

THE HONORABLE FRANKLIN D. BURGESS

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UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
AT TACOMA

CYNTHIA CORRIE AND CRAIG CORRIE,  
ON THEIR OWN BEHALF AND AS PERSONAL  
REPRESENTATIVES OF THE ESTATE OF  
RACHEL CORRIE AND HER NEXT OF KIN,  
INCLUDING HER SIBLINGS; MAHMOUD OMAR  
AL SHO'BI, ON HIS OWN BEHALF, ON BEHALF  
OF HIS SURVIVING SIBLINGS MUHAMMAD  
AL SHO'BI AND SAMIRA AL SHO'BI, AND ON  
BEHALF OF HIS DECEASED FAMILY MEMBERS,  
UMAR AL SHO'BI, FATIMA AL SHO'BI, ABIR AL  
SHO'BI, SAMIR AL SHO'BI, ANAS AL SHO'BI,  
AZZAM AL SHO'BI AND ABDALLAH  
AL SHO'BI; FATHIYA MUHAMMAD  
SULAYMAN FAYED, ON HER OWN BEHALF  
AND ON BEHALF OF HER DECEASED SON,  
JAMAL FAYED AND HIS NEXT OF KIN;  
FAYEZ ALI MOHAMMED ABU HUSSEIN ON  
HIS OWN BEHALF AND ON BEHALF OF HIS  
SONS, BAHJAT FAYEZ ABU HUSSEIN,  
AHMED FAYEZ ABU HUSSEIN, NOUR FAYEZ  
ABU HUSSEIN AND SABAH FAYEZ  
ABU HUSSEIN; MAJEDA RADWAN  
ABU HUSSEIN ON HER OWN  
BEHALF AND ON BEHALF OF HER  
DAUGHTERS, HANAN FAYEZ ABU HUSSEIN,  
MANAL FAYEZ ABU HUSSEIN, INSHERAH  
FAYEZ ABU HUSSEIN, AND FADWA FAYEZ  
ABU HUSSEIN; EIDA IBRAHIM SULEIMAN  
KHALAFALLAH ON HER OWN BEHALF  
AND ON BEHALF OF HER DECEASED

Civil Action No. CV-05192-FDB

**PLAINTIFFS' SURREPLY**

**ORAL ARGUMENT  
REQUESTED**

**PLAINTIFFS' SURREPLY (CV-05192-FDB) –**  
PAGE 1 OF 4

SEATTLE UNIVERSITY  
RONALD A. PETERSON LAW CLINIC  
1112 E. Columbia  
Seattle, Washington 98122-4340  
TELEPHONE: (206) 398-4130  
FACSIMILE: (206) 398-4136

1 HUSBAND, IBRAHIM MAHMOUD MOHAMMED )  
 2 KHALAFALLAH AND NEXT OF KIN, )  
 3 Plaintiffs, )  
 4 v. )  
 5 CATERPILLAR, INC., a Foreign Corporation, )  
 6 Defendant. )  
 7 )

8 COME NOW Plaintiffs with this Surreply asking the Court to strike the following  
 9 sections contained in Defendant’s Reply. This request is made because these sections include  
 10 new arguments not raised in the original Motion to Dismiss to which Plaintiffs did not have the  
 11 opportunity to respond or brief the court.

- 12 1. Section II A 3 on pages 8-9, “The International Norms Allegedly Applicable to  
 13 the Israeli Governments Practices are Too Vague and Subjective to Support A  
 14 Claim Under *Sosa*,” as it relates to cruel, inhuman and degrading treatment. As  
 15 Plaintiffs point out in their Brief In Opposition to the Motion to Dismiss  
 16 (Opposition, p. 10), Defendant did not raise the argument in its Motion to Dismiss  
 17 that Cruel, inhuman and degrading treatment was too vague of a claim to be  
 18 actionable under *Sosa*. In fact, Defendant first indicates in its Reply that the  
 19 question is *not* whether cruel, inhuman or degrading treatment as a claim would  
 20 meet *Sosa*’s requirements. Reply, p. 1, ll. 10-12; p. 6, ll. 6- 9 (the question is not  
 21 whether appropriately pled allegations of cruel, inhuman, or degrading treatment  
 22 in general might violate some well-recognized norms...). After acknowledging  
 23 this, Defendant then on pages 8 and 9, states the opposite, making the argument  
 24 that the *claim* itself of CIDT itself cannot survive *Sosa*. As Plaintiff did not have  
 25 a chance to respond to this argument, this portion of the Reply should be struck.

26 In the alternative, Plaintiffs seek leave to respond to this argument.

1 2. Section II A 1, pages 2 – 6, “Sosa Requires That The Federal Courts Apply a  
2 Restrictive Standard In Analyzing The Facts Of A Plaintiffs’ Claims.” In this  
3 section, Defendant raises new arguments that *Sosa* called for “fact-based”  
4 approach to deciding whether Plaintiffs claims should proceed. In its Motion to  
5 Dismiss, Defendant argued that under *Sosa*, Plaintiffs were asking the Court to  
6 recognize a new federal claim, and that such a claim could not withstand *Sosa*.  
7 MTD, p. 11; ll. 2-8; p. 12, ll. 7-8. Clearly recognizing the difficulty of making  
8 such an argument, Defendant now argues for a *new standard* – a “fact-based  
9 approach” - to be used, both with regard to the underlying claims as well as for  
10 aiding and abetting. This argument should be stricken, as Plaintiffs did not have a  
11 chance to respond to this argument, which advocates for an entirely new standard.  
12 In the alternative, Plaintiff seeks leave to respond to this argument. In addition, if  
13 the Court chooses to review it, Plaintiff attaches as supplemental authority an  
14 Amicus Brief filed by the nations top scholars in the *In Re Apartheid* case (filed  
15 after Plaintiffs’ Opposition was Due) which sets forth the standard courts should  
16 use post-*Sosa* to determine whether and when claims for aiding and abetting  
17 should survive *Sosa*.

18 3. Page 30, ll. 18-25, relating to notice and causation. In Defendant’s Motion to  
19 Dismiss, Defendant did not raise the issue of a casual link between the injuries,  
20 particular bulldozers, and notice.<sup>1</sup> Thus, this is a new argument to which  
21 Plaintiffs to which Plaintiffs have not had an opportunity to respond, and it should  
22 be stricken. In the alternative, Plaintiffs should be allowed leave to respond to  
23 this argument.

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26 <sup>1</sup> Defendant does discuss the fact that because other bulldozers could have been used for the demolitions, proximate cause is at issue, but that is a completely different argument. See MTD, p. 34.

1 4. Page 28, ll. 44, through page 29, ll. 4. Plaintiffs ask this be stricken, as Defendant  
2 for the first time raised Federal Rule 44.1 and take *Heath v. American Sail*  
3 *Training Ass'n*, 644 F. Supp. 1459 (D.R.I. 1986) completely out of context,  
4 misconstruing its holding. Plaintiffs have not had the chance to respond to  
5 Defendant's interpretation of this Rule or this case. Moreover, *Defendant* is the  
6 one who first suggested that foreign law - Israeli law - should apply without  
7 providing any prior notice. Moreover, Plaintiffs, on page 20 of the First Amended  
8 Complaint, give notice that any other applicable laws, domestic, foreign, or  
9 international, could apply. Because the burden is on Defendant to show why  
10 claims should be dismissed, it is its burden to show which law should apply.  
11 Thus, this portion should be stricken. In the alternative, Plaintiffs seek leave to  
12 respond to this argument.

13 Respectfully submitted,

14 DATED this 29<sup>th</sup> day of September, 2005.

SEATTLE UNIVERSITY  
RONALD A. PETERSON LAW CLINIC

/s/ GWYNNE L. SKINNER

Gwynne L. Skinner, WSBA No. 23490  
Davida Finger, WSBA No. 32818

18 JENNIFER M. GREEN  
19 CENTER FOR CONSTITUTIONAL RIGHTS  
20 666 Broadway, 7<sup>th</sup> floor  
21 New York, NY 10012  
22 Tel: (212) 614-6431  
23 Fax: (212) 614-6499  
24 jgreen@ccr-ny.org

23 GWYNNE L. SKINNER  
24 PUBLIC INTEREST LAW GROUP PLLC  
25 705 SECOND AVENUE, SUITE 501  
26 SEATTLE, WA 98104  
Tel: (206) 447-0103  
Fax: (206) 447-0115  
gskinner@pilg.org