IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND
GREENBELT DIVISION

WISSAM ABDULLATEFF SA'EED AL-QURAISHI, et al., **Plaintiffs,** **v.** **ADEL NAKHLA, et al.,** **Defendants.**	**Civil Action No. 8:08-cv-01696-PJM**

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF DEFENDANT L-3 SERVICES, INC.'S MOTION TO DISMISS

Dated: November 26, 2008

WILLIAMS & CONNOLLY LLP
Ari S. Zymelman, *pro hac vice*
azymelman@wc.com
F. Greg Bowman (Bar No. 16641)
fbowman@wc.com
Anne M. Rucker (Bar No. 27808)
arucker@wc.com
725 Twelfth Street, N.W.
Washington, DC 20005
(202) 434-5000 (telephone)
(202) 434-5029 (facsimile)
Attorneys for Defendant L-3 Services, Inc.

TABLE OF CONTENTS

TABLE OF AUTHORITIES iii

INDEX TO EXHIBITS ix

INTRODUCTION 1

FACTUAL AND PROCEDURAL BACKGROUND 3

A. The War in Iraq 3

B. The *Saleh* and *Ibrahim* Cases 5

C. This Case 6

ARGUMENT 9

I. Legal Standards 9

II. This Court Should Dismiss the Second Amended Complaint Because No Claims Lie for Injuries Arising from Wartime Confinement of Aliens Abroad (All Counts). 10

A. These Plaintiffs May Not Bring Civil Damages Claims Based on Their Conditions of Confinement in Iraq. 10

B. This Case Must Be Dismissed Because Derivative Immunity Bars Claims Arising From Contractors' Performance of Delegated Governmental Functions. 17

C. This Case Must Be Dismissed Under the Political Question Doctrine 19

1. Plaintiffs' Claims Implicate the Conduct of the War in Iraq, a Matter Textually Committed to the Political Branches. 20

2. There Are No Judicially Discoverable and Manageable Standards for Resolving this Case. 25

III. The Complaint Does Not State a Claim. 26

A. The ATS Claims Must Be Dismissed (Counts 1-9). 27

1. ATS Claims Are Limited to Narrowly Prescribed Circumstances. 27

2. The ATS Does Not Provide Jurisdiction over Claims Involving Official U.S. Action or Purely Private Action. 28

3. The Circumstances Alleged Preclude the Court from Implying a Cause of Action under the Federal Common Law. 32

a. Corporations Cannot Be Sued Under the Alien Tort Statute. 32

b. Special Factors 34

4. Cruel, Inhuman and Degrading Treatment Is Not Cognizable Under the ATS (Counts 4, 5, 6). 36

B. The Allegations Do Not State a Claim under the Common Law (Counts 10-20). 36

1. Counts 10-20 Are Governed by Iraq Law. 37

2. Defendants Are Immune from Claims Under Iraqi Law. 38

3. Iraq Law Does Not Recognize Some of the Claims and Relief Sought by Plaintiffs. 39

a. Iraq Law Does Not Recognize Aiding and Abetting or Civil Conspiracy as a Basis for Civil Liability (Counts 11, 12, 14, 15, 17 and 18). 39

b. Iraq Law Does Not Recognize Punitive Damages in a Civil Action. 40

C. Plaintiffs' Allegations of Conspiracy and Aiding and Abetting Are Legally Insufficient (Counts 2, 3, 5, 6, 8, 9, 11, 12, 14, 15, 17, and 18). 40

CONCLUSION 42

TABLE OF AUTHORITIES

FEDERAL CASES

Abagninin v. Amvac Chem. Corp., 545 F.3d 733 (9th Cir. 2008) 32

ACLU v. Dep't of Defense, 389 F. Supp. 2d 547 (S.D.N.Y. 2005) 26

Al-Shimari v. CACI Int'l, Inc., No. 08-827 (E.D.Va. docketed Aug. 8, 2008)....................7

Aldana v. Del Monte Fresh Produce, N.A., Inc., 416 F.3d 1242 (11th Cir. 2005)....................28, 36

Alicog v. Kingdom of Saudi Arabia, 860 F. Supp. 379 (S.D. Tex. 1994)....................18

Arsenaux v. Roberts, 726 F.2d 1022 (5th Cir. 1982)....................41

Baker v. Carr, 369 U.S. 186, 217 (1962)....................19, 20

Bancoult v. McNamara, 445 F.3d 427 (D.C. Cir. 2006) 24

Beanal v. Freeport-McMoRan, Inc., 969 F. Supp. 362 (E.D. La. 1997) 33

Bell Atl. Corp. v. Twombly, 127 S. Ct. 1955 (2007) 9, 40, 42

Ben-Joseph v. Mt. Airy Auto Transp., LLC, 529 F. Supp. 2d 604 (D. Md. 2008) 37

Blankenship v. Manchin, 471 F.3d 523 (4th Cir. 2006)....................5

Boumediene v. Bush, 128 S. Ct. 2229 (2008) 16

Bowoto v. Chevron Corp., 557 F. Supp. 2d 1080 (N.D. Cal. 2008) 36

Bowoto v. Chevron Corp., No. 99-2506, 2006 WL 2455752 (N.D. Cal. Aug. 22, 2006) 28

Bush v. Lucas, 462 U.S. 367 (1983) 34, 35

Butters v. Vance, 225 F.3d 462 (4th Cir. 2000) 17, 18

Chappell v. Wallace, 462 U.S. 296 (1983) 34

City of Worcester v. HCA Mgmt. Co., Inc., 753 F. Supp. 31 (D. Mass. 1990)....................17

Coleman v. Tennessee, 97 U.S. 509 (1878) 13

Correctional Services Corp. v. Malesko, 534 U.S. 61 (2001) 32, 35

Corrie v. Caterpillar, Inc., 403 F. Supp. 2d 1019 (W.D. Wash. 2005) 33

Dow v. Johnson, 100 U.S. 158 (1879) 13, 15

El-Masri v. Tenet, 437 F. Supp. 2d 530 (E.D. Va. 2006) 30

El-Masri v. United States, 479 F.3d 296 (4th Cir. 2007)....................................18, 24, 30

El-Shifa Pharm. Indus. Co. v. United States, 378 F.3d 1346 (Fed. Cir. 2004)....................................11, 24

Enahoro v. Abubakar, 408 F.3d 877 (7th Cir. 2005)....................................33

Estate of Rodriquez v. Drummond Co., 256 F. Supp. 2d 1250 (N.D. Ala. 2003)....................................33

Ex parte Quirin, 317 U.S. 1 (1942) 20

Filartiga v. Pena-Irala, 630 F.2d 876 (2d Cir. 1980)....................................28

Forti v. Suarez-Mason, 672 F. Supp. 1531 (N.D. Cal. 1987)....................................36

Goldstar (Panama) S.A. v. United States, 967 F.2d 965 (4th Cir. 1992) 18, 29

Gonzalez-Vera v. Kissinger, 449 F.3d 1260 (D.C. Cir. 2006)....................................9, 24

Hamdi v. Rumsfeld, 542 U.S. 507 (2004) 17, 21

Harbury v. Hayden, 522 F.3d 413 (D.C. Cir. 2008) 24

Heath v. Sanders, 2008 WL 3926436 (E.D. Va. Aug. 26, 2008) 40

Ibrahim v. Titan Corp., 391 F. Supp. 2d 10 (D.D.C. 2005).................................... passim

Ibrahim v. Titan Corp., 556 F. Supp. 2d 1 (D.D.C. 2007)....................................2, 5, 7, 15

In re Estate of Marcos Human Rights Litig., 978 F.2d 493 (9th Cir. 1992)....................................28

In re Iraq and Afghanistan Detainees Litig., 479 F. Supp. 2d 85 (D.D.C. 20007) 18, 24

Johnson v. Eisentrager, 339 U.S. 763 (1950).................................... passim

Kadic v. Karadzic, 70 F.3d 232 (2d Cir. 1995) 28, 31

Khulumani v. Barclay Nat'l Bank, 504 F.3d 254 (2d Cir. 2007)....................................33, 34

Koohi v. United States, 976 F.2d 1328 (9th Cir. 1992) 12, 22

Labram v. Havel, 43 F.3d 918 (4th Cir. 1995) 10

Laios v. Wasylik, 564 F. Supp. 2d 538 (E.D. Va. 2008) 9

Mangold v. Analytic Servs., Inc., 77 F.3d 1442 (4th Cir. 1996) 17

McAfee v. 5th Circuit Judges, 884 F.2d 221 (5th Cir. 1989) 41

Midland Psychiatric Assocs., Inc. v. United States, 145 F.3d 1000 (8th Cir. 1998) 17

Mujica v. Occidental Petrol. Corp., 381 F. Supp. 2d 1164 (C.D. Cal. 2005) 33, 35

Murray v. Northrop Grumman Info. Tech., Inc., 444 F.3d 169 (2d Cir. 2006) 17

Nat'l Bd. of YMCA v. United States, 396 F.2d 467 (Ct. Cl. 1968) 12

New Orleans v. Steamship Co., 87 U.S. 387 (1874) 13

Pani v. Empire Blue Cross Blue Shield, 152 F.3d 67 (2d Cir. 1998) 17

Perrin v. United States, 4 Ct. Cl. 543 (1868) 12

Piney Run Pres. Ass'n v. County Comm'rs, 523 F.3d 453 (4th Cir. 2008) 9

Rasul v. Myers, 512 F.3d 644 (D.C. Cir. 2008) 18, 24, 35

Roe v. Bridgestone Corp., 492 F. Supp. 2d 988 (S.D. Ind. 2007) 36

Ruttenberg v. Jones, 283 Fed. Appx. 121 (4th Cir. 2008) 40, 42

Saleh v. Titan Corp., 436 F. Supp. 2d 55 (D.D.C. 2006) .... passim

Sanchez-Espinoza v. Reagan, 770 F.2d 202 (D.C. Cir. 1985) .... passim

Saperstein v. Palestinian Auth., No. 04-20225, 2006 WL 3804718 (S.D. Fla. Dec. 22, 2006) 31

Schneider v. Kissinger, 412 F.3d 190 (D.C. Cir. 2005) 24

Schweiker v. Chilicky, 487 U.S. 412 (1988) 35

Sinaltrainal v. Coca-Cola Co., 256 F. Supp. 2d 1345 (S.D. Fla. 2003) 33

Smith v. Reagan, 844 F.2d 195 (4th Cir. 1988) 9

Sosa v. Alvarez-Machain, 542 U.S. 692 (2004) .... passim

Tech. Patents, LLC v. Deutsche Telekom AG, 573 F. Supp. 2d 903 (D. Md. 2008) 3, 10

Tel-Oren v. Libyan Arab Republic, 726 F.2d 774 (D.C. Cir. 1984) 28

Tellabs v. Makor Issues & Rights, 127 S. Ct. 2499 (2007) 9

Thigpen v. McDonnell, 273 Fed. Appx. 271 (4th Cir. 2008)....................42

Thigpen v. United States, 800 F.2d 393 (4th Cir. 1986)....................9

Tiffany v. United States, 931 F.2d 271 (4th Cir. 1991).................... passim

TWI d/b/a Servco Solutions v. CACI Int'l, Inc, 2007 WL 3376661 (E.D. Va. Nov. 9, 2007).......17

U.S. ex rel. Godfrey v. KBR, 2008 U.S. Dist. LEXIS 21957 (E.D. Va. Mar. 13, 2008)................42

United States v. Caltex (Phil.), Inc., 344 U.S. 149 (1952)....................12

United States v. Stanley, 483 U.S. 669 (1987)....................35

Vieth v. Jubelirer, 124 S. Ct. 1769....................19

Volvo Constr. Equip. N. Am., Inc. v. CLM Equip. Co., 386 F.3d 581 (4th Cir. 2004) 38

Webster v. Fall, 266 U.S. 507 (1925) 33

Wilkie v. Robbins, 127 S. Ct. 2588 (2007)....................34

Williams v. United States, 50 F.3d 299 (4th Cir. 1995)....................9

Wilson v. Libby, 535 F.3d 697 (D.C. Cir. 2008)....................35

Zivkovich v. Vatican Bank, 242 F. Supp. 2d 659 (N.D. Cal. 2002)....................21

FEDERAL LEGISLATIVE AUTHORITY

10 U.S.C. § 2734....................35

18 U.S.C. 2441 (2000 & Supp. V 2005)....................15

18 U.S.C. §§ 2340A (2008) 15

18 U.S.C. § 3261 (2000) 15

28 U.S.C. § 1350....................27

28 U.S.C. § 1350 n....................29, 33

28 U.S.C. § 1404(a) 38

28 U.S.C. § 2680 2

28 U.S.C. § 2860(j) 12

Pub. L. No. 107-243, 116 Stat. 1498 (2002) 3

U.S. Const. Article I, § 8 20

U.S. Const. Article I, § 9, cl. 2 16

U.S. Const. Article II, § 2, cl. 1 20

STATE CASES

Black v. Leatherwood Motor Coach Corp., 92 Md. App. 27 (1992) 38

Brabizon Group AB v. Marriott Int'l, Inc., 2006 MDBT 15, 2006 Md. Cir. Ct. LEXIS 19 (Baltimore City Nov. 6, 2006) 40

Hauch v. Connor, 295 Md. 120 (1983) 37, 38

Jacobs v. Adams, 66 Md. App. 779 (1986) 37

Naughton v. Bankier, 114 Md. App. 641 (Md. Ct. Spec. App. 1997) 40

White v. King, 244 Md. 348, 223 A.2d 763 (1966) 37

OTHER AUTHORITIES

Coalition Provisional Authority Order 17 (Revised June 27, 2004) 14, 15

Coalition Provisional Authority Order No. 17 (June 27, 2003) ..... passim

Coalition Provisional Authority Regulation No. 1 (May 16, 2003) 4

David Luban, *A Theory of Crimes Against Humanity,* 29 Yale J. Int'l L. 85, 95-97 (2004) 32

Department of Defense Directive 3115.09 (October 9, 2008) 26

Federal Rules of Civil Procedure 9, 40, 41

First Restatement of the Law of Conflict of Laws 38

H.R. Rep. No. 102-367 (1991)..29

Letter from the Permanent Representatives of the United Kingdom of Great Britain and Northern Ireland and the United States of America to the United Nations addressed to the President of the Security Council, U.N. SCOR, U.N. Doc. No. S/2003/538 (May 8, 2003).........................4

Restatement (Third) of Foreign Relations Law of the United States § 702 n. 5 (1987)................36

United Nations Security Council Resolution 1483 (May 22, 2003)..4

INDEX TO EXHIBITS

A United Nations Security Council Resolution 1483 (May 22, 2003)

B Second Periodic Report of the United States of America to the Committee Against Torture (June 29, 2005)

C Letter from the Permanent Representatives of the United Kingdom of Great Britain and Northern Ireland and the United States of America to the United Nations addressed to the President of the Security Council (May 8, 2003)

D Coalition Provisional Authority Regulation Number 1 (May 16, 2003)

E Testimony of Secretary of Defense Donald Rumsfeld and Senior Military Leaders Before the Senate Armed Services Committee (May 7, 2004)

F Testimony of Secretary of the Acting Secretary of the Army and Army Inspector General Before the Senate Armed Services Committee (July 22, 2004)

G Coalition Provisional Authority Order Number 17, Status of the Coalition, Foreign Liaison Missions, Their Personnel and Contractors (June 26, 2003)

H Coalition Provisional Authority Order Number 17 (Revised), Status of the Coalition Provisional Authority, MNF–Iraq, Certain Missions and Personnel in Iraq (June 27, 2004)

I Department of Defense Directive Number 3115.09, DoD Intelligence Interrogations, Detainee Debriefings, and Tactical Questioning (October 9, 2008)

J Declaration of Reema I. Ali

INTRODUCTION

Plaintiffs are allegedly 72 innocent Iraqi nationals detained by the U.S. military at approximately 26 different facilities in Iraq anywhere from six days to almost five years between July 2003 and May 2008. They ask this Court to inject itself into the military's detention and interrogation operations in the Iraq war zone by suing L-3 Services, Inc. for their alleged mistreatment. Some of the mistreatment would be shocking if true. Nonetheless, for reasons that have nothing to do with the truth of Plaintiffs' allegations, such claims cannot be litigated, and even if they were, they do not state a claim against L-3. Accordingly, the Second Amended Complaint (SAC or the "Complaint") must be dismissed in its entirety.

While Plaintiffs have attempted to downplay the context of their detention, it is a matter of public record that it took place in the context of military operations by the United States (and others in a multi-national force) pursuant to United Nations authority against a raging insurgency in Iraq. This case's fundamental premise is that the law allows alien enemy plaintiffs to bring claims for their mistreatment. This premise is wrong. The acts of which Plaintiffs complain took place while they were in the custody of the U.S. military, under the military's control, and at the hands of or with the participation of military personnel. In an attempt to avoid the doctrines that doom their claims, Plaintiffs have not sued the United States military or individual soldiers; instead they attempt to bring the claims against L-3. This maneuver is unavailing.

That these claims cannot be brought against the Government means that they also cannot be brought against L-3. The separation of powers and other concerns that preclude alien enemies from bringing civil damages claims against their wartime captors do not vanish simply because the complaint denominates military personnel as "co-conspirators" rather than defendants. Controlling Fourth Circuit precedent forecloses Plaintiffs' attempt to evade such limitations. In seeking to impose liability on the Defendants,

Plaintiffs invite this Court to make an unprecedented expansion of its reach by asking it to evaluate and supervise the military's interrogations and treatment of its detainees in a war zone. This invitation should be declined as it has been declined once before.

The U.S. District Court for the District of Columbia (Robertson, J.) granted judgment to L-3 Services' predecessor The Titan Corporation in two such suits with indistinguishable allegations, one of which included the Plaintiffs in this case as members of a putative class represented by the same counsel that represent Plaintiffs here. *See Saleh v. Titan Corp.*, 436 F. Supp. 2d 55, 59 (D.D.C. 2006), *appeal docketed*, No. 08-7008 (D.C. Cir. Jan. 29, 2008); *see also Ibrahim v. Titan Corp.*, 391 F. Supp. 2d 10, 15-16 (D.D.C. 2005), *appeal docketed*, No. 08-7009 (D.C. Cir. Jan. 29, 2008).[1] Judge Robertson rejected application of the political question doctrine at the motion to dismiss stage, but the law in the Fourth Circuit on derivative immunity and political question is clearer.

Instead of dealing with *Ibrahim* and *Saleh* globally based on the standing of the plaintiffs, the immunity of the defendants, or the justiciability of the claims, Judge Robertson dealt with each claim individually. The D.C. District Court dismissed the Alien Tort Statute (ATS), federal statutory, and certain common law claims on motions to dismiss but permitted limited (non-merits) discovery before granting judgment to Titan on the remaining common law claims, finding they were preempted and barred by the uniquely federal interests expressed in the combatant activities exception to the Federal Tort Claims Act, 28 U.S.C. § 2680 (j). *Ibrahim v. Titan Corp.*, 556 F. Supp. 2d 1 (D.D.C. 2007), *appeal docketed*, No. 08-7009 (D.C. Cir. Jan. 29, 2008).

Even if this Court evaluates the claims individually, as did Judge Robertson, the result here would be the same. On the ATS claims the facts of this case are indistinguishable, and while the relevant precedent is

not controlling, there seems little question that the Fourth Circuit would follow the D.C. Circuit given its persuasiveness and the Fourth Circuit law on derivative sovereign immunity. With regard to the state law claims, this Court can of course take notice of the disposition in D.C., but the question here is more simply answered. Maryland would apply Iraqi law, an issue not reached by Judge Robertson. Accordingly, no claims lie against L-3 because of immunity conferred by the Occupying Power and because most of Plaintiffs' theories of liability are not recognized under Iraqi law. Finally, the conspiracy claims—the glue that holds this case together—do not sufficiently state a claim and must be dismissed.

FACTUAL AND PROCEDURAL BACKGROUND[2]

A. The War in Iraq

Although Plaintiffs attempt to ignore the context of their detention by the U.S. military, that context is of public record and cannot be ignored in assessing whether Plaintiffs' allegations establish jurisdiction or state a claim. On October 16, 2002, Congress enacted the Authorization for Use of Military Force Against Iraq. *See* Pub. L. No. 107-243, 116 Stat. 1498, 1500-01 (2002). Following the initial invasion of Iraq by coalition military forces led by the United States in March 2003, the United States and the United Kingdom announced the creation of the Coalition Provisional Authority (CPA) to, *inter alia*, "exercise powers of government temporarily."[3] The United Nations Security Council formally recognized the CPA as an entity

---

[1] Briefing in the consolidated *Ibrahim* and *Saleh* appeals was completed November 21, 2008.

[2] For the purposes of the motion to dismiss for failure to state a claim, L-3 Services accepts, as it must, the well-pleaded factual allegations of the Complaint as true. *See Tech. Patents, LLC v. Deutsche Telekom AG*, 573 F. Supp. 2d 903, 908-09 (D. Md. 2008). We rely on these allegations, materials incorporated into the Second Amended Complaint, and other materials of which the Court may take judicial notice without converting this motion into one for summary judgment. Of course, the Court is not so limited on the issue of subject-matter jurisdiction.

[3] Ex. C at 1 (Letter from the Permanent Representatives of the United Kingdom of Great Britain and Northern Ireland and the United States of America to the United Nations addressed to the President of the

through which the Coalition nations acted "as occupying powers under unified command." *See* Ex. A, S.C. Res. 1483, U.N. Doc. S/RES/1483, pmbl. (May 22, 2003) ("UNSCR 1483"). Even after the CPA was dissolved and an interim Iraqi government was recognized on June 28, 2004, the U.S. forces' authority to continue its occupation, including capture and detention of persons on the battlefield in Iraq, was expressly authorized by numerous Resolutions of the United Nations Security Council acting under Chapter VII of the United Nations Charter.[4] Throughout the occupation, hostile forces in Iraq have launched armed attacks against civilian targets and U.S. forces. *See, e.g.*, Ex. B, Second Periodic Report of the United States of America to the Committee Against Torture ("Second Report of the United States"), at 70.[5] More than four years after the invasion, "[w]e remain a nation at war."[6]

The United States military has used civilian contractors to a greater extent and differently in Iraq than in any previous conflict, including having contractor employees fill jobs previously held solely by military personnel. *See* Congressional Budget Office, Contractors' Support of U.S. Operations in Iraq 12 (August 2008).[7] L-3 Services was one of those contractors alleged to have provided linguists and

---

Security Council, U.N. SCOR, U.N. Doc. No. S/2003/538 (May 8, 2003)); Ex. D (Coalition Provisional Authority Reg. No. 1 §1(1) (May 16, 2003)).

[4] *See* UNSCR 1483; UNSCR 1511 ¶ 13 (Oct. 16, 2003) (authorizing "all necessary measures to contribute to the maintenance of security and stability in Iraq"); UNSRC 1546 ¶ 10 (June 8, 2004) (same); UNSRC 1637 ¶ 1 (Nov. 8, 2005) (extending foregoing authority to December 31, 2006); UNSCR 1723 ¶ 1 (Nov. 28, 2006) (extending foregoing authority to December 31, 2007); UNSCR 1790 ¶ 1 (Dec. 18, 2007) (extending foregoing authority to December 31, 2008), available at http://www.un.org/Docs/sc/ (last visited Nov. 26, 2008).

[5] The Complaint incorporates an earlier version of this public report. *See* SAC ¶ 452.

[6] President George W. Bush, President Bush Discusses Iraq (July 31, 2008), available at http://www.whitehouse.gov/news/releases/2008/07/20080731.html (last visited Nov. 26, 2008).

[7] Available at: www.cbo.gov/ftpdocs/96xx/doc9688/08-12-IraqContractors.pdf (last visited Nov. 26, 2008).

interrogators to work for the military in the Iraqi detention facilities. *See generally Ibrahim*, 556 F. Supp. 2d at 5-7 (describing Titan's provision of linguist services at Abu Ghraib).[8]

In testimony at a congressional hearing concerning command and control at Abu Ghraib, top military officials confirmed that as a matter of policy and a matter of reality the U.S. military retained operational control over contract linguists and interrogators in Iraq. Secretary of Defense Donald Rumsfeld testified that civilian linguists and interrogators at Abu Ghraib were "responsible to [military intelligence] personnel who hire them and have the responsibility for supervising them." (Ex. E, Hearing of the U.S. Senate Committee on Armed Services 44 (May 7, 2004).) Acting Secretary of the Army Les Brownlee confirmed that civilian linguists and interrogators "work under the supervision of officers or noncommissioned officers (NCOs) in charge of whatever team or unit they are on." *Id.* He later testified further that, "any contract employee like that … is supposed to work under the direct supervision of an officer or non-commissioned officer who would be the supervisor of that person." (Ex. F, Hearing of the U.S. Senate Committee on Armed Services 1023 (July 22, 2004).) Finally, Army Inspector General Paul Mikolashek testified, with regard to civilian linguists and interrogators, that "their overs[eer] on a day-to-day basis was that military supervisor, that [military intelligence] person in that organization to whom they reported." *Id.* at 1022.

B. The *Saleh* and *Ibrahim* Cases

All 72 plaintiffs in this case were members of the putative class in *Saleh* and were represented there by the same counsel that represent them here. *See Saleh*, 436 F. Supp. 2d at 55. The *Saleh* action was first filed in June, 2004, in the Southern District of California. On July 27, 2004, other Iraqi nationals filed the

[8] Much of this discussion relies on the Titan contract, the terms of which are integral to and relied upon in the Complaint, *see, e.g.*, SAC ¶¶ 1, 440, and therefore properly considered by the Court without converting this motion into one for summary judgment. *See Blankenship v. Manchin*, 471 F.3d 523, 526 n.1 (4th Cir. 2006). Nonetheless, Judge Robertson's discussion is referenced solely as background.

Ibrahim action against Titan (and others) in the U.S. District Court for the District of Columbia. The *Saleh* action was transferred to the Eastern District of Virginia on defendants' motion and then re-transferred to the District of Columbia on plaintiffs' motion. The cases were consolidated in the District of Columbia for purposes of discovery and summary judgment. *See Saleh*, 436 F. Supp. 2d at 57 n.1, 60.

Plaintiffs in *Saleh* and *Ibrahim* similarly sought civil damages for alleged mistreatment during U.S. military detention in Iraq under the Alien Tort Statute, various other federal statutes including RICO, and common law causes of action. While the *Ibrahim* case was focused on the Abu Ghraib prison complex, the *Saleh* case, as a putative class action, encompassed all the U.S. detention facilities in Iraq. The District of Columbia (Robertson, J.) dismissed the ATS claims, all the other federal causes of action, and several common law claims for failure to state claims upon which relief can be granted. *Ibrahim*, 391 F. Supp. 2d at 16-20; *Saleh*, 436 F. Supp. 2d at 59-60. Judge Robertson recognized that "the treatment of prisoners during wartime implicates 'uniquely federal interests,'" *Ibrahim*, 391 F. Supp. 2d at 18 (quoting *Boyle v. United Tech. Corp.*, 487 U.S. 500, 504 (1988)), and that the remaining common law claims would be preempted if the contractor's employees "were essentially acting as soldiers," *id.* at 19. This test was later clarified to focus on the military's operational control. In a consolidated decision, Judge Robertson granted Titan summary judgment on the remaining state law claims in both *Saleh* and *Ibrahim*, finding that it was factually undisputed that the military exercised exclusive operational control over the linguists in Iraq and that therefore the claims were preempted by the combatant activities exception to the FTCA. *Ibrahim*, 556 F. Supp. 2d at 2-7, 9-11.

C. This Case

In May and June of this year, the *Saleh* plaintiffs' counsel filed a second wave of five actions on behalf of five plaintiffs in five different venues against L-3 Services, CACI, three individual CACI

interrogators, and Adel Nakhla, a former Titan linguist. After a series of transfers, voluntary dismissals, and amendments, this second wave now comprises this case against L-3 Services and Mr. Nakhla and one pending in the Eastern District against CACI. *See Al-Shimari v. CACI Int'l, Inc.*, No. 08-827 (E.D.Va. docketed Aug. 8, 2008), where a motion to dismiss has been filed, and discovery stayed pending its resolution.[9]

Plaintiffs allege they are 72 Iraqi nationals claim mistreatment during their capture and detention by the U.S. military at approximately 26 different U.S. military facilities in Iraq for periods ranging from six days to almost five years during the period July 2003 until May 2008, with a median detention of 375 days. Plaintiffs allege that they were innocent of wrongdoing, were wrongfully captured, and were mistreated while detained by the U.S. military during the war in Iraq. Plaintiffs seek damages for this alleged mistreatment from L-3 Services and Mr. Nakhla, one of its former employees. All reside in Baghdad with the exception of Mr. Al-Quraishi, an Iraqi residing in Jordan. A majority of the plaintiffs (52 of 72) claim to have been detained at Abu Ghraib prison.

This case stems from the allegation that Defendant L-3 Services sold "the services of Nakhla and other employees to the United States military." (SAC ¶ 1.) Defendant L-3 Services is said to be liable because one or more of these loaned employees, while assigned to military units that controlled detention facilities in Iraq, mistreated Plaintiffs, aided others in doing so, or joined a conspiracy to do so. In an attempt to extend liability to L-3 Services for the acts of unnamed military officials and others, Plaintiffs conclusorily allege the existence of a "torture conspiracy," *id.* ¶¶ 413-44, but fail to allege the formation of any agreement. Indeed, while the phrase "Defendants and/their co-conspirators," a phrase that includes

---

[9] Defendants L-3 Services and Nakhla have moved to transfer this case to the Eastern District of Virginia for consolidation with *Al-Shimari*. (D.E. 36). The convoluted procedural history of these cases is detailed in

military officials, *e.g.*, SAC ¶ 419, is used at least 80 times to describe who is alleged to have harmed them, plaintiffs allege no *facts* to support the "conspiracy" label on which their claims depend. *See* SAC ¶¶ 446, 473, 487, 502, 517, 532, 545.

Sixty-eight of the seventy-two plaintiffs do not even attempt to allege the identity of their alleged abuser. Aside from Mr. Al-Quraishi, the main thrust of Plaintiffs' allegations seems to be that L-3 is liable because its employees were present at Abu Ghraib and other military facilities, when unidentified other persons mistreated plaintiffs. Only two other plaintiffs even refer to an L-3 employee at all, and even where they do, there are vague assertions that the abusers were "speaking through" the L-3 translator (*e.g.*, SAC ¶¶ 24, 26).

The only four plaintiffs who provide any facts about the identity of their alleged abusers assert abuse by Defendant Nakhla (Mr. Al-Quraishi, SAC ¶¶ 9-20), by an unnamed L-3 employee (Mr. Al-Janabi, SAC ¶¶ 21-36; Mr. Al-Ogaidi, SAC ¶¶ 37-46), or by an unnamed interrogator (Mr. Al-Dulaimi, SAC ¶¶ 326-32).

Plaintiffs bring 20 counts sounding in tort without specifying which Plaintiff brings which count or whose actions (L-3 Services', Defendant Nakhla's, or one of the unnamed military or CACI co-conspirators') are at issue. The 20 counts asserted here are a subset of those asserted in the *Ibrahim* and *Saleh* actions. Counts 1-9 are brought under the Alien Tort Statute; Counts 10-20 assert state common law claims. The six substantive counts other than 19 and 20 (1, 4, 7, 10, 13, 16) are repeated as counts for civil conspiracy and aiding abetting the underlying torts (2-3, 5-6, 8-9, 11-12, 14-15, 17-18).

---

the briefing in that motion, which is set for argument on February 2, 2009. (D.E. 53).

ARGUMENT

I. Legal Standards

This motion is brought under Federal Rules of Civil Procedure 12(b)(1) and 12(b)(6). The arguments concerning the Plaintiffs' standing and the political question doctrine in Sections II.A and II.C, respectively, implicate the subject-matter jurisdiction of the Court, *see, e.g.*, *Johnson v. Eisentrager*, 339 U.S. 763 (1950); *Smith v. Reagan*, 844 F.2d 195, 197-200 (4th Cir. 1988); *Gonzalez-Vera v. Kissinger*, 449 F.3d 1260, 1262 (D.C. Cir. 2006), as do the defects in Plaintiffs' Alien Tort Statute claims, *see Sosa v. Alvarez-Machain*, 542 U.S. 692, 724 (2004). A court evaluating subject matter jurisdiction need not treat the allegations in the complaint as true, *Thigpen v. United States*, 800 F.2d 393, 396 (4th Cir. 1986), and may consider matters outside the complaint. *Williams v. United States*, 50 F.3d 299, 304 (4th Cir. 1995). The plaintiff bears the burden of persuasion when a motion to dismiss challenges the Court's subject-matter jurisdiction. *Piney Run Pres. Ass'n v. County Comm'rs,* 523 F.3d 453, 459 (4th Cir. 2008).

For a complaint to survive a Rule 12(b)(6) motion, its factual allegations "must be enough to raise a right of recovery above the speculative level" or present "enough facts to state a claim to relief that is plausible on its face." *Bell Atl. Corp. v. Twombly*, 127 S. Ct. 1955, 1959-60 (2007). Courts must consider the complaint in its entirety, as well as other sources, such as documents incorporated into the complaint by reference, and matters of which a court may take judicial notice. *Tellabs v. Makor Issues & Rights*, 127 S. Ct. 2499, 2509 (2007); *Laios v. Wasylik*, 564 F. Supp. 2d 538, 540 (E.D. Va. 2008). In ruling on a motion to dismiss, "the court must consider all well-pled allegations in a complaint as true and must construe all factual allegations in the light most favorable to the plaintiff," *Tech. Patents, LLC v. Deutsche Telekom AG*, 573 F. Supp. 2d 903, 908-09 (D. Md. 2008), but conclusory allegations regarding the legal effect of the facts alleged need not be accepted, *see Labram v. Havel*, 43 F.3d 918, 921 (4th Cir. 1995).

II. This Court Should Dismiss the Second Amended Complaint Because No Claims Lie for Injuries Arising from Wartime Confinement of Aliens Abroad (All Counts).

Plaintiffs' novel claims are barred *en toto* because they arise out of their detention by the U.S. military during war and post-war occupation. The local populace, including Plaintiffs, is not entitled to bring civil damages claims for their detention by the occupying force, here, the U.S. military. This dispositive rule of law was articulated and explained by the Supreme Court in *Eisentrager* in the context of habeas, and is further supported by the well-established case law denying claims for the destruction of property in a war zone and the law of occupation. Apart from the status of the Plaintiffs, their claims are barred because L-3—whose employees were only in Iraq to provide services to the U.S. military by performing functions delegated to them—enjoys derivative sovereign immunity against claims arising out of the military's detention. Finally, even if Plaintiffs' and L-3's status did not bar Plaintiffs' suit, it would still have to be dismissed because Plaintiffs' claims are inextricable from non-justiciable political questions.

A. These Plaintiffs May Not Bring Civil Damages Claims Based on Their Conditions of Confinement in Iraq.[10]

No court in the United States has allowed aliens—detained on the battlefield or in the course of post-war occupation and military operations by the U.S. military—to seek damages for their detention. Alien enemies resident abroad cannot maintain a civil action of any type in United States courts. *Johnson v. Eisentrager*, 339 U.S. 763, 776-77 (1950). Yet these Plaintiffs bring claims seeking money damages for their detention and treatment while in the custody of the U.S. military in the midst of a belligerent occupation in Iraq.

[10] The grounds for dismissal in this Section were not considered in *Ibrahim* and *Saleh*. Nonetheless, Judge Robertson relied heavily on *Eisentrager*'s reasoning. *See, e.g.*, *Ibrahim*, 391 F. Supp. 2d at 18-19.

Eisentrager dealt with claims by Germans held in prison in occupied Germany after the end of World War II. The plaintiffs there sought review of their detention by way of a writ of habeas corpus, alleging that they were being held wrongly. In *Eisentrager*, the Court reviewed the history of aliens' rights to litigate their claims in the U.S. courts, and concluded that it would be contrary to long-established legal principles to allow the petitioners to pursue civil litigation over their detention. The *Eisentrager* Court cogently explained the rationale for denying jurisdiction over even the Great Writ, where it would require inquiry into the military's detention of non-citizens in post-war occupied Germany.

Eisentrager did not involve civil damage claims, but its holding is directly applicable to Plaintiffs, who seek relief that is more easily withheld. Although *Eisentrager* concerned the availability of habeas rather than the constitutionally less significant right to claim civil damages, the "ultimate question" is the same: the proper role of civil courts of the United States in dealing with aliens detained overseas by the U.S. military acting during occupation. *See Eisentrager*, 339 U.S. at 765. *Eisentrager*'s holding and rationale is also the logical conclusion of two parallel long-standing lines of authority arising in the context of wartime military operations that illuminate how to handle claims for personal injury by the occupying forces and its contractors.

The first line of authority is the undisputed rule in the context of claims brought under the Takings Clause that the United States need not answer for destruction of enemy property, "a concept so manifest that it hardly requires further elaboration." *El-Shifa Pharm. Indus. Co. v. United States*, 378 F.3d 1346, 1355-56 (Fed. Cir. 2004). The enemy property doctrine is based on the common-sense principle that losses incurred during combatant activities are "necessary incidents of the ravages and burdens of war . . . ." *Nat'l Bd. of YMCA v. United States*, 396 F.2d 467, 471 (Ct. Cl. 1968). Thus, under accepted principles of war:

> No government, except as a special favor bestowed, has ever paid for the property of even its own citizens in its own country destroyed in attacking or defending against a common public enemy; much less is any government bound to pay for the property of neutrals domiciled in the country of its enemy, which its forces may chance to destroy in its operations against the enemy.

Perrin v. United States, 4 Ct. Cl. 543, 547-43 (1868), *aff'd* 79 U.S. 315, 316 (1870). This clear rule against claims arising out of war in a foreign country recognizes that while such claims may lie in other contexts "in wartime many losses must be attributed solely to the fortunes of war, and not to the sovereign." *United States v. Caltex (Phil.), Inc.*, 344 U.S. 149, 156-57 (1952).

The Takings Clause cases deal with property, but there is nothing to suggest that this "concept so manifest" would be different for personal injury claims. These cases are especially informative because they are free from the issues of sovereign immunity, in that the Constitution strips the Government of immunity for such claims. That wartime activities bar otherwise valid claims is further illustrated by the Federal Tort Claims Act ("FTCA"), where the combatant activities exception to liability under that Act reflects Congressional recognition that "war is an inherently ugly business for which tort claims are simply inappropriate." *Ibrahim*, 391 F. Supp. 2d at 18; *see also Koohi v. United States*, 976 F.2d 1328, 1337 (9th Cir. 1992) ("[D]uring wartime encounters no duty of reasonable care is owed to those against whom force is directed as a result of authorized military action.").[11]

The second well-established line of authorities supporting the application to the Plaintiffs here of the rule recognized in *Eisentrager* is the law of occupation, which has long exempted occupying forces from local law and local tribunals. *See New Orleans v. Steamship Co.*, 87 U.S. 387, 394 (1874) (occupying force empowered "to displace the pre-existing authority, and to assume to such extent as it may deem proper the

[11] "The provisions of [the FTCA] shall not apply to . . . [a]ny claim arising out of the combatant activities of the military or naval forces, or the Coast Guard, during time of war." 28 U.S.C. § 2860(j).

exercise by itself of all the powers and functions of government"); *see also Coleman v. Tennessee*, 97 U.S. 509, 517 (1878); *Dow v. Johnson*, 100 U.S. 158, 170 (1879) (stating that the law which applies to an occupying force "is not the civil law of the invaded country"). This ensures, as does the rule in *Eisentrager*, the efficient operation of the occupying force:

> There would be as much incongruity, and as little likelihood of freedom from the irritations of the war, in civil as in criminal proceedings prosecuted during its continuance. In both instances, from the very nature of war, the tribunals of the enemy must be without jurisdiction to sit in judgment upon the military conduct of the officers and soldiers of the invading army…. It is manifest that if officers or soldiers of the army could be required to leave their posts and troops, upon the summons of every local tribunal, on pain of a judgment by default against them, which at the termination of hostilities could be enforced by suit in their own States, the efficiency of the army as a hostile force would be utterly destroyed. Nor can it make any difference with what denunciatory epithets the complaining party may characterize their conduct. If such epithets could confer jurisdiction, they would always be supplied in every variety of form. . . . Nor is the position of the invading belligerent affected, or his relation to the local tribunals changed, by his temporary occupation and domination of any portion of the enemy's country.

Dow v. Johnson, 100 U.S. at 165-66.

Although these cases are couched in terms of immunity from "local law," it necessarily meant that the occupiers are immune from all tort law. Choice of law at the time of *Dow* and *Coleman* did not admit the possibility of tort claims being brought using the law of any place other than the commission of the tort, i.e., *lex loci*. *See Sosa v. Alvarez-Machain*, 542 U.S. 692, 704 (2004) ("[T]he general rule . . . was that a cause of action arising in another jurisdiction, which is barred by the laws of that jurisdiction, will also be barred in the domestic courts.") (internal quotations and citations omitted). Thus, vis-à-vis these claims, the immunity of occupation law is in fact immunity against tort claims by the subjects of the occupation wherever they may be brought.

These principles apply equally to Iraq. Indeed, the Occupying Power in Iraq, speaking through the Administrator of the CPA, recognized the immunity of occupying forces "under the laws and usages of war, and consistent with relevant U.N. Security Council resolutions":

> [U]nder international law occupying powers, including their forces, personnel, property and equipment, funds and assets, are not subject to the laws or jurisdiction of the occupied territory.

(Ex. G, CPA Order 17 (June 27, 2003).) The Order went further, and made clear that the immunity granted to occupying forces was extended to the military's contractors, expressly providing that "[c]oalition contractors and their sub-contractors as well as their employees not normally resident in Iraq, shall not be subject to Iraqi laws or regulations in matters relating to the terms and conditions of their contracts in relation to the Coalition Forces or the CPA." *Id.* § 3(1).[12]

Immunity from local law and tort suit does not mean that the occupying force is not subject to regulation or that offenses by it must go unpunished, just that enforcement authority remains with the occupier, here the United States military:

> [The army, or its officers or soldiers] remain subject to the laws of war, and *are responsible for their conduct only to their own government, and the tribunals by which those laws are administered*. If guilty of wanton cruelty to persons, or of unnecessary spoliation of property, or of other acts not authorized by the laws of war, they may be tried and punished by the military tribunals. *They are amenable to no other tribunal*, except that of public opinion, which, it is to be hoped, will always brand with infamy all who authorize or sanction acts of cruelty and oppression."

---

[12] CPA Order 17 was revised on June 27, 2004, to account for the impending turnover of authority to the Iraqi Interim Government. *See* Ex. H, Revised CPA Order 17 (June 27, 2004). It remains in effect today without material change to the immunities of the occupying forces and their contractors. *See id.* § 2(1); § 4(2) ("Contractors shall not be subject to Iraqi laws or regulations in matters relating to the terms and conditions of their Contracts, including licensing and registering employees, businesses and corporations; provided, however, that Contractors shall comply with such applicable licensing and registration laws and regulations if engaging in business or transactions in Iraq other than Contracts.").

Dow, 100 U.S. at 166 (emphasis added); *see also* Ex. H § 2(4) (CPA 17 June 27, 2004) ("The Sending States of [Multinational Forces] Personnel shall have the right to exercise within Iraq any criminal and disciplinary jurisdiction conferred on them by the law of that Sending State over all persons subject to the military law of that Sending State."); Ex. G § 2(4) (CPA 17 June 27, 2003) . The United States regulates the conduct of both soldiers and contractors. Those rules have been enforced through criminal law in the widely-reported court-martial of soldiers found to have engaged in abuses. *See Ibrahim*, 391 F. Supp. 2d at 16. There are also overlapping bases under which the United States could seek to prosecute contractors for criminal conduct at military detention facilities in Iraq. *See* 18 U.S.C. §§ 2340A (2008), 2441 (2000 & Supp. V 2005), 3261 (2000).[13] Moreover, as discussed below, the United States has undertaken to provide administrative remedies to those mistreated in U.S. military detention facilities in Iraq, to the extent such claims are substantiated. *See* III.A.3.b, *infra*. But the existence of military regulations governing military operations does not equate to the existence of a cause of action. *See Tiffany v. United States*, 931 F.2d 271, 279-82 (4th Cir. 1991). Nor, as we explain below in Section II.B, is the analysis altered by the fact that Defendants are civilian contractors rather than military personnel.

Eisentrager shares the same practical rationale with these other venerable lines of authority:

> It would be difficult to devise more effective fettering of a field commander than to allow the very enemies he is ordered to reduce to submission to call him to account in his own civil courts and divert his efforts and attention from the military offensive abroad to the legal defensive at home.

Eisentrager, 339 U.S. at 779; *see also Ibrahim*, 556 F. Supp. 2d at 5 ("[T]he military ought to be 'free from the hindrance of a possible damage suit' based on its conduct of battlefield activities.") (quoting *United*

[13] Contractor employees "normally resident in Iraq" are subject to prosecution in Iraqi courts. *See* Ex G (CPA 17 June 27, 2003) §1(5) (excluding Iraqis from category of persons entitled to immunity); Ex. H (CPA 17 June 27, 2004) § 1(11) (same).

States v. Johnson, 170 F.2d 767, 769 (9th Cir. 1948)). This rationale applies with even greater force to damages claims, because such claims do not enjoy the special Constitutional status of habeas, which endows the judiciary with a heightened responsibility to intervene vis-à-vis the Executive that is inapplicable to damages claims. *See* U.S. Const. Art. I, § 9, cl. 2.

While the holding of *Eisentrager* with regard to habeas has been refined in the unique factual setting of modern-day Guantanamo Bay, the holding and rationale remain vibrant and consistent with the law in this area, especially as concerns foreign occupied territory such as Iraq. Indeed, the Court recently relied upon *Eisentrager*'s analysis in *Boumediene v. Bush*, 128 S. Ct. 2229, 2257 (2008) and identified "critical differences" between Guantanamo and post-war Germany that justified allowing habeas petitions to review indefinite detention at Guantanamo, while preserving the holding of *Eisentrager* with regard to detention abroad. Key to that distinction was the difference between post-war Germany and Guantanamo. In that regard, Iraq during the relevant period looks like the post-war setting of *Eisentrager*:

> In addition to supervising massive reconstruction and aid efforts the American forces stationed in Germany faced potential security threats from a defeated enemy. . . . [A]t the time *Eisentrager* was decided, the Court was right to be concerned about judicial interference with the military's efforts to contain enemy elements, guerilla fighters, and were-wolves.

Boumediene, 128 S.Ct. at 2262.

In sum, aliens detained abroad by the U.S. military acting as an occupying force have never been accorded the right to civil litigation. Nor have the Courts ever allowed aliens to litigate damages against an occupying force or recognized claims for damages caused in the war zone. To allow Plaintiffs to proceed here would be contrary to values expressed by these holdings and as a practical consequence subject the conduct of war and occupation abroad to the debilitating effects of having to defend at home from the legal attacks of the military's detainees.

B. This Case Must Be Dismissed Because Derivative Immunity Bars Claims Arising From Contractors' Performance of Delegated Governmental Functions.

L-3 is immune from suit under controlling Circuit precedent. The delegation of governmental functions to private military contractors does not change their official nature: "[N]o matter how many times or to what level that function is delegated, it is a small step to protect that function when delegated to private contractors, particularly in light of the government's unquestioned need to delegate governmental functions." *Mangold v. Analytic Servs., Inc.,* 77 F.3d 1442, 1447-48 (4th Cir. 1996).[14] It is not the status of the defendant sued but rather the nature of the function being performed that determines whether claims are cognizable. "Extending immunity to private contractors to protect an important government interest is not novel." *Mangold*, 77 F.3d at 1448. The allegations in this case, which involve injuries arising during capture and detention by the U.S. military, clearly implicate such important governmental functions: the arrest and detention activities "by 'universal agreement and practice,' are 'important incident[s] of war.'" *Hamdi v. Rumsfeld*, 542 U.S. 507, 518 (2004) (citing *Ex parte Quirin*, 317 U.S. 1 (1942)).

The Fourth Circuit's decision in *Butters v. Vance*, 225 F.3d 462 (4th Cir. 2000), is controlling. In *Butters*, a female guard sued her former employer Vance, a private security corporation, for wrongful constructive termination under California state law. Vance had been hired by Saudi Arabia to provide security for a Saudi princess temporarily living in California, and Butters sued Vance based upon Saudi Arabia's discriminatory refusal to permit a female to work full rotations in the security command post. The

[14] *See also Murray v. Northrop Grumman Info. Tech., Inc.*, 444 F.3d 169, 175 (2d Cir. 2006) (holding that a government contractor was absolutely immune from tort liability for performing a contracted-for government function) (citing *Mangold*, 77 F.3d at 1447); *Pani v. Empire Blue Cross Blue Shield*, 152 F.3d 67, 71-73 (2d Cir. 1998) (same); *Midland Psychiatric Assocs., Inc. v. United States*, 145 F.3d 1000, 1005 (8th Cir. 1998) (holding that common-law official immunity barred tort suit against Medicare insurer); *TWI d/b/a Servco Solutions v. CACI Int'l, Inc*, 2007 WL 3376661, at *1 (E.D. Va. Nov. 9, 2007); *City of Worcester v. HCA Mgmt. Co., Inc.*, 753 F. Supp. 31, 37-38 (D. Mass. 1990).

Fourth Circuit held that the defendant corporation could not be sued for carrying out governmental functions on behalf of an employer that enjoyed sovereign immunity from the claims alleged. *Butters*, 225 F.3d at 466.

The same is true here. No claims lie against the United States or military officials for the conduct alleged. *See, e.g.*, *Goldstar (Panama) S.A. v. United States*, 967 F.2d 965, 970-71 (4th Cir. 1992) (dismissing on sovereign immunity grounds claims against the United States alleging failure to fulfill obligations of occupying power set forth in Hague Convention); *Sanchez-Espinoza v. Reagan*, 770 F.2d 202, 205 (D.C. Cir. 1985) (Scalia, J.) (dismissing claims against officials and contractors alleging torture, among other things). Indeed, every court to have considered damages claims alleging torture of military detainees by military officials has dismissed them. *See, e.g.*, *Rasul v. Myers*, 512 F.3d 644, 654 (D.C. Cir. 2008) (ATS claims against military officials alleging torture of detainees at Guantanamo); *In re Iraq and Afghanistan Litig*., 479 F. Supp. 2d 85, 109-15 (D.D.C. 2007) (ATS claims against military officials alleging torture of detainees in Iraq and Afghanistan); *see also* political question cases discussed at 24, *infra*; *cf. El-Masri v. United States*, 479 F.3d 296, 313 (4th Cir.), *cert. denied* 128 S. Ct. 373 (2007) (dismissing under state secrets privilege ATS claims against government officials and private contractors alleging unlawful detention and torture by CIA and its agents). As a result, no claim can lie against L-3 Services, as it enjoys the same immunity as the military for whom it was performing the contracted functions. *See Butters*, 225 F.3d at 466; *see also Alicog v. Kingdom of Saudi Arabia*, 860 F. Supp. 379, 385 (S.D. Tex. 1994), *aff'd*, 79 F.3d 1145 (5th Cir. 1996) (derivative sovereign immunity required dismissal where defendant "merely repeated" principal's order). Nor does the immunity turn on the nature of the allegations, but rather the functions that were being performed. By definition, immunity applies where there might be a claim in the

absence of immunity. And the conduct alleged in *Rasul*, *Sanchez-Espinoza*, the *Iraq and Afghanistan Litigation*, and *El-Masri* was no less heinous, yet those cases were dismissed.

C. This Case Must Be Dismissed Under the Political Question Doctrine.

The Supreme Court in *Baker v. Carr* set forth six independent tests for the existence of a non-justiciable political question: (1) a textually demonstrable constitutional commitment of the issue to a coordinate political department; (2) a lack of judicially discoverable and manageable standards for resolving it; (3) the impossibility of deciding without an initial policy determination of a kind clearly for non-judicial discretion; (4) the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; (5) an unusual need for unquestioning adherence to a political decision already made; or (6) the potentiality of embarrassment from multifarious pronouncements by various departments on one question. 369 U.S. 186, 217 (1962). If any "one of these formulations is inextricable from the case," *id*., the Court must dismiss the case as non-justiciable.

The first two *Baker* factors, of foremost "importance and certainty," *Vieth v. Jubelirer*, 124 S. Ct. 1769, 1776 (2004), are most at play here and require dismissal. Plaintiffs' claims arise from their capture and detention by the U.S. military in a foreign war zone; their adjudication would require a wholly unprecedented injection of the judiciary into wartime military operations and occupation conduct against the local population, in particular the conditions of confinement and interrogation for intelligence gathering. The Complaint, challenges the justification for Plaintiffs' capture and detention by the U.S. military, the interrogation methods used to gather intelligence from the detainees in Iraq, and the military's methods of supervising and administering its battlefield detention facilities. These important incidents of war-making (1) are textually committed to the political branches and (2) are lacking in judicially discoverable and

manageable standards. Because Plaintiffs' claims cannot be separated from these incidents of war-making, they are non-justiciable.

1. Plaintiffs' Claims Implicate the Conduct of the War in Iraq, a Matter Textually Committed to the Political Branches.

An issue is non-justiciable if there is a textually demonstrable constitutional commitment of the issue to a coordinate political department. *Baker*, 369 U.S. at 217. It is beyond peradventure that the conduct of foreign war abroad is a matter committed to the political branches. The Constitution provides that the Congress shall have the powers to "declare war," "make rules concerning captures on land and water," and "make rules for the government and regulation of the land and naval forces." U.S. Const. Art. I, § 8. The President is "Commander in Chief of the Army and Navy of the United States, and of the Militia of the several States, when called into actual Service of the United States." U.S. Const. Art. II, § 2, cl. 1.

In exercising the power to wage war, the President finds authorization in the Constitution itself to "direct the performance of those functions which may constitutionally be performed by the military arm of the nation in time of war." *Ex parte Quirin*, 317 U.S. at 28. "The decisions whether and under what circumstances to employ military force are constitutionally reserved for the executive and legislative branches." *Tiffany*, 931 F.2d at 277. Within these textually committed functions are "important incident[s] to the conduct of war" such as "the adoption of measures by the military command . . . to repel and defeat the enemy," including the power "to seize and subject to disciplinary measures those enemies who in their attempt to thwart or impede our military effort have violated the law of war." *Ex Parte Quirin*, 317 U.S. at 28-29.

"Of the legion of governmental endeavors, perhaps the most clearly marked for judicial deference are provisions for national security and defense." *Tiffany*, 931 F.2d at 277. In *Tiffany*, the Fourth Circuit

found non-justiciable claims that were similarly entangled with the military's mission. The *Tiffany* plaintiffs claimed that civilian and military government officials' negligent conduct in scrambling fighter jets over the United States to intercept an unidentified plane resulted in a midair collision that killed the innocent civilian pilot. The Fourth Circuit reversed the lower court's judgment in favor of the plaintiff, finding that even this domestic negligence case fell within the scope of the political question doctrine. Observing that "[t]he elementary canons of judicial caution are not limited to actions taken during actual wartime, but may extend to many other aspects of military operations" and that "[c]ourts are not in a position to dictate to a branch of the Department of Defense how it should react when it faces unknown and potentially hostile aircraft," *id.* at 278-79, the Fourth Circuit dismissed the entire suit as non-justiciable. Because such matters are "constitutionally reserved for the executive and legislative branches," the court found that the "strategy and tactics employed on the battlefield are clearly not subject to judicial review." *Id.* at 277. Significantly, the alleged violation of internal military regulations and procedures did not make the case justiciable: "It should be obvious that . . . military strategy does not project midair collisions as an element of the nation's defense . . . . To redesign the incentives through tort law, however, holds hazards of its own." *Id.* at 282.

This case more clearly implicates non-justiciable political questions than did *Tiffany*. While *Tiffany* challenged *peacetime* operations of the military within the United States, this case arises from the military's *wartime* intelligence collection and detention operations in a foreign war zone, core Executive functions and "important incident[s] of war." *Hamdi*, 542 U.S. at 518; *see also id.* at 531 (recognizing the "weighty and sensitive governmental interests in ensuring that those who have in fact fought with the enemy during a war do not return to battle against the United States"). Nor do justiciability concerns fade after hostilities cease. Even years after the cessation of actual hostilities, courts have held that war reparations claims are non-justiciable. *See, e.g., Zivkovich v. Vatican Bank*, 242 F. Supp. 2d 659, 666 (N.D. Cal. 2002) ("As an issue

affecting United States relations with the international community, war reparations fall within the domain of the political branches and are not subject to judicial review.").

Although Plaintiffs have not sued military personnel directly, their claims nevertheless implicate a broad range of military actions and decisions. Though the claims are framed as the alleged actions of L-3 employees, litigation of those acts cannot be separated from the context of the military prisons in which they allegedly occurred. Plaintiffs' claims will unavoidably require discovery and assessment of U.S. military interrogation policies, *see, e.g.*, SAC ¶¶ 13, 24, 45, 427, which remain classified. *See* note 15, *infra*. Their allegations touch directly on the U.S. military's detention policies and administration of its detention facilities in the Iraq war zone. *See, e.g.*, SAC ¶¶ 28 (denied prisoner number and treated as "ghost detainee"); 40 (treated as "ghost" detainee); 402 (denied prisoner number and hidden from International Committee of the Red Cross); 445 (hiding prisoners from ICRC). The very nature of the linguists' role intertwines their actions with those of the military, as Plaintiffs' captors were "speaking through," *e.g.*, SAC ¶ 26, L-3 Services' linguists. These operational military matters conducted abroad during and after a foreign war are not subject to review by the courts.

While the rationale of *Tiffany* is controlling here, the contrary political question rulings in *Koohi v. United States*, 976 F.2d 1328 (9th Cir. 1992) and in *Ibrahim* and *Saleh* bear mention. In *Koohi*, the claimants were the estates of civilians shot down during the so-called tanker wars. The district court dismissed the case on the political question doctrine. The Ninth Circuit affirmed the dismissal, but rejected application of the political question doctrine, instead relying on the combatant activities exception to the FTCA because imposition of liability on civilian contractors "would create a duty of care where the combatant activities exception is intended to ensure that none exists." *Koohi*, 976 F.2d at 1337. Obviously this case is directly at odds with controlling circuit precedent to the extent that it contends that damages

claims based on military decision making during war are not subject to the political question doctrine. But the persuasive value of *Koohi's* ruling on political question is questionable, where the holding affirmed dismissal of the complaint because no duty was owed.

Judge Robertson's political question rulings in *Ibrahim* and *Saleh* are more on point, but no more persuasive. After carefully explaining the doctrine, Judge Robertson provided no reason for why the doctrine would not apply to the detainees' claims for damages. *See Ibrahim*, 391 F. Supp. 2d at 15-16. In *Saleh* he adopted his ruling in *Ibrahim*, but began to retreat from it, acknowledging the claims there, as here, were a closer question because "the more plaintiffs assert official complicity in the acts of which they complain, the closer they sail to the jurisdictional limitation of the political question doctrine." *Saleh*, 436 F. Supp. 2d at 58. Judge Robertson's unexplained rulings on the political question doctrine are on appeal, and since the plaintiffs there have amended the complaint against CACI for a fourth time, the issue of dismissal remains unadjudicated in that parallel case.

Plaintiffs also seek to hold L-3 liable in part (and in the many instances where the abuser is not identified, likely in whole) for the tortious conduct of military officials by alleging a broad "conspiracy." *See* SAC ¶¶ 419, 424, 445, 456. And while it is understood that one can be prosecuted for conspiring with an otherwise immune person, the issue here is something quite different. One cannot prosecute claims against L-3 based on the acts of the military without invading the province of the military's Iraq detention operations. Litigation of the alleged conspiracy in the treatment of the detainees cannot be separated from the context of the military's conduct of wartime and occupation detention operations.

Perhaps attempting to circumvent the clear rules concerning alien enemies, enemy property, and occupation law, Plaintiffs allege that they were innocent civilians, supposedly mistakenly and/or wrongfully detained. *See* SAC ¶ 4. But this merely highlights the non-justiciability of their claims. The determination

of the military whether to detain someone abroad in the course of the occupation, and whether they were "innocent" or of "no intelligence value" is exactly the kind of determination that is committed solely to the political branch. *See El-Shifa Pharm. Indus. v. United States*, 378 F.3d 1346, 1361-70 (Fed. Cir. 2004) (judicial review of determination of enemy property is barred as a political question).

Nor can Plaintiffs escape the non-justiciability of their claims by arguing that they are claiming they were tortured. While torture is both illegal and wrong, courts have consistently found that allegations of torture do not sweep the claims out of established doctrines that bar claims by the alleged victims for alleged abuse while in the government's hands. *See Harbury v. Hayden*, 522 F.3d 413 (D.C. Cir. 2008) (alleged CIA torture and execution non-justiciable); *Schneider v. Kissinger*, 412 F.3d 190 (D.C. Cir. 2005) (alleged torture and killing of a Chilean general non-justiciable); *Gonzalez-Vera v. Kissinger*, 449 F.3d 1260 (D.C. Cir. 2006) (alleged conspiracy with Chilean officials to torture non-justiciable); *Bancoult v. McNamara*, 445 F.3d 427 (D.C. Cir. 2006) (alleged torture and other violations of international law non-justiciable); *see also Rasul v. Myers*, 512 F.3d 644 (D.C. Cir. 2008) (dismissing claims alleging torture by military at Guantanamo; political question doctrine not raised nor reached); *El-Masri*, 479 F.3d 296 (state secrets dismissal of claims against officials and contractors); *In re Iraq and Afghanistan Detainees Litig*., 479 F. Supp. 2d 85 (dismissing claims alleging torture by military in Iraq). The federal interests that make such claims non-justiciable or otherwise require their dismissal are not abated, and the claims are not converted into cognizable ones, by moving the government official from the category of "defendant" to "co-conspirator."

2. There Are No Judicially Discoverable and Manageable Standards for Resolving this Case.

Perhaps to downplay the unprecedented nature of the claims, the Complaint studiously avoids much mention of the raging war in Iraq that led to their capture by the U.S. military. But Plaintiffs cannot erase that their claims arise during wartime detention and interrogation by the U.S. military or that they are properly characterized as claims for war reparations. This simply is not an ordinary tort suit. The lack of judicially discoverable and manageable standards arises from two fundamental problems: (1) common law tort principles do not govern wartime military detention and interrogation, and (2) much of the evidence bearing on Plaintiffs' claims will be unavailable to the parties and the Court.

Neither the common law of torts nor any other judicially discoverable standard permits courts to resolve whether necessities of national defense outweigh countervailing civilian policies. *Tiffany*, 931 F.2d at 279. For example, how would the court assess Plaintiffs' various claims for infliction of emotional distress (Counts 15-18, 20)? Is a cognizable tort committed where a linguist translates a military interrogator's threat that is intended to inflict emotional distress for the purpose of eliciting intelligence? There are two options, both of which are foreclosed by precedent.

First, the Court might hold the civilian linguist to common law tort standards regardless of whether the interrogation technique was authorized. But because the military interrogator is admittedly "speaking through" the linguist (SAC ¶ 26), applying common law tort principles to the linguist would either prevent the military from using contractors in such roles or limit the military's interrogation practices to techniques consistent with tort principles when doing so. This would amount to an impermissible "fettering of the [military] field commander." *Eisentrager*, 339 U.S. at 779.

Second, the Court could entertain claims against the linguist only to the extent that the interrogator's threat was unapproved by military policies and regulations (perhaps with the further limitation that the linguist knew or should have known it was unauthorized). But this would impermissibly inject this Court into assessing compliance with military policies for interrogations, which the Fourth Circuit has rejected as a basis for a civil damages claim. *See Tiffany*, 931 F.2d at 279. Moreover, "[t]he presence of regulations does not change the reality that legislative and executive oversight of these particular military missions is to be preferred to that of the judiciary." *Id.* An additional manageability barrier here, not present in *Tiffany*, is that the interrogation plans and regulations governing interrogations are not subject to discovery.[15]

Further, there are no judicially discoverable and manageable standards to assess the battlefield determination to capture and detain Plaintiffs. Although Plaintiffs allege they are "innocent Iraqis" (SAC ¶ 4), they were captured and detained by the U.S. military, some for extended periods of months or years. Evaluation of the military's battlefield determination that Plaintiffs were either enemy prisoners of war or required to be detained based on an "imperative security need" is the type of military decision-making that is simply beyond the competence of the courts.

III. The Complaint Does Not State a Claim.

Separate from the status of the Plaintiffs, the derivative immunity of L-3, and the political question doctrine, each of Plaintiffs' claims is fatally and irremediably flawed.

---

[15] The military has asserted that documents relating to specific interrogations are protected from disclosure. *ACLU v. Dep't of Defense*, 389 F. Supp. 2d 547, 552 (S.D.N.Y. 2005). The Defense Department also recently promulgated a directive that classifies significant categories of information relating to the interrogations, including information relating to the identity of interrogators. *See* DoD Directive 3115.09, ¶ 3(d)(11)(a)-(c) (Oct. 9, 2008) (attached as Exhibit I). Moreover, Plaintiffs were in some instances allegedly treated as "ghost detainees," (SAC ¶¶ 28, 40). The CIA has classified all documents relating to the ghost detainee program in the interest of national defense. *See ACLU*, 389 F. Supp. 2d at 566.

A. The ATS Claims Must Be Dismissed (Counts 1-9).

Nine of Plaintiffs' twenty counts are founded on the Alien Tort Statute. These counts (implied causes of action grounded in federal common law) must be dismissed with regard to all Plaintiffs because the ATS does not provide jurisdiction over claims based on official U.S. action, and if Plaintiffs are claiming that there was no official U.S. action, that too takes their allegations outside the scope of the ATS. In ruling on ATS claims indistinguishable from the ones here, the D.C. district court dismissed them for these reasons. *Ibrahim*, 391 F. Supp. 2d at 13-15; *Saleh*, 436 F. Supp. 2d at 57-58. That well-reasoned outcome applies equally here. In addition, Plaintiffs' ATS claims fail for reasons not reached by Judge Robertson: that federal common law does not imply the causes of action they assert, and cruel, inhuman and degrading treatment is not an actionable norm under international law.

1. ATS Claims Are Limited to Narrowly Prescribed Circumstances.

The ATS provides that "[t]he district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States." 28 U.S.C. § 1350. In *Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004), the Supreme Court comprehensively examined the ATS for the first time. In rejecting the claim that arbitrary detention was actionable under the ATS, *Sosa* explained that the ATS "is a jurisdictional statute creating no new causes of action," *id.* at 724, that "enabled federal courts to hear claims in a very limited category defined by the law of nations and recognized at common law," *id.* at 712. ATS claims, like *Bivens* claims, are implied under the federal common law. *Id.* at 725-27. The Court directed that "great caution" should be applied in recognizing causes of action under the ATS "beyond the mere consideration whether underlying primary conduct should be allowed or not . . . ." *Id*. at 727-28. Beyond the three violations of the law of nations actionable when the statute was enacted (offenses against ambassadors, violations of safe conduct, and actions involving piracy or prize captures),

the Supreme Court concluded that causes of action under the ATS are limited to those based on violations of widely-accepted and well-defined international norms. *See id*. at 732. In determining the existence and contours of causes of action, the Court required courts to exercise "judicial caution" in expanding the scope of claims under the ATS. *Id.* at 725. The Court instructed lower courts to consider, among other factors, applicable legislative guidance; that "a decision to create a private right of action is one better left to legislative judgment in the great majority of cases"; "the potential implications for the foreign relations of the United States of recognizing such causes should make courts particularly wary of impinging on the discretion of the Legislative and Executive Branches in managing foreign affairs"; and the absence of a "congressional mandate to seek out and define new and debatable violations of the law of nations, and modern indications of congressional understanding of the judicial role in the field have not affirmatively encouraged greater judicial creativity." *Id.* at 727-28.

2. The ATS Does Not Provide Jurisdiction over Claims Involving Official U.S. Action or Purely Private Action.

The Fourth Circuit has not addressed whether the claims of torture advanced here fall within the ATS, but the other circuits to have considered the question have held that only "official torture," i.e., torture on behalf of a state, is actionable. *See Kadic v. Karadzic*, 70 F.3d 232, 243-44 (2d Cir. 1995); *Sanchez-Espinoza*, 770 F.2d at 206-07; *Filartiga v. Pena-Irala*, 630 F.2d 876, 881-85 (2d Cir. 1980); *see also Aldana v. Del Monte Fresh Produce, N.A., Inc.*, 416 F.3d 1242, 1247 (11th Cir. 2005) ("State-sponsored torture, unlike torture by private actors, likely violates international law and is therefore actionable under the Alien Tort Act."); *Bowoto v. Chevron Corp*., No. 99-2506, 2006 WL 2455752, at *5 (N.D. Cal. Aug. 22, 2006) (citing *Kadic* and *Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774 (D.C. Cir. 1984), in dismissing torture claims for failure to allege state action). Moreover, the most relevant U.S. legislation and international

agreement are consistent with this requirement for state action. The Torture Victim Protection Act (TVPA) extends to United States citizens the right to bring actions for damages alleging foreign *state* torture that aliens have under the ATS. *See* 28 U.S.C. § 1350 note § 2(a). The language of the TVPA was intended to "make[] clear that the plaintiff must establish some governmental involvement in the torture or killing to prove a claim" and that the statute "does not attempt to deal with torture or killing by purely private groups." H.R. Rep. No. 102-367, at 5 (1991), *reprinted in* 1992 U.S.C.C.A.N. 84, 87. Similarly, the Convention Against Torture expressly limits the international norm against torture to official state torture. 23 I.L.M. 1027 (1984).

Thus, as Judge Robertson found in dismissing indistinguishable ATS claims, the failure to allege that the acts of the L-3 employees undertaken were on behalf of the United States (the only "state actor" at issue) is fatal to Plaintiffs' ATS claims. *See Ibrahim*, 391 F. Supp. 2d at 14-15.

At the same time, if the allegations were that the L-3 employees were acting on behalf of the United States, the ATS claims would be barred based on the sovereign immunity of the United States. Official action of the United States is immune from suit under the ATS. *See Goldstar (Panama) S.A. v. United States*, 967 F.2d 965, 967-68 (4th Cir. 1992) (ATS claims arising out of U.S. occupation of Panama); *Ibrahim*, 391 F. Supp. 2d at 14 n.3 ("[I]f defendants were acting as agents of the state, they would have sovereign immunity."). Simply put, "plaintiffs cannot allege that conduct is state action for jurisdictional purposes but private action for sovereign immunity purposes." *Ibrahim*, 391 F. Supp. 2d at 14 n.3 (citing *Sanchez-Espinoza*, 770 F.2d at 207); *see also Saleh*, 436 F. Supp. 2d at 58 ("[T]here is no middle ground between private action and government action, at least for purposes of the Alien Tort Statute.").

The Fourth Circuit has not had occasion to address ATS claims against military contractors in the context of U.S. military operations,[16] but this Court should follow *Sanchez-Espinoza* and Judge Robertson's opinions in *Saleh* and *Ibrahim*. Those cases are on all fours with this one, there is no contrary precedent, and the derivative immunity on which those opinions rest in part is even more firmly established in this Circuit, *see* § II.B, *supra*.

The plaintiffs in *Sanchez-Espinoza*, like the Plaintiffs here and in *Saleh*, sought to use the Courts to adjudicate the U.S. Government's foreign policy, alleged abuses, and illegal conduct that took place with the alleged participation and acquiescence of U.S. military and other government officials. As here, the *Sanchez-Espinoza* plaintiffs founded their ATS claims on allegations of abhorrent, illegal conduct by private individuals and private corporations who were working as contractors of the government: murder, summary execution, abduction, torture, rape, wounding, and the destruction of private property and public facilities. *Sanchez-Espinoza*, 770 F.2d at 205. There too, the plaintiffs alleged that private parties acted "in concert and conspiracy" with other defendants, including U.S. government officials, to mistreat or aid in the mistreatment of the civilian population of a foreign nation in the midst of foreign hostilities. *Id.* at 205. In the face of these allegations, the court held that the ATS claims required state action, and that since the action was that of the United States, the allegations did not state a claim—to do so would "make a mockery of the doctrine of sovereign immunity." *Id*. at 207.[17] Although present and former U.S. officials (sued in

[16] *El-Masri v. United States*, 479 F.3d 296 (4th Cir.), *cert. denied* 128 S. Ct. 373 (2007), included ATS claims against three corporate contractors working for the CIA. The Fourth Circuit did not reach the merits of the ATS claims because it affirmed dismissal based on the state secrets privilege. The district court might have done so had the privilege not been invoked. *See El-Masri v. Tenet*, 437 F. Supp. 2d 530, 539 n.12 (E.D. Va. 2006) ("noting that El-Masri's legal claims are novel and might well be vulnerable to dismissal pursuant to Rule 12(b)(6) . . . quite apart from the application of the state secrets privilege.").

[17] While some courts have allowed ATS suits to proceed against foreign officials who have fallen outside the reach of their sovereign's immunity, those cases were considered by then-Judge Scalia in *Sanchez-*

both individual and official capacities) were defendants in *Sanchez-Espinoza*, Plaintiffs cannot escape *Sanchez-Espinoza*'s holding with regard to the private contractors by moving the official actors from the "defendant" to the "co-conspirator" category.

Plaintiffs' counsel has argued in other proceedings that the Second Circuit's ruling in *Kadic* relaxed the state action requirement for war crimes. Not so. In *Kadic*, defendant Radovan Karadzic was the president of the self-declared Serbian Republic of Bosnia-Herzegovina. The question was whether Karadzic's forces were proper subjects of international law when the self-declared republic for which they fought had not achieved full statehood. The Second Circuit recognized that international law had recently expanded to encompass internal armed conflicts that had previously been regulated by domestic law. It found that under this expanded view that Karadzic's forces were a "[p]arty to the conflict" because "the law of war embodied in common article 3 [of the Geneva Conventions] . . . binds parties to internal conflicts regardless of whether they are recognized nations or roving hordes of insurgents." *Kadic*, 70 F.3d at 243. Here, there is no question about the status or identity of the "party to the conflict" on which a claim for war crimes hinges; it is the United States. Plaintiffs cannot separate their claims from the fact that the alleged conduct took place in U.S. military prisons in Iraq. To read *Kadic* as Plaintiffs suggest would make purely private criminal activity a war crime merely because it occurred during wartime. No court, including *Kadic*, has so held. *See Saperstein v. Palestinian Auth.*, No. 04-20225, 2006 WL 3804718, at *8 (S.D. Fla. Dec. 22, 2006) (noting that no court has held that "murder of an innocent person during an armed conflict" amounts to per se violation of the law of nations); *see generally* David Luban, *A Theory of Crimes Against Humanity,* 29 Yale J. Int'l L. 85, 95-97 (2004) (discussing related development of international law of war crimes and

---

Espinoza and distinguished, "[s]ince the doctrine of foreign sovereign immunity is quite distinct from the doctrine of domestic sovereign immunity." *Sanchez-Espinoza*, 770 F.2d at 207 n.5; *see Saleh*, 436 F. Supp.

crimes against humanity); *cf. Abagninin v. Amvac Chem. Corp.*, 545 F.3d 733, 740-42 (9th Cir. 2008) (extension of liability for crimes against humanity to non-State entities with "de facto control over a defined territory" in Bosnia and Rwanda "does not justify eliminating the [state action] requirement altogether").

3. The Circumstances Alleged Preclude the Court from Implying a Cause of Action under the Federal Common Law.

Sosa's affirmative statement that ATS claims arise under federal common law, its discussion of the restraint required in implying causes of action under the ATS, and the Court's citation to its recent *Bivens* ruling (*Malesko*), supports that the well-developed federal common law relating to limitation of *Bivens* actions applies equally to ATS claims. *Sosa*, 542 U.S. at 727, 732-33. Otherwise, aliens would have broader rights under federal common law to sue for violations of international law than U.S. citizens suing in their own courts for violations of their constitutional rights, a result that is unsupported by law or logic.

a. Corporations Cannot Be Sued Under the Alien Tort Statute.

It does not automatically follow that if there is a federal common law cause of action against a natural person that there is also a cause of action against a corporation. Neither federal common law nor international law permits the extension of ATS liability to a corporation, even if plaintiffs' allegations stated a claim against a natural person. In *Correctional Services Corp. v. Malesko*, 534 U.S. 61 (2001), the Supreme Court held that there is no implied cause of action under *Bivens* against corporations for violations by their employees of individual constitutional rights, to do so would be to create an additional private right of action. Citing *Malesko*, *Sosa* cautioned that "a decision to create a private right of action is one better left to legislative judgment in the great majority of cases." 542 U.S. at 727; *see also id.* at 732 n.20 (in discussing the question of the status of a perpetrator that could be sued, expressly distinguishing between

---

2d at 58 n.3.

private actors that are corporations and those that are individuals). *Sosa* clearly supports not imposing ATS liability on corporations.

Further support for the lack of a right of action against corporations under the ATS can be found in the TVPA. The TVPA reflects Congress's understanding of the scope of actions under the ATS for torture. *See Enahoro v. Abubakar*, 408 F.3d 877, 884-86 (7th Cir. 2005), *cert. denied*, 546 U.S. 1175 (2006). The TVPA uses the term "individual" for both the potential claimants and defendants. 28 U.S.C. § 1350 note § 2(a). Recognizing that the term "individual" usually excludes legal entities such as corporations, and also that it would be impossible for a corporation, an abstract legal entity, to be a victim of physical abuse, courts have concluded that the TVPA does not allow for claims against corporations. *See Mujica v. Occidental Petrol. Corp.*, 381 F. Supp. 2d 1164, 1175-76 (C.D. Cal. 2005); *Corrie v. Caterpillar, Inc.*, 403 F. Supp. 2d 1019, 1026 (W.D. Wash. 2005), *aff'd on other grounds*, 503 F.3d 974 (9th Cir. 2007); *Beanal v. Freeport-McMoRan, Inc.*, 969 F. Supp. 362, 381-82 (E.D. La. 1997), *aff'd on other grounds*, 197 F.3d 161, 168-69 (5th Cir. 1999); *but see Sinaltrainal v. Coca-Cola Co.*, 256 F. Supp. 2d 1345, 1358-59 (S.D. Fla. 2003); *Estate of Rodriquez v. Drummond Co.*, 256 F. Supp. 2d 1250, 1266-67 (N.D. Ala. 2003). If the TVPA does not allow *citizens* to sue corporations for constitutional violations, it would be passing strange if the ATS were read to allow *aliens* to sue corporations—especially in the face of *Sosa*'s cautions about creating new causes of action as a matter of federal common law.[18]

---

[18] Since *Sosa*, some courts have allowed claims to proceed against corporations, but they have uniformly done so without discussing or analyzing the issue. *See, e.g.*, *Khulumani v. Barclay Nat'l Bank*, 504 F.3d 254, 282 (2d Cir. 2007), *aff'd without opinion for lack of quorum*, 128 S. Ct. 2424 (2008). Such decisions are unpersuasive, because "[q]uestions which merely lurk in the record, neither brought to the attention of the court nor ruled upon, are not to be considered as having been so decided as to constitute precedents." *Webster v. Fall*, 266 U.S. 507, 511 (1925).

International law similarly does not provide a cause of action against corporations for torture claims. International instruments have repeatedly rejected the imposition of corporate liability. *See generally Khulumani*, 504 F.3d at 321-26 (Korman, J., concurring in part and dissenting in part) (canvassing international instruments from Nuremberg on). Indeed, the Rome Statute that created the International Criminal Court (which has jurisdiction over violations of the law of war, including torture), 37 I.L.M. 999 (opened for signature July 17, 1998; entered into force July 1, 2002), considered and expressly rejected the imposition of corporate liability. *See Khulumani*, 504 F.3d at 322-23. Thus, even if the question of whether there is a cause of action under the ATS against corporations was to be answered by resort to international law, Plaintiffs cannot meet their burden of demonstrating the existence of a widely-accepted and well-defined international norm allowing such suits.

b. Special Factors

Damages actions do not lie under the federal common law where "special factors counsel[] hesitation." *Chappell v. Wallace,* 462 U.S. 296, 298 (1983) (quoting *Bivens*, 403 U.S. at 396). This limitation relates not to "the merits of the particular remedy" being sought, but "the question of who should decide whether such a remedy should be provided." *Bush v. Lucas*, 462 U.S. 367, 380 (1983).[19] Plaintiffs' ATS claims are barred by two such special factors: the existence of alternative remedies and national security and foreign policy concerns.

---

[19] *See Wilkie v. Robbins,* 127 S. Ct. 2588, 2608 (2007) (because *Bivens* does not give plaintiff a cause of action, "there is no reason to enquire further into the merits of [plaintiff's] claim or the asserted defense of qualified immunity"); *Lucas*, 462 U.S. at 390; *Sanchez-Espinoza*, 770 F.2d at 208 (because special factors foreclose a *Bivens* action, "[w]e do not reach the question whether the protections of the Constitution extend to non-citizens abroad").

First, there are unexhausted alternate remedies for the alleged injuries that bar Plaintiffs' claims under the federal common law and under international law.[20] The United States Army is statutorily authorized to pay claims for the alleged injuries under the Foreign Claims Act (FCA), 10 U.S.C. § 2734. The United States has publicly confirmed this. *See* Ex. B (Second Periodic Report of the Department of State).[21] Plaintiffs' ATS claims are thus barred unless it is "'crystal clear' that Congress intended [other remedial schemes] to serve as 'parallel' and 'complementary' sources of liability" to ATS suits against U.S. military contractors. *Malesko,* 534 U.S. at 68.

Second, Plaintiffs' ATS claims are barred by the same issues that make them political questions. *Sanchez-Espinoza*, 770 F.2d at 209 . *See* § II.C, *supra*; *see also United States v. Stanley*, 483 U.S. 669, 683 (1987) (no suit for non-consensual LSD experimentation because "congressionally uninvited intrusion into military affairs by the judiciary is inappropriate"); *Wilson*, 535 F.3d at 710 (allowing "judicial inquiry into [] allegations that implicate the job risks and responsibilities of covert CIA agents" militates against *Bivens* remedy); *Rasul*, 512 F.3d at 673 (Rogers, J., concurring) (arguing that "national security implications" of "the method of detaining and interrogating alleged enemy combatants during a war" are alternative grounds for dismissal of ATS claims for alleged torture while detained by U.S. military).

---

[20] *Sosa* suggested as much in dicta in stating that "basic principles of international law require that before asserting a claim in a foreign forum, the claimant must have exhausted any remedies available in the domestic legal system, and perhaps in other forums such as international claims tribunals." 542 U.S. at 733 n.21. While the facts of *Sosa* did not indicate a failure to exhaust, Plaintiffs' suit does, and Sosa's *dicta* on this point is persuasive. *But see Mujica*, 381 F. Supp. 2d at 1179 n.13 (observing that *Sosa* "considered an exhaustion requirement, a key part of the TVPA, but did not adopt it for the ATS").

[21] It does not matter whether the alternate remedy provides less than the full relief a plaintiff desires or denies recovery from the defendants of their choice. *See Schweiker v. Chilicky*, 487 U.S. 412, 425 (1988); *Lucas*, 462 U.S. at 378 n.14; *Wilson v. Libby*, 535 F.3d 697, 709 (D.C. Cir. 2008) ("[S]pecial factors analysis does not turn on whether the statute provides a remedy to the particular plaintiff for the particular claim he or she wishes to pursue" and may bar claims "even when the [alternate remedial] scheme provides the plaintiff with 'no remedy whatsoever.'") (internal citation omitted).

4. Cruel, Inhuman and Degrading Treatment Is Not Cognizable Under the ATS (Counts 4, 5, 6).

Even before *Sosa* limited the availability of ATS actions, the federal courts addressed claims for cruel, inhuman, and degrading treatment and found they did not state a claim. *See, e.g.*, *Forti v. Suarez-Mason*, 672 F. Supp. 1531, 1543 (N.D. Cal. 1987) (allegations of cruel, inhuman and degrading behavior fail to state a cognizable claim under ATS). After *Sosa*, there is no doubt that these claims do not "rest on a norm of international character accepted by the civilized world and defined with a specificity comparable to the features of the 18th-century paradigms we have recognized." *Sosa*, 542 U.S. at 725; *see Aldana*, 416 F.3d at 1247 (dismissing claims for cruel, inhuman, and degrading treatment based on *Sosa*'s observation that the International Covenant of Civil and Political Rights did not "'create obligations enforceable in the federal courts'") (quoting *Sosa*, 542 U.S. at 735).[22]

To the extent actionable at all, cruel, inhuman, and degrading treatment requires state action as well. *See* Restatement (Third) of Foreign Relations Law of the United States § 702 note 5 (1987) ("Torture as well as other cruel, inhuman, or degrading treatment or punishment, when practiced as state policy, are violations of customary international law."). As a result, Counts 4, 5, and 6 must also be dismissed under the rationales of *Tel-Oren* and *Sanchez-Espinoza*, *supra*.

B. The Allegations Do Not State a Claim under the Common Law (Counts 10-20).

The applicable choice of law principles require application of Iraq law to Plaintiffs' non-federal common law claims (Counts 10-20). But based on the laws and usages of war and a specific enactment of

[22] Contrary to the direction of *Sosa*, several district courts have found that "cruel, inhuman, and degrading treatment" is not well defined in international law, but nonetheless focused on the particular alleged conduct to decide whether the claim is actionable as applied to that conduct. *See, e.g.*, *Bowoto v. Chevron Corp.*, 557 F. Supp. 2d 1080, 1093-95 (N.D. Cal. 2008); *Roe v. Bridgestone Corp.*, 492 F. Supp. 2d 988, 1022-24 (S.D. Ind. 2007) (concluding that the general international norm against cruel, inhuman and degrading treatment is not sufficiently specific to apply to the allegations in the case).

the occupying authority, L-3 is immune from claims arising under Iraq law. Moreover, even if L-3 were not immune from its application, the law of Iraq does not recognize a number of Plaintiffs' claims (i.e., conspiracy and aiding and abetting) nor some of their requested relief (i.e., punitive damages). Those claims and requests for relief must therefore be dismissed.

1. Counts 10-20 Are Governed by Iraq Law.

The law governing the choice of law for Counts 10-20 is straightforward. "The district court must apply the law of the forum state, including its choice of law rules." *Ben-Joseph v. Mt. Airy Auto Transp., LLC*, 529 F. Supp. 2d 604, 606 (D. Md. 2008) (citing *Klaxon Co. v. Stentor Elec. Mfg. Co.*, 313 U.S. 487, 496-97 (1941)).

Maryland follows the traditional *lex loci delicti* rule for tort claims:

> With regard to tort conflicts principles, we reject the position of the Restatement and adhere to the rule that the substantive tort law of the state where the wrong occurs governs. The rule of *lex loci delicti* is well established in Maryland. When its rationale has been put into question, [*124] "this Court has consistently followed the rule," *White v. King,* 244 Md. 348, 352, 223 A.2d 763 (1966).

Hauch v. Connor, 295 Md. 120, 123 (1983); *see also Jacobs v. Adams*, 66 Md. App. 779, 789 (1986) ("Maryland has received many invitations to retire the rule of *lex loci delicti* in favor of 'more progressive' theories but has consistently declined them."). In defending the doctrine of *lex loci*, the Maryland Court of Appeals cited the rule's predictability as its primary virtue stating that "[c]ertainty in the law is not so common that, where it exists, it is to be lightly discarded." *White*, 244 Md. at 355. It has also noted that "*lex loci delicti* recognizes the legitimate interests which the foreign state has in the incidents of the act giving rise to the injury." *Hauch*, 295 Md. at 125. The *lex loci* rule is codified in the First Restatement of the Law of Conflict of Laws (*see* §§ 377-390; 412-424) that "while of merely historical interest elsewhere,

continues to provide guidance for the determination of *lex loci delicti* questions in Maryland." *Black v. Leatherwood Motor Coach Corp.*, 92 Md. App. 27, 40 (1992).

Under the traditional *lex loci* rule, the "place of the wrong" is defined as the jurisdiction "where the last event necessary to make an actor liable for an alleged tort takes place." Restatement (First) at § 377. Iraq is the place of the wrongs alleged in the complaint: Plaintiffs are Iraqi citizens who allege that they were injured in U.S. military facilities in Iraq. No injuries are alleged to have arisen outside of Iraq. Accordingly, under Maryland choice of law principles, the law of Iraq determines whether there is a legal injury (*id*. § 378), the scope of vicarious liability (*id*. § 387), duty (*id*. § 382), causation (*id*. § 383), defenses (*id*. § 388), and damages (*id*. § 412) for Counts 10-20.[23]

2. Defendants Are Immune from Claims Under Iraqi Law.

As set forth above, *see* § II.A, it is has been long-established that the local law of an occupied territory applies only to the extent permitted by the occupying power. In CPA Order 17, the Occupying Power conferred immunity from Iraq law to contractors such as L-3 Services for matters relating to their contracts: "[c]oalition contractors and their sub-contractors as well as their employees not normally resident in Iraq, shall not be subject to Iraqi laws or regulations in matters relating to the terms and conditions of their contracts in relation to the Coalition Forces or the CPA." Ex. G § 3(1). The Order remains in effect today as amended on June 27, 2004. *See* note 12, *supra*.

Thus, L-3 is directly immune from common law claims under Iraqi law. All of the claims against L-3 Services arise from its "selling the services of Nakhla and other employees to the United States

[23] Even if this case is transferred to Virginia, Maryland choice of law rules would still apply as law of the transferor jurisdiction. *Volvo Constr. Equip. N. Am., Inc. v. CLM Equip. Co.*, 386 F.3d 581, 600 (4th Cir. 2004) ("when a lawsuit is transferred from one federal court to another pursuant to 28 U.S.C. § 1404(a), the transferee court is obliged to apply the choice-of-law rules that the transferor court would have applied").

military," (SAC ¶ 1), which clearly "relates to" its contract. Indeed, Plaintiffs seek to recover from L-3, at least in part, based upon a theory of respondeat superior liability, which, by definition under these circumstances, involves underlying conduct that is within the scope of employment. But L-3 is immune for precisely such "matters relating to the terms and conditions of their contracts." Ex. H § 3(1). Similarly, Plaintiffs' claims for negligent hiring and negligent training relate directly to the personnel and services provided by L-3 Services and its predecessor under its contract with the U.S. Army. Accordingly, Counts 10-20 do not state a claim.

3. Iraq Law Does Not Recognize Some of the Claims and Relief Sought by Plaintiffs.

Even if the Court were to find that CPA 17 did not bar Plaintiffs' common law claims in their entirety, the claims must still be measured against Iraqi law. As set forth in the attached declaration of Reema Ali, most of the common law counts do not state a claim under Iraqi law.

a. Iraq Law Does Not Recognize Aiding and Abetting or Civil Conspiracy as a Basis for Civil Liability (Counts 11, 12, 14, 15, 17 and 18).

Plaintiffs make a number of claims alleging civil conspiracy and aiding and abetting liability under the common law but neither of these bases for liability is cognizable under Iraqi law. Iraq, as with most Arab countries, has a continental civil code system of law. *See* Ex. J (Ali Declaration) at ¶ 5. Unlike the common law system, under the code system, if a cause of action is not explicitly delineated by the code, it is not recognizable by the court. *Id.* ¶ 6.

Under Iraqi law, there is no liability for civil conspiracy or aiding and abetting. *Id.* ¶ 15. At least one court in Maryland has dismissed claims for civil conspiracy and aiding and abetting under similar circumstances. *See Brabizon Group AB v. Marriott Int'l, Inc.*, 2006 MDBT 15, 2006 Md. Cir. Ct. LEXIS 19

(Baltimore City Nov. 6, 2006). Because Iraqi law does not recognize claims of civil conspiracy and aiding and abetting, Counts 11, 12, 14, 15, 17, and 18 must be dismissed.

b. Iraq Law Does Not Recognize Punitive Damages in a Civil Action.

Punitive damages "should also be governed by the law of the state in which the wrong occurred." *Naughton v. Bankier*, 114 Md. App. 641, 650 (Md. Ct. Spec. App. 1997) (citing Restatement of Conflict of Laws (First) Sec. 412). Under the law of Iraq, however, punitive damages are not available in civil cases. *See* Ex. J (Ali Declaration) at ¶ 10. Damages under Iraqi law are discussed in Articles 204-210 of the Iraqi Civil Code and in all cases they are limited solely to compensation for injury. *Id.* This is based on the Sharia Principle that "damages must be at par with the injury no more and no less. It cannot exceed the injury so that it does not become a punishment or a source of wealth." *Id.* ¶ 11 (quoting Prof. Abdul Majeed Al Hakeem, *Al-Wajeez Fi Nathareyat Al El Tizam Fi Al Qanoon Al Madani Al Iraqi*, Vol. I p. 244).

C. Plaintiffs' Allegations of Conspiracy and Aiding and Abetting Are Legally Insufficient (Counts 2, 3, 5, 6, 8, 9, 11, 12, 14, 15, 17, and 18).

Under Federal Rule of Civil Procedure 8(a)(2) a plaintiff is required to plead sufficient grounds "to give the defendant fair notice of what the . . . claim is and the grounds upon which it rests." *Twombly*, 127 S. Ct. at 1964 (internal quotations omitted). The Supreme Court has made clear that "a plaintiff's [Rule 8] obligation to provide the grounds of his entitlement to relief requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." *Id.* at 1964-65 (internal quotations omitted). The Fourth Circuit has recently reaffirmed that "a complaint must be dismissed if it does not allege 'enough facts to state a claim to relief that is plausible on its face.'" *Ruttenberg v. Jones*, 283 Fed. Appx. 121, 128 (4th Cir. 2008) (quoting *Twombly*, 127 S. Ct. at 1974); *see also Heath v. Sanders*, 2008 WL 3926436 at *1 (E.D. Va. Aug. 26, 2008) ("[I]n order for a claim or complaint to survive dismissal for failure to state a claim, the plaintiff must 'allege facts sufficient to state all the elements of [his] claim.'") (citing

Bass v. E.I. DuPont de Nemours & Co., 324 F.3d 761, 765 (4th Cir. 2003); *Dickson v. Microsoft Corp.*, 309 F.3d 193, 213 (4th Cir. 2002); *Iodice v. United States*, 289 F.3d 270, 281 (4th Cir. 2002)). Separate and apart from the fact that civil conspiracy and aiding and abetting are not cognizable causes of action under the ATS or Iraqi law, Plaintiffs' allegations of conspiracy and aiding and abetting must be dismissed because they fail to meet these basic standards.

Plaintiffs' allegations of conspiracy essentially hinge on paragraphs 424 and 425 of the Complaint in which they make the bald assertion that "L-3 verbally expressed its intent to join the conspiracy by making a series of statements to military personnel and others . . . [and] L-3's actions evidence an intent to join the conspiracy, as the company knowingly and willfully permitted scores of its employees to participate in torturing and abusing prisoners over an extended period of time throughout Iraq." (SAC ¶¶ 424-25.) Plaintiffs further allege in a conclusory fashion that "Adel Nakhla and L-3 intentionally and knowingly agreed to and did work in concert with the co-conspirators. To the extent that any particular act was perpetrated by a co-conspirator, Nakhla and L-3 confirmed and ratified the same." (SAC ¶ 446.) But the complaint does not describe any of those supposed verbal statements or agreements, identify who might have made them at what time and on what authority, describe the scope of the alleged agreements, or state what the common purpose was supposed to be. If the motivation is alleged to be financial in nature, there is no allegation whatsoever of how harming any of the Plaintiffs could have been designed to contribute to that purpose.

Even under the liberal pleading standards of Rule 8, a plaintiff must do more than conclusorily allege conspiracy. *See McAfee v. 5th Circuit Judges*, 884 F.2d 221, 222 (5th Cir. 1989); *Arsenaux v. Roberts*, 726 F.2d 1022, 1024 (5th Cir. 1982) ("Mere conclusory allegations of conspiracy cannot, absent reference to material facts, survive a motion to dismiss."). Further, allegations of parallel conduct, without more, cannot

survive a motion to dismiss. *See Twombly*, 127 S. Ct. at 1966 ("Without more, parallel conduct does not suggest conspiracy, and a conclusory allegation of agreement at some unidentified point does not supply facts adequate to show illegality."). As the Fourth Circuit has held, plaintiffs "needed to plead *facts* that would reasonably lead to the inference that [defendants] positively or tacitly came to a mutual understanding to try to accomplish a common unlawful plan." *Ruttenberg*, 283 Fed. Appx. at 132 (affirming dismissal of conspiracy claims); *see also Thigpen v. McDonnell*, 273 Fed. Appx. 271, 273 (4th Cir. 2008) (affirming dismissal of conspiracy claims that failed to allege supporting facts); *U.S. ex rel. Godfrey v. KBR*, 2008 U.S. Dist. LEXIS 21957 at *17-18 (E.D. Va. Mar. 13, 2008) (dismissing conspiracy claim that failed to allege anything beyond parallel conduct). In other words, a plaintiff must "plead particularized *facts* sufficient to support a reasonable inference that [the defendants' actions] . . . were not separate and independent decisions, but rather in furtherance of a meeting of the minds" with a particular objective. *Godfrey*, 2008 U.S. Dist. LEXIS 21957 at *18 (emphasis added). Here, even assuming a meeting of the minds is alleged at all—which it is not—such agreement is alleged in a conclusory fashion without any factual support, and Plaintiffs' allegations in this regard must be dismissed.[24]

CONCLUSION

Accordingly, Defendant L-3 Services respectfully requests that this Court grant its motion and dismiss this case with prejudice.

[24] Moreover, even if civil conspiracy or aiding and abetting were bases for holding L-3 responsible under either the ATS or Iraqi law, and even if they had been sufficiently supported with factual allegations, L-3 is not liable for the actions of soldiers. That would turn *Butters* and *Mangold* on their head by making contractors liable for not only their own actions but those of U.S. officials.

Respectfully submitted,

Dated: November 26, 2008

/s/ F. Greg Bowman

Ari S. Zymelman, *pro hac vice*
azymelman@wc.com
F. Greg Bowman (Bar No. 16641)
fbowman@wc.com
Anne M. Rucker (Bar No. 27808)
arucker@wc.com
WILLIAMS & CONNOLLY LLP
725 Twelfth Street, N.W.
Washington, DC 20005
(202) 434-5000 (telephone)
(202) 434-5029 (facsimile)
Attorneys for Defendant L-3 Services, Inc.