 20 to less than 30 weeks there; 1.79% spent 30 to less than 40 weeks there; and 1.03% spent 40 weeks or more. Defendants provide no cumulative numbers to aid the Court's analysis, but those statistics show that 76.78% of low and medium security prisoners spent less than 10 weeks in administrative detention, and 92.16% spent less than 20 weeks there. *See* P. Opp. Ex. 13 (Beveridge Decl.) Table 2.

SMF 68: Undisputed, subject to clarification. Referring to his use of the word "box" to describe SHU, Yassin Aref testified: "Again, all this terms I learned from the prison, which is when you are in the single cell they call box. If you have the single cell, then you are in a box. And sometimes maybe I use it in that mean and sometimes kind of the context maybe I use it to say, small, it's lie down, I don't know. But usually these terms I learned them all in the prison, SHU, box, hole." Def. Ex. 17 (Aref Dep.) 77:4-77:11.

SMF 86: Disputed in part. McGowan testified that he wrote "a minimum of two" articles for the Huffington Post. Def. Ex. 19 (McGowan Dep.) 62:13-62:15.

SMF 87: Disputed. The cited testimony regards McGowan's time at FCI Sandstone. *See* Def. Ex. 19 (McGowan Dep.) 77:8-78:9.

SMF 89: Disputed in part as hearsay inadmissible for the truth of the matter asserted.

SMF 93: Disputed. While the 2009 Dodrill memorandum lists what the BOP has subsequently identified as "CMU designation criteria," the memo itself does not identify the list of possible reasons for CMU placement as CMU criteria, nor does the memo describe the CMU designation process. P. Ex. 46 (Dodrill Memo).

SMF 94: Disputed in part. *See supra* ¶ 93.

SMF 95: Disputed, mischaracterization. Smith testified that there was nothing "drastically different" about *four* of the criteria listed in the two documents rather than between the criteria listed in each document. Def. Ex. 11 (Smith Dep.) 91:8-91:15.

SMF 96: Disputed. The 2009 Dodrill memo states that "In determining whether *continued CMU placement is necessary*, the Unit Team will consider whether the original reasons for CMU placement still exist, *including whether*: [listing 5 criteria]." P. Ex. 46 (Dodrill Memo) (emphasis added). It does not state that an inmate is eligible for placement in a CMU if one or more of the five criteria are met. *Id.*

SMF 97: Disputed in part. *See supra* ¶ 96.

SMF 98: Undisputed, subject to clarification. The plain language of the criteria suggests that this statement is accurate. *See* SMF 96. However, the BOP interprets this criterion to include incarceration conduct. *See* P. Ex. 12 (Schiavone 30(b)(6) Dep.) 72:25-73:23; P. Opp. Ex. 1 (Smith Dep.) 110:14-113:7; P. Opp. Ex. 20 (Lockett Dep.) 150:5-152:11.

SMF 106: Undisputed, subject to clarification. While the Notices might be intended to provide a summary of the reasons for an inmate's placement in a CMU, they do not function that way in practice. The Regional Director is the deciding authority for CMU designations. P. Ex. 36 (Schiavone Dep.), 53:8-53:10; P. Ex. 12 (Schiavone 30(b)(6) Dep.) 77:13-80:3, 81:4-81:6. However, the Notice of Transfer to CMU is not drafted, edited, or finalized by the Regional Director, and does not reflect his reason(s) for approving CMU designation. P. Ex. 36 (Schiavone Dep.), 89:9-89:18; P. Ex. 12 (Schiavone 30(b)(6) Dep.), 95:7-95:10, 264:10-264:18, 285:3-285:10, *see also* Plaintiffs' Memorandum of Law in Support of their Opposition to Defendants' Motion for Summary Judgment and in Further Support of Plaintiffs' Motion for Summary Judgment ("P. Opp.") section II(B)(i). An adequate summary of the reasons for CMU

placement would summarize every reason (excepting those which cannot be disclosed for law enforcement reasons). Instead, the CTU drafts the Notice, but does not have a policy or practice of including on the form all of the reasons for the CTU's recommendation. "The Notice lists some but not necessarily all the reasons an inmate was placed in a CMU." R-SUF 144. Leslie Smith, chief of the CTU, sometimes omits one of the CTU's reasons for its recommendation, "because of space." P. Opp. Ex. 1 (Smith Dep.) 132:2-132:19.[1]

SMF 107: Undisputed that law enforcement sensitive information is excluded from the Notice. Disputed to the extent this paragraph implies that law enforcement sensitive information is the only type of information excluded from the Notice. *See, e.g.,* P. Ex. 12 (Schiavone 30(b)(6) Dep.) 213:11-214:17.

SMF 111: Undisputed, subject to clarification. The CTU only began routing the referral packet to the Correctional Services Division sometime in 2010 or 2011. SUF 105.

SMF 119: Disputed. *See supra* ¶ 106.

SMF 121: Disputed. Aref's "significant communication" with JeM was "key" in the Regional Director's decision to approve Aref's designation to the CMU. P. Ex. 3 (Nalley Dep.) 138:11-139:9. However, Aref's Presentence Investigation Report shows that his conviction resulted from a sting operation; he never had any actual contact with anyone from JeM, but rather with an undercover informant working with the FBI who pretended to be a member of JeM. P. Ex. 55 (Aref Designation Packet) P00005247-5285; P. Ex. 36 (Schiavone Dep.) 268:2-269:7. Therefore, the Regional Director did not approve the placement of Aref based on his actual offense conduct. Additionally, the Regional Director testified that one of his bases for approving Aref for the CMU was his links to al Qaeda. P. Opp. Ex. 16 (Nalley Dep.) 138:9-

[1] Plaintiffs cited to this testimony in their opening brief, in support of SUF 145, but mistakenly excluded the page from P. Ex. 16.

139:9 (referring to P. Ex. 55 at BOPCMU003287). These alleged links were not part of Aref's offense conduct.

Disputed with respect to Jayyousi's designation, because Nalley testified that: "it would have been based on probably his current offense and his conduct of that offense." P. Opp. Ex. 16 (Nalley Dep.) 172:3-172:12. Thus is does not appear that Nalley recalls the reason(s) he approved Jayyousi for CMU designation.

SMF 124: Disputed in part. *See supra* ¶ 106.

SMF 125: Disputed in part. *See supra* ¶ 106.

SMF 126: Disputed in part. *See supra* ¶ 106.

SMF 131: Undisputed, subject to clarification. The BOP began to regularly review the appropriateness of an inmate's ongoing placement in a CMU in late 2009. P. Ex. 12 (Schiavone 30(b)(6) Dep.) 142:11-143:17, 146:24-147:23.

SMF 140: Undisputed, subject to clarification. The BOP began using a new review form to document the reviews in 2013, which includes a box for "inmate comments/Statement." Def. Ex. 1 (Schiavone Decl. Ex. G).[2] The box is not filled out by the prisoner; instead a member of the prisoner's unit team summarizes the prisoner's statement. P. Opp. Ex. 15 (Schiavone 30(b)(6) Dep.) 185:11-189:5.

SMF 153: Undisputed, subject to clarification. In practice, the BOP notifies prisoners of transfer denials by sending a form memo that does not disclose the specific reasons the prisoner was denied transfer. P. Ex. 108 (CMU Transfer Denial Form Memos); P. Ex. 12 (Schiavone 30(b)(6) Dep.) 191:9-192:24.

SMF 157: Disputed. Once a prisoner has been designated to the CMU, he is more likely to be redesignated to the CMU. *See* P. Opp. at section I.

[2] Plaintiffs intended to refer the Court to this document as support for SUF 331.

SMF 158: Disputed in part. The BOP has procedures in place, for example with regards to designation to ADX, the BOP's maximum security facility, which houses "the most incorrigible" and "most dangerous" inmates in BOP custody, P. Opp. Ex. 1 (Smith Dep.) 159:2-159:4, to insure that sensitive law enforcement information is not disclosed in the designation process. Designation to ADX involves a written decision as to whether placement is warranted, including a summary of the pre-designation hearing and all information presented upon which the decision is based, and indicating the specific reasons for the decision, including a description of the act, or series of acts, or evidence on which the decision is based. The inmate receives a written decision that includes this information, unless safety or security would be compromised. P. Ex. 8 (Control Unit Programs) 7-11.

SMF 159: Disputed in part. The BOP can restrict CMU prisoners' communication, for example by placing them in holdover status in administrative segregation, to ensure that they do not circumvent communications monitoring during the short interval post-hearing and pre-transfer to a CMU. *See* P. Ex. 21 (Special Housing Units) BOPCMU000257.

SMF 160: Disputed. David Schiavone testified at his deposition that using procedures at the CMUs similar to those used at the SMUs is "certainly something that could be done because we're doing it [at the SMUs] …. I mean, it could be done. It would take some – some coordination to set up the procedures and the process." P. Ex. 36 (Schiavone Dep.) 97:20-99:1. Such procedures would also bring the CMUs into line with sound correctional practice. P. Ex. 96 (Kautzky Report) 5-6.

SMF 161: Disputed. *See supra* ¶ 160.

SMF 162: Disputed. *See supra* ¶ 160.

SMF 165: Disputed. *See supra* ¶ 121.

SMF 166: Disputed in part. *See supra* ¶ 121.

SMF 169: Disputed in part as unsupported. The Regional Director did not explain that Aref's placement in the CMU was based on his "offense history." *See* Def. Ex. 21 (Administrative Remedy – Yassin Aref) BOPCMU075719.

SMF 171: Undisputed, subject to clarification. Nalley's declaration is different from the explanation he gave at his deposition, where he testified: "He thinks that he is dealing with a terrorist. If he thinks it and believes it *then he is dealing with a terrorist*. If he's not the real terrorist it's not mine to say." P. Ex. 3 (Nalley Dep.) 145:19-145:22 (emphasis added).

SMF 173: Disputed in part as unsupported and subject to clarification. The CTU initially recommended Aref for redesignation, and then changed its mind one day later. P. Ex. 119 (Smith 10/25/10 Memo), P. Ex. 120 (Smith 10/26/10 Memo). No reference to the National Joint Terrorism Task Force appears in the cited document. Def. Ex. 4 (Pottios Decl. Ex. B) BOPCMU003292-93.

SMF 176: Disputed as unsupported. The exhibit does not indicate that law enforcement concerns regarding Aref had abated. *See* Def. Ex. 4 (Pottios Decl. Ex. C) BOPCMU003290-91.

SMF 184: Disputed. *See supra ¶* 121. In addition, Kifah Jayyousi's Notice to Inmate of Transfer listed as part of Jayyousi's offense conduct use of "religious training to recruit other individuals in furtherance of criminal acts in this country … and … significant communication, association and assistance to al-Qaida." P. Ex. 60 (Jayyousi Notice of Transfer). Jayyousi's PSR does not indicate that his offense conduct involved either. P. Ex. 59 (Jayyousi Designation Packet).

SMF 185. Disputed in part. *See supra* ¶ 184.

SMF 186: Undisputed, subject to clarification. Jayyousi's Notice of Transfer also cited other reasons for his designation to the CMU. *See* SMF 187.

SMF 188: Undisputed, subject to clarification. The characterization of the exhibit is incomplete. *See* Def. Ex. 22 (Administrative Remedy – Kifah Jayyousi).

SMF 190: Disputed as unsupported. The exhibit does not support the statement. *See* Def. Ex. 4 (Pottios Decl. Ex. E).

SMF 194: Disputed as unsupported. No reference to Jayyousi or USP Marion appears in the cited document. *See* Def. Ex. 43 (Miller Dep.) 24:13-24:22.

SMF 196: Disputed. *See supra* ¶ 157.

SMF 199: Disputed in part and subject to clarification. McGowan's Notice of Transfer mischaracterizes his offense conduct, and also cited other reasons for his designation to the CMU. *See* SUF 195-201, SMF 200.

SMF 202: Disputed in part as unsupported and mischaracterization. No reference to sensitive law enforcement information appears in the cited document. The document does refer to McGowan's incarceration correspondence regarding the radical environmental and animal rights movement. Def. Ex. 4 (Pottios Decl. Ex. H) BOPCMU005030-31.

SMF 204: Disputed in part as unsupported and mischaracterization. No reference to sensitive law enforcement information appears in the cited document. The document does refer to McGowan's incarceration correspondence regarding radical environmental groups. Def. Ex. 4 (Pottios Decl. Ex. I) BOPCMU003909-10.

SMF 206: Disputed in part. McGowan did not "instruct [his wife] to circumvent BOP's mail monitoring system by giving the reports to his attorney, who would then give them to McGowan." McGowan asked his wife to ask his attorney to send him CTU documents that had

been leaked on a public website and that mentioned him. P. Ex. 159 (Smith 2/1/11 memo); P. Ex 160 (Intelligence Analyst 1/31/11 memo).

SMF 220: Undisputed, subject to clarification. The transcriptions referenced includ various errors, for example, the transcription indicates that Jayyousi stated the CMU "fell from some hell," but the recording makes it clear that Jayyousi actually stated that the CMU "fell from the sky." *Compare* Stipulation, Dkt. No. 142, ¶ 6 *with* Def. Ex. 27 (Memorandum from John Bair Re: Inmate Jayyousi), Def. Ex. 33 (8/19/08 Email from David Schiavone). As well, the transcription does not include Arabic translations. *Id.*

SMF 228: Disputed in part. The incident report mischaracterizes some of Jayyousi's statements. For example, it indicates that Jayyousi stated that "Muslims should martyr themselves" when he actually said "[t]his is why we martyr." *Compare*, Stipulation, Dkt. No. 142, ¶ 6 *with* Def. Ex. 36 (8/20/08 Incident Report for Kifah Jayyousi).

SMF 229: Disputed in part, *see supra* ¶ 228.

SMF 232: Disputed in part. The second incident report mischaracterizes some of Jayyousi's comments, for example, by indicating that Jayyousi stated that the CMU "fell from some hell." *See supra* ¶ 220.

SMF 234: Undisputed, subject to clarification. The Disciplinary Hearing Officer (DHO) also stated: "After careful consideration, the DHO found that the inmate did not commit the prohibit act(s) of Code 212, Encouraging a group demonstration, based on the body of section 11 did not support the charge." Def. Ex 41[3] (1/29/09 Discipline Hearing Officer Report for Kifah Jayyousi) BOPCMU004245.

SMF 235: Disputed, *see supra* ¶ 234.

[3] Defendants erroneously cited Def. Ex. 42.

SMF 241: Undisputed, subject to clarification. Asked what he examined in considering Jayyousi's transfer request, Smith also testified that he "considered the speech," that the information was relevant to whether or not Jayyousi should be transferred out of the CMU, that he expected the Regional Director and regional staff to consider everything he put in his memos when reaching their decision, and that he was "sure" the information had some bearing on his recommendation against Jayyousi's transfer from the CMU. P. Ex. 16 (Smith Dep.) 269:9-270:6; P. Opp. Ex. 1 (Smith Dep.) 289:11-290:3, 295:6-295:21.

SMF 245: Disputed in part. The CTU's summary of Jayyousi's speech mischaracterized some of his statements; for example, it indicates that Jayyousi stated that "Muslims should martyr themselves," when he actually said "[t]his is why we Martyr." *Compare* Stipulation, Dkt. No. 142, ¶ 6 *with* Def. Ex. 4 (Pottios Decl. Ex. E).

SMF 247: Undisputed, subject to clarification. The CTU memo goes on to state: "Characteristics, behaviors and unacceptable activities which describe an individual involved in prison radicalization and recruitment were displayed by inmate Jayyousi and included: a charismatic individual, who makes highly inflammatory commentaries which elicit violence, terrorism or intimidation, and speech that disrespects or condemns other religious, ethnic, racial, or regional groups." Def. Ex. 4 (Pottios Decl. Ex. E.) BOPCMU004614.

SMF 249: Undisputed, subject to clarification. Terre Haute staff indicated in their memos that it was the nature of Jayyousi's conviction, not his institutional conduct that led them to recommend against his release from the CMU. SUF 390-398.

SMF 250: Disputed in part as inadmissible. Defendants reference "information received from the National Joint Terrorism Task Force's [sic] *regarding Jayyousi's possible release*, which was based on sensitive law enforcement information." SMF 250 (emphasis added).

However, Defendants have not previously disclosed that the redacted information pertained to "Jayyousi's possible release," invoking law enforcement and deliberative process privilege. *See* Def. Ex. 4 (Pottios Decl. Ex. E.) BOPCMU004614 (redacting privileged information). In depositions, BOP witnesses refused to answer questions about the nature of the information:

> Q. Would you have recommended against Mr. Jayyousi's transfer at the time had he not engaged in this sermon?
> …
> A. I believe yes, I would have.
> Q. Why?
> A. Sensitive law enforcement reporting.

P. Opp. Ex. 1 (Smith Dep.) 296:3-296:19.

> Q. Does the redacted information relate to Mr. Jayyousi or to another inmate?
> A. I couldn't comment on that.

P. Opp. Ex. 15 (Schiavone 30(b)(6) Dep.) 300:23-300:25.

SMF 252: Undisputed, subject to clarification. Smith's characterization of Jayyousi as a "very influential terrorist" was based in part on his belief that Jayyousi had been "credited with recruiting [Jose Padilla] to some form of violent action." P. Opp. Ex. 1 (Smith Dep.) 283:22-284:7. When asked what he was basing this on, he testified: "Something I read. I just can't remember where it's at." In response to Plaintiffs' subsequent request that Defendants produce "[A]ny and all documentation, referred to at page 269 of the Rough Draft Transcript of the Deposition of Leslie Scott Smith, that was considered by the BOP's Counter Terrorism Unit (CTU) in reviewing Mr. Jayyousi's eligibility for release from the CMU, and that relates to or substantiates the assertion that Kifah Jayyousi played a role in recruiting Jose Padilla to engage in terroristic acts," Defendants produced Jayyousi's superseding indictment; however, that document indicates that Jayyousi's co-defendants recruited Padilla, not Jayyousi. *See* P. Opp. Ex.

25 (Plaintiffs' Fourth Set of Production Requests for all Defendants); P. Opp. Ex. 26 (Jayyousi Superseding Indictment).

SMF 253: Disputed. This testimony is not credible given the structure of the memo, and the fact that 17 out of 24 pages of Jayyousi's Redesignation Packet are solely related to the sermon. P. Ex. 137 (Jayyousi Redesignation Packet). As well, 30(b)(6) witness David Schiavone, who drafted the March 22, 2011 CTU memo recommending that Jayyoui's transfer request be denied, testified that the CTU's recommendation was based on the CTU's belief "that the inmate still warranted the controls and monitoring of a CMU … based on his incarceration conduct and his offense conduct and the additional information noted in the presentence report." P. Ex. 12 (Schiavone 12(b)(6) Dep.) 293:21-294:12. Schiavone did not testify that information from the NJTTF was *the* (or even a) *reason* for this recommendation. *Id.* Indeed, when asked directly about the redacted information, Schiavone denied that it was the "primary reason" for the recommendation against transfer. *Id.* at 301:17-301:24. When pressed on the redaction, Schiavone refused to explain whether it was a basis for the recommendation or simply relevant background information:

Q. Okay. Please look at the last page of the memo. And you'll see there are several redactions. I'm going to ask you some questions about the redactions, but I'm hopeful that I can get responses from you that don't compromise any law enforcement sensitive information that's actually been redacted. So let's see if you can answer my questions without disclosing the actual information, which is not my intent. Now, the last part of the last sentence on BOP CMU 5018 is redacted. Does this redaction cover another reason why the CTU recommended against Mr. Jayyousi's designation out of the CMU?
A. It's a piece of information that is part of the overall referral and recommendation.
Q. Is that a yes or no, sir?
A. It's incorporated in the memo, so, yes, it's part of the relevant information that CTU provided.
Q. Well, I know that it's part of the relevant information, but, you know, my understanding of these memos is that they include some background information and context identifying information, and then also the actual reasons for the recommendation. So my question is whether this redacted information is an actual

reason for the CTU's recommendation or if it is something else? And you don't have to tell me what that something else is.

A. The CTU believed it was relevant to the referral and included it with all of the information. All of the information in the memo is relevant to the position of the CTU.

Q. Why don't you give me a minute to chew on that response?
(Pause.)

Q. Did the CTU rely on this redacted information to make its recommendation against Mr. Jayyousi's designation out of the CMU?

A. Yes. It's part of the substance of this information, all of which is relevant to the CTU's recommendation.

Q. Well, you know, I'm not satisfied with your response, and I'll tell you why. I see the paragraph in front of -- the paragraph that precedes the paragraph we've been discussing says, While in the CMU program, Inmate Jayyousi has not been sanctioned for an incident report. So that, to me, is an example of information that is relevant to this determination, but it is not a reason why the CMU recommended against redesignation. Do you agree with my characterization?
. . .

A: No. The – the information provided in here is a summary of relevant conduct, behavior, offense conduct information, which is used to make a correctional judgment. So it's all relevant. Nothing has any more importance than any other, necessarily, and nothing is one piece that could be identified to substantiate the referral to the CTU.

Q. So Mr. Jayyousi's clear conduct was one of the reasons the CMU recommended against his redesignation out -- I'm sorry. Let me start that again. Mr. Jayyousi's clear conduct was one of the reasons the CTU recommended against his transfer out of the CMU?

A. It's relevant background to describe an inmate's programming, which is included in all transfers.

Q. And is the following paragraph relevant background in the same way?

A. The paragraph with the redacted law enforcement information?

Q. Yes, sir.

A. It's relevant to this referral, yes.

Q. Is it relevant in the same way as background information, as the paragraph that precedes it?

A. It's different information. This is law enforcement information compared to the inmate's disciplinary history.

. . .

Q. I understand your testimony that all of the information in the memo is relevant. And maybe we can get at it this way. It would seem to me that, you know, some of the information in this memo counsels for Mr. Jayyousi's continued retention in the CMU; and some of the information in the memo, like the fact that he's had clear conduct, would counsel for his transfer out of the CMU; and some of the information in the memo might do neither one of those things, might simply be -- it might simply be neutral. Is the final paragraph information that counsels against

Mr. Jayyousi's transfer out of the CMU, that counsels for Mr. Jayyousi's transfer out of the CMU, or is neutral?

MR. CARTIER: I'll just object as vague. You can answer if you understand.

THE WITNESS: The information is taken in whole and is part of an overall judgment. The CTU made a recommendation to have the referral denied, and all of the information in the memo is relevant.

BY MS. MEEROPOL:

Q. Does the redacted information relate to Mr. Jayyousi or to another inmate?

A. I couldn't comment on that.

. . .

Q. Okay. Looking one last time at the preceding paragraph that states that Mr. Jayyousi has not been sanctioned for an incident report, is that information that counsels for his transfer from the CMU, against his transfer from the CMU, or is neutral?

A. The CTU doesn't quantify the individual information. We provide a view of our position for the decision-making authority, the Regional Director, to assess and make a judgment.

Q. The final paragraph, which is partially redacted, does that redaction cover the primary reason why the CTU recommended against Kifah Jayyousi's redesignation out of the CMU?

A. CTU did not have a primary reason. The overall opinion of the CTU is summarized throughout the document.

P. Opp. Ex. 15 (Schiavone 30(b)(6) Dep.) 295:4-301:24.

SMF 255: Disputed in part as unsupported. The cited document does not indicate that Jett believed that Jayyoui's August 15, 2008 sermon raised security concerns. *See* Def. Ex. 35 (8/19/08 Email from Brian Jett).

SMF 262: Disputed in part as vague and unsupported. To the extent that Defendants mean that the Nalley Declaration "has confirmed" his deposition testimony, the latter does not speak to whether sensitive law enforcement information from the NJTTF would have led Nalley to keep Jayyousi in the CMU in the absence of any additional information. *Compare* Def. Ex. 3 (Nalley Decl.) ¶ 14 *with* Def. Ex. 12 (Nalley Dep.) 191:14-192:14. Instead, in response to a question about whether his decision to deny Jayyousi transfer from the CMU was based "only" on the law enforcement information, Nalley testified: "I would have considered all of the packet in its entirety. I don't know which ones I used back then. But *one of the relevant ones would*

have been the CTU, the new sensitive or law enforcement sensitive information." P. Opp. Ex. 16 (Nalley Dep.) 194:1-194:9 (emphasis added).

SMF 268: Undisputed, subject to clarification. Plaintiffs agree that Smith testified as much, but his testimony is not credible for several reasons. First, the 2013 CTU memo does not include any mention of information from the NJTTF, nor is there a redaction in the document which might conceivably include this information. P. Ex. 143 (Smith 4/22/13 Memo). Second, Defendants' 30(b)(6) witness testified that the CTU decided to recommend Jayyousi for transfer because, "based on his incarceration conduct and available information, the CTU made a correctional judgment that he could program outside the monitoring requirements of a CMU." P. Opp. Ex. 15 (Schiavone 30(b)(6) Dep.) 315:19-315:24. Third, in his fact deposition, Schiavone, who authored the memo, was asked "[w]hat had changed since the last time you reviewed Mr. Jayyousi's eligibility for designation out of the CMU?" He responded "[j]ust a continued assessment of his conduct, his behavior, his communications, his overall actions. Q: Can you point to something specific? A: No. It's an assessment of the overall behavior and conduct of the inmate." P. Opp. Ex. 3 (Schiavone Dep.) 258:19-259:6.

SMF 269: Undisputed, subject to clarification. *See supra* ¶ 268.

SMF 271: Disputed as unsupported. Smith does not have authority to decide who is designated or redesignated to a CMU. Instead, the Regional Director is the deciding authority for CMU designations. P. Ex. 36 (Schiavone Dep.) 53:8-53:10; P. Ex. 12 (Schiavone 30(b)(6) Dep.) 77:13-80:3, 81:4-81:6. Therefore, Smith does not have authority to guarantee that "Plaintiffs will not be returned to a CMU based solely on their prior convictions and offense history." SMF 271. Indeed, in his declaration, Smith states only that "some newly obtained information would have to be presented to the CTU … before the CTU would consider *recommending* in favor of

[Plaintiffs'] placement back to a CMU." Def. Ex. 2 (Smith Decl.) ¶ 14. Additionally, newly obtained information would not necessarily need to be "presented" to the CTU in order for the CTU to consider recommending in favor of Plaintiffs' placement back in a CMU. SMF 271. The CTU itself continues to monitor Plaintiffs after their release from the CMU. P. Opp. Ex. 3 (Schiavone Dep.) 259:7-259:20, 261:1-261:13.

Dated: June 18, 2014

By: /s/ Alexis Agathocleous

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