IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

ESTATE OF HIMOUD SAED ABTAN, *et al.*, Plaintiffs, v. BLACKWATER LODGE AND TRAINING CENTER, INC., *et al.*, Defendants.	)	Case No. 07-cv-1831 (RBW)
ESTATE OF ALI HUSSAMALDEEN ALBAZZAZ, *et al.*, Plaintiffs, v. BLACKWATER LODGE AND TRAINING CENTER, INC., *et al.*, Defendants.	)	Case No. 07-cv-2273 (RBW)

PLAINTIFFS' OPPOSITION TO DEFENDANTS' MOTION TO DISMISS THE SECOND AMENDED COMPLAINT IN CASE NO.1:07-CV-01831 AND THE AMENDED COMPLAINT IN CASE NO.2:07-CV-02273

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INTRODUCTION

Defendants renew their attempt to dismiss or transfer this action to the Eastern District of Virginia, a neighboring jurisdiction located ten miles away with statutory limitations on punitive damages, because of Plaintiffs' alleged "obvious error" in their selection of the District of Columbia as the chosen forum.[1] Despite the "error," this Court denied Defendants' first motion to dismiss on identical grounds.[2] The Second Amended Complaint in *Abtan v. Blackwater Lodge and Training Center* (SAC) and the Amended Complaint in *Albazzaz v. Blackwater Lodge and Training Center* (FAC) (together referred to as "Complaints") joining new plaintiffs add no new facts and no new causes of actions. Defendants' motion is simply a renewal and restatement of the earlier venue motion that this Court already denied. Accordingly, Plaintiffs' argument is essentially the same as in the Memorandum opposing Defendants' motion to dismiss the earlier complaints. These actions belong in this District because acts and omissions culminating in the wanton and senseless killing of innocent persons occurred here in the District of Columbia.

STATEMENT OF FACTS RELEVANT TO VENUE

The Complaints allege that the following acts and omissions occurred in the District of Columbia:

[1] Defendants are not seeking a transfer for reasons of convenience. Plaintiffs were willing to transfer this and the related action to the Eastern District of Virginia if the Defendants agreed not to argue that Virginia's statutory cap on damages should be applied to the claims. Defendants refused this offer. *See Declaration of William O'Neil ("O'Neil Declaration") at ¶ 2.*

[2] Minute Order granting Plaintiffs Motion for Leave to Amend and denying without prejudice Defendants' Motion to Dismiss for Lack of Venue (March 28, 2008).

A. The Complaints Allege the Shootings Occurred as a Result of Prince and Blackwater Contracting with the Department of State.

The Complaints allege that heavily-armed Blackwater shooters were in Iraq killing innocents because Blackwater was providing services to the Department of State. *SAC* ¶¶ *31-33*; *FAC* ¶¶ *16-17*.The Complaints allege that the Defendants routinely conduct business and enter into contracts in this District. *SAC* ¶ *28*; *FAC* ¶ *13* .

They allege that Erik Prince, who completely controls the web of Blackwater companies, has earned and is continuing to earn hundreds of millions of dollars (already exceeding one billion dollars) from doing business with the United States federal government. S*AC* ¶¶ *20, 72, 79-80; FAC*¶¶ *13, 50, 57-58.*

The relevant Department of State office is located in Washington, D.C. at 2201 C Street, N.W., Washington, D.C. *See O'Neil Declaration at* ¶ *3, Exhibit 1*. Various individuals with reason to know have stated that Blackwater has or had an office either in or near the Department of State, but Plaintiffs have been unable to confirm these claims. *See O'Neil Declaration at* ¶ *4*. Knowledgeable Department of State officials testified before Congress that the State Department supervised Blackwater from the District of Columbia:

> High Threat Protection (HTP) Program Office **(*in Washington*)** individually reviews and approves candidates for key leadership positions. The contractor certifies that all other personnel meet the requirements. The Program Office may review qualifications and remove individuals not meeting contract requirements at any time…. The DS HTP program office **(*in Washington*)** meets weekly with contractor management and conducts periodic Program Management/Contract Compliance Reviews of task order operations at posts. In addition, the HTP office conducts announced and unannounced visits to contractor training

> facilities to monitor compliance with contract-training requirements.

See O'Neil Declaration at ¶ 5, attaching Statement of Richard J. Griffin, Assistant Secretary of State for Diplomatic Security, Oct. 2, 2007 (emphasis added).

The Complaints allege that Blackwater "routinely send heavily-armed shooters into the streets of Baghdad with the knowledge that some of those shooters are chemically influenced by steroids and other judgment-altering substances." This knowledge was obtained by Defendants here in this District. Defendants knew many of the Blackwater shooters were using steroids because the Department of State previously investigated that issue, and found significant steroid use. *See O'Neil Declaration at ¶ 6.*

B. The Complaints Allege Prince and Blackwater Made Misrepresentations in this District To Procure Business from the Department of State.

The Complaints allege that Defendants falsely held themselves out to the United States as operating legitimate companies, rather than revealing that they are mercenary or quasi-mercenary companies, in order to procure government business. *SA C ¶¶ 73-77; FAC ¶¶ 51-55*.

C. The Complaints Allege Blackwater Misled Congress by Falsely Underreporting Blackwater's Excessive and Unjustified Use of Force.

The Complaints allege that the many Blackwater shootings are being investigated by the Congressional Committee on Oversight and Government Reform ("Committee"). S*AC ¶ 68; FAC ¶ 48.*. The Complaints allege that Prince and Blackwater produced to that Committee approximately 437 internal incident reports that reveal that Blackwater forces consistently use excessive and unnecessary force. *SAC ¶¶ 46, 68; FAC ¶¶ 26, 48*. The Complaints allege that Blackwater employees told a Washington Post reporter that

Blackwater documents produced to the Oversight Committee underreported the actual number of shootings. *SAC ¶ 55; FAC ¶ 34*.

D. The Complaints Allege the Executive Branch Opened a Criminal Investigation of the Blackwater Shootings in this District.

The Complaints allege that Blackwater's actions are being investigated by the United States Department of Justice and the United States Federal Bureau of Investigation.***SAC ¶ 65; FAC ¶ 44.*** This investigation is occurring in this District, not in the Eastern District of Virginia. The Department of Justice has convened the Grand Jury in this jurisdiction, not the Eastern District of Virginia. The Grand Jury has subpoenaed witnesses to testify in this District. *See O'Neil Declaration at ¶ 7*. An Assistant United States Attorney from this District, not the Eastern District of Virginia, communicated with the victims' families about the Department's need for the automobiles as physical evidence. *See O'Neil Declaration at ¶ 8*.

E. Defendants' Renewed Motion To Dismiss Fails To Discuss Any Activities by Prince and the Blackwater Companies in this District.

The Defendants' Motion To Dismiss is noticeably silent on facts relating to venue, such as whether Prince and the other Defendants made telephone calls, attending meetings, and otherwise engaged in conduct in this District that led to the award of the Department of State contracts. The Defendants' Motion To Dismiss does not deny that both Erik Prince and the Blackwater companies engaged in continuous contacts with Department of State officials and others within this District in order to win and keep the lucrative contracts that resulted in this action. The Defendants' Motion To Dismiss does

not challenge this Court's ability to exercise personal jurisdiction over all of the Defendants.[3]

ARGUMENT

These are actions alleging that Erik Prince and his Blackwater companies are lawless mercenaries who have obtained federal government business under the false pretense of operating lawful enterprises. These are actions alleging that Erik Prince and his Blackwater companies wrongfully procured a contract and earned more than one billion dollars from the United States Department of State by making misrepresentations in this District. These are actions alleging that Erik Prince and his Blackwater companies wrongfully permitted "shooters" known to be on steroids to repeatedly and routinely use excessive force against Iraqis. These are actions alleging that Erik Prince and his Blackwater companies are affirmatively misleading Congress about the extent of their consistent and excessive use of force.

The District of Columbia, as the seat of the federal government (including the Department of State), is the place where a substantial number of acts and omissions critical to Plaintiffs' claims occurred. Indeed, but for acts and omissions by Prince and

[3] This failure to challenge jurisdiction is dispositive on the venue issue for all defendants except Erik Prince because defendants other than individuals who fail to challenge jurisdiction "lose their venue argument because they are deemed to reside in the district in which they are subject to personal jurisdiction." *Halliburton Energy Svcs. Inc. v. N.L. Industries*, No. Civ. H-05-4160, 2006 WL 3949170 at *11 (S.D.Tex. Jul. 25, 2006); *see also KMR Capital, L.L.C., v. Bronco Energy Fund, Inc.*, No. 06-189, 2006 WL 4007922, at *5, n. 69 (W.D.Texas July 11, 2006) (collecting cases); *Centerville ALF, Inc. v. Balanced Care Corp.*, 197 F.Supp.2d 1039, 1048 (S.D.Ohio 2002) (defendant who concedes a district court's personal jurisdiction by failing to raise a 12(b)(2) defense in motion to dismiss is deemed to reside in district for purposes of venue); *Chavis v. A-1 Limousine*, No. 95 Civ. 9560, 1998 WL 78290, at *3 (S.D.N.Y. Feb. 24, 1998) (defendants' concession that they are subject to personal jurisdiction in district establishes that venue is proper); *Soli-Tech, Inc. v. Halliburton Co*., No. 91-CV-10232-BC, 1993 WL 315358 at *2 (E.D.Mich. Jan. 26, 1993) ("Because Defendants did not raise personal jurisdiction as a defense in their 'first defensive move,' that defense is waived. Accordingly, defendant 'resides' within this Court's judicial district and as such venue is proper under 28 U.S.C. §1391(c).").

the Blackwater companies in the District of Columbia, the innocents who lost their lives in Nisoor Square would be alive today.

I. PLAINTIFFS' CHOICE OF FORUM IS ENTITLED TO DEFERENCE.

Defendants' venue preference is the Eastern District of Virginia, a forum that caps punitive damages and is not the forum chosen by Plaintiffs.(See footnote one, above.) While Plaintiffs do not dispute that venue would be proper in Virginia under Section 1391(b)(1), it is not the venue Plaintiffs have chosen. Plaintiffs, and not Defendants, are entitled to deference on their forum choice as long as they select a venue permitted by 28 U.S.C. § 1391(b). *Great Socialist People's Libyan Arab Jamahiraya v. Miski*, 496 F.Supp.2d 137, 144 (D.D.C. 2007); *Lentz v. Eli Lilly & Co.*, 464 F.Supp.2d 35, 38 (D.D.C.2006) (*citing Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 255, 102 S.Ct. 252, 70 L.Ed.2d 419 (1981)); *see also Liban v. Churchey Group II*, 305 F.Supp.2d 136, 141 (D.D.C.2004) (stating that "courts generally must afford substantial deference to the plaintiff's choice of forum") (citation omitted).

II. VENUE IS PROPER IN THIS DISTRICT UNDER 28 U.S.C. §1391(b)(2).

Defendants and Plaintiffs agree that venue is proper in the District of Columbia if a substantial part of the acts and omissions relevant to the claim occurred in the District of Columbia. Defendants, however, mistakenly conclude that venue is improper because the alleged tortious actions and the alleged injuries occurred in Iraq and none of the acts or omissions related to the incidents occurred in the District of Columbia. As to this crucial factual determination, Defendants are simply wrong.

First, as a matter of procedure, Plaintiffs are not required to plead the facts that support venue under 28 U.S.C. §1391(b)(2). *See Fed.R.Civ.P., Adv. Comm. Notes to*

Form 2, at ¶ 3 ("Since improper venue is a matter of defense, it is not necessary for plaintiff to include allegations showing the venue to be proper."); *15 Wright & Miller, Federal Practice & Procedure, at §3826.* This Court is free to consider all facts supporting venue even if not specifically alleged in the complaint. *See S.E.C. v. Ernst & Young,* 775 F.Supp. 411 (D.D.C. 1991) (refusing to dismiss for failure to plead venue as plaintiff need not plead venue; rather, lack of venue is an affirmative defense).

Second, as a matter of law, this Court need not decide whether ***more*** acts and omissions resulting in the claim occurred in Iraq or the District of Columbia. "Nothing in section 1391(b)(2) mandates that a plaintiff bring suit in the district where the most substantial portion of the relevant events occurred, nor does it require a plaintiff to establish that every event that supports an element of a claim occurred in the district where venue is sought." *Modaressi v. Vedadi*, 441 F.Supp.2d 51, 57 (D.D.C. 2006) (emphasis in original). *See also Sharp Elec. Corp.v. Hayman Cash Register Co.*, 655 F.2d 1228, 1229 (D.C.Cir.1981)(supporting plaintiff's choice of venue "if the activities in the forum district were not substantial.")[4]

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[4] In *Defendants' Reply in Support of their Motion to Dismiss the Amended Complaint for Lack of Venue and to Dismiss Non-Legal Entities*, page 6, Defendants question whether *Sharp* remains good law after the 1990 revision of Section 1391(b)(2). Plaintiffs disagree for three reasons. First, the 1990 Amendments to Section 1391(b) only reinforced the holding of *Sharp*, thus strengthening the reasoning of that case. *See* 28 U.S.C. §1391 (2000) (noting 1990 Amendments that provided for proper venue in "any district in which a substantial part of the events or omissions giving rise to the claim occurred"); *Sharp*, 655 F.2d. at 1229 (supporting plaintiff's choice of venue "if the activities that transpired in the forum district were not insubstantial"). Second, although Defendants characterize the *Sharp* holding as limited to "ensur[ing] the existence of at least one forum," *Reply* at 6, *Sharp* is in fact most cited as an authority for determinations of when venue is proper, the same grounds for which Plaintiffs cite the case. *See, e.g., Mathis v. Geo Group, Inc.*, 535 F.Supp.2d 83, 86 (D.D.C. 2008) (citing *Sharp* as authority in deciding a motion for §1391 venue transfer). Finally, although Defendants

Rather, as noted in *FC Investment Group v. Lichtenstein*, 441 F.Supp.2d 3, 11 (D.D.C. 2006), the venue statute, amended in 1990, no longer requires a court to determine the "best district," or the district with the "most significant" connection to the claim. Instead, the statute assumes by its terms that there can be more than one district in which a substantial part of the events giving rise to the claim occurred. *See generally Wright & Miller, Federal Practice and Procedure §3806 (1994 Supp.).*

Venue is proper in the District of Columbia if a substantial part of the acts and omissions relevant to the claim occurred in the District of Columbia. Venue does not become improper merely because a substantial part of the acts and omissions occurred in another district or, in this instance, a foreign country, Iraq. *FC Investment Group v. Lichtenstein*, 441 F.Supp.2d 3, 11 (D.D.C. 2006) (citing, among others, *Setco Enterprises Corp. v. Robbins,* 19 F.3d 1278, 1281 (8th Cir. 1994)) (venue not improper even if another district the site of more acts and omissions.)

As explained by the Court of Appeals, the "forum court should not oppose the plaintiff's choice of venue if the activities that transpired in the forum district were not insubstantial in relation to the totality of events giving rise to the plaintiff's grievance and if the forum is generally convenient for all litigants." *Sharp* at 1229; *see also Great Socialist People's Libyan Arab Jamahiraya v. Miski*, 496 F.Supp.2d 137, 144 (D.D.C. 2007). In evaluating where the event occurred for purposes of venue, "a court should not focus only on those matters that are in dispute or that directly led to the filing of the

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question the viability of *Sharp*, the case has been repeatedly cited as good law by the D.C. District Court since the 1990 amendments to Section 1391. *See, e.g., Mathis, supra*; *Great Socialist People's Libyan Arab Jamahiriya v. Miski*, 469 F.Supp.2d at 142-43 (relying on *Sharp*'s reasoning in deferring to plaintiff's choice of venue).

action," but should review "the entire sequence of events underlying the claim." *FC Investment Group*, 441 F.Supp.2d at 11 (citing *Mitrano v. Hawes*, 377 F.3d 402, 405 (4th Cir. 2004)).

Third, and most importantly, as a matter of fact, Defendants are simply wrong in stating that Plaintiffs fail to allege any events or omissions that give rise to Plaintiffs' claims occurred in this District, but rather in Iraq alone.[5] *Def. Motion page 3.* As set forth in the Statement of Facts, above, Plaintiffs allege a litany of conduct and misconduct that occurred in the District of Columbia. Plaintiffs allege the essential Blackwater government contracts were entered into with government agencies in this District, were supervised by government officials in this District, and were paid by funds located in this District.

Defendants have not denied, and cannot deny, that they engaged in series of communications with Department of State and other government officials located in the District of Columbia designed to procure and keep their government business. All of these communications suffice to serve as basis for venue, because they were essential links in a chain of events culminating in the shootings in Nisoor Square. The "substantial part of the events or omissions" test is satisfied "by a communication transmitted to or from the district in which the cause of action was filed, given a sufficient relationship between the communication and the cause of action.'" *FC Investment Group,* 441 F.Supp.2d at 11 (quoting *U.S. Titan, Inc. v. Guangzhou Zhen Hua Shipping Co.*, 241 F.3d 135, 153-54 (2d Cir.2001)).

[5] Notwithstanding their claim that none of the events or acts that give rise to Plaintiffs' claims took place in the United States, footnote 6 of Defendants' Motion states that the negligent hiring, training and supervision count in the Complaints conceivably could have occurred outside Iraq, although not in the Distict of Columbia.

Here, that relationship exists. Had Erik Prince and the Blackwater companies refrained from seeking that the Department of State award contracts, and refrained from persuading the Department of State to continue to award such contracts even in the fact of compelling evidence that a substantial number of Blackwater shooters were using steroids, the innocents who were gunned down at Nisoor and Al Watahba Squares would still be alive today.

III. DISMISSAL IS NOT APPROPRIATE UNTIL PLAINTIFFS HAVE CONDUCTED VENUE DISCOVERY.

Defendants aggressively assert that this Court should dismiss this action on the grounds that the District of Columbia is not a proper venue and that discovery is not needed because "Plaintiffs have again filed complaints without alleging any plausible basis for venue in this Court." *Defendants' Motion at 5*. To be sure, this Court would not have denied Defendants' motion to dimiss if no "plausible basis" for venue existed. *Defendants' Motion at 2, 4 and 9.* Therefore, Defendants' aggressive assertion ignores the controlling law establishing that Plaintiffs are entitled to discovery to establish additional facts supporting their forum choice if factual issues raise questions regarding the Plaintiffs chosen venue. *See Oppenheimer Fund, Inc. v. Sanders*, 437 U.S. 340, 351 n. 13 (1978) ("For example, where issues arise as to jurisdiction or venue, discovery is available to ascertain the bearing on such issues."); *Franz v. United States*, 591 F.Supp. 374, 376 (D.D.C. 1984) (noting that "parties were allowed full discovery for the purpose of ascertaining facts relevant to the venue issue"); *Brumley v. Dep't of Labor*, No. 87-3471, 1988 WL 75926, at *2 (D.D.C. July 13, 1988) (allowing discovery as to jurisdiction and venue); *Diemer v. United States Postal Service*, No. 86-0647, 1987 WL 9037, at *1 (D.D.C. Mar. 19, 1987) (noting previous discovery as to venue).

Such discovery is especially appropriate when, as in this case, "venue facts are within the knowledge of the defendant" which "may not be known to the plaintiff." *Ferraioli v. Cantor*, 259 F.Supp. 842, 846 (S.D.N.Y 1966). Here, Defendants are not publicly traded companies, and knowledge about their specific activities in the District of Columbia is not readily available. For example, although Defendants assert that the contract was issued in Virginia by the Office of Acquisition Management of the U.S. Department of State, (Roitz Dec. at ¶ 12), Defendants fail to attach the contract itself. Total Intelligence Solutions similarly identifies contracts formed with government entities or businesses in Virginia, but fails to identify contracts formed with government entities or businesses located in this District. (Devost Dec. at ¶ 5). Defendants' declarations simply skirt the key questions, and utterly fail to disavow or discuss Defendants conduct and activities in this District.[6]

IV. DEFENDANTS FAIL TO MEET THE STANDARD FOR TRANSFERING THIS ACTION.

Defendants' Motion both disavows and seeks transfer to the Eastern District of Virginia. *Compare Defendants' Motion at pp. 2 and 6* ("claims should be dismissed, not transferred"), *p. 11* (it is appropriate to dismiss rather than transfer…") *with id. at p. 13* (Court should transfer the case to the Eastern District of Virginia). Here, Defendants do not articulate any reasons why this Court should use its discretionary power to transfer

[6] In the alternative, and only to the extent necessary, Plaintiffs will voluntary dismiss without prejudice claims against Defendant Erik Prince. Under Federal Rule of Civil Procedure 41(a)(1), such a dismissal would have the effect of ensuring venue in this Court under Section 1391(b)(1) because the other Defendants have all conceded personal jurisdiction and thus reside in this District. *See* footnote 3, above. Rule 41(a)(1) "explicitly allows a plaintiff to voluntarily dismiss its case provided that the defendant has not served the adverse party with an answer or a motion for summary judgment." *Black Ride III, Inc. v. West*, No. 04-1027, 2005 WL 1522055, at *3 (D.D.C. June 28, 2005) (citing *Chambers v. Gesell*, 120 F.R.D. 1, 2 (D.D.C. 1998)).

the action pursuant to 28 U.S.C. § 1404(a). *Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 257, 102 S.Ct. 252, 70 L.Ed.2d 419 (1981) (recognizing court power and stating standard for reviewing request for transfer).

Section 1404(a) permits transfers for the convenience of parties and witnesses. However, "[i]n assessing the convenience to the parties [in the context] of the two potentially proper venues, the court recognizes that the plaintiff's choice of forum is usually accorded substantial deference in the venue analysis." *Reiffin v. Microsoft Corp.*, 104 F.Supp.2d 48, 52 (D.D.C.2000) (citations omitted).

Here, Defendants do not – and cannot – allege that the parties and witnesses suffer any inconvenience given the reality that this District courthouse is less than 10 miles from the Eastern District of Virginia courthouse. *See Modaressi*, 441 F.Supp.2d at 57 n. 7 (noting that in a case where both parties resided in Maryland, the geographic distance between the District of Columbia and the District of Maryland "is far too small to present anything more than minor practical difficulties for the parties or their witnesses" and thus did not defeat the public-private interests that otherwise weighed against the transfer); *see also DSMC v. Convera*, 273 F.Supp.2d 14, 21 (D.D.C. 2002) (the effort to move the case to the "abutting" Eastern District of Virginia is itself evidence that no such inconvenience would arise from litigating in the District of Columbia and disproves any claim of inconvenience).[7]

Defendants' half-hearted effort to transfer the case cannot nullify the plaintiffs' choice of forum. *See Sheraton Operating Corp. v. Just Corporate Travel*, 984 F.Supp. 22,

[7] Moreover, any claims of inconvenience are betrayed by the fact that several defendants brought their own suit in the District of Columbia Superior Court on an unrelated matter only one day after defendants filed their motion to dismiss. *See O'Neil Dec. at ¶9.*

26 (D.D.C.1997) (stating that "even if a transfer would significantly benefit the defendant, the Court will not grant the motion if the result merely would shift the inconvenience from the defendant to the plaintiff; the net convenience must increase") (quoting *Kirschner Brothers Oil, Inc. v. Pannill*, 697 F.Supp. 804, 807 (D.Del.1988)).

CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request that Defendants' motion to dismiss be denied.

Dated: April 22, 2008

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CERTIFICATE OF SERVICE

I, Katherine R. Hawkins, do hereby certify that on the 22nd day of April 2008, I caused true and correct copies of Plaintiffs' Opposition To Defendants Motion to Dismiss to be served electronically via the Court's cm/ecf system upon the following individuals at the address indicated:

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