

injected irrelevant information into the trial record, confusing the issues to be tried by misleadingly inviting the jury to speculate about the withheld information and causing unfair prejudice to Plaintiffs. Any value in CACI's argument that the Government's invocation of privilege has affected the parties in this case can be addressed by a neutral, straightforward instruction of the type that the Court gave the jury at the April 2024 trial, although Plaintiffs believe that the issue of state secrets need not be addressed before the jury at all. For the reasons set forth below, the Court should grant Plaintiffs' motion and preclude arguments by counsel about the Government's state secrets privilege and the invocation of state secrets objections by the Government.

RELEVANT BACKGROUND

This case is about Plaintiffs' torture and cruel, inhuman, and degrading treatment at Abu Ghraib and the role CACI interrogators played in that abuse. Long ago, this Court determined that the United States' assertion of state secrets was appropriate as a matter of law. At that time CACI made no attempt to challenge the merits of that assertion. *See, e.g.*, ECF No. 785; ECF No. 805; ECF No. 882; ECF No. 993. Nevertheless, at the April 2024 trial CACI repeatedly put the Government's invocation of the state secrets privilege before the jurors and then argued the significance to them.

CACI began doing so in its opening statement:

Unfortunately, I would love to put all of those interrogators and translators, all nine of them, in that box and let you look them in the eye. I can't do that. The United States says their identities are classified; the Court has agreed that they're classified state secrets. You're going to hear them by tape recording. That's the best I can do. . . . But I apologize, most of our witnesses you're going to see by video, by being read in, or by listening to the pseudonymous interrogators' recorded testimony.

ECF No. 1631 (Apr. 15, 2024 Afternoon Trial Tr.) 27:12-24.

In its case-in-chief CACI presented the audio recordings of eight pseudonymous depositions, and CACI left in many questions to which the Government objected on state secrets grounds and the deponent thus gave no answer. *See* ECF No. 1625 (Apr. 18, 2024 Trial. Tr.) 75, 82, 121, 129; ECF No. 1634 (Apr. 19, 2024 Trial. Tr.) 4, 120, 121; ECF No. 1598, Exs. B, C, E, G, & H; ECF No. 1600, Exs. A, C, & D.

Then in its closing argument, CACI again highlighted the Government's assertion of state secrets and discussed the audio recordings of the depositions it played in its defense, stating:

And I want to apologize for subjecting everyone to that. We didn't have a choice. We would have much preferred to have those pseudonymous witnesses get in that stand so we all could see them, including me, and know who they are and ask them to tell you exactly what happened. It would have taken half as long, and it would have been twice as valuable, but their identities are classified, even from me. So we had no choice but to do this tape-recorded process that was long and annoying and was boring, but I hope you understand why we had to do it.

ECF No. 1626 (Apr. 22, 2024 Trial Tr.) 39:12-23.

CACI then invited the jury to speculate that the answers to those questions would have been helpful to it and would have undermined Plaintiffs' claims, stating “[a]nd we also needed you to hear -- *we gave you a flavor of the objections for state secrets so you could learn the things that we could not present to you but wanted to present to you.*” *Id.* at 40:15-18 (emphasis added).

ARGUMENT

It is well established that comments, argument, and questions from counsel are not evidence, *see, e.g., Nguyen v. Dotson*, No. 1:23-cv-650, 2024 WL 3520815, at *5 (E.D. Va. July 24, 2024); *Bowden v. Hamilton*, No. 1:19-cv-1415, 2020 WL 2737507, at *5 (E.D. Va. May 26,

2020), and by definition such statements cannot be deemed relevant. And it is axiomatic that “irrelevant evidence is not admissible.” Fed. R. Evid. 402.

The Government’s assertion of its state secrets privilege—and CACI’s commentary about those designated state secrets—are irrelevant to any issue before the jury, and should be precluded from trial for lack of any probative value alone. Fed. R. Evid. 401, 402; *see, e.g., In re Zetia (Ezetimibe) Antitrust Litig.*, No. 2:18-md-2836, 2023 WL 4155408, at *2 (E.D. Va. Mar. 31, 2023) (ruling *in limine* that “[n]o party shall refer to or comment upon confidentiality designations applied under the terms of the Protective Order governing discovery in this case.”); *Carroll v. Bos. Sci. Corp.*, 2016 WL 3031063, at *3 (S.D.W. Va. May 24, 2016) (“Time after time, the court has ruled that whether a document is designated as confidential is entirely irrelevant.”); *Wise v. C.R. Bard, Inc.*, 2015 WL 541933, at *11 (S.D.W. Va. Feb. 10, 2015) (“[W]hether a party designates a document as confidential during the litigation process is absolutely irrelevant.”) (citation and quotation marks omitted); *Toshiba Corp. v. Imation Corp.*, 2013 WL 1248633, at *25 (W.D. Wis. Mar. 26, 2013) (granting motion *in limine* to preclude parties from discussing “[w]hether a document has been designated confidential” at trial), *supplemented*, 2013 WL 7157854 (W.D. Wis. Apr. 5, 2013).

CACI should be precluded from playing deposition designations that consist only of questions from counsel and the Government’s objections thereto on state secrets grounds. Such exchanges between counsel lack evidentiary value and are thus irrelevant to the issues to be tried by the jury. Fed. R. Evid. 401, 402; *see, e.g., Toshiba Corp.*, 2013 WL 1248633, at *25 (granting motion *in limine* to preclude parties from discussing “[t]he existence or result of discovery disputes” and to preclude “[a]ttorney objections; argument or colloquy during depositions”); *Long v. Phillips & Brooks/Gladwin, Inc.*, 2006 WL 8431254, at *7 (N.D. Ga.

Aug. 29, 2006) (granting motion *in limine* and prohibiting plaintiff's counsel from arguing about or commenting upon discovery disputes or issues that arose during depositions).

While the Court previously allowed CACI to play the Government's assertions of state secrets, *see* ECF No. 1494 (Mar. 1, 2024 Hr'g Tr.) 30:1-31:2, Plaintiffs respectfully submit that the Court should revisit that ruling now that CACI's intent in introducing those assertions is clear. The Court's prior ruling does not transform those comments into probative evidence, and CACI exploited that ruling to make impermissible arguments to the jury. With the benefit of the April 2024 trial record, the Court can see how CACI unfairly and misleadingly sought to leverage the Government's assertion of state secrets through defense counsel arguments and comments. This time around, Plaintiffs submit that CACI should be precluded from presenting deposition designations consisting of questions to which the only response was the Government's objection based on state secrets.

CACI should also be precluded from making arguments that invite the jury to speculate about what the evidence would have been but for the Government's state secrets objection, and from suggesting that any withheld evidence was important and would have been helpful to CACI and harmful to Plaintiffs. Indeed, in its closing argument counsel for CACI said as much to the jury, stating "***we gave you a flavor of the objections for state secrets so you could learn the things that we could not present to you but wanted to present to you.***" ECF No. 1626 (Apr. 22, 2024 Trial Tr.) 40:15-18 (emphasis added). Exploiting the Government's invocation of state secrets through these types of arguments should be precluded as unfairly prejudicing Plaintiffs, confusing the issues to be tried, and misleading the jury. *See* Fed. R. Evid. 403; *In re C.R. Bard, Inc., MDL No. 2187, Pelvic Repair Sys. Prods. Liab. Litig.*, 810 F.3d 913, 920 (4th Cir. 2016); *see, e.g., Bellew v. Ethicon, Inc.*, 2014 WL 6680356, at *2 (S.D.W. Va. Nov. 25, 2014) (granting

motion *in limine* to “exclude reference to the designation of documents as confidential for purposes of discovery or to refer to the documents as ‘secret’ documents or similar suggestion that because they were designated as confidential in connection with this litigation [defendant] was somehow hiding information”); *In re Ethicon, Inc., Pelvic Repair Sys. Prods. Liab. Litig.*, 2014 WL 505234, at *7 (S.D.W. Va. Feb. 5, 2014) (granting motion *in limine* and agreeing that “the probative value of suggesting [the defendant] had an illicit purpose for keeping documents confidential is outweighed by the danger of unfair prejudice and confusing the issues”).

CACI’s tactics seem designed to misleadingly suggest to the jury that CACI was the *only* party affected by the Government’s decision to withhold information as state secrets. Indeed, the jury instruction requested by CACI stated as much. *See* ECF No. 1567 at 20-21.¹ But the Court rightfully declined to give CACI’s instruction, because it was not an issue for the jury. Instead, as the Court has recognized and instructed the jury, *both* parties were affected by the Government’s invocation of state secrets. *See* ECF No. 1626 (Apr. 22, 2024 Trial Tr.) 6:13-22, 85:4-11. And the Court emphasized to the jury that *neither* side bore any responsibility for the Government’s decision to do so. *Id.* at 85:12-19.

CACI has argued that the Government’s assertion of the state secrets privilege has prevented it from defending itself, an argument that the Court has rejected, both before the April 2024 trial, ECF No. 1143 (Order denying CACI’s Motion to Dismiss Based on State Secrets Privilege), and after, ECF No. 1655 (Order denying CACI’s Motion for Judgment as a Matter of

¹ CACI’s Proposed Jury Instruction on State Secrets stated, *inter alia*, “the United States *prevented* CACI from learning the identities of the military and civilian interrogation personnel participating in any particular detainee’s intelligence interrogations, specifically including Plaintiffs Al Shimari’s and Al Zuba’e’s intelligence interrogations”; “CACI was *prevented* from discovering any information that could possibly lead to the identification of interrogation personnel in connection with a particular detainee” and “CACI has *not been allowed* to call these witnesses to testify at trial” (emphases added).

Law and granting Plaintiffs' Motion for a New Trial). Because this is an issue for the Court, not the jury, and because the Court has decided the issue, CACI should not be permitted to seize upon the Government's invocation of state secrets privilege to inject non-probative, misleading, and confusing information into the record, which unfairly prejudices Plaintiffs. To the extent that the Government's invocation of state secrets is a matter that needs to be addressed before the jury at all—and Plaintiffs maintain it should not—it is the Court that should address the issue, not counsel for CACI.

CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request that the Court grant their motion *in limine* to preclude comments, arguments, and statements from counsel concerning the Government's invocation of state secrets.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on September 6, 2024, I electronically filed the foregoing, which sends notification to counsel for Defendants.

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