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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

SALEH, an individual; SAMI ABBAS AL RAWI, an individual; MWAFAQ SAMI ABBAS AL RAWI, an individual; AHMED, an individual; ISMAEL, an individual; NEISEF, an individual; ESTATE OF IBRAHIEM, the heirs and estate of an individual; RASHEED, an individual; JOHN DOE NO. 1; JANE DOE NO. 2; A CLASS OF PERSONS SIMILARLY SITUATED, KNOWN HEREINAFTER AS JOHN and JANE DOES NOS. 3-1050,

Plaintiffs,

v.

TITAN CORPORATION, a Delaware Corporation; ADEL NAHKLA, a Titan employee located in Abu Ghraib, Iraq; CACI INTERNATIONAL INC., a Delaware Corporation; CACI, INC.-FEDERAL, a Delaware Corporation; CACI N.V., a Netherlands corporation; STEPHEN A. STEFANOWICZ, and JOHN B. ISRAEL,

Defendants.

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

REPLY MEMORANDUM OF DEFENDANTS CACI INTERNATIONAL INC, CACI, INC. -FEDERAL, AND CACI N.V. IN SUPPORT OF THEIR MOTION TO DISMISS PLAINTIFFS' SECOND AMENDED COMPLAINT

DATE: FEBRUARY 7, 2005
TIME: 2:00 P.M.
CTRM: 5

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83

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

MISCELLANEOUS

I. INTRODUCTION

Controlling precedent requires dismissal of all of Plaintiffs' claims as a matter of law. Plaintiffs, by their own admission, seek to hold the CACI Defendants[1] liable for injuries allegedly incurred during their detention by the United States in a combat zone.[2] These claims are precisely the sort of wartime reparations claims that present nonjusticiable political questions committed solely to the political branches for determination. Moreover, even if Plaintiffs' claims were not barred by the political question doctrine, it is clear that Plaintiffs' tort claims are preempted and their other claims fail as a matter of law. Therefore, the Court should dismiss Plaintiffs' Complaint in its entirety.

II. ANALYSIS

A. The Political Question Doctrine Bars Plaintiffs' Claims

In an effort to stave off dismissal of their Second Amended Complaint ("Complaint" or "SAC"), Plaintiffs argue that their claims do not present nonjusticiable political questions. Plaintiffs' opposition, however, mischaracterizes the nature of their own claims against Defendants in an attempt to overcome the obvious connection between Plaintiffs' claims and the United States' policies and activities in Iraq. Plaintiffs' arguments misconstrue the relevant case precedent, in which courts repeatedly have found that wartime reparations claims of the sort asserted by Plaintiffs are issues reserved to the political branches and not the courts. However,

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[1] The term "CACI Defendants" includes Defendants CACI International Inc, CACI, INC. – FEDERAL, and CACI N.V.

[2] Plaintiffs oppose some of the CACI Defendants' arguments in their Opposition to the CACI Defendants' Motion to Dismiss, and oppose other of the CACI Defendants' arguments in the Opposition to the Motion to Dismiss filed by Defendant Titan Corporation ("Titan"). For ease of reference, the CACI Defendants' will refer to Plaintiffs' Opposition to the CACI Defendants' Motion to Dismiss as the "CACI Opposition" or "CACI Opp." and will refer to Plaintiffs' Opposition to Titan's Motion to Dismiss as the "Titan Opposition" or "Titan Opp."

Plaintiffs' arguments cannot change either the nature of their claims or the case law holding their claims to be nonjusticiable.

1. Plaintiffs Seek To Hold Defendants Liable For Injuries Incurred as a Result of the United States' Conduct of the War in Iraq

Plaintiffs claim in the CACI Opposition that "Plaintiffs are asking this Court to review decisions and actions taken by American corporations, *not decisions made by the military.*" CACI Opp. at 10 (emphasis added). That statement is belied by the allegations of the SAC. The central premise of the SAC is exactly that which they now deny: that Plaintiffs supposedly were injured as a result of their detention by the United States in a combat detention facility and that Defendants should be held liable in a court action to the extent that such injuries are proven.

Plaintiffs' Complaint alleges that "Defendants and certain government officials conspired and formed an ongoing criminal enterprise designed to flout the United States domestic and international laws prohibiting the torture, abuse, and other mistreatment of the Plaintiffs." SAC ¶ 80. In their RICO Case Statement, which is treated as part of the Complaint, *see* Local Civ. R. 11.1(a), Plaintiffs allege Defendants conspired with "government officials [who] adopted and/or implemented policies and practices that led to detainees being kidnapped, tortured, threatened with death and bodily harm, physically and mentally permanently disabled, and, in some cases murdered." RICO Case Stmt. at 4. Plaintiffs further allege that the list of "certain government officials" with whom Defendants supposedly conspired reaches the highest levels of the federal government. Plaintiffs allege that the term "Torture Conspirators," as used in their Complaint, includes Secretary of Defense Donald H. Rumsfeld, Undersecretary of Defense for Policy Douglas J. Feith, Undersecretary of Defense for Intelligence Stephen A. Cambone, and Defense Department Foreign Affairs Specialist Mark Jacobson. RICO Case Stmt. at 4. Plaintiffs also allege that this supposed "Torture Conspiracy" include high-level military officers, including

four United States Army general officers, one of whom, General Ricardo Sanchez, was the senior military officer in Iraq. RICO Case Stmt. at 4-5.

Despite their arguments to the contrary, Plaintiffs' Complaint explicitly and repeatedly alleges that Defendants are liable for the actions of any of the persons encompassed by Plaintiffs' so-called "Torture Conspiracy,"[3] a list that includes at least thirty-five Defense Department officials and military personnel. RICO Case Stmt, at 4-5. Indeed, to drive home that their claims against Defendants are intertwined with the United States' policy in Iraq, Plaintiffs allege in Counts XI, XII, and XIII that Defendants are liable for violations of Plaintiffs' supposed constitutional rights because Defendants "*were conspiring with certain public officials, including certain military officials, and other persons acting in an official capacity on behalf of the United States.*" SAC ¶¶ 257, 263, 269 (emphasis added).[4]

In their Opposition to Titan's Motion to Dismiss, Plaintiffs again confirm that they are seeking to hold Defendants liable for the actions of the United States military in conducting

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[3] *See* SAC ¶ 199 (alleging Defendants liable on a co-conspirator theory for actions of "certain government officials" in causing supposed summary executions in Iraq); SAC ¶ 215 (alleging Defendants liable on a co-conspirator theory for actions of "certain government officials" in treating detainees cruelly or inhumanely); SAC ¶ 223 (alleging Defendants liable on a co-conspirator theory for actions of "certain government officials" in causing enforced disappearances); SAC ¶ 230 (alleging Defendants liable on a co-conspirator theory for actions of "certain government officials" in arbitrarily detaining Plaintiffs); SAC ¶ 236 (alleging Defendants liable on a co-conspirator theory for actions of "certain government officials" in committing war crimes); SAC ¶ 245 (alleging Defendants liable on a co-conspirator theory for actions of "certain government officials" in committing crimes against humanity); SAC ¶ 252 (alleging Defendants liable on a co-conspirator theory for actions of "certain government officials" in violating Geneva Conventions).

[4] Because claims of constitutional violations can never proceed against corporations, Plaintiffs have withdrawn their so-called "constitutional" claims against the CACI Defendants, but continue to assert them against the individual Defendants. *See* CACI Opp. at 40 n.25.

operations in Iraq. In response to Titan's argument that some counts must be dismissed because the conduct alleged was the act of the United States military and not Defendants, Plaintiffs state:

> Titan also argues that there is an insufficient factual basis to hold it responsible for enforced disappearance. *Titan simply ignores the allegations that Titan was part of a conspiracy and therefore liable for actions taken by co-conspirators.*

Titan Opp. at 23 n.29 (emphasis added).

Plaintiffs similarly argue in their Titan Opposition that "Titan is liable for the acts of its employees and their co-conspirators (soldiers, government officials) acting to further the Torture Conspiracy." Titan Opp. at 9; *see also* Titan Opp. at 9-10 ("Here, Plaintiffs alleged facts sufficient to support their claims under a theory that the soldiers and government officials were acting as agents of Titan and the Torture Conspiracy when they tortured detainees. . . . In sum, Titan is liable for the acts of the Torture Conspirators even if it could show that a given tort conferred no benefit on the venture or that the torts violated express joint venture policies adopted by the Torture Conspirators."); Titan Opp. at 39 ("Plaintiffs alleged that CACI and Titan acted as a personnel department for the United States military.").

Thus, Plaintiffs' assertion that their claims are not intertwined with the United States' prosecution of the war in Iraq is plainly inconsistent with the substance of their previous pleadings and with their Titan Opposition. At bottom, Plaintiffs seek to hold Defendants liable for the manner in which the United States government, as well as contractor employees working under the command of the United States military, detained and interrogated persons held in a combat zone detention facility. As discussed below and in the CACI Defendants' Motion to Dismiss, these are precisely the type of wartime reparations claims that courts have found to involve nonjusticiable political questions.

2. Plaintiffs' Opposition Misconstrues the Relevant Case Law

In their Motion to Dismiss, the CACI Defendants made two basic points concerning case law applying the political question doctrine to wartime damages claims. First, the CACI Defendants noted that American courts for more than two centuries have refused to entertain claims for wartime reparations, finding such questions more properly committed to diplomacy and the discretion of the political branches.[5] Second, the CACI Defendants observed that many courts, including several within this Circuit, have in recent years reaffirmed the bedrock principle that wartime reparations claims present nonjusticiable political questions that the courts have no proper constitutional role in resolving. *See* CACI Mem. at 6-10. Plaintiffs' efforts to avoid these clear lines of precedent are unavailing.

In their Opposition, Plaintiffs make no effort to distinguish the historical precedent cited by the CACI Defendants, nor could they. The United States Supreme Court held squarely in *Ware v. Hylton*, 3 U.S. (3 Dall.) 199, 230 (1796), that British subjects could not sue private parties to recover property seized during the American Revolution because such claims were properly resolved through diplomacy between the affected governments. Similarly, in *Perrin v. United States*, 4 Ct. Cl. 543 (1868), *aff'd*, 79 U.S. 315 (1870), the court held, in a decision affirmed by the Supreme Court, that plaintiffs could not recover damages for injury to their property as a result of the United States' intentional destruction of a town in Nicaragua, *even if such destruction violated the law of war*, because such claims present "international political questions." *Id.* at 544. Instead, Plaintiffs argue that other Supreme Court decisions undercut this principle, but those cases do not support Plaintiffs' position.

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[5] *Perrin v. United States*, 4 Ct. Cl. 543 (1868) (holding that plaintiffs could not recover damages for injury to their property caused by the United States' intentional destruction of a town in Nicaragua even if such destruction violated the law of war), *aff'd*, 79 U.S. 315 (1870).

For example, Plaintiffs cite *Ford v. Surget*, 97 U.S. 594 (1878), for the proposition that a "soldier was not exempt from civil liability for trespass and destruction of cattle if his act [is] not done in accordance with the usages of civilized warfare." CACI Opp. at 10. Putting aside that the case has *nothing* to do with cattle, the Supreme Court in *Ford* actually reinforced the unavailability of civil recompense for wartime injuries. In *Ford*, the defendant sought damages for a Confederate general's destruction of his cotton to prevent its seizure by the United States Army. In concluding that no civil damages claim could lie against the former Confederate general, the Court focused upon the fundamental fact that no damages claim would have been available if the cotton had been destroyed by the *United States Army*. *Id.* at 605 ("[The cotton] was therefore liable, at the time, to seizure or destruction by the Federal army, without regard to the individual sentiments of its owner . . . ."). From there, the Court observed that the Confederate Army's destruction of the cotton was an "act of war upon the part of the military forces of the rebellion, *for which the person executing such orders was relieved from civil responsibility at the suit of the owner voluntarily residing at the time within the lines of the insurrection*. *Id.* (emphasis added).

Plaintiffs similarly rely on *Freeland v. Williams*, 131 U.S. 405 (1889), but that case provides that military personnel are protected "from civil liability for any act done in the prosecution of a war." *Id.* at 417. Plaintiffs also rely on *Mitchell v. Harmony*, 54 U.S. (13 How.) 115, 133 (1851), a case that not only dealt with the rights of American citizens, but also has been criticized in subsequent Supreme Court decisions as employing language that is "far broader than the holdings." *United States v. Caltex (Philippines)*, 344 U.S. 149, 153 (1952); *see also El-Shifa Pharm. Indus. v. United States*, 378 F.3d 1346, 1360 (Fed. Cir. 2004) (noting that *Caltex*, and not *Mitchell*, correctly states the law on government liability for wartime losses).

Finally, *Little v. Barreme*, 6 U.S. (2 Cranch) 170, 173 (1804), did not involve losses incurred in a combat theater. Rather, at issue in *Little* was civil liability for damage to vessels belonging to citizens of neutral countries not in a combat theater, but on the high seas. As the Court made clear in *Ford*, damages incurred as a result of a wartime seizure in neutral waters are qualitatively different from injuries suffered by a person – such as Plaintiffs – voluntarily present in a combat theater. *Ford*, 97 U.S. at 604 (noting that "all the people residing within [enemy territory] were, according to public law, and for all purposes connected with the prosecution of the war, liable to be treated by the United States, pending the war and while they remained within the lines of the insurrection, as enemies, without reference to their personal sentiments and dispositions"). Thus, cases concerned with the rights of neutrals in neutral territory are simply inapplicable to questions relating to the availability of a civil damages action for injuries suffered in a combat theater as a result of the United States' prosecution of a war.

Plaintiffs' also seek to wave off the multitude of recent reparations cases as being limited to the Holocaust context. First, Plaintiffs argue that the more recent reparations cases are different because "Defendants here are private parties who, unlike the defendants in the holocaust cases, were not acting pursuant to official government policy." CACI Opp. at 17. Yet, Plaintiffs' Complaint exposes this statement for the misrepresentation that it is, as Plaintiffs specifically alleged that Defendants are liable for so-called "constitutional" claims because Defendants "were conspiring with certain public officials, including certain military officials, and other persons acting *in an official capacity on behalf of the United States*." SAC ¶¶ 257, 263, 269 (emphasis added).[6]

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[6] Moreover, it is not even accurate to say, as Plaintiffs assert in the CACI Opposition, that the defendants in all of the Holocaust cases were German companies acting pursuant to official

Plaintiffs' other effort to distinguish the more recent reparations cases is to argue that these cases involve claims for World War II-era misconduct and necessarily involve more difficult problems of judicial management than cases based on more recent conduct. CACI Opp. at 14. While some of the more recent wartime reparations decisions involve holocaust and other World War II-related claims, this is not true in all cases. For instance, the court in *Sarei v. Rio Tinto plc*, 221 F. Supp. 2d 1116, 1195 (C.D. Cal. 2002), dismissed the plaintiffs' alien tort claims on political question grounds where plaintiffs sought reparations for injuries they allegedly suffered during the recent civil war in Papua New Guinea. More fundamentally, Defendants' argument ignores that the recent reparations cases have held that wartime reparations claims are constitutionally committed to the political branches, a determination that is in no way dependent on the age of the claim.[7] The Supreme Court recognized in *Baker v. Carr*, 369 U.S. 186, 211-12 (1962), that courts applying the political question doctrine to cases touching upon the United States' foreign relations should consider "the particular question posed, in terms of the history of its management by the political branches, its susceptibility to judicial handling in light of its

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German policy. *See Alperin v. Vatican Bank*, 242 F. Supp. 2d 686 (N.D. Cal. 2003) (dismissing on political question grounds World War II reparations claim against various Vatican entities); *Zivkovich v. Vatican Bank*, 242 F. Supp. 2d 659 (N.D. Cal. 2002) (same).

[7] *See, e.g.*, *Alperin*, 242 F. Supp. 2d at 689-90 ("[C]ourts generally have recognized that adjudication through private litigation of claims such as those presented here would both intrude upon matters committed to the political branches and reflect a lack of respect for the coordinate branches of government."); *Zivkovich*, 242 F. Supp. 2d at 666 ("As an issue affecting United States relations with the international community, war reparations fall within the domain of the political branches and are not subject to judicial review."); *Frumkin v. JA Jones, Inc.*, 129 F. Supp. 2d 370, 376 (D.N.J. 2001) (dismissing World War II-era forced labor claims against German company because "[c]laims for war reparations arising out of World War II have always been managed on a governmental level"); *Iwanowa v. Ford Motor Co.*, 67 F. Supp. 2d 424, 485 (D.N.J. 1999) ("The executive branch has always addressed claims for reparations as claims between governments."); *Burger-Fischer v. Degussa AG*, 65 F. Supp. 2d 248, 273 (D.N.J. 1999) ("Under international law claims for compensation by individuals harmed by war-related activity belong exclusively to the state of which the individual is a citizen.").

nature and posture in the specific case, and the possible consequences of judicial action." Just last year, the Supreme Court echoed the determinations of the more recent reparations cases in observing that questions of wartime reparations are "sources of friction" in foreign affairs and therefore have been managed exclusively by the political branches of government:

> Since claims remaining in the aftermath of hostilities may be 'sources of friction' acting as an 'impediment to resumption of friendly relations' between the countries involved, there is a 'longstanding practice' of the national executive to settle them in discharging its responsibility to maintain the Nation's relationships with other countries.

Am. Ins. Ass'n v. Garamendi, 539 U.S. 396, 420 (2003) (quoting *United States v. Pink*, 315 U.S. 203, 225 (1942), and *Dames & Moore v. Regan*, 453 U.S. 654, 679 (1981)). In light of this history, the courts have no place in the determination of the propriety of wartime reparations.

B. Plaintiffs' Claims Are Preempted

It is evident from Plaintiffs' opposition that they either misunderstand the nature of the CACI Defendants' preemption argument or have created a straw man argument to gloss over the barriers to recovery posed by the CACI Defendants' actual preemption argument. Properly understood, the CACI Defendants' Motion to Dismiss demonstrates that Supreme Court and Ninth Circuit precedent requires dismissal of Plaintiffs' state and federal tort claims because allowing such claims would conflict with the federal policies underlying the combatant activities exception to the Federal Tort Claims Act ("FTCA"). *See* 28 U.S.C. § 2860(j).

Plaintiffs refer to the CACI Defendants' preemption argument as being the "government contractors defense," a defense recognized by the United States Supreme Court in *Boyle v. United Technologies Corp.*, 487 U.S. 500, 504 (1988). In *Boyle*, the Supreme Court did not merely identify the contours of a government contractor defense, but set forth the framework for determining whether federal law preempts tort claims. The *Boyle* Court announced that a court

should first consider whether "uniquely federal interests" are at issue in the tort claims and, if so, whether a "significant conflict" exists between the federal interest and the application of tort law. *Id.* at 507. Applying that framework, the *Boyle* Court held that the federal government has a unique interest in "the civil liabilities arising out of the performance of federal procurement contracts." *Id.* at 505-06. The Court further held that the imposition of tort liability in that case would conflict with the federal government's interest, as reflected in the discretionary function exception to the FTCA, in barring claims arising out of the design of military equipment. *Id.* at 512 ("It makes little sense to insulate the Government against financial liability for the judgment that a particular feature of military equipment is necessary when the Government produces the equipment itself, but not when it contracts for the production.").

Plaintiffs' claims clearly are preempted under the framework announced in *Boyle*. The *Boyle* Court recognized the "unique federal interest" in the extent to which government contractors will face civil liability as a result of the manner in which they perform under those contracts. *Id.* at 505-06. Moreover, as in *Boyle*, the imposition of liability in this case would conflict with the Congress's determination, as embodied in the combatant activities exception to the FTCA, that no tort liability should arise from the combatant activities of the United States.

The Ninth Circuit's decision in *Koohi v. United States*, 976 F.2d 1328, 1336-37 (9th Cir. 1992), is directly on point. In *Koohi*, the Ninth Circuit preempted state and federal tort claims against a weapons system manufacturer asserted by the heirs of passengers killed as a result of the U.S. Navy's accidental downing of an Iranian civilian aircraft. *Id.* The Ninth Circuit did not seek to fit plaintiffs' claims within the specific government contractor defense announced in *Boyle*. Rather, the Court of Appeals applied the *Boyle* Court's general preemption framework in determining whether tort liability would conflict with the purposes of the combatant activities

exception. The Court ultimately held that the combatant activities exception to the FTCA should preempt the plaintiffs' claims because an underlying purpose of the combatant activities exception is to eliminate any claim that a duty of care is owed to those killed or injured in combat: "The imposition of such liability on the manufacturers of the Aegis [weapons system] would create a duty of care where the combatant activities exception is intended to ensure that none exists." *Id.* at 1337. Moreover, the *Koohi* court cited *Boyle* for the proposition that "preemption [is] appropriate when imposition of liability on [a] defense contractor 'will produce the same effect sought to be avoided by the FTCA exception.'" *Id.* (quoting *Boyle*, 487 U.S. at 511).

Thus, *Koohi* is fatal to Plaintiffs' claims in at least two respects. First, because the Ninth Circuit grounded its decision in *Koohi* on the absence of a duty of care owed to persons killed or injured incident to the United States' combatant activities, it would undermine the purpose of the combatant activities exception to allow plaintiffs to impose a duty of care on the conduct of war by aiming their lawsuits at defense contractors instead of the United States government. *Id.*

Second, the *Koohi* court broadly reaffirmed the notion that preemption is appropriate where a tort suit against a government contractor would be barred if asserted directly against the United States. *Id.* While Plaintiffs half-heartedly submit in a single sentence that the combatant activities exception would not apply here because Plaintiffs "were not harmed by an activity that arose out of an actual or perceived immediate hostility with enemy forces," CACI Opp. at 23, such an assertion flies directly in the face of the Ninth Circuit's holding in *Koohi* that the combatant activities exception "would shield from liability those who supply ammunition to fighting vessels in a combat area," and includes "not only physical violence, but activities both necessary to and in direct connection with actual hostilities." *Id.* at 1333 n.3, 1336 (quoting

Johnson v. United States, 170 F.2d 767, 770 (9th Cir. 1948)). In light of the Supreme Court's recent observation that arrest and detention activities, "by 'universal agreement and practice,' are 'important incident[s] of war,'" *Hamdi v. Rumsfeld*, 124 S. Ct. 2633, 2640 (2004) (citing *Ex parte Quirin*, 317 U.S. 1, 28 (1942)), Plaintiffs cannot credibly argue that the conduct of detention and interrogation activities *in a combat zone* are anything other than combatant activities.[8] Under *Koohi*, the Court should not allow Plaintiffs to evade the policies underlying the combatant activities exception by asserting tort claims against the government contractors that supplied interrogators and linguists to support the United States military when such claims are barred against the United States and its officers.

Plaintiffs offer two other arguments in an effort to avoid a finding of preemption, neither of which is availing. First, Plaintiffs inaccurately cite *Snell v. Bell Helicopter Textron*, 107 F.3d 744 (9th Cir. 1997), for the proposition that Ninth Circuit precedent limits the government contractor defense to contractors "who design and manufacture military equipment," CACI Opp. at 20. That quotation is out of context and does not compel a conclusion that *Snell* bars preemption claims by government contractors who supply services instead of equipment. *Snell*, however, merely addresses the types of *manufacturers* that can assert a government contractor defense, ultimately concluding that manufacturers of *civilian* equipment cannot assert a government contractor defense. *Id.* at 746. *Snell* does not say *anything* about the availability of a preemption claim by a supplier of services, something that was not an issue in that case. Indeed, as Plaintiffs are forced to concede, many courts have applied a *Boyle*-type preemption

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[8] Indeed, Plaintiffs' decision not to name the United States or a single government official as defendants in this case, particularly in light of the fact that the supposed "Torture Conspirators" includes the highest-level officials in the Defense Department, demonstrates Plaintiffs' understanding that the combatant activities exception to the FTCA bars such claims.

analysis to government contractors providing services to the United States government, CACI Opp. at 21 n.12, a conclusion that necessarily follows from the flexible preemption test announced by the Supreme Court in *Boyle*, 487 U.S. at 512, and applied by the Ninth Circuit in *Koohi*, 976 F.2d at 1336-37.

Plaintiffs seek to salvage their alien tort claims by incorrectly asserting that "Defendants simply fail to address the Plaintiffs' federal common law claims." CACI Opp. at 23. At page 20 of their memorandum of points and authorities, the CACI Defendants noted that the Ninth Circuit had preempted ATCA claims in *Koohi*, 976 F.2d at 1336-37, and argued that "[p]reemption of Plaintiffs' state and federal tort claims is required because – as in *Koohi* – prosecution of these claims frustrates operation of the combatant activities exception to the FTCA." CACI Mem. at 20. The *Koohi* court did not distinguish between the plaintiffs' alien tort claims and their state law claims, finding that the *Boyle* preemption analysis applied with full force to federal tort claims when such claims conflict with the exceptions to FTCA liability. *Koohi*, 976 F.2d at 1336 ("We have also previously held that [the FTCA] exceptions may preempt federal statutory tort actions.").[9] Thus, the Court is left with a series of state and federal tort claims that, if asserted against the United States, would be barred by the combatant activities exception, and which must be dismissed under the binding precedent of *Boyle* and *Koohi*.

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[9] *See also Koohi*, 976 F.2d at 1333 n.4 (noting that Plaintiffs had asserted their claims under the Alien Tort Claims Act, 28 U.S.C. § 1350); Plaintiffs' Pet. for Writ of Certiorari, *Koohi v. United States*, No. 92-1504, 1993 WL 13075799, at *12 (Mar. 16, 1993) (noting that the plaintiffs asserted federal tort claims against the defense contractors under the Alien Tort Claims Act, 28 U.S.C. § 1350).

C. Even If They Were Not Barred By the Political Question Doctrine and a Preemption Analysis, Plaintiffs' Alien Tort Claims Still Would Fail as a Matter of Law

In their Motion to Dismiss, the CACI Defendants made the very basic point that reparations claims flowing from an external war, particularly a war in which the United States is one of the belligerents, cannot be asserted under the Alien Tort Claims Act ("ATCA"), 28 U.S.C. § 1350. Plaintiffs have sought to sidestep this fact by contorting the Supreme Court's decision in *Sosa v. Alvarez-Machain*, 124 S. Ct. 2739 (2004), in arguing that this Court has wide-ranging powers to recognize new law of nations torts, including torts that seek civil recompense for injuries sustained in an external war. *Sosa* cannot be stretched to reach such a result.

Plaintiffs ask the Court to ignore the Supreme Court's repeated admonitions in *Sosa* that the class of torts that may be recognized under ATCA is extremely narrow. In their Motion to Dismiss, the CACI Defendants observed that the *Sosa* Court identified five considerations that a court should analyze in assessing whether a proposed "law of nations torts" should be actionable. These considerations include: (1) the federal courts' practice "to look for legislative guidance before exercising innovative authority over substantive law"; (2) the fact that "a decision to create a private right of action is one better left to legislative judgment in the great majority of cases"; and (3) "the potential implications for the foreign relations of the United States of recognizing such causes should make courts particularly wary of impinging on the discretion of the Legislative and Executive Branches in managing foreign affairs." *Id.* at 2762-63.

Plaintiffs seek to avoid application of these considerations – which clearly point toward dismissal of their ATCA claims – by arguing that the considerations identified by the *Sosa* Court governed whether *any* new torts should be actionable under ATCA and that these considerations somehow became irrelevant once the *Sosa* Court allowed that a limited class of new torts may be

actionable under ATCA. Titan Opp. at 13-14. This argument is demonstrably incorrect. In announcing the considerations set forth above, the *Sosa* Court explicitly stated that these considerations should guide the determination of *which* types of tort claims should be actionable under ATCA. Specifically, the *Sosa* Court held that the five considerations counseling judicial caution in this area of the law should be applied "when considering *the kinds of individual claims that might implement the jurisdiction conferred by [ATCA]*. *Sosa*, 124 S. Ct. at 2762 (emphasis added). Thus, the language used by the *Sosa* Court definitively rejects Plaintiffs' contention that the Court can ignore the interests of the political branches and the impact on the United States' foreign relations when deciding whether to recognize new tort claims asserted under ATCA.

In any event, the *Sosa* Court was crystal clear in holding that the recognition of tort claims under ATCA is subject at all times to the will of Congress. As the Court noted:

> It is enough to say that Congress may [close the door to tort claims based on the law of nations] at any time (explicitly, or implicitly by treaties or statutes that occupy the field just as it may modify or cancel any judicial decision so far as it rests on recognizing an international norm as such.

Id. at 2765. The Ninth Circuit already has held in *Koohi*, 976 F.2d at 1336-37, that Congress sought to occupy the field with respect to tort claims alleging injuries incurred as a result of the United States' prosecution of war. The *Koohi* court dismissed state tort claims as well as ATCA claims asserted against defense contractors on the grounds that the combatant activities exception to the FTCA was intended to ensure that no duty was owed – by the United States or by government contractors – to persons injured incident to the United States' prosecution of a war. *Id.* Therefore, the *Sosa* Court's allowance that Congress is entitled to occupy the field with respect to categories of supposed ATCA claims, combined with the Ninth Circuit's holding in *Koohi* that Congress occupied the field with respect to injuries arising from the United States'

combatant activities, necessarily leads to the conclusion that ATCA cannot be applied to recognize actionable torts arising from the United States' prosecution of war.

Plaintiffs also invoke a few cases decided prior to the Supreme Court's decision in *Sosa* for the proposition that courts have allowed ATCA claims arising "out of conditions involving armed conflict." Titan Opp. at 15.[10] None of the cases cited by Plaintiffs, however, involves a claim based on the combatant activities of the United States, and therefore (unlike Plaintiffs' claims) the claims of the plaintiffs in those cases were not subject to the policies underlying the combatant activities exception. Moreover, all of the cases cited by Plaintiffs involve *internal* civil wars. It has long been the history in this country that reparations claims arising out of an external war are matters committed to resolution through diplomacy and the discretion of the political branches. *See Ware v. Hylton*, 3 U.S. (3 Dall.) at 230 (1796); *Perrin*, 4 Cl. Ct. at 544; *Frumkin v. JA Jones, Inc.*, 129 F. Supp. 2d 370, 376 (D.N.J. 2001); *Iwanowa v. Ford Motor Co.*, 67 F. Supp. 2d 424, 485 (D.N.J. 1999). Thus, even if the cases cited by Plaintiffs remain good law after *Sosa*, the fact remains that proposed ATCA claims not involving the United States' conduct of war and not involving the diplomatic considerations associated with an external war are qualitatively different from Plaintiffs' attempt to hold Defendants liable for injuries supposedly incurred as a result of the United States' conduct of the war in Iraq.

D. Plaintiffs' RICO Claims Fail as a Matter of Law

In their Motion to Dismiss, the CACI Defendants provided a lengthy list of the ways in which Plaintiffs' RICO claims are deficient as a matter of law. Plaintiffs lack standing to assert

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[10] Plaintiffs cite the following cases for the proposition that ATCA claims can arise out of "conditions involving armed conflict": *In re Estate of Marcos*, 25 F.3d 1467 (9th Cir. 1994) (declaration of martial law in the Philippines); *Kadic v. Karadzic*, 70 F.3d 232, 241-42 (2d Cir. 1995) (civil war in Bosnia); and *Presbyterian Church of Sudan v. Talisman Energy, Inc.*, 244 F. Supp. 2d 289, 296 (S.D.N.Y. 2003).

RICO claims, and they have not adequately pleaded predicate acts, an enterprise, or a pattern of racketeering activity. Plaintiffs' effort to resuscitate their RICO claims is unconvincing. Therefore, the Court should dismiss Plaintiffs' RICO claims for the reasons set forth in the CACI Defendants' Motion to Dismiss and for the reasons set out below.

1. Plaintiffs Do Not Have Standing Required for Civil RICO

Plaintiffs simply do not have standing to assert a civil RICO claim, and their arguments to the contrary are without merit. Plaintiffs' factual allegations identify injury to a Plaintiff's business or property *only* by persons involved in at-large field apprehensions.[11] Plaintiffs do not allege that the CACI Defendants were involved in any incidents resulting in injury to business or property, or that they conspired with the United States government concerning the conduct of United States personnel in effecting field arrests. Even Plaintiffs' conspiracy theory – implausible as it is and unsupported by any probative facts – does not suggest that the alleged conspiracy encompassed field arrest techniques or conduct. In their attempt to bring the field arrests within their reach, Plaintiffs merely recharacterize the alleged conspiracy to include "all of the misconduct related to the process of creating the appearance of 'intelligence.'" CACI Opp. at 27. However they phrase it, Plaintiffs have offered no factual allegations to support their conspiracy theory and have ignored the proximate cause requirements. Plaintiffs, grasping at

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[11] Plaintiffs' particular reference to ¶¶ 103 and 171 of the SAC, *see* CACI Opp. at 25, demonstrates their utter failure to establish by any factual pleading that Plaintiffs were injured in their business or property by Defendants. The most Plaintiffs can muster on this point is one allegation that one Plaintiff "owns and manages a company in Baghdad . . ." and a second allegation that the Defendants' actions caused "extensive damage to certain Plaintiffs' businesses and properties, including upon information and belief, putative RICO Class Members' businesses and properties located in the United States." SAC ¶¶ 103, 171. This does not suffice as factual pleading demonstrating injury to business or property by reason of a violation of the RICO statute.

straws to save their moribund RICO claims, are stuck with the inescapable fact that the gravamen of Plaintiffs' action is personal injury, which is not compensable under RICO.

In an effort to revive their § 1962(a) claim, Plaintiffs argue that they have sufficiently pleaded an investment injury by stating that

> the income received from the pattern of racketeering was used by Defendant Titan and CACI Corporate Defendants to invest in and operate the ongoing operations of the corporations, including but not limited to those portions of the corporate operations that were members of the Enterprise and the Torture Conspiracy.

RICO Case Stmt. ¶ 11(b) (referenced at CACI Opp. at 26 & n.16.) Neither this statement nor any other in the Complaint or the RICO Case Statement alleges, either baldly or with facts, that any of the putative RICO Plaintiffs suffered *an injury to his individual business or property as a result of Defendants' investment of the proceeds* supposedly derived from the CACI Defendants' alleged racketeering activities. It is not enough to imply or allege that Plaintiffs suffered injuries resulting from the alleged racketeering activities themselves. *See Nugget Hydroelec., L.P. v. Pacific Gas & Elec. Co.*, 981 F.2d 429, 437 (9th Cir. 1992); *Simon v. Behavioral Health,* 208 F.3d 1073, 1083 (9th Cir. 2000); Jed S. Rakoff & Howard W. Goldstein, *RICO: Civil and Criminal Law and Strategy*, § 1.06[1], at I-79 (2004). Plaintiffs' failure to plead an *investment injury to business or property* is fatal to their § 1962(a) claim.[12]

Plaintiffs assert standing to plead a violation of § 1962(c) based on alleged robberies and obstruction of justice. CACI Opp. at 26. As explained above, the robbery allegations do not

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[12] Plaintiffs quote a single sentence fragment out of context as support for their argument. CACI Opp. at 26 (quoting *Wagh v. Metris Direct, Inc.*, 363 F.3d 821, 829 (9th Cir. 2003)). In fact, Wagh argued that "his allegation that the appellees 'reinvest in themselves' the income generated by 'the enterprise's pattern of racketeering activity,' is therefore sufficient to state a [§ 1962(a)] claim." 363 F.3d at 828-29. This is exactly what the Plaintiffs have done in their SAC. But, the court in *Wagh* went on to state: "We disagree [with Wagh's argument] for several reasons." *Id.* at 829.

support a civil RICO claim against the CACI Defendants, even viewing the Plaintiffs' far-fetched conspiracy theory in the most favorable light permitted under the law.[13] In addition, Plaintiffs do not allege that any alleged obstruction of justice resulted in any *injury to business or property of any Plaintiff.*[14] The law is clear: RICO does not provide compensation for the economic consequences of personal injury. *Diaz v. Gates*, 380 F.3d 480, 483-485 (9th Cir. 2004) (citing and discussing cases, in particular, *Grogan v. Platt*, 835 F.2d 844 (11th Cir. 1998) (family of murder victim could not recover under RICO for economic consequences of the personal injury)). The Ninth Circuit's decision in *Diaz* is dispositive, despite Plaintiffs' arguments to the contrary.[15] Plaintiffs' continuing efforts to transform RICO into a vehicle for compensating alleged tort victims for attendant pecuniary losses is inconsistent with the intent, design, and application of RICO, and should be rejected.

Plaintiffs argue that "the Defendants agreed to participate in the overall plan to produce 'intelligence' through criminal torture of detainees . . . ." CACI Opp. at 34. However, the so-called facts Plaintiffs allege against the CACI Defendants, recruiting employees and communicating with government officials, *see* CACI Opp. at 33-34, are entirely consistent with simply doing business with the government. Plaintiffs' conclusory conspiracy pleadings fall far short of showing what they acknowledge as the relevant standard: that "the defendant must have

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[13] "[C]onclusory allegations of law and unwarranted inferences are insufficient to defeat a motion to dismiss." *Ove v. Gwinn*, 264 F.3d 817, 821 (9th Cir. 2001)

[14] Moreover, Plaintiffs do not plead any obstruction of justice predicate act that is cognizable under RICO. The facts alleged do not even come close to satisfying the elements of those obstruction-type offenses specifically enumerated in the RICO statute. *See* 18 U.S.C. § 1961(1)(B) (expressly limiting such predicate acts to violations of 18 U.S.C. §§ 1503, 1510, 1511, 1512, & 1513).

[15] Plaintiff Sami does not allege a business or property injury by simply alleging that he owns and manages a company in Baghdad. *See* CACI Opp. at 27 n.17.

been aware of the essential nature and scope of the criminal enterprise and intended to participate in it." CACI Opp. at 34 (internal quotations omitted) (quoting *Howard v. America Online Inc.*, 208 F.3d, 741, 751 (9th Cir. 2000)).

2. Plaintiffs Have Not Sufficiently Pleaded a Predicate Act

In addition to lacking standing, Plaintiffs have not sufficiently pleaded a predicate act. A sufficient pleading provides adequate notice to all involved of the fact-based allegations, so as to permit the defendant to either develop an adequate defense or avoid the necessity of making a defense altogether. Plaintiffs, having failed to meet that standard, now argue that they are not required to plead specific elements of state crimes in their civil RICO complaint. CACI Opp. at 28-29. In support, they offer quotes stripped of context from five decisions in two other circuits in criminal RICO cases. *Id.* Plaintiffs, however, fail to justify their sole reliance on *criminal* cases, which implicate different procedural safeguards, pleading standards, and motivations. They also ignore the context and import of the underlying decisions in these criminal cases. Finally, they overlook a Second Circuit case that expressly criticizes the holding in Plaintiffs' primary support. The law does not support the result Plaintiffs urge on this Court.

To support their argument that they need not plead all the elements of a specific state statute encompassed by § 1961(1)(A), Plaintiffs rely on *United States v. Coonan*, 938 F.2d 1553, 1563-64 (2d Cir. 1991) and *United States v. Paone*, 782 F.2d 386, 393-94 (2d Cir. 1986). These cases do *not* stand for the proposition that a plaintiff may vaguely allege serious crimes without providing concrete factual allegations to support each element of the state crime that will ultimately have to be proved. Rather, they apply the broadly accepted rule that the protection against double jeopardy and ancillary state rules of evidence do not prevent the government from successfully prosecuting a RICO violation even where the state could not have successfully

prosecuted the underlying state crime that serves as the RICO predicate act.

Plaintiffs also rely on *United States v. Watchmaker*, 761 F.2d 1459 (11th Cir. 1985), where the court rejected the convict's argument that his conviction was void because a subsequent amendment to his indictment had deprived him of his *criminal* Fifth Amendment grand jury right. The issue in *United States v. Miller*, 116 F.3d 641 (2d Cir. 1997), is equally inapposite. There, the court held that the state law prohibiting criminal facilitation of murder was encompassed by the RICO statute's terms, "any act . . . *involving* murder . . . ." *Id.* at 674 (emphasis added).[16] In *dicta*, the court in *Miller* quoted a passage from its prior decision in *United States v. Bagaric,* 706 F.2d 42 (2d Cir. 1983), upon which Plaintiffs rely.

The continuing authority of *Bagaric* has been called into question by the Second Circuit's own precedent. In *United States v. Carrillo*, 229 F.3d 177 (2d Cir. 2000),[17] which pointedly distinguished the *Bagaric* holding from the *Coonan* decision, *id.* at 183, the court criticized at length the *Bagaric's* flawed conclusion, *id.* at 183-86. The court expressed its "doubts" that "*Bagaric's* principle" "can be applied as a practical matter in all circumstances," *id.* at 183, stated that it did not represent "the best practice," *id.* at 185, and termed it "theoretical," *id.* Finally, explaining that for other reasons, it was "unnecessary for us. . . to consider whether the

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[16] Although not cited in the *Miller* decision, this conclusion accords with the Supreme Court's earlier decision in *United States v. Nardello*, 393 U.S. 286 (1969), in which the Court interpreted the term "extortion" in 18 U.S.C. § 1952, "Travel Act," to include state laws prohibiting blackmail.

[17] In more than one case cited by Plaintiffs, *Carrillo* is cited proximately to the Plaintiffs' citation. *See e.g., Dhingra*, 371 F.3d at 564; *Wiwa v. Royal Dutch Petroleum Co.*, 2002 WL 319877, at *24 (S.D.N.Y. Feb. 28, 2002). In one case, Plaintiffs affirmatively omitted a citation to the *Carrillo* case. CACI Opp. at 29 (quoting *Dhingra*, 371 F.3d at 564, with citations omitted.) It is, therefore, hard to explain why "Plaintiffs' counsel were unable to locate a single case that supports CACI's interpretation of § 196[1]." CACI Opp. at 28 (Plaintiffs mistakenly refer to § 1962, when the correct reference is § 1961).

court should convene *in banc* to deliberate the continuing authority of *Bagaric," id.* at 186, the panel explicitly noted that the opinion was circulated prior to filing, and "all the active judges of the court . . . have expressed agreement with it," *id.* at 186 n.6. This is the slender reed from the Second Circuit with which Plaintiffs try to support their preposterous argument that they are not required to plead the elements of the predicate acts that they must ultimately prove in a civil RICO action.

The "*Bagaric* principle" has never been adopted in the Ninth Circuit. Plaintiffs' implication that the Ninth Circuit's decision in *United States v. Dhingra*, 371 F.3d 557 (9th Cir. 2004) reflects approval of *Bagaric's* principle is misleading. In fact, *Dhingra's* reasoning *undermines* the Plaintiffs' position.[18] The *Dhingra* court read the statute in question to "incorporate only the laws for which a person could be charged with a criminal offense, *i.e., the law of the venue that would have jurisdiction over the defendant.*" *Id.* (emphasis added). Other cases from the Ninth Circuit are consistent. *See, e.g., United States v. Fernandez*, 2004 WL 2399856, at *10-11 (9th Cir. Oct. 27, 2004) (discussing a RICO indictment identifying a specific violation of the California criminal code prohibiting conspiracy to murder and the particular requirements of that crime); *United States v. Male Juvenile*, 280 F.3d 1008, 1018 (9th Cir. 2002) (discussing the use of a state law crime for definitional purposes where there is no parallel

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[18] In *Dhingra,* the court interpreted a federal statute that incorporates state law by reference to "prostitution or any sexual activity for which any person can be charged with a criminal offense." 18 U.S.C. § 2422(b). Dhingra argued that by failing to identify one particular state criminal law, "the statute incorporates all state and municipal laws across the country," and "makes criminal the engagement in sexual activity that is a crime under the law of any state, regardless of whether that state has jurisdiction over the defendant." 371 F.3d at 564. The Court squarely rejected Dhingra's argument: "We decline to embrace this far-flung interpretation of the statute . . . ." *Id.* The precise quote selected by Plaintiffs was not employed by the court in *Dhingra* in support of the proposition that Plaintiffs urge here; rather it was used to address a Tenth Amendment challenge, which the court rejected. *See* 371 F.3d at 564.

federal statute and the law applies only by virtue of its reference). Thus, Plaintiffs' failure to plead the elements of the alleged predicate acts is fatal to Plaintiffs' RICO claims.

E. Plaintiffs' "Geneva Conventions" Claim Fails as a Matter of Law

In their memorandum of points and authorities, the CACI Defendants cited several decisions holding that the Geneva Conventions do not create a private right of action. *See Hamdi v. Rumsfeld*, 316 F.3d 450, 468 (4th Cir. 2003), *vacated on other grounds*, 124 S. Ct. 2633 (2004); *Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774, 808-09 (D.C. Cir. 1984) (opinion of Bork, J.); *Huynh Thi Anh v. Levi*, 586 F.2d 625, 629 (6th Cir. 1978); *Holmes v. Laird*, 459 F.2d 1211, 1222 (D.C. Cir. 1972); *Iwanowa*, 67 F. Supp. 2d at 439 n.16; *Handel v. Artukovic*, 601 F. Supp. 1421, 1425 (C.D. Cal. 1985). In their CACI Opposition, Plaintiffs state that "federal courts have divided on whether the Geneva Conventions are enforceable in federal courts," CACI Opp. at 46, a statement that is clearly incorrect. None of the cases cited by Plaintiffs recognizes a private right of action for Geneva Conventions violations. In *Padilla ex rel. Newman v. Bush*, 233 F. Supp. 2d 564, 590 (S.D.N.Y. 2002), the court merely notes that treaties entered into by the United States are the "law of the land," but offers no opinion on whether a private right of action exists under the Geneva Conventions. In *United States v. Lindh*, 212 F. Supp. 2d 541, 553-54 & n.20 (E.D. Va. 2002), the court merely held, in a statement carefully limited to the belligerent immunity provisions of the treaty, that such immunities were generally enforceable. Finally, in *United States v. Noriega*, 808 F. Supp. 791, 799 (S.D. Fla. 1992), the court unambiguously stated that the question whether a private right of action existed under the Geneva Conventions was not before it. Thus, the cases cited by Plaintiffs cannot overcome the case law squarely and unanimously refusing to recognize a private right of action under the Geneva Conventions.

F. Plaintiffs' "Contracting Law" Claim Must Be Dismissed

In their memorandum of points and authorities, the CACI Defendants pointed out that Plaintiffs have cited no authority for the proposition that there is a private right of action available to them to allege violations of the United States' contracting laws. CACI Mem. at 48-49. This is still the case, as Plaintiffs' opposition fails to identify any authority that confers upon them the right to enforce alleged violations of the Federal Acquisition Regulations. *See* Titan Opp. at 38-39. Moreover, the CACI Defendants cited binding Ninth Circuit precedent holding that "a party to a contract is necessary, and if not susceptible to joinder, indispensable to litigation seeking to decimate that contract." *Dawavendewa v. Salt River Project Agr. Imp. & Power Dist.*, 276 F.3d 1150, 1157 (9th Cir. 2002); *see also Clinton v. Babbitt*, 180 F.3d 1081, 1088 (9th Cir. 1999); *Lomayaktewa v. Hathaway*, 520 F.2d 1324, 1325 (9th Cir. 1975). Plaintiffs have not attacked the applicability of these cases, and instead ignore them entirely. Count XXV plainly asks the Court to vitiate all of Defendants' contracts with the United States, even ones that have nothing to do with the provision of interrogation services in Iraq, and the law in this Circuit could not be clearer that Plaintiffs would have to join the United States as a party to pursue such a claim. Therefore, even if Plaintiffs had cited authority to support the existence of a private right of action to assert this claim, it still is subject to dismissal under governing Ninth Circuit precedent.

III. CONCLUSION

The motions to dismiss filed by the CACI Defendants and Titan clearly demonstrate that Plaintiffs' Complaint must be dismissed. The oppositions filed by Plaintiffs do nothing to change that fact. Therefore, the Court should dismiss all of the claims in Plaintiffs' Complaint.

Moreover, because amendment cannot cure the flaws in the Complaint, the Court's dismissal should be with prejudice and without leave to replead.

Respectfully submitted,

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

SALEH, an individual; SAMI ABBAS AL RAWI, an individual; MWAFAQ SAMI ABBAS AL RAWI, an individual; AHMED, an individual; ESTATE OF IBRAHIEM, the heirs and estate of an individual; RASHEED, an individual; JOHN DO NO. 1; JANE DOE NO. 2; A CLASS OF PERSONS SIMILARLY SITUATED, KNOWN HEREINAFTER AS JOHN and JANE DOES NOS. 3-1050, Plaintiffs, v. TITAN CORPORATION, a Delaware Corporation; ADEL NAHKLA, a Titan employee located in Abu Ghraib, Iraq; CACI INTERNATIONAL INC., a Delaware Corporation; CACI INCORPORATED-FEDERAL, a Delaware Corporation; CACI N.V., a Netherlands corporation; STEPHEN A. STEFANOWICZ; and JOHN B. ISRAEL, Defendants.	Case No. 04-CV-1143 R (NLS) **CERTIFICATE OF SERVICE**

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I, the undersigned, hereby certify:

I am employed in the County of San Diego, State of California. I am over the age of 18 and not a party to the within action; my business address is 501 West Broadway, Suite 400, San Diego, California.

On November 19, 2004, in the manner specified on the mailing list, I served the documents described as:

REPLY MEMORANDUM OF DEFENDANTS CACI INTERNATIONAL INC, CACI, INC. -FEDERAL, AND CACI N.V. IN SUPPORT OF THEIR MOTION TO DISMISS PLAINTIFFS' SECOND AMENDED COMPLAINT

on the interested parties in this action addressed as follows:

SEE ATTACHED SERVICE LIST

❑ **(BY HAND)** On November 19, 2004 I delivered such envelope to the party listed above and left the envelope with the party, the receptionist or person in charge thereof between the hours of 9:00 a.m. and 5:00 p.m.

■ **(BY MAIL)** On November 19, 2004 I placed such envelope for collection, deposit and mailing with the United States Postal Service following ordinary business practices at my place of business. I am readily familiar with the business practice of my place of business for collection and processing of correspondence for mailing with the United States Postal Service. Correspondence so collected and processed is deposited with the United States Postal Service that same day in the ordinary course of business. I am aware that, on motion of party served, service is presumed invalid if postal cancellation date or postage meter date is more than one day after date of deposit for mailing an affidavit.

❑ **(BY FACSIMILE)** On November 19, 2004, I caused a true copy of the document(s) to be transmitted via facsimile to a facsimile machine maintained by the person on whom the document(s) is served. Facsimile service has been agreed upon by the parties. I am aware that the service is complete at the time of transmission, but any period of notice shall be extended after service by facsimile transmission by two court days.

///

❑ **(BY OVERNIGHT MAIL)** On November 19, 2004, at San Diego, California, I deposited such envelope in a box or other facility regularly maintained by an express service carrier, or delivered to a courier or driver authorized by this express service carrier to receive documents in an envelope or other package designated by this express service carrier, with delivery fees paid or provided for.

I certify that the above referenced documents filed with the Court in this matter were produced on paper purchased as recycled.

I certify and declare under penalty of perjury under the laws of the State of California that the above is true and correct.

Executed November 19, 2004 at San Diego, California.

Sue Baker

Sue Baker

SERVICE LIST

Rawi, et al. v. Titan Corp., et al.
Case No. 04-CV-1153 R (NLS)

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