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SUNDUS SHAKER SALEH

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SAN FRANCISCO DIVISION

SUNDUS SHAKER SALEH, et al.,

Plaintiffs,

vs.

GEORGE W. BUSH, et al.,

Defendants.

No. 3:13-cv-01124 JST

PLAINTIFF'S *OSBORN* MOTION FOR AN EVIDENTIARY HEARING IN SUPPORT OF SECOND AMENDED COMPLAINT

Date: August 27, 2014
Time: 2:00 p.m.
Dept: Courtroom 9, 19th Floor
Judge: The Honorable Jon S. Tigar

Trial Date: None Set
Action Filed: March 13, 2013

PLEASE TAKE NOTICE that on August 27, 2014 at 2:00 p.m., or as soon thereafter as counsel may be heard, Plaintiff will present her motion pursuant to *Osborn v. Haley*, 127 S. Ct. 881 (2007) and *Gutierrez de Martinez v. Lamagno*, 515 U.S. 417 (1995) before the Honorable Jon S. Tigar, United States District Court Judge for the Northern District of California.

Pursuant to *Osborn* and *Lamagno*, Plaintiff shall request an evidentiary hearing to challenge the certification of the Attorney General made in this case; or, in the alternative, an

order from the Court that it will assume the truth of the factual allegations in her complaint for purposes of challenging the certification.

Respectfully submitted,

Dated: June 8, 2014

COMAR LAW

By /s/ *Inder Comar*
D. Inder Comar
Attorney for Lead Plaintiff
SUNDUS SHAKER SALEH

MEMORANDUM OF POINTS AND AUTHORITIES

1. Introduction

Plaintiff Sundus Shaker Saleh ("Plaintiff"), pursuant to *Osborn v. Haley*, 127 S. Ct. 881 (2007) and *Gutierrez de Martinez v. Lamagno*, 515 U.S. 417 (1995), requests the Court permit an evidentiary hearing in support of her Second Amended Complaint so that she may challenge the Attorney General certification which will likely result from the filing of her Second Amended Complaint. In the alternative, and should the Court not hold a hearing, Plaintiff requests that the Court assume the truth of the factual allegations in her complaint for purposes of challenging the certification. *McLachlan v. Bell*, 261 F.3d 908 (9th Cir. 2001). Under Supreme Court precedent, Plaintiff is entitled to either one or the other as a means of challenging the certification.

Plaintiff seeks application of federal common law, and in particular this country's World War II era prohibition of aggression, on high-ranking members of the Bush Administration related to their alleged planning and waging of the Iraq War. On May 20, 2014, the Court, dismissed Plaintiff's case with leave to amend (Dkt. No. 35, the "**Opinion**"). The Opinion stated:

> Here, the Attorney General has certified that each individual Defendant was acting within the scope of his or her federal employment when performing the acts at issue. Saleh presents no evidence to challenge the certification's conclusion that Defendants were acting within the scope of their employment. Instead Saleh relies on allegations in the complaint, which are not evidence, to argue that Defendants' conduct was motivated by personal goals and not by the duties of the offices they held. [Citation.] Accordingly, because Saleh has failed to challenge the Attorney General's certification, this action shall be deemed an action against the United Sates [sic] and the United States shall be substituted as the sole defendant.
>
> (Op. at p. 3-4.)

2. Legal Standard.

Pursuant to the Supreme Court's instructions in *Osborn* and *Lamagno*, courts of appeal hold that a plaintiff challenging a scope-of-employment certification is entitled

either to a presumption of truth in her allegations, or an evidentiary hearing. *Kashin v. Kent*, 457 F.3d 1033, 1043 (2006) (holding that denial of an evidentiary hearing regarding Attorney General certification was proper if "the certification, ***the pleadings***, the affidavits, and any supporting documentary evidence do not reveal an issue of material fact.") (emphasis added) (citing to *Gutierrez de Martinez v. DEA*, 111 F.3d 1148, 115 (4th Cir. 1997); *McLachlan*, 261 F.3d at 908 (deciding issue of Westfall Act certification and noting that "[b]ecause no evidentiary hearing was held, ***we accept as true the factual allegations in the complaint***") (emphasis added); *Stokes v. Cross*, 327 F.2d 1210, 1213-1216 (D.C. Cir. 2003) (conducting a review of law and holding that limited discovery was appropriate because plaintiff had alleged sufficient facts, which if true, rebutted scope of employment); *Tripp v. Executive Office of the President*, 200 F.R.D. 140 (D.D.C. 2001) (holding that discovery, briefing and an evidentiary hearing were all proper to determine scope of employment); *Melo v. Hafer* 13, F.3d 736, 747 (3d Cir. 1994) (requiring Attorney General to "state the basis for his or her conclusion" and, if facts differ than found in the complaint, holding that plaintiff "should be permitted reasonable discovery" as if responding to a motion for summary judgment).

In *Osborn*, the Supreme Court, relying on *Lamagno*, reiterated, "just as the Government's certification that an employee 'was acting within the scope of his employment' is subject to threshold judicial review, *Lamagno,* 515 U.S., at 434, 115 S.Ct. 2227, so a complaint's charge of conduct outside the scope of employment, when contested, warrants immediate judicial investigation."

3. Plaintiff's Allegations, If True, Warrant An Evidentiary Hearing On The Issue Of Scope Of Employment

In *Stokes*, *supra*, the Court dismissed the plaintiff's case after the Attorney General certified a defendant without providing the plaintiff the opportunity to contest the issue of scope of employment. Accordingly, "the court essentially afforded conclusive weight to AUSA Nagle's certification and apparently gave no thought to the possibility that the certification may have been in error." *Stokes*, 327 F.3d at 1215. The D.C. Circuit

reversed to permit the plaintiff an opportunity to conduct limited discovery and provide the court with evidence.

Similarly, in *McLachlan*, 261 F.3d at 909-11, the Court noted that an evidentiary hearing was never held. As a result, it "accept[ed] as true the factual allegations in the complaint." *Id*. at 909.

In this case, Plaintiff and Defendants stipulated that Plaintiff could challenge the certification in the body of her response. See Dkt. #27 (Stipulation of counsel). Because the Court declined to review Plaintiff's allegations or to accept their truth for purposes of the Attorney General certification, Plaintiff seeks either an *Osborn* hearing, or, in the alternative, requests that the Court conduct a review her allegations and assume their truth (as in *McLachlan*) for purposes of reviewing the Attorney General certification.

Plaintiff has challenged three of the four prongs of the Restatement test employed under District of Columbia law, and has alleged the following facts, *inter alia*, in support of her case through citations to papers of record and memoirs and other statements from former Bush Administration officials:

(1) Plaintiff alleges that the intent to invade Iraq was formed as early as December 1, 1997, prior to any Defendant holding office (2d Am. Compl. ¶¶ 27-34);

(2) Plaintiff alleges that Defendants began executing the plan to invade Iraq immediately upon coming into office (2d Am. Compl. ¶¶ 35-39);

(3) Plaintiff alleges that Defendants were motivated solely by personal motivations, including ideological and/or religious motives (2d Am. Compl. ¶ 109);

(4) Plaintiff alleges that Defendants ignored all warnings and advice to the contrary and sought to invade Iraq regardless of the cost (2d Am. Compl. ¶¶ 96-102); and

(5) Plaintiff alleges that Defendants undertook an intentional and knowing campaign to mislead the American public and international community to support a war and made untrue statements in order to scare people into supporting military action (2d Am. Compl. ¶¶ 65-95).

Under District of Columbia law, 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." *Adams v. Vertex, Inc.,* Case No. 04-1026 (HHK), 2007 U.S. Dist. LEXIS 22850, 2007 WL 1020788, at *7 (D.D.C. Mar. 29, 2007). The core of Plaintiff's complaint is that Defendants were motivated as early as 1997 to invade Iraq, and that they immediately began to use their positions in government beginning in January 2001 to execute such a plan.

Similarly, a plaintiff's allegations of false statements can "permit the imputation of a purely personal motivation." *Hicks v. Office of the Sergeant At Arms for the United States Senate*, 873 F.Supp.2d 258, 270-271 (D.D.C. 2012). While illegal or unauthorized conduct, by itself, may not automatically prevent conduct from "serving the master" to some extent (*Wilson v. Libby*, 535 F.3d 697 (D.C. Cir. 2008)), the nature of the tort, and in particular violent or extreme acts may impute a solely personal motivation. Plaintiff has claimed both repeated acts of allegedly false statements in order to support the run up to the war by Defendants, and the commission of an extremely violent act – a war – that resulted therefrom.

4. Conclusion.

For the reasons set forth above, Plaintiff respectfully requests that this Court hold an *Osborn* hearing, or, that the Court assume the truth of her allegations for purposes of the motion to dismiss and the expected certification of Defendants by the Attorney General.

Respectfully submitted,

Dated: June 8, 2014

COMAR LAW

By /s/ *Inder Comar*
D. Inder Comar
Attorney for Lead Plaintiff
SUNDUS SHAKER SALEH