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

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

MEMORANDUM OF LAW IN SUPPORT OF DEFENDANTS' MOTION TO SUBSTITUTE THE UNITED STATES IN PLACE OF ALL DEFENDANTS PURSUANT TO THE WESTFALL ACT

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INTRODUCTION

Pursuant to the Westfall Act, 28 U.S.C. § 2679(d)(3), Defendants respectfully petition this Court to certify that Defendants were "employee[s] of the Government . . . acting within the scope of [their] . . . employment" when the events giving rise to these consolidated actions occurred and, accordingly, to order that the United States "be substituted as the party defendant."[1]

The Westfall Act defines "employee[s] of the Government" to include all "persons acting on behalf of a federal agency in an official capacity, temporarily or permanently in the service of the United States, whether with or without compensation." 28 U.S.C. § 2671. It is firmly established that this definition encompasses government contractors whose work is actually or contractually subject to control by the relevant government agency. Here, where the State Department determined everything from the content of Defendants' training program to the rules of engagement governing conduct in the field, Defendants were plainly "employee[s] of the Government" within the meaning of the Westfall Act.

That Defendants are corporate entities does not alter that conclusion. The Westfall Act does not define the term "person" as used in the phrase "person[] acting on behalf of a federal agency," but under the Dictionary Act, 1 U.S.C. § 1, the presumptive rule of construction for federal statutes is that "the word[] 'person' . . . include[s] corporations . . . as well as individuals." The other relevant factors confirm the applicability of this presumption here. Thus, when a corporate contractor's work is—as here—actually or contractually subject to

[1] As required by § 2679(d)(3), a copy of this petition has been served upon the United States in accordance with the relevant provisions of the Federal Rules of Civil Procedure.

control by the relevant government agency, that corporate contractor is for purposes of the Westfall Act every bit as much an "employee of the Government" as a natural human.[2]

The second requirement for application of the Westfall Act—that the act allegedly giving rise to the claim have occurred within the scope of employment—also is satisfied here. When an employee's allegedly tortious conduct occurs abroad, the law of the forum state determines whether that conduct was within the scope of the employee's employment. Under Virginia law, an employee's conduct—even if an intentional tort or a criminal act—is considered to have been within the scope of the employee's employment if "it was expressly or impliedly directed by the employer, or is naturally incident to the business" and "was performed, although mistakenly or ill-advisedly, with the intent to further the employer's interest, or from some impulse or emotion that was the natural consequence of an attempt to do the employer's business." *Johnson v. Carter*, 983 F.2d 1316, 1322 (4th Cir. 1993), *overruled on other grounds by Gutierrez de Martinez v. Lamagno*, 515 U.S. 417 (1995). Here, each allegedly tortious act for which certification is sought meets this standard.

Defendants are accordingly entitled to this Court's certification that they were "employee[s] of the Government . . . acting within the scope of [their] . . . employment." The Westfall Act is intended (with certain limited exceptions not relevant here) to immunize government employees from suit for allegedly tortious conduct committed in the course of their employment. Consistent with that purpose, the Westfall Act provides that the "exclusive"

[2] One defendant, Erik Prince, alleged to be the owner of the other defendants, is a natural person, not a corporation. We seek certification that Mr. Prince also was an "employee of the Government . . . acting within the scope of his . . . employment" with respect to the conduct underlying Plaintiffs' allegations. Of course, since Mr. Prince's liability, if any, is wholly derivative of the liability of the corporate defendants (*see* Consolidated Memorandum in Support of Motions to Dismiss, at 41–42), certification that the corporate defendants were government employees will preclude the imposition of liability on Mr. Prince as well.

remedy available to plaintiffs alleging such conduct is suit against the government itself. 28 U.S.C. § 2679(b)(1). Upon this Court's certification that Defendants were government employees acting within the scope of their employment, "the United States shall be substituted as the party defendant." *Id*. at § 2679(d)(3).[3]

STATEMENT OF FACTS

A. Legal Framework: The Federal Tort Claims Act as Amended by the Westfall Act

The Westfall Act was enacted as an amendment to the Federal Tort Claims Act of 1946 ("FTCA"). The FTCA waives the government's sovereign immunity by giving federal district courts jurisdiction—with certain specified exceptions—over "claim[s] against the United States, for money damages, . . . for injury or loss of property, personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment." 28 U.S.C. § 1346(b)(1).

Notwithstanding the government's waiver in the FTCA of its immunity from liability for the tortious conduct of government employees, those employees themselves were—until the Supreme Court's decision in *Westfall v. Erwin*, 484 U.S. 292 (1988)—"absolutely immune from personal liability for common law torts so long as they were acting within the scope of their employment at the time the injury occurred." *B&A Marine Co., Inc. v. American Foreign Shipping Co., Inc.*, 23 F.3d 709, 716 (2d Cir. 1994) (Glasser, J., concurring). That absolute immunity grounded in federal common law was shared by government contractors, whether

[3] Upon the government's substitution as the party defendant, it will be up to the government to determine whether to assert preclusion of liability under 28 U.S.C. § 2680, which contains various exceptions to the United States' waiver of sovereign immunity. *See, e.g.*, §§ 2680(h), (k) (allowing the United States to assert sovereign immunity with respect to "[a]ny claims arising in a foreign country" or "[a]ny claim arising out of assault").

individuals or corporations, so long as they were "agents" of the government, as opposed to independent contractors, under the applicable common law standard. *See, e.g.*, *Blum v. Campbell*, 355 F. Supp. 1220, 1224 (D. Md. 1972) (holding individual and corporate contractors immune from suit because they were "agents of the government acting within the scope of their contract").

The *Westfall* decision, however, sharply curtailed government employees' common law immunity. Whereas government employees had theretofore been absolutely immune from suit for all tortious conduct committed within the scope of their employment, *Westfall* limited that immunity to situations in which the employees' conduct was "discretionary in nature." *Westfall*, 484 U.S. at 300.

Recognizing the far-reaching consequences of its common law decision, the *Westfall* Court openly invited a statutory response, noting that "[l]egislated standards governing the immunity of federal employees involved in state-law tort actions would be useful." *Id*. Congress did not hesitate to accept the Court's invitation, and less than a year later enacted the Westfall Act "to override" the Court's decision. *Gutierrez de Martinez v. Lamagno*, 515 U.S. 417, 425 (1995). As the Court subsequently observed, "Congress reacted quickly to delete the 'discretionary function' requirement, finding it an unwarranted judicial imposition" *Id*. at 426. Indeed, the Westfall Act had a sole "objective: to 'return Federal employees to the status they held prior to the *Westfall* decision.'" *Id.* (quoting H.R. Rep. No. 100-700, at 4 (1988)).

After enactment of the Westfall Act (known formally as the Federal Employees Liability Reform and Tort Compensation Act of 1988), government employees once again enjoyed (with limited exceptions not relevant here) absolute immunity from suit for torts committed while

acting within the scope of their employment whether or not their conduct was "discretionary in nature." In particular, the Wesfall Act provides that

> [t]he remedy against the United States provided by [the FTCA] for injury or loss of property, or personal injury or death arising or resulting from the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment ***is exclusive*** of any other civil action or proceeding for money damages by reason of the same subject matter against the employee whose act or omission gave rise to claim or against the estate of such employee. Any other civil action or proceeding for money damages arising out of or relating to the same subject matter against the employee or the employee's estate ***is precluded*** without regard to when the act or omission occurred.

28 U.S.C. § 2679(b)(1) (emphasis added). Thus, under the Westfall Act, suits against government employees for torts committed within the scope of their employment are "precluded" and suits against the government are the "exclusive" remedy for injured parties.

For purposes of the Westfall Act, and the FTCA more generally, the term "employee of the government" is defined to include all "persons acting on behalf of a federal agency in an official capacity, temporarily or permanently in the service of the United States, whether with or without compensation." 28 U.S.C. § 2671.

The determination whether a defendant named in a tort suit was at the relevant time an "employee of the government. . . . acting within the scope of his . . . employment" is in the first instance entrusted to the Attorney General. Under the procedures established by the Westfall Act, the named defendant provides a copy of the complaint to the relevant agency's designated recipient, who in turn forwards the complaint to the Attorney General. Upon the Attorney General's certification "that the defendant employee was acting within the scope of his . . . employment at the time of the incident out of which the claim arose, any civil action or proceeding commenced upon such claim in a United States district court shall be deemed an action against the United States . . . and the United States shall be substituted as the party defendant." *Id*. at § 2679(d)(1).

If, as in this case, the Attorney General refuses to issue such certification, "the employee may at any time before trial petition the court to find and certify that the employee was acting within the scope of his . . . employment." *Id.* at § 2679(d)(3). When petitioned for such certification, the court reviews *de novo* both the defendant's status as a government employee and, if the defendant is found to be a government employee, whether the defendant was acting within the scope of that employment at the time of the allegedly tortious conduct. *See, e.g., Shimoda-Atlantic, Inc., v. Talon Holdings, Inc.*, 2008 WL 906640, at *2–*3 (W.D. Ark. Apr. 1, 2008); *Creel v. United States*, 512 F. Supp. 2d 574, 580–85 (S.D. Miss. 2007). If the court certifies that the named defendant was a government employee acting within the scope of employment, then "such action . . . shall be deemed to be an action . . . brought against the United States . . . and the United States shall be substituted as the party defendant." 28 U.S.C. § 2679(d)(3).

B. The Conflict in Iraq and the State Department's Contract with USTC

For six years, defendant United States Training Center, Inc. ("USTC") provided security services to protect United States government officials traveling through the most dangerous parts of Iraq.[4] Historically, the State Department's Bureau of Diplomatic Security performed such functions with the support of the United States military, but the State Department determined that it did not have sufficient capabilities to provide the security services that would be needed in

[4] The contract was between the State Department and Blackwater Lodge and Training Center, Inc, which has since changed its name to U.S. Training Center, Inc. *See* Case No. 1:09-cv-615, Dkt #2. Plaintiffs have named many defendants other than USTC, but all of the allegations in the complaints relate to USTC's work for the State Department.

war-torn Iraq.[5] *See* Statement of Work § C, ¶ 1.2 (App. 4).[6] The State Department therefore contracted with USTC for the performance of such services.

Under the terms of the State Department contract, and in actual practice, the Department exercised substantial control over all aspects of USTC's performance: The State Department controlled the selection and training of USTC's security personnel, specified the rules of engagement governing the use of force, and retained tactical control over each protective mission.

1. The State Department controlled USTC's hiring and training.

The State Department had an extensive role in the selection and training of the personnel hired (as independent contractors) to perform the services required under the contract.[7] The contract required USTC to submit every resume it received to the State Department for pre-screening. *See* Worldwide Professional Personal Security ("WPPS") II Contract § C, ¶ 4.3.1.1

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[5] The situation in Iraq was extremely dangerous throughout the period of USTC's service. Between March 2005 and April 2008, when the events giving rise to these lawsuits occurred, the number of attacks and attempted attacks against Coalition and Iraqi targets never dropped below 400 per week. DOD, *Measuring Stability and Security in Iraq* (Mar. 2009), at 19, http://www.defenselink.mil/pubs/pdfs/Measuring_Stability_and_Security_in_Iraq_March_2009.pdf. Indeed, from mid-2006 to late-2007—when the majority of the alleged incidents giving rise to these lawsuits occurred—the violence in Iraq was its peak. *Id.* at 19-23. In the period from July to November 2007, Coalition and Iraqi government targets were attacked an average of 27 times per day in Baghdad, where all but one of the alleged incidents occurred. DOD, *Measuring Stability and Security in Iraq* (Dec. 2007), at 16 & 22, http: //www. defenselink. mil/pubs/pdfs/ FINAL-SecDef%20Signed-20071214. pdf. Despite these harrowing statistics, no diplomat under the protection of USTC personnel died, or even was injured, during the entire duration of USTC's contract with the State Department. The USTC personnel protecting the diplomats did not fare as well, however; many were injured or died while working in Iraq.

[6] "App." citations refer to the Appendix to the Consolidated Memorandum of Law in Support of Defendants' Motions to Dismiss, filed under seal with this Court on July 24, 2009.

[7] As noted, the personnel utilized by USTC to perform its obligations under the contract were hired as independent contractors, not as employees. The issue presented by this petition concerns USTC's employment status vis-à-vis the State Department, not the employment status vis-à-vis USTC of the independent contractors it utilized.

(App. 6); WPPS I Contract, at 17 (App. 288); *id.* § C, ¶ 5.1.1 (App. 304).[8] The contract gave the Department the authority to prevent any applicant from providing services under the contract. WPPS II Contract, § C, App. F (App. 18-19); WPPS I Contract, § C, ¶ 5.2 (App. 304–05). The contract also specified the screening procedures that USTC had to implement with respect to all applicants: USTC was, among other things, required to perform psychological, medical, and dental exams, run background checks, conduct drug testing, and monitor applicants for stability and performance during training. *See id.* § C, ¶ 4.3.1.2 (App. 6–7); *id.* § C, App. F (App. 18–19); Task Order Request 2006-06, ¶ 6.5 (App. 146); Task Order Proposal 2006-06, at 54 (App. 152); WPPS I Contract, at 17-20 (App. 288–91).

Applicants who were to be assigned to certain particularly sensitive positions were subject to an even higher level of State Department scrutiny; such applicants had to be specifically "vetted and approved by the [Department's] High Threat Protection program office." WPPS II Contract, § C, App. B (App. 9–10). In addition, the contract required that all personnel performing under it pass security clearances conducted by the State Department. *See* WPPS II Contract § C, App. E (App. 11–17); WPPS I Contract, at 19 (App. 290); *id.* § C, Attach. 4 (App. 312–20).

[8] The WPPS II Contract between the State Department and USTC was awarded on June 6, 2005 (App. 1–2) and the WPPS II Task Order request is dated February 8, 2006 (App. 141). Before the WPPS II Contract and Task Order, USTC's performance was governed by the WPPS I Contract. When describing contractual provisions demonstrating State Department control over services provided under the contract, we provide parallel citations to the WPPS II documents (excerpts of which appear at pages 1–274 of the Appendix) and the WPPS I documents (excerpts of which appear from page 275 of the Appendix). The provisions excerpted in the Appendix are just some of those that demonstrate pervasive State Department control. The WPPS II Contract and Task Order alone fill five 4-inch binders, which Defendants will provide to the Court if requested.

Successful applicants were required to undergo an intensive training regimen set forth in the contract, which devoted over 500 pages to detailed specifications of each element of the training program. The 164-hour training program was approved by the Department after a full, on-site demonstration. *See* WPPS II Contract § C, App. G (App. 31, 41). Many of the program's elements were created by the State Department itself; the remainder were developed by USTC in accordance with detailed specifications from the Department. *See* WPPS II Contract § C, ¶ 4.3.2.1 (App. 7–8); *id.* § C, App. G (App. 20–63); Task Order Proposal 2006-06 ¶¶ 4.17, 4.24–4.26 (App. 162, 165–66). The State Department even specified the precise facilities to be used for training—itemizing, for example, how many pieces of furniture were required to be in the rooms of a building used in live-fire simulation exercises. *See* WPPS II Contract § C, App. G (App. 20–36).

The contract specified each element of the training program in incredible detail. The contract required that trainees be instructed in, among other things, the use of weapons and the State Department's Deadly Force Policy. The contract also specified that—following the training program—USTC personnel were required to demonstrate knowledge of and/or proficiency in, among other things: (a) the functions of fourteen separate persons operating within a protective detail; (b) at least six different types of protective formations; (c) proper formations and positioning during different types of events, such as arrivals, departures, speeches, press conferences, and motorcades; (d) how to respond to specific types of attacks on protectees; and (e) various survival skills and defensive tactics. *See* WPPS II Contract § C, App. G, Attach. 5 (App. 55–57); WPPS I Contract, at 23–26 (App. 294–97). *See* WPPS II Contract § C, App. G, Attach. 5 (App. 55–57); Task Order 2006-06 Proposal ¶¶ 4.0–4.7, 4.12 (App. 153–58, 161); WPPS I Contract, Attach. 1 (App. 294–97); *id.* § C, Attach. 9 (App. 321–22).

Trainees also were required to satisfy specific criteria established by the Department to be authorized to handle weapons. *See, e.g.*, WPPS II Contract § C, App. G, Attach. 7–9 (App. 58–63); *id.* § C, App. N (App. 64–111); WPPS I Contract § C, Attach. 10-A (App. 325–27); *id.* § C, Attach. 11 (App. 328–70). Under the terms of the contract, the training had to be at least as rigorous as that provided to the Department's own security personnel. *Id.* § C, App. G, § 5.3.1 (App. 21); *id.* § C, App. U (App. 132-40) (incorporating syllabus for the State Department's Field Firearms Officer course); Task Order 2006-06 Proposal ¶ 2.10 (App. 149).

2. The State Department's had extensive control over all aspects of USTC's work in Iraq.

The State Department's control over USTC's performance was not limited to hiring and training; it extended to operations in the field. The State Department-issued Tactical Standard Operating Procedure ("TacSOP"), which was incorporated into the contract, defined in exhaustive detail the procedures to be followed by USTC while protecting government officials as they traveled to and from meetings throughout Baghdad. The TacSOP made clear that the State Department determined "how missions are conducted within Iraq," including those that were performed by USTC. TacSOP, at iv (App. 170). Among other things, the TacSOP enumerated the duties of each person involved in the mission (TacSOP, Ch. 1, pp. 6-8 (App. 171–73)), established highly detailed communications procedures (TacSOP, Ch. 2 (App. 174–93)), and prescribed the information to be covered in pre-mission briefs (TacSOP, App. A (App. 274)). Indeed, the contractually binding TacSOP provides more than 180 pages of detailed instructions on everything from the planning of a security mission to post-mission recovery efforts, including instructions governing the use of low visibility teams, advance teams, counter assault teams, tactical support teams, dog handlers, defensive marksmen, and air support. TacSOP, Chs. 6-13 (App. 195–272).

The contract also contained detailed rules governing the use of force. It incorporated both the State Department's Deadly Force Policy and the Mission Firearms Policy issued by the U.S. Ambassador to Iraq. The State Department's Deadly Force Policy provides that "deadly force is permissible when there is no safe alternative to using such force and without it the PSS [Protective Security Specialist] or others would face imminent and grave danger." WPPS II Contract, § C, App. P (App. 112); WPPS I Contract, § C, Attach. 13, at C-122 (App. 371). Of particular relevance here, the Mission Firearms Policy provides that "[s]hooting to disable a vehicle is authorized" and that "[i]n order to ensure safe separation from motorcade and suspected or likely VBIED [vehicle-borne improvised explosive devices], shots may be fired into the vehicle's engine block as needed to prohibit suspected or likely VBIED from entering into an area where the protective detail would be exposed to a VBIED attack." WPPS II Contract, Mission Firearms Policy, at 9 (App. 124).[9] The State Department rules state that after "feasible" warnings have been given, "[i]f the vehicle continues to be a threat," a security detail "is authorized to fire into the windshield to stop the threat." *Id.* The State Department's detailed rules on the use of force specifically addressed the permissibility of warning shots, providing that "[w]arning shots are not authorized" because they "may pose dangers to PSS or others." WPPS II Contract, § C, App. P (App. 113); WPPS I Contract, § C, Attach. 13, at C-123 (App. 372)

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[9] The Mission Firearms Policy expressly recognizes that

> [d]etermining whether deadly force is necessary may involve instantaneous decisions that encompass many factors, such as the likelihood that the subject will use deadly force on the individual or others if such force is not used by the individual; the individual's knowledge of the capabilities of the threatening party or situation; the presence of other persons who may be at risk if force is not used; and the nature and the severity of the subject's conduct or the danger posed.

WPPS II Contract, Mission Firearms Policy, at 4 (App. 119); WPPS I Contract, § C, Attach. 14, at C-129 (App. 378).

(same); *see also* WPPS II Contract, Mission Firearms Policy, at 9 (App. 124) ("At no time will a weapon be fired into the ground or air as a warning to stop a threat.").

Finally, the contract clearly established the State Department's control over each security mission. The State Department's Regional Security Office ("RSO") was specifically authorized to make tactical decisions regarding all aspects of each mission. *See* Task Order Request 2006-06 ¶ 6.1 (App. 144) (providing, *inter alia*, that "[a]ll personnel shall work under the direction of the RSO Baghdad" and that "[s]pecific detail size and complement will be based upon a security assessment of the area in which protection is to be provided and as directed by RSO"); *see also* TacSOP, Ch. 3, at 4 (App. 194) (granting the RSO initial mission approval authority and requiring RSO approval of changes to missions); *id.* Ch. 6, at 2 (App. 197) (Department authority to approve missions and assign personnel). The contract expressly placed all missions "under the daily oversight of the RSO or the RSO's designee." Task Order Request 2006-06 ¶¶ 6.0-6.1 (App. 143); *see also* WPPS II Contract § C, ¶ 1.5.3 (App. 5) (RSO exercises "on-site authority over the Contractor's [protective services] detail"); WPPS I Contract, at 3 (App. 284) (same). The contract mandated that each security mission "maintain[] constant communication with RTOC"—the Regional Tactical Operations Center, where the State Department RSO was stationed—"and notif[y] RTOC of any changes in status, route checkpoints, or other pertinent information." TacSOP, Ch. 3, at 4 (App. 194).

C. The Complaints in this case

The five Complaints in this consolidated proceeding involve claims for damages resulting from deaths and injuries alleged to have occurred in Iraq on various dates between 2005 and 2008. With one exception, the allegations arise from incidents that occurred while USTC was actively providing security services pursuant to its contract with the State Department:

- In *Albazzaz* (No. 1:09-cv-616), Plaintiffs allege that on September 9, 2007, USTC personnel opened fire without justification in a location known as Al Watahba Square in Baghdad. Albazzaz Compl. ¶¶ 13, 17.
- In *Abtan* (No. 1:09-cv-617), Plaintiffs allege that on September 16, 2007, USTC personnel opened fire without justification in a location known as Nisoor Square in Baghdad. Abtan Compl. ¶¶ 2, 44–48.[10]
- In *Hassoon* (No. 1:09-cv-618), Plaintiffs allege that between March 2005 and April 2008 USTC personnel opened fire without justification on six occasions (Hassoon Compl. ¶¶ 30–47, 50–79), and beat a civilian on another occasion (*id.* ¶¶ 48-49).
- In *Rabea* (No. 1:09-cv-645), Plaintiffs allege that on August 13, 2007, USTC personnel opened fire without justification on a road in Hilla, Iraq. Rabea Compl. ¶¶ 2, 5–6.

The complaint in *Sa'adoon* (No. 1:09-cv-615) arises from a supposed incident that, based on the facts alleged, appears not to have occurred during a State Department security mission. Rather, it concerns the purported misconduct of an individual, Andrew Moonen, who allegedly, of his own accord and after hours, attended a holiday party, got drunk, wandered "intoxicated" through Baghdad, and shot a security guard. Sa'adoon Compl. ¶¶ 19, 22-23. While Defendants do seek Westfall certification with respect to Counts Six and Seven of the Sa'adoon Complaint (which allege negligent hiring, training, and supervision and tortious spoliation of evidence, respectively), they do not currently seek certification with respect to the first five counts of the Sa'adoon Complaint (which relate to the alleged shooting itself) because, based on the information currently available to Defendants, it appears that Mr. Moonen's alleged actions

[10] Complaint citations for the *Abtan* and *Hassoon* matters refer to the First Amended Complaint.

would have been outside the scope of whatever employment relationship he had with Defendants and for that same reason outside the scope of Defendants' employment by the State Department.[11]

Each complaint seeks to recover damages—including pain and suffering and loss of consortium—allegedly caused by the respective incidents. Sa'adoon Compl. ¶¶ 4–6, 34–36; Albazzaz Compl. ¶ 29; Abtan Compl. ¶ 143; Hassoon Compl. ¶ 154; Rabea Compl. ¶ 55. In two of the cases, sixteen Plaintiffs—thirteen in *Abtan* (Compl. ¶ 114) and three in *Hassoon* (Compl. ¶ 127)—also seek recovery under the Racketeer Influenced and Corrupt Organizations Act ("RICO") based solely on damage to their automobiles that allegedly occurred during the incidents in question. Abtan Compl. ¶ 115; Hassoon Compl. ¶ 127.[12]

D. Procedural History

Plaintiffs previously filed suit against Defendants in other courts based on some of the incidents at issue here: In late 2007, Plaintiffs brought two cases in the United States District Court for the District of Columbia,[13] and in the spring of 2009 brought four additional suits in the

[11] Defendants do, however, reserve the right to pursue Westfall Act certification as to first five counts of the complaint if it is subsequently determined that Mr. Moonen was acting within the scope of employment or such certification is otherwise warranted.

[12] Because a claim alleging "a violation of a statute . . . under which such action against an individual is otherwise authorized" may proceed against government employees (28 U.S.C. § 2679(b)(2)(B)), Defendants do not seek substitution of the United States as party defendant with respect to the RICO claims set forth in the *Abtan* and *Hassoon* Complaints.

[13] The two cases filed in the District of Columbia were *Abtan et al. v. Blackwater Worldwide et al.*, No. 07-1831 (D.D.C., filed Oct. 11, 2007), and *Albazzaz v. Blackwater Worldwide et al.*, No. 07-2273 (D.D.C., filed Dec. 19, 2007).

United States District Court for the Southern District of California.[14] Plaintiffs ultimately chose to dismiss all of these cases voluntarily and to refile them in this Court as five separate cases.

Each time a new action has been initiated, Defendants have forwarded the complaint to the State Department in accordance with the procedure for seeking certification under the Westfall Act. *See* Exs. A, B (letters seeking certification for the District of Columbia cases); Exs. C, D, E (letters seeking certification for the Southern District of California cases)[15]; Exs. F, G, H (letters seeking certification for cases filed in this Court); *cf.* 28 U.S.C. § 2679(c). The Attorney General has, however, constructively denied those requests by failing to act on them.

ARGUMENT

The Westfall Act requires that the United States be substituted as the party defendant in a tort action upon certification that the named defendant was an "employee of the Government . . . acting within the scope of his . . . employment" at the time of the allegedly tortious conduct. 28 U.S.C. § 2679(b); *see also id.* at § 2679(d). Defendants are entitled to such certification, and therefore such substitution, because they were government employees acting within the scope of their employment when the incidents at issue occurred.[16]

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[14] The four lawsuits filed in the Southern District of California were: *Estate of Raheem Khalaf Sa'adoon, et al. v. Xe, et al.*, No. 09-cv-561 (S.D. Cal., filed Mar. 19, 2009); *Al-Razzaq et al. v. Xe et al.*, No. 09-cv-626 (S.D. Cal., filed Mar. 26, 2009); *Jarallah v. Xe et al.*, No. 09-cv-631 (S.D. Cal., filed Mar. 27, 2009); and *Estate of Sabah Salman Hassoon, et al. v. Xe, et al.*, No. 09-cv-647 (S.D. Cal., filed Apr. 1, 2009).

[15] One of the California cases, *Estate of Raheem Khalaf Sa'adoon, et al. v. Xe, et al.*, No. 09-cv-561 (S.D. Cal., filed Mar. 19, 2009), was voluntarily dismissed before Defendants were able to request certification from the State Department.

[16] As noted above (*see supra* at 13–14), Defendants do not seek certification for the first five counts of the *Sa'adoon* Complaint because they arise from conduct that appears to have been outside the scope of employment and Defendants do not seek substitution of the United States as party defendant with respect to the RICO claims set forth in the *Abtan* and *Hassoon* Complaints.

I. DEFENDANTS QUALIFY AS GOVERNMENT EMPLOYEES.

Defendants were government employees for purposes of the Westfall Act because the government controlled the performance of their work. That defendants are corporate entities rather than natural persons does not change that result.

A. A Contractor Is a Government "Employee" for Purposes of the FTCA If the Government Controls Or Has the Right to Control the Contractor's Work.

The term "[e]mployee of the government" is defined in the FTCA to include "persons acting on behalf of a federal agency in an official capacity, temporarily or permanently in the service of the United States, whether with or without compensation." 28 U.S.C. § 2671. It is well-established that federal contractors can be "[e]mployee[s] of the government" for purposes of the FTCA if certain criteria are met. *See, e.g., Patterson & Wilder Constr. Co. v. United States*, 226 F.3d 1269 (11th Cir. 2000); *United States v. Becker*, 378 F.2d 319 (9th Cir. 1967); *Maryland v. Manor Real Estate & Trust Co.*, 176 F.2d 414 (4th Cir. 1949); *Costa v. United States*, 845 F. Supp. 64 (D.R.I. 1994).

To determine whether a government contractor is a government "employee" for purposes of the FTCA, courts apply the test for a master-servant relationship set forth in the Restatement of Agency. *See, e.g., Rodriguez v. Sarabyn*, 129 F.3d 760, 765 (5th Cir. 1997); *Robb v. United States*, 80 F.3d 884, 889 n.5 (4th Cir. 1996); *B&A Marine Co. v. Am. Foreign Shipping Co.*, 23 F.3d 709, 713 (2d Cir. 1994); *Charlima, Inc. v. United States*, 873 F.2d 1078, 1080 n.5 (8th Cir. 1989). A contractor is considered an "employee of the government" for purposes of the FTCA if the contractor satisfies the standard for a "servant" under the Restatement (Second) or the materially identical standard for an "employee" under the Restatement (Third). A contractor qualifies as a "servant" under the Restatement (Second)—and thus as an employee for purposes of the FTCA—if "the physical conduct" of the contractor's performance of the relevant services

"is subject to [the government's] control or right to control." RESTATEMENT (SECOND) OF AGENCY § 220 (1958). Similarly, a contractor qualifies as an "employee" under the Restatement (Third) if the government "controls or has the right to control the manner and means of the [contractor's] performance of work." RESTATEMENT (THIRD) OF AGENCY § 7.07 (2006). "Notably, it is not necessary that the Government continually control all aspects of the [contractor's] activities, so long as it has the authority to do so given the nature of the task." *Patterson & Wilder Constr. Co.*, 226 F.3d at 1274.

There are thus two circumstances in which a contractor will be considered a government employee for purposes of the FTCA: "if the Government enjoys the power to control the detailed physical performance of the contractor, *or* if the Government in fact supervises the day-to-day operations." *B&A Marine Co.*, 23 F.3d at 713 (internal citations and quotation marks omitted) (citing *United States v. Orleans*, 425 U.S. 807, 814–15 (1976); *Logue v. United States*, 412 U.S. 521, 528 (1973)).

B. The Government Had the Right to—and Did in Fact—Control Defendants' Work.

In this case, both circumstances are present. The government had the right to control, and did in fact control, Defendants' performance. As the parties' extraordinarily detailed contract makes clear, USTC was hired not simply to provide security to U.S. officials traveling in Baghdad, but to provide it in the precise manner specified by the State Department. As detailed above (*see supra* at 7–12), the State Department retained and exercised substantial control over the hiring and training of USTC personnel, and over how the USTC personnel conducted each protective mission. The State Department, for example, determined how many and what type of protective specialists were assigned to particular missions, the defensive formations they were required to assume, and the circumstances under which they were permitted to use deadly force.

See, e.g., Task Order Request 2006-06 ¶ 6.1 (App. 144) (providing that "[s]pecific detail size and complement will be based upon a security assessment of the area in which protection is to be provided and as directed by [the State Department's Regional Security Office]"); TacSOP, Ch. 6, at 2 (App. 197) (requiring use of the "Strong Side Drop (Diamond Formation)" when delivering protectees to sites in Baghdad's International Zone); WPPS II Contract, Mission Firearms Policy, at 9 (App. 124) (establishing "Rules of Engagement" defining "permissible uses of deadly force").

On these facts, it is clear that the government not only "enjoy[ed] the power to control the detailed physical performance of" USTC, but also "in fact supervise[d] the day-to-day operations" of USTC. *B&A Marine Co.*, 23 F.3d at 713. Accordingly, Defendants were "[e]mployee[s] of the government" for purposes of the FTCA. *Cf. Becker*, 378 F.2d at 322–23 (affirming determination that contractor that "operated under the detailed control and direction of the Forest Service" was a government employee); *Pervez v. United States*, 1991 WL 53852, at *5 (E.D. Pa. Apr. 9, 1991) (holding that employment relationship between contractor and government was established where contractor's actions were "under the daily supervision, direction, and control of the United States"); *Ferguson v. United States*, 712 F. Supp. 775, 780 (N.D. Cal. 1989) (finding employment relationship where "[t]he authority of the United States to 'control' the actions of [the contractor] is [] set forth in . . . the contract"); *Motors Ins. Co. v. Aviation Specialties, Inc.*, 304 F. Supp. 973, 977 (W.D. Mich. 1969) (finding private contractor to be an employee for FTCA purposes where "United States Department of Agriculture

employees had complete and exclusive control of [the contractor's] activities in the execution of the contract").[17]

C. That Defendants Are Corporate Entities Does Not Affect Their Status As Government Employees.

The fact that Defendants are corporations does not affect their status as government employees. Under the FTCA, an "[e]mployee of the government" is any "person[] acting on behalf of a federal agency in an official capacity." 28 U.S.C. § 2671. Although the FTCA does not define the term "person" as used in the phrase "person[] acting on behalf of a federal agency," the Dictionary Act, which supplies generally applicable rules of construction for federal statutes, provides that "[i]n determining the meaning of any Act of Congress, unless the context indicates otherwise . . . the word[] 'person' . . . include[s] corporations . . . as well as individuals." 1 U.S.C. § 1. That interpretive presumption is consistent with long-standing usage. Indeed, in light of the "unquestionable" fact that corporations were "deemed persons" for civil purposes at common law, as early as 1826 the Supreme Court "expressly recognized the presumption that the statutory term 'person' '"extends as well to persons politic and incorporate, as to natural persons whatsoever."'" *Cook County v. United States*, 538 U.S. 119, 125 (2003) (quoting *United States v. Amedy*, 11 Wheat. 392, 412 (1826) (in turn quoting 2 E. Coke, THE SECOND PART OF THE INSTITUTES OF THE LAWS OF ENGLAND 736 (1787 ed.)). Thus, there is a strong presumption, rooted in tradition and statute, that the term "person" as used in the FTCA's definition of a government "employee" includes corporations.

[17] Certainly the allegations that certain individuals acted improperly in specific incidents does not undercut the showing of government control. Otherwise the Westfall Act would never apply because by definition its applicability to government contractors arises only in cases in which those contractors are alleged to have acted improperly and thereby engaged in tortious conduct.

It is, therefore, not surprising that courts have routinely recognized that corporations can be government "employees" for purposes of the FTCA. *See, e.g.*, *B&A Marine Co.*, 23 F.3d at 713 (holding that "the 'employee' status of [American Foreign Shipping Co., Inc.] . . . had been established as a matter of law"); *McKay v. United States*, 703 F.2d 464, 472 (10th Cir. 1983) (reversing summary judgment in favor of government where district court failed to determine "whether Rockwell [International Corporation] and Dow [Chemical Company] were independent contractors or were, in fact, employees of the United States within the meaning of the FTCA"); *Maryland v. Manor Real Estate & Trust Co.*, 176 F.2d 414, 419 (4th Cir. 1949) (holding real estate firm that managed property under contract to federal agency to be a government employee); *Pervez*, 1991 WL 53852, at *5 (E.D. Pa. Apr. 9, 1991) (ordering substitution of the United States in place of corporate contractor found to be "acting as an employee of the United States Government"); *Motors Ins. Co.*, 304 F. Supp. at 979 (finding corporate contractor to be "an employee of the United States"); *see also, e.g.*, *Williams v. United States*, 50 F.3d 299, 307 (4th Cir. 1995) (finding on facts of the case that corporate contractor was not a government employee because "the United States neither supervised nor controlled the day-to-day operations" of the contractor); *Brooks v. A.R.&S. Enterps., Inc.*, 622 F.2d 8, 12 (1st Cir. 1980) (finding on facts of the case that corporate contractor was not government employee because "the United States did not exercise day-to-day control over [its] activities").

Although the result in any given case depends on the unique facts of that case, it is clear that corporations can be government "employees" for purposes of the FTCA. If corporations were categorically outside the FTCA's definition of a government "employee," then courts would neither substitute the United States in place of corporate defendants under the FTCA nor bother analyzing whether a particular corporation met the relevant standard in a particular case.

Indeed, the government itself has recognized that corporations can be government "employees" for purposes of the FTCA. In *Pervez*, for example, "[t]he United States filed a Notice of Substitution under 28 U.S.C. § 2679 in which the Attorney General certified that Carpenter Technology was acting as an employee of the United States as defined in 28 U.S.C. § 2671." *Pervez*, 1991 WL 53852, at *4.[18] The plaintiff challenged the Attorney General's certification, arguing that the corporation's relationship with the government "was more akin to that of a general contractor than that of an employee." *Id*. Finding, however, that the corporation's acts were "under the daily supervision, direction, and control of the United States" and that the corporation was therefore a government employee, the court rejected that challenge and held that the government's request that the United States be substituted as the party defendant was proper under the FTCA. *Id*. at *5.

Alone against the great weight of authority, the Ninth Circuit has held that corporations cannot be government "employees" for purposes of the FTCA. But the Ninth Circuit's decision, in *Adams v. United States*, 420 F.3d 1049 (9th Cir. 2005), is neither binding nor persuasive. *Adams* acknowledges that "under the Dictionary Act, the FTCA's 'government employee' definition, which uses the word 'persons,' would include corporations unless 'the context [of the FTCA] indicates otherwise.'" *Id.* at 1052 (quoting 1 U.S.C. § 1; 28 U.S.C. § 2671). According to *Adams*, however, "[s]everal contextual features of the FTCA indicate Congress meant 'persons' to apply only to natural persons." *Id.* at 1053. But none of the "contextual features" identified in *Adams* actually support that conclusion.

[18] "Carpenter Technology" was actually two corporations, "Carpenter Technology Corporation, a Pennsylvania corporation, and Carpenter Technology, Ltd., a Canadian corporation." *Pervez*, 1991 WL 53852, at *1 & n.1.

First, noting that the FTCA covers "actions brought against 'any employee of the Government or his estate,'" *Adams* states that "Congress must have been thinking only in terms of natural persons" because "[c]orporations do not have estates." *Id*. (quoting 28 U.S.C. § 2679(c)). Wholly apart from the fact that corporations *do* have estates (when they go bankrupt), that reasoning does not withstand scrutiny. Even if one assumes for purposes of argument that corporations do not have estates, the mere fact that not all "employees" will have estates does not mean that the term "employees" is necessarily limited to those that do have estates. No one would suggest that a statute applicable to "parties or their counsel" categorically excludes *pro se* litigants merely because they do not have counsel, or that a statute applicable to "children or their parents" categorically excludes orphans merely because they do not have parents.

Indeed, the FTCA itself illustrates the fallacy of the Ninth Circuit's logic. Under the statute, actions may be brought for "loss of property or personal injury or death." 28 U.S.C. § 1346(b)(1). Corporations of course cannot "die" or suffer "personal injury," but corporations may nevertheless be claimants under the FTCA. *See, e.g.*, *Mass. Bonding & Ins. Co. v. United States*, 352 U.S. 128 (1956); *Indian Towing Co. v. United States*, 350 U.S. 61 (1955). That, however, would not be the case if the Ninth Circuit's reasoning were correct.

Second, *Adams* suggests that the word "employee" is limited to natural persons because the FTCA by its terms "does not extend to a civil action 'brought for a violation of a statute of the United States under which such action against an *individual* is otherwise authorized.'" 420 F.3d at 1053 (quoting 28 U.S.C. § 2679(b)(2)) (emphasis supplied by court). But, contrary to the Ninth Circuit's suggestion, the fact that § 2679(b)(2) "speaks in terms of an individual, not a corporate entity" indicates nothing about whether the word "person" as used in the FTCA's definition of a government employee is limited to natural persons.

Under the FTCA, the United States is "liable . . . in the same manner and to the same extent as a *private individual* under like circumstances." 28 U.S.C. § 2674 (emphasis added). Similarly, the FTCA confers jurisdiction on the federal district courts over tort claims brought against the United States "under circumstances where the United States, if a *private person*, would be liable to the claimant in accordance with the law of the place where the act or omission occurred." 28 U.S.C. § 1346(b)(1) (emphasis added). The Supreme Court has interpreted these provisions to mean that the United States is liable when state law "would impose liability on private persons ***or corporations*** under similar circumstances." *Rayonier Inc. v. United States*, 352 U.S. 315, 318 (1957) (emphasis added); *cf. United States v. Olson*, 546 U.S. 43, 46 (2005) (the FTCA "requires a court to look to the state-law liability of private entities" when assessing the liability of the United States). Thus, *Adams* notwithstanding, Supreme Court precedent makes clear that the terms "individual" and "person" as used in the FTCA *do* encompass corporate entities.[19]

Third, the Ninth Circuit correctly notes that "Congress passed the Westfall Act to amend the FTCA in response to the Supreme Court's limitation in *Westfall* of the scope of immunity available to federal employees." *Adams*, 420 F.3d at 1054. But based on the congressional finding that *Westfall* decision created "an immediate crisis involving the prospect of personal

[19] Another "contextual feature" of the FTCA that *Adams* interprets as indicating a congressional intent to exclude corporations from the FTCA's definition of a government "employee" is the fact that all of the categories included in the definition of "employee," except the category of "persons acting on behalf of a federal agency in an official capacity," apply only to human beings. Invoking the principle of *noscitur a sociis*—according to which the meaning of an ambiguous term "should be determined by the words immediately surrounding it" (Black's Law Dictionary (8th ed. 2004))—the court suggests that "persons" should be likewise limited to natural persons. *Adams*, 420 F.3d at 1053. But *noscitur a sociis* has no application here because there is no ambiguity. *See Schenkel & Shultz, Inc. v. Homestead Ins. Co.*, 119 F.3d 548, 551 (7th Cir. 1997) (*noscitur a sociis* may not be used "to create uncertainty in an otherwise unambiguous term").

liability and the threat of protracted personal tort litigation for the entire Federal workforce," the court mistakenly concludes that it thus "seems clear that when Congress enacted the Westfall Act, it intended the provisions of that Act to protect natural persons whose personal fortunes might suffer, not artificial corporate entities which have limited liability." *Id.* (quoting Federal Employees Liability Reform and Tort Compensation Act of 1988, Pub. L. 100-694 § 2(a)(5) (codified at 28 U.S.C. § 2671 n.)). That erroneous conclusion disregards basic canons of statutory interpretation.[20]

Prior to the *Westfall* decision, *all* federal employees—whether natural persons or corporate entities—had as a matter of common law enjoyed absolute immunity for tortious conduct committed within the scope of their employment. *See B&A Marine Co., Inc. v. American Foreign Shipping Co., Inc.*, 23 F.3d at 716. *Westfall* changed that, not by distinguishing between natural persons and corporate entities, but by depriving *all* federal employees of their immunity from tort liability for non-discretionary acts. Thus, even after *Westfall*, natural persons and corporate entities remained on equal footing; each continued to enjoy common law immunity, albeit immunity that was limited to discretionary acts. Yet, on the Ninth Circuit's view, enactment of the Westfall Act suddenly abolished that longstanding equality by simultaneously restoring the immunity of natural persons to its prior breadth while

[20] It is also based on a misreading of the congressional findings. When Congress spoke of "personal" liability, it was distinguishing employees' liability from that of the government, not distinguishing the liability of natural persons from that of corporate entities. Furthermore, although corporations might enjoy limited liability (*cf. Adams*, 420 F.3d at 1054), partnerships, associations, and other legal entities that could be federal employees under the applicable standards do not. And even though corporations enjoy limited liability, it seems obvious that they too would be consternated by their sudden exposure to tort liability. At minimum, they would likely demand to be paid more to perform the services they had been performing previously, thereby "impeding the ability of agencies to carry out their missions." Pub. L. 100-694 § 2(a)(6) (codified at 28 U.S.C. § 2671 n.).

eliminating the immunity of corporate entities altogether. There is, however, nothing in the statutory text, or its legislative history, to support that interpretation of the Westfall Act. On the contrary, the text, the history, and even the name of the Westfall Act reveal a single purpose—"to 'return Federal employees to the status they held prior to the *Westfall* decision.'" *Gutierrez de Martinez*, 515 U.S. at 426 (quoting H.R. Rep. No. 100-700, at 4 (1988)). Moreover, to the extent *Adams* suggests that Congress eliminated *sub silentio* the (albeit curtailed) common law immunity that corporate entities continued to enjoy even after *Westfall*, that suggestion is contrary to the canon of construction according to which the common law persists "absent clear statutory abrogation thereof." *Rios v. Nicholson*, 490 F.3d 928, 931 (Fed. Cir. 2007) (citing *Isbrandtsen Co. v. Johnson*, 343 U.S. 779, 783 (1952)).

The Ninth Circuit's suggestion that the Westfall Act abolished corporations' status as government employees under the FTCA is also contrary to the principle that "Congress is presumed to be aware of an administrative or judicial interpretation of a statute and to adopt that interpretation when it re-enacts a statute without change." *Lorillard v. Pons*, 434 U.S. 575, 580 (1978); *see also Sayyed v. Wolpoff & Abramson*, 485 F.3d 226, 231 (4th Cir. 2007) (recognizing and applying this principle). That principle applies "where, as here, Congress adopts a new law incorporating sections of a prior law." *Lorillard*, 434 U.S. at 581.

The Westfall Act did not introduce a new definition of government "employee"; rather, it incorporated the FTCA's pre-existing definition. *See* 28 U.S.C. § 2671. That definition, which defines the scope of the government's liability under 28 U.S.C. § 1346(b)(1), had long been interpreted by the courts to encompass corporations. *See, e.g.*, *McKay*, 703 F.2d at 472 (10th Cir. 1983); *Brooks*, 622 F.2d at 12; *Manor Real Estate & Trust Co.*, 176 F.2d at 419; *Motors Ins. Co.*, 304 F. Supp. at 979. Because Congress is "presumed to have had knowledge of the

interpretation given to the incorporated law" (*Lorillard*, 434 U.S. at 581), the fact that the Westfall Act "left intact the statutory provisions under which the federal courts had" deemed corporations to be government employees "is itself evidence that Congress affirmatively intended to preserve" that interpretation. *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Curran*, 456 U.S. 353, 381–82 (1982).[21]

There is yet another reason to reject the Ninth Circuit's holding in *Adams*. Under *Adams*, a suit against the individuals whose acts caused Plaintiffs' harm could be barred by the Westfall Act, but a suit against Defendants based solely on their vicarious liability for those same acts could not. And if the government contracts directly with individuals, those individuals could be protected under the Westfall Act; but if the government contracts with a corporation that then hires those same individuals, the individuals are protected but the corporation is not. Nothing in the Westfall Act warrants such inconsistent results.

* * *

In sum, the overwhelming weight of authority recognizes that contractors, including corporations, can be "employee[s] of the Government" within the meaning of the Westfall Act. A contractor is an "employee of the Government" for purposes of the Westfall Act if the government either controls or has the right to control the manner in which the contractor performs its work. Here, where the State Department controlled everything from Defendants'

[21] Moreover, Congress has shown itself to be capable of clearly limiting application of a statute to "natural persons" when it sees fit. *See, e.g.*, 11 U.S.C. § 548(d)(3)(A) (concerning "charitable contributions" made by "natural persons"); 12 U.S.C. § 1753 (providing that groups of "natural persons" may form federal credit unions); 15 U.S.C. § 15c(a)(1) (state attorneys general may bring *parens patriae* actions for federal antitrust violations on behalf of "natural persons residing in such State"). Accordingly, when Congress declines to include the modifier "natural," it has by negative implication indicated its intent to encompass *all* persons, natural or otherwise.

training program to the rules of engagement governing Defendants' conduct in the field, Defendants were "employee[s] of the Government" within the meaning of the Westfall Act.

II. DEFENDANTS WERE ACTING WITHIN THE SCOPE OF THEIR EMPLOYMENT

Because Defendants were "employee[s] of the Government" for purposes of the FTCA, the United States must be substituted as the party defendant if the acts giving rise to Plaintiffs' claims were within the scope of Defendants' employment. As we explain below, they were.

The scope of employment determination is ordinarily based on the law of the place where the act or omission at issue occurred. *See, e.g.*, *Johnson*, 983 F.2d at 1322. When that determination would require the application of foreign law, however, courts in the Fourth Circuit apply the law of the forum state. *See Gutierrez de Martinez v. D.E.A.*, 111 F.3d 1148, 1156 (4th Cir. 1997). Thus, in this case, Virginia law governs.

"For the most part, Virginia courts take a fairly broad view of scope of employment, and hold that even intentional torts may be within the scope of employment." *Gutierrez de Martinez*, 111 F.3d at 1156; *see also Tye v. Costco Wholesale*, 2005 WL 1667597, at *5 (E.D. Va. 2005) ("The doctrine of *respondeat superior* even extends to situations in which an employee has committed an intentional, even criminal, tortious act."). Under Virginia law, an act will be deemed to be within the scope of employment if

> (1) it was expressly or impliedly directed by the employer, or is naturally incident to the business, and
>
> (2) it was performed, although mistakenly or ill-advisedly, with the intent to further the employer's interest, or from some impulse or emotion that was the natural consequence of an attempt to do the employer's business, "and did not arise wholly from some external, independent, and personal motive on the part of the [employee] to do the act upon his own account."

Johnson, 983 F.2d at 1322 (alteration in original) (quoting *Kensington Assocs. v. West*, 362 S.E. 2d 900, 901 (Va. 1987)). The Fourth Circuit has stressed that "[t]he alleged tortious incident

cannot be looked at in isolation from the context in which it occurred." *Id.* at 1323 (quotation marks omitted).

The conduct that forms the basis of Plaintiffs' complaints satisfies both elements of the applicable two-part test.

First, the conduct was "expressly or impliedly directed" by the State Department or "naturally incident to the business." *Johnson*, 983 F.2d at 1322. The use of deadly force to protect government officials was expressly contemplated under the terms of the contract between USTC and the State Department. Even if the use of force was improper in some of the incidents at issue here, such occurrences unfortunately are "naturally incident" (*Johnson*, 983 F.2d at 1322) to the provision of security in a highly dangerous, heavily armed environment such as Baghdad—just as they are to the activities of members of the military and, in the far different atmosphere of the United States, the activities of law enforcement personnel.

Second, the alleged acts were "performed . . . with the intent to further the employer's interest" of protecting government officials, or at the very least resulted "from some impulse or emotion that was the natural consequence of an attempt to do the employer's business" and "did not arise wholly" from an independent "personal motive." *Johnson*, 983 F.2d at 1322. At the time of the alleged incidents, the independent contractors that had been hired to perform USTC's obligations under its contract with the State Department were engaged in security missions—the precise task for which USTC was retained. The conduct at issue here was far more consistent with the employer's interests than the conduct of employees that, despite its egregious nature, has been found to be within the scope of employment under Virginia law. *See, e.g.*, *Doyle-Penne v. Muhammad*, 229 F.3d 1142 (Table), 2000 WL 1086906, at *1 (4th Cir. 2000) (per curiam) (unpublished) (holding that employee's act of "pinning her [coworker] against an office

wall and repeatedly punching her in the chest" was within the scope of employment when it occurred in the office during the normal workday and arose out of a work-related altercation); *Plummer v. Center Psychiatrists, Ltd.*, 476 S.E.2d 172, 175 (Va. 1996) (psychologist's forced sexual intercourse with patient could be within scope of employment since it occurred during counseling session).

CONCLUSION

For the foregoing reasons, the United States should be substituted as the party defendant, with respect to all of the claims in all five of the Complaints, except Counts 1–5 in the *Sa'adoon* Complaint and the RICO counts in the *Abtan* and *Hassoon* Complaints.

Dated: August 12, 2009

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that, on August 12, 2009, I electronically filed the foregoing with the Clerk of Court using the CM/ECF system, which will then send a notification of such filing (NEF) to the following:

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I hereby also certify that on August 12, 2009, I caused a copy of the foregoing to be sent by hand delivery to the same party.

In addition, I hereby certify that, pursuant to 28 U.S.C. § 2679(d)(3) and Federal Rule of Civil Procedure 4(i)(1) (previously Federal Rule of Civil Procedure 4(d)(4)), I served the foregoing, as well as the sealed Appendix cited therein (filed with the Court on July 24, 2009), by certified mail to each of the following:

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Finally, I hereby certify that a copy of foregoing, as well as the sealed Appendix cited therein (filed with the Court on July 24, 2009), was sent by certified mail to the following interested party:

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