NOT YET SCHEDULED FOR ORAL ARGUMENT

United States Court of Appeals

for the

District of Columbia Circuit

No. 08-7008
Consolidated with 08-7009

HAIDAR MUHSIN SALEH et al.,
Plaintiffs-Appellants,

v.

TITAN CORPORATION. et al.,
Defendants-Appellees,

ILHAM NASSIR IBRAHIM, et al.,
Plaintiffs-Appellants,

v.

TITAN CORPORATION, et al.,
Defendants-Appellees,

On Appeal from the United States District Court for the District of Columbia in Case Nos. 04-cv-1248 and 05-cv-1165 (Hon. James Robertson, Judge)

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CERTIFICATE AS TO PARTIES, RULINGS AND RELATED CASES

Pursuant to Circuit Rule 28(a)(1), Appellants Saleh et. al and Ibrahim et. al make the following certification:

(1) Parties, Intervenors, and Amici. The following persons have appeared as Plaintiffs in *Saleh et al., v. Titan Corp. et al.,* No. 1:05-cv-1165 (D.D.C.) *("Saleh")*: Haidar Muhsin Saleh, Haj Ali Shallal Abbas Al-Uweissi, Jalel Mahdy Hadood, Umer Abdul Mutalib Abdul Latif, Ahmed Shehab Ahmed, Ahmed Ibrahim Neseif Jassem, Ismael Neisef Jassem Al-Nidawi, Kinan Ismael Neisef Al-Nidawi, Estate of Ibraheim Neisef Jassem, Mustafa (last name under seal), Natheer (last name under seal), Othman (last name under seal), Hassan (last name under seal), Abbas Hassan Mohammed Farhan, Hassan Mohammed Al Azzawi, Burhan Ismail Neisef, Haibat Fakhri Abbas, Hamid Ahmed Khalaf Haref Al-Zeidi, Ahmed Derweesh, Emad Ahmed Abdel Aziz, Mahmoud Shaker Hindy, Jabar Abdul Al-Azawi, Firas Raad Moarath, Abd al Wahab Youss, Hadi Abbass Mohamed, Estate of Jasim Khadar Abbas, Yousef Saldi Mohamed, Khadayer Abbass Mohamed, Ahmed Ubaid Dawood, Ali Jassim Mijbil, Waleed Juma Ali, Abdul Majeed S. Al-Jennabi, Mufeed Al-Anni, Bassam Akram Marougi, Sinaa Abbas Farhad, Ali Al-Jubori, Meheisin Khihdeir, Abdul Mutalib Al-Rawi, Summeiya Khalid Mohammed Sa'eed, Ali A. Hussein, Sebah N.

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The following entities have appeared as Defendants in the *Saleh* action:

Titan Corporation, L-3 Communications Titan Corporation, L-3 Services, Inc., CACI International Inc, CACI Premier Technology, Inc., CACI, Inc.-Federal, CACI, N.V., Adel Nakhla, Steven Stefanowicz, John Israel, Timothy Dugan, and Daniel Johnson.

The following persons have appeared as Plaintiffs in *Ibrahim et al., v. Titan Corp., et al.,* No. 1:04-cv-1248 (D.D.C.) *("Ibrahim"):* Ilham Nassir Ibrahim, Saddam Saleh Aboud, Nasir Khalaf Abbas, Ilham Mohammed Hamza Al Jumali, Hamid Ahmed Khalaf, Al Aid Mhmod Hussein Abo Al Rahman, Ahmad Khalil Ibrahim Samir Al Ani, Israa Talb Hassan Al-Nuamei, Huda Hafid Ahmad Al-Azawi, Ayad Hafid Ahmad Al-Azawi, Ali Hafid Ahmad Al-Azawi, Mu'Taz Hafid Ahmad Al-Azawi, and Hafid Ahmad Al-Azawi.

The following entities have appeared as Defendants in the *Ibrahim* action:

Titan Corporation, L-3 Communications Titan Corporation, L-3 Services, Inc., CACI International, Inc, CACI Premier Technology, Inc., CACI, Inc.-Federal, CACI, N.V.

This Court has granted CACI International, Inc.'s and CACI Premier Technology, Inc.'s motion for leave to intervene in this appeal. There were no amici before the District Court. Appellants are aware that certain Amici intend to file briefs in support of Appellants' position in this Court, but are not aware of the precise signatories.

(2) <u>Rulings Under Review</u>. The plaintiffs in *Ibrahim, et al.,* v. *Titan Corporation, et al.,* No. 08-7009 (D.C. Cir.) have filed a direct appeal of the Judge James Robertson's November 6, 2007, Memorandum Order (RI.102, RS.137) granting summary judgment against Titan Corporation. The official citation for the decision is *Ibrahim v. Titan Corp.*, 556 F.Supp.2d 1 (D.D.C. 2007). The *Ibrahim* Plaintiffs have also appealed from the District Court's November 26, 2007 denial of the Plaintiffs' Motion for Reconsideration of the November 6, 2007 Memorandum Order; and from the District Court's order, RI.114, directing the clerk to enter final judgment dismissing Titan Corporation. The plaintiffs in *Saleh, et al., v. Titan Corporation, et al.,* No.

08-7008 (D.C. Cir.) have filed a direct appeal from the final judgment, RS.154, entered by the District Court dismissing Titan Corporation pursuant to Fed. R. Civ. P. 54(b) and the November 6, 2007 Memorandum Order.

(3) <u>Related Cases</u>. The following cases, which the Court has consolidated, also involve the District Court's November 6, 2007 Memorandum Order:

Saleh et. al v. CACI International Inc. et. al, No. 08-7001, 08-7045 (D.C. Cir.)

Ibrahim, et al., v. CACI Premier Technology, et al., No. 08-7030, 08-7044 (D.C. Cir.)

Susan L. Burke

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* Authorities upon which we chiefly rely are marked with asterisks.

Statutes, Rules and Regulations

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GLOSSARY OF ABBREVIATIONS

AR	U.S. Army Regulation
ATS	Alien Tort Statute
CACI	Collectively, CACI International, Inc. and CACI Premier Technology, Inc.
COR	Contracting Officer's Representative
DoD	Department of Defense
Fay Report	AR 15-6 Investigation of the Abu Ghraib Detention Facility and 205th Military Intelligence Brigade, Major General George Fay, Investigating Officer (2004)
FM	U.S. Army Field Manual
FTCA	Federal Tort Claims Act
ICC	International Criminal Court
ICTR	International Criminal Tribunal for Rwanda
ICTY Yugoslavia	International Criminal Tribunal for the Former
L-3	Collectively, Titan Corporation, L-3 Communications Titan Corporation, and L-3 Services, Inc.
MG	Major General
MI	Military Intelligence
MP	Military Police
OIC	Officer in Charge
POC	Point of Contact

RI.__	The District Court record in *Ibrahim*, et. al., v. *CACI Premier Technology*, et. al, No. 1:04-cv-1248 (D.D.C.) (Robertson, J.)
RS.__	The District Court record in *Saleh*, et. al., v. *CACI International Inc.*, et. al, No. 1:05-cv-1165 (D.D.C.) (Robertson, J.)
SCSL	Special Court for Sierra Leone
SOF	Statement of Facts
Taguba Report	AR 15-6 Investigation of the 800th Military Police Brigade, Major General Antonio Taguba, Investigating Officer (2004)
UCMJ	Uniform Code of Military Justice

STATEMENT OF JURISDICTION

The District Court exercised jurisdiction over *Ibrahim v. Titan Corp.*, ("*Ibrahim*") and *Salehv. Titan Corp.*. ("*Saleh*") pursuant to 28 U.S.C. §1331 and 28 U.S.C. §1332. This Court has jurisdiction over the Plaintiffs' appeal pursuant to 28 U.S.C. §1291.

ISSUES PRESENTED FOR REVIEW

1. Did the District Court err by failing to consider military regulations that required the government contractor L-3 to supervise and discipline its own employees, and uncontradicted testimony from military officials that they followed those regulations?

2. Did the District Court err in permitting defense contractor L-3 to invoke the judicially-created affirmative defense (hereinafter "government contractor defense" or "*Boyle* doctrine") and insulate from review conduct by L-3 employees that was not contracted for and was prohibited by the military?

3. Did the District Court err in holding that torture and war crimes by corporate employees are not actionable under the Alien Tort Statute?

STATUTES AND REGULATIONS

The applicable statutes and regulations are reproduced in the addendum hereto.

STATEMENT OF THE CASE

Plaintiffs in this action are Iraqis who were mistakenly detained in prisons operated by the United States military during 2003 and 2004. According to military reports, up to 90 percent of the persons imprisoned in Iraq were innocents arrested by mistake.[1] All of the Plaintiffs fall into this category of persons, as each was voluntarily released by the military without any charges, convictions, or referrals to Iraqi authorities. During their tenures in prison, Plaintiffs were victims of serious abuse.

The *Saleh* Plaintiffs learned from the military's own reports that there were two corporate actors complicit in this abuse, Titan Corporation (now L-3) and CACI. L-3 employees served as translators; CACI employees served as interrogators at the Abu Ghraib prison. After learning of the corporate complicity in the abuse, the *Saleh* Plaintiffs brought suit in June 2004, alleging that L-3 translators conspired with others and abused them. Thereafter, the *Ibrahim* Plaintiffs filed suit in the District Court for the District of Columbia, alleging similar conduct, although without alleging any involvement by military personnel.

Defendants successfully sought to transfer the *Saleh* lawsuit, which was consolidated with the *Ibrahim* lawsuit in the District Court for the

[1] RS.112, Appendix C-9, at 37 (military report estimates that 85% - 90% of the detainees were of no intelligence value).

District of Columbia. The District Court dismissed Plaintiffs' claims under the Alien Tort Statute (ATS), but held Defendants were not immune from suit. The District Court permitted Plaintiffs' common law tort claims against L-3 and CACI to proceed, but ruled that Defendants were potentially entitled to invoke a judicially-created defense established by the Supreme Court in *Boyle v. United Technologies Corp*., 487 U.S. 500 (1988).

That defense insulates the United States contractors from liability to the extent necessary to ensure the United States is not indirectly exposed to liability beyond the waivers of sovereignty set forth in the Federal Tort Claims Act ("FTCA"). The District Court permitted a limited amount of discovery directed at contractual responsibilities, reporting structures, supervisory structures, and structures of command and control. *Ibrahim v. Titan Corp.*, 391 F.Supp.2d 10, 19 (D.D.C. 2005)("*Ibrahim I*"); *Saleh v. Titan Corp.*, 436 F.Supp.2d 55, 59-60 (D.D.C. 2006).

On November 6, 2007, the District Court ruled on Defendants' motions for summary judgment. *Ibrahim v. Titan Corp.*, 556 F. Supp. 2d 1 (D.D.C. 2007)("*Ibrahim II*"). The District Court noted that, because the government contractor defense is an affirmative defense, "the burden is on defendants to show that they meet the requirements for preemption."

Ibrahim II, 556 F. Supp. 2d at 5. The District Court held Defendants are eligible for preemption if and only they could prove that their employees

> were acting under the direct command and exclusive operational control of the military chain of command....When the military allows private contractors to retain authority to oversee and manage their employees' job performance on the battlefield, no federal interest supports relieving those contractors of their state law obligations to select, train, and supervise their employees properly.

Id.

The District Court denied CACI's motion for summary judgment, but granted L-3's motion. The District Court denied motions to reconsider, and granted L-3's motions for a final judgment on December 21, 2007. RI.115, RS.154. Plaintiffs timely filed Notices of Appeal. RS.159, RI.121.

STATEMENT OF FACTS

This Statement summarizes the record evidence regarding (1) the military's findings that L-3 employees abused prisoners, (2) the contract between L-3 and the United States, and (3) evidence produced by L-3 about supervision; and (4) evidence produced by the military about supervision.

(1) The Military's Findings That L-3 Employees Abused Prisoners.

The military found that a group of military personnel, L-3 employees, and CACI employees systemically and illegally abused prisoners at Abu

Ghraib. Major General Antonio Taguba, investigating the prisoner abuse under Article 15-6 of the Uniform Code of Military Justice, concluded that between October and December 2003, "numerous incidents of sadistic, blatant, and wanton criminal abuses were inflicted on several detainees" at Abu Ghraib prison. RS.112, Appendix C-40, at 16.

Major General Taguba identified as complicit in the abuse two L-3 translators, Adel Nakhla and John Israel. *Id.* at 17, 19, 48. A second military investigative report by Major General George Fay provided further details of the abuses at Abu Ghraib by L-3 employees. RS.112, Appendix C-9.

The military court-martialed the soldiers involved in the abuse. The military relied on the U.S. Army Field Manual 34-52, the interrogation manual in effect in Iraq in 2003-2004, which states that the Geneva Conventions, the Uniform Code of Military Justice (UCMJ) and U.S. policy forbid all "acts of violence or intimidation" against prisoners. RS.112, Appendix C-12, at 1-8.[2] *See also* Geneva Convention Relative to the Treatment of Civilian Persons In Time of War, Aug. 12, 1949 ("Fourth Geneva Convention"), 6 U.S.T. 3516, 75 U.N.T.S. 287, Art. 3, 27, 31, 32, 37, 100, 147.; 10 U.S.C. §§ 881, 892, 893, 928; and U.S. Army Regulation

[2] The Field Manual lists the following, among others, as techniques prohibited by the Geneva Conventions: electric shock, infliction of pain through chemicals or bondage, beating, mock executions, and threats of torture. RS.112, Appendix C-12, at 1-8.

190-8, Enemy Prisoners of War, Retained Personnel, Civilian Internees and Other Detainees, §1-5(a)-(c) (Oct. 1, 1997) (AR 190-8).

The military court-martialed and convicted eleven military police and military intelligence soldiers for abusing prisoners at Abu Ghraib. Those convicted received sentences ranging from discharge from the Army to ten years confinement. RS.112, Appendix C-54. L-3 translators in Iraq are not subject to prosecution under the UCMJ, or to any form of military discipline. *See* Lagouranis Decl. ¶11; Inghram Dep. 59; Bolton Dep. 392.

(2) L-3's Contract with the Military Required L-3 To Supervise Its Employees in Iraq.

L-3 provided several thousand translators to provide services to the military in Iraq during the years 2003-2004. In 2004 alone, the contract paid L-3 $247.2 million, which accounted for slightly over 12 percent of the company's revenues. RS.112, Appendix C-2.

L-3 received payment under a contract whose terms expressly required L-3 to supervise and discipline their own employees, and to ensure their compliance with the law. RS.112, Appendix C-1, §C-1; *see also* U.S. Army Regulation 715-9, Contractors Accompanying the Force (Oct. 29, 1999) ("AR 715-9") § 3-2(f); U.S. Army Field Manual 3-100.21, Contractors on the Battlefield (Jan. 2003) ("FM 3-100.21") § 4-45*;* 48 C.F.R. §§ 203.7000-203.7001. The contract required L-3 to have its

employees adhere to United States statutes, the Geneva Conventions and the laws of war, and U.S. Army regulations and field manuals governing the use of contractors in the field. RS.112, Appendix C-1, §C-1.1; §C-1.4.1.1. *See also* FM 3-100.21 §1-39; Peltier Dep. 114 [redacted]

The contract expressly imposed on L-3 an obligation to ensure that L-3 employees remained corporate, not government, employees. The contract states that translators "remain employees of the Contractor and will not be considered employees of the Government." RS.112, Appendix C-1, §C-1.4.1; see also *id.* at §C-1.4.2.4.

The contract required L-3 to select qualified persons. RS.112, Appendix C-1, §C-1.4.1, §C-1.4.1.2, §C-4.1. The contract required L-3 adequately train its translators to "deal unobtrusively with the local populace," and to obey "standards of conduct as prescribed by U.S. Army Instructions, this contract, and laws of host nation in performing work assignments." *Id.* at §C-1.4.1.2(e),(f).

The contract required L-3 to provide all necessary supervision of its employees. *Id.* at §C-1.1 ("The Contractor shall provide all…supervision"). The contract expressed in detail the level of supervision required by L-3. Namely, L-3 was required (1) to "provide a sufficient number of on-Site

Managers to adequately supervise contractor personnel during the period of this contract" (*id.* at §C-1.4.1.1); and (2) to ensure adequate supervision of translators' performance, L-3 had to assign "at least one staff member with a *security clearance equal to or higher than the linguists working in their region of responsibility*." *Id*. at §C-1.4.1.1.4 (emphasis added).

The contract does not distinguish between "operational" and "administrative" supervision, nor does it limit L-3's supervisory duties to "administrative" supervision. RS.112, Appendix C-1, §C-1.1, §C-1.4.1.1, §C-1.4.1.1.4. No member of the military has ever testified that L-3 was only required to provide administrative support or "administrative" supervision. *See* Rumminger Dep. 62 (Chief Warrant Officer Rumminger, the *only* military official to submit a declaration for L-3, testified in deposition that he knew nothing about L-3's contract with the military.)

The contract limited the military to using L-3 employees to provide "interpretation and translation services." RS.112, Appendix C-1 §C-1.1*; see also id.* at §C-5.1; Lagouranis Decl. ¶17; Mawiri Decl. ¶¶ 9, 14. Unlike soldiers, corporate employees could and did refuse assignments, and L-3 adjusted its employees' assignments to keep them satisfied. *See* Winkler Dep. 13[redacted]

See also Peltier Dep. 156-157; RS.112, Appendix C-41; Lagouranis Decl. ¶20; Mawiri Decl. ¶10.

The contract prohibited L-3 employees from engaging in combat. *See* RS.112, Appendix C-6 [redacted]); Hopkins Dep. 94-95 [redacted]); Bolton Dep. 209 [redacted]); Inghram Dep. 203 [redacted]

The vast majority of L-3 translators were Iraqi nationals hired off the streets of Iraq. [redacted] They were all at-will employees, free to quit at any time. Bolton Dep. 82; RS.112, Appendix C-57.

(3) Record Evidence Produced by L-3 Regarding Supervision.

L-3 produced during discovery documents in which L-3 admitted [redacted] RS.112, Appendix C-6. L-3 produced several documents describing L-3's supervisory practices in Iraq. [redacted] RS.112, Appendix C-16 at 22. [redacted]

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[redacted] RS.112, Appendix C-25, at 000581-000582.

L-3 recruiting advertisements state that site managers in Iraq were required to "provide *operational* direction to Titan linguists" and "ensure that linguists adhere to Titan, Armed Forces, and host nation standards of conduct concerning in-theater operations." RS.112, Appendix C-28 (emphasis added). *See also* RS.112, Appendix C-29*;* Peltier Dep. 150 [redacted]

Former L-3 site manager Thomas Crowley declared under oath that "[o]nly Titan [L-3] management had the power to supervise and discipline Titan [L-3] translators. The majority of my professional time in Iraq was spent supervising Titan [L-3] translators and responding to military concerns about Titan [L-3] translators." Crowley Decl. ¶7.

L-3 instructed its employees to report all complaints and problems to L-3 supervisory staff, not the military. *See* RS.112, Appendix C-15;

Crowley Decl. ¶5. [redacted]

L-3 told its translators that they did ***not*** have to follow military orders. Mawiri Decl. ¶¶9, 10, 14; Keune Dep. 98. L-3 required its employees to refuse military orders to abuse prisoners, and report any observed abuse to site managers. RS.112, Appendix C-21, at 000756 [redacted]; *id.* at 000758 [redacted]; RS.112, Appendix C-22, at [redacted]

[redacted] See Bolton Dep. 378-79.

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[redacted]; RS.112, Appendix C-23, at 000885[redacted]

[redacted]

RS.112, Appendix C-18 at 6[redacted]

[redacted]. *See also* RS.112, Appendix C-52 at

001797[redacted]

[redacted]

L-3 translators could and did report prisoner abuse to Site Managers. For example, an L-3 translator named Van Sayadian reported to Site Manager Crowley that he had witnessed L-3 translator Hamza Elsherbiny violently assault an Iraqi prisoner. A soldier stopped Elsherbiny's assault. Crowley Decl. ¶¶12-16; RS.112, Appendix C-19.[4]

[redacted]

[4] L-3's reaction was telling: the executives simply expressed the hope that the soldier involved "was on the team" and willing to overlook the criminal conduct by the L-3 employee. Crowley Decl. ¶¶13-16. Dissatisfied with L-3's response, Crowley reported the information to U.S. Army Criminal Investigation Division Agents in Baghdad. Crowley Decl. ¶17; RS.112, Appendix C-19. L-3 fired Crowley soon thereafter. Crowley Decl. ¶17.

[redacted] RS.112, Appendix C-43.

L-3 witnesses testified that the company did not adequately supervise its employees' performance in Iraq. Inghram Dep. 137-38 [redacted] *id.* at 143 [redacted] *see also* Bolton Dep. 59, 204; Mawiri Decl. ¶15.

L-3 executives testified – uniformly and in direct contradiction to the terms of the written contract -- that they had absolutely no responsibility to supervise employees' performance and absolutely no responsibility to prevent their employees from committing serious crimes or ethical violations.

[redacted] *See* Inghram Dep. 209-210. [redacted]

[redacted] Robertson Dep. 113-114. [redacted] *Id.* at 118-120.

The record evidence produced by L-3 is inconsistent on whether L-3 management could discuss specific interrogations with translators. David Winkler, former site manager at Abu Ghraib, signed a declaration stating that he was forbidden from discussing what occurred during interrogations (including prisoner abuse) with L-3 translators. Winkler Decl. ¶36.

But other L-3 witnesses testified to the contrary during depositions, stating that L-3 employees could report or seek assistance from management regarding any misconduct occurring during interrogations. [redacted] Hopkins Dep. 196–200 [redacted] *id.* at 232-233. *See also* Peltier Dep. 101 [redacted] *id.* at 124 [redacted]

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[redacted]

(4) Evidence Produced by the Military Regarding Supervision.

The military has not filed a statement of interest in this litigation. *See* RS.112, Appendix C-30.

Certain military fact witnesses testified or provided declarations, including the chief warrant officer at Abu Ghraib (Rumminger), a former military intelligence officer who speaks Arabic (Lagouranis), and the former commander of the military police at Abu Ghraib (Karpinski).

Rumminger testified under oath that L-3 employees could refuse to follow any interrogators' instructions to mistreat prisoners. Rumminger testified that an L-3 translator refused to translate swear words during interrogation for religious reasons, which Rumminger viewed as appropriate. Rumminger Dep. 95, 157-162. Rumminger testified that L-3 translators were permitted to ask interrogators to stop abusing prisoners. *Id.* at 164-65. Rumminger further testified that the military's Memorandum of Understanding with linguists (Rumminger Decl., Ex. A) allowed linguists to raise legal or moral problems with an interrogator's instructions as long as they did so "out of earshot of the detainee." Rumminger Dep. 165.

Rumminger assigned translators to "cells" but the interrogators within a "cell" and the "cells" themselves were free to "trade" L-3 translators amongst themselves without notifying Rumminger. Rumminger Dep. 89-100. Rumminger described his role with regard to L-3 translators as "kind of an ad hoc position." *Id.* at 127. Rumminger did not supervise L-3's translators and did not ensure that they abided by the laws of war. *Id.* at 69-70. Rumminger did not speak to L-3 employees about their day-to-day work in the interrogation booth, or provide them with guidance or supervision about their duties. *Id.* at 148-49. He did not know whether L-3 translators ever sought advice or guidance on their duties from other members of the military. *Id.* at 149.

Karpinski and Lagouranis both declared under oath that the military could not give corporate employees legally binding orders. *See* Karpinski Decl. ¶¶4, 7-9, 16-17; Lagouranis Decl. ¶¶11-12. They also declared under oath that interrogators, and other soldiers in daily contact with translators, did not have the power to discipline or terminate L-3 translators. Lagouranis Decl. ¶¶12, 14-15; Karpinski Decl. ¶11; *see also* RS.112, Appendix C-1 §C-1.4.2.4. Karpinski described an unsuccessful effort to have an L-3 employee (known as "Iraqi Mike") fired by L-3 because he was a former member of

the Iraqi Republican Guard and enemy prisoner of war at Camp Bucca. L-3 did not fire him. Karpinski Decl. ¶¶11, 17.

L-3 translators did not report to any defined chain of command, but rather translated for different soldiers on different days. L-3 translators often did not know the military chain of command. *See* Lagouranis Decl. ¶9, Mawiri Decl. ¶¶4, 9. At Abu Ghraib prison, L-3 employees translated for corporate interrogators from CACI, as well as for the CIA and FBI, all of whom operated outside the military chain of command. *See* RS.112, Appendix C-37.

The record below contains evidence from the military (not contested by L-3) establishing that several L-3 translators involved in the prisoner abuse were working for CACI interrogators, not the military.

John Israel, an L-3 translator named by the military as a suspect in prisoner abuse, translated for CACI civilian interrogator Steven Stefanowicz.[5] RS.112, Appendix C-36 at 3. Israel swore under oath that that CACI interrogator Stefanowicz instructed him not to discuss the contents of an interrogation with the military. *Id.* at 18.

[5] Based on military reports and soldiers' testimony, CACI interrogators Steven Stefanowicz and Daniel Johnson were two of the ringleaders of prisoner torture at Abu Ghraib. *See* RS.112, Appendix C-40 at 48; RS.112, Appendix C-9, at 82, 84, 132, 134; Graner Interview, 69-72, 115, 207-210, 231-239, 244-248, 261-265, 284-287, 290-292, 297-298; Frederick Interview at 45, 49-51, 54-56, 84-90, 109-110.

Etaf Mheisen, another L-3 translator identified by the military, participated in prisoner abuse while translating for CACI interrogator Daniel Johnson. According to the Fay Report, Mheisen ("CIVILIAN-16"), translated for Johnson ("CIVILIAN-10") when he illegally threatened prisoners with dogs, instructed Sergeant Ivan Frederick to assault a prisoner and restrict his breathing, and placed a prisoner in an illegal stress position. RS.112, Appendix C-9, at 133. *See also* Graner Interview 236 (identifies Etaf as translator for Johnson); *id.* at 238-239 (Etaf present during Johnson's torture of prisoners); Frederick Interview 44 (Etaf "always worked with JOHNSON"); *id.* at 43-44 (Etaf present during Johnson's torture of prisoners); *id.* at 54-56 (Etaf and Johnson had a "non-verbal agreement" regarding abuse of prisoners); *id.* at 109-110 (Etaf present during interrogation of prisoner photographed in stress position).

Adel Nakhla, another L-3 translator identified by the military as participating in the abuse (and appearing in many well-publicized photographs) translated for Graner and Frederick, both of whom were court-martialed for abusing prisoners at the Abu Ghraib hard site.[6] *See*

[6] L-3 translators sometimes translated for soldiers without being assigned or instructed to do so by any member of the military. Major General Taguba concluded that L-3 translators (and other civilians) "wandered about with too much unsupervised free access in the detainee area." RS.112, Appendix C-40, at 26.

Rumminger Dep. 167 (Nakhla "spent his spare time helping the MPs [in the isolation area of Abu Ghraib] when he wasn't on – on the job with interrogations….he often went over to see if the MPs needed any help"); *id.* at 192-94. *See also* Frederick Interview 40 ("NAKHLA was our primary interpreter. Now NAKHLA didn't have to be there, he chose to come there and help us out. I guess he just wanted to pass the time….he wasn't on duty.").

Nakhla abused prisoners, and was photographed abusing prisoners, at the hard site. *See* RS.112, Appendix C-37; RS.112, Appendix C-38; RS.46, Exhibit O. According to General Fay, Nakhla (CIVILIAN-17) "[a]ctively participated in detainee abuse," "was present during the abuse of detainees depicted in photographs," and failed to report or stop prisoner abuse. RS.112, Appendix C-9, at 133. In addition, a "detainee claimed that someone fitting CIVILIAN-17's description raped a young detainee." *Id.*

Another L-3 translator known to have abused prisoners is the Iraqi that General Karpinski tried to have terminated -- the former prisoner of war known as "Iraqi Mike." According to Graner (now serving ten years in Leavenworth prison), Iraqi Mike abused a prisoner although no one ordered or instructed him to do so. Graner Interview 99. *See also id.* at 8, 242-243.

In addition, as described above, L-3 translator Hamza Elsherbiny violently assault an Iraqi prisoner until he was stopped by a United States soldier.

SUMMARY OF ARGUMENT

L-3's egregious misconduct (described in the Statement of Facts) harmed the Plaintiffs, and also harmed the United States' military interests. There is no law or judicial doctrine that requires this Court to insulate such egregious corporate misconduct from civil liability. As explained below in Section I, even assuming *arguendo* that the District Court adopted an appropriate legal test ("exclusive operational control"), the District Court erred when applying the test to the facts because it failed to consider critical material facts – namely, L-3 breached its contract, and the military was unable to control or discipline L-3 employees. As explained below in Section II, if the District Court's "exclusive control" test, properly applied, results in immunity for L-3, then the test itself must be flawed. Immunity for defense contractors is only extended consistently with, not contrary to, the United States' interests. Here, as the military has stated in regulatory comments published recently in the Federal Register, the United States' interests are harmed, not helped, by letting L-3 and other service contractors evade accountability for their own acts not directed or controlled by the

military. Finally, as set forth in Section III, the District Court erred by dismissing Plaintiffs' claims asserted under the Alien Tort Statute.

STANDARD OF REVIEW

The Court of Appeals reviews *de novo* the District Court's rulings under Federal Rules of Civil Procedure 12(b)(6)(failure to state claim) and 56 (summary judgment), applying the same standards as the district court. *Wiley v. Glassman*, 511 F.3d 151, 155 (D.C. Cir. 2007); *Mastro v. Potomac Elec. Power Co.*, 447 F.3d 843, 849 (D.C. Cir. 2006). As the moving party, L-3 must carry the burden of proving that there is no genuine dispute as to any material fact. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247-49 (1986). In addition, L-3 must carry the burden of proving entitlement to an affirmative defense with a preponderance of the evidence. *Ibrahim I,* 391 F. Supp. 2d at 17-18 ("government contractor offense [*sic*] is an affirmative defense, with the burden of proof on the defendants."); *Hudgens v. Bell Helicopters/Textron*, 328 F.3d 1329, 1332-33 (11th Cir. 2003) (asserting that the burden was on defendant to satisfy the elements of the government contractor defense).

ARGUMENT

I. THE DISTRICT COURT ERRED IN GRANTING L-3'S MOTION FOR SUMMARY JUDGMENT.

The District Court developed a fact-based test to implement the *Boyle* doctrine – namely, did the military exercise exclusive operational control over L-3 employees. Even assuming *arguendo* that this test is sound, the District Court overlooked critical evidence in applying the test to the record. First, as described in Subsection A, the District Court ignored the facts relating to CACI interrogators, not military interrogators, conspiring with L-3 employees to abuse prisoners. Second, as described in Subsections B and C, the District Court erred by wholly crediting L-3's self-interested testimony, including its testimony about the meaning of the contract term "supervision." This L-3 testimony was contradicted both internally by other L-3 witnesses, and externally by military witnesses. The District Court should not have granted summary judgment.

A. The District Court Failed to Consider Evidence That L-3 Translators Abused Prisoners on Their Own Initiative or Under "Orders" From CACI Corporate Employees.

The District Court found the lawsuit alleged "actions of a type that… violate clear United States policy," *Ibrahim I,* 391 F.Supp.2d at 16, and explained that "common law claims against private contractors will be

preempted only to the extent necessary to insulate *military* decisions from state law regulation." *Ibrahim II,* 556 F.Supp.2d at 5 (emphasis in original). Yet the District Court subsequently granted L-3's motion for summary judgment, finding as an undisputed fact that L-3 could not be held responsible for its employees' abuse of prisoners because the military "***gave all the orders that determined how linguists performed their duties.***" *Ibrahim II*, 556 F.Supp.2d at 10 (emphasis added). This finding of fact is simply wrong.

The District Court failed to consider compelling evidence that L-3 translators who abused prisoners were acting at their own initiative or in conspiracy with non-military CACI employees, Stephen Stefanowicz and Daniel Johnson. The evidentiary record below is far from complete on the merits, as the District Court did not permit any discovery on the merits, instead confining discovery to contractual responsibilities, reporting structures, supervisory structures, and structures of command and control.[7] Nonetheless, this limited record establishes that at least four of the five L-3 translators directly involved in abusing prisoners in Iraq did not receive any direction from anyone in the military: John Israel, Etaf Mheisen, Hamza

[7] Plaintiffs believe the District Court erred in bifurcating discovery, and forcing Plaintiffs to defend against summary judgment without the benefit of complete discovery.

Elsherbiny, and an Iraqi national known as "Iraqi Mike." The record evidence shows that none of these persons was acting at the direction of the military.

John Israel, whom Major General Taguba named as a suspect in the abuse of prisoners at Abu Ghraib, translated for CACI interrogator Steven Stefanowicz. RS.112, Appendix C-36, at 3. Israel characterized Stefanowicz--whom Taguba identified as one of the ringleaders of the torture at Abu Ghraib -- as his "immediate military supervisor." *Id.* Israel swore under oath that Stefanowicz directed him not to share what was occurring in the interrogations with the military. *Id. at 18.*

Etaf Mheisen translated for CACI interrogator Daniel "DJ" Johnson, another CACI interrogator known from military reports to be a ringleader in the Abu Ghraib hard site abuse of prisoners. *Statement of Facts ("SOF") at 17.* Etaf Mheisen aided and abetted in Johnson's abuse of prisoners, which was not abuse directed by the military but by a CACI employee. *Id.*

"Iraqi Mike" was a former member of Saddam Hussein's Republican Guard and a former prisoner at Camp Bucca. *SOF at 16, 19-20.* L-3 violated the terms of the contract and the law by employing him as a translator in Iraq. Karpinski Decl. ¶¶ 10-11. Former General Janis Karpinski had unsuccessfully attempted to force L-3 to remove him from the

contract. *Id.* According to testimony from Private Charles Graner, Iraqi Mike, acting on his own initiative, beat and kicked a prisoner. *Id.*

L-3 translator Hamza Elsherbiny also acted on his own initiative and violently assaulted an Iraqi prisoner. *SOF at 12.* He clearly was not acting at the direction of the military, as a military soldier was the person who saved the prisoner, and stopped L-3 Elsherbiny from continuing his assault. *Id.*

L-3 did not – and cannot – point to any authorized military orders that caused this abuse. L-3 did not submit any declarations from these four translators claiming that they had been ordered by the military to abuse prisoners. L-3 did not take the deposition of any military person who claimed that he or she had ordered these four L-3 translators to abuse prisoners.

The District Court failed to consider all of this evidence, which reveals that L-3 translators harmed prisoners on their own initiative or in conspiracy with CACI corporate employees. Instead, the District Court assumed – without any supporting evidence – that L-3 translators were ordered to abuse prisoners by military interrogators, not CACI interrogators. But CACI provided one-fourth of the interrogators at Abu Ghraib. *See* RS.111, Appendix C-31 (organizational chart for Abu Ghraib's Joint

Debriefing and Interrogation Center states that there are 97 soldiers and 32 CACI employees assigned there). These CACI interrogators were not controlled by the military, but rather repeatedly engaged in unauthorized abuse of prisoners. RS.112, Appendix C-9 at 130-32, 134; RS.112, Appendix C-40 at 48.

This evidence simply cannot be reconciled with the District Court's conclusion that the military, and only the military, exercised absolute operational control over L-3 translators, and gave ***all*** the orders that determined how translators performed their duties. A reasonable jury could certainly find that the L-3 translators who conspired with CACI employees to abuse Plaintiffs were not under the United States military's command or control.

B. The District Court Relied on Evidence That is Genuinely in Dispute.

The District Court also erred by making a finding of fact that L-3 translators operated "under the direct command and exclusive operational control of military personnel." The District Court relied on self-interested testimony, and ignored the conflicting evidence that could be relied upon by a jury. In contrast to a clearly-delineated military chain of command, L-3 translators simply showed up and translated for different interrogators on different days. *SOF at 15-16*. None of these interrogators had any

authority to demand that L-3 translators be disciplined, fired or removed from the contract for misconduct. *Id.*

(1) L-3 Executive Winkler's Testimony Was Self-Serving and Contradicted by Other L-3 Witnesses and the Military.

No military person testified that L-3 was prevented from supervising its employees, and preventing them from abusing prisoners. Instead, L-3 argued, and the District Court agreed, that testimony from L-3 Abu Ghraib site manager David Winkler sufficed to establish that L-3 could not supervise its employees. Winkler testified that he was "prohibited by the military from observing linguists performing their duties or from discussing their interrogations," *Ibrahim II,* 556 F. Supp. 2d at 6 (quoting Winkler Decl. ¶36).

But Winkler's testimony about L-3's inability to observe or discuss interrogations was self-serving, and not entitled to be fully credited. The Supreme Court instructs district courts to "disregard all evidence favorable to the moving party that the jury is not required to believe," and to rely only testimony in favor of the moving party that is "uncontradicted and unimpeached," and "comes from disinterested witnesses." *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133, 150-53.(2000); *George v. Leavitt*, 407 F.3d 405, 413 (D.C. Cir. 2005) (overturning grant of summary judgment because plaintiff has proffered ample evidence by which a

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reasonable jury could conclude that [employer's] stated reasons for her termination are 'unworthy of credence'"); *Hill v. City of Scranton,* 411 F.3d 118, 129, n.16 (3rd Cir. 2005)(because "the only evidence" on an issue of fact came from "an interested witness….this factual issue cannot be resolved on summary judgment."); *Laxton v. Gap, Inc.*, 333 F.3d 572, 577 (5th Cir. 2003) ("We must disregard evidence favorable to the moving party that the jury is not required to believe"); *id. at* 582 (overturning district court's judgment as a matter of law in part because "the jury may have determined that [moving party's] witnesses lacked credibility.").

Winkler's testimony was directly contradicted by several sources. First, two other L-3 executives, Kevin Hopkins and Marc Peltier, testified at depositions that L-3 translators could discuss what occurred during interrogations. Both testified that L-3 translators were permitted to report any abuse of prisoners occurring during interrogations to L-3 management. *SOF at 14*.

Second, documents from L-3's own files state that translators were *required* to discuss interrogations with their L-3 site management chain if the interrogations included the illegal treatment of prisoners. *SOF at 11-12.*

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Third, the contract terms contradicted Winkler's testimony, as they required that L-3 management have the security clearance levels needed to supervise translators. *SOF at 9*. A reasonable jury could infer that the military required that L-3 management hold security clearances so that they would be able to supervise translators' performance of their job duties.

Fourth, former Site Manager's Thomas Crowley's declaration contradicts Winkler's testimony. Crowley described under oath an incident in which one L-3 translator reported to management about another L-3 translator's conduct during an interrogation. L-3 translator Hamza Elsherbiny violently assaulted a prisoner until stopped by a military soldier. L-3 management did nothing other than hope that the military soldier "was on the team" and would not report the incident to his chain of command. L-3 management did not alert anyone in the military chain of command to their employee's egregious misconduct. *SOF at 12*.

Fifth, and importantly, Chief Warrant Officer Rumminger, the only military witness submitting an affidavit to support L-3, testified during this deposition that he was not responsible for supervising or controlling the L-3

translators' performance of their duties during interrogations. Nor was he responsible for ensuring that L-3 employees followed the laws of war, and did not abuse prisoners. He could not identify any military person who was responsible for such oversight. *SOF at 15-16*.

(2) The District Court's Interpretation of the Military's Memorandum of Understanding Was Contradicted by the Military Witness Who Drafted the Memorandum, Chief Warrant Officer Rumminger.

In addition to Winkler's self-interested deposition testimony, the District Court relied on a Memorandum of Understanding, prepared by the military and signed by L-3 translators, as undisputed evidence of the military's exclusive operational control. The Memorandum stated that "it is not the translator's place to second guess the interrogator and refuse to translate words or phrases." *Ibrahim II*, 556 F.Supp.2d at 7 (quoting Rumminger Decl., Ex. A). The District Court relied on the Memorandum to conclude that L-3 translators lacked autonomy, and had to follow orders given by interrogators. Even if this interpretation was accurate (which it is not), that does not establish military control. As noted above, there were many CACI corporate employees acting as interrogators. But even more importantly, one of the authors of the Memorandum, Chief Warrant Officer Rumminger, contradicted the District Court's assumption that the

Memorandum prevented L-3 translators from acting autonomously. *See* Rumminger Dep. 106-07.

Chief Warrant Officer Rumminger testified that, notwithstanding the Memorandum, translators were allowed to stop an interrogation and refuse to translate words or phrases if they believed it would be unlawful or unethical to do so, as long as they raised these objections "out of earshot of the detainee." *SOF at 15-16*. Rumminger testified that an L-3 translator named Bakir had appropriately refused to translate swear words during interrogation for religious reasons. Rumminger Dep. 157-162.

As the moving party, L-3 had the burden of proving with evidence from sources other than its own employees that L-3 translators' abuse of prisoners occurred because the military exercised exclusive operational control over the translators. Such evidence is lacking. The District Court relied primarily on self-serving testimony from L-3 executive Winkler, which was contradicted by numerous sources. The District Court also relied on an interpretation of a military Memorandum of Understanding that was contradicted by one of the military's authors of the Memorandum.

C. The District Court Erred in Adopting the Moving Party L-3's Interpretation of the Contract Rather than the Military's Interpretation.

L-3's contract with the military required the company to "provide all….supervision" of its employees, and "provide a sufficient number of on-Site Managers to adequately supervise contractor personnel." *SOF at 7-8*.

(1) The Contract Requires That L-3 "Supervise" Its Employees.

L-3 now claims that the contract only required it to provide "administrative" rather than "operational" supervision of its employees, over matters such as filling out time sheets, handling vacation requests, and ensuring that translators were paid. The District Court accepted that contract interpretation, ruling that the Court would not inquire as to whether L-3 should have provided a more or different kind of supervision. *Ibrahim II*, 556 F.Supp.2d at 9.

But the text of the contract does not differentiate between "administrative supervision" and "operational supervision," as the District Court acknowledged. *Id.* at 6. When material contractual terms "are not free from ambiguity, the contract cannot be interpreted as a matter of law and the case must be remanded so that the fact-finder can determine the parties' true intent." *America First Inv. Corp. v. Goland*, 925 F.2d 1518, 1522 (D.C. Cir. 1991); *see also Connors v. Link Coal Co.*, *Inc*., 970 F.2d

902, 904 (D.C. Cir. 1992)(summary judgment based on interpretation of an agreement "is properly granted only where the provision in question admits only of the interpretation offered by the moving party")

(2) The Military Interprets the Term "Supervision" To Include Both Administrative and Operational Supervision.

L-3's claim that the contract imposed no duty to supervise its employees' actual operational performance of their duties contradicts Army regulations, military field manuals, and federal procurement regulations, all of which require that service contractors serving in combat zones supervise and discipline their own employees to ensure their compliance with the law.

U.S. Army Regulation 715-9 states that military contractors must "perform the necessary supervisory and management functions of their employees," because "[c]ontractor employees are not under the direct supervision of military personnel in the chain of command." AR 715-9 §3-2(f); *id.* at §3-3(b)("Contracted support service personnel shall not be supervised or directed by military or Department of the Army (DA) civilian personnel"). Similarly, the U.S. Army Field Manual on the use of contractors states that

> Maintaining discipline of contractor employees is the responsibility of the contractor's management structure, not the military chain of command. The contractor, through company policies, has the most immediate influence in dealing with infractions involving its employees. It is the contractor who

> must take direct responsibility and action for his employee's conduct.

U.S. Army Field Manual 3-100.21 §4-45; id. at §1-22 ("Management of contractor activities is accomplished through the responsible contracting organization, not the chain of command. Commanders do not have direct control over contractors or their employees (contractor employees are not the same as government employees)"); *id.* at §4-2 ("contractor management does not flow through the standard Army chain of command.... It must be clearly understood that commanders do not have direct control over contractor employees (**contractor employees are not government employees**)")(emphasis in original).

In order to ensure that contractors properly discipline and control their employees, federal procurement regulations require that defense contractors provide for a "written code of business ethics and conduct and an ethics training program for all employees"; a means by which "employees may report suspected instances of improper conduct, and instructions that encourage employees to make such reports"; "[d]isciplinary action for improper conduct"; "[t]imely reporting to appropriate Government officials of any suspected or possible violations of law in connection with Government contracts"; and "[f]ull cooperation" with government investigations of improper behavior. 48 C.F.R. §§ 203.7000-203.7001.

L-3 has produced no evidence from the contracting officer, acting contracting officer's representative, or any other government official that the United States waived the above requirements in Iraq. The only government official identified by L-3 to support its motion for summary judgment, Chief Warrant Officer Rumminger, testified at deposition that he lacked any knowledge of Titan's contract with the military. Rumminger Dep. 62.

The District Court should have interpreted L-3's contract consistently with the interpretation given to it by the United States, rather than adopting the moving party L-3's self-interested interpretation. *See 1010 Potomac Assocs. v. Grocery Mfrs. of Am., Inc.,* 485 A.2d 199, 205 (D.C. 1984) (A contract "must be interpreted as a whole, giving a reasonable, *lawful*, and effective meaning to all its terms")(emphasis added); Restatement (Second) of Contracts §203(a) (1981) ("an interpretation which gives a reasonable, lawful, and effective meaning to all the terms is preferred to an interpretation which leaves a part unreasonable, unlawful, or of no effect"); *Cole v. Burns Int'l Security Servs.,* 105 F.3d 1465, 1485 (D.C. Cir. 1997)("where a contract is unclear on a point, an interpretation that makes the contract lawful is preferred to one that renders it unlawful.").[8]

[8] The District Court's interpretation of the contract – that L-3 employees are under the ***exclusive*** control of the military -- makes it conflict with the federal regulation that bars the government from hiring personnel under

Had the District Court correctly interpreted the contract, the outcome would have been different. As the District Court explained, the central question is whether the military "***allows*** private contractors to retain authority to oversee and manage their employees' job performance" in theater, *Ibrahim II*, 556 F.Supp.2d at 5 (emphasis added). The District Court erred by accepting L-3's contract interpretation and wholly ignoring the federal regulations and binding military doctrine stating that contractors are *required* to supervise their employees' performance and discipline them for legal and ethical violations. A malfeasant contractor such as L-3 who voluntarily declines to supervise its employees to increase corporate profits--rather than because the military requires it--is not eligible for the defense: "common law claims against private contractors will be preempted only to the extent necessary to insulate *military* decisions from state law regulation." *Id.* at 5 (emphasis in original).

"personal services contracts" unless specifically authorized by statute. 48 C.F.R. § 37.104. The military cannot lawfully enter into "loaned employee" contracts. *See Fort Bragg Ass'n of Educators v. Fed. Labor Relations Auth.*, 870 F.2d 698, 703-04 (D.C. Cir. 1989); *West Point Elementary School Teachers Ass'n v. Fed. Labor Relations Auth.*, 855 F.2d 936, 940-41 (2d Cir. 1988).

(3) L-3's Self-Serving Litigation Position That It Only Had To Provide "Administrative" But Not "Operational" Supervision Is Contradicted by its Own Documents.

The District Court accepted the self-serving testimony from the L-3 executives as establishing that they were not required to exercise operational supervision. The testimony, however, only establishes is that L-3 woefully failed to live up to its contractual obligations. There is not a shred of evidence in the record establishing that the military gave L-3 permission to ignore the contract terms, and to ignore the obligations set out in the Army Field Manual and federal regulations governing the use of contractors, and to refrain from exercising operational supervision over there employees.

Indeed, other than the L-3 deposition testimony, L-3's own evidence is to the contrary. The contemporaneously-generated documents all reveal that L-3 viewed itself as obliged to exercise operational as well as administrative supervision over its employees.

L-3, as its executives testified with uniformity to support the newly-concocted contract interpretation, was simultaneously posting classified advertisements recruiting site managers. These potential site managers were told that their job would be to "provide *operational* direction to Titan linguists" and to "ensure that linguists adhere to Titan, Armed Forces, and host nation standards of conduct concerning in-theater operations." RS.112, Appendix C-28.

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L-3 documents do not support a limited reading of "supervision." The documents state that [redacted] *SOF at 9-10*. [redacted] *Id.* L-3 executives claimed during depositions that these documents did not reflect company policy, but a jury is not required to credit their testimony, especially given that former Titan site manager Thomas Crowley submitted a sworn declaration stating that this was the company policy. Crowley Decl. ¶5.

Another L-3 document [redacted] RS.112, Appendix C-43. L-3 argued below that this document is immaterial because L-3's directive was consistent with a standing military policy forbidding unescorted travel by translators. But if L-3 management had authority to order translators not to

obey operational instructions from particular members of the military that conflicted with official military policy, and terminate employees who disobeyed, then as a matter of logic L-3 also had the authority to order its employees, at pain of termination, to refuse interrogators' and guards' unlawful instructions to torture prisoners. L-3 training documents confirm L-3 had this authority. *SOF at 9-14*.

Given this evidence, the contradictions between L-3 executives' self-serving testimony and the military's interpretation, and L-3's utter failure to provide any corroborating testimony from military witnesses who administered its contract or supervised its employees during interrogations, a jury is not required to trust L-3 when it claims that the military forbade them from supervising their employees. No military person has so testified.

Here, this Court should follow the Supreme Court's instructions to "disregard all evidence favorable to the moving party that the jury is not required to believe," and to rely only testimony in favor of the moving party that is "uncontradicted and unimpeached," and "comes from disinterested witnesses." *Reeves*, 530 U.S. at 150-51. *See also George v. Leavitt*, 407 F.3d 405, 413 (D.C. Cir. 2005); *Hill v. City of Scranton,* 411 F.3d 118, 129, n.16 (3rd Cir. 2005); *Laxton v. Gap, Inc.*, 333 F.3d 572, 577, 582 (5th Cir. 2003). The District Court's ruling must be overturned because a reasonable

jury could conclude that L-3 was not only allowed, but legally obliged, to discipline and supervise its employees to prevent them from committing war crimes. Under these circumstances, excusing L-3 from liability does not serve any federal policy or interest.

II. THIS COURT SHOULD NOT ADOPT AN EXTENSION OF THE *BOYLE* DOCTRINE THAT REWARDS SERVICE CONTRACTORS SUCH AS L-3 WHO VIOLATE THEIR CONTRACTS.

For all the reasons set forth above, Plaintiffs are confident that the District Court, confronting a voluminous record, simply erred by overlooking critical sealed evidence contradicting the finding of fact that the military exercised exclusive operational control over L-3 translators.[9] If this Court finds that the District Court properly applied the "exclusive operational control" test to the facts, then the test itself must be flawed because the outcome rewards L-3 for blatantly violating the terms of their contracts with the United States. Such an extension would hurt, not protect, the United States' interests intended to be protected by the affirmative defense crafted by the Supreme Court in *Boyle v. United Technologies Corp*.

[9] The District Court's task was made more difficult because L-3 placed almost all their evidence under seal. Plaintiffs asked that the oral argument be sealed to permit counsel to discuss the evidence, but the District Court denied that request. *Oct 3, 2007, Oral Argument Tr. at 6.*

A. The Military Is Opposed to Such An Extension of the Boyle Doctrine To L-3 and Other Service Contractors Acting Outside Military Direction and Control.

In *Boyle,* the Supreme Court wanted to ensure that the military's decision-making around the design of weaponry was not distorted by corporate contractor concerns about state strict liability for product design. The Court reasoned that a corporate contractor should not be liable for merely implementing a discretionary government decision, provided the government approved reasonably precise specifications; the equipment conformed to those specifications; and the corporate contractor warned the military about known dangers. *Boyle*, 487 U.S. at 512. The Court held that liability under those facts was pre-empted by the "discretionary function exception" to the FTCA, 28 U.S.C. §2680(a).

This doctrine has been extended to encompass another FTCA exception, namely the combatant activities exception. *See Koohi v. United States*, 976 F.2d 1328, 1336-1337 (9th Cir. 1992)(barring suit against manufacturer of weapons detection system used by the military to mistakenly shoot down a passenger plane). *Koohi* dealt with a combat activity by the United States military during the "tanker war." 976 F.2d at 1329-1330. The contractors in *Koohi* supplied the U.S. military with a weapons system, but it was U.S. Navy servicemen aboard the *U.S.S.*

Vincennes who used those weapons to shoot down a civilian passenger plane. The Court of Appeals for the Ninth Circuit held that a manufacturer of a weapons detection system, manufactured to the *military's* specifications, could not be held liable when the *military* mistakenly used that system to shoot down a civilian plane. *Koohi*, 976 F.2d at 1337.

This "combatant activities" exception has been applied carefully by the judiciary to ensure that it does not turn into an absolute immunity merely because a contractor operates in the combat theatre.

The military has not filed a statement in this action supporting L-3's invocation of the *Boyle* defense. The military's overall views on the appropriate contours of the *Boyle* defense, however, are known. The military recently set forth its views in official comments published in the Federal Register months ***after*** the District Court issued its November 6, 2007 Order.

The military adopted a new regulation regarding contractors accompanying the force. In the accompanying comments, the military stated that the *Boyle* doctrine should not be extended to encompass contractors who provide services to the military (as distinct from commodities such as weapons). The military voiced unequivocal support for "the current rule of law, holding contractors accountable for the negligent or willful actions of

their employees, officers, and subcontractors." Defense Federal Acquisition Regulation Supplement; Contractor Personnel Authorized To Accompany U.S. Armed Forces, 73 Fed. Reg. 16764, 16768 (Mar. 31, 2008).

The military explained that the *Boyle* doctrine should not be applied to insulate service contractors, because the military does not actually control the services being provided. In words that corroborate the evidence described above, the military states that ***"[t]he public policy rationale behind Boyle does not apply when a performance-based statement of work is used in a services contract, because the Government does not, in fact, exercise specific control over the actions and decisions of the contractor or its employees or subcontractors****." Id. (emphasis added.)*

The military explained that "[c]ontractors will still be able to defend themselves when injuries to third parties are caused by the actions or decisions of the Government." *Id.* The military cautioned: "[h]owever, to the extent that contractors are currently seeking to avoid accountability to third parties for their own actions by raising defenses based on the sovereignty of the United States, this rule should not send a signal that would invite courts to shift the risk of loss to innocent third parties." *Id.*

Here, as discussed above, this action challenges L-3 actions, not military actions. L-3 translators abused prisoners, contrary to federal law

and policy. L-3 should not be entitled to shift the risks created by its wholesale failure to ignore its contractual duty to supervise its employees to innocent third parties such as Plaintiffs.

B. The District Court's Extension of the Boyle Doctrine Interferes with the Military Chain of Command.

The District Court found that L-3 was eligible for combatant activities pre-emption in an effort to "ensure[] that state law will not interfere with an officer's authority, pursuant to the military chain of command, to give *legally binding orders* to his subordinates….the exception eliminates the possibility that state law liability could cause a soldier to second-guess a direct order." *Ibrahim II,* 556 F.Supp.2d at 5 (emphasis added).

But there is no danger that civil liability for L-3 would interfere with this authority, because L-3 employees are not subject to legally binding orders from military officers. *See McMahon v. Presidential Airways*, 502 F.3d 1331, 1348 (11th Cir. 2007)(allowing suits against private contractors does not threaten military discipline, because "a private contractor is not in the chain of command.")

Courts have long recognized that there is no civilian equivalent to the military's structure of command and control. *See, e.g., Orloff v. Willoughby*, 345 U.S. 83, 94 (1953)(holding that "[t]he military constitutes a specialized

community governed by a separate discipline from that of the civilian. Orderly government requires that the judiciary be as scrupulous not to interfere with legitimate Army matters as the Army must be scrupulous not to intervene in judicial matters," but that this deference only applies to those "lawfully inducted" into the Army); *United States v. Brown*, 348 U.S. 110, 112 (1954)(noting "[t]he peculiar and special relationship of the soldier to his superiors"); *Parker v. Levy*, 417 U.S. 733, 743 (1974)("This Court has long recognized that the military is, by necessity, a specialized society separate from civilian society"); *Schlesinger v. Councilman*, 420 U.S. 738, 757 (1975)("To prepare for and perform its vital role, the military must insist upon a respect for duty and a discipline without counterpart in civilian life."); *Chappell v. Wallace*, 462 U.S. 296, 300 (1983)("no military organization can function without strict discipline and regulation that would be unacceptable in a civilian setting.").

Command is not simply giving directives, tasks or assigning work; it is also the ability to legally enforce those directives. If a soldier disregards or disobeys the lawful order of a commander, the soldier is subject to a comprehensive system of military justice ranging from administrative to

criminal sanctions.[10] L-3 translators in Iraq, the majority of whom were Iraqis hired from the local economy, were not subject to this system. *SOF at 9.* All translators were free to quit their jobs at any time. *SOF at 9.*

United States military members General Janis Karpinski and Specialist Anthony Lagouranis testified that the military lacked command or disciplinary authority over translators, and this lack of authority undermined the military's ability to control translators' behavior. Karpinski Decl. ¶¶ 4-11, 16-17; Lagouranis Decl. ¶¶11-17, 20. This testimony was corroborated by two former L-3 employees, one a translator (Marwan Mawiri) and one a site manager (Thomas Crowley). Mawiri Decl. ¶¶ 9-15; Crowley Decl. ¶¶7-11.

The District Court held that this evidence regarding the military's lack of actual control over L-3 translators was irrelevant to analyzing whether the military exercised exclusive operational control over L-3 translators. See *Ibrahim II*, 556 F.Supp.2d at 10, where the District Court held: "[a]lthough the record contains a declaration to the effect that Titan linguists did not always follow military orders…the ***insubordination of some linguists*** does

[10] International law also recognizes that military discipline is a crucial element of command. *See In re Yamashita*, 327 U.S. 1, 15 (1946)("the law of war presupposes that its violation is to be avoided through the control of operations of war by commanders who are to some extent responsible for their subordinates").

not change the fact that it was the military, and not Titan [L-3], that exerted operational control over contract linguists." (emphasis added). But if the military cannot give legally binding orders to L-3 translators, cannot fire translators, and cannot discipline them for wrongdoing except by making recommendations to L-3 management, the translators' refusals to follow military orders do not even rise to the level of "insubordination." The translators simply are not obliged to follow military direction. How then can the military be said to exercise exclusive operational control if it lacks the power to enforce any orders given to L-3 translators?

Instead, the District Court's findings result in a chaotic situation in which the obligation to supervise is shifted to the military, but the power to supervise L-3 translators (*i.e.* with discipline and termination) remains with L-3. *See* RS.112, Appendix C-11at V-7 ("Since contractor personnel are not subject to command authority enforced by an internal system of penal discipline, commanders have no method of guaranteeing armed contractor personnel will act in accordance with the law of war or [host nation] law."); *id.* at V-8 ("Contract employees are disciplined by the contractor through the terms of the employee and employer relationship. Employees may be disciplined for criminal conduct by their employer per the terms of their employment agreement…. Commanders have no penal authority to compel

contractor personnel to perform their duties or to punish any acts of misconduct.") Such a result cannot be countenanced, as it clearly would undermine military discipline in the theatre to an even greater degree than has L-3's shameful failure to perform its supervisory duties. Clearly, such an illogical result harms, not benefits, the United States' interests. This Court should reverse the District Court's grant of summary judgment to L-3, and remand the action for trial.

C. The District Court's Extension of the Boyle Doctrine Does Not Further the Military's Interest in Discipline and Control Over Combat Decision-making.

The District Court found that the "combatant activities" exception to the United States' waiver of sovereign immunity in the FTCA could serve as a basis for preemption of the victims' claims brought if those contractors were "acting under the direct command and exclusive operational control of the military chain of command." *Ibrahim II,* 556 F.Supp.2d at 3, 4. The District Court applied this test to find that L-3 was entitled to summary judgment.

This grant of summary judgment is erroneous as a matter of law for all the reasons set forth above. In addition, the District Court erred by failing to consider whether the holding furthers an interest of the United States, which is the very reason for the *Boyle* doctrine. The Supreme Court

in *Boyle* used as a touchstone whether imposing state tort liability would create a significant conflict with federal policies. *Boyle*, 487 U.S. at 504-513. *See also Ibrahim II*, 556 F.Supp.2d at 3.

The Supreme Court held in *Boyle* that the affirmative defense does not apply when the state law duty imposed is consistent with the contract, but would apply when that state law duty contradicts the contract. The Court went on to state that "it is easy to conceive of an intermediate situation, in which the duty sought to be imposed on the contractor is not identical to one assumed under the contract, but is also not contrary to any assumed." Boyle, 487 U.S. at 509. In that situation, as long as "[t]he contractor could comply with both its contractual obligations and the state prescribed duty of care," state law will not generally be pre-empted. *Id.* *See also In re Joint E. & S. Dist. New York Asbestos Litig.*, 897 F.2d 626, 632 (2d Cir. 1990)("Stripped to its essentials, the military contractor's defense under *Boyle* is to claim, 'The Government made me do it.'"); *Barron v. Martin-Marietta Corp.*, 868 F. Supp. 1203 (N.D. Cal. 1994)(holding that the "requisite conflict exists only where a contractor cannot at the same time comply with duties under state law and duties under a federal contract.").

Courts applying the *Boyle* doctrine have been careful to ensure that the doctrine does not insulate contractors acting against the United States'

interests. For example, in *Jama v. INS*, 334 F.Supp.2d 662 (D.N.J. 2004), the district court found the government contractor defense inapplicable to a contractor who ran a detention facility for asylum applicants because the alleged tortuous conduct violated certain contract terms and the duty to keep the detainees safe. The District Court held "[i]t would defy logic to suggest that the INS could have 'approved' practices that breached this larger duty." *Id*. at 689. *See also Shurr v. A.R. Siegler, Inc.*, 70 F. Supp. 2d 900, 927 (E.D. Wis. 1999)(government contractor defense cannot protect breaches of contract). Similarly, in *Malesko v. Corr. Servs. Corp.*, 229 F.3d 374 (2d. Cir. 2000), *rev'd on other grounds*, the Second Circuit found that the government contractor defense did not apply in that case because the injuries were caused by corporate practices, not by actions directed by the United States. *See Corr. Servs. Corp. v. Malesko*, 534 U.S. 61, 74 n.6, (2001)(government contractor defense "may [be] assert[ed]" where government "directed a contractor to do the very thing that is the subject of the claim").

In the one appellate court ruling permitting a service contractor to invoke the *Boyle* doctrine, the Court of Appeals for the Eleventh Circuit allowed the contractor to invoke the defense only after finding the contractor conformed to the contract and served the United States' interests. *See*

Hudgens v. Bell Helicopters/Textron, 328 F.3d 1329 (11th Cir. 2003), cited by the district court, *Ibrahim II*, 556 F.Supp.2d at 4, n.3. There, plaintiffs sued a service contractor who was supposed to maintain military helicopters for injuries sustained in a crash in which both men were injured by the helicopter's tail fin separating from the aircraft. The court carefully examined whether the conduct that led to the crash was conduct required by the terms of the contract. The court found that the contractor followed the military's precise maintenance procedures mandated by the contract. The court also confirmed that the service contractor had revealed all known dangers to the United States and fully conformed to contractually-required inspection procedures. *Id.* at 1334-1345.

But what federal policy here is in conflict with ensuring that L-3 and other service contractors do not abuse prisoners being detained by the military? L-3 relied heavily on the Ninth Circuit's extension of *Boyle* in *Koohi*. 976 F.2d at 1336-1337, and argued L-3 must be insulated from liability to protect the military's ability to react quickly in combat situations. The District Court seem persuaded that the combatant activities exception applied, yet noted critical distinctions: "[i]n *Koohi*….the preempted tort claims were for products liability. There was, and is, no controlling authority applying the combatant activities exception to the tortious acts or omissions

of civilian contractors in the course of rendering services during 'wartime encounters.'" *Ibrahim II,* 556 F. Supp. 2d at 3.

In fact, the combatant activities exception cannot be extended so far as to encompass L-3's misconduct, which undermines rather than furthers the military's interest in discipline and control over combat decision-making. The judiciary elsewhere has been careful not to extend the doctrine so far that it becomes untethered to the *Boyle* touchstone of protecting United States' interests.

For example, in *Carmichael v. KBR*, 450 F.Supp.2d 1373, 1381 (N.D.Ga. 2006), the district court rejected defense contractor KBR's attempt to invoke the government contractor defense. The district court found that the private contractor caused the plaintiffs' injury because a contractor employee was driving at excessive speed. Such malfeasance was not protected from liability. The Court noted that, unlike the actual combat situation in *Koohi*, the contractor did have a duty of care to those injured by the employee despite the fact that the injury occurred in the theatre of combat. *See Carmichael*, 450 F. Supp. 2d at 1374, 1380, quoting *Lessin* 2006 U.S. District LEXIS 39403 at *14-15. *See also Lessin v. Kellogg Brown & Root*, 2006 WL 3940556 at *5 (S.D.Tex. June 12, 2006)(declining to preempt claims against military logistics contractor in Iraq); *Whitaker v.*

Kellogg, Brown and Root, 444 F.Supp.2d 1277 (M.D. Ga. 2006)(no protection from liability when the alleged negligent act was performed by contractor, not government); *McMahon*, 502 F.3d at 1366 (declining to review or reverse district court's holding (460 F.Supp.2d. 1315, 1330 (M.D. Fla. 2006) that declines to extend *Boyle* "defense for private contractors based solely on the fact that [d]efendants were operating in a combat zone.") *Fisher v. Halliburton*, 390 F.Supp.2d 610, 615-16 (S.D. Tex. 2005)(declining to apply combatant activities preemption to negligence action against service contractor in Iraq because "[p]laintiffs' claims in this case do not involve any allegation that [d]efendants supplied equipment, defective or otherwise, to the United States military").

The district court's reasoning in *McMahon v. Presidential Airways, Inc.* is also instructive. There, the district court was asked to decide whether defendants' role as transport service providers in wartime Afghanistan entitled defendants to invoke the *Koohi* combatant activities extension of the *Boyle* doctrine. *See McMahon,* 460 F.Supp.2d at 1329. The district court cautioned against extending this extension even further, describing it as only "loosely based" on, and providing "far greater" immunity than, *Boyle*, 460 F.Supp.2d at 1328 and 1329. The district court held the "defense shields contractors only in military equipment procurement contracts and only when

the government dictates design specifications" and found no statutory or common law authority "for bestowing a private actor with the shield of sovereign immunity." *Id*. *See also Texas Industries, Inc. v. Radcliff Materials, Inc.*, 451 U.S. 630 (1981)(a defense should not be created by the courts unless authorized by federal common law or federal statute).

Until the District Court's ruling in this action, no court applying the *Boyle* doctrine to combat situations has permitted a contractor to invoke the doctrine to evade liability for its corporate employees' *violation* of federal laws and federal policies. Here, the District Court did not rule that L-3 adhered to the contract terms and thus furthered the military's expressed interests. Instead, the District Court simply ignored the voluminous evidence establishing that L-3 breached the contract terms requiring supervision of L-3 translators.

Here, the District Court did not identify any discretionary decisions, directions, acts or policies of the United States and its personnel that caused the injuries suffered by Plaintiffs in this case. The actions of L-3 employees, at times acting in concert with CACI employees and those soldiers willing to engage in criminal acts (who have already been court-martialed for prisoner abuse), caused Plaintiffs' injuries. Accordingly, there is no conflict between tort liability for L-3 and the United States' interests.

Applying the combatant activities exception does not change the result in any way. L-3 did not supply the military with equipment; rather, its employees directly participated in abusing plaintiffs. This distinction is crucial, because the combatant activities exception applies only to "claim(s) arising out of combatant activities *of the military or naval forces, or the Coast Guard*, during time of war." 28 U.S.C. §2680(j) (2007).[11] Assuming arugendo that the Abu Ghraib prison qualifies as in combat,[12] it is nonetheless critical that the L-3 translators, unlike the wrongdoers in *Koohi,* were not members of "the military or naval forces, or the Coast Guard." *Id*. Nor, as described in more detail above, were they soldier-equivalents subject to the military structures of command and control. The military lacked any means or mechanisms to control these corporate employees. The most the

[11] Creating additional classes of defendants who are not susceptible to suit is neither expressed nor implied in the FTCA. Nowhere are private contractors mentioned as included within these definitions. *See Chapman v. Westinghouse Elec. Corp.*, 911 F.2d 267, 271 (9th Cir. 1990)(private contractors are not government employees); *McMahon*, 460 F. Supp. 2d at 1327 ("[s]imply because the service was provided . . . during armed conflict does not render [d]efendants, or their personnel, members of the military or employees of the government").

[12] L-3 translators were not engaged in combatant activities because they were in prisons, which must be found outside the combat zone to comply with the Geneva Conventions. *Johnson v. United States*, 170 F.2d 767, 770 (9th Cir. 1948); *In re Agent Orange Prod. Liab. Litig.*, 580 F. Supp. 1242, 1255 (E.D.N.Y. 1984)(construing 'combatant activities' as "hostilities and physical violence" or the "actual engaging in the exercise of physical force"); *Skeels v. United States*, 72 F. Supp. 372, 374 (W.D. La. 1947).

military could do (which was at times unsuccessful as testified to by former General Karpinski) was to request that L-3 remove an employee from the contract. The military could not influence or control the day-to-day conduct of the L-3 translators.

As the Court of Appeals for the Fourth Circuit found, the prison abuse at Abu Ghraib "stunned the U.S. military, public officials in general, and the public at large." *CACI Premier Technology, Inc. v. Rhodes*, __ F.Supp.3d ___, No. 06-2140, 2008 WL 2971803 *1 (4th Cir. Aug. 5, 2008). These cases arose out of those acts, which two official military investigations have described as "sadistic, blatant, and wanton criminal abuses," *id.* at *2 (quoting Taguba Report); and as "shameful events" perpetrated by "a small group of morally corrupt soldiers and civilians" that "violated U.S. criminal law" or were "inhumane and coercive without lawful justification," *id.* at * 4 (quoting General Fay). Eleven of the defendants' co-conspirators have been court martialed, convicted, and sentenced to up to ten years in prison for these acts. L-3's direct participation in abuse at Abu Ghraib violated L-3's contract, Geneva Conventions, binding Army regulations, and military policy as set forth in Field Manual 34-52. RS.112, Appendix C-9 at 12-13, 69. There is no reason why the judicially-created *Boyle* doctrine should be

applied to insulate the corporate conspirators from all accountability without regard to whether such a result furthers the United States' interests.

The District Court's extension of the defense was not sought or supported by the military or any other arm of the United States government. *Compare Bentzlin v. Hughes Aircraft Co.*, 833 F.Supp 1486, 1491 n.8 (C.D.Cal. 1993)(barring plaintiffs' claims in part because "the government has intervened and taken the position that a case cannot be brought without undermining federal interests."). Indeed, as noted above, the Department of Defense rejected the finding that the military exercised complete control over service contractors in revising regulations for contractors accompanying the U.S. armed forces overseas. This Court should reverse the District Court, and rule that L-3 must proceed to trial. Permitting L-3 to invoke the defense on a record wholly deficient of any government direction would seriously undermine the United States' interests in preventing prisoner abuse.

III. PRIVATE PARTIES MAY BE HELD LIABLE UNDER THE ALIEN TORT STATUTE.

Plaintiffs submit that the District Court should not have dismissed their claims under the Alien Tort Statute, 28 U.S.C. §1350. The District Court held, based on *Sanchez-Espinoza v. Reagan*, 770 F.2d 202 (D.C. Cir. 1985) and *Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774 (D.C. Cir.

1984), that the law of nations does not apply to private actors. *Ibrahim I*, 391 F.Supp.2d at 14-15; *Saleh,* 436 F. Supp. 2d at 57-58. However, even if this Court finds that *Sanchez-Espinoza* barred ATS liability for private actors for all international law violations, it must consider the question anew in light of *Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004). *See In re Sealed Case No. 97-3112*, 181 F.3d 128, 143 (D.C. Cir. 1999)(examining whether "precedent has been altered by an intervening decision from a higher court").

The Supreme Court in *Sosa*, 542 U.S. 692 (2004), by taking up the action brought against Jose Francisco Sosa, a private party, implicitly recognized that ATS claims may be brought against private parties. *See Alvarez-Machain v. United States*, 331 F.3d 604, 609 (9th Cir. 2003), *rev'd Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004)(identifying Sosa as a *former* policeman at the time of the alleged violations). The Supreme Court held that ATS claims "must be gauged against the current state of international law," *id.* at 733, and recognized that private actors are potentially liable for violations of specific, universal, and obligatory international law norms. *Id.* at 732, n.20. *See also id.* at 732 (endorsing the view that "for purposes of civil liability, the torturer has become – like the pirate and slave trader before him – *hostis humani generis*, an enemy of all mankind.")

The Supreme Court in *Sosa* examined the law of nations at the time Congress passed the ATS. The law included "a second, more pedestrian element [that fell within the judicial sphere] regulating the conduct of individuals situated outside domestic boundaries and consequently carrying an international savor." *Sosa*, 542 U.S. at 715. The Court found that there was "a sphere in which these rules binding individuals for the benefit of other individuals overlapped with the norms of state relationships." *Id.*

The Court discussed violations of the law of nations understood to be within our federal common law in 1789, nearly all of which involved acts of private individuals acting without state action. *See, e.g., id.* at 716-17 (French adventurer); *id.* at 720 (piracy and prize captures cases, and cases against privateers); *id.* at 721 (civil suit against Americans who had taken part in the French plunder of a British slave colony in Sierra Leone.)

A. The Supreme Court's Sosa *Decision Cites With Approval Decisional Law Permitting ATS Actions Against Private Actors.*

In addition to the implicit ruling that claims against private parties may proceed under ATS, the Supreme Court's decision in *Sosa* cited with approval the Court of Appeals for the Second Circuit's decision in *Kadić v. Karadžić*. *Sosa*, 542 U.S. at 732, n.20. In *Kadić*, the Court of Appeals held that "in the modern era" international law does not confine its reach to state action, finding that "certain forms of conduct violate the law of nations

whether undertaken by those acting under the auspices of a state or only as private individuals." 70 F. 3d 232, 239 (2d Cir. 1995). The Court of Appeals found that acts of murder, rape, torture, and arbitrary detention of civilians, committed in the course of hostilities were actionable under the ATS as claims against a private party. 70 F. 3d at 242. Looking to the law of nations for guidance, including the 1949 Geneva Conventions and Article 3 common to each of the four conventions, the Court of Appeals found that "[t]he liability of private individuals for committing war crimes has been recognized since World War I and was confirmed at Nuremberg after World War II." *Id.* at 243. The Court further found that if torture were committed in the course of war crimes, then no state action should be required for liability of torture when committed in the furtherance of war crimes.[13] *Id* at 244.

The reasoning of *Kadić* has been widely adopted. *See Bao Ge v. Li Peng*, 201 F. Supp. 2d 14, 22, n.5 (D.D.C. 2000)(accepting that private parties can be held liable under ATS for "egregious acts of misconduct");

[13] The *Kadić* court agreed with Judge Edwards in *Tel Oren* that "torture and summary execution-when not perpetrated in the course of genocide or war crimes-are proscribed by international law only when committed by state officials or under color of law." *Id.* at 244. But because the plaintiffs had alleged that acts of torture "were committed during hostilities by troops under Karadžić's command," they were "already encompassed within the appellants' claims of…war crimes." *Id.* at 244.

Doe v. Islamic Salvation Front, 993 F.Supp.3, 14 (D.D.C. 1998)(finding violations including crimes against humanity, war crimes, murder and rape, "are proscribed by international law against both state and private actors, as evinced by Common Article 3 [of 1949 Geneva Conventions]"); *Khulumani v. Barclay Nat'l Bank, Ltd.*, 504 F.3d 254, 282 (2d Cir. 2007)(corporations may be liable under the ATS in cases where "a defendant played a knowing and substantial role in the violation of a clearly recognized international law norm."); *Iwanowa v. Ford Motor Co.,* 67 F. Supp. 2d 424, 445 (D.N.J. 1999)("No logical reason exists for allowing private individuals and corporations to escape liability for universally condemned violations of international law merely because they were not acting under color of law"). *See also Argentine Republic v. Amerada Hess Shipping Corp.*, 488 U.S. 428, 438 (1989)(observing that the ATS "by its terms does not distinguish among classes of defendants").

This reasoning has been endorsed by Congress, which passed legislation making clear that any United States national may be found criminally liable for war crimes.[14] In 1996, Congress enacted the War

[14] The Executive of the United States expressed support for private liability in the *Kadić* proceedings. *Kadić*, 70 F.3d at 239-240("The Executive Branch has emphatically restated in this litigation its position that private persons may be found liable under the Alien Tort Act for acts of genocide, war crimes and other violations of international humanitarian law.")

Crimes Act, 18 U.S.C. § 2441 (1996), which provided for criminal liability for war crimes when "the person committing such war crime or the victim of such war crime is a member of the Armed Forces of the United States *or a national of the United States*." The DoD requires contractors to notify their United States citizen employees that they are potentially subject to prosecution under the War Crimes Act for violations of the laws of war. *See* 48 C.F.R. § 252.225-7040(e)(2)(ii). Similarly, the 2006 Military Commissions Act defined "torture" and "cruel or inhuman treatment" as war crimes triable by military commission even if committed by non-state actors. *See* 10 U.S.C. § 948a(1)(A), §948c, §950v(b)(11), (12).

B. The Supreme Court's Sosa *Decision Directed that Lower Courts Look To International Law.*

The Supreme Court also made clear in *Sosa* that courts confronting ATS claims have to look to international law. *Sosa*, 546 U.S. at 733-34. It is well recognized under international humanitarian law that private parties may be liable for war crimes. *See* Trial of the Major War Criminals before the International Military Tribunal, Nuremberg, 14 Nov 1945-1 Oct 1946 (Nuremberg: 1947), i, at 233 ("individuals have international duties which transcend the national obligations of obedience imposed by the individual State")*; In re Tesch (Zyklon B Case*)*,* 13 Int'l L. Rep. 250 (Br. Mil. Ct. 1946)(industrialists convicted for sending poison gas to concentration camp,

knowing it would be used to kill); *Prosecutor v. Tadić*, Case No. IT-94-1-AR72, Appeal on Jurisdiction (Oct. 2, 1995), para.134 (finding customary international law imposes criminal liability for serious violations of common Article 3, regardless of the nature of the conflict, upon all who commit such violations).[15]

Building on the legacy of Nuremberg, the statutes for the various institutions set up to prosecute individuals for genocide, crimes against humanity and war crimes (i.e., 1993 ICTY, the 1994 Rwandan Tribunal (ICTR), the 1998 International Criminal Court and the 2002 Special Court for Sierra Leone), clearly state that *all* individuals, including private parties, can be held liable for these violations. *See, e.g.,* ICTY Statute Art. 7; ICTR Statute Art. 6. The ICTY, ICTR, SCSL, and ICC have all instituted proceedings against private parties for war crimes and crimes against humanity, demonstrating that there exists an international legal consensus that private parties may be held accountable for these acts. *See, e.g., Prosecutor v. Sesay et al.*, Corrected Amended Consolidated Indictment,

[15] While certain international law violations require state action pursuant to a specific provision of an operative treaty or a statute, it is now recognized that the law of nations contains no such requirement for crimes against humanity and war crimes, including torture as a war crime or crime against humanity. *See Prosecutor v. Kunarac,* Case Nos. IT-96-23 and IT-96-23/1-A, Judgment, ¶148 (Jun. 12, 2002)(finding the public-official requirement for torture to be limited to the Convention Against Torture (Art. 1) and not to be a requirement under customary international law),

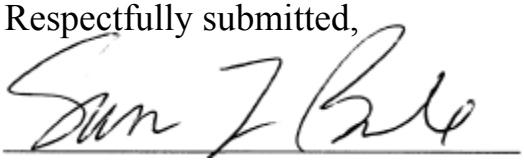
Case No. SCSL-2004-15-PT, Aug. 2, 2006 (charging Issa Sesay, founder of armed faction charged with crimes against humanity and war crimes)(available at: http://www.sc-sl.org/Documents/RUF/SCSL-04-15-T-619.pdf); *Prosecutor v. Lubanga,* Indictment, Case ICC-01/04-01/06, Aug. 28, 2006 (charging para-military leader with war crimes)(available at: http://www.icc-cpi.int/library/cases/ICC-01-04-01-06-356-Anx2_English.pdf).

This Court should follow the lead of the Supreme Court, look to the well-developed consensus in both domestic and international law, and hold that Plaintiffs may state ATS claims against L-3 for war crimes and crimes against humanity.

CONCLUSION

For all the foregoing reasons, this Court should permit Plaintiffs' common law and ATS claims to proceed to trial. The District Court erred by failing to recognize that L-3's contractual breaches, and the military's inability to give L-3 employees orders, were both facts material to the resolution of this matter. L-3's egregious misconduct harmed the Plaintiffs, and also harmed the United States' military interests. There is no law or judicial doctrine that requires this Court to insulate such egregious corporate misconduct from civil liability.

Respectfully submitted,



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ADDENDUM

ADDENDUM: STATUTES AND REGULATIONS

TABLE OF CONTENTS

Uniform Code of Military Justice, Punitive Articles

10 U.S.C. § 881. Art. 81. Conspiracy

(a) Any person subject to this chapter who conspires with any other person to commit an offense under this chapter shall, if one or more of the conspirators does an act to effect the object of the conspiracy, be punished as a court-martial may direct.

(b) Any person subject to this chapter who conspires with any other person to commit an offense under the law of war, and who knowingly does an overt act to effect the object of the conspiracy, shall be punished, if death results to one or more of the victims, by death or such other punishment as a court-martial or military commission may direct, and, if death does not result to any of the victims, by such punishment, other than death, as a court-martial or military commission may direct.

10 U.S.C. § 892. Art. 92. Failure to obey order or regulation

Any person subject to this chapter who—

(1) violates or fails to obey any lawful general order or regulation;

(2) having knowledge of any other lawful order issued by a member of the armed forces, which it is his duty to obey, fails to obey the order; or

(3) is derelict in the performance of his duties;

shall be punished as a court-martial may direct.

10 U.S.C. § 893. Art. 93. Cruelty and maltreatment

Any person subject to this chapter who is guilty of cruelty toward, or oppression or maltreatment of, any person subject to his orders shall be punished as a court-martial may direct.

10 U.S.C. § 928. Art. 128. Assault

(a) Any person subject to this chapter who attempts or offers with unlawful force or violence to do bodily harm to another person, whether or not the attempt or offer is consummated, is guilty of assault and shall be punished as a court-martial may direct.

(b) Any person subject to this chapter who—

(1) commits an assault with a dangerous weapon or other means or force likely to produce death or grievous bodily harm; or

(2) commits an assault and intentionally inflicts grievous bodily harm with or without a weapon;

is guilty of aggravated assault and shall be punished as a court-martial may direct.

Military Commissions Act

10 U.S.C. § 948a. Definitions

(1) Unlawful enemy combatant.—

(A) The term "unlawful enemy combatant" means—

(i) a person who has engaged in hostilities or who has purposefully and materially supported hostilities against the United States or its co-belligerents who is not a lawful enemy combatant (including a person who is part of the Taliban, al Qaeda, or associated forces); or

(ii) a person who, before, on, or after the date of the enactment of the Military Commissions Act of 2006, has been determined to be an unlawful enemy combatant by a Combatant Status Review Tribunal or another competent tribunal established under the authority of the President or the Secretary of Defense.

10 U.S.C. § 948c. Persons subject to military commissions

Any alien unlawful enemy combatant is subject to trial by military commission under this chapter.

10 U.S.C. § 950v. Crimes triable by military commissions

(b) Offenses.— The following offenses shall be triable by military commission under this chapter at any time without limitation….

(11) Torture.—

(A) Offense.— Any person subject to this chapter who commits an act specifically intended to inflict severe physical or mental pain or suffering (other than pain or suffering incidental to lawful sanctions) upon another person within his custody or physical control for the purpose of obtaining information or a confession, punishment, intimidation, coercion, or any reason based on discrimination of any kind, shall be punished, if death results to one or more of the victims, by death or such other punishment as a military commission under this chapter may direct, and, if death does not result to any of the victims, by such punishment, other than death, as a military commission under this chapter may direct.

(B) Severe mental pain or suffering defined.— In this section, the term "severe mental pain or suffering" has the meaning given that term in section 2340 (2) of title 18.

(12) Cruel or inhuman treatment.—

(A) Offense.— Any person subject to this chapter who commits an act intended to inflict severe or serious physical or mental pain or suffering (other than pain

or suffering incidental to lawful sanctions), including serious physical abuse, upon another within his custody or control shall be punished, if death results to the victim, by death or such other punishment as a military commission under this chapter may direct, and, if death does not result to the victim, by such punishment, other than death, as a military commission under this chapter may direct.

(B) Definitions.— In this paragraph:

(i) The term "serious physical pain or suffering" means bodily injury that involves—

(I) a substantial risk of death;

(II) extreme physical pain;

(III) a burn or physical disfigurement of a serious nature (other than cuts, abrasions, or bruises); or

(IV) significant loss or impairment of the function of a bodily member, organ, or mental faculty.

(ii) The term "severe mental pain or suffering" has the meaning given that term in section 2340 (2) of title 18.

(iii) The term "serious mental pain or suffering" has the meaning given the term "severe mental pain or suffering" in section 2340 (2) of title 18, except that—

(I) the term "serious" shall replace the term "severe" where it appears; and

(II) as to conduct occurring after the date of the enactment of the Military Commissions Act of 2006, the term "serious and non-transitory mental harm (which need not be prolonged)" shall replace the term "prolonged mental harm" where it appears.

18 U.S.C. § 2441. War Crimes

(a) Offense.— Whoever, whether inside or outside the United States, commits a war crime, in any of the circumstances described in subsection (b), shall be fined under this title or imprisoned for life or any term of years, or both, and if death results to the victim, shall also be subject to the penalty of death.

(b) Circumstances.— The circumstances referred to in subsection (a) are that the person committing such war crime or the victim of such war crime is a member of the Armed Forces of the United States or a national of the United States (as defined in section 101 of the Immigration and Nationality Act).

28 U.S.C. § 1291. Final decisions of district courts

The courts of appeals (other than the United States Court of Appeals for the Federal Circuit) shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of

the Virgin Islands, except where a direct review may be had in the Supreme Court. The jurisdiction of the United States Court of Appeals for the Federal Circuit shall be limited to the jurisdiction described in sections 1292(c) and (d) and 1295 of this title.

28 U.S.C. § 1350. Alien's action for tort

The district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States.

28 U.S.C. § 1346(b)(1)

Subject to the provisions of chapter 171 of this title, the district courts, together with the United States District Court for the District of the Canal Zone and the District Court of the Virgin Islands, shall have exclusive jurisdiction of civil actions on claims against the United States , for money damages, accruing on and after January 1, 1945, for injury or loss of property, or 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, 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. § 2680(a), (j)

The provisions of this chapter and section 1346(b) of this title shall not apply to—

(a) Any claim based upon an act or omission of an employee of the Government, exercising due care, in the execution of a statute or regulation, whether or not such statute or regulation be valid , or based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused.

…

(j) Any claim arising out of the combatant activities of the military or naval forces, or the Coast Guard, during time of war.

48 C.F.R. § 37.104. Personal services contracts.

(a) A personal services contract is characterized by the employer-employee relationship it creates between the Government and the contractor's personnel. The Government is normally required to obtain its employees by direct hire under competitive appointment or other procedures required by the civil service

laws. Obtaining personal services by contract, rather than by direct hire, circumvents those laws unless Congress has specifically authorized acquisition of the services by contract.

(b) Agencies shall not award personal services contracts unless specifically authorized by statute (*e.g.,* 5 U.S.C.3109) to do so.

(c)(1) An employer-employee relationship under a service contract occurs when, as a result of (i) the contract's terms or (ii) the manner of its administration during performance, contractor personnel are subject to the relatively continuous supervision and control of a Government officer or employee. However, giving an order for a specific article or service, with the right to reject the finished product or result, is not the type of supervision or control that converts an individual who is an independent contractor (such as a contractor employee) into a Government employee.

(2) Each contract arrangement must be judged in the light of its own facts and circumstances, the key question always being: Will the Government exercise relatively continuous supervision and control over the contractor personnel performing the contract. The sporadic, unauthorized supervision of only one of a large number of contractor employees might reasonably be considered not relevant, while relatively continuous Government supervision of a substantial number of contractor employees would have to be taken strongly into account …

48 C.F.R. § 203.7000

Government contractors must conduct themselves with the highest degree of integrity and honesty. Contractors should have standards of conduct and internal control systems that-

(1) Are suitable to the size of the company and the extent of their involvement in Government contracting,

(2) Promote such standards,

(3) Facilitate timely discovery and disclosure of improper conduct in connection with Government contracts, and

(4) Ensure corrective measures are promptly instituted and carried out.

48 C.F.R. § 203.7001

A contractor's system of management controls should provide for

(1) A written code of business ethics and conduct and an ethics training program for all employees;

(2) Periodic reviews of company business practices, procedures, policies, and internal controls for compliance with standards of conduct and the special requirements of Government contracting;
(3) A mechanism, such as a hotline , by which employees may report suspected instances of improper conduct, and instructions that encourage employees to make such reports;
(4) Internal and!or external audits, as appropriate;
(5) Disciplinary action for improper conduct;
(6) Timely reporting to appropriate Government officials of any suspected or possible violation of law in connection with Government contracts or any other irregularities in connection with such contracts; and
(7) Full cooperation with any Government agencies responsible for either investigation or corrective actions.

48 C.F.R. § 252.225-7040(e)(2)(ii)

(e) Pre-deployment requirements…
(2) The Contractor shall notify all personnel who are not a host country national, or who are not ordinarily resident in the host country, that….
(ii) Pursuant to the War Crimes Act (18 U.S.C. 2441), Federal criminal jurisdiction also extends to conduct that is determined to constitute a violation of the law of war when committed by a civilian national of the United States

Geneva Convention Relative to the Treatment of Civilian Persons In Time of War, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287.

Article 3

In the case of armed conflict not of an international character occurring in the territory of one of the High Contracting Parties, each Party to the conflict shall be bound to apply, as a minimum, the following provisions:

1. Persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed hors de combat by sickness, wounds, detention, or any other cause, shall in all circumstances be treated humanely, without any adverse distinction founded on race, colour, religion or faith, sex, birth or wealth, or any other similar criteria.
To this end, the following acts are and shall remain prohibited at any time and in any place whatsoever with respect to the above-mentioned persons:
(a) Violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture;
(b) Taking of hostages;

(c) Outrages upon personal dignity, in particular humiliating and degrading treatment;
(d) The passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court, affording all the judicial guarantees which are recognized as indispensable by civilized peoples.

2. The wounded and sick shall be collected and cared for.
An impartial humanitarian body, such as the International Committee of the Red Cross, may offer its services to the Parties to the conflict.
The Parties to the conflict should further endeavour to bring into force, by means of special agreements, all or part of the other provisions of the present Convention.
The application of the preceding provisions shall not affect the legal status of the Parties to the conflict.

Article 27
Protected persons are entitled, in all circumstances, to respect for their persons, their honour, their family rights, their religious convictions and practices, and their manners and customs. They shall at all times be humanely treated, and shall be protected especially against all acts of violence or threats thereof and against insults and public curiosity.

Women shall be especially protected against any attack on their honour, in particular against rape, enforced prostitution, or any form of indecent assault.
Without prejudice to the provisions relating to their state of health, age and sex, all protected persons shall be treated with the same consideration by the Party to the conflict in whose power they are, without any adverse distinction based, in particular, on race, religion or political opinion.

However, the Parties to the conflict may take such measures of control and security in regard to protected persons as may be necessary as a result of the war.

Article 31
No physical or moral coercion shall be exercised against protected persons, in particular to obtain information from them or from third parties.

Article 32

The High Contracting Parties specifically agree that each of them is prohibited from taking any measure of such a character as to cause the physical suffering or extermination of protected persons in their hands. This prohibition applies not only to murder, torture, corporal punishment, mutilation and medical or scientific experiments not necessitated by the medical treatment of a protected person but also to any other measures of brutality whether applied by civilian or military agents.

Article 37
Protected persons who are confined pending proceedings or serving a sentence involving loss of liberty shall during their confinement be humanely treated. As soon as they are released, they may ask to leave the territory in conformity with the foregoing Articles.

Article 100
The disciplinary regime in places of internment shall be consistent with humanitarian principles, and shall in no circumstances include regulations imposing on internees any physical exertion dangerous to their health or involving physical or moral victimization. Identification by tattooing or imprinting signs or markings on the body is prohibited.

In particular, prolonged standing and roll-calls, punishment drill, military drill and manoeuvres, or the reduction of food rations, are prohibited.

Article 147
Grave breaches to which the preceding Article relates shall be those involving any of the following acts, if committed against persons or property protected by the present Convention: wilful killing, torture or inhuman treatment, including biological experiments, wilfully causing great suffering or serious injury to body or health, unlawful deportation or transfer or unlawful confinement of a protected person, compelling a protected person to serve in the forces of a hostile Power, or wilfully depriving a protected person of the rights of fair and regular trial prescribed in the present Convention, taking of hostages and extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly.

U.S. Army Regulation 190-8, Enemy Prisoners of War, Retained Personnel, Civilian Internees and Other Detainees (Oct. 1, 1997), § 1-5(a)-(c)[16]

1-5. General protection policy

a. U.S. policy, relative to the treatment of EPW, CI and RP in the custody of the U.S. Armed Forces, is as follows:

(1) All persons captured, detained, interned, or otherwise held in U.S. Armed Forces custody during the course of conflict will be given humanitarian care and treatment from the moment they fall into the hands of U.S. forces until final release or repatriation.

(2) All persons taken into custody by U.S. forces will be provided with the protections of the GPW until some other legal status is determined by competent authority.

(3) The punishment of EPW, CI and RP known to have, or suspected of having, committed serious offenses will be administered IAW due process of law and under legally constituted authority per the GPW, GC, the Uniform Code of Military Justice and the Manual for Courts Martial.

(4) The inhumane treatment of EPW, CI, RP is prohibited and is not justified by the stress of combat or with deep provocation. Inhumane treatment is a serious and punishable violation under international law and the Uniform Code of Military Justice (UCMJ).

b. All prisoners will receive humane treatment without regard to race, nationality, religion, political opinion, sex, or other criteria. The following acts are prohibited: murder, torture, corporal punishment, mutilation, the taking of hostages, sensory deprivation, collective punishments, execution without trial by proper authority, and all cruel and degrading treatment.

c. All persons will be respected as human beings. They will be protected against all acts of violence to include rape, forced prostitution, assault and theft, insults, public curiosity, bodily injury, and reprisals of any kind. They will not be subjected to medical or scientific experiments. This list is not exclusive. EPW/RP are to be protected from all threats or acts of violence

[16] See RS.112, Appendix C-13 for further excerpts from AR 190-8.

U.S. Army Regulation 715-9, Contractors Accompanying the Force, §§ 3-2(c), 3-2(f), 3-3(b) (Oct. 29, 1999).[17]

§ 3-2(c)

Commercial firm(s) providing battlefield support services will supervise and manage functions of their employees, as well as maintain on-site liaison with functional U.S. organizations.

§ 3-2(f)

The commercial firm(s) providing the battlefield support services will perform the necessary supervisory and management functions of their employees. Contractor employees are not under the direct supervision of military personnel in the chain of command. The contracting officer (KO), or their designated liaison (contracting officer's representative (COR), is responsible for monitoring and implementing contractor performance requirements; however, contractor employees will be expected to adhere to all guidance and obey all instructions and general orders issued by the Theater Commander. In the event instructions or orders of the Theater Commander are violated, the Theater Commander may limit access to facilities and/or revoke any special status a contractor employee has as an individual accompanying the force to include directing the Contracting Officer to demand that the contractor replace the individual.

§ 3-3(b)

Contracted support service personnel shall not be supervised or directed by military or Department of the Army (DA) civilian personnel. Instead, as prescribed by the applicable federal acquisition regulations, or as required by force protection to insure the health and welfare, the Contracting Officer's Representative shall communicate the Army's requirements and prioritize the contractor's activities within the terms and conditions of the contract.

U.S. Army Field Manual 3-100.21, Contractors on the Battlefield (Jan. 2003)[18]

§ 1-22

Management of contractor activities is accomplished through the responsible contracting organization, not the chain of command. Commanders do not have direct control over contractors or their employees (contractor employees are not the same as government employees); only contractors manage, supervise, and

[17] See RS.112, Appendix C-3 for the full text of AR 715-9

[18] See RS.112, Appendix C-4 for the full text of Field Manual 3-100.21.

give directions to their employees. Commanders must manage contractors through the contracting officer or ACO. CORs may be appointed by a contracting officer to ensure a contractor performs in accordance with (IAW) the terms and conditions of the contract and the Federal acquisition regulations. The COR serves as a form of liaison between the contractor, the supported unit, and the contracting officer.

§ 1-25
It is important to understand that the terms and conditions of the contract establish the relationship between the military (US Government) and the contractor; this relationship does not extend through the contractor supervisor to his employees. Only the contractor can directly supervise its employees. The military chain of command exercises management control through the contract.

§ 4-2
As stated earlier, contractor management does not flow through the standard Army chain of command. Management of contractor activities is accomplished through the responsible requiring unit or activity COR through the supporting contracting organization in coordination with selected ARFOR commands and staffs. It must be clearly understood that commanders do not have direct control over contractor employees (**contractor employees are not government employees**); only contractors directly manage and supervise their employees. Commanders manage contractors through the contracting officer and their appointed CORs in accordance with the terms and conditions of the contract.

§ 4-45
Contractor employees are not subject to military law under the UCMJ when accompanying US forces, except during a declared war. Maintaining discipline of contractor employees is the responsibility of the contractor's management structure, not the military chain of command. The contractor, through company policies, has the most immediate influence in dealing with infractions involving its employees. It is the contractor who must take direct responsibility and action for his employee's conduct.

CERTIFICATE OF COMPLIANCE WITH RULE 32(a)(7)

I, Susan L. Burke, hereby certify that:

1. I am attorney representing the *Saleh* Plaintiffs.

2. This brief is in Times New Roman 14-point type. Using the word count feature of the software used to prepare this brief, I have determined that the text of the brief (excluding the Certificate as to Parties, Table of Contents, Table of Authorities, Glossary of Abbreviations, Addendum, and Certificates of Compliance and Service) contains 13,766 words.

Susan L. Burke

CERTIFICATE OF SERVICE

S*aleh, et al. v. Titan Corporation, et al.*, No. 08-7008

I, Robyn Cocho, being duly sworn according to law and being over the age of 18, upon my oath depose and say that:

I am retained by BURKE O'NEIL LLC, Attorneys for Appellees.

On the **2nd Day of September 2008**, I served the within (Proof) **JOINT BRIEF FOR APPELLANTS (Sealed and Unsealed Versions)** upon:

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via Federal Express, by causing 2 true copies of each to be deposited, enclosed in a properly addressed wrapper, in an official depository of Federal Express.

Unless otherwise noted, 7 copies of both versions have been filed with the Court on the same date and in the same manner as above.

September 2, 2008 _____