

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

ESTATE OF HIMOUD SAED ABTAN, et al.)	
)	
Plaintiffs,)	Civil Case No. 1:07-cv-01831 (RBW)
)	(Lead Case)
v.)	
)	
BLACKWATER LODGE AND TRAINING CENTER, et al.)	
)	
Defendants.)	
_____)	

ESTATE OF ALI HUSSAMALDEEN ALBAZZAZ, et al.)	
)	
Plaintiffs,)	Civil Case No. 07-cv-02273 (RBW)
)	(Consolidated Case)
v.)	
)	
BLACKWATER LODGE AND TRAINING CENTER, et al.)	
)	
Defendants.)	
_____)	

**DEFENDANTS’ MEMORANDUM OF POINTS AND AUTHORITIES IN
OPPOSITION TO PLAINTIFFS’ MOTION FOR LEAVE TO FILE A
THIRD AMENDED COMPLAINT IN CASE NO. 1:07-CV-01831**

Plaintiffs have moved for leave to file yet another complaint—the fourth to date—in Case Number 1:07-cv-01831, *Estate of Himoud Saed Abtan et al. v. Blackwater Worldwide et al.* (see Motion For Leave To File An Amended Complaint (“Motion”), Dkt. No. 30), seeking to add a count for “tortious spoliation of evidence” (Third Am. Cmpl. ¶¶ 125-129). Plaintiffs’ proposed Third Amended Complaint contains groundless allegations of spoliation and improper destruction of evidence relating to (1) the government-authorized repair of damaged security vehicles in

Iraq shortly after September 16, 2007, and (2) the supposed shredding of certain unidentified documents in North Carolina. *Id.* ¶¶ 80-93. Because of the pendency of a motion to dismiss based on improper venue, Plaintiffs' Motion to Amend should be denied without prejudice or deferred until after the Court resolves the venue issue.

At the outset, Defendants feel compelled to respond to Plaintiffs' brief, but inaccurate, incomplete, and misleading, account of correspondence between the parties before this Motion was filed. *See* Memorandum of Points and Authorities in Support of Plaintiffs' Motion for Leave to File a Third Amended Complaint ("Memorandum") at 1 & n.1. Rather than burden the Court by drawing attention to all the omissions and inaccuracies in Plaintiffs' description of the events leading to the filing of this Motion, Defendants attach to this Opposition an email chain between counsel regarding this issue and invite the Court to review it. *See* Ex. A (White Decl.) ¶ 2 & Attach. 1.

As that correspondence makes clear, Defendants addressed Plaintiffs' allegations and, to the extent Plaintiffs thought otherwise, this discovery-related dispute was poised for an in-Chambers, nonpublic, hearing with the Court, in accordance with the Court's standing order. *See* General Order And Guidelines For Civil Cases (ECF) ¶ 8 (Walton, J.). Private resolution in consultation with Chambers also would have been consistent with the Court's previous admonition to avoid improper publicity. *See* Order, Dkt. No. 8. Without explanation, Plaintiffs abruptly abandoned this approach and elected instead to file this Motion on the public docket. Plaintiffs' decision to file an amended complaint, rather than pursue an in-Chambers resolution of any lingering concerns, is particularly perplexing in light of the fact that Defendants' motion to dismiss for lack of venue is pending before the Court. *See* Dkt. No. 20. In addition, Plaintiffs' proposed spoliation count: (1) is insufficiently pleaded because it is based on only rank speculation rather

than information or a good-faith belief,¹ (2) is based on information Plaintiffs were aware of before they filed their last Motion to Amend the complaint,² (3) alleges a tort that, as pleaded, is not recognized by D.C. law,³ and (4) as the context in which it was brought suggests, arguably is not brought in good faith.⁴ These deficiencies provide ample grounds for this Court to deny

¹ Plaintiffs make their sensational allegations based on nothing more than the legally insufficient proviso that their charges are “likely” to be established by “reasonable discovery.” See, e.g., Third Am. Cmplt. ¶¶ 80-88, 90-93. Thus, Plaintiffs hope that a fishing expedition during discovery will land something to support the charges, but at present apparently lack sufficient information or a good-faith belief to proceed. This defect aside, the proposed spoliation count is fatally deficient because it fails to plead a nexus between the documents allegedly destroyed or the repairs made and this litigation. As for the March 2008 document-destruction claim (which Defendants investigated and found to have no basis), Plaintiffs do not allege that the documents allegedly destroyed had anything to do with this litigation, which involves events that took place in September 2007, events that have been, and were, the subject of ongoing, comprehensive investigations by several governmental agencies long before March 2008. Instead, Plaintiffs retreat behind the inadequate assertion that the documents “related to the company’s” unspecified “criminal and civil legal exposures.” *Id.* ¶ 92. With respect to the repair of the vehicles, which occurred well before this suit was filed, Plaintiffs do not allege facts that might support an inference that the repairs were done with this litigation in mind, but claim only—and contrary to the facts—that the repairs were completed without a “business need or rationale.” *Id.* ¶¶ 84-87.

² Compare Dkt. No. 17, March 28, 2008 (Plaintiffs’ motion for leave to file a Second Amended Complaint), with Mem. at 1 n.1 (“Upon receiving the allegations of spoliation on March 18, 2008 * * *”).

³ Plaintiffs offer no support for their assertion that alleged spoliation occurring in Iraq and North Carolina is governed by D.C. law. Assuming *arguendo* that local law applies, spoliation does not constitute an independent tort in D.C., unless the alleged spoliator has a “special relationship” that creates a “duty to preserve the evidence” beyond simply being a party to the underlying civil suit. See *Holmes v. Amerex Rent-A-Car*, 710 A.2d 846, 849-50 (D.C. 1998) (finding a “special relationship” because of a contractual agreement to preserve specific evidence). Rather, the ordinary course for dealing with allegations of spoliation between the parties to the underlying civil suit is through the discovery process. See *Williams v. Wash. Hosp. Ctr.*, 601 A.2d 28, 31 (D.C. 1991); *Battocchi v. Wash. Hosp. Ctr.*, 581 A.2d 759, 766-67 (D.C. 1990); see also *Mazloun v. District of Columbia Metro. Police Dep’t*, 522 F. Supp. 2d 24, 55-57 (D.D.C. 2007).

⁴ The context in which this filing arose and its significant weaknesses suggest that this Motion was brought merely to inject sensational and unfounded allegations into the public record that could further taint the jury pool against Defendants. Rather than risk an unpublicized resolution by this Court in Chambers, Plaintiffs’ public filing generated national press coverage within minutes of its being filed late Friday evening, on April 25, 2008. An article appeared on the

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Plaintiffs' Motion. *See Foman v. Davis*, 371 U.S. 178, 182 (1962) (holding that leave to amend may be denied for “undue delay, bad faith or dilatory motive on the part of the movant, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party, [or] futility of amendment”).

In any event, the failings of Plaintiffs' Motion under Federal Rule of Civil Procedure 15(a)(2) are beside the point at this stage of the litigation. In light of the pending request to dismiss or transfer the case on venue grounds, the Motion should be denied without prejudice or deferred until the venue issue is decided. The issue of improper venue has now been fully briefed for a second time, after another amendment to the complaint by Plaintiffs. *See* Dkt. Nos. 20, 22, 31. Defendants' motion to dismiss or to transfer the case to the Eastern District of Virginia is ripe for decision.

Moreover, Plaintiffs will suffer no hardship if their request to file this fourth complaint is denied without prejudice or deferred until the venue issue is settled. If the Court dismisses the case on venue grounds, Plaintiffs will retain the option of filing a complaint, with the new count included, where venue is proper. If the Court instead transfers the case to the Eastern District of Virginia, Plaintiffs can ask that Court for leave to add the spoliation count. Finally, if the Court denies Defendants' venue motion, Plaintiffs can renew their request to file a fourth complaint with this Court.

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Internet entitled “Iraqis Accuse Blackwater Of Shredding Documents” almost simultaneously with the filing. Over the following weekend, this story was repeated widely in the press. *See, e.g.*, Ex. A (White Decl.) ¶ 3 & Attach. 2 (attaching articles).

If, on the other hand, the Court grants Plaintiffs' Motion, and Plaintiffs do file a fourth complaint,⁵ the parties will have to complete yet again another round of briefing on the venue issue, resulting in additional and unnecessary expense. The time spent by the Court considering Plaintiffs' Motion, moreover, will be wasted if the Court later renders a ruling in Defendants' favor on the venue issue.

In sum, there is no reason to consider Plaintiffs' Motion at present, whereas there are substantial reasons to decide the pending venue issue first. Defendants therefore respectfully request that the Court DENY the Motion without prejudice or DEFER consideration of the Motion until the venue issue is decided.

Respectfully submitted,

/s/ Michael Lackey

Michael Lackey (#443362)

Andrew Pincus (#370726)

Peter White (#468746)

MAYER BROWN LLP

1909 K Street, N.W.

Washington, D.C. 20006

(202) 263-3000

Counsel for Defendants

Dated: May 7, 2008

⁵ Defendants note in this regard that Plaintiffs have still not yet filed an Amended Complaint in *Albazzaz*, even though Defendants drew attention to this fact about a month ago. See Defendants' Motion to Dismiss for Lack of Venue the Second Amended Complaint in Case No. 1:07-CV-01831 and the Amended Complaint in Case No. 07-CV-02273 at 2, Dkt. No. 20.

CERTIFICATE OF SERVICE

I, Peter White, an attorney, certify that on May 7, 2008, I caused true and correct copies of the foregoing Defendants' Memorandum of Point and Authorities in Opposition to be filed with the Clerk of the Court by using the CM/ECF system, which will send a notice of electronic filing to the following counsel who have registered for receipt of documents filed in this manner:

Shereef Hadi Akeel (admitted *pro hac vice*)
AKEEL & VALENTINE, PLC
888 West Big Beaver
Suite 910
Troy, MI 48084
(248) 269-9595

Susan L. Burke (414939)
William T. O'Neil (426107)
BURKE O'NEIL LLC
4112 Station Street
Philadelphia, PA 19127
(215) 971-5058

In addition, on this same date, I caused the above-mentioned Notice to be served upon the following counsel of record via first-class mail:

Michael A. Ratner
CENTER FOR CONSTITUTIONAL RIGHTS
666 Broadway, 7th Floor
New York, NY 10012
(212) 614-6439

/s/ Peter White
Peter White
MAYER BROWN LLP
1909 K Street, N.W.
Washington, D.C. 20006
(202) 263-3000

Counsel for Defendants