IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF VIRGINIA
- Alexandria Division -

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

PLAINTIFFS' OPPOSITION TO DEFENDANTS' MOTION TO SUBSTITUTE THE UNITED STATES IN PLACE OF ALL DEFENDANTS PURSUANT TO THE WESTFALL ACT

To decide Defendants' motion, the Court is required to make findings of fact on two issues: (1) whether Defendants qualify as government employees, and if so, (2) whether Defendants' conduct giving rise to the litigation fell within the scope of their employment as government employees. As Defendants admit, "the result in any given case depends on the unique facts of that case." *See Memorandum of Law in Support of Defendants' Motion To Substitute the United States in the Place of All Defendants Pursuant to the Westfall Act (hereinafter "Defendants' Westfall Memorandum") at 20.*

At present, the Court lacks the factual record needed to make a reasoned decision on Defendants' dispositive[1] Westfall motion. Although Defendants carry the burden of proving the facts alleged with a preponderance of the evidence, they failed to submit any declarations or other admissible evidence to support their motion. Instead, they simply allege a litany of "facts"

[1] Substituting the United States likely would result in dismissals of the lawsuits. *See* 28 U.S.C. § 2679(d) (3) (certification under the Westfall Act means that "the United States shall be substituted as a party defendant") and § 2679(d)(4) (such a case then "shall proceed in the same manner as any action against the United States" brought under the FTCA).

in their Memorandum, presumably expecting this Court to accept all of their characterizations of the facts as wholly accurate and uncontested. Yet, as set forth below in the Statement of Disputed Facts, Plaintiffs dispute Defendants' recitation of the "facts." The evidence obtained by Plaintiffs (without the benefit of any discovery) wholly contradicts Defendants' alleged "facts." [2]

This evidence will be submitted to the Court via witness testimony during the scheduled October 30, 2009 hearing. These witnesses will establish that Defendants did not operate under the control and direction of the State Department at all times. Had they done so, the killings and woundings at issue here might have been avoided. Instead, Defendants lied to the State Department about the qualifications of its men, and ignored State Department directives on the permissible use of force. The evidence will show that Defendants refused to stand down when expressly ordered to do so by the State Department, and instead rolled into the highly-populated Nissor Square and began firing and killing innocent civilians who were trying to flee. Such conduct precludes this Court from finding that Defendants were employees controlled by the State Department.

STATEMENT OF DISPUTED FACTS

The facts relevant to the Defendants' Westfall motion are disputed by the parties.

A. Defendants Allege "Facts" Without Appending Supporting Evidence.

Defendants assert the following relevant "facts":

[2] Plaintiffs have not been permitted to take depositions and obtain documents that bear on the amount of control actually exercised by the State Department. Without the benefit of discovery, Plaintiffs are unfairly disadvantaged. For that reason, Plaintiffs are separately filing a Motion To Lift the Stay of Discovery and To Stop Defendants From Improperly Threatening Legal Action Against Fact Witnesses.

1. Mr. Prince's liability is wholly derivative of the liability of the corporate defendants. *Defendants' Westfall Memorandum at 2, n.2.*
2. The State Department completely controlled Defendants' performance, including performance in the field. *Defendants' Westfall Memorandum at 7, 10, 16 and 17.*
3. The State Department controlled the selection and training of Defendants' employees. *Defendants' Westfall Memorandum at 7.*
4. The State Department specified the rules of engagement governing the use of force. *Defendants' Westfall Memorandum at 7.*
5. The State Department retained tactical control over each mission. *Defendants' Westfall Memorandum at 7.*
6. The State Department had an extensive role in the selection and training of the personnel hired by Defendants as independent contractors to perform the services required under the contract. *Defendants' Westfall Memorandum at 7.*
7. Defendants created the program elements in accordance with detailed specifications from the State Department. *Defendants' Westfall Memorandum at 9.*
8. With one exception (the Sa'adoon case), the allegations in the complaints arise from incidents that occurred while Defendants were actively providing security pursuant to its contract with the State Department. *Defendants' Westfall Memorandum at 12.*
9. The State Department determined how many and what type of protective service specialists were assigned to particular missions. *Defendants' Westfall Memorandum at 17.*
10. The State Department determined the defensive formations that the Defendants' employees were required to assume. *Defendants' Westfall Memorandum at 17.*

11. The State Department determined the circumstances under which Defendants were permitted to use deadly force. *Defendants' Westfall Memorandum at 17.*
12. The killings and woundings being litigated were all within the scope of government employment because they were either directed by the State Department or naturally incident to the business. *Defendants' Westfall Memorandum at 28.*
13. The killings and woundings at issue were all within the scope of government employment because they were done to further the United States' interests and did not arise from independent personal motives. *Defendants' Westfall Memorandum at 28.*

No evidence supporting these "facts" is appended to the Defendants' Westfall Memorandum. The only evidence relied upon in Defendants' Westfall Memorandum is the State Department contract itself. The text of the contract cannot reveal the actual practices employed by the Defendants in executing the contract.

B. Plaintiffs Dispute Defendants' Factual Allegations.

Other than the recitations of the State Department contract language, the "facts" alleged by Defendants in their Westfall Memorandum are false. Plaintiffs are prepared to call knowledgeable witnesses and introduce documentary evidence at the October 30, 2009, hearing to establish Defendants' actual practices, many of which contradicted the contract terms. Plaintiffs also hereby incorporate by reference the evidence appended to their Opposition to Defendants' Motion To Dismiss, which directly contradicts Defendants' allegations. Plaintiffs anticipate the witnesses being called will testify to the following facts:

1. Defendants repeatedly lied to the State Department about the qualifications of the men assigned to the State Department contract.

2. The State Department did not participate in any substantive way in the selection and retention process for Defendants' employees.
3. Defendants repeatedly lied to the State Department about the events occurring in the field.
4. The State Department did not control events in the field.
5. Defendants destroyed evidence and altered evidence relating to the killings and woundings in order to prevent the State Department from learning the truth about their misconduct.
6. The killings and woundings at issue in the complaints did not all arise from the Defendants actively providing security to United States' diplomats.
7. Some of the killings and woundings occurred at times when Defendants had been expressly ordered by State Department not to be in the field.
8. Some of the killings and woundings were done by men who would have been fired had the State Department been apprised of their prior misconduct.
9. Defendants, not the State Department, made the day-to-day decisions about how best to provide security services.
10. Defendants, not the State Department, controlled the conduct of the Defendants' employees.
11. Defendants, not the State Department, knew they were sending out heavily-armed men with judgment altered by steroids.
12. Defendants, not the State Department, knew that they were falsifying drug testing results.
13. Defendants, not the State Department, knew they were sending out men who had been deemed dangerous and unstable by Defendants' own employees.

14. Defendants, not the State Department, decided to continue to employ men who had killed innocent civilians for no reason.
15. Defendants repeatedly directed their employees to withhold information from the State Department about killings and woundings.
16. Defendants, not the State Department, briefed and counseled their employees on the circumstances when the use of force was permitted. These briefings were not supervised by the State Department. These briefings did not conform to the State Department's guidance on the use of force.
17. The killings and woundings at issue in these Complaints were not within the scope of any government employment.
18. Defendants, not the State Department, exercised operational and tactical control over their employees in the field.
19. Defendants, not the State Department, decided who would be assigned to a particular mission.
20. Defendants, not the State Department, decided which of the various possible protective formulations were used by Defendants' men during the missions.
21. The State Department did not approve the use of deadly force that caused the killings and woundings at issue.
22. Defendant Erik Prince engaged in conduct and made statements that create personal liabilities separate and apart from his derivative liabilities.

ARGUMENT

Plaintiffs' Complaints allege Defendants wholly ignored their obligations to the United States, and instead engaged in war crimes by killing and wounding innocent civilians who posed

no threat to any United States diplomat or other person. Now, Defendants seek to substitute the United States for themselves as Defendants, asserting that they were government employees and that their misconduct fell within the scope of their government employment. Not surprisingly, in light of the fact that the United States has indicted Defendants' employees for the killings and woundings at issue in this case, the United States disagrees, and refuses to certify Defendants as government employees.

Defendants, by moving this Court to certify Defendants over the United States' objections and in the face of the indictments, seek an extraordinary remedy. They ask the Court to rule that the record evidence submitted to date provides sufficient grounds to overrule the United States, and make two findings of fact: first, that Mr. Prince and his employees were all government employees (being paid in excess of one billion dollars) under the total control of the State Department; and second, that as government employees, they were acting within the authorized scope of their employment when they killed and wounded innocent civilians.

Defendants, however, utterly fail to carry their burden of proof. The only evidence they submit to establish the *bona fides* of their motion is the contract itself. Yet the contract terms alone cannot entitle Defendants to the extraordinary remedy they seek. *See, e.g., Johnson v. United States*, 2006 WL 572312 at *3-*4 (E.D.Va. March 7, 2006) (district court looked beyond the terms of the contract to the day-to-day operation of the independent contractor to determine that it was not an employee of the United States). Defendants are inviting the Court to commit reversible error by seeking a ruling in advance of discovery and in advance of the development of any factual record supporting their motion. This Court should deny that invitation, and order Defendants to renew their motion if they are able to obtain admissible evidence to substantiate the "facts" that undergird their motion. *See Gutierrez de Martinez v. Drug Enforcement*

Administration, 111 F.3d 1148 (4th Cir. 1997) (district court has the power to permit discovery and hold an evidentiary hearing on scope of employment issues).

Given that the Court's grant or denial of the Defendants' motion for Westfall substitution is immediately appealable, it is particularly important that the Court permit discovery.[3] *Osborn v. Haley*, 549 U.S. 225, 239 (2007) ("Tellingly, the Courts of Appeals are unanimous in holding that orders denying Westfall Act certification and substitution are amenable to immediate review under Cohen. We confirm that the Courts of Appeals have ruled correctly on this matter.") (internal citations omitted). Otherwise, even if Plaintiffs prevail on the instant motion, they will be unfairly prejudiced by being forced to litigate these important and dispositive issues before the Court of Appeals for the Fourth Circuit with only a sparse factual record developed during a short evidentiary hearing rather than the more robust and compelling factual record that could be developed with discovery. These issues are extremely important, and the Court is well within its discretion to permit Plaintiffs to take discovery. *Jamison v. Wiley*, 14 F.3d 222, 236 (4th Cir. 1994) (district courts have discretion to permit discovery on facts related to the Westfall analysis). Alternatively, if the Court prefers to convene the Westfall evidentiary hearing as scheduled on October 30, 2009, Plaintiffs ask that the Court increase the time allotted for the evidentiary hearing.

[3] In light of (1) the United States' vehement opposition to the Defendants' request for Westfall certification, (2) the fact that the Department of Justice has indicted Defendants' employees for their conduct at Nissor Square, (3) the Defendants' prior and wholly contradictory effort to avail themselves of the "government contractor defense" available only to government contractors, not employees, and (4) the Defendants' complete failure to attach any evidentiary support to their dispositive motion, Defendants appear to be advancing the motion more for the delaying benefit of the immediate appeal to the Court of Appeals than in any genuine expectation of obtaining the desired certification. Filing motions merely to delay proceedings is not permissible. Fed. R. Civ. P. 11.

I. DEFENDANTS' MOTION FOR WESTFALL CERTIFICATION IMPROPERLY INCLUDES FEDERAL CAUSES OF ACTION WITHIN ITS SCOPE.

The Westfall Act furthers federal interests by ensuring that federal employees cannot be made to answer for their conduct under state law. 28 U.S.C.A. § 2679(d) (2009). The Westfall Act does not immunize federal employees from federal law. *See generally Gutierrez de Martinez v. Drug Enforcement Admin.*, 111 F.3d 1148, 1152 (4th Cir. 1997) (holding the Westfall Act provides immunity for federal employees only "from state-law tort actions"). Defendants concede as much by excluding the claims raised under the federal Racketeering Influenced Corrupt Organizations Act counts. Yet Defendants fail to exclude from the scope of their motion the other federal counts, namely those based on federal common law (*i.e.* the war crimes and summary execution counts.) Even if the Court were to substitute the United States as Defendants for any claims arising under state law, such substitution cannot encompass the Plaintiffs' federal law claims. The legislative history of the Westfall Act clarifies that Congress never intended to make intentional, egregious violations of international law—such as war crimes which are criminalized in the War Crimes Act—subject to the Westfall Act's exclusive remedy provision. The House Report on the Westfall Act clearly stated that "[i]f an employee is accused of egregious misconduct rather than mere negligence or poor judgment, then the United States may not be substituted as a defendant." H.R. Rep. No. 100-700 at 5 (1988), *reprinted in* 1988 U.S.C.C.A.N. 5945, 5946 (noting that claims subject to Westfall Act would include "suits for clerical negligence" and recommending that Congress pass the statute to announce "standards governing . . . state-law tort action[s]"); 134 Cong. Rec. H4718 (June 27, 1988) (statement of Rep. Frank) ("we are not talking about intentional acts of harming people"). In light of this legislative history, the statutory term "negligent or wrongful" should not be construed to extend

to intentional, egregious torts in violation of a fundamental norm of international law such as war crimes.

In addition to the legislative history that demonstrates Congress's clear intent not to immunize intentional, egregious violations of international law, this result is also compelled by the long-settled principle that statutes should be construed to be consistent with international law.*The Charming Betsy*, 6 U.S. (2 Cranch) 64, 118 (1804) ("an act of Congress ought never to be construed to violate the law of nations if any other possible construction remains"); *see also F. Hoffman-LaRoche Ltd. v. Empagran S.A.*, 542 U.S. 155, 166 (2004); *McCulloch v. Sociedad Nacional de Marineros de Honduras*, 372 U.S. 10, 21 (1963). Since Nuremberg, international law has required states to hold perpetrators accountable for war crimes—*see* Robert H. Jackson, Final Report to the President on the Nuremberg Trials, Oct. 7, 1946, U.S. Dep't St. Bull. Vol. XV, nos. 366-391, Oct. 27, 1946, at 771, 774—not only through criminal punishment, but also through redress to victims. If this Court were to construe the Westfall Act to preclude suit against the Defendants in this case for the federal claims, the statute would be at odds with this fundamental principle of the law of nations. The U.S. law of statutory construction does not permit such an interpretation.

In an analogous context, the Supreme Court has held that when a state officer violates the Constitution, Eleventh Amendment immunity does not attach because the individual officer is "stripped of his official or representative character and is subjected in his person to the consequences of his individual conduct." *Ex Parte Young*, 209 U.S. 1234, 159-60 (1908). Similarly, when a federal officer acts outside his or her lawfully delegated authority, by intentionally violating a *jus cogens* norm, the conduct falls outside lawfully delegated authority. *Cf. Nasuti v. Scannell*, 906 F.2d 802, 807 n.10 (1st Cir. 1990) ("If an employee is accused of

egregious misconduct, rather than mere negligence or poor judgment, then the United States may not be substituted as the defendant, and the individual employee remains liable.") (citing H.R. Rep. No. 100-700 at 5, *reprinted in* 1988 U.S.C.C.A.N. 5945, 5949).

Should this Court find that Defendants can invoke the Westfall Act, those war crimes and summary execution claims brought under federal common law via the Alien Tort Statute must be found to fall entirely outside the scope of the Westfall Act because they are egregious, intentional torts in violation of the law of nations, the Fourth Geneva Conventions and the War Crimes Act.

II. DEFENDANTS FAILED TO CARRY THEIR BURDEN OF PROVING THAT THEY QUALIFY AS GOVERNMENT EMPLOYEES.

Defendants woefully fail to carry their burden. They did not introduce any evidence that could be found to establish the type of complete and total control needed before this Court could deem them government employees. But even had they introduced such evidence, all the Defendants other than Mr. Prince cannot be deemed government employees because they are corporations.

A. Defendants Other Than Mr. Prince Are Not Able To Qualify As Government Employees for Westfall Substitution Because They Are Corporations.

All but one of the Defendants are corporations, albeit shell companies wholly-owned and wholly-controlled by Mr. Prince. The United States refuses to certify corporations as "government employees" on the grounds that they do not fall within the meaning of the term "person" used in the Westfall Act. To date, the Court of Appeals for the Fourth Circuit has not ruled on whether corporations are eligible to seek Westfall substitution.

Other Circuits, however, have been persuaded by the United States' reasoning. *Adams v. United States*, 420 F.3d 1049, 1051 (9th Cir. 2005). *See also Meier v. United States,* 310

Fed.Appx. 976, 979 (9th Cir. 2009) (under FTCA, "persons" does not include corporate entities); *Safari v. Hamilton Family Enterprises*, 181 P.3d 278 (Col. Ct. App. 2008) (noting that *Adams* overruled earlier precedent and held that corporate entity cannot qualify as a "public employee" under the FTCA). In *Adams v. United States*, landowners sued two corporations which had contracted with the United States to spray herbicides on federal land. 420 F.3d at 1050-51. The plaintiffs alleged that they were damaged by the contractors' improper application of the herbicide, which drifted onto their land. *Id.* The contractors sought Westfall certification from the Court, arguing, as Defendants do here, that they were government employees acting within the scope of their employment. *Id.* at 1051. The United States opposed certification. *Id.*

The District Court refused to substitute the United States for the corporate contractors. 420 F.3d at 1051. On appeal, the Court of Appeals looked to the statutory text of the Federal Tort Claims Act ("FTCA"), 28 U.S.C. §§ 1346(b) (1), §§ 2671-2680. *Adams,*420 F.3d at 1051-52. The Westfall Act (passed in 1988) amended the FTCA and legislatively extinguished the Supreme Court's decision in *Westfall v. Erwin*, 484 U.S. 289 (1988). The Court of Appeals looked to the Supreme Court's decision in *Rowland v. California Men's Colony*, 506 U.S. 194 (1993), for guidance on statutory interpretation. *Id.* at 1052-53. The Court of Appeals determined that it had to look at the "context" of the Westfall Act, as directed by *Rowland* and as required by the Dictionary Act, 1 U.S.C. 1. *Adams*, 420 F.3d at 1053.

The Court of Appeals agreed with the United States that the context of the Westfall Act makes clear that the only natural persons may be "employed by the government." 420 F.3d at 1053 ("Several contextual features of the FTCA indicate Congress meant "persons" to apply only to natural persons.") At the outset, four of the five FTCA categories of "employees" are clearly all natural persons: namely, (1) officers or employees of any federal agency, (2)

members of the military or naval forces of the United States, (3) members of the National Guard while engaged in training or duty, and (4) officer[s] or employee[s] of a Federal public defender organization. 28 U.S.C. § 2671.

The only category that conceivably could include corporations is the category described as "persons acting on behalf of a federal agency in an official capacity." 28 U.S.C. § 2671. As to that category, the Court of Appeals for the Ninth Circuit looked to the FTCA definition of "federal agency" which expressly excludes corporate contractors from its reach. *Adams,* 420 F.3d at 1053-54. That is, the FTCA defines "federal agency" as "executive departments, the judicial and legislative branches, the military departments, independent establishments of the United States, and corporations primarily acting as instrumentalities or agencies of the United States, but does not include any contractor with the United States." 28 U.S.C. § 2671. Thus, the Court reasoned, it makes no sense to read the Westfall Act to have intended to change drastically, but silently, an express exclusion set forth in another section of the FTCA. *Adams,* 420 F.3d at 1054. This reasoning is sound, and follows the reasoning of the two Supreme Court long-standing decisions addressing agency-based sovereign immunities, *Logue v. United States,* 412 U.S. 521 (1973) and *United States v. Orleans,* 425 U.S. 807 (1976).

In *Logue*, the parents of a federal prisoner who committed suicide while being held in a county jail brought suit against the United States. 412 U.S. 521. The parents argued that the county jail was acting as a "federal agency" and its employees were acting as "employees of the United States" because the jail provided prison services to the United States. The Supreme Court rejected these contentions, concluding that the county jail could not, as a matter of law, be deemed to be a "federal agency," because section 2671 made a plain distinction between federal agencies and contractors. In so doing, the Court noted that Congress could have written the

FTCA's waiver of sovereign immunity to include liability for the acts of its contractors, but "instead incorporated into the definitions of the Act the exemption from liability for injury caused by employees of a contractor." *Id.* at 528. While this congressional choice leaves the courts free to look to the law of torts and agency to define "contractor," it does not leave them free to abrogate the exemption that the Act provides." *Id*.

Three years later, in *United States v. Orleans*, 425 U.S. 807 (1976), plaintiffs argued that the negligence of a government contractor should be imputed to the United States, notwithstanding the contractor exception, because the United States controlled the contractor's activity. In *Orleans*, the Supreme Court again made clear that the United States' contractual relationship with an entity does not transform the entity into a federal agency. The Supreme Court noted that the United States often pays (pursuant to contract) for insurance coverage for these non-federal entities for that very reason. *Id.* at 816. Clearly, the government merely contracting with an entity does not transform that entity into a federal agency under the FTCA.

In this case, Defendants have sought to dismiss these actions on the grounds that they are entitled to invoke the judicially-created "government contractor defense," a defense that protects corporate contractors who are in full compliance with the terms of their contract with the United States from being sued under state strict liability laws for defective products. *See Defendants' Memorandum in Support of Motion to Dismiss* at 4 (filed July 14, 2009) (The alleged wrongdoers in this case – Defendants and Moonen – are all private parties."). Defendants do not – and cannot – reconcile their arguments that they are entitled to this defense with their new arguments that they are employees of the United States.

Defendants instead argue there is a "strong presumption" that the word person in the FTCA includes corporations. *See Defendants' Westfall Memorandum* at 19. Defendants rely

exclusively on *Cook County Ill. v. U.S. ex rel Chandler,* 538 U.S. 119 (2003), for this supposed presumption. But there, the Supreme Court was not ruling on the meaning of the term "person" in the Federal Tort Claims Act; instead, it was determining the meaning of the word "person" within a wholly separate statutory scheme, the False Claims Act. That Act, as the Court knows, is designed to prevent fraud on the public fisc by corporations and others. 31 U.S.C. §§ 3729–3733. The question considered by the Supreme Court was whether a municipality was considered a "person" capable of defrauding the United States for FCA purposes, not whether a corporation is considered a "person" entitled to sovereign immunity under FTCA.

Defendants thereafter string together a citation to support the proposition that courts "routinely" find corporations to be government employees. *See Westfall Memorandum at 20.* Yet as Defendants' own parenthetical comments reveal to a careful reader, the string cite includes primarily decisions in which the court held either (1) the corporate entity was not an employee of the United States, *see, e.g., Williams v. United States*, 50 F.3d 299 (4th Cir. 1995); or (2) the trial court had failed to develop a sufficient factual record on which to rule. *See, e.g., McKay v. United States*, 703 F.2d 464, 472 (10th Cir. 1983).

Defendants also rely on *B&A Marine Co., Inc. v. American Foreign Shipping Co., Inc.*,23 F.3d 709 (2d Cir. 1994), and *Pervez v. United States*,1991 WL 53852 (E.D. Pa. Apr. 9, 1991). In *B&A,* the contract itself stated that the defendant was an "agent" of the United States. That, combined with the Court's findings about the direct control, led the Court to certify without ever focusing on the corporate nature of the defendant. The United States opposed certification there on a wholly different ground, which involved liability for libel. 23 F.3d at 712. *Pervez* was decided in 1991, prior to both *Rowland* and *Adams*. *Perez* appears to be the *only* reported case in which the United States actually certified an artificial entity. However, as the United States

explained to the court in *Vallier v. Jet Propulsion Laboratory*, 120 F. Supp. 2d 887 (C.D.Ca. 2000), the Department of Justice engaged in a careful evaluation of the question of whether artificial entities were eligible for Westfall Act certification and concluded that the certification in *Pervez* had been erroneous. *See Vallier*, 120 F. Supp. 2d at 894 n.8. Moreover, none of the parties in the *Pervez* case raised the inability of a corporation to be deemed a government employee.

In sum, although there is some support for the proposition that a corporation may be certified as a government employee under Westfall, the position taken by the United States should be accorded due respect. *Verlinden B.V. v. Central Bank of Nigeria,* 461 U.S. 480, 486 (1983)**.** Indeed, the District Court for the Middle District of Florida recently made a similar finding in a case brought against Blackwater subsidiary, Presidential Airways, Inc. *See McMahon v. Presidential Airways, Inc*., No. 6:05-cv-1002-Orl, Order at 4 (M.D. Fla. Sept. 28, 2009) (denying Westfall substitution "because a corporation is not an 'employee of the government' as that term is used in 28 U.S.C. §§ 2671, 2679"). Plaintiffs respectfully urge this Court to adopt the United States' position, as was done by the Court of Appeals for the Ninth Circuit.

B. Mr. Prince and the Corporate Defendants Failed To Carry Their Burden of Proving That The United States' Controlled Their Conduct.

Mr. Prince is not a corporation, and therefore he is free to try to persuade the Court that his actions were so directly and completely controlled by the United States that he must be considered a governmental employee. Yet neither Mr. Prince nor his corporate shells appended any evidence to the motion to carry their burden of proving that the United States actually controlled their actions in the field. *Borneman v. United States,* 213 F.3d 819, 827 (4th Cir. 2000) (movants carry burden on Westfall motion), *Maron v. United States,* 126 F.3d 317, 323

(4th Cir. 1997) (same). Instead, Defendants rely wholly on excerpts from the contract, claiming that the United States had the contractual power to control them. But such contractual power does not suffice.

A fact finder (here, the Court) trying to determine if a person was an employee under the United States' control must look at the totality of the facts bearing on control or lack thereof. As the Court of Appeals for the Fourth Circuit has explained, the contract terms alone cannot carry the evidentiary burden attendant to a finding of government employment. *Robb v. United States*, 80 F.3d 884 (4th Cir. 1996). The Court explained that the District Court needs to make factual findings about (1) any intent by the United States to establish an independent contract relationship as opposed to an employment relationship, and (2) the parties' actual practices under the contract. *Id.* at 893. The Court of Appeals cautioned that government contracts always involve outsourcing tasks that would otherwise be done by government employees, so that fact is of no import. *See Defendants' Westfall Memorandum* at 6-7 (explaining that historically the State Department provided security services, but it lacked sufficient capabilities to provide the security services in Iraq).

The State Department contract does not support Defendants' claim that they were so completely controlled by the United States as to be considered an employee. Although the contract contemplates oversight by the State Department, oversight by a United States department simply does not suffice to establish an employment relationship. *See, e.g., Charlima, Inc. v. United States*, 873 F.2d 1078 (8th Cir. 1999) (cited in *Defendants' Westfall Memorandum* at 16). In *Charlima*, the United States, namely the Civil Aeronautics Administration (CAA), decided it did not have enough employees to inspect all the airplanes needing inspection. Indeed, Congress determined that the Administration would have been required to employ an

additional 10,000 persons to keep pace with all the required inspections. The CAA outsourced the task to private parties, who were delegated to inspect airplanes and given very detailed directives on how to do so. The CAA acted as an overseer of the work, and required that the private parties' work conform to written and detailed regulations and policies. But the private parties conducting the inspections were held not to be government employees immunized from tort liability for their conduct.

In another decision cited by Defendants, *see Defendants' Westfall Memorandum* at 16, the Court of Appeals for the Eleventh Circuit made it clear that District Courts should be careful not to usurp the jury function if the evidence on control was susceptible to differing interpretations. *Patterson & Wilder Construction Co., Inc. v. United States,* 226 F.3d 1269 (11th Cir. 2000). There, the Court reversed the lower court, reasoning that the quantum of evidence adduced by the parties precluded summary judgment because reasonable jurors could draw different inferences. The Court ruled the parties had to submit the issue of whether the contractors could be considered government employees to a jury. *See also United States v. Becker*, 378 F.2d 319 (9th Cir. 1967)(the trial court acts as a fact-finder when deciding employment by the United States, and the appellate court reviews the record evidence to determine "clear error" under Fed. R. Civ. P. 52(a).

III. DEFENDANTS FAILED TO CARRY THEIR BURDEN OF PROVING THAT THE KILLINGS AND WOUNDINGS ARE WITHIN THE SCOPE OF THEIR ALLEGED GOVERNMENT EMPLOYMENT.

Defendants' Westfall Memorandum correctly states that the law of the place where the act occurred is the law that governs the scope of employment determination. *See Defendants' Westfall Memorandum* at 27. But then Defendants err by citing *Gutierrez de Martinez v. D.E.A.*, 111 F.3d 1148, 1156 (4th Cir. 1997) for the proposition that courts in the Fourth Circuit apply

the law of the forum state when "that determination would require the application of foreign law." *Id.* In fact, as the Court explained, it did not have to resolve the choice-of-law issue posed by the fact that the torts occurred in Columbia because the parties stipulated to Virginia law for purposes of the scope of employment issue. 111 F.3d at 1156 fn.6. Thus, it appears the law of the place of the tort (Iraq) governs.

Here, Defendants have the burden of proving with admissible evidence that the killings and woundings at issue in the Complaints fall within the scope of employment under Iraqi law.[4] No effort to carry that burden has been made. Instead, Defendants cite to Virginia scope-of-employment decisional law, and make conclusory statements that the killings and woundings were "naturally incident" to the provision of security in Iraq, and did not result from any personal motive.

These "facts" lack any evidentiary support. They are directly contradicted by evidence appended to Plaintiffs' Opposition to the Defendants' Motion to Dismiss (incorporated by reference here), which describes how Defendants acted from personal motives, disobeyed express State Department directives, and otherwise acted outside the scope of any governmental employment. Such personally-motivated misconduct places Defendants outside the scope of government employment whether measured by Iraqi or Virginia law.

[4] Plaintiffs intend to call an expert on Iraqi law as one of their witnesses at the October 30 hearing.

CONCLUSION

Plaintiffs respectfully request that this Court refrain from ruling on Defendants' motion to substitute the United States until such time as Plaintiffs have had the benefit of the discovery needed to create a complete record on the United States' lack of control Any other outcome will prejudice Plaintiffs by forcing them to litigate these important issues with less than complete evidence. Alternatively, if the Court intends to rule without permitting Plaintiffs any discovery, Plaintiffs respectfully ask that the Court extend the time allotted for the evidentiary hearing scheduled for October 30, 2009.

/s/

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Date: October 8, 2009

CERTIFICATE OF SERVICE

I, Susan L. Burke, hereby certify that on the 8th day of October 2009, I caused true and correct copies of Plaintiffs' Opposition To Defendants Motion to Dismiss to be served electronically via the Court's cm/ecf system upon the following individual at the address indicated:

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