IN THE 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

Plaintiffs' opposition makes clear that they cannot prove jurisdiction.[1] Plaintiffs avoid any meaningful discussion of the current state of the law or the actual facts developed in discovery. Instead, Plaintiffs repeatedly seek refuge in decisions made by this Court and the Fourth Circuit when this case was in a completely different procedural posture—*i.e.*, before the United States had disclosed the affiliations (Army or CACI PT) of the participants in Plaintiffs'

[1] *See Demetres v. E.W. Constr., Inc.*, 776 F.3d 271, 272 (4th Cir. 2015) (plaintiffs bear the burden of proving jurisdiction).

interrogations, and before CACI PT was permitted any discovery from such participants. *See, e.g.*, Pl. Opp. at 5, 7-8, 14-15. Plaintiffs do not seem to understand—and certainly do nothing to refute—that jurisdiction no longer hinges on what they were willing to *allege*, but depends on the *evidence* in the record.

With respect to extraterritoriality, Plaintiffs' opposition makes the remarkable argument that the Fourth Circuit's decision in *Al Shimari v. CACI Premier Technology, Inc.*, 758 F.3d 516 (4th Cir. 2014) ("*Al Shimari III*"), applied the "focus" test mandated by *RJR Nabisco, Inc. v. European Community*, 136 S. Ct. 2090 (2016). In *Al Shimari III*, however, the Fourth Circuit did not assess extraterritoriality by relying solely on the conduct relevant to the Alien Tort Statute's ("ATS") focus, as required by *RJR Nabisco*, but applied a holistic approach that aggregated all domestic facts relevant in any way to Plaintiffs' claims. *Al Shimari III*, 758 F.3d at 528. As multiple courts have held, *RJR Nabisco* precludes such an approach.

Plaintiffs' one-page discussion of the political question doctrine is functionally a refusal to participate. *See* Pl. Opp. at 2 (stating that CACI PT's political question argument "merits no discussion"). Plaintiffs argue that their claims do not require proof that "CACI personnel themselves carried out the torture of Plaintiffs" (true, but beside the point), and posit that CACI PT's fact-based challenge to justiciability has already been resolved by this Court and the Fourth Circuit (demonstrably incorrect). Pl. Opp. at 15. The Fourth Circuit clearly directed that justiciability be determined based on "the *evidence* regarding the *specific conduct* to which the plaintiffs were subjected and the source of any direction under which the acts took place." *Al Shimari v. CACI Premier Technology, Inc.*, 840 F.3d 147, 160 (4th Cir. 2016) ("*Al Shimari IV*") (emphasis added). This was Plaintiffs' chance to marshal facts supporting justiciability, and they decided to take a pass. The absence of factual support for justiciability requires dismissal.

What Plaintiffs' opposition lacks in substance, however, it makes up for in vitriol. Plaintiffs dedicate an entire section of their opposition to complaining that CACI PT is raising jurisdiction issues that it has raised before, seemingly oblivious that those prior challenges occurred at the pleadings stage, when discovery had barely begun and Plaintiffs could rely on their allegations instead of facts. With CACI PT largely having obtained the discovery that the Court is going to permit,[2] this is CACI PT's opportunity to make a fact-based pretrial challenge. As with its merits arguments, Plaintiffs' complaints about timing evince a fundamental lack of appreciation of the difference between facial and fact-based challenges to jurisdiction.

On a fact-based challenge to jurisdiction, neither allegations nor name-calling is a substitute for *facts*. Plaintiffs lack proof of domestic conduct in violation of ATS. Plaintiffs also lack evidence supporting justiciability. As a result, the Court has no basis for continuing to exercise subject matter jurisdiction over Plaintiffs' claims, and Plaintiffs' claims must be dismissed.

II. ANALYSIS

"When, as here, a defendant challenges the existence of subject matter jurisdiction in fact, the plaintiff bears the burden of proving the truth of such facts by a preponderance of the evidence." *United States ex rel. Vuyyuru v. Jadhav*, 555 F.3d 337, 347-48 (4th Cir. 2009) (citing *Adams v. Bain*, 697 F.2d 1213, 1219 (4th Cir.1982)). With respect to extraterritoriality, Plaintiffs have the burden of *proving facts*, not making allegations, showing domestic conduct sufficient to permit jurisdiction under ATS. With respect to the political question doctrine, Plaintiffs have the burden of *proving facts*, not making allegations, that CACI PT personnel

[2] CACI PT will depose CACI Interrogator G on February 12, 2019 by leave of court. He could not be deposed during the discovery period because of issues arising from his pseudonymous status.

engaged in unlawful conduct toward these Plaintiffs and that they were not operating under the actual control of the U.S. military.

Plaintiffs' opposition offers no facts. With respect to extraterritoriality, Plaintiffs offer only legal argument, with no effort to meet their factual burden for establishing ATS jurisdiction. For the political question doctrine, Plaintiffs openly refuse to make any effort at meeting their factual burden. Instead, Plaintiffs incorrectly posit that the Court's prior pleadings-stage decision on justiciability, which assumed the truth of Plaintiffs' allegations, is good enough to foreclose a fact-based challenge to justiciability. CACI PT has provided the Court with *facts* challenging the subject matter jurisdiction of this Court. Plaintiffs have offered no countervailing facts for the Court to weigh. Accordingly, Plaintiffs have not met their burden of proof and dismissal is required.

A. Plaintiffs Fail to Demonstrate Sufficient Domestic Conduct to Overcome the Presumption Against Extraterritorial Application of the Alien Tort Statute

Rather than engage with the actual law or facts relevant to the extraterritoriality analysis of their claims, Plaintiffs raise and attack strawmen to cushion an otherwise straightforward analysis. Plaintiffs revise CACI PT's legal arguments and factual recitation to suit their response. As a result, their opposition neither meets CACI PT's arguments nor provides a sufficient factual basis to allow for domestic application of the ATS.

Plaintiffs mischaracterize CACI PT's legal argument as asserting that *RJR Nabisco, Inc. v. European Community*, 136 S. Ct. 2090, 2101 (2016), "overturned" *Kiobel*'s touch-and-concern analysis "*sub silentio*." Pl. Opp. at 1; *see also id.* at 4. That is not what *RJR Nabisco* did, nor is it what CACI PT has argued. In *RJR Nabisco*, the Supreme Court explained that the focus test for extraterritoriality applies to claims under ATS in the same manner it applies to other federal statutes. *RJR Nabisco*, 136 S. Ct. at 2101. In particular, the Court rejected the

premise, adopted by the Fourth Circuit in *Al Shimari III*, that the "touch and concern" language in *Kiobel* somehow dictates a broader and more freewheeling extraterritoriality analysis for claims under ATS than the focus test that applies to other statutes. As the Court explained in *RJR Nabisco*, "[b]ecause 'all the relevant conduct' regarding those violations [in *Kiobel*] 'took place outside the United States,' we did not need to determine, as we did in *Morrison*, the statute's 'focus.'" *Id.* Thus, as CACI PT correctly argued (CACI PT Mem. at 7-9), *RJR Nabisco* did not overrule *Kiobel*. Rather, *RJR Nabisco* made clear that the focus test for extraterritoriality applies in full force to claims arising under ATS, and explained why *Kiobel* ruled for the defendants without having to apply the focus test

Plaintiffs also make the odd assertion that, in *Kiobel*, the Supreme Court actually "relied on the focus analysis in presenting a harmonized test for the distinct context of a jurisdictional statute like the ATS" and that the Fourth Circuit, in *Al Shimari III*, "correctly applied this understanding." Pl. Opp. at 2, 5. The Supreme Court has expressly stated that it did *not* apply the focus test in *Kiobel* because in that case *all* relevant conduct—bearing on ATS's focus or not—was extraterritorial. *RJR Nabisco*, 136 S. Ct. at 2101. Thus, Plaintiffs' contention that *Kiobel* somehow incorporated the focus test into its analysis is refuted by the Supreme Court itself. *Id.*

Moreover, Plaintiffs' argument that *Al Shimari III* actually applied the focus test (Pl. Opp. at 5) is belied by the Fourth Circuit's own words. Rather than applying the focus test (which is not mentioned in the opinion), the Court of Appeals examined whether or not "relevant conduct" occurred in U.S. territory. *Al Shimari III*, 758 F.3d at 528. The problem is that the "relevant conduct" considered in *Al Shimari III* was not conduct relevant to the ATS's focus.

Instead, the Court of Appeals' analysis embraced any facts that might relate in any way to Plaintiffs' claims:

> We also note that the Court broadly stated that the "claims," rather than the alleged tortious conduct, must touch and concern United States territory . . . suggesting that courts must consider *all the facts that give rise to ATS claims, including the parties' identities and their relationship to the causes of action*.

Id. at 527 (emphasis added) (citing Black's Law Dictionary 281 (9th ed. 2009) (defining "claim" as the "aggregate of operative facts giving rise to a right enforceable by a court")). The Fourth Circuit's definition of "relevant conduct" thus goes well beyond that which is relevant to the ATS's focus.

As Plaintiffs themselves concede, "***the focus of the ATS—or the object of its solicitude—is to provide jurisdiction over civil claims by aliens for core international law violations*** . . . so as to avoid diplomatic strife or even breaches of international law giving rise to war." Pl. Opp. at 10 n.4 (emphasis added).[3] As many courts have held, ATS's focus is unquestionably torts committed in violation of the law of nations. *See* CACI PT Mem. at 10 (citing *Doe v. Nestle, SA*, 906 F. 3d 1120, 1125 (9th Cir. 2018) ("*Doe II*"); *Adhikari v. Kellogg, Brown & Root, Inc.*, 845 F.3d 184, 197 (5th Cir. 2017); *Mastafa v. Chevron Corp.*, 770 F.3d 170, 185 (2d Cir. 2014); *Ratha v. Phatthana Seafood Co., Ltd.*, No. CV-16-4271, 2016 WL 11020222, at *8 (C.D. Cal. Nov. 9, 2016)); *see also Jesner v. Arab Bank, PLC*, 138 S. Ct. 1386, 1397 (2018) ("Congress drafted the ATS "to furnish jurisdiction for a relatively modest set of actions alleging violations of the law of nations.'"). Thus, the only conduct that is relevant to the

[3] *See also* Pl. Opp. at 9 (ATS's purpose is to provide jurisdiction to redress "violations of international law norms that are 'specific, universal and obligatory.'" (quoting *Kiobel*, 569 U.S. at 117)).

ATS's focus—and therefore relevant to whether Plaintiffs' claims represent a permissible domestic application of the ATS—is conduct that violates the law of nations. *Id.*[4]

The Fourth Circuit's decision in *Al Shimari III* relied on the following in concluding that Plaintiffs' allegations overcame the presumption against extraterritoriality:

> Here, the plaintiffs' claims allege acts of torture committed by United States citizens who were employed by an American corporation, CACI, which has corporate headquarters located in Fairfax County, Virginia. The alleged torture occurred at a military facility operated by United States government personnel.
>
> In addition, the employees who allegedly participated in the acts of torture were hired by CACI in the United States to fulfill the terms of a contract that CACI executed with the United States Department of the Interior. The contract between CACI and the Department of the Interior was issued by a government office in Arizona, and CACI was authorized to collect payments by mailing invoices to government accounting offices in Colorado. Under the terms of the contract, CACI interrogators were required to obtain security clearances from the United States Department of Defense.
>
> Finally, the allegations are not confined to the assertion that CACI's employees participated directly in acts of torture committed at the Abu Ghraib prison. The plaintiffs also allege that CACI's managers located in the United States were aware of reports of misconduct abroad, attempted to "cover up" the misconduct, and "implicitly, if not expressly, encouraged" it.

Al Shimari III, 758 F.3d at 529.

The domestic contacts stated in the first two paragraphs—the location CACI PT's corporate headquarters, where it hired employees, the citizenship of its interrogators, its employees' need for U.S. security clearances, where CACI PT's interrogation contracts with the

[4] Plaintiffs misconstrue CACI PT's description of the focus test. CACI PT does not contend "that *all* of the conduct relevant to the claim must have occurred in the United States." Pl. Opp. at 2. Quite the opposite. As CACI PT explained, consistent with *RJR Nabisco* and *WesternGeco*, "[t]he *only* relevant conduct for purposes of ATS jurisdiction is the conduct comprising the alleged international law violations." CACI PT Mem. at 10 (emphasis added). Other factors are irrelevant and cannot be considered.

U.S. government were executed, and where CACI PT submitted invoices under its interrogation contracts—are mundane acts of a domestic corporation, none of which violate international law or have any nexus to violations of international law. The allegations of domestic conduct in the third paragraph—that CACI PT managers in the United States were aware of misconduct abroad, attempted to "cover up" misconduct, and "implicitly, if not expressly, encouraged" it—were, as the Fourth Circuit acknowledged, mere *allegations*, *id.*, and are not supported by evidence. Plaintiffs' so-called evidence of domestic violations of international law amounts to nothing:

- CACI PT executive Charles Mudd testified that he visited Iraq periodically to check on employee welfare, but had no role in supervising the operational mission, which was the sole province of the U.S. Army. *See* Ex. 28-29.

- A former CACI PT employee emailed a program manager that he thought Army interrogators were not adequately supervised, and referenced an ongoing Army investigation into an unauthorized interrogation *by a soldier*. The CACI PT program manager did not alert military authorities to the email because the former employee had not witnessed anything and his email stated that the matter *was already being investigated by the Army*. *See* Pl. Opp. to Mot. for Summ. J., Ex. 54 at 1.

- CACI PT executive Charles Mudd testified, without contradiction, that CACI PT had no idea that Steve Stefanowicz was being accused of detainee abuse until the Taguba report became public, and until that time had been told by Army officials that its employees "are not in any type of trouble." Ex. 54 at 121-22.

- When U.S. Army Contracting Officer's Representative requested that Daniel Johnson be removed from the contract, he invited CACI PT and Mr. Johnson to submit a response. Pl. Opp. to Mot. for Summ. J., Ex. 57. CACI PT submitted a response as invited, and explicitly stated at the end that it "stand[s] ready to implement whatever direction we receive from CJTF-7." Pl. Opp. to Mot. for Summ. J., Ex. 54 at 1.

See generally CACI PT Reply In Support of Mot. for Summ. J. at 12-15.

Plaintiffs next assert that the Ninth Circuit's decision in *Doe v. Nestle* actually favors Plaintiffs because, according to them, the court in *Nestle* "identified relevant conduct occurring in the United States that itself did not amount to a law-of-nations violation." Pl. Opp. at 12. Not

so. In *Nestle*, the court held that the plaintiffs had sufficiently alleged domestic participation in international law violations. In particular, the plaintiffs had alleged that the defendants paid kickbacks from the United States in support of child slave labor, and the court remanded the case so that the district court could determine whether these allegations stated a claim for aiding and abetting. *Doe II*, 906 F. 3d at 1126. Moreover, unlike *Doe II*, the present case is beyond the pleading stage; Plaintiffs must support their allegations of domestic international law violations with *facts*. Plaintiffs' lack of facts showing domestic international law violations distinguishes the present case from the pleadings-stage result in *Doe II* and requires dismissal.

Plaintiffs attempt to distinguish the Fifth Circuit's decision in *Adhikari v. Kellogg, Brown & Root, Inc.*, 845 F.3d at 198, in which the plaintiffs "failed to introduce any evidence indicating that KBR's U.S.-based employees either (1) understood the circumstances surrounding Daoud's recruitment and supply of third-country nationals like Plaintiffs or (2) worked to prevent those circumstances from coming to light or Daoud's practices from being discontinued." 845 F.3d at 198. There are two problems with Plaintiffs' attempt to distance themselves from *Adhikari*. First, the plaintiffs in *Adhikari* argued that the district court should have allowed them to amend their complaint to allege domestic contacts because "they would be able to allege facts that satisfy *Al Shimari*." *Adhikari*, 845 F.3d at 199. The Fifth Circuit agreed that an amendment would be futile because the domestic contacts credited in *Al Shimari III*, and which the *Adhikari* plaintiffs sought to allege, were not themselves international law violations and thus brought the plaintiffs "no closer to satisfying the test articulated in *Morrison* and in *RJR Nabisco*." *Id.*

In addition, as in *Adhikari*, Plaintiffs here have no evidence that CACI PT's U.S.-based employees knew that detainee abuse was occurring, knew that any CACI PT personnel were implicated in any such abuse, facilitated or encouraged any abuse, or attempted to cover up any

abuse. *See Galligan v. Adtalem Global Educ. Inc.*, No. 17-C-6310, 2019 WL 423356, at *3 (N.D. Ill. Feb. 4, 2019) ("It is not enough that the challenged conduct has some connection to the United States" because "[i]f the statute is not extraterritorial, then [the court must] determine whether the case involves a domestic application of the statute, and [does so] by looking to the statute's 'focus.'" (second and third alterations in original) (quoting *RJR Nabisco*, 136 S. Ct. at 2101)).

Finally, Plaintiffs resurrect their 2013 argument that *Rasul v. Bush*, 542 U.S. 466 (2004)—a case decided nine years before *Kiobel*—somehow overcomes the presumption against extraterritoriality as it pertains to Abu Ghraib. Pl. Opp. at 13. Plaintiffs once again ignore that the issue in *Rasul* was whether petitioners' presence in military custody at Guantánamo Bay categorically deprived them of the "privilege of litigation" in United States courts. *Rasul*, 542 U.S. at 484. *Rasul* says nothing about the presumption against extraterritoriality, or what must occur domestically for a claim to proceed under ATS. Indeed, the Supreme Court based its holding in *Rasul* in large part on the specific nature of United States control over Guantánamo Bay, where the United States has a long-term lease and the right "to exercise [complete] control permanently if it so chooses." *Rasul*, 542 U.S. at 484. By contrast, Plaintiffs here were detained during a time of open insurgency in a war zone, where control over Iraq was being fought for every day. In the context of an open insurgency, the idea of "control" is a misnomer even if that concept could somehow bear on the presumption against extraterritoriality. *Rasul* has no application here; *Kiobel* and *RJR Nabisco* control.

B. Plaintiffs Fail to Adduce Evidence of Any Unlawful Acts or Autonomy Sufficient to Overcome Application of the Political Question Doctrine

CACI PT's suggestion of lack of justiciability is the first fact-based challenge to justiciability that has occurred since the Fourth Circuit's remand in *Al Shimari IV*. This was the

time for Plaintiffs to lay their cards on the table regarding facts, not allegations, that they contend meet their burden of proving subject matter jurisdiction. Plaintiffs have decided to fold, petulantly refusing to address justiciability on a fact-based level. Plaintiffs justify their decision with the dubious contention that the Court's previous denial of CACI PT's motion to dismiss, at a time when Plaintiffs' allegations were accepted as true, precludes the fact-based challenge to justiciability that the Fourth Circuit expressly directed this Court to conduct. Plaintiffs are mistaken and dismissal is required.

Plaintiffs offered ***zero*** evidence to overcome application of the political question doctrine in their opposition and have thereby waived any factual defense against it. Instead, Plaintiffs argue that "the Fourth Circuit and this Court have already rejected CACI's political question defense." Pl. Opp. at 14. That is a remarkable assertion. The Fourth Circuit certainly has not "rejected" CACI PT's political question defense. Rather, the Fourth Circuit has twice remanded the case to this Court to *evaluate and make a fact-based ruling* on CACI PT's political question defense:

- *Al Shimari III*, 758 at 536 – "A thorough analysis of these matters, as mandated by *Taylor*, cannot be achieved simply by reviewing the plaintiffs' pleadings and the limited record on appeal, but also will require factual development of the record by the district court and possibly additional jurisdictional discovery."

- *Al Shimari IV*, 840 F.3d at 160 – remanding with instructions that the Court decide justiciability based on "the evidence regarding the specific conduct to which the plaintiffs were subjected and the source of any direction under which the acts took place"

Remanding so that the district court can make a fact-based ruling on a defense would seem to be the opposite of rejecting the defense.

Plaintiffs' assertion that this Court has already rejected CACI PT's political question defense functionally argues that the Court has defied the Fourth Circuit's remand instructions. The Court's ruling on CACI PT's 2017 Rule 12 motion occurred at a time when the Court had

not yet opened post-remand discovery from the United States. At the time the Court ruled, the parties had *no idea* whether Plaintiffs' interrogators had been all soldiers, all CACI PT employees, or something in between. After the Court ruled on CACI PT's Rule 12 motion, CACI PT was permitted to commence discovery and learned that only two of the nine interrogators participating in an intelligence interrogation of Plaintiffs were CACI PT employees. Ex. 11 at 6; Ex. 14 at 4-5. Only after the Court had ruled on CACI PT's Rule 12 motion did the Court permit CACI PT to take pseudonymous depositions of these interrogators. Dkt. #791.

Thus, at the time the Court decided CACI PT's Rule 12 motion, CACI PT had not been permitted to take the deposition of a single participant in, or eyewitness to, any interrogation of these Plaintiffs. As quoted above, however, the Fourth Circuit was clear in expressly directing that the Court decide justiciability based on all the facts regarding Plaintiffs' treatment. *Al Shimari IV*, 840 F.3d at 160. Remand instructions must be "scrupulously and fully carried out." *Doe v. Chao*, 511 F.3d 461, 464-65 (4th Cir. 2007). Accordingly, Plaintiffs' argument that justiciability has been fully and finally decided, which would place the Court in open defiance of the Fourth Circuit's remand instructions, is not a fair interpretation of the Court's ruling on CACI PT's Rule 12 motion.

Moreover, Plaintiffs insist that this Court's ruling on CACI PT's 2017 motion to dismiss "held" that "CACI's 'unlawful acts against the Plaintiffs,' derive from its conspiratorial agreement and aiding and abetting of others to harm Plaintiffs." Pl. Opp. at 15 (purporting to quote *Al Shimari v. CACI Premier Tech., Inc.*, 300 F. Supp. 3d 758, 783-88 (E.D. Va. 2018)).[5] Once again, Plaintiffs' argument misapprehends the difference between rulings based on allegations and the fact-based assessment of justiciability ordered in *Al Shimari III* and *Al*

[5] This appears to be a misquote, as the language Plaintiffs attribute to the Court does not appear in the Court's opinion.

Shimari IV. Indeed, the Court's motion to dismiss ruling reduced the Court's entire analysis of CACI PT's purported involvement in detainee abuse to a footnote that relies on Plaintiffs' *allegations* and the Plaintiffs' *characterization* of discovery in this case. Dkt. #678 at 29 n.22. Notably, the Court's description of Plaintiffs' allegations does not connect CACI PT personnel to any mistreatment of these Plaintiffs, and the Court issued its ruling before a single eyewitness to Plaintiffs' interrogations had been deposed. In any event, the Court has never conducted the fact-based justiciability inquiry dictated by *Al Shimari IV* because the Court's only ruling on justiciability occurred before CACI PT was permitted to develop the record regarding what occurred in connection with Plaintiffs' interrogations.

As the factual record currently stands, there is no evidence of any connection between CACI PT personnel and the unlawful treatment alleged by Plaintiffs. There is no evidence CACI PT personnel ever directly mistreated a Plaintiff. CACI PT Mem. at 16-17. Most importantly and contrary to the allegations on which the Court previously relied, there is no evidence that CACI PT personnel ever aided or abetted the mistreatment of a Plaintiff, *id.* at 17, or conspired with anyone to either mistreat Plaintiffs or the detainee population at large in a manner that would necessarily include Plaintiffs, *id.* at 17-20.

While it is true that Plaintiffs do not need to prove that CACI PT personnel directly tortured them, Pl. Opp. at 15, they do have to establish, with facts, *some* connection between their alleged abuse and CACI PT. *See Al Shimari IV*, 840 F.3d at 160 (requiring "*evidence* regarding the specific conduct to which the plaintiffs were subjected and the source of any direction under which the acts took place" (emphasis added)). Plaintiffs have failed to meet this burden. While it may have been appropriate prior to the close of discovery to draw inferences on

an incomplete record in Plaintiffs' favor, that time has passed. The record is complete and Plaintiffs cannot prove jurisdiction. This case must be dismissed.

C. CACI PT's Suggestion of Lack of Subject Matter Jurisdiction Is Neither Dilatory Nor Inappropriate

Plaintiffs' argument that CACI PT has been "dilatory" in challenging subject matter jurisdiction ignores both the law and the procedural history of this case.

It is beyond question that challenges to subject matter jurisdiction "may be raised at any point during the proceedings." *Brickwood Contrs. v. Datanet Eng'g*, 369 F.3d 385, 390 (4th Cir. 2004) (en banc) (citing *Bender v. Williamsport Area Sch. Dist.*, 475 U.S. 534, 541 (1986)). Moreover, to the extent Plaintiffs argue that CACI PT should be precluded from raising its challenges because they should have been raised at some earlier point in the case, that is an argument for waiver, and objections to subject matter jurisdiction are never waived or forfeited. *Gonzalez v. Thaler*, 565 U.S. 134, 141 (2012). Plaintiffs' protestations aside, there is a very good reason why CACI PT filed its subject matter jurisdiction when it did—both of CACI PT's arguments are fact-based challenges to jurisdiction, which necessarily require development of the factual record before the challenge can be brought.

Plaintiffs complain that CACI PT could have brought its extraterritoriality challenge when the Supreme Court decided *RJR Nabisco* in 2016, or as part of its motion to dismiss in 2017. The problem with Plaintiffs' suggested approach is that Plaintiffs' Third Amended Complaint *alleges* domestic participation in international law violations directed at Plaintiffs. In order to properly bring its fact-based challenge regarding extraterritoriality, CACI PT needed to allow discovery to proceed toward completion, both to develop its own supporting facts and to preclude Plaintiffs from asserting that they needed discovery to respond. Similarly, CACI PT could not reasonably bring its fact-based challenge to justiciability, which required evidence

regarding the "specific conduct to which the plaintiffs were subjected and the source of any direction under which the acts took place," without first taking the depositions of those who interacted with Plaintiffs. *See Al Shimari IV*, 840 F.3d at 160. Moreover, while CACI PT steadfastly urged that any ruling on the political question doctrine should come after the parties had taken post-remand discovery, it included a justiciability argument in its 2017 motion to dismiss only because the Court specifically directed CACI PT not to wait to bring such a challenge. Dkt. #620 (stating the Court's intention to review "*alleged* acts" and "*allegations* of unlawful conduct" in assessing justiciability at the Rule 12 stage (emphasis added)).

Plaintiffs tally filings from over the course of a decade of litigation as purported evidence that CACI PT's motions "approach[] an abuse of process." Pl. Opp. at 2. According to Plaintiffs, it was "gamesmanship" and "an abuse of process" for CACI PT to file a motion for summary judgment, a motion to dismiss based on state secrets, and the suggestion of lack of jurisdiction. *Id.* at 3.[6] All three challenges involve distinct legal and factual bases for resolution of this case. As for timing, CACI PT can hardly file a motion for summary judgment prior to the close of discovery and, particularly on these facts, cannot be faulted for believing such a motion justified. Likewise, the Court directed CACI PT to seek any relief necessitated by the Court's state secrets rulings after CACI PT had taken court-ordered pseudonymous depositions and obtained the documents to which the state secrets privilege did not apply. Dkt. #791, 850, 886, 921, 1012. With respect to subject matter jurisdiction, the Fourth Circuit specifically ordered

[6] Plaintiffs also complain that CACI PT's defense against their vile, uncorroborated allegations has overly burdened them. *Id.* at 2, 4. In point of fact, the Court and CACI PT have had to cater to Plaintiffs in order to induce them to participate *at all*. *See, e.g.*, Dkt. #259 (cataloging Plaintiffs' failures to comply with Court ordered depositions); Dkt. #584 (status report describing the logistical hoops for Al Zuba'e's and Al Shimari's depositions in absentia); Dkt. Nos. 647, 650, 651, 658, 663, 670, 692 (status reports updating the court on Rashid's inability to appear even remotely for deposition).

that the political question doctrine be reevaluated on the basis of an evidentiary record, which was impossible until that record was complete.[7] Thus, Plaintiffs' complaints about the timing of CACI PT's jurisdictional challenge are baseless and provide no reason to divert the Court's attention from the lack of factual support for Plaintiffs' assertions of subject matter jurisdiction.

III. CONCLUSION

The Court should Plaintiffs' claims for lack of subject matter jurisdiction.

Respectfully submitted,

/s/ John F. O'Connor

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[7] Moreover, as CACI PT stated in its suggestion, it would have preferred to bring its suggestion of lack of subject matter jurisdiction after the Court ruled on the United States' March 2018 immunity motion so CACI PT could brief its derivative immunity defense in an informed manner. Given the Court's forecast that the motion likely would be decided by the end of December 2018 (12/10/18 Tr. at 26), CACI PT did not file its subject matter jurisdiction challenge when it filed its dispositive motions on December 20, 2018. When December 2018 passed with no ruling on the United States' motion, CACI PT concluded that it should file its non-immunity subject matter challenges rather than waiting for the Court's ruling.

CERTIFICATE OF SERVICE

I hereby certify that on the 8th day of February, 2019, 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 counsel:

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