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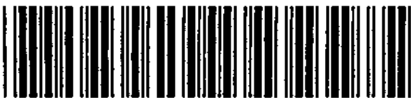

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UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

SALEH, an individual, et al.,
Plaintiffs,
v.
TITAN CORPORATION, a Delaware Corporation; et al.,
Defendants.

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

DEFENDANT ADEL L. NAKHLA'S REPLY TO PLAINTIFFS' OPPOSITION TO MOTION TO DISMISS

DATE: February 7, 2005
TIME: 2:00 p.m.
CTRM: 5

COMPLAINT FILED: June 9, 2004

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Defendant Adel L. Nakhla submits the following Reply in support of his Motion to Dismiss for Lack of Personal Jurisdiction and Failure to State a Claim Upon Which Relief May Be Granted.

I.

INTRODUCTION

Plaintiffs fail to allege any facts in the Second Amended Complaint ("Complaint" or "Compl.") that would allow this Court to assert personal jurisdiction over Mr. Nakhla. Recognizing this fact, Plaintiffs in their Opposition attempt to amend their Complaint by asserting "facts" related to Mr. Nakhla's "contacts" with this forum – even though none exist. But even allowing Plaintiffs to so amend their Complaint – and assuming the truth of Plaintiffs' conclusory assertions – this Court still has no basis to assert personal jurisdiction over Mr. Nakhla.

Moreover, assuming *arguendo* that this Court could exercise personal jurisdiction over Mr. Nakhla, Plaintiffs' constitutional claims – which they now assert against the individuals only – should be dismissed.[1] Plaintiffs, all nonresident aliens when their alleged injuries arose, may not assert a *Bivens* action under the U.S. Constitution. Furthermore, Plaintiffs' claims are precluded because the alleged acts arose out of the course of military service and the Plaintiffs have alternative remedies for their alleged injuries. For these reasons, among others discussed below, Plaintiffs' constitutional claims fail.[2]

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[1] *See* Plaintiffs' Memorandum of Points and Authorities in Opposition to Motions of Defendant CACI to Dismiss ("Pls.' Opp. (CACI)") at 40 & n.25 (conceding that constitutional claims are foreclosed against corporate defendants but remain as to individuals). Although Mr. Nakhla responds in this pleading only to Plaintiffs' constitutional claims, he joins the Reply briefs filed by the other defendants, and, as noted in his Motion to Dismiss, also joins the other defendants in moving to dismiss the other federal statutory and California common law counts alleged in the Complaint. *See* Local Rule 7.1(j)(2).

[2] As to all Plaintiffs other than Plaintiff Saleh, the Complaint alleges no connection between the Plaintiffs and the United States other than their detention by the United States military in a war zone located within the sovereign territory of Iraq. As to Plaintiff Saleh, the Complaint alleges that he is a Swedish citizen who resides in "both Sweden and Dearborn, Michigan." Compl. ¶ 2. Of course, at the time of the alleged incidents of which he complains, Plaintiff Saleh did not reside in the United States.

II.

ARGUMENT

A. Plaintiffs cannot demonstrate that this Court has personal jurisdiction over Mr. Nakhla.

In their Opposition, Plaintiffs fail to demonstrate that Mr. Nakhla is subject to this Court's jurisdiction under the Racketeer Influenced and Corrupt Organization Act ("RICO"), 18 U.S.C. § 1965(b), or that there are any contacts – much less minimum contacts – between Mr. Nakhla and California that would allow this Court to exercise personal jurisdiction over him. Accordingly, Plaintiffs' Complaint should be dismissed, under Fed. R. Civ. P. 12(b)(2).

1. Plaintiffs have failed to allege facts to support jurisdiction under RICO.

Plaintiffs argue that this Court may exercise personal jurisdiction over Mr. Nakhla under 18 U.S.C. § 1965(b), RICO's nationwide service provision. They claim to satisfy §1965(b)'s "ends of justice" test, announced in *Butcher's Union Local No. 498 v. SDC Inv., Inc.*, 788 F.2d 535, 539 (9th Cir. 1986), because one of the Defendants, Titan Corporation, is subject to personal jurisdiction in California and there is no other district in which all Defendants would be subject to personal jurisdiction. *See* Plaintiffs' Memorandum of Points and Authorities in Opposition to Defendant Adel Louis Nakhla's Motion to Dismiss the Complaint for Lack of Personal Jurisdiction and Failure to State a Claim upon which Relief Could Be Granted ("Opposition" or "Pls.' Opp.") at 2-4. Plaintiffs' assertions, made for the first time in their Opposition, do not allow this Court to exercise personal jurisdiction over Mr. Nakhla under RICO's nationwide service provision.

First, the Complaint does not allege that there is no other district in which a court will have personal jurisdiction over all of the defendants. Accordingly, Plaintiffs fail to meet the requirement of the second prong of the *Butcher's Union* "ends of justice" test, that the plaintiff must show in the *Complaint* that there is "no other district in which a court will have personal jurisdiction over all of the alleged co-conspirators." 788 F.2d at 539. For that reason alone, the

Complaint does not support the Court's exercise of personal jurisdiction over Mr. Nakhla under § 1965(b).[3]

Second, as the Ninth Circuit made clear in Butcher's Union, "the right to nationwide service in RICO suits is not unlimited," and "merely naming persons in a RICO complaint does not, in itself, make them subject to section 1965(b)'s nationwide service provisions." *Id.* Instead, a complaint must contain specific allegations to support personal jurisdiction over a defendant under § 1965(b):

> The cases are unanimous that a bare allegation of a conspiracy between the defendant and a person within the personal jurisdiction of the court is not enough [to establish personal jurisdiction over the defendant]. Otherwise plaintiffs could drag defendants to remote forums for protracted proceedings even though there were grave reasons for questioning whether the defendant was actually suable in those forums.

Dymits v. Am. Brands, Inc., No. C 96-1897, 1996 WL 751111, at *6 (N.D. Cal. Dec. 31, 1996) (quoting *Stauffacher v. Bennett*, 969 F.2d 455, 460 (7th Cir. 1992)).

The court's decision in *Dymits* is instructive for this case. The *Dymits* court, using the *Butcher's Union* "ends of justice" test, examined the allegations in the plaintiff's complaint and concluded that they were too vague to support personal jurisdiction over the defendants under § 1965(b). In *Dymits*, the plaintiff alleged, *inter alia*, that "all Defendants 'are members of nationwide conspiracy and some are members of conspiracy directed specifically against residents of the State of California and this District, and the ends of justice require that all parties be brought before this Court,'" and "Defendants 'formed nationwide conspiracy so as to incite smokers to physically attack nonsmokers whenever the latter objected to smoking in public places.'" 1996 WL 751111, at *6.

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[3] Plaintiffs attempt to remedy this deficiency by asserting in their Opposition that there is no other district that can exercise personal jurisdiction over all of the Defendants. *See* Pls.' Opp. at 3. It is well-established, however, that a party "cannot avoid dismissal of its complaint on the basis of arguments raised in a memorandum in opposition to the motion to dismiss." *Bishop v. Air Line Pilots Ass'n*, No. C-98-359, 1998 WL 47407, at *10 (N.D. Cal. Aug. 4, 1998). *See also Color and Design Exhibits, Inc. v. Sign, Display, & Allied Crafts Union Local 510*, No. C 92-20591, 1994 WL 669889, at *11 (N.D. Cal. Nov. 22, 1994) (holding that plaintiff could not amend its complaint by way of its opposition to the motion to dismiss).

1 Like the plaintiff in *Dymits*, Plaintiffs have done little more than make conclusory
2 allegations regarding Mr. Nakhla's supposed involvement in a nationwide RICO conspiracy. See,
3 *e.g.*, Compl. ¶ 18 ("As an employee and agent of Defendant Titan, and acting within his scope of
4 authority, Defendant Nakhla participated directly and indirectly in illegal conduct at the
5 Abu Ghraib Prison in Iraq and, upon information and belief, other locations."); ¶ 27 ("Each
6 Defendant conspired with other Defendants by entering into an agreement to commit wrongful and
7 tortious acts contained herein and each Defendant participated in or committed a wrongful act in
8 furtherance of said conspiracy that resulted in injury to the Plaintiffs."); ¶ 166 ("Upon information
9 and belief, the Torture Conspirators took steps to obstruct justice in the District of Columbia,
10 Virginia, California, and other states, as well as abroad."). These allegations are not sufficiently
11 specific to justify nationwide service and jurisdiction under RICO. *See Dymits*, 1996 WL 751111,
12 at *6. Accordingly, this Court may not exercise personal jurisdiction over Mr. Nakhla under
13 § 1965(b).

14 **2. Plaintiffs have failed to allege any facts to show minimum contacts.**

15 Despite Mr. Nakhla's declaration that he is a resident of Maryland and that he has
16 never lived in, owned property in, owned or operated a business in, *or even visited* California, see
17 Declaration of Adel Nakhla in Support of Motion to Dismiss, Plaintiffs argue that Mr. Nakhla is
18 subject to this Court's jurisdiction. Specifically, Plaintiffs argue in their Opposition that
19 Mr. Nakhla is subject to specific jurisdiction in California because he was an employee of Titan
20 Corporation, which is subject to personal jurisdiction in California. As an employee of Titan,
21 Plaintiffs argue that it is *"likely"* that Mr. Nakhla had "numerous contacts with California residents
22 through phone, email, fax, and mail." *See* Pls.' Opp. at 5-8 (emphasis added). Plaintiffs suggest
23 that these contacts are sufficient to meet the minimum contacts test for specific jurisdiction. *See*
24 *Id.*[4]
25
26 [4] Plaintiffs apparently concede, as they must, that there is no basis for this Court to exercise general jurisdiction over Mr. Nakhla, as they do not contest in their Opposition that Mr. Nakhla is not subject to
27 general jurisdiction in California. *See* Pls.' Opp. at 5-8.
28

Plaintiffs cannot demonstrate that Mr. Nakhla had minimum contacts with this jurisdiction. First, as Plaintiffs concede, the mere fact that a corporation is subject to general jurisdiction in California does not mean that a non-resident employee is subject to jurisdiction as well. *See* Pls.' Opp. at 6; *see also Calder v. Jones*, 465 U.S. 783, 790 (1984) ("Petitioners are correct that their contacts with California are not to be judged according to their employer's activities there."). Second, as discussed above, Plaintiffs may not overcome the Complaint's deficiency by asserting new facts – that Mr. Nakhla "likely" had "numerous contacts with California residents through phone, email, fax, and mail" – in their Opposition. Moreover, even assuming that this Court could consider those allegations, the Complaint is still insufficient to support the Court's exercise of specific jurisdiction over Mr. Nakhla. Indeed, Plaintiffs concede that such "contacts," even if established, are insufficient as a matter of law to establish minimum contacts between Mr. Nakhla and this forum. *See* Pls.' Opp. at 6; *see also Peterson v. Kennedy*, 771 F.2d 1244, 1262 (9th Cir. 1985) (concluding "that ordinarily use of the mails, telephone, or other international communications simply do not qualify as purposeful activity invoking the benefits and protection of the [forum] state .... Such contacts are normally legally insufficient to satisfy the first prong of the [Ninth Circuit's test for specific jurisdiction].") (internal quotations omitted).[5]

Third, given that the newly asserted "facts" are mere conclusory allegations, they cannot possibly be the basis on which this Court exercises personal jurisdiction. *See Fujitsu-ICL Sys. Inc. v. Efmark Serv. Co. of Ill., Inc.*, No. 00-CV-0777, 2000 WL 1409760, at *2 (S.D. Cal. June 29, 2000) (allegations regarding personal jurisdiction "may not be merely conclusory, but rather, must assert particular facts which establish the necessary ties between the defendant and

[5] In an attempt to bolster their argument that this Court should exercise specific jurisdiction over Mr. Nakhla because it is "likely" he had contacts with California through the telephone, mail, email, and fax, Plaintiffs suggest cases for the proposition that "those types of communications, with additional contacts, such as reaching into the forum for employment, payroll and human resources interactions, or employment contract negotiations, can surpass the threshold of minimum contacts." *See* Pls.' Opp. at 6 & n.4. However, Plaintiffs do not allege, *even in their Opposition*, that Mr. Nakhla performed any of these activities. *See id.* Therefore, even if these are legally cognizable bases on which to establish the exercise of specific jurisdiction, they are irrelevant in this case.

1 the forum state"); *Nicosia v. De Rooy*, 72 F. Supp. 2d 1093, 1097 (N.D. Cal. 1999) (In determining
2 whether a plaintiff has presented a *prima facie* case of personal jurisdiction, "[t]he Court need not
3 . . . assume the truth of conclusory allegations.")

4 Finally, Plaintiffs argue that this Court should exercise jurisdiction over Mr. Nakhla
5 because the Plaintiffs' alleged injuries would not have occurred but for Mr. Nakhla's alleged
6 involvement in the "Torture Conspiracy," part of which allegedly took place in California. *See*
7 Pls.' Opp. at 7. This is also insufficient to establish jurisdiction over Mr. Nakhla because such
8 "conclusory and unfounded allegations of a conspiracy between defendants in California and out-
9 of-state defendants cannot establish the minimum contacts necessary to show personal
10 jurisdiction." *Fischer v. United States*, No. EDC V02-691-OMP (SGL), 2003 WL 21262103, at *
11 3 (C.D. Cal. May 30, 2003). *See also Chirila v. Conforte*, No. 00-16878, 2002 WL 31105149, at *
12 3-4 (9th Cir. Sept. 20, 2002) (conclusory allegations of a conspiracy between a defendant and a
13 person within the personal jurisdiction of the court are not sufficient to establish a *prima facie* case
14 of personal jurisdiction).

15 As Plaintiffs have demonstrated no contacts between Mr. Nakhla and the State of
16 California on which specific jurisdiction can be based, this Court may not exercise personal
17 jurisdiction over Mr. Nakhla, and accordingly, the Complaint should be dismissed for lack of
18 personal jurisdiction under Fed. R. Civ. P. 12(b)(2).[6]

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22 [6] Plaintiffs request that, before granting Mr. Nakhla's Motion to Dismiss, the Court grant them discovery regarding jurisdictional facts. *See* Pls.' Opp. at 8. Jurisdictional discovery is appropriate only where
23 "pertinent facts bearing on the question jurisdiction are controverted or where a more satisfactory showing of the facts is necessary." *Butcher's Union*, 788 F.2d at 540 (internal quotation and citation omitted). As a
24 consequence, "[w]here a plaintiff's claim of personal jurisdiction appears to be both attenuated and based on bare allegations in the face of specific denials made by defendants, the Court need not permit even limited
25 discovery . . . ." *Terracom v. Valley Nat'l Bank*, 49 F.3d 555, 562 (9th Cir. 1995) (internal quotation and citation omitted). Because Plaintiffs' Complaint is devoid of allegations that would establish a *prima facie*
26 case of personal jurisdiction and because Mr. Nakhla has submitted a declaration with his Motion to Dismiss denying that he has the requisite contacts with California, this is not an appropriate case for jurisdictional
27 discovery. This Court should thus deny Plaintiffs' request.

28

B. Plaintiffs Fail To State A Claim For Violations Of The United States Constitution.

In Counts XI, XII and XIII of the Complaint, Plaintiffs ask this Court to confer upon them rights under the Constitution that the United States Supreme Court has refused to confer on nonresident aliens. Specifically, Plaintiffs claim that Mr. Nakhla conspired with the other Defendants to violate the Fourth, Fifth and Eighth Amendments of the United States Constitution.[7]

Even assuming, *arguendo*, that this Court finds that it may exercise personal jurisdiction over Mr. Nakhla, Plaintiffs' constitutional claims should be dismissed. Plaintiffs, all aliens detained outside the United States, may not assert rights under the United States Constitution. Furthermore, the Plaintiffs' constitutional claims must be dismissed because (1) the alleged wrongful acts arose out of military activity; and (2) other equally effective remedies are available to them.

1. Plaintiffs do not have the requisite constitutional rights to state a claim under *Bivens*.

Plaintiffs' constitutional claims are grounded in *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971). In *Bivens*, the Supreme Court recognized an implied right of action against federal officers in their personal capacities where they have violated constitutional rights under color of federal authority. *See id.* at 397. *See also Schowengerdt v. Gen. Dynamics Corp.*, 823 F.2d 1328, 1332 (9th Cir. 1987) (discussing the elements of a *Bivens* claim).

a. Plaintiffs may not assert rights under the Fourth, Fifth or Eighth Amendments.

Plaintiffs fail to state a claim under *Bivens* because the Supreme Court has consistently held that aliens beyond the United States' borders do not enjoy rights under the Constitution and has repeatedly reaffirmed the "well established [principle] that certain

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[7] Recognizing that the Fourteenth Amendment is applicable only to state actions, Plaintiffs have abandoned that claim. *See* Pls. Opp. (CACI) at 35 n.22.

constitutional protections available to persons inside the United States are unavailable to aliens outside of our geographic borders." *Zadvydas v. Davis*, 533 U.S. 678, 693 (2001).

In *Johnson v. Eisentrager*, the Supreme Court held that the Fifth Amendment does not confer due process rights upon aliens captured and imprisoned outside the United States. 339 U.S. 763 (1950). In *United States v. Verdugo-Urquidez*, the Supreme Court expanded Eisentrager, holding that nonresident aliens do not have rights under the Fourth Amendment outside the United States. 494 U.S. 259 (1990). Nor do Plaintiffs enjoy rights under the Eighth Amendment — regardless of citizenship or location – because that Amendment confers rights only after a person has been tried, convicted and sentenced. *See Ingraham v. Wright*, 430 U.S. 651, 671 & n.40 (1977) ("the State does not acquire the power to punish with which the Eighth Amendment is concerned until after it has secured a formal adjudication of guilt in accordance with due process of law"); *Lee v. City of Los Angeles*, 250 F.3d 668, 686 (9th Cir. 2001) (Eighth Amendment rights attach only "after conviction and sentence") (citing Graham v. Connor, 490 U.S. 386, 393 & n.6 (1989)). By Plaintiffs' own admissions, they were detainees who were been neither convicted nor sentenced. Compl. ¶¶ 101, 109, 114, 119, 132, 134, 137. They are thus "accorded no rights under the Eighth Amendment." Lee, 250 F.3d at 686. *See* also *In re Estate of Marcos*, 25 F.3d 1467, 1467 n.2 (9th Cir. 1994) (Eighth Amendment "does not apply to aliens whose claims arise outside the United States.").

b. *Rasul* neither overruled nor modified *Eisentrager*.

Responding to this precedent, Plaintiffs' argue that the Supreme Court's decision in *Rasul v. Bush*, 124 S. Ct. 2686 (2004), overturned or modified *Eisentrager*, and that Plaintiffs therefore may bring constitutional claims. *See* Pls.' Opp. (CACI) at 36. In *Rasul*, the petitioners were aliens detained at the U.S. Naval Base at Guantanamo Bay, Cuba, who sued under the federal habeas statute, 28 U.S.C. § 2241, challenging the legality of their detentions. Upholding the Petitioners' rights to bring suit under § 2241, the Court held that the statute "confers on the District Court the jurisdiction to hear petitioners' habeas corpus challenges . . . ." Rasul, 124 S. Ct. at 2698.

Rasul is inapposite because Plaintiffs do not bring a claim under § 2241. Moreover, *Rasul* did not implicitly or explicitly overrule *Eisentrager, Verdugo-Urquidez* or *Zadvydas.* Indeed, the holding did not concern the scope or substance of any constitutional right; it merely addressed whether, as a procedural matter, the petitioners were entitled to obtain review of habeas petitions. Nothing in *Rasul,* therefore, alters the holding of *Eisenstrager. See Rasul,* 124 S. Ct. at 2693-94 (highlighting the difference between *Rasul* and *Eisentrager* and stating that the facts in *Eisentrager* "were relevant only to the question of the prisoners' *constitutional* entitlement to habeas corpus" rather than "the question of the [*Rasul*] petitioners' *statutory* entitlement to habeas review" (emphasis in the original)).

2. Two independent factors require dismissal of the constitutional claims.[8]

Even if this Court finds that nonresident aliens are entitled to constitutional rights, two independent factors require dismissal of the constitutional claims. The Supreme Court has held that Bivens claims are not appropriate where "special factors" counsel against creating a cause of action without express direction from Congress. *United States v. Stanley*, 483 U.S. 669, 678 (1987). One such "special factor" is when the alleged wrongful conduct is incident to military service. *Id.* at 684. Additionally, the Court has held that *Bivens* claims are not available where Congress has established another remedy for a plaintiff's injuries that is "equally effective in the view of Congress." *Id.* at 678 (citing *Bivens*, 403 U.S. at 397). In this case, Plaintiffs' *Bivens* claims fail because the alleged acts arose in the course of military service *and* because Congress has provided Plaintiffs with alternative remedies to address their alleged injuries.

[8] Plaintiffs also argue generally that nonresident aliens enjoy "some" constitutional rights, because nonresident aliens may sue in United States courts, and enjoy procedural due process rights. *See* Pls.' Opp. (CACI) at 35. That may be so, but it in no way implies that aliens detained outside the United States *in a war zone* enjoy *substantive* constitutional rights, including substantive due process. *See Verdugo-Urquidez*, 494 U.S. at 268-69 ("it is not open to us . . . to endorse the view that every constitutional provision applies wherever the United States Government exercises its power").

a. Because the alleged acts arose in the course of military operations, Plaintiffs' *Bivens* claims must be dismissed.

The Supreme Court has stated unequivocally that "no *Bivens* remedy is available for injuries that 'arise out of or are in the course of activity incident to [military] service.'" *Stanley*, 483 U.S. at 684 (citing *Feres v. United States*, 340 U.S. 135, 146 (1950)). This rule is justified because of the "unique disciplinary structure of the Military Establishment and Congress' activity in the field." *Id.* at 683. The Court has explained that, because Congress has "plenary control over rights, duties, and responsibilities in the framework of the Military Establishment," courts have refrained from imposing restrictions on that framework – such as allowing *Bivens* actions – in the absence of specific congressional authorization. *Chappell v. Wallace*, 462 U.S. 296, 301 (1983).

It makes no difference that a defendant is a civilian contractor. Judicial inquiry into the actions of civilian contractors assigned to a military unit is no less intrusive upon the military than a direct suit against the officers themselves, especially when, as in this case, the officers rely on those civilians to perform critical military functions. *See Stanley*, 483 U.S. at 679-81 (rejecting the argument that *Feres* was not applicable to civilian defendants because "*Feres* did not consider the officer-subordinate relationship crucial"). The Fifth Circuit recognized this principle in *Gaspard v. United States*, 713 F.2d 1097 (5th Cir. 1983) when it dismissed a former soldier's *Bivens* claim against civilian officials of the Atomic Energy Commission arising out of nuclear radiation tests conducted on military servicemen in the 1950s. The Fifth Circuit precluded a *Bivens* claim against civilians because their actions were undertaken in conjunction with military officials:

> These tests were planned and conducted by both military and civilian personnel. Clearly then, any involvement of civilian officials must have been in conjunction with military planning and orders. . . . Since an inquiry into the AEC's role at [the site of the nuclear exposure tests] would necessitate an investigation of military affairs, we hold that [*Chappell v.*] *Wallace* also bars the claims against the civilian officials in this case.

Id at 1104. Like the civilians in *Gaspard*, the civilians here were an integral part of the military units and command structure in Iraq.

Ignoring cases such as *Stanley* and *Gaspard*, Plaintiffs contend that a *Bivens* action is available because, as civilian contractors, the individual Defendants are not "steeped in the discipline of military life nor bound by the constraints of military hierarchy." Pls.' Opp. (CACI) at 45. This argument misses the entire point of *Stanley*. It is not the "military hierarchy" that forms the basis of the "incident to service" special factor, but rather the degree of "judicial intrusion," and the "degree of disruption" that a *Bivens* remedy would have on military affairs. *Stanley*, 483 U.S. at 681-82. Sanctioning a *Bivens* claim would force this Court to intrude directly into military operations, precisely what the Supreme Court warned against. *Id.* at 682-83 (raising prospect of "compelled depositions and trial testimony by military officers concerning the details of their military commands"); *Eisentrager*, 339 U.S. at 779 ("It would be difficult to devise a 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.").

Nor is it relevant that *Plaintiffs* were never members of the U.S. military. The special factors "counseling hesitation" under *Bivens* are no different where the plaintiffs are civilians rather than military personnel. *See Sanchez-Espinoza v. Reagan*, 770 F.2d 202, 208-09 (D.C. Cir. 1985) (holding Nicaraguan citizens could not sue under *Bivens* because "the special needs of foreign affairs must stay [the judiciary's] hand in the creation of damage remedies against military and foreign policy officials for allegedly unconstitutional treatment of foreign subjects causing injury abroad" (internal cites omitted)). *See also Ricks v. Nickels*, 295 F.3d 1124 (10th Cir. 2002) (holding former serviceman incarcerated in military jail could not sue under *Bivens* on the grounds that it would require judicial intrusion into military matters notwithstanding his discharge and civilian status); *Gaspard*, 713 F.2d at 1104 (rejecting civilian spouse's *Bivens* claim against military and civilian officials because it would require judicial inquiry into military affairs).

Finally, in emphasizing that *Chappell* was "based" on Congress' enactment of a parallel military justice system that provided for review and remedy of alleged constitutional injuries, Pls.' Opp. (CACI) at 45-46, Plaintiffs ignore the Court's subsequent holding in *Stanley*, that alternative remedies are irrelevant to the special factors analysis concerning military affairs:

> The "special facto[r]" that "counsel[s] hesitation" is not the fact that Congress has chosen to afford some manner of relief in the particular case, but the fact that congressionally uninvited intrusion into military affairs by the judiciary is inappropriate.

Stanley, 483 U.S. at 683. Plaintiffs attempt to blur a line that was made clear by the Supreme Court: "no *Bivens* remedy is available for injuries that 'arise out of or are in the course of activity incident to service,'" *id.* at 684 (quoting Feres, 340 U.S. at 146), regardless of whether the plaintiffs or defendants are military or civilian, or whether there is an alternative remedial scheme.

b. Because Plaintiffs have alternative remedies, their *Bivens* claim must be dismissed.

When Congress provides remedial mechanisms to redress alleged constitutional injuries, the Supreme Court has determined that such mechanisms "counsel hesitation" in creating new *Bivens* remedies. *Bush v. Lucas*, 462 U.S. 367, 378 (1983) (declining to infer *Bivens* action in context of federal employment when civil service remedies are available); *Schweiker v. Chilicky*, 487 U.S. 412 (1988) (declining to recognize *Bivens* remedy for alleged due process violations in handling of Social Security applications when statutory remedial mechanisms are available). *See also Corr. Services Corp. v. Malesko*, 534 U.S. 61 (2001) (declining to extend *Bivens* to allow damages action against private corporation acting under color of federal law); *Chappell v. Wallace*, 462 U.S. 296 (1983) (declining to provide enlisted military personnel a *Bivens*-type remedy against their superior officers).[9]

[9] The Supreme Court's disposition against inferring *Bivens* actions in new contexts is unmistakable. As Justice Rehnquist explained in *Malesko*, the Court's *Bivens* jurisprudence has only been extended twice in over thirty years. *See* 534 U.S. at 68-69; *Davis v. Passman*, 442 U.S. 228 (1979) (extending *Bivens* to "liberty" violations under the Fifth Amendment); *Carlson v. Green*, 446 U.S. 14 (1980) (extending *Bivens* to Cruel and Unusual Punishment Clause of Eighth Amendment). Indeed, since *Carlson*, the Supreme Court has

Here, Plaintiffs' *Bivens* claims must be dismissed because Congress has enacted the Foreign Claims Act ("FCA"), 10 U.S.C. § 2734, and the Military Claims Act ("MCA"), 10 U.S.C. § 2733, comprehensive statutes designed to redress the injuries alleged by Plaintiffs. When such statutory schemes exist, the courts should "defer to Congress' judgment with regard to the creation of supplemental *Bivens* remedies." *Spagnola v. Mathis*, 859 F.2d 223, 228 (D.C. Cir. 1988) (en banc) (analyzing *Chilicky* and *Bush* and concluding that "courts must withhold their power to fashion damages remedies when Congress has put in place a comprehensive system to administer public rights, has 'not inadvertently' omitted damages remedies for certain claimants, and has not plainly expressed an intention that the courts preserve *Bivens* remedies."). *See also Saul v. United States*, 928 F.2d 829, 838 (9th Cir. 1991) (holding the Civil Service Reform Act was an equally effective alternative remedy because "[t]he text of the CSRA shows that Congress did not inadvertently omit a damages remedy for [the plaintiff]").

Nor does Plaintiffs' dissatisfaction with the monetary caps set forth in the FCA and the MCA make *Bivens* available to them. So long as Congress provides meaningful remedies — whether or not those remedies provide relief for every conceivable injury — courts must defer to Congress' determination of what are adequate remedial mechanisms. *See Chilicky*, 487 U.S. at 422-423 (stating that comprehensiveness of the statutory scheme, not the adequacy of specific remedies, counsels judicial abstention) (citing *Bush*, 462 U.S. at 368-88)).[10] Indeed, by Plaintiffs' own admission, as confirmed by the U.S. Army Claims Service, Plaintiff Saleh has filed an FCA administrative claim, and that claim apparently is pending. Pls.' Opp. (CACI) at 17 & Ex. I. Congress has determined that the remedies provided under the FCA and the MCA are adequate remedies. Accordingly, Plaintiffs' constitutional claims against Mr. Nakhla must be dismissed.[11]

"consistently refused to extend *Bivens* liability to any new context or new category of defendants." *Malesko*, 534 U.S. at 68.

[10] It bears noting that the monetary cap of $100,000 under the FCA and MCA may be waived by the Secretary of the Treasury. *See* 10 USC §§ 2733(d), 2734(d).

[11] Plaintiffs' claim that the FCA is not available because Mr. Nakhla was an "independent contractor" is unavailing. *See*. Pls' Opp. (Titan) at 26 n.33. Plaintiffs must be bound by their allegations that Mr. Nakhla was part of a "joint venture" and conspiracy with the military. In such a case, the FCA would clearly apply.

III.

CONCLUSION

Plaintiffs cannot demonstrate that this Court may exercise personal jurisdiction over Mr. Nakhla under RICO's nationwide service provision. Nor can they show that Mr. Nakhla's contacts with this forum subject him to specific jurisdiction in California. Accordingly, the Complaint should be dismissed under Fed. R. Civ. P. 12(b)(2).

Furthermore, even assuming that this Court exercises jurisdiction over Mr. Nakhla, Plaintiffs fail to state any claim – a *Bivens* action or otherwise – against Mr. Nakhla upon which relief could be granted. Accordingly, the Complaint must be dismissed under Fed. R. Civ. P. 12(b)(6).

DATED: November 19, 2004

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By
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DATED: November 19, 2004

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Furthermore, the cases cited by Plaintiffs for the proposition that the FCA is not an exclusive remedy involve *statutory* actions, an area in which the alternative remedy is not applicable, as it is in the *Bivens* context.

PROOF OF SERVICE

STATE OF CALIFORNIA, COUNTY OF SAN DIEGO

I am employed in the County of San Diego; I am over the age of eighteen years and not a party to the within entitled action; my business address is 501 West Broadway, 19th Floor, San Diego, California 92101-3598.

On **November 19, 2004**, I served the following document(s) described as

DEFENDANT ADEL L. NAKHLA's REPLY TO PLAINTIFFS' OPPOSITION TO MOTION TO DISMISS

on the interested party(ies) in this action by placing true copies thereof enclosed in sealed envelopes and/or packages addressed as follows:

See Attached Service List

☒ **BY MAIL:** I am "readily familiar" with the firm's practice of collection and processing correspondence for mailing. Under that practice it would be deposited with the U.S. postal service on that same day with postage thereon fully prepaid at San Diego, California in the ordinary course of business. I am aware that on motion of the party served, service is presumed invalid if postal cancellation date or postage meter date is more than one day after date of deposit for mailing in affidavit.

☐ **BY OVERNIGHT DELIVERY:** I served such envelope or package to be delivered on the same day to an authorized courier or driver authorized by the overnight service carrier to receive documents, in an envelope or package designated by the overnight service carrier.

☐ **BY FACSIMILE:** I served said document(s) to be transmitted by facsimile pursuant to Rule 2008 of the California Rules of Court. The telephone number of the sending facsimile machine was 619-234-3815. The name(s) and facsimile machine telephone number(s) of the person(s) served are set forth in the service list. The sending facsimile machine (or the machine used to forward the facsimile) issued a transmission report confirming that the transmission was complete and without error. Pursuant to Rule 2008(e), a copy of that report is attached to this declaration.

☐ **BY HAND DELIVERY:** I caused such envelope(s) to be delivered by hand to the office of the addressee(s).

☐ **STATE:** I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

☒ **FEDERAL:** I declare that I am employed in the office of a member of the bar of this Court at whose direction the service was made. I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Executed on **November 19, 2004**, at San Diego, California.

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