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UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

SALEH, *et al.*,

Plaintiffs.

v.

TITAN CORPORATION, *et al.*,

Defendants.

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

REPLY IN SUPPORT OF DEFENDANT TITAN'S MOTION TO DISMISS

Date: February 7, 2005
Time: 2:00 P.M.
Courtroom: 5
Judge: Hon. John S. Rhoades

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ATS	Alien Tort Statute
C. Opp.	Plaintiffs' Opposition to CACI's Motion to Dismiss
FCA	Federal Claims Act
FTCA	Federal Tort Claims Act
MCA	Military Claims Act
Mot.	Titan's Memorandum of Points and Authorities in Support of its Motion to Dismiss
RCS	RICO Case Statement
T. Opp.	Plaintiffs' Opposition to Titan's Motion to Dismiss
TVPA	Torture Victim Protection Act

As Titan set forth in its opening brief, these citizens of a foreign country, detained by the U.S. military during a time of war, in a theater of combat, cannot bring a civil claim in U.S. courts for their alleged mistreatment during their detention. Whether denominated as the military contractor defense, a "special factor," or the political question doctrine, it is clear that as a matter of federal law and separation of powers, civil claims against the U.S. military's contractors for their alleged conduct in the military's detention centers in an active war zone are not allowed. Binding precedent in this Circuit makes this clear, as does the Supreme Court precedent and every court to have addressed claims such as the ones presented here. In addition to this absolute bar to plaintiffs' claims, there are multiple other grounds on which their claims must be dismissed, either for failure to plead the key facts necessary to make a claim against Titan for the acts of its employees or others, or because of fundamental legal flaws, such as the lack of a private right of action, or that the statutes they invoke do not have extraterritorial reach.

In response, plaintiffs attempt to recast their pleadings to deemphasize the involvement of the government, selectively quote sentence fragments from adverse opinions to advance them for propositions contrary to their holdings (or quote dissents as holdings without indicating as much), and simply make assertions about the law without case support. Even if plaintiffs were allowed to disavow their pleadings in response to a motion to dismiss (and they are not), plaintiffs cannot have it both ways. If government officials were acting in their individual capacities in Iraq (an impossible assertion given plaintiffs' filings which are taken as true at this stage), then the alleged Titan employees (and remember the only identified Titan employees are not alleged to have acted against any of the plaintiffs in this case; plaintiffs cannot say whether they were harmed by Titan employees) were acting beyond the scope of their employment and Titan cannot be held liable.

Below, we address the main arguments advanced by plaintiffs, whether in response to Titan's or CACI's motion to dismiss. A careful look at what they write makes clear that even if it were not for the absolute bar of the circumstances of the alleged torts, plaintiffs have fundamentally failed to plead their claims against Titan, and their complaint must be dismissed.

I. Plaintiffs' Common Law Claims Must Be Dismissed

A. *Koohi* Requires Dismissal of Plaintiffs' Tort Claims

In its opening brief, Titan demonstrated that controlling Ninth Circuit precedent requires dismissal of plaintiffs' state and federal tort claims, which are based on their treatment in the military's custody in a war zone, because such claims conflict with the federal interest expressed by, among other things, the combatant activities exception to the FTCA. *Koohi v. United States*, 976 F.2d 1328 (9th Cir. 1992). Plaintiffs do not contend that *Koohi* has been overruled or called into question; to the contrary, in discussing the political question doctrine, plaintiffs correctly refer to *Koohi* as controlling precedent. (C. Opp. 10.[1]) Plaintiffs also do not dispute that their tort claims arose during a time of war in a theater of active combat and directly implicate the unique federal interest in warmaking. Instead, plaintiffs devote a mere three sentences to *Koohi* and dismiss its precedential authority based on no contrary authority, offering instead an argument directly contrary to the holdings of *Koohi*, that they "were not harmed by an activity that arose out of an actual or perceived immediate hostility with enemy forces." (C. Opp. 23.) Plaintiffs also argue that: (1) there is no significant conflict with state law (C. Opp. 21-23); (2) dismissal is not warranted because Titan has not shown that it conformed its conduct to its contract (C. Opp. 18-20); and (3) the military contractor defense is only available to contractors who "design and manufacture military equipment." (C. Opp. 20-21.) Each argument is without merit—the first three ignore *Koohi* and the last is frivolous.

1. The Combatant Activities Exception Applies Here

Boyle v. United Technologies Corporation, 487 U.S. 500 (1988), held that where state law would "significantly conflict" with "uniquely federal" interests, state law is pre-empted and the claims precluded. (Mot. 12-13.) *Boyle* dismissed a defective design claim involving a military helicopter crash during peacetime because of the conflict between state law and the uniquely federal interests reflected in the FTCA's discretionary function exception. *Koohi* applied *Boyle* in

[1] Plaintiffs' opposition to Titan's motion does not cite *Koohi* once, relying on the "incorporation" of their arguments in opposition to CACI's different arguments on the matter. (T. Opp. 6-7.) Notwithstanding plaintiffs' default, and their attempt to secure a double-length opposition brief by doing so, Titan responds here to the arguments advanced in opposition to CACI's brief.

a different factual context: a suit for injuries to passengers on an Iranian civilian airliner mistakenly shot down by the Navy in a theater of combat. The Ninth Circuit held that the tort claims—both state and federal—had to be dismissed against the military contractor that manufactured an allegedly defective fire control system that caused the plane to be shot down. Two facts, standing alone, compelled dismissal: the injuries (a) arose during a time of war; and (b) were in connection with combatant activities. *See Koohi*, 976 F.2d at 1333. Under such circumstances, the contractor owed no duty to the plaintiffs, no matter whether the injuries were caused intentionally or by negligence.

Plaintiffs here not dispute that their claims arose during a war. Instead they argue that because their injuries arose while they "were in detention," they "were not harmed by an activity that arose out of an actual or perceived immediate hostility with enemy forces." (C. Opp. 23.) However, this argument flies in the face of *Koohi*'s holding that "the term 'combatant activities' includes 'not only physical violence, but activities both necessary to and in direct connection with actual hostilities.'" *Koohi*, 976 F.2d at 1333 (quoting *Johnson v. United States*, 170 F.2d 767, 770 (9th Cir. 1948)).

In *Johnson v. United States*, plaintiffs (commercial clam farmers) sued under the FTCA, alleging that oils, sewage, and other noxious matter discharged from U.S. Navy ammunition ships anchored in the waters of Discovery Bay, in Washington State, had contaminated their clam beds. Those vessels had provided logistical support of combat operations in the Pacific. The Ninth Circuit held that the ships were not engaged in combatant activities because they were no longer in a theater of combat and the surrender of Japan had terminated combat. *Id.* at 770. The Court made clear, however, (as it would later hold in *Koohi*) that the outcome would have differed had hostilities continued or if the ships been located in the theater of combat, notwithstanding that the ships themselves were not directly involved in combat. *Id.*

In *Koohi*, the Ninth Circuit held what had been anticipated by *Johnson*: claims against military contractors for their support of military operations in a combat zone are barred as combatant activities. It did not matter in *Koohi* that the victims were non-combatant civilians, that the contractor may have performed negligently, recklessly, or in contravention to the terms of

its contract, or even that the actions of the Navy may have been unlawful. Nor did it matter that the contractors' activities—the manufacture of electronic equipment—did not itself constitute combat. It mattered only that the contractor's support was a "necessary adjunct" to military activities in a war zone. *Koohi*, 976 F.2d at 1333 n.5.

Plaintiffs' argument rings particularly hollow given the Supreme Court's recent observation that capture, detention, and interrogation by the military are important extensions of the war power and an "important incident of war." *Hamdi v. Rumsfeld*, 124 S. Ct. 2633, 2640 (2004). Plaintiffs cite no contrary authority anywhere in their more than 90 pages of opposition. Instead, they cite three District Court cases from other jurisdictions resolving suits for injuries arising in the context of combat. (C. Opp. 23.) In each, recovery was denied.[2] These cases do not limit the combatant activities exception to those factual settings, and certainly could not limit the precedential authority of *Johnson* and *Koohi*. If anything, two of the cases support Titan's position. In *Clark*, the alleged injuries were not inflicted by combat, but by a combination of atmospheric contaminants to which plaintiff was exposed in the theater of combat. *Rotko* makes clear that the combatant activity exception applies even where the injuries allegedly resulted from *ultra vires*, illegal, and unconstitutional actions.

2. Plaintiffs' Claims Conflict with the Federal Interest in Warmaking

Plaintiffs argue that their claims present no significant conflict with federal interests "[g]iven the federal interest in stopping torture." (C. Opp. 22.) This argument fails under *Boyle* and *Koohi* because courts must examine the federal interest underlying the government's undertaking—here the waging of war—not, as plaintiffs' argument suggests, the degree to which a competing federal interest (prevention of torture) might be furthered by plaintiffs' suit. The

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[2] Although the subsequent history was not cited by plaintiffs, *Minns v. United States*, 974 F. Supp. 500 (D. Md. 1997), was affirmed on other grounds without reaching the combatant activities exception. *See Minns*, 155 F.3d 445, 452 (4th Cir. 1998). *Clark v. United States,* 974 F. Supp. 895 (E.D. Tex. 1996), dismissed plaintiff's claim that his exposure to toxins while serving with the U.S. Army in the Gulf War caused his child to suffer birth defects. *Rotko v. Abrams*, 338 F. Supp. 46 (D. Conn. 1971), *aff'd*, 455 F.2d 992 (2d Cir. 1972), dismissed claims based on plaintiffs' son's death in combat in Vietnam, allegedly resulting from military orders that were *ultra vires*, in violation of treaties and the Constitution, and not actionable under the FTCA.

combatant exception implements both a separation of powers concern—that courts should not be in the business of second-guessing the actions of military commanders taken in a war zone—as well as a preemption concern, namely that warmaking is a uniquely federal interest.

Plaintiffs simply ignore that the Executive's power to wage war effectively is among the most important federal interests—and one that is jealously guarded by the federal courts against state or judicial intrusion: "While neither the Constitution nor the courts have defined the precise scope of the foreign relations power that is denied to the states, it is clear that matters concerning war are part of the inner core of this power." *Deutsch v. Turner Corp.*, 324 F.3d 692, 711 (9th Cir.), *cert. denied sub nom*, 540 U.S. 820 (2003). Moreover, courts have long held that warmaking is a function uniquely committed to the political branches, *Hamdi v. Rumsfeld*, 124 S. Ct. at 2647, and that courts should not hear civil suits brought by enemy nationals against military field commanders because such suits would cripple the paramount federal interest in effectively waging our nation's battles, *Johnson v. Eisentrager*, 339 U.S. 763, 779 (1950). It is well-settled that a suit restraining the actions of agents of the government, including military contractors, no less fetters government action than does a suit brought directly against government officials. *See Boyle*, 487 U.S. at 512; *Sanchez-Espinoza v. Reagan*, 770 F.2d 202, 207 n.4 (D.C. Cir. 1985) (Scalia, J.). It is equally well settled that a claim that military actions are illegal is not a reason for permitting judicial inquiry through the tort system into the lawfulness of the U.S. military actions. *See Koohi*, 976 F.2d at 1330 n.2.[3]

Therefore, the postulated federal interest in preventing torture does not equate to a private cause of action against military contractors for actions taken in support of military operations in a war zone. "The United States government is in the best position to monitor wrongful activity by contractors, either by terminating their contracts or through criminal prosecution." *Bentzlin v. Hughes Aircraft Co.*, 833 F. Supp. 1486, 1493 (C.D. Cal. 1993). In any case, plaintiffs' argument proves too much. Every application of the military contractor defense, or traditional government

[3] The authority of the Political Branches over warmaking also undergirds the application of political question doctrine here, which independently requires dismissal of plaintiffs' claims as fully argued by CACI.

immunity for that matter, is at the expense of "the perhaps recurring harm to individual citizens" who are denied recovery. *Boyle*, 487 U.S. at 523 (Brennan, J., dissenting) (quoting *Doe v. McMillan*, 412 U.S. 306, 320 (1973)). That there is a federal interest in protecting tort victims—whether from alleged torture or otherwise—does not bar application of the military contractor defense in situations where the United States has itself retained sovereign immunity. *See* § I.B.2, *infra* (TVPA restricted to torture under color of *foreign* law and criminal prohibition, not civil cause of action, for U.S. citizens accused of torture).

3. Contractual Compliance Is Irrelevant Under Koohi

Relying on *Boyle*, plaintiffs argue that the military contractor defense does not apply because Titan has failed to demonstrate that it complied with the government's specifications and that, at any rate, Titan's contract did not require it to torture defendants. (C. Opp. 18-20.) This argument has no application in the context of combatant activities.

In *Boyle* state law significantly conflicted with the uniquely federal interests reflected by the FTCA's discretionary function exception that protects government specifications. To ensure that the government's discretion was at issue rather than the contractor's, *Boyle* required the defendant to show that it had complied with the government-approved specifications that formed the basis of the suit.[4] In *Koohi*, as here, the primary conflict was with the federal interest in warmaking reflected by the combatant activities exception to the FTCA. In the context of that interest, as opposed to the context of the discretionary function interest, the specificity of the government contract and the contractors' compliance are irrelevant. *See Koohi*, 976 F.2d 1328. Where combatant activities of the U.S. military are implicated, one does not inquire into the merits; the defense applies regardless of whether the challenged actions were taken "carefully or negligently, properly or improperly." *Id.* at 1335; *see also Johnson*, 170 F.2d at 769 ("[I]t may be safely concluded that the 'exception' here involved relates to Governmental activities which by their very nature should be free from the hindrance of a possible damage suit.").

[4] *See Boyle*, 487 U.S. at 512 (inquiries into compliance assure "that the suit is within the area where the policy of the 'discretionary function' would be frustrated—i.e., they assure that the design feature in question was considered by a Government officer, and not merely by the contractor itself.").

4. The Military Contractor Defense Applies to Service Contracts

Plaintiffs' contention that the government contractor defense does not apply to service contracts (C. Opp. at 20-21), is frivolous. First, *Boyle* extended the government contractor defense *from* service contracts *to* procurement contracts. *See Boyle*, 487 U.S. at 506 ("The federal interest justifying [*Yearsley's*] holding surely exists as much in procurement contracts as in performance contracts; we see no basis for a distinction."). Second, *Malesko* again endorsed the application of the defense in the context of a service contract. *Correctional Servs. Corp. v. Malesko*, 534 U.S. 61, 74 n.6 (2001) (recognizing government contractor defense in context of a service contract for management of prison but finding its applicability unsupported in the record). Third, plaintiffs grossly misrepresent the Ninth Circuit law on this issue. *Snell v. Bell Helicopter Textron*, 107 F.3d 744, 746 n.1 (9th Cir. 1997) and the other cases cited at C. Opp. 20 *do not* address whether the military contractor defense applies to service contracts. *Snell* stated nothing more than the fact that the Ninth Circuit recognizes a "military contractor" not a "government contractor" defense. *Snell* and the other Ninth Circuit cases relied upon by plaintiffs merely represent further examples of the military contractor defense being applied in the context of procurement contracts. They say nothing about its application to military service contracts.[5]

5. Plaintiffs' Tort Claims Conflict with Other Federal Interests

a. Discretionary Function

Plaintiffs argue that the discretionary function exception is inapplicable because (1) Titan has failed to show that it conformed to its contract and cannot do so to the extent their allegations of torture are accepted as true (C. Opp. 18-20), and (2) unconstitutional and unlawful activity falls outside the scope of the discretionary function exception. (C. Opp. 21.) In short, plaintiffs argue that the behavior they allege places the conduct outside the scope of authority vested in any government official.

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[5] Remarkably, the only court of appeals authority cited by plaintiffs that actually addresses this issue, *Hudgens v. Bell Helicopters/Textron*, 328 F.3d 1329 (11th Cir. 2003) (C. Opp. 20), clearly holds that the defense *applies* to service contracts. Contrary to plaintiffs' representation that *Hudgens* involved the manufacture of helicopters (C. Opp. 20), the civilian contractor was repairing and maintaining them, the quintessential service contract. The same is true of the district court cases cited by plaintiffs. (C. Opp. 21.)

Plaintiffs' arguments fail because they cannot simultaneously contend that the actions of the conspiring government officials were at once official, subjecting them to the substantive international law norms they allege, and *ultra vires*. *See Sanchez-Espinoza*, 770 F.2d 202 (dismissing claims against contractors that allegedly provided substantial assistance for murder, kidnapping, and rape because they were supporting U.S. officials acting in their official capacity). If, as plaintiffs contend elsewhere, government officials acting in their official capacities, including the Secretary of Defense, contracted with Titan to provide linguists and promulgated interrogation policies that led to their injuries, then their claims are barred by the uniquely federal interests codified in the discretionary function exception.[6] (Mot. 15 n.16.) If, as plaintiffs now contend, the conspiring government officials were acting *ultra vires* then neither their actions nor the actions of the Titan employees who allegedly conspired with them fall within the scope of the ATS where official action is required "*as a jurisdictional necessity*." *Sanchez-Espinoza*, 770 F.2d at 207.[7] Moreover, to the extent that plaintiffs now allege that low-level military officials acted in an *ultra vires* manner in conspiring with Titan translators to commit unlawful acts, the Titan employees were acting outside the scope of employment in the same way military official were and their actions cannot be attributed to Titan. *See* § I.C.2, *infra*.

b. Foreign Activities

Rather than contend with the foreign country exception to the FTCA, plaintiffs argue that the exception does not apply because they do not seek to apply foreign law, only domestic and international law. (C. Opp. 23.) Plaintiffs' contention is off the mark and contrary to the holding of *Sosa*. The foreign country exception to the FTCA "bars all claims based on any injury suffered in a foreign country...." *Sosa*, 124 S. Ct. at 2754. Plaintiffs' assertion that they seek to apply

[6] In the SAC and RICO statement, plaintiffs quite clearly advanced the position that government officials involved in the conspiracy acted in an "official capacity." *See, e.g.*, SAC ¶¶ 67(b); 257; 263; 269; 275; RICO Statement at 20 ("Defendants' actions were accorded the color of the United States law because they were conspiring with certain public officials, including certain military officials, and other persons acting in an official capacity on behalf of the United States.").

[7] In a highly misleading citation to *Sosa*, plaintiffs suggest that the Supreme Court endorsed liability for torture by private actors under the ATS. (T. Opp. 17, citing *Sosa*, 124 S. Ct. at 2766 n.20.) The Court did no such thing. At most, it implied, through a *compare...with* citation, that *genocide* by private actors violates international law.

only domestic and international law is of no consequence. That the United States would unquestionably be immune from suit by virtue of *Sosa*'s reading of the foreign country exception means that Titan, acting under the direction and control of the U.S. military, similarly cannot be sued. *See Butters v. Vance Int'l, Inc.*, 225 F.3d 462, 466-67 (4th Cir. 2000); *Sanchez-Espinoza*, 770 F.2d at 207 n.4.

B. The ATS Claims Must Be Dismissed

Titan's opening brief demonstrated that *Koohi* requires dismissal of the ATS claims, as do several other deficiencies in the claims; plaintiffs largely fail to respond, arguing only that *Sosa* endorsed *Marcos*, which, even if correct, is irrelevant. *Sosa* supports dismissal. It confirmed that ATS claims must be analyzed like any other implied cause of action, requiring deference to legislative judgments (such as the combatant activities exception) and consideration of common law defenses that might not apply to statutory actions.[8]

1. *Koohi* Requires Dismissal of the ATS Claims

Titan explained how *Sosa*'s holding confirmed *Koohi*'s binding precedent in this Circuit: ATS claims are barred where based on injuries incurred incident to combatant activities of the U.S. military just as state common law claims are precluded and preempted. (Mot. 24-26.) Plaintiffs offer no substantive response, incredibly writing that, "[d]efendants simply fail to address the Plaintiffs' federal common law claims." (C. Opp. 23.) This statement and the argument that the ATS claims survive in the face of a valid military contractor defense (C. Opp. 23-24), are frivolous. *See* Mot. 13-15; 21-24; 25-27 (discussing *Koohi* and its theoretical basis).

2. *Sosa* Supports Dismissal of the ATS Claims

Rather than substantively address *Koohi*, plaintiffs argue that, "*Sosa* upholds the line of rulings that gave aliens access...to sue their torturers" because it "squarely upheld and endorsed the reasoning of...the Ninth Circuit in [*Marcos*]" and "adopted the reasoning of *Filartiga*." (T. Opp. 10-11.) Plaintiffs' argument is misplaced. First, *Sosa* did not uphold any ATS claims; it

[8] We also showed that courts are jurisdictionally required to subject ATS claims to a "more searching review" (Mot. 27-28), an important point to which plaintiffs failed to respond. Plaintiffs' extended discussion of their individual ATS claims (T. Opp. 20-25), does not undermine our original discussion of these issues and we stand on our opening brief.

held that the claim for arbitrary detention that the Ninth Circuit had recognized was *outside* the narrow class of claims cognizable under the ATS, and expressed a series of cautions on implying new causes of action under ATS. Second, regardless of whether (and for what purposes) the Court endorsed *Marcos* and *Filartiga*, neither those cases, nor any others relied upon by plaintiffs, involved ATS claims with the key facts that require dismissal here: injuries incurred incident to the combatant activities of the U.S. military. Those cases involved military actions of *other countries*, or the acts of *other sovereigns*. Notwithstanding plaintiffs' penchant for describing ugly acts of torture in place of legal argument, not one of those cases involved the U.S. military as the sovereign actor, let alone U.S. combat operations, both of which underlie *Koohi* and constitute one of the special factors that preclude liability for Titan.

Marcos involved neither an international armed conflict nor, more importantly, the U.S. military.[9] Plaintiffs' misplaced reliance on *Marcos* demonstrates that they have failed (1) to find any support for extending ATS to claims involving the U.S. military; and (2) to appreciate the critical distinction between the U.S. military and foreign militaries for ATS claims.[10] This critical distinction—rooted in the difference between the retained sovereign immunity of the United States in its own courts and the immunity that Congress has granted foreign sovereigns in our courts—explains why plaintiffs cannot identify a single case allowing an ATS claim in the context of U.S. military operations, and why the only cases to consider such claims rejected them. *See Koohi*, 976 F.2d 1328; *Sanchez-Espinoza,* 770 F.2d 202; *Bentzlin*, 833 F. Supp. 1486.

Titan also demonstrated in its opening brief that *Sosa* independently reinforced the unavailability of the ATS claims here because (1) the common law is reluctant to infer causes of action under new circumstances in the absence of Congressional action and (2) the FTCA's

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[9] Plaintiffs also argue that the "traditional ATCA claims upheld in *Sosa* have historically arisen out of conditions involving armed conflict," citing *Marcos*, *Kadic*, and *Presbyterian Church of Sudan*. (T. Opp. 15). Again, none of those cases involved the U.S. military and they are not relevant to the application of the military contractor defense here.

[10] *See Sanchez-Espinoza*, 770 F.2d at 207 n.5 ("Since the doctrine of foreign sovereign immunity is quite distinct from the doctrine of domestic sovereign immunity that we apply here…nothing in today's decision necessarily conflicts with the decision of the Second Circuit in *Filartiga v. Pena-Irala*") (internal citations omitted).

combatant activity exception represents Congress's judgment that claims arising under such circumstances are not permitted. (Mot. 25-26.) Plaintiffs first respond (T. Opp. 12-14), that the Court did not mean what it said in *Sosa*, 124 S. Ct. at 2762-63—that courts must be cautious in extending ATS claims to new circumstances and, in doing so, must defer to "legislative judgment." Not constrained by their own arguments any more than the precedent they ignore, plaintiffs later reverse themselves and argue the converse: that this Court *should* be guided by Congress's legislative judgment, as expressed in the Torture Victim Protection Act of 1991 ("TVPA"). (T. Opp. 14.) Plaintiffs are right that Congress has spoken in the TVPA: it expressed Congress's judgment by creating a statutory damages action for victims of torture *only* against an individual acting under authority of a *foreign* nation, 106 Stat. 73 § 2(a). Thus, it codifies the critical distinction between retained U.S. sovereign immunity and foreign sovereign immunity earlier recognized in *Sanchez-Espinoza*.[11] *See* n.10, *supra*.

Plaintiffs also attempt to limit the effect of *Sosa*'s dramatic recasting of the ATS's theoretical underpinnings by arguing that the five reasons for judicial caution enumerated by the Court are not "for lower courts to apply to every ATCA claim," and that the "*Sosa* Court specifically chose not to adopt 'a policy of case-specific deference to the political branches.'" (T. Opp. 13). Plaintiffs simply disregard the plain meaning of what the *Sosa* Court wrote, not to mention the holding of that case.[12] The Court chose not to apply such deference to that case because it was unnecessary. *See* 124 S. Ct. at 2762 ("This requirement is fatal to Alvarez's claim."). The Court admonished lower courts that "[a] series of reasons argue for judicial caution when considering the kinds of individual claims that might implement the jurisdiction conferred by the early statute." *Id.*

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[11] That the ATS "remain[s] intact to permit suits based on other norms that already exist or may ripen in the future into rules of customary international law," H.R. Rep. No. 102–367, pt. 1, p. 4 (1991), *reprinted in* 1992 U.S.C.C.A.N. 85, 87, does not alter the analysis because no ATS claims have been allowed in the context of U.S. military operations. Equally significantly, Congress provided that there is no civil cause of action for torture committed by U.S. citizens. *See* 18 U.S.C. § 2340A & 2340B.

[12] Plaintiffs omit a key clause: "*Another possible limitation that we need not apply here* is a policy of case-specific deference to the political branches." *Sosa*, 124 S. Ct. at 2766 n.21 (emphasis supplied).

3. Corporations Are Not Subject to ATS Claims

Plaintiffs concede that *Malesko* bars their Constitutional claims against Titan (their attempt to disavow such claims notwithstanding), but seek to limit *Malesko* to *Bivens* actions. (T. Opp. 17 n.13.) As set forth in our opening brief (Mot. 26-27), and again not disputed, *Malesko* applied the principle that the federal common law is reluctant to infer actions in the absence of legislation. *Sosa* cited it for that proposition (Mot. 28), and given *Sosa*'s holding that ATS actions are implied actions, *Malesko* is equally applicable here. Plaintiffs respond that *Sosa*'s "endorsement" of *Filartiga*, *Marcos*, and *Kadic* support ATS claims against corporations. (T. Opp. 17). Without debating whether *Sosa* endorsed those cases (and for what propositions), none of them involved corporate defendants and therefore do not address this point.

Two additional arguments are equally unfounded: Plaintiffs contend that *Malesko* is inapplicable because the ATS arises under international law, not federal common law and the deterrence rationale does not apply. (T. Opp. 17.) The premises are wrong: ATS suits are federal common law claims that enforce a narrow class of international norms, *Sosa*, 124 S. Ct. at 2761; they do not exist "to recognize that courts are responsible for enforcing international law." (T. Opp. 17 n.13.) Nor does this affect the applicability of *Malesko* to ATS suits: The inability to sue corporations is a function of the limits of implied rights of action under federal common law. Relying upon *Malesko*, *Sosa* made clear that the federal common law's reluctance to recognize implied causes of action is fully applicable to ATS actions. *Sosa*, 124 S. Ct. at 2762-63; *see also id.* at 2772 (Scalia, J., concurring in part and concurring in judgment) ("*Bivens* provides perhaps the closest analogy [to implied causes of action under ATS].").

Consistent with the rules developed in the context of *Bivens* actions, the federal common law will not recognize an implied ATS action for every claim that properly asserts violation of an international norm. *Sosa*, 124 S. Ct. at 2763 ("The creation of a private right of action raises issues *beyond the mere consideration whether underlying primary conduct should be allowed or not*....") (emphasis added). Put another way, there is a distinction between the applicability of the underlying substantive norm—informed by international law in ATS claims and the Constitution in *Bivens* claims—and the availability of an implied remedy under federal common law where