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

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

PLAINTIFFS' OPPOSITION TO XE'S NEW DISMISSAL ARGUMENTS

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Defendants sought dismissal of these five lawsuits, arguing that Virginia's choice-of-law *lex loci* doctrine requires the application of Iraqi law, and they are immune from Iraqi law under CPA Order 17, and therefore the Court must dismiss the lawsuit. Now, despite having admitted at oral argument that Defendants are not subject to the jurisdiction of Iraqi courts, Defendants' post-hearing brief completely reverses course, and argues that this Court should dismiss on *forum non conveniens* and exhaustion grounds. Defendants astonishingly argue there is no nexus to the United States, wholly ignoring the citizenship of the wrongdoers. Defendants argue that given the lack of nexus to the United States, the Court should send the matter to Iraq and permit the Iraqi judiciary to rule on the lawsuit, including presumably on the *bona fides* of Defendants' defense that the conduct at issue was defensive and consistent with the terms of the contract with the United States Department of State. But Defendants are not willing to concede that they would be subject to Iraqi jurisdiction, and expressly state they continue to claim immunity from Iraqi jurisdiction. Defendants wholly ignore the overarching practical problem created by their arguments, such as whether the United States Department of State would consent to submitting

the confidential contract to the Iraqi judiciary. Given that the Department of State has requested, and undersigned counsel has voluntarily agreed, not to share the terms of the contract with their clients, the Iraqi victims, it is simply impossible to argue that the Iraqi victims would be able to obtain the sealed and confidential contract for use in Iraqi courts.

Defendants' arguments are not principled. Defendants have not met the heavy burden that must be carried by a defendant advocating dismissal on exhaustion or *forum non conveniens*. Indeed, even their own expert is not willing to state that the Iraqi courts have jurisdiction over Defendants. Instead, the University of Pittsburgh law professor (an American who has never trained in Iraq or practiced law in Iraq) speculates that, because CPA Order 17 is unclear, perhaps some Iraqi jurist may decide to take jurisdiction over the matter. But the doctrines of *forum non conveniens* and exhaustion do not rely on mere hopes that another jurisdiction may act contrary to the rule of law. Under the well established principles of both doctrines, Defendants carry the burden of proving that an alternative forum exists. Here, Defendants have not -- and cannot -- carry this burden.

I. THESE LAWSUITS CANNOT BE DISMISSED ON THE BASIS OF FORUM NON CONVENIENS.

Supreme Court jurisprudence requires Defendants seeking to dismiss based on the *forum non conveniens* doctrine to establish with admissible evidence that a court, not a country, exists as an adequate alternative forum in which to litigate these five lawsuits. As explained in Subsection B, Defendants have fallen far from fulfilling this burden, as all they have done is argue that an Iraqi jurist (in some unknown jurisdiction) might ignore CPA Order No. 17. But even if that were true, how would this Iraqi court obtain jurisdiction over Defendants? They have not consented to jurisdiction in Iraq. Because Defendants have not established an adequate alternative forum, this Court need not engage in a balancing of the convenience factors. But

such balancing, if done, would result in this Court maintaining jurisdiction for the reasons set forth below in Subsection B.

A. The Forum Non Conveniens Doctrine Requires a Two-Step Analysis.

Supreme Court jurisprudence controls the application of the *forum non conveniens* doctrine. In *Piper Aircraft Co. v. Reyno*, 454 U.S. 235 (1981), the Supreme Court set out a two-step analysis: ***First,*** a court must determine whether an adequate alternate forum is available. ***Second***, if and only if an adequate forum is available, the court should balance private and public factors of convenience to determine if they weigh heavily in favor of litigation in the alternate, adequate forum. *Id.* at 247-252.

1. The Supreme Court Defines "Adequate Forum" as One That Is Able To Exercise Jurisdiction Over Defendants.

With regard to the first and threshold step, it is not enough that the forum exist. Rather, the forum must be "adequate." The *Piper* Court defined "adequate" as meaning that the defendant must be amendable to process in that jurisdiction. The *Piper* Court also clearly stated that "dismissal would not be appropriate where the alternative forum does not permit litigation of the subject matter of the dispute." *Id.* at 254 n.22. The Supreme Court cited with approval and relied on *Phoenix Canada Oil Co. Ltd. v. Texaco, Inc*., 78 F.R.D. 44 (Del. 1978), a case in which the court denied dismissal based on *forum non conveniens* because it was unclear whether the alternative forum, Ecuador, would hear the case.

There, the Court also was troubled by the fact that Ecuador lacked a codified legal remedy for the claims asserted. *See also Bridgeway Corp. v. Citibank*, 201 F.3d 134 (2d Cir. 2000) (declining to enforce a judgment by the Republic of Liberia's dysfunctional legal system). The *Piper* Court stated that "if the remedy provided by the alternative forum is so clearly inadequate or unsatisfactory that it is no remedy at all, the unfavorable change in law may be

given substantial weight; the district court may conclude that dismissal would not be in the interests of justice." *Piper* at 265.

The very premise of the *forum non conveniens* doctrine presupposes that there are two forums from which to choose. Dismissal is improper unless such alternative forum exists. *See Gulf Oil Corp. v. Gilbert*, 330 U.S. 501, 506-507 (1947) ("In all cases in which the doctrine of *forum non conveniens* comes into play, it presupposes at least two forums in which the defendant is amenable to process; the doctrine furnishes criteria for choice between them"); *see also Fidelity Bank Plc v. N. Fox Shipping N.V.*, 242 Fed. Appx. 84, 91 (4th Cir. 2007) and *Wiwa v. Royal Dutch Petroleum Co*., 226 F.3d 88, 99-108 (2d Cir. 2000) (both stating that the Court must first determine whether an alternative forum exists before assessing whether dismissal is appropriate under *forum non conveniens*).

2. The Supreme Court Defines the "Convenience" Factors To Include Practical Problems Such as Access to Sources of Proof.

In those instances where the defendants are able to establish an adequate alternative forum, a court then must engage in a balancing test. The court looks to private factors, defined by the Supreme Court to include (1) the hardships a defendant would face if the suit remained in the current forum versus those the plaintiff would face if the case were dismissed and brought in an alternative forum; (2) ease to sources of proof; (3) availability of process for the unwilling witnesses and the cost of obtaining attendance of willing witnesses; (4) the ability to view the premises in cases where it is relevant; and (5) "all other practical problems that make trial of a case easy, expeditious and inexpensive." *Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 241 n.6 (1981), quoting *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501, 508 (1947). The court is also to look to public factors, which tend to be referred to as "comity concerns." Such concerns turn on the public interest in the suit, such as whether the jury of the forum has an interest in the matter, or

instead would be forced to hear lawsuits concerning matters of little interest or import to the jury. *Id.* at 509. None of these factors needs to be balanced and considered, however, unless the court finds as a threshold matter that an adequate alternative forum exists.

B. Iraq Is Not an Adequate Alternative Forum.

Here, there is no showing that Iraq is an adequate alternative forum; so the Court need not reach the balancing factors. Defendants, as those advocating *forum non conveniens,* have the burden to prove that an Iraqi court could exercise jurisdiction over Defendants and hear this lawsuit. But no such proof has been submitted. Instead, Defendants submitted a statement from a University of Pittsburgh law professor. This gentlemen claims expertise in Iraqi law but has never been trained or practiced in Iraq. He now reverses his early convictions that led him to opine that Defendants were wholly and absolutely immune from Iraqi law, and speculates that it is unclear what an Iraqi jurist would do if confronted with these lawsuits. That evidence does not suffice to establish Iraq as an adequate alternative forum. This evidence does, however, destroy the viability and the need for the Court to consider Defendants' previous immunity argument.

1. Defendants Repeatedly Admitted That Iraq Is Not an Alternative Forum.

Plaintiffs believe the Court need not deliberate long on whether Iraq is an adequate alternative forum because Defendants already repeatedly made judicially binding admissions, both in writing and during oral argument, that they view themselves as immune from being hauled into Iraqi courts. *See Defendants' Mot. to Dismiss at 32-33*; *see Transcript at 68-69.* For example, Defendants' reply brief insisted that the CPA Order 17 provides them with immunity, stating that the Order "provided broad immunity to contractors, such as USTC… Defendants have shown that the relevant provisions of the CPA Order provide broad immunity and prevent liability in litigation such as this." (p. 30). These judicially-binding admissions

could, perhaps, be set aside if Defendants now conceded that they submit to jurisdiction in Iraqi courts. However, Plaintiffs found no such concession in Defendants's post-hearing brief. Instead, Defendants appear to remain intent on challenging the jurisdiction of any Iraqi court, and they disavowed any intent to waive their immunity arguments. *See note 2 at p. 3 of Defendants' Consolidated Post-Hearing Brief in Response to the Court's Order (filed Sept. 4, 2009)(hereinafter "Defendants' Post-Hearing Brief").*

Defendants are "playing fast and loose with the courts," which is not permissible. In *Lowery v. Stovall*, 92 F.3d 219, 223 (4th Cir. 1996), the Court of Appeals for the Fourth Circuit explains that parties cannot assert factually inconsistent positions. *See Lucas v. Burnley*, 879 F.3d 1240, 1242 (4th Cir. 1989) (stating "the general rule is that a party is bound by the admissions of [its] pleadings."); *see also Berckeley Inv. Group, Ltd. v. Colkitt*, 455 F.3d 195 (3d Cir. 2006) (stating that the party was barred from taking any position inconsistent with statements of fact in prior court filings under doctrine of judicial admissions). Defendants' prior judicial admissions that they view CPA Order 17 as preventing the Iraqi courts from exercising jurisdiction over them should be given full weight and effect. Such effect protects the integrity of the judicial process. *Lamonds v. General Motors Corp.*, 34 F.Supp.2d 391 (W.D.Va. 1999). *See also Lowery v. Stovall*, 92 F.3d 219, 224 (4th Cir. 1996) (judicial estoppel prevents assertion of factually inconsistent positions); *Edwards v. Aetna Life Ins. Co.*, 690 F.2d 595, 599 (6th Cir. 1982) (stating "the essential function of judicial estoppel is to prevent intentional inconsistency; the object of the rule is to protect the judiciary, as an institution, from the perversion of judicial machinery").

2. CPA Order 17 Prevents Iraqi Courts From Exercising Jurisdiction Over American Contractors Who Were In Iraq and Working on American Contracts Prior to January 1, 2009.

Defendants do not come up with any new evidence that contradicts their former position that CPA Order No. 17 grants them immunity from suit in Iraq, instead relying only on a new opinion from their University of Pittsburgh expert who views CPA Order No. 17 as ambiguous because it has not been the subject of discussion by prominent scholars or others. *See Exhibit A, Defendants' Post-Hearing Brief, at para. 8.*

That is no longer true, as Plaintiffs have been forced by Defendants' actions to obtain additional expertise on the meaning of CPA Order No. 17. Plaintiffs' requests have provoked the Iraqi community of scholars and legislators to discuss the meaning of the Order, and provide their opinions to this Court. On September 4, 2009, Plaintiffs submitted the Declaration of Dr. Sabah Al Bawiis, who opined that CPA Order No. 17 bestows immunity from Iraqi jurisdiction on Defendants. *See Exhibit A to Plaintiff's Supplemental Memorandum and Iraqi Legal Opinions Regarding the Lack of an Alternative Forum in Iraq (filed on September 4, 2009).*

Plaintiffs now respectfully submit three additional Declarations. First, appended as Exhibit A is the Declaration of Dr. Hameed Honoon Khaled, Director of the Consultative Office of Baghdad University's College of Law. His declaration, attached as Exhibit A, consists of the statement of the collective opinion of law professors at Baghdad University. These Iraqi law scholars, all of whom were trained in Iraqi law and live in Iraq, support the conclusion that the Order grants immunity to Americans who were in Iraq working under contract for the United States prior to January 1, 2009.

Second, appended as Exhibit B is the Declaration of Dr. Saleem Abdullah Al-Juboori, an Iraqi Member of Parliament and Vice-Chair of the Legal Committee. His declaration, attached

as Exhibit B, explains that Defendants are immune "since the acts subject of the claim were carried out by a private company at a time when Coalition Provisional Authority Order No. 17 was effective; whereas Section 4 of the same order provide that private companies did not fall under Iraqi jurisdiction while carrying out their work; and whereas the order was still effective at the filing of the legal action, Iraqi courts cannot try claims to which private companies are party."

Third, appended as Exhibit C is the Declaration of Dr. Al-Soufi, who is a practicing Iraqi attorney, trained in Iraq law. His Declaration states that CPA Order 17 organized the legal status of the Coalition and the employees and contractors who worked for them. Paragraph (2) of Section 3 of the Order states that the Coalition's contractors and subcontractors, including those individuals who do not reside in Iraq, are immune from Iraqi legal remedies. Dr. Al-Soufi applies the definition of "contractors," "subcontractors," and "legal measures" under CPA Order 17 to this Section and the plain language of the text and concludes that the Iraqi judiciary is barred from adjudicating cases involving parties that have contracted with the Coalition Provisional Authority.

Plaintiffs also are attaching as Exhibit D a document relating to an unsuccessful attempt by an Iraqi family to exercise jurisdiction over a different foreign contractor (not Defendants here). The document expresses the view of the Ministry of Education in Iraq, which advised the family members that they cannot seek redress in Iraqi courts for the death of their loved one. This letter evidences the fact that the Iraqi government does not believe the Iraqi courts are permitted to exercise jurisdiction over foreign contractors who were in Iraq prior to January 1, 2009.

In addition to this scholarship and evidence from Iraq, the existing scholarship in the United States on the meaning of CPA Order No. 17 also uniformly finds that American contractors working on United States contracts are entitled to immunity from Iraqi process under CPA Order 17. *See* U.S. Congressional Research Service. *Private Security Contractors in Iraq: Background, Legal Status and Other Issues* (RL32419 Aug. 25, 2008) by Jennifer K. Elsea, et al; *see also* Michael Hurst, *After Blackwater: A Mission-Focused Jurisdictional Regime for Private Military Contractors During Contingency Operations*, 76 Geo. Wash. L. Rev. 1309, 1312 (2008) (stating that Iraqi courts do not have jurisdiction over private military contractors absent consent from the sending state).

In short, there is no evidence other than the University of Pittsburgh law professor's sudden finding of ambiguity to support the claim that Iraq is an adequate alternative forum.[1] To the contrary are the opinions of Iraqi jurists, law professors and legislators. In addition, there is the text of CPA Order No. 17 itself.

Although the Order may not be a model of clear drafting, there are several provisions that clearly are logically read by Iraqi courts to prevent them from exercising jurisdiction over Defendants. Section 18 of the Order unequivocally states:

> Except where immunity has been waived in accordance with Section 5 of this Order, third-party claims including those for property loss or damage and for personal injury, illness or death or in respect of any other matter arising from or attributed to acts or omissions of CPA, MNF and Foreign Liaison Mission

[1] Further, even Exhibit A undermines Defendants' arguments because in Exhibit A, the University of Pittsburg law professor admits that "the issues addressed in my previous reports should impose substantial limitations on the ability to recover under Iraqi law." *See Exhibit A to Defendants' Post-Hearing Brief at para. 10.* Stated more bluntly, this University of Pittsburgh law professor is already on record saying that Plaintiffs do not state claims under Iraqi law. This alone compels a finding that Iraq is not an adequate alternative forum. *Piper Aircraft Co. v. Reyno*, 454 U.S. 235 (1981); *Compania Naviera Joanna SA v. Koninklijke Boskalis Westminster NV,* 569 F.3d 189 (4th Cir. 2009) (stating in dicta that an inadequate forum based on substantive law arises where the alternative forum does not permit litigation of the subject matter).

> Personnel, International Consultants, and Contractors or any persons employed by them for activities relating to performance of their Contracts, whether normally resident in Iraq or not and that do not arise in connection with military operations, ***shall be submitted and dealt with by the Sending State whose personnel (including the Contractors engaged by that State), property, activities or other assets are alleged to have caused the claimed damage, in a manner consistent with the Sending State's laws, regulations and procedures***. (emphasis added)

Read in conjunction with Section 2 of the same Order, which states that contractors are immune from the Iraqi legal process, Section 18 preserves that immunity and pushes the claims back to the sending country, unless the sending country (here the United States) waives immunity under Section 5. [2]

This Section does not require that the acts or omissions be in conformance with the terms of the relevant contract. Rather, it states "for activities relating to performance of their Contracts." Defendants' expert admits this text was drafted by American lawyers, not Iraqi jurists. In English, this text is broad and clearly subsumes acts and omissions that may be shown at trial to have violated the terms of the contracts with the United States. (Defendants have gone on record stating that they will defend themselves by providing the conduct was within the contractual zone.) Any other interpretation of the text would be nonsensical, as it would place in Iraqi hands disputes over the meaning and scope of contracts entered into by the United States government.

These contracts are viewed by this Court and all the parties as so highly confidential that they cannot be placed on the public record. Indeed, the United States has asked, and undersigned

[2] Plaintiffs have not found a single instance in which the United States has waived immunity in Iraq. *See* Human Rights Watch, Q&A: Private Military Contractors and the Law, *available at* http://www.hrw.org/legacy/english/docs/2004/05/05/iraq8547.htm) (stating "Human Rights Watch is unaware of any home states having waived immunity."). Indeed, in connection with the shootings at Nisoor Square, the United States as the sending state invoked its own jurisdiction and criminally prosecuted Mr. Prince's employees.

counsel have agreed, that counsel not share the text of the contracts with their Iraqi clients. It defies belief that Defendants are now implicitly suggesting that their defense (i.e. that they complied with the contract terms and therefore did not commit war crimes) should be adjudicated in Iraq.

Further, as a practical note, it simply impossible to believe that the Iraqi courts would not have exercised jurisdiction over Defendants in the wake of the Nisoor Square massacre if they had been permitted by the law to do so. The massacre caused widespread public outrage in Iraq.[3]

The Iraqi government took the only measures available to it in light of CPA Order No. 17. They revoked Defendants' license to operate in Iraq, and set about drafting and passing legislation that set aside CPA Order No. 17. This legislation means that any American contractors acting in Iraq subsequent to January 1, 2009, are subject to the jurisdiction of Iraqi courts. But this legislation did not purport to have retroactive effect, and does not attempt to extinguish the immunity from suit in Iraq for the acts committed by persons in Iraq to perform under contract with the United States prior to January 1, 2009.[4]

[3] *See* Sudarsan Raghavan, *Iraqi Families Vent Anger Over Killing*, WASH. POST, Dec. 14, 2008, at A20 (describing the Iraqi outrage at the Nisoor Square killings); *see also* Sabrina Tavernise, *U.S. Contractor Banned by Iraq Over Shootings*, N.Y. TIMES, Sept. 18, 2007, available at http://www.nytimes.com/2007/09/18/world/middleeast/18iraq.html?scp=14&sq=blackwater%20nisour%20square%20outrage&st=cse (describing the anger of Iraqis and Iraqi senior officials at the Nisoor Square killings)

[4] Note, the immunity conferred by Order No. 17 is jurisdictional, not substantive and absolute as argued by Defendants. It removes those persons from the jurisdictional reach of Iraqi courts, not from the reach of the rule of law, including Iraqi law. Thus, this Court is free to apply Iraqi law if deemed necessary by choice of law principles.

3. Even Without CPA Order 17, There Is No Record Evidence Establishing that Iraqi Courts Can Obtain Jurisdiction Over Defendants.

But importantly, even if this Court were to set aside the dispute over the Iraqi interpretation of CPA Order No. 17, the Court would still lack sufficient evidence on which to dismiss based on *forum non conveniens*. The Court of Appeals for the Fourth Circuit has made it crystal clear that parties cannot merely suggest a country that could be an alternative. Instead, there must be proof that an actual court in a specific jurisdiction can hear the matter. For example, in *Kontoulas v. A.H. Robins Co. Inc*., the Court of Appeals affirmed the District Court's denial of a motion to dismiss on *forum non conveniens* grounds. The Court held that Defendants failed to meet their burden of proof in establishing than an alternative forum was more appropriate. The Court reasoned that although defendants indicated that they would consent to jurisdiction in the alternative forum, mere consent did not indicate that the other jurisdiction was necessarily better. Furthermore, defendants failed to indicate which *court* provided the alternate forum, only suggesting a country. *Kontoulas v. A.H. Robins Co. Inc*., 745 F.2d 312, 315 (4th Cir. 1984).

Here, the facts are even more lopsided, and clearly cannot sustain an argument for dismissal. Xe intends to contest jurisdiction in Iraq. Xe has not provided the Court with any Iraqi law or legal opinions that would establish that the Iraqi courts would view themselves as permitted to exercise jurisdiction over Mr. Prince and his array of wholly-owned companies. Mr. Prince and his companies are not in Iraq. How would Iraq obtain jurisdiction over them? Defendants are inviting the Court to commit reversible error by asking the Court to dismiss without providing any of the record evidence needed to establish that Iraq is an adequate alternative forum as defined by the controlling Supreme Court jurisprudence. *Kontoulas v. A.H. Robins Co. Inc,* 745 F.2d 312 (4th Cir. 1984)

C. Given the Lack of Adequate Alternative Forum, the Court Need Not Engage in the "Convenience" Balancing Test, But That Test Would Result in Denying Defendants' Forum Non Conveniens Argument.

Because Defendants have so woefully failed to provide the Court with any record evidence that would support a finding that Iraq is an "adequate alternative" forum, as is required by Supreme Court jurisprudence, this Court need not even take the second step in the analysis. In an excess of caution, however, Plaintiffs include the following points in rebuttal to Defendants' claims that the convenience balancing favors their motion to dismiss on *forum non conveniens*. The Supreme Court cites the following as factors: (1) the hardships a defendant would face if the suit remained in the current forum versus those the plaintiff would face if the case were dismissed and brought in an alternative forum, (2) ease to sources of proof, (3) availability of process for the unwilling witnesses and the cost of obtaining attendance of willing witnesses, (4) the ability to view the premises in cases where it is relevant; and (5) "all other practical problems that make trial of a case easy, expeditious and inexpensive." The Court also requires that a balancing of public interests, which tend to be referred to as "comity" and is addressed below as the sixth factor.

1. Defendants Do Not Face Any Hardships if the Trial Is Held in Virginia.

Defendant Erik Prince lives in McLean, Virginia. He controls the litany of companies named as Defendants from his offices in Tysons Corner, Virginia. His executives and employees live in the United States, either in Virginia or North Carolina. It simply is impossible for Defendants to claim trying the case in Virginia poses a hardship to them. Indeed, they filed a motion in the District of Columbia seeking this very venue. That motion is attached as Exhibit E.

2. Plaintiffs Will Lose All Access To Sources of Proof if the Matter Is Adjudicated in Iraq.

Plaintiffs will lose their access to critical documents if the lawsuits are adjudicated in Iraq. For example, if the Defendants were to move the lawsuit to Iraq, and then claims all their actions were in conformity with the United States contract, Plaintiffs would have nothing with which to rebut such a meritless defense. Here, the Court and the Plaintiffs' counsel have access to the contract, which serves to rein in the Defendants' ability to make unfounded claims based on the content of the contract.

3. Plaintiffs Will Not Be Able To Compel Witnesses To Attend a Trial in Iraq.

The witnesses with first-hand knowledge of the wrongdoing are Americans, and one Australian who is living in the United States. They are, for the most part, living in North Carolina or Virginia. Because many of the witnesses fear crossing Mr. Prince, there are going to be a limited number of witnesses voluntarily testifying at Plaintiffs' request. Those who are willing to testify voluntarily are unlikely to travel to Iraq to do so, as Iraq remains dangerous for Americans.

As to the non-willing witnesses, Plaintiffs are going to need to be able to use judicial process to compel attendance at trial or deposition. These critical witnesses would be wholly unavailable to Plaintiffs were the matter tried in Iraq.

In contrast, Defendants are not harmed by proceeding in this Court, because the third party Iraqi witnesses to the wrongful acts are very willing and able to travel to the United States to testify. Plaintiffs will be bringing over for trial the Iraqi eye-witnesses to the various shootings.

4. Modern Technology Will Provide Jurors An Adequate Substitute To An In-Person Visit to the Sites of the Wrongful Acts.

Although a jury sitting in Virginia will not be able to leave the courthouse and travel to see the various sites of the wrongdoing, modern technology will provide an adequate substitute. Plaintiffs will have videos and photographs of the locations, which will provide the jurors the necessary location. Indeed, if required to do so by the Court, Plaintiffs likely could arrange some sort of real-time transmission of the visual images of the locations.

5. It Will Be Much Easier and Cheaper To Try these Lawsuits in the United States Than To Try the Case in Iraq.

It will be much less expensive to try these lawsuits in the United States. If Plaintiffs were forced to litigate in Iraq, they would incur substantial costs associated with travel for counsel and witnesses. In addition, they likely would need to pay for security for the American counsel and witnesses in order to prevent any injuries or deaths due to the volatility of the security situation in Iraq. Such added costs are not necessary in the United States. Defendants do not incur any additional costs if the matter is tried in the United States, as Plaintiffs will be bearing the burden of the travel expenses for the Plaintiffs and Iraqi eye witnesses, and the expenses associated with obtaining visual images of the locations.

6. American Juries Have An Interest In These Lawsuits.

This case involves wrongdoing by Americans who were being paid with American tax payer dollars to protect American diplomats in a war zone. Xe (formerly Blackwater) and the web of companies owned and operated by Erik Prince are United States corporations. Erik Prince is a United States citizen and a resident of the Commonwealth of Virginia. The Department of Justice has indicted five of Mr. Prince's employees for their actions on September 16, 2007 at Nisoor Square, Iraq, with a sixth individual pleading guilty. Indeed, the FBI and the United

States Military have both conducted extensive investigations into the killings at Nisoor Square and then Secretary of State Condoleeza Rice called Prime Minister Maliki to apologize for the shootings. Congressional hearings were led by Henry Waxman, Chair of the Congressional House of Representatives Committee on Oversight and Government Reform, regarding Blackwater's role in Iraq.

There is no question that the United States has a strong interest in allowing oversight and accountability of private contractors, hired by the Department of State, and paid for by U.S. taxpayer money, and allowing a remedy for those individuals who have been harmed by these contractors. The United States has not waived the rights accorded to the sending state by CPA Order No. 17, although it could do so. For Defendants to argue that there is "little or no connection" between the United States and this dispute is so patently erroneous that it raises serious questions about the credibility of their arguments.

Contrary to Defendants' outlandish statement that these lawsuits have no nexus to the United States, American jurors in general, and Virginia jurors specifically, have a direct and compelling interest in the deciding the consequences for wrongdoing engaged in by Americans. There is a clear nexus to the United States because the wrongdoers are all Americans.

A Virginia jury is a jury of Mr. Prince's peers. Such a jury will have a keen interest in being permitted to hear the claims and Mr. Prince's defenses. Such a "hometown" jury will be able to assess the merits of Mr. Prince's defense that his employees were not engaged in wrongful conduct designed to kill innocent Iraqis (as is contended by both Plaintiffs and the Department of Justice), but rather were simply doing their jobs in conformity with the terms of the contract with the United States.

Clearly, the United States has a nexus with the dispute, and therefore deference should be given to Plaintiffs' choice of forum. *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501, 508 (1947) (stating "unless the balance is strongly in favor of the defendant, the plaintiff's choice of forum should rarely be disturbed.")

Defendants assert principles of international comity require this Court to push the Iraqi Plaintiffs out of the United States (the forum they chose) and into Iraqi courts. Defendants cite as analogous *Ungaro-Benages v. Dresdner Bank AG*, 379 F.3d 1227 (11th Cir. 2004), but they fail to inform the Court that the Court of Appeals' decision turned on the fact that the United States and Germany had reached a formal agreement on the best mechanism to use for victims of the Nazi regime. Here, CPA Order No. 17 reflects the joint decision of both the United States and Iraq that the courts of the sending state (here, the United States) are the best place for claims asserted against non-Iraqi contractors who were in Iraq prior to January 1, 2009, because they were working for the United States or some other Coalition Party. Thus, even Defendants' own authority compels the conclusion that the lawsuits need to be tried in this Court.

Further, although the Iraqi government clearly has a strong interest in the case, Iraq has not attempted to ignore CPA Order 17, which barred Iraqi police from arresting the wrongdoers while they were in Iraq, and which continues to bar the courts from hearing disputes arising out of conduct by contractors in Iraq prior to January 1, 2009. What Defendants are advocating is that this Court turn a blind eye to the rule of law, and instead dismiss Mr. Prince and his companies, knowing that they will not submit themselves to jurisdiction in Iraq. It is troubling that officers of the court are willing to make such arguments.

II. THE ALIEN TORT STATUTE DOES NOT REQUIRE FUTILE EXHAUSTION OF NON-EXISTENT LOCAL REMEDIES.

Defendants argue for the first time that the "doctrine of exhaustion of local remedies requires Plaintiffs to pursue their claims in Iraqi courts before instigating suit in the United States." *Post-Hearing Brief at 3*. First, they cannot raise an exhaustion claim because they waived it by failing to include this argument in their motion to dismiss. See Fed.R.Civ.P. 12(g).

Even had they timely raised the argument, however, the Court should reject it, as it lacks merit. There is no local remedy available to these Plaintiffs, as is demonstrated in Section I, above. No international or domestic law requires Plaintiffs to engage in meaningless acts before bringing suit in the United States. Defendants do not provide any legal authority for their argument, relying instead merely on a argument that exhaustion "makes sense." *Post-Hearing Brief at 3*. Although Defendants suggest that exhaustion is some sort of established international legal custom, they provide no compelling support for that position.

A. Defendants Waived Their Exhaustion Argument By Failing To Raise It in a Timely Fashion.

During oral argument, the Court expressed an interest in learning whether CPA Order No. 17 clearly bars suit in Iraq. It does, as Defendants conceded during the hearing. Yet now, Defendants seek to capitalize on the Court's interest, and raise for the first time an exhaustion argument. It is safe to say that every lawyer appearing before the Court likely leaves oral argument wishing they had made a different or additional argument. But the Federal Rules of Civil Procedure are designed to prevent parties from an endless round of litigation. When Defendants asked this Court dismiss the lawsuits, they were obliged to raise all their grounds for dismissal. F.R.C.P. Rule 12(g) clearly states "…a party that makes a motion under this rule must not make another motion under this rule raising a defense or objection that was available to the

party but omitted from its earlier motion." The advisory committee notes following Rule 12 state that the purpose of the required consolidation of defenses and objections is "that it works against piecemeal consideration of a case.... A party who by motion invites the court to pass upon a threshold defense should bring forward all the specified defenses he then has and thus allow the court to do a reasonably complete job." Here, Defendants could have raised its exhaustion defense during its Motion to Dismiss, but failed to do so, thereby waiving their rights to assert an exhaustion argument. *See, e.g., In re South Africa Apartheid Litigation,* 617 S. Supp. 2d 228, 281, n. 320 (S.D.N.Y. 2009) (finding the affirmative defense of exhaustion waived because not raised by defendants in motion to dismiss).

B. Exhaustion Is Not Required Here.

1. **Defendants Cannot Rely on Congressional Intent**.

Defendants claim "international law" supports imposing an exhaustion requirement, but they fail to provide the Court with any compelling legal authorities. Instead, they argue that Congress must have intended for Alien Tort Statute plaintiffs to exhaust because Congress included exhaustion as a perquisite to bringing a claim under the TVPA against foreign defendants. This is a very odd argument for two reasons. First, the argument fails to address why Congress did not amend the Alien Tort Statute. If Congress wanted aliens bringing claims against American tortfeasors to first try to haul Americans into local courts, it could have amended the statute. But it did not. Second, the TVPA is limited to claims brought by either Americans or aliens against foreign defendants. Plaintiffs here are bringing claims against Americans, not foreigners. Thus, all of the reasons why Congress may have wanted TVPA plaintiffs to try to seek justice in the home courts of foreign defendants are the same reasons that

compel this Court to exercise jurisdiction here. This Court, not Iraq, is the local remedy for claims against American tortfeasors.

2. International Law Does Not Require Futile Action.

Defendants augment their odd "Congressional intent" argument with an argument that international law (incorporated into federal common law via the ATS) requires that plaintiffs exhaust "local remedies" in the Iraqi judiciary. But there is no such clear requirement found in the ATS decisions issued by the Supreme Court or the lower courts. In S*osa*, the Supreme Court stated that the court *may* consider an exhaustion remedy in an "appropriate case." *Sosa v. Alvarez-Machin*, 542 U.S. 692, 733 n.21 (2004). *See Jean v. Dorelien*, 431 F.3d 776, 781 (11th Cir. 2005); *Sarei v. Rio Tinto*, 550 F.3d 822, 828 (9th Cir. 2008) (finding exhaustion to be a prudential doctrine). These lawsuits, where the Defendants are being hauled into their own courts, not the courts of a foreign land, are hardly the "appropriate case" for the application of exhaustion.

But even were exhaustion a routine part of ATS law (which it is not), neither international nor domestic law requires futile actions. Notably, the Senate Report on the TVPA, drawing on international law principles, stated that remedies which are "ineffective, unobtainable, unduly prolonged, inadequate, or obviously futile" need not be exhausted. S. Rep. No. 249, 102d Cong., 1st Sess. 8 (1992), at 10. Exhaustion can only be required if there is an alternative jurisdiction that could provide an adequate judicial remedy. *See, e.g., Akvidar v. Turkey*, 23 Eur. Ct. H.R. 143, ¶¶ 57, 60, 67, 72 (1996). Here, of course, there is no remedy in Iraq.

Defendants bear the burden to plead and prove the availability of local remedies. *See Jones v. Bock*, 549 U.S. 199 (2007). Defendants rely on the Court of Appeals for Ninth Circuit's

en banc decision in *Sarei v. Rio Tinto*, 550 F.3d 822, 828 (9th Cir. 2008). But the reasoning of that decision, when applied to the facts here, yields the opposite result. There, the Court of Appeals in *Sarei* sets out to factors to be taken into account in an exhaustion analysis, namely the "nexus" to the United States, and the "universality" of the claim. *See Sarei*, 550 F.3d at 831. The Court noted that exhaustion may only be considered when there is a showing of adequacy of remedy, and if pursuing the local remedy would be futile, or result in a denial of justice, then the plaintiffs need not exhaust. *See Sarei*, 550 F.3d at 828.

Significantly, when the district court applied both of the "nexus" and "universality" factors to claims against a non-U.S. corporation for violations alleged to have occurred in Papua New Guinea on remand, it found that exhaustion did not warrant dismissal of plaintiffs' "universal" claims, such as war crimes. *Sarei v. Rio Tinto*, 00-cv-11695-MMM (C.D.Cal. July 31, 2009). The district court concluded that the "nexus" was "weak" by looking to the facts including that Rio Tinto is a foreign corporation; that the acts occurred exclusively on foreign soil; that the violations were directed at aliens had almost no connection to the United States; that Rio Tinto has operations or interests in the United States. *Sarei*, Slip Op. at 13-22. In relation to the "war crimes" claim, the district court found that under the Restatement (Third) of Foreign Relations Law of the United States, the Geneva Conventions and U.S. case-law, including cases brought under the ATS, war crimes were a matter of "universal concern." *Id.* at 26-27. Weighing these two factors, the district court found that prudential exhaustion should not apply to plaintiffs ATS claims for war crimes.

Here, applying the *Sarei* reasoning yields the same result as reached by the District Court on remand. But the facts are even more compelling against imposing on exhaustion requirement here. First, there is no showing by defendants that a local remedy exists, as is discussed above in

Section I. Second, in these lawsuits, there is a strong nexus to the United States: the wrongdoers are all Americans. They were in Iraq because the United States' Department of State hired them to protect diplomats. Third, the lawsuits involve a matter of universal, not local, concern. The conduct alleged to have occurred is using the guise of working for the United States to instead embark on an unauthorized and wholly illegal scheme to kill as many innocent Iraqis as possible. If proven at trial, this misconduct clearly constitutes war crimes and matters of universal concern.

Defendants try to avoid the inevitable result of applying the *Sarei* appellate reasoning to the facts here by arguing that by sending these claims to Iraq, this Court would avoid potential foreign policy conflicts between the country in which the tort occurred and the country in which it is litigated. *Id.* at 4. This is nonsense. Iraq and the United States both agree that CPA Order 17 places the power and the obligation to exercise jurisdiction in the hands of the sending state (here, the United States.) Defendants are concocting a non-existent foreign policy conflict, which could be easily resolved by the United States if it existed. It does not. As evidenced by the Plaintiffs' ability to obtain Declarations from Iraqi legislators and the entirety of the faculty at Iraq's leading law school, Iraq is comfortable with the fairness and efficacy of litigation in this nation. Xe introduces no evidence to the contrary, relying instead merely on speculation. The policy voiced by both countries is one and the same – claims against U.S. contractors who operated in Iraq prior to January 1, 2009, should be tried in U.S. courts.

CONCLUSION

There is simply no reason to dismiss Plaintiffs' claims here. Defendants woefully failed to carry their burdens necessary for either a *forum non conveniens* or exhaustion argument. They did not – and cannot – establish that Iraqi courts are able to exercise jurisdiction over these

Defendants and hear these lawsuits. For the foregoing reasons, the Court should not dismiss Plaintiffs' lawsuits.

Dated: September 16, 2009

Respectfully submitted,

/s/

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William F. Gould (VA Bar #67002)
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Attorney for Abtan and Albazzaz Plaintiffs

CERTIFICATE OF SERVICE

I hereby certify that on the 16th day of September, 2009, I caused a copy of Plaintiffs' Opposition to Xe's New Dismissal Argument to be served via ECF on the following:

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EXHIBIT A

LANGUAGE

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TRANSLATION CERTIFICATION

This is to certify that the translation of the attached document, **Ref: declaration of the legal consultative office**, is to the best of our knowledge and ability, a true and accurate translation of the original text delivered to Language Innovations, LLC by our client. The original document was translated from **Arabic** into **English** and at completion delivered to the client on **September 10, 2009.**

I hereby declare that all statements made herein are of my own knowledge and are true and that all statements made based on information or belief are believed to be true.

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Date: September 16, 2009

Signature: _____

Lindsey Crawford
Language Innovations, LLC

Subscribed and sworn before me this 16th day of September 2009, at Washington, DC.

_____
Notary Public

My Commission expires: BRIAN FRIEDMAN
Notary Public District of Columbia
My Commission Expires July 14, 2013

1725 I Street, NW Suite 300 Washington, DC 20006 202.349.4180 tel 888.349.4180 toll free 202.349.4182 fax
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In the Name of Allah, Most Gracious, Most Merciful
Republic of Iraq
[Logo]
Ministry of Higher Education & Scientific Research

Baghdad University
College of Law

Number: *3*
Date: *09/09/2009*

Re. Applicability of Iraqi law to private security companies working in Iraq

Upon review of Order No. 17 - which pertains to the status of the Coalition Provisional Authority, multinational forces in Iraq, and nationals and delegations assigned to Iraq; is issued by the Director of the Coalition Provisional Authority on the twenty seventh of June 2003; and is published in Iraqi Official Gazette No. 3979 of 2003 - as well as the amendment thereto issued on the twenty seventh of June 2004, it appeared to us that contractors, including private security companies, are covered by the immunity under the said order, based upon its fourth section which provides that contractors have immunity from any Iraqi legal action. This means that they are not subject to the Iraqi law, and no legal actions before the courts or other Iraqi civilian, penal, or administrative entities, may be filed against them with regard to work carried under the terms and conditions of a contract with the Coalition Provisional Authority or the sending state, or any subcontracting, unless in case of a written waiver of this immunity.

In the Name of Allah, Most Gracious, Most Merciful
Republic of Iraq
[Logo]
Ministry of Higher Education & Scientific Research

Baghdad University
College of Law

Number: -
Date: -

Third party actions may be filed with the sending state which nationals had caused the damages, including loss of or damage to assets, personal harm, illness, or death, or any other arising of an act or omission by the contractors. Pursuant to Section Eighteen of Order No. 17, these actions are filed in accordance with the laws, regulations, and procedures of the sending state.

This Order is effective as of the day on which it was issued – 06/27/2003 through 12/31/2008. The agreement between Iraq and the United States of America is effective as of 01/01/2009, pursuant to Law No. 51 of 2008. Under Article 12, Paragraph 2 of the Agreement, private security companies are subject to Iraqi jurisdiction.

[Signature]
Dr. Hameed Honoon Khaled
Director, Consultative Office
09/09/2009

EXHIBIT B

LANGUAGE

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This is to certify that the translation of the attached document, **Ref: Declaration of legislator Dr Saleem Abdullah Al Juboori**, is to the best of our knowledge and ability, a true and accurate translation of the original text delivered to Language Innovations, LLC by our client. The original document was translated from **Arabic** into **English** and at completion delivered to the client on **September 11, 2009.**

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Language Innovations, LLC

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Notary Public

My Commission expires: BRIAN FRIEDMAN
Notary Public District of Columbia
My Commission Expires July 14, 2013

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translate@languageinnovations.com email www.languageinnovations.com web

Re. Declaration on the courts' competence to try claims filed against foreign security companies working in Iraq.

Since the acts subject of the claim were carried out by a private company at a time when Coalition Provisional Authority Order No. 17 was effective; whereas Section 4 of the same order provided that private companies did not fall under Iraqi jurisdiction while carrying out their work; and whereas the order was still effective at the filing of the legal action, Iraqi courts cannot try claims to which private companies are party. Even Section 18 of Coalition Provisional Authority Order No. 17 establishes this, since it provides as follows: "Except where immunity has been waived in accordance with Section 5 of this Order, third-party claims including those for property loss or damage, and for personal injury, illness or death, or any other matter arising from or attributed to acts or omissions of the Coalition Provisional Authority, Multinational Forces, or foreign liaison mission personnel, international consultants and contractors, or any person employed by them for activities relating to the performance of their contracts, whether normally resident of Iraq or not, or that do not arise in connection with military operations, shall be filed with the Sending State whose personnel (including the contractors engaged by that State), property, activities, and other assets are alleged to have caused the claimed damage, in a manner consistent with the Sending State's laws, regulations, and procedures."

[Seal] : Iraqi Council of Representatives
Rep. Saleem Abdullah Al-Juboori

[Signature]
Dr. Saleem Abdullah Al-Juboori
Iraqi Member of Parliament
And Vice-Chair of the Legal Committee
09/09/2009

EXHIBIT C

LANGUAGE

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This is to certify that the translation of the attached document, **Ref: Supplemental Declaration**, is to the best of our knowledge and ability, a true and accurate translation of the original text delivered to Language Innovations, LLC by our client. The original document was translated from **Arabic** into **English** and at completion delivered to the client on **September 3, 2009.**

I hereby declare that all statements made herein are of my own knowledge and are true and that all statements made based on information or belief are believed to be true.

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Date: September 16, 2009

Signature: _____

Lindsey Crawford
Language Innovations, LLC

Subscribed and sworn before me this 16th day of September 2009, at Washington, DC.

_____
Notary Public

My Commission expires: BRIAN FRIEDMAN
Notary Public District of Columbia
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Supplemental Declaration

I have been asked to describe why Iraqi courts cannot hear the cases against the American contractors.

Iraqi courts refrain from hearing any litigation against contracting parties with the Coalition pursuant to the order of the Provisional Coalition Authority No. (17), issued on June 27, 2003 which organized the legal status of the Coalition and the foreign liaison delegations, their employees and contractors working with them. What we are concerned with in this order of the Provisional Coalition Authority is the legal status of the working contractors or the parties having a contract with this Authority. Paragraph (2) of Section Three (Contractors) of the said order stipulates the following:

> The Coalition's contractors and the subcontractors working with them, as well as their employees who don't reside in Iraq, enjoy an immunity against the Iraqi measures with regard to the acts they carry out within the frame of their official activities, in accordance with the provisions and terms of a contract concluded between a contractor and the Coalition Forces or the Provisional Coalition Authority pursuant to the terms of a subcontract).
>
> (No Iraqi legal measure is taken against the Coalition's contractors, subcontractors and their employees, who don't reside in Iraq.... etc.)

Thus, it appears that the said stipulation excluded the contracting parties with the Coalition Authority from being subject to Iraqi legal measures. This stipulation requires the determination of the contracting parties included, first, in its provisions, and, second, what are the legal measures the Iraqi courts refrain from taking against them.

To answer the first question, the Iraqi judiciary resorts to the first section of the said order which was limited to the statement of specifications mentioned in the order. Paragraphs (5) and (6) of the first section of this order stipulated the following:

5) The expression Coalition's contractors means the non-Iraqi commercial entities or non-Iraqi businessmen who usually don't reside in Iraq and supply goods and/or services to the Coalition Forces or Provisional Coalition Authority or on behalf of them, according to the contractual arrangements).

6) The expression Coalition's subcontractors means the non-Iraqi commercial entities or non-Iraqi businessmen who usually don't reside in Iraq and supply goods and/or services to the Coalition's contractors or on behalf of them, and to the activities carried out by the Coalition or the Provisional Coalition Authority, according to the contractual arrangements).

To apply the stipulation of this Coalition Authority's order, the measures which the Iraqi courts refrain from taking against the contractors with the Coalition Authority should be determined. Here paragraph (3) of the first section of said order defines these measures, as it stipulated the following:

3) The expression legal measures means any measures taken for the arrest of a person or persons or their detention. It also means the legal litigations' measures taken in the Iraqi courts or before other Iraqi bodies, whether penal or civil or administrative or of different aspect).

Therefore, and pursuant to the foregoing provisions, the Iraqi judiciary refrains from hearing litigations covered by the abovementioned stipulations.

/signed/
Dr. Ihsan N. AL-Soufi
2 September 2009

EXHIBIT D

LANGUAGE

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This is to certify that the translation of the attached document, **Ref: Sandi - Iraqi Prime Minster**, is to the best of our knowledge and ability, a true and accurate translation of the original text delivered to Language Innovations, LLC by our client. The original document was translated from **Arabic** into **English** and at completion delivered to the client on **September 2, 2009.**

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Date: September 16, 2009

Signature: _____

Lindsey Crawford
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Notary Public

My Commission expires: BRIAN FRIEDMAN
Notary Public District of Columbia
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IN THE NAME OF ALLAH, MOST GRACIOUS, MOST MERCIFUL

/Official emblem reads:/
Iraq
Ministry of Education

/Arabic and English read:/
REPUBLIC OF IRAQ
MINISTRY OF EDUCATION

No.: 4578
Date: 11/16/2007

/Illegible official round seal/
248
11/22/2007

General Secretariat for the Council of Ministers
Re.: Accident

We present to you our sincere regards...

We attach herewith the complaint of Mr. Mohamed Ahmed Mohamed / Specialized Supervisor at the General Directorate of Education in Kirkuk, regarding a painful accident the family of the said individual was subject to, which led to the killing of his wife, a teacher (Shaghik Hazem Nassif), their two children (Ali Mohamed Ahmed) and his sister (Nesrine Ahmed Mohamed) and his brother-in-law (Ala' Eldine Othman) as a result of a collision with one of the vehicles belonging to the security company operating in Iraq.

We would like to indicate the following: -
1- A committee to investigate the matter was formed and it recommended that the family of the said individual be granted the same rights granted to the martyrs of the terrorist acts.
2- The said individual requests that a litigation be brought against the company (Sandi Group for Private Security Protection), not for compensation, but to prove that the killing his family was subjected to, was not an accidental killing but a premeditated one.
3- The Ministry is incapable of bringing up the litigation for two reasons:
A- The accident was not the result of an official action or because of it. Therefore, the institution of the litigation against the company to request a compensation, is subject to cassation (for not being able to determine the liabilities) which is one of the formal reasons for rebutting the litigation stipulated in the Civil Procedural Law No. (83) for the year 1969, but the victim could resort to the judiciary to request a compensation in accordance with the two orders of your respectable Council No. K/2/2/86/5216 dated

IN THE NAME OF ALLAH, MOST GRACIOUS, MOST MERCIFUL

/Official emblem reads:/
Iraq
Ministry of Education

/Arabic and English read:/
REPUBLIC OF IRAQ
MINISTRY OF EDUCATION

No.:
Date:

3/5/2008 and No. K/2/1/27/7214, dated 4/3/2008, the copies of which are herewith attached.
B- The incapacity of instituting a penal litigation against the said company because the Iraqi courts don't hear penal litigations brought against US forces or security companies.

Kindly be informed... and provide us with your instructions with regard to the submitted case.

Please accept our great consideration

Attachments
All fundamentals

/signed/
Dr. Khodair Musa Jaafar Al-Khuzai'i
Minister of Education
11/6/2008

Copy to //
- General Directorate of Education in Kirkuk / Vocational Education / Kindly be informed... and accept our consideration.
- Directorate of Legal Affairs / Pleading and Compliance

/Illegible handwriting/

EXHIBIT E

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

ESTATE OF HIMOUD SAED ABTAN, *et al.*	)	
	)	Civil Case No. **1:07-cv-01831 (RBW)**
Plaintiffs,	)	
	)	
v.	)	
	)	
BLACKWATER WORLDWIDE, *et al.*	)	
	)	
Defendants.	)	
	)	

DEFENDANTS' MOTION TO DISMISS THE AMENDED COMPLAINT FOR LACK OF VENUE AND TO DISMISS NON-LEGAL ENTITIES

Defendants Blackwater Worldwide; Blackwater USA; Blackwater Lodge and Training Center, Inc.; Blackwater Security Consulting, LLC; Blackwater Armor and Targets, LLC; Blackwater Airships, LLC; Blackwater Logistics, LLC; Blackwater Canine; Raven Development Group, LLC; Greystone Limited; Total Intelligence Solutions, LLC; Prince Group LLC; EP Investments, LLC; and Erik Prince (collectively, "Defendants"), pursuant to 28 U.S.C. § 1406(a) and Fed. R. Civ. P. 12(b)(3) move for dismissal of Plaintiffs' Amended Complaint for lack of venue or, in the alternative, for the transfer of this action to the Eastern District of Virginia. Defendants also move for dismissal of three named non-legal entities—Blackwater Worldwide, Blackwater USA, and Blackwater Canine—for lack of personal jurisdiction, pursuant to Fed. R. Civ. P. 12(b)(2); for lack of capacity to be sued, pursuant to Fed. R. Civ. P. 17(b); and for misjoinder of Parties, pursuant to Fed. R. Civ. P. 21.[1]

[1] The spelling "Atban" is used in the caption of the Complaint, the Court's docket sheet, and the Court's December 19, 2007 order. The spelling "Abtan" is used in the Amended Complaint. This Motion and all supporting papers adhere to the naming convention used in the Amended Complaint.

As required by Local Rule 7(a), the reasons supporting this motion are set forth in the attached Defendants' Memorandum in Support of Their Motion to Dismiss the Amended Complaint for Lack of Venue and to Dismiss Non-Legal Entities. A Proposed Order is also attached as required by Local Rule 7(c). Defendants have served counsel for Plaintiffs with copies of this Motion, the Memorandum and its supporting documents, and the Proposed Order.

Respectfully submitted,

/s/ Michael Lackey
Michael Lackey (#443362)
Andrew Pincus (#370726)
Peter White (#468746)
MAYER BROWN LLP
1909 K Street, N.W.
Washington, D.C. 20006
(202) 263-3000

Counsel for Defendants

Dated: January 22, 2008

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

ESTATE OF HIMOUD SAED ABTAN, *et al.*	)	
	)	Civil Case No. **1:07-cv-01831 (RBW)**
Plaintiffs,	)	
	)	
v.	)	
	)	
BLACKWATER WORLDWIDE, *et al.*	)	
	)	
Defendants.	)	
	)	

DEFENDANTS' MEMORANDUM IN SUPPORT OF THEIR MOTION TO DISMISS THE AMENDED COMPLAINT FOR LACK OF VENUE AND TO DISMISS NON-LEGAL ENTITIES

Michael Lackey (#443362)
Andrew Pincus (#370726)
Peter White (#468746)
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(202) 263-3000

Counsel for Defendants

Dated: January 22, 2008

TABLE OF CONTENTS

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INTRODUCTION

Blackwater Worldwide; Blackwater USA; Blackwater Lodge and Training Center, Inc. ("Blackwater Lodge"); Blackwater Security Consulting LLC ("Blackwater Security"); Blackwater Armor and Targets LLC ("Blackwater Armor"); Blackwater Airships LLC ("Blackwater Airships"); Blackwater Logistics LLC ("Blackwater Logistics"); Blackwater Canine; Raven Development Group LLC ("Raven Development"); Greystone Limited ("Greystone"); Total Intelligence Solutions, LLC ("Total Intelligence"); Prince Group LLC ("Prince Group"); EP Investments LLC ("EP Investments"); and Erik Prince (collectively, "Defendants"), respectfully submit this Memorandum in Support of Their Motion to Dismiss the Amended Complaint for Lack of Venue and to Dismiss Non-Legal Entities.

This Memorandum establishes grounds for dismissal of the Amended Complaint itself and, in any event, of three named Defendants. First, pursuant to Fed. R. Civ. P. 12(b)(3) and 28 U.S.C. § 1406(a), all claims should be dismissed because Plaintiffs committed an obvious error by filing in the wrong court an Amended Complaint that neither alleges venue properly nor satisfies Plaintiffs' burden of establishing that venue is proper. Second, pursuant to three Rules of Federal Civil Procedure—12(b)(2), 17(b), and 21—the claims against Blackwater Worldwide, Blackwater USA, and Blackwater Canine should be dismissed because these purported Defendants are not legal entities, and a suit may not be brought against something that is not a legal entity.

ARGUMENT

Plaintiffs cite two venue provisions, but neither provides any grounds for venue in this Court. When venue is defective, 28 U.S.C. § 1406(a) authorizes this Court either to dismiss or to transfer the action. All Defendants that are legal entities reside for venue purposes in Virginia, and venue would therefore be proper in the Eastern District of that State ("E.D. Va."). Here, however, because Plaintiffs have committed an obvious error in suing without even alleging any plausible basis for venue in the District of Columbia, Defendants request that this Court dismiss all claims. Moreover, this Court has independent grounds to dismiss claims against the three nominal Defendants that in fact are not legal entities.

I. Plaintiffs' Claims Should Be Dismissed For Lack Of Venue

A. Plaintiffs provide no basis for venue in the District of Columbia.

The Amended Complaint fails to establish any basis for venue in this Court. Plaintiffs have the "obligation to institute the action in a permissible forum," and thus bear "the burden of establishing that venue is proper." *Freeman v. Fallin*, 254 F. Supp. 2d 52, 56 (D.D.C. 2003). Here, Plaintiffs rely on two provisions in support of venue in the District of Columbia—28 U.S.C. § 1391(a)(3) and 28 U.S.C. § 1391(b)(2). Am. Cmplt. ¶ 22. As explained below, neither provision is relevant to this case.

The first provision relied on by Plaintiffs applies to actions "founded ***only*** on diversity of citizenship." 28 U.S.C. § 1391(a) (emphasis added). It is inapplicable here because Plaintiffs do not rely only on diversity. Am. Cmplt. ¶ 21 (basing jurisdiction on both diversity and the presence of a federal question); *see Friedman v. Revenue Mgmt. of N.Y., Inc.*, 839 F. Supp. 203, 206 (S.D.N.Y. 1993) (when "[j]urisdiction * * * is based on diversity and a federal question," Section

1391(a) is "irrelevant for the determination of proper venue"), *aff'd* 38 F.3d 668 (2d Cir. 1994). Indeed, this provision cannot apply because this Court has no diversity jurisdiction over this case. *See Eze v. Yellow Cab Co. of Alexandria, Va., Inc.*, 782 F.2d 1064, 1065 (D.C. Cir. 1986) (per curiam) ("A diversity suit, in line with the *Strawbridge* rule, may not be maintained in federal court by an alien against a citizen of a state and a citizen of some other foreign country.");[2] *see also Allendale Mut. Ins. Co. v. Bull Data Sys., Inc.*, 10 F.3d 425, 428 (7th Cir. 1993) (Posner, J.) (explaining in dicta how such a case does "not fit any of the possibly applicable jurisdictional pigeonholes").

The second provision relied on by Plaintiffs is also inapplicable because it permits suit in "a judicial district in which a substantial part of the events or omissions giving rise to the claim occurred, or a substantial part of property that is the subject of the action is situated." 28 U.S.C. § 1391(b)(2). No property is at issue here, and the alleged "events or omissions" giving rise to Plaintiffs' claims occurred in Iraq, not in the District of Columbia—and not even in the United States, for that matter. Plaintiffs do not allege that ***any*** of the events giving rise to their claims occurred in the District of Columbia, much less "a substantial part" of them. Therefore, Section 1391(b)(2) provides no basis for venue in this Court. *See Rogers v. Metro. & City Police New Scotland Yard of London*, Civ. A. No. 91-2124 (CRR), 1992 WL 23669, at *1 (D.D.C. Jan. 23, 1992) (finding venue improper in this Court under Section 1391(b)(2) because the "complaint describe[d] no important events giving rise to [plaintiff's] claim which took place in the District of Columbia or property alleged to be located in the District" but rather "describe[d] events occurring mostly in Colorado, California, or overseas").

---

[2] As discussed in Part I.B.3, *infra*, Greystone Limited is an alien corporate Defendant.

Accordingly, as Plaintiffs have committed an obvious error in suing without even alleging any plausible basis for venue in this Court, Defendants request that this Court dismiss all claims.

B. Venue would be proper in the Eastern District of Virginia.

In view of the allegations of the Amended Complaint, venue would be proper in E.D. Va. Under Section 1391(b)(1)—which Plaintiffs do not cite—venue is proper in "a judicial district where any defendant resides, if all defendants reside in the same State." As demonstrated below, the only State in which all Defendants reside for venue purposes is Virginia, and venue would be proper in E.D. Va. Nevertheless, Defendants submit that this action should be dismissed, not transferred to E.D. Va., for the reasons given below. *See* Part I.C, *infra*.

1. The non-alien corporate Defendants

The Defendants who are non-alien corporations reside in Virginia.[3] For venue purposes, a corporation resides in any judicial district in which "it is subject to personal jurisdiction." 28 U.S.C. § 1391(c). To be subject to personal jurisdiction in Virginia in this case, each Defendant must have "continuous and systematic" contacts with the State. *Helicopteros Nacionales de Colombia, S.A. v. Hall*, 466 U.S. 408, 416 (1984) (providing the standard for general personal jurisdiction). This constitutional minimum is the relevant standard, for Virginia law[4] extends general

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[3] These are Blackwater Lodge, Blackwater Security, Blackwater Armor, Blackwater Airships, Blackwater Logistics, Raven Development, Total Intelligence, Prince Group, and EP Investments. Three Defendants—Blackwater Worldwide, Blackwater USA, and Blackwater Canine—are not legal entities, *see* Part II, *infra*, and thus should not be considered separately for venue purposes.

[4] Virginia law determines whether Defendants have sufficient contacts with Virginia to support general jurisdiction, and thus to make federal venue proper under Section 1391(b)(1) and Section 1391(c). *Beech Aircraft Corp. v. EDO Corp.*, Civ. A. No. 90-1518, 1991 WL 133551, at *2 (D.D.C. Feb. 15, 1991) ("Whether personal jurisdiction could be established over [the defendant] in the federal courts of Kansas is determined with reference to Kansas law.").

personal jurisdiction as far as the federal Constitution permits. *English & Smith v. Metzger*, 901 F.2d 36, 38 (4th Cir. 1990); *Witt v. Reynolds Metals Co.*, 240 Va. 452, 454-56 (1990).

Each non-alien corporate Defendant has the requisite "continuous and systematic" contacts with the State of Virginia:

a. Prince Group, EP Investments, and Total Intelligence have their respective principal places of business in Virginia. The location of a corporation's principal place of business is conclusive evidence that it is subject to general personal jurisdiction. *See Perkins v. Benguet Consol. Mining Co.*, 342 U.S. 437, 447-48 (1952) (finding general personal jurisdiction where the principal place of business had temporarily relocated because of the Second World War); *Devaughn v. Inphonic, Inc.*, 403 F. Supp. 2d 68, 72 (D.D.C. 2005) (finding a corporation subject to personal jurisdiction where its principal place of business was located); *Intranexus, Inc. v. Siemens Med. Solutions Health Servs. Corp.*, 227 F. Supp. 2d 581, 582 n.3 (E.D. Va. 2002) ("[I]t is indisputable that venue would be proper in the Eastern District of Pennsylvania because Defendant has its principal place of business in Pennsylvania and is therefore subject to personal jurisdiction therein pursuant to 28 U.S.C. § 1391(c)."); *LG Elecs. Inc. v. Advance Creative Computer Corp.*, 131 F. Supp. 2d 804, 813 (E.D. Va. 2001) ("General jurisdiction exists over resident defendants with their principal place of business in the jurisdiction."); *Witt*, 240 Va. at 455 ("A foreign corporation * * * which has its principal place of business in the forum * * * may be subjected to personal jurisdiction there.").

All three Defendants have the requisite contacts, because each has its principal place of business in Virginia. The principal place of business of Prince Group and EP Investments is an approximately 10,000 square feet office located at 1650 Tysons Blvd., McLean, Virginia 22102 ("the McLean Site"). Schmitz Decl., Ex. A, ¶ 4; Prince Decl., Ex. B, ¶ 5. All Prince Group em-

ployees work at the McLean Site. Schmitz Decl., Ex. A, ¶ 5. Total Intelligence's principal place of business is nearby at 901 North Glebe, Arlington, Virginia, 22203 ("the Arlington Office"); Total Intelligence also maintains a presence at the McLean Site and at an office in Falls Church, Virginia. Devost Decl., Ex. C, ¶ 4. More than 70% of Total Intelligence's employees reside in Virginia. *Id.* ¶ 6. Plaintiffs themselves recognize that these Defendants are based in E.D. Va.. Am. Cmplt. ¶¶ 12, 13, 18.

b. The remaining non-alien corporate Defendants—Blackwater Lodge, Blackwater Security, Blackwater Armor, Blackwater Airships, Blackwater Logistics, and Raven Development—also reside in Virginia.

First, several of these Defendants have offices in Virginia. Roitz Decl., Ex. D, ¶¶ 9, 22 (Blackwater Lodge, Blackwater Security); Matthews Decl., Ex. E, ¶ 5 (Blackwater Armor). This fact alone is sufficient to establish that these Defendants are subject to general personal jurisdiction. *Schmidt v. Am. Inst. of Physics*, 322 F. Supp. 2d 28, 32 n.1 (D.D.C. 2004); *see* 4 WRIGHT & MILLER, FEDERAL PRACTICE & PROCEDURE § 1067.5 (Westlaw 2008) ("[T]he defendant must be engaged in longstanding business in the forum state, such as marketing or shipping products, or performing services or ***maintaining one or more offices*** there * * *.") (emphasis added); *see also Helicopteros Nacionales de Colombia*, 466 U.S. at 416 (finding no general jurisdiction and emphasizing that the defendant did "not have a place of business" in the state).

Second, Blackwater Lodge, Blackwater Security, and Raven Development are authorized to do business in Virginia. Roitz Decl., Ex. D, ¶¶ 7, 20; Matthews Decl., Ex. E, ¶ 17. This is strong evidence that they are subject to general personal jurisdiction within the State. *Helicopteros Nacionales de Colombia*, 466 U.S. at 416 (finding no general jurisdiction and emphasizing that the defendant "never ha[d] been licensed to do business in the State"); *Inversiones Inmobil-*

iarias El Bosque, S.A. v. Transtainer Corp., No. Civ. A. 03-0962, 2004 WL 325615, at *3 (E.D. La. Feb. 18, 2004) (finding general personal jurisdiction under both Louisiana law and the federal Constitution where defendant was "authorized to do business in Louisiana, ha[d] appointed an agent for service of process, ha[d] solicited business in Louisiana, and ha[d] maintained an office in Kenner, Louisiana").

Finally, all of these Defendants have other "continuing and systematic" contacts with the State. Blackwater Lodge is the corporation that leases the McLean Site. Roitz Decl., Ex. D, ¶ 9. Blackwater Lodge and Blackwater Security have a host of contacts that meet the "continuous and systematic" test, including contracts with and frequent visits to the State Department's Office of Acquisition Management, which is located in Arlington, Virginia. *E.g.*, *id.* ¶¶ 7–14, 20–26. Virginia is one of the major places of business for Blackwater Logistics, and a significant amount of its cargo shipments involve Virginia ports. Matthews Decl., Ex. E, ¶ 14. Virginia is also a major place of business for Raven Development, and its business contacts with the State include development of a $10 million auto-auction facility. *Id.* ¶¶ 19–21. Moreover, the non-alien corporate Defendants routinely conduct business in Virginia with clients and strategic partners or owners (including other Defendants and Mr. Prince),[5] including frequent business trips, meetings, and acquisition of government contracts. Roitz Decl., Ex. D, ¶¶ 10, 20–21; Matthews Decl., Ex. E, ¶¶ 6, 10, 15, 20. Taken together, these contacts are more than sufficient to subject each of these Defendants to general personal jurisdiction in Virginia, because it is unquestionable

[5] For example, Blackwater Security is a wholly owned subsidiary of Blackwater Lodge, which is a wholly owned subsidiary of EP Investments, which has its principal place of business in McLean, Virginia. Roitz Decl., Ex. D, ¶ 26; *see also* Part I.B.1.a, *supra*. Although establishing general jurisdiction over a parent corporation does not "automatically establish jurisdiction over a wholly owned subsidiary," *Keeton v. Hustler Magazine, Inc.*, 465 U.S. 770, 781 n.13 (1984), courts are more likely to find general jurisdiction in a state where "shareholders reside," *U.S. Gen., Inc. v. Draper City*, No. 2:05-CV-917 TS, 2006 WL 1594184, at *4 (D. Utah June 7, 2006) (relying on an eleven-factor test that includes this point).

that each Defendant "'has adopted the state as one of its major places of business.'" *Witt*, 240 Va. at 456 (quoting *Ratliff v. Cooper Labs., Inc.*, 444 F.2d 745, 748 (4th Cir. 1971)).

2. The individual Defendant (Erik Prince)

An individual defendant resides in the place of his domicile. *King v. Wall & Beaver St. Corp.*, 145 F.2d 377, 378-79 (D.C. Cir. 1944); 14D WRIGHT & MILLER, FEDERAL PRACTICE & PROCEDURE § 3805 & n.12 (Westlaw 2008). In determining a person's domicile, courts consider "two factors: physical presence in a state, and intent to remain there for an unspecified or indefinite period of time." *Prakash v. Am. Univ.*, 727 F.2d 1174, 1180 (D.C. Cir. 1984).

Erik Prince resides in Virginia. Mr. Prince's domicile is in McLean, Virginia, where he lives and intends to continue residing indefinitely. Prince Decl., Ex. B, ¶ 1. Plaintiffs apparently concede the point. Am. Cmplt. ¶ 11 (describing Mr. Prince as "a resident of McLean, Virginia").

3. The alien corporate Defendant

Greystone is organized in Barbados. Burgess Decl., Ex. F, ¶ 3. As an alien, Greystone "may be sued in any district," 28 U.S.C. § 1391(d), including E.D. Va. In determining proper venue in a suit with alien and non-alien defendants, the alien is ignored—"venue is proper in any district in which the suit could have been brought against the non-alien defendants alone." 14D WRIGHT & MILLER, FEDERAL PRACTICE & PROCEDURE § 3810 (Westlaw 2008). Here, because all of the other Defendants are subject to general personal jurisdiction in Virginia, venue would be proper in E.D. Va.[6]

[6] Given that Greystone has significant business relationships with Virginia, Burgess Decl., Ex. F, ¶¶ 6–7, it is likely that it has the requisite "continuous and systematic" contacts. An inquiry into Greystone's contacts with Virginia is unnecessary, however, given the company's status as an alien.

C. Dismissal of all claims is appropriate.

In this case, dismissal—not transfer to E.D. Va.—is appropriate. Because Plaintiffs filed this case in the wrong court, the resolution of venue is governed by 28 U.S.C. § 1406(a), which provides:

> The district court of a district in which is filed a case laying venue in the wrong division or district shall dismiss, or if it be in the interest of justice, transfer such case to any district or division in which it could have been brought.

Id. Accordingly, this Court has the discretion either to dismiss this action or to transfer it to a district court where venue is proper, namely E.D. Va.

It is appropriate for this Court to dismiss rather than transfer an action when a plaintiff has "committed an obvious error in filing [its] action in the wrong court, and thereby imposed substantial unnecessary costs on both the defendant and the judicial system." *Nichols v. G.D. Searle & Co.*, 991 F.2d 1195, 1201 (4th Cir. 1993) (affirming a dismissal for lack of personal jurisdiction). In such a circumstance, it would not serve the interests of justice and judicial economy "simply to transfer [the] action to the proper court, with no cost to" Plaintiffs or Plaintiffs' counsel. *Id.*; *Coté v. Wadel*, 796 F.2d 981, 984-85 (7th Cir. 1986) (Posner, J.) (dismissing rather than transferring an action, even though the statute of limitations had run, because "litigants and the public will benefit substantially in the long run from better compliance with the rules limiting personal jurisdiction"). This general rule is also applicable to cases where a plaintiff sues in an obviously improper forum. Although general practice is to transfer a case to a forum where venue is proper, "district courts often dismiss a case, rather than transfer it under Section 1406(a), if the plaintiff's attorney reasonably could have foreseen that the forum in which the suit was filed was improper and * * * similar conduct should be discouraged." 14D WRIGHT & MILLER, FEDERAL PRACTICE & PROCEDURE § 3827 & n.37 (Westlaw 2008).

Here, the case for dismissal is strong. First, Plaintiffs offer no explanation that is even remotely plausible for venue in this Court. The Amended Complaint cites two venue provisions, which, as discussed above, are facially irrelevant.

Second, Plaintiffs' own allegations regarding the Defendants invariably refer to McLean, Virginia or Moyock, North Carolina, not Washington, D.C. *E.g.*, Am. Cmplt. ¶¶ 11–19. Plaintiffs mention the District of Columbia only in a paragraph seeking discovery in order to show that Defendants "routinely conduct business and enter into contracts in this District." Am. Cmplt. ¶ 20. But this generic assertion (1) alleges nothing concrete, (2) bears no relationship to the venue provisions on which Plaintiffs rely, and (3) is undercut by the fact that even when Plaintiffs allege places where Defendants are registered to do business, they include Virginia and ten other States but ***not*** the District of Columbia. *Id.* ¶ 19.

Third, Plaintiffs' own allegations suggest that the proper venue is E.D. Va. In the Amended Complaint, Plaintiffs allege (albeit incorrectly) that all Defendants are "owned and personally controlled" by one individual, Mr. Prince, and by two corporations, Prince Group and EP Investments. *Id.* ¶ 14. All three—by Plaintiffs' own admission—reside in Virginia. *Id.* ¶¶ 11 ("Erik Prince, a resident of McLean, Virginia"), 12 ("The Prince Group LLC is * * * located at 1650 Tysons Boulevard, McLean, Virginia, 22102"), 13 ("EP Investments, LLC is located at 1650 Tysons Boulevard, McLean, Virginia, 22102").

Therefore, given the fact that Plaintiffs have made no effort whatsoever to connect their allegations to the venue requirements of federal law or the location of even one of the numerous parties they have named as Defendants, dismissal is appropriate in this case. In the alternative, Defendants request that this Court transfer this case to a court where venue is proper, namely E.D. Va.

II. Plaintiffs' Claims Against Non-Legal Entities Should Be Dismissed

Three of the named Defendants, moreover—Blackwater Worldwide, Blackwater USA, and Blackwater Canine—are not legal entities, and therefore all claims against them should be dismissed. It is axiomatic that a suit may not be brought against "something that is not a legal entity." 5A WRIGHT & MILLER, FEDERAL PRACTICE & PROCEDURE § 1321 & n.16 (Westlaw 2008). Moreover, an unincorporated corporate division is not a distinct legal entity from the corporation of which it is a part. *E.E.O.C. v. St. Francis Xavier Parochial School*, 77 F. Supp. 2d 71, 75-76 (D.D.C. 1999) (collecting cases that establish this proposition beyond contradiction), *aff'd* 254 F.3d 315 (D.C. Cir. 2000). As one district court said, expressing surprise that a plaintiff sued both a corporation and one of its unincorporated divisions: "counsel must be aware, however, that by definition a corporate division is not a separate legal entity and hence is not suable." *Salzstein v. Bekins Van Lines, Inc.*, 747 F. Supp. 1281, 1282 n.1 (N.D. Ill. 1990); *see also United States v. BCCI Holdings (Luxembourg), S.A.*, 833 F. Supp. 32, 38-39 (D.D.C. 1993) (collecting "cases which hold that unincorporated divisions of a parent corporation cannot be indicted or sued"), *aff'd* 46 F.3d 1185 (D.C. Cir. 1995).

"Blackwater Canine" is a division of Blackwater Lodge, a named Defendant in this case. Roitz Decl., Ex. D, ¶ 17. "Blackwater Worldwide" and "Blackwater USA" are merely doing-business-as ("d/b/a") names. Blackwater Lodge is among the corporate entities that use "Blackwater Worldwide," and Blackwater Lodge has registered "Blackwater USA" as its d/b/a name. Roitz Decl., Ex. D, ¶ 16. Plaintiffs themselves acknowledge in the Amended Complaint that Blackwater USA "is an assumed name under which Defendants [sic] Blackwater Lodge and Training Center, Inc. conducts business." Am. Cmplt. ¶ 17.

This Court may dismiss the claims against the non-legal-entity Defendants on any one of several grounds. First, pursuant to Fed. R. Civ. P. 17(b), this Court may dismiss because the non-legal entities lack the capacity to be sued. *Yates v. Gayle*, Civil A. No. 6:06cv455, 2007 WL 671584, at *4 (E.D. Tex. Feb. 27, 2007); *see also* Fed. R. Civ. P. 41(b) (permitting a defendant to move dismissal for plaintiff's failure to comply with any rule—here, Rule 17(b)).

Second, pursuant to Fed. R. Civ. P. 21, this Court may dismiss for misjoinder of non-legal entities. *Minn. Mining & Mfg. Co. v. Rynne*, 661 F.2d 722, 724 (8th Cir. 1981) (per curiam) (upholding dismissal of a corporate defendant pursuant to Rule 21 where all that remained was a name without separate officers, assets, or liabilities).

Third, pursuant to Fed. R. Civ. P. 12(b)(2), this Court could dismiss because, as a matter of course, it is impossible for a non-legal entity to have independent contacts with ***any*** jurisdiction sufficient to establish personal jurisdiction.

There is therefore no reason not to and every reason for this Court to dismiss the non-legal entities—whichever Rule the Court may choose to apply.

* * * * *

WHEREFORE, Defendants respectfully request that the Court grant their Motion and enter an order dismissing the claims against the non-legal entities and dismissing the Amended Complaint in its entirety; or, in the alternative, dismissing the claims against the non-legal entities and transferring the remaining claims to the U.S. District Court for the Eastern District of Virginia.

Respectfully submitted,

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Dated: January 22, 2008

CERTIFICATE OF SERVICE

I, Peter White, an attorney, certify that on January 22, 2008, I caused true and correct copies of the foregoing Motion to Dismiss, the Memorandum and its supporting documents, and the attached Proposed Order to be filed with the Clerk of the Court by using the CM/ECF system, which will send a notice of electronic filing to the following counsel who has registered for receipt of documents filed in this manner:

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In addition, on this same date, I caused the above-mentioned Motion, Memorandum, supporting documents, and Proposed Order to be served upon the following counsel of record via first-class mail:

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