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 TO EXCLUDE IRRELEVANT, MISLEADING, AND CONFUSING REGULATORY AND POLICY EVIDENCE

I. INTRODUCTION

Plaintiffs have signaled their intention to create a side show at trial seeking to introduce irrelevant and confusing evidence designed to mislead the jury that military law and policy preclude the U.S. Army from exercising the level of control over contractors required for the borrowed servant doctrine to apply. *See* Dkt. #1718-1 at 6-13, Dkt. #1737-1 (amicus brief solicited by Plaintiffs importing all manner of irrelevant military-related jurisprudence into the borrowed servant analysis). Plaintiffs want to take a straightforward question of fact for the jury (whether the U.S. Army exercised sufficient control over CACI interrogators to trigger the borrowed servant doctrine) and twist it into a convoluted question of law that the jury is in no way equipped to decide. This is improper for several reasons. To start, *none* of Plaintiffs arguments alter or inform the Fourth Circuit's test for determining application of the borrowed servant doctrine. Evidence of what Plaintiffs believe the law required or prohibited at that time does not alter what actually happened on the ground at Abu Ghraib, and that is the only relevant inquiry.

Also, if Plaintiffs are permitted to move forward with this diversionary tactic, CACI will have no choice but to respond with equal evidence demonstrating the error of Plaintiffs' arguments and supposed proof. For every regulation or policy statement Plaintiffs selectively cite, CACI will offer statutes, regulations, policy statements, and Department of Defense instructions, guidance, and admissions that say the opposite. On top of that, CACI will offer law and policy documents demonstrating that contractor personnel are not permitted to supervise or direct military personnel to contradict Plaintiffs' argument that CACI interrogators stepped into a purported command vacuum and instructed military police. The jury will drown in irrelevant legal contradictions that bear no resemblance to what actually happened in this case or the determination the Fourth Circuit mandates for determining if someone is a borrowed servant.

Of course, that is what Plaintiffs intend. Plaintiffs need the jury to consider anything but the actual facts of this case that prove beyond a shadow of a doubt that the military exercised plenary control over CACI interrogators related to detainee operations, while CACI had no visibility whatsoever into the day-to-day performance of its employees. So, Plaintiffs plan to put on a show and – with all the subtlety of the Wizard of Oz yelling "Pay no attention to the man behind the curtain!"[1] – try to distract the jury from the reality of what occurred at Abu Ghraib. Plaintiffs' tactic will only serve to confuse the jury and waste time; the Court should not allow it.

The Court should prohibit Plaintiffs from offering law and policy in the guise of evidence and from making legal arguments to the jury, and restrict Plaintiffs to arguing application of the borrowed servant doctrine based on the factual inquiry dictated by the Fourth Circuit and ***deemed law of the case by this Court***. Dkt. #1630, 5/2/2024 Trial Tr. at 12:1-4.

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[1] Vidor, King, *et al.*, *The Wizard of Oz*, Metro-Goldwyn-Mayer (MGM) (1939).

II. BACKGROUND[2]

The lead investigation into the connection between military intelligence operations at Abu Ghraib and detainee abuse, upon which Plaintiffs rest their case, concluded:

> ***No doctrine exists to guide interrogators and their intelligence leaders (NCO, Warrant Officer, and Officer) in the contract management or command and control of contractors in a wartime environment.*** These interrogators and leaders faced numerous issues involving contract management: roles and responsibilities of JIDC personnel with respect to contractors; roles, relationships, and responsibilities of contract linguists and contract interrogators with military personnel; and the methods of disciplining contractor personnel. All of these need to be addressed in future interrogation and interrogation management training.

Ex. 1 (PTX-23) at 53 (emphasis added). The United States has admitted that CACI interrogators were:

> ***subject to the direction of the military chain of command***, beginning with their military section leader, an Army non-commissioned officer, who was briefed both prior to and following the interrogation to ensure that the interrogators were focused on answering CJTF-7's priority intelligence requirements, human intelligence (HUMINT) requirements, and source directed requirements. The military section leader was also responsible for strictly enforcing the interrogation rules of engagement (IROE). . . .
>
> ***No CACI personnel were in this chain of command.*** While the CACI site manager at Abu Ghraib, Dan Porvaznik, managed CACI personnel issues and the ICE OIC relied on him as one source of information regarding the abilities and qualifications of CACI interrogators, ***the military chain of command controlled the interrogation facility, set the structure for interrogation operations, and was responsible for how interrogations were to occur during both planning and execution phases***.

[2] *See* Dkt. #1730 at 2-7 (full history of CACI's consistent assertion of borrowed servant doctrine defense).

Ex. 2 (DX-2) at 8 (emphasis added); *see also id.* at 14 (with minor differences). At the first trial, the evidence of the Army's total control over CACI interrogators' work with detainees was so ubiquitous that the Court commented:

> It has been said a million times in this case, ***the military controls what they do***; CACI controls the administrative elements of their employment, which means pay, promotions, where they sleep, vacations.

Dkt. #1634, 4/19/24 Trial Tr. at 51:1-6 (emphasis added); *see also* Ex. 3 (chart of evidence related to Army command and control).

To try to refute the avalanche of evidence that the U.S. Army maintained control over CACI interrogators at Abu Ghraib, Plaintiffs offered into evidence cherry-picked quotes from an Army Field Manual ("AFM"), which provides *non-binding guidance* regarding the use of contractors on the battlefield. *See* Ex. 4 (PTX-207) at 4; *see also* Dkt. #1625, 4/18/2024 Trial Tr. at 61:16-17, 67:6-10 (Billings Test.) (confirming AFM is merely guidance). The only basis Plaintiffs had for introducing this evidence was that Mark Billings, a CACI witness, said he was generally familiar with field manuals. There is no evidence from anyone else associated with the Army or the government that this guidance was considered or followed – indeed, there is ample evidence it was not. In particular, Col. Pappas (commander of the forward operating base and the military intelligence unit at Abu Ghraib) had never seen this document. Ex. 5 (excerpt from Pappas *de bene esse* deposition).[3]

The field manual, thus, offered the jury only non-binding advice about "the appropriate way to do things." Dkt. #1625, 4/18/2024 Trial Tr. at 58:6-9. Given the total divide between this document and the realities of interrogation operations at Abu Ghraib, it is unsurprising that

[3] This testimony was removed as part of an objection from the recording of Col. Pappas's *de bene esse* deposition cross-examination played at trial. CACI would not consent to its removal at the upcoming trial.

the jury found the field manual unhelpful and confusing. As the jury ably pointed out: "There are clear contradictions in the Field Manual, mainly regarding COR responsibilities . . . ." Dkt. #1617-7 at 20 (jury note). These contradictions are just the tip of the iceberg.

In their most recent attack on the Court's application of the borrowed servant doctrine, Plaintiffs found every snippet of Army policy they could lay their hands on to support their *irrelevant* contention that contractors cannot be supervised by military personnel and even solicited amici to opine on the parade of horribles associated with application of the borrowed servant doctrine to the military. Dkt. #1718-1; Dkt. #1737-1.[4]

There is little doubt that, given the chance, Plaintiffs will thrust this potpourri of cherry-picked passages on the jury in an attempt to confuse and mislead the jury regarding the inquiry mandated by this Court and the Fourth Circuit for determining application of the borrowed servant doctrine. Among those authorities that should be excluded is:

- Dep't of the Army, Contractors on the Battlefield, Field Manual 3-100.21 (100-21) (Jan. 2003) (PTX-207) (found by the jury to have "clear contradictions");
- U.S. Joint Chiefs of Staff, Joint Publication 4-0, DOCTRINE FOR LOGISTICS SUPPORT OF JOINT OPERATIONS, CONTRACTORS IN THE THEATER (Apr. 2000);
- Br. of Retired Military Officers as *Amicus Curiae*, *Al Shimari v. CACI International, Inc.*, Nos. 09-1335, 10-1891, 10-1921, Dkt. 120-1 (4th Cir. Dec. 20, 2011) (included as a precaution, presumably Plaintiffs understand this is inadmissible);

[4] CACI will reserve until its opposition a response to Plaintiffs' consistently incorrect descriptions of the law. In the meantime, however, it is worth noting that application of the borrowed servant doctrine to a military contractor vis-à-vis the military is neither new, "unique," nor "unprecedented," Dkt. #1718-1 at 2. *See, e.g.*, *McLamb v. E. I. Du Pont De Nemours & Co.*, 79 F.2d 966 (4th Cir. 1935) (experts provided by Du Pont to U.S. Army, and assigned by the Army to direct workmen, were borrowed servants of the U.S. Army, resulting in a directed verdict for Du Pont). Indeed, more often than not, it is the military that invokes the doctrine in an effort to avoid tort liability for a contractor under workers compensation laws. *See, e.g.*, *Luna v. United States*, 454 F.3d 631 (7th Cir. 2006) (U.S. Navy, as borrowing employer, enjoyed immunity from negligence liability under Illinois' workers compensation law and, thus, could not be held liable in negligence under FTCA for the employee's injuries).

- U.S. Joint Chiefs of Staff, Joint Publication 1-02, DEPARTMENT OF DEFENSE DICTIONARY OF MILITARY AND ASSOCIATED TERMS (Apr. 2001);

- U.S. Dep't of the Army, Reg. 715-9, Contractors Accompanying the Force (1999) (Plaintiffs have requested that the government provide a certified copy of this document);

- Gordon L. Campbell, *Presentation to Joint Services Conference on Professional Ethics 2000* (January 27-28, 2000), archived on February 8, 2003, https://web.archive.org/web/20030208084548/http://www.usafa.af.mil/jscope/JSCOPE00/Campbell00.html ("The views presented herein are entirely those of the author, and ***do not represent*** the official position of the United States Army Combined Arms Support Command, the United States Army, or the Department of Defense.") (emphasis added);

- U.S. Dep't of Def., Instruction No. 3020.41, *Contractor Personnel Authorized to Accompany the U.S. Armed Forces* ¶ 6.3.3 (2005);

- 48 CFR § 52.247-21 Defense Federal Acquisition Regulation Supplement; Contractor Personnel Authorized to Accompany U.S. Armed Forces Deployed Outside the United States, 73 Fed. Reg. 16,764 (Mar. 31, 2008) (48 C.F.R. § 252.225-7040(b)(3)(iii)).

See generally Dkt. #1718-1. Exactly *none* of these documents will help the jury determine any issue of fact in this case. They will, if allowed, expand the case exponentially on both sides and mislead and confuse the jury. These documents and Plaintiffs' irrelevant argument should be excluded.

III. ANALYSIS

A. Application of the Borrowed Servant Doctrine Is Based on Reality, Not Plaintiffs' Contorted Version of Army Law and Policy

Discussing the permissiveness of military personnel supervising contractor personnel in the abstract is irrelevant to the borrowed servant analysis and misleads the jury regarding the proper inquiry. The Fourth Circuit has laid out in detail exactly how courts in this Circuit must apply the borrowed servant doctrine: a person is a borrowed servant "where he is 'in the general service of [a principal], and, nevertheless, with respect to particular work, may be transferred,

with his own consent or acquiescence, to the service of a third person, so that he becomes the servant of that person, with all the legal consequences of the new relation.'" *Est. of Alvarez by & through Galindo v. Rockefeller Found.*, 96 F.4th 686, 693–94 (4th Cir. 2024) (quoting *Standard Oil Co. v. Anderson*, 212 U.S. 215, 220 (1909)). The Court continued, "When determining whether such a transfer has occurred, 'we must inquire whose is the work being performed;' this question 'is usually answered by ascertaining who has the power to control and direct the servants in the performance of their work.'" *Id.* (quoting *Standard Oil*, 212 U.S. at 221–22). That inquiry – who has the power to control and direct the employee – is fact-sensitive determination based on the realities of the worksite. *Id.* at 694 (examining who, in fact, directed and controlled the employee's work); *Huff v. Marine Tank Testing Corp.*, 631 F.2d 1140, 1142 (4th Cir. 1980) (the facts on the ground showed that the borrowing employer had the power to assign work to the employees, integrated the employees into teams with the borrowing employer's own employees, and provided identical supervision to its own employees and the employees it borrowed); *see also Trevino v. Gen. Dynamics Corp.*, 626 F. Supp. 1330, 1339 (E.D. Tex. 1986), *aff'd in part, vacated in part*, 865 F.2d 1474 (5th Cir. 1989) ("the test of whether or not a person is a borrowed servant is factual").

The borrowed servant inquiry does not examine whether the borrowing employer's exercise of control over the work of the borrowed employee was lawful or good policy, because it is irrelevant. *Trevino*, 626 F. Supp. at 1339 ("even though the master/servant relationship was proscribed, the Court may still find that such a relationship did, in fact, exist between [the Navy] and the General Dynamics employees"). The point of the borrowed servant doctrine is that *respondeat superior* liability should attach to the employer "in the better position to take measures to prevent the injury suffered by the third party." Restatement (Third) Of Agency

§ 7.03, cmt. d(2) (2006); *id.* ("[A] special employer may in fact be in the better position to exercise control in a manner that reduces the risk of injury to third parties. This possibility may be especially likely when the nature of a borrowed employee's work requires coordinated effort as part of a skilled team and close direction or supervision by the team's leader."). Neither law nor policy can answer that critical question, which relies upon "factual indicia" that indicate whether the general employer has retained the right to control an employee or "the right has been assumed by a special employer." *Id.*

B. Army Policies and Regulations Do Not Govern the Borrowed Servant Analysis and, Regardless, State Only a General Rule for which CACI's Contract Fits All the Exceptions

As described above, none of the factors the Fourth Circuit and this Court consider for determining whether someone is a borrowed employee involve a review of law or policy – it is an entirely fact-based inquiry. It is, therefore, not surprising that there have been many cases in which the military has been found, under the facts of that case, to be a borrowing employer of a contractor under its control. *See, e.g.*, *McLamb v. E. I. Du Pont De Nemours & Co.*, 79 F.2d 966 (4th Cir. 1935) (directed verdict in favor of contractor based on U.S. Army's status as borrowing employer); *Al-Khazraji v. United States*, 519 F. App'x 711, 714 (2d Cir. 2013) (Army deemed "special employer" of borrowed servant civilian contractor); *Luna v. United States*, 454 F.3d 631 (7th Cir. 2006) (U.S. Navy deemed borrowing employer); *United States v. N. A. Degerstrom, Inc.*, 408 F.2d 1130, 1132 (9th Cir. 1969) (contractor permitted to recover from the Department of the Army, as the borrowing employer, for damage to contractor's property caused by the borrowed employee, for whom contractor was the general employer). In short, the existence of a general rule against military personnel supervising contractor personnel is irrelevant.

Regardless, there are significant exceptions to the general rule, *all of which apply here*. Plaintiffs offer excised snippets from regulations to say it is impossible for the military to have

controlled CACI interrogators. Aside from being plainly untrue based on the facts of this case and *the admissions of the U.S. government*, it is simply incorrect to extrapolate based on those provisions that contractors can never be supervised by the military chain of command.

For example, in personal service contracts an employer-employee relationship is created between the Government and contractor personnel. *See* 48 C.F.R. § 2.101(b); *see also id.* § 37.104(a). Plaintiffs say that "CACI's contract with the government at issue in this case can only be a non-personal services contract . . . because the law prohibits government officials from entering into personal service contracts without specific statutory authorization." Dkt. #1718-1 at 12-13 (citing 48 C.F.R. § 37.104(b) (Oct. 1, 2002); Federal Acquisition Regulations ("FAR") Part 37.104(b)). But the FAR defines a personal services contract as "a contract that, by its express terms ***or as administered***, makes the contractor personnel appear to be, in effect, Government employees." *Id.* § 2.101(b) (emphasis added). Contracts can be deemed personal service contracts when contractor personnel were under "the relatively continuous supervision and control" by a government officer or a government employee. *Id.* § 37.104(c)(1).

Just like the borrowed servant doctrine, determination of whether a contract has been administered as a personal services contract is a fact-based inquiry: "Each contract arrangement must be judged in the light of its own facts and circumstances, the key question always being: Will the Government exercise relatively continuous supervision and control over the contractor personnel performing the contract?" *Id.* § 37.104(c)(2) ("sporadic, unauthorized supervision of only one of a large number of contractor employees might reasonably be considered not relevant, while relatively continuous Government supervision of a substantial number of contractor employees would have to be taken strongly into account"). To that end, the FAR provides

"descriptive elements that should be used as a guide in assessing whether or not" a contract is personal in nature – all but one of which apply here:

(d) The following descriptive elements should be used as a guide in assessing whether or not a proposed contract is personal in nature:	
(1) Performance on site.	✓
(2) Principal tools and equipment furnished by the Government.	✓
(3) Services are applied directly to the integral effort of agencies or an organizational subpart in furtherance of assigned function or mission.	✓
(4) Comparable services, meeting comparable needs, are performed in the same or similar agencies using civil service personnel.	
(5) The need for the type of service provided can reasonably be expected to last beyond one year.	✓
(6) The inherent nature of the service, or the manner in which it is provided reasonably requires directly or indirectly, Government direction or supervision of contractor employees in order to—	✓
(i) Adequately protect the Government's interest;	✓
(ii) Retain control of the function involved; or	✓
(iii) Retain full personal responsibility for the function supported in a duly authorized Federal officer or employee.	✓

Compare 48 C.F.R. § 37.104(d) *with* Ex. 3 (chart of evidence regarding borrowed servant doctrine).

The sixth element is particularly instructive here. It is widely recognized that the "inherent nature" of intelligence and interrogation services require government supervision to protect government interests and retain control over operations. 48 C.F.R. § 37.104(d)(6). In fact, there is and has been both statutory and regulatory support specifically for using personal

service contracts for contracts to be performed outside the United States or that directly support the mission of a DoD intelligence organization – *i.e.*, exactly the type of contract at issue in this case. Current law provides:

> (d) Additional Authority for Personal Services Contracts.—
>
> (1) In addition to the authority provided under subsection (a), the Secretary of Defense may enter into personal services contracts if the personal services—
>
> (A) are to be provided by individuals outside the United States, regardless of their nationality, and are determined by the Secretary to be necessary and appropriate for supporting the activities and programs of the Department of Defense outside the United States;
>
> (B) ***directly support the mission of a defense intelligence component*** or counter-intelligence organization of the Department of Defense; . . . .

See 10 U.S.C. § 129b(d) (emphasis added); 48 C.F.R. § 237.104(b)(i)(7)(iii) ("DFARS") (same). The criteria for such a contract fit the exact situation the Army found itself facing in 2003: the need for interrogation services was urgent, the Army could not fill interrogator slots by other means, and the interrogation services were "necessary and appropriate for supporting DoD activities and programs outside the United States." 48 C.F.R. § 237.104(b)(i)(7)(iii)(2)(iii). Indeed, contractors serving in highly-supervised intelligence functions that support finding an employer-employee relationship with the military are sufficiently recognized that the Army Regulation that sets for the procedures governing the activities of Army intelligence components *defines* "employee" to include contractors. *See* Ex. 6, U.S. Dep't of the Army, Reg. 381-10, US Army Intelligence Activities, p. 18 (1984) ("A person employed by, assigned to, or acting for an agency within the intelligence community, ***including contractors*** and persons otherwise acting at the direction of such an agency.") (emphasis added).

If Plaintiffs are permitted to prove the general rule that contractors are usually not supervised by military personnel, then CACI must be allowed to prove that its interrogators fit the large exception to the rule: contractors serving outside the United States, in support of military intelligence units, who are subject to the continuous supervision and control of the military chain of command. Indeed, if Plaintiffs are permitted to muddy the factual inquiry for application of CACI's borrowed servant defense by attempting to prove CACI interrogators could not have been under the command and control of the military, then CACI must be permitted to make the same argument to the jury to challenge Plaintiffs' assertion that CACI interrogators stepped into a purported command vacuum and took charge of military police. As Plaintiffs' amici helpfully point out, "the military prohibits contractors from commanding military forces, 'especially the leadership of military personnel who are members of the combat, combat support, or combat service support role,' which ensures that no soldier is ever subject to the command of a person who may not be trained in the laws of war." Dkt. #1737-1 at 8 (quoting 48 C.F.R. 7, Federal Acquisition Regulation, Subpart 7.5—Inherently Governmental Functions at H 7-503 (c)(3) (1996, 2024); U.S. Joint Publication (JP) 4-0, Doctrine For Logistics Support of Joint Operations, Contractors In The Theater (Apr. 2000), ch, V., para, l.d) ("In all instances, contractor employees cannot lawfully perform military functions and should not be working in scenarios that involve military combat operations where they might be conceived as combatants")).

What's good for the goose is good for the gander. If Plaintiffs are allowed to turn this trial into a free-for-all in which the jury parses military law and policy, rather than resolving the straightforward factual inquiries mandated by binding precedent, then it must work both ways.

CACI must be granted the same latitude. For the sake of the jury and *because it is absolutely irrelevant under the law*, all of this evidence should be excluded.

C. Contract Provisions Do Not Govern the Borrowed Servant Analysis and, Regardless, Support CACI's Defense

In addition to arguing that law and policy preclude application of the borrowed servant doctrine, Plaintiffs argue that CACI's contract with the government stipulated "that CACI – and not the military –'is responsible for providing supervision for all contractor personnel.'" Dkt. #1718-1 at 7-8 (quoting PTX-83 at 6-7). Plaintiffs' argument is incorrect as a matter of law and fact. As explained above, the administration and performance of the contract is what matters to the borrowed servant inquiry. To the extent there are provisions that allocate control over contractors, "[t]he reality at the worksite and the parties' actions in carrying out a contract . . . can impliedly modify, alter, or waive express contract provisions." *Melancon v. Amoco Prod. Co.*, 834 F.2d 1238, 1245 (5th Cir.), *amended on reh'g in part sub nom. Melancon v. Amoco Prods. Co.*, 841 F.2d 572 (5th Cir. 1988) (citing *McDonough Marine Service, Inc. v. M/V ROYAL STREET*, 465 F. Supp. 928, 935 (E.D. La. 1979), *aff'd* 608 F.2d 203 (5th Cir. 1979) and *Stauffer Chemical Co. v. W.D. Brunson*, 380 F.2d 174, 182 (5th Cir. 1967)). Regardless, "parties to a contract cannot automatically prevent a legal status like 'borrowed employee' from arising merely by saying in a provision in their contract that it cannot arise." *Id.*; *see also Cruz v. United States*, 247 F. Supp. 3d 1138, 1145 (S.D. Cal. 2017), *aff'd sub nom. Cruz v. Nat'l Steel & Shipbuilding Co.*, 910 F.3d 1263 (9th Cir. 2018) (actual relationship governs borrowed servant analysis, not express contract provision).

In any event, the contract in this case was clear. CACI contractors "perform[ed] under the direction and control of the unit's MI chain of command or Brigade 52." Dkt. #1640-6 ("As the operational element, HSTs support the overall divisional/separate brigade HUMINT mission,

and perform under the direction and control of the unit's MI chain of command or Brigade 52, as determined by the supported command."); Dkt. #1648 at 25 (contract required that CACI interrogators "perform under the direction and control of the unit's MI chain of command."); *see also* Dkt. #1640-5 at 6 ("Identified personnel supporting this effort will be integrated into MIL/CIV analyst, screening, and interrogation teams (both static/permanent facilities and mobile locations), in order to accomplish CDR CJTF-7 priorities and tasking IAW Department of Defense, US Civil Code, and International Regulations."). Moreover, all of the evidence in this case made clear that CACI interrogators were integrated into military intelligence teams and subject to the Army chain of command. *See* Ex. 3. Argument over competing contract provisions, particularly to the extent they are used to bolster or detract from irrelevant arguments about law and policy, will do nothing to enhance the jury's ability to determine the only question that matters: who controlled the day-to-day work by CACI interrogators.

IV. CONCLUSION

For the foregoing reasons, the Court should exclude all evidence and argument that law or policy precludes application of the borrowed servant doctrine in this case.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on the 4th day of October, 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 below-listed counsel.

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