

**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

James S. Vine, <i>et al.</i> ,)	
)	
Plaintiffs,)	
)	C. A. No.1:01CV02674 (HHK)
v.)	
)	
Republic of Iraq,)	
)	
Defendant.)	
)	

**PLAINTIFFS' REPLY MEMORANDUM IN SUPPORT OF MOTION
FOR PARTIAL SUMMARY JUDGMENT AND/OR ADJUDICATION AS TO
COMMON LIABILITY ISSUES AND MEMORANDUM IN OPPOSITION
TO DEFENDANT'S MOTION FOR JUDGMENT ON THE PLEADINGS**

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INTRODUCTION

Iraq's opposition to Plaintiffs' motion for partial summary judgment and/or adjudication is no opposition at all. Indeed, that opposition does not challenge the veracity of any of the facts Plaintiffs rely upon in support of their motion or take issue with any of the legal conclusions that Plaintiffs draw from those facts. Instead, Iraq asks the Court to postpone resolution of the issues presented in Plaintiffs' motion for partial summary judgment until the individual damages phase of these proceedings. That approach is diametrically opposed to the bifurcated process Iraq agreed to six months ago.

Iraq similarly seeks to turn back the clock – this time by twelve months to September 7, 2006 – by asking the Court to reconsider its denial of Iraq's motion to dismiss. Iraq does not, however, even pretend that any of the criteria that must be satisfied before a court will revisit its own rulings are present here. Nor does it seek to justify its many month delay in filing such a motion.

The combination of Iraq's position on plaintiffs' motion for partial summary judgment and/or adjudication and its untimely and unsupportable motion for reconsideration suggest that it is stalling for time. The Court should reject this strategy. It should grant plaintiffs' motion, and deny Iraq's.

ARGUMENT

I. PLAINTIFFS' MOTION FOR PARTIAL SUMMARY JUDGMENT AND/OR SUMMARY ADJUDICATION SHOULD BE GRANTED.

A. The Common Factual And Legal Issues Raised By Plaintiffs' Motion Are Ripe For Immediate Adjudication.

On February 16, 2007, the parties to this action filed a Joint Case Management Report, which they represented would “substantially facilitate the economic and expeditious adjudication of these claims.” *Id.* at 1. The central feature of this *joint* plan was that, in accordance with Fed. R. Civ. P. 42(b), this Court “bifurcate[e] this case into two phases:

(1) a common and/or class-wide liability phase [Phase One] at which this Court will determine whether Iraq is liable to all American citizens who were physically present in Iraq and/or Kuwait on or after August 2, 1990 and were forbidden from leaving those countries; and, if necessary, (2) a plaintiff-specific phase [Phase Two] during which each individual claimant’s claim would be separately adjudicated to determine whether he or she is eligible for relief and the amount of such relief.”

Joint Case Management Plan ¶ 11. Iraq submitted that it would be “premature” to begin Phase Two discovery—that is, “discovery relating to the claims of individual plaintiffs”—“until such time as the common liability issues raised in Phase One are resolved.” *Id.* ¶ 8. Plaintiffs, for their part, proposed that all discovery begin immediately and expressed their view that the common liability issues that would be the subject of Phase One could be resolved through summary adjudication and without the need for an actual trial. *Id.* ¶¶ 1 & 8. On April 6, 2007, this Court embraced the parties’ proposed approach to this litigation, ordering the action bifurcated in precisely the manner they had suggested and setting a briefing schedule for Plaintiffs’ proposed motion for partial summary judgment. Scheduling Order, filed April 6, 2007, at 1-2.

Consistent with this Court's order, Plaintiffs served discovery relating to the common issues in this case on both Iraq and the United States, engaged two expert witnesses and filed a motion for partial summary judgment and/or adjudication urging this Court to resolve common legal and factual issues in their favor. In its opposition, Iraq does not dispute any of the factual or legal arguments presented by Plaintiffs in support of their motion. Instead, knowing that it is headed for defeat, Iraq argues, in effect, that the bifurcated approach to this litigation that Iraq itself advocated more than a half year ago was a mistake, that everything that has happened since this Court adopted that approach has been a waste of time and that, instead of resolving all of the factual and legal issues raised in Plaintiffs' motion now, this Court should adjudicate them separately in each of 236 individual trials involving the specific claims of the 236 named Plaintiffs in this action. This kind of cynical gamesmanship should not be tolerated.

In support of its argument that this Court should reverse course and go back to square one, Iraq contends (at 1, n.1) that there is "an open question" whether resolving the common issues in this case "will materially expedite this litigation." But six months ago, Iraq expressed no such doubt on that score, representing that the early determination of the common issues in this case would "substantially facilitate the economic and expeditious adjudication of these claims." Joint Case Management Report at 1. Iraq was right then and is wrong now. The proposition that it could somehow be more efficient and expeditious to resolve the common factual issues relating to Iraq's conduct in detaining American citizens in Iraqi-occupied territory and the legal consequences of that conduct in 236 separate hearings than to do so in a single common hearing

is absurd on its face. At any rate, having led this Court down the bifurcation path, Iraq is judicially estopped from asserting otherwise.

Iraq's argument (at 1, n.1) that this Court cannot pass upon Plaintiffs' motion for partial summary judgment and/or adjudication "because it will not completely resolve any claims or defenses at issue in this case" fares no better. Although Iraq does not explain why it believes this to be the case, its argument appears to be that this Court cannot render a decision against Iraq on the common liability issues at this time because it will not be known whether any given Plaintiff has a right to relief until the completion of Phase Two. That argument is bogus.

Where a court bifurcates a proceeding into separate phases, as this Court has done here, it "may order a separate trial of any claim . . . or of any number of claims" or of "any separate *issue* . . . or *issues*." Fed. R. Civ. P. 42(b) (emphasis added). In ordering bifurcation in this case, this Court understood and ordered that the central issue to be resolved at Phase One would be whether Iraq did, in fact, adopt the hostage-taking policy described in the complaint and whether, as a result of having done so, Iraq is liable to any American citizen (or his or her spouse) who was "physically present in Iraq and/or Kuwait on or after August 2, 1990 and [was] forbidden from leaving those countries." Scheduling Order at 1. A party is permitted to move, not only for summary judgment on the entirety of a claim, but alternatively on "any part" of the claim. Fed. R. Civ. P. 56(a). If summary judgment is not rendered on the entire action, the court "shall if practicable ascertain what material facts exist without substantial controversy." *Id.* 56(d). Inasmuch as Plaintiffs believed that there was no real dispute regarding the common liability issue, that is, on "part" of their claim, they concluded that a trial on this issue was unnecessary

and, instead, sought to resolve it by motion, which they styled as one for partial summary judgment and/or adjudication of common issues under Fed. R. Civ. P. 56.

Plaintiffs believe that Fed. R. Civ. P. 56 is the appropriate procedural vehicle for their motion and that it gives this Court all of the authority it needs to grant them the relief they have requested.¹ But even if Iraq is correct and there is no “claim” that is ripe for review under Fed. R. Civ. P. 56 at this stage, there is no question that Fed R. Civ. P. 42(b) gives this Court the authority not only to resolve any distinct legal claim, but also to adjudicate “any separate *issue* . . . or *issues*” that may form the basis for such a claim. Consistent with the proposal Iraq advocated in the Joint Case Management Plan and its order adopting that proposal, this Court should exercise that authority now by resolving the factual and legal issues that are common to the claims of all named Plaintiffs.

In yet another effort to turn the bifurcation process it earlier agreed to into a meaningless exercise, Iraq also asserts (at 22, n. 8) that it is premature for this Court to determine what the governing law is in this case because Plaintiffs have “not yet presented any particular claims on behalf of any specific named Plaintiffs” and, hence, Iraq has had “neither occasion nor basis on which to assess Plaintiffs’ assertion that no true conflict exists.” This is just more gamesmanship.

As Iraq admits that this dispute will be governed by the law of some American jurisdiction (at 22, n.8), the choice-of-law issue reduces to whether a conflict exists between the

¹ Even Iraq admits (at 1, n.1) that, at a minimum, this Court has the authority under Rule 56(d) to issue an order ruling that the facts set forth in Plaintiffs’ Statement Of Facts Upon Which There Is No Genuine Issue (“Statement of Undisputed Facts”) have been established for purposes of all further proceedings in this case.

