IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
ALEXANDRIA DIVISION

Isa Saharkhiz, et al., Plaintiffs, vs. Nokia Corporation, et al., Defendants.	Civil Action No. 1:10-cv-912-AJT-TRJ

MEMORANDUM OF LAW IN SUPPORT OF DEFENDANT NOKIA INC.'S MOTION TO DISMISS

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Defendant Nokia Inc. is a U.S.-based, wholly-owned, indirect subsidiary of Defendant Nokia Corporation,[1] based in Finland. During the relevant time period, Nokia Inc. (referred to hereafter as "Nokia U.S.") conducted business activities solely in the United States. Nokia U.S. respectfully submits this Memorandum of Law in Support of its Motion to Dismiss pursuant to Federal Rules of Civil Procedure 12(b)(1) and 12(b)(6).

INTRODUCTION

Plaintiffs seek to recover for the alleged torture and other abuse of Isa Saharkhiz at the hands of the Iranian government since his reported arrest in Iran in 2009. Plaintiffs do not allege that Nokia U.S. itself committed those abuses. Instead, they assert a theory of accomplice liability based on allegations that "Defendants" sold telecommunications equipment to the Telecommunications Company of Iran ("TCI") that allowed TCI to intercept communications and locate persons within Iran and that TCI allegedly provided access to that information to the Iranian government. Plaintiffs do not allege that Nokia U.S. itself – as opposed to any of the other five Defendants – sold the technology to TCI or played any role in either TCI's purchase of the technology or the manner in which it subsequently used that technology.[2] Instead, Plaintiffs allege that an executive board member of "NSN," defined in the Complaint to include both Nokia Siemens Networks B.V. (Netherland) ("NSN BV") and Nokia Siemens Networks US, LLC ("NSN US"), testified in a European Parliament hearing that "NSN" provided the technology at issue to Iran in 2008. (Compl. ¶ 39.) The law requires more from Plaintiffs to state a claim against Nokia U.S.

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1 Nokia Corporation has not yet been served and is not appearing in this action at this time.

2 In fact, Plaintiffs do not allege that the technology at issue was, in fact, used as any part of the arrest of Isa Saharkhiz in Iran.

Independent of Plaintiffs' failure to plead facts linking Nokia U.S. to their claims, those claims are legally deficient for multiple reasons. Plaintiffs' claims (Counts I-III) under the Alien Tort Statute, 28 U.S.C. § 1350 ("ATS"), fail for multiple reasons. As the Second Circuit reasoned in a decision issued last week, there is no specific, universal, and obligatory norm of international law that would support imposition of liability on corporate defendants. *See Kiobel v. Royal Dutch Petroleum Co.*, ___ F.3d ___, Nos. 06-4800-cv, -06-4876-cv, 2010 WL 3611392, *21 (2d Cir. Sept. 17, 2010) (attached as Ex. A). Moreover, where liability for aiding and abetting the violation of a norm of international law is imposed, it properly requires a plaintiff to plead (and subsequently prove) that the defendants acted "with the purpose of facilitating" the predicate violation of international law. *See Presbyterian Church of Sudan v. Talisman Energy, Inc.*, 582 F.3d 244, 259 (2d Cir. 2009). Plaintiffs include no such allegations specific to Nokia U.S. nor even as to the collective "Defendants." Rather, Plaintiffs allege only that "Defendants" had general knowledge that the government of Iran might get access to and misuse information obtained through the technology at issue. Plaintiffs nowhere allege that "Defendants" – much less Nokia U.S. specifically – acted with the purpose of facilitating any alleged abuses by the government of Iran. That deficiency also compels dismissal of the ATS claims. In addition, as most courts have recognized, the ATS does not reach claims for cruel, inhuman or degrading treatment because those claims lack the specificity required for an enforceable international norm. And finally, the ATS does not apply to actions by the Iranian government, in Iran, directed at its own citizens.

Plaintiffs' claims (Counts I & III) under the Torture Victims Protection Act, 28 U.S.C. § 1350 notes ("TVPA"), fare no better. Those claims fail because TVPA liability is unavailable against corporations and cannot be imposed vicariously; Plaintiffs make no factual allegations

remotely suggesting that Nokia U.S. acted under color of Iranian law; and merely selling goods to a foreign telecommunications company allegedly tied to the government does not amount to aiding and abetting torture. Nor have Plaintiffs stated claims (Counts IX-X) under either the Electronic Communications Privacy Act, 18 U.S.C. § 2510 *et seq.* ("ECPA"), or the Comprehensive Iran Sanctions, Accountability and Divestment Act, Pub. L. No. 111-195, 124 Stat. 1312-51 (2010) ("CISADA"). The ECPA does not extend liability to entities that provide the equipment others use to conduct unlawful interceptions, and in any event, addresses the unlawful interception of information in the United States, not in Iran. The CISADA was not enacted into law until July 2010, well after the alleged technology sale of which Plaintiffs complain, and has no retroactive application.

As for the state-law claims (Counts IV-VIII), Virginia law does not apply to alleged torts committed in Iran by Iranian government officials against Iranian citizens, and moreover, in the absence of any viable federal law claim, the Court should decline to exercise supplemental jurisdiction over the state-law claims. In all events, merely selling goods to a foreign telecommunications company no more amounts to aiding and abetting alleged human rights abuses by the relevant government as a matter of state law than it does as a matter of federal law. Finally, because the Complaint pleads no facts suggesting conduct directed at or direct injury to Plaintiff Mehdi Saharkhiz, his claims must also be dismissed in their entirety.

PLAINTIFFS' FACTUAL ALLEGATIONS

Plaintiff Isa Saharkhiz

Plaintiffs allege that Isa Saharkhiz is a journalist who formerly worked for the Islamic Republic News Agency ("IRNA") in Iran. (Compl. ¶¶ 46-47.) Following the end of the "Tehran Spring" in 1999, Plaintiffs allege that Isa Saharkhiz was forced to resign from his position with the IRNA. (*Id.* ¶¶ 48, 51.) Both before and after his resignation, Isa was a visible and frequent

critic of the Iranian government and the Grand Ayatollah. Plaintiffs allege that he was one of the founders of the "outspoken" Society for the Defense of Freedom of the Press, which "fought against the oppressive tactics of the Iranian regime …." (*Id.* ¶ 50.) Following his resignation in 1999, Isa also founded two publications that "were an expose and a critic of the corrupt economic practices of the religious hardliners in the Iranian government." (*Id.* ¶ 52.) Plaintiffs allege that Isa Saharkhiz was convicted in a 2003 trial, and his publications were ordered closed in 2004, because he insulted the Grand Ayatollah. (*Id.* ¶¶ 53-54.)

Nonetheless, Isa Saharkhiz apparently continued his "direct attack" on the Grand Ayatollah online. (*Id.* ¶ 55.) After the disputed 2009 presidential election in Iran, Isa "wrote an article directly aimed at the Grand Ayatollah for being a hypocrite and accusing him as the chief architect of the election coup." (*Id.* ¶ 56.) Thereafter, Plaintiffs allege that Isa feared for his life and fled Tehran for Tirkadeh in northern Iran. (*Id.*) Plaintiffs allege that Isa was arrested on June 20, 2009, by the Ministry of Intelligence and National Security of the Islamic Republic of Iran and heavily beaten during his arrest, and he has apparently remained in jail since his arrest. (*Id.* ¶¶ 57, 59-60.)

Without pointing to any conduct specifically by Nokia U.S., the Complaint alleges that, in 2008, "Defendants" sold equipment permitting lawful intercepts of electronic communications and a "monitoring center" to analyze them to TCI.[3] (*Id.* ¶¶ 36, 43.) The Complaint alleges that "Defendants" "knowingly and willingly" sold the technology to TCI and that "Defendants" "knew or should have known" or "had every reason to know" that the government of Iran would have access to and could misuse the information gathered with the technology. (*Id.* ¶¶ 37, 39, 42.) The Complaint also claims that the Iranian government "had the capability of monitoring"

[3] As noted above, the Complaint alleges that an executive board member of "NSN" testified that it was "NSN" that sold a monitoring center to TCI in 2008. (Compl. ¶ 39.)

Isa Saharkhiz's conversations and identifying his location "largely due" to the equipment sold and serviced by "Defendants" (*id.* ¶ 57), and that the arrests of unnamed Iranian citizens "*may* be linked" to the technology (*id.* ¶ 18 (emphasis added)). At no point, however, does the Complaint claim that the technology at issue played any role in the arrest or alleged mistreatment of Isa Saharkhiz[4] or that the Iranian government in fact intercepted any of Isa Saharkhiz's communications.

Plaintiff Mehdi Saharkhiz

Plaintiff Mehdi Saharkhiz is Isa Saharkhiz's son and lives in New Jersey. (*Id.* ¶ 17.) The Complaint alleges no direct injury to Mehdi Saharkhiz, but instead asserts that, as a result of his father's imprisonment and mistreatment, Mehdi suffers from nightmares and emotional distress. (*Id.* ¶ 62.) The Complaint also states that Mehdi and his father "are suing for compensation for loss of property, income, opportunity and economic distress in conjunction with Isa's arbitrary arrest and prolonged detention" (*id.* ¶ 17), but the Complaint contains no factual allegations supporting such a claim.

Defendant Nokia U.S.

Other than information regarding its corporate citizenship and agent for service (*id.* ¶ 20), the Complaint does not contain any allegations specific to Nokia U.S., and it does not allege any legal theories or factual predicate for ignoring the separate corporate existence of the separate

[4] The Complaint also purports to sue on behalf of "additional unnamed and to be included Plaintiffs," which includes all citizens of Iran who allegedly have been injured "as a result of the arbitrary arrest and prolonged detention, torture, and cruel, inhuman or other degrading treatment" by the government of Iran. (Compl. ¶¶ 4, 18.) Only by reference to this broadly defined group and Isa Saharkhiz collectively as "Plaintiffs" does the Complaint allege that the government of Iran obtained information through the use of equipment allegedly provided by "Defendants." (*Id.* ¶ 5.) Tellingly, no such allegation is included in that portion of the Complaint setting out allegations specific to Isa Saharkhiz. (*See id.* ¶¶ 46-64.) With respect to the broader group of unidentified Plaintiffs, the Complaint provides no factual description of any of their arrests, injuries or ties to any defendant.

Defendants.[5] (*Id.*) Referring to both Nokia Corporation and Nokia Inc., Plaintiffs allege that "Nokia operates a business concerned primarily with telecommunication devices, internet service, digital mapping and navigation services and most importantly, equipment and services for communications networks globally, all designed to facilitate electronic communication and the sharing of information." (*Id.* ¶ 21.) Plaintiffs further allege that "Nokia [*i.e.*, both Nokia Corporation and Nokia Inc.] has access to and provide [sic] services capable of identifying information about individuals using its electronic devices and networks." (*Id.*) Plaintiffs, however, allege no facts tying any of these activities to the sale of technology to TCI, to any specific actions by the Iranian government, or to the events surrounding the arrest and detention of Isa Saharkhiz.

The only other reference to Nokia U.S. is the allegation that "Nokia" (*i.e.*, both Nokia Corporation and Nokia Inc.) owns approximately 50% of Defendant NSN BV and "effectively controls NSN BV as it has the ability to appoint key officers and the majority of the members of its Board of Directors and, accordingly, Nokia consolidates Nokia Siemens Networks on its financial statements." (*Id.* ¶ 27.) The Complaint contains no factual allegation to support the conclusory assertion of "effective control," and Plaintiffs also fail to make any allegations tying such alleged "control" to the sale of technology to TCI or the alleged abuse of Isa Saharkhiz by the government of Iran.

LEGAL STANDARD

"When presented with a motion to dismiss for lack of subject matter jurisdiction, all reasonable factual inferences must be made in favor of the non-moving party. . . . The plaintiff

[5] Plaintiffs also allege no facts or legal theories to justify ignoring the separate legal existence of Nokia Inc. and Nokia Corporation, which Plaintiffs do by referring to them jointly as "Nokia" throughout the Complaint. (Compl. ¶ 20.)

bears the burden of persuasion when a court's subject matter jurisdiction has been challenged under Rule 12(b)(1)." *Symeonidis ex rel. Symeonidis v. Hurley & Koort, P.L.C.*, Civil Action Number 3:05CV762-JRS, 2006 WL 2375743, at *3 (E.D. Va. Aug. 15, 2006) (internal citations omitted) (attached as Ex. B). A motion to dismiss for lack of subject-matter jurisdiction pursuant to Fed. R. Civ. P. 12(b)(1) should be granted where, as here, "the district court lacks the statutory or constitutional power to adjudicate [the case]." *Makarova v. United States*, 201 F.3d 110, 113 (2d Cir. 2000).

To survive a motion to dismiss for failure to state a claim under Fed. R. Civ. P. 12(b)(6), "a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1949 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). Mere conclusory statements in a complaint—such as "'labels and conclusions' or 'a formulaic recitation of the elements of a cause of action'"—are neither sufficient to state a claim nor entitled to a presumption of truth. *See id.* (quoting *Twombly*, 550 U.S. at 555). And legitimate, non-conclusory factual allegations, to satisfy the plausibility requirement, must "allow the court to draw the reasonable inference"—not simply a "speculative" one—"that the defendant is liable for the misconduct that is alleged." *Ashcroft*, 129 S. Ct. at 1940.

ARGUMENT

I. THE COMPLAINT DOES NOT PROVIDE FAIR NOTICE TO NOKIA U.S. OF ITS ALLEGED WRONGDOING.

The Complaint fails to specify any conduct by Nokia U.S. that would tie it to the sale of technology to TCI, the alleged disclosure of information by TCI to the government of Iran, or the alleged arrest and abuse of Isa Saharkhiz. Instead, Plaintiffs name six separate entities as Defendants and then refer throughout the Complaint to alleged conduct by this collective group

of "Defendants." Plaintiffs never differentiate between any of the Defendants nor identify what role any of them are alleged to have played in connection with the alleged abuses by the government of Iran. "A complaint that 'lump[s] all the defendants together in each claim and provid[es] no factual basis to distinguish their conduct' fails to satisfy Rule 8." *Pro Image Installers, Inc. v. Dillon*, No. 3:08cv273/MCR/MD, 2009 WL 112953, at *1 (N.D. Fla. Jan. 15, 2009) (attached as Ex. C) (quoting *Lane v. Capital Acquisitions & Mgmt. Co.*, No. 04-60602 CIV, 2006 WL 4590705, at *5 (S.D. Fla. 2006)); *see also Smith v. United States*, 561 F.3d 1090, 1104 (10th Cir. 2009) (recognizing that in *Bivens* actions where suits are often against multiple officials, "'it is particularly important in such circumstances that the complaint make clear exactly *who* is alleged to have done *what* to *whom*, to provide each individual with fair notice'") (quoting *Robbins v. Okla.*, 519 F.3d 1242, 1249-50 (10th Cir. 2008) (applying notice principles to § 1983 claims)); *Major Tours, Inc. v. Colorel*, ___ F. Supp. 2d ___, No. 05-3091 (JBS/JS), 2010 WL 2557250, *11 (D.N.J. June 22, 2010) (attached as Ex. D) ("complaint must allege, in more than legal boilerplate, those facts about the conduct of each defendant giving rise to liability"). The collective pleading in the Complaint does not provide Nokia U.S. with the fair notice required by Rule 8, and the Complaint should be dismissed.

II. PLAINTIFFS FAIL TO STATE A COGNIZABLE CLAIM UNDER THE ALINE TORT STATUTE.

Plaintiffs fail to establish subject matter jurisdiction for claims against Nokia U.S. under the Alien Tort Statute ("ATS") for three independent reasons: (i) the ATS does not extend liability to corporations; (ii) Plaintiffs fail to plead facts alleging the necessary requirements for aiding and abetting liability under the ATS; and (iii) cruel, inhuman and degrading treatment is not sufficiently definite to form the basis for an ATS claim. The ATS vests the district courts with "original jurisdiction of any civil action by an alien for a tort only, committed in violation of

the law of nations or a treaty of the United States." 18 U.S.C. § 1350. The ATS is a "jurisdictional statute" that "creat[es] no new causes of action," but rather enables federal courts to recognize causes of action for a limited number of "torts in violation of the law of nations." *Sosa v. Alvarez-Machain*, 542 U.S. 692, 724 (2004). In *Sosa*, the Supreme Court mandated extreme "restraint" in applying the ATS, and more generally, set a "high bar to new private causes of action for violating international law." *Id.* at 725-27. The Court expressed considerable concern over "suits under rules that would go so far as to claim a limit on the power of foreign governments over their own citizens, and to hold that a foreign government or its agent has transgressed those limits." *Id.* at 727. Accordingly, it held that the ATS permits the adjudication of only those international-law claims with the same "definite content and acceptance among civilized nations" as the "historical paradigms" of violation of safe conduct, infringement of the rights of ambassadors, and piracy. *Id.* at 733. Thus, the ATS confers jurisdiction to enforce only those few international law norms that are: (1) specifically defined; (2) universally accepted; and (3) binding upon states. *Id.*

A. The Court Lacks Jurisdiction Over Plaintiffs' ATS Claims Because Customary International Law Does Not Extend Liability to Corporations.

For years, courts have largely assumed, without analysis, that corporations could be liable under the ATS. Yet, "none of these cases identifies a universal and well-defined standard of international law. Most of these cases refer to earlier cases that did not even **mention** corporate liability." *See Doe v. Nestle, S.A.*, No. CV 05-5133, slip op. at 137 (C.D. Cal. Sept. 8, 2010) (emphasis in original) (attached as Ex. E). The Fourth Circuit has not squarely addressed this issue. In *Nestle* and in *Kiobel v. Royal Dutch Petroleum Co.*, ___ F.3d ___, Nos. 06-4800-cv, 06-4876-cv, 2010 WL 3611392 (2d Cir. Sept. 17, 2010) (Ex. A), the courts undertook a detailed analysis of the issue of corporate liability, recognizing that "**plaintiffs** must bear the burden to

show that international law **does** recognize corporate liability." *Nestle*, slip op. at 156 (emphasis in original). In addition, both courts concluded that *Sosa* requires that courts look to international law to determine whether liability reaches "the perpetrator being sued." *See Sosa*, 542 U.S. at 732 n.20.[6]

Applying *Sosa*, both courts analyzed the history of international tribunals since Nuremburg, international treaties, and the works of publicists (*Kiobel*, 2010 WL 3611392, at *12-20; *Nestle*, slip op. at 137-55), and the Second Circuit recognized that "customary international law has steadfastly rejected the notion of corporate liability for international crimes, and no international tribunal has ever held a corporation liable for a violation of the law of nations." *Kiobel*, 2010 WL 3611392, at *3; *see also Nestle*, slip op. at 143. As a result, the Second Circuit held that the claims against corporate defendants "fall outside the limited jurisdiction provided by the ATS." *Id*.; *see also Nestle*, slip op. at 157 ("In this Court's view, the Supreme Court's guidance in *Sosa* requires that, at present, corporations may not be held liable under international law in an Alien Tort Statute action.").

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[6] Older cases in the Second Circuit and elsewhere previously have permitted ATS actions to proceed against corporations, but without conducting the detailed analysis of international law undertaken by the Second Circuit in *Kiobel* and by the district court in *Nestle*. For example, the Eleventh Circuit's recent decisions note that "the law of this Circuit is that [the ATS] grants jurisdiction from complaints of torture against corporate defendants." *Romero v. Drummond Co.*, 552 F.3d 1303, 1315 (11th Cir. 2008). But in so stating, the Court found itself bound by *Aldana v. Del Monte Fresh Produce, N.A.*, 416 F.3d 1242 (11th Cir. 2005), which permitted ATS (and TVPA) claims to proceed against a corporate defendant without any analysis of the nature of the defendant as addressed in *Kiobel*. The court in *Xe Services Alien Tort Litigation*, 665 F. Supp. 2d 569 (E.D. Va. 2009), also concluded that corporations could be liable under the ATS, but in doing so, the court relied on *Romero* and a number of pre-*Kiobel* cases from courts in the Second Circuit. *See Xe Servs.*, 665 F. Supp. 2d at 588. Moreover, the court in *Xe Services* looked to the ATS and *Sosa* for language distinguishing individuals and corporations, *id.*, when the appropriate question, as explained in *Kiobel*, is whether "customary international law" extends liability to corporations. Because customary international law only reaches individuals, the ATS can go no further.

B. Plaintiffs Fail To Allege Facts To Support Aiding And Abetting Liability Under The ATS.

Plaintiffs do not – because they cannot – allege that Nokia U.S. itself or any of the other Defendants violated any international norm merely by allegedly providing technology or services to TCI or that Nokia U.S. or any other Defendant actually engaged in torture. Instead, Plaintiffs seek to hold Defendants liable for violations of international law committed by the Iranian government under an aiding and abetting theory of liability. To the extent that aiding and abetting is cognizable under the ATS or TVPA, *Sosa* requires courts to look to international law to provide the necessary requirements for such liability. *Sosa*, 542 U.S. at 729, 732 n.20; *see also Xe Servs.*, 665 F. Supp. 2d at 582; *Al Shimari v. CACI Premier Tech.*, 657 F. Supp. 2d 700, 728 (E.D. Va. 2009).

Once again, the Second Circuit provides reasoned authority on this issue. In *Presbyterian Church of Sudan v. Talisman Energy, Inc.*, 582 F.3d 244 (2d Cir. 2009), the Court of Appeals applied *Sosa* to establish the elements for accomplice liability under the ATS.[7] Under that decision, a defendant may be liable only if it "(1) provides practical assistance to the principal which has a substantial effect on the perpetration of the crime, and (2) does so with the purpose of facilitating the commission of that crime." *Id.* at 259 (quoting *Khulumani v. Barclay Nat'l Bank Ltd.*, 504 F.3d 254, 277 (2d Cir. 2007) (Katzmann, J., concurring)); *see also id.* at 247 ("a claimant must show that the defendant provided substantial assistance with purpose of facilitating the alleged offenses"). In holding that "the *mens rea* standard for aiding and abetting liability in ATS actions is purpose rather than knowledge alone," the Second Circuit examined several sources of international law to determine the custom of states in addressing secondary

[7] In *Talisman*, the Court assumed without deciding that the ATS and TVPA could apply to corporations. 582 F.3d at 261 n.12. As discussed above, the Court in *Kiobel* subsequently answered that question in the negative.

liability, including the 1998 Rome Statute of the International Criminal Court, to which 148 countries agreed. *Id.* at 259. The Court reasoned that there is no "consensus" under international law, as required by *Sosa*, "for imposing liability on individuals who *knowingly* (but not purposefully) aid and abet a violation of international law." *Id.* (emphasis in original).

The Court applied the substantial effect and specific-intent requirements to affirm the dismissal of ATS claims against companies alleged to have aided-and-abetted human-rights violations in the Sudan by building roads and airports for that government, paying royalties to it, and selling to it fuel for military aircraft. *See id.* at 262-63. The Court reasoned that "obviously there are benign and constructive purposes for these projects," and there was "no evidence that any of this was done for an improper purpose." *Id.* at 262; *see also id.* at 262-63 (no evidence that defendants "provided fuel for the purpose of facilitating attacks on civilians"). Other courts that have permitted ATS and TVPA claims to proceed on aiding and abetting theories likewise have adopted that standard. *See Nestle*, slip op. at 40; *Abecassis v. Wyatt*, Civil Action No. H-09-3884, 2010 WL 1286871, at *25 (S.D. Tex. Mar 31, 2010) (attached as Ex. F); *Aziz v. Republic of Iraq*, No.1:09-cv-869, slip op. at 11 (D. Md. June 9, 2010) (attached as Ex. G).[8]

Applying that standard in this case, the Plaintiffs must thus show: (a) that Nokia U.S. had a direct connection to the alleged sale of intercept equipment and a monitoring center to TCI; (b) that such sale to TCI substantially assisted the Iranian government's violation of a norm of international law; and (c) assuming there were allegations connecting Nokia U.S. to the sale

[8] The Fourth Circuit has not addressed the applicable *mens rea* standard. The Eleventh Circuit in *Cabello v. Fernandez-Larios*, 402 F.3d 1148 (11th Cir. 2005), reviewed the sufficiency of the evidence in support of a jury finding based on an instruction that incorporated a lesser "knowledge" standard, but the standard itself was not challenged on appeal nor reviewed by the Court of Appeals. *Id.* at 1158-59. As the court noted in *Nestle*, the "less-stringent 'knowledge' standard … rests on a number of premises that … fail to satisfy the requirements set forth by the Supreme Court in *Sosa*." *Nestle*, slip op. at 40.

(which there could not be), that Nokia U.S. would have intended that any such sale would facilitate those alleged abuses. The Complaint fails to allege any of these minimum requirements.

First, Plaintiffs do not plead that Nokia U.S. provided substantial assistance to the government of Iran in the torture of Isa Saharkhiz. Plaintiffs do not tie Nokia U.S. to the technology or services sold to TCI or to the release of information by TCI to the government of Iran, nor do they tie that technology to Isa Saharkhiz's arrest, which is particularly significant in light of his history of conflicts with the government of Iran and his very public attacks on the Grand Ayatollah. Indeed, Isa Saharkhiz's 2003 arrest and conviction demonstrate that the government of Iran was not dependent on the technology acquired by TCI in 2008 to monitor and locate Iranian citizens. (*See* Compl. ¶¶ 36, 43, 51-54, 57.) Moreover, the Complaint alleges that it was the article that Isa published online after the 2009 presidential election – and not some intercepted private electronic communication – that led to his current arrest and detention. (*Id.* ¶ 56.) Thus, the allegations in the Complaint are not even enough to make it "possible" that Nokia U.S. provided substantial assistance to the government of Iran's alleged abuse of Isa Saharkhiz, much less to make it "plausible." *See Iqbal*, 129 S. Ct. at 1950 ("mere possibility of misconduct" not enough).

Second, Plaintiffs do not allege that Nokia U.S. (or any other Defendant) acted with any purpose to facilitate the Iranian government's mistreatment of Saharkhiz or any of the unnamed Plaintiffs. *See Aziz*, slip op. at 11-12 (Ex. G) (sale of a mustard gas ingredient to Saddam Hussein's Iraq in the 1980s did not indicate a purpose to facilitate that regime's gassing of Kurdish populations). A "knowing" sale is not enough. *See also Nestle*, slip op. at 74-75 (Ex. E) (finding that "Defendants' logistical support and other assistance" that allegedly "generally

furthered the Ivorian farmers' ability to continue using forced labor" not enough for aiding and abetting liability because it was not "'specifically directed' to assist or encourage 'the perpetration of a certain specific crime'" and did not have "a 'substantial effect' on the specific crimes").

Finally, Plaintiffs' ATS claims fail for the independent reason that they seek to impose ATS liability for alleged injuries suffered by Iranian citizens in Iran at the behest of the Iranian government. But as the Supreme Court recently held, in overruling a line of Second Circuit decisions generally providing for extraterritorial application of federal statutes, "[w]hen a statute gives no clear indication of an extraterritorial application, it has none." *Morrison v. Nat'l Austr. Bank*, 130 S. Ct. 2869, 2878 (2010); *see also Cedeño v. Intech Group, Inc.*, ___ F. Supp. 2d ___, No. 09 Civ. 9716(JSR), 2010 WL 3359468, at *2 (S.D.N.Y. Aug. 25, 2010) (attached as Ex. H) (*Morrison* "repudiated the Second Circuit's prior development of an 'effects test' and a 'conduct test' to evaluate the extraterritoriality of statutes that were silent on the issue"). The ATS gives no such "clear indication" of its own application to torts committed entirely within the territory of a foreign country. *See* 18 U.S.C. § 1350. Moreover, in drafting the ATS, Congress was specifically concerned with torts and international-law violations committed inside the United States. *See Sosa*, 542 U.S. at 716-17 (describing domestic assaults on foreign ambassadors). The presumption against extraterritoriality is particularly important for claims involving foreign governments, victims, and tortfeasors. As the Supreme Court explained in *Sosa*, it would be quite remarkable to "consider suits under rules that would go so far as to claim a limit on the power of foreign governments over their own citizens, and to hold that a foreign government or its agent has transgressed those limits." *Sosa*, 542 U.S. at 727-28.

For each of these independent reasons, Plaintiffs' aiding and abetting claims must be dismissed.

C. Plaintiffs' Cruel, Inhuman And Degrading Treatment Claim Is Not Cognizable Under The ATS.

The cruel, inhuman and degrading treatment claim asserted by Plaintiffs is barred because it is not a cause of action properly recognized under the ATS. *See Aldana v. Del Monte Fresh Produce, N.A.*, 416 F.3d 1242, 1247 (11th Cir. 2005). As noted above, *Sosa* provides that the ATS confers jurisdiction to enforce only international law norms that are: (1) specifically defined; (2) universally accepted; and (3) binding upon states. *See Xe Servs.*, 665 F. Supp. 2d at 582. Cruel, inhuman and degrading treatment, however, has no specific definition, and as a result, it is not a valid cause of action under the ATS. *See, e.g., Aldana*, 416 F.3d at 1247; *Forti v. Suarez-Mason*, 694 F. Supp. 707, 712 (N.D. Cal. 1988).[9]

III. PAINTIFFS FAIL TO STATE A CLAIM UNDER THE TORTURE VICTIMS PROTECTION ACT.

Plaintiffs further claim that "Defendants" violated the TVPA, which "provides a cause of action for official torture and extrajudicial killing." *Kadic v. Karadzic*, 70 F.3d 232, 245 (2d Cir. 1995). Specifically, the TVPA provides:

> An individual who, under actual or apparent authority, or color of law, of any foreign nation - (1) subjects an individual to torture shall, in a civil action, be liable for damages to that individual; or (2) subjects an individual to extrajudicial killing shall, in a civil action, be liable for damages to the individual's legal representative, or to any person who may be a claimant in an action for wrongful death.

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[9] While other courts have surveyed international law and found that cruel, inhuman and degrading treatment can be the basis for a claim, even those cases allow the action only where "the specific conduct alleged by the plaintiffs has been universally condemned as cruel, inhuman, or degrading." *Bowoto v. Chevron Corp.*, 557 F. Supp. 2d 1080, 1094 (N.D. Cal. 2008). Here, Plaintiffs do not identify any conduct independent of their "torture" claim that would meet this threshold requirement. Thus, even those courts that have recognized such a claim would not permit Plaintiffs' Count II to proceed.

TVPA § 2(a), 28 U.S.C. § 1350 notes. For at least four independent reasons, Plaintiffs have failed to state a claim under the TVPA.

First, because the TVPA authorizes suits only against "individuals," courts repeatedly have held that "the TVPA does not apply to corporations." *Bowoto v. Chevron Corp.*, No. 09-15641, 2010 WL 3516437, at *9 (9th Cir. Sept. 10, 2010) (attached as Ex. I); *see also, e.g.*, *Arndt v. UBS AG*, 342 F. Supp. 2d 132, 141 (E.D.N.Y. 2004) (corporations "cannot be sued under the TVPA"); *In re Terrorist Attacks on Sept. 11, 2001*, 349 F. Supp. 2d 765, 828 (S.D.N.Y. 2005), *aff'd*, 538 F.3d 71 (2d Cir. 2008); *Friedman v. Bayer Corp.*, No. 99-CV-3675, 1999 WL 33457825, at *2 & n.2 (E.D.N.Y. Dec. 15, 1999); *Doe v. Exxon Mobil Corp.*, 393 F. Supp. 2d 20, 28 (D.D.C. 2005), *appeal dismissed*, 473 F.3d 345 (D.C. Cir. 2007), *cert. denied*, 128 S. Ct. 2931 (2008). Nokia U.S. is a corporation, and it accordingly cannot be sued under the TVPA.[10]

Second, under a proper reading of the statute, accomplice liability is unavailable under the TVPA. By its plain text, the TVPA "limits liability to '[a]n individual' who subjects another to torture," and "does not contemplate" any sort of secondary liability. *Bowoto,* 2010 WL 3516437, at *8 (quoting TVPA § 2(a)). Yet Plaintiffs here seek only to hold Defendants vicariously liable under the TVPA for the Iranian government's actions.

Third, "[b]y its plain language, the [TVPA] renders liable only those individuals who have committed torture or extrajudicial killing 'under actual or apparent authority, or color of

[10] Some courts have concluded that the word "individual" can include corporations. *See, e.g.*, *Romero,* 552 F.3d at 1315. In *Romero,* however, as noted above, "it does not appear that the defendants in that case ever challenged the notion of corporate liability … and the Eleventh Circuit did not explain its reasoning on the issue." *Bowoto*, 2010 WL 3516437, at *7 (Ex. I). Moreover, that conclusion would require that two different definitions be given to the word "individual" as used in the same statute because the TVPA separately references the killing or torture of an "individual," TVPA § (2)(a)(1), 28 U.S.C. § 1350 notes, which can only include natural persons.

law, of any foreign nation.'" *Kadic*, 70 F.3d at 245 (quoting TVPA § 2(a)). Courts that have entertained aiding and abetting liability under the TVPA have applied the "color of law" requirement not only to primary actors, but also to aiders and abettors. *See, e.g.*, *In re S. African Apartheid Litig.*, 346 F. Supp. 2d 538, 555 (S.D.N.Y. 2004) ("[C]reating aider and abettor liability for private actors not acting under color of law would be inconsistent with the [TVPA]."), *aff'd in relevant part*, *Khulumani*, 504 F.3d at 259-60 (per curiam); *Corrie v. Caterpillar, Inc.*, 403 F. Supp. 2d 1019, 1027 (W.D. Wash. 2005). "For purposes of the TVPA, an individual acts under color of law when he acts together with state officials or with state aid." *Khulumani*, 504 F.3d at 260. Plaintiffs fail to allege that Nokia U.S. has any connection to Iran, much less that it acted together with Iranian government officials. Similarly, Plaintiffs do not tie Nokia U.S. to the sale of technology or services to TCI, nor would such commercial transactions be enough to constitute acting under color of law. *See, e.g.*, *Bigio v. Coca-Cola Co.*, 239 F.3d 440, 448 (2d Cir. 2001) ("private party does not act under color of law simply by purchasing property from the government").

Finally, as explained at length above, the Complaint alleges only that "Defendants" sold technology or support services to TCI. Plaintiffs fail to tie Nokia U.S. to such transactions or to tie those transactions to Isa Saharkhiz's arrest and detention. Thus, those transactions would not constitute substantial assistance of alleged human-rights abuses.

IV. THE COMPLAINT FAILS TO STATE COGNIZABLE CLAIMS FOR VIOLATION OF THE ECPA AND THE COMPREHENSIVE IRAN SANCTIONS, ACCOUNTABILITY AND DIVESTMENT ACT.

A. Plaintiffs Have No Claim Under The ECPA.

The Complaint fails to state a claim under either Section 2511 or Section 2512. Aiding and abetting the improper interception of communications by providing the mechanism for the interception is not a basis for liability under the statute. *See Motise v. Am. Online, Inc.*, No. Civ.

A. 04-1494, 2005 WL 1667658, at *4 (E.D. Va. June 24, 2005) (attached as Ex. J) ("The [ECPA] does not recognize a cause of action for aiding and abetting a primary violator."); *Doe v. GTE Corp.*, 347 F.3d 655, 658 (7th Cir. 2003) ("[N]othing in the [ECPA] statute condemns assistants, as opposed to those who directly perpetrate the act."). Indeed, the statute contains an explicit exception to liability for "provider[s] of wire or electronic communication service" acting in the normal course of business. 18 U.S.C. § 2512(2); *cf.* Compl. ¶ 36 ("Defendants" provided technology to TCI). Other courts have also recognized that there is no private right of action under Section 2512, *see DirecTV, Inc. v. Amato*, 269 F. Supp. 2d 688, 691 (E.D. Va. 2003) ("no private cause of action lies under § 2520 for violations of § 2512"), and that the ECPA does not apply extra-territorially such that it could reach interceptions in Iran, *see United States v. Barona*, 56 F.3d 1087, 1090 (9th Cir. 1995) (recognizing "general and undisputed proposition[]" that the ECPA has "no extraterritorial force").

B. The Comprehensive Iran Sanctions, Accountability and Divestment Act Does Not Apply On The Facts Pled.

The CISADA is equally inapplicable. The law was not adopted until July 2010, and it does not include a retroactivity provision. In the absence of clear congressional intent to the contrary, a statute is presumed not to apply retroactively. *See Ward v. Dixie Nat'l Life Ins. Co.*, 595 F.3d 164, 172 (4th Cir. 2010) ("courts assume that statutes operate prospectively only, to govern future conduct and claims, and do not operate retroactively to reach conduct and claims arising before the statute's enactment"). Nothing in the CISADA suggests that its provisions were meant to be retroactive, and therefore, it does not provide Plaintiffs with a claim here.[11]

[11] The CISADA also does not create a private right of action. "Unless such 'congressional intent can be inferred from the language of the statute, the statutory structure, or some other source, the essential predicate for implication of a private remedy simply does not exist.'" *Karahalios v. Nat'l Fed'n of Fed. Employees*, 489 U.S. 527, 532-33 (1989) (quoting *Thompson v. Thompson*, 484 U.S. 174 (1988)). Nothing in the CISADA creates either an

V. PLAINTIFFS FAIL TO STATE TORT CLAIMS UNDER VIRGINIA LAW.

Plaintiffs also raise tort claims (Counts IV-VIII), purportedly under Virginia law (*see* Compl. ¶¶ 89, 94, 99), for battery, assault, false imprisonment, intentional infliction of emotional distress, and negligence. Plaintiffs' state-law claims must be dismissed because, in the absence of viable federal claims, the Court should not exercise supplemental jurisdiction, because Virginia law does not govern torts committed by and against Iranians within Iran, and because Plaintiffs have not alleged facts that would make Nokia U.S. liable for aiding and abetting.

A. The Court Should Decline To Exercise Supplemental Jurisdiction.

Because Plaintiffs' federal claims must be dismissed, their state-law claims should also be dismissed. "Once a district court has dismissed the federal claims in an action, it maintains 'wide discretion' to dismiss the supplemental state law claims over which it properly has supplemental jurisdiction." *Yashenko v. Harrah's NC Casino Co.*, 446 F.3d 541, 553 n.4 (4th Cir. 2006); *see also Waybright v. Fredrick County, MD*, 528 F.3d 199, 209 (4th Cir. 2008) ("With all its federal questions gone, there may be the authority to keep it in federal court under 28 U.S.C. §§ 1367(a) and 1441(c) (2000), but there is no good reason to do so."). This Court, too, should decline to hear Plaintiffs' tort claims following dismissal of the federal claims.

B. Virginia Law Does Not Apply to the Allegedly Tortious Conduct.

Plaintiffs assume, without justification, that Virginia law would apply to any state-law claims. But the Court must first apply Virginia's choice of law rules. *See McFarland v. Va. Ret. Servs. of Chesterfield, L.L.C.*, 477 F. Supp. 2d 727, 732 (E.D. Va. 2007). "Under Virginia law, the rule of *lex loci delicti*, or the law of the place of the wrong, applies to choice-of-law decisions

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explicit or implicit private remedy. *See also GE Capital Mortgage Serv., Inc.*, 124 F. App'x 152, 154, 2005 WL 269728, at *1-2 (4th Cir. Feb. 3, 2005) (attached as Ex. L) (court must look for "rights-creating language," which "is language that explicitly confer[s] a right directly on a class of persons that include[s] the plaintiff." (internal quotations omitted)).

in tort actions." *Colgan Air, Inc. v. Raytheon Aircraft Co.*, 507 F.3d 270, 275 (4th Cir. 2007). The alleged wrongs that led to Isa Saharkhiz's alleged injuries here (of which Mehdi's injuries are plainly derivative) took place in Iran. Thus, under Virginia law, Iranian tort law, not Virginia law, would apply, and Iranian law does not recognize aiding and abetting liability. *See Basch v. Westinghouse Elec. Corp.*, 777 F.2d 165, 171 (4th Cir. 1985) (noting "the general principle of Iranian law that 'no one is liable for the actions of another'"). As a result, the Complaint fails to state a cognizable legal claim under Iranian law, and should be dismissed for this additional reason.

VI. MEHDI SAHARKHIZ'S CLAIMS MUST BE DISMISSED.

As a final matter, Mehdi Saharkhiz, Saharkhiz's son, was not arrested (unlawfully or otherwise), imprisoned, beaten, denied medical care or detained. While he claims to suffer from emotional distress (Compl. ¶ 17), his injuries are entirely derivative of his father's. His federal claims thus fail for all the reasons that his father's claims fail and because he is not a proper party under either the ATS (no international norm recognizing emotional distress) or TVPA (not an individual tortured).

As to the state-law claims, Mehdi's claims would also be governed by the place of the alleged wrong, or Iran, and he cannot demonstrate a right to recover under Iranian law. *See supra* at 19. If U.S. law were applied to his claims, under Virginia choice of law rules, New Jersey law, where Mehdi resides (Compl. ¶ 17) would presumably apply. *See Colgan Air*, 507 F.3d at 275 (place of the wrong supplies controlling law). Under any state law, of course, Mehdi's state-law claims must be dismissed because the Complaint does not allege that Mehdi Saharkhiz was battered (Count IV), assaulted (Count V) or falsely imprisoned (Count VI), nor does it allege any facts that would support creation of a duty between Nokia US (or any other Defendant) and himself (Count VIII). *See Brunson v. Affinity Fed. Credit Union*, 972 A.2d

1112, 1122-23 (N.J. 2009) (negligence claim requires the existence of a duty of care); *Blue Ridge Serv. Corp. of Va. v. Saxon Shoes, Inc.*, 624 S.E.2d 55, 62 (Va. 2006) (negligence claim requires legal duty owed by defendant). And as to the claim for intentional infliction of emotional distress, "[f]or an intentional act to result in liability, the defendant must intend both to do the act and to produce emotional distress." *Juzwiak v. Doe*, ___ A.2d ___, 2010 WL 3022213, *4 (N.J. Super. A.D. Aug. 3, 2010) (attached as Ex. K) (quoting *Buckley v. Trenton Saving Fund Soc'y.*, 111 N.J. 355, 366, 544 A.2d 857 (1988)). Plaintiffs do not, and cannot, plead such an intent. Thus, all of Mehdi's indirect claims should be dismissed.[12]

CONCLUSION

For the foregoing reasons, all of Plaintiffs' claims should be dismissed.

[12] As noted above, Plaintiffs also purport to sue on behalf of "unnamed plaintiffs," but they plead no facts to support claims by those persons or their own standing to sue on behalf of those persons, and such "claims" should be dismissed. *See Dean v. WLR Foods, Inc.*, 204 F.R.D. 75, 76-77 (W.D. Va. 2001) (based on Magistrate's recommendation and without objection, noting entry of dismissal of unnamed plaintiffs for lack of standing).

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Respectfully submitted,

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