UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
ALEXANDRIA DIVISION

SUHAIL NAJIM ABDULLAH AL SHIMARI, *et al.*, Plaintiffs, v. CACI PREMIER TECHNOLOGY, INC., Defendant.	Case No. 1:08-cv-0827 LMB-JFA

STATUS REPORT OF PLAINTIFFS

Pursuant to the Court's November 28, 2017 order, Plaintiffs Al Shimari, Al-Ejaili, and Al-Zuba'e respectfully submit this status report in advance of the conference scheduled for January 3, 2018. Because the parties have not regularly appeared before Magistrate Judge Anderson over the nearly ten years of this litigation, Plaintiffs include a description of the procedural history and key prior judicial decisions in the case.

INTRODUCTION

This litigation was commenced in 2008 by Iraqi victims of torture perpetrated at the infamous Abu Ghraib prison in 2003 and 2004 by certain United States military personnel acting in concert with and under the direction of private contractors. Defendant CACI Premier Technology, Inc. ("CACI") is a for-profit U.S. corporation that was hired by the U.S. government to provide interrogation services at Abu Ghraib during the time when Plaintiffs were detained there. Military investigations have implicated CACI interrogators in the detainee abuses that took place at Abu Ghraib. Those investigations describe how a military command

vacuum existed that enabled CACI employees to direct low-level military police to inflict severe pain on detainees, including Plaintiffs, to "soften them up" for interrogation.

After discovery, multiple motions to dismiss from CACI, and three rulings by the Fourth Circuit in Plaintiffs' favor, this case is at last heading towards trial. Following the recent denial of CACI's Rule 12 motion to dismiss, Judge Brinkema made clear that the case "is going to go forward" and directed the parties to resolve any lingering discovery issues or "sit down either with Judge Anderson or a private mediator" to discuss settlement.[1] (Dkt. 653-2 at 21:18-24.) Over CACI's initial opposition, Judge Anderson granted Plaintiffs' motion to hold a status conference to resolve these remaining discovery issues. (Dkt. 656.)

The remaining discovery issues are few in number and narrow in scope. There has already been robust discovery in this case, including depositions of Plaintiffs and military personnel at Abu Ghraib, document productions from CACI and the U.S. Government, and the extensive document and deposition discovery taken in the factually related case, *Saleh v. Titan Corp.*, No. 05-cv-1165 (D.D.C.). Indeed, CACI has previously taken the position that, outside of the motions to compel, discovery was complete when the initial discovery period closed in April 2013. (*See* Dkt. 499 at 1, 5.) At the present time, there remain only a small number of outstanding motions to compel production from the Government, which were fully briefed but dismissed as moot when the District Court dismissed this case in 2013. (Dkt. 460.) There is no need to re-brief the motions to compel, which largely concern evidence that Plaintiffs maintain is unnecessary to resolve their claim that CACI conspired with, and aided and abetted, U.S. military personnel to torture Plaintiffs and other detainees at Abu Ghraib in late 2003 and early

[1] In accordance with this instruction, Plaintiffs sent CACI a written settlement proposal and are prepared to address that proposal at the conference.

2004. Beyond those outstanding motions, Plaintiffs have a small number of unresolved requests to the Government for specific documents, which were pursued well before the close of the initial discovery period in 2013.

These discovery issues are ripe to resolve. CACI has argued in the past that Plaintiffs need evidence directly linking CACI interrogators to the Plaintiffs, a statement that is legally incorrect for the conspiracy and aiding and abetting claims that are at the center of this case. Plaintiffs must show that CACI was a co-conspirator with the military police, not that CACI employees directly mistreated the Plaintiffs abuse as CACI has contended. Further discovery into the interrogators is a sideshow to Plaintiffs' case, and Plaintiffs would oppose any attempt by CACI to reopen general discovery, which is unnecessary and will only serve to further delay resolution of this almost decade-long litigation. The case therefore should move promptly to final pretrial proceedings and trial.

BACKGROUND

Plaintiffs are three Iraqi civilians who were detained by the United States during its military occupation of Iraq and who were subsequently tortured and subjected to cruel and inhuman treatment while being held at Abu Ghraib prison's "Hard Site" in 2003 and 2004. While in custody, Plaintiffs were subjected to serious abuse—repeated beatings, sexual assaults, the use of painful stress positions for extended periods of time, intimidation through unmuzzled military working dogs, sleep and sensory deprivation, and prolonged periods of forced nudity during winter conditions. (*See* Dkt. 639 at 3-16.)[2] Plaintiffs, who were not held as so-called "enemy combatants," *see Al Shimari v. CACI Premier Tech., Inc.*, 758 F.3d 516, 521 n.2 (4th

[2] CACI argued in its recent motion to dismiss that this treatment was insufficiently serious to support actionable claims for torture, war crimes, or cruel, inhuman, or degrading treatment pursuant to the Alien Tort Statute. (Dkt. 627 at 12-25.) Judge Brinkema denied this motion from the bench. (Dkt. 653-2 at 22:17.)

Cir. 2014) ("*Al Shimari III*"), were released without charges. They have been living with the physical and mental scars from their abuse ever since.

In the wake of revelations of serious mistreatment of detainees at Abu Ghraib, several military investigations concluded that CACI employees directed and participated in the horrific abuses that occurred. *Id.* at 521 (citing reports of Major General Antonio M. Taguba ("Taguba Report") and Major General George R. Fay ("Fay Report")). Several CACI co-conspirators, including military police ("MPs") Charles Graner and Ivan Frederick II who acted under the direction of CACI, were convicted by U.S. courts martial for their role in abusing detainees. Mr. Graner and Mr. Frederick have implicated CACI in directing the abuses at Abu Ghraib of the kind suffered by Plaintiffs in sworn depositions taken in the present case.

In 2008, Plaintiffs initiated this proceeding against CACI, alleging that CACI conspired with and aided and abetted low-level U.S. military personnel who tortured and otherwise seriously abused them at the Abu Ghraib Hard Site beginning in the fall of 2003 and continuing into early 2004. In their Third Amended Complaint ("TAC") (Dkt. 251), Plaintiffs reasserted their claims against CACI for war crimes, torture, and cruel, inhuman, or degrading treatment ("CIDT") under the Alien Tort Statute, 28 U.S.C. § 1350, for conduct prohibited under *inter alia* the Torture Statute, 18 U.S.C. § 2340, the War Crimes Act, 18 U.S.C. § 2441, and international law.[3] The TAC incorporated the extensive discovery already taken in the case at that point, including the deposition of Mr. Al Ejaili, military investigation reports, court martial records, depositions of the MPs, and Plaintiffs' expert reports.

[3] The TAC also asserted common law tort claims for Mr. Al Shimari. All Plaintiffs voluntarily dismissed those claims with prejudice earlier this year. (Dkt. 575.)

The claims of Mr. Taha Rashid were dismissed by this Court without prejudice in early 2017 after he was detained in Iraq while attempting to travel to attend his deposition. (Dkt. 598-1, 607.) Mr. Rashid subsequently has been released without charge and he expects to move to have his claims reinstated. (Dkt. 650.)[4]

A. The Conspiracy and CACI's Involvement

The conspiracy between CACI and U.S. military personnel began no later than October 2003, when the conspirators named in the TAC were working in the Hard Site at Abu Ghraib. It ended around February 2004 when military authorities received photographs and information concerning the abusive conduct that had been occurring.

MPs guarded detainees at the Hard Site under the direction of CACI employees and Military Intelligence personnel ("MIs") who conducted interrogations. (*See* TAC ¶ 17.) Although officers of the MP Company were supposed to have been in charge of the MPs, subsequent military investigations determined that there was a command vacuum—confirmed by testimony offered by MP co-conspirators in this case—that led CACI employees and MIs to take over. (*Id.* ¶ 18.) CACI interrogators had access to the areas of Abu Ghraib where detainees were held, which led to confusion among MPs as to whether those CACI employees were military or civilian personnel. (*Id.* ¶¶ 89, 96.) The confusion was exacerbated as CACI personnel gave directions to military personnel and sought to position themselves as authority figures at the Hard Site. (*Id.* ¶ 96.) Under these conditions, the conspiracy to torture and otherwise seriously abuse Plaintiffs and other detainees began and continued unchecked. (*Id.* ¶¶ 144-145.) Given the command vacuum, CACI was able to direct, encourage, substantially support, and ratify detainee

[4] For purposes of the background section to this status report, references to "Plaintiffs" include Mr. Rashid (who was then an active plaintiff) unless otherwise noted.

abuse in order to "extract more information from detainees to please" its "single most important customer," the United States government. (*Id.* ¶¶ 156, 157.) Defendant's participation in the torture and abuse of Plaintiffs enabled it to reap millions of dollars in profits as a result. (*See id.* ¶ 10.)

The facts "on the ground" at Abu Ghraib and CACI's involvement were confirmed by military personnel who were subsequently sentenced by court martial to prison terms in connection with their involvement in the abuse. For example, then-Staff Sergeant Ivan Frederick—who was sentenced by court martial to eight years' imprisonment for his participation in abuse at Abu Ghraib and demoted to Private—testified that civilian interrogators employed by CACI filled the command vacuum at the Hard Site by assuming de facto positions of authority. (*Id.* ¶ 18.) CACI interrogators instructed Frederick and other MPs to "soften up" detainees at the Hard Site for interrogation using the specific techniques described by Plaintiffs. (*Id*. ¶¶ 18, 78, 118.) Frederick testified in a deposition in this case that CACI personnel ordered him to set the conditions for abusing detainees and ordered severe forms of abuse (*id.* ¶¶ 18, 115, 116), which often occurred during the night shift, not during formal interrogation sessions (*id.* ¶ 78). CACI employees knew, and military personnel understood, that "setting conditions" for interrogations equated to serious physical and mental harm in an attempt to make detainees more responsive to questioning. (*Id.* ¶ 114.) Then-Corporal Charles Graner—who was sentenced by court martial to ten years' imprisonment for his participation in the Abu Ghraib abuse and demoted to Private—also gave sworn testimony that he seriously mistreated detainees on the instructions of CACI employees Steven Stefanowicz and Daniel Johnson. (*Id.* ¶ 100.)

Plaintiffs identified Graner and Frederick as individuals who beat and/or abused them and other detainees at the Hard Site. (*Id.* ¶¶ 131-135.) In their depositions, the Plaintiffs also

testified that civilian interrogators participated in and directed MPs to conduct the abuse they suffered. (*See* Dkt. 639-2, Ex. A (Al-Ejaili Tr.) at 51:22-52:10, 54:13-17, 56:11-21; Ex. G (Al-Zuba'e Tr.) at 33:18-21, 35:10-37:5, 40:4-41:9, 46:4-5, 67:19-71:5, 76:4-19, 90:22-93:4; Ex. J (Al Shimari Tr.) at 45:17-46:13, 50:3-17, 56:13-19, 63:2-64:15, 120:1-19, 120:20-121:1.)

CACI's involvement in the conspiracy to torture or otherwise abuse Hard Site detainees was also confirmed in the Taguba and Fay Reports, which found that acts of "sadistic, blatant, and wanton criminal" abuse occurred at Abu Ghraib and that CACI employees, along with other conspirators, had "responsibility or complicity in the abuses that occurred at Abu Ghraib." (*Id.* ¶¶ 78, 81.) The Fay Report concluded that, "[w]hat started as nakedness and humiliation, stress and physical training (exercise), carried over into sexual and physical assaults by a small group of morally corrupt and unsupervised soldiers and civilians." (*Id.* ¶ 82.) The civilians identified by the Fay Investigation included at least five CACI employees. (*Id.*) The Taguba Report similarly identified CACI employees as being directly or indirectly responsible for the detainee abuses and operating with the MPs in a "conspiracy of silence." (*Id.* ¶ 83-84.)

As a result of this conspiracy, Plaintiffs suffered severe physical and psychological mistreatment at Abu Ghraib. (Dkt. 639 at 3-16 (detailing the specific abuses suffered by the Plaintiffs)). This severe mistreatment—as documented in Plaintiffs' deposition testimony, interrogatories, and the examinations and expert reports by Plaintiffs' medical expert, Dr. Stephen N. Xenakis—has resulted in permanent physical and mental harm to the Plaintiffs, including scars, lasting pain, post-traumatic stress disorder, and severe depression. (*Id*. at 7, 11-12, 15-16.)

B. Procedural History

This case has a lengthy procedural history, including multiple periods of discovery.

1. Early Proceedings and CACI's Premature Appeal

Plaintiff Al Shimari initiated this case in Ohio federal court in 2008 and the case was subsequently transferred here. The case was assigned to Judge Gerald Bruce Lee. Soon after the transfer, Plaintiffs filed their First Amended Complaint. (Dkt. 28.) CACI moved to dismiss Plaintiffs' claims under the political question doctrine ("PQD"), failure to state a claim (including on the conspiracy claim) and various other theories. The District Court denied the motion on March 18, 2009 and upheld a subset of Plaintiffs' claims, though it dismissed Plaintiffs' claims under the Alien Tort Statute ("ATS"). (Dkt. 94.) CACI appealed, and although a panel of the Fourth Circuit initially reversed,[5] it subsequently reheard the case *en banc* and held in May 2012 that there was no appellate jurisdiction over CACI's premature appeal, reinstating the case.[6]

In connection with CACI's appeal, the Fourth Circuit invited the United States to participate. The United States filed an amicus brief asserting that Plaintiffs' claims should proceed based on "the strong federal interest" in remediating claims arising out of the violations of the federal torture statute (18 U.S.C. § 2340), such as the claims raised in this case against a private contractor for violations at Abu Ghraib, but the United States did not seek to intervene in the litigation. *See* Brief of United States as Amicus Curiae at 22, *Al Shimari v. CACI Int'l, Inc.*, No. 09-1335 (4th Cir. Jan. 14, 2012), dkt. 146.

On remand, the District Court granted Plaintiffs' motion to reinstate their ATS claims, recognizing that torture, war crimes, and CIDT are torts whose prohibition is "specific and universal and obligatory." (Dkt. 159; Dkt. 471, at 26:11-23.) After having affirmed the

[5] *See Al Shimari v. CACI Int'l Inc.*, 658 F.3d 413, 420 (4th Cir. 2011) ("*Al Shimari I*").

[6] *Al Shimari v. CACI Int'l, Inc.*, 679 F.3d 205, 212 (4th Cir. 2012) (en banc) ("*Al Shimari II*"), vacating *Al Shimari I*, 658 F.3d 413.

conspiracy claims in its decision on CACI's first motion to dismiss, dkt. 94, the District Court subsequently dismissed the conspiracy allegations without prejudice in the Second Amended Complaint as legally insufficient, dkt. 215. Plaintiffs filed the TAC with additional support for their conspiracy allegations on March 28, 2013. (Dkt. 254.)

2. Discovery

The parties engaged in extensive fact and expert discovery in late 2012 and early 2013, with discovery closing on April 26, 2013. To start, the parties agreed that the extensive discovery record from a factually related case, *Saleh v. Titan Corp*., No. 05-cv-1165 (D.D.C.)—including numerous depositions—would be treated as if it had been produced in this action. In addition, the parties exchanged documents and information, and took numerous depositions, including fact depositions of Mr. Al Ejaili, multiple former military officers and MPs who were present at Abu Ghraib at the time of Plaintiffs' abuse, and a Rule 30(b)(6) deposition of CACI's designated corporate representative. All Plaintiffs submitted medical expert reports, in addition to four additional expert reports.[7] CACI did not submit any expert reports.

CACI also noticed the Plaintiffs for depositions and medical examinations and insisted that Plaintiffs travel to the United States for those examinations. Plaintiff Al-Ejaili was able to travel to the United States for his deposition and defendant's medical examination.[8] The three other plaintiffs (Mr. Al Shimari, Mr. Al-Zuba'e, and then-Plaintiff Mr. Rashid) were issued visas by the U.S. Embassy in Baghdad to travel to the United States in February 2013—a process that necessarily requires a thorough security screening--and purchased tickets and secured boarding

[7] All four plaintiffs provided confidential expert medical reports to CACI on February 1, 2013, following medical examinations of Plaintiffs in Erbil, Iraq by Dr. Xenakis, a board certified physician and retired U.S. Army brigadier general. (*See* Dkt. 639, Exs. D, K, and M (confidential medical reports on Plaintiffs).)

[8] Although Mr. Al-Ejaili met with CACI's medical expert in March 2013, CACI did not submit an expert medical report.

passes for a flight to the United States in March 2013 to appear for their depositions. (*See* Dkt. 410 ¶¶ 24, 29, 31-32.) Without any explanation, and under unusual circumstances, these three plaintiffs were prevented from boarding their flight at the gate of the airport in Baghdad and were therefore unable to appear for the noticed depositions. Although these three plaintiffs were unable to enter the United States despite their best efforts (*see* Dkt. 409 at 4, 9), CACI refused to agree to depose the three Plaintiffs via video link or to have them travel to a country such as Turkey to be deposed. Instead, CACI repeatedly moved to have their claims dismissed as a sanction for failing to appear for the depositions.[9] (*See* Dkt. 258; Dkt. 367.) As explained further below, all three current Plaintiffs have now been deposed by CACI.

During the initial discovery period, the parties also received extensive third-party discovery from the U.S. Government. (Dkt. 653 at 5.) This discovery included the trial exhibits and transcripts of depositions taken in court martial and Article 32 proceedings against twelve soldiers for detainee abuse that occurred at Abu Ghraib, as well as copies of the Taguba and Fay Reports along with related annexes. The Government also produced partially redacted copies of Plaintiffs' detainee files, though there were lingering questions that Plaintiffs raised with the Government prior to the close of discovery regarding the completeness of the Government's search for responsive documents and production in light of references in news reports to other unproduced documents mentioning Plaintiffs. (*See* Dkt. 491, Ex. D.) In particular, Plaintiffs requested that the Government produce certifications related to the admissibility of certain produced documents and also that it search for and produce specific MP log books containing

[9] As a result, the parties spent considerable resources briefing CACI's motions and seeking discovery concerning why these three plaintiffs had been prevented from boarding their flights after obtaining U.S. visas and boarding passes.

information related to Plaintiffs and an additional photograph of one of the Plaintiffs. (*Id.*) The Government did not respond to this request prior to the dismissal of the case in 2013.

Right before the close of discovery, CACI filed two motions to compel. First, CACI moved to compel the Government to disclose the identity of the specific individuals who participated in the interrogation of Plaintiffs so they could be deposed. (Dkt. 275; Dkt. 276.) Second, CACI moved to compel the Government to produce complete and unredacted copies of the Taguba and Fay Reports, as well as the Review of Department of Defense Detention Operations and Detainee Interrogation Techniques authored by Vice Admiral Albert Church, III ("Church Report").[10] (Dkt. 279; Dkt. 280 at 1-5.) Plaintiffs also filed two motions to compel. (Dkt. 380; Dkt. 392.) The first motion sought documents and information from the Government regarding the denial of Messrs. Al Shimari, Rashid, and Al-Zuba'e attempts to travel to the United States for their depositions. (Dkt. 381.) The second motion sought to compel additional testimony from CACI's Rule 30(b)(6) corporate designee, who was inadequately prepared to testify regarding the noticed topics at deposition, particularly CACI's involvement in three of the Plaintiffs being prevented from boarding their flight to attend their depositions. (Dkt. 393.)[11] Briefing for these four motions was completed by May 9, 2013; however, the District Court stayed all motions on that date after CACI filed a motion to dismiss Plaintiffs' ATS claims in light of the Supreme Court's decision in *Kiobel v. Royal Dutch Petroleum Co.*, 133 S. Ct. 1659 (2013). (*See* Dkt. 433.)

[10] CACI also moved to compel the United States to produce the authors of these reports for deposition. (Dkt. 261.) That motion was denied. (Dkt. 309.)

[11] These motions may now be moot as all current Plaintiffs have been deposed, although they could have renewed relevance depending on former Plaintiff Mr. Rashid's circumstances. (*See* Dkt. 651.)

3. The Fourth Circuit's *Kiobel* Decision Reinstates Plaintiffs' ATS Claims

On June 25, 2013, the District Court dismissed this case on the grounds that it lacked ATS jurisdiction in the wake of *Kiobel*. (Dkt. 460.) The District Court simultaneously denied as moot several outstanding motions, including the four outstanding motions to compel that had been filed by CACI and Plaintiffs. (*Id.*)

The Fourth Circuit reversed the District Court's order and held that Plaintiffs' lawsuit sufficiently "touches and concerns" the United States so as to displace the ATS's presumption against extraterritoriality. *See Al Shimari III*, 758 F.3d at 537. On appeal, CACI had also raised the PQD as an alternative ground to affirm the District Court's dismissal; however, the Fourth Circuit remanded the case with instructions for the District Court to further develop the record in order to resolve the PQD defense raised by CACI. *Id.* at 531-37.

4. PQD Discovery

On remand, CACI argued "no additional discovery is necessary" to resolve the PQD issue in its favor. (Dkt. 486 at 6.) CACI emphasized that "the parties have had every opportunity to take discovery in this action and the discovery period closed" prior to dismissal of Plaintiffs' TAC. (*Id.*) Plaintiffs agreed that the parties should proceed with briefing the PQD issue, and they agreed with CACI that the District Court need not resolve the discovery motions that the District Court had previously dismissed as moot prior to deciding the PQD issue. (Dkt. 488 at 5-6.)

After the Government informed Plaintiffs that it would not make any additional production arising out of outstanding discovery requests and commitments that Plaintiffs had obtained prior to the 2013 dismissal of the case absent direction from the court (*id*. at 6), Plaintiffs moved to compel the Government to produce a subset of documents still at issue that

they believed to be potentially relevant to the PQD briefing (Dkt. 492).[12] That motion was denied without prejudice as premature because discovery had not yet been reopened. (Dkt. 495.) The District Court subsequently reopened discovery for 120 days without any limit on its scope, (Dkt. 497); however, CACI promptly moved for modification of the Court's order and sought to restrict the scope of permissible discovery. (Dkt. 499.) CACI requested that discovery be limited to jurisdictional discovery bearing on PQD and also requested that the Court require any party seeking discovery "to show good cause for seeking discovery it did not adequately pursue during the prior discovery period." (*Id.* at 1.) The District Court entered a consent order limiting discovery to jurisdictional discovery related to the PQD issue. (Dkt. 507.)

5. The Fourth Circuit's PQD Decision Reinstates Plaintiffs' Claims

After briefing on the PQD issue, the District Court held that Plaintiffs' suit raised a nonjusticiable political question and therefore dismissed Plaintiffs' case yet again. (Dkt. 547.) In October 2016, the Fourth Circuit vacated the District Court's decision. *Al Shimari v. CACI Premier Tech., Inc.*, 840 F.3d 147 (4th Cir. 2016) ("*Al Shimari IV*"). The Court of Appeals held that the PQD defense does not shield a defendant that engaged in unlawful conduct, including violations of international law, even if, as CACI alleged, such conduct was done at the behest of the U.S. military. *Id*. at 151. The Court of Appeals made clear that such conduct could not be lawfully authorized, and that the issue of military (or governmental) control is therefore irrelevant when the conduct is unlawful. *Id*.

[12] The United States ultimately produced certifications requested by Plaintiffs for the Taguba and Fay reports.

6. Proceedings on Remand from *Al Shimari IV*

Immediately after *Al Shimari IV* was issued, Judge Lee recused himself *sua sponte* and the case was reassigned to Judge Brinkema. After the case was reassigned, the parties submitted status reports setting forth their respective positions on how the case should proceed on remand. (Dkt. 564; Dkt. 568.) In their status report, Plaintiffs noted that there remained certain outstanding discovery issues that Plaintiffs would pursue with the Government. (*See* Dkt. 568 at 19, 22.) Plaintiffs intended to renew prior requests for specific MP log books from the military that referenced Plaintiffs, an issue that had been raised with the DOJ prior to the close of discovery in 2013, s*ee* dkt. 49, Ex. D.

The District Court determined that it needed to resolve the PQD jurisdictional issue first, (Dkt. 653 at 7), and it ordered that the depositions of the as yet un-deposed Plaintiffs be taken via video link after concluding that this was the only discovery needed to determine whether the specific conduct alleged in the TAC was unlawful and therefore outside the scope of the PQD. (*See, e.g.*, Dkt. 571.) Plaintiffs Mr. Al-Zuba'e and Mr. Al Shimari traveled to Beirut where video depositions were conducted in February 2017; Mr. Rashid was unable to travel due to his detention.

After those depositions took place, the District Court instructed CACI to file a motion raising any Rule 12 arguments it intended to make, including its PQD defense. (Dkt. 616, 620.) CACI moved to dismiss pursuant to Rule 12(b)(1) and 12(b)(6) on a variety of grounds, including lack of jurisdiction and failure to state a claim. (Dkt. 626, 627.) CACI argued—among other things—that the abuses suffered by Plaintiffs were insufficiently serious to be actionable as claims for torture, CIDT, or war crimes pursuant to the ATS. (Dkt. 627 at 12-25.) On September 22, 2017, the Court denied CACI's motion to dismiss from the bench. (Dkt. 653-2 at

22:17.) The Court informed CACI that the case would go forward and it instructed the parties to address any lingering discovery issues and/or engage in settlement discussions. (*Id.* at 21:18-24.) In light of the Court's instructions, Plaintiffs contacted CACI about jointly requesting a conference before Judge Anderson and filed a motion seeking the conference after CACI refused to consent. (*Id.* at 8.) Plaintiffs also communicated a settlement proposal to CACI, to which they have not yet received a response.

PLAINTIFFS' PROPOSED DISCOVERY PLAN

Discovery concluded in this case in April 2013, supplemented by jurisdictional discovery and the depositions of Mr. Al Shimari and Mr. Al-Zuba'e. The only discovery that should be permitted at this point involves resolving open discovery issues. This consists of whatever prior motions to compel CACI wishes to renew and, for Plaintiffs, following up with the Government on the issues of specific MP log books referencing Plaintiffs and a photograph of one of the Plaintiffs, issues that were pending before the close of discovery, dkt. 49, Ex. D.[13]

Resolving these discovery issues should not require much time. Plaintiffs believe that their own outstanding discovery issues with the Government can be resolved promptly and need not delay the proceedings. CACI's motions to compel were fully briefed in 2013 and are ripe for decision by this Court. Plaintiffs have taken no position on CACI's motions to compel, but have argued that the discovery sought by CACI is unnecessary for Plaintiffs to prove their case. (Dkt. 328 at 2.)

Plaintiffs' conspiracy or aiding and abetting theories of liability do not require evidence that CACI employees had direct contact with Plaintiffs, so the identity of specific interrogators

[13] Plaintiffs also intend to request additional business record certifications from the Government regarding documents previously produced, such as the Plaintiffs' detainee files.

assigned to Plaintiffs is not required for Plaintiffs to prevail at trial. (Dkt 639 at 30-40.) CACI itself has previously acknowledged (in a brief filed in this case) that a defendant can be liable for the acts of a co-conspirator "even if the defendant had no involvement with the actions that injured the plaintiff." (Dkt. 222 at 11.) CACI is correct: a defendant may be held liable for the substantive offenses that his *co-conspirators* committed in furtherance of a conspiracy when their commission is reasonably foreseeable. *See United States v. Oliver,* No. 12-4047, No. 12-4052, 2013 U.S. App. LEXIS 4741, at *9 (4th Cir. Mar. 8, 2013); *Brown v. Gilner,* No. 1:10-cv-00980 (AJT/IDD), 2012 U.S. Dist. LEXIS 138662,*24 (E.D. Va. Sept. 25, 2012) (applying Virginia law). Similarly, aiding and abetting liability requires only that CACI's directions constituted *practical assistance* to the MPs who engaged in torture that had a *substantial effect* on their conduct, and were *knowingly* given with the *purpose of inducing or facilitating* the MPs' illegal abuse of detainees in the hopes of eliciting information in their interrogations. *See Aziz v. Alcolac,* 658 F.3d 388, 396 (4th Cir. 2011); Restatement (Second) of Torts § 876. No direct interaction between CACI and Plaintiffs is required. The evidence sought by CACI regarding the official interrogator identities is not integral to the case; it does not justify further delay.

While Plaintiffs take no position on the motions to compel brought by CACI, those motions are no doubt a stratagem to manufacture yet another ground to move for dismissal by seeking to induce the United States to invoke the states secret privilege and then moving for dismissal on that basis. (Dkt. 276 at 4 (statement by CACI that, "[i]f the end result is that the United States invokes the state secrets privilege to withhold detainee-specific interrogation information from CACI PT, it would not be the first time that civil suits arising from the War on Terror must be dismissed because their litigation would require disclosure of state secrets").) As the Government aptly observed in opposing CACI's motion, CACI should not be permitted to

"forc[e] a showdown on the [United States'] claim of privilege"—here, with the express intention of having the Government invoke the state secrets privilege—without pursuing reasonable alternatives "that would vitiate the relevance of the classified information sought by CACI." (Dkt. 324 at 19-20.) And as Judge Brinkema indicated recently at oral argument, regardless of whether discovery shows that a CACI employee interrogated Plaintiffs, evidence that CACI was involved in a conspiracy to abuse detainees for information is sufficient to get to a jury even if CACI's actions do not relate to a particular Plaintiff. (Dkt. 653-2 at 20:8-15.) Discovery in this case has already produced ample evidence, as incorporated in the TAC, of CACI's involvement in a conspiracy with military personnel to abuse detainees at Abu Ghraib. (Dkt 639 at 30-40.)

Finally, Plaintiffs will provide any available updates regarding Mr. Rashid's status at the conference on January 3, 2018. At this time, we understand that he is at liberty in Iraq but has not been able to secure documents that would permit him to travel to a location where he can give a deposition. If he is able to do so in the near future so as not to delay the current litigation, he will promptly move for reinstatement.

CONCLUSION

For the reasons above, Plaintiffs request that the Court resolve the limited outstanding discovery issues and establish a schedule for final pretrial proceedings and trial.

Dated: December 27, 2017

Respectfully submitted,

/s/ John Kenneth Zwerling

John Kenneth Zwerling (VA Bar #08201)
THE LAW OFFICES OF JOHN KENNETH ZWERLING, P.C.
114 North Alfred Street
Alexandria, Virginia 22314
Tel. 703-684-8000

jz@zwerling.com

Baher Azmy, *Admitted pro hac vice*
Katherine Gallagher, *Admitted pro hac vice*
CENTER FOR CONSTITUTIONAL RIGHTS
666 Broadway, 7th Floor
New York, NY 10012

Robert P. LoBue, *Admitted pro hac vice*
PATTERSON BELKNAP WEBB & TYLER LLP
1133 Avenue of the Americas
New York, New York 10046

Shereef Hadi Akeel, *Admitted pro hac vice*
AKEEL & VALENTINE, P.C.
888 West Big Beaver Road
Troy, MI 48084-4736

Attorneys for Plaintiffs

CERTIFICATE OF SERVICE

I hereby certify that on December 27, 2017, I electronically filed Plaintiffs' Discovery Report through the CM/ECF system, which sends notification to counsel for Defendant.

/s/ John Kenneth Zwerling
John Kenneth Zwerling (VA Bar #08201)