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 **PUBLIC VERSION**
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 OPPOSITION TO THE UNITED STATES' MOTION FOR SUMMARY JUDGMENT

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I. INTRODUCTION

Granting the United States' summary judgment motion would not spare the Court from deciding the United States' year-old assertion of sovereign immunity. Dkt. #696. Immunity from suit implicates the Court's subject matter jurisdiction. *Cunningham v. Gen. Dynamics Info. Tech., Inc.*, 888 F.3d 640, 649 (4th Cir. 2018). As the Fourth Circuit aptly observed, the Court may not "assume subject matter jurisdiction merely to reach a less thorny issue." *Di Biase v. SPX Corp.*, 872 F.3d 224, 232 (4th Cir. 2017). Rather, the Court must satisfy itself that it has jurisdiction to proceed before ruling on this motion. "The requirement that jurisdiction be established as a threshold matter 'spring[s] from the nature and limits of the judicial power of the United States' and is 'inflexible and without exception.'" *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 94-95 (1998).

In addition, CACI PT has been very open that it was awaiting the Court's ruling on the United States' sovereign immunity motion so that it could incorporate the Court's analysis into its own assertion of derivative sovereign immunity. *See* Dkt. #1057 at 2-3. With the trial date rapidly approaching, and the Court having indicated at the February 27, 2019 hearing that it might not decide the United States' immunity at all, CACI PT filed its assertion of derivative sovereign immunity on February 28, 2019. Dkt. #1149. As CACI PT explains in its derivative immunity papers (Dkt. #1150 at 1-2, 5), deciding CACI PT's derivative sovereign immunity defense requires deciding whether the United States would be immune for the same claims of detainee abuse. Therefore, a proper resolution of CACI PT's derivative sovereign immunity challenge would require resolving the United States' immunity assertion *even if* jurisprudential doctrine did not require that the Court resolve the United States' immunity challenge before ruling on its summary judgment motion.

With respect to the United States' summary judgment motion, it has become glaringly obvious that Plaintiffs wish to extract damages from CACI PT for conduct allegedly perpetrated by U.S. military personnel, despite no ascertainable connection to CACI PT interrogators. Plaintiffs abandoned any claims of direct abuse by CACI PT interrogators. Plaintiffs cannot identify any interaction they had with a CACI PT employee or any facts implicating CACI PT personnel directly or indirectly in any abuse they allegedly suffered. Thus, if Plaintiffs were in fact abused, CACI PT has no liability to them unless CACI PT conspired with or aided and abetted the soldiers who actually abused them.

If CACI PT faces any liability for Plaintiffs' claims it will be secondary to *jus cogens* acts of torture and war crimes committed by U.S. soldiers. The Government's motion is based on the flawed premise CACI PT's derivative claims are based in contract and, thus, were released by CACI PT. But *jus cogens* violations bear no relationship to any lawful contract, let alone CACI PT's contracts with the United States, which specifically contemplate compliance with local and military standards. Therefore, any settlement agreement related to the United States' contracts with CACI PT is wholly irrelevant to the present case. CACI PT's claims against the United States are based on the United States' primary liability and efforts to hamstring CACI PT's ability to defend itself, not from any contractual arrangement between the parties.

The parties' settlement agreement addresses contractual claims for eleven different task orders, including the two under which CACI PT provided interrogators to support the war effort in Iraq. Properly construed, the language of the settlement agreement limits the scope of settled claims to those that have a significant relationship to the task orders. CACI PT's common-law indemnification, contribution, and exoneration claims relate to whether U.S. military personnel engaged in torture and war crimes against Plaintiffs for which CACI PT has been held

secondarily liable. Whether CACI PT had a contract with the United States is irrelevant to the merits of these claims.

CACI PT's claim for breach of the duty of good faith and fair dealing did not accrue until the United States first began interfering with CACI PT's ability to defend this case, years after the parties executed the 2007 settlement agreement. Because the cause of action had not yet accrued, the general release set forth in the settlement agreement does not bar it. Moreover, the Government's argument that this type of claim must be grounded in an express provision of the contract is contrary to law. The United States' efforts to withhold from CACI PT the information necessary for CACI PT to defend itself against Plaintiffs' claims abdicates its basic responsibility towards a faithful contractor and frustrates CACI PT's rights to the benefits of the contracts.

II. STATEMENT OF MATERIAL FACTS

1. CACI PT provided interrogation services under two delivery orders, Delivery Order 35 ("DO 35") and Delivery Order 71 ("DO 71"). DO 35 and DO 71 expressly required that CACI PT personnel follow standard operating procedures, abide by higher authority regulations, and act as directed by the military chain of command. *See, e.g.*, Ex. 1 at ¶¶ 4, 6 (DO 35); Ex. 2 at ¶¶ 3, 4 (DO 71).

2. In 2007, CACI PT entered into a settlement agreement with the Department of the Interior to resolve a dispute concerning payments owed to CACI PT under multiple task orders, including DO 35 and DO 71. U.S. Ex. 2 at 2.

3. The 2007 Settlement Agreement provides:

> DOI's payment of the Settlement Amount shall constitute full and final payment, settlement, and accord and satisfaction of all claims and disputes by DOI and CACI arising out of or related to the terminated Task Orders, *including those in CBCA No. 546, including but not limited to all claims for interest, general*

> *administrative costs, direct and indirect costs of all kinds whatsoever relating to the terminated Task Orders*.

Id. (emphasis added).

4. After the Abu Ghraib detainee abuse scandal came to light, "the government acted swiftly to institute court-martial proceedings against offending military personnel, but no analogous disciplinary, criminal, or contract proceedings [were] so instituted against" CACI PT personnel. *See Saleh v. Titan Corp.*, 580 F.3d 1, 10 (D.C. Cir. 2009).

5. Plaintiffs cannot identify any interaction they had with a CACI PT employee. Ex. 3 at 6 (Al-Ejaili); Ex. 4 at 7-8 (Al Shimari); Ex. 5 at 7 (Al-Zuba'e).

6. When deposed, Plaintiffs could not testify to any interaction with CACI PT personnel, or to any facts implicating CACI PT personnel directly or indirectly in any abuse they allegedly suffered. Ex. 6 at 9-10, 66, 73, 194-96, 216 (Al-Ejaili); Ex. 7 at 30-31, 33, 36, 44-45, 56-58, 64, 65, 81 (Al-Zuba'e).

7. Army interrogator Sergeant Joseph Beachner had been assigned as Al-Ejaili's interrogator. Ex. 8 at 16. Beachner affirmed the contents of his prior sworn statement that: (1) he was Al-Ejaili's assigned interrogator; (2) he learned that CACI PT interrogator Steven Stefanowicz was questioning Al-Ejaili during IP Roundup, an event during which the military intelligence brigade questioned detainees to find any weapons in detainees' hands after a detainee used a smuggled pistol to shoot a soldier; (3) nothing during Mr. Stefanowicz's questioning of Al-Ejaili violated the applicable interrogation rules of engagement; and (4) when Sergeant Beachner asked Mr. Stefanowicz to stop questioning Al- Ejaili, he willingly complied. *Id.*; [redacted] That single encounter that complied with the applicable interrogation rules of engagement reflects the only evidence in the record of any interaction between a CACI PT employee and Al-Ejaili.

8. According to the United States, Al Shimari and Al-Zuba'e were interrogated by CACI PT Interrogators A and G, respectively. [redacted] Ex. 11 at 93-106 (CACI Int. A); Ex. 12 at 30-31 (CACI Int. G).

III. ANALYSIS[1]

A. The United States Is Not Entitled to Summary Judgment That the 2007 Settlement Releases CACI PT's Equitable Claims Seeking Recovery for *Jus Cogens* Violations By U.S. Soldiers

By its very nature, a third-party claim is contingent on the defendant in the main action being held liable. Fed. R. Civ. P. 14. As CACI PT has asserted in its Answer to the Third Amended Complaint and in its dispositive motions, there are a number of reasons why CACI PT cannot be held liable to Plaintiffs. These reasons range from Plaintiffs' failure to marshal facts supporting their claims to legal defenses such as the presumption against extraterritoriality, the political question doctrine, derivative immunity, preemption, and CACI PT's inability to fairly defend itself without access to privileged state secrets. CACI PT's third-party claims arise only if CACI PT fails to prevail on each and every one of these defenses *and* a jury finds CACI PT liable at trial. Accordingly, arguments regarding the interplay between CACI PT's third-party claims and the 2007 release are based on the hypothetical assumption that CACI PT's legal and factual arguments have been rejected as to at least one (yet undetermined) allegation of abuse made by at least one (yet undetermined) Plaintiff.

Whether a party has a valid release defense is a two-step inquiry. While construction of a release agreement is a question of law, *King v. Dep't of the Navy*, 130 F.3d 1031, 1033 (Fed. Cir. 1997), whether the release encompasses a particular claim is a question of fact. *Dureikov v.*

[1] To the extent the government rehashes its sovereign immunity argument, CACI PT has already responded. *See* Dkt. # 731.

United States, 209 F.3d 1345, 1356-57 (Fed. Cir. 2000); *Fort Vancouver Plywood Co. v. United States*, 860 F.2d 409, 414 (Fed.Cir.1988); *see also Lemke v. Sears, Roebuck & Co.*, 853 F.2d 253, 255 (4th Cir. 1988) (applying Virginia law).

As explained below, the scope of the 2007 release is narrower than the Government posits. Equally important, there is no basis on which the Court can conclude as a matter of law that whatever liabilities a jury hypothetically might assign to CACI PT are necessarily within the scope of the release agreement. Conversely, the limitation of Plaintiffs' claims to *jus cogens* violations of international law precludes any conclusion that whatever third-party claims CACI PT ultimately might have were released by the 2007 agreement.

1. The Release Agreement Applies Only to Claims Having a Significant Relationship to the Delivery Orders

A release agreement to which the United States is a party is ordinarily construed according to federal law. *Prudential Ins. Co. of Am. v. United States*, 801 F.2d 1295, 1298 (Fed. Cir. 1986). Under federal law, the plain language of the contract will be viewed as controlling if it is unambiguous on its face. *Coast Fed. Bank, FSB v. United States*, 323 F.3d 1035, 1040-41 (Fed. Cir. 2003) (en banc). The 2007 release provides:

> DOI's payment of the Settlement Amount shall constitute full and final payment, settlement, and accord and satisfaction of all ***claims and disputes by DOI and CACI arising out of or related to the terminated Task Orders***, including those in CBCA No. 546, including but not limited to all claims for interest, general administrative costs, direct and indirect costs of all kinds whatsoever relating to the terminated Task Orders.

U.S. Ex. 2 at 2 (emphasis added).

The Government argues that the 2007 release should absolve it of primary liability for any claims involving CACI PT personnel working in Iraq under DO 35 and DO 71, on the dubious theory that "in the absence of these task orders, CACI would not have provided

interrogators to the U.S. Army, and would not now be defending itself against Plaintiffs' claims in this action." U.S. Mem. at 12. The Government's proposed construction would release the United States from all claims involving personnel who worked on DO 35 or DO 71, no matter how far removed the claim is from the actual performance of the Delivery Orders. The Government's argument cannot be squared with the actual language of the release, or with case law construing this language.

Importantly, the release is not cast in terms of subject matter or geographic location. Rather, the required inquiry is the nexus between the parties' *claims* and the terminated *Task Orders*. The United States could have sought a broader release that encompassed any claims or disputes arising out of operations in Iraq, or Abu Ghraib prison, or involving alleged mistreatment of detainees.[2] But that is not the agreement the United States struck; rather, the release applies only to claims "arising out of or related to" the specified contracts.

The proper construction of the term "arising out of or related to" is well established. Such language reaches only "dispute[s] between the parties having a significant relationship to the contract." *Wachovia Bank, N.A. v. Schmidt*, 445 F.3d 762, 769 (4th Cir. 2006); *Am. Recovery Corp. v. Computerized Thermal Imaging*, 96 F.3d 88, 93 (4th Cir. 1996) (quoting *J.J. Ryan & Sons v. Rhone Poulenc Textile, S.A.*, 863 F.2d 315, 321 (4th Cir. 1988)); *see also Evans v. Building Materials Corp. of Am.*, 858 F.3d 1377, 1381 (Fed. Cir. 2017) (a claim "relates to" a contract "if it has a 'significant relationship' to the contract"). These cases apply the plain

[2] *See, e.g.*, *Russell v. United States*, 132 Fed. Cl. 361, 365 (2017) (U.S. released from claims "arising out of or relating to the claims brought in this lawsuit, or that could have been brought, against the United States, or any other agencies or instrumentalities of the United States"); *Peckham v. United States*, 61 Fed. Cl. 102, 108 (2004) (U.S. release from claims "relating to or arising from Boulder Oaks Resort or any lands or other real and personal property now or previously at, on or in the Cleveland National Forest.").

meaning test to *exactly the same language as that in the 2007 release*, and therefore end the inquiry as to the proper construction of the release.

Despite the wealth of case law interpreting the precise contract language at issue here, the Government seeks a broader release by relying on cases involving substantially different contract language. For example, the Government reaches back 112 years to invoke *United States v. William Cramp & Sons Ship & Engine Bldg. Co.*, 206 U.S. 118, 128 (1907), but that case involved a release of "all claims *of any kind or description* under *or by virtue of* said contract." *Id.* at 126-27 (emphasis added). *Cramp* focused on the language "claims of any kind or description" and "by virtue of" the contract, neither of which is implicated by the 2007 release. Similarly, the Government relies on *Am. Contrs. Indem. Co. v. Carolina Realty & Dev. Co.*, 529 F. App'x 346, 349-50 (4th Cir. 2013), but that case applied Florida law to construe far broader contract language[3] that released claims related to a *project* – not a contract. *Id.* at 349-50. The 2007 settlement agreement between CACI PT and the United States releases claims and disputes arising out of the Task Orders (*i.e.*, the contracts), *not* interrogation operations in Iraq (*i.e.*, the

[3] *Compare* the relevant language of the settlement agreement in *Am. Contrs. Indem. Co.*:

> [The parties] fully and forever settle, release and discharge, each other, each of their predecessors, successors, assigns, agents, insurers, sureties, attorneys, officers, directors and employees from any and all past and present claims, demands, damages, debts, or causes of action, in law or in equity, damages and losses of any and all kind or nature, whether contingent or fixed, known and unknown claims for known and unknown damages and which arise or may arise out of acts, omissions or events which occurred prior to the date hereof, arising out of or related to [the Florida Litigation], all other matters between the Parties relating to the [Florida] Project.

with "[T]he Settlement Amount shall constitute full and final payment, settlement, and accord and satisfaction of all claims and disputes by DOI and CACI arising out of or related to the terminated Task Orders . . . ." U.S. Ex. 2 at 2.

underlying project). *See* U.S. Ex. 2 at 2 (describing eleven different task orders for the provision of various specified services, of which DO 35 and DO 71 were only two).

The contextual language surrounding the "arising out of or related to" language further supports the conclusion that release does not extend to all claims involving CACI PT personnel whose presence in Iraq occurred pursuant to the terminated Task Orders. The 2007 release provides examples of the sorts of "claims and disputes" that arise out of or relate to the terminated Task Orders. The examples "include[e] those in CBCA No. 546, including but not limited to all claims for interest, general administrative costs, direct and indirect costs of all kinds whatsoever relating to the terminated Task Orders." *See id.*

Descriptive clauses like these examples of released claims provide clarity as to the kind of claims intended to fall within the scope of the release. *See, e.g.*, *Shelby Cty. State Bank v. Van Diest Supply Co.*, 303 F.3d 832, 837 (7th Cir. 2002) ("descriptive clauses of inclusion . . . make clear the kind of entities that ought to be included"); *id.* (a court "must shy away from finding that a significant phrase . . . is nothing but surplusage"); *see also* U.S. Mem. at 11 (citing *Julius Goldman's Egg City v. United States*, 697 F.2d 1051, 1058 (Fed. Cir. 1983) (quoting *Arizona v. United States*, 575 F.2d 855, 863 (Ct. Cl. 1978)) (A contractual interpretation that "'gives a reasonable meaning to all parts will be preferred to one which leaves a portion of it useless, inexplicable, inoperative, void, insignificant, meaningless, superfluous, or achieves a weird and whimsical result.'"). Here, the language makes clear that the parties had a dispute over payment for contract performance and reached a settlement to resolve that dispute. All of the examples relate to claims that stem directly from the terms of the contracts, requiring a far more direct relationship than the Government espouses.

Indeed, as the Government highlights, U.S. Mem. at 6 n.4, the dispute that prompted the 2007 settlement was adjudicated before the Civilian Board of Contract Appeals ("CBCA"). The CBCA is "an independent tribunal housed within the General Services Administration" that "presides over various disputes involving Federal executive branch agencies," primarily "contract disputes between government contractors and agencies under the Contract Disputes Act."[4] The Board has no authority over tort claims[5] and, indeed, has no authority over the Department of Defense and its constituent agencies.[6] Thus, it would be irrational to believe that the settlement of a CBCA matter, a settlement that specifically references contract-related claims to illustrate the scope of the release, could be construed as a blanket release of claims that are in no way based on the contractual relationship between the parties.

As the foregoing discussion shows, the relevant factual question, once the release has been construed, is whether CACI PT's claims against the United States have a significant relationship to the Delivery Orders. As CACI PT explains in Section III.A.2, *infra*, they do not. CACI PT's common-law indemnification, contribution, and exoneration claims relate to whether U.S. military personnel engaged in torture and war crimes against Plaintiffs for which CACI PT has been held secondarily liable. Whether CACI PT had a contract with the United States is irrelevant to the merits of these claims. Moreover, CACI PT's breach of contract claim did not accrue until 2013 – when the United States first began interfering with CACI PT's ability to defend this case – with the United States' breach continuing through discovery in 2017 through

[4] *See* United States Civilian Board of Contract Appeals, https://www.cbca.gov/.

[5] As CACI PT previously explained, the Contract Disputes Act likewise does not apply to its breach of contract claim. *See* Dkt. #731 at 33-35.

[6] *See* United States Civilian Board of Contract Appeals, "About The Board," https://www.cbca.gov/board/index.html.

2019. No reasonable construction of the 2007 settlement would release a breach of contract that had not yet even occurred.

2. CACI PT's Equitable Claims for Indemnification, Contribution, and Exoneration Do Not Significantly Relate to the Terminated Task Orders

As set forth in Section III.A.1, the 2007 release encompasses only those claims that have a significant relationship to the terminated Delivery Orders. Whether CACI PT's common-law indemnification, contribution, and exoneration claims are significantly related to DO 35 and DO 71 is a question of fact. *Dureikov*, 209 F.3d at 1356-57; *Fort Vancouver Plywood Co.*, 860 F.2d at 414; *Lemke*, 853 F.2d at 255. There are at least three reasons why the Court cannot resolve this issue in the United States' favor as a matter of law: (1) claims alleging *jus cogens* violations by U.S. soldiers by definition cannot relate to a contract between CACI PT and the United States; (2) CACI PT's third-party claims are equitable claims under common-law, such that the existence of a contract between CACI PT and the United States is irrelevant to their resolution; and (3) the factual basis for CACI PT's third-party claims cannot be known until such time as the factual basis for any judgment against CACI PT is known.

a. Claims Seeking Recovery from the United States for Torture and War Crimes by U.S. Solders Cannot Relate to CACI PT's Contracts

CACI PT's third-party claims arise from its potential liability for Plaintiffs' allegations that they were tortured or subjected to war crimes by U.S. soldiers and that CACI PT personnel assisted and/or conspired with the torturing soldiers. It is beyond cavil that allegations of war crimes and torture do not bear a significant relationship with CACI PT's contracts with the United States. Nowhere in either DO 35 or DO 71 does either party agree to such terms. To the contrary, the task orders expressly required that CACI PT personnel follow standard operating procedures, abide by higher authority regulations, and act as directed by the military chain of

command. *See, e.g.*, Ex. 1 at ¶¶ 4, 6; Ex. 2 at ¶¶ 3, 4. Indeed, a contract for unlawful acts or for which the object of the contract is unlawful would have been void and unenforceable in the first place. *Smithy Braedon Co. v. Hadid*, 825 F. 2d 787, 790 n.4 (4th Cir. 1987) (citing 6A A. Corbin, *Corbin on Contracts* § 1512, at 711 (1962); 3 S. Williston, *Williston on Contracts* § 1630, at 2865-66 (1920); *Gibbs & Sterrett Mfg. Co. v. Brucker*, 111 U.S. 597, 601 (1884)); *see also Yousuf v. Samantar*, 699 F.3d 763, 776 (4th Cir. 2012) (holding that "*jus cogens* violations are not legitimate official acts"). Accordingly, a release for claims "arising out of or relating to the terminated Task Orders" cannot encompass CACI PT's claims involving conduct *by soldiers* that not only was not contemplated by the contract, but also for which the United States could not even legitimately contract.

b. The Contractual Relationship Between CACI PT and the United States Is Irrelevant to CACI PT's Common-Law Claims

Plaintiffs "are not contending that the CACI interrogators laid a hand on the plaintiffs"[7] and all claims alleging direct abuse by CACI PT personnel have been abandoned and dismissed. All that remains are claims seeking to hold CACI PT liable on aiding and abetting and conspiracy theories for abuses allegedly inflicted by soldiers. CACI PT has asserted three common-law claims against the United States – common-law indemnification, exoneration, and contribution. These claims assert that if CACI PT is found liable to Plaintiffs for abuses committed by soldiers, at a detention facility under U.S. control, CACI PT's fault is secondary to that of the United States and equity allows CACI PT to recover some or all of its damages from the primary wrongdoer. *See, e.g.*, *Yohay v. City of Alexandria Employees Credit Union. Inc.*,

[7] *See* 9/22/17 Tr. at 15 ("We are not contending that the CACI interrogators laid a hand on the plaintiffs."); *see also* Dkt. #639 at 31 n.30 (the "gravamen of Plaintiffs' complaint is conspiracy and aiding and abetting"); *id.* at 1 ("Plaintiffs sued CACI under well-established theories of accessory liability.").

827 F.2d 967, 973-74 (4th Cir. 1987) (common-law indemnification); *Uptagrafft v. United States*, 315 F.2d 200, 203 (4th Cir. 1963) (exoneration); *United States v. Savage Truck Line, Inc.*, 209 F.2d 442, 447 (4th Cir. 1953) (contribution).

CACI PT's common-law claims are equitable in nature and are "assertable without an allegation of contractual relationship." *Williams ex rel. Estate of Williams v. United States*, 469 F. Supp. 2d 339, 342 (E.D. Va. 2007). If CACI PT is held liable to Plaintiffs, it necessarily will be for abuses inflicted by U.S. military personnel, in a wartime detention facility under U.S. military control. The relevant facts for CACI PT's common-law claims are whether U.S. military personnel are the primary wrongdoers in connection with Plaintiffs' claims. It neither helps nor hurts CACI PT's third-party claims that CACI PT personnel were at Abu Ghraib prison pursuant to government contracts. Plaintiffs do not seek to hold CACI PT liable based on its status as a contracting party; they seek to hold CACI PT liable based on the allegation that its employees aided and abetted or conspired with soldiers who committed torture and war crimes. By the same token, CACI PT's third-party claims are not based on the United States' status as a contracting party; they are based on the conduct of soldiers as the alleged primary wrongdoers in connection with Plaintiffs' claims.

Two cases illustrate this distinction. In *Wachovia Bank, N.A.*, 445 F.3d at 768, a bank sought to compel the defendants (the "Schmidt Defendants") to arbitrate a state-court action they had filed against the bank. The basis for the bank's request was an arbitration agreement in a Note that extended to claims "arising out of or relating to" the Note, language identical to that at issue here. *Id.* The Fourth Circuit held that the underlying plaintiffs' suit did not arise out of or relate to the Note because the claims were not grounded in the bank's actions as a lender, but as an investment advisor. *Id.* As the Fourth Circuit explained, "a court's resolution of the Schmidt

Defendants' state-court claims will require no inquiry into the Note's terms, nor even knowledge of the Note's existence." *Id.* The bank responded that its issuance of the Note and its provision of investment services were part of a "single, integrated courts of dealing" between the parties so that the Note's arbitration clause should apply to its investment advice. *Id.* The Fourth Circuit rejected this argument, as the terms of the parties' arbitration agreement did not create an agreement to anything arising out of their business relationship, but only when their *claims* related to their contractual lending relationship with the bank. *Id.* at 769. As in *Wachovia Bank*, whether CACI PT and the United States had a contract is irrelevant; CACI PT has sued the United States as a *tortfeasor*, not as a contracting party.

Similarly, in *Itility, LLC v. United States*, 124 Fed. Cl. 452 (2015), the U.S. Court of Federal Claims held that a plaintiff's claim seeks relief "relating to the contract" when its basis for relief is "because that party was a government contractor." *Id.* at 458. CACI PT's claims for equitable relief are not based on its status as a contractor, but based on the allegation that it is secondarily liable as a tortfeasor for torts committed by U.S. soldiers. CACI PT's claims are neither strengthened nor weakened by the fact that it had a contract to perform interrogation services in Iraq.

Indeed, the Federal Circuit, applying federal law, held that a claim for equitable subrogation did not relate to a government contract because such a claim is grounded in equity and not on the terms of a contractual relationship:

> Finding no persuasive reasons to the contrary, we adopt the view that, [t]he right of subrogation is not founded on contract. It is a creature of equity; is enforced solely for the purpose of accomplishing the ends of substantial justice; ***and is independent of any contractual relations between the parties***.

Transamerica Ins. Co. v. United States, 989 F.2d 1188, 1192 (Fed. Cir. 1993) (emphasis added) (internal quotations omitted). That CACI PT's equitable claims are completely independent of

its contractual relationship with the United States requires the same result. The Government's citation to *W & F Bldg. Maint. Co. v. United States*, 56 Fed. Cl. 62, 65 (2003), is unavailing because in that case the plaintiff settled "any and all claims under [the] contract" and then turned around and filed an action seeking an equitable adjustment to the very same contract. Unlike *W & F*, CACI PT's third-party claims against the United States are entirely divorced from the Task Orders.[8]

Nevertheless, the Government urges that "there can be no serious dispute" that CACI PT's third-party claims arise out of CACI PT's performance of its contract because the claims "must be 'derivative' of plaintiff's claim" under Rule 14. U.S. Mem. at 7. This misconstrues the Rule's import and requirements. Under Rule 14:

> [A] third party claim is not appropriate where the defendant and putative third party plaintiff says, in effect, "It was him, not me." Such a claim is viable only where a proposed third party plaintiff says, in effect, "If I am liable to plaintiff, then my liability is only technical or secondary or partial, and the third party defendant is derivatively liable and must reimburse me for all or part . . . of anything I must pay plaintiff."

EI DuPont de Nemours and Co. v. Kolon Industries, 688 F. Supp. 2d 443, 462 (E.D. Va. 2009) (quoting *Watergate Landmark Condominium Unit Owners' Assoc. v. Wiss, Janey, Elstner Assoc., Inc.*, 117 F.R.D. 576, 578 (E.D. Va. 1987)). Thus, CACI PT's secondary liability would be derivative of the United States' primary liability, while the United States' liability would arise

[8] The Government argues that CACI PT has admitted that its claims "aris[e] out of CACI['s] performance of its contract," U.S. Mem. at 2, 7, 13. That is not true. In connection with one of its several alternative grounds for recovery, CACI PT alleged that *Plaintiffs' claims* arise out of CACI PT's performance of its contract. *See* Dkt. #665 at ECF p. 64, ¶ 57 (discussing the United States "denying CACI PT access to information that would allow CACI PT *to defend itself* for claims arising out of CACI PT's performance of its contract" (emphasis added)). At the time CACI PT filed its third-party complaint, Plaintiffs had claims in this case that CACI PT personnel had directly abused them. Given that some (though far from all) of Plaintiffs' allegations involve abuse allegedly inflicted on them during their interrogations, CACI PT's allegation in connection with its breach of contract claim was appropriate.

not from any contract with CACI PT, but from the alleged tortious misconduct of U.S. military personnel.

c. The Contingent Nature of CACI PT's Third-Party Claims Precludes Any Finding That They Have a Significant Relationship to the Delivery Orders

As set forth above, equitable claims against the United States for *jus cogens* violations for which U.S. soldiers are primarily at fault cannot arise out of or relate to the Delivery Orders. But even if the Court disagreed with that blanket proposition, there is no basis for concluding as a matter of law that CACI PT's claims arise out of or relate to the Delivery Orders. This reality flows directly from the contingent nature of third-party claims.

At this point, it is impossible to know which if any of Plaintiffs claims could be credited triggering the United States' derivative liability and the range of possibilities is staggering. There are three Plaintiffs remaining in this action. Two of them were interrogated for intelligence purposes by CACI PT personnel; the other one was not. Some of Plaintiffs' allegations of mistreatment involve relatively minor acts, such as a shove by a soldier. These allegations do not seem to qualify as universally-accepted violations of international norms as required for claims under the Alien Tort Statute, *Sosa v. Alvarez-Machain*, 542 U.S. 692, 725 (2004), though the Court has not yet eliminated them from the case. Other allegations may violate international law if the allegations were true. Moreover, some of Plaintiffs' allegations of abuse involve interrogation approaches approved by the U.S. military, such as stress positions and use of isolation. Ex. 13 (IROE). Other allegations, such as alleged sexual assaults were not authorized interrogation approaches. Some allegations of mistreatment allegedly occurred during interrogations with interrogators present; others involved mistreatment in the cellblock with no interrogation personnel alleged to be present.

If the Court were to conclude that, under some circumstances, CACI PT's third-party claims for equitable relief *could* relate to the Delivery Orders, the Court still cannot assess the nexus between CACI PT's claims against the United States and CACI PT's Delivery Orders. This is because the contours of CACI PT's third-party claims depend on what Plaintiffs can prove at trial. Hypothetically, if CACI PT were held liable to one of the Plaintiffs, based on proof at trial that an off-duty CACI PT employee who was never assigned to interrogate the Plaintiff nevertheless helped a soldier abuse him, the Court might view the nexus between that and the Delivery Orders differently than if CACI PT's liability arose out of a CACI PT interrogator directing an MP to mistreat a detainee assigned to that interrogator.

If Plaintiffs prevailed on some of their claims at trial, the Court would know, among other things: (1) whether CACI PT's liability arises out of conduct occurring during an interrogation or not; (2) whether CACI PT has been found liable to a Plaintiff who was not interrogated by CACI PT personnel; (3) whether or not CACI PT personnel found to have aided or conspired with soldiers to mistreat Plaintiffs did so in connection with their performance of interrogation duties; and (4) whether any abuses Plaintiffs prove were interrogation approaches authorized by the U.S. military chain of command. At present, the Court does not and cannot know the answers to any of these questions.

Thus, the Court has no factual basis for determining if CACI PT's third-party claims are significantly related to the Delivery Orders. That determination cannot be made in the blind, which is what the Government's motion seeks.

B. The 2007 Release Does Not Apply to CACI PT's Claim for Breach of Contract

In Section III.A, CACI PT explained why its equitable claims do not arise out of or relate to the Delivery Orders referenced in the 2007 release. CACI PT's other claim – for breach of

contract – unquestionably arises out of and relates to the Delivery Orders. Nevertheless, the 2007 release does not bar CACI PT's claim for breach of the duty of good faith and fair dealing because CACI PT's breach of contract claim did not arise until years *after* the parties executed the 2007 release.

"The rule for releases is that absent special vitiating circumstances, a general release bars claims based upon events occurring ***prior to the date of the release***." *Augustine Med., Inc. v. Progressive Dynamics, Inc.*, 194 F.3d 1367, 1373 (4th Cir. 1999) (emphasis added); *MW Builders, Inc. v. United States*, 136 Fed. Cl. 584, 586 (2018) (same); *Raytheon Co. v. United States*, 96 Fed. Cl. 548, 553 (2011) (same). CACI PT's breach of contract claim is based *entirely* on conduct taking place after the parties executed the 2007 release. In particular, CACI PT claims that the United States breached its duty of good faith and fair dealing by refusing to disclose information necessary for CACI PT to fairly defend *this case*, filed in 2008. *See* Dkt. #665 at ¶¶ 31, 55-57. CACI PT did not seek discovery in this case from the United States until 2013. *See* Dkt. #281-1 at Ex. 3 (1/16/13 subpoena to United States seeking documents relating to Plaintiffs' detention and identifying participants in their interrogations). There is not a single allegation in connection with CACI PT's breach of contract claim that involves conduct by the United States prior to the initiation of this action. Therefore, the 2007 release does not preclude CACI PT's breach of contract claim.

C. CACI PT Does Not Require Express Indemnification or Good Faith Provisions to Support Its Breach of Contract Claim

The Government argues that CACI PT must ground its claim for breach of the implied duty of good faith and fair dealing on an express term of the contract. U.S. Mem. at 7; *id.* at 14 (citing *Precision Pine & Timber, Inc. v. United States*, 596 F.3d 817, 831 (Fed. Cir. 2010); *Bradley v. Chiron Corp.*, 136 F.3d 1317, 1326 (Fed. Cir. 1998); *Racine & Laramie, Ltd. v. Cal.*

Dep't of Parks & Recreation, 11 Cal. App. 4th 1026 (1992)). But in *Metcalf Constr. Co. v. United States*, 742 F.3d 984 (Fed. Cir. 2014) – a case cited by the Government, U.S. Mem. at 14 – the Federal Circuit resoundingly rejected the Government's application of these precedents.

The Government relies on *Precision Pine* for the premise that "[t]he implied duty of good faith and fair dealing cannot expand a party's contractual duties beyond those in the express contract or create duties inconsistent with the contract's provisions." U.S. Mem. at 14 (citing *Precision Pine & Timber, Inc.*, 596 F.3d at 831). But in *Metcalf*, the Federal Circuit specifically explained – to the Government no less – that the quoted language is not so broad:

> [A]ll that the quoted language means is that the implied duty of good faith and fair dealing depends on the parties' bargain in the particular contract at issue. The government suggests a much more constraining view when it argues, for example, that there was no breach of the implied duty because "Metcalf cannot identify a contract provision that the Navy's inspection process violated." Gov't Br. 16. That goes too far: a breach of the implied duty of good faith and fair dealing does not require a violation of an express provision in the contract.

Id. at 994 (citation omitted).

The Government relies on *Bradley* and *Racine* for the proposition that "implied covenants of good faith and fair dealing are limited to assuring compliance with the express terms of the contract." U.S. Mem. at 14 (citing *Bradley*, 136 F.3d at, 1326 (*Racine & Laramie, Ltd.*, 11 Cal. App. 4th 1026). But in *Metcalf*, the Federal Circuit explained that *Bradley*:

> in addressing a claim of constructive fraud under California law, mentions the duty of good faith and fair dealing only in a parenthetical explaining an intermediate appellate court decision from California[, *Racine*], and [*Racine*] itself makes clear that "the covenant is implied as a supplement to the express contractual covenants, to prevent a contracting party from engaging in conduct which (while not technically transgressing the express covenants) frustrates the other party's rights to the benefits of the contract."

Metcalf, 742 F.3d at 994. Moreover, in *Centex Corp. v. United States*, 395 F.3d 1283, 1304 (Fed. Cir. 2005), also cited by the Government, the Federal Circuit:

> declined to read *Bradley*'s parenthetical expansively, concluding that "it would be inconsistent with the recognition of an implied covenant if we were to hold that the implied covenant of good faith and fair dealing could not be enforced in the absence of an express promise to pay damages in the event of conduct that would be contrary to the duty of good faith and fair dealing."

Metcalf, 742 F.3d at 994 (citing *Centex Corp.*, 395 F.3d at 1306).

In short, the Government's entire premise that an implied duty must rest on an express contractual provision is contrary to law. The Government selectively quotes the language from *Dobyns v. United States*, No. 2015–5020, ___ F.3d ___, 2019 WL 453486, at *8 (Fed. Cir. Feb. 6, 2019), to avoid that fact. U.S. Mem. at 14-15 (quoting *Dobyns*, 2019 WL 453486, at *8, but excluding "To be sure, 'a breach of the implied duty of good faith and fair dealing does not require a violation of an express provision in the contract.'"). Thus, the Government's attempts to require an express contract provision go well beyond the requirements of the law. The duty of good faith and fair dealing must simply be "keyed to the obligations and opportunities established in the contract," so as to not fundamentally alter the parties' intended allocation of burdens and benefits associated with the contract. *Dobyns*, 2019 WL at *5 (quoting *Lakeshore Eng'g Servs., Inc. v. United States*, 748 F.3d 1341, 1349 (Fed. Cir. 2014) (citations omitted)).[9]

Here, there is no question that the duty CACI PT faults the United States for failing to fulfill is keyed to an obligation in the contracts. As described in CACI PT's Third-Party Complaint, *see* Dkt. #665 at 64-65, the United States acted in bad faith when it denied CACI PT access to the information necessary for CACI PT to fairly defend itself on the merits of

[9] In *Dobyns*, the Federal Circuit cites to the language from *Bradley* and *Racine* quoted by the government, which are properly explained in *Metcalf*.

Plaintiffs' claims. The Government's implied duty of good faith requires that it not actively impede CACI PT's ability to defend itself against liability for complying with obligations imposed by the United States in the Delivery Orders (*i.e.*, that CACI PT interrogators follow military rules and operate within the military chain of command).

DO 35 provided for integration of CACI PT interrogators into the military's interrogation teams in order to accomplish intelligence priorities established by Coalition Joint Task Force-7 ("CJTF-7"). Ex. 1 at ¶ 4. DO 35 also provided that CACI PT interrogators would conduct interrogations in accordance with "local SOP and higher authority regulations," would conduct other intelligence activities "as directed," and "will report findings of interrogation IAW with local reference documents, SOPs, and higher authority regulations as required/directed." *Id.* at ¶ 6 (emphasis added). DO 71 provided that CACI PT interrogators would perform under the direction and control of the unit's military intelligence chain of command, as determined by the supported command. Ex. 2 at ¶ 3. DO 71 also provided at "[a]ll actions [of the interrogators provided under DO 71] will be managed by the Senior [Counter-Intelligence] Agent," a member of the United States military. *Id.* at ¶ 4.d.

Some of the acts that Plaintiffs allege to be actionable as torture, war crimes, or cruel, inhuman or degrading treatment ("CIDT"), either standing alone or in conjunction with other alleged acts of mistreatment, were general conditions of detention established by the military chain of command at Abu Ghraib prison either before CACI PT interrogators arrived or without input from CACI PT. Other acts that Plaintiffs allege to be actionable as torture, war crimes, or CIDT, either standing alone or in conjunction with other alleged acts of mistreatment, were interrogation techniques specifically determined to be lawful by the United States, and preapproved by the military chain of command for all interrogations or approved for use on a

case-by-case basis. *See, e.g.*, Ex. 11 at 43-45, 57-61, 63-79 (CACI Int. A); Exs. 13-15. Because Plaintiffs are alleging that these types of treatment, standing alone or when viewed cumulatively with other acts of alleged mistreatment, constitute torture, war crimes, or CIDT, they are seeking to hold CACI PT liable for interrogation rules CACI PT was obligated to follow under its contracts with the United States. Accordingly, the United States cannot in good faith turn its back on a contractor that faithfully complied with its contracts merely because the lawsuit at issue relates to a scandal from which the government would prefer to distance itself. Doing so is the epitome of bad faith and is actionable.

IV. CONCLUSION

For the foregoing reasons, the Court should deny the United States' motion for summary judgment.

Respectfully submitted,

/s/ John F. O'Connor

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CERTIFICATE OF SERVICE

I hereby certify that on the 1st day of March, 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. A copy of the version of this memorandum that is filed under seal also will be sent by email on the same date to the below-listed counsel:

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