

**UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA**

**AHMED RATEB POPAL,  
et al.,**

**Plaintiffs,**

**v.**

**ULDRIC L. FIORE, JR.,  
et al.,**

**Defendants.**

**Civil Action No. 11-801 (JEB)**

**MEMORANDUM OPINION**

Afghan Plaintiffs Ahmed and Rashid Popal and their Watan Group are subcontractors who help deliver supplies to United States troops in Afghanistan. Defendant Uldric Fiore is the Army's Suspension and Debarment Official who, in response to perceived violations, has proposed debaring Plaintiffs from working with the U.S. military. Plaintiffs have initiated this action seeking to enjoin the Army from proceeding with its debarment. They claim that the proposed debarment is arbitrary and capricious and that being excluded from their supply work will result in irreparable harm. Defendants have now moved to dismiss the case on the ground that no final agency action has occurred. Because the Court agrees that the doctrine of finality prevents Plaintiffs' suit at present, Defendants' Motion will be granted.

## I. Factual and Procedural Background

### A. The Debarment Process

The Federal Acquisition Regulations (FAR) govern the process by which contractors may be debarred – that is, stripped of their ability to contract with the federal government. See 48 C.F.R. § 9.400 *et seq.* A contractor may be debarred for a number of reasons, including “[c]ommission of fraud or a criminal offense in connection with . . . performing a public contract or subcontract” and “[w]illful failure to perform in accordance with the terms of its contract.” §§ 9.406-2(a)(1)(iii), -2(b)(1)(i)(A). As soon as debarment is proposed, the contractor is placed on the Excluded Parties List System (EPLS), § 9.404(b)(1), which excludes it from receiving further contracts from the federal government. § 9.405(a).

Each agency is instructed to establish its own debarment procedure, provided it is “consistent with principles of fundamental fairness.” § 9.406-3(b)(1). When debarment is being proposed, a notice must be sent to the contractor informing it and giving the reasons why the action is being considered. § 9.406-3(c). The contractor must be allowed to submit “information and argument in opposition to the proposed debarment.” § 9.406-3(b)(1). Where the debarment is not the result of a civil or criminal judgment and this submission raises a genuine factual dispute, a hearing must be conducted. § 9.406-3(b)(2). If the debarment process is fact-based rather than judgment-based – *i.e.*, if a hearing is held – the debarring official must prepare written findings of fact, § 9.406-3(d)(2)(i), and the cause of debarment must be proven by a preponderance of the evidence. § 9.406-3(d)(3).

Final debarment is by no means an automatic sanction: “The existence of a cause for debarment, however, does not necessarily require that the contractor be debarred; the seriousness of the contractor's acts or omissions and any remedial measures or mitigating factors should be

considered in making any debarment decision.” § 9-406-1(a). In fact, the FAR specifies ten different mitigating factors and remedial measures the debarring official should consider “[b]efore arriving at any debarment decision.” Id. For example, he should consider whether “the contractor has fully investigated the circumstances surrounding the cause for debarment,” “cooperated fully with government Agencies,” and “implemented or agreed to implement remedial measures.” §§ 9.406-1(a)(1-10). The hearing process thus leads, in a sizeable number of instances, to the proposed debarment not being finalized. See Gov’t Mot., Exh. 1 (Declaration of Christine S. McCommas) at 2-3 (noting that out of 64 debarments proposed by the Army since 2005, only 25 have been finalized; since mid-2007, at least ten proposed debarments have been terminated based on materials submitted by contractor).

B. Watan

To help fulfill its mission in Afghanistan, the United States military decided to outsource the delivery and security of much of its supplies to local Afghan truckers. Compl., ¶ 13. This was achieved in March 2009 through the Host Nation Trucking (HNT) Contract, which was split among eight companies. Id., ¶¶ 13, 15-16. Some of those companies in turn subcontracted with Plaintiffs here. Plaintiffs Ahmed Rateb Popal and Rashid Popal are the owners of Watan Risk Management and other Watan-affiliated companies, all headquartered in Kabul, Afghanistan. Id., ¶ 5.

In the fall of 2009, a number of news articles reported on the increased insecurity of Afghanistan’s roads and the widespread use of bribes to ensure safe passage of goods. See id., ¶¶ 17-18. In response, an inquiry was launched by Representative John F. Tierney, who was at the time the Chair of the House Subcommittee on National Security and Foreign Affairs. See id., Exh. 1 (Warlord, Inc.: Extortion and Corruption Along the U.S. Supply Chain in Afghanistan,

House Committee on Oversight and Government Reform, Subcommittee on National Security and Foreign Affairs, 111th Congress, June 22, 2010, Methodology). In May 2010, the Popals met with members of the Subcommittee's staff in Dubai to aid in the research of this report. Compl., ¶ 19. During this interview, according to the report, Plaintiffs candidly admitted to paying bribes to various "security services" for safe passage. See, e.g., Warlord, Inc. at 29, 41.

On December 6, 2010, following the release of Warlord, Inc., the Army's Contract and Fiscal Law Division issued Notices of Proposed Debarment against Ahmed and Rashid Popal and Commander Ruhullah, a former Watan employee. Compl., ¶ 30. The Notices informed Plaintiffs that they faced debarment for failing to abide by the arming restrictions mandated by the HNT Contract and for improperly making payments to Afghan government officials to secure safe passage for their cargo. Id., ¶ 31; Pl. Mot. at 12.

On December 20, 2010, counsel for Plaintiffs met with Defendant Fiore to discuss the Notices and the factual basis behind the proposed debarment. Pl. Mot. at 12. During the meeting, Plaintiffs argued that the Warlord, Inc. report was flawed and should not be relied on. Id. On January 5, 2011, Plaintiffs responded to the Notices in a lengthy submission that assailed the factual basis for the proposed debarment. See id. at 13. The next week, the Army requested further information from Plaintiffs. Compl., ¶ 37. This request was accompanied by a memo summarizing the interview between Plaintiffs and Congressional staff in Dubai. Pl. Mot. at 14. Plaintiffs met with Fiore once again on January 28, 2011, and they thereafter provided the additional requested information in early February 2011. Id. The Army attempted to set a hearing on several occasions, but received no response to its requests. Gov't Mot. at 11.

Instead of then proceeding to the next stage of the debarment process – namely, the factual hearing – Plaintiffs filed suit in this Court to enjoin debarment on April 28, 2011. Defendants then filed the instant Motion to Dismiss.<sup>1</sup>

## II. Legal Standard

The D.C. Circuit has explained that the Administrative Procedure Act (APA) is not a “jurisdiction-conferring statute.” Trudeau v. FTC, 456 F.3d 178, 183 (D.C. Cir. 2006). Instead, subject-matter jurisdiction exists pursuant to the so-called “federal question” statute, 28 U.S.C. § 1331, which confers jurisdiction on federal courts to review agency action. Oryszak v. Sullivan, 576 F.3d 522, 524-25 (D.C. Cir. 2009) (citations omitted). In addition, “the provision of the APA limiting judicial review to ‘final agency action,’ 5 U.S.C. § 704, goes not to whether the court has jurisdiction but to whether the plaintiff has a cause of action.” Id. at 525 n.2 (holding that district court should have dismissed APA suit for failure to state a claim, not for want of subject matter jurisdiction). Rule 12(b)(6) is thus the proper framework for analysis.

That rule provides for the dismissal of an action where a complaint fails “to state a claim upon which relief can be granted.” When the sufficiency of a complaint is challenged under Rule 12(b)(6), the Court must “treat the complaint’s factual allegations as true . . . and must grant plaintiff ‘the benefit of all inferences that can be derived from the facts alleged.’” Sparrow v. United Air Lines, Inc., 216 F.3d 1111, 1113 (D.C. Cir. 2000) (quoting Schuler v. United States, 617 F.2d 605, 608 (D.C. Cir. 1979)) (internal citation omitted). The notice pleading rules are

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<sup>1</sup> In considering this Motion, the Court has reviewed Plaintiffs’ Complaint and Application for Preliminary Injunction, Defendants’ Opposition and their Motion to Dismiss or for Summary Judgment, Plaintiffs’ Reply and Opposition, and Defendants’ Reply. Not only were the briefs filed on an accelerated timetable, but, after consultation with the parties, the Court held an expedited hearing on June 14, 2011, and issued this Opinion three days later.

“not meant to impose a great burden upon a plaintiff.” Dura Pharms., Inc. v. Broudo, 544 U.S. 336, 347 (2005). But while “detailed factual allegations” are not necessary to withstand a Rule 12(b)(6) motion, Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 555 (2007), “a complaint must contain sufficient factual matter, accepted as true, to ‘state a claim to relief that is plausible on its face.’” Ashcroft v. Iqbal, 129 S. Ct. 1937, 1949 (2009) (quoting Twombly, 550 U.S. at 570). The Court need not accept as true, however, “‘a legal conclusion couched as a factual allegation,’” nor an inference unsupported by the facts set forth in the Complaint. Trudeau, 456 F.3d at 193 (quoting Papasan v. Allain, 478 U.S. 265, 286 (1986)). Plaintiff must put forth “factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged.” Iqbal, 129 S.Ct. at 1949. Though a plaintiff may survive a 12(b)(6) motion even if “recovery is very remote and unlikely,” Twombly, 550 U.S. at 556 (citing Scheuer v. Rhodes, 416 U.S. 232, 236 (1974)), the facts alleged in the complaint “must be enough to raise a right to relief above the speculative level.” Id. at 555.

### **III. Analysis**

Defendants argue that the Court should not reach the merits of Plaintiffs’ arguments about their proposed debarment. Instead, they contend, the Court should invoke the doctrine of finality and dismiss the case.

The doctrine of finality prevents courts from reviewing agency decisions before they are final so as to “avoid premature intervention in the administrative process.” CSI Aviation Services, Inc. v. U.S. Dept. of Transp., 637 F.3d 408, 410 (D.C. Cir. 2011). Finality is distinct from, though closely related to, the principles of ripeness and exhaustion. Darby v. Cisneros, 509 U.S. 137, 144 (1993) (“We have recognized that the judicial doctrine of exhaustion of administrative remedies is conceptually distinct from the doctrine of finality. ‘The

finality requirement is concerned with whether the initial decisionmaker has arrived at a definitive position on the issue that inflicts an actual, concrete injury; the exhaustion requirement generally refers to administrative and judicial procedures by which an injured party may seek review of an adverse decision and obtain a remedy if the decision is found to be unlawful or otherwise inappropriate.”) (quoting Williamson County Regional Planning Com'n v. Hamilton Bank of Johnson City, 473 U.S. 172, 192-93 (1985)); see also John Doe, Inc. v. Drug Enforcement Admin., 484 F.3d 561, 567 (D.C. Cir. 2007) (“Finality, ripeness, and exhaustion of administrative remedies are related, overlapping doctrines that are analytically but not categorically distinct. Exhaustion focuses on the process a litigant must follow; ripeness describes the fitness of issues for judicial review; finality focuses on the conclusiveness of agency action.”)

Unless otherwise provided by law, courts may only review agency decisions under the APA once they are final. 5 U.S.C. § 704 (“[F]inal agency action for which there is no other adequate remedy in a court [is] subject to judicial review.”); see also Myers v. Bethlehem Shipbuilding Corp., 303 U.S. 41, 50-51 (1938) (finding that it is a “long-settled rule of judicial administration that no one is entitled to judicial relief for a supposed or threatened injury until the prescribed administrative remedy has been exhausted”). An agency action is deemed final (1) when it “mark[s] the consummation of the agency’s decisionmaking process,” and (2) when the decision taken is one by which “rights or obligations have been determined, or from which legal consequences will flow.” Bennett v. Spear, 520 U.S. 154, 177-78 (1997) (internal citations omitted); see also Franklin v. Massachusetts, 505 U.S. 788, 797 (1992) (to determine finality, the “core question is whether the agency has completed its decisionmaking process, and whether the result of that process is one that will directly affect the parties”).

In challenging Defendants' reliance on finality, Plaintiffs first argue that the proposed debarment fulfills the second prong of the Bennett test. As they were placed on the EPLS immediately upon issuance of the notices of proposed debarment, they can no longer bid on government contracts. Legal consequences, they maintain, have thus flowed from this action. See Opp. at 5; but see Lasmer Industries, Inc. v. Defense Supply Center Columbus, 2008 WL 2457704 at \*6 (S.D. Ohio 2008) (notice of proposed debarring extension "not an action from which rights or obligations have been determined or from which legal consequences will flow").

The Court need not decide the question because where Plaintiffs' case falters is on the first prong of Bennett. This is because the decisionmaking process has simply not yet been consummated. The Army has not "rendered its last word on the matter," Whitman v. American Trucking Associations, 531 U.S. 457, 478 (2001), since the debarment process has not run its course. A notice of proposed debarment by its very name indicates that it is a preliminary decision that is "of a merely tentative or interlocutory nature." Bennett, 520 U.S. at 178. As noted above, debarment is a four-step process – issuance of notice, opportunity to respond, factual hearing, and final decision – half of which Plaintiffs have yet to complete. Plaintiffs still have the opportunity, as described above, to invoke all of their remedial measures and mitigating factors for the Army to consider. See § 9.406-1(a).

Plaintiffs nonetheless argue that a final determination has been made because the Army has already made up its mind, even if it may not yet have formally debarred Watan. Pl. Opp. 3-4. To support this position, Plaintiffs point to Defendants' Motion and highlight the "factual conclusions" that they claim the government has already reached. Id. at 4. Plaintiffs thus aver that allowing the debarment process to run its course would be "futile." Id. This argument holds little water for several reasons.

First, the regulations' emphasis on remedial measures and mitigating factors gives Plaintiffs an excellent opportunity to avoid the finalization of the debarment. They can, for example, explain how they cooperated in Dubai and should not be singled out for doing what they claim other contractors are also doing. That they believe the Army's decision on the admissibility of the Warlord, Inc. report dims their chances of success does not relieve them of the requirement to complete the agency process. See National Ass'n of Home Builders v. U.S. Army Corps of Engineers, 417 F.3d 1272, 1279 (D.C. Cir. 2005) ("the doctrine of finality would be no more than an empty box if the mere denial of a procedural advantage constituted final agency action subject to judicial review") (internal quotations and citations omitted). Second, Defendants have presented clear evidence that many proposed debarments do not lead to final debarment. See McCommas Declaration at 2-3. In fact, in the last four years alone, at least ten proposed debarments have not been finalized based on the contractors' submissions. Id. Third, the factual allegations made by Defendants in their pleadings should not be read as "prejudg[ing] the evidence," as Plaintiffs claim, id. at 5, but rather as necessary argument in the alternative. It would be shoddy lawyering indeed for Defendants to place all of their eggs in their finality basket and fail to address the merits at all. Such omission could be deemed a concession that the Army's actions were arbitrary and capricious and that the Congressional report is untrustworthy. See LCvR 7(b); see also Harrison v. Snow, 2004 WL 2915335 at \*1 (D.C. Cir. 2004) (quoting Twelve John Does v. District of Columbia, 117 F.3d 571, 577 (D.C. Cir.1997)) ("Where the district court relies on the absence of a response as a basis for treating a motion as conceded, we honor its enforcement' of Local Rule 7(b).").

Plaintiffs' argument that the Army has already made up its mind and is withholding a decision is especially bold considering that it is they, rather than the government, who have

halted the debarment process. See Compl., ¶ 40 (“To date, Plaintiffs are undecided on whether to agree to a factual hearing.”); Pl. Mot. at 14 (same); see also Gov’t Mot. at 17 (hearing normally held within 45 days of contractor’s written response to notice of proposed debarment). In short, Plaintiffs petition this Court to “bypass[] an administrative proceeding capable of granting the desired relief.” Peter Kiewit Sons' Co. v. U.S. Army Corps of Engineers, 714 F.2d 163, 167-68 (D.C. Cir. 1983). This the Court cannot do.

In their briefs, Plaintiffs posit that a Southern District of Ohio case, while not binding, is very persuasive in its handling of issues quite similar to those at play in this case. See Lasmer Industries, Inc. v. Defense Supply Center Columbus, 2008 WL 2457704 (S.D. Ohio 2008). They also contended at the hearing that Lasmer was correctly decided. The Court agrees that Lasmer is instructive, but believes its reasoning supports Defendants.

The procedural posture of Lasmer was nearly identical to the instant case. Lasmer Industries, which had been debarred from 2005-08, filed suit to enjoin a proposed extension of its debarment before an agency hearing had been held or the debarment extension finalized. Lasmer made three arguments: the Agency’s proposed debarring extension contradicted the FAR, the defendants exceeded their authority by issuing a notice of proposed extension, and the procedures outlined in the regulations denied Lasmer due process. Lasmer at \*4-5. Defendant there, like here, moved to dismiss on the ground that no final agency action had taken place. The only argument common to this case is the first – *i.e.*, the notice of proposed debarment extension should not have been issued. Plaintiffs here agreed at the hearing that they are not suggesting that the debarring official acted without authority or that the regulations are facially invalid. Nor

did Plaintiffs' briefs ever so contend.<sup>2</sup> The Lasmer court clearly rejected the plaintiffs' first argument, finding that the notice was not a final agency action and thus not reviewable under the APA. The same result should obtain here.

Plaintiffs finally argue that their challenge to the Army's debarment procedure should be viewed as a purely legal question for the Court rather than a factual question to be determined by the Agency. They contend that the admissibility of the Warlord, Inc. report is a legal issue, as is the question of whether the Army should be estopped from treating them unfairly. The ultimate questions for decision, however, are quintessentially factual ones: did they violate the contract, did they comply with arming restrictions, did they pay bribes, and did they employ sufficient remedial measures? This is, therefore, precisely the kind of factual analysis in which the Army engages by deploying its agency expertise and issuing its findings of fact. The Court does not know what the ultimate basis of debarment will be or even if the debarment will be finalized. In the event it is not, the analysis in which Plaintiffs ask this Court to engage would be entirely moot. If Plaintiffs feel they have been wronged by a final future decision, they may return to court. Only then may their grievance be entertained.

#### **IV. Conclusion**

The Court, accordingly, ORDERS that:

1. Defendants' Motion to Dismiss is GRANTED;
2. Plaintiffs' Motion for Preliminary Injunction is DENIED; and

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<sup>2</sup> Following the hearing, Plaintiffs submitted a pleading entitled "Plaintiffs' Clarification of Point Addressed At Oral Argument," which claimed that "counsel misspoke" at the hearing and should have "identified the third" Lasmer issue as relevant in this case. Id. at 1. Yet this third issue in Lasmer concerned whether the regulations themselves afforded due process where they gave no deadline for a final decision. That is not at all what Plaintiffs maintain here.

3. The case is DISMISSED.

**SO ORDERED.**

*/s/ James E. Boasberg*  
JAMES E. BOASBERG  
United States District Judge

Date: June 17, 2011