IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

SUNDUS SALEH, Plaintiff - Appellant, v. GEORGE W. BUSH, et al., Defendants - Appellees.	No. 15-15098

OPPOSITION TO APPELLANT'S
MOTION FOR JUDICIAL NOTICE

Plaintiff requests that this Court take judicial notice of excerpts from the Report of the Iraq Inquiry, Report of a Committee of Privy Counsellors (July 6, 2016) (the Chilcot Report). She asserts that these excerpts support her "allegation that Defendant-Appellees' invasion of Iraq was illegal under international law" and her claim that "Defendant-Appellees' intended to invade Iraq at least as early as July 2002 and 'fix' intelligence around its invasion." Mot. for Judicial Notice at 2. Because plaintiff seeks judicial notice of facts that are not beyond reasonable dispute and that are irrelevant to the issues on appeal, her motion should be denied.

"Judicial notice may be taken of a fact 'not subject to reasonable dispute in that it is capable of accurate and ready determination by resort to sources whose accuracy

cannot reasonably be questioned.'" *Santa Monica Food Not Bombs v. City of Santa Monica*, 450 F.3d 1022, 1025 n.2 (9th Cir. 2006) (quoting Fed. R. Evid. 201). Here, plaintiff seeks judicial notice of statements in the Chilcot Report regarding the legality of, and the motivations for, the Iraq War. Those assertions are not beyond dispute and therefore are inappropriate for judicial notice. *See Owino v. Holder*, 771 F.3d 527, 534 n.4 (9th Cir. 2014) (denying motion for judicial notice where "[t]he government does not concede that the facts in this article are beyond dispute, and [the party seeking judicial notice] has not so demonstrated").

In any event, this Court should "decline to take judicial notice" of the excerpts because they "are not relevant to the resolution of th[e] appeal." *Santa Monica Food Not Bombs*, 450 F.3d at 1025 n.2; *see Rhine v. Stevedoring Servs. of Am.*, 596 F.3d 1161, 1166 n.2 (9th Cir. 2010) (declining judicial notice where the "factual dispute is not relevant to the legal issue raised"). The only issue before this Court is whether, under the Westfall Act, the United States properly certified that the alleged actions taken by the individual defendants in planning and conducting the Iraq War fell within the scope of their employment. That question is answered by application of the scope of employment test under District of Columbia law. The named defendants in this case were formerly the President, the Vide-President, the Secretary of Defense, and other high-level officials, and conducting foreign policy, leading the military, and making decisions about warfare undoubtedly fell within the scope of their employment. The

district court therefore properly upheld the United States' certification decision under the Westfall Act.

As explained in appellees' brief (at 19-23), plaintiff's allegation that the individual defendants violated international law is beside the point. The Westfall Act grants absolute immunity to federal employees for "wrongful" acts taken within the scope of employment, whether or not they are illegal. *See* 28 U.S.C. § 2679(b)(1). And under District of Columbia law, illegal and even shocking acts may fall within the scope of employment. *See, e.g.*, *Lyon v. Carey*, 533 F.2d 649, 652 (D.C. Cir. 1976) (mattress deliveryman acted within the scope of his employment when assaulting and raping a customer during a delivery-related dispute). Thus, courts have repeatedly upheld Westfall Act certifications in cases involving alleged violations of international law. *See Ali v. Rumsfeld*, 649 F.3d 762, 774-78 (D.C. Cir. 2011) (holding that alleged torture of detainees was within the scope of employment, and rejecting argument that "the Westfall Act does not cover egregious torts that violate *jus cogens* norms" (internal quotation marks omitted)); *Rasul v. Myers*, 512 F.3d 644, 656-61 (D.C. Cir. 2008), *vacated*, 555 U.S. 1083 (2008), *reinstated in relevant part*, 563 F.3d 527, 528-29 & n.1 (D.C. Cir. 2009) (alleged torture of detainees); *Harbury v. Hayden*, 444 F. Supp. 2d 19, 35-36 (D.D.C. 2006) (alleged torture and extrajudicial execution of Guatemalan rebel leader), *aff'd on other grounds*, 522 F.3d 413 (D.C. Cir. 2008); *Bancoult v. McNamara*, 370 F. Supp. 2d 1, 7-8 (D.D.C. 2004) (alleged "genocide, torture, forced relocation, and

cruel, inhuman, and degrading treatment"), *aff'd on other grounds*, 445 F.3d 427 (D.C. Cir. 2006); *Schneider v. Kissinger*, 310 F. Supp. 2d 251, 264-66 (D.D.C. 2004) (alleged kidnapping), *aff'd on other grounds*, 412 F.3d 190 (D.C. Cir. 2005).

Plaintiff's allegations regarding the individual defendants' motivations for planning and conducting the Iraq War are similarly irrelevant. To fall within the scope of employment, "even a *partial* desire to serve the master is sufficient." *Council on Am. Islamic Relations v. Ballenger*, 444 F.3d 659, 665 (D.C. Cir. 2006). And when an employee's actions occur in the course of performing job duties, "the employee is *presumed* to be intending, at least in part, to further the employer's interests." *Weinberg v. Johnson*, 518 A.2d 985, 989 (D.C. 1986) (emphasis added). Plaintiff has not alleged any personal benefit that the defendants sought to achieve through a war with Iraq, let alone alleged facts to support a claim that defendants' actions were solely for their personal benefit.

CONCLUSION

For the foregoing reasons, appellant's motion for judicial notice should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on August 1, 2016, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

s/ *Patrick G. Nemeroff*
PATRICK G. NEMEROFF