

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NORTH CAROLINA
WESTERN DIVISION
Case 5:09-cv-450-BO**

R. DANIEL BRADY, ET AL.,)
)
 Plaintiffs,)
)
 vs.)
)
 XE SERVICES LLC,)
 BLACKWATER SECURITY)
 CONSULTING LLC, ET AL.,)
)
 Defendants.)
)

PLAINTIFFS' MOTION FOR REMAND

COME NOW plaintiffs in the above-entitled action, pursuant to 28 U.S.C. § 1447(c), and hereby move the Court for an Order remanding the above-entitled action back to the North Carolina Superior Court, Wake County. This Motion for Remand is based upon the following grounds:

1. The plaintiffs' Complaint does not allege any claims which "arise under" the Constitution, laws or treaties of the United States;
2. The defendants are not persons acting under color of any agency or office of the United States, and are not entitled to invoke the federal officer removal statute pursuant to 28 U.S.C. 1441(a)(1) to establish removal jurisdiction;
3. The defendants' anticipated defenses, as stated in their removal papers, even if based upon a federal statute or federal preemption, do not provide a basis for removal jurisdiction;

4. The defendants are not entitled to removal pursuant to the Federal Tort Claims Act (FTCA), 28 U.S.C. § 1346(b)(1), or on any basis related to *Saleh v. Titan Corp.*, 2009 WL 2902081 (D.C. Cir. Sept. 11. 2009);

5. The defendants are not entitled to removal pursuant to 28 U.S.C. § 1441, for any reason based on *Grable & Sons Metal Prods., Inc. v. Darue Eng'g & Mfg.*, 545 U.S. 308, 312 (2005), or for any similar reason;

6. The defendants' removal papers present an inadequate factual and evidential record upon which to premise removal under 28 U.S.C. § 1442(a)(1) and other similarly asserted grounds;

7. The U.S. District Court lacks subject matter jurisdiction of the instant action;

8. The plaintiffs do not, at this time, seek recovery of attorneys' fees in connection with the defendants' removal of this state court action to federal court, pursuant to 28 U.S.C. § 1447(c). However, the plaintiffs reserve the right to do so as removal jurisdiction is further briefed by the parties.

In support of this Motion for Remand, plaintiffs concurrently submit herewith Plaintiffs' Memorandum of Law in Support of Motion for Remand ("Memorandum of Law"). The grounds stated in the plaintiffs' Memorandum of Law are incorporated herein by reference.

WHEREFORE, plaintiffs, by their undersigned attorneys, move this court for an Order remanding the instant action back to the North Carolina Superior Court, Wake County, for the reasons stated in this Motion and the accompanying Memorandum of Law.

This the 16th day of November, 2009

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**PLAINTIFFS' MEMORANDUM OF LAW
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**PLAINTIFFS' MEMORANDUM OF LAW
IN SUPPORT OF
MOTION FOR REMAND**

Plaintiffs hereby submit this memorandum of law in support of their Motion to Remand, in accordance with 28 U.S.C. § 1447 and Local Rule 7.1 of the United States District Court for the Eastern District of North Carolina.

I. INTRODUCTION

On September 15, 2009, plaintiff R. Daniel Brady, as Administrator of the Estates of Ali Kinani, Abraham Abed Al Mafraje, and Mahde Saheb Naser Shamake, decedents' heirs Mohammed Hafedh Abdulrazzaq Kinani, Kalled Abraham Al Mafraje, Saheb Naser Shamake ("wrongful death plaintiffs"), and Majid Salman Abed Al-Kareem, Nasear Hamza Latif Rahief, Ghassen Abad Alkarem Mahmood ("personal injury plaintiffs"), filed an action in the North Carolina Superior Court, Wake County, alleging wrongful death claims (pursuant to N.C. Gen. Stat. § 28A-18-2 and/or directly through heirs) and state-created personal injury claims (under North Carolina and/or Iraqi law).¹ On October 15, 2009, the Blackwater-related individuals and entity defendants filed a Notice of Removal of this action to this United States District Court

¹ The captioned plaintiffs are collectively referred to as "plaintiffs." Allegations from plaintiffs' Complaint are referred to as "Compl. ¶ ____."

("Blackwater defendants). The next day, October 16, 2009, defendant Jeremy P. Ridgeway ("Ridgeway") filed his separate Notice of Removal of this action to this Court.²

A. Summary of Factual Basis of Plaintiffs' Complaint

Plaintiffs are three Baghdad residents and the estates (or heirs) of three deceased former Baghdad residents (including a nine-year old boy), and three Baghdad residents who suffered grave personal injuries at the hands of defendants (and proximately by those who employed them). Plaintiffs' claims stem from a massacre that occurred on September 16, 2007 in Baghdad's Nisur Square (just outside the area known as the "Green Zone"). On that day, plaintiffs allege that Blackwater employees repeatedly fired automatic weapons and detonated grenades into the crowded Nisur Square thoroughfare without justification, thereby causing (i) the deaths of the three plaintiffs whose estates (or their heirs) brought this suit and (ii) the injuries of the remaining three plaintiffs. Compl. ¶¶ 1, 10-19; *see also, In re: XE Services Alien Tort Litigation*, 2009 WL 3415129, *2 (E.D. Va. Oct. 21, 2009)(Ellis, J.)(parallel Nisur Square action, the "Virginia action"). Five of the individual defendants have been federally indicted for voluntary manslaughter due to the conduct alleged in the Complaint. *See* Compl. ¶¶ 4, 104 (Exhibit 5/"Indictment"). A sixth, defendant Ridgeway, pled guilty and has executed a "Factual Proffer in Support of Guilty Plea," confessing to the felonious manslaughter alleged in the Complaint. *See* Compl. ¶¶ 4, 107 (Exhibit 6/"Ridgeway Proffer"). All of the indicted defendants, along with defendant Ridgeway (who has already pled guilty), are referred to as the "Indicted Defendants."

² The separate removals prompted the Court to assign two different case numbers to plaintiffs' Complaint, as reflected by the filing of identical Motions for Remand and supporting memoranda in each case (5:09-cv-449 and 450). The Blackwater defendants' Notice of Removal will be referred to as "Blackwater Rem. ¶ ____;" Ridgeway's Notice of Removal will be referred to as "Ridgeway Rem. ¶ ____." All defendants are sometimes collectively referred to for purposes of convenience as "defendants" or as "Blackwater."

B. Defendants' Unjustifiable Removal

To justify a baseless removal, defendants assert, as their primary grounds for federal jurisdiction, and pursuant to 28 U.S.C. § 1442(a)(1), that the conduct set forth in the Complaint occurred while they were carrying out duties or tasks “of the federal superior.” Ridgeway Rem. ¶ 9; Blackwater Rem. ¶ 7. On its face, this is an absurd contention – that indicted conduct for voluntary manslaughter occurred as part of an “effort to *assist*, or to help *carry out*, the duties or tasks of the federal superior.” *Id.* (Italics in defendants’ original removal papers.) The indictment would not exist if the Nisur Square manslaughter (and related events) had actually been authorized by the federal government.

Defendant Ridgeway’s Factual Proffer, in and of itself, establishes that he was not carrying out the tasks of a federal superior; and, indeed, he has confessed and stipulated, as part of his criminal plea deal, that his “Raven 23 Convoy had not been authorized [by a federal superior] to depart from the International Zone on September 16, 2007.” Ridgeway Proffer ¶ 7 (also stipulating that the Indicted Defendants acted “in contravention of that order”). Defendant Ridgeway cannot have it both ways; he cannot be a de facto federal officer to support removal here and simultaneously admit to the felonious conduct asserted in the criminal papers supporting his guilty plea. He should be compelled, therefore, to either withdraw his criminal proffer or to withdraw his Notice of Removal. Others of the defendants have also made contradictory representations in their criminal court filings – representations that do not square with the collective stated bases for the instant Removal.³ Removing defendants should not be

³ See, e.g., Exhibit A (“Memorandum in Support of Motion for Finding of No Probable Cause Due to Absence of Subject Matter Jurisdiction”), representing to a Utah federal court, among other things, that the Indicted Defendants were engaged in a “two-way firefight” at Nisur Square and that the mission was non-military.

permitted to make arguments of convenience that depend on which court they happen to be in and upon whether their alleged liability is criminal or civil.

On October 16, 2009, in court papers filed with the United States District Court for the Eastern District of Virginia, in the parallel Virginia action, the United States Department of Justice rejected the preposterous contention that defendants' acts occurred under color of any federal office:

[T]he individual members of the PRS Details⁴ could not be considered to be government employees in any event. These individuals were hired by and remained under the control of [Blackwater] while working in Iraq.

* * *

Defendants do not contend that agents of the State Department Bureau of Diplomatic ("DS") were even present when the incidents which form the basis for Plaintiffs' claims occurred. Instead, the individual members of the PRS Details operated by [Blackwater] were directly supervised by [Blackwater's] supervisory personnel while conducting protective security operations, and were under [Blackwater's] direct supervision when the tortious acts for which Plaintiffs seek to recover damages in these actions were committed.

U.S. Opposition at 25, 55-56. Ironically, the very first case defendants cite in support of their instant removal, *Watson v. Philip Morris Cos., Inc.*, 551 U.S. 142 (2007), plainly states that § 1442(a)(1) applies only "to private persons 'who lawfully' assist the federal officer 'in the performance of his official duty'." *Id.* at 151 (quoting *Davis v. South Carolina*, 107 U.S. 597, 600 (1883)). The government, through the Indictment, and otherwise, has rejected defendants' spurious notion that the felonious conduct that is the gravamen of the Complaint occurred in furtherance of any federal governmental objective.

⁴ The members of Blackwater's Raven 23 Convoy are referred to in the government's papers as part of a "Protective Security Detail" or "PRS Detail." *See* United States of America's Opposition to Defendants' Motion to Substitute at 6 ("U.S. Opposition"/Virginia action), attached as Exhibit B.

Moreover, plaintiffs' Complaint explicitly states: "No federal causes of action or questions are raised herein." Compl. ¶ 9. And in fact the Complaint states only wrongful death and personal injury claims. Not a single one of plaintiffs' stated claims arise under any provision of the United States Constitution or any treaty or statute or law of the United States.⁵ Yet almost the whole of defendants' removal is justified by claims that their actions were authorized or directed by federal officials or by the anticipated federal defenses they might raise. Over the course of a century, the United States Supreme Court has repeatedly held, subject to extremely limited exceptions not applicable here, that an affirmative defense premised on federal law does not independently confer federal subject matter jurisdiction over a state court action. Defendants have ignored this law, citing "colorable federal defenses" such as preemption and the political question doctrine.

Defendants' removal papers also contain factual allegations found nowhere within plaintiffs' Complaint. For instance, the Blackwater defendants claim the Complaint "allege[s] that Defendants are liable in tort for injuries sustained on September 16, 2007 during a firefight in a Baghdad market⁶ known as Nisur Square." Blackwater Rem. ¶ 4. There was no "firefight," which implies, of course, adversaries shooting at each other. As the Complaint alleges, and as defendant Ridgeway's proffer attests:

[O]n September 16, 2007, at least six members of the Raven 23 Convoy, including defendant Ridgeway, opened fire with automatic weapons and grenade launchers on unarmed civilians located in and around Nisur Square in central

⁵ Defendants have not premised their removal on diversity of citizenship, which would be patently improper, in any event, since plaintiffs are foreign citizens and one of the defendants is a foreign company (Greystone Limited is a Barbados corporation). *See, In re: XE Services Alien Tort Litigation*, 2009 WL at *21; *Slavchev v. Royal Caribbean Cruises, Ltd.*, 559 F.3d 251, 254 (4th Cir. 2009). *See, e.g.*, Compl. ¶¶ 14, 27 (Iraqi plaintiff/Barbados defendant).

⁶ For reasons presumably strategic, the Blackwater defendants describe Nisur Square as a "Baghdad market." Nisur Square is large traffic circle, with an abstract statue of a knight at its center; it is not a "market." *Cf.* Ridgeway Proffer ¶ 7; Compl. ¶ 68.

Baghdad, killing at least fourteen people, wounding at least twenty people, and assaulting but not injuring at least eighteen others. None of these victims was an insurgent, and many were shot while inside of civilian vehicles that were attempting to flee from the Raven 23 Convoy. One victim was shot in his chest, while standing in the street with his hands up.

Ridgeway Proffer ¶ 4; Compl. ¶ 106. It is a fundamental principle of federal law, subject to limited exceptions such as § 1442(a)(1), that removal must be premised exclusively upon the facts and claims contained within the plaintiff's complaint. Federal courts have described the plaintiff as the "master of his own pleadings," and have consistently held that only the facts included in the complaint dictate removal jurisdiction (except, for instance, with respect to the creation of a record for purposes of § 1442(a)(1)). Defendants have made no record whatsoever, other than the bald conclusory assertions in their removal papers.

In sum, the removing defendants seek to federalize traditional state law causes of action (wrongful death, personal injury, etc.), they make assertions that their actions occurred under color of a federal office (despite federal felony indictments, a plea deal, and contrary court filings by the federal government), and they premise their removal on an amalgam of anticipated federal defenses (including improperly vague assertions of "other federal principles" (e.g., *Blackwater Rem.* ¶ 12)).

This is not the first time Blackwater has removed a wrongful death case from Wake County Superior Court to this Court. See *Nordan v. Blackwater Security Consulting*, 382 F. Supp. 2d 801 (E.D.N.C. 2005). The Eastern District, in *Nordan*, entertained Blackwater's various removal arguments and summarily rejected them: "[T]his court lacks subject matter jurisdiction over this cause of action, whether asserted [by Blackwater] on the basis of complete preemption or unique federal interests." *Nordan*, 382 F. Supp. 2d at 813. Now Blackwater is back, re-asserting federal removal jurisdiction on spurious grounds and retreading many of its prior

rejected arguments. The federal courts are courts of limited jurisdiction, and traditional removal principles dictate that this case should be remanded to state court for disposition.

II. FACTS

A. Blackwater's Personal Protective Services Function

1. The Indicted Defendants were employees of Blackwater, not the federal government.

The entities comprising Blackwater, as alleged, are a web of companies which were formed and/or acquired by defendant Erik Prince ("Prince") beginning in or about 1996. Compl. ¶ 48. Blackwater has grown to become one of the world's largest providers of "private personal protective services" and offers a diverse range of related services, including helicopter and air transport services. Compl. ¶ 49. The primary operational facility for Blackwater personnel is located in northeastern North Carolina. Compl. ¶ 50. Plaintiffs allege that the Indicted Defendants spent significant time training and working at Blackwater's North Carolina facility. Compl. ¶ 51.

In 2003, Blackwater entered into a contract with the U.S. State Department known as the "Worldwide Personal Protective Services Contract II" ("the WPPS contract" or "WPPS") for the provision of private personal protective services to certain high-level U.S. and foreign government officials working in Baghdad, Iraq. Compl. ¶ 53. Under the WPPS and otherwise, Blackwater (and its Iraqi-based employees) was always obligated to comply with the law of the United States and Iraq. Compl. ¶ 54. Blackwater was required to properly recruit, screen, select and train its employees engaged in providing private personal protective services in Iraq. Blackwater provided all necessary training facilities for its private personal protection personnel, as well as all equipment, materials and supplies as necessary. Compl. ¶ 55. Under the WPPS, it remained Blackwater's duty and responsibility to take any necessary disciplinary action with

respect to its employees; furthermore Blackwater retained the right to supervise, evaluate, discipline or terminate its employees as necessary. Compl. ¶ 56.

Plaintiffs allege that Blackwater paid its employees, including the Indicted Defendants, salaries for the private personal protective services they provided pursuant to their employment, and either party could terminate the employment relationship without incurring any liabilities. Compl. ¶ 59. At all times, Blackwater retained the right to direct and control its employees engaged in providing private personal protective services, including the Indicted Defendants. Compl. ¶ 60. The U.S. government has determined that Blackwater's employees, similarly situated to the Indicted Defendants, were Blackwater employees for whom Blackwater was required to provide workers' compensation insurance. Compl. ¶ 61, Ex. 1. The U.S. government has further determined that Blackwater's employees, similarly situated to the Indicted Defendants, were employees for purposes of compliance with the tax law of the United States. Compl. ¶ 61; *and see* Compl. Ex. 1. Blackwater retained the right to direct and control its employees pursuant to the WPPS contract. Compl. ¶ 62.

As Blackwater employees, the Indicted Defendants were required to follow certain standards and rules of engagement prior to the use of deadly force. These standards included the State Department Mission Firearms Policy for Iraq ("the Mission Firearms Policy").⁷ As a condition of their employment with Blackwater, the Indicted Defendants were required to sign a written acknowledgement agreeing to abide by the use-of-force policies set forth in the Mission Firearms Policy. Compl. ¶ 63.

⁷ It should be noted that Judge Ellis scrupulously analyzed Blackwater's claims that its work pursuant to the WPPS implicated the "political question doctrine" and similar justiciability questions – and flatly rejected these arguments. *In re: Xe Services*, 2009 WL 3415129, * 22-23.

2. **The federal government has repeatedly stated in Court papers that Blackwater and the Indicted Defendants were not acting as de facto federal officers or “employees” under the WPPS or during the Nisur Square shootings.**

(a) The Virginia Nisur Square Tort Action

As alluded to earlier, a separate case is being litigated in the federal Eastern District of Virginia that arises out of the Nisur Square shootings.⁸ *See, In re: XE Services Alien Tort Litigation* [the “Virginia action”], 2009 WL at *2. The plaintiffs in the Virginia action seek recovery from Blackwater-related defendants under the federal Alien Tort Statute, 28 U.S.C. § 1350, for injuries resulting from the alleged commission of war crimes. The Virginia plaintiffs have also alleged that the Blackwater defendants there are civilly liable for RICO violations under 18 U.S.C. § 1964. In addition to their federal causes of action, the Virginia plaintiffs have asserted that the defendants are liable under non-federal tort law for (i) assault and battery, (ii) wrongful death, (iii) intentional infliction of emotional distress, (iv) negligent infliction of emotional distress, (v) negligent hiring, training, and supervision, and (vi) tortious spoliation of evidence. *Xe Services*, 2009 WL at *4. In any event, the Virginia federal court, acting through Judge T.S. Ellis, II, has made it clear that federal jurisdiction in the Virginia action *exists solely because of the federal causes of action alleged by the plaintiffs there.*⁹ *Id.* at *24.

The plaintiffs in this action, however, have raised no federal claims under the federal war crimes statute, § 1350, nor have they made any federal RICO claims pursuant to § 1964. In fact, the instant plaintiffs’ Complaint specifically states: “*No federal causes of action or questions are*

⁸ According to the docket sheet in the Virginia action, within the last several days, the Blackwater defendants in that action have agreed to a monetary settlement with the Iraqi plaintiffs.

⁹ As the *Xe Services* opinion reflects, Judge Ellis dismissed the plaintiffs’ *federal war crimes* claims with leave to re-plead, and he makes it abundantly clear that the federal court would lack subject matter jurisdiction if such claims cannot be made. *Id.* at *24.

raised herein.” Compl. ¶ 9. The instant plaintiffs limited the causes of action in the North Carolina state action to: (1) wrongful death; (2) personal injury; (3) negligent supervision; and, (4) negligent retention. Not a single one of plaintiffs’ claims in the Complaint arises under or is based upon any federal law.

(b) The government’s filings in the Virginia action disavow Blackwater’s assertions that it and its employees are federal government employees or actors.

In the U.S. Opposition filed on October 16, 2009 in the Virginia action, the Department of Justice (“DOJ”) *repeatedly confirms* that neither Blackwater (nor its related entities) nor the Indicted Defendants could be considered colorable federal employees “in any event.” Reason: These individuals were hired by and remained under the control of Blackwater while they were working in Iraq. U.S. Opposition at 6. Under the WPPS (and just as plaintiffs allege in the Complaint),

The Department of State did not control the detailed physical performance of the work of [Blackwater] . . . the corporate entity to which the State Department awarded the contract and issued task orders to provide security services for the protection of U.S. government personnel working or traveling in and around certain parts of Iraq. While [Blackwater] was obligated to comply with strict specifications and standard operating procedures in performing its work under the [WPPS] contract task orders, the imposition of *such requirements did not vitiate [Blackwater’s] status as an independent contractor. Indeed, the personnel who actually performed the work on behalf of [Blackwater] – including the individuals who allegedly committed the tortious acts [at Nisur Square] that form the basis for Plaintiffs’ claims in these actions, were hired by [Blackwater] and remained under [Blackwater’s] direct supervision and control while furnishing services pursuant to the contract and task orders.*

U.S. Opposition at 4 (emphasis added). As made manifest by the DOJ’s statements in the U.S. Opposition, *none of the instant defendants were plausibly “acting within the scope of [their] supposed Federal employment at the time of the incident which forms the basis for Plaintiffs’ claims.”* *Id.* at 5 (emphasis added).

The federal government's disavowal is further illustrated by the Nisur Square Indictment and defendant Ridgeway's Factual Proffer. The Department of Justice does not criminally prosecute duly authorized and lawful acts of the federal government itself. Plaintiffs' Complaint and the federal government's public court filings clearly provide that defendants' conduct had nothing whatsoever to do with the federal government or acts authorized by the federal government. Hence, there is no factual basis for the Notices of Removal filed by defendants.

B. The Nisur Square Shootings – September 16, 2007

Nisur Square is a traffic circle that serves as a major thoroughfare in Baghdad. Nisur Square is located just outside a fortified area of central Baghdad known as the "International Zone," also commonly referred to as the "Green Zone." Most of the foreign embassies in Iraq, including the United States Embassy, are located in the International Zone. Compl. ¶ 68. On September 16, 2007, the Indicted Defendants¹⁰ were assigned to a convoy of four heavily-armed trucks known as a Tactical Support Team which used the call sign "Raven 23." The function of the Tactical Support Team was to assist other Blackwater personal protective personnel operating in Baghdad. Part of the assistance included the use of Blackwater's helicopters and other aircraft. Compl. ¶ 69. *At approximately noon on September 16, 2007, the Raven 23 Convoy exited the International Zone without first obtaining the necessary and proper authorization to do so.* Compl. ¶ 70.

As the Complaint alleges, Blackwater's employees, including the Indicted Defendants who were members of the Raven 23 Convoy, understood that their mission was supportive in

¹⁰ For the ease of reference, defendants Donald Wayne Ball ("Ball"), Dustin L. Heard ("Heard"), Evan Shawn Liberty ("Liberty"), Jeremy P. Ridgeway ("Ridgeway"), Nicholas Abram Slatten ("Slatten"), and Paul Alvin Slough ("Slough") are all referred to as "the Indicted Defendants."

nature and that they were not permitted to engage in offensive action, to discharge their weapons without first determining the need to do so, to use the tactic known as “suppressive fire,” or to exercise police powers. Rather, the Indicted Defendants, as *personal protective employees*, understood that they were authorized to discharge their firearms *only in self-defense and as a last resort*. Compl. ¶ 71. Shortly after the Raven 23 Convoy’s unauthorized departure from the International Zone on September 16, 2007, plaintiffs allege that the Raven 23 Convoy was specifically directed by the Regional Security Office of the United States Embassy to return to the International Zone. The Raven 23 Convoy disobeyed this instruction and failed to return to the International Zone. In complete contravention of the WPPS, the Raven 23 Convoy, including the Indicted Defendants, set up a blockade at Nisur Square to stop civilian traffic from flowing through the traffic circle. Compl. ¶ 72.

The Raven 23 Convoy entered Nisur Square against the flow of traffic. The convoy’s four heavily-armed vehicles positioned themselves in a line on the southern half of the circle in order to block any traffic from entering the circle from the south or the west. Compl. ¶ 73. Moments after the Raven 23 Convoy entered the traffic circle, and without any provocation or justification, the Indicted Defendants (acting in concert) opened fire on a white Kia sedan approaching the traffic circle from the south. These shots killed the driver of the vehicle, who was later identified as a second-year Iraqi medical student. As an Iraqi police officer directing traffic at Nisur Square waived his arms in an effort to prevent further gunfire, defendant Ridgeway fired his M-4 assault rifle into the front passenger side window of the white Kia sedan, killing the passenger (later identified as an Iraqi physician and the mother of the driver). Compl. ¶ 74.

Other members of the Raven 23 Convoy fired weapons into the white Kia sedan. At least one launched an M-203 grenade at the white Kia sedan, which exploded under the passenger compartment, rupturing and igniting the fuel line and causing the vehicle to erupt in flames. By this time, Blackwater's helicopters had arrived to support the actions of Raven 23 and the Indicted Defendants. Compl. ¶ 75. The Indicted defendants were, at all times relevant to the Nisur Square shootings, subject to certain rules of engagement, including the "Mission Firearms Policy." Prior to the use of deadly force, the Indicted Defendants were required to give reasonable warnings to pedestrians and vehicles in harm's way. These reasonable warnings included the use of hand and verbal warnings; firing of pin flares; and pointing (but not firing) weapons at a vehicle. The Indicted Defendants failed to observe any of the required protocols that day at Nisur Square. Compl. ¶ 77.

As the Indicted Defendants departed from Nisur Square, they proceeded against the flow of traffic - continuing to randomly fire at vehicles and unarmed pedestrians and at a red bus containing innocent civilians. The Indicted Defendants then proceeded back to the International Zone. As their convoy moved by, the Indicted Defendants continued to fire into the rooftops, windshields and trunks of other civilian vehicles and at pedestrians that posed no threat whatsoever. Compl. ¶ 78.

C. The Wrongful Deaths and Personal Injuries Caused By Defendants

Just prior to the time the shooting at Nisur Square began, plaintiff Mohammed Kinani ("Mr. Kinani"), an Iraqi businessman, was driving his Isuzu sport utility vehicle toward the traffic circle. His automobile was located behind the white Kia sedan and was occupied by his nine-year-old son, Ali Kinani, and four other family members, including his sister and three other small children who were seated in the back seat with Ali Kinani. Without any warning or

justification whatsoever, the Indicted Defendants opened fire on Mr. Kinani's vehicle, striking the vehicle at least ten times in the front grill, front windshield and side passenger door. Compl. ¶¶ 79-80. Mr. Kinani's little boy, plaintiff's decedent Ali Kinani, was struck by a bullet in the left side of his head. When Mr. Kinani opened the passenger door to provide aid to his young son, Ali Kinani slumped to his left toward his father. As Mr. Kinani reached to catch his injured son, a portion of Ali Kinani's brain fell out of the open wound in his head and landed between Mr. Kinani's feet on the pavement. Compl. ¶ 81. A photograph of Ali Kinani taken just prior to his death is attached to the Complaint as Exhibit 2.

After the Indicted Defendants left Nisur Square, Mr. Kinani drove to a hospital near Nisur Square. Due to the grave nature of his injuries, young Ali Kinani was immediately placed in an ambulance for transport to a better equipped Baghdad hospital. Ali Kinani died shortly after reaching the second hospital. Compl. ¶ 82.

The other deaths and injuries suffered by plaintiffs follow similar facts. Plaintiff Mahde Shamake's vehicle was struck from the rear by bullets fired by one or more of the Indicted Defendants. Mahde Shamake was shot in the back, creating a large exit wound in his chest that killed him. Compl. ¶ 84. Plaintiff Abraham Al Mafraje, a seventy-five-year-old retired farmer, was shot in the head and killed by the Indicted Defendants. Plaintiff Ghassan Abad Alkarem Mahmood, a fifty-three-year-old engineer and father of five (5) children, was shot in the head and neck by gunfire from the Indicted Defendants and remained incapacitated for several months after the shooting. He has been unable to resume his employment as an engineer and will be unable to work as an engineer in the future. Compl. ¶ 86.

Nasear Hamza Latif Rahief ("Mr. Rahief"), a sixty-five-year old widower and father of nine (9) children, was a passenger in a minivan taxi. He was shot in the right shoulder by gunfire

from the Indicted Defendants. Mr. Rahief was a produce merchant who supported his family by working in one of Baghdad's open markets. He was unable to work for at least one year due to his injuries. Compl. ¶ 87. Majid Salman Abed Al-Kareem ("Mr. Al-Kareem"), a fifty-year old businessman, husband and father of a three-year-old child, scrambled out of his vehicle and sought cover, but was struck with grenade shrapnel in his shoulder, abdomen, and leg. The shrapnel from the grenade remains lodged in his body, causing him to suffer constant pain and discomfort. Compl. ¶ 88.

When the Raven 23 Convoy left Nisur Square on the early afternoon of September 16, 2007, at least fourteen (14) Iraqi civilians lay dead or dying and another twenty (20) or more civilians suffered serious personal injuries. At no time prior to leaving Nisur Square did any of Indicted Defendants make any effort to render aid or assistance to those civilians who had been killed or injured. Compl. ¶ 89.

III. LEGAL ARGUMENT

A. Federal Subject Matter Jurisdiction is Limited

Federal courts are courts of limited jurisdiction and are empowered to hear only those cases authorized by federal statutes and the Constitution. *Kokkonen v. Guardian Life Ins. Co.*, 511 U.S. 375, 377 (1994); *Bender v. Williamsport Area Sch. Dist.*, 475 U.S. 534, 541 (1986). As a result, there is an initial presumption that federal courts lack subject matter jurisdiction to resolve a particular suit. *Id.* The presence or absence of a federal question is typically governed by the "well-pleaded complaint rule," which provides, subject to extremely limited exceptions, that federal jurisdiction exists only when a federal question is presented on the face of the plaintiff's complaint. *Rivet v. Regions Bank*, 522 U.S. 470, 475 (1998); *Caterpillar, Inc. v. Williams*, 482 U.S. 386, 398-99 (1987). The well-pleaded complaint rule confines the search for

federal question jurisdiction to the face of the complaint. *Franchise Tax Bd. v. Construction Laborers Vacation Trust*, 463 U.S. 1, 10 (1983). As a general rule, the plaintiff is considered the master of its complaint and may avoid federal jurisdiction by relying exclusively on state law. *Caterpillar*, 482 U.S. at 392.

An exception to the well-pleaded complaint rule arises in the context of a removal based on 28 U.S.C. § 1442(a)(1), known as the “federal officer removal statute.” *Mesa v. California*, 489 U.S. 121, 136-37 (1989). Section 1442(a)(1) does nothing more than grant district court jurisdiction over cases in which a *federal officer* (or an equivalent person) is a defendant. *Mesa*, 489 U.S. at 136-37. Section 1442(a) does not independently support Article III “arising under” jurisdiction. Rather, it is the raising of a federal question or defense in the officer’s removal petition that constitutes the federal law under which the action against the federal officer arises for Article III purposes. *Id.* The removal statute itself merely serves to overcome the “well-pleaded complaint” rule, which would otherwise preclude removal even if a federal defense were alleged. *See Merrell Dow Pharms., Inc. v. Thompson*, 478 U.S. 804, 808 (1986) (under the “well-pleaded complaint” rule “[a] defense that raises a federal question is inadequate to confer federal jurisdiction”). *In other words, as applied here, if the Court finds that the instant defendants are not “federal officers or employees” or combatants under military command (which they are not), or that § 1442(a)(1) is inapplicable for other reasons, removal jurisdiction will not lie simply because defendants have suggested the presence of federal defenses in their removal papers.*

An unbroken line of United States Supreme Court cases establishes that a defense that raises a federal question does not give the court federal question jurisdiction. *Merrell Dow*, 478 U.S. at 808; *Rivet*, 522 U.S. at 478; *Caterpillar* 482 U.S. at 398-399. When the plaintiff’s complaint does not raise a federal question, a defense based on federal law that only *partially*

preempts state law does not raise a federal question. See *Metropolitan Life Ins. Co. v. Taylor*, 481 U.S. 58, 63 (1987). The defense of federal preemption authorizes removal to federal court only when the area of law has been *completely preempted* by Congress. *Taylor*, 481 U.S. at 63. Otherwise, state courts have *concurrent jurisdiction* over federal claims and defenses with the federal courts unless (1) Congress provides that the federal courts have exclusive jurisdiction, or (2) there is a clear incompatibility between state court jurisdiction and a federal interest. *Gulf Offshore Co. v. Mobil Oil Corp.*, 453 U.S. 473, 478 (1981). None of these limited exceptions apply here.

To determine whether there is federal question jurisdiction in a state created action, the court must decide if a substantial, disputed question of federal law is a *necessary element* of the state law cause of action. *Merrell Dow Pharms.*, 478 U.S. at 813; *Franchise Tax*, 463 U.S. at 13; *Mulcahey v. Columbia Organic Chems. Co.*, 29 F.3d 148, 151 (4th Cir. 1994). The mere presence of a federal issue in a state law cause of action *does not* confer federal question jurisdiction. *Merrell Dow*, 478 U.S. at 814; *Franchise Tax*, 463 U.S. at 13. Generally speaking, even a state law cause of action based on the violation of a federal law does not raise a federal question. *Merrell Dow*, 478 U.S. at 814; *Mulcahey*, 29 F.3d at 151; *Clark v. Velsicol Chem. Corp.*, 944 F.2d 196, 198-99 (4th Cir. 1991)(negligence action based on violation of federal regulation did not confer federal subject matter jurisdiction).

In this case, absolutely *none* of the claims contained within the Plaintiffs' Complaint "arise under" the Constitution, treaties, or laws of the United States. Moreover, plaintiffs' Complaint, and the other materials attached to the Complaint and this brief (such as Ridgeway's Factual Proffer, the Nisur Square Indictment, and the government's previous disavowal of defendants' status as "federal employees" in the Virginia action), demonstrate the absurdity of

defendants' assertion of § 1442(a) "federal officer" status. As such, there simply does not exist federal subject matter jurisdiction over the instant action. Since federal courts are courts of limited jurisdiction, this Court should remand the action back to the state court for lack of subject matter jurisdiction.

B. Defendants Are Not Federal Officers Entitled to Invoke § 1442(a)(1)

1. The Federal Officer Removal Statute

The primary removal provision invoked by defendants, 28 U.S.C. § 1442(a)(1), provides in pertinent part that:

A civil action or criminal prosecution commenced in a State court against any of the following persons may be removed by them to the district court of the United States for the district and division embracing the place wherein it is pending:

- (1) Any officer of the United States or any agency thereof, or person *acting under* him, for any *act under color of such office* or on account of any right, title or authority claimed under any Act of Congress for the apprehension or punishment of criminals or the collection of the revenue.

Mesa, 489 U.S. at 124-25 (emphasis added). The Supreme Court has made it clear that § 1442 "permits removal only if [defendants], in carrying out the 'act[s]' that are the subject of the petitioners' complaint, w[ere] 'acting under' any 'agency' or 'officer' of the 'United States.'" *Watson*, 551 U.S. at 147 (quoting *Colorado v. Symes*, 286 U.S. 510, 517 (1932)) (emphasis added). The federal officer removal statute's reach is circumscribed, and it only "applies to private persons 'who lawfully assist' the federal officer 'in the performance of his official duty'." *Watson* at 151 (quoting *Davis*, 107 U.S. at 600)(emphasis added). In this case, defendants were not lawfully assisting the Department of State in any way, they were not acting at the direction of any federal officer, and they cannot seriously contend that the WPPS caused them to engage in the felonious Nisur Square shootings. See, e.g., *Xe Services* at *23. Ergo, no § 1442(a)(1) jurisdiction exists over plaintiffs' claims against defendants.

In order to remove an action pursuant to § 1442(a)(1), in addition to the “lawfully assist” gloss set forth by *Watson*, defendants *must establish* that (1) they acted under the direction of a federal officer, (2) that they can maintain a colorable federal defense to the plaintiffs' claims, and that (3) there is a causal nexus or connection "between the plaintiffs' claims and acts [defendants] performed under color of federal office." Under the “direction” element, a defendant acts under the control of a federal officer only if the federal officer has "direct and detailed control" over the activity. *Carter v. Monsanto Co.*, 635 F. Supp. 2d 479, 488 (S.D. W.Va. 2009); *see North Carolina v. Ivory*, 906 F.2d 999, 1002 (4th Cir. 1990). Defendants do not meet any of these requirements.

2. Defendants Cannot Meet the “Lawfully Assisting,” “Acting Under,” or “Causal Nexus” Requirements of § 1442(a)(1)

It is not enough that the defendants' actions occurred under the "general auspices of a federal office or officer" or that the defendants participated in federally regulated events. *Ryan v. Dow Chem. Co.*, 781 F.Supp. 934, 947 (E.D.N.Y. 1992). Even if the defendants could satisfy the “acting under” requirement by showing that they acted at the direction of a federal officer (which they cannot), federal officer removal would only be appropriate if the defendants can also establish a “causal nexus” *between the acts taken under federal control and the alleged acts underlying the plaintiffs' claims*. *Jefferson County, Ala. v. Acker*, 527 U.S. 423, 433 (1999); *Carter*, 635 F. Supp. 2d at 489. Accordingly, to sustain removal jurisdiction, defendants must show (1) that the Nisur Square shootings (and other tortious acts alleged) occurred under the *direct and detailed control* of a federal officer, and (2) that *because of* the direction and detailed control of the federal officer, they engaged in the negligent acts alleged in the Complaint. *See Carter* at 495 (citing *Campbell v. Brook Trout Coal, LLC*, 2008 WL 4415078, *4 (S.D. W.Va. 2008)(finding *no causal nexus* between the defendants' actions and the actions undertaken

pursuant to federal control because “[t]here were no orders or direction from federal officers that prevented [the defendant] from fulfilling its duties to the plaintiffs.”); *see also Isaacson v. Dow Chem. Co.*, 517 F.3d 129, 137-39 (2d Cir. 2008). Defendants cannot plausibly satisfy these requirements. As previously discussed at length, the Nisur Square shootings and the events that proximately caused them had nothing to do with the WPPS (or any other federal directive or act). Moreover, nothing contained in the WPPS prevented defendants from discharging the legal duties they owed plaintiffs. *See Campbell* at *4; *Isaacson* at 137-38. The Nisur Square killings were the acts of the Indicted Defendants, operating solely on Blackwater’s behalf.

The relevant precedents prohibit the Blackwater defendants from morphing a relationship with the federal government into a claim that they are “federal officers” entitled to invoke the removal jurisdiction afforded by § 1442(a)(1). Otherwise every independent contractor doing business with the federal government could, at will, or on their say-so, thrust perfectly proper state court actions onto the federal court docket. The removing defendants cannot establish that their shootings at Nisur Square (or plaintiffs’ claims of negligent supervision/retention) occurred as a result of their “federal responsibilities.” *See North Carolina v. Ivory*, 906 F.2d 999, 1002 (4th Cir. 1990)(citing *Maryland v. Soper*, 270 U.S. 9, 34 (1926)). The Fourth Circuit has made it clear that § 1442(a)(1) is “not satisfied by some talismanic invocation” that a defendant was acting as a federal officer. *Ivory*, 906 F.2d 999, 1002 n.4 (4th Cir. 1990).

The relevant facts demonstrate that defendants were not “acting under” the detailed direction of a federal officer with respect to the Nisur Square shootings (or with respect to any connected claim by plaintiffs). *Carter* at 488; *Ivory* at 1002. For instance, in his Factual Proffer, Ridgeway admits that he, as well as the other Indicted Defendants, were only authorized to discharge their firearms in self-defense and as a last resort. Even so, Ridgeway admits that the

Nisur Square shootings did not occur for purposes of “self-defense” or as a “last resort.” Ridgeway further admits that he, along with the other Indicted Defendants, failed to follow and completely disregarded the Mission Firearms Policy, the WPPS, and/or other applicable rules of engagement. Compl. ¶ 107. These defendants were acting for Blackwater, in complete contravention of the WPPS, and were certainly not acting at the behest of anyone in the federal government. At the time the shootings occurred, Raven 23 was outside the Green Zone, wholly without authorization.

Ridgeway’s removal papers spotlight defendants’ inappropriate invocation of § 1442(a)(1). Ridgeway’s newfound claim that he was a federal officer, acting lawfully in the course of the events at Nisur Square, totally contradicts his previous court declarations that his “Factual Proffer in Support of Guilty Plea is true and accurate.” Moreover, the federal government, though its court papers in the Virginia action, repeatedly confirms that Blackwater (and its employees) were *independent contractors* for purposes of the WPPS, and that the Department of State “did not control the detailed physical performance of the work of [Blackwater], the particular corporate entity to which the State Department awarded the contract and issued task orders to provide security services for the protection of U.S. personnel working or travelling in and around certain parts of Iraq.” U.S. Opposition at 4.

As the Department of Justice puts it,

[the State Department’s] imposition of [contract] requirements did not vitiate [Blackwater’s] status as an independent contractor. Indeed the personnel who actually performed the work on behalf of [Blackwater] – including the individuals who allegedly committed the tortious acts that form the basis for Plaintiffs’ claims in these actions – were hired by [Blackwater] and remained under [Blackwater’s] direct supervision and control while furnishing services pursuant to the contract and task orders.

U.S. Opposition at 4. After the shootings at Nisur Square, Blackwater declared publicly that its officials had investigated the facts surrounding the incident, that Blackwater approved of and condoned the Indicted Defendants' conduct, that Blackwater had determined that the Indicted Defendants were fully justified in their actions, and that the Indicted Defendants had acted properly at all relevant times as employees of Blackwater. Compl. ¶ 132. Blackwater thus confirmed that the Indicted Defendants' conduct was in the scope their employment with Blackwater – but not for the State Department or within the WPPS independent contractor relationship. In sum, the Indicted Defendants were not even supposed to be at Nisur Square on September 16, 2007, the federal government's court filings establish that the shootings constituted conduct outside the WPPS, and the federal government has charged the Indicted Defendants with voluntary manslaughter (Ridgeway has already pled guilty). It is not plausible for these defendants to now stand before this Court and say: "We did all this at the direction of the State Department."

Defendants cannot plausibly establish § 1442(a)(1) causation either. The mere fact that Blackwater entered into the WPPS contract with the State Department *has nothing to do* with the felonious shootings at Nisur Square. The Indicted Defendants left the Green Zone without the required authorization, and engaged in an unlawful offensive use of force that was completely at odds with their WPPS "protective services" mission. The federal government had nothing to do with the decisions the Indicted Defendants made to shoot and kill innocent civilians on September 16, 2007. To demonstrate the "acting under" causation required by § 1442(a)(1), defendants "must establish that the act that is the subject of plaintiffs' attack [here, the Nisur Square shootings] occurred *while* defendants were performing their official duties." *See Isaacson v. Dow Chem. Co.*, 517 F.3d 129, 138-39 (2d Cir. 2008)(emphasis in original); *Carter*, 635 F.

Supp. 2d at 488; *Ohio v. Sherwin-Williams Co.*, 2008 WL 4115706 (S.D. Ohio 2008); *see also Soper*, 270 U.S. at 33. As Ridgeway's Factual Proffer and the federal indictment of the Indicted Defendants attest, the instant defendants cannot possibly make the required showing of a "causal nexus" between the WPPS and the felonious Nisur Square shootings alleged in plaintiffs' Complaint (at least without torturing reality). The Nisur Square shootings had nothing to do with the work Blackwater contracted for and was supposed to do for the State Department under the WPPS. Likewise, the WPPS did not call for Blackwater employees to commit felony manslaughter killings of innocent citizens of Baghdad – a tacit premise of defendants' removal.

3. Defendants Cannot Plausibly Raise Colorable "Federal Defenses" For Purposes of § 1442(a)(1) Jurisdiction and "Federal Defenses" Do Not Independently Support Subject Matter Jurisdiction

In addition to the "lawfully assisting," "acting under" and "causal nexus" mandates of § 1442(a)(1), *Watson*, and the other precedents, defendants also bear the burden of raising a colorable federal defense in conjunction with federal officer statutory removal. *See Isaacson*, 517 F.3d at 138. (The Court need not even reach this issue, once it is satisfied defendants have not met the other § 1442(a)(1) requirements.) Although defendants do not have to prove the aptness of any federal defense at this time, they must still make a plausible showing on this issue – or else § 1442(a)(1) jurisdiction will not lie. *Id.*; *see also Jefferson County*, 527 U.S. at 431. Furthermore, defendants must demonstrate that any alleged federal defenses arose in connection with their official duties. *See Isaacson*, 517 F.3d at 138 (quoting *Arizona v. Manypenny*, 451 U.S. 232, 241 (1981)). This they cannot do, since the Nisur Square shootings had nothing to do with their independent contractor work for the State Department.

For the reasons set forth above, defendants cannot plausibly assert any colorable federal defense. Five of the federal defenses asserted by defendants in their removal papers (Westfall

Act, government contractor defense, absolute immunity, political question doctrine) have, as a prerequisite, the requirement that the defendants act properly with or at the behest of or as a de facto officer of the federal government. *See, e.g., Boyle v. United Technologies Corp.*, 487 U.S. 500, 512 (1988)¹¹; *see also In re: Joint E. & S. Dist. New York Asbestos Litig.*, 897 F.2d 626, 632 (2d Cir. 1990)(“Stripped to its essence, the military contractor’s defense¹² under *Boyle* is to claim, ‘The Government made me do it.’”). Defendants’ remaining “preemption” defense is invalid as a matter of law (for the reasons that follow).¹³ Moreover, the felonious conduct that is the gravamen of the Complaint, conduct substantiated by the Nisur Square Indictment and Ridgeway’s guilty plea, was not authorized by the federal government, was not connected in any plausible way to the direction of the federal government, and was plainly outside the scope of the WPPS (establishing an *independent contractor* “protective services” relationship between Blackwater and the State Department). As a result, defendants cannot meet § 1442(a)(1)’s plausible “federal defense” requirement, and there is no removal jurisdiction based on this statute.

C. Defendants’ Assertion of Removal Jurisdiction on a Theory of Complete Preemption Has No Support in Law of Fact

The Blackwater defendants, but not defendant Ridgeway, have also premised their removal jurisdiction on the federal defense of complete preemption. Specifically, the Blackwater defendants have removed on the exemptions from liability found in the Federal Tort Claims Act

¹¹ Courts applying the *Boyle* doctrine have been careful to ensure that the doctrine does not insulate contractors *acting against* the United State’s interests. *See, e.g., Jama v. INS*, 334 F. Supp. 2d 662, 689 (D.N.J. 2004).

¹² Of course, Blackwater was not, with respect to the events at issue, a “military contractor.” In any event, “whether the facts establish the condition for the military contractor defense is a question for the jury.” *Boyle*, 487 U.S. at 514; *McMahon v. Presidential Airways, Inc.*, 502 F.3d 1331, 1354 (11th Cir. 2007)(stating that the *Boyle* Court created an “affirmative defense”).

¹³ Defendants’ basis for removal under *Grable* is completely invalid for other reasons.

(“FTCA”), 28 U.S.C. § 1346(b), and a recent and related case, *Saleh v. Titan Corp.*, 2009 WL 2902081, at *5-9 (D.C. Cir. Sept. 11, 2009). Plaintiffs do not disagree with the precept that a federal defense that completely preempts state law will raise a federal question, and by extension, removal jurisdiction. *Metropolitan Life*, 481 U.S. at 63 (only complete preemption raises a federal question). However, the complete preemption doctrine must be applied narrowly, sparingly and with great restraint. *See, e.g., Marcus v. AT&T Corp.*, 138 F.3d 46, 54 (2d Cir. 1998); *see also* 13 Wright & Miller, *Federal Practice & Procedure* § 3522 (2d ed. Supp. 1998)(“complete preemption” doctrine to be applied narrowly). The problem with the Blackwater defendants’ complete preemption argument is that it is plainly inapplicable to the facts that give rise to plaintiffs’ Complaint.

1. Government contractors are expressly excluded from the reach of the FTCA

The FTCA is actually headed at § 1346 as “United States as defendant.” As this title suggests, and as the statute’s language makes clear, the FTCA constitutes, by its terms, a limited waiver of the federal government’s sovereign immunity. Subject to limitations and exceptions, the FTCA makes the United States liable for the negligent or wrongful acts or omissions of federal employees acting within the scope of their employment, in the same manner as a private employer would be liable for the torts of its employees under applicable state law. *See* § 1346(b)(1). In order for a tort claim to come within this limited waiver of sovereign immunity, the tortfeasor must be an “employee of the government” as that term is defined by the FTCA. *See FDIC v. Meyer*, 510 U.S. 471, 477 (1994); *Logue v. United States*, 412 U.S. 521, 526 (1972)(“for the Government to be liable for the negligence of [an individual], he must be shown to be an ‘employee of the Government’ as that term is used in the [FTCA].”).

The FTCA carefully defines the meaning and scope of the term “Employee of the government.” 28 U.S.C. § 2671. In pertinent part, an employee of the government includes “officers or employees of any federal government agency” and “persons acting on behalf of a federal agency in an official capacity.” *Id.* The Blackwater defendants appear to have ignored the portion of the FTCA definition which states:

[T]he term “Federal agency” includes the executive departments, the judicial and legislative branches, the military departments, independent establishments of the United States, and corporations primarily acting as instrumentalities and agencies of the United States, ***but does not include any contractor with the United States.***

28 U.S.C. § 2671 (emphasis added). By expressly providing that the term “Federal agency” does not include any contractor with the United States, such as the Blackwater defendants, Congress foreclosed attempts by contractors to cloak themselves with the United States’ sovereign immunity, a gambit which, if allowed, would effectively shift responsibility for the torts of the contractor’s employees to the United States. Not surprisingly, the Blackwater defendants are seeking to do exactly that. *See Orleans v. United States*, 425 U.S. 807, 814 (1976) (confirming that the FTCA excludes contractors from its reach). Blackwater had and maintained the ability “to control the detailed physical performance” of its employees, plainly distinguishing this contractor and its employees from federal agents subject to the FTCA. *Orleans* at 814 (quoting *Logue* at 528).

2. The Blackwater defendants are not plausibly covered by *Saleh’s* extension of the FTCA’s “Combatant Activities Exception”

Despite contrary court documents filed by the Indicted Defendants (except Ridgeway) in the criminal case against them (*e.g.*, Exhibit A at 2, “[We] were not employed by the Department of Defense or under any Defense Department contract, nor were [we] employed in support of the Defense Department’s mission overseas”), and the Blackwater defendants’ admissions in their

removal papers that their function was protecting diplomats (*i.e.*, not engaging in warfare alongside the military), these removing defendants have nonetheless advanced the District of Columbia Circuit's holding in *Saleh* as one of their "complete preemption" arguments. Again, the problem with this argument is its flat-out inapplicability.

The holding from *Saleh* is not ambiguous:

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.

Id., 580 F.3d at Headnote 3 (no page numbering in slip opinion and emphasis added). None of the Blackwater defendants were "integrated into combatant activities;" instead, under the WPPS and the rules of engagement, they were prohibited from such activity. And, as they have admitted over and again, *the Blackwater defendants were not under the command of the military*. Perhaps these facts explain why defendant Ridgeway did not seek to justify his removal grounds on *Saleh*. In any event, *Saleh* is plainly inapposite. Since *Saleh* does not apply to the instant facts, it cannot "completely preempt" plaintiffs' state created claims and cannot provide for removal jurisdiction.

D. Defendants' Reliance on *Grable* as a Removal Jurisdiction "Catch-All" is Inappropriate in this State-Created Wrongful Death and Tort Action and Should be Summarily Rejected

Defendants assert entitlement to removal jurisdiction pursuant to *Grable & Sons Metal Prods., Inc. v. Darue Eng'g & Mfg.*, 545 U.S. 308, 312 (2005), "inasmuch as Plaintiffs' state law claims implicate the significant federal issues just discussed." The "federal issues just discussed," such as defendants' government contractor defense or immunity defense, are anticipated or perhaps inevitable defenses that do not independently support removal. The Supreme Court decision to this effect in *Caterpillar*, 482 U.S. at 392-93, has certainly not been

overruled. *Grable* is not a jurisdictional “catch-all,” something to be employed to avoid the longstanding rule from *Caterpillar*.

In *Grable*, the court determined that federal question jurisdiction supported removal in an extremely narrow fact pattern. There, a landowner-plaintiff challenged the sufficiency of an IRS seizure notice made directly pursuant to 26 U.S.C. 6335(a) of the United States tax code. *Grable*, 545 U.S. at 310-11. To avoid any confusion about the sweep of federal question jurisdiction under § 1331, the *Grable* Court explained that “*federal jurisdiction demands not only a contested federal issue, but a substantial one*, indicating a serious federal interest in claiming advantages thought to be inherent in a federal forum.” *Id.* at 313 (emphasis added). The Supreme Court, in *Grable*, made it absolutely clear that such a “substantial federal issue” is confined to circumstances where it is the “principal issue,” and where the “state-law claim necessarily raise[s] a stated federal issue” that goes to the “heart” of the case. *Id.* at 314-19; *see also Bennett v. Southwest Airlines Co.*, 484 F.3d 907, 912 (7th Cir. 2007)(“federal defenses do not justify removal,” nor does the possibility “that standards of care used in tort litigation come from federal law . . . make the tort claim one ‘arising under’ federal law”). None of the *Grable* factors are present here.

Plaintiffs’ claims do not present “substantial” federal issues; they are state-created tort claims, and fall far short of the *Grable* removal standard. As the Supreme Court pointedly recognized in *Grable*, merely because a federal issue may be present in an action - that fact, by itself, is not sufficient to justify the:

opening [of the] federal courts to any state action embracing a point of federal law. Instead, the question is, does a state-law claim necessarily raise a stated federal issue, *actually disputed and substantial*, which a federal forum may entertain without disturbing any congressionally approved balance of federal and state judicial responsibilities.

Grable at 314. Plaintiffs' Complaint rests on traditional state law claims of wrongful death and personal injury. The fact that Iraqi law may play some as yet undefined role in this case does not "federalize" the action (*see, e.g.*, N.C.R. Civ. P. 44.1 – Determination of Foreign Law). This case simply "cannot be squeezed into the slim category *Grable* exemplifies." *Bennett*, 484 F.3d at 910 (quoting *Empire Healthchoice v. McVeigh*, 547 U.S. 677, 701 (2006)).

CONCLUSION

For the foregoing reasons, the case was improvidently removed, and plaintiffs therefore respectfully pray the Court to GRANT their Motion to Remand this case back to the North Carolina Superior Court.

This the 16th day of November, 2009

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I hereby certify that on November 16, 2009, I electronically filed the foregoing with the Clerk of Court using the CM/ECF system, which will send notification of such filing to the following:

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