UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
ALEXANDRIA DIVISION

SUHAIL NAJIM ABDULLAH AL SHIMARI *et al*.,	)	
Plaintiffs,	)	
v.	)	Case No. 1:08-cv-827 (LMB/JFA)
CACI PREMIER TECHNOLOGY, INC.,	)	
Defendant.	)	

PLAINTIFFS' OPPOSITION TO DEFENDANTS' MOTION TO STRIKE PLAINTIFFS' MOTION TO PRECLUDE THE BORROWED SERVANT DEFENSE

Plaintiffs cannot outdo the barnyard metaphors that CACI conjures in its motion, but if there is one literary reference that captures CACI's motion, it would be Queen Gertrude's reaction to the play *Murder of Gonzago*: "The lady doth protest too much, methinks."[1] CACI knows it has no good answer to Plaintiffs' arguments on the merits, so it grasps for procedural straws. Contrary to CACI's assertion, Plaintiffs' motion to preclude the borrowed-servant defense, supported by *amici* who are actual experts on military and agency law, is a proper motion *in limine* and does not violate any of the rules that CACI cites in its motion. Federal Rule of Civil Procedure 12(h)(2) expressly permits a plaintiff to challenge the legal sufficiency of an affirmative defense at or before trial even if the plaintiff did not previously move to strike that defense, and courts regularly hear and grant motions *in limine* to preclude affirmative defenses

[1] William Shakespeare, Hamlet act 3, sc. 2, l. 254.

before trial. The other rules that CACI cites either do not apply to Plaintiffs' motion or are not a proper basis to strike a motion.

By invoking the law of the case, CACI throws stones from a glass house. After previously filing at least fifteen motions to dismiss repeating the same meritless arguments, CACI just filed six motions *in limine* seeking to relitigate every ruling that it did not like from the April trial, including long-settled issues like the admission of the Taguba and Fay reports. The issues that Plaintiffs raise regarding the borrowed-servant doctrine are critical to this case, and currently unresolved. Additionally, CACI itself has since sought to reopen the Court's rulings on the borrowed-servant defense by moving *in limine* to exclude previously admitted evidence on the grounds that such evidence is somehow not relevant to what CACI insists is the proper scope of the defense. *See* ECF No. 1745 at 6-14. CACI cannot ask the Court to invoke the "law of the case" to defend rulings in CACI's favor, while challenging the rulings it does not like. The Court has discretion to revisit its prior rulings when important new arguments or facts come to light, like those presented in the briefs filed by Plaintiffs and the *amici*. The upcoming retrial gives the Court the chance to revisit the propriety of CACI's borrowed-servant defense.

ARGUMENT

I. PLAINTIFFS' MOTION TO PRECLUDE THE BORROWED-SERVANT DEFENSE IS A PROPER MOTION *IN LIMINE*

Federal Rule of Civil Procedure 12(h)(2) expressly permits plaintiffs to challenge the legal sufficiency of an affirmative defense at or before trial, and the timing of Plaintiffs' motion does not violate any of the rules cited by CACI.

A. Rule 12(h)(2) Permits Plaintiffs to Challenge the Legal Sufficiency of Affirmative Defenses at Trial

Federal Rule of Civil Procedure 12(h)(2) states that a "failure … to state a legal defense to a claim … may be raised … at trial." Fed. R. Civ. P. 12(h)(2). If a challenge to the legal

sufficiency of a defense can be raised at trial, then it can also be raised *in limine*. Consistent with that proposition, courts in this District and elsewhere regularly hear and grant motions *in limine* to preclude affirmative defenses on the basis that the defenses are foreclosed as a matter of law. *See, e.g.*, *Advanced Training Grp. Worldwide, Inc. v. Proactive Tech. Inc.*, No. 19-cv-505, 2020 WL 4574493, at *10-11 (E.D. Va. Aug. 7, 2020) (granting motion *in limine* to preclude an affirmative defense because, as a matter of law, that defense could not apply to a breach-of-contract claim); *SEC v. Westport Cap. Markets LLC.*, 613 F. Supp. 3d 643, 645-46 (D. Conn. 2020) (granting motion *in limine* to preclude affirmative defense as inapplicable to fraud claims); *E.I. Dupont De Nemours and Co. v. Kolon Indus., Inc.*, No. 09-cv-58, 2011 WL 13079492, at *1 (E.D. Va. May 16, 2011) (granting motion *in limine* to preclude affirmative defense in part because the defense could not apply to a non-patent case). Under Rule 12(h)(2), this Court has discretion to rule *in limine* that CACI's borrowed-servant defense is foreclosed as a matter of law, and that as a result CACI may not present evidence or argument to the jury concerning that defense. Such a ruling would fulfill the "primary purpose of an *in limine* ruling," which "is to streamline the case for trial and to provide guidance to counsel regarding evidentiary issues." *Adams v. NVR Homes, Inc.*, 141 F. Supp. 2d 554, 558 (D. Md. 2001).

B. Plaintiffs Did Not Waive Any Subsequent Challenge to the Borrowed-Servant Defense

CACI first argues that Plaintiffs permanently waived any challenge to the borrowed-servant defense by not filing a Rule 12(f) motion to strike the defense within 21 days of CACI's Answer. Unsurprisingly, CACI does not cite any authority for this plainly incorrect waiver argument. Indeed, as noted in the very treatise that CACI cites elsewhere in its brief, "Rule 12(h)(2) permits a 'failure … to state a legal defense' to be asserted … 'at trial,' which provides a method for attacking an opposing party's pleading even if the time for moving to strike

under Rule 12(f) has expired." 5C Charles Alan Wright & Arthur R. Miller, Federal Practice & Procedure ("Wright & Miller") § 1380 (3d ed.). Rule 12(h)(2) allows an "objection of failure to state a legal defense" to be made for the first time at trial because these objections are "closely enmeshed with the substantive merits of the lawsuit." *Id.* § 1392. Thus, Rule 12(h)(2) makes clear that a plaintiff's choice not to file a Rule 12(f) motion does not waive any subsequent challenge to the legal sufficiency of an affirmative defense. *See id.*

CACI's position would also lead to absurd results. If CACI were correct, then a plaintiff would be forced to move to strike, at the start of the case, every boilerplate affirmative defense in an Answer. For example, CACI asserted 17 affirmative defenses in its Answer, including the inapplicable defenses of laches, estoppel, and unclean hands. ECF No. 665 at pp. 50-51. Plaintiffs did not move to strike these defenses. But if CACI sought to present a laches defense to the jury, Plaintiffs would be entitled to challenge that defense as legally insufficient, and could move at trial or *in limine* to preclude any evidence or argument pertaining to laches. CACI's borrowed-servant defense is no different.

Contrary to CACI's suggestion, Rule 12(f) motions to strike affirmative defenses that present "disputed or substantial issues of law" are highly disfavored during the early phases of a case. Wright & Miller § 1381 (3d ed.); *accord Waste Mgmt. Holdings, Inc. v. Gilmore*, 252 F.3d 316, 347 (4th Cir. 2001) ("Rule 12(f) motions are generally viewed with disfavor…."). Federal courts prefer to resolve difficult legal issues presented by an affirmative defense only "after further development by way of discovery and a hearing on the merits, either on a summary judgment motion or at trial." Wright & Miller § 1381; *see also, e.g.*, *Ramos v. Hertz Corp.*, No. 17-CV-02576 (CMA (NRN), 2018 WL 4635972, at *4-5 (D. Colo. Sept. 26, 2018) (noting that "motions to strike are not favored and, generally, should be denied" and stating that "[t]he Court

is not prepared to decide this important legal question … on a motion to strike"), *appeal dismissed*, 2021 WL 8820314 (10th Cir. 2021); *In re Seastreak, LLC*, No. 13-cv-00315 (WJM), 2014 WL 1272125, at *2 (D.N.J. Mar. 27, 2014) ("[A] motion to strike is an inappropriate means of testing the legal merits of a defense."). Thus, a Rule 12(f) motion to strike CACI's assertion of the borrowed-servant defense on the grounds that it violates *jus cogens* and military law and policy—an issue that no court has confronted before—would have been premature.

In contrast, now is an appropriate time for the Court to consider this important issue. The issue has been fully developed through "discovery and a … [prior] trial," Wright & Miller § 1381, which revealed the extent to which CACI's borrowed-servant defense conflicts with this Court's prior rulings in this case regarding the non-derogability of the *jus cogens* norm against torture and with the federal interests embedded in military law and policy. *See* ECF No. 1718-1 at 3-13. An *in limine* ruling before the retrial is the proper occasion to address the propriety of this defense because such a ruling would streamline the retrial and give the parties guidance on what evidence and argument will be permitted.

C. Plaintiffs' Motion *In Limine* Does Not Violate Local Rule 56(A)

CACI also contends that the timing of Plaintiffs' motion violates Local Rule 56(A), which requires motions for summary judgment to be filed "within a reasonable time before the date of trial." Not so. First, Plaintiffs' motion does not violate this Rule because it is a motion *in limine*, not a motion for summary judgment. As explained above, Rule 12(h)(2) permits a party to seek to preclude an affirmative defense in a motion *in limine*.

Even if the Court were inclined to treat Plaintiffs' motion as one for partial summary judgment, Plaintiffs' motion is timely. Plaintiffs filed their motion 33 days before trial. It is not uncommon in this District for full summary judgment motions, let alone a partial summary judgment motion, to be filed and heard closer to trial, including up until the day of trial itself.

See, e.g., *Russell v. Nationwide Ins. Co.*, No. 07-cv-130, 2009 WL 10733285, at *1 n.1 (E.D. Va. June 29, 2009 (ruling on motion for summary judgment that was filed on the morning of trial "[b]ecause of the seriousness of the contention"), *aff'd,* 401 Fed. Appx. 763 (4th Cir. 2010); *Aventis Pharma Deutschland GmbH v. Lupin Ltd.*, No. 05-cv-421, 2006 WL 1582412, at *2 n.2 (E.D. Va. June 5, 2006) (ruling on cross-motions for summary judgment filed 10 days before trial, and before a reply brief was filed, because it was "well within [the Court's] discretion to decide the instant motions before it without considering" a party's reply brief); *Carefirst of Md., Inc. v. First Care, P.C.*, 422 F. Supp. 2d 592, 600 n.3 (E.D. Va. 2006) (ruling on party's motion for summary judgment filed "five business days" prior to final pre-trial conference). The foregoing authorities demonstrate that it was reasonable for Plaintiffs to file their motion 33 days before trial. Thus, even if the Court is inclined to treat Plaintiffs' motion as one for partial summary judgment, Plaintiffs' motion did not violate Local Rule 56(A).

Moreover, even if Plaintiffs' motion was deemed untimely under Local Rule 56(A) (which it is not), "[t]his Court enjoys broad discretion to allow summary judgment briefing based on its authority to modify pre-trial procedural deadlines to serve the best interests of justice." *Goins v. Civility Mgmt. Solutions LLC*, No. 21-cv-2100 (GLS), 2023 WL 6216615, at *3 (D. Md. Sept. 25, 2023). It is also within the Court's interests to hear Plaintiffs' motion because "[r]esolving issues raised via summary judgment … [will] eliminate unnecessary proof and issues and weed out unsupportable claims, leaving for trail only those issues properly before" the Court. *Id.* (citing *Everett, Inc. v. Nat'l Cable Advertising, L.P.*, 57 F.3d 1317, 1323 (4th Cir. 1995)). Hearing Plaintiffs' motion will both serve the interests of justice and considerably streamline the issues for the jury.

D. Plaintiffs' Motion Does Not Violate Local Rule 7(F)(1) or the Court's Order Regarding Briefing for Dispositive Motions

CACI next argues that Plaintiffs' Notice of Hearing violates Local Rule 7(F)(1) because Plaintiffs' deadline to file an *optional* reply brief is the same day as the noticed hearing. ECF No. 1730 at 9. This is nonsensical. The fact that Plaintiffs gave themselves limited time to file an optional reply brief is not a basis to strike Plaintiffs' motion. Plaintiffs can simply forego filing a reply brief if they wish, or they can file one sooner than the deadline.

CACI also contends that Plaintiffs' Notice of Hearing violates the Court's order that "any dispositive motions be filed such that the reply brief is received by the Court at least one week before oral argument." ECF No. 1730 at 9-10 (quoting ECF No. 974). CACI is wrong because Plaintiffs' motion is not a dispositive motion. A "dispositive motion" is "a motion for a trial-court order to decide a *claim or case* in favor of the movant without further proceeds; specif., a motion that, if granted, results in judgment on the case *as a whole*." MOTION, Black's Law Dictionary (12th ed. 2024) (emphasis added). Plaintiffs' motion to preclude a defense would not "decide a claim or case," nor would it "result[] in judgment on the case as a whole." Plaintiffs' conspiracy and aiding-and-abetting claims will remain at issue in the upcoming trial, whether or not Plaintiffs' motion to preclude the borrowed-servant defense is granted.

E. The Timing of Plaintiffs' Motion Does Not Prejudice CACI

The timing of Plaintiffs' motion also does not unfairly prejudice CACI. CACI's only complaint is that Plaintiffs' motion will make CACI "expend resources to confront [it] in the month before trial." ECF No. 1730 at 2. This complaint is close to astonishing coming from CACI, who just filed six motions seeking to relitigate the Court's rulings in the April trial and

has filed at least fifteen motions to dismiss[2] and several related motions for reconsideration, often repeating the same meritless arguments, not to mention two meritless interlocutory appeals and two wasteful mandamus Hail Marys. The minimal burden on CACI—a ten-billion-dollar corporation which has rebuffed this Court's repeated recommendations that it engage in settlement discussions—of having to write a brief on a discrete legal issue concerning a defense that CACI is choosing to assert is not a basis to strike a meritorious and timely motion. This is especially true given that Plaintiffs' motion has the potential to streamline the upcoming trial and affects important federal interests.

F. None of CACI's Procedural Arguments Bear on Plaintiffs' Request for a Dual-Servant Instruction

In any event, none of CACI's timeliness arguments bear on Plaintiffs' alternative request for a dual-servant instruction. ECF No. 1718-1 at 14-22. There can be no dispute that a request for a modified jury instruction 33 days before trial is timely. Thus, even if the Court were inclined to strike Plaintiffs' motion to preclude the borrowed-servant defense, the Court should grant Plaintiffs' request for a dual-servant instruction.

II. LAW OF THE CASE DOES NOT PREVENT THE COURT FROM HEARING PLAINTIFFS' MOTION, PARTICULARLY GIVEN THE NEED TO HARMONIZE THE COURT'S PRIOR RULINGS

CACI's final argument is that the law of the case—here, via a statement from the bench—prevents the Court from hearing Plaintiffs' motion. Again, having filed numerous motions *in limine* asking the Court to reverse its prior rulings, the irony of this argument is obvious. CACI has also put the borrowed-servant defense at issue by moving *in limine* to exclude previously admitted evidence on the grounds that it is not relevant to what CACI insists

[2] ECF Nos. 34, 180, 183, 312, 363, 516, 609, 626, 811, 1040, 1057, 1149, 1331, 1367, 1487.

is the proper scope of the defense. *See* ECF No. 1745 at 6-14. CACI's solipsism aside, it cannot have it both ways by citing "law of the case" to defend the rulings that it likes, while seeking to relitigate the rulings that it does not like. Plaintiffs respectfully submit that this Court should see through CACI's hypocrisy.

Additionally, the doctrine invoked by CACI is not absolute. "Law of the case … does not and cannot limit the power of a court to reconsider an earlier ruling." *American Canoe Ass'n v. Murphy Farms, Inc.*, 326 F.3d 505, 515 (4th Cir. 2003)). This is because "the ultimate responsibility of the federal courts, at all levels, is to reach the correct judgment under law." *Nadendla v. WakeMed*, 24 F.4th 299, 304 (4th Cir. 2022) (quoting *American Canoe Ass'n*, 326 F.3d at 515 (alteration adopted)). Accordingly, Federal Rule of Civil Procedure 54(b) authorizes courts to "revise[]" any interlocutory ruling "at any time before the entry of final judgment." *Phoenix v. Amonette*, 95 F.4th 852, 856 (4th Cir. 2024) (citation omitted).[3]

The "basic aim of Rule 54(b) is to give district courts flexibility to revise their rulings as the litigation develops and new facts or arguments come to light." *Id.* at 857 (citation omitted); *see generally* Wright & Miller § 4478.1 (describing at length the scope of a district court's authority to revise its prior rulings). Accordingly, the Fourth Circuit has affirmed district courts who revised prior rulings for a variety of reasons, including where "later developments produce 'different evidence' than was anticipated," *Phoenix*, 95 F.4th at 857 (citation omitted), and where the district court realized after additional briefing "that it had not applied the right legal standard … and corrected itself." *Nadendla*, 24 F.4th at 304.

[3] For example, earlier in this case, Judge Lee invoked Rule 54(b) and reversed his prior ruling that had dismissed Plaintiffs' Alien Tort Statute claims. Judge Lee cited recently published persuasive authorities as to corporate liability under the Alien Tort Statute as his basis for doing so. *See* Decl. of Muhammad U. Faridi dated Oct. 8, 2024, Ex. A at 23:10-27:12.

Plaintiffs respectfully submit that this Court should revisit its prior ruling because "new facts and arguments [have] come to light." *Phoenix*, 95 F.4th at 857 (citation omitted). In terms of new arguments: the Court has not previously considered Plaintiffs' arguments that the federal interests embedded in military law and policy foreclose the borrowed-servant defense's application to this case. *See* ECF No. 1718-1 at 3-14. Nor has the Court heard *amici*'s arguments that the exclusion of contractors from the chain of military of command is vitally important to the United States military, ECF No. 1737-1, and that agency law recognizes that one employee performing work on behalf of multiple employers can subject each employer to liability, ECF No. 1743-1. In terms of new facts: after the Court's prior rulings on the borrowed-servant defense, the jury in the April trial indicated through its notes and questions that its confusion and disagreement about the borrowed-servant defense prevented it from reaching a verdict. ECF No. 1617-7 at 4, 9, 22.

In addition, as explained in Plaintiffs' motion, ECF No. 1718-1 at 3-6, allowing CACI to present a borrowed-servant defense would raise a legal impossibility that conflicts with this Court's and the Fourth's Circuit's prior rulings. A military could never lawfully order torture, *see Al Shimari v. CACI Premier Tech., Inc*., 840 F.3d 147, 157 (4th Cir. 2016) and even the United States does not enjoy sovereign immunity for violations of the *jus cogens* norm of torture, *see Al Shimari v. CACI Premier Tech., Inc*., 368 F. Supp. 3d 935, 966-968, 970-71 (E.D. Va. 2019), *appeal dismissed*, 775 Fed. Appx. 758 (4th Cir. 2019). As Plaintiffs have explained, these rulings foreclose, as a matter of law, any argument that the military could have ordered, commanded or borrowed CACI interrogators to torture.

To the undersigned's knowledge, the April trial was the first one in any American court in which a military contractor asserted the borrowed-servant defense against claims that it

violated the *jus cogens* norms against torture and CIDT. During the April trial, the parties had very limited time to brief and to solicit *amici*'s views on the novel and important issues presented by CACI's borrowed-servant defense. The upcoming retrial gives the parties and the Court the opportunity to give these issues the attention that they deserve. Plaintiffs respectfully request that the Court take this opportunity and review Plaintiffs' motion on the merits.

CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request that the Court deny CACI's motion to strike and hear on the merits Plaintiffs' motion *in limine* to preclude the borrowed-servant defense.

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Respectfully submitted,

/s/ Charles B. Molster, III

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CERTIFICATE OF SERVICE

I hereby certify that on October 8, 2024, I electronically filed the foregoing, which sends notification to counsel for Defendants.

/s/ Charles B. Molster
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