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

IN RE: BLACKWATER 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)**

CONSOLIDATED MEMORANDUM OF LAW IN SUPPORT OF DEFENDANTS' MOTIONS TO DISMISS

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STATEMENT

Plaintiffs in these consolidated cases are Iraqi residents asserting claims for injuries allegedly suffered in Iraq as a result of actions that occurred in Iraq. They seek to recover damages in a United States court from a government contractor providing security services in Iraq whose actions were governed by detailed standards prescribed by the United States and closely supervised by United States government employees While the injuries and deaths described in these complaints,[1] like the many thousands of other injuries and deaths that have occurred in Iraq,[2] are tragic, Plaintiffs have not stated a claim that is within this Court's jurisdiction and upon which the Court may grant relief.

Historically, the personal safety of United States diplomats operating overseas has been secured by the Department of State's Bureau of Diplomatic Security with the support of the

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[1] The complaints in the consolidated cases are cited herein as follow: *Sa'adoon et al. v. Prince et al.*, No. 1:09-cv-615, "Sa'adoon Compl."; *Albazzaz et al. v. Prince et al.*, No. 1:09-cv-616, "Albazzaz Compl."; *Abtan et al. v. Prince et al.*, No. 1:09-cv-617, "Abtan Compl." (referring to Plaintiffs' First Amended Complaint); *Hassoon et al. v. Prince et al.*, No 1:09-cv-618, "Hassoon Compl." (referring to Plaintiffs' First Amended Complaint); and *Rabea et al. v. Prince et al.*, No. 1:09-cv-645, "Rabea Compl." "Complaints" refers collectively to the foregoing and "Plaintiffs" refers collectively to the Plaintiffs in all of the cases, unless otherwise indicated.

This Consolidated Memorandum is filed in support of the motions to dismiss that were previously filed in each case. *See* Sa'adoon Dkt No. 14; Albazzaz Dkt No. 8; Abtan Dkt No. 10; Hassoon Dkt No. 9; Rabea Dkt No. 10.

[2] From March 2005 to April 2008, when the events giving rise to these lawsuits occurred, the weekly number of attacks and attempted attacks in Iraq—including attacks against infrastructure and government organizations, improvised explosive devices and mines, sniper and small arms attacks, and mortar, rocket, and surface-to-air missiles—never dropped below 400. DOD, *Measuring Stability and Security in Iraq* (Mar. 2009), at 19, http://www.defenselink.mil/pubs/pdfs/Measuring_Stability_and_Security_in_Iraq_March_2009.pdf. Mid-2006 to late 2007—when the majority of the alleged incidents giving rise to these lawsuits occurred—was the peak of the violence in Iraq. *Id.* at 19-23. From July to November 2007, Coalition and Iraqi government targets were attacked an average of 27 times ***per day*** in Baghdad, where all but one of the alleged incidents occurred. DOD, *Measuring Stability and Security in Iraq* (Dec. 2007), at 16 & 22, http://www.defenselink.mil/pubs/pdfs/FINAL-SecDef%20Signed-20071214.pdf.

United States military. When the State Department determined that it did not have sufficient personnel to secure the safety of United States diplomats performing critical functions in the war-torn Iraq (*see* App. 4, 282), it entered into detailed contracts with several private contractors to perform this function in Iraq and elsewhere.

The principal Defendant in this case, U.S. Training Center ("USTC"), for 6 years provided security services to protect government officials in Iraq pursuant to a contract with and under the close direction of the State Department.[3] Teams of independent contractors ("ICs") working with USTC under the contract escorted government officials to and from meetings throughout Baghdad. No diplomat under the protection of USTC personnel died or even was injured during the entire duration of the contract. The individuals protecting them did not fare as well: many were injured and some died while protecting diplomats in Iraq.

These actions involve claims for damages resulting from deaths and injuries alleged to have occurred in Iraq on various dates between 2005 and 2008. With one exception, the allegations arise from incidents that occurred while the ICs were performing security services pursuant to the contract between USTC and the State Department.

- In *Albazzaz* (No. 1:09-cv-616), Plaintiffs allege that on September 9, 2007, ICs opened fire without justification in a location known as Al Watahba Square in Baghdad. Albazzaz Compl. ¶¶ 13, 17.
- In *Abtan* (No. 1:09-cv-617), Plaintiffs allege that on September 16, 2007, ICs opened fire without justification in a location known as Nisoor Square in Baghdad. Abtan Compl. ¶¶ 2, 44-48.

[3] The contract was entered into between the State Department and Blackwater Lodge and Training Center, Inc. (App. 2), which changed its name to U.S. Training Center, Inc. *E.g.*, Sa'adoon Dkt No. 2.

- In *Hassoon* (No. 1:09-cv-618), Plaintiffs allege that in seven different incidents between March 2005 and April 2008, ICs opened fire without justification six times (Hassoon Compl. ¶¶ 30-47, 50-79), and beat a civilian (*id.* ¶¶ 48-49).
- In *Rabea* (No. 1:09-cv-645), Plaintiffs allege that on August 13, 2007, ICs opened fire without justification on a public road in Hilla, Iraq. Rabea Compl. ¶¶ 2, 5-6.

One incident did not occur during a State Department security mission. Rather, it concerns the alleged misconduct of an IC, Andrew Moonen, who allegedly, of his own accord and after hours, attended a holiday party, got drunk, wandered "intoxicated" through Baghdad and shot a security guard. Sa'adoon Compl. ¶¶ 19, 22-23.

The complaints in all of the cases seek recovery for the deaths and injuries that allegedly occurred as a result of these incidents and for pain and suffering and loss of consortium suffered by Plaintiffs and the estates. Sa'adoon Compl. ¶¶ 4-6, 34-36; Albazzaz Compl. ¶ 29; Abtan Compl. ¶ 143; Hassoon Compl. ¶ 154; Rabea Compl. ¶ 55. In two of the cases, 16 Plaintiffs—13 in *Abtan* (Compl. ¶ 114) and 3 in *Hassoon* (Compl. ¶ 127)—also seek recovery under the Racketeer Influenced and Corrupt Organizations Act ("RICO") based solely on damage to their automobiles that allegedly occurred during the incidents in question. Abtan Compl. ¶ 115; Hassoon Compl. ¶ 127.

The complaints' allegations go far beyond describing the harm allegedly suffered by Plaintiffs, however. They include an encyclopedia of vituperative assertions. The complaints describe Defendants as "modern-day merchants of death" (Rabea Compl. ¶ 1) who have caused "a staggering number of senseless deaths" (Sa'adoon Compl. ¶ 16) and indirectly accuse the State Department of soliciting "mercenary" services (*id.* ¶¶ 12, 29; Albazzaz Compl. ¶¶ 9, 11; Abtan Compl. ¶¶ 1, 32; Hassoon Compl. ¶¶ 29). In two of the complaints, Plaintiffs

characterize Defendants as "an ongoing criminal enterprise" whose continued existence "pose[s] a grave and special threat to the well-being of the world." Abtan Compl. ¶¶ 119, 142; Hassoon Compl. ¶¶ 131, 153.

Yet the Department of Justice has brought criminal charges in only one instance—the September 16, 2007 incident at issue in *Abtan*. And in announcing the indictment of the six ICs charged with criminal violations arising from that incident, the United States Attorney stated that "[t]he indictment does not charge or implicate Blackwater Worldwide" (USTC's predecessor). He emphasized that the indictment was "very narrow in its allegations":

> Six individual Blackwater guards have been charged with unjustified shootings * * * not the entire Blackwater organization in Baghdad. There were 19 Blackwater guards on the * * * team that day * * * . Most acted professionally, responsibly and honorably. Indeed, this indictment should not be read as accusation against any of those brave men and women who risk their lives as Blackwater security contractors.

DOJ, *Transcript of Blackwater Press Conference* (Dec. 8, 2008), *available at* http://www.usdoj.gov/opa/pr/2008/December/08-nsd-1070.html.

The Supreme Court recently reaffirmed that "the tenet that a court must accept as true all of the allegations contained in a complaint is inapplicable to legal conclusions. Threadbare recitals of the elements of a cause of action * * * do not suffice." *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1949 (2009). A court deciding a motion to dismiss should "begin by identifying pleadings that, because they are no more than conclusions, are not entitled to the assumption of truth"; with respect to the complaint's "well-pleaded factual allegations, a court should assume their veracity and then determine whether they plausibly give rise to an entitlement to relief." *Id*. at 1950.

Many of Plaintiffs' allegations must be disregarded as "bare assertions * * * [that] amount to nothing more than a 'formulaic recitation of the elements'" of their claims. *Id.* at 1951. What

remains, even taken as true, is insufficient "'to nudg[e] [the] claim[s]' * * * 'across the line from conceivable to plausible.'" *Id*.

ARGUMENT

Plaintiffs' complaints are insufficient for a number of independent reasons. To begin with, Plaintiffs' allegations do not entitle them to relief under the Alien Tort Statute or the RICO statute (Points I and II).[4] Without these claims, there is no federal jurisdiction (Point III). The complaints also present nonjusticiable political questions (Point IV). The non-federal counts must be dismissed under applicable Iraqi law (Point V) and, in the case of the *Sa'adoon* complaint, under Virginia law as well (Point VI). The hiring and training allegations in all complaints also must be dismissed under the government contractor defense (Point VII) and absolute immunity (Point VIII). The estates' claims fail for lack of capacity to sue (Point IX). Any claims remaining against Erik Prince or the corporate defendants other than USTC, must be dismissed because Plaintiffs have alleged no basis for imposing liability on these Defendants (Points X-XI). Some Plaintiffs' non-federal claims (Point XII) and one Plaintiff's RICO claim (Point XIII) must be dismissed as untimely. Finally, one Defendant must be dismissed because it lacks capacity to be sued (Point XIV).

I. THE ALIEN TORT STATUTE CLAIMS MUST BE DISMISSED.

Count one of the complaints in all cases (alleging "war crimes") and count two of the complaints in *Abtan* and *Hassoon* (alleging "summary execution") invoke the Alien Tort Statute ("ATS"). Sa'adoon Compl. ¶¶ 37-42; Albazzaz Compl. ¶¶ 32-37; Abtan Compl. ¶¶ 75-81;

[4] At the Court's direction, Defendants have included at the beginning of each Point an explanation of which complaints and counts (and where relevant which Plaintiffs) the Point covers. For the Court's convenience, Defendants have also set forth the same information in the Addendum that appears at the end of this Memorandum.

Hassoon Compl. ¶¶ 89-94; Rabea Compl. ¶¶ 22-27 ("war crimes"); Abtan Compl. ¶¶ 82-86; Hassoon Compl. ¶¶ 95-98 ("summary execution").

The ATS provides that "[t]he district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations." 28 U.S.C. § 1350. In *Sosa v. Alvarez-Machain*, 542 U.S. 692, 724 (2004), the Supreme Court held that "the ATS is a jurisdictional statute creating no new causes of action." Federal courts possess only a "restrained" authority to recognize causes of action for a "narrow class of international norms" and must exercise "great caution" before concluding that a claim meets this "high bar." *Id.* at 725, 727-29.

Sosa established two prerequisites for recognition of any federal common law cause of action. First, the international law norm on which the claim is based must have as "definite content and acceptance among civilized nations" as piracy, violation of safe conducts, and assaults on ambassadors, the "historical paradigms familiar when § 1350 was enacted." *Sosa*, 542 U.S. at 732. Second, even if a norm meets this "demanding standard of definition" (*id.* at 738 n.30), the court must determine whether, as a matter of domestic law, violations of the norm should be actionable: "the determination whether a norm is sufficiently definite to support a cause of action should (and, indeed, inevitably must) involve an element of judgment about the practical consequences of making that cause available to litigants." *Id.* at 732-33. Plaintiffs' claims cannot satisfy these exacting standards and must be dismissed under Federal Rule of Civil Procedure 12(b)(1).

A. Defendants And The ICs Are Not State Actors.

The alleged wrongdoers in this case—Defendants and the ICs—are private persons or entities. Because ATS liability is limited to state actors, the ATS counts should be dismissed—the result reached by another court in this District in a case with substantially identical facts. *See*

Al Shimari v. CACI Premier Tech., Inc., No. 1:08cv827, slip op. 60-61 (GBL) (E.D. Va. Mar. 18, 2009) (stating that "the Court is unconvinced that ATS jurisdiction reaches private defendants").

Indeed, in *Sanchez-Espinoza v. Reagan*, 770 F.2d 202 (D.C. Cir. 1985), then-Judge Scalia held that the "law of nations * * * does not reach private, non-state conduct"; the "basis for [ATS] jurisdiction requires action authorized by the sovereign as opposed to private wrongdoing." *Id.* at 206-07; *accord Saleh v. Titan Corp.*, 436 F. Supp. 2d 55, 57-58 (D.D.C. 2006); *Doe I v. Exxon Mobil Corp.*, 393 F. Supp. 2d 20, 26 (D.D.C. 2005).[5]

B. There Is No Norm Of Secondary Liability Actionable Under The ATS.

None of the allegations suggests that Defendants personally committed war crimes or summary execution. The ATS claim can proceed, therefore, only if some norm of international law makes ***Defendants*** derivatively liable for the alleged acts of the ***ICs***. There is no such norm.[6]

1. Corporations Are Not Subject To Liability Under The ATS.

Sosa requires an ATS plaintiff to show, *inter alia*, that "international law extends the scope of liability for a violation of a given norm *to the perpetrator being sued*" (542 U.S. at 732 n.20) (emphasis added). Plaintiffs cannot possibly show—much less with the required degree of specificity and universality—that international law imposes secondary liability on corporations. Indeed, the international consensus is ***against*** secondary liability for corporations.

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[5] Plaintiffs have not alleged that Defendants acted under color of law. Any attempt to do so would be futile, moreover, because "color of law" provides "no middle ground between private action and government action, at least for purposes of the [ATS]." *Saleh*, 436 F. Supp. 2d at 57-58; *see also Doe I*, 393 F. Supp. 2d at 26.

[6] Plaintiffs also seek to hold Defendants derivatively liable for spoliation of evidence allegedly committed by employees. Sa'adoon Compl. ¶¶ 65-70; Albazzaz Compl. ¶¶ 59-64; Abtan Compl. ¶¶ 109-13; Hassoon Compl. ¶¶ 121-126; Rabea Compl. ¶¶ 49-54. But there is no international law norm prohibiting spoliation that would provide a basis for liability under *Sosa*. Even if spoliation were somehow actionable, derivative liability against Defendants would be unavailable, as explained in this subsection.

"Crimes against international law are committed by men, *not by abstract entities*, and only by punishing individuals who commit such crimes can the provisions of international law be enforced." *The Nuremberg Trial*, 6 F.R.D. 69, 110 (1946) (emphasis added); *see also In re Agent Orange Prod. Liab. Litig.*, 373 F. Supp. 2d 7, 57 (E.D.N.Y. 2005), *aff'd sub nom. Vietnam Ass'n for Victims of Agent Orange v. Dow Chem. Co.*, 517 F.3d 104 (2d Cir. 2008), *cert. denied*, 129 S. Ct. 2524 (2009). Accordingly, international law "plainly do[es] not recognize" vicarious liability for an "artificial entity." *Khulumani v. Barclay Nat'l Bank Ltd.*, 504 F.3d 254, 321-26 (2d Cir. 2007) (Korman, J., concurring & dissenting in part). Thus, the various statutes governing international criminal tribunals restrict the tribunals' jurisdiction to "natural persons."[7] In the case of the Rome Statute, the drafters considered corporate liability, but rejected it, in accordance with the United States' position. *See* U.N. Diplomatic Conf. of Plenipotentiaries on the Establishment of an Int'l Crim. Ct., at 134-35 ¶ 54, U.N. Doc. A/Conf. 183/13 (Vol. II) (1998).

2. Defendants' Conduct Is Not Actionable Under International Law.

Even if corporations could be liable under the ATS, no such liability is available here. Under *Sosa*, ATS jurisdiction extends only to conduct that is proscribed by the law of nations with the same "definite content and acceptance among civilized nations" as the historical paradigms of piracy and violation of safe conducts. *See* 542 U.S. at 732. "As the [ATS] is merely a jurisdictional vehicle for the enforcement of universal norms, the contours of secondary

[7] *See* Statute of the Int'l Criminal Tribunal for the Former Yugoslavia, art. 6, 32 I.L.M. 1192, 1194 (1993); Statute of the Int'l Criminal Tribunal for Rwanda, art. 5, 33 I.L.M. 1602, 1604 (1994); Rome Statute of the Int'l Criminal Ct. ("Rome Statute"), art. 25(1), 37 I.L.M. 1002, 1016 (1998) (not ratified by the U.S.).

liability must stem from international sources." *In re South African Apartheid Litig.*, 617 F. Supp. 2d 228, 256 (S.D.N.Y. 2009).

Plaintiffs do not explain the theory of secondary liability that they mean to invoke. In most of the complaints, Plaintiffs do not allege ***any*** theory of secondary liability in support of their ATS claims. The ATS count in the *Abtan* complaint makes a passing reference to Defendants' "conspir[ing]" with the ICs. Abtan Compl. ¶¶ 80, 85. But there is no international law norm imposing liability based on a conspiracy between a corporation and its alleged employees or agents. Indeed, U.S. domestic law precludes such liability. *See, e.g.*, *Perk v. Vector Resources Group, Ltd.*, 485 S.E.2d 140, 144 (Va. 1997). Moreover, the Supreme Court has made clear that conspiracy is applicable to war crimes only when its object is "genocide" or a "common plan to wage aggressive war" (*Hamdan v. Rumsfeld*, 548 U.S. 557, 610 (2006) (plurality op.)); *see also Presbyterian Church of Sudan v. Talisman Energy, Inc.*, 453 F. Supp. 2d 633, 664-65 (S.D.N.Y. 2006). Even if there were such a definite norm, moreover, recognizing a cause of action under the ATS for "conspiracy" would produce significant adverse practical consequences—allowing plaintiffs to extend private damages liability far beyond the state actors that are the focus of international law, based solely on a claim of conspiracy—and therefore violate the second step of the *Sosa* inquiry. *See* p. 6, *supra*. The same two flaws preclude Plaintiffs from resting secondary liability on their allegations of "facilitat[ing], order[ing], acquies[ing], confirm[ing] [and] ratif[ying]," which are present only in the ATS allegations in *Abtan*. Abtan Compl. ¶¶ 80, 85. Plaintiffs have identified no definite international law norm

recognizing such liability and the practical consequences preclude recognition of such a claim under *Sosa*.[8]

Finally, even if a claim of secondary liability could be asserted, Plaintiffs' allegations in *Abtan* are insufficient. Paragraphs 80 and 85 of the *Abtan* complaint set forth only "[t]hreadbare recitals of the elements of a cause of action" that "do not suffice." *Iqbal*, 129 S. Ct. at 1949. The allegations that "some" ICs supposedly were "chemically influenced by steroids and other judgment-altering substances" (Abtan Compl. ¶ 51) or that some ICs "have been involved in human rights abuses" (*id.* ¶ 53) are insufficient to support Plaintiffs' claims because they allege nothing about the ICs involved in the incident that is the subject of this lawsuit. Similarly, the assertion that Defendants have a "corporate culture" (*id.* ¶ 50) that does not punish excessive use

[8] For example, there is no clearly defined ***criminal*** norm of aiding and abetting that would satisfy that decision, much less a ***civil*** norm enforceable "without the check imposed by prosecutorial discretion." *Sosa*, 542 U.S. at 727. The three major recent international criminal tribunals—the International Criminal Court and the International Criminal Tribunals for the Former Yugoslavia and Rwanda—have sharply disagreed over the proper standards for criminal aiding-and-abetting liability. *Compare* Rome Statute, art. 25(3)(c), 37 I.L.M. at 1016 (adopting a purposive standard) (emphasis added), *with Prosecutor v. Vasiljevic*, ICTY-98-32-A, ¶ 102 (Feb. 25, 2004), *available at* 2004 WL 2781932 (requiring only "knowledge"). These divergent standards prove that the first *Sosa* requirement—clarity and universality—is not met. 542 U.S. at 725. Recognizing aiding and abetting under the ATS would also conflict with established domestic legal principles and visit significant adverse practical consequences, thereby failing *Sosa*'s second requirement as well. *See Cent. Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A.*, 511 U.S. 164, 180-82 (1994) (holding that doctrine of civil aiding-and-abetting liability is "at best uncertain in application"). A sharply-divided panel of the Second Circuit held an aiding and abetting claim could satisfy *Sosa*'s first requirement (*Khulumani*, 504 F.3d 254 (per curiam)); the United States disagreed with the majority's view. *See* U.S. Amicus Br., *Isuzu Motors, Inc. v. Ntsebeza*, 128 S. Ct. 2424, 2008 WL 408389, at *20-21 (2008).

An agency theory could not save Plaintiffs' ATS claims either. Civil agency is only sporadically recognized across jurisdictions, and it varies greatly in its contours. *See Talisman Energy*, 453 F. Supp. 2d at 687-88.; Gyula Eorsi, *Private and Governmental Liability for the Torts of Employees and Organs* in INTERNATIONAL ENCYCLOPEDIA OF COMPARATIVE LAW, vol. xi § 4-60 to -62 (André Tunc ed., 1976)). In any event, there is not an agency norm of international character.

of force is by itself insufficient to establish a plausible basis for relief on any secondary liability theory, and thus fails the standard set by the Supreme Court in *Iqbal*.

C. The ICs Did Not Commit "War Crimes."

The war crimes claim suffers from two additional, independent, deficiencies. First, to constitute a war crime, the conduct giving rise to the claim must be performed by a "[p]art[y] to a conflict." *Kadic v. Karadzic*, 70 F.3d 232, 242-43 (2d Cir. 1995). Plaintiffs do not allege that Defendants or the ICs are parties to the conflict or otherwise "combatants involved in the * * * war." *In re Sinaltrainal Litig.*, 474 F. Supp. 2d 1273, 1287 (S.D. Fla. 2006). As Plaintiffs acknowledge, Defendants were retained by the State Department for the limited purpose of providing security services in Baghdad. Sa'adoon Compl. ¶ 17; Albazzaz Compl. ¶ 15; Abtan Compl. ¶ 44; Hassoon Compl. ¶ 34; Rabea Compl. ¶ 21. Although those services were performed in a war zone, the ICs were not a general purpose combat force.

Second, a war crimes claim under the ATS must arise from acts that "were committed in furtherance of war hostilities." *In re Sinaltrainal*, 474 F. Supp. 2d at 1287; *see also Kadic*, 70 F.3d at 242. Conduct is not actionable under the ATS as a "war crime" simply because it occurred in the midst of an armed conflict. *Saperstein v. Palestinian Auth.*, No. 1:04-cv-20225, 2006 WL 3804718, at *8 (S.D. Fla. Dec. 22, 2006); *accord Doe v. Islamic Salvation Front*, 257 F. Supp. 2d 115, 120-21 (D.D.C. 2003). Plaintiffs do not link the misconduct they allege to some political or military objective. The complaints instead assert that Defendants were motivated by ***commercial*** goals. Sa'adoon Compl. ¶ 18; Albazzaz Compl. ¶¶ 14, 16; Abtan Compl. ¶¶ 1, 38, 52; Hassoon Compl. ¶¶ 27, 131, 152; Rabea Compl. ¶¶ 1, 21. The misconduct was allegedly committed "in furtherance of * * * business interests and activities" (*In re Sinaltrainal*, 474 F. Supp. 2d at 1287) (internal quotation marks omitted), and the war crimes claim is deficient for that reason as well. The complaints contain no allegations that the ICs had

the requisite political or military objectives; in *Sa'adoon* Plaintiffs themselves assert that Moonen was in a drunken state when he allegedly killed Sa'adoon "for no reason." Sa'adoon Compl. ¶ 22.

D. The "Summary Execution" Count Does Not State A Claim.

The summary execution count—which is included only in *Abtan* (Compl. ¶¶ 82-86) and *Hassoon* (Compl. ¶¶ 95-98)—also must be dismissed for two additional independent reasons. First, summary execution committed outside the course of genocide or war crimes is actionable as a violation of the law of nations "only when committed by state officials or under color of law." *Kadic*, 70 F.3d at 243. The complaints allege, however, that "[t]he killings were not carried out under the authority of any country or court" (Abtan Compl. ¶ 83; Hassoon Compl. ¶ 96). Plaintiffs have accordingly pled themselves out of court.

Second, by enacting the Torture Victims Protection Act (28 U.S.C. § 1350, note § 2(a)(2)), Congress "specifically provided a cause of action for [certain] violations" of the law of nations, including extrajudicial killings, and "set out how those claims must proceed." *Enahoro v. Abubakar*, 408 F.3d 877, 886 (7th Cir. 2005). Claims for summary execution under the ATS are precluded, the Seventh Circuit correctly held in *Enahoro*, because they would circumvent Congress's carefully crafted scheme. *Id.* at 885; *see also Sosa*, 542 U.S. at 726.

E. Punitive Damages Are Not Available Under The ATS.

Plaintiffs' claims in all cases for punitive damages cannot be based on the ATS. Punitive damages are not recognized by most jurisdictions outside the United States. They have been described as "repugnant to * * * fundamental conceptions of justice" and "utterly intolerable." Wolfgang Wurmnest, *Recognition and Enforcement of U.S. Money Judgments in Germany*, 23 BERKELEY J. INT'L L. 175, 195 (2005). Necessarily, therefore, punitive damage claims cannot meet *Sosa*'s first requirement of clarity and universality. *See* Nina H. B. Jorgensen, THE

RESPONSIBILITY OF STATES FOR INTERNATIONAL CRIMES 206-07 (2000) ("[I]nternational law cannot currently be said to embrace punitive damages."). Prohibiting punitive damages in ATS actions is also consistent with the goal of securing uniformity in the domestic application of international law. *See In re South African Apartheid*, 617 F. Supp. 2d at 256 & n.137 (because the ATS is a "jurisdictional vehicle for the enforcement of universal norms," "the outcome of an [ATS] case should not differ from the result that would be reached under analogous jurisdictional provisions in foreign nations").

II. THE RICO CLAIM MUST BE DISMISSED.

In *Abtan* and *Hassoon*, Plaintiffs amended the complaint to add a claim based on the Racketeer Influenced and Corrupt Organizations Act ("RICO") (18 U.S.C. §§ 1961-62, 1964); *see* Abtan Compl. ¶¶ 114-142; Hassoon Compl. ¶¶ 127-153. Because RICO provides standing only to plaintiffs who suffered injury to property, and allows recoveries based on such injuries alone, Plaintiffs seek as damages three times the cost of repairing 13 cars allegedly damaged in the September 16 incident in *Abtan* (Compl. ¶ 115) and 3 vehicles allegedly damaged in different incidents in *Hassoon* (Compl. ¶ 127). In view of these *de minimis* damages, it seems likely that the RICO counts—with their allegations of multiple murders, child prostitution, drug trafficking, and the like—was included solely because the sensational charges might lead a jury to decide the case on the basis of prejudice and passion. *See Nichols v. Mahoney*, 608 F. Supp. 2d 526, 536 (S.D.N.Y. 2009) (given "the specter of treble damages and the possibility of permanent reputational injury to defendants from the allegation that they are 'racketeers[,]' Courts have frequently commented on the 'in terrorem' settlement value that a threat of a civil RICO claim creates").

To state a claim under Section 1962(b) and (c) of RICO, Plaintiffs must allege: "(1) that the defendant (2) through the commission of two or more acts (3) constituting a 'pattern' (4) of

'racketeering activity' (5) directly or indirectly * * * [acquires] or maintains an interest in [(§ 1962(b))], or participates in [(§ 1962(c))], (6) an 'enterprise' (7) the activities of which affect interstate or foreign commerce." *Moss v. Morgan Stanley Inc.*, 719 F.2d 5, 17 (2d Cir. 1983). In addition, under RICO's civil remedies provision (18 U.S.C. § 1964(c)), Plaintiffs must allege (8) that they were "injured in [their] business or property" and (9) that such injury was "caused by predicate acts." *Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. 479, 496-97 (1985).

Plaintiffs' RICO allegations are deficient for four independent reasons. First, Plaintiffs do not allege that Mr. Prince—the only Defendant against whom they assert their RICO claim—committed or otherwise participated in any of the alleged predicate acts. Second, Plaintiffs cannot show that the alleged injury to their business or property—damage to their vehicles—was caused by the conduct that qualifies as RICO predicate acts, and they thus lack standing to sue. Third, RICO cannot be applied extraterritorially to alleged acts in Iraq. Fourth, Plaintiffs fail to allege a qualifying pattern of predicate acts. Finally, Plaintiffs are not entitled to punitive damages or injunctive relief under RICO, so their requests for such relief must be dismissed.

A. Defendant Prince Committed No Acts Constituting A Pattern Of Racketeering Activity.

Plaintiffs make a number of sensational allegations about the acts supposedly committed by "the Prince RICO Enterprise." Abtan Compl. ¶ 119; Hassoon Compl. ¶ 129. A RICO claim, however, "is not against a RICO enterprise, but against a RICO Defendant." *Palmetto State Med. Ctr., Inc. v. Operation Lifeline*, 117 F.3d 142, 148 (4th Cir. 1997). "To demonstrate a pattern of racketeering activity," therefore, a plaintiff must show that, "at a minimum, *each* RICO defendant committed two acts of racketeering activity within a ten-year period." *Id.*

(emphasis added); *see also DeFalco v. Bernas*, 244 F.3d 286, 306 (2d Cir. 2001).[9] Plaintiffs have not met this requirement.

The only allegation of ***any*** conduct by Mr. Prince, the sole RICO defendant, is that he "has created an enterprise." Abtan Compl. ¶ 117; Hassoon Compl. ¶ 129. That allegation is a legal conclusion not eligible for the presumption of truth under the Supreme Court's ruling in *Iqbal*. Moreover, the "conduct" of creating an enterprise is not included within the definition of "racketeering activit[ies]" set forth in Section 1961(1).

Because the complaints thus fail to allege that Mr. Prince committed even a single predicate act, the RICO claim must be dismissed. *See, e.g.*, *Brannon v. Boatmen's First Nat'l Bank*, 153 F.3d 1144, 1150 (10th Cir. 1998) ("[P]laintiffs have simply failed to allege that [a defendant] engaged in a 'pattern of racketeering activity.'"); *Emery v. American Gen. Fin., Inc.*, 938 F. Supp. 495, 499 (N.D. Ill. 1996) ("[I]t is clear that liability under RICO is limited to persons who have 'personally committed' at least two predicate acts of racketeering.").

Even if this fatal deficiency were ignored, the claim is insufficient for two additional reasons. *First*, a RICO plaintiff may not simply allege in conclusory terms a violation of one of the state or federal laws described in Section 1961(1). Rather, the plaintiff must allege "facts that support each statutory element of a violation of one of" those laws. *Raney v. Allstate Ins. Co.*, 370 F.3d 1086, 1087 (11th Cir. 2004) (per curiam); *see also Joyner v. Abbott Labs.*, 674 F. Supp. 185, 190 (E.D.N.C. 1987) (the "factual basis for the 'acts of racketeering'" must be alleged "with enough specificity to show there is probable cause that the defendant committed

[9] *Palmetto* and *DeFalco* concerned claims under Section 1962(c). But the requirement that each defendant have committed RICO predicates derives from the phrase "through [or from] a pattern of," which also appears in Sections 1962(a) and (b). It therefore governs claims under those provisions as well. *See, e.g.*, *Adena, Inc. v. Cohn*, 162 F. Supp. 2d 351, 358 (E.D. Pa. 2001).

the crimes alleged"). Plaintiffs have not alleged any facts that support a plausible inference that Mr. Prince committed each statutory element of any of the crimes they allege. *Raney*, 370 F.3d at 1087.

Second, a RICO plaintiff also must allege facts demonstrating that, "through a pattern of" crimes that Mr. Prince himself engaged in, Mr. Prince "acquir[ed] or maintain[ed] * * * [an] interest in" or "conduct[ed] or participat[ed] * * * in the conduct of" the enterprise. 18 U.S.C. § 1962(b)-(c). Plaintiffs have not in any way linked Mr. Prince to the predicate acts they set forth, and have certainly not done so with the requisite factual specificity. Neither have Plaintiffs attempted to connect the predicate acts (that they fail properly to allege) to the "acquisition or maintenance" or "conduct or participation" by Mr. Prince or any particular person. The RICO count accordingly must be dismissed.[10]

B. Plaintiffs Lack Standing To Assert The RICO Claim.

A RICO plaintiff "only has standing if * * * he has been injured in his business or property by the conduct constituting the [Section 1962] violation." *Sedima*, 473 U.S. at 496-97. The "compensable injury necessarily is the harm caused by predicate acts sufficiently related to constitute a pattern." *Id.* at 497. In *Holmes v. Securities Investor Protection Corp.*, 503 U.S. 258, 268 (1992), the Court elaborated on this requirement, emphasizing that the damages recoverable under RICO may compensate only the harm proximately caused by those predicate

[10] The complaints name only Mr. Prince as the Defendant in the RICO counts. Abtan Compl. p. 19; Hassoon Compl. p. 20. But even if the complaints were somehow construed to name the other Defendants as RICO Defendants, they would be deficient with regard to the other Defendants for the same reasons they are deficient with regard to Mr. Prince. Plaintiffs have alleged no predicate acts that were committed by ***any*** Defendant, instead simply eliding this requirement by repeated reference to "the Prince RICO Enterprise." *See Myers v. Finkle*, 758 F. Supp. 1102, 1111 (E.D. Va. 1990) ("A RICO complaint must identify each 'person' who is alleged to be liable. Collectivizing 'defendants' in the alleged pattern of racketeering activity will not suffice.").

acts. That requires, among other things, a "direct relation between the injury asserted and the injurious conduct alleged." *Id.* The Plaintiffs asserting the RICO claim here lack standing under this test.

The sole injury to business or property alleged in the complaints is "property damage to [the] cars [of 13 named Plaintiffs] during" the September 16, 2007 incident in *Abtan* (Compl. ¶ 115) and damage to Plaintiffs' vehicles during the alleged March 2005, July 2005, and February 2007 shootings in *Hassoon* (Compl. ¶¶ 59, 63, 79). And the only acts that could even plausibly be claimed to have proximately caused that injury are the alleged "murders" arising out these four incidents; the other alleged predicate acts (Abtan Compl. ¶¶ 133-139; Albazzaz Compl. ¶¶ 25-28) had no connection—and certainly no *proximate* connection—with that property damage. The viability of the RICO claim accordingly turns on whether the September 16, 2007, March 2005, July 2005, and February 2007 "murders" qualify as predicate acts under the statute.

To constitute a predicate act under RICO, an act must fall within the definition of "racketeering activity" in 18 U.S.C. § 1961(1). Plaintiffs presumably rest their designation of the "murders" as predicate acts on the reference in Section 1961(1) to "any act * * * involving murder, * * * which is chargeable under State law."

The complaints do not identify which "State law" the alleged murders are supposedly "chargeable under." It is plain, however, that the "murders" that Plaintiffs allege in support of their RICO claims are not "chargeable under" the law of Virginia. They were committed in Iraq (Abtan Compl. ¶¶ 2, 44-45; Hassoon Compl. ¶¶ 57, 62, 74), and "[e]very crime to be punished in Virginia must be committed in Virginia" (*Moreno v. Baskerville*, 452 S.E.2d 653, 655 (Va. 1995)). Indeed, these "murders" are not chargeable under the law of ***any*** State, because it is a

well established principle that "there can be no territorial jurisdiction where conduct and its results both occur outside its territory." Wayne R. LaFave, SUBSTANTIVE CRIMINAL LAW § 4.4 (2d. ed. 2008); *see also* MODEL PENAL CODE § 1.03(1) ("[A] person may be convicted under the law of this State of an offense committed by his own conduct or the conduct of another for which he is legally accountable if * * * either the conduct that is an element of the offense or the result which is such an element occurs within this State * * *."); RESTATEMENT (FIRST) CONFLICT OF LAWS § 425 (1934) ("[A] state has no jurisdiction to make an act or event a crime if the act is done or the event happens outside its territory."). All of the conduct with respect to the "murders" underlying the RICO claims in *Abtan* and *Hassoon* took place in Iraq and, because the alleged victims reside there, the results also occurred in Iraq. The "murders" therefore cannot qualify as predicate acts.

Because Plaintiffs thus have failed to allege damage to property proximately caused by a pattern of predicate acts, they lack standing and the RICO count must be dismissed.

C. RICO Does Not Apply Extraterritorially.

Because "Congress generally legislates with domestic concerns in mind," there is a "legal presumption that Congress ordinarily intends its statutes to have domestic, not extraterritorial, application." *Small v. United States*, 544 U.S. 385, 388-89 (2005) (internal quotation marks omitted). The courts that have addressed the issue have uniformly concluded that a RICO claim cannot be premised on foreign conduct with foreign effects. *E.g.*, *Butte Mining PLC v. Smith*, 76 F.3d 287, 291-92 (9th Cir. 1996); *North South Fin. Corp. v. Al-Turki*, 100 F.3d 1046, 1051 (2d Cir. 1996).

Virtually all of the alleged predicate acts appear to involve exclusively foreign conduct and foreign effects. That appears to be true of all the supposed "murders" to which the complaints refer (Abtan Compl. ¶¶ 121-132; Hassoon Compl. ¶¶ 133-141), the sexual

exploitation allegations (Abtan Compl. ¶ 137; Hassoon Compl. ¶ 148), and the destruction of evidence that allegedly occurred "on or after September 16, 2007" (Abtan Compl. ¶ 135; Hassoon Compl. ¶ 146). The complaints fail to identify where the other predicate acts occurred (Abtan Compl. ¶¶ 133-136, 138-139; Hassoon Compl. Compl. ¶¶ 143-147, 149-152) and any injury or effect that the alleged misconduct caused. It therefore does not allege facts establishing that a "material" part of the misconduct that "*directly* cause[d] the losses" occurred in the United States. *Grunenthal GmbH v. Hotz*, 712 F.2d 421, 424 (9th Cir. 1983) (emphasis added); *see also Liquidation Comm'n of Banco Intercont'l, S.A. v. Renta*, 530 F.3d 1339, 1352 (11th Cir. 2008); *Aldana v. Fresh Del Monte Produce, Inc.*, 305 F. Supp. 2d 1285, 1306 (S.D. Fla. 2003) (even domestic conduct is insufficient when it is "far removed from the completion of the wrongdoing"), *aff'd in relevant part*, 416 F.3d 1242 (11th Cir. 2005). Plaintiffs request an impermissible extraterritorial application of RICO, and the RICO counts in *Abtan* and *Hassoon* must be dismissed on this ground as well.

D. Plaintiffs Have Not Adequately Alleged A Pattern Of Racketeering Activity.

Plaintiffs' allegations concerning a pattern of racketeering activity are deficient in yet another respect. To plead the requisite "pattern" under RICO, "a plaintiff * * * must show that the racketeering predicates are *related*." *ePlus Tech., Inc. v. Aboud*, 313 F.3d 166, 181 (4th Cir. 2002). For predicate acts to be "related," they must have "'the same or similar purposes, results, participants, victims, or methods of commission, or otherwise [be] interrelated by distinguishing characteristics and [not be] isolated events.'" *Id.* at 182.

Although Plaintiffs assert a "pattern of murder" (Abtan Comp. ¶ 121; Hassoon Compl. ¶ 133), they allege no facts about either the participants (beyond a vague and inadequate reference to "the Prince RICO Enterprise") or the methods of the alleged murders that would support a plausible inference that they form a pattern. The same is true of the other predicate

acts. *See* Abtan Compl. ¶¶ 133-139; Hassoon Compl. ¶¶ 143-151. The complaints, moreover, contain no allegations whatsoever about any common purpose of the predicate acts beyond the "naked assertion devoid of * * * factual [content]" (*Iqbal*, 129 S. Ct. at 1949 (internal quotation marks omitted)) that they were "designed to create more wealth for Defendant Erik Prince and the Prince RICO Enterprise" (Abtan Compl. ¶ 119; Hassoon Compl. ¶ 131). *See Heller Fin., Inc. v. Gramm Computer Sales, Inc.*, 71 F.3d 518, 524-25 (5th Cir. 1996) ("reaping the profits" theory is insufficient to establish relationship and show RICO pattern).

This "lack of any clear and distinct relationship between the alleged acts defeats a component necessary for liability under RICO." *Davis v. Hudgins*, 896 F. Supp. 561, 569 (E.D. Va. 1995), *aff'd*, 87 F.3d 1308 (4th Cir. 1996) (per curiam); *see also Mkt. Prods. Mgmt., LLC v. Healthandbeautydirect.com, Inc.*, 333 F. Supp. 2d 418, 426-29 (D. Md. 2004). Because the complaints' "minimal assertions do not permit [the Court] to realistically assess the purposes, participants, or methods of the alleged acts to determine their relatedness" (*Synergy Fin., L.L.C. v. Zarro*, 329 F. Supp. 2d 701, 713 (W.D.N.C. 2004) (internal quotation marks omitted)), the RICO count must be dismissed for this reason as well.

E. Punitive Damages And Injunctive Relief Are Not Available Under RICO.

Plaintiffs' remedial requests under RICO include "punitive damages" and extensive injunctive relief. Abtan Compl. ¶¶ 3, 155; Hassoon Compl. ¶¶ 154-155. Punitive damages, however, are unavailable under RICO. *See SouthStar Funding, LLC v. Sprouse*, No. 3:05-CV-253, 2007 WL 812174, at *5 (W.D.N.C. Mar. 13, 2007); *Toucheque v. Price Bros. Co.*, 5 F. Supp. 2d 341, 350 (D. Md. 1998); *Mylan Labs., Inc. v. Akzo, N.V.*, 770 F. Supp. 1053, 1084 (D. Md. 1991); *see also Humana Inc. v. Forsyth*, 525 U.S. 299, 313 (1999). The injunctive relief authorized by 18 U.S.C. § 1964(c) is likewise not available to a private plaintiff. *See Oregon Laborers-Employers Health & Welfare Trust Fund v. Philip Morris Inc.*, 185 F.3d 957, 967-68

(9th Cir. 1999); *Minter v. Wells Fargo Bank, N.A.*, 593 F. Supp. 2d 788, 794-95 (D. Md. 2009); *see also Johnson v. Collins Entm't Co.*, 199 F.3d 710, 726 (4th Cir. 1999); *In re Fredeman Litig.*, 843 F.2d 821, 828-29 (5th Cir. 1988); *R.J. Reynolds Tobacco Co. v. Market Basket Food Stores, Inc.*, No. 5:05-cv-253, 2007 WL 319965, at *8-*9 (W.D.N.C. Jan. 30, 2007). Plaintiffs' requests in *Abtan* and *Hassoon* for these remedies under RICO should therefore be dismissed even if the RICO counts in their entirety are not.[11]

III. THE COURT SHOULD NOT EXERCISE SUPPLEMENTAL JURISDICTION OVER THE REMAINING CLAIMS.

All the complaints assert four bases for federal jurisdiction—ATS, federal question, diversity, and supplemental (Sa'adoon Compl. ¶ 2; Albazzaz Compl. ¶ 2; Abtan Compl. ¶ 42; Hassoon Compl. ¶ 1; Rabea Compl. ¶ 3)—and the *Abtan* and *Hassoon* complaints also invoke jurisdiction under RICO (Abtan Compl. ¶ 42; Hassoon Compl. ¶ 1). As established above, ATS jurisdiction is lacking in all of the cases and RICO jurisdiction is lacking in *Abtan* and *Hassoon*. The remaining counts do not arise under federal law and therefore cannot support federal question jurisdiction. Diversity jurisdiction is absent: the complaints contain no allegations about Plaintiffs' citizenship (only allegations about their residence). *See Axel Johnson, Inc. v. Carroll Carolina Oil Co.*, 145 F.3d 660, 663 (4th Cir. 1998). Even if Plaintiffs are citizens of Iraq, there would be no diversity jurisdiction, because Defendant Greystone LTD is a foreign citizen (*see* Greystone Decl., Ex. A); "alien citizenship on both sides of the controversy destroys diversity" (*Gen. Tech. Applications, Inc. v. Exro Ltda*, 388 F.3d 114, 120 (4th Cir. 2004)).

[11] Any award of compensatory damages under RICO would be limited to property damage that gives the putative Plaintiffs standing (*see, e.g., Genty v. Resolution Trust Corp.*, 937 F.2d 899, 918-19 (3d Cir. 1991)), and any attorney's fees recovered would be limited to those relating to the RICO claim (*see Northeast Women's Ctr. v. McMonagle*, 889 F.2d 466, 476 (3d Cir. 1989)).

This case thus may proceed only as a matter of supplemental jurisdiction. The Court has discretion to dismiss supplemental jurisdiction claims when original jurisdiction claims have been dismissed. *See* 28 U.S.C. § 1367(c)(3). That discretion should "[c]ertainly" be exercised when "federal claims are dismissed before trial." *Ruttenberg v. Jones*, 603 F. Supp. 2d 844, 873-74 (E.D. Va. 2009) (internal quotation marks omitted); *see also Moseley v. Price*, 300 F. Supp. 2d 389, 400 (E.D. Va. 2004). The complaints should therefore be dismissed under Federal Rule of Civil Procedure 12(b)(1).

IV. PLAINTIFFS' CLAIMS RAISE NONJUSTICIABLE POLITICAL QUESTIONS.

Plaintiffs' claims invite the Court to second-guess a myriad of State Department decisions about how best to provide security services in a war zone—an inquiry precluded by the political question doctrine. The complaints accordingly must be dismissed under Federal Rule of Civil Procedure 12(b)(1).[12]

A. Standard of Review

Because the political question doctrine is a matter of justiciability, the plaintiff bears the burden of establishing that the doctrine does not apply. *Richmond, Fredericksburg & Potomac R.R. v. United States*, 945 F.2d 765, 768 (4th Cir. 1991). A court should not attach any "presumptive truthfulness * * * to the plaintiff's allegations" (*Fisher v. Va. Elec. & Power Co.*, 243 F. Supp. 2d 538, 540 n.2 (E.D. Va. 2003)), but "regard the pleadings' allegations as mere

[12] Plaintiffs' claims in three of the five complaints (Sa'adoon Compl. ¶ 30; Albazzaz Compl. ¶ 26; Abtan Compl. ¶ 58) that the contract between USTC and the State Department violates the Anti-Pinkerton Act (5 U.S.C. § 3108) cannot be entertained, because Plaintiffs have not joined the United States, an indispensable party to any such claim. *See Ibrahim v. Titan Corp.*, 391 F. Supp. 2d 10, 20 (D.D.C. 2005). The Act prevents the government from contracting with "organizations that offer quasi-military and armed forces for hire," not with an organization—like USTC—"providing guard or protective services * * * even though the guards are armed." *In re Brian X. Scott*, 2006 WL 2390513, at *6 (Comp. Gen. Aug. 18, 2006); *accord United States ex rel. Weinberger v. Equifax, Inc.*, 557 F.2d 456, 463 (5th Cir. 1977).

evidence on the issue, and may consider evidence outside the pleadings" (*Balzer & Assocs., Inc. v. Union Bank & Trust Co.*, No. 3:09CV273, 2009 WL 1675707, at *4 (E.D. Va. June 15, 2009) (internal quotation marks omitted)).

B. The Political Question Doctrine Is At Its Height When Consideration Of A Case Would Intrude Upon Military And Foreign Affairs.

The political question doctrine holds that courts may not entertain claims requiring review of decisions "constitutional[ly] commit[ed]" to a political branch, claims as to which there is "a lack of judicially discoverable and manageable standards," or claims that cannot be decided "without an initial policy determination of a kind clearly for nonjudicial discretion." *Baker v. Carr*, 369 U.S. 186, 217 (1962). "[N]ational security and foreign relations" matters are "the quintessential sources of political questions." *Bancoult v. McNamara*, 445 F.3d 427, 433 (D.C. Cir. 2006); *see also Tiffany v. United States*, 931 F.2d 271, 277 (4th Cir. 1991).

The Eleventh Circuit recently affirmed the dismissal of a suit against a government contractor on political question grounds, holding that the government's "plenary control" over the activity giving rise to the suit—convoys transporting fuel through a "warzone"—meant that resolution of the plaintiff's claims "would require extensive reexamination and second-guessing of many sensitive judgments" for which there were "no judicially manageable standards." *Carmichael v. Kellogg, Brown & Root Servs., Inc.*, No. 08-14487, 2009 WL 1856537, at *1-*2, *16 (11th Cir. June 30, 2009); *see also Whitaker v. Kellogg, Brown & Root, Inc.*, 444 F. Supp. 2d 1277, 1282 (M.D. Ga. 2006) (what a "reasonable driver in a combat zone, subject to military regulations and orders, would do" is not fit for judicial resolution). Decisions about how to

protect government officials in a war zone are no less constitutionally committed to the Executive Branch. Plaintiffs' claims, must be dismissed under the political question doctrine.[13]

C. The Complaints Challenge Decisions That Are Constitutionally Committed To The Political Branches And As To Which There Are No Judicially Ascertainable Standards.

1. The Actions Of The ICs Could Not Be Examined Without Calling Into Question The Policy Judgments And Tactical Decisions Of The State Department.

Counts one through five in *Albazzaz* (Compl. ¶¶ 32-56) and *Rabea* (Compl. ¶¶ 22-45), and counts one through six in *Abtan* (Compl. ¶¶ 75-105) and *Hassoon* (Compl. ¶¶ 89-117) assert that ICs used unnecessary force while providing security services during a "period of armed conflict" in Baghdad (Albazzaz Compl. ¶ 34; Abtan Compl. ¶ 77; Hassoon Compl. ¶ 91).[14]

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[13] Indeed, the very status of Defendants as government contractors here is the result of an "initial policy determination of the kind clearly for non-judicial discretion." *Baker*, 369 U.S. at 217. The State Department was required, as a matter of operational necessity, to retain USTC because of the scale of operations in Iraq and the State Department's other obligations around the world. Imposition of liability, and the attendant diminished willingness of private contractors to complement the State Department's efforts (*see Tozer v. LTV Corp*., 792 F.2d 403, 405 (4th Cir. 1986)), would thus directly interfere with the United States' ability to conduct foreign affairs.

The only counts to which the political question doctrine does not directly apply are the counts alleging spoliation. Sa'adoon Compl. ¶¶ 65-70; Albazzaz Compl. ¶¶ 59-64; Abtan Compl. ¶¶ 109-13; Hassoon Compl. ¶¶ 121-126; Rabea Compl. ¶¶ 49-54. But this count must be dismissed on other grounds. *See* Point V.C, *infra*. In any event, the political question doctrine renders the remaining counts nonjusticiable and Plaintiffs cannot maintain a claim for spoliation of evidence that allegedly would have supported only nonjusticiable claims.

[14] Counts one through five in *Sa'adoon* do not derive from Moonen's performance of security services but from alleged actions that occurred when, of his own accord and after hours, Moonen attended a holiday party, got drunk and, by Plaintiffs' own assertion, wandered "intoxicated" through Baghdad and shot a security guard. Sa'adoon Compl. ¶¶ 19, 22-23. The argument for dismissal in Point IV.C.1 does not, therefore, apply to counts one through five in *Sa'adoon*, although those counts must be dismissed for the independent reason that they are not actionable under either the law of Iraq (*see* Point V, *infra*) or the law of Virginia (*see* Point VI, *infra*).

A decision to use force in a war zone is a classic political question—standards do not exist for assessing "whether reasonable care was taken to achieve military objectives while minimizing injury and loss of life." *McMahon v. Presidential Airways, Inc.*, 502 F.3d 1331, 1363 (11th Cir. 2007) (internal quotation marks omitted); *see also Tiffany*, 931 F.2d at 277-78; *Zuckerbraun v. Gen. Dynamics Corp.*, 755 F. Supp. 1134, 1142 (D. Conn. 1990), *aff'd*, 935 F.2d 544 (2d Cir. 1991).

As the Eleventh Circuit recently explained, when a contractor works under government-prescribed standards and government control that "thoroughly pervade[]" the contractor's work, "it would be impossible to make any determination regarding" the contractor's alleged misconduct without bringing the government's judgments into question. *Carmichael*, 2009 WL 1856537, at *8; *see id.* at *19 (negligent training claim barred when contractor personnel's training is "deeply bound up with military regulations"); *see also Bancoult*, 445 F.3d at 433, 436-37; *Tozer v. LTV Corp.*, 792 F.2d 403, 406 (4th Cir. 1986) (when government and contractor work closely together "it is nearly impossible to contend that the contractor [acted negligently] without actively criticizing" the government's decisions). Given the State Department's pervasive direction to and control over USTC,[15] this Court cannot decide the appropriateness of the ICs' use of defensive force without also deciding the appropriateness of the State Department procedures, methods, tactics, training, supervision, and control that underlie the governmental

[15] The WPPS II Contract between the State Department and USTC was awarded on June 6, 2005 (App. 1-2) and the WPPS II Task Order request is dated February 8, 2006 (App. 141). Before the WPPS II Contract and Task Order, the WPPS I Contract between USTC and the State Department governed. When describing contractual provisions demonstrating State Department control over services provided under the contract, we provide parallel citations to the WPPS II documents—excerpts of which appear at pages 1-274 of the Appendix—and the WPPS I documents—excerpts of which appear from page 275 of the Appendix.

authorization to use defensive force—the very inquiry precluded by the political question doctrine.

Thus, the State Department-issued Tactical Operating Procedure ("TacSOP"), which was incorporated into the contract, defined in exhaustive detail the procedures to be followed by the ICs during the course of their missions protecting government officials as they traveled to and from meetings throughout Baghdad. It prescribes the information to be covered in pre-mission briefs (TacSOP, App. A (App. 274)), duty descriptions for ICs and support staff (TacSOP, Ch. 1, pp. 6-8 (App. 171-173)), and communications procedures (TacSOP, Ch. 2 (App. 174-193)). Moreover, the TacSOP specifies, in more than 180 pages of detailed instructions, the activities to be conducted in each stage of a protective security operation, such as planning, stage time, movement, and post-mission or recovery for protective security teams, low visibility teams, advance teams, counter assault teams, tactical support teams, explosive detection dog handlers, defensive marksmen, and air support. TacSOP, Chs. 6-13 (App. 195-272).

The contract also contained detailed rules governing the use of force. The State Department's Deadly Force Policy, which was incorporated into the contract, provides that "deadly force is permissible when there is no safe alternative to using such force and without it the PSS [Protective Security Specialist] or others would face imminent and grave danger." *See* WPPS II Contract, § C, App. P (App. 112); WPPS I Contract, § C, Attach. 13, at C-122 (App. 371). Consistent with the State Department's Deadly Force Policy, the U.S. Ambassador to Iraq has issued a Mission Firearms Policy that states:

> Determining whether deadly force is necessary may involve instantaneous decisions that encompass many factors, such as the likelihood that the subject will use deadly force on the individual or others if such force is not used by the individual; the individual's knowledge of the capabilities of the threatening party or situation; the presence of other persons who may be at

> risk if force is not used; and the nature and the severity of the subject's conduct or the danger posed.

WPPS II Contract, Mission Firearms Policy, at 4 (App. 119); WPPS I Contract, § C, Attach. 14, at C-129 (App. 378). Of particular relevance here, the rules on the use of defensive force in that Policy state that "[s]hooting to disable a vehicle is authorized" and that "[i]n order to ensure safe separation from motorcade and suspected or likely VBIED [vehicle-borne improvised explosive devices], shots may be fired into the vehicle's engine block as needed to prohibit suspected or likely VBIED from entering into an area where the protective detail would be exposed to a VBIED attack." WPPS II Contract, Mission Firearms Policy, at 9 (App. 124). The Department of State rules state that after "feasible" warnings have been given, "[i]f the vehicle continues to be a threat," a security detail "is authorized to fire into the windshield to stop the threat." *Id.*[16]

Finally, the contract clearly delineated the State Department's control over each security mission. The State Department's Regional Security Office ("RSO") was explicitly authorized to make tactical decisions regarding all aspects of each mission conducted by ICs. *See* Task Order Request 2006-06 ¶ 6.1 (App. 144); *see also* TacSOP, Ch. 3, at 4 (App. 194) (granting the RSO initial mission approval authority and requiring RSO approval of changes to missions); *id.* Ch. 6, at 2 (App. 197) (Department authority to approve missions and assign personnel). The contract expressly placed all missions "under the daily oversight of the RSO or the RSO's designee." Task Order Request 2006-06 ¶¶ 6.0-6.1 (App. 143); *see also* WPPS II Contract § C, ¶ 1.5.3

[16] The Department of State's rules on the use of defensive force were so detailed that they even addressed the permissibility of warning shots, providing that "[w]arning shots are not authorized" because they "may pose dangers to PSS or others." WPPS II Contract, § C, App. P (App. 113); WPPS I Contract, § C, Attach. 13, at C-123 (App. 372) (same); *see also* WPPS II Contract, Mission Firearms Policy, at 9 (App. 124) ("At no time will a weapon be fired into the ground or air as a warning to stop a threat."). Such rules clearly reflect the type of discretionary, policy-laden judgments that balance safety, protection, and other factors that are appropriately left to the elected branches of our government.

(App. 5) (RSO exercises "on-site authority over the Contractor's [protective services] detail"); WPPS I Contract, at 3 (App. 284) (same). The contract mandated that each security mission "maintain[] constant communication with RTOC [Regional Tactical Operations Center, where the State Department RSO was stationed] and notif[y] RTOC of any changes in status, route checkpoints, or other pertinent information." TacSOP, Ch. 3, at 4 (App. 194).

Such rules clearly reflect the type of discretionary, policy-laden judgments that balance safety, protection, and other factors (*e.g.*, foreign relations and the accomplishment of the Department of State's overall diplomatic mission) against the inherent risks associated with authorizing the use of deadly force in defense of Department of State personnel and individuals that protect them. Had the Department of State desired a different tradeoff of civilian protection against government officials' safety, it would have selected different policies or a different quantum of oversight. The political question doctrine bars this court from second-guessing the Department of State's decisions. Such judgments are committed to the elected branches of our government.

Nor may the judiciary entertain tort claims based on any alleged failure of USTC or individual ICs to comply with the standards specified by the State Department. Otherwise, the political question doctrine would permit claims based on alleged noncompliance with the rules of engagement that are routinely issued to guide combat troops. Like all tactical judgments, decisions to use force during a protective security mission necessarily are "split second decisions [in] circumstances that are tense, unpredictable, and rapidly evolving." WPPS II Contract, Mission Firearms Policy, at 4 (App. 119); WPPS II Contract § C, App. P (App. 112); WPPS I Contract § C, Attach. 14, at C-128 (App. 377); WPPS I Contract § C, Attach. 13, at C-122 (App. 371). As such, the ICs' decisions to discharge their firearms while conducting security missions

in a war zone on the streets of Baghdad are no more susceptible to judicial oversight than any other decision in a combat zone. *See Tozer*, 792 F.2d at 406; *Whitaker*, 444 F. Supp. 2d at 1282.

2. Any Judicial Inquiry Into The Hiring And Training Of ICs Would Necessarily Intrude On Decisions Committed To The Executive Branch.

Count six in *Sa'adoon* (Compl. ¶¶ 62-64), *Albazzaz* (Compl. ¶¶ 57-58), and *Rabea* (Compl. ¶¶ 46-48), and count seven in *Abtan* (Compl. ¶¶ 106-108) and *Hassoon* (Compl. ¶¶ 118-120) allege that USTC negligently hired and trained the ICs involved in each of the incidents in question. Again, Plaintiffs' grievance is with the State Department's policy decisions.

The contract requires USTC to submit every resume it receives to the State Department for pre-screening. *See* WPPS II Contract § C, ¶ 4.3.1.1 (App. 6); WPPS I Contract, at 17 (App. 288); *id.* § C, ¶ 5.1.1 (App. 304). The contract gave the Department the authority to prevent any applicant from providing services as an IC under the contract. WPPS II Contract, § C, App. F (App. 18-19); WPPS I Contract, § C, ¶ 5.2 (App. 304). The Department gives personnel in key positions an even higher level of scrutiny. *See* WPPS II Contract, § C, App. B (App. 9-10). The contract specified the screening procedures utilized by USTC—which include psychological, medical, and dental exams; background checks; drug testing; and monitoring for stability and performance during training. *See id.* § C, ¶ 4.3.1.2 (App. 6-7); *id.* § C, App. F (App. 18-19); Task Order Request 2006-06, ¶ 6.5 (App. 146); Task Order Proposal 2006-06, at 54 (App. 152); WPPS I Contract, at 17-20 (App. 288-291). In addition, the contract required all personnel performing under it to pass security clearances conducted by the State Department. *See* WPPS II Contract § C, App. E (App. 11-17); WPPS I Contract, at 19 (App. 290); *id.* § C, Attach. 4 (App. 312-320).

Plaintiffs allege that the State Department's screening procedures failed to weed out applicants with criminal records and participants in human rights abuses. *See* Abtan Compl.

¶¶ 53-54. Whether the Department's procedures were adequate, and whether alternative or additional steps might have been wise, are classic political questions entrusted to the political branches. *See Heisig v. United States*, 719 F.2d 1153, 1156 (Fed. Cir. 1983).

Successful applicants were required to undergo an intensive training regimen specified in the contract, which devoted over 500 pages to detailed specifications of each element of the training program. The 164-hour training program was approved by the Department after a full, on-site demonstration. Many of the programs were created by the State Department; the remainder were developed by USTC in accordance with detailed specifications from the Department. *See* WPPS II Contract § C, ¶ 4.3.2.1 (App. 7-8); *id.* § C, App. G (App. 20-63); Task Order Proposal 2006-06 ¶¶ 4.17, 4.24-4.26 (App. 162, 165-66). The State Department even specified the precise facilities to be used for training the ICs (*see* WPPS II Contract § C, App. G (App. 20-36))—including such details as the minimum pieces of furniture in the rooms of a building used to simulate live gunfire situations (*id.* (App. 28)).

Trainees received instruction in the State Department's Deadly Force Policy, the use of weapons, and the proper procedures for conducting motorcade operations. *See* WPPS II Contract § C, App. G, Attach. 5 (App. 55-57); Task Order 2006-06 Proposal ¶¶ 4.0-4.7, 4.12 (App. 153-58, 161); WPPS I Contract, Attach. 1 (App. 294-97); *id.* § C, Attach. 9 (App. 321-22). Trainees also were required to satisfy specific criteria set by the Department to be authorized to handle weapons. *See, e.g.*, WPPS II Contract § C, App. G, Attach. 7-9 (App. 58-63); *id.* § C, App. N (App. 64-111); WPPS I Contract § C, Attach. 10-A (App. 325-27); *id.* § C, Attach. 11 (App. 328-70). The IC's training was required to be at least as rigorous as that provided to the Department's security personnel. *Id.* § C, App. G, § 5.3.1 (App. 21); *id.* § C, App. U (App. 132-

40) (incorporating syllabus for the State Department's Field Firearms Officer course); Task Order 2006-06 Proposal ¶ 2.10 (App. 149).

The contractual specifications for each element of the IC training program were incredibly detailed. As just one example, 20 pages of the TacSOP were devoted to specifying how ICs were to be instructed on appropriate responses to sixteen different types of attacks on a motorcade, including how to "engage" the threat, hold security, and conduct a proper counter-assault. *See* TacSOP, Ch. 9 (App. 220-39).[17] The contract specified that—following the training program—ICs were required to demonstrate knowledge and/or proficiency of, among other things: (a) the functions of fourteen separate persons operating within a protective detail; (b) the "terrorist attack cycle" and various terrorist groups; (c) at least six different types of protective formations; (d) proper formations and positioning during different types of events, such as arrivals, departures, speeches, press conferences, and motorcades; (e) how to respond to specific types of attacks on protectees; and (f) various survival skills and defensive tactics. *See* WPPS II Contract § C, App. G, Attach. 5 (App. 55-57); WPPS I Contract, at 23-26 (App. 294-97).

The Supreme Court has recognized that the training of military personnel falls to the Executive Branch, free of judicial oversight. *See Gilligan v. Morgan*, 413 U.S. 1, 10 (1973); *see also Tiffany*, 931 F.2d at 278. The same conclusion applies to the State Department's detailed policy determinations regarding the appropriate training standards for security personnel providing protective services in a war zone.

[17] The provisions included in the Appendix are just some of those that demonstrate pervasive State Department control. The entire WPPS II Contract fills five 4-inch binders, which Defendants will provide to the Court if requested.

V. THE NON-FEDERAL CLAIMS ARE NOT ACTIONABLE UNDER APPLICABLE IRAQI LAW.

Plaintiffs do not identify a source of law for counts two through seven in *Sa'adoon* (Compl. ¶¶ 43-70), *Albazzaz* (Compl. ¶¶ 38-64), and *Rabea* (Compl. ¶¶ 28-54), and counts three through eight in *Abtan* (Compl. ¶¶ 87-113) and *Hassoon* (Compl. ¶¶ 99-126), all of which allege common-law torts. Non-federal claims brought in a district court are subject to the forum state's choice of law rules. *Limbach Co. v. Zurich Am. Ins. Co.*, 396 F.3d 358, 361 (4th Cir. 2005) (per curiam).

Virginia's "settled rule" is that the law of the "place of the wrong" determines the substantive rights of the parties. *Jones v. R.S. Jones & Assocs., Inc.*, 431 S.E.2d 33, 34 (Va. 1993); *McMillan v. McMillan*, 253 S.E.2d 662, 663 (Va. 1979). For tort claims, the place of the wrong is "where the last event necessary to make an act liable for an alleged tort takes place." *Quillen v. Int'l Playtex, Inc.*, 789 F.2d 1041, 1044 (4th Cir. 1986) (internal quotation marks omitted). Plaintiffs sustained their alleged injuries in Iraq. Iraqi substantive law therefore governs their non-federal claims. Under Iraqi law the claims are not actionable.[18]

A. Defendants Are Immune From Suit Under Iraqi Law.

The Coalition Provisional Authority ("CPA") was established in 2003 to govern Iraq temporarily and restore security. *See* CPA Regulation No. 1. In June 2004, the Administrator of the CPA issued Order No. 17, which immunized contractors like USTC from "Iraqi legal process," defined as "any * * * legal proceedings in Iraqi courts or other Iraqi bodies, whether

[18] Foreign law is determined at the motion to dismiss stage by an expert's declaration. Fed. R. Civ. P. 44.1; *see Haywin Textile Prods. v. Int'l Fin. Inv. & Commerce Bank Ltd.*, 152 F. Supp. 2d 409, 411 (S.D.N.Y.), *aff'd*, 38 F. App'x 96 (2d Cir. 2002).

criminal, civil, or administrative." CPA Order No. 17 § 1(10); *see also id.* § 2(1) (extending immunity to contractors, as well as their subcontractors and employees); *id.* § 4(3). Order 17 was in effect when the events giving rise to this lawsuit occurred and bars the non-federal claims.

Virginia courts do not hesitate to follow choice of law rules that leave a plaintiff without a remedy. *See McMillan*, 253 S.E.2d at 663 (affirming the dismissal of a suit based on Tennessee's "common-law rule of interspousal immunity"); *see also Milton v. ITT Research Inst.*, 138 F.3d 519, 522-53 (4th Cir. 1998) (choice of law ruling resulted in dismissal).

B. The Vicarious Liability Asserted Here Is Not Recognized Under Iraqi Law.

Even if Order 17 does not apply, Plaintiffs' non-federal claims arising from the incidents in question (*i.e.*, counts two through five in *Sa'adoon*, *Albazzaz*, and *Rabea*, and counts three through six in *Abtan* and *Hassoon*) are not actionable under Iraqi law. In these counts, Plaintiffs seek to hold Defendants vicariously liable for the alleged actions of the ICs. Under the law of Iraq vicarious liability is not available in the circumstances alleged here.[19]

Iraq has a civil law system, and the principles of legal interpretation under Iraqi law therefore differ significantly from those in common law jurisdictions like the United States. Declaration of Professor Haider Ala Hamoudi, Ex. B ("Hamoudi Decl.") ¶¶ 7-8. The controlling sources of law in Iraq are the provisions of codes covering discrete legal areas (such as company law, personal status law, and civil law) and commentaries of learned experts. *Id.* ¶¶ 6-9.

[19] Some of the complaint's non-federal counts in each of the cases mention "aid[ing] and abet[ting]" (Sa'adoon Compl. ¶ 45; Albazzaz Compl. ¶ 40; Abtan Compl. ¶ 89; Hassoon Compl. ¶ 101; Rabea Compl. ¶ 30), or "conspir[ing]" and other phrases that could be read as intimating secondary liability (Sa'adoon Compl. ¶¶ 51, 56; Albazzaz Compl. ¶¶ 46, 51; Abtan Compl. ¶ 96; Hassoon Compl. ¶ 107; Rabea Compl. ¶¶ 36, 40). To the extent that any of these putative bases for liability are even available under the applicable law, Plaintiffs offer nothing more than "[t]hreadbare recitals" of legal conclusions, and their allegations are therefore insufficient. *Iqbal*, 129 S. Ct. at 1949.

The Iraqi Civil Code and its authoritative commentaries recognize a general principle of "wrongful action." A "wrongful action" is roughly equivalent to a common law tort and consists of three elements: fault, harm, and causation. Hamoudi Decl. ¶¶ 14-19. Vicarious liability rules are considerably more circumscribed than under the common law. Article 219 of the Civil Code limits vicarious liability to "the government, the municipalities, the foundations that provide public services, and every person who exploits one of the industrial or trade foundations." *Id.* ¶ 20. This provision does not cover "people *or companies* that exploit foundations other than trade and industrial foundations [or] individuals who do not form foundations but engage in industrial or trade activity or anything else." *Id.*

The terms "government" and "municipalities" in the Civil Code provision are self-explanatory. The term "foundations" refers to institutions that provide public services and are owned and operated by the Iraqi government. Hamoudi Decl. ¶ 21. The last category of entities—a "person who exploits a foundation of trade or industry"—applies to contractors that work with the previously defined "foundations." *Id.* ¶ 22. To fall under this category, a private company must have a direct contractual relationship with the government of Iraq or any entity wholly or majority owned by the government. *Id.* ¶ 23.

As a consequence, vicarious liability in Iraq does not extend to privately owned companies that have no contractual relationship with the Iraqi government. Hamoudi Decl. ¶¶ 20, 23-27. None of the Defendants has a contractual relationship with the Iraqi government. And yet counts two through five in *Sa'adoon*, *Albazzaz*, and *Rabea*, and counts three through six in *Abtan* and *Hassoon* seek to hold Defendants vicariously liable for the alleged misconduct of the ICs. These counts should be dismissed.

C. Iraqi Law Does Not Recognize A Tort of Spoliation.

Spoliation of evidence is not a separately actionable tort under Iraqi law. Hamoudi Decl. ¶ 30. That is also the rule in Virginia. *See Bass v. E.I. Dupont De Nemours & Co.*, 28 F. App'x 201, 206 (4th Cir. 2002) (per curiam). Count seven in *Sa'adoon* (Compl. ¶¶ 65-70), *Albazzaz* (Compl. ¶¶ 59-63), and *Rabea* (Compl. ¶¶ 49-54), and count eight in *Abtan* (Compl. ¶¶ 109-113) and *Hassoon* (Compl. ¶¶ 121-126)—all alleging spoliation—should therefore be dismissed.

D. Punitive Damages Are Unavailable Under Iraqi Law.

Damages under Iraqi law are exclusively compensatory. Hamoudi Decl. ¶¶ 31-32. Iraqi law thus does not recognize punitive damages. *Id.* ¶ 31. For that reason, and because the ATS and RICO counts, even if not dismissed, cannot support an award of punitive damages (Points I.E, II.E, *supra*), Plaintiffs' prayers for punitive damages (Sa'adoon Compl. ¶ 71(b); Albazzaz Compl. ¶ 65(b); Abtan Compl. ¶ 143; Hassoon Compl. ¶ 154(b); Rabea Compl. ¶ 56) must be dismissed.

VI. THE NON-FEDERAL CLAIMS IN *SA'ADOON* WOULD NOT BE ACTIONABLE UNDER VIRGINIA LAW EITHER.

Although Iraqi law governs the non-federal counts in all cases, even if Virginia law is applied to the non-federal counts in *Sa'adoon* (*i.e.*, counts two through five), those counts should still be dismissed. These counts seek to hold Defendants vicariously liable for Moonen's alleged shooting of a security guard on December 24, 2006. "In order to hold an employer liable for its employee's act under the doctrine of *respondeat superior* [in Virginia], an injured party is required to establish that the relationship of master and servant existed at the time and with respect to the specific action out of which the injury arose." *Smith v. Landmark Commc'ns, Inc.*, 431 S.E.2d 306, 307 (Va. 1993). Even if Virginia's *respondeat superior* doctrine applied,

Plaintiffs in *Sa'adoon* could not prevail on counts two through five because Moonen was not acting within the "scope of employment" with respect to the shooting.

According to the complaint, Moonen attended a Christmas Eve party in "Little Venice" and there "consumed excessive quantities of alcohol." Sa'adoon Compl. ¶ 19. Moonen allegedly left the party in an "intoxicated state" and, "after losing his way and stumbling drunkenly around Little Venice," came across Sa'adoon and shot him. *Id.* ¶¶ 20, 22. As a matter of law, Moonen's "deviation from [Defendants'] business," as described in the complaint, was so "great and unusual" that he then was not acting within the scope of employment. *Kensington Assoc. v. West*, 362 S.E.2d 900, 902 (Va. 1987).

An act is within the scope of employment only if (1) it is "naturally incident to the business" and (2) it "was performed * * * with the intent to further the employer's interest, or from some impulse or emotion that was the natural consequence of an attempt to do the employer's business." *Kensington*, 362 S.E.2d at 901. Moonen's alleged tortious conduct satisfies neither element; to the contrary, it sprung from an "external, independent, and personal motive on [Moonen's] part * * * to do the act upon his own account." *Sayles v. Piccadilly Cafeterias, Inc.*, 410 S.E.2d 632, 634 (Va. 1991) (internal quotation marks omitted).

In *Sayles*, the Virginia Supreme Court held that an employee who had become intoxicated at a holiday party hosted by his employer after working hours was not acting within the scope of employment when the automobile he was negligently operating struck another vehicle about five minutes after he left the party. 410 S.E.2d at 633. Three facts were central to the court's determination that *respondeat superior* was inapplicable as a matter of law: (1) the tortious conduct took place off the employer's premises; (2) attendance at the party was not required by the employer; and (3) the employee was intoxicated. *Id.* at 633; *see also Am. Safety*

Razor Co. v. Hunter, 343 S.E.2d 461, 463 (Va. Ct. App. 1986) ("[A] severely intoxicated employee has removed himself from the scope of his employment.").

The same result is required here. The party that allegedly led to the shooting did not take place on premises owned by any Defendant. To the contrary, Plaintiffs allege that the party occurred "in an area of Iraq referred to as Little Venice." Sa'adoon Compl. ¶ 19. Plaintiffs do not even allege, moreover, that Defendants sponsored the holiday party that Moonen attended, much less that attendance was required. Finally, as Plaintiffs themselves emphasize, Moonen "consumed excessive quantities of alcohol," "bec[a]me intoxicated," and was "visibly intoxicated" when the alleged shooting occurred. *Id.* ¶¶ 19-20, 22.[20]

VII. THE NEGLIGENT HIRING AND TRAINING CLAIMS ARE BARRED BY THE GOVERNMENT CONTRACTOR DEFENSE.

In *Boyle v. United Technologies Corp.*, 487 U.S. 500 (1988), the Supreme Court held that a contractor could not be subject to state-law tort suits based on its performance of an equipment contract with the federal government if "(1) the United States approved reasonably precise specifications; (2) the equipment conformed to those specifications; and (3) the supplier warned the United States about the dangers in the use of the equipment that were known to the supplier but not to the United States." *Id.* at 512. This defense applies to service contracts. *See, e.g.*, *Hudgens v. Bell Helicopters/Textron*, 328 F.3d 1329, 1335 (11th Cir. 2003); *Richland-Lexington*

[20] Plaintiffs' claim is not salvaged by the allegation that Moonen shot Sa'adoon with a "Xe-Blackwater Glock." Sa'adoon Compl. ¶ 20. In *Kensington*, the employer knew that the employee "carried a pistol and acknowledged that he was armed for [the employer's] benefit." 362 S.E.2d at 901. "[W]hile on duty and after completing his rounds through the [employer's] building," the employee, who had "drunk a 'couple of beers,'" pulled out his pistol to have "fun" and shot a fellow employee. *Id.* Despite all this, the Virginia Supreme Court unanimously held that the employer's "reckless act was such a great and unusual deviation from [the] business that the question whether he acted outside the scope of his employment was one of law for the court," and one to be resolved in favor of the employer. *Id.* at 903-04.

Airport Dist. v. Atlas Props., Inc., 854 F. Supp. 400, 422-23 (D.S.C. 1994). The negligent hiring and training claims (count six in *Sa'adoon*, *Albazzaz*, and *Rabea*, and count seven in *Abtan* and *Hassoon*) are barred by the government contractor defense ("GCD").

A. Detailed Contractual Provisions Defined The Standards For Hiring And Training The ICs.

The first element of the GCD is that the government approved reasonably precise procedures concerning the conduct underlying the plaintiff's claim. The contract between USTC and the government prescribed extraordinarily detailed procedures and standards for hiring and training ICs. *See* pp. 29-31, *supra*. The first element of the GCD is plainly satisfied.

B. Plaintiffs Do Not Allege That Defendants Failed To Comply With The Detailed Contractual Standards For Hiring And Training ICs.

The second element of the GCD is that the contractor's performance conformed to the standards set by the government. The complaints do not allege that USTC failed to comply with the contractual standards governing hiring.

The same is true of the allegations concerning training. Plaintiffs assert that Defendants "fail[ed] to train personnel properly." Sa'adoon Compl. ¶ 63(c); Albazzaz Compl. ¶ 58(c); Abtan Compl. ¶ 107(c); Hassoon Compl. ¶ 119(c); Rabea Compl. ¶¶ 47(c). But this "legal conclusion[]" cast in the form of a factual allegation is not binding on the court (*Robinson v. Am. Honda Motor Co*., 551 F.3d 218, 222 (4th Cir. 2009)), and the complaints allege no facts indicating that the training of ICs did not comply with the contractual specifications—the issue that is relevant under the GCD.

C. There Are No Risks In Relying On The Contractual Hiring And Training Standards That Were Known To USTC But Not To The State Department.

Under the final element of the GCD, the contractor must have warned the government of any "dangers in reliance on the procedures that were known to [the contractor] but not to the

United States." *Hudgens*, 328 F.3d at 1335. The complaints make no allegation to the contrary, and the level of detail of these standards and their similarity to those for the Department's own security service employees render any such allegation wholly implausible. The hiring and training allegations are barred by the GCD and should therefore be dismissed.

VIII. THE NEGLIGENT HIRING AND TRAINING CLAIMS ARE ALSO BARRED BY ABSOLUTE IMMUNITY.

In *Mangold v. Analytic Services, Inc.*, 77 F.3d 1442 (4th Cir. 1996), the Fourth Circuit—applying the Supreme Court's decisions in *Westfall v. Erwin*, 484 U.S. 292 (1988), *Barr v. Matteo*, 360 U.S. 564 (1959), and *Yearsley v. Ross Constr. Co.*, 309 U.S. 18 (1940)—held that the "absolute immunity" applicable to "federal officials exercising discretion while acting within the scope of their employment" extends to government contractors. *Id.* at 1446-47. The court reasoned that, "[i]f absolute immunity protects a particular governmental function, no matter how many times or to what level that function is delegated, it is a small step to protect that function when delegated to private contractors." *Id.* at 1447-48; *see also TWI v. CACI Int'l, Inc.*, No. 1:07-cv-908, 2007 WL 3376661, at *3 (E.D. Va. Nov. 9, 2007). If USTC is not eligible for the GCD on the ground that it retained discretion, Defendants are immune under *Mangold*.

Mangold immunity requires that the contractor was performing "delegated actions in the government's stead" and that the conduct at issue was "within the scope of employment." *TWI*, 2007 WL 3376661, at *3. USTC was plainly performing delegated actions that would otherwise have been performed by the State Department, because the Department ordinarily provides its own protective security services. The hiring and training of ICs, moreover, was clearly within the scope of employment under the contract. If the GCD does not bar Plaintiffs' hiring and training claims, therefore, absolute immunity does.

IX. THE CLAIMS OF THE "ESTATE" PLAINTIFFS MUST BE DISMISSED.

Some of the Plaintiffs are "Estates" of individuals who allegedly died as a result of the incidents in question. Sa'adoon Compl. ¶¶ 1, 4 (Estate of Raheem Khalaf Sa'adoon); Albazzaz Compl. ¶¶ 3-5 (Estates of Ali Hussamaldeen Albazzaz, Kadhum Kayiz Aziz, and Sa'ad Raheem Jarallah); Abtan Compl. ¶¶ 4-7, 19-21, 23 (Estates of Himoud Saed Abtan, Usama Fadhil Abbass, Oday Ismail Ibraheem, Ali Khaleel, Mushtaq Karim Abd Al-Razzaq, Qasim Mohamed Abbas Mahmoud, Mohamed Abbas Mahmoud, and Ghaniyah Hassan Ali); Hassoon Compl. ¶¶ 3, 6, 9, 11, 18, 21 (Estates of Sabah Salman Hassoon, Azhar Abdullah Ali, Nibrass Mohammed Dawood, Akram Khalid Sa'ed Jasim, Suhad Shakir Fadhil, Husam Hasan Jaber, and Khalis Ali Al Qaysi); Rabea Compl. ¶ 5 (Estate of Husain Salih Rabea).

The "capacity to sue or be sued" of an estate is determined by "the law of the state where the [district] court is located." Fed. R. Civ. P. 17(b)(3). To represent an estate under Virginia law, a person must "[q]ualif[y]"—as an executor, administrator, or personal representative—before a Virginia court. *See* Va. Code Ann. § 26-59(A) (non-resident representative); Va. Code Ann. §§ 64.1-116 to 64.1-122.2 (resident representative); *see also* Va. Code Ann. § 8.01-50(B) (wrongful death statute). Admission as a personal representative in another jurisdiction is insufficient (*see Harmon v. Sadjadi*, 639 S.E.2d 294, 301-02 (Va. 2007)), and failure to qualify in Virginia is a bar to suit (*see, e.g.*, *Johnston Mem'l Hosp. v. Bazemore*, 672 S.E.2d 858, 860 (Va. 2009)).

Moreover, the jurisdiction of probate here presumably is Iraq. The law of Iraq requires special proceedings to obtain capacity to act on behalf of an estate. Under the Iraqi code, the Personal Status Court must appoint an individual known as a *qassam shar'i*, who determines the identity of the deceased and the heirs, and issues a report determining how the estate should be

divided. Hamoudi Decl. ¶ 37. Without the appointment and report of a *qassam shar'i*, no litigant may bring a civil suit on behalf of an estate. *Id.* ¶¶ 37-41.

The complaints do not allege that anyone has been appointed *qassam shar'i* in Iraq, much less that anyone has qualified to represent the estates in a Virginia court. Failure to obtain capacity to sue requires dismissal. *See Schieszler v. Ferrum Coll.*, 236 F. Supp. 2d 602, 613 (W.D. Va. 2002); *see also Myelle v. Am. Cyanamid Co.*, 57 F.3d 411, 413-14 (4th Cir. 1995).

X. THE CLAIMS AGAINST DEFENDANT PRINCE MUST BE DISMISSED.

The complaints do not allege that Mr. Prince directly injured or harmed any Plaintiff. The only conceivable basis for Mr. Prince to remain in this suit, therefore, is if he could somehow be held vicariously liable. For such liability to attach, however, Plaintiffs would have to establish not only the liability of USTC—the entity that contracted with the State Department to provide security services in Iraq—but also that there was some basis for ignoring the separate corporate existence of USTC and disregarding the corporate forms of several other entities. Plaintiffs have alleged no facts supporting this "extraordinary" remedy. *O'Hazza v. Executive Credit Corp.*, 431 S.E.2d 318, 320 (Va. 1993). To pierce the corporate veil, Plaintiffs would have to demonstrate, not only that an entity was treated "as a mere department, instrumentality, agency, etc.," but also that the entity "was a device or sham used to disguise wrongs, obscure fraud, or conceal crime." *Cheatle v. Rudd's Swimming Pool Supply Co.*, 360 S.E.2d 828, 831 (Va. 1987).

Plaintiffs' allegations in *Sa'adoon* concerning veil piercing are as follows: "Blackwater * * * [is] wholly owned and personally controlled by * * * [Mr.] Prince" (Sa'adoon Compl. ¶ 16); "Erik Prince personally controls all the [Xe] entities" (*id.*¶ 10); and that the various entities were formed "merely to reduce legal exposures and do not operate as individual and independent companies" (*id.*). Plaintiffs make slight variations of these allegations in *Albazzaz* (Compl. ¶¶ 7, 10, 16), *Abtan* (Compl. ¶¶ 1, 33, 38), *Hassoon* (Compl. ¶¶ 23, 27), and *Rabea* (Compl. ¶¶ 7, 10).

Assuming that Mr. Prince "owns" USTC, however, mere ownership obviously cannot suffice to pierce the corporate veil. That leaves only Plaintiffs' claim about supposed "control" by Mr. Prince and their assertion that "various" entities "were formed merely to reduce legal exposure." Sa'adoon Compl. ¶ 10. Even before *Iqbal*, these assertions would have been insufficient "conclusory allegations or legal conclusions" *Fernandez-Montes v. Allied Pilots Ass'n*, 987 F.2d 278, 284 (5th Cir. 1993). Plaintiffs allege no facts providing a plausible basis for applying the "extraordinary exception" to the rule of "immunity [for] stockholders." *Cheatle*, 360 S.E.2d at 831. Mr. Prince therefore must be dismissed as a Defendant. *See In re James River Coal Co.*, 360 B.R. 139, 173 (Bankr. E.D. Va. 2007); *Apace Commc'ns, Ltd. v. Burke*, 522 F. Supp. 2d 512, 520-523 (W.D.N.Y. 2007). Defendant Prince should therefore be dismissed from all of the suits.

XI. CORPORATE DEFENDANTS OTHER THAN USTC MUST BE DISMISSED.

Plaintiffs also have named as Defendants a number of corporate entities other than USTC—the company that entered into the contract with the State Department. Sa'adoon Compl. ¶¶ 8-13; Albazzaz Compl. ¶¶ 7-11; Abtan Compl. ¶¶ 34-41; Hassoon Compl. ¶¶ 23-29; Rabea Compl. ¶¶ 8-12. But they do not allege any wrongful act by these entities or (as explained in Point X, *supra*) any plausible argument for disregarding the corporate form. These defendants accordingly should be dismissed.

XII. CERTAIN PLAINTIFFS' NON-FEDERAL CLAIMS IN *SA'ADOON* AND *HASSOON* ARE BARRED BY THE STATUTE OF LIMITATIONS.

Plaintiffs' non-federal claims are governed by the "substantive law of * * * the place of the wrong"—Iraq—"and the procedural law of Virginia." *Jones*, 431 S.E.2d at 34. Because a statute of limitations is generally considered "procedural," Virginia law supplies the applicable

limitations period. *Id.* at 34-35.[21] Under this limitations period, several of the non-minor Plaintiffs' non-federal claims in *Sa'adoon* and *Hassoon* are time-barred.[22]

Virginia has a two-year statute of limitations for any "action for personal injuries, whatever the theory of recovery" (Va. Code Ann. § 8.01-243(A)),[23] and for wrongful death actions (*id.* § 8.01-244). Counts two through seven in *Sa'adoon* (Compl. ¶¶ 43-70) and counts three through eight in *Hassoon* (Compl. ¶¶ 99-126) are subject to this two-year limitations period. Under the parties' tolling agreement, these counts are barred to the extent the claims accrued before March 19, 2007 in *Sa'adoon* and April 1, 2007 in *Hassoon*.

The limitations period for a non-minor plaintiff begins to run "the date the injur[ies] [were] sustained" (Va. Code Ann. § 8.01-230) as long as "*any* injury or damage immediately results from the wrongful or negligent act of another." *Stone v. Ethan Allen, Inc.*, 350 S.E.2d 629, 632 (Va. 1986). Thus the non-minor Plaintiffs' claims in *Sa'adoon* that arise out of injuries sustained before March 19, 2007—those of the estate and the decedent's wife Wijdan Mohsin Saed—must be dismissed as untimely. The non-minor Plaintiffs' claims in *Hassoon* that arise out of injuries

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[21] This is the case unless the jurisdiction whose substantive law governs has a limitations period "directed so specifically to the right of action * * * as to warrant saying that the limitation qualifies the right." *Jones*, 431 S.E.2d at 35. Iraqi law has no such specific limitations period. *See* Hamoudi Decl. ¶¶ 28-29.

[22] The argument in this Point applies only to certain Plaintiffs (specified below) in the *Sa'adoon* and *Hassoon* cases. The parties have stipulated that the filing of the original *Sa'adoon* complaint in the Southern District of California (*see Sa'adoon et al. v. Xe et al.*, No. 09-cv-561-W-LSP (S.D. Cal., filed Mar. 19, 2009)) and the filing of the original *Hassoon* complaint in the Southern District of California 2009 (*see Hassoon et al. v. Xe et al.*, No. 09-cv-647 (S.D. Cal., filed Apr. 1, 2009)) tolled the statute of limitations.

[23] This statute of limitations applies to assault and battery claims (*Snyder v. City of Alexandria*, 870 F. Supp. 672, 678 (E.D. Va. 1994)), actions for emotional distress (*Michael v. Sentara Health Sys.*, 939 F. Supp. 1220, 1229 n.7 (E.D. Va. 1996)), and negligence (*Pearson v. White Ski Co.*, 228 F. Supp. 2d 705, 706, 709 (E.D. Va. 2002)).

sustained before April 1, 2007—those of the Estate of Sabah Salman Hassoon, Hamzia Ubaid Alwan, the Estate of Azhar Abdullah Ali, Ibtisam Abbass Jorrey, the Estate of Nibrass Mohammed Dawood, the Estate of Suhad Shakir Fadhil, Shakir Fadhil Ali, Maulood Mohammed Shathir Husein, Husam Hasan Jaber, the Estate of Khalis Kareem Ali Al Qaysi, and Hikmat Ali Husein Al Rubae—must likewise be dismissed as untimely.

XIII. PLAINTIFF AL RUBAE'S RICO CLAIM IN *HASSOON* IS TIME-BARRED.

The RICO claim of Hikmat Ali Husein Al Rubae—one of the Plaintiffs in *Hassoon* (Compl. ¶¶ 74, 127)—must also be dismissed because it is time-barred. A civil action under RICO is subject to a four-year statute of limitations, which begins to run when the claimant discovers his or her injury, regardless of whether or when the alleged "pattern" of racketeering activity is discovered. *Rotella v. Wood*, 528 U.S. 549, 549 (2000). Mr. Al Rubae's RICO claim is based on damage to his BMW alleged to have occurred in March 2005. Hassoon Compl. ¶¶ 79, 127. This damage therefore occurred before April 1, 2007, which is the applicable date under the tolling agreement between the parties. Accordingly, Mr. Al Rubae's RICO claim is time-barred.

XIV. DEFENDANTS ARE INCORRECTLY NAMED.

As Defendants have explained (*e.g.*, Sa'adoon Dkt. No. 2), most of the entities listed as Defendants are misnamed. There are no entities named "Prince Group" or "The Prince Group LLC," "EP Investments LLC," "Greystone," "Total Intelligence," "Xe," "Blackwater Worldwide," "Blackwater Lodge and Training Center," "Blackwater Target Systems," "Blackwater Security Consulting," or "Raven Development Group." Plaintiffs must correct these errors, as they have in the amended complaints that were filed in *Abtan* and *Hassoon*. "Blackwater Worldwide," moreover, was a doing-business-as name only, which in any event is no longer used. *See id.* "Blackwater Worldwide" should therefore be dismissed with prejudice

in *Sa'adoon*, *Albazzaz*, and *Rabea* (as Plaintiffs did voluntarily in the amended complaints in *Abtan* and *Hassoon*) because as a non-legal entity Blackwater Worldwide lacks the capacity to be sued. *See Yates v. Gayle*, No. 6:06cv455, 2007 WL 671584, at *4 (E.D. Tex. Feb. 27, 2007); Fed. R. Civ. P. 17(b); Fed. R. Civ. P. 21.

CONCLUSION

For the foregoing reasons, the complaints should be dismissed.

Dated: July 24, 2009

Respectfully submitted,

/s/
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ADDENDUM

For the Court's convenience and following the Court's direction, a list of the Points made in the foregoing Consolidated Memorandum of Law (referred to by their roman numeral in the Memorandum) is set forth below, with a specification of which complaints and counts (and where relevant which Plaintiffs) each Point covers.

Point I (the ATS claims must be dismissed)

- Point I, Sections A through C, and E (concerning the standards for liability under the ATS, the requirements for pleading war crimes, and punitive damages under the ATS) apply to the ATS counts alleging war crimes, which are contained in every complaint. Sa'adoon Compl. ¶¶ 37-42; Albazzaz Compl. ¶¶ 32-37; Abtan Compl. ¶¶ 75-81; Hassoon Compl. ¶¶ 89-94; Rabea Compl. ¶¶ 22-27.
- Point I, Sections A, B, D, and E (concerning the standards for liability under the ATS, the requirements for pleading summary execution, and punitive damages under the ATS) apply to the ATS counts alleging summary execution, which are contained in the *Abtan* complaint (¶¶ 82-86) and the *Hassoon* complaint (¶¶ 95-98).

Point II (the RICO claims must be dismissed)

- Point II applies to the counts alleging a violation of RICO, which are contained in the *Abtan* complaint (¶¶ 114-142) and the *Hassoon* complaint (¶¶ 127-153).

Point III (there is no basis for federal jurisdiction)

- Point III applies to all complaints.

Point IV (Plaintiffs' claims raise nonjusticiable political questions)

- Point IV, Sections A to B (concerning the political question doctrine generally) apply to the following counts:

- Count six in *Sa'adoon* (Compl. ¶¶ 37-64);
- Counts one through six in *Albazzaz* (Compl. ¶¶ 32-58) and *Rabea* (Compl. ¶¶ 22-48);
- Counts one through seven in *Abtan* (Compl. ¶¶ 75-108) and *Hassoon* (Compl. ¶¶ 89-120).

- Point IV, Section C.1 (applying the political question doctrine to allegations of unnecessary force) applies to the following counts:
  - Counts one through five in *Albazzaz* (Compl. ¶¶ 32-56) and *Rabea* (Compl. ¶¶ 22-45);
  - Counts one through six in *Abtan* (Compl. ¶¶ 75-105) and *Hassoon* (Compl. ¶¶ 89-117).
- Point IV, Section C.2 (applying the political question doctrine to allegations of negligent hiring and training) applies to the following counts:
  - Count six in *Sa'adoon* (Compl. ¶¶ 62-64), *Albazzaz* (Compl. ¶¶ 57-58) and *Rabea* (Compl. ¶¶ 46-48);
  - Count seven in *Abtan* (Compl. ¶¶ 106-108) and *Hassoon* (Compl. ¶¶ 118-120).

Point V (the non-federal claims are not actionable under applicable Iraqi law)

- Point V applies to the following counts:
  - Counts two through seven in *Sa'adoon* (Compl. ¶¶ 43-70), *Albazzaz* (Compl. ¶¶ 38-64), and *Rabea* (Compl. ¶¶ 28-54);
  - Counts three through eight in *Abtan* (Compl. ¶¶ 87-113) and *Hassoon* (Compl. ¶¶ 99-126).

Point VI (the non-federal claims would not be actionable under Virginia law)

- Point VI applies only to counts two through five in *Sa'adoon* (Compl. ¶¶ 43-61).

Point VII (hiring and training claims barred by the government contractor defense)

- Point VII applies to the following counts:
    - Count six in *Sa'adoon* (Compl. ¶¶ 62-64), *Albazzaz* (Compl. ¶¶ 57-58) and *Rabea* (Compl. ¶¶ 46-48);
    - Count seven in *Abtan* (Compl. ¶¶ 106-108) and *Hassoon* (Compl. ¶¶ 118-120).

Point VIII (hiring and training claims barred by the absolute immunity doctrine)

- Point VIII applies to the following counts:
    - Count six in *Sa'adoon* (Compl. ¶¶ 62-64), *Albazzaz* (Compl. ¶¶ 57-58) and *Rabea* (Compl. ¶¶ 46-48);
    - Count seven in *Abtan* (Compl. ¶¶ 106-108) and *Hassoon* (Compl. ¶¶ 118-120).

Point IX (the claims of the estate plaintiffs must be dismissed)

- Point IX applies to the wrongful death counts in every complaint, which are brought on behalf of the estate Plaintiffs. The estate Plaintiffs in each case are as follows:
    - Estate of Raheem Khalaf Sa'adoon. Sa'adoon Compl. ¶¶ 1, 4;
    - Estates of Ali Hussamaldeen Albazzaz, Kadhum Kayiz Aziz, and Sa'ad Raheem Jarallah. Albazzaz Compl. ¶¶ 3-5;
    - Estates of Himoud Saed Abtan, Usama Fadhil Abbass, Oday Ismail Ibraheem, Mushtaq Karim Abd Al-Razzaq, Qasim Mohamed Abbas Mahmoud, Mohamed Abbas Mahmoud, and Ghaniyah Hassan Ali. Abtan Compl. ¶¶ 4-7, 19-21, 23;

- Estates of Sabah Salman Hassoon, Azhar Abdullah Ali, Nibrass Mohammed Dawood, Akram Khalid Sa'ed Jasim, Suhad Shakir Fadhil, Husam Hasan Jaber, and Khalis Ali Al Qaysi. Hassoon Compl. ¶¶ 3, 6, 9, 11, 18, 21;
- Estate of Husain Salih Rabea. Rabea Compl. ¶ 5.

Point X (Defendant Prince must be dismissed)

- Point X applies to all counts in all complaints, which are asserted against Defendant Erik Prince.

Point XI (the corporate Defendants other than USTC must be dismissed)

- Point XI applies to all counts in all complaints, which are asserted against Defendants other than USTC.

Point XII (certain Plaintiffs' non-federal claims are untimely)

- Point XII applies to the following claims of the following Plaintiffs:
  - Counts two through seven in *Sa'adoon* (Compl. ¶¶ 43-70), asserted by the estate Plaintiff (Compl. ¶ 4) and Plaintiff Wijdan Mohsin Saed (Compl. ¶ 5);
  - Counts three through eight in *Hassoon* (Compl. ¶¶ 99-126), asserted by the Estate of Sabah Salman Hassoon (Compl. ¶ 3), Hamzia Ubaid Alwan (Compl. ¶ 4), the Estate of Azhar Abdullah Ali (Compl. ¶ 6), Ibtisam Abbass Jorrey (Compl. ¶ 7), the Estate of Nibrass Mohammed Dawood (Compl. ¶ 9), the Estate of Suhad Shakir Fadhil (Compl. ¶ 18), Shakir Fadhil Ali (Compl. ¶ 19), Maulood Mohammed Shathir Husein (Compl. ¶ 20), Husam Hasan Jaber (Compl. ¶ 21), the Estate of Khalis Kareem Ali Al Qaysi (Compl. ¶ 21), and Hikmat Ali Husein Al Rubae (Compl. ¶ 22).

Point XIII (a RICO Plaintiff's claim is untimely)

- Point XIII applies to the RICO claim asserted by Hikmat Ali Husein Al Rubae in *Hassoon*. Compl. ¶¶ 22, 74, 127.

Point XIV (the Defendants are misnamed and include one non-legal entity)

- Point XIV applies to the Defendants named in the complaints in *Sa'adoon*, *Albazzaz*, and *Rabea*.

CERTIFICATE OF SERVICE

I hereby certify that on this 24th day of July 2009, I will electronically file the foregoing Memorandum with the Clerk of Court using the CM/ECF system, which will then send a notification of such filing (NEF) to the following:

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In addition, I hereby certify that on this 24th day of July 2009, I sent the Appendix to Memorandum of Law by first class U.S. mail to the same party.

/s/
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