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UNITED STATES DISTRICT COURT

DISTRICT OF OREGON

PORTLAND DIVISION

ROCKY BIXBY; et al.,

Plaintiffs,

v.

KBR, INC.; et al.,

Defendants.

Civil No.: 3:09-CV-632-PK

MEMORANDUM IN SUPPORT OF DEFENDANTS' MOTION TO DISMISS PURSUANT TO RULE 12(B)(1) OF THE FEDERAL RULES OF CIVIL PROCEDURE

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Defendants KBR, Inc., Kellogg Brown & Root Services, Inc., KBR Technical Services, Inc., Overseas Administration Services, Ltd., and Service Employees International, Inc. (hereinafter referred to as "KBR" or "Defendants") hereby file this memorandum in support of their motion pursuant to Rule 12(b)(1) of the Federal Rules of Civil Procedure to dismiss the underlying complaint based upon the political question doctrine, principles of derivative sovereign immunity, and the combatant activities exception of the Federal Tort Claims Act, 28 U.S.C. § 2680(j).

I. INTRODUCTION

In the months preceding the invasion of Iraq in March 2003, the United States government, in conjunction with its Coalition partners, made numerous strategic and policy-sensitive decisions regarding the conduct of the invasion and the post-invasion governance of Iraq. One of the highest priorities in Operation Iraqi Freedom was to secure and restore the Iraqi oil infrastructure in order to increase Iraqi oil production, which had been greatly impaired during the pre-war period. In an effort to further its military and foreign policy objectives, the United States planned to use the increased oil revenues to help rebuild the Iraqi economy and stabilize the post-invasion government.

Plaintiffs' "contractor on the battlefield" lawsuit arises from this United States' oil restoration effort in Iraq. Before the invasion, the United States Army Corps of Engineers ("USACE"), which headed up Task Force Restore Iraqi Oil ("TF RIO"), issued a classified contract to KBR directing it to assist the United States with restoring the Iraqi oil industry.[1]

[1] The relevant (and now declassified) portions of Contract No. DACA63-03-D-0005, also known as the "Restore Iraqi Oil" ("RIO") contract, appear as Attachment 1 to the Declaration of Gordon Sumner ("Sumner Decl."), attached hereto as Exhibit 1. Significantly, the RIO contract was a "rated order" contract under the Defense Production Act. *See* Defense Production Act of 1950 ("DPA"), 50 U.S.C. app. §§ 2071(a), 2073 (2000). Under this statute, the U.S. military can

Because KBR was to perform its work in a hostile war environment, the United States military assigned members of the U.S. Army National Guard to escort and protect KBR personnel while they worked at oil infrastructure facilities throughout Iraq, including the Qarmat Ali Water Treatment Plant ("Qarmat Ali") near Basra.

Plaintiffs in this case are members of the Oregon National Guard who allege that, while they provided force protection for KBR at Qarmat Ali during the spring and summer of 2003, they were exposed to and injured by sodium dichromate, a chemical that apparently had been used at Qarmat Ali by the state-owned Iraqi oil industry prior to the invasion. Plaintiffs seek to recover from KBR for allegedly failing to warn them in a timely fashion regarding the potential dangers of sodium dichromate and failing to remediate the contamination or otherwise protect them from exposure to the chemical, even though the RIO contract issued to KBR required the military to assess facilities such as Qarmat Ali; ensure that they were free of environmental and other hazards; and then declare them to be "benign" before directing KBR to begin its restoration work. But for the government's decision not to conduct an environmental assessment at Qarmat Ali before declaring it benign, Plaintiffs would not have been exposed to sodium dichromate and would not have suffered their alleged injuries. As a result, the case cannot be adjudicated without evaluating this and other key military decisions, and the Court will be forced inevitably "to question the judgment . . . of the United States military." *Taylor v. Kellogg Brown & Root Services, Inc.*, No. 2:09-cv-00341 at 11 (E.D. Va. Apr. 16, 2010) (attached hereto is Exhibit 16).

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compel private contractors to provide products or services the military determines are necessary to protect U.S. national security interests. Failure to do so can subject the contractor to civil and criminal fines and penalties.

Plaintiffs' complaint raises issues that transcend the traditional state tort law concepts that courts apply in routine tort cases. Instead, this case implicates "uniquely federal" interests -- namely, the effective and efficient prosecution of wartime activities by the United States and its allies; the determination, prioritization, and execution of foreign policy initiatives such as the rebuilding of the critical infrastructure of formerly hostile nations; and the organization and execution of related "mission-critical" activities such as securing, assessing, and restoring vital oil infrastructure under dangerous conditions in war theaters. *See Boyle v. United Technologies Corp.*, 487 U.S. 500, 505 (1988) (finding that "uniquely federal" interests are implicated in suits arising out of the performance of federal contracts).

These paramount federal interests deserve deference by the federal judiciary and must be protected from the application of varying state tort law standards. *See, e.g, Corrie v. Caterpillar, Inc.*, 503 F.3d 974, 983 (9th Cir. 2007) (explaining that courts "cannot intrude into . . . foreign policy decision[s] committed under the Constitution to the legislative and executive branches[.]"); *Koohi v. United States*, 976 F.2d 1328, 1335 (9th Cir. 1992) ("[T]ort law, in toto, is an inappropriate subject for injections into the area of military engagements."); *Bentzlin v. Hughes Aircraft Co.*, 833 F. Supp. 1486, 1492 (C.D. Cal. 1993) ("The federal interests that exist in wartime would be frustrated by allowing state tort suits against government contractors that arise from wartime deaths[.]"); *Nejad v. United States*, 724 F. Supp. 753 (C.D. Cal. 1989). *See also Saleh v. Titan Corp.*, 580 F.3d 1, 11 (D.C. Cir. 2009) ("[t]he federal government's interest in preventing military policy from being subjected to fifty-one separate sovereigns . . . is not only broad - it is also obvious"), *rehearing en banc denied*, no. 08-7001 (Jan. 25, 2010). These important federal interests extend not only to combat operations, but to the myriad operations performed by the military as part of post-combat initiatives. *See Tiffany v. United States*, 931

F.2d 271, 278 (4th Cir. 1991) ("The elementary canons of judicial caution are not limited to actions taken during actual wartime, but may extend to many other aspects of military operations.").

The intimate involvement of the United States, as well as other sovereign nations, in the post-invasion rebuilding of Iraq and the restoration of its oil infrastructure is indisputable. As will be demonstrated below, the significant and overwhelming interests of the federal government in the oil restoration program, as well as the ongoing military operations in Iraq, cannot be extracted from Plaintiffs' state tort allegations, nor can they be undermined or defined by the uncertainties of applying various and varying state tort law standards of care.

Several decisions from this Circuit have recognized the need to preserve and protect these paramount federal interests from judicial interference. *See Corrie*, 503 F.3d at 983-84 (dismissing damage claims against contractor for injuries caused by equipment sold to foreign government with the knowledge and approval of United States government); *Koohi*, 976 F.2d at 1336-37 (dismissing wrongful death claims against missile defense system contractors for erroneous identification and destruction of civilian aircraft during Persian Gulf War); *Nejad*, 724 F. Supp. at 755 (C.D. Cal. 1989) (same); *Bentzlin*, 833 F. Supp. at 1493-94 (dismissing wrongful death claims against missile manufacturer for "friendly fire" incident that resulted in military deaths during Persian Gulf War).

This Ninth Circuit case law is reinforced by three recent appellate decisions that used the same interlocking legal doctrines presented here to dismiss tort suits against contractors who assisted the U.S. military as "contractors on the battlefield" or performed "public works" projects similar to the oil restoration project at issue.

First, in *Carmichael v. Kellogg, Brown & Root Services, Inc.*, 572 F.3d 1271 (11th Cir. 2009), *petition for cert. filed* (U.S. Dec. 9, 2009) (No. 09-683), the Eleventh Circuit upheld the dismissal of a state tort suit against a battlefield contractor based on the political question doctrine. The Eleventh Circuit concluded that resolution of the plaintiffs' claims would have required inappropriate judicial scrutiny and second-guessing of U.S. military discretionary decisions, strategies, and policies made during Operation Iraqi Freedom regarding military convoy activity in Iraq. Second, the D.C. Circuit, relying on the reasoning set forth in *Koohi* and *Bentzlin*, applied the combatant activities exception to dismiss state tort law claims arising out of Operation Iraqi Freedom against two military contractors that, at the direction of the U.S. military, had been integrated into combatant activities in Iraq, i.e., interrogation of prisoners at Abu Ghraib, over which the military retained command authority. *Saleh,* 580 F.3d at 7. Finally, in *Ackerson v. Bean Dredging LLC*, 589 F.3d 196 (5th Cir. 2009), a case involving a non-wartime contract issued by the United States Corps of Engineers, the Fifth Circuit protected against state tort law claims the federal interest embodied in the Corps' decision to delegate "public works" functions, i.e., the building of levies in New Orleans, to private contractors. In doing so, the Fifth Circuit dismissed outright a state tort suit under the derivative sovereign immunity principles set forth by the Supreme Court in *Yearsley v. W.A. Ross Constr. Co.*, 309 U.S. 18 (1940), namely that government contractors are immune from tort suits arising from the performance of duties within the scope of a validly conferred federal contract.

These decisions are bound together by recurring and interrelated core principles. First, these decisions recognize the fundamental axiom that discretionary acts of the United States, particularly those that occur in active war theaters, cannot be challenged by state tort law principles. *See* 28 U.S.C. § 2680(a) (waiver of sovereign immunity does not extend to claims

"based upon the exercise or performance or the failure to exercise or perform a *discretionary function or duty*") (emphasis added). *See* 28 U.S.C. § 2680(j) (waiver of sovereign immunity does not extend to combatant activities); *Saleh,* 580 F.3d at 11. *Cf. Bentzlin*, 833 F. Supp. at 1493 ("the objectives of tort law—deterrence, punishment, and providing a remedy to innocent victims—are inconsistent with the government's interests in combat, and thus tort law cannot be applied to government actions in combat").

Second, these cases recognize that discretionary decisions of the United States military are often implicated in state tort suits brought against private contractors who implement military decisions. *Accord Boyle*, 487 U.S. at 511 (finding that state tort suits against defense contractors would lead to inappropriate "second-guessing" of discretionary judgments of the United States military); *McMahon v. Presidential Airways, Inc.*, 502 F.3d 1331, 1340 (11th Cir. 2007) ("service-related tort suits against private contractors may sometimes threaten interference with sensitive military decisions"). Such discretionary decisions and federal interests must be protected against the vagaries of state tort law standards, regardless of whether the defendant is the United States or its contractor. *See Corrie*, 503 F.3d at 984 ("[R]esolving [plaintiffs'] suit will necessarily require us to look beyond the lone [corporate] defendant in this case and toward the foreign policy interests and judgments of the United States government itself."); *Saleh*, 580 F.3d at 8 ("whether the defendant is the military itself or its contractor, the prospect of military personnel being haled into lengthy and distracting court or deposition proceedings is the same . . . requiring extensive judicial probing of the government's wartime policies").

Finally, these cases recognize that the paramount federal and public interest in the orderly and effective disposition of military and related foreign policy strategies, tactics, and logistics, whether those efforts are conducted by the government directly or through the efforts of private

contractors acting under the direction of the government, outweighs and supersedes any state interests in applying state tort law standards of care to the conduct of the government and its contractors in the performance of battlefield activities. *See Bentzlin*, 833 F. Supp. at 1492 (federal interest in wartime operations "require[s] the displacement of state tort suits which seek to impose a duty of care upon contractors where the federal government has determined none exists"); *Saleh*, 580 F.3d at 7 (finding that tort principles have no place on the battlefield and that military commanders and contractors should be free from the "doubts and uncertainty inherent in potential subjection to civil suit").

These principles squarely apply to the instant case. As part of its strategy to restore oil production as quickly as possible following the 2003 invasion, the United States worked in close coordination with Iraq's Oil Ministry and the British military, which provided security in the southern portions of Iraq. The United States and its Coalition partners made the initial policy decision to refurbish and utilize pre-existing, dilapidated, and heavily looted Iraqi oil infrastructure facilities, such as Qarmat Ali, rather than construct new facilities. In the U.S. military's judgment, the refurbishment of Qarmat Ali was absolutely essential to oil production in southern Iraq because Iraq's southern oil fields rely on water pressure to flow properly, and the water used in the southern oil fields was treated and supplied by Qarmat Ali.

Despite its contractual obligations to ensure facilities were free of environmental hazards before directing KBR to begin work, the United States military determined that performing an initial environmental assessment at Qarmat Ali was not feasible due to the exigencies of war and the large scale reconstruction efforts. *See* Ex. 2 at Bates No. 00181 (official Army correspondence to Congress wherein the Secretary of the Army stated that "the number of sites (approximately 4,000) over the geographic area of Iraq potentially needing occupational health

assessments in the immediate aftermath of hostilities, combined with the need to restore critical infrastructure as soon as possible, made this impracticable").

Therefore, it is apparent that policy, tactical, and operational judgments of the United States military, as well as foreign policies of the United States and its allies, pervade the facts and circumstances giving rise to Plaintiffs' alleged injuries. Indisputable evidence, including statements by the then-current Secretary of the Army Pete Geren, a sworn declaration by the USACE Procurement Contracting Officer for the RIO contract, Gordon Sumner, and an official statement from the British Ministry of Defence, establishes that the U.S. military, with input from the Iraqi Ministry of Oil and the British military, controlled the key discretionary decisions that lie at the heart of Plaintiffs' claims, *e.g.*:

- The U.S. military and the Iraqi Ministry of Oil, not KBR, decided which facilities were essential to the Iraqi oil program and prioritized their refurbishment;
- The U.S. military, not KBR, decided for which Iraqi oil facilities, including Qarmat Ali, the military would conduct environmental assessments;
- The U.S. military, not KBR, determined when an Iraqi oil facility was adequately "benign" and sufficiently free from environmental hazards for the USACE to direct KBR personnel to begin the restoration effort at particular facilities, including Qarmat Ali;
- The U.S. and British military, not KBR, were responsible for setting protocols and training military personnel regarding the proper use of personal protective equipment ("PPE") to counter the threat of residual chemical hazards throughout oil infrastructure facilities in Iraq;
- The U.S. and British military, not KBR, were responsible for notifying their respective personnel, including Plaintiffs, regarding their potential exposure to sodium dichromate; and
- The U.S. and British military, not KBR, were responsible for conducting testing they deemed adequate to determine whether and to what extent military personnel were exposed to sodium dichromate; whether they were injured thereby; and what medical care, both present and future, is appropriate for military personnel to receive.

These discretionary acts of the U.S. government, as well as those of other sovereign nations, establish an "indelible military footprint" inseparable from Plaintiffs' state tort law allegations against KBR and KBR's *defenses*. Accordingly, this Court should dismiss all of Plaintiffs' claims under the political question doctrine, derivative sovereign immunity principles, and the FTCA's combatant activities exception.

II. FACTUAL BACKGROUND

A. The United States and Its Allies Controlled the War and Oil Restoration Efforts in Iraq, Including the Actions of Contractors Such as KBR

In March 2003, acting under the orders of the President and working in concert with the armed forces of other nations, the military forces of the United States began the invasion of Iraq in an operation now known as Operation Iraqi Freedom. The United States exercised, and continues to exercise, plenary control over all U.S. military operations in Iraq, such as battle planning, force protection, and reconstruction efforts.

One of the United States' most significant and pressing goals was to secure Iraq's oil infrastructure and rapidly return Iraq's oil production to pre-hostility levels. *See* Ex. 1, Sumner Decl. ¶ 4. Achieving this goal as quickly as possible was essential not only to Iraq's economic recovery after the war, but also to the foreign policy and goals of the United States, specifically, to pursue the policy-based determination that revenues from the production of oil would help fund the allied forces' reconstruction efforts in Iraq. For example, Secretary of Defense Donald Rumsfeld testified to Congress that "when it comes to reconstruction, . . . we will turn first to the resources of the Iraqi government itself . . . . Once Saddam Hussein is gone, the U.S. will work with the Iraqi Interim Authority that will be established to tap Iraq's oil revenues . . . to fund their reconstruction effort." *See FY 2003 Emergency Supplemental: Hearing Before the Subcomm. on Defense of the H. Comm. on Appropriations* (March 27, 2003), *available at*

http:www.gpo.gov/fdsys/pkg/CHRG-108shrg73/pdf/CHRG-108shrg73.pdf. *See also Status and Prospects for Iraq Reconstruction: Hearing Before the Senate Foreign Relations Committee* (July 29, 2003), *available at* http://foreign.senate.gov/testimony/2003/BoltenTestimony030729.pdf (testimony of Joshua Bolten, Director, Office of Management and Budget) ("In addition to rebuilding critical infrastructure, rapid restoration of Iraqi oil production is a high priority.").

Private contractors played a supporting role in this effort. Decades prior to the 2003 invasion, the United States made a policy-level decision to use private contractors to perform essential military functions and achieve key military goals during wartime. *See* "Logistics Civil Augmentation Program (LOGCAP)," Army Regulation 700-137 (16 December 1985) ("AR 700-137"), § 1.1 (attached hereto as Exhibit 3). The steady reduction in the size and number of troops available for wartime deployments resulted in the military's increased reliance on civilian contractors to augment military operations through the provision of logistical and engineering services. Col. David L. Carr, *Considerations for the Development of a DOD Environmental Policy for Operations other than War,* AEPI White Paper (May 1997), at 20 (attached hereto as Exhibit 4). As a result, during Operation Iraqi Freedom, contractors such as KBR provided services that were previously provided by military engineering and combat units. *Id.*

B. The U.S. Military Was Responsible For Providing a "Benign" Workplace, Free of Environmental Hazards, and Ensuring the Safety of Military and Contractor Personnel Performing Work in Iraq Under the RIO Contract

It is indisputable that the military controlled where and when KBR performed its oil infrastructure restoration efforts. On March 3, 2003, only weeks before the invasion began, the USACE issued the RIO contract to KBR. Ex. 1, Sumner Decl. ¶ 7. The actual work performed by KBR was described in various "task orders" issued by the USACE as part of the RIO contract. *Id.* ¶ 8. Task Order 3, which the USACE issued on March 20, 2003, the day the

invasion began, is of most relevance to this litigation. *Id.* ¶ 8, Attach. 2. This classified task order, which the military now has declassified, required KBR to provide "emergency response tasks for Iraqi oil restoration," and it governed the services KBR provided at Qarmat Ali and many other Iraqi oil infrastructure facilities in 2003. Ex. 1, Sumner Decl., Attach. 2 at 2. The work encompassed by this task order was "***intended to support immediate actions by the US and coalition forces*** to respond to oil well fires and oil spills, and to prevent or mitigate significant hazards or damage to oil facilities." *See id.* at 1, § 1.1.1 (emphasis added).

The plain language of Task Order 3 obligated the military to provide KBR with a "benign" environment in which to work. *See id.* at 1; Ex. 1, Sumner Decl. ¶ 9. The contract provides that an Iraqi Oil Infrastructure facility is considered "benign and ready for a contractor" if the facility has been "***cleared of*** all enemy forces, ***environmental hazards (NBC and industrial)***, mines, unexploded ordnance, booby-traps, and sabotage systems." Ex. 1, Sumner Decl., Attach. 2 at 1, § 1.1.1 (b) (emphasis added)). Under Task Order 3, the military could not authorize or direct the contractor to enter any facility until the day after the facility has "been secured and cleared and declared benign [by the military]." *Id.,* § 1.1.1 (c). In short, KBR did not, and could not, begin work at Qarmat Ali until specifically directed by the military and only after the military had declared the site "benign" and free of environmental hazards.

Notwithstanding these contractual obligations, the United States determined that performing an initial environmental assessment at Qarmat Ali was not feasible due to the exigencies of war and the scale of the reconstruction efforts. In response to a Congressional inquiry, former Secretary of the Army Pete Geren described the situation as follows:

> ***Ordinarily, the Army would perform an environmental assessment of a site prior to the deployment of service members or contractors to that site. In this case, however, the number of***

> ***sites*** (approximately 4,000) over the geographic area of Iraq potentially needing occupational health assessments in the immediate aftermath of hostilities, ***combined with the need to restore critical infrastructure as soon as possible, made this impracticable***. This was exacerbated by the fact that a large number of the approximately 4,000 sites had been designated as suspect for the presence of weapons of mass destruction, and warranted special attention. Finally, in order to prioritize its actions, the Army focused its assessments on major bed down locations and the surrounding areas during the pre-deployment phase. The Qarmat Ali site was not identified within the radial proximity of any bed down location.

Ex. 2 at Bates No. 00181 (emphasis added).

Moreover, Task Order 3 did not require KBR to conduct an initial assessment of an Iraqi Oil Infrastructure facility prior to moving in and beginning work at the facility. Ex. 1, Sumner Decl. ¶ 9, Attach. 2; Ex. 2 at Bates No. 00181 ("The Army's contract with KBR did not require KBR to perform an environmental assessment prior to the arrival of U.S. Service members."). Task Order 3 further disavowed any intention or responsibility for KBR to perform remediation for pre-existing environmental contamination. Ex. 1, Sumner Decl. ¶ 9, Attach. 2 at 4, § 1.13.1. Nor did its contract require KBR to report symptoms of hazardous substance exposure to the government. The Secretary of the Army also has confirmed that "[t]he Army's contract with KBR did ***not*** require KBR to perform an environmental assessment prior to the arrival of U.S. service members." *See* Ex. 2 at Bates No. 00181 (emphasis added). In fact:

> KBR was in substantial compliance with [the contract's] pertinent terms and conditions. . . . [T]he government's own statement of work for the Qarmat Ali Water Injection Plan effort stated that the facility was free of environmental hazards. The contract did not require KBR to provide personnel protective equipment to military personnel. Likewise, the contract did not require KBR to report symptoms of hazardous substance exposure to the government.

Id. at Bates No. 00194.

Regarding the Qarmat Ali facility, in early April 2003, shortly after the invasion began, the U.S. military ordered the Army's 3rd Infantry Division to conduct an initial assessment of Qarmat Ali. *See The Exposure at Qarmat Ali*: Hearing before the Senate Democratic Policy Committee (August 3, 2009) (attached as Exhibit 5). The purpose of the Army's assessment was to report on the infrastructure, safety, and surroundings at Qarmat Ali. *Id.* at 14. The military's assessment team noted the presence of orange stains in the soil but did not believe that the stains required further investigation or action. *Id.* The soldiers who conducted this assessment recommended that the Army "build a new plant because it would have taken too much time and money to clean up the mess and fix the machinery." *Id.* Nonetheless, because Qarmat Ali was such a vital oil infrastructure facility, the U.S. military and TF RIO made its refurbishment a high priority. Ex. 1, Sumner Decl. ¶ 6.

C. The U.S. Military, in Conjunction with the Iraqi Ministry of Oil and the British Military, Controlled the Restoration Efforts at Qarmat Ali

1. Through Task Force RIO, the United States, Iraqi, and British Governments Worked Together to Restore Iraqi Oil Production

Although the U.S. military led the effort to restore the Iraqi oil program, it did not act alone. The USACE worked closely with officials from the Coalition Provisional Authority ("CPA") and with representatives from the Iraqi Ministry of Oil and the various state-owned Iraqi petroleum companies. *See* Ex. 1, Sumner Decl. ¶¶ 5, 10. The British military also was involved because it was the Coalition partner responsible for security in Southern Iraq. Official Statement from the British Ministry of Defence ("MOD Statement") (attached hereto as Exhibit 6); Ex. 1, Sumner Decl. ¶ 6. In connection with TF RIO's efforts to restore Iraqi oil production, the USACE held regular planning meetings with representatives from the Ministry of Oil, the various Iraqi state-owned oil companies, KBR, and the British military. Ex. 1, Sumner Decl.

¶ 10; Ex. 6, MOD Statement at 2. In these meetings, the U.S. military, in conjunction with the Ministry of Oil and the CPA, established the policies and set the tactical and operational priorities regarding engineering and construction concerns, equipment needs, safety and security problems, and logistical issues at the various Iraqi oil facilities, including Qarmat Ali. Ex. 1, Sumner Decl. ¶ 10.

The restoration of the Iraqi oil program was intended to be a "joint effort" between the various governmental entities and KBR. *See* TF RIO Final Work Plan dated July 24, 2003 (attached hereto as Exhibit 7) at 15. The Iraqi Ministry of Oil and the state-owned petroleum companies were responsible for the engineering and construction of most of the projects. *Id.* at 9. The SOC and the other state-owned companies had "overall responsibility" for the projects, and KBR was to serve "primarily a procurement role for restoration commodities." *Id.* The Ministry of Oil expected that it would "provide[] the engineering and construction management of all major projects with assistance from KBR only as requested." *Id.* at 10. Importantly, the USACE exercised responsibility for funding and for various other engineering management obligations, including "environmental and safety standards for the project and its personnel . . . ." *Id.* at 11. The participants recognized that the urgency of some projects would require "temporary solutions and 'band-aid fixes' for damaged and looted facilities." *Id.* at 10.

2. The Qarmat Ali Water Treatment Plant Was Essential to TF RIO's Goal of Restoring Iraqi Oil Production

Historically, Qarmat Ali was a crucial component of Iraq's oil production infrastructure. This water treatment plant, which is located near Basra in Southern Iraq, was designed by the Soviet Union in the late 1970s. Iraqi oil workers injected the water processed and treated at Qarmat Ali into the oil fields of southern Iraq to build and maintain enough pressure for oil and gas to rise to the surface. Ex. 1, Sumner Decl. ¶ 6. All of the oil wells in southern Iraq relied on

this water pressure in order to flow properly. *Id*. Unfortunately, Qarmat Ali was nearly destroyed from looting and vandalism prior to and following the invasion of Iraq. *See generally Id.* ¶ 12; *see also* Ex. 6, MOD Statement at 2. Thus, the restoration and refurbishment of Qarmat Ali was essential to restoring oil production in Iraq and the ongoing military operations in Iraq. Ex. 1, Sumner Decl. ¶ 12

After receiving direction from the military, KBR personnel began restoration work at Qarmat Ali in April, 2003. Declaration of Kuo Ying Tseng ¶ 5 (attached hereto as Exhibit 8). Because KBR personnel were traveling round trip via military convoys from their station in Kuwait, they only were able to visit Qarmat Ali for several hours at a time during their initial site visits. *See* Ex.1, Sumner Decl. ¶ 11. KBR personnel worked directly with representatives from Iraq's Southern Oil Company ("SOC"), who played a significant role in the day to day operations at Qarmat Ali. Ex.1, Sumner Decl. ¶ 5. In fact, even the material requisition forms for procurements related to the water injection project had to go through SOC and ultimately be approved by the USACE. *See* July 20, 2003 Meeting Minutes (attached hereto as Exhibit 9) ("In order for Corps of Engineers to allow us to procure materials, we must have an Owner Service Request from SOC, submitted to the COE, approved then transmitted to KBR for action.").

The work at Qarmat Ali, as well as other Iraqi oil infrastructure facilities, was often hindered by ongoing wartime hostilities. Ex. 1, Sumner Decl. ¶¶ 11-12; Ex. 6, MOD Statement at 2. Significant damage, looting, and sabotage occurred, and the continued attacks delayed efforts to restore production capacity. Ex. 1, Sumner Decl. ¶¶ 11-12; Ex. 7, Final Work Plan at 4. Qarmat Ali was in an especially volatile area of the Iraqi war theater, and there were many days when KBR personnel could not get to Qarmat Ali or when operations at Qarmat Ali had to

be shut down entirely due to these combat war zone concerns. *See* Ex. 1, Sumner Decl. ¶ 12; Ex. 6, MOD Statement at 2.

Due to the hostile nature of the war theater in Iraq, and consistent with its regulations regarding force protection, the U.S. military deployed members of the Army National Guard to provide security protection for KBR personnel working on the RIO contract and to protect Iraqi oil infrastructure facilities against further damage from looting, including the work performed at Qarmat Ali. *See* Ex. 6, MOD Statement at 2. In addition, because Qarmat Ali was located in Southern Iraq, the British military provided perimeter site security there. *Id.* Neither the RIO contract nor Task Order 3 required KBR to provide personal protective equipment ("PPE") to these military personnel, nor did KBR have any authority to determine when military personnel carried or used their PPE. Ex. 2 at Bates No. 00194.

3. Discovery and Remediation of Sodium Dichromate Contamination at Qarmat Ali

During KBR's efforts at Qarmat Ali, it learned that Iraqi workers previously used sodium dichromate as an anti-corrosive in the chemical injection process. As KBR personnel spent more time there, they learned that sodium dichromate had potentially contaminated the soil surrounding several buildings at Qarmat Ali. Evidence exists that KBR informed USACE representatives of the potential contamination verbally no later than July 25, 2003. Brief to Senator Bayh on Sodium Dichromate Exposure, December 22, 2008 at 18 (attached hereto as Exhibit 10). After environmental testing confirmed the presence of sodium dichromate in early August 2003, KBR informed the military and, at the military's direction, took immediate steps to encapsulate and remediate the sodium dichromate contamination. August 2003 Letters from KBR to Cheryl Hodge-Snead (attached hereto as Exhibit 11).

The U.S. military then began testing to determine what exposures, if any, had occurred. Leading the effort was the U.S. Army Center for Health Promotion and Preventive Medicine ("USACHPPM"), a subordinate command of the U.S. Army Medical Command. *See On Occupational and Environmental Health Exposures in Military Operations: Hearing Before the Senate Veterans' Affairs Committee,* 111th Cong. 1 (2009) (Statement of John J. Resta, U.S. Army Center of Health Promotion & Preventive Medicine) (USACHPPM provides "support to deployed preventive medicine units and personnel who conduct occupational and environmental health surveillance activities.") (attached hereto as Exhibit 12); *Preventive Medicine,* Army Regulation 40-5 ("AR 40-5") (May 25, 2007), *available at* http://www.army.mil/USAPA/epubs/pdf/r40_5.pdf.

USACHPPM studied the air and soil quality at the plant, and it conducted biological, medical, and epidemiological tests on potentially exposed National Guardsmen and Department of Defense civilians at the plant. It concluded that "[w]ith only a relatively brief short-term exposure, no long-term adverse health effects related to cancer or reproduction are expected."[2] *See Health Risk Facts Related to Sodium Dichromate at Qarmat Ali Water Treatment Plant, Basrah, Iraq* (attached as Exhibit 13). The British Military conducted its own tests and concluded that "it [appears] that there are no parameters within either the air samples or soil samples analyzed which are cause for concern at this present moment in time whilst the guard force are undertaking relatively passive duties." *See Environmental and Industrial Hazards*

[2] Notwithstanding the military's conclusion that adverse health effects are unlikely, the Department of Veterans Affairs recently announced it was expanding the Gulf War Registry to include soldiers exposed to sodium dichromate at Qarmat Ali. Letter from Eric Shinseki, Secretary of Veteran Affairs, to John Rockefeller, Senator, U.S. Senate (Oct. 8, 2009) (attached as Exhibit 15). Soldiers who enroll in this registry will receive a complete exposure assessment and a targeted physical examination. *Id.* These evaluations will be repeated periodically to monitor the soldiers' health. *Id.*

(EIH) Tier 2 Assessment Qarmat Ali Water Treatment Plant - Interim Report (attached as Exhibit 14) at 4; *see also* Ex. 6, MOD Statement at 2.

Secretary Geren has informed various U.S. Senators that the Army's medical evaluations of the soldiers, including those conducted prior to the remediation efforts, "indicate[d] little or no expectation of future health concern." Ex. 2 at Bates No. 00179. Nonetheless, Secretary Geren confirmed that he and his staff planned "[t]o ensure that any Soldiers exposed in this incident are notified and provided with proper care." *Id.* He assured the Senators that "the Army is aggressively and thoroughly responding to this issue." *Id.*

III. ARGUMENT

The Court should dismiss Plaintiffs' claims under Federal Rule of Civil Procedure 12(b)(1) for lack of subject matter jurisdiction. *See Corrie v. Caterpillar, Inc.* 503 F.3d 974, 982 (9th Cir. 2007) (holding that "if a case presents a political question, we lack subject matter jurisdiction to decide that question"); *Koohi v. United States*, 976 F.2d 1328, 1337 (9th Cir. 1992) ("Both political question doctrine and sovereign immunity go to jurisdiction.") (citing *Rivera v. United States*, 924 F.2d 948, 951 (9th Cir. 1991)) (J. Kleinfeld, concurring). When resolving challenges to justiciability and subject matter jurisdiction, the court may look beyond the pleadings and consider affidavits, declarations, and other outside materials. *See Corrie*, 503 F.3d at 979-80.

A. This Action is Non-Justiciable Under the Political Question Doctrine

The Court should grant KBR's Motion to Dismiss because this case raises claims that are non-justiciable under the political question doctrine, *Baker v. Carr*, 369 U.S. 186 (1962). Consideration of the plaintiffs' claims would require the Court to second-guess the reasonableness of sensitive discretionary actions undertaken by the United States and its

Coalition partners in the conduct of foreign policy and military operations. These matters are clearly committed to the legislative and executive branches of our government and, as such, are not subject to review by the judiciary. *Marbury v. Madison*, 5 U.S. 137, 170 (1803) ("Questions, in their nature political, or which are, by the constitution and laws, submitted to the executive, can never be made in this court.")

Article III of the United States Constitution limits judicial power to "cases" and "controversies." Courts lack the constitutional jurisdiction or competence to decide political questions because they do not present cases or controversies within the meaning of the Constitution. *See Corrie*, 503 F.3d at 980 ("disputes involving political questions lie outside of the Article III jurisdiction of federal courts").

In *Baker v. Carr*, the Supreme Court set forth six independent tests for the existence of a political question outside the proper scope of review of the federal judiciary:

> (1) a textually demonstrable constitutional commitment of the issue to a coordinate political department; or
> (2) a lack of judicially discoverable and manageable standards for resolving it; or
> (3) the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or
> (4) the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or
> (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.

369 U.S. at 217. These six independent "tests are probably listed in descending order of both importance and certainty." *Vieth v. Jubelier*, 124 S. Ct. 1769, 1776 (2004) (finding non-justiciable political question based on the second test).

There is a growing body of case law that applies the political question doctrine to cases brought against private contractors for their work on or near the battlefield and finds such cases to be non-justiciable. *See, e.g.*, *Carmichael v. Kellogg, Brown & Root Servs.*, 572 F.3d 1271, 1282-83 (11th Cir. 2009) (affirming dismissal of tort suit involving a soldier injured while escorting KBR personnel on a military supply convoy mission); *Taylor v. Kellogg Brown & Root Services, Inc.*, No. 2:09-cv-00341 (E.D. Va. Apr. 16, 2010) (Ex. 16) (dismissing lawsuit against private contractor that provided electrical maintenance services to the military in Iraq); *Smith v. Halliburton Co.*, No. H-06-0462, 2006 WL 2521326 (S.D. Tex. Aug. 30, 2006) (dismissing lawsuit against private contractor that provided dining services on a military base in Iraq); *Whitaker v. Kellogg Brown & Root, Inc.*, 444 F. Supp. 2d 1277 (M.D. Ga. 2006) (dismissing a private contractor who provided support services to the military for convoy operations in Iraq); *Bentzlin v. Hughes Aircraft Co.*, 833 F. Supp. 1486 (C.D. Cal 1993) (dismissing wrongful death action brought by families of military personnel killed in "friendly fire" accident); *Zuckerbraun v. General Dynamics Corp.*, 755 F. Supp. 1134 (D. Conn. 1990) (dismissing wrongful death action on behalf of Navy sailors killed from Iraqi attack on U.S.S. Stark), *aff'd on other grounds*, 935 F.2d 544 (2d Cir. 1991). These decisions recognize that several of the *Baker* factors can be implicated in personal injury lawsuits against private contractors, if such lawsuits call into question military decisions.

Importantly, the Court must determine not only whether resolution of Plaintiffs' claims will raise a political question, but also whether Defendants will raise political questions in asserting their defenses. *See, e.g.*, *Lane v. Halliburton*, 529 F.3d 548, 565 (5th Cir. 2008) (holding that to determine whether a political question exists the court "must look beyond the complaint, considering how the Plaintiffs might prove their claims and how KBR would

defend"); *McMahon v. Presidential Airways, Inc.*, 502 F.3d 1331, 1365 (11th Cir. 2007) ("the district court has an independent obligation to make sure that *the disposition* of the case will not require it to decide a political question") (emphasis added).[3]

1. Plaintiffs' Complaint Raises Issues Regarding Discretionary Military and Foreign Policy Decisions That Are Constitutionally Committed to the Political Branches

The political question doctrine "excludes from judicial review those controversies which revolve around policy choices and value determinations constitutionally committed for resolution to the halls of Congress or the confines of the Executive Branch." *Japan Whaling Ass'n v. Am. Cetacean Soc'y*, 478 U.S. 221, 230 (1986). As the Supreme Court explained in *Baker*, questions touching on national security and foreign affairs often implicate the political question doctrine, as they "frequently turn on standards that defy judicial application, or involve the exercise of a discretion demonstrably committed to the executive or legislature . . . ." *Baker*, 369 U.S. at 211. *See also Bancoult v. McNamara*, 445 F.3d 427, 433 (D.C. Cir. 2006) (national security and foreign relations are "quintessential sources of political questions"); *Whitaker*, 444 F. Supp. 2d at 1281 ("the [military's] use of those civilian contractors to accomplish the military objective does not lessen the deference due to the political branches").

In this case, the allegedly negligent conduct of KBR is intertwined with non-reviewable policies and decisions of the United States and other sovereign nations. Plaintiffs' injuries would not have occurred *but for* a panoply of discretionary judgments by military and civilian

[3] In *Koohi v. United States*, 976 F.2d 1328 (9th Cir. 1992), a decision that ultimately applied the FTCA's combatant activities exception to dismiss an injured party's claims, the Ninth Circuit suggested that political questions rarely, if ever, will arise in cases involving only money damages. *Id.* at 1332. However, subsequently, the Ninth Circuit did dismiss a money damages tort suit under the political question doctrine. *See Corrie*, 503 F.3d at 974. Numerous decisions from courts across the country have similarly applied the political question doctrine to dismiss suits seeking only money damages.

government authorities, including: (1) the U.S. military's decision, made in consultation with the Iraqi Ministry of Oil, to restore and use pre-existing, dilapidated, and heavily looted Iraqi oil facilities rather than construct new ones; (2) the U.S. military's decision to forego an environmental assessment of Qarmat Ali due to the exigencies of the war; and (3) the U.S. military's decision to send civilian contactors and military service members into Qarmat Ali without adequately determining that the facility was "benign." If this case proceeds, the Court will be forced to second-guess these military judgments and consider their contribution to the causation of Plaintiffs' injuries. In addition, the adjudication of Plaintiffs' claims and Defendants' defenses will force the Court to pass judgment on: (1) the adequacy of the U.S. military's regulations, instructions, and training regarding recognition of hazards and the proper use of PPE in light of the threat of residual chemical hazards; (2) the adequacy of the U.S. military-approved and funded remediation efforts at Qarmat Ali; (3) the adequacy and timeliness of the U.S. military's notification to Plaintiffs that they were potentially exposed to sodium dichromate; and (4) the adequacy of the medical and environmental testing methods chosen and implemented by the United States and British militaries.

These decisions and actions were based on sensitive wartime and foreign policy judgments regarding: (1) how best to accommodate the urgent need for increased oil revenues in a combat environment; (2) which Iraqi oil facilities would not receive the customary environmental assessment in light of the manpower and time constraints under which the military was operating; and (3) when and under what circumstances military personnel should be trained and instructed regarding potential environmental dangers of military missions. Judicial review of such decisions would encroach on the constitutional authority of the Executive Branch and violate time-honored separation of powers principles.

Here, the record undisputedly establishes that, if this case proceeds, the Court will have to address these military judgments and decisions because they are inextricably linked with KBR's allegedly deficient conduct. Plaintiffs may purport to challenge only the conduct of KBR, but it will be impossible to reach the issue of *causation* in this action without inappropriately assessing the possible connections between these military decisions and Plaintiffs' alleged injuries. *See Bentzlin*, 833 F. Supp. at 1497 ("proving plaintiffs' case requires inquiry into other possible causes . . . [n]o trier of fact can reach the issue of manufacturing defect without eliminating other variables which necessarily involve political questions."); *Nejad v. United States*, 724 F. Supp. 753, 755 (C.D. Cal. 1989) (finding that, although the plaintiffs purported to only challenge "the negligent manner in which the President's decision was carried out," "the same considerations which preclude judicial examination of the decision to act must necessarily bar examination of the manner in which that decision was executed by the President's subordinates.") (citing *Rappenecker v. United States*, 509 F. Supp. 1024, 1030 (N.D. Cal. 1980)). For example, Plaintiffs' allege that "*by operation of contract*, the KBR defendants assumed a duty to inspect the site, direct the work, and control the clean-up work at the site," yet the plain language of Task Order 3 makes clear that the military, *not KBR*, had responsibility to inspect the site and provide a benign work environment free from environmental hazards. Pls.' Second Am. Compl. ¶ 24 (emphasis added); Ex. 1, Sumner Decl. ¶ 9.

Even assuming *arguendo* that KBR bears some responsibility for Plaintiffs' alleged injuries, Plaintiffs cannot establish that KBR *alone* was responsible. *See Carmichael*, 572 F.3d at 1295 (explaining "it would be impossible to determine that [defendant's conduct] alone was the sole cause of the accident or to possibly apportion blame without ruling out the potential causal role played by pivotal military judgments"). Rather, at a minimum, this Court would have

to adjudicate the extent to which several "pivotal military judgments" caused or contributed to Plaintiffs' injuries. *See id.*; *see also Lane*, 529 F.3d at 561 ("If we must examine the Army's contribution to causation, 'political question' will loom large."). For example, if this action proceeds, this Court would inevitably have to question the military's decision to send contactors and soldiers to a dilapidated Iraqi oil facility without first ensuring that the facility was free of environmental hazards. *See Corrie*, 503 F.3d at 982 ("It is difficult to see how [this Court] could impose liability on [Defendants] without at least implicitly deciding the propriety of the United States' decision . . ."). Therefore, this Court should dismiss the action as non-justiciable under the first *Baker* factor.

2. There Are No Judicially Discoverable Standards for the Resolution of Plaintiffs' Claims

Even if this Court were constitutionally empowered to review military and foreign policy decisions regarding how best to rebuild the Iraqi oil infrastructure during wartime, dismissal of these claims under *Baker* would be required because such decisions cannot be measured against any judicially discoverable or manageable standards of care. Indeed, "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 . . . ." *Gilligan v. Morgan*, 413 U.S. 1, 10 (1973); *Rappenecker*, 509 F. Supp. at 1030 ("[C]ourts lack standards with which to judge whether reasonable care was taken to achieve tactical objectives in combat while minimizing injury and loss of life.").

The military's "but for" choices regarding how best to rebuild Iraq's oil infrastructure necessarily involve military strategies, on-the-ground considerations, and trade-offs as to the existing infrastructure, security threats, known (and unknown) combat theater hazards, and

resource limitations. Adjudication of the questions raised in this case would require the Court to pass judgments in the realm of military affairs without knowledge or expertise regarding the formulation, implementation, and ramifications of those policies and decisions. *See Baker*, 369 U.S. at 217. These issues require "a complex, subtle balancing of many technical and military considerations . . . [c]ourts will often be without knowledge of the facts or standards necessary to assess the wisdom of the balance struck." *Aktepe v. United States*, 105 F.3d 1400, 1404 (11th Cir. 1997) (citation omitted).

Moreover, the Court cannot resolve Plaintiffs' claims involving alleged exposure to pre-existing sodium dichromate using traditional tort law standards. Despite what Plaintiffs would like this Court to believe, this is not a garden variety toxic tort suit. The hallmark "reasonable person" standards cannot apply here. The circumstances giving rise to these claims did not occur at a water treatment plant in Oregon; they occurred at an outdated facility in Iraq using Soviet-era technology that had suffered substantial damage from pre-invasion neglect, looting, and vandalism, only weeks following the invasion. As stated by the Eleventh Circuit, the "familiar touchstones" of "common sense and everyday experience" "have no purchase here," where Defendants were performing duties under a "rated order" contract at the direction of the U.S. military in a war zone. *See Carmichael*, 572 F.3d at 1289; *accord Whitaker*, 444 F. Supp. 2d at 1282 ("The question here is not just what a reasonable [contractor] would do -- it is what a reasonable [contractor] in a combat zone, subject to military regulations and orders, would do. That question necessarily implicates the wisdom of the military's strategic and tactical decisions, a classic political question over which this Court has no jurisdiction.").

In short, if this case proceeds, the Court will be required to determine whether the military acted reasonably, *inter alia*, in restoring and using pre-existing, dilapidated, and heavily

looted Iraqi oil infrastructure facilities, rather than constructing new facilities; deciding to forego an environmental assessment of Qarmat Ali due to the exigencies of war; training its military personnel regarding the identification of chemical hazards; not instructing military personnel to wear PPE; approving and helping to implement certain remediation efforts at Qarmat Ali; deciding not to notify service members of the potential exposure to sodium dichromate as soon as the military learned of its presence at the facility; and selecting the testing methods for soldiers potentially exposed to sodium dichromate. These determinations, and others like them, "are critical for assessing whether the military might have been negligent and whether its negligence might have played a causal role in the [plaintiffs' alleged injuries]." *Carmichael*, 572 F.3d at 1290. The Court is simply not equipped to make such determinations.

3. The Issues Raised By This Case Are Impossible to Decide Without an Initial Policy Determination of a Kind Clearly for Nonjudicial Discretion, or Without Embarrassing or Expressing a Lack of Respect Due to the Coordinate Branches of Government

Several other factors set forth in *Baker* also apply in this case. Resolution of this case implicates a variety of initial policy determinations clearly committed to the discretion of the political branches. The methods by which the government prepares and executes its war plan, including the concomitant decision to use civilian contractors to provide services traditionally provided by soldiers, necessarily require initial policy decisions clearly committed to the discretion of the political branches. *See, e.g.*, Ex. 3, at 1, AR 700-137 § 1-1 (explaining that "the use of civilian contractors to perform selected services in wartime to augment Army forces . . . will release military units for other missions or fill shortfalls"). *Accord Bancoult*, 445 F.3d at 437 (judiciary cannot "dictate to the executive what its priorities should have been . . . ." To require the executive to "comport with some minimum level of protections" would constitute "meddling in foreign affairs beyond our institutional competence.").

Furthermore, it would express a lack of respect due to the coordinate branches of government for this Court to call into question the policies and judgments of the United States and its Coalition partners regarding ongoing military efforts and foreign policy initiatives. *See In re Korean Air Lines Disaster*, 597 F. Supp. 613, 616 (D. D.C. 1984). It is impossible to resolve Plaintiffs' claims against KBR while also respecting the government's strategic and tactical decisions about restoring Iraqi oil production, utilizing the heavily looted pre-existing Iraqi facilities, informing service members about known chemical hazards, and balancing personnel safety and military necessity on the battlefield. *Id.* ("[D]ecisions which affect the national security . . . involve policy considerations beyond the scope of judicial expertise" and would "certainly evince a lack of respect due coordinate branches of government." (citations omitted)). Also, the U.S. military and British military have concluded, after conducting their own environmental and medical testing, that soldiers at Qarmat Ali did not suffer any injury and are unlikely to suffer injury in the future. *See* Ex. 13 at 1; Ex. 14; Ex. 6, MOD Statement at 2. It would show a lack of respect to the military for this Court to second-guess those conclusions.

Finally, the judicial proceedings here would create multifarious pronouncements by various federal entities on this incident. Both the Executive Branch and the Legislative Branch are actively investigating and reviewing the issues raised by this case. For example, the Army is investigating the incident pursuant to Army Regulation 15-6 and the Defense Health Board is reviewing the methods and procedures used in the medical evaluations conducted by USACHPPM. In light of these various pronouncements, it is particularly important that the judicial system not second-guess the Executive Branch's response and express a different opinion on "what went wrong" or "what the military should have done" with respect to protecting soldiers from pre-existing environmental hazards in Iraq.

In short, Plaintiffs' claims against Defendants cannot be separated from the military and foreign policy decisions of the United States government. This case implicates several of the factors set forth in *Baker*, any one of which is sufficient to render the matter non-justiciable.

B. The Court Should Dismiss This Action Because It Conflicts with Well-Established Principles of Derivative Sovereign Immunity

In addition to being non-justiciable under the political question doctrine, this suit should be dismissed under the principles of derivative sovereign immunity. Plaintiffs' claims are based squarely upon KBR's performance under a "rated order" contract with the United States to provide mission-critical support services in Iraq. As explained below, government contractors such as KBR are immune from suit for performing discretionary government functions within the scope of a validly conferred federal contract. *Yearsley v. W.A. Ross Constr. Co.*, 309 U.S. 18 (1940); *Mangold v. Analytic Servs., Inc.*, 77 F.3d 1442, 1448 (4th Cir. 1996).

As a general matter, the United States as a sovereign is immune from suit except under those limited circumstances in which it has waived that immunity. With the passage of the Federal Tort Claims Act ("FTCA"), 28 U.S.C. §§ 2671-80, the United States waived its immunity to tort suits, but only as expressly set forth in the FTCA. The FTCA contains an extensive list of exceptions to this general waiver of tort immunity. One exception encompasses in relevant part any claim "based upon the exercise or performance or the failure to exercise or perform a *discretionary function or duty* on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused." 28 U.S.C. § 2680(a) (emphasis added).

This "discretionary function" exception "marks the boundary between Congress' willingness to impose tort liability upon the United States and its desire to protect certain governmental activities from exposure to suit by private individuals." *United States v. S.A.*

Empresa de Viacao Aerea Rio Grandense (Varig Airlines), 467 U.S. 797, 808 (1984). The underlying basis for the exception was the wish of Congress "to prevent judicial 'second-guessing' of legislative and administrative decisions grounded in social, economic, and public policy through the medium of an action in tort." *Id.* at 814.

The discretionary function exception applies not only to high-level governmental actors, but extends to those actors at any level or status who make discretionary decisions or see that they are put into execution. "It is the nature of the conduct, rather than the status of the actor, that governs whether the discretionary function exception applies in a given case." *Varig Airlines*, 467 U.S. at 813. "It necessarily follows that *acts of subordinates in carrying out the operations of government in accordance with official directions cannot be actionable.*" *Id.* at 811 (quoting *Dalehite v. United States*, 346 U.S. 15, 35-36 (1953) (emphasis added)).

There is a substantial body of case law that extends this "discretionary function" immunity under certain circumstances to government contractors acting at the behest of the United States. The notion that government contractors should be immune from tort liability for performing duties within the scope of their government contract was first enunciated by the Supreme Court in *Yearsley*. In *Yearsley*, the Supreme Court considered whether a contractor building river dikes at the direction of the United States Army Corps of Engineers could be held liable for an alleged "taking" of land washed away by the dikes. 309 U.S. 18. In its defense, the defendant alleged that the work was "done pursuant to a contract with the United States Government, and under the direction of the Secretary of War . . . for the purpose of improving the navigation of the Missouri River . . . ." *Id.* at 19. In reply, the plaintiffs "alleged that the contract did not contemplate the taking of their land without just compensation." *Id.* at 19-20.

The Supreme Court unanimously held that a contractor acting pursuant to a contract with the federal government could not be held liable for such loss of property where the contract was "validly conferred" and where the contractor did not exceed its authority. *Id.* at 22. The Court deemed the acts of the contractor the "act[s] of the government," and it held that liability, if any, rested with the government itself, not its contractor. *Id.*

A similar line of cases has granted immunity to government contractors based on the Supreme Court's reasoning in *Westfall v. Erwin*, 484 U.S. 292 (1988). In *Westfall*, the plaintiff sought to recover for personal injuries allegedly sustained by the negligent storage of chemicals. 484 U.S. at 293-94. The defendants, who were employed by the United States Army, asserted that they were immune from the state tort law claims of the plaintiff because they were acting within the scope of their official duties. *Id.* The Supreme Court held that federal employees are immune from state tort suits for discretionary acts that fall within the scope of their official duties. *Id.* at 299-300.[4]

Utilizing the reasoning in *Westfall*, courts have held that government contractors have the same immunity as the government when they are performing discretionary government functions. *See Mangold*, 77 F.3d at 1447-48 (finding that "[e]xtending immunity to private contractors to protect an important government interest is not novel."). The Fourth Circuit explained: "If absolute immunity protects a particular governmental function, *no matter how many times or to what level that function is delegated*, it is a small step to protect that function when delegated to private contractors, particularly in light of the government's unquestioned need to delegate governmental functions." *Id.* (emphasis added). *See also Murray v. Northrop*

[4] *Westfall* was superseded, but only to the extent that it applies to federal employees, by the Federal Employees Liability and Reform and Tort Compensation Act, 28 U.S.C. § 2679(d).

Grumman Info. Tech., Inc., 444 F.3d 169, 176 (2d Cir. 2006) (a private contractor hired to perform a "quintessential government function" is absolutely immune from state tort liability for actions taken in the course of its official duties).

Recently, the Fifth Circuit confirmed that a private entity, while performing a "public works" project for the U.S. military, holds derivative sovereign immunity. In *Ackerson v. Bean Dredging LLC*, the Fifth Circuit affirmed the lower court's dismissal of plaintiffs' tort claims against numerous contractors who allegedly provided negligent dredging services under an Army Corps of Engineers contract that plaintiffs claimed caused environmental damage and amplified the storm surge in the New Orleans region during Hurricane Katrina. The Fifth Circuit found that the military contractors' services had been undertaken "pursuant to contracts with the federal government that were for the purpose of furthering projects authorized by acts of Congress . . . ." 589 F.3d at 206. Because "plaintiffs did not allege that the contractor defendant 'exceeded his authority or that [the contract] was not validly conferred,'" the government contractor was immune from suit. *Id*. at 206-207. *Accord Servco Solutions v. CACI Int'l, Inc*., No. 1:07cv908, 2007 WL 3376661, at *3 (E.D. Va. Nov. 9, 2007) (derivative immunity of a contractor did "not require explicit authorization by the government for each action taken," but rather such immunity was determined "by the nature of the function being performed").

In this litigation, as in *Yearsley* and *Ackerson*, Plaintiffs' allegations challenge conduct that falls well within the scope of KBR's official duties pursuant to a validly conferred federal contract. KBR's provision of engineering and logistical support services at Qarmat Ali, from which Plaintiffs' injuries allegedly arose through their escort duties, clearly were part of KBR's contractual obligations under Task Order 3 and within the scope of direction from the USACE. *See* Ex. 1, Sumner Decl., Attach. 2; Ex. 2. KBR has not "exceeded its authority" from the

federal government. Further, as stated by Secretary Geren, KBR complied with and abided by the limitations set by the USACE. *See* Ex. 2. As such, Plaintiffs' allegations are in reality an attack on the U.S. military's policies and decisions (e.g., the decision not to conduct an environmental assessment of Qarmat Ali before deeming it "benign" and allowing work to begin, the military's delayed notification to the Oregon National Guardsmen regarding their potential exposure to sodium dichromate, etc.), "not any separate act of negligence by the Contractor Defendants." *Ackerson*, 589 F.3d at 207.

Furthermore, the reasons for extending such immunity to KBR in this case are even more compelling than the circumstances in the cases described above because of the military's extensive role in and control over the work KBR performed. *See also Servco Solutions v. CACI Int'l, Inc.*, No 1:07-cv-00908, 2007 WL 3376661 (E.D. Va. Nov. 9, 2007), at *3 (finding that granting immunity to government contractors serves the public interest because "the government cannot perform all necessary and proper services itself and must therefore contract out some services,' and that ability must be protected.") (quoting *Mangold*, 77 F.3d at 1448). It follows that KBR should also be immune from suit for executing the will of the United States by performing these government functions during the Iraqi war. *See Servco Solutions*, 2007 WL 3376661, at *3.

C. The Court Should Dismiss These Actions Because Plaintiffs' Injuries Arose As Part of Combatant Activities During a Time of War

An additional, related basis exists requiring dismissal of this case. The Plaintiffs' claims are preempted by the combatant activities exception to the FTCA, 28 U.S.C. § 2680(j). The FTCA, together with 28 U.S.C. § 1346, creates a cause of action against, and constitutes a waiver of sovereign immunity by, the United States for actions in tort. The FTCA contains a number of exceptions to this general rule, however, including § 2680(j), which excludes "[a]ny claim

arising out of the combatant activities of the military or naval forces, or the Coast Guard, during time of war."[5]

Although the FTCA does not apply explicitly to government contractors, numerous courts have extended the principles underlying the FTCA's exceptions to tort suits against government contractors. *See Koohi*, 976 F.2d at 1336 (applying exception to bar state tort law claims against weapons manufacturers for injuries sustained after the Navy mistook a civilian aircraft for a military flight and shot it down); *Bentzlin*, 833 F. Supp. at 1494 (applying exception to dismiss claims brought on behalf of a group of U.S. Marines that were killed when a missile intended for an Iraqi target hit the Marines' truck instead); *Taylor v. Kellogg Brown & Root Services, Inc.*, No. 2:09-cv-00341 at 11 (E.D. Va. Apr. 16, 2010) (applying exception to dismiss claims brought by a Marine who received an electrical shock allegedly caused by a private contractor's services).

Both the *Koohi* and *Bentzlin* decisions found that the three principles of tort law -- deterrence, punishment, and remedy to innocent victims -- are inconsistent with conduct that occurs in combat zones. First, in time of war, caution must often give way to "bold and imaginative measures" needed to achieve victory. Concerns about tort liability cannot be permitted to deter participants from taking swift action as the need arises. *Koohi*, 976 F.2d at 1335. Second, the government, as well as the contractors that support the government, should not be punished for mistakes made during war. *Id.*; *see also Bentzlin*, 833 F. Supp. at 1493.

[5] Although the FTCA does not define "combatant activities," courts have viewed the concept to include "not only physical violence, but activities both necessary to and in direct connection with actual hostilities." *Johnson v. United States*, 170 F.2d 767, 770 (9th Cir. 1948). *See also Taylor*, No. 2:09-cv-00341 at 18 ("restricting the combatant activities exception to actual combat would require an unduly narrow reading of the scope of Section 2680(j) of the FTCA, which applies broadly to all claims "arising out of the combatant activities of the military or naval forces.").

Third, there is a federal interest in seeing that casualties of war, no matter how sustained and by whom, are subject to uniform treatment. *Id.*

Using these Ninth Circuit precepts, the D.C. Circuit's recent decision in ***Saleh v. Titan Corp.*** further articulated the rationale for extending the combatant activity exception to battlefield contractors. Recognizing the paramount federal interests advanced and protected by the FTCA's combatant activities exception, the *Saleh* court established the following bright-line test: "During wartime, where a private service contractor is integrated into combatant activities over which the military retains command authority, a tort claim arising out of the contractor's engagement in such activities shall be preempted." 580 F.3d at 9. The D.C. Circuit found no meaningful distinction between conduct by the military itself and conduct by contractors in support of the military's mission. Rather, because the exception supports "the elimination of tort from the battlefield," it is "equally implicated whether the alleged tortfeasor is a soldier or a contractor . . . ." *Id.* at 7. Furthermore, a court need not identify a discrete conflict between state and federal duties in order to apply the combatant activities exception; "it is the imposition ***per se*** of the state or foreign tort law that conflicts with the FTCA's policy of eliminating tort concepts from the battlefield." *Id.*

The reasoning set forth in *Saleh* is consistent with prior case law that similarly dismissed battlefield claims against contractors. *See, e.g.*, *Bentzlin*, 833 F. Supp. at 1494 ("[d]eaths and injuries of soldiers in war arise from a plethora of circumstances, many of which may be judged to involve some degree of fault. . . . In a wartime context, state law cannot establish the duty of care owed to American soldiers who necessarily assume the risk of death.").

Here, KBR was "integrated and performing a common mission with the military under ultimate military command." *Saleh*, 580 F.3d at 6-7. KBR worked in a wartime theater of

operations under the direction and control of the USACE's TF RIO. Qarmat Ali was a critically important facility, located inside a war zone in Iraq and subject to enemy attacks and related risks. Hostile elements required ongoing force protection from the military. Given the paramount federal interest in the conduct of war, foreign policy, and reconstruction efforts, all implicated in this case, the imposition of state tort law duties necessarily would conflict with the FTCA's policy of eliminating tort concepts from the wartime theater. *Id.* at 7. *See also Ibrahim v. Titan*, 556 F. Supp. 2d 1, 5 (D. D.C. 2007) ("[P]reemption ensures that [defense contractors] need not weigh the consequences of obeying military orders against the possibility of exposure to state law liability.").

Therefore, this Court should follow the well-established reasoning of this line of cases and dismiss Plaintiffs' suit. Imposing tort liability on KBR will create conflicting duties that could cause contractors supporting the military in a time of war to fail in their role to support the war effort, or, more drastically, to refrain from participating in any military support contracts whatsoever, leaving the military without the support it needs to fulfill its mission and endangering the foreign policy goals of the United States.[6]

IV. CONCLUSION

For the foregoing reasons, KBR respectfully requests that Plaintiffs' Second Amended Complaint be dismissed.

[6] This is not to say that Plaintiffs have no recourse for the harms they are alleged to have suffered. Military plaintiffs seeking relief for injuries incurred as a result of military service are compensable under the Veterans' Benefits Act administered by the Department of Veterans Affairs. *See* Ex. 15, Letter from Shinseki.

Dated: April 23, 2010

BULLIVANT HOUSER BAILEY PC

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