UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA

SUHAIL NAJIM ABDULLAH AL SHIMARI, *et al*., Plaintiffs, v. CACI PREMIER TECHNOLOGY, INC., Defendant,	)	No. 1:08-cv-0827 LMB-JFA
CACI PREMIER TECHNOLOGY, INC., Third-Party Plaintiff, v. UNITED STATES OF AMERICA, and JOHN DOES 1-60, Third-Party Defendants.	)	

DEFENDANT/THIRD-PARTY PLAINTIFF CACI PREMIER TECHNOLOGY, INC.'S REPLY IN SUPPORT OF ITS SUGGESTION OF LACK OF SUBJECT MATTER JURISDICTION

I. INTRODUCTION

The analytical framework mandated by *Jesner v. Arab Bank, plc*, 138 S. Ct. 1386 (2018), precludes judicial recognition of private rights of actions under Alien Tort Statute ("ATS") that arise out of military operations in a war. Plaintiffs' opposition admits that language in *Jesner* "could be read to portend what CACI claims is a broader rollback of ATS," but argues that CACI PT[1] is relying on "stray language [that is] taken out of context." Pl. Opp. at 14. There is an

[1] "CACI PT" refers to Defendant/Third-Party Plaintiff CACI Premier Technology, Inc.

irony in Plaintiffs' argument because CACI PT's memorandum dealt extensively, and nearly exclusively, with the actual language used by the majority in *Jesner*. Plaintiffs' opposition, by contrast, largely avoids confronting what *Jesner* actually said, and instead laments that CACI PT's arguments would change ATS litigation as it has existed since 1980. Plaintiffs' nostalgia for prior case law aside, it is *Jesner*, not CACI PT, that has clarified and refined the required approach when considering claims brought under ATS. CACI PT is merely asking the Court to do what *Jesner* commands.

Indeed, Plaintiffs' opposition is distinctly pre-*Jesner* in its thinking.[2] Plaintiffs devote remarkably little of their opposition to actually discussing the majority's analysis in *Jesner*. Instead, Plaintiffs cite no fewer than twenty-seven lower federal court cases decided before *Jesner* for the proposition that *Jesner* should be more or less limited to its facts. But neither jurisprudence nor time works this way. Lower federal court decisions cannot alter the mandatory framework adopted in *Jesner*, and lower federal court decisions issued before *Jesner* certainly have no bearing on what *Jesner* means or how it should be applied. A fair and honest reading of *Jesner* is fatal to Plaintiffs' claims.

II. ANALYSIS

Plaintiffs' opposition begins inauspiciously by accusing CACI PT of "seiz[ing] on, and inflat[ing], select passages from [the *Jesner*] ***plurality opinion***." Pl. Opp. at 1 (emphasis added). CACI PT does not rely on a "plurality opinion" that the Court can take or leave as it wishes; CACI PT's arguments are grounded ***exclusively*** in Parts I, II-B-1, and II-C of Justice Kennedy's opinion in *Jesner*, all of which are joined by a majority of the Supreme Court and constitute

[2] For its part, the United States did not file a response to CACI PT's suggestion of lack of subject-matter jurisdiction, perhaps because the United States is a party only as a third-party defendant. Given the nature of CACI PT's arguments, the Court might benefit from receiving the views of the United States.

binding holdings of the Court. Plaintiffs repeat this error four additional times in their opposition, each time attempting to downgrade the Court's holdings in *Jesner* to the musings of a plurality. Pl. Opp. at 11, 13, 14, 15. As explained below, however, Plaintiffs cannot sidestep the mandatory framework for evaluating ATS adopted by the Court in *Jesner*. Plaintiffs' arguments are not true to that framework, and do not provide a basis for ignoring *Jesner* in favor of older, mostly lower-court cases that Plaintiffs like better.

A. Plaintiffs' Opposition Asks the Court to Apply *Sosa*'s Framework While Ignoring *Jesner*'s Detailed Refinement of the *Sosa* Framework

There are three Supreme Court decisions addressing ATS: *Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004); *Kiobel v. Royal Dutch Petroleum Co.*, 569 U.S. 108 (2013); and *Jesner*, 138 S. Ct. 1386 (2018). In *Sosa*, the Court held that ATS was jurisdictional only, and its ultimate decision was that the plaintiff's ATS claim failed because an illegal detention of limited duration was not a universally-recognized violation of international law. *Sosa*, 542 U.S. at 738. But Plaintiffs like *Sosa*, so they tell the Court that it must follow not only *Sosa*'s ultimate decision, which is irrelevant to this case, but also the framework adopted in *Sosa* for evaluating ATS claims. Pl. Opp. at 8.

Plaintiffs do not like the Supreme Court's decisions in *Kiobel* and *Jesner* so much, so they sing a different tune. Plaintiffs tell the Court that it should ignore those cases' pronouncements regarding the framework for evaluating ATS claims and limit *Kiobel* and *Jesner* to their specific facts. Plaintiffs' approach creates a Frankenstein's monster of a rule that treats *Sosa*'s general framework as supreme while carving out only the specific facts that were at issue in *Kiobel* and *Jesner*. As Plaintiffs would explain it:

> Following *Jesner*, the ATS landscape now appears to be as follows: (i) under *Sosa*, courts must ensure that a claim raises a norm that is sufficiently "specific, universal and obligatory"; (ii) under *Kiobel*, a court must ask if the "relevant conduct" underlying

> a claim sufficiently "touch[es] and concern[s]" the United States so as to overcome the presumption against extraterritoriality; and (iii) under *Jesner*, courts cannot extend their jurisdiction over a *Sosa*-based claim that overcomes *Kiobel*'s presumption-against-extraterritoriality against foreign corporate defendants, and should keep at the forefront the foreign policy implications of recognizing such claims.

Pl. Opp. at 17. Indeed, according to Plaintiffs, the framework applied in *Jesner* "is limited to the distinct cautions pertaining to ATS claims against foreign corporations." Pl. Opp. at 13. This is not a plausible reading of *Jesner*, as it is willfully blind to what *Jesner* actually says.

Just as in *Sosa*, the *Jesner* majority sets out the mandatory framework for considering all ATS claims, and *then* applies that generally-applicable framework to the case before it. With respect to the separation-of-powers concerns courts must consider in addressing ATS claims, the *Jesner* Court begins Part II-B-1 by noting the Court's "general reluctance to extend judicially created private rights of action" and restating the high bar for judicial creation of a private right of action. *Jesner*, 138 S. Ct. at 1402. After laying out that generally-applicable framework, the Court held in *Jesner* that "[t]his caution *extends* to the question whether the courts should exercise the judicial authority to mandate a rule that imposes liability on artificial entities like corporations." *Id.* at 1402-03 (emphasis added). Thus, by *Jesner*'s explicit words, the separation-of-powers concerns that counsel against creating private rights of action, which "apply with particular force in the context of the ATS" (*id.* at 1403), apply to *all* ATS claims, including but not limited to claims seeking to impose corporate liability.

The *Jesner* Court employed the same analytical framework in addressing the foreign-policy consideration inherent in ATS claims. In Part I, the Court addressed the "principal objective" of the ATS, which was "to avoid foreign entanglements by ensuring the availability of a federal forum where the failure to provide one might cause another nation to hold the United States liable for an injury to a foreign citizen." *Id.* at 1397. Having established that "principal

objective" of ATS generally, the *Jesner* Court applied that framework to the case before it in Part II-C by observing that the objective of ATS was not served by suits against foreign corporations because such suits were causing, not avoiding, foreign entanglements. *Id.* at 1406-07. Thus, contrary to Plaintiffs' arguments, *Jesner* sets forth a mandatory analytical framework applicable to all ATS claims and then, unsurprisingly, applies that general framework to the facts of the case before it.

B. Plaintiffs' Opposition Ignores *Jesner*'s Holding That the Exercise of "Vigilant Doorkeeping" Is Independent of Whether the Plaintiff's Claims Allege Violations of Universally-Accepted Norms

Plaintiffs' opposition spills considerable ink arguing that "the norms at issue in this case – torture, war crimes and cruel, inhuman, and degrading treatment – have been widely recognized as establishing a cognizable cause of action under the ATS, including by this Court." Pl. Opp. at 3-6, 18-19. That question, which is debatable in many respects, is entirely irrelevant to CACI PT's arguments here. Plaintiffs' argument represents the pre-*Jesner* thinking that caused this Court and others to hold that the reasons for great caution and vigilant doorkeeping announced in *Sosa* simply required that courts be firmly convinced that the alleged torts are universally-recognized violations of international norms. CACI Mem. at 2.

Jesner rejects that line of thinking. In *Jesner*, the Court "assumed . . . that individuals who knowingly and purposefully facilitated banking transactions to aid, enable, or facilitate the terrorist acts would themselves be committing crimes" under the same "well-settled, fundamental precepts of international law." *Jesner*, 138 S. Ct. at 1394. Nevertheless, the Court held that the plaintiffs' claims must be dismissed because the "great caution" and "vigilant doorkeeping" required under ATS is an entirely distinct inquiry from whether the tort alleged was sufficiently well-recognized to be actionable. Under *Jesner*, courts must consider whether separation-of-powers and/or foreign-policy concerns require dismissal *even if* the plaintiff alleges universally-

recognized and specifically-defined violations of international law. Plaintiffs ignore this prominent and inconvenient feature of *Jesner*.

C. Plaintiffs Rely on Old Lower Court Decisions to Argue That They Somehow Limit the Reach of the Supreme Court's Decision in *Jesner*

Plaintiffs accuse CACI PT of proposing a "radical reinterpretation of decades of [ATS] litigation" (Pl. Opp. at 1), but Plaintiffs have it backwards. CACI PT is not "reinterpreting anything from decades of ATS litigation; it is ***in****terpreting* the Supreme Court's decision in *Jesner*. Supreme Court cases do not adjust to prior decisions by federal district courts and courts of appeals, those courts adjust to the decisions of the Supreme Court. Thus, Plaintiffs' wistful trip down the memory lane of ATS cases past neither binds the Supreme Court in *Jesner* nor aids this Court in applying what the Supreme Court has said in 2018 is the state of the law.

Indeed, Plaintiffs' lengthy paean to the Second Circuit's decision in *Filártiga v. Peña-Irala*, 630 F.2d 876 (2d Cir. 1980), illustrates the flaws in Plaintiffs' approach. The Second Circuit decided *Filártiga* at a time when disco was king, a plucky team of college hockey players beat the mighty Soviets in Lake Placid, and Bill Cosby was a beloved television father. Plaintiffs' opposition unselfconsciously lauds *Filártiga* as "put[ting] torturers on notice that 'whenever an alleged torturer is found and served with process by an alien within our borders, [28 U.S.C.] § 1350 provides federal jurisdiction' to hear a claim against them." Pl. Opp. at 3. But *Filártiga* is a curious poster-child for the "decades of [ATS] litigation" CACI PT supposedly is seeking to upend, as current Supreme Court precedent renders *Filártiga* wrongly decided. In *Warfaa v. Ali*, 33 F. Supp. 3d 653, 658 (E.D. Va. 2014), *aff'd*, 811 F.3d 653 (4th Cir. 2016), this Court held that "[b]ecause the extraterritoriality analysis set forth in *Kiobel* appears to turn on the location of the relevant conduct, not the present location of the defendant, a straightforward application to the instant action leads the Court to conclude that plaintiff's ATS claims are

'barred' and must be dismissed." *Id.* at 658. If Mr. and Mrs. Filártiga brought their ATS suit today, it would meet the same fate.

Undeterred, Plaintiffs submit that "the Supreme Court has repeatedly endorsed" *Filártiga*. Pl. Opp. at 2. Not so much. As explained above, *Kiobel* rejects the extraterritorial jurisdiction exercised in *Filártiga*. In *Sosa*, the Supreme Court mostly references *Filártiga* descriptively in discussing the birth and growth of modern ATS litigation. *See, e.g.*, *Sosa*, 542 U.S. at 732. In *Jesner*, the majority pointedly notes that the Supreme Court "did not review *Filártiga*," *Jesner*, 138 S. Ct. at 1398, and its other references to the case range from merely descriptive to at-best noncommittal. *Id.* (describing *Sosa* as "*acknowledge[ing]* the decisions made in *Filártiga* and similar cases" (emphasis added)); *id.* (recounting "debates in the courts of appeals over whether the court in *Filártiga* was correct").

Thus, Plaintiffs' extensive reliance on *Filártiga* is an excellent case study in the flaws in Plaintiffs' zealous reliance on lower court decisions that predate *Jesner*. Those decisions do not, and cannot, limit the Supreme Court in *Jesner*. Plaintiffs' approach only punctuates how much the *Supreme Court*, not CACI PT, has engaged in a "reinterpretation of decades of [ATS] litigation" (Pl. Opp. at 1) to correct what the Court perceives as insufficiently rigorous gatekeeping by federal courts with respect to claims brought under ATS.

D. Plaintiffs Ignore *Jesner*'s Clear Holding Regarding Separation-of-Powers Concerns

As CACI PT has explained, Congress has legislated extensively in the areas of torture, war crimes, CIDT, and litigation arising out of military operations. This legislation includes the Torture Victims Prevention Act ("TVPA"), 28 U.S.C. § 1350 note; the Anti-Torture Statute, 18 U.S.C. § 2340A, 2340B; the War Crimes Act, 18 U.S.C. § 2441; the combatant activities exception to the FTCA, 28 U.S.C. § 2680(j); the Military Extraterritorial Jurisdiction Act of

2000, 18 U.S.C. § 3261 *et seq.*; and Article 2(a)(10) of the Uniform Code of Military Justice, 10 U.S.C. § 802(a)(10). *See* CACI PT Mem. at 13-15. The common thread running through all of this legislation is that none of it permits a private right of action in the circumstances here. Plaintiffs agree. Pl. Opp. at 22-23.

Nevertheless, Plaintiffs' opposition argues that all of this legislation "reflects the firm congressional policy against torture and CIDT in the context of war," and therefore evinces a federal policy that should be furthered by creation of a private right of action under ATS. Pl. Opp. at 18-24. In CACI PT's view, under *Jesner* the absence of an applicable private right of action in all of this legislation evinces a congressional determination that claims of torture, war crimes, and CIDT arising out of U.S. military operations should be dealt with criminally, through diplomacy, or through a private right of action only to the extent Congress affirmatively has created one. CACI PT Mem. at 15-16.

It seems clear from *Jesner* that the Supreme Court agrees with CACI PT's approach. In *Jesner*, the Court reaffirmed its "general reluctance to extend judicially created private rights of action." 138 S. Ct. at 1402. The Court acknowledged that Congress "is in the better position to consider if the public interest would be served by imposing a new, substantive legal liability." *Id.* (quoting *Ziglar v. Abbasi*, 137 S. Ct. 1843, 1857 (2017)). Indeed, the Court held that "if there are sound reasons to think Congress might doubt the efficacy or necessity of a damages remedy, . . . courts must refrain from creating the remedy in order to respect the role of Congress." *Id.* Based on these principles, the Court held that it would be inappropriate to permit ATS suits against foreign corporations "absent further action from Congress." *Id.* at 1403. The lesson of *Jesner* is that when Congress has legislated with respect to particular conduct, and not created an applicable private right of action, "there are sound reasons to think Congress might doubt the

efficacy or necessity of a damages remedy," and "courts must refrain from creating the remedy in order to respect the role of Congress." *Id.* at 1402.

Plaintiffs' seven pages of separation-of-powers analysis are noteworthy for one thing – Plaintiffs do not once cite to or address any of the separation-of-powers analysis in *Jesner*. Instead, Plaintiffs' references to *Jesner* consist of the general condemnation of *jus cogens* violations in a three-Justice section of Justice Kennedy's opinion and an unremarkable comment from Justice Alito's opinion that "the judiciary's 'function is to effectuate congressional policy.'" Pl. Opp. at 18, 21 (citing *Jesner*, 138 S. Ct. at 1401-02 (plurality opinion); *id.* at 1410 (Alito, J., concurring)). There are two substantive sections that make up the Court's opinion in *Jesner*, one dealing with separation-of-powers concerns and the other dealing with foreign-policy concerns. Somehow Plaintiffs' opposition manages to address *Jesner*'s application to separation-of-powers concerns while studiously avoiding any discussion whatsoever of what *Jesner* actually said on the issue. Plaintiffs' avoidance of *Jesner* in discussing how to apply *Jesner* is telling.

E. Plaintiffs Mischaracterize *Jesner*'s Analysis of Foreign-Policy Concerns Inherent in ATS Cases

Plaintiffs' discussion of the foreign-policy concerns inherent in their ATS claims ignores what *Jesner* actually said about the relevant foreign-policy considerations. Plaintiffs' analysis also misses that the issue is not whether some redress should be available for international law violations in a war, but rather whether judge-made private rights of action should be permitted to supplement all of the existing and available means of redress for such violations.

Plaintiffs quote CACI PT's argument that "Congress enacted ATS to provide a federal forum for international law violation[s] that 'if not adequately redressed could rise to an issue of war,'" but Plaintiffs call this a "false premise." Pl. Opp. at 25 (quoting CACI Mem. at 18). But

that premise did not originate with CACI PT, as CACI PT was directly quoting the Supreme Court's decision in *Sosa*. Thus, Plaintiffs' own preferences notwithstanding, it is a *binding* premise. Indeed, the Supreme Court offers a similar formulation in *Jesner*, holding that "[t]he principal objective of the statute, when first enacted, was to avoid foreign entanglements by ensuring the availability of a federal forum where the failure to provide one might cause another nation to hold the United States responsible for an injury to a foreign citizen. *Jesner*, 138 S. Ct. at 1397 (citing *Sosa*, 542 U.S. at 715-19). Thus, as CACI PT has argued, ATS has no application where war has already erupted because ATS's purpose of avoiding foreign entanglements and risking the commencement of war are goals that cannot be achieved. CACI PT Mem. at 18-20.

Plaintiffs' respond that CACI PT's argument is wrong because "[e]ven during war, domestic law (*e.g.*, War Crimes Act) and international Conventions governing conduct of war (*e.g.*, CAT, Geneva Conventions) and the corresponding obligation to the international community are not suspended," Pl. Opp. at 26. But Plaintiffs' argument misses the entire point of *Jesner* – the issue is not whether international law violations are bad, but whether judges should take the extraordinary step of permitting a private right of action through judge-made law. In *Jesner*, the plaintiffs alleged that Arab Bank "helped finance attacks by Hamas and other terrorist groups." *Jesner*, 138 S. Ct. at 1394. In *Kiobel*, the defendants were alleged to have aided the Nigerian military in "beating, raping, killing, and arresting residents and destroying or looting property." *Kiobel*, 569 U.S. at 113. In *Sosa*, the plaintiff alleged that the defendant illegally abducted and detained him. *Sosa*, 542 U.S. at 738.

In all of these cases, Supreme Court recognized that the issue is not whether international law applies, but whether federal courts should create a private right of action on top of other available means of redress. As the Court put it in *Sosa*:

> The creation of a private right of action raises issues beyond the mere consideration whether underlying primary conduct should be allowed or not, entailing, for example, a decision to permit enforcement without the check imposed by prosecutorial discretion. Accordingly, even when Congress has made it clear by statute that a rule applies to purely domestic conduct, we are reluctant to infer intent to provide a private cause of action where the statute does not supply one expressly.

Sosa, 542 U.S. at 727. Thus, Plaintiffs' "all-or-nothing" approach – that a private right of action must be allowed because international law continues to apply during war – misses the fundamental point in *Sosa*, *Kiobel*, and *Jesner*, where the Court rejected a private right of action for illegal conduct because of the separate considerations underlying the judicial creation of private rights of action under ATS.

F. Plaintiffs' Assertion That Their Claims Do Not Arise Out of Military Operations in a War Is Refuted By the Record

Finally, Plaintiffs argue that the Court should reject CACI PT's position on the grounds that the alleged conduct "occurred in a prison location outside the zone of combat against civilian detainees" (Pl. Opp. at 19), and thus supposedly has little to do with military operations. Plaintiffs' argument is not remotely credible. As explained by Colonel Thomas Pappas, commanding officer of the military intelligence unit at Abu Ghraib prison, "Abu Ghraib prison was a military detention facility located within an active war zone." Supp. O'Connor Decl., Ex. 2 at ¶ 5. During the time Colonel Pappas served there, "the facility was subject to enemy mortar fire, rocket-propelled grenades, and sniper fire," and that "U.S. soldiers at Abu Ghraib prison were killed and injured by enemy fire." *Id.* Moreover, as Colonel Pappas explained, "CACI PT provided civilian interrogators to provide interrogation services to the U.S. military within the then-existing active theater of war," and served under the operational control of the U.S. military chain of command. *Id.* ¶¶ 6, 8-9.

Indeed, CACI PT recently took the deposition of William Cathcart, who served as a Sergeant in the United States Army at Abu Ghraib during the time frame in which Plaintiffs' claims arise. Sergeant Cathcart, who was actually shot by a detainee at Abu Ghraib prison, testified as follows concerning the wartime environment at the prison:

> Q: While you were deployed at Abu Ghraib prison, did the prison come under mortar fire?
>
> A: That was probably an understatement. We came under mortar fire and small arms quite a bit. One particular day, 35 mortars hit, several -- several thousand rounds were fired. Yeah, it was not a pleasant place.
>
> Q: Were external attacks, whether by mortars or RPGs or sniper fire, a regular occurrence while you were at Abu Ghraib prison?
>
> A: Yes.
>
> Q: Did anyone get killed by mortars or RPGs or sniper fire or any other external attacks?
>
> A: We had one of our external patrol teams get hit by a IED, and it killed the driver. There was a couple times that the mortars would – would cause injury but not – but not death.

Supp. O'Connor Decl., Ex. 3 at 90. Thus, Plaintiffs' factual argument that Abu Ghraib prison was more akin to a Club Fed than a combat zone fares no better than Plaintiffs' attempts to construe *Jesner* by conspicuously avoiding what the Court actually said in *Jesner*.

III. CONCLUSION

The Court should dismiss this case for lack of subject matter jurisdiction.

Respectfully submitted,

/s/ John F. O'Connor

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CERTIFICATE OF SERVICE

I hereby certify that on the 11th day of June, 2018, I will electronically file the foregoing with the Clerk of Court using the CM/ECF system, which will then send a notification of such filing (NEF) to the following:

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