APPENDIX

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APPENDIX A

UNITED STATES COURT OF APPEALS,
DISTRICT OF COLUMBIA CIRCUIT

No. 23-7009
Consolidated with 23-7013

WYE OAK TECHNOLOGY, INC.,

Appellee

v.

REPUBLIC OF IRAQ AND MINISTRY OF DEFENSE OF THE REPUBLIC OF IRAQ,

Appellants

Appeals from the United States District Court
for the District of Columbia
(No. 1:10-cv-01182)

Argued: February 13, 2024

Decided: July 16, 2024

Before: MILLETT and WALKER, Circuit Judges, and GINSBURG, Senior Circuit Judge.

Opinion for the Court filed by Circuit Judge MILLETT.

MILLETT, Circuit Judge:

In late-summer 2003, a small American company named Wye Oak Technology, Inc. entered into a contract with the Iraqi Ministry of Defense to rebuild Iraq's largely destroyed military, with the cost financed by Iraq. Wye Oak performed successfully under the contract for nearly five months. But Iraq refused to pay and gave the promised money to someone else. When Wye Oak's owner flew to Iraq to try to obtain the payment due, he was shot and killed by unidentified assailants. Wye Oak eventually closed shop in Iraq with the payment dispute still unresolved.

Years later, Wye Oak sued Iraq in a United States federal district court for breach of contract. After a decade of litigation, the district court awarded Wye Oak more than $120 million in damages.

On appeal, Iraq does not dispute that it breached its agreement with Wye Oak. It argues instead that it is completely immune from suit and that, alternatively, the district court's damage award was too high. Wye Oak, for its part, contends that the damage award was too low.

Whatever the merits of the damages dispute, we cannot reach it. Iraq is immune from suit, so we have no jurisdiction. We accordingly reverse the district court's judgment and remand for dismissal of the case.

A

Under the Foreign Sovereign Immunities Act ("FSIA"), a foreign state is immune from civil suit in the United States unless the suit falls under one of the Act's enumerated exceptions. 28 U.S.C. § 1604;

Verlinden v. Central Bank of Nigeria, 461 U.S. 480, 488–489, 103 S.Ct. 1962, 76 L.Ed.2d 81 (1983).

The "most significant" of these exceptions is the "commercial" exception. *Republic of Argentina v. Weltover, Inc.*, 504 U.S. 607, 611, 112 S.Ct. 2160, 119 L.Ed.2d 394 (1992). It provides that a foreign state is not immune when the action is based

> [1] upon a commercial activity carried on in the United States by the foreign state; or [2] upon an act performed in the United States in connection with a commercial activity of the foreign state elsewhere; or [3] upon an act outside the territory of the United States in connection with a commercial activity of the foreign state elsewhere and that act causes a direct effect in the United States[.]

28 U.S.C. § 1605(a)(2).

Only the third clause of the commercial exception is at issue here. To establish a statutory exception to Iraq's sovereign immunity under that clause, Wye Oak must show that its lawsuit is (1) based on an act by the foreign state outside the United States; (2) that was taken in connection with commercial activity; and (3) that caused a direct effect in the United States. 28 U.S.C. § 1605(a)(2); *Weltover*, 504 U.S. at 611, 112 S.Ct. 2160.

The first two elements of that test have already been resolved in Wye Oak's favor. In a prior appeal in this case, we held that this lawsuit is based on an act that occurred outside the United States because Iraq breached its contract with Wye Oak to pay Wye Oak in Iraq for work performed in Iraq. *Wye Oak Tech.,*

Inc. v. Republic of Iraq, 24 F.4th 686, 703 (D.C. Cir. 2022) (*Wye Oak II*). We also held that the breach was connected to a commercial activity because Iraq contracted with a private entity, Wye Oak, for military reconstruction services. *Id.*

Before us is the remaining jurisdictional question of whether Iraq's breach "cause[d] a direct effect in the United States[.]" 28 U.S.C. § 1605(a)(2).

To answer that question in Wye Oak's favor, we would have to find an effect in the United States that had "no intervening element, but rather, flow[ed] in a straight line without deviation or interruption" from the breach in Iraq. *Princz v. Federal Republic of Germany*, 26 F.3d 1166, 1172 (D.C. Cir. 1994) (quotation marks omitted); *Weltover*, 504 U.S. at 618, 112 S.Ct. 2160 ("[A]n effect is direct if it follows as an immediate consequence of the defendant's activity.") (formatting modified).

B

In the early 2000s, the United States led a multi-national military coalition that toppled Saddam Hussein's government in Iraq. *Wye Oak Tech., Inc. v. Republic of Iraq*, No. 1:10-cv-01182, 2019 WL 4044046, at *3 (D.D.C. Aug. 27, 2019) (*Wye Oak I*). The coalition then handed over power to an interim Iraqi government. *Id.*

As the United States worked to transition Iraq's governance to Iraqi politicians and voters, it also worked to hand over military security to Iraqi armed forces. *Wye Oak I*, 2019 WL 4044046, at *3. The invasion, though, had left Iraq's military structure, equipment, and personnel in ruins.

In 2004, Wye Oak and its president, Dale Stoffel, contacted the Iraqi Ministry of Defense with a plan to inventory and assess Iraq's existing military equipment, refurbish what equipment it could, and sell the rest for scrap. *Wye Oak II*, 24 F.4th at 692. With the recommendation of U.S. military leaders in Iraq, the Ministry agreed. *Wye Oak I*, 2019 WL 4044046, at *4.

To implement that plan, the Ministry and Wye Oak signed a Broker Services Agreement in August 2004. *Wye Oak I*, 2019 WL 4044046, at *4. The Agreement made Wye Oak the "sole and exclusive Broker" for all matters related to refurbishing Iraqi military equipment or selling it as scrap. J.A. 479 (Broker Services Agreement). The Ministry agreed "not to conduct any Military Refurbishment Services or arrange for the use, sale or lease of any Refurbished Military Equipment provided for under th[e] Agreement nor engage in any scrap sales, except pursuant to an engagement with [Wye Oak] under th[e] Agreement." J.A. 479 (Broker Services Agreement). The Agreement also set out a payment process under which Wye Oak would submit invoices to the Ministry. The Ministry would then "make full payment on such invoice[s] immediately upon presentation * * * in the form and manner as directed by [Wye Oak]." J.A. 481 (Broker Services Agreement).

Wye Oak performed as promised under the Agreement. In Iraq, it worked with Dale's other company, CLI Corporation, to hire contractors, began its initial assessment of equipment, and prepared for refurbishment and scrap operations. *Wye Oak I*, 2019 WL 4044046, at *8. Back in the United States, Dale's

brother David Stoffel managed some of the company's business affairs from West Virginia. *Id.* at *8. He created a computer program to inventory and track all the equipment Dale was handling abroad, oversaw Wye Oak's electronic communications, and communicated with the Iraq-based members of Wye Oak to see what support they might need. *Id.* at *15.

Several months into the agreement, Wye Oak presented the Iraqi Ministry of Defense with three invoices detailing its costs and the amount it charged for overhead and profit. *Wye Oak I*, 2019 WL 4044046, at *9. Together, the invoices totaled nearly $25 million. *Id.* Wye Oak designated the Ministry's Baghdad office as the place of payment. *Wye Oak Tech., Inc. v. Republic of Iraq*, No. 1:10-cv-1182, 2022 WL 17820569, at *6–7 (D.D.C. Dec. 20, 2022) (*Wye Oak III*); J.A. 489–491 (Invoices).

The Ministry agreed to pay. *Wye Oak I*, 2019 WL 4044046, at *9. But it gave the money to a Lebanese businessman named Raymond Zayna instead. It did not pay a penny to Wye Oak. *See id.* at *8, *13–14.

Wye Oak pursued various efforts to secure payment. Dale flew back to the United States where he and David contacted several American officials to try to enlist support for Wye Oak's efforts. *Wye Oak I*, 2019 WL 4044046, at *15. As a result of that outreach, a Senator contacted the State Department and asked for its assistance. *Wye Oak III*, 2022 WL 17820569, at *15. The State Department talked to the Department of Defense. *Id.* The Department of Defense then met with Wye Oak and appointed a representative to advise the Ministry. *Id.*

In December, Dale flew back to Iraq to ensure Wye Oak's work remained on schedule and to try to resolve the payment issue. *Wye Oak I*, 2019 WL 4044046, at *16. When Dale arrived in Iraq, he attended a meeting with Ministry officials, Zayna, and U.S. military officers. *Id.* Everyone agreed that Zayna and the Ministry would give Wye Oak the money. *See id.* at *16–17. Dale then went on a tour of Iraq to survey Wye Oak's progress. *Id.* at *17.

Days later, Dale received word that payment was ready in Baghdad. He drove toward the city to receive it. *Wye Oak III*, 2022 WL 17820569, at *3. On the way, unknown assailants attacked his car and shot him and a companion to death. *Wye Oak I*, 2019 WL 4044046, at *17. All of Wye Oak's personnel then left Iraq permanently. *Id.* at *18.

Wye Oak kept managing its contractors in Iraq for a few weeks after Dale's death. But without payment, it soon had to cease all work in Iraq. *Wye Oak I*, 2019 WL 4044046, at *18–19. Back in the United States, David stopped developing his software program and monitoring electronic communications from Iraq. *Wye Oak III*, 2022 WL 17820569, at *12. Wye Oak cancelled multiple planned business ventures, including plans to subcontract some of its work to CLI, expand its U.S.-based computer infrastructure and personnel, and build an international support network focused on Eastern Europe. *Id.* at *10–13.

C

1

Wye Oak sued Iraq in the Eastern District of Virginia for breach of contract. *Wye Oak Tech., Inc. v.*

Republic of Iraq, No. 1:09-cv-793, 2010 WL 2613323, at *1 (E.D. Va. June 29, 2010), *aff'd* 666 F.3d 205 (4th Cir. 2011). That court transferred the case to the United States District Court for the District of Columbia. *Id.*

The district court found Iraq liable after an eight-day bench trial. *Wye Oak I*, 2019 WL 4044046, at *54. The court first determined that Iraq bore responsibility for any breach of the Agreement by its Ministry of Defense. *Id.* at *21. The district court then held that it had jurisdiction under the commercial exception's second clause because it found that Wye Oak's suit was based on an act performed in the United States in connection with a commercial activity of the foreign state elsewhere. *Id.* at *21–24. The court did not address the exception's other clauses. Turning to the merits, the district court found that Iraq had materially breached the agreement when it failed to pay money due under the three invoices. *Id.* at *24–28. It ordered Iraq to pay Wye Oak over $120 million. *Id.* at *54; *Wye Oak I*, Order, No. 553 (Nov. 15, 2019).

Iraq appealed and this court vacated the district court's judgment. *Wye Oak II*, 24 F.4th at 703–704. We held that the commercial exception's second clause did not apply to Wye Oak's breach-of-contract suit. *Id.* at 702. That clause, we explained, is triggered only when the foreign sovereign engages in action inside the United States, while Wye Oak's suit was based solely on Iraq's conduct in Iraq. *Id.*

We then concluded that it was "plausible" that Iraq might lose immunity under the commercial exception's third clause. *Wye Oak II*, 24 F.4th at 703.

We held that the first two elements of that test were met because the suit was based on (1) an act outside the United States that (2) related to Iraq's commercial activity. *Id.* We remanded the case to the district court to develop a factual record to determine whether Iraq's breach had a "direct effect" inside the United States. *Id.* (quoting 28 U.S.C. § 1605(a)(2)).

2

The district court developed the needed factual record and found that Iraq's breach had direct effects within the United States. *Wye Oak III*, 2022 WL 17820569.

At the outset, the court rejected a number of Wye Oak's claimed direct effects. It ruled that Iraq's failure to pay the money it owed into Wye Oak's Pennsylvania-based bank account did not cause a "direct effect" in the United States because nothing in the Agreement obligated Iraq to deposit the money in the United States. *Wye Oak III*, 2022 WL 17820569, at *5–8. The Agreement instead provided that Iraq would pay Wye Oak "immediately" upon receiving an invoice "in the form and manner as directed by [Wye Oak,]" J.A. 481, and the invoices Wye Oak submitted specified payment in Baghdad, J.A. 489–491 (Invoices); *Wye Oak III*, 2022 WL 17820569, at *7–8.

The court also found that Iraq did not "target" Wye Oak in the United States for a commercial relationship because Iraq did not take "any affirmative actions" in the United States to identify Wye Oak or solicit a contractual commitment. *Wye Oak III*, 2022 WL 17820569, at *8–9. Instead, Wye Oak approached the Iraqi government in Iraq about doing business for it in Iraq. *Id.* at *9. Regardless of

whether Iraq might have anticipated that Wye Oak would feel some loss from the breach in the United States, the court held that was not enough to support jurisdiction. *Id.* at *10.

As for Wye Oak's argument that the breach interrupted its subcontract with U.S.-based CLI, the court reasoned that the Agreement did not require that subcontract, and so its loss was not a direct effect of the breach. *Wye Oak III*, 2022 WL 17820569, at *10–11.

The district court, however, found that there were other direct effects in the United States. It noted that Wye Oak performed "a number of activities in the United States"—such as the development of inventory-tracking software and management of Wye Oak's electronic communications—in connection with its work under the Agreement. *Wye Oak III*, 2022 WL 17820569, at *12. Iraq's breach ground this domestic work to a halt. *Id.*

The court additionally found that the breach disrupted Wye Oak's "clear" plans to expand its operations in the United States to support its work for Iraq, and that Iraq knew "from the start of the relationship" how important this work was to Wye Oak's business. *Wye Oak III*, 2022 WL 17820569, at *12, *14. The court added that Iraq's failure to pay also stopped the frequent trips Dale and other Wye Oak employees made between the United States and Iraq and prevented Wye Oak from building a broad network across Eastern Europe for refurbishing Soviet-era military supplies. *Id.* at *13.

The court concluded by finding that Iraq's breach directly impacted U.S. diplomatic and military

operations in the United States. *Wye Oak III*, 2022 WL 17820569, at *15. When Iraq did not pay, Wye Oak reached out to several U.S. officials in the United States for assistance, and some of those officials took steps—in the United States—to help. *Id.* at *15–16. According to the court, the breach also interfered with U.S. efforts to stand up a strong Iraqi military to replace the U.S. military in Iraq. *Id.* at *17–18. This interference, the court ruled, impacted policy decisions made in Washington about its readiness to withdraw American troops from Iraq. *Id.*

Having found jurisdiction under the commercial exception, the district court reentered its prior damages order with the numbers adjusted to account for increased interest. *See Wye Oak III*, Judgment, No. 553 (Dec. 20, 2022). Both parties appealed.

II

We review the district court's factual findings for clear error. *Wye Oak II*, 24 F.4th at 700. We review its legal interpretation and application of the FSIA *de novo*. *Id.*

III

Iraq loses its immunity to this lawsuit only if its breach of contract caused a direct effect in the United States. It did not. Iraq was the center of Wye Oak's entire commercial relationship with the Ministry, and Iraq is where the breach's direct effects occurred. As a result, the district court lacked jurisdiction over this

suit, and so its judgment is vacated, and the case remanded with instructions to dismiss.[1]

A

The only jurisdictional question left in this case is whether Iraq's breach caused a direct effect in the United States. *See* 28 U.S.C. § 1605(a)(2). A "direct effect" is one that "follows as an immediate consequence" of the breach. *Weltover*, 504 U.S. at 618, 112 S.Ct. 2160 (quotation marks omitted). Here, all of the immediate consequences of Iraq's breach were felt in Iraq, not the United States.

From the start, Wye Oak and the Ministry fully anchored their relationship in Iraq. Wye Oak approached the Iraqi Ministry of Defense, in Iraq, about doing business there. *Wye Oak III*, 2022 WL 17820569, at *9. Wye Oak and the Iraqi government negotiated the scope of that work and executed their Broker Services Agreement in Iraq. *Id.* The work involved rebuilding Iraqi military equipment for use by Iraq's armed forces. *Wye Oak I*, 2019 WL 4044046, at *5–6; J.A. 479 (Broker Services Agreement). The

[1] We address only whether the commercial exception's third clause applies to this case. Our earlier decision held that its second clause does not. *Wye Oak II*, 23 F.4th at 702. Wye Oak makes no argument that that the first clause is relevant here, and the district court did not rely on that clause either. That is unsurprising. In cases like this that involve "a contract executed and performed outside the United States," our analysis generally focuses only on the third clause, and nothing about the facts in this case warrants different treatment. *See Helmerich & Payne Int'l Drilling Co. v. Bolivarian Republic of Venezuela*, 784 F.3d 804, 817 (D.C. Cir. 2015), *vacated on other grounds*, 581 U.S. 170, 137 S.Ct. 1312, 197 L.Ed.2d 663.

equipment was already in Iraq, and the maintenance and refurbishment work were to be performed there as well. *Wye Oak I*, 2019 WL 4044046, at *8; J.A. 479 (Broker Services Agreement). Wye Oak's personnel travelled to Iraq to visit its military bases and to assess their stores of weapons and equipment. *See Wye Oak III*, 2022 WL 17820569, at *13. Wye Oak hired contractors to come to Iraq to work at those bases. *Wye Oak I*, 2019 WL 4044046, at *8. And Iraq used the refurbished equipment in Iraq to help defend its people. *Id.* at *18–19.

The breach occurred in Iraq too. When the time came for payment, Wye Oak chose Iraq as the place where the Ministry should pay. J.A. 489–491 (Invoices). The Ministry in Iraq chose not to do so, and instead paid someone else in Iraq. Those withheld dollars—which should have changed hands in Baghdad—were meant to fund Wye Oak's ongoing work in Iraq.

B

Wye Oak counters that, despite these extensive ties to Iraq, there still were three alleged "direct effects" in the United States: the missed payment, stymied business activities for the Pennsylvania-based Wye Oak operation, and diplomatic and military reactions to the contract breach. None qualifies as a direct effect in the United States within the meaning of the FSIA's commercial exception.

1

Wye Oak's first argument is that the missing funds from Iraq's refusal to pay are a direct effect in the United States. But Wye Oak has shown no such

domestic harm because Wye Oak asked for the payment to be made in Iraq, not in the United States, and not to a United States bank.

Generally, if a foreign state is obligated to pay money due under a contract into a U.S. bank account—and does not—then those missing funds are considered a direct effect in the United States. *See Helmerich*, 784 F.3d at 818.

On the other hand, we have repeatedly held that when a foreign state merely has the discretion to pay in the United States, the missing funds do not have a direct effect in the United States. That is because, when the foreign state is not "supposed" to send money into the United States, its failure to pay the plaintiff has no "immediate consequence" there. *Peterson v. Royal Kingdom of Saudi Arabia*, 416 F.3d 83, 90–91 (D.C. Cir. 2005) (internal quotation marks omitted); *see Helmerich*, 784 F.3d at 818; *Goodman Holdings v. Rafidain Bank*, 26 F.3d 1143, 1146 (D.C. Cir. 1994) (no direct effect when "[n]either New York nor any other United States location was designated as the place of performance where the money was supposed to have been paid") (quotation marks omitted); *Odhiambo v. Republic of Kenya*, 764 F.3d 31, 39 (D.C. Cir. 2014) (There is "no direct effect where the foreign sovereign might well have paid its contract partner through a bank account in the United States but might just as well have done so outside the United States.") (quotation marks omitted).

At Wye Oak's direction, Iraq was obligated to pay Wye Oak in Baghdad, not the United States. *Wye Oak III*, 2022 WL 17820569, at *7. Wye Oak submitted three invoices. Each one instructed the Ministry to

pay Wye Oak "at [the Ministry's] Baghdad[,] Iraq office[.]" J.A. 489, 490, 491 (Invoices).

Wye Oak disputes this characterization of Iraq's obligation. A month after Iraq paid Zayna instead of Wye Oak, Dale emailed Zayna to tell him to pay Wye Oak via its Pennsylvania-based bank account. Wye Oak argues that this instruction changed Iraq's payment obligation to the United States.

But Iraq agreed to pay "pursuant to" the instructions in Wye Oak's invoices. J.A. 481 (Broker Services Agreement). Once it received those invoices, it was obligated to pay "immediately" and "in the form and manner" Wye Oak had instructed. J.A. 481 (Broker Services Agreement); J.A. 489 (Invoice) ("Pay Immediate Upon Receipt"); J.A. 490, 491 (Invoices) (same). Iraq never agreed to honor any changes to those instructions made weeks later by Wye Oak to a third party in an email. *See Wye Oak III*, 2022 WL 17820569, at *7 ("[The Agreement] specified that Wye Oak would be paid pursuant to the pro forma invoices it submitted.").

Nor, in any event, does the email show that Iraq agreed to modify the process for receiving payment instructions. Even assuming Zayna could speak for the Ministry, *see Wye Oak III*, 2022 WL 17820569, at *2 n.2 (declining to resolve whether Zayna was Iraq's agent), Zayna responded to Dale's email by refusing to send the money to the United States, *id.* at *2. He instead told Dale that he had set up an Iraqi bank account for payment. J.A. 566 ("Come to Baghdad, I already opened an account for you in North bank a month ago and you already get paid a small amount, I'll feed t[h]is account as much[ ]as you need to

proceed with this project."). So, to the extent Dale and Zayna's email exchange has any relevance, it corroborates that payment would be in Iraq.

Because Iraq, not the United States, was the place designated by Wye Oak "where the money was 'supposed' to have been paid[,]" Iraq's missed payments did not have a "direct effect" in the United States. *Goodman Holdings*, 26 F.3d at 1146; *see Peterson*, 416 F.3d at 90–91.

2

Wye Oak next argues that Iraq's breach interrupted the flow of commerce between the United States and Iraq. That argument fails as well because, for a breach of contract, a halt in commerce between the United States and another country counts as a direct effect in the United States only if the contract "establishe[d] or necessarily contemplate[d] the United States as a place of performance[.]" *Odhiambo*, 764 F.3d at 40.

Nothing in Wye Oak's Agreement with Iraq established or "necessarily contemplate[d]" performance in the United States. *Odhiambo*, 764 F.3d at 40. Quite the opposite. The contract was for the rehabilitation or scrapping of military equipment entirely in Iraq. The Agreement appointed Wye Oak as the Ministry's "sole and exclusive Broker" for "the provision of Military Refurbishment Services with respect to all of the various military bases, offices and properties owned by, or under the control of, the Ministry and/or the Republic of Iraq[.]" J.A. 479 (Broker Services Agreement). There are no relevant domestic direct effects when "all activities covered by the contract would have occurred outside the United States[.]" *Cruise Connections Charter Mgmt. 1, LP v.*

AG of Canada, 600 F.3d 661, 665 (D.C. Cir. 2010) (citing *United World Trade, Inc. v. Mangyshlakneft Oil Prods. Ass'n*, 33 F.3d 1232, 1237–1239 (10th Cir. 1994)).

True, the same Ministry official who signed the Agreement also gave Wye Oak a letter that represented that Wye Oak's work was to be undertaken "with the assistance and cooperation of the United States Mi[l]itary and all coalition partners as may[ ]be required by law, statute or as described in [the Agreement.]" J.A. 486 (Letter from Ministry to Wye Oak) (emphasis omitted). But that language does not appear in the Agreement. And nothing in the terms or subject of the Agreement itself shows that it necessarily contemplated performance in the United States. *See Odhiambo*, 764 F.3d at 40; *contrast EIG Energy Fund XIV, L.P. v. Petroleo Brasileiro, S.A.*, 104 F.4th 287, 296 (D.C. Cir. 2024) (foreign fraud caused direct effect in United States because the plaintiffs' presence in the United States was the reason the foreign state targeted them, "not mere happenstance") (quotation marks omitted).

Anyhow, the letter must be read in the context of a military-rehabilitation service to be performed on Iraqi equipment in Iraq. *See* J.A. 1409 (Wye Oak's witness describing the letter as "a letter of introduction" that was meant to "ensure safe passage, or at least uninterrupted passage to [Iraqi] bases"). Given that setting for the contract's performance, the letter's reference most logically refers to the support and assistance of the United States military and its coalition partners *in Iraq* by, for example, providing access to coalition-run facilities. *See Wye Oak I*, 2019

WL 4044046, at *8; J.A. 479–480 (Broker Services Agreement) (directing Wye Oak to begin work at multiple coalition-run facilities in Iraq). Iraq, after all, was a place of ongoing hostilities and military operations, making the support of the United States military in Iraq critical to Wye Oak's Iraqi operations.

Given all of that, Wye Oak's references to scattered commercial interchanges that dried up after Iraq's breach come up short. For example, David Stoffel decided to stop his work in West Virginia after months of not being paid. But Iraq never agreed to, or necessarily contemplated, his work in the United States in the first place. *See Odhiambo*, 764 F.3d at 40. The same goes for Wye Oak's planned American-based expansion: That was a unilateral business judgment made by Wye Oak that fell outside the scope of the Agreement. *See Cruise Connections*, 600 F.3d at 665.

As for any subcontracts Wye Oak planned to sign for work done abroad, their failure is not a direct effect in the United States for two reasons. First, they were not contemplated by the Agreement. Second, they were to be performed outside the United States. While some of the envisioned subcontractors were U.S. companies, "harm to a U.S. citizen, in and of itself, cannot satisfy the direct effect requirement." *Cruise Connections*, 600 F.3d at 665.

To be sure, one result of Iraq's breach is that Wye Oak eventually stopped operations in Iraq. Its U.S.-based personnel correspondingly stopped traveling to Iraq and no longer worked in the United States to support those Iraqi operations. But those "decision[s] to cease business" in the United States did not "flow

immediately" from Iraq's breach. *Helmerich*, 784 F.3d at 818–819. They were orthogonal to the disrupted Iraq-based work, especially since the Agreement simply never established or contemplated any travel or performance in the United States to begin with. *See Cruise Connections*, 600 F.3d at 665; *Odhiambo*, 764 F.3d at 40.

3

Lastly, Wye Oak argues that the breach had diplomatic and military impacts in the United States. That argument fares no better.

Wye Oak is correct that some American government officials took steps in the United States to assist Wye Oak. For example, at Wye Oak's urging, a Senator contacted the State Department to see if it could help get Wye Oak paid. *See Wye Oak III*, 2022 WL 17820569, at *15. The State Department then spoke with the Department of Defense. *Id.* The Department of Defense, in turn, met with Wye Oak and appointed a representative to advise the Iraqi Ministry on "acquisition logistics and basing" and to make weekly reports back to the Department on the Ministry's progress. *Id.*; J.A. 1315–1316, Trial Tr. 91:19–92:5; 94:21–95:18 (Dec. 19, 2018).

None of these diplomatic actions amounts to a direct effect of Iraq's breach. A direct effect cannot have any "intervening element" between it and the breach. *Princz*, 26 F.3d at 1172 (quotation marks omitted). These effects had at least three intervening and independent elements: Wye Oak's decision to seek out the officials; the officials' own decisions to act based on Wye Oak's overtures; and the government's response to those overtures. *See id.*; *Helmerich*, 784

F.3d at 818–819. The Agreement did not contemplate any of those actions. *See Odhiambo*, 764 F.3d at 40.

Nor can we brush off those intervening elements as just additional, but-for causes for diplomatic actions that were inevitably triggered by Iraq's breach. *See EIG Energy*, 104 F.4th at 296 (holding that the mere existence of "multiple but-for causes of an injury do[es] not break the chain of causation for any one of them") (quotation marks omitted). Iraq broke its promise to hand over the money in Baghdad. But then Dale chose to fly back to the United States and petition U.S. officials for support. Those officials independently opted to listen, and their subsequent actions were far from a necessary consequence of Iraq's failure to pay. *See Odhiambo*, 764 F.3d at 44 (Pillard, J., concurring in part) ("[I]n cases in which parties engage in commercial activities abroad and a plaintiff thereafter unilaterally decides to relocate to the United States where he then seeks to enforce claims relating to the foreign commercial activity, the direct-effects requirement is not satisfied.") (citing *Peterson*, 416 F.3d 83 and *Zedan v. Kingdom of Saudi Arabia*, 849 F.2d 1511 (D.C. Cir. 1988)).

Wye Oak next asserts that its mission's failure hurt U.S. readiness to withdraw from Iraq, which impacted how American decisionmakers in Washington approached winding down the conflict. That argument does not hold up either.

Wye Oak's work no doubt was an important piece of rebuilding Iraqi military capability. *Wye Oak III*, 2022 WL 17820569, at *17. And Iraq's rehabilitated military was important to U.S. strategy because the

United States anticipated standing down its own troops as Iraq's stood up. *Id.*

But that is not enough. In *Princz v. Federal Republic of Germany*, 26 F.3d 1166 (D.C. Cir. 1994), a Holocaust survivor argued that his forced labor in German war factories had direct effects in the United States because he was contributing to the Nazi war effort, *id.* at 1168, 1172–1173. He reasoned that his work incrementally moved the needle in making the Nazis a more formidable foe. *See id.* at 1172. We rejected that argument, holding that too "[m]any events and actors necessarily intervened between" his work and "any effect felt in the United States" for it to constitute a direct effect. *Id.*

So too here. There were too many discretionary steps made by too many actors reacting to too many considerations and circumstances over multiple years to be able to trace the timing of the eventual withdrawal of American troops from Iraq directly (or even indirectly) to Iraq's failure to pay many years earlier on Wye Oak's contract. *See Weltover*, 504 U.S. at 618, 112 S.Ct. 2160 (holding an effect was not direct because it was "too remote and attenuated"). Courts are particularly ill-equipped to sort through, in the first instance, causally intertwined matters involving complex and diplomatically sensitive pronouncements about strategic military decisionmaking in overseas hostilities. *See Chicago & Southern Air Lines, Inc. v. Waterman S.S. Corp.*, 333 U.S. 103, 111, 68 S.Ct. 431, 92 L.Ed. 568 (1948) (Foreign-policy decisions "are delicate, complex, and involve large elements of prophecy"; the judiciary often lacks the "aptitude, facilities [and] responsibility" to evaluate them.);

Gilligan v. Morgan, 413 U.S. 1, 10, 93 S.Ct. 2440, 37 L.Ed.2d 407 (1973) ("[It] is difficult to conceive of an area of governmental activity in which the courts have less competence" than "[t]he complex[,] subtle, and professional decisions as to the composition, training, equipping, and control of a military force[.]").

In sum, the record in this case does not show the type of direct effects in the United States from Iraq's breach of the Agreement that would trigger the FSIA's commercial exception.

IV

Because the FSIA's commercial exception does not apply in this case, Iraq is immune from suit. The district court accordingly lacked jurisdiction. We vacate its judgment and remand for dismissal of the case.

So ordered.

APPENDIX B

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Case No. 1:10-cv-1182-RCL

WYE OAK TECHNOLOGY, INC.,

Plaintiff,

v.

REPUBLIC OF IRAQ AND MINISTRY OF DEFENSE OF THE REPUBLIC OF IRAQ,

Defendants.

Filed: December 20, 2022

MEMORANDUM OPINION

This case concerns plaintiff Wye Technology, Inc.'s ("Wye Oak") nearly two decades-long breach of contract dispute with defendants Republic of Iraq ("Iraq") and the Iraqi Ministry of Defense ("MoD") pursuant to the Foreign Sovereign Immunities Act ("FSIA"), 28 U.S.C. § 1602 *et seq*. Wye Oak's effort to collect its payment has brought the company to two U.S. district courts and two U.S. circuit courts.

Following a bench trial in 2018, this Court entered judgment for Wye Oak and awarded damages. Following an appeal, the Circuit vacated the judgment and remanded the case to this Court to determine whether subject-matter jurisdiction exists based on the third clause of 28 U.S.C. § 1605(a)(2), which abrogates sovereign immunity when a foreign state engages in an "act outside the territory of the United States in connection with a commercial activity of the foreign state elsewhere and that act causes a direct effect in the United States."

After considering the record, the relevant filings, the applicable law, and the parties' briefing, the Court once again concludes that it properly maintains subject-matter jurisdiction over the case and will **ENTER JUDGMENT** for Wye Oak.

I. BACKGROUND

A. Factual Background

The factual background of this case has been described in detail in previous opinions from this Court and the Circuit. *See Wye Oak Tech. v. Republic of Iraq*, No. 10-cv-1182 (RCL), 2019 WL 4044046, *1 (D.D.C. Aug. 27, 2019) ("*Wye Oak I*"); *Wye Oak Tech. v. Republic of Iraq*, 24 F.4th 686, 704 (D.C. Cir. 2022) ("*Wye Oak II*"). The Court includes below an overview of the most salient relevant facts and procedural history for consideration of the case on remand.

After the fall of Saddam Hussein's regime, Iraq possessed large stocks of military equipment, much of which consisted of Soviet-era weaponry. *Wye Oak I*, 2019 WL 4044046, at *3. U.S.-led coalition forces, working closely with the newly constituted

transitional government of Iraq, endeavored to rebuild Iraq's armed forces. *Wye Oak II*, 24 F.4th at 692. The Iraqi Military Equipment Recovery Project ("IMERP") was developed to carry out this objective. *See Wye Oak I*, 2019 WL 4044046, at *3-4. According to retired General David Petraeus, then-leader of the group overseeing the rebuilding effort, IMERP "was a centerpiece" "to the establishment of a mechanized and armored division for Iraq[.]" Petraeus Dep., ECF No. 418-1, at 33:25-34:2. In particular, coalition forces and the Iraqi transitional government understood the critical importance of equipping an armored brigade to ensure the safety and security of the January 2005 parliamentary election. *See* Trial Tr. 12/17/18 PM at 35:21-37:5 (Testimony of Brigadier General Howard Clements); Trial Tr. 12/19/18 AM 25:9-26:14 (Testimony of Major Kevin Todd Neal); Pl.'s Ex. 16 (Joe Kane, *Iraqi Mech Brigade Moves Toward Initial Ops*, THE ADVISOR, Oct. 9, 2004) at 1, 8. Successful completion of the election was a key milestone for Iraqi security forces' self-sufficiency. *See* Petraeus Dep. 20:19-21:2, 28:19-30:3. And Iraqi security forces taking on greater responsibility was a necessary precondition for coalition forces' expeditious withdrawal from Iraq. *See id.*

The U.S. military viewed Pennsylvania-based private defense contractor Wye Oak and its chief executive officer, Dale Stoffel, as particularly well-equipped to carry out the IMERP, given Dale Stoffel's extensive experience with Soviet military equipment and his global contacts. *Wye Oak I*, 2019 WL 4044046, at *3-4. After reviewing Wye Oak's pitch, the MoD hired Wye Oak to complete a variety of tasks,

including "inventorying and assessing Iraq's existing military equipment; refurbishing any such equipment to the extent possible; and arranging for scrap sales of any equipment that was not salvageable." *Wye Oak II*, 24 F.4th at 692. In August 2004, the MoD and Wye Oak entered into a written Broker Services Agreement ("BSA"). *Id.* The BSA outlined Wye Oak's broker responsibilities and period of performance. *Id.* The BSA also included some of the details of Wye Oak's compensation, establishing that MoD would pay Wye Oak according to pro forma invoices. *Id.*

After executing the BSA, Wye Oak began performing both in Iraq and in the United States. *Id.* Wye Oak staff present in Iraq started "identifying, assessing, and refurbishing military equipment on the ground in that country." *Id.* Wye Oak staff in the United States—including David Stoffel, Dale Stoffel's brother and head of the company's information technology department—began purchasing computer equipment and software and overseeing all electronic communications. *Id.* Around the same time, Wye Oak granted Lebanese businessman Raymond Zayna a limited power of attorney to arrange financing and bank guarantees on behalf of Wye Oak for its contract with MoD. *Wye Oak I*, 2019 WL 4044046, at *8-9.[1]

In October 2004, Wye Oak submitted three pro forma invoices to the MoD, totaling $24,714,697.15. *Wye Oak II*, 24 F.4th at 692. Each invoice instructed the MoD to remit payment to Wye Oak "at the

[1] Based on the evidence presented at trial, this Court concluded that "it is more likely than not that Zayna was inserted at the behest of the MoD" but that [n]either side offer[ed] definitive evidence on this point." *See Wye Oak I*, 2019 WL 4044046, at *9.

Baghdad Iraq office of [the MoD]." Pl.'s Ex. 18 (Invoices). It is undisputed that the MoD never paid these invoices. *Wye Oak II*, 24 F.4th at 692.

In the weeks following Wye Oak's submission of the invoices, Wye Oak representatives met with American and Iraqi officials at least twice to discuss the still-outstanding invoices. *Id.* at 693. Eventually, the MoD remitted payment on the three invoices to Zayna, even though Wye Oak had not expressly or impliedly authorized that Zayna accept payment on its behalf. *Wye Oak I*, 2019 WL 4044046, at *13-14. At the same time, Wye Oak contacted and met with various U.S. legislative and military figures in the United States—including U.S. senators and the office of then-Secretary of Defense Donald Rumsfeld—to notify them that the MoD's nonpayment had significantly impacted its mission. *Id.* at *15 (citing Trial Tr. 12/18/18 AM 59:17-60:20 (Testimony of David Stoffel)).

In addition to leveraging contacts in Washington, Wye Oak attempted to recover the funds from Zayna. On November 25, 2004, Dale Stoffel contacted Zayna by email. *Wye Oak I*, 2019 WL 4044046, at *15. In that email, Dale Stoffel demanded that Zayna transfer money owed to Wye Oak to Wye Oak's bank account at National City Bank of Pennsylvania in Monongahela, Pennsylvania. *See* Pl.'s Ex. 31. Zayna declined and instead urged Dale Stoffel to travel from the United States to Iraq to sort out the payment details in person.[2] *See* Pl.'s Ex. 33.

[2] Wye Oak maintains a consistent theory throughout its papers that Zayna was Iraq's agent and thus any actions or statements

On December 5, 2004, American officials and MoD representatives met again and the MoD again agreed to pay Wye Oak. Trial Tr. 12/17/18 PM 18:10-22:25 (Clements); Trial Tr. 12/20/18 AM 33:11-34:25, 35:9-25, 36:14-37:1 (Testimony of Lieutenant Colonel Patrick Marr); Trial Tr. 12/20/18 PM 72:17-74:9 (Testimony of Professor Nicholas Beadle). Three days later, Dale Stoffel was on his way to Baghdad to receive the payment when he was shot multiple times and killed. *Wye Oak I*, 2019 WL 4044046, at *17. After Dale Stoffel's death, Wye Oak withdrew all of its U.S. personnel from Iraq. *Wye Oak II*, 24 F.4th at 693. Through local contractors, Wye Oak coordinated the production of operational armored vehicles for Iraq's January 2005 parliamentary election. *Id.* An Iraqi general declared that the election would be secure

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by or directed to Zayna may be attributed as made by or directed to Iraq. *See, e.g.*, Pl.'s Reply at 10 ("Zayna Was Iraq's Man, And Dale's Instruction To Zayna Was An Instruction To Iraq"). Wye Oak supports this position with a handful of citations to Iraqi agency law, *see, e.g., id*. at 13 n.4, as well as a line from this Court's previous opinion that "Zayna was MoD's agent[,]" *see id*. at 5 (citing *Wye Oak I*, 2019 WL 4044046, at *17). Ultimately, this Court need not decide the precise legal contours of the agency relationship—which Iraq vigorously contests, *see* Defs.' PFFCL at 38-43—because no conclusion herein turns on the existence of any agency relationship. Additionally, this Court's previous statement regarding agency was made in the context of ruling that certain statements by Zayna were admissible as a statement by a party opponent. This evidentiary ruling should not have preclusive effect on the agency question in a different context. *Cf. Secs. Ind. Ass 'n v. Bd. of Govs.*, 900 F.2d 360, 364 (D.C. Cir. 1990) ("Courts are admonished not to permit quinreflective invocation" of issue preclusion to gloss over serious questions of fairness and the scope of prior litigation") (quoting *Montana v. United States*, 440 U.S. 147, 162-64 & n.11 (1979)).

thanks to Wye Oak's work refurbishing and equipping the military. *See Wye Oak I*, 2019 WL 4044046, at *19 (citing Pl.'s Ex. 47 (Andrew Hughan, *Iraqi Mechanized Brigade Assumes Mission*, THE ADVISOR, Jan. 15, 2005) at 3).

Eventually, the lack of payment caused Wye Oak to cease operations in Iraq sometime after the January 2005 election. *Wye Oak II*, 24 F.4th at 693.

B. Procedural Background

Wye Oak first filed its breach of contract complaint against the MoD and Iraq in the Eastern District of Virginia. *See Wye Oak Tech., Inc. v. Republic of Iraq*, No. 09-cv-793, 2010 WL 2613323, at *1 (E.D. Va. June 29, 2010). Iraq moved to dismiss, claiming sovereign immunity. *Wye Oak II*, 24 F.4th at 693. In 2010, the Eastern District of Virginia determined that venue was improper and transferred the case to this Court. *See Wye Oak Tech.*, 2010 WL 2613323, at *11. In the same opinion, the Eastern District of Virginia found that all three clauses of the FSIA's commercial activities exception applied and thus the court had subject-matter jurisdiction. *Id.* at *8-9. Iraq appealed that finding to the Fourth Circuit and this Court stayed the current case. *Wye Oak II*, 24 F.4th at 694. The Fourth Circuit affirmed the Eastern District of Virginia's jurisdictional finding, holding that the actions Wye Oak alleged to have taken inside of the United States meant that "Wye Oak ha[d] made a sufficient showing that its breach of contract claim [was] based upon an act performed in the United States in connection with a commercial activity of the foreign state elsewhere" under the second clause of 28

U.S.C. § 1605(a). *See Wye Oak Tech., Inc. v. Republic of Iraq*, 666 F.3d 205, 216-17 (4th Cir. 2011).

This Court lifted the stay following the Fourth Circuit's decision and the lawsuit proceeded, culminating in an eight-day bench trial in December 2018. *Wye Oak II*, 24 F.4th at 694. In August 2019, this Court issued its findings of fact and conclusions of law, holding both that the Fourth Circuit's decision with respect to clause two was binding on this Court based on the "law of the case" doctrine and that the facts supported an independent determination of clause two's applicability. *Wye Oak I*, 2019 WL 4044046, at *23-24. After determining that the exception to sovereign immunity applied, this Court examined the evidence and concluded that MoD had breached its contract with Wye Oak.[3] *Id.* at *27-28. Accordingly, this Court entered judgment for Wye Oak and against the MoD and Iraq. J., ECF No. 466.[4]

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[3] The Court also concluded that The Court also concluded that "MoD is not separate from the Republic of Iraq—MoD and Iraq are legally one and the same." *Wye Oak I*, 2019 WL 4044046, at *19.

[4] The Court originally entered judgment against the MoD and Iraq in the amount of "$120,338,393.71, plus $10,909.11 per day for each day after October 9, 2019." J., ECF No. 466. Following various dueling motions and additional considerations, the Court later amended the judgment to clarify that the MoD and Iraq were jointly and severally liable for "the amount of $120,742,030.78, comprised of the final judgment amount of $120,338,393.71, plus $10,909.11 per day for each day after October 9, 2019 through and including November 15, 2019, the date of entry of Judgment." Am. J., ECF No. 483-1. The Court further ordered that the "judgment set forth herein shall accrue interest from November 15, 2019 at the legal rate pursuant to 28

The Court also ordered the defendants to pay Wye Oak's costs, including reasonable attorney fees and expenses. Mem. Order, ECF No. 486; Order, ECF No. 517. Both parties appealed aspects of this Court's post-trial judgment and corresponding orders.[5] *Wye Oak II*, 24 F.4th at 695-96.

On appeal, the D.C. Circuit vacated the judgment and remanded the case. *Id.* at 703-04. The Circuit first determined that the Fourth Circuit's jurisdictional holding was not binding on this Court or the Circuit based on the "law of the case" doctrine.[6] *Id.* at 698-99. Next, the Circuit "disagree[d] with the view of the district court (and, for that matter, the Fourth Circuit) that the second clause of the commercial activities exception can be satisfied for FSIA purposes based on the various acts that the *plaintiff* (Wye Oak) took inside the United States to perform under the BSA." *Id.* at 702 (emphasis in original). The Circuit went on say that the inapplicability of the second clause "does not mean that Iraq must be found to have retained its

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U.S.C. § 1961 of 1.58%, and shall be computed daily and compounded annually until paid in full." *Id*.

[5] Because the sole issue before this Court is the existence of subject-matter jurisdiction under clause three of the commercial activities exception, the Court will not address other matters still disputed by the parties, such as the Court's calculation of damages and attorney fees.

[6] The D.C. Circuit distinguished the different postures of the case, finding that the Fourth Circuit's determination that Wye Oak had plausibly pleaded that there was jurisdiction under the second clause of the commercial activities exception was sufficiently different from the Circuit's examination of the jurisdictional question following discovery and a bench trial. *Wye Oak II*, 24 F.4th at 698-99.

sovereign immunity with respect to Wye Oak's breach of contract claims—at least not yet" *id.* at 703, because the Circuit did "discern a plausible basis for sustaining the district court's jurisdictional ruling in the language of the commercial activity exception's *third* clause." *Id.* at 690 (emphasis in original). Because this Court had not specifically addressed the applicability of the third clause in its post-trial opinion, and mindful that the "Court of Appeals should not . . . resolve[ ] in the first instance [a] factual dispute which had not been considered by the District Court[,] *id.* at 703 (quoting *Pullman-Standard v. Swint*, 456 U.S. 273, 291-92 (1982) (alterations in original)), the Circuit remanded the case for this Court to analyze the "direct effects arguments in the first instance." *Id.* at 703.

On remand, the parties submitted supplemental briefing. *See* Pl.'s Proposed Findings of Fact and Conclusions of Law, ECF No. 542 [hereinafter "Pl.'s PFFCL"]; Defs.' Proposed Findings of Fact and Conclusions of Law, ECF No. 546 [hereinafter "Defs.' PFFCL"]; Defs.' Resp. to Pl.'s PFFCL, ECF No. 547;[7] Pl.'s Reply in Supp. of Pl.'s PFFCL, ECF No. 550 [hereinafter "Pl.'s Reply"]. Wye Oak points the Court to four alleged direct effects in the United States due to Iraq's failure to pay the three invoices. *See* Pl.'s PFFCL at 6-7. Iraq argues that none of the effects proposed by Wye Oak are sufficient to satisfy an abrogation of sovereign immunity under the third clause of 28 U.S.C. § 1605(a)(2), and therefore this

[7] ECF No. 546 and 547 appear to be the same document.

Court cannot properly exercise subject-matter jurisdiction over the case. *See* Defs.' PFFCL at 15-17.

II. LEGAL STANDARD

Under the FSIA, a "foreign state shall be immune from the jurisdiction of the courts of the United States and of the States" unless one of specific statutorily defined exceptions applies. 28 U.S.C. § 1604 (emphasis added). The FSIA is thus the "sole basis for obtaining jurisdiction over a foreign state in our courts." *Argentine Republic v. Amerada Hess Shipping Corp.*, 488 U.S. 428, 434 (1989). "The most significant of the FSIA's exceptions—and the one at issue in this case—is the 'commercial' exception of § 1605(a)(2)[1" *Republic of Argentina v. Weltover, Inc.*, 504 U.S. 607, 611 (1992). Under Section 1605(a)(2)'s third clause, a foreign state is not immune when the "lawsuit is (1) 'based . . . upon an act outside the territory of the United States'; (2) that was taken 'in connection with a commercial activity' of [Iraq] outside this country; and (3) that 'cause[d] a direct effect in the United States.'" *Id.* (citing 28 U.S.C. § 1605(a)(2)).

A direct effect "is one which has no intervening element, but, rather, flows in a straight line without deviation or interruption." *Princz v. Fed. Republic of Germany*, 26 F.3d 1166, 1172 (D.C. Cir. 1994) (internal citation omitted). Though "jurisdiction may not be predicated on purely trivial effects in the United States[,]" the Supreme Court has "reject[ed] the suggestion that § 1605(a)(2) contains any unexpressed requirement of 'substantiality' or 'foreseeability.'" *Weltover*, 504 U.S. at 618. While the plaintiff bears the burden of producing evidence that

the FSIA exception applies, *Bell Helicopter Textron, Inc. v. Islamic Republic of Iran*, 734 F.3d 1175, 1183 (D.C. Cir. 2013), "the [defendant foreign state] bears the ultimate burden of persuasion (i.e., to show that the commercial-activity exception does not apply)." *FG Hemisphere Assocs., LLC v. Democratic Republic of the Congo*, 447 F.3d 835, 842 (D.C. Cir. 2006).

III. DISCUSSION

As a threshold matter, "there is no dispute that Wye Oak's lawsuit relates to Iraq's commercial activity and is based upon an act of Iraq that took place outside of United States territory: its failure to pay the invoices. Thus, the first two requirements for application of clause three of the FSIA's commercial activities exception are satisfied." *Wye Oak II*, 24 F.4th at 703 (citing *Ivanenko v. Yanukovich*, 995 F.3d 232, 238 (D.C. Cir. 2021)). Therefore, the sole issue on remand is "whether Iraq's breach of contract caused 'direct effects' in the United States for the purpose of the third clause of 28 U.S.C. § 1605(a)(2)." *Id.* at 690.

Wye Oak has posited four examples of direct effects in the United States flowing from Iraq's breach of the BSA: (1) Iraq was required to submit payment to Wye Oak's U.S. bank account, (2) Iraq specifically targeted Wye Oak because it knew that effects of its nonpayment would be felt in the United States; (3) Iraq's nonpayment caused the cut-off of a flow of capital, data, services, and personnel between the United States and Iraq; and (4) Iraq's nonpayment affected military and diplomatic operations in the United States. *See id.* at 703.

The Court will examine each of Wye Oak's theories in turn to determine whether it constitutes a direct

effect sufficient to satisfy the commercial activities exception. The Court concludes that Wye Oak has not met its burden to produce evidence showing the applicability of the sovereign immunity exception with respect to its first proposed direct effect. For the second, Wye Oak has met its burden of production, but Iraq has, in turn, met its burden to demonstrate entitlement to sovereign immunity. For the final two proposed direct effects, Wye Oak has met the burden of production, and Iraq has not met its burden of persuasion. Therefore, the Court may properly exercise subject-matter jurisdiction over the case.

A. Wye Oak Has Not Demonstrated That Iraq Had an Obligation to Deposit Funds Into the Company's U.S. Bank Account

Wye Oak's first direct effect argument is that it designated its Pennsylvania-based bank account as the place of payment and Iraq's failure to pay into that account caused a direct effect in the United States. Pl.'s PFFCL at 12. Iraq's main rejoinder is that, because payment was due in Iraq, not the United States, its nonpayment could not create a direct effect in the United States on this basis. Defs.' PFFCL at 27.

In this Circuit, in determining whether there is a direct effect in the United States based on the place of payment, "our touchstone is the Supreme Court's decision in *Republic of Argentina v. Weltover*." *Valambhia v. United Republic of Tanzania*, 964 F.3d 1135, 1140 (D.C. Cir. 2020). In *Weltover*, the government of Argentina issued U.S. dollar-dominated bonds as part of a foreign exchange program. 504 U.S. at 609. Bondholders were permitted to elect one of four cities—one of which was

New York—as the place to receive payment upon the bonds' maturity date. *Id.* at 609-10. When the bonds matured, Argentina attempted to reschedule the payments. *Id.* at 610. Several bondholders, exercising their rights under the bonds' terms, then demanded full payment in New York. *Id.* After Argentina failed to make the payments, the bondholders sued under 28 U.S.C. § 1605(a)(2)'s third clause. *Id.* The Supreme Court agreed with the bondholders that the court properly maintained subject-matter jurisdiction because "New York was thus the place of performance for Argentina's ultimate contractual obligations, the rescheduling of those obligations necessarily had a 'direct effect' in the United States: Money that was supposed to have been delivered to a New York bank for deposit was not forthcoming." *Id.* at 619.

Contrary to Wye Oak's insistence that "[t]his case is directly and obviously analogous to *Weltover*," Pl.'s PFFCL at 8, there is one significant difference here: the BSA did not designate any possible places of payment. Instead, Section 5(b) of the BSA, the section devoted to payment instructions, merely stated:

> Payments to [Wye Oak] of the aforementioned commission will be paid pursuant to proforma invoices submitted by [Wye Oak] and then reconciled by final invoice. Upon providing such proforma invoice, [the MoD] will make full payment on such invoice immediately upon presentation. All payments to be made to [Wye Oak] under this Agreement shall be made in United States Dollars in the form and manner as directed by [Wye Oak].

See Pl.'s Ex. 5 (BSA), at § 5(b).

Wye Oak, focusing on the last sentence of Section 5(b), insists that payment was due in the United States because Wye Oak designated its U.S. bank account in its November 25, 2004 email to Zayna. Pl.'s PFFCL at 9-10. Iraq, focusing on the first sentence of Part 5(b), counters that the MoD's office in Baghdad, Iraq was the location of payment because that was the place designated in Wye Oak's October 2004 pro forma invoices. Defs.' PFFCL at 28-29.[8]

Under the law of this Circuit, there is no direct effect in the United States when a foreign sovereign did not have an obligation pay in the United States. Since *Weltover*, the Circuit's cases "draw a very clear line: For purposes of clause three of the FSIA commercial activity exception, breaching a contract that establishes or necessarily contemplates the United States as a place of performance causes a direct effect in the United States, while breaching a contract that does not establish or necessarily contemplate the United States as a place of performance does not cause a direct effect in the United States." *Odhiambo v. Republic of Kenya*, 764 F.3d 31, 40 (D.C. Cir. 2014). Accordingly, the Circuit has found a direct effect when the parties knew at the time of contracting that

[8] Iraq also resists the notion that the November 25,2004 email created an obligation to pay into a U.S. bank account because it was sent after Iraq's breach and it was directed to Zayna, not Iraq. *See* Defs.' PFFCL at 35-43. Iraq further argues that even if the email created an obligation, it was superseded by Dale Stoffel's return to Iraq in December 2004 to accept payment in Iraq. *See id*. at 91-92. Because the Court finds that Iraq did not have an obligation to pay Wye Oak in the United States based on the terms of the BSA or the parties' course of performance, the Court need not address these remaining arguments.

performance was to occur in the United States. *See de Csepel v. Republic of Hungary*, 714 F.3d 591, 601 (D.C. Cir. 2013) ("Hungary promised to return the artwork to members of the Herzog family it knew to be residing in the United States and then breached that obligation by refusing to do so"); *I.T. Consultants, Inc. v. Republic of Pakistan*, 351 F.3d 1184, 1186, 1190 (D.C. Cir. 2003) (finding a direct effect when a memorandum of understanding required payment to a U.S. company's U.S. bank account because "the involvement of a U.S. bank was immediate and unavoidable").

More often, however, the Circuit has found no direct effect when an agreement was silent on where payment was to occur. *See Valambhia*, 964 F.3d at 1140-42 (Irish corporation held a judgment against Tanzania but Tanzania was under no obligation to satisfy the judgment in the plaintiffs' New York-based account); *Odhiambo*, 764 F.3d at 40 (Kenya was not obliged to pay a whistleblower award to a Kenyan national in the United States); *Peterson v. Kingdom of Saudi Arabia*, 416 F.3d 83 (D.C. Cir. 2005) (Saudi Arabia had no obligation to pay retirement funds to former employee in the United States); *Goodman Holdings v. Rafidain Bank*, 26 F.3d 1143 (D.C. Cir. 1994) (Iraqi bank had no obligation to make payments in the United States on letters of credit issued to Irish corporations).[9] Put differently, it is not enough, under

[9] Iraq's reliance on *Zedan v. Kingdom of Saudi Arabia*, however, is misplaced. *See* Defs.' PFFCL at 100. That case relied on the pre-*Weltover* requirement that a direct effect be "one that is substantial and foreseeable." *Zedan v. Kingdom of Saudi Arabia*, 849 F.2d 1511, 1514 (D.C. Cir. 1988).

this Circuit's precedent, that a foreign sovereign might have anticipated that payment would occur in the United States. The foreign sovereign must have been bound under a contractual obligation, express or implied, to make a payment in the United States. *See Valambhia*, 964 F.3d at 1142.

Here, neither MoD nor Iraq under an obligation to pay Wye Oak in the United States. The BSA specified that Wye Oak would be paid pursuant to the pro forma invoices it submitted. *See* Pl.'s Ex. 5. In October 2004, Wye Oak submitted pro forma invoices designating Iraq, not the United States, as the location of payment. Presumably, Wye Oak considered the invoices it submitted to be sufficiently detailed; it was only after the MoD had failed to pay them, and Wye Oak repeatedly sought to recover the funds, that Dale Stoffel sent the email with Wye Oak's bank account information.[10] Even if, at the time of contracting, Iraq might have contemplated that Wye Oak would demand payment in the United States, Iraq was not specifically bound to do so.[11]

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[10] The parties engage in an extended discussion of whether a direct effect can be established if an obligation to make a payment arises after a party's breach. *See, e.g.*, Defs.' PFFCL at 83-87; Pl.'s Reply at 17-18. Because the Court concludes there was no obligation, the Court need not answer this question.

[11] Wye Oak argues that certain clues in the BSA—such as its English language, the requirement that payment be made in U.S. dollars, and the directive to send written notices and requests to Wye Oak's address in the United States—put Iraq on notice that the United States was the place of performance for payment. *See* Pl.'s PFFCL at 12. These facts, without more, are not enough to establish a direct effect in the United States. *See*

Wye Oak insists that the pro forma invoices lacked all of the details necessary for Iraq to successfully make payments, and, therefore, the Court should look to Dale Stoffel's November 25, 2004 email to Zayna to resolve the ambiguity. *See* Pl.'s PFFCL 12-17; Pl.'s Reply at 10-32. By providing the account and routing numbers for payment to Wye Oak's Pennsylvania-based account, *see* Pl.'s Ex. 31, and addressing the email to Zayna, Wye Oak contends that this email created binding obligations on Iraq. *See* Pl.'s PFFCL at 13-16; Pl.'s Reply at 10-14. However, Wye Oak has not sufficiently explained why the invoices lacked the necessary details to enable Iraq to pay especially when, by the terms of the BSA, the parties apparently contemplated that payment could—and would—be made according to the invoices' instructions. Similarly, even if the BSA's payment provision and the invoices, or both, were ambiguous, Wye Oak has not demonstrated to this Court whether Iraqi law, which governs the BSA, permits the introduction of email communications to explain the potential ambiguity.

To be sure, this case plainly does not evince the same concerns animating the various panels finding no direct effect when the agreement was silent on place of payment, namely, preventing "opportunistic plaintiffs from unilaterally haling foreign sovereigns into United States courts[.]" *See Odhiambo*, 764 F.3d at 47 (Pillard, J., concurring in part). Nor is this the sort of "'pay wherever you are' scenario[] in which the asserted direct effect in the United States is simply

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Friedman v. Gov't of Abu Dhabi, U.A.E., 464 F. Supp. 3d 52, 65 (D.D.C. 2020).

that plaintiffs reside or are citizens here, without more[.]" *Valambhia*, 964 F.3d at 1142. There is, simply put, much more to Wye Oak's connection to the United States than its Pennsylvania bank account. At all relevant times, Wye Oak was, and continues to be, a U.S. corporation headquartered in the United States. Wye Oak performed essential services for the contract from the United States. At the time of contracting, Iraq could very well have predicted that Wye Oak's forthcoming pro forma invoices would have sought payment in the United States for its services. With these facts in mind, the direct effects "result should be different where, for example, a foreign government hires an American [ ] firm abroad without specifying place of performance, and, once the work is complete, reneges on payment[.]" *Odhiambo*, 764 F.3d at 45 (Pillard, J., concurring in part).

Nevertheless, this Court is bound by the Circuit's precedent requiring an obligation on the part of the foreign sovereign to deposit funds to a U.S. account.[12] *See Goodman Holdings*, 26 F.3d at 1146 (no direct effect because "[n]either New York nor any other United States location was designated as the 'place of performance' where money was 'supposed' to have

[12] Likewise, even if the funds had been delivered to Wye Oak in Iraq in accordance with the pro forma invoices, the possibility that the funds might eventually have made their way to Wye Oak's account in the United States is insufficient to establish a direct effect based on failure to pay into a U.S. bank account. After all, by the plain terms of the BSA, which sets out the financial obligations that form the basis of Wye Oak's claims, Iraq theoretically could have satisfied those obligations by depositing funds in "any other country." *See Daou v. BLC Bank, S.A.L.*, 42 F.4th 120, 136 (2d Cir. 2022).

been paid"); *Peterson*, 416 F.3d at 91 (no direct effect because "Saudi Arabia 'might well have paid' [the plaintiff] in the United States 'but it might just as well have done so' outside of the United States") (internal citations omitted).

Because Wye Oak has not demonstrated that Iraq was obligated to make a payment in the United States, Wye Oak's first putative direct effect is insufficient to abrogate Iraq's sovereign immunity. *See Bell Helicopter*, 734 F.3d at 1183.

B. Iraq Has Met Its Burden of Persuasion to Show That Iraq Did Not "Target" Wye Oak

Wye Oak's second direct effects theory is that Iraq "targeted" Wye Oak, "clearly kn[owing] that a U.S. company would feel the loss in the United States when Iraq failed to pay." Pl.'s PFFCL at 10. Wye Oak contends that such "targeting" occurred both before and during the relationship between the parties. *See id.*; *see also* Pl.'s Reply at 33. Wye Oak points to the Circuit's decision in *EIG Energy Fund XIV v. Petroleo Brasileiro*, 894 F.3d 339 (D.C. Cir. 2018) in support of its position. In that case, the Circuit found that a U.S. company had "made out a *prima facie* case for [subject-matter] jurisdiction" when it alleged that Petrobras, a state-owned oil company in Brazil, "specifically targeted U.S. investors" for its foreign investment vehicle Sete Brasil Participacoes, S.A. ("Sete"), all the while "intentionally conceal[ing] the ongoing fraud at Petrobras and Sete" and using "money invested in Sete" "to pay bribes and kickbacks." *Id.* at 345 (emphasis in original). Iraq counters that there is no evidence that it targeted a U.S. company, and if there was any targeting, it was

Wye Oak that targeted *Iraq*.[13] In reply, Wye Oak refines its "targeting" argument as "Iraqi officials carefully insert[ing Zayna into the relationship with Wye Oak, intentionally craft[ing] the 'fraudulent' [contract of financial agreement],[14] and generally

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[13] Iraq's other arguments are without merit. Iraq first disputes Wye Oak's targeting theory because the IMERP and BSA were conceived of, presented in, and did not contemplate any performance outside of Iraq. *See* Defs.' 46-52. Assuming without deciding that Iraq's version of facts is correct, none of those facts is directly responsive to the targeting argument. Iraq also argues that *EIG Energy* is not controlling because it was a tort, rather than contract, case. Defs.' PFFCL at 22-23, 92, 93-94. There is no such categorical approach to evaluating the FSIA in this Circuit. *See EIG Energy*, 894 F.3d at 349. Iraq further urges the Court not to adopt Wye Oak's targeting theory, warning that it is a "sweeping proposition" and would mean that "such a rule that would strip sovereign immunity where a foreign government simply seeks to do business with a U.S. individual or corporation." Defs.' PFFCL at 94. The Court does not view Wye Oak's papers as advancing such a theory. *See* Pl.'s PFFCL at 32-33. Regardless, the Court understands Wye Oak's legal argument to be based in *EIG Energy*, which, as this Court will explain, is distinguishable from this case.

[14] In October 2004, the MoD and Zayna discussed, and Wye Oak did not object to, concluding an agreement whereby Zayna's company would finance the IMERP. *Wye Oak I*, 2019 WL 4044046, at *12 (citing Pl.'s Ex. 21 (Contract of Financial Agreement)). In 2011, three MoD officials involved in negotiating and executing the agreement were criminally convicted for "conclud[ing] a financial agreement" with Zayna's company. *See id*. (citing Defs.' Suppl. Mem. in Opp'n to Pl.'s Mot. for Sanctions, ECF No. 430, and Ex. A. to Pl.'s Mot. to Reopen Evid., ECF No. 438-1). Because the parties, subject matter, timeframe, and amounts involved in the summary of the conviction matched the facts admitted into evidence at trial, the Court concluded that the conviction "more likely than not refers to the [contract of financial agreement]." *Id*. The Court further remarked that the

orchestrat[ing] '[a] scheme' to steal millions of dollars.'" Pl.'s Reply at 33 (quoting *Wye Oak I*, 2019 WL 4044046, at *9, 13).

Based on a careful review of the trial record, the Court concludes that the facts in the instant case are sufficiently different in kind from the actions in *EIG Energy* so as to render the "targeting" theory inapplicable. Thus, Iraq's sovereign immunity is not pierced by Wye Oak's second direct effects argument. To support the finding of "specific targeting" giving rise to FSIA jurisdiction, the Circuit in *EIG Energy* noted that Petrobras had undertaken concrete actions in the United States to initiate the relationship with the U.S. company, including disseminating multiple documents and presentations in the United States as well as sending Petrobras representatives to the United States to meet with the U.S. company on at least two occasions. *See EIG Energy*, 894 F.3d at 342. These actions were essential to the jurisdictional analysis in the U.S. company's fraudulent inducement lawsuit because "[a]t least some of the misstatements and omissions in service thereof took place in the United States, where the ultimate consequences of the fraud were later felt." *Id.* at 348.

Here, the record does not show any affirmative actions taken by Iraq or the MoD in the United States to identify Wye Oak. Instead, it appears that the significant steps to begin the relationship between the parties were taken by Wye Oak and were carried out

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existence of this conviction evidence "strongly indicate[d]" "a fraudulent scheme between these MoD officials and Zayna to steal millions of dollars." *Id*.

in Iraq. Wye Oak representatives had a history of operating in Iraq and were present in Iraq in early 2004. William Felix Dep., ECF No. 418-10, at 7:14-25:14. Wye Oak approached the MoD and coalition leaders with an early version of the IMERP concept in February or March 2004. *See* Pl.'s Ex. 8.3. In April 2004, Wye Oak submitted a more detailed plan to the MoD in Iraq. *See* Pl.'s Ex. 8.4. In June 2004, Wye Oak sent the MoD a letter formally proposing the IMERP in Iraq. *See* Pl.'s Ex. 1. In August 2004, Wye Oak and the MoD officially executed the BSA in Iraq. *See* Pl.'s Ex. 5. This evidence indicates that Wye Oak initiated the relationship with Iraq.

Wye Oak's secondary argument, that the "targeting" occurred during the existence of the relationship, is not supported by this Circuit's caselaw. Wye Oak contends that "Zayna's key email," from December 2, 2004, establishes targeting because Zayna urged Dale Stoffel to travel from the United States to Iraq with the promise of payment, all the while knowing that Iraq had no intention of paying Wye Oak. *See* Pl.'s Reply at 33 (citing Pl.'s Ex. 33). That Zayna's "misstatements and omissions in service of the fraud were affirmatively *directed into* the United States," *see* Pl.'s Reply at 33 (emphasis added), such as they were, is not enough to meet the targeting standard set forth in *EIG Energy*. As previously explained, *EIG Energy* focused on the fact that "the misstatements and omissions in service thereof *took place in* the United States."[15] 894 F.3d at 348 (emphasis added). The absence of such actions here is dispositive.

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[15] Relatedly, even if the operative fraudulent action was not Zayna's email but the contract of financial agreement between

Furthermore, *Nnaka v. Fed. Republic of Nigeria*, 756 Fed. App'x 16 (D.C. Cir. 2019) (per curiam), which Wye Oak cites for the proposition that a letter sent from abroad to the United States can support FSIA jurisdiction, is inapposite. The letter at issue in that case was "an intergovernmental communication from Nigeria to the United States regarding who had authority to represent the Nigerian government in an asset-forfeiture action" and receipt of such "letter caused the district court to dismiss [the plaintiff] from the asset forfeiture case[.]" *Nnaka*, 756 Fed. App'x at 18. The letter thus had immediate legal consequences in the United States. By contrast, there were no immediate legal consequences of Zayna's email to Dale Stoffel.

Finally, Wye Oak's contention that "Iraq knew that the losses [due to its nonpayment] would be felt in the United States" is insufficient to establish a direct effect under this Circuit's precedent. *See* Pl.'s PFFCL at 21. Wye Oak's argument proceeds as follows: (1)

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the MoD and Zayna's company, this argument would similarly fall short of *EIG Energy*. In that case, the Circuit remarked that the injury occurred to the U.S. company when "'Petrobras successfully induced [it] to invest in the Petrobras-Sete project,' which 'occurred, at least in part, in the United States.'" *EIG Energy*, 894 F.3d at 344 (internal citation omitted) (alteration in original). Here, the contract of financial agreement was negotiated and concluded in Iraq. *Wye Oak I*, 2019 WL 4044046, at *12-13. Moreover, the agreement "did not legitimately implicate the BSA, as the evidence establishes the [agreement] was not agreed to—let alone signed—by Wye Oak and therefore did not meet the requirements set forth in the BSA's modification clause." *Id*. (citing Pl.'s Ex. 5).

Iraq "knew it targeted a U.S. company";[16] (2) Iraq knew that Wye Oak was carrying out administrative functions in the United States in support of the BSA and that Wye Oak expected the pro forma invoices to compensate the company for these activities; (3) payment was required to be made in U.S. dollars; and (4) thus, Iraq knew that nonpayment would directly cause a loss to Wye Oak in the United States. *See* Pl.'s PFFCL at 17-21. Even if these facts are true, they do not together establish a direct effect in the United States, but rather, a kind of indirect effect on the Wye Oak balance sheet in this country. To conclude that this chain of facts satisfies 28 U.S.C. § 1605(a)(2)'s third clause would so expand the Circuit's "targeting" rule from *EIG Energy* as to cover potentially the vast majority of large business deals between foreign sovereigns and U.S. companies. Therefore, the Court is unable to find that Iraq's nonpayment caused a direct effect in the United States on this basis.

Because this Court is not persuaded that Iraq specifically targeted a U.S. company, let alone Wye Oak, Iraq has met its burden to demonstrate that there is no exception to sovereign immunity on this basis. *See FG Hemisphere Assocs.*, 447 F.3d at 842.

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[16] Based on facts such as the English language of the BSA, a September 2004 Limited Power of Attorney document bearing Wye Oak's U.S.-based contact information and corporate seal, and the fact that the BSA required notices to be sent to Wye Oak's U.S.-based address. *See* Pl.'s PFFCL at 17-21.

C. Iraq's Nonpayment Directly Resulted in the Cut-Off of the Flow of Data, Services, Capital, and Personnel Between the United States and Iraq

This Court's conclusion that Wye Oak's first two direct effects arguments do not carry the day is not the end of the inquiry, because Wye Oak next argues that "Iraq's breach cut off the flow of capital, personnel, data, and intangible services between the United States and Iraq." Pl.'s PFFCL at 22. Wye Oak points to two main examples of such a cut-off: (1) "Iraq disrupted Wye Oak's subcontract with CLI [Construction ("CLI")], a U.S. company that was also to operate in Iraq," and (2) "[Iraq] starved Wye Oak of the funds it needed to expand its U.S. presence for its own operations in the United States and Iraq, forced Wye Oak to cease providing administrative and digital services in the United States related to operations in Iraq, disrupted the flow of data and services between the two countries, and ultimately required Wye Oak to withdraw[] its personnel from Iraq because they were not being paid." *Id.* at 10. Iraq argues that neither the facts nor the law support Wye Oak's theory. *See* Defs.' PFFCL at 23-24.

Based on its review of the extensive record and the parties' briefing, the Court concludes that Wye Oak has established that Iraq's nonpayment resulted in a direct effect in the United States based on the cut-off of data, services, capital, and personnel, and Iraq has failed to meet its burden to convince this Court otherwise.

1. Interference with Subcontractor Relationship is Not a Direct Effect

Wye Oak first claims that Iraq's nonpayment caused its relationship with its main subcontractor to be disrupted. Specifically, Wye Oak claims that Iraq's failure to pay the invoices prevented Wye Oak from proceeding with a formal subcontracting relationship with CLI, another Pennsylvania-based corporation of which Dale Stoffel was a co-owner. *See* Pl.'s PFFCL at 27. Iraq insists that any inability to form this subcontracting relationship, if it occurred, does not qualify as a direct effect for FSIA purposes because the BSA did not expressly require Wye Oak to hire CLI as a subcontractor nor was there a formal, written agreement between Wye Oak and CLI. *See* Defs.' PFFCL at 97-99.

Wye Oak's argument turns on the proper interpretation of *Cruise Connections Charter Mgmt. 1, LP v. Attorney General of Canada*, 600 F.3d 661 (D.C. Cir. 2010). In that case, a U.S. company signed a contract with the Canadian government which, by its terms, required the U.S. company to subcontract with U.S.-based cruise lines as part of the U.S. company's performance in Vancouver. *See Cruise Connections*, 600 F.3d at 662. Under the subcontracts, the U.S. company "would have received a flat fee" from the cruise lines while performing. *See id.* at 664-65. The U.S. company and U.S. cruise lines had already drafted the subcontracts and were waiting on final assurances from the Canadian government regarding the cruise lines' tax liability before consummating the agreements. *See id.* at 663-64. The Circuit found that the Canadian government's termination of the main

contract, thereby scuttling the subcontracts, caused a direct effect in the United States because the action's result was that "revenues that would otherwise have been generated in the United States were 'not forthcoming.' *See id.* at 665 (citing *Weltover*, 504 U.S. at 619).

After review, the Court concludes that Wye Oak has not met its burden to demonstrate that its inability to enter into a formal subcontracting relationship with CLI was a direct effect in the United States caused by Iraq's nonpayment. Like the U.S. company and its would-be subcontractors in *Cruise Connections*, Wye Oak and CLI drafted an extensive, written subcontract agreement; the document introduced at trial totaled some 60 pages. *See* Pl.'s Ex. 25. And like *Cruise Connections*, the subcontract agreement went unsigned while Wye Oak and CLI awaited action from Iraq. *See* Trial Tr. 12/18/18 AM 53:8-25 (Stoffel). But unlike *Cruise Connections*, and dispositively, the BSA did not require Wye Oak to hire CLI.

Wye Oak's response is that Iraq was aware of Wye Oak's need for and intention to hire CLI, even if not expressly stated in the BSA, due to factors such as the nature and scope of the work under the IMERP, CLI's connection to Wye Oak, and CLI's experience working on similar projects in Iraq. *See* Pl.'s PFFCL at 18-20. However, the possibility of Wye Oak hiring CLI is not enough to show a direct effect under the standard laid out in *Cruise Connections*. In that case, the Circuit focused on the fact that the subcontracts guaranteed a flat fee to the U.S. company, that the subcontracts were required by the main agreement, and that the Canadian government's actions interfering with the

subcontracts necessarily deprived the U.S. company of guaranteed revenue. *See Cruise Connections*, 600 F.3d at 662-65. Here, the record does not establish what revenues, if any, Wye Oak was deprived of due to its inability to consummate its relationship with CLI.[17]

Moreover, and distinct from *Cruise Connections*, Wye Oak engaged other subcontractors even though Wye Oak could not finalize its agreement with CLI. Wye Oak hired local Iraqi subcontractors to complete some aspects of the IMERP. *See* Trial Tr. 12/18/18 PM 64:10-24 (Stoffel); Trial Tr. 12/21/18 PM 94:2-14 (Testimony of Dr. John Gale). Thus, Iraq's nonpayment did not prevent Wye Oak from hiring *any* subcontractors, just *this* one. Even if CLI's unique experience in Iraq and the field would have made CLI the best subcontractor possible for the job, the lack of an obligation on Wye Oak's part to hire CLI as well as the lack of guaranteed revenue for Wye Oak means that the argument about interference with the subcontractor relationship, standing alone, does not establish a direct effect.[18]

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[17] Dale Stoffel, as sole owner of Wye Oak and part-owner of CLI, may have lost out on revenue. *See* Felix Dep. at 7:3-5. Still, the Court has not been presented with evidence of what share of the revenue, if any, Dale Stoffel would have received. Regardless, additional fact-finding is not necessary because the Court, which "is in a much better position than [the Circuit is] to analyze Wye Oak's direct effects arguments in the first instance," has determined that Wye Oak has established a direct effect on two other bases. *Wye Oak II*, 24 F.4th at 703.

[18] Iraq advances other arguments concerning why the subcontractor relationship is insufficient, none of which have merit. Iraq argues that the subcontractor relationship theory is

2. Cut-Off of Data, Services, Capital, and Personnel is a Direct Effect

Wye Oak finds firm footing, at last, in the second part of its third argument. Wye Oak insists that Iraq's nonpayment disrupted flows of data, services, capital, and personnel between the United States and Iraq, thus establishing a direct effect. Wye Oak bases its legal argument in *McKesson HBOC, Inc. v. Islamic Republic of Iran*, 271 F.3d 1101 (D.C. Cir. 2001), *partially on other grounds*, 320 F.3d 280 (D.C. Cir. 2003). In that case, McKesson, a U.S. corporation, owned a minority stake in an Iranian dairy farm, a relationship that involved McKesson's contribution of capital and members to the farm's board of directors in return for McKesson's receipt of annual dividends. *McKesson*, 271 F.3d at 1104. Both the capital and personnel flows ceased in the wake of the 1979 Islamic Revolution and the Iranian government's takeover of the dairy farm. *Id.* The Circuit held that the district court properly maintained subject-matter jurisdiction

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insufficient because it did not have any role in selecting CLI or subcontractors. *See* Defs.' PFFCL at 99. "The FSIA, however, requires only that effect be 'direct,' not that the foreign sovereign agree that the effect would occur." *Cruise Connections*, 600 F.3d at 665 (citing *Weltover*, 504 U.S. at 618). Iraq also disputes that CLI was a U.S. corporation because the address listed for CLI in the draft subcontract agreement is in Iraq. *See* Defs.' PFFCL at 58. This is incorrect because a corporation's mailing address alone does not dictate its domicile. *Richard v. Bell Atlantic Corp.*, 946 F. Supp. 54, 73-74 (D.D.C. 1996). Finally, Iraq contends that any performance by CLI was not required to be in the United States. *See* Defs.' PFFCL at 97. Circuit precedent plainly holds that a direct effect in the United States can be established even if the subcontractor performance is to occur outside of the country. *See Cruise Connections*, 600 F.3d at 662.

over McKesson's suit alleging illegal expropriation by Iran because Iran's action resulted in two independent direct effects (1) "the cut-off of the constant flow of capital, management personnel, engineering data, machinery, equipment, materials and packaging between the two companies," and (2) "the abrupt end of McKesson's role as an active investor." *McKesson*, 271 F.3d at 1105 (internal quotations and citations omitted).

Wye Oak carried out a number of activities in the United States daily in connection with the IMERP program. As the Circuit already determined, "[t]here is no error, much less clear error, with respect to the district court's determination that 'Wye Oak performed work in the United States' " to support the BSA. *Wye Oak II*, 24 F.4th at 700 (quoting *Wye Oak I*, 2019 WL 4044046, at *15). Specifically, this Court found that David Stoffel "focused on writing a computer program that could ultimately be used to inventory and track all the equipment Wye Oak was refurbishing and would potentially broker for sales," *Wye Oak I*, 2019 WL 4044046, at *24 (citing Trial Tr. 12/18/18 AM 38:11-41:17 (Stoffel); Pl.'s Ex. 65 (D. Stoffel Logistics Application Code)), that he "oversaw the company's electronic communications from his perch in the U.S.," *id.* (citing Trial Tr. 12/18/18 AM 44:9-19 (Stoffel)), and that "Wye Oak performed administrative activities in the U.S. in support of the BSA" including "purchas[ing] computer equipment and materials, such as software, for the business in

the U.S."[19] *Id.* at 15 (citing Trial Tr. 12/18/18 AM 44:5-10 (Stoffel)).

The constant connection between Wye Oak's U.S. and Iraqi operations bears worth repeating: David Stoffel testified that because "[e]-mail communications and internet connections were challenging at that time, particularly in Iraq," "part of [his] regular job was to read and receive or at least review every e-mail that came into the [server]" and to follow up with Wye Oak representatives, through email or telephonic communications, as needed. Trial Tr. 12/18/18 AM 44:11-19. Moreover, David Stoffel maintained a computer server in Ohio and paper files in Pennsylvania related to the IMERP. Trial Tr. 12/18/18 AM 31:7-32:1, 32:25-33:5, 44:11-20 (Stoffel). These activities necessarily involved managing the flow of data and services, and these activities stopped when Wye Oak stopped working on the IMERP as a result of Iraq's nonpayment.

In addition to the cut-off of the flow of data and services between the United States and Iraq, Iraq's nonpayment disrupted capital flows between the two countries. Wye Oak had clear plans to use funds from the project to expand its business in the United States to support the BSA and the company's work in Iraq.

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[19] Iraq seems to argue that because the BSA did not specifically charge Wye Oak with carrying out work in the United States, "[t]he work David Stoffel did in the United States was not compensable under the BSA" and, in Iraq's view, cannot be considered in the direct effects analysis. *See* Defs.' PFFCL at 53. The Court is aware of no authority espousing such a narrow view of the commercial activities exception and rejects such a limitation.

Pl.'s PFFCL at 21. For example, at trial, David Stoffel testified that Wye Oak planned to expand its computer infrastructure and hire additional U.S.-based personnel to support the IMERP program. Trial Tr. 12/18/18 AM at 49:6-18, 54:22-55:9. Iraq's nonpayment obviously, and predictably, prevented Wye Oak from carrying on these activities. To be sure, it may often be the case that a U.S. company that signs a business contract with a foreign sovereign has plans to do more business in the United States, and that the breaching foreign sovereign's nonpayment necessarily disrupts those plans. These facts alone would not create subject-matter jurisdiction based on direct effect. However, the relationship between Wye Oak and Iraq was not that of a typical contractor and customer. The parties participated in commercial activity intertwined with a consequential transnational mission. The size, scope, and importance of the project, as well as Wye Oak's existing infrastructure—or lack thereof—was apparent from the start of the relationship.

Along with the flow of data, services, and capital between the two countries, Wye Oak facilitated the flow of personnel between United States and Iraq, and Iraq's failure to pay resulted in both the loss of human life and the halting of the flow of Wye Oak personnel between the United States and Iraq. Prior to December 2004, Wye Oak personnel, particularly Dale Stoffel, made frequent trips between the United States and Iraq. Pl.'s PFFCL at 30-31. Evidence at trial established that Dale Stoffel last traveled to Iraq in early December 2004 in an attempt to secure payment and that on December 8, 2004, Dale Stoffel

and CLI representative Joe Wemple were shot and killed on their way to Baghdad to arrange for funding to be released later that day. Trial Tr. 12/18/18 PM 5:3-6:11 (Stoffel); Pl.'s Ex. 42 (Emails between W. Felix and Capt. J. O'Sullivan).[20] William Felix, Dale Stoffel's successor as Wye Oak's chief executive officer, testified that the deaths of Dale Stoffel and Joe Wemple resulted in the cessation of all travel by Wye Oak and CLI personnel from the United States to Iraq.[21] Felix Dep. 48:24-49:7. *See* Pl.'s Ex. 49 (Email from W. Felix to Gen. D. Petraeus and others); Trial Tr. 12/18/18 PM 50:13-16 (Stoffel); Trial Tr. 12/19/18 PM 84:10-16 (Man).

In addition to the disruption of Wye Oak personnel traveling in support of the IMERP, Iraq's nonpayment dismantled the larger personnel network Wye Oak was building. As Iraq concedes, Professor Nicholas Beadle, the coalition's senior advisor to the MoD at the time, testified at trial that one of the reasons that Wye Oak was especially well-qualified to carry out the IMERP was its extensive contact list of experts in refurbishing Soviet military equipment. *See* Defs.' PFFCL at 54,61 (citing Trial Tr. 12/20/18 PM 44:8-

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[20] As this Court previously stated, "[b]ut for MoD's breach of the BSA, Dale Stoffel may very well not have been murdered." *Wye Oak I*, 2019 WL 4044046, at *33.

[21] Wye Oak notes that Dale Stoffel's death caused lasting emotional impacts on William Felix and David Stoffel as well as Dale Stoffel's widow and four children. Pl.'s PFFCL at 26-27. This Court draws no conclusion as to whether a foreign sovereign's commercial activity causing a direct emotional effect on individuals in the United States, if true, would be sufficient to establish jurisdiction under 28 U.S.C. § 1605(a)(2)'s third clause.

45:2). And David Stoffel testified that Wye Oak was in the process of building that network. *See* Defs.' PFFCL at 54-55 (citing Trial Tr. 12/18/18 PM 64:10-24; 65:5-9). This network consisted of representatives from Ukraine, Moldova, Belarus, and Russia, in addition to Wye Oak personnel and local Iraqi employees. *See* Defs.' PFFCL at 63 (citing PI.'s Ex. 8.9-8.10 (IMERP Presentation Slides), Pl.'s Ex. 11 (Letter from D. Stoffel to M. Morozov), Felix Dep. at 103:2, Trial Tr. 12/18/18 PM 16:8-11; 65:17-20 (Stoffel)). Iraq's nonpayment directly resulted in Wye Oak's inability to continuing building or maintaining this network.[22]

Iraq's arguments to the contrary are unavailing. Iraq first contends that *McKesson* does not apply to Wye Oak's case because "McKesson was a *substantial* investor" and Iran's actions "interrupted *substantial* flows of McKesson personnel, equipment, and technical know-how from the United States to Iran." *See* Defs.' PFFCL at 23 (emphases added) (citing *Foremost-McKesson, Inc. v. Islamic Republic of Iran*, 905 F.2d 438, 451 (D.C. Cir. 1990)). This argument is a red herring: nothing in the *McKesson* case states or even implies that a substantiality showing is required to establish a direct effect. What's more, Iraq's citation to pre-*Weltover* precedent is ineffective in the face of the Supreme Court's clear command: "[W]e reject the

[22] Iraq seems to suggest that a disruption to personnel cannot serve as a direct effect if the personnel were non-Americans. *See* Defs.' PFFCL at 53-54. *McKesson* imposes no such requirement. A direct effect is established when the foreign sovereign's actions prevent personnel affiliated with the U.S.-based company from carrying on their roles. *See McKesson*, 271 F.3d at 1105-06.

suggestion that § 1605(a)(2) contains any unexpressed requirement of 'substantiality.'" *Weltover*, 504 U.S. at 618. Even if some substantiality standard were required, the facts demonstrate that the effect of nonpayment here was indeed substantial in its disruption of data, services, capital, and personnel between the United States and Iraq.

Iraq also argues that Wye Oak's inability to expand or continue its U.S. operations "is an inherently indirect consequence of [MoD]'s nonpayment and irrelevant to [MoD]'s obligations under the BSA" because the agreement did not contemplate Wye Oak's "business activities" in the United States. Defs.' PFFCL at 99. In an apparently related argument, Iraq contends that any flow of personnel or information "was entirely incidental to the express terms of the BSA and solely for Wye Oak's account." *Id.* at 96-97. Iraq misconstrues Wye Oak's argument and thus its entitlement to jurisdiction. Wye Oak advances, and the trial record establishes, that Iraq's failure to pay the invoices as required by the BSA prevented Wye Oak from expanding or continuing U.S. operations *devoted to the IMERP*, not the company's activities in general. *See* Pl.'s PFFCL at 33-34. This is a clear example of a direct effect in the United States. And the foreseeability of the direct effect to the foreign sovereign is immaterial for the jurisdictional analysis. *See Cruise Connections*, 600 F.3d at 665.

Iraq next seems to suggest, unconvincingly, that Wye Oak's status as an independent contractor, and not an investor, renders the instant case sufficiently distinguishable from *McKesson*. *See* Defs.' PFFCL at 24-25, 96-97. The U.S. company's status as an investor

in a foreign corporation had potential relevance in *McKesson* only as another, independent example of a direct effect in the United States of a foreign country's action, separate and apart from the direct effect consisting of the cut-off of capital, data, personnel, equipment, and materials. *See* 271 F.3d at 1105. 'Accordingly, Wye Oak's status as an independent contractor is irrelevant to the direct effect argument it advances and this Court accepts.

Finally, Iraq's insistence that "[t]his case more closely resembles" the Circuit's opinion in *Rong v. Liaoning Province Gov't*, 452 F.3d 883 (D.C. Cir. 2006) falters on several levels. From the start, the primary issue in that case was whether a Chinese province's takeover of a business in which the plaintiffs had invested was "commercial activity" under 28 U.S.C. 1605(a)(2)'s third clause, and, because the Circuit determined it was not, the court expressly did not consider the plaintiffs' direct effects argument. *See Rong*, 452 F.3d at 889. Therefore, the majority's position in that case does not shed any light on the issue at bar. Iraq's invocation of Judge Karen Henderson's concurrence in that case is equally unhelpful. Judge Henderson would have also found there not be subject-matter jurisdiction under the FSIA because the province's action did not cause a direct effect in the United States. *See id.* at 515 (Henderson, J., concurring). In reaching her decision, Judge Henderson distinguished the alleged direct effect in *Rong*—"only the monetary loss of a Chinese national resident in the U.S."—from the direct effect in *McKesson*—"not merely nonpayment but also cessation of the 'flow of capital, management

personnel, engineering data, machinery, equipment, materials and packaging' between Iran and the United States." *See id.* (internal citation omitted). Iraq responds that Wye Oak's loss, like that of the unsuccessful plaintiffs in *Rong*, was merely monetary. Defs.' PFFCL at 97. But as previously outlined, Wye Oak has established several other losses beyond payment due under the invoices and lost profits. Thus, Wye Oak has shown a direct effect consistent with Judge Henderson's position in *Rong*.

Based on the Court's review of the record, Iraq's nonpayment resulted in the cut-off of capital, personnel, data, and intangible services between the United States and Iraq, a flow which occurred daily for months. Thus, Iraq's action created a direct effect in the United States.[23]

D. Iraq's Nonpayment Directly Affected U.S. Diplomatic and Military Operations in the United States

Wye Oak's final proffered example of a direct effect is that "Iraq's breach directly affected U.S. military and diplomatic operations." Pl.'s PFFCL at 11. In terms of harm to diplomatic operations, Wye Oak argues there was a direct effect in the United States because various U.S. government officials in the

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[23] Iraq expresses a concern that finding a direct effect here would expose a foreign sovereign to U.S. courts' jurisdiction any time the sovereign hires a U.S. company to carry out services. *See* Defs.' PFFCL at 24. The Court takes under consideration the defendants' concern about expanding FSIA jurisdiction beyond the line provided for in this Circuit's case law but is confident that the record here supports subject-matter jurisdiction in this highly unusual, fact-specific instance.

legislative and executive branches "became involved in attempting to get Wye Oak paid so the IMERP program could get back on track." *Id.* at 34. Additionally, because Wye Oak's work on the "IMERP program was critical to the effort to return U.S. troops to the United States from Iraq[,]" Wye Oak's inability to complete the program due to nonpayment delayed the return of U.S. forces from Iraq to the United States. *Id.* Iraq disputes that its breach of the BSA caused any effect on U.S. diplomatic or military operations, and, if it did, the effect was only in Iraq. Defs.' PFFCL at 100-01. Additionally, Iraq argues that the IMERP program was only a part of the overall U.S. exit strategy, such that any changes to U.S. policy due to hiccups in the IMERP program caused by Iraq's nonpayment would not be sufficiently direct for purposes of 28 U.S.C. § 1605(a)(2)'s third clause. *Id.* at 101-02. The Court will address each argument in turn.

1. Involvement by U.S. Government Officials is a Direct Effect

It is undisputed that, after Iraq refused to pay Wye Oak's invoices, Wye Oak corresponded with a variety of U.S. governmental officials through written, telephonic, and in-person communications in an attempt to secure payment. Such officials included then-Senator Rick Santorum, then-Deputy Under Secretary for International Technology Security John Shaw, the office of then-Secretary of Defense Donald Rumsfeld, and others. *See* Trial Tr. 12/18/18 AM 59:17-60:20 (Stoffel); *Wye Oak I*, 2019 WL 4044046, at *15. After corresponding or meeting with Wye Oak, certain U.S. government officials took action to

attempt to secure payment for Wye Oak. For example, upon learning of Wye Oak's nonpayment predicament, then-Senator Rick Santorum contacted the State Department and asked what actions that department had taken to help Wye Oak. *See* Pl.'s Ex. 60.6 (Letter from Sen. R. Santorum to Asst. Sec. Kelly). The State Department reported that it had discussed the matter with the Department of Defense. *See* Pl.'s Ex. 60.9-60.10 (Letter from Asst. Sec. Kelly to Sen. R. Santorum). Additionally, after Wye Oak representatives met with Deputy Shaw, he appointed a Defense Department representative to serve as an advisor to the MoD and to make weekly reports to the Defense Department. Trial Tr. 12/19/18 PM 91:19-92:5; 94:23-95:10 (Marr). Following Dale Stoffel's death, William Felix sent a letter to then-Senator Arlen Spector as another effort to receive payment. *See* Pl.'s Ex. 51.

The thrust of Iraq's opposition to the notion that efforts by U.S. diplomatic officials to secure payment on behalf of Wye Oak cannot be a direct effect centers on—and misunderstands—the causation standard required under the FSIA. Iraq first argues that, under the prevailing law, the "immediate consequence" of Iraq's nonpayment must be felt in the United States and, because "[MoD]' s nonpayment was felt first by Wye Oak *in Iraq*[,]" this cannot be a direct effect. *See* Defs.' PFFCL at 100 (emphasis in original). Iraq cites *Millicom Int'l Cellular v. Republic of Costa Rica*, 995 F. Supp. 14 (D.D.C. 1998) as authority for this proposition. In that case, cellular telephone operators based in Luxembourg and Costa Rica alleged that the Costa Rican government had engaged in a number of

illegal activities preventing the operators' customers from placing calls to the United States on the operators' network and instead requiring customers to place calls on the Costa Rican government's network. *See Millicom*, 995 F. Supp. at 21. The district court found that there was no direct effect in the United States because the "immediate consequence" of the sovereign's activity was the operators' "inability to compete in that market," not the customers' inability to place international calls to the United States. *Id.*

There are several reasons why Iraq's position, and its reliance on *Millicom*, is mistaken. The Circuit has not adopted the district court's strict reading of the immediacy requirement. To the contrary, the Circuit has consistently rejected a "highly restrictive causation requirement" in the FSIA context. *See EIG Energy*, 894 F.3d at 346 (citing *Kilburn v. Socialist People's Libyan Arab Jamahiriya*, 376 F.3d 1123 (D.C. Cir. 2004)). Most recently, the Circuit limited a direct effect only in so far as it is not "purely trivial" or too "remote and attenuated." *Valambhia*, 964 F.3d at 1140 (citing *Weltover*, 504 U.S. at 618). Here, while Wye Oak certainly felt the effect of Iraq's nonpayment in Iraq, the company also felt the effect contemporaneously, and non-trivially, in the United States.

In a related argument, Iraq contends that the meetings and correspondence Wye Oak had with U.S. officials do not satisfy the immediacy requirement because they "were dependent upon intervening events and actors; Wye Oak chose to set up such meetings, the members of Congress or their staff or Pentagon officials decided to accept those meetings,

and then those individuals chose whether or not to take any action." *See* Defs.' PFFCL at 92-93.[24]

The two, out-of-circuit cases Iraq cites in another effort to support its strict construction of immediacy are inapposite. *Frank v. Antigua & Barbuda* concerned an Antigua-based bank that engaged in a ponzi scheme by selling fraudulent certificates of deposit. 842 F.3d 362, 365-66 (5th Cir. 2016). The Fifth Circuit held that the Antiguan government had not caused any direct effect in the United States when U.S.-based investors bought the fraudulent certificates, even though "Antigua may have helped facilitate" the scheme, because the bank's "criminal activity served as an intervening act interrupting the causal chain between [the] Antigua[n government's] actions and any effect on investors." *Id.* at 370. In *Virtual Countries, Inc. v. Republic of South Africa*, the Second Circuit held that there was no direct effect in the United States when South Africa issued a negative press release about a U.S. company's business, South African media outlets publicized the press release, the U.S. company's potential investors and potential business partner learned of the press release, and then the potential investors and business partner declined to engage with the U.S. company. 300 F.3d 230, 237 (2d Cir. 2002). Both cases cited the

[24] In the same section, Iraq cites to two cases for the proposition that courts in this Circuit have not considered the involvement of U.S. government officials in remedying a contractual breach to be a "direct effect." *See* Defs.' PFFCL at 103 (citing *Friedman*, 464 F. Supp. 3d at 65 and *Odhiambo*, 764 F.3d at 45). This statement is misleading. Neither case specifically addressed the question.

specific concern that "[d]efining 'direct effect' to permit jurisdiction when a foreign state's actions precipitate reactions by third parties, *which reactions then have an impact on a plaintiff*; would foster uncertainty in both foreign states and private counter-parties." *Id.* at 238 (emphasis added). Such a concern is not present here. It was Iraq's actions—failing to pay the invoices—that caused the impact on Wye Oak, which then precipitated actions or reactions by third parties (U.S. government officials).

Evidence at trial established that Iraq was aware that Wye Oak was not just any U.S. company, but one that was closely connected to and supported by the U.S. government. Part of Wye Oak's pitch to Iraq was that it "had government contacts throughout the world." *Wye Oak I*, 2019 WL 4044046, at *4 (citing Trial Tr. 12/18/18 PM 65:7-9 (Stoffel)). MoD ultimately hired Wye Oak "at the recommendation of the United States government[.]" *Wye Oak II*, 24 F.4th at 692. And "[a]lthough the IMERP program [was] an Iraqi funded program, it [was] clearly a joint program with the US and Coalition Forces." Pl.'s Ex. 36 (Email from D. Stoffel to Capt. J. O'Sullivan). Thus, Iraq's commercial activity, in the form of the IMERP, was inextricably tied up in its relationship with the U.S. government, and by extension, Wye Oak's relationship with the U.S. government. Because of these close connections, U.S. government officials' attempts to secure payment for Wye Oak were an "immediate consequence" of Iraq's nonpayment. *See Weltover*, 504 U.S. at 618.

2. Impact on U.S. Military Operations is a Direct Effect

Wye Oak's observation that Iraq's nonpayment had a direct impact on U.S. military operations in the United States has even more force. Evidence introduced at trial repeatedly illustrated the importance of the IMERP program to the U.S. military's overall strategy with respect to Iraq after the fall of Saddam Hussein's regime. As General Petraeus testified, Wye Oak's work on the IMERP was the "centerpiece" to "the establishment of a mechanized and armored division for Iraq, starting with a battalion the would be available . . . for the elections in January of 2005." Petraeus Dep. at 34:1-4. *See* Trial Tr. 12/17/18 PM at 36:7-10 (Clements) ("So the Iraqi forces had to step up to the plate by the 30th of January. They needed the weapons and equipment to do it. And the target was to equip the Iraqi armored brigade, and get them on the streets by then"); Trial Tr. 12/19/18 AM 25:9-25 (Neal). Professor Beadle, whose "testimony was especially convincing," *Wye Oak I*, 2019 WL 4044046, at *11 n.3, further testified that "the obvious inference from managing to get an [Iraqi] armed forces, which included a small element of the Air Force and Navy as well, in due course, was the faster that he [Gen. Petraeus, through the IMERP program] could build it, then the easier it was for the U.S. and for the Coalition troops to step back."). Trial Tr. 12/20/18 PM 44:3-7. General Petraeus similarly added: "The entire concept for Iraq from the U.S. and coalition perspective was I think succinctly stated by President George W. Bush when he said, As the stand

up, the Iraqi security forces, we will stand down"). Petraeus Dep. at 29:1-5.

Communications made shortly before and after Dale Stoffel's death underscored the continuing importance the U.S. military placed on the program. For example, on December 2, 2004, Dale Stoffel wrote an email to Captain John "Ronnie" O'Sullivan, the deputy to Brigadier General Clements, a key U.S. military representative on the IMERP program in Iraq, relaying his impressions from meetings he had the previous day: "The senior Pentagon people and the Secretary's Office are really intense and passionate about the IMERP program and its success. *In their words, there is nothing of higher priority in theater than this program with respect to its success and speed*." *See* Pl.'s Ex. 36 (emphasis added). Shortly after Dale Stoffel's death, General Petraeus wrote to his widow emphasizing her late husband's accomplishments, particularly the fact that "Iraq is on track to have a battalion's worth of soldiers trained and equipped prior to January's elections" and "[n]one of this would have been possible without your husband's visionary leadership, relentless drive, and complete dedication." Petraeus Dep. 26:23-27:25; Pl.'s Ex. 43. And recall, re-equipping the Iraqi military was a necessary first step for the United States and coalition forces to withdraw from Iraq. Petraeus Dep. at 20:19-21:2, 28:19-30:3.

In its main attempt to rebut Wye Oak's argument, Iraq again disputes the proper definition of causation. Iraq posits that any effect that its breach may have had on overall U.S. military policy with respect to Iraq is too attenuated to be a direct effect. Defs.' PFFCL at

101-02. In support, Iraq cites *Princz v. Federal Republic of Germany*, 26 F.3d 1166, 1172 (D.C. Cir. 1994) and *Energy Allied Int'l Corp. v. Petroleum Oil & Gas Corp. of South Africa*, Civ. No. H-082387, 2009 WL 2923035, at *4 (S.D. Tex. Sept. 4, 2009). In *Princz*, the Circuit found that the work the plaintiff performed as a slave laborer in Poland and Germany for Nazi-supporting employers did not have a direct effect in the United States because "[m]any events and actors necessarily intervened between" his work and the United States' military effort against Nazi-controlled territories. 26 F.3d at 1172. In *Energy Allied Int'l Corp.*, the district court determined that a hypothetical oil shortage in the United States resulting from a South African state-owned oil company's refusal to participate in a joint venture with a Texas corporation in Egypt was too attenuated to serve as a direct effect. 2009 WL 2923035, at *4. Both cases are far afield from Wye Oak. Iraq's nonpayment caused an impact on the U.S. military that was far from hypothetical. Multiple U.S. military leaders linked the overall success of the U.S. mission in the Iraq with Wye Oak's work to equip the Iraqi military and the Iraqi military's corresponding ability to achieve self-sufficiency.[25] Wye Oak was only able to equip one Iraqi brigade, *Wye Oak I*, 2019 WL 4044046,

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[25] Iraq expresses concern that there are not enough facts in the record for the Court to determine "when U.S. forces would have departed Iraq for the U.S. had [the MoD] paid Wye Oak's Invoices by October 28, 2004." *See* Defs.' PFFCL at 102. The Circuit recently rejected such "a highly restrictive causation requirement under which contributing factors readily and predictably caused by the defendant's same act would preclude jurisdiction." *See EIG Energy*, 894 F.3d at 346.

at *19. While still a success, one brigade was not sufficient for Iraqi forces to take on enough security responsibility and allow the coalition forces to withdraw. *Id.* at *3-4. And unlike in *Princz*, there are no intervening actors that cut off the chain of causation between Iraq's nonpayment and the impact on the U.S. military's readiness to leave Iraq.

Iraq was repeatedly made aware of the close relationship between Wye Oak and the U.S. military. In July 2004, before Iraq and Wye had finalized the BSA, Iraqi Defense Minister Hazim al-Shalan wrote to General Petraeus requesting access to coalition-controlled military equipment depositories in Taji. *See* Pl.'s Ex. 2. In granting the request, General Petraeus wrote: "I fully support the Iraqi Ministry of Defense in initiating and expediting the Iraqi Military Equipment Recovery Project." *See* Pl.'s Ex. 3. He further stressed that the U.S. military would "provide all necessary documentation and escort" for the MoD and Wye Oak delegations. *Id.* Representatives from the U.S. military attended key meetings between the MoD and Wye Oak. *See, e.g.*, Trial Tr. 12/20/18 AM 13:21-14:19, 33:3-34:25 (Marc); Pl.'s Ex. 20.6 (Letter from P. Man- to MoD); Trial Tr. 12/17/18 PM 19:4-20:11 (Clements); Trial Tr. 12/20/18 PM 71:17-72:16 (Beadle). And the U.S. military worked shoulder-to-shoulder with Wye Oak on its IMERP operations. *See* Trial Tr. 12/19/18 AM 42:1-43:4 (Neal); *See* Pl.'s Ex. 64 (Photographs). Thus, through statements and actions directed to or in the presence of Iraq, the U.S. military demonstrated its commitment to Wye Oak's work.

Iraq, seemingly recognizing this fact, accuses Wye Oak of impermissibly co-opting effects on the U.S. military, a third party, into the direct effect analysis. *See* Defs.' PFFCL at 103-04. This argument is easily dispatched of through the cases that Iraq itself cites. Most critically, the Circuit has unambiguously stated that "[n]othing in the FSIA requires that the 'direct effect in the United States' harm the plaintiff."[26] *Cruise Connections*, 600 F.3d at 666 (citing 28. U.S.C. § 1605(a)(2)). "The commercial activities exception requires only that the foreign government's act outside the territory of the United States cause a direct effect in the United States." *Id.* (internal citation, quotations, and alterations omitted). This requirement is clearly met here. And, as the Circuit has counseled, the relationship between the direct effect and the plaintiff's injury is relevant to the question of damages, not whether this Court has *jurisdiction* over the case. *Id.*

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[26] Puzzlingly, Iraq similarly looks to side-step *Exxon Mobil Corp. v. Corporation CIMEX S.A.*, 534 F. Supp. 3d 1, 20 (D.D.C. 2021). which relied on the same proposition from *Cruise Connections*, by apparently arguing that the FSIA' s lack-of-injury-to-the-plaintiff requirement somehow ought to be viewed differently in tort and contract cases. *See* Defs.' PFFCL at 104. The Court sees no basis for this distinction. In addition, the Court is unsure what effect Iraq's position would even have on the current case, as both this case and *Cruise Connections* involved breach of contract claims. Moreover, the Court is unsure why Iraq cites an out-of-circuit district court case, *Morris v. People's Republic of China*, 478 F. Supp. 2d 561, 569 (S.D.N.Y. 2007), for a similar position, *see* Defs.' PFFCL at 103-04, as the case suggests a more expansive reading of subject-matter jurisdiction than the Circuit permits.

In sum, Iraq's nonpayment of Wye Oak caused a direct effect in the United States by disrupting a program that bore directly on the U.S. military's readiness to withdraw from Iraq. That, along with the other bases identified above, is sufficient to abrogate Iraq's sovereign immunity in this suit.

* * *

"As the FSIA cases consistently demonstrate, there is no single factual *sine qua non* of a United States direct effect." *Odhiambo*, 764 F.3d at 46 (Pillard, J., concurring in part) (emphasis in original). Wye Oak's case is a quintessential example of "[w]here the facts, taken together, show that a foreign government's commercial activity has a direct effect in the United States," and thus "claims in United States court relating to that commercial activity are not barred by the FSIA." *Id.* Consistent with this tradition, the Court therefore holds that Iraq's breach of the BSA caused a direct effect in the United States because its nonpayment to Wye Oak, a U.S. company carrying out a program essential to U.S. diplomatic and military policy, resulted in the cut-off of the flow of capital, personnel, data, and intangible services between the United States and Iraq, triggered actions by top U.S. officials, and straightforwardly impacted U.S. military operations. That is precisely an effect that is "sufficiently 'direct' and sufficiently 'in the United States' that Congress would have wanted an American court to hear the case[.]" *Frank*, 842 F.3d at 369 (quoting *Tex. Trading & Milling Corp. v. Fed. Republic of Nigeria*, 647 F.2d 300, 313 (2d Cir. 1980).

IV. CONCLUSION

This Court concludes that Iraq's breach of the BSA caused "direct effects" in the United States for the purpose of the third clause of 28 U.S.C. § 1605(a)(2) and thus an exception to Iraq's presumption of sovereign immunity applies. Therefore, the Court properly maintains subject-matter jurisdiction over the case and will re-enter judgment for Wye Oak. A separate and consistent Order shall issue this date.

SIGNED this 20th day of December, 2022.

/s/ Royce C. Lamberth
Royce C. Lamberth
United States District Judge

APPENDIX C

UNITED STATES COURT OF APPEALS,
DISTRICT OF COLUMBIA CIRCUIT

No. 19-7162
Consolidated with 19-7169

WYE OAK TECHNOLOGY, INC.,

Appellee

v.

REPUBLIC OF IRAQ AND MINISTRY OF DEFENSE OF THE REPUBLIC OF IRAQ,

Appellants.

Appeals from the United States District Court
for the District of Columbia
(No. 1:10-cv-01182)

Argued: September 23, 2021

Decided: February 4, 2022

Before: HENDERSON and JACKSON, Circuit Judges, and SENTELLE, Senior Circuit Judge.

JACKSON, Circuit Judge:

This appeal arises from a fully litigated contract dispute between an American defense contractor and a foreign government that resulted in a multimillion-dollar plaintiff's judgment. Wye Oak Technology, Inc. first filed its complaint against the Republic of Iraq in the U.S. District Court for the Eastern District of Virginia ("EDVA"). Finding improper venue, that court transferred the case to the U.S. District Court for the District of Columbia ("DDC"), but not before flatly denying Iraq's motion to dismiss the complaint on sovereign immunity grounds. And when the DDC eventually entered judgment in Wye Oak's favor nearly a decade later, after an eight-day bench trial, it did so partly in reliance on an intervening ruling from the Fourth Circuit, which rejected Iraq's contention that none of the exceptions to sovereign immunity in the Foreign Sovereign Immunities Act ("FSIA"), 28 U.S.C. § 1602 *et seq.*, applied to Wye Oak's breach of contract claims.

To be specific, the Fourth Circuit held that because Wye Oak alleged that it had engaged in various acts inside the United States pursuant to the parties' agreement, the lawsuit could proceed under the second clause of the FSIA's commercial activities exception. *See* 28 U.S.C. § 1605(a)(2) (abrogating foreign sovereign immunity with respect to claims that are "based upon . . . an act performed in the United States in connection with commercial activity of the foreign state elsewhere"). Thus, we are now called upon to decide whether we agree with our sister circuit's FSIA interpretation (as applied in the context of the post-trial judgment in Wye Oak's favor that the

DDC has entered against Iraq). We must also determine, incidentally, whether the law of the case doctrine somehow constrains our own assessment of Iraq's alleged immunity at this stage of the case.

In the opinion that follows, we first reject Wye Oak's argument that Iraq's participation in the DDC bench trial implicitly waived its sovereign immunity for the purpose of the FSIA's waiver exception. We then explain that the law of the case doctrine does not require us to adhere to the Fourth Circuit's conclusions about the applicability of the FSIA's commercial activities exception, and, indeed, unlike the Fourth Circuit, we conclude that the second clause of 28 U.S.C. § 1605(a)(2) does not apply to the established facts of this case. But we do discern a plausible basis for sustaining the district court's jurisdictional ruling in the language of the commercial activity exception's *third* clause. *See* 28 U.S.C. § 1605(a)(2) (abrogating immunity if the action is "based upon . . . an act outside the territory of the United States in connection with a commercial activity of the foreign state elsewhere and that act causes a direct effect in the United States"). And we find that the district court is best positioned to evaluate (or develop) the record as necessary to determine, in the first instance, whether the facts support application of *that* provision of the FSIA.

Therefore, the district court's post-trial judgment is vacated to the extent that it is premised on a finding of subject-matter jurisdiction that rests on an erroneous interpretation of the second clause of the commercial activities exception, and this matter is remanded to the district court for a determination of

whether Iraq's breach of contract caused "direct effects" in the United States for the purpose of the third clause of 28 U.S.C. § 1605(a)(2).

I

The FSIA, 28 U.S.C. § 1602, *et seq*., affords the "sole basis for obtaining jurisdiction over a foreign state" in United States courts. *Argentine Republic v. Amerada Hess Shipping Corp.*, 488 U.S. 428, 434, 109 S.Ct. 683, 102 L.Ed.2d 818 (1989); *see also Samantar v. Yousuf*, 560 U.S. 305, 314, 130 S.Ct. 2278, 176 L.Ed.2d 1047 (2010). That statute "bars federal and state courts from exercising jurisdiction when a foreign state is entitled to immunity, and . . . confers jurisdiction on district courts to hear suits . . . when a foreign state is not entitled to immunity." *Diag Hum., S.E., v. Czech Republic-Ministry of Health*, 824 F.3d 131, 134 (D.C. Cir. 2016).

The FSIA establishes the general rule for granting foreign sovereign immunity, 28 U.S.C. § 1604, and it also makes that grant of immunity subject to nine exceptions, *see id.* §§ 1605–1607; *Mohammadi v. Islamic Republic of Iran*, 782 F.3d 9, 13–14 (D.C. Cir. 2015). The FSIA exceptions are exhaustive; if none applies to the circumstances presented in a case, the foreign state has immunity and the court lacks subject-matter jurisdiction. *Odhiambo v. Republic of Kenya*, 764 F.3d 31, 34 (D.C. Cir. 2014).

The two FSIA exceptions that are relevant to this appeal—waiver and commercial activity—appear at 28 U.S.C. § 1605(a)(1) and (2). In its entirety, that section of the statute provides:

> (a) A foreign state shall not be immune from the jurisdiction of courts of the United States or of the States in any case—
>
> (1) in which the foreign state has waived its immunity either explicitly or by implication, notwithstanding any withdrawal of the waiver which the foreign state may purport to effect except in accordance with the terms of the waiver;
>
> (2) in which the action is based upon a commercial activity carried on in the United States by the foreign state; or upon an act performed in the United States in connection with a commercial activity of the foreign state elsewhere; or upon an act outside the territory of the United States in connection with a commercial activity of the foreign state elsewhere and that act causes a direct effect in the United States.

Section 1605(a)(1) recognizes two species of waiver. Where "explicit[ ]" waiver occurs, the foreign state expressly consents to forgo its sovereign immunity with respect to a certain class of disputes or a particular subject matter. *See World Wide Mins., Ltd. v. Republic of Kazakhstan*, 296 F.3d 1154, 1162 (D.C. Cir. 2002). Generally speaking, because explicit waivers of sovereign immunity are narrowly construed "in favor of the sovereign" and are not enlarged "beyond what the language requires[,]" *id.* (quoting *Library of Cong. v. Shaw*, 478 U.S. 310, 318, 106 S.Ct. 2957, 92 L.Ed.2d 250 (1986)), a foreign state "will not be found to have [explicitly] waived its

immunity unless it has clearly and unambiguously done so[,]" *id.*

The waiver provision that is most relevant here is the FSIA's reference to "implicit[ ]" waivers of sovereign immunity, which the statute "does not define." *Creighton Ltd. v. Gov't of the State of Qatar*, 181 F.3d 118, 122 (D.C. Cir. 1999). However, this circuit has "followed the 'virtually unanimous' precedents construing the implied waiver provision narrowly." *Id.* (internal citations omitted). Thus, we have long held that "implicit in § 1605(a)(1) is the requirement that the foreign state have *intended* to waive its sovereign immunity." *Id.* (emphasis added). The legislative history of the FSIA provides only three examples of implicit waivers by a foreign state, H.R. Rep. No. 94-1487, at 18 (1976), and courts have been reluctant to recognize an implicit waiver of sovereign immunity in other circumstances. *See Foremost-McKesson, Inc. v. Islamic Republic of Iran*, 905 F.2d 438, 444 (D.C. Cir. 1990) (explaining that an implied waiver occurs if the foreign state agrees to arbitration, agrees that the law of a particular country governs a contract, or has filed a responsive pleading without raising the defense of sovereign immunity).

Under Section 1605(a)(2), a foreign state's sovereign immunity is subject to abrogation based on the state's commercial activities. This statutory exception codifies the "restrictive theory" of sovereign immunity that the United States Department of State first endorsed in 1952, *Republic of Argentina v. Weltover, Inc.*, 504 U.S. 607, 612, 112 S.Ct. 2160, 119 L.Ed.2d 394 (1992), pursuant to which foreign states were not afforded immunity in cases "arising out of purely

commercial transactions[,]" *id.* at 613, 112 S.Ct. 2160 (quoting *Alfred Dunhill of London, Inc. v. Republic of Cuba*, 425 U.S. 682, 703, 96 S.Ct. 1854, 48 L.Ed.2d 301 (1976)). The Supreme Court had long held that when "a foreign government acts, not as regulator of a market, but in the manner of a private player within it," *id.* at 614, 112 S.Ct. 2160, its private acts might be sufficient to justify the invocation of the jurisdiction of American courts, *see id.* (distinguishing acts of the state as a market participant from undertakings aimed at "fulfilling its uniquely sovereign objectives"); *see also Permanent Mission of India to the United Nations v. City of New York*, 551 U.S. 193, 199, 127 S.Ct. 2352, 168 L.Ed.2d 85 (2007). Thus, the FSIA's commercial activities exception carves out, and exempts from sovereign immunity, a sphere of private commercial action that foreign states sometimes undertake.

Notably, as Congress has worded it, the commercial activities exception is also designed to ensure that there is a sufficient connection between the foreign state's commercial activity and the United States to warrant the exercise of jurisdiction. *See Jam v. Int'l Fin. Corp.*, —— U.S. ——, 139 S. Ct. 759, 766, 203 L.Ed.2d 53 (2019). Thus, the first clause of section 1605(a)(2) requires a plaintiff's claim to be "based upon" an aspect of the foreign state's commercial activity that has a "substantial contact with the United States." *Odhiambo*, 764 F.3d at 36; *see also Zedan v. Kingdom of Saudi Arabia*, 849 F.2d 1511, 1513 (D.C. Cir. 1988) (clarifying that the degree of contact required must be more than isolated or transitory, and a plaintiff's mere citizenship status or

place of residence will not suffice). The second clause of the commercial activities exception permits a suit against a foreign state when the plaintiff's claim is based "upon an act performed in the United States[,]" and that act is taken "in connection with a commercial activity of the foreign state elsewhere." 28 U.S.C. § 1605(a)(2). And the third clause of the exception permits a suit against a foreign state if the claim is based upon an act outside the United States that is related to the foreign state's commercial activity if that act "causes a direct effect in the United States." *Id.*

II

A

After the fall of Saddam Hussein at the conclusion of the United States-led military action in Iraq, the newly constituted transitional government of Iraq sought to rebuild that country's armed forces. To this end and at the recommendation of the United States government, the Iraqi Ministry of Defense ("MoD") engaged the services of Wye Oak, a private defense contractor headquartered in Pennsylvania that specializes in foreign military equipment. As part of this engagement, Wye Oak committed to inventorying and assessing Iraq's existing military equipment; refurbishing any such equipment to the extent possible; and arranging for scrap sales of any equipment that was not salvageable.

MoD and Wye Oak entered into a written Broker Services Agreement ("BSA") in August of 2004. Under the express terms of the BSA, Wye Oak was to serve as the sole and exclusive broker for these equipment recovery and refurbishment services for a one-year

period. As compensation for this work, Wye Oak was to receive a 10% commission for scrap sales and 10% of the profit for any refurbishing services.

To receive its compensation, Wye Oak was required to provide the MoD with pro forma invoices detailing the work that had been done. The BSA specifically provided that "[a]ll payments to be made to [Wye Oak] under this Agreement shall be made in United States Dollars in the form and manner as directed by [Wye Oak]." Joint App'x 775.

Wye Oak began performing under the BSA in August of 2004. Wye Oak's CEO, Dale Stoffel, and other Wye Oak staff who were present in Iraq immediately began identifying, assessing, and refurbishing military equipment on the ground in that country. Meanwhile, David Stoffel—Dale's brother and the head of Wye Oak's information technology department, which was located in the United States—began to oversee all I.T. services for Wye Oak. These services included purchasing computer equipment and software and reviewing all email communications that came through the server that housed Wye Oak's data.

In October of 2004, Wye Oak submitted three pro forma invoices to the MoD, totaling $24,714,697.15. Each invoice specifically instructed the MoD to remit its payment to Wye Oak "at the Baghdad Iraq office of [the MoD]." Joint App'x 781–83. There is no dispute that the MoD never paid these invoices.

Nor is it disputed that Wye Oak made many concerted efforts to collect the fee. For example, in the two months between Wye Oak's October submission of the invoices and December 8, 2004—when Dale

Stoffel was tragically slain in Baghdad on his way to organize the release of funding—Wye Oak representatives met with American and Iraqi officials at least twice to discuss the project's progress and to address the still-outstanding invoices. As relevant here, these in-person meetings took place at MoD's headquarters in Baghdad. Wye Oak reported on the status of the project and also expressed its concerns about Iraq's failure to pay the invoices, including the specific worry that the lack of funding could interfere with Wye Oak's ability to execute subcontracts, such as an anticipated construction services agreement with Wye Oak's sister company, CLI Corporation, an American construction firm headquartered in Pennsylvania. During the meetings, Wye Oak managed to secure additional payment promises from Iraq.

Wye Oak also undertook various diplomatic efforts to secure the overdue funding. Its representatives reached out to American government officials (such as then-Secretary of Defense Donald Rumsfeld) to discuss the non-payment dilemma. And Wye Oak contacted General Investment Group, s.a.l. ("GIG"), a Lebanese company run by financier Raymond Zayna, which had entered into separate funding agreements with Wye Oak and Iraq related to the military equipment-recovery project. GIG had agreed to provide some financing for the project, and in its post-invoice conversations with GIG, Wye Oak stressed the necessity of payment of the invoices, and implored GIG to authorize that such payments be made to Wye Oak's bank account in Pennsylvania.

Despite these overtures, Wye Oak's invoices remained overdue when Dale Stoffel died on December 8, 2004. In the wake of that tragedy, the company withdrew all of its U.S. personnel from Iraq. It subsequently relied on local contractors with respect to its performance under the BSA, which included coordinating the production of operational armored vehicles for Iraq's January 2005 parliamentary election. Wye Oak ceased all operations in Iraq shortly after the January 2005 election, due to the lack of funding.

B

1

Wye Oak filed a complaint against Iraq in the EDVA on July 20, 2009, claiming that Iraq breached the BSA by refusing to pay the generated invoices. *Wye Oak Tech., Inc. v. Republic of Iraq*, No. 09CV793, 2010 WL 2613323, at *1 (E.D. Va. June 29, 2010). Iraq responded with a motion to dismiss Wye Oak's complaint, contending primarily that, as a sovereign nation, it is entirely immune from suit under the FSIA. *See* Joint App'x 72 ("As a matter of law . . . the [c]ourt lacks subject matter jurisdiction because no exception to Defendant's sovereign immunity applies under the Foreign Sovereign Immunities Act.").

On June 29, 2010, the EDVA issued a lengthy opinion that, among other things, examined each of the three clauses of the FSIA's commercial activities exception to assess Iraq's sovereign immunity contention. The court evaluated "the factual allegations of the complaint and referenced writings" with respect to each clause, *Wye Oak Tech.*, 2010 WL 2613323 at *7, and concluded, for each, that "Wye Oak

has sufficiently established at this stage that this exception to the FSIA's sovereign immunity applies" such that "the [c]ourt may exercise subject matter jurisdiction over Iraq in this case[,]" *id.* at *8. The EDVA further held that venue was not proper because a "substantial part of the events or omissions giving rise to Wye Oak's claim" did not occur in the Eastern District of Virginia. *Id.* at *11 (finding as much based on Wye Oak's allegations). Therefore, in addition to ruling on Iraq's motion to dismiss, that court also transferred the case "forthwith" to the federal district court in the District of Columbia. *Id.*

Iraq could not appeal the part of the EDVA's order that affected the transfer. *Ukiah Adventist Hosp. v. F.T.C.*, 981 F.2d 543, 546 (D.C. Cir. 1992). But it did appeal that court's concomitant rejection of its sovereign immunity argument. *See Wye Oak Tech., Inc. v. Republic of Iraq,* 666 F.3d 205, 206 (4th Cir. 2011).

On appeal, the Fourth Circuit began its consideration of Iraq's sovereign immunity argument with a discussion of the threshold question of whether it even had jurisdiction to entertain an appeal from the transferred case. *Id.* at 210. The panel majority acknowledged that it was not appropriate for the EDVA to have ruled on the merits of Iraq's motion to dismiss once it had determined that venue was improper. *Id.* at 209. However, over a vigorous dissent, the majority held that appellate jurisdiction could be invoked nonetheless, because the EDVA's sovereign immunity holding was an "immediately appealable" order, and that particular decision was thus "effectively severed from the balance of the case,"

in accordance with circuit authority. *Id.* at 209–10 (quoting *Technosteel, LLC v. Beers Constr. Co.*, 271 F.3d 151, 159–60 (4th Cir. 2001)).

With respect to the merits of the sovereign immunity question, the majority affirmed the EDVA's ruling based on the complaint's allegations of fact. The panel concluded that Iraq was engaged in commercial activity under the contract with Wye Oak. *Id.* at 216–17. And it homed in on various acts that Wye Oak had allegedly undertaken inside the United States in connection with the BSA, including its alleged creation of computer programming software, contacts with agents of foreign nations, and provision of accounting services. *Id.* at 216. According to the panel majority, if true, these domestic acts meant that "Wye Oak made a sufficient showing that its breach of contract claim [was] based upon an act performed in the United States in connection with a commercial activity of the foreign state elsewhere" under the second clause of the FSIA. *Id.* Therefore, the panel held that section 1605(a)(2) of the FSIA authorized Wye Oak to litigate its claims against Iraq in federal court. *Id.* at 217.

The dissenting judge rejected the conclusion that appellate review was available in this circumstance based on the circuit's precedents. *Id.* at 218 (Shedd, J., dissenting). And he further maintained that the panel should forgo ruling on the sovereign immunity issue once the transfer had occurred, because, in his view, if the D.C. Circuit disagreed with the Fourth Circuit's immunity holding it "would create a circuit split in the *same* case[,]" which the law of the case doctrine could not fix. *Id.* 219 (describing the "tenuous situation"

that would arise "if the courts in the District of Columbia were to find that subject matter jurisdiction does not exist").

2

Meanwhile, after the transferred case arrived in the DDC, on December 17, 2010, the court stayed its proceedings at the parties' request, in light of the pending Fourth Circuit appeal. The DDC lifted its stay approximately 18 months later, once the Fourth Circuit had ruled. The parties then engaged in pre-trial proceedings until August of 2019, when an eight-day bench trial commenced.

At the conclusion of the bench trial, the trial judge ordered the parties to submit Proposed Findings of Fact and Conclusions of Law; notably, the briefing that ensued was the first time that either party asked the DDC to address the sovereign immunity issue. Wye Oak filed the first brief, and it suggested therein that the district court should hold expressly that Iraq did not have sovereign immunity under the second or third clauses of the commercial activity exception. Iraq's proposed findings and conclusions eschewed any analysis of these purported statutory bases for abrogating its sovereign immunity. Instead, Iraq's brief merely maintained that "[p]laintiff bears the burden of proving at trial the existence of sufficient facts to establish that the Court possesse[d] [subject-matter] jurisdiction" and the court "shall determine its jurisdiction accordingly." Joint App'x 505.

On August 27, 2019, the DDC issued findings of fact and conclusions of law in support of its post-trial judgment. *See Wye Oak Tech., Inc. v. Republic of Iraq*, No. 10-CV-01182, 2019 WL 4044046 (D.D.C. Aug. 27,

2019). The district court specifically held that it had subject-matter jurisdiction "under clause two of the [FSIA's] commercial activity exception[,]" *id.* at *22, acknowledging first that the Fourth Circuit had held as much, and reasoning that the Fourth Circuit's opinion was "law of the case[,]" *id.* at *23. The district court further found that "the Fourth Circuit's immunity determination was substantively correct[,]" *id.*, because the evidence at trial established that Wye Oak had, in fact, engaged in various acts in the United States in connection with the BSA, such as managing the company's "electronic communications[,]" and "writing a computer program that could ultimately be used to inventory and track all the equipment Wye Oak was refurbishing[,]" *id.* at *24. Based on these acts, the DDC concluded that "Wye Oak's [breach of contract] action" was based upon "an act performed in the United States in connection with a commercial activity of the foreign state elsewhere" within the meaning of clause two of the commercial activities exception. *Id.*

The district court further concluded that the evidence presented at trial established that Iraq had materially breached the BSA. *Id.* at *27. As a remedy, the court awarded Wye Oak approximately $88.9 million in compensation, including approximately $20.5 million for damages actually incurred plus $68.4 million for lost profits and prejudgment interest. *Id.* at *54. The district court also specifically rejected Wye Oak's argument that it was entitled to "complementary damages" under Iraqi law, because, in the court's view, complementary damages were

similar to punitive damages, which the FSIA forecloses. *Id.* at 52.

C

Iraq and Wye Oak now cross-appeal from the district court's post-trial judgment. As relevant here, Iraq argues that the district court erred in concluding that the second clause of the commercial activities exception applies, and that it was therefore entitled to invoke immunity under the FSIA. Appellants' Br. 18, 24. Wye Oak insists that the district court properly exercised jurisdiction over its claims under the FSIA for several independent reasons. It argues that Iraq "waived any immunity defense under 28 U.S.C. § 1605(a)(1) by failing to preserve or press that defense at trial." Appellee's Br. 15. It also contends that the Fourth Circuit's jurisdictional ruling "is law of the case," *id.* at 20, and that, regardless, its claims satisfy both the second and third clauses of the FSIA's commercial activities exception, *id.* at 25, 30.

This cross-appeal relates additionally to both parties' objections to various aspects of the district court's damages calculation. *See, e.g.*, Appellants' Br. 16–17 (arguing that the district court erred by awarding Wye Oak certain damages, including costs Wye Oak did not incur, speculative lost profits, and prejudgment interest on the lost profit award); Appellee's Br. 17 (challenging the district court's conclusions concerning prejudgment interest and complementary damages). Because we conclude that the district court's jurisdictional holding must be reconsidered, we decline to address the parties' damages arguments.

III

The relative burdens of the parties with respect to establishing the applicability (or not) of an exception to sovereign immunity under the FSIA are well established, as is the applicable standard of review. "[T]he FSIA begins with a presumption of immunity, which the plaintiff bears the initial burden to overcome by producing evidence that an exception applies, . . . and once shown, the sovereign bears the ultimate burden of persuasion to show the exception does not apply[.]" *Bell Helicopter Textron, Inc. v. Islamic Republic of Iran*, 734 F.3d 1175, 1183 (D.C. Cir. 2013); *see also Helmerich & Payne Int'l Drilling Co. v. Bolivarian Republic of Venezuela*, 743 F. App'x 442, 449 (D.C. Cir. 2018). And when a district court considers the sovereign immunity question and rules that it has subject-matter jurisdiction over a legal claim brought in federal court against a foreign sovereign, that denial of immunity is reviewed de novo. *See Odhiambo*, 764 F.3d at 35.

IV

For the reasons explained below, we cannot accept the contentions that Iraq has implicitly waived its sovereign immunity or that the law of the case doctrine requires us to accept the Fourth Circuit's conclusions about the applicability of the second clause of the FSIA's commercial activities exception. And because we find that the second clause is only applicable when the act inside the United States upon which the plaintiff's claim is based is an act *of the foreign sovereign*, we conclude that the district court's invocation of subject-matter jurisdiction over Wye

Oak's claims against Iraq must be sustained, if at all, on the basis of another FSIA provision.

A

It is important to note, at the outset, that Wye Oak's argument that Iraq implicitly waived its immunity defense for the purpose of FSIA section 1605(a)(1)—the first immunity-related contention that Wye Oak makes on appeal—appears nowhere in the post-trial briefs that Wye Oak filed in the district court, and the trial judge did not address it. That omission alone raises the specter of forfeiture. *NetworkIP, LLC v. F.C.C.*, 548 F.3d 116, 120 (D.C. Cir. 2008) (explaining that arguments in favor of subject-matter jurisdiction can be forfeited by inattention or deliberate choice).

But even if we consider the merits of Wye Oak's implicit waiver assertion, Wye Oak does not explain how that argument—which is based upon Iraq's decision to participate in the DDC's bench trial and its failure to engage on the immunity issue in its trial briefs—squares with this court's holdings on the subject. Wye Oak cites *Phoenix Consulting, Inc v. Republic of Angola*, 216 F.3d 36 (D.C. Cir. 2000), which does admit the possibility that a foreign state's "failure to assert the immunity after consciously deciding to participate in the litigation may constitute an implied waiver of immunity," *id.* at 39. But, here, Iraq *did* "assert its immunity under the FSIA . . . in its responsive pleading." *Id.* Moreover, and importantly, we have never varied from the basic principle that "[a]n implied waiver depends upon the foreign government's having at some time *indicated* its amenability to suit." *Princz v. Federal Republic of Germany*, 26 F.3d 1166, 1174 (D.C. Cir. 1994)

(emphasis added); *accord Creighton, Ltd.*, 181 F.3d at 122.

Far from demonstrating that it intended to waive sovereign immunity, Iraq squarely raised an immunity defense in a motion to dismiss that it timely filed at the first opportunity after Wye Oak filed the complaint, and it then vigorously litigated the EDVA's denial of that motion, including pursuing a separate appeal of that court's no-immunity ruling. To be sure, having lost that appeal, Iraq knowingly proceeded to litigate the claims against it, and ultimately responded to Wye Oak's post-trial jurisdictional arguments with a tepid statement about the court's needing to make its own decision about subject-matter and personal jurisdiction. But nothing in the record establishes that Iraq ever *disclaimed* or *withdrew* its long-preserved assertion of sovereign immunity. And, again, we have consistently concluded that what matters when discerning any type of waiver of sovereign immunity is the foreign sovereign's actual intent. *See Foremost-McKesson*, 905 F.2d at 444; *see also Phoenix Consulting Inc.*, 216 F.3d at 39 (explaining that "if the sovereign makes a conscious decision to take part in the litigation, then it must assert its immunity under the FSIA either before or in its responsive pleading" (internal quotation marks and citation omitted)).

Thus, we cannot conclude that Iraq's trial participation and post-trial argument, standing alone, "fit in th[e] selective company" of implied waiver cases, *Khochinsky v. Republic of Poland*, 1 F.4th 1, 9 (D.C. Cir. 2021), or otherwise indicates Iraq's intent to abandon the immunity that it has asserted from the

outset of this case, such that the FSIA's section 1605(a)(1) applies.

B

We also disagree with both of Wye Oak's paired assertions that (1) the law of the case doctrine requires us to accept the Fourth Circuit's holding that the second clause of the FSIA's commercial activities exception applies to abrogate Iraq's sovereign immunity, and, in any event, (2) the Fourth Circuit's analysis of the applicability of the second clause of section 1605(a)(2) to Wye Oak's breach of contract claims is substantively correct.

1

The "[l]aw-of-the-case doctrine refers to a family of rules embodying the general concept that a court involved in later phases of a lawsuit should not re-open questions decided . . . by that court or a higher one in earlier phases." *Crocker v. Piedmont Aviation, Inc.* 49 F.3d 735, 739 (D.C. Cir. 1995) (internal quotation marks omitted). Colloquially speaking, the doctrine ensures that "the same issue presented a second time in the same case in the same court should lead to the same result." *Kimberlin v. Quinlan*, 199 F.3d 496, 500 (D.C. Cir. 1999) (internal quotation marks and citation omitted); *see also, Musacchio v. United States*, 577 U.S. 237, 244–45, 136 S.Ct. 709, 193 L.Ed.2d 639 (2016).

The law of the case doctrine is a principle that guides courts in the exercise of their discretion, not a binding rule. Thus, rigid adherence to rulings made at an earlier stage of a case is not required under all circumstances, as other circuits have recognized. *See*

Murphy v. F.D.I.C., 208 F.3d 959, 966 (11th Cir. 2000); *see also Pepper v. United States*, 562 U.S. 476, 506, 131 S.Ct. 1229, 179 L.Ed.2d 196 (2011) (explaining that the doctrine "directs a court's discretion, it does not limit the tribunal's power"). Furthermore, there are certain situations in which it is widely accepted that courts should not apply the doctrine to preclude reconsideration of a prior legal determination, even if the issue was previously litigated in the context of that case. *See, e.g., Crocker*, 49 F.3d at 740 (explaining that "an intervening change of law" will "support a departure from the previously established law of the case"); *see also Pepper*, 562 U.S. at 506–07, 131 S.Ct. 1229 (authorizing setting aside the doctrine "if the court is 'convinced that [the prior decision] is clearly erroneous and would work a manifest injustice' " (internal citations omitted)).

That said, Wye Oak's argument that the Fourth Circuit's ruling qualifies as law of the case falters at the threshold, because under the circumstances presented here—and, in particular, the distinct procedural postures in which the immunity issue arises—this court and the Fourth Circuit panel are actually addressing *different* questions.

The Fourth Circuit's de novo review of the EDVA's ruling was a targeted assessment of the legal sufficiency of Wye Oak's complaint for the purpose of proceeding to discovery. *See Wye Oak Tech., Inc.*, 666 F.3d at 216 (concluding that Wye Oak presented sufficient facts to support a reasonable inference that its breach of contract claim is based upon an act performed in the United States in connection with a

commercial activity of the foreign state elsewhere). At most, the panel held that the allegations in Wye Oak's complaint could plausibly support a finding that the second clause of the FSIA's commercial activity exception applies such that sovereign immunity did not preclude continued litigation of Wye Oak's claims. Neither party asked the district court or this court to revisit *that* determination.

Instead, the full course of litigation commenced, and when the trial court in the DDC undertook to address whether Iraq was immune from judgment nearly a decade later, in order to assess whether it had subject-matter jurisdiction to issue a post-trial order against that foreign state, the DDC engaged in a fundamentally distinct legal analysis *and* had a different assortment of tools with which to make its determination. Specifically, at that stage of the proceedings, the district court had the benefit of a full adversarial hearing of the issues and a developed factual record, and its task was to determine whether any FSIA exception had been triggered such that Iraq's immunity from judgment was abrogated and a post-trial judgment could be issued against it, in light of the established facts of the case.

In other words, our consideration of the sovereign immunity question, which stems from our review of the DDC's post-trial judgment, plainly transcends the Fourth Circuit's threshold conclusions about the plausible boundaries of Wye Oak's pleading for law of the case purposes. *Cf. Sherley v. Sebelius*, 689 F.3d 776, 782 (D.C. Cir. 2012) (explaining that the preliminary injunction exception to the law of the case arose because "[a]n appellate court in a later phase of

the litigation with a fully developed record, full briefing and argument, and fully developed consideration of the issue [should] not bind itself to the time-pressured decision it made earlier on a less adequate record").

It is also quite significant that the core legal issue that we are purportedly constrained to consider based on the Fourth Circuit's ruling itself pertains to the defense of immunity, and therefore the court's own subject-matter jurisdiction. Applying the law of the case doctrine to constrain a court's post-trial assessment of its own jurisdiction based on an earlier determination of that question is inherently incompatible with the established ongoing duty of a court to determine its own jurisdiction at every stage of the legal proceedings. *Cf. Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 95, 118 S.Ct. 1003, 140 L.Ed.2d 210 (1998) ("[E]very federal appellate court has a special obligation to satisfy itself not only of its own jurisdiction, but also that of the lower courts in a cause under review[.]" (internal quotation marks and citation omitted)); *see also Henderson ex rel. Henderson v. Shinseki*, 562 U.S. 428, 434, 131 S.Ct. 1197, 179 L.Ed.2d 159 ("[F]ederal courts have an independent obligation to ensure that they do not exceed the scope of their jurisdiction, and therefore they must raise and decide jurisdictional questions that the parties either overlook or elect not to press."). Applying the law of the case doctrine to constrain subsequent jurisdictional analyses is also in tension with the federal rules that make clear that alleged jurisdictional defects are not waivable, *see* Fed. R. Civ. P. 12(h)(1), and can be raised "at any time[,]" Fed. R.

Civ. P. 12(h)(3); *see also Union Pac. R. Co. v. Bhd. of Locomotive Eng'rs & Trainmen Gen. Comm. of Adjustment, Cent. Region*, 558 U.S. 67, 81, 130 S.Ct. 584, 175 L.Ed.2d 428 (2009) (explaining that arguments *against* subject-matter jurisdiction can never be forfeited or waived).

Thus, it is hard to accept the suggestion that the law of the case doctrine must be rigidly applied to calcify a threshold determination that a court has subject-matter jurisdiction. *Cf. Bishop v. Smith*, 760 F.3d 1070, 1085 (10th Cir. 2014) (explaining that, while jurisdictional issues are not excluded from the law of the case doctrine, issues such as subject-matter jurisdiction may be particularly suitable for reconsideration, even where the law of the case doctrine might otherwise counsel against it). At the very least, there is considerable support for the notion that, when the issue on review is jurisdictional in nature, a doctrine that already incorporates a degree of discretion and flexibility should give way as needed to facilitate consideration of similar jurisdictional questions that may arise at subsequent (but procedurally distinct) stages of this case. *See Am. Canoe Ass'n v. Murphy Farms, Inc.*, 326 F.3d 505, 515 (4th Cir. 2003) ("Law of the case, which is itself a malleable doctrine meant to balance the interests of correctness and finality, can likewise be *calibrated* to reflect the increased priority placed on subject matter jurisdictional issues generally[.]" (emphasis added)).

Sherley v. Sebelius, does not hold otherwise. 689 F.3d at 776. Wye Oak points to that opinion and argues that, where the relevant facts are the same at both the pleading and the trial stages of the

proceedings, the posture of the case should not matter. *See* Tr. of Oral Arg. 27–28. But this court in *Sherley* adhered to the earlier preliminary injunction ruling in that case primarily due to the earlier court's fulsome consideration of the legal issues based upon an already fully developed factual record. 689 F.3d at 782. Not so here. Again, the Fourth Circuit made its immunity determination in the context of a motion to dismiss that tested the sufficiency of Wye Oak's pleading, which is substantively different than accelerated consideration of the merits of a plaintiff's claims under the preliminary injunction standard.

In addition, as noted above, the scant and unproven factual allegations in Wye Oak's complaint were no match for the trial record; the latter included extensive evidence that both sides had presented about Iraq's commercial activity, Wye Oak's various acts of performance, and Iraq's alleged breach of the parties' agreement. Thus, when it came time for the final analysis of whether there was subject-matter jurisdiction to enter a post-trial judgment against this foreign state under the FSIA framework, the DDC's assessment was a far more significant undertaking than the threshold inquiry into whether the complaint's allegations provide a sufficient basis for the parties to proceed to litigate despite Iraq's immunity defense. And the latter is all that the Fourth Circuit addressed.

Therefore, we hold that we are not here being presented with "the same issue" that the Fourth

Circuit decided in a manner that implicates the law of the case doctrine. *Kimberlin*, 199 F.3d at 500.[1]

2

The district court below not only determined that law of the case required it to find that the second clause of the FSIA's commercial activities exception was satisfied, it also found affirmatively that the Fourth Circuit's immunity conclusions were correct, given the actions that Wye Oak took in the United States to perform under the BSA. *Wye Oak Tech.*, 2019 WL 4044046, at *23-*25. Wye Oak has reiterated that same substantive argument on appeal. *See* Appellee's Br. 25. And it is one that we reject for the following reasons.

To start, we note that the district court's factual findings concerning Wye Oak's conduct are reviewed for clear error. *Massachusetts v. Microsoft Corp.*, 373 F.3d 1199, 1207 (D.C. Cir. 2004). We consider de novo the district court's interpretation and application of 28 U.S.C. § 1605(a)(2). *Odhiambo*, 764 F.3d at 35.

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[1] In their briefs, the parties spill a considerable amount of ink debating whether, assuming the law of the case doctrine is applicable, one or more of the established exceptions to that doctrine applies. One such exception is where the previous decision was "clearly erroneous and would work a manifest injustice." *Crocker*, 49 F.3d at 740. We note here that our disagreement with the Fourth Circuit's substantive determination about the applicability of the second prong of the FSIA's commercial activity exception as a matter of law—which is detailed in Part 2 of this section—makes it quite likely that, even if the law of the case doctrine were applicable to the instant circumstances, the "clearly erroneous" exception to the doctrine would relieve us of the constraints that the doctrine imposes.

There is no error, much less clear error, with respect to the district court's determination that "Wye Oak performed work in the United States" in connection with the BSA such as "writing a computer program[,]" "maintaining e-mail communications[,]" and performing "administrative activities." *Wye Oak Tech.*, 2019 WL 4044046, at *24. However, that court's legal analysis is mistaken, because the second clause of the FSIA—which provides that foreign states are not immune when the legal action is "based . . . upon an act performed in the United States in connection with a commercial activity of the foreign state elsewhere," § 1605(a)(2)—requires that the act at issue be one that *the foreign state* has performed in the United States in connection with its commercial activity elsewhere.

The first clue that this is the correct interpretation of the commercial activities exception's second clause is the language and structure of that provision, taken as a whole. Section 1605(a)(2) is commonly considered with reference to its isolated clauses, but all three appear in a single subsection. *See* 28 U.S.C. § 1605(a)(2). And the first and third clauses have long been interpreted to relate only to the conduct of the foreign state—i.e., it is the foreign state that has to have engaged in activity that took place in the United States, or that has to have engaged in acts elsewhere that have an effect inside the United States. *See Odhiambo*, 764 F.3d at 36 (explaining that under clause one of the commercial activities exception, the plaintiff's claim must be "based upon some commercial activity by" the foreign state); *Cruise Connections Charter Mgmt. 1, LP v. Att'y Gen. of*

Canada, 600 F.3d 661, 662 (D.C. Cir. 2010) ("[F]oreign governments engaging in commercial activities outside the United States enjoy immunity from suit in U.S. courts unless those activities have a direct effect in the United States."); *see also Atlantica Holdings v. Sovereign Wealth Fund Samruk-Kazyna JSC*, 813 F.3d 98, 112 (2d Cir. 2016) (explaining that the "focus" of the direct effects clause of the commercial activities exception is "the activity of the sovereign" and if such activity has a direct effect in the United States).

Consistent with the purposes of section 1605(a)(2), this court has previously determined that if the foreign state carries on commercial activity inside the United States (clause one), or if it engages in an act elsewhere in connection with its commercial activity elsewhere and that act has a direct effect inside the United States (clause three), there is no immunity for legal actions based upon that foreign state's domestic commercial activity or its impactful foreign act. *See, e.g., Odhiambo*, 764 F.3d at 36–38. And our careful and considered application of the first and third clauses to link abrogation of sovereign immunity to the fact and implications of the foreign state's *own* activities renders it entirely anomalous for us to now read clause two to dispense with immunity if just *anyone* performs an act in the United States in connection with the foreign state's commercial activity.

The view that the second clause of the commercial activities exception is triggered only by acts of the foreign state is not an unusual position. Indeed, an established treatise that Wye Oak relies on specifically states that "the [commercial activities]

exception's second clause provides for jurisdiction where *a defendant qualifying as a 'foreign state' under the statute engages in acts in the United States* in connection with a commercial activity abroad." Ernesto J. Sanchez, *The Foreign Sovereign Immunities Act Deskbook* 137 (2013) (emphasis added). So, too, have this court and others routinely focused on whether the defendant (the foreign state) has performed acts inside the United States in connection with its commercial activity elsewhere when undertaking the second-clause commercial activities exception inquiry. *See, e.g., Kensington Int'l Ltd. v. Itoua*, 505 F.3d 147, 157 (2d Cir. 2007) (holding that the appellant's claims did not fall under the second clause of the commercial activities exceptions because it failed to allege any acts performed by the foreign defendant in the United States as the basis of its complaint); *Can-Am Int'l, LLC v. Republic of Trinidad & Tobago*, 169 F. App'x 396, 406 (5th Cir. 2006) (stating that the acts of a foreign sovereign in the United States in connection with foreign commercial activity may give rise to subject-matter jurisdiction); *Gilson v. Republic of Ireland*, 682 F.2d 1022, 1027 (D.C. Cir. 1982), *abrogated on other grounds by Saudi Arabia v. Nelson*, 507 U.S. 349, 113 S.Ct. 1471, 123 L.Ed.2d 47 (1993), (concluding the court had jurisdiction under the second clause of the commercial activities exception because Ireland performed an act in the United States by enticing Gilson to enter into a commercial contract); *see also Termorio S.A. E.S.P. v. Electrificadora Del Atlantico S.A. E.S.P.*, 421 F. Supp. 2d 87 (D.D.C. 2006), *judgment aff'd*, 487 F.3d 928 (D.C. Cir. 2007) (finding no jurisdiction over a breach of contract claim because

no element of the claim was based on any of the foreign defendant's commercial activities in United States).

To the extent that one might think that the second clause is ambiguous with respect to whose act counts because it lacks a qualifier that expressly links the referenced "act" to "the foreign state," the legislative history of section 1605(a)(2) leaves no doubt. Prior to the passage of the FSIA, the House Judiciary Committee produced a house report that analyzed each proposed section of the FSIA and explained the situations in which a foreign state would not be immune. *See* H.R. Rep. No. 94-1487, at 18–19 (1976). Significantly for present purposes, the Committee stated plainly that the second clause of the commercial activities exception "*looks to conduct of the foreign state in the United States*." *Id.* at 19 (emphasis added). And the Senate Judiciary Committee echoed that exact same sentiment. *See* S. Rep. No. 94-1310, at 12 (1976) (stating that the "act performed in the United States in connection with a commercial activity of the foreign state elsewhere, looks to conduct of the foreign state in the United States[.]").

For all these reasons, we disagree with the view of the district court (and, for that matter, the Fourth Circuit) that the second clause of the commercial activities exception can be satisfied for FSIA purposes based on the various acts that *the plaintiff* (Wye Oak) took inside the United States to perform under the BSA. Again, we have no quarrel with the district court's finding that, while inside the United States, Wye Oak "wr[ote] a computer program that could

ultimately be used to inventory and track all the equipment Wye Oak refurbish[ed]" pursuant to the BSA, and that it also handled electronic communications about the performance of the company's contractual obligations "to ensure Wye Oak's leadership was aware of all messages they received." *Wye Oak Tech.*, 2019 WL 4044046, at *24. We only hold that, regardless, the necessary "act performed" that implicates the second clause of section 1605(a)(2) is an act of the foreign sovereign; therefore, the district court's application of that provision to support its jurisdiction based on Wye Oak's actions cannot be sustained.[2]

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[2] The "based upon" language that appears in section 1605(a)(2) relates to all three clauses of that section, and it is, incidentally, yet another reason why Wye Oak's clause two argument fails. The Supreme Court has made clear that, to determine what an action is "based upon" for FSIA purposes, the court must "zero[ ] in on the core of the . . . suit" and assess whether "the particular conduct constitutes the gravamen of the suit." *OBB Personenverkehr AG v. Sachs*, 577 U.S. 27, 35, 136 S.Ct. 390, 193 L.Ed.2d 269 (2015). And while neither the district court nor the Fourth Circuit discussed this responsibility, it is reasonably obvious that the gravamen of the Wye Oak's breach of contract suit is not any act of performance that Wye Oak undertook pursuant to the BSA. Rather, it is Iraq's nonperformance of its promised obligations, including its failure to pay for the services Wye Oak rendered, and that nonperformance occurred in Iraq, not in the United States. *See Zedan*, 849 F.2d at 1514 (explaining that the plaintiff's suit was not based "upon an act performed in the United States," but upon a contract entered into in Saudi Arabia, which was breached); *Petersen Energía Inversora S.A.U. v. Argentine Republic*, 895 F.3d 194, 207 (2d Cir. 2018) (holding in a breach-of-contract case that the plaintiff's "lawsuit [was] 'based on' Argentina's breach of a commercial obligation"); *Devengoechea v. Bolivarian Republic of Venezuela*, 889 F.3d

C

Our conclusion that the second clause of the FSIA's commercial activities exception is inapplicable does not mean that Iraq must be found to have retained its sovereign immunity with respect to Wye Oak's breach of contract claims—at least not yet—because Wye Oak points to one other potential basis for concluding that the district court has subject-matter jurisdiction to enter its post-trial judgment. The third clause of the commercial activities exception abrogates a foreign state's immunity if the legal action "is based . . . upon an act outside the territory of the United States in connection with a commercial activity of the foreign state elsewhere and that act causes a direct effect in the United States." 28 U.S.C. § 1605(a)(2). And there is no dispute that Wye Oak's lawsuit relates to Iraq's commercial activity and is based upon an act of Iraq that took place outside United States' territory: its failure to pay the invoices. Thus, the first two requirements for application of clause three of the FSIA's commercial activities exception are satisfied. *See Ivanenko v. Yanukovich*, 995 F.3d 232, 238 (D.C. Cir. 2021).

Wye Oak now maintains that the trial record also established the only other requirement for finding that clause three of the commercial activities exception applies, because Iraq's nonpayment had direct effects inside the United States. And from what we have seen so far, given the law in this area, we find

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1213, 1223 (11th Cir. 2018) (determining that "[t]he conduct that actually injured [plaintiff]—and therefore that makes up the gravamen of [his] lawsuit—is Venezuela's failure to return [certain artwork] to [him]" in breach of a bailment agreement).

that Wye Oak's clause-three argument is at least plausible. *See Weltover*, 504 U.S. at 607, 112 S.Ct. 2160; *see also EIG Energy Fund XIV, L.P. v. Petroleo Brasileiro, S.A.*, 894 F.3d 339, 345 (D.C. Cir. 2018).

In particular, as examples of direct effects in the United States that flowed directly from the breach, Wye Oak points to the fact that Iraq was required to submit payment for Wye Oak's services to a bank in the United States, and that Iraq's nonpayment resulted in the cut-off of a flow of capital and personnel between the United States and Iraq. Wye Oak also argues that Iraq specifically targeted it (a Pennsylvania company) to engage in these services because Iraq knew that, when the bill was not paid, that loss of revenue would be felt in the United States. More generally, Wye Oak further maintains that Iraq's failure to make good on its payment obligations directly affected military and diplomatic operations in the United States.

These factual contentions are not uncontested; indeed, Iraq vigorously rejects Wye Oak's allegations in this regard. More importantly, however, Iraq asserts that the DDC did not make the "factual findings necessary for this [c]ourt to rule that any of Wye Oak's claimed consequences satisfy clause three, nor could it have on the record presented." Appellants' Reply Br. 14. And we also observe that there is no indication in the record that the district court specifically considered the disputed factual allegations about the impact of Iraq's failure to pay or any other facts that allegedly support application of the third clause of the commercial activities exception.

"Factfinding is the basic responsibility of district courts, rather than appellate courts," *Pullman-Standard v. Swint*, 456 U.S. 273, 291–92, 102 S.Ct. 1781, 72 L.Ed.2d 66 (1982) (internal quotations and citation omitted), and in this regard, we are fully cognizant of our limitations, *see id.* ("[T]he Court of Appeals should not . . . resolve[ ] in the first instance [a] factual dispute which had not been considered by the District Court."). The district court is in a much better position than we are to analyze Wye Oak's direct effects arguments in the first instance, and to engage in additional fact-finding, as may be necessary, if the existing record is unclear. Therefore, the current judgment will be vacated, and we are remanding this matter back to the district court for this purpose.

V

For the reasons explained above, we cannot accept Wye Oak's argument that Iraq waived its sovereign immunity, nor do we agree with the Fourth Circuit's conclusion that the second clause of the FSIA's commercial activities exception applies based on the various activities that Wye Oak carried out in the United States in connection with its contract with Iraq. As for Wye Oak's alternative argument that the district court had subject-matter jurisdiction over its breach of contract claims because the third clause of the commercial activities exception applies to the facts established during the bench trial, we remand to

the district court to make that assessment in the first instance.[3]

So ordered.

[3] We do not opine on the sufficiency of the existing record to support a determination that the district court has jurisdiction to enter the judgment here on the basis of clause three of the commercial activities exception, nor do we comment on the need to further develop the record to permit the district court to assess its own jurisdiction.

APPENDIX D

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil No. 1:10-cv-01182-RCL

WYE OAK TECHNOLOGY, INC.,

Plaintiff,

v.

REPUBLIC OF IRAQ *et al.*,

Defendants.

Filed: August 27, 2019

MEMORANDUM OPINION

Fifteen years ago, Wye Oak Technology, an American company, entered into the Broker Services Agreement (BSA) with the Iraqi Ministry of Defense (MoD) to play a key role in re-equipping the Iraqi military. Iraq urgently needed to rebuild its armed forces as the Coalition Provisional Authority (CPA) transferred sovereignty back to the Iraqi people and the interim Iraqi government prepared to hold its first parliamentary elections since the fall of Saddam Hussein. The BSA was set to be the central component

of the Iraqi Military Equipment Recovery Project (IMERP).

Under the BSA, Wye Oak was responsible for developing an inventory and assessing what military equipment was salvageable and what was scrap, providing military refurbishment services, arranging for scrap sales, and arranging for the sale of military equipment. Wye Oak began performing as soon as the BSA was effectuated. By October 2004, Wye Oak submitted three pro forma invoices to MoD for work in relation to the IMERP.

But MoD never paid these invoices to Wye Oak. Instead, MoD paid a third-party, Raymond Zayna, the money owed to Wye Oak under the BSA. Nonetheless, Wye Oak continued to perform under the contract while desperately trying to extract the funds it was owed. And briefly, Wye Oak thought it succeeded. After months of performing vital activities as part of the IMERP despite not being paid, all issues seemed to be solved after a December 5, 2004 meeting. However, this was not the case.

A few days later, Wye Oak's president Dale Stoffel and his colleague Joe Wemple were brutally murdered on their way to arrange for funding to finally be released. Nonetheless, Wye Oak still did not immediately abandon the IMERP even after Dale Stoffel's tragic death. Instead, Wye Oak exceeded the goal of producing a mechanized brigade of operational armored vehicles for Iraq's January 2005 parliamentary election. Yet Wye Oak was never paid for the vital work it performed under the BSA.

Now, more than fifteen years after Wye Oak entered into the BSA, and more than a decade after Wye Oak

first filed suit, the Court finds MoD breached the BSA. And because MoD is an integral component of the national government itself, the Republic of Iraq is also liable for the breach.

Ultimately, the Court will award Wye Oak damages for its three invoices, lost profits from construction, lost profits from refurbishing military equipment, and lost profits from scrap sales. Also, the Court will award Wye Oak prejudgment interest and costs, including reasonable attorney's fees and expenses.

I. Legal Standard

Wye Oak bears the burden of proving its breach of contract claim by a preponderance of the evidence. The preponderance of the evidence standard "simply requires the trier of fact to believe that the existence of a fact is more probable than its nonexistence before [he] may find in favor of the party who has the burden to persuade the [judge] of the fact's existence." *Concrete Pipe & Prods., Inc. v. Constr. Laborers Pension Tr.*, 508 U.S. 602, 622 (1993) (internal quotation marks omitted). In a bench trial, the Court is the trier of fact and rules on the law. Wye Oak will only succeed in its suit if it demonstrates it is more likely than not that the MoD materially breached the BSA.

The BSA provides it "shall be exclusively construed and interpreted pursuant to the laws of the Republic of Iraq." Pl.'s Ex. 5 ¶ 21. Thus, under this choice-of-law clause, Iraqi law controls for the purposes of interpreting the contract.

Under Iraqi law, the rules of evidence and procedure of the venue where the dispute is pending control.

Mallat Dep. 2/14/19, 33:17–34:4. Thus, the Federal Rules of Evidence apply to any evidentiary issues in this matter.

Finally, under the Federal Rules of Evidence, "[i]n determining foreign law, the court may consider any relevant material or source, including testimony, whether or not submitted by a party or admissible under the Federal Rules of Evidence. The court's determination must be treated as a ruling on a question of law." Fed. R. Evid. 44.1.

II. Factual Background

A. The Initial Effort to Rebuild Iraqi Armed Forces Following the U.S.-led Invasion in 2003

In March 2003, U.S. forces invaded Iraq and swiftly toppled Saddam Hussein's dictatorial regime. The U.S.-led Coalition forces set up the CPA to govern Iraq as a transitional government. On June 28, 2004, the CPA transferred sovereignty to the Iraqi people and an interim Iraqi government. This interim government held office until parliamentary elections occurred in January 2005.

As part of Iraq's rebuilding efforts, Iraq needed to rebuild its own armed forces. This was especially vital as a growing insurgency began to take hold following the U.S.-led invasion and occupation.

Secretary of Defense Donald Rumsfeld requested that then-Lieutenant General David Petraeus lead the Multi-National Security Transition Command–Iraq (MNSTC-I) to help rebuild the Iraqi armed forces and police. MNSTC-I's mission was to oversee and support the reconstruction of Iraq's Ministry of Defense and Ministry of Interior. MNSTC-I developed

the IMERP to re-equip the Iraqi military. The IMERP's goal was to salvage the military equipment that could be refurbished and the scrap military equipment that was scattered across Iraq after the fall of Saddam Hussein's regime.

Under Saddam Hussein, Iraq had an extremely large military with extensive stocks of military equipment. Expert Report of John M. Gale app. C, 11, 43–47, Pl.'s Ex. 101. A significant amount of this equipment consisted of Soviet weaponry. Tr. 12/18/18 PM 65:7–9; Tr. 12/19/18 PM 85:8–13. Destroyed and abandoned equipment littered the country following the U.S.-led invasion. *See* Tr. 12/17/18 PM 28:25–29:25; Tr. 12/19/18 AM 13:7–14, 33:6–34:2; Tr. 12/20/18 PM 37:8–19; Petraeus Dep. 14:18–15:20; Pl.'s Ex. 63. The IMERP intended to determine what equipment was recoverable and what could be scrapped, hoping to immediately repair salvageable equipment so that a portion of the Iraqi armed forces could be rebuilt as quickly as possible. IMERP's immediate focus was to prepare at least one armored mechanized brigade to be on the streets in time for the new Iraqi government's parliamentary election in January 2005. *See* Tr. 12/17/18 PM 35:21–37:5; Tr. 12/19/18 AM 25:9–26:14; Joe Kane, *Iraqi Mech Brigade Moves Toward Initial Ops*, The Advisor, Oct. 9, 2004, Pl.'s Ex. 16, at 1, 8. This was a critical component of the Coalition and Iraq's goal to withdraw American troops and have Iraqi security forces take on greater responsibility. Petraeus Dep. 20:19–21:2, 28:19-30:3.

The Coalition and MNSTC-I leaders viewed Wye Oak and its president, Dale Stoffel, as capable of

executing the IMPERP effort. Wye Oak, and Dale Stoffel in particular, had extensive familiarity with Soviet military equipment and had government contacts throughout the world. *See* Tr. 12/18/18 PM 65:7–9; Pl.'s Ex. 1; Pl.'s Ex 5 ¶ 2. Further, Wye Oak possessed the necessary arms and weapons licenses to perform the planned work. Pl.'s Ex. 1; Pl.'s Ex. 51. And Wye Oak had a strong relationship with CLI Corporation, an American based construction firm that had experience working in Iraq, as Dale Stoffel was a part owner of CLI. Pl.'s Ex. 51.

On June 25, 2004, Wye Oak officially presented MoD its proposal to carry out the IMERP. Pl.'s Ex. 1. Wye Oak offered its services to "assess [MoD's] discarded and/or damaged military equipment to identify military salvageable equipment and scrap, account and inventory, value and identify purchasers for such military equipment and scrap, to maximize and to assist you in carrying out the Iraqi Military Equipment Recovery Project. In such role, Wye Oak would act as the exclusive broker for such transactions for the [sic] Iraq's Ministry of Defense for a minimum of ten percent commission on each such transaction." *Id.* Following this letter, on July 4, 2004, Iraq's Minister of Defense, Hazim al-Shalan, requested access to the military equipment depositories at the Taji military base so MoD personnel and Dale Stoffel could inspect and assess the equipment as part of the beginning phase of the IMERP. Pl.'s Ex. 2. Petraeus responded on July 20, 2004 with his full support for the MoD's expeditious initiation of the IMERP, and granted al-Shalan's request. Pl.'s Ex. 3.

Wye Oak and MoD began drafting the BSA. Nicholas Beadle, a United Kingdom government official and senior Coalition advisor to the Iraqi MoD, Iraqi Minister of Defense Hazim al-Shalan, and Iraqi MoD Secretary General Bruska Shaways, recalled his conversations with Shaways in July 2004 regarding the draft contract. Beadle made sure Shaways understood the MoD was agreeing to pay Wye Oak up front based on pro forma invoices—besides commissions—without having seen the completed work and would only have an opportunity to reconcile the payments at a later time. Tr. 12/20/18 PM 37:20–38:16, 53:11–54:3; Tr. 12/21/18 AM 36:16–38:20. On August 16, 2004, the MoD and Wye Oak officially entered into a contract, the BSA, to carry out the IMERP.

B. Iraq Contemplates Stopping Some Scrap Exports

While Wye Oak and MoD were negotiating the BSA, Iraq was also in the process of cracking down on scrap smuggling. On June 19, the General Secretary of Iraq's Council of Ministers informed the Ministries of Industry, Trade, and Finance that the Prime Minister directed the formation of a committee of representatives from these ministries to study scrap exports and provide a recommendation on the topic. Defs.' Ex. 56.

Following this directive, the Ministry of Trade wrote the Council of Ministers to inform the Council of its views on exporting scrap. Defs.' Ex. 55. The Ministry of Trade stated the decision to export scrap was implemented in accordance with CPA Order 54 on the Trade Liberalization Policy of 2004 issued on February 26, 2004. *Id.* According to the Ministry of

Trade, CPA Order 54 in part sought to stop scrap smuggling and institute a legal regime to govern scrap exports. *Id.* CPA Order 54 prohibited the export of "metals of all kinds, including scrap," in quantities in excess of personal use without a license from the Ministry of Trade. Defs.' Ex. 54. However, the Basra Governate apparently interfered with authorized scrap exports. *Id.* This led the Ministry of Trade to request the Basra Governate be directed not to interfere with the export of scrap done in accordance with previously granted licenses. *Id.*

The committee formed pursuant to the Prime Minister's direction ultimately recommended stopping scrap exports but allowing those who already had export licenses to continue their export efforts because those licensees only accounted for a small portion of existing scrap. Defs.' Ex. 57. But the committee also urged the Ministry of Interior and General Commission of Customs to institute strict procedures to prevent scrap smuggling. *Id.*

On July 17, 2004, the General Secretary of the Cabinet issued a letter to the Ministry of Interior regarding the prohibition of exporting scrap with copies to the Office of the Prime Minister, Ministry of Industry and Minerals, Ministry of Trade, and National Intelligence Service. Defs.' Ex. 53. Specifically, the letter stated the Prime Minister agreed to the Ministry of Industry and Minerals' proposal to stop exporting scrap, with the exception that some materials of a military nature could still be exported upon the Prime Minister and his economic committee's approval. *Id.* Unfortunately, this Court was never provided with the Ministry of Industry and

Minerals' proposal referenced in this letter, which makes it impossible to fully comprehend the exact terms of the prohibition on exporting scrap the Prime Minister approved.

This deliberation on scrap exports and decision by the Prime Minister was never communicated to Wye Oak at any time during the BSA negotiations or after Wye Oak and the MoD signed the BSA. And Beadle testified he understood all orders prohibiting scrap sales to only apply to private sales, not the MoD. Tr. 12/21/18 AM 7:25–8:10. Further, Neal testified General Bashar, an MoD official working on the effort to recover vehicles, informed him the scrap ban was intended to stop individuals from illegally taking scrap and did not affect Wye Oak. Tr. 12/19/18 AM at 29:22–31:16; Tr. 12/19/18 PM 4:9–18.[1]

C. Wye Oak and MoD Execute the BSA

Wye Oak and MoD entered into the BSA to carry out the IMERP on August 16, 2004. The BSA was signed by Dale Stoffel on behalf of Wye Oak and countersigned by Iraqi MoD Secretary General Bruska Shaways. Pl.'s Ex. 5. Secretary General Shaways had the "full signatory authority" of MoD regarding all matters related to Wye Oak's work recovering and selling scrap military equipment. Pl.'s

[1] General Bashar's declarations were admitted into evidence as admissions by a party-opponent—and therefore non-hearsay—under Federal Rule of Evidence 801(d)(2). General Bashar was an MoD employee speaking on a matter— whether the scrap ban applied to the MoD—within the scope of his relationship with the MoD, as he worked on the IMERP, which contemplated exporting scrap as part of the program, while he was employed by the MoD. Fed. R. Evid. 801(d)(2)(D).

Ex. 6. Under the BSA, MoD was required to "work exclusively with [Wye Oak] regarding furnishing of Military Refurbishment Services, Scrap Sales and the sale of Refurbished Military Equipment with respect to all Military Equipment." Pl.'s Ex. 5. The BSA appointed Wye Oak as the sole and exclusive broker for:

> (i) the accounting, inventory, and assessment of discarded and/or damaged Military Equipment in connection with the Iraqi Military Equipment Recovery Project to identify which Military Equipment is salvageable and suitable for Military Refurbishment Services and which Military Equipment is scrap;
>
> (ii) the arranging of any Scrap Sales of any Military Equipment that is not suitable for Military Refurbishment Services;
>
> (iii)the provision of Military Refurbishment Services with respect to all of the various military bases, offices and properties owned by, or under the control of, the Ministry and/or the Republic of Iraq, wherever such bases, offices and property maybe [sic] located and all the related military equipment located thereon or otherwise owned by the Ministry and/or the Republic of Iraq; and
>
> (iv)the arranging for the sale of Military Equipment and/or Refurbished Military Equipment to Customers during the term of this Agreement or for Scrap Sales of any such Military Equipment that is not suitable for Military Refurbishment Services, which

> arranging shall include the valuation of any such Military Equipment, whether original, refurbished or scrap, and the identification of prospective Customers for such sales.

Pl.'s Ex. 5 ¶ 2. MoD agreed "not to conduct any Military Refurbishment Services or arrange for the use, sale or lease of any Refurbished Military Equipment provided for under [the BSA] nor engage in any scrap sales, except pursuant to an engagement with [Wye Oak] under [the BSA]." *Id.* The BSA stated Wye Oak would begin performing services at five military facilities: "Taji Military Base/Camp Cooke, Camp Normandy, Camp Ashraft, Camp Anaconda, and the Coalition facilities at the Hilla Military Facility." *Id.*

The BSA provided specific definitions for the terms military equipment, military refurbishment services, refurbished military equipment, customers, and scrap sales. Military equipment was defined as "any equipment that is used by or in the provision of military [sic], including, without limitation, any and all vehicles, aircrafts, guns, missiles, armored personnel carriers, heavy armor/tanks, military radar equipment, ballistic missiles, rocket launchers, artillery, artillery scrap, small arms, small arms scrap or any parts or components thereof." *Id.* ¶ 1. The contract defined military refurbishment services as "any services sold, performed for, or provided with respect to any Refurbished Military Equipment that is either retained by the Ministry or sold or otherwise provided to Customers by the Ministry, including, but not limited to, the inspection of the Military Equipment prior to performing any Military

Refurbishment Services to make a value assessment and a refurbishing assessment for such Military Equipment." *Id.* The BSA provided that "Refurbished Military Equipment shall mean any Military Equipment that has been refurbished by, or under the direction of, the Broker pursuant to this Agreement, and sold or provided to customers by the Ministry." *Id.* Customers were defined as "purchasers of the 'Military Refurbishment Services' and/or 'Refurbished Military Equipment' and 'or Scrap sales' including, but not limited to, Iraqi Ministry of Defense, commercial establishments and governmental and semi-governmental entities in the military sector." *Id.* And scrap sales were defined as "sales to any third party of any Military Equipment or other items which may not be defined as scrap but contemplated by the nature of this Agreement (e.g., brass, gun barrels, etc.) that the Broker or Iraqi Ministry of Defense determines is not suitable for Military Refurbishment Services in accordance with the terms of this Agreement." *Id.*

Further, Wye Oak was required to use "all reasonable commercial efforts to perform the Military Refurbishment Services and in the development of markets and sales prospects for Military Equipment, including Refurbished Military Equipment and Scrap Sales." *Id.* ¶ 3. Wye Oak was not under any obligation to expend any money in performing these services or activities, except money that was advanced by the MoD to cover "certain expenses associated with the performance of the Military Refurbishment Services, the sales of any Military Equipment, Refurbished Military Equipment or any Scrap Sales." *Id.* ¶ 3. In

addition, MoD was required to "fully inform [Wye Oak] at all times of all matters reasonably required to enable [Wye Oak] to carry-out its duties as set forth [in the BSA]." *Id.* ¶ 4.

As compensation, MoD was required to pay Wye Oak "a commission of [a] minimum of ten percent (10%) based on the Contract Value set out in each Sales Contract entered into by the Ministry, pursuant to this Agreement." *Id.* ¶ 5. With respect to Refurbished Military Equipment, the MoD was required to pay Wye Oak 10% of such equipment's refurbishment cost. *Id.* The commissions were to be paid "pursuant to proforma invoices submitted by [Wye Oak] and then reconciled by final invoice. Upon providing such proforma invoice, Ministry will make full payment on such invoice immediately upon presentation. All payments to be made to [Wye Oak] under this Agreement shall be made in United States Dollars in the form and manner as directed by [Wye Oak]." *Id.* Also, the BSA provided significant protections for Wye Oak. Wye Oak was entitled to receive and retain all commissions for sales contracts for military refurbishment services, refurbished military equipment, or scrap MoD cancelled or terminated, regardless of the cause. *Id.*

The BSA was set to last for one year. This one-year term was to renew automatically for two subsequent, consecutive one-year periods unless either Wye Oak or the MoD gave the other party written notice it would not renew at least sixty days prior to the end of any term. If termination notice was provided, the BSA was set to terminate at the end of the then-current term. *Id.* ¶ 6.

This Agreement was not assignable by either party. *Id.* ¶ 8. Any purported assignment of the BSA without written consent from both parties was void and without effect. *Id.* A failure by one of the parties to assert any right in the BSA or upon a breach of the BSA would not constitute a waiver of such rights. *Id.* ¶ 12. And a written waiver of any right was not deemed to extend to any subsequent breach. *Id.* The BSA was not to be amended or supplemented except in writing, signed by both parties. *Id.* ¶ 13. The BSA constituted the entire agreement between Wye Oak and the MoD. *Id.* ¶ 14.

In addition, the BSA contained an indemnification clause. Each party was to "indemnify, defend and hold harmless the other party from and against any and all liabilities, demands, claims, lawsuits, damages, judgments, costs (including reasonable attorney's fees and expenses) including but not limited to injury to persons (including death), loss or damage to, or destruction of property arising out of that party's breach of this Agreement or that party's negligent or willful actions while performing hereunder." *Id.* ¶ 15.

Finally, the English version of the Agreement governed and the BSA was required to be construed and interpreted pursuant to Iraqi law. *Id.* ¶¶ 18, 21.

D. Wye Oak Begins Performance

Wye Oak more likely than not began performing activities related to the BSA around the same time as the contract was signed. In the days preceding the BSA, Wye Oak identified 70,000 tons of brass artillery casings it believed could be sold as scrap. Wye Oak began trying to broker a sale of these scrap brass shell casings and had some communications with at least

one potential customer after the BSA was signed. *See* Defs.' Ex. 91 (email from Coskun Akdeniz to Dale Stoffel on August 18, 2004, regarding a potential customer for the scrap brass casings).[2] Unfortunately, these shell casings were stolen from the Iraqi military base where they were stored before Wye Oak could broker any sales contract. *See* Pl.'s Ex. 24 (email from Dale Stoffel to Nick Beadle, William Felix, and Colonel David Styles with the subject line "missing brass" and attached pictures of the brass); Pl.'s Ex. 26 (email from Colonel David Styles to Dale Stoffel, Nick Beadle, and William Felix regarding the stolen brass); Tr. 12/18/18 AM 81:16–84:21 (David Stoffel testifying the potential sale of the 70,000 tons of brass shell casings was never completed). While Wye Oak claims MoD and Iraq were at fault for this theft, the evidence presented to the Court is insufficient to establish this point.

Nonetheless, Wye Oak continued to move ahead. Wye Oak worked with its sister company CLI, and Wye Oak and CLI hired Iraqi laborers. Tr. 12/18/18 PM 64:17-64:19; Felix Dep. 20:15– 23:1, 80:22–81:3. On September 6, 2004, Secretary General Shaways wrote to Multi-National Forces-Iraq Commanding General George Casey to inform him that "Wye Oak has begun the initial assessment of equipment and is preparing to assemble the necessary personnel to inventory, assess and remove Iraqi military equipment or scrap for sale or use by the Iraqi Ministry of Defense." Pl.'s Ex. 10. Shaways then

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[2] This exhibit was moved into evidence by defendants as a Wye Oak business record without objection by Wye Oak. Tr. 12/18/18 AM 81:16–84:15.

requested access to Iraqi military bases under the U.S. military and Coalition forces' control because military equipment and scrap were located on those bases. *Id.*

On September 17, Dale Stoffel reached out to a Ukrainian company to invite specific employees and affiliates to Iraq to assist Wye Oak in assessing, recovering, and refurbishing military equipment for the IMERP. Pl.'s Ex. 11. Wye Oak offered to provide transportation from Ukraine to Iraq and to arrange visas for these individuals. *Id.* Several witnesses testified Dale Stoffel brought in a team from Ukraine to assist with the work. *See, e.g.*, Tr. 12/19/18 AM 42:1– 9; Felix Dep. 102:24–104:06. While Dale Stoffel and individuals from CLI, Iraqi laborers, and workers from Ukraine got started on identifying, assessing, and refurbishing military equipment in Iraq, David Stoffel worked on the IMERP from the United States. David Stoffel oversaw all information technology services for Wye Oak. Tr. 12/18/18 AM 31:7–32:1, 43:22–25, 44:11–20, 48:25–49:5.

By September 29, 2004, Wye Oak provided MNSTC-I project officer Colonel David Styles an initial survey of equipment that had been reviewed thus far at Camp Normandy. Pl.'s Ex. 14. This survey consisted of 745 units of military equipment, including various tanks, armored personnel carriers, artillery, rocket launchers, anti-aircraft guns, and vehicles. *Id.* Even the equipment marked "operational" still likely required at least some maintenance before it could be put back into operation. Tr. 12/19/18 AM 12:14–20.

The Iraqi government announced in October 2004 it would be standing up a mechanized brigade of about

3,000 soldiers by early 2005. Pl.'s Ex. 16 at 1. Iraqi Brigadier General Mahmoud Bashar, the official selected to lead the new brigade, proudly proclaimed most of the tanks and personnel carriers would come from Iraq. *Id.* These statements were reported in *The Advisor*, an authorized publication of MNSTC-I. This publication was authenticated as a self-authenticating official publication and newspaper under Federal Rules of Evidence 902(5) and 902(6). The Iraqi government and General Bashar's declarations were admitted into evidence as admissions by a party-opponent—and therefore non-hearsay—under Federal Rule of Evidence 801(d)(2). Nicholas Beadle testified Wye Oak was the one performing the work to refurbish the vehicles discussed in *The Advisor*'s October 2004 issue that the Iraqi government and General Bashar boasted about. Tr. 12/20/18 PM 57:5–21. Beadle declared, "Wye Oak were the only show in town. They were the only ones who were performing refurbishment work of this sort." Tr. 12/20/18 PM 57:5–21.

E. Wye Oak and Zayna Sign a Limited Power of Attorney

On September 28, 2004, Wye Oak granted Raymond Zayna, a Lebanese businessman in charge of the General Investment Group, s.a.l. (GIG), a limited power of attorney to arrange financing and bank guarantees on behalf of Wye Oak for its contract with MoD. Pl.'s Ex. 13. Wye Oak made clear Zayna's authority under this agreement was circumscribed. Wye Oak specified "GIG will provide financial services with respect to the IMERP Contract *when and as requested by Wye Oak*." *Id.* (emphasis added). The

parties drastically differ on how Raymond Zayna came to be involved with Wye Oak and MoD.

Wye Oak insists Zayna was inserted by MoD, while defendants claim Wye Oak and Zayna had a business relationship dating back to summer 2004. Neither side offers definitive evidence on this point. Wye Oak bases its contention on several witnesses' personal observation giving the impression that Dale Stoffel and Raymond Zayna did not have any form of relationship. *See, e.g.*, Tr. 12/17/18 PM 24:6–21 (Clements stated he did not believe any relationship existed between Stoffel and Zayna based on his observations of their interactions during meetings); Tr. 12/17/18 PM 25:21–26:7 (Clements recalled a December 5, 20004 meeting in which discussions focused on the fact Zayna was holding funds on behalf of MoD and needed MoD's authorization to release those funds to Wye Oak); Tr. 12/20/18 76:24–77:24 (Beadle saw Zayna in the MoD without Stoffel or anyone from Wye Oak on occasions). On the other hand, defendants point to an email from Dale Stoffel in November 2004 indicating GIG paid for Ukrainian expert's travel to Iraq to help assess and repair military equipment (likely as a result of Dale Stoffel's September 17, 2004 invitation) to indicate Dale and Zayna had a preexisting relationship. Pl.'s Ex. 31, 2 ("$112,150.00 from Invoice #MUQ002 due to GIG for completed work for the transportation of Ukrainian Experts to assess the repair/overhaul work."). But David Stoffel did not recall ever hearing about Zayna until September or October 2004. Tr. 12/18/18 AM 57:13–18. And William Felix repeatedly stated he associated Zayna with MoD. Felix Dep. 141:7–16. It is

unlikely David Stoffel and William Felix, two important players among a small group of people that made up Wye Oak and CLI, would either not have heard of Zayna or viewed him as an interloper to Wye Oak's arrangement with MoD if Wye Oak was indeed the party who inserted Zayna into this deal in the first place. This leads the Court to believe it is more likely than not that Zayna was inserted at the behest of the MoD.

This conclusion is even more likely given that Ziad Cattan, the Deputy Secretary General of the MoD, was convicted for his role, along with Bruska Shaways and Sawsan Jasim, in concluding a financial agreement with GIG, Zayna's company, that violated Iraqi law and intentionally caused harm. *See* 34/CR3/2011, ECF No. 430; 34/CR3/2011, ECF No. 438-1. This conviction indicates these MoD officials conspired with Zayna to steal millions of dollars. The Court is left with the distinct inference from this Iraqi Integrity Commission case that Zayna had a relationship with these MoD officials and was more likely than not inserted by these officials into the arrangement between Wye Oak and MoD.

F. Wye Oak Presents Three Invoices to MoD

In October 2004, Wye Oak submitted three pro forma invoices to MoD for work in relation to the IMERP. On October 11, 2004, Wye Oak submitted two pro forma invoices for construction at the Muqdadiya Armored Depot (Invoice #MUQ001) and Taji Facility (Invoice #TAJI001). Pl.'s Ex. 18. These invoices covered the initial construction costs for armored vehicle repair facilities, costs of purchasing tools and moving spare parts, the initial hiring and training of

workers, and a 10% mobilization fee for construction efforts at Taji. *Id.* Further, these invoices included a 15% overhead cost and 10% profit. *Id.* Invoice #MUQ001 was for $2,302,300 and Invoice #TAJI001 was for $5,945,500. *Id.* On October 18, 2004, Wye Oak submitted a third invoice, Invoice #MUQ002, for vehicle recovery efforts at Muqdadiya. *Id.* at 3. This invoice covered travel, lodging, and food for technical experts, materials to wash and paint vehicles, costs for skilled and unskilled labor, and costs for the initial repair of 246 armored vehicles at both Muqdadiya and Taji. *Id.* This invoice also included a 15% overhead cost and 10% profit. *Id.* It was for $16,466,897.15. *Id.* In sum, these three invoices totaled $24,714,697.15.

G. October 19, 2004 Meeting

On October 19, 2004, a meeting was convened at MoD headquarters to ensure the IMERP was progressing. The meeting consisted of Shaways, Beadle, Marr, Dale Stoffel, Zayna, Styles, Ziad al-Cattan, and Jasim. Tr. 12/20/18 AM 13:21–14:19; Pl.'s Ex. 20, 6.

Marr arrived at the MoD at about the same time as Dale Stoffel, and they waited together for about an hour while Zayna met with the senior MoD officials in Shaways office. Tr. 12/20/18 AM 13:21–14:19. Beadle arrived shortly before Marr, Stoffel, and him entered Shaways office. *Id.* And they were later joined by Colonel Styles. *Id.*

1. *MoD Approved Wye Oak's Three Invoices*

During the meeting, the parties discussed Wye Oak's three invoices and how they would be financed. Tr. 12/20/18 PM 64:3–16. Ultimately, Marr testified

that Shaways declared MoD accepted the invoices. Tr. 12/20/18 AM 16:13–20. And Beadle further testified Shaways agreed to pay the invoices to Dale Stoffel. Tr. 12/20/18 PM 65:23–66:4. This testimony regarding Shaways' ratification of the invoices and agreement to pay Dale Stoffel was admissible as non-hearsay admissions by a party-opponent. Shaways was authorized to make such decisions for MoD regarding all matters related to Wye Oak's work under the BSA. *See* Pl.'s Ex. 6 (letter from Shaways asserting he had full signatory authority on all matters with respect to the BSA, as designated by the Iraqi Minister of Defense); Fed. R. Evid. 801(d)(2)(C). Further, Shaways was an MoD employee speaking on a matter—work related to the IMERP—within the scope of his relationship with MoD while he was employed by MoD. Fed. R. Evid. 801(d)(2)(D). The Court therefore concludes it is more likely than not MoD approved Wye Oak's three invoices and agreed to pay this money to Wye Oak's president, Dale Stoffel.

2. *Wye Oak and MoD Effectuated the First Amendment to the BSA*

In addition to discussing and approving the three Wye Oak invoices, the parties at the October 19 meeting took up an amendment to the BSA. Tr. 12/20/18 AM 18:5–18:20; Tr. 12/20/18 PM 63:7–17. The amendment, termed the "First Amendment," was presented to the Court as Wye Oak's business record, but lacked any signature from either Shaways or Dale Stoffel. Tr. 12/18/18 AM 26:4–35:25; Pl.'s Ex. 19; Pl.'s Ex. 19.1.

Defendants took issue with the unsigned amendment as initially presented to the Court because defendants wanted to also admit the document's metadata in addition to the document itself. Tr. 12/18/18 PM 3:5–4:12. Wye Oak had no objection to the admission of the document's metadata. Tr. 12/18/18 PM 3:21–4:6. Metadata is data that describes and gives information about other data. Here, the file's metadata describes the file's creation date, time saved, and who created, edited, and saved the file. Pl.'s Ex. 19.1. The metadata showed William Felix last saved the Microsoft Word document. *Id.* Indeed, David Stoffel testified this document was found on the computer he had purchased for Felix. Tr. 12/18/18 PM 93:6–7. Further, the metadata showed the document was created on October 25, 2004 at 3:26 a.m. and also last saved on October 25, 2004 at 3:26 a.m., with a total editing time of 6 minutes. Pl.'s Ex. 19.1. However, Marr and Beadle both testified the First Amendment was brought up, and signed, during the October 19, 2004 meeting. This raises a question as to whether the document presented to the Court was indeed the pertinent document discussed at the October 19 meeting or whether it was created in the first instance on October 25, after the meeting.

Metadata can be misleading. For example, "if a Microsoft Word document is created on one machine, and transferred to and saved to a second machine without being altered, the copy on the second machine (erroneously) will show the date the document was saved to the second machine as the date created." *The Sedona Principles, Third Edition: Best Practices, Recommendations & Principles for Addressing*

Electronic Document Production, 19 Sedona Conf. J. 1, 171 (2018). "There is . . . the real danger that information recorded by the computer as application metadata may be inaccurate." *Id.* at 211. This is a significant note of caution regarding the utility of metadata in determining a document's true creation date.

Ultimately, the Court finds it is more likely than not that the First Amendment presented to the Court during trial, Pl.'s Ex. 19, was a copy of the document discussed during the October 19 meeting. Marr and Beadle both testified during the trial this amendment was discussed by the parties at the meeting. Tr. 12/20/18 AM 18:5–6 ("I saw a document, the document looked like [Pl.'s Ex. 19]."); Tr. 12/20/18 PM 63:7 ("Well, they discussed this amendment, first of all."). The Court found Marr and Beadle to both be extremely credible witnesses, who participated in the October 19 meeting. Their testimony, which corroborates one another, when weighed against the inherent potential misimpressions metadata can produce, leads the Court to conclude the preponderance of the evidence establishes this document was the same document the parties dealt with at the October 19, 2004 meeting.

The Court must next decide whether this First Amendment was actually signed by Shaways and Dale Stoffel. Both Marr and Beadle testified they personally saw Shaways and Dale Stoffel sign the document. Referring to the First Amendment, Marr asserted "I saw Bruska Shaways sign it and Dale Stoffel sign it." Tr. 12/20/18 AM 18:9–10. Beadle also responded in the affirmative when he was specifically

asked by Wye Oak's counsel whether he saw Bruska Shaways sign the First Amendment and whether he saw Dale Stoffel sign the First Amendment. Tr. 12/20/18 PM 63:12–17. While defendants contend these statements are hearsay that cannot be admitted to establish the First Amendment was signed and effectuated as a valid amendment to the BSA, the testimony about Shaways and Stoffel's signatures is admissible.

First, signatures are written assertions and nonverbal conduct intended as assertions, which makes them statements under Federal Rule of Evidence 801(a). Shaways signature is certainly not hearsay, as it constitutes an admission by a party-opponent under Rule 801(d)(2). Shaways was authorized to make decisions for the MoD regarding all matters related to Wye Oak's work under the BSA. *See* Pl.'s Ex. 6 (letter from Shaways asserting he had full signatory authority on all matters with respect to the BSA, as designated by the Iraqi Minister of Defense). So Shaways was authorized to amend the BSA. Accordingly, his signature was a statement made by an individual authorized to make a statement on the subject that is now being offered against the defendants. *See* Fed. R. Evid. 801(d)(2)(C). Shaways was also an MoD employee making a statement on a matter—the BSA—within the scope of his relationship with MoD while that relationship existed. *See* Fed. R. Evid. 801(d)(2)(C).

Further, Shaways and Stoffel's signatures constitute verbal acts where the legal effects of the statements flow just by virtue of the fact they were made. In other words, the significance of these

signatures lies solely in the fact they were made. Testimony about the fact the signatures occurred was not offered to prove the truth of anything asserted. Accordingly, these signatures are not hearsay. *See* Fed. R. Evid. 801(c) adv. comm. note ("If the significance of an offered statement lies solely in the fact that it was made, no issue is raised as to the truth of anything asserted, and the statement is not hearsay."); *Mueller v. Abdnor*, 972 F.2d 931, 937 (8th Cir. 1992) (finding communications relevant to making a contract, such as conversations and letters, are not hearsay because such "verbal acts" are not assertions and are not offered to prove the truth of the matter); 2 McCormick on Evidence § 249 (7th ed. 2016) ("[P]roof of oral utterances by the parties in a contract suit constituting the offer and acceptance which brought the contract into being are not evidence of assertions offered testimonially but rather verbal conduct to which the law attaches duties and liabilities."); *see also Preferred Properties, Inc. v. Indian River Estates, Inc.*, 276 F.3d 790, 799 n.5 (6th Cir. 2002); *Stuart v. UNUM Life Ins. Co. of Am.*, 217 F.3d 1145, 1154 (9th Cir. 2000). The credible testimony from Marr and Beadle regarding Shaways and Stoffel signing the First Amendment sufficiently demonstrates it is more likely than not both parties signed the First Amendment and therefore validly amended the BSA.[3]

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[3] Beadle's testimony was especially convincing. He was the Coalition's senior advisor to the MoD at this time. Tr. 12/18/18 PM 26:20–24. Beadle had significant insight into MoD's operations and closely worked with the MoD figures involved in

This amendment attempted to clarify the BSA. The First Amendment altered the definition of "military refurbishment services" to read:

> any services sold, performed for, or provided with respect to any Refurbished Military Equipment that is either retained by the Ministry or sold or otherwise provided to Customers by the Ministry, including, but not limited to, the inspection of the Military Equipment prior to performing any Military Refurbishment Services to make a value assessment and a refurbishing assessment for such Military Equipment, including but not limited to, construction of facilities, bases, billeting, service/repair depots, repair factories/facilities.

Pl.'s Ex. 19; Pl.'s Ex. 19.1. Wye Oak's role as the sole and exclusive broker for providing military refurbishment services was altered such that Wye Oak was now appointed for:

> the provision of Military Refurbishment Services with respect to all of the various military bases, offices and properties owned by, or under the control of, the Ministry and/or the Republic of Iraq, wherever such bases, offices and property maybe [sic] located and all the related military equipment located thereon or otherwise owned by the Ministry and/or the Republic of Iraq, including but not limited to,

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this contract. And Beadle demonstrated his impartiality throughout his testimony.

> construction of facilities, bases, billeting, service/repair depots, repair factories/facilities.

Pl.'s Ex. 19; Pl.'s Ex. 19.1. And one of the compensation terms in the BSA was altered such that:

> The Ministry shall pay [Wye Oak] a commission of minimum of ten percent (10%) based on the Contract Value set out in each Sales Contract entered into by the Ministry, pursuant to this Agreement. With respect to Refurbished Military Equipment and Military Refurbishment Services, the Ministry will pay [Wye Oak] ten percent (10%) of such Military Refurbishment Services and equipment's refurbishment cost.

Pl.'s Ex. 19; Pl.'s Ex. 19.1.

H. MoD and GIG Sign the Contract of Financial Agreement

Defendants contend the parties at the October 19, 2004 meeting also discussed a financial plan that ultimately resulted in the Contract of Financial Agreement (CFA) between MoD and GIG. Under the CFA, GIG committed to finance the IMERP program MoD had contracted with Wye Oak to carry out. Pl.'s Ex. 21. Defendants' allegation that this arrangement was discussed during the October 19 meeting is solely based on the fact the memorandum Marr signed (but did not write) commemorating the meeting states that Shaways approved the three invoices and "the financial plan," which defendants claim refers to the CFA. *See* Pl.'s Ex. 20; Tr. 12/20/18 AM 25:8–26:3. Defendants proceed to argue there is no evidence Dale Stoffel objected to the payment plan set forth in the CFA despite being present when it was allegedly

discussed and agreed upon during the October 19 meeting. Defs.' Proposed Findings of Fact & Conclusions of Law 16, ECF No. 431-1 [hereinafter ECF No. 431]. Defendants contend Wye Oak, through Dale Stoffel, had a legal obligation under Iraqi law to express disagreement with the CFA's payment plan under Article 81(1) of the Iraqi Civil Code. Article 81(1) provides: "No statement will be attributed to a silent person but silence in the course of need for expression will be deemed to be an acceptance." Pl.'s Ex. 97. Defendants conclude Wye Oak's failure to object to the CFA at the October 19 meeting or at any time prior to Zayna being paid, as discussed in the following section, means Wye Oak consented to such payment arrangement. ECF No. 431-1, at 45–46.

However, Marr robustly refuted this characterization of events when he testified during trial. Marr testified he understood the term "financial plan" in the memorandum he signed to be referring to the First Amendment. Tr. 12/20/18 AM 26:10–15. Indeed, Marr stated "[t]here was no discussion of a financial plan that has been documented elsewhere in the exhibits," referring to the CFA, and the only financial plan he reviewed during the October 19 meeting was the First Amendment. Tr. 12/20/18 AM 26:10–23. In addition, Beadle testified he never saw the CFA before it was presented to him as an exhibit at trial. Tr. 12/20/18 PM 78:19–24. And Beadle recalled the "financial plan" approved at the October 19 meeting referred to in Marr's memorandum was a plan "for the refurbishment program and the establishment of the facilities . . . It was largely – the conversation started on the basis of those – of the

second invoice, which showed a proportion of what – a much larger bill, and that bill was the financial plan." Tr. 12/20/18 PM 67:4–12. Based on this testimony thoroughly rebutting the tenuous (at best) evidence put forward by defendants, the Court concludes the CFA was not discussed during the October 19 meeting. This means no inference can be drawn that Dale Stoffel was ever even aware of—let alone consented to—the CFA.

Thus, without any input from Wye Oak, MoD and GIG concluded and signed the CFA on October 24, 2004. The CFA declared MoD had "signed contract [sic] with Wye Oak Technology Inc. to implement the program of rehabilitation and repair of military equipment" and GIG had "committed to funding this program of (Wye Oak Technology Inc.)." Pl.'s Ex. 21. The CFA stated that "[MoD] gives to [GIG] several payments under the bank guarantees as far as the amount of such payments for purposes of implementation of the contract," and "[GIG] submits cost invoices to the [MoD], so as to enable [GIG] of the resolve the invoices from the amount of the bank guarantee provided for the [MoD]." *Id.* Despite focusing on Wye Oak and the IMERP, the Court concludes the CFA did not legitimately implicate the BSA, as the evidence establishes the CFA was not agreed to—let alone signed—by Wye Oak and therefore did not meet the requirements set forth in the BSA's modification clause. *See* Pl.'s Ex. 5 ("This Agreement shall not be amended or supplemented except in writing, signed by both parties.").

Further, following trial, this Court was presented with evidence—for the first time—that MoD officials

were convicted for violating Iraqi law and intentionally causing harm based on their conclusion of a financial agreement with GIG, which the Court concludes more likely than not refers to the CFA. After a decade of litigation and months after this trial concluded, defendants produced a summary of the criminal conviction of Ziad Cattan along with Bruska Shaways and Sawsan Jasim. 34/CR3/2011, ECF No. 430. The summary states:

> In 2004, convicted fugitive Ziyad Tariq Abdallah Al Qattan, when he was working as the Deputy Secretary-General at the Ministry of Defense, in conjunction with the defendants Bruska Nouri Sadeeq and Sawsan Jasim Mohamed when they were working at the Ministry of Defense, concluded a financial agreement with the General Investment Group (GIG) Company to finance a Ukrainian company tasked with the rehabilitation of tanks for the Ministry. Failure to follow the legal procedures for contracting caused intentional harm to the state assets and to the interest of the entity for which he was working. An amount of four million dollars was paid for the maintenance of tanks type (T72). There was a second payment valued at (twenty-four million and seven hundred fourteen thousand and six hundred ninety-seven dollars and fifteen cents) for the maintenance of tanks type (T55). . . . He was convicted by the Al Rasafa Criminal Court, the specialist in integrity cases, and he was sentenced *in absentia* to seven years in prison, pursuant to article (340) of the

> Criminal Penalties Code, on 24/3/2011 in case number (34/CR3/2011).

34/CR3/2011, ECF No. 438-1.[4] The second payment cited in the conviction summary matches the exact amount owed to Wye Oak for the three invoices but paid to Zayna instead, as discussed below. And the summary appears to be referring to the CFA, as this was an agreement constituted between MoD and GIG in 2004 relating to the IMERP, which included the rehabilitation, refurbishment, and maintenance of tanks. This strongly indicates the CFA was a fraudulent scheme between these MoD officials and Zayna to steal millions of dollars.

I. MoD Paid Zayna Instead of Wye Oak

Following the CFA, MoD proceeded to pay Zayna for the invoiced amounts in three checks mirroring the three Wye Oak invoices, despite the fact Wye Oak was not a party to the CFA. On October 25, 2004, MoD paid three checks to Zayna. The first check was for $5,945,500, the second check was for $2,302,300, and the third check was for $16,466,897. Pl.'s Ex. 22 at 4. These amounts matched the totals of Invoice #TAJI001, Invoice #MUQ001, and Invoice #MUQ002, respectively, minus 15 cents.[5] *Compare id.*, *with* Pl.'s

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[4] Article 340 of the Iraqi Criminal Penalties Code states: "Any public official or agent who willfully inflicts damage on the property or interests of the authority for which he works or to which he is associated by virtue of his position or on another's property that has been entrusted to him is punishable by a term of imprisonment not exceeding 7 years or by detention." ECF No. 438-2.

[5] Invoice #MUQ002 was for $16,466,897.15, whereas the third check to Zayna was for $16,466,897.00. The other two checks

Ex. 18. This leads the Court to conclude these checks were payments for Wye Oak's three invoices, which MoD approved and had agreed to pay to Dale Stoffel at the October 19, 2004 meeting.

Although Felix testified Dale Stoffel was aware MoD released the money to Zayna and conveyed this to him, Felix Dep. 163:4–164:20, there is no evidence to indicate Wye Oak directed MoD to release the funds in this manner or concurred with this action. *Cf.* Pl.'s Ex. 5 ("All payment to be made to [Wye Oak] under this Agreement shall be made in United States Dollars in the form and manner directed as by [Wye Oak]."). As discussed, Wye Oak was not a signatory to the CFA so this agreement did not modify the BSA. And under the limited power of attorney granted by Wye Oak to Zayna, GIG was only supposed to provide financial services "when and as requested by Wye Oak," yet there is no evidence to suggest Wye Oak ever made such a request. Accordingly, the Court concludes these payments to Zayna—not Wye Oak—constituted a material breach of the BSA by MoD.

J. Wye Oak Continued to Perform until Nonpayment Became a Serious Impediment

1. *Wye Oak Performed Work in Iraq*

Nonetheless, Wye Oak continued to perform activities as part of the IMERP. At trial, Major Todd Neal testified he observed Wye Oak working on the IMERP when he was tasked with leading the effort to refurbish vehicles to operational condition to be provided to the Iraqi military. Neal remembered that

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from MoD to Zayna matched Invoice #TAJI001 and Invoice #MUQ001 exactly.

Dale and Ukrainian experts inspected warehouses at Taji and assessed military equipment. Tr. 12/19/18 AM 42:1–9; *see* Pl.'s Ex. 64. Dale Stoffel worked on the equipment alongside others at Muqdadiya and Taji, or had laborers working at those installments. Tr. 12/19/18 AM 42:12–43:4. Dale Stoffel brought Iraqi mechanics to these installations to have them perform work under the IMERP. Tr. 12/19/18 PM 59:2–10. Neal specifically recalled Dale Stoffel providing instructions for these workers and paying them for their work. Tr. 12/19/18 PM 59:2–10, 60:4–6. When asked whether he had knowledge of GIG hiring a workforce at Taji and Muqdadiya for the IMERP, Neal unequivocally responded GIG did not employ such a workforce. Tr. 12/19/18 PM 63:22–64:3. Neal reiterated the workers he interacted with were employed by Dale Stoffel, not anyone else. Tr. 12/19/18 PM 63:22–64:3. And based on his recollection, Neal estimated Wye Oak had between 12 and more than 20 people working at Muqdadiya and between 12 to 15 people working on armored vehicles alone at Taji. Tr. 12/19/18 AM 27:11–28:5.

As further evidence of Wye Oak's work, on October 23, 3004, Major John Petkosek wrote Colonel Styles, copying Dale Stoffel on the email, to report that "Dale and his team have been here [Muqdadiya] for a few days and they are doing great work. They have been working on the vehicles for several days now." Pl.'s Ex. 50.[6] Major Petkosek even attached a photograph—one

[6] This exhibit was admitted as a business record of Wye Oak's without objection. Tr. 12/18/18 AM 33:23–24; Tr. 12/18/18 PM 3:1–5:5.

of many admitted into evidence—of Wye Oak's team working on military vehicles. *Id.*

In addition, Beadle recalled that Wye Oak was making progress and General Petraeus shared his pleasure with Wye Oak's labor. Tr. 12/20/18 PM 70:2–5; Petraeus Dep. at 40:12–16, 41:2–7. Petraeus avowed Wye Oak had " [a] lot of wrench-turners, as we used to say, and they were cranking out refurbished vehicles pretty expeditiously . . . what I saw was a lot of elbows and other parts of the body, as we used to say, actively turning wrenches, fixing equipment, repairing parts, replacing parts, and all the rest of this. Again, it was quite a beehive of activity up there." Petraeus Dep. 40:12–16, 41:2–7.

Finally, plaintiff cites another article from *The Advisor*, published on November 27, 2004, authenticated as a self-authenticating official publication and newspaper under Federal Rules of Evidence 902(5) and 902(6), to support the notion Wye Oak continued to perform into November 2004. *See* Pl.'s Ex. 29. In this article, the Iraqi 1st Mechanized Brigade Commander states the brigade represents the core of what could potentially be an expanded Iraqi force and could grow into a full division. *Id.* Although this assertion by an Iraqi MoD official was obviously an out-of-court statement, it is not hearsay and is admissible into evidence. The statement is not offered to prove the truth of the matter asserted—that the brigade could potentially lead to an expanded Iraqi force; rather, the statement is solely offered to show a

brigade was actually being developed at this time.[7] Therefore, this falls outside the rule against hearsay. The Iraqi MoD official's statement is further acknowledgement that a brigade was being produced as part of the IMERP. This coincides with multiple pieces of evidence discussed above pointing to Wye Oak being the one conducting this IMERP work.

And Wye Oak was aided in its work by its informal partnership with CLI. Although Wye Oak never had a formal, signed subcontract agreement between it and CLI, CLI worked with Wye Oak on the IMERP. Tr. 12/18/18 AM 53:8–25; Felix Dep. 42:14–44:21. David Stoffel recalled Wye Oak prepared a formal subcontract agreement for CLI, but the parties never went ahead with officially consummating that agreement because Wye Oak was waiting payment for the three invoices so it could use that money to pay its subcontractor. Tr. 12/18/18 AM 53:8–25. Wye Oak did not want to sign the agreement with CLI unless it actually had the money to pay CLI under that agreement. Tr. 12/18/18 AM 53:8–25. Nonetheless, William Felix testified the two companies had a verbal agreement. Felix Dep. 42:22–45:16. CLI employees, such as Kenny Kelzer and Joe Wemple, worked with Wye Oak on the IMERP due to the close relationship between these two companies. Tr. 12/19/18 AM 43:1–4; Tr. 12/18/18 PM 8:1–4, 50:21–25; Felix Dep. 6:16–7:24, 42:14–45:16, 114:1–115:11.

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[7] Even if this assertion was offered to prove the truth of the matter asserted, it would still be admissible as an admission by a party-opponent under Rule 801(d)(2). Fed. R. Evid. 801(d)(2).

2. *Wye Oak Performed Work in the United States*

While Dale Stoffel and others on Wye Oak's team performed in Iraq, David Stoffel supported the group from the U.S. David Stoffel focused on writing a computer program that could ultimately be used to inventory and track all the equipment Wye Oak was refurbishing and would potentially broker for sales. Tr. 12/18/18 AM 38:11–41:17; Pl.'s Ex. 65. Dale Stoffel would send David Stoffel information regarding the equipment and how far along pieces of equipment were in the refurbishment and scrapping process. Tr. 12/18/18 AM 38:11–41:17; Pl.'s Ex. 65. David used this information to build the computer program to aid the company in its IMERP work.

David Stoffel also purchased computer equipment and materials, such as software, for the business in the U.S. Tr. 12/18/18 AM 44:5–19. He oversaw all electronic communications, in part to ensure Wye Oak's leadership was aware of all messages they received, as the team traveled frequently and maintaining e-mail communications and Internet connection could be challenging at times in Iraq during this period. Tr. 12/18/18 AM 44:5–19. In addition to these duties, David Stoffel maintained regular communication with the Wye Oak members in Iraq to see what they needed him to work on. Tr. 12/18/18 AM 50:1–24.

3. *Nonpayment Eventually Became a Significant Impediment to Wye Oak's Work*

Eventually, the nonpayment of Wye Oak's three invoices to Wye Oak created a significant impediment to their continued IMEPR work. Frustrated by not receiving payment, Dale Stoffel returned to the U.S.

in November 2004. Tr. 12/18/18 AM 60:18–20. Yet, his brother, David, observed him continuing to work on the Wye Oak venture focused on the IMERP even when he was back in the United States during this time. Tr. 12/18/18 AM 60:18–61:15. David and Dale Stoffel reached out to American officials, including senators and Secretary of Defense Donald Rumsfeld, during this period to notify them about the significant hurdles to accomplishing the IMERP's goal. Tr. 12/18/18 AM 59:17–60:20. In late November, Dale Stoffel and Bob Irey, a member of CLI, met with then-Senator Rick Santorum's staff regarding the lack of payment to Wye Oak for work it performed under the IMERP initiative. Pl.'s Ex. 60, 6.[8] Wye Oak and CLI representatives also met with then-Deputy Under Secretary for International Technology Security John Shaw to discuss this issue. *Id.*

On November 25, 2004, Dale Stoffel emailed Zayna to stress the necessity of GIG releasing the funds for the work being conducted under the IMERP. Pl.'s Ex. 31.[9] Stoffel conveyed officials had become concerned over delays in the IMERP and he wanted the funds to

[8] This document was admitted into evidence under the public records exception to the rule against hearsay. Fed. R. Evid. 803(8). The documents in this exhibit were released pursuant to the Freedom of Information Act (FOIA) by the U.S. Department of State. They are records of a public office setting out that office's activities and therefore fall under the public records exception. *Id*.

[9] This email was admitted as evidence without objection as a business record of Wye Oak's. Tr. 12/18/18 AM 33:23–24; Tr. 12/18/2018 PM 3:1–5:5.

be released to prevent any future delays. *Id.* [10] However, Zayna refuted Stoffel's characterization of events—claiming GIG was a partner in the project and was paying for everything. Pls.' Ex. 33. [11] And Zayna urged Dale Stoffel to return to Iraq to sort through these financial issues. *Id.*

Finally, Brigadier David Clements set up a call with Stoffel at the end of November to try to convince Stoffel to return to Iraq. Tr. 12/17/18 PM 17:7–18:9. The IMERP was a critical program and those involved needed to figure out a way to get the program moving forward once again. Ultimately, at the end of the call between Stoffel and Clements, Stoffel agreed to return to Iraq. *Id.*

K. December 5, 2004 Meeting

Brigadier Clements's staff convened a meeting at MoD headquarters on December 5, 2004 to remedy the problem that had arisen with the IMERP. Tr. 12/17/18 PM 18:10–13. Dale Stoffel attended the meeting on behalf of Wye Oak; Ziad Cattan, Bruska Shaways, Michal al-Sarraf, and others attended on behalf of MoD; Clements, Beadle, Styles, Marr, and others attended on behalf of the Coalition; and Zayna also attended. Tr. 12/17/18 PM 19:4–20:11; Tr. 12/20/18 AM 33:3–14; Tr. 12/20/18 PM 71:17–72:16.

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[10] Dale instructed Zayna to transfer money owed to Wye Oak to Wye Oak's bank account at national City Bank of Pennsylvania in Monongahela, Pennsylvania. Pl.'s Ex. 31.

[11] This email was admitted as evidence without objection as a business record of Wye Oak's. Tr. 12/18/18 AM 33:23–24; Tr. 12/18/2018 PM 3:1–5:5.

Clements, Marr, and Beadle each testified at trial regarding their recollection of what transpired at this meeting. The conversation focused on why Wye Oak had not been paid. Clements asked the Iraqi officials to respond to the allegation Wye Oak had not been paid despite submitting the invoices and doing the work under the IMERP:

> [Brig. Clements]: Ziad Cattan spoke first. And in what can only be described as a display of some bluster, started off by saying: Well, the work hasn't been done, and there are problems with the work and that's why the invoices hadn't been paid.
>
> I tried to pin him down to say precisely what had not been done or what work was unsatisfactory. He was unable to give any concrete examples of this, and became increasingly agitated as he was trying to describe things that he didn't have the facts for.
>
> He was interrupted, at some point, by Bruska Shaways, who said: Well, actually, the real issue is, we cannot pay the invoices because the money to pay the invoices is being held by this gentleman. And he pointed to the person who hadn't been introduced to me at the start of the meeting. And he explained that this was somebody who I later learned was Mr. Zayna, who was some form of intermediary holding the funds in Beirut, Lebanon. And that was the first I or, indeed, any of my staff who briefed me on the contractual arrangements had heard of the funding arrangements for IMERP.

[Plaintiff's Counsel]: So you learned that the funds actually had been paid but had been paid to a Mr. Zayna, and those funds were in Lebanon, correct?

[Brig. Clements]: That's what I was told, yes.

[Plaintiff's Counsel]: All right. Did you then make inquiry of the MOD as to how they could get those funds paid to Wye Oak?

[Brig. Clements]: I think I made the inquiry of Mr. Zayna to say: Well, are you going to pay this money to Wye Oak and to Mr. Stoffel?

Bruska Shaways had explained to me that this somewhat unusual arrangement was necessary as a means of transferring money from Baghdad, because the banking system was not working after the invasion and in the difficult circumstances at the time. So I said: Okay. But let's talk about this. *And I asked Zayna, directly what he needed to pay the money to Wye Oak. And he explained that he could not pay that money without the authorization of the Iraqi MOD.*

I went back to the Iraqi MOD and I said: Can you give Mr. Zayna the authorization to pay the monies to Wye Oak? And despite the earlier bluster from Mr. Cattan, both he and Mr. Shaways agreed that, yes, they could give that direction to Mr. Zayna, and that they would tell him to pay the money to Wye Oak.

I asked Zayna if he was happy with what the Iraqi MOD would tell him; he said he was. And I asked Mr. Stoffel if he was happy with what

> the Iraqis and Mr. Zayna had said, and Mr. Stoffel said that, yes, he was satisfied with that.

Tr. 12/17/18 PM 20:12–22:25 (emphasis added). Marr and Beadle each recounted substantially similar versions of what transpired at the December 5 meeting. Each recalled that Cattan or Shaways initially objected to paying Wye Oak, but eventually agreed the money should be released, through Zayna, to Wye Oak. Tr. 12/20/18 AM 33:15–34:25, 35:9–25, 36:14-37:1; Tr. 12/20/18 PM 72:17–73:21; 73:22–74:9.

The statements by Cattan, Shaways, and Zayna were all admissible as admissions by party-opponents—and therefore non-hearsay—under Federal Rule of Evidence 801(d)(2). Cattan and Shaways were authorized by the MoD to make statements regarding the BSA and IMERP, and were both MoD officials making statements on a matter—the BSA—within the scope of their relationships with MoD while that relationship existed. *See* Fed. R. Evid. 801(d)(2)(C)–(D). Also, Zayna was MoD's agent, as MoD had paid Zayna the money for the invoices and Zayna was being used as an intermediary by MoD to pay Wye Oak. Thus, Zayna's statements constituted assertions made by MoD's agent on a matter—the payments under the BSA for the three invoices—within the scope of that relationship while it existed. Fed. R. Evid. 801(d)(2)(C).

Ultimately, the largely parallel testimony offered by Clements, Marr, and Beadle—three highly credible witnesses who were present for the December 5 meeting—establishes by a preponderance of the evidence MoD agreed to provide authorization for the release of the funds by Zayna to Wye Oak to pay for

the three invoices. The Coalition officials and Dale Stoffel believed they had finally solved this critical issue and the IMERP program could proceed. *See, e.g.*, Tr. 12/17/18 PM 24:23–25:20; Tr. 12/20/18 AM 36:23–37:1; Pl.'s Ex. 40.

L. Wye Oak Goes Back to Work, But Dale Stoffel is Murdered

Several days after the meeting, on December 8, Clements toured Taji with Dale Stoffel to review Wye Oak's work. Tr. 12/17/18 PM 26:8–25; *see* Pl.'s Ex. 59 (pictures from Clements's December 8 tour of Wye Oak's activities at Taji). Clements observed a "vast area of armored vehicles and other equipment in various states of repair," and specifically focused on numerous vehicles that were in decent condition and were selected to be refurbished next. Tr. 12/17/18 PM 28:13–24, 30:7–23; Pl.'s Ex. 59 at 4 (a picture of Clements, Stoffel, General Bashar (the Iraqi Mechanized brigade Commander), and others standing in front of one of the tanks deemed suitable for the refurbishment effort). Wye Oak and MNSTC-I personnel set up a triage process to determine what vehicles were most suitable for refurbishment. Tr. 12/17/18 PM 34:15–35:1. The IMERP appeared ready to once again move forward.

But tragedy struck. Dale Stoffel left Taji with his interpreter and Joe Wemple, who was the construction manager working with Dale on the IMERP, to travel to Baghdad to arrange for funding to be released later in the day on December 8. Tr. 12/18/18 PM 5:3–6:11; Pl.'s Ex. 42; Defs.' Ex. 40. Their car was attacked and Dale Stoffel and Joe Wemple were brutally murdered. Pl.'s Ex. 42. Dale Stoffel and

Joe Wemple were shot multiple times and killed, and their car was shot up. *Id.* It remains unknown what happened to the translator traveling with them. Although a terrorist group claimed responsibility for their murders, numerous witnesses speculated this terrorist group was just a cover-up and Zayna and Cattan were actually responsible for their killings.[12] Tr. 12/18/18 AM 70:7–72:2; Tr. 12/19/18 PM 6:20–7:18; Tr. 12/20/18 PM 16:8–18:16, 20:9–24.

Wye Oak's work, led by Dale Stoffel, had already made a significant impact. Indeed, General Petraeus credited Dale Stoffel for refurbishing a significant number of armored vehicles and tanks in his letter to Dale Stoffel's wife, Barbara Stoffel, after his murder. On December 15, 2004, General Petraeus wrote:

> While there is nothing I can say to minimize your grief, I hope that in time you will take comfort in knowing that Dale made a direct and lasting contribution to our efforts to create capable and effective Iraq security forces. Only months ago the Iraqi Armed Forces had no mechanized force; now, there are already many operational tanks and armored vehicles, and Iraq is on track to have a battalion's worth of soldiers trained and equipped prior to January's elections. None of this would have been possible without your husband's visionary leadership, relentless drive, and complete dedication. An irreplaceable member of our

[12] The Court is unable to make a definitive assessment of who was responsible for Dale Stoffel and Joe Wemple's murders based solely on the testimony elicited during trial.

> team, he will be sorely missed by all who knew him.

Petraeus Dep. 26:23–30:3; Pl.'s Ex. 43.

M. Wye Oak Produced Armored Vehicles in Time for the January 2005 Elections, But Eventually Ceased to Perform Work in Iraq Because It was Never Paid

Nonetheless, Wye Oak did not immediately abandon the IMERP after Dale's death and actually exceeded the goal of producing a mechanized brigade of operational armored vehicles for Iraq's January 2005 parliamentary election.

William Felix took over as Wye Oak's CEO and President following Dale's death. Felix Dep. 200:8–15. And Wye Oak and CLI's American personnel either returned to the U.S. or stayed in the U.S. rather than travel back to Iraq. Felix Dep. 48:24–49:7. Yet Wye Oak did not abandon the IMERP. They relied on their local contractors to move forward. Tr. 12/18/18 AM 72:15–23. David Stoffel specifically testified Ahmet Ersavci, a Turkish businessman, continued working with Wye Oak through 2005. Tr. 12/18/18 PM 7:14–19. And Major Neal, who was charged with overseeing the work on behalf of the U.S. military to ensure the IMERP progressed, testified the same personnel continued to conduct work at Muqdadiya and Taji even after Dale's death as had been working on the IMERP for Wye Oak prior to Dale's murder. Tr. 12/19/18 AM 24:18–25:8. In particular, Neal recalled that an individual named Karem, Wye Oak's Iraqi supervisor and foreman at Muqdadiya who Dale hired, was in charge of Wye Oak's labor force in Iraq after Dale's death. Tr. 12/19/18 PM 65:3–21; Pl.'s Ex. 44. And Neal provided instructions to Karem during

this period, essentially becoming a project manager as they worked to accomplish the IMERP mission. Tr. 12/19/18 PM 65:3–21. Neal testified Zayna stepped in after Dale's death to pay the workers, but he never actually saw Zayna provide payment to the workers. Tr. 12/19/18 AM 21:12–23:20. And Beadle adamantly stated Zayna and GIG did not do any work in connection with refurbishing military equipment, bases, or facilities while Beadle was in Iraq, which was until March 2005. Tr. 12/21/18 AM 12:11–22; 17:11–17.

By December 17, 2004, Wye Oak's team, under Karem and Neal's leadership, had 26 tanks running and an MTLB (a Soviet multi-purpose armored vehicle) and seven troop carriers ready to move from Muqdadiya to Taji. Pl.'s Ex. 44 at 1. Neal also projected they would have another 20 vehicles, mostly tanks, ready the following week. *Id.* Wye Oak's work was on display during Iraq's January 5, 2005 Army Day parade to Iraqi Prime Minister Ayad Allawi. Iraqi tanks and armored vehicles all flying the Iraqi flag were featured in this parade. Petraeus Dep. 21:3–22:9. General Petraeus and Beadle both testified the tanks and armored vehicles on display during the Army Day parade were the result of Wye Oak's refurbishment efforts. Tr. 12/21/18 AM 1:11–12:22; Petraeus Dep. 39:2–40:16.

And by January 15, 2005, the Iraqi 1st Mechanized Brigade was fully operational and ready to assume its mission. In an article in *The Advisor*, Iraqi Staff Brigadier General Kasim Jasim Nazal declared "[t]he brigade is at the Ministry to protect it and all the election centers . . . We are also going to keep Baghdad

secure and protect the main gates of the city; the brigade will be very visible on election day." Pl.'s Ex. 47 at 3.[13] Neal testified Wye Oak exceeded the goal of producing a battalion of hard-skinned vehicles and tanks to have in Baghdad for the January 30, 2005 election. Tr. 12/19/18 AM 25:9–25, 26:6–14. It was very important to have Iraqi forces providing security for the first Iraqi elections since the fall of Saddam Hussein. Tr. PM 12/17/18, 36:1–10. "The original mandate was to provide one battalion of armored vehicles. At the elections we had provided two and a half battalions of armored vehicles, almost the entire brigade complement." Tr. 12/19/18 AM 25:9–25, 26:6–14; *See* Pl.'s Ex. 64 at 63 (a picture of U.S. and Iraqi forces with tanks at a checkpoint in Baghdad as the Coalition delivered the vehicles to Baghdad for the election); Tr. 12/19/18 AM 46:20–47:4. And Neal asserted: "Wye Oak's people refurbished [those vehicles]." Tr. 12/19/18 AM 25:9–25, 26:6–14.

But eventually, the lack of funding caused Wye Oak to cease operations in Iraq sometime after the January 2005 election.[14]

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[13] This statement was admissible as an admission by a party-opponent under Rule 801(d)(2). Fed. R. Evid. 801(d)(2). Iraqi Staff Brigadier General Nazal was an Iraqi MoD official authorized to make statements about the mechanized brigade he was tasked with leading and was an employee making a statement on a matter within the scope of his employment relationship while it lasted.

[14] The Court was not presented with any evidence or testimony Wye Oak continued to perform work on the IMERP after early 2005.

N. Iraq Prohibits Scrap Sales

Finally, while Wye Oak worked to provide armored vehicles in time for the January 2005 election, the Council of Ministers issued a decision to prohibit scrap sales to private parties. Defs.' Ex. 58. On December 28, 2004, the General Secretary of the Council of Ministers sent a letter addressed to all ministries stating scrap materials were proscribed from being sold to merchants or any private sector entities. *Id.* Further, the letter required ministries to deliver extra scrap to the state-owned companies belonging to the Ministry of Industry and Minerals. *Id.*

Yet, as with the scrap policy decision made in July 2004, there is no evidence Wye Oak was ever informed of this directive and the Court does not believe defendants established it ever applied to MoD.[15] No copy of this letter was found in MoD's files, and as discussed below, the Court has reason to believe the absence of a copy of this letter indicates it did not apply to MoD.

III. Legal Discussion

A. MoD is Not Separate from the Republic of Iraq

This Court previously held MoD and Iraq are separate juridical entities as a matter of Iraqi law in an opinion denying Wye Oak's motion for judgment on the pleadings on this narrow question. *Wye Oak Tech.,*

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[15] As stated *supra* in Section II(B), Neal testified General Bashar, an MoD official working on the effort to recover vehicles, informed him the scrap ban was intended to stop individuals from illegally taking scrap and did not affect Wye Oak. Tr. 12/19/18 AM 29:22–31:16; Tr. 12/19/18 PM 4:9–18.

Inc. v. Republic of Iraq, 72 F. Supp. 3d 356, 359 (D.D.C. 2014). This determination was grounded in Iraq's answer to Wye Oak's complaint that stated MoD is a separate juridical entity from the Republic of Iraq. *Id.* at 360–61. On a motion for judgment on the pleadings, the Court was required to accept as true all facts pled by the non-moving party and make all reasonable inferences favorable to the non-movant. *Peters v. National R.R. Passenger Corp.*, 966 F.2d 1483, 1485 (D.C. Cir. 1992). Accordingly, this Court made the presumption that MoD is a legally separate entity from Iraq for purposes of determining liability in this case. *Id.* The Court recognized the ultimate determination on this issue was necessarily fact dependent and reserved final judgment on the matter until the then-sparse record at that stage in litigation was more fully developed. Now that the Court has had the benefit of completing the bench trial and having expert testimony from plaintiff's Iraqi law expert (the only Iraqi law expert presented to this Court), the Court is finally able to resolve this issue. MoD is not separate from the Republic of Iraq—MoD and Iraq are legally one and the same.

The Foreign Sovereign Immunities Act (FSIA) provides federal courts with original jurisdiction over suits against foreign states if one of the statute's enumerated exceptions to sovereign immunity applies. 28 U.S.C. § 1330. Under the FSIA, a "foreign state" includes "a political subdivision of a foreign state or an agency or instrumentality of a foreign state." *Id.* § 1603. The distinction between (1) a political subdivision of a foreign state and (2) an

agency or instrumentality of a foreign state is fundamental under the FSIA.

Without the benefit of a complete record, this Court turned to the Supreme Court's decision in *First National City Bank v. Banco Para El Comercio Exterior de Cuba (Bancec)*, 462 U.S. 611 (1983), addressing the separate juridical status of state-owned entities. In *Bancec*, the specific question was whether a separate instrumentality, a state-owned bank, could be held liable for actions of the foreign state. *Id.* The Supreme Court held that "government instrumentalities established as juridical entities distinct and independent from their sovereign should normally be treated as such." *Id.* at 626–27. However, this presumption could be overcome if: (1) the instrumentality was so extensively controlled by the sovereign that a relationship of principal and agent is created; or (2) recognizing the instrumentality as a separate entity would "work a fraud or injustice." *Id.* at 629–30.

Now that this Court has a fully developed record, the Court can now finally assess whether MoD is an inseparable part of the Republic of Iraq or constitutes an agency or instrumentality. The Court concludes the *Bancec* presumption does not apply here because no meaningful distinction can be drawn between MoD and Iraq. *Bancec* focused on foreign sovereigns' instrumentalities, but MoD is an integral component of the national government itself.

Courts use the "core functions" test to distinguish between foreign states and their agencies and instrumentalities. Under the core functions test, the Court must determine whether the foreign entity's

core functions are predominantly government or commercial. *Transaero, Inc. v. La Fuerza Aerea Boliviana*, 30 F.3d 148, 151 (D.C. Cir. 1994). If the entity's core functions are governmental, then the entity is considered part of the state itself. *See e.g.*, *Roeder v. Islamic Republic of Iran*, 333 F.3d 228, 234 (D.C. Cir. 2003) (holding that the Iranian "Ministry of Foreign Affairs must be treated as the state of Iran itself rather than its agent" because the conduct of foreign affairs is an indispensable governmental function); *Transaero*, 30 F.3d at 151 (holding the Bolivian Air Force was a foreign state because its core functions were governmental); *see also Garb v. Republic of Poland*, 440 F.3d 579 (2d Cir. 2006) (concluding the Polish Ministry of the Treasury is not an "agency or instrumentality" for purposes of the "takings" exception of the FSIA, but rather is an integral part of Poland's political structure with an indisputable governmental function, and as such is the "foreign state" itself).

MoD's core functions are primarily governmental. MoD was established as part of the transitional government by CPA Order 67. Pl.'s Ex. 113. Professor Chibli Mallat, plaintiff's Iraqi law expert, testified CPA Order 67 and other CPA orders "re-organiz[ed] the government in a way that would extricate it from its regrettable antecedence of bearing the main features of a dictatorship . . . the CPA order is the establishing order for the operation of government in Iraq and this has naturally an important consequence in this case on the placing of the Ministry of Defense as part and parcel of the Iraqi government." Mallat Dep. 2/14/19 37:11–21. Mallat repeatedly stressed the

CPA orders promulgated at this time regarding the MoD were intended to "subordinate" the MoD to Iraq's civilian institutions that were elected by the Iraqi people. Mallat Dep. 2/14/19, 37:22–41:4. CPA Order 67 explicitly states "all those who work in the MoD are responsible to lawfully elected civilian authority." Pl.'s Ex. 113 § 5(c). Indeed, the Prime Minister is the commander-in-chief of the Iraqi armed forces. Pl.'s Ex. 111 art. 78; Pl.'s Ex. 112 art. 39. Further, CPA Order 67 declares "[t]he mission of the MoD is to secure, protect, and guarantee the security of Iraq's borders and to defend Iraq." Pl.'s Ex. 113 § 4. Nothing could be a more core governmental function.

Also, the Iraqi Law of Executive Authority, which Iraq uses to argue MoD is a separate instrumentality, provides that each ministry "shall be considered as an expression of the word government." Law of Executive Authority No. (50) 1964, art. I, para. 2, Pl.'s Ex. 108. Contrary to Iraq's contention, this text demonstrates MoD, as a ministry, is "part and parcel of the government." Mallat Dep. 2/14/19, 53:4–55:22.

As the D.C. Circuit determined in *Transaero*, "armed forces are as a rule so closely bound up with the structure of the state that they must in all cases be considered as the 'foreign state' itself, rather than a separate 'agency or instrumentality' of the state. The 'powers to declare and wage war' are among the 'necessary concomitants' of sovereignty." *Transaero*, 30 F.3d at 153 (D.C. Cir. 1994) (citing *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 318 (1936)). The Court's examination of the evidence and testimony presented in this case lead it to determine this rule is aptly applied to the MoD here. No

governmental entity is more closely linked with the state itself than the MoD—the entity charged with defending the nation. As a result, the Court holds that MoD is an inseparable part of the Republic of Iraq. And the Republic of Iraq is therefore liable for any breach of the BSA by MoD.

B. The Court has Subject Matter Jurisdiction and Personal Jurisdiction Over Defendants

The FSIA provides the only means of suing a foreign sovereign in U.S. courts. *Argentine Republic v. Amerada Hess Shipping Corp.*, 488 U.S. 428, 439 (1989). A foreign state is presumptively immune from federal and state courts' jurisdiction, subject to several codified exceptions. *See id*. §§ 1604–1607.

Jurisdiction in this case is predicated upon the FSIA's commercial activity exception to sovereign immunity. Under the FSIA:

> A foreign state shall not be immune from the jurisdiction of courts of the United States or of the States in any case . . . in which the action is based [1] upon a commercial activity carried on in the United States by the foreign state; or [2] upon an act performed in the United States in connection with a commercial activity of the foreign state elsewhere; or [3] upon an act outside the territory of the United States in connection with a commercial activity of the foreign state elsewhere and that act causes a direct effect in the United States.

Id. § 1605(a)(2). Wye Oak only needs to establish its claim falls within one of the exceptions provided in §

1605(a)(2) because the exceptions are disjunctive and only one needs to apply to bestow jurisdiction.

1. *The BSA was a "Commercial Activity" Under the FSIA*

The FSIA defines "commercial activity" as "either a regular course of commercial conduct or a particular commercial transaction or act. The commercial character of an activity shall be determined by reference to the nature of the course of conduct or particular transaction or act, rather than by reference to its purpose." *Id.* § 1603(d). The Supreme Court has further elaborated on what constitutes commercial activity under the FSIA. In *Weltover*, the Court concluded:

> when a foreign government acts, not as a regulator of a market, but in the manner of a private player within it, the foreign sovereign's actions are "commercial" within the meaning of the FSIA. Moreover, because the [FSIA] provides that the commercial character of an act is to be determined by reference to its "nature" rather than its "purpose," 28 U.S.C. § 1603(d), the question is not whether the foreign government is acting with a profit motive or instead with the aim of fulfilling uniquely sovereign objectives. Rather, the issue is whether the particular actions that the foreign state performs (whatever the motive behind them) are the *type* of actions by which a private party engages in "trade and traffic or commerce."

Republic of Argentina v. Weltover, Inc., 504 U.S. 607, 614–15 (1992) (citing Black's Law Dictionary 270 (6th

ed. 1990)). Specifically, the Supreme Court stated "a contract to buy army boots or even bullets is a 'commercial' activity, because private companies can similarly use sales contracts to acquire goods." *Id.* at 615.

Under the BSA, Wye Oak was contracted to provide commercial services to MoD. Wye Oak was appointed as the sole and exclusive broker to conduct inventory, assess, and rehabilitate military equipment in connection with the IMERP; arrange scrap sales; provide military refurbishment services, including constructing facilities; and arrange military equipment sales. *See* Pl.'s Ex. 5; Pl.'s Ex. 19. A contract to engage in these activities is undoubtedly commercial in nature because private companies can similarly contract to have goods inventories and rehabilitated, contract to have facilities constructed, and contract with a broker to arrange the sale of goods. It is irrelevant under § 1603(d) that the contract involved activities related to the military and aimed to re-equip the Iraqi military to enhance that country's security—a core sovereign interest. Accordingly, the BSA constituted a "commercial" activity under the FSIA.

2. *This Action is Based Upon an Act Performed in the U.S. in Connection with a Commercial Activity of Iraq Elsewhere*

This Court has jurisdiction under clause two of the commercial activity exception. Wye Oak's breach of contract claim is based on acts performed in the U.S.

in connection with a commercial activity of the foreign state, Iraq, elsewhere.[16]

The Fourth Circuit previously concluded Wye Oak sufficiently showed that its breach of contract claim could proceed under clause two in denying Iraq's appeal of the denial of its motion to dismiss on sovereign immunity grounds.[17] *Wye Oak Tech., Inc. v. Republic of Iraq*, 666 F.3d 205, 216 (4th Cir. 2011). The Fourth Circuit determined Wye Oak's computer programming and administrative activities performed in the U.S. in connection with MoD's activities regarding the BSA in Iraq demonstrated the breach of contract claim was based on an act performed in the U.S. in connection with a commercial activity of the foreign state elsewhere. *Id.*

Although the case was transferred to this Court, and therefore is no longer within the Fourth Circuit, the law-of-the-case principle indicates the Fourth

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[16] The Court refers to the foreign state as Iraq in its discussion on its subject matter and personal jurisdiction over defendants because MoD is part of the state itself. *See supra* Section III(A).

[17] The Fourth Circuit's opinion had the oddity of being decided after the case was transferred to this Court. The Eastern District of Virginia district court that originally had the case transferred it to the U.S. District Court for the District of Columbia, but reached the issue of jurisdiction in the same opinion granting Iraq's request to transfer the case to this district. *Wye Oak Tech., Inc. v. Republic of Iraq*, No. 1:09cv793, 2010 WL 2613323 (E.D. Va. June 29, 2010). Iraq appealed that district court's denial of its motion to dismiss based on sovereign immunity, and this Court stayed the case pending the outcome of the Fourth Circuit's decision. The Fourth Circuit determined it had jurisdiction over Iraq's appeal. *Wye Oak Tech., Inc. v. Republic of Iraq*, 666 F.3d 205, 209–11 (4th Cir. 2011).

Circuit's opinion should nonetheless control. The law-of-the-case principle stipulates a court should be loath to disturb its own or a coordinate court's prior decisions absent extraordinary circumstances. *Christianson v. Colt Indus. Operating Corp.*, 486 U.S. 800, 817 (1988); *see Hill v. Henderson*, 195 F.3d 661, 678 (D.C. Cir. 1999) (recognizing "a decision of a court of coordinate state is entitled to be considered law of the case") (internal quotations marks omitted); *see also* Charles A. Wright et al., *Federal Practice and Procedure* § 4478.4 (4th ed. 2007) ("Special situations . . . may bring the same case successively to different courts of appeals. . . . In all of these circumstances, an appellate court tends to defer to the earlier appellate decision in much the same way as it would defer to its own earlier decision.").

The mandate rule further compels this Court to follow the Fourth Circuit's decision on this matter. The mandate rule forbids lower "courts from reconsidering issues that have already been decided in the same case." *Indep. Petrol. Ass'n of Am. v. Babbitt*, 235 F.3d 588, 597 (D.C. Cir. 2001) (quoting *LaShawn A. v. Barry*, 87 F.3d 1389, 1393 n.3 (D.C. Cir. 1996) (en banc)). "When matters are decided by an appellate court, its rulings, unless reversed by it or by a superior court, bind the lower court." *Ins. Grp. Comm. v. Denver & R. G. W. R. Co.*, 329 U.S. 607, 612 (1947).

And in any event, the Fourth Circuit's determination was correct. The Supreme Court in *Nelson* held that the phrase "based upon" in the FSIA's commercial activity exception refers to "those elements that, if proven, would entitle a plaintiff to

relief under his theory of the case." *Saudi Arabia v. Nelson*, 507 U.S. 349, 357 (1993). In *Nelson*, an American employee of a Saudi hospital sued the Kingdom of Saudi Arabia seeking damages for injuries he allegedly suffered while detained and tortured by the Saudi government. *Id.* The employee argued the commercial activity exception applied because the hospital recruited him in the U.S. *Id.* While the Supreme Court determined these recruiting activities "led to the conduct that eventually injured" the employee, they were not the basis for the suit. *Id.* at 358. The torts Saudi Arabia allegedly committed formed the basis for the suit—not the arguably commercial activities that came before their alleged commission. *Id.* Because the employee had no need to demonstrate the hospital recruited him in order to prevail on the merits, the hospital's recruiting activities provided no basis for his suit. *Id.*

Although Nelson interpreted the phrase "based upon" in the commercial activity exception's first clause, the nearly identical statutory text and structure of clauses one and two led the D.C. Circuit to conclude that "based upon" means the same thing in both clauses. *Odhiambo v. Republic of Kenya*, 764 F.3d 31, 37 (D.C. Cir. 2014). The D.C. Circuit noted, "to the degree that the text leaves any ambiguity, the legislative history is 'crystal clear' that clause two's reference to acts 'performed in the United States in connection with a commercial activity of the foreign state elsewhere' is 'limited to those' acts 'which in and of themselves are sufficient to form the basis of a cause of action.'" *Id.* at 37–38 (quoting *Zedan v. Kingdom of Saudi Arabia*, 849 F.2d 1511, 1514 (D.C.

Cir. 1988) (quoting H.R. Rep. No. 94–1487, at 19 (1976), 1976 U.S.C.C.A.N. 6604)); *see* S. Rep. No. 94–1310, at 18 (1976), 1976 U.S.C.C.A.N. 1983.

In *Odhiambo*, the D.C. Circuit fashioned a test under clause two based on *Nelson*. The D.C. Circuit stated: "a suit against a foreign sovereign may proceed under clause two only if the 'act performed in the United States in connection with a commercial activity of the foreign state elsewhere' establishes a fact without which the plaintiff will lose." *Odhiambo*, 764 F.3d at 38. Here, the acts Wye Oak performed in the U.S. in connection with the BSA in Iraq established Wye Oak performed under the BSA, which is a necessary aspect to succeeding in a breach of contract case when a defendant asserts the plaintiff did not perform.

As discussed in Section II(J)(2), Wye Oak performed work in the United States. David Stoffel conducted activities supporting Wye Oak's efforts under the BSA. David Stoffel focused on writing a computer program that could ultimately be used to inventory and track all the equipment Wye Oak was refurbishing and would potentially broker for sales. Tr. 12/18/18 AM 38:11–41:17; Pl.'s Ex. 65. This work aided Wye Oak's efforts under the IMERP. Further, David Stoffel oversaw the company's electronic communications from his perch in the U.S., in part to ensure Wye Oak's leadership was aware of all messages they received, as the team traveled frequently and maintaining e-mail communications and Internet connection could be challenging at times in Iraq during this period. Tr. 12/18/18 AM 44:5–49:18. In addition, Wye Oak performed administrative

activities in the U.S. in support of the BSA. Tr. 12/18/18 AM 49:19-50:24.

These acts performed in the U.S. were done in connection with Iraq's commercial activity, the BSA, in Iraq. And these U.S.-based acts establish Wye Oak performed (partly in the U.S. and partly outside the U.S.) under the BSA. Performance is a fact without which Wye Oak would lose. So Wye Oak's action falls within clause two: the action is based upon "an act performed in the United States in connection with a commercial activity of the foreign state elsewhere." 28 U.S.C. § 1605(a)(2). Thus, the Court has subject matter jurisdiction over Iraq and MoD.

3. *The Court has Personal Jurisdiction over Iraq and MoD*

This Court has personal jurisdiction over Iraq and MoD under 28 U.S.C. § 1330(b). Section 1330(b) provides that "[p]ersonal jurisdiction over a foreign state shall exist as to every claim for relief over which the district court" has subject matter jurisdiction under the FSIA as long as the defendant was properly served under 28 U.S.C. § 1608. As discussed above, this Court has subject matter jurisdiction over defendants, as Iraq and MoD are not entitled to sovereign immunity based on the FSIA's commercial activity exception. And proper service was effectuated in this case in accordance with 28 U.S.C. § 1608(a)(3).[18] The Clerk of Court mailed a copy of the

[18] 28 U.S.C. § 1608(a)(3) requires that service be sent "by any form of mail requiring a signed receipt, to be addressed and dispatched by the clerk of court to the head of the ministry of foreign affairs of the foreign state concerned."

summons, complaint, and notice of suit, together with a translation of each into the official language of the foreign state to the head of Iraq's Ministry of Foreign Affairs at the Minister's office in Baghdad, Iraq. Certificate of Clerk, ECF No. 127; Service, ECF No. 128.[19] The Court does not need to examine whether Iraq and MoD have the minimum contacts that would otherwise be required to find personal jurisdiction under the Fifth Amendment's Due Process Clause, as foreign sovereigns are not "persons" protected by the Fifth Amendment. *I.T. Consultants, Inc. v. Islamic Republic of Pakistan*, 351 F.3d 1184, 1191 (D.C. Cir. 2003); *see also Practical Concepts, Inc. v. Republic of Bolivia*, 811 F.2d 1543, 1548 n.11 (D.C. Cir. 1987) (in FSIA cases, "subject matter jurisdiction plus service of process equals personal jurisdiction") (internal quotation marks and citation omitted). Accordingly, this Court has personal jurisdiction over the defendants.

C. Defendants Breached the BSA

1. *Wye Oak's Three Invoices Were Submitted Under the BSA*

Wye Oak's three invoices were submitted pursuant to the BSA. Under the BSA, Wye Oak was the sole and exclusive broker for several enumerated activities. Pl.'s Ex. 5 ¶ 2. Two of these activities are applicable to the three invoices. First, Wye Oak was appointed as MoD's sole and exclusive broker for "the accounting,

[19] MoD and Iraq each filed their answers to Wye Oak's amended complaint after proper service was effectuated. Answer by the Ministry of Defense of the Republic of Iraq, ECF No. 129; Answer by the Republic of Iraq, ECF No. 139.

inventory, and assessment of discarded and/or damaged Military Equipment in connection with the Iraqi Military Equipment Recovery Project to identify which Military Equipment is salvageable and suitable for Military Refurbishment Services and which Military Equipment is scrap." *Id.* Second, Wye Oak was appointed as MoD's sole and exclusive broker for "the provision of Military Refurbishment Services with respect to all of the various military bases, offices and properties owned by, or under the control of, the Ministry and/or the Republic of Iraq, wherever such bases, offices and property maybe [sic] located and all the related military equipment located thereon or otherwise owned by the Ministry and/or the Republic of Iraq." *Id.*

The BSA further directed Wye Oak to provide military refurbishment services pursuant to the terms of the Agreement, designated the military installations where the work would commence, and required Wye Oak to use all reasonable commercial efforts to perform the work. *Id.* ¶ 2–3. The BSA specified Wye Oak was not under any obligation to spend *any* sum of money in performing military refurbishment services or in developing markets and sales prospects for equipment and scrap under the BSA other than money advanced by MoD to cover expenses associated with performing military refurbishment services, selling military equipment or refurbished military equipment, or scrap sales. *Id.* ¶ 3.

As detailed in Section II(C), the BSA provided specific definitions for the terms used in the contract. The terms "military equipment," "military

refurbishment services," "refurbished military equipment," and "customers" are all applicable to determining whether the three invoices fall under the BSA. Military equipment was defined as "any equipment that is used by or in the provision of military, including, without limitation, any and all vehicles, aircrafts, guns, missiles, armored personnel carriers, heavy armor/tanks, military radar equipment, ballistic missiles, rocket launchers, artillery, artillery scrap, small arms, small arms scrap or any parts or components thereof." *Id.* Military refurbishment services was defined as "any services sold, performed for, or provided with respect to any Refurbished Military Equipment that is either retained by the Ministry or sold or otherwise provided to Customers by the Ministry, including, but not limited to, the inspection of the Military Equipment prior to performing any Military Refurbishment Services to make a value assessment and a refurbishing assessment for such Military Equipment." *Id.* The BSA provided that "Refurbished Military Equipment shall mean any Military Equipment that has been refurbished by, or under the direction of, the Broker pursuant to this Agreement, and sold or provided to customers by the Ministry." *Id.* And customers were defined as "purchasers of the 'Military Refurbishment Services' and/or 'Refurbished Military Equipment' and 'or Scrap sales' including, but not limited to, Iraqi Ministry of Defense, commercial establishments and governmental and semi-governmental entities in the military sector." *Id.*

In October 2004, Wye Oak submitted three pro forma invoices to MoD: Invoices #MUQ001, #TAJI001,

and #MUQ002. These invoices covered the initial construction costs for armored vehicle repair facilities and for the initial repair of 246 armored vehicles at Muqdadiya and Taji. Pl.'s Ex. 18. They also covered the costs of purchasing tools and moving spare parts; the costs of initial hiring and training of skilled and unskilled workers; the costs of travel, lodging, and food for technical experts; the costs of materials to wash and paint vehicles; and a 10% mobilization fee for construction efforts at Taji. *Id.* Finally, these invoices included a 15% overhead cost and 10% profit. *Id.*

These invoiced costs all fall within the BSA. First, these activities involved the accounting, inventory, and assessment of military equipment in connection with the IMERP to identify which equipment was salvageable and suitable for refurbishment services and which equipment was scrap as called for in § 2(i) of the BSA. *See* Pl.'s Ex. 5 ¶ 2(i). To carry out these responsibilities, Wye Oak needed to construct facilities, purchase tools, hire and train workers, and bring in technical experts. Wye Oak would not be able to conduct these duties under the BSA without places to carry out such work, the equipment necessary to carry out such work, and the workers required to perform such work. Neal testified the facilities necessary to scrap and refurbish armored vehicles were largely non-existent at Taji and Muqdadiya in 2004 and 2005. Tr. 12/19/18 AM 34:4–35:15. There was only a tank depot at Taji, but it was not operational and needed to be overhauled to be capable of working on armored vehicles to determine if they should be scrapped or could be refurbished. Tr.

12/19/18 AM 34:4–35:15. And Wye Oak was not under any obligation to spend its own money in carrying out these activities. Rather, MoD was to advance the sums of money to cover the expenses associated with performing these activities, as these activities all constituted military refurbishment services under the BSA. These activities were focused on developing the capability to inspect military equipment prior to performing refurbishment efforts to assess the equipment and to carry out such inspection. They were also carried out with respect to military equipment that was being refurbished by Wye Oak and provided to MoD. Accordingly, these invoiced costs fell squarely within the BSA.

Second, the invoiced activities involved the direct provision of military refurbishment services as called for § 2(iii) of the BSA. *See* Pl.'s Ex. 5 ¶ 2(iii). Constructing repair facilities, repairing armored vehicles, hiring and training workers, bringing in technical experts, acquiring tools and spare parts, and acquiring materials to wash and paint vehicles are all core aspects of refurbishing military equipment to sell or provide to MoD. Wye Oak would not have been able to carry out the military refurbishment services without engaging in these activities and undertaking such costs. Thus, these invoiced costs were also covered by the BSA. And again, while the BSA provided Wye Oak was required to use all reasonable commercial efforts to perform these military refurbishment services, Wye Oak was not under any obligation to spend money carrying out these services. Instead, MoD was supposed to cover the expenses

associated with performing military equipment services.

The First Amendment further supports these conclusions. The First Amendment clarified the definition of military refurbishment services to explicitly include the "construction of facilities, bases, billeting, service/rapier depots, repair factors/facilities." Pl.'s Ex. 19; Pl.'s Ex. 19.1. The Court believes such construction activities were already covered under the BSA's original definition of military refurbishment services, as this construction would always be required to provide Wye Oak with the spaces needed to inspect, assess, and refurbish military equipment. So such construction would be a service "performed for[] or provided with respect to any Refurbished Military Equipment." Pl.'s Ex. 5 ¶ 1(e). But the First Amendment makes it unquestionable that construction activities, which were part of the invoices, were covered under the contract as amended.

And contrary to defendants' contention, the BSA did not provide that MoD would only pay Wye Oak a 10% commission on sales contracts for military refurbishment services, refurbished military equipment, and scrap sales. ECF No. 431-1, 4–5. This commission was just one aspect of Wye Oak's potential compensation under the BSA. MoD was also required to pay Wye Oak 10% of the refurbishment cost for refurbished military equipment, which consists of any military equipment refurbished by Wye Oak and sold or provided to customers, including MoD itself. Pl.'s Ex. 5 ¶ 5(a). Refurbishment cost necessarily includes the costs associated with

conducting the refurbishment, such as labor, equipment, and the construction of facilities—the costs accounted for in the three invoices. This was clarified in the First Amendment, which made explicit that MoD was required to pay Wye Oak 10% of military refurbishment services and equipment's refurbishment cost. Pl.'s Ex. 19; Pl.'s Ex. 19.1.

Payments to Wye Oak based on sales contracts or refurbishment costs were to be paid pursuant to pro forma invoices submitted by Wye Oak. Pl.'s Ex. 5 ¶ 5(b). The BSA required the MoD to fully pay such invoices "immediately upon presentation." *Id.* Here, Wye Oak presented the three pro forma invoices to MoD.

Defendants' assertion also ignores the fact the BSA required Wye Oak to use all reasonable commercial efforts to perform the military refurbishment services yet did not require Wye Oak to spend any money carrying out these services. Instead, MoD was supposed to cover the expenses associated with performing military equipment services. As explained, this was another basis in the BSA for payment to Wye Oak from MoD for the invoiced costs.

Finally, while the BSA made Wye Oak ultimately "responsible for its own administrative costs, expenses and charged necessary or incidental to its functions" under the Agreement, this does not change the clear language throughout the rest of the BSA that MoD was to advance funds to Wye Oak and pay 10% of the refurbishment cost for refurbished equipment.

Accordingly, Wye Oak's three invoices were submitted under the BSA.

2. *Wye Oak was never paid for its three invoices*

Although Wye Oak submitted the three invoices pursuant to the BSA, MoD never paid Wye Oak. Instead, MoD paid Zayna these amounts. *See supra* Section II(I). But Wye Oak never authorized Zayna to receive these funds on its behalf. *See supra* Section II(I).

Defendants contend ¶ 10 of the BSA provided that MoD had the right to determine payment terms for sales contracts or contractual arrangements equivalent to sales contracts Wye Oak arranged. Defendants assert they could therefore insert intermediaries or demand bank guarantees as referenced in the CFA. Defs.' Further Rebuttal to Wye Oak's Proposed Findings of Fact & Conclusions of Law 14, ECF No. 431-2 [hereinafter ECF No. 431-2]. However, this section only required Wye Oak to obtain written instructions from MoD concerning the terms of commitments and contract offers made in the name of or on behalf of MoD. Pl.'s Ex. 5 ¶ 10 ("[Wye Oak] is not authorized to enter into commitment of any kind in the name or on behalf of the Ministry, nor shall [Wy Oak] make any contractual offers to Customers or prospective Customers on behalf of Ministry unless [Wye Oak] shall have first obtained written instructions from Ministry concerning the terms of such offers."). This had nothing to do with the invoiced activities that related to military refurbishment services. Thus, MoD was not authorized under the BSA to require bank guarantees never referenced in the contract or to insert a middleman into the contractual relationship absent a written amendment

including such new terms signed by both parties, which never occurred. *See id.* ¶ 13.

And, as the Court concluded in Section II(G)(1), Wye Oak established by a preponderance of the evidence that MoD approved Wye Oak's invoices and agreed to pay this money to Wye Oak's president, Dale Stoffel, at the October 19, 2004 meeting. *See supra* Section II(G)(1). Yet this money was to Zayna, not Wye Oak. Wye Oak was never paid for the three invoices.

3. *Wye Oak Performed Under the BSA*

As discussed in Sections II(D), (J), (L), and (M), Wye Oak performed under the BSA. Shortly after signing the BSA, Wye Oak began putting together the necessary workforce and identifying, recovering, and assessing military equipment in Iraq. Wye Oak then started refurbishing armored vehicles—a critical part of the IMERP. And although nonpayment of Wye Oak's three invoices created a significant impediment to Wye Oak continuing to work on the IMERP—and resulted in the October 19 and December 5 meetings in which MoD agreed to pay the funds—Wye Oak ultimately continued performing. Wye Oak refurbished a significant number of armored vehicles. And even after Dale Stoffel's murder, Wye Oak did not abandon the IMERP. In fact, Wye Oak exceeded the goal of producing a mechanized brigade of operational armored vehicles for Iraq's January 2005 parliamentary election. Eventually, Wye Oak did cease operations in Iraq sometime after the January 2005 election, though, as it never received funding from MoD despite MoD's promises at the October 19 and December 5 meetings.

4. *MoD Materially Breached the Contract with Wye Oak*

Accordingly, MoD materially breached the BSA by not paying Wye Oak for the three invoices and the work Wye Oak performed. Wye Oak submitted two pro forma invoices on October 11, 2004, and a third pro forma invoice on October 18, 2004. Under the BSA, MoD was required to fully pay these invoices immediately upon their presentation. *Id.* ¶ 5. And MoD approved these three invoices and agreed to pay this money to Wye Oak's president, Dale Stoffel, at the October 19, 2004 meeting. Yet MoD never paid Wye Oak.

Wye Oak's damages expert assessed the date of breach as October 28, 2004, and Wye Oak has proposed this date as the date of breach. Wye Oak and its damages expert reason that while payment on the invoices was due immediately upon presentation (October 11 for two invoices and October 18 for the third) and MoD approved the invoices on October 19, a ten-day grace period to October 28 for payment to occur was reasonable. The Court sees no reason to reject plaintiff's allowance of a grace period during which payment should have occurred, especially since payment should have occurred immediately under the strict terms of the BSA. Thus, the Court finds MoD materially breached the BSA on October 28, 2004.

MoD's material breach meant Wye Oak was no longer required to perform. Therefore, Wye Oak did not breach the contract by ceasing to perform sometime after the January 2005 election, as its duties had already been discharged by this point in time.

D. The Court Rejects Defendants' Affirmative Defenses

Iraq and MoD have put forward several affirmative defenses to this suit. To prevail on an affirmative defense, defendants bear the burden of proving the affirmative defense by a preponderance of the evidence. *Bowden v. United States*, 106 F.3d 433, 437 (D.C. Cir. 1997). The Court finds defendants have not met their burden for any of the alleged affirmative defenses.

1. *The Court Rejects the Defense Wye Oak was Not Properly Licensed*

Iraq and MoD argue Wye Oak failed to receive permission from the Ministry of Trade to act as a broker and therefore could not have consummated sales contracts. Iraq and MoD cite Iraq's Law of Trade, stating: "A non-Iraqi person can exercise a commercial activity in accordance with the requirements of the national plan by permission from the Concerned Entity." Article 8 of the Law of Trade (Law No. 30 of 1984). They allege Wye Oak failed to ever apply for and receive permission to act a broker from the Ministry of Trade so it cannot claim damages under the BSA. Defendants cite several Iraqi court cases in which a plaintiff's failure to prove the plaintiff applied for and received the required permission necessitated the court deny any claims for broker fees and dismiss the lawsuit. So defendants contend Wye Oak is unable to obtain relief on its breach of contract claim as a result of its omission to obtain the required license.

However, plaintiff's Iraqi law expert gave numerous reasons why this license requirement did not apply to

Wye Oak. First, Mallat distinguished the current matter from the Iraqi court cases cited by defendants. Those cases involved a different Iraqi trade law, not the provision of Iraq's Trade Law cited by Iraq and MoD here. In the cases cited by Iraq and MoD, an Iraqi plaintiff sued a foreign government official and foreign state-owned corporation claiming the defendants did not pay him pursuant to their contracts. The Iraqi courts rejected the plaintiff's claims because he had not obtained the required business license to represent a foreign person or corporation. ECF No. 253-3. Here, Wye Oak was working with MoD, part of the Iraqi government, not a foreign person, corporation, or government. The law at issue in the cases cited by Iraq and MoD is clearly not applicable to this suit. Therefore, these cases do not demonstrate Wye Oak was required to obtain any license.

Second, this expert asserted CPA Order 39 modified Iraq's Law of Trade when it was enacted in September 2003. Chibli Mallat 3rd Expert Report 3, Pl.'s Ex. 117. Mallat informed the Court CPA Order 39 liberalized trade and placed foreign and domestic business on equal footing. *Id.* CPA Order 39 provided "A foreign investor shall be entitled to make foreign investments in Iraq on terms no less favorable than those applicable to an Iraqi investor." *Id.* This led Mallat to conclude requiring Wye Oak to obtain a license when it was operating in Iraq as a broker for MoD would undermine CPA Order 39.

Third, Mallat stated that even if Article 8 of the Law of Trade remained in force after CPA Order 39, the license requirement would not have been applicable to

Wye Oak because Wye Oak was MoD's agent under the BSA. According to Mallat, because MoD would not have needed a license, neither did Wye Oak. Pl.'s Ex. 115.

Fourth, Mallat pointed to the BSA's requirement that MoD "shall fully inform [Wye Oak] at all times of all matters reasonably required to enable [Wye Oak] to properly carry out its duties." Pl.'s Ex. 5 ¶ 4(a). MoD never informed Wye Oak of this alleged licensure requirement and never requested Wye Oak obtain a license. The evidence establishes Wye Oak performed work under the BSA without any complaint from MoD that Wye Oak lacked a license to perform such activities. And finally, the evidence establishes MoD paid the invoiced amounts—albeit to Zayna not Wye Oak—without voicing any complaint regarding a licensing issue. This indicates the license requirement either did not apply to Wye Oak, as it would be quite odd for MoD to engage in unlawful contractual activity, or MoD did not fulfill its contractual obligation to inform Wye Oak about this requirement.

Ultimately, defendants have not met their burden of proof to establish this affirmative defense. The Court concludes that Article 8 of the Iraqi Law of Trade likely did not apply to Wye Oak, acting as MoD's agent, even if it remained in full effect after CPA Order 39. This conclusion is supported by MoD's own actions not informing Wye Oak of any such requirement and paying Zayna the invoiced amounts without ever raising any licensure issue.

2. *The Court Rejects the Defense Wye Oak was Not Owed Any Compensation Under the BSA Because Wye Oak Did Not Conclude Any Sales Contracts*

Iraq and MoD argue Wye Oak needed to conclude sales contracts as a precondition to any payment under the BSA. ECF No. 431-1, at 4–5, 8–12; ECF No. 431-2, at 16–17. Defendants allege MoD was only obligated to pay Wye Oak 10% commissions on sales contracts for military refurbishment services, refurbished military equipment, and scrap sales. Defendants contend Wye Oak was therefore not owed any money under the BSA because Wye Oak never concluded any sales contracts.

However, the Court has already rejected this argument in Section III(C)(1). The BSA did not provide that MoD would only pay Wye Oak a 10% commission on sales contracts for military refurbishment services, refurbished military equipment, and scrap sales. As explained above, this commission was just one aspect of Wye Oak's potential compensation under the BSA. MoD was also required to pay Wye Oak 10% of the refurbishment cost for refurbished military equipment. And MoD was supposed to cover expenses associated with performing military equipment services under the BSA, as Wye Oak was required to use all reasonable commercial efforts to perform military refurbishment services yet was not required to spend any money carrying out these services. Accordingly, the Court rejects this defense.

3.*The Court Rejects the Defense Wye Oak Waived any Breach*

Finally, defendants argue that even if MoD did breach its contract with Wye Oak, Wye Oak waived any breach by agreeing to payment terms at the December 5, 2004 meeting and then never providing documentation it had performed the invoiced work. Defendants allege the parties at the December 5 meeting agreed MoD would authorize GIG to disburse the funds it was holding upon receipt of documentation of the work Wye Oak had performed. This appears to be primarily based on an exchange between defense counsel and Clements:

> [Defense Counsel]: There was discussion during the December 5th meeting, was there not, that in order to get paid Wye Oak should produce cost invoices from, whether it's from a labor force or parts that they're buying, indication of the expenditure of monies?
>
> [Clements]: Again, I can't claim that that was precisely what was being talked about. As far as I was concerned, it was to provide more detail that would allow the funds to be released. I don't know whether it was cost of invoices, sales contract or whatever it was. As far as I was concerned, it was more detail.
>
> [Defense Counsel]: Okay. Well, more detail that would support the claim under the pro forma invoices?
>
> [Clements]: Yes, sir, that's fair.

Tr. 12/18/18 AM 6:25–7:13. Defendants state they never received such documentation.

However, any such discussion about providing additional details could not have validly amended the BSA and constituted a waiver by Wye Oak. The BSA could only be amended by a written amendment signed by both parties, and there is no evidence the December 5 meeting resulted in any valid written, signed amendment to the BSA. Therefore, Wye Oak did not validly agree to the new payment scheme thereby releasing MoD from its breach as defendants allege. Rather, the evidence shows Wye Oak was simply trying to extract payment that was owed to it from MoD. This payment issue risked hindering the IMERP and spurred the December 5 meeting. Thus, Wye Oak did not waive MoD's breach of the BSA's requirement to pay the invoices immediately upon presentation.

IV. Damages

The Court must next examine the damages Wye Oak is owed for defendants' breach of the BSA. Wye Oak contends it is owed four categories of damages: the amounts under the three invoices it never received, lost profits from constructing bases, lost profits from refurbishing military equipment, and lost profits from broker fees earned on scrap sales. Wye Oak also seeks damages for categories of lost profits its damages expert, Dr. John Gale, was unable to calculate because of defendants' discovery abuses. Further, Wye Oak seeks prejudgment interest. And Wye Oak argues it is entitled to enhanced damages because of defendants' alleged bad faith and fraud. Finally, Wye Oak contends it is entitled to costs, including reasonable attorney's fees and expenses.

The Iraqi approach to damages is set forth in Article 169 of the Civil Code. Article 169 declares:

> (1) If the compensation (damages) has not been estimated in the contract or in a provision of the law it will be assessed by the court.
>
> (2) The damages shall be in respect of every obligation which arises from the contract be it an obligation of conveyance of property, a benefit or any other right in rem, or an obligation to do or to abstain from doing an action and includes the loss of and the lost profit suffered by the creditor on account of loss of or delay in receiving the right provided that this was a natural result of the failure of or delay by the debtor to perform the obligation.
>
> (3) Where the debtor had not committed cheating (fraud) or a grievous fault the compensation may not exceed the loss suffered or the amount of the lost profit which has been normally anticipated at the time of the contracting.

Pl.'s Ex. 97 art. 169. Wye Oak is therefore permitted to recover damages for payments it never received pursuant to the three invoices and for lost profits. Beyond citing Article 169, the parties' briefings on the issue of damages entirely focus on U.S. case law. This indicates the parties believe Iraqi damages principles mirror that of American law. Accordingly, the Court will turn to the American rule on damages as set forth in the seminal case of *Story Parchment Co. v. Paterson Parchment Paper Co.*, 282 U.S. 555 (1931), to determine the amount of damages to be awarded to Wye Oak.

In *Story Parchment Co.*, the Supreme Court stated:

> Where the tort itself is of such a nature as to preclude the ascertainment of the amount of damages with certainty, it would be a perversion of fundamental principles of justice to deny all relief to the injured person, and thereby relieve the wrong-doer from making any amend for his acts. In such case, while the damages may not be determined by mere speculation or guess, it will be enough if the evidence show the extent of damages as a matter of just and reasonable inference, although the result be only approximate.

Id. at 562. The Supreme Court emphasized "the clear distinction" in the standard of proof necessary to establish a plaintiff's *entitlement* to damages and to assess the *amount* of those damages. *Id.* ("[T]here is a clear distinction between the measure of proof necessary to establish the fact that petitioner had sustained some damage, and the measure of proof necessary to enable the jury to fix the amount"). While a plaintiff must prove entitlement to damages with reasonable certainty or preponderance of the evidence, proof of the amount of damages only requires a reasonable estimate. *See id.*; *see also Hill v. Republic of Iraq*, 328 F.3d 680, 684–85 (D.C. Cir. 2003) (holding "that to recover damages a FSIA plaintiff must prove that the projected consequences are "reasonably certain" (i.e., more likely than not) to occur, and must prove the amount of damages by a "reasonable estimate" under this circuit's application of *Story*"); *Samaritan Inns, Inc. v. District of Columbia*, 114 F.3d 1227, 1235 (D.C. Cir. 1997)

(plaintiff must "prove the fact of injury with reasonable certainty, [and prove] the amount of damages . . . based on a reasonable estimate"); *Wood v. Day*, 859 F.2d 1490, 1493 (D.C. Cir. 1988) (plaintiff need only provide "some reasonable basis on which to estimate damages") (quoting *Romer v. District of Columbia*, 449 A.2d 1097, 1100 (D.C. 1982)); *Abraham v. Gendlin*, 172 F.2d 881, 883 (D.C. Cir. 1949) ("[T]here is a clear distinction between the measure of proof necessary to establish the fact of damage and the measure of proof necessary to enable the jury to fix the amount.").

Thus, the Court's must "'make a just and reasonable estimate of the damage based on relevant data.'" *United States ex rel. Miller v. Bill Harbert Int'l Constr., Inc.*, 608 F.3d 871, 905 (D.C. Cir. 2010) (quoting *Bigelow v. RKO Radio Pictures, Inc.*, 327 U.S. 251, 264 (1946)). Such relevant data may include "probable and inferential as well as direct . . . and positive proof." *Bigelow*, 327 U.S. at 264. In setting about this task, the Court is mindful that damages "may not be determined by mere speculation or guess . . . although the result may be only approximate." *Hill*, 328 F.3d at 684; *see also Rhodes v. United States*, 967 F. Supp. 2d 246, 313–14 (D.D.C. 2013).

Finally, the D.C. Circuit instructs trial courts to explain the reasons for the determination of the damages award and tether these reasons to the record. *See Eureka Inv. Corp. v. Chicago Title Ins. Co.*, 743 F.2d 932, 940 (D.C. Cir. 1984) ("[I]t is essential that the trial court give sufficient indication of how it computed the amount so that the reviewing court can determine whether it is supported by the record.")

(citing *Hatahley v. United States*, 351 U.S. 173, 182 (1956)); *see also Safer v. Perper*, 569 F.2d 87, 100 (D.C. Cir. 1977) ("The measure of damages and method of computation [must] be exposed so as to inform the litigants and afford a possibility of intelligent review."). The Court turns to this important task after briefly discussing Dr. Gale's expert damages report.

A. Dr. Gale's Expert Damages Report

The Court accepted Dr. Gale as a qualified expert witness to perform economic damages analysis. Tr. 12/21/18 PM 99:2–12. Gale is a qualified expert in economics, with a specialty in measuring the economic effects of government contracts. He received his Ph.D. in Economics from the University of Wisconsin, with a specialization in Industrial Organization, and has over 20 years of experience modeling competition and consumer demand to calculate damages due to breach of contract and other causes. Pl.'s Ex. 101 at 30–35. Further, Gale has previously been accepted as a damages expert. *See id.* at 29. Gale is the only damages expert in this case, as defendants did not put forward their own damages expert.

Dr. Gale used a "but for" analysis to determine Wye Oak's damages. *Id.* at 4. This methodology is well-established and commonly used in the determination of damages due to breach of contract and other economic harm. *See id.*; Tr. 12/21/18 PM 58:13–60:1. Such "but for" analyses are commonly accepted by courts. *See, e.g., Brennan's Inc. v. Dickie Brennan & Co.*, 376 F.3d 356, 371–72 (5th Cir. 2004) (holding expert testimony of hypothetical damages for breach of contract, based on putting plaintiff in position it would have occupied but for breach, is one proper

measure of damages). Under the but for test, Gale calculated the profits Wye Oak would have earned if MoD had complied with the BSA's terms (the but for profits), determined the profits Wye Oak actually earned (the actual profits), and calculated damages as the difference between these figures.

In addition to attacking Gale's individual damage calculations, defendants take issue with Gale's but for analysis. First, they contend the date of breach occurred in December 2004, after Dale Stoffel was killed, not on October 28, 2004.[20] Second, if the Court finds the breach occurred on October 28, they contend Gale ignored critical events subsequent to the date of the breach of the BSA. Namely, Gale's assessment was not affected by Dale Stoffel's death or by Iraq's alleged scrap sales ban. The Court now addresses these overarching objections.

1. *The Court Finds Defendants Breached the BSA on October 28, 2004*

Dr. Gale assessed the date of breach as October 28, 2004, and Wye Oak has proposed this as the date of breach. Defendants counter Wye Oak waived any breach at the December 5, 2004 meeting. So defendants argue the ultimate breach must not have occurred until later in December 2004 when defendants yet again failed to pay Wye Oak the money it had been owed since October 2004. The Court has already assessed and rejected defendants' waiver argument in Section III(D)(3).

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[20] Although defendants vehemently dispute any breach of contract occurred, the Court has determined a breach did indeed occur.

While payment on the invoices was due immediately upon presentation (October 11 for two invoices and October 18 for the third) under the BSA and MoD approved these invoices on October 19, Wye Oak and its damages expert have stated a ten-day grace period to October 28 for payment to occur was reasonable. As stated above, the Court does not see any reason to reject plaintiff's proposal permitting a grace period during which payment should have occurred. Accordingly, the Court finds MoD materially breached the BSA on October 28, 2004.

2. *Gale Did Not Err in Not Taking into Account Subsequent Events*

Defendants take issue with the fact that Dr. Gale did not take into account that Dale Stoffel was killed in December 2004, that Wye Oak pulled its American personnel out of Iraq following Dale's death, and that Iraq allegedly prohibited scrap sales in December 2004. Defendants contend that when years have passed between the date of the breach of contract and the trial, the Court should consider post-breach evidence when determining damages. *See Sinclair Refining Co. v. Jenkins Petroleum Process Co.*, 289 U.S. 689, 698 (1933) (finding in the patent dispute context that when years have passed between the date of the purported wrong to the date of trial, subsequent events constitute a "book of wisdom that courts may not neglect"); *see also Anchor Sav. Bank, FSB v. United States*, 597 F.3d 1356, 1369–70 (Fed. Cir. 2010) ("[W]here it is necessary to fashion an appropriate award, a court 'may consider post-breach evidence when determining damages in order to place the non-breaching party in as good a position as he

would have been had the contract been performed.'") (quoting *Fifth Third Bank v. United States*, 518 F.3d 1368, 1377 (Fed. Cir. 2008)). According to defendants, Dale Stoffel's death, Wye Oak's withdrawal of American personnel from Iraq, and the alleged scrap ban were all intervening causes for Wye Oak's purported lost profits damages for which defendants were not responsible. While the Court recognizes it is appropriate to consider post-breach events in a case such as this one in which nearly 15 years have passed from the date of breach to the Court issuing this judgment, the Court must reject each of defendants' charges.

a. Dale Stoffel's Murder

Defendants contend Wye Oak's damages should be reduced as a result of Dale Stoffel's death because Wye Oak was a small company in which Dale Stoffel was an extraordinarily impactful individual with expertise in the work covered under the BSA. However, the Court does not believe Gale erred by not accounting for Stoffel's death despite the fact the Court cannot make a definitive finding that Dale Stoffel was murdered at the behest of Zayna and Cattan.

But for MoD's breach of the BSA, Dale Stoffel may very well not have been murdered. The evidence shows Stoffel was traveling on December 8 from Taji to Baghdad to try to arrange for the funding owed to Wye Oak to finally be disbursed. Defs.' Ex. 40. The Court therefore cannot pretend as though this fateful trip would have occurred just the same if Wye Oak had been paid as it should have been under the BSA. But for MoD's continued failure to pay Wye Oak,

forcing Dale Stoffel to persistently wrangle with MoD officials and Zayna (who was paid instead of Wye Oak) to extract the money rightfully belonging to Wye Oak, Stoffel likely never would have been making the trip on which he was killed. In other words, but for MoD's breach Stoffel never would have been in the situation he was in on December 8, 2004 when he was murdered. Therefore, but for MoD's breach Stoffel may never have been murdered.

Accordingly, it was not improper that Gale did not incorporate this event in his construction of the but for world. Dale Stoffel may very well still be alive today if not for MoD's breach. This is the insight the Court draws from looking within the "book of wisdom." To discount Wye Oak's damages for Dale Stoffel's murder, which at least in part resulted from a series of events set into place by MoD's breach, would not be wise, as defendants contend, it would be unjust.

b. Wye Oak's Withdrawal of American Personnel

Defendants further argue Wye Oak's damages should be diminished because Wye Oak could not have performed to the level it asserts without American personnel present in Iraq. This again ignores defendants' role in this post-breach event. David Stoffel testified Wye Oak and CLI were willing to send their U.S.-based personnel back to Iraq if Wye Oak got paid the money it was owed for the three invoices and could have the appropriate security (after Dale Stoffel and Joe Wemple were killed). Tr. 12/18/18 AM 75:1–7. And Bill Felix echoed this sentiment. Felix stated the reason Wye Oak and CLI did not return to Iraq

after Dale Stoffel was killed was because Wye Oak never received payment for its three invoices. Felix Dep. 69:10–19. MoD was in breach of contract so Wye Oak's personnel did not return to Iraq to continue performing work it was not being paid for. Felix further testified he would have returned to Iraq had Wye Oak been paid. Felix Dep. 69:10–19. And Felix indicated some of the money could have gone towards paying for security. Felix Dep. 201:21–203:1. Thus, defendants' argument about Wye Oak's withdrawal of U.S. personnel from Iraq completely disregards the primary reason these individuals left Iraq and did not return—MoD never paid Wye Oak, thereby breaching the contract. And this argument ignores the fact Wye Oak had non-American personnel in Iraq that continued to perform until sometime in 2005 as discussed in Section II(M).

c. The Scrap Ban

Iraq and MoD contend Iraq prohibited the sale and export of scrap metal so Wye Oak was precluded from entering into any scrap sales contracts. Therefore, defendants assert Wye Oak would not have been able to earn broker fees from scrap sales.

As detailed in Section II(B), the General Secretary of the Cabinet issued a letter to the Ministry of Interior on July 17, 2004, regarding the prohibition of exporting scrap with copies to the Office of the Prime Minister, Ministry of Industry and Minerals, Ministry of Trade, and National Intelligence Service. Defs.' Ex. 53. The letter stated the Prime Minister agreed to the Ministry of Industry and Minerals' proposal to stop exporting scrap, with the exception that some materials of a military nature could continue to be

exported upon the Prime Minister's and his economic committee's approval. *Id.* But this Court was never provided with the Ministry of Industry and Minerals' proposal referenced in this letter, which makes it impossible to fully comprehend the exact terms of the prohibition on exporting scrap the Prime Minister approved. This deliberation on scrap exports and decision by the Prime Minister was never communicated to Wye Oak at any time during the BSA negotiations or after Wye Oak and MoD signed the BSA.

And as explained in Section II(N), the General Secretary of the Council of Ministers sent a letter addressed to all ministries on December 28, 2004, stating scrap materials were proscribed from being sold to merchants or any private sector entities. Defs.' Ex. 58. Again, there is no evidence Wye Oak was ever informed about this directive and no copy of this letter was found in MoD's files.

These alleged scrap bans are an affirmative defense and therefore defendants bear the burden of proof. This Court finds defendants have not carried their burden of establishing the bans on exporting and selling scrap applied to sales made by MoD.

First, Neal testified General Bashar, an MoD official working on the effort to recover vehicles, informed him the scrap ban was intended to stop individuals from illegally taking scrap and did not affect Wye Oak. Tr. 12/19/18 AM 29:22–31:16; Tr. 12/19/18 PM 4:9–18.

Second, Wafaa Muneer, the Ministry of Justice's Legal Department's Senior Manager of Foreign Litigation, indicated the scrap bans did not apply to MoD. The Court previously found Muneer to be a

"qualified person" under Federal Rules of Evidence 803(6) and 902(12) who could testify on the record-keeping systems of Iraq's ministries to admit the documents related to the alleged scrap bans as business records. Muneer has extensive experience as a lawyer in the Iraqi government and is responsible for managing document production, including managing the search and retrieval of documents maintained in the files of the Office of the Prime Minister, Council of Ministers, and Iraq's various ministries. She has significant knowledge of the record-keeping practice of the ministries across the Iraqi government. And during her *de bene esse* deposition, she testified regarding the flow of work between the Council of Ministers and various other ministries. "The instructions or directives are issued in the form of a letter that has a number and a date after it is signed off by the authorized official, whether it is the Secretary General of the Prime Minister's office. Then that letter is sent over to the party concerned." Muneer Dep. 2/5/19, 17:1–10.

Specifically, when discussing the June 19, 2004 letter from the General Secretary of Iraq's Council of Ministers informing the Ministries of Industry, Trade, and Finance the Prime Minister directed the formation of a committee of representatives from these ministries to study scrap exports and provide a recommendation on the topic, Defs.' Ex. 56, she asserted she knew the letter was sent to, and received by, the Ministry of Trade because it had a "stamp that you see on it, it is the stamp of the Ministry of Trade, and . . . this is proof that the Ministry of Trade has received this letter." Muneer Dep. 2/5/19, 96:18–22.

Muneer further stated all ministries used this system to date and number the correspondence they received. Muneer Dep. 2/5/19, 95:7–97:12. But there is no similar document bearing MoD's stamp indicating it was sent to, or received, by MoD in regard to either the July 17, 2004 or the December 28, 2004 alleged scrap bans. Indeed, there is no evidence copies of these letters exist in MoD's files. This suggests to the Court that MoD was not an intended recipient of the scrap ban directives and these prohibitions were not binding on MoD. Mallat deduced the same: "I understand from various testimonies and documents that the Ministry of Defense in the arguments presented by its counsel in the present case did not find any scrap ban documents in its possession and so were not produced. Considering the fact that it's a requirement that Mrs. Muneer underlined that this should be filed properly, the fact that directives coming from the Council of Ministers were not filed suggests that they were simply not directives addressed to the Ministry of Defense." Mallat Dep. 2/14/19, 82:11-21. And MoD was going to be the scrap seller under the BSA—Wye Oak was merely brokering the sales for MoD—so there was no reason Wye Oak would be bound in any manner beyond MoD.

Third, the Court again notes there is no evidence Wye Oak was ever informed about these alleged scrap bans. One reason why MoD may not have provided notice was the scrap bans did not apply to MoD and therefore there was no need to give notice. Defendants failed to present any witness who could be questioned on this subject.

Because this is an affirmative defense, defendants bear the burden of proof. And records related to the alleged scrap bans were uniquely under their control. Yet defendants did not provide the Court all records to sufficiently understand the entire significance of the July 17, 2004 directive. And the lack of evidence that copies of these letters exist in MoD's files strongly indicates these prohibitions were not binding on MoD based on Muneer's testimony on ministries' filing practices. Therefore, defendants have not carried their burden of proving the scrap bans applied to MoD. Accordingly, the Court does not believe the December scrap ban was a superseding event that shielded defendants from liability for lost profits from scrap sales.

B. Damages for the Three Invoices

Wye Oak is entitled to damages for its three invoices. These invoices are described in Section II(F). Although plaintiff's damages expert only calculated an award based on Wye Oak's overhead and profits from these three invoices because he felt he lacked sufficient documentary evidence of direct costs incurred by Wye Oak not included in overhead costs, the testimony and evidence elicited at trial (which occurred after Gale produced his expert report) demonstrate Wye Oak performed the invoiced activities. Wye Oak has demonstrated it is more likely than not it incurred the invoiced costs for performing this work.

Invoice #MUQ001 covered the initial construction cost of an armored vehicle depot at Muqtadiya, the initial hiring and training of workers, and the initial purchasing of tools. The construction cost of the

armored vehicle depot was invoiced at $1,600,000 and the initial hiring and training of workers and purchasing tools was invoiced at $220,000. Also, Invoice #MUQ001 included $273,000 in overhead and $209,300 in profits. Gale did not include in Wye Oak's damages either the construction cost or the cost to hire and train workers and purchase tools because he did not find documentary evidence of those costs. Pl.'s Ex. 101 at 8. But the evidence at trial demonstrates initial construction work at Muqdadiya was completed. The evidence shows armored vehicles were refurbished at that installation, which could not have been completed if the depot was not initially constructed. Further, this work could not have occurred if Wye Oak had not hired and trained workers or purchased tools. And it would have been impossible to construct the depot, hire and train workers, and purchase tools without spending money. Therefore, the Court finds the preponderance of the evidence shows Wye Oak expended funds for the direct costs billed in this invoice in addition to its overhead costs. Wye Oak is entitled to be reimbursed for the costs it incurred. Thus, the Court will award Wye Oak for these costs and its overhead and profit on this invoice, which amounts to $2,302,300.

Invoice #TAJI001 covered mobilization costs incurred for the construction of the Taji facility and the movement of spare parts to Taji. The mobilization costs totaled $4,200,000 and the cost to move spare parts to Taji was $500,000. Pl.'s Ex. 18. Invoice #TAJI001 included $705,000 in overhead and $540,500 in profits, too. Again, Gale only assessed Wye Oak was owed the overhead and profit amounts

from Invoice #TAJI001 because he did not find evidence of the other costs. However, the evidence demonstrates Wye Oak performed refurbishment work at Taji. This required spare parts to be moved to Taji. As a result, the Court finds it is more likely than not that Wye Oak expended the $500,000 to move the spare parts to Taji. Wye Oak is therefore entitled to this amount to reimburse it for its expenditure. In addition, Wye Oak is entitled to its overhead costs, which the Court also finds were incurred in performing this work, and its profit on this invoice. Accordingly, the Court will award Wye Oak $1,745,500 for Invoice #TAJI001.[21]

Finally, Invoice #MUQ002 covered the cost of travel, lodging, and food for technical experts, materials to wash and paint vehicles, costs for skilled and unskilled labor, and costs for the initial repair of 246 armored vehicles at both Muqdadiya and Taji. The cost of travel, lodging, and food for technical experts was $112,150, the cost of materials to wash and paint vehicles was $83,600, the cost for skilled and unskilled labor was $56,000, and the costs for initially refurbishing vehicles at Muqdadiya and Taji amounted to $12,866,500. In addition. this invoice included $1,952,596.50 in overhead and $1,496,990.65 in profits. Once again, Gale only assessed Wye Oak was owed the overhead and profit amounts from Invoice #MUQ002 because he did not find documentary evidence of the other costs. But the evidence demonstrates Wye Oak incurred more than just its overhead costs for this invoice, too. The

[21] Wye Oak does not seek damages for the $4.2 million in mobilization fees included in Invoice #TAJI001.

evidence shows Wye Oak had a local workforce and paid this workforce. And the evidence shows Wye Oak washed and painted the vehicles as part of its refurbishment efforts, and incurred expenses obtaining the material necessary to do this work. Further, Wye Oak refurbished armored vehicles at Muqdadiya and Taji. In fact, Wye Oak exceeded the goal of producing a mechanized brigade of operational armored vehicles for Iraq's January 2005 parliamentary election. Accordingly, the Court finds it is more likely than not Wye Oak incurred the costs for these activities in addition to its overhead on this invoice. However, the record does not establish Wye Oak incurred expenses for technical experts' travel, lodging, and food. Instead, the evidence indicates GIG paid for this. In Dale Stoffel's November 25, 2004 email to Raymond Zayna, he stated the $112,150 from Invoice #MUQ002 was "due to GIG for completed work for the transportation of Ukrainian Experts to assess the repair/overhaul work." Pl.'s Ex. 31. The Court therefore finds Wye Oak was not the party that incurred this cost included in Invoice #MUQ002. In sum, the Court will award Wye Oak for its incurred costs in addition to its overhead and profit on this invoice, which amounts to $16,455,687.

Defendants contend the evidence does not sufficiently demonstrate Wye Oak expended funds beyond its overhead costs. Defendants point out that Wye Oak has not provided the Court with any bank records or other documentary evidence of specific expenditures for the costs it claims it incurred. While the ideal case may include such specific records, this is not always the situation. Expenses can be incurred

in other ways than simply withdrawing funds from bank accounts. And the Court must note Dale Stoffel's computer was with him in the car when he was murdered. The computer was taken and the records that may have existed on his computer were lost to Wye Oak. This does not lower Wye Oak's burden in any way, but it may be one reason Wye Oak has not presented documentary evidence. Ultimately, the fact Wye Oak performed the activities on the invoices and refurbished a significant number of armored vehicles demonstrates it was incurring costs. And defendants approved these invoiced costs at the October 19, 2004 meeting (and again stated it would pay Wye Oak for these invoiced costs at the December 5, 2004 meeting). Wye Oak is entitled to receive these (approved) costs, which the record establishes it incurred in performing the BSA.

Accordingly, the Court will award Wye Oak a total of $20,503,487.15 in damages for the three invoices.

C. Lost Profits

To recover lost profits for a breach of contract, the plaintiff must establish that the breach proximately caused the loss, that the loss of profits was a foreseeable result of the breach, and that the amount of damages can be established with a reasonable estimate. The Court will address these elements when assessing each of the lost profits claims. But the Court will first examine—and dispense with—five of defendants' overall objections to plaintiffs' lost profits calculations: (1) that the BSA excluded lost profits damages, (2) that Wye Oak was not qualified to perform under the BSA, (3) that Wye Oak did not have the capacity to perform under the BSA, (4) that Gale

assumed an unrealistic timeframe for calculating Wye Oak's lost profits, and (5) that the Court should give additional scrutiny to Wye Oak's damage calculation because it was a new business.

1. *Defendants' Overall Objections to Plaintiffs' Lost Profits Calculations*

First, defendants argue the BSA explicitly exempted lost profits damages. They point to the provision in the BSA that states:

> In the event of any cancellation or termination of any Sales Contract by the Ministry regardless of cause:
>
> 1.Broker shall retain all commissions theretofore paid under this Agreement;
>
> 2.Broker shall be entitled to receive its commission which is payable in respect of each Sales Contract concluded by the Ministry during the term of this Agreement.
>
> 3.Broker shall also be entitled to receive its commissions from the Ministry on all Sales Contracts in which the Contract Value or portions thereof become payable by the Customers to the Ministry for a further period of one year from the date of termination with respect to Sales Contracts on which the Broker has represented or worked for the Ministry as its Broker.

Pl.'s Ex. 5 ¶ 4(c). Defendants allege this provision demonstrates the parties negotiated a limit on available damages to sales contracts Wye Oak brokered yet were canceled or terminated by MoD. Therefore, defendants argue Wye Oak should not be

able to obtain lost future profits for contracts not yet brokered. But this provision does not limit damages resulting from a material breach of the BSA as defendants contend. And it does not indicate the parties contemplated limiting available damages resulting from a breach of the BSA. The BSA does not contain any such provision.

Second, defendants allege Wye Oak was not qualified to perform. Defendants charge Wye Oak did not put forward evidence it previously successfully undertook projects of a similar scale as the BSA, did not fully explain its business plan, and did not demonstrate it had available capital to perform. However, these claims are rebutted by the BSA's own language praising Wye Oak and by Wye Oak's demonstrated record of performance, as detailed above. The BSA recognized Wye Oak "has extensive experience in facilitating and arranging for the purchase and sale of all types of Military Equipment at the highest and best commercial prices and rates. The Ministry acknowledges that [Wye Oak] has established contacts throughout the world regarding the sale of Military Equipment and [Wye Oak] has also established government and other contacts in Iraq." *Id.* ¶ 2. Also, Wye Oak performed under the BSA, exceeding the goal set for the number of refurbished military vehicles produced by the January 2005 election. The evidence establishes Wye Oak only ceased performing under the BSA because of defendants' material breach not paying Wye Oak for the three invoices. Defendants cannot claim Wye Oak was not qualified to perform work under the BSA, some of which it was already performing, based on

newly moved goal posts defendants have only just asserted should be the standard upon which to judge Wye Oak's qualifications. Such a finding would contradict the record in this matter.

Third, defendants claim Wye Oak did not have the capacity to perform under the BSA. Defendants seem to base this allegation on the fact that Wye Oak was a small company, that Iraq was a war zone, and that there may not have been a demand for Wye Oak's services. For the reasons stated in the previous paragraph, Wye Oak's record of performance under the BSA establishes it had the capacity to perform; indeed, it already was. And the record demonstrates Wye Oak had already partnered with CLI and obtained local labor so Wye Oak's size does not seem to be the Achilles' heel defendants make it out to be. Also, Wye Oak already demonstrated it could perform in a war zone, which is exactly what the contract contemplated and called for, so the Court does not find this to be an impediment to Wye Oak's capacity. Finally, defendants' argument about a lack of demand for Wye Oak's services is bizarre. The Court has been presented with a great deal of testimony on the importance of the IMERP and the critical goal of re-equipping the Iraqi armed forces. This is why defendants contracted with Wye Oak. To now argue Iraq may not have been able to fund the services it contracted Wye Oak to perform is illogical. Essentially, defendants are stating Wye Oak should not receive lost profits damages because defendants may have materially breached the contract at some other point in time. This is not a valid (or serious) defense. In addition, Gale presented the Court with

evidence regarding the robust worldwide demand for scrap. *See infra* Section III(C)(4). There does not seem to be any lack of demand for Wye Oak's services.

Fourth, defendants take issue with Gale's timeframe for calculating lost profits. Defendants argue it is unrealistic to think Wye Oak could have accomplished the base construction services, military equipment refurbishment activities, and scrap sales within one year, rather than spreading it out over the three-year life of the contract.[22] Gale started his timeframe calculation by examining the percentage of total base construction cost at Taji and Muqtadiya covered by Wye Oak's October 2004 invoices. Taji had a total construction budget of $42,000,000 based on the calculations in Invoice #TAJI001, and Wye Oak invoiced $4,700,000 on this project on October 11, 2004. Invoice #MUQ001 did not provide the total construction budget for Muqtadiya, but showed Wye Oak invoiced $1,820,000 on this project on October 11, 2004. Gale used the fact Wye Oak had invoiced approximately 11% of the work for Taji in Invoice #TAJI001 to assess Wye Oak likely invoiced this same percentage of the work for Muqtadiya in Invoice #MUQ001. So Muqdadiya's total cost was $16,300,000. Pl.'s Ex. 101 at 8–10.

On November 25, 2004, Dale Stoffel emailed Raymond Zayna, informing Zayna that Wye Oak had been advised to submit invoices for the next phase of

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[22] The term of the BSA was one year, commencing on August 16, 2004, with two option years, which would automatically renew unless either party notified the other in writing at least 60 days before the period would end of the intent not to renew. Pl.'s Ex. 5 ¶ 3.

construction work at Taji. Pl.'s Ex. 31 at 3. The new invoice would be for an additional $12,600,000 million for "the next 30% of the work." *Id.* Gale deduced this indicated Wye Oak planned to complete another 30% of the construction work at Taji by the end of the first quarter of 2005. He then assumed this same pace of construction, 30% per quarter, for both Taji and Muqtadiya. This means they would have been completed by the end of the third quarter of 2005. And Gale believed the remaining bases would have been started after the initial delivery of armored vehicles in January 2005. Using the same pace of construction for those bases, Gale calculated construction at the remaining bases would have been completed by the end of 2005. Gale testified the percentage of funds expended is a common economic proxy for determining the progress towards a project's completion. Tr. 12/21/18 PM 15:24–16:25, 17:1–18:3, 30:6–35:12.

Further, Gale's report states that he assessed Wye Oak would refurbish military equipment and engage in scrap sales during the same time frame in which it was constructing the facilities. Gale based his determination of the timing of military equipment refurbishment on the fact Wye Oak refurbished a significant number of armored vehicles between August 2004 and January 2005 at the same time that Wye Oak's invoices demonstrate it was starting to construct the facilities at Taji and Muqtadiya. Pl.'s Ex. 101 at 18. Gale indicates he assumes Wye Oak would have continued to operate in this manner, refurbishing military equipment while simultaneously constructing the facilities. He believes

Wye Oak would have engaged in scrap sales during this time frame as well because it would have been optimal for Wye Oak to determine which vehicles could be refurbished and which had to scrapped simultaneously. *Id.* Therefore, it makes sense to engage in scrap sales at the same time as the other activities are occurring. In addition, Gale believed this pace was reasonable to assume because the pro forma invoice component of the contract was structured in such a manner as to encourage the work to be completed as fast as possible. The Court finds this pace of work to be reasonable based on the extensive evidence in this case that the IMERP was a key priority for Iraqi security and there was an urgency to re-equip the Iraqi military. Ultimately, the Court finds Gale's assessment to be reasonable, based on adequate evidence, and founded in solid economic principles.

Fifth, defendants also contend it is improper to award damages for lost profits to a new business because the absence of income and expense experience renders anticipated profits too speculative. However, defendants primarily rely on decisions applying state laws precluding lost profits damages for new businesses. And the one D.C. Circuit case defendants cite, *Eureka Inv. Corp. N.V. v. Chicago Title Ins. Co.*, 743 F.2d 932, 939 (D.C. Cir. 1984), did not deny damages based on the businesses' newness. Defendants have not pointed the Court to any source indicating this rule exists in Iraqi law or that it is even the general rule in the U.S. today. To the contrary, "most recent cases reject the once generally acceptable rule that lost profits damages for a new business are

not recoverable." Robert L. Dunn, *Recovery of Damages for Lost Profits* § 4.3 (5th ed.1998). And the Federal Circuit has explicitly rejected this rule in a breach-of-contract suit against the U.S. Department of Housing and Urban Development. *Energy Capital Corp. v. United States*, 302 F.3d 1314, 1324–27 (Fed. Cir. 2002). The Court requires Wye Oak to establish all the elements required to recover lost profits, which may be difficult for a new venture to do, but such damages are not barred as a matter of law and the Court is not required under the law applicable to this case to examine Wye Oak's lost profits damages with additional scrutiny.

2. *Lost Profits from Construction*

As discussed above in Section III(C)(1), the BSA covered construction as an integral part of Wye Oak's military refurbishment services efforts. Gale found Wye Oak intended to build at least eight facilities to perform the services covered by the BSA. Gale used the construction budgets from Taji and Muqtadiya to determine the construction cost at the remaining bases. The Court finds that defendants' breach proximately caused Wye Oak's lost profits from construction, that this was a foreseeable result of the breach, and that Gale's estimates are reasonable.

First, defendants' breach was the natural and proximate cause of plaintiff's lost profits from construction. The Court has already detailed defendants' material breach. If defendants had not breached the BSA, Wye Oak would have been able to engage fully in this military refurbishment service. Indeed, Wye Oak had already begun construction activities at Taji and Muqtadiya even without

receiving any payment. And the Court has already found Wye Oak and CLI, who had extensive construction experience, had a strong relationship and were prepared to formally establish a partnership once Wye Oak received payment on the three invoices. Pl.'s Ex. 51; Tr. 12/18/18 AM 53:8-25; Tr. 12/18/2018 PM 8:1–4, 50:21-25; Tr. 12/19/18 AM 43:1–4; Felix Dep. 6:16–7:24, 42:14-45:16, 114:1-115:11.

Second, the loss of profits from base construction was a foreseeable result of the breach. Constructing facilities was an essential aspect of Wye Oak's military refurbishment services duties under the BSA. Lost profits from construction were therefore a natural result of defendants' breach. And defendants had reason to foresee these lost profits damages would be a probable result of their breach when the BSA was signed. Restatement (Second) of Contracts § 351. Defendants were aware of the importance of constructing facilities to carry out the refurbishment military services and had reason to foresee failing to pay Wye Oak for the three invoices would inhibit Wye Oak's ability to construct facilities, thereby losing profits it would have garnered.

Third, Gale's assessment of the amount of lost profits from base construction was a reasonable estimate. Gale assessed Wye Oak would have constructed facilities at eight military installations. The BSA specifically listed five facilities where Wye Oak was to begin performing services: "Taji Military Base/Camp Cooke, Camp Normandy [also called Muqtadiya], Camp Ashraft, Camp Anaconda, and the Coalition facilities at the Hilla Military Facility." Pl.'s Ex. 5 ¶ 2. In addition to these military installations

set forth in the BSA, Beadle testified there were plans to have facilities at Dahuk, Diwaniyah, and Nasiriyah. Tr. 12/20/18 PM 39:13–41:18; Pl.'s Ex. 96. And the three invoices demonstrate Wye Oak began construction at Taji and Muqtadiya shortly after the BSA came to fruition even without receiving payment. Based on this prompt action, Gale assessed Wye Oak would have also rapidly begun and completed construction at the other military installations had defendants not breached the contract. The Court finds these assessments to be reasonable based on the evidence elicited in this case.

Gale used the constructions costs invoiced at Taji and Muqtadiya to assess the costs for construction at the other sites. As discussed above, Taji had a total construction budget of $42,000,000 based on the calculations in Invoice #TAJI001 and Gale used the ratio of work initially invoiced at Taji compared with Taji's total cost to assess the cost of construction at Muqtadiya would have been $16,300,000. Taji and Muqtadiya were set to be used for both vehicle recovery and scrapping activities. Based on an interview with David Stoffel, Gale determined four of the other military installations would also have been used for both vehicle recovery and scrapping activities, and would have operated at a similar scale and scope as Muqtadiya.[23] This led Gale to set

[23] At trial, Gale explained the damages amounts for construction set forth in his report were conservative, especially after he learned more about the scope and scale of the likely construction activity from listening to Beadle's testimony. Gale explained, "the testimony was that a couple of those facilities were contemplated to being almost as big as Taji, while I've assumed

construction costs at those four installations at the same amount as Muqtadiya, $16,300,000, a reasonable estimation given that these facilities were supposed to be set up to perform the same type of work. The remaining two installations were only planned to be used for scrapping, so Gale estimated construction would cost half as much as it would for the other facilities because only half of the work (scrapping activities) was going to be performed there. Therefore, he estimated these sites would cost $8,150,000 each.[24] Further, Gale included a 15% overhead cost for construction based on the 15% overhead included in Wye Oak's three invoices. Although defendants argue the BSA did not specifically permit overhead costs to be paid to Wye Oak, overhead is a natural cost for businesses and the Court sees no reason this would have been excluded from future invoices, especially given that defendants approved Wye Oak's three invoices that all included 15% overhead. Gale's total cost estimation is therefore scaled with the 15% overhead charge even though Gale did not separately calculate that Wye Oak should receive that 15% overhead charge. In other words, the profit margin calculation includes the 15% overhead, but there is no separate claim for profit on that 15%

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them all to be the size of Muqtadiya, which is significantly smaller than Taji Tr. 12/21/18 PM 26:3–7.

[24] Gale testified his assumption these two installations would only cost $8,150,000 each was conservative, too, because, "at each one of these facilities you still have to build barracks; you still have to build latrines; you still have to build food service, regardless of how much you're doing. And it's only the parts of the facility that are actually doing the work that you save half on." Tr. 12/21/18 PM 25:15–24.

overhead charge. Tr. 12/21/18 PM 4:24–5:15. The Court finds these cost assessments to be reasonable, and likely conservative.

And Gale estimated this construction work would all be completed by the end of 2005, as discussed above in Section III(C)(1). The Court believes this timeline is reasonable and based on sound economic principles.

Finally, under the First Amendment, defendants were required to pay Wye Oak 10% of the cost of military refurbishment services, which would include construction costs, as compensation. Pl.'s Ex. 19. The MoD was required to pay Wye Oak immediately upon the presentation of pro forma invoices at the beginning of each stage of construction. Pl.'s Ex. 5 ¶ 5(b). The loss of the expected 10% fees constitutes the lost profits to Wye Oak from facility construction due to defendants' breach. Gale calculated Wye Oak's lost profits from construction was $15,327,200.

Ultimately, the Court finds Gale's assessment was a reasonable estimate of the lost profits from construction that was proximately caused by defendants' breach and a foreseeable result of this breach. Accordingly, the Court will award Wye Oak $15,327,200 in lost profits from construction.

3. *Lost Profits from Refurbishing Military Equipment*

Wye Oak suffered lost profits from not being able to refurbish military equipment under the BSA. Refurbishing military equipment was one of Wye Oak's key responsibilities and it was a vital task as part of the IMERP. Under the BSA, MoD was required to pay Wye Oak 10% of the equipment's

refurbishment cost. Pl.'s Ex. 5 ¶ 5(a). Defendants' breach proximately caused Wye Oak's lost profits from refurbishing military equipment, this was a foreseeable result of the breach, and Gale's estimates are reasonable.

First, defendants' breach was the natural and proximate cause of plaintiff's lost profits from refurbishing military equipment. If defendants had not breached the BSA, Wye Oak would have been able to continue refurbishing military equipment, thus earning 10% of the equipment's refurbishment cost. Wye Oak had already begun refurbishing military equipment despite the fact defendants did not pay Wye Oak for this work. Indeed, the Court has already found Wye Oak exceeded the goal of producing a mechanized brigade of operational armored vehicles for Iraq's January 2005 parliamentary election. The evidence shows Wye Oak was eventually forced to cease performing these refurbishment activities because defendants never paid Wye Oak. Thus, defendants' breach caused Wye Oak's lost profits from refurbishing military equipment.

Second, the loss of profits from refurbishing military equipment was a foreseeable result of the breach. Refurbishing military equipment was a key component of the BSA. Iraq needed to re-equip its armed forces. Lost profits from refurbishing military equipment was therefore a natural result of defendants' breach. And defendants had reason to foresee these lost profits damages would be a probable result of their breach when the BSA was signed. Restatement (Second) of Contracts § 351. Defendants were aware of the importance of refurbishing military

equipment; this was a driving factor in entering into the BSA. And defendants had reason to foresee failing to pay Wye Oak for the three invoices would inhibit Wye Oak's ability to refurbish military equipment, thereby losing profits it would have garnered.

Whether Gale's calculation for lost profits from refurbishing military equipment constitutes a reasonable estimate is more difficult. Iraq had a significant military with extensive equipment prior to the U.S.-led Coalition invasion in 2003. A significant amount of military equipment was damaged during the invasion. Wye Oak was surveying this military equipment to develop an inventory, but it did not complete this effort by the time defendants breached the BSA. *See* Tr. 12/18/18 AM 38:11–41:17; Pl.'s Ex. 65 (discussing David Stoffel's work writing a computer program that could ultimately be used to inventory and track all the equipment Wye Oak was refurbishing and would potentially broker for sales based on information Dale Stoffel sent him). Gale therefore had to rely on Wye Oak's initial estimates of the amount of salvageable military equipment and on public sources listing Iraq's military equipment during the relevant time. Gale found the numbers of military equipment were largely consistent across the public sources he relied on.

At this point, the Court must take a brief detour to note defendants' discovery abuses that severely limited the material available to Wye Oak and Gale. Wye Oak's discovery sought information about Iraq's weapons inventories between 2003 and 2007. But defendants did not provide any documentation or answers in response. *See generally* Tr. 12/21/18 PM

91:20–93:19; Wye Oak's Second Set of Interrogatories (requesting inventories for specified weapons between 2003 and 2007 and inventory of equipment damaged during the invasion); ECF No. 228-5 (Iraq Response to Wye Oak's Second Set of Interrogatories); ECF No. 228-7 (MoD Response to Wye Oak's Second Set of Interrogatories); ECF No. 228-11 (Iraq Response to Wye Oak's Fourth Set of Interrogatories); ECF No. 228-15 (MoD Response to Wye Oak's Third Request for Production of Documents). Then when conducting Talib's *de bene esse* deposition, after the first week of trial had already been completed, Wye Oak learned Talib never even looked for relevant documents. Talib Dep. 2/8/19, 111:4–117:22. Talib only looked for records on large-scale weapons inventories from 2003. *Id.* He did not search for documents at any military bases or otherwise look for documents that could be used to extrapolate inventory. Further, Talib did not make any effort to look for inventories from 2004 through 2007, despite Wye Oak specifically requesting documents from this period during discovery. Talib Dep. 2/8/19, 117:10–121:9. [25]

[25] In response to Wye Oak's sanctions motion, defendants attempted to excuse Talib's definitive statements that he did not make any effort to search for the documents Wye Oak explicitly requested by filing an affidavit from Talib claiming that when he investigated whether MoD possessed responsive documents, he learned the original armored brigade was reorganized and records were not maintained after 2009. Talib Decl., ECF No. 406-3. But this affidavit, submitted after the trial ended, contradicts Talib's clear *de bene esse* deposition testimony. Talib did not equivocate during his testimony—he asserted he did not search for the documents Wye Oak requested. And to the extent Talib's affidavit is truthful, which the Court has serious reason to doubt given his sworn trial testimony, defendants never

Defendants' flagrant disregard for its discovery obligations can only be seen as bad faith. Defendants have used their own egregious discovery abuses to attempt to deprive Wye Oak of the evidence it would have used to obtain a damages award. Defendants' discovery abuses forced Gale to locate and rely on third-party data sources instead of primary data sources and documents. And during trial, defendants sought to leverage their own discovery failures to call into question the reliability of Gale's assessments. This cannot stand. *See Shepherd v. Am. Broad. Companies., Inc*, 62 F.3d 1469, 1478 (D.C. Cir. 1995) (determining district courts may impose issue related sanctions—sanctions for litigation misconduct that are fundamentally remedial, rather than punitive and do not preclude trials on the merits—for litigation misconduct—whenever "a preponderance of the evidence establishes that a party's misconduct has tainted the evidentiary resolution of the issue"). The Court will therefore credit Gale's estimates based on these data sources as a sanction. *See id.* at 1475 (declaring "inherent power sanctions available to courts include fines, awards of attorneys' fees and expenses, contempt citations, disqualifications or suspensions of counsel, and drawing adverse evidentiary inferences or precluding the admission of evidence").

Returning to Gale's assessments: To calculate Wye Oak's lost profits from not being able to complete the military equipment refurbishment, Gale had to

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disclosed this information to Wye Oak. Therefore, the Court cannot credit defendants' after-the-fact excuses for its clear discovery abuses.

identify the quantity of each type of equipment, the cost of replacement of each type of equipment, and the threshold percentage at which equipment would be refurbished or scrapped. He then multiplied the cost of refurbishment by the number of pieces of each type of equipment. Finally, he multiplied that number by 10% to derive Wye Oak's lost profits. Pl.'s Ex. 101 at 11.

With completed surveys about repair records, purchase prices, and replacement rates, Gale could have developed economic models to determine the expected cost of refurbishing each type of military equipment by examining the timing of repairing and replacing the equipment. Tr. 12/21/18 PM 41:18-42:25. Such models rely on a comparison between the repair cost and the replacement cost of a piece of equipment. *Id.* at 12. The repair cost an owner would be willing to expend is commonly a percentage of the cost to replace the equipment. *Id.* Absent such completed surveys, Gale created a range of refurbishment costs for each type of military equipment as a function of the replacement cost, which he drew from public information on sales and listings. *Id.*

Gale separated the military equipment Wye Oak would have refurbished under the BSA into five categories: (1) tanks; (2) armored personnel carriers (APC) and other armored vehicles; (3) helicopters; (4) artillery, airplanes, and ships; and (5) other military equipment. *Id.* [26] Wye Oak estimated that 20% of

[26] The BSA defined military equipment as "any equipment that is used by or in the provision of military, including, without limitation, any and all vehicles, aircrafts, guns, missiles,

military equipment would be salvageable. *Id.* at 13; *see* Tr. 12/21/18 AM 87:4–14. Gale used this estimate that 20% of the equipment could be refurbished. Pl.'s Ex. 101 at 13.[27] He testified he believed this 20% figure was actually a conservative estimate based on publicly available analysis about the state of Iraqi military equipment after the invasion because numerous studies assessed that only a small percentage of Iraqi military equipment was even engaged in the war. Tr. 12/21/18 AM 65:23–67:3, 73:3–18. And Gale testified reports found about half of Iraqi military equipment was not functional before the war because sanctions limited Iraq's ability to obtain spare parts to make the necessary repairs for that equipment. Tr. 12/21/18 AM 65:23–67:3, 73:3–18. This information led Gale to believe a significantly greater percentage of Iraqi military equipment was likely capable of being refurbished because it was never in battle and likely only needed rather insignificant repairs once sanctions no longer prevented parts from being obtained. Tr. 12/21/18 AM 65:23–67:3, 73:3–18.

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armored personnel carriers, heavy armor/tanks, military radar equipment, ballistic missiles, rocket launchers, artillery, artillery scrap, small arms, small arms scrap or any parts or components thereof." Pl.'s Ex. 5 ¶ 1(d). Non-armored vehicles, missiles, military radar equipment, ballistic missiles, rocket launchers, and small arms are all included in this definition but fall outside the four defined categories of military equipment in Gale's report. This military equipment is therefore referred to as "other military equipment." Pl.'s Ex. 101, 17–18.

[27] Gale did not have any other information to rely on because defendants disregarded their discovery obligations and did not provide any records showing the numbers of equipment that were refurbished and scrapped.

Gale explained that if more equipment was capable of being refurbished, the damages estimate would have been higher. Tr. 12/21/18 AM 65:23–67:12.

Defendants take issue with Gale's use of Wye Oak's estimate that 20% of the military equipment would have been suitable for refurbishment. Although Gale discussed reports indicating Iraq did not use most of its military equipment during the U.S.-led Coalition invasion during his testimony, these studies are not listed in his expert report as documents he relied on. Defendants conclude Gale has therefore failed to support his assumption that 20% of Iraqi military equipment was salvageable. While the Court is troubled by Gale's failure to include these studies as documents he relied on in his expert report, the Court must also note defendants engaged in discovery abuse by not even searching for inventories of military equipment that Wye Oak requested. Defendants' disregard for their discovery obligations forced Gale to have to rely on Wye Oak's own business estimates and look for publicly available studies. Defendants cannot weaponize these abuses to call Gale's estimates into question. Therefore, the Court finds it was reasonable for Gale to rely on Wye Oak's estimate that 20% of the military equipment would have been suitable for refurbishment.

Then Gale calculated refurbishment cost of each piece of military equipment using a range of refurbishment cost between 10% to 40% of replacement cost. Pl.'s Ex. 101 at 14. At the time defendants breached the BSA, Wye Oak had already invoiced costs to refurbish 246 armored vehicles in Invoice #MUQ002. The invoiced refurbishment costs

per vehicle from this invoice were approximately 5% of the replacement costs of the vehicles. But Gale did not believe it would be appropriate to use this number as a benchmark for the cost to refurbish the remaining salvageable vehicles. *Id.* at 13–14. Wye Oak targeted military equipment that required the least amount of work to refurbish so that such work could be done quickly. Wye Oak was focused on producing armored vehicles for the January 2005 election. Gale asserted that subsequently refurbished equipment would require significantly higher refurbishment costs than those already invoiced because they would require more work. He therefore assumed the lower range of average per-unit cost to refurbish subsequent vehicles would be 10% of the replacement costs of the vehicles. And he determined the higher range of average per-unit cost to refurbish subsequent vehicles would be 40% based on industry guidelines that advise not spending more than 40% of the replacement cost on refurbishing existing equipment. *Id.* at 14. While defendants argue Gale should have used the 5% figure based on Wye Oak's invoiced costs, the Court finds Gale's estimates were reasonable. The evidence in this case demonstrates Wye Oak was initially focused on the armored vehicles that required the least amount of work to refurbish so that these vehicles could be put into operation expeditiously and in time for the January 2005 election. The Court therefore concurs with Gale's assessment that using the 5% figure would not have been appropriate for subsequently refurbished equipment that would typically require more work and therefore cost more. *Id.*

Subsequently, Gale examined the number and types of equipment in each category of military equipment present in Iraq, the amount of each type of equipment that was salvageable, the per-unit low and high refurbishment costs for each type of equipment, and the scrap value of the non-salvageable equipment for each type of equipment.[28] Gale used data from Wye Oak's estimates and public sources in these assessments. And he calculated refurbishment cost per unit using a range of refurbishment cost between 10% to 40% of replacement cost for all military equipment, except the tanks, APCs, and other armored vehicles that were included in Wye Oak's Invoice #MUQ002, since he used the refurbishment cost Wye Oak already invoiced for this equipment. Gale assumed no Iraqi Navy assets could be salvaged and would therefore all be sold as scrap because of a lack of information on whether Iraqi Navy equipment could be salvaged following the 2003 invasion. *Id.* at 17. This assumption was informed by public studies showing the Iraqi Navy was operating solely with ships supplied by the U.S. military as of October 2005. *Id.* at 17 n.68. And Gale did not include estimates of

[28] Gale stated "the minimum value of a helicopter that cannot be refurbished would be its disposal value. The disposal value would be its scrap value plus the value of any parts that could be recovered and sold. Unlike armored vehicles, simply using the scrap value likely vastly understates the disposal value of the helicopter as it does not value any electronic or mechanical components that could be separately salvaged and sold as replacement parts." Pl.'s Ex. 101 at 16. Therefore, he estimated the average disposal value of helicopters that could not be salvaged was 10% of the replacement cost based on the value of a helicopters' components, which would be sold as parts. *Id.*; Tr. 12/21/18 PM 67:3–71:14.

quantities, refurbishment costs, or scrap value for the category consisting of other military equipment because he was only able to find limited information on these types of equipment. *Id.* at 17–18. Although Wye Oak asks the Court to enhance Gale's damages calculation by issuing an award for the category consisting of other military equipment as a sanction for defendants' discovery abuses, Wye Oak has not provided any factual basis upon which the Court could issue such an award. Therefore, the Court will not disturb Gale's estimates by trying to fashion an estimate of its own absent any factual underpinning.

Defendants' only complaint regarding Gale's assessments for the specific types of equipment focuses on aircraft. Defendants contend there was not a plan to refurbish aircraft based on General Petraeus' testimony. When asked by defense counsel whether he observed aircraft equipment being refurbished as part of the effort to rehabilitate Iraqi military equipment, General Petraeus stated he did not recall observing aircraft equipment being refurbished. General Petraeus asserted:

> there was an effort to retrieve and to at least assess Iraqi aircraft, which, interestingly, in some places had been buried. Presumably they were going to go back and dig it up. But that's not really good for the maintenance of jets and all the rest of that. So I don't – I don't recall if any Iraqi aircraft were ever made capable of flying again. But that wasn't one of the efforts that we were pursuing at that time . . . We really didn't even have an Iraqi Air Force

> program, I don't recall us having at that time. We ultimately did . . .

Petraeus Dep. 8/8/18, 58:17–59:15. General Petraeus was then cut off by defense counsel, who asked a new question focused on Iraqi naval vessels. Petraeus Dep. 8/8/18, 59:16–20. General Petraeus' statements are not as definitive as defendants make them out to be. General Petraeus was very careful throughout his testimony to only discuss topics on which he had personal knowledge. He was typically not willing to make statements about events he did not know about. So the Court is not especially troubled by his testimony that he did not recall observing aircraft equipment being refurbished. Stating he did not recall observing this is different than definitively stating it did not occur at all. And it is worth noting General Petraeus' high-level responsibilities in Iraq during this period would likely have limited his ability to be fully aware of every particular facet of the refurbishment effort. Further, General Petraeus' testimony indicates there was an effort to assess Iraqi aircraft and that eventually there was an Iraqi Air Force program. In addition, the BSA specifically cites aircraft as one of the types of military equipment covered by the contract. Pl.'s Ex. 5 ¶ 1(d). Wye Oak's record of performance, especially its quick work refurbishing armored vehicles in the run-up to the January 2005 election, indicates Wye Oak would have refurbished Iraqi aircraft as part of the BSA had defendants not breached the Agreement.

Gale determined the low refurbishment cost for tanks would be $34,954,500 and the high refurbishment cost for tanks would be $126,420,000.

Pl.'s Ex. 103 tbls.3–3B. For APCs and other armored vehicles, Gale determined the low refurbishment cost would be $33,880,000 and the high refurbishment cost would be $119,360,000. Pl.'s Ex. 103 tbls.4–4B. For helicopters, Gale determined the low refurbishment cost would be $46,245,359 and the high refurbishment cost would be $184,981,437. Pl.'s Ex. 103 tbls.5–5B. And for artillery, airplanes, and ships, Gale determined the low refurbishment cost would be $31,201,024 and the high refurbishment cost would be $124,804,096. Pl.'s Ex. 103 tbls.6–6B. As stated above, Gale did not assess any refurbishment costs for the category of other military equipment.[29]

And Gale estimated this refurbishment work would all be completed by the end of 2005, as discussed above in Section III(C)(1). The Court believes this timeline is reasonable and based on sound economic principles.

In sum, Gale calculated the total low refurbishment cost for all categories would be $146,280,883. He calculated the total high refurbishment cost for all categories would be $555,565,533. The Court finds that Gale's assumptions, methodologies, and calculations are grounded in sound economic principles and result in reasonable estimates. Ultimately, the Court believes it is most appropriate to award Wye Oak lost profit damages for refurbished military equipment at a refurbishment cost rate of

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[29] Gale assessed the scrap value for the brass shell casings that were stolen at this point in his report. However, as discussed above in Section II(D), the evidence presented to the Court is insufficient to establish defendants were at fault for this theft, so the Court will not award Wye Oak damages based on this estimated scrap value.

20% of replacement cost (except for the T-54/-55 and APCs, for which the Court will apply the invoiced cost per unit): $267,707,266. The Court believes this refurbishment cost rate, slightly below what the midpoint cost rate would be (25%), is a conservative assessment. It accounts for the fact that some equipment was bound to be in better condition while other equipment would need more significant work to refurbish. And the Court believes this award accounts for the fact that some equipment would not require significant refurbishment work, as demonstrated by Wye Oak's initial invoices and by Gale's finding that some Iraqi military equipment likely only needed spare parts to be refurbished. This equipment would likely slightly reduce the refurbishment cost rate. Therefore, the Court believes this award best captures the true refurbishment cost across the vast array of military equipment. And accordingly, Wye Oak's 10% broker fee is $26,770,726.60. So the Court will award Wye Oak $26,770,726.60 in lost profits from military equipment refurbishing.

4. *Lost Profits from Scrap Sales*

Scrap sales were an important part of the BSA. Absent the breach by MoD, Wye Oak would have arranged for the sale of scrap and earned broker fees from these sales. Defendants' breach directly proscribed Wye Oak's ability to engage in scrap sales, thereby removing Wye Oak's ability to earn broker fees on these deals. And Wye Oak's lost profits from scrap sales was a foreseeable result of defendants' breach and Gale's estimates on this topic are reasonable.

Defendants assert the lost profits on scrap sales are speculative because Wye Oak had not completed any scrap sales at the time defendants breached the BSA. They contend there is too much uncertainty in whether Wye Oak would have completed any scrap sales for the Court to award these damages. However, defendants ignore that scrap sales were a fundamental aspect of the BSA. Arranging scrap sales was one of Wye Oak's primary responsibilities under the BSA, and earning commissions on these sales was a primary manner in which Wye Oak would be compensated under the BSA. Pl.'s Ex. 5 ¶ 2–5. Lost profits are recoverable when those profits emanate "from the use of the subject of the contract itself," regardless of whether independent or collateral undertakings, such as dealings with third parties, are involved. *Cal. Fed. Bank, FSB v. United States*, 245 F.3d 1342, 1349 (Fed. Cir. 2001).

The Federal Circuit set forth the applicable test for determining whether lost profits arise from activity collateral to the contract in *Wells Fargo*:

> If the profits are such as would have accrued and grown out of the contract itself, as the direct and immediate results of its fulfillment, then they would form a just and proper item of damages, to be recovered against the delinquent party upon a breach of the agreement . . . But if they are such as would have been realized by the party from other independent and collateral undertakings, although entered into in consequence and on the faith of the principal contract, then they are too uncertain and remote to be taken into

> consideration as a part of the damages occasioned by the breach of the contract in suit.

Wells Fargo Bank, N.A. v. United States, 88 F.3d 1012, 1022–23 (Fed. Cir. 1996). The relevant inquiry in applying this test is whether the lost profits are too remote to be classified as a natural result of the breach.

Collateral undertakings are too remote to permit the award of lost profits when those undertakings are not directly related to the subject of the contract. *Mann v. United States*, 68 Fed. Cl. 666, 669 (2005). For example, in *Rumsfeld v. Freedom NY, Inc.*, 329 F.3d 1320, 1333 (Fed. Cir. 2003), the plaintiff sought to recover lost profits associated with future contracts the plaintiff alleged it would have been awarded absent the harm to its business caused by the government's breach of an unrelated contract. The Federal Circuit determined such lost profits were too "remote and uncertain" to be recoverable because they were the result of independent and collateral undertakings. *Id.*

However, lost profits are recoverable when they directly relate to the subject of the contract, even if they would have required a transaction with a third party. *Precision Pine & Timber, Inc. v. United States*, 72 Fed. Cl. 460, 472 (2006), *on reconsideration*, 81 Fed. Cl. 235 (2007), *on reconsideration in part*, 81 Fed. Cl. 733 (2008), *and aff'd in part, rev'd in part and remanded*, 596 F.3d 817 (Fed. Cir. 2010), and *aff'd in part, rev'd in part and remanded*, 596 F.3d 817 (Fed. Cir. 2010); *Mann*, 68 Fed. Cl. at 670. In *Mann*, the plaintiff sought to recover lost profits from energy sales to third parties as a result of the government's

breach of a geothermal lease agreement with the plaintiff. 68 Fed. Cl. at 666. The Court of Federal Claims denied the government's motion for summary judgment on the plaintiff's claim for lost profits, finding the profits from the energy sales from the leased property to third parties were contemplated by both parties. *Id.* at 670. The court held the subject matter of the contract was geothermal energy, and the "[p]rofits on the use of the subject of the contract itself . . . are recoverable as damages." *Id.* at 671.

Here, scrap was an essential aspect of the subject matter of the BSA. Wye Oak's lost profits from scrap sales therefore directly relate to the subject of the contract. Thus, Wye Oak's lost profits damages from scrap sales are recoverable despite the fact they would have required Wye Oak to transact with a third party. Such sales were specifically contemplated by the parties to the BSA.

The Federal Circuit's decision in *Energy Capital* further illustrates lost profits from scrap sales are recoverable here. In *Energy Capital*, the government challenged the Court of Federal Claims' lost profits award to Energy Capital on its breach of contract claim, arguing such lost profits were premised on several uncertain steps that needed to occur. Specifically, the government objected to the fact that several parties would have needed to agree to the transaction for Energy Capital to have earned the profit. But the Federal Circuit rejected this argument, finding Energy Capital's anticipated profits flowed directly from the agreement the government breached, rather than from other independent and collateral undertakings. The purpose of the

agreement between Energy Capital and the government was to permit Energy Capital to make a profit by engaging in transactions with third parties. "When the government breached the [] agreement, Energy Capital was no longer able to issue those loans [to third parties], and its resulting loss of profits flowed directly from the government's breach." *Id.*

Accordingly, Wye Oak's claim for lost profits from scrap sales is not speculative. Wye Oak may recover such lost profits, which naturally flowed from defendants' breach. And the loss of these profits was a foreseeable result of the breach.

Further, Gale's calculations on Wye Oak's lost profits from scrap sales were reasonable estimates. Gale divided scrap into the same five categories as the refurbishment costs: (1) tanks; (2) APCs and other armored vehicles; (3) helicopters; (4) artillery, airplanes, and ships; and (5) other military equipment. Pl.'s Ex. 101 at 19. Gale used the same data discussed in the previous section for the number and types of equipment in each category of military equipment present in Iraq. And he determined the military equipment that was not refurbished would be turned into scrap. In addition, Gale included the 70,000 tons of brass shell casings Wye Oak had attempted to sell before it was stolen. However, the evidence presented to the Court is insufficient to establish defendants were at fault for this theft so the Court will not award Wye Oak damages based on the brass shell casings' estimated scrap value.

For tanks, APCs, and other military equipment, Gale used the equipment's weight and the price of scrap steel to calculate the scrap value because the

largest components of these types of equipment are made from steel. Scrap steel is shipped internationally and prices vary by location. Gale found the international scrap market was doing well during the relevant period, driven by Chinese imports. *Id.* at 20. Gale elected to use Turkey as a proxy to set the value of scrap steel. Gale explained he looked for the closest market to Iraq that had a significant volume of scrap from the U.S., as his data was from the U.S. geological survey that reports the quantities and value of U.S. scrap exports. Tr. 12/21/18 AM 62:3–63:8. In 2004, 631,000 tons of scrap were shipped from the U.S. to Turkey, which was valued at $136 million. And those numbers increased in 2005 to 1.5 million tons of scrap shipped from the U.S. to Turkey at a value of over $300 million. Pl.'s Ex. 101 at 20. Gale set the value of scrap Wye Oak would have been processing and the value of the scrap sales at the price Turkey was paying for U.S. scrap. This was a reasonable estimate of what Turkey would have paid for Iraqi scrap. *Id.* Gale also believed Turkey was an attractive export market for Iraqi scrap because of its geographic proximity. Tr. 12/21/18 AM 63:9–25. Accordingly, Gale used the 2004 average scrap steel price in Turkey, which was $215 per metric ton, for his calculations.

Gale also used ships' weight and the price of scrap steel to determine their scrap value even though Gale believed this approach was conservative. Even assuming ships do not have any valuable components that could be sold separately, Gale asserted ships contain significant amounts of other types of scrap metal that command higher scrap prices than steel.

Pl.'s Ex. 101 at 21. Nonetheless, Gale used the conservative approach to determine scrap value for naval equipment.

Gale did not believe it was appropriate to solely rely on the weight and price of scrap steel for helicopters and aircrafts. Gale determined this would understate their scrap value because helicopters and aircrafts are not predominately steel. Instead, helicopters and aircrafts contain parts that could be salvaged or sold as spare parts. This led Gale to estimate the value of a helicopter or aircraft that could not be refurbished would be 10% of the replacement cost. Pl.'s Ex. 101 at 20– 21.

Using this methodology, Gale determined the scrap value for tanks would be $14,994,100. Pl.'s Ex. 103 tbls.3–3B. For APCs and other armored vehicles, Gale determined the scrap value would be $6,334,829. Pl.'s Ex. 103 tbls.4–4B. For helicopters, Gale determined the scrap value would be $184,981,437. Pl.'s Ex. 103 tbls.5–5B. And for artillery, airplanes, and ships, Gale determined the scrap value would be $57,534,782. Pl.'s Ex. 103 tbls.6–6B. Gale did not assess any scrap value for the category of other military equipment besides the brass shell casings, which the Court does not accept.

And Gale estimated this refurbishment work would all be completed by the end of 2005, as discussed above in Section III(C)(1). The Court believes this timeline is reasonable and based on sound economic principles.

In sum, Gale calculated the total scrap value would be $263,845,148.[30] Accordingly, Wye Oak's 10% commission on the total scrap value would be $26,384,514.80. The Court finds that Gale's assumptions, methodologies, and calculations are grounded in sound economic principles and result in reasonable estimates. Defendants' objections that Gale baselessly assumed there would have been demand for Iraqi scrap and that Gale failed to consider the impact on prices due to Iraqi scrap entering the market are without merit. Gale found the scrap market was quite vibrant during this period, especially given China's significant demand. Pl.'s Ex. 101 at 20. There is no reason to think Iraqi scrap would have been rejected by a market with a high demand for scrap. Gale's data shows both the amount and value of scrap being shipped from the U.S. to Turkey increased from 2004 to 2005. And defendants have not provided any reason to think the influx of Iraqi scrap would have significantly altered global prices, especially given the high demand in the market. Thus, the Court will award Wye Oak lost profits damages from scrap sales in the amount of $26,384,514.80.

5. *Lost Profits from the Sale of Surplus Military Equipment*

Wye Oak was appointed as the sole and exclusive broker to arrange for the sale of military equipment and refurbished military equipment to customers

[30] This value does not include the scrap value of the brass shell casings because the Court does not believe these were properly included in Gale's assessments.

under the BSA. Pl.'s Ex. 5 ¶ 2(iv). Wye Oak asserts it would have earned profits from brokering the sale of surplus military equipment MoD did not need or want had MoD not breached the contract. But Gale did not calculate lost profits damages for this because he did not have any records on equipment Iraq sold during the 2004 through 2007 timeframe. So he could not make any reasoned estimate.

Wye Oak contends the Court should nonetheless award it lost profits damages for this category as a sanction for defendants' discovery abuses. Defendants did not turn over any documents indicating how many military vehicles it kept for itself and how many were sold on the international market. On the other hand, defendants assert it would be highly speculative to award such lost profits.

Wye Oak would only have been able to earn these lost profits if MoD determined it did not need or want the military equipment, and then Wye Oak successfully brokered a sale with another party. Without any data on whether Iraq sold surplus military equipment during this period, the Court cannot fairly find Iraq made any such sales. The evidence in this case demonstrates how vital it was for Iraq to re-equip its own military, which indicates Iraq may not have been in a position to sell surplus military equipment at this time. Further, without any data on this matter the Court does not believe a reasonable estimate on this topic is possible. Therefore, the Court will not award Wye Oak lost profits for the sale of surplus military equipment.

D. Terminal Value

Wye Oak asks this Court to award it damages from the BSA's terminal value despite Gale's assumption there was no terminal value. Terminal value measures the value of the business at the end of the forecasting period, which in this case was when the BSA would have terminated had it been fully carried out, August 2007. Terminal value could result from continuing with a follow-on contract or liquidating assets at the end of a contract. Tr. 12/21/18 AM 70:9–71:4. Gale "assum[ed] Wye Oak's lost business opportunity under the contract ha[d] no value beyond the forecasting period." Pl.'s Ex. 101 at 22. Therefore, he assessed the BSA's terminal value was zero.

Notwithstanding Gale's assessment, Wye Oak claims fairness suggests there would have been some terminal value and the reason Gale had to be so conservative in his analysis was defendants' discovery abuses. This stems from Gale's testimony there may have been terminal value, but to be conservative in his estimates he assumed there was not. Tr. 12/21/18 AM 70:9– 71:4. But this single exchange during trial is not sufficient to persuade the Court to depart from the expert's final assessment on this matter. The Court will not award Wye Oak damages for any lost terminal value.

E. Discounted Future Income

The Court must calculate the expected value of the future profits Wye Oak would have earned as of the date of the breach, October 28, 2004. To estimate the expected value of the lost profits, Gale applied a discounted cash flows (DCF) methodology. Pl.'s Ex. 101 at 21. The DCF methodology looks at the

discounted value of damages through an investor's eyes. *Id.* An investor in Wye Oak would see value in the company through future payouts to the business. The value of a lost future business opportunity can be estimated as the present value of expected net future cash flows. *Id.* at 21–22. The present value is calculated by applying a discount rate to future cash flows. As Gale explained: "[L]et's say an investor was going to come invest in Wye Oak . . . Wye Oak would say: I'll give you $130 a year from now. And the investor will say: Well, I'll buy that for $100. They're going to expect a 30 percent rate of return by investing in Wye Oak." Tr. 12/21/18 PM 60:6–60:17. This valuation approach has three elements: (1) a forecast of future net cash flows; (2) an estimate of the terminal value of the project at the end of the forecasting period; and (3) selecting and applying an appropriate discount rate to compute the present value of future cash flows and the terminal value. Pl.'s Ex. 101 at 22. As explained in the previous section, Gale assumed the BSA did not have a terminal value. And Gale assumed the lost business opportunities would occur over a finite period of time—until the BSA was set to end in August 2007—so the forecast of future net cash flows ended in August 2007. *Id.*

The discount rate is the most important aspect of the DCF methodology. *Id.* The discount rate reflects the "opportunity cost" to investors for investing in alternative investments of "comparable risk and other investment characteristics." *Id.* For the purpose of selecting a discount rate, Gale assumed 100% equity funding for Wye Oak. *Id.* at 22–23. While Gale noted equity funding is more expensive than debt funding,

he asserted it is a common source of funding among high-growth companies and, therefore, is a reasonable assumption in Wye Oak's case. *Id.* Assuming 100% equity funding yields a higher discount rate and, therefore, a lower damages estimation here. *Id.*

The cost of equity is the rate of return required by equity investors as compensation for the risk of financing the business. *Id.* at 23. Gale asserted methods for estimating the cost of equity include the "build-up" method, the capital asset pricing model, the arbitrage pricing theory, and the Farma-French "three-factor" model. *Id.* The capital asset pricing model, arbitrage pricing theory, and Farma-French "three-factor" model all require historical market prices for the company (or industry benchmarks); whereas, the build-up method does not. In the absence of historical pricing data, the build-up method utilizes an additive approach to estimate the cost of equity. It uses the sum of the risk-free rate and various risk premiums. Gale used the build-up method to estimate the equity cost of capital for Wye Oak as of October 28, 2004, adding the risk-free rate, the equity-risk premium, the firm size premium, and the industry risk premium. *Id.*

1. *Risk-Free Rate*

Gale used the 3-year United States Treasury note as of January 5, 2005, which was 3.39%, as the risk-free rate. U.S. Treasury securities are commonly accepted risk-free investments and the three-year time horizon matches the time horizon of the cash flows at issue. *Id.* at 24. Defendants did not object to this risk-free rate and the Court finds it was reasonable.

2. *Equity Risk Premium*

The second component of the cost of equity is the equity-risk premium. The equity-risk premium compensates equity investors for taking on risks not present among risk-free assets. *Id.* Gale included a country-specific risk premium in his estimate because there were greater risks associated with doing business in a country like Iraq from an investor's perspective. *Id.* The sources of country risk are economic life cycle risk (early growth countries are riskier), political risk, legal risk, and economic structures risk (e.g., oil sector dependence). *Id.* at 25. Gale found it was appropriate to look to the current equity-risk premium estimate when estimating the 2005 level because the World Bank's latest data on political instability and violence, rule of law, corruption, and regulatory quality in Iraq remain at similar levels as 2005. *Id.* at 25. Thus, Gale used the 2018 estimate of Iraq's equity-risk premium, which was 13.72%. *Id.* at 24–25.

Defendants complain Gale did not adequately take into account Wye Oak was operating in a war zone. But this ignores the fact Gale did look at country-specific risks, including political instability and violence. He found that the most recent data from the World Bank is similar to the data from 2005. And he included a country-specific risk premium in his estimate. This would seem to account for the fact Iraq was a war zone. So the Court finds Gale's equity-risk premium calculation of 13.72% to be reasonable.

3. *Firm Size Premium*

The discount rate's third component is a company size premium. Smaller companies are more likely to

fail than larger ones so they are seen as riskier investments. For this purpose, Gale assumed the risk premium on the 10% smallest companies by market capitalization (up to approximately $500 million). He derived the size premium from the Ibbotson SBBI 2005 Yearbook, finding it was 4.02%. *Id.* at 25–26. Defendants argue Gale used the incorrect tables in Ibbotson, leading to a smaller size premium.

Ibbotson breaks down size premiums based on company size, categorizing companies in terms of size on a 1 through 10 scale, with 10 representation the smallest companies. The categories applicable to Wye Oak are the "micro-cap" category that combines categories 9 and 10, category 10, or category 10b, which is subset of category 10 and represents the very smallest of the small companies (with market capitalization up to $144 million). Gale selected the micro-cap category, which has a size premium of 4.02%. Defendants contend Gale should have solely focused on category 10, which represents the smallest companies and has a size premium of 6.41%, or solely focused on category 10b, which represents the smallest of the small companies and has a size premium of 9.90%. Defendants think it would have been most accurate to rely on category 10b. And even then defendants argue Gale should have further raised this figure because Wye Oak did not have a market capitalization approaching $144 million. However, this ignores the fact that the micro-cap category contains a larger sample size of data on small companies and is therefore more reliable than solely looking at category 10. This is even more of an issue when comparing the micro-cap category to category

10b alone. *See In re Bachrach Clothing, Inc.*, 480 B.R. 820, 871 (Bankr. N.D. Ill. 2012) (observing that Ibbotson cautioned: 'Breaking the smallest decile down lowers the significance of the results compared to results for the 10th decile taken as a whole, however. The same holds true for comparing the 10th decile with a micro-cap aggregation of the 9th and 10th decile.' . . . In other words, the data reported in the micro-cap category was more reliable because it contained a larger sample size of small companies."). Accordingly, the Court finds Gale's assessment the size premium was 4.02% based on Ibbotson's micro-cap category was reasonable.

4. *Industry Risk Premium*

The final component of the discount rate is the industry premium. The industry premium is intended to compensate investors for risks particularly associated with the industry at issue. Gale determined that industry-wide risks, beyond country risks, were present here, namely in the business of dismantling scrap metals. Based on the Standard Industrial Classification (SIC) code for miscellaneous durable goods, which includes scrap and waste materials, Gale determined the industry risk premium was 9.07%. Pl.'s Ex. 101 at 26.

Defendants counter that Gale should have used the industry risk premium for the SIC code for scrap and waste materials, instead of the aggregate industry risk premium for the entire miscellaneous durable goods category. The industry risk premium for the SIC code for scrap and waste materials specifically was 12.21%. So defendants allege Gale's use of the

lower aggregate value artificially inflates the lost profits calculation.

However, this ignores that scrap was only one aspect of the BSA. The BSA also included refurbishing military equipment and refurbishment services. Thus, confining the industry risk premium rate to the SIC code for scrap and waste materials would not account for the other aspects of Wye Oak's work under the BSA. Accordingly, the Court finds Gale's determination the industry risk premium was 9.07% to be reasonable.

5. *Defendants' Objections that Gale Did Not Include a Company-Specific Risk Premium and Did Not Apply a Higher Discount Rate to Damages in Option Years*

Defendants have two additional objections to Gale's discount rate calculation. First, defendants take issue with the fact Gale did not include a company-specific risk adjustment. Defendants believe this is appropriate because Wye Oak was heavily dependent on key figures, such as Dale Stoffel, and was operating in a dangerous environment during this period. However, the company size premium inherently takes into account the dependence of companies on key personnel. Smaller companies are more dependent on key personnel than larger companies. So the size premium already accounts for this. And the dangers of operating in Iraq was taken into account when determining the equity-risk premium, as discussed above. Therefore, the Court is not persuaded by this objection.

Second, defendants assert Gale should have applied a higher discount rate to damages in option years. The

damages period calculated by Gale only extends two and one-half months into the first option year. Defendants believe Gale should have applied a higher discount rate to the damages during this two and one-half months period that extends beyond the BSA's first year. The Court is not convinced it was necessary for Gale to adjust the discount rate for this period, especially given the unlikely prospect defendants would have terminated the BSA if Wye Oak was performing on the timeline Gale assumed, which this Court has found was reasonable. Thus, the Court also rejects this objection to Gale's calculation.

6. *Discount Rate*

Applying the build-up methodology of adding the risk-free rate, the equity-risk premium, the firm size premium, and the industry risk premium to estimate the equity cost of capital for Wye Oak, Gale determined the discount rate was 30.2%. The Court finds Gale's methodology and calculations were grounded in sound economic principles and were reasonable. Accordingly, the Court accepts 30.2% as a reasonable discount rate for determining damages.

F. Prejudgment Interest

Under Iraqi law, Wye Oak is entitled to prejudgment interest on the judgment from the date the suit was filed. Article 171 of the Iraqi Civil Code sets prejudgment interest rate at 5% in commercial matters. Pl.'s Ex. 97.[31] Prejudgment interest is not

[31] Defendants state Iraqi law caps prejudgment interest at 6% per annum commencing on the date of filing the suit, citing Article 171 of the Iraqi Civil Code. Defs.' Proposed Findings of Fact & Conclusions of Law: Mem. Regarding Damages 3 n.1, 41,

compounded under Iraqi law and cannot exceed the sum of the judgment. Pl.'s Ex. 97 art. 174.

After acknowledging Article 171 typically sets the prejudgment interest rate, Wye Oak argues the Court should augment the rate in this case pursuant to Article 175. Article 175 provides: "The legal rate of the commercial interest charged on current accounts will vary according to fluctuations of the local market applicable; capitalization (the method of computing compound interest) is effected on current accounts according to the commercial usage." *Id.* at art. 175. *Black's Law Dictionary* defines current account as "[a]

ECF No. 428. This led plaintiff to adjust the interest rate it sought to 6% and to state defendants corrected plaintiff's mistaken reference to 5%. Pl.'s Reply 80, ECF No. 433. However, the Iraqi Civil Code entered into evidence in this case by the parties' stipulation states: "Where the object of the obligation is a sum of money which was known at the time the obligation arose and the debtor delayed the payment thereof he shall be obligated to pay to the creditor by way of damages for the delay a legal interest at the rate of four per cent in regard to civil matters and five per cent in respect of commercial matters; this interest will commence from the date of filing a judicial claim in respect thereof if the agreement or the commercial usage has not fixed a different date for the running of the interest save in all cases where the law provides otherwise." Pl.'s Ex. 97 art. 171. And plaintiff's Iraqi law expert declared Article 171 limited interest to 5% for commercial transactions running from the date the suit commenced. Pl.'s Ex. 117. Accordingly, the Court finds that the 5% interest figure is correct. Defendants appear to be mistaken in citing a 6% interest figure, as this number does not appear anywhere in the applicable Iraqi statutes governing this action. Perhaps defendants' mistake caused plaintiff to become confused (or to see this as an opportunity to enhance their damages by capitalizing on defendants' mistake). Regardless, the Court will use the correct interest rate, 5%.

running or open account that is settled periodically." Black's Law Dictionary (11th ed. 2019). This does not describe the BSA. The compensation terms under the BSA did not create running or open accounts. Under the BSA, MoD was supposed to pay Wye Oak a 10% commission on sales contracts for military refurbishment services, refurbished military equipment, and scrap sales; MoD was supposed to pay Wye Oak 10% of the refurbishment cost for refurbished military equipment; and MoD was supposed to cover expenses associated with performing military equipment services, as Wye Oak was required to use all reasonable commercial efforts to perform military refurbishment services yet was not required to spend any money carrying out these services. Payments to Wye Oak based on the sales contracts or refurbishment costs were to be paid immediately upon Wye Oak's presentation of pro forma invoices. Pl.'s Ex. 5 ¶ 5(b). These payment mechanisms do not fall within the definition of current accounts. Therefore, Article 175 is inapplicable here and the Court will not augment the statutory interest rate.

Accordingly, Wye Oak will be awarded prejudgment interest at a rate of 5% per annum, calculated as simple interest, dating back to the date Wye Oak filed this suit, July 20, 2009.[32]

G. Enhanced Damages

Wye Oak argues it is entitled to enhanced damages under Iraqi law because of defendants' bad faith and

[32] The Court will order plaintiff to submit a proposed order with the calculated amounts based on this interest rate.

fraud. The Iraqi Civil Code explicitly provides for enhanced damages in cases of bad faith, fraud, or cheating. Article 173(2) states: "The creditor may claim a complementary compensation to be added to the legal or contractual interests if he has established that the damage which exceeds the interests was due to cheating or gross fault committed by the debtor." Pl.'s Ex. 97 art. 173(2). Professor Mallat analogized complementary damages under Article 173(2) to the concept of punitive damages under American law. Mallat Dep. 2/15/19, 452:15–453:11; Mallat Dep. 2/16/19, 463:20–464:11. Although Mallat stated "[g]enerally civil law system does not accept punitive damages . . . the closest to [punitive damages] would be this [complementary damages under Article 173(2)]." Mallat Dep. 2/15/19, 452:15–453:11. Later, in response to a question from plaintiff's counsel on his "opinion as it relates to the availability of punitive damages under Iraqi law," Mallat clearly articulated:

> Punitive damages as a concept is not recognized in civil law generally, including in Iraqi law. But what I explained yesterday is that under Article 173.2, which allows the judge in egregious cases such as the ones that are based on fraud or cheating, or a gross mistake, the judge is entitled and has a discretion to add – to complement whatever damages he sees to be fit for the gross fault, the mistake or the cheating, and that would be the closest equivalent to punitive damages in American law.

Mallat Dep. 2/16/19, 463:20–464:11. The Court agrees that complementary damages under Iraqi law mirror

punitive damages under American law. Punitive damages are awarded in addition to actual damages in circumstances where a defendant acts with recklessness, malice, or deceit, or when the Court finds it appropriate to penalize the wrongdoer or attempt to deter similar behavior. *See* Black's Law Dictionary (11th ed. 2019).

But punitive damages are not available against foreign states under the FSIA (except against state sponsors of terrorism under 28 U.S.C. § 1605A, but this provision is not applicable here). The FSIA explicitly provides "a foreign state except for an agency or instrumentality thereof shall not be liable for punitive damages." 28 U.S.C. § 1606. As discussed *supra* in Section III(A), MoD is an inseparable part of the Republic of Iraq, it is not an agency or instrumentality under the FSIA. So although punitive damages may not exist in Iraqi law in exactly the same manner as in American law, complementary damages are essentially equivalent to punitive damages. It would violate the FSIA's clear intent to allow Wye Oak to recover complementary damages based on the technicality that Iraqi law has given a different name to punitive damages.

And the FSIA provides the means of suing a foreign sovereign in U.S. courts but does not establish the cause of action. Instead, parties must look elsewhere for the private right of action.[33] But parties cannot overcome the FSIA's prohibition on punitive damages

[33] The exception to this is that the FSIA has created a private right of action as part of the state sponsors of terrorism exception. But this is not applicable here.

being levied against foreign states just because punitive damages may be otherwise possible against a private party sued under the same cause of action. Thus, defendants cannot be held liable for punitive damages—called complementary damages in Iraqi law—here.[34]

[34] Although defendants never raised the argument that punitive damages are not available against foreign states under the FSIA, the Court does not believe that it is required to ignore the FSIA's clear statutory text. Such a result would be bizarre. And while the D.C. Circuit recently concluded the district court lacked authority to *sua sponte* raise a forfeited statute of limitations defense in an FSIA terrorism exception case, at least where the defendant sovereign failed to appear, that situation is easily distinguishable from the one at hand. *See Maalouf v. Islamic Republic of Iran*, 923 F.3d 1095, 1115 (D.C. Cir. 2019). The statute of limitations defense is an affirmative defense that would defeat the entire claim and must ordinarily be raised in a defendant's answer or amendment thereto. But the prohibition on punitive damages being levied against foreign states only reduces the potential damage award a plaintiff can obtain. And ordinarily the issue of punitive damages does not arise at the pleadings stage, unlike a statute of limitations. Further, the D.C. Circuit has previously determined plaintiffs who disregarded the statutory text in seeking punitive damages against Iran, who did not appear in the case, and did not follow Congress' explicit mechanism for converting their case to the updated FSIA terrorism exception, which allowed for punitive damages, could not obtain punitive damages. *Bakhtiar v. Islamic Republic of Iran*, 668 F.3d 773, 775 (D.C. Cir. 2012). The court came to that conclusion based on the FSIA's clear text, despite the fact Iran did not raise these arguments. Thus, this Court finds it is necessary to adhere to the FSIA's clear statutory text rather than disregard the statute, rendering Congress' careful calibration of when punitive damages should be available meaningless.

H. Costs, Including Reasonable Attorney's Fees and Expenses

Finally, Wye Oak is entitled to costs, including reasonable attorney's fees and expenses, under the BSA. The BSA provides:

> Each party shall indemnify, defend and hold harmless the other party from and against any and all liabilities, demands, claims, lawsuits, damages, actions, judgments, costs (including reasonable attorney's fees and expenses) including but not limited to injury to persons (including death), loss or damage to, or destruction of property arising out of that party's breach of this Agreement or that party's negligent or willful actions while performing hereunder.

Pl.'s Ex. 5 ¶ 15. This provision explicitly requires defendants to indemnify Wye Oak because Wye Oak's costs, including reasonable attorney's fees and expenses, arose out of MoD's breach of the BSA. Thus, defendants will be ordered to pay plaintiff's costs, including reasonable attorney's fees and expenses. This amount will be separately determined in accordance with Local Rule 54.2.

V. Conclusion

For the reasons stated above, the Court finds MoD materially breached the BSA. The Republic of Iraq is also liable for MoD's breach because MoD is an integral component of the national government itself. The Court will award Wye Oak $88,985,928.55 in damages: $20,503,487.15 for its three invoices and $68,482,441.40 in lost profits ($15,327,200 from

construction; $26,770,726.60 from refurbishing military equipment; and $26,384,514.80 from scrap sales). Further, the Court will accept 30.2% as a reasonable discount rate for determining the lost profit damages. The Court will award prejudgment interest at a rate of 5% per annum, calculated as simple interest, dating back to the date Wye Oak filed this suit, July 20, 2009. Finally, the Court will order defendants to pay Wye Oak's costs, including reasonable attorney's fees and expenses. A separate order will follow.

SIGNED this 27th of August, 2019.

/s/ Royce C. Lamberth
Royce C. Lamberth
United States District Judge

APPENDIX E

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 23-7009

September Term, 2024

Consolidated with 23-7013

WYE OAK TECHNOLOGY, INC.,

Appellee,

v.

REPUBLIC OF IRAQ AND MINISTRY OF DEFENSE OF THE REPUBLIC OF IRAQ,

Appellants.

Filed On: October 16, 2024

BEFORE: Srinivasan, Chief Judge; Henderson, Millett, Pillard, Wilkins, Katsas, Rao, Walker, Childs, Pan, and Garcia, Circuit Judges; and Ginsburg, Senior Circuit Judge

O R D E R

Upon consideration of Wye Oak Technology, Inc.'s petition for rehearing en banc, the response thereto, and the absence of a request by any member of the court for a vote, it is

ORDERED that the petition be denied.

Per Curiam

FOR THE COURT:
Mark. J. Langer, Clerk

BY: /s/
Daniel J. Reidy
Deputy Clerk

APPENDIX F

PLAINTIFF'S TRIAL EXHIBIT

PX-005

BROKER SERVICES AGREEMENT

This Broker Services Agreement (this "Agreement") is entered into on this 16th day of August 2004 by and between **Wye Oak Technology, Inc.,** and **The Ministry of Defense of the Republic of Iraq**.

1. DEFINITIONS.

a. **"Broker"** shall mean Wye Oak Technology, Inc.

b. **"Contract value"** shall mean the total gross contract price set in any Sales Contract between a Customer and the Ministry.

c. **"Customers"** shall mean purchasers of the "Military Refurbishment Services" and/or "Refurbished Military Equipment" and/or "Scrape Sales" including, but not limited to, Iraqi Ministry of Defense, commercial establishments and governmental and semi-governmental entities in the military sector.

d. **"Military Equipment"** shall mean any equipment that is used by or in the provision of military, including, without limitation, any and all vehicles, aircrafts, guns, missiles, armored personnel carriers, heavy armor/tanks, military radar equipment, ballistic missiles, rocket launchers, artillery, artillery scrap, small arms,

small arms scrap or any parts or components thereof.

e. **"Military Refurbishment Services"** shall mean any services sold, performed for, or provided with respect to any Refurbished Military Equipment that is either retained by the Ministry or sold or otherwise provided to Customers by the Ministry, including, but not limited to, the inspection of the Military Equipment prior to performing any Military Refurbishment Services to make a value assessment and a refurbishing assessment for such Military Equipment.

f. **"Ministry"** shall mean The Ministry of Defense of the Republic of Iraq and shall be deemed to include all its affiliated instrumentalities, divisions and agencies of the Government of the Republic of Iraq.

g. **"Refurbished Military Equipment"** shall mean any Military Equipment that has been refurbished by, or under the direction of, the Broker pursuant to this Agreement, and sold or provided to customers by the Ministry.

h. **"Sales Contracts"** shall mean one or more contracts between the Ministry and Customers providing for the sale of Military Refurbishment Services and/or Refurbished Military Equipment and/or Scrap Sales to the Ministry or to one or more Customers or other third parties.

i. **"Scrap Sales"** shall mean sales to any third party of any Military Equipment or other items which may not be defined as scrap but

contemplated by the nature of this Agreement (*e.g.*, brass, gun barrels, etc.) that the Broker or Iraqi Ministry of Defense determines is not suitable for Military Refurbishment Services in accordance with the terms of this Agreement.

2. EXCLUSIVE APPOINTMENT OF BROKER.

The Broker has extensive experience in facilitating and arranging for the purchase and sale of all types of Military Equipment at the highest and best commercial prices and rates. The Ministry acknowledges that Broker has established contacts throughout the world regarding the sale of Military Equipment and Broker has also established government and other contacts in Iraq. With respect to subject matter herein, the Ministry hereby appoints Broker as its sole and exclusive broker for:

(i) the accounting, inventory, and assessment of discarded and/or damaged Military Equipment in connection with the Iraqi Military Equipment Recovery Project to identify which Military Equipment is salvageable and suitable for Military Refurbishment Services and which Military Equipment is scrap;

(ii) the arranging of any Scrap Sales of any Military Equipment that is not suitable for Military Refurbishment Services;

(iii) the provision of Military Refurbishment Services with respect to all of the various military bases, offices and properties owned by, or under the control of, the Ministry and/or the Republic of Iraq, wherever such bases, offices and property maybe located and all the related

military equipment located thereon or otherwise owned by the Ministry and/or the Republic of Iraq; and

(iv) the arranging for the sale of Military Equipment and/or Refurbished Military Equipment to Customers during the term of this Agreement or for Scrap Sales of any such Military Equipment that is not suitable for Military Refurbishment Services, which arranging shall include the valuation of any such Military Equipment, whether original, refurbished or scrap, and the identification of prospective Customers for such sales.

Broker hereby agrees to (i) provide the Military Refurbishment Services pursuant to the terms of this Agreement and (ii) represent the Ministry as its client in both Scrap Sales and the sale of Refurbished Military Equipment to Customers during the term of this Agreement ("Services"); provided, however, that Ministry acknowledges and agrees that the Broker currently represents and will represent in the future other persons doing business throughout the world, including in the Republic of Iraq in addition to the Ministry. The Ministry agrees not to conduct any Military Refurbishment Services or arrange for the use, sale or lease of any Refurbished Military Equipment provided for under this Agreement nor engage in any scrap sales, except pursuant to an engagement with the Broker under this Agreement.

Broker will begin such Services for and at Taji Military Base/Camp Cooke, Camp Normandy, Camp Ashraft, Camp Anaconda, and the Coalition facilities at the Hilla Military Facility. A schedule detailing a

plan, time line, approach and all related and necessary approvals thereto for Services for the remainder of sites in Iraq will be prepared by Broker.

3. SERVICES.

Broker shall use all reasonable commercial efforts to perform the Military Refurbishment Services and in the development of markets and sales prospects for Military Equipment, including Refurbished Military Equipment and Scrap Sales. Broker shall be under no obligation to spend any sum of monies, whether promotional or otherwise, in performing such services or in doing such development, other than any sums of monies that are advanced by the Ministry to cover certain expenses associated with the performance of the Military Refurbishment Services, the sales of any Military Equipment, Refurbished Military Equipment or any Scrap Sales.

4. DUTIES OF THE MINISTRY.

(a) The Ministry shall full inform Broker at all times of all matters reasonably required to enable Broker to properly carry-out its duties as set forth above.

(b) The Ministry shall work exclusively with the Broker regarding furnishing of Military Refurbishment Services, Scrap Sales and the sale of Refurbished Military Equipment with respect to all Military Equipment:

(i) As a sub-contractor for the Broker where Broker has procured a contract for itself or one of its affiliates from the Customers for the Military Refurbishment Services, any Scrap Sales or the sale of Refurbished

Military Equipment. Each sub-contract will be based either on the terms and conditions of the primary contract procured by the Broker or on other terms and conditions as may be mutually agreed upon by the Ministry and Broker and set forth in a separate written sub-contract.

(ii) As the primary contractor, where the Broker has procured a Sales Contract for and on behalf of the Ministry from the Customers.

(c) The Ministry may reject any Sales Contracts or offers thereto in its sole discretion; however, if Broker presents a legitimate Sales Contract, which is at prevailing market rate for the goods or services offered, the Ministry will remain obligated to compensate Broker under Section 5 below regardless of such rejection.

5. <u>COMPENSATION</u>.

(a) The Ministry shall pay Broker a commission of minimum of ten percent (10%) based on the Contract Value set out in each Sales Contract entered into by the Ministry, pursuant to this Agreement. With respect to Refurbished Military Equipment, the Ministry will pay Broker ten percent (10%) of such equipment's refurbishment cost.

(b) Payments to Broker of the aforementioned commission will be paid pursuant to proforma invoices submitted by Broker and then reconciled by final invoice. Upon providing such proforma invoice, Ministry will make full payment on such

invoice immediately upon presentation. All payments to be made to Broker under this Agreement shall be made in United States Dollars in the form and manner as directed by Broker.

(c) In the event of any cancellation or termination of any Sales Contract by the Ministry regardless of cause:

1. Broker shall retain all commissions theretofore paid under this Agreement.
2. Broker shall be entitled to receive its commission which is payable in respect of each Sales Contract concluded by the Ministry during the term of this Agreement.
3. Broker shall also be entitled to receive its commission from the Ministry on all Sales Contracts in which the Contract Value or portions thereof become payable by the Customers to the Ministry for a further period of one year from the date of termination with respect to Sales Contracts on which the Broker has represented or worked for the Ministry as its Broker.

6. <u>TERM AND TERMINATION</u>.

The term of this Agreement shall be for a period of one (1) year commencing on the date hereof and such term shall be automatically renewed for two subsequent, consecutive periods of one year each unless either party gives the other party written notice that it will not renew this Agreement at least sixty (60) days prior to the end of any period of the

terms. If such notice is provided, the Agreement will terminate at the end of the then current term.

7. EFFECT OF TERMINATION.

In the event of termination of this Agreement pursuant to paragraph 6:

(a) Neither the Ministry nor Broker shall have any further duty, obligation or liability to the other party except as otherwise expressly stated in this Agreement.

(b) Notwithstanding termination of this Agreement, all commission payable hereunder shall be paid to Broker without any set-off, deduction or defense whatsoever.

8. ASSIGNMENT.

This Agreement is not assignable by either party and any purported assignment of this Agreement without both parties written consent shall be void and without effect.

9. CONFIDENTIAL INFORMATION.

From time to time, the parties hereto may furnish to each other materials and other information they deem necessary for the proper performance of their obligations hereunder. All such information, including the existence and terms of this Agreement, except as necessary for Broker to facilitate sales, shall be kept confidential by the parties hereto. Each of the parties hereto shall use such materials and information only as authorized by the supplying party and such information shall be revealed only to those Brokers, representatives and employees of the parties hereto who need to know the information for the

purpose of evaluating potential contracts between the above parties. Neither party shall use any such material or information either in conflict with the purpose of this Agreement. The said obligations shall survive any termination of this Agreement for a period of one year.

10. <u>RELATIONSHIP OF PARTIES</u>.

Broker is not authorized to enter into any commitment of any kind in the name or on behalf of the Ministry, nor shall Broker make any contractual offers to Customers or prospective Customers on behalf of Ministry unless Broker shall have first obtained written instructions from Ministry concerning the terms of such offers.

The relationship of Broker to the Ministry created hereby is intended to be that of independent contractor. Expect for office facilities for Broker, which will be provided by the Ministry, at the various locations and sites as necessary to perform the duties of this Agreement, Broker shall be responsible for its own administrative costs, expenses and charges necessary or incidental to its functions hereunder (but without any obligation to incur any minimum or other level of such costs, expenses and charges) and shall indemnify and save Ministry harmless from and against all such costs, expenses and charges which Broker incurs, and all claims, disputes, actions, judgments and liability of every kind which are made, contracted, allowed or incurred by Broker and responsibility for which has not been specifically assumed by Ministry in advance and in writing.

11. NOTICE.

All notices and requests under this Agreement shall be given in writing and the effective date of such notice or request shall be the date of postmark or the date of transmittal by cable, facsimile or other means of electronic transmittal. The addresses to be used hereunder for each party hereto shall be as follows:

Broker:

Wye Oak Technology, Inc.

117 Laken Street

Monongahela, PA, USA 15063;

Attention: Dale C. Stoffel, President

Telephone No.: 724.258.8670

Local Iraqi No.: 07901320080

E-Mail: dstoffel@wyeoaktech.com

Ministry:

Iraqi Ministry of Defense

Baghdad, Iraq, APO AE 09316

Attention: Minister Hazim al-Shalan

Telephone No.: _____

Facsimilie No.: _____

E-Mail: _____

12. WAIVER.

A failure by one of the parties to this Agreement to assert any rights for or upon any breach of this Agreement shall not be deemed a waiver of such right. No waiver in writing by one of the parties hereto with respect to any right shall be deemed to extend to or

affect any subsequent breach of like or different kind or impair any right in consequence thereof.

13. MODIFICATION.

This Agreement shall not be amended or supplemented except in writing, signed by both parties.

14. ENTIRE AGREEMENT; MODIFICATION.

This Agreement contains the entire agreement of the parties with respect to the subject matter hereof, and there is no warranties, representations or agreements between them with respect thereto, except as contained herein. This Agreement may not be modified, amended or supplemented except by a writing signed by both parties hereto.

15. INDEMNIFICATION.

Each party shall indemnify, defend and hold harmless the other party from and against any and all liabilities, demands, claims, lawsuits, damages, actions, judgments, costs (including reasonable attorney's fees and expenses) including but not limited to injury to persons (including death), loss or damage to, or destruction of property arising out of that party's breach of this Agreement or that party's negligent or willful actions while performing hereunder.

16. SEVERABILITY.

All provisions of this Agreement are intended to be interpreted and construed in a manner to make such provisions valid and enforceable. The invalidity or unenforceability of any phrase or provision hereof will in no way affect the validity or enforceability of any

other portion of this Agreement, which will be deemed to modify it, restrict it, or omit it to the extent necessary to make the Agreement enforceable.

17. FORCE MAJEURE.

Neither party shall be liable to the other for any failure to perform any obligations under this Agreement due to causes which are beyond their reasonable control and of a nature which neither party has the authority or power to remedy, including without limitation, acts of God, acts of the other party, acts of civil or military authority including governmental priorities, strikes or other labor disturbances, fires, floods, epidemics, wars and riots, delays in transportation or unavailability of materials or supplies from ordinary sources. In the event of such an occurrence, the party claiming relief thereon shall give prompt written notice thereof to the other party and any time for performance of an obligation shall be extended by time equal to the length of any delay attributable to such occurrence.

18. CONTROLLING LANGUAGE.

If this Agreement is written in two or more languages, the English text thereof shall be deemed to be the authoritative version and shall be controlling for all purposes.

19. CAPTIONS.

The captions and section headings in this Agreement are included for convenience of reference only and shall not affect or be considered in the interpretation or construction of any provision of this Agreement.

20. COUNTERPARTS.

This Agreement may be executed simultaneously in one or more counterparts, each of which shall be deemed an original but all of which together shall constitute one and the same instrument without necessity of production of the others.

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21. GOVERNING LAW.

This Agreement shall be exclusively construed and interpreted pursuant to the laws of the REPUBLIC OF IRAQ without regard to its principles of conflicts of laws.

IN WITNESS WHEREOF, the parties have signed this Broker Services Agreement and this Agreement shall be effective as of the 16th day of August, 2004.

Iraqi Ministry of Defense	**Wye Oak Technology, Inc.**
By: /s/ Dr. Bruska Noori Shaways	By: /s/ Dale C. Stoffel
Dr. Bruska Noori Shaways, Secretary General of the Ministry of Defense of the Republic of Iraq	Dale C. Stoffel, President of Wye Oak Technology, Inc.
[seal: (text in Arabic) Ministry of Defense Secretary General Office]	[seal: Wye Oak Technology, Inc. Corporate SEAL 1999 Delaware]