UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA

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

DEFENDANT CACI PREMIER TECHNOLOGY, INC.'S MEMORANDUM IN SUPPORT OF ITS MOTION *IN LIMINE* TO EXCLUDE EVIDENCE REGARDING TRAINING AND EXPERIENCE OF CACI EMPLOYEES

I. INTRODUCTION

The first trial of this action generated considerable satellite litigation regarding the training and experience levels of (1) CACI interrogators in general, and (2) individual CACI employees who are not alleged to have had any role in Plaintiffs' treatment. Plaintiffs presented report findings that "about half" of the CACI personnel who served as interrogators at Abu Ghraib prison lacked the required training and experience for the position. CACI responded with evidence that it sent a number of screeners and others to Iraq who the U.S. Army decided to promote to interrogator because the Army was desperately short on personnel to conduct interrogations.

Evidence of the experience and training of CACI interrogators is irrelevant. There is no claim before the Court for negligent training. The issues before the Court are whether individual CACI employees participated in conduct so universally condemned as to make them "enemies of all mankind," and whether *respondeat superior* principles render CACI liable for any such

conduct. Whether CACI employees generally, or individual employees *not* involved in Plaintiffs' treatment, were well trained, poorly trained, or something in between, does not make it more or less likely that *other* CACI employees engaged in the "universally condemned" conduct alleged. *Al Shimari v. CACI Premier Tech., Inc.*, 368 F. Supp. 3d 935, 956 (E.D. Va. 2019); *id.* at 964 (describing the alleged *jus cogens* norm violations as "acts that are, as a matter of morality and reason, fundamentally wrong").

Moreover, admission of the training and experience evidence Plaintiffs presented at the first trial of this action is particularly misleading and unfair in light of the Court's state secrets rulings. Those rulings have prevented CACI from presenting evidence regarding the training and experience of the CACI interrogators *who actually interrogated Plaintiffs*, which makes admission of evidence regarding the training and experience of *other* CACI interrogators not just irrelevant, but brutally unfair. For the retrial of this action to proceed with any semblance of fairness in light of the Court's state secrets ruling, the Court should exclude evidence regarding the training and experience levels of CACI interrogators generally and regarding individual CACI employees not assigned to interrogate Plaintiffs.

II. BACKGROUND

This is a case solely involving claims under the Alien Tort Statute ("ATS"), 28 U.S.C. § 1350. Plaintiffs initially brought a number of common-law claims as well, including negligent training, but Plaintiffs voluntarily dismissed all of their common-law claims, with prejudice, more than seven years ago. Dkt. #574 (filed Jan. 17, 2017). All that remains in the case are claims under ATS seeking to hold CACI liable for employees' alleged role in conspiring with, or aiding and abetting, U.S. soldiers who allegedly engaged in torture or cruel, inhuman, or degrading treatment of Plaintiffs.

When CACI sought discovery regarding Plaintiffs' treatment while in U.S. military custody at Abu Ghraib prison, the United States, through Secretary of Defense Mattis, invoked the state secrets privilege three separate times to deny CACI access to this discovery. The Court upheld each assertion of the state secrets privilege. Dkt. #791, 850, 886, 921, 1012. These rulings barred CACI from discovering the identities of military and CACI interrogators assigned to interrogate these Plaintiffs, and from discovering personal background information on interrogators that could shed light on their identities. Dkt. #775-1; *see also* Dkt. #791, 850 (orders upholding invocation of state secrets and overruling CACI's objection to order). After the Court upheld the United States' assertion of the state secrets with respect to interrogator identities, the United States disclosed that a grand total of two (2) CACI interrogators (assigned the pseudonyms CACI Interrogator A and CACI Interrogator G) had been assigned to participate in one interrogation each of a Plaintiff.

When CACI Interrogator A appeared for his pseudonymous telephone deposition, he was not allowed to testify as to his interrogation background and training. Specifically, he was not permitted to testify about:

- Whether he had prior military service before being hired by CACI. Ex. 1 at 13:5-8;
- If he served in the military, his military occupational specialty (including whether he had been an interrogator in the military), his rank, or the characterization of his discharge. *Id.* at 13:9-18;
- His prior education. *Id.* at 16:9-15;
- His post-high school employment history. *Id.* at 16:17-20; and
- Whether he had any training in the interrogation of security detainees prior to being employed by CACI. *Id.* at 131:1-5.

CACI Interrogator G's pseudonymous telephone deposition proceeded in much the same manner. CACI Interrogator G was not permitted to testify about:

- Whether he had prior military service before joining CACI. Ex. 2 at 15:21-16:4;
- Whether he had received formal interrogation training from the U.S. military before joining CACI. *Id.* at 16:5-9;
- Whether he had prior military experience as an interrogator. *Id.* at 16:11-15;
- Whether he had prior training from the U.S. military on the Geneva Conventions. *Id.* at 16:17-17:2;
- Whether, prior to joining CACI, he had military training regarding the permissible interrogation approaches for a military interrogation. *Id.* at 17:4-9;
- Whether he had been awarded any medals or awards from the U.S. military; *Id.* at 17:21-18:3;
- The characterization of any discharge he received from the U.S. military. *Id.* at 19:8-17;
- His educational background after high school. *Id.* at 24:11-14; and
- His employment history prior to joining CACI. *Id.* at 24:16-20.

While CACI was barred from developing evidence regarding the interrogation experience and training of the interrogators *who actually interacted with these Plaintiffs*, Plaintiffs focused much of their case in the first trial on presenting generalized evidence about the experience and training level of CACI employees as a group and about the experience and training of three specific CACI employees (Dugan, Johnson, and Stefanowicz). Dugan and Johnson are not alleged to have had any interaction with Plaintiffs or input into their treatment. Stefanowicz is alleged to have had a brief conversation with Al-Ejaili that was innocuous and fully in compliance with the Interrogation Rules of Engagement.

With the Court's blessing, Plaintiffs presented excerpts from the Jones-Fay report to the effect that "about half" of the CACI interrogators, in MG Fay's view, "lacked sufficient background and training" but were assigned by the U.S. Army to conduct interrogations

"because there were no more military assets to fill the slots." Ex. 3 at p. 80 of 177. Plaintiffs elicited testimony from Torin Nelson that he had concerns as to whether former CACI employee Daniel Johnson (who had no interaction with Plaintiffs) had the requisite training and experience to be interrogating detainees. 4/15/24 PM Trial Tr. at 94:17-95:3 (Ex. 4). Plaintiffs' counsel engaged in a long dialogue with former CACI employee Mark Billings as to whether CACI interrogators generally had the training and experience to be "resident experts" as called for the CACI's statement of work. 4/18/24 Trial Tr. at 38:18-39:8 (Ex. 5). Plaintiffs' counsel questioned former CACI employee Daniel Porvaznik as to the adequacy of the training and experience of Messrs. Dugan, Johnson, and Stefanowicz, none of whom is alleged by Plaintiffs to have had any role in their treatment. 4/19/24 Trial Tr. at 96:5-99:18 (Ex. 6).

Plaintiffs' closing argument highlighted their strategy to make the trial a referendum on whether CACI performed its contracts well and not whether CACI personnel knowingly or purposefully involved themselves in misconduct that is so universally condemned as to be actionable under the ATS. Their counsel posed to the jury what he viewed as a rhetorical question whether CACI personnel were "resident experts" as required by the statements of work, as if the trial were a breach of contract case. 4/22/24 Trial Tr. at 30:21-22 (Ex. 7) ("So with all this money to gain, did CACI hire resident experts?"); *id.* at 31:19-25 ("And take a look at what General Fay found. He found that CACI's failure to send qualified and trained people to Abu Ghraib was detrimental to the intelligence operation at Abu Ghraib."). Plaintiffs' counsel referred in his closing argument to an internal CACI assessment that Mr. Stefanowicz (who is not alleged to have had input into Plaintiffs' treatment) did not meet the contract requirement to be hired as an interrogator (*id.* at 31:1-8), no great surprise since CACI hired Mr. Stefanowicz as a screener, not an interrogator. Counsel continued and argued that Tim Dugan (who is not

alleged to have had anything to do with Plaintiffs) was a "no-go" for an interrogator position. *Id.* at 31:9-11. Again, CACI did not hire Mr. Dugan as an interrogator; he was promoted at the U.S. Army's request because the Army lacked personnel to conduct interrogations. And finally, Plaintiffs' counsel argued in his closing that Daniel Johnson (not alleged to have had anything to do with Plaintiffs) was just 22 years old. *Id.* at 31:12-18.

III. ANALYSIS

A. The Training Level of CACI Employees, and Especially the Training Level of CACI Employees Who Had No Input into Plaintiffs' Treatment, Is Not Relevant to the Claims Remaining in this Case

Federal Rule of Evidence 401 sets the standard for relevance of trial evidence:

> Evidence is relevant if:
>
> (a) it has any tendency to make a fact more or less probable than it would be without the evidence; and
>
> (b) the fact is of consequence in determining the action.

Fed. R. Evid. 401. Evidence of the level of experience and training of CACI interrogators who actually had a role in Plaintiffs' treatment (*i.e.*, CACI interrogators assigned to interrogate one of the Plaintiffs) does not make it more or less likely that such interrogators would engage in conduct so far beyond the realm of acceptable conduct as to be actionable under ATS. But even if that were not so, evidence that "about half" of the CACI interrogators, in MG Fay's view, lacked sufficient experience and training, without showing that the CACI interrogators who interacted with Plaintiffs lacked adequate experience and training is transparently irrelevant. The same is true as to evidence that specific CACI employees (Dugan, Johnson, and Stefanowicz) supposedly lacked sufficient experience and training absent evidence that they had any input into these Plaintiffs' treatment.

This case is not a roving commission to report on whether CACI interrogators were adequately trained, or whether CACI did a good, mediocre, or poor job in providing qualified interrogators to augment the U.S. Army's interrogation mission in Iraq. This is not a breach of contract case alleging that CACI failed to provide interrogators with the experience and training called for in its statements of work.[1] There is no negligent training claim in this case. The issue in this case is not one of technical proficiency, but rather whether one or more CACI employees engaged in *universally-condemned conduct* in conspiring with, or aiding and abetting, U.S. soldiers who tortured or inflicted cruel, inhuman, or degrading treatment on these Plaintiffs. To be actionable under the ATS, U.S. soldiers must have engaged in conduct that is so universally condemned that they are "enemies of all mankind." *Sosa v. Alvarez-Machain*, 542 U.S. 692, 732 (2004); *see also Jesner v. Arab Bank, PLC*, 584 U.S. 241, 257-58 (2018). Thus, CACI employees must have *known* the soldiers were engaging in such universally-condemned conduct (for conspiracy) or aided and abetted the soldiers *for the purpose*[2] of facilitating conduct that renders its purveyors the enemies of all mankind. *Sosa*, 542 U.S. at 732; *Aziz v. Alcolac, Inc.*, 658 F.3d 388, 401 (4th Cir. 2011); *Al Shimari v. CACI Premier Tech., Inc.*, 684 F. Supp. 3d 481, 507 (E.D. Va. 2023). Whether an interrogator was a school-trained interrogator does not make the interrogator more or less likely to get involved in universally-0condemned conduct that everyone4 knows is wrong.

But Plaintiffs' training evidence is even more attenuated. They are not presenting evidence that the CACI employees who actually had input on Plaintiffs' treatment (*i.e.*, CACI

[1] As the evidence showed at trial, any interrogators who lacked the specific qualifications set forth in the statements of work either received a waiver from the U.S. Army or were promoted by the Army in theater because of the exigencies of a shooting war.

[2] *See Aziz*, 658 F.3d at 400 (establishing "purposefulness" standard for aiding-and-abetting claims under the ATS).

interrogators assigned to interrogate these Plaintiffs) were inadequately trained. Rather, they have offered, and would offer in a retrial, MG Fay's conclusion that *some* ("about half") of the CACI interrogators lacked adequate training and experience, but were made interrogators because the U.S. Army did not have enough school-trained interrogators. Plaintiffs also offered, and would offer in a retrial, evidence regarding the training levels of Dugan, Johnson, and Stefanowicz, none of whom are alleged to have had input into Plaintiffs'; treatment. Evidence regarding the training and experience of CACI employees who had no input into Plaintiffs' treatment does not make it more likely (or less likely) that *other* CACI employees who did have input into Plaintiffs' treatment knowingly elected to enter into a conspiracy or purposefully aided and abetted torture.

B. Even If Plaintiffs' Training and Experience Evidence Were Relevant, Admitting Such Evidence Would Be Unfairly Prejudicial to CACI, Particularly in Light of the Court's State Secrets Rulings

Even if Plaintiffs' evidence as to the training and experience of CACI interrogators, unmoored from evidence that supposedly undertrained employees had input into Plaintiffs' treatment, were somehow relevant, admission of that evidence would be unfairly prejudicial.

Federal Rule of Evidence 403 provides as follows:

> The court may exclude relevant evidence if its probative value is substantially outweighed by a danger of one or more of the following: unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence.

Fed. R. Evid. 403. Moreover, this case has been the subject of three successful invocations of the state secrets privilege by the United States. As the Fourth Circuit has held, "[i]f a proceeding involving state secrets can be *fairly* litigated without resort to the privileged information, it may continue." *Abilt v. CIA*, 848 F.3d 305, 313 (4th Cir. 2017 (emphasis added) (quoting *El-Masri v. United States*, 479 F.3d 296, 306 (4th Cir. 2007). If not, it must be dismissed. *Id.*

Whether viewed through the lens of Rule 403 or under the special considerations required in state secrets cases, the touchstone is fairness. Here, Plaintiffs seek to present (1) generalized evidence that "about half" of the CACI interrogators lacked adequate experience and training, but were thrust into interrogation roles by the U.S. Army because of the exigencies of war (Ex. 3 at p. 80 of 177); and (2) evidence as to the training and experience of three CACI employees for whom there is no evidence or allegation that they had input into these Plaintiffs' treatment. At the same time, CACI is prevented by the state secrets privilege from rebutting this evidence by presenting evidence concerning the training and experience *of the two CACI employees who actually were assigned to interrogate these Plaintiffs*. How can it possibly be fair to allow into evidence MG Fay's opinion that "about half" of CACI's interrogators were underqualified, leaving the Jury to simply guess whether any of them interacted with Plaintiffs, while simultaneously denying CACI the opportunity to show the jury the qualifications of the CACI interrogators who actually had input into Plaintiffs' treatment?

Moreover, the significance of MG Fay's generalized opinion is very much disputed. At Secretary Rumsfeld's direction, Vice Admiral Albert T. Church, III, investigated Department of Defense interrogation operations in light of the Abu Ghraib scandal and reached a far different conclusion regarding the qualifications of CACI interrogators:

> Overall, we found that contractors made a significant contribution to U.S. intelligence efforts. Contract interrogators were typically former MI or law enforcement personnel, and on average were older and more experienced than military interrogators; many anecdotal reports indicated that this gave contract interrogators additional credibility in the eyes of detainees, thus promoting successful interrogations. In addition, contract personnel often served longer tours than DoD personnel, creating continuity and enhancing corporate knowledge at their commands.
>
> Finally, notwithstanding the highly publicized involvement of some contractors in abuse at Abu Ghraib, we found very few instances of abuse involving contractors. In addition, a

> comprehensive body of federal law permits the prosecution of U.S. nationals - whether contractor, government civilian, or military - who may be responsible for the inhumane treatment of detainees during U.S. military operations overseas. Thus, contractors are no less legally accountable for their actions than their military counterparts.

Church Report at 17 (Ex. 8). Thus, allowing evidence of the training and experience of CACI interrogators *in general*, and/or the training and experience of specific employees with no alleged input into Plaintiffs' treatment is not just unfair in light of the state secrets burdens imposed on CACI, but also will involve satellite litigation on an issue that does not make it more or less likely that individual CACI interrogators conspired or aided and abetted the torture or cruel, inhuman, or degrading treatment of these Plaintiffs.

IV. CONCLUSION

For the foregoing reasons, the Court should preclude Plaintiffs from presenting evidence regarding the training and experience of any CACI interrogators, including individual CACI employees (such as Messrs. Dugan, Johnson, and Stefanowicz).

Respectfully submitted,

/s/ John F. O'Connor

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CERTIFICATE OF SERVICE

I hereby certify that on the 6th day of September, 2024, 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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