IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NORTH CAROLINA
WESTERN DIVISION

R. DANIEL BRADY ET AL.,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	Civil Action No. 5:09-CV-00449-BO
	)	
XE SERVICES LLC ET AL.,	)	
	)	
Defendants.	)	
	)	

CORPORATE DEFENDANTS' MOTION TO DISMISS THE COMPLAINT OR, IN THE ALTERNATIVE, TO STRIKE EXHIBITS

Pursuant to Federal Rules of Civil Procedure 12(b)(1), 12(b)(6), and 12(f), Defendants Xe Services LLC, Blackwater Security Consulting LLC, U.S. Training Center, Inc., Raven Development Group LLC, GSD Manufacturing LLC, Prince Group, LLC, Total Intelligence Solutions LLC, Greystone Limited a/k/a Greystone Ltd., Terrorism Research Center, Incorporated, Technical Defense Associates, Incorporated, Aviation Worldwide Services, L.L.C., Guardian Flight Systems LLC, Presidential Airways, Inc., STI Aviation, Inc., Air Quest, Inc., Samarus Co. Ltd., and Erik Prince (collectively, the "Corporate Defendants"),[1] hereby move to dismiss Plaintiffs' Complaint or, in the alternative, to strike the exhibits to the Complaint.

The Corporate Defendants' Motion to Dismiss should be granted for the following reasons: (1) Plaintiffs lack standing to sue in this Court; (2) the Complaint presents nonjusticiable political questions; (3) Plaintiffs' claims are preempted by federal foreign policymaking authority; (4) Plaintiffs fail to state a claim under applicable Iraqi law; (5)

[1] Although Mr. Prince is a natural person, he, like the corporate entities named as defendants, appears to have been sued on a theory of vicarious liability for conduct of the six individual independent contractors named as defendants. Accordingly, Mr. Prince is included in the group denominated "Corporate Defendants."

Plaintiffs' claims are barred by the government contractor defense; (6) Plaintiffs' claims are barred by absolute immunity; and (7) Plaintiffs fail to state a claim against any of the corporate entities named as defendants or against defendant Erik Prince personally.

The Corporate Defendants' Motion to Strike should be granted because Plaintiffs have improperly appended evidentiary materials to their pleading, and because these materials are irrelevant to Plaintiffs' claims and prejudicial to Defendants.

The grounds for the Corporate Defendants' Motion are set forth more fully in the accompanying Memorandum of Law.

WHEREFORE, the Corporate Defendants respectfully request that the Court grant their Motion.

Dated: November 12, 2009

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on November 12, 2009, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system, which will send notification of such filing to the following:

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CORPORATE DEFENDANTS' MEMORANDUM OF LAW IN SUPPORT OF THEIR MOTION TO DISMISS THE COMPLAINT OR, IN THE ALTERNATIVE, TO STRIKE EXHIBITS

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Defendants Xe Services LLC, Blackwater Security Consulting LLC, U.S. Training Center, Inc., Raven Development Group LLC, GSD Manufacturing LLC, Prince Group, LLC, Total Intelligence Solutions LLC, Greystone Limited a/k/a Greystone Ltd., Terrorism Research Center, Incorporated, Technical Defense Associates, Incorporated, Aviation Worldwide Services, L.L.C., Guardian Flight Systems LLC, Presidential Airways, Inc., STI Aviation, Inc., Air Quest, Inc., Samarus Co. Ltd., and Erik Prince (collectively, the "Corporate Defendants"),[1] respectfully submit this memorandum of law in support of their motion to dismiss the complaint.

SUMMARY OF NATURE OF THE CASE

Plaintiffs are Iraqi residents and the estates of Iraqis asserting tort claims for injuries allegedly suffered in Iraq as a result of actions that occurred in Iraq. They seek to recover damages from a government contractor providing security services in Iraq whose actions were governed by detailed standards prescribed by the United States and closely supervised by United States government employees.

RELEVANT FACTS

Historically, the personal safety of U.S. diplomats overseas has been secured by the State Department's Bureau of Diplomatic Security with the support of the U.S. military. When the State Department determined that it did not have sufficient personnel to secure the safety of U.S. diplomats performing critical functions in the war-torn Iraq (*see* App. 4), it entered into detailed contracts with several private contractors to perform this function in Iraq and elsewhere.

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[1] Although Mr. Prince is a natural person, he, like the corporate entities named as defendants, appears to have been sued on a theory of vicarious liability for conduct of the six individual independent contractors named as defendants (for Mr. Prince and the majority of the corporate defendants, Plaintiffs' claims require veil-piercing as well, *see infra* Part VII). Accordingly, Mr. Prince is included in the group denominated "Corporate Defendants."

The principal corporate defendant in this case, U.S. Training Center ("USTC"), for six years provided security services to protect government officials in Iraq pursuant to a contract with and under the close direction of the State Department.[2] Teams of independent contractors ("ICs") working with USTC under the contract escorted government officials to and from meetings throughout Baghdad. No diplomat under the protection of USTC personnel died or even was injured during the entire duration of the contract. The ICs protecting them did not fare as well: many were injured and some died while protecting diplomats in Iraq.[3]

This action involves claims for damages arising out of deaths and injuries to civilians alleged to have occurred during a security mission pursuant to the contract between USTC and the State Department. Plaintiffs allege that on September 16, 2007, certain ICs performing a tactical support mission opened fire without justification in a location known as Nisoor Square in Baghdad. Compl. ¶¶ 68-78. Plaintiffs assert claims against the ICs for wrongful death and negligence causing personal injury. *Id.* ¶¶ 110-25. Plaintiffs also seek to hold the Corporate Defendants liable for these alleged deaths and injuries on theories of vicarious liability (*id.* ¶¶ 126-41), negligent supervision (*id.* ¶¶ 142-46), and negligent retention (*id.* ¶¶ 147-53).

The injuries and deaths described in the complaint, like the many thousands of other American and Iraqi casualties that have occurred in the Iraqi war zone, are tragic. Plaintiffs,

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[2] The contract was entered into between the State Department and Blackwater Lodge and Training Center, Inc. (App. 2), which has changed its name to U.S. Training Center, Inc.

[3] Mid-2006 to late 2007—when the incident giving rise to this lawsuit occurred—was the peak of the violence in Iraq. DOD, *Measuring Stability and Security in Iraq* (Mar. 2009), at 19-23, http://www.defenselink.mil/pubs/pdfs/Measuring_Stability_and_Security_in_Iraq_March_2009.pdf. During the summer of 2007, the weekly number of attacks and attempted attacks in Iraq—including attacks against infrastructure and government organizations, improvised explosive devices and mines, sniper and small arms attacks, and mortar, rocket, and surface-to-air missiles—reached nearly 1600. *Id.* at 19. From July to November 2007, Coalition and Iraqi government targets in Baghdad were attacked an average of 27 times ***per day***. DOD, *Measuring Stability and Security in Iraq* (Dec. 2007), at 16, 22, http://www.defenselink.mil/pubs/pdfs/FINAL-SecDef%20Signed-20071214.pdf.

however, have not stated a claim that is within this Court's jurisdiction and upon which the Court may grant relief.

ARGUMENT

Plaintiffs' claims against the Corporate Defendants are insufficient for a number of independent reasons. First, Plaintiffs lack standing to sue in this Court. Second, the complaint presents nonjusticiable political questions. Third, the claims are preempted because they interfere with federal interests in foreign policymaking in a war zone. Fourth, the claims raise theories of recovery that are not available under the governing Iraqi law. Fifth, the claims are barred by the government contractor defense and the doctrine of absolute immunity. Sixth, any remaining claims against the corporate entities and Erik Prince must be dismissed because Plaintiffs have alleged no factual or legal basis for imposing liability on these defendants. Finally, the exhibits appended to the complaint should be stricken under Fed. R. Civ. P. 12(f).[4]

I. PLAINTIFFS LACK STANDING TO SUE IN THIS COURT.

Plaintiffs are noncitizens and nonresidents of the United States asserting claims for injuries sustained in a foreign country and governed by foreign tort law. As such, they lack standing to sue in this Court.

Standing has two distinct components: "Article III standing, which enforces the Constitution's case or controversy requirement, and 'prudential' standing, which embodies 'judicially self-imposed limits on the exercise of federal jurisdiction.'" *Frank Krasner Enters.,*

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[4] In addition to these grounds for dismissal, the Corporate Defendants, as well as certain individual defendants have filed requests with the State Department for certification that they were statutory employees of the government acting within the scope of their employment at the time of the incident underlying this action. As set forth in the Westfall Act, 28 U.S.C. § 2679, the effect of such certification would be to substitute the United States as the defendant in this action. *Id.* § 2679(c). The State Department has not responded to the Corporate Defendants' request, which was made October 6, 2009. Assuming no response is promptly forthcoming, the Corporate Defendants intend to move this Court pursuant to 28 U.S.C. § 2679(d)(3) to substitute the United States.

Ltd. v. Montgomery County, 401 F.3d 230, 234 (4th Cir. 2005) (quoting *Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1, 11 (2004)).

One "recognized prudential limitation to standing" is "the general rule that non-resident aliens have no standing to sue in United States courts" for injuries sustained outside the United States. *Doe VIII v. Exxon Mobile Corp.*, Civil No. 07-1022, 2009 WL 3112823, at *3 (D.D.C. Sept. 30, 2009) (quoting *Berlin Democratic Club v. Rumsfeld*, 410 F. Supp. 144, 152 (D.D.C. 1976)); *see also Johnson v. Eisentrager*, 339 U.S. 763, 771 (1950). This rule is subject to certain exceptions: nonresident aliens may sue for injuries sustained outside the United States when a "specific statutory scheme" contemplates such suits (*e.g.*, the Alien Tort Statute, 28 U.S.C. § 1350); when there is a *res* located in the United States; when the alien is seized abroad and transported to the United States for prosecution; or, under certain circumstances, where the alien alleges a violation of the U.S. Constitution. *See Doe VIII*, 2009 WL 3112823, at *4; *see also Kukatush Mining Corp. v. SEC*, 309 F.2d 647, 650 (D.C. Cir. 1962).

Plaintiffs do not fall within any of these exceptions. They are citizens and residents of Iraq (Compl. ¶¶ 10-19) suing for damages purportedly sustained in Iraq (*id.* ¶¶ 68-78). Their claims are governed not by any U.S. statute, but by Iraqi tort law. *See infra* Part IV. They have had "no contact with the United States other than [their interactions] abroad with private United States citizens." *Berlin Democratic Club*, 410 F. Supp. at 153. Indeed, the only nexus between Plaintiffs' claims and the courts of the United States is the fact that they have chosen to file them here.[5] "When the non-resident alien does not make application under a statute of the United

[5] That the Estate plaintiffs are represented by a North Carolina administrator (Compl. ¶¶ 10-12) does not alter this analysis. The claims asserted by the administrator are claims belonging to the decedents and prosecuted by the administrator "in his representative capacity" for the benefit of the Estates. *Davis v. Piper Aircraft Corp.*, 615 F.2d 606, 610 (4th Cir. 1980). Accordingly, it is the status of the decedents—not of the administrator—that is relevant to the standing analysis.

States for certain action, or is not subjected to its courts, but is harmed in his own country, he cannot and should not expect entitlement to the advantages of a United States court." *Id.* at 152. Accordingly, Plaintiffs' claims should be dismissed for lack of standing.

II. <u>PLAINTIFFS' CLAIMS PRESENT NONJUSTICIABLE POLITICAL QUESTIONS.</u>

Plaintiffs' claims invite the Court to second-guess a number of State Department decisions about how to provide security services in a war zone—an inquiry precluded by the political question doctrine. The political question doctrine holds that courts may not entertain cases presenting issues that are "constitutional[ly] commit[ted]" to a political branch of government, or where there is a "lack of judicially discoverable and manageable standards" for resolving the claims, or where the claim cannot be decided "without an initial policy determination of a kind clearly for nonjudicial discretion." *Baker v. Carr*, 369 U.S. 186, 217 (1962). Matters of "national security and foreign relations" are "the quintessential sources of political questions." *Bancoult v. McNamara*, 445 F.3d 427, 433 (D.C. Cir. 2006), *cert. denied*, 549 U.S. 1166 (2007); *see also Tiffany v. United States*, 931 F.2d 271, 277 (4th Cir. 1991), *cert. denied*, 502 U.S. 1030 (1992).

The political question doctrine applies in suits against government contractors with the same force as in suits against the government. *See Whitaker v. Kellogg Brown & Root, Inc.*, 444 F. Supp. 2d 1277, 1281 (M.D. Ga. 2006) ("When the military seeks to accomplish its mission by partnering with government contractors who are subject to [their] orders . . . the use of those civilian contractors . . . does not lessen the deference due to the political branches in this area."); *see also United States v. Munoz-Flores*, 495 U.S. 385, 394 (1990) ("[The political question] doctrine is designed to restrain the Judiciary from inappropriate interference in the business of

the other branches of Government; the identity of the *litigant* is immaterial to the presence of these concerns in a particular case.").

The Eleventh Circuit recently affirmed the dismissal of a suit against a government contractor on political question grounds when the activity giving rise to the suit involved the transport of fuel through a war zone and was subject to military control. *Carmichael v. Kellogg, Brown & Root Servs., Inc.*, 572 F.3d 1271, 1275-76 (11th Cir. 2009) (holding that resolution of the plaintiff's claims "would require extensive reexamination and second-guessing of many sensitive judgments" for which there was "no judicially manageable standard").

The decisions at issue here, concerning how to protect U.S. diplomats traveling in a war zone, present policy issues of a kind clearly of non-judicial discretion, they involve decisionmaking constitutionally committed to the Executive Branch, and there are no judicially manageable standards for evaluating those decisions. Plaintiffs' claims should therefore be dismissed under Federal Rule of Civil Procedure 12(b)(1).

A. <u>Standard of Review</u>

Because the political question doctrine is a matter of justiciability, the plaintiff bears the burden of establishing that the doctrine does not apply. *Richmond, Fredericksburg & Potomac R.R. Co. v. United States*, 945 F.2d 765, 768 (4th Cir. 1991), *cert. denied*, 503 U.S. 984 (1992). A court should not attach any "presumptive truthfulness * * * to the plaintiff's allegation" (*Fisher v. Va. Elec. & Power Co.*, 243 F. Supp. 2d 538, 540 n.2 (E.D. Va. 2003)), but "regard the pleadings' allegations as mere evidence on the issue, and may consider evidence outside the pleadings" (*Balzer & Assocs., Inc. v. Union Bank & Trust Co.*, No. 3:09CV273, 2009 WL 1675707, at *4 (E.D. Va. June 15, 2009) (internal quotation marks omitted)).

B. <u>The Claims Turn On Nonjusticiable Political Questions.</u>

1. The Actions of the ICs In Carrying Out The Security Mission Cannot Be Examined Without Calling Into Question The Policy Judgments And Tactical Decisions Of The Federal Government.

The gravamen of Plaintiffs' complaint is that certain ICs used unjustified force while providing protective services to American diplomats traveling in the Iraq war zone pursuant to a contract with the State Department.[6] *See, e.g.*, Compl. ¶¶ 1-2, 5. Accordingly, adjudicating Plaintiffs' claims would require the Court to re-examine numerous policy judgments and tactical decisions of the State Department.[7]

To begin, the very status of USTC as a government contractor here is the result of an "initial policy determination of a kind clearly for nonjudicial discretion." *Baker*, 369 U.S. at 217. The State Department was required, as a matter of operational necessity, to retain USTC because of the scale of operations in Iraq and the State Department's other obligations around the world. Imposition of liability, and the attendant diminished willingness of private contractors to complement the State Department's efforts would directly interfere with the United States' ability to conduct foreign affairs. *Cf. Saleh v. Titan Corp.*, 580 F.3d 1, 8 (D.C. Cir. 2009) ("Allowance of [tort] suits [against military contractors] will surely hamper military flexibility

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[6] The contract between the State Department and defendant USTC in effect during the relevant time period was known as the Worldwide Personal Protective Services II ("WPPS") contract. Relevant excerpts of the WPPS contract are included in the accompanying Appendix ("App.").

[7] The events at issue here have also been the subject of litigation in *Abtan v. Prince*, No. 1:09-cv-617, one of seven lawsuits consolidated before Judge Ellis in the U.S. District Court for the Eastern District of Virginia. Judge Ellis dismissed all seven cases, although he declined to do so on the basis of the political question doctrine. *See In re: Xe Servs. Alien Tort Litig.*, Nos. 1:09-cv-615, 616, 617, 618, 645, 2009 WL 3415129, at *22-23 (E.D. Va. Oct. 21, 2009). Judge Ellis's analysis of the political question doctrine (with which Defendants respectfully disagree, for the reasons stated herein) extended only to one aspect of Defendants' argument—that the case presented issues constitutionally committed to the Executive Branch—without reaching the arguments that there are no judicially manageable standards for the resolution of Plaintiffs' claims or that their resolution would be impossible without making an initial policy determination of a kind clearly for non-judicial discretion. *See id.* Moreover, Judge Ellis explicitly left open the issue that he did address for further fact-finding. *Id.* at *23 n.40.

and cost-effectiveness, as contractors may prove reluctant to expose their employees to litigation-prone combat situations.").

Moreover, given the State Department's pervasive direction to and control over USTC, this Court cannot decide the appropriateness of the ICs' use of force without also deciding the appropriateness of the State Department procedures, methods, tactics, training, supervision, and control that underlie the governmental authorization to use deadly or defensive force—the very inquiry precluded by the political question. These sorts of quasi-military judgments are "exclusively committed to the legislative and executive branches of the federal government, and are therefore not subject to judicial review." *Carmichael*, 572 F.3d at 1281 (internal quotations omitted). And when a contractor works under government-prescribed standards and government control, "it would be impossible to make any determination" regarding the contractor's alleged misconduct without bringing the government's judgments into question. *Id.* at 1283; *see also Tozer v. LTV Corp.*, 792 F.2d 403, 406 (4th Cir. 1986) (when government and contractor work closely together "it is nearly impossible to contend that the contractor [acted negligently] without actively criticizing" the government's decisions), *cert. denied*, 487 U.S. 1233 (1988).

Here, the WPPS contract gave the State Department pervasive control over the ICs' activities in Iraq. The State Department-issued Tactical Operating Procedure ("TacSOP"), which was incorporated into the WPPS contract, defined in exhaustive detail the procedures to be followed by the ICs during the course of their various missions protecting government officials as they traveled to and from meetings throughout Baghdad. For instance, it prescribes the information to be covered in pre-mission briefs (TacSOP, App. A (App. 287)), duty descriptions for ICs and support staff (TacSOP, Ch. 1, pp. 6-8 (App. 184-86)), and communications procedures (TacSOP, Ch. 2 (App. 187-206)). Moreover, the TacSOP specifies, in over 180

pages of detailed instructions, the activities to be conducted in each stage of a protective security operation, such as planning, stage time, movement, and post-mission or recovery for protective security teams, low visibility teams, advance teams, counter assault teams, tactical support teams, explosive detection dog handlers, defensive marksmen, and air support. *See, e.g.*, TacSOP Chs. 6-13 (App. 209-85).

The contracts also contained detailed rules governing the use of force. The State Department's Deadly Force Policy, which was incorporated into the contract, provides that "deadly force is permissible when there is no safe alternative to using such force and without it the PSS [Protective Security Service] Specialist or others would face imminent and grave danger." *See* WPPS Contract, § C, App. P (App. 114). Consistent with the State Department's Policy, the U.S. Ambassador to Iraq has issued a Mission Firearms Policy that states:

> Determining whether deadly force is necessary may involve instantaneous decisions that encompass many factors, such as the likelihood that the subject will use deadly force on the individual or others if such force is not used by the individual; the individual's knowledge of the capabilities of the threatening party or situation; the presence of other persons who may be at risk if force is not used; and the nature and the severity of the subject's conduct or the danger posed.

WPPS Contract, Mission Firearms Policy, at 4 (App. 121).

Of particular relevance here, that Policy's rules on the use of defensive force state that "[s]hooting to disable a vehicle is authorized" and that "[i]n order to ensure safe separation from motorcade and suspected or likely VBIED [vehicle-borne improvised explosive devices], shots may be fired into the vehicle's engine block as needed to prohibit suspected or likely VBIED from entering into an area where the protective detail would be exposed to a VBIED attack." *Id.* at 9 (App. 126). Finally, the State Department's rules on the use of defensive force even address the permissibility of warning shots, providing that "[w]arning shots are not authorized" because they "may pose dangers to PSS or others." WPPS Contract, § C, App. P (App. 115); *see also*

WPPS Contract, Missions Firearms Policy, at 9 (App. 126) ("At no time will a weapon be fired into the ground or air as a warning to stop a threat.").

Finally, the contract clearly delineated the State Department's control over each security mission. The State Department's Regional Security Office ("RSO") was explicitly authorized to make tactical decisions regarding all aspects of each mission conducted by ICs. *See* Task Order Request 2006-06 ¶ 6.1 (App. 157); *see also* TacSOP, Ch. 3, at 4 (App. 207) (granting the RSO initial mission approval authority and requiring RSO approval of changes to missions); *id.* Ch. 6 at 2 (App. 210) (Department authority to approve missions and assign personnel). The contract expressly placed all missions "under the daily oversight of the RSO or the RSO's designee." Task Order Request 2006-06 ¶¶ 6.0.-6.1 (App. 155-57); *see also* WPPS Contract § C, ¶ 1.5.3 (App. 5) (RSO exercises "on-site authority over the Contractor's [protective services] detail"). The contract mandated that each security mission "maintain[] constant communication with RTOC [Regional Tactical Operations Center, where the State Department RSO was stationed] and notif[y] RTOC of any changes in status, route checkpoints, or other pertinent information." TacSOP, Ch. 3, at 4 (App. 207).

Such rules clearly reflect the type of discretionary, policy-laden judgments that balance safety, protection, and other factors (*e.g.*, foreign relations and the accomplishment of the Department of State's overall diplomatic mission) against the inherent risks associated with authorizing the use of deadly force in defense of Department of State personnel and the individuals that protect them. Had the Department of State desired a different tradeoff of civilian protection against government officials' safety, it would have selected different policies. The political question doctrine bars this court from second-guessing those judgments.

2. This Court Lacks Judicially Manageable Standards For Evaluating The Actions Of The State Department And The Actions of the ICs.

The decision to use force in a war zone is a classic political question—standards do not exist for assessing "whether reasonable care was taken to achieve military objectives while minimizing injury and loss of life." *McMahon v. Presidential Airways, Inc.*, 502 F.3d 1331, 1363 (11th Cir. 2007) (internal quotation marks omitted); *see also Tiffany*, 931 F.2d at 277-78; *Zuckerbraun v. Gen. Dynamics Corp.*, 755 F. Supp. 1134, 1142 (D. Conn. 1990), *aff'd*, 935 F.2d 544 (2d Cir. 1991). Indeed, "it is difficult to conceive of an area of governmental activity in which the courts have less competence." *Gilligan v. Morgan*, 413 U.S. 1, 10 (1973).

As discussed above (pp. 8-10), the State Department set forth detailed standards governing the ICs' missions and their use of force. This Court cannot now reevaluate whether the State Department or the ICs struck the appropriate balance between protecting diplomats in Iraq and ensuring civilian safety. Unlike the State Department, the judiciary has no agents or sources in Iraq, nor does it have policy advisors regarding the provision of security services in Baghdad at the height of armed conflict. Instead of fabricating standards in an area in which the judiciary lacks expertise, the Court should "instead trust that [the executive branch] is in the best position to determine the appropriate tradeoff between safety and combat effectiveness." *McMahon*, 502 F.3d at 1350; *see also Aktepe v. United States*, 105 F.3d 1400, 1404 (11th Cir. 1997) ("[C]ourts lack standards with which to assess whether reasonable care was taken to achieve military objectives while minimizing injury and loss of life."), *cert. denied*, 522 U.S. 1045 (1998).

Nor may the judiciary entertain tort claims based on any alleged failure of USTC or individual ICs to comply with standards set forth by the State Department. Otherwise, the political question doctrine would permit claims based on alleged noncompliance with the rules of

engagement that are routinely issued to guide combat troops (and indeed, those are precisely the types of allegations Plaintiffs raise here). Like all tactical judgments, decisions to use force during a protective security mission necessarily are "split second decisions [in] circumstances that are tense, unpredictable, and rapidly evolving." WPPS Contract, Mission Firearms Policy, at 4 (App. 121); *id.* § C, App. P (App. 114). As such, the ICs' decisions to discharge their firearms while conducting security missions in the Baghdad war zone are no more susceptible to judicial oversight than any other decision in a combat zone. *See Tozer*, 792 F.2d at 406; *Whitaker*, 444 F. Supp. 2d at 1282.

3. Any Judicial Inquiry Into The Supervision And Retention Of ICs Would Necessarily Intrude On Decisions Committed To The Executive Branch.

Counts seven and eight allege that the Corporate Defendants negligently supervised and retained the ICs involved in each of the incidents in question. Again, Plaintiffs' grievance is with the State Department's policy decisions, not with the Corporate Defendants here. The WPPS contract provided detailed specifications for the hiring and training of ICs, mandated periodic performance reviews by the State Department, and authorized the State Department to discharge ICs at will.

The contract requires USTC to submit every resume it receives to the State Department for pre-screening. *See* WPPS Contract § C, ¶ 4.3.1.1 (App. 7). The contract gave the Department the authority to prevent any applicant from providing services as an IC under the contract. *Id.* § C, App. F (App. 20-21). The Department gives personnel in key positions an even higher level of scrutiny. *See id.* § C, App. B (App. 11-12). The contract specified the screening procedures utilized by USTC—which include psychological, medical, and dental exams; background checks; drug testing; and monitoring for stability and performance during training. *See* id. § C, ¶ 4.3.1.2 (App. 7); *id.* § C, App. F (App. 20-21); Task Order Request 2006-06, ¶ 6.5 (App. 159);

Task Order Proposal 2006-06, at 54 (App. 165). In addition, the contract required all personnel performing under it to pass security clearances conducted by the State Department. *See* WPPS Contract § C, App. E (App. 13-19).

The State Department's oversight of the ICs was also reflected in the intensive training regimen specified in the contract, which devoted over 500 pages to detailed specifications of each element of the training program. The 164-hour training program was approved by the Department after a full, on-site demonstration. Many of the programs were created by the State Department; the remainder were developed by USTC in accordance with detailed specifications from the Department. *See* WPPS Contract § C, ¶ 4.3.2.1 (App. 8); *id.* § C, App. G (App. 22-38); Task Order Proposal 2006-06 ¶¶ 4.17, 4.24-4.26 (App. 175, 178-79). The State Department even specified the precise facilities to be used for training the ICs (*see* WPPS Contract § C, App. G (App. 22-38))—including such details as the minimum pieces of furniture in the rooms of a building used to simulate live gunfire situations (*id.*).

Prospective ICs also received instruction in the State Department's Deadly Force Policy, the use of weapons, and the proper procedures for conducting motorcade operations. *See* WPPS Contract § C, App. G, Attach. 5 (App. 57); Task Order 2006-06 Proposal ¶¶ 4.0-4.7, 4.12 (App. 166-71, 174). Trainees also were required to satisfy specific criteria set by the Department to be authorized to handle weapons. *See, e.g.*, WPPS Contract § C, App. G, Attach. 7-9 (App. 60-65); *id.* § C, App. N (App. 66). The IC's training was required to be at least as rigorous as that provided to the Department's security personnel. *Id.* § C, App. G, § 5.3.1 (App. 23); *id.* § C, App. U (App. 145-53) (incorporating syllabus for the State Department's Field Firearms Officer course); Task Order 2006-06 Proposal ¶ 2.10 (App. 162-65). In addition to the detailed provisions regarding the State Department's control over ICs and the conduct of security

missions, *see supra* pp. 8-10, the contract provides that a U.S. Government Agent in Charge ("AIC") will have "on-site authority over the Contractor's [protective services] ("PRS") detail." WPPS Contract § C, 1.5.3 (App. 5). The contract also requires contractors to perform their duties in compliance with directions from the State Department's Contracting Officer ("CO"), Contracting Officer's Representative ("COR"), or the AIC. *Id.* at 4.1.2 (App. 6). Further, the contract provides that the government will assess the contractor's performance every six months. *Id.* at 1.5.4 (App. 5).

Moreover, the government had the right to direct USTC to remove ICs for failure to comply with the standards of conduct. *Id.* § C, App. Q (App. 131). The contract required USTC to report adverse information about ICs to the State Department, and to notify the government of all misconduct incidents. *Id.* § C, App. E § 2.4 (App. 14); *id.* § C, App. Q (App. 131). If the State Department discharged one of the ICs due to unsatisfactory performance, USTC could be assessed a monetary penalty. *Id.* at 4.3.3 (App. 10); *see also id.* § H-15 (App. 142-44). USTC's responsibility, in contrast, was to maintain 100% continuity of service—*i.e.*, to deploy enough ICs that protective details were fully manned. *Id.* § C, 4.3.3, Performance Measures (App. 10).

Plaintiffs' claims are in essence that the State Department's supervision and retention procedures failed to control or weed out ICs who allegedly engaged in misconduct. *See* Compl. ¶¶ 144, 149. Plaintiffs do not allege that USTC failed to comply with these procedures with respect to any of its ICs, let alone the ICs alleged to have been involved in the incident underlying their claims. Whether the Department's procedures were adequate, and whether alternative or additional measures might have been prudent, are questions entrusted to the political branches. *See Heisig v. United States*, 719 F.2d 1153, 1156 (Fed. Cir. 1983).

III. **PLAINTIFFS' CLAIMS ARE PREEMPTED BECAUSE THEY INTERFERE WITH THE STRONG FEDERAL INTEREST IN WARTIME POLICYMAKING IN A FOREIGN WAR ZONE.**

As the D.C. Circuit recently held, "the federal government occupies the field when it comes to warfare, and its interest in combat is always 'precisely contrary' to the imposition of a non-federal tort duty" in a war zone. *Saleh*, 580 F.3d at 7 (quoting *Boyle v. United Techs. Corp.*, 487 U.S. 500, 500 (1988)). For Plaintiffs' suit to go forward against a contractor providing diplomatic security services to State Department personnel during time of war would interfere with the federal government's paramount interest in preventing the execution of its wartime policy decisions from being subject to the tort law of other sovereigns. "The states (and certainly foreign entities) constitutionally and traditionally have no involvement in federal wartime policy-making." *Id.* at 11; *see also* U.S. Const. art I, § 10. The imposition of tort liability on Defendants would in effect be an "indirect challenge[]" to the U.S. government's judgment about how best to ensure the safety of U.S. diplomats travelling in a war zone. *Saleh.* 580 F.3d at 7. "[D]irect challenges obviously are precluded by sovereign immunity," *id.*, and this Court, like the D.C. Circuit, should not permit Plaintiffs to circumvent the strictures of sovereign immunity by suing government contractors instead of the government.

Implied foreign affairs preemption under *Crosby v. National Foreign Trade Council*, 530 U.S. 363 (2000), requires a court to balance the non-federal sovereign's interest in regulation of conduct though tort against the federal government's interest in freely exercising its constitutional prerogatives in the field of foreign relations. In a case like this, where "all [the] alleged [harm] occurred in Iraq against Iraqi citizens," "the interests of any U.S. state" in applying its tort law to the dispute "are *de minimis*." *Saleh*, 580 F.3d at 12. The federal interest, in contrast, is strong indeed: "the Constitution entrusts foreign policy exclusively to the National Government." *Am. Ins. Ass'n v. Garamendi*, 539 U.S. 396, 419 n.11 (2003). As the D.C. Circuit

recognized, "'[o]ur system of government . . . imperatively requires that federal power in the field affecting foreign relations be left entirely free from local interference." *Saleh*, 580 F.3d at 12 (quoting *Hines v. Davidowitz*, 312 U.S. 52, 63 (1941)). Under these circumstances, "the very imposition of *any state law* create[s] a conflict with federal foreign policy interests." *Id.* at 13.

Plaintiffs' claims in this case arise from the alleged conduct of ICs working under contract with USTC while subject to a pervasive regime of State Department supervision and control. *See supra* pp. 8-10. As a threshold matter, the very use of ICs to provide diplomatic security services reflects a "federal wartime policy-making" judgment. *See Saleh*, 580 F.3d at 11. Congress has expressly charged the Secretary of State with the responsibility for "implement[ing] . . . policies and programs . . . to provide for the security of United States Government operations of a diplomatic nature" abroad. 22 U.S.C. § 4802. In this case, the Secretary of State decided to provide for the security of diplomatic in Iraq through the use of contractors like USTC. Although protective services have been traditionally provided by Diplomatic Security ("DS") agents employed by the State Department, "given a shortage of Diplomatic Security agents …, private security contractors are widely viewed as vital to U.S. efforts to protect many Iraqi and U.S. government officials, general contractors working to stabilize and reconstruct Iraq, and government facilities." CRS Report for Congress No. RL32419, *Private Security Contractors in Iraq: Background, Legal Status, and Other Issues* (Sept. 29, 2008), http://assets.opencrs.com/rpts/RL32419_20080929.pdf, at 1. The State Department has "report[ed] significant benefits from the use of private security contractors." *Id.*

at 35. Among other things, use of these contractors "offers a surge capability to meet an extraordinary but time-limited need." *Id.*[8]

A regime imposing non-federal tort liability simply because the government chose to protect its diplomats with contractors rather than soldiers (or other State Department personnel) would fundamentally "undercut[] the President's diplomatic discretion and the choice he has made exercising it." *Garamendi*, 539 U.S. at 423-24. The situation here is the same as the one presented in *Saleh*: not only would "the costs of imposing tort liability on government contractors [be] passed through to the American taxpayer," but also State Department personnel would face "the prospect of … being haled into lengthy and distracting court or deposition proceedings," and litigation would "as often as not devolve into an exercise in finger-pointing between the defendant contractor and the [State Department], requiring extensive judicial probing of the government's wartime policies." 580 F.3d at 8. The overall effect would be to hamper severely the "flexibility and cost-effectiveness" that the State Department has achieved through the use of contractors, "as contractors may prove reluctant to expose their employees" to a "litigation-prone" wartime environment. *Id.*

Moreover, the State Department has prescribed detailed standards with respect to the conduct of the ICs' security missions and, in particular, with respect to their use of force in a war zone. Indeed, the contract explicitly provided for an interlocking web of State Department oversight over security missions, ranging from the Regional Security Officer's power to make

[8] In particular, the State Department "has stated that contractors can be recruited, vetted, hired, trained, and deployed in 90 to 120 days," whereas the hiring and training DS agents takes two years. CRS Report, *supra*, at 35-36. Moreover, "the use of [contractors] allows the fielding of an already trained, experienced cadre of security professionals whose required skills can be designated in the contract." *Id.* at 36. And "[w]hen the surge need is gone, just as the State Department could rapidly expand its force, it can also reduce its security force when requirements change." *Id.*

tactical decisions regarding those missions to the Agent-in-Charge's on-site authority over protective services details. *See supra* pp. 8-10. Thus, as in *Saleh*, "control over the tactical and strategic parameters of the mission[s]" remained at all times in the hands of the federal government, in which the Constitution reposes exclusive authority for "wartime policy-making."[9] 580 F.3d at 2, 11. Plaintiffs' claims must be preempted in order to protect the federal government's overriding interest in accomplishing its diplomatic objectives during a time of war.

IV. PLAINTIFFS' CLAIMS ARE GOVERNED BY IRAQI LAW, UNDER WHICH THEY ARE NOT ACTIONABLE.

Plaintiffs bring three tort claims against the Corporate Defendants, two of which they plead under North Carolina common law (negligent supervision and negligent retention, Compl. ¶¶ 142-53), and one of which they plead alternatively under the laws of both North Carolina and Iraq (vicarious liability for wrongful death and personal injury, *id.* ¶¶ 126-41).[10] Notwithstanding the complaint's references to the laws of North Carolina, Plaintiffs' claims are governed by Iraqi law.

Non-federal claims brought in a district court are subject to the forum state's choice of law rules. *Limbach Co. v. Zurich Am. Ins. Co.*, 396 F.3d 358, 361 (4th Cir. 2005) (per curiam). "The Supreme Court of North Carolina consistently has held that the *lex loci delicti* doctrine applies to actions sounding in tort." *Jordan v. Shaw Indus., Inc.*, 131 F.3d 134, 1997 WL 734029, at *2 (4th Cir. 1997) (citing *Boudreau v. Baughman*, 322 N.C. 331, 335, 368 S.E.2d

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[9] *Saleh* expressly rejected the contention that preemption was appropriate only if the contractor was subject to "exclusive operational control," explaining that "unique and significant federal interests are implicated in situations where operational control falls short of exclusive." 580 F.3d at 8. Thus, the mere fact "that a contractor has exerted some limited influence over an operation does not undermine the federal interest in immunizing the operation from suit." *Id.* at 8-9.

[10] Although wrongful death is a purely statutory claim in North Carolina, it is treated as a tort because recovery "depends upon the same proof of actionable negligence or misconduct under the general rules of tort liability which would apply to an action strictly for personal injury." *Nelson v. United States*, 541 F. Supp. 816, 818 (M.D.N.C. 1982).

849, 854 (1988)). "Under this doctrine, the tort is deemed to have taken place, for choice of law purposes, in the jurisdiction in which the last event necessary to impose liability occurs." *Id.* "For actions sounding in tort, the state where the injury occurred is considered the situs of the claim." *Boudreau*, 322 N.C. at 335, 368 S.E.2d at 854; *see also Jones v. Skelley*, 673 S.E.2d 385, 393 (N.C. Ct. App. 2009); *Hensley v. Nat'l Freight Transp., Inc.*, 668 S.E.2d 349, 351 (N.C. Ct. App. 2008), *aff'd*, 363 N.C. 255, 675 S.E.2d 333 (2009); *Gbye v. Gbye*, 130 N.C. App. 585, 585-86, 503 S.E.2d 434, 434-35 (1998) ("In actions arising in tort, the doctrine of *lex loci deliciti* provides that the law of the state where the tort was allegedly committed controls the substantive issues of the case.").

As the Plaintiffs themselves allege, their claimed injuries occurred in Baghdad. Compl. ¶¶ 5, 79-89. Iraqi substantive law therefore governs. *See Sa'adoon v. Prince*, No. 1:09-cv-615, 2009 WL 3172713 (E.D. Va. Sept. 18, 2009) (Iraqi law governed claim of wrongful death occurring in Iraq). Under Iraqi law, Plaintiffs' claims are not actionable, for several reasons.[11]

A. Defendants Are Immune From Suit Under Iraqi Law.

The Coalition Provisional Authority ("CPA") was established in 2003 to govern Iraq temporarily and restore security. *See* CPA Regulation No. 1. In June 2004, the CPA issued Order No. 17, which immunized contractors like USTC from "Iraqi legal process," defined as "any * * * legal proceedings in Iraqi courts or other Iraqi bodies, whether criminal, civil, or administrative." CPA Order No. 17 § 1(10); *see also id.* § 2(1) (extending immunity to contractors, as well as their subcontractors and employees); *id.* § 4(3). Order 17 was in effect when the events giving rise to this lawsuit occurred and therefore bars Plaintiffs' claims.

[11] Foreign law is determined at the motion to dismiss stage by an expert's declaration. Fed. R. Civ. P. 44.1; *see Haywin Textile Prods., Inc. v. Int'l Fin. Inv. & Commerce Bank Ltd.*, 152 F. Supp. 2d 409, 411 (S.D.N.Y. 2001), *aff'd*, 38 F. App'x 96 (2d Cir. 2002).

B. <u>The Vicarious Liability Asserted Here Is Not Recognized Under Iraqi Law.</u>

Even if Order 17 does not apply, Plaintiffs' efforts to hold the Corporate Defendants vicariously liable for the alleged conduct of the ICs (Compl. ¶¶ 126-141) fail as a matter of Iraqi law. Under the law of Iraq vicarious liability is not available in the circumstances alleged here.

Iraq has a civil law system, in which principles of legal interpretation differ significantly from those in common law jurisdictions like the United States. Declaration of Professor Haider Ala Hamoudi ("Hamoudi Decl.") (attached as Exhibit A), ¶¶ 7-8. The controlling sources of law in Iraq are the provisions of codes covering discrete legal areas (such as company law, personal status law, and civil law) and commentaries of learned experts. *Id.* ¶¶ 7-9.

The Iraqi Civil Code and its authoritative commentaries recognize a general principle of "wrongful action." A "wrongful action" is roughly equivalent to a common law tort and consists of three elements: fault, harm, and causation. Hamoudi Decl. ¶¶ 14-19. Vicarious liability rules are considerably more circumscribed than under the common law. Article 219 of the Civil Code limits vicarious liability to "the government, the municipalities, the foundations that provide public services, and every person who exploits one of the industrial or trade foundations." *Id.* ¶ 20. This provision does not cover "people *or companies* that exploit foundations other than trade and industrial foundations [or] individuals who do not form foundations but engage in industrial or trade activity or anything else." *Id.*

The terms "government" and "municipalities" in the Civil Code provision are self-explanatory and are clearly inapplicable to the case pled here. The term "foundations" refers to institutions that provide public services and are owned and operated by the Iraqi government. Hamoudi Decl. ¶ 21. The last category of entities—a "person who exploits a foundation of trade or industry"—applies to contractors that work with the previously defined "foundations." *Id.* ¶ 22. To fall within this category, a private company must have a direct contractual relationship

with the government of Iraq or any entity wholly or majority owned by the government. *Id.* ¶ 23. As a consequence, vicarious liability in Iraq does not extend to privately owned companies that have no contractual relationship with the Iraqi government. *Id.* ¶¶ 20, 23-27, 42.[12]

Because none of the Corporate Defendants is alleged to have had a contractual relationship with the Iraqi government, they cannot be held vicariously liable for the alleged misconduct of the ICs. Accordingly, counts five and six of the complaint should be dismissed.

C. Punitive Damages Are Unavailable Under Iraqi Law.

Count nine of Plaintiffs' complaint is a request for punitive damages. Compl. ¶¶ 154-57. Damages under Iraqi law are exclusively compensatory. Hamoudi Decl. ¶¶ 30-31. Punitive damages are not available. *Id.* ¶ 31. Plaintiffs' claim must therefore be dismissed.[13]

V. PLAINTIFFS' CLAIMS ARE BARRED BY THE GOVERNMENT CONTRACTOR DEFENSE.

In *Boyle v. United Technologies Corp.*, 487 U.S. 500 (1988), the Supreme Court held that a contractor could not be subject to state-law tort suits based on its performance of an equipment contract with the federal government if "(1) the United States approved reasonably precise specifications; (2) the equipment conformed to those specifications; and (3) the supplier warned the United States about the dangers in the use of the equipment that were known to the supplier but not to the United States." *Id.* at 512. This defense applies to service contracts as well. *See, e.g.*, *Hudgens v. Bell Helicopters/Textron*, 328 F.3d 1329, 1335 (11th Cir. 2003); *Richland-Lexington Airport Dist. v. Atlas Props., Inc.*, 854 F. Supp. 400, 422-23 (D.S.C. 1994). USTC's provision of security services, including its hiring, training, retention, and supervision of ICs,

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[12] The only other form of secondary liability that exists under Iraqi law (parental liability) is inapplicable here. Hamoudi Decl. ¶ 28. Iraqi law does not impose liability for "ratif[ying] and condon[ing]" (Compl. ¶ 132) conduct of employees. Hamoudi Decl. ¶¶ 28-29.

[13] In addition, North Carolina law bars the award of punitive damages on the basis of vicarious liability. *See* N.C. Gen. Stat. § 1D-15(c).

was conducted in accordance with detailed contractual specifications set forth by the State Department; accordingly, Plaintiffs' claims are barred by the government contractor defense.

The first element of the government contractor defense is that the government approved reasonably precise procedures concerning the conduct underlying the plaintiff's claim. The contract between USTC and the State Department prescribed detailed procedures and standards for USTC's performance, including the hiring, training, supervision, and evaluation of ICs. *See supra* pp. 8-10. This regimen of contractual requirements establishes without doubt the first element of the government contractor defense.

The second element of the government contractor defense is that the contractor's performance conformed to the standards set by the government. The complaint does not allege that USTC failed to comply with the contractual standards governing its performance, including the hiring, training, and supervision of ICs. Instead, Plaintiffs simply make general allegations, including that the Corporate Defendants failed to provide "appropriate and increased supervision of its employees" (Compl. ¶ 144), maintained a "corporate culture of condoning reckless and unlawful conduct" (*id.*), and "engaged in a negligent and grossly negligent pattern and practice of retaining employees who had demonstrated that they were unfit to perform their duties" (*id.* ¶ 149). These allegations simply do not address the critical issue of whether USTC conducted itself in accordance with the contractual specifications set forth by the government.

The final element of the defense is that the contractor must have warned the government of any "dangers in reliance on the procedures that were known to [the contractor] but not to the United States." *Hudgens*, 328 F.3d at 1335. There can be no doubt that the State Department's knowledge regarding the risks of using ICs to carry out security missions in a war-zone was equal if not superior to USTC's. *See, e.g.*, *Gilligan*, 413 U.S. at 10.

As discussed above (pp. 7-10), the State Department has substantial experience in providing security services to diplomats and exercised plenary control over the security missions, the hiring and training of ICs, and the performance of USTC generally. The State Department was therefore well-positioned—indeed, better positioned than Defendants—to appreciate the risks associated with employing ICs to perform its security missions. The complaint makes no allegation to the contrary, and the level of control the State Department exercised over these missions renders such an allegation implausible. The negligent supervision and retention allegations are therefore barred by the government contractor defense and should be dismissed.

VI. PLAINTIFFS' CLAIMS ARE ALSO BARRED BY ABSOLUTE IMMUNITY.

In *Mangold v. Analytic Services, Inc.*, 77 F.3d 1442 (4th Cir. 1996), the Fourth Circuit—applying the Supreme Court's decisions in *Westfall v. Erwin*, 484 U.S. 292 (1988), *Barr v. Matteo*, 360 U.S. 564 (1959), and *Yearsley v. W.A. Ross Constr. Co.*, 309 U.S. 18 (1940)—held that the "absolute immunity" applicable to "federal officials exercising discretion while acting within the scope of their employment" extends to government contractors. *Mangold*, 77 F.3d at 1446. The court reasoned that, "[i]f 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." *Id.* at 1447-48; *see also TWI v. CACI Int'l, Inc.*, No. 1:07-cv-908, 2007 WL 3376661, at *3 (E.D. Va. Nov. 9, 2007). If Defendants are not eligible for the government contractor defense because they retained discretion, they are immune under *Mangold*.

Mangold immunity requires that the contractor was performing "delegated actions in the government's stead" and that the conduct at issue was "within the scope of employment." *TWI*, 2007 WL 3376661, at *3. USTC was plainly performing delegated actions that would otherwise have been performed by the State Department, because the Department ordinarily provides its

own protective security services. The retention and supervision of ICs, moreover, was clearly within the scope of employment under the contract. Accordingly, if the government contractor defense does not bar Plaintiffs' claims, absolute immunity does.

VII. PLAINTIFFS HAVE FAILED TO STATE A CLAIM AGAINST ANY OF THE CORPORATE ENTITIES.

Plaintiffs name sixteen different corporate entities as defendants, without making any effort to identify the roles they allegedly played in the events giving rise to this lawsuit. Compl. ¶¶ 20-35. Instead, Plaintiffs lump all of these separately operated companies together, treating them as a single entity. *See id.* ¶ 39 ("The corporate defendants described above and Prince are hereinafter collectively referred to as 'Blackwater-Xe.'"). This form of pleading does not satisfy either Rule 8 or Rule 12(b)(6) of the Federal Rules of Civil Procedure.

Rule 8(a)(2) requires "a short and plain statement of the claim showing that the pleader is entitled to relief," Fed. R. Civ. P. 8(a)(2), so that the defendant has "fair notice of what the . . . claim is and the grounds upon which it rests." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007) (quoting *Conley v. Gibson*, 355 U.S. 41, 47 (1957)). Where, as here, a plaintiff sues multiple defendants and states several causes of action, Rule 8 requires that he "must allege the basis of his claim against *each* defendant." *Gauvin v. Trombatore*, 682 F. Supp. 1067, 1071 (N.D. Cal. 1988) (emphasis added). The "use of either the collective term 'Defendants' or a list of the defendants named individually but with no distinction as to what acts are attributable to whom [makes it] impossible for any of these individuals to ascertain what particular . . . acts they are alleged to have committed." *Robbins v. Okla. ex rel. Dep't of Human Servs.*, 519 F.3d 1242, 1250 (10th Cir. 2008); *accord, e.g.*, *Atuahene v. City of Hartford*, 10 F. App'x 33, 34 (2d Cir. 2001) ("lumping all the defendants together in each claim and providing no factual basis to distinguish their conduct" violates the strictures of Rule 8 and is grounds for dismissal); *Classen*

Immunotherapies, Inc. v. Biogen IDEC, 381 F. Supp. 2d 452, 455 (D. Md. 2005); *Gen-Probe, Inc. v. Amoco Corp.*, 926 F. Supp. 948, 961 (S.D. Cal. 1996).

Here, Plaintiffs' failure to differentiate among the sixteen corporate entities named as defendants defeats their claims against all of the Corporate Defendants. Absent any factual allegations tying any particular corporation to any of the events underlying Plaintiffs' claims, the Corporate Defendants have no way of discerning which acts they are alleged to have committed and have no notice of which claims they must defend. Otherwise put, the "well-pleaded factual allegations" in Plaintiffs' complaint do not "plausibly give rise to an entitlement to relief" from any of the Corporate Defendants. *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1940-41 (2009). *Cf. id.* at 1952 (allegations of misconduct by "various other defendants, who are not before [the court]" were not properly considered in determining whether plaintiff had stated a claim "to relief *from petitioners*" (emphasis added)).

Moreover, USTC, the company that contracted with the State Department (*see* App. 2), is the only one of the so-called "Blackwater-Xe" entities against which Plaintiffs could plausibly have a factual basis for stating a claim. None of the other Corporate Defendants had, or is alleged to have had, a contractual relationship with the State Department in Iraq, or to have played any other role in the events underlying Plaintiffs' claims. Absent any factual allegations concerning these defendants, Plaintiffs have failed to state a claim against any of them.

For these reasons, the claims against the Corporate Defendants should be dismissed.

VIII. THE CLAIMS AGAINST DEFENDANT PRINCE MUST BE DISMISSED.

Other than a single conclusory allegation that "the wrongful deaths and injuries alleged … arise, in whole or in part, from the acts and/or omissions committed" by Defendant Erik Prince (Compl. ¶ 36), the complaint does not contain any factual allegation that Mr. Prince committed any act in his personal capacity that directly injured or harmed any plaintiff. Instead,

Plaintiffs appear to claim that Prince should be held liable for torts committed by various corporate entities with which he is affiliated. *Id.* ¶¶ 37-38. However, Plaintiffs' contentions in support of this corporate veil piercing attempt are insufficient to warrant such a "drastic remedy." *Dorton v. Dorton*, 77 N.C. App. 667, 672, 336 S.E.2d 415, 419 (1985).

Veil-piercing "should be invoked only in an extreme case where necessary to serve the ends of justice." *Id.* Courts may "extend liability for corporate obligations beyond the confines of a corporation's separate entity … to prevent fraud or to achieve equity." *Glenn v. Wagner*, 313 N.C. 450, 454, 329 S.E.2d 326, 330 (1985). North Carolina uses the "instrumentality rule," *id.*, which states that if "the corporation is so operated that it is a mere instrumentality or alter ego of the sole or dominant shareholder and a shield for his activities in violation of the declared public policy or statute of the State, the corporate entity will be disregarded and the corporation and the shareholder treated as one and the same person." *Henderson v. Sec. Mortgage & Fin. Co.*, 273 N.C. 253, 260, 160 S.E.2d 39, 44 (1968); *see Broussard v. Meineke Discount Muffler Shops, Inc.*, 155 F.3d 331, 349 (4th Cir. 1998) ("A corporate parent cannot be held liable for the acts of its subsidiary unless the corporate structure is a sham.").

In *Glenn*, the North Carolina Supreme Court outlined the three elements necessary to pierce the corporate veil under the instrumentality rule:

> (1) Control, not mere majority or complete stock control, but complete domination, not only of finances, but of policy and business practice in respect to the transaction attacked so that the corporate entity as to this transaction had at the time no separate mind, will or existence of its own; and
>
> (2) Such control must have been used by the defendant to commit fraud or wrong, to perpetrate the violation of a statutory or other positive legal duty, or a dishonest and unjust act in contravention of plaintiff's legal rights; and
>
> (3) The aforesaid control and breach of duty must proximately cause the injury or unjust loss complained of.

313 N.C. at 455, 329 S.E.2d at 330.

In evaluating whether those elements are present, courts look to the following non-exhaustive list of factors: (1) "Inadequate capitalization"; (2) "[n]on-compliance with corporate formalities"; (3) "Complete domination and control of the corporation so that it has no independent identity"; (4) "Excessive fragmentation of a single enterprise into separate corporations"; (5) "non-payment of dividends"; (6) "insolvency"; (7) "siphoning of funds by the dominant shareholder"; (8) "non-functioning of other officers or directors"; and (9) "absence of corporate records." 313 N.C. at 455-56, 458, 329 S.E.2d at 330-31, 332. The focus of the inquiry should be on the "reality, not form, [of] the operation of the corporation," and "the presence or absence of any particular factor" is not determinative. 313 N.C. at 458, 329 S.E.2d at 332; *see also, e.g.*, *DeWitt Truck Brokers, Inc. v. W. Ray Flemming Fruit Co.*, 540 F.2d 681, 687 (4th Cir. 1976); *Clark v. B.H. Holland Co.*, 852 F. Supp. 1268, 1277 (E.D.N.C. 1994).

Here, Plaintiffs attempt to show that the so-called "Blackwater-Xe" entities are "mere instrumentalities" of Mr. Prince by alleging—"[u]pon information and belief"—that: (a) Prince "completely dominates and controls the web of companies . . . such that the entities . . . have no separate mind, will or existence of their own" (Compl. ¶ 37); (b) the entities "failed to observe corporate formalities, including the failure to maintain separate books or accountings for each separate entity" (*id.*); and (c) "Blackwater-Xe was purposefully fragmented into an excessive number of subsidiaries, affiliates, and/or divisions" operated as a single company (*id.* ¶ 38).

While these allegations neatly track the language of *Glenn*, the complaint is devoid of any factual basis to support them. *Cf. Broussard*, 155 F.3d at 349. As the Supreme Court reaffirmed in *Iqbal*, "the tenet that a court must accept as true all of the allegations contained in a complaint is inapplicable to legal conclusions." 129 S. Ct. at 1940. "Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice." *Id.*

Moreover, Plaintiffs do not make these allegations with respect to each entity whose corporate form they ask this Court to disregard; instead, they simply lump together admittedly separate legal entities (*see* Compl. ¶¶ 20-35) under the name "Blackwater-Xe." *Id.* ¶ 37. In addition, Plaintiffs have failed even to allege an essential prerequisite to veil-piercing: that the companies have "abused [their] corporate privilege" or that the Court must disregard the corporate form "to prevent an injustice." *Richmond*, 308 F. Supp. 2d at 658; *see Clark*, 852 F. Supp. at 1277 (complaint must "present an element of injustice or fundamental unfairness") (quoting *DeWitt Truck Brokers*, 540 F.2d at 687).

In short, the threadbare and conclusory allegations in the complaint are inadequate to support the extraordinary remedy of piercing the corporate veil. Mr. Prince should therefore be dismissed as a defendant.

IX. THE EXHIBITS TO THE COMPLAINT SHOULD BE STRICKEN.

Finally, the exhibits Plaintiffs have attached to their complaint should be stricken pursuant to Federal Rule of Civil Procedure 12(f). These exhibits include:

1. An IRS letter concerning the legal status of an IC as an "employee."

2. A photograph of Ali Kinani, whose Estate is a plaintiff, prior to his death.

3. A letter of condolence from the U.S. Ambassador to the family of Ali Kinani.

4. A letter of condolence from the U.S. Army Commanding General to the family of Ali Kinani.

5. The criminal indictment of the IC Defendants.

6. The factual proffer in support of Defendant Ridgeway's guilty plea in the criminal proceeding.

These exhibits are not contracts or other "written instruments" that might properly be treated as part of the complaint pursuant to Federal Rule of Civil Procedure 10(c). *See, e.g.*, *Murphy v. Cadillac Rubber & Plastics, Inc.*, 946 F. Supp. 1108, 1115 (W.D.N.Y. 1996) ("written

instrument" means "a document evidencing legal rights or duties or giving formal expression to a legal act or agreement, such as a deed, will, bond, lease, insurance policy or security agreement"); *Rose v. Bartle*, 871 F.2d 331, 339 n.3 (3d Cir. 1989) (written instruments "consist largely of documentary evidence, specifically, contracts, notes, and other 'writing[s] on which [a party's] action or defense is based'") (quoting 5 Wright & Miller, Federal Practice and Procedure § 1327, at 489).

To the contrary, the exhibits are "entirely unnecessary to any 'short and plain statement of the claim,'" and many of them "would be prejudicial if ever viewed by a jury." *Nextel of N.Y., Inc. v. City of Mount Vernon*, 361 F. Supp. 2d 336, 340 (S.D.N.Y. 2005) (striking exhibits on these grounds) (quoting Fed. R. Civ. P. 8(a)(2)); *see also, e.g.*, *Chapman v. Duke Energy Carolinas, LLC*, No. 3:09-cv-37RJC, 2009 WL 1652463, at *2 (W.D.N.C. June 11, 2009) (striking EEOC letters that could not be used "to compel a finding of discrimination"); *Mandsager v. UNC Greensboro*, No. 1:00cv1018, 2002 WL 31942139, at *1 (M.D.N.C. Nov. 15, 2002) (striking exhibit that was not "integral to the complaint"); *Jones v. Thunderbird Transp. Co.*, 178 F. Supp. 9, 11 (D. Kan. 1959) (same); *see also Xerox Corp. v. ImaTek, Inc.*, 220 F.R.D. 241, 243 (D. Md. 2003) (striking allegations that "do not relate in any way to either parties' claims").

The Ridgeway proffer and the criminal indictment are improperly "submitted to bolster Plaintiffs' allegation[s]" in the complaint. *Galvan v. Yates*, No. CVF 05-0986, 2006 WL 1495261, at *4 (E.D. Cal. May 24, 2006) (striking witness declarations from complaint that were being used to "substantiate Plaintiffs' allegation"); *see also Montgomery v. Buege*, No. CIV. 08-385, 2009 WL 1034518, at *4 (E.D. Cal. Apr. 16, 2009) (striking declaration containing factual account of events underlying cause of action and articles providing medical information on

plaintiff's injuries). And the indictment is problematic for the additional reason that it is still pending before the district court; no findings of fact or law have been made that could be used to support any element of a civil cause of action. *See RSM Prod. Corp. v. Fridman*, No. 06-cv-11512, 2009 WL 424540, at *12 (S.D.N.Y. Feb. 19, 2009) ("complaints in other actions that have been dismissed, settled, or otherwise not resolved, are, as a matter of law, immaterial within the meaning of Fed. R. Civ. P. 12(f)"). Moreover, the indictment is highly prejudicial to the defendants. *See Toto v. McMahan, Brafman, Morgan & Co.*, No. 93 Civ. 5894, 1995 WL 46691, at *16 (S.D.N.Y. Feb. 7, 1995) (striking references to defendant's indictment and noting that "[f]requently courts will strike references that have criminal overtones").

CONCLUSION

For the foregoing reasons, the exhibits should be stricken and the complaint should be dismissed.

Dated: November 12, 2009　　　　Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on November 12, 2009, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system, which will send notification of such filing to the following:

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