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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

SALEH, an individual; SAMI ABBAS AL RAWI, an individual; MWAFAQ SAMI ABBAS AL RAWI, an individual; AHMED, an individual; ISMAEL, an individual; NEISEF, an individual; ESTATE OF IBRAHIEM, the heirs and estate of an individual; RASHEED, an individual; JOHN DOE NO. 1; JANE DOE NO. 2; A CLASS OF PERSONS SIMILARLY SITUATED, KNOWN HEREINAFTER AS JOHN and JANE DOES NOS. 3-1050,

Plaintiffs,

v.

TITAN CORPORATION, a Delaware Corporation; ADEL NAHKLA, a Titan employee located in Abu Ghraib, Iraq; CACI INTERNATIONAL INC., a Delaware Corporation; CACI INCORPORATED-FEDERAL, a Delaware Corporation; CACI N.V., a Netherlands corporation; STEPHEN A. STEFANOWICZ, and JOHN B. ISRAEL,

Defendants.

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

MEMORANDUM OF POINTS AND AUTHORITIES OF DEFENDANT CACI INTERNATIONAL INC IN OPPOSITION TO PLAINTIFFS' MOTION FOR A PRELIMINARY INJUNCTION

DATE: **TO BE DETERMINED**
TIME: **TO BE DETERMINED**
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I. INTRODUCTION

More than fifty years ago, the United States Supreme Court disavowed the judiciary's capacity to set military policy:

> [J]udges are not given the task of running the Army. . . . 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.

Orloff v. Willoughby, 345 U.S. 83, 93-94 (1953). Yet Plaintiffs ask this Court to appoint itself as a roving commission to make the complex professional military judgment as to the quantum of training that should be required of civilian interrogators before the United States military may employ them in Iraq. Indeed, Plaintiffs, not one of which is a United States citizen and not one of which is currently detained in Iraq, ask this Court not only to *establish* the training requirements for civilian interrogators in Iraq, but to *overrule* the job qualifications established by the United States armed forces. There is hardly an area of professional judgment that is less appropriate for judicial intervention than decisions going to the prospective composition and training of personnel to serve with the armed forces in a combat environment, and the law could not be clearer on that point. Plaintiffs' motion is more a publicity stunt by Susan Burke and her firm than a *bona fide* request.

The circumstances under which Plaintiffs bring this motion demonstrates its futility. First, by Plaintiffs' own account, not a single one of the named Plaintiffs is even in the custody of the United States, meaning that the named Plaintiffs lack any claim of standing to assert this motion. Moreover, Plaintiffs' proposed factual premise for this motion collapses under the weight of its illogic. Plaintiffs seek to impose judge-made restrictions on the ability of CACI

International Inc ("CACI")[1] to furnish interrogators to the United States in support of the war effort in Iraq based not on the CACI's conduct, but on hearsay statements of recent abuses that Plaintiffs admit that they cannot even tie to CACI. As Plaintiffs concede in their brief:

> Neither the individual Class Plaintiffs tortured in July nor Plaintiffs' counsel have yet to ascertain what role, ***if any***, CACI interrogators played in their personal tragedies. ***Indeed, CACI interrogators may not even have been located at the particular facility where those events occurred.***

Pl. Mem. at 9 (emphasis added). Incredibly then, Plaintiffs ask this Court to wade into the subtle, complex area of professional military operations in order to oversee CACI's provision of interrogators in Iraq based on a hearsay allegation that someone other than the named Plaintiffs was abused by someone at a facility where CACI very well might not even have any interrogators.

CACI has at all times provided highly trained and qualified interrogators in support of the United States military's mission in Iraq, and is proud of the patriotic service that its employees have rendered. In fact, while Plaintiffs discuss the myriad investigations of the misconduct that took place at Abu Ghraib prison, they disingenuously fail to advise the Court that the interrogators provided by CACI without exception satisfied all of the job requirements established by the military in the relevant statement of work. *See* Pl. Mem., Ex. C at 89 (Army Inspector General Report) ("In summary, contract interrogators in [Operation Iraqi Freedom] met the requirements of the CJTF-7 C2 Interrogation Cell [Statement of Work]."). But the salient – and dispositive – point with respect to Plaintiffs' motion is not that CACI's

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[1] Plaintiffs have directed this motion at Defendant CACI International Inc, even though the corporate entity that actually has a contract with the United States government to provide interrogators in support of the war effort in Iraq is a subsidiary of CACI that is not a party to this action.

interrogators were in fact highly trained, but that it is the role of the political branches and not the courts to make the judgment as to the amount and types of training that should be required of civilian interrogators supporting the war effort in Iraq. Because the training requirements of interrogators deployed in Iraq is a matter reserved to the professional judgment of the political branches, the Court should summarily deny Plaintiffs' motion.

II. FACTS

The facts involved in this motion are uncomplicated and, because Plaintiffs' motion fails as a matter of law, ultimately irrelevant. The political question doctrine and Plaintiffs' lack of standing dooms Plaintiffs' motion under any set of facts.

A subsidiary of CACI has a contract to provide civilian interrogators to support the United States military in Iraq. *See* Pl. Mem., Ex. I. That contract, which runs through December 2004, replaces prior interrogation delivery orders that were set to expire. *Id.* CACI's contract includes a statement of work that sets forth the United States' requirements for a CACI employee to qualify for work as an interrogator under the contract. Notably, under the prior interrogation delivery orders, which included a different statement of work, the Army Inspector General found that all persons hired by CACI as an interrogator satisfied the requirements set forth in the statement of work. *See* Pl. Mem., Ex. C at 89 ("In summary, contract interrogators in [Operation Iraqi Freedom] met the requirements of the CJTF-7 C2 Interrogation Cell [Statement of Work].").

Plaintiffs' motion seeks extraordinary relief and judicial involvement in the war effort. First, Plaintiffs ask the Court to establish specific training requirements for CACI employees deploying to Iraq, though, oddly, not for any other interrogators that might deploy to Iraq. Then, Plaintiffs ask the Court to require CACI to provide Plaintiffs with copies of the resumes

of all persons currently serving as interrogators in Iraq, and to provide Plaintiffs with resumes and employment records for any person CACI desires to deploy to Iraq under its contract with the United States. Under Plaintiffs' proposed order, Plaintiffs, a collection of non-U.S. citizens, would have the power to approve or disapprove of particular interrogators – even though they meet the military's requirements as stated in CACI's contract – with the Court becoming involved in all "challenges" to decide who may and who may not deploy as an interrogator to Iraq on a case-by-case basis. The extraordinary relief that Plaintiffs seek, which would place the Court in the untenable position of overseeing the Iraqi war effort on a daily basis, is far outside the type of relief that this Court has the power to grant.

III. ANALYSIS

A. Plaintiffs' Motion Presents a Nonjusticiable Political Question

Plaintiffs' motion overtly asks this Court to sit in judgment of the decisions the United States military has made in establishing the level of training required for interrogators supporting the United States' war effort in Iraq. Because Plaintiffs' motion essentially asks this Court to appoint itself as a *de facto* Secretary of Defense overseeing the war effort, the Court must deny Plaintiffs' motion as presenting a nonjusticiable political question.

In *Baker v. Carr*, 369 U.S. 186 (1962), the Supreme Court set forth the controlling standards for determining whether a case raises a nonjusticiable political question. After reviewing the doctrine's history, the Court noted that cases raising political questions generally have one or more of the following characteristics:

> (1) a textually demonstrable constitutional commitment of the issue to a coordinate political department;
>
> (2) a lack of judicially discoverable and manageable standards for resolving it;
>
> (3) the impossibility of deciding without an initial policy determination of a kind clearly for non-judicial discretion;

(4) the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government;

(5) an unusual need for unquestioning adherence to a political decision already made; or

(6) the potentiality of embarrassment from multifarious pronouncements by various departments on one question.

Id. at 217. If any "one of these formulations is inextricable from the case," the Court must dismiss the case as presenting a nonjusticiable political question. *Id.*; *United States v. Mandel*, 914 F.2d 1215, 1222 (9th Cir. 1990).

While it is true that not every case having a foreign affairs or wartime connection presents a political question, the political question doctrine unquestionably has widespread application to "questions touching foreign relations." *Baker*, 369 U.S. at 211; *see also United States v. Curtiss-Wright Corp.*, 299 U.S. 2304, 320 (1936) (noting that the political question doctrine distinguishes between cases involving foreign relations and those involving domestic issues); *United States v. Martinez*, 904 F.2d 601, 602 (11th Cir. 1990) (observing that "the political question doctrine routinely precludes judicial scrutiny" of foreign affairs issues). Rather than automatically holding that any suit relating in any way to foreign relations presents a nonjusticiable political question, the Court instead must undertake a "discriminating analysis of the particular question posed, in terms of the history of its management by the political branches, its susceptibility to judicial handling in light of its nature and posture in the specific case, and the possible consequences of judicial action." *Baker*, 369 U.S. at 211-12.

The present action fits squarely within the class of cases touching on foreign relations to which the political question doctrine applies. Plaintiffs ask this Court to veto the United States military's considered judgment as to the appropriate level of training for contract interrogators in Iraq. As the Supreme Court has flatly held, decisions concerning the composition and

training of a fighting force are professional military judgments that should be left to the political branches of government not only because of their superior expertise in such matters, but also because of their periodic electoral accountability. Judicial interference into the manner in which the United States conducts a war – particularly with respect to a motion that seeks to limit the United States' wartime options for obtaining interrogator support – infringes upon subjects constitutionally committed to Congress and the President, demonstrates a lack of respect for coordinate branches of government, creates the risk of inconsistent pronouncements by different branches of government, and involves the Court in an area that lacks any judicially discoverable and manageable standards. For these reasons, the Court should follow the clear precedent in this regard and decline to second-guess the political branches' decisions concerning the training requirements for interrogators.

1. Supreme Court Precedent Clearly Prohibits Judicial Intervention into Military Judgments Concerning Appropriate Training Standards

Plaintiffs' preliminary injunction motion treads upon ground conclusively covered by the United States Supreme Court more than thirty years ago. In *Gilligan v. Morgan*, 413 U.S. 1, 3 (1973), a case Plaintiffs inexplicably fail to cite, students at Kent State University filed suit against officials charged with overseeing the Ohio National Guard, the lawsuit coming after four students died as a result of gunfire from Ohio National Guardsmen on Kent State's campus. The lawsuit asked the district court to review the adequacy of the training and operation of the Ohio National Guard. As characterized by the Supreme Court:

> Respondents continue to seek for the benefit of all Kent State students a judicial evaluation of the appropriateness of the "training, weaponry and orders" of the Ohio National Guard. They further demand . . . that the District Court establish standards for the training, kind of weapons and scope and kind of orders to control the actions of the National Guard. Respondents contend that thereafter the District Court must assume and exercise a

> continuing judicial surveillance over the Guard to assure compliance with whatever training and operations procedures may be approved by that court.

Id. at 5-6. The Supreme Court held that the relief sought by the students – establishment and oversight of training and operations requirements of the Ohio National Guard – fell squarely within the political question doctrine.

The *Gilligan* Court began its political question analysis by observing that the United States Constitution vests control of the National Guard in Congress and the President. As a result, the Court acknowledged that "[t]he relief sought by respondents, requiring initial judicial review and continuing surveillance by a federal court over the training, weaponry and orders of the Guard, would therefore embrace critical areas of responsibility vested by the Constitution in the Legislative and Executive Branches of the Government." *Id.* at 7. Having thus framed the issue, the Court noted that it would be inappropriate for a district court to establish prospective training and operational requirements for military forces *even if* the court had some degree of expertise in this area:

> Trained professionals, subject to the day-to-day control of the responsible civilian authorities, necessarily must make comparative judgments on the merits as to evolving methods of training, equipping, and controlling military forces with respect to their duties under the Constitution. It would be inappropriate for a district judge to undertake this responsibility in the unlikely event that he possessed requisite technical competence to do so.

Id. at 8. Finally, the Court capped off its decision in *Gilligan* with a broad recognition that professional military judgments in matters of training and operations are subject to review only by the political branches of government, with the federal courts having no place in reviewing such decisions:

> It would be difficult to think of a clearer example of the type of governmental action that was intended by the Constitution to be left to the political branches directly responsible – as the Judicial

> Branch is not – to the electoral process. Moreover, it is difficult to conceive of an area of governmental activity in which the courts have less competence. The complex, subtle, and professional decisions as to the composition, training, equipping, and control of a military force are essentially professional military judgments, subject always to civilian control of the Legislative and Executive Branches. The ultimate responsibility for these decisions is appropriately vested in branches of the government which are periodically subject to electoral accountability. It is this power of oversight and control of military force by elected representatives and officials which underlies our entire constitutional system.

Id. at 10.

Nevertheless, Plaintiffs ask this Court to issue an order precisely of the type rejected in *Gilligan*: an order that prohibits the United States military from deploying a CACI contract interrogator to Iraq unless the prospective interrogator meets the training criteria established *by this Court*. Such a usurpation of the prerogatives of the political branches cannot be squared with the Court's holding in *Gilligan*.

Just as control of the National Guard is constitutionally vested in the political branches, the powers to control the armed forces and to wage war are vested in Congress and the President. Article I of the Constitution grants Congress the powers to declare war, to "provide for the common Defence," to "raise and support Armies," to "provide and maintain a Navy," and to "make Rules for the Government and Regulation of the land and naval Forces." U.S. Const. art. I, § 8, cls. 1, 11, 12, 13, 14. The President's power to regulate the armed forces and the conduct of war flows from Article II of the Constitution, which appoints the President as "Commander in Chief of the Army and Navy of the United States." U.S. Const. art. II, § 2, cl. 1; *see also Sale v. Haitian Centers Council, Inc.*, 509 U.S. 155, 188 (1993) (noting that the President has "unique responsibility" for the conduct of "foreign and military affairs").

Moreover, while Plaintiffs may disingenuously characterize their motion as one seeking "a narrow and limited injunction," Pl. Mem. at 9, the reality is that Plaintiffs ask this Court to

take the extraordinary and unprecedented step of substituting its own judgment as to the appropriate minimum training requirements of interrogators serving with the armed forces for the considered judgment of the armed forces in establishing its own criteria. Indeed, Plaintiffs' proffered "justification" for judicial intervention is precisely the same as that offered by the students in *Gilligan*: that alleged past misconduct was the predictable outcome of training norms and that the establishment of training requirements by the federal courts was necessary to prevent future misconduct. *Compare Gilligan*, 413 U.S. at 4 (framing the issue as whether "there was a pattern of training, weaponry and orders in the Ohio National Guard which singly or together require or make inevitable the use of fatal force in suppressing civilian disorders") *with* Pl. Mem. at 5 (asserting that "torture during interrogations conducted by untrained interrogators is a foreseeable and predictable result"). However, the *Gilligan* Court refused to consider the merits of this argument – and rejected the Sixth Circuit's willingness to entertain this argument – because the degree of training appropriate for a military force is a professional military judgment that must be left to the considered judgment of the political branches. *Gilligan*, 413 U.S. at 10.

The argument for nonjusticiability is, if anything, even stronger here. In *Gilligan*, the Ohio National Guard was operating domestically in time of peace, but the Court still found the students' claims nonjusticiable because the relief sought infringed on the political branches' power to regulate the armed forces. In the present action, by contrast, Plaintiffs seek to dictate the training requirements established by the armed forces for deployment of personnel in time of war into a combat theater. Thus, Plaintiffs' motion infringes not only on the political

branches' general powers to set military policy, but also seeks judicial restriction of the choices available to Congress and the President in time of war.[2]

Presumably, Plaintiffs will seek to distinguish *Gilligan*, and explain away their inexcusable failure to bring that case to the Court's attention, by asserting that they are seeking to impose requirements on CACI and not on the armed forces. Such an argument, however, ignores the reality of the relief Plaintiffs seek. The United States government already has a contract with CACI that sets forth the training and experiential requirements for the interrogators performing under that contract. *See* Pl. Mem., Ex. I (detailing award of CACI's current interrogator contract for Iraq). Any pronouncement by this Court of new, judge-made training requirements for CACI interrogators deploying to Iraq does not just restrict CACI, but also prohibits the United States government from accepting interrogators from CACI that the government has determined meet all of the necessary qualifications for performing under the contract. The Ninth Circuit has rightly held that a plaintiff cannot avoid prohibitions on suing the United States government by directing its suit instead at a defense contractor, and the same analysis applies here. *McKay v. Rockwell Int'l Corp.*, 704 F.2d 444, 449 (9th Cir. 1983) ("To permit [petitioner] to proceed . . . here would be to judicially admit at the back door that which has been legislatively turned away at the front door." (quoting *Stencel Aero Eng'g Corp. v. United States*, 431 U.S. 666, 673 (1977))). *Gilligan* explicitly holds that the federal courts have no power to establish prospective training requirements for the United States military, and

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[2] The Supreme Court recently observed that arrest and detention activities in a combat theater "by 'universal agreement and practice,' are 'important incidents of war.'" *Hamdi v. Rumsfeld*, 124 S. Ct. 2633, 2640 (2004) (citing *Ex parte Quirin*, 317 U.S. 1, 28 (1942)). Thus, the manner in which detainees in Iraq are held and interrogated is a central part of the political branches' war powers.

Plaintiffs cannot obtain the same result by directing their motion at the contractor providing the interrogators instead of the government entities receiving the interrogators.

2. There Are No Judicially Discoverable and Manageable Standards for Evaluating the Relief Plaintiffs Seek

As the *Gilligan* Court noted, judicial involvement in establishing military training requirements implicates the political question doctrine not only because the power to wage war and control the military are constitutionally vested in the political branches, but also because establishing training norms is a professional military judgment outside the judiciary's competence. *See Gilligan*, 413 U.S. at 10 (noting that "it is difficult to conceive of an area of governmental activity in which the courts have less competence . . . [than making the] complex, subtle, and professional decisions as to the composition, training, equipping, and control of a military force"). In order to make this determination – mindful that the United States continues to be involved in daily combat operations in Iraq – the Court would have to assess not only the relative merits of different types of training, but also to weigh the benefits of particular types of proffered job qualifications against the current and future intelligence-gathering needs of the United States military in Iraq, a need that likely will wax and wane over time. As the *Gilligan* Court recognized, this balance is best struck by the political branches that are regularly accountable to the voting public. *Id.*

In assessing the merits of Plaintiffs' motion, the Court would have to (1) make an additional determination whether the level of training required of CACI interrogators by the armed forces is appropriate, and (2) if the Court determined that the training requirements set by the military were inadequate, write its own training curriculum and impose it upon CACI and, as a practical matter, on the United States government. The *Gilligan* Court expressly rejected the notion that these were matters appropriate for judicial determination. *Id.* at 5-6

(noting that the *Gilligan* plaintiffs sought an initial judicial evaluation of the adequacy of the training requirements for the Ohio National Guard and continued judicial oversight of new standards).

The relief Plaintiffs seek also is unmanageable from a practical perspective. If the Court were to grant the relief sought by Plaintiffs, the Court presumably would have to review and approve the training curricula, and perhaps attend sessions to ensure that the training is conducted in a manner that the Court finds appropriate. Plaintiffs' proposed order would require CACI to provide resumes and employment files of prospective interrogators to *Plaintiffs*, a group of foreigners with no demonstrated loyalty to the United States or to the United States' war effort in Iraq, so that *Plaintiffs* can decide whether to object to CACI's provision of interrogators that meet all of the job requirements established by the United States government. *See* Pl. Proposed Order at 2. Thus, the injunction Plaintiffs seek would not only give Plaintiffs at least a temporary veto power over the United States' receipt of CACI interrogators, but would place yet another layer of review and delay on the provision of crucial interrogator assets to support the war effort in Iraq. Because Plaintiffs' motion presents the clearest of political questions, the Court should deny the motion on the basis of the Supreme Court's holding in *Gilligan*.

B. Plaintiffs Lack Standing to Seek This Preliminary Injunction

A federal court may not issue a preliminary injunction unless the party applying for such relief has standing. *Oakland Tribune, Inc. v. Chronicle Pub. Co., Inc.*, 762 F.2d 1374, 1376 (9th Cir. 1985). Moreover, "[p]ast exposure to illegal conduct does not in itself show a present case or controversy regarding injunctive relief . . . if unaccompanied by any continuing, present adverse effects." *O'Shea v. Littleton*, 414 U.S. 488, 494 (1974); *see also Rizzo v. Goode*, 423

U.S. 362, 371-72 (1976). The named Plaintiffs lack standing to enjoin CACI's provision of interrogators to Iraq for the simple reason that none of the named Plaintiffs is currently detained by the United States. As such, even if Plaintiffs could overcome the clear political question presented by their motion, they still would lack standing to dictate the training requirements for interrogators in Iraq.

The named Plaintiffs make no effort to contend that they are at risk of harm if their motion for injunctive relief is denied. *See* Pl. Mem. at 14 (arguing that the persons subject to irreparable harm are those who "remain imprisoned"). Instead, the named Plaintiffs contend that the fact that they have been released from detention is irrelevant, arguing that the Court should grant the injunction based on the supposed threat of irreparable harm to others whom Plaintiffs suggest may become members of a putative class. Indeed, the named Plaintiffs go so far as to state that the Court has the power to grant a class-wide preliminary injunction even in the absence of a certified class. Pl. Mem. at 13-14.

However, Plaintiffs' counsel, in apparent derogation of their ethical obligations,[3] failed to advise this Court that the Ninth Circuit has ruled definitively that a federal court may *not* issue class-wide injunctive relief prior to certification of a class. In *Zepeda v. INS*, 753 F.2d 719, 727 (9th Cir. 1985), the Ninth Circuit flatly rejected the argument that named plaintiffs in

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[3] *See* Fed. R. Civ. P. 11(b) ("By presenting to the court . . . a pleading, written motion, or other paper, an attorney or unrepresented party is certifying that, to the best of the person's knowledge, information, and belief, formed after an inquiry reasonable under the circumstances . . . the claims, defenses, and other legal contentions therein are warranted by existing law or by a nonfrivolous argument for the extension, modification, or reversal of existing law or the establishment of new law."); Cal. R. Prof. Conduct 5-200(B) ("In presenting matters, a member . . . [s]hall not seek to mislead the judge, judicial officer, or jury by an artifice or false statement of fact or law."); Pa. R. Prof. Resp. 3.3(a)(3) ("A lawyer shall not knowingly . . . fail to disclose to the tribunal legal authority in the controlling jurisdiction known to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel.").

a proposed class action could obtain preliminary injunctive relief for the benefit of putative class members prior to class certification:

> We vacate the preliminary injunction solely because it bars such practices not only against the individual plaintiffs before the court, but also against other individuals who are not before the court. Such broad relief is not necessary to remedy the rights of the individual plaintiffs; if the scope of the injunction is narrowed, there is no question that the individual plaintiffs will be protected from the INS's former practices. That is all the relief to which they are entitled. They are not entitled to relief for people whom they do not represent.

Id. at 728 n.1; *see also id.* (holding that "injunctive relief should be narrowly tailored to remedy the specific harms shown by plaintiffs, rather than to enjoin all possible breaches of the law" (quoting *Davis v. Romney*, 490 F.2d 1360, 1370 (3d Cir. 1974))); *Nat'l Center for Immigrants Rights, Inc. v. INS*, 743 F.2d 1365, 1371 (9th Cir. 1984) ("The INS asserts that in the absence of class certification, the preliminary injunction may properly cover only the named plaintiffs. We agree."). Thus, contrary to Plaintiffs' representation to the Court, the Court *cannot* issue a preliminary injunction in this action unless the named Plaintiffs would suffer irreparable harm in the absence of an injunction.

Because none of the named Plaintiffs is currently being detained by the United States government, they are not in danger of suffering *any* harm at the hands of anyone associated with United States detention facilities in Iraq. The only way that Plaintiffs could be subject to conduct – legal or otherwise – in a United States detention facility is to be arrested and detained by the United States government a second time at some point in the future. The United States Supreme Court has twice rejected the notion that a litigant could have standing to enjoin arrest procedures in the absence of evidence that the plaintiff was likely to be arrested again and subjected to the same procedures. *O'Shea*, 414 U.S. at 496 (holding that the respondents lacked standing to enjoin alleged illegal conduct in bond and sentencing proceedings because "the

prospect of future injury rests on the likelihood that respondents will again be arrested for and charged with violations of criminal law and will again be subjected to bond proceedings"); *see also City of Los Angeles v. Lyons*, 461 U.S. 95, 108 (1983) (holding that a plaintiff lacked standing to enjoin police use of chokeholds during arrests because of only speculative possibility that plaintiff would be arrested again and subjected to a chokehold). Here, Plaintiffs have failed to allege that they were abused in any way by CACI interrogators in the first instance, much less that they are (1) likely to be detained by the United States again, and (2) likely to be assigned to a CACI interrogator.

Thus, binding Ninth Circuit precedent limits the named Plaintiffs' right to a preliminary injunction to measures designed to avert irreparable harm *to them*, and the named Plaintiffs face no reasonable threat of *any* sort of interaction with personnel located at United States detention facilities in Iraq. Therefore, Plaintiffs' motion would have to be denied based on lack of standing even if Plaintiffs their motion did not present a nonjusticiable political question.

C. Plaintiffs, By Their Own Admission, Have No Evidence of Any Involvement By CACI Personnel in Ongoing Misconduct in Iraq

Beyond the nonjusticiable nature of their motion, Plaintiffs' motion also fails to draw *any* connection between CACI employees and the alleged continued abuses in Iraq. Indeed, Plaintiffs' supposed justification for the injunction they seek is a classic case of argument by non-sequitur. They claim, based on one untested hearsay statement, that there has been abuse of detainees in Iraq as recently as July 2004. Pl. Mem. at 9. From that premise, Plaintiffs claim that a solution is to impose training and experience restrictions on interrogators provided to the United States military by CACI, restrictions that would not be binding on any non-CACI interrogators. But Plaintiffs, by their own admission, do not have a scintilla of evidence to suggest that CACI employees were involved in the July 2004 abuse that they allege, or any

other recent or ongoing abuse for that matter. As Plaintiffs themselves are forced to concede in their brief:

> Neither the individual Class Plaintiffs tortured in July nor Plaintiffs' counsel have yet to ascertain what role, ***if any***, CACI interrogators played in their personal tragedies. ***Indeed, CACI interrogators may not even have been located at the particular facility where those events occurred.***

Pl. Mem. at 9 (emphasis added). Thus, Plaintiffs argument essentially is that the Court should issue an injunction against CACI, and only against CACI,[4] because *somebody* is alleged in a hearsay statement to have abused detainees in July 2004 at a facility *where CACI interrogators might not even be located.* The law is clear that a preliminary injunction is an extraordinary remedy to be issued only when necessary to preserve the status quo. *See* 11A Charles A. Wright, et al., *Federal Practice & Procedure* § 2942, at 43 (2d ed. 1995) ("Since an injunction is regarded as an extraordinary remedy, it is not granted routinely."). It would abuse this remedy for the Court to grant a preliminary injunction against CACI where Plaintiffs claim that *somebody else* suffered abuse as a detainee in July 2004 and that, for all Plaintiffs are aware, CACI personnel had no involvement whatsoever in that alleged abuse.

D. Plaintiffs Cannot Seek an Injunction Against CACI Because the United States is an Indispensable Party to this Motion

While Plaintiffs try to cast their motion as being one solely against CACI, it is clear that Plaintiffs are seeking to disrupt the interrogation contract between CACI and the United States.

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[4] The fact that this motion is directed only at CACI demonstrates the absurdity of Plaintiffs' position. Because Plaintiffs have one questionable hearsay statement alleging recent detainee abuse in Iraq, Plaintiffs ask the Court to establish training requirements for CACI interrogators. Not only is it true that, by Plaintiffs' own admission, Plaintiffs have no evidence of any involvement by CACI interrogators in the hearsay allegation of abuse, but Plaintiffs' motion would do nothing to prevent the United States from procuring interrogators from other companies whose interrogators would not have the level of training sought in Plaintiffs' motion.

Plaintiffs' motion asks this Court to prohibit CACI from providing – and necessarily prohibiting the United States military from receiving – interrogators who satisfy all of the training and experiential requirements dictated by the United States in that contract, unless the interrogators also satisfy additional training requirements established by this Court. It is black-letter law that all the parties to a contract are indispensable to any action seeking to rescind or alter that contract. *See Dawavendewa v. Salt River Project Agr. Imp. & Power Dist.*, 276 F.3d 1150, 1157 (9th Cir. 2002) (reaffirming "the fundamental principle [that] a party to a contract is necessary, and if not susceptible to joinder, indispensable to litigation seeking to decimate that contract."); *Clinton v. Babbitt*, 180 F.3d 1081, 1088 (9th Cir. 1999) ("[A] district court cannot adjudicate an attack on the terms of a negotiated agreement without jurisdiction over the parties to that agreement."); *Lomayaktewa v. Hathaway*, 520 F.2d 1324, 1325 (9th Cir. 1975) ("No procedural principle is more deeply imbedded in the common law than that, in an action to set aside a lease or a contract, all parties who may be affected by the determination of the action are indispensable.").

The United States has a clear interest in receiving – indeed, a contractual right to receive – interrogators from CACI who satisfy the requirements set forth in CACI's interrogation contract. Plaintiffs must add the United States as a party to any action that seeks to prohibit CACI from providing interrogators on the basis set forth in that contract. Therefore, even if Plaintiffs could overcome the other flaws in their motion, they would have to add the United States as a party before asking this Court to vary to terms under which CACI provides interrogators in support of the war effort in Iraq.

E. Plaintiffs Fail to Satisfy the Test for Issuance of a Preliminary Injunction

As discussed above, the Court need not even apply the test for issuance of a preliminary injunction because: (1) Plaintiffs' motion raises a nonjusticiable political question; (2) Plaintiffs

lack standing; (3) Plaintiffs have provided no connection between CACI and their hearsay allegation of recent detainee abuse in Iraq; and (4) Plaintiffs have failed to join an indispensable party. All of these infirmities are threshold flaws that mandate summary denial of Plaintiffs' motion. However, even if the Court were to ignore all of these fundamental flaws in Plaintiffs' motion, Plaintiffs *still* could not satisfy the test for issuance of a preliminary injunction.

The Ninth Circuit recently described as follows the criteria for deciding whether to issue a preliminary injunction:

> (1) the likelihood of the moving party's success on the merits; (2) the possibility of irreparable injury to the moving party if relief is not granted; (3) the extent to which the balance of hardships favors the respective parties; and (4) in certain cases, whether the public interest will be advanced by granting the preliminary relief. The moving party must show either (1) a combination of probable success on the merits and the possibility of irreparable harm, or (2) the existence of serious questions going to the merits, the balance of hardships tipping sharply in its favor, and at least a fair chance of success on the merits. These two formulations represent two points on a sliding scale in which the required degree of irreparable harm increases as the probability of success decreases.

Owner-Operator Indep. Drivers Ass'n v. Swift Transp. Co., Inc., 367 F.3d 1108, 1111 (9th Cir. 2004) (quoting *Miller v. Cal. Pac. Med. Ctr.*, 19 F.3d 449, 456 (9th Cir. 1994)). Here, Plaintiffs cannot satisfy any of the applicable tests because they can demonstrate no probability of irreparable harm and have no likelihood of success on the merits.

1. Plaintiffs Have No Likelihood of Irreparable Harm

As the Ninth Circuit has announced, in a line of cases not disclosed by Plaintiffs' counsel, the named plaintiffs in a proposed class action lawsuit can obtain a preliminary injunction based only on *their own* threat of irreparable harm and not based on the threat of irreparable harm to putative class members. *Zepeda*, 753 F.2d at 727; *Nat'l Center for Immigrants Rights*, 743 F.2d at 1371. Because none of the named Plaintiffs is currently being

detained by the United States government, there is no present threat of irreparable harm to these Plaintiffs based on the manner in which interrogations take place in United States detention facilities. Therefore, whether this deficiency is cast as a lack of standing or as one going to irreparable harm, the absence of any reasonable threat of harm to the named Plaintiffs is fatal to their motion. *See* Section II.B, *supra*.

2. Plaintiffs Are Not Likely to Prevail on the Merits

Plaintiffs do not even argue in their motion that they have established a likelihood of prevailing on their claims against CACI, instead arguing (incorrectly) that their risk of irreparable harm is so great that they should receive a preliminary injunction upon a lesser showing on the merits. Pl. Mem. at 10 (seeking issuance of a preliminary injunction only under the "alternative" test). For the reasons set forth in CACI's Memorandum of Points and Authorities in Support of its Motion to Dismiss Plaintiffs' Second Amended Complaint, which was filed on September 10, 2004 and is incorporated herein by reference, it is exceedingly likely that Plaintiffs will not advance beyond the *pleading stage*, much less establish at trial some far flung and improbable conspiracy between CACI, Titan Corporation, and elements of the United States government (including the Secretary of Defense).

F. Plaintiffs' Motion Should Be Resolved Summarily and in Short Order, Without a Hearing or Discovery

Plaintiffs' motion suffers from at least two fundamental infirmities that are both obvious and not susceptible to being remedied by taking discovery. First, the Supreme Court's decision in *Gilligan v. Morgan*, 413 U.S. at 10, is directly on point in holding that federal courts lack jurisdiction to entertain a motion seeking to impose prospective training requirements on personnel involved in military operations. *See generally* Section II.A, *supra*. The applicability of *Gilligan* is simply (and wholly) a function of the type of relief Plaintiffs seek, a subject that

is determined from the pleadings and not susceptible to factual development. The Court needs neither argument nor facts to determine that Plaintiffs seek an injunction that imposes training requirements on interrogators who may deploy with the United States military in support of the war effort in Iraq.

Second, binding Ninth Circuit and Supreme Court precedent demonstrate that Plaintiffs lack standing to seek this injunction. None of the named Plaintiffs is in United States custody, which makes any threat of harm to them, even if the Court were to accept Plaintiffs' distortion of the facts, speculative at best. Simply put, people who are not being interrogated cannot be injured by interrogators. *See* Section II.B, *supra*. There is only one relevant fact to the standing analysis, the fact – admitted by Plaintiffs – that they are not in United States custody. *See* Pl. Mem. at 13 ("Although the injunction protects class members rather than the representative plaintiffs . . . ."). Thus, the standing analysis becomes no more clear by holding a hearing or allowing Plaintiffs to take discovery.

Plaintiffs' counsel filed this motion as a publicity stunt, and failed to advise the Court of binding precedent running contrary to their position on both the political question doctrine and on standing. The Court should not permit Plaintiffs to continue to use their frivolous motion as a soapbox to turn this action into a public spectacle. There is no arguable claim that Plaintiffs have standing to assert this motion or that Plaintiffs' motion presents a justiciable controversy. Therefore, the Court should exercise its powers under Local Rule 7.1(d)(1) to deny Plaintiffs' motion without oral argument. CACI should not be required to continue to operate under threat of a preliminary injunction motion that is legally indefensible.

IV. CONCLUSION

For the foregoing reasons, the Court should summarily deny Plaintiffs' preliminary injunction motion.

Respectfully submitted,

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

SALEH, an individual; SAMI ABBAS AL RAWI, an individual; MWAFAQ SAMI ABBAS AL RAWI, an individual; AHMED, an individual; ESTATE OF IBRAHIEM, the heirs and estate of an individual; RASHEED, an individual; JOHN DO NO. 1; JANE DOE NO. 2; A CLASS OF PERSONS SIMILARLY SITUATED, KNOWN HEREINAFTER AS JOHN and JANE DOES NOS. 3-1050, Plaintiffs, v. TITAN CORPORATION, a Delaware Corporation; ADEL NAHKLA, a Titan employee located in Abu Ghraib, Iraq; CACI INTERNATIONAL INC., a Delaware Corporation; CACI INCORPORATED-FEDERAL, a Delaware Corporation; CACI N.V., a Netherlands corporation; STEPHEN A. STEFANOWICZ; and JOHN B. ISRAEL, Defendants.	Case No. 04-CV-1143 R (NLS) **CERTIFICATE OF SERVICE**

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I, the undersigned, hereby certify:

I am employed in the County of San Diego, State of California. I am over the age of 18 and not a party to the within action; my business address is 501 West Broadway, Suite 400, San Diego, California.

On October 20, 2004, in the manner specified on the mailing list, I served the documents described as:

MEMORANDUM OF POINTS AND AUTHORITIES OF DEFENDANT CACI INTERNATIONAL INC. IN OPPOSITION TO PLAINTIFFS' MOTION FOR A PRELIMINARY INJUNCTION

on the interested parties in this action addressed as follows:

SEE ATTACHED SERVICE LIST

❑ **(BY HAND)** On October 20, 2004 I delivered such envelope to the party listed above and left the envelope with the party, the receptionist or person in charge thereof between the hours of 9:00 a.m. and 5:00 p.m.

■ **(BY MAIL)** On October 20, 2004 I placed such envelope for collection, deposit and mailing with the United States Postal Service following ordinary business practices at my place of business. I am readily familiar with the business practice of my place of business for collection and processing of correspondence for mailing with the United States Postal Service. Correspondence so collected and processed is deposited with the United States Postal Service that same day in the ordinary course of business. I am aware that, on motion of party served, service is presumed invalid if postal cancellation date or postage meter date is more than one day after date of deposit for mailing an affidavit.

❑ **(BY FACSIMILE)** On October 20, 2004, I caused a true copy of the document(s) to be transmitted via facsimile to a facsimile machine maintained by the person on whom the document(s) is served. Facsimile service has been agreed upon by the parties. I am aware that the service is complete at the time of transmission, but any period of notice shall be extended after service by facsimile transmission by two court days.

❑ **(BY OVERNIGHT MAIL)** On October 20, 2004, at San Diego, California, I deposited such envelope in a box or other facility regularly maintained by an express service carrier, or delivered to a courier or driver authorized by this express service carrier to receive documents in an envelope or other package designated by this express service carrier, with delivery fees paid or provided for.

I certify that the above referenced documents filed with the Court in this matter were produced on paper purchased as recycled.

I certify and declare under penalty of perjury under the laws of the State of California that the above is true and correct.

Executed October 20, 2004 at San Diego, California.

Sue Baker

Sue Baker

SERVICE LIST

Rawi, et al. v. Titan Corp., et al.
Case No. 04-CV-1153 R (NLS)

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