UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

TALAL AL-ZAHRANI, *et al.*, Plaintiffs, v. DONALD RUMSFELD, *et al*. and UNITED STATES, Defendants.	Case No. 09-cv-00028 (ESH)

PLAINTIFFS' REPLY IN SUPPORT OF MOTION FOR RECONSIDERATION IN LIGHT OF NEWLY-DISCOVERED EVIDENCE AND MOTION FOR LEAVE TO AMEND

Plaintiffs Talal Al-Zahrani and Ali Abdullah Ahmed Al-Salami, in their individual capacities and as representatives of the estates of their deceased sons Yasser Al-Zahrani and Salah Ali Abdullah Ahmed Al-Salami, by and through their counsel, respectfully submit this Reply in support of their Motion for Reconsideration in Light of Newly-Discovered Evidence and Motion for Leave to Amend, which concern the circumstances of their detained sons' deaths at Guantánamo Bay in June 2006.

While reconsideration is admittedly an unusual measure, the circumstances of this case in light of the new evidence presented in Plaintiffs' motions are just that – unusual and extraordinary. Plaintiffs allege that for nearly four years Defendants have taken cover under a false account of suicide for the murder of Plaintiffs' sons at a secret facility at Guantánamo. The facts are just emerging, and only because of the conscience of former soldiers who came

forward on their own because they could no longer remain silent. Both what is and is not yet known in light of these shocking allegations makes dismissal inappropriate, particularly where Plaintiffs have no other remedy, and compels the Court to set aside its previous judgment and permit Plaintiffs to proceed on a corrected record.

I. Plaintiffs Should Not Be Barred from Presenting the New Evidence to the Court

Defendants' obvious attempt to sweep the extraordinary nature of these facts and circumstances under the rug– circumstances that are precisely the sort suited for a Rule 59(e) motion – is apparent from their leading arguments, which focus on the lapse of a 30-day window at the tail end of an alleged four-year cover-up of murder that Defendants argue should keep this evidence from the Court altogether, and which conclude that Plaintiffs' inability to discover the evidence before its publication, from a whistleblower who came forward on his own out of a crisis of conscience, "evince[es] a complete lack of due diligence." U.S. Opp. at 8. These claims are indeed bold but unpersuasive in the context of this case, where:

- An alleged cover-up of murder has been perpetuated for four years at the highest levels of government;
- The most obvious and important sources of information about what happened and who was involved – Al-Zahrani and Al-Salami – are deceased, never met with counsel and had virtually no contact with the outside world during their detention;
- Virtually all other information about what happened, who was involved, where, why, and how is in the exclusive control of the government;
- The government fought virtually every request for information from Plaintiffs, Plaintiffs' counsel and counsel for other detainees for two years after the deaths, at which point it produced portions of the final report of the military's investigation only because it was compelled through FOIA litigation;
- Much of what the government finally did produce is redacted, including all names and identifying information of military personnel;
- The government ignored repeated requests for information by Plaintiffs and the individuals they retained for independent autopsies of their sons about the condition of the men's bodies after they were returned;

- Plaintiffs even resorted to an international tribunal, the Inter-American Commission on Human Rights, in their quest for information, which made inquiries to which the government responded with a handful of news clippings; and
- The evidence at issue only became known because a soldier came forward on his own, prompted by his conscience and a change in the administration, despite the years of work on this issue by many involved.

Contrary to Defendants' suggestion, Plaintiffs and their counsel became aware of the soldiers and their accounts after the publication of the online version of the *Harper's* article on January 18, 2010. This was the first time Plaintiffs and their counsel learned of the information in the article. Between that time and the Court's opinion, Plaintiffs' counsel consulted with their clients in Saudi Arabia and Yemen, with Seton Hall, and with the journalist who wrote the *Harper's* article; determined the substance of their proposed amendments and their next steps; sought and retained additional co-counsel to address the anticipated greater resource needs of the case in light of the new evidence; conferred with Defendants' counsel on or about February 2, 2010 about Plaintiffs' intention to request a status conference; and sent a proposed request to Defendants' counsel the following week outlining the new evidence and the issues Plaintiffs proposed to discuss with the Court. Plaintiffs' counsel took these steps indeed because of, not for lack of diligence and came forward when they believed they could in good faith present these extraordinary new allegations to the Court.

In sharp contrast, in all of the cases Defendants' cite as support for an automatic rule barring Plaintiffs from presenting the new evidence because it was available 30 days before the Court's ruling, the plaintiffs claimed inadvertence or offered no plausible explanation at all for their delay, and the time period between the availability of the evidence to the plaintiffs

and its presentation to the court ranged from several months to several years.[1] Virtually all of the cases are also out-of-circuit or non-controlling district court cases, with the exception of one D.C. Circuit case where the plaintiff sought to introduce a tape recording made by the plaintiff over five months before dismissal, where the plaintiff himself conceded that the evidence was not "new" for reconsideration purposes. *Schoenbohm v. FCC*, 204 F.3d 243, 250 (D.C. Cir. 2000) (citing *ICC v. Bhd. of Locomotive Eng'rs*, 482 U.S. 270, 283(1987)).

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[1] Citing Defendants' cases: *Obriecht v. Raemisch*, 517 F.3d 489, 494 (7th Cir. 2008) (affidavit and complaints plaintiff filed in 2003 with administrative review board, which plaintiff did not attach to a § 1983 claim filed with district court in 2005 and offered no reason for such failure, not "newly available" for purpose of reconsideration motion); *Miller v. Baker Implement Co.*, 439 F.3d 407, 414 (8th Cir. 2006) (information plaintiff sought to compel from defendants during the course of ongoing discovery five months after plaintiff had the opportunity, on the day of the district court's judgment, where plaintiff offered no explanation for failure to timely compel, not considered "newly available" for purpose of reconsideration motion); *Barrett v. Tallon*, 30 F.3d 1296, 1301 (10th Cir. 1994) (plaintiffs could have but purposefully delayed their request for leave to amend as all discovery and motion deadlines in litigation passed); *Westlands Water Dist. v. Firebaugh Canal*, 10 F.3d 667, 677 (9th Cir. 1993) (plaintiff presented no new facts whatsoever but rather merely sought leave to add additional contractual claims to a previously filed complaint, and could have done so at any stage of litigation); *Hagerman v. Yukon Energy Corp.*, 839 F.2d 407, 414 n.9 (8th Cir. 1988) (evidence not considered "new" because it was known to plaintiff before filing suit, approximately two years before summary judgment issued, plaintiff had opportunity to raise evidence in summary judgment hearing, and plaintiff did not argue that he was unable to raise evidence prior to summary judgment); *Artis v. Bernanki*, 256 F.R.D. 4, 6 (D.D.C. 2009) (plaintiff's declaration recounting events from ten years prior, where plaintiff fails to explain why the information could not have been presented while defendant's motion to dismiss was pending, could not "plausibly" be understood as being "previously unavailable"); *Int'l Painters & Allied Trade Indus. Pension Fund v. Design Tech.*, 254 F.R.D. 13, 18-19 (D.D.C. 2008) (plaintiffs moved to amend a holding to include an award of attorneys fees in this case, and in an additional case decided approximately three years prior; plaintiffs had missed a court-imposed deadline to file the information announced approximately three weeks prior to the holding of the court; plaintiffs conceded that they missed the deadline due to oversight); *Niedermeier v. Office of Max S. Baucus*, 153 F. Supp. 2d 23, 30 (D.D.C. 2001) (where plaintiff filed motion for reconsideration and to amend on the basis of manifest injustice, admittedly knew of new facts 10-12 months before the district court's opinion and during the pendency of defendant's motion to dismiss, and offered no reason for the failure to present the facts until after dismissal); *Indep. Petroleum Ass'n of Am. v. Babbitt*, 178 F.R.D. 323, 327 (D.D.C. 1998), *affd*, 235 F.3d 588 (D.C. Cir. 2001) (plaintiffs did not seek to introduce "new" evidence, nor did they contend the evidence was new, but rather sought to introduce additional evidence known to plaintiffs' counsel prior to their first filing in the case).

Defendants' additional attempts to bar this evidence from the Court merit only brief mention. Defendants' assumption that basic inquiries by Plaintiffs' counsel would have revealed Sergeant Hickman's statements long ago and that counsel's inability to know the evidence until its publication reflects a "total lack of due diligence" is both erroneous and naïve. Whistleblowers like Sergeant Hickman come forward at great personal and professional risk. Given the repercussions for him and others if information were disclosed prematurely, it is far from unreasonable that he and the inner circle of individuals trusted with his information would remain extremely discrete until a decision were made to go public. As to Defendants' inability to understand why Plaintiffs would not have presented their allegation of a cover-up to the Court earlier, since Defendants argue that certain facts supporting the allegation were knowable to Plaintiffs at least as of December 2009, Defendants appear to argue for a lower pleading standard than that required by the Federal Rules and case law. While facts such as the condition and missing organs of the deceased's bodies were known to Plaintiffs prior to the publication of the *Harper's* article and were, indeed, cited in their complaint, the soldiers' express accounts of a cover-up, and their statements suggesting the events being covered up, were the lynchpin that allowed Plaintiffs to piece the facts together and plausibly allege in good faith that Defendants had participated in a cover-up of murder.

II. The New Evidence Compels the Court To Set Aside Its Dismissal of Plaintiffs' *Bivens* Claims Because the Court Cannot Conclude without More that *Rasul II*'s Special Factors Holding Is Necessarily Controlling

Defendants continue to attempt to diminish the extraordinary and material nature of the new evidence by arguing that nothing about what it reveals – that the Court's adjudication of this case was likely based on a false record, that while some material facts are emerging,

others remain unknown – should disturb the Court or its prior judgment barring Plaintiffs' *Bivens* claims. Defendants also misrepresent that Plaintiffs did not argue in their reconsideration motion that the new allegations actually compel the Court to change its prior position, but only "suggested" that the Court could decide differently. Ind. Defs.' Opp. at 8.

Contrary to this distortion, Plaintiffs argued in their motion for reconsideration that the new allegations do indeed prevent the Court from maintaining its prior holding that *Rasul II*'s special factors analysis is controlling and necessarily forecloses Plaintiffs' *Bivens* claims. See Pls.' Mot. at 9 ("As such, because of Defendants' obstruction, the Court is without a sufficient understanding of the contours of this case to be able to determine if the D.C. Circuit's special factors analysis in *Rasul II* indeed applies, or if the reasons for recognizing a remedy in the specific context of this case outweigh the reasons against."). Plaintiffs explained that the decision whether to infer a *Bivens* remedy is a matter of judgment and requires a careful weighing of reasons for and against, that such an assessment must be made in light of the pertinent facts and circumstances of each case, and – in light of Plaintiffs' claim that material facts about Al-Zahrani and Al-Salami's deaths at Guantánamo have been deliberately covered up and remain unknown – that the Court cannot be convinced that it has a sufficient understanding of this case to be able to conclude that *Rasul II* necessarily remains controlling and that the Court's opinion should stand. The new allegations thus compel the Court to set aside its opinion – or "change its position" – dismissing Plaintiffs' *Bivens* claims on the basis of *Rasul II*'s special factors holding, which was the rationale for the Court's dismissal of those claims.

In addition, what the Court currently does know about this case makes it far from clear that vacating its opinion and permitting Plaintiffs to amend their complaint with the new

evidence would be a futile gesture. *See infra*, Section VI.A.1. As Plaintiffs discussed in their motion for reconsideration, the invocation of national security special interests is not an automatic bar to a *Bivens* remedy. *See* Pls.' Mot. at 10-11 (citing *Boumediene v. Bush*, 533 U.S. 723 (2008); *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004); *Iqbal v. Hasty*, 490 F.3d 143 (2nd Cir. 2007); *Ertel v. Rumsfeld*, No. 06-6964 (N.D. Ill. Mar. 5, 2010); *Padilla v. Yoo*, 633 F. Supp. 2d 1005 (N.D. Cal. 2009)). In the context of this case, where egregious, undoubtedly unconstitutional misconduct by federal officers has remained hidden for years because of the very secrecy of Guantánamo, where Plaintiffs have no other remedy, and where the wisdom of hindsight in other cases shows that the government's bald assertions of national security have not only been overblown many times but have allowed actual abuses to go uncovered, the national security interests Defendants invoke should be carefully scrutinized and are not necessarily fatal to Plaintiffs' claims on amendment.

III. The New Evidence Compels the Court To Set Aside Its Dismissal of Plaintiffs' ATS Claims Because Plaintiffs Have at a Minimum Presented Sufficient Facts To Rebut the Government's Certification and Warrant Discovery

Confronted with a clear showing that the new evidence and allegations compel the Court to grant reconsideration with respect to Plaintiffs' ATS claims because there is at the very least a material factual dispute about whether the alleged conduct was within the scope of employment, the government turns to attacking the plausibility of the allegations by misrepresenting and omitting facts, and then moves to arguing that Plaintiffs cannot establish that Defendants' conduct was outside the scope of employment as a matter of law. In between, the government dodges the question of whether the new allegations, if well-pled, would create a material dispute about the scope of employment and entitle Plaintiffs to discovery, because the answer is clear that it would. Instead, the government attempts to

quickly dispose of the question by characterizing it as a "hypothetical issue" the Court need not address. U.S. Opp. at 6.

In arguing that Defendants' alleged conduct was within the scope of employment, the government discusses the first three prongs of the test set forth in Section 228 of the Restatement Second of Agency. *See* U.S. Opp. at 15. With respect to the first prong relating to the nature of the conduct, the government argues that Plaintiffs' emphasis on the unauthorized nature of the alleged conduct is misplaced because unauthorized conduct can still be foreseeable and within the scope of employment. *See id*. at 15-16. It is clear, however, that the prohibited or unauthorized nature of conduct is at least a factor indicating that conduct is outside the scope,[2] particularly where, as here, the conduct is unauthorized in more than one respect (here, as to both nature and location).[3] *See CNA v. United States*, 535 F.3d 132, 146-47 (3d Cir. 2008) (upholding a district court decision based on Restatement § 228 that the defendant's "conduct was outside the scope of his employment because it

[2] *See* Restatement Second Agency § 230, cmt. c (1958) ("The prohibition by the employer … accentuates the limits of the servant's permissible action and hence makes it more easy to find that the prohibited act is entirely beyond the scope of employment. Thus, where a person employs another to make collections, a specific direction by such employer that servants shall not use force in seeking to collect debts is a factor tending to show that an assault made by the servant to enforce collection is not within the scope of employment. … [If] the master has prohibited the use of a particular [instrumentality], it is more difficult to find that its use is within the class of acts authorized or is performed with the intent to act in the master's behalf.").

[3] *See* Restatement Second Agency § 229, cmt. e (1958) ("In determining whether or not the act is beyond the scope of employment, the fact that the act is unauthorized in more than one respect is considered. Thus, an act which is a slight departure from that authorized as to its nature, place, and time of performance, may be found to be not within the scope of employment, while a similar act done at the required place and time, or an otherwise authorized act done at a slightly different place or time, would within the scope of employment. Likewise a number of slight departures from the authorized conduct may place the entire activity beyond the scope of employment.").

occurred in an unauthorized time and space," and looking to Army regulations prohibiting the conduct at issue).

In determining whether unauthorized conduct is foreseeable, the Restatement considers other factors as well, including whether the act is commonly done by such employees; the time, place and purpose of the act; the similarity in quality of the act done to the act authorized; the extent of departure from the normal method of accomplishing an authorized result; and whether the act is seriously criminal. *See* Restatement Second Agency § 229(2); *see also McIntyre ex rel. Estate of McIntyre v. United States*, 545 F.3d 27, 39 (1st Cir. 2008) (quoting Restatement § 229 factors for determining whether unauthorized conduct is incidental to authorized conduct); *Siemens Bldg. Techs., Inc. v. PNC Fin. Servs. Group, Inc.*, 226 Fed. Appx. 192, 196 (3d Cir. 2007) (same). Given the outcome of death here – a result expressly prohibited by the detention and interrogation policies and procedures at Guantánamo as Plaintiffs demonstrated in their reconsideration motion – it can reasonably be inferred that the conduct at issue was neither commonly done nor similar to authorized acts, and represented an extreme departure from the normal methods of accomplishing authorized results. Its serious criminality is obvious, and Plaintiffs also allege that the conduct took place at a secret, unauthorized location – Camp No. At a minimum, the totality of these factors gives rise to a material dispute about the scope of employment.

Even if the conduct were broadly found to be within the ultimate objective of the employer, to be foreseeable, it would have to be "within the ultimate objective of the principal *and* an act which it is not unlikely that such a servant would do." Restatement Second Agency § 229, cmt. b (emphasis added). In other words, even if an act is a means of accomplishing an authorized result, "it may be done in so outrageous or whimsical a manner

that it is not within the scope of employment." Restatement Second Agency § 229, cmt. b. Indeed, the Restatement provision the government cites for the proposition that even forbidden acts may be within the scope of employment holds employers liable for "acts which it is *natural* to expect that servants may do." U.S. Opp. at 16 (citing Restatement Second Agency § 229, cmt. b) (emphasis added). Furthermore, to be foreseeable, "it is not enough that an employee's job provides an opportunity to commit an intentional tort." *Haddon v. United States*, 68 F.3d 1420, 1424 (D.C. Cir. 1995); *see also Adams v. Vertex, Inc.*, 2007 U.S. Dist. LEXIS 22850 (D.D.C. Mar. 29, 2007) ("An employee's acts are not a direct outgrowth of her assigned duties if those duties merely provide an opportunity for the tortious conduct to occur."). *Id.* at 25 (citing *Boykin v. District of Columbia*, 484 A.2d 560, 563 (D.C. 1984)).

The government's non sequitur that since the Court held that the conduct Plaintiffs originally alleged was foreseeable, the conduct here is no less foreseeable, forgets that the Court's conclusion was premised on finding that the conduct in Plaintiffs' amended complaint, as in *Rasul*, was authorized and related to interrogations, and glosses over the multi-factor analysis required to determine whether conduct that is *unauthorized*, as here, is foreseeable and within the scope of employment.

With respect to the second prong relating to the time and space limits of conduct, the government argues that the unauthorized nature of Camp No is insignificant because conduct need only be in an authorized area or in an area "not unreasonably distant" from it to satisfy the test. U.S. Opp. at 18. The government then turns to attempting to map out the literal distance between Camp No and the prison camp – ironically, faulting Plaintiffs for "failing to come forward with any specific facts" regarding the location of a *secret* site – but "deducing" in any case that Camp No was not unreasonably distant from the prison. Id. at 19. But here

the government has the wrong emphasis. Where conduct is authorized only on the "employer's premises" – here, according to standard operating procedures for Guantánamo, in three specific facilities within the parameters of the prison camp – "an intentional departure from the premises, even for a comparatively slight distance, would remove the servants so acting from within the scope of employment." Restatement Second Agency § 234, cmt. d. ("as where operatives in a factory, without the master's knowledge, transfer their activities to an adjacent street"). Furthermore, "if the area within which the servant is to act is very limited" – here, again, in three specific facilities – "a slight departure from it may be effective to remove the act from the scope of employment." *Id.*, cmt. c. The nature of the act, among other factors, is also considered as part of the analysis in determining whether the conduct occurred outside of time and space limits. *See id.* §§ 233, cmt. a; 234, cmt. a. Thus, the unauthorized, uncommon, seriously criminal, and arguably unforeseeable nature of the alleged conduct at issue here, combined with its occurrence at a secret location off the grounds of the employer's main premises, particularly where the sites for interrogation were specifically and narrowly defined (if the conduct here was in fact in connection with interrogations, which Plaintiffs do not concede), together render the conduct outside of permissible time and space limits or, at a minimum, create a material factual dispute about whether the conduct fell within those limits.

With respect to the third prong relating to the purpose and motivation of the actor, the government argues that Plaintiffs have not made any showing that Defendants acted without any intent to serve their employer. But ordinarily, "it is only from the manifestations of the servant and the circumstances that … his intent can be determined." Restatement Second Agency § 235, cmt. a; *see also Schecter v. Merchs. Home Delivery, Inc.*, 892 A.2d 415, 428

(D.C. 2006) ("[I]t is the state of the servant's mind which is material. Its external manifestations are important only as evidence."). The prohibited, seriously criminal and arguably unforeseeable nature of the conduct here, its secret and unauthorized location outside the prison camp, and the circumstances of the cover-up that ensued all infer that Defendants were acting against their employer's interests to some degree,[4] although the question of degree would be an issue of fact. *See Lyon v. Carey*, 533 F.2d 649, 655 (D.C. Cir. 1976) (issue of motivation is "a question of fact for the trier of fact, rather than a question of law for the court"); Restatement Second Agency § 228, cmt. d ("The question whether or not the act done is so different from the act authorized that it is not within the scope of employment is decided by the court if the answer is clearly indicated; otherwise, it is decided by the jury"). Indeed, in the cases the government cites for the proposition that conduct is within the scope of employment if done at least in part to serve the employer's interest, the plaintiffs received discovery. *See Lyon v. Carey*, 533 F.2d 649, 651 (D.C. Cir. 1976) (holding that scope of employment was a factual question for the jury, and could not be decided as a matter of law); *Brown v. Argenbright Sec., Inc.*, 782 A.2d 752, 758 (D.C. 2001); *Johnson v. Weinberg*, 434

[4] *Jordan v. Medley*, 711 F.2d 211, 215 (D.C. Cir. 1983) (Scalia, J.) ("A directed verdict against the employer would be particularly rare in the case of an intentional tort, which by its nature is willful and thus more readily suggests personal motivation.") (internal citations omitted); *Penn Cent. Transp. Co. v. Reddick*, 398 A.2d 27, 31 (D.C. 1979) ("When a servant's conduct is wholly unprovoked, highly unusual, and outrageous, these facts alone may be sufficient to indicate that the motive for an intentional tort was personal."); *Mackey v. Milam*, 154 F.3d 648, 654-55 (6th Cir. 1998) (Cole, J., dissenting) ("Clearly, the conduct alleged here was intended to neither facilitate nor promote the business of the United States Air Force. The Air Force does not promote, facilitate or condone sexual harassment; in fact, it has promulgated regulations prohibiting such conduct. … It is clear to me that the nature of the conduct alleged here is so divergent from the defendants' legitimate duties and work activities that it severed the employer-employee relationship between the Air Force and the defendants."); Restatement Third Agency § 7.07, cmt. c ("The character, extreme nature, or other circumstances accompanying an employee's actions may demonstrate that the employee's course of conduct is independent of performing work assigned by the employer and intended solely to further the employee's own purposes").

A.2d 404, 406 (D.C. 1981) (plaintiffs received "extensive pretrial discovery" before the trial court ruled on scope of employment).

For Defendants' conduct to fall within the scope of employment, it must meet each of these prongs – with respect to the nature of the conduct, its time and space, and its purpose – and the failure to meet one fails the test altogether and renders conduct outside the scope. *See* Restatement Second Agency § 228(2). Considering the totality of the facts and circumstances, taking the facts to be true, and affording Plaintiffs the benefit of all reasonable inferences therefrom, Plaintiffs have clearly raised at least a material factual dispute as to each prong and merit discovery.

The government can only challenge this showing by misrepresenting and omitting the new facts, which are set forth in full in Plaintiffs' motion for reconsideration and attached *Harper's* article, and arguing that they are insufficient to support Plaintiffs' new allegations and rebut the government's certification. While the government portrays Plaintiffs as having "conjured up" their allegations out of thin air, U.S. Opp. at 6, it bears repeating that the underlying factual accounts came from decorated former soldiers who served under Defendants' own command, who were eye-witnesses to camp activity on the night in question, and who presumably have much to lose and little to gain by coming forward.

Plaintiffs briefly outline the discrepancies for the benefit of the Court:

- The government states that only Sergeant Hickman claims to have been on duty in an observation tower the night the detainees died, *See* U.S. Opp. at 3, but at least three of the four – Sergeant Hickman, Army Specialist Penvose and Army Specialist Caroll – were on guard duty in observation towers that night. *See* Pls.' Mot. at 5. All four soldiers had first-hand observations of camp activity that night. *See id*. at 4;

- The government states that Sergeant Hickman "claims to have seen three unidentified prisoners being placed into a paddy wagon" traveling in the direction "of what he believes, but does not claim to know for sure," was Camp No, U.S. Opp. at 5, but Sergeant Hickman specifically states that he saw the van drive up to the camp where

detainees were held three separate times in short succession. *See* Pls.' Mot. at 4. By the third time, he drove ahead of the van to confirm where it was going and saw it approach and turn toward Camp No, thereby eliminating any question in his mind about its destination. *See id.*;

- The government states that sometime later "a" paddy wagon returned, "ostensibly" from Camp No, and backs up to the medical clinic, *See* U.S. Opp. at 5, but Sergeant Hickman stated that he watched from his guard tower the same van he had seen transporting the detainees to Camp No return to the camp and back up into the medical clinic. *See* Pls.' Opp. at 5;

- The government states that the soldiers do not claim to know whether the van actually went to Camp No, U.S. Opp. at 6, but, again, Sergeant Hickman stated that he confirmed that the van was going to Camp No. Pls.' Mot. at 4;

- The government states that the soldiers do not claim to have seen "whether anything or anybody (let alone these specific detainees) actually were unloaded from the paddy wagon into the medical clinic," U.S. Opp. at 6, but Sergeant Hickman was told by a medical corpsman in the medical facility about 45 minutes after he saw the van back up to the clinic that three dead prisoners had been delivered to the clinic, that they had died because they had rags stuffed down their throats, and that one of them was severely bruised. *See* Pls.' Mot. at 5;

- The government states that the "so-called cover-up, as alleged by Plaintiffs, consisted of an order by Defendant Bumgarner that none of the guards make any comments to the media that would undermine the preliminary determination that the detainees had committed suicide in their cells," U.S. Opp. at 7, but Defendant Bumgarner specifically told the guards not to undermine the official story that the men had committed suicide in their cells *by hanging themselves*, as opposed to having choked to death on rags stuffed down their throats. *See* Pls.' Mot. at 6. Furthermore, Defendant Bumgarner did not limit his order to prohibiting the guards from speaking to the media; the order was broadly not to make any comments or suggestions that in any way would undermine the official report, and he reminded the guards that their communications were being monitored. *See id.* The government also fails to note that Defendant Bumgarner disclosed in a press interview the apparently sensitive point about the rags stuffed down the men's throats, was subsequently called into Defendant Harris's office who told him the article "could get me (Harris) relieved," was subsequently suspended, and later had his home raided by the FBI. *See id.*;

- The government also fails to note two additional facts about the cover-up: one, that contrary to the NCIS report that the deceased were found in their cells and transported from there to the medical clinic, Army Specialist Penvose and Army Specialist Caroll, who were on guard duty in watch towers at the time the NCIS report says the deceased would have been transported from their cells to the clinic, had an unobstructed view of the path by which the men would have been carried, and neither saw any detainees being transferred from the camp to the clinic that night, *see* Pls.' Mot. at 5, and two,

> that none of the four former soldiers, despite being material witnesses with first-hand knowledge of camp activity that night, and despite Sergeant Hickman's relatively senior position, were ever interviewed or approached for the NCIS investigation. *See* Pls.' Opp. at 4.

In addition, while the government questions the sufficiency of Plaintiffs' allegations, it remains silent on the sufficiency of its own certification and the fact that it was made nearly five months before the close of the Department of Justice's "inquiry" into these allegations.

Accepting as true all the facts Plaintiffs allege in their reconsideration motion, and affording Plaintiffs "the benefit of all favorable inferences that can be drawn from the alleged facts," as the Court must, *United Motorcoach Ass'n v. Welbes*, 614 F. Supp. 2d 1, 7 (D.D.C. 2009), Plaintiffs present plausible allegations that their sons did not die by taking their own lives in their cells, that they died at the hands of Defendants at Camp No or from events occurring there, and that there has been a cover-up of the true circumstances of these deaths for nearly four years. The government cannot avoid the conclusion that at a minimum, Plaintiffs' well-pled allegations create a material factual dispute as to whether Defendants' conduct was within the scope of employment and should permit Plaintiffs to take limited discovery. *See Stokes v. Cross*, 327 F.3d 1210, 1216 (D.C. Cir. 2003) ("Stokes was not required to allege the existence of evidence he might obtain through discovery. He was merely required to plead sufficient facts that, if true, would rebut certification."); *Kimbro v. Velten*, 30 F.3d 1501, 1508 (D.C. Cir. 1994) ("Regardless of the content of the certification, then, the federal district court must at least conduct an evidentiary hearing on the scope issue.").

IV. <u>Amendment Should Be Permitted</u>

Once the more stringent standard of Rule 59(e) has been met – which plaintiffs submit has been satisfied in light of the newly-discovered evidence presented here, its material

impact on the Court's previous judgment, and the no less than extraordinary circumstances at issue – Rule 15(a)'s liberal standard for granting leave to amend governs. *Jung v. Ass'n of Am. Med. Colleges*, 184 Fed. Appx. 9, 13 (D.C. Cir. 2006) (quoting *Firestone v. Firestone*, 76 F.3d 1205, 1208 (D.C. Cir. 1996)). Rule 15(a) requires that leave to amend "shall be freely given when justice so requires," Fed. R. Civ. P. 15(a); the Supreme Court has instructed that "this mandate is to be heeded." *Foman v. Davis*, 371 U.S. 178, 182 (1962). Under this permissive standard, Plaintiffs' proposed amendments should be allowed. Plaintiffs have demonstrated that amendment would not be futile because it is not clear that Plaintiffs' claims "would not survive a motion to dismiss." *Nat'l Wrestling Coaches Ass'n v. Dep't of Educ.*, 366 F.3d 930, 945 (D.C. Cir. 2004) (citation omitted). "If a proposed amendment is not *clearly* futile, then denial of leave to amend is improper." Charles Alan Wright & Arthur R. Miller, Federal Practice and Procedure § 1487 (2d Ed. 1990) (emphasis added); *see also Price v. College Park Honda*, 2006 U.S. Dist. LEXIS 14906, *9-10 (D.D.C. Mar. 31, 2006) (futile motion is one "in which the amended complaint clearly would not survive a motion to dismiss"). In light of Plaintiffs' showing against futility, the strong interests of justice at stake, and the well-established policy "that leave to amend is liberally to be granted," *Belizan v. Hershon*, 495 F.3d 686, 690 (D.C. Cir. 2007), the Court should permit Plaintiffs to correct the record and proceed with their case.

A. *Bivens* Claims

1. Special Factors

Plaintiffs briefly note at the outset that the Court did not dismiss Plaintiffs' claims under 28 U.S.C. § 2241(e)(2) or address Plaintiffs' arguments on the question of the constitutionality of § 2241(e)(2). For the reasons discussed in their opposition to Defendants'

motion to dismiss Plaintiffs' constitutional claims, which Plaintiffs incorporate herein, *see* Pls. Mem. Opp. at 4-22 (dkt. no. 19), Plaintiffs maintain that § 2241(e)(2) is unconstitutional and cannot bar their claims as a constitutional matter.

For the reasons discussed in this reply and in Plaintiffs' reconsideration motion, it also cannot be said that Plaintiffs' *Bivens* claims would clearly not withstand a motion to dismiss. With regard to special factors, Plaintiffs have previously discussed the remedial judgment a court must exercise in deciding whether to infer a *Bivens* remedy and the balancing test required in light of the pertinent facts and circumstances of each case. In the face of the alleged cover up of the material facts and circumstances of this case, Plaintiffs submit that the Court cannot at this stage conclude that *Rasul II* would necessarily bar Plaintiffs' *Bivens* claims in light of the nature of the inquiry required. It is also clear that the presence of national security interests need not foreclose a *Bivens* remedy in every case, as Plaintiffs discussed in their motion for reconsideration. Again, unless it is clear that Plaintiffs' *Bivens* claims would not survive a motion to dismiss, denying leave to amend would be improper.

Defendants' argument that courts do not employ a case-by-case approach and that the cookie-cutter similarity with *Rasul II* should end the inquiry flies in the face of the judgment and balancing required in *Bivens* cases and the fact-intensive, case-specific analyses that, contrary to Defendants' understanding, do indeed characterize the current law. Defendants further argue that the new allegation of murder is of no consequence because *Rasul* and *Sanchez-Espinoza* both involved similarly egregious allegations and were barred by special factors. The point, however, is not that the allegation of murder here should necessarily weigh more heavily than torture in *Rasul* or murder and torture in *Sanchez-Espinoza*, but that the new allegations and changed circumstances of this case in their totality, including the

cover-up, cannot leave the Court convinced that Plaintiffs' *Bivens* claims would necessarily be foreclosed by *Rasul II*'s special factors holding.

Defendants also outline three additional "special factors" they argue should counsel hesitation: "1) the constitutional commitment of national security and foreign policy to the political branches of government; 2) Congress's refusal to provide a damages remedy for aliens detained abroad despite careful attention to the treatment of those detainees; and 3) the impact such a remedy could have on the military's effectiveness," which they raised in their motion to dismiss Plaintiffs' constitutional claims. Ind. Defs.' Opp. at 13 (citing Ind. Defs.' Mot. to Dismiss at 8-17). Plaintiffs addressed these arguments in their opposition to Defendants' motion, which they incorporate herein. *See* Pls.' Mem. Opp. at 50-55 (dkt. no. 19).

2. Qualified Immunity

It is similarly not clear that Defendants would necessarily be entitled to qualified immunity. *Rasul* is not controlling here because it addressed the state of clearly-established law as of 2004, and Plaintiffs submit that significant legal developments occurred between 2004 and 2006 that would have fairly given notice to Defendants by June 2006 that murdering detainees in U.S. custody at the U.S. military base at Guantánamo Bay was unconstitutional.

As outlined in Plaintiffs' motion for reconsideration, by the time of Defendants' alleged conduct, the state of the law was at least informed by: the Supreme Court's landmark decision in *Rasul v. Bush* in June 2004, which dispelled the notion that Guantánamo was a legal black hole and that detainees had no rights, and indeed suggested that detainees can assert constitutional violations, 542 U.S. 466, 483 n.15 (2004); the passage of the Reagan Act in October 2004, noting that the U.S. Constitution prohibits the torture and cruel, inhuman

and degrading treatment of foreign prisoners in U.S. custody, *see* Ronald W. Reagan National Defense Authorization Act for Fiscal Year 2005, Pub. L. No. 108-375, § 1091,)).§§ 1091(a)(6),(8) and 1091 (b)(1)-(3), 118 Stat. 1811, 1091 (codified at 10 U.S.C. § 801 note (2005)); and U.S. State Department reports filed with the United Nations Committee Against Torture outlining the legal and policy positions of the U.S. government with respect to torture and confirming that the United States treats detainees in its custody in accordance with the standards of the Constitution, *see, e.g.*, United States Written Response to Questions Asked by the Committee Against Torture 20, 24 (April 28, 2006).

While Defendants argue that neither the Supreme Court nor the D.C. Circuit had held by 2006 that Guantánamo detainees have constitutional rights, that fact is not dispositive of qualified immunity. *See Fletcher v. United States Parole Comm'n*, 550 F. Supp. 2d 30, 43 (D.D.C. 2008) (citing *Hope v. Pelzer*, 536 U.S. 730, 739 (2002)) ("[t]he absence of a Supreme Court or circuit decision is not, as defendants suggest, by itself dispositive of qualified immunity"); *see also Navab-Safavi v. Broad. Bd.*, 650 F. Supp. 2d 40, 63 (D.D.C. 2009) (quoting Hope, 536 U.S. 730, 739) ("clearly established does not mean that the very action in question has previously been held unlawful"); *id*. at 63 (quoting *Freeman v. Fallin*, 310 F. Supp. 2d 11, 17 (D.D.C. 2004)) ("the Supreme Court has expressly rejected a requirement that previous cases be fundamentally similar, concluding that officials can still be on notice that their conduct violates established law even in novel factual circumstances").

Furthermore, contrary to Defendants' suggestion, while applicable case law provides one source for determining what rights are clearly established, it is not the exclusive body of law to which courts can turn. The Reagan Act and State Department reports were thus capable of putting Defendants on notice and informing the state of the law at the time for

clearly-established purposes. *See, e.g., Hope*, 536 U.S. 730, 743-44 (2002) (citing state correctional regulation as source of clearly established law); *Atherton v. D.C. Office of the Mayor*, 567 F.3d 672, 689 (D.C. Cir. 2009) ("State regulations may give rise to a constitutionally protected liberty interest if they contain substantive limitations on official discretion, embodied in mandatory statutory or regulatory language") (internal citations omitted); *Austin v. Dist. of Columbia*, 2007 U.S. Dist. LEXIS 34793, *30-31 (D.D.C. May 11, 2007) (examining standing general orders of the metropolitan police as sources of clearly established law); *Brosseau v. Haugen*, 543 U.S. 194, 199 (2004) ("Of course, in an obvious case, these standards can 'clearly establish' the answer, even without a body of relevant case law."); *Butera v. District of Columbia*, 235 F.3d 637, 652 n.17 (D.C. Cir. 2001) ("the Supreme Court made clear that, in evaluating whether the right at issue was clearly established, a court need not have found the very action in question unlawful in the past. Rather, a court must consider whether 'in the light of pre-existing law the unlawfulness [was] apparent.' To make this determination, however, the parties have pointed us to no source other than case law from the Supreme Court and the circuits") (internal citations omitted).

As Plaintiffs have consistently noted, obviously illegal or outrageous conduct can also be enough to put defendants on notice that their conduct was unconstitutional. The alleged conduct here would undoubtedly have done so. *Safford Unified Sch. Dist. #1 v. Redding*, 129 S. Ct. 2633, 2643 (2009) ("The unconstitutionality of outrageous conduct obviously will be unconstitutional, this being the reason, as Judge Posner has said, that '[t]he easiest cases don't even arise.'" (citation omitted); *Hope v. Pelzer*, 536 U.S. 730, 745 (2002) (rejecting qualified immunity because the "obvious cruelty inherent" in shackling prisoners to a hitching post on a hot day - along with a conclusion that the treatment was "antithetical to human dignity" - was

sufficient to put defendants on notice of a constitutional violation despite the absence of a decision establishing the unconstitutionality of the conduct).

Defendants cite *Kiyemba v.* Obama, 555 F. 3d 1022 (D.C. Cir. 2009), for the proposition that Plaintiffs' sons had no Fifth Amendment rights at the time of their deaths. But to the extent that *Kiyemba* addresses the power of the Judiciary to order the Executive to release Guantánamo detainees into the United States, it is irrelevant to this case. The Circuit's discussion of detainees' due process rights furthermore has no precedential force because the Supreme Court vacated the holding as moot. *See Al Odah v. United States*, 321 F.3d 1134, 1143 (D.C. Cir. 2003); *City of Roseville v. Norton*, 219 F. Supp. 2d 130, 155 (D.D.C. 2002) ("[T]he Court notes that the [court of appeals decision] was vacated [by the Supreme Court], albeit on other grounds, and, therefore, has no precedential value."). This Court's alternate reasoning on qualified immunity in its prior judgment is additionally not a bar to Plaintiffs' claims, because the Court's treatment of the issue was "unnecessary to the decision," which was premised on finding that special factors counsel hesitation, and thus dicta. *Lawson v. United States*, 176 F.2d 49, 51 (D.C. Cir. 1949).

B. <u>42 U.S.C. § 1985(3)</u>

Under subsections (2) and (3) of 42 U.S.C. § 1985, the relevant bases of liability under the act are allegations (and ultimately evidence) of:

1. A conspiracy to deprive (directly or indirectly) persons of the equal protection of the law, in any state or territory; that is
2. Motivated by an invidious racial or class based animus; and intended
3. To obstruct or prevent a person from acting as a party or witness to enforce rights of equal protection; or
4. Simply to injure any person.

Plaintiffs have clearly alleged these elements. They have alleged a conspiracy, in part, located in Washington, D.C., to create a "black site" at Guantanamo, "as a secret detention

facility, to be kept as a secret from everyone, including other government officials" and the existence of which was to be denied by those military personnel who had knowledge of it. Pls.' Proposed Second Am. Compl. ¶ 103. They further knew that "lethal" assaults occurred at Camp No. *Id.* at ¶ 219. There are numerous allegations in the complaint that point to detailed evidence of the racial and/or class based animus that infused this conspiracy. *See, e.g., id.* ¶¶ 105, 108. In addition, this conspiracy precluded Al-Zahrani and Al-Salami from testifying as witnesses and potential parties in numerous proceedings, their own *habeas* applications, those of other detainees, Combatant Status Review Tribunals and military tribunals/military commissions. 42 U.S.C. §1985(2). And finally, alternatively, as a result of this animus based conspiracy, Defendants caused injury to the persons of Al-Zahrani and Al-Salami. 42 U.S.C. § 1985(3).

Defendants make various claims in an attempt to oppose Plaintiffs' proposed additional count under 42 U.S.C. § 1985, two of which merit a response. First, they claim such an amendment is futile because there is a territorial limitation in the statute that precludes its application to these alleged acts and to these Plaintiffs. Second, they claim that such an action is precluded by the doctrine of qualified immunity.

These arguments are readily dispensed with. As to the alleged geographical limitation of this statute, Defendants concede that the statute applies to any "State or Territory." However they argue that the meaning of "territory," as intended by Congress in the Civil Rights Act of 1871, "presumably" was not the same as that identified in *Boumediene v. Bush,* 128 S. Ct. 2229 (2008). It is understandable why the Government attempts to so argue, since in that case the court clearly held that the Guantanamo Bay Naval Base in Cuba was indeed a *de facto* and juridical "territory" of the United States.

> Indeed, it is not altogether uncommon for a territory to be under the de jure sovereignty of one nation, while under the plenary control, or practical sovereignty, of another. This condition can occur when a territory is seized during war, as Guantanamo was during the Spanish-American War.

Id. at 2252

The government provides no authority for its contention that "presumably" the Congress of 1871 intended something entirely different, when it legislated against certain conspiracies in any "State or Territory," than the meaning gleaned from the plain meaning of those words. The reason for such a strained claim by the government is that it must somehow overcome the standard black letter rule that statutes are to be understood, if at all possible, within their plain meaning. *See, e.g., BP America Production Co. v. Burton,* 549 U.S. 84, 101 (2006).

Further, the government seeks to twist the allegation contained in the proposed Amended Complaint that the conspiracy, in part, occurred in the District of Columbia. It claims that this demonstrates Plaintiffs' recognition of weakness in their claim. Rather, it is simply based, again, on a plain reading of § 1985. That statute establishes liability whenever there is a *conspiracy* in any State or Territory, not, as in *Sosa v. Alverez-Machain,* 542 U.S. 692 (2001),[5] where it was claimed, in part, that the tort arose and therefore the cause of action accrued in the United States. As this Court well knows, having based its earlier ruling on this issue, under the FTCA, a there is a territorial limitation based on where the injury occurs. § 1985 expands its territorial reach to any injury that results from a conspiracy located in "any

[5] In fact, in general Defendants' reliance on *Sosa* is misplaced. That case focuses on where the injury occurred (most egregious in Mexico, more mundane in the United States) see *Sosa v. Alverez-Machain, supra*, at 703 -708. There was judicial of where the conspiracy occurred as a basis for liability.

State or Territory." This significantly broadens the territorial reach of this statute, as distinguished from the FTCA.

Given new evidence, which form the basis of Plaintiffs' request to amend and add a claim under 42 U.S.C. § 1985, there is certainly now a good faith basis for this allegation, due to the new information regarding the establishment of a secret location for holding, detaining, interrogating, torturing and, indeed, executing, prisoners. It is now revealed that this information was concealed from Guantanamo military personnel and, if discovered by them, was not to be discussed. Given the scope and implications of such a conspiracy, it begs credulity that such a plan was not hatched in Washington D.C., possibly outside of the Department of Defense and outside the chain of command at Guantanamo.

The second defense the Government puts forward to the proposed Amended Complaint is that of qualified immunity. That the Government asserts this defense reflects the weakness of its opposition to Plaintiffs' attempt to amend this complaint. Qualified immunity, designed to protect public officials acting under color of law, originated with the case of *Harlow v. Fitzgerald,* 457 U.S. 800 (1982):

> We therefore hold that government officials performing discretionary functions generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.

Id. at 818.

In *Harlow,* the Supreme Court made clear that the doctrine would be bootstrapped into § 1983, also part of the Civil Rights Act of 1871, since state and local public officials are entitled to the same protection as federal officials. However, the qualified immunity defense, one with enormous implications (including an automatic interlocutory appeal, *Mitchell v. Forsyth*, 472 U.S. 522 (1985)) was not extended to any other statute, nor to any other group of

defendants. Indeed this is logical, in that 42 U.S.C. § 1983 require that public officials act "under color of law" before liability can be imposed. Further, it was federal legislation that was grounded and authorized by the Fourteenth Amendment. *Monroe v. Pape,* 365 U.S. 167 (1961). As a consequence, only public officials and those conspiring with them to violate the Constitution, may be held liable under that statute, i.e. § 1983 imposes a "state action" requirement.

Significantly and quite distinctly, there is no "state action" requirement under § 1985. Whether a §1985 Defendant is a public official or private is irrelevant because § 1985 is grounded on a very different Amendment than § 1983, the Thirteenth Amendment. Thus, this statute imposes liability for certain kinds conduct, regardless of whether it is public in nature. The Defendant need not have acted under color of law in order to be held liable. *Griffin v. Breckenridge,* 403 U.S. 88 (1971).

The significance of this distinction is twofold – first, assuming a conspiracy, either class based or based on an invidious racial animus, the intended sweep of liability under § 1985 is considerably broader than that of § 1983. It can reach conduct, whether under color of law or not. As a consequence, the need to shield the discretionary functions of public officials is not protected or intended to be protected; and, second, that the statutory prohibition action resulting from such a conspiracy, is clearly established and presumed by the statute itself.

In addition, it must be noted that there is *no authority* for the proposition that such a defense to a claim brought under § 1985, i.e. of qualified immunity, exists at all. Indeed, the

only authority to which defendants can point is in a dissent by Judge Wald in *Bois v. Marsh,* 801 F.2d 462 (D.C. Cir.1986).[6]

Defendants, of course, do not bother to inform this Court of the rest of Judge Wald's opinion, with regard to §1985 actions, which is far more expansive than that advocated by the Defendants:

> The KKK Act is a broad civil rights law designed to provide a remedy for intentional torts (not negligence) against private persons (in addition to public ones) and represents the affirmative creation of a new cause of action (not merely the lifting of a ban on effecting existing rights). It is therefore not reasonable to infer that the KKK Act Congress meant to exclude the military by silence. Civil rights laws, unlike waivers of sovereign immunity, are generally construed broadly to further their obvious remedial purposes.

Id. at 475 n.5.

C. <u>ATS and D.C. Tort Law Claims</u>

It is also eminently clear that Plaintiffs' ATS claims would survive a motion to substitute and would not convert to FTCA claims subject to dismissal under the foreign country exception. As discussed at length in Section III, *supra*, Plaintiffs have presented new facts and allegations that at a minimum create a material dispute with respect to each prong of the Restatement Second Agency § 228 test cited by the government, if not demonstrate that Defendants' conduct, given the totality of the facts and circumstances, was outside the scope of employment. The government can only avoid this conclusion by misrepresenting and omitting facts in an attempt to argue that the new evidence does not plausibly support

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[6] Notably, Judge Wald came to no conclusion with regard to whether is such a defense in § 1985 actions. She simply poses that possible defense as a potential implication of allowing such a claim to go forward, as would have occurred had her dissent been the majority and controlling opinion: "(T)he doctrine of qualified immunity… provides officials who have acted in objective good faith, which includes unconstitutional behavior that at the time was not clearly established as such, with a cloak of protection against litigants." *Bois, supra* at 477.

Plaintiffs' allegations and would not be sufficient to rebut the government's certification – which, as noted previously, was made five months before DOJ's own inquiry into the allegations had concluded.

As an additional matter, while the government lumps Plaintiffs' new ATS claim for extrajudicial execution and D.C. tort law claim for spoliation of evidence together with Plaintiffs' other non-constitutional tort claims and argues that they, too, would be subject to the Westfall Act and subsequently dismissed pursuant to the FTCA, *see* U.S. Opp. at 21-22, the new claims have not actually been certified by the Attorney General or his designee. Certification pursuant to the Westfall Act is required to substitute the United States for the individual defendants, *see* 28 U.S.C. § 2679(d)(1), and a certification as to some conduct may not be simply transferred to other conduct. *See* 28 U.S.C. § 2679(d) (discussing certification not of an entire case but of "the incident out of which the claim arose"); *Rasul v. Myers*, 512 F.3d 644, 661 n.11 (D.C. Cir. 2008) (quoting *Lyons v. Brown*, 158 F.3d 605, 607 (1st Cir. 1998)) ("where a single case involves multiple claims, [Westfall] certification is properly done at least down to the level of individual claims and not for the entire case viewed as a whole"). Without and until proper certification of Plaintiffs' additional claims, there is no presumption that Defendants' conduct was within the scope of employment, substitution pursuant to the Westfall Act cannot occur, and the claims cannot convert to FTCA claims. At this stage of considering Plaintiffs' motion to amend, it therefore cannot be presumed that Plaintiffs' new claims would necessarily convert to FTCA claims and be subject to dismissal under the foreign country exception. Amendment is therefore not futile on this point alone.

Even if the claims were to be converted, the government's arguments for futility merit only brief mention. With respect to the claim that Plaintiffs have failed to fulfill the

exhaustion requirement, Plaintiffs reiterate, as they stated in their motion for reconsideration, their intention to file administrative claims with the appropriate agencies for tortious spoliation of evidence and extrajudicial execution. As to the argument that the new claims would be barred by the foreign country exception to the FTCA, a spoliation claim by definition seeks redress for harm to "the ability to prove the potential civil action." *Holmes v. Amerex Rent-A-Car*, 180 F.3d 294, 297 (D.C. Cir. 1999) (internal citations omitted); *see also West v. Goodyear Tire & Rubber Co.*, 167 F.3d 776, 779 (2nd Cir. 1999) (citing Black's Law Dictionary 1401 (6th ed.1990)) ("Spoliation is the destruction or significant alteration of evidence, or the failure to preserve property for another's use as evidence in pending or reasonably foreseeable litigation"). The civil action harmed by Defendants' alleged spoliation of evidence is this action, located in the District of Columbia. The government thus cannot argue that the claim would be barred by the foreign country exception to the FTCA, and amendment would not be futile.

For the foregoing reasons, Plaintiffs' Motion for Reconsideration in Light of Newly-Discovered Evidence and Motion for Leave to Amend should be granted.

Dated: May 3, 2010

Respectfully submitted,

_/s/ Pardiss Kebriaei____________________

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