

# EXHIBIT 2

**IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF MARYLAND**

**IN RE:  
KBR, INC., BURN PIT LITIGATION**

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\* Master Case No.: RWT 09md2083  
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\* This Document Relates To:  
\* All Member Cases  
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**MEMORANDUM OPINION**

Forty-three separate actions have been filed in, or removed to, federal courts throughout the United States that assert various claims against KBR, Inc., Kellogg, Brown & Root Services, Inc., Kellogg, Brown & Root, LLC, and Halliburton Company (collectively “the KBR Defendants”) and in some, but not all cases, ERKA Ltd. (“ERKA”). The common theme in these cases is that the Plaintiffs are seeking to recover damages for injuries allegedly resulting from exposure to emissions from burn pits operated by the Defendants at military bases throughout Iraq and Afghanistan or from the provision by the Defendants of contaminated water at military bases in those countries. By Order dated October 16, 2009 (and later Orders), the Judicial Panel on Multi-District Litigation transferred all of the foregoing cases to the undersigned for coordinated or consolidated pretrial proceedings.

The KBR Defendants have filed a Motion to Dismiss for Lack of Subject Matter Jurisdiction [Paper No. 21] and ERKA has filed a Motion to Dismiss for Lack of Personal Jurisdiction [Paper No. 32]. In their motion, the KBR Defendants assert that the tort actions brought by the Plaintiffs against them should be dismissed for lack of jurisdiction because (1) they are non-justiciable under the Political Question Doctrine, (2) they conflict with well-established principles of derivative sovereign immunity and (3) claims of the Plaintiffs are

preempted by the Combatant Activities Exemption to the Federal Tort Claims Act, 28 U.S.C. § 2680(j). The KBR Defendants attach to their motion numerous public documents and declarations of various military personnel.

As a factual predicate for their legal arguments, the KBR Defendants contend that it is undisputed that:

- The military, not KBR, decided which method of waste disposal to utilize at a particular base – e.g., recycling, incineration, landfills, or burning;
- The military, not KBR, decided where to locate the burn pits at particular bases;
- The military, not KBR, decided where to locate the living quarters and dining facilities for military and contractor personnel in relation to the burn pit; and
- The military, not KBR, decided which types of waste could or could not be placed in a burn pit.

(Memorandum in support of Defendants’ Motion to Stay Discovery Pending Resolution of Motion to Dismiss, p. 15, [Paper No. 22]). They also contend that the same decision-making and control was exercised by the military with regard to water purification and distribution facilities.

The Plaintiffs disagree, and contend that discovery is necessary to resolve factual disputes with the KBR Defendants. The Court is reluctant to authorize unnecessarily extensive discovery of military officials who are otherwise engaged in war fronts in two different countries, and has stayed discovery pending further action on the Motion to Dismiss filed by the KBR Defendants.

Reduced to its simplest terms, it is the position of the KBR Defendants that “the military exercised pervasive decision-making authority and control over the waste management and disposal judgments at issue,” thus rendering this Court without jurisdiction to proceed further. In

support of their legal arguments, the KBR Defendants note that “the United States military relies heavily on private contractors” to support war time activities on the battlefield (Memorandum in Support of Motion to Dismiss, p. 4) and that to entertain the Plaintiffs’ tort claims would require “inappropriate judicial scrutiny and second-guessing into [military] discretionary decisions, strategies and policies.” *Id.* at p. 5.

As noted above, the Court has declined to authorize any discovery at this juncture, especially since to do so may have an intrusive and disruptive effect on the operations of the military. That does not, however, mean that it would not be helpful to the Court to understand the position of the United States with respect to the factual issues in this case, and any observations that it may wish to make with respect to the legal issues in this case, especially since they implicate questions of deference to military judgments in two war zones.

For the foregoing reasons, this Court will, by separate Order, invite the participation of the United States of America as *amicus curiae* and request that it furnish to the Court, within sixty (60) days from the date of this Order, any factual information and/or documentation pertinent to the issues raised in the KBR Defendants Motion to Dismiss, together with such comment, if any, as the United States may wish to make with respect to the jurisdictional issues relating to the possible pursuit of the tort claims in this case against its contractors.

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Date

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/s/  
Roger W. Titus  
United States District Judge