

EXHIBIT 6

IN THE UNITED STATES DISTRICT COURT
FOR DISTRICT OF MARYLAND

In Re: KBR Burn Pit Litigation

8:09-MD-02083-RWT

**PLAINTIFFS' OPPOSITION TO THE COURT'S PROPOSED
DISCOVERY ON THE UNITED STATES – SUBMITTED TO CHAMBERS ONLY**

Plaintiffs respectfully oppose the Court's plan to serve discovery on the United States. In the event the Court overrules these objections and proceeds to serve discovery on the United States, Plaintiffs respectfully request that the Court include the questions proposed by Plaintiffs below.

Plaintiffs object to the Court's plan to serve its own discovery on the United States for four reasons:

First, the Federal Rules establish that discovery is the province of the litigants, not the Court. *See, e.g., Lowery v. Alabama Power Co.*, 483 F.3d 1184, 1218 (11th Cir. 2007) (district court should not insert itself into the fray by engaging in its own discovery, and should not participate in a one-sided subversion of the rules.) Yet the Court's proposed Memorandum and Order essentially serve a form of discovery on the United States by soliciting answers to specific questions. Although the Court may invite the United States to intervene or participate as amici, the Court should not go further and serve questions on the United States.

Second, even if the Court had the power to conduct discovery, the Court acts prematurely by proceeding before the Court has had the benefit of Plaintiffs' opposition brief. As presently crafted, the Court's proposed Memorandum and Order accepts Halliburton/KBR's framing of the relevant facts and issues in these lawsuits, including its argument that these lawsuits raise the

question of “deference to military judgments in two war zones.” See Court’s Proposed Memorandum and Proposed Order. Not surprisingly, as the Court’s proposed discovery tracks the issues as Halliburton/KBR unilaterally framed them, Halliburton/KBR now supports that discovery without modification.

Plaintiffs respectfully submit that the Court should frame its discovery questions *after* it has had the opportunity to review Plaintiffs’ oppositional briefing, and the decisional law cited therein. Plaintiffs’ Opposition will explain why Halliburton/KBR errs in framing the issues, and errs in claiming these lawsuits raise political questions not within the purview of this Court. The political question doctrine was intended to protect against judicial overreaching into executive functions, such as the war-making function. See *Marbury v. Madison*, 1 Cranch 137, 164-166, 2 L.Ed. 60 (1803); *Occidental of Umm al Qaywayn, Inc. v. A Certain Cargo of Petroleum Laden Aboard Tanker*, 577 F.2d 1196, 1203 (5th Cir. 1978) (“[T]he genesis of the political question is the constitutional separation and disbursement of powers among the branches of government.”).

As the Supreme Court has repeatedly ruled, however, not all disputes arising in the context of war raise political questions. Indeed, the Supreme Court held the federal courts have the power (and obligation) to adjudicate disputes far more closely related to the military’s own warmaking power than this dispute. For example, the Supreme Court ruled in *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004), and again in *Boumediene v. Bush*, 128 S.Ct. 2229, 2277 (2008), that the federal courts are obliged to hear disputes arising from the military’s designation of combatant status, which is clearly an “important incident[] of war,” *Hamdi*, 542 U.S. at 518 (2004). To similar effect, the Supreme Court reversed a presidential directive ordering the seizure of steel mills to protect the production of armaments for the Korean War, *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952), and reviewed on the merits a presidential

order resolving the Iranian hostage crisis, *Dames & Moore v. Regan*, 453 U.S. 654 (1981). Halliburton/KBR's misconduct occurred in the midst of the Iraq and Afghanistan wars, but that fact, standing alone, does not deprive the judiciary of its power to adjudicate the tort claims of American service members against an American corporation.

Wars are not litigation-free zones for defense contractors. *See, e.g., McMahon v. Presidential Airways*, 502 F.3d 1331, 1366 (11th Cir. 2007)(no defense for private contractors merely because operating in a combat zone); *Lessin v. Kellogg Brown & Root*, 2006 WL 3940556 at *5 (S.D.Tex. June 12, 2006)(declining to preempt claims against military logistics contractor in Iraq); *Whitaker v. Kellogg, Brown and Root*, 444 F.Supp.2d 1277 (M.D. Ga. 2006)(no protection from liability when the alleged negligent act was performed by contractor, not government); *Fisher v. Halliburton*, 390 F.Supp.2d 610, 615-16 (S.D. Tex. 2005)(cannot apply defense to service contractors because designed to protect against state product liability claims only) and *Harris et al. v. Kellogg Brown & Root, Services, Inc.*, C.A. No. 08-563 (W.D. Pa. March 31, 2009).

Plaintiffs' claims do not raise a political question. The Court of Appeals for the Fourth Circuit explained in *Tiffany v. United States*, 931 F.2d 271 (4th Cir. 1991), a lawsuit cannot, by definition, raise a political question if the military has already issued regulations and promulgated policy directives governing the conduct being challenged by the lawsuit. As will be made apparent by Plaintiffs' oppositional briefing, Plaintiffs are not challenging any military decision, but rather are seeking recourse for the serious harms caused by Halliburton/KBR's blatant refusal to abide by the terms of the LOGCAP contract and task orders, which required Halliburton/KBR to operate burn pits and treat water in a manner consistent with the health and safety of the service members. Even in those instances when Halliburton/KBR was directed or

permitted to use a burn pit, Halliburton/KBR created hazardous exposures that harmed Plaintiffs by failing to abide by the controlling military regulations and directives governing waste disposal and water treatment. These claims are comparable to those raised in *Lane v. Halliburton*, 529 F.3d 548, 558-560 (11th Cir. 2008) and *McMahon v. Presidential Airways, Inc.*, 502 F.3d 1331 (11th Cir. 2007), and are able to be adjudicated without interfering with, or second-guessing in any way, military decision-making.

In short, Plaintiffs believe that the Court will have a greater appreciation for the disputed facts, and the manner in which these disputed facts fit within the spectrum of decisional law about defense contractors, after Plaintiffs file their consolidated complaint, joint statement of facts, and opposition to Halliburton/KBR's motion to dismiss. After this briefing has been reviewed, the Court likely will be able to frame questions for the United States in an impartial manner. At present, it is difficult for the Court to avoid being unduly influenced by Halliburton/KBR's arguments and reasoning, as that is the only paper that has been filed with the Court. Plaintiffs respectfully suggest that it is important for the Court to avoid tipping the scales of justice until such time as the Court has had the benefit of Plaintiffs' oppositional briefing.

Third, although the Court purports to be lessening these lawsuits' burden on the military by serving judicial discovery, the Court's Proposed Order will unduly and unnecessarily burden the military by eliciting facts that are not essential to the resolution of the dispute before the Court. Stated differently, even if the military answered each of the Court's questions in the affirmative, those answers would not resolve whether these lawsuits raise political questions, and would not shed light on the actual disputes that need to be adjudicated. The military made a series of decisions that impacted the burning of waste and the treatment of water. These military decisions are spelled out in writing and at length in regulations, directives, contracts, task orders,

army doctrinal manuals, and the like. This body of military decision-making was not provided to the Court by Halliburton/KBR, and was wholly ignored by Halliburton/KBR. Even in those instances when the military permitted Halliburton/KBR to use a burn pit for waste disposal, Halliburton/KBR was obliged, but failed, to burn materials in a manner that avoided or lessened any harmful health impact on service members. Instead, Halliburton/KBR operated the burn pits in a manner that created unnecessary hazardous exposures. These task orders and other controlling materials were not provided to the Court by Halliburton/KBR. Plaintiffs will append the materials in their possession to their oppositional briefing, and submit an affidavit explaining why discovery is needed to obtain the complete set of relevant task orders from Halliburton/KBR.¹

This body of military decision-making over waste disposal and water treatment is not in dispute. Rather, the dispute before the Court turns on whether (1) Halliburton/KBR abided by the military's decisions (as alleged without supporting evidence by Halliburton/KBR) or (2) Halliburton/KBR wholly and systemically ignored these military decisions and instead acted in a manner that served its own financial goals but seriously harmed Plaintiffs.

As set forth in the Complaints, and as will be elaborated upon in the upcoming briefing, Plaintiffs contend that the latter occurred. Plaintiffs will append declarations from former Halliburton/KBR employees who will attest Halliburton/KBR repeatedly and blatantly violated the military's regulations, promulgated guidance, verbal instructions and other directives. For

¹ As was admitted by Halliburton/KBR officials during trial in a fraud case in the Eastern District of Virginia, Halliburton/KBR has all of the task orders and military directives in its possession. This reduces any potential burden on the military, as Halliburton/KBR are able to produce most, if not all, of the documents this Court should review before ruling on the motion to dismiss.

example, Plaintiffs will append evidence to their upcoming Opposition to show

Halliburton/KBR:

- (1) violated the military's regulations and promulgated guidance on when and how to burn hazardous materials,
- (2) violated the military's regulations and promulgated guidance on when and how to burn medical waste,
- (3) violated the military's regulations and promulgated guidance on whether to combine wastes for burning,
- (4) violated the military's regulations and promulgated guidance on the timing and duration of burning,
- (5) ignored and rebuffed the military's repeated demands for the installation of incinerators,
- (6) violated the military's regulations and promulgated guidance on the methods to be used for water treatment,
- (7) failed to monitor water quality as required by the military,
- (8) intentionally distributed contaminated water, and
- (9) deceived the military through a series of written and verbal misrepresentations that prevented the military from discovering the full scope of Halliburton/KBR's egregious misconduct.

In short, even if the military answers the Court's four questions, those answers will neither prove nor disprove the merits of Plaintiffs' claims.² The military simply does not know

² Plaintiffs have obtained a substantial amount of evidence about Halliburton/KBR's misconduct, which will be appended to the Plaintiffs' Opposition. The full scope of this injury-causing

whether Halliburton/KBR burned only what the military told it to burn because the military lacks the resources to supervise Halliburton/KBR employees in two theatres of war. For that reason, in the declarations appended to Halliburton/KBR's motion to dismiss, each military official carefully limited his or her observations about Halliburton/KBR's purported contract compliance to modest and time-limited personal observations. Yet it is incumbent on this Court to learn whether these facts are in genuine dispute before ruling on Halliburton/KBR's motion to dismiss. No legitimate federal interest is served in immunizing Halliburton/KBR from liability if Halliburton/KBR blatantly and repeatedly ignored the military's decision-making.

Fourth, in the event the Court decides to serve judicial discovery on the military before reviewing Plaintiffs' opposition brief, Plaintiffs respectfully suggest the Court add the following questions to the Court's discovery requests:

- (1) Which burn pits, if any, were designed and operated wholly and exclusively by the military without any contractor involvement from the year 2003 to the present?
- (2) Which water treatment systems, if any, were designed and operated wholly and exclusively by the military without any contractor involvement from the year 2003 to the present?
- (3) Did the military attempt to grant Halliburton/KBR permission to breach the terms of the LOGCAP?
- (4) Did the military attempt to grant Halliburton/KBR permission to violate military regulations and promulgated guidance on disposal of hazardous materials?

misconduct, however, can only be discovered by conducting discovery on Halliburton/KBR. It is for this reason that Plaintiffs urge the Court to permit discovery on Halliburton/KBR. Such discovery does not burden the military, but rather benefits the military by ensuring that defense contractors do not get a free pass to ignore the military's instructions, particularly when such misconduct harms military men and women.

- (5) Did the military attempt to grant Halliburton/KBR permission to violate military regulations and promulgated guidance on the tracking of hazardous material?
- (6) Did the military attempt to grant Halliburton/KBR permission to violate military regulations and promulgated guidance on the use of dangerous accelerants?
- (7) Did the military attempt to grant Halliburton/KBR permission to distribute water that was contaminated and failed to conform to the military's regulations and promulgated guidance?
- (8) Will permitting injured service members to obtain documents from Halliburton/KBR create a serious burden on the war effort?
- (9) Will permitting injured service members to depose Halliburton/KBR officials and employees create a serious burden on the war effort?
- (10) Will permitting the federal courts to adjudicate whether Halliburton/KBR violated military regulations and promulgated guidance, and in so doing seriously injured service members, create a serious burden on the war effort?
- (11) Does the military have any evidence relating to whether Halliburton/KBR violated the military's regulations or promulgated guidance regarding waste disposal?
- (12) Does the military have any evidence relating to whether Halliburton/KBR violated the military's regulations or promulgated guidance regarding water treatment?
- (13) Does any single military official have the power to grant Halliburton/KBR verbal permission to deviate from the terms of the contract negotiated with the military?
- (14) Is waste disposal considered combat?
- (15) Is water treatment considered combat?

CERTIFICATE OF SERVICE

I hereby certify that on March 1, 2010, I electronically filed the Plaintiffs' Opposition to the Court's Proposed Discovery on the United States through the CM/ECF system, which sends notification to Bikram Bandy, lead counsel for Defendants.

/s/

Susan L. Burke