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UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

SAN FRANCISCO DIVISION

FIVE POINT HOLDINGS, LLC, et al. Plaintiffs, vs. UNITED STATES OF AMERICA Defendant.	Case No. 3:20-cv-04180-JD Case No. 3:20-cv-01485-JD [Both cases related to Case No. 18-CV-05330-JD] UNITED STATES' NOTICE OF MOTION; CONSOLIDATED MOTION TO DISMISS FOR LACK OF SUBJECT-MATTER JURISDICTION; MEMORANDUM OF POINTS AND AUTHORITIES Hearing: Date: November 12, 2020 Time: 10:00 a.m. Place: Courtroom 11, 19th Floor
CPHP DEVELOPMENT, LLC, et al. Plaintiffs, vs. TETRA TECH, INC., et al. Defendant.	

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NOTICE OF MOTION AND MOTION

PLEASE TAKE NOTICE that on November 12, 2020, at 10:00 a.m. in Courtroom 11, located on the 19th Floor of 450 Golden Gate Avenue, San Francisco, California 94102, defendant United States will move to dismiss these actions pursuant to Fed. R. Civ. P. 12(b)(1). The consolidated motion is based on this notice, the following memorandum of points and authorities, exhibits, the reply, and such oral argument as the Court may permit.

RELIEF SOUGHT

The United States moves the Court to dismiss the claims against it pursuant to Fed. R. Civ. P. 12(b)(1) and 12(h)(3) for lack of subject-matter jurisdiction. As described more fully below, this Court lacks subject-matter jurisdiction because there has been no waiver of sovereign immunity under the Federal Tort Claims Act ("FTCA"). 28 U.S.C. §§ 1346(b), 2671–80. The motion has been consolidated for these cases pursuant to the Court's order. (Case No. 3:20-cv-04180-JD, Doc. 31; 3:20-cv-04185-JD, Doc. 35).

MEMORANDUM OF POINTS AND AUTHORITIES

ISSUE

Whether the Court lacks subject-matter jurisdiction over Plaintiffs' claims because they are barred by exceptions to the waiver of sovereign immunity in the FTCA.

FACTUAL AND PROCEDURAL BACKGROUND

On February 27, 2020, plaintiff property developer groups (referred to separately as "Five Point" or "FP" and "Homebuilder" or "HB" plaintiff groups, and collectively as "Plaintiffs") filed separate actions against the United States regarding the former Hunters Point Naval Shipyard (the "Shipyard").

The complaints allege that the United States purchased the Shipyard property in 1939 and used the site for ship repair during World War II and the Korean War. FP Compl. ¶ 16.[1] Due to Naval activities at the Shipyard, there was a potential for contamination by radioactive materials. *Id.* The United States deactivated the Shipyard in 1974 and most of the site was leased to a

[1] When citing factual allegations in the Complaints, the United States accepts those allegations as true for purposes of this motion.

commercial repair company from 1976 to 1986. *Id.* (*See also* HB Compl. ¶ 21.)

In 1991, pursuant to the Defense Base Closure and Realignment Act of 1990, the United States Department of Navy ("Navy") announced its intention to close the Shipyard and transfer it to the City and County of San Francisco ("San Francisco") for further development. FP Compl. ¶¶ 1, 16–17. The Navy contracted with environmental remediation contractors including Tetra Tech, Inc., and Tetra Tech, EC, Inc. (collectively "Tetra Tech") to remediate the property for subsequent property transfers by the United States to San Francisco and then to developers. *See id.* ¶ 2. In 2004, the Navy issued a Finding of Suitability of Transfer ("FOST") of "Parcel A" of the Shipyard to San Francisco. HB Compl. ¶ 29. HB Plaintiffs began developing Parcel A, and building and selling residences there. *See id.* ¶ 2. There were also plans for transfers of Shipyard properties to FP Plaintiffs beginning in 2016, with the majority of the property to be transferred by 2019. FP Compl. ¶ 2. (*See also* HB Compl.¶¶ 2, 23–33.)

The further transfer and planned redevelopment of Shipyard property was delayed as a result of the fraud perpetrated by the Navy's remediation contractor, Tetra Tech. FP Compl. ¶ 4. Among other activities, Tetra Tech oversaw, directed, and concealed the falsification of a large number of soil samples taken from the Shipyard. *Id.* ¶ 23. Tetra Tech put soil, taken from areas known to contain clean soil, into jars which were supposed to contain soil from areas supposedly remediated by Tetra Tech. *Id.* Tetra Tech then represented to the United States that the clean soil had come from areas where remediation had taken place; thus, falsely identifying as "clean" areas where potentially contaminated soil still exists. *Id.* Two Tetra Tech employees pled guilty to felonies for their roles in fraudulent conduct. *Id.* ¶¶ 5, 24. The United States is pursuing violations of the False Claims Act against Tetra Tech on behalf of the Navy based upon the widespread fraud in the performance of Tetra Tech's environmental investigation work at the Shipyard property under its contract with the Navy. *Id.* ¶ 5. (*See also* HB Compl. ¶¶ 34–52.)

Plaintiffs allege that the United States was grossly negligent in its supervision of Tetra Tech because it did not properly supervise the investigation, testing, and remediation of the Shipyard property despite straightforward obligations under its contract with Tetra Tech and governing law to do so. FP Compl. ¶¶ 4, 6, 27. Plaintiffs contend that despite obtaining

evidence of fraud, the United States allowed Tetra Tech to continue its activities under the Shipyard remediation contracts without informing Plaintiffs of the extent of the fraud. *Id.* ¶ 29. (*See also* HB Compl. ¶¶ 6–8.)

HB Plaintiffs claim that development of the Shipyard has been interrupted and sales have been negatively impacted. HB Compl. ¶ 9. FP Plaintiffs claim that they face significant delay and negative public perception for their redevelopment of the Shipyard. FP Compl. ¶ 30. Plaintiffs state that the delay is resulting in substantial economic and reputational harm to Plaintiffs, which cannot generate any revenue from its investment in redeveloping the Shipyard until after the Shipyard is properly investigated and remediated, and thereafter transferred to Plaintiffs. *Id.* ¶ 39. (*See also* HB Compl. ¶¶ 9, 62–63.)

Plaintiffs' Complaints state four causes of action against the United States. The first cause of action is for "Negligence" to include "negligent supervision of Tetra Tech and Tetra Tech's employees, negligent enforcement of rules instituted to curb Tetra Tech's fraudulent activities, and negligent communication of information concerning Tetra Tech's fraudulent activities to Plaintiffs." FP Compl. ¶¶ 40–51; *see also* HB Compl. ¶¶ 93–104. The second cause of action is for "Negligent Hiring" for "continuing to hire and contract with employees, independent contractors, and other agents that were unfit and incompetent, including Tetra Tech, Tetra Tech's employees, and individuals associated with Tetra Tech." FP Compl. ¶¶ 52–59; *see also* HB Compl. ¶¶ 113–23. The third cause of action is for "Negligent Interference with Prospective Economic Advantage" based on the United States' duty "to avoid negligent conduct that would interfere with and adversely affect the existing and prospective economic relationships of Plaintiffs." FP Compl. ¶¶ 60–69; *see also* HB Compl. ¶¶ 136–47. Finally, the fourth cause of action is for "Equitable Indemnity" based on being named as defendants in other lawsuits related to the Shipyard development and alleging that these claims arise "from the United States' failure to ensure proper investigation, testing, and remediation of the Shipyard." FP Compl. ¶¶ 70–77; *see also* HB Compl. ¶¶ 163–68.

INTRODUCTION

The United States has not waived its sovereign immunity for Plaintiffs' claims and therefore this court lacks subject-matter jurisdiction. *See United States v. Orleans*, 425 U.S. 807, 814 (1976) (stating that, as the sovereign, the United States "can be sued only to the extent that it has waived its immunity" from suit). Plaintiffs brought this action under the FTCA. The FTCA waives the government's sovereign immunity for certain types of tort claims, but specifically reserves immunity with respect to others.

The FTCA provides federal jurisdiction for:

> claims against the United States, for money damages . . . for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.

28 U.S.C. § 1346(b). This waiver is limited, however, by several exceptions. 28 U.S.C. §§ 2680(a)–(n). Three of these exceptions are applicable to Plaintiffs' claims. First, the "interference with contract rights exception" preserves the United States' sovereign immunity to "[a]ny claim arising out of . . . interference with contract rights." 28 U.S.C. § 2680(h). Second, the "discretionary function exception" preserves the United States' sovereign immunity to "[a]ny claim . . . based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused." 28 U.S.C. § 2680(a). Third, the "misrepresentation exception" preserves the United States' sovereign immunity to "[a]ny claim arising out of … misrepresentation [or] deceit." 28 U.S.C. § 2680(h).

These three exceptions each bar Plaintiffs' tort claims in this case. First, claims that the government's negligence interfered with existing or prospective commercial relationships are barred by the FTCA's interference with contract rights exception. In fact, since the essence of all of Plaintiffs' negligence claims is an alleged interference with their business relationships, this exception bars all of those claims. Second, claims that the government negligently hired,

supervised, and retained government contractors, or was negligent in the dissemination of information are precluded by the FTCA's discretionary function exception because such claims challenge discretionary, policy-based conduct. Third, claims alleging that the government made misleading statements or failed to disclose important information are barred by the FTCA's misrepresentation exception. Finally, to the extent Plaintiffs claim a right to equitable indemnification, that claim is barred because the Court lacks subject-matter jurisdiction over any underlying claim on which the equitable indemnification claim can be based.

STANDARD OF REVIEW

The United States moves to dismiss the claims against it for lack of subject-matter jurisdiction pursuant to Fed. R. Civ. P. 12(b)(1) and 12(h)(3), and relies upon the attached declarations and exhibits to support the motion. The Court may consider these materials without converting the motion into a summary judgment motion under Fed. R. Civ. P. 56. *See Land v. Dollar*, 330 U.S. 731, 735 n.4 (1947); *White v. Lee*, 227 F.3d 1214, 1242 (9th Cir. 2000). The Court must ensure that it has subject-matter jurisdiction at the outset before proceeding with the merits of a case. *See Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 94–95 (1998).

ARGUMENT

I. Plaintiffs' Complaints Are Barred by the Interference with Contract Rights Exception.

Plaintiffs' Complaints are barred by the FTCA's "interference with contract rights exception." This exception immunizes the United States from liability for "[a]ny claim arising out of . . . interference with contract rights." 28 U.S.C. § 2680(h). This exception applies broadly to bar claims that the government's negligence interfered with existing or prospective commercial relationships.

The leading case on application of the exception is *Art Metal-U.S.A., Inc. v. United States*, 753 F.2d 1151 (D.C. Cir. 1985). In that case, Art Metal, a supplier of metal office furniture, sued the General Services Administration ("GSA") after the GSA "abruptly ceased doing business" with the company based on disclosures of the company's improprieties in a series of newspaper articles. *Id.* at 1153. The District of Columbia Circuit held that because the

alleged breach was of the duty not to interfere with Art Metal's prospective economic relationships with third parties—which was indistinguishable from a claim for interference with existing contract rights—the claim was barred. *Id.* at 1155. The court explained that the interference with contract rights exception necessarily precludes claims based on interference with prospective contractual relationships because it would be "illogical" to "subject the government to liability if its employees interfered with the plaintiff's mere expectation of entering a contract, but not if they interfered with a contract already in existence." *Id.*

While the Ninth Circuit has not explicitly ruled that the exception covers interference with prospective economic advantage,[2] district courts within the Circuit have followed *Art Metal*, and have given the exception a broad interpretation. For example, in *Powerturbine, Inc. v. United States*, No. 3:14-CV-0435-CAB-BLM, 2014 WL 12160753 (S.D. Cal. Dec. 15, 2014), plaintiffs claimed that the disclosure of a document regarding an investigation "caused Powerturbine to lose contracts and business prospects and left Plaintiffs with a tarnished image and reputation in the industry." *Id.* at *2 (internal quotations omitted). Even though plaintiffs' complaint had not explicitly asserted a claim for interference with prospective economic advantage, the court found, after discussing *Art Metal*, that the interference with contract rights exception barred the claims. *Id.* at *13. *See also Saratoga Sav. & Loan Ass'n v. Fed. Home Loan Bank of S.F.*, 724 F. Supp. 683, 688 (N.D. Cal. 1989) (dismissing claim alleging conspiracy to interfere with prospective economic advantage under interference with contract rights exception).

Here, one of Plaintiffs' causes of action is entitled "Negligent Interference with Prospective Economic Advantage." FP Compl. Heading VII; HB Compl. Heading G. Plaintiffs

[2] The Ninth Circuit has stated in dicta that "[t]here may be doubt that interference with a prospective advantage falls within the statutory exception." *Builders Corp. of Am. v. United States*, 259 F.2d 766, 769 (9th Cir. 1958). However, this Court has found that the exception covers interference with prospective economic advantage and has discounted the Ninth Circuit's statement as contrary to the "current legal trend." *Saratoga Sav. & Loan Ass'n v. Fed. Home Loan Bank of S.F.*, 724 F. Supp. 683, 688 (N.D. Cal. 1989). Further, in *Mundy v. United States*, 983 F.2d 950, 953 (9th Cir. 1993), the Ninth Circuit apparently assumed that the exception could apply to interference with prospective economic advantage, but found that no such claim was presented in that case.

allege that "existing and prospective economic relationships with individuals and entities . . . depend on the timely transfer of the Shipyard properties to Plaintiffs" consistent with the Navy's schedule. *See* FP Compl. ¶ 61. They further allege that the "United States owed a duty of care to Plaintiffs to avoid negligent conduct that would interfere and adversely affect the existing and prospective economic relationships of Plaintiffs." *Id.* ¶ 64. Plaintiffs contend that they "have suffered and will suffer economic harm, injury, and losses, including increased construction costs and delays in the overall development." *Id.* ¶ 68. (*See also* HB Compl. ¶¶ 137–46). Thus, the interference with contract rights exception clearly precludes this cause of action.

Moreover, considering the substance of Plaintiffs' negligence claims, the interference with contract rights exception bars all of those claims. *See Powerturbine*, 2014 WL 12160753, at *13 (considering the substance of plaintiffs' claims in finding them barred by the exception); *see also Willfong v. U.S. Dep't of Agric.*, No. C-01-0438 PJH, 2002 WL 433602, at *2 (N.D. Cal. Mar. 11, 2002) (considering the substance of plaintiffs complaint and holding that it was barred by the interference with contract rights exception, even though the complaint had been amended to remove the "interference with contract rights" allegation). The Court must look beyond the characterizations in the pleadings in determining the bases of the claims. *Mt. Homes, Inc. v. United States*, 912 F.2d 352, 356 (9th Cir. 1990). Here, the Court cannot read any of Plaintiffs' negligence claims as alleging a cause of action distinct from a claim alleging that government negligence interfered with Plaintiffs' existing and prospective economic relationships. For example, the Plaintiffs' general negligence causes of action state that the United States had a duty to "avoid causing economic and other injury to Plaintiffs" and claim that it was foreseeable that the United States' negligence "would significantly delay and/or hinder redevelopment of the Shipyard, discourage property buyers, lessees, investors and lenders, and harm Plaintiffs." FP Compl. ¶¶ 41, 43. (*See also* HB Compl. ¶ 94.) Plaintiffs' other negligence claims are likewise predicated on damages arising from Plaintiffs' existing and prospective economic relationships. Because the substance of each of Plaintiffs' negligence claims reveals that they are in essence for interference with economic relationships, the Court should dismiss all of those claims based on this exception.

II. The Discretionary Function Exception Deprives the Court of Jurisdiction Because the Plaintiffs' Claims Challenge Discretionary Governmental Conduct that Is Susceptible to Policy Analysis.

Independently of the interference with contract rights exception, the FTCA's discretionary function exception bars claims regarding hiring, supervision, and retention of remediation contractors as well as claims regarding the dissemination of information about the Shipyard. The exception "marks the boundary between Congress' willingness to impose tort liability upon the United States and its desire to protect certain governmental activities from exposure to suit by private individuals." *Berkovitz v. United States*, 486 U.S. 531, 536 (1988) (internal quotes omitted).

Courts employ the Supreme Court's well known two-part test to determine whether the discretionary function exception applies to particular claims. *Kim v. United States*, 940 F.3d 484, 487 (9th Cir. 2019). First, for the exception to apply, the alleged conduct must not have been subject to a statute, regulation, or policy that prescribes a specific course of action for a government employee to follow. *See United States v. Gaubert*, 499 U.S. 315, 322 (1991); *Berkovitz*, 486 U.S. at 536. Second, assuming that the government had discretion, the exception applies if the alleged negligent conduct was "susceptible" to an analysis involving social, economic, or political policy considerations. *Gaubert*, 499 U.S. at 322–23; *Berkovitz*, 486 U.S. at 536–37. Significantly, the exception applies regardless of whether the government was negligent. *See Routh v. United States*, 941 F.2d 853, 855 (9th Cir. 1991).

The United States has the initial burden of establishing that the discretionary function exception applies. *Prescott v. United States*, 973 F.2d 696, 702 (9th Cir. 1992). However, "[w]hen established governmental policy, as expressed or implied by statute, regulation, or agency guidelines, allows a Government agent to exercise discretion, it must be presumed that the agent's acts are grounded in policy when exercising that discretion." *Gaubert*, 499 U.S. at 324. To rebut such presumption and "survive a motion to dismiss," the plaintiff must show "the challenged actions are not the kind of conduct that can be said to be grounded in the policy of the regulatory regime." *See id.* at 324–25.

A. Plaintiffs' Claims Regarding Negligent Hiring, Retention, and Supervision Are Barred by the Discretionary Function Exception.

Plaintiffs allege that the United States was negligent in hiring contractors "that were unfit and incompetent, including Tetra Tech, Tetra Tech's employees, and individuals associated with Tetra Tech." FP Compl. ¶ 54. Plaintiffs also contend that the United States was negligent in its "supervision of Tetra Tech and Tetra Tech's employees," and its "enforcement of rules instituted to curb Tetra Tech's fraudulent activities." *Id.* ¶ 44. Plaintiffs do not cite any specific provisions that they claim constrained the United States' discretion, but they generally allege that the United States was subject to "contractual and statutory obligations to ensure a proper investigation and effective remediation of the Shipyard properties," *id.* ¶ 27, and "violated its own authority to ensure proper environmental investigation and remediation and ultimate transfer of the Shipyard property under the Defense Base Closure and Realignment Act of 1990 and related regulations." *Id.* ¶ 46. (*See also* HB Compl. ¶¶ 94, 101, 114–23.)

The discretionary function exception applies to these allegations because: (1) no specific and mandatory provisions constrained the government's discretion in hiring, retaining or supervising Tetra Tech or other remediation contractors at the Shipyard property, and (2) the government's conduct in these areas is susceptible to policy analysis.

First, there was no prescribed course of conduct for engaging and supervising Tetra Tech and other remediation contractors at the Shipyard. The Navy's hiring and retention of environmental remediation contractors is governed by Part 36 of the Federal Acquisition Regulations ("FAR") and Part 236 of the Defense Federal Acquisition Regulation Supplement ("DFARS"), in particular FAR Section 36.602 and DFARS Section 236.602. 48 C.F.R. §§ 36.602, 236.602. There are no specific and mandatory requirements in these regulations that would have prohibited the Navy from contracting with, or retaining contractors at the Shipyard.

With respect to the Navy's oversight of environmental remediation contractors, there are a number of potentially relevant provisions. The redevelopment and environmental remediation of the Shipyard is implemented pursuant to the Defense Base Closure and Realignment Act of 1990, 10 U.S.C. § 2687, and regulations promulgated pursuant to that statute, 32 C.F.R. Parts

174 and 176 (Revitalizing Base Closure Communities and Addressing Impacts of Realignment). Bain Decl. ¶ 2. The Department of Defense and the Department of Navy have also issued policy manuals and guidance for base realignment and closure, such as the Department of Defense Redevelopment and Realignment Manual (2006), and the Department of Navy Base Realignment and Closure Implementation Guidance (2007). Bain Decl. ¶ 3, Exs. 1, 2. Further, these agencies issue regulations, instructions, and manuals regarding environmental restoration at their properties, including properties designated for closure. Potentially applicable documents include the Department of Navy Environmental Restoration Program Manual; the Navy's Construction Quality Management Program (known as NAVFAC P-445); and the Navy Environmental Readiness Program Manual (known as OPNAVINST 5090.1). Bain Decl. ¶ 4, Exs. 3, 4, 5. Additionally, the environmental work at the Shipyard is governed by a Federal Facility Agreement that the Navy entered with federal and state regulators. Bain Decl. ¶ 5, Ex. 6. While these documents address environmental remediation at the Shipyard, they do not contain relevant specific and mandatory procedures for overseeing the contractors' work.

Through its environmental restoration contracts, the contractor, not the Navy, is responsible for controlling the quality of the work. Bain Decl. ¶ 4, Ex. 4 at xiii. Indeed, the contractor's quality control responsibilities are specifically defined in the government contract. Bain Decl. ¶ 6, Ex. 7, Part 5.0. The Navy employs a quality assurance program to evaluate the contractor's work which is outlined in NAVFAC P-455 and in the contract. Bain Decl. ¶ 4, Ex. 4 at xiii–xiv, section 1.6; Bain Decl. ¶ 6, Ex. 7, sections 5.3, 5.6, 5.7, 5.11.

Navy provisions provide broad statements regarding the goals of the oversight, rather than specific procedures to implement the oversight. For example, OPNAVINST 5090.1, Section 1-3.2(h) provides that Navy contracting officers must ensure that contractors comply with applicable environmental laws, policies, and regulations. Bain Decl. ¶ 4, Ex. 5, section 1-3.2(h). But, such result-based provisions do not defeat the discretionary function exception because they do not specify how the government employees ensure environmental compliance. *See, e.g.*, *Miller v. United States*, 163 F.3d 591, 595 (9th Cir. 1998) (stating "requirements for fire suppression . . . do not eliminate discretion because they do not tell firefighters how to fight

the fire"); *Aragon v. United States*, 146 F.3d 819, 826 (10th Cir. 1998) (finding that a pollution prevention provision suggested "principles rather than practices," and stating that "[a]n objective, alone, does not equate to a mandatory directive").

Courts have repeatedly found that when no specific and mandatory provisions constrain the government's discretion in hiring and supervising contractors, the first part of the discretionary function exception test is satisfied. *See Bibeau v. Pac. Nw. Research Found., Inc.*, 339 F.3d 942, 946 (9th Cir. 2003) (finding failure to supervise contractor in absence of mandate to do so is discretionary); *Garcia v. U.S. Air Force*, 533 F.3d 1170, 1178 (10th Cir. 2008) (finding that the Air Force had discretion in its oversight of a contractor's work when the Air Force inspectors' guidelines did not contain specific inspection requirements).

Because there are no specific and mandatory provisions here removing the Navy's discretion in selection and retention of remediation contractors or oversight of their work, the Court must presume that the Navy's exercise of its discretion is policy-based. *See Gaubert*, 499 U.S. at 324–25. Courts have generally held that the government's decisions in hiring and supervising others involve policy judgment of the type Congress intended the discretionary function exception to shield. *See Vickers v. United States*, 228 F.3d 944, 950 (9th Cir. 2000) (listing cases). In fact, cases show that the government's hiring, retention, and oversight of its contractors is protected by the discretionary function exception because the government's conduct inherently involves balancing policy considerations. *See, e.g., In re Consol. U.S. Atmospheric Testing Litig.*, 820 F.2d 982, 995–96 (9th Cir. 1987) (concluding that claims involving negligent supervision of a government contractor fall within the discretionary function exception); *SAI v. Smith*, No. 16-CV-01024-JST, 2018 WL 534305, at *5 (N.D. Cal. Jan. 24, 2018) (stating that "supervision of contractors falls within the discretionary function exception"); *Vallier v. Jet Propulsion Lab.*, 120 F. Supp. 2d 887, 913–14 (C.D. Cal. 2000) (finding that the discretionary function exception barred negligent supervision claim).

Here, the United States submits a declaration from Lawrence Lansdale, Environmental Director of the Navy's base closure project management office, which articulates the policies involved in hiring and oversight environmental contractors who perform remediation work for

the Navy. Mr. Lansdale states that it is the policy of the Navy to enter contracts with experienced environmental contractors, who assume responsibility for planning the fieldwork, establishing a quality control system for the fieldwork, performing the fieldwork, supervising the fieldwork, and implementing quality control measures. Lansdale Decl. ¶ 5. In turn, the Navy has specialists, in areas such as safety and quality assurance, to review contractors' plans and to consult with contractors as necessary. *Id.* ¶ 6. As Mr. Lansdale attests, the Navy's oversight of environmental contractors' work is based on broad policy considerations applicable to all installations over which the Navy has responsibility, considerations which go beyond application of scientific and professional judgement. *Id.* ¶ 8. The policy judgments behind delegation of responsibilities to the contractor and the determination of procedures to monitor the contractor's work require balancing the Navy's objectives of investigating and remediating environmental contamination at its installations, making closed properties available for redevelopment, and limitations on staffing, funding and expertise. *Id.* ¶ 8. These are exactly the type of policy considerations that the discretionary function exception is designed to shield from tort suit.

The Ninth Circuit's decision in *Myers v. United States*, 652 F.3d 1021 (9th Cir. 2011), shows why the FTCA's discretionary function exception applies here to bar Plaintiffs' claims of negligent hiring, retention, and supervision. In *Myers*, the Navy hired a remediation contractor to excavate and transport contaminated soils to a landfill. *Id.* at 1025. Plaintiff claimed that the Navy was negligent in overseeing the contractor's work, causing a minor's exposure to a hazardous chemical which allegedly resulted in injury. *Id.* at 1023.

Under the first part of the discretionary function exception test, the Ninth Circuit found that the government did not have discretion with respect to one claim of negligence because the plaintiff had identified a relevant mandatory and specific provision that the government had violated; namely, a mandatory requirement in a Navy manual that a Navy certified industrial hygienist or other competent person review the contractor's health and safety plan. *Id.* at 1029. The plan was relevant because the plaintiff contended that air monitoring in the plan was insufficient to determine whether contaminated dust was leaving the work site. *See id.* at 1025–26. However, the court also found that provisions stating that a Navy Quality Assurance Officer

("QAO") "will ensure that all work is performed in accordance with approved work plans [and] sampling plans" and "shall maintain for inspection a log of quality assurance field activities" allowed for discretion. *Id.* at 1030–31. While noting that the provisions were mandatory, the court ruled that the provisions were not sufficiently specific because they did not indicate what the QAO must do to ensure work performance in compliance with plans or what the QAO must log as quality assurance field activity. *Id.*

Here, Plaintiffs cannot identify any relevant provision, like the Navy manual provision in *Myers*, which would have prevented Plaintiffs' alleged injuries by uncovering Tetra Tech's fraud and allowing the Shipyard development to proceed as originally scheduled. The Navy's role in overseeing Tetra Tech's work was similar to the quality assurance function in *Myers*. The Navy had discretion in determining how to ensure Tetra Tech's compliance with applicable standards.

Under the second part of the discretionary function exception test, the *Myers* Court did not question whether the Navy's decision to hire a contractor to perform the environmental remediation work, rather than do the work itself, was susceptible to policy analysis, as it most certainly was. *See id.* at 1031–32. Instead, the court focused on the "conduct of the remediation project." *Id.* at 1032. The court recognized that the implementation of a project may be protected by the discretionary function exception, if the implementation involves balancing competing policy considerations. *Id.* But, the court found that the test was not met because the Navy had not shown that the degree of oversight it exercised was based on more than scientific or professional judgment and that any judgement it exercised beyond technical or professional standards was impacted by policies aside from limited agency resources. *Id.* at 1032–33.

As the declaration from Mr. Lansdale shows, here there were competing policy considerations involved in the degree of the Navy's hiring, retention, and oversight of environmental contractors at the Shipyard. Decisions regarding hiring, retention, and oversight were not made solely on the basis of professional or technical judgment. Neither were the decisions impacted solely by limitations on agency resources. Instead, the hiring of environmental contractors and the degree of oversight of their work was based on a complex mix of policy factors regarding environmental restoration, redevelopment, safety, and funding.

Lansdale Decl. ¶ 8. Thus, the discretionary function exception bars the Plaintiffs' negligent hiring, retention, and supervision claims.

B. Plaintiffs' Claims Premised on the United States' Communications or Withholding of Information Are Barred by the Discretionary Function Exception.

As with the claims regarding negligent hiring, retention, and supervision, Plaintiffs' claims regarding dissemination of information—including that the Navy withheld information about fraud and assured Plaintiffs regarding the transfer schedule—are barred by the discretionary function exception because they challenge discretionary, policy-based conduct.

First, the Navy's communication of information to Plaintiffs or the public regarding the Shipyard remediation, including Tetra Tech's fraudulent conduct, was discretionary. The Navy's Base Realignment and Closure Manual contains provisions regarding communications and community liaison, but none of those provisions are sufficiently specific and mandatory to remove discretion. *See, e.g.*, Bain Decl. ¶ 3, Ex. 2, section 8.1 (Navy to provide information to assist communities in developing a plan consistent with Navy environmental policies). Additionally, the Comprehensive Environmental Response, Compensation and Liability Act and its implementing regulations contain a number of community relations and public notification provisions for sites, like the Shipyard, undergoing environmental remediation. *See, e.g.*, 42 U.S.C. § 9613(k) (administrative record requirement); 40 C.F.R. 300.430(c) (community relations regulations). But, none of these provisions would have required the Navy to notify Plaintiffs or the public of Tetra Tech's fraud at any particular time.

Second, the Navy's decisions about what information to disseminate and when to disclose that information are susceptible to policy analysis. Mr. Lansdale states that the content and timing of information to disclose to stakeholders in Base Realignment and Closure properties can depend on a number of factors, including: the need to provide accurate information; the need to consider other governmental interests, such as law enforcement; the need to determine how the content and timing of disclosure may affect the progress of a project and the perception of the property; and the need of the stakeholders and public to know certain

information. Lansdale Decl. ¶ 9.

Courts have frequently held that notification decisions regarding property undergoing environmental remediation are protected by the discretionary function exception. For example, in *Welsh v. U.S. Army*, No. C 08-3599 RS, 2009 WL 250275, *1 (N.D. Cal. Feb. 3, 2009), plaintiffs brought claims alleging exposure to carbon tetrachloride on former Fort Ord property that had been leased to plaintiffs. As part of the Base Closure and Realignment process, the Army entered a Finding of Suitability for Transfer, which identified some hazardous substances on the parcel, but not carbon tetrachloride. *Id.* This Court found that the discretionary function exception barred plaintiffs' claims regarding the remediation. *Id.* at * 3–4. In allowing residential use while environmental plans were ongoing, the Court found that the Army's actions implicated policies in quickly putting property to productive use, spurring economic recovery, reducing caretaker costs, and fast-tracking environmental cleanup. *Id.* at *4. *See also Loughlin v. United States*, 393 F.3d 155, 165 (D.C. Cir. 2004) (finding that discretionary function exception barred warning claim because the government, in deciding what information to release to the public about the hazards it detected during its investigation and what other remediation steps to take, had to weigh several factors, including the reliability of test results, whether additional testing should be done, the significance of the hazard, and the possibility of unnecessarily alarming the residents).

Additionally, the discretionary function exception protects the government from claims of injury allegedly resulting from a failure to provide earlier notice to persons who the government suspects might be affected by criminal conduct or other wrongdoing. *Dichter-Mad Family Partners, LLC v. United States*, 707 F. Supp. 2d 1016, 1042–43 (C.D. Cal. 2010), *aff'd and adopted*, 709 F.3d 749 (9th Cir. 2013) (holding that the discretionary function exception barred a claim that the Securities and Exchange Commission failed to investigate and share information regarding Bernard Madoff's Ponzi scheme); *Weissich v. United States*, 4 F.3d 810, 813–14 (9th Cir. 1993) (holding that the discretionary function exception barred a claim that the U.S. Probation Service negligently failed to warn a prosecutor of an impending threat posed by a federal probationer, who shot and killed the prosecutor). Thus, Plaintiffs' claims challenging the

United States' communications or withholding information regarding Tetra Tech's fraud are barred by the discretionary function exception.

III. Plaintiffs' Claims Premised on the United States' Communications or Withholding of Information Are Barred by the Misrepresentation Exception.

Independently of the FTCA's interference with contract rights and discretionary function exceptions, the FTCA's misrepresentation exception bars Plaintiffs' claims premised on the United States' communications or withholding of information. This exception immunizes the United States from liability for "[a]ny claim arising out of … misrepresentation [or] deceit." 28 U.S.C. § 2680(h). "The misrepresentation exception is broadly construed." *Frigard v. United States*, 862 F.2d 201, 202 (9th Cir. 1988). The exception applies when "the essence of the claim involves the government's failure to use due care in obtaining and communicating information." *JBP Acquisitions, LP v. United States*, 224 F.3d 1260, 1264 (11th Cir. 2000). It applies not only to affirmative miscommunication of information, but also to a "failure to communicate information, whether negligent, or intentional." *Lawrence v. United States*, 340 F.3d 952, 958 (9th Cir. 2003).

The Supreme Court has twice provided guidance on distinguishing misrepresentation from ordinary negligence claims in applying the FTCA's misrepresentation exception. In the first case interpreting the exception, *United States v. Neustadt*, 366 U.S. 696, 698–700 (1961), plaintiffs relied on an inaccurate written appraisal prepared by the Federal Housing Administration ("FHA") when purchasing a house and brought a claim against the FHA based on this reliance. The Court held that the misrepresentation exception barred plaintiffs' claims against the FHA. *Id.* at 710–11. The Court defined negligent misrepresentation as the breach of "the duty to use due care in obtaining and communicating information upon which that party may reasonably be expected to rely in the conduct of his economic affairs." *Id.* at 706.

Subsequently, in *Block v. Neal*, 460 U.S. 289, 297 (1983), the Supreme Court distinguished the duty to obtain and communicate accurate information—which falls within the misrepresentation exception—from the duty to perform a separate task. In that case, the plaintiff had received a loan from the Farmers Home Administration ("FmHA"), and the plaintiff

sued the FmHA alleging that it failed to properly inspect and supervise construction. *Id.* at 290–92. The Court held that the plaintiff could pursue the claim against the FmHA for allegedly breaching a duty to supervise the construction, though the misrepresentation exception would bar suit based on an alleged duty to carefully obtain and communicate information regarding an inspection. *Id.* at 297. The *Block* Court distinguished *Neustadt* on the grounds that the plaintiffs in *Neustadt* had alleged no injury that they would have suffered independently of their reliance on the negligent appraisal; thus the entire action was barred by the misrepresentation exception. *Id.* at 296–97 (stating that "[t]he gravamen of the action against the Government in *Neustadt* was that the plaintiff was misled by a 'Statement of FHA Appraisal' prepared by the Government.")

The Supreme Court's decisions are instructive here. Plaintiffs have brought claims both for (1) the negligent hiring and supervision of environmental remediation contractors and (2) the negligent communication and withholding of information regarding Tetra Tech's fraudulent activity and the schedule for development of the Shipyard. The claims are distinct. Indeed, Plaintiffs specifically allege in the negligence count of their complaint that the United States breached a duty to Plaintiffs through "negligent communication of information concerning Tetra Tech's fraudulent activities" to Plaintiffs. FP Compl. ¶ 44; HB Compl. ¶ 97. Because this negligence claim is distinct from Plaintiffs' other negligence claims, it is barred regardless of the application of the FTCA's interference with contract rights or discretionary function exceptions.

In fact, courts have primarily applied the misrepresentation exception to "claims of economic loss flowing from commercial transactions," such as Plaintiffs' claims here. *See Kim v. United States*, 940 F.3d 484, 493 (9th Cir. 2019). *See also Neustadt*, 366 U.S. at 711 n.26 (noting that the misrepresentation torts largely cover "the invasion of interests of a financial or commercial character, in the course of business dealings") (internal quote omitted).

Here, Plaintiffs claim that their reliance on the United States' "misrepresentations" when they acquired interest to redevelop Shipyard properties and the United States' failure "to communicate the full nature and extent of Tetra Tech's fraud" caused them to incur "substantial economic" harm because they cannot "generate any revenue from [their] investment in

redeveloping the Shipyard" and have "incurred substantial costs in responding to the harm cause by Tetra Tech." FP Compl. ¶¶ 39, 50. *See also* HB Compl. ¶¶ 8–9, 94, 104 (alleging that the United States "withheld information" about Tetra Tech's fraud and "instead advised the Homebuilders that the project would remain on schedule"). Where the United States' communications or withholding of information are central to a plaintiff's claims, as they are here, the claims must be dismissed under the FTCA's misrepresentation exception. *See Kim*, 940 F.3d at 493–94 (finding misrepresentation exception barred claim where the alleged misrepresentation was not collateral to the claim).

IV. Plaintiffs' Equitable Indemnity Claim Is Barred Because the United States Has Not Waived Sovereign Immunity for any Underlying Tort Claim.

Finally, Plaintiffs cannot maintain an action for equitable indemnity because the United States is not subject to any underlying tort liability on which a tort claim for indemnity can be premised. When the United States is immune from an underlying tort suit, a co-tortfeasor cannot recover in contribution or indemnity from the United States, though its share of damages to the underlying claimant may be reduced by the government's proposed proportionate share of fault. Here, Plaintiffs claim that they have been named as defendants in several lawsuits "due to the negligent oversight of the United States of Tetra Tech's fraudulent activities." FP Compl. ¶ 71; HB Compl. ¶ 164. Plaintiffs contend that they are "entitled to equitable indemnification and/or contribution from the United States for the costs incurred in responding to claims arising from the United States' failure to ensure proper investigation, testing, and remediation of the Shipyard." FP Compl. ¶ 73; *see also* HB Compl. ¶ 165.

As shown above, under the FTCA's interference with contract rights, discretionary function, and misrepresentation exceptions, the United States is immune to any claim related to its oversight of Tetra Tech. Because the United States has immunity for any claimed negligent conduct, Plaintiffs cannot bring a claim for equitable indemnification.

In *Collins v. Plant Insulation Co.*,110 Cal. Rptr. 3d 241 (Cal. App. 2010), a California appellate court determined how claims of co-tortfeasors are determined under California comparative fault law where one of the alleged tortfeasors was immune under the FTCA's

discretionary function exception. The family of a deceased welder, who worked at the Shipyard, among other places, brought an action against an asbestos distributor, the Plant Insulation Co. ("Plant") and several other entities. *Id.* at 242–43. On appeal, Plant challenged the trial court's exclusion of the Navy from the verdict form. *Id.* at 243. California's comparative fault statute, known as "Proposition 51," provides several liability, allocated in direct proportion to each defendant's percentage of fault, for non-economic damages in actions for wrongful death, personal injury or property damage. *Id.* at 243–44 (citing Cal. Civ. Code § 1431). The court considered the Navy's immunity from suit under the FTCA's discretionary function exception, and recognized that immunity protected the government from liability regardless of negligence. *Id.* at 248–49. Because the government could be negligent and still protected by the immunity, the court found that the jury should have been allowed to allocate fault to the Navy under Proposition 51, *id.* at 249–52, even though the Navy was "immune from *paying for* its tortious acts." *See id*. at 251 (internal quote omitted). Thus, there was no right to a contribution or indemnity action where the government was immune by reason of the discretionary function exception; instead, the co-tortfeasor had a right to have any damage award reduced by a fact finder's apportionment of fault to the government.[3]

CONCLUSION

For all of the foregoing reasons, this Court should grant the United States' motion to dismiss.

Dated: July 17, 2020

Respectfully submitted,

J. PATRICK GLYNN
Director, Torts Branch

[3] The FP Plaintiffs reference Section 330 of the National Defense Authorization Act of 1993 (*see* 10 U.S.C. § 2687 note) in the equitable indemnity cause of action of their complaint. *See* FP Compl. ¶ 74. We do not interpret the Plaintiffs' equitable indemnity cause of action as stating a claim for indemnity under Section 330. Such a statutory claim, when ripe, would be within the exclusive jurisdiction of the Court of Federal Claims under the Tucker Act. 28 U.S.C. § 1491(a)(1).

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that he is an employee of the United States Department of Justice, and is a person of such age and discretion to be competent to serve papers. The undersigned further certifies that he is causing a copy of the foregoing Notice of Motion, Consolidated Motion to Dismiss for Lack of Subject-Matter Jurisdiction and Memorandum of Points and Authorities, to be served on counsel of record by the Court's Electronic Case Filing System.

I declare under penalty of perjury that the foregoing is true and correct.

Executed July 17, 2020 in Alexandria, VA.

/s/ Adam Bain
ADAM BAIN