IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF VIRGINIA ALEXANDRIA DIVISION

IN RE: XE ALIEN TORT CLAIMS ACT LITIGATION	**Case No. 1:09-cv-615** **Case No. 1:09-cv-616** **Case No. 1:09-cv-617** **Case No. 1:09-cv-618** **Case No. 1:09-cv-645** **(consolidated for pretrial purposes)** **(TSE/IDD)**

PLAINTIFFS' REPLY TO DEFENDANTS' OPPOSIITON TO MOTION TO LIFT THE STAY OF DISCOVERY AND TO STOP DEFENDANTS FROM IMPROPERLY THREATENING LEGAL ACTIONS AGAINST FORMER EMPLOYEES

Defendants argue that Plaintiffs' motion to lift the stay should be denied for three reasons, none of which has merit.

First, Defendants argue that Plaintiffs failed to identify the categories of information relating to the Westfall Act certification that is being withheld pursuant to the confidentiality agreement. This is inaccurate. As Plaintiffs explained in their Memorandum in Opposition to Defendants' Motion for Westfall Act certification, counsel has interviewed former employees and learned twenty-two critical facts set forth in their Opposition to Defendants' Westfall Act motion. These included the facts that Defendants repeatedly lied to the State Department about the qualifications of the men; repeatedly lied about killings and other events occurring in the field; and destroyed evidence to prevent the State Department from learning the truth about their misconduct. These facts also included that the killings and woundings at issue in the complaints did not all arise from the Defendants actively providing security to United States' diplomats.

As explained by Plaintiffs in their Opposition to Defendants' Motion for Westfall Certification, these facts all relate to whether Defendants are government employees, not merely to whether they acted within the scope of that employment. Defendants are forced to concede this as Defendants included these "facts" within the Section of their Memorandum arguing that they are entitled to pass the threshold test of being considered government employees. Thus, unless Defendants filed the Westfall motion merely as a mechanism to delay the proceedings, they must have viewed these facts as relevant to the Court's decisionmaking on the Westfall Act.

Plaintiffs contest Defendants' characterization of the facts because persons with first-hand information about Defendants' operations have verbally shared their experiences in Iraq and elsewhere, and that information directly contradicts what is set forth in Defendants' Memorandum. But because that information also comes within Defendants' definition of "sensitive" information in the confidentiality contract, Plaintiffs cannot obtain declarations or other forms of admissible evidence from these witnesses with first-hand knowledge. They fear (with apparent justification) that they will be sued or otherwise harmed if Defendants learn they disclosed any information. Indeed, Defendants continue to threaten to fire or reprimand current employees if they even speak to former employees thought to be sharing information. Thus, on contested matters clearly relevant and contested, Plaintiffs are being forced to rely on pleadings alone. This is not the appropriate way to proceed in federal court.

Second, Defendants assert Plaintiffs are inappropriately extrapolating from scant evidence, *i.e.* a single letter. What is notable about Defendants' Opposition in this regard is that they did not directly deny any of the allegations made by Plaintiffs about the scope and breadth of the intimidation campaign. Instead, they simply scold Plaintiffs for extrapolating from a single letter. Defendants, not Plaintiffs, know full well the scope of their conduct. That defense

counsel are not willing to submit and sign a pleading stating that this intimidation campaign is not occurring speaks volumes. But in any event, Plaintiffs are not extrapolating from a single letter. Undersigned counsel has talked to multiple former employees who have been threatened with suit or worse if they are found to have shared any information about Defendants with third parties.

Third, Defendants argue that discovery is premature. As set forth in Plaintiffs' motion, however, discovery is not premature because any ruling by this Court likely will result in an appeal to the Court of Appeals for the Fourth Circuit. Unless the Court adopts and makes a finding of fact that Plaintiffs' recitation of the facts are accurate, and Defendants inaccurate, Plaintiffs will be prejudiced by the lack of discovery on a dispositive motion. *See, e.g.,* Fed.R.Civ. P. 56(f) (permitting parties to seek additional discovery prior to entry of summary judgment.) Sadly, Defendants' version of reality may even be given greater deference by an appellate court because the statements are being made by the party with first-hand participation in events. Any statements made by Plaintiffs, Iraqis without any knowledge of Defendants' operations, likely will be viewed with skepticism unless declarations or deposition testimony from knowledgeable witnesses is found in the evidentiary record available to the Court of Appeals.

Respectfully submitted,

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Date: October 15, 2009

CERTIFICATE OF SERVICE

I, Susan L. Burke, hereby certify that on the 15th day of October 2009, I caused true and correct copies of Plaintiffs' Reply to Defendants' Opposition to Plaintiffs' Motion To Lift Stay and To Stop Defendants From Improperly Threatening Legal Action to be served electronically via the Court's cm/ecf system upon the following individual at the address indicated:

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