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UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

SALEH, *et al.*,

Plaintiffs.

v.

TITAN CORPORATION, *et al.*,

Defendants.

Case No. 04-CV-1143 R (NLS)

REPLY IN SUPPORT OF DEFENDANT TITAN'S MOTION TO DISMISS

Date: February 7, 2005
Time: 2:00 P.M.
Courtroom: 5
Judge: Hon. John S. Rhoades

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ATS	Alien Tort Statute
C. Opp.	Plaintiffs' Opposition to CACI's Motion to Dismiss
FCA	Federal Claims Act
FTCA	Federal Tort Claims Act
MCA	Military Claims Act
Mot.	Titan's Memorandum of Points and Authorities in Support of its Motion to Dismiss
RCS	RICO Case Statement
T. Opp.	Plaintiffs' Opposition to Titan's Motion to Dismiss
TVPA	Torture Victim Protection Act

As Titan set forth in its opening brief, these citizens of a foreign country, detained by the U.S. military during a time of war, in a theater of combat, cannot bring a civil claim in U.S. courts for their alleged mistreatment during their detention. Whether denominated as the military contractor defense, a "special factor," or the political question doctrine, it is clear that as a matter of federal law and separation of powers, civil claims against the U.S. military's contractors for their alleged conduct in the military's detention centers in an active war zone are not allowed. Binding precedent in this Circuit makes this clear, as does the Supreme Court precedent and every court to have addressed claims such as the ones presented here. In addition to this absolute bar to plaintiffs' claims, there are multiple other grounds on which their claims must be dismissed, either for failure to plead the key facts necessary to make a claim against Titan for the acts of its employees or others, or because of fundamental legal flaws, such as the lack of a private right of action, or that the statutes they invoke do not have extraterritorial reach.

In response, plaintiffs attempt to recast their pleadings to deemphasize the involvement of the government, selectively quote sentence fragments from adverse opinions to advance them for propositions contrary to their holdings (or quote dissents as holdings without indicating as much), and simply make assertions about the law without case support. Even if plaintiffs were allowed to disavow their pleadings in response to a motion to dismiss (and they are not), plaintiffs cannot have it both ways. If government officials were acting in their individual capacities in Iraq (an impossible assertion given plaintiffs' filings which are taken as true at this stage), then the alleged Titan employees (and remember the only identified Titan employees are not alleged to have acted against any of the plaintiffs in this case; plaintiffs cannot say whether they were harmed by Titan employees) were acting beyond the scope of their employment and Titan cannot be held liable.

Below, we address the main arguments advanced by plaintiffs, whether in response to Titan's or CACI's motion to dismiss. A careful look at what they write makes clear that even if it were not for the absolute bar of the circumstances of the alleged torts, plaintiffs have fundamentally failed to plead their claims against Titan, and their complaint must be dismissed.

I. Plaintiffs' Common Law Claims Must Be Dismissed

A. *Koohi* Requires Dismissal of Plaintiffs' Tort Claims

In its opening brief, Titan demonstrated that controlling Ninth Circuit precedent requires dismissal of plaintiffs' state and federal tort claims, which are based on their treatment in the military's custody in a war zone, because such claims conflict with the federal interest expressed by, among other things, the combatant activities exception to the FTCA. *Koohi v. United States*, 976 F.2d 1328 (9th Cir. 1992). Plaintiffs do not contend that *Koohi* has been overruled or called into question; to the contrary, in discussing the political question doctrine, plaintiffs correctly refer to *Koohi* as controlling precedent. (C. Opp. 10.[1]) Plaintiffs also do not dispute that their tort claims arose during a time of war in a theater of active combat and directly implicate the unique federal interest in warmaking. Instead, plaintiffs devote a mere three sentences to *Koohi* and dismiss its precedential authority based on no contrary authority, offering instead an argument directly contrary to the holdings of *Koohi*, that they "were not harmed by an activity that arose out of an actual or perceived immediate hostility with enemy forces." (C. Opp. 23.) Plaintiffs also argue that: (1) there is no significant conflict with state law (C. Opp. 21-23); (2) dismissal is not warranted because Titan has not shown that it conformed its conduct to its contract (C. Opp. 18-20); and (3) the military contractor defense is only available to contractors who "design and manufacture military equipment." (C. Opp. 20-21.) Each argument is without merit—the first three ignore *Koohi* and the last is frivolous.

1. The Combatant Activities Exception Applies Here

Boyle v. United Technologies Corporation, 487 U.S. 500 (1988), held that where state law would "significantly conflict" with "uniquely federal" interests, state law is pre-empted and the claims precluded. (Mot. 12-13.) *Boyle* dismissed a defective design claim involving a military helicopter crash during peacetime because of the conflict between state law and the uniquely federal interests reflected in the FTCA's discretionary function exception. *Koohi* applied *Boyle* in

[1] Plaintiffs' opposition to Titan's motion does not cite *Koohi* once, relying on the "incorporation" of their arguments in opposition to CACI's different arguments on the matter. (T. Opp. 6-7.) Notwithstanding plaintiffs' default, and their attempt to secure a double-length opposition brief by doing so, Titan responds here to the arguments advanced in opposition to CACI's brief.

a different factual context: a suit for injuries to passengers on an Iranian civilian airliner mistakenly shot down by the Navy in a theater of combat. The Ninth Circuit held that the tort claims—both state and federal—had to be dismissed against the military contractor that manufactured an allegedly defective fire control system that caused the plane to be shot down. Two facts, standing alone, compelled dismissal: the injuries (a) arose during a time of war; and (b) were in connection with combatant activities. *See Koohi*, 976 F.2d at 1333. Under such circumstances, the contractor owed no duty to the plaintiffs, no matter whether the injuries were caused intentionally or by negligence.

Plaintiffs here not dispute that their claims arose during a war. Instead they argue that because their injuries arose while they "were in detention," they "were not harmed by an activity that arose out of an actual or perceived immediate hostility with enemy forces." (C. Opp. 23.) However, this argument flies in the face of *Koohi*'s holding that "the term 'combatant activities' includes 'not only physical violence, but activities both necessary to and in direct connection with actual hostilities.'" *Koohi*, 976 F.2d at 1333 (quoting *Johnson v. United States*, 170 F.2d 767, 770 (9th Cir. 1948)).

In *Johnson v. United States*, plaintiffs (commercial clam farmers) sued under the FTCA, alleging that oils, sewage, and other noxious matter discharged from U.S. Navy ammunition ships anchored in the waters of Discovery Bay, in Washington State, had contaminated their clam beds. Those vessels had provided logistical support of combat operations in the Pacific. The Ninth Circuit held that the ships were not engaged in combatant activities because they were no longer in a theater of combat and the surrender of Japan had terminated combat. *Id.* at 770. The Court made clear, however, (as it would later hold in *Koohi*) that the outcome would have differed had hostilities continued or if the ships been located in the theater of combat, notwithstanding that the ships themselves were not directly involved in combat. *Id.*

In *Koohi*, the Ninth Circuit held what had been anticipated by *Johnson*: claims against military contractors for their support of military operations in a combat zone are barred as combatant activities. It did not matter in *Koohi* that the victims were non-combatant civilians, that the contractor may have performed negligently, recklessly, or in contravention to the terms of

its contract, or even that the actions of the Navy may have been unlawful. Nor did it matter that the contractors' activities—the manufacture of electronic equipment—did not itself constitute combat. It mattered only that the contractor's support was a "necessary adjunct" to military activities in a war zone. *Koohi*, 976 F.2d at 1333 n.5.

Plaintiffs' argument rings particularly hollow given the Supreme Court's recent observation that capture, detention, and interrogation by the military are important extensions of the war power and an "important incident of war." *Hamdi v. Rumsfeld*, 124 S. Ct. 2633, 2640 (2004). Plaintiffs cite no contrary authority anywhere in their more than 90 pages of opposition. Instead, they cite three District Court cases from other jurisdictions resolving suits for injuries arising in the context of combat. (C. Opp. 23.) In each, recovery was denied.[2] These cases do not limit the combatant activities exception to those factual settings, and certainly could not limit the precedential authority of *Johnson* and *Koohi*. If anything, two of the cases support Titan's position. In *Clark*, the alleged injuries were not inflicted by combat, but by a combination of atmospheric contaminants to which plaintiff was exposed in the theater of combat. *Rotko* makes clear that the combatant activity exception applies even where the injuries allegedly resulted from *ultra vires*, illegal, and unconstitutional actions.

2. Plaintiffs' Claims Conflict with the Federal Interest in Warmaking

Plaintiffs argue that their claims present no significant conflict with federal interests "[g]iven the federal interest in stopping torture." (C. Opp. 22.) This argument fails under *Boyle* and *Koohi* because courts must examine the federal interest underlying the government's undertaking—here the waging of war—not, as plaintiffs' argument suggests, the degree to which a competing federal interest (prevention of torture) might be furthered by plaintiffs' suit. The

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[2] Although the subsequent history was not cited by plaintiffs, *Minns v. United States*, 974 F. Supp. 500 (D. Md. 1997), was affirmed on other grounds without reaching the combatant activities exception. *See Minns*, 155 F.3d 445, 452 (4th Cir. 1998). *Clark v. United States,* 974 F. Supp. 895 (E.D. Tex. 1996), dismissed plaintiff's claim that his exposure to toxins while serving with the U.S. Army in the Gulf War caused his child to suffer birth defects. *Rotko v. Abrams*, 338 F. Supp. 46 (D. Conn. 1971), *aff'd*, 455 F.2d 992 (2d Cir. 1972), dismissed claims based on plaintiffs' son's death in combat in Vietnam, allegedly resulting from military orders that were *ultra vires*, in violation of treaties and the Constitution, and not actionable under the FTCA.

combatant exception implements both a separation of powers concern—that courts should not be in the business of second-guessing the actions of military commanders taken in a war zone—as well as a preemption concern, namely that warmaking is a uniquely federal interest.

Plaintiffs simply ignore that the Executive's power to wage war effectively is among the most important federal interests—and one that is jealously guarded by the federal courts against state or judicial intrusion: "While neither the Constitution nor the courts have defined the precise scope of the foreign relations power that is denied to the states, it is clear that matters concerning war are part of the inner core of this power." *Deutsch v. Turner Corp.*, 324 F.3d 692, 711 (9th Cir.), *cert. denied sub nom*, 540 U.S. 820 (2003). Moreover, courts have long held that warmaking is a function uniquely committed to the political branches, *Hamdi v. Rumsfeld*, 124 S. Ct. at 2647, and that courts should not hear civil suits brought by enemy nationals against military field commanders because such suits would cripple the paramount federal interest in effectively waging our nation's battles, *Johnson v. Eisentrager*, 339 U.S. 763, 779 (1950). It is well-settled that a suit restraining the actions of agents of the government, including military contractors, no less fetters government action than does a suit brought directly against government officials. *See Boyle*, 487 U.S. at 512; *Sanchez-Espinoza v. Reagan*, 770 F.2d 202, 207 n.4 (D.C. Cir. 1985) (Scalia, J.). It is equally well settled that a claim that military actions are illegal is not a reason for permitting judicial inquiry through the tort system into the lawfulness of the U.S. military actions. *See Koohi*, 976 F.2d at 1330 n.2.[3]

Therefore, the postulated federal interest in preventing torture does not equate to a private cause of action against military contractors for actions taken in support of military operations in a war zone. "The United States government is in the best position to monitor wrongful activity by contractors, either by terminating their contracts or through criminal prosecution." *Bentzlin v. Hughes Aircraft Co.*, 833 F. Supp. 1486, 1493 (C.D. Cal. 1993). In any case, plaintiffs' argument proves too much. Every application of the military contractor defense, or traditional government

[3] The authority of the Political Branches over warmaking also undergirds the application of political question doctrine here, which independently requires dismissal of plaintiffs' claims as fully argued by CACI.

immunity for that matter, is at the expense of "the perhaps recurring harm to individual citizens" who are denied recovery. *Boyle*, 487 U.S. at 523 (Brennan, J., dissenting) (quoting *Doe v. McMillan*, 412 U.S. 306, 320 (1973)). That there is a federal interest in protecting tort victims—whether from alleged torture or otherwise—does not bar application of the military contractor defense in situations where the United States has itself retained sovereign immunity. *See* § I.B.2, *infra* (TVPA restricted to torture under color of *foreign* law and criminal prohibition, not civil cause of action, for U.S. citizens accused of torture).

3. Contractual Compliance Is Irrelevant Under Koohi

Relying on *Boyle*, plaintiffs argue that the military contractor defense does not apply because Titan has failed to demonstrate that it complied with the government's specifications and that, at any rate, Titan's contract did not require it to torture defendants. (C. Opp. 18-20.) This argument has no application in the context of combatant activities.

In *Boyle* state law significantly conflicted with the uniquely federal interests reflected by the FTCA's discretionary function exception that protects government specifications. To ensure that the government's discretion was at issue rather than the contractor's, *Boyle* required the defendant to show that it had complied with the government-approved specifications that formed the basis of the suit.[4] In *Koohi*, as here, the primary conflict was with the federal interest in warmaking reflected by the combatant activities exception to the FTCA. In the context of that interest, as opposed to the context of the discretionary function interest, the specificity of the government contract and the contractors' compliance are irrelevant. *See Koohi*, 976 F.2d 1328. Where combatant activities of the U.S. military are implicated, one does not inquire into the merits; the defense applies regardless of whether the challenged actions were taken "carefully or negligently, properly or improperly." *Id.* at 1335; *see also Johnson*, 170 F.2d at 769 ("[I]t may be safely concluded that the 'exception' here involved relates to Governmental activities which by their very nature should be free from the hindrance of a possible damage suit.").

[4] *See Boyle*, 487 U.S. at 512 (inquiries into compliance assure "that the suit is within the area where the policy of the 'discretionary function' would be frustrated—i.e., they assure that the design feature in question was considered by a Government officer, and not merely by the contractor itself.").

4. The Military Contractor Defense Applies to Service Contracts

Plaintiffs' contention that the government contractor defense does not apply to service contracts (C. Opp. at 20-21), is frivolous. First, *Boyle* extended the government contractor defense *from* service contracts *to* procurement contracts. *See Boyle*, 487 U.S. at 506 ("The federal interest justifying [*Yearsley's*] holding surely exists as much in procurement contracts as in performance contracts; we see no basis for a distinction."). Second, *Malesko* again endorsed the application of the defense in the context of a service contract. *Correctional Servs. Corp. v. Malesko*, 534 U.S. 61, 74 n.6 (2001) (recognizing government contractor defense in context of a service contract for management of prison but finding its applicability unsupported in the record). Third, plaintiffs grossly misrepresent the Ninth Circuit law on this issue. *Snell v. Bell Helicopter Textron*, 107 F.3d 744, 746 n.1 (9th Cir. 1997) and the other cases cited at C. Opp. 20 *do not* address whether the military contractor defense applies to service contracts. *Snell* stated nothing more than the fact that the Ninth Circuit recognizes a "military contractor" not a "government contractor" defense. *Snell* and the other Ninth Circuit cases relied upon by plaintiffs merely represent further examples of the military contractor defense being applied in the context of procurement contracts. They say nothing about its application to military service contracts.[5]

5. Plaintiffs' Tort Claims Conflict with Other Federal Interests

a. Discretionary Function

Plaintiffs argue that the discretionary function exception is inapplicable because (1) Titan has failed to show that it conformed to its contract and cannot do so to the extent their allegations of torture are accepted as true (C. Opp. 18-20), and (2) unconstitutional and unlawful activity falls outside the scope of the discretionary function exception. (C. Opp. 21.) In short, plaintiffs argue that the behavior they allege places the conduct outside the scope of authority vested in any government official.

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[5] Remarkably, the only court of appeals authority cited by plaintiffs that actually addresses this issue, *Hudgens v. Bell Helicopters/Textron*, 328 F.3d 1329 (11th Cir. 2003) (C. Opp. 20), clearly holds that the defense *applies* to service contracts. Contrary to plaintiffs' representation that *Hudgens* involved the manufacture of helicopters (C. Opp. 20), the civilian contractor was repairing and maintaining them, the quintessential service contract. The same is true of the district court cases cited by plaintiffs. (C. Opp. 21.)

Plaintiffs' arguments fail because they cannot simultaneously contend that the actions of the conspiring government officials were at once official, subjecting them to the substantive international law norms they allege, and *ultra vires*. *See Sanchez-Espinoza*, 770 F.2d 202 (dismissing claims against contractors that allegedly provided substantial assistance for murder, kidnapping, and rape because they were supporting U.S. officials acting in their official capacity). If, as plaintiffs contend elsewhere, government officials acting in their official capacities, including the Secretary of Defense, contracted with Titan to provide linguists and promulgated interrogation policies that led to their injuries, then their claims are barred by the uniquely federal interests codified in the discretionary function exception.[6] (Mot. 15 n.16.) If, as plaintiffs now contend, the conspiring government officials were acting *ultra vires* then neither their actions nor the actions of the Titan employees who allegedly conspired with them fall within the scope of the ATS where official action is required "*as a jurisdictional necessity*." *Sanchez-Espinoza*, 770 F.2d at 207.[7] Moreover, to the extent that plaintiffs now allege that low-level military officials acted in an *ultra vires* manner in conspiring with Titan translators to commit unlawful acts, the Titan employees were acting outside the scope of employment in the same way military official were and their actions cannot be attributed to Titan. *See* § I.C.2, *infra*.

b. Foreign Activities

Rather than contend with the foreign country exception to the FTCA, plaintiffs argue that the exception does not apply because they do not seek to apply foreign law, only domestic and international law. (C. Opp. 23.) Plaintiffs' contention is off the mark and contrary to the holding of *Sosa*. The foreign country exception to the FTCA "bars all claims based on any injury suffered in a foreign country...." *Sosa*, 124 S. Ct. at 2754. Plaintiffs' assertion that they seek to apply

[6] In the SAC and RICO statement, plaintiffs quite clearly advanced the position that government officials involved in the conspiracy acted in an "official capacity." *See, e.g.*, SAC ¶¶ 67(b); 257; 263; 269; 275; RICO Statement at 20 ("Defendants' actions were accorded the color of the United States law because they were conspiring with certain public officials, including certain military officials, and other persons acting in an official capacity on behalf of the United States.").

[7] In a highly misleading citation to *Sosa*, plaintiffs suggest that the Supreme Court endorsed liability for torture by private actors under the ATS. (T. Opp. 17, citing *Sosa*, 124 S. Ct. at 2766 n.20.) The Court did no such thing. At most, it implied, through a *compare...with* citation, that *genocide* by private actors violates international law.

only domestic and international law is of no consequence. That the United States would unquestionably be immune from suit by virtue of *Sosa*'s reading of the foreign country exception means that Titan, acting under the direction and control of the U.S. military, similarly cannot be sued. *See Butters v. Vance Int'l, Inc.*, 225 F.3d 462, 466-67 (4th Cir. 2000); *Sanchez-Espinoza*, 770 F.2d at 207 n.4.

B. The ATS Claims Must Be Dismissed

Titan's opening brief demonstrated that *Koohi* requires dismissal of the ATS claims, as do several other deficiencies in the claims; plaintiffs largely fail to respond, arguing only that *Sosa* endorsed *Marcos*, which, even if correct, is irrelevant. *Sosa* supports dismissal. It confirmed that ATS claims must be analyzed like any other implied cause of action, requiring deference to legislative judgments (such as the combatant activities exception) and consideration of common law defenses that might not apply to statutory actions.[8]

1. *Koohi* Requires Dismissal of the ATS Claims

Titan explained how *Sosa*'s holding confirmed *Koohi*'s binding precedent in this Circuit: ATS claims are barred where based on injuries incurred incident to combatant activities of the U.S. military just as state common law claims are precluded and preempted. (Mot. 24-26.) Plaintiffs offer no substantive response, incredibly writing that, "[d]efendants simply fail to address the Plaintiffs' federal common law claims." (C. Opp. 23.) This statement and the argument that the ATS claims survive in the face of a valid military contractor defense (C. Opp. 23-24), are frivolous. *See* Mot. 13-15; 21-24; 25-27 (discussing *Koohi* and its theoretical basis).

2. *Sosa* Supports Dismissal of the ATS Claims

Rather than substantively address *Koohi*, plaintiffs argue that, "*Sosa* upholds the line of rulings that gave aliens access...to sue their torturers" because it "squarely upheld and endorsed the reasoning of...the Ninth Circuit in [*Marcos*]" and "adopted the reasoning of *Filartiga*." (T. Opp. 10-11.) Plaintiffs' argument is misplaced. First, *Sosa* did not uphold any ATS claims; it

[8] We also showed that courts are jurisdictionally required to subject ATS claims to a "more searching review" (Mot. 27-28), an important point to which plaintiffs failed to respond. Plaintiffs' extended discussion of their individual ATS claims (T. Opp. 20-25), does not undermine our original discussion of these issues and we stand on our opening brief.

held that the claim for arbitrary detention that the Ninth Circuit had recognized was *outside* the narrow class of claims cognizable under the ATS, and expressed a series of cautions on implying new causes of action under ATS. Second, regardless of whether (and for what purposes) the Court endorsed *Marcos* and *Filartiga*, neither those cases, nor any others relied upon by plaintiffs, involved ATS claims with the key facts that require dismissal here: injuries incurred incident to the combatant activities of the U.S. military. Those cases involved military actions of *other countries*, or the acts of *other sovereigns*. Notwithstanding plaintiffs' penchant for describing ugly acts of torture in place of legal argument, not one of those cases involved the U.S. military as the sovereign actor, let alone U.S. combat operations, both of which underlie *Koohi* and constitute one of the special factors that preclude liability for Titan.

Marcos involved neither an international armed conflict nor, more importantly, the U.S. military.[9] Plaintiffs' misplaced reliance on *Marcos* demonstrates that they have failed (1) to find any support for extending ATS to claims involving the U.S. military; and (2) to appreciate the critical distinction between the U.S. military and foreign militaries for ATS claims.[10] This critical distinction—rooted in the difference between the retained sovereign immunity of the United States in its own courts and the immunity that Congress has granted foreign sovereigns in our courts—explains why plaintiffs cannot identify a single case allowing an ATS claim in the context of U.S. military operations, and why the only cases to consider such claims rejected them. *See Koohi*, 976 F.2d 1328; *Sanchez-Espinoza,* 770 F.2d 202; *Bentzlin*, 833 F. Supp. 1486.

Titan also demonstrated in its opening brief that *Sosa* independently reinforced the unavailability of the ATS claims here because (1) the common law is reluctant to infer causes of action under new circumstances in the absence of Congressional action and (2) the FTCA's

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[9] Plaintiffs also argue that the "traditional ATCA claims upheld in *Sosa* have historically arisen out of conditions involving armed conflict," citing *Marcos*, *Kadic*, and *Presbyterian Church of Sudan*. (T. Opp. 15). Again, none of those cases involved the U.S. military and they are not relevant to the application of the military contractor defense here.

[10] *See Sanchez-Espinoza*, 770 F.2d at 207 n.5 ("Since the doctrine of foreign sovereign immunity is quite distinct from the doctrine of domestic sovereign immunity that we apply here…nothing in today's decision necessarily conflicts with the decision of the Second Circuit in *Filartiga v. Pena-Irala*") (internal citations omitted).

combatant activity exception represents Congress's judgment that claims arising under such circumstances are not permitted. (Mot. 25-26.) Plaintiffs first respond (T. Opp. 12-14), that the Court did not mean what it said in *Sosa*, 124 S. Ct. at 2762-63—that courts must be cautious in extending ATS claims to new circumstances and, in doing so, must defer to "legislative judgment." Not constrained by their own arguments any more than the precedent they ignore, plaintiffs later reverse themselves and argue the converse: that this Court *should* be guided by Congress's legislative judgment, as expressed in the Torture Victim Protection Act of 1991 ("TVPA"). (T. Opp. 14.) Plaintiffs are right that Congress has spoken in the TVPA: it expressed Congress's judgment by creating a statutory damages action for victims of torture *only* against an individual acting under authority of a *foreign* nation, 106 Stat. 73 § 2(a). Thus, it codifies the critical distinction between retained U.S. sovereign immunity and foreign sovereign immunity earlier recognized in *Sanchez-Espinoza*.[11] *See* n.10, *supra*.

Plaintiffs also attempt to limit the effect of *Sosa*'s dramatic recasting of the ATS's theoretical underpinnings by arguing that the five reasons for judicial caution enumerated by the Court are not "for lower courts to apply to every ATCA claim," and that the "*Sosa* Court specifically chose not to adopt 'a policy of case-specific deference to the political branches.'" (T. Opp. 13). Plaintiffs simply disregard the plain meaning of what the *Sosa* Court wrote, not to mention the holding of that case.[12] The Court chose not to apply such deference to that case because it was unnecessary. *See* 124 S. Ct. at 2762 ("This requirement is fatal to Alvarez's claim."). The Court admonished lower courts that "[a] series of reasons argue for judicial caution when considering the kinds of individual claims that might implement the jurisdiction conferred by the early statute." *Id.*

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[11] That the ATS "remain[s] intact to permit suits based on other norms that already exist or may ripen in the future into rules of customary international law," H.R. Rep. No. 102–367, pt. 1, p. 4 (1991), *reprinted in* 1992 U.S.C.C.A.N. 85, 87, does not alter the analysis because no ATS claims have been allowed in the context of U.S. military operations. Equally significantly, Congress provided that there is no civil cause of action for torture committed by U.S. citizens. *See* 18 U.S.C. § 2340A & 2340B.

[12] Plaintiffs omit a key clause: "*Another possible limitation that we need not apply here* is a policy of case-specific deference to the political branches." *Sosa*, 124 S. Ct. at 2766 n.21 (emphasis supplied).

3. Corporations Are Not Subject to ATS Claims

Plaintiffs concede that *Malesko* bars their Constitutional claims against Titan (their attempt to disavow such claims notwithstanding), but seek to limit *Malesko* to *Bivens* actions. (T. Opp. 17 n.13.) As set forth in our opening brief (Mot. 26-27), and again not disputed, *Malesko* applied the principle that the federal common law is reluctant to infer actions in the absence of legislation. *Sosa* cited it for that proposition (Mot. 28), and given *Sosa*'s holding that ATS actions are implied actions, *Malesko* is equally applicable here. Plaintiffs respond that *Sosa*'s "endorsement" of *Filartiga*, *Marcos*, and *Kadic* support ATS claims against corporations. (T. Opp. 17). Without debating whether *Sosa* endorsed those cases (and for what propositions), none of them involved corporate defendants and therefore do not address this point.

Two additional arguments are equally unfounded: Plaintiffs contend that *Malesko* is inapplicable because the ATS arises under international law, not federal common law and the deterrence rationale does not apply. (T. Opp. 17.) The premises are wrong: ATS suits are federal common law claims that enforce a narrow class of international norms, *Sosa*, 124 S. Ct. at 2761; they do not exist "to recognize that courts are responsible for enforcing international law." (T. Opp. 17 n.13.) Nor does this affect the applicability of *Malesko* to ATS suits: The inability to sue corporations is a function of the limits of implied rights of action under federal common law. Relying upon *Malesko*, *Sosa* made clear that the federal common law's reluctance to recognize implied causes of action is fully applicable to ATS actions. *Sosa*, 124 S. Ct. at 2762-63; *see also id.* at 2772 (Scalia, J., concurring in part and concurring in judgment) ("*Bivens* provides perhaps the closest analogy [to implied causes of action under ATS].").

Consistent with the rules developed in the context of *Bivens* actions, the federal common law will not recognize an implied ATS action for every claim that properly asserts violation of an international norm. *Sosa*, 124 S. Ct. at 2763 ("The creation of a private right of action raises issues *beyond the mere consideration whether underlying primary conduct should be allowed or not*....") (emphasis added). Put another way, there is a distinction between the applicability of the underlying substantive norm—informed by international law in ATS claims and the Constitution in *Bivens* claims—and the availability of an implied remedy under federal common law where

Congress has not spoken. *Compare Malesko*, 534 U.S. 61 (no implied action against corporations for Constitutional violations) *with Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 936-37 (1982) (statutory action against corporations for Constitutional violations). The rationale of deterring the individuals who commit the wrongs by requiring the suits to be against them is as applicable under ATS as under *Bivens*.

4. Special Factors Require Dismissal of the ATS Claims

By placing ATS claims in the federal common law, *Sosa* made the ATS subject to the same limitations that courts have imposed on *Bivens* actions, including the "special factors counseling hesitation in the absence of affirmative action by Congress." *United States v. Stanley*, 483 U.S. 669, 678 (1987) (quotation omitted). Two special factors apply here: the existence of alternative remedies, *Schweiker v. Chilicky*, 487 U.S. 412, 423 (1988); *Malesko*, 534 U.S. at 66-70, and whether injuries arise incident to military service, *Stanley*, 483 U.S. at 683-84. *See* Mot. 21-24. To ignore the impact of these special factors on ATS claims would result in recognizing more expansive common law remedies in favor of aliens than on behalf of U.S. citizens—a perverse result unsupported by any expressed legislative judgment (and certainly none is identified by plaintiffs).

On exhaustion, plaintiffs argue that defendants have not established plaintiffs' failure to exhaust and there are no alternate remedies available. (T. Opp. 25-26.) Plaintiffs' first argument fails because alternate remedies operate to bar implied actions rather than postpone suit until after exhaustion occurs. (Mot. 21-24; *Malesko*, 534 U.S. at 66-70.) Plaintiffs' second argument relies on factual assertions that are contrary to their own allegations and that would require dismissal of their claims for other reasons. Plaintiffs argue that the FCA is unavailable because (a) Titan employees were independent contractors (T. Opp. 26 n.33); (b) plaintiffs may be considered "unfriendly to the United States" (C. Opp. at 44); and (c) their injuries arose in combat. (T. Opp. 15 n.12.) All these are contrary to plaintiffs' factual allegations and legal positions taken elsewhere. *See* T. Opp. 8-10 (repeatedly asserting joint venture between Titan and the U.S. military); SAC 23-34 (asserting plaintiffs detained without cause, implying they were not

combatants); T. Opp. 23 (asserting injuries were not result of combat).[13] Plaintiffs' treatment of CPA Order 17, (T. Opp. 25), which immunizes Coalition government and contracting personnel from Iraqi courts, suffers in the same way: Titan's employees are immunized by CPA 17 only if its employees' actions were in compliance with its contract, which plaintiffs dispute to avoid the discretionary function exception. (C. Opp. 18-20.)

Plaintiffs also contend that Congress must express its intention that alternate remedies displace implied actions and the remedies must be complete to do so. (C. Opp. at 42-43.) Plaintiffs are incorrect on both counts. *Bivens* actions are permitted despite overlapping FTCA relief was because it is "'crystal clear' that Congress intended the FTCA and *Bivens* to serve as 'parallel' and 'complementary' sources of liability." *Malesko*, 534 U.S. 61, 68 (internal citations omitted).[14] The limits on payment or review of FCA claims does not nullify their availability as alternative remedies. *See Bush v. Lucas*, 462 U.S. 367, 388 (1983) (alternate remedies need not provide complete relief). Thus, the limitation on the Service Secretary's FCA authority (about which plaintiffs are not completely candid, *see* 10 U.S.C. § 2734(d)) and the lack of subsequent judicial review of the Army's determination (C. Opp. 41-43), are irrelevant.

Implied causes of action must also be dismissed where the danger of interference with military discipline is too great. *United States v. Stanley*, 483 U.S. 669, 684 (1987). Similar considerations are addressed by the military contractor defense and the political question doctrine, but, after *Sosa*, they are equally applicable as a "special factor." Plaintiffs contend that *Stanley* is inapplicable because they are suing civilians (C. Opp. at 45), an argument rejected in *Stanley* and *Malesko*: "We have reached a similar result in the military context, *Chappell v. Wallace*, 462

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[13] Plaintiffs also contend that the FCA is unavailable because: (1) "the military has indicated in writing...that actions against independent private contractors are appropriate to pursue in federal court." (T. Opp. 26.) This grossly mischaracterizes the email, which states that the filing of the suit "will not affect any recommendation made on the FCA claim of Mr. Saleh," (C. Opp. Exhibit I). That in no way "indicates" that such suit is "appropriate"; if anything, it indicates that Mr. Saleh's FCA claim is viable.

[14] The four cases plaintiffs cite to establish the proposition that the MCA is not an exclusive remedy are inapplicable because they deal with whether express statutory actions, not implied actions, are displaced by the MCA. *See* C. Opp. at 44.

U.S. 296, 304 (1983), even where the defendants were alleged to have been civilian personnel, *United States v. Stanley*, 483 U.S. 669, 681 (1987)." *Malesko*, 534 U.S. at 68.[15]

C. Titan Is Not Liable for the Alleged Torts

Nowhere is plaintiffs' failure to allege the facts necessary to support their claims against Titan more stark than in the failure to plead facts supporting direct or vicarious Titan liability for the alleged misconduct. Notwithstanding the liberal use of the term "Torture Conspirators" (without specifics of how Titan conspired) or the generic term "Defendants" (without identifying the specific acts that give rise to Titan's liability) the opposition confirms that plaintiffs have not stated a claim against Titan. "[F]ederal courts repeatedly have required a plaintiff suing multiple defendants to set forth sufficient facts to lay a foundation for recovery against each particular defendant named in the suit." *Clark v. Mayfield*, 1994 U.S. Dist. LEXIS 17401, at *11 (S.D. Cal. 1994) (Rhoades, J.). Filing voluminous exhibits and reports does not excuse plaintiffs from making plain what each defendant did. *Id.* at *13-14. Plaintiffs have done little more substantively than the *pro se* plaintiff in *Clark* and their conclusory allegations of joint venture, partnership, and agency, unsupported by factual pleading, fail as to Titan.

1. Plaintiffs Have Not Alleged Facts for Direct Corporate Liability of Titan

Plaintiffs do not deny that managerial participation in the alleged torts, or formulation of policy that encouraged or allowed abuses (Mot. 16), are required to plead corporate liability. Instead, they contend that their allegations of deficient Titan hiring, training, and supervision are sufficient because they allege "managerial involvement." (T. Opp. 8, citing SAC ¶¶ 57-60, 86.) "Managerial involvement" in the contracts is not enough to plead Titan's liability for the alleged torts of others. Plaintiffs must plead managerial involvement in the torts. As a case relied upon by plaintiffs makes clear (T. Opp. 8), such allegations of negligence in hiring, training, and

[15] *See also Ricks v. Nickels*, 295 F.3d 1124 (10th Cir. 2002) (former soldier); *Whitley v. United States*, 170 F.3d 1061 (11th Cir. 1999) (foreign soldier); *Minns v. United States*, 155 F.3d 445, 448-49 (4th Cir. 1998) (collecting cases applying *Stanley* to civilian plaintiffs); *Daberkow v. United States*, 581 F.2d 785 (9th Cir. 1978) (foreign soldier). Plaintiffs also argue that *Stanley* is inapplicable because 10 U.S.C. § 938 ("Article 138") is unavailable to civilians. (C. Opp. 46). But Article 138 is mechanism for challenging improper treatment, and these plaintiffs enjoy an equivalent remedy: the Great Writ. *See Rasul v. Bush*, 124 S. Ct. 2686 (2004); *see also Malesko*, 534 U.S. at 74 (injunctive relief weighs against availability of implied damages action).

supervision do not state a claim for corporate liability for the intentional torts alleged by plaintiffs. *See Farmers Ins. Group v. County of Santa Clara,* 11 Cal. 4th 992, 1011 (1995) (holding employer negligence irrelevant to vicarious liability for employees' torts).[16]

2. Plaintiffs Have Not Alleged Facts for Vicarious Liability of Titan

Plaintiffs aver in their opposition that they have "ample evidence linking Titan *employees*" to the alleged torts. (T. Opp. 2; emphasis added.) But the liability of corporations for the acts of their alleged employees is controlled by the principles of *respondeat superior*, which require more than the bare allegation of employment. (Mot. 16-17) By not addressing these arguments in their Opposition, plaintiffs implicitly concede that they have not stated any grounds for *respondeat superior* liability for the acts of Titan's employees.[17] Instead they argue agency to impute to Titan the alleged acts of (mostly) unidentified others, but in doing so and lacking a factual basis for agency liability, plaintiffs conflate agency with conspiracy, joint venture, and partnership. *See* T. Opp. 8-10. The SAC supports none of these theories.

a. No Claim for *Respondeat Superior* Liability Based on Agency

The Opposition maintains that Titan's motion did not address agency liability (T. Opp. 9), in disregard of Titan's discussion at § I.A.2 of its motion. (Mot. 16-17, especially n.18 specifically discussing agency.) No matter—plaintiffs do nothing to undermine the arguments they ignored. While plaintiffs correctly state the law of agency in California—which requires that "each party manifest[ ] acceptance of a relationship whereby one party is to perform work for the

[16] Plaintiffs also rely on their allegation that "Team Titan," advertised for "male U.S. citizens...who must undergo a favorable U.S. Army Counterintelligence screening interview" (SAC ¶ 86), to support managerial involvement in tortious activity. Hiring candidates acceptable to the Army, as contractually required (SOW § C-1.4.1.2), cannot be a source of liability.

[17] Although plaintiffs acknowledge that vicarious liability requires that the acts be within the scope of employment (T. Opp. 9), they have no response to their failure to plead that the acts were within the scope. (Mot. 16-17.) No wonder. *Farmers Insurance Group* considered whether a prison guard's on-the-job sexual harassment was within the scope of employment. The Court noted that, even if the torts alleged were foreseeable, in the "absence of a causal link" between the torts and the officer's work, the acts were outside the scope of employment. *Farmers Ins.*, 11 Cal. 4th at 1011. Moreover, a government investigation on which plaintiffs rely heavily, the "Schlesinger Report," concluded that the abuses at Abu Ghraib were the result of "aberrant behavior" and the "predilections" of the individual perpetrators. *Schlesinger Report* at 13. In *Farmers*, the California Supreme Court made clear that such acts taken for the "employees' personal gratification" can not result in vicarious liability. *Farmers Ins.*, 11 Cal. 4th at 1007.

other under the latter's direction" (T. Opp. 9)—they have not (and cannot) allege that the soldiers, government officials, and others accused of orchestrating the abuses at Abu Ghraib accepted a relationship whereby they would work at Titan's direction. Nor are the vague assertions that Titan influenced government officials or military decision makers sufficient to establish agency, which requires establishing the right to control the details of the work. *See* 2 Summary of Cal. Law § 14. Broad supervisory powers or the power to influence or make suggestions is not enough. *See McDonald v. Shell Oil Co.*, 44 Cal. 2d 785, 790 (1955).[18]

b. Allegations Do Not Establish a Joint Venture or Partnership

Plaintiffs' complaint simply failed to allege facts sufficient to find a joint venture because, *inter alia*, the SAC does not allege facts demonstrating the right to joint control by the co-venturers. (Mot. 16.) In response, plaintiffs do nothing more than reiterate their baseless allegations of Titan participation in the "conspiracy", without explaining how that allegation establishes the existence of a joint venture. (T. Opp. 8, citing SAC ¶ 25.)

Plaintiffs go on to further muddy their claim by introducing a new theory: that Titan is liable under partnership liability. (T. Opp. 8-9.) The SAC does not allege that Titan was a partner with any entity or that Titan participated as co-owner of any business. As the treatise plaintiffs cite makes clear "[a] partnership is an *association of two or more persons* to carry on as *co-owners a business for profit.*" 9 Witkin, Summary of Cal. Law, Partnership § 14 (9th ed. 1989) (emphasis in the original). There are no such allegations in the SAC.

c. Allegations Do Not Establish Conspiracy

In an attempt to salvage their claims of vicarious liability, plaintiffs attempt to bolster their claims with conclusory allegations of conspiracy. (T. Opp. 9.) Such conclusory allegations are insufficient to support a civil conspiracy claim. *See Marts v. Hines*, 68 F.3d 134, 136 (5th Cir. 1995). Civil conspiracy requires "an object to be accomplished, a meeting of the minds on the

[18] Plaintiffs also claim that Titan ratified the actions of all soldiers and others that acted "consistently" with the U.S. Army report known as the "Miller Report". (T. Opp. 10.) Setting aside the fact that the Army, not Titan, issued the Miller Report, ratification requires that the alleged agent purport to act for the ratifying party. *See Emery v. Visa Int'l Serv. Ass'n,* 95 Cal. App. 4th 952, 955 (2002). There are no allegations that soldiers or other government officials held themselves out as agents of Titan.

object or course of action, one or more overt acts, and damages as the proximate result thereof." 16 Am. Jur. 2d § 51; *see also Vieux v. E. Bay Reg'l Park Dist.*, 906 F.2d 1330, 1343 (9th Cir. 1990). To be a co-conspirator requires an actual agreement to conspire, *Vieux,* 906 F.2d at 1343, with knowledge of the co-conspirators' unlawful objectives. *See Moore v. Brewster*, 96 F.3d 1240, 1245 (9th Cir. 1996). This means that the soldiers, government officials and others involved in the treatment of detainees in Iraq cannot be implicitly or incidentally incorporated into the "Torture Conspiracy" by their mere presence, knowledge, or even their actions. *See Kidron v. Movie Acquisition Corp.*, 40 Cal. App. 4th 1571, 1582 (1995) (knowledge of a planned tort is insufficient, absent intent to conspire); *People v. Austin*, 23 Cal. App. 4th 1596, 1607 (1994) (evidence of act furthering illegal purpose is not sufficient to prove conspiracy absent knowledge and intent) *overruled in part on other grounds by People v. Palmer*, 24 Cal. 4th 856, 861 (2001). It is also insufficient to allege that Titan's management "knew or should have known" that torts would be committed. *See Schick v. Lerner,* 193 Cal. App. 3d 1321, 1328 (1987). It must be shown that the "co-conspirators" (many of whom are high ranking officials of our government) actually agreed with Titan and that they intended that these acts be carried out. Plaintiffs' filings fall far short of alleging facts that establish those extraordinary charges.

The most detailed allegations in support of the alleged conspiracy are found in Paragraph 14 of plaintiffs' RICO Case Statement, which requires plaintiffs to "describe in detail the facts showing the existence of the alleged conspiracy." There, plaintiffs allege that: (1) Titan recruited only persons acceptable to the government; (2) Titan worked "hand-in-hand" on teams with CACI employees and government officials; (3) some of these teams engaged in illegal conduct, and (4) there are additional, unspecified facts. (RCS ¶ 14.) In plaintiffs' Motion for Class Certification they add the allegation that "Titan engaged in acts and omissions on a corporate level that corporate officials knew or should have known would result in their employees participating in the Torture Conspiracy." (Mot. for Class Cert. at 5.) None of these allegations are sufficient to establish civil conspiracy.

Plaintiffs incorporate into their filings three exhaustive government investigations of detainee abuse.[19] These investigations did not find any suggestion of conspiracy; they establish the opposite. The Fay Report found the primary causes of the detainee abuse to be individual misconduct, a lack of discipline, and poor military leadership. (Fay 2.) The Schlesinger Report criticized the actions of government officials from Secretary Rumsfeld, to senior Generals, and on down to individual soldiers. *See* Schlesinger 5-19. Nowhere in the 102-page final report did the Schlesinger panel use the word conspiracy, find that there was any plan or agreement between Titan and any entity, or even imply that The Titan Corporation was in any way responsible for the abuses at Abu Ghraib. If anything, the criticism was that government policy, not contractor policy, set the conditions for the abuses conducted by the individuals. *Id.*

II. Plaintiffs' Statutory Claims Must Be Dismissed

A. Plaintiffs' RICO Claims Must Be Dismissed

Titan's motion showed that (1) no RICO claim exists because the United States government is a necessary member of the alleged enterprise; (2) plaintiffs' allegations are insufficient to tie Titan to CACI without the government; (3) plaintiffs lack standing because they fail to allege property losses proximately caused by Titan; and (4) RICO does not reach the alleged extraterritorial conduct. (Mot. 31-43). In response, plaintiffs attempt to run from their pleadings: they disregard their RICO case statement to put forth an ever-shifting enterprise and allege damage that is not in their complaint and which is neither legally sufficient nor caused by the alleged enterprise. None of these contortions rescue plaintiffs' RICO claim.[20]

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[19] The Fay Report, Ex. A to Plaintiffs' Motion for Preliminary Injunction, the Schlesinger Report, Ex. B to Plaintiffs' Motion for Preliminary Injunction, and the Taguba Report, Ex. H to SAC. Plaintiffs' attached exhibits are a part of their pleading for all purposes, (Fed. R. Civ. P. 10(c)), and therefore their statements should be accepted as true for the purposes of a motion to dismiss. *See Karam v. City of Burbank*, 352 F.3d 1188, 1192 (9th Cir. 2003). Where the facts demonstrated by an exhibit are at variance with the pleading, the exhibit controls. *See* 2-10 *Moore's Federal Practice* § 10.05 n.20 (collecting cases).

[20] Even if plaintiffs had stated a RICO claim, they cannot avoid the military contractor defense. *See Chappell v. Robbins*, 73 F.3d 918, 925 (9th Cir. 1996) ("In passing RICO, Congress did not [intend] to displace common-law immunities."). As they often do when confronted with analogous holdings, plaintiffs assert without a single case in support, that *Chappell* did not mean what it said, but is limited to "legislative immunity." (T. Opp. 29.) In doing so they ignore the rationale of the case: the continued vitality of common-law defenses.

1. Plaintiffs' Enterprise Allegations Do Not State a Claim

Perhaps recognizing that they have pled themselves out of court, plaintiffs declare that the alleged enterprise does not include the United States but only "some employees of the United States." (T. Opp. 28.) This bald assertion, however, cannot avoid the allegations of the SAC and plaintiffs' RICO case statement, whose purpose is to provide notice of plaintiffs' alleged RICO claim. *See* Civ. L. R. 11.1; *Gutierrez v. Givens*, 1 F. Supp. 2d 1077, 1087-98 (S.D. Cal. 1998). As Titan highlighted in its opening brief (Mot. 33-34), plaintiffs' core assertion is that government officials, including the Secretary of Defense and other senior Department of Defense officials—both civilian and military—"adopted and/or implemented policies and practices that led to detainees being kidnapped, tortured, threatened with death and bodily harm, physically and mentally permanently disabled, and, in some cases, murdered." (RCS 4.) Plaintiffs repeatedly allege that these officials were "acting in an official capacity on behalf of the United States." (SAC ¶¶ 257, 263, 269, 275; RCS 20.) These are not merely "some employees of the United States wrongfully participat[ing]" in an alleged enterprise.[21] In total, plaintiffs identify 126 soldiers, officers, and civilian officials in the Department of Defense as possible participants in the enterprise. (RCS 4-5.)

In an attempt to avoid the fatal flaw in their enterprise, plaintiffs recharacterize Titan's argument as one for that calls for "absolute immunity...to insulate private corporations from liability merely because they conspire with those government officials willing to act outside the law," and then spend several pages knocking down their straw man of "qualified immunity" for "private actors who conspire with [government employees]." (T. Opp. 28.) In doing so, plaintiffs do not address the real issue: the impossibility of a RICO enterprise involving government employees acting in their official capacity. *Compare* Mot. 34 *with* T. Opp. 27-29.

[21] Plaintiffs' counsel, on behalf of one of the parties it seeks to add as a plaintiff in this case, has requested a criminal prosecution in Germany based on the conduct at issue here. That case is brought solely against the government officials, among others Secretary of Defense Donald Rumsfeld, Former CIA Director George Tenet, and Undersecretary of Defense for Intelligence Dr. Stephen Cambone, along with various military officials. *See* http://www.ccr-ny.org/v2/reports/report.asp?ObjID=TCRlT9TuSb&Content=471 (viewed 12/3/04).

Plaintiffs have not even pled an enterprise of CACI and Titan alone. As we pointed out (Mot. 35-36), plaintiffs must allege the actual business and decision-making structure of the alleged enterprise. In opposition, plaintiffs point to a laundry list of allegations, none of which plead the required facts, but instead concern alleged contacts among, and actions taken by, the alleged members of the enterprise. (T. Opp. 31.[22]) Plaintiffs' remaining basis for an enterprise between CACI and Titan is "Team Titan"—a joint venture between Titan and CACI that had nothing to do with Iraq. While plaintiffs contend that they are "on firm terrain when alleging that 'Team Titan' exists" (T. Opp. 5-6), they cannot escape that their original claim that Team Titan provided services to the U.S. military in Iraq—the only pleaded link between CACI and Titan supporting the alleged enterprise—was unsupportable and based on a false exhibit that plaintiffs withdrew.[23]

To salvage the value of "Team Titan" for the claims, plaintiffs attach an email and argue that it shows that "Titan intends to use the 'Team Titan' contract to deploy persons to Iraq." (T. Opp. 5-6.) The email says no such thing. It states repeatedly that the Team Titan contract ("A&AS") has *not* been used to deploy personnel to Iraq: "no one has used this contract to support operations in Iraq", "A&AS is not being used for anything outside of the UK and Germany at this time", and "The translator work in Iraq was performed by another Group at Titan and not associated with...the A&AS contract in any way." (T. Opp. Exhibit G).

2. Plaintiffs Lack Standing

Plaintiffs do not dispute that all but plaintiffs Ahmed, Neisef, and Sami lack standing. In response to the clear showing that the alleged property losses of these three plaintiffs occurred

[22] Two of the allegations highlight that plaintiffs' enterprise requires the government as a member: (a) issuance of an Army report that directed the guard force to be "actively engaged in setting the conditions for the successful exploitation of internees" and (b) control over the detention conditions in Abu Ghraib. *See id.*

[23] As discussed in our opening brief, plaintiffs filed a falsified document to support the original allegation that Team Titan was a collaboration between Titan and CACI to supply personnel to Iraq. (Mot. 36-37 n.34). Remarkably, plaintiffs fail to respond to the falsity of their original exhibit A and instead address only a third party's "concern about its reputation." (T. Opp. 5-6.) That concern was based in part on the falsification that plaintiffs' counsel ignores: "We are unable to find any website that contains the false information you attach as Exhibit A to your Complaint." (T. Opp. Ex. G, Letter from Alion dated Jun. 15, 2004.)

before or during the arrests that led to their detention, plaintiffs now expand the Torture Conspiracy to conduct outside of detention. (T. Opp. 32.) While this argument supports that their detention was incident to combat and thus invokes the absolute bar of the military contractor defense, it cannot cure the lack of proximate cause between Titan's alleged conduct during their detention (the "Torture Conspiracy" they have pled) and pre-detention thefts.[24]

Plaintiffs rely on *Wagh v. Metris Direct, Inc.*, 363 F.3d 821 (9th Cir. 2003) to claim standing under § 1962(a) and cite RCS ¶11(b) for the necessary allegations. (T. Opp. 34.) Plaintiffs' RICO Case Statement says that, "[p]laintiffs allege that the income received from the pattern of racketeering was used by Defendant Titan and CACI Corporate Defendants to invest in and operate the ongoing operations of the corporations." (RCS ¶ 11(b).) This is not enough. As the *Wagh* court clearly stated, "the acquisition and reinvestment of the proceeds of racketeering activity in the general affairs of an enterprise" does not qualify as investment injury. *Wagh*, 363 F.3d at 829. Without a "direct causal link" between the funds from the predicate acts and subsequent economic injury, plaintiffs' § 1962(a) claim must be dismissed. *Id.*

3. RICO Does Not Reach the Alleged Extraterritorial Conduct

Plaintiffs concede that RICO only applies if significant, furthering conduct occurred in the United States or if foreign conduct caused substantial effects in the United States. (T. Opp. 35.) Plaintiffs assert that the Ninth Circuit has found the conduct test satisfied where "parties held one meeting in Los Angeles during which the defendants made misrepresentations," (T. Opp. 35, citing *Grunenthal GmbH v. Hotz,* 712 F.2d 421, 424 (9th Cir. 1983)), and argue the alleged domestic conduct here is of the same magnitude. The difference, however, is that *Grunenthal* concerned alleged "misrepresentations in connection with an agreement to sell…stock." *Id.* at

[24] Nor does plaintiff Sami's contention that he was "prevent[ed] from carrying on [his] on-going business" provide standing. Although *Diaz v. Gates*, 380 F.3d 480, 484 (9th Cir. 2004) ("the consequential damages of being deprived of [the] right 'to pursue gainful employment'" is not economic loss under RICO), has been vacated and scheduled for *en banc* consideration, 2004 WL 2634566 (9th Cir. Nov. 18, 2004), *Guerrero v. Gates*, 357 F.3d 911, 920 (9th Cir. 2004) similarly held that such allegations do not provide standing. The rationale of both cases, and distinguishing them from the two cases relied upon by plaintiffs, *National Org. for Women, Inc. v. Scheidler,* 510 U.S. 249 (1994) and *Mendoza v. Zirkle Fruit Co.*, 301 F.3d 1163 (9th Cir. 2002), was that, as here, the injuries to business and property flowed from personal injuries for which there is no RICO claim.

422. A single meeting making the required misrepresentations, where "immediately thereafter defendants signed and plaintiff was induced to execute the stock purchase agreement" met the requirements. *Id.* at 425. The conduct in the United States constituted the alleged violation. *Id.* Here, the alleged conduct in the United States (meetings, emails, etc.), was "merely preparatory" and far removed from the alleged predicate acts in Iraq. *See id.* at 421.

On the effects side, plaintiffs do not dispute that *Empagran* is fatal to their position, but dispute its applicability because it is "based on antitrust law, rather than securities fraud law, the standard adopted by the Ninth Circuit in *Butte Mining*." (T. Opp. 37.) *Butte Mining* did not state that securities fraud was the only basis on which to evaluate the "effects test." *See Butte Mining PLC v. Smith*, 76 F.3d 287, 291-92 (9th Cir. 1996). Indeed, RICO was modeled on antitrust laws. *See Agency Holding Corp. v. Malley-Duff & Assoc.*, 483 U.S. 143, 150 (1987). Both securities and antitrust law can be used to inform the RICO "effects" standard and the antitrust approach is an "equally or even more appropriate test." *North South Fin. Corp. v. Al-Turki*, 100 F.3d 1046, 1051-52 (2d Cir. 1996). In RICO, as in the antitrust laws, the domestic effect must injure the foreign plaintiffs and give rise to a claim on their behalf. *See F. Hoffmann LaRoche LTD v. Empagran S.A.*, 124 S. Ct. 2359, 2369-72 (2004).[25]

B. Plaintiffs Also Have No Claim Under the RFRA

Plaintiffs concede that RLUIPA does not create a cause of action against those acting under color of United States law, but ask to amend their Complaint to add a claim under the Religious Freedom Restoration Act ("RFRA"), 42 U.S.C. § 2000-bb-1. (T. Opp. 43). Since RFRA has no extraterritorial application, Count XIV must still be dismissed.

Federal statutes do not apply extraterritorially unless Congress "clearly manifest[s]" such an intent. *Sale v. Haitian Ctrs. Council, Inc.*, 509 U.S. 155, 188 (1993); *see also United States v. Vasquez-Velasco,* 15 F.3d 833, 839 n.4 (9th Cir. 1994). Neither the text of RFRA nor its legislative history contains a "clear manifestation" of extraterritorial application, thus RFRA does

[25] Defendants attempt to further distinguish *Butte Mining* because the defendants were aliens. (T. Opp. 36-37.) *Empagran* makes clear that the test is where the effects are felt, not the citizenship of the parties. *See* 124 S. Ct. at 2369-72.

not extend to Titan's alleged conduct in Iraq.[26] The presumption against extraterritoriality has "special force" here because it would "involve foreign and military affairs for which the President has unique responsibility." *See Sale*, 509 U.S. at 188.

C. No Private Right of Action Exists Under the Geneva Conventions

Plaintiffs argue that although federal courts are "divided" on whether the Geneva Conventions are enforceable, they still enjoy "rights" under the Conventions because certain provisions are self-executing. (C. Opp. 46-48). Plaintiffs fail to point to any authority for the proposition that the Geneva Conventions create a private right of action against a non-signatory such as Titan. Some courts have found that the Geneva Conventions create rights enforceable in federal court against the *United States* and its officials, as demonstrated by the cases cited by the Plaintiffs. The only court that has addressed the issue has held that the Geneva Conventions do not create a right of action against private parties. *See Handel v. Artukovic,* 601 F. Supp. 1421, 1425 (C.D. Cal. 1985) (class action suit against private party where court held that "the Geneva Convention does not offer plaintiffs a private right of action."). *See also Hamdan v. Rumsfeld,* 2004 WL 2504508, at *9 (D.D.C. Nov. 8, 2004) (finding the Geneva Convention enforceable against the United States but distinguishing claims where the plaintiff asserts a "private right of action.").

D. Plaintiffs Cannot Sue Based on Titan's Government Contract

Titan demonstrated in its opening brief that (1) there is no private right of action under Contracting Laws; (2) plaintiffs lack standing to protest Titan's contract with the United States because they did not participate in the procurement process; and (3) plaintiffs also lack standing because they have failed to allege that they suffered any harm as the result of Titan's alleged violation of Contracting Law. (Mot. 46-48). Titan also noted that the United States is an indispensable party under Federal Rule of Civil Procedures 19(b). (Mot. 48 n.42). In response, plaintiffs fail to point to *any* authority for the proposition that a private right of action exists under

[26] Military occupation did not extend U.S. law to Iraq. *See Fleming v. Page,* 50 U.S. 603, 615 (1850) ("[C]onquests do not enlarge the boundaries of this Union, nor extend the operation of our institutions and laws beyond the limits before assigned to them by the legislative power.").

Contracting Law, thereby effectively conceding this dispositive point and dooming Count XXV. *Compare* Mot. 46-47 *with* T. Opp 37-40.

In addition, plaintiffs do not contest that only participants in the procurement process have standing to sue. *Compare* Mot. 47-48 *with* T. Opp. 46-48. Nowhere in their pleadings do plaintiffs allege that they were participants in the procurement process.

Finally, the only harm plaintiffs allege is that they "were injured by untrained CACI and Titan employees attempting to perform inherently governmental functions in violation of the FAR." (T. Opp. 40.) Such injury is not fairly "traceable" to a Contracting Law violation.[27]

Dated: December 3, 2004

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The Titan Corporation

[27] Plaintiffs argue that the United States is not an indispensable party because the government "cannot claim that it has an interest in litigating its right to enter illegal contracts," citing *Adler v. Fed. Rep. of Nigeria*, 219 F.3d 869, 880 (9th Cir. 2000). Plaintiffs' citation is misleadingly (without citation) to a dissenting opinion. Plaintiffs' failure to join the United States is an independent reason to dismiss Count XXV. *See* Fed. R. Civ. P. 19(b).

PROOF OF SERVICE
(FRCP 5)

I am a citizen of the United States and a resident of the State of California. I am employed in San Diego County, State of California, in the office of a member of the bar of this Court, at whose direction the service was made. I am over the age of eighteen years, and not a party to the within action. My business address is Cooley Godward LLP, 4401 Eastgate Mall, San Diego, California 92121. On the date set forth below I served the documents described below in the manner described below:

1. **REPLY IN SUPPORT OF DEFENDANT TITAN'S MOTION TO DISMISS**

☒ (BY U.S. MAIL) I am personally and readily familiar with the business practice of Cooley Godward LLP for collection and processing of correspondence for mailing with the United States Postal Service, and I caused such envelope(s) with postage thereon fully prepaid to be placed in the United States Postal Service at San Diego, California.

☒ (BY ELECTRONIC MAIL) I am personally and readily familiar with the business practice of Cooley Godward LLP for the preparation and processing of documents in portable document format (PDF) for e-mailing, and I caused said documents to be prepared in PDF and then served by electronic mail to the undersigned.

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I declare under penalty of perjury under the laws of the State of California that the above is true and correct. Executed on **December 3, 2004** at San Diego, California.

Cynthia E. Hourani